



Episode 3 – Contracting Methods

Part 212 – Acquisition of Commercial Products and Commercial Services

Part 213 – Simplified Acquisition Procedures

Part 214 – Sealed Bidding

Part 215 – Contracting by Negotiation (Subparts 1-3)

Part 244 – Subcontracting Policies and Procedures

Co-Host – Lou Chiarella

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- Professorial Lecturer of Law at the George Washington University Law School, Government Procurement Law Program.
- Deputy Assistant General Counsel in the Procurement Law Division, Office of the General Counsel, U.S. Government Accountability Office (GAO) (2001-2022).
- Army Judge Advocate (1988-2018), culminating with his assignment as Chief Counsel for the Army Futures Command Task Force, which resulted in the Army's largest acquisition-related reorganization in 50 years.



Co-Host – Dave Drabkin

Independent consultant with 41-plus years of federal government contracting experience in both the public and private sector.

Chairman of The Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), <https://discover.dtic.mil/section-809-panel/>

The President of the United States appointed Dave to the Service Acquisition Reform Act (SARA) and the Multiple Award Schedule (MAS) Panels.

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Co-Host – Bill Walter

- Managing Director of Forvis' Government Contracting Advisory practice
- More than three decades of experience in government contracting
- Former DCAA auditor and Executive with one of the largest DoD service contractors
- Bill's work includes helping clients understand the requirements associated with developing and implementing pricing strategies, indirect cost allocation solutions, developing accounting, estimating, procurement, project management and integrated system requirements for clients in various industries including aerospace and defense, contingency contracting, logistics, oil and gas, energy, manufacturing, healthcare, construction and professional services.

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Today's Topics:

Contracting Methods

- Part 212 – Acquisition of Commercial Products and Commercial Services
- Part 213 – Simplified Acquisition Procedures
- Part 214 – Sealed Bidding (yes, it still exists even if rarely used)
- Part 215 – Contracting by Negotiation (Subparts 1, 2, 3)
- Part 244 – Subcontracting Policies and Procedures

Welcome Back, and Our Rules of Engagement

- Class will begin promptly at 2:00 pm ET.
- Class will end at 3:30 pm ET.
- Please use the Q&A panel to ask your questions
 - And if we are unable to answer the questions today, we'll get back to you.

How to Receive Credits

- To get credit for the class you must collect the passwords provided during the class.
- You must respond to the email from PCI with the passwords to get credit.

What's in the Documents Folder Today?

- Class Deviations 2018-O0016 – Defense Commercial Solutions Opening Pilot Program, <https://www.acq.osd.mil/dpap/policy/policyvault/USA001228-18-DPAP.pdf>
- Class Deviation 2018-O0021 – Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System, <https://www.acq.osd.mil/dpap/policy/policyvault/USA002554-18-DPC.pdf>
- Department of Defense Guidebook for Acquiring Commercial Items
 - Part A, https://www.acq.osd.mil/dpap/cpic/cp/docs/Guidebook_Part_A_Commercial_Item_Determination_07_10_2019.pdf
 - Part B, https://www.acq.osd.mil/dpap/cpic/cp/docs/Guidebook_Part_B_Commercial_Item_Pricing_20180126.pdf
- DCMA Commercial Item Group Year in Review 2020, [The DCMA Commercial Item Group FY20 Year in Review.pdf](https://www.acq.osd.mil/dpap/dars/pgi/pgi_html/current/PGI215_3.htm#215.300)
- DoD Source Selection Procedures Memo - https://www.acq.osd.mil/dpap/dars/pgi/pgi_html/current/PGI215_3.htm#215.300

Polling Question #1

How much experience do you have with source selection?

- A. I routinely write proposals
- B. I am never/seldomly involved in proposal preparation
- C. I routinely evaluate proposals
- D. I am never/seldomly involved in evaluations/award decisions



212.001 - Definitions

“Market research” means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of DoD in whole or in part. The review shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market capabilities and pricing information, and may include any of the techniques for conducting market research provided in FAR 10.002(b)(2) (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

Polling Question #2

What is the current term of art for buying commercial “stuff”?

- a. Commercial Items
- b. Commercial Products
- c. Commercial Services
- d. Both b and c



212.1 – Acquisition of Commercial Products/Services

- Over SAT must make written determination (may require higher level approval)
- Prior commercial(ity) determinations
- Nontraditional defense contractors

212.2 – Special Requirements

- LPTA – see DFARS 215.101-2-70
- No reverse auctions for PPE & aviation critical safety items
- Only one offer – see DFARS 215.371
- Limited use of time-and-materials & labor-hour
 - Support for commercial item
 - Emergency repair services
 - Head of agency approval for other commercial services

212.209 – Price Reasonableness

- Market research if sufficient
- If not sufficient, request additional information
 - Prices paid for the same or similar items sold under different terms and conditions;
 - Prices paid for similar levels of work or effort on related products or services;
 - Prices paid for alternative solutions or approaches; and
 - Other relevant information that can serve as the basis for determining the reasonableness of price.
- CO has right to request additional information including including uncertified cost data such as labor costs, material costs, and other direct and indirect costs

Trivia

What's the most that DoD pay for a right-hand drive passenger sedan?

(DFARS 212.271)

Starbucks Gift Card (Sent electronically through Starbucks website)



DFUN with the DFARS™ T-Shirt (no Small)



212.272 – Preference for Commercial Items

- Commercial IT, see DFARS 239.101
- Must use commercial for:
 - Facility related services,
 - knowledge based,
 - Medical, or
 - Transportation.
- Above \$10M, CO must obtain approval.

212.3 – Solicitation Provisions & Clauses

- 212.3 contains over 100 DoD unique clauses and provisions applicable to DoD commercial buys.
- If included in SAM as part of annual reps and certs, CO can accept SAM registration.
- Let's talk about a few examples.
- Tailoring inconsistent with customary commercial practice requires HCA approval

212.5 – Applicability of Certain Laws

- There are 11 laws that don't apply to commercial contracts
 - A few examples: [We pick 2 each & discuss]
- There are 19 laws that don't apply to commercial subcontracts:
 - A few examples: [We pick 2 each & discuss]
- COTS - requirement to buy strategic materials critical to national security from American sources, is not applicable to contracts and subcontracts except as provided at DFARS 225.7003-3(b)(2)(i).

Polling Question #3

Which of the following is PROBABLY NOT usually procured using the procedures in FAR Part 12 and DFARS Part 212?

- a. A laptop computer
- b. Drywall screws
- c. Night vision goggles
- d. Nuclear missiles



212.70 ~~Conversion Limitation~~ RESERVED

- The DFARS keeps changing!
- Same with DFARS 212.71 (Pilot Program – Nondevelopmental Items): now also RESERVED

Polling Question #4

What is the current general simplified acquisition threshold for DoD?

- A. \$150,000
- B. \$200,000
- C. \$250,000
- D. \$800,000



FAR 2.101 Simplified Acquisition Thresholds

- Simplified Acquisition Threshold (SAT) means \$250,000, except:
 - Contingencies or recovery from certain identified disasters
 - \$800,000 inside US
 - \$1.5 million outside US
 - \$500K Humanitarian Assistance or Peacekeeping outside US
- Micro-Purchase Threshold (MPT) \$10K except:
 - Construction \$2K
 - SCA \$2.5K
 - Contingencies or recovery \$20K inside US/\$35K outside US

213.1 - Procedures

- Structure awards $>$ MPT to minimize invoice \leq MPT
- Promote competition PGI 213.104
- Considerations:
 - Supply chain risk
 - LPTA
 - Reverse auctions
 - Evaluation of offers \geq \$1M - Basis of award shall include evaluation of SPRS data for FSC or PSC being purchased

213.3 Simplified Acquisition Methods

- 213.270 – Governmentwide Commercial Purchase Card (GPC)
 - DoD uses the GPC for transactions \leq MPT.
 - See the various exceptions to use of the GPC – there are lots!
- 213.302 - Purchase orders –
 - requires written acceptance for classified
- 213.5 – Certain Commercial Items
 - Only One Offer
 - Brand Name or Equal – additional documentation requirements

214 – Sealed Bidding

- Unique – Supply Chain risk factor for IT
- Only One Offer

215 – Contracting by Negotiation

- Section M of an RFP is helpful for contractors formulating an offer since it essentially provides a roadmap of the criteria a contracting officer will use to evaluate offers
- Lowest Price Technically Acceptable (LPTA) only use
 - Requirements that can be clearly described
 - No, or minimal, value from exceeding minimum requirements
 - No subjective judgement on technical evals
 - Technical proposals won't result in added value/benefit
 - No, or minimal benefit to a different source selection process
 - Expendable or nontechnical good with short life-expectancy/shelf life
 - Determination that lowest price represents full life-cycle costs
 - Justification for use of LPTA
- LPTA don't use for
 - IT, cybersecurity, systems engineering, technical, professional, knowledge-based services or advanced electronic testing
 - PPE
 - Knowledge based training or logistics services in contingencies & operations OCONUS

215 - LPTA Prohibitions

- PPE or aviation critical safety – combat casualties
- Engineering and manufacturing development for major defense acquisition programs (MDAP)
- Auditing contracts
- Tents or Temporary Structures

215.203 – Tiered Evaluations

- Tiered (Cascading) Evaluations
 - 8a, Hubzone, SDVOSB first
 - Market research
 - Set-aside criteria
 - For T/Dos – sufficient #
 - Written determination
 - \geq \$100M, include FAR 52.215-1 Alternate I

215.3 Source Selection

- See DPC's 79-page Source Selection Procedures (Aug. 20, 2022)
- Don't forget the Acquisition Plan we discussed in Episode 2
- Evaluation Factors & Subfactors
 - Small Business utilization
 - Supply Chain Risk factor
 - Sustainment & Reliability
 - Past Performance
- CO "should" conduct discussions w/ offerors >\$100M
- Must consider protections for Selected Reserve (215.370)

215.371 Only One Offer

- Promote Competition
- Fair and Reasonable Price
- Consider other than certified cost and pricing data
- Exceptions:
 - <SAT
 - Contingency, humanitarian/Peacekeeping
 - SB set-asides
 - S&T
 - A&E
- Waiver
 - HCA may waive add'l 30-day recompetete
- Don't forget Intent to Resolicit provision

244 - Subcontracting

- Definition
 - “Significant deficiency”
- COs must not withhold consent to subK w/o written approval by PM or comparable
- Primes must substantiate value received when selecting other than lowest price

244.3 – Contractors' Purchasing Systems Reviews

- ACO responsible for initiating reviews
- Threshold \geq \$50M next 12 months
- Review
 - Commercial item determinations
 - Counterfeit Electronic Part Detection & Avoidance System
 - Cyber
- ACO
 - Approve/disapprove
 - Pursue corrective actions
- Process – significant deficiencies
 - Written findings
 - Kor given 30 days to respond
 - Final Determination

244.3 CPSR Determinations

- Approve
- Disapprove
 - Kor given 45 days
 - Correct
 - Corrective Action Plan
 - Withhold payments
- Impact on source selection
 - Consider impact on acquisition
 - Provide add'l time to correct
 - Consider different K type (FFP or FPI(firm target))
 - Separate CLIN
 - Reduce objective for profit or fee
 - Reopener clause

244.4 Commercial Products, Commercial Services, and Commercial Components

- Kors responsible for making commercial product and commercial service determinations – reasonable business judgement
- Items <\$10,000 for use in multiple Ks & not identifiable to any particular K treated as commercial product & do not require commercial product determination.
- Flowdown to commercial product and commercial service subs

Polling Question #5

When does the DFARS encourage (“should”) contracting officers to conduct discussions in a negotiated procurement?

- A. In all negotiated procurements
- B. In no negotiated procurements
- C. When the acquisition will probably take a long time to negotiate
- D. When the estimated value of the acquisition exceeds \$100 million [see DFARS 215.306]



Polling Question #6

Who is responsible for selecting a subcontractor?*

- a. The prime contractor ONLY
- b. The Government ONLY
- c. Ultimately the prime contractor, though it can request assistance from the Government
- d. There is no procedure for subcontractor selection



Take Four

Use commercial products and commercial services as much as possible at every level of contracting!

Make sure you know and understand DoD's specific competition and source selection requirements!

Avoid Sealed Bidding whenever possible!

Carefully consider what to flowdown and what flowdowns to accept!

See you again on April 12th . . .

Same Bat Time . . .

Same Bat Channel . . .



THANKS!!!!!!