



Advanced Fundamentals of Government Contracting

Michael Killham, JD, LLM

mkillham@gmail.com

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INSTRUCTOR BIOGRAPHY

- **Michael Killham** is a California attorney with more than 30 years of experience in U.S. Government procurement and subcontracting support. He provides legal advice, training, and assistance concerning all aspects of government and commercial contracting and fiscal law, including but not limited to subjects relating to Contract Formation and Administration, Legal Compliance, Subcontracting, Negotiations, Bid Protests, Contract Disputes, Commercial Item Contracting, Contract Terminations, Export/Import Compliance, and Source Selection.

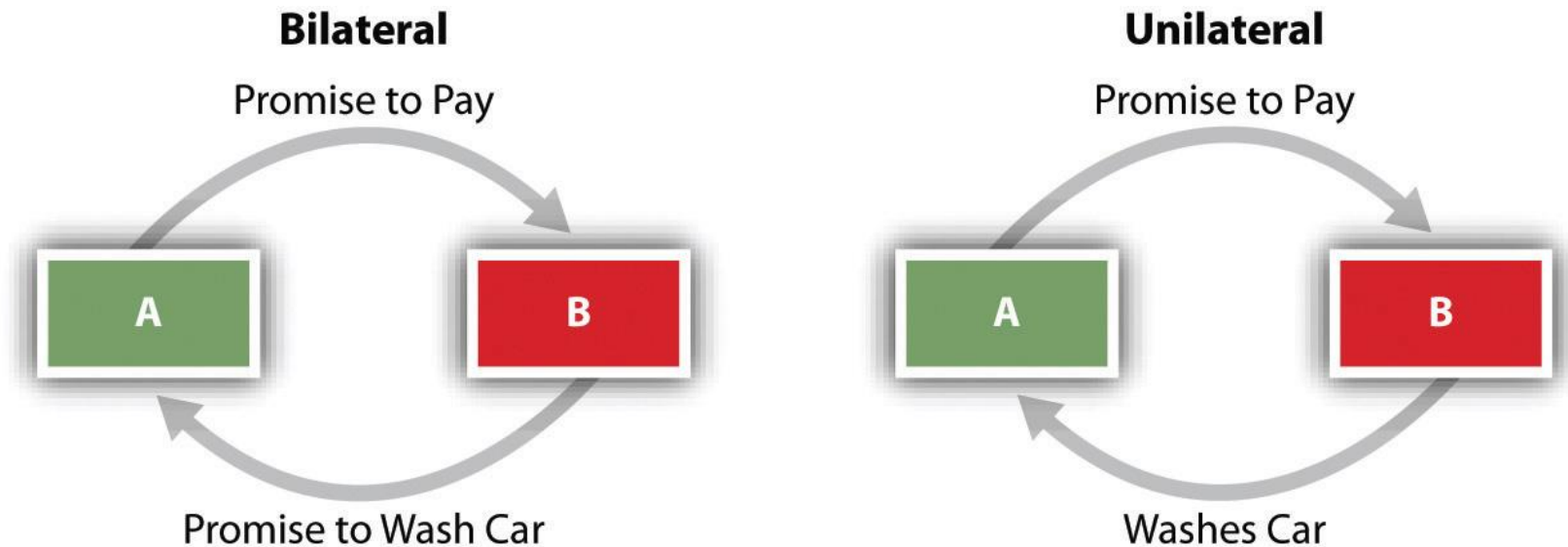
The instructor served as corporate counsel for major U.S. government aerospace contractors following a military career as a U.S. Army Judge Advocate. His assignments have included serving as the Director, Legal Operations, for Lockheed Martin Aeronautics Company, Advanced Development Programs (a.k.a. "Skunkworks") in Palmdale, California; as the General Counsel for a U.S./French joint venture - Thales-Raytheon Systems Company, LLC - and MD Helicopters, Inc., in Fullerton, California and Mesa, Arizona, respectively; as Senior Business Counsel for Raytheon Space & Airborne Systems in El Segundo, California; and as Division Counsel for two separate operating divisions of Litton Industries, Inc. In these positions, he was responsible for identifying, advising on, and resolving a wide variety of legal and business-related issues, including those relating to government and commercial contracting and subcontracting, export/import compliance, corporate governance, labor/employment law, government cost accounting, intellectual property rights, litigation/litigation management, and more.

- While in the military, the instructor served as a Trial Attorney prosecuting civil fraud cases in the Civil Division (Procurement Fraud Branch), U.S. Department of Justice, Washington, D.C.; as the Senior Command Counsel in Kuwait during a period of build-up for renewed hostilities with Iraq; as the Senior Professor of Contract and Fiscal Law at the U.S. Army Judge Advocate General's School, Charlottesville, Virginia; as a Trial Attorney for the U.S. Army Contract Appeals Division in Arlington, Virginia; and as the Chief, Military Justice, and Criminal Prosecutor for the 1st Armored Division in Germany.
- Mr. Killham received a Bachelor of Science degree from the United States Military Academy at West Point, a Juris Doctor degree from Notre Dame Law School, and a Master of Laws degree (with emphasis on U.S. Government Procurement) from The Judge Advocate General's School. He is a graduate of the U.S. Army Infantry Officer's and Judge Advocate General's Basic Courses, Airborne School, Ranger School, and Command and General Staff College, and served as a Company Executive Officer, S-3 Air Officer, and Platoon Leader in the 1st Battalion, 505th Infantry Regiment, 82d Airborne Division at Ft. Bragg, North Carolina.

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BILATERAL VS UNILATERAL CONTRACTING



Privity of Contract: a direct contractual relationship between the contracting parties

FEDERAL, STATE & FOREIGN GOVERNMENT, AND COMMERCIAL CONTRACTING

- Federal Government Contracting
 - Simplified Acquisitions, Sealed Bidding, Competitive Negotiations
 - Contract Types: Firm-Fixed-Price, Cost-Reimbursable, Indefinite Quantity, Time-and-Materials/Labor Hour, Options, etc.
 - Subject Matter: Supplies, Services, Research & Development, Construction, Architect & Engineer, Facilities, Training, Utility Services, Commercial Items
 - Agreements: Blanket Purchase Agreement (BPA), Basic Ordering Agreement (BOA), Cooperative Research and Development Agreement (CRADA)
 - Grants
- State & Local Government Contracting
- Foreign Government Contracting
 - Direct Commercial Sales (DCS) vs. Foreign Military Sales (FMS)
- Commercial Contracting/Subcontracting – Contractor to Contractor, Contractor to Foreign Government

COMMERCIAL VS GOVERNMENT CONTRACTING

- Applicable Law (Federal, State, or Foreign)
- International Treaties & Conventions (e.g., TAA, NAFTA, UN CISG)
- Principles (UCC – sales of goods & commercial transactions)
- “Contract”
 - More than an “Agreement”
 - Definitions vary
 - Defined in next slide
- Contracting Authority (Actual, Apparent, Implied)

COMMERCIAL VS GOVERNMENT CONTRACTING - DEFINITIONS

- “Contract” – “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.” FAR § 2.101

COMMERCIAL VS GOVERNMENT CONTRACTING - DEFINITIONS

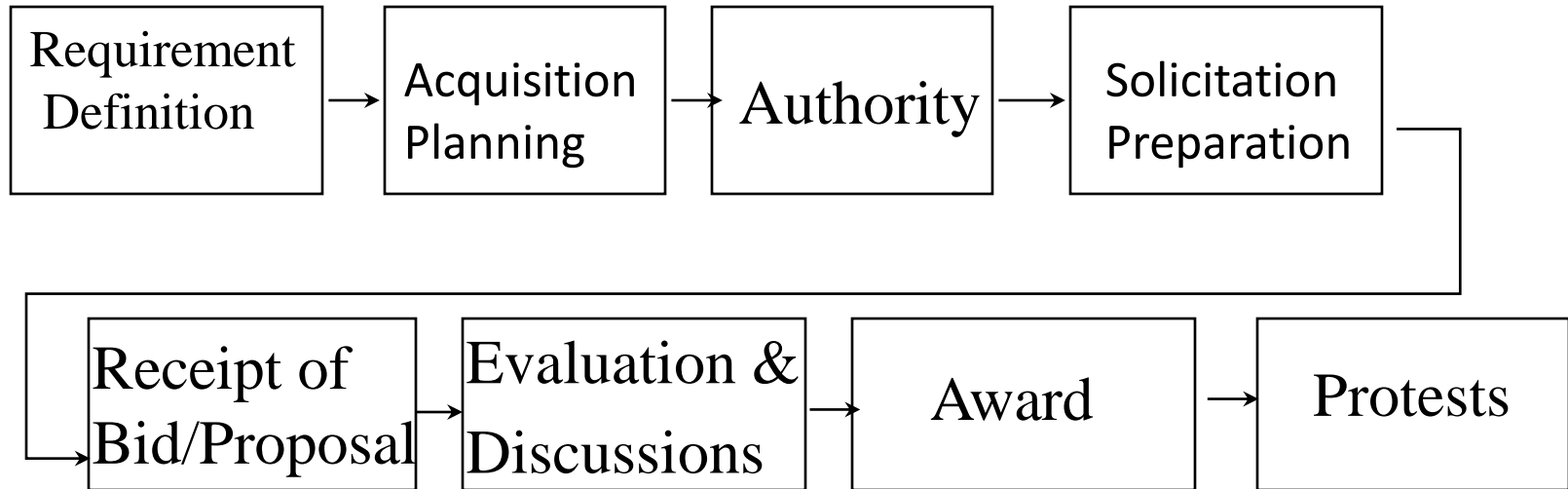
- “Contract” – as distinguished from "[agreement](#)", means the total legal obligation that results from the parties' agreement as determined by the [Uniform Commercial Code](#) as supplemented by any other applicable laws. UCC §§ 1-201 & 2.106(1)
- “Contract” - a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Restatement of Contracts 2d § 1
- “Contract” – an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation. 17 Corpus Juris Secundum Contracts § 1(1)(a)
- Other Definitions: “adjustment”, “equitable adjustment”, “request for an equitable adjustment”, “best efforts”, “strict compliance”

THE PROCUREMENT PROCESS

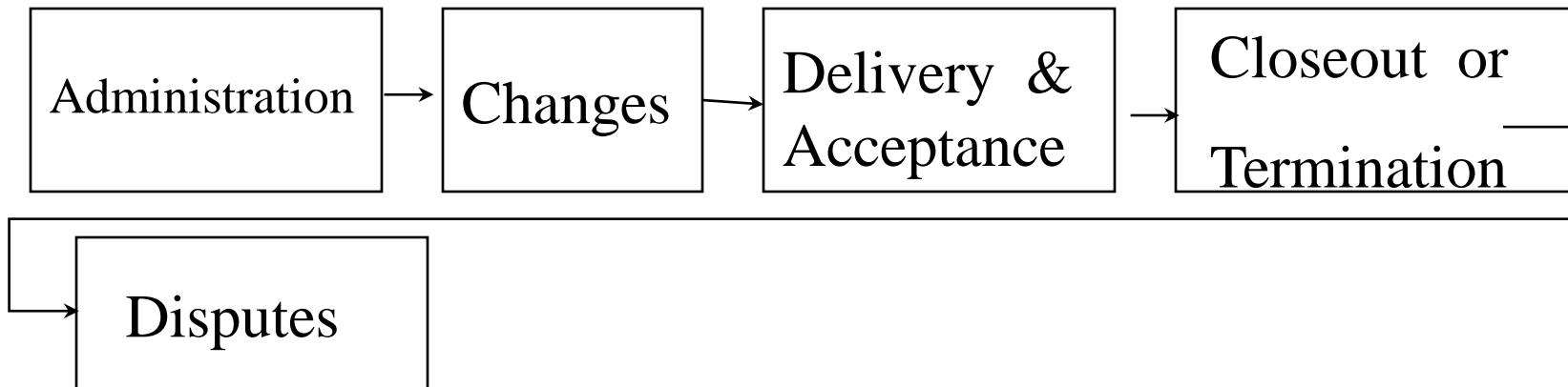
Formation

Fiscal Law

Ethics



Administration



FEDERAL PROCUREMENTS

What Applies/Governs?

- Procurement Statutes
- Procurement Regulations
 - (e.g., FAR, DFARS, AFARS, AFFARS, NMCARS)
- Executive Orders
- "Case Law"
- Contract Clauses & Solicitation Provisions

FEDERAL PROCUREMENTS

Key Statutes & Regulations

- Armed Services Procurement Act (ASPA)
- Procurement (formerly, Federal Property & Admin Services Act)
- The Procurement Integrity Act
- Competition In Contracting Act (CICA)
- Truthful Cost or Pricing Data (formerly, Truth in Negotiations Act)
- Contract Disputes (formerly, Contract Disputes Act of 1978)
- Federal Acquisition Regulation (FAR)
- Defense FAR Supplement (DFARS)
- Other Agency Supplements (e.g., VA, Commerce, State, etc.)
- International Traffic in Arms Regulations (ITAR)
- Export Administration Regulations (EAR)

FEDERAL PROCUREMENTS

Government Players

- Commander
- Comptroller
- Requiring Activity
- User
- Technical Activity
- Contract Office
- Small Business Advocate
- Competition Advocate
- Legal Office
- Contract Administration Office
- Defense Contract Audit Agency
- SBA
- OMB
- GAO
- ASBCA
- CABCA
- U.S. COFC
- CAFC
- U.S. Supreme Court

FEDERAL PROCUREMENTS

(More) Government Players

- Agency Heads
- Heads of Contracting Activities (HCAs)
- Contracting Officers (CO – KO - PCO/ACO/TCO)
- Contracting Officer Representatives (COR/COTR/QAR)
- Investigative Agencies
 - DCIS, NCIS, AFOSI, CID, FBI, GAO-OSI, IG, DCAA

FEDERAL PROCUREMENTS

Contractor Players

- Owner/CEO Shareholders
- Bankers & Finance
- Marketers
- Production
- Engineering
- Contract Administration
- Purchasing / Subcontract Administration
- Subcontractor Suppliers
- In-House / Outside Counsel
- Quality Assurance
- Internal Auditors



GENERAL AUTHORITY RULES

- Government: Only persons with Actual Authority can bind the government
- Contractors/Subcontractors: Persons with Actual or Apparent Authority can bind the contractor
- Other Theories That Bind: Implied Authority, Imputed Knowledge, Ratification, Equitable Estoppel

METHODS OF CONTRACT FORMATION

- Express Contract
 - Mutual intent to contract
 - Offer and acceptance
 - Conduct by an officer having actual authority to bind the government
- Government contracts normally should be in writing
 - Oral contracts are generally unenforceable unless supported by documentary evidence
 - A party may prevail in an oral contract if the court can infer a “meeting of the minds”
- “Implied-in-Fact Contract” – is “founded upon a meeting of the minds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties”
- “Implied-in-Law Contract” – a “fiction of law” where “a promise is imputed to perform a legal duty.” Not a true agreement, and neither the Contract Disputes Act (CDA) nor the Tucker Act grants jurisdiction over such cases.

AUTHORITY OF AGENCIES

- Constitutional – as a sovereign entity, the U.S. has inherent authority to contract to discharge governmental duties. A government contract must:
 - Not be prohibited by law; and
 - Be an appropriate exercise of governmental powers and duties.
- Statutory – Congress has enacted various statutes regulating the acquisition of goods and services by the federal government, including the Procurement statute, ASPA, OFPPA, CICA, FASA, DOD and Other Agency Authorization and Appropriations Acts.
- Regulatory – the FAR, agency supplements, and other regulatory requirements are codified at 48 C.F.R.. Agencies publish proposed, interim, and final changes to the FAR in the Federal Register, and issue changes to it in Federal Acquisition Circulars (FAC).

AUTHORITY OF PERSONNEL

- The government is bound only by government agents acting within the actual scope of their authority to contract. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).
- Heads of Agencies and Contracting Activities possess contracting authority by virtue of their positions. Other individuals acquire contracting authority by delegation.
- Contracting officers may bind the government only to the extent of the authority delegated to them on the SF 1402 (Certificate of Appointment, commonly known as the “warrant”) or by other authorized documents.
- The acts of government agents who exceed their contracting authority (i.e., “unauthorized commitments”) normally **do not bind** the government.
- The acts of contractor personnel who exceed their authority **may bind** the contractor if a third party reasonably believes an agent has authority, based on the third party’s dealings with the principal, even though the principal did not confer or intend to confer that authority. This is called “**apparent authority**”.

THEORIES THAT BIND THE GOVERNMENT

- **Implied Authority** – Courts and boards may find implied authority to contract if the questionable acts, orders, or commitments of a government authority are an integral or inherent part of that person's assigned duties.
- **Ratification** – Persons with contracting authority may ratify the unauthorized commitments of persons who lacked contracting authority. Such ratification may be express or implied.
- **Imputed Knowledge** – When the relationship between two persons creates a presumption that one would have informed the CO of certain events, the boards may impute the knowledge of the person making the unauthorized commitment to the CO.
- **Equitable Estoppel** – A contractor's reasonable detrimental reliance on statements, actions, or inactions by a government employee may estop the government from denying liability.

ALTERNATIVES TO RATIFICATION

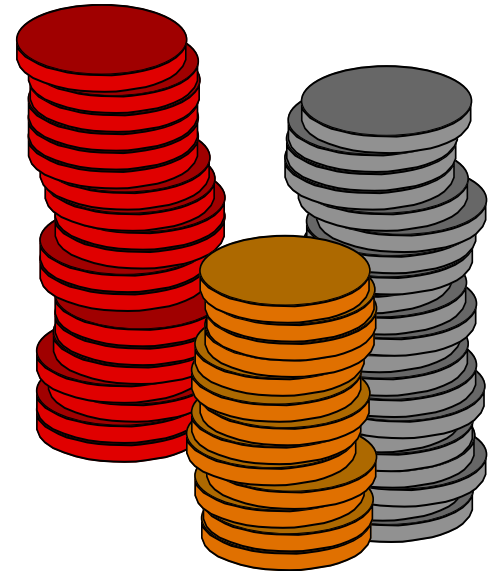
- Requests for Extraordinary Contractual Relief – in the interest of national defense
- Doubtful Claims – the government pays the reasonable value of services received on an implied, quasi-contractual basis provided –
 - The goods or services would have been a permissible procurement;
 - The Government received and accepted a benefit;
 - The firm acted in good faith; and
 - The amount to be paid did not exceed the reasonable value of the benefit received.
- Contract Disputes Act (CDA) Claims

PRACTICAL EXERCISE

- Identify at least 7 occasions throughout the course of solicitation, award, administration, and close-out of a government contract when it might be important to verify the contracting authority of the government person involved in that action.
- What type of authority binds the contractor but does not bind the government? Why is there a difference?
- What action might a government contractor take to protect its rights if the CO fails to provide written direction in a timely manner?
- What actions might the government take if the contractor fails to perform in a timely manner?

FUNDING AND FUND LIMITATIONS

- Appropriations Process
 - Congress Has the Power of the Purse
- Purpose Restrictions
- Time Restrictions
 - Presumption - Good for 1 Year
 - Bona Fide Needs Rule
- Amount Restrictions/ADA
- Fund Cites – 2132020
- Miscellaneous Receipts Act



FUNDING AND FUND LIMITATIONS – KEY TERMINOLOGY

- Authorization Act
- Appropriation Act
- Fiscal year
- Accounting classification – i.e., “fund cite”
- Budget authority – i.e., “obligational authority”
- Contract authority
- Commitment of funds
- Obligation of funds
- Period of availability
- Current year funds
- Expired funds
- Cancelled funds

Funding Limitations

- U.S. Constitution
- Purpose Statute – 31 U.S.C. §1301(a)
- Anti-Deficiency Act – 31 U.S.C. 1341, 1342, 1350, 1351, 1511-1519
- Informal Agreements
- Fiscal Law Philosophy – proper only when authorized

FUNDING AND FUND LIMITATIONS - PURPOSE

- **31 U.S.C. § 1301(a):** “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”
- The “**Necessary Expense Doctrine**” (a.k.a. The 3-part Purpose Test)
 - Expenditure must bear a **logical relationship** to the appropriation charged
 - Expenditure must **not be prohibited** by law
 - Expenditure must **not be otherwise provided for** (Election Doctrine)
- **Important Questions**
 - Who is the purpose for?
 - How is the acquisition classified?(Expense, Investment, Construction?)
 - Is the purchase part of a system, or not? (e.g., 100 computers)
- **Miscellaneous topics:** Fund cites, Earmarks, Otherwise Provided For/Election Doctrine, Questionable Expenses

FUNDING AND FUND LIMITATIONS - TIME

- **Assumption** – funds are available for one year unless otherwise stated
- **Exceptions** to the general prohibition against obligating funds after their period of availability
 - Bid Protests; Terminations for Default; Terminations for Convenience
- The “**Bona Fide Needs**” Rule – use current year money to satisfy current year needs. Exceptions –
 - Supply Contracts (Stock-Level Exception; Lead & Production Lead-Time Exceptions)
 - Service Contracts (Severable vs. Non-Severable Services)

FUNDING AND FUND LIMITATIONS - AMOUNT

- The **Anti-Deficiency Act** prohibits –
 - Making or authorizing an expenditure in excess of the amount available in an appropriation;
 - Making or authorizing an expenditure in excess of an apportionment or a formal subdivision of funds;
 - Incurring an obligation in advance of an appropriation, unless authorized; and
 - Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342. An agency, however, may accept gratuitous” services under certain circumstances.
- **Augmentation** of appropriations is generally prohibited. Exceptions include –
 - The Economy Act; Foreign Assistance Act; Revolving Funds; Proceeds from Bond Forfeitures; Defense Gifts; Health Care Recoveries; Military Pay Recoveries; Military Leases of Real or Personal Property; Damage to Real Property; Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation; Host nation contributions to relocate armed forces; Government credit card and travel refunds. Also, certain refunds, receipt of property other than cash, and funds held in trust for third parties.

PRACTICAL EXERCISE

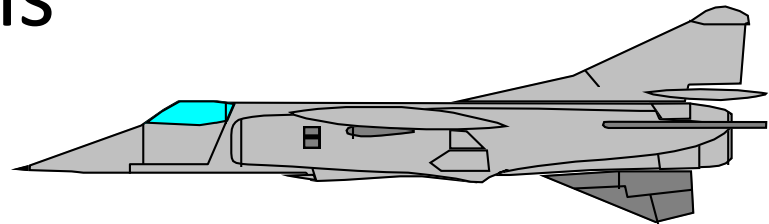
Which of the following items may a government agency purchase using appropriated funds, and under what circumstances?

- Clothing
- Food
- Bottled water
- Workplace food storage and preparation equipment
- Personal office furniture and equipment
- Entertainment (e.g., office parties, alcohol)
- Business cards
- Fines & penalties
- Professional licenses and certificates (e.g., driver's license, bar license)

SPECIFICATIONS -

How the Government Defines Its Needs

- Design Specifications
- Performance Specifications
- Purchase Descriptions
(i.e., “brand name or equal”)
- Mixed Specifications



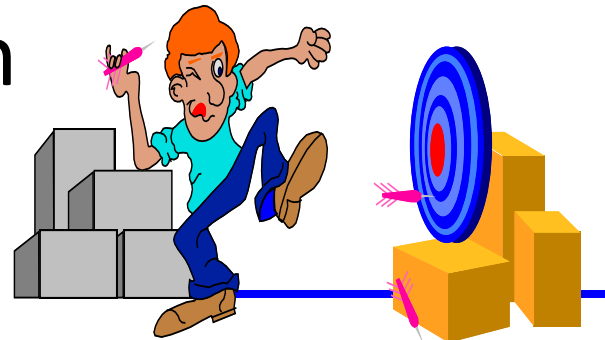
DESIGN SPECIFICATIONS

- No Design Involved:
“Build to Print”
- Government Tells Contractor How to Perform the Work
- Restrictive of Competition



PERFORMANCE SPECIFICATIONS

- Defines the Outcome, Not the Means/
Methods of Performance
- Gov't Doesn't Tell the Contractor How
to Perform Work
- Promotes Competition



PURCHASE DESCRIPTIONS AND MIXED SPECIFICATIONS

- Describes the **essential physical characteristics and functions** required to meet the government's requirements.
- **“Brand Name or Equal Purchase Description”** identifies the product by its brand name and model or part number or other appropriate nomenclature by which it is offered for sale and permits offers on products essentially equal to the specified brand name product. FAR 11.104
- **Mixed Specifications – contains one or more types of each**

Query – who is liable when the specifications are mixed and the contractor fails to perform due to problems in the specifications?

PERFORMANCE-BASED ACQUISITIONS

- **Performance-based contracts** shall include:
 - A performance work statement (PWS);
 - Measurable performance standards and a method of assessing performance against those standards; and
 - Performance incentives, when appropriate. FAR 37.601
- There are **two ways to generate the PWS**. Either the Government creates the PWS or prepares a statement of objectives (SOO) from which the contractor generates the PWS along with its offer. The SOO does not become part of the contract. The minimum elements of the SOO are purpose, scope or mission, period or place of performance, background, performance objectives, and any operating constraints. FAR 37.602(c).
- **Quality assurance plans** to measure and monitor performance are prepared by either the Gov't or submitted by the contractor. FAR 37.604

POLICIES APPLICABLE TO SPECIFICATIONS

Agencies are required to develop specifications that:

- Permit full and open competition;
- State the agency's minimum needs;
- Include restrictive provisions or conditions only to the extent they satisfy the agency's needs or are authorized by law. FAR 11.002(a)
- To the maximum extent practicable:
 - State requirements for supplies and services in terms of functions to be performed, performance required, or essential physical characteristics.
 - Define requirements in terms that encourage offerors to supply commercial and non-developmental items (NDI).

COMMON PRE-AWARD PROBLEMS RELATING TO SPECS

- Failure to list an item's **salient characteristics** when using Brand Name or Equal Purchase Descriptions.
- Writing requirements that **require a particular brand-name, product, or feature** of a product, peculiar to one manufacturer.
- Issuing **unduly restrictive** specifications that which fail to promote full and open competition.
- Issuing **ambiguous** specifications.

Query – What law(s) and regulations are violated when issuing specifications such as those described, above? How can the government avoid these problems? What actions can a contractor take, and what remedies are available when these problems exist?

COMPETITION

- The Competition in Contracting Act of 1984 (CICA)
- The following parts of the FAR implement the statutory requirements of CICA -
 - Part 5 – Publicizing Contract Actions;
 - Part 6 – Competition Requirements;
 - Part 7 – Acquisition Planning;
 - Part 8 – Required Sources of Supplies or Services;
 - Part 10 – Market Research;
 - Part 11 – Describing Agency Needs;
 - Part 12 – Acquisition of Commercial Items;
 - Part 13 – Simplified Acquisition Procedures; and
 - Part 16.5 – Indefinite Delivery Contracts

COMPETITION:

3 LEVELS



#1 (The Default): “Full & Open”

#2: Full & Open After Exclusion of Sources

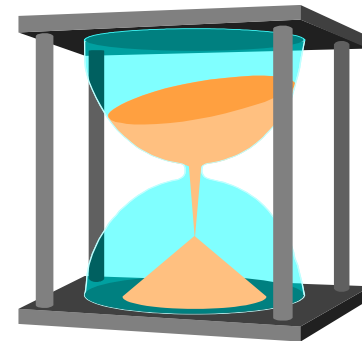
#3: Other Than F&O Competition

- Need Statutory Authority for this
- Justification & Approval (J&A)

COMPETITION:

7 STATUTORY EXCEPTIONS

- Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements
 - In DOD, NASA, and the Coast Guard “one” means “only one or a limited number”
- Unusual or Compelling Urgency
- Industrial Mobilization; Engineering, Development, or Research Capability; or Expert Services
- International Agreement
- Authorized or Required by Statute
- National Security
- Public Interest



COMPETITION: IMPLEMENTATION OF COMPETITION REQUIREMENTS

- **Advocate for Competition** (not a substitute for bid protest)
- **Acquisition Planning** is the process of coordinating and integrating the efforts of the agency's acquisition personnel through a comprehensive plan that provides an overall strategy for managing the acquisition and fulfilling the agency's need in a timely and cost-effective manner. FAR 2.101; FAR Part 7.
- **Market Research** means the process of collecting and analyzing information about the ability of the market to satisfy the agency's needs. FAR 2.101; FAR Part 10.

PRACTICAL EXERCISE

- The Department of Homeland Security is concerned that a terrorist located in Mexico might attempt to install a nuclear weapon in a small, single engine aircraft, fly it over the Mexican/U.S. border, and detonate the weapon while in the air over Los Angeles. Current estimates indicate that such an event would cause approximately 3 million casualties. You have been tasked to develop an acquisition strategy and to conduct initial market research to determine what capabilities, if any, presently exist or can be quickly developed to prevent this event from occurring. Please prepare a short outline of the steps you might take.

CONTRACT TYPES

- Fixed-Price Contracts
- Cost-Reimbursement Contracts
- Variations
- How to Choose?
- Who Chooses?
- FAR Part 16



FIXED-PRICE CONTRACTS

FAR Subpart 16.2

- **Firm-Fixed-Price (FFP)**
 - Contract price is independent of cost
 - If the work doesn't change, the price remains the same
 - Contractor assumes price risk, and benefits from cost controls
 - Generally, easier to administer
- **Fixed-Price with Economic Price Adjustment (FP w/EPA)**
 - Provides for upward and downward adjustment of price upon the occurrence of specified contingencies
 - Adjustment can be based on changes in cost indexes or specified items
- **Fixed-Price with Award Fee (FPAF)**
 - Contractor receives a negotiated fixed price for satisfactory performance, plus may receive an award fee determined by the customer.
- **Fixed-Price Incentive Fee (FPIF)**
 - Fee, if any, is determined by application of a formula based on the relationship of final negotiated cost to the total target cost.
 - Parties agree in advance on a firm target cost, target profit, and profit adjustment formula.
 - Either a FPI (firm target) or FPI (successive target) may be used.

COST-REIMBURSEMENT CONTRACTS

FAR Subpart 16.3

- Contractor receives allowable incurred costs to the extent prescribed in the contract.
- Government bears the most cost or performance risk.
- Contractor must only use “best efforts” to perform.
- Limitations on Cost-Type Contracts include:
 - Contractor must have an adequate cost accounting system.
 - Government must exercise appropriate surveillance.
 - May not be used for acquisition of commercial items.
 - Cost ceilings are imposed through the Limitation of Cost clause, FAR 52.232.20 (fully funded); or the Limitation of Funds clause, FAR 52.232-22 (incrementally funded).
 - These clauses impose requirements on the contractor to track costs, give written notice when approaching the estimated cost of funds limit, and to forfeit costs above the ceiling unless the CO authorizes otherwise. Exceptions.

COST-REIMBURSEMENT CONTRACTS:

Types

- **Cost-Plus-Percentage-of-Cost** (CPPC) Contracts are prohibited and void.
- **Cost** Contracts. FAR 16.302 – Contractor receives allowable incurred costs, but no fee.
- **Cost-Sharing** Contracts. FAR 16.303 – Contractor receives an agreed-upon portion of its allowable costs.
- **Cost-Plus-Fixed-Fee** Contracts. FAR 16.306 – Contractor receives allowable costs, plus a fixed-fee that is negotiated and set prior to award. The fixed-fee does not vary with actual costs but may be adjusted as a result of changes in the work to be performed. There are limitations on the maximum fees (6%, 10% and 15%), depending on the type of contract.
- **Cost-Plus Award-Fee** (CPAF) Contracts. FAR 16.305 – Contractor receives its costs plus a fee consisting of a base amount (may be zero) and an award amount based on a judgmental evaluation by the Government.

COST-REIMBURSEMENT CONTRACTS:

Types

- **Cost-Plus-Incentive Fee (CPIF) Contracts.** FAR 16.304
 - Specify a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula;
 - Are appropriate for services and development and test programs;
 - May combine technical incentives with cost incentives;
 - Require Government payment of the fee despite minor problems with the contract; and
 - Provide no entitlement to any portion of the incentive fee upon termination of a CPIF contract for convenience.
- FAR Parts 30, 31

OTHER CONTRACT TYPES

- **Time-and-Materials** and **Labor-Hour** Contracts. FAR Subpart 16.6
- **Indefinite Delivery** – 3 Types
 - Definite-Quantity/Indefinite-Delivery Contracts. FAR 16.502
 - Requirements. FAR 16.502
 - Indefinite-Quantity/Indefinite-Delivery. FAR 16.504
- **Letter** Contracts. FAR 16.603
- **Miscellaneous** Matters
 - “Bridge” contracts
 - Multiple-Award IDIQs
 - Options
 - Task order protests
 - Order > \$25M (DOD) or \$10M (Other agencies)
 - Downselections
 - Order exceeds the contract’s scope of work
 - Previously set-aside for small business
 - BOAs and BPAs



COMMERCIAL PRODUCTS/SERVICE POLICY: FAR Part 12

- Buying commercial products/services has benefits:
 - **Proven Products (Quality Goods)**
 - **Cheaper - No R&D (Reasonable Price)**
 - **“Fair and Reasonable Price” has been determined (Sometimes)**
 - **Faster (Acquisition Lead-time) (Delivered timely)**
- Procedures resemble those of the commercial marketplace to make gov’t more like a private consumer



COMMERCIAL ITEMS ARE ...

(1) Any item that is customarily used by the general public for non-government purposes

AND

- i. has been sold, leased or licensed, OR
- ii. offered for sale, lease, or license to the general public

FAR §2.101

AND INCLUDE ...

(2) Any item, not yet for sale in the commercial marketplace that has:

- evolved from a commercial item through advances in technology or performance,

AND

- will be available in the commercial marketplace in time to satisfy Gov't delivery requirements.

AND ...

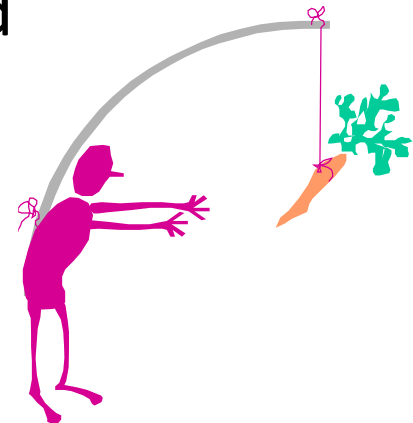
(3) Any item that would meet (1) or (2), above, except it has:

- i) Modifications that are customarily available in the commercial marketplace, **OR**
- ii) *Minor* modifications made to meet Federal Government requirements even though not customarily available in the commercial marketplace.

SOCIOECONOMIC POLICIES

- Everyone wants their fair share!
 - Small Businesses
 - Small Disadvantaged Businesses/8(a)s
 - HUBZone
 - Women-Owned
 - ANCs (Alaska Native Corporations)
 - Veteran-Owned
 - Service-Disabled, Veteran-Owned

- Contracting agencies have “goals”
- How to get classified?
- FAR Part 19



SMALL BUSINESS SET-ASIDES

- **Over \$10,000 up to \$250,000:** are reserved automatically for small business concerns, with exceptions.
- **Over \$250,000:** may still be reserved or partially reserved for small business concerns.
- Contracting officers must perform market research regarding small business availability and capabilities.

SMALL BUSINESS SET-ASIDES: EXCEPTIONS

1

No Responsible Small Businesses

2

Outside of U.S.



LABOR STANDARDS

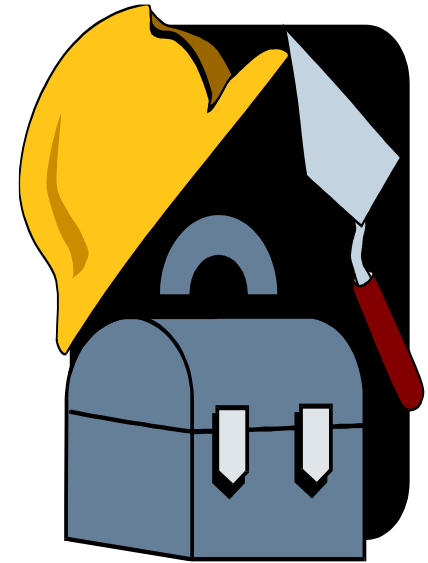
Service Contract Labor Standards (formerly, Service Contract Act)



- Contracts over \$2,500
- Non-Professional Service Employees
- Local Prevailing Wage
- DOL creates wage determination
- Principal stated purpose is the employees' well-being

LABOR STANDARDS

- Wage Rate Requirements (construction)
(formerly “Davis Bacon Act”)
- - Construction Contracts
- - Over \$2,000
- - Laborers/Mechanics
- performing work on-site
- - Prevailing Wage



HOW THE GOV'T BUYS SUPPLIES: A Priority List of Sources

- Agency Inventories
- Excess Other Agency Inventories
- Federal Prison Industries, Inc.
- Committee for Purchase from People Who Are Blind or Severely Disabled
- GSA Federal Supply Schedules
- “Open Market” Purchases



FEDERAL SUPPLY SCHEDULES: The Big Picture

- GSA awards ID/IQ contracts to thousands of vendors.
- Agencies place task and delivery orders against FSS contracts, using FSS vendors.



FEDERAL SUPPLY SCHEDULES

- GSA manages the FSS.
- FSS satisfies competition requirements.
- Because FSS is pre-approved by Congress, an agency need not seek further competition, nor make a separate determination of fair and reasonable pricing.



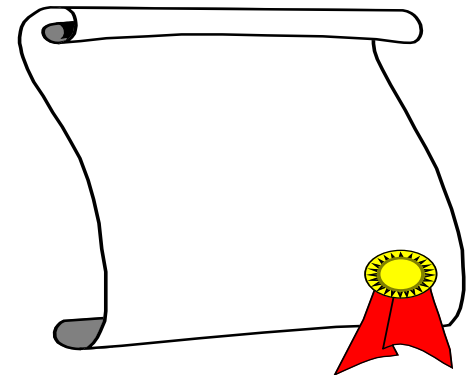
FEDERAL SUPPLY SCHEDULES

- The FSS is limited to commercial supplies and services.
- The prices of supplies offered on the FSS is limited to fixed prices.
- The price of services offered on the FSS is limited to either hourly rates or fixed prices for the performance of a specific task.
- Vendors' prices are public.



PROCUREMENT METHODS

- Sealed Bidding
- Competitive Negotiations (a/k/a “Negotiated Procurements” or “Contracting by Negotiation”)
- Simplified Acquisitions
- Federal Supply Schedules



CONTRACT METHODS: TERMINOLOGY

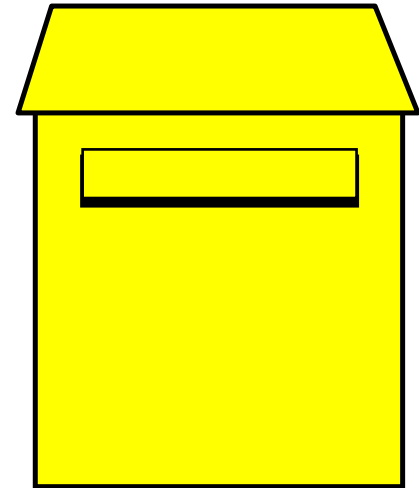
Procurement Methods	Name of Solicitation	Response to Solicitation	“Responder”	FAR
Sealed Bidding	Invitation for Bids (IFB)	Bid	Bidder	14
Negotiated Procurements	Request for Proposals (RFP)	Proposal	Offeror	15
Simplified Acquisitions	Request for Quotations (RFQ)	Quotation	Vendor	13
Federal Supply Schedules	Request for Quotations (RFQ)	Quotation	Vendor	8.4

THREE CONTRACTING METHODS

- Sealed Bidding (FAR Part 14)
- Competitive Negotiations
- Simplified Acquisition Procedures

SEALED BIDDING ADVANTAGES

- Encourages competition, thus reducing costs to the government
- Reduces opportunities for bribery and corruption
- Great for developed products or commodities



LIMITATION OF CONTRACT TYPES

- **Two types of contracts** are permitted in Sealed Bidding
 - Firm-Fixed-Price (FFP)
 - Fixed-Price w/Economic Price Adjustment (FP w/ EPA)

No Cost-Type Ks!

CHOOSING SEALED BIDDING VS NEGOTIATIONS (IFB v. RFP)

- **CO Must Solicit Sealed Bids IF:**
 - Time Permits
 - Award Based on Price/
Price-Related Factors
 - Discussions Not Required
 - CO Expects > 1 Bid
- Otherwise, CO Must Use Competitive Proposals

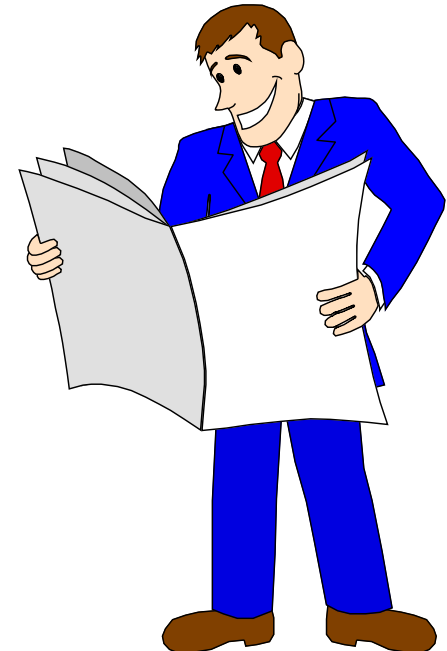


SEALED BIDDING: BASIC PROCESS

Invitation for Bids (IFB)
+
Sealed Bids from Bidders
+
Bid Opening / Responsiveness
+
Evaluation of Bids / Responsibility
+
Award / Acceptance of Bid by Government
= CONTRACT

SEALED BIDDING

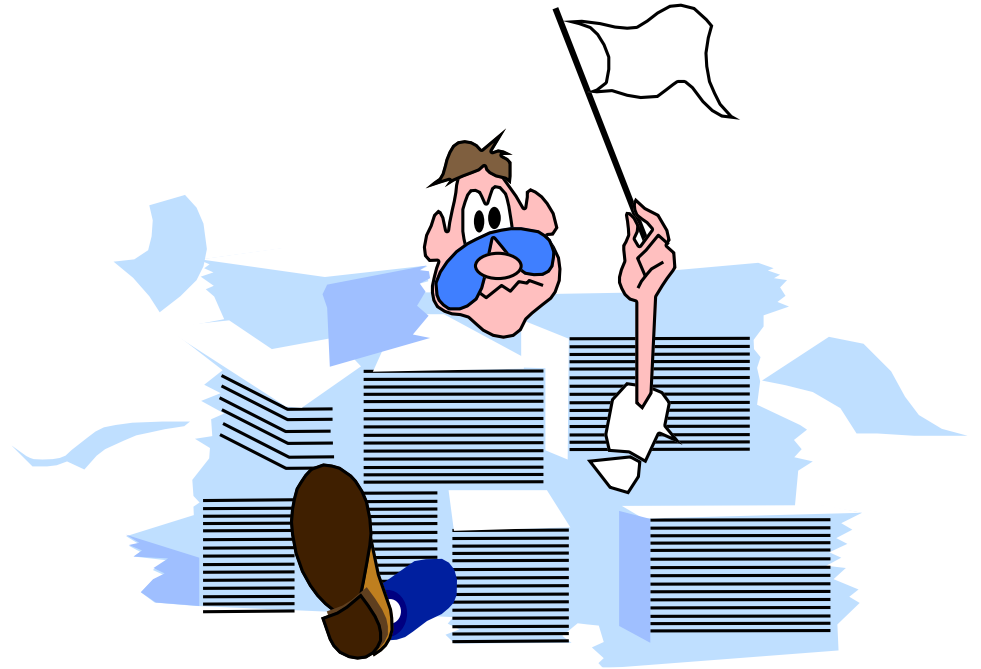
- Publicizing Requirements
 - “FedBizOpps” if over \$25K
 - Public Posting if over \$15K, but under \$25K
 - Mailing Lists, Newspapers, etc.
 - Commerce Business Daily is dead
- TIP: 30 Days Generally Required
- FAR Part 5



SEALED BIDDING

Bid Opening

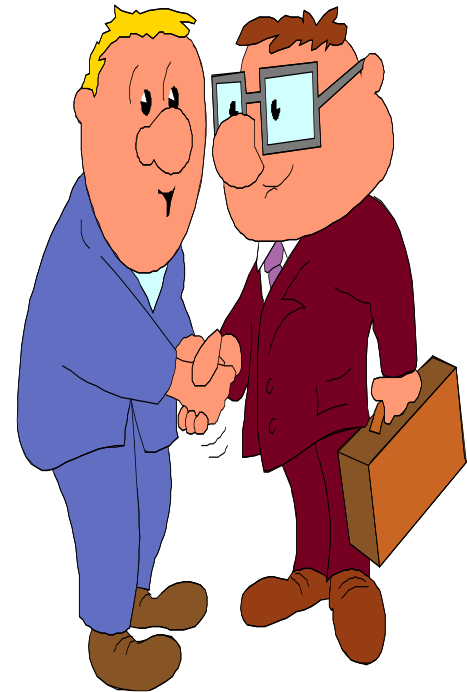
- Regulated and Formal “Ritual”
- Initial Handling
- Public Opening
- “LATE IS LATE”



CONTRACT AWARD

Contract award must be made to the:

Lowest priced,
Responsive bid, by a
Responsible bidder.



RESPONSIVENESS

- Government may only accept a “responsive” bid.
- When? At bid opening
- Bid must comply in all material respects with the IFB, such that award would result in a binding contract with terms & conditions that do not vary from the IFB.



RESPONSIVENESS

- Price – Must be FFP
- Quantity – Same as IFB
- Quality – Must meet all specs
- Delivery – Must meet schedule
- Firm Bid – May not equivocate!
- Submission Requirements – right place, time, method

RESPONSIBILITY DETERMINATIONS

- Responsibility may be determined anytime prior to Award.
- Chief Concern: Does the company have the financial, technical, and managerial ability to perform the contract?

RESPONSIVE VS RESPONSIBLE

Responsiveness

- Sealed Bidding only
- Bid meets all essential requirements of solicitation
- Objective (little discretion)
- Determined as of time of bid opening

Responsibility

- All contracts
- Bidder appears to have the ability and capacity to perform
- Subjective (more discretion)
- Determined any time prior to award

MAY THE CO CANCEL THE SOLICITATION?

Yes, if there is a valid reason, such as:

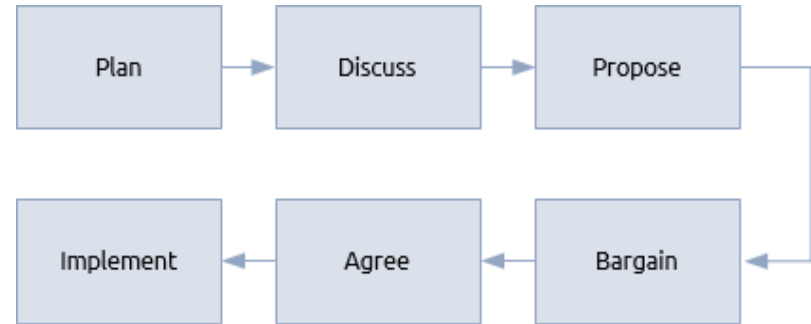
- Insufficient Funds
- No Longer Needed
- Change in Requirements
- Change in Technology
- Expectation of Significant Cost Savings by Recompensation

THREE CONTRACTING METHODS

- Sealed Bidding
- Competitive Negotiations (a/k/a Negotiated Procurements) -- FAR Part 15
- Simplified Acquisition Procedures

COMPETITIVE NEGOTIATIONS

- Maximizes Competition
- Similar to Commercial Buying
- Gov't May Consider
 - Technical Factors
 - Management Capability
 - Past Performance
- - Best Value
- Used When Sealed Bidding is Inappropriate



COMPETITIVE NEGOTIATIONS

Developing the RFP

- Identify Requirement/Need
- Develop Source Selection Plan
- Develop the RFP
 - Section C (Specifications):
What the Gov't Wants
 - Section L (Instructions):
What Offerors Should Submit
 - Section M (Criteria):
How the Gov't Will Evaluate



COMPETITIVE NEGOTIATIONS

SAMPLE RFP SECTION C

C.1.2. PERSONNEL . . .

* * * * *

C.1.2.2. PROJECT MANAGER QUALIFICATIONS

C.1.2.2.1 The **Project Manager** shall have the following minimum qualifications:

C.1.2.2.1.1. A Masters Degree in Education, Business Administration, or Management and two years experience managing or administering an adult education program or an equivalent education/training related program.

COMPETITIVE NEGOTIATIONS

SAMPLE RFP SECTION M

M.2 EVALUATION FACTORS

(a) Proposals will be evaluated considering the following technical subfactors to determine whether they are technically acceptable. The subfactors are equally important. To be considered for award, offers must be determined to be technically acceptable for all subfactors.

(1) Personnel Qualifications

(2) Technical Experience

(3) Quality Control Plan

COMPETITIVE NEGOTIATIONS

SAMPLE RFP SECTION L

L.10 INSTRUCTION FOR PREPARATION OF TECHNICAL AND PRICE PROPOSALS:

(1) PERSONNEL QUALIFICATIONS

(a) Provide resumes for Proposed **Project Manager** (see C.1.2.2), Language Laboratory Technician (see C.1.2.3), Test Examiner (see C.1.2.4), Tutor/Instructors (see C.1.2.5), and Courseware Developer/Instructional Manager (see C.1.2.5.2).

NEGOTIATED PROCUREMENTS: BASIC PROCESS

Request for Proposals (RFP)

+

Evaluation of Initial Proposals / Competitive
Range

+

Discussions / Final Revised Proposals (FPR)

+

Evaluation of FPRs

+

Award / Acceptance of Proposal by Government
= CONTRACT

COMPETITIVE NEGOTIATIONS



Must Disclose:

Significant Factors &
Subfactors upon which
the award decision will
be based

COMPETITIVE NEGOTIATIONS

Failure to Disclose Evaluation Factors is GENERALLY
Fatal
(to your procurement)



COMPETITIVE NEGOTIATIONS

Drafting Evaluation Criteria

- Must Consider:
 - Quality
 - Technical Approach
 - Management Approach
 - Personnel Qualifications
 - Past Performance (usually)
- Must Consider Cost or Price



COMPETITIVE NEGOTIATIONS

Sample RFP Section L

L.10 INSTRUCTION FOR PREPARATION OF TECHNICAL AND PRICE PROPOSALS:

* * * * *

5. PERFORMANCE HISTORY

a. The Contractor shall include information concerning the experience the offeror has had in performance of Government or other contracts for similar services of the variety and magnitude set forth in this solicitation.

COMPETITIVE NEGOTIATIONS

Sample RFP Section L (con't)

b. Clearly state your past performance providing same or similar services to other customers (at least 3) on or off a military installation. The information should include data as to the term of said contracts, number and type of personnel provided, the procuring agencies contracted with, and a point of contact and telephone number of someone who has knowledge of the offeror's past performance.

COMPETITIVE NEGOTIATIONS

- Must Disclose Relative Importance of Factors and Subfactors, using, e.g.,
 - Percentages
 - Algebraic Paragraph
 - Descending Order
 - Narrative Statement



COMPETITIVE NEGOTIATIONS

SAMPLE RFP SECTION M

M.2 EVALUATION FACTORS

(a) Proposals will be evaluated considering the following technical subfactors to determine whether they are technically acceptable. The subfactors are equally important . . .

- (1) Personnel Qualifications
- (2) Technical Experience
- (3) Quality Control Plan

COMPETITIVE NEGOTIATIONS

Drafting Evaluation Criteria

GAO/Courts PRESUME Factors
and Subfactors are EQUAL If Relative
Importance is Unstated



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COMPETITIVE NEGOTIATIONS

Drafting Evaluation Criteria

- Must Disclose How Agency Will Make Its Award Decision -
 - Low Price Technically Acceptable (LPTA), or
 - Cost-Technical Tradeoff (a/k/a “Best Value”)



COMPETITIVE NEGOTIATIONS

- Lowest Price Technically Acceptable (LPTA)
 - Use when clearly defined requirements and minimal risk of unsuccessful performance.
 - Tradeoffs NOT permitted.
 - All technical factors are GO/NO GO.
 - May tailor the evaluation criteria to determine what is “acceptable.”

COMPETITIVE NEGOTIATIONS

- The Tradeoff Process
 - Permits “tradeoffs” between cost and non-cost factors
 - Do not have to award to the lowest priced or highest rated offeror
 - But must be consistent with the stated importance of your evaluation factors
 - Document the justification for the tradeoff!

PREPARING THE RFP

The Best Value Continuum

- The Tradeoff Process
 - “I have discriminating tastes and cheap swill just will not suffice.”
- Lowest Price Technically Acceptable (LPTA)
 - “Gimme somethin’ cold that won’t make me go blind.”



vs.



COMPETITIVE NEGOTIATIONS

SAMPLE RFP SECTION M

M.3 AWARD FACTORS:

* * * * *

2. Among those offers determined to be technically acceptable, award will be made to the single offeror submitting the lowest priced offer on the total of all line items in keeping with Section M.1, FAR 52.217-0005, titled “Evaluation of Options” above.

COMPETITIVE NEGOTIATIONS

Notice of Intent to Hold Discussions

- 2 Options
 - Discussions; OR
 - No Discussions Unless Discussions Are Necessary
- Use FAR Language!!



COMPETITIVE NEGOTIATIONS

SAMPLE RFP SECTION L

L.10 INSTRUCTIONS TO OFFERORS -- COMPETITIVE ACQUISITION (OCT 1997)

* * * * *

(f) Contract Award.

* * * * *

(4) The Government intends to evaluate proposals and award a contract without discussions with offerors . . . The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary.

COMPETITIVE NEGOTIATIONS

Submission of Initial Proposals

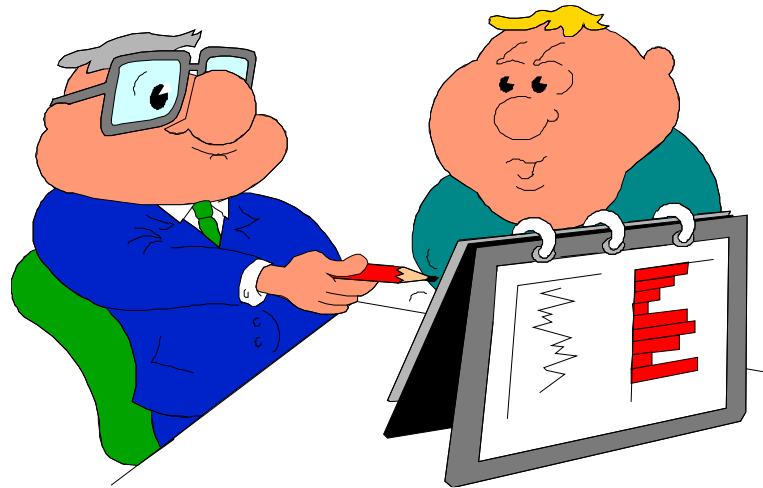
- Not Less Than 30 Days After Issuance of RFP
- “LATE IS LATE”
- No “Firm Bid Rule”



COMPETITIVE NEGOTIATIONS

Submission of Initial Proposals

- Oral Presentations
 - May Supplement/Partially Replace Written Proposal
 - Good for “Soft Data”
 - Must Notify Offerors of Requirements



COMPETITIVE NEGOTIATIONS

Submission of Proposals

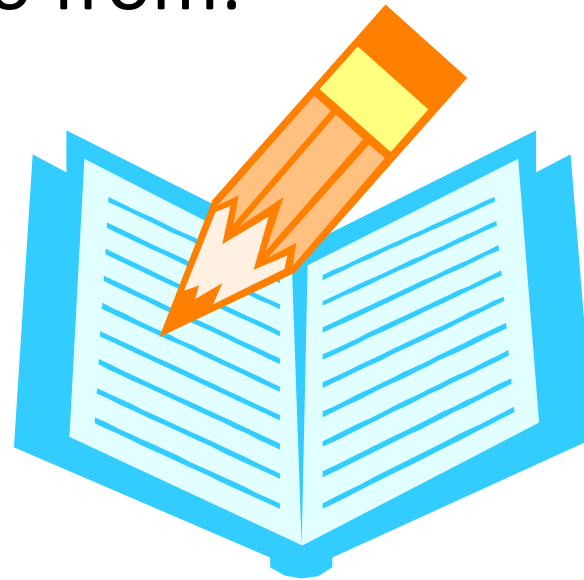


Gov't Employees May
Not
Disclose Proposal
Contents

COMPETITIVE NEGOTIATIONS

Evaluation of Proposals

- Evaluating Past Performance
 - Agencies May Obtain Past Performance Info from:
 - Offeror's Proposal
 - Agency's Own Experience
 - Other Sources



COMPETITIVE NEGOTIATIONS

Evaluation of Proposals

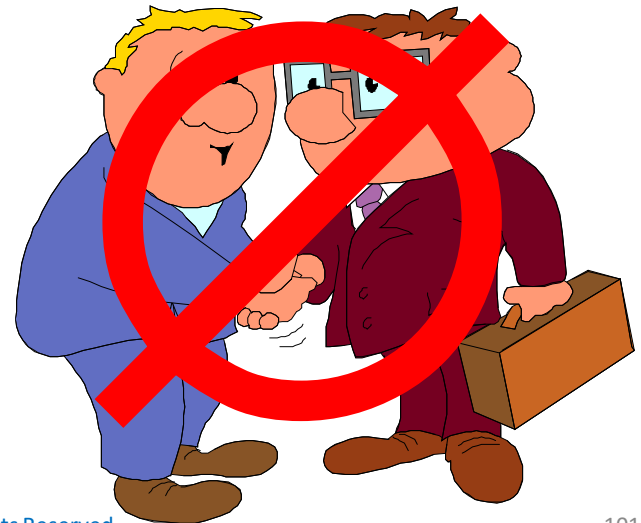
- Must Consider Cost or Price
 - Fixed-Price Ks:
 - Must Determine Whether PROPOSED PRICE is Fair and Reasonable
 - Cost-Reimbursement Ks:
 - Must Determine Whether PROBABLE COST is Fair and Reasonable



COMPETITIVE NEGOTIATIONS

Award w/o Discussions

- Must Give Proper Notice
- Must Select Compliant Proposal
- Must Evaluate IAW Stated Evaluation Criteria
- Must NOT Hold Discussions with Any Offeror



COMPETITIVE NEGOTIATIONS

Determination to Conduct Discussions

CO Must Determine that Discussions are Necessary
if RFP Stated That Award was to be Made Without
Discussions



COMPETITIVE NEGOTIATIONS

Determining Competitive Range

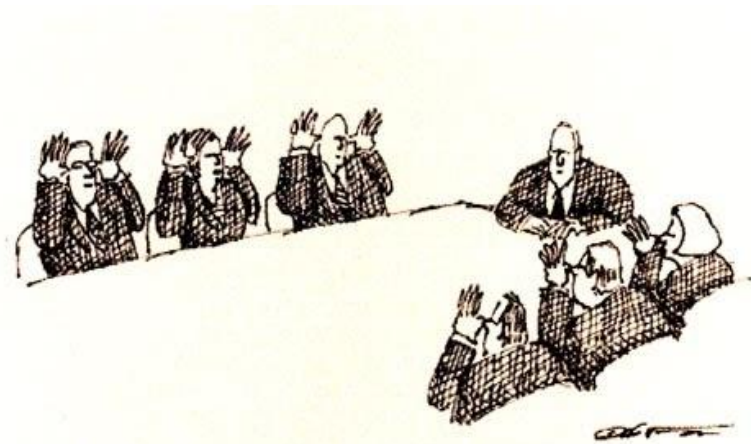
- CO/SSA Determines.
- Include Highest Rated Proposals UNLESS Range is Reduced for Efficiency Purposes.
- Consider ALL Evaluation Factors/Subfactors.
- “If in Doubt, Leave it Out!!”



COMPETITIVE NEGOTIATIONS

Conducting Discussions

- May Be Oral/Written.
- Must Be Meaningful.
 - Must Disclose
 - Deficiencies
 - Significant Weaknesses
 - Must Give Offeror Opportunity to Revise.



The mediator sensed that the negotiations were in trouble.

CONDUCTING DISCUSSIONS

- REMEMBER: Goal = Best Value
- CO Should Focus on Meaningful, not Minimum, Criteria.
- BUT Agency MAY NOT:
 - Favor One Offeror Over Another;
 - Disclose An Offeror's Technical Solution or Price to Others;
 - Disclose Sources of Past Performance Information; or
 - Disclose Source Selection Information (PIA).

COMPETITIVE NEGOTIATIONS

Final Proposal Revisions

- CO Must Tell Offerors:
 - Discussions Are Over;
 - Offerors May Submit Final Proposal Revisions; and
 - Revisions Are Due by Time/Date Specified.



COMPETITIVE NEGOTIATIONS

Final Proposal Revisions

- Multiple Revisions
 - In the Past, CO's Ability to Request Severely Restricted
 - BUT Additional Revisions Sometimes Necessary
 - Avoid IF Possible

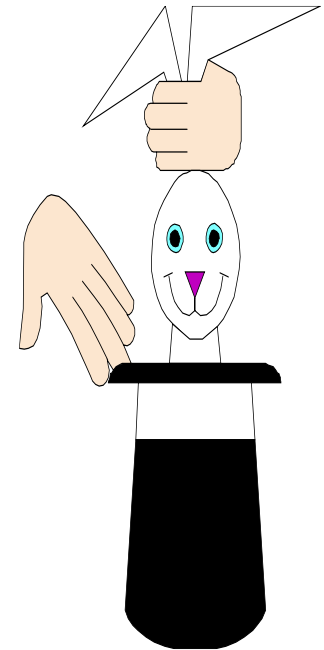


COMPETITIVE NEGOTIATIONS

Selection for Award

Agency -

- Is NOT Required to Use Same Evaluators
- Must Evaluate Final Proposal Revisions
IAW Stated Evaluation Criteria
- Should NOT Accept a Non-Compliant Offer



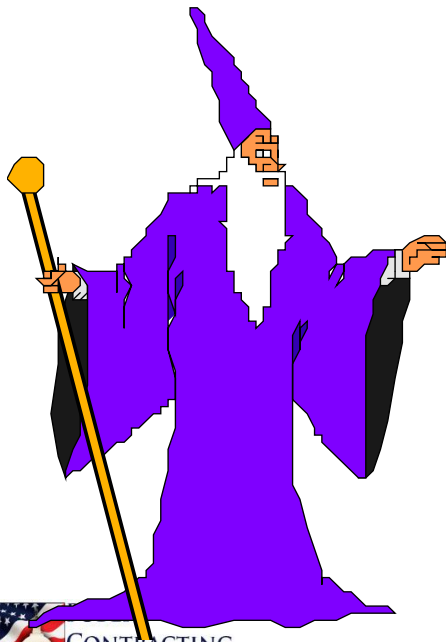
So, Who Wins?

	A	B	C
Technical	Very Good	Good	Good
Past Performance	Very Good	Very Good	Good
Price	\$23M	\$21M	\$25M

COMPETITIVE NEGOTIATIONS

Selection for Award

- Cost-Technical Tradeoff
 - CO/SSA Has Broad Discretion
 - BUT Decision Must Be:
 - Rationale, and
 - Consistent with Stated Evaluation Factors/Subfactors.



COMPETITIVE NEGOTIATIONS

Selection for Award

- Source Selection Decision Document
 - Written Memorandum Explaining Decision
 - SSA is NOT Personally Required to Write the Decision



COMPETITIVE NEGOTIATIONS

Award Decision

- Must Notify Unsuccessful Offerors
 - ASAP IF Excluded from the Competitive Range
 - BEFORE Award IF Small Business Set-Aside
 - Otherwise, within 3 Days of Contract Award



COMPETITIVE NEGOTIATIONS

Debriefings

- Preaward Debriefings
 - Request: w/in 3 Days of Notice
 - When Held: ASAP
 - Minimum Requirements
 - Prohibitions



COMPETITIVE NEGOTIATIONS

Debriefings

- Postaward Debriefings
 - Request: w/in 3 Days of Notice
 - When Held: w/in 5 Days of Request
 - Follow-up Questions: w/in 2 Days
 - Answers: w/in 5 Days
 - Minimum Requirements
 - Prohibitions



CONTRACTING METHODS

- Sealed Bidding
- Competitive Negotiations
- **Simplified Acquisition Procedures
(FAR Part 13)**

SAP: Big Picture (FAR Part 13)

- If you're under certain dollar thresholds, allows:
 - Limited competition
 - Reduced publication time
 - Decreased applicability of certain laws
 - Increased flexibility in purchasing procedures used

SIMPLIFIED ACQUISITION THRESHOLD

- Acquisitions of supplies or services of any kind not exceeding \$250,000
- \$800,000 inside US & \$1.5M outside US, in support of a contingency operation, recovery, or defense against nuclear, biological, chemical or radiological (NBCR) attack
- FAR 2.101



COMMERCIAL PRODUCTS/SERVICES

Allows SAP when: $\leq \$7.5\text{M}$

Contingency Operations/ Combat NBCR

- Inside the U.S.: $\leq \$15\text{M}$
- Outside the U.S.: $\leq \$15\text{M}$
- Now Permanent

MICRO-PURCHASE THRESHOLD

Normal Threshold: $\leq \$10,000$

Contingency Operations / Combat NBCR

- Inside the U.S.: $\leq \$20,000$
- Outside the U.S.: $\leq \$30,000$



When to use SAP?

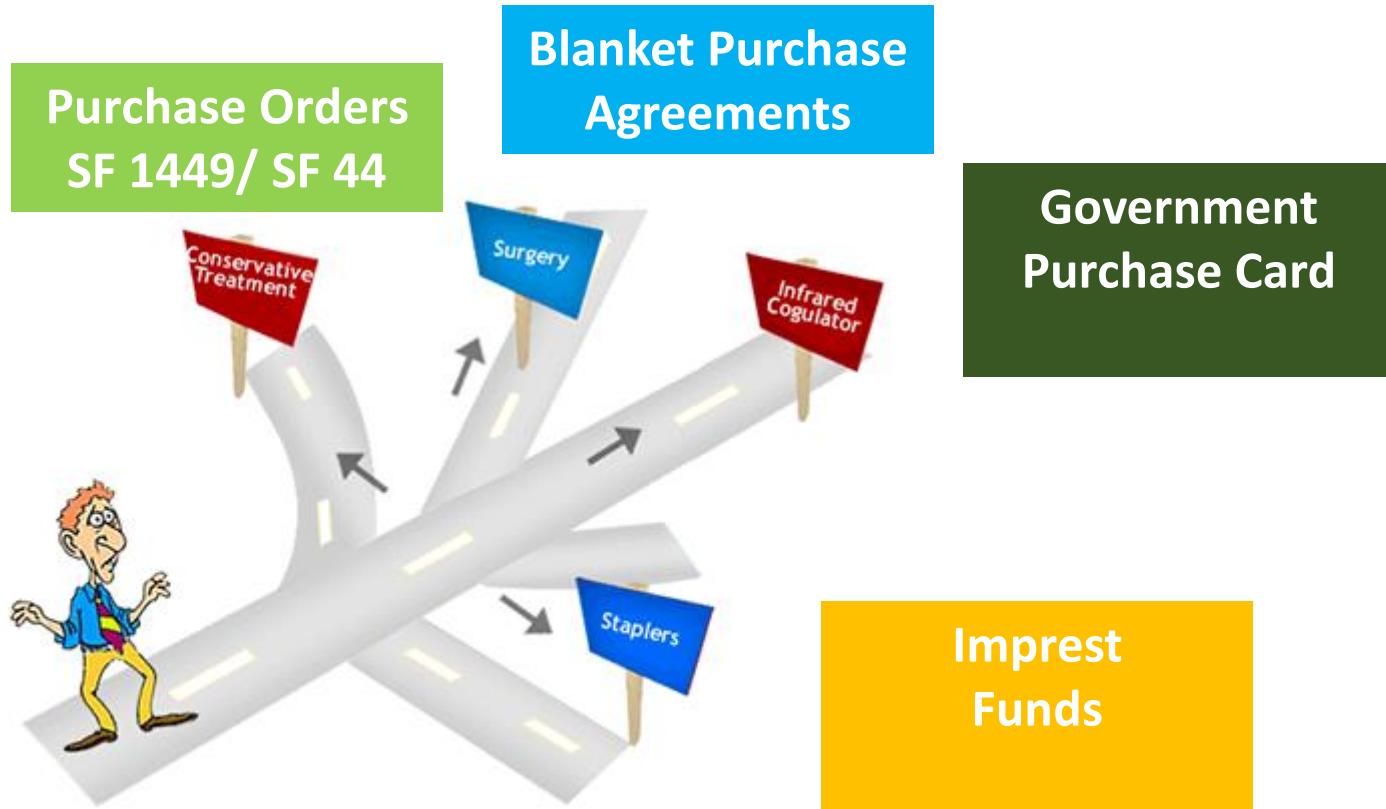
“Agencies **SHALL** use simplified acquisition procedures to the “**maximum extent practicable**” for all purchases of supplies or services not exceeding the simplified acquisition threshold.” FAR 13.003(a)

WHAT IF OVER THE SAP THRESHOLD?

- Use Sealed Bidding (FAR Part 14) or Competitive Negotiations (FAR Part 15)
- If it is a Commercial Product or Service, then FAR Part 12 also applies.



SAP: PURCHASING METHODS



SAP: BASIC PROCESS

Request for Quotations (RFQ)

+

Quotations from Vendors

+

Evaluation of Quotes

+

Offer (order) from Government to selected vendor

+

Acceptance from contractor

= CONTRACT

PUBLICIZING REQUIREMENTS

- Same as Sealed Bidding/Negotiated Procurements
- > \$25,000:
Synopsis in SAM.gov
- \$15,000-\$25,000:
Display in a public place

COMPETITION REQUIREMENTS

- No CICA Requirement for “Full & Open” Competition
- The Standard: “Maximum Extent Practicable”
- No competition requirements for procurements < micro-purchase threshold

“MAXIMUM EXTENT PRACTICABLE”

1

“Rule of 3” is no longer necessary

2

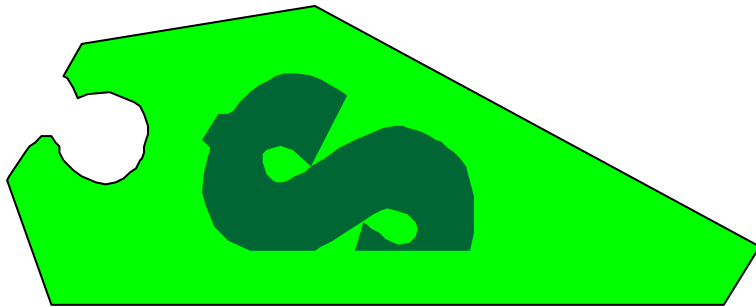
If they ask, let them compete

3

Don't restrict to a particular product

MICRO-PURCHASES

- \$10,000 or less
- Distributed among qualified sources
- No competition required if price is deemed reasonable



PURCHASE ORDERS (RFQ)

- Government offer to buy something
- Not a delivery order/task order
- Considerations
 - No personal preferences
 - Not just name brands
 - Tell them basis of award



SAP EVALUATION: Process & Criteria

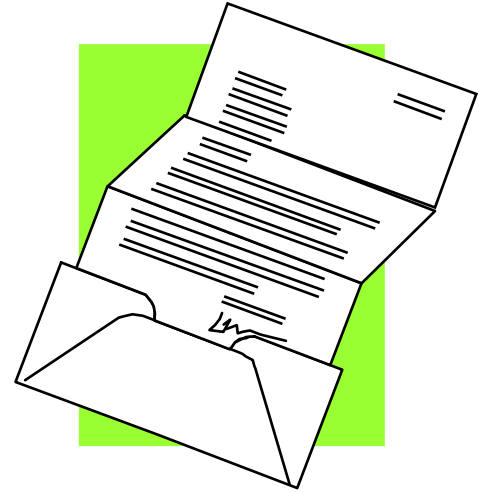


- FAR 13.106-1 and 12.602
- CO has broad discretion
- FAR Parts 14 and 15 are NOT mandatory
- RFQ must include basis for award
- If using price & other factors, keep it simple:
technical, past performance, price
 - FAR 52.212-2 Evaluation – Commercial Items is optional
- No evaluation factors = price only!

PURCHASE ORDERS:

Legal Affect of Quotes

- A quotation is NOT an Offer.
- Government Order is the Offer.
- What Constitutes Contractor Acceptance?



CYBERSECURITY

- FAR 52.204-21 --“**Basic Safeguarding of Covered Contractor Information Systems**” must be inserted in all solicitations and contracts when the contractor or non-COTS subcontractors at any tier may have Federal contract information residing in or transiting through its information system.
 - It outlines minimum controls for protecting contractor information systems that process, store, or transmit federal contract information.
 - It applies to acquisitions, other than COTS, when a Federal contractor’s information system may contain Federal contract information.
- DFARS Subpart 204.73 – requires DoD contractors and subcontractors to:
 - **Safeguard** covered defense information that resides in or transits through covered contractor information systems; and
 - **Report** rapidly cyber incidents and investigations.

CYBERSECURITY: 15 STANDARDS

- **Limit** info systems **access** to authorized users, processes, and devices;
- Limit info systems **access** to the types of transactions and functions that authorized users are permitted to access;
- **Verify and control/limit connections** to and use of external info systems;
- **Control info** posted or processed on publicly accessible info systems;
- **Identify info** systems users, processes, or devices;
- **Authenticate (or verify)** the identifies of authorized users, processes, or devices;
- **Sanitize or destroy** info systems media containing Federal Contract Info before disposal or release for reuse;
- **Limit physical access** to organizational info systems, equipment, and the respective operating environments to authorized individuals;

CYBERSECURITY: 15 STANDARDS

- **Escort visitors and monitor** visitor activity; maintain audit logs of physical access; and control and manage physical access devices;
- **Monitor, control, and protect** organizational communications;
- **Implement subnetworks** for publicly accessible system components that are physically separated;
- **Identify, report, and correct** information and information system flaws in a timely manner;
- **Provide protection** from malicious code;
- **Update** malicious code protection mechanisms; and
- **Perform periodic scans** of the info systems and real-time scans of files from external sources as files are downloaded, opened, or executed.

BID PROTESTS

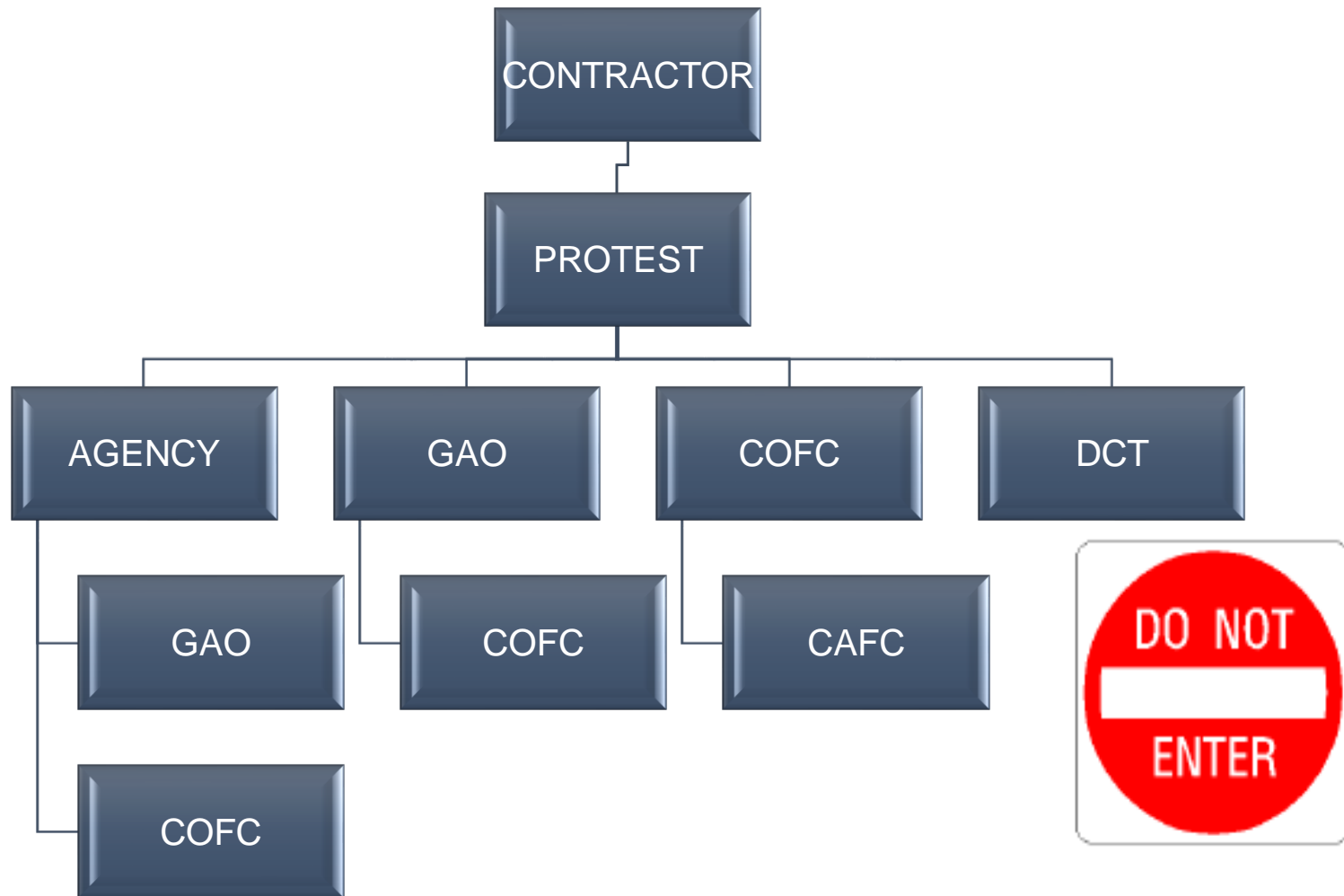
(Suing When You Lose)

- A unique aspect of public contracting
- Promotes transparency, accountability
- Contractors act as private attorneys general



BID PROTESTS:

Multiple Forum Choices



GAO BID PROTESTS

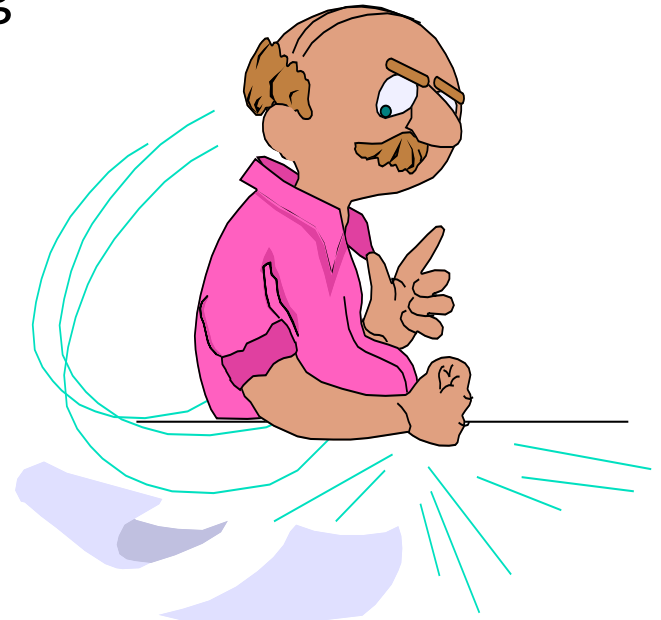
Key Questions

- Who can protest?
- When to protest?
- What to protest?
- How to protest?
- What can protester “win”?
- Does agency have to stop performance?



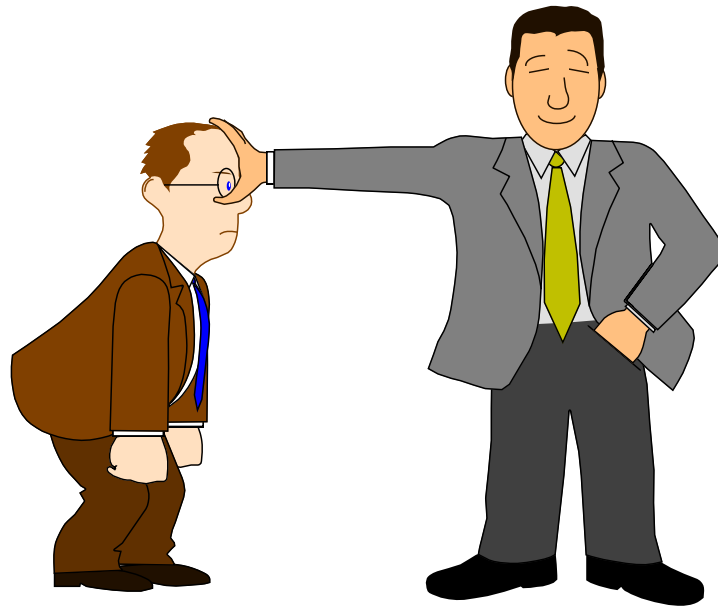
GAO BID PROTESTS

- Who? An “Interested Party”
- How? Fax, Email, Mail, Hand-Delivery
- When? (It Depends)
 - Solicitation defect: before closing
 - Anything else: 10 calendar days
- CICA Stay



GAO BID PROTESTS

- Protective Order
- Agency Report
- Comments (response to Agency Report)
- Hearings
- Decisions
- Deadline: 100 days



GAO BID PROTESTS:

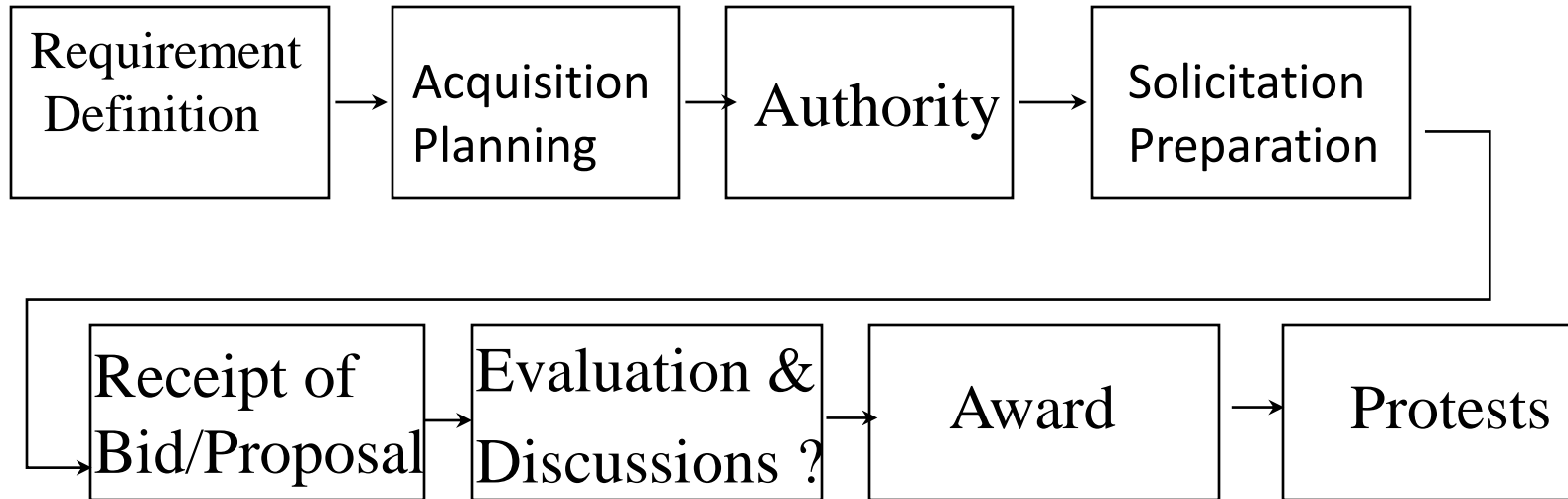
Potential Remedies

- “Appropriate Corrective Action”
 - Terminate the Contract
 - Recompete the Contract
 - Revise the Solicitation
 - Reevaluate Proposals/Quotes
 - Make New Source Selection Decision
- Protest Costs (including attorneys’ fees)
- Bid or Proposal Costs

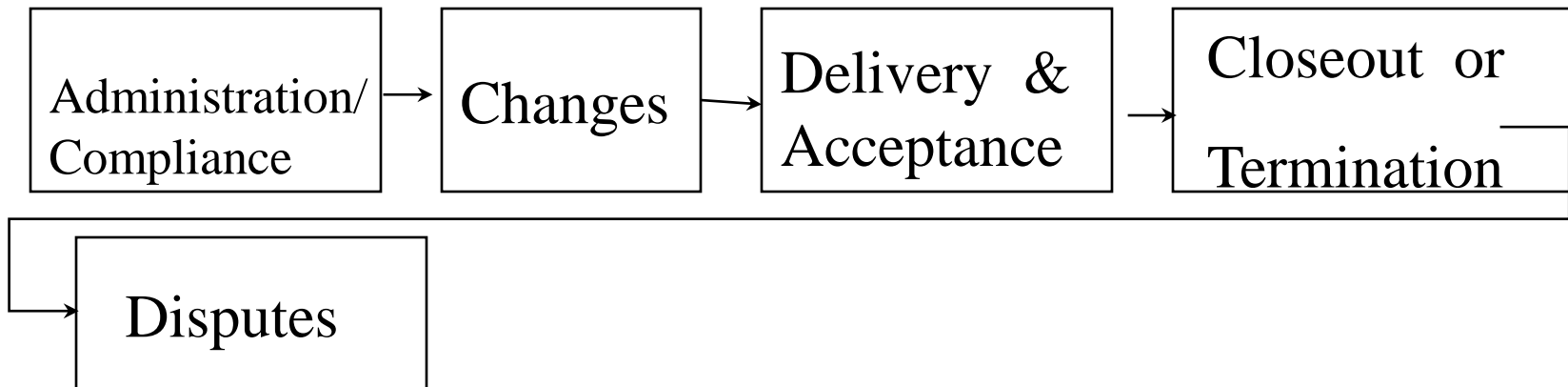
It’s Only a Recommendation, But . . .

THE PROCUREMENT PROCESS

Formation



Administration



LAWS, REGULATIONS, ETHICS & COMPLIANCE

Part A – The No-No’s: Bribery and Gratuities, Kickbacks, and Contingent Fees

Part B – The Line-Drawings: Procurement Integrity, Conflicts of Interest, Hiring from the Government, Other Compliance Issues

Part C – The Dark Side: False Claims and False Statements, Certifications, Suspension and Debarment, and Compliance Programs

WHO IS THE FEDERAL GOVERNMENT CUSTOMER?

The government is the sovereign, but it wears two hats:

- **Sovereign** Role – Public trust:

- The government is spending our money!
- The playing field should be level.
- No corruption



- **Proprietary** Role – Buying power:

- Laws and regulations protect government (i.e., us!)
- False Statement = Crime
- Government has the cops



WHAT DOES THIS MEAN?

- Federal government contracting is regulated heavily.
- ***Practices or activities that are legal and acceptable in the commercial marketplace may be illegal or unacceptable in the US government marketplace!***
- Contractors must maintain a rigorous Compliance Program:
 - To comply with federal regulations;
 - To avoid/mitigate risks of non-compliance; and
 - To maintain credibility and trust of customers, employees, and community.
- Contractor employees must recognize and address sensitive issues before taking improper and irreversible actions.

WHAT HAPPENS IF CONTRACTORS DON'T COMPLY?

Bad Stuff!

- Company is at risk:
 - fines and criminal penalties
 - protests and cancellation of awarded contracts
 - “suspension” or “debarment” –i.e., temporary or permanent preclusion from seeking government business
 - negative “responsibility” determinations
 - damage to company’s reputation
- Individual employees are also at risk:
 - loss of employment
 - criminal penalties
 - suspension or debarment



BOEING AND USAF – CONFLICTS OF INTEREST, BRIBERY, AND GRATUITIES

- Darleen Druyan – second-ranking USAF procurement official
- Michael Sears - CFO, Boeing Aerospace, heir-apparent to become CEO.
- Activity/Behavior
 - Druyan negotiated \$20B contract with Boeing while discussing home purchase, post-government employment, and employment for her future son-in-law.
 - Sears and Druyan held “non-meetings”.



DARLEEN DRUYAN AND MICHAEL SEARS

What was the result?

- A) Only Darleen Druyan went to jail.
- B) Only Michael Sears went to jail.
- C) Neither went to jail.
- D) Both went to jail.



“Collateral” damage:

- Congress cancelled the \$20B contract
- Contracting community: Intensified scrutiny**

DARLEEN DRUYAN AND MICHAEL SEARS

What was the result?

•

- A) Only Darleen Druyan went to jail.
- B) Only Michael Sears went to jail.
- C) Neither went to jail.
- D) Both went to jail!**



Query: Why did these individuals ignore the law and think they could get away with this criminal behavior?

Query: What should you do if you became aware of something like this in your organization?

ANTI-KICKBACK ACT

- Prohibits payments or other things of value:
 - given by subcontractors, vendors and suppliers to prime contractors, other subcontractors, etc., or vice versa
 - “for the purpose of improperly obtaining or rewarding favorable treatment” in connection with prime *or* subcontract.
- Kickbacks are illegal because:
 - They undermine competition.
 - They cause supplier selections to be made on other than merit.
 - Government may pay additional costs with no benefits.

CONTINGENT FEES

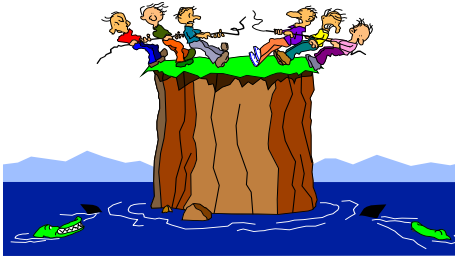


- **Contingent Fee** means “any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract. FAR 52.203-5
- The clause states “the Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency.
- It applies above the SAP, other than those for commercial items.
- Contingent fees are often paid in commercial – including international – contracting, so this restriction may come as a surprise to some.

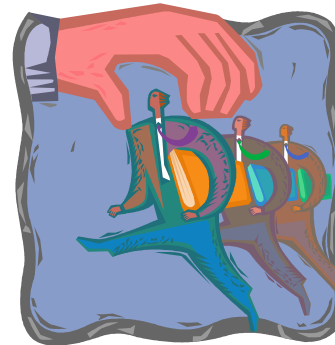
Part B – The Line-Drawings

Procurement Integrity

Conflicts of Interest



Hiring from the Government



PROCUREMENT INTEGRITY ACT – IMPROPER DISCLOSURE

- Applies during procurement process.
 - (Aren't we always in a procurement process?)
- Regulates the behavior of -
 - contractors and subcontractors
 - government employees
- Prohibits improper **disclosure** or **receipt** of procurement information.
- Purpose: ensure level playing field.
- Enacted by the Office of Federal Procurement Policy (OFPP) in 1988 (41 U.S.C. §423), implemented in FAR 3.104

PROCUREMENT INTEGRITY ACT – IMPROPER DISCLOSURE

- The Procurement Integrity Act prohibits:
 - federal officials from knowingly *disclosing*; or
 - contractor employees (or teaming partners) from knowingly *obtaining*, either:
 - contractor bid or proposal information, or
 - source selection information
- It applies to written or verbal information
- Blended workplace: take extra care to avoid disclosure or receipt of proprietary or source selection or other non-public information.



CONTRACTOR BID AND PROPOSAL INFORMATION

- Any information submitted to the government by a competitor in connection with a bid or proposal, such as:

- proposals
- technical questions
- cost or pricing information
- technical solutions



- Information is usually marked proprietary, but does not have to be marked to be protected.
- Ask yourself – if this were your company’s own information, would you want competitors to be able to see it? If not, you can assume the reverse is true.

SOURCE SELECTION INFORMATION (SSI)

- Procurement-related information developed by ***the government*** that has not been made available to the public, and whose knowledge could benefit a competitor.
- Includes verbal information and electronic, audio, and video material, marked protectively or not.
- **Examples:**
 - bid prices, proposed costs
 - source selection or evaluation plans
 - competitive range determinations
 - rankings of proposals or competitors
 - government evaluations of proposals
 - reports of source selection boards or boards

IMPROPER DISCLOSURE - EXAMPLES

- During procurement, government accidentally returned proposal of one bidder to another bidder.
- A (friendly) government employee provided verbal information regarding the status of a procurement.
- Government posted procurement-related information on its website with footer: “For government use only.”
- Government sent disk that included source selection information.
- Subcontractor or consultant provided procurement-sensitive information, where government was original source.
- Contracting officer sent email that contained procurement-sensitive attachment.

PROCUREMENT INTEGRITY ACT

“The Drill”

- If the conversation gets into information relating to bid and proposal or source selection information – **STOP** the conversation!
- If you receive (or come into contact with) written or email information you think may be bid and proposal or source selection information, immediately:
 - **limit accidental access**: retrieve and secure all copies, stop email distributions.
 - **limit further exposure**: do not discuss, show, or forward (via email) the information to anyone, including your manager.
 - **report it**: call [Legal/Contracts/Compliance], explain how you received the information and who else has it.
- If in doubt about whether you or company should have certain information, contact Legal/Contracts/Compliance.
 - verifying your right to have information before you use it is better than trying to mitigate the improper use of the information later.

PROCUREMENT INTEGRITY ACT

LESSONS

- If appropriate, ask the source of the information whether it is bid or proposal information or source selection information. Document their response.
- Before accepting questionable information, ask yourself:
 - What is being given to me, and why?
 - Where did it come from?
 - Is the information available to all competitors?
 - Would I want my company information to be in the hands of a competitor?
- Ask. **And document!**

WHAT SHOULD YOU DO?

Your teaming partner in a major procurement offers you a copy of your competitor's preliminary proposal and the agency's internal evaluation guidelines.

What should you do?

One of your colleagues informs you he accidentally forwarded a "competimate's" email containing an attachment with information protected under a non-disclosure agreement to several of your company's employees not protected under the NDA.

What should you do?

ORGANIZATIONAL CONFLICTS OF INTEREST

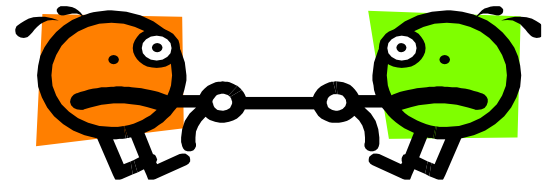
- An OCI “means that because of other activities or relationships with another person, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”
- There are three kinds of Organizational Conflicts of Interest:
 - Unequal access to information
 - Impaired objectivity
 - Ability to set biased ground rules



UNEQUAL ACCESS TO INFORMATION

- Arises when contractor, as part of its performance, has access to nonpublic information that will give it an unfair competitive advantage over other offerors.
- Being the incumbent (and thereby having a better understanding of the customer), alone, does not normally create an OCI. “Experience” is considered a “natural advantage of incumbency.”
- An OCI will arise, however, when an incumbent contractor has proprietary information, source selection information, or other nonpublic information not provided to competitors that gives the contractor ***unique insight*** into the bidding or evaluation process (i.e., knowledge of future requirements, budget estimates, etc.)
- Unfair competitive advantage is presumed if access to information is shown.
- Usual mitigation is a firewall (or disclosure to all parties).

IMPAIRED OBJECTIVITY



- Arises when contractor has opportunity to provide advice that might affect its own business interests:
 - E.g., evaluating work different division of contractor performed under another separate contract
 - E.g., evaluating work performed by a competitor
 - E.g., providing advice that might affect an affiliate's business interest
- If opportunity exists, lack of objectivity is presumed.
- Government's primary concern is that the contractor will not be able to behave objectively because of other economic pressures and consequences.
- Usual mitigation involves limiting scope of work.

Query: What should a company do when it receives a government request to develop and deliver an important specification for an upcoming procurement?

BIASED GROUND RULES

- Arises when a contractor can **set the ground rules** for another procurement. Unfair advantage is presumed.
- Government's primary concern is that contractor could:
 - Skew the competition, whether intentionally or not, in its own favor (and away from government's goals), or
 - Gain an unfair advantage in the competition by virtue of its special knowledge of the agency's future requirements.
- Example: contractor writes the specifications or SOW and bids on the contract or offers to provide a system for which it has provided Systems Engineering Technical Assistance (SETA). (DFARS has strict rules for Major Defense Acquisition Programs.)
- Very difficult to mitigate after the fact.
- Note: Trying to “shape the deal” before the RFP is issued does not create an OCI provided other potential bidders are free to do the same.

OCI REGULATIONS

FAR SUBPART 9.5

- Contracting Officer is directed to “avoid, neutralize or mitigate significant potential conflicts before contract award.”
- **Preferably EARLY!!!!**
- Each situation is different. “The exercise of common sense, good judgment, and sound discretion is required.” FAR 9.505
- Communication – internal and external - is key!
- Contractors:
 - Ask yourself: are you being asked to provide advice or information that might help your company in future competitions or in your other business interests?
 - Remember - your competitors are always on the lookout.
 - You may have to choose which contract you want – you can’t always eat your cake and have it, too.



WHAT SHOULD YOU DO?

Toward the end of a five-year contract, the COTR asks you to provide a description of your work processes and job code qualifications. What should you do?

- A) Provide the requested information because the requested documentation is easy to compile.
- B) Decline to provide the requested information because it will be expensive to put together and it is not required under the contract.
- C) Express a concern that if information you provide is used in a follow-on solicitation, you may not be allowed to participate.
- D) Agree to provide the requested information if the agency pays for it.

PERSONAL CONFLICTS OF INTEREST

FAR 52.203-16

- Concern over tasks that are performed by both government employees (who are subject to conflict-of-interest laws) and contractor employees (who are not)
- Rule: Contractor employees performing acquisition functions closely associated with inherently governmental functions must not use their function, or nonpublic Government information to which they have access, for personal (or family) gain.
- “Inherently governmental functions” include planning acquisitions, developing requirements documents or evaluation criteria, evaluating proposals, administering contracts, evaluating costs.
- Contractors must screen for potential PCI’s (including financial disclosure by employees), maintain oversight, report violations, and take appropriate disciplinary action.
- Requires training, tracking, disclosures, reassignments, etc.

HIRING FROM THE GOVERNMENT

Former government employees may be valuable recruits. But revolving door statutes regulate when and how they may be hired and what they may do after being hired. These statutes:

- Prohibit certain government personnel (“procurement officials”) from even discussing employment with contractors who are participating in procurement.
- Restrict current and former government personnel with major roles on major programs from accepting employment with affected contractors.
- Restrict former government personnel (personally involved in or supervising matter) from communicating to agency regarding that matter. 18 U.S.C. §207.
- Require “covered” DoD officials to obtain ethics letter before being hired by major defense contractors (and requires contractors to certify compliance).



HIRING FROM THE GOVERNMENT LESSONS

- Rules are complex and change frequently.
- Government employees can obtain “30-day letter” from DAEO
 - Senior DoD officials are required to do so if hired by Major Defense Contractor
 - Contractor should request letter
 - But does ethics letter address all issues?
 - Generally, does not address “representation” restrictions.
- Contractor: Remember, by staying within the lines, you are protecting former government employee as much as you are protecting company.

WHAT SHOULD YOU DO?

Your customer, a senior agency official, tells you she wants to leave government and go into private industry. She says that she is aware that your company is looking for someone with her expertise. What should you do?

- A) Promise her a job elsewhere in the company.
- B) Promise that you'll recommend her to the hiring department if she gives you a favorable response to your most recent REA.
- C) Offer her a job on your team as "government liaison."
- D) Ask a knowledgeable person in HR or Legal what the hiring rules are.

QUERY: What are the possible consequences if the company hires this person despite Legal Department recommendations to the contrary?

OTHER COMPLIANCE ISSUES

- **Lobbying Laws**

- Byrd Amendment: contractor may not use appropriated funds to lobby legislative and executive branches of the federal government. (FAR 52.203-11)
- HLOGA (Honest Lobbying and Open Government Act of 2008): imposes registration and reporting requirements.

- **Antitrust Laws**

- Restrict sharing competitive information
- Restrict collusive bidding, market division
- Restrict joint offer where each offeror can fully perform
- Require Certificate of Independent Price Determination (FAR 52.230-2)
- CO must report suspected violations



INTERNATIONAL COMPLIANCE ISSUES



- **Export Control Laws**
 - Export Administration Regulations (Commerce) for dual use products, ITAR (State Department) for defense products, services
 - Note: “Deemed Export” occurs if foreign national is shown technical data in U.S.
- **Foreign Corrupt Practices Act (FCPA)**
 - Anti-bribery law for activities outside the U.S. for US companies and those acting on their behalf
 - Anti-bribery and record-keeping provisions
- **Country of Origin Rules**
 - **Domestic preference (“Buy-American”) laws**
 - Trade Agreements Acts
 - Falsely affixing a “Made in America” label is a basis for suspension or debarment.

Part C – The Dark Side

False Claims and False Statements



Certifications



Suspension and Debarment



Compliance Programs



FALSE CLAIMS ACT (FCA) AND FALSE STATEMENTS ACT

- FCA prohibits knowing attempts to obtain money or property from the government relating to false or misleading information (even if not presented directly to government).
- Does not have to be an intentional lie; the Civil False Claims Act also applies to deliberate ignorance or reckless disregard of truth.
- **Criminal False Statements Act** prohibits false written or oral statement concerning a matter that is material and within government agency's jurisdiction.

Routine mistakes are not violations . . . IF they are corrected promptly.



FALSE CLAIMS ACTS

CRIMINAL VS CIVIL

Criminal (18 U.S.C. §287)

- **Penalties** = Imprisonment (up to 5 years), Fine (up to \$250,000)
- **Elements** = “knowing claim to be false, fictitious, or fraudulent”
- **Burden of Proof** = Beyond a reasonable doubt

Civil (31 U.S.C. §3729 et seq.)

- **Penalties** = Fine (\$10,781 to \$21,563 per false claim (invoice), plus treble damages.)
- **Elements** = "knowingly presents, or causes to be presented, . . . a false or fraudulent claim
- **Burden of Proof** = Preponderance of evidence
- **Qui Tam Relator** – shares in recovery

Prosecutors prefer to bring civil cases because penalties are similar but burden of proof is lower.

FALSE CLAIMS/STATEMENTS

EXAMPLES

- **False claims:**
 - Submitting invoices for services not provided or accepted
 - Submitting invoices based on erroneous timecards, prices, or indirect rates
- **False statements:**
 - Altering information or results in reports provided to government (e.g., test results, milestone completions, etc.)
 - False certifications (of any sort)
- **Product Substitution**
 - Different product/person, even if superior or cheaper
 - May be considered fraud unless contract is modified
- **Special FCA issues for schedule contracts**
 - Failure to disclose “discounts” and “concessions” on Commercial Sales Practices Format.
 - Failure to implement Price Reductions clause.



CERTIFICATIONS

- **Certificate of Current Cost or Pricing Data (FAR 15.406-2)** – Truthful Cost or Pricing Data Act (formerly, “Truth in Negotiations Act” or “TINA”) requires contractor to submit cost or pricing data that is accurate, current and complete as of the date of price “handshake”.
- **Certification of Final Indirect Costs (FAR 52.242-4)** – must certify that all costs in final indirect rate proposal are allowable (and none are expressly unallowable).
- **Certification Regarding Responsibility Matters (FAR 52.209-5)** – Must disclose whether Offeror or Principals are suspended or debarred, or have (within 3 years) been:
 - (a) convicted, indicted, or had civil judgment or charge against them, relating to specific listed crimes, including fraud, contract-related criminal offenses, bribery, making false statements, tax evasion
 - (b) notified of any unsatisfied, unchallenged, delinquent federal taxes (in excess of \$10,000)(See, FAR 9.104-5(a)(2))
 - (c) terminated for default.

SUSPENSION AND DEBARMENT

- Government will do business with “responsible” contractors, only, which includes those having “a satisfactory record of integrity and business ethics”. FAR 9.104-1(d)
- General Services Administration ("GSA") maintains a government-wide a List of Excluded Parties at www.sam.gov.
- Prime must verify (and should document) that subcontractors are not on the excluded parties list.

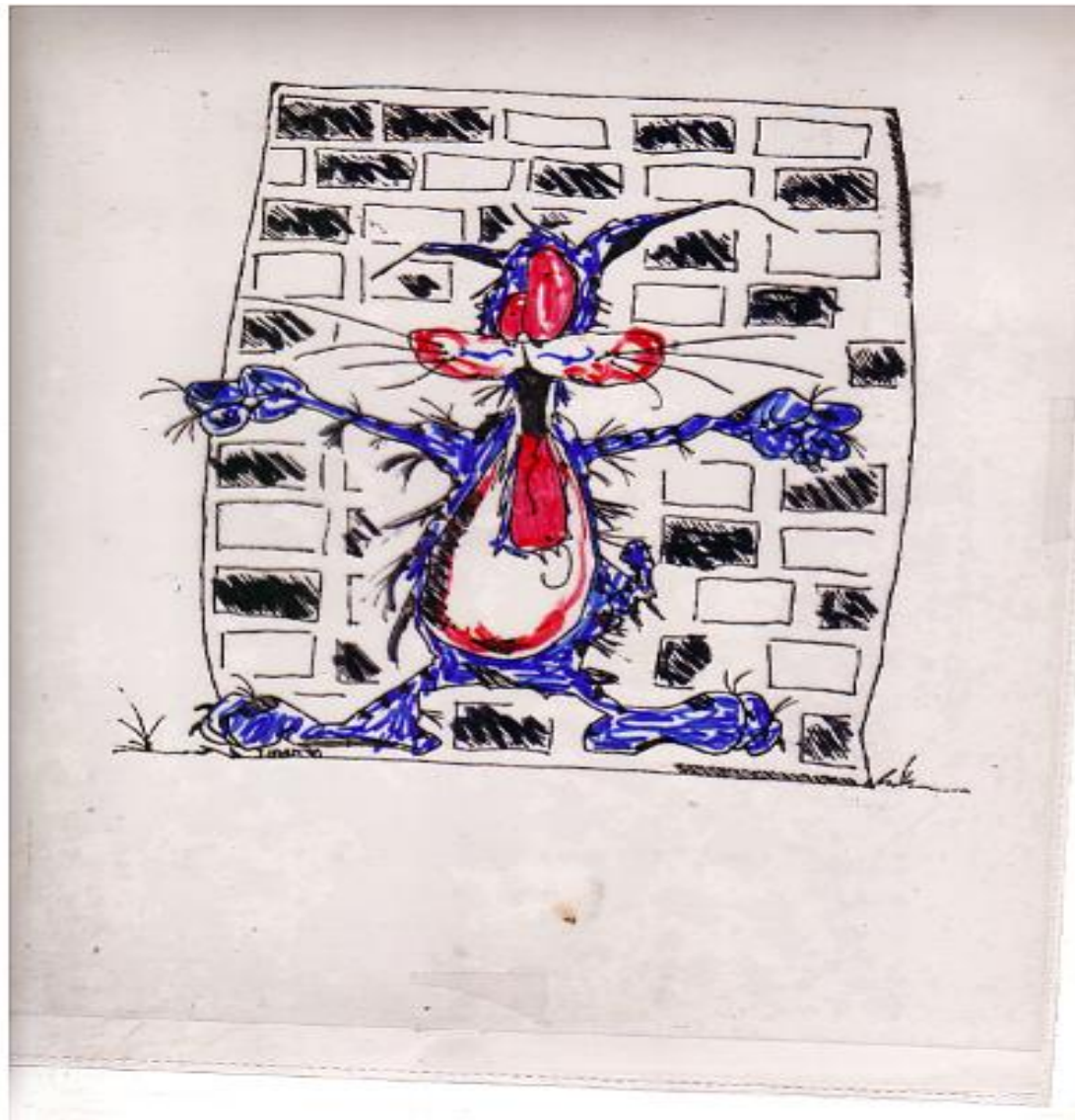


SUSPENSION AND DEBARMENT GROUNDS (FAR 9.406-2)

- Conviction or civil judgment for (OR INDICTMENT OR ADEQUATE EVIDENCE OF) fraud, antitrust, theft, embezzlement, false statements or integrity matters
- Serious violation of government contract terms – i.e., willful failure to perform or history of failure to perform
- Violation of the Drug-Free Workplace Act
- Intentionally affixing a false “Made in America” inscription
- Commission of an offense indicating a lack of business integrity affecting present responsibility
- Any other cause so serious that it affects present responsibility
- Failure to disclose credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations, violation of the civil False Claims Act, or significant overpayment on a contract

SUSPENSION OR DEBARMENT CONSEQUENCES

- No new contract awards (unless waiver)
- No new subcontract awards (unless waiver)
- Lost teaming opportunities
- No new modifications or options to contracts awarded previously
- No orders beyond guaranteed minimums in IDIQ contracts
- No new orders under the Federal Supply Schedule, BPAs, or BOAs
- May continue to perform previously awarded contracts (but CO might terminate for convenience due to concerns about integrity)



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CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT

- Required if contractor has an expected contract valued over \$6M (formerly, \$5.5M) with a performance period of 120 days or more. FAR 3.1004(a)
- Commercial items contracts and small businesses have scaled down requirements. FAR 3.1004(b)
- FAR 52.203-13 (derived from DOJ Sentencing Guidelines) requires contractor to:
 - Conduct business “with the highest degree of honesty and integrity”
 - Have a business ethics awareness and compliance program, including written code of business ethics & compliance, which it provide to all employees, plus agents/subcontractors (training) “as appropriate” (usually annually).

CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT

- Contractor must have an internal control system that:
 - Assigns responsibility at sufficiently high level (Ethics Officer reporting to senior management) and provides adequate resources to ensure effectiveness of its compliance system;
 - Keeps “bad actors” out of the company’s performance – reasonable due diligence and appropriate delegation of authority;
 - Conducts periodic internal reviews of business practices, policies, and internal controls to assess effectiveness of internal control system;
 - Includes an internal reporting mechanism, such as a hotline; and
 - Provides for corrective and disciplinary actions for improper conduct (or “failing to take steps to prevent or detect improper conduct”).

Query: If a company doesn't have an internal control system that meets the requirements, above, how might it create one?

BUT WAIT, THERE'S MORE

- Contractor must make timely written disclosure when it has “credible evidence” that a principal, employee, agent, or subcontractor has committed a violation of criminal law involving fraud, conflict of interest, bribery or gratuity, or violation of the Civil False Claims Act.
- “Full cooperation” must be given to all Government agencies involved with audits, investigations or corrective actions.
- “Full cooperation” does not require:
 - Waiver of the attorney-client privilege or the protections afforded by the attorney work product doctrine; or
 - Individual waiver of the attorney-client privilege or Fifth Amendment rights.

Query: Who should be involved in drafting and reviewing the disclosure, and to whom should it be submitted?

CONCLUSION (WE'RE ALMOST THERE)



PENALTIES FOR VIOLATIONS



- Negative news coverage
- Federal Awardee Performance and Integrity (FAPIS) Information System
 - Effective April 15, 2011
 - Five years of data
 - Contractor must certify current, accurate, and complete
- Fines
- Suspension or Debarment
- Termination of employment
- Criminal prosecution



IS IT BETTER TO RUN NEAR THE SIDELINES, OR IN THE MIDDLE OF THE FIELD

It depends on the Risk/Reward ratio.

- What do you have to gain?
- What happens if you are wrong?

Query: Identify one example, each, where a contracting party might legitimately decide to do something where that activity could later be determined to have been (1) illegal or (2) legal, but improper. What could one do to mitigate the risks?

When little is gained and much could be lost – stay in the middle of the field!

- Bribery and Gratuities
- Kickbacks
- Contingent Fees
- False Claims and False Statements



When much might (and should) be gained – you can run near the sideline – BUT DO NOT STEP OUT OF BOUNDS!

- Procurement Integrity
- Organizational Conflicts of Interest
- Hiring from the Government



THE BOTTOM LINE

- In the federal government marketplace, parties must:
 - **Conduct business in accordance with both the *letter* and the *spirit* of the law; and**
 - **Avoid actions that, while technically legal, give the appearance of improper behavior.**
- Ask yourself:
 - How will this look to the investigator?
 - How will this look on the front page of my local newspaper?
 - How does this feel in my gut?
 - ***“Could we do business in complete trust with someone who acts this way?”***

WHAT SHOULD YOU DO?

You go to dinner at a restaurant and are seated at a table next to two people who are talking about a proposal they are submitting in response to an important solicitation. You realize they are working for a competitor and that you are also responding to the same solicitation.

What should you do?

- A) Put in your hearing aids so you can hear every word that is spoken.
- B) Send them a bottle of wine to loosen their tongues.
- C) Engage them in conversation and try to draw out their plans for the competition.
- D) Introduce yourself and tell them who you work for.

MARK TWAIN'S PERSPECTIVE ON ETHICS

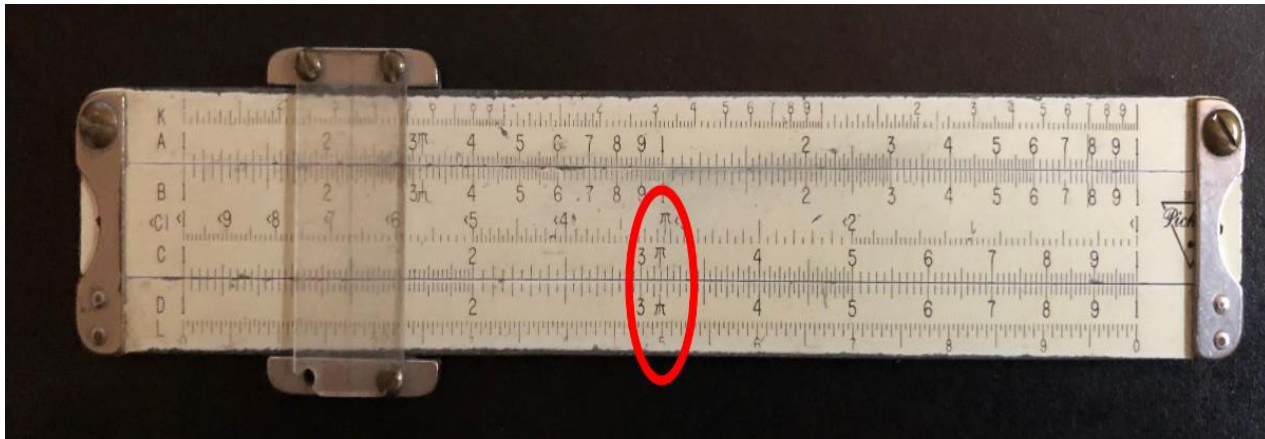
*Always do right. This will
gratify some people,
& astonish the rest.*

*Long Young
Mark Twain*

New York, Feb. 16, 1901.



PRICING OF CONTRACT ADJUSTMENTS



DEFINITIONS

- **“Cost or Pricing Data”** is all facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.” FAR 2.101
- **“Certified Cost or Pricing Data”** means “cost or pricing data” required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or is required to have been certified, IAW 15.406-2. This certification states that, to the best of the person’s knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award.
- **“Data Other Than Certified Cost or Pricing Data”** means pricing data, cost data, and judgmental information necessary for the CO to determine a fair and reasonable price or to determine price realism.

DEFINITIONS

- “Price” is cost plus any fee or profit applicable to the contract type. FAR 15.401
- “Pricing” is the process of establishing a reasonable amount or amounts to be paid for supplies or services. FAR 2.101

GENERAL PRICING CONCEPTS

- **Concept #1** – Purchase supplies and services at fair and reasonable prices.
- **Concept #2** – Obtain necessary information in the least burdensome manner possible, given the circumstances of each procurement.
- **Concept #3** – The objective of proposal analysis is to ensure the final agreed-to price is fair and reasonable. FAR 15.404-1(a).
- **“Price Analysis”** is the process of examining and evaluating a proposal without evaluating its separate cost elements and proposed profit. FAR 15.404-1(b)(1).
- **“Value Analysis”** gives insight into the relative worth of a product.
- **“Cost Analysis”** reviews and evaluates the separate cost elements and profit and fee within a proposal to determine a fair and reasonable price or to determine cost realism. FAR 15.404-1(c).

GENERAL PRICING CONCEPTS

- **“Cost Realism Analysis”** is mandatory on all cost-reimbursement contracts and is optional on fixed-price incentive contracts and some other competitive contracts. The objective is to determine the probable cost of performance for each offeror to ensure the final price is fair and reasonable. FAR 15.404-1(d).
- **“Technical Analysis”** is used when personnel with specialized knowledge, skills, experience, or capability in engineering, science, or management are needed to assist the CO in determining the need for reasonableness of the resources proposed for use by a contractor, assuming reasonable economy and efficiency.

TRUTHFUL COST OR PRICING DATA – “TCPA”, FORMERLY “TINA”

- The purpose of TCPA is to:
 - Provide the government with accurate, current, and complete information
 - Level the negotiation playing field;
 - Require truth in negotiations and allow the Government to revise the contractor’s price downward to compensate for erroneous, incomplete, or out-of-date information provided
 - Require a responsible contractor representative to certify contractor compliance with these requirements.

TINA – DISCLOSURE REQUIREMENTS

- Disclosure can be either mandatory or non-mandatory.
- Mandatory disclosure is required for:
 - Award of –
 - A negotiated contract expected to exceed \$2M (except UCAs); or
 - A subcontract at any tier expected to exceed \$2M if the Government required all higher-tier prime and subcontractors to submit COPD;
 - Modification of -
 - A bid or negotiated prime contract involving a price adjustment expected to exceed \$2M; or
 - A subcontract at any tier involving a price adjustment expected to exceed \$2M if the Government required all higher-tier prime and subcontractors to submit COPD.
 - Negotiated final pricing actions such as termination settlements and total final price agreements for FPIF and FP Redeterminable contracts if -
 - The total final price agreement exceeds \$2M; or
 - The partial termination settlement plus the estimate to complete the continuing portion of the contract exceeds \$2M.
 - Nonmandatory Disclosure – unless prohibited, pricing actions between the SAP and \$2M

SIX EXCEPTIONS TO CCOPD DISCLOSURE REQUIREMENTS

- Simplified Acquisitions. FAR 15.403-1(a)
 - \$250K
- Adequate Price Competition. FAR 15.403-1(b)(1) and (c)(1).
 - Two or more offerors competing independently;
 - Contract is awarded “best value”; and
 - Price was “reasonable”.
- Prices Set By Law or Regulation. FAR 15.403-1(c)(2)
- Commercial Supplies or Services. FAR 15.403-1(c)(3)
- Modifications to Commercial Supplies/Services contracts. FAR 15.403-1(c)(3)(iii)(A) and (C)
- Waivers. FAR 15.403-1(c)(4)

DEFINING COST OR PRICING DATA

- Examples
- BCA Guidance – a “reasonable person objective test”
- Factual vs. Judgmental
- Must be “significant”

Query: Which of the following are cost or pricing data that should be disclosed when CCOPD disclosure is required?

Vendor quotes, nonrecurring costs, changes in production methods, projections on business prospects, unit-cost trends, make-or-buy decisions, estimated resources to obtain business goals, and management decisions that could have a significant bearing on costs.

SUBMISSION OF CCOPD AND OTHER DATA

- Procedural requirements
- Obligation to update data
- Certification of CCOPD
- Even when an exception applies, the CO still must determine price reasonableness. The CO shall –
 - Obtain data from Government and other sources;
 - Require submission of DOTCCPD from the offeror to the extent necessary;
 - Consider whether cost data are necessary;
 - Require the offeror to submit the prices at which similar items have been sold;
 - Consider the guidance in Section 3.3, Chapter 3, Volume I of the Contract Pricing Reference Guide cited at FAR 15.404-1(a)(7) to determine the data the offeror must submit.

DEFECTIVE PRICING

- **Defective Cost or Pricing Data** is data that as of the date of agreement on the contract price (or other agreed-upon date), is subsequently determined to have been inaccurate, incomplete, or noncurrent.
- **Audit Rights**
- **Remedies**
 - Contractual Remedies (price adjustment and penalties for defective prime and subcontractor data)
 - Administrative Remedies (termination, suspension, debarment, voiding and rescission of the contract)
 - Judicial Remedies – Criminal and Civil
 - Fraud Indicators

CHANGES & EQUITABLE ADJUSTMENTS

CHANGES

- A distinctive feature of Government contracting.
- Provides Government considerable flexibility in contract management
- Is considered a fundamentally important contract clause
- Covers actual and constructive changes under the “Changes” clause.
- Is different than claims for breach of contract.

BRIEF HISTORY

- First known “Changes” clause in a U.S. Government contract appeared in 1818
- Sample Clauses
 - Supplies/FFP: FAR 52.243-1
 - Construction: FAR 52.243-4
 - Cost-Reimbursement: FAR 52.243-2
 - Services: FAR 52.243-1, Alt. I
 - Time & Materials (T&M): FAR 52.243-3
 - Commercial Products & Commercial Services: FAR 52.212-4

PURPOSE

- Provides flexibility for the Government
- Provides compensation and additional time to the contractor
- Facilitates the implementation of contractor-suggested changes
- Permits ordering additional work without re-competing the contract
- Provides a basis for contractor claims

BREAKING DOWN THE CHANGES CLAUSES

- Permits authorized Government personnel (usually CO) to make changes “within the scope” of the contract
- Does not permit “Cardinal” changes
- Requires notification (20 day, 30 days, none?)
- Can be used to educate the CO
- Provides for an equitable adjustment including costs, time, and profit

FORMAL CHANGES

- Government and contractor identify and discuss the need for a change.
- Contractor submits a proposal.
- Government reviews, perhaps audits, and initiates negotiations.
- Parties negotiate and reach agreement.
- CO issues contract modification, often with release language per FAR 43.204(c).

WHAT IF THE PARTIES CANNOT AGREE?

- The Government may issue a unilateral change order.
- Contractor has a contractual duty to proceed pending resolutions of disputes “arising under the contract” (and, sometimes, “arising under or relating to the contract”).
- If contractor disagrees with the Government’s position, it may request a CO’s “final decision”, appeal that decision, and initiate the disputes process.

COMMERCIAL SUPPLIES/SERVICES “CHANGES” CLAUSE (FAR 52.212-4(c))

- Differs from the standard “Changes” clauses.
- Permits changes when the terms and conditions of the contract are changed by written agreement of the parties, only.

CONSTRUCTIVE CHANGES

- A product of “case law”
- Contractor spots a change, often well after the fact.
- Contractor submits a claim or a request for an equitable adjustment (REA).
- Government responds in a variety of ways:
 - Agrees to the contractor’s request / claim (no, really)
 - Denies it on timeliness grounds
 - Denies it on the merits
 - Ignores the contractor’s request (i.e., silence)
 - Agrees to talk

7 TYPES OF CONSTRUCTIVE CHANGES

- Delay and disruption
- Acceleration
- Improper inspection
- Demanding work beyond the statement of work (SOW)
- Defective specifications
- Superior knowledge
- Contract interpretation

BREACH OF CONTRACT

- Unlike the “Changes” clause, under breach, a contractor is entitled to recover all damages that flow from the breach, including anticipatory profits.
- Many of the situations classified as “constructive changes” are really breaches of contract, but the Government prefers the constructive change approach because it limits the contractor’s recovery.

SUBCONTRACT WRINKLES

- From the Prime's Perspective:
 - The “Changes” clause is not a mandatory flow-down clause, but a prudent prime should normally include such clauses in its subcontracts.
 - The clause should provide the sub with less than 30 (or 20) days to notify the prime of a potential change—giving the prime enough time to submit its claim to the Government.
 - The subcontract should include indemnification and hold-harmless language for false and unsupported subcontractor claims.

SUBCONTRACT WRINKLES

- From the Subcontractor's Perspective:
 - A modified "Changes" clause should not be accepted without understanding it;
 - If it has been modified, the sub should make sure it can live with the changes; and
 - If it has been modified, the sub should determine if the notice period is sufficient.

SAMPLE CASES

- *Neil R. Gross & Co.*, B-237434, 90-1 CPD 212
- *Avtron Manufacturing, Inc.*, B-229972, 88-1 CPD 458
- *DOR Biodefense, Inc.; Emergent BioSolutions*, B-296358.3 and .4, 2006 CPD 35

CONTRACT INTERPRETATION – THE BASIC ISSUE

- Questions of contract interpretation arise in determining whether there is a contract, as well as in determining rights and duties under a contract. Restatement (Second) of Contracts, §200 (1981)
- When interpreting the plain meaning of a contract, a court must first determine what documents constitute that contract.
- In defining the contract, consider:
 - Written contract;
 - Pre-contract exchanges;
 - Common law principles affecting content (e.g., duty of good faith/fair dealing); and
 - Extra-contractual authorities affecting the subject of the contract.

DEFINING THE CONTRACT

- The **Parole Evidence Rule** provides that when parties have agreed upon a subject and put that interpretation in their written contract, previous agreements, not in the contract, cannot add to, detract from, or change the written agreement.
 - In a partially integrated agreement, inconsistent prior or contemporaneous agreements are discharged;
 - In a partially integrated agreement, consistent prior or contemporaneous agreements can supplement that agreement; and
 - In a fully integrated agreement, all prior or contemporaneous agreements are discharged.
- In every contract, there exists an **implied covenant of good faith and fair dealing**.
- Contractual significance of **Vendor Proposals & Oral Presentations?**

DEFINING THE CONTRACT

- Consider Incorporation by Reference
- Apply the Christian Doctrine, if appropriate
- Presume parties have contracted with knowledge of the law and awareness of applicable statutes and regulations.
- The Interpretation Dispute Process -
 - Determine whether a contract was **formed**
 - If so, then determine the **content**
 - Next, apply the **Principles of Contract Interpretation**
 - Finally, apply the rules of ***Contra Proferentum***

DEFINING THE CONTRACT

Overarching Principles

- Find the “Intent of the Parties”
 - Interpret Objectively
 - Interpret in Light of all the Circumstances
 - Consider Words in the contract over Extrinsic Evidence
-
- “Secondary” Overarching Principles
 - The Plain Meaning Rule
 - The Parole Evidence Rule
 - Contra Proferentem and its Federal Exception

DEFINING THE CONTRACT

INTRINSIC EVIDENCE

- Interpret the contract as a whole.
- Give greater weight to specific and exact terms vs. general language.
- Specially negotiated terms prevail over boilerplate language.
- Exclusive lists admit no outsiders.
- Apply “Order of Precedence” clauses to resolve conflicts.

CLAIMS

CLAIMS

- Claims are a standard element of any Government contract.
- Claims have many sources, but all are processed under the Contract Disputes Act and the “Disputes” clause.
- All claims are negotiated on a sole-source basis.

BREAKING DOWN THE “DISPUTES” CLAUSE

- All claims must be in **writing**.
- Contractor claims must be **submitted** to the CO.
- Contractor claims over \$100,000 must be **certified**.
- The prescribed certification language should be followed verbatim.
- **Interest** runs from the date the claim is received by the CO.
- The CO must decide claims within 60 days or, for larger claims, inform the contractor within 60 days when the claims will be decided.

CLAIM RECOGNITION

- The **Loss Approach** (Reactive/NOT recommended)
 - Contractor realizes the problem after-the-fact
 - Money already has been lost
 - Contractor may not have the means to mount the effort necessary to maximize recovery
 - Evidence and witnesses are sometimes lacking
 - Contractor's claim may be untimely



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CLAIM RECOGNITION

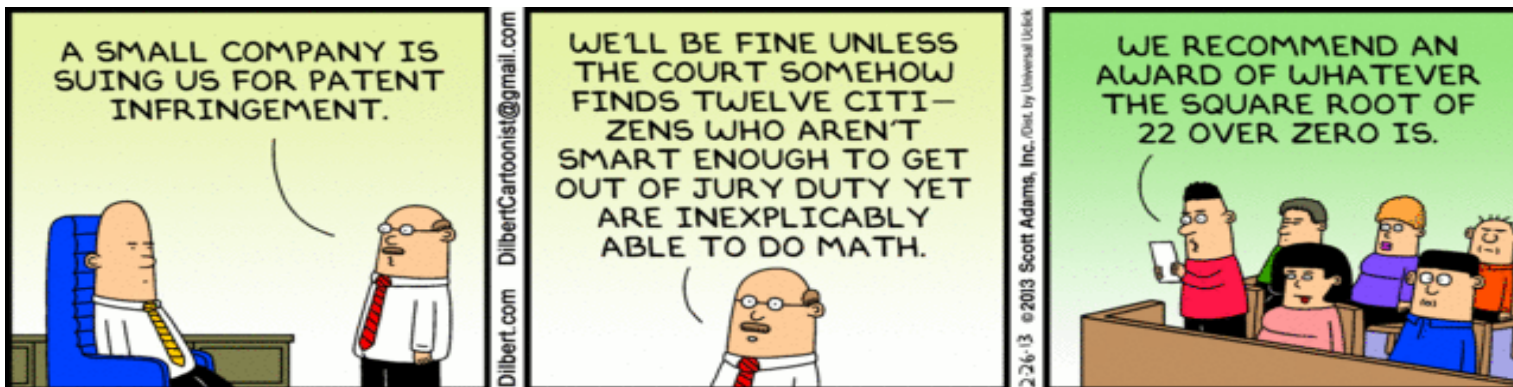
- The Event-Oriented Approach (Proactive)
 - Train contractor personnel to recognize potential claims
 - Notify government CO (in writing) when changes occur
 - Establish separate charge numbers to capture claims related costs; capture costs
 - Submit and negotiate timely requests for adjustment, as appropriate
 - File claims without undue delay if REA negotiations prove unproductive
 - Mitigate damages
 - Identify and preserve witnesses and evidence
 - Consider ADR, as appropriate

PRE-CLAIM ANALYSIS

- Selection of Forum
 - Which forum(s) has jurisdiction?
 - What kind of claims can it decide?
 - How much will it cost (energy, money, other resources) to pursue this claim?
 - How long will it take?
 - Can the matter be resolved without going the full route?
 - Does the forum provide for ADR?
 - If more than one forum has jurisdiction, which forum's procedures or track record are more favorable?

PRE-CLAIM ANALYSIS

- What is the likelihood of success in a particular forum?
- What are the pro's and con's of each available forum?
- If the forum you have selected issues a decision, can the decision be appealed?



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CLAIMS ARISING UNDER THE CONTRACT

- Several standard clauses can give rise to claims:
 - Changes clauses
 - Stop-Work Order clause
 - Government-Furnished Property clauses
 - Differing Site Conditions clause
 - Inspection clauses
 - First Article Approval clause
 - Escalation clauses
 - Payment clauses

POTENTIALLY AVAILABLE RELIEF

- Increased costs of performance
- Delay and stand-by costs
- Impact on other work (ripple effect)
- Unrecovered overhead
- Profit (maybe)
- Interest
- Extension of time
- Adjustment of other affected provisions of the contract

INITIATING THE CLAIM

- Start the claims process with the CO
- Submit a written claim, certified if necessary
- Submit before the six-year statute of limitations expires
- Remember the CO is not an island—he/she has advisors
- Write your claim to persuade key advisors to the CO

INVESTIGATING AND DOCUMENTING THE CLAIM

- Document Review
 - Collect and review all pertinent contract documents, including the solicitation as amended
 - Review all pertinent correspondence, particularly e-mails
 - Interview all involved personnel
 - Preserve the product of each interview (video, tape, statement)
- Obtaining Government Information
 - Consider submitting a FOIA request

PREPARING THE CLAIM

- Statement of Facts
 - Probably the most important document
 - Make it factual, straightforward, and unemotional
 - Avoid inflammatory language
 - Tell your story
 - Identify your strengths and weaknesses
 - Be able to back up each statement with evidence
 - Mark it appropriately: “Draft”, “Attorney-Client Privilege”, “Attorney Work Product”

LEGAL ANALYSIS

- Identify pertinent legal issues and their order of merit.
- Identify legal arguments that might apply if additional information were available.
- Discuss each legal issue and the case law relating to it.
- Identify areas where further factual investigation is warranted.
- Identify potential Government counter-claims.

LEGAL ANALYSIS

- Discuss the alternative forums for processing the claim.
- Discuss recommended techniques for preserving the evidence.
- List additional means to bolster the claim (*e.g.*, hiring an expert, producing a video, discovery).

CONTRACTOR CERTIFICATION

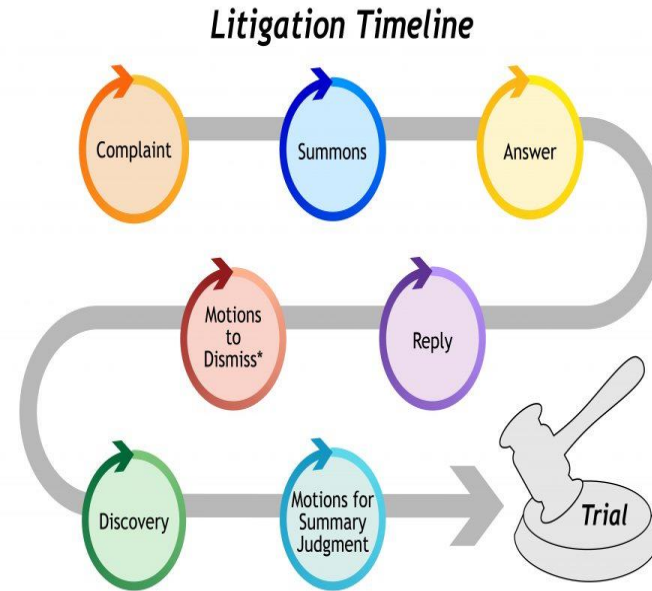
- Required for all claims > \$100K.
- If uncertified and > \$100K, it is not a claim.
- If certified defectively, it can/must be corrected.
- Must be signed by someone duly authorized to bind the company.
- Should track the prescribed language in FAR 33.207(c).

THE DECISION TO SUBMIT A CLAIM: CONSIDERATIONS

- This is a business decision.
- Potential impact on customer relationship?
- What is your burden of proof, and how will it be met? (*e.g.*, Will you need to show that a certain Government employee is a liar?).
- How will this be received by the customer?
- Will it be a surprise?
- Alternatives?
- Should ADR be elected early?

CLAIM SUBMISSION

- Document and preserve records showing when, how and to whom the claim was submitted.
- Document mailing and government receipt of the claim.



**Motions that parties can choose:*

- *Motion for Default Judgment*
- *Motion to Dismiss*
- *Motion for Judgment on the Pleadings*

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THE CO's FINAL DECISION

- Due within 60 days of receipt if the claim is under \$100,000.
- If over \$100,000, due within 60 days after receiving a certified claim; however, CO may extend that period.
- CO's failure to issue a timely final decision may be considered a “**deemed denial**” and appealed or used as the basis for requesting a Board or Court order directing the CO to issue a final decision (FAR 33.211(g)).

THE CO's FINAL DECISION

- Under FAR 33.211, the decision should:
 - Describe the claim or dispute
 - Reference the pertinent contract terms
 - State the factual area of agreement and disagreement
 - State the CO's decision, with supporting rationale
 - Include a paragraph informing the contractor the decision is final and stating the appeal deadlines

SUBCONTRACT WRINKLES

- What does the subcontract say regarding disputes?
- Normally, Subs have no privity of contract with the Government, so most subcontractor claims go through the prime and are then “sponsored” by the prime.
- If the claim is over \$100,000, the prime will almost certainly require the sub to certify its claim and may demand more (*e.g.*, audit, indemnification, hold harmless).

SUBCONTRACTOR WRINKLES

- Drafting and negotiating a subcontract “Disputes” clause is often tricky.
- A good subcontract “Disputes” clause will address: (a) disputes that might arise between the prime and the sub, and (b) disputes that might really be between the sub and the Government.

CONTRACT DISPUTES

DEADLINES FOR APPEALING

- There are two forums with jurisdiction to consider a challenge to an adverse contracting officer's decision: the appropriate board of contract appeals and the U.S. Court of Federal Claims ("COFC").
- A company has 90 calendar days from receipt of the CO's final decision to appeal to the board and one year to file suit in the COFC.
- Once a filing is made at either forum, the contractor has "elected" its forum and may not change (except where the first forum lacks jurisdiction).

FILING AT A BOARD OF CONTRACT APPEALS

- There are two boards of contract appeals: the Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA).
- USPS and the FAA have their own forums.
- The forums have different rules, which you should understand before bringing an action.

THE NOTICE OF APPEAL

- The contractor files its Notice of Appeal at the board.
- It should contain:
 - A recitation of the contract number;
 - The name of the Government agency involved;
 - The CO's name;
 - The date of the adverse final decision;
 - A brief summary of the dispute between the parties;
 - The name and business address of the contractor;
 - The name of the person to whom the board and the Government agency should address all appeal-related correspondence; and
 - A copy of the final decision being challenged.

NOTICE OF DOCKETING

- Shortly after filing the notice of appeal, the board will send a notice of docketing.
- This notice will assign a case number to your appeal and will include a copy of the board's rules.
- The notice of docketing will mention that the board will make Alternative Dispute Resolution (“ADR”) available to the parties.

WHAT IF ADR IS DECLINED?

- The parties will proceed to act in accordance with the board's rules.
- This generally means that the appellant will have 30 days to file its “complaint,” and the Government will have 30 days thereafter to file its “appeal file” (i.e., the “Rule 4 file”).
- The appeal file usually consists of all documents relevant to the dispute.
- Absent objection, documents in the file are generally treated as if they have been admitted into evidence.

THE PLEADINGS

- The **complaint** is the first of several documents called the “pleadings.”
- The complaint usually consists of a series of numbered paragraphs.
- The goal in drafting the complaint is to tell your story.
- In addition to providing the factual background, the complaint should list the various “counts” and a prayer for relief.

THE ANSWER

- Once the complaint is filed, the opposing party has 30 days to file its “answer”.
- The **answer** normally consists of a series of numbered paragraphs corresponding to the complaint, and the “respondent”) will generally either admit to or deny each numbered paragraph.
- The respondent might also include a counterclaim or an affirmative defense in its answer.
- Always compare the complaint and the answer to develop a statement of undisputed facts.

COUNTERCLAIMS

- The board lacks jurisdiction over a counterclaim unless it has been the subject of a contracting officer's final decision.

AMENDMENT OF PLEADINGS

- Parties may amend their pleadings with the board's permission.
- Normally, the board grants permission if the amendment is germane to the appeal and does not unfairly prejudice the opposing party.

AFFIRMATIVE DEFENSES

- An affirmative defense is one that assumes the complaint to be true but, nevertheless, constitutes a defense to it.
- Some of the more common affirmative defenses are:
 - Prejudice to the defending party due to the untimely filing of the claim
 - Accord and satisfaction
 - Lack of liability due to absence of privity
 - Fraud or misrepresentation
 - *Res judicata* or collateral estoppel
 - Failure of the opposing party to give the notice required by the particular clause, such as the “Changes” clause

PREHEARING PROCEDURES

- After the exchange of pleadings and preliminary motions, either party may request a prehearing conference.
- These conferences are often a springboard to settlement, depending on how the judge assesses the case.
- Even if settlement discussions do not begin, a prehearing conference can be useful in addressing other matters.

PREHEARING PROCEDURES

- For example, a prehearing conference might result in the following:
 - Simplification, clarification, or narrowing of the issues
 - The possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof
 - Agreements and rulings to facilitate discovery
 - Limitation on the number of expert witnesses
 - An agreement disposing of some of the issues in dispute
 - Exchange of witness lists
 - Exchange of exhibits
 - Exchange of written expert testimony

PREHEARING BRIEFS

- During or after the prehearing conference, the board might ask the parties to submit prehearing briefs addressing factual and legal issues.

MOTIONS

- After the issues have been joined, one or both parties may submit motions for summary judgment.
- This motion essentially argues that, even if all the facts are read in favor of the opposing party, the moving party still must prevail.
- The boards do not favor resolving disputes based on such motions, but there are situations where they make sense.
 - For example, if you compare the Government's admissions to the complaint, you might find the Government has admitted a fact or facts that could lead to a successful motion for summary judgment.

ELECTION TO HAVE A HEARING

- After the complaint and answer have been filed, the parties are required to advise the board if they desire a hearing.
- If either party requests a hearing, the request will be granted.
- A hearing means greater expense in pursuing the claim, but if witness testimony is critical to meeting your burden, a hearing may be necessary.
- Witness credibility is one of the key factors to consider in deciding whether to ask for a hearing.

PURPOSES OF A HEARING

- The judge has an opportunity to hear testimony from key witnesses.
- The judge can observe the demeanor of each witness, which may affect credibility and the weight given that testimony.
- It might help clarify confusing portions of the written record.
- It may help dissect complex issues.
- It might allow for expert testimony.
- It might introduce evidence not otherwise on the record.

VENUE

- Although hearings are normally held at the board's offices, judges will travel for the convenience of the witnesses.

THE HEARING

- A board judge will preside over the hearing.
- If an opinion is issued, it normally will be signed by three judges.
- Once the introductory matters are addressed, the parties will be asked if they want to make opening statements.
- This is a good opportunity to tell your story, so don't waive it.

THE HEARING

- The party with the burden of proof—normally the contractor—goes first, presenting its direct case through the testimony of witnesses and expert witnesses.
- Opposing counsel may cross-examine each witness.
- Judges are free to ask their own questions.
- Once the first party has presented its case, the other party proceeds with its witnesses and expert witnesses, all of whom may be cross-examined.

POST-HEARING BRIEFS

- Once the hearing is complete, the parties will have an opportunity to submit post-hearing briefs, tying their arguments to the record.
- Once the record is closed, the board will begin working on its opinion.
- There is no mandatory time limit involved with a board proceeding, so the issuance of a decision is outside the parties' control.

POST-DECISION

- Once a decision is issued, either party may file a motion for reconsideration within 30 days of receipt of the decision.
- Reversals are rare, so the more feasible path is to file an appeal with the U.S. Court of Appeals for the Federal Circuit.
- If a party loses at the Federal Circuit, in theory, it can appeal to the U.S. Supreme Court.

ALTERNATIVE DISPUTE RESOLUTION

- Both the boards and the COFC encourage parties in the dispute to use ADR.
- ADR can be binding or non-binding.
- ADR has several advantages over full-blown litigation:
 - The parties control the method and the schedule;
 - It is usually less expensive than litigation; and
 - It is less likely to damage the business relationship.
- If parties elect to use ADR, a settlement judge will be assigned.
 - In fact, ADR is available to the parties even without going to a board or the COFC.
 - FAR 33.214 encourages the parties to use ADR during contract performance.

THE U.S. COURT OF FEDERAL CLAIMS

- A contractors may challenge a CO's final decision in a lawsuit at the COFC.
- The contractor has one year from receipt of a final decision to file suit at the COFC.
- The U.S. Department of Justice will represent the Government.
- A trial at the COFC will be conducted in accordance with the court's rules.

THE U.S. COURT OF FEDERAL CLAIMS

- A federal judge will conduct the trial.
- Only the presiding judge will write the decision.
- Appeals from the COFC are to the U.S. Court of Appeals for the Federal Circuit (CAFC).
- ADR is available to the parties, and a settlement judge will be appointed if the parties so choose.

TERMINATION FOR CONVENIENCE (T4C) FAR Part 49



GOVERNMENT RIGHT TO T4C

- Inherent Authority
 - Developed after Civil War
 - Don't buy if need is gone
- Contractual Authority
 - Inherent authority
 - Clause limits KTR recovery (e.g.: FAR 52.249-2)

THE “CHRISTIAN DOCTRINE”

- If you forget it....
- “It’s in there”
- if it is a “fundamentally important” mandatory clause.



T4C DECISION

- Not much guidance in FAR Part 49.
- T4C ONLY when it is in the Government's interest.
- DO NOT T4C if:
 - A “No-cost” termination is possible (FAR 49.109-4).
 - Contract balance is less than \$5,000.
 - Contractor is in default.

T4C DECISION

- Exercise of Discretion
 - Broad discretion in CO, but watch out...
- Standards of Review
 - Bad faith
 - Abuse of discretion

CAN GOVERNMENT CHANGE ITS MIND?

- Reinstatement -- Yes, if done bilaterally and there is still a need.
- Convert it to T4D -- NO WAY!

T4C MECHANICS

- Written notice
- Notice effective when received by KTR
- Stop work – Prime and subs
- T4C settlement proposal
 - Audited
 - Negotiated
 - Final settlement modification

WHAT'S IN IT FOR THE CONTRACTOR?

- Costs incurred to point of termination.
- Profit (or loss) on those incurred costs.
- Proposal preparation costs/attorney fees.
- Note - Fairness principle on costs.

IS T4C A POT OF GOLD?

LIMITATIONS

- Overall contract price (ceiling), plus settlement expenses and price of valid claims.
- **NO ANTICIPATORY PROFITS.**
- No full recovery for “usable items”.
- Court may impose loss percentages to amount due if contractor was losing money on performance.
- Costs are reasonable, allowable, allocable and kept in accordance with Generally Accepted Accounting Principles (GAAP).

TERMINATION FOR DEFAULT (T4D) FAR Part 49



DEFAULT TERMINATION - DEFINED

- A contractor's unexcused present or prospective failure to perform in accordance with the contract's terms, specifications, or delivery schedule.

WHAT DO THE COURTS SAY?

- [A] termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and in the presence of solid evidence. A T4D is a “contractor death sentence”.

GROUND FOR T4D

- Depends on T4D/termination clause in the contract.
- For example, in Fixed-Price Supply contracts (FAR 52.249-8):
 - Late Performance
 - Failure to make progress (Cure Notice)
 - Violation of “other” K provision (Cure Notice)
- Common Law
 - Anticipatory repudiation

NOTICE REQUIREMENTS

- Show Cause Letter
 - Use when T4D after delivery date or for anticipatory repudiation
 - In writing
 - Identify problems “Show reason why CO should not T4D.”
 - Reasonable time to respond
 - Required if practicable

CURE NOTICE

- Required if T4D before delivery date (e.g.: Failure to make progress or perform other contract provision)
- In writing
- Identify Contractor's problem/failure
- Minimum 10 days to correct
- T4D defective if notice not sent, defective or default contractor too soon!

CONTRACTOR DEFENSES

- Excuses
 - Beyond the control AND without the fault or negligence of the Contractor and any subcontractors or suppliers. Everyone must be clean!
 - Claimed excuse must prevent performance
 - Examples of excuses
- Abuse of Discretion/Bad Faith
- Failure to consider FAR 49.402-3(f) factors

WAIVER OF DELIVERY/PERFORMANCE DATE

- Precludes termination - DeVito
- Reasonable forbearance period
- Detrimental reliance required by Contractor
(Government leads the Contractor on!)
- Reestablish delivery schedule

GOVERNMENT REMEDIES

- Excess costs of reprocurement
 - Similar item
 - Mitigation required
- Unliquidated progress payment
- Advance payments
- Liquidated damages

CONTRACTOR REMEDIES

- Payment for:
 - Supplies accepted
 - Services accepted
 - Construction completed
- Appealable CO decision to Board of Contract Appeals or Court of Federal Claims
- **CONVERSION TO T4C IF T4D IS IMPROPER!**

OTHER TRANSACTION AUTHORITY

- Introduction
- Objectives
- Background – Definition of OTA; History; OTA Types; Laws/Regulations; Purpose & Reasons for Use
- Requirements and Definitions – Statutory Authority; Funding; Participation; and Competition; Approval Authority
- Planning and Execution
- Terms and Conditions
- Intellectual Property
- Protests and Dispute Jurisdiction
- Stand-Alone OTA and Consortia

OTA - RESOURCES

- DoD Other Transactions Guide for Prototype Projects (Dec 2018), [https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20\(OT\)%20Guide.pdf](https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf), or <https://aaf.dau.edu/ot-guide>
- Defense Advanced Research Projects Agency (DARPA); <http://www.darpa.mil/>
- Defense Innovation Unit library: <https://diu.mil/library>
- 10 U.S.C. § 2371b – Authority of the Department of Defense to carry out certain prototype projects.
- Defense Acquisition University, Prototype Ots, <https://aaf.dau.edu/contracting-cone/ot/prototype>
- Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress (Updated February 22, 2019), <https://crsreports.congress.gov/product/pdf/R/R45521>

QUESTIONS?



Thank You!



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