

COMMONLY INCORPORATED FEDERAL PROCUREMENT CONTRACT CLAUSES AND WHAT THEY MEAN

As Tribes continue to grow, the scope of legal work expands with it. Among the plethora of law tribal attorneys may find themselves grappling with is the wonderful world of federal government contract and procurement law. As with Federal Indian Law, be prepared to set your notions about law from other practice areas aside. This is a whole different ball game, complete with its own set of unique rules.

This article is intended to be a simplistic practitioner's tool for use in deciphering commonly incorporated Federal Acquisitions Regulation (FAR) provisions in federal procurement contracts.¹ Unfortunately, these provisions are often incorporated by reference. To make it easier for you to understand the regulations I have listed a few of them in sequential order and provide a brief, non-comprehensive, and possibly cynical, explanation of what they are all about.

The list is not meant to be exhaustive and intentionally leaves out a number of other FAR clauses that are typically encountered in federal contracts. However, the common clauses that are not covered below typically are either detailed in the contract itself, or deal with payment procedures and invoicing or otherwise relate to the mechanics of procurement.²

1. DFAR 252.204-7003. Control of Government Personnel Work Product.

DFAR 252.204-7003 is a DFAR provision, even though the contracts won't tell you this and will likely just list it as "252.204-7003" and incorporate it by reference. The contracts also probably won't tell you where to find them. DFARs are the Defense Federal Acquisition Regulation Supplements for some Armed Forces or DOD contracts and can be found here: <http://www.acq.osd.mil/dpap/dars/dfars/index.htm>. This provision says that your procedures for protecting against unauthorized disclosure of information doesn't work against a DOD or Armed Forces employee in so far as it might require them to relinquish control of their work product, whether or not the work product is confidential.

2. DFAR 252.204-7004 ALT A. Central Contractor Registration Alternate A.

252.204-7004 Alt A is a DFAR provision. It amends FAR 52.204, which basically says to use your DUNS number, and if you don't have one, get one. This Alternate A says in addition to using the DUNS number, you need to get a

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FAR provisions incorporated by reference can be found here: <http://www.acqnet.gov/far/>.

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Which means you really should read them verbatim.

CAGE code to register in the CRC database. The DFAR provision may be incorporated into your contract even though FAR 52.204 is not, in which case it is meaningless, but that isn't unusual for government contracts. Basically, when dealing with federal acquisitions contracts you get to figure out what actually applies and doesn't apply to you – they take a “kitchen sink” approach to contracts – and they won't tell you if you ask for clarification (at least not the Army Corps of Engineers). My guess is that the Contracting Officers don't know what actually applies in your contract, don't care, and don't want to do any additional work. If your contract also has FAR 52.204 listed and you don't have a CAGE number, or don't have a clue what one is, you probably need to read this provision in more detail.

3. **DFAR 252.226-7001. Using Indian Organizations and Indian Owned Enterprises.** 252.226-7001 is another DFAR provision. This provision says you are to use your “best efforts” to give Indian Organizations and businesses “the maximum practicable opportunity” to participate in subcontracts “to the fullest extent consistent with efficient performance of the contract”. I'm sure Tribes do this anyway, but as far as everyone else is concerned it looks like a large loophole to get around subcontracting with Indian organizations while giving an incorporeal nod to Indian Country.³
4. **FAR 52.209-6. Protecting the Government's Interest.** FAR 52.209-6 states that for any contract over \$30k, the contractor cannot subcontract with someone who is debarred or suspended. Furthermore, for any subcontract over \$30k, you must require the first-tier sub to disclose in writing whether or not they are debarred. It's a good idea to find out if your subs are debarred or have proceedings pending. If they do, there is probably a reason and you shouldn't use them anyway.
5. **FAR 52.211-17. Delivery of Excess Quantities.** FAR 52.211-17 states that anything under \$250 in value that was delivered to the feds in excess of what was supposed to be delivered, the Government gets to keep – the “you sleep, you loose” rule. Anything delivered in excess worth over \$250 is to be either returned to you at your expense or kept by the Government and reimbursed, and the Government gets to choose between the two options.
6. **FAR 52.222-3. Convict Labor.** Many federal contracts incorporate FAR 52.222-3. For purposes of Indian Country, this provision essentially says that no convict, meaning any person who is incarcerated or on work release, can work on the project provided the conviction is from State court. It doesn't say anything about Tribal convicts, so I would venture to say Tribal convicts can work on a project.

³ On a brighter note, however, FAR 52.219-9, which encourages subcontracts with small businesses, will be amended in September 2007 to allow Alaska Native Corporations and Indian tribes to be counted towards a contractor's goals for subcontracting with small business regardless of the Tribe's size.

It also excludes anyone who has served their sentence, been pardoned, or is on probation or parole.

7. **FAR 52.222-19. Child Labor-Cooperation with Authorities.** FAR 52.222-19 says you agree to cooperate with the feds in investigations of child labor law violations, including providing access to your records, documents, etc. I'm guessing they get to decide what records and documents are relevant to their investigation, not you.
8. **FAR 52.222-20. Walsh-Henry Public Contracts Act.** FAR 52.222-20 says that if your contract is for over \$10,000 then it is subject to the Walsh-Henry Public Contracts Act (41 USCA 34-45). Basically, federal minimum wage applies, the 40 hour work week applies, no male under 16 or female under 18 will work on the project, and no work is to be conducted in a facility that has conditions which are unsanitary or hazardous or dangerous to the health and safety of employees. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work is performed is prima-facie evidence of compliance with the provisions relating to facility conditions. There isn't any similar prima-facie rule for compliance with Tribal laws.
9. **FAR 52.222-26. Equal Opportunity.** FAR 52.222-26 is likely in every federal contract. It deals with non-discrimination. However, Indians living on or near an Indian reservation, in connection with employment opportunities on or near an Indian reservation are excluded from this provision. In other words, Indian preference laws and practices do not violate this FAR.
10. **FAR 52.222-35. Equal Opportunity for Disabled Vets.** FAR 52.222-35 prohibits discrimination against disabled and Viet Nam vets and requires affirmative action to treat them without discrimination based on their disability. It includes certain job notice requirements. All subcontracts of \$100k or more must include this provision.
11. **FAR 52.222-36. Equal Opportunity for Workers with Disabilities.** FAR 52.222-36 prohibits discrimination against people with disabilities (physical or mental) on the basis of their disability and requires affirmative action to treat them without discrimination based on their disability. This also includes job notice requirements. All subcontracts of \$10k or more must include this provision.
12. **FAR 52.222-37. Employment Records of Disabled Vets.** FAR 52.222-37 requires that you produce VET 100 Reports to the Secretary of Labor annually provided a contract is for \$100k or more. It looks like this provision started being used in Sept. 2006, so even if you haven't been doing it in the past you may have to start. Having said that, it excludes "State and local government". If anyone asks, you might want to argue that a tribe ought to be considered a local government under this provision if you don't otherwise have the resources or

desire to produce these reports. Arguably, the language is intended to exempt any governmental organization whether State, County, Municipal, or Tribal, but one must always be wary of the False Claims Act ⁴ when dealing with federal contracts.

13. FAR 52.222-41. Service Contract Act. FAR 52.222-41 makes the Service Contract Act (41 USC 351) subject to the contract. Consequently, any service contract over \$2,500 is required to meet certain minimum wage and fringe benefit amounts pursuant to the Secretary of Labor Regulations, which can be found in 29 CFR Part 4.

14. FAR 52.223-5. Pollution Prevention and Right-to-Know Information. FAR 52.223-5 makes the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11001-11050) and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13101-13109) applicable when federal facilities are involved in the contract. Federal facilities are subject to these acts and this provision requires you to provide all information needed by the facility to comply with the acts. I'm guessing they get to decide what information is needed.

15. FAR 52.225-1. Buy America Act. FAR 52.225-1 requires that any supplies furnished to the feds under the contract are to be in accordance with the Buy America Act (41 USC 10a-10d). If you're really interested, read the act. Actually, you should probably read it even if you aren't interested because it applies to your contract.

16. FAR 52.225-13. Restrictions on Certain Foreign Purchases. FAR 52.225-13 essentially prohibits most transactions involving Cuba, Iran, Sudan, and North Korea. Other off-limit countries, organizations, and even people, can be found here: <http://www.treas.gov/offices/enforcement/ofac>. I'm guessing a Tribe isn't going to be contracting with any of these countries in the near future, but you never know. And as the international political scene/policy changes, the black list is likely to change. So, if you transact with any foreign countries, organizations, terrorists, or foreign nationals you should probably check out the webpage.

17. FAR 52.232-11. Extras. FAR 52.232-11 says that you won't get paid for extras unless it is otherwise authorized in the contract or the Contracting Officer authorized them in writing. Rule of thumb: don't give the Government anything extra.

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31 USC 3729-3333. Tribes are probably exempt from the Act, see *Vermont Agency of Natural Resources v. Stevens*, 529 U.S. 765 (2000), but individuals aren't (read: attorneys and employees). Also, see *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 123 S.Ct. 1239 when dealing with Tribal corporations as the court held municipal corporations are "persons" under the False Claims Act. And don't rest on your laurels when it comes to a suit of a Tribal government and the sovereign immunity defense; if an employee is covered by tribal insurance for wrongful acts or you have some kind of indemnification statute, a litigant might try getting to the Tribe's coffers indirectly by obtaining a judgment against the covered employee.

- 18. FAR 52.232-25. Prompt Payment.** FAR 52.232-25 details the payment process. Of note is that if you receive a duplicate or over payment, you are to immediately notify the Contracting Officer and request instructions for disposition of the overpayment. You should probably do this when it happens because the Government has all the power in these contractual relationships and you never know who you may end up dealing with if they find out some time after the fact.
- 19. FAR 52.233-3. Protest After Award.** FAR 52.233-3 basically says that when the government Contracting Officer receives a notice of protest or one is likely forthcoming, they can issue a stop work order to you and you have to stop working on the project and minimize costs. Lesson to learn: be prepared for a stop work order if you pursue a notice of protest, e.g. be prepared to lay people off and terminate subcontracts.
- 20. FAR 52.233-4. Breach of Contract Claims.** FAR 52.233-4 makes the law of the United States applicable to resolving any claim for breach of contract. In short, Federal, not Tribal or State, contract law applies. And by the way, federal contract law (especially procurement law) is a whole different universe then you might be used to. If you have any questions, consult W. Noel Keyes' treatise on Government Contracts (his nutshell is good too) or anything and anyone coming out of the George Washington University Law School's Procurement and Government Contract Law department. They also have a good webpage: http://www.law.gwu.edu/Burns/Research/govtk/govcon_resources/intro_govk_resources.htm. Finally, you might also want to look at resources published by the Public Contract Law section of the ABA – what the heck, if you are dealing with government contracts why not join the section?
- 21. FAR 52.243-5. Changes and Changed Conditions.** FAR 52.243-5 provides that the Contract Officer can make changes in drawings and specifications if done in writing. It also provides that you are to promptly notify the Officer of subsurface or latent physical conditions that materially differ from those in the contract and unknown unusual physical conditions at the site before proceeding with the work. If your contract involves construction, closely inspect the site before starting work and let the Contracting Officer know in writing if there are any conditions that are different from what was contemplated in the RFP or any other drawings and specifications the feds gave you. **HEED THIS WARNING:** See *Daewoo Engineering and Construction Co. v. United States*, 73 Fed. Cl. 547 (Oct. 13, 2006) where Daewoo bid \$73 million on a 53 mile road construction project. The next lowest bidder was \$100 million and the site where construction was to be done encountered over 150 inches of rainfall a year (did I mention the construction site was on the tropical island of Palau?). Needless to say, Daewoo didn't fully realize what they were dealing with, found out after the award that there were problems with the moisture content of the soil which they didn't originally anticipate, submitted a certified claim of \$64 million for costs it would incur if the Army Corps of Engineers didn't approve their proposed method of construction, got their own expert to view the site after the fact who ended up

saying the certified claim should have been \$21 million less, didn't disclose this to the Corps, and filed suit for \$64 million in the Court of Federal Claims. Instead of getting \$64 million, Daewoo got a \$50 million judgment *against* them under the Army Corps' counterclaim pursuant to the False Claims Act – even though the Corps never paid any part of Daewoo's claim and consequently didn't incur any actual damages from the counterclaimed fraud.

22. FAR 52.246-1. Contractor Inspection Requirements. Under FAR 52.246-1 you are to perform all inspections and tests necessary to substantiate that all deliverables under the contract conform to the contract requirements. This is the case even if the contract provides that the Government will perform inspections and tests (unless the contract says the Government is to do these things exclusively). In short, police your own work - don't rely on the feds to do it for you.

There are many other provisions in your federal procurement contracts that you will need to read and become familiar with. Be sure to review each contract and the above provisions from time to time because the FAR provisions are always subject to change. What they cover today, may well change tomorrow.

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