

GEORGE MASON UNIVERSITY LAW SCHOOL
Contract Negotiations of Government Contractors - Spring 2024
Mondays, 8:10 p.m. – 10:10 p.m. (2 credits)
Professor Dean Dastvar (he/him)
dean@varyst.com

Syllabus

1. Background

As of late November 2023, of the \$650B+ that the US Government spends annual in government contracts and grants, \$122B+ was spent in Virginia and given to Virginia-based recipients, making Virginia the third largest recipient jurisdiction in the US (behind California and Texas) in Fiscal Year 2023. Numerous large and powerful companies in government contracts have headquarters or a significant presence in the DC metropolitan area, such as Boeing, Lockheed Martin, Raytheon, and Northrop Grumman. In addition to the larger players, many small yet powerful companies aggressively compete for government contracts or subcontracts and are forced to both cooperate and compete with one another in the tough world of public sector contracts, where millionaires are sometimes made overnight. Allies become competitors, competitors become litigants, and litigators may become owners, all in a heartbeat. It's up to you, a promising new legal professional in this landscape, to help navigate a young company to success. In this course, you will live that story through an immersive practice of law, negotiating the contracts (and politics) of US government contractors.

2. Student Learning Outcomes

- a. By the end of this course, students should:
 - i. Understand the business lifecycles of federal government contractors and the associated legal issues within the transactions which regularly take place
 - ii. Review, redline, and draft clauses which are unfavorable to their prime/subcontractor client with improved technique and ability
 - iii. Anticipate and diagnose key legal and business issues within the various transactions of government contractors and effectively mitigate them
 - iv. Express legal opinions and advisory to their clients, immediate managers, and counterparties in practical, efficient, and accessible language
 - v. Build and manage a contract playbook to maintain your company's risk profile within acceptable levels

3. Class Preparation and Participation [30% of Grade]

- a. Before each class, all students should read the assigned materials, perform work assignments, and prepare to engage scenarios with clients, counterparties, or immediate supervisors. These roles will be played by either the professor or fellow students.
- b. To simulate live practice, students will be held to account as full legal professionals – how you present your understanding, your professionalism, your work product, and your level of effort to engage with the course material will affect your participation grade. **Your participation score is 30% of your grade.** You are required to bring your preparation and professionalism daily.

- c. Negotiations and contract reviews are also part of your participation grade. You will be going against either the professor or your peers. Your grade will be based on your level of effort and preparation. This includes:
 - i. Asking the professor questions in advance to better engage with a scenario
 - ii. Preparing an effective negotiation strategy with yourself or your team
 - iii. Reviewing and/or preparing the company negotiation playbook
 - iv. Attempting to think through all major potential risks for your client
 - v. Attempting to spot contractual risks for your client

4. Final Take Home Project [70% of Grade]

- a. Your final grade will be largely based on a self-scheduled take home project - the review of a fictional Federal GovCon NDA, Teaming Agreement, and Subcontract as the fictional Subcontractor company based on a quasi-fictional federal solicitation. You will be evaluated based on your ability to:
 - i. Issue spot and explain the issues - "What are risks and why are they risks?"
 - ii. Redline the issue in the document - "What do we add and/or remove to fix it? Why?"
 - iii. Explain to your General Counsel (the professor) what fallbacks you propose if the counterparty does not accept your approach. You must try to anticipate your adversary - "How will we respond in the future?"
- b. Your score will be based on the effectiveness of your representation based on the above criteria.
 - i. You must diagnose the risks, express and implied, and directly respond to said risks for the short term while crafting and explaining strategies for mitigation in the longer term of the negotiation process.
- c. This is an absolute score without a curve.
- d. **Your final exam will be 70% of your grade.**
- e. The due date of this project will be announced during the beginning weeks of the course.

5. Use of AI Policy

- a. Unless otherwise stated by University policy, using a Large Language Model ("LLM") is ok in my class. LLMs (such as GPT or Bard) are the newest weapons in a legal professional's arsenal and should be closely studied and experienced by the new generation. If you learn a new trick or ability with prompt engineering, please show the class so we can all learn more about this cutting-edge technology together. You can use LLMs to help you any complete your assignments.
- b. CAVEAT: Please keep in mind that while they can help analyze text and generate text, LLMs cannot think for you (at least not yet). An LLM cannot catch all of your client's risks and it cannot provide effective legal counsel. It is your brainpower, instinct, intuition, creativity, experience, and professional excellence that is the true value-add in this course as well as in your practice for your clients. As in your future professional life, in this class you will have final ownership of all work product submitted.

6. Attendance

- a. Your attendance is required for credit in this course, as set forth in the Academic Regulations 4-1, which can be found at the link: <https://www.law.gmu.edu/academics/regulations>.
- b. You may miss a maximum of 3 class sessions and remain in compliance with the attendance policy. (AR 4-1.1.)
- c. You must be present for at least 90 minutes (75%) of a 2- hour class to be considered in attendance. (AR 4-1.1.)

7. Topics and Reading/Work Assignments

- a. Throughout the course, you will be given reading and work assignments designed to drill important skills and help you hone your craft. They will be tested on your final project so it is important to ask questions during the class and prepare your notes for your final. You will be expected to incorporate the skills you have learned and with your client's criteria. As an in-house counsel/legal professional, you will have one client throughout the course and must learn what its specific needs are in terms of legal risk and strive to meet them.
- b. The following assignments may be revised or supplemented during the progression of the semester, and I will inform you of any changes by email. Please note that the right-most column is the preparation you should have completed BEFORE the beginning of class. You will be called on to present your understanding and provide your advisory often.

Date	Topic	Preparation
Week 1 - Introduction to Federal Contracts	<p>Discussion of macro/microscopic overview of how the Federal Contracting Process works</p> <p>Understand the scale and scope of the US Federal Contracting System</p> <p>Understand how the US tax dollar's lifecycle from appropriations to procurement</p> <p>The <i>Christian</i> Doctrine</p> <p>Preparing for the Scenario with the Client company, which will persist throughout the semester</p>	<p>Please read the syllabus carefully.</p> <p>Reading: CRS: Overview of the Federal Procurement Process and Resources</p> <p>CRS: The Appropriations Process: A Brief Overview</p> <p>CRS: The Congressional Appropriations Process: An Introduction (optional)</p> <p>CRS: Overview of the Authorization-Appropriations Process</p> <p>Brookings: Reforming Federal Procurement...</p>

Week 2 – The Initial Steps: Team Formation	<p>Helping a GovCon client through the initial phases of opening discussions with fellow GovCons</p> <p>Understanding the Anatomy of a Teaming Agreement</p> <p>Understanding how the process works in a GovCon’s lifecycle from capture to fulfillment.</p> <p>Understanding the legal and business risks with each part of the process</p>	<p>Reading: Browse the following FAR Parts and have an overview of each FAR Part general purpose (this is just to get a mental map): 1-4, 6-7, 9, 12, 15-16, 19, 31, 37, 42-44, 46, 52-53</p> <p>Steptoe: The Government Contractor Teaming Agreement Toolkit</p> <p>Work Assignment:</p> <ol style="list-style-type: none"> 1. Review Playbook from General Counsel 2. Review NDA #1 using Playbook 3. Review Teaming Agreement #1 using Playbook
Week 3 – After the Win – the Anatomy of a Subcontract	<p>Review submitted redlines</p> <p>Walk through anatomy of NDA and TA – pitfalls</p>	<p>Work Assignment: In Teams of two (2):</p> <ol style="list-style-type: none"> 1. Review NDA #2 2. Review TA #2 3. Review CTA #1 <p>Submit Redlines to professor by 11:59pm before class – be prepared to present redlines to class.</p>
Week 4 – Negotiating the Subcontract Part 2	<p>Explaining the anatomy of a Subcontract</p> <p>Explaining the Risks within a Sub-k:</p> <ol style="list-style-type: none"> 1. Limitation of Liability 2. Indemnification 	<p>Work Assignment:</p> <ol style="list-style-type: none"> 1. Review NDA #3 2. Review TA #3 3. Review Sub-k #1 <p>Submit Redlines to professor by 11:59pm before class – be prepared to present redlines to class</p>
Week 5 –Data Rights, Sensitive Information, and Privacy	<p>Data Rights</p> <p>Intellectual Property – Work Made For Hire</p>	<p>Reading: Fox Rothschild: The Federal Contractor's Guide to Data Rights</p>

	<p>IP in the FAR</p> <p>Privacy – Data</p> <p>CUI</p> <p>FOCI</p>	<p>NSF: Introduction to CUI</p> <p>DCSA: CUI FAQ</p> <p>FOCI: Intro to DCSA, FOCI, and FOCI Mitigating Agreements</p> <p>Work Assignment: Review and Redline: Subcontract #2</p>
<p>Week 6 – Mergers and Acquisitions Pitfalls: Novation and the Anti-Assignment Act</p>	<p>Assignment and Novation with the Federal Government</p> <p>What’s allowed?</p> <p>How do we do it?</p> <p>How do we write/redline a clause well?</p>	<p>Reading: Anti-Assignment Act (41 U.S.C. § 6305)</p> <p>FAR 42.1204(a), Applicability of novation agreements.</p> <p>Koprince: GAO Confirms that Novations Work: Agency Properly Recognized Buyer of Contract as Awardee</p> <p>Work Assignment: Drill: Assignment Clauses</p>
<p>Week 7 - Payment terms– How the Government pays for what it buys</p>	<p>Payment Terms</p> <ul style="list-style-type: none"> • Firm Fixed Price • Time & Materials • Labor Hours • Lowest Price Technically Acceptable (LPTA) <p>Evaluate the Pros and Cons: Payment Terms – Between Contractors Pay-when-Paid (“PWP”) Net 30 (or 60, 90 etc.)</p> <p>When things don’t go well: Rights of withholding and setoff Interest payments Breach for lack of payment</p>	<p>The Firm Fixed Myth</p> <p>Pay-when-paid/pay-if-paid risks</p> <p>New Virginia Law Prohibits “Pay-When-Paid” and “Pay-If-Paid” Provisions in Construction Contracts</p> <p>Right of Setoff (Federal Construction)</p> <p>Review FAR Clause for the “Payment Terms” outlined (center column)</p>

		<p>Prepare to defend/attack a PWP clause (TBD). Explain why it is a risk or isn't a risk from either Prime or Subcontractor perspective</p>
Week 8 – Termination	<p>By Government vs. Contractor</p> <p>The Risk and Rewards of Termination:</p> <ul style="list-style-type: none"> • For Convenience • For Cause • For Insolvency 	<p>Review and be prepared to explain: FAR 52.249-2 Termination for Convenience of the Government (Fixed-Price).</p> <p>Read: You've Just Been Terminated for Convenience, Now What?</p> <p>Read: Theodore Watson – Termination for Default</p> <p>Read: Unfairly Terminated? Recent Cases Offer Contractors Relief</p> <p>Drill: Review the assigned clauses (TBD) and outline the risks to your client.</p>
Week 9 Dispute Resolution	<p>Dispute Resolution Methods Pros and Cons: ADR vs. Courts</p> <p>Reviewing Pros and Cons –can a counterparty benefit from ADR more than your client?</p>	<p>Westlaw: ADR</p> <p>HBR: ADR</p> <p>AAA's Guide to Drafting the Clause</p> <p>(TBD) Practical Law: What's Wrong with My Arbitration Clause?</p> <p>Drill: Review the various ADR Clauses for potential issues and redline accordingly. Please prepare your discussion for the class</p>

Week 10 – Corruption, Fraud, and Espionage	<p>Corruption: What is the Anti-Kickback Act? How is it implemented? Corruption and other issues</p> <p>Fraud: Right of Audits</p> <p>National Security: Export to Non-citizens</p>	<p>52.203-7 Anti-Kickback Procedures</p> <p>Anti-kickback example #1</p> <p>SBIR: Defense Audits</p> <p>Jones Day: Compliance with Export Controls Can Be Essential to Winning Government Contracts</p> <p>Drill: Analysis of Audit Clauses</p>
Week 11 – Managing Competition	<p>Knowing how to deal with:</p> <ul style="list-style-type: none"> • Non-compete • Non-solicitation • Organizational Conflicts of Interest 	<p>FAR Subpart 9.5,</p> <p>Non-Compete Agreements: The Trend Toward Obscurity?</p> <p>Non-solicitation Article TBD</p> <p>Drill: review non-compete and non-solicitation clause scenarios and prepare advisory for your client regarding risks (TBD).</p>
Week 12 – Bid Protests	<p>Bid Protest Methods</p> <ul style="list-style-type: none"> • Agency • GAO • COFC • ASBCA <p>What if the Subcontractor wants to protest but you, as the Prime, do not wish to upset the end customer (e.g., DoD)?</p>	<p>CRS: Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments</p> <p>Drill: Review provided scenarios and prepare advisory to your client regarding a potential protest.</p>
Week 13 – Recap Week	<p>Big Recap – Review of major key terms and playbook in preparation for your final project.</p>	<p>Work Assignment: Final Practice Reviews:</p> <ul style="list-style-type: none"> • NDA • Teaming Agreement

	<p>We will go over your redlines live and Q&A for each clause of the NDA, TA, and Sub-k as needed.</p> <p>We'll go over the Playbook and how it will apply to your final project.</p> <p>Good Luck!</p>	<ul style="list-style-type: none">• Subcontract
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