

GOVERNMENT CONTRACTING 101

THE VIEW FROM 50,000 FEET

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BACKGROUND

- The U.S. Government is a huge buyer with steady demands
- Unusual rules and behavior—not like a typical commercial customer—it is a sovereign entity
- Requires the contractor to have employees or consultants who understand the Government and its peculiarities—simply allowing commercially-oriented personnel to administer Government contracts can lead to problems

THE U.S. GOVERNMENT

Legislative

Executive

Judicial

- Separate but equal
- Each Federal agency has its own peculiar characteristics

THE GROUND RULES

- The world of Government contracts is heavily affected by statutes and regulations
- Some deal with socio-economic issues that would not be present in a commercial contract

Statutes

- The Armed Services Procurement Act of 1947
- The Federal Property and Administrative Services Act of 1949
- The Buy American Act
- The Office of Federal Procurement Policy Act of 1974
- The Contract Disputes Act of 1978
- The Competition in Contracting Act of 1984 (CICA)
- The Federal Acquisition Streamlining Act of 1994

MORE STATUTES

- The Clinger-Cohen Act
- The Truth in Negotiations Act (TINA)
- The Small Business Act
- The Service Contract Act
- The Davis-Bacon Act
- The Procurement Integrity Act
- The Freedom of Information Act (FOIA)
- The Administrative Procedure Act

THE REGULATIONS

- Regulations are issued in order to implement the statutes
- They have the force and effect of law
- The most important one for contractors is the Federal Acquisition Regulation (FAR)
- In addition, each major Federal agency has a FAR Supplement
- If you are in this business in any meaningful way, you have to learn to work with the regulations

TIPS ON WORKING WITH THE REGULATIONS

- Make sure you are using the correct version of the regulation
- Stay current on the regs
- Always double-check the reg before plowing ahead
- Understand how “prescription” clauses work
- Use the Table of Contents
- Check to see if there is any “case law” on the topic
- Always exhaust the reg tree
- Don’t be afraid to ask for an explanation

CARDINAL RULE

- The regulations in effect on the date of contract award generally will govern the contract regardless of its period of performance and despite the fact that a regulation might change during the course of the contract.

THE *CHRISTIAN* DOCTRINE

- Unique to Government contracts
- Takes its name from *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963)
- Stands for the proposition that a prescribed clause will be read into a contract even if the Government neglected to include it
- Does not apply to subcontracts

KEY PLAYERS

- The **Contracting Officer**—the most important
- Only the C.O. can bind the Government contractually
- The C.O. is vested with broad discretion—makes challenging a C.O.’s decision very difficult
- Every C.O. has a “warrant”
- Other Government personnel (COTR, KOR, lawyers, auditors, program managers) may act like they have contractual authority, but it is a safe bet that they don’t

CARDINAL RULE

- The risk of dealing with an unauthorized Government employee is on the contractor.

THE CONTRACT AWARD PROCESS

- The Need
 - Process begins when the agency determines it has a need for a particular product, service or program
 - That need must ultimately be defined in either a written Statement of Work (SOW) or a product description
 - The need must be coupled with the appropriate amount of funding

THE CONTRACT AWARD PROCESS

- The Procurement
 - Once the package gets to the appropriate C.O., the C.O. will conduct “market research” to determine precisely how to conduct the acquisition
 - The big question is whether or not to use a commercial item acquisition approach under FAR Part 12—which simplifies life for everyone
 - The C.O. has many choices, depending on the dollar amount of the procurement, but using negotiated procedures under FAR Part 15 is frequently used

NEGOTIATED PROCUREMENT

- Basically come in two forms: sole-source and competitive
- Sole-source procurements are closely scrutinized by both agency officials and competitors and are frequently challenged
- The reasons to justify a sole-source procurement are listed in FAR Part 6, “Competition Requirements”

SOURCE SELECTION PROCESSES AND TECHNIQUES

- Government is often seeking the “best value” through its acquisition, in terms of cost and technical factors
- C.O. must set forth the “evaluation criteria” for each solicitation in Section M—and must abide by them
- The best-value determination requires a “tradeoff” between cost (price) and technical factors

LPTA

- One of the techniques available to the Government is the Low Price-Technically Acceptable (“LPTA”) approach—but the solicitation must clearly advise offerors that this approach will be employed

THE SOLICITATION

- Often called a Request for Proposals (“RFP”)
- Must be a complete presentation of the Government’s needs and must be written to maximize competition
- Must clearly spell out the evaluation factors, which must include cost/price, technical, and in most cases, “past performance”

PROPOSAL PREPARATION

- A proposal must “conform” to the RFP’s requirements in order to be considered acceptable
- An offeror must carefully review the RFP
- Attend any pre-proposal conference that is held
- If you have any questions or concerns, you must bring them to the C.O.’s attention before the submission of proposals

PROPOSAL PREPARATION

- Consider the “type” of contract and the risk that will pose
- Contract types are laid out in FAR Part 16
- They break down generally into fixed-price, cost-reimbursement, incentive, indefinite-delivery, time and materials, labor-hour and letter contracts

PROPOSAL PREPARATION

- As a general proposition, the cost-plus-fixed-fee (CPFF) type of contract is the least risky for a contractor while a firm-fixed-price (FFP) contract is the riskiest
- In terms of risk, all other contract types fall somewhere in between these two
- This does not mean that a CPFF contract imposes no risk on a contractor—it certainly does

PROPOSAL PREPARATION

- The offeror must carefully review the SOW
- Look for omissions, ambiguities, specification “pyramids” and dangerous language
- Make sure your pricing folks have taken all of these issues into account

PROPOSAL SUBMISSION

- Make sure you understand the deadline for submissions and whether electronic proposals are authorized
- Read Section L of the solicitation, which contains the instructions, and make sure your proposal complies
- Have an experienced person or team review the proposal

CARDINAL RULE

- Although there are exceptions, in most cases late proposals will be rejected, no matter what your tale of woe is

PROPOSAL EVALUATION

- The C.O. usually will review the price proposals and will send the technical proposals to a Source Evaluation Board
- The evaluation will be conducted in accordance with the solicitation's evaluation criteria (Section M)
- If the solicitation warns the offerors properly, the C.O. may award a contract based on initial offers, but may engage in “clarifications” in the process

PROPOSAL EVALUATION

- Otherwise, the C.O. will establish a competitive range consisting of the offerors with the most highly rated proposals
- The C.O. may engage in “communications” in order to determine which offerors should make the competitive range
- As a general rule, if there’s doubt, they’re out

Exchanges

- The C.O. may engage in several types of “exchanges” with offerors
- Once the competitive range has been established, these exchanges are called “discussions” or “negotiations”
- These are exchanges that are undertaken with the intent of allowing the offeror to revise its proposal
- They may apply to price, schedule, technical issues, contract type or any other term or condition

DISCUSSIONS

- Discussions must be tailored to each offeror's proposal
- In conducting discussions, the agency is prohibited from (a) favoring one offeror over another; (b) revealing an offeror's technical solution or anything else that might be considered proprietary; (c) revealing an offeror's price without that offeror's permission; and (d) disclosing the names of people who provided past performance information

DISCUSSIONS

- At a minimum, a C.O. must indicate to, or discuss with each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which an offeror has not yet had an opportunity to respond
- Discussions must be “meaningful”

Final Proposal Revisions

- At the conclusion of discussions, each offeror still within the competitive range will be given an opportunity to submit its final proposal revisions
- All such submissions must be submitted by a common cutoff date

SOURCE SELECTION

- Once the final proposal revisions have been submitted, the results will be turned over to the “Source Selection Official” for an award decision
- The SSO’s decision must be (a) documented; (b) independent; and (c) based on a comparative assessment of proposals against all of the solicitation’s source evaluation criteria
- It also must include a rationale for any business judgments or tradeoffs made, including benefits associated with additional costs

AWARD

- Award can be made to the selected offeror
- Notice of award must be sent within three calendar days of award to the “disappointed offerors” whose proposals were within the competitive range

DEBRIEFINGS

- All offerors, including the awardee, are entitled to a “debriefing” after an offeror has been eliminated from the competition or after the contract award has been made
- Debriefings must be requested within three days after notification of award, or elimination from the competitive range, has been received
- There are two kinds of debriefings, “pre-award,” under FAR 15.505, and “post-award” under FAR 15.506—post-award debriefings are much more informative, if you can afford to wait

DEBRIEFINGS

- In a post-award debriefing, an offeror is entitled to the following information:
 - The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
 - The overall ranking of all offerors, when any ranking was developed;
 - A summary of the rationale for award;
 - For acquisition of commercial items, the make and model of the item to be delivered by the awardee;and

DEBRIEFINGS

- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed
- Debriefings can be conducted in person, by phone, or in writing

PROTESTS

- Once a company has completed its debriefing, it must quickly decide whether to file a “bid protest”
- Protests relating to most contract awards may be filed in one of three forums: (1) the agency; (2) the U.S. Government Accountability Office (GAO); or (3) the U.S Court of Federal Claims

CARDINAL RULES

- Never delay in deciding where and when to file a protest—the clock is ticking loudly!
- To protect your interests, always check with a lawyer who knows this area of the law

THE CONTRACT

- Congratulations!
- But do you know what you have gotten into?
- U.S. Government contracts have a number of unique features

The “Changes” Clause

- Supposed to give the Government some flexibility to change its mind, during the course of a contract, about (a) drawings, designs or specifications; (b) the method of shipment or packing; or (c) the place of delivery
- If such a change is ordered, the clause authorizes an “equitable adjustment” to make the contractor whole for its extra work plus any schedule extensions that might be required

The “Changes” Clause

- Only the C.O. has the authority to direct a change
- This principle is violated on a daily basis
- Sometimes a contractor discovers that it is performing in a manner that is inconsistent with the contract, and upon investigation may conclude that a “constructive change” has occurred

THE “CHANGES” CLAUSE

- If a constructive change has occurred, an equitable adjustment may still be possible, but it is often an uphill battle because it has not been discovered until after the fact
- The “Changes” clause for commercial-items contracts states that “Changes in the terms and conditions of this contract may be made only by written agreement of the parties.” [FAR 52.212-4(c)]

CARDINAL RULE

- Once a contract is awarded, you must educate the team that is going to be performing the contract

INSPECTION AND ACCEPTANCE

- Inspection and acceptance are generally prerequisites to payment under a Government contract
- The Government's inspection methods must be reasonable and must not unduly delay the contractor's work
- The contractor must provide and maintain an inspection system that is acceptable to the Government

INSPECTION AND ACCEPTANCE

- If any of the products or services do not comply with the contract's requirements, the Government may require the contractor to perform them again at no additional cost

PAYMENT

- Each contract will contain its own payment terms
- A contractor must abide by them because the Government's payment obligation is triggered only by a "proper invoice"
- The Prompt Payment Act provides some protection for contractors, but the best method of avoiding payment issues is to have an acceptable invoicing procedure and offer a prompt payment discount to the Government

FRAUD AND ETHICAL CONSIDERATIONS

- People doing business with the U.S. Government must turn square corners
- The typical Government contract contains numerous clauses that can lead to civil or criminal prosecution
- It should be no surprise that criminal prosecution will arise from dishonest acts such as fraud, bribery, theft and kickbacks

FRAUD AND ETHICAL CONSIDERATIONS

- In the world of Government contracting, criminal liability can also arise from false statements, including false certifications, false claims, product substitution, billing misrepresentations, false data rights claims and antitrust violations
- In addition, FAR Part 9 contains detailed procedures for administrative sanctions known as “suspension” and “debarment”

FRAUD AND ETHICAL CONSIDERATIONS

- FAR Part 9 also contains guidance on Organizational Conflicts of Interest (OCI), which may not lead to criminal sanctions but could easily cause a company or a person to be excluded from a contract
- In addition, the Procurement Integrity Act imposes strict limitations on a contractor's ability to obtain certain procurement information and to discuss employment opportunities with Government procurement officials

FRAUD AND ETHICAL CONSIDERATIONS

- While a contractor should not be paralyzed from fear of possible civil or criminal liability for unethical or fraudulent conduct, a prudent contractor establishes a “compliance program” to ensure that the company’s employees are educated on the rules, what the company’s expectations are, including a code of conduct, and how to deal with ethical issues if they arise

GOVERNMENT CONTRACT COSTS

- Another thing that distinguishes Government contracts from the commercial marketplace is the importance of—and the detailed regulations governing—costs
- The cost regulations are contained in FAR Part 31
- In a negotiated contract, costs can become important if there is not adequate competition to ensure that the forces of the marketplace will bring about a reasonable price

GOVERNMENT CONTRACT COSTS

- Costs are also critical in a cost-reimbursement contract that will be subjected to an annual audit
- The key question with respect to costs is generally whether a cost is “allowable”
- Under FAR 31.201-2, a cost is allowable if it is (a) reasonable; (b) allocable; (c) consistent with the Cost Accounting Standards (CAS), if they apply; and (d) consistent with the terms of the particular contract

GOVERNMENT CONTRACT COSTS

- A cost is considered to be reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business
- A cost is considered to be allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship

GOVERNMENT CONTRACT COSTS

- Government contract costs are divided into “direct” and “indirect” costs.
- A direct cost is any cost that can be identified specifically with a particular final cost objective
- An indirect cost is any cost not directly identified with a single, final cost objective, but is identified with two or more final cost objectives or an intermediate cost objective

GOVERNMENT CONTRACT COSTS

- FAR Part 31 lists a number of costs that are “unallowable” *per se*, such as interest and bad debts
- This does not mean that a contractor cannot include the cost in its bid price; it just means that it will be disallowed if it is audited

THE TRUTH IN NEGOTIATIONS ACT

- The Truth in Negotiations Act (TINA) is one of the most troublesome aspects of Government contracting
- The statute applies to (a) negotiated procurements in excess of \$750,000 where there is not adequate competition and (b) any contract modification in excess of \$750,000

THE TRUTH IN NEGOTIATIONS ACT

- Under TINA, a contractor is required to sign a
- Certificate of Current Cost or Pricing Data, as of the date of agreement on price, stating that the cost data supplied by the offeror are “current, complete and accurate.”
- If it later turns out that some of the data were “defective,” the contractor will be the target of a “defective pricing action” that will probably lead to a reduction in contract price and, in egregious cases, possible criminal liability

THE TRUTH IN NEGOTIATIONS ACT

- There are some exceptions to TINA—set forth at FAR 15.403-1
- They include (1) when the contracting officer determines that the prices agreed upon are based on “adequate price competition;” (b) when the prices are set by law or regulation; (c) when a “commercial item” is being procured; or (d) when a waiver has been granted

THE TRUTH IN NEGOTIATIONS ACT

- Because a TINA exemption could rise or fall on it, the broad definition of a “commercial item” is critical
- It is set forth at FAR 2.101 and reads follows:

Commercial Item means---

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and ---

THE TRUTH IN NEGOTIATIONS ACT

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial market place in time to satisfy the deliver requirements under a Government solicitation;

CLAIMS

- It is an unfortunate fact of Government contracting that the parties will become involved in claims
- Most claims are filed by the contractor, but the Government also has the right to file a claim
- The Government contracts dispute process is governed by the Contract Disputes Act and FAR Part 33

CLAIMS

- The “Disputes” clause at FAR 52.233-1 is a mandatory clause that will undoubtedly appear in any prime contract awarded
- It requires that all claims must be submitted in writing to the C.O.
- A claim in excess of \$100,000 is not a “claim” unless it is properly certified
- Claims must be certified within six years of their accrual

CLAIMS

- Once a C.O. receives a proper claim, she must decide it within 60 calendar days or notify the contractor of the date by which the decision will be issued
- Unless the claim is resolved in the meantime, the C.O. will issue a “Contracting Officer’s Final Decision”
- Once the final decision is issued, the clock begins to tick on the time period that the contractor has to challenge the decision

CLAIMS

- A contractor has 90 calendar days to file an “appeal” at the proper board of contract appeals or one year to file suit at the U.S. Court of Federal Claims
- If the contractor has not completed performance, the “Disputes” clause requires the contractor to continue performance in accordance with the C.O.’s direction notwithstanding the existence of the dispute

CARDINAL RULE

- Stopping work is one of the riskiest things a Government contractor can do

TERMINATIONS

- “Termination” is a term of art in Government contracts
- There are essentially two kinds of terminations
- The most notorious is “Default Termination”
- If your contract is defaulted, that fact will haunt your company for three years
- In addition to losing the contract, you may be exposed to reimbursing your Government customer for the “excess costs of reprourement

TERMINATIONS

- Under the “Default” clause at FAR 52.249-8, a contractor can be terminated for failure to deliver or perform on time, failure to make progress, and failure to perform other material contract provisions
- In considering whether to terminate a contract for default, a C.O. must conduct the analysis set forth at FAR 49.402-3

TERMINATIONS

- There are defenses to default terminations, but a contractor must have the evidence to prove those defenses
- Two of the most common defenses are that the failure to perform was “excusable” under the “Default” clause and that the Government waived the due date for deliveries
- In situations other than a failure to deliver on time, a C.O. will issue a “cure notice” to the contractor giving it ten days to either cure its failure or to explain why the contract should not be terminated

TERMINATIONS

- The second type of termination is called a “convenience” termination
- Essentially it means that the U.S. Government has the unilateral right to cancel any of its contracts as long as it has a good-faith reason to do so
- A “T for C” does not leave a black mark on a contractor’s record

TERMINATIONS

- Under a T for C, the contractor has one year to file a request for reimbursement of costs incurred in association with the termination
- The contractor is entitled to reimbursement for all of the costs it incurred plus a reasonable profit on those costs
- At common law, a T for C would be a breach of contract
- The convenience termination power is a stark reminder that the U.S. Government is a sovereign, and sovereigns have different interests and powers than commercial entities do