

Understanding

**GOVERNMENT
CONTRACT LAW**

SECOND EDITION

Terrence M. O'Connor

**UNDERSTANDING
GOVERNMENT
CONTRACT LAW**

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UNDERSTANDING GOVERNMENT CONTRACT LAW

Second Edition

TERRENCE M. O'CONNOR



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Understanding Government Contract Law

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*To Carol, as always, the love of my life, and
To Kathleen, Maura, and Tate,
as always, the loves of my life*

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**UNDERSTANDING
GOVERNMENT
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Introduction

Suggestions on How to Use This Book

Overview

Suggested Approaches

Shortcuts

SUGGESTIONS ON HOW TO USE THIS BOOK

As I've seen so often in the past, I learn a lot from my “students”—in this case, the readers of the first edition.

One thing I learned from their feedback was that the book's readers typically fell into one of three categories.

One group of readers used the book as a textbook in classes led by someone with government contract experience. These readers had a guide to help them use this book.

A second group—typically readers with some background in government contracts—used the book as a reference for solving specific issues they faced in their day-to-day work. They would go to the table of contents or the index, find the relevant topic, and read the material on that topic. This group did not need a guide as much as the first group.

The third group had, I think, the hardest job: they had no guide. They worked their way through the book by themselves at their own pace.

I thought it might help this third group if I could be their guide. So, I have prepared an overview to help this third group; I think it might also be a help to the other two groups. Following this overview, I have made suggestions on what chapters might be of more interest to readers

with specific interests. I end with shortcuts I have used in the book to help make the material easier to read.

OVERVIEW

This book breaks the complex arena of government contract law into its three most basic parts:

1. Part I: The *parties* to a government contract—for example, a business with a government contract and a government contracting officer/contract specialist;
2. Part II: The *government contract* itself—the different forms a government contract can take, the way its terms are different from commercial contracts and how ambiguous contract terms are interpreted; and
3. Part III: The *lawsuits* the two parties get into over the government contract—protests and claims—and how these lawsuits are similar to lawsuits in which you and I might get involved as well as how they are different from these types of lawsuits.

Part I discusses the legal roles of the contracting officer and the government contractor. Chapters 1–4 deal with a contracting officer’s four roles: (1) being a judge, (2) being a watchdog or sheriff, (3) being sued and therefore being a defendant in a lawsuit over an action the contracting officer did or did not take, and (4) being a plaintiff in a whistleblowing lawsuit. Chapter 5 turns the book’s focus to the other party on a government contract: the government contractor. It discusses the most important and perhaps difficult part of a contractor’s work: ensuring that any commitments from the government’s side come from the government employee with the appropriate authority. This is usually the contracting officer, but there are exceptions. Chapter 5 also discusses ways the contractor might commit fraud against the government.

Part II deals with, first, trying to understand the almost-inexhaustible variety of legal agreements the government uses to buy the goods and services it needs—agreements, concession contracts, procurement contracts, task and delivery orders, and blanket purchase agreements, to name a few; these are discussed in chapter 6. Chapter 7 considers two sticky problems: (1) the difficulty in writing a contract that is perfectly clear and (2) the guidelines for interpreting an ambiguous contract. Chapter 8 reviews the way in which government contracts are distinctly different from business-to-business (B2B) contracts.

Part III reviews lawsuits over government contracts. Chapter 9 sets the stage by describing the typical lawsuit—one between neighbors, one between businesses, or one between a government contractor and the government. Chapter 10 discusses the government-contract lawsuit called a protest. This involves a lawsuit brought by a vendor against the government agency that denied the vendor a winning contract. Chapter 11 explains the other type of government-contract lawsuit: typically, a “claim” involving a vendor who is suing the government, usually for more money during performance of the government contract. Chapter 12 examines the availability of attorneys’ fees after contractors successfully sue the government.

Suggested Approaches

Readers Brand New to Government Contracts

For those readers who are new to government contracts, I would suggest starting with chapter 8 on how government contracts are different from B2B and consumer-type contracts and then go to chapter 6 to learn about the various types of government agreements and to understand how one government contract “vehicle” can differ from the others.

Readers Already Doing Government Contracts

Having taught government contracting officers and contract specialists for decades, I understand the difficult job they have—especially as they try to work with the concepts of fairness and abuse of discretion. For these readers, chapters 1 and 2 would be a good place to start because they are similar to an instruction manual.

These same chapters would be a good place for government contractors to start if they think the government has treated them unfairly in not awarding them a contract or in interfering with the contract they won and are trying to perform. The examples in these chapters show what the government contract judges think is right and what they think is wrong.

Readers Involved in Government Contract Litigation

Part III, which is an overview of the government contract litigation process, is not meant to be a step-by-step description of what, for example, a government contractor should do to sue the government. As I hope Part III shows, litigating a government contract case has a number of procedural quirks that can leave the contractor with no remedy.

People generally have to be pretty bright to run a business that handles government contracts, but there are situations when they might be able

to win a protest or a claim without hiring a lawyer. In some situations, a businessperson might be safe with no lawyer representing them; however, getting preliminary advice from a government contract lawyer, or having their business lawyer discuss the situation with a government contract lawyer, is a good first step.

For government procurement personnel, Part III can give a high-level view of what the protest or claims process is like. But as a former government lawyer, I like to think that their agency counsel is their best friend. In any event, Part III's overview will help a contracting officer understand the process. I hope that Part III will also make it easier for contracting officers to contribute to the efforts of agency lawyers or U.S. Justice Department lawyers who will do the actual litigation for the government.

Shortcuts

As a lawyer trying to write a government contracts book for nonlawyers, I ran into the dilemma of having to decide which master to serve: the lawyers or the nonlawyers. I decided to go with the nonlawyers, since there are already a number of fine law books for government contract lawyers.

In focusing on the nonlawyers, I had two goals. My first goal was to make the book as useful as possible, and my second goal was to make the book as readable as possible. As I wrote this book, I did some things lawyers would not do. For example, instead of putting legal citations in the text or at the bottom of the page, I put the notes at the very end of the book in the hope that the text would flow better. In the same vein, on several occasions I've taken some liberty with direct quotations from legal decisions in the hopes of making the quotations more readable. For example, I have deleted legal citations within the quotations because they tend to slow down the reading of the quotation. And if the quotation I used had itself a quotation from another judge's opinion, I deleted the internal quotation marks, again to make the quotation more readable. I also discussed some cases at greater length and omitted specific page citations to material from the case I had already cited.

Finally, in this second edition, I have added a number of decisions handed down in the more than ten years since the first edition was published. However, because I believe it can be an interesting teaching point, I have retained some decades-old decisions and have not inserted newer decisions to make the same legal point. A thirty- or forty-year-old decision that is still current law makes a valuable point—that the “old” decision states a fundamental principle of government contract law.

PART I

THE PARTIES TO A GOVERNMENT CONTRACT

How's this for an impossible job description:

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.

This is the best summary of the contracting officer's job in all the law dealing with contracting officers, and it's from Federal Acquisition Regulation (FAR) 1.602-2. From this quote, it's clear that a contracting officer is supposed to be a protector of the government's interests—an advocate for the government in the same way lawyers are to be advocates solely for their clients.

But then this same FAR section goes on to throw the contracting officer a curve, or perhaps a U-turn. In "safeguarding the interests of the United States," the contracting officer, according to FAR 1.602-2(b), is supposed to "ensure that contractors receive impartial, fair, and equitable treatment."

So, a contracting officer is supposed to be a judge who treats a contractor fairly and reasonably.

But whose side is the contracting officer on—the government’s side, similar to a sheriff protecting the government’s interests? Or no one’s side (neither the government’s nor the contractor’s), just as a judge?

Unfortunately, FAR has no answer. Having created this tension between the contracting officer as a guardian of the government’s interests and the contracting officer as a judge, FAR does not say much about how the contracting officer is supposed to do this job. There is no instruction manual for contracting officers describing how to do the job FAR gives them.

And if there is no instruction manual for one party to the government contract—the contracting officer—how can the other party—the contractor—anticipate what the contracting officer is supposed to do?

Part I starts by looking at all aspects of the contracting officer’s job.

In chapter 1, we look at the contracting officer as a judge. In this role, contracting officers must follow two basic rules: they must be fair and reasonable, and they must make independent decisions—that is, decisions made without pressure from their lawyers, their bosses, or their auditors.

In chapter 2, we look at the other job the contracting officer has—safeguarding the government’s interests. We look at how a contracting officer protects the taxpayers and the U.S. Department of the Treasury.

In chapter 3, we look at one of the downsides of the contracting officer’s job—the contracting officer as defendant. An unfortunate and rare role a contracting officer might play is that of a defendant in a lawsuit brought by a contractor or by a member of the public injured during a contract.

In chapter 4, we look at the flip side—the uncertain, evolving law regarding the contracting officer as a plaintiff. One part of this role is bounty hunting. Because members of the public can turn into whistleblowers and share in any fraud recovery to which they lead the government, a contracting officer may earn one of these lucrative recoveries as well. We also look at whether a contracting officer can sue members of the public for acts like defamation of character.

In chapter 5, we look at the government contractor and the most common problems a contractor finds. These include making sure the government employee involved has the authority to do the deal (because a deal made with unauthorized government employees typically ends in no contract with the government); avoiding the “bait and switch” tactic, which is defined as promising to provide one set of personnel and then switching to another set after the contract has been won; and avoiding fraud.

Chapter 1

The Contracting Officer as Judge

A “Fair and Reasonable” Judge

*Three Simple Rules for Always Being Fair and Reasonable
Being Fair and Reasonable in Awarding a Government
Contract*

*Being Fair and Reasonable in Administering
a Government Contract*

An “Independent” Judge

What kind of relationship is a contracting officer supposed to have with a contractor?

FAR 1.602-2(b) answers this critical and fundamental question this way: a contracting officer is supposed to “ensure that contractors receive impartial, fair, and equitable treatment.”

In effect, this FAR provision adds black robes to the contracting officer’s wardrobe by making the contracting officer a judge. A judge’s decisions should be fair and reasonable, and they should be reached independently—without bias or pressure from someone else. As a judge,