CHAPTER 1

GOVERNMENT CONTRACTS: A REGULATED BUSINESS RELATIONSHIP

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I. Contracting Officers Are Responsible for Business Decisions

A. Role of the Contracting Officers

1. The Authority to Negotiate and Make Decisions about Government Contracts Lies with the Contracting Officer

It is a fundamental principle of government contracting that the government can only be bound by a contract or contract modification if it is approved by a contracting officer (CO) who has actual authority to bind the government.1

COs, therefore, play a central role in government contracting because they are charged with negotiating with contractors and making decisions obligating the taxpayer funds.2

The Federal Acquisition Regulation (FAR) confers on COs broad authority over government contracts. “Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them.”3 In exercising this power, COs are charged with “ensur[ing] that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.”4

In exercising these responsibilities, the FAR confers on COs considerable latitude to exercise judgment to act in the interest of the United States at every stage of the procurement process:

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2 See FAR 1.601(a) (“Contracts may be entered into and signed on behalf of the Government only by contracting officers”) (emphasis added).
3 FAR 1.602-1.
4 Id; see also FAR 1.602–2 (listing some of the responsibilities of COs).
Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment.\(^5\)

Thus at the outset, the CO determines how to structure a procurement based on the needs of the Agency. During the competition phase of a procurement, the CO is responsible for the evaluation of bids and proposals. Over the course of performance, the CO administers the contract by evaluating the contractor’s performance, determining whether the contractor is complying with applicable contractual and legal requirements, and authorizing payment to the contractor. If necessary, the CO has the power to change, amend, and adjust the contract (formally and informally if warranted by changing requirements, circumstances, budgets or other agency needs), and withhold or make partial payment (if performance issues exist). At the conclusion of the contract, the CO is responsible for ending the relationship with the contractor—when performance is complete (if all goes well) or by terminating the contract for cause (i.e., non-performance) or convenience (if due to changing circumstances, the agency no longer needs the product or service being procured). Upon completion or termination, the CO has the authority to commence a new procurement.

To be sure, COs have a duty to ensure that “all the requirements of law . . . have been met” and do not have the power to disregard the law.\(^6\) Likewise, COs do not have the power to waive statutory or regulatory requirements, absent some statutory grant to exercise such discretion. For instance, although an agency “may waive” the application of the FAR’s organizational conflict of interest (OCI) rules or procedures if it determines that their application “would not be in the Government’s interest,” such a waiver cannot be made unilaterally by a CO. FAR 9.503.\(^7\) Nonetheless, within the gray areas of the law, contracting officers have considerable discretion to determine whether to accept the contractor’s performance and to determine whether a contractor is complying with applicable contractual and legal requirements. Thus, although a CO cannot disregard legal requirements, the CO has considerable discretion in determining whether the contractor complied with them in the first place.

The CO’s authority and discretion to make business and legal judgments on behalf of the government has practical consequences for FCA litigation, especially in light of the Escobar decision. Although the DOJ has exclusive authority to litigate and settle claims on behalf of government agencies,\(^8\) its freedom of action to adopt a particular argument in litigation is defined and constrained by the actions taken by COs.

\(^{5}\) FAR 1.602–2 (emphasis added).
\(^{6}\) FAR 1.602–1; see also Fluor Enterprises, Inc. v. United States, 64 Fed. Cl. 461, 492 (2005) (“Failure to follow the applicable rules negates the agent’s authority to enter into a contract binding on the government”) (quotations omitted).
\(^{8}\) See 28 U.S.C. § 516.
2. Contracting Officers May Delegate Many Procurement and Contract Management Responsibilities

The government has created an enormous framework of large agencies with substantial responsibilities to assist with the regulation, management, administration and oversight of federal contracts. Within government contracting offices, much of the day-to-day management of contract performance is handled by program personnel, such as the contracting officer’s representative. In fact, one of the CO’s formal responsibilities is to designate and authorize, in writing and in accordance with agency procedures, a contracting officer’s representative (COR) on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties. 9

Additionally, pursuant to FAR Subpart 42.2, the CO has the authority to delegate certain contract administration responsibilities to designated administrative contracting officers (ACOs), also referred to as contract administration officers, or CAOs), who are, in effect, subordinate COs.

As provided in agency procedures, contracting officers may delegate contract administration or specialized support services, either through interagency agreements or by direct request to the cognizant CAO listed in the Federal Directory of Contract Administration Services Components.10

Only the procuring CO is authorized to negotiate and award a contract, authorize changes, and grant or deny requests for equitable adjustments. Nonetheless, COs have the option to delegate numerous (81, to be precise!) administrative tasks to ACOs.11 In fact, in most agencies, COs are actually required to delegate the following four specialized administrative responsibilities to ACOs: negotiating forward pricing rate agreements, establishing indirect cost rates and billing rates, evaluating the adequacy of the contractor’s disclosure statements and compliance with cost accounting standards, and determining the adequacy of the contractor's accounting system. Id.

ACOs are not located at the procurement office, but operate out of a separate contract administration office. In the case of Department of Defense (DOD) contracts, ACOs operate out of the Defense Contract Administration Agency (DCMA) and are assisted by the Defense Contract Audit Agency (DCAA).

a. Role of DCMA—Contract Management

As explained above, the administration of DOD contracts is centralized within DCMA, which was established in March 2000 as an independent defense agency under the direction of the Under Secretary of Defense for Acquisition, Technology & Logistics. The creation of DCMA was the product a decades-long effort to streamline the management of defense contracts and to control costs. DCMA is organized into eight directorates and commands, including the

9 FAR 1.602–2(d).
10 FAR 42.202(a).
11 See FAR 42.302.