

# Government vs. Commercial Contracts: Specific Comparisons Between the FAR and the UCC



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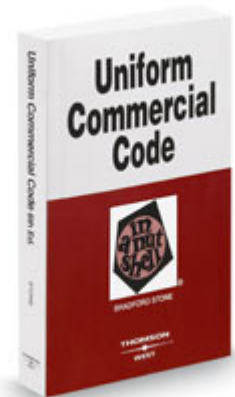
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# Three Part Comparison

- **Uniform Commercial Code**
  - Contractual “presumptions” applicable to commercial transactions between merchants
  - Party-neutral
- **Federal Acquisition Regulation**
  - Largely mandatory terms and conditions appropriate for contracts between a private contractor and the Government
  - Favors the Government and the taxpayer
- **FAR Part 12 - Government Acquisition of Commercial Items**
  - Acknowledges that typical Government contract methods are not effective for its acquisition of commercial items
  - Middle ground between “Traditional FAR” and UCC

# The Uniform Commercial Code

- Article Two: Contracts For Sale Of Goods, Entitled “Sales”
- Article Two Intends To Codify the Common Law
  - Largely adopted by 49 states (Louisiana) and Washington D.C.
- Fundamental Purposes [UCC 1-102(2)]
  - To simplify, clarify and modernize the law governing commercial transactions
  - To permit continued expansion of commercial practices through custom, usage and agreement, and
  - To make uniform the laws of various jurisdictions
- Designed To Facilitate The Free Flow Of Commerce
  - Supplies reasonable substitutes for missing terms
  - Unless the contract states otherwise, UCC presumptions apply



# The Federal Acquisition Regulation

- The “Traditional FAR”
  - Tool to ensure material terms are in writing
  - Unlike UCC, FAR provisions cannot be “tailored”
  - Favors one contracting party (Government) over the other to protect the taxpayer
- The “Commercial Item” FAR
  - FAR Part 12: governs Government acquisition of commercial items
  - Relies on market to regulate price and quality
  - Some commercial item acquisition provisions can be “tailored” [exceptions to tailoring, See FAR 12.302(b)]



## FAR v. UCC

- Recognize The Different Interests Of The Respective Buyers And Sellers
  - FAR Reflects the Power Of Government As Buyer
  - UCC Balances Interests Of Buyer And Seller
  - FAR Part 12: Recognizes That Typical FAR Provisions Are Unnecessary When Government Buys Commercial Items
    - ❖ Middle ground between “Traditional FAR” & UCC



# FAR Part 12 Procurements

- Federal Acquisition Streamlining Act (FASA) of 1994 (Public Law 103-55)
- Acquisition of supplies or services that meet FAR 2.1 definition of “commercial item”
  - Items customarily used by general public or non-governmental entities for non-governmental purposes
  - Items not yet on market evolved from a commercial item through technological or performance advancements
  - Modified commercial items

# Contract Formation

## ***Uniform Commercial Code - Commercial Transactions***

- Offer & Acceptance Need Not Be Unequivocal - Writing Not Required
  - UCC 2-207: expression of acceptance containing additional, non-material terms is still acceptance
  - UCC 2-305: failure to specify price is not fatal
- No Competition Requirements

## ***FAR - Government Non-Commercial Purchases***

- Offer And Acceptance Are Clear And Unequivocal
- Sealed Bidding Procedures (FAR Part 14) And Negotiated Procurements (FAR Part 15)
  - Written terms
  - Description of goods, price, place of delivery and inspection/acceptance terms
- Requirement Of Full And Open Competition (FAR 6.000)



# Contract Formation (*cont'd*)

## ***Government Acquisition Of Commercial Items***

- Solicitation And Evaluation Requirements
  - Solicitation pursuant to FAR 12.204 (SF 1449) - “encouraged,” if simplified acquisition threshold not exceeded
  - Streamlined solicitation pursuant to FAR 12.603 - appropriate when FAR 12.204 not used
  - FAR 12.205 or 12.602 - evaluation and contracting officer acceptance
- Formal Competition
  - Both FAR 12.205 and FAR 12.603 discuss methods for evaluating and comparing multiple offers
  - FAR 13.500 – Test Program-simplified acquisition procedures appropriate for commercial item purchases not exceeding \$5,500,000

# Warranties

## UCC - Commercial Transactions

- Express And Implied Warranties
- UCC 2-313: Express Warranty
  - Affirmation of fact or promise which is part of the bargain
  - *I.E.*, description of goods or showing of sample
- UCC 2-314: Implied Warranty (Merchantability; Usage of Trade)
  - Fair, average quality
  - Fit for ordinary purpose
- UCC 2-315: Implied Warranty (Fitness For Particular Purpose)
  - Seller has reason to know the buyer's intended use
  - Seller knows buyer is relying on seller's expertise



## Warranties (*cont' d*)

### ***FAR - Government Non-Commercial Purchases***

- FAR 52.246-17 and FAR 52.246-18: contain non-mandatory warranties for simple and complex items
  - Each warrant that items are free from defects and will conform with requirements of the contract
  - Each disclaim the implied warranty of fitness and merchantability

### ***Government Acquisition Of Commercial Items***

- FAR 52.212-4(o): Warrants Merchantability and Fitness
- Accommodates Commercial Tendencies - Offers No More Than Warranties Applied In Commercial Practice
- Negotiable

# Inspection

## ***UCC - Commercial Transactions***

- UCC 2-513 - Buyer's Right To Inspection Of Goods
  - Buyer can inspect prior to payment at any time, in any reasonable manner
  - Expenses of inspection borne by buyer, UNLESS goods are rejected

## ***FAR - Government Non-Commercial Purchases***

- FAR 52.246 - Inspection Of Supplies
  - Contractor must establish and maintain an inspection system acceptable to the Government
  - Government retains right to inspect goods prior to acceptance
  - Government retains right to review inspection documents during contract performance and for as long afterwards as the contract requires

## ***Government Acquisition Of Commercial Items***

- FAR 52.212-4(a) - Inspection/Acceptance For Commercial Items
  - Seller warrants that the goods conform with the contract requirements
  - Government retains right to inspect goods prior to acceptance
  - Government has no right to examine inspection documentation



# Unilateral Changes

## ***UCC - Commercial Transactions***

- Buyer Has No Right To Unilaterally Change A Contract
- UCC 2-209: Addresses Modification, Rescission And Waiver
  - Consideration not necessary to modify or change contract
  - Modifications must be in writing and bilateral

## ***FAR - Government Non-Commercial Purchases***

- FAR Part 43: Gives Government The Right To Unilaterally Change
- 52.243 *et seq.*: Contracting Officer Change Orders Must Be Within General Scope Of The Contract

## ***Government Acquisition Of Commercial Items***

- FAR 52.212-4(c): Unless Contract Has A Changes Clause, Only Bilateral Modifications Are Permitted And They Must Be In Writing



# Contractor Claims/Disputes

## ***UCC - Commercial Transactions***

- “Traditional” Litigation
- Defines Permissible Damages

## ***FAR - Government Non-Commercial Purchases***

- If Government Issues A Change Order And Parties Can't Agree On Price or Schedule - Dispute Resolution Under Contract Disputes Act (“C.D.A.”), 41 U.S.C. § 601 *et seq.*
- Constructive Changes - Also Give Rise to C.D.A. Procedures

## ***Government Acquisition Of Commercial Items***

- FAR 52.212-4(c) - Changes Can Be Made Only By Written Agreement Of The Parties
- FAR 52.212-4(d) - Disputes. Failure To Reach Agreement On Matters
- Arising Under Or Relating To The Contract Is A Dispute Subject To The C.D.A.



# Terminations For Convenience

## ***UCC - Commercial Transactions***

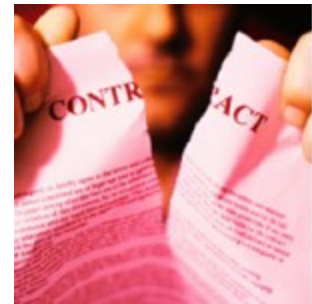
- No Coverage Unless Negotiated Into Contract
- If Commercial Contract Contains Termination for Convenience Clause, Contract May Be Illusory If No Provision For Recovery Of Costs

## ***FAR - Government Non-Commercial Purchases***

- FAR Subpart 49.1 - 49.3: Gives Government The Right To Unilaterally Terminate A Contract For Convenience
- Government Can Do So When In Government' s “Interests” See FAR 49.101(b)
- Contractor Entitled To Cost Of Terminated Work Plus Profit on Costs Incurred
- If Cannot Reach Agreement: A “Dispute,” Subject To C.D.A. Procedures
- Government Maintains Audit Rights For 3 Years After Final Settlement

## ***Government Acquisition Of Commercial Items***

- FAR 12.403
  - Only when in Government' s “best interests”
  - Contractor entitled to % of work performed plus reasonable termination costs
  - No Government audit rights



# Cost Or Pricing Data

## ***UCC - Commercial Transactions***

- Not Addressed

## ***FAR - Government Non-Commercial Purchases***

- Contractor Must Certify That It Has Given All Facts Which All Prudent Parties Would Expect To Impact Negotiations
- 10 U.S.C. § 2306a (TINA), 41 U.S.C. § 254(b) (authorizing audit and inspection)
- Exceptions
  - Acquisition below minimum threshold - \$650,000
  - Prices set by law
  - Determination of adequate price competition
  - Commercial item acquisitions

## ***Acquisition Of Government Commercial Items***

- Exempt From Disclosure



# Audit Rights

## ***UCC - Commercial Transactions***

- No Coverage

## ***FAR - Government Non-Commercial Purchases***

- 52.215-2: Audit and Records, Negotiation
  - Until 3 years from final payment
  - Proposal, pricing, negotiation and performance records
  - Access for Comptroller General or Contracting Officer
- Additional “Audit” Rights Under The Inspection Clause

## ***Government Acquisition Of Commercial Items***

- FAR 52.212-5(d): If Competitive, Exceeds Simplified Threshold And Excludes 52.215-2
  - Until three years from final payment
  - Access to “directly pertinent” records involving transactions related to the contract, not to pre-award disclosures or cost or pricing data
  - Access for Comptroller General



# QUESTIONS??

