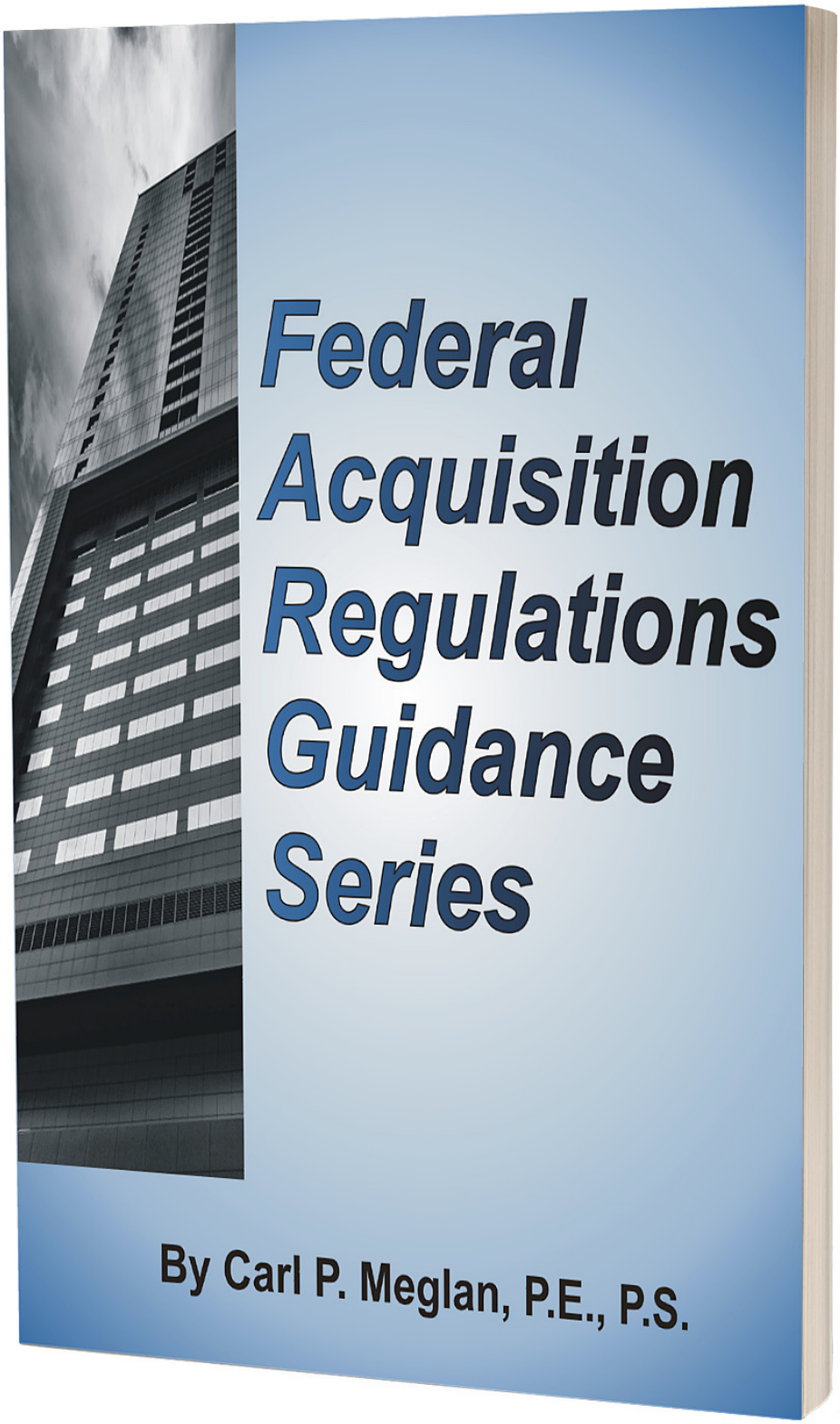

PREFACE

For more than a century, applied science and engineering have created major avenues for advancements in building and roadway construction, materials testing, and project delivery methods. Beyond technological achievement, however, three elements remain basic to the success of any construction project — cost, quality, and schedule. All three elements are mutual, and all three must be carefully executed to produce satisfying results. Still, even the best-planned projects can encounter challenging obstacles or disputes, often threatening the successful completion of a contract or increasing risk due to unresolved issues.

Before his recent passing, Carl P. Meglan, P.E., P.S. (1937-2018), author of the *Federal Acquisition Regulations Guidance Series*, brought more than 40 years of engineering experience to the forefront of dispute and claims resolution. He specialized in the risk management practices that are vital in today's construction marketplace. As a notable benchmark, he provided mediation or arbitration services for the American Arbitration Association on nearly 120 construction claims cases addressing more than $7 billion worth of projects across the United States. Combined with training in construction forensics and organizational leadership, Meglan's professional reach extended to more than 200 projects in both the public and private sectors. His construction expertise encompassed a wide array of engineering projects, including dams, sewers, and water and waste treatment facilities; streets and highways; tunnels, bridges, and airports; educational institutions; hospitals and health care facilities; prisons; warehouses, office complexes, and retail malls; power plants and marine, mining, and industrial facilities; and athletic complexes.

Risk is an inherent element in all successful businesses and industries, particularly construction, but avoiding risk totally may not be all that prudent, according to Meglan. One could lose a substantial share of marketplace potential. He pointed out that what consultants call risk avoidance is actually the practice of not placing one's self in jeopardy or harm's way by exposure to unnecessary liability. This is generally accomplished through carefully structured contract documents and reliable insurance underwriters. Equally important, though, Meglan emphasized, is having a defined risk mitigation plan in place *before* a construction claim or project dispute arises. Hopefully, this *Federal Acquisition Regulations Guidance Series* will assist in that challenge.

DISCLAIMER

Federal Acquisition Regulations serve as guidance documents only and are written for the expressed purpose of helping construction industry executives and supervisors learn better ways of identifying the sources and causes of construction claims and preventing disputes. For exact interpretations on matters of law, always consult with expert legal counsel.

Federal Acquisition Regulations Guidance Series

Part 1: Federal Acquisition Regulations System

(Subpart 1.6: Career Development, Contracting Authority, and Responsibilities)

Part 1: Federal Acquisition Regulations System

(Subpart 1.7: Determinations and Findings)

Part 2: Definitions of Words and Terms

(Subpart 2.1: Definitions and Subpart 2.2: Definitions Clause)

FEDERAL ACQUISITION REGULATIONS

PART 1: FEDERAL ACQUISITION REGULATIONS SYSTEM

Subpart 1.6: Career Development, Contracting Authority, and Responsibilities

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FAR is divided into "Parts" (Parts 1 through 53, plus a forms section, a forms-for-reproduction section, an index, and appendices, all of which follow Part 53 in the order just listed). The complete set of *FAR* would fill approximately two dictionary-size binders. Fortunately, only a small portion of the total *FAR* book or package actually deals with federal fixed-price construction contracts.

This *FAR Facts* addresses only Part 1, Subpart 1.6.

SUBPART 1.6: CAREER DEVELOPMENT, CONTRACTING AUTHORITY, AND RESPONSIBILITIES

1.601 General.

(a) Unless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high-level officials are designated contracting officers solely by virtue of their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under 1.603.

To repeat, the most important part of the above paragraph states, "Contracts may be entered into and signed on behalf of the Government *only* by contracting officers."

1.602 CONTRACTING OFFICERS

1.602-1 Authority.

(a) 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. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

The bottom line of paragraph 1.602-1 simply means that all contracting officers (COs) may enter into, administer, and terminate federal contracts — and *only* COs may do so. However, not all COs are *equal* in authority. There is somewhere in the federal appointing agency's records, "clear instructions in writing regarding the limits of their [contracting officers'] authority."

A contractor performing a federal government fixed-price construction contract can determine the limits of its CO's authority by simply contacting the appointing agency and requesting a copy of the written instructions regarding the limits of its CO's authority. The agency *has to* furnish that information because "information on the limits of the contracting officers' authority *shall* be readily available to the public and agency personnel."

Stated in the simplest of terms, when in doubt, ask! If the CO finds the contractor's request to be offensive, he or she is out of line. If the agency tells the contractor that it doesn't have such information, it, too, is out of line.

Continuing with Subpart 1.602-1:

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

This is probably an appropriate place to make the point that a CO is a very special person in the federal fixed-price construction contracting process. Indeed, the CO may be the closest thing to God that a contractor will ever meet on any government fixed-price contract for construction. Not even in the private sector can one find a contract administrator with such wide powers and discretionary authority. And, believe it or not, *FAR* spells out a CO's *responsibilities* in plain language in such a way that neither the contractor nor the CO can be the least bit in doubt about them.

1.602-2 Responsibilities.

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.

Unlike construction project inspectors, engineers, architects, and most construction managers or contract administrators who work for owners, *FAR* states very clearly and unequivocally that COs "should be allowed wide latitude to exercise business judgment." To better define the term "business judgment," here's what *FAR* Subpart 1.602-2 says about the CO's responsibilities:

Contracting officers shall:

(a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;

Translation? That the contract meets all requirements of the law, all executive orders, all federal regulations, and all other applicable procedures including clearances and approvals.

That, in a very few words, is a great deal of responsibility to lay on one contract administrator, at least more than you'll find anywhere else in the construction industry. It's one of the things that makes fixed-price construction COs vastly different and superior to their government counterparts at the state and local levels, and even their counterparts in private industry. But there's more.

Contracting officers shall:

(b) Ensure that contractors receive impartial, fair, and equitable treatment; and

Let's refer to Webster's *New World Dictionary of the American Language*, *Second College Edition,* and note the definitions of the words "impartial, fair, equitable, and treatment" for comparison's sake:

■ *Impartial*: favoring no one side or party more than another; without prejudice or bias; fair; just;

■ *Fair*: 6. just and honest; impartial; unprejudiced; 7. according to the rules; 9. pleasant and courteous; favorable; helpful; Syn. fair, the general word implies the treating of both or all sides alike, without reference to one's own feelings or interests.

■ *Equitable*: 1. characterized by equity; fair; just; said of actions, results of actions, etc;

Closely aligned is the word "equity":

■ *Equity*: 1. fairness; impartiality; justice; 2. anything that is fair and equitable; 4. law a) resort to general principles of fairness and justice whenever existing law is inadequate; b) a system of rules and doctrines, as in the U.S., supplementing common and statute law and superseding such law when it proves inadequate for just settlement.

■ *Treatment*: 1. act, manner, method, etc., of treating or dealing with, a person, thing, subject, etc.

Having meticulously examined these definitions, let's apply their meanings to *FAR* Subpart 1.602-2(b) and remember that COs shall "ensure that contractors receive impartial, fair, and equitable treatment."

And now on to (c):

Contracting officers shall:

(c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields as appropriate.

The operative words in paragraph (c) are "request and consider." The advice has to be requested by the CO, not forced upon or insisted upon by the contractor, and the advice has to be considered but not necessarily accepted or acted upon by the CO.

For example, COs often call for federal auditors to examine certain portions of a contractor's financial and other records. However, as stated in *FAR* Subpart 1.602-2(c), and also in the *FAR* part that deals with contractor audits, the CO has an obligation to simply "consider" the audit findings and nothing more.

The bottom line of 1.602-2(c) is simply that COs have the duty to request the advice of specialists and then to consider that requested advice before making decisions and determinations.

In summary, very few contractors performing federal government fixed-price construction contracts have ever really read *FAR* Subpart 1.602-2 regarding the responsibilities of federal COs. And, unfortunately, based on the experience of **Meglan, Meglan & Company, Limited,** more than a few COs have often forgotten or ignored the section entirely. Still, federal COs have the responsibilities and, hopefully, the wisdom of a venerable Solomon when it comes to dealing with contracts and their contractors to which they have been assigned. Within the construction industry, there is no other owner-appointed counterpart or equal — none!

It is a wise and careful contractor who gently reminds the CO that he or she (the contractor) has read *FAR* Subpart 1.602-2 and knows what the federal government says COs *shall* do with regard to contracts and contractors. So, with all the foregoing *FAR* language quoted and commented upon, what happens when a CO exceeds the limits of his or her authority? The government's terminology for fixing the limits of authority excesses is called simply "ratification."

The *FAR* part, subpart, and sections that deal with ratification of unauthorized contracting actions, decisions, findings, and determinations or a lack thereof, are all contained in the following:

1.602-3 Ratification of Unauthorized Commitments

(a) *Definitions.*

"Ratification," as used in this subsection, means the act of approving an unauthorized commitment by an official who has authority to do so.

"Unauthorized commitment," as used in this subsection, means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.

The most common type of unauthorized commitments are those made by federal government inspectors and engineers on fixed-price construction projects. Only a CO or duly designated and authorized contracting officer's representative (COR) has authority to authorize commitments on behalf of the federal government, and then, only to the limit of his or her authority according to the written documentation in the agency's files.

The next common type of unauthorized commitments is that made by federal CORs who exceed the limits

of their authority granted to them by their respective COs. Not all federal COs authorize and designate a COR to administer their fixed-price construction contracts, but most usually do. The authorized COR has definite limits of authority placed on him or her by the CO, and those limits are spelled out in writing. When they are exceeded, the process called "ratification" must take place.

The third most common form of unauthorized commitment is that made by a federal CO who exceeds his or her limit of authority, which is in writing and on file within the agency that appointed the CO to the contract. These kinds of unauthorized commitments are extremely rare but occasionally do occur, since some COs are — for lack of a better word — beginners, with limits of $25,000, $50,000 or not-to-exceed $100,000 placed on their authority by the agency and agency head.

This is why the prudent and knowledgeable contractor requests the agency to disclose or make known to him or her in writing the exact limitations of authority of the CO assigned to the fixed-price construction contract, before the project gets underway. Upon reading the remainder of *FAR* Subpart 1.602-3, the reason for requesting limits of authority in writing from the agency or the CO will become painfully obvious.

Ratification can be very time consuming and expensive to a contractor. At best, the process delays payment of earned monies for work performed, and at worst, it may preclude payment altogether after a very lengthy and laborious paperwork-generating-and-negotiating process.

Unless a contractor has been through the ratification process, he or she will probably not really appreciate the time, money, and plain grief these unauthorized commitments can create when they have to be ratified by someone in the agency with the proper authority and limits authorization from the agency.

Here's the rest of Subpart 1.602-3:

(b) *Policy.*

(1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel.
(2) Subject to the limitations of paragraph (c) of this subsection, the head of the contracting activity, unless a higher-level official is designated by the agency, may ratify an unauthorized commitment.
(3) The ratification authority in subparagraph (b) (2) of this subsection may be delegated in accordance with agency procedures. but in no case shall the authority be designated below the level of chief of the contracting office.
(4) Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the General Accounting Office for resolution (see 1.602-3(d) of subpart).
(5) Unauthorized commitments that would involve claims subject to resolution under the Contract Disputes Act of 1918 should be processed in accordance with Subpart 33.2. Disputes and Appeals.

(c) *Limitations.* The authority in subparagraph (b)(2) of this subsection may be exercised only when:

(1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
(2) The ratifying official has the authority to enter into a contractual commitment;
(3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;
(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;
(5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;
(6) Funds are available and were available at the time the unauthorized commitment was made; and,
(7) The ratification is in accordance with any other limitations prescribed under agency procedures.

Please be aware of the fact that ratification of the unauthorized commitment *must satisfy* all seven of those paragraphs, not just any one of them. Conse-

quently, the process is generally time consuming, tedious, and very expensive.

Knowing which government employees are COs and CORs and knowing the limits of their authority is the only way for a contractor to avoid an unauthorized commitment on a government fixed-price construction contract. Get the authorized limits in writing from the agency before the project begins.

If the unauthorized commitment is nonratifiable, this is what *FAR* Subpart 1.602-3(d) says must happen for the contractor to get paid:

(d) *Nonratifiable Commitments*. Cases that are not ratifiable under this subsection may be subject to resolution as recommended by the General Accounting Office under its claim procedure (*GAO Policy and Procedures Manual for the Guidance of Federal Agencies*, Title 4, Chapter 2), or as authorized by *FAR* Part 50. Legal advice should be obtained in these cases.

If that sounds even more tedious, expensive and time consuming than the ratifiable unauthorized commitment process, you're right. Moreover, when the government starts recommending that its agencies seek legal advice, can the contractor involved in the unauthorized commitment afford to do anything less?

A contractor's bottom line regarding unauthorized commitments is knowing the authorized limits of the CO and COR and recognizing the fact that inspectors, engineers, and other agency personnel have no authority to commit the government. *Don't perform extra work for "strangers" whom you don't know anything about regarding their authority on federal fixed-price construction contracts!*

The final portion of *FAR* Subpart 1.6 deals with precisely how and why COs are selected, appointed, and terminated. This section is must reading for any contractor doing business with the federal government via fixed-price construction contracts.

1.603 SELECTION, APPOINTMENT, AND TERMINATION OF APPOINTMENT

1.603-1 General.

Subsection 414(4) of title 41, *United States Code*, requires agency heads to establish and maintain a procurement career management program and a system for the selection, appointment, and termination of appointment of contracting officers. Agency heads or their designees may select and appoint contracting officers and terminate their appointments.

These selections and appointments shall be consistent with Office of Federal Procurement Policy's (OFPP) standards for skill-based training in performing contracting and purchasing duties as published in OFPP Policy Letter No. 92-3, Procurement Professionalism Program Policy-Training for Contracting Personnel, June 24, 1992.

1.603-2 Selection.

In selecting contracting officers, the appointing official shall consider the complexity and dollar value of the acquisitions to be assigned and the candidate's experience, training, education, business acumen, judgment, character, and reputation.

If these *FAR* directives (note the word "shall") seem rather uncharacteristic for a government entity, remember the prior comments about COs needing to have "Solomon's wisdom."

Examples of selection criteria include:

(a) Experience in Government contracting and administration, commercial purchasing, or related fields;
(b) Education or special training in business administration, law, accounting, engineering, or related fields;
(c) Knowledge of acquisition policies and procedures, including this and other applicable regulations;
(d) Specialized knowledge in the particular assigned field of contracting; and,
(e) Satisfactory completion of acquisition training courses.

Oh, yes! COs must go to school to become trained. One doesn't just walk out of college with a degree or simply rise through the ranks to become a federal CO. Every one of these individuals appointed to a fixed-price construction contract has been specially trained for the position and then appointed, but only if satisfying all qualification requirements.

1.603-3 Appointment.

(a) Contracting officers shall be appointed in writing on an SF 1402, Certificate of Appointment, which shall state any limitations on the scope of authority to be exercised, other than limitations contained in applicable laws or regulations. Appointing officials shall maintain files containing copies of all appointments that have not been terminated.

(b) Agency heads are encouraged to delegate micro-purchase authority to individuals who are employees of an executive agency or members of the Armed Forces of the United States who will be using the supplies or services being purchased. Individuals delegated this authority are not required to be appointed on an SF 1402, but shall be appointed in writing in accordance with agency procedures.

A copy of the SF 1402, Certificate of Appointment, is what the contractor should request in writing from the CO's governing agency at the beginning of the fixed-price construction contract. Additionally, when a COR has been designated by the CO (usually at the preconstruction conference), the contractor should request a copy of the COR's SF 1402.in writing from the CO. Every CO and COR has such a certificate on file with the agency that appointed him or her. No one administers fixed-price construction contracts for the federal government without being appointed to the job via an SF 1402.

1.603-4 Termination.

Termination of a contracting officer appointment will be by letter, unless the Certificate of Appointment contains other provisions for automatic termination. Terminations may be for reasons such as reassignment, termination of employment, or unsatisfactory performance. No termination shall operate retroactively.

Although it's not stated in *FAR* Subpart 1.603-4, any contractor or citizen of the U.S. can obtain a copy of the CO's termination letter by filing a Freedom of Information Act request with the agency's FOIA officer.

If a contractor has reason to believe that his or her CO has been terminated for unsatisfactory performance, filing an FOIA request for the termination letter is an absolute must, especially if there are serious disputes and claims involved with the project that remain unresolved, which will more than likely be decided later by a Federal Board of Contract Appeals or the U.S. Court of Claims.

# # #

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Meglan, Meglan & Company, Limited
Columbus, Ohio

FEDERAL ACQUISITION REGULATIONS

PART 1: FEDERAL ACQUISITION REGULATIONS SYSTEM

Subpart 1.7: Determinations and Findings

Editor's Note: For purposes of clarity, all text excerpted verbatim from the *Federal Acquisition Regulations* is shown in **boldface** type.

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This FAR Facts addresses only Part 1, Subpart 1.7.

SUBPART 1.7: DETERMINATIONS AND FINDINGS

1.700 Scope of Subpart.

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This subpart prescribes general policies and procedures for the use of determinations and findings (D&Fs). Requirements for specific types of D&Fs can be found with the appropriate subject matter.

Review the part and subpart section of the *FAR* that covers the particular and specific *action* being taken by a contracting officer regarding a contractor on a federal fixed-price construction contract. An example would be a contracting officer's D&Fs actions taken to terminate a contractor for default on a federal fixed-price construction contract.

1.701 Definition.

"Determination and Findings" (D&F) means a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions.

The *FAR* parts and subparts are, themselves, regulations, so the form of written approval by an authorized official may well appear in a *FAR* part and subpart.

The term "authorized official" usually means a contracting officer (CO) or a designated contracting officer's representative (COR) who has been given authorized limits of authority by the agency and whose limits of authority are in written form on file at the agency and can be viewed in person and/or a copy requested in writing by a contractor who is working on a federal fixed-price construction contract and by the general public (see *FAR Facts* on Part 1, Subpart 1.6, that addresses the same in more detail).

The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

In plain words, *every* CO's or designated COR's determination with regard to a particular statute or regulation or specified action taken by him or her on a fixed-priced contract in favor of or against the contractor has to be supported by written findings, which are generally maintained and filed in the CO's or COR's contract files for any particular project.

1.702 General.

(a) A D&F shall ordinarily be for an individual contract action. Unless otherwise prohibited, class D&Fs may be executed for classes of contract actions (see 1.703). The approval granted by a D&F is restricted to the proposed contract action(s) reasonably described in that D&F. D&Fs may provide for a reasonable degree of flexibility. Furthermore, in their application, reasonable variations in estimated quantities or prices are permitted, unless the D&F specifies otherwise.

When a CO or COR is dealing with a federal fixed-price construction contract and the modifications or equitable adjustments to that contract, this 1.702(a) clause and its meaning are fairly obvious.

When the actions being recommended or taken by the CO or COR deal with matters such as terminations for default (T-4-D) or terminations for the convenience (T-4-C) of the government, the "D&Fs may provide for a reasonable degree of flexibility" phrase usually results in a Federal Board of Contract Appeals judge (always an attorney) or a U. S. Court of Claims judge (also always an attorney) deciding what is and isn't a reasonable degree of flexibility.

In a layman's opinion, the U.S. Court of Claims Court judge will generally render the fairer, more unbiased decision as to whether the CO or COR rendered his or her decision within a reasonable degree of flexibility. The opinion regarding this matter is not intended to deprecate or take away from the stature of agency-appointed Federal Boards of Contract Appeals judges and their integrity, but common sense would dictate that the farther one gets away from the agency involved within the federal judicial system, the more impartial the decision will be.

A majority of the attorneys **Meglan, Meglan & Company, Limited,** has consulted and worked with on federal contract litigation and alternate dispute resolution cases seem to prefer trying them in the U.S. Court of Claims for the reasons described above.

(b) When an option is anticipated, the D&F shall state the approximate quantity to be awarded initially and the extent of the increase to be permitted by the option.

Clause 1.702(b), of course, deals mainly and almost exclusively with original contract drafting, modifications, and equitable adjustments on federal fixed-price construction contract matters.

1.703 Class Determinations and Findings.

(a) A class D&F provides authority for a class of contract actions. A class may consist of contract actions for the same or related supplies or services or other contract actions that require essentially identical justification.

Stated simply, the class D&F deals with more than one contract and applies to all contracts categorized by the government in the same class of contracts, such as all of the fixed-priced contracts bid, awarded, and administered by a particular agency.

(b) The findings in a class D&F shall fully support the proposed action either for the class as a whole or for each action. A class D&F shalt be for a specified period, with the expiration date stated in the document.

The principal problem encountered with a class D&F in fixed-price construction projects is that class D&F documents don't always make it into the CO's contract files to which the class D&F applies — and almost *never* make it into the COR's contract files.

Thus, when the contractor files a Freedom of Information Act request with the CO or COR to obtain the contract files, the class D&F information is no where to be found, often because matters that are sensitive to the government's position in price negotiations are usually exempt from FOIA requests.

(c) The contracting officer shall ensure that individual actions taken pursuant to the authority of a class D&F are within the scope of the D&F.

This "within the scope" issue is another matter that is best decided in the U.S. Court of Claims, not in the Federal Boards of Contract Appeals, attorneys point out.

1.704 Content.

Each D&F shall set forth enough facts and circumstances to clearly and convincingly justify the specific determination made.

Meglan, Meglan & Company, Limited, has for some time urged its contractor clients to make certain that *all* project documentation is routinely transmitted to the CO, even if the project is being managed in the field and administered by a designated COR.

Absent the contractor's side of a determination's set of facts and circumstances, the contracting officer's D&Fs and subsequent actions could result without all the facts being noted and reviewed by the CO, through absolutely no fault of the CO. Remember, just because something is given or sent to the CO's designated representative by the contractor is no guarantee that it's going to be forwarded to the CO for his or her file. More than a few erroneous D&Fs occur because of this phenomena.

A contractor should make sure that daily construction record reports, daily construction quality control reports, memos, RPIs, RFPs, RFQs, schedules, and all correspondence on a federal fixed-price construction contract are addressed to both the COR and CO on the first page of any letter or transmittal. Using a format that addresses the COR on the left side of the letter or transmittal and CO on the right, adjacent to the COR's name and address, is the best approach to take. This paperwork and all attached documents should then be transmitted by fax, mailed, or hand-delivered to each party, separately. Nothing less works!

As a minimum, each D&F shall include, in prescribed agency format, the following information:

(a) Identification of the agency and of the contracting activity and specific identification of the document as a "Determination and Findings."

(b) Nature and/or description of the action being approved.

(c) Citation of the appropriate statute and/or regulation upon which the D&F is based.

(d) Findings that detail the particular circumstances, facts, or reasoning essential to support the determination. Necessary supporting documentation shall be obtained from appropriate requirements and technical personnel.

Please note the last sentence in Subpart 1.704(d) and make sure it is well understood. A contractor would do well to have *all* field management personnel working on fixed-price construction contracts memorize this statement.

While *FAR* Subpart 1.704(d) deals with *both* individual and class D&F documentation, the point must be made that contracting functions of COs and heads of agencies (who are usually contracting officers themselves) are *directed* to rely upon technical support personnel — inspectors, base engineers and their assistants, consultants, experts, attorneys, CORs, and others employed by the government and agency involved — for supporting documentation.

Moreover, it doesn't take a genius to conclude that the documentation provided to the CO by agency support personnel will almost inherently be pro-government and anti-contractor as simply a matter of human nature. Couple that with the fact that those "in the trenches" tend to carry grudges or hard feelings when it comes to a perceived adversary, which, in regard to federal fixed-price construction contracts, means the contractor and his or her project management personnel.

A contractor must always develop and structure systems for documentation and regular, on-time delivery of that documentation to the CO on fixed-price contracts. Those systems should routinely (preferably on a daily basis) generate supporting documentation that describes "particular circumstances, facts, or reasoning" that is "essential" to a CO "to support the determination" and deliver it promptly to the CO for inclusion in his or her contract files.

In brief, don't rely on others outside the construction firm to do these important documentation and deliv-

ery functions. Have your management people do it themselves — and do it right from the start.

Meglan, Meglan & Company, Limited, has witnessed dozens of contractors who literally nailed themselves to the wall because they failed to document their side of a dispute or claim and place it within the contracting officers' files *as it was occurring* (termed "contemporaneous documentation" by the legal profession). The failure opened the door for a CO's designated representative, or the government's inspectors, engineers, engineering technicians, and other *nonauthorized* government employees (see *FAR Facts* regarding Subparts 1.6 and 2.2), or in the worst case scenario, all of the foregoing, to "stuff" the CO's files with their versions of the facts, events, and circumstances as they occurred.

Some contractors have even relied upon the COR, inspectors, etc., to tell their side of the dispute or claim and then decide which contractor-generated documentation the CO was actually given to review, make a D&F, and then take action upon. It's one thing to be ignorant. It's quite another to be foolish or unwarrantedly trusting.

(e) A determination, based on findings, that the proposed action is justified under applicable statute or regulation.

(f) Expiration date of the D&F, if required (see 1.706).

(g) The signature of the official authorized to sign the D&F (see 1.707) and the date signed.

Summarizing *FAR* Subpart 1.704 on D&F content, nobody makes wise and just decisions with only half the facts at hand. *Don't ever trust the government's nonauthorized or limited authorization personnel to tell the contractor's story to the CO — not ever*.

In *FAR* Subpart 1.602-2 Responsibilities (b), contracting officers are directed to "ensure that contractors receive impartial, fair, and equitable treatment" (see *FAR Facts* on Subpart 1.6). Nonauthorized government personnel are *not* directed by *FAR* to uphold that same assurance or standard of personal and professional conduct.

If a contractor is to trust anyone on a federal fixed-price construction project, it should be the CO. Only after the contractor's version of the events facts and have been carefully documented in writing and placed in the CO's files does the contracting officer carefully make its D&F and then take appropriate action, based on his or her duty to "ensure that contractors receive impartial, fair, and equitable treatment."

1.705 Supersession and Modification.

(a) If a D&F is superseded by another D&F, that action shall not render invalid any action taken under the original D&F prior to the date of its supersession.

This "innocuous" little paragraph has hidden meanings *and* implications, the likes of which most contractors and the general public cannot begin to understand.

Suppose, for example, that a CO issues a D&F that supports the default termination of a contractor on a $10 million fixed-price construction contract. The matter is then assigned to a terminating CO who, for whatever reason, decides that the contractor should not have been terminated for default and was, in fact, wrongfully terminated. He writes a D&F to that effect but, instead, terminates the contractor for the convenience of the government. Then suppose that one of the actions taken by the government following the original default termination was to call forward the contractor's bonding company to complete the contract. The bonding company proceeds to hire a "completing contractor" to finish the contract at a cost of $15 million. After all that has occurred, the new CO or TCO writes the more recent, superseding D&F and converts the T-4-D to a T-4-C.

Simply explained, once the TCO writes the D&F and takes the T-4-C government action, *it's litigation time*, because *FAR* Subpart 1.705(a) says "that action shall not render invalid any action taken under the original D&F prior to the date of its supersession."

Far fetched? **Meglan, Meglan & Company, Limited,** saw seven of these T-4-D cases in a single year, and that was dealing with but a small portion of all the contractors in that particular predicament on federal fixed-price construction contracts. Some government agencies and their contract administration offices are well known for this scenario. Examples include Paris Island Marine Base outside Beaufort,

South Carolina, and Wright-Patterson Air Force Base near Dayton, Ohio, to name but a few.

The *FAR* Subpart 1.705(a) supersession clause is an invitation for major litigation, and it's the only way it can be perceived. And, it's all the more reason to make sure that all facts are in the CO's file when the first D&F is written and contracting action is taken.

Moving forward to the D&F modification clause:

(b) The contracting officer need not cancel the solicitation if the D&F, as modified, supports the contract action.

1.706 Expiration.

Expiration dates are required for class D&Fs and are optional for individual D&Fs. Authority to act under an individual D&F expires when it is exercised or on an expiration date specified in the document, whichever occurs first.

The word "exercised" simply means that the proposed action covered by the D&F has been taken. Some examples include: a contract award notification letter sent to the contractor by the CO and then subsequently signed by the CO and contractor; a contract modification prepared and signed by both the government (contracting officer) and the contractor; a T-4-D letter written and sent to both the contractor and its bonding company by the CO, notifying the bonding company that it is to obtain a completing contractor; or, a suspension of the contract ordered in writing by the CO and sent to the contractor. The examples are almost limitless.

Authority to act under a class D&F expires on the expiration date specified in the document. When a solicitation has been furnished to prospective offerors before the expiration date, the authority under the D&F will continue until award of the contract(s) resulting from the solicitation.

1.707 Signatory Authority.

When a D&F is required, it shall be signed by the appropriate official in accordance with agency regulations. Authority to sign or delegate signature authority for the various D&Fs is as shown in the applicable FAR part.

In plain language, this means that one must read the applicable *FAR* part and its subparts to find out who can and cannot sign a D&F and/or delegate the signing to others in the agency regarding a particular *FAR* part and subpart.

No one ever said reading, understanding, and correctly interpreting *FAR* was going to be an easy or short task. After all, this is the federal government in action. Would you expect anything less?

# # #

Federal Acquisitions Regulations **serve as guidance documents only and are written for the expressed purpose of helping construction industry executives and supervisors learn better ways of identifying the sources and causes of construction claims and preventing disputes.**

Meglan, Meglan & Company, Limited
Columbus, Ohio

FEDERAL ACQUISITION REGULATIONS

PART 2: DEFINITIONS OF WORDS AND TERMS

Subpart 2.1: Definitions and Subpart 2.2: Definitions Clause

Editor's Note: For purposes of clarity, all text excerpted verbatim from the *Federal Acquisition Regulations* is shown in **boldface** type.

FAR is divided into "Parts" (Parts 1 through 53, plus a forms section, a forms-for-reproduction section, an index, and appendices, all of which follow Part 53 in the order just listed). The complete set of *FAR* would fill approximately two dictionary-size binders. Fortunately, only a small portion of the total *FAR* book or package actually deals with federal fixed-price construction contracts.

This FAR Facts addresses only Part 2, Subparts 2.1 and 2.2.

SUBPART 2.1: DEFINITIONS

2.101 Definitions.

As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular part or portion of a part.

Users of *FAR* are, therefore, and as noted above, cautioned that there are two ways that a basic Part 2 definition can be altered. Checking *FAR* Parts other than Part 2 for a definitions section that applies only to that part should be the first order of business when reading and interpreting any *FAR* part.

Here are portions of some of the more pertinent definitions contained in *FAR* Part 2:

"Contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications.

Please note that the term "bilateral" as used above means signed by two parties but *not necessarily prepared* by two parties. The final clause in the definition is more important because of what it omits, rather than what it includes. For example, unilateral con-

tract modifications are *not* defined in Part 2 as being a "contract." Only bilateral contract modifications (those signed by both the government and the contractor) are considered by the government to be a "mutually binding, legal relationship obligating the seller [the contractor] to . . . and the buyer [the government] to pay for them."

"Contract administration office" means an office that performs (1) assigned postaward functions related to the administration of contracts; and (2) assigned preaward functions.

"Contracting office" means an office that awards or executes a contract for supplies or services and performs postaward functions not assigned to a contract administration office.

"Contracting officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

The rest of the definition for contracting officer (CO) will continue shortly.

In reading and rereading the above definitions, one thing stands out above all else. Unlike any other form of government in the U.S., the federal government gives sole and complete authority to its designated contracting officers "...to enter into, administer and/or terminate [construction] contracts and make related determinations and findings."

In fact, federal COs are the closest thing to God that any contractor will ever meet on a construction project. This implies no disrespect. The point to be made is that any contractor doing business with the federal government *must* understand that the CO is the *last word on everything that has to do with the contract*, including money, short of the Federal Boards of Contract Appeals and the U.S. Court of Claims.

Many contractors on federal construction contracts fail to recognize the absolute authority vested in their CO by the federal government. Base engineers, inspectors, and hosts of other federal employees, consultants, construction managers, and many others work *for* the CO, not vice versa!

COs on federal construction projects are specially trained, qualified and, in general, highly experienced, no-nonsense-type contract administrators who have the complete authority to *enter into*, *administer*, and *to terminate* a construction contract without consulting anyone else. They also are supposed to be the final arbiters or determiners of all contract interpretations and disputes on a construction project.

Obviously, it's the intent of the federal government to provide one person with the complete authority, expertise, and knowledge to decide all issues related to a federal construction contract and its administration on behalf of the government.

How fair and unbiased that decision-making is accomplished is usually a function of the individual CO's training, experience, background, and personality. Most federal COs are extremely fair and unbiased. A few, very few, for whatever reason, take their lofty position as a mandate for power to play win-lose games. However, they don't usually survive as COs. They usually get replaced rather swiftly.

Returning to the rest of the definition of a contracting officer:

The term [contracting officer] includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

The basic problem most contractors encounter in dealing with these "authorized representatives of the contracting officer" (e.g., for the U.S. Army Corp of Engineers, that would be the contracting officer's representative or COR, who is usually stationed at the construction site) is that the CO usually doesn't bother to advise the contractor of "the limits of their authority as delegated by the contracting officer," which leaves the contractor guessing as to just how much authority the COR really has.

Any contractor who is working on site with a COR should request a written statement from the CO that defines the COR's delegated authority, both in terms of decision-making authority and monetary limits on change order, modification of contract, and/or equitable adjustment to contract signing authority. The monetary limit usually doesn't exceed $100,000 and can be as low as $25,000.

Another common problem that contractors encounter in dealing almost exclusively with the COR is the

fact that paperwork often goes into the COR's files but never makes it to the CO's files. Later, when large change orders, modifications of contract, equitable adjustments to the contract, claims, and disputes arise that exceed the COR's limits of authority and are referred to the CO, the paperwork from the contractor regarding such matters is not in the CO's files. This is evidence that the CO has not been routinely kept advised of the contractor's position by the contractor, and/or the COR has not forwarded the information to the CO.

To avoid this information blackout, a contractor should routinely copy the CO on all pertinent project documentation and correspondence. Using a format that addresses both the COR and CO at the beginning of the letter (COR on the left side and CO on the right, adjacent to the COR's name and address) is a prudent way to avoid this problem. Daily construction record reports, schedules, quality control reports, etc., should also be sent to both the CO and COR so that all files are kept up to date and always contain the *complete* contractor records and paperwork.

If the COR objects to the contractor about the double-addressing format and/or sending of its project documentation to the CO, implying "you're going over my head," the contractor should make it *very clear* in writing to the COR that this method is routinely utilized on all federal government fixed-price construction contracts because of the unknown "limits of . . .[the COR's] authority as delegated by the contracting officer" and exactly when that authority might be or might have been exceeded.

Returning to the definitions:

"Administrative contracting officer (ACO)" refers to a contracting officer who is administering contracts.

"Termination contracting officer (TCO)" refers to a contracting officer who is settling terminated contracts.

A single contracting officer may be responsible for duties in any or all of these areas.

Reference in this [FAR] regulation . . . to administrative contracting officer or termination contracting officer does not (1) require that a duty be performed at a particular office or activity; or (2) restrict in any way a contracting officer in the performance of any duty properly assigned.

The basic problem most contractors encounter with the above quoted *FAR* subsection is a phenomena that can best be called the "COs switch-and-swap syndrome," which brings into question the whole matter of "a contracting officer in the performance of any duty properly assigned."

Some federal government departments, agencies, and bureaus change COs on a fixed-price construction contract, like most people change blouses or shirts, and with about as much notice to those most affected by the change or switch (i.e., the change or switch becomes apparent only when actually seen or encountered).

When a contractor working on a fixed-price contract becomes aware of a CO switch or change having been made, a letter should be sent immediately to the contracting agency, bureau, or department, respectfully asking for confirmation in writing of the new CO's "duty [being] properly assigned."

Following receipt of written confirmation of the proper assignment of duties relative to the new CO, the contractor should request in writing if the new CO has *all* the prior CO's documents and files for the contract, including the contractor's paperwork that had been routinely forwarded and filed.

The same methodology applies to a change or switch of CORs, except that the CO would be the one to receive the contractor's letter, rather than the agency, bureau, or department.

Apparently, the federal government is allowed to change or switch COs and/or CORs on fixed-price contracts without advanced notice to the contractor, since nothing is contained in *FAR* preventing the maneuver. Any confusion that results usually originates or derives from the new CO or COR not having all the records and, thus, not having all the facts and details from the contractor's viewpoint or side.

Asking a couple of seemingly "dumb" questions in writing when a switch or change is made is far better than later encountering serious judgmental errors and omissions by the CO or COR, caused by a lack of

paperwork and consequent lack of knowledge of the facts involved in the matter.

Continuing on with the definitions:

"Facsimile" means electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document, e.g., facsimile bid, the terms refers to a document (in the example given, a bid) that has been transmitted to and received by the Government via facsimile.

Translation? The federal government generally accepts facsimile transmitted letters and documents, but not always.

"Head of the contracting activity" includes the official who has overall responsibility for managing the contracting activity.

Normally, this is the person a letter is written to by the contractor when the CO is changed or switched, as previously discussed.

"May" denotes the permissive. However, the words "no person may. . ." mean that no person is required, authorized, or permitted to do the act described.

"Offer" means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; responses to requests for quotations (simplified acquisition) are "quotations," not offers.

Stated simply, bids and RFP quotations bind the contractor on fixed-price federal government contracts. RFQ quotations do not bind the contractor and are merely quotes for negotiating purposes.

"Shall" means the imperative.

"Supplies" means all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories and equipment; machine tools; and the alteration or installation of any of the foregoing.

Translation? The materials utilized in a federal fixed-price construction contract by a contractor are called "supplies" by the government.

SUBPART 2.2: DEFINITIONS CLAUSE

2.201 Contract Clause.

[The contracting officer shall] insert the clause at 52.202-1 Definitions, in solicitations and contracts that . . . [the rest does not apply to fixed-price contracts for construction]. If the contract is for personal services, construction, architect-engineer services, or dismantling, demolition, or removal of improvements, [the contracting officer shall] use the clause with its Alternate I. The contracting officer include additional definitions, provided they are consistent with the clause and the FAR.

There have been situations where the additional definitions were *not* consistent with the clause and *FAR*. Those situations require the use of competent, experienced, legal assistance. If a contractor suspects that such inconsistencies exist in a particular federal fixed-priced contract, assistance should be *immediately* sought from an experienced attorney and law firm specializing in construction contract law.

Here is the clause at 52.202-1 Definitions:

2.101 Definitions [June 1997].

"Head of agency" (also called "agency head") means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise in-

dicated, including any deputy or assistant chief official of an executive agency; and the term "authorized representative" means any person, persons, or, board (other than the contracting officer) authorized to act for the head of the agency or Secretary.

"Contracting officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

All federal government fixed-price contracts for construction contain the above 52.202-1 Definitions clause. The preceding quotation of and discussion of *FAR* Part 2 explains, in full, why that clause is routinely inserted by all federal agencies.

# # #

Meglan, Meglan & Company, Limited
Columbus, Ohio