

## THE TWO MOST IMPORTANT QUESTIONS ABOUT YOUR CONTRACT (PART ONE)

Questions are wonderful things. They allow you to control the conversation. They allow you to search for information; to get to the bottom of an issue. Questions provide clarity. They can direct, seek facts, be ambiguous, or explore. To Socrates, questions were the only true source of knowledge. Most contracting specialists who have been at the task of managing contracts for some period of time feel confident in their skills and abilities. They know contracting and how to do government contracting. They know how to negotiate and how asking questions can be a powerful negotiating tool. This confidence is good, but in our constantly evolving environment, with continuous process changes, it can quickly become misplaced overconfidence. That can lead to disasters.

There are two questions that can be asked of any contract that reveal a great deal about how it is being managed. They become critically important in understanding the contract, and as simple as the questions may be, the answers are often quite complicated, if not convoluted. Think about a contract that you currently manage. Think seriously about what you know about that contract. Now ask yourself these two questions:

1. What exactly is in the contract?
2. How do you know when it's done?

These two questions have been posed to a great number of contracting professionals. Too often the response is nothing more than a blank stare. "Certainly," you think, "you have to know what the contract is! After all, don't all government contracts have to be in writing?" There are two errors with that thought. First, no, government contracts do not have to be in writing. And second, it is often extremely difficult to determine what is in and not in a contract. For the most part, this is due to weak contracting processes, or a lack of formality in your contracting operations. Simple laziness and lack of knowledge are also frequently contributing factors — inexcusable, but nonetheless contributors.

The first question will be addressed in this issue; the second will be covered in a future article/next month.



## FEDERAL COMMON LAW VERSUS THE UNIFORM COMMERCIAL CODE

Some of the confusion in determining what constitutes the contract comes from the introduction of commercial practices into government acquisitions. There are two very different bodies of law that pertain to government contracts and commercial contracts. Government contracts are governed by what is known as the “federal common law.” This includes the classic contract formation requirements and the more rigid formality of contract operations that is required for the transparency of government acquisitions and the expenditure of taxpayer funds. The general rule is that unless you have met all of these formal requirements, there is no contract and the government is not bound.

Commercial contracts are quite different and governed by the laws of the respective states. A completely different approach is taken. This body of law, known as the Uniform Commercial Law (UCC), makes clear in its preamble that the goal is to “find” a contract rather than not find one. The informality of the process can result in people and entities being bound by a contract that was not completely consistent with their intent. For example, you would almost never find a government contract that was not so certain in its terms that it omitted price, delivery, quantity, or quality. (PDQ2, to use an old Government Accountability Office term). Under the UCC, however, all of those terms can be omitted and a contract will still be found to exist. No price? No problem. No delivery date? No problem. The UCC is flexible enough to permit ease of entering contracts to overcome what, in a government environment, would be unacceptable.

What many in government contracting fail to appreciate is that the bulk of the government’s vendors come from the commercial world. The contracts are simple, frequently cover no more than one page of fine print, and the “battle of the forms” is resolved for them through the UCC. What the contract contains, therefore, is more often defined by how the parties act in relation to each other rather than what might appear in any written document. While the exact contents of the contract are less important, they are not irrelevant, and if a dispute arises, the same issues of what language controls is still critically important. The so-called gap-fillers become part of the contract based on industry standards and practice, past dealings of the parties, and more importantly, their interactions on the current contract.

Government contracts have similar concepts, but they work far differently. One such doctrine is referred to as the Christian Doctrine. Based on the case of *G.L. Christian and Associates* decided by what was then known as the Court of Claims, the court determined that there were certain clauses that implemented such a fundamental precept of government

contracting that the clause would be automatically “read into” any government contract. The clause in question in that case was the Termination for Convenience, thus that clause is built into all government contracts whether it is physically included or not. Conversely, the Availability of Funds clause has been specifically held to **not** be incorporated by reference and unless it is included in a contract award or option, any attempt to obligate funds that are not available will be considered a violation of the Anti-Deficiency Act.

The effect of these differences is that the two parties — government and contractor, could have vastly different impressions of what is “in” the contract. This has led to a great many Board of Contract Appeals cases, and interestingly the contractor wins about as often as the government. Both parties are at risk and it too often takes litigation to resolve the issue. Both parties knew exactly “what the contract was.” One of them was wrong.

## INCORPORATION BY REFERENCE

Government contracts, generally to a greater degree than commercial contracts, incorporate a significant level of content by reference. The matrix in Federal Acquisition Regulation (FAR) Part 53 specifies which clauses may be so incorporated and those that may not. Several issues can arise with such incorporation. For example, what if the date of the clause is omitted? Which version applies? What if an old clause is included, does that apply or is it the most current version? One particular practice that causes great confusion appears in government subcontracts where language essentially as follows is included. “This subcontract contains those clauses that are incorporated by reference in the prime contract between the government and the prime contractor.” Too often the prime contractor then refuses to share a copy of the prime contract with the sub on the basis of confidentiality. Occasionally this incorporation also says that the subcontract will be automatically updated as the prime is updated. Is it fair to impose clauses on a subcontractor that the sub has never seen and is unaware of any updates? Can such clauses be held against the subcontractor? Add to this twist, that the subcontract is entered into under the UCC, not the FAR, thus as a commercial contract, greater flexibility is permitted. Even so, the UCC will not generally impose duties or obligations on a party if they could not be aware of that obligation. So we return to the initial question — What is the contract?

With some agencies the “incorporated by reference” string becomes amazingly long. Both the Department of Defense (DOD) and the Department of Energy (DOE) apply many instructions, directives, policy statements, and other such management documents to their contracts. In almost all cases those documents in turn refer to other documents. In one case where a comprehensive compliance matrix was developed to root

out every single requirement of a DOE contract, the mapping covered all four walls surrounding a large cubicle area. The complexity and interrelationship of all the various documents, each referring to others by reference as well, led to the inclusion of requirements in the contract that neither the government or its contractor anticipated. A strict reading of the contract, however, clearly imposed those requirements. Had the government insisted on compliance with any of those obtuse or even esoteric requirements, it very well may have prevailed under the federal common law. In all probability these requirements would not have been imposed on a subcontractor. Both parties were, again, operating at risk for not fully understanding what the contract “is.”

## ATTACHMENTS

Attachments create additional problems with ascertaining contract content. Many contracts will refer to an attachment, but not include it due to its length. Are such documents ever made available? How do you know? How do you prove it? Which version? As a general rule, any attachment that is clearly identified and reasonably available to the parties will be considered part of the contract. Does that ensure that both parties are completely familiar with the contents of that attachment? Could it be the case that a prime contractor attempts to flow an attachment to its subcontractor, fails to provide it and thus the sub is relieved from compliance, while the prime is held to have knowledge of the contents since it was reasonably made available to it? Could the prime get squeezed between the government and its sub? The answer, scary though it may be, is yes — not being abundantly clear on what the contract contains can wreak havoc on both the prime and the sub. The government also suffers since it now must take remedial action to demand full compliance with “the contract” — whatever it may be.

There is an old adage that no one reads the contract. Hopefully no professional contract manager ever takes that approach, but assuming for a moment that it is even partly true, what does that say about who has read the attachments? In full? In current version? With complete understanding of the obligations it may impose? Too often the contract is treated as “just like last time,” when such reliance is unwarranted. Can you honestly say that you have read every referenced attachment? Do you even have copies of those attachments? If not, can you honestly say that you know what the contract is?

Let’s consider two examples of mischief in this area. Some contracts are no longer available in hard copy. A basic document is provided electronically and incorporates a panoply of clauses, also available online. If the subcontractor was, for whatever reason, unable to access the online versions of clauses, and let’s also posit that this was due to unfamiliarity with online systems, or inadequate hardware interface, or other cause reasonably attributable to the subcontractor, can those clauses

be held against them? Does it matter that the prime contractor is a major Fortune 50 company with a wealth of resources at its disposal and the subcontractor was the classic mom-and-pop service provider? Should that matter? What might a court ultimately determine is the contract? Given this system, a hard copy of the contract never exists. It is in bits and pieces and bytes buried within a labyrinth of a prime contractor’s megasystem. Is it abundantly clear what the contract is?

As a second scenario for mischief, as noted above, consider the government contract that incorporates a lengthy list of DOD instructions or DOE orders. In almost all cases, those instructions and orders also incorporate ancillary documents by reference. At what point does the string terminate? Must every reference to every document referenced by every other document become part of the contract? General rules of contract interpretation say yes, but is that fair? And once again, even if the government can hold the prime contractor responsible for that byzantine arrangement, can the prime likewise hold the subcontractor’s feet to the fire? Might the federal common law and the UCC come to opposite conclusions on the subject? Once again — yes. So we again visit the question — What is the contract?

In some agencies it is a practice to incorporate the contractor’s proposal into the ultimate contract. The thinking is that if the contractor proposed to do it, it became a basis of the bargain and the government wants to ensure it gets what it was promised. Proposals often contain superfluous material and a great deal of what marketers call “puffing.” There might be a conflicts clause that says that in the case of a conflict the government’s language supersedes the contractor’s proposal language, but sometimes there is no direct conflict. There are just differences. What can the contractor be held to?

A related issue concerns the inclusion of “self-deleting clauses.” Too often clauses are put into a contract because of a correct or incorrect understanding of the regulations that in reality have no relationship to the contract at all. Most parties will pass over them on the basis that they are “self-deleting.” Can you always be sure that both parties would make the same list of those clauses that have deleted themselves? On at least one occasion a prime contractor included every variety of their standard terms and conditions (FFP, Cost-plus, time and materials, etc.) in case it would apply to the work at some point. Arguably the nonapplicable clauses were self-deleting, but who knew which ones? The net effect was that there were seven inspection and acceptance clauses included in the contract and neither party knew which one applied. Once again, bad drafting practices increased risk. Once again we are posed with the question — What is the contract? If a clause does not apply, proper formality of contract operations would demand that they be deleted from the document entirely.

## IMPLIED TERMS

As described above, the UCC will more often imply terms in a contract that occurs with federal government contracts. Nonetheless there can be implied terms beyond those imposed by the Christian Doctrine. For example there is always an implied obligation of good faith. There is always an obligation of non-interference. And if the government has superior knowledge about an aspect of contract performance, it is obligated to reveal the knowledge it has. None of these items are explicitly listed in the contract as obligations, but are imposed as a matter of public policy and fairness.

In contracts covered by the UCC, and to a lesser degree those federal contracts entered into under FAR Part 12 Acquisition of Commercial Items, much more can be implied. These are sometimes illustrated through the use of “visible” and “invisible” terms. The invisible terms might include those imposed by law (e.g., licensing), course of dealing, industry standards, implied warranties, and other common “gap-fillers.”

## LEGAL IMPEDIMENTS

There can also be legal impediments to what the contract does or does not contain. Under the federal common law it is necessary to honor the legal concept of consideration — quid pro quo, or a thing for a thing. Failure to obtain consideration for a contract change legally invalidates the change, although the argument is rarely raised. Under the UCC it explicitly states that consideration for modifications is not required. Nonetheless, legally speaking, the modification is not enforceable and thus affects what is in, or not in, the contract.

Authority is also an important factor in government contracts. Only a warranted contracting officer may commit the U.S. Government, and all actions taken must be within the delegated authority. Any action taken outside of that authority does not bind the government. And interestingly, it is the obligation of those dealing with the government to know the authority of those with whom they deal. This can affect what the contract contains, or more accurately what a court might enforce against either of the parties. In commercial contracts there is a legal doctrine of apparent authority which provides that if one party to a transaction has given the other party a reasonable expectation of authority, that authority will be assumed even if there are no corporate documents specifically empowering that corporate representative's actions. The doctrine of apparent authority does not apply to those who act for the government. Only actual express authority applies.

A third area of legal impediment involves partial discharge of a contract. There are too many diverse situations where this might arise to cover in this article, but bankruptcy, ability to void a contract (usually due to capacity), impossibility, and destruction of subject matter are all ways in which a contract can be discharged. If some portion of the contract has been discharged due to some legal impediment this has a direct impact on what the contract now “is.”

## SOLUTIONS

How do you answer the question — What is the contract? There may be no absolutely sure method, given the complexity of government contracts, but adherence to the following disciplines will take you much closer.

1. Read the contract. If the adage is even partly true that “no one reads the contract” make certain that at minimum you, the contract manager, have read the entire document.
2. Maintain a complete and accurate contract file. Make sure you know the versions of all the clauses included in full text or by reference. Make sure that you have accurately inserted the proper reference for anything included by reference, as well as where to find it, and if these references create a “reference string,” make sure you know where that string leads. If appropriate, cut it off.
3. Communicate effectively with everyone on the team. And remember that FAR clearly states that the contractor is part of that team. From the prime’s perspective, that would mean that the subcontractors are also part of the team. Learn to ask good questions and practice active listening. Do not rely on assumptions. Make the contract say what the parties have truly agreed to, and remove unnecessary language and requirements. The contract is your primary communication tool. Use it effectively.
4. Use available tools wisely and appropriately. Using technology to record your contracts is fine so long as record retention and recovery disciplines are honored. Paperless systems can be more efficient, but they do not suit everyone’s specific style. Don’t force it if not necessary. Some environments militate against paperless systems – such as many contingency contracting environments. Others mandate it and it works quite well, for example in FAR Part 8, orders from General Services Administration, or Veterans Affairs schedules. Contracting tools should be scaled to the need.
5. Create a contract compliance matrix. Pull on those strings and see what the requirements truly are. Create the chart that defines the requirements, cites the references, and assigns responsibility. You will not only find this an enlightening exercise in answering that question of what exactly the contract is, it is an outstanding communications tool. Engineers and technical types are far more likely to review a chart than to read a multiple an inches-thick document.

## SUMMARY

Determining exactly what the contract is can be a challenge, but it is a critical part of contract management. It’s not always easy to determine what is in, and what is out, of a contract. Make formality of contract operations part of your disciplines in contract management. Consider the impediments of knowing what the contract is and work diligently to make it clearer to both parties. Consider the five steps listed above in managing your contracts, and continue to improve your own skills. Next month/issue we’ll look at the second-hardest question — How do You Know When your Contract is Done?

## ABOUT THE AUTHOR

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