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# 10 Commandments of Government Contracting

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## Foreword

I have been involved in Government contracting for more than 40 years, first as a contract negotiator for the Government and, since 1975, as a lawyer in private practice. During that time I have learned many valuable lessons about this peculiar business and the men and women on both sides of the table. The 10 Commandments of Government Contracting is a sister publication of the 10 Myths of Government Contracting, both of which are also available online ([www.thompsoncoburn.com/commandments](http://www.thompsoncoburn.com/commandments) and [www.thompsoncoburn.com/myths](http://www.thompsoncoburn.com/myths)).

## Acknowledgments

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## About the Author

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# I. Thou shalt do thy homework.

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**B**ecause of the complexity of the Government's procurements, the dollar amounts involved, and the chaos that unfortunately governs a contractor's life, smart executives develop habits and rules by which they survive. One of those rules echoes the Boy Scout motto: Be prepared. In other words, do your homework.

Regardless of where you are in the procurement cycle, you must prepare in advance for what is about to happen. In the solicitation stage, your team must familiarize itself with the potential customer: Understand its culture, its modus operandi, and its peculiarities. For example, one might assume that all Navy offices conduct business in the same way; however, the Naval Air Systems Command and the Naval Sea Systems Command operate very differently. If you don't keep that in mind, you could find yourself on the outside looking in because of your failure to adapt to the customer.

With respect to the solicitation itself, if the issuance of the solicitation is the first time you have heard about the procurement, you are already behind your competitors. Agencies are making frequent use of draft solicitations or Requests for Information, and by missing out on those you might have already missed an opportunity to enhance your chances of winning the contract. Once the actual solicitation is issued, you and your team must review it carefully and thoroughly to ensure that you understand it. If you have questions, they must be submitted by the prescribed deadline for questions, and certainly no later than the proposal submission date. Finally, all Government solicitations and contracts are fraught with deadlines, and

someone on your team must be riding herd to avoid missing a deadline; it only takes one miss to knock you out.

## EDUCATE YOUR TEAM

Once you have been awarded a contract, the very first step is to educate the team that is responsible for contract performance. Many companies have a practice of using one team to chase the business and an entirely different group of people to perform the contract. If you don't educate that team on precisely what is in store for them, you will be looking down the barrel of a contract claim.



If you are a newcomer to Government contracting, your team needs to be schooled in the very basics of the business — contract type and its importance; the scope of work; the existence and roles

of the contracting officer versus the contracting officer's technical representative; other key customer personnel, schedules, and reporting; and possible trouble spots. You will also have to educate the team on that peculiar Government contract clause entitled "Changes," how that could come into play during contract performance, and how changes are recognized. Finally, your team must completely understand the vital role that documentation will play during contract performance — more on that in the Fifth Commandment. Experienced Government contractors don't need to start with some of the very basic concepts

listed above (such as “What is a Contracting Officer?”), but they should nonetheless make sure their team is aware of what lies ahead.

## **PREPARING FOR A NEGOTIATION**

Over the course of a contract, situations can arise that will lead to negotiations between the parties. For a contractor, these can be unsettling. Most people are uncomfortable taking a position that is adverse to the customer’s position, but this is a fact of life in Government contracting. In fact, this type of negotiation, when conducted properly, is an opportunity to enhance — not harm — your relationship with your customer. In this setting, begin preparing by ensuring you have all the facts. Everything starts with the facts, and it is risky to move past this point without nailing them down. In addition to gathering all of the relevant documents and interviewing the correct people, the fact-gathering process should incorporate two key questions. First, what does the contract say? Second, what do the applicable regulations say? This is not always an easy process, particularly if people are working in different locations, but once it is completed your strategy should begin to take shape.

In preparing for the negotiation, your main challenge will not be that the Government representatives know more about the regulations than you do. In fact, that is not always the case — and it really doesn’t matter. Your challenge is to make sure that you know the relevant regulations and the case law. You may need to include your lawyers in this process. If you prepare in this way, you will be ready regardless of the knowledge level of your opponent.

If you find cases or articles that support your position, always bring them to the negotiation and provide copies to your customer. Remember that your goal is to persuade your customer that your position is valid. She will then need to seek approval from management; help her make her case.

Finally, it is naïve to think that your customer will agree to everything you request; therefore, never begin a negotiation without having a backup plan or plans. The ability to move to Plan B could prove invaluable. Without it, you have no flexibility, which, as any experienced dealmaker can tell you, is critical for a truly successful negotiation.

Going about your business in this way takes time and effort, but the dividends will be significant. You simply cannot afford to go into every stage of the contracting process “playing things by ear.” Your opponents and your competitors are likely not taking that approach. And if they are, your well-prepared team will have a major advantage. There is simply no substitute for doing your homework.



## II. Thou shalt study thy adversary.

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**T**he movie “Patton” contains many memorable scenes, but one that will always stay etched in my memory is where the great German field marshal Erwin Rommel, the Desert Fox, begins his retreat after being beaten by Patton at El Alamein. As the German tanks turn and flee, Patton, played by the inimitable actor George C. Scott, screams, “Rommel, you magnificent bastard, I read your book!” Very few of the things we do in the Government contracting world will involve the kinds of stakes that were associated with this famous World War II battle, but Patton’s rant is evidence that knowledge of your adversary is a very valuable weapon.

A contract negotiation is not a battle between enemies fighting to the death. Instead, it is an opportunity for two entities with competing interests to negotiate an agreement that makes sense for both sides. While it is true that the two sides have different interests and positions, the point of most negotiations is to reach a deal that the parties can live with, one that will require the cooperation of both parties from beginning to end if it is to be fruitful. Smart executives know that this contract, this negotiation, could lead to other contracts and other negotiations. So while it is perfectly acceptable to be firm and to stake out various positions, experienced negotiators know they should avoid a take-it-or-leave-it position even if that is the position from which they are dealing. They also know that the more they know about their opponent, the better they can prepare.

When I use the term “negotiation” in this article, it could include everything from the negotiation of a sole-source, multi-million dollar

contract to a meeting with a contracting officer to discuss a waiver or a change order. Regardless of the situation, your goal is to persuade your customer that something needs to be done, that the way things currently stand will not be satisfactory, or that something needs to change. Customers are not always receptive to such arguments, so your preparation process, which we discussed in the First Commandment, must include finding out about the person or persons you need to persuade. In street terms, this is known as “getting the book” on someone.



How can we do this? First, if we do not already know the answers to these questions, we need to find out where this person fits within her organization. What is her job title? To whom does she report? Who will she have to persuade if she reaches

an agreement with you? Before the Internet took over our lives, we would obtain this information by looking at an agency’s organizational chart, which would provide a bird’s eye view of the agency and was a wonderful starting point. We would then contact people within our own organization to find out if they knew the person and, if they did, what the person was like. If we knew someone outside our organization who might have dealt with them, we would contact them as well, pursuing the same line of questions.

This process takes time and effort, but it is well worth it. Many years ago one of our clients was having a miserable experience with a civilian agency. We tried to resolve the problem at as low a level as possible (more on this in the Third Commandment), but we got nowhere. We worked our way up the ladder, all to no avail, and finally decided we needed to meet with the Director of Contracts, a very experienced executive who had just joined the agency after many years at the Pentagon in senior contracting positions. I had never met this gentleman, but I had contacts who had worked with him for years. I spoke to several of them, and their views were unanimous: He was very smart and very tough, but he prided himself on having a reputation for fairness. In preparing for our 30-minute meeting, we focused on fairness, and we made sure to mention that special word frequently during our time with him. A few days after that meeting we had a favorable resolution. There has never been any doubt in my mind about the importance of this crucial step in preparing for that meeting.

This experience is a reminder of how valuable a tool a telephone can be. Of course with the advent of the Internet and the capabilities provided by e-mail and social media, these can be valuable resources as well. I have been stunned by what people will post online. While you will want to tap these resources when getting the book on an upcoming opponent, I would be cautious about using e-mail for this background research. Once an e-mail is sent, you have lost control of it. One of the recipients of an e-mail asking for information about your upcoming opponent might, perfectly innocently, forward it to a friend or a colleague who might forward it to your opponent without giving it a second thought. Now you have a problem. While it is impossible to prevent all such leaks from occurring, using a phone rather than e-mail will reduce the possibility of it happening at all.

The information you need is out there. You need to figure out the best way to get it, and then you need to figure out how to use it. It is always possible that someone will act out of character or do something surprising, but this important step in the preparation process will generally prove to be very valuable.



## III. Thou shalt start as low as possible.

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If all we knew about Washington was based on the dramas we watch on television or the stories reported in the media, it would be easy to conclude that everything that gets accomplished is based on who people know. Make no mistake about it, knowing the right people can be a very helpful thing over the course of a career in Government contracts, and that is one place where experience trumps raw intelligence. However, experienced executives also know that they simply cannot keep going to their same contacts (senators, congressmen, political appointees) every time a problem arises—at some point they will have used up all their credit.

If you are in this business for the long run, you should never lose sight of the fact that most Government actions originate with and are controlled by low-to-mid-level Government employees who are there for the duration and who remain in place even as political appointees, and their administrations, come and go. Their names rarely appear in the media; the work they do is usually in the background. They might not even meet with contractors in person on a regular basis—and yet their power is undeniable. It is easy to fall into the trap of calling these people “bureaucrats,” but that word is a cynical stereotype that can lead to problems on its own.

Smart executives know that, as a general rule, the best way to approach a problem with the Federal Government is to start at the lowest rung possible and work your way up the ladder rung by rung only when absolutely necessary. Can you start at the top? Sure, but there are reasons you might not want to do that: First, and perhaps most important, one

of the biggest mistakes you can make is to go over someone's head, or around him, without giving him a good-faith opportunity to address the problem. This could lead to embarrassment for the employee, or worse, and he will not soon forget the source of the problem, even as he rises through the ranks.



Second, if you happen to know someone who is in a powerful position, give some careful thought as to whether you really want to ask her to intercede on your behalf. Her staff members are not stupid—they will know when their boss is being asked to do something because of a relationship and not based on the merits,

and that can lead to loss of morale, gossip and perhaps whistleblowing. If you were really a friend of this official, why would you ever put her in this position? Phrased another way, the fact that you have a close personal relationship with someone might mean that they are radioactive to you. There are too many ways this kind of thing can go wrong, and your competitors are not going to be objective in their analysis of what actually happened. Instead, start at the bottom and work your way up if necessary. If the matter has to go to your friend or relative, she should probably recuse herself from dealing with it.

Third, don't count on your congressional representatives to carry your water for you. Many people naively believe that a letter or inquiry from

their representative or senator will strike fear into the heart of the agency, thus achieving their goals without spending a penny on a lawyer. There is no doubt that having the right politician in your corner can be a big help, but if that is the only thing you have going for you, you have a problem. Members of Congress are certainly going to do what they can, within proper boundaries, to help a constituent, particularly if their efforts can lead to more jobs in their state or district. If you have supported an elected official financially, again within the legal limits, you will normally be treated politely and efficiently. But Federal agencies are well-versed in the ways of Washington, and they have professional personnel who deal with Congressional staffers daily. They know how to handle Congressional inquiries, and they aren't going to panic just because your letter to their agency head shows courtesy copies have been sent to the President, the Vice President and all the elected officials from your state. When they do receive a Congressional inquiry, they initiate a process that enables the agency head to respond to the elected official in a timely and informed way. This process involves going to the very people you are accusing of skullduggery and asking them to prepare a response to your letter. This means that these agency personnel now have to stop the work they are doing and turn their attention and energy to your complaints—another thing they will not soon forget.

Although there are situations when political intervention can be effective, on most occasions it is going to end in a note from your representative or senator enclosing the agency's response and thanking you for your inquiry. The only thing that will have changed is that you will now have alienated several key agency personnel. This is where the raw power of a Government employee can come into play: Because of the broad discretion accorded to Government officials, they have the ability to make countless decisions without telling anyone about them—not exercising an option or ignoring a request for an equitable adjustment, a waiver request, or a personnel change under your contract, to name a few. In other words, they have the ability to turn off your faucet without telling you, and it could be quite a while before you realize you have been damaged.

While there are exceptions to every rule, this commandment involves your obligation to work with your Government customers in good faith, avoiding anything that would cause them to lose face. Dealing in a straightforward and transparent manner with your Government contacts and developing solid business relationships with them are vital to your success. Going over their heads or around them without giving them a fair opportunity to address the problem will create risks that could harm both you and your company.



## IV. Thou shalt stay informed

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**H**enry Ford once said, “Anyone who stops learning is old, whether he’s twenty or eighty.” Those words, spoken in the early 20th century, ring true today, and they certainly apply to people involved in Government contracting, regardless of your position. Why? Because every contract or subcontract in which you are involved is just one part of a much bigger picture. The more you know about the big picture, the better you will be able to protect your organization.

Our business is governed by some daunting regulations, so knowledge and understanding of them is vital; but the very last thing I would tell someone is that they need to sit down and read the Federal Acquisition Regulation from cover to cover in order to understand our business. The Eighth Amendment, which prohibits cruel and unusual punishment, should prevent this from ever happening to you. For purposes of this discussion, I will assume that you are beyond the introductory stage of working with the regulations and would like to continue your upward path.

There are a number of periodicals that cover the world of Government contracts on a daily basis, and you should be reading at least one of them regularly. If you have a limited budget, I recommend you start with Bloomberg BNA’s Federal Contracts Report. It is issued online Monday through Friday, and it contains a summary of breaking news from Congress, the Executive Branch and the courts, boards and the Government Accountability Office. It frequently contains white papers on a single current topic. As with any other publication, it is one thing

to subscribe to it; it is quite another thing to actually read it. You have to discipline yourself to spend at least 30 minutes a week reading these periodicals; this investment of time will pay off in the long run because very few of the people you encounter will be doing the same thing. If you subscribe to too many of these publications, you will be setting yourself up for failure—pick one or two and stick with them. For purposes of daily reading in addition to Bloomberg’s FCR, I recommend Law 360 Government Contracts or PubKLaw.

These subscriptions cost money, and it is tempting to opt for the freebies. In my experience, the quality of the free information is spotty and often



unreliable. You are far better off using a reliable source with an established reputation. The money you will spend on a subscription will pale when compared to the costs of a protest or claim litigation that could have been avoided if you had been

reading the right publications. I would much prefer learning about a disastrous protest argument by reading about it rather than finding it out on my own dime (and time).

In addition to the daily updates, there are a variety of publications that are published on a less-frequent basis and are valuable for obtaining a much broader view of a particular issue. The dean of these publications is “Briefing Papers,” a monthly publication that deals in depth with a single

topic in each issue. The Briefing Papers series dates back to 1963 and has covered nearly every possible topic in the field—some more than once. In terms of one-stop shopping, it cannot be surpassed.

In 1987, professors Ralph Nash and John Cibinic of the George Washington University Law School began to publish the Nash & Cibinic Report, a monthly publication that is now published by Westlaw. Professor Cibinic passed away in 2005, but Professor Nash is joined by two regular contributors, Vernon Edwards and Karen Manos, both experts on Government contract matters, as well as other experienced guest authors. It is the most authoritative and analytical publication in the field today and covers current issues, generally using recent court, board and GAO decisions to spark a lengthy discussion of the issues, how they have developed over time and where things are headed. Professors Nash and Cibinic were and are prolific writers, and any article or book written by either of them will be a valuable addition to your bookshelf.

While there are a host of other publications available, you cannot go wrong with the ones I have mentioned; but you are mistaken if you think these are the only things you have to read. In addition to reading these specialized publications, you have an obligation to stay abreast of current events. Yes, that means reading a decent newspaper every day and at least one of the daily business newspapers, such as The Wall Street Journal or The Financial Times. These publications will complete the “big picture” mentioned earlier. International, national and local events can have an impact on projects your organization is working on or pursuing. For example, the current Mideast conflict might have an impact on your company’s ability to complete a Corps of Engineers construction project in Israel, or the recent report of major computer hacking could seriously threaten several projects you are performing. In recent years we have also seen Government shutdowns and sequestration. Developments like these can have a significant impact on your cost structure, to name but one effect on your business, and you have to stay on top of them. In many cases, despite your efforts to stay current on things, you will find your company or agency reacting to what has happened; but in others, you will have the ability to revise your strategies and approaches based on what

you have read and what you believe it portends for the future—that is when your reading really pays off.

Finally, you can learn something valuable from almost anything you read, oftentimes from the most unlikely publications. For example, you might learn something about negotiation strategy and tactics from the way a star quarterback negotiates with his professional football team or the way a company resolves its labor disputes with a union. Share that lesson with your team. Or you might learn something about leadership from a good biography; for example, Robert Caro's Pulitzer-winning series of books on LBJ does a wonderful job of describing the complex web of government and its relationships with the private sector, including Government contractors, as does David McCullough in his biography of Harry Truman. Arthur Miller's 1947 play, "All My Sons," later made into an award-winning movie, portrays the true story of a businessman in Ohio who colludes with Army inspectors to defraud the Government by shipping defective airplane engine parts, a decision that leads to tragedies on several levels. These books and the play might be about people who have been gone more than 50 years, but they still provide valuable insight into the nature of our business and will teach you lessons you will never forget.

Yes, ramping up your reading takes time, and spare time is something few people have. In our case, reading the right materials has to be a priority, and there is no time like the present to start making it part of your schedule.



## V. Thou shalt document thy actions.

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**W**hen Congress was contemplating the passage of the Federal Acquisition Streamlining Act of 1994 (“FASA”), and its companion statute, the Federal Acquisition Reform Act of 1995 (“FARA”), many pundits predicted that their enactment would make the world of Government contracts more like the commercial sector. Twenty years later, we know that is not the case; what really happened is that the two statutes made the world of Government contracting less unattractive to commercial vendors, and many firms began vying for Government contracts for the first time.

Experience has shown that one of the worst mistakes a commercial company can make in performing a Government contract is to treat its customer exactly how it treats its commercial customers—that can lead to trouble. Uncle Sam is a very different breed of customer. The Government is a sovereign entity, and a contractor has to tailor its approach to this demanding and peculiar customer if it hopes to survive.

While there are many significant differences between Government contracting and commercial contracting, one of the most important rules of Government contracting is that you must document your actions. As one grizzled Government contracts veteran once told me, “If it’s not in writing, it doesn’t exist.” There are many reasons for this. First, commercial transactions generally are governed by a doctrine called “apparent authority.” In layman’s terms, this means that if one person reasonably concludes that another person has the power to bind his organization contractually, the organization will be bound. That doctrine does not

apply to Government contracts. Instead, the doctrine of "actual authority" applies, and to paraphrase the U.S. Supreme Court, the risk of dealing with an unauthorized Government employee is on the contractor. It is a tough rule, with tough consequences, but, as will be discussed below, it gets worse.

"Dear Charles:

"Confirming our telephone discussion earlier this afternoon,"



As the regulations and the case law have evolved over time, one of the most fundamental principles is that oral advice is generally not binding, even if that advice was provided by an authorized contracting officer. As a result, no experienced contractor wants to

follow a course of action that might deviate from the contract without a written directive to do so from the appropriate contracting officer. This can present a host of practical problems for a contractor, particularly one that is working with a demanding and aggressive contracting officer's technical representative, who generally wants you to move full speed ahead and catch up with the paperwork later. But to do so is to chart a perilous path for a contractor, and the case books are filled with decisions describing contractors that have regretted this decision.

The perils of proceeding on the basis of an unauthorized or undocumented directive are complicated further by the revolving door that comes with any Government contract: Contracting officers and their supporting personnel come and go. If the contractor has not obtained adequate documentation for agreements and understandings reached while a particular person was on the job, his or her successor is not likely to follow them.

Experienced Government contractors also know that our business is a hectic one, with many moving parts, deadlines and requirements, and

it is filled with negotiations, both small and large. In order to succeed amid this chaos, a smart executive develops good business habits with documentation at the top of the list. I have often said, for example, that a contract negotiator's mind is like a bathtub: She fills it with all the facts that she needs for this negotiation, and she uses what she needs. When it is over, she drains the bathtub and moves on to the next problem. But what happens if, a year later, some questions arise about what actually was agreed upon during that negotiation? Without adequate documentation, it sets up a swearing contest, and you are likely to lose if your opponent is the Government. This is because Federal Acquisition Regulation ("FAR") 15.406.3, "Documenting the Negotiation," requires a contracting officer to document the results of a negotiation. Without comparable documentation, the contractor could be on the losing end of such an argument.

In her wonderful novel, *The Poisonwood Bible*, Barbara Kingsolver wrote, "Memory is a complicated thing, a relative to truth, but not its twin." That insightful observation recognizes that memory can be fragile and unreliable, and I can assure you that it does not get better with age. If you are working on something important to your organization, leave a trail. Use notes, photographs, recordings, memoranda—whatever it takes to help you reconstruct things if and when you are faced with a challenge in the future. These materials must be put in the correct file in a timely fashion. This is not merely to protect you and your sacred behind, although it doesn't hurt. Instead it's because you are human and can forget details or, months or years later, it's for your successor or your lawyers or a judge—anyone who is trying to figure out what actually happened in your negotiation. Your carefully documented file may be what saves the day.

Finally, it is important to understand that e-mail can be both a great asset and an awful liability. In terms of documentation, e-mail is a handy thing to use to confirm agreements and understandings reached on the phone or in meetings, and I highly recommend it for that. On the other hand, once you have pushed the "Send" button you have lost control of that e-mail, so when you are writing it remember to limit it to things you would not mind The Washington Post obtaining and printing. This is a damage-control technique. Hopefully you will never have to find this out the hard way.



## VI. Thou shalt avoid political intervention.

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In the Third Commandment, “Thou Shalt Start as Low as Possible,” I discussed the challenges associated with obtaining political intervention to solve a Government contracting problem. This topic deserves treatment on its own because it is fraught with risk. Political intervention will almost certainly give rise to something known as a “congressional” within the Executive Branch agencies. To an agency employee, “congressional” is a four-letter word.

My first experience with a congressional was in the early 1970s, when I was an Army sergeant assigned to an office in Alexandria, Virginia, where, among other things, we prepared daily briefings for the Army’s Assistant Chief of Staff for Intelligence. The Vietnam War was still raging, and some disgruntled enlisted personnel had begun a practice called “fragging,” where they would roll a live grenade into an officer’s tent. Hundreds of officers were killed as a result. One day we received a packet from the Pentagon with a pink sheet on it. I soon learned that this was a “congressional” and that the pink sheet basically meant that anyone finding it in their in-box had to drop everything else and address this first. It was hotter than hot.

In this case, it was a letter from the mother of a young Army officer. She had written to her congressman, her two senators, the Secretary of the Army, the Vice President and the President imploring them to do something to protect her son and his fellow officers from fragging. Back then, each one of those letters worked its way through the system to our

office, and we were tasked with preparing the draft response, an exercise that involved no fewer than five people for each letter. The name of that woman, who had every right to be concerned about her son's welfare, remains indelibly etched into my memory.

Over the years I have encountered a number of situations where our client or someone on our team thought we should seek political intervention. If we had exhausted every other possible means of resolving the problem, I was willing to consider the political angle, but even then I was wary



of it. While your congressmen or senator certainly represents your district or state, they do not view themselves as your company's man or woman in Washington. Unless your company employs a significant number of people, it is difficult to attract meaningful attention from your elected representatives and

their staffers. Jobs are a sacred cow to politicians. If you can convince them that what you are asking for will either bring lots of new jobs to the district or prevent the loss of lots of jobs, you might have a shot at obtaining some meaningful assistance. Yes, there are situations where your story is so poignant or the injustice you are trying to correct is so outrageous that even the little guys can get help, but they are rare. I am not saying you are going to get the brush-off from your elected representative—far from it. A staffer will contact you, listen sympathetically and be very polite. More

often than not, the staffer will prepare a written communication to the agency (every agency has an office of legislative liaison) and at some point several weeks in the future, the staffer will forward you the agency's written response with a cover note saying something like, "For your information," or "with kind regards." More likely than not, the note will be a very polite... brush-off. But remember how that note was generated: It was sent from your congressman's office to the agency's legislative liaison office, and from there it worked its way to the office most directly responsible for the problem. Those folks had to drop everything they were doing in order to prepare the agency's response, and they will not soon forget the names of the people or the company behind the congressional. So now you have not only swung and missed, but you also have alienated some bureaucrats—people who might be involved in future decisions involving your company—in the process.

If you and your lawyers truly believe that political intervention is necessary, hire a professional to guide you through the process. I am well aware that "lobbyist" has negative connotations, but I am also aware of many people who are skilled in Government relations. Labels aside, they know what will work and what will not work. They can give you an independent opinion on whether you have any chance for success and can work with you to develop an action plan. Trying to do this on your own is both naïve and wasteful, and it could actually damage whatever relationship you have with an agency that is your customer or potential customer. This simply is not smart business.



## VII. Thou shalt avoid hostility.

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**F**or someone coming into Government contracting for the first time, one of the most difficult things to understand is the role that protests and disputes play in the Government contracting world. In the commercial sector, the thought of suing a customer or a prospective customer is simply absurd; after all, how can you expect to develop or maintain a good business relationship with someone you are litigating against? Isn't the customer always right?

In Government contracting, one quickly learns about a "contract of adhesion," that is, a contract that does not result from two evenly-matched parties negotiating a deal from scratch, but one that is created as a result of a procurement process in which the customer, a Federal agency, dictates the rules of the road from start to finish. Sometimes this customer makes mistakes, and Congress decided long ago that it needed to enact statutes that provided the contractor, or the disappointed offeror, legal recourse. Those statutes are implemented by Part 33 of the Federal Acquisition Regulation, "Protests, Disputes, and Appeals."

Even though the statutes and regulations contemplate processes for protests, disputes and appeals, a contractor should exercise caution and restraint in pursuing these avenues. As a general rule, I advise clients to try to resolve disagreements with their customers at the lowest possible level and at the earliest possible time, always maintaining a professional demeanor. I also advise them never to go over a Government employee's head until it is abundantly clear that that person will not deal with them

reasonably. Companies should deal with these issues on their own, for as long as they can, because introducing a lawyer into the process can complicate the matter in numerous ways. Perhaps most important in dealing with these situations is the “tone” of all communications. Tone

is something rarely covered in school, but it can have great influence on your ability to resolve a problem with a customer. If that customer thinks you are yelling at her (for example, by typing an email in all caps), threatening her or condescending to her, your chances for success are quickly heading south. Smart contractors avoid inflammatory



language and they never, never, never threaten a contracting officer. Once he or she perceives a threat, there is a danger they will abandon their organizational goals and deal with you personally. While you might prevail several years and thousands of dollars later, they will have had the satisfaction of knowing how much trouble they have caused you.

One wag once said, “Never argue with a man who buys ink by the barrel,” making the point that picking a fight with a newspaper is not a very smart thing to do. The same can be said of picking a fight with Uncle Sam. Even if you win, you may find it is a Pyrrhic victory because

you have alienated so many Government officials in the process. Moreover, if your fight spills into litigation, your adversary is one that does not worry about budgets like you do—it prints money. While the protest or disputes process may ultimately be your only choice, make sure you and your lawyers discuss your chances of success and the likely cost before declaring war. The decision to litigate is yours, not your lawyer's, and you need this information in order to make this important decision.

I have heard people say that suing the government is not like a lawsuit in the commercial sector because the statutes and regulations allow for such actions and the Government is like an elephant—this stuff just rolls off its back and no one takes things personally. In other words, it's all business. That is simply not true. Behind every government action there is a person or, more likely, a team of people, who are going to become involved as witnesses in your litigation. In order to prevail in your protest or claim you may have to show that these people are incompetent, liars or schemers, and you will be exposing them to many difficult hours of deposition and court testimony. This is an experience they are not likely to forget, and, more troubling, they will always associate it with you and your company. Imagine how this experience will affect the other contracts you are performing with this same agency, or the way that this agency will evaluate future proposals you submit. You must take this potential impact into account before you pull the trigger.

Because of the potential damage that litigating a contract dispute might cause to the relationship between you and your customer, you and your lawyer should carefully consider using Alternative Dispute Resolution ("ADR") rather than a full-blown trial format. The boards of contract appeals and the U.S. Court of Federal Claims are happy to accommodate parties that elect ADR, and it has two great advantages over full-blown litigation: First, the parties control the schedule—something that will never happen otherwise. Second, because of the nature of ADR, it offers an opportunity for the parties to resolve their differences without destroying their relationship, something scorched-earth litigation will not achieve.

"Past performance" plays a major role in Government contracting today and should weigh heavily on your mind as you contemplate going to the mat with your Government customer. While agencies are not supposed to retaliate against a contractor by slamming its past performance just because it had the audacity to sue them or file a protest against them, there is no doubt that these adversary relationships can "chill" the past performance reviews this contractor will be receiving in the future. For example, imagine the frustration when a contractor receives an "acceptable" or "met requirements" rating from a customer agency when it believes it should have been rated as "outstanding." Good luck challenging that.

When I broke into this business in the early 1970s, there was nothing contractors enjoyed more than a good fight, for example, throwing an annoying Government auditor out of their offices or telling a demanding contracting officer's technical representative to go jump in the lake. But imagine how either of those sophomoric actions would play out today in a past performance evaluation (and in the world of social media). That is why I tell people that the concept of past performance is the number one behavior modification tool in the Government's toolbox. With that kind of weapon available to the Government, smart contractors teach their employees to behave professionally in all their dealings with the Government, even if they are angry or frustrated. This should be expected behavior in any event, of course, but this disciplined, controlled approach will protect your interests in the long run.



## VIII. Thou shalt maintain thy integrity.

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**O**n reflection, most seasoned veterans of our business would tell you that your integrity, your reputation for honesty, is your most valuable possession in the business world, including Government contracting. Judging from countless media accounts over the years of men and women who have been convicted of a crime relating to a Government contract, it would appear that this message was either not delivered to them or was simply ignored.

Personal integrity should never be confused with the Federal Government's insistence that its contractors have codes of conduct. Integrity starts with you, the person you look at in the mirror every day. Without personal integrity, a code of conduct is meaningless. You would be naïve to believe that your organization's code of conduct is designed to protect you. In fact, it is designed to protect your employer if someone, including you, gets caught doing something improper. The code of conduct allows your employer to argue that the company and all of its good employees should not be punished for the acts of one bad apple.

Due to the advances in technology that have swept through the business world and the world at large, we are all accustomed to handling entire business transactions without actually meeting the people on the other side of the table. That is unfortunate because inter-personal relationships are still a critical part of the dynamic between sellers and buyers and are essential to long-term, mutually-productive business relationships. Those long-term relationships depend almost entirely on the integrity of

the individuals involved; one unethical move can destroy even the most traditional of relationships, and the short-term gain you might achieve rarely outweighs the long-term risks.



Most of us put great stock in our ability to size-up the people with whom we deal, and we often make the mistake of transferring an individual's qualities and behavior to her organization. We believe that the way our adversary acts and deals with us reflects the values and culture of her employer, whether a private company or a Government agency. That being the case, we must be painfully

aware that when we negotiate with others, for example, we are not merely attempting to promote our own image. We represent a company and its stockholders or the Government and the taxpayers, and our performance and behavior will form our organization's image in the eyes of our opponents. In this context, unethical behavior can cause major problems.

The world of Federal contracting is complex and often confusing, and the dollars involved can be staggeringly high. Little wonder that this market would attract some unsavory characters. If you are in the Government contracting business for any decent length of time, you will encounter ethical challenges. Some can be blatant and easy to identify and reject; others can be far more subtle, proposed by people you believe are

trustworthy and honest. These are much more difficult. Perhaps the worst situation is when someone senior to you attempts to involve you in an unethical scheme. This puts you in a very uncomfortable and difficult position.

What can you do when you are confronted with an ethics challenge? If you have the time, your first task is to make sure you understand the situation. If you are convinced there is a problem, contact the person in your organization charged with handling ethical issues. If no such person exists, talk to a trusted colleague or superior and see how he or she views the situation. If you still are not satisfied, ask your lawyer.

If you don't have the luxury of time to take these important steps, ask yourself these questions: First, if I go ahead and do this, how would it look on the front page of *The Washington Post*? Second, what would my parents say if I told them I was going to do this? If the answer to either of these questions suggests there is a problem, you should probably distance yourself from the situation. Finally, trust your instincts. If alarms are going off in your head, even soft ones, avoid doing anything until you have had an opportunity to take the steps outlined above.

Your ability to recognize an ethical problem immediately will increase with your experience. This also serves as a reminder to those of us in leadership positions: Our younger or less-experienced team members are watching us very carefully. We cannot afford to send the wrong signals on ethical issues. If you think someone may have misread or misunderstood you, make sure you clear it up before things go too far.

In a March 28, 2005 *New Yorker* article about Supreme Court Justice Antonin Scalia, Margaret Talbot quoted Justice Scalia's father Eugene as saying, "Brains are like muscles—you can hire them by the hour. The only thing that's not for sale is character." You can't go wrong living by that advice.



## IX. Thou shalt be prepared to reciprocate.

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It would be wonderful if everything in a Government contractor's life were black and white, where both parties could live by the language in the contract and there would be no need to stray from that language. But that does not happen. In fact, a Government contractor's life is filled with dealing with people, on both sides of the fence, who either don't like what the contract says or want to ignore it. One of the most difficult things to learn is when and where to be flexible in terms of performing or administering the contract. Many times the ability to make the right decision boils down to the relationship between the parties.

The two parties to a contract have a peculiar relationship. On the one hand it is adversarial because they represent different interests and have different goals. On the other hand, any experienced contractor or contracting officer will be quick to admit that successful contract performance requires the cooperation of both parties from beginning to end. Without that cooperation, failure will always be a possibility.

Lawyers and judges often preach about the sanctity of contract and how important the language of the contract is, and they are correct. But it is also true that Murphy's Law plays as significant a role in Government contracting as it does in every other walk of life; if that is the case, the parties need to be prepared to deal with the twists and turns they are likely to encounter during contract performance.

Let's look at a typical example: The contractor gets a call from the contracting officer one day in June. The C.O. says that she knows that deliveries are not due until July, but she is wondering if the contractor might be able to ship five units right away—it would make the admiral very happy. Could the contractor argue that this would be an "acceleration" under the contract and demand consideration in exchange for doing it? Of course. But should he? That is a judgment call. Maybe the five units are sitting on the factory floor and sending them early is not a problem at all. As a general rule, contractors should leap at opportunities to do favors for their customers, because you never know when you might need one in return. In a situation like this, if management approves, a smart contractor is probably going to send the five units early without asking for anything in return.



Fast forward one month: The contract says that the delivery date is July 30, and the hardware is ready to go a few days before that. But the instruction manuals that are to accompany the hardware are not in the format the Government personnel had expected. The

contractor assures the C.O. that the corrections can be readily made and asks for another week to get everything done. Faced with this situation, a

C.O. has a number of options, including a default termination for failure to deliver acceptable products on time. But that is where the relationship between the parties can come into play. Without needing to be reminded of the favor the contractor did a month earlier, the C.O. is likely to accept the contractor's proposal without amending the contract.

This is the kind of give and take that goes on all the time between contracting parties, and it reminds me of advice I got from one of my bosses in my early days as a contracting officer: People live up to commitments made to other people better than institutions do. If someone you trust tells you that you have a deal, you have a deal. But you don't get to that point in a relationship until you have built a bond of trust. Regardless of your position, and on which side of the table you sit, you need the other side to cooperate with you, and they need you to do the same. Understanding when and where to ask for and grant favors is one of the unwritten rules of our business. Taking a different approach—demanding strict compliance with the terms of the contract on all matters large and small—is going to cause more problems than it solves.

The importance of a business relationship is not parceled out on a contract-by-contract basis. If you think about it, you will realize that our business relationships are on a continuum; they are comprised of many different contracts, deals and negotiations between the parties over a period of time. In some cases one party has the upper hand; in others, the reverse is true. That should not affect the basic trust the parties have developed over time. I learned this from a total stranger on an airplane more than 35 years ago. We were eating breakfast on a flight south, and we started to talk about what we had to do that day. He was going to Atlanta to meet with the executives of a major airline for the negotiation of a deal that he was under great pressure to close that same day. When he described the situation, I remarked that it didn't sound like he had much leverage because, in effect, the other company was a sole-source and could demand a huge price. He agreed, but he then told me that he had been doing favors for this company in the New York airports for years, and he intended to call in every I.O.U. he had that afternoon. That was a lesson I will never forget.



# X. Thou shalt not stereotype thine opponent.

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One of the most dangerous things that can happen to us in our business career is to make the mistake of stereotyping our adversary. In the world of Government contracting, the two most common stereotypes are (1) all Government employees are stupid and lazy and (2) all contractor employees are thieves and liars who are out to bamboozle the Government. There are several problems with both of those statements, of course, but the most obvious is how absurd these stereotypes become when the two sides sit down at a table to negotiate: half the Government team used to work for industry, where presumably they were thieves, and half of the contractor's team used to work for the Government, where presumably they were stupid and lazy.

My first boss in a Government contracting office taught me how dangerous these stereotypes can be, not by what he told me, but by how he did his job. When everyone else left late in the afternoon, he stayed. If he had a negotiation coming up, he stayed late, sometimes for several nights in a row. (This was years before the virtual office arrived.) In every negotiation that I saw him conduct, he was far and away the most prepared person at the table. This made for some interesting scenes. For companies meeting him for the first time, the looks of shock, and sometimes panic, were a source of great amusement for his colleagues—he did not fit the contractor's stereotype of a Government employee. On the other hand, those contractors who had dealt with him before treated him with great

respect and came prepared for a grilling. Over time I realized that the deals struck in those sessions produced the best examples of successful negotiations because both sides walked away from the table knowing that they had done their very best and were able to come to an agreement despite not getting everything they wanted.

Of course, stereotypes are not limited to the two discussed above. Within an industry, certain companies have reputations, and people are often shocked when a person from that company does not fit that mold at



all. Moreover, stereotypes based on race, age, religion, gender, nationality, sexual preference and geography, as pernicious as they are, often creep into the picture. If you perceive this happening with your team members, you have to cut it off immediately.

I learned a lot as a young agency negotiator, and

perhaps my most vivid memory is of the time that I watched stereotypes work against my colleagues. As a novice, my role in this negotiation was as an observer. During the preparation stage, I listened as my colleagues told me about the Texans that would be coming to town. They would laugh as they would describe their western outfits, mimic their southern drawls and dish out some folksy expressions, all of which painted a picture of a bunch of nice, but harmless, people. The impression I got

from my colleagues was that our team would have no problem getting what it wanted in the upcoming negotiation, and I was eager to see them in action. Finally, the big day came. I was amused to see the Texans, all of whom had dressed the part, deliver as expected. They wore ten-gallon hats and cowboy boots. Their demeanor was one of courtly manners and an almost fawning deference. But more than that, their folksy sayings, uttered in a deep southern drawl, made our team members believe that, as predicted, they were superior in every way to these bumpkins.

Once the negotiation was completed, and our guests had departed, our team remained in the conference room congratulating each other on the great deal they had just struck and taking great delight in mimicking our opponent's team members' mannerisms and expressions. As this went on, I happened to peek out the window of our tenth-floor conference room, and I noticed the Texans walking across the street in front of our building, pulling off their ten-gallon hats and their string ties, and slapping each other on the back. I got the strangest feeling, later confirmed by the way things turned out, that the Texans had gotten exactly what they wanted out of that negotiation. In order to do that, they had to play to the stereotypes they knew existed, and they did it to perfection.

The point is: We're all the same! We are in an industry with a revolving door. Until the other person shows that she is a crook or a dummy, you must trust her. We cannot deal in good faith until we have faith in one another. Stereotypes prevent this from happening, and you must avoid this trap at all costs.

## About the Firm

Thompson Coburn's Government Contracts attorneys have substantial experience in every phase of contractual and disputes processes, whether at the federal, state or local level. In fact, many of our attorneys have served in the federal government, including in the Departments of Justice, Defense and Transportation, as well as in the Central Intelligence Agency. This firsthand insight serves our clients well when they face the complexities of the contracting and compliance processes.

In addition to being counselors, our attorneys are seasoned litigators who have advocated our clients' interests before numerous federal courts, including the U.S. Supreme Court, the U.S. Courts of Appeals, the U.S. District Courts and the U.S. Court of Federal Claims. Moreover, we regularly litigate disputes at the Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA), and pursue and defend bid protests before the Government Accountability Office (GAO).

Thompson Coburn LLP is built on a foundation of sophisticated corporate and litigation practices, each with a long track record of success in the boardroom and the courtroom. Since the firm's founding in 1929, we have represented clients from nearly every industrial and corporate sector, including transportation, technology, communications, manufacturing, and energy. With 380 lawyers and 50 practice areas, we serve clients throughout the United States and abroad.



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