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Contracting Commandment No. 5: Thou shalt document thy actions

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When 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.


Courtesy of Thompson Coburn

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.

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 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.

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