BY FAR THE MOST
MADDENING
CONTRACTS OF THEM
ALL

FRAC Conference 2018
Presentation Outline

- Introductions
- Contract Overview
  - What is a contract?
  - Contracts vs. Grants
  - Differences between Government and industry contracts
  - How do I read this thing?
- All About the FAR
  - What is the FAR and how to navigate it
  - When is it not-applicable
  - Flow-down requirements
  - Negotiation strategies
  - Clauses to be aware of /Challenging Clauses
- Group Exercise – FAR Clause Review Techniques
What is a contract?

- A legally binding agreement between two entities
- Can take many forms
  - Grant
  - Contract
  - Basic Ordering Agreement
- Government Contracts - Subject to Federal procurement regulations and heavily regulated
# Contract vs. Grant - What's the difference?

## Contract -
- Can take many forms
- Government or Industry
- Agreement between two entities to purchase a good or service
- SOW negotiated between the parties
- Can include numerous deliverables
- Failure to perform carries higher risk
- Extensive sponsor involvement
- Federal contracts - FAR

## Grant -
- Legal instrument of financial assistance where the goal is to accomplish a public purpose
- SOW defined by recipient
- More freedom
- Limited deliverables
- Failure to perform carries lower risk
- Limited sponsor involvement
- Federal grants – OMB Uniform Guidance
Industry Contracts vs. Federal

- Siemens
- Disney
- Lockheed Martin
- NBC Universal
- Cargill

- U.S. Army
- NASA
- U.S. Department of Agriculture
- National Science Foundation
- Dept. of Defense
# Industry Contracts vs. Government Contracts

<table>
<thead>
<tr>
<th></th>
<th>Federal Contract</th>
<th>Industry Contract</th>
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<tbody>
<tr>
<td><strong>Governing Law</strong></td>
<td>Federal Law</td>
<td>State Law</td>
</tr>
<tr>
<td><strong>Contract Format</strong></td>
<td>Specified by the awarding agency</td>
<td>Mutually agreed to by the parties</td>
</tr>
<tr>
<td><strong>RFP Process</strong></td>
<td>Competitive solicitation required unless sole source justification is approved</td>
<td>Not required unless funding being used is flowed down from a Federal award</td>
</tr>
<tr>
<td><strong>Protest Process</strong></td>
<td>Available</td>
<td>Not Available unless the funding being used is flowed down from a Federal Award</td>
</tr>
<tr>
<td><strong>Terms and Conditions</strong></td>
<td>Subject to Federal procurement regulations such as the FAR, CFR, DFARS, etc. These regulations generally cover any possible situation that could arise.</td>
<td>Mutually agreed upon and the parties can agree to remain silent on certain terms</td>
</tr>
<tr>
<td><strong>Audit</strong></td>
<td>Subject to Federal audit and oversight</td>
<td>Not required but can be agreed upon by both parties unless the funding being used is flowed down from a Federal Award</td>
</tr>
<tr>
<td><strong>Data Rights</strong></td>
<td>The Government generally requests unlimited rights with all procurements. Institutions of higher education can typically negotiate this requirement out. At a minimum you will be required to provide the Government with a royalty free license.</td>
<td>Mutually agreed to by the parties unless the funding being used is flowed down from a Federal Award</td>
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</tbody>
</table>
Negotiation Techniques with Government

- Any Contract other than sealed bidding considered negotiated contract. However, contract can be awarded without discussion. \( \text{FAR 15.215-1} \)
- Start discussions early in proposal phase prior to contract award unless non-competitive negotiation
- Understand your Statement of Work
- Investigate prescription for inclusion of a clause
  - Applicability
  - Mandatory or Discretionary
- Suggest more appropriate clause
- Suggest an alternate for clause
- Deviations from the FAR: Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specific needs and requirements of each agency. \( \text{FAR 1.402} \)
- **Attack the problem not each other** The differences between the two sides are a mutual problem. In a win/win negotiation, discussions center on identifying and resolving these differences, not attacking the messenger. Negative personal comments can add nothing to attaining a mutually satisfactory result. Ideally, negotiators should think of themselves as working side-by-side to resolve differences in a cordial manner.

- **Focus on long-term satisfaction and common interests** Many negotiators become so involved with their objectives in a particular negotiation that they lose sight of the bottom line — long-term satisfaction. Winning a particular point in a negotiation may mean losing a chance to achieve a mutually satisfactory result.

- **Consider available alternatives** Your solution may not be the only right solution to a particular point in the negotiation. The same may be true of the government’s position. Attempt to identify other solutions for consideration. The final solution may not be any better than the original solution offered by one side or the other. However, it is perceived as better, because it was reached through mutual cooperation.

- **Base results on objective standards whenever possible** Negotiators are more likely to be satisfied with a particular result, when it is based on an objective standard including: Historical experience; Industry practice.

- **Regardless of the negotiation result, the government is more likely to perceive a win/win outcome when you exhibit win/win behavior**
Focus on positive tactics to resolve differences. Do not rely on deceptive behavior or bargaining ploys. Tricking another negotiator may win an apparently favorable result, but the results during contract performance or in the next negotiation may be devastating. Remember if you gain a concession the government is training to expect a concession.

Emphasize the importance of a win/win result. Remain positive during and after the negotiation. Never gloat about winning the negotiation, even as a joke.

The perception of the result by each side determines whether an outcome is win/win or win/lose. In other words, the same contractual result could be viewed as being either win/win or win/lose depending on the eyes of the beholder. For example, a $700,000 contract price could be considered a win/win or win/lose outcome depending on how the government views that price.

The negotiator's behavior during and after negotiation is often the primary influence on the other side's perception. Regardless of the negotiation result, the government is more likely to perceive a win/win outcome when you exhibit win/win behavior. Remember the government will be reporting on how your verbal and non-verbal actions affected the negotiations for possible future use.
Identify and combine questions to be covered before initiating an exchange. Resist the urge to call each time a question arises. This can lead to confusion of issues.

Make a checklist of the points you want to cover. It’s easy to get side tracked during a telecom.

Always request a written response if the exact wording or ruling is important.

Include appropriate personnel if technical details are discussed.

Prepare a negotiation plan and appropriate to match the complexity of the project. This will help you identify priorities and trade-offs. Plan your negotiation and follow your plan as much as possible.
Government actively trains personally on how to negotiate. DAU CPRG

- Rule 1: Be Prepared
- Rule 2: Aim High make positive assumptions
- Rule 3: Give Yourself Room To Compromise
- Rule 4: Put Pressure On The Contractor
- Rule 5: Do Not Volunteer Weaknesses
- Rule 6: Use Concessions Wisely
- Rule 7: Say It Right
- Rule 8: Satisfy Non-Price Issues
- Rule 9: Use The Power Of Patience
- Be Willing To Walk Away From Or Back To Negotiations
Negotiation Techniques for Industry

- **Look for Shared personal interest**: Develop a personal rapport.
- **Verify flow-down requirements**: Commercial vs. non-commercial, contract type etc. Industry and government tools are available to assist.
- **Describe what you need and be comfortable with silence**: Often the last person to speak concedes position.
- **Leave room for other side to bargain**.
- **Apply steady forward pressure but have patience and remain calm**: Sometimes most of the negotiation happens in the last period.
- **Meeting of the minds**: Help other side understand that their requirements is not always required. Boiler plate does not have to be accepted.
- **Learn to say thank you and move forward**: Reduce time over target.
Government Contracts typically have a standard format or form outlined in the next few slides.

Industry contracts vary tremendously depending on the size, type of entity, and their resources.
FAR 15.204.1

(a) Contracting officers shall prepare solicitations and resulting contracts using the uniform contract format outlined in Table 15-1 of this subsection.

(b) Solicitations using the uniform contract format shall include Parts I, II, III, and IV (see 15.204-2 through 15.204-5). Upon award, contracting officers shall not physically include Part IV in the resulting contract, but shall retain it in the contract file. (See 4.1201(c).) The representations and certifications are incorporated by reference in the contract by using 52.204-19 (see 4.1202(b)) or for acquisitions of commercial items see 52.212-4(v).

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<td>Part I—The Schedule</td>
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<tr>
<td>A</td>
<td>Solicitation/contract form (Typically a Standard Form (SF) 33 is used)</td>
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<tr>
<td>B</td>
<td>Supplies or services and prices/costs</td>
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<tr>
<td>C</td>
<td>Description/specifications/statement of work</td>
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<tr>
<td>D</td>
<td>Packaging and marking</td>
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<td>E</td>
<td>Inspection and acceptance</td>
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<td>F</td>
<td>Deliveries or performance</td>
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<td>G</td>
<td>Contract administration data</td>
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<td>H</td>
<td>Special contract requirements</td>
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<tr>
<td>Part II—Contract Clauses</td>
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<tr>
<td>I</td>
<td>Contract clauses</td>
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<tr>
<td>Part III—List of Documents and Exhibits, and Other Attachments</td>
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<tr>
<td>J</td>
<td>List of attachments</td>
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<tr>
<td>Part IV—Representations and Instructions</td>
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<tr>
<td>K</td>
<td>Representations, certifications, and other statements of offerors or respondents</td>
</tr>
<tr>
<td>L</td>
<td>Instructions, conditions, and notices to offerors or respondents</td>
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<tr>
<td>M</td>
<td>Evaluation factors for award</td>
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</table>
Standard Government Forms

- SF26 – Award/Contract
- SF30 – Amendment of Solicitation/Modification of Contract
- SF33 – Solicitation Offer and Award
- SF1449 – Solicitation/Contract/Order for Commercial Items
Are your legal name and address listed correctly?

Are you required to sign and return x number of copies?

Is there a DPAS rating?

What are the shipping terms?
Do they match your proposal?

Does the award amount match your proposal?
FAR Overview
What is the FAR?

- Federal Acquisition Regulations
- What is the benefit of the FAR?
  - These regulations ensure the Government’s purchasing procedures are standard and conducted in a fair and impartial manner.
- Can be listed in full text or table form
- FAR Clauses are unique to each contract based on scope, value, etc.
- The only person that can change a FAR clause is the Government Contracting Officer
Subchapter A – General
- 4 parts and topics covered are definitions, improper practices and administrative matters

Subchapter B – Competition and Acquisition Planning
- 8 parts and ensures procurements are fair, open and to the benefit of the Government

Subchapter C – Contracting Methods and Contract Types
- Provides information on special acquisition methods, Simplified Acquisition Threshold (SAT) and contract types

Subchapter D – Socioeconomic Programs
- Covers small business programs, equal employment opportunity, safety, foreign acquisition & emergency programs

Subchapter E – General Contracting Requirements
- Details contractors rights and responsibilities

Subchapter F – Special Categories of Contracting
- Covers information to specific types of special acquisitions such as large purchases (aircraft carriers), R&D, and IT

Subchapter G – Contract Management
- Regulations and processes required for contract administration, subcontracting, and termination

Subchapter H – Clauses and Forms
- Covers the standard contract clauses and forms used throughout the Government. Contains FAR Part 52 which is the most common Part we see.
52.202-1 Definitions.

As prescribed in 2.201, insert the following clause:

DEFINITIONS (Nov 2013)

When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless—
(a) The solicitation, or amended solicitation, provides a different definition;
(b) The contracting parties agree to a different definition;
(c) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or
(d) The word or term is defined in FAR Part 31, for use in the cost principles and procedures.

(End of clause)
2.201 Contract clause.

Insert the clause at 52.202-1, Definitions, in solicitations and contracts that exceed the simplified acquisition threshold.
A FAR is not applicable when:

- Institution type
- Cost-type of contract
- Funding is below a threshold outlined in the clause

Note: Be very careful to evaluate if a clause is applicable or not and the risk level of leaving it in.
When should a clause be flowed down in a subcontract?

- If you are issuing the subcontract there are two philosophies:
  - Flow down all of the clauses with minor adjustments for entity type
  - Flow down only those clauses that are required and applicable
- If you are the subcontractor:
  - Is the clause applicable to your institution?
  - Is the clause applicable to the cost-type of your contract?
  - Is the clause applicable to the type of work?
  - Are the funds under any required threshold (e.g., SAT)?
When should a clause be flowed down in a subcontract?

- Is the clause required to be flowed down?

52.203-6 Restrictions on Subcontractor Sales to the Government.
As prescribed in 3.303-2, insert the following clause:

REstrictions on Subcontractor Sales to the Government (Sept 2006)

(a) Except as provided in (b) of this clause, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract which exceed the simplified acquisition threshold.

(End of clause)
Strategies

- **Agency Strategies**
  - New agency or an agency who you know is flexible - Request deletion of all clauses which are not applicable.
  - Prime agreement from the Government /Difficult Prime Agency - only request deletions of those that are not applicable to your entity, scope of work, and which may increase your risk if accepted.

- **Review Strategies**
  - Evaluate the agency’s flexibility
  - Know the parameters you are working with (type of agreement, scope of work, etc.).
  - Identify which clauses are not applicable and their level of risk
- Respond to the agency with descriptive comments for why you are requesting a deletion or change.
  - If the agency declines some or all of your changes request a conference call.
  - Be prepared to validate your request even if the reason for deletion is the risk to your entity.
  - Respectfully coach the other agency on the FAR and what flexibility they have to make the changes you are requesting.
  - Add language in the contract itself to clarify any confusion in the FAR or set an order of precedence article.
FAR Tools

- FAR Matrix under 52.301
- Develop a FAR Matrix specific to your institution
- Listserves
- Other university websites
CLauses to be aware of and challenging clauses
52.232-20 – Limitation of Cost

Prescribed for use “in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated, whether or not the contract provides for payment of a fee.”

“(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that --

(1) The costs the Contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.”
Prescribed for use “in solicitations and contracts if an incrementally funded cost-reimbursement contract is contemplated”

“(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of

(1) the total amount so far allotted to the contract by the Government or,

(2) if this is a cost-sharing contract, the amount then allotted to the contract by the Government plus the Contractor’s corresponding share.

The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.”
Most entities typically accept 52.223-6 Drug Free Workplace which implements an entity wide policy.

Drug Free Workforce - Required to conduct drug free training/monitoring and drug testing prior to, and during employment.

- Problematic for most entities to implement
- Could be problematic with collective bargaining agreements

NOTE: If a contract is covered under a security clearance this clause cannot be removed. You either have to implement the drug free workforce plan or request to have the security clearance reduced, if possible.
Small Business and Subcontracting Requirements

- Small Business Subcontracting Plan
  - Required for awards over $700,000
  - Plan must be approved before award
- 52.244-5 Competition in Subcontracting
  - Applicable to awards over SAT ($150k)
  - “(a) The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.”
- Do you need Prime Sponsor approval to subcontract out?
Cost Accounting Principals and Procedures 
FAR Subpart 31

- Subpart 31.1 Applicability
- Subpart 31.2 Contracts with Commercial Organizations
- Subpart 31.3 Contracts with Educational Institutions
- Subpart 31.6 Contracts with State Owned and Indian Tribes
- Subpart 31.7 Contracts with Non Profit Organizations

- All non-commercial subparts refer back to Uniform Guidance as the governing regulations for cost accounting principals. Note there are some additional restrictions for subpart 31.6.
52.245-1 Government Property

- Government property includes government furnished property and contractor acquired property (materials, equipment, property)
  - Government retains title any government property under the contract
  - Contractor is required to track all items purchased under the contract
- For most entities it is more favorable to request Alternate II
  - Contractor retains title for items purchased under $5,000 with approval from Government Contractor
  - Items purchased over $5,000 would vest according to the contract (make sure language is included in the contract)
Applicable if a contract is subject to the Service Labor Act for service employees unless exempted by the Secretary of Labor.

Service employees are persons engaged in the performance of the contract other than any person employed in a bona fide executive, administrative, or professional capacity.

This clause is problematic for some entities as it dictates the hourly wage, fringe benefits, holidays, etc.

Useful Article: National Contract Management Association

Restrictive Clauses to be Aware of

- DFARS 252.204-7000 – restricts disclosure of information outside of your entity. This can restrict publications, public records laws, etc.
- FAR 52.204-21 / DFARS 252.204-7012 outlines the requirements for safeguarding controlled defense information (CDI).
- These are mandatory flow-downs. Make sure to get your export office involved when you see these clauses.
If you are a subcontractor confirm if these are in your Prime sponsor’s prime agreement or part of their boilerplate template.

Evaluate your work to see if it is fundamental research. If yes, then you need to request confirmation from the Government Contracting Officer in writing that your work is fundamental research.

If the work is controlled, then these clauses would be applicable and must be complied with.

For 252.204-7012 your export office would work with the PI to evaluate the ~100 items of requirements. It is required to notify the government of those items which you cannot comply with within 30 days of contract execution.
This clause specifies terms and conditions that will apply to commercial purchases made by the Government. This clause is not used much at IHEs, however it can happen.

This clause replaces many other clauses as it incorporates them by reference. The incorporated clauses are related to the purchase of commercially available goods/services, rather than research.

If the activity involves research, it would be advantageous to replace it with the standard FAR clauses for Research & Development or change to 52.213-4 Terms and Conditions – Simplified Acquisitions (Other than Commercial Items).
52.244-6 Subcontracts for Commercial Items

- 52.222-55 and 52.222-62 incorporates the Fair Labor Act, Service Labor Act and wage determinations.
- 52.204-21 Contractor Covered Information Systems – which is applicable when the contractor stores, processes or transmits federal information on their systems.
- Since 52.244-6 incorporates numerous clauses including the ones listed above this clause has to be reviewed for risk each time.
- If incorporated from the government see if you can get it removed if you are not producing commercial items and if you do not anticipate subcontractors. If flow-down from an industry prime determine the risk of accepting.
IP and Data Rights Clauses

- 52.227-11 Patent Rights – Ownership by Contractor
  - Review any alternates included to make sure they are applicable.
- 52.227-13 Patent Rights – Ownership by government
  - May be applicable depending on the scope
- 52.227-14 Rights in Data – general
  - Most commonly used, but review alternates (IHEs typically request Alt IV which substitutes the copyright clauses)
- 52.227-17 Rights in Data – special works
  - When the production/compilation of data is for the government's internal use.
- 52.227-18 Rights in Data – existing works
  - Acquisition of audiovisual or similar works.
- 52.227-20 Rights In Data – SBIR

Note: These clauses may include reporting requirements. Also, note the requirements for subcontractors.
Requires the contractor to provide a wage statement document to all individuals performing work under the contract if they are subject to the Fair Labor Act, Davis Bacon, or Service Contract Labor Standards.

GSA letter stating this clause is null and void and should be removed from solicitations and contracts.
Group Exercise # 2

- FAR Clause Review Techniques
Resources

- https://www.acquisition.gov/?q=browsefar
- Association of American Universities – This site will have correspondence from AAU and COGR on specific or troublesome clauses. http://www.aau.edu/policy/scientific_openness.aspx?id=6872
- National Academies – Troublesome Clauses
- National Contract Management Association – Contract Management Publication
QUESTIONS?