



SEASON 2023, EPISODE EIGHT
APRIL 19, 2022
FAR PARTS 9 AND 14:
CONTRACTOR QUALIFICATIONS AND
SEALED BIDDING

I. Introduction

This chapter brings us to two important issues in the FAR: contractor qualifications in **Part 9**, and sealed bidding in **Part 14**. Contractor qualifications are the “bedrock” on which sealed bidding—and negotiated procurements, as we will discuss in the next chapter—rests. If a contractor isn’t qualified to do business with the Government, then you can bet the Government isn’t going to jump at the chance to do business with that contractor in any regard! Contractor qualifications are, of course, important in every government contracting context, but one could say they’re of particular importance in sealed bidding because there’s little to no discussion or negotiation that goes on in that method of contracting. Thus, the Government needs to be extra sure that the contractor is qualified/responsible before awarding the contract!

II. Contractor Qualifications

So what do we mean when we say “qualified/responsible”? Determining whether a contractor is qualified/responsible consists of two major prongs, with the first generally being the more important: overall contractor responsibility, which encompasses things like whether the contractor will actually do the work it’s paid to do and won’t do things like abandon the worksite, go bankrupt, fail to meet deadlines, or defraud the Government. See **FAR 9.1**. The second, technical qualifications, encompass whether the contractor possesses the technical know-how or the equipment, personnel and/or facilities necessary to do certain highly specialized work. See **FAR 9.2**. The rest of **Part 9** touches on specific sub-issues within these broad categories, as well as what happens if a contractor fails to demonstrate “responsibility” in manner consistent with **Part 9** (i.e. termination, suspension and/or debarment) and organizational conflicts of interest which can lead to a contractor’s ineligible to bid/propose for certain Government work.

A. Responsibility and Qualifications

As you’ve probably guessed, the contracting officer must make a positive determination of responsibility *before* awarding a contract. **FAR 9.103(a) and (b)**. She must document and justify her responsibility determination, whether it’s positive or negative. Contracting officers make these determinations on a contract-by-contract basis, and for each individual awardee. Just because an awardee has been determined responsible in a past procurement doesn’t mean it will be considered responsible at the time of proposal submission!

Question 1 – Past performance evaluations/records are often used by contracting officers to determine a contractor’s “responsibility” prior to contract award. What can a contractor do to demonstrate “present” responsibility if it has been deficient in meeting contract requirements in the past? [Hint: Check out **FAR 9.104-3**]

FAR 9.104-1 tells us that contracting officers must take into consideration seven general standards as part of their assessment of a contractor’s responsibility. The specifics regarding application of each of these seven standards is in **9.104-3**. Additionally, there are a number of tools contracting officers can use when making responsibility determinations. **9.104-6**. We can find the procedures contracting officers use to find this type of useful information, as well as procedures used to evaluate and document said information and the resulting determination, in **9.105**.

So, what if the contractor has never done business with the Government? And what about subcontractors? If there was a blanket prohibition on contractors with no past performance record doing business with the Government, then new government contractors would be in a really tight spot! Thankfully, the FAR provides that a contracting officer may still determine a contractor responsible even if the contractor has no past performance record with the Government. The guidelines for this determination are in **9.104-1(c)**. As for subcontractors, determination of their responsibility rests primarily on the prime contractors. **9.104-4**. Remember, the Government has no direct contractual relationship with the subcontractor, so it’s up to the prime to sort that out! Unless, certain special circumstances arise which permit the Government to determine subcontractor responsibility directly. See **FAR 9.104-4**.

Question 2 – Under what special circumstance may the Contracting Officer determine a prospective subcontractor’s responsibility?

So what about qualifications? As it turns out, the qualifications standards in **Subpart 9.2** don’t apply to every procurement. For something like manufacturing pens or doorknobs, a qualification determination probably isn’t necessary, and in fact might hinder the overall expediency of the procurement—which is why **9.202(a)** requires a written justification of requiring a qualification determination. For something like a complicated research project, that qualification determination becomes very important. We can find the guidelines for which acquisitions should be subject to qualification requirements in **9.206**. To streamline the process, the Government maintains a qualified bidders list (QBL), a qualified

manufacturers list (QML), and a qualified products list (QPL). The products and entities on these lists are all pre-approved for the purposes of qualification requirements. **9.203**.

B. Suspension, Debarment, and Other Unpleasant Issues

Sometimes the Government may determine that it is too risky to do business with a contractor who has a record of poor integrity or ethics. In the event a contractor is deemed to be too risky for these reasons, the Government may determine that the contractor is “ineligible”, “suspended” or “debarred” from bidding or proposing for or performing any new work for the Government for a specified period of time. This suspension/debarment determination is made by an agency Suspension and Debarment Official (“SDO”) following a discussion and hearing with the affected contractor. The decision to suspend or debar must be based on a finding that the contractor is not *presently* responsible. Neither suspension nor debarment is initiated to punish contractors; rather, they are conducted to safeguard the Government from doing business with a contractor of “questionable” responsibility. **9.402(b)**. The Government does not only consider predictable financial risks, such as the likelihood that a contractor will fail to perform, but also the less-tangible risk that a contractor may fail to act in good faith in dealing with the Government.

So what’s the difference between ineligibility, suspension, and debarment? They are all very serious matters and are never undertaken lightly. Ineligibility is what it sounds like; the contractor is for some reason not eligible to be awarded a Government contract. **2.101**. There are many reasons why that can happen; usually these reasons are statutory in nature. Ineligibility remains effective until a statutory change. Suspension is when the cognizant official determines that the contractor temporarily shouldn’t do business with the Government (and shouldn’t subcontract with a prime doing business with the Government), usually because the contractor is “suspected” of some type of wrongdoing. **9.407-1(b)**. Debarment is when the cognizant official excludes a contractor from doing business with the Government (and from subcontracting) for a certain period of time, usually because the contractor has actually been convicted of some kind of wrongdoing. **9.406-2**.

The procedures for each of these situations are pretty involved, so we won’t go into them here. If you are interested in learning more about them, take a trip through **Subpart 9.4**! And then answer these quick questions.

Question 3 – Where can a Government procuring contracting officer find whether a contractor or subcontractor has been suspended or debarred? [Hint: Check out **FAR 9.404**]

Question 4 – True or False? A contractor may be “suspended” from government contracting if it has been “indicted” for violating the Drug Free Workplace Act. Explain your answer. [Hint: Check out **FAR 9.407-2**]

Question 5 – What is the longest period of time that a contractor may be “suspended” from government contracting? [Hint: Check out **FAR 9.407-4**]

Question 6 – What is the longest period of time that a contractor may be “debarred” from government contracting? [Hint: Check out **FAR 9.406-4**]

C. Organizational Conflicts of Interest

Subpart 9.5 covers organizational conflicts of interest, or OCIs. What is an OCI? According to **2.101**, organizational conflict of interest means that “because of other activities or relationships with other persons, 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.” In other words, the person or organization has an interest that in some way conflicts with the Government’s interest. Contracting officers are responsible for identifying and, when possible, eliminating or mitigating OCIs. The rules addressing OCIs protect the integrity of the procurement process and protect the Government from contractors who may not be capable of providing objective advice. We’ve put together a handy table to help explain the three categories of OCIs. Look through it and then complete the exercise below.

Type of OCI	Explanation of OCI	Possible Mitigation
<i>Unequal Access to Information</i>	<i>A firm has access to non-public information that may provide a competitive advantage on a future procurement</i>	<ul style="list-style-type: none"> • Government shares information with all interested parties • Contractor establishes a “firewall” between performing and bidding organizations
Impaired Objectivity	A contractor has business interests that could be affected by performing the contracts, such as when it is asked to evaluate its own work or assist in the evaluation of its own proposals	<ul style="list-style-type: none"> • Make evaluation criteria as objective as possible • Delegate evaluation work to “firewalled” subcontractor who reports directly to Government customer
Biased Ground Rules	An organization has helped to create the SOW, specifications, or evaluation criteria (“ground rules”) for a procurement and then wishes to compete for work under a separate procurement that includes those ground rules	<ul style="list-style-type: none"> • None • Note: An OCI will not exist if creation of ground rules and performance of the contract containing those ground rules are part of the same contract

Exercise 1 – For each of the following situations, identify the type of OCI that has occurred.

1. A company is requested to perform validation and verification services on a product developed by a corporate affiliate.

2. A company obtains a draft SOW from a marketing consultant who has been hired to assist in the development of the proposal for the product described in the SOW.

3. A company develops the specifications for a new 5-ton truck and then joins as a subcontractor on a prime contractor’s team on a contract that includes those specifications.

4. A company has a support contract with an agency that involves looking over the agency's five year budget plan for future procurements some of which it would like to participate in as an interested offeror.
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III. Sealed Bidding

What is sealed bidding? **FAR 14.101** defines it as “a method of contracting that employs competitive bids, public opening of bids, and awards.” Sealed bidding is different from contracting by negotiation—which we will explore during our discussion of **Part 15**—because price is the only evaluation criterion, and there is no opportunity to negotiate. That's why we say contractor qualifications are so important in sealed bidding!

There are five stages in a sealed bid procurement, summarized in **14.101(a) through (e)**. The first stage involves developing the solicitation (a.k.a., Invitation for Bids, or IFB). The second stage involves publicizing the solicitation. The third stage involves how contractors must submit their bids. The fourth stage involves how the Government must public announce the bids and evaluate them for responsiveness and responsibility. Finally, the fifth stage discusses the contract award.

A. The Five Stages of Sealed Bidding, Stage One: Preparing the IFB

The first step is the preparation of the IFB. In the IFB, the CO must state the requirements of the procurement clearly, accurately, and completely, and must also avoid using overly restrictive requirements or specifications. The standard solicitation format for soliciting sealed bids is spelled out in **14.201-1 through 14.201-5**. This format is called the “Uniform contract format,” and it is used in both sealed bidding and contracting by negotiation. Prescribing a uniform format simplifies the process for everyone involved, because everyone working with the contract—both on the Government team and the contractor team—will know where to find the information relevant to their part of the task. The Uniform contract format sets out thirteen different sections, which helps to maximize clarity. Some might think that number is far too high but remember that the Uniform contract format is used for a lot of different procurements. Better too clear than not clear enough!

Question 7 – Identify a type of contract that does not require a contracting officer to use the Uniform contract format when developing a FAR Part 14 solicitation? [Hint: Check out **FAR 14.201-1**]

The FAR requires that COs include certain provisions and clauses in an IFB. **14.201-6** indicates that COs must insert the provisions at **52.214-3** (Amendments to Invitations for Bids) and **52.214-4** (False Statements in Bids) into all IFBs. COs must also insert the provisions at **52.214-5** (Submission of Bids), **52.214-6** (Explanation to Prospective Bidders), and **52.214-7** (Late Submissions, Modifications, and

Withdrawals of Bids). **14.201-6** and **14.201-7** list other provisions and clauses that the CO should include in specific situations.

B. The Five Stages of Sealed Bidding, Stage Two: Publicizing the IFB

The second step is publicizing the IFB. The publicizing requirements in **5.102** apply to IFBs for sealed bidding procurements. Publicizing must occur “a sufficient time” before the public opening of the bids so that prospective offerors will have enough time to prepare and submit their bids. Subsection **14.202-1** mandates that the CO must provide *at least 30 calendar days* between the date the solicitation was synopsisized and the public opening of the bids! This way, the properly publicized solicitation reaches as many potential offerors as possible and gives them “sufficient time” to respond.

Note that “sufficient time” may be more than 30 calendar days. When determining whether the deadline in the IFB is reasonable, COs should consider a variety of factors, which are laid out in **14.202-1(b)**.

C. The Five Stages of Sealed Bidding, Stage Three: Submitting Bids

The third step in this process is the offerors’ submission of bids. As is usually the case in Government contracting, offerors should be certain to submit their bids *on time*! For the purposes of sealed bidding, that means offerors must submit their bids before the time the IFB specifies that bids will be publicly opened. **14.302**. To help offerors submit their bids in a timely manner, the IFB should specify how, when, and where bids should be submitted. Should the offeror submit the bid by mail? By hand? By email? These time, place, and manner requirements should be strictly followed. Many a bid has been disqualified because it was received too late, or in the wrong office. Note that the FAR dictates that offerors should not submit bids by email (or other e-commerce, such as fax) unless the IFB specifically allows offerors to submit bids in that manner. **14.301**.

If an offeror wants to withdraw or alter its bid, it may do so by any avenue authorized in the IFB. For example, if the IFB allows bid submission by mail, hand delivery, and fax, an offeror may withdraw or modify its bid using any of those options, regardless of how it originally submitted its bid. However, the offeror should be certain to withdraw or modify the bid “not later than the exact time set for opening of bids.” **14.303**.

Question 8 – Up to what point in time is a contractor permitted to withdraw its bid under a **FAR Part 14** procurement? [Hint: check out **14.303**]

D. The Five Stages of Sealed Bidding, Stage Four: Opening and Evaluating Bids

Fourth, the CO opens and evaluates the bids. The procedures for opening bids are spelled out in **14.402**. The price-related evaluation criteria for bids – which are usually placed in Part M of the IFB -- are listed in brief in **14.201-8**. All bids are publicly opened (which means that competitors' prices are made known), and then the CO evaluates the bids for responsiveness and responsibility without discussions with offerors.

Question 9 – **FAR 14.408-2** informs contracting officers to consider whether bids are “materially unbalanced”. What is a materially unbalanced bid? Explain why a contracting officer should be concerned about them?

E. The Five Stages of Sealed Bidding, Stage Five: Awarding the Contract

Fifth and finally, the CO awards the contract. COs must award the contract to the “responsible bidder” whose bid conforms to the IFB and is the most advantageous to the Government. **14.408-1(a)(3)**. Note that “most advantageous to the Government” here only means best price and price-related factors, because of the nature of sealed bidding, as we discussed above. Therefore, the CO first determines which bid is the lowest price. Second, the CO makes sure that the bid conforms to the requirements of the IFB—i.e., that it matches the quantity, specifications, and delivery dates. Additionally, COs may generally only award firm-fixed-price contracts under a **Part 14** procurement, per **14.103-2**. This makes sense, since award of a cost-reimbursement contract would negate the low-price criterion.

What if the requiring agency receives two or more equally low bids? In that case, the CO must evaluate the bids using the list of priorities stated in **14.408-6**. If this happens, the CO must be sure to document how she broke the tie between the bidders. Even if there was no tie to be broken, the CO should document how and why she awarded the contract. **14.408-7**.

COs can't leave unsuccessful offerors hanging! Although sealed bidding might feel like a “don't call us, we'll call you” situation, it does not allow COs to ignore unsuccessful offerors. Once a CO awards a contract, he must, at minimum, notify all unsuccessful offerors in writing or electronically within three calendar days of contract award. **14.409-1(a)(1)**.

Question 10 – For sealed bids covered by the Trade Agreements Act, what information must be included in notices to unsuccessful bidders from WTO or a Free Trade Agreement country? [Hint: Check out **FAR 14.409-1**]

F. A (Sort of) Extra Stage: Two-Step Sealed Bidding

Sometimes a procurement is appropriate for sealed bidding but is a little too complicated for the most basic sealed bidding processes. In that case, a CO should consider using two-step sealed bidding. The exact procedures for two-step sealed bidding are set forth in **Subpart 14.5**. Two-step sealed bidding essentially adds a precursor stage to the five stages discussed in Part II above. COs should use this process when a procurement would work well for sealed bidding, but there are some undefined technical specifications or similar issues to iron out before it is completely ready to undergo the five-stage process. The criteria for determining whether a procurement would be suitable for two-step sealed bidding are listed in **14.503-1**.

The precursor step is for the agency to request submissions of technical proposals, followed by evaluation (and potentially discussions!). Those proposals are then evaluated technically on a pass-fail basis. Only those contractors who submitted acceptable technical proposals are invited to submit sealed price bids. The agency then moves into the regular sealed bidding process we discussed above. It is important to note that during the two-step sealed bidding process, COs may *only* consider bids from bidders who submitted acceptable technical proposals during the precursor stage, per **14.503-2**. COs cannot consider new proposals. This makes sense when we think about the reasons for using two-step sealed bidding procedures.

Extra credit: When we consider Contracting by Negotiation in Chapter 9, we will encounter something called “Lowest Price Technically Acceptable” (often called LPTA) contracting. You will want to consider whether (and how) LPTA contracting, and two-step sealed bidding are different from each other.

Question 11 – What happens to unacceptable technical proposals in a two-step procurement? What are the contractor’s options if a technical proposal is found unacceptable? [Hint: check out **14.503-1**]

Discussion Questions

1. **FAR Part 9.1** requires contracting officer to determine whether a contractor possesses or has the ability to obtain by the time of contract award required “resources” to perform in his/her responsibility determination. What should an interested offeror provide to the procuring contracting officer in its proposal/bid to demonstrate “present responsibility” if it does not presently possess sufficient warehouse space needed to perform a transportation services contract? [Hint: Check out **FAR 9.104-3**]

2. Why might two companies wish to enter into a **FAR 9.602** contractor teaming arrangement?

3. **FAR 52.209-6** permits prime contractors to subcontract with a contractor who has been suspended and debarred. Under what circumstances is this permissible? What information must the prime contractor provide in its proposal when it wishes to offer the subcontractor services of a suspended/debarred subcontractor? [Hint: Check out **FAR 9.405-2**]

4. True or false? The suspension or debarment of a contractor has no effect on its corporate affiliates. Explain your answer. [Hint: Check out **FAR 9.406-1**]

5. What should a procuring contracting officer do if she believes the performance of a contract will cause an OCI which would cause the awardee to be disqualified from certain future contracts? [Hint: Check out **FAR 9.507-2**]

6. **FAR Part 14** generally does not permit communications between the Government and contractors after bid submission and contract award. Nonetheless, under what circumstances may a procuring contracting officer request that an interested bidder delete terms in its bid under a **FAR Part 14** procurement. [Hint: Check out **FAR 14.404-2**]

7. Under a **FAR Part 14** procurement, a procuring contracting officer is permitted to correct “certain” types of mistakes in a contractor’s bid before contract award and without the assistance of the contractor. What is the name of this type of mistake and identify for me an example of this type of mistake. [Hint: Check out **FAR 14.407**]

8. What four (4) things may a procuring contracting officer do if a contractor informs him that the contractor’s proposal contains a mistake after the award of a **FAR Part 14** contract. [Hint: Check out **FAR 14.407-4**]

Answer Key

Answer 1 – As noted in **FAR 9.104-3(b)**, the contractor can present evidence that it has taken corrective action to remedy the prior deficiencies or show that the cause of the past failure/deficiency was “properly beyond the contractor’s control”.

Answer 2 – **FAR 9.104-4** tells us that the Government is permitted to determine “subcontractor responsibility” under three circumstances: when the contract involves (i) medical supplies, (ii) urgent requirements, or (iii) substantial subcontracting.

Answer 3 – The contracting officer can find that information in the “Excluded Parties” list found in the U.S. Government’s System for Award Management portal.

Answer 4 – True, a contractor can be suspended for failing to comply with the requirements of the Drug-Free Workplace clause, or if a number of contractor employees have convicted violations of criminal drug statutes occurring in the workplace. This would indicate the contractor has not made a good effort to make a drug free workplace.

Answer 5 – A suspension may extend beyond 18 months if “legal proceedings have been initiated within that time period”. See **FAR 9.407-4(b)**. In that circumstance, the suspension would be extended until the conclusion of the legal proceeding. A suspension may extend beyond 18 months if “legal proceedings have been initiated within that time period”. See **FAR 9.407-4(b)**. In that circumstance, the suspension would be extended until the conclusion of the legal proceeding.

Answer 6 – The longest period a contractor may be debarred is 5 years. This lengthy debarment period can only be imposed against contractors who have violated the Drug Free Workplace Act.

Exercise 1 –

1. Impaired Objectivity
2. Unequal access to information
3. Biased ground rules
4. Unequal access to information

Answer 7 – Construction, shipbuilding, subsistence items etc.

Answer 8 – A contractor is permitted to withdraw their bid by any method authorized by the solicitation if notice is received in the office designated in the solicitation not later than the exact time set for opening of bids.

Answer 9 - Materially unbalanced bid is when there is a reasonable doubt that the award given to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the government. The CO should be concerned as there are many risks with unbalanced pricing such as risks to the government in determining the competitive range, or unreasonably high prices for contract performance etc.

Answer 10 – The dollar amount of the successful bid, and the name and address of the successful bidder.

Answer 11 – If a technical proposal is found unacceptable, a notice will be forwarded to the offeror upon completion of the proposal evaluation. The CO if allowed, may correct the proposal and resubmit.

Discussion Questions Answer Key

1. The offeror must provide a commitment or explicit arrangement stating they will have the necessary resources in existence at the time of the contract award.
2.
 1. To complement each other's unique capabilities
 2. offer the gov. the best combination of performance, cost, and delivery for the system or product being acquired.
3. The only circumstance that a debarred may receive a contract is if the head agency determines there is a compelling reason for such action. A corporate office must send a notice to the CO stating the name of the subcontractor, the contractor's knowledge of the reasons for the subcontractor having an active exclusion record, the reasons for doing business, and systems put in place to protect the government.
4. False, it can include the affiliates if they were specifically named, given notice of debarment.
5. The CO should create a clause first negotiating the clauses final terms with the successful offeror if it is appropriate to do so.
6. A procuring CO may request a low bidder to delete objectionable conditions from a bid provided the conditions do not go to the substance or work an injustice on other bidders.
7. Clerical mistakes, example: obvious misplacement of a decimal point.
8.
 1. Rescind contract
 2. Reform the contract
 3. No change shall be made in the contract as awarded
 4. Ask the contractor to support the alleged mistake by submission

APPENDIX

All of the following materials are linked below to PCI's website or to an online link.

[AT&T GAO Bid Protest Decision](#)

A GAO decision issued on January 2013 regarding a protest challenging the Marine Corps' evaluation of potential unequal access to information and impaired objectivity organizational conflicts of interest.

[GAO – Original Sealed Bidding Decision](#)

The original GAO decision regarding sealed bidding. The case reviews a decision regarding the Defense Logistics Agency's decision to solicit competitive proposals instead of sealed bids. The decision upholds that the Competition in Contracting Act (CICA) did not leave the determination of which competitive procedure to use to the complete discretion of the contracting officers.

[GSA Instructions to Bidders – Sealed Bid](#)

A list of ten instructions given by GSA for bidders using sealed bidding for government real or related personal property.

[Health Net Federal Services GAO Decision](#)

A decision by the GAO issued November 2009 regarding a protest of the Department of Defense's evaluation of past performance, in particular identifying the work performed by parent companies and corporate affiliates in prior contracts and the solicitation in question.

[HHS Sealed Bid Checklist – Presolicitation Award](#)

A guiding checklist published by the Department of Health & Human Services regarding seal bid acquisitions from presolicitation to award.

[NOAA FAR Part 14 Process Map](#)

A visual guide issued by the National Oceanic and Atmospheric Administration providing a Process Map for FAR Part 14 Sealed bidding.

FUN WITH THE FAR
Episode 8
FAR Parts 9 & 14
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