



The FAR Express

A Trip Through the Contract Life Cycle



PUBLIC
CONTRACTING
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Practice provides client counseling relating to all facets of government contracts, especially in compliance and organizational conflicts of interest areas.

Prior experience includes 21 years at Electronic Data Systems Corporation, including Director of Contracts and Legal for EDS Federal.



Let's Get Acquainted

I work for a

- A) Contractor**
- B) Government Agency**
- C) Law Firm**
- D) Myself**

My principal role is

- A) Contracts**
- B) Operations**
- C) Finance**
- D) Management**
- E) Other**

Agenda

Requirements (Part 11)

Acquisition Planning (Parts 7,10,5)

Solicitation Preparation (Parts 6,9,16,30,31)

Submission of Bid/Proposal (Parts 3, 4,12,13,14,15,8,38)

Evaluation and Discussions (Part 15)

Award and Debrief (Part 15)

Protest (Part 33.1)

Administration and Performance (Parts 1,27,37,44)

Changes and Delays (Part 42,43,49)

Disputes (Part 33.2)

Delivery and Acceptance (Part 46)

Closeout/Termination (Parts 4,42,49)

Bonus: Other Parts

Note: You can access the FAR at:

<https://www.acquisition.gov/browse/index/far>

Course Objectives

To understand the life cycle of a procurement and contract

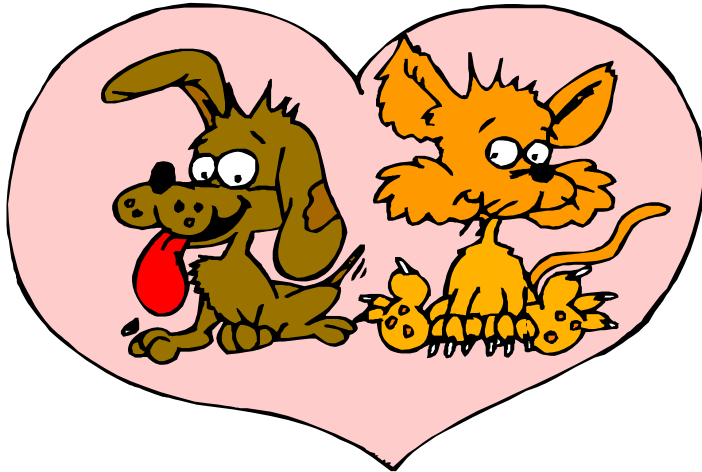
To learn how this life cycle is reflected in different parts of the Federal Acquisition Regulation

To learn to “Navigate” the FAR – comfortably!

REAL Course Objective

Change the FAR from

To



Federal Acquisition Regulation



Why We Need to Know the FAR

The FAR sets forth the “rules of the road” that most Federal Agencies follow to acquire goods and services.

Prime contractors need to know:

- what the Contracting Officer will need and expect.
- what the Contracting Officer is (and is not) allowed to do.

Subcontractors need to know what they must accept as “flow-down” clauses, and their rights and remedies.

- Knowledge of the FAR helps one form and administer contracts.



Organization

Parts 1-4	A	General
Parts 5-12	B	Competition and Acquisition Planning
Parts 13-18	C	Contracting Methods and Contract Types
Parts 19-26	D	Socioeconomic Programs
Parts 27-33	E	General Contracting Requirements
Parts 34-41	F	Special Categories of Contracting
Parts 42-51	G	Contract Management
Parts 52-53	H	Clauses and Forms

Typical Content of Part/Subpart

Scope and Applicability

Definitions

General

Policy

Rules (statutory or policy based)

Guidance

Exceptions / Exclusions / Limitations

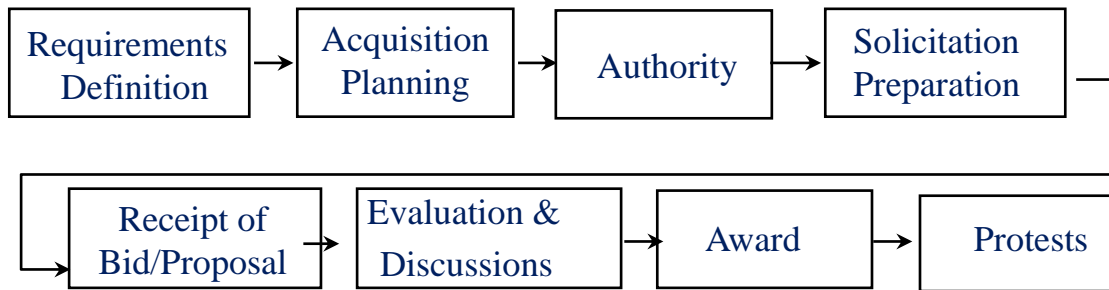
Procedures

• **Solicitation Provisions and Contract Clauses (Part 52)**



The “Procurement” Process

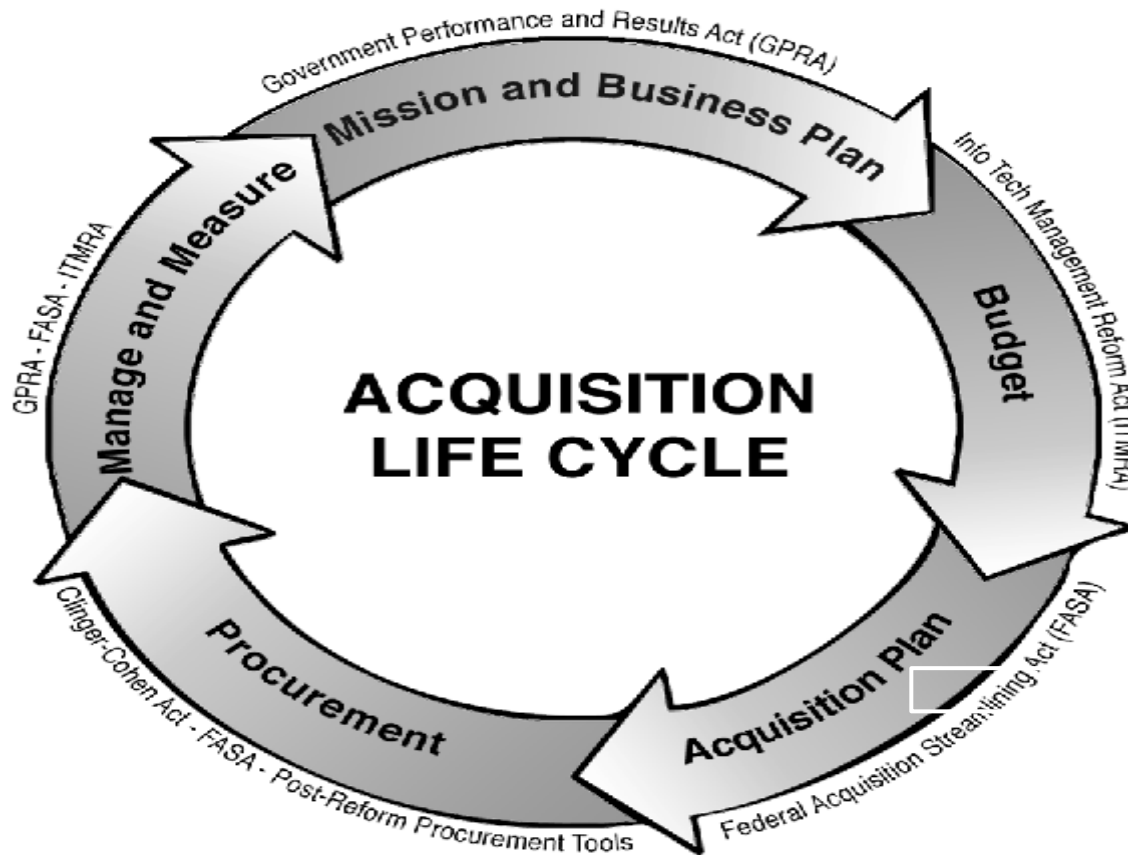
Formation



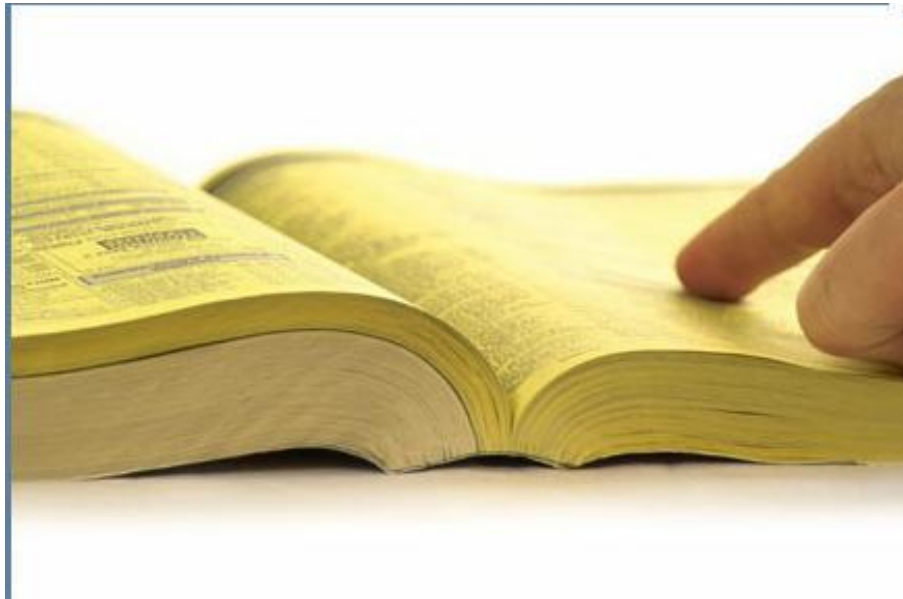
Administration



Acquisition Life Cycle



Requirements Definition (FAR Part 11)



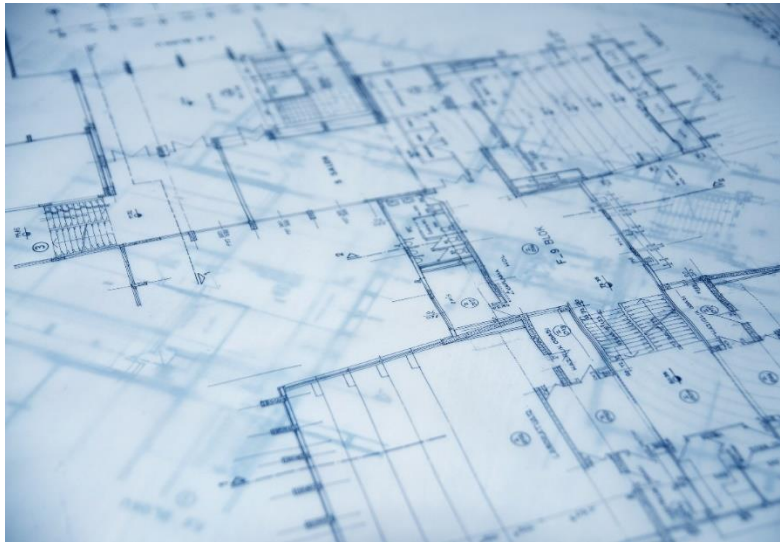
Agency Requirements (Part 11)

- Defined by user community (program office)
- Broad agency discretion in defining its requirements
- Agency requirements will become Section C of solicitation and contract

Policies (FAR Part 11.002)

- only include restrictive provisions if necessary
- prefer commercial items (including in subcontracts)
- seek contractor input [but avoid OCI]

Acquisition Planning/Authority (Parts 7,10,5)



Part 7 – Acquisition Planning - i.e., plan ahead



Acquisition Plans (7.1)

- Perform market research, consider commercial sources
- Contents (e.g., need, life cycle costs, plan of action, etc.) (7.105)
- “Major Systems” require additional steps

Economic Quantities: How much to buy? (7.2)

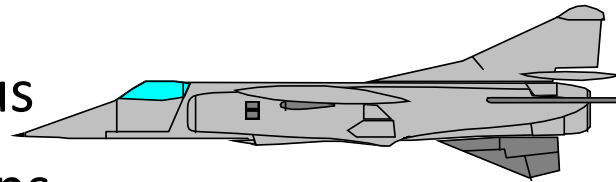
Contractor vs. Government (7.3) (OMB Circular A-76)

Lease vs. Purchase (7.4) – how to decide?

- Inherently Governmental (7.5) – definitions and examples
- Bundling: Pros and cons (7.107)

Types of Specifications

- Design Specifications – “Build to print”
 - May restrict of competition
 - Specifications may be ambiguous
 - Implied warranty of specifications
- Performance Specifications – Defines outcomes, not means/methods
 - Preferred method for acquiring services (FAR 37.102(a))
 - May be difficult to specify results or evaluation criteria
- Purchase Descriptions (i.e., “brand name or equal”)
- Mixed Specifications



Part 10 – Market Research

- Why do it?
 - Know the product or service and the marketplace.
 - Seek out commercial / non-developmental items.
 - Use/develop small businesses.
 - Assess the impact of bundling on small business.
 - Understand commercial industry practices.
- How do you do it?
 - Eight techniques – 10.002(b)(2)



Part 5 – Publicizing

Policy: Increase competition and help small businesses find opportunities

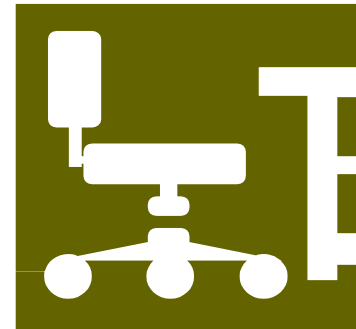


- Government wide point of entry (GPE)
 - Synopsise proposed awards and other actions >\$25K, especially those with opportunities for subcontractors (5.2, 5.3)
- MAC, GWAC, Schedule – awards publicized at <http://www.contractdirectory.gov/contractdirectory/>

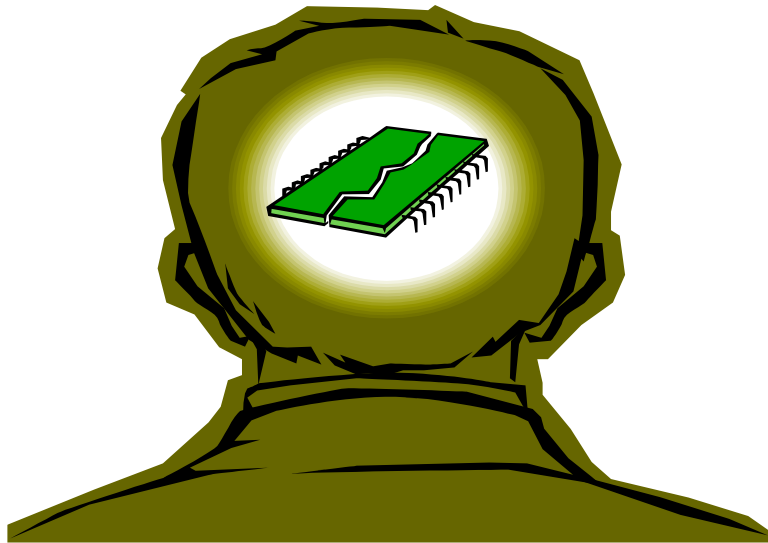
Part 8 – Required Sources

Priorities? (8.0)

- Excess Personal Property (8.1)
- Federal Prison Industries (UNICOR) (8.6)
 - If justified after market research
- Blind or Severely Disabled (8.7)
 - Procurement List from AbilityOne nonprofits at <http://www.abilityone.gov>

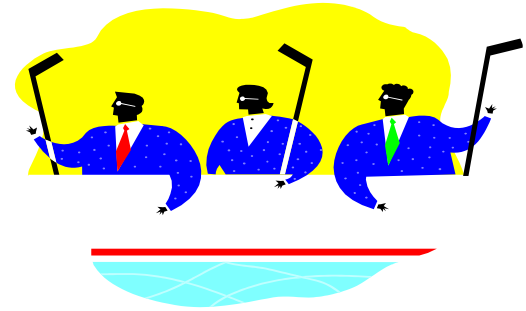


Solicitation Preparation/Issue (Parts 6,9,16,30,31)



Part 6 – Competition

(Default): “Full and Open” (6.1)



Full and Open Competition After
Exclusion of Sources (6.2)

Other Than Full and
Open Competition (6.3)

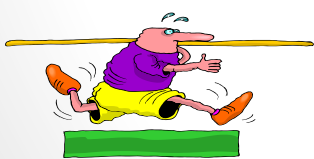


Part 6 – Competition

- **Full and open competition** is an imperative (6.1)

All “Responsible Sources” are permitted to compete.

“Contracting officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart [e.g., sealed bids, competitive proposals] that are best suited to the circumstances of the contract action and consistent with the need to fulfill the Government’s requirements efficiently.” (6.101)



Part 6 – Competition

- Full and Open after exclusion of sources – i.e., Set-asides (6.2)
 - Alternative Sources (e.g., for national defense)
 - Local firms during disaster (also in 26.2)
 - References Part 19 (Small Business Programs)
 - Small business concerns (including SBIR)
 - Section 8(a) competition
 - HUBZone small business concerns
 - Service-disabled veteran-owned small business concerns
 - Women-owned small business concerns

Part 6 – Competition

- Other than Full and Open Competition (i.e., Sole Source) (6.3)
 - Seven statutory exceptions:
 - Only one responsible source
 - Unusual and compelling urgency
 - Industrial mobilization
 - International agreement
 - Authorized or required by statute
 - National security
 - Public interest
 - Requires Justification and Approval (J&A)
 - Must solicit from as many sources as practicable.
 - Sole Source not justified by lack of advance planning.

Part 9 – Qualifications

- Responsibility (9.1)
 - Affirmative determination of responsibility must satisfy seven standards. (FAR 9.104-1)
 - Federal Awardee Performance and Integrity Information System (FAPIS) combines Past Performance Information Retrieval System (PPIRS) and Excluded Parties List System (EPLS) - www.ppirs.gov. If total contracts >\$10M, Contractor must update FAPIS.
 - Must file certification regarding responsibility matters (52.209-5)
 - Restrictions if “inverted domestic corporation,” or employment law violations.
 - Prime must verify (and should document) that subcontractors are not on excluded parties list. (52.209-



Part 9 – Qualifications

Suspension/Debarment Grounds (9.406-2, 9.407-2)

- 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
- Violation of Drug-Free Workplace or affixing false origin label
- Commission of offense indicating lack of business integrity that affects present responsibility
- Any other cause so serious that it affects present responsibility
- Failure to disclose credible evidence of violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations, violation of civil False Claims Act, or significant contract overpayment

Part 9 – Qualifications

Consequences of Suspension or Debarment

- No new contracts (unless waiver)

 - No new subcontracts (unless waiver)

 - Loss of teaming opportunities

 - No new mods or options to current contracts

 - No new task orders under schedule contracts

 - Harm to reputation

 - Can keep previously awarded contracts (but CO could decide to terminate for convenience because of integrity concerns)

Suspension and Debarment Official (caught in a moment of candor)



Part 9.5 - Organizational Conflicts of Interest (OCI)

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 unfair competitive advantage.

Simply being incumbent (and thereby having better understanding of the customer) does not create an OCI. “Experience” is considered a “natural advantage of incumbency.”

May be OCI, however, if incumbent contractor has proprietary information, source selection information, or other nonpublic information not provided to competitors that gives it an advantage (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 OCI

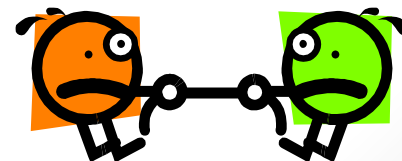
Arises when contractor has opportunity to provide advice that might affect its own business interests:

- 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.



Biased Ground Rules OCI

- Arises when contractor has the ability to **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 wants to provide a system for which it has provided Systems Engineering Technical Assistance (SETA). (DFARS has strict rule 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 OCI, as long as other potential bidders are free to do the same.

OCI Regulation (FAR 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?
- Remember that your competitors are always on the lookout.
- You may have to choose which contract you want – you can’t always have your cake and eat it, too.



Contract Types (FAR Part 16)

Fixed-Price Contracts

Cost-Reimbursement Contracts

Why Do We Care?

- Allocates cost and performance risk
- Determines profit incentives
- Determines oversight requirements
- Determines payment mechanism



Part 16 – Contract Types

- Fixed-price Contract Types (16.2)
 - Requirements well-defined, costs known or predictable
 - Price does not depend on cost – if work doesn't change, price doesn't change.
 - Must be FP if commercial items or sealed bidding.
 - Firm Fixed Price (FFP)
 - Cost risks and rewards are with the contractor.
 - Easy to administer? Watch out for scope creep!
 - Payments made on delivery, or progress payments based on milestones or incurred costs
 - FP with Economic Price Adjustment (FP-EPA) - when identified cost elements may change over time. (16.203-1(a))
 - FP Level of Effort (FP-LOE) - mostly R&D <\$150K

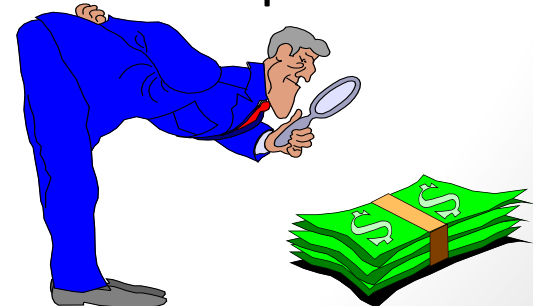


Part 16 – Contract Types

- Cost-Reimbursement Types (16.3)
 - Requirements not well-defined, costs not predictable.
 - Contractor paid “allowable costs”
 - Contractor only required to use “best efforts.”
 - Subject to Limitations of Costs/Funds clauses (Part 32)
 - Contractor must have acceptable accounting system.
 - Payments made as costs are incurred (typically monthly).
 - Agency must be able to administer.

Cost Plus Fixed Fee (CPFF) – 16.306

- Fixed fee set in advance. Doesn't change unless scope of work changes.



Cost Reimbursable Contracts

(Pure) Cost contract – no fee

- R&D contract
- Non-profit contractor

Cost Sharing contracts – contractor expects compensating benefits.

- E.g., development of product that can be marketed commercially
- E.g., service that will be paid for by customers
 - Court Reporting service
 - Airport taxi concession contract
 - Surplus property auction contract

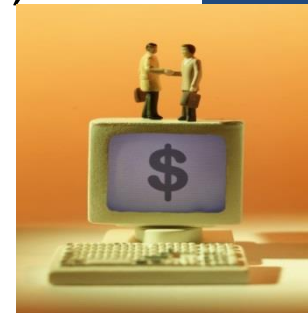
Cost Allowability

Costs must be reasonable, allocable, and consistent with FAR, GAAP, CAS, and contract.

“Reasonable”: cost does not exceed amount that would be incurred by prudent person in conduct of competitive business.

“Allocable”:

- Direct – costs are incurred specifically for contract; or
- Indirect/overhead – costs benefits more than one contract, with base that reflects beneficial relationship; or
- General and Administrative (G&A) – costs are needed to support overall operation of business



FAR: Part 31 describes allowability of 46 particular types of costs

CAS: Part 30 incorporates Cost Accounting Standards if applicable

Another Perspective



Never ask of money spent
Where the spender thinks it went.
Nobody was ever meant
To remember or invent
What he did with every cent.

(Robert Frost)

izquotes.com

Cost Limitation Clauses

Required by Anti-Deficiency Act

- Limitation of Funds Clause (incrementally funded) = FAR 52.232-22
- Limitation of Cost Clause (fully funded) = FAR 52.232-20

Contractor must give written notice when approaching funding limit (e.g., 60 days before contractor estimates it will reach 80% of ceiling).

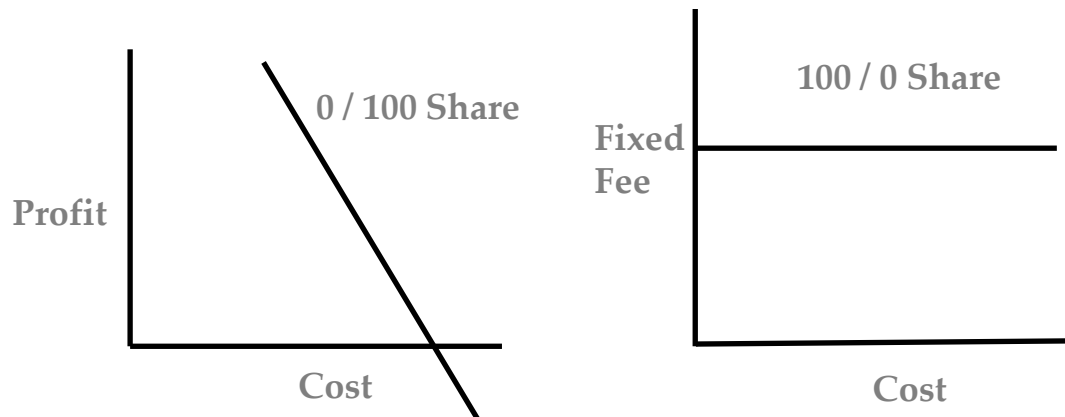
- Contracting Officer must tell contractor whether additional funding is available.
- Contractor is not required to spend above ceiling, and may not be able to recover excess costs.

Contractors often perform “at risk” – why or why not?

What if provisional indirect rates are later revised upward?

Fixed Price vs. Cost Reimbursement

Firm Fixed Price vs. Cost Reimbursement
Plus Fixed Fee



Incentive Contracts (Part 16.4)

Contractor and government share risk.

- If contractor performs efficiently, can get larger fee.
- Contract type incentivizes lower costs, faster performance.

Objective type: “Incentive Fee” contracts:

- Profit determined by formula, based on actual results and costs achieved.
- Cost Plus Incentive Fee (“CPIF”) or Fixed Price Incentive Contract (“FPI”). (16.402, 16.403)

Incentive Fee Example

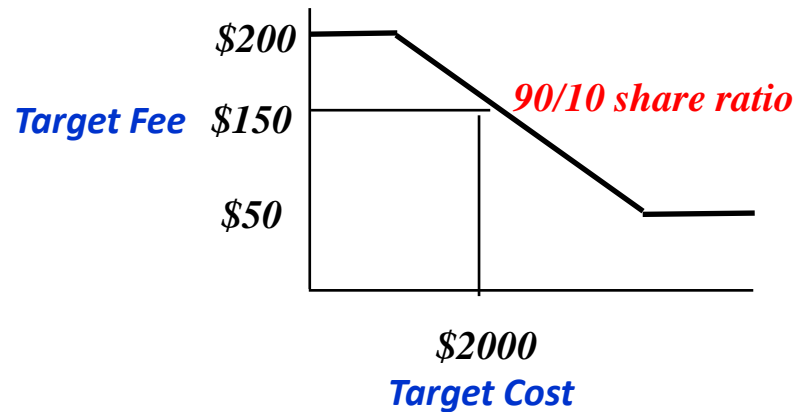
Target Cost: \$2000

Target Fee: \$150

Maximum Fee: \$200

Minimum Fee: \$50

**Sharing Arrangement:
90/10**



- 1) Underrun or Overrun = Target Cost – Actual Cost
- 2) Adjusted Fee = Target Fee + (10% of Underrun or Overrun)
- 3) Final Price = Actual Cost + Adjusted Fee

Incentive Contracts - Subjective

- “Award Fee” contracts (16.405):
 - Profit determined by Government’s appraisal of contractor’s performance.
 - Cost Plus Award Fee Contract (“CPAF”) or Fixed Price Award Fee Contracts (“FPAF”).
 - Award Fee Plan states frequency and criteria for award fee
 - Award fee pool may include base fee plus award fee.

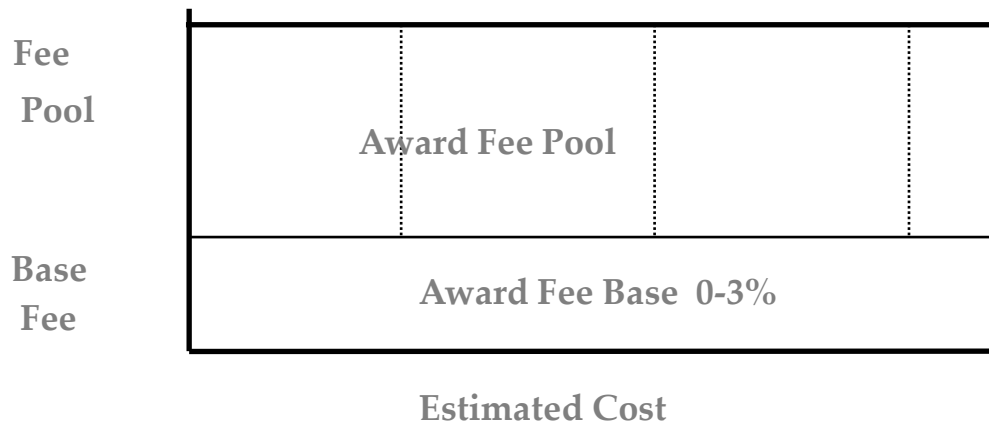


Advantages – Communication and feedback, higher fee possible?

- Disadvantages - Increased administrative costs, subjectivity, may chill contractor’s willingness to assert contract rights.
- Contractor should try to provide input at all stages.

Part 16 – Contract Types

Cost Plus Award Fee



Indefinite Delivery Contracts

- Definite quantity, Indefinite Delivery Contract
- Requirements Contract – quantity not stated
 - Government must buy what it needs.
 - Contractor must be able to supply.
- Indefinite Delivery, Indefinite Quantity (IDIQ) Contract
 - “Task Order” or “Delivery Order” Contracts
 - Guaranteed minimum (“more than . . . nominal”).
 - Contractor must be able to supply – but may not get orders.
 - Contractor relies on government estimate – what if estimate is faulty?
 - Multiple award preference (“hunting license”)

16.504(c)

Other Contract Types

Time & Materials Contracts (16.6)

- Fully burdened rates
- Material at cost or catalog
- Government must monitor

Labor Hour Contracts

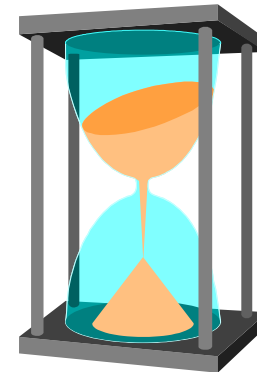
- Like T&M, “hold the M”

Letter Contracts (16.603-2)

- Compelling urgency
- Must be subsequently definitized

Basic Ordering Agreements (16.7)

- Not contract, just agreement on specified terms



Contract Types - Recap

Fixed-Price

Requirements well-defined

Costs predictable

Cost risk with contractor

Contractor must deliver

Easy to administer?

Watch out for scope creep!

Agency – easy to administer

Paid on delivery (or progress)

No cost ceiling

No fee limitation

Cost-Reimbursement

Requirements evolving

Costs not predictable

Cost risk with Government

Best efforts

Need cost accounting system

Paid allowable costs

Agency must audit, monitor

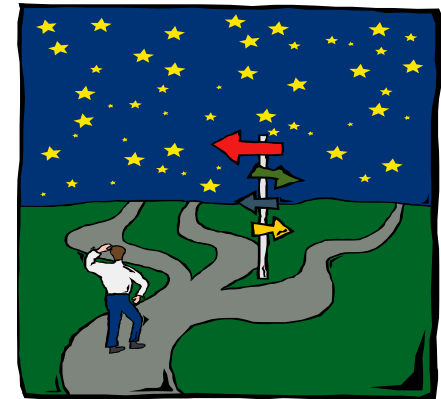
Paid as incurred (monthly)

Limitation of Costs/Funds

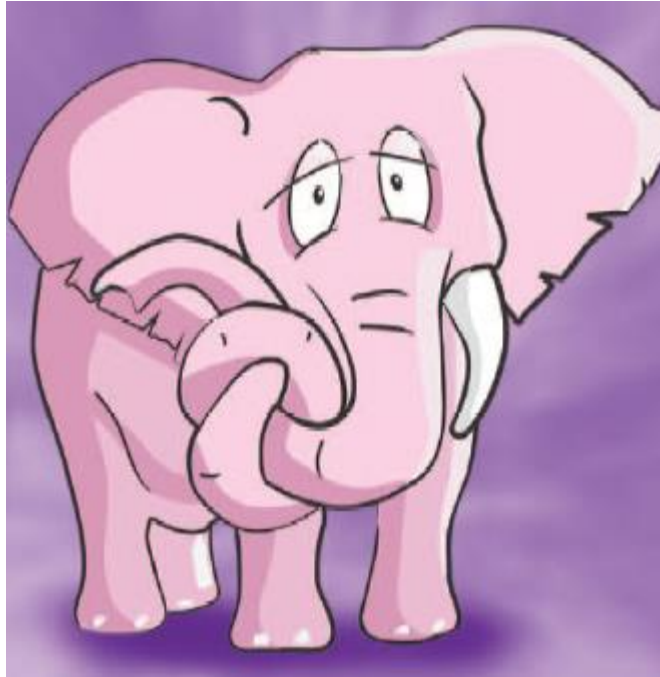
Fee limitations

Factors in Selecting Contract Type (FAR 16.104)

- Price competition
- Accuracy of price/cost analysis
- Stability, complexity of requirements
- Urgency of requirements
- Period of performance
- Contractor's technical/financial responsibility
- Contractor's accounting system
- Contractor's concurrent contracts
- Proposed subcontracting
- Acquisition history



Submission of Bid/Proposal (Parts 3, 4,12,13,14,15,8,38)



Becoming a Government Contractor (Part 4)

- Taxpayer Identification Numbers
- System for Award Management (SAM)
- Personal Identity Verification
- Commercial and Government Entity (CAGE) Code

Contractor Acquisition Process

Identifying Opportunities

- Reporting (Federal Procurement Data System)
- Can find out who buys what! (4.6)
<https://www.fpds.gov>
- Sales and Marketing Efforts
- Trade Associations
- Monitor Publications
- Government/Industry Day Events

Contractor Acquisition Process

Bid/No-Bid Decision

Can we win?

- What/Who is the competition?
- What are the discriminators?
- What are our advantages?

Can we perform?

- Should we team (i.e., make or buy)?

Can we make a profit?

- What is the margin?
- What are the opportunities for growth?

Contractor Acquisition Process

Proposal Effort

Form the “team”

- Prime/Sub? Partnership? Joint Venture?
- Who are the “preferred providers”?

Internal proposal reviews

- Red Teams, Green Teams

Win Themes

- Why will/should Government select our team?

Procurement 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

When Is It a Binding Contract??

RFP: Proposal is Offer
+ Government Accepts
= Contract formed

IFB: Bid is Offer
+ Government Accepts
= Contract formed

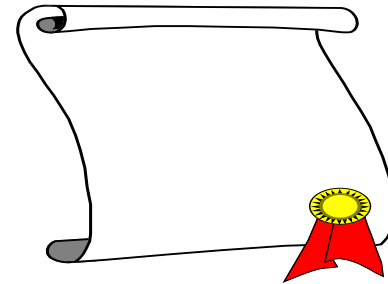
RFQ: Quote is NOT an Offer (FAR 13.004)
Government-issued Order is Offer
+ Contractor accepts or delivers
= Contract

If contractor does not accept,
Contractor is not in default.

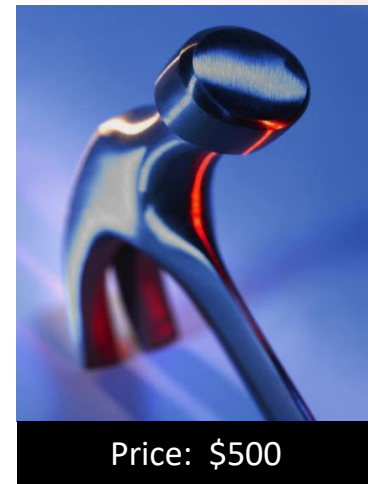
But until contractor accepts, Government may cancel.

Procurement Methods

- Commercial Items (Part 12)
- Simplified Acquisitions (Part 13)
- Sealed Bidding (Part 14)
- Competitive Negotiations (a/k/a Negotiated Procurements, Contracting by Negotiation) (Part 15)
- Federal Supply Schedules (Parts 8, 38)



Commercial Items (FAR Part 12): Policy



- Procurement reform in 1990's – takes advantage of (and gains access to) commercial marketplace
 - Companies with commercial customers not willing to submit to government specs and audits
 - Commercial marketplace creates competitive price
 - Faster
- Statutory preference for buying commercial items (FAR 12.000)
- Primes should incorporate commercial items to maximum extent practicable. FAR 12.102(c)

Part 3 – Procurement Integrity Act (PIA) – Improper Disclosure

FAR 3.104 - 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

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.



Procurement Integrity Act – “The Drill”

If the conversation starts to get into information you think may be bid and proposal or source selection information – **STOP** the conversation!

If you receive (or come into contact with) possibly troublesome written or email information, immediately:

- **limit accidental access**: retrieve and secure all copies, stop email forwarding.
- **limit further exposure**: do not discuss, show, or forward the information to anyone, including your manager.
- **report it**: call [Legal/Contracts/Compliance], explain how you received the information and who else has it.
- verifying your right to have information before you use it is much better than trying to mitigate improper use of information after the fact.

Commercial Products Are . . .

Items customarily used by the general public for non-government purposes;
and

sold/leased/licensed; or
offered for sale/lease purchase; or
will be offered for sale/lease/license;
including those with minor
modifications.



FAR §2.101

Commercial Services

- Installation, maintenance, repair, training, and other services procured in support of commercial item (if similar services provided to public)
- Services “of a type offered and sold competitively in substantial quantities in the commercial marketplace,” based on established catalog or market prices for specific tasks or specific outcomes
- Does not include services sold at hourly rates without established catalog or market price

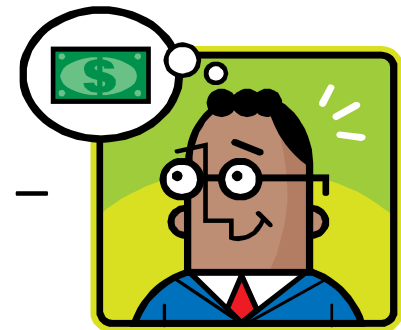


Commercial Items Policy

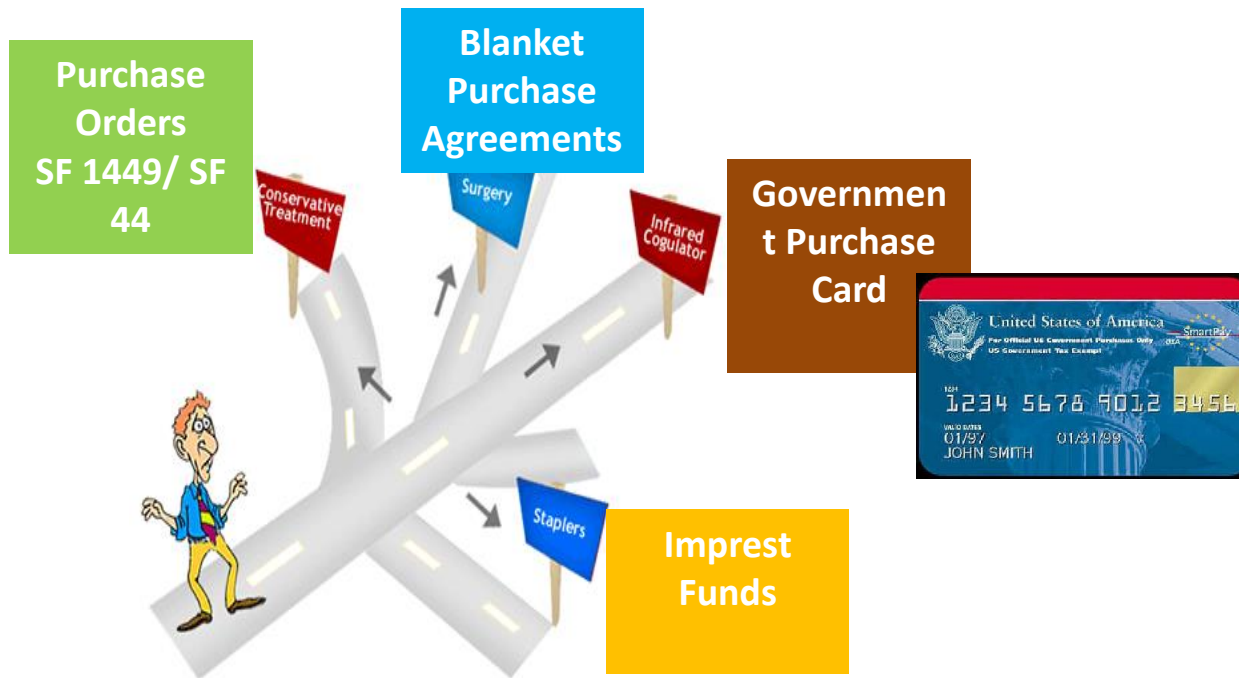
- Procedures resemble those of commercial market, make government more like a private consumer.
- Many clauses/certifications/regulations do not apply.
- Commercial clauses
 - Changes – must be bilateral
 - T4C – percentage completion
 - Warranties of merchantability and fitness for purpose, commercial warranties
 - Technical data presumed developed at private expense

Part 13 – Simplified Acquisition

- Simplified Acquisition Threshold – currently \$250K for most purchases
- Use to “maximum extent practicable.” Reduces burdens.
- Many laws and clauses don’t apply (but beware – statutes may)
- Between \$10,000 and \$250,000: reserved for small businesses.
- Use competition to the maximum extent practicable.
- Broad discretion in evaluation



SAP: Micro-Purchasing Methods ($< \$10,000$)



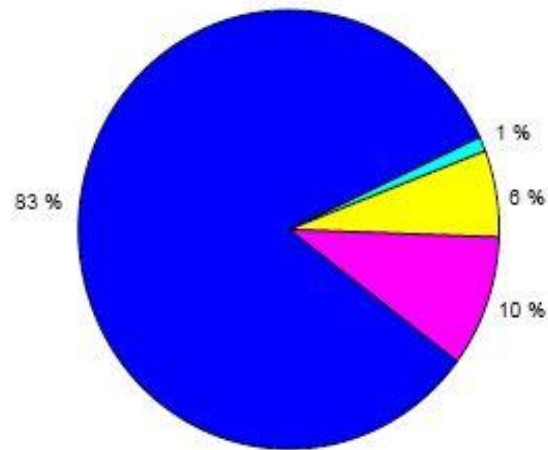
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66

% of Contract Actions v. % of Procurement Dollars

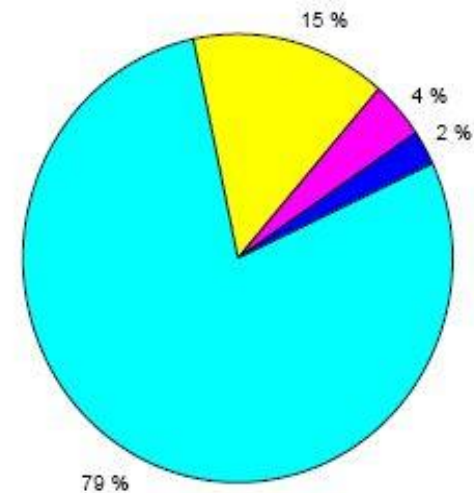
Federal Procurement Data System - Next Generation
CONTRACT ACTIONS BY DOLLAR VALUE
 Actions Reported - Fiscal Year 2007 through Fourth Quarter

Number of actions for action dollar ranges



< \$25,000	3,280,263
Between \$25,000 and \$100,000	304,087
Between \$100,000 and \$1,000,000	244,209
>=\$1,000,000	55,019

Sum of dollars for action dollar ranges



< \$25,000	\$11,054,768,303
Between \$25,000 and \$100,000	\$18,491,543,257
Between \$100,000 and \$1,000,000	\$68,202,988,756
>=\$1,000,000	\$382,248,980,040

Parts 8, 38 – Required Sources

- GSA (and VA) award ID/IQ contracts under 40 schedules.
- Government uses volume leverage to negotiate discounts.
- Agencies place task and delivery orders against schedules.

Benefits

- Simplified process, reduced time and cost
- Satisfies competition, pricing, responsibility requirements.

Limitations – commercial items, fixed price or rate

Risks to Contractor (**Note: GSA class deviation nullifies 15 standard commercial terms. (552.212-4)**)

- Must disclose commercial pricing information.
- Price reduction clause (“Most Favored Customer”), audits
- New: Transactional Data Rule

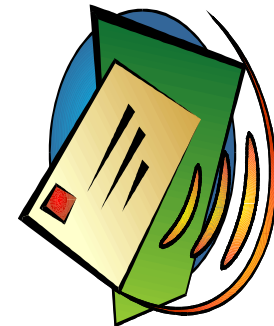


Choosing Sealed Bidding (Part 14) or Competitive Negotiations (Part 15)

Contracting Officer Must Solicit Sealed Bids if:

- Time Permits
- Award Based only on Price/Price-Related Factors
- Discussions Not Required
- Contracting Officer Expects > 1 Bid

Otherwise, Contracting Officer Should Use Competitive Proposals



Part 14 – Sealed Bidding (nee “Advertising”)

- **Invitation For Bids (IFB) – clear description of requirements.**
 - **Can’t be unnecessarily restrictive.**
 - **Government publicizes requirements if >\$25K**
 - **Only FFP and FFP/EPA contracts. (Can’t use cost contracts)**

Advantages

- **Price competition reduces costs to the government.**
- **Reduces opportunities for bribery and corruption.**
- **Faster process (no discussions or revised bids, no audits unless mod exceeds TINA threshold (\$2M))**

Uniform Contract Format

- **Table 14-1 (same as Negotiated Contract) (14.2)**

Part I: The Schedule

- A – Solicitation/contract form**
- B – Supplies or services and prices**
- C – Description/specifications – i.e., SOW**
- D – Packaging and marking**
- E – Inspection and acceptance**
- F – Deliveries or performance**
- G – Contract administration data (who has authority)**
- H – Special contract requirements (“local”)**

Uniform Contract Format, cont.

Part II: Contract Clauses

I – Contract clauses – often by reference. Self-deleting?

Part III: List of Documents, Exhibits, Other Attachments

J – List of documents, exhibits, other attachments

Part IV: Representations and Instructions

K – Representations, certifications, and other statements of bidders

L – Instructions, conditions, and notices to bidders

M – Evaluation factors for award

Standard Contract Format

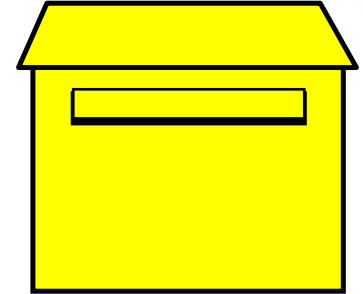
- Uniform Contract Format for both Sealed Bidding and Negotiated Contracts
- Standard Form SF33 (FAR 53.301-33)

11. TABLE OF CONTENTS							
(✓)	SEC.	DESCRIPTION	PAGE(S)	(✓)	SEC.	DESCRIPTION	PAGE
PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES			
X	A	SOLICITATION/CONTRACT FORM	1	X	I	CONTRACT CLAUSES	12
X	B	SUPPLIES OR SERVICES AND PRICES/COSTS	10	PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS			
X	C	DESCRIPTION/SPECS./WORK STATEMENT	61	X	J	LIST OF ATTACHMENTS	11
X	D	PACKAGING AND MARKING	1	PART IV - REPRESENTATIONS AND INSTRUCTIONS			
X	E	INSPECTION AND ACCEPTANCE	4	X	K	REPRESENTATIONS, CERTIFICATIONS AND	15
X	F	DELIVERIES OR PERFORMANCE	6			OTHER STATEMENTS OF OFFERORS	
X	G	CONTRACT ADMINISTRATION DATA	7	X	L	INSTRS., CONDS., AND NOTICES TO OFFER	37
X	H	SPECIAL CONTRACT REQUIREMENTS	22	X	M	EVALUATION FACTORS FOR AWARD	8

Part 14 – Sealed Bidding

- Submission of Bids (14.3)
 - Responsiveness: Bid must comply in all material respects with the IFB. Rationale: Fairness to other bidders.
 - Price – Must be FFP
 - Quantity – Same as IFB
 - Quality – Must meet all specifications
 - Delivery – Must meet schedule
 - Firm Bid – Can't equivocate!
 - Submission Requirements – FOLLOW INSTRUCTIONS!
 - Timeliness— “late is late!”

Part 14 – Sealed Bidding



Opening Bids and Awarding Contracts (14.4)

- Secure bids, no discussions, public opening
- Reject if bid not responsive. 14.404-2
- Identify apparent low bidder – determine responsibility (financial, technical, managerial, ethical ability to perform contract).
- Award is made to lowest-price, responsive, responsible bidder.

Part 14 – Sealed Bidding

What's wrong with price competition?

Reporter: “Mr. [Alan] Shepherd, what were you thinking about in 1961 as you sat atop the Redstone rocket, waiting for liftoff to become the first American in space?”

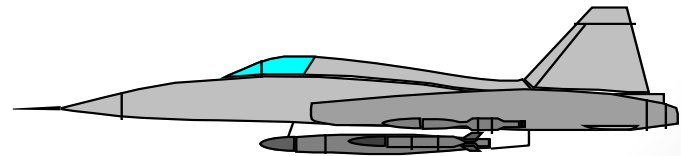
Astronaut Alan Shepherd: “The fact that every part of this ship was built by the low bidder!”

Price may not be all that matters!



Part 15 - Competitive Negotiations

- Used when sealed bidding is not appropriate
 - Specifications are not well defined
 - Price is not the only important factor
- **Pre-RFP exchanges of information are encouraged.**
- **Agency issues Request for Proposal (RFP)**
- **Uses Uniform Contract Format – same as Part 14**

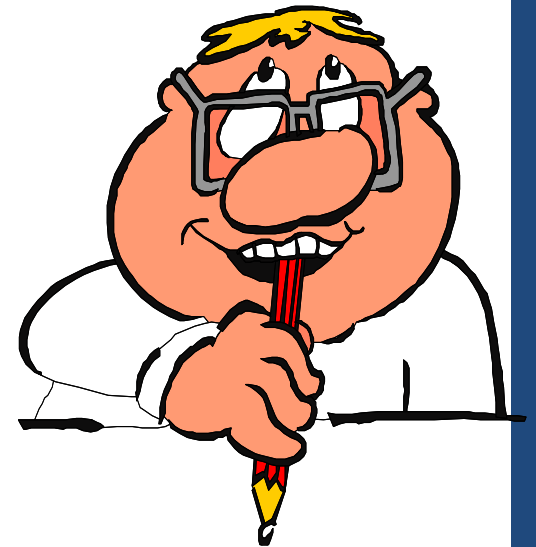


Part 15 - Best Value Continuum

LPTA (Low Price Technically Acceptable) vs.
Cost-Technical Tradeoff (“Best Value”)

RFP Reflects Source Selection Plan

- Section C (Specifications):
What the Government Wants
- Section L (Instructions):
What Offerors Should Submit
- Section M (Criteria):
How the Government Will Evaluate



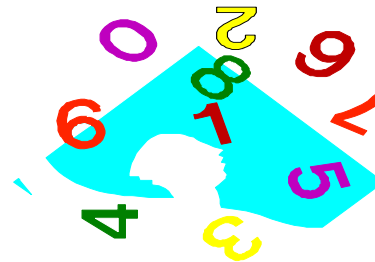
Evaluation Criteria

Must disclose significant factors and subfactors on which the contract award decision will be based, and their relative importance.

- Percentages
- Descending order
- Narrative statement

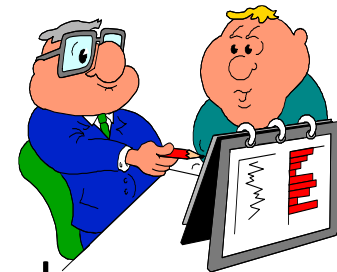
Must Consider “Quality”

- Technical approach
- Management approach
- Personnel qualifications
- Must consider price
- Must consider past performance

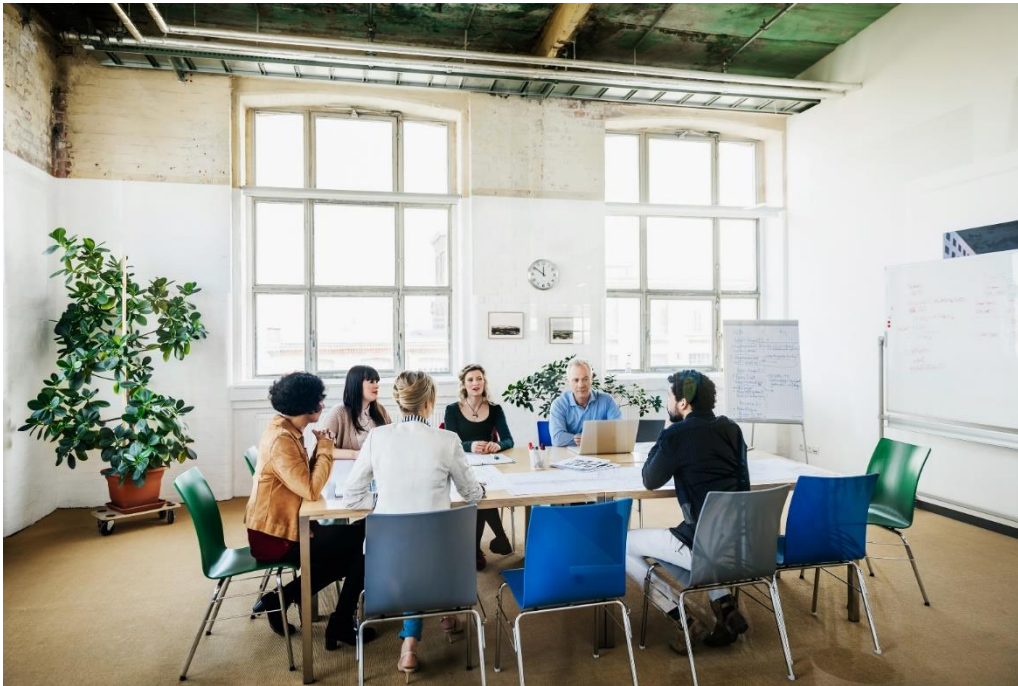


Source Selection Process

- Oral presentations – may (or may not) streamline process. (15.1)
- Award on initial proposals
 - Can have “clarifications,” but no discussions
- Competitive range – “all of the most highly rated proposals, unless . . . reduced for purposes of efficiency . . .”
- Exchanges with offerors (a/k/a discussions)
 - Government must disclose deficiencies, significant weaknesses, adverse past performance
- Submission of Final Revised Proposals (nee “BAFO”)



Evaluation and Discussions (Part 15)



Does Agency Hold Discussions?

Agency Decides Yes

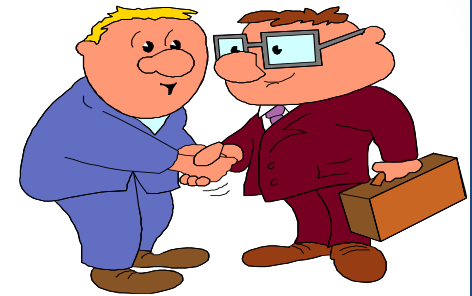
Must hold discussions with all offerors in competitive range

Can be oral or written

Must be meaningful - Must disclose (at least) deficiencies and significant weaknesses

Must give offeror chance to revise proposal

May not disclose another offeror's technical solution or price, sources of past performance information, or Source Selection Information



Agency Decides No

- Must give proper notice in RFP
- May NOT hold discussions with any offeror

Evaluation of Price/Cost

Must consider Cost/Price

- Fixed-Price Contracts:
 - Must determine whether PROPOSED PRICE is Fair and Reasonable
- Cost Reimbursement Contracts:
 - Must determine whether PROBABLE COST is Fair and Reasonable



Price or Cost Analysis

- Goal: “Fair and reasonable price”
 - Cost-Price Analysis (15.404-1)
 - Extensive audit rights
 - Approved Purchasing System (15.404-3)
 - Profit objectives (15.404-4(c))
 - Government’s independent “Should Cost” Analysis (15.407-4)
 - Unbalanced pricing concerns



Part 15 – Contracting by Negotiation

Unbalanced Pricing example

CLIN 1	\$100/item	\$200/item
CLIN 2	\$150/item	\$10/item
If Govt buys six of each	\$1500	\$1260
If Govt buys ten of CLIN 1 and two of CLIN 2	\$1300	\$2020

Truthful Cost or Pricing Data (nee “TINA”)

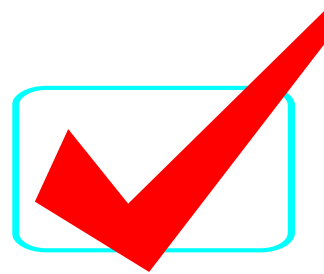
- What is “Cost or pricing data”?
- Applies to negotiated contracts and mods over \$2M unless:
 - Adequate price competition (two or more offers, or reasonable expectation of competition)
 - Price set by law or regulation
 - Commercial items
- Certification – data is “accurate, complete, and current
- Defective pricing audits
- Flows down to subcontractors

Final Proposal Revisions (FPRs)

Neer “BAFO”

Contracting Officer must tell offerors:

- “Discussions are over”
- “Offerors may submit final proposal revisions”
- “Revisions are due by the time/date specified”



Multiple proposal revisions

- Permitted, but discouraged

Award and Debrief (Part 15)



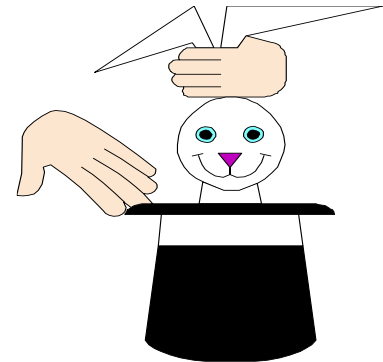
Selection for Award

Must evaluate final proposal
revisions

IAW stated evaluation criteria

Agency is NOT required to use same
evaluators for each proposal

Agency can NOT accept 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

A) Offeror A?

B) Offeror B?

C) Offeror C?

So, Who Wins?

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

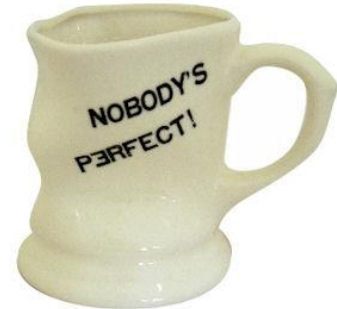
- Offeror A bests Offeror C on Technical, Past Performance, and Price.
- Offeror B bests Offeror C on Past Performance and Price.
- Offeror A bests Offeror B on Technical, but loses on Price.
- Is “Very Good” Technical worth \$2M price difference?

Selection for Award

- SSA has broad discretion, but decision must be:
 - Reasonable
 - Consistent with stated evaluation factors/subfactors
- Source Selection Decision Document
 - Written memorandum explaining decision



Can I Find Out Why We Were Not Selected?



- Yes – you are entitled to a “debrief” in:
 - Negotiated procurements (i.e., based on “competitive proposals” under FAR Part 15)
 - Awards of task or delivery orders >\$5M under multiple award IDIQ contracts
- **Must submit written request to CO within 3 days of notice of exclusion or award**
- Debrief may be face to face, telephonic, or written.

Can I find out why we didn't make competitive range?

- Yes (But briefing can be postponed until after award.)

Can I find out why we won?

Yes – and you should.

What do you learn at a debrief?

- Evaluation of significant weaknesses and deficiencies
- Your overall evaluated cost or price and technical rating
- Your past performance information (but not sources)
- Summary of rationale for award
- Awardee's overall evaluated cost or price and technical rating
- Make and model of awardee's commercial items
- Responses to relevant questions about source selection procedures

What don't you learn?

- You do not learn awardee's trade secrets and privileged information, or detailed scoring

Debriefing – Best Practices

Contractor: Prepare thoroughly

- Review solicitation, communications.
- Develop and submit list of questions.

Contractor: Be non-confrontational.

- Goal is to get information, improve future proposals.
- Don't try to argue that decision was wrong.
- Consider seeking advice from counsel and consider whether counsel should attend.

Government:

- Provide as much information as you legally can.
- If you have a good story, you should be willing to tell it.
- If necessary, ask awardee for permission to disclose information.
- If contractor thinks you are hiding information, it may provoke a protest.

Protest (Part 33.1)



Protest/Dispute Culture

Commercial Litigation – can be brutal

- Parties often do not want to do any more business with each other.
- Each party may not care if other party is severely hurt – in fact, they may welcome it!



Government Contracts Litigation (Protests, Claims, Disputes)

- Parties want to continue to do business with each other.
- Adversary process is more restrained – punches are pulled.



Bid Protests - Overview

What is a protest?

- ***A complaint by an interested party regarding a contract action (usually an or proposed award)***
- Unique to Government procurement
- Promotes accountability, transparency, integrity
- Pre-award protests
 - Challenge defects in the solicitation, or
 - Challenge offeror's exclusion from the competition
- Post-award protests
 - Challenge contract award



Who can protest?

Protestor must be “interested party” – i.e., party with economic interest in outcome of protest

- Losing bidder – as long as grant of protest might give protestor a “substantial chance of receiving an award”
 - - E.g., fifth-ranked bidder has no standing if protest won’t raise its score or challenge top four bidders.
- Losing subcontractor? – only through prime contractor
- Awardee – can intervene on behalf of agency
- Non-bidder – can challenge solicitation as being too restrictive (thereby preventing it from bidding)

Principal protest forums and deadlines

Agencies (number unknown) – same deadlines as GAO (Part 33.1)

GAO (about 2500/year) **(4 C.F.R. 21)**

- Challenge to RFP terms must be made before bid opening or initial proposal closing date
- Challenge to exclusion from the competition must be made within 10 days of notice of exclusion (pre-award)
- Protest against an award must be made within 10 days of a requested and required debriefing (**but not before debriefing**)

Court of Federal Claims (about 100/year)

- Time limits are looser.

Protestor can take two bites at the apple.

- GAO protest can be filed within 10 days of denial of agency protest

- COFC protest may be filed after denial of GAO protest

“Automatic” Stay

- Competition in Contracting Act provides for stays of an award (if agency or GAO protest is filed before award) and of performance (if agency or GAO protest is filed after award).
- “Automatic stay” is issued only if notice is given to the agency:
 - For a pre-award protest, before award
 - For a post-award protest, within 10 days of award or within 5 days of a requested and required debriefing
 - Note: Although protest may be filed 10 days after debriefing, it must be filed within 5 days to obtain stay.
- Agency can seek to “override” stay on the basis of “urgent and compelling circumstances “ or “best interests of the United States.”
- COFC: The protester must ask court to issue preliminary injunction (but the government often agrees to a standstill)

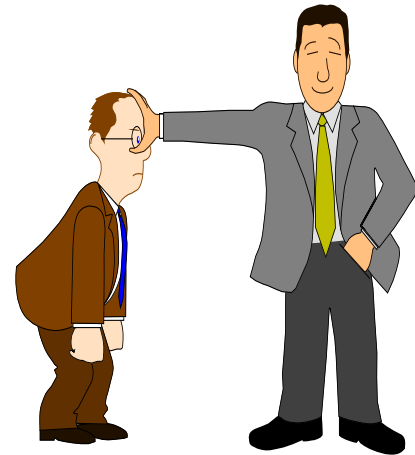


Grounds for Pre-Award Protest

- Solicitation defects
 - Unduly restrictive provisions
 - Ambiguities
- Exclusions from the competition
 - Unreasonable evaluation or exclusion
 - OCI disqualification

Grounds for Post-Award Protest

- Failure to follow the solicitation evaluation criteria
- Inadequate documentation of the record
- Unequal treatment of offerors
- Unreasonable price or cost evaluation
- Unreasonable technical evaluation
- Lack of meaningful discussions
- Unreasonable best value analysis
- Organizational conflict of interest



Non-protestable issues

Non-Protestable Issues: (4 C.F.R. §21.5)

Contract administration issues

Small business size issues – SBA is exclusive forum

Protests by subcontractors (unless prime is buying agent)

Features of a GAO Protest

- Protestor may request documents from agency.
- Awardee(s) may intervene.
- GAO will generally issue Protective Order to protect sensitive (competitive) information
- Agency may take voluntary Corrective Action. (30% of protests)
- Hearings are discretionary.
- GAO issues “recommendation” within 100 days.
- GAO can only “recommend” since it is in legislative branch.
- GAO may recommend amending solicitation, reopening discussions, or allowing proposal revisions. It rarely recommends award directly to protestor.
- Winning protestor may recover legal fees.

COFC Protest Process

- No automatic stay; protester must seek Temporary Restraining Order
- Timeliness and jurisdiction looser than at GAO
- COFC reviews administrative record under a deferential standard of review
- No firm deadline for disposition, but Court expedites protests
- Court's approach to some questions is different from GAOs

When should you protest?

Filing a protest is a business decision. Just because you can protest doesn't mean you should protest.

Consider strength and possible benefits of protest



- What is likelihood of success?
- If you are the incumbent, you may be able to stay on job and continue revenue stream.
- If you win, what are the possible remedies?
 - Most likely remedy will may be another bite at the apple rather than a contract award. What are your chances of winning the second round?
 - May get legal fees and/or bid and proposal costs.
 - May affect how agency conducts procurements in future.

When should you not protest?

Consider costs of protest

- Legal expenses
- Workforce must remain on standby.
- Distraction from productive work
- Possible harm to customer relationship



Consider other drawbacks

- Most protests lose.
- If agency “doesn’t want you,” what are your chances of winning if you get another chance?
- If you win, can you perform the contract successfully and profitably?

Best Practices – Avoid Protests

Agency

- Follow the rules set forth in the FAR and the RFP.
- Don't use shortcuts – amend the RFP if necessary.
- Treat offerors fairly and equally.
- Communicate well, but communicate carefully and equally.
- **Be as open as possible at debriefs**

Best Practices – Avoid Protests

Contractors

- Read and follow RFP instructions (Section L) carefully.
- If there are ambiguities, ask! Don't play "gotcha."
- If you choose not to ask question for tactical reasons, live with the consequences. Do not expect two bites at the apple.
- Don't itch for a fight. Everybody will lose.

Administration and Performance

(Parts 1, 27, 37, 44)



The Players

- Program Managers (“Buyers”) – generate requirements and develop specifications
- Contracting Officers – conduct procurements and administer contracts and terminations.
- Contracting Officer Representatives and Specialists – work with contracting officers, at least in theory

Who Has Authority?

- **ONLY WARRANTED CONTRACTING OFFICER HAS ACTUAL AUTHORITY TO BIND THE GOVERNMENT!**
- Other players (Contract Representatives (COR, COTR)), Program Managers, Specialists, Quality Control Representatives, even Investigators and Inspector Generals **DO NOT HAVE AUTHORITY** to bind the government.
- Government is never bound by “Apparent Authority.” (Apparent authority means that principal, through its actions, leads a third party to believe that another is the agent of the principal.)
- But contractors can be bound by apparent authority.
- Best practice: Conduct contractual negotiations through single point of contact (“contract administrator”).

Contracting Officer Responsibilities

Did you know that FAR 1.602 says:

“Contracting officers shall . . . [e]nsure that contractors receive impartial, fair, and equitable treatment”? (1.602-2(b))

Does your contracting officer know?

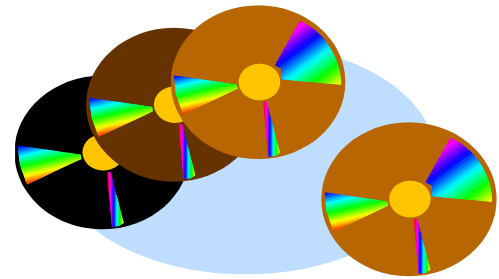
Part 27 – Patents, Data, Copyrights

- **General Policies (27.1)**
 - Called “Data Rights” (not consistent with common law).
 - Government encourages “maximum practical commercial use” of inventions.
 - Government acquires only rights that it needs.
 - Generally, Government gets license, not ownership.
 - Generally, Contractor retains ownership rights.
 - Scope of license depends on degree of Government funding.
 - License rights are not delivery rights!
- **Note: DFARS data rights provisions replace FAR data rights provisions.**

Part 27 – Patents, Data, Copyrights

• Patents and Copyrights (27.2)

- Can a patent or copyright owner prevent a Government contractor from infringing?
- No! Their only remedy is suit for royalties against Government, if . . .
 - Contractor is operating (i.e., infringing) with Government's authorization and consent.
 - I.e., use of patented/copyrighted material is either embodied in structure of statement of work or necessary to comply with specifications
 - Alternate (R&D) - if used in performance

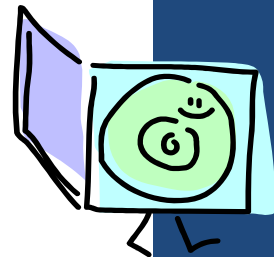


Part 27 – Patents, Data, Copyrights

- **Patent Rights (27.3)**
 - **Patent provisions serve several purposes**
 - **Government (as buyer/user) gets rights it needs.**
 - **Promotes inventions and their commercialization.**
 - **Government generally gets nonexclusive, nontransferable, irrevocable, paid-up license.**
 - **Contractor generally gets title to patent (unless foreign).**
 - **Contractor must comply with administrative requirements (notice, marking, record-keeping).**
 - **Government has “march-in” rights if contractor sits on invention. (Bayh-Dole Act)**
 - **Subcontractors rights: 27.304-3; 52.227-11(k), -13(i)**

Part 27 – Patents, Data, Copyrights

- **Rights in Data and Copyrights (27.4)**
 - **Commercial Data – use commercial license (unless inconsistent with law – e.g., arbitration, indemnification).**
 - **Non-commercial Data: Scope of license depends on degree of Government funding. (“Follow the funds” test)**
 - **Unlimited rights license if USG funded development, if development required by contract, or for form, fit, or function data.**
 - **“Limited”(TD)/“restricted”(SW) rights license if developed “at private expense” (includes IR&D, B&P).**
 - **DoD obtains “government purpose rights” license if mixed funding.**
 - **Follow notice/marking provisions, or else you may lose protection. (27.404-5(b))**



Part 37 – Service Contracting

General (37.1)

- **Service contract: primary purpose is to perform identifiable task rather than to furnish end item of supply.**
- **Rely on private sector for commercial services.**
- **Not for inherently governmental functions. [See 7.5]**
- **Use performance-based acquisition methods.(37.6)**
 - **Performance work statement or statement of objectives**
 - **Quantifiable performance standards – how to assess?**
 - **Financial incentives – tied to objectives (without distorting)**

Part 37 – Service Contracting

Advisory and Assistance Services (31.2)

- **Used to obtain outside points of view, special expertise**
- **Not for policy, decision-making, or managerial (inherently governmental functions).**
- **Avoid if knowledge is available elsewhere in government.**
- **Not to evaluate proposals**

Part 44 – Subcontracting

- **Consent to Subcontract (44.2)**

- **Approved Purchasing System satisfies consent requirements in cost reimbursement contracts.**



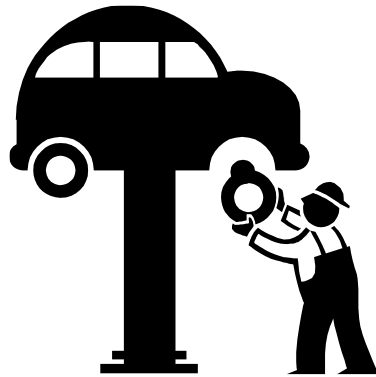
- **Contractor’s Purchasing System Reviews (44.3)**

- **CPSR – evaluates “efficiency and effectiveness” with which contractor spends Govt money and complies with policy.**
- **If >\$25M in qualifying Government contracts during the next 12 monthsreviewed every 3 years.**
- **Have policy, follow policy, document! “Do it their way.” (with apologies to Paul Anka and Frank Sinatra)**

- **Subcontracts for Commercial Items (44.4)**

- **Identifies clauses that are required in a commercial items subcontract.**

Changes (Part 43)



Changes – Basic Theory

Government can make in-scope changes unilaterally.*

- ◆ Gives Government flexibility when its needs change, without needing to award new contract
- ◆ Contractor is entitled to “equitable adjustment” change increases its cost or time.
- ◆ Important difference from commercial contracts

*Commercial items contracts (under Part 12) allow only bilateral changes.

Changes -- Fixed Price (Aug 1987)

FAR 52.243-1

- (a) The Contracting Officer may at any time, by **written order**, and without notice to the sureties, if any, make changes **within the general scope of this contract** in any one or more of the following:
- (1) **Drawings, designs, or specifications** when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
 - (2) **Method** of shipment or packing.
 - (3) **Place** of delivery.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an **equitable adjustment** in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract....

Formal (“Directed”) Changes (Part 43.1)

Remember: Only Contracting officers can bind government - others should not induce contractors to change.

CO and contractor discuss need for change.

Contractor submits “change proposal.”

If possible, parties agree on price in advance and execute a bilateral modification.

If parties cannot reach agreement, Government may issue unilateral change order.

Contractor has a duty to proceed, but should reserve its right to submit request for equitable adjustment.

Contractor must perform if directed to do so by Contracting Officer, even if in dispute.



Equitable Adjustments

Difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed, plus profit/overhead.

Include direct costs and indirect costs

Does not include consequential damages

Cannot re-price the entire Contract!!!

- Compare to partial termination for convenience, where contractor may be able to reprice work already performed.

Cardinal Changes

- “Cardinal” changes are changes outside the scope of the contract. Contractor is not required to perform.

But refusal may risk termination.

- CO may claim work is in scope.
- Generally, contractor is better off performing, if it can, and seeking equitable adjustment for changed work.
- Protestor may claim it is illegal sole-source award
Legal test: Would including this allegedly out-of-scope work in the solicitation have significantly affected the competitive field?
 - Should offerors have anticipated this change?
Was it within the contemplation of the parties?
 - Would competitors have bid differently had it been aware of possible new work?



Constructive Changes

Contracting officer does not issue directed change, BUT

Government action (or failure to act) increases contractor's costs (or time).

- Contractor should monitor performance and cost so that it can identify constructive change at time of action or failure to act.
- Sometimes, however, constructive change is recognized only later, when performance is over budget or behind schedule.

Constructive Changes

In commercial contracting, buyer's actions or failure to act might be considered breaches of contract.

Government actions or failure to act that affect contract are treated as “constructive” changes rather than breaches of contract.

- Theory: Government could have taken action (or failed to act) under the Changes clause.
- Originally, this provided basis for BCA jurisdiction. Today, it's a historical holdover.

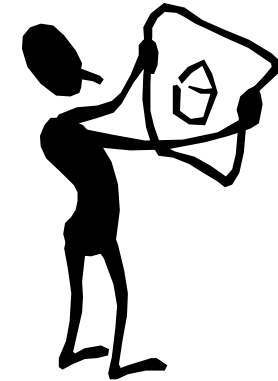
Notification of Changes

Notification of Changes clause (e.g., FAR 52.243-1(c)): Contractor must notify Government of change in timely manner.

- Gives Government opportunity to reconsider whether it wants extra work, before you go at risk and spend money.
- Dispute is easier to resolve before money is spent.
- If no timely notice, Contractor may lose right to equitable adjustment.

Ambiguous Specifications Scenario

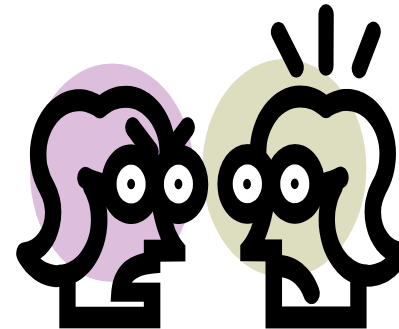
Contracting officer asks you to perform work that you believe is not required by contract.



You believe the CO is misinterpreting the specifications in the contract, and tell the CO “it’s a change.”

Contracting officer says, “no it’s not. Do it, or I’ll terminate you for default.”

You don’t want to perform this work if you aren’t going to get paid extra for it.



- **What do you do?**

Ambiguous Specifications Scenario

Result of Claim

Do You

YOU WIN

YOU LOSE

Perform?

Yes:

Perform and
get paid  


|

|

Perform but
don't get paid



No:


Don't perform
and no revenue.
T4D is converted
to T4C 

|

|

|

|

Don't Perform
and no revenue.
T4D and assessed
repro. costs 

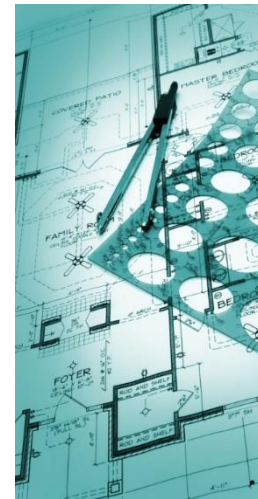
Types of Constructive Changes

Defective Specifications

- Government provides defective specifications or drawing, which contractor relies on.
- Sometimes referred to as “implied warranty of specifications.

Government failure to cooperate

- Delay in approvals
- Failure to prevent interference by other KR’s



Constructive Changes – Other Types

Superior knowledge

- Government has knowledge that is vital
- Government knows that contractor does not have this knowledge, and fails to disclose

Constructive Acceleration

- Government accelerates schedule (or delays)
- Contractor's costs are increased (not a given)

Changed inspection requirements

Impossibility, mistake (who bears risk?)



Changes Clauses in Subcontracts

Changes Clause is not a mandatory flowdown, but Prime Contractor “must” include it in subcontract, for business reasons

- What if Government unilaterally changes specifications, and change affects subcontract specifications?
- Subcontract notification period should fit within prime contractor’s 30-day notice period.

Subcontractor must accept Changes clause

- Subcontractor can limit Prime’s unilateral right to make changes to situations where Government has unilaterally directed change (that affects subcontract).
- Subcontractor can resist giving Prime right to make unilateral changes to subcontract for Prime’s own benefit.
- Note: Similar situation with respect to Termination for Convenience Clause

Delays

(Parts 42,43,49)



Government Delays – Supply/Services

- **Stop Work – Supply/Services – FAR 52.242-15**
 - Actual suspension by CO
 - Contractor entitled to equitable adjustment but must minimize costs
 - Within 90 days, CO must either cancel stop work or terminate the contract for convenience



Government Delay of Work – Fixed Price Supplies/Services - 52.242-17

- “Constructive suspension” - delays caused by CO act/failure to act.
- Equitable adjustment but no profit

Government Delay - Construction

➤ Suspension of Work – Construction – FAR 52.242-14

- Covers both actual suspensions and constructive suspensions.
- CO order, discretionary amount of time
- Adjustment for ordered delay or failure of CO to act
- Equitable adjustment – but no profit!

Contractor Delays

Excusable delay – allows contractor to avoid Termination for Default or Liquidated Damages (FAR 52.249-8(c), (d)). Contractor gets time extension, not price adjustment.



Delay MUST be:

- Beyond control **AND** without fault or negligence
- Of both contractor and Subcontractors/Suppliers at any tier
- E.g., “Act of God,” unusually severe weather, labor issues (if no alternatives)
- Doesn’t cover problems in contractor’s performance.

Best Practices in Contract Administration



Best Practice – Work Together

Both contractor and Government are susceptible to making contract administration mistakes.

Although Government and contractor have different goals, this is not a zero-sum game: everyone benefits when contract administration is done correctly.

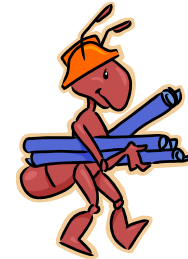
So . . . try to create a “virtuous cycle.”

Best Practice – Document!

- FIRST RULE OF GOVERNMENT CONTRACTING: It's not enough to do what is required – **one must document it!**

- Contractor: For auditors
- Government: For inspectors general, or protests

Memories fade and people change jobs.



- Good documentation makes disputes less likely.

Document and reconcile as tasks are performed; don't wait until contract is complete. E.g., contract closeout should begin at award – planning, tracking, and documenting.

Document important communications in writing, especially modifications to contracts. (Contracting Officer may forget, deny, or be unavailable.)

Best Practice: Know the SOW

- CO and Program Office: Understand contract SOW (which may differ from what you wrote in initial acquisition plan).
Contractor: Be sensitive to differences between what your (program) customer expects and what contract actually requires.

Avoid (or recognize) constructive changes - watch for requests for extra work (especially in FFP contracts) or constructive changes.

Contractor: Give prompt notice of constructive changes. Let Government decide whether you should do extra work. A dispute is easier to resolve before money is spent.

Contractor: If you do extra work voluntarily in order to exceed your customers' expectation, do so with your eyes wide open.

CAUTION

Best Practice – Don't Let the Grizzly Bears Sleep

Be proactive. Problems will surface. Act accordingly..

- Contractor: Communicate with CO early and often.
- CO: Don't be standoffish.
- Face-to-face meetings may be more effective than email changes or telephone tag.



Avoid common traps:

- “I don't want to tell my manager. (There goes my bonus.)”
- “What my CO doesn't know won't hurt me.”
- “No lawyers – they'll just get me into trouble.”
- “This Cure Notice is just a shot over the bow. The contracting officer just wants to send me a message.”
- “It's better to ask forgiveness afterwards than permission beforehand.”

Don't Let the Grizzly Bears Sleep!

AND THE MOST COMMON
AVOIDANCE TECHNIQUE OF ALL:

- “Maybe the problem will go away and I won’t have to address it.” (And maybe the pig will fly.)



Best Practice: Contractors, Choose your Battles

Not every issue should become a “federal case.”
Sometimes it’s best to pull your punches.

Hardball negotiations may poison relationship. People have long memories.

Why take position that will antagonize other side if you know you will eventually have to give it up?

Remember that you want to continue to business with your government customer.

Contractor: If you follow the contracting officer’s direction you can protect your legal and contractual rights, with less risk.

- If you don’t – even if you’re right, you’re wrong!

Best Practice: CO's, Exercise Independent Judgment

Contracting Officers are “allowed wide latitude to exercise business judgment.”

Don't be afraid to exercise independent judgment when making decisions.

- Reviewing requests for equitable adjustment
- Deciding CDA claims and terminations

Role of DCAA (or IG) is advisory.

- CO's are often reluctant to decide against DCAA recommendations.

Your mandate is to “safeguard the interests of the United States in its contractual relationships” and to “ensure that contractors receive impartial, fair, and equitable treatment.” (FAR 1.602-2). DCAA is not your client. The United States of America (including the contractor!) is your client.



Disputes

(Part 33.2)



Claims

- Claims are a standard part of the Government contracting process. “Claim is not a four-letter word!” [Why is this in quotation marks?]
- Most claims fall under the Changes clause (including constructive changes), where parties cannot agree on equitable adjustment.
- Claims can also arise under other contract provisions (e.g., stop work, differing site conditions, termination).
- The Government may also make a claim for liquidated damages, deductive changes, defective pricing, Price Reductions (MAS), etc.
- All claims **Arising under” or “relating to” contract** are processed under the Contract Disputes Act of 1978 and the “Disputes” clause (FAR 52.233-1)

Recognizing Potential Claims

Examine cost growth or schedule slippage.

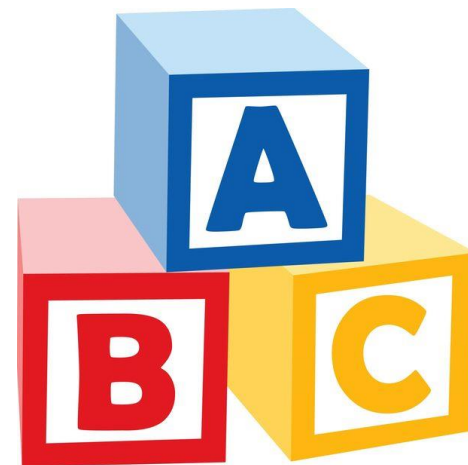
- Was it caused by government action or inaction (such as contract modifications or improper rejection reports or testing)?
- Not every cost overrun is the Government's fault!

It's as easy as A,B,C:

Action by government on
Baseline of contract results in
Cost or schedule increase.

Are these items causally linked?

When do you look?



Claim Recognition - AFTER

The Loss Approach (Reactive)

- Contractor realizes the problem after-the-fact.
- Money has already been lost, so it may be difficult to resolve – someone must pay.
- Evidence and witnesses may not be available.
- Claim may be untimely.

Claim Recognition - BEFORE

The Event-Oriented Approach (Proactive)

- Contractor's personnel are trained to recognize potential claims
 - E.g., when agency requests task that falls outside contract SOW.
 - E.g., when agency hinders work.
- Claims can be resolved before money is spent!
- Costs of changed work can be charged to a new job number and tracked.
- Claim will be timely.
- Witnesses and evidence are generally available.
- Costs of dispute will be reduced.

What is in a Proper Claim?

- Written demand requesting payment of sum certain (or other relief) by contracting officer
- Must not be routine (i.e., in dispute), and certified if over \$100K
- Interest runs from the date the claim is received.
- Claim should Include
 - Statement of Facts – straightforward and unemotional
 - Discuss relevant contract requirements, how work was augmented or impeded
 - Pricing – compute the amount of the claim
 - Legal basis for the claim



CDA Certification

"I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor." (FAR 33.207(c))

- Required if claim is >\$100,000.
- Prescribed language should be followed verbatim
- May be executed by any person duly authorized to bind Contractor with respect to a claim.

Ultimately, Filing a Claim Is a Business Decision



- Review facts and merits (contract documents, communications)
- How strong is your case, factually and legally?
- What will it take to meet your burden of proof? (Will you need to prove that a Government employee is a liar?)
- What is the potential impact on your relationship with this customer?
- How will the customer feel about that claim? Will it be a surprise? It shouldn't.
- Are there ways to mitigate negative customer impact – e.g., using ADR?

What If Claim Is Denied?

- CO's decision is due within 60 days of receipt of claim.
 - If claim is >\$100K, CO can extend period and specify decision timetable.
- After CO Issues Final Decision (COFD), Contractor can accept decision, or appeal to Board of Contract Appeals or Court of Federal Claims.
- What happens if CO doesn't issue timely COFD?
 - Contractor can appeal "deemed denial" of claim (FAR 33.211(g))
 - Usual result is that CO is directed to issue decision for benefit of Board or Court
- **Contractor must continue performance while claim is pending or on appeal.**

Best Practices – Avoid Disputes

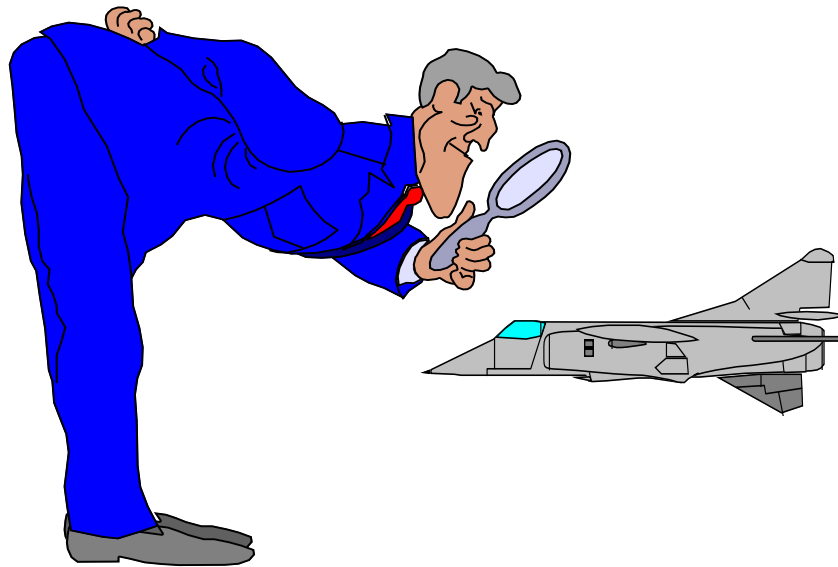
**Communicate, communicate,
communicate**

Document, document, document

**Stay current: Bad news is not like
wine. It does not improve with
age.**

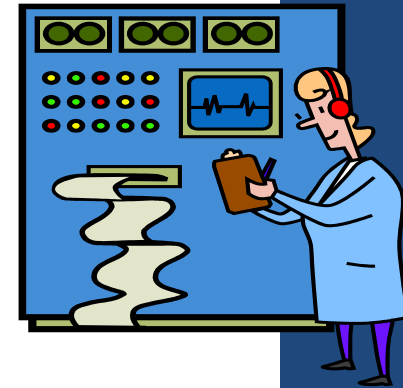


Delivery, Inspection and Acceptance (Part 46)



Inspection/Test Standards

- Contractor is responsible for QA, but Government may intervene (46.1)
 - Commercial items – use contractor’s QA system
- Must measure only what is required in contract.
- Nature of test should consider content, use, standard industry practice (pencils v. jet planes)
- Tests may be specified in the contract (15 different clauses in 46.3)
- Presumed reasonable
 - May government change contract specified tests?
- What if there is no specified test? May be first deliverable by contractor.



Inspection Clause Remedies

Remedies depend on WHEN defective items delivered:

- Delivered before required delivery date (RDD) – Government can reject, require correction (or reperformance) or accept at reduced price. Can't terminate for default.
- Delivered on RDD – Government can reject and allow correction (or reperformance), accept at reduced price, or terminate for default.
- If delivery is substantially compliant, must allow correction and reasonable time to correct, but no increase in price

What Is Substantial Compliance?

Must meet all 5 elements!

On time performance

Good faith belief item complies

Minor defect/deficiency

Correctable within reasonable time

Time not of the essence

Postpones a termination for default (T4D)

- Contractor MUST still correct deficiencies or else may T4D

Tradeoff for government:

- Is work “suitable for intended purpose”?
- Would it cost too much to fix v. gain realized?
- This should be a “business decision.”

Delivered After RDD

Government may:

Reject and allow correction (or reperformance) within reasonable time

Repair, replace, or reperform In-house

- By separate contract
- And charge the contractor

Accept at reduced price

Termination for Default



Where Does Government Go Wrong?

Overzealous inspectors

Improper inspections

Estoppel (similar to superior knowledge)

- Authorized Government official has knowledge of true facts
- Contractor does not
- Government knows that contractor does not
- Contractor relies on mistaken understanding

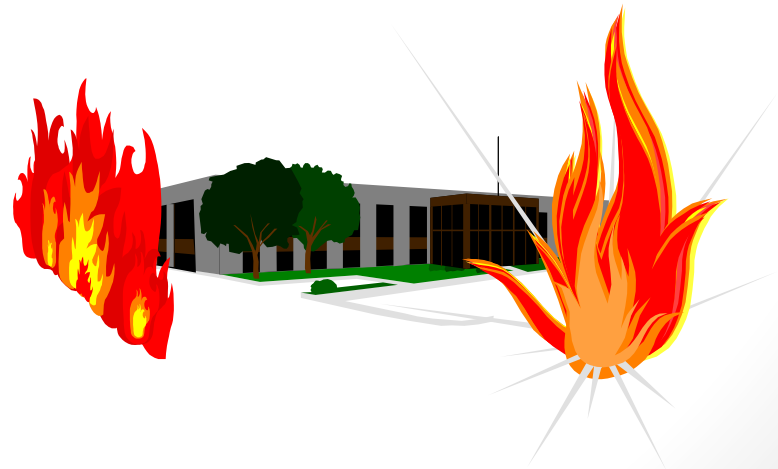
Prior course of dealings

These inspection problems give rise to constructive changes.

Acceptance (46.4, 46.5)

Acceptance is conclusive, except for

- Latent defect
- Fraud
- Gross mistake amounting to fraud
- Other contract provision - *e.g.*: warranty (46.7) - may be express or implied



Closeout/Termination (Part 49)



Termination for Convenience (“T4C”)

The Clause: “The Government may terminate performance of work under this contract in whole, or . . . in part if the Contracting Officer determines that it is in the Government’s interest.” FAR 52.249-2(a)

Government has right to terminate without cause.

Contractor may recover costs and reasonable profit, but not anticipated future profits.

Purpose: Wars end, Congress stops funding programs, circumstances or technology change. (Would you want your tax dollars wasted?)

T4C Clause = Mandatory clause. Unique aspect of government contracts – not in most commercial contracts.

“Should I T4C?”

Contracting Officer should T4C ONLY when it is in the Government’s best interest.

- Note: T4C extinguishes funding (which must be deobligated).

Contracting Officer should not T4C if:

- No-Cost termination is possible (FAR 49.109-4).
- Contract balance is less than \$5,000.
- Contractor is in default but it is not worth going through default process
- Contracting officer may not T4C out of “malice.”

Termination Process

- CO provides contractor with written notice, stating effective date and extent of termination (if partial)

Contractor must stop work!

- Notify subcontractors. (Is it in your subcontract? It should be!!!)
- Mitigate termination costs
 - Reassignments or severance?
 - Dispose of inventory, work in progress

T4C settlement proposal (within one year of notice)

- Audited and negotiated, then settlement modification
- Convert to claim if not settled (with right to appeal to Board of Contract Appeals or Court of Federal Claims)



Termination Settlements

Contractor is entitled to recover:

- Contract price for work performed and accepted
- Costs incurred to point of termination, plus reasonable profit thereon, unless it is a “loss contract.”
- Wind down costs (e.g., severance payments, unrecoverable lease costs)
- Settlement expenses (including legal and accounting)
- **Not lost profits!**
- FAR Part 31 cost principles are not strictly applied - “fair and reasonable” compensation.
- Commercial contracts – amount based on percentage of completion.

Constructive Terminations

Constructive termination for convenience:

- Where government does not say it is terminating for convenience but takes action that effectively does so – e.g., by making performance impossible - court may treat contract as having been “constructively terminated for convenience.”

T4C: Partial Terminations

Partial Termination for Convenience vs. Deductive Change:

- Both involve reduction in contract requirements with accompanying reduction in price.
- Deductive change reduces contract price by price of deleted work.
- Partial termination for convenience allows contractor to reprice from bottom up (excluding deleted work).
- Partial termination may, or may not, be better for contractor.

T4C Scenario

GSA awards Wimaco 5-year contract to design and deliver 5000 widgets, at price of \$60/widget. (Total contract price = \$300,000)

Wimaco's offered price anticipates a steep learning curve with major upfront development costs.

- The first 500 widgets will cost Wimaco \$200/widget to produce. (\$100,000 total)
- The remaining 4500 widgets will cost Wimaco \$40/widget to produce. (\$180,000 total)
- Thus Wimaco's total cost ($500 \times \$200 + 4500 \times \40) = \$280,000) Profit is \$20,000.

T4C Scenario

After 6 months, GSA decides it needs only 3000 widgets, and decides to reduce the contract requirement.

GSA is choosing between a deductive change or a partial termination for convenience. Which is better for Wimaco?

- A) Deductive Change
- B) Partial Termination for Convenience
- C) It doesn't matter

T4C Scenario

A) Deductive Change

Price reduced by $2000 \times \$60 = 120,000$. New contract price (for 3000 widgets) is \$180,000.

B) Partial Termination for Convenience

Contract is repriced. Wimoco can show its cost will be \$200,000 (\$100,000 for first 500 widgets and \$100,000 for next 2500 widgets). New contract price (for 300 widgets) will be \$200,000 plus negotiated profit.

C) It matters!

Best Practices

Termination for convenience clause is not a mandatory flowdown!

- Subcontractor's rights are defined by subcontract. So Prime contractor omits clause at its peril.
- Subcontractor may want to limit prime's right to terminate to instances where prime contract is terminated.

Good recordkeeping is essential – only supported, auditable costs will be allowed.

Contractor must show diligent compliance with the requirement to stop work and wind down subcontracts.

Consider using accounting and legal assistance (costs can be included in settlement proposal).

Termination for Default (FAR 49.4)

(52.249-8): “The Government may. . . by written notice of default to the contractor terminate this contract in whole or in part if the Contractor **fails to**—

- **Deliver** the supplies or perform the services within the time specified. . .
- **Make progress** so as to endanger performance of the contract. . .
- **Perform** any of the other provisions of this contract”
- **Proceed** (rather than proceeding and then filing constructive change claim).
- Contractor should proceed as directed, lest it provide “anticipatory repudiation” under common law.



T4D is Discretionary

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.

Highly discretionary—the Government is never compelled to terminate for default. Government can (FAR 49.402-4)

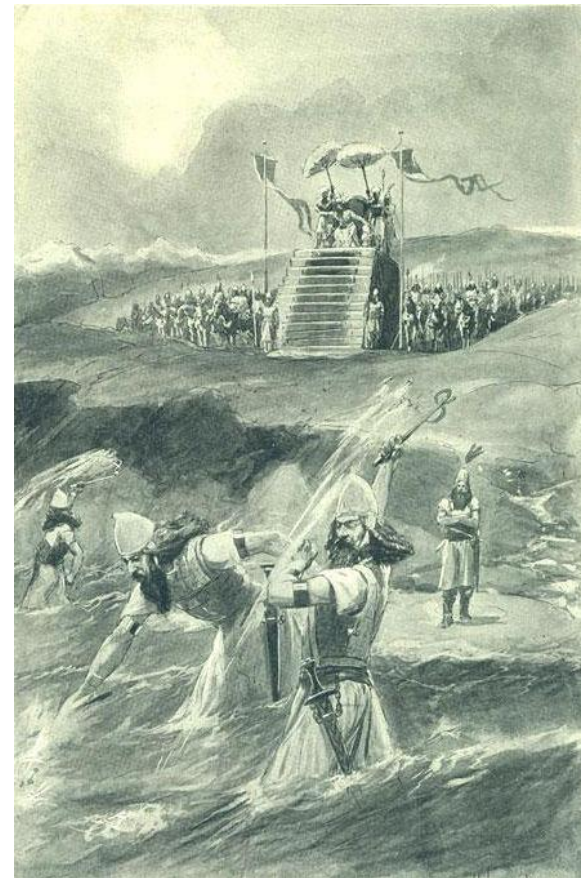
- Allow contractor to continue performance under extended schedule.
- Allow contractor to continue to perform via subcontractor.
- Execute deductive change or no-cost termination for convenience, and meet requirements in-house or under a different contract.

T4D In Ancient Days

In ancient Persia, Xerxes had two bridges built on the Hellespont for his army to cross, but the bridges were destroyed by a storm before the army arrived.

Xerxes was enraged and had those responsible for building the bridges beheaded.

He also gave the water three hundred whiplashes and branded it with red-hot irons.



T4D: Procedural Protections

- Termination for default contains important protections for the contractor.

Government must prove default termination was not an abuse of discretion.

Government must issue written Cure Notice if T4D comes before delivery date (*e.g.*: Failure to make progress or perform other contract provision). Not required if performance deadline has passed.

Cure notice must Identify Contractor's problem/failure with "enough particularity" to inform the contractor as to what has placed it in danger of default.

Contractor has minimum 10 day "grace period" to contest or cure.

- Flowdown: Prime contractors should give subs <10 days, to allow processing time.



T4D: Show Cause Notice

- Optional, but required if practicable.
- In writing, reasonable time to respond.
- “Show reason why CO should not T4D.”
- Used when Contractor’s cure notice response was unsatisfactory. T4D justification is presumed, but contractor has opportunity to show that T4D is not best choice for government.
- Also used when T4D after delivery date or for anticipatory repudiation.
- Note: Cure Notice and Show Cause Notice not generally part of commercial practice in a “termination for cause.”

Contractor Defenses

Excusable Delay

- Beyond the control AND without the fault or negligence of contractor and any Sub or supplier.
- Must reestablish “reasonable” delivery schedule

Waiver of schedule (if Government lets contractor continue to work after due date)

Doctrine of Substantial Compliance – if delivery is timely and defect is minor, contractor is given more time.

No grounds for termination, or CO did not consider relevant information

- CO did not exercise independent discretion.
- CO did not follow required procedures (document!).



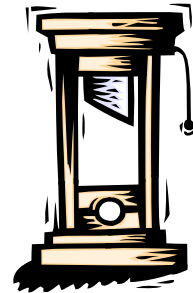
T4D: Financial Consequences (Zero Sum)

Contractor must return excess payments or unliquidated progress payments.

Government is not liable for cost of work in process that is not accepted.

Contractor must pay excess cost of reprocurement (“cost to cover”) of same or similar items – often from next higher bidder.

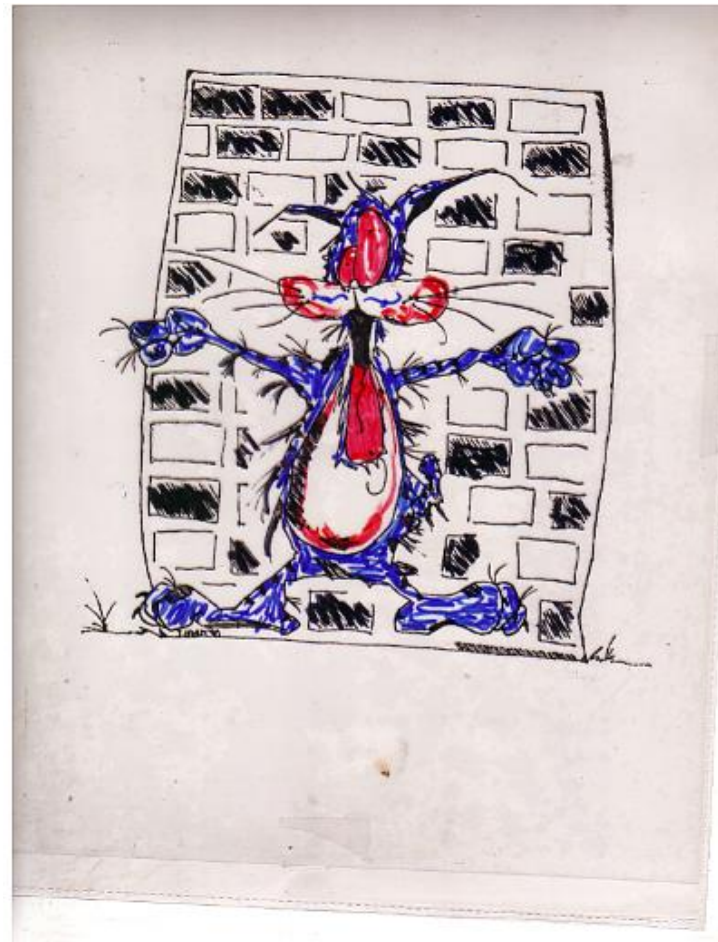
Cost reimbursement contracts have no cost consequences (because contractor was entitled to all allowable costs).



T4D: Non-financial Consequences

- Adverse responsibility determinations
- Negative Past Performance evaluations
- Possible suspension and debarment consideration

These consequences may be more significant than the financial costs.



Wrongful Termination for Default

What happens if contractor challenges T4D and prevails?

Does contractor get contract back – NO!

Faulty T4D is considered a “constructive termination for convenience,” since government had the right to T4C.

So T4D is converted to a T4C.

That’s much less damaging, but it doesn’t get the business back.

T4D: Best Practices

T4D clause is not mandatory flowdown, but prime should include clause in subcontracts. (Termination for cause provision is standard in commercial contracts.)

As always, good recordkeeping is essential.

- Cure Notice (or SC Notice) is WAKE UP CALL.
 - Focus team efforts, bring in resources as needed.
 - Don't keep your manager in the dark (“my customer just wants to send me a message”).

T4D: Best Practices

- Some effects of T4D (vs. T4C) are asymmetrical
 - Monetary (reprocurement costs) is zero-sum. What contractor pays, government receives.
 - Other repercussions (past performance, responsibility determinations) harm contractor but do not benefit government.
 - This provides opportunities for contractor to trade dollars in return for no-cost T4C (or conversion to T4C).

Contract Closeout (Parts 4.7, 4.8, 42)



Why Does Closeout Matter?

Timely closeout saves dollars!

The agency

- Can de-obligate excess funds and identify new funds
- Can reduce contract administration burden
- Can ensure program requirements have been met
- Can allow program shop to focus on future requirements

The contractor

- Can ensure that it has received all money due
- Can focus on future opportunities
- Can reduce contract administration burden

Contract Closeout Steps

- Certification of completed work
- Return GFP, GFE
- Intellectual property – patents, tech data, copyrights
- **Indirect rates finalized** (or quick closeout procedures under FAR 42.708)
- Resolve or reserve any pending claims
- Final invoice
- Audits
- Release of claims and final payment
- Record retention requirements

Indirect Rates

- Issue: Contractor cannot submit final voucher, and contract cannot be closed, until indirect rates are settled.
- Process:
 - Contractor submits “Incurred Cost Submission” within six months of end of contractor’s fiscal year.
 - DCAA evaluates direct and indirect costs, prepares audit report. (But how long will this take?)
 - CO and contractor negotiate final rates.
 - Contractor submits completion voucher (within 120 days).



DCMA Closeout Policy

“If all contract terms and conditions were met, then follow FAR 4.804-5, procedures for closing the contract.”

“When it becomes apparent that there will be a delay in the settlement of final indirect rates, it is recommended that the ACO utilize quick closeout where applicable.”

Quick Closeout (FAR 42.708)

- Contractor can invoice indirect costs before final rate determination.

Advantages – avoids payment delays, reduces administrative burdens

Prerequisites:

- (a) Contract or task order is physically complete
- (b) Unsettled contract costs are “relatively insignificant” (dollar and percentage limits)
- (c) CO has performed risk assessment
- (d) Parties can agree on reasonable estimate of allocable indirect dollars

- Limitations

- (a) Indirect rate determination for contract is final – can't reconcile over- or under-payments on other contracts.
- (b) Indirect rates are not precedent on other contracts.

Closeout - Best Practices

Closeout planning should begin at contract award.
("Pay me now or pay me later.")

- Determine what must be tracked.
- Assign roles and responsibilities.

Review status of funds, task orders, etc. along the way. Don't wait until the contract ends.

Keep good documentation, and keep it current.

Don't be adversarial – good contract administration and efficient closeout benefit both parties.

- Ignored problems won't fade away or improve with age – they will become obstacles at closeout.

Scenario – You Break It, You Buy It!

March 2005: Army awards three-year contract to Good Hands, Inc. (GHI), under which the Army will provide significant amount of GFP (Government Furnished Property) to be used in contract performance.

February 2008: GHI completes performance, and submits government property inventory report, which discloses that some GFP was lost or damaged.

Army assesses cost of repair and replacement against GHI.

Scenario – You Break It, You Buy It!

- GHI claims it is not liable because loss and damage were not willful and were not covered by insurance, citing 52.245-1(h), Government Property (June 2007):
 - (1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, damage, destruction, or theft to the Government property furnished or acquired under this contract, except when any one of the following applies –
 - (i) The risk is covered by insurance . . .
 - (ii) The loss, damage, destruction or theft is the result of willful misconduct or lack of good faith on the part of Contractor’s managerial personnel
 - (iii) The Contracting Officer has, in writing, revoked the Government’s assumption of risk for loss, damage, destruction, or theft . . .”

Scenario – You Break It, You Buy It!

Is GHI liable for the cost of repair and replacement of the lost or damaged GFP?

A) No, because under the cited Government Property clause “the Contractor shall not be liable” unless the risk is covered by insurance or is willful, neither of which is the case.

B) Yes, because a contractor is a bailee and, notwithstanding the cited clause, should be held accountable for the loss or damage to property under its control.

C) Yes, because public policy requires that contractor’s have an incentive to protect Government Property under their control.

D) Yes, because under the Christian Doctrine the Contracting Officer should not be able to waive the Government’s property rights.

E) None of the above. But then what?

Scenario – You Break It, You Buy It!

E) None of the above. But then what?

2005 = Date of Contract

2007 = Date of clauses cited by GHI

But **prior clause (dated 2003)** put responsibility for loss or damage on contractor.

In 2007, Government changed policy on basis that it would cost less for Government to self-insure than it would to pay contractor the allowable cost of insurance.

2005 contract had 2003 **clause!**

Lesson: Make sure you are looking at the clause that is in your contract – it may not be the current version!

Bonus Tracks – Other FAR Parts



Part 1 – FAR System

“Guiding Principles” (1.102)

- (a) provide best value product or service to customer.
- (b) maintain public trust and fulfill public policy objectives.
 - Maximize use of commercial products and services.
 - Use contractors with successful past performance.
 - Promote competition.
 - Minimize operating costs.
 - Conduct business with integrity, fairness, and openness.

Part 1 – FAR System

Did you know? (1.102(d)):

“The role of each member of the Acquisition team is to exercise personal initiative and sound business judgment . . .”

[M]embers of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law . . . [it] is a permissible exercise of authority.”

- So much for the myth that “if the FAR is silent, we can’t do it.”

Part 1 - FAR Taxonomy (1.105-2)

PART	15	Contracting by Negotiation
SUBPART	15.1	Source Selection Processes and Techniques
SECTION	15.101	Best Value Continuum
SUBSECTION	15.101-1	Tradeoff Process
PARAGRAPH	15.101-1(b)	“When using a tradeoff process . . .”
SUBPARAGRAPH	15.101-1(b)(1)	“All evaluation factors. . .”

The FAR's "WBS"

31. 2 01- 2 (a) (2)

Part

Subpart

Section

Subsection

Paragraph



raph

Part 1 – Agency Supplements

- Implement or supplement FAR.
- Parts of agency supplement that do not relate to specific FAR provisions use numbers 70 and up.

Division	DOD	DOE
PART 15	215	915
SUBPART 15.1	215.1	915.1
SECTION 15.101	215.101	915.101
SUBSECTION 15.101-1	215.101-1	915.101-1
PARAGRAPH / SUBPARAGRAPH	ETC	ETC

Part 2 – Definitions

Part 2 Definitions apply throughout the FAR.

More than 200 terms, 28 pages

Important definitions

- Advisory and assistance services
- Inherently governmental function
- In writing
- Shall

Note: Definitions that apply only to one Part or Subpart will be recited in that Part / Subpart.

Part 3 – Improper Business Practices, PCIs

Safeguards (3.1)

- Standards of conduct (impartiality, conflicts of interest)
- Certificate of Independent Pricing

Contingent Fees (3.4) - any commission, percentage, brokerage or other type of fee that will be paid to third parties only if the contract is awarded (“kill and eat” provision) is illegal

Part 3 – Improper Business Practices, PCIs

- **Subcontractor kickbacks**
- **Byrd Amendment – lobbying with appropriated funds (3.8)**
- **Contractor Code of Business Ethics (3.10)**
- **Personal Conflicts of Interest (3.11)**
 - **Covers contractor employees performing “acquisition functions closely associated with inherently governmental functions.”**
 - **They may not use function or information for personal or family gains.**
- **“Inherently governmental functions”**: 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.**

What Does This Mean?

Federal government contracting is heavily regulated.

Practices or activities that are legal and acceptable in the commercial marketplace may not be legal or acceptable in the US government marketplace!

Contractor must maintain a rigorous Compliance Program

- To comply with federal regulations
- To avoid/mitigate risks of non-compliance
- To maintain credibility and trust of customers, employees, and community

Contractor employees must be sensitive to issues before they take improper and irreversible actions.

What Happens If We 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



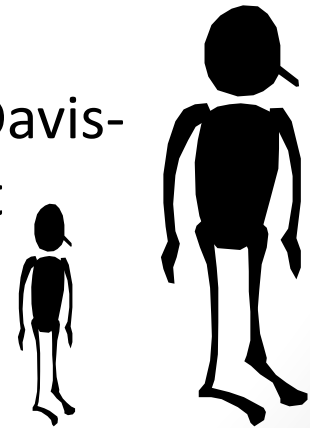
Other Parts

17 – Special Contracting Methods (e.g., multi-year contracts, options)

Part 18 – Emergency acquisitions (Disaster relief, “contingency operations”)

Parts 19 – small business programs, other socio-economic preferences (e.g., disabled veterans, women-owned, HUBZones), 8(a) program), subcontracting plans

Part 22 – Labor Laws (e.g., Service Contract Act, Davis-Bacon Act, Walsh-Healey Act), Equal Employment Opportunity



Other Parts

- Part 23 – Environmental rules, drug free workplace
- Part 24 – Privacy and Freedom of Information Act
- Part 25 – Foreign Acquisitions (Buy American Act, Trade Agreements Acts)
- Part 26 – Other socioeconomic preferences (Indian Incentive Program, HBCU's)
- Part 28 – Bonds and Insurance
- Part 29 – Taxes
- Part 32 – Contract Financing (e.g., progress/milestone payments, Anti-Deficiency Act, Limitation of Costs/Funds, Assignment of Funds, Prompt Payment)



Special Categories of Contracting

- Part 34 – Major Systems Acquisitions, Defense Production Act (Government Priority)
- Part 35 – Research and Development Contracting
- Part 36 – Construction and Architect-Engineer Contracting
- Part 39 – Acquisition of Intellectual Property (including privacy, disability access)
- Part 41 – Acquisition of Utility Services

Other Parts

Part 42 – Contract Administration and Audit Services (42.1)

- Indirect cost rates
- Novation/change of name agreements
- Contractor Performance Assessment Reporting System (CPARS)

Part 45 – Government Property

Part 48 – Value Engineering

Part 50 – Extraordinary Actions and SAFETY Act

Part 51 – Use of Government Sources

Part 52 – Solicitation Provisions and Contract Clauses

Part 53 - Forms



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