

## Mitigating Risks in Purchase Orders and Contracts

*What we need to know and what we can do to mitigate risks when contracting for products and services.*

### *ISM-CB Seminar Working Agenda*

**Date:** Wednesday April 6, 2016 – Richland, WA – 8:00 -5:00

**Audience:** Purchasing agents, buyers and contracting specialists. Our membership covers southeast Washington. We include members from Government contractors, public agencies, private companies, food processing, construction, utilities, manufacturing and industrial organizations. We limit seminar participation to 40 in order to encourage interaction and discussion with our speakers. Our web site is [www.ismcb.org](http://www.ismcb.org)

### Working agenda

7:00 -8:00	Registration, continental breakfast, networking
8:00 -8:30	Welcome, Introductions, Administrative issues - Taylor
8:30- 9:00	Discussion: What are risks associated in purchasing and contracting? - Taylor
9:00- 10:00	Bonds & Insurance – McGilvray
10:00-10:15	Break
10:15-11:45	Bonds and Insurance – McGilvray
11:45-12:45	Lunch
12:45- 2:00	Warranties - Bensussen
2:00 – 2:15	Break
2:00- 3:15	Vetting a Supplier - Coronado
3:15-3:30	Break
3:30-4:30	Options and Payment Terms - Taylor/TBD
4:30-5:00	Wrap up - Taylor

### Topics and talking points

#### 1. Bonds and Insurance:

- a. Speaker: **Scott McGilvray & Nick Montera**
- b. What is the difference between bonds and insurance?
  - i. Do they cover different risks?
  - ii. Do they differ in terms of net effect on enforcement or collection?
  - iii. Are there minimum requirements by law in Washington?
- c. How would bonds or insurance mitigate risks in purchases or contracts?
- d. What is the process for obtaining a Bond?
  - i. What factors affect the costs to the seller?
  - ii. Is there a lead time or prequalification limitation?
- e. What are the different types of bonds/insurance that might be appropriate for purchase orders vs contracts?
- f. Are there circumstances when a performance bond could be used in complex equipment or fabrication purchases?

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- i. Ex.: equipment where vendor has guaranteed specific performance characteristics after installation and startup.
- g. Are there standard forms and formats the buyer could specify in the solicitation?
- h. What State or Federal limitations or regulations which should be considered?
- i. Can an insurance policy or bond cover contractor regulation violation?
- j. How would a buyer identify a reputable bonding or insurance underwriter?
- k. How would a buyer make a claim for a bond or insurance?
- l. When do we need to involve lawyers?
- m. Bond and insurance pitfalls, errors, mistakes and war stories.
- n. Miller Act applicability to federal contractors.

### 2. Warranties

- a. Speaker: **Stan Bensussen**, Chief Counsel, MSA
- b. What are the different types of contract warranties?
  - i. Merchantability vs Express warranties
  - ii. Manufacturer warranties and distributors
- c. What types of risks can warranties mitigate?
- d. What are the enforcement limitations?
- e. What is the correct contract language to ensure that warranties are a viable remedy for buyers?
- f. What are the common pitfalls in exercising warranties??
- g. What will the court enforce and what will they throw out?
- h. Is there such a thing as a “warranty” for service contracts?
- i. Warranty pitfalls, errors, mistakes and war stories?

### 3. Vetting a potential supplier/contractor

- a. Speaker Ashley **Coronado**, Government Contracting Assistance Specialist. Washington Procurement Technical Assistance Center (PTAC)
- b. What information about a potential supplier is available online?
- c. What kinds of submittals should buyers ask for in solicitations? What can we expect as a reasonable response?
- d. How can we verify a supplier’s legal identity and business information is accurate?
- e. What information is validated by a 3<sup>rd</sup> party?
- f. What online information should be questioned?
- g. What are some of the weaknesses you have seen with supplier registrations and online information? How can we mitigate those concerns?
- h. A review of online sources of supplier information

### 4. Options, Payments and Retainage

- a. Speaker: Mike Taylor

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- b. How we can creatively use options, retainage and payment terms to encourage performance and successful completion.
  - c. How to decide if retainage could be helpful?
    - i. How much retainage?
    - ii. When to capture retainage and when to pay it back.
  - d. How can we use options for untested suppliers or specifications?
  - e. How does option language affect contract value and performance obligations?
  - f. Option & payment language pitfalls, mistakes and war stories.
    - i. Enforceability – who has the option and what parameters?
5. **Discussion; implementation and contract writing strategies (time permitting)**
- a. Mike Taylor,

## References, examples and links

### Bonds & Insurance:

1. National Association of Surety Bond Producers: <http://www.nasbp.org/NASBP/Home>
2. American Institute of Architects publishes standard bond forms – available here:
  - a. <http://www.nasbp.org/agency-resources>
3. Surety bond basics : <http://www.attny.com/gci32djd.html>
4. Washington State Code –Contractor Bonds;  
<http://apps.leg.wa.gov/RCW/default.aspx?cite=39.08>
5. Federal Acquisition Regulations (FAR) part 28 describes bonding requirements for the government and government contractors along with standard forms (SF25 and SF25A).
  - a. FAR: <http://www.acquisition.gov/far/current/html/FARTOCP28.html>
  - b. FAR clause 52.228-... <https://www.acquisition.gov/?q=/browse/far/52>
  - c. GSA standard forms: <http://www.gsa.gov/portal/forms/type/SF> (25 & 25A)
6. The Department of the Treasury maintains a surety Bond web page.  
[https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/surety\\_home.htm](https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/surety_home.htm)  
Federal Contracting Officers are prohibited from accepting surety bonds issued by corporate sureties not listed in the Treasury Circular
7. U.S. Treasury Department list of certified companies.
  - a. [https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570\\_a-z.htm](https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm)
8. Actions Needed to Better Protect Against Billions of Dollars in Federal Exposure to Decommissioning Liabilities. [GAO-16-40](https://www.gao.gov/products/GAO-16-40)
9. GAO protest case - inadequate bid bond. Bob Cummins Construction Company [B-406812.2](https://www.gao.gov/products/B-406812.2): Aug 28, 2012

### Warranties:

10. FAR 46.7 – Warranties <https://www.acquisition.gov/?q=/browse/far/46>
11. FAR warranty Clauses 52.246-xxx <https://www.acquisition.gov/?q=/browse/far/52>

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12. GAO protest case - Scaletta Armoring [B-412302](#): extension of OEM warranty after modification of equipment by reseller.
13. [NOLO web summary](#) - [Breach of Warranty Cases in Small Claims Court](#). *Understand the different types of warranty claims that might apply to your defective product claim.*

### Vetting Contractors:

14. Better Business Bureau <http://www.bbb.org/us/Find-Business-Reviews/>
15. Dun & Bradstreet <http://fedgov.dnb.com/webform/>
16. System for Award Management (SAM) [www.sam.gov](http://www.sam.gov)
17. U.S. DOL National Pre-award registry- Contractor EEO compliance reviews [http://www.dol-esa.gov/preaward/pa\\_reg.html](http://www.dol-esa.gov/preaward/pa_reg.html)
18. Washington Procurement Technical Assistance Center (PTAC) <http://washingtonptac.org/>  
Association of Procurement Technical Assistance Centers (APTAC) – to find PTAC in other states [www.aptac-us.org](http://www.aptac-us.org)
19. Washington State list of debarred contractors [www.lni.wa.gov/TradesLicensing/PrevWage/AwardingAgencies/DebarredContractors/](http://www.lni.wa.gov/TradesLicensing/PrevWage/AwardingAgencies/DebarredContractors/)
20. Washington State Revenue – lookup registered businesses <http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/>
21. Contractor Responsibility Checklist: [http://www.mltweb.com/tools/articles/resp\\_checklist.pdf](http://www.mltweb.com/tools/articles/resp_checklist.pdf)
22. SEC filings at Edgar <http://www.sec.gov/edgar/searchedgar/webusers.htm>
23. SBA Dynamic Small Business search: [dsbs.sba.gov](http://dsbs.sba.gov)
24. EPA Enforcement & Compliance History: <https://echo.epa.gov/>

### Payment & Options:

25. DOT payment methods explanation
  - a. [www.fhwa.dot.gov/programadmin/contracts/etgpayment.cfm](http://www.fhwa.dot.gov/programadmin/contracts/etgpayment.cfm)
26. WA State contract terms – section 6 payments
  - a. [www.des.wa.gov/sitecollectiondocuments/facilities/eas/easgencond697.pdf](http://www.des.wa.gov/sitecollectiondocuments/facilities/eas/easgencond697.pdf)
27. FAR 17.2 – Options <https://www.acquisition.gov/?q=/browse/far/17>
28. FAR 32.0 Contract Financing
29. Coast Guard source selection contract for big ticket items and complex spec. [GAO decision B-400697](#) Fixed price with economic adjustments for one unit; option to buy 33 more.. Proposed price \$1.3B
30. GAO Report: [Training and Guidance Needed to Ensure Appropriate Use of the Option to Extend Services Clause](#) - [GAO-16-262R](#):

### Discussion, implementation and contract writing strategies

31. Writing Better Contracts [http://www.mltweb.com/handouts/writing\\_tips.pdf](http://www.mltweb.com/handouts/writing_tips.pdf)

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32. Creative Contracting: <http://www.mltweb.com/handouts/contract.pdf>
33. Ken Adams legal drafting blog:  
<http://www.adamsdrafting.com/writing/ken-adamss-articles/>

### Presenters:

#### **Stanley Bensussen**

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#### **Ashley Coronado**

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### **Risks in purchasing equipment and contracting for services**

1. Contract language doesn't adequately invoke coverage
2. Contractor business failure
3. Contractor cash flow issues limit performance
4. Contractor refuses to perform
5. Contractor starts the job then refuses to finish without additional money
6. Contractor violates EPA or OSHA laws during performance
7. Cost overruns
8. Faulty equipment
9. Fraud -
10. Hidden defects
11. Incomplete work
12. Insurance policy doesn't cover the specific loss
13. Insurance policy lapsed
14. Market changes
15. Partial completion & failure
16. Patent Infringement
17. Regulation violations
18. Shoddy service
19. Supplier not authorized to make express warranty about mfg. item
20. Unable to enforce a claim in court
21. Untested performance guarantees
22. Workman's' Lien
23. Work-site injury