



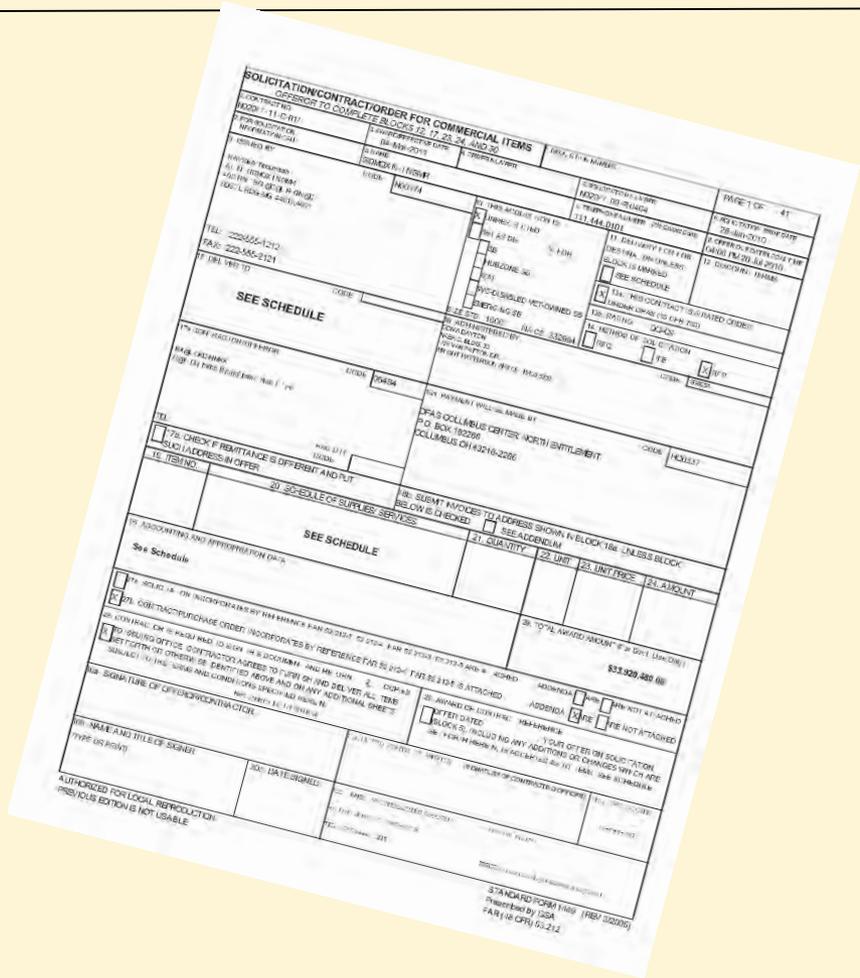
# Contract Formation for Government Contract Property; Easy to do...



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**2015 Acquisition Insight Focus Days**  
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# Do We Have A Problem Here?


...and if so, what is it, & how do we fix it?

# DISCUSSION POINTS

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- **Current initiatives & why they are...**
- **Two problems**
  - **Acquisition Planning & Purchase Request**
  - **Contract Formation**
- **A Suggested Approach...**
- **No Easy Fix for a Poorly Formed Contract**
  - **Christian & Hart's foods cases**

# Current Initiatives & why they are...

## ➤ Because of these...

- OSD ATL attention to audit findings regarding **ACCOUNTABILITY** for contract GP, **AND...**
- Financial Improvement and Audit Readiness (FIAR) planning – Compliance with requirements of the Chief Financial Officers Act of 1990)

## ➤ ...it lead to this...

- Increased attention to the contract document, specifically...
- Assuring contract document inclusion of appropriate GP-related clauses

**NOW DRAW THE  
BASE LINE AND  
MEASURE!**



# GFP DFARS\* Required Clauses

**SOURCE**  
 DPAP  
 Government Furnished  
 Property Scorecard v1.9  
**10/4/2013**

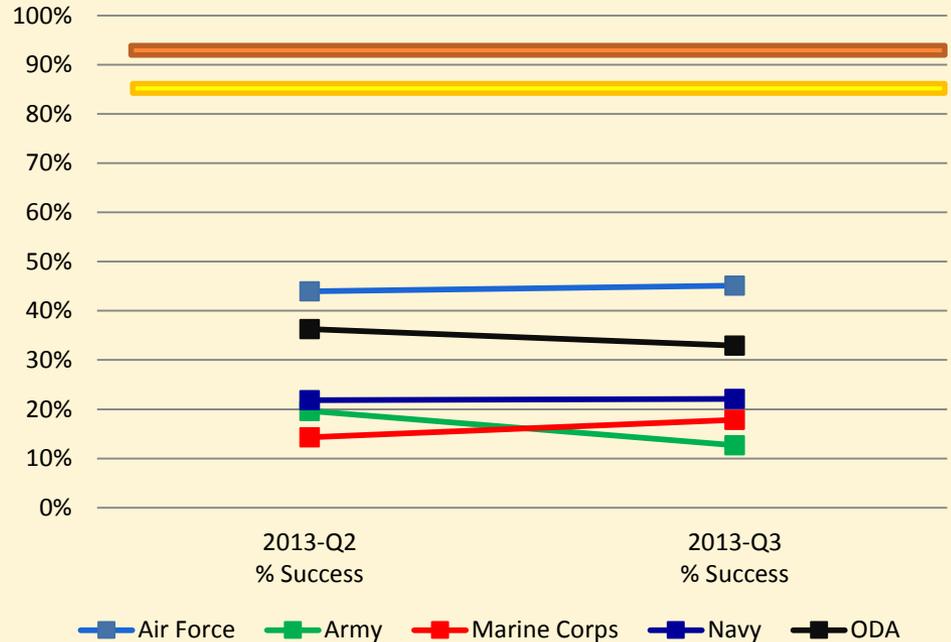
## GFP DFARS Required Clauses Inclusion

### Trend Chart

Scorecard Goal		
Status	Lower	Upper
Green	92	100
Yellow	85	< 92
Red	0	< 85

## GFP DFARS Required Clauses Inclusion Trending

FY13 Q2-Q3



Component	2013-Q2	2013-Q3	Change
Air Force	43.96%	45.13%	↑ 1.17
Army	19.64%	12.67%	↓ (6.97)
DCMA	0.00%	0.00%	0.00
DLA	0.00%	0.00%	0.00
Marine Corps	14.29%	17.86%	↑ 3.57
Navy	21.82%	22.10%	↑ 0.28
ODA	36.27%	32.95%	↓ (3.32)

\*GFP FAR clause data, **unavailable**

## Conclusions and Recommendations

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- **Establishing proper contract structure is the first step in managing, tracking and reporting GFP**
- **Currently there is need for improvement**
- **Recommendations**
  - **Establish scorecards on component performance**
  - **Issue memo informing components of current levels of performance, scorecards and need for improvement**
  - **Monitor performance quarterly**

SOURCE

DPAP  
Government Furnished  
Property Scorecard v1.9

**10/4/2013**

# Component Scorecard

## GFP FAR Clause when Cost Reimbursable

Component	2014-Q4	2015-Q1	2015-Q2	2015-Q3	2015-Q4
Air Force	81%	92%	93%		
Army	73%	84%	86%		
DLA	N/A	N/A	N/A		
Marine Corps	92%	0%	80%		
Navy	62%	86%	71%		
ODA	96%	100%	80%		
Total	74%	88%	81%		

## GFP DFARS Required Clauses

Component	2014-Q4	2015-Q1	2015-Q2	2015-Q3	2015-Q4
Air Force	65%	67%	72%		
Army	32%	41%	41%		
DLA	13%	67%	0%		
Marine Corps	41%	14%	26%		
Navy	28%	40%	16%		
ODA	45%	54%	37%		
Total	38%	45%	21%		

Scorecard Goal		
Status	Lower	Upper
Green	92	100
Yellow	85	< 92
Red	0	< 85

**SOURCE**  
 DPAP  
 Government Furnished  
 Property Scorecard v1.9  
**MAY 2015**

How often do components include mandatory property clauses?

## MANDATORY in SOLICITATIONS & CONTRACTS

- FAR 52.245-1 **Government Property** (all cost type, T&M, and in labor hour and fixed-price when the Government will provide property)

## ALSO MANDATORY in SOLICITATIONS & CONTRACTS when 52-245-1 appears

- DFARS 252.211-7007 Reporting of Government-Furnished Property
- DFARS 252.245-7001 Tagging, Labeling, and Marking of Government-Furnished Property
- DFARS 252.245-7002 Reporting Loss of Government Property
- DFARS 252.245-7003 Contractor Property Management System Administration
- DFARS 252.245-7004 Reporting, Reutilization, and Disposal

**...this begs an issue - if the CLAUSES aren't there, then what about...**

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**... other contract document requirements involving GOVERNMENT PROPERTY ?**

**Is there a “root” issue?**



**Perhaps these two...?**

- 1. Customer *Acquisition Planning* and resulting *Purchase Request* do not adequately address Government Contract Property requirements...**
- 2. *Contracts* aren't properly formed to support Government Property requirements...**

# KEY GP Related Acq Planning issues

WHAT	FACTORS	WHY	“Guidance”
<b>Contract Type/Structure</b>	<ul style="list-style-type: none"> <li>• FP?</li> <li>• CR?</li> <li>• FP w/CR CLINS?</li> </ul>	<ul style="list-style-type: none"> <li>• Clause selection</li> <li>• CLINS for CAP</li> </ul>	<ul style="list-style-type: none"> <li>• FAR 45.107</li> <li>• DFARS 245.107</li> <li>• DFARS PGI 245.4</li> </ul>
<b>Funding</b>	<ul style="list-style-type: none"> <li>• Adequate to complete the contract thru closeout?</li> </ul>	<ul style="list-style-type: none"> <li>• Timely contract closeout – DEMIL, HAZMAT &amp; Waste</li> </ul>	<ul style="list-style-type: none"> <li>• FAR 32.7</li> <li>• FAR 52.245-(j)(7)(ii)</li> </ul>
<b>GFP</b>	<ul style="list-style-type: none"> <li>• Facilitate contract?</li> <li>• Object of contract?</li> <li>• Source of supply?</li> </ul>	<ul style="list-style-type: none"> <li>• Justification for GFP</li> <li>• SOW</li> <li>• Clause selection</li> <li>• Solicitation</li> <li>• Source selection criteria</li> </ul>	<ul style="list-style-type: none"> <li>• FAR 45.102(b)</li> <li>• FAR 45.102(d)</li> <li>• FAR 45.107</li> <li>• FAR 45.2</li> <li>• DFARS PGI 245.103-70</li> <li>• DFARS PGI 245.2</li> </ul>
<b>Contract Administration</b>	<ul style="list-style-type: none"> <li>• Who’s doing Property Admin?</li> <li>• Who’s doing Property disposal?</li> </ul>	<ul style="list-style-type: none"> <li>• Delegate YES/NO</li> <li>• If not, who?</li> <li>• Disposal – don’t pay twice...</li> </ul>	<ul style="list-style-type: none"> <li>• FAR 42.301(b)</li> <li>• FAR 45</li> <li>• FAR 52.245-(j)</li> </ul>

# ...which drives the Purchase Request

WHAT	FACTORS	WHY	“Guidance”
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# ...which drives the construct of the Solicitation/Model contract

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# ***...A Thought...***

## **Perceived Problem:**

“Many post-award Government contract property problems have their roots in non-existent-to-poor **acquisition planning** on the part of the Government customer and contracting officer”

## **Hypothesis:**

“Better advance planning for Government contract property would result in **better contractual direction** to the parties and either mitigate or eliminate many post-award Government property issues”

***So, we need to improve our ACQ Planning & contract writing tradecraft beyond merely including the right GP clauses...***

# ...a suggested approach

- *Extract the contract “gotta haves” from the FAR/DFARS*
- *There aren’t that many – relatively easy to highlight!!*
- *Make it easier for the REQUIRING ACTIVITY and the CONTRACTING OFFICER?*
- *HOW?*
  1. GCP – WHAT CLAUSES GO ON CONTRACT?
  2. GCP– WHAT TO INCLUDE IN A SOLICITATION & RESULTING CONTRACT?
  3. GCP– GOVERNMENT PROPERTY EVALUATION FACTORS & CRITERIA

Let's take a peek at something called the "Uniform Contract Format" for OTHER GP requirements!



- **Uniform Contract Format: FAR 15.204**

## **Table 15-1--Uniform Contract Format**

**Part I -- The Schedule**

**Part II -- Contract Clauses**

**Part III -- List of Documents, Exhibits, and Other Attachments**

**Part IV -- Representations and Instructions**

## Part I -- The Schedule

- A** Solicitation/contract form
- B** Supplies or services and prices
- C** Description/specifications
- D** Packaging and marking
- E** Inspection and acceptance
- F** Deliveries or performance
- G** Contract administration data
- H** Special contract requirements

## Part II -- Contract Clauses

**I** Contract clauses

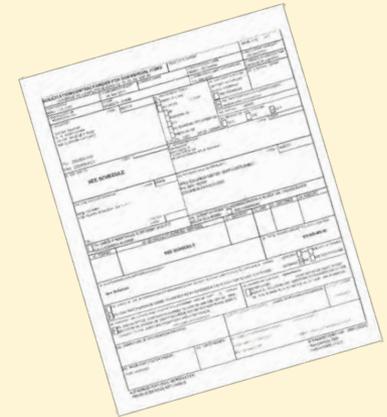
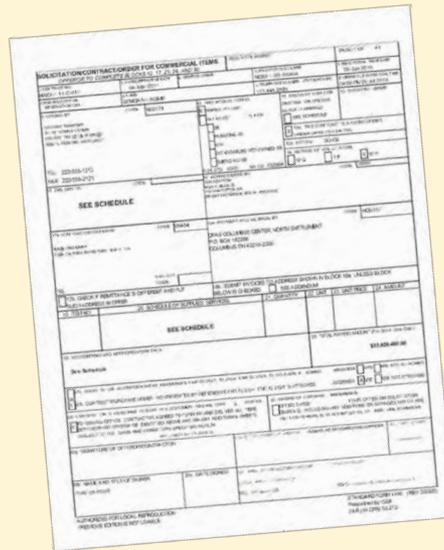
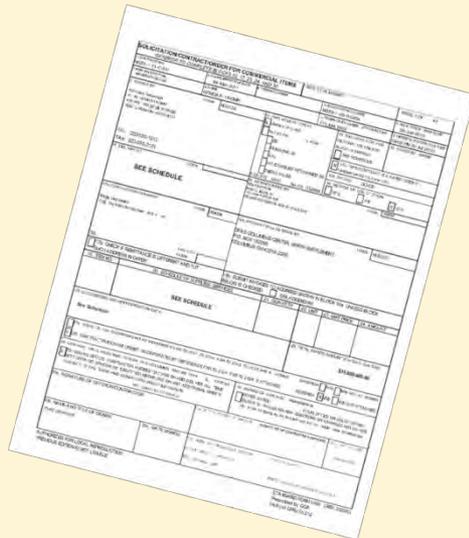
## Part III -- List of Documents, Exhibits, and Other Attachments

**J** List of documents, exhibits, and other attachments

# Uniform Contract Format

## Part IV -- Representations and Instructions

- K** Representations, certifications, and other statements of bidders
- L** Instructions, conditions, and notices to bidders
- M** Evaluation factors for award



# About those GP clauses...

## Why is it so hard to...*get* GOVERNMENT PROPERTY clauses on contract?

- Automated Contract Writing Tools
- FAR
  - Clauses themselves
  - The Prescriptions within FAR 1-51
  - Subpart 52.3 Provisions and Clauses Matrix
- The Human element to include:
  - Procuring Contracting Officer
  - The Buying Offices
  - The Components
  - The Contractors



- ...as they relate to the Government Property Clauses
  - The Christian Doctrine
    - G. L. Christian and Associates v. U. S., 312 F.2d 418, 160 Ct.Cl. 1 \*419
  - Hart's Food Services
    - ASBCA No. 307561989 WL 47610 (A.S.B.C.A.), ASBCA No. 30,756, 89-2 BCA

SOURCE

Dr Doug Goetz  
Archives

# THE CHRISTIAN DOCTRINE

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- The Christian doctrine permits **the incorporation by operation of law of mandatory contract clauses** which express a **significant or deeply ingrained strand of public procurement policy**. *G.L. Christian & Assoc. v. United States*, 312 F.2d at 424, 427
- The Christian doctrine, however, does not permit the "automatic incorporation of every required contract clause"
- Rather, it must be determined whether there is any **significant or deeply ingrained public procurement policy** supporting incorporation of the clause

# BIG QUESTION!

***So, does the Christian Doctrine apply to:***

- 1. THE Government Property Clause?***  
***and/or***
- 2. Government Property Clauses?***

# IT DEPENDS!!!

- **FOR THE OLD GOVERNMENT PROPERTY CLAUSE – Which we can extrapolate to the current FAR 52.245-1, we have...**
- **Hart's Food Services**
  - ASBCA No. 307561989 WL 47610 (A.S.B.C.A.), ASBCA No. 30,756, 89-2 BCA
  - Hart's Food Services ruled that the Government Property clause **WAS... FUNDAMENTAL PROCUREMENT POLICY** and therefore **WAS IN THE CONTRACT** – even when left out – **BY OPERATION OF LAW!!!**

# IT DEPENDS!!!

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- **O.k., so FAR 52.245-1 can be read into the Contract even when NOT THERE – if applicable, i.e., that there is Government Property under the contract.**
- **What about other GP RELATED CLAUSES???**
  - **DFARS 252.211-7007???**
  - **DFARS 252.245-7001???**
  - **DFARS 252.245-7002???**
  - **DFARS 252.245-7003???**
  - **DFARS 252.245-7004???**

# IT DEPENDS!!!

**WE HAVE NO CASE LAW TO  
ASSIST US IN DETERMINING  
WHETHER OR NOT CHRISTIAN  
APPLIES TO THESE GOVERNMENT  
PROPERTY CLAUSES!!!**

***...OBTW – Isn't the heck of a way to  
WRITE a contract to rely upon  
CHRISTIAN & HARTS?***

# CONCLUSIONS

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- **Generally, does our contract planning & writing need to improve?**
- **Don't we need to get ALL the appropriate GP related clauses on contract to benefit all parties?**
- **What about getting OTHER contract requirement into the contract?**

***How do we accomplish this...***

***...that REMAINS the \$64,000 question!***