



Contingency Contracting: Past, Current and Future Uses by the U.S. Government

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Jessica V. Haire, Tom Mason, Francis “Chip”
Purcell, Jr., Partners at Thompson Hine LLP

Sarah Maguire, Senior Counsel at BAE Systems

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Presenters



Jessica V. Haire
Thompson Hine



Tom Mason
Thompson Hine



**Francis "Chip"
Purcell, Jr.**
Thompson Hine



Sarah Maguire
BAE Systems

Introduction

- Background of contingency contracting and other emergency acquisition forms/practices
- Lessons learned from prior contingency contracting/emergency acquisitions
- Best practices for contractors

Contingency Contracting Issues

- Statutory and regulatory bases for contingency contracting
 - Part of emergency acquisition provisions in FAR Part 18 (and FAR Part 26)
- Fiscal law considerations impacting contingency contracting
 - Legal and funding considerations
- Acquisition flexibilities available for contingency contracting
 - Flexibilities available for contingency contracting and other emergency acquisitions function alongside available acquisition flexibilities
- Contracting planning and administration considerations
 - What are considerations impacting preparation for and performance of contingency-type contract

Need for Contingency Contracting

- Form of contracting to support different emerging or emergency events
 - Military operations (Afghanistan and Iraq)
 - Defense or recovery from certain attacks (chemical, cyber, biological)
 - Emergency or major disaster declarations (COVID-19 pandemic, Hurricane Katrina)
- Need for government to procure goods and services on expedited basis
 - Limited ability to plan for agency needs
 - Requirement to obtain products and services quickly and in difficult to reach locations (including foreign countries)
 - Potentially limited pool of qualified contractors able to meet agency needs

Contingency Operations

- Contingency operation
 - FAR 2.101 – a military operation that:
 - (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
 - (2) results in the call or order to, or retention on, active duty of members of the uniformed services under sections 688, 12301(a), 12302, 12304, 12304(a), 12305 or 12406 of title 10 of the United States Code, Chapter 15 of title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress.
 - Definition identical to definition of “contingency operations” at 10 U.S.C. § 101(a)(13).

Defense or Recovery from Certain Events

- Designated as emergency in FAR 18.202
- Specified types of attacks
 - Cyber
 - Nuclear
 - Biological
 - Chemical
 - Radiological

Emergency or Major Disaster Declaration

- Covered events (per FAR 18.203 and Subpart 26.2)
 - Incident of national significance
 - Emergency declaration
 - National emergency
 - Major disaster
- Stafford Act (42 U.S.C. 5121)
 - Per Stafford Act, preference is given to local organizations, firms or individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration.

Authority and Structure of Contingency Contracting

- Regulatory basis for contingency contracting – FAR Part 18, Emergency Acquisitions
 - FAR Part 18 provides for emergency acquisition flexibilities in specified circumstances:
 - Support of contingency operation (as defined in FAR 2.101)
 - To facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack against United States
 - To support a request to facilitate the provision of international disaster assistance
 - In response to presidential issuance of emergency declaration or major disaster declaration
- Additional guidance in FAR Subpart 26.2 for major disasters (Stafford Act)

Authority and Structure of Contingency Contracting

- FAR Part 18 recognizes that the FAR contains acquisition flexibilities that do not require designation of contingency operation or other emergency event.
- Available flexibilities (per FAR Subpart 18.1):
 - Synopses of proposed contract actions
 - Unusual and compelling urgency
 - Contract vehicles (Federal Supply Schedule, multi-agency BPAs, multi-agency IDIQs)
 - Qualification requirements
 - Priorities and allocations

Authority and Structure of Contingency Contracting

- Available flexibilities (per FAR Subpart 18.1):
 - Soliciting from single source
 - Oral requests for proposals
 - Letter contracts
 - Interagency acquisitions
 - Awards to designated small businesses (8(a)s, HUBZone, SDVOSB, woman-owned)
 - Overtime approvals
 - Trade agreements
 - Advanced payments

Authority and Structure of Contingency Contracting

- Available flexibilities (per FAR Subpart 18.1):
 - Assignment of claims
 - Electronic funds transfer
 - GAO protests
 - Contractor rent-free use of government property
 - Pub. L. 85-804 contracting authority
- These flexibilities can be used by the agency in addition to and in conjunction with flexibilities provided for specified emergency acquisition actions (as specified in FAR Subpart 18.2).

Authority and Structure of Contingency Contracting

- Emergency acquisition flexibilities available for any type of emergency:
 - Relief from registration in Central Contractor Registration (now SAM.gov) – FAR 4.1102(a)(3) exempts contractors from required registration with SAM.gov when the contract is an emergency acquisition, although if practicable, the CO is required to modify the contract or agreement to require registration after award (per FAR 4.1102(b)).
 - Relief from use of electronic funds transfer – FAR 32.1103(e) exempts contract payment through EFT when the award is in support of emergency operations if EFT is not known to be possible or an EFT payment would not support the objectives of the operation.

Authority and Structure of Contingency Contracting

- Emergency acquisition flexibilities designated for contingency operations (per FAR 18.201):
 - Micro-purchase threshold – the threshold increases when the agency head determines that the supplies or services are to be used to support a contingency operation
 - Simplified acquisition threshold – the threshold increases when the agency head determines that the supplies or services are to be used to support a contingency operation.
 - Commercial items – the threshold limits authorized for use of simplified procedures for certain commercial items may be increased for acquisitions to support a contingency operation (see FAR 13.500(c)).
 - Purchase Order-Invoice-Voucher (SF 44) – normal threshold for use of SF 44 is at or below micro-purchase threshold, but agencies may establish higher dollar limitations for purchase made to support a contingency operation.

Authority and Structure of Contingency Contracting

- Emergency acquisition flexibilities designated for defense or recovery from certain attacks (per FAR 18.202):
 - Micro-purchase threshold – the threshold increases when the agency head determines that the supplies or services are to be used to facilitate defense against or recovery from specified attack.
 - Simplified acquisition threshold – the threshold increases when the agency head determines that the supplies or services are to be used to facilitate defense against or recovery from specified attack.
 - Simplified procedures for commercial items – the threshold limits authorized for use of simplified procedures for certain commercial items may be increased for acquisitions to facilitate defense against or recovery from specified attack.
 - Treating certain items as commercial – contracting officer may treat any acquisition of supplies or services as an acquisition of commercial items if agency head determines the acquisition to be used to facilitate defense against or recovery from specified attack.

Authority and Structure of Contingency Contracting

- Emergency acquisition flexibilities designated for incidents of national significance, emergency declaration or major disaster declaration (per FAR 18.203 and FAR Subpart 26.2):
 - Limited use of full and open competition – agencies may limit the use of full and open competition when authorized or required by statute that the acquisition be made through another agency or from a specified source (including awards made pursuant to Stafford Act).
 - Evaluation preference – contracting officer may use a local area or local firm preference when contracting for major disaster or emergency assistance activities and when the use of such preference is authorized in agency regulations or procedures.
 - Temporary waiver of Cargo Preference Act requirements – Per FAR 47.502(c), Cargo Preference Act is waived when Congress, the President or Secretary of Defense declares that an emergency justifying a temporary waiver exists and notifies the appropriate agency(ies). However, for exemption, act requires that preference be given to U.S.-flagged vessels when transportation of supplies by ocean vessel is necessary.

Fiscal Law Considerations

- Legal Considerations
 - Anti-Deficiency Act
 - The Purpose statute
 - Prohibition against augmentation
 - Prohibition against advanced payments
- Funding Considerations
 - Sources of funding
 - Emergency authorizations of funding

Contract Formation Issues

- Authority
 - Requires properly authorized contracting officer to enter into and administer contract.
 - Contractor should ensure that government representative is properly authorized to avoid any later authority issues.
- Risk Considerations
 - Expedited timeframe within which agency seeks to obtain necessary goods and services may increase award-related risks.
 - Agencies may seek to mitigate risk by limiting the value and/or length of a contract to address only immediate needs.

Contract Formation Issues

- Terms and Conditions and Pricing
 - Both contract terms and conditions and pricing may differ depending upon emergency event and immediacy of agency needs.
 - Contractors should ensure that contract terms and conditions are adequate to address contractor performance risks and pricing terms are sufficient to support performance in emergency environment.
- Proper Business Practices
 - Expedited procurement process can lead to greater risk of improper business practices, i.e., conflicts of interest, fraud.
 - Contractors should maintain adequate processes and procedures to prevent any improper practices related to procurement and detect and investigate any evidence of potential improper conduct.

Contract Formation Issues

- Contractor Sources
 - Large business
 - Small business
 - Local business (Stafford Act)
 - Pre-positioned contractors
 - Pre-identified contractors
- Contract Types
 - Agencies may use contract types available in FAR Part 16
 - Special considerations in selecting contract type where emergency:
 - Government risk considerations
 - Ability to use letter contracts when agency requires immediate start and negotiation of definitive contract not possible (FAR 16.603)
 - Use of time-and-materials or labor-hour contracts for commercial services under specified circumstances (see FAR 12.207, 16.601, 52.212-4)

Contract Formation Issues

- **Public Notice of Contract Actions**
 - Normally agency must synopsise actions over \$25k on SAM.gov.
 - Agency not required to post notice if exception at FAR 5.202 exists, i.e., unusual and compelling urgency.
- **Contractor Responsibility Determination**
 - FAR 9.104 requires that agency only may award a contract to a responsible prospective contractor that meets stated criteria.
 - No waiver of responsibility determination during emergency; however, specific requirements for determining a prospective contractor's responsibility may vary by agency and dollar value of the acquisition (see FAR 9.105-2, agency FAR supplement).

Contract Formation Issues

- Competition Exceptions
 - Competition in Contracting Act (CICA) requires agencies to seek full and open competition to maximum extent.
 - FAR 6.302 provides several exemptions from competition that can be utilized by agency during emergency:
 - Single responsible source
 - Unusual and compelling urgency
 - National security
 - Public interest
 - Agency is required to document its decision to make sole-source award with written justification (see FAR 6.303)
 - Contractor should be prepared to provide supporting information to be included in J&A to extent necessary and possible.

Contract Formation Issues

■ Contract Pricing Considerations

- Agency is required to make and document a price reasonableness determination.
- Emergency situation and/or use of sole-source award may limit use of certain price analysis techniques set forth at FAR Subpart 15.4:
 - No ability to compare multiple proposed prices.
 - Agency instead may utilize market research, prior purchase prices, independent government cost estimate
- Additional factors related to emergency circumstances may impact pricing:
 - Difficulties in sourcing materials and components
 - Expedited shipping to areas with limited accessibility
 - Additional market factors
- Contractors should be prepared to provide adequate support for proposed pricing commensurate with FAR requirements applicable to procurement.

Contract Administration Issues

- Contract Documentation
 - Use of emergency contracting procedures does not alleviate agency responsibilities with respect to administrative record-keeping.
 - Emergency contracting requirements may prevent challenges to normal record-keeping requirements and practices:
 - Difficulty obtaining detailed documentation from contractor
 - Operations conducted in foreign country or disaster area
 - Performance using specific contract types/vehicles during emergency operations (e.g., blanket purchase agreements)
 - Because agency ability to maintain adequate contract records will impact contractor delivery of products and services, payment and past performance, contractor should ensure that it maintains regular communications with contracting officials and provides responsive information reflecting contractor performance.

Contract Administration Issues

- **Delivery, Inspection and Acceptance**
 - Performance during emergency situation may impact contractor ability to deliver products and services and government ability to inspect and accept products and services:
 - Delivery to foreign country or disaster area
 - Expedited delivery requirements
 - Changing/evolving customer requirements
 - Lack of authorized/qualified government personnel on ground to inspect and accept products and services
 - Contractor should plan for and take actions to mitigate delivery, inspection and acceptance risks:
 - Clear and continued communications on specific government requirements and timing and place of delivery
 - Capture of any changes with respect to government requirements, place of delivery, inspection or acceptance criteria.
 - Designation of authorized personnel in foreign country or disaster area to inspect and accept products and services.

Contract Administration Issues

■ Payment

- Risks associated with delivery, inspection and acceptance of products and services also may impact contractor payment:
 - Delays in delivery, inspection or acceptance will impact contractor ability to submit proper invoice
 - Lack of clear agency chain of command/authority in emergency operations impact ability to obtain necessary approvals
- Contractor should take appropriate actions to reduce risks that emergency operations will slow ability to receive payment:
 - Actions to ensure timely delivery, inspection and acceptance of products and services – eliminate factors that are caused by the contractor
 - Advanced payments
 - Use of other acquisition flexibilities in FAR Subpart 18.2

Contract Administration Issues

■ Additional Considerations

– Past performance

- Contractor should ensure that it monitors performance-related evaluations (i.e., CPARS) to ensure that government assessment of performance is accurate and that contractor responds to any inaccurate description of performance.
- Past performance can be key element in demonstrating contractor capacity and skill to respond to contingency requirements.

– Contract modifications/change orders

- Critical question will be whether work performed is in or out of scope – oral agreements, letter contracts and rapid initial contract actions may lead to poorly worded or defined requirements.
- Important for contractor to ensure that government has completely memorialized contractual requirements and that contractor raises timely objection to incomplete or inaccurate requirements.
- Contractor must provide government with timely notice of any change impacting performance and follow requirements to protect rights to cost or schedule recovery.

Contract Administration Issues

■ Additional Considerations

– Terminations (default and convenience)

- Rapid changes in requirements may result in government conclusion that it no longer needs products or services, resulting in termination for convenience – maintain accurate performance records and develop complete termination settlement proposal to recover allowable costs and profits.
- Poorly developed contract requirements, poorly trained or remote agency contracting personnel and shifting government priorities during performance of contingency contract may increase risk of default termination – contractor can mitigate risk through (i) well-defined contract requirements, (ii) ongoing real-time communications with customer and (iii) accurate performance records.

– International law

- Some contingency requirements (predominantly contingency operations) will involve performance in foreign country – determine application of foreign law and impact on performance (including performance costs).
- Status of Forces Agreements (SOFAs) – determine applicability and potential benefits to contractors.

Contract Administration Issues

■ Additional Considerations

– Protests

- Quick pace of contingency contracting may lead to bases for pre- and post-award protests, i.e., poorly defined requirements, ineligible bidders, incomplete/inaccurate evaluations – contractors should assess both solicitation requirements (prior to proposal submission) and debriefing information to protect rights and ensure fair competition among offerors.
- Consider timing of protest resolution against tempo of contingency requirements (agency vs. GAO v. COFC) and impact of automatic stay on operations (government ability to override stay based upon performance in best interest of U.S. or urgent and compelling circumstances).

– Contract closeout

- Contractor should ensure that it determines whether any potential claims related to performance exist before submission of final invoice/receipt of final payment.
- Contractors should be familiar with record retention requirements post-closeout and maintain sufficient information to ensure compliance.

Contingency Contracting Uses

- DOD defines contingency operations as small, medium, or large-scale military operations (Iraq and Afghanistan), including support for peacekeeping operations, major humanitarian assistance efforts, noncombatant evacuation operations, and international disaster relief efforts, domestic emergency response (Hurricane Katrina) and pandemic-related emergency declarations (COVID-19)
 - Operation Enduring Freedom
 - Operation Iraqi Freedom
 - Operation United Assistance (West Africa 2014, Ebola response)
 - Operation Warp Speed

Contingency Contracting Uses – Operation Enduring Freedom

- Response to September 11, 2001 attacks.
- Operation Enduring Freedom (OEF) ended on December 31, 2014 and transitioned to Operation Freedom's Sentinel (OFS) on January 1, 2015.
- Increased Acquisition Thresholds



Source: <https://dcas.dmdc.osd.mil>

Contingency Contracting Uses – Operation Iraqi Freedom

- Began March 20, 2003
- 38,299 transactions;
\$371,529,453.
- The top three spending categories—construction supplies, vehicles, and construction services



Source: <https://dcas.dmdc.osd.mil>

Contingency Contracting Uses – Operation United Assistance

- Ebola Response – West Africa 2014
- Increased Acquisition Thresholds
- USAID was the lead agency
- \$400.5m expended



Source: <https://www.africom.mil/>

Contingency Contracting Uses – Operation Warp Speed

- COVID-19
- Accelerated testing, supply, development, and distribution of safe and effective vaccines, therapeutics, and diagnostics

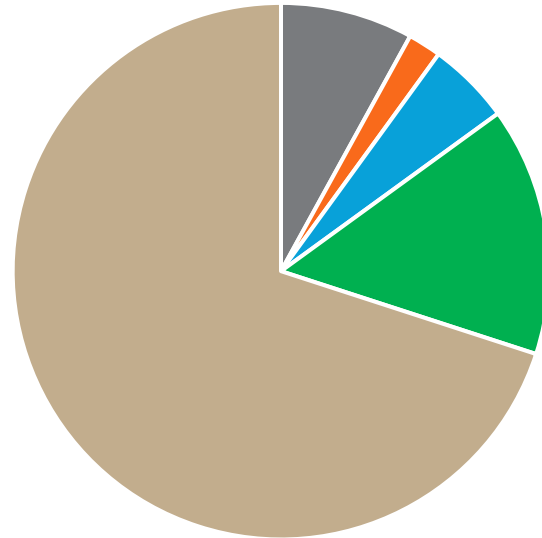


Source: <https://www.defense.gov/>

Contingency Contracting Uses – Overseas Contingency Operations

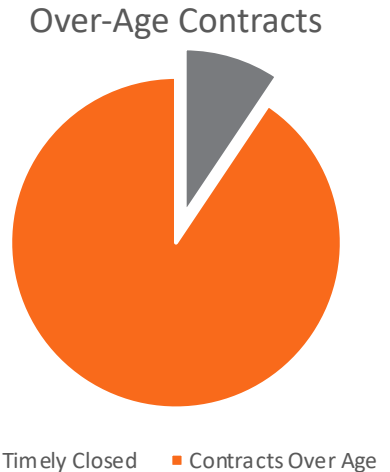
FY2017 OCO Funding Request by Activity

8%	Base Requirements
2%	Counterterrorism Partnerships Fund
5%	European Reassurance Initiative
15%	Operation Inherent Resolve and related missions
70%	Operation Freedom's Sentinel and related missions



Lessons Learned

- DOD Inspector General Report Findings and Lessons Learned:
 - communication and coordination
 - documentation
 - consistency in contracting processes; and
 - staffing and training.
- GAO reports on contingency contracting in overseas operations
 - lack of advance planning and failure to close out contracts (FAR 4.804-1);
 - workforce shortfalls;
 - contractor accounting challenges;
 - lack of contract-level funding data; and
 - Late discovery of improper funding.



Recommended Improvements – What It Means For Contractors

- Recommended improvements regarding use of contingency contracting
 - Advance Contracts
 - Updated Criteria for Budgets
 - Published resources
 - UCAs
 - Fraud Awareness

Contingency Contracting Issues for Potential Contractors

- Understand the agency's needs in an emergency contracting situation
 - What are the agency's needs, both short- and long-term?
 - How can the contractor assist the agency customer in fulfilling those needs?
 - What can the contractor offer to fulfill those needs in an emergency contracting environment?
 - Unique products/services
 - Ability to provide products/services on expedited basis
 - Ability to deliver products/perform services in foreign country/disaster area
 - What are additional factors impacting agency needs/requirements?
 - Funding source(s)
 - Timing
 - Place of performance (foreign laws/treaties)

Contingency Contracting Issues for Potential Contractors

- Understand who the players are with respect to emergency contracting requirements and their respective roles and responsibilities
 - Who represents the agency?
 - Contracting officer
 - Agency personnel in theater/on ground
 - What is the authority of relevant government personnel?
 - Authority to execute/modify contracts
 - Authority to inspect/accept products or services
 - Who represents the contractor and is part of contractor team?
 - Prime contractor personnel
 - Subcontractors
 - Suppliers
 - What are the roles of contractor team members?
 - Prime contractor personnel with ability to represent/bind the company
 - Subcontractor agreements (teaming agreement, subcontract)
 - Additional considerations (performance in foreign country, compliance with host nation laws)

Contingency Contracting Issues for Potential Contractors

- Understand the agency's contracting type and manner/method of acquisition
 - What type of contract will the agency use?
 - Consideration of contractor risks based on contract type:
 - Fixed-price – contractor bears risk
 - Cost-reimbursement – greater risk for government
 - Impact of those risks in emergency contracting environment
 - What is agency justification for award in emergency environment?
 - Circumstances permitting other than full and open competition
 - One responsible source
 - Unusual and compelling urgency
 - National security
 - Ability of government to document justification
 - Role of contractor in assisting with development of justification
 - What acquisition flexibilities are available to and used by agency as part of procurement?
 - Normally available flexibilities at FAR Subpart 18.1
 - Emergency acquisition flexibilities at FAR Subpart 18.2
 - Role of contractor in supporting agency use of appropriate acquisition flexibilities

Contingency Contracting Issues for Potential Contractors

- Understand tools available to contractor to mitigate performance risks
 - What are legal tools to mitigate risk?
 - Legal bases for indemnification
 - Pub. L. 85-804
 - What are contract tools to mitigate risk?
 - Selection of contract type that provides greatest protection to contractor/shifts risk away from contractor
 - Fixed-price contracts
 - Commercial contracting
 - Development/selection of contract terms that maximize contractor protections
 - What additional tools are available to contractor to mitigate risk?
 - Insurance (including Defense Base Act)
 - Third-parties (subcontractors, suppliers)

Contingency Contracting Issues for Potential Contractors

- Understand best practices in contract administration
 - What are the contract’s requirements?
 - Develop strong understanding of what the contract requires – “shall” matrix
 - Who has authority to administer the contract?
 - Identify contracting officer/contractor officer representative/authorized personnel on the ground
 - Identify who speaks on behalf of the contractor and has authority to bind the company
 - How is the contract administered?
 - Develop best practices to communicate with the government
 - Ensure that all relevant communications are captured and preserved
 - Develop processes to monitor performance and report any changes in requirements – change order management
 - When are we required to delivery and where?
 - Given environment and tempo of contingency contracting, ensure that all parties agreed on what is being provided (either products or services) and where delivery/performance will take place
 - Capture any changes in requirements real-time to ensure agreement between parties
 - Ensure ability to manage contract performance/change in requirements

Contingency Contracting Issues for Potential Contractors

- Understand general contingency contracting performance issues
 - Delivery/inspection/acceptance
 - Ensure both parties are clear on all terms impacting delivery/inspection/acceptance
 - Invoicing
 - Ensure adequate systems and processes to record necessary information to generate invoice on timely basis
 - Capture any changes in requirements that impact invoicing – change orders, modifications
 - Track any issues impacting invoicing – changes in contracting personnel, delivery/performance issues
 - Payment
 - Track invoice submission and payment timing
 - Overcommunicate on issues impacting payment – contracting personnel, DFAS issues
 - Use available tools/remedies – Prompt Payment Act
 - Contract closeout
 - Ensure mutual understanding on timing/issues impacting completion of performance
 - Communicate with government personnel on closeout issues – who is responsible for what action and by what date
 - Ensure that any closeout action does not comprise contractor interests – payment, claims

Contingency Contracting Issues for Potential Contractors

- Understand contingency contracting performance issues in foreign country
 - Applicable laws
 - Ensure contractor understands what laws govern performance – U.S. or host nation or both
 - Ensure that contract clearly identifies applicable laws
 - Personnel
 - Ensure parties identify who relevant personnel are in country – both contractor and government
 - Determine contractor compliance obligations for its personnel in country – local laws, General Order No. 1, additional contractual/legal obligations
 - Prime contractor requirements
 - Housing
 - Transportation
 - Permits/licenses
 - Use of third-parties to provide necessary support (e.g., professional employer organization)
 - Cost impacts
 - Ensure parties agree on who is responsible for payment of performance costs in foreign country
 - Ensure that contract reflects foreign performance payment obligations
 - Develop and implement systems and processes that can capture additional performance obligations and costs

Contingency Contracting Issues for Potential Contractors

- Understand legal risks and remedies associated with contingency contracting
 - Compliance
 - Ensure that contractor maintains adequate processes and procedures to track compliance with contract terms and conditions and legal obligations
 - Ensure that contractor is able to monitor employee/subcontractor/third party compliance with contract/legal obligations (including host nation laws)
 - Consider reporting obligations/options when compliance issues are detected/investigated
 - Requests for equitable adjustment/claims
 - Track contract performance to identify issues and events giving rise to cost/schedule/performance impacts
 - Develop systems to track and capture cost/schedule/performance impacts
 - Submit/negotiation requests for equitable adjustments/claims with appropriate and authorized contracting personnel
 - Overcommunicate with agency on contract performance issues that involve or could lead to cost/schedule/performance impacts
 - Disputes
 - Understand dispute resolution options and procedures
 - Determine cost impacts/allowability of costs arising from contract disputes
 - Consider customer relations impact associated with contract disputes
 - Past performance/customer relations
 - Be aware that contractor performance will impact future contracting opportunities – past performance
 - Ensure that all parties agree on what the contract requires and when performance/delivery will occur
 - Seek informal feedback from customer on performance and adjust/modify performance as necessary



Questions?

Contact Information

- **Jessica Haire**, Jessica.Haire@ThompsonHine.com
- **Francis “Chip” Purcell**,
Chip.Purcell@ThompsonHine.com
- **Tom Mason**, Thomas.Mason@ThompsonHine.com
- **Sarah Maguire**, sarah.a.maguire@baesystems.com