

**Government Contract Law
in the
Twenty-First Century**

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Government Contract Law in the Twenty-First Century

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Preface and Acknowledgments

Government contracting matters more than ever. Government has grown, especially in what it does—and how it uses contracting to get its jobs done. As an example, for the wars in Iraq and Afghanistan, the government used contractors for everything from serving meals and repairing vehicles to providing interpreters and guarding convoys and bases. At times, in the theater of war the government had more contractors than it had military or civilian employees.

Like the business of government contracting, the law of government contracting matters more than ever, too. It provides the legal structure for the government to buy its enormous needs of goods and services. These are transactions with a far larger role for lawyers than contracts between purely private parties, because government contracting is far more regulated. Government contracting carries out the great range of policies by which Congress and Executive authorities seek to make procurement economical, efficient, competitive, practical, fair, and an instrument of diverse substantive national policies like support for small business. As a field of practice, it puts lawyers—both established and starting—to work where they can accomplish much for their clients, their country, the economy, and themselves.

Through this subject, such lawyers take on the challenges of a sophisticated legal specialty. As a subject, it is both intensely practical and intellectually stimulating. There is no point in memorizing or otherwise dully plodding away at government contract law. This body of law is too vast, too complex, and too rapidly evolving to be mastered entirely in a single semester course of study. Those who tackle it learn core concepts and then learn to follow the trail of study to specific advanced areas.

This book on government contracting law in the 2000s has roots in a predecessor volume, *Government Contracting Law: Cases and Materials*, first published in 1998. It is a very new book that follows a very new approach in key respects.

Reviewing its novel approach serves as an introduction to its contents. This book has adopted a new focus, so that instead of being heavily weighted just to traditional core topics, it covers a wide set of interesting emerging topics. The book has nineteen chapters, seven beyond the predecessor book, reflecting this diverse set of fresh topics. The new chapters, plus many new subchapters and current cases and notes even in the core chapters, reflect a whole new set of worlds in government contracting since the 1990s.

It helps to group all the new material into four largely or entirely new lines of practice reflected in this book's new chapters. One line of practice covers technology and health, which have the necessary new chapters. A few years back, issues of technology, and specifically intellectual property, were relatively simple. The government acquired the intellectual property it needed, on its terms. And, a government contracting book could omit contracting with health providers altogether, because government payment for medical goods and services did not matter so much.

Now the government acquires much of the intellectual property—such as word processing software like that with which this book, and millions of government documents

a week, are written—in a “commercial” way that makes complex compromises with the commercial world about intellectual property. And, the government’s purchases of health care are big business, with rapid evolution in the 2000s of how the government, particularly the Defense Department, buys health care.

Second, government contracting has new and complex litigation aspects. The book has the contemporary chapter on the False Claims Act and defective pricing suits. In the last century, the False Claims Act case law had only begun its development after the 1986 statutory amendments. Now that body of law is full-blown; and there have been a string of important Supreme Court rulings in the 2000s. The book has separate chapters on protests, and on claims, reflecting how each has rapidly evolved. Since 2000, protests no longer come to district courts, while the Court of Federal Claims has become their vital judicial forum. Claims now come through a consolidated Civilian Board of Contract Appeals.

Third, transactional government contracting has evolved, too. Commercial, IDIQ, and MAS contracting have mushroomed, with their unique bodies of law. Not until 2008 could a challenger even protest an IDIQ task order award; now IDIQ case law is a whole subject. Commercial and MAS contracting law have moved rapidly as the era of government-restricted procurement has given way to a commercial market. So these areas have the new chapter they need. And, construction law has its own chapter, reflecting how it increasingly emerges as a separate specialized body of law.

Fourth, government contracting has increasing connections with diverse policy realms. This book has the current chapter on international procurement, including the global wars from 2001 to the present. More than ever before, we live in a global world. We make war with the support of private contractors, and we have new government contracting law to deal with these challenges. This book has the needed chapter on government and contractor workforce, recognizing how developments reflect how much more they matter, with so much more procurement of services, rather than goods, and close oversight by government employees of what contractors provide. The 2000s shook up the government workforce issue, with the struggles over whether the defense and homeland security employees would be organized as in the past. And, the book has the contemporary chapter on government breach and takings, subjects more emphasized these days, in the wake of *Winstar*, than hitherto.

With these new lines of practice and so many new subjects, the book’s cases have had to catch up to the present. A large majority of the book’s cases come from the last decade or two. Whenever possible, the book has traded in older in favor of more recent cases. Among other benefits, this increases the likelihood that the cases will discuss a context familiar to the students of this generation. For example, almost none of this book’s cases that relate to wartime procurement relate to the experience of past generations with World War II, the Korean War, the Vietnam War, or even the Persian Gulf War. The war-related cases have to do with the Iraq and Afghanistan wars. Very few of the cases in this book that relate to regulations, stop with the versions of the regulations before the Federal Acquisition Regulation (FAR) of 1984. These fresh cases focus on the implementation and evolution of the FAR and successor waves of regulations as the new development.

Does this mean that those who taught the predecessor volume must throw out their whole set of notes for their government contracting course and start all over from scratch when planning how to teach from this book? Of course not. The book has continuity for the core subjects of the government contracting curriculum. Those continuing basics include the limited authority of officials, competition, negotiated procurement, and protests of awards. So too do the basics continue of the core of contract types and administra-

tion, changes, claims, small businesses and subcontracts, and disputes. Termination for convenience and for default are as they were.

As to these subjects, this book uses fresh cases in place of those from decades ago, and delves into new aspects that have replaced old ones. But, those who taught the predecessor volume will have no unnecessary difficulty teaching the core of their course using the new one. Moreover, they will find their load lightened by their not having to supplement the book with explanations of what has changed in the years since the 1980s, the 1990s, or even the early 2000s.

As for the two authors, Charles Tiefer, Professor at University of Baltimore Law School, annually teaches a course in government contract law. He served as General Counsel (Acting), Deputy General Counsel, and Solicitor of the U.S. House of Representatives in 1984–95. In 2008–11, he served as Commissioner on the Commission on Wartime Contracting in Iraq and Afghanistan, a full-time federal commission created by Congress. He participated in its 25 televised hearings and major reports that delved deeply into state-of-the-art procurement issues.

William Shook is senior partner in the government contracting firm of Shook Doran in Washington, D.C. He came to that position after serving from 1979 through 1985 on various congressional investigations committees that focused on government contracting procedures and abuses. Since then, his practice has been at the cutting edge in fast-evolving areas such as commercial contracting and intellectual property. He lectures across the country regarding government contract law. It has been an effective, thought-provoking, and pleasant collaboration, with one party bringing the academic perspective, and the other, successful and extensive experience with a broad range of issues in practice.

Professor Tiefer acknowledges the assistance of his colleagues at the University of Baltimore Law School with whom he has had valuable discussions of the work, including: Dean Phillip J. Closius, who has inspired the school's intellectual flowering; former deans Gil Holmes and John Sebert; the current Acting Dean, Michael Higginbotham; and associate deans John Lynch, Jane C. Murphy, and Donald Stone, each of whom encouraged scholarship in many ways that made the book possible. A special thanks goes to Dean Closius and Associate Dean Lynch, who willingly supported the years of leave at the Commission and also provided the supportive welcome back.

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