



Contracting in Times of Upheaval: Lessons from the Russian Invasion

Presented by Partners from FH+H:



Dave Jonas
Tom Craig
Adam Munitz

Thomas “Tom” Craig

Managing Partner, FH+H



Thomas “Tom” Craig’s practice includes a wide variety of matters such as government contracting, export and other regulatory compliance, sensitive government inquiries and internal investigations, complex civil litigation, and structuring business transactions.

While he handles all matters related to government contractors, from bid protests to teaming agreements, Mr. Craig specializes in high-profile and high-risk matters that require comprehensive coordination of legal, media, political, and consulting efforts.

Mr. Craig had a distinguished military career, serving more than 21 years as an active duty Marine.

Adam Munitz

Partner, FH+H



Adam Munitz represents, advises, and counsels companies and individuals on a wide variety of matters, including foreign investment, export compliance, international business transactions, FOCI (foreign ownership, control, and influence), reviews by the Committee on Foreign Investment in the United States (CFIUS), and government contracting.

Mr. Munitz has spent years supporting agencies and corporations in the defense and national security sectors.

Dave Jonas

Partner, FH+H



Dave Jonas served 20 years in the Marine Corps and became the first judge advocate in the history of the Army, Navy, Air Force or Marine Corps to argue a case at the U.S. Supreme Court. He concluded his service as Nuclear Nonproliferation Planner for the Joint Chiefs of Staff.

Mr. Jonas then served as General Counsel of two federal agencies including the National Nuclear Security Administration, with its \$20 billion budget making it about half of the Department of Energy, the vast majority of that \$20B directed toward government contracts. DOE/NNSA has the largest government contracts other than DOD.

Mr. Jonas teaches Nuclear Nonproliferation Law & Policy at Georgetown and George Washington Law Schools.



About FH+H

FH+H is a diverse, security-focused law firm that understands high-growth, high-risk environments. We are proud to be veteran owned.

FH+H is a full-service firm that boasts robust Government Contracts and International Transactions practices. FH+H attorneys assist domestic, foreign, and multinational clients, including individuals, fast-growing business, and conglomerates, in securely navigating global transactions.

Our team helps build sustainable businesses in some of the most challenging operating environments in the world.

(703) 590-1234 | info@fhhfirm.com
1751 Pinnacle Drive, Suite 1000
Tysons, VA 22102

GOVERNMENT CONTRACTING IN TIMES OF CRISIS

Balancing Operational Needs with Legal Requirements

- Customers in crisis will often insist on “skipping steps.”
- Operationally oriented businesses have an instinct to support.
- Lawyers need to ensure decisions are made while cognizant of all relevant risks.
 - Risk awareness, not risk avoidance.
 - Understanding the difference between facilitating goals and becoming an impediment.

Ensuring Appropriate Authority

- “Actual” vice “Apparent” authority is generally required to bind the government.
 - FAR 1.602
 - *Federal Crop Ins. Corp v. Merrill*, 332 U.S. 380 (1947)
 - *CACI, Inc. v. Stone*, 990 F.2d 1233 (1993)
- Get it in writing
 - Particularly if there is any question about scope.

Avoiding Scope Issues

- Is request in the current scope of the contract?
 - If not a modification is likely required.
 - Proceeding with email authorization is generally an acceptable risk.
- Is request within scope of contract vehicle?
 - If a request is purportedly made under a contracting vehicle, ensure it is within the scope of that vehicle.
 - If not, the contracting officer may lack authority.

Implications of Exceeding Scope

- A task order or contract that exceeds the scope of the contracting officer's authority may be void or voidable.
 - *Foley Company v. United States*, 36 Fed. Cl. 788 (1996)
- Voidable contracts may be ratified, or paid as quantum meruit.
 - *Dan Rice Construction Co. v. United States*, 36 Fed. Cl. 1 (1996)
 - *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986)
- Even if a contract is eventually paid or ratified, long delays are common.

Subcontracting Consideration

- Subcontracting crisis work may increase business risk.
- Unlike the Government, contractors are subject to apparent authority.
- Mitigate risks with good subcontracting practices.
 - Ensure clarity on scope.
 - Ensure proper flow down, particularly of “pay when paid” provisions.

DEFENSE PRODUCTION ACT

Defense Production Act

- Passed in 1950 in response to Korean War
 - 50 USC Chapter 55
 - DPAS 15 CFR §700
- Authority
 - Allows President to use various tools to prioritize and incentivize production in support of national security.
 - Prioritizing certain contracts, e.g. Rated Orders. (Title I)
 - Incentivize certain economic activities or capabilities (Title II)
 - Other miscellaneous authorities (Title VII)
 - CFIUS
 - Anti-trust exemptions

Recent Invocations of DPA

- COVID-19
 - Ventilator production
 - PPE production
 - Vaccine production
 - Protection of critical supply chain (e.g. meat plants)
- Afghanistan Evacuation Effort
 - CRAF airlift
- Securing vital materials
 - Presidential Determination 2022-11 (battery materials)

DPAS Rated Orders

- Authority to order priority performance of certain orders.
 - DX “Highest National Defense Emergency”
 - DO “Critical to National Defense”
- Must be accepted
 - Unless cannot meet performance requirements.
- Must be flowed down to subcontractors and suppliers
- Additional notification requirements apply. 15 CFR 700.13
- Assistance with obtaining parts and supplies is available.
- 15 CFR 700; FAR 52.211-15; <https://www.dcms.mil/DPAS/>

OTHER CRISIS CONTRACTING CONSIDERATIONS

Inability to Perform

- Supply Chain Disruptions
- Labor Shortages
- Competing priority orders
- Significant pricing obstacles

Rated Orders

- Take each in order of priority and time.
 - 15 CFR 700.75
- Consider seeking assistance for supply issues.
- Closely coordinate with contracting office.

Non-Rated Orders

- Supply chain or labor issues do not generally excuse performance.
- Pricing issues do not generally excuse performance.
 - Beware of running to cost reasonableness issues. FAR 31.201-3
- Communication remains important.
- Consider seeking modification or REA. FAR 252.243-7002
- Sometimes descoping the contract is the best remedy.

Sovereign Acts Doctrine

- The government “cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign.” *Conner Bros. Const., Co., Inc. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008).
- In theory the doctrine is limited to cases where the impact on the contract is “merely incidental to the accomplishment of a broader governmental objective.” *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432 (1996).
- In practice “public and general” is often interpreted very broadly.
 - Barring contractor from base for security reasons.
- The government is not generally liable for supply chain and labor issues caused by:
 - COVID rules.
 - Sanctions regimes.
 - Security rules.
 - ITAR restrictions.

OUTLOOK FOR THE FUTURE

Geopolitics Continue to Drive Contracting

- Ukraine suggests that:
 - National Security Budgets will remain robust.
 - Foreign Military Sales and Direct Commercial Sales will remain brisk.
 - Sanctions will continue to complicate the contracting landscape.

DPA Will Remain an Important Tool

- “Emergency” and “Crisis” contracting measures are being used for more diverse purposes.
 - Pandemic
 - Humanitarian missions
- The same tools will likely be used more in the future including:
 - To compete for scarce materials
 - As an extension of related sanctions and financial regimes.
 - To deal with humanitarian crises, natural disasters and the like.

Implications for U.S. Government Contractors

SANCTIONS & EXPORT CONTROLS

Overview of Current Sanctions

Financial Sanctions

- Blocking sanctions on Russian banks
- Restrictions related to transactions with the Central Bank; sovereign debt and wealth funds
- Access to SWIFT payment system blocked for Russian banks

Sanctions on Individuals/Entities

- Blocking sanctions on high-level Russian officials and oligarchs
- Blocking sanctions on President Putin & immediate family
- Travel bans on many wealthy Russian individuals
- Sanctions on Russian defense companies

***Note** that the EU, UK, and Canada (among other countries) have also issued various sanctions related to Russia, any of which may impact U.S. firms doing business in those countries.

Sanctions Implications for Manufacturers and Integrators

- Often, contractors that build large platforms source parts and components from suppliers located all over the world. They will have to be particularly wary of Russian suppliers moving forward
 - According to DefenseNews, titanium procurement will be particularly challenging
 - Russian microelectronics, communications, and navigation companies sanctioned
- While it is always important to conduct due diligence on such suppliers, it is significantly more important now that such broad restrictions have been imposed Russian entities.

New Export/Import Restrictions

Export/Import Restrictions

- Broad increased restrictions (license requirements and policies of denial) on all items on the Commerce Controls List.
 - Policy of denial on semiconductors, computers, telecommunications, information security equipment, lasers, and sensors
- Policies of Denial for license requests of all items subject to the EAR (including EAR99 items) to “Military End Users” or “Military End Uses.”
 - 49 military end users added to BIS’ Entity List on February 24, 2022
 - 92 entities added to BIS’ Entity List on March 9, 2022 (Belize, Estonia, Latvia, Malta, Russia, Singapore, Slovakia, Spain, and UK)
- Prohibitions on oil, gas, and related energy imports and restrictions on exports.
 - Expands scope of existing general prohibition by imposing additional license requirement for exports, reexports, or transfers (in-country) of any item subject to the EAR (even if EAR99) and listed in new Supplement No. 4 to Part 746 to and within Russia and removes “knowledge” requirement
- Suspension of “Normal Trade Relations” with Russia.

***Note** that the EU, UK, and Canada (among other countries) have also issued various sanctions related to Russia, any of which may impact U.S. firms doing business in those countries.

Evasion Mitigation

- In light of the sanctions recently imposed on Russia and the resulting impact on its defense and aerospace sectors, proscribed Russian parties will likely use cut-outs and other strategies to procure U.S.-origin hardware
- Ensuring employees can identify “red flags” is increasingly important. These may include:
 - The customer or purchasing agent is reluctant to offer information about the end-use of the item.
 - The product's capabilities do not fit the buyer's line of business, such as an order for sophisticated computers for a small bakery.
 - The item ordered is incompatible with the technical level of the country to which it is being shipped, such as semiconductor manufacturing equipment being shipped to a country that has no electronics industry.
 - The customer/vendor has little or no business background
 - Delivery dates are vague, or deliveries are planned for or routed through out of the way destinations.
 - When questioned, the buyer is evasive and especially unclear about simple export-related questions.

Kalashnikov Procurements

- The U.S. has imposed restrictions on goods manufactured by the Kalashnikov Concern since Russia's original invasion of Ukraine in 2014.
- With heightened U.S. and EU restrictions put in place this year, companies should exercise even more caution when procuring Kalashnikov firearms for overseas training/sourcing contracts with the U.S. Government (FMS and otherwise)

Need for Heightened Due Diligence

- Deemed Exports
 - The risk of engaging in an unlicensed deemed export increases every time export controls are enhanced.
 - Deemed exports may occur when sharing export controlled information (either “**Technology**” or “**Technical Data**”) with foreign nationals, even when such foreign nationals are physically located within the U.S.
 - When interacting with suppliers, program partners, and other third parties, contractors should exercise heightened due diligence to ensure they do not inadvertently effectuate a deemed export to a prohibited party.

Need for Heightened Due Diligence

- Foreign National/Dual National Employees
 - While companies must always vet the citizenship of foreign national and dual national employees, more scrutiny may now be required for companies that work with dual-use items given the expanded restrictions for Russia.
- Temporary Exports
 - Often, complex projects require both imports of items and temporary exports of items for testing, manufacturing, or evaluation purposes.
 - Companies must exercise increased due diligence to ensure such exports do not involve designated Russian nationals or entities.

OTHER NOTABLE IMPACTS

Implications for Mergers and Acquisitions

- Due to the robust new layer of sanctions, contractors should engage in additional due diligence when evaluating sources of funding *and* when investing in new companies:
 - Ultimate beneficial owners may not always be disclosed transparently .
 - Sources of funding may similarly be obscured.
 - When considering venture capital/PE investment, ensure you understand both the beneficial owners and the identity of the fund managers.

Federal Contracting for Peace and Security Act

- This is a proposed law put forth by the House Committee on Oversight and Reform (H.R. 7185) that would place even more restrictions on the ability for U.S. businesses to transact with Russian entities.
- Specifically, the law would:
 - Establish that it is the policy of the U.S. Government not to conduct business with companies that undermine its national security interests by continuing to operate in Russia during the war against Ukraine; and
 - Prohibit the Government from purchasing products or services from companies that continue to conduct business in Russia during the war.



Federal Contracting for Peace and Security Act

- Notably, the proposed law would also make “reasonable exceptions” for products or services purchased for the benefit of Ukraine or to meet basic human needs, as well as for cases in which prohibition or termination of a contract would not be in the national interest of the United States.
- This would require advance notification to the President and Congress.

Timing of Export Licenses

- Government contractors that export defense articles or dual use items should expect fluctuations in license application processing times.
- Export licenses to Ukraine are being prioritized, which means that applications for licenses to export to other destinations could take longer to process.
- **Bottom Line:** Contractors should plan for export license reviews to take longer than anticipated.

Supporting Ukraine

- Many Government contractors are now in a position to support the Ukraine by providing defense articles, defense services, and dual use items.
- However, U.S. export control laws and regulations *still apply* to exports to Ukraine.
 - Companies exporting goods, including donated goods, must still ensure they have the appropriate export licenses in place.
 - Similarly, any companies and individuals engaged in **brokering activities** vis-à-vis defense articles and defense services should ensure they are appropriately registered and licensed, as necessary.
 - NOTE: brokering licenses are required for brokering activities tied to ALL foreign-origin defense articles and defense services, regardless of the United States Munitions List categories into which they would otherwise fall if they were U.S.-origin

***Brokering Activities** are defined as “any action on behalf of another to facilitate the manufacture, export, permanent import, transfer, reexport, or retransfer of a U.S. or foreign defense article or defense service, regardless of its origin”

New Disarmament Treaty Calls For World Powers To All Fire Their Nuclear Stockpiles At Fiji

Yesterday 7:35AM • SEE MORE: ONION PUBLIC RADIO ▾



The world is a safer place today. Hear what went into the unprecedented, unilateral agreement to obliterate the 7,000-square-mile island.

"New Disarmament Treaty Calls for World Powers to All Fire Their Nuclear Stockpiles at Fiji." The Onion, The Onion, 14 Sept. 2020, www.theonion.com/new-disarmament-treaty-calls-for-world-powers-to-all-fi-1845047326.



thebabylonbee



To Protect Against Nuclear Fallout, Dr. Fauci Recommends Wearing Three Masks



“To Protect against Nuclear Fallout, Dr. Fauci Recommends Wearing Three Masks.” The Babylon Bee, 28 Feb. 2022, babylonbee.com/news/to-protect-against-nuclear-fallout-dr-fauci-recommends-wearing-three-masks.



thebabylonbee



Nuclear Launch Codes To Be Stored Securely On CNN+ Broadcast Where No One Will Ever See Them



Read the article at
[BabylonBee.com](https://babylonbee.com)

“Nuclear Launch Codes to Be Stored Securely on CNN+ Broadcast Where No One Will Ever See Them.” The Babylon Bee, 13 Apr. 2022, babylonbee.com/news/nuclear-launch-codes-to-be-stored-securely-on-cnn-broadcast-where-no-one-will-ever-see-them.

The First Financial World War

- Russia facing historic sanctions resulting in unprecedented compliance challenges
- The ultimate effects of these sanctions are unknown
- Office of Financial Assets Control (OFAC) oversees financial sanctions and published FAQs
- New sanctions being added daily
- Other agencies:
 - Commerce for export controls
 - State for visa
 - Justice for anti-kleptocracy measures
- Banks can handle these sanctions, but other companies have much to contend with

Nuclear Implications: Deterrence and Nuclear Weapons

- I am going to briefly discuss the nuclear issues that you have surely heard about in Ukraine
- No nuclear weapons have been used in anger since 1945, although there have been over 2,000 nuclear tests since then
 - Massive retaliation and mutually assured destruction (MAD) provided deterrence and kept the peace during the Cold War
- Strategic vs. Tactical
 - No one really envisioned anyone employing a single tactical nuclear weapon, for which massive retaliation is inherently unbelievable
 - No treaties signed by Russia or the United States prevent the use of nuclear weapons
- ICJ Opinion
- Russian Doctrine: escalating to de-escalate and likely NATO responses

Nuclear Implications: Risks in Civil Nuclear Facilities Under Attack/in a War Zone

- Civil nuclear power plants generally quite safe but not designed for protection against military attack
- Nuclear power plants run on LEU
- Spent fuel risks
- Potential failure of cooling systems
- Potential release of radiation