



Legal Rights and Responsibilities of Parties to Federal Procurement Contracts

As a general rule, the rights and responsibilities of the parties to a contract are governed by the terms of the contract. In the case of federal procurement contracts (i.e., contracts whereby an agency obtains supplies and services for its own direct benefit or use), some of these terms are unique to the contract and the circumstances of its performance. Such terms may, for example, specify the work the contractor is to perform, the time period(s) within which it is to perform, and how the contractor is to be compensated for performance. Other terms, however, are standard ones that appear, in some form, in all or most federal procurement contracts. These standard terms may be required by statute, and their use and language is often prescribed by regulation, typically the Federal Acquisition Regulation (FAR).

See generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by Kate M. Manuel et al.

This “In Focus” provides a brief overview of the standard types of terms that appear in federal procurement contracts. It also notes key CRS reports on the topics discussed here.

Contractors’ Obligation to Provide Supplies and Services

While the details of what the contractor is to do, and how and when the contractor is to do this work, vary by contract, certain standard clauses address the use of specific materials in the contract (e.g., 48 C.F.R. §52.211-5, requiring the use of supplies that are “new, reconditioned, or remanufactured,” as defined in the clause). Other standard clauses prescribe the time of delivery for supply and service contracts (other than construction and architect-engineering contracts) (e.g., 48 C.F.R. §52.211-8), as well as address how any extensions of the time in which the contractor is to perform are to be handled (48 C.F.R. §52.211-13).

Executive agencies are also generally required to ensure, among other things, that (1) their contracts incorporate inspection and other quality requirements, including any appropriate warranties, necessary to protect the government’s interest; (2) the supplies and services “tendered” by the contractor meet contract requirements; and (3) non-conforming supplies or services are rejected. See, e.g., 48 C.F.R. §46.102; 48 C.F.R. §46.407 (rejection of non-conforming supplies or services).

Government’s Obligation to Pay

Standard terms also generally govern the government’s obligation to pay the contractor for performance under the contract. The specific date or time frame within which payment is due can vary depending upon the circumstances of the contract (e.g., architect-engineer contracts, construction contracts). However, one frequently used contract clause requires that invoice payments be made within 30 days after receipt of a “proper invoice” or after the government “accepts” the supplies or services, whichever is later. 48 C.F.R. §52.232-25. If the government fails to make the required payment within this time frame, it is obligated to pay the contractor interest on the late payment. *Id.*

Since 2011, the Obama Administration has developed some additional standard clauses that call for “accelerated payments,” with the intent of getting payments to small business contractors and subcontractors more quickly. See, e.g., 48 C.F.R. §52.232-40(a). However, these clauses do not call for the payment of interest on any payments that are not made within the “accelerated” time frame, and the FAR otherwise generally continues to limit agencies’ ability to make certain payments earlier than seven days prior to the date specified in the contract. 48 C.F.R. §32.906(a).

See CRS Report R41230, *Legal Protections for Subcontractors on Federal Prime Contracts*, by Kate M. Manuel.

Modifying the Contract

The contracting parties generally have wide latitude to make “bilateral modifications”—or mutually agreed upon changes—to the contract, provided that the modification is within the scope of the contract. 48 C.F.R. §43.103(a).

However, “unilateral modifications”—or changes directed by the agency, potentially without the contractor’s consent—are also possible under contracts that include one of the standard Changes Clauses. Different versions of the Changes Clause are used in different types of contracts (e.g., fixed-price, construction, etc.). However, all variants of the Changes Clause provide that “[t]he Contracting Officer may, at any time, by written order, ... make changes within the general scope of this contract” to certain terms of the contract, such as (1) the contract specifications; (2) the method or manner of performing the work; (3) any government-furnished property or services to be used in performing the contract; (4) the method of shipping or packing; (5) the place of delivery for supplies; and (6) the

time and place of performance for services. *See* 48 C.F.R. §§52.243-1 to 52.243-5.

Options “Extending” the Contract

The contract could also include standard terms granting the agency the “unilateral right ... to purchase additional supplies or services called for by the contract, or ... to elect to extend the term of the contract.” Such terms are commonly known as “options.” 48 C.F.R. §2.101. Agencies may generally incorporate options in contracts whenever it is “in the Government’s best interest” to do so, and the FAR provides several standard Option Clauses for agencies to use in specific circumstances. 48 C.F.R. §17.202(a).

However, it is important to note that the agency’s right to exercise any option is limited by the time frames and procedures prescribed in the clause(s) establishing the option. Also, the contractor generally has no legal entitlement to have the agency exercise any options under the contract. Determining whether to exercise an option is a “unilateral right” of the government.

Termination of the Contract for Default or Convenience

The FAR requires that procurement contracts include standard terms granting the agency broad discretion to terminate the contract prior to the completion of performance. *See* 48 C.F.R. Part 49. Some terminations are for default, or based on the contractor’s anticipated or actual failure to perform substantially as required by the contract. 48 C.F.R. §§52.249-8 to 52.249-10. Other terminations are based on the “Government’s interest.” The “Government’s interest” has been construed to permit termination for convenience when, among other things, (1) the government no longer needs the supplies or services provided for in the contract; (2) questions have been raised about the propriety of the award, or about continued performance of the contract; (3) the business relationship between the agency and the contractor has deteriorated; or (4) the agency decides to restructure its contractual arrangements or perform work in-house.

The contractor may be entitled to certain compensation—more limited in the case of a default termination than a convenience one—if the government exercises its right to terminate. However, it is generally not entitled to damages for breach of contract because the government is exercising a right given to it by the contract when it terminates.

See CRS Report R43055, *Terminating Contracts for the Government’s Convenience: Answers to Frequently Asked Questions*, by Kate M. Manuel, Erika K. Lunder, and Edward C. Liu.

Resolution of Disputes

Standard contract terms provide for the resolution of disputes that arise during contract performance between the parties regarding their rights and responsibilities under or relating to the contract. Such “contract disputes” are to be

distinguished from “bid protests,” because they are limited to the parties to an existing contract, while bid protests can involve any “interested party” affected by the award or proposed award of a government contract.

The standard Dispute Clause (48 C.F.R. §52.233-1) addresses the content and form of “claims” between contracting parties. It also prescribes time frames for bringing claims (generally six years after they accrue), and for their resolution by the contracting officer. Claims that are not resolved within the requisite time frame are deemed to have been denied. If the contracting officer’s decision is unfavorable to the contractor, the contractor may generally appeal that decision to an agency board of contract appeals (within 90 days of the decision), or the U.S. Court of Federal Claims (within 12 months of the decision).

See CRS Report R43460, *Contractor Fraud Against the Federal Government: Selected Federal Civil Remedies*, by Brandon J. Murrill (discussing the Contract Disputes Act).

Contractual Remedies

The contract can also include a number of other standard terms giving the agency certain recourse if the contractor fails to perform as required under the contract. In addition to the rejection of non-conforming goods and termination, such terms could, depending upon the circumstances, provide for (1) the contractor re-doing the work at no cost to the government; (2) “liquidated damages,” or damages whose amount the parties agree upon when the contract is formed as compensation for a specific breach whose damages would otherwise be hard to determine; (3) equitable price reductions or other consideration; (4) re-procurement at the contractor’s expense; (5) performance and other bonds; (6) insurance against loss or damage; and (7) reduction or withholding of contractor fees.

Non-Contractual Remedies

It should also be noted that the government and, in some cases, third parties have other recourse—not provided under the terms of the contract—if the contractor fails to perform as required, or causes harm by its performance or failure to perform. Such means of recourse include, but are not limited to, debarment and suspension; suits for fraud under the civil False Claims Act; and tort suits.

See generally CRS Report RL34753, *Debarment and Suspension of Government Contractors: Legal Overview*, by Kate M. Manuel; CRS Report R43460, *Contractor Fraud Against the Federal Government: Selected Federal Civil Remedies*, by Brandon J. Murrill; CRS Report R43462, *Tort Suits Against Federal Contractors: Selected Legal Issues*, by Rodney M. Perry.

Kate M. Manuel, kmanuel@crs.loc.gov, 7-4477