



GSA Council



## 2002 FEDERAL MARKETPLACE – IT OPPORTUNITIES AND NEW PROCUREMENT POLICY CONFERENCE

# *TERMS AND CONDITION IN GOVERNMENT CONTRACTS*

Presentation

By

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# SCOPE OF PRESENTATION

- **PART 1 –**
  - **REVIEWS AND COMPARES CLAUSES IN –**
    - STANDARD GOVERNMENT CONTRACTS; AND
    - FAR PT 12 CONTRACTS FOR COMMERCIAL ITEMS
- **PART 2 –**
  - **PROVIDES SOME PRACTICAL POINTERS**



# *PART 1 – COMPARISON OF CLAUSES- TYPES OF CLAUSES*



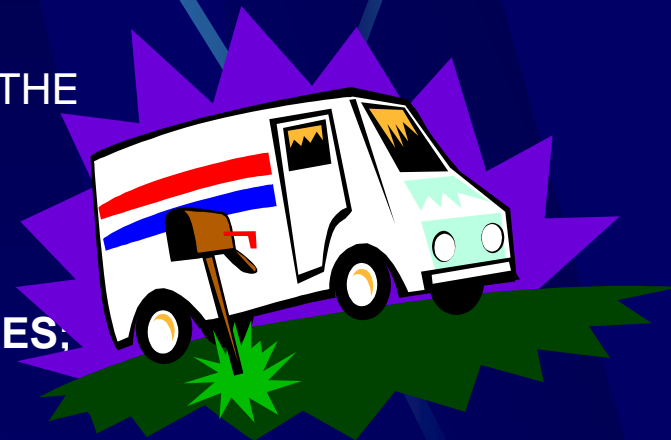
STANDARD U.S.  
GOVERNMENT CONTRACTS  
FAR PART 12 CONTRACTS  
FOR “COMMERCIAL ITEMS”

- FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS
- USED IN GSA MULTIPLE AWARD CONTRACTS



# FAR PT 12 CONTRACTS FOR COMMERCIAL ITEMS - WHAT IS A "COMMERCIAL ITEM"?

- **"OF A TYPE" CUSTOMARILY USED FOR NONGOVERNMENTAL PURPOSES**
- **MODIFIED COMMERCIAL ITEMS IF MODIFICATIONS**
  - "OF A TYPE" CUSTOMARILY AVAILABLE IN THE COMMERCIAL MARKETPLACE; OR
  - MINOR
- **NONDEVELOPMENTAL ITEMS IF**
  - **DEVELOPED FOR GOVERNMENT PURPOSES, AND**
  - **ANY MODIFICATIONS**
    - "OF A TYPE" CUSTOMARILY AVAILABLE IN THE COMMERCIAL MARKETPLACE; OR MINOR
- **CERTAIN SERVICES**



# WHAT IS A COMMERCIAL ITEM? - SERVICES AS COMMERCIAL ITEMS

- **SUPPORT SERVICES IF**
  - OFFERED TO GENERAL PUBLIC UNDER SIMILAR TERMS AND CONDITIONS; AND
  - USING SAME WORK FORCE
- **STAND ALONE SERVICES IF**
  - SOLD COMPETITIVELY IN SUBSTANTIAL QUANTITIES IN COMMERCIAL MARKETPLACE
  - BASED ON ESTABLISHED CATALOG OR MARKET PRICES FOR SPECIFIC TASK PERFORMED



# RULES FOR "TAILORING" PROVISIONS - FAR 52.212-4 CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS

- **CONGRESS REQUIRED GOVERNMENT TO PROMULGATE -**
  - STANDARD PROVISIONS FOR COMMERCIAL ITEMS CONTRACTS
  - PROVISIONS NOT INCONSISTENT WITH CUSTOMARY COMMERCIAL PRACTICE
- **RESULT**
  - FAR 52.212-4 CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS
- **"TAILORING" -**
  - PROVISIONS MAY BE "TAILORED" TO THE EXTENT NOT INCONSISTENT WITH CUSTOMARY COMMERCIAL PRACTICE



## FAR 52.212-4 CLAUSE - "CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS"

(a) Inspection/Acceptance/Rejection

(b) Assignment

(c) Changes

(d) Disputes

(e) Definitions

(f) Excusable Delays

(g) Invoice

(h) Patent Indemnity

(i) Payment

(j) Risk of Loss

(k) Taxes

(l) Termination for Convenience

(m) Termination for Cause

(n) Title

(o) Warranty

(p) Limitation of Liability

(q) Other Compliance

(r) Compliance With Unique Laws

(s) Order of Precedence



# Inspection, Acceptance, Rejection

## ● Standard Government Contracts

### ● Clause –

- FAR 52.246-2 Inspection of Supplies – Fixed Price
- **Acceptance based on government inspection**
  - In process inspections
  - Inspection upon delivery
- **Acceptance final** except for:
  - Fraud; and
  - gross mistakes amounting to fraud

## ● FAR Part 12 Commercial Items Contracts

### ● Clause

- FAR 52.212-4 Contract Terms and Conditions – Commercial Items, paragraph (a)
- **Acceptance based upon sellers assurance items meet contract requirements**
  - primary reliance upon seller's quality control system FAR 12.208
- **Government can revoke acceptance**
  - within a reasonable time



# CHANGES

- **Standard Government Contracts**

- **Clause: FAR 52.243-1 Changes – Fixed Price**
- CO may *unilaterally* order changes
  - Contractor entitled to an equitable adjustment
- Clause requires Changes be within scope of contract

- **FAR Part 12 Commercial Items Contracts**

- **Clause**
  - FAR 52.212-4, Contract Terms and Conditions – Commercial Items, paragraph (c)
- Changes only by **bilateral agreement**
  - Cost determined by agreement
- CICA limits changes to scope of contract

# Termination for Default ("T/D") Standard Government Contracts FAR 52.249-8, Default(Fixed-Priced Supply and Service) Clause

## ● **Grounds**

- Failure to timely perform
- Failure to meet specifications
- Failure to make progress so as to endanger performance
- Failure to perform other contract provisions

## ● **Defenses**

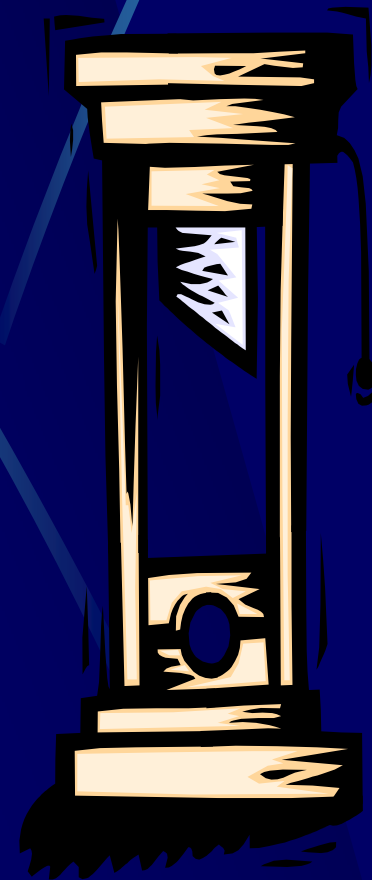
- Beyond control and without fault or negligence
  - Excusable delay, defective specifications and impossibility
- Waiver of due date
- CO abuse of discretion

## ● **Remedies**

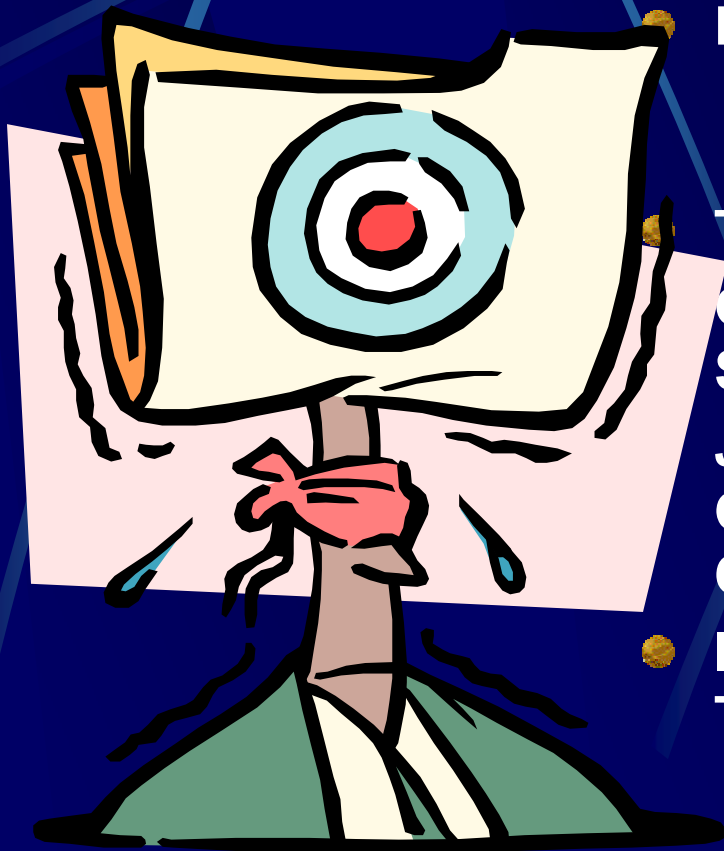
- Primary remedy excess costs of reprocurement

## ● **Judicial Review Under Disputes Clause**

## ● **Improper T/D a Termination for Convenience**



Termination for Default  
FAR Part 12 Contracts for Commercial Items  
FAR 52.212, Contract Terms and Conditions – Commercial Items  
para. (m), Termination for Cause and (f) Excusable Delays



**Different Terminology**

- ***Termination for Cause*** instead of *Termination for Default*

**Two Clauses Instead of One**

**Grounds, Defenses and Remedies Similar**

**Judicial Review of Contracting Officer Determination Under Disputes Clause**

- **Improper Termination for Default a Termination for Convenience**

# DISPUTES

- **Both Standard and FAR Part 12 Contracts for Commercial Items Subject to Contract Disputes Act of 1978 (“CDA”)**



- **Clauses**

- **Standard Government Contracts - FAR 52.233-1 Disputes**
- **FAR Part 12 Contracts - FAR 52.212-4, paragraph (d)**
  - Incorporates standard government contracts clause by reference

- **Procedure**

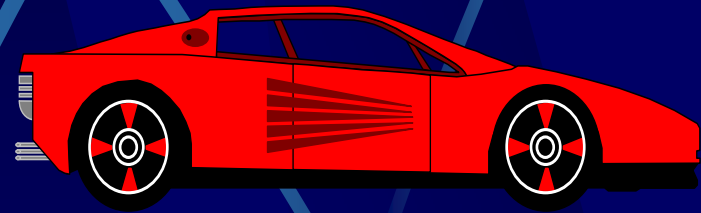
- CO Issues Final Decision
- Contractor May Appeal to Court of Federal Claims or Board of Contract Appeals
- Contractor Generally Required to Continue Work

- **ADR May Be an Option**



# *TERMINATION FOR CONVENIENCE -BACKGROUND*

- What is a Termination for Convenience (“T/C”)
- Purpose
  - Need for flexibility
- Effect
  - No anticipatory profits
  - Comparison to commercial contracts
- Contractor need to know



# Termination for Convenience Formula for Recovery

## ● Standard Government Contracts

### ● Clause

- FAR 52.249-2 Termination for Convenience of the Government (Fixed-Price) clause

- **Recovery** = Allowable incurred costs + allowable continuing costs + profit + settlement expense

## ● FAR Part 12 Commercial Items Contracts

### ● Clause

- FAR 52.212-4, Contract Terms and Conditions – Commercial Items - paragraph (I)

- **Recovery** = % of price reflecting % completion + charges resulting from T/C

- CAS and Cost Principles Not Required

- No Government Audit Rights



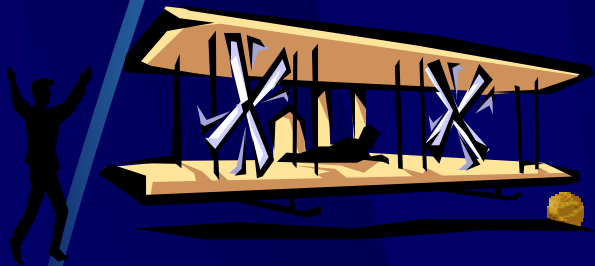
# PATENT INFRINGEMENT CLAUSES – TYPES

## ● **AUTHORIZATION AND CONSENT**

- AUTHORIZES CONTRACTOR TO INFRINGE PATENT IN PERFORMANCE OF GOVERNMENT CONTRACT
- PATENT HOLDERS ONLY REMEDY – SUIT AGAINST U.S. IN U.S. CLAIMS COURT

## ● **PATENT INDEMNITY**

- REQUIRES INFRINGING CONTRACTOR TO REIMBURSE U.S. THE COST OF PATENT INFRINGEMENT





# PATENT INFRINGEMENT CLAUSES – USAGE

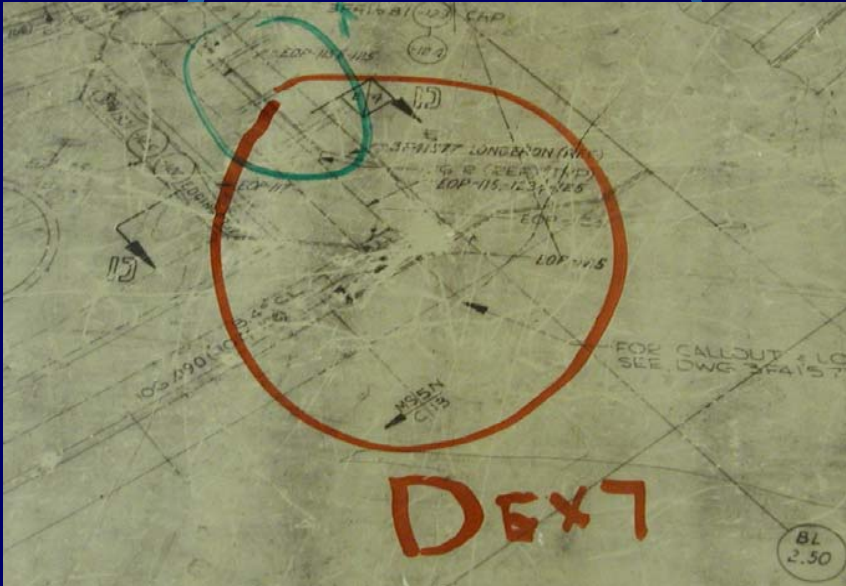
## ● Standard Government Contracts

- **Authorization and Consent Clause**
  - Generally Required [FAR 27.201-1 and -2]
- **Patent Indemnity**
  - **Sealed Bid Contracts**
    - Required for commercial supplies/services [FAR 27.203-2]
  - **Negotiated Contracts**
    - Not Required for goods or services [FAR 27.203-3]

## ● FAR Part 12 Commercial Items Contracts

- **Authorization and Consent clause**
  - Not included in Contract Terms and Conditions – Commercial Items
  - Is it permissible?
    - permissible only if not inconsistent with customary commercial practice
- **Patent Indemnity**
  - Contract Terms and Conditions – Commercial Items, paragraph (h)

# WARRANTY STANDARD GOVERNMENT CONTRACTS



- **Standard Government Contracts**

- **Implied warranty of Government designated specifications**

- If contractor complies with specifications the Government is responsible for any deficiencies

- **Warranty Clauses**

- Not mandatory
- If included provide government with post-acceptance rights
  - Overcomes finality of acceptance under inspection clause

# WARRANTY FAR PART 12 COMMERCIAL ITEMS CONTRACTS

- **FAR 52.212-4 Contract Terms and Conditions - Commercial Items**
  - “(o) *Warranty*. The contractor warrants . . . that the items delivered . . . are merchantable and fit for use for the particular purpose described in this contract.”
  - Provides Government with additional post acceptance rights
    - Government may revoke acceptance in FAR Part 12 Contracts



## PART 2 – SOME PRACTICAL ADVICE – UNDERLYING LEGAL PRINCIPLES



- **JUDICIAL INSERTION OF REQUIRED CLAUSES –**
  - IT'S THERE EVEN IF IT'S NOT – THE *CHRISTIAN* DOCTRINE
- **AUTHORITY OF GOVERNMENT AGENTS**
  - ACTUAL AUTHORITY ONLY
  - NO APPARENT AUTHORITY
- **IDIQ CONTRACTS**
  - FAILURE TO ORDER GUARANTEED MINIMUM A BREACH

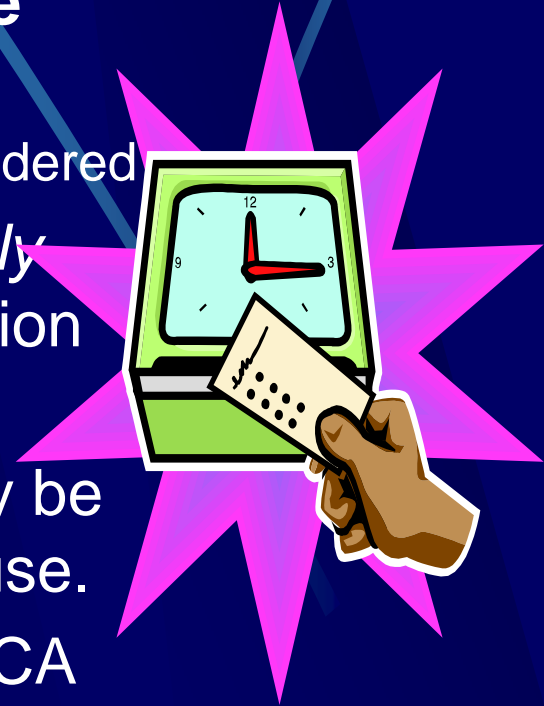
## *JUDICIAL INSERTION OF REQUIRED CLAUSES - IT'S THERE EVEN IF IT'S NOT - THE CHRISTIAN DOCTRINE*

- *G.L. Christian Associates v. U.S*, 160 Ct. Cl. 1, 312 F.2d 418 (1963)
  - Its there even if its not
  - *Christian* Doctrine has been used to:
    - Include termination for convenience clause
    - substitute standard clause for short form services clause



## HOW TO BENEFIT FROM THE *CHRISTIAN* DOCTRINE SERVICE CONTRACTS BE SURE YOU HAVE THE RIGHT CLAUSE

- **FAR 52.249-4 Short Form Service Contracts T/C clause**
  - limits recovery to price of services rendered
- used limited to when CO *reasonably* determines no substantial preparation costs
- If short form improperly used it may be judicially replaced by standard clause.  
*DWS, Inc.*, ASBCA 29742, 90-2 BCA para. 22,696





# AUTHORITY OF GOVERNMENT AGENTS



- **Private Contracts**

- Apparent Authority Binding

- **Government Contracts**

- Contractors Bound by Apparent Authority
- Actual Authority Required to Bind Government
  - Contracting Officer's Warrant
  - Ratification

- **Key Point**

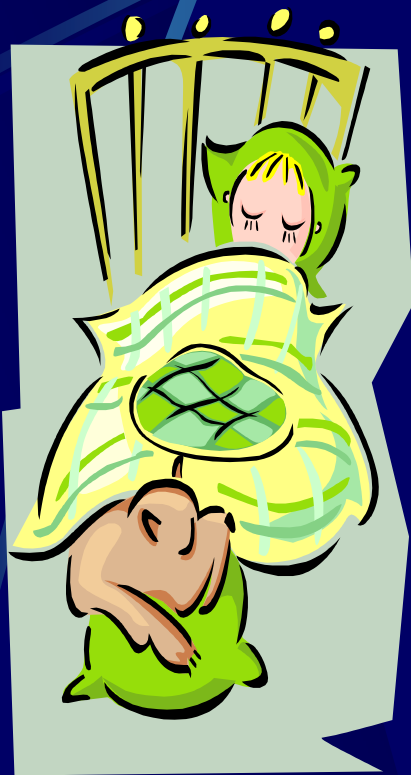
- Know Who You Are Dealing With





# TRICKS OF THE TRADE – MAXIMIZING CONTRACTOR RECOVERY – IDIQ CONTRACTS

## “LET SLEEPING DOGS LIE”



- Government required to purchase guaranteed minimum
- Failure to order a breach
  - entitles contractor to anticipatory profits or in some cases the price of the items not purchased.
- Contractor’s recovery limited by T/C clause if T/C during contract period.
- Therefore, “let sleeping dogs lie”



# THANK YOU

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