



# PUBLIC CONTRACTING INSTITUTE

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# Virtual Fundamentals Class Slides

**Session Two**

# Today's Agenda

Commercial Products and Services

Contractor Acquisition Process

Contract Types

Federal Supply Schedule

But  
First,  
Let's  
Play



# Grab Bag for \$400

**This type of  
specification leaves  
the choice of means  
and method of  
performance to the  
contractor**

# **Authority for \$600**

**The government individual who has actual authority to enter into, modify, and terminate contracts on behalf of their agency**

# **Solicitations for \$800**

**The section of the solicitation which instructs offerors on how to format their proposal submissions**

# **Solicitations for \$400**

**The section of the solicitation which sets forth the government's specifications, or alternatively, the work that the contractor is to perform.**



# Commercial Products and Services (FAR Part 12)



Buying commercial products & services has benefits

- **Proven Items (Quality Goods)**
- **Cheaper - No R&D (Reasonable Price)**
- **Faster (Acq. Lead time) (Delivered timely)**

Procedures more closely resemble those of the commercial marketplace

It's really a middle ground between commercial (UCC) contracting and "regular" government contracting!

# Commercial Products and Services (FAR Part 12)



- The FAR contains broad definitions of the terms “commercial products” and “commercial services,” in order to support the “buy commercial” policy.
- There are incentives for both government agencies and contractors associated with the purchase of commercial products and commercial services.
- Generally a commerciality determination by one DoD contracting officer is upheld by other DoD contracting officers unless clearly erroneous.

# Commercial Products Are ...

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

AND

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

FAR § 2.101



# And include...

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

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

**AND**

- will be available in the commercial marketplace in time to satisfy Government delivery requirements (e.g., new model car, upgraded software)

# And include....

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

- i) Modifications that are customarily available in the commercial marketplace (e.g., computer upgrades), **OR**
- ii) *Minor* modifications made to meet Federal Government requirements even though not customarily available in the commercial marketplace [Minor: must retain non-governmental functions and characteristics]

# Commercial Services

- Installation, maintenance, repair, training, and other services procured in support of commercial item, as long as source of services provides similar services to public under similar terms and conditions
- 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, under standard commercial terms and conditions
- Does not include services sold at hourly rates without established catalog or market price



# Commercial Products & Services Policy

- Procedures resemble those of commercial market, make government more like a private consumer.
- Many 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
- Requires agency to perform market research.

# Contractor Acquisition Process Planning

## Identifying Opportunities

- 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?

# 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

- Who Chooses?
- Can Contractor Influence?



# Fixed-Price Contracts (FAR 16.2)

- Firm Fixed Price (FFP)
  - Appropriate if requirements are well-defined and costs are predictable
  - Contract price is not dependent on cost
  - If the work doesn't change, the price doesn't change
  - Cost risks and rewards are with contractor
  - Easy to administer (for government)
  - Not so easy for contractor - requires performance management to avoid scope creep
  - Must be fixed price if commercial items or sealed bidding

# Fixed-Price Contracts (FAR 16.2)

## Fixed Price with Economic Price Adjustment (EPA) Clause

- If identifiable cost elements may change, price is pegged to changes in those costs or surrogate indexes
- “De-risks” contract to some degree

# Fixed-Price Contracts - Payment

Contractor delivers product or service, submits invoice, and is paid.

This is why you care what the delivery unit is in the Section B CLINs!

Milestone billings - payments before final delivery, pegged to specific performance events (milestones).

Government may provide financing (loans, progress payments, generally based on incurred costs) to maintain supplier base or support small businesses.

# Cost Reimbursement Contracts (FAR 16.3)

## Characteristics:

- Appropriate if requirements are not well-defined and costs are not predictable.
- Contractor only required to use best efforts.
- Contractor reimbursed all “allowable” costs.
- “Allowable” = reasonable, allocable, not unallowable under FAR, IAW GAAP or CAS, not prohibited by contract.

## Limitations on Use

- Contractor needs “adequate” accounting system
- Agency must have ability to administer

Fee limits (R&D = 15%, A&E = 6%, Other = 10%)

- Payment (monthly) during contract



# Cost Reimbursement Contracts

(Pure) Cost contract – no fee

- R&D contract
- Non-profit contractor
- Travel expense reimbursement

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

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

- Is it type of cost generally recognized as ordinary and necessary for conduct of business or contract performance?
- Does it follow sound business practices (arm’s length bargaining, regulations)?
- Does it comply with contractor’s responsibilities to government, customers, owners, public?
- Is it consistent with contractor’s established practices?

# Cost Allowability

- “Allocable”:

- Cost is incurred specifically for the Contract (“Direct cost” – e.g., direct labor, materials, “other direct costs”); or
- Cost benefits both the Contract and other work, distributed in reasonable proportion to benefits received (“Indirect cost” pool – e.g., overhead); or
- Cost is necessary to overall operation of business (“indirect cost” pool – e.g., General and Administrative (“G&A”))

# Cost Allowability

- **Allowable** under FAR Parts 30 (CAS) and 31:
  - Alcohol?
  - Lobbying?
  - Food?
  - Entertainment?
  - Interest?
  - Travel?
  - Fines/Penalties?
  - Legal Expenses?

# Cost Accounting Standards (CAS)

Standard and thresholds apply to negotiated contracts, not including:

Sealed Bidding

Negotiated contracts under \$750,000

Contracts and subcontracts with small businesses

Commercial items

Firm Fixed Price contracts with adequate price competition

Threshold:

\$50 million (in CAS-covered contracts) for full coverage

\$7.5 million for “modified” coverage (only 4 standards)

Disclosure:

- Contractor must describe accounting practices
- Contractor must advise of changes in accounting practices (and may have to provide consideration if change results in cost increase to Government).

# Cost Limitation Clauses

- Required by Anti-Deficiency Act
  - Limitation of Cost Clause (fully funded) = FAR 52.232-20
  - Limitation of Funds Clause (incrementally funded) = FAR 52.232-22

Contractor must give advance notice when approaching funding limit (e.g., 60 days before contractor reaches 80% of funding, based on current Estimate At Completion).

- 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?

# Cost Plus Award Fee Contracts

Fee is Tied to the Quality of Contractor Performance

- Award Fee pool (funding) – may include base fee
- Award Fee Plan – frequency and criteria

Advantages

- Communication and feedback
- Higher fee possible?

Disadvantages

- Increased administrative costs
- Subjectivity
- May chill contractor's willingness to assert
- Contractor should seek input at all stages



# Cost Plus Incentive Fee Contracts

Fee is Tied to Contractor Cost Control

- Contract would have a target cost
- Contractor fee tied to the degree the contractor meets or beats the target cost



# Contract Types - Recap

## Fixed-Price

Requirements well-defined

Costs predictable

Cost risk with contractor

Contractor must deliver

CR - 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



# Indefinite Contracts

## Indefinite Delivery

- Quantity known
- Contractor must be able to meet deliveries

## Requirements

- Quantity not guaranteed
- Government must buy what it needs
- Contractor must be able to supply
- Gov't is giving K'tor a monopoly



# Indefinite-Delivery, Indefinite-Quantity (IDIQ) Contracts

IDIQ contracting is a 2-step process:

- Award of the IDIQ contract(s)
- Issuance of task and delivery orders, as needed, under the IDIQ contracts

Every IDIQ contract has 3 mandatory elements:

- A maximum order amount (usually really high)
- A guaranteed minimum (usually really low)
- An ordering period (e.g., 5 years)

# IDIQ Contracts

## Single-award IDIQ contract:

- Only one IDIQ contract holder
- No incentive for contractor to offer lower prices at the time of task order issuance
- Not preferred

## Multiple-award IDIQ contract:

- More than one IDIQ contract holder:
- Two rounds of competition
- Congressionally-preferred
- IDIQ contract holder is only guaranteed the minimum and fair opportunity to compete for orders

# IDIQ Contracts

- What if the government estimate is faulty?

What happens if the government doesn't use the IDIQ contract?

What happens if an IDIQ contractor doesn't get any orders?

# Other Contract Types

- Time & Materials Contracts

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

- Labor Hour Contracts

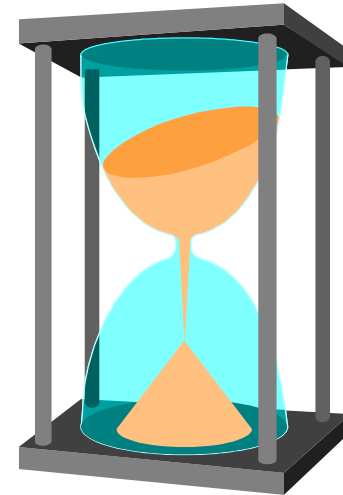
- Like T&M, “hold the M”

- Letter Contracts

- Compelling urgency
- Must be subsequently definitized

- Basic Ordering Agreement

- Not contract, just agreement on specified terms



# 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

# Solicitations and Offers

- RFP: The Proposal is an Offer  
+ Government Accepts = Contract formed
- IFB: The Bid is an Offer  
+ Government Accepts = Contract formed
- RFQ: The Quote is NOT an Offer (FAR 13.004)  
Government-issued Order is the Offer  
+ Contractor accepts or delivers = Contract

If contractor does not accept, the Contractor is not in default and the Government may cancel.

# Scenario - What Kind of Contract Was It?

GSA awarded a FFP task order to Mobley under its Federal Supply Schedule. GSA subsequently requested modification for two additional tasks, for which Mobley submitted a price of \$134,000. The Contracting Officer sent Mobley a modification for that amount, which stated:

Mobley shall provide documentation upon invoicing showing the hours invoiced for during that monthly period. Mobley will be paid based on the hours documented and verified for such labor category and task during that month.”



## Scenario - What Kind of Contract Was It?

Mobley performed and was paid \$134,000. Two years later, after acceptance and closeout, based on an IG audit, the Contracting Officer issued a decision that Mobley had overbilled \$32,835 because it had billed for more hours than it had worked.

Mobley appealed this decision, contending that the contract was a firm fixed-price contract that it had satisfactorily performed. The government argued that the modification changed the contract to a time and materials contract.

# Scenario - What Kind of Contract Was It?

## **Q: What kind of contract was it?**

- A) Firm fixed price, because the initial task order and the contract modification said so.
- B) Time and materials, because the modification said that Mobley will be paid based on the hours documented and verified for such labor category and task during that month.
- C) Time and materials, because you can't fight city hall (or, in this case, GSA).
- D) Firm fixed price, because FAR requirements for time and materials contracts (e.g., D&F that no other type was suitable, approval by contracting agency, ceiling price) were not followed.

# Federal Supply Schedules

GSA awards ID/IQ contracts to thousands of vendors.

- >\$65 Billion worth of orders placed in 2023
- >20 Million commercial products and services
- >18,000 GSA FSS contracts/contractors

Other federal agencies place task and delivery orders against FSS contracts, using FSS vendors.

- **Benefits** – simplified process
  - Reduces time, cost
  - Satisfies competition requirements
  - GSA has already made “reasonable price” determination
  - Reduced likelihood of protest

# Federal Supply Schedules

- FSS is limited to commercial products and services.
- Pricing of supplies offered on the FSS must be on fixed price basis.
- Pricing of services offered on the FSS is limited to either fully-burdened hourly rates or fixed prices for performance of a specific task.
- All vendors' prices are public.
- Vendors must provide GSA with their “most favored customer pricing” (for the Schedule quantity).
- GSA charges a funding fee of 0.75%.
- FSS procedures are set forth in FAR Subpart 8.4

# Federal Supply Schedules – Risks!

The Contractor must disclose – and certify - commercial sales and pricing information

- Catalog, or
- Comparable commercial sales (“Basis of Sale”)

Price Reduction Clause (“Most Favored Customer”)

- If catalog or BOS price drops, contractor must reduce price.
- Requires sales team discipline
- Audits – severe penalties for violations

Competition Requirements

<\$10K: no competition required

>\$10K and <\$250K: compare 3 vendors/get 3 quotes

>\$250: issue RFQ on the GSA eBuy

# FSS Orders

When competing FSS orders and evaluating vendors' quotations, the ordering agency must perform three different evaluations:

- **Technical Evaluation:** does what the vendor is offering meet the requirements of the RFQ?
- **Price Evaluation:** is the vendor's price reasonable?
- **Scope Evaluation:** is what the vendor is offering present on its FSS contract? (100% of what the agency wants to buy must be on the vendor's FSS contract).



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