

# 42ND ANNUAL AGLF CONFERENCE

MAY 2-4, 2022 THE DON CESAR ST. PETE BEACH FL



## Basics of Federal Finance

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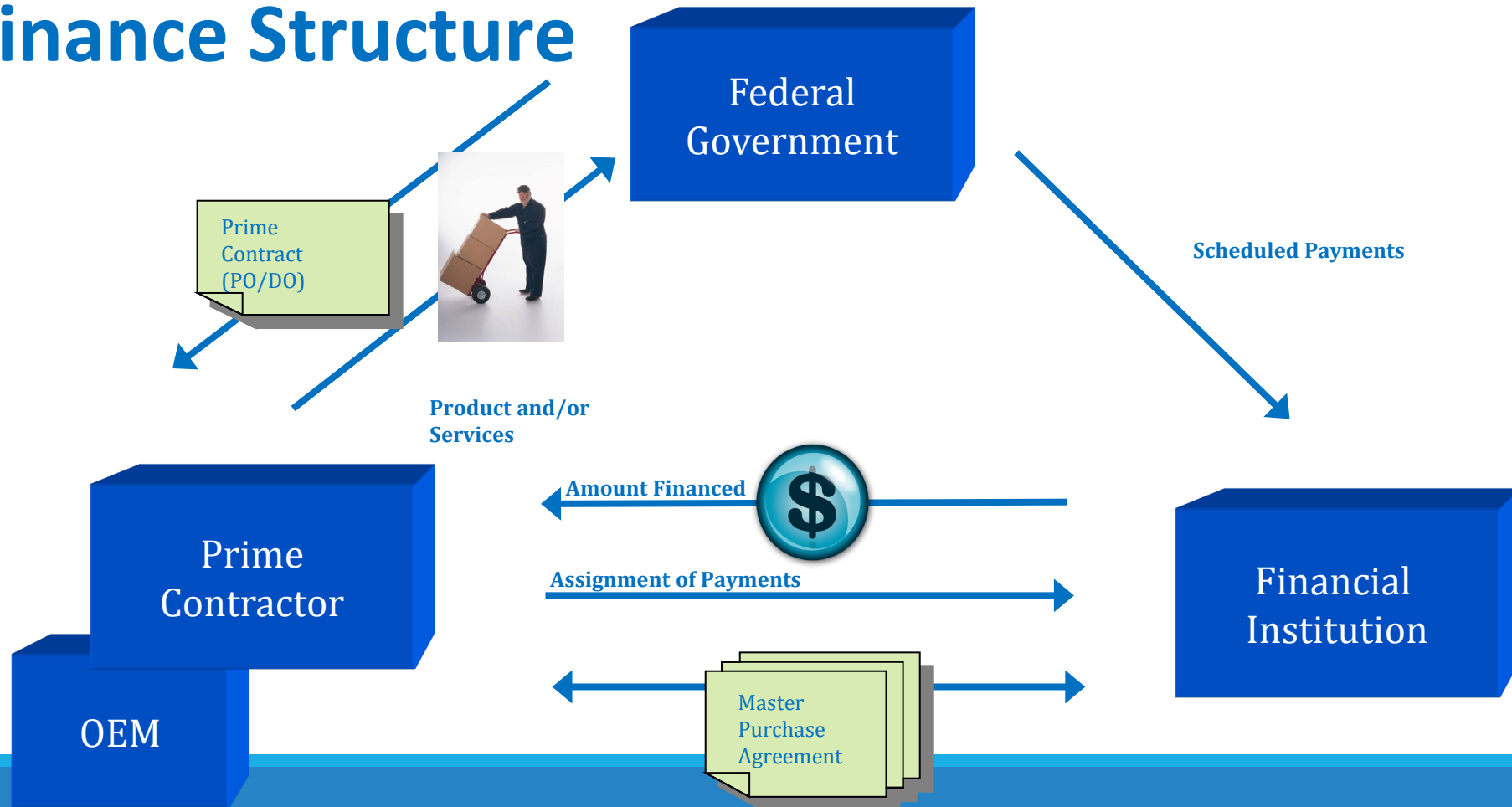
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## Basic Finance Structure



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## Basic Concepts – Federal Financing

1. Government Contract obligations of Prime Contractor cannot be assigned – Only payment stream can be assigned. Per FAR, assignment can be made only to a bank, trust company, or other financing institution. Gov. may deem any other assignment invalid.
2. Privity of Contract stays with the Prime Contractor - Financial Institution needs to work through Contractor to resolve any issues.
3. Federal Acquisition Regulations (FAR) – body of law controlling federal financing
  - a. Payments assigned to Financial Institution through “Assignment of Claims” (FAR 52.232.23), Instrument of Assignment & Notices
  - b. Contract Disputes Act (FAR 33.202) – disputes regarding federal leases are determined under federal laws
4. Government Agency issues a multi-year contract for the Solution. This contract can be referred to as a “task order”, “purchase order”, “delivery order”, award, etc. There is often an underlying contract, or “ordering vehicle” which is the basic agreement for procurement that houses many terms and conditions (i.e., SEWP, CHES, GSA, FSS, etc.)



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## Basic Concepts – Federal Financing - cont'd

5. Financing terms and conditions not inherent in Federal order; e.g. specific FARS need to be included in Order. Orders placed under GSA schedule (IT) may need to team with another entity to incorporate financing terms and conditions [SIN132-3].
6. Government is Lessee → Bankruptcy not an issue. Credit underwriting focus is on performance obligation of Prime Contractor, validation of financing terms (mitigants to Gov termination rights) and essentiality of equipment.
7. Anti-Deficiency Act – Prevents Fed Gov from making obligations or expenditures in excess of what is appropriated or an amount permitted by agency regulations. Prevents Gov from entering into a contract that is not “fully funded”.
8. Invoicing & Collection/Prompt Payment Act – the Government will pay late interest penalties!

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## Basic Concepts – Federal Financing - cont'd

9. LTOP and LWOO's – financing products
  - a. LTOP – Lease to Ownership Plan
  - b. LWOO – Lease With Option to Own (sometimes referred to as LWOP)
  
10. Financing that exceeds 12 months or crosses fiscal years (9/30) is funded by Government in 12-month increments (FAR 32.703-3). Contract should have provisions regarding the availability of funds (for current period and beyond). (FARs 52-232-18 and 52-232-19)
  
11. Funding beyond current year is subject to Continuing Resolution (CR) which is Gov's formal funding process. These are referred to as future "Option Years".

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## Termination Rights of Federal Agencies

1. Non-Appropriation – enables the Gov to terminate the contract (whole or in part) when they can not obtain funding (at the executive agency level) for future payments due to the insufficiency of appropriated funds from Congress.
2. Non-Renewal – enables the Gov to terminate the contract (whole or in part) at the time of renewal when it's in the best interest of the Gov to do so. (FAR 52.217-9)
3. Termination for Convenience – allows for Gov to terminate contract (whole or in part) at any point in time when it's in the best interest of the Gov. It protects the Gov when a product becomes obsolete or there is no longer a need for the service. If a contract is terminated, there is generally compensation that can be due the Prime Contractor in the way of termination charges (reference FARs 52.249 and 52.212-4). Prime must file a claim to recover costs.
4. Termination for Default/Cause – allows the Gov to terminate the contract for any reason related any fault or performance of the Prime Contractor (FAR 52-249)



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## Termination Mitigants

- The Essential Use review is of the utmost importance in determination Termination Risk
  - The Essential Use asks for information about:
    - Function of Agency
    - Function of end users within Agency
    - The role the product plays and any savings associated with the contract
    - Is it product replacing existing systems or equipment
    - Manufacturer's history with Agency
    - Any planned changes in the agency or command ( data center closings, etc)
    - Reasoning for uneven payment streams
  - The Essential Use is acknowledged by the Contracting Officer
- Statement of Work useful in essential use assessment
- Other items of consideration include length of financing term (vs obsolescence of equipment), statement of work within long-term strategy of Agency, asset location (rental location?), etc.

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## Termination Mitigants Cont'd

- Awarded Contract must include financing terms and conditions incorporated into the contract (often stated on financing proposal):
  - Non Substitution Clause
    - Government cannot terminate the contract and replace the equipment/service with similar equipment/service for the original contract length
  - Termination for Convenience FAR (52.212-4 or 52.249-2)
    - Allows for Prime/Assignee to file claim for liquidated damages
  - Termination Charge Clauses
    - Allows for a termination charge, especially where little to no collateral value exists
  - All items delineated in one CLIN
    - Lessens likelihood of partial termination



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## Termination Mitigants Cont'd

*.....financing terms and conditions cont'd*

- Option to Extend the Term of the Contract (FAR 52.217-8 and 52.217-9)
  - Validates that Gov Agency's intent is to enter into a multi-year agreement
- Availability of Funds for the Next Fiscal year (FAR 52.232-19)
  - Evidence of an Agency's intention to finance over a period of time and will use best efforts to get the funding required
- Return provisions: The Gov Agency must return the equipment in the event of a termination at their own expense
  - Lessens likelihood of termination/return

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## Termination Mitigants Cont'd

- Request [Fiscal] Funding Mods 60-90 days in advance
  - Often if there is a possible termination, you can find out about it before it happens
    - Identify technology refresh
    - Identify change in customer needs
  - You can work to either stop/mitigate the termination or begin your negotiations with the Government
- Contractor Performance on previous contracts
- Contractor Financial Stability

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What if *THEY* DO.....



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## Terminate for Convenience

- The FAR allows the Government to terminate a contract, in whole or in part, at any time if it's in the Government's interest.
- Christian Doctrine will read a "T for C" clause into a contract even if its omitted otherwise. "T for C" allows Prime to file a claim for charges and other costs.
- Because of potential liability of the Government, they are rare since they will most likely wait until end of fiscal year or option period.

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## Non-Renewal

- Not a termination per se, but the failure of the Government to affirmatively renew the Contract for the succeeding fiscal year. There are two types of Non-Renewal:
  - Mandatory Non-Renewal occurs when funds haven't been appropriated for the succeeding fiscal year. No liability incurred by Government
  - Discretionary Non-Renewal occurs when the Government decides it no longer needs the equipment or discovers other equipment that is superior. No liability incurred by Government.

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## Non-Appropriation

- Non-appropriation clauses enable the Government to terminate where they were unable to obtain funding for future payments obligation under a Contract.
- Congressional determination
- Anti-Deficiency Act
  - Quasi-Government Agencies that are not subject to budgetary statutes are not subject to Anti-Deficiency Act.



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## Protections

- Covenants, Representations & Warranties
  - Essentiality of Equipment
  - Replacement Equipment/Non-Substitution
  - Failure to delete/disable software
  - Notice of Termination
- Follow-up early/often for fiscal renewal modifications
- FAR Clauses - 52.249.2 and 52.212-4

## Actions

- Possible Claim – Non-Substitution
- Return of Equipment
- Removal of Software – Delete/Disable Certification
- Stoppage of Services

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## Termination for Default

The Government may terminate a Contract where the Contractor:

- Fails to deliver goods or services in time specified within the Contract;
  - Fails to perform any other provision of the Contract;
  - Fails to make progress and such failure endangers the performance of the Contract;
- or
- In connection with Contractor's violation of certain laws and regulations.

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## Protections

- For Contractor (other than proof of no fault), Government must provide Notice and a cure period and follow other procedures in the FARS.
- Contractors can protect themselves with flow downs to subcontractors.
- Lenders never take on this risk. To further mitigate it, however, most require certain representations and warranties be made by Contractor. [Reps and Warranties are as good as financial stability of Prime Contractor.]

## Actions

- Contractor – Clear Cure Notice – Use Flow Down Clauses to Subcontractors
- Funding Institution – Use MPA (Master Purchase Agreement) to make Contractor pay for Default
- Return of Equipment
- Removal of Software
- Stoppage of Services



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## Federal vs. State and Local vs. Commercial Termination Rights

Right	Federal	State and Local	Commercial
Convenience	Yes	No	No
Default	Yes	No	No
Non-Renewal	Yes	Yes	No
Non-Appropriation	Yes	Yes	No
Right to Offset	Maybe	No	No

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## Purchase & Assignment [of payments] to Financial Institution

1. Financial Institution will validate that Gov contract allows for valid assignment of payments
2. Financial Institution will require leasing terms and conditions of proposal incorporated into Government Order or teamed with GSA Schedule 70, SIN 132-3 (IT).
4. Prime Contractor/OEM need sale treatment/revenue recognition from purchase agreement with Financial Institution
5. Master Purchase Agreement defines relationship and obligations between Prime Contractor and Financial Institution
  - a. Responsibilities of Prime Contractor - Set-off indemnity, insurance, taxes, assignment of claims, obtaining follow-on modifications to contract, installation/maintenance/support services, claims and appeals, termination for default of Prime Contractor
  - b. Responsibilities of Financial Institution – Assumption of termination risk (except termination for default and cancellation), all interface with Government thru the Prime Contractor

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## Documentation Required from Government – To be Coordinated by Prime Contractor

- ✓ Government Contract (i.e. the underlying procurement contract and any incorporated attachments)
- ✓ Delivery Order/Task Order/Purchase Order/Award
  - *Must show periods of performance, base year \$ funding, total value of financing, leasing terms and conditions, termination penalties, provisions for sales/pp tax, etc.*
- ✓ Essential Use Questionnaire
- ✓ Written Evidence of User's Acceptance (Certificate of Acceptance, DD250, etc)
- ✓ Warrant of Contracting Officer (certificate that provides proof CO is authorized to bind the Gov Agency and within \$ threshold)
- ✓ Notice of Assignment and Acknowledgement executed by Contracting Officer (granting the assignment to Financial Institution)
- ✓ Modifications to the "order" as appropriate (records sequential changes made to the order)



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## Documentation Required from Prime Contractor – To be Coordinated by Financial Institution

- ✓ Master Purchase Agreement & Assignment Schedule
  - *Master agreement outlining terms and conditions of sale and assignment*
  - *Assignment schedule details Government contract, term, purchase price, payment schedule, etc*
- ✓ Secretary's Certificate
  - *Validates authorized signors of agreements*
- ✓ Certificate of Prime Contract
  - *Certifies true and exact copy of Government Contract and Order*
- ✓ Instrument of Assignment of Claims
  - *Assent of assignment with Prime Contractor's seal*
- ✓ Bill of Sale
  - *Written instrument to transfer title of equipment*
- ✓ Closing Certificate
  - *Certifies closing conditions have been performed*

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## Documentation Required from Prime Contractor –

### To be Coordinated by Financial Institution – Cont'd

- ✓ Limited Power of Attorney
  - *Limited to specific transaction, necessary in the event Gov Agency makes payment to payable to Prime Contractor*
- ✓ Evidence relating to risk of loss
  - Risk of loss lies with Prime Contractor, evidence that Financial Institutional is Loss Payee
- ✓ UCC Filings naming Prime Contractor as debtor and Funding Source as secured party
  - UCC-1 Lien filing is on contracts receivable and title of equipment as appropriate
  - Proof that receivables and title are free & clear of liens
- ✓ Invoice from Prime Contractor to Financial Institution
- ✓ Copy of Agreement of Maintenance and Support between Prime Contractor and Manufacturer/Supplier or Purchase Order to OEM for Product/Services
- ✓ Evidence of Assignment must be sent to Disbursement Office
- ✓ Pay Proceeds Agreement authorizing payments to Suppliers, Manufacturer
  - To redirect payment to suppliers as required by Financial Institution or requested by Prime Contractor

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## Post Award/Post Funding - Invoicing/Collecting

- **Invoicing**
  - May be done by Prime or Funding Source
  - Adhere to “non-standard” invoicing requirements, i.e. POP, net 30, CLINS, WAWF, IPP, etc.
  - If Invoice Rejected, Prime May Need to Facilitate Resolution (clock starts all over with resubmission)
- **Collecting/ Delinquencies**
  - Funding Source May Contact Agency for payment information
  - Agency May Require Prime to be Involved
  - If Delinquencies are due to Prime’s Performance, Funding Source may have recourse
  - If Delinquencies are due to Agency delay, will pay interest on past due amount



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## Post Award/Post Funding - Renewals/Terminations

- **Renewals**
  - Request 60-90 days in advance of current POP Expiration
  - Consistent Follow up and Escalation
  - Communication with Funding Source on Status
- **Terminations**
  - Notify Funding Source
  - Claim Preparation by Funding Source
  - Submission of Claim
  - Return of Equipment/Software Removal
  - Claim may go to Contract Board and/or Court

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## Post Award/Post Funding - Additions and End of Term

- **Tech Refresh/Adds/Drops**
  - Funding Source must be notified of any changes and give approval
  - Co Terminious Adds
  - Partial Terminations
- **End of Term Options**
  - Buyout
  - Extension
  - Return of Equipment/Software Removal

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