Contractual Transfers of “Contract” Property Accountability

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Presented by:
Tom Ruckdaschel
Deputy Director (DCMA-AQC)
tom.ruckdaschel@dcma.mil
804-734-0505
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Learning Objectives

• The Regulatory State
• Identifying Government “contract” property
• The concept of contract accountability (and transfer, thereof)
• The process of transferring “contract” property accountability from one contract to another (application of policy)
• Contractor acquired property (“CAP”); what it is and why it’s different
• DoD requirements, including use of Standard GFP attachments
• PCARSS capability (what it does and doesn’t do)
Today’s discussion centers around contractual transfers of “property” accountability (contractual events and transactions)

This excludes other (noncontractual “transfer” actions) such as:

- Shipments
- Movements
- Logistics transactions
- Interservice transfers of accountability (from one “property book” to another)
- “Debits & Credits” under Material Management and Accounting Systems (where material and associated costs move between contracts)
The Regulatory State

- Federal Acquisition Regulations System (Title 48 of the U.S. Code of Federal Regulations (CFR))
  - Federal Acquisition Regulation (FAR) = Chapter 1, Parts 1-99 of 48 CFR
  - Defense Federal Acquisition Regulation Supplement (DFARS) = Chapter 2, Parts 200-299 of 48 CFR
- FAR: provides uniform policies and procedures for Federal acquisition; issued and maintained by DoD, GSA and NASA
- DFARS: DoD specific. Issued and maintained by DoD; includes delegations of FAR authorities
- Procedures, Guidance and Information ("PGI"): guidance and direction to DoD Contracting Officers
• Federal Acquisition Regulation
  • Part 45: Federal Government Policy
    • Clause 52.245-1 (June 2007, August 2010, April 2012)
    • Clause 52.245-9, “Use and Charges”
• Defense Federal Acquisition Regulation Supplement
  • Part 245: Department of Defense Policy
  • Associated (“property” related) DFARS clauses:
    252.211-7007 (“Reporting of Government-Furnished Property”)
    252.245-7001 (“Tagging, Labeling and Marking of GFP”)
    252.245-7002 (“Reporting Loss of Government Property”)
    252.245-7003 (“Contractor Property Management System Admin.”)
    252.245-7004 (“Reporting, Reutilization, and Disposal”)
Background: “Contract” Property

• Reference: DoD Instruction 4161.02, “Accountability and Management of Government Contract Property”

• Property that’s either:
  • Furnished to a contractor by the Government [“GFP”]
  • Acquired by a contractor—and where the contractor is entitled to be reimbursed as a direct item of cost [“CAP”] (Reference: FAR 52.216-7, “Allowable Cost and Payment”)

• CAP that is subsequently delivered and accepted undergoes a “change of state” – it becomes GFP (it is no longer CAP)

More on CAP later
• Federal Acquisition Regulation (FAR) 45.102: Contracting officers shall provide property to contractors only when it is clearly demonstrated—
  “To be in the Government’s best interest; that the overall benefit to the acquisition significantly outweighs the increased cost of administration; that providing the property does not substantially increase the Government’s assumption of risk; and that Government requirements cannot otherwise be met.”

• DoD Procedures, Guidance and Information 245.103-70 provides the criteria needed for a business case (“firm requirements”)
The requiring activity is the decision point on furnishing property to contractors

- FAR 7.105(a)(15), “Contents of Written Acquisition Plans”
- FAR 45.102, “Policy on Providing”
- FAR 45.201, “Solicitation Requirements”
- PGI 245.103-70: “Furnishing Government Property to Contractors”

Furnishing Government property is fundamentally a requiring activity or buying command “pre-award” activity
To fully understand contractual transfers of “property” accountability, we must first discuss:

- Legal aspects of contracts
- Federal contracting methods
- The nature of tangible assets

From there we can address:

- What “transfer” really means?
- What exactly is being transferred?
What is a contract?

“A mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them.” FAR Part 2, “Definitions”

What is agreed to is contracted for; what is contracted for is agreed to

Each contract stands alone (basic tenet of contract law)
“Nothing external to the contract can be read into it and applied to the parties”

“The courts will look to the contents of the contract and nothing more”

(DAU “Ask a Professor”)
“When needed to perform a Government contract: Property must have direct connection, nexus, or “attachment” to that contract—gained via the contract formation process through ultimate award, thus making it accountable to that contract—and no other.”

• What is a contractual transfer of property accountability?
  • Changing (“modifying”) what was previously agreed to; creating a new contractual arrangement
• What makes contractual transfers of property of accountability different?
  • Property is “tangible.” It’s something people *use*
  • Its use is bargained for, negotiated, and included as a contract term
• Property is the only contract term that physically exists (think about it!)
We will discuss the difference between contract accountability and “authorized use” later in this briefing.
Transfers require modification of two (can only be two!) contracts (property can only be accountable to one contract at a time)

- Adding Government “contract” property to an existing contract to benefit the Government
- Deleting that same property from the contract to which it is “attached” (i.e., currently contracted for)

We can only transfer property when:

- Firm requirements (FAR 45.102/45.106) exist under the gaining contract
- The property is no longer needed for performance on its accountable contract

…and the property is “GFP” (hold that thought!)
FAR 45.106, “Transferring Accountability”

“Government property shall be transferred from one contract to another only when firm requirements exist under the gaining contract.”

“Such transfers shall be documented by modifications to both gaining and losing contracts. Once transferred, all property shall be considered Government-furnished property to the gaining contract.”
• Meets FAR 45.201 requirements
• Required on all DoD contract writing systems (OSD memo April 2012)
• Also used for property transfers (like any other GFP)

Under Revision!
The following five (5) scenarios are the most common
“Losing” contract (Contract “A”) is physically complete, but has excess Government property (special tooling)

“Gaining” contract (Contract “B”) has no accountable Government property of any kind; “plain old” fixed price production contract

Both contracts are with the same contractor (and with the same PCO/buying command)
Discussion (Scenario 1)

• This is “new GFP” to the gaining contract; the requirements of FAR 45.102 (PGI 245.103-70) apply

• Both gaining and losing contracts require modification
  • Reference: FAR 45.106 and PGI 245.103-71
  • Standard Form 30 is required (No DD 1149s!)

• What’s required:
  • Consideration (Reference: FAR 42.302(a)(30)(v))
  • Standard GFP attachment is required on the gaining contract (PGI 245.103-72)
  • FAR clause 52.245-1 and its associated DFARS clauses must be added (and FAR 52.245-9, “Use and Charges”)

• Contract “B” requires a business case (Reference: FAR 45.102, PGI 245.103-70); i.e., do “firm requirements” exist?
Scenario 2
Again, both contracts are with the same contractor

“Losing” contract (Contract “A”) is physically complete; has excess Government property (special tooling)

“Gaining” contract (Contract “B”) has no accountable Government property of any kind; another “plain old” fixed price production contract

• Contract “A” is with Army
• Contract “B” is with Navy
First: Both DoD Components must agree!

- An interservice transfer of accountability (internal to the Government) must occur

- Component “property books” must be adjusted; this doesn’t involve the contractor
Discussion (cont.)

- Same as Scenario #1
- Both gaining and losing contracts need to be modified
  - Reference: FAR 45.106 and PGI 245.103-71
  - Standard Form 30 is required (No DD 1149s!)
- What’s required:
  - Consideration (Reference FAR 42.302(a)(30)(v))
  - Standard GFP attachment is required (PGI 245.103-72) on the gaining contract
  - FAR clause 52.245-1 and its associated DFARS clauses must be added (as well as FAR 52.245-9)
- Contract “B” requires a business case (Reference: FAR 45.102, PGI 245.103-70); i.e., do “firm requirements” exist?
Scenario 3
Contract “A” is with ABC Corp.
Contract “B” is with EFG Corp.

“Losing” contract (Contract “A”) physically complete, but has excess Government property (special tooling)

“Gaining” contract (Contract “B”) has no accountable Government property of any kind; “plain old” fixed price production contract
Discussion (Scenario 3)

- Same as Scenarios 1 and 2. This is “new GFP” to the gaining contract; FAR 45.102 (PGI 245.103-70) applies.
- Both gaining and losing contracts require modification:
  - Reference FAR 45.106 and PGI 245.103-71/
  - Standard Form 30 is required (No DD 1149s!)
- What’s required:
  - Property must be shipped to the new contractor
  - Consideration (Reference FAR 42.302(a)(30)(v))
  - Standard GFP attachment is required (PGI 245.103-72)
  - FAR clause 52.245-1 and its associated DFARS clauses must be added (as well as FAR 52.245-9)
- Contract “B” requires a business case (Reference: FAR 45.102, PGI 245.103-70); i.e., do “firm requirements” exist?
Scenario 4
Government sends out a new solicitation (not a contract yet!)

Contractor “A” has special tooling not specified in the solicitation; contractor includes in its proposal the use of that tooling, in turn lowering its bid $

The property is accountable to contract “A” (which is still physically active, i.e., not yet physically complete)
Where Government Property was NOT already specified in the Solicitation as being offered as Government Furnished Property, the Contracting Officer would need to request from the contractor:

(1) A list or description of all Government property that the offeror or its subcontractors propose to use on a rent-free basis. The list shall identify the accountable contract under which the property is held and the authorization for its use (from the contracting officer having cognizance of the property);

(2) The dates during which the property will be available for use (including the first, last, and all intervening months) and, for any property that will be used concurrently in performing two or more contracts, the amounts of the respective uses in sufficient detail to support prorating the rent;

(3) The amount of rent that would otherwise be charged in accordance with FAR 52.245-9, “Use and Charges” (Reference: FAR 45.201(c))
When price is the determining award factor:

- Contractor “A” already possesses Special Tooling under another contract
- Contractor “A” bids $500,000 in response to the solicitation
- Contracting Officer applies a rent equivalent evaluation factor of $33,000 (the amount of rent due if rent were charged)
- In effect, contractor “A”’s bid is increased by $33,000; so, contractor “A”’s bid is now $533,000 (for evaluation purposes ONLY!)

Thus, contractor “B” gets the award (they have the lower bid)
WHY?

FAR 45.202 (a): “The contracting officer shall consider any potentially unfair competitive advantage that may result from an offeror or contractor possessing Government property. This shall be done by adjusting the offers by applying, for evaluation purposes only, a rental equivalent evaluation factor as specified in FAR 52.245-9.”
A Few Words About Contract Mods

- Standard Form 30, “Amendment of Solicitation/Modification of Contract,” is required (No DD 1149s!)
- DoD’s standard GFP fillable PDF attachment must be added to the gaining contract (only); not the losing contract
  - No MS EXCEL spreadsheets
  - No MS WORD documents
  - No kidding! (must have the standard GFP attachment)
- Reference: PGI 245.103-72
...and GFP Attachments

- Aligns with FAR 45.201, “Solicitation Requirements”; the Government’s “promise” list of GP to be provided upon award; it’s really not a new requirement
- There is no requirement for reconciling against contractor records, i.e., add/delete (myth & legend)
- In the case of transfers...attachment is added to the gaining contract—only—not the losing contract
Scenario 5
So what’s the difference between a contractual transfer of property accountability and an authorized use provision?
Use vs. Accountability

- The difference is **severability**
- Contract terms are not severable from their contract; by extension, neither is accountable Government property
- Where as authorized use may be permitted on other contracts, the property remains “attached” to its accountable contract
• Transferring accountability from one contract to another means:
  • Detaching an asset(s) from one contract, and
  • Attaching that same asset(s) to another contract by modifying contract terms
• This is a unique contractual event; again, property is the only contract term that physically exists
“Losing” contract (Contract “A”) is active (not physically complete); has special tooling; used only about 20% of the time.

Contract “B” has no accountable property of any kind; “plain old” FP production contract.

Contractor says it could accelerate delivery on contract “B” if allowed to use the special tooling accountable to contract “A”.

Both Contracts are with the same PCO and same contractor.
Discussion (Scenario 5)

• What should the Government consider?
  • Was contractor use of Government owned property considered during contract formation?
  • Will the use of Special Tooling on contract “B”:
    • Jeopardize performance of contract “A”?
    • Increase risk to the Government, or costs, e.g., additional maintenance due to more wear and tear?

• What’s required: in principle, should be treated as a new procurement
  • Firm requirements on the gaining contract must exist
  • Rationale must be documented (FAR 45.102/PGI 245.103-70)
• The Special Tooling remains contractually accountable (attached) to contract “A” (the tooling is still needed!)
• This is not new GFP to contract “B”; but the principles of FAR 45.102 (PGI 245.103-70) must still be considered, i.e., “firm requirements” must exist
• Both contracts must be modified to reflect that authorized use was granted
• Consideration from contract “B” (e.g., faster delivery, etc.) may be required
One other wrinkle...
Transfers of Contractor Acquired Property are Different

Why? Because Contractor Acquired Property is Different
Quick Review: What is CAP?

• CAP is property the Government has taken title to under a cost reimbursement contract; contractors are entitled to be reimbursed (FAR 52.216-7, “Allowable Cost and Payment”)

• CAP exists ONLY within a cost reimbursable environment (cost reimbursable contract or FP contract with cost reimbursement CLINS); CAP is not listed in contracts as a deliverable nor is it GFP

Contractors are required to manage/control CAP under FAR 52.245-1 requirements
• Prior to transfer to another contract, CAP must first be “converted” to GFP. This requires a “delivery event”
  • Contract Line Items or “CLINS” must first be created; this allows the CAP to be delivered and accepted by the Government (thru WAWF iRAPT) – on the contract to which it was acquired...like any other deliverable
  • A contract modification can now be created; once signed by the Contracting Officer, the CAP can be “delivered” as specified in the CLIN
• The CAP becomes GFP upon execution of the delivery event
Thus, contractual accountability has moved from the losing contract (Contract “A”) to the gaining contract
PGI 245.402-71, “Delivery of Contractor-acquired Property”

“(1)(i) When delivery of contractor-acquired property is required, the contracting officer shall direct that the delivery be accomplished by contract line item, except as described in paragraph (1)(ii) of this section.”

We can only transfer GFP, which means that we cannot ever transfer CAP to another contract…“as CAP”
Yes. You Heard That Right

CAP can never be transferred...as CAP

CAP must first be converted to GFP (via a CLIN)
Many Possibilities

- Scenario 1. Same contractor; from one existing contract to another under the same PCO
- Scenario 2. Same contractor; two different contracts under two different PCOs. Same DoD Component
- Scenario 3. Same contractor; two contracts under two different DoD Components (Army and Navy, for example); by extension two different PCOs
- Scenario 4. Two different contractors; by extension, two different contracts. Same PCO
- Scenario 5. Two different contractors; by extension two different contracts. Two different PCOs/same DoD Component
- Scenario 6. Two different contractors; two different PCOs. Different DoD Components (Army and Navy); by extension, two different PCOs
This might seem complicated!
That’s why it’s called contract “management”
Summary

- Transfers of accountability must be in the Government’s interest, not the contractor’s.
- In principle, transfers should be treated as a new procurement.
  - Firm requirements on the gaining contract must exist.
  - Rationale must be documented (Reference: FAR 45.106 and PGI 245.103-70).
- Principles of transfer also apply to granting authorized use.
  - Minimize competitive advantage.
  - Maintain a level procurement playing field.
A Short Discussion on PCARSS
• DCMA “etool”—Plant Clearance Automated Reutilization Screening System

• Deployed in the late 1990s; PCARSS allows contractors to electronically report property excess to contract requirements

• It can also create standard GFP attachments (for contracts administered by DCMA)

Required under DFARS clause 252.245-7002, “Reporting, Reutilization, and Disposal”
How the Process Works

• The contractor:
  (1) *Identifies* a new requirement (contract); (2) *requests* transfer of accountability to the other contract; and (3) *reports* the property to PCARSS/identifies the contract number (consistent with FAR 52.245-1(j))

• PCARSS creates the GFP attachment, and emails it to the DCMA Contracting Officer (CO)

• The CO can now execute (or *not*)
  • If approved, the CO creates the contract modification; includes the standard GFP attachment; adds clauses, etc.
  • If disapproved, the excess property is disposed of like any other excess property (Reference: FAR 45.6); but the contractor will have to resubmit the schedule to PCARSS
If “Yes” is selected for this question, the User must enter a DCMA Contract Number.
PCARSS does not transfer anything…
…but it can create the Standard GFP Attachment

Reporting property to PCARSS does not constitute a request for transfer of accountability; contractors must formally notify the contracting officer (a process outside of PCARSS)
• The question I hear most often: are contractors required to use PCARSS to create the attachment?
• Short Answer: No. FAR 52.245-1(j)(1)(“Pre Disposal Requirements”) contains the following language:

(i) If the Contractor determines that the property has the potential to fulfill requirements under other contracts, the Contractor, in consultation with the Property Administrator, shall request that the Contracting Officer transfer the property to the contract in question, or provide authorization for use, as appropriate
• FAR 52.245-1(j)(1) is a Pre Disposal Requirement. Accordingly, there is no contractual requirement to use PCARSS during this pre-decisional phase.

• There is, however, a contractual requirement to notify the contracting officer if the property can be used on another contract; use of PCARSS facilitates that process.

• Reporting the property through PCARSS creates that list (standard GFP attachment), using the established practice of reporting property excess to contractual requirements.
Bottom Line: It’s not about PCARSS; It’s about the data (the GFP attachment)
GFP Policy

Training, Procedures, and Tools

www.dodprocurementtoolbox.com
BACK UP SLIDES
DFARS 252.232-7003 (b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests and receiving reports using WAWF, in one of the following electronic formats that WAWF accepts: Electronic Data Interchange, Secure File Transfer Protocol, or World Wide Web input. Information regarding WAWF is available on the Internet at https://wawf.eb.mil/.

DFARS 252.246-7000 "(b) Contractor submission of the material inspection and receiving information required by Appendix F of the Defense FAR Supplement by using the Wide Area WorkFlow (WAWF) electronic form (see paragraph (b) of the clause at 252.232-7003 <http://www.acq.osd.mil/dpap/dars/dfars/html/current/252232.htm>) fulfills the requirement for a material inspection and receiving report (DD Form 250)."

DFARS Appendix F (b) The use of the DD Form 250 is on an exception basis (see DFARS 232.7003 <http://www.acq.osd.mil/dpap/dars/dfars/html/current/232_70.htm> (a)) because use of the WAWF RR is now required by most DoD contracts
Special Tooling fabricated by the contractor and direct charged to the Cost Reimbursement Government Contract where the Government has title.

“Contractor-acquired property” (CAP) means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title.

**DELIVERABLE END ITEM**

**CAP** of the Material classification acquired by the Contractor and used to Produce the Deliverable End Item.

Special Test Equipment acquired by the contractor and direct charged to the Cost Reimbursement Government contract where the Government has title.

**CAP** of the ST classification acquired by the contractor and used to fabricate parts for the Deliverable End Item.

Material acquired by the contractor and direct charged to the Cost Reimbursement Government Contract Where the Government has title.

**CAP** of the STE classification acquired by the Contractor and used to test the Deliverable End Item.

Special Tooling fabricated by the contractor and direct charged to the Cost Reimbursement Government Contract Where the Government has title.

**CAP** of the STE classification acquired by the Contractor and used to test the Deliverable End Item.

Slide courtesy of Dr. Goetz