

# CONTRACT LAW

## HIGHLIGHTS PACKAGE

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**COURSE INTRODUCTION**

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## GENERAL

Defense Procurement University designed the Contract Law video curriculum for personnel who have fundamental experience and training in government procurement. It will greatly enhance your employees' understanding of the principles of contract law, and their ability to apply those principles to actual problems encountered in contracting.

This course will provide students with a fairly detailed overview of the legal bases behind specifications and statements of work; the inspection and acceptance process; changes in federal government contracts; equitable adjustments; patent and data rights; disputes avoidance; contractor remedies, including protests, claims, disputes, and appeals; socioeconomic programs; termination's for convenience; and the administration of government property.

## COURSE STRUCTURE

The course consists of twelve instructional modules and one examination module and is designed to be completed in thirteen weeks. Plan to complete one module each week, setting aside approximately the same time each week to complete the work. The twelve instructional modules lead the participant through the logical evolution of the contracting process. The post-course examination is an open-book test of the student's learning power over the twelve-week curriculum, and is designed to be completed in approximately two hours.

## COURSE MATERIALS

The core knowledge of this course is presented in the written student materials and the videotapes. Each of the student's digests contains an introduction to the module topic, a discussion of key points, and tips and references. The videotape presentations are the focal point for learning, with discussion guided by an in-house facilitator and guest speakers.

References are made throughout the course to such sources as the Federal Acquisition Regulation (FAR), Department of Defense Federal Acquisition Regulation Supplement (DFARS), and the Armed Services Pricing Manual (ASPM), but only the FAR is actually needed to perform the course work. Students should plan to have a copy available for each session.

Students should read the student materials for each module (that is, the introduction and learning objectives, and the module digest). Then they should view the videotape for the module and refer to the written materials and the video presentation overlap, the video is not simply an oral summary of what's in the digest, nor is the digest simply a transcript of the video. They are meant to be complementary.

**VIDEOTAPE PRESENTATION:** The videotape for each module brings information to you via a professional skilled in video communication. The materials presented were researched and written by contracting and procurement experts with extensive Federal and private industry experience.

Each videotape ranges in length from 25 to 50 minutes, and requires standard VHS playback equipment. (U-Matic 3/4" tapes are available upon request). Each module is presented in three or four segments, and allows the viewers the opportunity to pause the presentation for discussion or written exercises between segments.

Because procurement policies and techniques change so rapidly, an attempt has been made to avoid including perishable material in the videotapes, so as to extend their relevance as long as possible. In spite of this, procedural, regulatory, and legislative changes will occur that will make occasion parts of the videotape presentation out of date.

**STUDENT MATERIALS:** The heart of the written materials, and probably of the entire course, is the module digest. Each module digest includes an introduction, an abstract, a list of learning objectives, a discussion of the major points, tips and references, and a self-test. The reference materials are for the most part source citations from regulatory documents, but pertinent articles or cases may also be included. Each module digest is separately-bound, for easy reference when watching the videotape presentation or participating in a classroom session.

**THE FACILITATOR'S GUIDE:** The role of the facilitator in the Contract Law curriculum is to provide students with significant information that is specific to your organization. He or she is generally an in-house expert in government procurement, and is probably a member of upper management.

In a unique formatting strategy, the Facilitator's Guide follows the videotape, point by point, in outline form. The Facilitator's Guide offers suggestions for class discussion, and includes guidelines for course administration, supplemental reading materials, guest speakers, and more.

The facilitator may arrange for guest speakers to join the class from time to time to enhance the learning environment. Students are encouraged to take advantage of the facilitator's and guest's knowledge and experience, which will be instrumental when it is time for students to apply the information they have gained to their own jobs.

**THE VIEWER'S GUIDE:** The Viewer's Guide follows the same formatting strategy as the facilitator's Guide, and is for use by students working at home or in their office without the benefit of a classroom setting or facilitator. The Viewer's Guide includes

written exercises at the end of each video segment, which encourage students to apply the information they have learned to their own contracting environment and experiences.

**THE COURSE EXAMINATION:** The twelve instructional modules are followed by a two-hour, open-book course examination. You may use any of your study materials while taking the exam, but will only need the student materials and the FAR. After they have completed the course examination, the facilitator should review the correct answers with the facilitator's answer key, and point out page references in the student materials.

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**MODULE 1 SPECIFICATIONS AND STATEMENTS OF WORK**  
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**ABSTRACT**

Precision is the key factor in drafting and interpreting Statements of Work (SOWs). The SOW must include exacting descriptive terminology, and yet must allow enough leeway to meet less rigid regulatory and production demands. Achieving that often requires intradepartmental teamwork of technical, legal, and contracting personnel.

The Government must be absolutely precise in its description of the materials, products, and services it requires. At the same time, it must not inadvertently place restrictions on free and open competition by making the specifications too limiting. As the contractor, you must be perfectly accurate in analyzing the specifications. The added challenge is to show how your company will use its special resources and expertise to creatively meet the Government's requirements without sacrificing efficiency or accuracy.

Specifications address three main areas of requirements--design, performance, and functional. They may be included individually or in combination, depending on how the Government can best describe the product or service it seeks. It is important to note the advantages and disadvantages each type of specification represents in order to better analyze the SOW, once it has been drafted.

There has been a recent effort to streamline and standardize the procurement process when possible. So, for those single procurements that do not require specifications, less detailed purchase descriptions may be used. There are policies and procedures that reflect the increasing use of off-the-shelf items and commercially produced items modified for Government use. Basic commercial item descriptions may be used for these, within certain parameters.

Formal specifications are most appropriate for describing complex



with the dollar value and type of product. The Government generally has the right to inspect supplies or services at any time and, with only a few exceptions, at just about any place during contract performance, as long as these inspections do not unduly impede your progress in completing the contract. If your supplies or services are rejected, you have a right to receive prompt notice of such rejection.

Your Government contract will specify who can accept your supplies or services for the Government and where this acceptance will take place. This is formal acceptance, but if the formal processes break down, acceptance can occur by operation of general principles of law--a concept termed "informal or implied acceptance."

There are five general types of Government warranties: a failure-free or hardware warranty, a correction of deficiencies warranty, a supply warranty, a service warranty, and a construction warranty. Certain DoD weapons systems production contracts have very specific warranty requirements that are mandated by law. The details of most other warranties are left to the discretion of the contracting officer.

In deficiencies that are covered by warranties, the Government has the burden of proving probable cause. Once it has done so, it generally enjoys cumulative rights to corrective action under warranty and inspection clauses.

### LEARNING OBJECTIVES

Upon completion of this module, students should be able to--

1. Explain the roles of the Government and the contractor in product inspection;
2. Understand the legal significance of the acceptance process;
3. Describe conditions under which you might be able to overturn a Government rejection of your products or services;
4. Understand the types or levels of quality requirements that a Government contract might contain;
5. Explain your organization's continuing potential liability after acceptance of products and services;
6. Recognize and understand the implications of the various types of warranties in a particular contract.

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**MODULE 3 CHANGES IN FEDERAL GOVERNMENT CONTRACTS**

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## ABSTRACT

The Changes clause is a mandatory clause that allows the Government to change the terms of its contracts in an almost infinite variety of situations. When it was first used, the Changes clause had no counterpart in ordinary commercial contracts. It is now such a recognized and valued part of public contracts that it is not only used by many state and local governments but has also been incorporated into the standard forms of the Associated General Contractors of America and the American Institute of Architects.

The Changes clause provides Government contracts with needed flexibility. After award, events may necessitate changes in the basic contract. New technology or other developments may require alterations in the product or services being procured or modifications in other aspects of the basic contract, and the Changes clause allows for these. Similarly, the clause allows the parties to correct errors or suggest better ways of performance. The Clause requires that the contract be equitably adjusted to reflect the change. The Changes clause is susceptible to unfair use, so its use must be monitored. For example, a contractor might deliberately underestimate the cost of performance, either to be competitive or to stay within the buyer's budget. Deliberate underestimation is sometimes called a "buy-in", where the contractor will try during negotiation to minimize the effects of the underestimate, thereby establishing a better basis for processing changes later. After award, the contractor will search for any Government action that can be construed as a constructive change or a change in scope, to increase the contract price.

Even if the scope of work is reasonably well defined, contractors may suggest changes, in or out of the scope of the work, in order to increase sales volume. Most firms consider current contracts the best source of new business--derived from selling additional quantities, from finding new uses for the item, or from making engineering change proposals to "improve" the item. For the most part, technical personnel want to make the best possible item regardless of how it will be used, and the contractor frequently finds it easy to secure enthusiastic support from a customer's technical personnel for "improvement" changes. As each of these changes is made, of course, the contractor is in that respect a sole source.

## LEARNING OBJECTIVES

Upon completion of this module, students should be able to--

1. Evaluate whether a change is within the scope of the contract;
2. Discuss whether a representative of the contracting officer can order changes;













Beyond that, it is helpful to keep in mind that the Competition in Contracting Act of 1984 provided that protests whose basis is restrictive competitive practices of the procuring agencies receive more favorable consideration. So it is important to identify any such restrictions as well as any statutory or regulatory violations that may be inherent in the basis for your protest.

### LEARNING OBJECTIVES

After completing this module, students should be able to--

1. Define terms to describe aspects of preaward challenges to contract award;
2. Explain who can file a protest in the various protest forums;
3. Know the factors you must consider in selecting a protest forum;
4. Explain what types of relief you can expect as a result of a sustained protest;
5. Explain what kind of an effect the current climate of Government procurement has on preaward protests;
6. Identify bases of protests that are indicators of appropriate administrative forums;
7. Identify basic procedures and characteristics of each of the administrative and judicial protest forums.

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### MODULE 10                      CONTRACTOR REMEDIES II

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### ABSTRACT

The most important event in recent years affecting the post-award remedies of Government contractors was passage of the Contract Disputes Act (CDA) of 1978. The act not only allowed more claims to be settled administratively, but it also gave a contractor a real choice of forums when appealing from a contracting officer's adverse final decision. However, in fulfilling one of its goals of making post-award dispute procedures more equitable to both the contractor and the Government, the act also cut back from six years to 120 days the period during which an appeal from an adverse board of contract appeals decision was allowed and gave the Government as well as the contractor the right to appeal such

decisions.

The CDA is implemented generally by FAR Subpart 33.2 and specifically by the Disputes clause in each Government contract. One of the new terms of the clause is a requirement that claims exceeding \$50,000 have a certification attesting to the good faith of the claimant and the completeness and accuracy of the claim's supporting data.

Together with the Federal Courts Improvement Act of 1982 (FCIA), the CDA dramatically changed the organizational structure for handling a CDA claim. The FCIA established two new judicial organizations. The new Claims Court, in addition to the agency boards, was given postaward claims jurisdiction immediately after the contracting officer's decision. The new Court of Appeals for the Federal Circuit became the appeal forum for both the Claims Court and the agency boards.

Although most claims can be classified as CDA claims, some cannot. If the contract is one that facilitates the national defense, a non-CDA claim against that contract may be processed administratively through the "extraordinary" relief of Public Law 85-804, if that claim is not detailed in FAR Part 50. One important restriction is that a contractor must have completely exhausted other avenues of administrative relief before it becomes eligible for relief under this public law. Otherwise, there is no general forum for the settlement of non-CDA claims except the Claims Court.

Subcontractors cannot make any claim against the Government unless their claim is sponsored by their prime contractor or unless a clause in their subcontract allows it.

### LEARNING OBJECTIVES

After completing this module, students should be able to--

1. Discuss how the Contract Disputes Act (CDA) of 1978 changed the way disputes claims on Government contracts are resolved;
2. Discuss the impact of the Federal Courts Improvement Act of 1982;
3. Explain the necessary elements of a CDA claim;
4. Define what constitutes a CDA claim as opposed to a non-CDA claim;
5. Explain the different forums available for the resolution of CDA claims and non-CDA claims;
6. Make an appropriate choice among the claims resolution forums by identifying the advantages and disadvantages of each.

7. On pre-CDA contract claims, make an appropriate choice between pre-CDA and post-CDA procedures by identifying the advantages and disadvantages of the two sets of procedures as they relate to a particular forum.
8. Recognize typical issues o post-award claims;
9. Discuss subcontractor remedies in various Government contract situations.

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**MODULE 11                    TERMINATIONS FOR CONVENIENCE**  
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**ABSTRACT**

Default and convenience termination's have many similarities because both have the same final outcome: your Government contract is prematurely voided. They also have differences, because the reasons for the action taken are different. In a default, you are perceived as the reason for the termination. In a convenience termination, you are merely the victim of circumstance. In either case, the contract can be terminated in whole or in part.

Some of the same rules apply for notification and your duties upon notification. Other rules are very different. In a default, you are liable for excess costs of reprocurement and will not be afforded such things as an equitable adjustment on any continued portion of a contract, partial payments before a settlement agreement, or extra compensation in the form of settlement expenses. In termination for convenience, you are entitled to some of that compensation.

There has been some controversy about using partial terminations for convenience versus deleting work under the Changes clause of the contract. Although there is some legal precedent that requires the deleted work to be analyzed as "minor" (indicating Changes clause procedures) or "major" (indicating partial termination procedures), uncertainty and the need for judgment still prevail. Government-wide regulations do not address the issue.

Government rights to default are permissive rather than mandatory but can be waived if the Governments waits too long in making a decision about whether to exercise its rights. The Government can also waive its rights to default if it neglects to comply with appropriate default procedures, such as giving a contractor prenotification in the form a "cure" notice or a "show cause" notice before issuing the official termination notice itself.

Not only may the Government take actions that constitute a waiver, but also you may be able to prove that any default based on untimely delivery was an "excusable delay" under the termination clauses in your contract.

## LEARNING OBJECTIVES

After completing this session, students should be able to--

1. Explain the differences between a default and a convenience termination;
2. Discuss the clauses that apply in contract termination's;
3. Explain your duties as a contractor in a termination action;
4. Recognize the accounting procedures used in settling convenience termination's;
5. Understand some basic rights that your company has in recouping expenses as a result of a convenience termination;
6. Advance possible arguments in response to a Government default action.

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### MODULE 12

### GOVERNMENT PROPERTY

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### ABSTRACT

Having legal title means having all of the rights of ownership. Equitable title recognizes rights in connection with the use of property. When Government property is provided to a contractor, legal title for Government-furnished property (GFP) always remains with the Government, but legal title to contractor-acquired Government property depends on the administrative classification of the property itself and on the terms, conditions, and clauses in a particular Government contract.

One of the most important distinctions is between property classified as facilities and property in all other classifications. This distinction may determine whether more than one contract is used for a single contractual undertaking, whether the Government property will be furnished at all, and, if it is furnished, the terms and conditions that will govern its use.

The Government must carefully decided whether to furnish property on a particular contract, balancing cost considerations and the furtherance of Government programs against its own management costs and the liability for its own involvement. A contractor must also weigh the benefits of accepting such property against any perceived disadvantages, such as a possible negative effect on profit and the impact of GFP that may not be suitable for its intended use.

The Government is generally responsible for providing property that is in the condition and quantities described in a

solicitation and are suitable for the purposes described. The contractor is generally responsible for inspecting such property promptly upon receipt, using the property only as provided in the contract, and accounting for and controlling the use of such property, assuming the risk of loss as specified by the terms of the contract, and disposing of the property in accordance with the Government's instructions. A subcontractor's responsibilities in regard to such property are generally the same as the prime contractor's.

### LEARNING OBJECTIVES

After completing this module, students should be able to--

1. Understand the concept of title and how the standard FAR clauses affect title to Government property;
2. Identify the major classifications of Government property (a contract's terms and conditions will most likely apply different rules according to these classifications);
3. Identify what motivates the Government to furnish property to a contractor, and why the Government sometimes prefers not to furnish property on a particular contract;
4. Understand the basic Government policies governing property, and how these policies may affect a particular contract;
5. Safeguard your company's interests by being aware of some of the common trouble areas when GFP is accepted;
6. Understand Government, prime contractor, and subcontractor responsibilities relating to Government property;
7. Be able to explain the special aspects of facilities contracts.