THE ONE HUNDRED FORTY-SIXTH

Contract Attorneys

COURSE
(JA 501)

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TJGASA, Contract & Fiscal Law Department
600 Massie Road
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TJAGSA
600 Massie Road
Charlottesville, VA 22903

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The Contract Attorneys Course Deskbook introduces basic contracting concepts to the attorney who is new to public contract law. There concepts include authority of the government and its personnel to enter into contracts, statutorily mandated competition requirements, contract formation (sealed bidding and competitive negotiation), contract types, labor standards, socioeconomic policies, contract performance, modification, termination, inspection, acceptance, warranties, changes, disputes, remedies, and procurement fraud.

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THE JUDGE ADVOCATE GENERAL'S SCHOOL
DEPARTMENT OF THE ARMY

CONTRACT AND FISCAL LAW DEPARTMENT

BIOGRAPHIES OF PROFESSORS

LIEUTENANT COLONEL TIMOTHY J. PENDOLINO, JA, Professor and Chair, Contract and Fiscal Law Department. B.S., South Dakota School of Mines and Technology, 1981; J.D., Ohio Northern University, 1983; Judge Advocate Officer Basic Course, 1984; LL.M., Military Law, The Judge Advocate General's School, 1994. Career Highlights: Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, 1998-2000; Command Judge Advocate, U.S. Army Central Command – Kuwait, 1997-1998; Professor, Contract Law Department, The Judge Advocate General's School, 1994-1997; Contract Law Attorney-Advisor, U.S. Army TRADOC Contracting Activity, 1990-1993; Contract Law Attorney-Advisor, U.S. Army Armament, Munitions, and Chemical Command, Rock Island Arsenal, Illinois, 1987-1990; Administrative Law Attorney, OSJA, Fort Knox, Kentucky, 1986-1987; Legal Assistance Officer, OSJA, Fort Knox, Kentucky, 1984-1986. Member of the Bar of West Virginia; admitted to practice before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces.

LIEUTENANT COLONEL ELIZABETH D. BERRIGAN, JA, Professor and Vice-Chair, Contract and Fiscal Law Department. B.A., Duquesne University, 1983; J.D., University of Dayton School of Law, 1986; Judge Advocate Officer Basic Course, 1987; Defense Language Institute Foreign Language Center, Spanish, Honors Graduate, 1988; LL.M., Military Law, The Judge Advocate General's School, 1996. Career Highlights: Chief, Claims Division, Chief, Legal Assistance Division, HQ, I Corps, Fort Lewis, Washington, 1996-1998. Trial Attorney/Bid Protest Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1993-1995. Bid Protest Attorney, Contract Law Division, Office of The Judge Advocate General, Washington, D.C., 1993. Assistant Judge Advocate to the Auditor General, The U.S. Army Audit Agency, Alexandria, Virginia, 1989-1993. Operational/International Law Attorney, U.S. Army South, Republic of Panama, 1988-1989. Chief, Legal Assistance Division, Fort Benjamin Harrison, Indiana, 1987-1988. Member of the Bar of Pennsylvania; admitted to practice before the U.S. Supreme Court, the U.S. District Court for the Western District of Pennsylvania and the Supreme Court of Pennsylvania.

MAJOR LOUIS A. CHIARELLA, JA, Professor, Contract and Fiscal Law Department, B.A., University of Notre Dame (with Honors), 1985; J.D., State University of New York at Buffalo (with Honors), 1988; M.A., Catholic University of America (with Honors), 1996; Judge Advocate Officer Basic Couse, 1988; LL.M., Military Law, The Judge Advocate General's School, 1997. Career Highlights: Chief, Criminal Law Division; Chief, Administrative and Civil Law Division, HQ, 7th ID and Fort Carson, Fort Carson, Colorado, 1997-1999. Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1992-1996. Special Assistant United States Attorney (Felony Prosecutor); Special Assistant United States Attorney (Magistrate Court Prosecutor); Legal Assistance Attorney, Fort Knox, Kentucky, 1988-1992. Member of the Bars of New York and Ohio; admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Court for the Western District of Kentucky, and the U.S District Court for the Western District of New York.

MAJOR JOHN J. SIEMIETKOWSKI, JA, Professor, Contract and Fiscal Law Department. B.A., Georgetown University, 1984; J.D., Catholic University Law School, 1987; Judge Advocate Officer Basic Course, 1988; LL.M., Military Law, The Judge Advocate General's School, 2000. Career Highlights: Center Judge Advocate, Eisenhower Army Medical Center, Fort Gordon, Georgia, 1998-1999; Civil Litigation Attorney, The Barbknecht Firm, Dallas, Texas, 1996-1998; Trial Defense Counsel and Legal Assistance Attorney, 1st Legal Support Organization, U.S. Army Reserve, San Antonio, Texas, 1996-1997; Defense Legal Advisor, U.S. Embassy, Paris, France, 1994-1996; Trial Defense Counsel, 21st Theater Army Area Command, Hoensbroek, The Netherlands, 1991-1994; Special Assistant U.S. Attorney, III Corps, Fort Hood, Texas, 1989-1991; Trial Defense Counsel, 2nd Armored Division, Fort Hood, Texas, 1988-1989. Member of the Bars of Pennsylvania, New Jersey, Texas, and Virginia; admitted to practice before the U.S. Supreme Court, the U.S. District Court for the District of New Jersey, the U.S. District Court for the Northern District of Texas, the U.S. District Court for the Eastern District of Texas, the U.S. Court of Appeals for the Armed Forces, and the U.S. Army Court of Criminal Appeals.

MAJOR JONATHAN C. GUDEN, JA, Professor, Contract and Fiscal Law Department. B.S., University of Wisconsin-Stout (*magna cum laude*), 1983; J.D., Florida State University (with Honors), 1988; Quartermaster Officer Basic Course (First Honor Graduate), 1985; Judge Advocate Officer Basic Course (Commandant's List), 1989; LL.M., Military Law, The Judge Advocate General's School (Commandant's List), 1997. Career Highlights: Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1997-1999; Senior Defense Counsel, U.S. Army Alaska, Fort Wainwright, Alaska, 1994-1996; Instructor, Army Logistics Management College, Fort Lee, Virginia, 1992-1994; Defense Counsel/Legal Assistance Attorney, I Corps and Fort Lewis, Fort Lewis, Washington, 1989-1992; Platoon Leader, 231st Transportation Company (MB), U.S. Army Reserve, St. Petersburg, Florida, 1983-1988. Member of the Bars of Florida and Minnesota; admitted to practice before the U.S. Supreme Court and the U.S. Army Court of Criminal Appeals.

MAJOR KEVIN M. WALKER, JA, Professor, Contract and Fiscal Law Department. B.A., Purdue University, 1985; J.D., The Albany Law School of Union University, 1992; Infantry Officer Basic Course, 1985; Infantry Officer Advanced Course, 1990; Judge Advocate Officer Basic Course, 1993; U.S. Army Command and General Staff Officer Course, 1996; LL.M., Military Law, The Judge Advocate General's School, 2000. Career Highlights: Chief, Administrative/Civil Law Division; Chief, Military Justice Division, U.S. Army Special Operations Command, Fort Bragg, North Carolina, 1997-1999; Trial Defense Counsel, Fort Bragg, North Carolina, 1996-1997; Staff Judge Advocate, U.S. Forces Haiti/U.S. Support Group Haiti, Port-au-Prince, Haiti, 1995; Chief, Operational Law Division; Chief, Regulatory Law/Special Assistant U.S. Attorney, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky, 1993-1996; HHC Commander; HHC Executive Officer; Anti-Armor Platoon Leader (TOW2); HHC, 1/105th Infantry (L), 10th Mountain Division (L), NYARNG, Schenectady, New York, 1989-1992; Unit Training Officer, 5030th USARF School, 123rd ARCOM, Fort Benjamin Harrison, Indiana, 1987-1989; Rifle Platoon Leader, Company A, 2/293d Infantry, 38th Infantry Division, INARNG, Attica, Indiana, 1985-1987. Member of the Bars of New York and Connecticut; admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Court for the Northern District of New York, the U.S. Court of Appeals for the Armed Forces, and the U.S. Army Court of Criminal Appeals.

MAJOR KAREN S. WHITE, USAF, Professor, Contract and Fiscal Law Department. B.S.B.P.A., University of Arizona, 1986; J.D., University of Arizona School of Law, 1995; Air Force Judge Advocate Staff Officer Course, 1995; Squadron Officer's School, 1997; Air Command and Staff College, 1999; LL.M., Military Law, The Judge Advocate General's School, 2000. Career Highlights: Deputy Staff Judge Advocate, Chief, Military Justice and Claims Officer, Office of the Staff Judge Advocate, 9th Reconnaissance Wing, Beale Air Force Base, California, 1995-1999; Funded Legal Education Student, University of Arizona School of Law, 1992-1995; Squadron Section Commander, 86th Maintenance Squadron, Ramstein Air Base, Germany, 1990-1992; Executive Officer, 832nd Combat Support Squadron, Gila Bend Air Force Auxiliary Field, Arizona, 1989-1990; Protocol Officer, Keesler Technical Training Center, Keesler Air Force Base, Mississippi, 1988-1989; Student Squadron Commander, 3419th Student Squadron, Keesler Air Force Base, Mississippi, 1987-1988. Member of the State Bar of Arizona; admitted to practice before the U.S. Supreme Court, and the U.S. Court of Appeals for the Armed Forces.

ADMINISTRATIVE & CIVIL LAW DEPARTMENT

MAJOR COREY L. BRADLEY, JA, Professor, Administrative and Civil Law Department. B.S., University of Southern California, 1986; J.D., Willamette University, 1989; Airborne School, 1984; 120th Judge Advocate Officer Basic Course, 1989; Combined Arms and Services Staff School, 1995; Air Assault School, 1996; LL.M., 47th Judge Advocate Officer Graduate Course, 1999. Legal Assistance Attorney and Trial Counsel, 3d Armored Division, Hanau, Germany, 1990-91; Command Judge Advocate, 3/325th Airborne Battalion Combat Team, Vicenza, Italy, 1991-93; Medical Claims Judge Advocate/Deputy Center Judge Advocate, Tripler Army Medical Center, Honolulu, Hawaii, 1993-96; Litigation Attorney, Tort Branch, Litigation Division, Arlington, Virginia, 1996-98. Member of the Bars of Oregon, the United States Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, and the United States Supreme Court.

BIOGRAPHIES OF RESERVE PROFESSORS

COLONEL JONATHAN H. KOSARIN (USAR), Deputy Counsel, Special Projects Division, Navy Office of General Counsel, Washington, D.C. B.A., Syracuse University (*magna cum laude*), 1973; J.D., Brooklyn Law School, 1976; LL.M., Government Procurement Law, George Washington University, 1984; The Judge Advocate General's School Basic Course, 1977; The Judge Advocate General's School Graduate Course, 1985; Command and General Staff College, 1990; The Army War College, 1997. Career Highlights: Trial Counsel, Defense Counsel, Chief of Administrative Law and Senior Law Instructor, U.S. Army Military Police and Chemical Schools, Fort McClellan, Alabama, 1977-1980; Trial Attorney, Contract Appeals Division, Washington, D. C., 1980-1984; Attorney Advisor and European Trial Attorney, United States Army Europe & Seventh Army, Heidelberg, Federal Republic of Germany, 1985-1987; Deputy Staff Judge Advocate, 300th Support Group (Area) (USAR), Fort Lee, Virginia, 1987-1990; Associate General Counsel and Director of Procurement Law, Federal Home Loan Bank Board, Washington, D.C., 1987-1989; Associate Counsel, Naval Supply Systems Command, Washington, D.C., 1989-1994; Deputy Counsel, Special Projects Division, 1994-Present; Adjunct Instructor of Procurement and Contracting, University of Virginia, 1989-Present Member of the Bars of New York and the District of Columbia; Admitted to practice before the U.S. Supreme Court, the U.S. Courts of Appeals for the District of Columbia and Federal Circuits; the U.S. District Courts for the District of Columbia and the Eastern District of New York, and the United States Court of Federal Claims. Member of the American Bar Association and the District of Columbia Bar Association.

LIEUTENANT COLONEL MICHAEL K. CAMERON (USAR), Associate General Counsel, Immigration & Naturalization Service, Department of Justice, Washington, D.C. B.A., Washington and Lee University, 1978; J.D., Wake Forest University, 1981; The Judge Advocate General's School Basic Course, 1981; LL.M., Military Law, The Judge Advocate General's School, 1989. Career Highlights: Chief Counsel, U.S. Army Contracting Center, Europe, Frankfurt, Germany, 1993-1995; Professor, Contract Law Division, The Judge Advocate General's School, 1990-1993; Chief, Nonresident Instruction Division, The Judge Advocate General's School; Special Assistant United States Attorney, U.S. Attorney's Office, Detroit, Michigan, 1987-1988; Administrative Law Attorney, Contract Law Attorney, Senior Counsel Civil Law, XVIII Airborne Corps, Fort Bragg, North Carolina, 1984-1987; Senior Defense Counsel, Taegue, Korea, 1983-1984; Trial Attorney, Fort Dix, New Jersey, 1981-1983. Member of the Bar of North Carolina; admitted to practice before the Army Court of Military Review, the U.S. District Court for the Eastern District of Michigan, and the U.S. Supreme Court.

Chapter 1
Introduction to Government Contract Law

146th Contract Attorneys Course

CHAPTER 1

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CHAPTER 1

INTRODUCTION TO GOVERNMENT CONTRACT LAW

I. COURSE OVERVIEW.

A. Part I - Contract Formation.

1. The formation phase concerns issues that arise primarily when entering into a contract.

2. Major topics include:

a. Authority.

b. Competition.

c. Methods of acquisition: simplified acquisition, sealed bidding, and negotiations.

d. Contract types.

e. Socioeconomic policies.

f. Protests.

g. Procurement fraud.

LTC Tim Pendolino
146th Contract Attorneys Course
April/May 2001

B. Part II - Contract Performance and Special Topics.

1. The administration phase concerns issues that arise primarily during performance of a contract.

2. Major topics include:

a. Contract changes.

b. Inspection and acceptance.

c. Terminations for default and for the convenience of the government.

d. Contract claims and disputes.

e. Environmental contracting issues.

f. Procurement integrity and ethics in government contracting.

g. Alternative disputes resolution (ADR).

C. Instructional Material.

1. Government Contract Law Deskbook, Volume I and Volume II.

2. Includes two seminar problems that require the application of the general principles discussed in the conference sessions. The deskbook also includes one professional responsibility seminar problem.

3. Optional reading.

a. John Cibinic, Jr., and Ralph C. Nash, Formation of Government Contracts, published by Government Contracts Program, George Washington University, 3d edition, 1998.

b. Cibinic and Nash, Administration of Government Contracts, published by The George Washington University, 3d edition, 1995.

4. A listing of some contract law terminology and common abbreviations is at Appendix A of the Government Contract Law Deskbook, Volume I. For further review, see Nash, Schooner, and O'Brien, The Government Contracts Reference Book, published by The George Washington University, 2d edition, 1998.

5. A listing of additional contract law research materials and Internet web sites can be found in Volume 1, Chapter 12 this deskbook.

D. Examination.

1. Objective test.

2. A score of 70 is a passing grade.

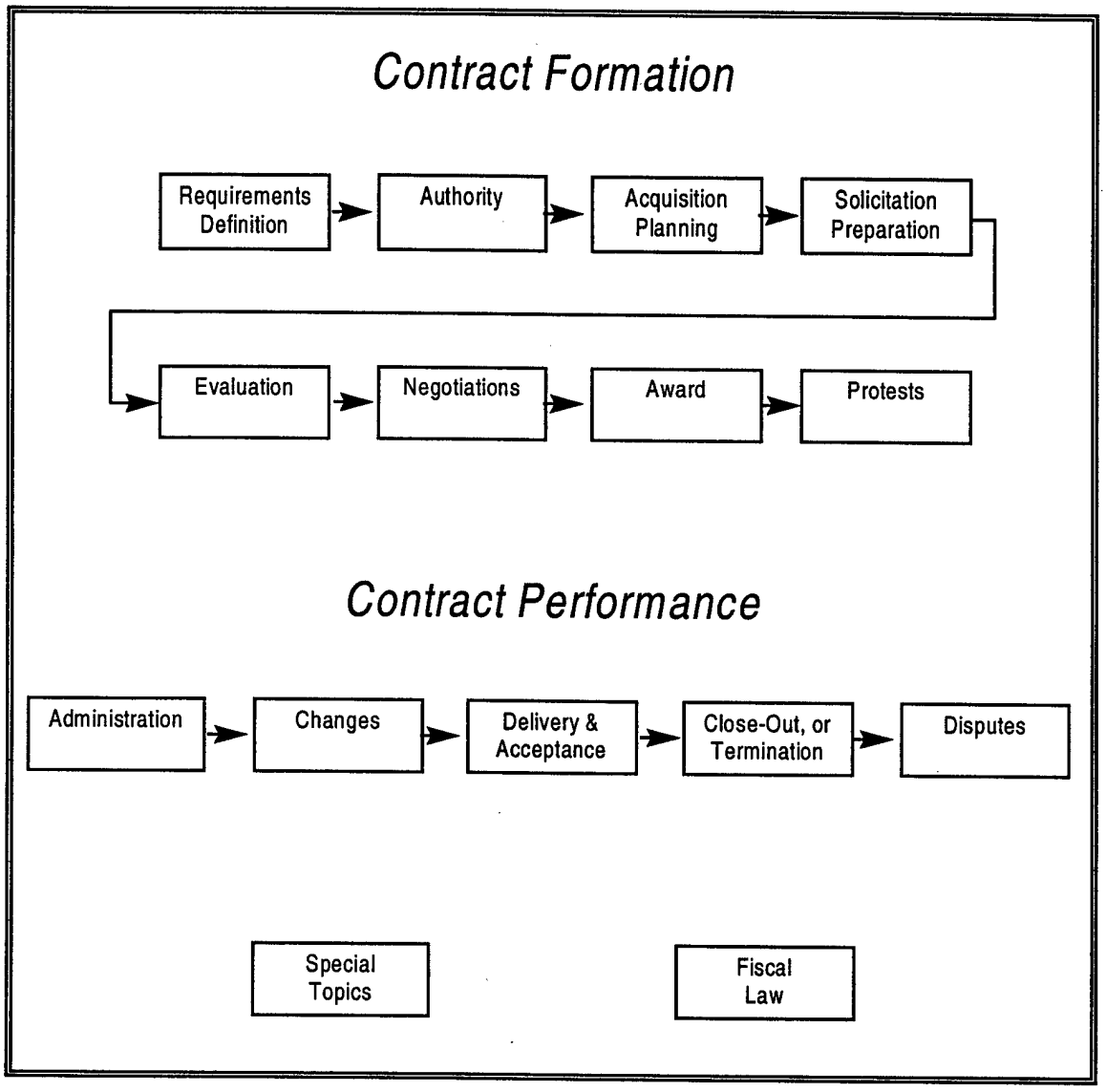
E. ABA Section of Public Contract Law Award.

1. The student with the highest grade is designated Distinguished Graduate and receives the American Bar Association (ABA) Section of Public Contract Law Award.

2. The award consists of a one-year free membership in both the ABA and the ABA Section of Public Contract Law. The name of the student is engraved on a permanent plaque that lists all distinguished graduates of the Contract Attorneys Course.

II. OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS.

The Contracting Process



III. COMMERCIAL/GOVERNMENT CONTRACT COMPARISON.

A. Interrelationship of Commercial and Government Contract Law. The government, when acting in its proprietary capacity, is bound by ordinary commercial law unless otherwise provided by statute or regulation.

> "If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." Cooke v. United States, 91 U.S. 389, 398 (1875).

B. Federal Statutes and Regulations Preempt Commercial Law. Government statutes and regulations predominate over commercial law in nearly every aspect.

> Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that this contract comes within the terms of the law. The Floyd Acceptances, 74 U.S. 666, 680 (1868).

C. Role of Public Policy in Government Contract Law.

1. Clauses required by statute or regulation will be incorporated into a contract by operation of law. G. L. Christian & Assoc. v. United States, 160 Ct. Cl. 1, 312 F.2d 418, cert. denied, 375 U.S. 954 (1963) (regulations published in the Federal Register and issued under statutory authority have the force and effect of law).

2. Clauses included in a contract in violation of statutory or regulatory criteria will be read out of a contract. Carrier Corp., GSBCA No. 8516, 90-1 BCA ¶ 22,409; Charles Breseler Co., ASBCA No. 22669, 78-2 BCA ¶ 13,483.

3. A clause incorporated erroneously will be replaced with the correct one. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993).

4. Contracts tainted by fraud in the inducement may be void ab initio, and contractors may not recover costs incurred during performance. Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659.

5. Labor Standards. See FAR Part 22.

6. Socioeconomic Policies. See FAR Part 25.

IV. CONTRACT ATTORNEY ROLES.

A. Advisor to the Commander and the Contracting Officer.

1. Advise on formation and administration phase issues.

2. Advise on fiscal law issues.

B. Litigator.

1. Litigate protests.

2. Litigate disputes.

3. Litigate collateral matters before federal bankruptcy, district, and circuit courts.

C. Fraud Fighter.

1. Advise how to prevent, detect, and correct fraud, waste, and abuse.

2. Provide litigation support for fraud cases.

D. Business Counselor.

1. Ensure the commander and contracting officer exercise sound business judgment.

2. Provide opinions on the exercise of sound business practices.

3. Counsel is part of the contracting officer's team. FAR 1.602-2; FAR 15.303(b)(1). Army policy requires counsel to participate fully in the entire acquisition process, from acquisition planning through contract completion or termination and close out. Army Federal Acquisition Regulation Supplement (AFARS) 1.602-2.

V. CONTINUING LEGAL EDUCATION FOR THE CONTRACT ATTORNEY.

A. Basic Courses.

1. Contract Attorneys Course (CAC).

a. Basic instruction for attorneys new to the practice of contract law.

b. Offered twice a year; two week course.

c. If you have substantial contract law experience and are taking this as a refresher, please keep the purpose of this course in mind.

2. Fiscal Law Course.

a. Instruction on the statutory and regulatory limitations governing the obligation and expenditure of appropriated funds, and an insight into current fiscal law issues within DOD and other federal agencies.

b. Offered four times a year -- three times here, up to 150 students; once by satellite from the Air Force Judge Advocate General's School, Maxwell AFB, AL, 800-1500 students; 4 ½ days.

B. Advanced Courses.

1. Advanced Contract Law Course.

a. Covers specialized acquisition topics. Intended for attorneys with more than one year of contract law experience. The course addresses a wide variety of topics, possibly including: a survey of recent developments in the field of procurement law; competition; competitive sourcing; commercial item acquisitions; contract litigation; environmental contracting; costs and cost accounting standards; deployment contracting; and fiscal law.

b. Offered in alternate years opposite the Contract Litigation Course (next course March 2001); up to 150 students per course; 4 ½ days.

2. Contract Litigation Course.

a. Instruction on various aspects of federal litigation before the General Accounting Office, federal courts, and the boards of contract appeals. Scope of instruction includes the analysis of claims, bid protests, contract disputes, and litigation techniques.

b. Offered in alternate years with the Advanced Contract Law Course (next course March 2002); up to 150 students per course; 4 ½ days.

3. Procurement Fraud Course.

a. Instruction on criminal, civil, administrative, and contractual remedies used to combat procurement fraud.

b. Offered every other year (next course May 2002); up to 150 students per course; 2 ½ days.

C. Annual Updates.

1. Government Contract Law Symposium.

a. Annual survey of developments in legislation, case law, administrative decisions, and DOD policy for experienced contract law attorneys.

b. Offered in December at The Judge Advocate General's School; up to 245 students per course; 4 ½ days.

2. USAREUR Contract/Fiscal Law Course.

a. To provide USAREUR attorneys instruction on a variety of contract law and/or fiscal law topics, including an annual survey of developments in legislation, case law, administrative decisions, and DOD and USAREUR policy.

b. Offered annually in Germany; 50 students per course; 4 ½ days.

VI. CONCLUSION.

The Players

GOVERNMENT

- Commander
- Comptroller
- Requiring Activity
- User
- Technical Activity
- Contracts Office
- Small Business Advocate
- Competition Advocate
- Legal Office
- Contract Administration Office
- Defense Contract Audit Agency

CONTRACTOR

- Owner / CEO / Shareholders
- Banker & Finance
- Marketers
- Production
- Engineering
- Contract Administration
- Purchasing
- Subcontractors Suppliers
- In-House / Outside Counsel
- Quality Assurance
- Internal Auditors

Chapter 2
Authority to Contract

146th Contract Attorneys Course

CHAPTER 2

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CHAPTER 2

AUTHORITY TO CONTRACT

I. **INTRODUCTION.** "The United States employs over 3 million civilian employees. Clearly, federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States." City of El Centro v. U.S., 922 F.2d 816 (Fed. Cir. 1990).

II. **OBJECTIVES.** Following this block of instruction, students should:

A. Understand the elements of a contract and the different ways that a contract can be formed.

B. Understand the constitutional, statutory, and regulatory bases that permit federal executive agencies to contract using appropriated funds (APFs).

C. Understand how individuals acquire the power to contract on behalf of the government.

D. Understand the different theories that bind the government in contract.

E. Understand what constitutes an "unauthorized commitment" and be able to describe how, and by whom, unauthorized commitments may be ratified.

MAJ John Siemietkowski
146th Contract Attorneys Course
April/May 2001

III. METHODS OF CONTRACT FORMATION.

A. FAR Definition of a Contract. A contract is a mutually binding legal relationship obligating the seller to furnish supplies and services (including construction) and the buyer to pay for them. It includes all types of commitments obligating the government to expend appropriated funds and, except as otherwise authorized, must be in writing. Contracts include bilateral agreements; job orders or task letters issued under a Basic Ordering Agreement; letter contracts; and orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance. FAR 2.101

B. Express Contract.

1. An express contract is a contract whose terms the parties have explicitly set out. BLACK'S LAW DICTIONARY 321 (7th ed. 1999).

2. The required elements to form a government contract are:

a. mutual intent to contract;

b. offer and acceptance; and

c. conduct by an officer having the actual authority to bind the government in contract.

Allen Orchards v. United States, 749 F. 2d 1571, 1575 (Fed. Cir. 1984).

3. Requirement for contract to be in writing. See FAR 2.101 definition of contract, supra.

a. Oral contracts are generally not enforceable against the government unless supported by documentary evidence. See 31 U.S.C. § 1501(a)(1) (an amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of a binding agreement between an agency and another person that is in writing, in a way and form, and for a purpose authorized by law).

b. The predecessor provision to 31 U.S.C. 1501(a)(1) was construed as requiring a written contract to obtain court enforcement of an agreement. United States v. American Renaissance Lines, Inc., 494 F.2d 1059 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1974).

c. The Court of Claims held that failure to reduce a contract to writing under 31 U.S.C. 1501(a)(1) should not preclude recovery. Rather, a party can prevail if it introduces additional facts from which a court can infer a meeting of the minds. Narva Harris Construction Corp. v. United States, 574 F.2d 508 (1978).

d. The Ninth Circuit has held that FAR 2.101 does not prevent a court from finding an implied-in-fact contract. PACORD, Inc. v. United States, 139 F.3d 1320 (9th Cir. 1998).

e. The Armed Services Board of Contract Appeals has followed the Narva Harris position. Various correspondence between parties can be sufficient "additional facts" and "totality of circumstances" to avoid the statutory prohibition in 31 U.S.C. § 1501 (a)(1) against purely oral contracts. Essex Electro Engineers, Inc., ASBCA Nos. 30118, 30119, 88-1 BCA ¶ 20,440; Vec-Tor, Inc., ASBCA Nos. 25807 and 26128, 84-1 BCA ¶ 17,145.

f. The ASBCA has found a binding oral contract existed where the Army placed an order against a GSA requirements contract. C-MOR Co., ASBCA Nos. 30479, 31789, 87-2 BCA ¶ 19,682 (however, the Army placed a written delivery order following a telephone conversation between the contract specialist and C-MOR). Cf. RMTC Sys., AGBCA No. 88-198-1, 91-2 BCA ¶ 23,873 (shipment in response to phone order by employee without contract authority did not create a contract).

C. Implied Contracts.

1. Implied-in-Fact Contract.

a. Where there is no written contract, contractors often attempt to recover by alleging the existence of a contract "implied-in-fact."

b. An implied-in-fact contract is "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the parties showing, in the light of the surrounding circumstances, their tacit understanding." Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923).

c. The requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. OAO Corp. v. United States, 17 Cl. Ct. 91 (1989) (finding implied-in-fact contract for start-up costs for AF early warning system). See generally Willard L. Boyd III, Implied-in-Fact Contract: Contractual Recovery against the Government without an Express Agreement, 21 Pub. Cont. L. J. 84-128 (Fall 1991).

2. Implied-in-Law Contract.

a. An implied-in-law contract is not a true agreement to contract. It is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress." Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923).

b. When a contractor seeks recovery under an implied-in-law theory, the government should file a motion to dismiss for lack of jurisdiction. Neither the Contract Disputes Act (CDA) nor the Tucker Act grants jurisdiction to courts and boards to hear cases involving implied-in-law contracts. 41 U.S.C. §§ 601-613; 28 U.S.C. §§ 1346 and 1491. See Hercules, Inc. v. United States, 516 U.S. 417 (1996); Amplitronics, Inc., ASBCA No. 44119, 94-1 BCA ¶ 26,520.

IV. AUTHORITY OF AGENCIES.

A. Constitutional. As a sovereign entity, the United States has inherent authority to contract to discharge governmental duties. United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831). This authority to contract, however, is limited. Specifically, a government contract must:

1. not be prohibited by law; and

2. be an appropriate exercise of governmental powers and duties.

B. Statutory. Congress has enacted various statutes regulating the acquisition of goods and services by the government. These include the:

1. Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. §§ 2301 - 2316. The ASPA applies to the procurement of all property (except land) and services purchased with appropriated funds by the Department of Defense (DOD), Coast Guard, and National Aeronautics and Space Administration (NASA).

2. Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. §§ 251-260. The FPASA governs the acquisition of all property and services by all executive agencies except DOD, Coast Guard, NASA, and any agency specifically exempted by 40 U.S.C. § 474 or any other law.

3. Office of Federal Procurement Policy Act (OFPPA), 41 U.S.C. § 401 et. seq. This legislation apples to all executive branch agencies, and created the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget. The Administrator of the OFPP is given responsibility to "provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies." 41 U.S.C. § 405(a).

4. Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175.

a. CICA amended the ASPA and the FPASA to make them identical. Because of subsequent legislative action, they are now different in some significant respects.

b. CICA mandates full and open competition for many, but not all, purchases of goods and services.

5. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243. FASA amended various sections of the statutes described above, and eliminated some of the differences between the ASPA and the FPASA.

6. The Clinger-Cohen Act, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186 (1996). This statute is also referred to the Federal Acquisition Reform Act.

7. Clinger-Cohen Act, Pub. L. No. 104-106, Division E, § 5101, 110 Stat. 680 (1996) (previously known as the Information Technology Management Reform Act (ITMRA)). This statute governs the acquisition of information technology by federal agencies. It repealed the Brooks Automatic Data Processing Act, 40 U.S.C. § 759.

8. Annual DOD Authorization and Appropriation Acts.

C. Regulatory.

1. Federal Acquisition Regulation (FAR), codified at 48 C.F.R. chapter 1.

a. The FAR is the principal regulation governing federal executive agencies in the use of appropriated funds to acquire supplies and services.

b. The DOD, NASA, and the General Services Administration (GSA) issue the FAR jointly.

c. These agencies publish proposed, interim, and final changes to the FAR in the Federal Register. They issue changes to the FAR in Federal Acquisition Circulars (FACs).

2. Agency regulations. The FAR system consists of the FAR and the agency regulations that implement or supplement it. The following regulations supplement the FAR.

a. Defense Federal Acquisition Regulation Supplement (DFARS), codified at 48 C.F.R. chapter 2. The Defense Acquisition Regulation (DAR) Council publishes DFARS changes/proposed changes in the Federal Register, and issues them as Defense Acquisition Circulars (DACs).

b. Army Federal Acquisition Regulation Supplement (AFARS).

c. Air Force Federal Acquisition Regulation Supplement (AFFARS).

d. Navy Acquisition Procedures Supplement (NAPS).

e. The AFARS, AFFARS, and NAPS are not codified in the C.F.R. The military departments do not publish changes to these regulations in the Federal Register but, instead, issue them pursuant to departmental procedures.

3. Major command and local command regulations.

V. AUTHORITY OF PERSONNEL.

A. Contracting Authority.

1. Agency Head.

a. The FAR vests contracting authority in the head of the agency. FAR 1.601(a). Within DOD, the heads of the agencies are the Secretaries of Defense, the Army, the Navy, and the Air force. DFARS 202.101.

b. In turn, the head of the agency may establish subordinate contracting activities and delegate broad contracting authority to the heads of the subordinate activities. FAR 1.601(a).

2. Heads of Contracting Activities (HCAs).

a. HCAs have overall responsibility for managing all contracting actions within their activities.

b. There are approximately 65 DOD contracting activities, plus others who possess contracting authority delegated by the heads of the various defense agencies. Examples of DOD contracting activities include Army Forces Command, Naval Air Systems Command, and Air Force Materiel Command. DFARS 202.101.

c. HCAs are contracting officers by virtue of their position. See FAR 1.601; FAR 2.101.

d. HCAs may delegate some of their contracting authority to deputies.

(1) In the Army, HCAs appoint a Principal Assistant Responsible for Contracting (PARC) as the senior staff official of the contracting function within the contracting activity. The PARC has direct access to the HCA and should be one organizational level above the contracting office(s) within the HCA's command. AFARS 1.601(4).

(2) The Air Force and the Navy also permit delegation of contracting authority to certain deputies. AFFARS 5301.601-92; NAPS 5201.603-1.

3. Contracting officers.

a. Agency heads or their designees select and appoint contracting officers. Appointments are made in writing using the SF 1402, Certificate of Appointment. Delegation of micropurchase authority shall be in writing, but need not be on a SF 1402. FAR 1.603-3.

b. Contracting officers may bind the government only to the extent of the authority delegated to them on the SF 1402. Information on a contracting officer's authority shall be readily available to the public and agency personnel. FAR 1.602-1(a).

4. Contracting Officer Representatives (COR).

a. Contracting officers may authorize selected individuals to perform specific technical or administrative functions relating to the contract. A COR may also be referred to as a COTR or QAR.

b. Typical COR designations do not authorize CORs to take any action, such as modification of the contract, that obligates the payment of money. See AFARS 53.9001, Sample COR designation.

B. Actual Authority.

1. The government is bound only by government agents acting within the actual scope of their authority to contract. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (government agent lacked authority to bind government to wheat insurance contract not authorized under Wheat Crop Insurance Regulations); Hawkins & Powers Aviation, Inc. v. United States, 46 Fed. Cl. 238 (2000) (assistant director of Forest Service lacked authority to modify aircraft contract).

2. Actual authority can usually be determined by viewing a contracting officer's warrant or a COR's letter of appointment. See Farr Bros., Inc., ASBCA No. 42658, 92-2 BCA ¶ 24,991 (COR's authority to order suspension of work not specifically prohibited by appointment letter).

3. The acts of government agents which exceed their contracting authority do not bind the government. See HTC Indus., Inc., ASBCA No. 40562, 93-1 BCA ¶ 25,560 (contractor denied recovery although contracting officer's technical representative encouraged continued performance despite cost overrun on the cost plus fixed-fee contract).

C. Apparent Authority.

1. Definition. Authority that a third party reasonably believes an agent has, based on the third party's dealings with the principal. BLACK'S LAW DICTIONARY 128 (7th ed. 1999).

2. The government is not bound by actions of one who has apparent authority to act for the government. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Sam Gray Enterprises, Inc. v. United States, 43 Fed. Cl. 596 (1999) (embassy chargé d'affaires lacked authority to bind government); Mark L. McAfee v. United States, 46 Fed. Cl. 428 (2000) (AUSA lacked authority to forgive plaintiff's farm loan in exchange for cooperation in foreclosure action).

3. In contrast, contractors are bound by apparent authority. American Anchor & Chain Corp. v. United States, 331 F.2d 860 (Ct. Cl. 1964) (government justified in assuming that contractor's plant manager acted with authority).

VI. THEORIES THAT BIND THE GOVERNMENT. The following are often used in combination to support a contractor's claim of a binding contract action.

A. Implied authority.

1. Use of this theory requires that the government employee have some actual authority.

2. Courts and boards may find implied authority to contract if the questionable acts, orders, or commitments of a government employee are an integral or inherent part of that person's assigned duties. See H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989); Confidential Informant v. United States, 46 Fed. Cl. 1 (2000) (even though FBI agents lacked actual authority to contract for rewards, government may be liable under theory of "implied actual authority"); Jess Howard Elec. Co., ASBCA No. 44437, 96-2 BCA ¶ 28,345 (contract administrator had implied actual authority to grant contract extension despite written delegation to the contrary); Sigma Constr. Co., ASBCA No. 37040, 91-2 BCA ¶ 23,926 (contract administrator at work site had implied authority to issue change orders issued under exigent circumstance [drying cement]); Switlik Parachute Co., ASBCA No. 17920, 74-2 BCA ¶ 10,970 (quality assurance representative [QAR] had implied authority to order 100% testing of inflatable rafts).

3. The authority of officials subordinate to the contracting officer is derived from the facts of each case, based on the words of the contract and the conduct of the parties during the contract administration. See Jordan & Nobles Constr. Co., GSBCA No. 8349, 91-1 BCA ¶ 23,659 (on-site representative had authority to inspect supplies and direct work according to his contract interpretation, making the government liable for direction to contractor to stop rejecting defective brick).

B. Ratification.

1. Formal or Express. FAR 1.602-3 provides the contracting officer with authority to ratify certain unauthorized commitments. See section VII, infra. Henke v. United States, 43 Fed. Cl. 15 (1999); Khairallah v. United States, 43 Fed. Cl. 57 (1999) (no ratification of unauthorized commitments by DEA agents).

2. Implied. A court or board may find ratification by implication where a contracting officer has actual or constructive knowledge of the unauthorized commitment and adopts the act as his own. The contracting officer's failure to process a claim under the procedures of FAR 1.602-3 does not preclude ratification by implication. Reliable Disposal Co., ASBCA No. 40100, 91-2 BCA ¶ 23,895 (KO ratified unauthorized commitment by requesting payment of the contractor's invoice); Tripod, Inc., ASBCA No. 25104, 89-1 BCA ¶ 21,305 (KO's knowledge of contractor's complaints and review of inspection reports evidenced implicit ratification); Houston Helicopters, IBCA No. 3186, 96-1 BCA ¶ 28,172 (original contracting officer's approval of payment and forwarding of recommendation for payment ratified dispatcher's decision).

C. Imputed Knowledge.

1. This theory is often used when the contractor fails to meet the contractual obligation to give written notice to the contracting officer of, for example, a differing site condition. Williams v. United States, 127 F. Supp. 617 (Ct. Cl. 1955) (contracting officer deemed to have knowledge of road paving agreement on Air Force base).

2. When the relationship between two persons creates a presumption that one would have informed the contracting officer of certain events, the boards may impute the knowledge of the person making the unauthorized commitment to the contracting officer. Sociometrics, Inc., ASBCA No. 51620, 00-1 BCA ¶ 30,620 ("While the [contract] option was not formally exercised, the parties conducted themselves as if it was."); Leiden Corp., ASBCA No. 26136, 83-2 BCA ¶ 16,612, mot. for recon. denied, 84-1 BCA ¶ 16,947 ("It would be inane indeed to suppose that [the government inspector] was at the site for no purpose.")

D. Equitable Estoppel.

1. A contractor's reasonable, detrimental reliance on statements, actions, or inactions by a government employee may estop the government from denying liability for the actions of that employee. Lockheed Shipbldg. & Constr. Co., ASBCA No. 18460, 75-1 BCA ¶ 11,246, aff'd on recon., 75-2 BCA ¶ 11,566 (government estopped by Deputy Secretary of Defense's consent to settlement agreement).

2. To prove estoppel in a government contract case, the party must establish:

a. knowledge of the facts by the party to be estopped;

b. intent, by the estopped party, that his conduct shall be acted upon, or actions such that the party asserting estoppel has a right to believe it is so intended;

c. ignorance of the true facts by the party asserting estoppel; and

d. detrimental reliance. Emeco Industries, Inc. v. United States, 485 F.2d 652, at 657 (Ct. Cl. 1973).

VII. UNAUTHORIZED COMMITMENTS.

A. Definition. An unauthorized commitment is an agreement that is nonbinding solely because the government representative who made it lacked the authority to enter into that agreement. FAR 1.602-3.

B. Ratification.

1. Ratification is the act of approving an unauthorized commitment, by an official who has the authority to do so, for the purpose of paying for supplies or services provided to the government as a result of an unauthorized commitment. FAR 1.602-3(a).

2. Contracting officers may ratify certain unauthorized commitments. FAR 1.602-3. See also AFARS 1.602-3-90; NAPS 5201.602-3; AFFARS 5301.602-3.

3. Contracting officers may ratify unauthorized commitments if:

a. The government has received and accepted supplies or services, or the government has obtained or will obtain a benefit from the contractor's performance of an unauthorized commitment.

b. At the time the unauthorized commitment occurred, the ratifying official could have entered into, or could have granted authority to another to enter into, a contractual commitment which the official still has authority to exercise.

c. The resulting contract otherwise would have been proper if made by an appropriate contracting officer.

d. The price is fair and reasonable.

e. The contracting officer recommends payment and legal counsel concurs, unless agency procedures expressly do not require such concurrence.

f. Funds are available and were available when the unauthorized commitment occurred.

g. Ratification is within limitations prescribed by the agency.

4. Army HCAs may delegate the authority to approve ratification actions, without the authority to redelegate, to the following individuals.

a. PARC (for amounts of $100,000 or less) (AFARS 1.602-3(b)(3)(A)); and

b. Chiefs of Contracting Offices (for amounts of $10,000 or less) (AFARS 1.602-3(b)(3)(B)).

5. The Air Force and the Navy also permit ratification of unauthorized commitments, but their limitations are different than those of the Army. See AFFARS 5301.602-3; NAPS 5201.602-3.

C. Alternatives to Ratification. If the agency refuses to ratify an unauthorized commitment, a binding contract does not arise. A contractor can pursue one of the following options:

1. Requests for extraordinary contractual relief.

   a. Contractors may request extraordinary contractual relief in the interest of national defense. Pub. L. No. 85-804 (50 U.S.C. §§ 1431-1435); FAR Part 50.

   b. FAR 50.302-3 authorizes, under certain circumstances, informal commitments to be formalized for payment where, for example, the contractor, in good faith reliance on a government employee's apparent authority, furnishes supplies or services to the agency. Radio Corporation of America, ACAB No. 1224, 4 ECR ¶ 28 (1982) (contractor granted $648,747 in relief for providing, under an informal commitment with the Army, maintenance, repair, and support services for electronic weapon system test stations).

   c. Operational urgency may be grounds for formalization of informal commitments under P.L. 85-804. Vec-Tor, Inc., ASBCA Nos. 25807, 26128, 85-1 BCA ¶ 17,755.

2. Doubtful Claims.

   a. Prior to 1995-1996, the Comptroller General had authority under 31 U.S.C. § 3702 to authorize reimbursement on a quantum meruit or quantum valebant basis to a firm that performed work for the government without a valid written contract.

   b. Under quantum meruit, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis. Maintenance Svc. & Sales Corp., 70 Comp. Gen. 664 (1991).

   c. The GAO used the following criteria to determine justification for payment:

      (1) The goods or services for which the payment is sought would have been a permissible procurement had proper procedures been followed;

(2) The government received and accepted a benefit;

(3) The firm acted in good faith; and

(4) The amount to be paid must not exceed the reasonable value of the benefit received. Maintenance Svc. & Sales Corp., 70 Comp. Gen. 664 (1991).

d. Congress transferred the claims settlement functions of the General Accounting Office to the Office of Management and Budget (OMB), which then further delegated settlement authority. See The Legislative Branch Appropriations Act, 1996, Pub. L. 104-53, 109 Stat. 514, 535 (1995); 31 U.S.C. 3702.

e. The Claims Division at the Defense Office of Hearings and Appeals (DOHA) settles these types of claims for the Department of Defense. DOHA decisions can be found at www.defenselink.mil/dodgc/doha.

3. Contract Disputes Act (CDA) claims. If the contractor believes it can meet its burden in proving an implied-in-fact contract, it can appeal a contracting officer's final decision to the United States Court of Federal Claims or the cognizant board of contract appeals. 41 U.S.C. §§ 601-613; FAR Subpart 33.2.

VIII. CONCLUSION.

Chapter 3
Funding & Fund Limitations

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CHAPTER 3

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CHAPTER 3

FUNDING AND FUND LIMITATIONS

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, § 8, grants to Congress the power to ". . . lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . ."

2. U.S. Constitution, Art. I, § 9, provides that "[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law. . . ."

B. Historical Perspective.

1. For many years after the adoption of the Constitution, executive departments exerted little fiscal control over the monies appropriated to them. During these years, departments commonly:

a. Obligated funds in advance of appropriations.

b. Commingled funds and used funds for purposes other than those for which they were appropriated.

c. Obligated or expended funds early in the fiscal year and then sought deficiency appropriations to continue operations.

LTC Tim Pendolino
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2. Congress passed the Antideficiency Act (ADA), 31 U.S.C. §§ 1301, 1341, 1342, 1350, 1351, and 1511-1519, to curb the fiscal abuses by the executive departments which frequently created "coercive deficiencies" that required supplemental appropriations. The Act consists of several statutes that authorize administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds.

II. KEY TERMINOLOGY.

A. Fiscal Year (FY). The Federal Government's fiscal year begins on 1 October and ends on 30 September.

B. Period of Availability. Most appropriations are available for obligation for a limited period of time, *e.g.*, one fiscal year for operation and maintenance appropriations. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter.

C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations may include orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. DOD Financial Management Regulation 7000.14, vol. 1, p. xxi.

D. Budget Authority.

1. Congress finances federal programs and activities by granting "budget authority." Budget authority is also called obligational authority.

2. Budget authority means ". . . authority provided by law to enter into obligations which will result in immediate or future outlay involving government funds . . . ." 2 U.S.C. § 622(2).

a. Examples of "budget authority" include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Cir. A-34, § 11.2.

b. "Contract authority," as noted above, is a limited form of "budget authority." Contract authority permits agencies to obligate funds in advance of appropriations but not to disburse those funds absent appropriations authority. See, e.g., 41 U.S.C. § 11 (Feed and Forage Act).

3. Agencies do not receive cash from appropriated funds to pay for services or supplies. Instead they receive the authority to obligate a specified amount.

E. Authorization Act.

1. An authorization act is a statute, passed annually by Congress, that authorizes the appropriation of funds for programs and activities.

2. An authorization act does not provide budget authority. That authority stems from the appropriations act.

3. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority.

2. An appropriation is a statutory authorization to "incur obligations and make payments out of the U.S. Treasury for specified purposes." The Army receives the bulk of its funds from two annual Appropriations Acts: (1) the Department of Defense Appropriations Act; and (2) the Military Construction Appropriations Act.

3. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. Principles of Fed. Appropriations Law, vol. I, p. 2-13, GAO/OGC 91-5 (1991).

G. Comptroller General and General Accounting Office (GAO).

1. Investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.

2. Established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.

3. Issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

III. ADMINISTRATIVE CONTROL OF APPROPRIATIONS.

A. Methods of Subdividing Funds.

1. Formal subdivisions. Appropriations are subdivided by the executive branch departments and agencies.

a. These formal limits are referred to as apportionments, allocations, and allotments.

b. Exceeding a formal subdivision of funds violates the ADA. 31 U.S.C. § 1517(a)(2); DFAS-IN Reg. 37-1, para. 7-5b.

2. Informal subdivisions. Agencies may subdivide funds at lower levels, *e.g.*, within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets. These limits are <u>not</u> formal subdivisions of funds.

a. These targets also may be referred to as allowances.

b. Incurring obligations in excess of a target is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation may occur, and the person responsible for exceeding the target may be held liable for the violation.

c. Army policy allows formal subdivisions of funds at the Major Command (MACOM) level and above.

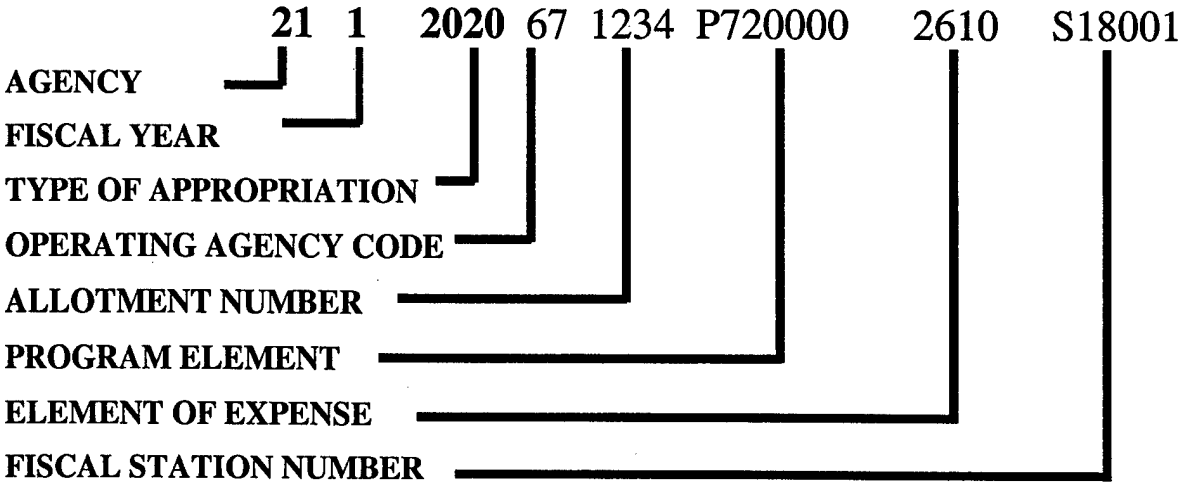
B. Accounting Classifications.

1. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to ensure that funds are used correctly.

2. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications. The XX, in DFAS-IN 37-100-XX, stands for the last two digits of the fiscal year, e.g., DFAS-IN 37-100-01 is the source for accounting classification data for FY 2001 for the Department of the Army. DFAS-IN 37-100-XX is published annually.

C. Understanding an Accounting Classification.

1. The following is a sample fund cite:



a. The first two digits represent the military department. The "**21**" in the example shown denotes the Department of the Army.

b. Other department codes are:

(1) 17 - Navy

(2) 57 - Air Force

(3) 97 - Department of Defense

c. The third digit shows the fiscal year/period of availability of the appropriation. The "1" in the example shown indicates FY 2001 funds.

(1) Annual appropriations are used frequently in installation contracting.

(2) Other fiscal year designators encountered less frequently in installation contracting include:

(a) Third Digit = X = No year appropriation. This appropriation is available for obligation indefinitely.

(b) Third Digit = 7/1 = Multi-year appropriation. In this example, funds were appropriated in FY 1997 and remain available through FY 2001.

d. The next four digits reveal the type of the appropriation. The following designators are used within DOD fund citations:

	ARMY	NAVY/MC	AIR FORCE	OSD
Military Personnel	2010	1453/1105	3500	N/A
Reserve Personnel	2070	1405/1108	3700	N/A
National Guard Personnel	2060	N/A	3850	N/A
O&M*	**2020**	1804/1106	3400	0100
O&M, Reserve	2080	1806/1107	3740	N/A
O&M, National Guard	2065	N/A	3840	N/A
Procurement (Aircraft)	2031	1506	3010	N/A
Procurement (Missiles)	2032	N/A	3020	N/A
Procurement (Tracks)	2033	1507	N/A	N/A
Procurement (Ammunition)	2034	1508	3011	N/A
Shipbuilding & Conversion	N/A	1611	N/A	N/A
Other Procurement	2035	1810/1109	3080	0300
RDT&E,	2040	1319	3600	0400
Military Construction	2050	1205	3300	0500
Family Housing Constr.	0702	0703	7040	0706
Reserve Construction	2086	1235	3730	N/A
National Guard Constr.	2085	N/A	3830	N/A
Environmental Restoration	0810	0810	0810	0810
Wildlife Conservation	5095	5095	5095	N/A

*Operations and Maintenance: This appropriation funds the operation and maintenance of most Army activities and facilities.

IV. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

A. General Limitations.

1. The authority of executive agencies to spend appropriated funds is limited.

2. An agency may obligate and expend appropriations only for a proper **purpose.**

3. An agency may obligate only within the **time** limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year).

4. An agency must obligate within the **amounts** appropriated by Congress and formally distributed to or by the agency.

B. Limitations Based Upon Purpose.

1. The "Purpose Statute," (31 U.S.C. § 1301(a)) provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.

2. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

a. Expenditure of appropriations must be for a specified purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.

b. The expenditure must not be prohibited by law.

c. The expenditure must not be otherwise provided for, i.e., it must not fall within the scope of some other appropriation.

3. Appropriations Acts. DOD has nearly one hundred separate appropriations available to it for different purposes.

a. Appropriations are differentiated by service (Army, Navy, etc.), component (Active, Reserve, etc.), and purpose (Procurement, Research and Development, etc.). The major DOD appropriations provided in the annual Appropriations Act are:

(1) Operation and Maintenance -- used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

(2) Personnel -- used for military pay and allowances, permanent change of station travel, etc.;

(3) Research, Development, Test and Evaluation (RDT&E) -- used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and

(4) Procurement -- used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement."

b. DOD also receives smaller appropriations for other specific purposes (e.g., Overseas Humanitarian, Disaster, and Civic Aid (OHDACA), Chemical Agents and Munitions Destruction, etc.).

c. Congress appropriates funds separately for military construction.

4. Authorization Acts.

a. Annual authorization acts generally precede DOD's appropriations acts.

b. The authorization act may clarify the intended purposes of a specific appropriation, or contain restrictions on the use of the appropriated funds.

5. Legislative History.

a. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

b. The legislative history is not necessarily binding upon the Executive Branch. If Congress provides a lump sum appropriation without restricting what may be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 75-2 CPD ¶ 203.

6. The Necessary Expense Rule.

a. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriation act, although it does specify the purpose of many expenditures. DOD has reasonable discretion to determine how to accomplish the purpose of an appropriation. Internal Revenue Serv. Fed. Credit Union -- Provision of Automatic Teller Mach., B-226065, 66 Comp. Gen. 356 (1987).

b. The standard for measuring the propriety of a particular expenditure, if not specified in the statute, is:

(1) Whether it is reasonably necessary to carry out an authorized function; or

(2) Whether it will contribute materially to the effective accomplishment of that function.

c. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). A necessary expense, however, must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

C. Limitations Based upon Time. 31 U.S.C. § 1502(a).

1. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within the period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.

a. Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations, or to liquidate prior valid obligations, but not to incur new obligations.

b. There are several important exceptions to the general prohibition against obligating funds after the period of availability.

(1) Protests. 31 U.S.C. § 1558. This statutory provision is incorporated at FAR 33.102(c).

(2) Terminations for default. See Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).

(3) Terminations for convenience, pursuant to a court order or agency determination of erroneous award. Navy, Replacement Contract, B-238548, 91-1 CPD ¶ 117; Matter of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).

2. Appropriations are available only for the bona fide need of an appropriation's period of availability. 31 U.S.C. § 1502(a). See Magnavox -- Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953).

3. In analyzing the bona fide need for a given item or service, the following factors are appropriate for consideration:

   a. The required delivery date in the contract.

   b. The normal rate of consumption.

   c. When the government will make facilities, sites, or tools available.

   d. Whether the government controls when the contractor may begin the work.

   e. Normal weather conditions when planning for outdoor construction or renovation projects.

4. Supplies.

   a. Supplies are generally the bona fide need of the period in which they are needed or consumed. Orders for supplies are proper only when the supplies are actually required. Thus, supplies needed for operations during a given fiscal year are bona fide needs of that year. To Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965).

   b. There are two exceptions to the foregoing general rule.

(1) Stock level exception. A bona fide need for supplies exists when there is a present requirement for supply items to meet authorized stock levels (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.). DFAS-DE 7000-4, para. 4c(1).

(2) Lead-time exception. Goods or materials may not be readily available when required because of the lead time necessary to order, produce, fabricate, and deliver them. Activities may purchase long-lead items in one FY, even though the items will not be used until needed in the next FY. Chairman, Atomic Energy Commission, 37 Comp. Gen. 155, 159 (1957).

5. Services.

a. Services are presumed to be "severable" and, hence, bona fide needs of the fiscal year in which they are performed. Examples are janitorial, gardening, and transportation services. As a general rule, use current funds to obtain current services, and do not use current funds to obtain future services.

b. There are statutory exceptions to the general rule. 10 U.S.C. § 2410a permits DOD agencies to award severable service contracts for a period not to exceed 12 months at any time during the fiscal year, funded completely with current appropriations. This statutory exception essentially swallows the general rule. Non-DOD agencies have similar authority. 41 U.S.C. § 253l. For the Coast Guard the authority is found in 10 U.S.C. § 2410a(b).

c. If the services are **nonseverable**, i.e., for a single undertaking, agencies must obligate funds for the entire undertaking at contract award, even though performance will occur during the next fiscal year. See Incremental Funding of U.S. Fish & Wildlife Serv. Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (work on an environmental impact statement properly crossed fiscal years).

D. Limitations Based upon Amount.

1. The Antideficiency Act, 31 U.S.C. §§ 1341-44, 1511-17, prohibits any government officer or employee from:

a. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).

b. Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). See 31 U.S.C. § 1517(a)(2).

c. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).

d. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342.

2. Investigating violations. If a violation occurs, the agency must investigate to identify the responsible individual. The agency must report the violation to Congress through the Secretary of the Army. Violations could result in administrative and/or criminal sanctions. See DOD 7000.14-R, vol. 14.

a. The commander must submit a flash report within fifteen working days of discovery of the violation.

b. The MACOM commander must appoint a "team of experts," including members from the financial management and legal communities, to conduct a preliminary investigation.

c. If the preliminary report concludes a violation occurred, the MACOM commander will appoint an investigative team to determine the cause of the violation and the responsible parties. Investigations are conducted pursuant to AR 15-6, Procedure for Investigating Officers and Boards of Officers.

d. The head of the agency must report to the President and Congress whenever a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517 is discovered. OMB Cir. A-34, para. 32.2; DOD Dir. 7200.1, Administrative Control of Appropriations (4 May 1995), encl. 5, para. R.

3. Individuals responsible for an Antideficiency Act violation shall be sanctioned commensurate with the circumstances and the severity of the violation. See DOD Dir. 7200.1, para. D.5; see also 31 U.S.C. §§ 1349(a), 1518.

V. COMMON PROBLEMS.

A. Using Appropriated Funds for Personal Expenses.

1. Food.

a. Generally, appropriated funds are not available to pay for government employees' food or refreshments within their official duty stations. Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (coffee and donuts unauthorized entertainment expense). However, agencies may pay, under **limited circumstances**, a facility rental fee that includes the cost of food. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999, (unpub.) (payment of fee was proper because fee was all-inclusive, not negotiable, and competitively priced to those that did not include food).

b. Exceptions.

(1) "Light Refreshments."

(a) The agency may consider the cost of "light refreshments" as part of the agency's overall administrative costs of hosting government-sponsored conferences. See Federal Travel Regulation, Part 301-74. See also Joint Federal Travel Regulation (JFTR), Part G: Conference Planning, ¶ 2550; Joint Travel Regulation (JTR), Part S: Conference Planning, ¶ 4950.

(b) The conference must involve attendee travel. JFTR, ¶ U2550, D; JTR ¶ 4950, D. A "conference" is defined as a "meeting, retreat, seminar, symposium or . . . training activities that are conferences . . ." Id.

(2) Formal Meetings and Conferences. 5 U.S.C. § 4110.

(a) The government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.

(b) However, this exception does **not apply to purely internal business meetings or conferences sponsored by government agencies.** Pension Benefit Guaranty Corp.—Provision of Food to Employees, B-270199, Aug. 6, 1996 (unpub); Meals for Attendees at Internal Government Meetings, B-230576, 68 Comp. Gen. 604 (1989).

(c) **NOTE:** This provision applies only to civilian employees. There is no corresponding provision for military members in Title 10 of the U.S. Code. But see ¶ 4510 of the Joint Federal Travel Regulation, that authorizes military members to be reimbursed for occasional meals within the **local area** of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS.

(3) Training. 5 U.S.C. § 4109; 10 U.S.C. §4301.

(a) The government may provide meals if necessary to achieve the objectives of a training program. Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.).

(b) However, an agency's characterization of a meeting as "training" is not controlling. Corps of Engineers—Use of Appropriated Funds to Pay for Meals, B-249795, May 12, 1993 (unpub.) (quarterly managers meetings of the Corps do not constitute "training"); See also Pension Benefit Guaranty Corp.—Provision of Food to Employees, supra. (food not proper training expense if unnecessary for employee to obtain full benefit of training).

(4) Award Ceremonies. 5 U.S.C. § 4503 (civilian incentive awards); 10 U.S.C. § 1124 (military **cash** awards).

(a) Defense Reutilization and Marketing Service Award Ceremonies, B-270327, March 12, 1997 (agency may spend $20.00 per person for luncheons provided at awards ceremonies pursuant to the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124 which expressly permit agency to "incur necessary expense for the honorary recognition. . ."]).

(b) **NOTE: 10 U.S.C. § 1125 governs Secretary of Defense's (SECDEF) authority to award medals, trophies, badges, etc. to members/units of armed forces for accomplishments. This statute does not have the express "incur necessary expense" language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124.**

2. Licenses and Certificates.

a. General Rule. Agencies may not use appropriated funds to pay employees' license or certificate fees. A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to court of appeals).

b. Exception. When obtaining the license is necessary to comply with state-established environmental standards. Air Force--Appropriations--Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994 (unpub.).

3. Business Cards.

a. General Rule. Agencies may use appropriated funds for business cards if the agency head or delegee determines that the purchase is a "necessary expense." See To Mr. Jerome J. Markiewicz, B-280759, Nov. 5, 1998 (unpub.).

b. **Army Policy**. Army Regulation 25-30, para. 11.11, (21 June 1999). Army policy authorizes the printing of business cards at government expense.

(1) Business cards must be necessary to perform official duties and to facilitate business communications.

(2) Commercially printed business cards are authorized but are restricted generally to designated investigators and recruiters. Such cards must be limited to a single ink color. Department of the Army memorandum, dated 2 August 1999, however, permits agencies to procure printed business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer.

(3) Agencies must use existing hardware and software to produce cards and must use card stock that may be obtained through in-house or commercial supply channels.

c. **Air Force Policy.** Air Force IC 99-1 to DODD 5330.3/AFSUP provides guidance for the printing of business cards.

(1) The cards must be required for the performance of official functions when the exchange of the cards would facilitate mission-related business communications.

(2) Agencies must use existing hardware, software and agency-purchased card stock.

(3) Business cards for recruiters may be purchased through the Defense Automated Printing Service after receiving approval from Headquarters Air Education and Training Command, Communications and Information Directorate.

d. **Navy Policy.** Department of the Navy memorandum, dated 9 March 1999, authorizes printing of business cards.

(1) General or flag rank or civilian Senior Executive Service members may approve printing of cards for those organizations or positions that require business cards in the performance of official duties.

(2) Activities must use existing software and agency-purchased card stock.

4. Christmas Cards.

a. Holiday greeting cards are a personal expense, and use of appropriated funds to purchase them is improper. See Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma (II), B-247563.4, December 11, 1996 (unpub.).

b. Greeting cards are distinguishable from business cards. The former are used normally as goodwill gestures; the latter facilitate business communications and are linked to mission accomplishment.

B. Improper Augmentation of Appropriations.

1. General rule -- Augmentation of appropriations is prohibited.

a. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. This generally results in expenditures by the agency in excess of the amount originally appropriated by Congress.

b. Basis for the augmentation rule. Augmentation normally violates one or more of the following provisions:

(1) The United States Constitution, Article I, § 9, Clause 7: "No money shall be drawn from the treasury except in consequence of appropriations made by law."

(2) 31 U.S.C. § 1301(a) (Purpose Statute): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

(3) 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute): "Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim."

C. Expense/Investment Threshold Issues.

1. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. See DOD Reg. 7000.14-R, vol. 2A, ch 1. Expenses generally include:

a. Labor of civilian, military, or contractor personnel;

b. Rental charges for equipment and facilities;

c. Food, clothing, and fuel;

d. Maintenance, repair, overhaul, and rework of equipment;

e. Real property maintenance, repair, and O&M-funded minor construction projects; and

f. Assemblies, spare and repair parts, and other items of equipment not designated for centralized management and costing less than $100,000.

2. Investments are the acquisition costs of DOD capital assets and are normally financed with procurement appropriations. These costs benefit future periods and tend to have a long-term character. Investments generally include:

a. All items of equipment, including assemblies, ammunition, explosives, modification kits, and spares and repair parts not managed by the Defense Working Capital Fund (formerly Defense Business Operations Fund), that are subject to centralized item management;

b. All equipment items having a system unit cost equal to or greater than $100,000; and

c. Construction, including equipment installed and made an integral part of the facilities.

3. Past audits revealed problems with activities using O&M funds to acquire computer systems that exceeded the expense/investment threshold. This constitutes a violation of the Purpose Statute and may result in a violation of the Antideficiency Act. DOD Reg. 7000.14-R, vol. 2A, ch. 1, para. 010201D and DFAS-IN 37-100-01, Appendix A provide special guidance for information technology (IT) purchases.

a. Agencies must consider the "system" concept when evaluating the procurement of IT end items. The determination of what constitutes a "system" must be based on the primary function of the hardware and software to be acquired, as stated in the approved requirements document.

b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate "system" for funding purposes, if the primary function of the end item is to operate independently.

d. Include standard off-the-shelf software as part of the total system cost when purchased as part of initial acquisition of equipment.

e. Fragmented or piecemeal acquisition of a documented requirement may not be used to circumvent the "system" concept.

D. Military Construction.

1. Congressional oversight of the Military Construction Program is extensive and pervasive. For example, no public contract relating to erection, repair, or improvements to public buildings shall bind the government for funds in excess of the amount specifically appropriated for that purpose. 41 U.S.C. § 12.

2. There are different categories of construction work with distinct funding requirements.

3. Specified Military Construction (MILCON) Program -- projects costing over $1.5 million.

a. Congress authorizes these projects by location and funds them in a lump sum by service.

b. Congressional reports identify individual projects specifically.

4. Unspecified Minor Military Construction (MMC) Program -- military construction projects costing between $500,000 and $1.5 million. 10 U.S.C. § 2805(a).

a. Congress provides annual funding and approval to each military department for minor construction projects that are not specifically identified in a Military Construction Appropriations Act.

b. The Service Secretary concerned uses these funds for minor projects not specifically approved by Congress.

c. Statute and regulations require approval by the Secretary of the Department and notice to Congress before a minor military construction project exceeding $500,000 is commenced.

5. Minor Military Construction projects costing less than $500,000. 10 U.S.C. § 2805(c); DOD Dir. 4270.36; AR 415-15, para. 1-6.c.(1).

a. Services fund these projects with O&M appropriations.

b. Construction includes alteration, conversion, addition, expansion, and replacement of existing facilities, plus site preparation and installed equipment.

c. The $500,000 limitation applies to each minor construction project. A project includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b).

d. Project splitting is prohibited. The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (Air Force improperly split into multiple projects, a project involving a group of twelve related buildings).

e. Using O&M funds for construction in excess of the $500,000 project limit violates the Purpose Statute and may result in a violation of the Antideficiency Act. See DOD Accounting Manual 7220.9-M, Ch. 21, para. E.4.e; AFR 177-16, para. 23c; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

6. Maintenance and repair projects.

a. DOD funds these projects with O&M appropriations.

b. "Maintenance" is routine recurrent work that prevents deterioration and preserves the facility for its intended purpose. See AR 420-10, sec. II, Terms.

c. DOD guidance. Memorandum, Office of the Secretary of Defense, Comptroller, 2 July 97, subject: Definition for Repair and Maintenance.

(1) Repair means to restore a real property facility, system, or component to such a condition that it may be used effectively for its designated purpose.

(2) When repairing a facility, the components of the facility may be repaired by replacement, and the replacement may be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment may be repaired by replacement, be state-of-the-art, and provide for more capacity than the original unit due to increased demand/standards. Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (*e.g.*, accessibility, health safety, or environmental) may be included as repair.

(3) Additions, new facilities, and functional conversions must be done as construction. Construction projects may be done concurrently with repair projects as long as the work is separate and segregable.

d. Army guidance. See AR 420-10, Management of Installation Directorates of Public Works; see also DA Pamphlet 420-11, Project Definition and Work Classification.

(1) A facility must be in a failed or failing condition to be considered for a repair project.

(2) When repairing a facility you may bring it (or a component of a facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair project. Another example would be adding air conditioning to meet a current standard when repairing a facility. Moving load-bearing walls, additions, new facilities, and functional conversions must be done as construction.

(3) Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when a component or facility is not in need of repair, is construction.

e. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately unless the work is so integrated that separation of construction from maintenance and repair is not possible. In the latter case, fund all work as construction.

f. Improperly classifying work as maintenance or repair, rather than construction, may lead to exceeding the $500,000 project limit.

7. Exercise-related construction. See The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

a. Congress has prohibited the use of O&M for minor construction outside the U.S. on Joint Chiefs of Staff (JCS) directed exercises.

b. All exercise-related construction projects coordinated or directed by the JCS outside the U.S. are limited to unspecified minor construction accounts of the Military Departments. Furthermore, Congress has limited the authority for exercise-related construction to no more than $5 million per Department per fiscal year. 10 U.S.C. § 2805(c) (2). Currently, Congress funds exercise-related construction as part of the Military Construction, Defense Agencies, appropriation.

c. DOD's interpretation excludes from the definition of exercise-related construction only truly temporary structures, such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. DOD funds the construction of these temporary structures with O&M appropriations.

d. Congress requires the Secretary of Defense to give prior notice of the plans and scope of any proposed military exercise involving U.S. personnel if the amounts expended for construction, either temporary or permanent, are projected to exceed $100,000. Military Construction Appropriations Act, 1999, Pub. L. 105-237, § 113, 112 Stat. 1558 (1998).

8. Operational Construction -- Use of O&M appropriations. The Deputy General Counsel (Ethics & Fiscal), Department of the Army, has concluded that O&M funds may be used for materials and/or erection of structures of a temporary operational nature if materials or structures are intended to be used only for a temporary period by forces in a declared contingency or to facilitate combat operations. Activities may not build structures intended to sustain permanent operations following contingency or combat operations. MILCON appropriations criteria apply in all other situations.

E. Improper Year-End Spending.

1. Overstocking supplies.

2. Entering into contracts for maintenance, repair, and construction although work cannot begin until the spring.

3. Inappropriate offloading using interagency orders.

a. Several statutes authorize federal agencies to obtain goods and services from other agencies. See 31 U.S.C. § 1535 (Economy Act); 41 U.S.C. § 23 (Project Order Statute); see also FAR Subpart 17.5; DFARS Subpart 217.5.

b. Activities must avoid using interagency acquisitions to circumvent the law. See, e.g., DOD Inspector General Audit Report Nos. 94-008 (Oct. 20, 1993), 93-068 (Mar. 18, 1993), 93-042 (Jan. 21, 1993), 92-069 (Apr. 3, 1992), 90-085, (June 19, 1990).

c. General officer approval is required before issuing an Economy Act order to a supplying activity outside DOD.

VI. CONCLUSION.

Chapter 4
Competition

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CHAPTER 4

COMPETITION

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CHAPTER 4

COMPETITION

I. INTRODUCTION. Following this block of instruction, students will understand:

A. The levels of competition applicable to government contracts.

B. The statutory and regulatory requirements for full and open competition.

C. The exceptions to the requirement for full and open competition.

D. The impact of specifications on competition.

II. COMPETITION REQUIREMENTS.

A. The Competition in Contracting Act of 1984. Pub. L. No. 98-369, Title VII, § 2701, 98 Stat. 1175.

1. Congressional Intent. Congress decided to promote economy, efficiency, and effectiveness in the procurement of supplies and services by requiring agencies to conduct acquisitions on the basis of full and open competition to the maximum extent practicable. The Competition in Contracting Act (CICA) amended several titles of the United States Code, including:

a. The Armed Services Procurement Act of 1947. Title 10 U.S.C. §§ 2304-2305 details the competition requirements that apply to the Department of Defense (DOD), the individual military departments, the Department of Transportation (DOT) (e.g., the Coast Guard), and the National Aeronautics and Space Administration (NASA).

b. The Federal Property and Administrative Services Act of 1949. Title 41 U.S.C. §§ 253-253a details the competition requirements that apply to agencies other than the DOD, the individual military departments, the DOT, and NASA.

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c. The Office of Federal Procurement Policy Act. Title 41 U.S.C. §§ 401-424 details additional competition requirements applicable to all agencies.

(1) 41 U.S.C. § 404 establishes the Office of Federal Procurement Policy (OFPP) to provide leadership and guidance in the development of procurement policies and systems.

(2) 41 U.S.C. § 416 requires agencies to publicize procurement actions by publishing or posting procurement notices.

(3) 41 U.S.C. § 418 requires agencies to appoint competition advocates.

2. The following sections of the Federal Acquisition Regulation (FAR) – and the corresponding sections of the Defense Federal Acquisition Regulation Supplement (DFARS) and individual service supplements (e.g., the Army Federal Acquisition Regulation Supplement (AFARS)) – implement the statutory requirements:

a. FAR Part 5 -- Publicizing Contract Actions;

b. FAR Part 6 -- Competition Requirements;

c. FAR Part 7 -- Acquisition Planning;

d. FAR Part 10 -- Market Research;

e. FAR Part 11 -- Describing Agency Needs;

f. FAR Part 12 -- Acquisition of Commercial Items; and

g. FAR Part 13 -- Simplified Acquisition Procedures.

B. Congressional Scheme.

1. The overarching goal of CICA is to achieve competition to the maximum extent practicable.

2. There are three possible levels of competition in the acquisition process.

a. Full and Open Competition.

b. Full and Open Competition After Exclusion of Sources.

c. Other Than Full and Open Competition.

3. Agencies must achieve competition to the maximum extent practicable at each level of competition.

C. Applicability of FAR Part 6. FAR 6.001.

1. The provisions of FAR Part 6 do not apply to the following types of procurements:

a. Simplified acquisitions. FAR Part 13; American Eurocopter Corp., B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 (holding that the simplified acquisition of a Bell helicopter was exempt from the statutory requirement for full and open competition). But see L.A. Sys. v. Dep't of the Army, GSBCA No. 13472-P, 96-1 BCA ¶ 28,220 (holding that the Army improperly fragmented its requirements in order to use simplified acquisition procedures and avoid the requirement for full and open competition).

b. Contracts awarded using contracting procedures authorized by statute. See, e.g., 18 U.S.C. §§ 4121-4128; 41 U.S.C. §§ 46-48c; FAR Subpart 8.6 (acquisitions from Federal Prison Industries, Inc.); FAR Subpart 8.7 (acquisitions from nonprofit agencies employing people who are blind or severely disabled).

c. Contract modifications within the scope of the original contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (holding that a modification adding T3 circuits was within the scope of a comprehensive contract for telecommunication services); Phoenix Air Group, Inc. v. U.S., 46 Fed. Cl. 90 (2000) (holding that a modification for flight training services was within the scope of the original contract despite different geographical area); Paragon Systems, Inc., B-284694.2, July 5, 2000, 2000 CPD ¶ 114; L-3 Communications Aviation Recorders, B-281114, Dec. 28, 1998, 99-1 CPD ¶ 18; Sprint Communications Co., B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60; Neil R. Gross & Co., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212, aff'd on reconsid. B-237434.2, May 22, 1990, 90-1 CPD ¶ 491. But see Makro Janitorial Svcs, Inc., B-282690, Aug. 18, 1999, 99-1 CPD ¶ 39 (holding that a task order for housekeeping services improperly exceeded the scope of a contract for preventive maintenance and inventory); CCL Inc., v. United States, 39 Fed. Cl. 780 (1997) (holding that a modification adding 10 DOD MegaCenters was outside the scope of a contract to consolidate 44 Air Force Logistics Command computer facilities into 6 information processing centers); Ervin and Assocs., Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 (holding that a task order to support HUD's Portfolio Reengineering/Mark-to-Market Demonstration Program was outside the scope of an accounting support services contract); Access Research Corp., B-281807, Apr. 5, 1999, 99-1 CPD ¶ 64 (holding that the digitization of the Air Force's technical order warehouse was within the scope of the original contract and all prior modifications).

d. Orders placed under requirements or definite-quantity contracts.

e. Orders placed under indefinite-quantity contracts entered into pursuant to FAR Part 6. Corel Corp., B-283862, Nov. 18, 1999, 99-2, CPD ¶ 90. But see Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 (holding that orders which implement a "downselect" that result in the elimination of a vendor to which a delivery order contract has been issued from consideration for future orders are not exempt from competition requirements).

f. Orders placed under task or delivery order contracts entered into pursuant to FAR Subpart 16.5.

2. The FAR provisions that govern these types of procurements set forth the applicable competition requirements.

D. Full and Open Competition. 10 U.S.C. § 2304(a)(1); 41 U.S.C. § 253(a)(1); FAR Subpart 6.1.

1. Definition. FAR 6.003.

a. "Full and open competition" refers to a contract action in which all responsible sources are permitted to compete.

b. Full and open competition may not actually achieve competition.

2. Policy. FAR 6.101.

a. Contracting officers must promote full and open competition by using competitive procedures to solicit offers and award contracts unless they can justify using full and open competition after exclusion of sources (FAR Subpart 6.2), or other than full and open competition (FAR Subpart 6.3).

b. Contracting officers must use the competitive procedure that is best suited to the particular contract action.

3. Examples of competitive procedures that promote full and open competition include:

a. Sealed bidding. FAR Part 14.

b. Contracting by negotiation. FAR Part 15.

c. Combinations (e.g., two-step sealed bidding). FAR Part 14.5.

E. Full and Open Competition After Exclusion of Sources. 10 U.S.C. § 2304(b); 41 U.S.C. § 253(b); FAR Subpart 6.2; DFARS Subpart 206.2.

1. Policy. FAR 6.201.

a. Under limited circumstances, a contracting officer may exclude one or more sources from a particular contract action.

b. After excluding these sources, a contracting officer must use competitive procedures that promote full and open competition.

2. A contracting officer may generally exclude one or more sources under two circumstances.

a. Establishing or maintaining alternative sources for supplies or services. FAR 6.202; DFARS 206.202.

(1) The agency head must determine that the exclusion of one or more sources will serve one of six purposes.

(a) Increase or maintain competition and probably result in reduced overall costs.

(b) Enhance national defense by ensuring that facilities, producers, manufacturers, or suppliers are available to furnish necessary supplies and services in the event of a national emergency or industrial mobilization. Hawker Eternacell, Inc., B-283586, 1999 U.S. Comp. Gen. LEXIS 202 (Nov. 23, 1999); Right Away Foods Corp., B-219676.2, B-219676.3, Feb. 25, 1986, 86-1 CPD ¶ 192; Martin Elecs. Inc., B-219803, Nov. 1, 1985, 85-2 CPD ¶ 504.

(c) Enhance national defense by ensuring that educational institutions, nonprofit institutions, or federally funded research and development centers will establish and maintain essential engineering, research, and development capabilities.

(d) Ensure the continuous availability of a reliable source of supply.

(e) Satisfy projected needs based on historical demand.

(f) Satisfy a critical need for medical, safety, or emergency supplies.

(2) The agency head must support the decision to exclude one or more sources with written determinations and findings (D&F). See generally FAR Subpart 1.7; see also DFARS 206.202 (providing sample format and listing required contents).

(a) The agency head or his designee must sign the D&F.

(b) The agency head cannot create a blanket D&F for similar classes of procurements.

b. Set-asides for small businesses. FAR 6.203; DFARS 206.203.

(1) A contracting officer may limit competition to small business concerns to satisfy statutory or regulatory requirements. See FAR Subpart 19.5.

(2) The contracting officer is not required to support the determination to set aside a contract action with a separate written justification or D&F.

F. Other Than Full and Open Competition. 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c); FAR Subpart 6.3; DFARS Subpart 206.3; AFARS Subpart 6.3.

1. Policy. FAR 6.301.

a. Executive agencies cannot contract without providing for full and open competition unless one of the statutory exceptions listed in FAR 6.302 applies.

b. A contract awarded without full and open competition must reference the applicable statutory exception.

c. Agencies cannot justify contracting without providing for full and open competition based on:

(1) A lack of advance planning. 10 U.S.C. § 2304(f)(5)(A); FAR 6.301(c)(1); TLC Servs., Inc., B-252614, June 22, 1993, 93-1 CPD ¶ 481; Service Contractors, B-243236, July 12, 1991, 91-2 CPD ¶ 49. Cf. Diversified Tech. & Servs. of Virginia, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 (refusing to fault the Department of Agriculture where the procurement was delayed by the agency's efforts to implement a long-term acquisition plan).

(2) Concerns regarding the availability of funds. 10 U.S.C. § 2304(f)(5)(A); FAR 6.301(c)(2). Cf. AAI ACL Tech., Inc., B-258679.4, Nov. 28, 1995, 95-2 CPD ¶ 243 (distinguishing the expiration of funds from the unavailability of funds).

d. The contracting officer must solicit offers from as many potential sources as is practicable under the circumstances. See Kahn Indus., Inc., B-251777, May 3, 1993, 93-1 CPD ¶ 356 (holding that it was unreasonable to deliberately exclude a known source simply because other agency personnel failed to provide the source's telephone number).

e. If possible, the contracting officer should use competitive procedures that promote full and open competition.

2. There are seven statutory exceptions to the requirement to provide for full and open competition.

a. Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements. 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 253(c)(1); FAR 6.302-1; DFARS 206.302-1; AFARS 6.302-1.

(1) DOD, NASA, and the Coast Guard. The agency is not required to provide for full and open competition if:

(a) There is only one or a limited number of responsible sources; and

(b) No other supplies or services will satisfy the agency's requirements.

Cubic Defense Sys. Inc. v. United States, 45 Fed. Cl. 239 (1999); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306 (1998); Datacom, Inc., B-274175 et al., Nov. 25, 1996, 96-2 CPD ¶ 199; Mnemonics, Inc., B-261476.3, Nov. 14, 1995, 96-1 CPD ¶ 7; Nomura Enter., Inc., B-260977.2, Nov. 2, 1995, 95-2 CPD ¶ 206; Masbe Corp. Ltd., B-206253.2, May 22, 1995, 95-1 CPD ¶ 253; Pilkington Aerospace, Inc., B-259173, Mar. 13, 1995, 95-1 CPD ¶ 180. But see National Aerospace Group, Inc., B-282843, 1999 U.S. Comp. Gen. LEXIS 151 (Aug. 30, 1999) (sustaining protest where the Defense Logistics Agency's documentation failed to show that only the specific product would satisfy the agency's need).

(2) Other Agencies. The agency is not required to provide for full and open competition if:

(a) There is only one responsible source; and

(b) No other supplies or services will satisfy the agency's requirements.

Information Ventures, Inc., B-246605, Mar. 23, 1992, 92-1 CPD ¶ 302.

b. Unusual or Compelling Urgency. 10 U.S.C. § 2304(c)(2); 41 U.S.C. § 253(c)(2); FAR 6.302-2; DFARS 206.302-2; AFARS 6.302-2. An agency is not required to provide for full and open competition if:

(1) Its needs are of unusual and compelling urgency; and

(2) The government will be seriously injured unless the agency can limit the number of sources from which it solicits offers.

Parmatic Filter Corp., B-283645, B-283645-2, 1999 U.S. Comp. Gen. LEXIS 238 (Dec. 20, 1999); Ervin & Assocs., Inc., B-275693, Mar. 17, 1997, 97-1 CPD ¶ 111; Eclypse Int'l Corp., B-274507, Nov. 12, 1996, 96-2 CPD ¶ 179; Polar Power, Inc., B-270536, Mar. 18, 1996, 96-1 CPD ¶ 157; AT&T Corp., B-270344, Feb. 28, 1996, 96-1 CPD ¶ 117; BlueStar Battery Sys. Corp., B-270111.2, B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67. But see National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 (holding that agency documentation failed to show that need was of an unusual and compelling urgency); K-Whit Tools, Inc., B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382 (holding that the "urgency" that justified use of noncompetitive procedures resulted from agency's lack of advance planning).

c. Industrial Mobilization, Engineering, Developmental, or Research Capability, Expert Services. 10 U.S.C. § 2304(c)(3); 41 U.S.C. § 253(c)(3); FAR 6.302-3; AFARS 6.302-3. An agency is not required to provide for full and open competition if it must limit competition to:

(1) Maintain facilities, producers, manufacturers, or suppliers to furnish supplies or services in the event of a national emergency or industrial mobilization. Greenbrier Indus., B-248177, Aug. 5, 1992, 92-2 CPD ¶ 74. Cf. Outdoor Venture Corp., B-279777, July 17, 1998, 98-2 CPD ¶ 2 (permitting the DLA to exercise an option for tents at a lower price because it awarded the initial contract on a sole-source basis to an industrial mobilization base producer).

(2) Ensure that educational institutions, nonprofit institutions, or federally funded research and development centers will establish and maintain essential engineering, research, and development capabilities.

(3) Acquire the services of an expert for litigation. See SEMCOR, Inc.; HJ Ford Assocs. Inc., B-279794, B-279794.2, B-279794.3, July 23, 1998, 98-2 CPD ¶ 43 (defining "expert").

d. International Agreement. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(c)(4); FAR 6.302-4. An agency is not required to provide for full and open competition if it is precluded by:

(1) An international agreement or treaty (e.g., a status of forces agreement (SOFA)); or

(2) The written direction of a foreign government that will reimburse the agency for its acquisition costs (e.g., pursuant to a foreign military sales agreement). See Electro Design Mfg., Inc., B-280953, Dec. 11, 1998, 98-2 CPD ¶ 142 (upholding agency's decision to combine system requirements into single procurement at foreign customer's request); Goddard Indus., Inc., B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104; Pilkington Aerospace, Inc., B-260397, June 19, 1995, 95-2 CPD ¶ 122.

e. Authorized or required by statute. 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 253(c)(5); FAR 6.302-5; DFARS 206.302-5. An agency is not required to provide for full and open competition if:

(1) A statute authorizes or requires the agency to procure the supplies or services from a specified source.[1] See, e.g., 18 U.S.C. §§ 4121-4128; 41 U.S.C. §§ 46-48c; FAR Subpart 8.6 (acquisitions from Federal Prison Industries, Inc.); FAR Subpart 8.7 (acquisitions from nonprofit agencies employing people who are blind or severely disabled); see also JAFIT Enter., Inc., B-266326, Feb. 5, 1996, 96-1 CPD ¶ 39.

(2) The agency needs a brand name commercial item for authorized resale. Defense Commissary Agency – Request for Advance Decision, B-262047, Feb. 26, 1996, 96-1 CPD ¶ 115.

f. National Security. 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 253(c)(6); FAR 6.302-6. An agency is not required to provide for full and open competition if disclosure of the government's needs would compromise national security. However, the mere fact that an acquisition is classified, or requires contractors to access classified data to submit offers or perform the contract, does not justify limiting competition.

g. Public Interest. 10 U.S.C. § 2304(c)(7); 41 U.S.C.§ 253(c)(7); FAR 6.302-7; DFARS 206.302-7. An agency is not required to provide for full and open competition if the agency head determines that full and open competition is not in the public interest.

(1) The agency head (i.e., the Secretary of Defense for all defense agencies) must support the determination to use this authority with a written D&F.

[1] DFARS 206.302-5 generally permits agencies to use this authority to acquire: (1) supplies and services from military exchange stores outside the United States for use by armed forces stationed outside the United States pursuant to 10 U.S.C. § 2424(a); and (2) police, fire protection, airfield operation, or other community services from local governments at certain military installations that are being closed. However, DFARS 206.302-5 also limits the ability of agencies to use this authority to award certain research and development contracts to colleges and universities. See 10 U.S.C. § 2424(b) (limiting the authority granted by 10 U.S.C. § 2424(a)).

(2) The agency must notify Congress at least 30 days before contract award. Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000) (holding that NASA's use of the public interest exception required Congressional **notice**, and not Congressional **consent**).

3. Justifications and Approvals (J&As) for Other Than Full and Open Competition. FAR 6.303; FAR 6.304; DFARS 206.303; AFARS 6.303.

a. Basic Requirements. FAR 6.303-1(a); AFARS 6.303-1(a). The contracting officer must prepare a written justification, certify its accuracy and completeness, and obtain all required approvals before negotiating or awarding a contract using other than full and open competitive procedures.

(1) Individual v. Class Justification. FAR 6.303-1(c); DFARS 206.303-1; AFARS 6.303-1(c). The contracting officer must prepare the justification on an individual basis for contracts awarded pursuant to the "public interest" exception (FAR 6.302-7). Otherwise, the contracting officer may prepare the justification on either an individual or class basis.

(2) Ex Post Facto Justification. FAR 6.303-1(e); AFARS 6.303-1(e). The contracting officer may prepare the written justification within a reasonable time after contract award if:[2]

(a) The contract is awarded pursuant to the "unusual and compelling urgency" exception (FAR 6.302-2); and

(b) Preparing the written justification before award would unreasonably delay the acquisition.

[2] If the contract is less than or equal to $50,000,000, the agency must forward the justification to the approval authority within 10 working days of contract award. If the contract exceeds $50,000,000, the agency must forward the justification to the approval authority within 30 working days of contract award. AFARS 6.303-1(e).

(3) Requirement to Amend the Justification. AFARS 6.303-1-90. The contracting officer must prepare an amended J&A if:

(a) An increase in the estimated dollar value of the contract causes the agency to exceed the approval authority of the previous approval official;

(b) A change in the agency's competitive strategy reduces competition; or

(c) A change in the agency's requirements affects the basis for the justification.

b. Contents. FAR 6.303-2; DFARS 206.303-2; AFARS 6.303-2.

(1) Format. AFARS 53.9005.[3]

(2) The J&A should be a stand-alone document. DFARS 206.303-2.

(a) Each justification must contain sufficient information to justify the use of the cited exception. FAR 6.303-2(a).

(b) The J&A must document and adequately address all relevant issues.

(3) At a minimum, the justification must:

(a) Identify the agency, contracting activity, and document;

(b) Describe the action being approved;[4]

[3] The format specified in AFARS 53.9005 is mandatory for contract actions greater than $50,000,000.

(c) Describe the required supplies or services and state their estimated value;

(d) Identify the applicable statutory exception;

(e) Demonstrate why the proposed contractor's unique qualifications and/or the nature of the acquisition requires the use of the cited exception;

(f) Describe the efforts made to solicit offers from as many potential sources as practicable;[5]

(g) Include a contracting officer's determination that the anticipated cost to the government will be fair and reasonable;

(h) Describe any market research conducted, or state why no market research was conducted;

(i) Include any other facts that justify the use of other than full and open competitive procedures, such as:

(i) An explanation of why the government has not developed or made available technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition, and a description of any planned remedial actions;

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[4] The justification should identify the type of contract, type of funding, and estimated share/ceiling arrangements, if any. AFARS 53.9005.

[5] The justification should indicate: (1) whether the Commerce Business Daily (CBD) notice was (will be) published; and, if not (2) which exception under FAR 5.202 applies. FAR 6.303-2; AFARS 53.9005.

(ii) An estimate of any duplicative cost to the government and how the estimate was derived if the cited exception is the "sole source" exception (FAR 6.302-1);

(iii) Data, estimated costs, or other rationale to explain the nature and extent of the potential injury to the government if the cited exception is the "unusual and compelling urgency" exception (FAR 6.302-2).[6]

(j) List any sources that expressed an interest in the acquisition in writing;[7]

(k) State any actions the agency may take to remove or overcome barriers to competition for future acquisitions; and

(l) Include a certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(4) Each justification must also include a certificate that any supporting data provided by technical or requirements personnel is accurate and complete to the best of their knowledge and belief. FAR 6.303-2(b).

c. Approval. FAR 6.304(a); DFARS 206.304; AFARS 6.304.

(1) The appropriate official must approve the justification in writing.

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[6] The justification should include a description of the procurement history and the government's plan to ensure that the prime contractor obtains as much competition as possible at the subcontractor level if the cited exception is the "sole source" section (FAR 6.302-1). AFARS 53.9005.

[7] If applicable, state: "To date, no other sources have written to express an interest." AFARS 53.9005. See Centre Mfg. Co., Inc., B-255347.2, Mar. 2, 1994, 94-1 CPD ¶ 162 (denying protest where agency's failure to list interested sources did not prejudice protester).

(2) Approving officials.

(a) The approval official for proposed contract actions not exceeding $500,000 is the contracting officer.

(b) The approval official for proposed contract actions greater than $500,000, but not exceeding $10,000,000, is normally the competition advocate.[8]

(c) The approval official for proposed contract actions greater than $10,000,000, but not exceeding $50,000,000, is the head of the contracting activity or his designee.[9]

(d) The approval official for proposed contract actions greater than $50,000,000 is the agency's senior procurement executive.[10]

(3) The justification for a contract awarded pursuant to the "public interest" exception (FAR 6.302-7) is considered approved when the D&F is signed. FAR 6.304(b).

(4) The agency must determine the appropriate approval official for a class justification based on the total estimated value of the class. FAR 6.304(c).

(5) The agency must include the estimated dollar value of all options in determining the appropriate approval level. FAR 6.304(d).

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[8] A higher level official can withhold approval authority. See FAR 6.304(a)(2).

[9] The designee must be a general officer, a flag officer, or a GS-16 or above. FAR 6.304(a)(3).

[10] The approval authority within DOD is the Under Secretary of Defense (Acquisition & Technology); however, the Under Secretary may delegate this authority to: (1) an Assistant Secretary of Defense; or (2) a general officer, flag officer, or GS-16 or above. DFARS 206.304.

G. Reprocurement Contracts. FAR 49.402-6.

1. If the repurchase quantity is less than or equal to the terminated quantity, the contracting officer can use any acquisition method the contracting officer deems appropriate; however, the contracting officer must obtain competition to the maximum extent practicable.

   a. The GAO will review the reasonableness of an agency's acquisition method against the standard specified in FAR 49.402-6(b). See International Tech. Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 (recognizing that "the statutes and regulations governing regular procurements are not strictly applicable to reprocurements after a default").

   b. If there is a relatively short time between the original competition and the default, it is reasonable to award to the second or third lowest offeror of the original solicitation at its original price. Vereinigte Geb Udereinigungsgesellschaft, B-280805, Nov. 23, 1998, 98-2 CPD ¶ 117 (holding that an agency could modify the contract requirements in its reprocurement without resolicitation); Performance Textiles, Inc., B-256895, Aug. 8, 1994, 94-2 CPD ¶ 65; DCX, Inc., B-232672, Jan. 23, 1989, 89-1 CPD ¶ 55.

2. If the repurchase quantity is greater than the terminated quantity, the contracting officer must treat the entire quantity as a new acquisition subject to the normal competition requirements.

3. Contracting officers have wide latitude to decide whether to solicit the defaulted contractor. Montage, Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176; ATA Defense Indus., Inc., B-275303, Feb. 6, 1997, 97-1 CPD ¶ 61.

III. IMPLEMENTATION OF COMPETITION REQUIREMENTS.

A. Competition Advocates. 41 U.S.C. § 418; FAR Subpart 6.5; AFARS Subpart 6.5; AR 715-31, Army Competition Advocacy Program; AFI 63-301, Air Force Competition Advocacy.

1. Requirement. FAR 6.501; AFARS 6.501. The head of each agency must designate a competition advocate for the agency itself, and for each procuring activity within the agency.[11] The designated officer or employee must:

a. Not be the agency's senior procurement executive;

b. Not be assigned duties or responsibilities that are inconsistent with the duties and responsibilities of a competition advocate; and

c. Be provided with whatever staff or assistance is necessary to carry out the duties and responsibilities of a competition advocate (e.g., specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and small disadvantaged business concerns).

2. Duties and Responsibilities. FAR 6.502. Competition advocates must generally challenge barriers to and promote the acquisition of commercial items and the use of full and open competitive procedures. For example, competition advocates must challenge unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

a. Agency Competition Advocates. FAR 6.502(b). Agency competition advocates must:

[11] The ASA(RDA) appoints the Army Competition Advocate General (ACAG), who is the Deputy Assistant Secretary of the Army for Procurement (SARD-ZP). AFARS 6.501.

(1) Review the agency's contracting operations and identify conditions or actions that unnecessarily restrict the acquisition of commercial items and the use of full and open competitive procedures;

(2) Prepare and submit an annual report to the agency senior procurement executive; and

(3) Recommend goals and plans for increasing competition.

b. Special Competition Advocates. AFARS 6.502; AR 715-31, para. 1.13. Special competition advocates oversee Major Army Command/Major Subordinate Command (MACOM/MSC) Competition Advocacy Programs. Their duties include, but are not necessarily limited to, the duties set forth in FAR 6.502 and AFARS 6.502.

c. Local Competition Advocates. AR 715-31, para. 1.14. Local competition advocates oversee Competition Advocacy Programs below the MACOM/MSC level for contracts less than $100,000.

3. A competition advocate's "review" of an agency's procurement is not a substitute for normal bid protest procedures. See Allied-Signal, Inc., B-243555, May 14, 1991, 91-1 CPD ¶ 468 (holding that a contractor's decision to pursue its protest with the agency's competition advocate did not toll the bid protest timeliness requirements). But see Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413 (holding that a contractor's reasonable reliance on the competition advocate's representations may extend the time for filing a bid protest).

B. Acquisition Planning. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. § 253a; 41 U.S.C. § 264b; FAR Part 7; DFARS Subpart 207.

1. Definition. FAR 7.101. "Acquisition planning" is the process of coordinating and integrating the efforts of the agency's acquisition personnel through a comprehensive plan that provides an overall strategy for managing the acquisition and fulfilling the agency's need in a timely and cost effective manner.

2. Policy. FAR 7.102(a). Agencies must perform acquisition planning and conduct market research for all acquisitions to promote:

   a. The acquisition of commercial or nondevelopmental items to the maximum extent practicable (10 U.S.C. § 2377; 41 U.S.C. § 264b); and

   b. Full and open competition (or competition to the maximum extent practicable) (10 U.S.C. § 2305(a)(1)(A); 41 U.S.C. § 253a(a)(1)).

3. Timing. FAR 7.104.

   a. Acquisition planning should begin as soon as the agency identifies its needs.

   b. Agency personnel should avoid issuing requirements on an urgent basis, or with unrealistic delivery or performance schedules.

4. Written Acquisition Plans. FAR 7.105.

   a. Written acquisition plans are not required for every acquisition.

   b. DFARS 207.103(c)(i) requires a written acquisition plan for:

      (1) Development acquisitions with a total estimated cost of $5,000,000 or more;

      (2) Production and service acquisitions with a total estimated cost of $15,000,000 or more for any fiscal year, or $30,000,000 or more for the entire contract period, (including options); and

      (3) Other acquisitions that the agency considers appropriate.

c. Contents. FAR 7.105. The specific contents of a written acquisition plan will vary; however, it must identify decision milestones and address all the technical, business, management, and other significant considerations that will control the acquisition.

C. Market Research. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. §253a; 41 U.S.C. § 264b; FAR Part 10.

1. Definition. FAR 2.101. "Market research" refers to the process of collecting and analyzing information about the ability of the market to satisfy the agency's needs.

2. Policy. FAR 10.001.

a. Agencies must conduct market research "appropriate to the circumstances" before:

(1) Developing new requirements documents;

(2) Soliciting offers for acquisitions with an estimated value that exceeds the simplified acquisition threshold ($100,000); and

(3) Soliciting offers for acquisitions with an estimated value of less than the simplified acquisition threshold if:

(a) Adequate information is not available; and

(b) The circumstances justify the cost.

b. Agencies must use the results of market research to determine:

(1) If sources exist to satisfy the agency's needs;

(2) If commercial (or nondevelopmental) items are available that meet (or could be modified to meet) the agency's needs;

(3) The extent to which commercial (or nondevelopmental) items can be incorporated at the component level; and

(4) The practice(s) of firms engaged in producing, distributing, and supporting commercial items.

3. Procedures. FAR 10.002.

a. The extent of market research will vary.

b. Acceptable market research techniques include:

(1) Contacting knowledgeable government and/or industry personnel;

(2) Reviewing the results of market research for the same or similar supplies or services;

(3) Publishing formal requests for information;

(4) Querying government data bases;

(5) Participating in interactive, on-line communications with government and/or industry personnel;

(6) Obtaining source lists from other sources (e.g., contracting activities, trade associations, etc.);

(7) Reviewing catalogs and other product literature;

(8) Conducting interchange meetings; and/or

(9) Holding pre-solicitation conferences with potential offerors.

D. Developing Specifications. 10 U.S.C. § 2305; 41 U.S.C. § 253a; FAR Part 11; DFARS Part 211.

1. Types of Specifications.

a. Design specifications.

b. Performance specifications.

c. Purchase descriptions (including brand name or equal specifications).

d. Mixed specifications.

2. Policy. Agencies are required to develop specifications that:

a. Permit full and open competition;

b. State the agency's minimum needs; and

c. Include restrictive provisions or conditions only to the extent they satisfy the agency's needs or are required by law.

See CHE Consulting, Inc., B-284110 et al., Feb. 18, 2000, 2000 CPD ¶ 51 (holding that requiring offerors to obtain support agreements from 65% of the original equipment manufacturers satisfied a legitimate agency need and did not unduly restrict competition); American Eurocopter Corp., B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 (holding that requiring a certain model Bell helicopter was a reasonable agency restriction); Instrument Specialists, Inc., B-279714, July 14, 1998, 98-2 CPD ¶ 106 (holding that a mere disagreement with an agency requirement did not make it an unreasonable restriction); APTUS, Co., B-281289, Jan. 20. 1999, 99-1 CPD ¶ 40 (holding that so long as the specification was not unduly restrictive, the agency had the discretion to define its own requirements).

3. Compliance with statutory and regulatory competition policy.

a. Specifications must provide a common basis for competition.

b. Competitors must be able to price the same requirement. See Deknatel Div., Pfizer Hosp. Prod. Grp., Inc., B-243408, July 29, 1991, 91-2 CPD ¶ 97 (finding that the agency violated the FAR by failing to provide the same specification to all offerors); see also Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 (chastising the Army because its "impermissibly broad" statement of work failed to give potential offerors reasonable notice of the scope of the proposed contract).

4. Common Preaward Problems Relating to Specifications.

a. Brand Name or Equal Purchase Descriptions.

(1) As a general rule, agencies cannot write their requirements in a manner that requires the provision of a particular manufacturer's product. FAR 11.104. But see G.H. Harlow Co., Inc., B-266049, Jan. 26, 1996, 96-1 CPD ¶ 95 (holding that use of a brand name or equal specification was not unduly restrictive where the agency reasonably determined that the salient characteristic being challenged was a necessary safety feature); Building Sys. Contractors, Inc., B-266180, Jan. 23, 1996, 96-1 CPD ¶ 18 (holding that a specification requiring Landis equipment was not unduly restrictive because the Air Force was already using Landis equipment in 23 facilities and it needed a single, base-wide, integrated energy management control system).

(2) DFARS 211.270-1 prohibits the use of "brand name or equal" purchase descriptions if the contract is expected to exceed the simplified acquisition threshold.

(3) When an agency uses a "brand name or equal" purchase description, the purchase description:

(a) Should include a complete common generic identification of the item (DFARS 211.270-1(a)(1));

(b) Should reference all known acceptable brand name products (DFARS 211.270-1(a)(2));

(c) May use a commercial catalog description (DFARS 211.270-1(a)(3));

(d) Should give prospective offerors the opportunity to offer alternate products (DFARS 211.270-1(a)(4)); and

(e) Must identify salient characteristics (DFARS 211.270-1(a)(5)).

Failure of a solicitation to list an item's salient characteristics improperly restricts competition by precluding potential offerors of equal products from determining what characteristics are considered essential for its item to be accepted, and cancellation of the solicitation is required. T-L-C Sys, B-227470, Sept. 21, 1987, 87-2 CPD ¶ 283. But see Micro Star Co., Inc., GSBCA No. 9649-P, 89-1 BCA ¶ 21,214 (holding that failing to list salient characteristics merely meant that the protester's bid could not be deemed nonresponsive for failure to meet that particular characteristic).

(4) Special Responsiveness Rules.

(a) Bidders must submit data to describe their proposed products. DFARS 252.210-7000.

(b) Failure to submit the required data renders the bid nonresponsive. Interand Corp., B-224512.2, Dec. 31, 1986, 66 Comp. Gen. 181, 87-1 CPD ¶ 5.

(c) Failure to meet the salient characteristics listed in the solicitation renders the bid nonresponsive. Elastomeric Roofing Assoc., B-234125, May 12, 1989, 68 Comp. Gen. 426, 89-1 CPD ¶ 451.

b. Ambiguous Specifications.

(1) Specifications or purchase descriptions that are subject to two or more reasonable interpretations are ambiguous and require the amendment or cancellation of the solicitation. RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD ¶ 109; Flow Tech., Inc., B-228281, Dec. 29, 1987, 67 Comp. Gen. 161, 87-2 CPD ¶ 633.

(2) Issues raised by ambiguous (defective) specifications:

(a) Adequacy of competition.

(b) Contract interpretation.

(c) Constructive change.

c. Unduly Restrictive Specifications.

(1) Specifications must promote full and open competition. Agencies may only include restrictive provisions to meet their minimum needs. 10 U.S.C § 2305(a)(1)(B); 41 U.S.C. § 253a(a)(2)(B). See CHE Consulting, Inc., B-284110 et. al., Feb. 18, 2000, 2000 CPD ¶ 51; Hoechst Marion Roussel, Inc., B-279073, May 4, 1998, 98-1 CPD ¶ 127 (holding that the VA's decision to restrict solicitation for Diltiazem to lower dosage strengths lacked any basis in the agency's needs); Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 (holding that a requirement for a test instrument capable of operating existing program-specific software was unduly restrictive, where the requirement did not accurately reflect the agency's actual needs); Falcon Indus., B-256419, June 3, 1994, 94-1 CPD ¶ 337 (holding that the exclusion of alternative technology based solely on cost considerations was unduly restrictive); cf. Instrument Specialists, Inc., B-279714, 98-2 CPD ¶ 1 (holding that requirements for monthly service calls and a 15 working day turn-around time for off-site repairs of surgical instruments were not unduly restrictive); Caswell Int'l Corp., B-278103, Dec. 29, 1997, 98-1 CPD ¶ 6 (holding that a requirement to obtain interoperable equipment to ensure operational safety and military readiness was reasonably related to the agency's needs); Laidlaw Envtl, B-272139, Sept. 6, 1996, 96-2 CPD ¶ 109 (holding that a prohibition against using open burn/ open detonation technologies to demilitarize conventional munitions was unobjectionable where it reflected Congress' legitimate environmental concerns).

(2) Common examples of restrictive specifications:

(a) Specifications written around a specific product. Ressler Assoc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230.

(b) Geographical restrictions that limit competition to a single source and do not further a federal policy. See, e.g., Marlen C. Robb & Son Boatyard & Marina, Inc., B-256316, June 6, 1994, 94-1 CPD ¶ 351; H & F Enters., B-251581.2, July 13, 1993, 93-2 CPD ¶ 16.

(c) Specifications that exceed the agency's minimum needs. Trilectron Indus., B-248475, Aug. 27, 1992, 92-2 CPD ¶ 130; CardioMetrix, B-248295, Aug. 14, 1992, 92-2 CPD ¶ 107.

(d) Requiring approval by a testing laboratory (e.g., Underwriters Laboratory (UL)) without recognizing equivalents. HazStor Co., B-251248, Mar. 18, 1993, 93-1 CPD ¶ 242. But see G.H. Harlow Co., B-254839, Jan 21, 1994, 94-1 CPD ¶ 29 (upholding requirement for approval by testing laboratory for fire alarm and computer-aided dispatch system).

E. Publicizing Contract Actions. 41 U.S.C. § 416; FAR Part 5; DFARS Subpart 205.

1. Policy. FAR 5.002.

Publicizing contract actions increases competition. FAR 5.002(a). But see Interproperty Investments, Inc., B-281600, Mar. 8, 1999, 99-1 CPD ¶ 55 (holding that an agency's diligent good-faith effort to comply with publicizing requirements was sufficient); Aluminum Specialties, Inc. t/a Hercules Fence Co., B-281024, Nov. 20, 1998, 98-2 CPD ¶ 116 (holding that there was no requirement for the agency to exceed publicizing requirements, even if it had done so in the past).

2. Methods of Disseminating Information. FAR 5.101.

a. Commerce Business Daily (CBD). FAR 5.101(a)(1).

(1) Contracting officers must synopsize proposed contract actions expected to exceed $25,000 in the CBD unless:

(a) The contracting officer determines that one or more of the fifteen exceptions set forth in FAR 5.202 applies (e.g., national security, urgency, etc.).

(b) The head of the agency determines that advance notice is inappropriate or unreasonable.

(2) Contracting officers must wait at least:

(a) 15 days after synopsizing the proposed contract action to issue the solicitation; and

(b) 30 days after issuing the solicitation to open bids or receive initial proposals.

(3) The decision not to synopsize a contract action must be proper when the solicitation is issued. American Kleaner Mfg. Co., B-243901.2, Sept. 10, 1991, 91-2 CPD ¶ 235.

(4) If the agency fails to synopsize (or improperly synopsizes) a contract action, the agency may be required to cancel the solicitation. Sunrise Int'l Grp., B-252892.3, Sept. 14, 1993, 93-2 CPD ¶ 160; RII, B-251436, Mar. 10, 1993, 93-1 CPD ¶ 223.

b. Posting. FAR 5.101(a)(2).

(1) Contracting officers must display proposed contract actions expected to fall between $10,000 and $25,000 in a public place.

(2) The term "public place" includes electronic means of posting information, such as electronic bulletin boards.

(3) Contracting officers must display proposed contract actions for 10 days or until bids/offers are opened, whichever is later, beginning no later than the date the agency issues the solicitation.

(4) Contracting officers are not required to display proposed contract actions in a public place if the exceptions set forth in FAR 5.102(a)(1), (a)(4) through (a)(9), or (a)(11) apply, or the agency uses an oral or FACNET solicitation.

c. Handouts, announcements, and paid advertising. FAR 5.101(b).

3. Solicitation Mailing Lists (Bidders Lists). FAR 14.205.

a. Contracting officers must generally establish solicitation mailing lists to ensure access to adequate sources of supplies and services.

b. Contracting officers may use different portions of large lists for separate acquisitions. However, contracting officers must generally solicit bids from:

(1) The incumbent. Kimber Guard & Patrol, Inc., B-248920, Oct. 1, 1992, 92-2 BCA ¶ 220. See Qualimetrics, Inc., B-262057, Nov. 16, 1995, 95-2 CPD ¶ 228 (concluding that GSA should have verified mailing list to ensure that incumbent's successor was on it). But see Cutter Lumber Products, B-262223.2, Feb. 9, 1996, 96-1 CPD ¶ 57 (holding that agency's inadvertent failure to solicit incumbent does not warrant sustaining protest where agency otherwise obtained full and open competition).

(2) Any contractor added to the list since the last solicitation. Holiday Inn, Inc., B-249673-2, Dec. 22, 1992, 92-2 CPD ¶ 428.

(3) All contractors on the segment of the list designated by the contracting officer.

IV. CONCLUSION.

Chapter 5
Types of Contracts

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CHAPTER 5

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CHAPTER 5

TYPES OF CONTRACTS

I. INTRODUCTION.

A. In determining which type of contract was entered into by the parties, . . . the court is not bound by the name or label given to a contract. Rather, it must look beyond the first page of the contract to determine what were the legal rights for which the parties bargained, and only then characterize the contract. Crown Laundry & Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 515 (1993).

B. Following this block of instruction, the student should:

1. Know the factors that a contracting officer must consider in selecting a contract type.

2. Understand the fundamental differences between fixed-price and cost-reimbursement contracts.

3. Understand the characteristics of the various indefinite delivery contracts.

II. SELECTION OF CONTRACT TYPE.

A. Regulatory Limitations.

1. Sealed Bid Procedures. Only firm fixed-price contracts or fixed-price contracts with economic price adjustment may be used under sealed bid procedures. FAR 16.102(a) and 14.104.

MAJ Jon Guden
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April/May 2001

2. Commercial items. Use firm-fixed-price contracts or fixed-price contracts with economic price adjustment. FAR 12.207. A proposed amendment of FAR 12.207 and 16.2 would clarify that agencies should use, to the maximum extent practicable, a FFP or FP w/EPA contract, and would authorize the use of noncost-based incentives such as award fees and performance or delivery incentives.[1]

3. Contracting by Negotiation. Any contract type or combination of types described in the FAR may be selected for contracts negotiated under FAR Part 15. FAR 16.102(b).

B. Factors to Consider.

1. Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. FAR 16.103(a). (See Figure 1, page 3).

2. Selection of a contract type is ultimately left to the reasonable discretion of the contracting officer. Diversified Technology & Services of Virginia, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 (change from cost-reimbursement to fixed-price found reasonable).

3. There are numerous factors that the contracting officer should consider in selecting the contract type. FAR 16.104.

   a. Whether price competition is available.

   b. The accuracy of price or cost analysis.

   c. The type and complexity of the requirement.

   d. Urgency of the requirement.

[1] See Federal Acquisition Regulation; Contract Types for Commercial Item Acquisitions, 65 Fed. Reg. 83292 (proposed December 29, 2000).

e. Period of performance or length of production run.

f. Contractor's technical capability and financial responsibility.

g. Adequacy of the contractor's accounting system.

h. Concurrent contracts.

i. Extent and nature of proposed subcontracting.

j. Acquisition history.

4. In the course of an acquisition, changing circumstances may make a different type appropriate. Contracting Officers should avoid protracted use of cost-reimbursement or time-and-materials contracts after experience provides a basis for firmer pricing. FAR 16.103(c).

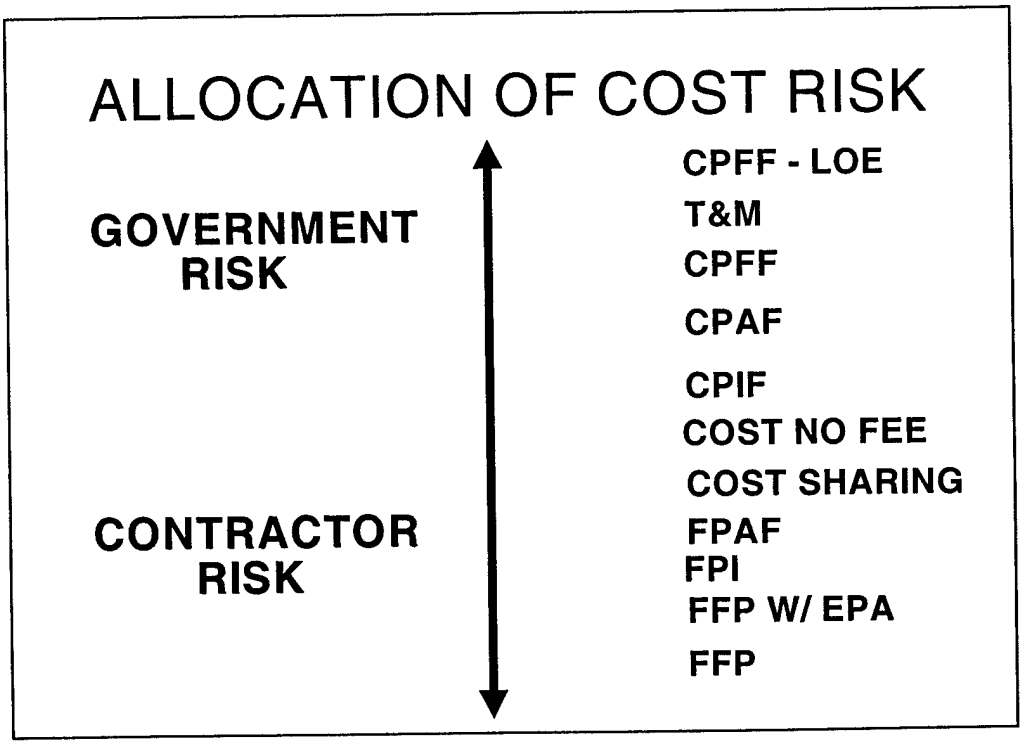


Figure 1

C. Statutory Prohibition against Cost-Plus-Percentage-of-Cost (CPPC).

1. The cost-plus-percentage-of-cost system of contracting is prohibited. 10 U.S.C. § 2306(a); 41 U.S.C. § 254(b); FAR 16.102(c).

2. Identifying Cost-Plus-Percentage-of-Cost. In general, any contractual provision is prohibited that assures the Contractor of greater profits if it incurs greater costs. The criteria used to identify a proscribed CPPC system, as enumerated by the court in Urban Data Sys., Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983) (adopting criteria developed by the Comptroller General at 55 Comp. Gen. 554, 562 (1975)), are:

   a. Payment is on a predetermined percentage rate;

   b. The percentage rate is applied to actual performance costs;

   c. The Contractor's entitlement is uncertain at the time of award; and

   d. The Contractor's entitlement increases commensurately with increased performance costs.

3. Compare The Dep't of Labor-Request for Advance Decision, B-211213, Apr. 21, 1983, 62 Comp. Gen. 337, 83-1 CPD ¶ 429 (CPPC system) with Tero Tek Int'l, Inc., B-228548, Feb. 10, 1988, 88-1 CPD ¶ 132 (travel entitlement not uncertain so CPPC not present).

III. CONTRACT TYPES - CATEGORIZED BY PRICE.

A. Fixed-Price Contracts. FAR Subpart 16.2. The contractor promises to perform at a fixed-price, and bears the responsibility for increased costs of performance. ITT Arctic Servs., Inc. v. United States, 207 Ct. Cl. 743 (1975); Chevron U.S.A., Inc., ASBCA No. 32323, 90-1 BCA ¶ 22,602 (the risk of increased performance costs in a fixed-price contract is on the contractor absent a clause stating otherwise). Use of a FP contract is normally inappropriate for research and development work, and has been limited by DOD Appropriations Acts. See FAR 35.006 (c) (the use of cost-reimbursement contracts is usually appropriate); But cf. AT&T v. United States, 177 F.3d 1368 (Fed. Cir. 1999) (upholding completed FP contract for developmental contract despite stated prohibition contained in FY 1987 Appropriations Act).

1. Firm-Fixed-Price Contract (FFP). FAR 16.202.

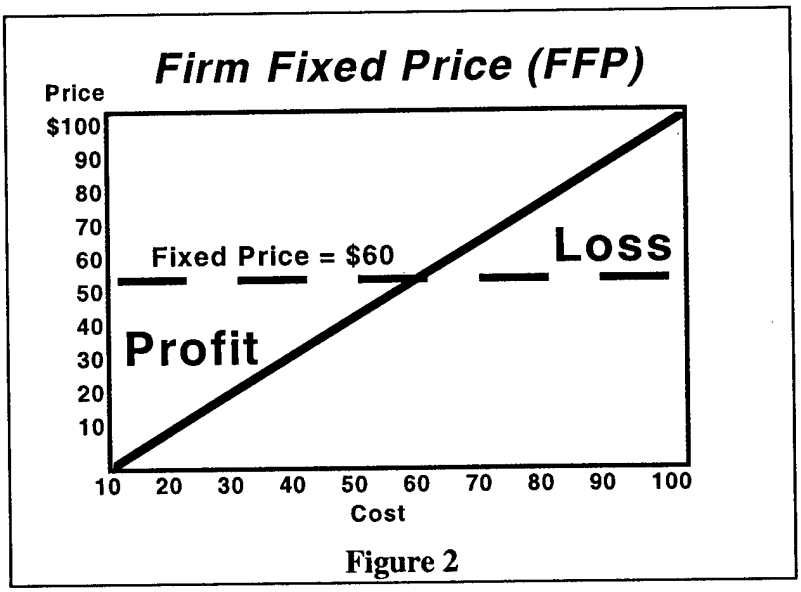


Figure 2

a. A FFP contract is not subject to any adjustment on the basis of the contractor's cost experience on the contract. It provides maximum incentive for the contractor to control costs and perform effectively, and imposes a minimum administrative burden on the contracting parties. FAR 16.202-1. (See Figure 2)

b. Appropriate for use when acquiring commercial items or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications when the contracting officer can establish fair and reasonable prices at the outset, such as when:

(1) There is adequate price competition;

(2) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data;

(3) Available cost or pricing information permits realistic estimates of the probable costs of performance; or

(4) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved. FAR 16.202-2.

2. Fixed-Price Contract with Economic Price Adjustment (FP w/ EPA). FAR 16.203.

a. Provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies.

b. May be used when the contracting officer determines:

(1) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and

(2) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. FAR 16.203-2.

c. Methods of adjustment for economic price adjustment clauses. FAR 16.203-1.

(1) Based on published or otherwise established prices of specific items or the contract end items (see Figure 3). Adjustments should normally be restricted to industry-wide contingencies. See 52.216-2 (standard supplies) and 52.216-3 (semistandard supplies); DFARS 216.203-4 (use when contract exceeds simplified acquisition threshold and delivery will not be completed within six months of contract award).

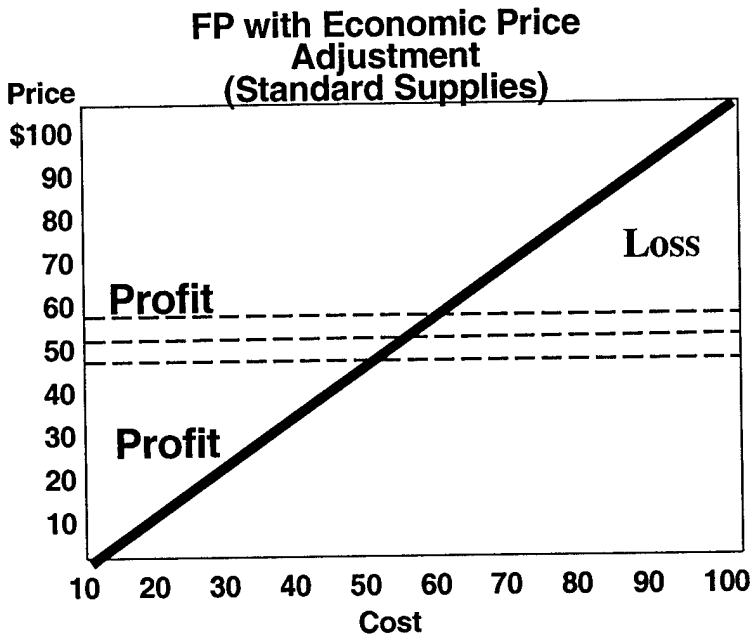


Figure 3

(2) Actual costs of labor or material (not shown). Price adjustments should be limited to contingencies beyond the contractor's control. The contractor is to provide notice to the contracting officer within 60 days of an increase or decrease, or any additional period designated in writing by the contracting officer. Prior to final delivery of all contract line items, there shall be no adjustment for any change in the rates of pay for labor (including fringe benefits) or unit prices for material which would not result in a net change of at least 3% of the then-current contract price. FAR 52.216-4(c)(3). The aggregate of the increases in any contract unit price made under the clause shall not exceed 10 percent of the original unit price; there is no limitation on the amount of decreases. FAR 52.216-4(c)(4).

(3) Cost indexes of labor or material (see Figure 4). The standards or indexes are specifically identified in the contract. There is no standard FAR clause prescribed when using this method. The DFARS provides extensive guidelines for use of indexes. The Air Force recognizes the abnormal escalation index method and the constant dollar index method. See AFFARS 5316.203-1(c).

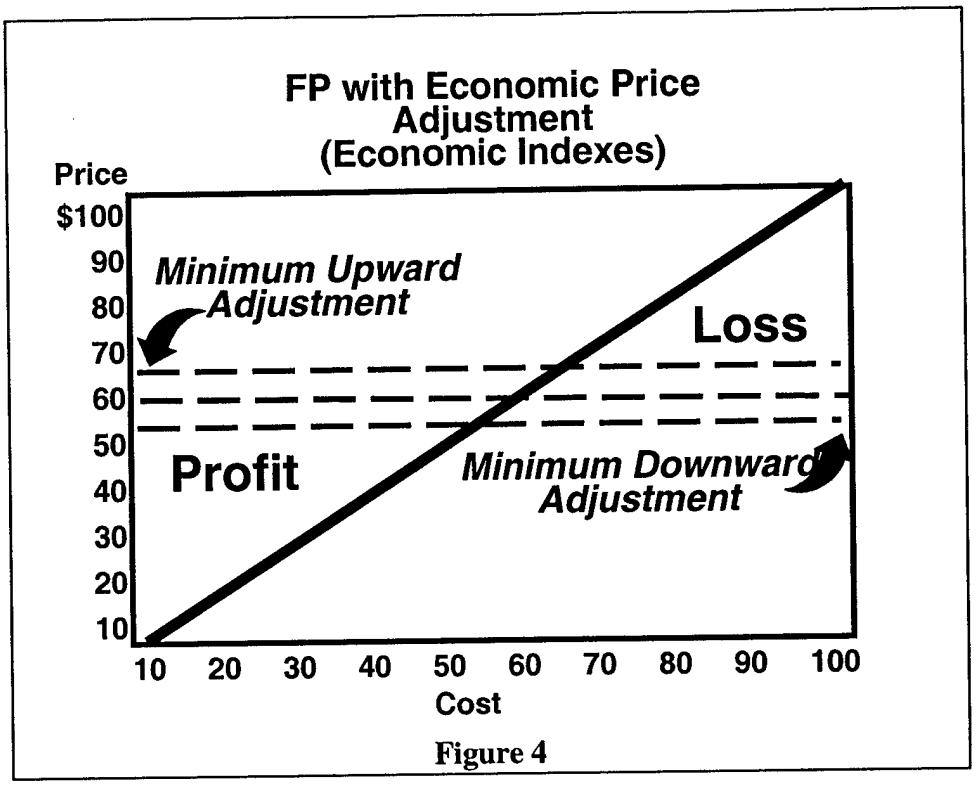


Figure 4

(4) EPA clauses must be constructed to provide the contractor with the protection envisioned by regulation. Courts and boards may reform EPA clauses to conform with regulations. See Beta Systems, Inc. v. United States, 838 F.2d 1179 (Fed. Cir. 1988) (reformation appropriate where chosen index failed to achieve purpose of EPA clause); Craft Mach. Works, Inc., ASBCA No. 35167, 90-3 BCA ¶ 23,095 (EPA clause did not provide contractor with inflationary adjustment from a base period paralleling the beginning of the contract, as contemplated by regulations). Alternatively, a party may be entitled to fair market value, or *quantum valebant*, recovery. Barrett Refining Corp. v. United States, No. 00-5036, 2001 U.S. App. LEXIS 3807 (Fed. Cir. Mar. 13, 2001)

(5) More than one cost ceiling may be used. Commercial Energies, Inc., B-243616, Aug. 15, 1991, 91-2 CPD ¶ 152 (agency could use two ceilings in contract for natural gas, because the ceilings protected the government against two contingencies).

d. A contractor may waive its entitlement to an adjustment by not submitting its request within the time specified in the contract. Bataco Indus., 29 Fed. Cl. 318 (1993) (contractor filed requests more than one year after EPA clause deadlines).

3. Fixed-Price Contracts with Price Redetermination (FP-R). FAR 16.205 and 16.206.

a. Prospective. May be used in acquisitions of quantity production or services for which it is possible to negotiate a fair and reasonable firm fixed price for an initial period, but not for subsequent periods of contract performance. Use only if negotiations have established that:

(1) conditions for use of a FFP contract are not present and a FPI contract would not be more appropriate;

(2) the contractor's accounting system is adequate for price redetermination;

(3) the prospective pricing periods can be made to conform with operation of the contractor's accounting system; and

(4) there is reasonable assurance that price redetermination actions will take place promptly at the specified times. FAR 16.205-3.

b. Retroactive.

(1) This contract provides for:

(a) a fixed ceiling price; and

(b) retroactive price redetermination within the ceiling after completion of the contract.

(2) This type is used for R&D contracts with an estimated cost of $100,000 or less, where the contractor's accounting system is adequate for price redetermination, there is reasonable assurance that the redetermination will take place promptly at the specified time, and the head of the contracting activity (or higher–level official, if required by agency procedures) approves its use in writing.

(3) The contractor has no cost control incentive except the ceiling price. The contracting officer should make it clear during discussions before award that the contractor's management effectiveness and ingenuity will be considered in retroactively determining the price. FAR 16.206-2(c).

4. Fixed-Price Incentive Contract (FPI). FAR 16.204; 16.403. A FPI contract provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of final negotiated total cost to the total target cost. The final price is subject to a price ceiling that is negotiated at the outset of the contract.

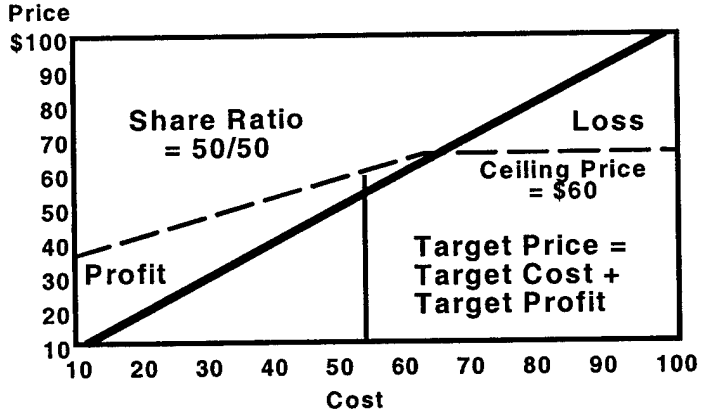


Figure 5

a. The contractor must complete a specified amount of work for a fixed-price.

b. The government and the contractor agree in advance on a firm target cost, target profit, and profit adjustment formula.

c. Use the FPI contract only when:

(1) A FFP contract is not suitable;

(2) The supplies or services being acquired and other circumstances of the acquisition are such that the contractor's assumption of a degree of cost responsibility will provide a positive profit incentive for effective cost control and performance; and

(3) If the contract also includes incentives on technical performance and/or delivery, the performance requirements provide a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work. FAR 16.403.

d. Individual line items may have separate incentive provisions. DFARS 216.403(b)(3).

e. The parties may use either FPI (firm target) or FPI (successive targets).

(1) FPI (firm target) specifies a target cost, a target profit, a price ceiling, and a profit adjustment formula.

(2) FPI (successive targets) specifies an initial target cost, an initial target profit, an initial profit adjustment formula, the production point at which the firm target cost and profit will be negotiated, and a ceiling price.

5. Fixed-Price Contracts with Award Fees. FAR 16.404.

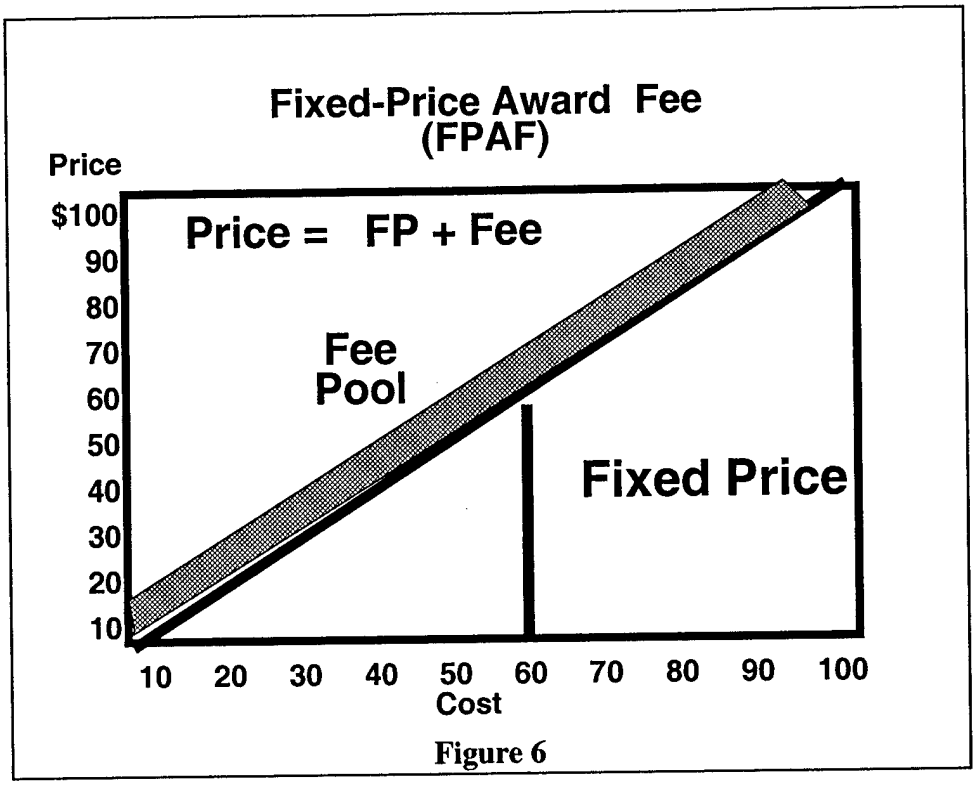


Figure 6

a. The contractor receives a negotiated fixed price (which includes normal profit) for satisfactory contract performance. Award fee (if any) will be paid in addition to that fixed price.

b. The contract must provide for periodic evaluation of the contractor's performance against an award fee plan.

c. This type of contract should be used when the government wants to motivate a contractor and other incentives cannot be used because the contractor's performance cannot be measured objectively.

d. Limitation. The following conditions must be present before a fixed price contract with award fee may be used:

(1) The administrative costs of conducting award-fee evaluations are not expected to exceed the expected benefits;

(2) Procedures have been established for conducting the award-fee evaluation;

(3) The award-fee board has been established; and

(4) An individual above the level of the contracting officer approved the fixed-price-award-fee incentive.

B. Cost-Reimbursement Contracts. FAR Subpart 16.3.

1. Cost-Reimbursement contracts provide for payment of allowable incurred costs to the extent prescribed in the contract, and establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the contracting officer's approval. FAR 16.301-1.

2. Application. Use when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. FAR 16.301-2.

3. The government pays the contractor's allowable costs plus a fee (often erroneously called profit) as prescribed in the contract.

4. To be allowable, a cost must be reasonable, allocable, properly accounted for, and not specifically disallowed. FAR 31.201-2.

5. The decision to use a cost-type contract is within the contracting officer's discretion. Crimson Enters., B-243193, June 10, 1991, 91-1 CPD ¶ 557 (decision to use cost-type contract reasonable considering uncertainty over requirements causing multiple changes).

6. Limitations on Cost-Type Contracts. FAR 16.301-3.

a. The contractor must have an adequate cost accounting system. See CrystaComm, Inc., ASBCA No. 37177, 90-2 BCA ¶ 22,692 (contractor failed to establish required cost accounting system).

b. The Government must exercise appropriate surveillance to provide reasonable assurance that efficient methods and effective cost controls are used.

c. May not be used for acquisition of commercial items.

7. Cost ceilings are imposed through the Limitation of Cost clause (fully funded) FAR 52.232-20, or the Limitation of Funds clause (incrementally funded) FAR 52.232-22.

a. When the contractor has reason to believe it is approaching the estimated cost of the contract or the limit of funds allotted, it must give the contracting officer written notice.

b. FAR 32.704 provides that a contracting officer must, upon receipt of notice, promptly obtain funding and programming information pertinent to the contract and inform the contractor in writing that:

(1) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount; or

(2) The contract is not to be further funded and the contractor should submit a proposal for the adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract; or

(3) The contract is to be terminated; or

(4) The Government is considering whether to allot additional funds or increase the estimated cost, the contractor is entitled to stop work when the funding or cost limit is reached, and any work beyond the funding or cost limit will be at the contractor's risk.

c. The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. Titan Corp. v. West, 129 F.3d 1479 (Fed. Cir. 1997); Advanced Materials, Inc., ASBCA No. 47014, 96-1 BCA ¶ 28,002. Exceptions to this rule include:

(1) The overrun was unforeseeable. RMI, Inc. v. United States, 800 F.2d 246 (Fed. Cir. 1986) (burden is on contractor to show overrun was not reasonably foreseeable during time of contract performance). To establish unforeseeability, the contractor must establish that it maintained an adequate accounting system. SMS Agoura System, Inc., ASBCA No. 50451, 97-2 BCA ¶ 29,203 (contractor foreclosed from arguing unforeseeability by prior decision).

(2) Estoppel. American Electronic Laboratories, Inc. v. United States, 774 F.2d 1110 (Fed. Cir. 1985) (partial estoppel where Government induced continued performance through representations of additional availability of funds); Hydrothermal Energy Corp. v. United States, 26 Cl. Ct. 7 (1992) (unsuccessfully asserted); Advanced Materials, Inc., supra (unsuccessfully asserted); Southwest Marine of San Francisco, Inc., ASBCA No. 33404, 89-1 BCA ¶ 21,425 (unsuccessfully asserted).

8. Cost-Plus-Fixed-Fee (CPFF) Contract. FAR 16.306.

a. The contract price is the contractor's allowable costs, plus a fixed fee that is negotiated and set prior to award.

b. Limitation on Maximum Fee for CPFF contracts. 10 U.S.C. § 2306(d); 41 U.S.C. § 254(b); FAR 15.404-4(c)(4).

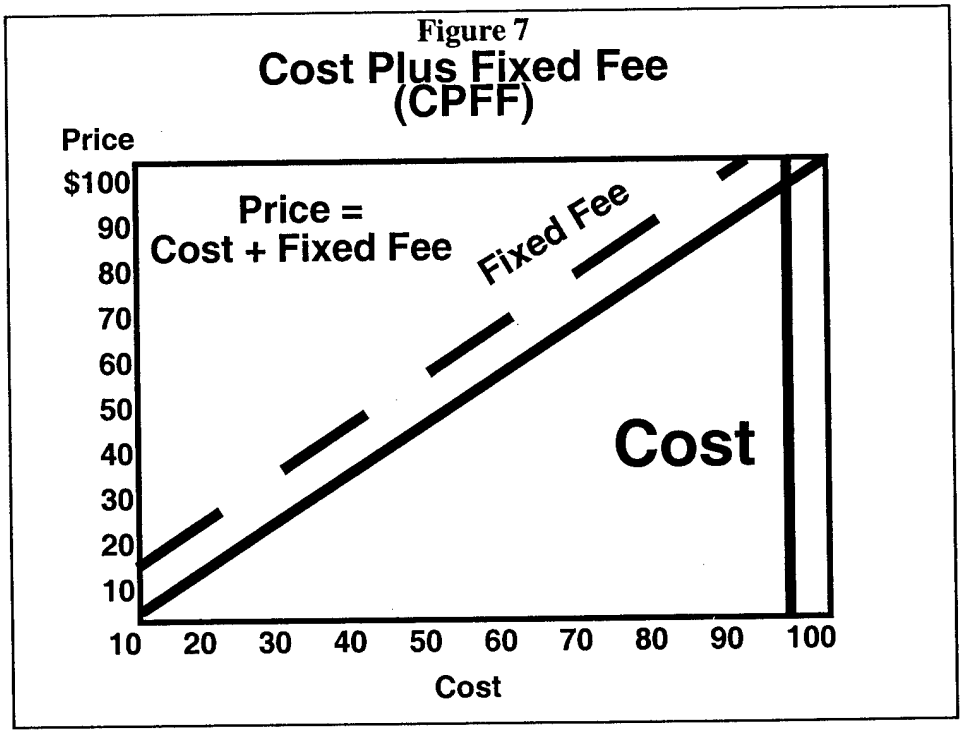
(1) Maximum fee limitations are based on the estimated cost at the time of award, not on the actual costs incurred.

(2) For research and development contracts, the maximum fee is a specific amount no greater than 15% of estimated costs at the time of award.

(3) For contracts other than R&D contracts, the maximum fee is a specific amount no greater than 10% of estimated costs at the time of award.

(4) In architect-engineer (A-E) contracts, the contract price (cost plus fee) for the A-E services may not exceed 6% of the estimated project cost. Hengel Assocs., P.C., VABCA No. 3921, 94-3 BCA ¶ 27,080.

Figure 7



c. DOD agencies may not use CPFF contracts on construction contracts estimated to exceed $25,000 that are funded by a military construction appropriations act, and are to be performed in the United States (except Alaska). DFARS 216.306. Exceptions to this restriction:

(1) Contracts for environmental restoration at an installation that is being closed or realigned where payments are made from a Base Realignment and Closure (BRAC) Account, or

(2) Contracts specifically approved in writing by the Secretaries of the military department for environmental work not classified as construction, or the Secretary of Defense or designee for contracts that are not for environmental work only or are for environmental work classified as construction.

9. Cost-Plus-Incentive-Fee Contract (CPIF). FAR 16.304, FAR 16.405-1.

a. The CPIF specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee is determined in accordance with the formula.

b. A CPIF is appropriate for services or development and test programs. FAR 16.405-1. See Northrop Grumman Corp. v. United States, 41 Fed. Cl. 645 (1998) (Joint STARS contract).

c. The government may combine technical incentives with cost incentives. FAR 16.405-1(b)(2).

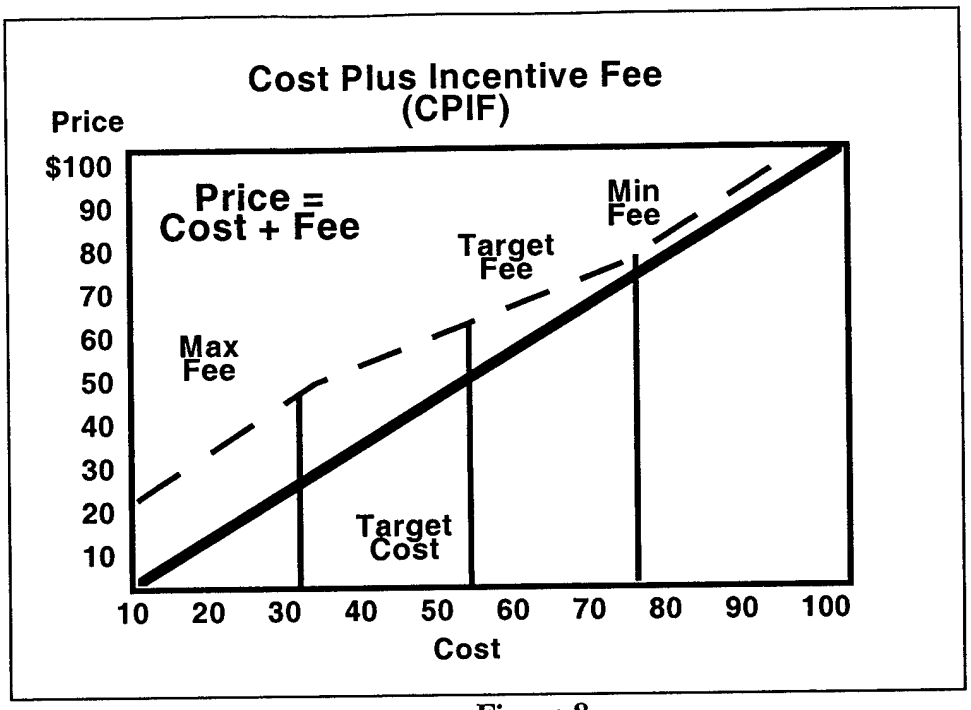


Figure 8

10. Cost-Plus-Award-Fee (CPAF) Contract. FAR 16.305 and 16.405-2.

    a. The contractor receives its costs plus a fee consisting of a base amount (which may be zero) and an award amount based upon a judgmental evaluation by the Government sufficient to provide motivation for excellent contract performance.

    b. Limitations on base fee. DOD contracts limit base fees to 3% of the estimated cost of the contract exclusive of fee. DFARS 216.405-2(c)(ii).

    c. Award fee. The DFARS lists sample performance evaluation criteria in a table that includes time of delivery, quality of work, and effectiveness in controlling and/or reducing costs. See DFARS Part 216, Table 16-1.

d. The award fee is determined unilaterally by the contracting officer or Award Fee Determining Official, and is subject to the Disputes Clause.

e. A contractor is entitled to unpaid award fee when the government terminates a cost-plus-award fee contract for convenience. Northrop Grumman Corp. v. Goldin, 136 F.3d 1479 (Fed. Cir. 1998).

f. A CPAF contract shall provide for evaluations at stated intervals during performance so the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected. Partial payment shall generally correspond to the evaluation periods. FAR 16.405-2(b)(3).

g. The award fee schedule determines when the award fee payments are made. The fee schedule does not need to be proportional to the work completed. Textron Defense Sys. v. Widnall, 143 F.3d 1465 (Fed. Cir. 1998) (end-loading award fee to later periods).

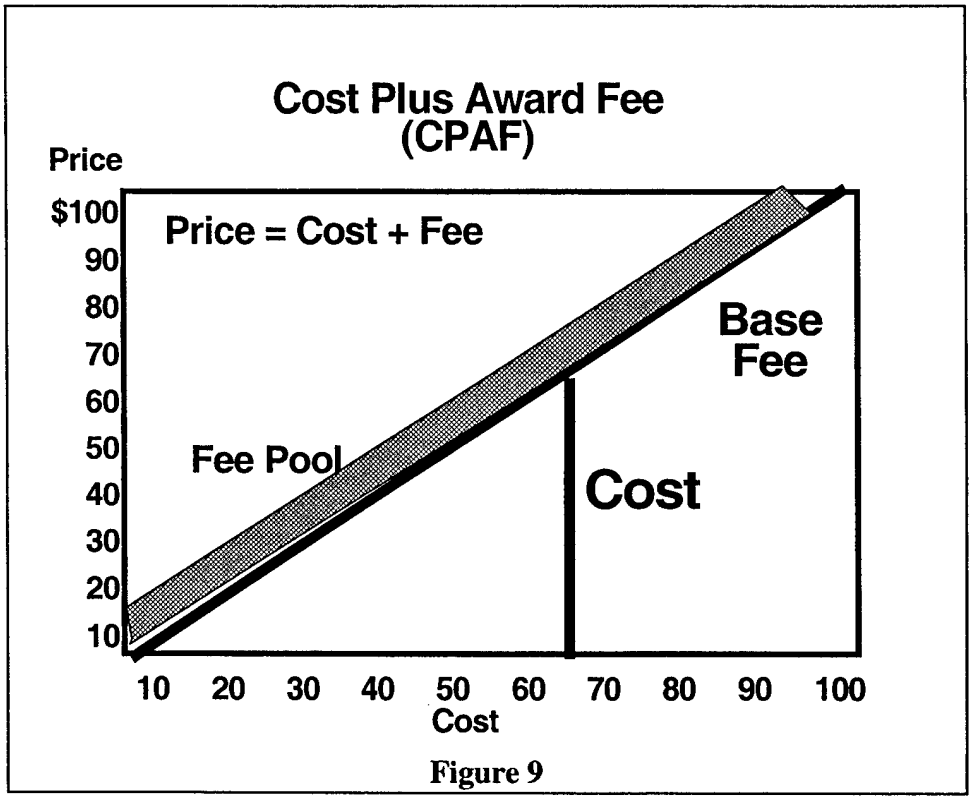


Figure 9

11. Cost Contract. FAR 16.302.

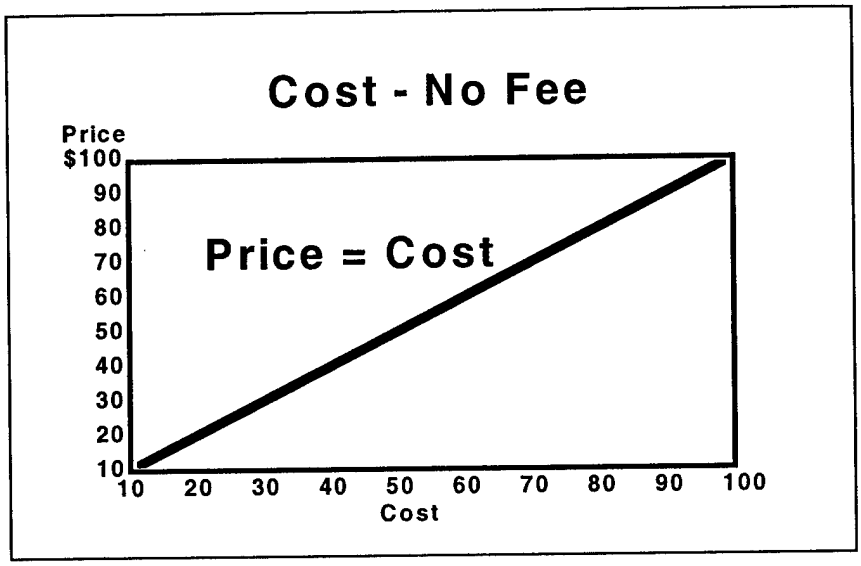


Figure 10

a. The contractor receives its allowable costs but no fee.

b. May be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations, and for facilities contracts.

12. Cost-Sharing Contract. FAR 16.303.

a. The contractor is reimbursed only for an agreed-upon portion of its allowable cost.

b. Normally used where the contractor will receive substantial benefit from the effort.

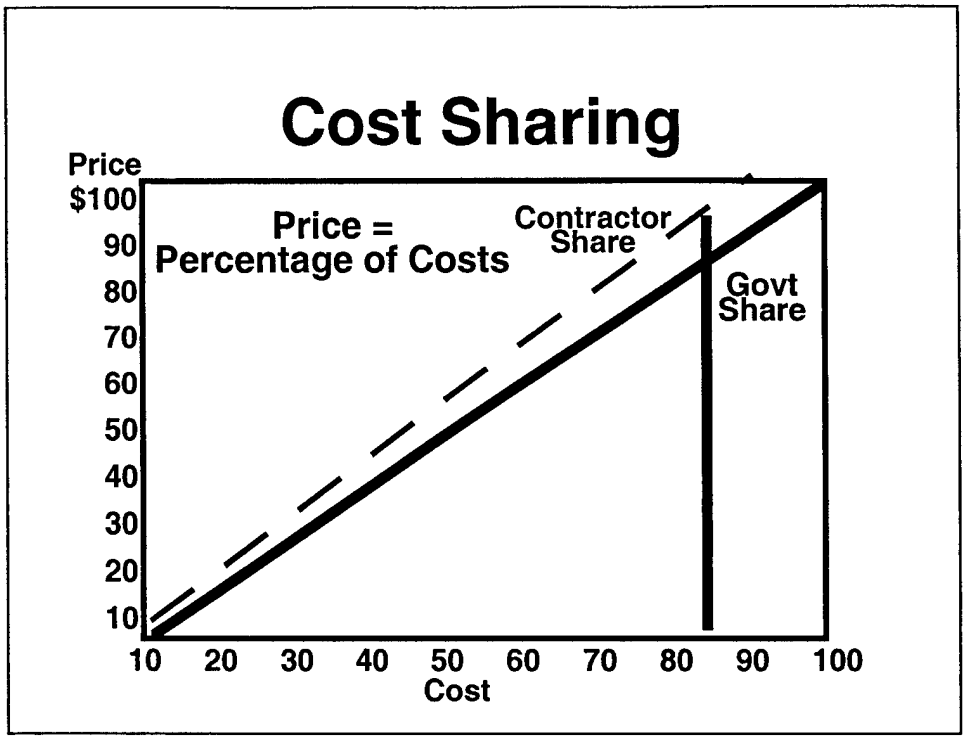


Figure 11

C. Time-and-Materials and Labor-Hour Contracts. FAR 16.6.

1. Application. Use these contracts when it is not possible at contract award to estimate accurately the extent or duration of the work or to anticipate with any reasonable degree of confidence.

2. Government Surveillance. Appropriate surveillance is required to assure that the contractor is using efficient methods to perform these contracts, which provide no positive profit incentive for a contractor to control costs or ensure labor efficiency.

3. Limitation on use. The contracting officer must execute a D&F that no other contract type is suitable, and include a contract price ceiling.

4. Types.

a. Time-and-materials (T&M) contracts. Provide for acquiring supplies or services on the basis of:

(1) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and

(2) Materials at cost, including, if appropriate, material handling costs as part of material costs.

(a) Material handling costs shall include those costs that are clearly excluded from the labor-hour rate, and may include all appropriate indirect costs allocated to direct materials.

(b) An optional pricing method described at FAR 16.601 (b)(3) may be used when the contractor is providing material it sells regularly to the general public in the ordinary course of business, and several other requirements are met.

b. Labor-hour contracts. Differs from T&M contracts only in that the contractor does not supply the materials.

D. Level of Effort Contracts.

1. Firm-fixed-price, level-of-effort term contract. FAR 16.207. Government buys a level of effort for a certain period of time, i.e., a specific number of hours to be performed in a specific period. Suitable for investigation or study in a specific R&D area, typically where the contract price is $100,000 or less.

2. Cost-plus-fixed-fee-term form contract. FAR 16.306(d). Similar to the FFP-LET with the price equal to cost incurred plus a fee. The contractor is required to provide a specific level of effort over a specific period of time, which differentiates this contract from the cost-plus-fixed-fee completion form.

IV. CONTRACT TYPES - INDEFINITE DELIVERY CONTRACTS.

A. Indefinite Delivery Contracts.

1. FAR 16.501-2(a) recognizes three types of indefinite delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts.

2. Advantages. All three types permit Government stocks to be maintained at minimum levels, and permit direct shipment to users.

B. Definite-Quantity/Indefinite-Delivery Contracts. FAR 16.502; 52.216-20. The quantity and price are specified for a fixed period. The government issues delivery orders that specify the delivery date and location.

C. Variable Quantity Contracts Generally.

1. Variable quantity contracts permit flexibility in both quantities and delivery schedules.

2. These contracts permit ordering of supplies or services after requirements materialize.

3. A variable quantity contract must be either a requirements or an ID/IQ contract. See Satellite Services, Inc., B-280945.3, Dec. 4, 1998, 98-2 CPD ¶ 125 (solicitation flawed where it neither guaranteed a minimum quantity nor operated as a requirements contract).

4. Definitions. FAR 16.501-1.

a. Delivery order contract. A contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

b. Task order contract. A contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

D. Requirements Contracts. FAR 16.503; 52.216-21.

1. The government promises to order all of its requirements, if any, from the contractor, and the contractor promises to fill all requirements. See Sea-Land Serv., Inc., B-266238, Feb. 8, 1996, 96-1 CPD ¶ 49 (solicitation for requirements contract which contained a "Limitation of Government Liability" clause purporting to allow the government to order services elsewhere rendered contract illusory for lack of consideration).

a. The Government breaches the contract when it purchases its requirements from another source. Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982); MDP Constr., Inc., ASBCA No. 49527, 96-2 BCA ¶ 28,525 (Ft. Carson requirements contract to replace baths in family housing conflicted with Army Corps of Engineers construction contract to revitalize family housing).

b. The Government also may breach the contract if it performs the contracted-for work in-house. C&S Park Serv., Inc., ENGBCA No. 3624, 78-1 BCA ¶ 13,134 (failure to order mowing services in a timely fashion combined with use of government employees to perform mowing services entitled contractor to equitable adjustment under changes clause).

c. Reported cases measure a contractor's relief under various theories: common-law breach (lost profits); the contract's Changes clause (difference between the cost of work originally called for and the work as performed); or the Termination for Convenience clause (settlement costs).

d. Contractors often seek lost profits as a measure of damages when the Government purchases supplies or services from an outside source. See Carroll Automotive, ASBCA No. 50993, 98-2 BCA ¶ 29,864; S&W Tire Services, Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048 (Government hired contractor to run motor pool after award of contract to Appellant to recap tires).

e. The Government cannot escape liability for the breach of a requirements contract by retroactively asserting constructive termination for convenience. Carroll Automotive, ASBCA No. 50993, 98-2 BCA ¶ 29,864 (Government invoked constructive T4C theory two years after contract performance).

2. The Contracting Officer shall state a realistic estimated total quantity in the solicitation and resulting contract. The estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The estimate may be obtained from records of previous requirements and consumption, or by other means, and should be based on the most current information available. FAR 16.503(a)(1).

a. There is no need to create or search for additional information. Medart v. Austin, 967 F.2d 579 (Fed. Cir. 1992) (court refused to impose a higher standard than imposed by regulations in finding reasonable the use of prior year's requirements as estimate).

b. Failure to use available data or calculate the estimates with due care may entitle the contractor to additional compensation. See Crown Laundry & Dry Cleaners v. United States, 29 Fed. Cl. 506 (1993) (government negligent where estimates were exaggerated and not based on historical data); Contract Management, Inc., ASBCA No. 44885, 95-2 BCA ¶ 27,886 (relief under Changes clause where Government failed to revise estimates between solicitation and award to reflect funding shortfalls); Beldon Roofing & Remodeling Co., B-277651, Nov. 7, 1997, CPD 97-2 ¶131 (GAO recommended cancellation of IFB where solicitation failed to provide realistic quantity estimates).

3. The only limitation on the Government's freedom to vary its requirements after contract award is that it be done in good faith.

a. The Government acts in good faith if it has a valid business reason for varying its requirements, other than dissatisfaction with the contract. Technical Assistance Int'l, Inc. v. United States, 150 F.3d 1368 (Fed. Cir. 1998) (no breach or constructive change where Government diminished need for vehicle maintenance and repair work by increasing rate at which it added new vehicles into the installation fleet).

b. "Bad faith" includes actions "motivated solely by a reassessment of the balance of the advantages and disadvantages under the contract" such that the buyer decreases its requirements to avoid its obligations under the contract. Technical Assistance Int'l, Inc. v. United States, 150 F.3d 1368 (Fed. Cir. 1998) (citing Empire Gas Corp. v. American Bakeries Co., 840 F. 2d 1333, 1341 (7th Cir. 1988)).

c. The Government is not liable for acts of God that cause a reduction in requirements. Sentinel Protective Services, Inc., ASBCA No. 23560, 81-2 BCA ¶ 15,194 (drought reduced need for grass cutting).

4. Limits on use of requirements contracts for Advisory and Assistance Services.[2] FAR 16.503(d). Activities may not issue solicitations for requirements contracts for advisory and assistance services in excess of three years and $10 million, including all options, unless the contracting officer determines in writing that the use of the multiple award procedures in FAR 16.504 is impracticable. See para. III.E.10b, infra.

[2] "Advisory and assistance services" means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision making; management and administration; program and/or program management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures

E. Indefinite-Quantity/Indefinite-Delivery Contract (also called ID/IQ or Minimum Quantity). FAR 16.504.

1. An ID/IQ contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor shall furnish any additional quantities, not to exceed the stated maximum. FAR 16.504(a).

2. Application. Contracting officers may use an ID/IQ contract when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. The contracting officer should use an indefinite quantity contract only when a recurring need is anticipated. FAR 16.504(b).

3. In order for the contract to be binding, the minimum quantity in the contract must be more than a nominal quantity. FAR 16.504(a)(2). See Aalco Forwarding, Inc., et. al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 ($25,000 minimum for moving and storage services); Sea-Land Serv., Inc., B-278404.2 Feb. 9, 1998, 98-1 CPD ¶ 47 (after considering the acquisition as a whole, found guarantee of one "FEU" [3] per contract carrier was adequate consideration to bind the parties).

4. The contractor is entitled to receive only the guaranteed minimum. Travel Centre v. General Services Administration, Nos. 00-1054, 00-1126, 2001 U.S. App. LEXIS 61 (Fed. Cir. Jan. 4, 2001) (holding that agency met contract minimum so "its less than ideal contracting tactics fail to constitute a breach."); Crown Laundry & Dry Cleaners, Inc., ASBCA No. 39982, 90-3 BCA ¶ 22,993.

(including those of an engineering or technical nature). All advisory and assistance services are classified as: Management and professional support services; Studies, analyses and evaluations; or Engineering and technical services. FAR 2.101.

[3] Meaning Forty-Foot Equivalent Unit, an FEU is an industry term for cargo volumes measuring 8 feet high, 8 feet deep, and 40 feet deep.

5. The government may not retroactively use the Termination for Convenience clause to avoid damages for its failure to order the minimum quantity. Compare Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) (termination many months after contract completion where minimum not ordered was invalid), and PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (contracting officer may not terminate an indefinite-quantity contract for convenience after end of contract term), with Montana Refining Co., ASBCA No. 50515, 00-1 BCA ¶ 30,694 (partial T4C proper when Government reduced quantity estimate for jet fuel eight months into a twelve month contract).

6. The contractor must prove the damages suffered when the Government fails to order the minimum quantity. Delta Construction International, Inc., ASBCA No. 52162, 00-1 BCA ¶ 31,195. The standard rule of damages is to place the contractor in as good a position as it would have been had it performed the contract. Compare Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) (allowing Maxima to retain payment of guaranteed minimum), and Delta Construction International, Inc., ASBCA No. 52162, 00-1 BCA ¶ 31,195 (received guaranteed minimum), with PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (not automatically entitled to minimum; Board remanded to parties to determine quantum), and AJT Assocs., Inc., ASBCA No. 50240, 97-1 BCA ¶ 28,823 (Government paid contractor lost profits on unordered minimum quantity).

7. The contract statement of work cannot be so broad as to be inconsistent with statutory authority for task order contracts and the requirements of the Competition in Contracting Act. See Valenzuela Engineering, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 (statement of work for operation and maintenance services at any government facility in the world deemed impermissibly broad).

8. FAR 16.504(a)(4) sets forth several requirements for indefinite-quantity solicitations and contracts, including the use of FAR 52.216-27, Single or Multiple Awards, and FAR 52.216-28, Multiple Awards for Advisory and Assistance Services.

9. FAR 16.504(c) establishes a preference for making multiple awards of indefinite-quantity contracts under a single solicitation for similar supplies or services. See Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170 (GAO ruled that the government must make multiple awards in CAAS indefinite delivery/indefinite quantity type of contracts). The contracting officer must document the decision whether or not to make multiple awards in the acquisition plan or contract file.

a. A contracting officer must not make multiple awards if one or more of the conditions specified in FAR 16.504(c)(1)(ii)(B) is present.

(1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(3) The cost of administration of multiple contracts may outweigh any potential benefits from making multiple awards;

(4) The tasks likely to be ordered are so integrally related that only a single contractor can reasonably perform the work;

(5) The total estimated value of the contract is less than the simplified acquisition threshold; or

(6) Multiple awards would not be in the best interests of the government.

b. For advisory and assistance services contracts exceeding three years and $10 million, including all options, the contracting officer must make multiple awards unless (FAR 16.504(c)(2)):

(1) the contracting officer or other official designated by the head of the agency makes a written determination as part of acquisition planning[4] that multiple awards are not practicable because only one contractor can reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related. Compare Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170 (ruling that Army's failure to execute D&F justifying single award rendered RFP defective) with Cubic Applications, Inc., v. United States, 37 Fed. Cl. 345 (1997) (Cubic not entitled to equity where it failed to raise multiple award issue prior to award);

(2) the contracting officer or other official designated by the head of the agency determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(3) Only one offer is received; or

(4) the contracting officer or other official designated by the head of the agency determines that the advisory and assistance services are incidental and not a significant component of the contract.

10. Placing Orders. FAR 16.505.

a. FAR 16.505(a) sets out the general requirements for orders under delivery or task order contracts. A separate synopsis under FAR 5.201 is not required for orders.

b. Orders under multiple award contracts. FAR 16.505(b).

[4] But see Cubic Applications, Inc., v. United States, 37 Fed. Cl. 345 (1997), where the court held that Army's failure to make the determination prior to issuance of the solicitation was harmless error.

(1) Fair Opportunity. Each awardee must be given a "fair opportunity to be considered for each order in excess of $2,500." See Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170.

(2) Exceptions. Awardees need not be given an opportunity to be considered for an order when any of the conditions described at FAR 16.505(b)(2) are present.[5]

(3) Contracting officers have broad discretion in developing appropriate order placement procedures. Procedures should be tailored to each acquisition. Submission requirements should be kept to a minimum. The contracting officer must not employ allocation or designation of any preferred awardee(s) that would result in less than fair consideration being given to all awardees prior to placing each order.

(4) The contracting officer makes his or her determination based on past performance, quality of delivery, cost, and other factors the contracting officer believes are relevant. Price or cost is a mandatory factor in the selection process. Formal evaluation plans and scoring of offers or quotes are not required.

(5) The contracting officer must document in the contract file the rationale for placement and price of each order.

(6) The contract may specify maximum or minimum quantities that may be ordered under each task or delivery order. FAR 16.504(a)(3). However, individual orders need not be of some minimum amount to be binding. See C.W. Over and Sons, Inc., B-274365, Dec. 6, 1996, 96-2 CPD ¶ 223 (individual delivery orders need not exceed some minimum amount to be binding).

(7) Protests concerning orders.

[5] The exceptions to the fair opportunity requirement are: urgent need, only one capable source, logical follow-on, or order necessary to satisfy a minimum guarantee. FAR 16.505(b)(2).

(a) The issuance of a task or delivery order is generally not protestable.[6] Exceptions include:

(1) Where an agency conducts a downselection (selection of one of multiple contractors for continued performance). See Electro-Voice, Inc., B-278319.2 Jan. 15, 1998, 98-1 CPD ¶ 23.

(2) A competition is held between an ID/IQ contractor (or BPA holder) and another vendor. AudioCARE Systems, B-283985, Jan. 31, 2000, 2000 CPD ¶ 24.

(3) The order exceeds the contract's scope of work. See Makro Janitorial Services, Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping services beyond scope of preventive maintenance contract); Ervin & Assocs., Inc., B-278850, Apr. 30, 1998, 98-1 CPD ¶ 89 (contract's "broad range" of services language did not justify out of scope order).

(b) The FAR requires the head of an agency to designate a Task and Delivery Order Ombudsman to review complaints from contractors and ensure they are afforded a fair opportunity to be considered for orders. The ombudsman must be a senior agency official independent of the contracting officer and may be the agency's competition advocate. FAR 16.505(b)(5).

[6] "[A] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." 10 U.S.C. § 2304c (d). See also 4 C.F.R § 21.5(a), which provides that the administration of an existing contract is within the purview of the contracting agency, and is an invalid basis for a GAO protest.

V. LETTER CONTRACTS. FAR SUBPART 16.603.

A. Use. Letter contracts are used when the Government's interests demand that the contractor be given a binding commitment so that work can start immediately, and negotiating a definitive contract is not possible in sufficient time to meet the requirement.

B. Approval for Use. The head of the contracting activity (HCA) or designee must determine in writing that no other contract is suitable. FAR 16.603-3; DFARS 217.7404-1. Approved letter contracts must include a not-to-exceed (NTE) price.

C. Definitization. The parties must definitize the contract (agree upon contractual terms, specifications, and price) by the earlier of the end of the 180 day period after the date of the letter contract, or the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.[7] 10 U.S.C. § 2326; DFARS 217.7404-3. The maximum liability of the Government shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization, but shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official who authorized the letter contract. 10 U.S.C. § 2326(b)(2); FAR 16.603-2(d); DFARS 217.7404-4.

D. Liability for failure to definitize? See Sys. Mgmt. Am. Corp., ASBCA Nos. 45704, 49607, 52644, 00-2 BCA ¶ 31,112 (finding Assistant Secretary of the Navy unreasonably refused to approve a proposed definitization of option prices for a small disadvantaged business's supply contract).

VI. OPTIONS.

A. Definition. A unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. FAR 17.201.

[7] FAR 16.603-2(c) provides for definitization within 180 days after date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first.

B. Use of Options.

1. The Government can use options in contracts awarded under sealed bidding and negotiated procedures when in the Government's interest.

2. Inclusion of an option is normally not in the Government's interest when:

a. The foreseeable requirements involve:

(1) Minimum economic quantities; and

(2) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.

b. An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an ID/IQ or requirements contract with options.

3. The contracting officer shall not employ options if:

a. The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable;

b. Market prices for the supplies or services involved are likely to change substantially; or

c. The option represents known firm requirements for which funds are available unless—

(1) The basic quantity is a learning or testing quantity; and

(2) Competition for the option is impracticable once the initial contract is awarded.

4. Evaluation of options. Normally offers for option quantities or periods are evaluated when awarding the basic contract. FAR 17.206(a).

C. Contract Information.

1. The contract shall state the period within which the option may be exercised. The period may extend beyond the contract completion date for service contracts.

2. The contract shall specify limits on the purchase of additional supplies or services, or the overall duration of the term of the contract.

D. Total Contract Period.

1. Generally, a contract, including all options, may not exceed five years.[8] FAR 17.204(e). Delco Elec. Corp., B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391 (use of options with delivery dates seven and half years later does not violate FAR 17.204(e), because the five year limit applies to five years' requirements in a supply contract). See also Freightliner, ASBCA No. 42982, 94-1 BCA ¶ 26,538 (option valid if exercised within five years of award).

2. Variable option periods do not restrict competition. Madison Services, Inc., B-278962, Apr. 17, 1998, 98-1 CPD ¶ 113 (Navy's option clause that allowed the Navy to vary the length of the option period from one to twelve months did not unduly restrict competition).

E. Exercising Options.

1. The government must comply with applicable statutes and regulations before exercising an option. Golden West Refining Co., EBCA No. C-9208134, 94-3 BCA ¶ 27,184 (option exercise invalid because statute required award to bidder under a new procurement); New England Tank Indus. of N.H., Inc., ASBCA No. 26474, 90-2 BCA ¶ 22,892 (option exercise invalid because of agency's failure to follow DOD regulation by improperly obligating stock funds); see FAR 17.207.

[8] These limitations do not apply to information technology contracts.

a. The Contracting Officer may exercise an option only after determining that-

(1) Funds are available;[9]

(2) The requirement fills an existing need;

(3) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered;[10] and

(4) The option was synopsized in accordance with Part 5 unless exempted under that Part.

b. The Contracting Officer shall make the determination to exercise the option on the basis of one of the following:

(1) A new solicitation fails to produce a better price or more advantageous offer.

(2) An informal analysis of the market indicates the option is more advantageous.

(3) The time between contract award and exercise of the option is so short that the option is most advantageous.

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[9] Failure to determine that funds are available does not render an option exercise ineffective, because it relates to an internal matter and does not create rights for contractors. See United Food Servs., Inc., ASBCA No. 43711, 93-1 BCA ¶ 25,462 (holding valid the exercise of a one-year option subject to availability of funds).

[10] The determination of other factors should take into account the Government's need for continuity of operations and potential costs of disrupting operations. FAR 17.207(e).

2. The government must exercise the option according to its terms. See Lockheed Martin Corp. v. Walker, 149 F.3d 1377 (Fed. Cir. 1998) (Government wrongfully exercised options out of sequence); VARO, Inc., ASBCA No. 47945, 96-1 BCA ¶ 28,161 (inclusion of eight additional contract clauses in option exercise invalidated the option); The Boeing Co., ASBCA No. 37579, 90-3 BCA ¶ 23,202 (Navy failed to exercise the option within the 60 days allowed in the contract and the court invalidated the option); The Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997) (exercise of option on 1 Oct. proper).

3. If a contractor contends that an option was exercised improperly, and performs, it may be entitled to an equitable adjustment. See Lockheed Martin IR Imaging Systems, Inc. v. West, 108 F.3d 319 (1997) (partial exercise of an option was held to be a constructive change to the contract).

4. The government has the discretion to decide whether to exercise an option.

   a. Decision to not exercise.

      (1) The decision not to exercise an option is generally not a protestable issue since it involves a matter of contract administration. See Young-Robinson Assoc., Inc., B-242229, Mar. 22, 1991, 91-1 CPD ¶ 319 (contractor cannot protest agency's failure to exercise an option because it is a matter of contract administration); but see Mine Safety Appliances Co., B-238597, July 5, 1990, 69 Comp. Gen. 562, 90-2 CPD ¶ 11 (GAO reviewed option exercise which was, in effect, a source selection between parallel development contracts).

      (2) A contractor may file a claim under the Disputes clause, but must establish that the Government abused its discretion or acted in bad faith. See Kirk/Marsland Advertising, Inc., ASBCA No., 51075, 99-2 ¶ 30,439 (summary judgment to Government); Pennyrile Plumbing, Inc., ASBCA No. 44555, 96-1 BCA ¶ 28,044 (no bad faith or abuse of discretion).

b. The decision to exercise an option is subject to protest. See Alice Roofing & Sheet Metal Works, Inc., B-283153, Oct. 13, 1999, 99-2 CPD ¶ 70 (protest denied where agency reasonably determined that option exercise was most advantageous means of satisfying needs).

VII. CONCLUSION.

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CONTRACT TYPES -- DISCUSSION PROBLEMS

1. The NAVAIR Aviation Supply Office (ASO) awarded a firm-fixed-price contract for 9,397 aluminum height adapters to Joe's Aluminum Manufacturing Corp. Shortly after contract award, the price of aluminum rose drastically. Joe's refused to continue performance unless the government granted a price increase to cover aluminum costs. The ASO terminated the contract for default and Joe's appealed the termination to the ASBCA.

Should the ASO have granted the price increase? Why or why not?

2. The US Army Information Systems Command (ISC) issued a solicitation for a new computer system for its headquarters building at Fort Huachuca. The solicitation required offerors to assemble a system from commercial-off-the-shelf (COTS) components that would meet the agency's needs. The solicitation provided for the award of a firm-fixed price contract. Several days after issuing the solicitation, ISC received a letter from a potential offeror who was unhappy with the proposed contract type. This contractor stated that, although the system would be built from COT components, there was a significant cost risk for the awardee attempting to design a system that would perform as ISC required. The contractor suggested that ISC award a cost-plus-fixed-fee (CPFF) contract. Additionally, the contractor suggested that ISC structure the contract so that the awardee would be paid all of its incurred costs and that the fixed fee be set at 10% of actual costs.

How should ISC respond?

3. Redstone Arsenal awarded a contract to Hanley's Dirty Laundry, Inc. for laundry services at the installation. The contract contained the standard indefinite quantity clause, however, it did not set forth a guaranteed minimum quantity. At the end of the first year of performance, the government had ordered only half of the contract's estimated quantity. Hanley's filed a claim for the increased unit costs attributable to performing less work than it had anticipated. The Arsenal prepared the estimated quantities for the contract by obtaining estimated monthly usage rates from serviced activities and multiplying by twelve. These estimates were two years old at the time the Arsenal awarded the contract but no attempt was made to update them. In addition, the Arsenal had more recent historical data available but failed to use it. Hanley's argued that the government was liable due to a defective estimate. The government argued that the contract was an indefinite quantity contract, therefore, there was no liability for a defective estimate.

Is the government liable?

4. United Food Services (UFS) received a contract to perform base operation support services at Fort Bliss. The contract was structured with a base year and four option years. The contracting officer exercised the fourth option year subject to the availability of funds (SAF) because Congress had not yet passed an Appropriations Act. Because Fort Bliss was only receiving parts of its yearly funding under continuing resolution authority (CRA), the contracting officer was forced to incrementally fund (add a few dollars at a time to cover a specified period of performance) the option. UFS, who wanted out of the option (its option prices were no longer profitable), claimed that exercising the option SAF, and the incremental funding, invalidated the option and that Fort Bliss must pay fair market value for its services.

How should Fort Bliss respond?

5. A Navy contract required Grumman Technical Services (Grumman) to maintain TA-J4 Naval aircraft at five Naval air stations. The contract, which ran concurrent with the fiscal year, provided for a base year and four option years and required the Navy to exercise each option by written notice "prior to the expiration of the current period of performance." On 25 September, the contracting officer issued a contract modification deleting one of the five sites from the contract effective 1 October. On 30 September, the contracting officer issued and delivered to Grumman a modification exercising the option for the next year. This modification showed the deletion of the fifth site and also had an effective date of 1 October. Grumman claimed that the option exercise was invalid because it changed the terms of the contract by deleting a line item (the fifth site).

How should the Navy respond?

DETERMINING COST PLUS INCENTIVE FEES

TARGET COST = $90

TARGET FEE = $10

MIN FEE = $ 2

MAX FEE = $12

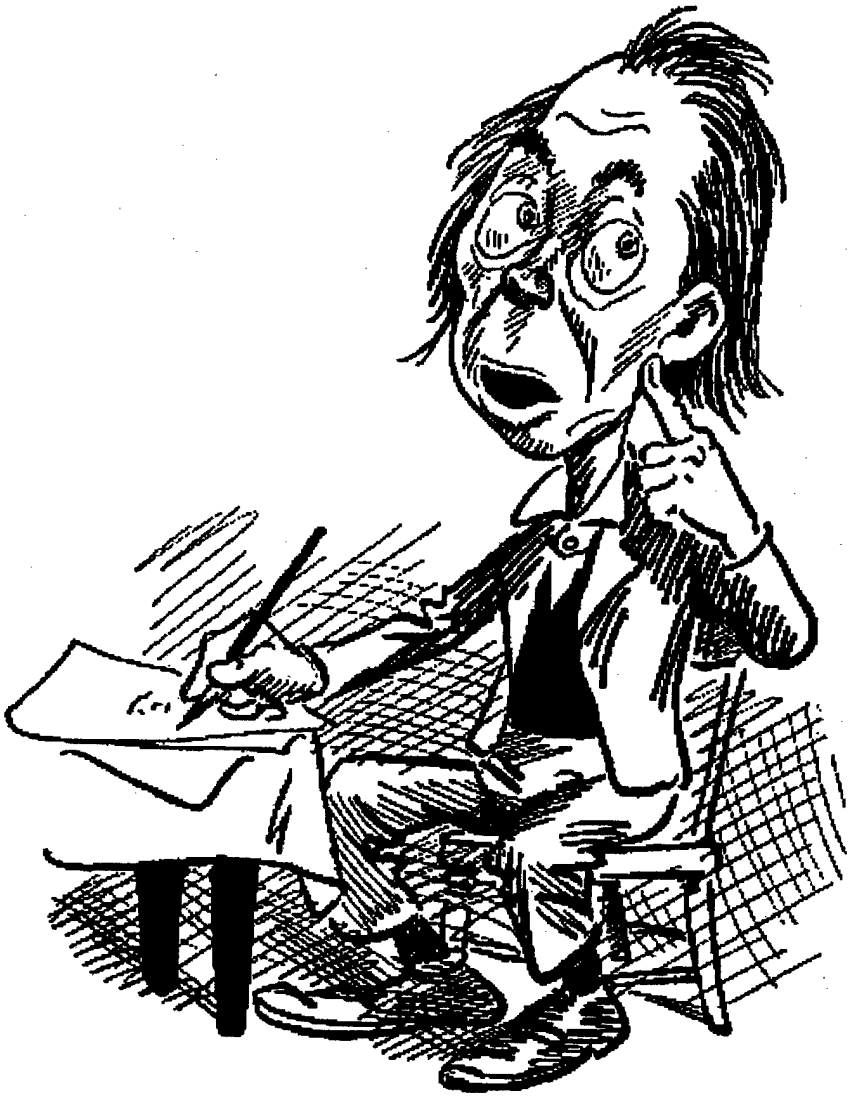
SHARE RATIOS = 80% (GOVT) / 20% (CONTRACTOR)

****

WHAT IF:

ACTUAL COST	CONTRACTOR PAID
$90	
80	
70	
100	
140	

Chapter 6
Simplified Acquisition Procedures



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CHAPTER 6

SIMPLIFIED ACQUISITION PROCEDURES

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CHAPTER 6

SIMPLIFIED ACQUISITION PROCEDURES

I. INTRODUCTION. Following this block of instruction, students should:

A. Understand that simplified acquisition procedures streamline the acquisition process and result in substantial savings of time and money to the Government.

B. Understand how simplified acquisition procedures differ from other acquisition methods.

C. Understand the various simplified acquisitions methods, and the situations when each method should be used.

II. REFERENCES.

A. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (hereinafter FASA).

B. FAR Part 13.

III. WHEN TO USE SIMPLIFIED ACQUISITION PROCEDURES.

A. Definitions.

1. Simplified acquisitions are acquisitions of supplies, services, or construction in the amount of $100,000 or less using simplified acquisition procedures. FAR 2.101; FAR 13.003.

MAJ John Siemietkowski
146th Contract Attorneys Course
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2. Simplified acquisition procedures are those methods prescribed in Part 13 of the FAR, Part 213 of the DFARS, and agency FAR supplements for making simplified acquisitions using imprest funds, purchase orders, credit cards, and blanket purchase agreements.

3. Micro-purchase means an acquisition of supplies or services (except construction), the aggregate amount of which does not exceed $2,500, except that in the case of construction the limit is $2,000. FAR 2.101.

B. Purpose. FAR 13.002. Simplified acquisition procedures are used to:

1. Reduce administrative costs;

2. Increase opportunities for small business concerns;

3. Promote efficiency and economy in contracting.

C. Policy. Agencies shall use simplified acquisition procedures to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold. FAR 13.003(a).[1]

1. Other Sources. Agencies need not use simplified acquisition procedures if it can meet its requirement using:

a. Required sources of supply under FAR part 8 (e.g., Federal Prison Industries, Committee for Purchase from People who are Blind or Severely Disabled, and Federal Supply Schedule contracts);

b. Existing indefinite delivery/indefinite quantity contracts; or

c. Other established contracts.

[1] In support of contingency operations defined by 10 U.S.C. § 101(a)(13), the simplified acquisition threshold increases to $200,000. FASA § 1502 (amending 10 U.S.C. § 2302(7)); DFARS 213.000.

2. Agencies shall not use simplified acquisition procedures to acquire supplies and services initially estimated to exceed the simplified acquisition threshold, or that will, in fact, exceed it. FAR 13.003(d).

3. Activities shall not divide requirements that exceed the simplified acquisition threshold into multiple purchases merely to justify using simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003(d). See L.A. Systems v. Department of the Army, GSBCA 13472-P, 96-1 BCA ¶ 28,220 (Government improperly fragmented purchase of computer upgrades into four parts because agency knew that all four upgrades were necessary and were therefore one requirement). But see Petchem, Inc. v. United States, 99 F.Supp. 2d 50 (D.D.C. 2000) (Navy did not violate CICA by purchasing tugboat services on a piecemeal basis even though total value of the services exceeded $100,000).

D. Commercial Item Test Program.

1. Authority.

a. Congress created the authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold but not greater than $5,000,000. Pub.L. 104-106, § 4202(a)(1)(A) (codified at 10 U.S.C. § 2304(g)(1)(B)).

b. Authority to issue solicitations under the test program was to expire on January 1, 2000. However, the Administration requested an extension because it did not have enough information to assess the program's effectiveness. Accordingly, Congress extended the period of the test program until January 1, 2002. See National Defense Authorization Act for Fiscal Year 2000 § 806(b).

2. Use.

a. For the period of the test, contracting activities are to use simplified acquisition procedures to the maximum extent practicable. FAR 13.500(b).

b. Congress created this authority to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). Therefore, agencies should take advantage of the simplified process. See American Eurocopter Corporation, B-283700, Dec. 16, 1999, 1999 U.S. Comp. Gen. LEXIS 222 (agency used authority of FAR 13.5 to purchase Bell Helicopter).

3. Special Documentation Requirements. FAR 13.501.

a. Sole source acquisitions. Acquisitions conducted under simplified acquisition procedures are exempt from the requirements in FAR Part 6. However, contracting officers shall not conduct sole source acquisitions, as defined in FAR 6.003, unless the need to do so is justified in writing and approved at the levels specified in FAR 13.501.

(1) For a proposed contract exceeding $100,000 but not exceeding $500,000, the contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in agency procedures.

(2) For a proposed contract exceeding $500,000, the approval authority is the competition advocate for the procuring activity, the head of the procuring activity, or a designee who is a general or flag officer or a civilian in the grade of GS-16 or above. This authority is not delegable further.

b. Contract file documentation. The contract file shall include:

(1) A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR 13.5 were used;

(2) The number of offers received;

(3) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and

(4) Any approved justification to conduct a sole-source acquisition.

IV. SIMPLIFIED ACQUISITION PROCEDURES.

A. Small Business Set-Aside Requirement. FAR 13.003(b).

1. Any acquisition for supplies or services that has an anticipated dollar value exceeding $2,500, but not over $100,000, is automatically reserved for small business concerns.[2] FAR 13.003(b)(1); FAR 19.502-2.

2. Exceptions. The set-aside requirement does not apply when:

a. There is no reasonable expectation of obtaining quotations from two or more responsible small business concerns that are competitive in terms of market prices, quality, or delivery. FAR 19.502-2(a). See Hughes & Sons Sanitation, B-270391, Feb. 29, 1996, 96-1 CPD ¶ 119 (finding reasonable the agency's use of unrestricted procurement based on unreasonably high quotes received from small businesses for recently cancelled RFQ); But see American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 (limited small business response to unrestricted solicitation for maintenance services did not justify issuance of unrestricted solicitation for significantly smaller acquisition of similar services);

b. Purchases occur outside the United States, its territories and possessions, Puerto Rico, and the District of Columbia. FAR 19.000(b).

3. Canceling a small business set-aside. FAR 19.502-2(a); 19.506.

[2] Contracting offices should maintain source lists of small business concerns to ensure that small business concerns are given the maximum practicable opportunity to respond to simplified acquisition solicitations. FAR 13.102.

a. If the government does not receive an acceptable (e.g. fair market price) quote from a responsible small business concern, the contracting officer shall withdraw the set-aside and complete the purchase on an unrestricted basis.

b. In establishing that a offered price is unreasonable, the contracting officer may consider such factors as the government estimate, the procurement history for the supplies or services in question, current market conditions, and the "courtesy bid" of an otherwise ineligible large business. Vitronics, Inc., B-237249, Jan. 16, 1990, 69 Comp. Gen. 170, 90-1 CPD ¶57.

c. GAO will sustain a protest concerning a set-aside withdrawal only if the contracting officer's decision had no rational basis or was based on fraud or bad faith. See Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248 (quote 95% higher than government estimate was unreasonable); Vitronics, Inc., B-237249, Jan. 16, 1990, 69 Comp. Gen. 170, 90-1 CPD ¶57 (protester's quote that was 6% higher than large business courtesy quote was not per se unreasonable and required explanation from contracting officer).

B. Synopsis and Posting requirements. FAR 13.105.

1. Activities must meet the posting and synopsis requirements of FAR 5.101 and 5.203 unless:

a. FACNET or the single government-wide point of entry is used for widespread public notice, and offerors are provided a means to respond to the solicitation electronically; or

b. An exception under FAR 5.202 applies.

2. When acquiring commercial items, the contracting officer can use the combined synopsis/solicitation procedure detailed at FAR 12.603.

C. Competition Requirements. FAR 13.104; FAR 13.106-1.

1. Competition standard.

a. The Competition in Contracting Act of 1984 (CICA) exempts simplified acquisition procedures from the requirement that agencies obtain full and open competition. 10 U.S.C. § 2304(g)(1); 41 U.S.C. § 253(a)(1)(A).

b. For simplified acquisitions, CICA requires only that agencies obtain competition to the "maximum extent practicable." 10 U.S.C. § 2304(g)(3); 41 U.S.C. §§ 253(a)(1)(A), 259(c); FAR 13.104.

2. Defining "maximum extent practicable."

a. Agency must make reasonable efforts, consistent with efficiency and economy, to give a responsible source the opportunity to compete. Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333.

(1) FAR 13.104 no longer contains the provision that solicitation of three or more vendors is sufficient.

(2) If not using FACNET or the single government-wide point of entry, competition requirements ordinarily can be obtained by soliciting quotes from sources within the local trade area. FAR 13.104(b).

(3) Vendors who ask should be afforded a reasonable opportunity to compete. An agency does not satisfy its requirement to obtain competition to the maximum extent practicable where it fails to solicit other responsible sources who request the opportunity to compete. Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333 (agency failed to solicit protester who had called contracting officer 19 times).

(4) An agency's failure to solicit an incumbent is not in itself a violation of the requirement to promote competition. Rather, the determinative question where an agency has deliberately excluded a firm which expressed an interest in competing is whether the agency acted reasonably. See SF & Wellness, B-272313, Sep. 23, 1996, 96-2 CPD ¶ 122 (protest denied where contract specialist left message on incumbent's answering machine); Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 (protest sustained where decision not to solicit incumbent was based on alleged past performance problems that were not factually supported).

b. An agency should include restrictive provisions, such as specifying a particular manufacturer's product, only to the extent necessary to satisfy the agency's needs. See American Eurocopter Corporation, B-283700, Dec. 16, 1999, 1999 U.S. Comp. Gen. LEXIS 222 (finding reasonable the solicitation for a Bell Helicopter model 407); Delta International, Inc., B-284364.2, May 11, 2000, 00-1 CPD ¶ 78 (agency could not justify how only one type of x-ray system would meet its needs).

c. Sole source.

(1) An agency may limit an RFQ to a single source if only one source is reasonably available (e.g., urgency, exclusive licensing agreements, or industrial mobilization). FAR 13.106-1(b).

(2) Agencies must furnish potential offerors a reasonable opportunity to respond to the agency's notice of intent to award on a sole source basis. See Jack Faucett Associates, Inc., B-279347, June 3, 1998, 1998 U.S. Comp. Gen. LEXIS 215 (unreasonable to issue purchase order one day after providing FACNET notice of intent to sole-source award).

d. Purchases of $2,500 or less ("micro-purchases"). FAR 13.202.

(1) To the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.202(a)(1). See Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258 (agency properly distributed orthopedic business based on a rotation list).

(2) Competition is not required for a micro-purchase if the contracting officer determines that the price is reasonable. FAR 13.202(a)(2); Michael Ritschard, B-276820, Jul. 28, 1997, 97-2 CPD ¶ 32 (contracting officer properly sought quotes from two of five known sources, and made award).

(3) As of 31 July 2000, DoD requires the use of the government credit card for all purchases at or below the micropurchase threshold. 65 Fed. Reg. 46,625 (2000).

V. SIMPLIFIED ACQUISITION METHODS. "Authorized individuals"[3] shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003(h).

A. Purchase Orders. FAR 13.302.

1. Definition. A purchase order is a government offer to buy certain supplies, services, or construction, from commercial sources, upon specified terms and conditions. FAR 13.001. A purchase order is different than a delivery order, which is placed against an established contract.

2. Considerations for soliciting competition.

a. Contracting officers shall promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is most advantageous to the government considering the administrative cost of the purchase. FAR 13.104.

[3] An "authorized individual" is someone who has been granted authority under agency procedures to acquire supplies and services under simplified acquisition procedures. FAR 13.001.

b. Contracting officers shall not:

(1) solicit quotations based on personal preference; or

(2) restrict solicitation to suppliers of well-known and widely distributed makes or brands. FAR 13.104(a).

c. If not providing notice of proposed contract action through the single, government-wide point of entry, maximum practicable competition ordinarily can be obtained by soliciting quotes or offers from sources within the local trade area. FAR 13.104(b).

d. Before requesting quotes, FAR 13.106-1(a) requires the contracting officer to consider:

(1) The nature of the article or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or is relatively noncompetitive;

(2) Information obtained in making recent purchases of the same or similar item;

(3) The urgency of the proposed purchase;

(4) The dollar value of the proposed purchase; and

(5) Past experience concerning specific dealers' prices.

e. Basis of Award. Regardless of the method used to solicit quotes, the contracting officer shall notify potential quoters of the basis on which award will be made (price alone or price and other factors, e.g., past performance and quality). Contracting officers are encouraged to use best value. FAR 13.106-1(a)(2).

3. Methods of soliciting quotes.

a. Oral.

(1) Contracting officers shall solicit quotes orally to the maximum extent practicable, if:

(a) The acquisition does not exceed the simplified acquisition threshold;

(b) It is more efficient than soliciting through available electronic commerce alternatives; and

(c) Notice is not required under FAR 5.101.

(2) It may not be practicable for actions exceeding $25,000 unless covered by an exception in FAR 5.202.

b. Electronic.

(1) Agencies shall use electronic commerce when practicable and cost-effective. FAR 13.003(f); FAR Subpart 4.5.

(2) Drawings and lengthy specifications can be provided off-line in hard copy or through other appropriate means. FAR 13.003(f).

c. Written. FAR 13.106-1(d).

(1) Contracting officers shall issue a written solicitation for construction requirements exceeding $2,000.

(2) If obtaining electronic or oral quotations is uneconomical, contracting officers should issue paper solicitations for contract actions likely to exceed $25,000.

4. Legal effect of quotes.

a. A quotation is not an offer, and can't be accepted by the government to form a binding contract. FAR 13.004(a); Haworth, Inc., B-241583.5, Apr. 23, 1991, 91-1 CPD ¶ 398.

b. Offer. An order is a government offer to buy supplies or services under specified terms and conditions. A supplier creates a contract when it accepts the government's order. C&M Mach. Prods., Inc., ASBCA No. 39635, 90-2 BCA ¶ 22,787 (bidder's response to purchase order proposing a new price was a counteroffer that the government could accept or reject).

c. Acceptance. FAR 13.004(b). A contractor may accept a government order by:

(1) notifying the government, preferably in writing;

(2) furnishing supplies or services; or

(3) proceeding with work to the point where substantial performance has occurred. [4]

5. Receipt of quotes.

a. Contracting officers shall establish deadlines for the submission of responses to solicitations that afford suppliers a reasonable period of time to respond. FAR 13.003(h)(2). See American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable).

b. Contracting officers shall consider all quotations that are timely received. FAR 13.003(h)(3).

(1) The Government can solicit and receive new quotations any time before contract formation, unless a request for quotations establishes a firm closing date. Technology Advancement Group, B-238273, May 1, 1990, 90-1 CPD ¶ 439; ATF Constr. Co., Inc., B-260829, July 18, 1995, 95-2 CPD ¶ 29.

[4] "Substantial performance" is a phrase used in construction or service contracts, which is synonymous with "substantial completion." It is defined as performance short of full performance, but nevertheless good faith performance in compliance with the contract except for minor deviations. RALPH C. NASH, ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 497 (2d ed. 1998).

(2) When a purchase order has been issued prior to receipt of a quote, the agency's decision not to consider the quote is unobjectionable. Comspace Corp. B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186.

6. Evaluations.

a. Evaluations must be conducted based on the factors set forth in the solicitation. American Artisan Productions, Inc., B-278450, Jan. 30, 1998, 1998 U.S. Comp. Gen. LEXIS 29; National Aerospace Group, Inc., B-281958, May 10, 1999, 99-1 CPD ¶ 82 (rejecting lower quote because vendor had no prior performance history was unreasonable because the determination was inconsistent with the stated evaluation scheme).

b. The contracting officer has broad discretion in fashioning suitable evaluation criteria. At the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in FAR Parts 14 or 15 may be used. FAR 13.106-2(b). See Cromartie and Breakfield, B-279859, Jul. 27, 1998, 1998 U.S. Comp. Gen. LEXIS 266 (upholding rejection of quote using Part 14 procedures for suspected mistake).

c. If a solicitation contains no evaluation factors other than price, price is the sole evaluation criterion. United Marine International, Inc., B-281512, Feb. 22, 1999, 99-1 CPD ¶ 44.

d. If using price and other factors, ensure quotes can be evaluated in an efficient and minimally burdensome fashion. Formal evaluation plans, discussions, and scoring of quotes are not required. Contracting officers may conduct comparative evaluations of offers. FAR 13.106-2(b)(2); See United Marine International LLC, B-281512, Feb. 22, 1999, 99-1 CPD ¶ 44 (discussions not required).

e. Evaluation of other factors, such as past performance:

(1) Does not require the creation or existence of a formal data base; and

(2) May be based on information such as the contracting officer's knowledge of, and previous experience with, the supply or service being acquired, customer surveys, or other reasonable basis. FAR 13.106-2(b)(2); See MAC's General Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 (reasonable to use protester's default termination under a prior contract as basis for selecting a higher quote for award); Environmental Tectonics Corp., B-280573.2, Dec. 1, 1998, 98-2 CPD ¶ 140 (Navy properly considered evidence of past performance from sources not listed in vendor's quotation).

7. Award.

a. Price Reasonableness. The contracting officer shall determine that a price is fair and reasonable before making award.

b. Documentation.

(1) Documentation should be kept to a minimum. FAR 13.106-3(b) provides examples of the types of information that should be recorded.

(2) The contracting officer must include a statement in the contract file supporting the award decision if other than price-related factors were considered in selecting the supplier. FAR 13.106-3(b)(3)(ii); See Universal Building Maintenance, Inc, B-282456, Jul. 15, 1999, 1999 U.S. Comp. Gen. LEXIS 132 (protest sustained because contracting officer failed to document award selection, and FAR Parts 12 and 13 required some explanation of the award decision).

c. Notice to unsuccessful vendors shall be provided if requested. FAR 13.106-3(c) and (d).

8. Termination or cancellation of purchase orders. FAR 13.302-4.

a. The government may withdraw, amend, or cancel an order at any time before acceptance. See Alsace Industrial, Inc., ASBCA No. 51708, 99-1 BCA ¶ 30,220 (holding that the government's offer under the unilateral purchase order lapsed by its own terms when Alsace failed to deliver on time); Master Research & Mfg., Inc., ASBCA No. 46341, 94-2 BCA ¶ 26,747.

b. If the contractor has not accepted a purchase order in writing, the contracting officer may notify the contractor in writing, and:

(1) Cancel the purchase order, if the contractor accepts the cancellation; or

(2) Process the termination action if the contractor does not accept the cancellation or claims that it incurred costs as a result of beginning performance. But see Rex Sys., Inc., ASBCA No. 45301, 93-3 BCA ¶ 26,065 (contractor's substantial performance only required government to keep its unilateral purchase order offer open until the delivery date, after which the government could cancel when goods were not timely delivered).

c. Once the contractor accepts a purchase order in writing, the government cannot cancel it; the contracting officer must terminate the contract in accordance with:

(1) FAR 12.403(d) and 52.212-4(l) for commercial items; or

(2) FAR Part 49 and 52.213-4 for other than commercial items.

B. Blanket Purchase Agreements. FAR 13.303.

1. Definition.

a. A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply. FAR 13.303-1(a).

b. A BPA is not a contract. The actual contract is not formed until an order is issued or the basic agreement is incorporated into a new contract by reference. Modern Technology Corp. v. United States, 24 Cl.Ct. 360 (1991)(Judge Bruggink provides comprehensive analysis of legal effect of a BPA in granting summary judgment to Postal Service in breach claim).

c. BPAs may be issued without a commitment of funds; however, a commitment and an obligation of funds must separately support each order placed under a BPA.

d. Blanket purchase agreements should include the maximum possible discounts, allow for adequate documentation of individual transactions, and provide for periodic billing. FAR 13.303-2(d).

2. Limits on BPA usage.

a. The use of a BPA does not justify purchasing from only one source or avoiding small business set-asides. FAR 13.303-5(c).

b. If there is an insufficient number of BPAs to ensure maximum practicable competition for a particular purchase, the contracting officer must solicit from other sources or create additional BPAs. FAR 13.303-5(d).

c. A BPA may be properly established when:

(1) There are a wide variety of items in a broad class of supplies and services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.

(2) There is a need to provide commercial sources of supply for one or more offices or projects that do not have or need authority to purchase otherwise.

(3) Use of BPAs would avoid the writing of numerous purchase orders.

(4) There is no existing requirements contract for the same supply or service that the contracting activity is legally obligated to use.

3. Establishment of BPAs.

a. After determining a BPA to be advantageous, contracting officers shall:

(1) Establish the parameters of the BPA. Will the agreement be limited to individually identified items, or will it merely identify broad commodity groups or classes of goods and services?

(2) Consider quality suppliers who have provided numerous purchases at or below the simplified acquisition threshold.

b. BPAs may be established with:

(1) More than one supplier for goods and services of the same type to provide maximum practicable competition.

(2) A single source from which numerous individual purchases at or below the simplified acquisition threshold will likely be made. This may be a useful tool in a contingency operation where vendor choices may be limited, and contract personnel can negotiate the terms for subsequent orders in advance of, or concurrent with, a deployment.

(3) The FAR authorizes the creation of BPAs under the Federal Supply Schedule (FSS) "if not inconsistent with the terms of the applicable schedule contract." FAR 13.303-2(c)(3).[5]

(a) FAR 8.404(b)(4) provides the following guidance for creating a BPA under the FSS:

[5] All schedule contracts contain BPA provisions. FAR 8.404(b)(4).

(i) It is permitted when following the ordering provisions of FAR 8.4.

(ii) Ordering offices may establish BPAs to establish accounts with contractors to fill recurring requirements.

(iii) BPAs should address the frequency of ordering and invoicing, discounts, and delivery locations and times.

(b) GSA provides a sample BPA format for agencies to use.

(c) Benefits of establishing BPAs with a FSS contractor.

(i) It can reduce costs. Agencies can seek further price reductions from the FSS contract price.

(ii) It can streamline the ordering process. A study of the FSS process revealed that it was faster to place an order against a BPA than it was to place an order under a FSS.

(iii) Purchases against BPAs established under GSA multiple award schedule contracts can exceed the simplified acquisition threshold and the $5,000,000 limit of FAR 13.5. FAR 13.303-5(b).

4. Review of BPAs. The contracting officer who entered into the BPA shall (FAR 13.303-6):

a. ensure it is reviewed at least annually and updated if necessary;

b. maintain awareness in market conditions, sources of supply, and other pertinent factors that warrant new arrangements or modifications of existing arrangements; and

c. review a sufficient random sample of orders at least annually to make sure authorized procedures are being followed.

C. Imprest Funds. FAR Part 13.305; DFARS 213.305.

1. Definition. An imprest fund is a "cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts." FAR 13.001.

2. DOD Policy. DOD does not support the use of cash payments from imprest funds. This policy is based, in part, on the mandatory electronic funds transfer requirements of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). DFARS 213.305-1(1).

3. DOD Use.

a. Use of imprest funds must comply with the conditions stated in the DOD Financial Management Regulation[6] and the Treasury Financial Manual.[7]

b. Imprest funds can be used without further approval for:

(1) Overseas transactions at or below the micro-purchase threshold in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. § 2302(7); and

(2) Classified transactions. 213.305-3(d)(ii).

[6] DOD 7000.14-R, Volume 5, Disbursing Policy and Procedures.

[7] Part 4, Chapter 3000, section 3020.

c. On a very limited basis, installation commanders and commanders of other activities with contracting authority may be granted authority to establish imprest funds. DFARS 213.305-1(2). Approval is required from the Director for Financial Commerce, Office of the Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller). DFARS 213.305-3(d)(I)(B).

D. Government-wide Commercial Purchase Card. FAR 13.301.

1. Purpose. The government-wide commercial purchase card is authorized for use in making and/or paying for purchases of supplies, services, or construction. DOD contracting officers must use the card for all acquisitions at or below $2,500. Streamlined Payment Practices, 65 Fed. Reg. 46,625 (2000).

2. Implementation.

a. Agencies using government-wide commercial purchase cards shall establish procedures for use and control of the card. FAR 13.301(b). Procedures and purchasing authority differ among agencies.

b. Agencies must have effective training programs in place to avoid card abuses. For example, cardholders may be bypassing required sources of supply. See Memorandum, Administrator of the Office of Federal Procurement Policy, to Agency Senior Procurement executives, subject: Applicability of the Javits-Wagner-O'Day Program for Micropurchases (Feb. 16, 1999)(clarifies that JWOD's status as a priority source under FAR 8.7 applies to micropurchases).

c. Do's and Don'ts. *See* www-benning.army.mil/DOC/IMPAC.htm

3. Uses. FAR 13.301(c).

a. To make micro-purchases. As of 31 July 2000, DoD requires the use of the government credit card for all purchases at or below the micropurchase threshold. 65 Fed. Reg. 46,625 (2000);

b. To place task or delivery orders;

c. To make payments when the contractor agrees to accept payment by the card.

d. Do not give the card to contractors. AFI 64-117, AIR FORCE GOVERNMENT PURCHASE CARD PROGRAM; Memorandum, Secretary of the Air Force (Associate Deputy Assistant Secretary-Contracting & Acquisition), to ALMAJCOM, subject: Contractor Use of the Government-wide Purchase Card (28 July 2000); FAR 13.301(a); FAR 1.603-3.

E. Electronic Commerce. An exploding growth area. More than 1,300 federal "e-government" initiatives. *See* ww.govexec.com/dailyfed/0101/012401j2plain.htm.

1. Electronic Signatures in federal procurement. 65 Fed. Reg. 65,698 (Nov. 1, 2000) (to be codified at 48 C.F.R. pts. 2 and 4).

2. Single point of electronic access to government-wide procurement opportunities. *See* www.fedbizopps.gov.

3. Treasury Department policy on electronic transactions in federal payments and collections. *See* www.contracts.ogc.doc.gov/cld/ecomm/66fr394.htm.

4. Agencies can use "certified e-mail" from U.S. Postal Service. *See* www.fedtechnology.com (Jan. 23, 2001 issue).

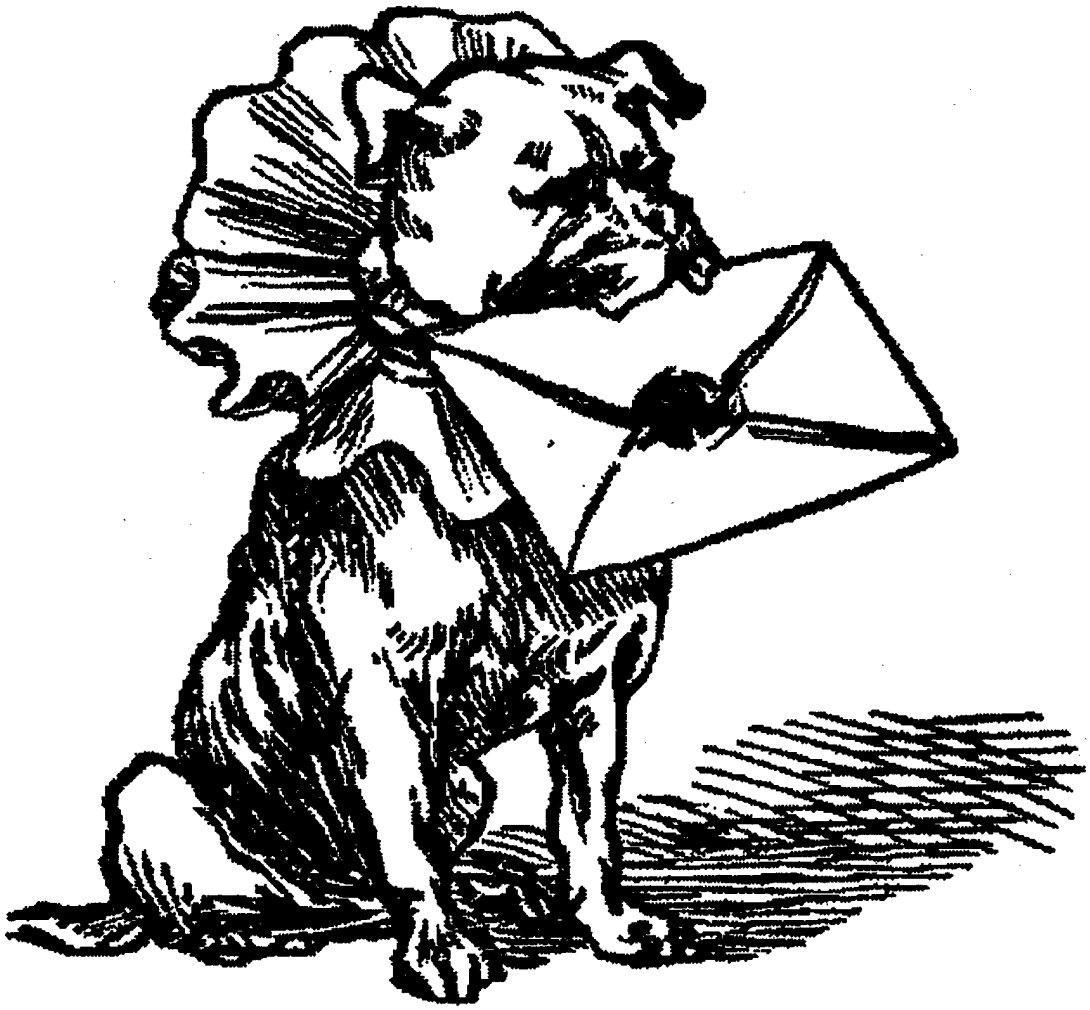
5. GSA on-line property auction. *See* www.govexec.com/dailyfed/0101/011801h1.htm.

6. Reverse auctions. Prospective contractors bid down the price in real time to compete to provide the product sought by the government. *See* Thomas F. Burke, *Online Reverse Auctions*, West Group Briefing Papers (Oct. 2000). Tremendous growth potential, yet no statutory or regulatory guidance. Civilian Agency Acquisition Council and Defense Acquisition Regulations Council have solicited comments regarding whether FAR guidance is necessary. 65 Fed. Reg. 65232 (Oct. 31, 2000).

7. Internet failure may not excuse late delivery of contractor's proposal. Performance Construction, Inc., B-286192, Oct. 30, 2000, 2000 CPD ¶ 180.

VI. CONCLUSION.

Chapter 7
Sealed Bidding



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CHAPTER 7

SEALED BIDDING

I. INTRODUCTION.

"The purpose of these statutes and regulations is to give all persons equal right to compete for government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis." United States v. Brookridge Farm, Inc., 111 F.2d 461, 463 (10th Cir. 1940).

II. THREE CONTRACT METHODS.

A. Simplified Acquisition Procedures. FAR Part 13.

B. Sealed Bidding. FAR Part 14.

C. Negotiations. FAR Part 15.

III. FRAMEWORK OF THE SEALED BIDDING PROCESS.

A. History and Purpose. 2 Stat. 536; 6 Ops. Atty. Gen. 99; 2 Ops. Atty. Gen. 257.

B. Current Statutes.

1. DoD, Coast Guard, and NASA – Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301-2331.

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2. Other federal agencies – Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 251-261.

3. These parallel statutory structures provide that:

a. The head of an agency shall solicit sealed bids if—

(1) time permits the solicitation, submission, and evaluation of sealed bids;

(2) the award will be made on the basis of price and other price-related factors [see FAR 14.201-8];

(3) it is not necessary to conduct discussions with the responding sources about their bids; and

(4) there is a reasonable expectation of receiving more than one sealed bid.

b. The head of an agency shall request competitive proposals if sealed bids are not required. See Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (sealed bidding required when all elements enumerated in the Competition in Contracting Act (CICA) are present—agencies may not use negotiated procedures); see also UBX Int'l, Inc., B-241028, Jan. 16, 1991, 91-1 CPD ¶ 45 (use of sealed bidding procedures for ordnance site survey was proper).

C. Regulations.

1. FAR Part 14--Sealed Bidding.

2. DoD and agency regulations:

a. Defense FAR Supplement (DFARS), Part 214--Sealed Bidding.

b. Air Force FAR Supplement (AFFARS), Part 314-- Sealed Bidding.

c. Army FAR Supplement (AFARS), Part 14--Sealed Bidding.

d. Navy Acquisition Procedures Supplement (NAPS), Part 14--Sealed Bidding.

e. Defense Logistics Acquisition Regulation (DLAR), Part 5214--Sealed Bidding.

D. Overview of Sealed Bidding Process: The Five Phases. FAR 14.101.

1. Preparation of the Invitation for Bids (IFB).

2. Publicizing the Invitation for Bids.

3. Submission of Bids.

4. Evaluation of Bids.

5. Contract Award.

IV. PREPARATION OF INVITATION FOR BIDS.

A. Format of the IFB.

1. Uniform Contract Format. FAR 14.201-1.

2. Standard Form 33 - Solicitation, Offer and Award. FAR 53.301-33. See Appendix A.

3. Standard Form 30 - Amendment of Solicitation; Modification of Contract. See Appendix B.

B. Specifications.

1. Clear, complete, and definite.

2. Minimum needs of the government.

3. Preference for Commercial Items. FAR 11.003.

C. Definition. "Offer" means "bid" in sealed bidding. FAR 52.214-1.

D. Contract Type: Contracting officers may use only **firm fixed-price** and **fixed-price with economic price adjustment** contracts in sealed bidding acquisitions. FAR 14.104.

V. PUBLICIZING THE INVITATION FOR BIDS.

A. Policy on Publicizing Contract Actions. FAR 5.002. Contracting officers must publicize contract actions to increase competition, broaden industry participation, and assist small business concerns in obtaining contracts and subcontracts. With limited exceptions, contracting officers shall promote **full and open competition.** This means that all responsible sources are permitted to compete. FAR 6.003.

B. Methods of Soliciting Potential Bidders. FAR 5.101; FAR 5.102. DoD uses three primary methods to promote competition: the Commerce Business Daily, Bidders Mailing Lists, and copies of the solicitations posted in public places.

1. Commerce Business Daily (CBD). FAR Subpart 5.2. The contracting officer may not issue a solicitation until at least 15 days after publication in the CBD. Further, when synopsis in the CBD is required, the contracting officer must give bidders a minimum of 30 days after issuance of the IFB to prepare and submit their bids. These time limits may be shortened when procuring commercial items.

2. Bidders Mailing Lists (BML). FAR 14.205. In addition, contracting activities develop sources through the use of the BML. Such lists consist of firms known to supply particular goods or services. When a requirement arises for an item for which a BML exists, the contracting agency must send copies of the IFB to firms on the list. Failure to solicit a contractor that requests to be included on the list may require resolicitation. Applied Constr. Technology, B-251762, May 4, 1993, 93-1 CPD ¶ 365. If the BML is excessively long, the contracting officer may rotate portions of the list for separate acquisitions.

3. Posting in a Public Place. FAR 5.101. Every proposed contract action expected to exceed $10,000 but not expected to exceed $25,000 must be posted in a public place at the contracting office issuing the solicitation not later than the date the solicitation is issued and for at least ten days. Electronic posting may be used to satisfy this requirement.

C. Late Receipt of Solicitations. Failure of a potential bidder to receive an IFB in time to submit a bid, or to receive a requested solicitation at all, does not require postponement of bid opening unless adequate competition is not obtained. See Family Carpet Serv. Inc., B-243942.3, Mar. 3, 1992, 92-1 CPD ¶ 255. See also Educational Planning & Advice, B-274513, Nov. 5, 1996, 96-2 CPD ¶ 173 (refusal to postpone bid opening during a hurricane was not an abuse of discretion where adequate competition was achieved and agency remained open for business); Lewis Jamison Inc. & Assocs., B-252198, June 4, 1993, 93-1 CPD ¶ 433 (GAO denies protest where contractor had "last clear opportunity" to avoid being precluded from competing);. But see Applied Constr. Technology, B-251762, May 4, 1993, 93-1 CPD ¶ 365 (although agency received 10 bids in response to IFB, GAO sustains protest where agency failed to solicit contractor it had advised would be included on its bidder's mailing list).

D. Failure to Solicit the Incumbent Contractor. Failure to give notice of a solicitation for supplies or services to a contractor currently providing such supplies or services may be fatal to the solicitation, unless the agency:

1. Made a diligent, good-faith effort to comply with statutory and regulatory requirements regarding notice of the acquisition and distribution of solicitation materials; **and**

2. Obtained reasonable prices (competition). Transwestern Helicopters, Inc., B-235187, July 28, 1989, 89-2 CPD ¶ 95 (although the agency failed inadvertently to solicit incumbent contractor, the agency made reasonable efforts to publicize the solicitation, which resulted in 25 bids). But see Professional Ambulance, Inc., B-248474, Sep. 1, 1992, 92-2 CPD ¶ 145 (agency failed to solicit the incumbent and received only three proposals; GAO recommended resolicitation).

VI. SUBMISSION OF BIDS.

A. Safeguarding Bids. FAR 14.401.

1. Bids (including bid modifications) received before the time set for bid opening generally must remain unopened in a locked box or safe. FAR 14.401.

2. A bidder generally is not entitled to relief if the agency negligently loses its bid. Vereinigte Gebudereinigungsgesellschaft, B-252546, June 11, 1993, 93-1 CPD ¶ 454.

B. Method of Submission. FAR 14.301.

1. To be considered for award, a bid must comply in all material respects with the invitation for bids, to include the method of submission, i.e., the bid must be **responsive** to the solicitation. FAR 14.301(a); LORS Medical Corp., B-259829.2, Apr. 25, 1995, 95-1 CPD ¶ 222 (bidder's failure to return two pages of IFB does not render bid nonresponsive; submission of signed SF 33 incorporates all pertinent provisions).

a. General Rule - Offerors may submit their bids by any written means permitted by the solicitation.

b. Unless the solicitation specifically allows it, the contracting officer may not consider telegraphic bids. FAR 14.301(b); MIMCO, Inc., B-210647.2, Dec. 27, 1983, 84-1 CPD ¶ 22 (telegraphic bid, which contrary to solicitation requirement makes no mention of bidder's intent to be bound by all terms and conditions, is nonresponsive).

c. The government will not consider facsimile bids unless permitted by the solicitation. FAR 14.301(c); FAR 14.202-7; Recreonics Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249 (bid properly rejected for bidder's use of fax machine to transmit acknowledgement of solicitation amendment); but see Brazos Roofing, Inc., B-275113, Jan. 23, 1997, 97-1 CPD ¶ 43 (bidder not penalized for agency's inoperable FAX machine); PBM Constr. Inc., B-271344, May 8, 1996, 96-1 CPD ¶ 216 (ineffective faxed modification had no effect on the original bid, which remained available for acceptance); International Shelter Sys., B-245466, Jan. 8, 1992, 92-1 CPD ¶ 38 (hand-delivered facsimile of bid modification is not a facsimile transmission).

C. Time and Place of Submission. FAR 14.302.

1. Reasons for specific requirements.

a. Equality of treatment of bidders.

b. Preserve integrity of system.

c. Convenience of the government.

2. Place of submission—as specified in the IFB. FAR 14.302(a); CSLA, Inc., B-255177, Jan. 10, 1994, 94-1 CPD ¶ 63; Carolina Archaeological Serv., B-224818, Dec. 9, 1986, 86-2 CPD ¶ 662.

3. Time of submission - as specified in the IFB. FAR 14.302(a).

a. The official designated as the bid opening officer shall decide when the time set for bid opening has arrived and shall so declare to those present. FAR 14.402-1; J. C. Kimberly Co., B-255018.2, Feb. 8, 1994, 94-1 CPD ¶ 79; Chattanooga Office Supply Co., B-228062, Sept. 3, 1987, 87-2 CPD ¶ 221 (bid delivered 30 seconds after bid opening officer declared the arrival of the bid opening time is late).

b. The bid opening officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable. Action Serv. Corp., B-254861, Jan. 24, 1994, 94-1 CPD ¶ 33. The bid opening officer may reasonably rely on the bid opening room clock when declaring bid opening time. General Eng'g Corp., B-245476, Jan. 9, 1992, 92-1 CPD ¶ 45.

c. If the bid opening officer has not declared bid opening time, a bid is timely if delivered by the end of the minute specified for bid opening. Amfel Constr., Inc., B-233493.2, May 18, 1989, 89-1 CPD ¶ 477 (bid delivered within 20-50 seconds after bid opening clock "clicked" to the bid opening time was timely where bid opening officer had not declared bid submission period ended); Reliable Builders, Inc., B-249908.2, Feb. 9, 1993, 93-1 CPD ¶ 116 (bid which was time/date stamped one minute past time set for bid opening was timely since bidder relinquished control of bid at the exact time set for bid opening).

d. Arbitrary early or late bid opening is improper. William F. Wilke, Inc., B-185544, Mar. 18, 1977, 77-1 CPD ¶ 197.

4. Amendment of IFB.

a. The government must display amendments in the bid room and must send, before the time for bid opening, a copy of the amendment to everyone that received a copy of the original IFB. FAR 14.208(a).

b. If the government furnishes information to one prospective bidder concerning an invitation for bids, it must furnish that same information to all other bidders as an amendment if (1) such information is necessary for bidders to submit bids or (2) the lack of such information would be prejudicial to uninformed bidders. See Phillip Sitz Constr., B-245941, Jan. 22, 1992, 92-1 CPD ¶ 101; see also Republic Flooring, B-242962, June 18, 1991, 91-1 CPD ¶ 579 (bidder excluded from BML erroneously).

5. Postponement of bid opening. FAR 14.208; FAR 14.402-3.

a. The government may postpone bid opening before the scheduled bid opening time by issuing an amendment to the IFB. FAR 14.208(a).

b. The government may postpone bid opening even **after** the time scheduled for bid opening if:

(1) The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence, Ling Dynamic Sys., Inc., B-252091, May 24, 1993, 93-1 CPD ¶ 407; or

(2) Emergency or unanticipated events interrupt normal governmental processes so that the conduct of bid opening as scheduled is impractical. If urgent requirements preclude amendment of the solicitation:

(a) the time for bid opening is deemed extended until the same time of day on the first normal work day; and

(b) the time of actual bid opening is the cutoff time for determining late bids. FAR 14.402-3 (c). See ALM, Inc., B-225679, Feb. 13, 1987, 87-1 CPD ¶ 165, but note that this case pre-dates the applicable FAR provision.

c. For postponement due to the delay of an important segment of bids in the mails, the contracting officer publicly must announce postponement of bid opening and issue an amendment.

D. The Firm Bid Rule.

1. Distinguish common law rule, which allows an offeror to withdraw an offer any time prior to acceptance. See Restatement (Second) of Contracts § 42 (1981).

2. Firm Bid Rule:

a. After bid opening, bidders may not withdraw their bids during the period specified in the IFB, but must hold their bids open for government acceptance during the stated period. FAR 14.407-1, 52.214-16.

b. If the solicitation requires a minimum bid acceptance period, a bid that offers a shorter acceptance period than the minimum is nonresponsive. See Banknote Corp. of America, Inc., B-278514, 1998 U.S. Comp. Gen. LEXIS 33 (Feb. 4, 1998) (bidder offered 60-day bid acceptance period when solicitation required 180 days and advised bidders to disregard 60-day bid acceptance period provision); see also Hyman Brickle & Son, Inc., B-245646, Sept. 20, 1991, 91-2 CPD ¶ 264 (30-day acceptance period offered instead of the required 120 days).

c. The bid acceptance period is a material solicitation requirement. The government may not waive the bid acceptance period because it affects the bidder's price. Valley Constr. Co., B-243811, Aug. 7, 1991, 91-2 CPD ¶ 138 (60 day period required, 30-day period offered).

d. A bid that fails to offer an unequivocal minimum bid acceptance period is ambiguous and nonresponsive. See John P. Ingram Jr. & Assoc., B-250548, Feb. 9, 1993, 93-1 CPD ¶ 117 (bid ambiguous even where bidder acknowledged amendment which changed minimum bid acceptance period). But see Connecticut Laminating Company, Inc., B-274949.2, Dec. 13, 1999, 99-2 CPD ¶ 108 (bid without bid acceptance period is acceptable where solicitation did not require any minimum bid acceptance period).

e. Exception - the government may accept a solitary bid that offers less than the minimum acceptance period. Professional Materials Handling Co., - - Reconsideration, 61 Comp. Gen. 423 (1982).

f. After the bid acceptance period expires, the bidder may extend the acceptance period only where the bidder would not obtain an advantage over other bidders. FAR 14-404-1(d). See Capital Hill Reporting, Inc., B-254011.4, Mar. 17, 1994, 94-1 CPD ¶ 232; The Vemo Co., B-243390, Nov. 12, 1991, 91-2 CPD ¶ 443. See also NECCO, Inc., B-258131, Nov. 30, 1994, 94-2 CPD ¶ 218 (bidder ineligible for award where bid expired due to bidder's offering a shorter extension period than requested by the agency).

E. Treatment of Late Bids, Bid Modifications, and Bid Withdrawals. FAR 14.304. "The Late Bid Rule."

1. Definition: A "late" bid, bid modification, or bid withdrawal is one that is received in the office **designated** in the IFB after the **exact time** set for bid opening. FAR 14.304(b)(1). If the IFB does not specify a time, the time for receipt is 4:30 P.M., local time for the designated Government office. Id.

2. There are exceptions to the **late bid rule**. These exceptions, listed in paragraph F. below, only apply if the contracting officer receives the late bid **prior to contract award**. FAR 14.304(b)(1).

3. General rule for all bids, bid modifications, and bid withdrawals:

⇒ **LATE IS LATE!** FAR 14.304(b)(1); FAR 52.214-7; The Staubach Co., B-276486, May 19, 1997, 97-1 CPD ¶ 190, citing Carter Mach. Co., B-245008, Aug. 7, 1991, 91-2 CPD ¶ 143.

F. Exceptions to the Late Bid Rule.

1. **Electronically submitted bids.** A bid may be considered if it was transmitted through an electronic commerce method authorized by the solicitation and was received **at the initial point of entry to the Government infrastructure** by the government not later than 5:00 P.M. one working day prior to the date specified for the receipt of bids. FAR 14.304(b)(1)(i).

2. **Government control.** A bid may be considered if there is acceptable evidence to establish that it was received at the government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids. FAR 14.304(b)(1)(ii). **NOTE: This is a recent change to the FAR's exceptions to the late bid rule. In 1999, FAR 14.304 was amended to include the above rule. Before this change, the FAR contained four exceptions to the late bid rule: (1) the five-day mail rule, (2) the two-day mail rule, (3) the government mishandling rule, and (4) the electronic bid rule (see paragraph F.1. above).**

3. The **"Government Frustration"** Rule.

   a. If timely delivery of a bid, bid modification, or bid withdrawal that is hand-carried by the bidder (or commercial carrier) is frustrated by the government such that the government is the **paramount cause** of the late delivery, then the bid is timely. Computer Literacy World, Inc., GSBCA 11767-P, May 22, 1992, 92-3 BCA ¶ 25,112 (government employee gave unwise instructions, which caused the delay); Kelton Contracting, Inc., B-262255, Dec 12, 1995, 95-2 CPD ¶ 254 (Federal Express Package misdirected by agency).

   b. The bid must be out of the bidder's control at the time of bid opening. Fredricks Rubber Co., B-172974, 51 Comp. Gen. 69 (1971) (gear box case). But see Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 (late bid should be considered where lateness was due to government misdirection and bid had been relinquished to UPS); Select, Inc., B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22 (bidder relinquished control of bid by giving it to UPS).

c. The government may consider commercial carrier records to establish time of delivery to the agency, if corroborated by relevant government evidence. Power Connector, Inc., B-256362, June 15, 1994, 94-1 CPD ¶ 369 (agency properly considered Federal Express tracking sheet, agency mail log, and statements of agency personnel in determining time of receipt of bid).

d. If the government is not the cause of the late delivery of the hand-carried bid, then the general rule applies—late is late. Selrico Services, Inc., B-259709.2, May 1, 1995, 95-1 CPD ¶ 224 (erroneous confirmation by agency of receipt of bid); Fire Sec. Sys., Inc., B-236132, Oct. 24, 1989, 89-2 CPD ¶ 374 (manhandling of protester's agent by another bidder's agent); Gull's, Inc., B-232599, Jan. 25, 1989, 89-1 CPD ¶ 74 (building entrance locked and blocked by construction); Work Sys. Design, Inc., B-223942, Nov. 26, 1986, 86-2 CPD ¶ 613 (bid left at loading dock); National Minority Research Dev. Corp., B-220057, Sept. 18, 1985, 85-2 CPD ¶ 303 (car accident); Data Pathing, Inc., B-188234, May 5, 1977, 77-1 CPD ¶ 311 (sniper); V.J. Gautieri, Inc., B-181720, Sep. 17, 1974, 74-2 CPD ¶ 173 (voting case); To James P. Smith, B-173392, 51 Comp. Gen. 173 (1971) (no "late kid" exception); but see Aable Tank Services, Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 (bid should be considered when its arrival at erroneous location was due to agency's affirmative misdirection).

e. The bidder must not have contributed substantially to the late receipt of the bid; it must act reasonably to fulfill its responsibility to deliver the bid to the proper place by the proper time. Bergen Expo Sys., Inc., B-236970, Dec. 11, 1989, 89-2 CPD ¶ 540 (Federal Express courier refused access by guards, but courier departed); Monthei Mechanical, Inc., B-216624, Dec. 17, 1984, 84-2 CPD ¶ 675 (bid box moved, but bidder arrived only 30 seconds before bid opening).

f. This rule has no statutory or regulatory basis; rather, the GAO fashioned the rule under its bid protest authority.

G. Modifications and Withdrawals of Bids.

1. When may offerors modify their bids?

a. **Before** bid opening: Bidders may modify their bids at any time before bid opening. FAR 14.303; FAR 52.214-7.

b. **After** bid opening: Bidders may modify their bids only if one of the exceptions to the Late Bid Rule applies to the modification. FAR 14.304(b)(1); FAR 52.214-7(b).

(1) See FAR exceptions to Late Bid Rule in paragraph F. above.

(2) Government Frustration Rule. I & E Constr. Co., B-186766, Aug. 9, 1976, 76-2 CPD ¶ 139.

(3) The government may also accept a late modification to an otherwise successful bid if it is more favorable to the government. FAR 14.304(b)(2); FAR 52.214-7(f); Environmental Tectonics Corp., B-225474, Feb. 17, 1987, 87-1 CPD ¶ 175.

2. When may offerors withdraw their bids?

a. **Before** bid opening: Bidders may withdraw their bids at any time before bid opening. FAR 14.303 and 14.304(e); FAR 52.214-7.

b. **After** bid opening. Because of the Firm Bid Rule, bidders generally may withdraw their bids **only if** one of the exceptions to the Late Bid Rule applies. FAR 14.304(b)(1); FAR 52.214-7(b). See Para. VII.G, infra.

3. Transmission of modifications or withdrawals of bids. FAR 14.303 and FAR 52.214-5.

a. Offerors may modify or withdraw their bids by written or telegraphic notice, which must be received in the office designated in the invitation for bids before the exact time set for bid opening. FAR 14.303(a). See R.F. Lusa & Sons Sheetmetal, Inc., B-281180.2, Dec. 29, 1998, 98-2 CPD ¶ 157 (unsigned/uninitialed inscription on outside envelope of bid not an effective bid modification).

b. The exceptions to the late bid rule apply to bid modifications and bid withdrawals only if the modification or withdrawal is received **prior to contract award**, unless it is a modification of the successful offeror's bid. FAR 14.304(b)(1); FAR 14.304(b)(2).

VII. EVALUATION OF BIDS.

A. Evaluation of Price.

1. Contracting officer evaluates price and price-related factors. FAR 14.201-8; Monterey Bay Boatworks Co., B-255321, Feb. 24, 1994, 94-1 CPD ¶ 145 (price-related factors).

2. Award made on basis of lowest price offered.

3. The government may reject a materially unbalanced bid. A materially unbalanced bid contains inflated prices for some contract line items and below-cost prices for other line items, and gives rise to a reasonable doubt that award will result in the lowest overall cost to the government. FAR 14.404-2(g); LBCO, Inc., B-254995, Feb. 1, 1994, 94-1 CPD ¶ 57 (inflated first article prices); Custom Envtl. Serv., Inc., B-252538, July 7, 1993, 93-2 CPD ¶ 7.

B. Evaluation of Responsiveness of Bids. 10 U.S.C. § 2305; 41 U.S.C. § 253b.

1. A bid is responsive if it unequivocally offers to provide the requested supplies or services at a firm, fixed price. Unless something on the face of the bid either limits, reduces, or modifies the obligation to perform in accordance with the terms of the invitation, the bid is responsive. New Dimension Masonry, Inc., B-258876, Feb. 21, 1995, 95-1 CPD ¶ 102 (statements in cover letter conditioned the bid); Metric Sys. Corp., B-256343, June 10, 1994, 94-1 CPD ¶ 360 (bidder's exception to IFB indemnification requirements changed legal relationship between parties)

2. The government may accept only a responsive bid. The government must reject any bid that fails to conform to the essential requirements of the IFB. FAR 14.301(a); FAR 14.404-2.

3. The government may not accept a nonresponsive bid even though it would result in monetary savings to the government since acceptance would compromise the integrity of the bidding system. MIBO Constr. Co., B-224744, Dec. 17, 1986, 86-2 CPD ¶ 678; Perkin-Elmer, B-214040, Aug. 8, 1984, 63 Comp. Gen. 529, 84-2 CPD ¶ 158.

4. When is responsiveness determined? The contracting officer determines the responsiveness of each bid at the **time of bid opening** by ascertaining whether the bid meets all of the IFB's essential requirements. See Gelco Payment Sys., Inc., B-234957, July 10, 1989, 89-2 CPD ¶ 27. See also Stanger Indus. Inc., B-279380, June 4, 1998, 98-1 CPD ¶157 (agency improperly rejected low bid that used unamended bid schedule that had been corrected by amendment where bidder acknowledged amendments and bid itself commited bidder to perform in accordance with IFB requirements).

5. Essential requirements of responsiveness. FAR 14.301; FAR 14.404-2; FAR 14.405; Tektronix, Inc.; Hewlett Packard Co., B-227800, Sep. 29, 1987, 87-2 CPD ¶ 315.

a. **Price**. The bidder must offer a firm, fixed price. FAR 14.404-2(d); United States Coast Guard—Advance Decision, B-252396, Mar. 31, 1993, 93-1 CPD ¶ 286 (bid nonresponsive where price included fee of $1,000 per hour for "additional unscheduled testing" by government); J & W Welding & Fabrication, B-209430, Jan. 25, 1983, 83-1 CPD ¶ 92 ("plus 5% sales tax if applicable"—nonresponsive).

b. **Quantity**. The bidder must offer the quantity required in the IFB. Inscom Elec. Corp., B-225221, Feb. 4, 1987, 87-1 CPD ¶ 116 (bid limited government's right to reduce quantity under the IFB); Pluribus Prod., Inc., B-224435, Nov. 7, 1986, 86-2 CPD ¶ 536.

c. **Quality**. The bidder must agree to meet the quality requirements of the IFB. FAR 14.404-2(b); Reliable Mechanical, Inc; Way Eng'g Co., B-258231, Dec. 29, 1994, 94-2 CPD ¶ 263 (bidder offered chiller system which did not meet specifications); Wyoming Weavers, Inc., B-229669.3, June 2, 1988, 88-1 CPD ¶ 519.

d. **Delivery**. The bidder must agree to the delivery schedule. FAR 14.404-2(c); Valley Forge Flag Company, Inc., B-283130, Sept. 22, 1999, 99-2 CPD ¶54 (bid nonresponsive where bidder inserts delivery schedule in bid that differs from that requested in the IFB); Viereck Co., B-256175, May 16, 1994, 94-1 CPD ¶ 310 (bid nonresponsive where bidder agreed to 60-day delivery date only if the cover page of the contract were faxed on the day of contract award); HoseCo, Inc., B-226420, Mar. 12, 1987, 87-1 CPD ¶ 282. But see Image Contracting, B-253038, Aug. 11, 1993, 93-2 CPD ¶ 95 (bidder's failure to designate which of two locations it intended to deliver did not render bid nonresponsive where IFB permitted delivery to either location).

6. Other bases for rejection of bids for being nonresponsive.

a. Ambiguous, indefinite, or uncertain bids. FAR 14.404-2(d); Trade-Winds Envtl. Restoration, Inc., B-259091, Mar. 3, 1995, 95-1 CPD ¶ 127 (bid contained inconsistent prices); Caldwell & Santmyer, Inc., B-260628, July 3, 1995, 95-2 CPD ¶ 1 (uncertainty as to identity of bidder); Reid & Gary Strickland Co., B-239700, Sept. 17, 1990, 90-2 CPD ¶ 222 (notation in bid ambiguous).

b. Variation of acceptance period. John's Janitorial Serv., B-219194, July 2, 1985, 85-2 CPD ¶ 20.

c. Placing a "confidential" stamp on bid. Concept Automation, Inc. v. General Accounting Office, GSBCA No. 11688-P, Mar. 31, 1992, 92-2 BCA ¶ 24,937. But see North Am. Resource Recovery Corp., B-254485, Dec. 17, 1993, 93-2 CPD ¶ 327 ("proprietary data" notation on cover of bid did not restrict public disclosure of the bid where no pages of the bid were marked as proprietary).

d. Bid conditioned on receipt of local license. National Ambulance Co., B-184439, Dec. 29, 1975, 55 Comp. Gen. 597, 75-2 CPD ¶ 413.

e. Requiring government to make progress payments. Vertiflite, Inc., B-256366, May 12, 1994, 94-1 CPD ¶ 304.

f. Failure to furnish required or adequate bid guarantee. Schrepfer Industries, Inc., B-286825, Feb. 12, 2001, 2001 U.S. Comp. Gen. LEXIS 4 (photocopied power of attorney unacceptable); Quantum Constr., Inc., B-255049, Dec. 1, 1993, 93-2 CPD ¶ 304 (defective power of attorney submitted with bid bond); Kinetic Builders, Inc., B-223594, Sept. 24, 1986, 86-2 CPD ¶ 342 (bond referenced another solicitation number); Clyde McHenry, Inc., B-224169, Sept. 25, 1986, 86-2 CPD ¶ 352 (surety's obligation under bond unclear).

g. Exception to liquidated damages. Dubie-Clark Co., B-186918, Aug. 26, 1976, 76-2 CPD ¶ 194.

h. Solicitation requires F.O.B. destination; bid states F.O.B. origin. Taylor-Forge Eng'd Sys., Inc., B-236408, Nov. 3, 1989, 89-2 CPD ¶ 421.

i. Failure to include sufficient descriptive literature (when required by IFB) to demonstrate offered product's compliance with specifications. FAR 52.214-21; Adrian Supply Co., B-250767, Feb. 12, 1993, 93-1 CPD ¶ 131. **NOTE**: The contracting officer generally should disregard **unsolicited** descriptive literature. However, if the unsolicited literature raises questions reasonably as to whether the offered product complies with a material requirement of the IFB, the bid should be rejected as nonresponsive. FAR 14.202-5(f); FAR 14.202-4(g); Delta Chem. Corp., B-255543, Mar. 4, 1994, 94-1 CPD ¶ 175; Amjay Chems., B-252502, May 28, 1993, 93-1 CPD ¶ 426.

C. Responsiveness Distinguished from Responsibility. Data Express, Inc., B-234685, July 11, 1989, 89-2 CPD ¶ 28.

1. Bid responsiveness concerns whether a bidder has offered **unequivocally** in its bid documents to provide supplies in conformity with all material terms and conditions of a solicitation for sealed bids, and it is determined as of the time of bid opening.

2. Responsibility refers to a bidder's apparent **ability** and **capacity** to perform, and it is determined any time prior to award. Triton Marine Constr. Corp., B-255373, Oct. 20, 1993, 93-2 CPD ¶ 255 (bidder's failure to submit with its bid preaward information to determine the bidder's ability to perform the work solicited does not render bid nonresponsive).

3. The issue of responsiveness is relevant only to the sealed bidding method of contracting.

D. Informalities or Irregularities in Bids. FAR 14.405.

1. Minor irregularities.

a. **Definition**: A minor informality or irregularity is merely a matter of form, not of substance. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of supplies or services acquired. FAR 14.405.

b. 3-Part Test. To determine whether a defect or variation is immaterial, review the facts of the case with the following considerations:

(1) whether item is divisible from solicitation requirements;

(2) whether cost of item is *de minimis* as to contractor's total cost; and

(3) whether waiver or correction clearly would not affect competitive standing of bidders.

Red John's Stone Inc., B-280974, Dec. 14, 1998, 98-2 CPD ¶ 135.

c. Examples of minor irregularities.

(1) Failure to return the number of copies of signed bids required by the IFB. FAR 14.405(a).

(2) Failure to submit employer identification number. Dyneteria, Inc., B-186823, Oct. 18, 1976, 76-2 CPD ¶ 338.

(3) Use of abbreviated corporate name if the bid otherwise establishes the identity of the party to be bound by contract award. Americorp, B-232688, Nov. 23, 1988, 88-2 CPD ¶ 515 (bid also gave Federal Employee Identification Number).

(4) Failure to certify as a small business on a small business set-aside. See Willis B. Simmons, Inc. & Assocs., B-226477, Mar. 17, 1987, 87-1 CPD ¶ 299. See also J. Morris & Assocs., B-259767, 95-1 CPD ¶ 213 (bidder may correct erroneous certification after bid opening).

(5) Failure to initial bid correction. Durden & Fulton, Inc., B-192203, Sept. 5, 1978, 78-2 CPD ¶ 172.

(6) Failure to price individually each line item on a contract to be awarded on an "all or none" basis. Seaward Corp., B-237107.2, June 13, 1990, 90-1 CPD ¶ 552; see also Vista Contracting, Inc., B-255267, Jan. 7, 1994, 94-1 CPD ¶ 61 (failure to indicate cumulative bid price).

(7) Failure to furnish information with bid, if the information is not necessary to evaluate bid and bidder is bound to perform in accordance with the IFB. W.M. Schlosser Co., B-258284, Dec. 12, 1994, 94-2 CPD ¶ 234 (equipment history); But see Booth & Assocs., Inc. - - Advisory Opinion, B-277477.2, Mar. 27, 1998, 98-1 CPD ¶104 (agency properly reinstated bid where bidder failed to include completed supplement schedule of hourly rates but schedule was not used in the bid price evaluation).

(8) Negligible variation in quantity. Alco Envtl. Servs., Inc., ASBCA No. 43183, 94-1 BCA ¶ 26,261 (variation in IFB quantity of .27 percent).

(9) Failure to acknowledge amendment of the solicitation if the amendment is nonessential, its impact on the cost of contract performance is *de minimis*, or the bid received is clearly based on the IFB requirements as amended. See FAR 14.405(d).

d. Discretionary decision—the contracting officer shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the government's advantage. FAR 14.405; Excavation Constr. Inc. v. United States, 494 F.2d 1289 (Ct. Cl. 1974).

2. Signature on bid.

a. Normally, a bidder's failure to sign the bid is not a minor irregularity, and the government must reject the unsigned bid. See Firth Constr. Co. v. United States, 36 Fed. Cl. 268 (1996) (no signature on SF 1442); Power Master Elec. Co., B-223995, Nov. 26, 1986, 86-2 CPD ¶ 615 (typewritten name); Valencia Technical Serv., Inc., B-223288, July 7, 1986, 86-2 CPD ¶ 40 ("Blank" signature block); but see PCI/RCI v. United States, 36 Fed. Cl. 761 (1996) (one partner may bind a joint venture).

b. **Exception**. If the bidder has manifested an intent to be bound by the bid, the failure to sign is a minor irregularity. FAR 14.405(c).

(1) Adopted alternative. A & E Indus., B-239846, May 31, 1990, 90-1 CPD ¶ 527 (bid signed with a rubber stamp signature must be accompanied by evidence authorizing use of the rubber stamp signature).

(2) Other signed materials included in bid. Johnny F. Smith Truck & Dragline Serv., Inc., B-252136, June 3, 1993, 93-1 CPD ¶ 427 (signed certificate of procurement integrity); Tilley Constructors & Eng'rs, Inc., B-251335.2, Apr. 2, 1993, 93-1 CPD ¶ 289; Cable Consultants, Inc., B-215138, 63 Comp. Gen. 521 (1984).

E. Failure to Acknowledge Amendment of Solicitations.

1. General rule: Failure to acknowledge a material amendment renders the bid nonresponsive. See Christolow Fire Protection Sys., B-286585, Jan. 12, 2001, 2001 U.S. Comp. Gen. LEXIS 15 (amendment revised inaccurate information in bid schedule regarding number, types of, and response times applicable to service calls); Environmediation Srvcs., LLC, B-280643, Nov. 2, 1998, 98-2 CPD ¶ 103. See also Logistics & Computer Consultants Inc., B-253949, Oct. 26, 1993, 93-2 CPD ¶ 250 (amendment placing additional obligations on contractor under a management contract); Safe-T-Play, Inc., B-250682.2, Apr. 5, 1993, 93-1 CPD ¶ 292 (amendment classifying workers under Davis-Bacon Act).

2. Even if an amendment has no clear effect on the contract price, it is material if it changes the legal relationship of the parties. Specialty Contractors, Inc., B-258451, Jan. 24, 1995, 95-1 CPD ¶ 38 (amendment changing color of roofing panels); Anacomp, Inc., B-256788, July 27, 1994, 94-2 CPD ¶ 44 (amendment requiring contractor to pickup computer tapes on "next business day" when regular pickup day was a federal holiday); Favino Mechanical Constr., Ltd., B-237511, Feb. 9, 1990, 90-1 CPD ¶ 174 (amendment incorporating Order of Precedence clause).

3. An amendment that is nonessential or trivial need not be acknowledged. FAR 14.405(d)(2); L&R Rail Serv., B-256341, June 10, 1994, 94-1 CPD ¶ 356 (amendment decreasing cost of performance not material); Day & Night Janitorial & Maid Serv., Inc., B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1 (negligible effect on price, quantity, quality, or delivery).

4. How does a bidder acknowledge an amendment?

   a. In writing only. Oral acknowledgement of an amendment is insufficient. Alcon, Inc., B-228409, Feb. 5, 1988, 88-1 CPD ¶ 114.

   b. Formal acknowledgement.

      (1) Sign and return a copy of the amendment to the contracting officer.

      (2) Standard Form 33, Block 14.

      (3) Notify the government by letter or by telegram of receipt of the amendment.

   c. Constructive acknowledgement. The contracting officer may accept a bid that clearly indicates that the bidder received the amendment. C Constr. Co., B-228038, Dec. 2, 1987, 67 Comp. Gen. 107, 87-2 CPD ¶ 534.

F. Rejection of All Bids—Cancellation of the IFB.

1. **Prior** to bid opening, almost any reason will justify cancellation of an invitation for bids if the cancellation is "in the public interest." FAR 14.209. See Berendse & Sons Paint Co. Inc., B-262244, Nov. 21, 1995, 95-2 CPD ¶ 235; Ramsey Canyon Enters., B-204576, Mar. 15, 1982, 82-1 CPD ¶ 237;.

2. **After** bid opening, the government may not cancel an IFB unless there is a compelling reason to reject all bids and cancel the invitation. FAR 14.404-1(a)(1). See Grot, Inc., B-276979.2, Aug. 14, 1997, 97-2 CPD ¶ 50 (cancellation proper where all bids exceeded the "awardable range" and agency concluded that specifications were unclear); Site Support Services, Inc., B-270229, Feb. 13, 1996, 96-1 CPD ¶ 74 (cancellation proper where IFB contained incorrect government estimate); Canadian Commercial Corp./ Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 (no compelling reason to cancel simply because some terms of IFB are somehow deficient); US Rentals, B-238090, Apr. 5, 1990, 90-1 CPD ¶ 367 (contracting officer cannot deliberately let bid acceptance period expire as a vehicle for cancellation);

3. Examples of compelling reasons to cancel.

   a. Violation of statute. Sunrise International Group, B-252892.3, Sep. 14, 1993, 93-2 CPD ¶ 160 (agency's failure to allow 30 days in IFB for submission of bids in violation of CICA was compelling reason to cancel IFB).

   b. Insufficient funds. Michelle F. Evans, B-259165, Mar. 6, 1995, 95-1 CPD ¶ 139 (management of funds is a matter of agency judgment); Armed Forces Sports Officials, Inc., B-251409, Mar. 23, 1993, 93-1 CPD ¶ 261 (no requirement for agency to seek increase in funds).

   c. Requirement disappeared. Zwick Energy Research Org., Inc., B-237520.3, Jan. 25, 1991, 91-1 CPD ¶ 72 (specification required engines driven by gasoline; agency directive required diesel).

d. Specifications are defective and fail to state the government's minimum needs, or unreasonably exclude potential bidders. McGhee Constr., Inc., B-250073.3, May 13, 1993, 93-1 CPD ¶ 379; Control Corp.; Control Data Sys., Inc.—Protest and Entitlement to Costs, B-251224.2, May 3, 1993, 93-1 CPD ¶ 353; Digitize, Inc., B-235206.3, Oct. 5, 1989, 90-1 CPD ¶ 403.

e. Agency determines to perform the services in-house. Mastery Learning Sys., B-258277.2, Jan. 27, 1995, 95-1 CPD ¶ 54.

f. Time delay of litigation. P. Francini & Co. v. United States, 2 Cl. Ct. 7 (1983).

g. All bids unreasonable in price. California Shorthand Reporting, B-250302.2, Mar. 4, 1993, 93-1 CPD ¶ 202.

h. Eliminate appearance of unfair competitive advantage. P&C Constr., B-251793, Apr. 30, 1993, 93-1 CPD ¶ 361.

i. Failure to incorporate wage rate determination. JC&N Maint., Inc., B-253876, Nov. 1, 1993, 93-2 CPD ¶ 253.

j. Failure to set aside a procurement for small businesses or small disadvantaged businesses when required. Ryon, Inc., B-256752.2, Oct. 27, 1994, 94-2 CPD ¶ 163; Baker Support Servs., Inc.; Mgmt. Technical Servs., Inc., B-256192.3, Sept. 2, 1994, 95-1 CPD ¶ 75.

4. Before cancelling the IFB, the contracting officer must consider any prejudice to bidders. If cancellation will affect bidders' competitive standing, such prejudicial effect on competition may offset the compelling reason for cancellation. Canadian Commercial Corp., supra; Safemasters Co., B-192941, Jan. 22, 1979, 79-1 CPD ¶ 38.

5. If an agency relies on an improper basis to cancel a solicitation, the cancellation may be upheld if another proper basis for the cancellation exists. Shields Enters. v. United States, 28 Fed. Cl. 615 (1993).

6. Cancellation of the IFB may be post-award. Control Corp., B-251224.2, May 3, 1993, 93-1 CPD ¶ 353.

G. Mistakes in Bids Asserted Before Award. FAR 14.407-1.

1. General rule. A bidder bears the consequences of a mistake in its bid unless the contracting officer has actual or constructive notice of the mistake prior to award. Advanced Images, Inc., B-209438.2, May 10, 1983, 83-1 CPD ¶ 495.

2. After bid opening, the government may permit the bidder to remedy certain substantive mistakes affecting price and price-related factors by correction or withdrawal of the bid. For example, a clerical or arithmetical error normally is correctable or is a basis for withdrawal. United Digital Networks, Inc., B-222422, July 17, 1986, 86-2 CPD ¶ 79 (multiplication error); but see Virginia Beach Air Conditioning Corp., B-237172, Jan. 19, 1990, 90-1 CPD ¶ 78 (bid susceptible to two interpretations—correction improper).

3. Mistakes in bid which are **NOT** correctable.

a. Errors in judgment. American Dredging Co., B-229991.2, Sept. 15, 1988, 88-2 CPD ¶ 248 (incorrect assumption regarding the capacity of the scows used to tow away dredged materials), R.P. Richards Constr. Co., B-274859.2, Jan. 22, 1997, 97-1 CPD ¶ 39 (bidder's misreading of a subcontractor quote and reliance on its own extremely low estimate for certain work were mistakes in judgement).

b. Omission of items from the bid. McGhee Constr., Inc., B-255863, Apr. 13, 1994, 94-1 CPD ¶ 254; J. W. Creech Inc., B-191177, Mar. 8, 1978, 78-1 CPD ¶ 186. But see Pacific Components, Inc., B-252585, June 21, 1993, 93-1 CPD ¶ 478 (bid correction permitted for mistake due to omissions from subcontractor quotation).

c. Nonresponsive bid. Temp Air Co., Inc., B-279837, Jul. 2, 1998, 98-2 CPD ¶ 1 (bid could not be made responsive by post-bid opening explanation or correction).

4. Only the government and the bidder responsible for the alleged mistake have standing to raise the issue of a mistake. Huber, Hunt & Nichols, Inc., B-271112, May 21, 1996, 96-1 CPD 246 (contractor's negligence in bid preparation does not preclude correction); Reliable Trash Serv., Inc., B-258208, Dec. 20, 1994, 94-2 CPD ¶ 252;.

5. Contracting Officer's responsibilities.

   a. The contracting officer must examine each bid for mistakes. FAR 14.407-1; Andy Elec. Co.—Recon., B-194610.2, Aug. 10, 1981, 81-2 CPD ¶ 111.

      (1) Actual notice of mistake in a bid.

      (2) Constructive notice of mistake in a bid, e.g., price disparity among bids or comparison with government estimate. R.J. Sanders, Inc. v. United States, 24 Cl. Ct. 288 (1991) (bid 32% below government estimate insufficient to place contracting officer on notice of mistake in bid); Central Mechanical, Inc., B-206250, Dec. 20, 1982, 82-2 CPD ¶ 547 (allocation of price out of proportion to other bidders).

   b. Bid verification. The contracting officer must seek verification of each bid that he has reason to believe contains a mistake. FAR 14.407-1 and 14.407-3(g).

      (1) To ensure that the bidder is put on notice of the suspected mistake, the contracting officer must advise the bidder of all disclosable information that leads the contracting officer to believe that there is a mistake in the bid. Liebherr Crane Corp., ASBCA No. 24707, 85-3 BCA ¶ 18,353, aff'd 810 F.2d 1153 (Fed. Cir. 1987) (procedure inadequate); But see Foley Co., B-258659, Feb. 8, 1995, 95-1 CPD ¶ 58 (bidder should be allowed an opportunity to explain its bid); DWS, Inc., ASBCA No. 29743, 93-1 BCA ¶ 25,404 (particular price need not be mentioned in bid verification notice).

(2) Effect of bidder verification. Verification generally binds the contractor unless the discrepancy is so great that acceptance of the bid would be unfair to the submitter or to other bidders. Trataros Constr., Inc., B-254600, Jan. 4, 1994, 94-1 CPD ¶ 1 (contracting officer properly rejected verified bid that was far out of line with other bids and the government estimate); VA—Advance Decision, B-225815.2, Oct. 15, 1987, 87-2 CPD ¶ 362. But see Foley Co., B-258659, Feb. 8, 1995, 95-1 CPD ¶ 58 (government improperly rejected low bid where there was no evidence of mistake); Aztech Elec., Inc. and Rod's Elec., Inc., B-223630, Sept. 30, 1986, 86-2 CPD ¶ 368 (below-cost bid is a matter of business judgment, not an obvious error requiring rejection).

(3) Effect of inadequate verification. If the contracting officer fails to obtain adequate verification of a bid for which the government has actual or constructive notice of a mistake, the contractor may seek additional compensation or recision of the contract. See, e.g., Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.

c. The contracting officer may not award a contract to a bidder when the contracting officer has actual or constructive notice of a mistake in the bid, unless the mistake is waived or the bid is properly corrected in accordance with agency procedures. Ouchinikov Bros., B-205186, May 25, 1982, 82-1 CPD ¶ 496; Sealtite Corp., ASBCA No. 25805, 83-1 BCA ¶ 16,243.

6. Correction of mistakes prior to award—standard of proof and allowable evidence. FAR 14.407-3.

a. The bidder alleging the mistake has the burden of proof. VA—Advance Decision, B-225815.2, Oct. 15, 1987, 87-2 CPD ¶ 362.

b. Apparent clerical mistakes. FAR 14.407-2; Action Serv. Corp., B-254861, Jan. 24, 1994, 94-1 CPD ¶ 33 (additional zero); Sovran Constr. Co., B-242104, Mar. 18, 1991, 91-1 CPD ¶ 295 (cumulative pricing); Engle Acoustic & Tile, Inc., B-190467, Jan. 27, 1978, 78-1 CPD ¶ 72 (misplaced decimal point); Dependable Janitorial Serv. & Supply Co., B-188812, July 13, 1977, 77-2 CPD ¶ 20 (discrepancy between unit and total prices); B&P Printing, Inc., B-188511, June 2, 1977, 77-1 CPD ¶ 387 (comma rather than period—correct bid not approved); Brazos Roofing, Inc., B-275319, Feb. 7, 1997, 97-1 CPD ¶ 66 (incorrect entry of base price used in calculation of option year prices was an obvious transcription error) .

(1) Contracting officer may correct, before award, any clerical mistake apparent on the face of the bid.

(2) The contracting officer must first obtain verification of the bid from the bidder.

c. Other mistakes disclosed before award. FAR 14.407-3.

(1) Correction by low bidder. Circle, Inc., B-279896, July 29, 1998, 98-2 CPD ¶ 67. Shoemaker & Alexander, Inc., B-241066, Jan. 15, 1991, 91-1 CPD ¶ 41.

(a) The low bidder must show by clear and convincing evidence: (i) the existence of a mistake in its bid; and (ii) the bid actually intended or that the intended bid would fall within a narrow range of uncertainty and remain low. FAR 14.407-3. See Three O Constr., S.E., B-255749, Mar. 28, 1994, 94-1 CPD ¶ 216 (no clear and convincing evidence where bidder gave conflicting explanations for mistake).

(b) Bidder can refer to such things as: (i) bidder's file copy of the bid; (ii) original workpapers; (iii) a subcontractor's or supplier's quotes; or (iv) published price lists.

(2) Correction of a bid that **displaces a lower bidder.** J & J Maint., Inc., B-251355, Mar. 1, 1993, 93-1 CPD ¶ 187; Virginia Beach Air Conditioning Corp., B-237172, Jan. 19, 1990, 90-1 CPD ¶ 78; Eagle Elec., B-228500, Feb. 5, 1988, 88-1 CPD ¶ 116.

(a) Bidder must show by clear and convincing evidence: (a) the existence of a mistake; and (b) the bid actually intended. FAR 14.407-3.

(b) **Limitation on proof** - the bidder can prove a mistake only from the solicitation (IFB) and the bid submitted, not from any other sources. Bay Pacific Pipelines, Inc., B-265659, Dec. 18, 1995, 95-2 CPD ¶ 272.

d. Action permitted when a bidder presents clear and convincing evidence of a mistake, but not as to the bid intended; or evidence that reasonably supports the existence of a mistake, but is not clear and convincing. Advanced Images, Inc., B-209438.2, May 10, 1983, 83-1 CPD ¶ 495.

(1) The bidder may withdraw the bid. FAR 14.407-3(c).

(2) The bidder may correct the bid where it is clear the intended bid would fall within a narrow range of uncertainty and remain the low bid. Conner Bros. Constr. Co., B-228232.2, Feb. 3, 1988, 88-1 CPD ¶ 103; Department of the Interior—Mistake in Bid Claim, B-222681, July 23, 1986, 86-2 CPD ¶ 98.

(3) The bidder may waive the bid mistake if it is clear that the intended bid would remain low. William G. Tadlock Constr., B-251996, May 13, 1993, 93-1 CPD ¶ 382 (waiver not permitted); Hercules Demolition Corp. of Virginia, B-223583, Sep. 12, 1986, 86-2 CPD ¶ 292; LABCO Constr., Inc., B-219437, Aug. 28, 1985, 85-2 CPD ¶ 240.

e. Once a bidder asserts a mistake, the agency head or designee may disallow withdrawal or correction of the bid if the bidder fails to prove the mistake. FAR 14.406-3(d); Duro Paper Bag Mfg. Co., B-217227, Jan. 3, 1986, 65 Comp. Gen. 186, 86-1 CPD ¶ 6.

f. Approval levels for corrections or withdrawals of bids.

(1) Apparent clerical errors: The contracting officer. FAR 14.407-2.

(2) Withdrawal of a bid on clear and convincing evidence of a mistake, but not of the intended bid: An official above the contracting officer. FAR 14.407-3(c).

(3) Correction of a bid on clear and convincing evidence both of the mistake and of the bid intended: The agency head or delegee. FAR 14.407-3(a). **Caveat:** If correction would displace a lower bid, the government shall not permit the correction unless the mistake and the intended bid are both ascertainable substantially from the IFB and the bid submitted.

(4) Correction rather than withdrawal of a low bidder's bid: If (a) a bidder requests permission to withdraw a bid rather than correct it, (b) the evidence is clear and convincing both as to the mistake in the bid and the bid intended, and (c) the bid, both as uncorrected and as corrected, is the lowest received, the agency head or designee may determine to correct the bid and not permit its withdrawal. FAR 14.407-3(b).

(5) Neither correction nor withdrawal. If the evidence does not warrant correction or withdrawal, the agency head may refuse to permit either withdrawal or correction. FAR 14.407-3(d).

(6) Heads of agencies may delegate their authority to correct or permit withdrawal of bids without power of redelegation. FAR 14.407-3(e). This authority has been delegated to specified authorities within Defense Departments and Agencies. DFARS 214.406-3.

VIII. AWARD OF THE CONTRACT.

A. Evaluation of the Responsibility of the Successful Bidder. 10 U.S.C. § 2305; 41 U.S.C. § 253b.

1. Government acquisition policy requires that the contracting officer make an affirmative determination of responsibility prior to award. FAR 9.103.

2. General rule. The contracting officer may award only to a responsible bidder. FAR 9.103(a); Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64 (responsibility requirement implied); Atlantic Maint., Inc., B-239621.2, June 1, 1990, 90-1 CPD ¶ 523 (an unreasonably low price may render bidder nonresponsible); but see The Galveston Aviation Weather Partnership, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 (below-cost bid not legally objectionable, even when offering labor rates lower than those required by the Service Contract Act).

3. Responsibility defined. Responsibility refers to an offeror's apparent **ability** and **capacity** to perform. To be responsible, a prospective contractor must meet the standards of responsibility set forth at FAR 9.104. FAR 9.101; Kings Point Indus., B-223824, Oct. 29, 1986, 86-2 CPD ¶ 488.

4. Responsibility is determined at any time prior to award. Therefore, the bidder may provide responsibility information to the contracting officer at any time before award. FAR 9.103; FAR 9.105-1; ADC Ltd., B-254495, Dec. 23, 1993, 93-2 CPD ¶ 337 (bidder's failure to submit security clearance documentation with its bid is not a basis for rejection of bid); Cam Indus., B-230597, May 6, 1988, 88-1 CPD ¶ 443.

B. Minimum Standards of Responsibility—Contractor Qualification Standards.

1. General standards of responsibility. FAR 9.104-1.

a. Financial resources. The contractor must demonstrate that it has adequate financial resources to perform the contract or that it has the ability to obtain such resources. FAR 9.104-1(a); Excavators, Inc., B-232066, Nov. 1, 1988, 88-2 CPD ¶ 421 (a contractor is nonresponsible if it cannot or does not provide acceptable individual sureties).

(1) Bankruptcy. Nonresponsibility determinations based solely on a bankruptcy petition violate 11 U.S.C. § 525. This statute prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, or deny employment to, terminate employment of, or discriminate with respect to employment against, a person that is or has been a debtor under 11 U.S.C. § 525, solely because such person has been a debtor under that title.

(2) The courts have applied the bankruptcy anti-discrimination provisions to government determinations of eligibility for award. In re Son-Shine Grading, 27 Bankr. 693 (Bankr. E.D.N.C. 1983); In re Coleman Am. Moving Serv., Inc., 8 Bankr. 379 (Bankr. D. Kan. 1980).

(3) A determination of responsibility should not be negative solely because of a prospective contractor's bankruptcy. The contracting officer should focus on the contractor's ability to perform the contract, and justify a nonresponsibility determination of a bankrupt contractor accordingly. Harvard Interiors Mfg. Co., B-247400, May 1, 1992, 92-1 CPD ¶ 413 (Chapter 11 firm found nonresponsible based on lack of financial ability); Sam Gonzales, Inc.—Recon., B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306.

b. Delivery or performance schedule: The contractor must establish its ability to comply with the delivery or performance schedule. FAR 9.104-1(b); System Dev. Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644.

c. Performance record: The contractor must have a satisfactory performance record. FAR 9.104-1(c). Information Resources, Inc., B-271767, July 24, 1996, 96-2 CPD ¶ 38; Saft America, B-270111, Feb. 7, 1996, 96-1 CPD ¶ 134; North American Constr. Corp., B-270085, Feb. 6, 1996, 96-1 CPD ¶ 44; Mine Safety Appliances, Co., B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86. The contracting officer **shall presume** that a contractor seriously deficient in recent contract performance is nonresponsible. FAR 9.104-3(b). See Schenker Panamericana (Panama) S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67 (agency justified in nonresponsiblity determination where moving contractor had previously failed to conduct premove surveys, failed to provide adequate packing materials, failed to keep appointments or complete work on time, dumped household goods into large containers, stacked unprotected furniture onto trucks, dragged unprotected furniture through hallways, and wrapped fragile goods in a single sheet of paper; termination for default on prior contract not required). See also Pacific Photocopy & Research Servs., B-281127, Dec. 29, 1998, 98-2 CPD ¶ 164 (contracting officer properly determined that bidder had inadequate performance record on similar work based upon consistently high volume of unresolved customer complaints).

d. Management/technical capability: The contractor must display adequate management and technical capability to perform the contract satisfactorily. FAR 9.104-1(e); TAAS-Israel Indus., B-251789.3, Jan. 14, 1994, 94-1 CPD ¶ 197 (contractor lacked design skills and knowledge to produce advanced missile launcher power supply).

e. Equipment/facilities/production capacity: The contractor must maintain or have access to sufficient equipment, facilities, and production capacity to accomplish the work required by the contract. FAR 9.104-1(f); IPI Graphics, B-286830, B-286838, Jan. 9, 2001, 2001, U.S. Comp. Gen. LEXIS 19 (contractor lacked adequate production controls and quality assurance methods).

f. Business ethics: The contractor must have a satisfactory record of business ethics. FAR 9.104-1(d); FAR 9.407-2; FAR 14.404-2(h); Interstate Equip. Sales, B-225701, Apr. 20, 1987, 87-1 CPD ¶ 427.

2. Special or definitive standards of responsibility: Definitive responsibility criteria are specific, objective standards established by an agency to measure an offeror's ability to perform a given contract. FAR 9.104-2(a); D.H. Kim Enters., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86.

a. An example is to require that a prospective contractor have a specified number of years of experience performing the same or similar work. Hardie-Tynes Mfg. Co., B-237938, Apr. 2, 1990, 90-1 CPD ¶ 587 (agency properly considered manufacturing experience of parent corporation in finding bidder met the definitive responsibility criterion of five years manufacturing experience); BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309 (IFB required five years of experience in transformer design, manufacture, and service - GAO held that this definitive responsibility criterion was satisfied by a subcontractor).

b. Although the GAO will not readily review affirmative responsibility determinations based on general responsibility criteria, it will review affirmative responsibility determinations where the solicitation contains definitive responsibility requirements. 4 C.F.R. § 21.5(c) (1995).

c. Evaluations using definitive responsibility criteria are subject to review by the Small Business Administration (SBA) through its Certificate of Competency process. FAR 19.602-4.

d. Statutory/Regulatory Compliance.

(1) Licenses and permits.

(a) When a solicitation contains a **general** condition that the contractor comply with state and local licensing requirements, the contracting officer need not inquire into what those requirements may be or whether the bidder will comply. James C. Bateman Petroleum Serv., Inc., B-232325, Aug. 22, 1988, 88-2 CPD ¶ 170; but see International Serv. Assocs., B-253050, Aug. 4, 1993, 93-2 CPD ¶ 82 (where agency determines that small business will not meet licensing requirement, referral to SBA required).

(b) On the other hand, when a solicitation requires **specific** compliance with regulations and licensing requirements, the contracting officer may inquire into the offeror's ability to comply with the regulations in determining the offeror's responsibility. Intera Technologies, Inc., B-228467, Feb. 3, 1988, 88-1 CPD ¶ 104.

(2) Statutory certification requirements.

(a) Small business concerns. The contractor must certify its status as a small business to be eligible for award as a small business. FAR 19.301.

(b) Equal opportunity compliance. Contractors must certify that they will comply with "equal opportunity" statutory requirements. In addition, contracting officers must obtain pre-award clearances from the Department of Labor for equal opportunity compliance before awarding any contract exceeding $1 million. FAR Subpart 22.8. Solicitations may require the contractor to develop and file an affirmative action plan. FAR 52.222-22 and FAR 52.222-25; Westinghouse Elec. Corp., B-228140, Jan. 6, 1988, 88-1 CPD ¶ 6.

(c) Submission of lobby certification. Tennier Indus., B-239025, July 16, 1990, 90-2 CPD ¶ 25.

(3) Organizational conflicts of interest. FAR Subpart 9.5. Government policy precludes award of a contract, without some restriction on future activities, if the contractor would have an actual or potential unfair competitive advantage, or if the contractor would be biased in making judgments in performance of the work. Necessary restrictions on future activities of a contractor are incorporated in the contract in one or more organizational conflict of interest clauses. FAR 9.501; The Analytic Sciences Corp., B-218074, Apr. 23, 1985, 85-1 CPD ¶ 464.

C. Responsibility Determination Procedures.

1. Sources of information. The contracting officer must obtain sufficient information to determine responsibility. FAR 9.105.

a. Contracting officers may use pre-award surveys. FAR 9.105-1(b); FAR 9.106; DFARS 209.106; Accurate Indus., B-232962, Jan. 23, 1989, 89-1 CPD ¶ 56.

b. Contracting officer must check the list entitled Parties Excluded from Procurement Programs. FAR 9.105-1(c)(1); see also AFARS 9.4 and FAR Subpart 9.4. But see R.J. Crowley, Inc., B-253783, Oct. 22, 1993, 93-2 CPD ¶ 257 (agency improperly relied on non-current list of ineligible contractors as basis for rejecting bid; agency should have consulted electronic update).

c. Contracting and audit agency records and data pertaining to a contractor's prior contracts are valuable sources of information. FAR 9.105-1(c)(2).

d. Contracting officers also may use contractor-furnished information. FAR 9.105-1(c)(3). International Shipbuilding, Inc., B-257071.2, Dec. 16, 1994, 94-2 CPD ¶ 245 (agency need not delay award indefinitely until the offeror cures the causes of its nonresponsibility).

2. Standards of review of contracting officer determinations of responsibility.

a. The GAO will not review **affirmative** responsibility determinations absent a showing of bad faith or fraud. 4 CFR § 21.5(c) (1995); See Hard Bottom Inflatables, Inc., B-245961.2, Jan. 22, 1992, 92-1 CPD ¶ 103. But see Impresa Construzioni Geom. Domenico Garufi v. U.S., Fed. Cir., No. 99-5137, Jan. 3, 2001 (CAFC, in finding that contracting officer has wide, but not absolute, discretion in making responsibility determination, remanded the case back to COFC to determine whether contracting officer had a rational basis for making responsibility determination).

b. The GAO will review nonresponsibility determinations for reasonableness. Schwender/Riteway Joint Venture, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203 (determination of nonresponsibility unreasonable when based on inaccurate or incomplete information).

3. Subcontractor responsibility issues.

a. The agency may review subcontractor responsibility. FAR 9.104-4(a).

b. Subcontractor responsibility is determined in the same fashion as is the responsibility of the prime contractor. FAR 9.104-4(b).

D. Award of the Contract.

1. Statutory standard. The contracting officer shall award with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous, considering price and other price-related factors. 10 U.S.C. § 2305(b)(4)(B); 41 U.S.C. § 253b; FAR 14.407-1(a).

2. Multiple awards. If the IFB does not prohibit partial bids, the government must make multiple awards when they will result in the lowest cost to the government. FAR 52.214-10; FAR 52.214-22; WeatherExperts, Inc., B-255103, Feb. 9, 1994, 94-1 CPD ¶ 93.

3. An agency may not award a contract to an entity other than that which submitted a bid. Gravely & Rodriguez, B-256506, Mar. 28, 1994, 94-1 CPD ¶ 234 (sole proprietorship submitted bid, partnership sought award).

4. Communication of acceptance of the offer and award of the contract. The contracting officer makes award by giving written notice within the specified time for acceptance. FAR 14.408-1(a).

5. The "mail box" rule applies to award of federal contracts. Award is effective upon mailing (or otherwise furnishing the award document) to the successful offeror. FAR 14.408-1(c)(1). Singleton Contracting Corp., IBCA 1770-1-84, 86-2 BCA ¶ 18,800 (notice of award and request to withdraw bid mailed on same day); Kleen-Rite Corp., B-190160, July 3, 1978, 78-2 CPD ¶ 2.

E. Mistakes in Bids Asserted After Award. FAR 14.407-4; FAR Subpart 33.2 (Disputes and Appeals).

1. The contracting officer may correct a mistake by contract modification if correction would be favorable to the government and would not change the essential requirements of the specifications.

2. The government may:

a. Rescind the contract;

b. Reform the contract;

(1) to delete items involved in the mistake; or

(2) to increase the contract price if the price as increased does not exceed that of the next lowest acceptable bid; or

c. Make no change in the contract, if the evidence does not warrant rescission or reformation.

3. Rescission or reformation may be made only on the basis of clear and convincing evidence that a mistake in bid was made, and only if the mistake was (i) mutual or (ii) if unilaterally made by the contractor, was so apparent that the contracting officer should be charged with having had notice of the mistake. Government Micro Resources, Inc. v. Department of Treasury, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (government on constructive notice of mistake where contractor's price exceeded government estimate by 62% and comparison quote by 33%); Kitco, Inc., ASBCA No. 45347, 93-3 BCA ¶ 26,153 (mistake must be clear cut clerical or arithmetical error, or misreading of specifications, not mistake of judgment); Liebherr Crane Corp., 810 F.2d 1153 (Fed. Cir. 1987) (no relief for unilateral errors in business judgment).

4. Reformation is not available for contract formation mistakes. Gould, Inc. v. United States, 19 Cl. Ct. 257 (1990).

   a. Reformation is a form of equitable relief that applies to mistakes made in reducing the parties' intentions to writing, but not to mistakes that the parties made in forming the agreement. To show entitlement to reformation, the contractor must prove (i) a clear agreement between the parties and (ii) an error in reducing the agreement to writing.

   b. The contractor must prove four elements in a claim for reformation based on mutual mistake. Management & Training Corp. v. General Servs. Admin., GSBCA No. 11182, 93-2 BCA ¶ 25,814. These elements are:

      (1) The parties to the contract were mistaken in their belief regarding a fact. See Dairyland Power Co-op v. United States, 16 F.3d 1197 (1994) (mistake must relate to an existing fact, not future events);

      (2) The mistake involved a basic assumption of the contract;

      (3) The mistake affected contract performance materially; and

      (4) The party seeking reformation did not agree to bear the risk of a mistake.

5. Proof requirements. Mistakes alleged or disclosed after award are processed in accordance with FAR 14.407-4(e) and FAR Subpart 33.2. The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence. See Government Micro Resources, Inc. v. Department of Treasury, supra (board awards contractor recovery on quantum valebant basis).

6. Mistakes alleged after award are subject to the Contract Disputes Act of 1978 and the Disputes and Appeals provisions of the FAR. FAR Subpart 33.2; ABJ Servs., B-254155, July 23, 1993, 93-2 CPD ¶ 53 (the GAO will not review a mistake in bid claim alleged by the contractor after award).

7. Extraordinary contractual relief under Public Law No. 85-804. National Defense Contracts Act, 72 Stat. 972, 50 U.S.C. § 1431-1435; DFARS Subpart 250.7001.

IX. CONCLUSION.

SOLICITATION, OFFER AND AWARD

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 350)	RATING	PAGE OF PAGES

2. CONTRACT NO.	3. SOLICITATION NO.	4. TYPE OF SOLICITATION	5. DATE ISSUED	6. REQUISITION/PURCHASE NO.
		☐ SEALED BID (IFB) ☐ NEGOTIATED (RFP)		

SSUED BY	CODE	8. ADDRESS OFFER TO *(If other than Item 7)*

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and _____ copies for furnishing the supplies or services in the Schedule will be received at the place specified in Item 8, or if handcarried, in the depository located in _____ until _____ *(Hour)* local time _____ *(Date)*

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-10. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL:	A. NAME	B. TELEPHONE NO. *(Include area code) (NO COLLECT CALLS)*

11. TABLE OF CONTENTS

(√)	SEC.	DESCRIPTION	PAGE(S)	(√)	SEC.	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES	
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS				PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING				PART IV - REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE					
	G	CONTRACT ADMINISTRATION DATA			L	INSTRS., CONDS., AND NOTICES TO OFFERORS	
	H	SPECIAL CONTRACT REQUIREMENTS			M	EVALUATION FACTORS FOR AWARD	

OFFER *(Must be fully completed by offeror)*

TE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if this offer is accepted within _____ calendar days *(60 calendar days unless a different period is inserted by the offeror)* from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

13. DISCOUNT FOR PROMPT PAYMENT *(See Section I, Clause No. 52-232-8)*	10 CALENDAR DAYS %	20 CALENDAR DAYS %	30 CALENDAR DAYS %	CALENDAR DAYS %

14. ACKNOWLEDGMENT OF AMENDMENTS *(The offeror acknowledges receipt of amendments to the SOLICITATION for offerors and related documents numbered and dated:*	AMENDMENT NO.	DATE	AMENDMENT NO.	DATE

15A. NAME AND ADDRESS OF OFFEROR	CODE	FACILITY	16. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER *(Type or print)*

15B. TELEPHONE NO. *(Include area code)*	15C. ☐ CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE - ENTER SUCH ADDRESS IN SCHEDULE.	17. SIGNATURE	18. OFFER DATE

AWARD *(To be completed by Government)*

19. ACCEPTED AS TO ITEMS NUMBERED	20. AMOUNT	21. ACCOUNTING AND APPROPRIATION

22. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION:

☐ 10 U.S.C. 2304(c) ( ) ☐ 41 U.S.C. 253(c) ( )

23. SUBMIT INVOICES TO ADDRESS SHOWN IN *(4 copies unless otherwise specified)*	ITEM

24. ADMINISTERED BY *(If other than Item 7)*	CODE	25. PAYMENT WILL BE MADE BY	CODE

26. NAME OF CONTRACTING OFFICER *(Type or print)*	27. UNITED STATES OF AMERICA *(Signature of Contracting Officer)*	28. AWARD DATE

IMPORTANT -- Award will be made on this Form, or on Standard Form 26, or by other authorized official written notice.

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. *(If applicable)*

6. ISSUED BY	CODE	7. ADMINISTERED BY *(If other than Item 6)*	CODE

8. NAME AND ADDRESS OF CONTRACTOR *(No., street, county, State and ZIP Code)*	(√)	9A. AMENDMENT OF SOLICITATION NO.
		9B. DATED *(SEE ITEM 11)*
		10A. MODIFICATION OF CONTRACTS/ORDER NO.
		10B. DATED *(SEE ITEM 13)*
CODE FACILITY CODE		

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA *(If required)*

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(√)	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: *(Specify authority)* THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES *(such as changes in paying office, appropriation date, etc.)* SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
	D. OTHER *(Specify type of modification and authority)*

E. IMPORTANT: Contractor ☐ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION *(Organized by UCF section headings, including solicitation/contract subject matter where feasible.)*

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER *(Type or print)*		16A. NAME AND TITLE OF CONTRACTING OFFICER *(Type or print)*	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY *(Signature of Contracting Officer)*	

Chapter 8
Negotiations

146th Contract Attorneys Course

CHAPTER 8

NEGOTIATIONS

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CHAPTER 8

NEGOTIATIONS

I. INTRODUCTION.

A. Objectives. Following this instruction, students will understand:

1. The extensive planning required to conduct a competitively negotiated procurement.

2. The procedures used to conduct a competitively negotiated procurement.

3. Some of the common problem areas to avoid in the award of a competitively negotiated procurement.

B. Types of Negotiated Acquisitions.

1. Competitively Negotiated Acquisitions.

2. Four-Step Negotiated Acquisitions.

3. Broad Agency Announcements.

4. Architect-Engineer Contracts.

5. Sole or Limited Source Acquisitions.

6. Unsolicited Proposals.

7. Design-Build Procedures.

C. Background.

Major Karen White, USAF
146th Contract Attorneys Course
April/May 2001

1. In the past, negotiated procurements were known as "open market purchases." These procurements were authorized only in emergencies.

2. The Army Air Corps began using negotiated procurements in the 1930s to develop and acquire aircraft.

3. Negotiated procurements became universal during World War II. The Armed Services Procurement Act of 1947 authorized negotiated procurements for peacetime use if one of seventeen exceptions to formal advertising (now sealed bidding) applied.

4. In 1962, Congress codified agency regulations that required contractors to submit cost/pricing data for certain procurements to aid in the negotiation process.

5. The Competition in Contracting Act (CICA) of 1984 expanded the use of negotiated procurements by eliminating the traditional preference for formal advertising (now sealed bidding).

6. In early 1990s, Congress: (a) modified the procedures for awarding contracts on initial proposals; (b) expanded debriefings; and (c) made other minor procedural changes in the negotiated procurement process.

7. In 1997, the FAR Part 15 rewrite effort resulted in significant changes to the rules regarding: (a) exchanges with industry; (b) the permissible scope of discussions; and (c) the competitive range determination.

II. CHOOSING NEGOTIATIONS.

A. Sealed Bidding or Competitive Negotiations. The CICA eliminated the historical preference for formal advertising (now sealed bidding). Statutory criteria now determine which procedures to use.

B. Criteria for Selecting Competitive Negotiations. 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 253(a)(2). The CICA provides that, in determining the appropriate competitive procedure, agencies:

1. Shall solicit sealed bids if:

   a. Time permits the solicitation, submission, and evaluation of sealed bids;

   b. The award will be made solely on the basis of price and other price-related factors;

   c. It is unnecessary to conduct discussions with responding sources; and

   d. There is a reasonable expectation of receiving more than one sealed bid.

2. Shall request competitive proposals if sealed bids are not appropriate under B.1., above.

C. Contracting Officer's Discretion.

1. The decision to negotiate involves a contracting officer's business judgment, which will not be upset unless it is unreasonable. The contracting officer, however, must demonstrate that one or more of the sealed bidding criteria is not present. Specialized Contract Serv., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90 (finding that the Army reasonably concluded that it needed to evaluate more than price in procuring lodging services). Compare Racal Corp., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (finding that the possible need to hold discussions to assess offerors' understanding did not justify the use of negotiated procedures where the Army did not require offerors to submit technical proposal) with Enviroclean Sys., B-278261, Dec. 24, 1997, 97-2 CPD ¶ 172 (finding that the Army reasonably concluded that discussions might be required before award).

2. A Request for Proposals (RFP) by any other name is still a RFP. Balimoy Mfg. Co. of Venice, Inc., B-253287.2, Oct. 5, 1993, 93-2 CPD ¶ 207 (finding that an IFB that calls for the evaluation of factors other than price is not an IFB).

D. Comparing the Two Methods.

	Sealed Bidding	Negotiations
Evaluation Criteria	Price and Price-Related Factors	Price and Non-Price Factors
Responsiveness	Determined at Bid Opening	N/A
Responsibility	Based on Pre-Award Survey; SBA May Issue COC	Evaluated Comparatively Based on Disclosed Factors
Contract Type	FFP or FP w/EPA	Any Type
Discussions	Prohibited	Required (Unless Properly Awarding w/o Discussions)
Right to Withdraw	Firm Bid Rule	No Firm Bid Rule
Public Bid Opening	Yes	No
Flexibility to Use Judgment	None	Much
Late Offer/Modifications	Narrow Exceptions	Narrow Exceptions
Past Performance	Evaluated on a Pass/Fail Basis as Part of the Responsibility Determination	Included as an Evaluation Factor; Comparatively Assessed; Separate from the Responsibility Determination

III. CONDUCTING COMPETITIVE NEGOTIATIONS.

A. Developing a Request for Proposals (RFP). The three major sections of a RFP are: Specifications (Section C), Instructions to Offerors (Section L), and Evaluation Criteria (Section M). Contracting activities should develop these three sections simultaneously so that they are tightly integrated. See U.S. Army Materiel Command Pamphlet 715-3, Contracting for Best Value, A Best Practices Guide to Source Selection, (1 Jan. 98) (available on the internet at: http://www.amc-acquisition.net) [hereinafter AMC Pam. 715-3] (explaining how key solicitation documents and evaluation standards should track each other).

1. Section C describes the required work.

2. Section L describes what information offerors should provide in their proposals and prescribes the format.

   a. Instructions reduce the need for discussions merely to understand the offerors' proposals.

   b. Instructions also make the evaluation process more efficient by dictating page limits, paper size, organization, and content. [NOTE: An offeror ignores these instructions and limitations at its peril. See Coffman Specialists, Inc., B-284546; B-284546.2, May 10, 2000, 2000 U.S. Comp. Gen. LEXIS 58 (agency reasonably downgraded a proposal that failed to comply with solicitation's formatting requirement. See also U.S. Envtl. & Indus., Inc., B-257349, July 28, 1994, 94-2 CPD ¶ 51 (concluding that the agency properly excluded the protester from the competitive range after adjusting its proposal length for type size smaller than the minimum allowed and refusing to consider the "excess" pages)].

3. Section M describes how the government will evaluate proposals.

   a. The criteria must be detailed enough to address all aspects of the required work, yet not so detailed as to mask differences in proposals.

   b. Solicitations must provide offerors enough information to compete equally and intelligently, but they need not give precise details of the government's evaluation plan. See QualMed, Inc., B-254397.13, July 20, 1994, 94-2 CPD ¶ 33.

   c. Evaluation scheme must include an adequate basis to determine cost to the government. S.J. Thomas Co, Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

B. Drafting Evaluation Criteria.

1. Statutory Requirements.

a. 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 253a(b) require each solicitation to include a statement regarding:

(1) All the significant factors and subfactors the agency reasonably expects to consider in evaluating the proposals; and

(2) The relative importance of each factor and subfactor.

See FAR 15.304(d).

b. 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) further require agency heads to:

(1) Clearly establish the relative importance of the evaluation factors and subfactors, including the quality factors and subfactors;

(2) Include cost/price as an evaluation factor; and

(3) Disclose whether all of the non-cost and non-price factors, when combined, are:

(a) Significantly more important than cost/price;

(b) Approximately equal in importance to cost/price; or

(c) Significantly less important than cost/price.

See FAR 15.304(e).

c. Agencies occasionally omit either: (1) significant evaluation factors and subfactors; (2) their relative importance; or (3) both. See Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 (finding no prejudice even though the evaluation committee applied different weights to the evaluation factors without disclosing them); cf. Danville-Findorff, Ltd, B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232 (finding no prejudice even though the agency listed the relative importance of an evaluation factor as 60 in the RFP, used 40 as the weight during evaluation, and used the "extra" 20 points for an unannounced evaluation factor).

d. The GAO will generally excuse an agency's failure to specifically identify subfactors if the subfactors are: (1) reasonably related to the stated criteria; and (2) of relatively equal importance. See Johnson Controls World Servs., Inc., B-257431, Oct. 5, 1994, 94-2 CPD ¶ 222 (finding that "efficiency" was reasonably encompassed within the disclosed factors); AWD Tech., Inc., B-250081.2, Feb. 1, 1993, 93-1 CPD ¶ 83 (finding that the agency properly considered work on similar superfund sites even though the agency did not list it as a subfactor). The GAO, however, has held that an agency must disclose reasonably related subfactors if the agency gives them significant weight. See Devres, Inc., B-224017, 66 Comp. Gen. 121, 86-2 CPD ¶ 652 (1986) (concluding that an agency must disclose subfactors that have a greater weight than the disclosed some factors).

2. Mandatory Evaluation Factors.

a. Cost or Price. 10 U.S.C. § 2305(a)(3)(A)(ii); 41 U.S.C. § 253a(c)(1)(B); FAR 15.304(c)(1). Agencies must evaluate cost/price in every source selection. See AMC Pam. 715-3 (discussing the requirement to evaluate cost/price); see also Spectron, Inc., B-172261, 51 Comp. Gen. 153 (1971); but see RTF/TCI/EAI Joint Venture, B-280422.3, Dec. 29, 1998, 98-2 CPD ¶ 162 (GAO denied protest alleging failure to consider price because protestor unable to show prejudice from Army's error).

b. Technical and Management (i.e., Quality) Factors. FAR 15.304(c)(2). The government must also consider quality in every source selection. See AMC Pam. 715-3 (discussing the requirement to evaluate technical factors).

(1) The term "quality" refers to evaluation factors other than cost/price (e.g., technical capability, management capability, prior performance, and past performance). See 10 U.S.C. § 2305(a)(3)(A)(i); 41 U.S.C. § 253a(c)(1)(A); FAR 15.304(c)(2).

(2) FAR 15.304(a) recommends tailoring the evaluation factors and subfactors to the acquisition, and FAR 15.304(b) recommends including only evaluation factors and subfactors that:

(a) Represent key areas that the agency plans to consider in making the award decision; and

(b) Permit the agency to compare competing proposals meaningfully.

c. Past Performance.

(1) Statutory Requirements.

(a) The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1091, 108 Stat. 3243, 3272 [hereinafter FASA], added a note to 41 U.S.C. § 405 expressing Congress's belief that agencies should use past performance as an evaluation factor because it is an indicator of an offeror's ability to perform successfully on future contracts.

(b) The FASA also directed the Administrator of the Office of Federal Procurement Policy (OFPP) to provide guidance to executive agencies regarding the use of past performance information in awarding contracts. 41 U.S.C. § 405(j).

(c) In response, OFPP issued the following pamphlet: A Guide to Best Practices for Past Performance, May 1995 (available on the internet at: http://www.arnet.gov/BestP/BestPrac. html). Cf. DOD, A Guide to Collection and Use of Past Performance Information, May 1999 (available on the internet at: http://www.acq.osd.mil/ar/doc/ppiguide.pdf).

(2) FAR Requirements. FAR 15.304(c)(2); FAR 15.304(c)(3); FAR 15.305(a)(2).

(a) Agencies must include past performance as an evaluation factor in all RFPs issued on or after 1 January 1999 with an estimated value in excess of $100,000[1] unless the contracting officer documents why past performance is not an appropriate evaluation factor.

(b) The RFP must:

(i) Describe how the agency plans to evaluate past performance;

(ii) Provide offerors with an opportunity to identify past or current contracts for similar work; and

(iii) Provide offerors an opportunity to provide information regarding any problems they encountered on the identified contracts and their corrective actions.

[1] On 29 January 1999, the Director of Defense Procurement extended a class deviation from FAR 15.304(c), requiring DOD contracting activities to evaluate past performance in all source selections for negotiated procurements of: (1) RPFs for systems and operations support with an estimated value in excess of $5 million; (2) RFPs for services, information technology, or science and technology with an estimated value in excess of $1 million; and (3) RFPs for fuels and health care with an estimated value in excess of $100,000. Memorandum, Director, Defense Procurement, to Directors of Defense Agencies, subject: Class Deviation—Past Performance (29 Jan. 99). See *Spector Extends Class Deviation on Contract Past Performance Data*, BNA FEDERAL CONTRACTS DAILY, Feb. 18, 1999.

d. Small Business Participation.

(1) FAR Requirements. FAR 15.304(c)(4). Agencies must evaluate the extent to which small disadvantaged business concerns will participate in the performance of:

(a) Unrestricted acquisitions expected to exceed $500,000; and

(b) Construction contracts expected to exceed $1 million.

But see FAR 19.201 and FAR 19.1202 (imposing additional limitations).

(2) DFARS Requirements. DFARS 215.304. Agencies must evaluate the extent to which small businesses and historically black colleges will participate in the performance of the contract if:

(a) The FAR requires the use of FAR 52.219-8, Utilization of Small, Small Disadvantaged, and Women-Owned Small Business Concerns; and

(b) The agency plans to award the contract on a best value or tradeoff basis.

3. Requirement to Disclose Relative Importance. FAR 15.304(d).

a. Agencies must disclose the relative importance of all significant evaluation factors and subfactors.

b. Agencies may disclose the relative order of importance by:

(1) Providing percentages or numerical weights in the RFP;

(2) Providing an algebraic paragraph;

(3) Listing the factors or subfactors in descending order of importance; or

(4) Using a narrative statement.

See AMC Pam. 715-3 (discussing the different methods an agency may use to establish and disclose the relative weight of the significant evaluation factors and subfactors). But see Health Servs. Int'l, Inc., B-247433, June 5, 1992, 92-1 CPD ¶ 493 (finding that the agency misled offerors by listing equal factors in "descending order of importance").

c. The GAO presumes that all of the listed factors are equal if the RFP does not state their relative order of importance. See North-East Imaging, Inc., B-256281, June 1, 1994, 94-1 CPD ¶ 332; cf. Isratex, Inc. v. United States, 25 Cl. Ct. 223 (1992).

(1) The better practice is to state the relative order of importance expressly.

(2) Agencies should rely on the "presumed equal" line of cases only when a RFP inadvertently fails to state the relative order of importance. See High-Point Schaer, B-242616, May 28, 1991, 70 Comp. Gen. 525, 91-1 CPD ¶ 509 (applying the "equal" presumption).

d. Agencies need not disclose their specific rating methodology. FAR 15.304(d). See ABB Power Generation, Inc., B-272681, Oct. 25, 1996, 96-2 CPD ¶ 183.

4. Requirement to Disclose Basis of Award. FAR 15.101-1; FAR 15.101-2.

a. Agencies must disclose how they intend to make the award decision.

b. Agencies generally choose:

(1) The tradeoff process; or

(2) The lowest price technically acceptable process.

See AMC Pam. 715-3 (discussing the strengths and weaknesses of each process).

5. Problem Evaluation Factors.

a. Options.

(1) The evaluation factors should address all evaluated options clearly. A solicitation that fails to state whether the agency will evaluate options is defective. See generally FAR Subpart 17.2; see also Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 (sustaining a protest where the agency failed to inform offerors that it would not evaluate options due to a change in its requirements).

(2) Agencies must evaluate options at the time of award; otherwise, they cannot exercise them unless they prepare a Justification and Approval (J&A). FAR 17.207(f).

b. Key Personnel.

(1) A contractor's personnel are very important in a service contract.

(2) Evaluation criteria should address:

(a) The education, training, and experience of the proposed employee(s);

(b) The amount of time the proposed employee(s) will actually perform under the contract;

(c) The likelihood that the proposed employee(s) will agree to work for the contractor; and

(d) The impact of utilizing the proposed employee(s) on the contractor's other contracts.

See Biospherics, Inc., B-253891.2, Nov. 24, 1993, 93-2 CPD ¶ 333; cf. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 (finding that the awardee's misrepresentation of the availability of key personnel justified overturning the award). But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 (concluding that it was not improper for an offeror to provide a substitute where it did not propose the key employee knowing that he would be unavailable).

(3) Agencies should request resumes, hiring or employment agreements, and proposed responsibilities in the RFP.

C. Notice of Intent to Hold Discussions.

1. 10 U.S.C. § 2305(a)(2)(B)(ii)(I) and 41 U.S.C. § 253a(b)(2)(B) require RFPs to contain either:

a. "[A] statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors," or

b. "[A] statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussion conducted for the purpose of minor clarification[s]), unless discussions are determined to be necessary."

2. Statutes and regulations provide no guidance on whether an agency should award with or without discussions. Contracting officers should consider factors indicating that discussions may be necessary (e.g., procurement history, competition, contract type, specification clarity, etc.). Discussions may be as short or as long as required, but offerors must be given an opportunity to revise proposals after discussions end.

3. A protest challenging the failure to include the correct notice in the solicitation is untimely if filed after the date for receipt of initial proposals. See Warren Pumps, Inc., B-248145.2, Sept. 18, 1992, 92-2 CPD ¶ 187.

D. Draft Requests for Proposals. FAR 15.201(a); AFARS 15.405-90. See AMC Pam. 715-3.

A draft RFP is a useful method of obtaining industry comments on acquisition documents (e.g., contract provisions, specifications, etc.) and shortening the time industry requires to prepare actual proposals. The FAR encourages early exchanges of information about future acquisitions, provided the exchanges are consistent with procurement integrity requirements.

E. Submission of Initial Proposals.

1. Proposal Preparation Time.

a. Agencies must give potential offerors at least 30 days after they issue the solicitation to submit initial proposals for contracts over the simplified acquisition threshold. 41 U.S.C. § 416; 15 U.S.C. § 637(d)(3); FAR 5.203.

b. Amendments.

(1) An agency must amend the RFP if it changes its requirements (or terms and conditions) significantly. FAR 15.206 (b). See United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374; see also MVM, Inc. v. United States 46 Fed. Cl. 126 (2000).

(2) After amending the RFP, the agency must give prospective offerors a reasonable time to modify their proposals, considering the complexity of the acquisition, the agency's needs, etc. FAR 15.206(f).

2. "Early" Proposals.

a. FAR 2.101 defines "offer" as a " response to a solicitation, that, if accepted, would bind the offeror to perform the resultant contract.

b. Agencies must evaluate offers that respond to solicitation, even if offer pre-dates the solicitation. STG Inc., B-2859110, 2000 U.S. Comp. Gen. LEXIS 133 (Sept. 20, 2000).

c. If agency wants to preclude evaluation of proposals received prior to RFP issue date, must notify offerors and allow sufficient time to submit new porposals by closing date. Id. at *5 n.3.

3. Late Proposals. FAR 15.208; FAR 52.215-1.

a. A proposal is late if the agency does not receive it by the time and date specified in the RFP.

(1) If no time is stated, 4:30 p.m. local time is presumed.

(2) FAR 52.215-1 sets forth the circumstances under which an agency may consider a late proposal.

(3) The late proposal rules mirror the late bid rules.

b. Both technical and price proposals are due before the closing time. See Inland Serv. Corp., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266.

c. Agencies must retain late proposals unopened in the contracting office.

4. No "Firm Bid Rule." An offeror may withdraw its proposal at any time. FAR 52.215-1(c)(8). The agency, however, only has a reasonable time in which to accept a proposal. See Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 324, 91-1 CPD ¶ 242 (holding that 13 months was too long).

5. Oral Presentations. FAR 15.102.

   a. Offerors may present oral presentations as part of the proposal process. See NW Ayer, Inc., B-248654, 92-2 CPD ¶ 154.[2]

   b. Offerors must reduce their oral presentations to writing where they include material terms and conditions.

6. Confidentiality.

   a. Prospective offerors may restrict the use and disclosure of information contained in their proposals by marking the proposal with an authorized restrictive legend. FAR 52.215-1(e).

   b. Agencies must safeguard proposals from unauthorized disclosure. FAR 15.207(b).

F. Evaluation of Initial Proposals.

1. General Considerations. See AMC Pam. 715-3 (discussing general considerations).

[2] The use of oral proposals in lieu of (or in addition to) written proposals is an area receiving significant attention in the acquisition community. Practitioners should ensure that contracting personnel are kept apprised of developments in this area and encourage the use of oral proposals where appropriate. See, e.g., Memorandum, Office of the Assistant Secretary of the Army (Research, Development, and Acquisition), subject: Oral Communications with Offerors (June 2, 1995); Procurement Executives Assoc. & Office of Federal Procurement Policy, Guidelines for the Use of Oral Presentations (March 1996) (available on the internet at http://www.doe.gov/html/procure/oral.html).

a. The composition of an evaluation team is left to the agency's discretion and the GAO will not review it absent a showing of conflict of interest or bias. See University Research Corp., B-253725.4, Oct. 26, 1993, 93-2 CPD ¶ 259.

b. Evaluators must read the entire proposal. Intown Properties, Inc., B-262362.2, Jan. 18, 1996, 96-1 CPD ¶ 89 (record failed to demonstrate whether agency had considered information contained in offeror's best and final offer).

c. Evaluators must be reasonable and follow the evaluation criteria in the RFP. See Marquette Med. Sys. Inc., B-277827.5; B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90; Foundation Health Fed. Servs., Inc., B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3.

d. Evaluators must be consistent. If evaluators downgrade an offeror for a deficiency, they must downgrade other offerors for the same deficiency. See Park Sys. Maint. Co., B-252453, June 16, 1993, 93-1 CPD ¶ 466.

e. Evaluators must avoid double-scoring or exaggerating the importance of a factor beyond its disclosed weight. See J.A. Jones Mgmt. Servs., B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244.

f. Evaluators must evaluate compliance with the stated requirements. If an offeror proposes a better—but noncompliant—solution, the agency should amend the RFP and solicit new proposals, provided the agency can do so without disclosing proprietary data. FAR 15.206(d). See Beta Analytics, Int'l, Inc. v. U.S., 44 Fed. Cl. 131 (US Ct. Fed. Cl. 1999); GTS Duratek, Inc., B-280511.2, B-285011.3, Oct. 19, 1998, 98-2 CPD ¶ 130; Labat-Anderson Inc., B-246071, Feb. 18, 1992, 92-1 CPD ¶ 193; cf. United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 (holding that substantial changes required the agency to cancel and reissue the RFP).

g. Evaluators may consider matters outside the offerors' proposals if their consideration of such matters is not unreasonable or contrary to the stated evaluation criteria. See Intermagnetics Gen. Corp.—Recon., B-255741.4, Sept. 27, 1994, 94-2 CPD ¶ 119.

h. Agencies may not downgrade past performance rating based on offeror's history of filing claims. See AmClyde Engineered Prods. Co., Inc., B-282271, June 21, 1999, 99-2 CPD ¶ 5.

2. Evaluating Cost/Price. See AMC Pam 715-3 (providing general guidance on cost/price evaluations).

a. Contracting activities should score cost/price in dollars and avoid schemes that: (1) mathematically relate cost to technical point scores; or (2) assign point scores to cost.

b. Evaluation scheme must be reasonable, and provide an objective basis for comparing cost to government. SmithKline Beecham Corp., B-283939, Jan. 27, 2000, 2000 CPD ¶ 19.

c. Firm Fixed-Price Contracts. FAR 15.305(a)(1).

(1) Comparing proposed prices usually satisfies the requirement to perform a price analysis because an offeror's proposed price is also its probable price. See Ball Technical Prods. Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. But see Triple P Servs., Inc., B-271629.3, July 22, 1996, 96-2 CPD ¶ 30 (indicating that an agency may evaluate the reasonableness of the offeror's low price to assess its understanding of the solicitation requirements if the RPF permits the agency to evaluate offerors' understanding of requirements as part of technical evaluation).

(2) If an agency needs to perform a cost realism analysis, the agency should base any adjustments to the offered price on identifiable costs to the government (e.g., in-house costs or life-cycle costs). See FAR 15.404-1(d). See also Futurues Group Int'l, B-281274.5, 2000 U.S. Comp. Gen. LEXIS 134 (Mar. 10, 2000) (cost realism analysis must consider all information reasonably available at the time of evaluation, not just what offeror submits.)

d. Cost Reimbursement Contracts. FAR 15.305(a)(1).

(1) Agencies should perform a cost realism analysis and evaluate an offeror's probable cost of accomplishing the solicited work, rather than its proposed cost.[3] See FAR 15.404-1(d); see also Kinton, Inc., B-228260.2, Feb. 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112 (indicating that it is improper for an agency to award based on probable costs without a detailed cost analysis or discussions with the offeror).

(2) Agencies should evaluate cost realism consistently from one proposal to the next.

(a) Agencies should consider all cost/price elements. It is unreasonable to ignore unpriced "other cost items," even if the exact cost of the items is not known. See Trandes Corp., B-256975.3, Oct. 25, 1994, 94-2 CPD ¶ 221; cf. Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.

(b) Agencies may not apply estimated adjustment factors mechanically. A proper cost realism analysis requires the agency to analyze each offeror's proposal independently based on its particular circumstances, approach, personnel, and other unique factors. See The Jonathan Corp., B-251698.3, May 17, 1993, 93-2 CPD ¶ 174; Bendix Field Eng'g Corp., B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227.

[3] Probable cost is the proposed cost adjusted for cost realism.

3. Scoring Technical and Management Factors. See AMC Pam. 715-3 (providing general guidance on technical evaluations).

a. Agencies possess considerable discretion in evaluating proposals, and particularly in making scoring decisions. See Billy G. Bassett, B-237331, Feb. 20, 1990, 90-1 CPD ¶ 195 (indicating that the GAO will not rescore proposals; it will only review them to ensure that the agency's evaluation is reasonable and consistent with the stated evaluation criteria). See also Antarctic Support Associates v. United States, 46 Fed. Cl. 145 (2000). (court cited precedent of requiring "great deference" in judicial review of technical matters.)

b. Rating Methods. See AMC Pam. 715-3 (discussing the strengths and weaknesses of the various rating methods). An agency may adopt any evaluation method it desires, provided the method is not arbitrary and does not violate any statutes or regulations. See BMY, A Div. of Harsco Corp. v. United States, 693 F. Supp. 1232 (D.D.C. 1988). At a minimum, an agency must give better proposals higher scores. See Trijicon, Inc., B-244546, Oct., 25, 1991, 71 Comp. Gen. 41, 91-2 CPD ¶ 375 (concluding that the agency failed to rate proposals that exceeded the minimum requirements higher than those offering the minimum). An agency may give higher scores to proposals that exceed the minimum requirements, even if the RFP does not disclose how much extra credit will be given under each subfactor. See PCB Piezotronics, Inc., B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286.

(1) Numerical. An agency may use point scores to rate individual evaluation factors. But see Modern Tech. Corp., B-236961.4, Mar. 19, 1990, 90-1 CPD ¶ 301 (questioning the use of arithmetic scores to determine proposal acceptability). The agency, however, should only use point scores as guides in making the award decision. See Telos Field Eng'g, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240 (concluding that it was unreasonable for the agency to rely on points alone, particularly when the agency calculated the points incorrectly).

(2) Adjectives. An agency may use adjectives (e.g., excellent, good, satisfactory, marginal, and unsatisfactory)—either alone or in conjunction with other rating methods—to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. See Hunt Bldg. Corp., B-276370, June 6, 1997, 98-1 CPD ¶ 101 (denying a challenge to the assigned adjectival ratings where the evaluators adequately documented the different features offered by each firm and conveyed the comparative merits of the proposals to the selection official); see also FAR 15.305(a); Biospherics Incorp., B-278508.4; B-278508.5; B-278508.6, Oct 6, 1998, 98-2 CPD ¶ 96 (holding that while adjectival ratings and point scores are useful guides to decision making, they must be supported by documentation of the relative differences between proposals).

(3) Colors. An agency may use colors in lieu of adjectives to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor.

(4) Narrative. An agency must provide a narrative to rate the strengths, weaknesses, and risks of each proposal. The narrative provides the basis for the source selection decision; therefore, the narrative should reflect the relative importance of the evaluation factors accurately.

(5) GO/NO GO. The FAR does not prohibit a pure pass/fail method, but the GAO disfavors it. See CompuChem Lab., Inc., B-242889, June 19, 1991, 91-1 CPD ¶ 572. Because pass/fail criteria imply a minimum acceptable level, these levels should appear in the RFP. See National Test Pilot School, B-237503, Feb. 27, 1990, 90-1 CPD ¶ 238 (holding that award to the low cost, technically acceptable proposal was inconsistent with the statement that the technical factors were more important than cost).

(6) Dollars. This system translates the technical evaluation factors into dollars that are added or subtracted from the evaluated price to get a final dollar price adjusted for technical quality. See DynCorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69.

c. Agencies must reconcile adverse information. See Maritime Berthing, Inc., B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89.

d. A responsibility determination is not strictly part of the technical evaluation, but the evaluation process may include consideration of responsibility matters. See Applied Eng'g Servs., Inc., B-256268.5, Feb. 22, 1995, 95-1 CPD ¶ 108. If responsibility matters are considered without a comparative evaluation of offers, however, a small business found technically unacceptable may appeal to the SBA for a COC. See Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38.

4. Evaluating Past Performance or Experience. See AMC Pam. 715-3, App. D (proving specific guidance and procedures for evaluating past performance); see also John Brown U.S. Servs., Inc., B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 (comparing the evaluation of past performance and past experience).

a. Using the Experience of Others. Evaluating the past performance or experience of parents, subsidiaries, officers, and team members is difficult. See Oklahoma County Newspapers, Inc., B-270849, May 6, 1996, 96-1 CPD ¶ 213; Tuscon Mobilephone, Inc., B-258408.3, June 5, 1995, 95-1 CPD ¶ 267; Aid Maint. Co., B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188; FMC Corp., B-252941, July 29, 1993, 93-2 CPD ¶ 71; Pathology Assocs., Inc., B-237208.2, Feb. 20, 1990, 90-1 CPD ¶ 292.

b. Comparative Evaluations of Small Businesses' Past Performance.

(1) If an agency comparatively evaluates offerors' past performance, small businesses may not use the SBA's Certificate of Competency (COC) procedures to review the evaluation. See Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148; Smith of Galeton Gloves, Inc., B-271686, July 24, 1996, 96-2 CPD ¶ 36.

(2) If an agency fails to state that it will consider responsibility-type factors, small businesses may seek a COC. See Envirosol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295; Flight Int'l Group, Inc., B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.

(3) If an agency uses pass/fail scoring for a responsibility-type factor, small businesses may seek a COC. See Clegg Indus., Inc., B-242204, Aug. 14, 1991, 70 Comp. Gen. 680, 91-2 CPD ¶ 145.

c. Evidence of Past Performance.

(1) Agencies may consider their own past experience with an offeror rather than relying solely on the furnished references. See Birdwell Brothers Painting and Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129.

(2) In KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447, an agency properly considered extrinsic past performance evidence when past performance was a disclosed evaluation factor. In fact, ignoring extrinsic evidence may be improper. See SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33; cf. Aviation Constructors, Inc., B-244794, Nov. 12, 1991, 91-2 CPD ¶ 448.

(3) Past Performance Evaluation System. FAR Subpart 42.15.

(a) Agencies must establish procedures for collecting and maintaining performance information on contractors. These procedures should provide for input from technical offices, contracting offices, and end users. FAR 42.1503.

(b) Agencies must prepare performance evaluation reports for each contract in excess of $100,000. FAR 42.1502.

d. Agencies must make rational—rather than mechanical—comparative past performance evaluations. In Green Valley Transportation, Inc., B-285283, Aug. 9, 2000, 2000 CPD ¶ 133, GAO found unreasonable an agency's use of absolute numbers of performance problems, without considering the "size of the universe of performance" where problems occurred.

e. Lack of past performance history should not bar new firms from competing for government contracts. See Espey Mfg. & Elecs. Corp., B-254738, Mar. 8, 1994, 94-1 CPD ¶ 180; cf. Laidlaw Envtl. Servs., Inc., B-256346, June 14, 1994, 94-1 CPD ¶ 365 (permitting the agency to give credit for commercial past performance if it is equivalent to comparable prior government experience). Agencies must give a neutral rating to firms "without a record of relevant past performance." FAR 15.305(a)(2)(iv). See Excalibur Sys., Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13 (holding that a neutral rating does not preclude award to a higher-priced, higher technically-rated offeror in a best value procurement).

f. Agencies must clarify adverse past performance information when there is a clear basis to question the past performance information. See A.G. Cullen Construction, Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 145.

5. Scoring disparities are not objectionable or unusual. See Resource Applications, Inc., B-274943.3, Mar. 5, 1997, 97-1 CPD ¶ 137 (finding that the consensus score accurately reflected the proposal's merit, even though it was higher than any of the individual evaluator's scores); Executive Security & Eng'g Tech., Inc., B-270518, Mar. 15, 1996, 96-1 CPD ¶ 156 (holding that the mere presence of apparent inconsistencies is not a basis for disturbing the award); Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 (noting that the individual evaluators' ratings may differ from the consensus evaluation). Consistency from one proposal to the next, however, is essential. See Secure Servs. Tech., Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421.

6. Products of the Evaluation Process.

a. Evaluation Report. See AMC Pam. 715-3 (discussing the importance of documenting proposal strengths, weaknesses, and risks).

(1) The evaluators must prepare a report of their evaluation. See Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482.

(2) The contracting officer should retain all evaluation records. See FAR 4.801; FAR 4.802; FAR 4.803; see also United Int'l Eng'g, Inc., B-245448.3, Jan. 29, 1992, 71 Comp. Gen. 177, 92-1 CPD ¶ 122; Southwest Marine, Inc., B-265865.3, Jan. 23, 1996, 96-1 CPD ¶ 56.

(3) If evaluators use numerical scoring, they should explain the scores. See J.A. Jones Mgmt Servs, Inc., B-276864, Jul. 24, 1997, 97-2 CPD ¶ 47; TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239; S-Cubed, B-242871, June 17, 1991, 91-1 CPD ¶ 571.

(4) Evaluators should ensure that their evaluations are reasonable. See DNL Properties, Inc., B-253614.2, Oct. 12, 1993, 93-2 CPD ¶ 301.

b. Deficiencies. The initial evaluation must identify all parts of the proposals that fail to meet the government's minimum requirements.

c. Advantages and Disadvantages. The initial evaluation should identify the positive and negative aspects of acceptable proposals.

d. Questions and Items for Negotiation. The initial evaluation should identify areas where discussions are necessary/desirable.

e. Competitive Range Recommendation. The evaluation report should recommend the proposals to include in a competitive range.

G. Award Without Discussions.

1. Recent History of Award Without Discussions.

a. Before 1990, agencies could only award on initial proposals if the most favorable proposal also resulted in the lowest overall cost to the government.

(1) In 1990, Congress lifted this restriction for defense agencies. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 802, 104 Stat. 1589 (1990).

(2) In 1994, Congress lifted this restriction for civilian agencies. FASA § 1061 (amending 41 U.S.C. § 253a).

b. An agency may <u>not</u> award on initial proposals if it:

(1) States its intent to hold discussion in the solicitation; or

(2) Fails to state its intent to award without discussions in the solicitation.

10 U.S.C. § 2305(b)(4)(A)(ii); 41 U.S.C. § 253a(b)(2)(B).

c. A proper award on initial proposals need not result in the lowest overall cost to the government.

2. To award without discussions, an agency must:

a. Give notice in the solicitation that it intends to award without discussions;

b. Select a proposal for award which complies with all of the material requirements of the solicitation;

c. Properly evaluate the selected proposal in accordance with the evaluation factors and subfactors set forth in the solicitation;

d. Not have a contracting officer determination that discussions are necessary; and

e. Not conduct discussions with any offeror, other than for the purpose of minor clarifications.

See TRI-COR Indus., B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137.

3. Discussions v. Clarifications. FAR 15.306(a), (d). See AMC Pam. 715-3 (discussing how and when an agency may request clarifications).

a. Award without discussions means **NO DISCUSSIONS**.

(1) "Discussions" are "negotiations that occur after establishment of the competitive range that may, at the Contracting Officer's discretion, result in the offeror being allowed to revise its proposal." FAR 52.215-1(a).

(a) The COFC has found "mutual exchange" a key element in defining discussions. See Cubic Defense Systems, Inc. v. United States, 45 Fed. Cl. 450 (2000).

(b) The GAO has focused on "opportunity revise" as the key element. See MG Industries, B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17.

(2) An agency may not award on initial proposals if it conducts discussions with any offeror. See To the Sec'y of the Navy, B-170751, 50 Comp. Gen. 202 (1970); see also Strategic Analysis, Inc., 939 F. Supp. 18 (D.D.C. 1996) (concluding that communications with one offeror concerning the employment status of its proposed key personnel were discussions). But see Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996) (refusing to sustain a protest because the protester could not show that there was a "reasonable likelihood" that it would have been awarded the contract in the absence of the improper discussions).

b. An agency, however, may "clarify" offerors' proposals.

(1) "Clarifications" are "limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated." FAR 15.306(a).

(2) Clarifications include:

(a) The opportunity to clarify—rather than revise—certain aspects of an offeror's proposal (e.g., the relevance of past performance information to which the offeror has not previously had an opportunity to respond); and

(b) The opportunity to resolve minor irregularities, informalities, or clerical errors.

c. Examples.

(1) The following are discussions:

(a) The substitution of resumes for key personnel. See University of S.C., B-240208, Sept. 21, 1990, 90-2 CPD ¶ 249; Allied Mgmt. of Texas, Inc., B-232736.2, May 22, 1989, 89-1 CPD ¶ 485. But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95.

(b) Allowing an offeror to explain a warranty provision. See Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

(2) The following are not discussions.

(a) Audits. See Data Mgmt. Servs., Inc., B-237009, Jan. 12, 1990, 69 Comp. Gen. 112, 90-1 CPD ¶ 51.

(b) Allowing an offeror to correct a minor math error, correct a certification, or acknowledge a nonmaterial amendments. See E. Frye Enters., Inc., B-258699, Feb. 13, 1995, 95-1 CPD ¶ 64; cf. Telos Field Eng'g, B-253492.2, Nov. 16, 1993, 93-2 CPD ¶ 275.

(c) A request to extend the proposal acceptance period. See GPSI-Tidewater, Inc., B-247342, May 6, 1992, 92-1 CDP ¶ 425.

d. Minor clerical errors should be readily apparent to both parties.

(1) If the agency needs an answer before award, the question probably rises to the level of discussions.

(2) The only significant exception to this rule involves past performance data.

H. Determination to Conduct Discussions.

1. To conduct discussions with one or more offerors after stating an intent to award without discussions, the contracting officer must find that discussions are necessary and document this conclusion in writing. 10 U.S.C. § 2305(b); 41 U.S.C. § 253a(b)(2)(B)(i).

2. Statutes and implementing regulations provide little guidance for making this determination. A contracting officer should consider factors such as favorable but noncompliant proposals, unclear proposals, incomplete proposals, unreasonable costs/prices, suspected mistakes, and changes/ clarifications to specifications See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339.

I. Communications. FAR 15.306(b). See AMC 715-3 (discussing how and when an agency should hold communications).

1. The contracting officer may need to hold "communications" with some offerors before establishing the competitive range.

2. "Communications" are "exchanges of information, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range." FAR 15.306(b).

3. The purpose of communications is to help the contracting officer and/or the evaluators:

   a. Understand and evaluate proposals; and

   b. Determine whether to include a proposal in the competitive range.

4. The parties, however, cannot use communications to permit an offeror to revise its proposal.

5. The contracting officer must communicate with offerors who will be excluded from the competitive range because of adverse past performance information. [NOTE: The contracting officer must give an offeror an opportunity to respond to adverse past performance information to which it has not previously had an opportunity to respond].

6. The contracting officer may also communication with offerors who are neither clearly in nor clearly out of the competitive range.[4] [NOTE: The contracting officer may address "gray areas" in an offeror's proposal (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes).]

J. Establishing the Competitive Range. FAR 15.306(c). See AMC Pam. 715-3 (discussing how and when an agency should establish the competitive range).

1. The competitive range is the group of offerors with whom the contracting officer will conduct discussions, and from whom the agency will seek revised proposals.

2. The contracting officer establishes the competitive range.[5]

3. The contracting may establish the competitive range any time after the initial evaluation of proposals. See SMB, Inc., B-252575.2, July 30, 1993, 93-2 CPD ¶ 72.

4. The contracting officer must consider all of the evaluation factors (including cost/price) in making the determination. See Kathpal Technologies, Inc., B-283137.3, Dec. 30, 1999, 2000 CPD ¶ 6.

a. The contracting officer may exclude a proposal from the competitive range despite its lower cost or the weight accorded cost in the RFP if the proposal is technically unacceptable. See Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.

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[4] The contracting officer may not communicate with offerors who are clearly in or clearly out of the competitive range. FAR 15.306(b)(1)(ii).

[5] The contracting officer may have to obtain the source selection authority's approval in a complex source selection. See AMC Pam 715-3.

b. The contracting officer may exclude an unacceptable proposal that requires major revisions to become acceptable if including the proposal in the competitive range would be tantamount to allowing the offeror to submit a new proposal. See Harris Data Communications v. United States, 2 Cl. Ct. 229 (1983), aff'd, 723 F.2d 69 (Fed. Cir. 1983); see also Strategic Sciences and Tech., Inc., B-257980, 94-2 CPD ¶ 194 (holding that it was reasonable for the agency to exclude an offeror who proposed inexperienced key personnel—which was the most important criteria—from the competitive range); InterAmerica Research Assocs., Inc., B-253698.2, Nov. 19, 1993, 93-2 CPD ¶ 288 (holding that it was proper for the agency to exclude an offeror that merely repeated back language from solicitation and failed to provide required information).

5. The contracting officer must include all of the "most highly rated proposals" in the competitive range unless the contracting officer decides to reduce the competitive range for purposes of efficiency.

a. The GAO ordinarily gives great deference to the agency. To prevail, a protester must show that the decision to exclude it was: (1) clearly unreasonable; or (2) inconsistent with the stated evaluation factors. See Mainstream Eng'g Corp., B-251444, Apr. 8, 1993, 93-1 CPD ¶ 307; cf. Intertec Aviation, B-239672, Sept. 19, 69 Comp. Gen. 717, 90-2 CPD ¶ 232 (holding that the agency improperly excluded an offeror from the competitive range where its alleged technical deficiencies were minor, its cost was competitive, and the agency's action seriously reduced available competition).

b. If the contracting officer has any doubts about whether to exclude a proposal from the competitive range, the contracting officer should leave it out.[6]

6. The contracting officer may limit the number of proposals in the competitive range to "the greatest number that will permit an efficient competition among the most highly rated offerors" if:

[6] In the past, agencies generally included any proposal in the competitive range that had a reasonable chance of receiving award. In a recent decision, the GAO concluded that little has really changed. SDS Petroleum Prods., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59.

a. The agency notified offerors in the solicitation that the contracting officer may limit the competitive range for purposes of efficiency; and

b. The contracting officer determines that the number of proposals the contracting officer would normally include in the competitive range is too high to permit efficient competition.

7. Common Errors.

a. Reducing competitive range to one proposal.

(1) A competitive range of one is not "per se" illegal or improper. See Clean Sys. Co., Inc., B-281141.3, Feb. 16, 1999, 99-1 CPD ¶ 36; SDS Petroleum Prods., B-280430 Sept. 1, 1998, 98-2 CPD ¶ 59 (concluding that the new standard for establishing the competitive range does not preclude a range of one per se). However, a contracting officer's decision to reduce a competitive range to one offeror will receive "close scrutiny." See Rockwell Int'l Corp. v. United States, 4 Cl. Ct. 1 (1983); Aerospace Design, Inc., B-247793, July 9, 1992, 92-2 CPD ¶ 11.

(2) When there is an initial competitive range of one, judicial scrutiny is heightened. See Birch & Davis Int'l v. Christopher, 4 F.3d 970 (Fed. Cir. 1993) (holding that if a contracting officer determines an initial competitive range of one, there must be a clear showing that the excluded bids have no reasonable chance of being selected).

b. Excluding an offeror from the competitive range for omissions that the offeror could easily correct during discussions. See Dynalantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101.

c. Using predetermined cutoff scores. See DOT Sys., Inc., B-186192, July 1, 1976, 76-2 CPD ¶ 3.

d. Excluding an offeror from the competitive range for "nonresponsiveness."

(1) An offeror may cure a material defect in its initial offer during negotiations; therefore, material defects do not necessarily require exclusion from the competitive range. See Leigh Instruments, Ltd., B-233270, Mar. 3, 1989, 89-1 CPD ¶ 232.

(2) The concept of "responsiveness" is incompatible with the concept of the a competitive range. See Consolidated Controls Corp., B-185979, Sept. 21, 1976, 76-2 CPD ¶ 261.

K. Conducting Discussions. FAR 15.306(d). See AMC Pam. 715-3 (discussing the requirement to conduct discussions).

1. The contracting officer must conduct oral or written discussions with each offeror in the competitive range. FAR 15.306(d)(1).

a. The contracting officer may not hold discussions with only one offeror. See Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 (stating that the "acid test" of whether discussions have been held is whether an offeror was provided the opportunity to modify/revise its proposal).

b. The contracting officer may hold face-to-face discussions with some—but not all—offerors, provided the offerors with whom the contracting officer did not hold face-to-face discussions are not prejudiced. See Data Sys. Analysts, Inc., B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.

2. The contracting officer determines the scope and extent of the discussions; however, the discussion must be fair and meaningful.

a. The contracting officer must discuss any matter that the RFP states the agency will discuss. See Daun-Ray Casuals, Inc., B-255217.3, 94-2 CPD ¶ 42 (holding that the agency's failure to provide an offeror with an opportunity to discuss adverse past performance information was improper—even though the offeror received a satisfactory rating—because the RFP indicated that offerors would be allowed to address unfavorable reports).

b. The contracting officer must tailor discussions to the offeror's proposal. FAR 15.306(d)(1).

c. At a minimum, the contracting officer must notify each offeror in the competitive range of deficiencies, significant weaknesses, and other aspects of its proposal that the offeror could alter or explain to materially enhance its potential for award. FAR 15.306(d)(3). But see FAR 15.306(d)(4) (indicating that the contracting officer may eliminate an offeror's proposal from the competitive range after discussions have begun, even if the contracting officer has not discussed all material aspects of the offeror's proposal or given the offeror an opportunity to revise it).

(1) Deficiencies.

(a) A "deficiency" is "a material failure . . . to meet a Government requirement or a combination of significant weaknesses . . . that increases the risk of unsuccessful contract performance to an unacceptable level." FAR 15.301. See CitiWest Properties, Inc., B-274689, Nov. 26, 1997, 98-1 CPD ¶ 3; Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168; Columbia Research Corp., B-247631, June 22, 1992, 92-1 CPD ¶ 536.

(b) The contracting officer does not have to specifically identify each deficiency. Instead, the contracting officer merely has to lead the contractor into areas requiring improvement. See Du & Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156; Arctic Slope World Services, Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75.

(c) The contracting officer does not have to point out a deficiency if discussions cannot improve it. See Appalachian Council, Inc., B-256179, May 20, 1994, 94-1 CPD ¶ 319 (past performance); Encon Mgmt., Inc., B-234679, June 23, 1989, 89-1 CPD ¶ 595 (business experience). But see American Combustion Indus., Inc., B-275057.2, Mar. 5, 1997, 97-1 CPD ¶ 105 (sustaining a protest based on the agency's failure to provide an offeror with an opportunity to discuss adverse past performance information to which it had not previously had an opportunity to respond).

(d) The contracting officer does not have inquire into omissions or business decisions on matters clearly addressed in the solicitation. See Wade Perrow Constr., B-255332.2, Apr. 19, 1994, 94-1 CPD ¶ 266; National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.

(e) The contracting officer does not have to actually "bargain" with an offeror. See Northwest Regional Educ. Lab., B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74. But cf. FAR 15.306(d) (indicating that negotiations may include bargaining).

(2) Significant Weaknesses.

(a) A "significant weakness" is "a flaw that appreciably increases the risk of unsuccessful contract performance." FAR 15.301. Examples include:

(i) Flaws that cause the agency to rate a factor as marginal or poor;

(ii) Flaws that cause the agency to rate the risk of unsuccessful contract performance as moderate to high; and

(iii) Relatively minor flaws that have a significant cumulative impact (e.g., minor flaws in several areas that impact the overall rating).

See AMC Pam. 715-3.

(b) The contracting officer does not have to identify every aspect of an offeror's technically acceptable proposal that received less than a maximum score. See Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222; SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462, recon. denied, B-252476.3, Oct. 27, 1993, 93-2 CPD ¶ 251.

(c) In addition, the contracting officer does not have to advise an offeror of a minor weakness that the agency does not consider significant, even if it subsequently becomes a determinative factor between two closely ranked proposals. See Brown & Root, Inc. and Perini Corp., A Joint Venture, B-270505.2, Sept. 12, 1996, 96-2 CPD ¶ 143; cf. Professional Servs. Group, B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 (holding that the discussions were inadequate where "deficient" staffing was not revealed because the agency perceived it to be a mere "weakness").

(3) Other Aspects of an Offeror's Proposal. The contracting officer must provide an offeror with a meaningful opportunity to improve its proposal by discussing any lack of detail throughout the proposal that resulted in a low but acceptable score. See Eldyne, Inc., B-250158, Jan. 14, 1993, 93-1 CPD ¶ 430, sustained on recon., Dep't of the Navy—Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ 422; see also Motorola, Inc., B-254489, Dec. 15, 1993, 93-2 CPD ¶ 322; Andrew M. Slovak, B-253275.2, Nov. 2, 1993, 93-2 CPD ¶ 263.

d. Since the purpose of discussions is to maximize the agency's ability to obtain the best value, the contracting officer should do more than the minimum necessary to satisfy the requirement for meaningful discussions. See FAR 15.306(d)(2).

3. Prohibited Discussions.

a. FAR Prohibitions. FAR 15.306(e).

(1) The agency may not favor one offeror over another.

(2) The agency may not disclose an offeror's technical solution to another offeror.[7]

(3) The agency may not reveal an offeror's prices without the offeror's permission.[8]

(4) The agency may not reveal the names of individuals who provided past performance information.

(5) The agency may not furnish source selection information in violation of the Procurement Integrity Act (41 U.S.C. § 423).

b. Other Prohibitions. The FAR no longer includes specific prohibitions on technical leveling, technical transfusion, and auctioning; however, the Procurement Integrity Act and the Trade Secrets Act still apply.

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[7] This prohibition includes any information that would compromise and offeror's intellectual property (e.g., an offeror's unique technology or an offeror's innovative or unique use of a commercial items). FAR 15.306(e)(2).

[8] The contracting officer may advise an offeror that its price is too high or too low and reveal the results of the agency's analysis supporting that conclusion. In addition, the contracting officer may advise all of the offerors of the price that the agency considers reasonable based on its price analysis, market research, and other reviews. FAR 15.306(e)(3).

(1) Technical leveling involves helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion. See Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

(2) Technical Transfusion.

(a) Technical transfusion involves the government disclosure of one offeror's proposal to another to help that offeror improve its proposal.

(b) There is one reported case of technical transfusion resulting in reversal of award. Litton Sys., Inc., B-234060, May 12, 1989, 68 Comp. Gen. 422, 89-1 CPD ¶ 450. Cf. Simmonds Precision Prods., Inc., B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 (concluding that asking an offeror if it considered alternate approaches is not technical transfusion, even though the questions resulted in the offeror proposing a solution similar to the protester's); Technical Assessment Sys., Inc., B-242436, May 3, 1991, 91-1 CPD ¶ 432 (concluding that the disclosure of unsolicited advertising material is not technical transfusion).

(3) Auctioning.

(a) Auctioning involves the practice of promoting price bidding between offerors by indicating the price offerors must beat, obtaining multiple proposal revisions, disclosing other offerors' prices, etc.

(b) Auctioning is not inherently illegal. See Nick Chorak Mowing., B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82. Moreover, the GAO usually finds that preserving the integrity of the competitive process outweighs the risks posed by an auction. See Navcom Defense Electronics, Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126; Baytex Marine Communication, Inc., B-237183, Feb. 8, 1990, 90-1 CPD ¶ 164.

(c) FAR 15.306 allows discussion of price. See National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.

c. Fairness Considerations.

(1) Discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. See Metro Machine Corp., B-281872.2, Apr. 22, 1999, 99-1 CPD ¶ 101 (finding that a question about a proposal that did not reasonably put the offeror on notice of agency's actual concern was not adequate discussions); see also SRS Tech., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 (concluding that the Navy mislead the offeror by telling it that its prices were too low when all it needed was better support for its offered prices); Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 (concluding that the agency misled the offeror and caused it to raise its price by telling it that its price was below the government estimate; DTH Mgmt. Group, B-252879.2, Oct. 15, 1993, 93-2 CPD ¶ 227 (concluding that the agency mislead an offeror by telling it that its price was below the government estimate when it knew that the government estimate was faulty).

(2) The contracting officer must provide similar information to all of the offerors. See Securiguard, Inc., B-249939, Dec. 21, 1992, 93-1 CPD ¶ 362; Grumman Data Sys. Corp. v. Sec'y of the Army, No. 91-1379, slip op. (D.D.C. June 28, 1991) (agency gave out answers, but not questions, misleading other offerors); SeaSpace Corp., B-241564, Feb. 15, 1991, 70 Comp. Gen. 268, 91-1 CPD ¶ 179.

L. Final Proposal Revisions (Formerly Known as Best and Final Offers or BAFOs). 15.307.

1. Requesting final proposal revisions concludes discussions. The request must notify offerors that:

   a. Discussions are over;

   b. They may submit final proposal revisions to clarify and document any understandings reached during negotiations;

   c. They must submit their final proposal revisions in writing;

   d. They must submit their final proposal revisions by the common cutoff date/time; and

   e. The government intends to award the contract without requesting further revisions.

2. Agencies do not have to reopen discussions to address deficiencies introduced in the final proposal revision. See Ouachita Mowing, Inc., B-276075, May 8, 1997, 97-1 CPD ¶ 167; Logicon RDA, B-261714.2, Dec. 22, 1995, 95-2 CPD ¶ 286; Compliance Corp., B-254429, Dec. 15, 1993, 94-1 CPD ¶ 166.

   a. Agencies, however, must reopen discussions in appropriate cases. See TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 (holding that the agency erred in not conducting additional discussions where there were significant inconsistencies between technical and cost proposals that required resolution); cf. Dairy Maid Dairy, Inc., B-251758.3, May 24, 1993, 93-1 CPD ¶ 404 (holding that a post-BAFO amendment that changed the contract type from a requirements contract to a definite quantity contract was a material change that required a second round of BAFOs); Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276 (holding that the contracting officer properly requested additional BAFOs after amending the RFP).

b. Agencies may request additional BAFOs even if the offerors' prices were disclosed through an earlier protest if additional BAFOs are necessary to protect the integrity of the competitive process. BNF Tech., Inc., B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258.

3. If the agency reopens discussions with one offeror, the agency must reopen discussions with all of the remaining offerors. See Paramax Sys. Corp., B-253098.4, Oct. 27, 1993, 93-2 CPD ¶ 282; SmithKline Beecham Pharmaceuticals, N.A., B-252226.2, Aug. 4, 1993, 93-2 CPD ¶ 79; cf. Unitor Ships Serv., Inc., B-245642, Jan. 27, 1992, 92-1 CPD ¶ 110; Booz, Allen & Hamilton, Inc., B-236476, Dec. 4, 1989, 89-2 CPD ¶ 513.

M. Selection for Award.

1. Agencies must evaluate final proposals using the evaluation factors set forth in the solicitation.

a. Bias in the selection decision is improper. See Latecoere Int'l v. United States, 19 F.3d 1342 (11th Cir. 1994) (stating that bias against a French firm "infected the decision not to award it the contract . . . .").

b. There is no requirement that the same evaluators who evaluated the initial proposals also evaluate the final proposals. See Medical Serv. Corp. Int'l, B-255205.2, April 4, 1994, 94-1 CPD ¶ 305.

2. A proposal that fails to conform to material solicitation requirement is technically unacceptable and cannot form the basis of award. Wellco Ent. Inc., B-282150, June 4, 1999, 99-1 CPD ¶ 107 (citing Int'l Sales Ltd., B-253646, Sept. 7, 1993, 93-2 CPD ¶ 140). See GTS Duratek, Inc., B-280511.2; B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130; Mine Safety Appliances Co., B-247919.5, Sept. 3, 1992, 92-2 CPD ¶ 150; cf. Presearch, Inc., B-257889, Nov. 21, 1994, 94-2 CPD ¶ 197 (denying the protest because the GAO found no prejudice). If the agency wants to accept an offer that does not comply with the material solicitation requirements, the agency must issue a written amendment and give all of the remaining offerors an opportunity to submit revised proposals. FAR 15.206(d). See Beta Analytics Int'l, Inc. v. U.S., 44 Fed. Cl. 131 (U.S. Ct Fed. Cl. 1999); 4th Dimension Software, Inc., B-251936, May 13, 1993, 93-1 CPD ¶ 420.

3. The evaluation process is inherently subjective.

   a. The fact that an agency reasonably might have made another selection does not mean that the selection made was unreasonable. See Red R. Serv. Corp., B-253671.4, Apr. 22, 1994, 94-1 CPD ¶ 385. However, the decision must be based on accurate information. See CRA Associated, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.

   b. Point scoring techniques do not make the evaluation process objective. See VSE Corp., B-224397, Oct. 3, 1986, 86-2 CPD ¶ 392. Therefore, the RFP should not state that award will be made based on the proposal receiving the most points. See Harrison Sys. Ltd., B-212675, May 25, 1984, 84-1 CPD ¶ 572.

4. A cost/technical tradeoff analysis is essential to any source selection decision using a tradeoff (rather than a lowest-priced, technically acceptable) basis of award. See Duke/Jones Hanford, Inc., B-249637.10, July 13, 1993, 93-2 CPD ¶ 26. But cf. State Mgmt. Servs, B-255528.6, Jan. 18, 1995, 95-1 CPD ¶ 25 (indicating that a cost/technical tradeoff decision is only necessary when one proposal is rated higher technically, and another is lower in cost). More than a mere conclusion, however, is required to support the analysis. See ITT Fed. Svs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 (quoting Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 at 5); Redstone Technical Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181.

a. Agencies have broad discretion in making cost/technical tradeoffs, and the extent to which one is sacrificed for the other is tested for rationality and consistency with the stated evaluation factors. See MCR Fed. Inc., B-280969, Dec. 4, 1999, 99-1 CPD ¶ 8; see also Widnall v. B3H Corp., 75 F. 3d 1577 (Fed. Cir. 1996) (stating that "review of a best value agency procurement is limited to independently determining if the agency's decision was grounded in reason").

b. Beware of tradeoff techniques that distort the relative importance of the various evaluation criteria (e.g., "Dollars per Point"). See Billy G. Bassett; Lynch Dev., Inc., B-237331, Feb. 20, 1990, 90-1 CPD ¶ 195; T. H. Taylor, Inc., B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.

c. Comparative consideration of features in competing proposals is permissible—even if those features were not given quantifiable evaluation credit under disclosed evaluation criteria—if the basis for award stated in the RFP provides for an integrated assessment of proposals. See Grumman Data Sys. Corp. v. Dep't of the Air Force, GSBCA No. 11939-P, 93-2 BCA ¶ 25,776, aff'd sub nom. Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044 (Fed. Cir. 1994) (concluding that the SSA's head-to-head comparison of proposals may permissibly look at features not directly evaluated).

d. A cost/technical tradeoff analysis may consider relevant matters not disclosed in the RFP as tools to assist in making the tradeoff. See Advanced Mgmt., Inc., B-251273.2, Apr. 2, 1993, 93-1 CPD ¶ 288 (holding that it is permissible to consider that loss of efficiency in awarding to a new contractor would reduce effective price difference between the contractor and the incumbent).

e. Agencies should make the cost/technical tradeoff decision after receiving final proposals if final proposals were requested. See Halter Marine, Inc., B-255429, Mar. 1, 1994, 94-1 CPD ¶ 161.

5. The selection decision documentation must include the rationale for any trade-off made, "including benefits associated with additional costs." FAR 15.308; Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 (finding it improper to rely on a purely mathematical price/technical tradeoff methodology).

6. A well-written source selection memorandum should contain:

   a. A summary of the evaluation criteria and their relative importance;

   b. A statement of the decision maker's own evaluation of each of the proposals: (1) adopting recommendations of others or stating a personal evaluation; and (2) identifying major advantages and disadvantages of each proposal (see J&J Maintenance Inc., B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶106); **and**

   c. A description of the reasons for choosing the successful offeror, comparing differences in cost with differences in technical factors.

7. The SSA need not personally write the decision memorandum. See Latecoere Int'l Ltd., B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70.

8. The selection decision is subject to review for rationality and consistency with the stated evaluation criteria. See Beneco Enterprises, B-283154, 1999 U.S. Comp. Gen. LEXIS 246 (Oct. 13, 1999). The SSA has considerable discretion. See Calspan Corp., B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28.

   a. The SSA may consider slightly different scores a tie and award to the lower cost offeror. See Tecom, Inc., B-257947, Nov. 29, 1994, 94-2 CPD ¶ 212; Duke/Jones Hanford, Inc., B-249637.10, July 13, 1993, 93-2 CPD ¶ 26.

   b. Conversely, the SSA may consider slightly different scores to represent a significant difference justifying the greater price. See Macon Apparel Corp., B-253008, Aug. 11, 1993, 93-2 CPD ¶ 93; Suncoast Assoc., Inc., B-265920, Dec. 7, 1995, 95-2 CPD ¶ 268.

   c. In one case, a SSA's decision to award to a substantially lower scored offeror, whose cost was only slightly lower, was not adequately justified. TRW, Inc., B-234558, June 21, 1989, 68 Comp. Gen. 512, 89-1 CPD ¶ 584. However, after the SSA's reconsideration, the same outcome was adequately supported. TRW, Inc., B-234558.2, Dec. 18, 1989, 89-2 CPD ¶ 560.

d. Reliance on the scores of evaluators alone, without looking at strengths and weaknesses of each proposal, may be unreasonable. See SDA, Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320.

N. Debriefings. 10 U.S.C. § 2305(b)(5); 41 U.S.C. § 253b(e); FAR 15.505-506. See AMC Pam. 715-3, App. F (providing guidelines for conducting debriefings).

1. Notices to Unsuccessful Offerors. FAR 15.503.

a. Preaward Notices.

(1) The contracting officer must provide prompt, written notice to offerors excluded or eliminated from the competitive range. FAR 15.503(a)(1).

(2) Small Business Set-Asides. FAR 15.503(a)(2).

(a) The contracting officer must provide written notice to the unsuccessful offerors before award.

(b) The notice must include the name and address of the apparently successful offeror and state that:

(i) The government will consider additional proposal revisions; and

(ii) No response is required unless the offeror intends to challenge the small business size status of the apparently successful offeror.

b. Postaward Notices. FAR 15.503(b).

(1) The contracting officer must notify unsuccessful offerors within 3 days of the date of contract award.

(2) The notice must include the number of offerors solicited, the number of proposals received, the names and addresses of the awardees, the awarded prices, and a general description of why the unsuccessful offeror's proposal was not accepted.

2. Debriefings.

a. Preaward Debriefings. FAR 15.505.

(1) An offeror excluded from the competitive range (or otherwise eliminated from consideration for award) may request a preaward debriefing.

(a) An offeror must submit a written request for a debriefing within 3 days of the date it receives its preaward notice.

(b) If the offeror does not meet this deadline, the offeror is not entitled to either a either a preaward or postaward debriefing.

(2) The contracting officer must "make every effort" to conduct the preaward debriefing as soon as practicable.

(a) The offeror may request the contracting officer to delay the debriefing until after contract award.

(b) The contracting officer may delay the debriefing until after contract award if the contracting officer concludes that delaying the debriefing is in the best interests of the government. See Global Eng'g. & Const. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (declining to review the contracting officer's determination).

(3) At a minimum, preaward debriefings must include:

(a) The agency's evaluation of significant elements of the offeror's proposal;

(b) A summary of the agency's rationale for excluding the offeror; and

(c) Reasonable responses to relevant questions.

(4) Preaward debriefings must not include:

(a) The number of offerors;

(b) The identity of other offerors;

(c) The content of other offerors' proposals;

(d) The ranking of other offerors;

(e) The evaluation of other offerors; or

(f) Any of the information prohibited in FAR 15.506(e).

b. Postaward Debriefings. FAR 15.506.

(1) An unsuccessful offeror may request a postaward debriefing.

(a) An offeror must submit a written request for a debriefing within 3 days of the date it receives its postaward notice.

(b) The agency may accommodate untimely requests; however, the agency decision to do so does not extend the deadlines filing protests.

(2) The contracting officer must conduct the postaward debriefing within 5 days of the date the agency receives a timely request "to the maximum extent practicable."

(3) At a minimum, postaward debriefings must include:

(a) The agency's evaluation of the deficiencies and significant weaknesses in the offeror's proposal;

(b) The overall ratings of the debriefed offeror and the successful offeror;

(c) The overall rankings of all of the offerors;

(d) A summary of the rationale for the award decision;

(e) The make and model number of any commercial item(s) the successful offeror will deliver; and

(f) Reasonable responses to relevant questions.

(4) Postaward debriefings must <u>not</u> include:

(a) A point-by-point comparison of the debriefed offeror's proposal with any other offeror's proposal; and

(b) Any information prohibited from disclosure under FAR 24.202 or exempt from release under the

(c) Freedom of Information Act.

(5) General Considerations. The contracting officer should:

(a) Tailor debriefings to emphasize the fairness of the source selection procedures;

(b) Point out deficiencies that the contracting officer discussed but the offeror failed to correct;

(c) Point out areas for improvement of future proposals;

IV. CONCLUSION.

Chapter 9
Commercial Item Acquisitions

146th Contract Attorneys Course

CHAPTER 9

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CHAPTER 9

COMMERCIAL ITEM ACQUISITIONS

I. INTRODUCTION. Following this block of instruction, the students should:

A. Understand the government's emphasis on purchasing commercial items.

B. Understand the FAR definition of a commercial item.

C. Understand the methods which can be used to acquire commercial items.

D. Understand that the acquisition of commercial items streamlines all contracting methods.

II. REFERENCES.

A. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA].

B. Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA].

C. FAR Parts 8 and 12.

D. Assistant Secretary of Defense (Command, Control, Communications & Intelligence) and Under Secretary of Defense (Acquisition, Technology & Logistics), COMMERCIAL ITEM ACQUISITIONS: CONSIDERATIONS AND LESSONS LEARNED (June 26, 2000).

MAJ John Siemietkowski
146th Contract Attorneys Course
April/May 2001

III. POLICY.

A. Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) states a preference for government acquisition of commercial items. The purchase of proven products such as commercial and non-developmental items can eliminate the need for research and development, minimize acquisition lead-time, and reduce the need for detailed design specifications or expensive product testing. S. Rep. No. 103-258, at 5 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2566.

B. Part 12, which falls under FAR Subchapter B - Competition and Acquisition Planning, implements the statutory preference for purchase of commercial items by prescribing policies and procedures unique to the acquisition of commercial items. The acquisition policies resemble those of the commercial marketplace.

C. Agencies shall conduct market research to determine whether commercial items or non-developmental items are available that can meet the agency's requirements. FAR 12.101(a).

D. Contracting officers shall use the policies of Part 12 in conjunction with the policies and procedures for solicitation, evaluation, and award prescribed under Parts 13, Simplified Acquisition Procedures; Part 14 , Sealed Bidding; and Part 15, Contracting by Negotiation. FAR 12.102(b).

E. Required contract types. FAR 12.207. Proposed expansion of permissible contract types. 65 Fed. Reg. 83,292 (Dec. 29, 2000).

IV. DEFINITIONS. FAR PART 2.101

A. Commercial Item.

1. FAR 2.101. Any item, other than real property, that is of a type customarily used for non-governmental purposes and that:

a. Has been sold, leased, or licensed to the general public; or

b. Has been offered for sale, lease, or license to the general public. Matter of Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 (actual sale or license to general public not required for commercial item classification; determination of commercial item status is discretionary agency decision).

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

3. Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition but for:

a. Modifications of a type customarily available in the commercial marketplace. See Crescent Helicopters, B-284706 et al, May 30, 2000, 2000 CPD ¶ 90 (helicopter wildfire suppression was "commercial").

b. Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements.

(1) "Minor" modifications means modifications that do not significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process. Matter of Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 (combining commercial hardware with commercial software in new configuration, never before offered, did not alter "non-governmental function or essential physical characteristics").

(2) Factors to be considered in determining whether a modification is minor include the value and size of the modification, and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor.

4. A non-developmental item, if the agency determines it was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments.

B. Commercial Services.

1. Definition. 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 performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. See Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474 (1999) (holding there was no market price for radioactive waste disposal services).

2. DOD may treat procurements of certain commercial services as procurements of commercial items if the source provides similar services contemporaneously to the public under similar terms and conditions. 41 U.S.C.A. § 403(12)(E)(ii) (West Supp. 2000).

C. Commercially Available Off-the-Shelf Item.

1. Is a commercial item;

2. Sold in substantial quantities in the commercial marketplace; and

3. Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. See Chant Engineering Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 ([n]ew equipment like Chant's proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment.").

D. Component means any item supplied to the federal government as part of an end item or of another component.

E. Non-Developmental Item.

1. Any previously developed item of supply used exclusively for governmental purposes by a federal agency, a state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

2. Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

3. Any item of supply being produced that does not meet the requirements of paragraph (a) or (b) solely because the item is not yet in use. Trimble Navigation, Ltd., B-271882, August 26, 1996, 96-2 CPD ¶ 102 (award improper where awardee offered a GPS receiver that required major design and development work to meet a material requirement of the solicitation that the receiver be a NDI).

V. PRIORITY SOURCES FOR COMMERCIAL ITEMS.

A. Supplies. FAR 8.001(a)(1). Agencies shall satisfy requirements through the following sources, in descending order of authority:

1. Agency inventories;

2. Excess from other agencies (see FAR 8.1);

3. Federal Prison Industries, Inc. (18 U.S.C.A. § 4124; FAR 8.6). See www.unicor.gov. Waivers are possible for purchases of $2,500 or less. *See* http//:web.deskbook.osd.mil/reflib/MDOD/066DVDOC.HTM and www.unicor.gov/customer/waiverform.htm.;

4. Committee for Purchase From People Who Are Blind or Severely Disabled (JWOD). See www.jwod.com;[1]

5. Government wholesale supply sources, such as stock programs of the GSA, Defense Logistics Agency (DLA), and military inventory control points;

[1] Some JWOD products can be found on GSA's Federal Supply Schedules.

6. Mandatory Federal Supply Schedules (FAR 8.4). See <www.fss.gsa.gov>;

7. Optional use Federal Supply Schedules (FAR 8.4). See <www.fss.gsa.gov>; and

8. Commercial sources.

B. Services.

1. Committee for Purchase From People Who Are Blind or Severely Disabled;

2. Mandatory Federal Supply Schedules;

3. Optional use Federal Supply Schedules; and

4. Federal Prison Industries, Inc. or commercial sources (including educational and non-profit institutions).

VI. FEDERAL SUPPLY SCHEDULES.

A. Background.

1. The General Services Administration (GSA) manages the FSS program pursuant to the Section 201 of the Federal Property Administrative Services Act of 1949. A FSS is also known as a multiple award schedule (MAS).

2. The Federal Supply Schedule (FSS) program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. The FSS program provides over four million commercial off-the-shelf products and services, at stated prices, for given periods of time.

3. Congress recognizes the multiple award schedule (MAS) program as a full and open competition procedure if participation in the program has been open to all responsible sources and orders and contracts under the program result in the lowest overall cost alternative to the United States. 10 U.S.C. § 2302(2)(C).

4. Therefore, an agency need not seek further competition, synopsize the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides in accordance with FAR 19.5 (required for procurements under the simplified acquisition threshold). FAR 8.404(a). But see Draeger Safety, Inc., B-285366, B-285366.2, Aug. 23, 2000 (unpublished) (though the government need not seek further competition when buying from the FSS, if it asks for competition among FSS vendors, it must give those vendors sufficient details about the solicitation to allow them to compete intelligently and fairly).

B. Ordering under the FSS[2].

1. Agencies place orders to obtain supplies or services from a FSS contractor. When placing the order, the agency has determined that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the government's needs. FAR 8.404(a).

2. An agency must reasonably ensure that the selection meets its needs by considering reasonably available information about products offered under FSS contracts. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

3. If an agency places an order against an expired FSS contract, it may result in an improper sole-source award. DRS Precision Echo, Inc., B-284080; B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26.

4. Thresholds.

[2] Unfortunately, many contracting officers do not follow GSA's established procedures when using the FSS. GENERAL ACCOUNTING OFFICE, GAO-01-125, NOT FOLLOWING PROCEDURES UNDERMINES BEST PRICING UNDER GSA'S SCHEDULE (Nov. 2000).

a. Under $2500. Agencies can place an order with any FSS contractor. FAR 8.404(b)(1).

b. Above $2500, but below the "maximum order threshold." FAR 8.404(b)(2).

(1) Consider reasonably available information using the "GSA Advantage!" on-line shopping service, or

(2) Review catalogs/pricelists of at least three schedule contractors and select the best value vendor. The agency may consider:

(a) Special features of the supply or service;

(b) Trade-in considerations;

(c) Probable life of the product;

(d) Warranties;

(e) Maintenance availability;

(f) Past performance; and

(g) Environmental and energy efficient considerations.

c. Above the maximum order threshold.

(1) Follow same procedures as for orders above $2500, but below the "maximum order threshold," and

(2) Review additional schedule contractor's catalogs/pricelists, or use "GSA Advantage!";

(3) Seek price reduction from best value contractor;

(4) Order from contractor offering best value and lowest overall cost alternative. An order can still be placed even without price reductions.

5. Advantages of FSS ordering.

a. Reduce the time of buying.

b. Reduce the cost of buying. Agencies can fill recurring needs while taking advantage of quantity discounts associated with government-wide purchasing.

c. While not protest proof, ordering from a FSS should diminish the chances of a successful protest.

(1) The language of 10 U.S.C. § 2304c(d)[3] does not apply to FSS orders. Severn Companies, Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181, at 2 n.1.

(2) Whether the agency satisfies a requirement through an order placed against a MAS contract/BPA or through an open market purchase from commercial sources is a matter of business judgement that the GAO will not question unless there is a clear abuse of discretion. AMRAY, Inc., B-210490, Feb. 7, 1983, 83-1 CPD ¶ 135.

(3) An agency may consider administrative costs in deciding whether to proceed with a MAS order, even though it knows it can satisfy requirements at a lower cost through a competitive procurement. Precise Copier Services, B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25.

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[3] "[A] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." See also 4 C.F.R § 21.5(a), which provides that the administration of an existing contract is within the purview of the contracting agency, and is an invalid basis for a GAO protest. GAO will summarily dismiss a protest concerning a contract administration issue.

(4) The GAO will review orders to ensure the choice of a vendor is reasonable. Commercial Drapery Contractors, Inc., B-271222, June 27, 1996, 96-1 CPD ¶ 290 (protest sustained where agency's initial failure to follow proper order procedures resulted in "need" to issue order to higher priced vendor, on the basis it was now the only vendor that could meet delivery schedule).

d. GSA awards and administers the contract (not the order). Problems with orders should be resolved directly with the contractor. Failing that, complaints concerning deficiencies can be lodged with GSA telephonically (1-800-488-3111) or electronically (through "GSA Advantage!").

6. Disadvantages.

a. Must pay GSA's "service charge" (a 1% "Industrial Funding Fee," included in the vendor's quoted price).

b. FSS order or competitive procurement?

(1) When an agency makes its best value determination based solely on the FSS offerings, there is no requirement that vendors receive advance notice regarding either the agency's needs or selection criteria. COMARK Federal Systems, B-278323, B-278323.2, Jan. 20, 1998, 98-1 CPD ¶ 34.

(2) Likewise, a proper FSS order can be placed after an agency issues an RFQ to FSS vendors for the purpose of seeking a price reduction. COMARK Federal Systems, 98-1 CPD ¶ 34, at 4 n.3.

(3) However, where an agency shifts the burden of selecting items on which to quote to the FSS vendors, and intends to use vendor responses as basis of evaluation, it is a competition rather than a FSS buy. The agency must then provide guidance on how the award is to be made. COMARK Federal Systems, 98-1 CPD ¶ 34 (RFQ to three FSS firms holding BPAs with the agency failed to accurately state the agency's requirements where it did not state that award was to be made on the basis of price/technical factors tradeoff).

(4) Allowing the contractor to deliver material of lower cost and quality does not afford vendors fair and equal treatment. See Marvin J. Perry & Associates, B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128 (protest sustained where contractor substituted ash wood rather than red oak in FSS furniture buy resulted in an unfair competition).

c. Agencies can not order "incidentals" on Federal Supply Schedule orders.

(1) In ATA Defense Industries, Inc., 38 Fed. Cl. 489 (1997), the Court of Federal Claims ruled that "bundling" non-schedule products with schedule products violated the Competition in Contracting Act. The contract in question involved the upgrade of two target ranges at Fort Stewart, Georgia. The non-schedule items amounted to thirty-five percent of the contract value.

(2) Prior to 1999, the GAO allowed incidental purchases of non-schedule items in appropriate circumstances. ViON Corp., B-275063.2, Feb. 4, 1997, 97-1 CPD ¶ 53 (authorizing purchase of various cables, clamps, and controller cards necessary for the operation of CPUs ordered from the schedule).

(3) The GAO has concluded, in light of the COFC's analysis in ATA, that there is no statutory basis for the incidental test it enunciated in ViON. Agencies must comply with regulations governing purchases of non-FSS items, such as those concerning competition requirements, to justify including those items on a FSS delivery order. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

VII. SPECIAL COMMERCIAL PROCEDURES.

A. Streamlined Solicitation of Commercial Items. These procedures apply whether using simplified acquisition, sealed bid, or negotiation procedures.

1. Publication. FAR 5.203(a). A contracting officer can expedite the acquisition process when purchasing commercial items.

a. Whenever agencies are required to publish notice of contract actions under FAR 5.201, the contracting officer may issue a solicitation less than 15 days after publishing notice in the CBD. FAR 5.203(a)(1); or

b. Use a combined CBD synopsis/solicitation procedure. FAR 5.203(a)(2).

(1) FAR 12.603 provides the procedures for the use of a combination CBD synopsis/solicitation document. The combination synopsis/solicitation must have less than 12,000 textual characters (approximately three and one-half single spaced pages).

(2) The combined CBD synopsis/solicitation is only appropriate where the solicitation is relatively simple. It is not recommended for use when lengthy addenda to the solicitation are necessary.

(3) Do not use the Standard Form 1449 when issuing the solicitation.

c. Amendments to the solicitation are published in the same manner as the initial synopsis/solicitation. FAR 12.603(c)(4).

2. Response time. FAR 5.203(b).

a. The contracting officer shall establish a solicitation response time that affords potential offerors a reasonable opportunity to respond to commercial item acquisitions. See American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable).

b. The contracting officer should consider the circumstances of the individual acquisition, such as its complexity, commerciality, availability, and urgency, when establishing the solicitation response time.

3. Offers. FAR 12.205.

a. Contracting officers should allow offerors to propose more than one product that will meet agency's needs.

b. If adequate, request only existing product literature from offerors in lieu of unique technical proposals.

B. Streamlined Evaluation of Offers.

1. When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at FAR 52.212-2, Evaluation-Commercial Items. Paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors.

a. For many commercial items, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance.

(1) Technical capability may be evaluated by how well the proposed product meets the Government requirement instead of predetermined subfactors.

(2) A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions.

b. Past performance shall be evaluated in accordance with the procedures for simplified acquisitions or negotiated procurements, as applicable.

C. Award. Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered. FAR 12.602(c); Universal Building Maintenance, Inc., B-282456, July 15, 1999, 99-2 CPD § 32.

D. Reverse Auctions. Reverse auctions use the Internet to allow on-line suppliers to compete in real-time for contracts by lowering their prices until the lowest bidder prevails. Reverse auctions can further streamline the already abbreviated simplified acquisition procedures.

1. Commercial item acquisitions lend themselves to reverse auctions because technical information is not needed unless the CO deems it necessary. Even in those instances, existing product literature may suffice.

2. Commercial item acquisitions lend themselves to reverse auctions because the CO has only to ensure that an offeror's product is generally suitable for agency needs and that the offeror's past performance indicates that the offeror is a responsible source.

VIII. CONTRACT CLAUSES FOR COMMERCIAL ITEMS

A. Contracting officers are to include only those clauses that are required to implement provisions of law or executive orders applicable to commercial items, or are deemed to be consistent with customary commercial practice. FAR 12.301(a).

B. FAR Subpart 12.5 identifies laws that: (a) are not applicable to contracts for the acquisition of commercial items; (b) are not applicable to subcontracts, at any tier, for the acquisition of a commercial item; and (c) have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

C. Contract Terms and Conditions, FAR 52.212-4, is incorporated in the solicitation and contract by reference. It implements the following statutory requirements that shall not be tailored:

1. Assignments;

2. Disputes;

3. Payment;

4. Invoices;

5. Other compliances; and

6. Compliance with laws unique to Government contracts.

D. 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items, incorporates by reference clauses required to implement provisions of law or executive orders applicable to commercial items.

E. Tailoring of provisions and clauses.

1. Contracting officers may, after conducting appropriate market research, tailor FAR 52.212-4 to adapt to the market conditions for a particular acquisition. FAR 12.302(a). See Smelkinson Sysco Food Services, B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 (protest sustained where agency failed to conduct market research before incorporating an "interorganizational transfers clause").

2. Certain clauses implement statutory requirements and shall not be tailored. FAR 12.302(b).

a. Assignments.

b. Disputes.

c. Payment.

d. Invoice.

e. Other compliances.

f. Compliance with laws unique to Government contracts.

3. Before a contracting officer tailors a clause or includes a term or condition that is inconsistent with customary commercial practice for the acquisition, he must obtain a waiver under agency procedures. FAR 12.302(c).

a. The request for waiver must describe the customary practice, support the need to include the inconsistent term, and include a determination that use of the customary practice is inconsistent with the government's needs.

b. A waiver can be requested for an individual or class of contracts for an item.

4. Tailoring shall be by addenda to the solicitation and contract.

IX. UNIQUE TERMS AND CONDITIONS FOR COMMERCIAL ITEMS.

A. Acceptance. FAR 12.402; FAR 52.212-4.

1. Generally, the government relies on a contractor's assurance that commercial items conform to contract requirements. The government always retains right to reject nonconforming items.

2. Other acceptance procedures may be appropriate for the acquisition of complex commercial items, or items used in critical applications. The contracting officer should include alternative inspection procedures in an addendum to SF 1449, and must examine closely the terms of any express warranty.

B. Termination.

1. FAR Clause 52.212-4, Contract Terms and Conditions - Commercial Items, permits government termination of a commercial items contract either for convenience of the government or for cause. See FAR 12.403(c)-(d).

2. This clause contains termination concepts different from the standard FAR Part 49 termination clauses.

3. Contracting officers may use FAR Part 49 as guidance to the extent Part 49 does not conflict with FAR Part 12 and the termination language in FAR 52.212-4.

C. Warranties. The government's post-award rights contained in 52.212-4 include the implied warranty of merchantability and the implied warranty of fitness.

1. Implied warranties.

a. Merchantability. Provides that an item is reasonably fit for the ordinary purposes for which such items are used.

b. Fitness. Provides that an item is fit for use for the particular purpose for which the government will use the item. The seller must know the purpose for which the government will use the item, and the government must have relied upon the contractor's skill and judgment that the item would be appropriate for that purpose. Legal counsel must be consulted prior to the government asserting a claim of breach of this warranty.

2. Express warranties.

a. Solicitations should require offerors to offer the government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.

b. Solicitations may specify minimum warranty terms.

X. INFORMATION TECHNOLOGY.

A. Clinger-Cohen Act of 1996, 40 U.S.C. § 1401.

B. FAR Part 39.

C. Agencies can contract directly for information technology.

D. Agencies must use "modular contracting" as much as possible. Modular contracting is the use of successive acquisitions of interoperable increments.

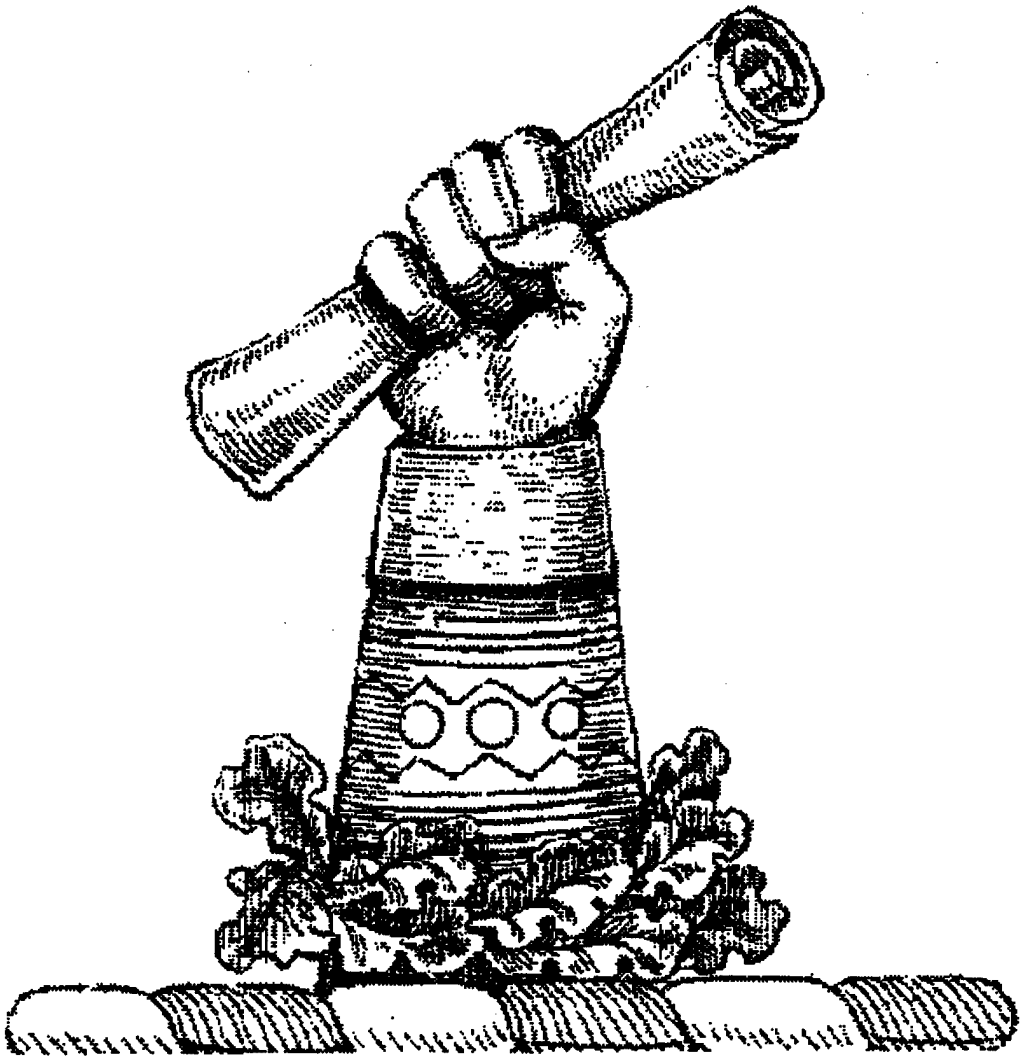
E. Agencies are responsible and accountable for results.

F. "SmallBizMall.gov" – agencies can use to buy information technology from section 8(a) small, disadvantaged businesses.

G. In deciding whether to place an order for brand name software under a FSS contract, government does not have to first consider the unsolicited offer of an alternate software product from a vendor that does not have a FSS contract. Sales Resources Consultants, Inc, B-284943; B-284943.2, June 9, 2000, 00-1 CPD § 102.

XI. CONCLUSION.

Chapter 10
Socioeconomic Policies



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CHAPTER 10

SOCIOECONOMIC POLICIES

I. INTRODUCTION.

A. Goals of the Acquisition Process.

1. Quality Goods and Services.

2. Reasonable Price.

3. Timely Manner.

B. Collateral Policies.

1. Often no direct relationship to goals of the acquisition process.

2. Tension.

3. Debate.

II. POLICY AND PROCEDURE IN SUPPORT OF SMALL BUSINESS.

A. Policy. 15 U.S.C. §§ 631-650; FAR 19.201.

1. Place a fair proportion of acquisitions with small business concerns.

2. Promote maximum subcontracting opportunity for small businesses.

Major KarenWhite, USAF
146th Contract Attorneys Course
April/May 2001

3. Small business defined. FAR 19.001.

a. Independently owned and operated;

b. Not dominant in field; and,

c. Meets applicable size standards.

B. Size Determination Procedures.

1. The Small Business Administration (SBA) establishes small business size standards, which are based either on the number of employees or annual receipts. The SBA matches a size standard with a supply, service or construction classification.

2. The contracting officer adopts an appropriate product or service classification called a Standard Industrial Classification (SIC) code and includes it in the solicitation. FAR 19.102.

a. This classification establishes the applicable size standard for the acquisition.

b. Contractors may appeal the contracting officer's SIC code selection to the SBA. On appeal, the SBA has exclusive authority to determine the proper code for the acquisition.
13 C.F.R. § 121.1102; Expeditions Int'l Travel Agency, B-252510, June 28, 1993, 93-1 CPD ¶ 497.

c. The contracting officer need not delay bid opening or contract award pending a SIC code appeal. See Aleman Food Serv., Inc., B-216803, Mar. 6, 1985, 85-1 CPD ¶ 277. If the SBA finds the original SIC code improper, the contracting officer must amend the solicitation only if he receives the SBA determination before the date offers are due. See FAR 19.303(c)(5).

d. The GAO does not review "classification" protests. Tri-Way Sec. & Escort Serv., Inc., B-238115.2, Apr. 10, 1990, 90-1 CPD ¶ 380; JC Computer Servs., Inc. v. Nuclear Regulatory Comm'n, GSBCA No. 12731-P, 94-2 BCA ¶ 26,712; Cleveland Telecommunications Corporation, B-247964, July 23, 1992, 92-2 CPD ¶ 47.

e. The SBA switched to the North American Industry Classification System (NAICS) on 1 October 2000. 64 Fed. Reg. 57,118 (1999). The NAICS is a six-digit classification system that provides for three-country comparability.

3. Small business certification. FAR 19.301.

a. Self-certification. To be eligible for award as a small business, an offeror must certify that it is a small business at the time of the certification. Ralph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39; United Power Corp., B-239330, May 22, 1990, 90-1 CPD ¶ 494. Contracting officer may accept the self-certification unless contracting officer has information prior to award that reasonably impeaches the certification. Fiber-Lam, Inc., B-237716.2, Apr. 3, 1990, 90-1 CPD ¶ 351.

b. SBA certification. MTB Investments, Inc., B-275696, March 17, 1997, 97-1 CPD ¶ 112; Olympus Corp., B-225875, Apr. 14, 1987, 87-1 CPD ¶ 407.

c. If an acquisition is set-aside for small business, failure to certify status **does not** render the bid nonresponsive. Last Camp Timber, B-238250, May 10, 1990, 90-1 CPD ¶ 461; Concorde Battery Corp., B-235119, June 30, 1989, 89-2 CPD ¶ 17.

d. Neither the FAR nor the SBA regulations require a firm to re-certify size status before an agency exercises an option where the agency awarded the original contract on a set-aside basis. See Vantex Serv. Corp., B-251102, Mar. 10, 1993, 93-1 CPD ¶ 221.

e. If a contractor misrepresents its status as a small business intentionally, the contract is void or voidable. C&D Constr., Inc., ASBCA No. 38661, 90-3 BCA ¶ 23,256; J.E.T.S., Inc., ASBCA No. 28642, 87-1 BCA ¶ 19,569, aff'd, J.E.T.S., Inc. v. United States, 838 F.2d 1196 (Fed. Cir. 1988). Cf. Danac, Inc., ASBCA No. 30227, 92-1 BCA ¶ 24,519. Additionally, such a misrepresentation may be a false statement under 18 U.S.C. § 1001.

4. Size status protests. FAR 19.302.

a. An offeror, a contracting officer, or the SBA may challenge a small business certification. A protest is "timely" if received by the contracting officer within 5 business days after bid opening or after the protester receives notice of the proposed awardee's identity in negotiated actions. A contracting officer's challenge is always timely. 13 C.F.R. § 121.1603. Eagle Design and Mgmt., Inc., B-239833, Sept. 28, 1990, 90-2 CPD ¶ 259; United Power Corp., B-239330, May 22, 1990, 90-1 CPD ¶ 494.

(1) The contracting officer must forward the protest to the SBA Government Contracting Area Office and withhold award absent a finding of urgency. FAR 19.302(h)(1); Aquasis Servs., Inc., B-240841.2, June 24, 1991, 91-1 CPD ¶ 592.

(2) The SBA Government Contracting Area Office must rule within 10 business days or the contracting officer may proceed with award. Systems Research and Application Corp., B-270708, Apr. 15, 1996, 96-1 CPD ¶ 186; International Ordnance, Inc., B-240224, July 17, 1990, 90-2 CPD ¶ 32.

(3) Area Office decisions are appealable to the Office of Hearings and Appeals. If, however, an activity awards to a firm that the Area Office initially finds is "small," the activity need not terminate the contract if the SBA reverses the determination. McCaffery & Whitener, Inc., B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168; Verify, Inc., B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107.

b. In negotiated small business set-asides, the agency must inform each unsuccessful offeror prior to award of the name and location of the apparent successful offeror. Resource Applications, Inc., B-271079, August 12, 1996, 96-2 CPD ¶ 61; Phillips Nat'l, Inc., B-253875, Nov. 1, 1993, 93-2 CPD ¶ 252.

c. Post-award protests generally do not apply to the current contract. FAR 19.302(j). But see Adams Indus. Servs., Inc., B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56 (protester filed protest after award; however, under the circumstances of this procurement, simplified acquisition procedures did not require the agency to issue a pre-award notice to unsuccessful vendors. FAR 13.106 (c). Since the protest was filed within 5 days after the protester received notice of the issuance of a purchase order to the awardee, the protest was considered timely.)

d. The GAO does not review size protests. McCaffery & Whitener, Inc., supra; Correa Enters., Inc.-Recon., B-241912.2, July 9, 1991, 91-2 CPD ¶ 35.

e. Courts will not overrule a SBA determination unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with law or regulation. STELLACOM, Inc, v. United States, 24 Cl. Ct. 213 (1991).

C. Competition Issues: Contract Bundling.

1. Contract bundling is the practice of combining two or more procurement requirements, provided for previously under separate contracts, into a solicitation for a single contract. 15 U.S.C. § 632(o)(2).

2. On 26 July 2000, the SBA issued a final rule addressing contract bundling. 65 Fed. Reg. 45,831 (2000). The rule attempts to reign in bundled contracts that are too large and thus restrict competition for small businesses.

3. Key parts of the new rule on contract bundling.

a. Permits "teaming" among two or more small firms, who may then submit an offer on a bundled contract.

b. Requires the agency to submit to the SBA for review any statement of work containing bundled requirements. If the SBA concludes that the bundled requirements are too large, it may appeal to the agency.

c. When the solicitation requirements are "substantial," the agency must show that the bundling is "necessary and justified" and that it will obtain "measurably substantial benefits."

(1) The interim rule defines "substantial bundling" as a contract consolidation resulting in an award with an annual average value of $10 million or more.

(2) An agency may find a bundled requirement "necessary and justified" if it will derive more benefit from bundling than from not bundling.

(3) The agency must show that the benefits are "measurably substantial," which the rule defines as cost savings, price reduction, quality improvements, and other benefits that will lead to the following:

(a) Benefits equivalent to 10% if the contract value (including options) is $75 million or less; or

(b) Benefits equivalent to 5% or $7.5 million, whichever is greater, if the contract value (including options) is over $75 million.

(c) Reducing only administrative or personnel costs does not justify bundling unless those costs are expected to be substantial in relation to the dollar value of the contract.

4. The interim rule on bundling does not apply to cost comparison studies conducted under OMB Circular A-76.

D. Responsibility Determinations and Certificates of Competency (COCs). Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7101, 108 Stat. 3243, 3367 [hereinafter FASA] (repealing § 804, National Defense Authorization Act, 1993, Pub. L. No. 102-484), 106 Stat. 2315, 2447 (1992); FAR Subpart 19.6.

1. The contracting officer must determine an offeror's responsibility. FAR 9.103(b).

2. If the contracting officer finds a small business nonresponsible, he must forward the matter to the SBA Contracting Area Office immediately. FAR 19.602-1(a)(2).

3. The SBA issues a COC if it finds that the offeror is responsible.

a. The burden is on the offeror to apply for a COC. Thomas & Sons Bldg. Contr., Inc., B-252970.2, June 22, 1993, 93-1 CPD ¶ 482.

b. The contracting officer may appeal a decision to issue a COC to the SBA Central Office. FAR 19.602-3; Department of the Army - Recon., B-270860, July 18, 1996, 96-2 CPD ¶ 23.

4. The contracting officer "shall" award to another offeror if the SBA does not issue a COC within 15 business days of receiving a referral. FAR 19.602-4(c); Mid-America Eng'g and Mfg., B-247146, Apr. 30, 1992, 92-1 CPD ¶ 414. Cf. Saco Defense, Inc., B-240603, Dec. 6, 1990, 90-2 CPD ¶ 462.

5. If the SBA refuses to issue a COC, the contracting officer need not refer the case back to the SBA upon presentation of new evidence by the contractor. Discount Mailers, Inc., B-259117, Mar. 7, 1995, 95-1 CPD ¶ 140.

6. Once issued, a COC is **conclusive** as to all elements of responsibility. GAO review of the COC process is limited to determining whether government officials acted in bad faith or failed to consider vital information. The Gerard Co., B-274051, Nov. 8, 1996, 96-2 CPD ¶ 177; UAV Sys., Inc., B-255281, Feb. 17, 1994, 94-1 CPD ¶ 121; J&J Maint., Inc., B-251355.2, May 7, 1993, 93-1 CPD ¶ 373; Accord Accurate Info. Sys., Inc. v. Dep't of the Treasury, GSBCA No. 12978-P, Sept. 30, 1994, 1994 BPD ¶ 203, mot. for recon. denied, 1994 BPD ¶ 236. But see Pittman Mech. Contractors, Inc.-Recon., B-242242.2, May 31, 1991, 91-1 CPD ¶ 525;

7. The COC procedure does not apply when an agency eliminates a small business from a procurement due to a material misrepresentation by the small business. RMTC Sys., Inc. v. Dep't of the Air Force, GSBCA No. 12346-P-R, 1993 CPD ¶ 169.

8. The COC procedure does not apply when an agency declines to exercise an option due to responsibility-type concerns. E. Huttenbauer & Son, Inc., B-258018.3, Mar. 20, 1995, 95-1 CPD ¶ 148.

9. The COC procedure generally does not apply when the contracting officer rejects a technically unacceptable offer. See Paragon Dynamics, Inc., B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248; Pais Janitorial Serv. & Supplies, Inc., B-244157, June 18, 1991, 91-1 CPD ¶ 581.

10. The COC procedure applies to service contracts when an agency determines that a small business contractor fails to meet criteria in a pre-qualification program which relate to the contractor's capability to perform the contract. Stevens Tech. Serv., Inc., B-250515.2, May 17, 1993, 93-1 CPD ¶ 385.

E. Regular Small Business Set-Asides. FAR Subpart 19.5.

1. The decision to set aside a procurement is within the "discretion" of the agency. FAR 19.501; Espey Mfg. & Elecs. Corp., B-254738.3, Mar. 8, 1994, 94-1 CPD ¶ 180; State Mgmt. Serv., Inc., B-251715, May 3, 1993, 93-1 CPD ¶ 355; Information Ventures, B-27994, Aug. 7, 1998, 98-2 CPD ¶ 37; but see Safety Storage, Inc., B2510851, Oct.29, 1998, 98-2 BCA ¶ 102.

2. The agency must exercise its discretion reasonably and in accordance with statutory and regulatory requirements. DCT Inc., B-252479, July 1, 1993, 93-2 CPD ¶ 1; Neal R. Gross & Co., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53.

3. DFARS 219.201(d) requires small business specialist review of all acquisitions over $10,000, including those restricted for exclusive small business participation.

4. Types of set-asides.

a. Total Set-Asides.

(1) Acquisitions over $100,000. FAR 19.502-2(b). The contracting officer shall set-aside any acquisition over $100,000 for small business participation when:

(a) The contracting officer reasonably expects to receive offers from two or more responsible small businesses, and,

(b) Award will be made at a fair market price.

(2) Acquisitions between $2,500 and $100,000. FAR 19.502-2(a):

(a) Each acquisition that has an anticipated dollar value exceeding $2,500, but not over $100,000, is automatically reserved for small business concerns.

(b) Exceptions. There is no requirement to set aside if there is no reasonable expectation of receiving offers from two or more responsible small businesses that will be competitive in terms of price, quality, and delivery schedule.

b. Partial. FAR 19.502-3; Aalco Forwarding, Inc., et. al., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75. The contracting officer must set aside a portion of an acquisition, except for construction, for exclusive small business participation when:

(1) A total set-aside is not appropriate;

(2) The requirement is severable into two or more economic production runs or reasonable lots;

(3) One or more small business concerns are expected to have the technical competence and capacity to satisfy the requirement at a fair market price; and

(4) The acquisition is not subject to simplified acquisition procedures.

5. Contractor Limitations. If the agency sets aside an acquisition, certain subcontracting and domestic end item limitations apply. FAR 52.219-14; Innovative Refrigeration Concepts, B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61; Adrian Supply Co., B-257261, Sept. 15, 1994, 95-1 CPD ¶ 21; Kaysam Worldwide, Inc., B-247743, June 8, 1992, 92-1 CPD ¶ 500; Vanderbilt Shirt Co., B-237632, Feb. 16, 1990, 90-1 CPD ¶ 290.

a. Services. The contractor must spend at least 50% of contract costs on its own employees.

b. Supplies.

(1) A small business manufacturer must perform at least 50% of the cost of manufacturing.

(2) A small business nonmanufacturer (i.e., a dealer) must provide a small business product unless the SBA determines that no small business in the federal market produces the item. See Fluid Power Int'l, Inc., B-278479, Dec. 10, 1997, 97-2 CPD ¶ 162.

(3) Both manufacturers and nonmanufacturers must provide domestically produced or manufactured items.

c. Construction. The contractor's employees must perform at least 15% of the cost of the contract. If special trade contractors perform construction, the threshold is 25%.

6. Rejecting SBA set-aside recommendations and withdrawal of set-asides. FAR 19.505, 19.506.

a. The contracting officer may reject a SBA recommendation or withdraw a set-aside before award. Aerostructures, Inc., B-280284, September 15, 1998, 98-2 CPD ¶ 71.

b. The FAR sets forth notice and appeal procedures for resolving disagreements between the agency and the SBA. If the contracting agency and the SBA disagree, the contracting agency has the final word on set-aside or withdrawal decisions.

c. Potential offerors also may challenge the contracting officer's decision to issue unrestricted solicitations or withdraw set-asides. American Imaging Servs., B-238969, July 19, 1990, 90-2 CPD ¶ 51.

d. If the activity receives **no** small business offers, the contracting officer may not award to a large business but must withdraw the solicitation and resolicit on an unrestricted basis. Western Filter Corp., B-247212, May 11, 1992, 92-1 CPD ¶ 436; CompuMed, B-242118, Jan. 8, 1991, 91-1 CPD ¶ 19; Ideal Serv., Inc., B-238927.2, Oct. 26, 1990, 90-2 CPD ¶ 335.

7. An agency is not required to set aside the reprocurement of a defaulted contract. Premier Petro-Chemical, Inc., B-244324, Aug. 27, 1991, 91-2 CPD ¶ 205.

8. Small Business Competitiveness Demonstration Program (SBCDP). FAR Subpt. 19.10. The SBCDP is designed to test the ability of small businesses to compete successfully in certain industry categories. Generally, set-asides are not required for acquisitions subject to this program.

III. PROGRAMS FOR SMALL DISADVANTAGED BUSINESSES.

A. Contracting with the SBA's "8(a)" Business Development Program. 15 U.S.C. § 637(a); 13 C.F.R. Part 124; FAR Subpart 19.8.

1. The primary program in the federal government designed to assist small disadvantaged businesses is commonly referred to as the 8(a) program. The program derives its name from Section 8(a) of the Small Business Act. Section 8(a) authorizes the SBA to enter into contracts with other federal agencies. The SBA then subcontracts with eligible small disadvantaged businesses. 15 U.S.C. § 637(a). By Memorandum of Understanding, dated 6 May 1998, between DOD and the SBA, the SBA delegated its authority to DOD to enter into 8(a) prime contracts with 8(a) contractors. 63 Fed. Reg. 33,587 (1998). See FAR 19.8

a. Either the SBA or the contracting activity may initiate selection of a requirement or a specific contractor for an 8(a) acquisition. FAR 19.803

b. Businesses must meet the criteria set forth in 13 C.F.R. §§ 124.102 - 124.109 to be eligible under the 8(a) program. Autek Sys. Corp., 835 F. Supp. 13 (D.D.C. 1993), aff'd, 43 F.3d 712 (D.C. Cir. 1994).

(1) The firm must be owned and controlled by socially and economically disadvantaged persons. The regulations require 51% ownership and control by one or more individuals who are **both** socially and economically disadvantaged. See Software Sys. Assoc. v. Saiki, No. 92-1776 (D.D.C. June 24, 1993); SRS Technologies v. United States, No. 95-0801 (D.D.C. July 18, 1995).

(a) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. 13 C.F.R. § 124.103(a).

(i) There is a rebuttable presumption that members of certain designated groups are socially disadvantaged. 13 C.F.R. § 124.103(b)(1).

(ii) Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by a "preponderance of the evidence." 13 C.F.R § 124.103(c)(1). Previously, individuals not members of designated groups needed to prove social disadvantage by "clear and convincing evidence."

(b) Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished credit capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. 13 C.F.R. § 124.104(a).

(i) In considering diminished capital and credit opportunities, the SBA will consider such factors as:

(a) Personal income for the last two years;

(b) Personal net worth and the fair market value of all assets; and

(c) Financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification.

(ii) Net Worth. 13 C.F.R. § 124.104(c). For initial 8(a) eligibility, the net worth of an individual claiming disadvantage must be less than $250,000. For continued 8(a) eligibility, net worth must be less than $750,000.

(2) The firm must have been in business for two full years in the industry for which it seeks certification.

(3) The firm must possess the potential for success. 15 U.S.C. § 637(a)(7). The SBA is responsible for determining which firms are eligible for the 8(a) program. The SBA has reasonable discretion to deny participation in the 8(a) program to clearly unqualified firms as long as applications receive careful and thorough review. See Neuma Corp. v. Abdnor, 713 F. Supp. 1 (D.D.C. 1989).

c. The firm must have an approved business plan. 15 U.S.C. § 636(j)(10)(1).

d. Generally, the SBA will not accept an 8(a) reservation if:

(1) An activity already has issued a solicitation as a small business or SDB set-aside;

(2) An activity has indicated publicly an intent to issue a solicitation as a small business or SDB set-aside; or

(3) The SBA determines that inclusion of a requirement in the 8(a) program will affect a small business or SDB adversely. 13 C.F.R. § 124.309. See John Blood, B-280318-19, Aug. 31, 1998, 98-2 CPD ¶ 58; McNeil Technologies, Inc., B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40; American Mutual Protective Bureau, B-243329.2, June 16, 1994, 94-1 CPD ¶ 371; State Janitorial Servs., B-240646, Dec. 6, 1990, 90-2 CPD ¶ 463; FAR 19.804-2(a)(9); DFARS 219.804-1;

2. Procedures.

a. If the activity decides that an 8(a) contract is feasible, it offers SBA an opportunity to participate.

b. If the SBA accepts, the agency or the SBA chooses a contractor, or eligible firms compete for award. See Defense Logistics Agency and Small Bus. Admin. Contract No. DLA100-78-C-5201, B-225175, Feb. 4, 1987, 87-1 CPD ¶ 115.

c. Activities must compete acquisitions if:

(1) The activity expects offers from two eligible, responsible 8(a) firms at a fair market price, see Horioka Enters., B-259483, Dec. 20, 1994, 94-2 CPD ¶ 255; and

(2) The value of the contract is expected to exceed $5 million for actions assigned manufacturing SIC codes or $3 million for all other codes. See 13 C.F.R. § 124.311(a). The threshold applies to the agency's estimate of the total value of the contract, including all options. Id.

d. The COC procedures do not apply to sole source 8(a) acquisitions. DAE Corp. v. SBA, 958 F.2d 436 (1992); Action Serv. Corp. v. Garrett, 797 F. Supp. 82 (D.P.R. 1992); Universal Automation Leasing Corp., GSBCA No. 11268-P, 91-3 BCA ¶ 24,255; Joa Quin Mfg. Corp., B-255298, Feb. 23, 1994, 94-1 CPD ¶ 140; Aviation Sys. & Mfg., Inc., B-250625.3, Feb. 18, 1993, 93-1 CPD ¶ 155; Alamo Contracting Enters., B-249265.2, Nov. 20, 1992, 92-2 CPD ¶ 358.

e. Subcontracting limitations apply to competitive 8(a) acquisitions. See FAR 52.219-14; Data Equip., Inc. v. Dep't of the Air Force, GSBCA No. 12506-P, 94-1 BCA ¶ 26,446; see also Tonya, Inc. v. United States, 28 Fed. Cl. 727 (1993); Jasper Painting Serv., Inc., B-251092, Mar. 4, 1993, 93-1 CPD ¶ 204.

f. Partnership between General Services Administration (GSA) and SBA.[1]

(1) SBA agreed to accept all 8(a) firms in GSA's Multiple Award Schedule Program.

(2) Agencies that buy from a Federal Supply Schedule 8(a) contractor may count the purchase toward the agency's small business goals.

[1] Press release highlighting agreement available at http://ftp.sbaonline.sba.gov/news/current00/00-58.pdf.

g. Graduation from 8(a) program. Firms graduate from the 8(a) program when they successfully achieve the targets, objectives, and goals set forth in their business plan prior to expiration of the program term. 13 C.F.R. § 124.208. See Gutierrez-Palmenberg, Inc., B-255797.3, Aug. 11, 1994, 94-2 CPD ¶ 158.

(1) The program is divided into two stages: a "developmental" stage and a "transitional" stage. 13 C.F.R. § 124.303.

(2) For firms approved for 8(a) participation after 15 November 1998, the developmental stage is four years and the transitional stage is five years.

(3) 8(a) time period upheld. Minority Bus. Legal Defense & Educ. Funds, Inc. v. Small Bus. Admin., 557 F. Supp. 37 (D.D.C. 1982). No abuse of discretion by refusing to keep a contractor in 8(a) program beyond nine years. Woerner v. United States, 934 F.2d 1277 (App. D.C. 1991).

h. The GAO will not consider challenges to an award of an 8(a) contract by contractors that are not eligible for the program or particular acquisition. CW Constr. Servs. & Materials, Inc., B-279724, July 15, 1998, 98-2 CPD ¶ 20 (SBA reasonably determined that protestor was ineligible for award of 8(a) construction contract because it failed to provide sufficient information to show that it established and maintained an office within geographical area specified in solicitation as required by SBA regulations); AVW Elec. Sys., Inc., B-252399, May 17, 1993, 93-1 CPD ¶ 386. Likewise, the GAO will not consider challenges to a SBA decision that an 8(a) contractor is not competent to perform a contract. L. Washington & Assocs., B-255162, Oct. 19, 1993, 93-2 CPD ¶ 254.

3. Mentor/Protégé Program. 13 C.F.R. § 124.520.

a. The Mentor/Protégé Program is designed to encourage approved mentors to provide various forms of assistance to eligible 8(a) contractors. The purpose of mentor/protégé relationship is to enhance the capabilities of the protégé and to improve its ability to successfully compete for contracts. This assistance may include:

(1) Technical and/or management assistance;

(2) Financial assistance in the form of equity investments and/or loans;

(3) Subcontracts; and

(4) Joint ventures arrangements.

b. Mentors. Any concern that demonstrates a commitment and the ability to assist an 8(a) contractor may act as a mentor.

c. A mentor benefits from the relationship in that it may:

(1) Joint venture as a small business for any government procurement;

(2) Own an equity interest in the protégé firm up to 40%; and

(3) Qualify for other assistance by the SBA.

B. Challenge to the 8(a) program

1. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). In a five to four holding, the Supreme Court declared that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a "strict scrutiny" standard. Thus, only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster.

2. Post Adarand Reactions and Initiatives.

3. Post-Adarand Cases. Cache Valley Elec. Co. v. State of Utah, 149 F.3d 1119 (10th Cir. 1998); Cortez III Serv. Corp. v. National Aeronautics & Space Admin., 950 F. Supp. 357 (D.D.C. 1996); Ellsworth Assocs v. United States, 937 F. Supp. 1 (D.D.C. 1996); SRS Technologies v. Department of Defense, 917 F. Supp. 841 (D.D.C. 1996); Dynalantic Corp. v. Department of Defense, 894 F. Supp. 995 (D.D.C. 1995); C.S. McCrossan Constr. Co., Inc. v. Cook, 1996 U.S. Dist. LEXIS 14721 40 Cont. Cas. Fed. ¶ 76,917 (D.N.M. 1996).

4. Adarand on Remand. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997). But see Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999); Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722 (2000). Adarnad Constructors, Inc., v. Slater, et al., No. 97-1304, 2000 U.S. App. LEXIS 23725 (10th Cir. Sept. 25, 2000).

C. Small Disadvantaged Business (SDBs) Procurements. FAR Part 19.

1. Introduction.

a. On 24 June 1998, the Clinton Administration unveiled its long-awaited rules revamping its approach to helping small disadvantaged businesses win federal contracts. The rules were published in the 30 June 1998 Federal Register.

b. The new rules permit eligible SDBs to receive price evaluation adjustments in Federal procurement programs.

c. The Department of Commerce will determine the price adjustments available for use in Federal procurement programs. The Department of Commerce specified the price adjustments by Standard Industrial Classification major groups and regions. 63 Fed. Reg. 35,714 (June 30, 1998); FAR 19.201(b).

d. Under the new regulations, the Department of Commerce is responsible for the following:

(1) Developing the methodology for calculating the benchmark limitations;

(2) Developing the methodology for calculating the size of the price evaluation adjustment that should be employed in a given industry; and

(3) Determining applicable adjustments.

2. Benchmarking. 63 Fed. Reg. 35, 767 (June 30, 1998).

a. Only SDBs in industries that show the ongoing effects of discrimination will be able to receive up to a 10% price evaluation adjustment in bidding for government contracts at the prime contract level.

b. The Department of Commerce identified the following industries (or segments of the industries) that would be eligible for price evaluation adjustments: agriculture, forestry, fishing, mining, construction, manufacturing, transportation, communications, wholesale and retail trade, finance, insurance, and real estate among others. 63 Fed Reg. 35,714 (June 30, 1998).

c. The Department of Commerce is not limited to the price evaluation adjustment for SDB concerns where it has found substantial and persuasive evidence of

(1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and

(2) A demonstrated incapacity to alleviate the problem by using those mechanisms. FAR 19.201.

d. If an agency makes an affirmative determination that the SDB mechanism has an undue burden or is otherwise inappropriate, the determination shall be forwarded through agency channels to the OFPP, which shall review the determination with the Department of Commerce and the SBA. After consultation with OFPP (or if the agency does not receive a response within 90 days) the agency may limit the use of the SDB mechanism until the Department of Commerce determines the updated price evaluation adjustment.

3. To be eligible to receive a benefit as a prime contractor based on disadvantaged status, a concern, at the time of its offer must either be certified as a SDB or have a completed SDB application at the SBA or a Private Certifier. FAR 19.304.

4. Protesting a representation of disadvantaged business status. FAR 19.305.

5. DOD's Approach.

a. On 24 February 1999, the Director of Defense Procurement has directed that DOD contracting activities suspend the use of price evaluation adjustments for small disadvantaged businesses for a period of one year. 64 Fed. Reg. 4847 (1999).

b. This suspension was required by 10 U.S.C. § 2323(e)(2), as amended by section 801 of the Strom Thurmond Defense Authorization Act of 1999. Section 801 provided that the price evaluation adjustment would only apply when DOD fails to achieve its goal of awarding five % of its total contract dollars to small disadvantaged businesses in the previous fiscal year. DOD exceeded the five % goal for Fiscal Year 1999. See http://web1.deskbook.osd.mil/reflib/MDOD/067DV/067DVDOC.HTM (memorandum directing suspension for all DoD activities from 24 Feb 2000 - 23 Feb 2001).

D. Assisting Women-Owned Enterprises. 15 U.S.C. § 644(g).

1. Recent amendments under FASA to the Small Business Act established a Government-wide goal for participation by women-owned and controlled small business concerns. The goal is not less than 5 % of the total value of all prime and subcontracts awards each fiscal year.[2]

2. A small business is owned and controlled by women if 51% or more of the business is owned by one or more women, and the management and daily business operation of the concern are controlled by one or more women. 15 U.S.C. § 637(d)(3)(D).

E. HUBZone. HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592).

1. The purpose of the HUBZone program is to provide federal contracting assistance for qualified small business concerns located in historically underutilized business zones in an effort to increase employment opportunities. 13 C.F.R. § 126.100.

[2] On 23 May 2000, President Clinton signed Executive Order 13, 157, 65 Fed. Reg. 34,035 (2000), highlighting his commitment to expanding opportunities for Women Owned Small Businesses. The EO sets out several steps Executive Agencies should take to increase contracting opportunities.

2. ~~Until 30 September 2000, the HUBZone program applies only to~~ procurements by the following agencies and departments: Agriculture, Defense, Energy, Health and Human Services, Housing and Urban Development, Transportation, Veterans Affairs, EPA, GSA, and NASA. After 30 September 2000, the program will apply to all federal departments and agencies that employ contracting officers. 13 C.F.R. § 126.101.

3. Requirements to be a Qualified HUBZone Small Business Concern (SBC). 13 C.F.R. § 126.103.

   a. The concern must be a HUBZone SBC as defined by 13 C.F.R. § 126.103; and

   b. At least 35 % of the SBC's employees must reside in the HUBZone and the concern must certify that it will attempt to maintain this %age during the performance of any HUBZone contract.

4. An owner of a HUBZone SBC is a person who owns any legal or equitable interest in the concern. More specifically, SBCs included: corporations, partnerships, sole proprietorships and limited liability companies. 13 C.F.R. § 126.201.

5. Size standards. 13 C.F.R. § 126.203. At time of application for certification, a HUBZone SBC must meet SBA's size standards for its primary industry classification.

6. Certification. 13 C.F.R. § 126.300. A SBC must apply to the SBA for certification.

7. Methods of Acquisition. 13 C.F.R. § 126.600. HUBZones contracts can be awarded through any of the following procurement methods:

   a. Sole source awards;

b. Set-aside awards based on competition restricted to qualified HUBZone SBCs; or

c. Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs.

8. Simplified Acquisition Procedures. 13 C.F.R. § 126.608. If the requirement is below the simplified acquisition threshold, the contracting officer should set-aside the requirement for consideration among qualified HUBZone SBCs using simplified acquisition procedures.

9. A concern that is both a qualified HUBZone SBC and a SDB must receive the benefit of both the HUBZone price evaluation preference and the SDB price evaluation preference described in 10 U.S.C. § 2323, in full and open competition.

10. Subcontracting Limitations. 13 C.F.R. § 126.700. A qualified HUBZone SBC prime contractor can subcontract part of its HUBZone contract provided:

a. Service Contract (except Construction) – the SBC must spend at least 50 % of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs;

b. General Construction – the SBC must spend at least 15 % of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs;

c. Special Trade Construction – the SBC must spend at least 25 % of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs; and

d. Supplies – the SBC must spend at least 50 % of the cost of the contract performance incurred for personnel on the concern's employees or on the employees of other qualified HUBZone SBCs.

11. Protest Procedures. 13 C.F.R. § 126.801.

IV. THE BUY AMERICAN ACT (BAA).

A. Origin and Purpose. 41 U.S.C. §§ 10a-10d (1995); Executive Order 10582 (1954), as amended, Executive Order 11051 (1962). The Act was passed during the Depression of the 1930s and was designed to save and create jobs for American workers.

B. Preference for Domestic Products/Services.

1. As a general rule, under the BAA, agencies may acquire only domestic end items. Unless another law or regulation prohibits the purchase of foreign end items, however, the contracting officer may not reject as nonresponsive an offer of such items.

2. The prohibition against the purchase of foreign goods does not apply if: the product is not available in sufficient commercial quantities; domestic preference would be inconsistent with the public interest; the product is for use outside the United States; the cost of the domestic product would be unreasonable; or the product is for commissary resale. The Trade Agreements Act and the North American Free Trade Agreement may also provide exceptions to the Buy American Act.

C. Definitions and Applicability. FAR 25.101.

1. Manufactured domestic end products are those articles, materials, and supplies acquired for public use under the contract that are:

a. Manufactured in the United States. Valentec Wells, Inc., ASBCA No. 41659, 91-3 BCA ¶ 24,168; General Kinetics, Inc, Cryptek Div., 242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445 ("manufacture" means completion of the article in the form required for use by the government); A. Hirsh, Inc., B-237466, Feb. 28, 1990, 69 Comp. Gen. 307, 90-1 CPD ¶ 247 (manufacturing occurs when material undergoes a substantial change); Ballantine Labs., Inc., ASBCA No. 35138, 88-2 BCA ¶ 20,660; and

b. Comprised of "substantially all" domestic components (over 50% test by cost). For DOD, the components may be domestic or qualifying country components. See DFARS 252.225-7001.

2. An unmanufactured domestic end product must be mined or produced in the United States. Geography determines the origin of an unmanufactured end product. 41 U.S.C. § 10a and §10b.

3. The nationality of the company that manufactures an end item is irrelevant. Military Optic, Inc., B-245010.3, Jan. 16, 1992, 92-1 CPD ¶ 78.

4. Components are materials and supplies incorporated directly into the end product. Orlite Eng'g Co., B-229615, Mar. 23, 1988, 88-1 CPD ¶ 300; Yohar Supply Co., B-225480, Feb. 11, 1987, 66 Comp. Gen. 251, 87-1 CPD ¶ 152.

a. Parts are not components, and their origin is not considered in this evaluation. Hamilton Watch Co., B-179939, June 6, 1974, 74-1 CPD ¶ 306.

b. A component is either entirely foreign or entirely domestic. A component is domestic only if it is manufactured in the United States. Computer Hut Int'l, Inc., B-249421, Nov. 23, 1992, 92-2 CPD ¶ 364.

c. A foreign-made component may become domestic if it undergoes substantial remanufacturing in the United States. General Kinetics, Inc, Cryptek Div., B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445.

d. Material that undergoes manufacturing is not a "component" if the material is so transformed that it loses its original identity. See Orlite Eng'g and Yohar Supply Co., supra.

e. The cost of components includes transportation costs to the place of incorporation into the end product, and any applicable duty. FAR 25.101; DFARS 252.225-7001(a)(5)(ii). Component costs do **NOT** include:

(1) Packaging costs, S.F. Durst & Co., B-160627, 46 Comp. Gen. 784 (1967);

(2) The cost of testing after manufacture, Patterson Pump Co., B-200165, Dec. 31, 1980, 80-2 CPD ¶ 453; Bell Helicopter Textron, B-195268, 59 Comp. Gen. 158 (1979); or

(3) The cost of combining components into an end product, To the Secretary of the Interior, B-123891, 35 Comp. Gen. 7 (1955).

5. Qualifying country end products/components. See DFARS 225.872.

a. DOD does not apply the restrictions of the BAA when acquiring equipment or supplies that are mined, produced, or manufactured in "qualifying countries." Qualifying countries are countries with which we have reciprocal defense agreements. They are enumerated in DFARS 225.872-1(a).

b. A manufactured, qualifying country end product must contain over 50 % (by cost) components mined, produced, or manufactured in the qualifying country or the United States. DFARS 252.225-7001(a)(7).

c. Qualifying country items thus receive a "double benefit" under the BAA. First, qualifying country components may be incorporated into a product manufactured in the United States to become a domestic end product. Second, products manufactured by a qualifying country are exempt from the BAA.

D. Certification Requirement.

1. A contractor certifies by its offer that each end product is domestic and/or indicates which end products are foreign. FAR 52.225-1; DFARS 252.225-7006.

2. The contracting officer may rely on the offeror's certification that its product is domestic, unless, prior to award, the contracting officer has reason to question the certification. New York Elevator Co., B-250992, Mar. 3, 1993, 93-1 CPD ¶ 196 (construction materials); Barcode Indus., B-240173. Oct. 16, 1990, 90-2 CPD ¶ 299; American Instr. Corp., B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287.

E. Exceptions to the Buy American Act. As a general rule, the Buy American Act does not apply in the following situations:

1. The required products are not available in sufficient commercial quantities. FAR 25.102(a)(4); FAR 25.108; Midwest Dynamometer & Eng'g Co., B-252168, May 24, 1993, 93-1 CPD ¶ 408.

2. The agency head (or designee) determines that domestic preference is inconsistent with the public interest. FAR 25.102. DOD has determined that it is inconsistent with the public interest to apply the BAA to qualifying countries. Technical Sys. Inc., B-225143, Mar. 3, 1987, 66 Comp. Gen. 297, 87-1 CPD ¶ 240.

3. The Trade Agreements Act (TAA) authorizes the purchase. 19 U.S.C. §§ 2501-82; FAR 25.400; Olympic Container Corp., B-250403, Jan. 29, 1993, 93-1 CPD ¶ 89; Becton Dickinson AcuteCare, B-238942, July 20, 1990, 90-2 CPD ¶ 55; IBM Corp., GSBCA No. 10532-P, 90-2 BCA ¶ 22,824.

a. If the TAA applies to the purchase, only domestic products, products from **designated** foreign countries, qualifying country products, and products which, though comprised of over 50% foreign components, are "substantially transformed" in the United States or a designated country, are eligible for award. See Compuadd Corp. v. Dep't of the Air Force, GSBCA No. 12021-P, 93-2 BCA ¶ 25,811 ("manufacturing" standard of the BAA is less stringent than "substantial transformation" required under TAA); Hung Myung (USA) Ltd., B-244686, Nov. 7, 1991, 71 Comp. Gen. 64, 91-2 CPD ¶ 434; TLT-Babcock, Inc., B-244423, Sept. 13, 1991, 91-2 CPD ¶ 242.

b. The TAA applies only if the estimated cost of an acquisition equals or exceeds a threshold (currently $190,000 for supplies) set by the U.S. Trade Representative.

c. The TAA does **not** apply to DOD unless the DFARS lists the product, even if the threshold is met. See DFARS 225.403-70. If the TAA does not apply, the acquisition is subject to the BAA. See, e.g., Hung Myung (USA) Ltd., B-244686, Nov. 7, 1991, 91-2 CPD ¶ 434; General Kinetics, Inc, Cryptek Div., 242052.2, May 7, 1991, 7, 91-1 CPD ¶ 445.

d. Because of the component test, the definition of "domestic end product" under the BAA is more restrictive than the definition of "U.S. made end product" under the TAA. Thus, for DOD, if an offeror submits a U.S. made end product, the BAA evaluation factor still may apply. See DFARS 225.105(5); DFARS tbl. 25-1.

4. The North American Free Trade Agreement (NAFTA) Implementation Act authorizes the purchase. Pub. L. No. 103-182, 107 Stat. 2057 (1993); FAR 25.402. Note, however, that NAFTA does not apply to DOD procurements unless the DFARS lists the product. See DFARS 225.403-70.

5. The Caribbean Basin Economic Recovery Act authorizes the purchase. 19 U.S.C. §§ 2701-05; FAR 25.401.

6. The product is for use outside the United States. FAR 25.102(a)(1). Note: under the Balance of Payments Program, an agency must buy domestic even if the end item is to be used overseas. A number of exceptions allow purchase of foreign products under this program. If both domestic and foreign products are offered, and if the low domestic price exceeds the low foreign price by more than 50%, the contracting officer must buy the foreign item. FAR Subpart 25.3; DFARS Subpart 225.3.

7. The cost of the domestic product is unreasonable. FAR 25.102(a)(2); FAR 25.105; DFARS 225.102. Although cost reasonableness normally is a preaward determination, an agency may also make this determination after award. John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989).

   a. Civilian agencies.

      (1) If an offer of a non-domestic product is low and a large business offers the lowest-priced, domestic product, increase the non-domestic product by 6%.

      (2) If an offer of a non-domestic product is low and a small business offers the lowest-priced, domestic product, increase the non-domestic product by 12%.

   b. DOD agencies increase offers of non-domestic, non-qualifying country products by 50%, regardless of the size of the business that offers the lowest-priced, domestic end product. Under the DFARS, if application of the differential does not result in award on a domestic product, disregard the differential and evaluate offers at face value. DFARS 225.105(2).

   c. Do not apply the evaluation factor to post-delivery services such as installation, testing, and training. Dynatest Consulting, Inc., B-257822.4, Mar. 1, 1995, 95-1 CPD ¶ 167.

d. In a negotiated procurement, agencies may award to a firm offering a technically superior but higher priced non-domestic, non-qualifying country product. STD Research Corp., B-252073.2, May 24, 1993, 93-1 CPD ¶ 406.

F. Construction Materials. 41 U.S.C. § 10b; FAR Subpart 25.2.

1. This portion of the BAA applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

2. The Act requires construction contractors to use only domestic materials in the United States.

3. Exceptions. This restriction does not apply if:

a. The cost would be unreasonable, as determined by the head of agency;

b. The agency head (or delegee) determines that use of a particular domestic construction material would be impracticable; or,

c. The material is not available in sufficient commercial quantities. See FAR 25.108.

4. Application of the restriction. The restriction applies to the material in the form that the contractor brings it to the construction site. FAR 25.201. See S.J. Amoroso Constr. Co. v. United States, 26 Cl. Ct. 759 (1992), aff'd, 12 F.3d 1072 (Fed. Cir. 1993); Mauldin-Dorfmeier Constr., Inc., ASBCA No. 43633, 93-2 BCA ¶ 25,790 (board distinguishes "components" from "construction materials"); Mid-American Elevator Co., B-237282, Jan. 29, 1990, 90-1 CPD ¶ 125.

5. Post-Award exceptions.

a. Contractors must formally request waiver of the BAA. C. Sanchez & Son v. United States, 6 F.3d 1539 (Fed. Cir. 1993) (contractor failed to formally request waiver of BAA; claim for equitable adjustment for supplying domestic wire denied).

b. Failure to grant a request for waiver may be an abuse of discretion. John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989) (contracting officer abused discretion by denying post-award request for waiver of BAA, where price of domestic materials exceeded price of foreign materials plus differential).

6. The DOD qualifying country source provisions do not apply to construction materials. DFARS 225.872-2(b).

G. Remedies for Buy American Act Violations.

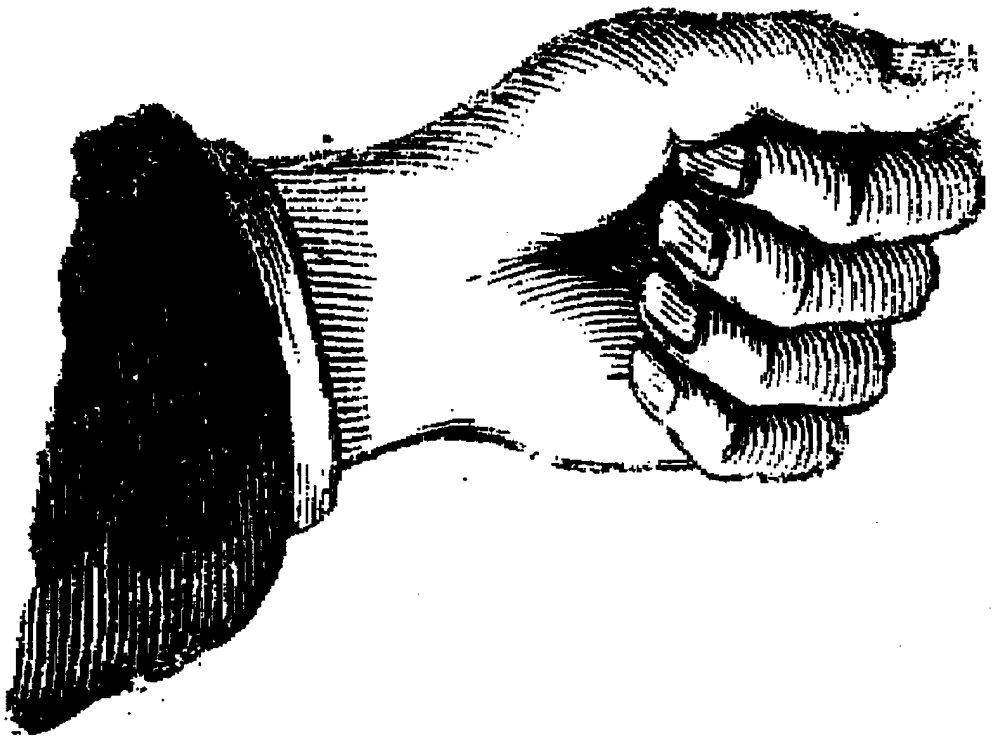
1. If the agency head finds a violation of the Buy American Act—Construction Materials, the findings and the name of the contractor are made public. The contractor will be debarred for three years. FAR 25.204.

2. Termination for default is proper if the contractor's product does not contain over 50% (by cost) domestic or qualifying country components. H&R Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.

3. A contractor is not entitled to an equitable adjustment for providing domestic end items if required by the BAA. Valentec Wells, Inc., ASBCA No. 41659, 91-3 BCA ¶ 24,168; LaCoste Builders, Inc., ASBCA No. 29884, 88-1 BCA ¶ 20,360; C. Sanchez & Son v. United States, supra.

V. CONCLUSION.

Chapter 11
Contract Pricing



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CHAPTER 11

CONTRACT PRICING

I. INTRODUCTION.

A. Objectives. Following this block of instruction, the student should:

1. Understand the different types of contractor pricing information available for determining price reasonableness, and when to require their submission.

2. Understand the purpose of the Truth in Negotiations Act.

3. Understand what defective pricing is, and the remedies available to the government.

B. References.

1. Federal Acquisition Regulation 15.4, Contract Pricing.

2. DoD Contract Pricing Reference Guide home page: http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html.

3. The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a and 41 U.S.C. § 254b.

4. The Truth in Negotiations Act (TINA) Handbook, Inspector General Department of Defense, April 1, 1993.

5. DCAA Contract Audit Manual (CAM) DCAAM 7640.1, Chapter 14. Available at: http://www.dcaa.mil/.

6. William Rudland, Defective Pricing (Update No. 4, 1995).

MAJ Kevin M. Walker
146th Contract Attorneys Course
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II. INFORMATION REQUIRED TO DETERMINE PRICE REASONABLENESS.

A. Requirement. Contracting officers are required to determine price reasonableness before making contract awards. FAR 15. 404-1(a); 14.408-2.

B. Definitions. FAR 15.401.

1. "Cost or pricing data" means all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are data requiring certification in accordance with 15.406-2. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. See also DCAAM § 14.104-4.

2. "Information other than cost or pricing data" refers to information that the contractor (or subcontractor) is not required to certify, but the government needs to determine price reasonableness and/or cost realism (e.g., pricing, sales, or cost information). For commercial items, such data would include price, sales data, and terms & conditions of sales.

3. The term "cost realism" means that the costs in an offeror's proposal are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the various elements of the offeror's technical proposal.

C. FAR Pricing Policy.

1. FAR 15.402(a) provides that contracting officers shall not obtain more information than is necessary to establish the reasonableness of offered prices. The contracting officer should rely on information obtained from within the Government first, information obtained from sources other than the offeror second, and information obtained from the offeror last. If the contracting officer obtains information from the offeror, the contracting officer should obtain information on the prices at which the offeror previously sold the same or similar items. FAR 15.402(a)(2)(i).

2. The contracting officer should use every means available to determine whether a fair and reasonable price can be determined before requesting cost or pricing data. In fact, the FAR admonishes the contracting officer to avoid unnecessary requirements for cost or pricing data because it increases proposal preparation costs, extends acquisition lead-time, and wastes both contractor and Government resources. FAR 15.402(a)(3).

D. Order of Preference. FAR 15.402 To the extent cost or pricing data are not required by FAR 15.403-4, the contracting officer shall generally use the following order of preference to determine the type of information necessary to determine price reasonableness:

1. No additional information except in unusual circumstances, if the agreed upon price is based on adequate price competition. The additional information shall to the maximum extent practicable be obtained from sources other than the offeror.

2. Information other than cost or pricing data (e.g., established catalog or market prices).

3. Cost or pricing data.

III. OTHER THAN COST OR PRICING DATA.

A. General Requirements. 10 U.S.C. § 2306a(d); 41 U.S.C. § 254b(d); FAR 15.403-3(a).

1. The contracting officer must obtain enough information from the contractor (or subcontractor) to determine price reasonableness and/or cost realism.

2. The contracting officer can only require contractors (or subcontractors) to submit information other than cost or pricing data to the extent necessary to determine price reasonableness and/or cost realism.

3. At a minimum, the contracting officer should generally obtain information on the prices at which the same item or similar items were previously sold.[1]

4. The contracting officer must ensure that information used to support price negotiations is sufficiently current to permit the negotiation of a fair and reasonable price.

5. The contracting officer should limit requests for updated information to information that affects the adequacy of the offeror's proposal (e.g., changes in price lists).

B. Adequate Price Competition. FAR 15.403-3(b).

1. Additional information is not normally required to determine price reasonableness and/or cost realism.

2. If additional information is required, the contracting officer must obtain the information from sources other than the offeror to the maximum extent practicable.

3. The contracting officer may request information to:

   a. Determine the cost realism of competing offers; and/or

   b. Evaluate competing proposals.

[1] This requirement does not apply if offeror's proposed price is: (1) based on adequate price competition; or (2) set by law or regulation.

C. Commercial Items. 10 U.S.C. § 2306a(d)(2); 41 U.S.C. § 254b(d)(2); FAR 15.403-3(c)(1).

1. The contracting officer must limit requests for sales data to sales for similar items during a relevant time period.

2. To the maximum extent practicable, the contracting officer must limit information requests to data that is in a form regularly maintained by the offeror as part of its commercial operations.

3. The government cannot disclose any information obtained under this authority if it is exempt from disclosure (e.g., pursuant to the Freedom of Information Act).

D. Submission of Other Than Cost or Pricing Data. FAR 15.403-3(a)(2); FAR 15.403-5(a)(3) and (b)(2).

1. The contracting officer must state the requirement to submit information other than cost or pricing data in the solicitation. See FAR 52.215-20 (Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data); FAR 52.215-21 (Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data -- Modifications).

2. If the contracting officer requires the submission of information other than cost or pricing data, the contractor may submit the information in its own format unless the contracting officer concludes that the use of a specific format is essential and describes the required format in the solicitation.

3. The offeror is not required to certify information other than cost or pricing data.

4. Interim FAR Rule on commercial item pricing.

a. In 1999, the GAO issued a report reviewing how the DOD prices commercial items.[2] In an evaluation of sixty-five sole-source commercial item purchases, the GAO identified problems with the government's price analysis. In more than half of the purchases, the contracting officer compared the offered price with the offeror's catalog price, or with the price paid in previous procurements. The government negotiated lower prices in only three of the thirty-three cases.

b. Contracting officers failed to compare "apples to apples." For example, on two occasions the government made non-urgent purchases for stock replenishment. In one case, the government paid a price based on a ten-day delivery, when delivery was not required for nineteen months. In a second case, the government paid for ten-day delivery even though the contractor would not complete delivery until one year after placement of the order.

c. An antidote to the commercial-item pricing problems identified by the GAO may lie in an interim rule[3] amending the FAR to implement sections of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999.[4]

d. The interim rule advises contracting officers that existence of a price in a price list, catalog, or advertisement does not, in and of itself, establish a price to be fair and reasonable.[5]

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[2] GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: DOD PRICING OF COMMERCIAL ITEMS NEEDS CONTINUED EMPHASIS, REPORT NO. GAO/NSIAD-99-90 (June 24, 1999). The GAO looked at contracts concerning aircraft spare parts.

[3] 64 Fed. Reg. 51,835 (1999). *See* Federal Acquisition Circular (FAC) 97-14, FAR Case 98-300, Determination of Price Reasonableness and Commerciality (visited 14 Nov. 99), *available at* <http://farsite.hill.af.mil>.

[4] Pub. L. No. 105-261, §§ 803, 808, 112 Stat. 1920 (1998).

[5] 64 Fed. Reg. at 51,836 (amending FAR 15.403-3(c) and 13.106-3(a)(2)(iii)).

e. A contracting officer must require the offeror to provide information, other than cost or pricing data, that is adequate to establish a fair and reasonable price.[6] This must include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold.[7]

f. Failure of the contractor to submit the requested information will make it ineligible for award unless the head of the contracting activity determines it in the government's interest to make award.[8]

IV. TRUTH IN NEGOTIATIONS ACT.

A. Evolution.

1. May 1959 – The General Accounting Office (GAO) reported a large number of overpricing cases.

2. October 1959 – DOD revised the Armed Services Procurement Regulation (ASPR) to require contractors to provide a Certificate of Current Cost or Pricing Data during contract negotiations. In 1961 DOD added a price reduction clause to the ASPR.

3. 1962 – Congress passed TINA. Pub. L. No. 87-653, 76 Stat. 528 (1962) (codified at 10 U.S.C. § 2306f). TINA applied to DOD, the Coast Guard, and NASA. Public Law 89-369 extended TINA's reach to all Executive Branch Departments and Agencies.

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[6] 64 Fed. Reg. at 51,836 (amending FAR 15.403-3(a)(1)).

[7] *Id.* To help determine the type of information a contractor should provide, the interim rule directs contracting officers to consider the guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide. *Id.* The guide is prepared jointly by the Air Force Institute of Technology and the Federal Acquisition Institute and is informational, not directive, in nature. Free copies of the five-volume set can be obtained online at <http://www.gsa.gov/fai>.

[8] 64 Fed. Reg. at 51,836-37 (adding FAR 15.403-3 (a)(4)).

4. Significant amendments to TINA occurred in 1986 (Pub. L. No. 99-661, 100 Stat. 3946), 1994 (the Federal Acquisition Streamlining Act of 1994 (FASA)), and 1996 (the Clinger-Cohen Act of 1996, a.k.a. the Federal Acquisition Reform Act of 1996 (FARA)).

5. TINA is currently codified at 10 U.S.C. § 2306a and 41 U.S.C. § 254b.

B. Why have the TINA?

1. "The objective of these provisions is to require truth in negotiating. Although not all elements of costs are ascertainable at the time a contract is entered into, those costs that can be known should be finished currently, accurately, and completely. If the costs that can be determined are not furnished accurately, completely, and as currently as is practicable, the Government should have the right to revise the price downward to compensate for the erroneous, incomplete, or out-of-date information." S. REP. NO. 1884, at 3 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476, 2478.

2. TINA's purpose is to level the negotiation playing field by ensuring that government negotiators have access to the same pricing information as the contractor's negotiators. TINA requires contractors to submit cost or pricing data that is accurate, complete, and current as of the date of agreement on contract price. The purpose of TINA is <u>not</u> to detect fraud.

V. WHEN TO OBTAIN COST OR PRICING DATA.

A. Disclosure Requirements. Contractors submit cost or pricing data only for large-dollar, negotiated contract actions. Disclosure can be either mandatory or nonmandatory.

1. Mandatory Disclosure. 10 U.S.C. § 2306a(a)(1); 41 U.S.C. § 254b(a)(1); FAR 15.403-4(a)(1). Unless an exception applies, the contractor (or subcontractor) must generally submit cost or pricing data before the:

a. Award of a negotiated contract expected to exceed $550,000[9] (except an undefinitized action such as a letter contract);

b. Award of a subcontract at any tier expected to exceed $550,000 if the government required the prime contractor and each higher-tier subcontractor to furnish cost or pricing data;

c. Modification of a prime contract involving a price adjustment[10] expected to exceed $550,000 (regardless of whether cost or pricing data was initially required); or

d. Modification of a subcontract at any tier involving a price adjustment expected to exceed $550,000 if the government required the prime contractor and each higher-tier subcontractor to furnish cost or pricing data under the original contract or subcontract.

2. Nonmandatory. 10 U.S.C. § 2306a(c); 41 U.S.C. § 254b(c); FAR 15.403-4(a)(2).

a. Unless prohibited because an exception applies, the head of the contracting activity (HCA) can authorize a contracting officer to obtain cost or pricing data for pricing actions expected to cost between $100,000 and $550,000 if the submission of such data is necessary to determine price reasonableness.

b. The HCA must justify the decision in writing, and cannot delegate this authority to another agency official.

B. Prohibition on Obtaining Cost or Pricing Data.

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[9]The threshold was adjusted effective October 2000 pursuant to the statutory requirement to keep it constant in terms of fiscal year 1994 dollars. See 65 Fed. Reg. 60,553. See also, 10 U.S.C. § 2306a(a)(7) and 41 U.S.C. § 254(b).

[10] Price adjustment amounts shall consider both increases and decreases. For example, a $150,000 modification resulting from a decrease of $350,000 and an increase of $200,000 qualifies as an adjustment necessitating cost or pricing data. FAR 15.403-4(a)(1)(iii).

1. Simplified Acquisitions. FAR 15.403-1(a). A contracting officer cannot require a contractor to submit cost or pricing data for an acquisition that is at or below the simplified acquisition threshold (i.e., $100,000).

2. Exceptions. FAR 15.403-1(b).

a. Adequate Price Competition. 10 U.S.C. § 2306a(b)(1)(A)(i); 41 U.S.C. § 254b(b)(1)(A)(i); FAR 15.403-1(b)(1) and (c)(1). A contracting officer cannot require a contractor to submit cost or pricing data if the agreed upon price is based on adequate price competition.

(1) Two Offers Received. FAR 15.403-1(c)(1)(i).

(a) Adequate price competition exists if two or more responsible offerors, competing independently, submitted responsive offers; and

(b) The government awarded the contract to the offeror whose proposal represented the best value, and in which price was a substantial factor in the source selection. FAR 15.403-1(c)(1)(i); and

(c) The contracting officer did not find the successful offeror's price unreasonable.[11] See Serv-Air, Inc., B-189884, Sept. 25, 1978, 78-2 CPD ¶ 223, aff'd on recons., Mar. 29, 1979, 79-1 CPD ¶ 212 (holding that cost or pricing data was not required because there was adequate price competition); cf. Litton Sys., Inc., Amecom Div., ASBCA No. 35914, 96-1 BCA ¶ 28,201 (denying the contractor's motion for summary judgment because a dispute of fact existed regarding whether there was adequate price competition).

(2) One Offer Received. FAR 15.403-1(c)(1)(ii).

[11] The contracting officer must: (1) support any finding that the successful offeror's price was unreasonable; and (2) obtain approval at a level above the contracting officer. FAR 15.403-1(c)(1)(i)(B).

(a) Adequate price competition exists if the government reasonably expected that two or more responsible offerors, competing independently, would submit offers; and

(b) even though the government only received one proposal, the contracting officer reasonably concluded that the offeror submitted its offer with the expectation of competition.[12]

(3) Current or Recent Prices. FAR 15.403-1(c)(1)(iii). Adequate price competition exists if price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition. See Norris Industries, Inc., ASBCA No. 15442, 74-1 BCA ¶ 10,482 (concluding that there was not adequate price competition where only one recent previous contract was for a quantity comparable to current contract).

b. Prices set by law or regulation. FAR 15.403-1(c)(2). Pronouncements in the form of periodic rulings, reviews, or similar actions of a government body, or embodied in the laws, are sufficient to set a price.

c. Commercial items. Acquisitions of items meeting the commercial item definition in FAR 2.101 are exempt from the requirement for cost or pricing data. FAR 15.403-1(c)(3).

d. Waivers. FAR 15.403-1(c)4). The HCA, without power of delegation, may waive in writing the requirement for cost or pricing data in exceptional cases. The waiver must specifically identify the parties to whom it relates.

[12] The contracting officer can reasonably conclude that the offeror submitted its offer with the expectation of competition if circumstances indicate that the offeror: (1) believed that at least one other offeror was capable of submitting a meaningful offer; and (2) had no reason to believe that other potential offerors did not intend to submit offers; and the determination that the proposed price is based on adequate competition is reasonable, and is approved at a level above the contracting officer. FAR 15.403-1(c)(1)(ii)(A)(B).

3. Requiring a contractor to submit cost or pricing data when there is adequate competition may be an abuse of the contracting officer's discretion. See United Technologies Corp., Pratt & Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30,444 (rejecting Air Force's contention that the contracting officer had absolute discretion both to require certified cost or pricing data and to include a price adjustment clause where the price was negotiated based on adequate price competition).

VI. EXAMPLES OF COST OR PRICING DATA.

A. Cost or pricing data includes:

1. Vendor quotations;

2. Nonrecurring costs;

3. Information on changes in production methods and production/ purchasing volume;

4. Data supporting projections of business prospects, business objectives, and related operational costs;

5. Unit-cost trends such as those associated with labor efficiency;

6. Make-or-buy decisions;

7. Estimated resources to attain business goals; and

8. Information on management decisions that could have a significant bearing on costs.

B. Board Guidance.

1. According to the Armed Services Board of Contract Appeals (ASBCA), the statutory and regulatory definitions "plainly denote" a more expansive interpretation of cost or pricing data than routine corporate policy, practice, and procedures. United Techs. Corp./Pratt & Whitney, ASBCA No. 43645, 94-3 BCA ¶ 27,241. See Plessey Indus., ASBCA No. 16720, 74-1 BCA ¶ 10,603 (applying the "traditional 'reasonable man' test" to determine whether data constitutes cost or pricing information).

2. Factual information is discrete, quantifiable information that can be verified and audited. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842.

C. Fact vs. Judgment.

1. These distinctions are often difficult to make. Information that mixes fact and judgment may require disclosure because of the underlying factual information. See, e.g., Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195; cf. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842 (holding that reports regarding estimated labor hours were not required to be disclosed because they were "pure judgment").

2. Management decisions are generally a conglomeration of facts and judgment. See, e.g., Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722. To determine whether management decisions can be classified as cost or pricing data, one should consider the following factors:

   a. Did management actually make a "decision?"

   b. Was the management decision made by a person or group with the authority to approve or disapprove actions affecting costs?

   c. Did the management decision require some sort of "action" affecting the relevant cost element, or was the "decision" more along the lines of preliminary planning for possible future action?

d. Is there a substantial relationship between the management decision and the relevant cost element?

e. Is the management decision the type of decision that prudent buyers and sellers would reasonably expect to affect price negotiations significantly?

D. Cost or Pricing Data Must be Significant.

1. The contractor must disclose the data if a reasonable person (i.e., a prudent buyer or seller) would expect it to have a significant effect on price negotiations. Plessey Indus., Inc., ASBCA No. 16720, 74-1 BCA ¶ 10,603.

2. Prior purchases of similar items may be "significant data." Kisco Co., ASBCA No. 18432, 76-2 ¶ 12,147; Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.

3. The duty to disclose extends not only to data that the contractor knows it will use, but also to data that the contractor thinks it might use. If a reasonable person would consider the data in determining cost or price, the data is significant and the contractor must disclose it. Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121; P.A.L. Sys. Co., GSBCA No. 10858, 91-3 BCA ¶ 24,259 (holding that a contractor should have disclosed vendor discounts even though the government was not entitled to them).

4. The amount of the overpricing is not determinative of whether the information is significant. See Conrac Corp. v. United States, 558 F.2d 994 (1977) (holding that the government was entitled to a refund totaling one-tenth of one percent of the total contract price); Kaiser Aerospace & Elecs. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489 (holding that the government was entitled to a refund totaling two-tenths of one percent of the total contract price). But see Boeing Co., ASBCA No. 33881, 92-1 BCA ¶ 24,414 (holding that a $268 overstatement on a $1.7 billion contract was "*de minimis*").

5. Note: The DCAA Contract Audit Manual (CAM) DCAAM 7640.1, states that potential price adjustments of the lesser of 5 percent of the contracts value or $50,000, should normally be considered immaterial. DCAAM .¶ 14-120.1. These materiality criteria do not apply when:

a. A contractor's deficient estimating practices results in recurring defective pricing; or

b. The potential price adjustment is due to a systemic deficiency which affects all contracts priced during the period. DCAAM .¶ 14-120.1.

VII. THE SUBMISSION OF COST OR PRICING DATA.

A. Procedural Requirements.

1. Format. FAR 15.403-5.

a. In the past, contractors used a Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet, to submit cost or pricing data; however, this form is obsolete.

b. Today, the contracting officer can:

(1) Require contractors to submit cost or pricing data in the format specified in FAR 15.408, Table 15-2;

(2) Specify an alternate format; or

(3) Allow contractors to use their own format.

2. Submittal to Proper Government Official.

a. Contractors must generally submit cost or pricing data to the contracting officer or the contracting officer's authorized representative. 10 U.S.C. § 2306a(a)(3); 41 U.S.C. § 254b(a)(3).

b. The boards often look at whether the person to whom the disclosure was made participated in the negotiation of the contract. See Singer Co., Librascope Div. v. United States, 217 Cl. Ct. 225, 576 F.2d 905 (1978) (holding that disclosure to the auditor was not sufficient where the auditor was not involved in the negotiations); Sylvania Elec. Prods., Inc. v. United States, 202 Ct. Cl. 16, 479 F.2d 1342 (1973) (holding that disclosure to the ACO was not sufficient where the ACO had no connection with the proposal and the contractor did not ask the ACO to forward the data to the PCO); cf. Texas Instruments, Inc., ASBCA No. 30836, 89-1 BCA ¶ 21,489 (holding that disclosure to the ACO was sufficient where the ACO was involved in the negotiation of the disputed rates and knew that the subject contract was being negotiated); Litton Sys., Inc., Amecom Div., ASBCA Nos. 34435, et. al., 93-2 BCA ¶ 25,707 (holding that disclosure of indirect cost actuals to resident auditor based on established practice was sufficient disclosure though auditor did not participate in negotiations).

3. Adequate Disclosure. A contractor can meet its obligation if it provides the data physically to the government and discloses the significance of the data to the negotiation process. M-R-S Manufacturing Co. v. United States, 492 F2d 835 (1974).

a. The contractor must advise government representatives of the kind and content of the data and their bearing on the prospective contractor's proposal. Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195.

b. Making records available to the government may constitute adequate disclosure. Appeals of McDonnell Douglas Helicopter Sys., ASBCA No. 50447, 50448, 50449, 2000 BCA¶ 31,082 (furnishing or making available historical reports to DCAA resident auditor and DLA in-plant personnel in connection to Apache procurement make-buy decisions held adequate).

c. Knowledge by the other party of the data's existence is no defense to a failure to provide data. Grumman Aerospace Corp., ASBCA No. 35188, 90-2 BCA ¶ 22,842 (prime contractor's alleged knowledge of subcontractor reports not sufficient because subcontractor was obligated to physically deliver the data).

B. Obligation to Update Data.

1. The contractor is obligated to disclose data in existence as of the date of price agreement. Facts occurring before price agreement and coming to the negotiator's attention after that date must be disclosed before award if they were "reasonably available" before the price agreement date.

2. The contractor's duty to provide updated data is not limited to the personal knowledge of its negotiators. Data within the contractor's (or subcontractor's) organization are considered readily available.

3. Near the time of price agreement, a contractor sometimes conducts internal "sweeps" of cost or pricing data to ensure it meets its disclosure requirements.

4. Contracting officer responsibilities. See Memorandum from E. R. Spector, Deputy Assistant Secretary of Defense for Procurement, "Contractor Delays in Submitting Certificates of Current Cost or Pricing Data" (7 June 1989). Based upon this memorandum, the contracting officer must take the following actions when the contractor (or subcontractor) submits additional cost or pricing data:

a. Obtain a statement from the contractor summarizing the impact of the additional data;

b. Reduce the contract price if the data indicates that the negotiated price was increased by a significant amount; and

c. List the data in the price negotiation memorandum and identify the extent to which the contracting officer relied on the data to establish a fair and reasonable price.

C. Certification of Data.

1. Requirement. FAR 15.406-2. When cost or pricing data is required, the contractor must submit a Certificate of Current Cost or Pricing Data using the format found at FAR 15.406-2(a). See 10 U.S.C. § 2306a(a)(2) and 41 U.S.C. § 254b(a)(2)(requiring any person who submits cost or pricing data to certify that the data is accurate, complete, and current).

2. Due Date for Certificate. FAR 15.406-2(a). The certificate is due as soon as practicable after the date the parties conclude negotiations and agree to a contract price.

3. Failure to Submit Certificate. 10 U.S.C. § 2306a(f)(2); 41 U.S.C. § 254b(f)(2). A contractor's failure to certify its cost or pricing data does not relieve it of liability for defective pricing. See S.T. Research Corp., ASBCA No. 29070, 84-3 BCA ¶ 17,568.

VIII. DEFECTIVE PRICING.

A. Definition. Defective cost or pricing data is that data which is subsequently discovered to have been inaccurate, incomplete, or noncurrent. Under TINA and contract price reduction clauses, the government is entitled to an adjustment in the contract price, to include profit or fee, when it relied on defective cost or pricing data.

B. Audit Rights. Subsequent to award of a negotiated contract under which the contractor submitted cost or pricing data, the government has several rights to audit the contractor's records.

1. Contracting Agency's Right.

a. Statutory Basis. 10 U.S.C. § 2306a(g); 41 U.S.C. § 254b(g). The HCA has the same right to examine contractor (or subcontractor) records to evaluate the accuracy, completeness, and currency of the cost or pricing data that the HCA has under 10 U.S.C. § 2313(a)(2) and 41 U.S.C. § 254d(a)(2).

b. Definition. 10 U.S.C. § 2313(i); 41 U.S.C. § 254d(i). The term "records" includes "books, documents, accounting procedures and practices, and any other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form."

c. Examination Authority. 10 U.S.C. § 2313(a)(2), (e)-(f); 41 U.S.C. § 254d(a)(2), (e)-(f).

(1) The HCA, acting through an authorized representative, has the right to examine all records related to:

(a) The proposal for the contract (or subcontract);

(b) The discussions conducted on the proposal;

(c) The pricing of the contract (or subcontract); or

(d) The performance of the contract (or subcontract).

(2) The HCA's examination right expires 3 years after final payment on the contract.

(3) The HCA's examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.

d. Contract Clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding); FAR 52.215-2 (Audit and Records – Negotiation).

e. Subpoena Power. 10 U.S.C. § 2313(b); 41 U.S.C. § 254d(b).

(1) The Director of the Defense Contract Audit Agency (DCAA)[13] can subpoena any of the records that 10 U.S.C. § 2313(a) gives the HCA the right to examine.

(2) The Director of the DCAA can enforce this subpoena power by seeking an order from an appropriate U.S. district court.

(3) DCAA's subpoena power does not extend to a contractor's internal audit reports. United States v. Newport News Shipbldg. and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988) (Newport News I).

(a) Internal audits are not related to a particular contract.

(b) Internal audits contain the subjective evaluations of the contractor's audit staff.

(4) DCAA's subpoena power is aimed at obtaining objective data upon which to evaluate the specific costs a contractor charged to government.

(5) DCAA's subpoena power extends to a contractor's federal income tax returns and other financial data. United States v. Newport News Shipbldg. and Dry Dock Co., 862 F.2d 464 (4th Cir. 1988) (Newport News II).

(6) DCAA's subpoena power is not limited to records relating to a contractor's pricing practices.

[13] For civilian agencies, this right extends to the Inspector General of the agency and, upon the request of the HCA, the Director of the DCAA or the Inspector General of the General Services Administration. 41 U.S.C. § 254d(b)(1).

(7) DCAA's subpoena power extends to objective factual records relating to overhead costs that the contractor may pass on to the government.

(8) DCAA's subpoena power also extends to a contractor's work papers for its federal income tax returns and financial statements. United States v. Newport News Shipbldg. and Dry Dock Co., 737 F. Supp. 897 (E.D. Va. 1989) (Newport News III), aff'd, 900 F.2d 257 (4th Cir. 1990).

2. Comptroller General's Right.

a. Statutory Basis. 10 U.S.C. § 2313(c), (e)-(f); 41 U.S.C. § 254d(c), (e)-(f). The Comptroller General (or the Comptroller General's authorized representative) has the right "to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract."

b. The Comptroller General's examination right only applies to contracts awarded using other than sealed bid procedures. The Comptroller General's examination right expires 3 years after final payment on the contract.

c. The Comptroller General's examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.

d. Contract Clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding); FAR 52.215-2 (Audit and Records – Negotiation).

e. Subpoena Power. 31 U.S.C. § 716.

(1) The Comptroller General has the power to subpoena the records of a person to whom the Comptroller General has access by law or agreement.

(2) The Comptroller General can enforce this subpoena power by seeking an order from an appropriate U.S. district court. United States v. McDonnell-Douglas Corp., 751 F.2d 220 (8th Cir. 1984).

f. Scope of the Comptroller General's Examination Right.

(1) The term "contract," as used in the statute, embraces not only the specific terms and conditions of a contract, but also the general subject matter of the contract. Hewlett-Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).

(2) For cost-based contracts, the Comptroller General's examination right is extremely broad; however, for fixed-price contracts, the books or records must bear directly on the question of whether the government paid a fair price for the goods or services. Bowsher v. Merck & Co., 460 U.S. 824 (1983).

3. Inspector General's Right. 5 U.S.C. App. 3 § 6.

a. Statutory Basis. 5 U.S.C. App. 3 § 6(a)(1).

(1) The Inspector General of an agency has the right "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material . . . which relate to programs and operations with respect to which that Inspector General has responsibilities . . . ."

(2) This statutory right has no contractual implementation.

b. Subpoena Power. 5 U.S.C. App. B § 6(a)(4).

(1) The Inspector General has the power to subpoena all data and documentary evidence necessary to perform the Inspector General's duties.

(2) The Inspector General can enforce this subpoena power by seeking an order from an appropriate U.S. district court.

c. Scope of the Inspector General's Right. The scope of the Inspector General's right is extremely broad and includes internal audit reports. United States v. Westinghouse Elec. Corp., 788 F.2d 164 (3d Cir. 1986).

4. Obstruction of a Federal Audit. 18 U.S.C. § 1516.

a. This statute does not increase or enhance the government's audit rights.

b. The statute makes it a crime for anyone to influence, obstruct, or impede a government auditor (full or part-time government/contractual employee) with the intent to deceive or defraud the government.

IX. DEFECTIVE PRICING REMEDIES.

A. Contractual.

1. Price Adjustment. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 254b(e)(1)(A); FAR 15.407-1(b)(1); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification). The government can reduce the contract price if the government discovers that a contractor, prospective subcontractor, or actual subcontractor submitted defective cost or pricing data.

a. Amount. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 254b(e)(1)(A); FAR 15.407-1(b)(1); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).

(1) The government can reduce the contract price by any significant amount by which the contract price was increased because of the defective cost or pricing data. Unisys Corp. v. United States, 888 F.2d 841 (Fed. Cir. 1989); Kaiser Aerospace & Elec. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489; Etowah Mfg. Co., ASBCA No. 27267, 88-3 BCA ¶ 21,054.

(2) Profit or fee can be included in the price reduction.

(3) Interest. The government can recover interest on any overpayments it made because of the defective cost or pricing data. 10 U.S.C. § 2306a(f)(1)(A); 41 U.S.C. § 254b(f)(1)(A); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification). The contracting officer must:

(a) Determine the amount of the overpayments;

(b) Determine the date the overpayment was made;[14] and

(c) Apply the appropriate interest rate.[15]

b. Defective Subcontractor Data. FAR 15.407-1(e)-(f).

(1) The government can reduce the prime contract price regardless of whether the defective subcontractor data supported subcontract cost estimates or firm agreements between the subcontractor and the prime.

[14] For prime contracts, the date of overpayment is the date the Government paid for a completed and accepted contract item. For subcontracts, the date of overpayment is the date the Government paid the prime contractor for progress billings or deliveries that included a completed and accepted subcontract item. FAR 15.407-1(b)(7).

[15] The Secretary of the Treasury sets interest rates on a quarterly basis. 26 U.S.C. § 6621(a)(2).

(2) If the prime contractor uses defective subcontractor data, but subcontracts with a lower priced subcontractor (or fails to subcontract at all), the government can only reduce the prime contract price by the difference between the subcontract price the prime contractor used to price the contract and:

(a) The actual subcontract price if the contractor subcontracted with a lower priced subcontractor; or

(b) The contractor's actual cost if the contractor failed to subcontract the work.

(3) The government can disallow payments to subcontractors that are higher than they would have been absent the defective cost or pricing data under:

(a) Cost-reimbursement contracts; and

(b) All fixed-price contracts except firm fixed-price contracts and fixed-price contracts with economic price adjustments (e.g., fixed-price incentive contracts and fixed-price award fee contracts).

2. If the government fails to include a price reduction clause in the contract, courts and boards will read them in pursuant to the Christian Doctrine. University of California, San Francisco, VABCA No. 4661, 97-1 BCA ¶ 28,642; Palmetto Enterprises, Inc., ASBCA No. 22839, 79-1 BCA ¶ 13,736.

3. A defective pricing claim is not subject to the normal six-year statute of limitations. Radiation Sys., Inc., ASBCA No. 41065, 91-2 BCA ¶ 23,971.

4. A defective pricing claim can't be asserted as an affirmative defense to a contractor's money claim. Computer Network Sys., Inc., GSBCA No. 11368, 93-1 BCA ¶ 25,260.

5. Penalties. 10 U.S.C. § 2306a(f)(1)(B); 41 U.S.C. § 254b(f)(1)(B); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).

   a. The government can collect penalty amounts where the contractor (or subcontractor) knowingly submitted defective cost or pricing data.

   b. The contracting officer can obtain a penalty amount equal to the amount of the overpayment.

   c. The contracting officer must consult an attorney before assessing any penalty.

6. Government's Burden of Proof. The government bears the burden of proof in a defective pricing case. General Dynamics Corp., ASBCA No. 32660, 93-1 BCA ¶ 25,378. To meet its burden, the government must prove that:

   a. The information meets the definition of cost or pricing data;

   b. The information existed before the date of agreement on price;

   c. The data was reasonably available before the date of agreement on price;

   d. The data the contractor (or subcontractor) submitted was not accurate, complete, or current;

   e. The undisclosed data was the type that prudent buyers or sellers would have reasonably expected to have a significant effect upon price negotiations;

   f. The government relied on the defective data; and

g. The government's reliance on the defective data caused an increase in the contract price.

7. Once the government establishes nondisclosure of cost and pricing data, there is a rebuttable presumption of prejudice.

a. The contractor must then demonstrate that the government would not have relied on this information.

b. Once demonstrated, the burden of showing detrimental reliance shifts back to the government.

c. Hence, the ultimate burden of showing prejudice rests with the government.

8. The ASBCA often views defective pricing cases as "too complicated" to resolve by summary judgment. Grumman Aerospace Corp., ASBCA No. 35185, 92-3 BCA ¶ 25,059; McDonnell Douglas Helicopter Co., ASBCA No. 41378, 92-1 BCA ¶ 24,655. But see Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,770 (granting the contractor's motion for summary judgment because the government failed to meet its burden of proof).

9. Successful Defenses to Price Reductions.

a. The information at issue was not cost or pricing data.

b. The government did not rely on the defective data. 10 U.S.C. § 2306a(e)(2); 41 U.S.C. § 254b(e)(2).

c. The price offered by the contractor was a "floor" below which the contractor would not have gone.

10. Unsuccessful Defenses to Price Reductions. 10 U.S.C. § 2306a(e)(3); 41 U.S.C. § 254b(e)(3); FAR 15.407-1(b)(3).

a. The contractor (or subcontractor) was a sole source supplier or otherwise was in a superior bargaining position.

b. The contracting officer should have known that the cost or pricing data the contractor (or subcontractor) submitted was defective. FMC Corp., ASBCA No. 30069, 87-1 BCA ¶ 19,544.

c. The contract price was based on total cost and there was no agreement about the cost of each item procured under the contract.

d. The contractor (or subcontractor) did not submit a Certificate of Current Cost or Pricing Data.

11. Offsets. 10 U.S.C. § 2306a(e)(4)(A)-(B); 41 U.S.C. § 254b(e)(4)(A)-(B); FAR 15.407-1(b)(4)-(6); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).

a. The contracting officer must allow an offset for any understated cost or pricing data the contractor (or subcontractor) submitted.

b. The amount of the offset may equal, but not exceed, the amount of the government's claim for overstated cost or pricing data arising out of the same pricing action.

c. The offset does not have to be in the same cost grouping as the overstated cost or pricing data (e.g. material, direct labor, or indirect costs).

d. The contractor must prove that the higher cost or pricing data:

(1) Was available before the "as of" date specified on the Certificate of Current Cost or Pricing Data; and

(2) Was not submitted.

e. The contractor is not entitled to an offset under two circumstances:

(1) The contractor knew that its cost or pricing data was understated before the "as of" date specified on the Certificate of Current Cost or Pricing Data. See United Tech. Corp.,Pratt & Whitney v. Peters, No. 98-1400, 1999 U.S. App. LEXIS 15490 (Fed. Cir. July 12, 1999)(affirming in part ASBCA's denial of offsets for "sweep" data intentionally withheld from government).

(a) Prior to the 1986 TINA amendments, contractors could obtain offsets for intentional understatements. See United States v. Rogerson Aircraft Controls, 785 F.2d 296 (Fed. Cir. 1986) (holding that a contractor, under pre-1986 TINA, could offset intentional understatements that were "completely known to the Government at the time of the negotiations and in no way hindered or deceived the Government").

(b) Even under the pre-1986 TINA, the offset must be based on cost or pricing data. Errors in judgment can't serve as a basis for an offset. See AM General Corp., ASBCA No. 48476, 99-1 BCA ¶ 30,130 (characterizing contractor's decision to amortize nonrecurring costs of HMMWV production as "at most, errors of judgment" that failed to support an offset).

(2) The government proves that submission of the data before the "as of" date specified on the Certificate of Current Cost or Pricing Data would not have increased the contract price in the amount of the proposed offset.

B. Administrative remedies.

1. Termination of the Contract. FAR Part 49; Joseph Morton Co. v. United States, 3 Cl. Ct. 120 (1983), aff'd, 757 F.2d 1273 (Fed. Cir. 1985).

2. Suspension and Debarment. FAR Subpart 9.4; DFARS Subpart 209.4.

3. Cancellation of the Contract. 10 U.S.C. § 218; FAR Subpart 3.7.

C. Judicial remedies.

1. Criminal.

a. False Claims Act. 18 U.S.C. § 287. See Communication Equip. and Contracting Co., Inc. v. United States, 37 CCF ¶ 76,195 (Cl. Ct. 1991) (unpub.) (holding that TINA does not preempt the False Claims Act so as to limit the government's remedies).

b. False Statement Act. 18 U.S.C. § 1001. See, e.g., United States v. Shah, 44 F.3d 285 (5th Cir. 1995).

c. The Major Fraud Act. 18 U.S.C. § 1031.

2. Civil.

a. False Claims Act. 10 U.S.C. §§ 3729-33. Civil penalty between $5,000 and $10,000, plus treble damages. 10 U.S.C. §§ 3729(a).

b. The Program Fraud Civil Remedies Act of 1986. 31 U.S.C. §§ 3801-3812; DOD Dir. 5505.5 (Aug. 30, 1988).

D. Fraud indicators. DOD IG's Handbook on Indicators of Fraud in DOD Procurements, No. 4075-1h, June 1987.

1. High incidence of persistent defective pricing.

2. Continued failure to correct known system deficiencies.

3. Consistent failure to update cost or pricing data with knowledge that past activity showed that prices have decreased.

4. Failure to make complete disclosure of data known to responsible personnel.

5. Protracted delay in updating cost or pricing data to preclude possible price reduction.

6. Repeated denial by responsible contractor employees of the existence of historical records that are later found to exist.

7. Repeated utilization of unqualified personnel to develop cost or pricing data used in estimating process.

X. CONCLUSION.

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Contract Law
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CHAPTER 12

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CHAPTER 12

CONTRACT LAW RESEARCH MATERIALS

I. STARTING POINT.

A. Solicitation Provisions and Contract Clauses.

1. Definitions:

a. "Solicitation provision" or "provision" means a term or condition used only in solicitations and applying only before contract award. FAR 52.101(a).

b. "Contract clause" or "clause" means a term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award. FAR 52.101(a).

2. Read the solicitation/contract.

3. For provisions/clauses incorporated by reference, see FAR Part 52 and Part 52 of the appropriate supplements. See FAR 52.102-1.

B. Contract Attorneys Course Deskbook.

II. STATUTES.

A. The Armed Services Procurement Act of 1947 (ASPA). 10 U.S.C. §§ 2301-2329.

1. Basic procurement statute.

2. Covers DoD, NASA, and Coast Guard.

MAJ Kevin M. Walker
Mr. Dan Lavering, TJAGSA Librarian
146th Contract Attorneys Course
April/May 2001

B. The Federal Property and Administrative Service Act (FPASA). 41 U.S.C. §§ 251-260.

1. Basic procurement statute.

2. Covers GSA and other federal agencies not covered by ASPA.

C. Competition in Contracting Act (CICA). Pub. L. No. 98-369 (1983). Current statutes: 10 U.S.C. §§ 2301-2306; 41 U.S.C. § 403.

1. Amended ASPA and FPASA to make both statutes identical.

2. Changes have been made to both the ASPA and the FPASA since the enactment of CICA, so there now are differences between the statutes.

D. Contract Disputes Act of 1978 (CDA). 41 U.S.C. §§ 601-613.

1. Waiver of sovereign immunity for contract appeals to agency boards of contract appeals (BCAs) and direct access suits to the United States Court of Federal Claims.

2. Covers claim process, certification, litigation, boards of contract appeals, etc.

E. Tucker Act. 28 U.S.C. § 1491.

1. Basic jurisdictional statute for the United States Court of Federal Claims.

2. Creates "exclusive" judicial forum for resolution of pre-award protests. 28 U.S.C. § 1491(a)(3).

F. Equal Access To Justice Act (EAJA). 5 U.S.C. § 504, 28 U.S.C. § 2412(d).

1. Requires the government to pay attorney's fees if the prevailing party is a small business and the government's position was not substantially justified.

2. Title 5 applies to the BCAs. Title 28 applies to the U.S. Court of Federal Claims. The EAJA does not apply to bid protest actions.

G. Annual Authorization and Appropriation Acts.

1. Practice Note: The Library of Congress website "Thomas" is your best source for recent legislative materials. http://thomas.loc.gov/. Thomas coverage begins with the 93rd Congress. Complete coverage begins with the 104th Congress.

III. REGULATIONS.

A. Federal Acquisition Regulation (FAR).

1. Effective 1 April 1984.

2. The General Services Administration cooperates with the FAR Secretariat to publish and distribute the FAR through the Code of Federal Regulations.

3. The FAR is located at:

a. 48 C.F.R. Chapter 1.

b. The loose-leaf edition of the FAR issued by GSA and published by the Government Printing Office (GPO), was updated periodically by Federal Acquisition Circulars (FAC). NOTE: The FAR loose-leaf publication terminated effective 31 Dec 2000. Beginning 1 Jan 2001, the FAR will only be published electronically. 65 Fed. Reg. 56,452 (18 Sep 2000). The electronic FAR is available at http://www.arnet.gov/far/.

c. Annual FAR Volume for the year beginning January 1st published by Commerce Clearing House (CCH). CCH also published an annual DFARS volume. Both FAR and DFAR have supplements published as of 1 July each year.

4. Proposed and final changes to the FAR are published in the Federal Register and published independently as Federal Acquisition Circulars (FACs). Final changes are incorporated into the C.F.R. and the electronic version of the FAR by GPO. (Electronic notification of proposed and final rules are available as an e-mail service from the FAR site: http://www.arnet.gov/far/. CCH also updates the Government Contract Law Reporter.

5. Superseded the Defense Acquisition Regulation (DAR), the Federal Procurement Regulation (FPR), and the NASA Procurement Regulation (NASAPR). [Note that the DAR previously replaced the Armed Services Procurement Regulation (ASPR).]

6. To fill the void left by the lack of an official, loose-leaf printed version of the FAR, CCH has initiated "Federal Procurement Regulations" publications. This is a four-volume publication covering the FAR, the DFAR, and selected agency supplements. This publication is also available on line at: http://business.cch.com/government_contracts/. The volumes are broken down as follows:

a. Volume 1: FAR.

b. Volume 2: DFARS.

c. Volume 3: GSA, Energy, Transportation, and EPA acquisition regulations, and NASA FAR supplement.

d. Volume 4: Army, Navy, Air Force, Defense Logistics Agency, Cost Accounting Standards Board and SBA supplements.

B. Departmental and Agency Regulations are located at various chapters of title 48 of the C.F.R.

Agency Supplements to the FAR Found In
Title 48, C.F.R.

Chapter:

1. Federal Acquisition Regulation (FAR). http://www.arnet.gov/far/.

2. Defense FAR Supplement (DFARS). The DFARS was completely revised in 1991. Available at: http://www.acq.osd.mil/dp/dars/dfars.html.

3. Health and Human Services.

4. Department of Agriculture.

5. General Services Administration Regulation (GSAR). See also: CCH's Federal Procurement Regulation Reporter, Volume 3.

6. Department of State.

7. Agency For International Development.

8. Veterans Affairs.

9. Department of Energy Acquisition Regulation (DEAR). See also: CCH's Federal Procurement Regulation Reporter, Volume 3.

10. Treasury.

12. Department of Transportation Acquisition Regulation (TAR). See also: CCH's Federal Procurement Regulation Reporter, Volume 3.

13. Commerce.

14. Interior.

15. Environmental Protection Agency. See also: CCH's Federal Procurement Regulation Reporter, Volume 3.

16. Office of Personnel Management.

17. NASA FAR Supplement (NFS). See also: CCH's Federal Procurement Regulation Reporter, Volume 3.

19. United States Information Agency.

22. Small Business Administration. Federal Procurement Regulation Reporter, Volume 4.

24. Housing And Urban Development.

25. National Science Foundation.

28. Department of Justice.

29. Department of Labor.

35. Panama Canal Commission.

44. Federal Emergency Management Agency.

51. Department of the Army (AFARS). See also: CCH's Federal Procurement Regulation Reporter, Volume 4. Available at: http://farsite.hill.af.mil/VFAFAR1.HTM.

52. Navy Acquisition Procedures Supplement (NAPS). See also: CCH's Federal Procurement Regulation Reporter, Volume 4. Available at: http://farsite.hill.af.mil/VFNAPSa.htm.

53. Department of the Air Force (AFFARS or AF FAR Supplement). See also: CCH's Federal Procurement Regulation Reporter, Volume 4. Available at: http://farsite.hill.af.mil/VFAFFAR1.HTM.

54. Defense Logistics Acquisition Regulation Supplement 4105.1 (DLAR). See also: CCH'S Federal Procurement Regulation Reporter, Volume 4.

C. The FAR System.

1. The FAR is divided into eight (8) subchapters and fifty-three (53) parts.

2. The FAR organizational system applies to the FAR and all agency supplements to the FAR. See FAR 1.104-2.

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Part 3: Improper Business Practices and Personal Conflicts of Interest

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Part 9: Contractor Qualifications

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Part 20: [Reserved]

Part 21: [Reserved]

Part 22: Application of Labor Law to Government Acquisitions

Part 23: Environment, Conservation, Occupational Safety, and Drug-Free Workplace

Part 24: Protection of Privacy and Freedom of Information

Part 25: Foreign Acquisition

Part 26: Other Socioeconomic Programs

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Part 28: Bonds and Insurance

Part 29: Taxes

Part 30: Cost Accounting Standards

Part 31: Contract Cost Principles and Procedures

Part 32: Contract Financing

Part 33: Protests, Disputes, and Appeals

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Part 35: Research and Development Contracting

Part 36: Construction and Architect-Engineer Contracts

Part 37: Service Contracting

Part 38: Federal Supply Schedule Contracting

Part 39: Acquisition of Information Resources

Part 40: [Reserved]

Part 41: Acquisition of Utility Services.

Subchapter G: Contract Management

Part 42: Contract Administration

Part 43: Contract Modifications

Part 44: Subcontracting Policies and Procedures

Part 45: Government Property

Part 46: Quality Assurance

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Part 48: Value Engineering

Part 49: Termination of Contracts

Part 50: Extraordinary Contractual Actions

Part 51: Use of Government Sources by Contractors

Subchapter H: Clauses and Forms

Part 52: Solicitation Provisions and Contract Clauses

Part 53: Forms

IV. CASES.

A. General. Most court cases concerning government contracts are decided in the U.S. Court of Federal Claims (formerly the Court of Claims, and the U.S. Claims Court), the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court. A few contract cases have been decided in the federal District Courts and numbered U.S. Courts of Appeals.

B. United States Supreme Court.

1. Decisions are reported in the official Supreme Court Reporter (U.S.) and unofficial reporters (S. Ct. and L.Ed.2d).

2. United States Federal Claims Court Reporter (Fed. Cl.) contains procurement-related decisions of the U.S. Supreme Court resulting from appeals from the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit.

3. Federal Court Procurement Decisions (FPD) contains procurement-related decisions of the U.S. Supreme Court resulting from appeals from the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. This Reporter was discontinues in 1998. Cited in older publications.

4. New decisions are reported and summarized in United States Law Week (U.S.L.W.).

C. United States Courts of Appeals. Cases are reported in West's Federal Reporter (F., F.2d, and F.3d). Of primary interest are the decisions of the Court of Appeals for the Federal Circuit upon appeals from the U.S. Court of Federal Claims and the boards of contract appeals. The court's contract decisions are reprinted in the FPD, Cl. Ct., Fed. Cl. and CCF.

D. United States District Courts. Cases are reported in West's Federal Supplement (F. Supp.) and West's Federal Supplement 2d Series (F. Supp. 2d)

E. United States Court of Claims. Decisions of the old Court of Claims appear in the official United States Court of Claims reports (Ct. Cl.) and in West's Federal Reporter (before 1960 in West's Federal Supplement). The Federal Courts Improvement Act (FCIA) of 1982 bifurcated the Court of Claims and created the United States Claims Court and the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 171 et seq., 1494-1497, 1499-1503.

F. United States Claims Court/Court of Federal Claims.

1. Decisions since the Court's inception in October 1982 are published in West's Claims Court Reporter (Cl. Ct.). In 1992 (Vol. 27) the publication was renamed the Federal Claims Reporter (Fed. Cl.) with the change in the court's name.

2. The Claims Court/Federal Claims Reporter also contains:

   a. Decisions by the Court of Appeals for Federal Circuit (Fed. Cir.).

   b. U.S. Supreme Court reviews of Claims Court/Federal Claims and Federal Circuit decisions.

3. Published in bi-weekly advance sheets and bound volumes.

4. Features:

   a. Each volume has tables of cases reported, statutes, and rules cited, and a words and phrases index.

   b. West's Key Number Digest.

   c. The Federal Claims Digest, published three times a year, provides cumulative tables of cases, tables of statutes and rules cited, words and phrases, and a Key Number Digest.

G. Federal Court Procurement Decisions (FPD). (No longer published.)

1. The FPD reports government contract decisions issued since 1 October 1982 by the U.S. Claims Court, the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court.

2. The FPD also includes cases that are not officially published; they are printed as "public records" and are not citable as legal precedent.

3. Published monthly by Federal Publications, Inc. (Fed. Pubs., Inc.) in loose-leaf format.

4. Features:

a. Case name index.

b. Subject matter index.

c. Full text of Contract Disputes Act.

d. Court rules.

e. Judges' pictures and biographies.

H. Contract Cases Federal (CCF). CCF contains decisions by the U.S. Court of Federal Claims and other federal courts concerning government contracts. The CCF is available on line at: http://business.cch.com/government_contracts/.

V. COMPTROLLER GENERAL'S DECISIONS.

A. Decisions of the Comptroller General of the United States (Comp. Gen.). This is the official reporter of Comptroller General's Decisions.

1. Contains decisions rendered to heads of departments and establishments, to disbursing and certifying officers, and to interested parties.

2. Published by Government Printing Office in one volume per fiscal year. (Until Volume 73, which contains 1993-1994 in one volume.)

   a. Decisions are presented in full text and represent about ten percent of total decisions rendered annually.

   b. For unpublished decisions and General Accounting Office (GAO) Reports, call the GAO at (202) 512-6000 (also available on FLITE and on the Internet at www.gao.gov).

3. Features:

   a. Table of Decision Numbers: pre-1939 numbers begin with "A" prefix; post-1939 numbers begin with "B" prefix.

   b. Alphabetical list of claimants.

   c. Subject matter index.

   d. List of statutes, court cases, and Comptroller decisions cited.

B. Comptroller General's Procurement Decisions (CPD).

1. Covers published and unpublished decisions issued by the Comptroller General since 1974.

2. Published by West Publishing in one volume per calendar year, beginning in 2000.

3. Separate index volume with three indexes:

   a. B-number index.

   b. Subject matter index.

c. Index cross-referencing the CPD's to official reporter.

VI. DECISIONS OF BOARDS OF CONTRACT APPEALS.

A. Board of Contract Appeals Decisions (BCA).

1. Includes most decisions and orders of the various boards of contract appeals.

2. Published by CCH in bound casebooks dating from 1956 (first volume is 56-2). One or more volumes are published annually depending on the number of decisions issued (three volumes per year since 1984).

3. Features:

a. Alphabetical list of appellants.

b. Docket number by title of board.

c. Topical index.

d. Board rules.

e. Judges' biographies.

4. BCA decisions are initially published in the Government Contract Reporter loose-leaf system published by CCH, entitled Board of Contract Appeals Decisions. These decisions are published with the BCA volume and paragraph citation that will be designated in the bound BCA volume, so the loose-leaf issue is cited identically as the bound volume.

5. Armed Services Board of Contract Appeals decisions are also available at: http://www.law.gwu.edu/asbca/.

VII. GOVERNMENT CONTRACTS REPORTER.

A. Comprehensive procurement legal research tool.

B. Published on the Internet and very timely.

C. CD-ROM issued monthly.

D. Published by CCH.

VIII. CITATORS.

A. Shepard's Federal Citations.

B. Government Contracts Citator.

1. Published by West Publishing Company.

2. Produced in two volumes in loose-leaf format.

a. Basic Cumulation: 1956 through 1976.

b. Supplementary Cumulation: 1977 through 1987.

3. Updated quarterly on various colored pages.

4. Arranged in two major divisions.

5. Court and agency opinions division.

a. Opinions listed alphabetically by name of contractor.

b. Name of each court or agency taking action on the case.

c. Primary volume in which case is reported.

d. Government Contracts citation.

e. Names of decisions, which have cited the decision.

6. Comptroller General's decisions division.

a. Officially published decisions are listed by Comp. Gen. citation, B-number, and CPD citation.

b. Decisions that are not published officially are listed by B-number and CPD citation.

c. Government Contracts citation.

d. Other decisions citing the opinion.

C. Commerce Clearing House (CCH) Citator Service.

1. The bound CCH Board of Contract Appeals Decisions and the loose-leaf CCH Contract Appeals Decision include a citator for all board decisions in the CCH service.

2. The Main Citator Table is in one volume and includes BCA decisions from 56-2 through 86-1.

3. List of more recent decisions is contained in the current Citator Table of Contract Appeals Decisions Reports.

IX. COMPUTER-ASSISTED LEGAL RESEARCH.

A. LEXIS (Mead Data Central). www.lexis.com. Use: All Sources **:** Area of Law - By Topic **: Public Contracts.**

B. WESTLAW (West Publishing Company).

C. Federal Legal Information Through Electronics (FLITE). http://aflsa.jag.af.mil.

1. Managed by the US Air Force, Legal Services and Research Division; Maxwell AFB, Alabama.

2. Covers BCA decisions, Comptroller General opinions, federal court decisions, Army regulations, and Air Force instructions.

3. Also has access to LEXIS and WESTLAW.

4. Free to some Air Force Attorneys. Army attorneys can access FLITE through the Corps of Engineers Automated Legal System (CEALS). Other federal agencies must pay a fee (amount varies with size of search). However, the Legal Research Division will perform research for all DoD attorneys free of charge.

5. Phone number: (334) 953-3008, DSN 493-3008. You can FAX your questions to the Research Division at: (334) 953-3008, DSN 493-7159. Internet access: http://aflsa.jag.af.mil.

D. JAGCNET:

1. Operated by the Department of the Army, Office of The Judge Advocate General.

2. The Army JAG Corps web based communication system. Includes the successor to the LAAWS electronic bulletin board (BBS). The BBS serves as a clearinghouse for information and questions on government contract and fiscal law; environmental law, ethics and standards of conduct; and procurement integrity, among others.

3. Free to Department of Defense attorneys, paralegals, and enlisted legal personnel.

4. TJAGSA Contract and Fiscal Law Deskbooks regularly uploaded to bulletin board/database and may be downloaded by authorized users.

5. Internet access: http://www.jagc.army.mil.

6. Publications of The Judge Advocate General's School (TJAGSA) are also available at: http://www.jagcnet.army.mil/TJAGSA. The TJAGSA portion of JAGCNET is open to the general public, without registration.

E. The Internet. Appendix A is a list of acquisition-related homepages currently being maintained on the Internet's World Wide Web. Each of these homepages also serves as a springboard to other web sites containing acquisition-related information. Acquisition attorneys should ensure that they have access to the Internet and that they monitor one or more of these homepages to keep abreast of the latest developments.

X. SPECIALIZED SOURCES.

A. Extraordinary Contractual Relief Reporter (ECR).

1. Decisions under Public Law 85-804. See FAR Part 50.

2. Published by Federal Publications, Inc. in loose-leaf form. (Not current, for historical use only.)

3. Three volumes (Vol. 1, 1958-1965; Vol. 2, 1966-1973; Vol. 3, 1974-1980; loose-leaf binder covers to current date).

4. Updated periodically.

B. Commerce Clearing House Labor Law Reporter.

1. Covers government labor standards.

2. Published by Commerce Clearing House in loose-leaf form.

3. Updated periodically.

C. CCH Cost Accounting Standards Guide. Available in loose-leaf, CD-ROM, and at: http://business.cch.com/government_contracts/.

1. Covers actions of Cost Accounting Board, federal agencies, and Congress concerning cost accounting practices.

2. Published by CCH in loose-leaf form. (also available in CD_ROM and on-line at: http://business.cch.com/government_contracts/.

3. Updated monthly.

4. Cost Accounting Standards Board Acquisition Regulation Supplement is contained in Federal Procurement Regulations, Volume 4.

XI. JOURNALS AND PERIODICALS.

A. The Government Contractor (GC).

1. Published by the West Publishing Company.

2. Produced weekly in loose-leaf format (three-hole punch version). Contains reports and analyses of all significant government contract decisions and rulings by the courts, boards, and Comptroller General. It also gives notice of proposed and final statutory and regulatory changes.

3. Published since January 1959. The bi-weekly issues are consolidated into bound volumes every three years.

4. Material is indexed by name, decision number, and subject matter.

B. Federal Contracts Reports (Fed. Cont. Rep.). Available on JAGCNET, WESTLAW and LEXIS.

1. Published by the Bureau of National Affairs, Inc. (BNA).

2. Produced weekly since 1964 in a newsletter format.

3. Reports on all major developments in government contracts.

4. Provides commentary and "history" leading up to changes in law and regulation.

5. Indexed by subject matter and contains a table of cases reported.

6. Cumulative indices are issued each quarter and every six months.

C. Public Contract Law Journal (Pub. Cont. L.J.).

1. Specializes in contract law articles.

2. Published by Section on Public Contract Law of the ABA.

3. Members also receive the Procurement Lawyer (PROCUREMENT LAW.) four times each year.

D. The Nash & Cibinic Report (N&CR).

1. Published monthly by West Publishing Company beginning January 1987.

2. Provides government contract analysis by Professors Ralph C. Nash and John Cibinic.

3. Monthly articles on varying areas of government contract law.

4. A N&C Roundtable held in early December of each year is complimentary to subscribers. The Roundtable offers a discussion by guest experts of several major areas of current interest.

E. Briefing Papers.

1. Monthly issue deals with a specific area of contract law - emphasis is practical.

2. Published by West Publishing Company.

F. National Contract Management Association.

1. National Contract Management Journal. Two volumes per year.

2. Contract Management magazine. Monthly.

3. Both publications contain typically non-legal discussion of broad range of procurement and contract administration issues.

G. The Army Lawyer.

1. Contract Law Notes.

2. Recent Developments in Contract Law - *Contract and Fiscal Law Developments of 200X - The Year in Review* published in the January issue each year.

H. Military Law Review.

I. Air Force Law Review.

J. Yearbook of Procurement Articles.

1. Annual reprint of most law review articles dealing with government contract law.

2. Published by Federal Publications. (Discontinued 1990. Bound volumes from 1940 through 1990 remain.)

XII. TEXTS.

Note: These are both current and historical texts. CCH has purchased GWU texts.

A. Frank M. Alston, Margaret M. Worthington & Lewis P. Goldsman, Contracting with the Federal Government, published by John Wiley & Sons, Inc., 3d edition, 1992. Written primarily for accounting audience. Incorporates numerous FAR forms.

B. Donald P. Arnavas and William J. Ruberry, Government Contract Guidebook, published by Federal Publications, Inc., 1st edition, 1986, 1990 supplement. Broad overview of formation and administration issues.

C. James P. Bedingfield and Louis I. Rosen, Government Contract Accounting, published by Federal Publications, Inc., 2d edition, 1985.

D. Richard J. Bednar, John Cibinic, Jr., Ralph C. Nash, Jr., et al., Construction Contracting, published by The George Washington University Government Contracts Program, 1991.

E. John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts, published by The George Washington University Government Contracts Program, 3d edition, 1998.

F. John Cibinic, Jr. and Ralph C. Nash, Jr., Administration of Government Contracts, published by The George Washington University Government Contracts Program, 3d edition, 1995.

G. John Cibinic, Jr. and Ralph C. Nash, Jr., Cost Reimbursement Contracting, published by The George Washington University Government Contracts Program, 2d edition, 1993.

H. Department of Defense, Armed Services Pricing Manual (ASPM), published by the Government Printing Office in 2 volumes in 1986, 1987.

I. John Cibinic, Jr. and Ralph C. Nash, Jr., Competitive Negotiation: The Source Selection Process, published by the George Washington University Government Contracts Program, 1993.

J. DoD Defense Contract Audit Agency, DCAA Contract Audit Manual, DCAAM 7640.1, published by the Government Printing Office in 2 volumes, updated regularly. Available at: http://www.dcaa.mil/.

K. Brian C. Elmer, Jean-Pierre Swennen and Richard L. Beizer, Government Contract Fraud, published by Federal Publications, Inc., 1st edition, 1985.

L. General Accounting Office, Principles of Federal Appropriations Law, published by the Government Printing Office, Volume I, July 1991; Volume II, December 1992; Volume III, November 1994; Volume IV, Not yet published.

M. Andrew K. Gallagher, Negotiated Procurement, published by GCA Publications, Inc. in hardback with loose-leaf supplements through 1984. Outdated, but still useful.

N. Noel Keyes, Government Contracts Under The FAR, published by West Publishing, 1986, and pocket part. Organized to coincide with the FAR's 53 parts.

O. Peter S. Latham, Government Contract Disputes, published by Federal Publications, Inc., 2d edition, 1988, 1991 supplement.

P. James F. Nagle, How to Review a Federal Contract & Research Federal Contract Law, published by the American Bar Association, 1990.

Q. James F. Nagle, History of Government Contracting, published by The George Washington University Government Contracts Program, 1992.

R. Ralph C. Nash, Jr., Government Contract Changes, published by Federal Publications, Inc., 2d edition, 1989.

S. Ralph C. Nash, Jr. and Leonard Rawicz, Patents and Technical Data, published by The George Washington University Government Contracts Program, 1983, with 1992 supplement.

T. Ralph C. Nash, Jr., Steven L. Schooner, and Karen R. O'Brien, The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement, published by The George Washington University Government Contracts Program, 1998.

U. Walter Pettit, Carl Vacketta, and David Anthony, Government Contract Default Terminations, published by Federal Publications, Inc., 1st edition, 1991.

V. Melvin Rishe, Contract Costs, published by Federal Publications, Inc., 1st edition, 1984.

W. William Rudland, Defective Pricing, published by Federal Contracting Press, 1990. (Update No. 4, 1995).

X. Seyfarth, Shaw, Fairweather & Geraldson, The Government Contract Compliance Handbook published by Federal Publications, Inc., 2d edition, 1991. Good appendices.

Y. Paul Shnitzer, Government Contract Bidding, published by Federal Publications, Inc., 3rd edition, 1987, 1991 supplement.

Z. John W. Whelan, Federal Government Contracts: Cases and Materials, published by Foundation Press in 1985, with supplements.

AA. Steven W. Feldman, Government Contracts Awards: Negotiation & Sealed Bidding, published by West Group, three Volumes, 1994, 1996, 1997-200, with supplements.

XIII. REFERENCES.

A. Holmes and Holmes, Techniques for Researching Public Contract Law, 10 Public Contract Law Journal 58 (1978).

B. Army Law Library Service: (804) 972-6394.

XIV. CONCLUSION.

APPENDIX

CONTRACT & FISCAL LAW WEBSITES

CONTENT	ADDRESS

Meta-sites

Professor Steve Schooner's site	http://www.law.gwu.edu/facweb/sschooner/default.htm
Where in Federal Contracting?	http://www.wifcon.com/
FedBizOps	http://www.fedbizops.gov/
Army Single Face to Industry (ASFI)	http://acquisition.army.mil/default.htm
Navy Electronic Commerce Online	http://www.neco.navy.mil/
DoD Busops	http://www.dodbusopps.com/
DoD E-mall	/https://www.emallmom01.dla.mil/scripts/default.asp

A

ABA LawLink Legal Research Jumpstation	http://www.abanet.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Section (Agency Level Bid Protests)	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Acquisition Reform	http://tecnet0.jcte.jcs.mil:9000/htdocs/teinfo/acqreform.html
Acquisition Reform Network	http://www.arnet.gov
ACQWeb - Office of Undersecretary of Defense for Acquisition & Technology	http://www.acq.osd.mil
Agency for International Development	http://www.info.usaid.gov
Air Force Acquisition Reform	http://www.safaq.hq.af
Air Force Contract Augmentation Program	http://www.afcesa.af.mil/Directorate/CEX/AFCAP/afcap.html
Air Force Electronic Commerce Home Page	http://www.afca.scott.af.mil/ecommerce/index.htm
Air Force FAR Supplement	http://www.hq.af.mil/SAFAQ/contracting/far/affars/html
Air Force Home Page	http://www.af.mil/
Air Force Materiel Command Web Page	http://www.afmc.wpafb.af.mil
Air Force Materiel Command SJA Web Page	http://afmc.mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://afpubs.hq.af.mil/orgs.asp?type=pubs
Air Force Site, FAR, DFARS, Fed. Reg.	http://farsite.hill.af.mil
Army Acquisition Website	http://acqnet.sarda.army.mil/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Electronic Commerce Home Page	http://www.armyec.sra.com/
Army Home Page	http://www.dtic.mil/armylink
Army Financial Management Home Page	http://www.asafm.army.mil/homepg.htm
Army Materiel Command Web Page	http://www.amc.army.mil/
Army Portal	http://www.us.army.mil/

Army Single Face to Industry (ASFI) Acquisition Web Site	http://acquisition.army.mil/default.htm
Army STRICOM (Simulation, Training, and Instrumentation Command) Home Page	http://www.stricom.army.mil/

C

CAGE Code Assignment Also Search/Contractor Registration (CCR)	http://www.disc.dla.mil
CASCOM Home Page	http://www.cascom.army.mil/
CECOM	http://www.monmouth.army.mil/cecom/cecom.html
Code of Federal Regulations	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
Coast Guard Home Page	http://www.dot.gov/dotinfo/uscg
Central Contractor Registration (DOD)	http://www.ccr2000.com/index.cfm
Commerce Business Daily (CBD)	http://cbdnet.access.gpo.gov/index.html
Comptroller General Decisions	http://www.gao.gov/decisions/decison.htm
Congress on the Net-Legislative Info	Http://thomas.loc.gov/
Contract Pricing Guides (address)	http://www.gsa.gov/staff/v/guides/instructions.htm
Contract Pricing Reference Guides	http://www.gsa.gov/staff/v/guides/volumes.htm
Cost Accounting Standards	http://www.fedmarket.com/cas/casindex.html

D

DCAA Web Page	http://www.dcaa.mil
DCAA - Electronic Audit Reports	http://www.abm.rda.hq.navy.mil/branch11.html
Debarred List	http://www.arnet.gov/epls/
Defense Acquisition Deskbook	http://www.deskbook.osd.mil
Defense Acquisition University	http://www.acq.osd.mil/dau/
DoD Busops	http://www.dodbusopps.com/
DoD Contract Pricing Reference Guide home page	http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html
DoD E-mall	/https://www.emallmom01.dla.mil/scripts/default.asp
Defense Logistics Agency Electronic Commerce Home Page	http://www.supply.dla.mil/
Defense Tech. Info. Ctr. Home Page (use jumper Defenselink and other sites)	http://www.dtic.mil
Department of Justice (jumpers to other Federal Agencies and Criminal Justice)	http://www.usdoj.gov
Department of Veterans Affairs Web Page	http://www.va.gov
DFARS Web Page (Searchable)	http://www.dtic.mil/dfars
DFAS	http://www.dfas.mil/
DFAS Electronic Commerce Home Page	http://www.dfas.mil/ecedi/
DIOR Home Page - Procurement Coding Manual/FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Claiment Program Number (procurement Coding Manual)	http://web1.whs.osd.mil/diorhome.htm
DOD Contracting Regulations	http://www.dtic.mil/contracts
DOD Home Page	http://www.dtic.mil/defenselink
DOD Instructions and Directives	http://web7.whs.osd.mil/corres.htm
DOD SOCO Web Page	http://www.dtic.mil/defenselink/dodgc/defense_ethics

DOL Wage Determinations	http://www.ceals.usace.army.mil/netahtml/srvc.html

F

FAC (Federal Register Pages only)	http://www.gsa.gov:80/far/FAC/FACs.html
FAR (GSA)	http://www.arnet.gov/far/
Federal Acquisition Jumpstation	http://procure.msfc.nasa.gov/fedproc/home.html
Federal Acquisition Virtual Library (FAR/DFARS, CBD, Debarred list, SIC)	http://159.142.1.210/References/References.html
FedBizOps	http://www.fedbizops.gov/
Federal Register	http://law.house.gov/7.htm
FFRDC - Federally Funded R&D Centers	http://web1.whs.osd.mil/diorhome.htm
Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
Financial Operations (Jumpsites)	http://www.asafm.army.mil

G

GAO Documents Online Order	http://gao.gov/cgi-bin/ordtab.pl
GAO Home Page	http://www.gao.gov
GAO Comptroller General Decisions (Allows Westlaw/Lexis like searches)	http:/www.access.gpo.gov/su_docs/aces/aces170.shtml?desc017.html
GovBot Database of Government Web sites	http://www.business.gov
GovCon - Contract Glossary	http://www.govcon.com/information/gcterms.html
Gov't. Information Locator Services Index U.S. Army Publications	http://www-usappc.hoffman.army.mil/gils/gils.html
GSA Advantage	www.fss.gsa.gov
GSA Legal Web Page	http://www.legal.gsa.gov

J

JAGCNET (Army JAG Corps homepage)	http://www.jagcnet.army.mil/
JAGCNET Contract & Fiscal Law publications	http://www.jagcnet.army.mil/ContractLaw
JAGCNET The Army JAG School Homepage	http://www.jagcnet.army.mil/TJAGSA
Joint Electronic Commerce Program Office	http://www.acq.osd.mil/ec/
Joint Publications	http://www.dtic.mil/doctrine
Joint Travel Regulations (JTR)	http://www.dtic.mil/perdiem/jtr.html
JWOD (Javits-Wagner-O'Day Act)	www.jwod.gov

L

Laws, Regulations, Executive Orders, & Policy	http://159.142.1.210/References/References.html#policy, etc
Library (jumpers to various contract law sites - FAR/FAC/DFARS/AFARS)	http://acqnet.sarda.army.mil/library/default.htm
Library of Congress Web Page	http://lcweb.loc.gov
LOGCAP Homepage (Army AMC)	http://www.amc.army.mil/dcs_logistics/lg-ol/infopage.html

M

Marine Corps Home Page	http://www.usmc.mil
MWR (Army) Home Page	http://trol.redstone.army.mil/mwr/index.html

w.asafm.army.mil/fo/naf/naf.htm	NAF Financial (MWR)
w.npr.gov/library/index.html	National Performance Revie

N

National Industries for the Blind	www.nib.org
NISH	www.nish.org
NAVSUP Home Page	http://www.navsup.navy.mil/NAVSUP/home.htm
Navy Acquisition Reform	http://www.acq-ref.navy.mil/
Navy Electronic Commerce On-line	http://ecic.abm.rda.hq.navy.mil/
Navy Home Page	http://www.navy.mil

O

OGC Contract Law Division	http://www.ogc.doc.gov/OGC/CLD.HTML
OGE Ethics Advisory Opinions	http://fedbbs.access.gpo.gov/libs/oge_opin.html
OGE Web Page (Ethics training materials and opinions	http://www.access.gpo.gov/usoge
Office of Acquisition Policy	http://www.gsa.gov/staff/ap.htm
Office of Deputy ASA (Financial Ops) Information on ADA violations/NAF Links/Army Pubs/and Various other sites	http://www.asafm.army.mil/financial.htm
Office of Management and Budget (OMB)	http://www.access.gpo.gov/su_docs/budget/index/html
Office of Management and Budge Circulars	http://www.whitehouse.gov/WH/EOP/omb/html
OFPP (Guidelines for Oral Presentations)	http://www.doe.gov/html/procure/oral.html
OFPP (Best Practices Guides)	http://www.arnet.gov/BestP/BestP.html

P

Policy Works - Per Diem Tables	http://www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/perd97.htm
Producer Price Index	http://www.bis.gov/ppihome.htm
Purchase Card Program	http://purchasecard.dfas.mil

S

SBA Government Contracting Home Page	http://www.sbaonline.sba.gov/GC/
Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner/default.htm
Service Contract Act Directory of Occupations	http://www.dol.gov//dol/esa/public/regs/compliance/whd/wage/main.htm
SIC	http://spider.osha.gov/oshstats/sicser.html

T

Taxes/Insurance	http://www.payroll-taxes.com
Training and Doctrine Command (TRADOC) Acquisition Center	http//www.tac.eustis.army.mil

U

U.S. Congress on the Net-Legislative Info	Http://thomas.loc.gov/
U.S. Code	http://law.house.gov/usc.htm
UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov

Chapter 13
Bid Protests

146th Contract Attorneys Course

CHAPTER 13

BID PROTESTS

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APPENDIX: Bid Protests -- Multiple Fora

CHAPTER 13

BID PROTESTS

"The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly and, whenever possible, in a way that maximizes competition."

OFFICE OF GENERAL COUNSEL, UNITED STATES GENERAL ACCOUNTING OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (6th ed. 1996)

I. INTRODUCTION.

A. Background. The protest system established by the Competition in Contracting Act of 1984 (CICA) and implemented by General Accounting Office (GAO) Bid Protest Regulations is designed to provide for the expeditious resolution of protests with only minimal disruption to the procurement process. DataVault Corp., B-249054, Aug. 27, 1992, 92-2 CPD ¶ 133. See FAR Subpart 33.201.

B. Jurisdiction. Multiple fora. An unsuccessful offeror may protest to the agency, the GAO, the United States Court of Federal Claims (COFC), or a federal district court. See Appendix.

C. Remedies.

1. Generally, protest fora do not direct the award of a contract and may not award lost profits.

2. Whether the filing of a protest to challenge a contract solicitation or an award creates an automatic stay or suspension of any work on the procurement is of critical importance and varies from forum to forum.

LTC Beth Berrigan
146th Contract Attorneys Course
April / May 2001

II. AGENCY PROTESTS.

A. Authority.

1. Agency protests are protests filed[1] directly with the contracting officer or other cognizant government official within the agency. These protests are governed by FAR 33.103, AFARS 33.103, NAPS 5233.103, AFFARS 5333.102 and 5333.103.

2. Contracting officers **must consider and seek legal advice** regarding all protests filed with the agency. FAR 33.102(a).

B. Procedures. FAR 33.103. In late 1995, President Clinton issued an Executive Order directing all executive agencies to establish alternative disputes resolution (ADR) procedures for bid protests. The order directs agency heads to create a system that, "to the maximum extent possible," will allow for the "inexpensive, informal, procedurally simple, and expeditious resolution of protests." FAR 33.103 implements this Order. Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).

1. Open and frank discussions. Prior to the submission of a protest, all parties shall use "their best efforts" to resolve issues and concerns raised by an "interested party" **at the contracting officer level**. "Best efforts" include conducting "open and frank discussions" among the parties.

2. Objectives. FAR 33.103(d). The goal of an effective agency protest system is to:

   a. resolve agency protests effectively;

   b. help build confidence in the federal acquisition system; and

[1]FAR 33.101 defines "filed" to mean:

> [t]he complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency's close of business is presumed to be 4:30 p.m., local time.

c. reduce protests to the GAO and other judicial protest fora.

3. Protesters are **not required** to exhaust agency administrative remedies.

4. Procedures tend to be informal and flexible.

   a. Protests must be clear and concise. Failure to submit a coherent protest may be grounds for dismissal. FAR 33.103(d)(1).

   b. "Interested parties" may request review at a "level above the contracting officer" of any decision by the contracting officer that allegedly violated applicable statute or regulation and, thus, prejudiced the offeror. FAR 33.103(d)(4).

5. Timing of Protests.

   a. Pre-award protests, to include protests challenging the propriety of a solicitation, must be filed **prior to bid opening or the date for receipt of proposals**.

   b. In all other cases, the contractor must file its protest to the agency **within 10 days of when the protester knew or should have known of the bases for the protest**. For "significant issues" raised by the protester, however, the agency has the discretion to consider the merits of a protest that is otherwise untimely. FAR 33.103(e).

6. Suspension of Procurement.

   a. Pre-Award Stay. The contracting officer **shall not** make award if an agency protest is filed before award. FAR 33.103(f)(1) imposes an administrative stay of the contract award.

      (1) The agency may override the stay if one of the following applies:

(a) contract award is justified in light of "urgent and compelling" reasons; or

(b) a prompt award is in "the best interests of the Government."

(2) The override decision must be made in writing and then approved by an agency official "at a level above the contracting officer" or another official pursuant to agency procedures. FAR 33.103(f)(1).

(3) If the contracting officer elects to withhold award, he must inform all interested parties of that decision. If appropriate, the contracting officer should obtain extensions of bid/proposal acceptance times from the offerors. If the contracting officer cannot obtain extensions, he should consider an override of the stay and proceed with making contract award. FAR 33.103(f)(2).

b. Post-Award Stay. If the agency receives a protest within 10 days of contract award or 5 days of a "required" debriefing date offered by the agency,[2] the contracting officer shall suspend contract performance immediately. FAR 33.103(f)(3).

(1) The agency may override the stay if one of the following applies:

(a) contract performance is justified in light of "urgent and compelling" reasons; or

(b) contract performance is in "the best interests of the Government."

[2] See FAR 15.505 and FAR 15.506.

(2) The override determination must be made in writing and then approved by an agency official "at a level above the contracting officer" or another official pursuant to agency procedures. FAR 33.103(f)(3).

C. Processing Protests.

1. Contractors generally present protests to the contracting officer; but they may also request an independent review of their protest at a level above the contracting officer, in accordance with agency procedures. Solicitations should advise offerors of this option. FAR 33.103(d)(4).

   a. Agency procedures shall inform the protester whether this independent review is an alternative to consideration by the contracting officer or as an "appeal" to a contracting officer's protest decision.

   b. Agencies shall designate the official who will conduct this independent review. The official need not be in the supervisory chain of the contracting officer. However, "when practicable," the official designated to conduct the independent review "should" not have previous "personal involvement" in the procurement.

   c. **NOTE:** This "independent review" of the contracting officer's initial protest decision, if offered by the agency, does **NOT** extend GAO's timeliness requirements.

2. The agencies "shall make their best efforts" to resolve agency protests within 35 days of filing. FAR 33.103(g).

3. Discovery. To the extent permitted by law and regulation, the agency and the protester may exchange information relevant to the protest. FAR 33.103(g).

4. The agency decision shall be "well reasoned" and "provide sufficient factual detail explaining the agency position." The agency must provide the protester a written copy of the decision via a method that provides evidence of receipt. FAR 33.103(h).

D. Remedies. FAR 33.102.

1. Failure to Comply with Applicable Law or Regulation. FAR 33.102(b). If the agency head determines that, as a result of a protest, a solicitation, proposed award, or award is improper, he may:

   a. take any action that the GAO could have "recommended," had the contractor filed the protest with the GAO; and,

   b. award costs to the protester for prosecution of the protest.

2. Misrepresentation by Awardee. If, as a result of awardee's **intentional** or **negligent** misstatement, misrepresentation, or miscertification, a post-award protest is sustained, the agency head may require the awardee to reimburse the government's costs associated with the protest. The government may recover this debt offsetting the amount against **any** payment due the awardee under **any** contract between the awardee and the government.[3] This provision also applies to GAO protests. FAR 33.102(b)(3).

3. Follow-On Protest. If unhappy with the agency decision, the protester may file its protest with either the GAO or a federal court (see Appendix). If the vendor elects to proceed to the GAO, it must file its protest within 10 days of receiving notice of the agency's **initial adverse action.**[4] 4 C.F.R. § 21.2(a)(3) (1998).

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[3]In determining the liability of the awardee, the contracting officer shall take into consideration "the amount of the debt, the degree of fault, and the costs of collection." FAR 33.102(b)(3)(ii).

[4]In its "White Book," the GAO advises that it applies a "straightforward" interpretation of what constitutes notice of adverse agency action. Specific examples include: bid opening; receipt of proposals; rejection of a bid or proposal; or contract award. OFFICE OF GENERAL COUNSEL, UNITED STATES GENERAL ACCOUNTING OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 13 (6th ed. 1996). **The reader can obtain a free copy of this booklet by calling (202) 512-6000 or by accessing the GAO Internet Homepage at: http://www.gao.gov.**

III. GENERAL ACCOUNTING OFFICE (GAO).

A. Statutory Authority. The Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56, is the current statutory authority for GAO bid protests of federal agency procurements. Title 31 U.S.C. § 3533 authorizes GAO to issue implementing regulations.

B. Regulatory Authority. The GAO's bid protest rules are set forth at 4 C.F.R. Part 21. FAR provisions governing GAO bid protests are at FAR 33.104. Agency FAR supplements contain regulatory procedures for managing GAO protests. See generally DFARS 233.1; AFARS 33.104; AFFARS 5333.104; NAPS 5233.104; DLAAR 33.104.

C. Who May Protest?

1. 31 U.S.C. § 3551(1) and 4 C.F.R. § 21.1(a) (1998) provide that an "interested party" may protest to the GAO.

2. An "**interested party**" is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 31 U.S.C § 3551(2); 4 C.F.R. § 21.0(a) (1998).

   a. **Before** bid opening or proposal submission due date, a protester must be a **prospective bidder or offeror with a direct economic interest**. A prospective bidder or offeror is one who has expressed an interest in competing. Total Procurement Servs., Inc., B-272343, Aug. 29, 1996, 96-2 CPD ¶ 92; D.J. Findley, Inc., B-221096, Feb. 3, 1986, 86-1 CPD ¶ 121.

   b. **After** bid opening or the submission of proposals, a protester must be an **actual bidder or offeror with a direct economic interest**.

c. **Small Business Certificate of Competency (COC) Determinations.** 4 C.F.R. § 21.5(b)(2) (1998).

d. **Procurements Under Section 8(a) of the Small Business Act** (i.e., small disadvantaged business contracts). The GAO will review a decision to place a procurement under the 8(a) program only for possible bad faith by agency officials or a violation of applicable law or regulation. 4 C.F.R. § 21.5(b)(3) (1998). See Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178. See also Security Consultants Group, Inc., B-276405.2, June. 9, 1997, 97-1 CPD ¶ 207 (protest sustained where agency failed to provide complete and accurate information of all vendors eligible for an 8(a) award).

e. **Affirmative Responsibility Determinations.** 4 C.F.R. § 21.5(c) (1998); Imaging Equip. Servs., Inc., B-247197, Jan. 13, 1992, 92-1 CPD ¶ 62.

(1) Exception: Where solicitation includes definitive responsibility criteria. King-Fisher Co., B-236687, Feb. 12, 1990, 90-1 CPD ¶ 177.

(2) Exception: Where protester alleges fraud or bad faith. HLJ Management Group, Inc., B-225843, Mar. 24, 1989, 89-1 CPD ¶ 299.

f. **Procurement Integrity Act Violations.** The protester must first report information supporting allegations involving violations of the Procurement Integrity Act to the agency within 14 days after the protester first discovered the possible violation. 4 C.F.R. § 21.5(d) (1998); 41 U.S.C. § 423. See, e.g., SRS Techs., B-277366, July 30, 1997, 97-1 CPD ¶ 42.

g. **Subcontractor Protests.** The GAO will not consider subcontractor protests unless requested to do so by the procuring agency. 4 C.F.R. § 21.5(h) (1998). See RGB Display Corporation, B-284699, MAY 17, 2000. See also Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103. However, the GAO will review subcontract procurements where the subcontract is "by" the government. See supra RGB Display Corporation (subcontract procurement is "by" the government where agency handles substantially all the substantive aspects of the procurement and the prime contractor acts merely as a conduit for the government).

h. **Procurements by Non-Federal Agencies** (e.g., U.S. Postal Service, Federal Deposit Insurance Corporation (FDIC), nonappropriated fund activities [NAFIs]). 4 C.F.R. § 21.5(g) (1998). The GAO will consider a protest involving a non-federal agency if the agency involved has agreed in writing to have the protest decided by the GAO. 4 C.F.R. § 21.13 (1998).

i. **Judicial Proceedings.** 4 C.F.R. §21.11 (1998). The GAO will not hear protests that are the subject of pending federal court litigation unless requested by the court. SRS Techs., B-254425, May 11, 1995, 95-1 CPD ¶ 239; Snowblast-Sicard, Inc., B-230983, Aug. 30, 1989, 89-2 CPD ¶ 190. The GAO also will not hear a protest that has been finally adjudicated, i.e., dismissed with prejudice. Cecile Indus., Inc., B-211475, Sept. 23, 1983, 83-2 CPD ¶ 367.

j. **Task and Delivery Orders.** The GAO may not hear protests associated with the placement of a task or delivery order except when the order "increases the scope, period, or maximum value" of the underlying contract. 10 U.S.C. § 2304(c). The GAO, however, has held that it has protest jurisdiction over task and delivery orders placed under Federal Supply Schedule (FSS) contracts. Severn Co., Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2-3, n.1. Additionally, the GAO will hear cases involving the "downselect" of multiple awardees, as that determination is implemented by the issuance of task and delivery orders. See Electro-Voice, Inc., B-278319; Jan. 15, 1998, 98-1 CPD ¶ 23. See also Teledyne-Commodore, LLC - - Reconsideration, B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121.

3. What Is a Procurement?

a. A procurement of property or services by a federal agency. 31 U.S.C. § 3551. New York Tel. Co., B-236023, Nov. 7, 1989, 89-2 CPD ¶ 435 (solicitation to install pay phones is an acquisition of a service). The transaction, however, must relate to the agency's mission or result in a benefit to the government. Maritime Global Bank Group, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 (Navy agreement with a bank to provide on-base banking services not a procurement).

b. Sales of government property are excluded. Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534 (sale of property by FHA not a procurement of property or services); Columbia Communications Corp., B-236904, Sept. 18, 1989, 89-2 CPD ¶ 242 (GAO declined to review a sale of satellite communications services). The GAO will consider protests involving such sales, however, if the agency involved has agreed in writing to allow GAO to decide the dispute. 4 C.F.R. § 21.13(a) (1998); Assets Recovery Sys., Inc., B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67.

c. The GAO has also considered a protest despite the lack of a solicitation or a contract when the agency held "extensive discussions" with a firm and then decided not to issue a solicitation. Health Servs. Mktg. & Dev. Co., B-241830, Mar. 5, 1991, 91-1 CPD ¶ 247. Accord RJP Ltd., B-246678, Mar. 27, 1992, 92-1 CPD ¶ 310.

d. A "Federal Agency" includes executive, legislative, or judicial branch agencies. 31 U.S.C. § 3551(3) (specifically refers to the definition in the Federal Property and Administrative Services Act of 1949 at 40 U.S.C. § 472); 4 C.F.R. § 21.0(c) (1998). However, it excludes:

(1) The Senate, House of Representatives, the Architect of the Capitol, and activities under his direction. 40 U.S.C. § 472(b); 4 C.F.R. § 21.0(c) (1998). Court Reporting Servs., Inc., B-259492, Dec. 12, 1994, 94-2 CPD ¶ 236.

(2) Government corporations identified in 31 U.S.C. § 9101 that are only partially owned by the United States, e.g., FDIC. 31 U.S.C. § 3501; Cablelink, B-250066, Aug. 28, 1992, 92-2 CPD ¶ 135. This exclusion does not apply to wholly government-owned corporations, e.g., TVA. See Kennan Auction Co., B-248965, June 9, 1992, 92-1 CPD ¶ 503 (Resolution Trust Corporation); Monarch Water Sys., Inc., B-218441, Aug. 8, 1985, 85-2 CPD ¶ 146. See also 4 C.F.R. § 21.5(g) (1998).

(3) The Postal Service. 4 C.F.R. § 21.5(g) (1998). But see Hewlett-Packard Co. v. United States, 41 Fed. Cl. 99 (1998) (the **Court of Federal Claims** held that its jurisdiction is dependent upon the Tucker Act, not federal procurement law, therefore the Postal Service is not exempt from the court's bid protest jurisdiction as it is from GAO's).

e. Generally, the GAO does not view procurements by nonappropriated fund instrumentalities (NAFIs) as "agency procurements." 4 C.F.R. § 21.5(g) (1998). The Brunswick Bowling & Billiards Corp., B-224280, Sept. 12, 1986, 86-2 CPD ¶ 295.

(1) The GAO **will** consider procurements conducted by federal agencies (i.e., processed by an agency contracting officer) on behalf of a NAFI, even if no appropriated funds are to be obligated. Premier Vending, Inc., B-256560, July 5, 1994, 94-2 CPD ¶ 8; Americable Int'l, Inc., B-251614, Apr. 20, 1993, 93-1 CPD ¶ 336.

(2) The GAO will consider a protest involving a NAFI-conducted procurement if there is evidence of pervasive involvement in the procurement of federal agency personnel and the NAFI is acting merely as a conduit for the federal agency. See Thayer Gate Dev. Corp., B-242847.2, Dec. 9, 1994 (unpublished) (involvement of high ranking Army officials in project did not convert procurement by a NAFI to one conducted by the Army).

E. When Must a Protest Be Filed?

1. Time limits on protests are set forth in 4 C.F.R. § 21.2 (1998).[5]

   a. **Defective Solicitation.** GAO must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals.** 4 C.F.R. § 21.2(a)(1) (1998); Carter Indus., Inc., B-270702, Feb. 15, 1996, 96-1 CPD ¶ 99 (untimely challenge of agency failure to include mandatory clause indicating whether agency will conduct discussions prior to making award).

   b. Protesters **challenging a Commerce Business Daily (CBD) notice of intent** to make a sole source award must **first** respond to the CBD notice in a timely manner. See Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32 (unless the specification is so restrictive as to preclude a response, the protester must first express interest to the agency); see also PPG Indus., Inc., B-272126, June 24, 1996, 96-1 CPD ¶ 285, fn. 1 (timeliness of protests challenging CBD notices discussed).

   c. When an **amendment to a solicitation** provides the basis for the protest, then the protest must be filed by the next due date for revised proposals. 4 C.F.R. § 21.2(a)(1) (1998).

[5]Under the GAO bid protest rules, "days" are calendar days. In computing a period of time for protest (merits) purposes, do not count the day on which the period begins. When the last day falls on a weekend day or federal holiday, the period extends to the next working day. 4 C.F.R. § 21.0(e) (1998).

d. **Required Debriefing.** Procurements involving competitive proposals carry with them the obligation to debrief the losing offerors, if the debriefing is timely requested. See FAR 15.506 and 15.506. In such cases, protesters may not file a protest prior to the debriefing date offered by the agency. The protester, however, must file its protest no later than 10 days "after the date on which the debriefing is held." 4 C.F.R. § 21.2(3) (1998); Fumigadora Popular, S.A., B-276676, Apr. 21, 1997, 97-1 CPD ¶ 151 (protest filed four days after debriefing of **sealed bid procurement** not timely); The Real Estate Center, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74.

e. **Government Delay of Pre-Award Debriefings.** The agency may delay pre-award debriefings until after award when it is in "the government's best interests." If the agency decides to delay a pre-award debriefing that is otherwise timely requested and required, the protester is entitled to a post-award debriefing and the extended protest time frame. If a protester files its protest within five days of the offered debrief, protester will also be entitled to stay contract performance. 10 U.S.C. § 2305(b)(6); FAR 15.505(b). Global Eng'g & Constr. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (protest of exclusion from competitive range).

f. Protests based on **any other matter** must be submitted within 10 days after receiving actual or constructive knowledge of the basis for protest. 4 C.F.R. § 21.2(a)(2) (1998). Learjet, Inc., B-274385, Dec. 6, 1996, 96-2 CPD ¶ 215 (interpretation of solicitation untimely); L. Washington & Assocs., Inc., B-274749, Nov. 18, 1996, 96-2 CPD ¶ 191 (untimely protest of elimination from competitive range).

g. Protests initially filed with the agency:

(1) The agency protest must generally be filed within the same time restrictions applicable to GAO protests, unless the agency has established more restrictive time frames. 4 C.F.R. § 21.2(a)(3) (1998). Orbit Advanced Techs., Inc., B-275046, Dec. 10, 1996, 96-2 CPD ¶ 228 (protest dismissed where protester's agency-level protest untimely even though it would have been timely under GAO rules); IBP, Inc., B-275259, Nov. 4, 1996, 96-2 CPD ¶ 169.

(2) If the contractor previously filed a timely agency protest, a subsequent GAO protest must be filed within 10 days of formal notice, actual knowledge, or constructive knowledge of the initial adverse agency decision. 4 C.F.R. § 21.2(a)(3) (1998). Consolidated Mgt. Servs., Inc.--Recon., B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76 (oral notice of adverse agency action starts protest time period. **Continuing to pursue agency protest after initial adverse decision does not toll the GAO time limitations.** Telestar Int'l Corp.--Recon., B-247029, Jan. 14, 1992, 92-1 CPD ¶ 69.

2. Protesters must use due diligence to obtain the information necessary to pursue the protest. See Automated Medical Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 (protest based on FOIA-disclosed information not timely where protester failed to request debriefing); Products for Industry, B-257463, Oct. 6, 1994, 94-2 CPD ¶ 128 (protest challenging contract award untimely where protester failed to attend bid opening and did not make any post-bid attempt to examine awardee's bid); Adrian Supply Co.--Recon., B-242819, Oct. 9, 1991, 91-2 CPD ¶ 321 (use of FOIA request rather than the more expeditious document production rules of the GAO may result in the dismissal of a protest for lack of due diligence and untimeliness). But see Geo-Centers, Inc., B-276033, May 5, 1997, 97-1 CPD ¶ 182 (protest filed three months after contract award and two months after debriefing is **timely** where the information was obtained via a FOIA request that was filed immediately after the debriefing).

3. Exceptions for otherwise untimely protests. 4 C.F.R. § 21.2(c) (1998).

a. **Significant Issue Exception**: The GAO may consider a late protest if it involves an issue significant to the procurement system. See Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-C CPD ¶ 18; Premier Vending, Inc., B-256560, Jul. 5, 1994, 94-2 CPD ¶ 8.

b. Significant issues generally: 1) have not been previously considered; and 2) are of widespread interest to the procurement community. Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-C CPD ¶ 18. DynCorp, Inc., B-240980, Oct. 17, 1990, 90-2 CPD ¶ 310.

c. The GAO may consider a protest if there is good cause, beyond the protester's control, for the lateness. A.R.E. Mfg. Co., B-246161, Feb. 21, 1992, 92-1 CPD ¶ 210; Surface Combustion, Inc.--Recon., B-230112, Mar. 3, 1988, 88-1 CPD ¶ 230.

F. "The CICA Stay"—Automatic Stay. 31 U.S.C. § 3553(c) and (d).

1. Pre-award Protests:

a. An agency may not award a contract after receiving notice of a timely protest **FROM THE GAO**. 31 U.S.C. § 3553(c); 4 C.F.R. § 21.6 (1998); FAR 33.104(b); AFARS 33.104(b); AFFARS 5333.104(b).

b. The automatic stay is triggered **only** by notice from GAO. See McDonald Welding v. Webb, 829 F.2d 593 (6th Cir. 1987); Survival Technology Inc. v. Marsh, 719 F. Supp. 18 (D.D.C. 1989). See also Florida Professional Review Org., B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17 (no duty to suspend performance where protest filed on eighth day after award [Friday] but GAO notified agency of protest on eleventh day after award [Monday]).

2. Post-award Protests: The contracting officer shall suspend contract performance immediately when the agency receives notice of protest from the GAO **within 10 days of the date of contract award or within five days AFTER THE DATE OFFERED for the required post-award debriefing**. The CICA stay applies under either deadline, whichever is the later. 31 U.S.C. § 3553(d); 4 C.F.R. § 21.6 (1998); FAR 33.104(c); AFARS 33.104(c); AFFARS 5333.104(c).

3. "Proposed Award" Protests: An agency's decision to cancel a solicitation based upon the determination that the costs associated with contract performance would be cheaper if performed in-house (i.e., by federal employees) may be subject to the CICA stay. See Inter-Con Sec. Sys., Inc. v. Widnall, No. C 94-20442 RMW, 1994 U.S. Dist. LEXIS 10995 (D.C. Cal. July 11, 1994); Aspen Sys. Corp., B-228590, Feb. 18, 1988, 88-1 CPD ¶ 166. In reviewing a protest of an in-house cost comparison, the GAO will look to whether the agency complied with applicable procedures in selecting in-house performance over contracting. DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543.

4. "The CICA Override"—Relief From The CICA Stay. 31 U.S.C. § 3553(c) and (d); FAR 33.104(b) and (c); AFARS 33.104; AFFARS 5333.104.

a. Pre-Award Protest Stay: The head of the contracting activity may, on a nondelegable basis, authorize the award of a contract:

(1) Upon a written finding that urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General; **AND**

(2) The agency is likely to award the contract within 30 days of the written override determination.

b. Post-Award Protest Stay: The head of the contracting activity may, on a nondelegable basis, authorize **continued performance** under a previously awarded contract upon a written finding that:

(1) Continued performance of the contract is **in the best interests of the United States**; or

(2) Urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General.

c. In either instance, if the agency is going to override the automatic stay, it must notify the GAO. Banknote Corp. of America, Inc., B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53 (GAO will not review the decision).

5. Override decisions, however, are subject to judicial review. See Dairy Maid Dairy v. United States, 837 F. Supp. 1370 (E.D. Va. 1993) (Army improperly overrode automatic stay by failing to consider using incumbent contractor to continue services; pre-award and post-award stays require separate determinations and findings); see also DTH Mgmt. Group v. Kelso, 844 F. Supp. 251 (E.D.N.C. 1993).

6. An agency's decision to override a GAO CICA stay based upon its determination that such action is in the best interests of the United States may or may not be subject to judicial review—depending on the federal circuit. Compare Foundation Health Fed. Servs. v. United States, No. 93-1717, 39 CCF ¶ 76,681 (D.D.C. 1993) with Management Sys. Applications Inc. v. Dep't of Health and Human Servs., No. 2:95cv320 (E.D. Va. Apr. 11, 1995).[6] But see Hughes Missile Sys. Co. v. Department of the Air Force, No. 96-937-A (E.D. Va. July 19, 1996).[7]

G. Availability of Funds. The "end-of-fiscal-year spending spree" results in a large volume of protest action during the August-November time frame. To allay worries about the loss of funds pending protest resolution, 31 U.S.C. § 1558 provides that funds will not expire for 100 days following resolution of the bid protest.[8] FAR 33.102(c).

H. Scope of GAO Review.

1. The scope of GAO's review of protests is similar to that of the Administrative Procedures Act. 5 U.S.C. § 706. GAO does not conduct a *de novo* review. Instead, it reviews the agency's actions for violations of procurement statutes or regulations, arbitrary or capricious actions, or abuse of discretion. New Breed Leasing Corp., B-274201, Nov. 26, 1996, 96-2 CPD ¶ 202 (agency violated CICA due to lack of reasonable advanced planning) But see Datacom, Inc., B-274175, Nov. 25, 1996, 96-2 CPD ¶ 199 (sole source award proper when the result of high-level political intervention); Serv-Air, Inc., B-258243, Dec. 28, 1994, 96-1 CPD ¶ 267; Hattal & Assocs., B-243357, July 25, 1991, 91-2 CPD ¶ 90.

2. The protester generally has the burden of demonstrating the agency action is clearly unreasonable. The Saxon Corp., B-232694, Jan. 9, 1989, 89-1 CPD ¶ 17.

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[6]See 63 FED. CONT. REP. 561-2 (1995) for a discussion of this case.

[7]For a published account of this case, see *Court Denies Hughes' Request to Enjoin JASSM Contracts Pending Resolution of Protest*, 66 FED. CONT. REP. 71 (1996).

[8]This authority applies to protests filed with the agency, at the GAO, or in a federal court. 31 U.S.C. § 1558. See also OFFICE OF THE GENERAL COUNSEL, UNITED STATES GENERAL ACCOUNTING OFFICE, Principles of Federal Appropriations Law 5-74 (2d ed. 1991).

3. When conducting its review, the GAO will consider the **entire** record surrounding agency conduct, to include statements and arguments made in response to the protest. AT&T Corp., B-260447, Mar. 4, 1996, 96-1 CPD ¶ 200. The agency may not, however, for the first time in a protest, provide its rationale for the decision in a request for reconsideration. Department of the Army—Recon., B-240647, Feb. 26, 1991, 91-1 CPD ¶ 211.

4. As part of its review, the GAO has demonstrated a willingness to probe factual allegations and assumptions underlying agency determinations or award decisions. See, e.g., Redstone Tech. Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181; Secure Servs. Tech., Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421 (GAO conducted a comparative analysis of competitors' proposals and the alleged deficiencies in them and sustained the protest when it determined that the agency had not evaluated the proposals in a consistent manner); Frank E. Basil, Inc., B-238354, May 22, 1990, 90-1 CPD ¶ 492 (GAO reviewed source selection plan).

5. If the protester alleges bad faith, the GAO will presume the agency acted in good faith. The protester must present "well-nigh irrefragable proof" of a specific and malicious intent to harm the protester. Sanstrans, Inc., B-245701, Jan. 27, 1992, 92-1 CPD ¶ 112.

6. Timeliness Exceptions. When challenging the timeliness of a protest, the burden is on the government. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65. If untimely on its face, the protester is required to include "all the information needed to demonstrate . . . timeliness." 4 C.F.R.§ 21.2(b) (1998); Foerster Instruments, Inc., B-241685, Nov. 18, 1991, 91-2 CPD ¶ 464.

7. When there is a doubt as to whether a protest is timely, the GAO will generally consider the protest. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 405.

8. If a protester alleges that a requirement is unduly restrictive, the government must make a *prima facie* case that the restriction is necessary to meet agency needs. Mossberg Corp., B-274059, Nov. 18, 1996, 96-2 CPD ¶ 189 (solicitation requirements for procurement of shotguns overly restrictive). The burden then shifts to the protester to show that the agency justification is clearly unreasonable. See Morse Boulger, Inc., B-224305, Dec. 24, 1986, 86-2 CPD ¶ 715. See also Saturn Indus., B-261954, Jan. 5, 1996, 96-1 CPD ¶ 9 (Army requirement for qualification testing of transmission component for Bradley Fighting Vehicle was reasonable).

9. To prevail, a protester must demonstrate prejudice. To meet this requirement, a protester must show that but for the agency error, there existed "a substantial chance" that the offeror would have been awarded the contract. Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). See, e.g., Northrop Worldwide Aircraft Servs., Inc.—Recon., B-262181, June 4, 1996, 96-1 CPD ¶ 263 (agency failure to hold discussions); ABB Envtl. Servs., Inc., B-258258.2, Mar. 3, 1995, 95-1 CPD ¶ 126 (agency used evaluation criteria not provided for in solicitation); Tektronix, Inc., B-244958, Dec. 5, 1991, 91-2 CPD ¶ 516 (clearly improper relaxation of a specification requirement for a competitor did not result in relief because protester failed to show that its offer would have been any different absent relaxation).

I. Bid Protest Procedures.

1. The Protest. 4 C.F.R. § 21.1 (1998).

   a. Protests must be **written**.

   b. Although the GAO does not require formal pleadings submitted in a specific technical format, a protest, at a minimum, shall:

      (1) include the name, address, telephone and facsimile (fax) numbers of the protester (or its representative);

      (2) be signed by the protester or its representative;

      (3) identify the contracting agency and the solicitation and/or contract number;

(4) **provide a detailed legal and factual statement of the bases of the protest, to include copies of relevant documents;**

(5) provide all information demonstrating the protester is an interested party and that the protest is timely;

(6) specifically request a decision by the Comptroller General; and

(7) state the form of relief requested.

c. If appropriate, the protest may also include:

(1) a request for a protective order;

(2) a request for specific documents relevant to the protest; and,

(3) a request for a hearing.

d. The GAO may dismiss a protest which is frivolous, or which does not state a valid ground for a protest. 31 U.S.C. ¶ 3554(a)(4); Federal Computer Int'l Corp.--Recon., B-257618, July 14, 1994, 94-2 CPD ¶ 24 (mere allegation of improper agency evaluation made "on information and belief" not adequate); see also Siebe Envtl. Controls, B-275999, Feb. 12, 1997, 97-1 CPD ¶ 70 ("information and belief" allegations not adequate even though government delayed debriefing regarding competitive range exclusion).

(1) At a minimum, a protester must make a *prima facie* case asserting improper agency action. Brackett Aircraft Radio, B-244831, Dec. 27, 1991, 91-2 CPD ¶ 585.

(2) Generalized allegations of impropriety are not sufficient to sustain the protester's burden under the GAO's Bid Protest Rules. See 4 C.F.R. § 21.5(f) (1998); Bridgeview Mfg., B-246351, Oct. 25, 1991, 91-2 CPD ¶ 378; Palmetto Container Corp., B-237534, Nov. 5, 1989, 89-2 CPD ¶ 447.

(3) The protester must show material harm. Tek Contracting, Inc., B-245590, Jan. 17, 1992, 92-1 CPD ¶ 90 (protest that certification requirement was unduly restrictive is denied where protester's product was not certified by any entity); IDG Architects, B-235487, Sept. 18, 1989, 89-2 CPD ¶ 236.

e. The protest must include sufficient information to demonstrate that it is timely. The GAO will not permit protesters to introduce for the first time, in a motion for reconsideration, evidence to demonstrate timeliness. 4 C.F.R. § 21.2(b) (1998). Management Eng'g Assoc.--Recon., B-245284, Oct. 1, 1991, 91-2 CPD ¶ 276.

2. The protester must provide the contracting activity timely notice of the protest. This notification allows the agency to prepare its administrative report for the protest.

a. The agency must receive a complete copy of the protest and all attachments no later than one day after the protest is filed with the GAO. 4 C.F.R. § 21.1(e) (1998); Rocky Mountain Ventures, B-241870.4, Feb. 13, 1991, 91-1 CPD ¶ 169 (failure to give timely notice may result in dismissal of the protest).

b. The GAO will not dismiss a protest, absent prejudice, if the protester fails to timely provide the agency a copy of the protest document. Arlington Pub. Schs., B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16 (although protester late in providing agency protest documents, agency already knew of protest and its underlying bases).

3. The GAO generally provides immediate telephonic notice of a protest to the agency. **It is this notice by the GAO that triggers the CICA stay**, discussed above. 4 C.F.R. § 21.3(a) (1998).

4. Agency List of Documents. In response to a protester's request for production of documents, the agency must provide to all interested parties and the GAO **at least five days prior to submission of the administrative report** a list of:

   a. documents or portions of documents which the agency has released to the protester or intends to produce in its report; and,

   b. documents which the agency intends to withhold from the protester and the reasons underlying this decision.

   c. Parties to the protest must then file any objections to the agency list within two days of receipt of the list.

5. Agency's Administrative Report. The agency must **file an administrative report within 30 days** of telephonic notice by the GAO. 4 C.F.R. § 21.3(c) (1998); FAR 33.104(a)(3)(i). Subject to any protective order, discussed below, the agency will provide copies of the administrative report simultaneously to the GAO, protester(s), and any intervenors. 4 C.F.R. § 21.3(d) (1998).

   a. Mandatory contents of an agency report. 4 C.F.R. § 21.3(c) (1998).

      (1) The protest.

      (2) The protester's proposal or bid.

      (3) The successful proposal or bid.

      (4) The solicitation.

      (5) The abstract of bids or offers.

      (6) A statement of facts by the contracting officer.

(7) All evaluation documents.

(8) All relevant documents.

b. Also included are:

(1) Documents requested by the protester. 4 C.F.R. § 21.3(c) (1998).

(2) A legal memorandum suitable for forwarding to GAO;

(3) An index of all relevant documents provided under the protest.

c. Agencies must include all relevant documents in the administrative report. See Federal Bureau of Investigation—Recon., B-245551, June 11, 1992, 92-1 CPD ¶ 507 (incomplete report misled GAO about procurement's status).

d. Late agency reports. Given the relatively tight time constraints associated with the protest process, the GAO will consider agency requests for extensions of time on a case-by-case basis. 4 C.F.R. § 21.3(f).

6. Document Production.[9] Except as otherwise authorized by GAO, all requests for documents must be filed with GAO and the contracting agency no later than two days after their existence or relevance is known or should have been known, whichever is earlier. The agency then must either provide the documents or explain why production is not appropriate. 4 C.F.R. § 21.3(g) (1998).

7. Protective Orders. Either on its own initiative or at the request of a party to the protest, the GAO may issue a protective order controlling the treatment of protected information. 4 C.F.R. § 21.4 (1998).

[9]**PRACTICE TIP:** Keep in mind that the government has every right to request relevant documents from the protester. See 4 C.F.R. 21.3(d) (1998). See also "GAO Orders Protester to Comply With Agency's Document Request," 61 FED. CONT. REP. 409 (1994).

a. The protective order is designed to limit access to trade secrets, confidential business information, and information that would result in an unfair competitive advantage.

b. The request for a protective order should be filed as soon as possible. It is the responsibility of protester's counsel to request issuance of a protective order and submit timely applications for admission under the order. 4 C.F.R. § 21.4(a) (1998).

c. The GAO shall determine the terms of the protective order prior to the due date for the agency administrative report. 4 C.F.R. § 21.4(a) (1998).

d. Individuals seeking access to protected information may not be involved in the competitive decision-making process of the protester or interested party. 4 C.F.R. § 21.4(c) (1998).

(1) Protesters may retain outside counsel or use in-house counsel, so long as counsel is not involved in the competitive decision-making process. Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222 (access to protected material appropriate even though in-house counsel has regular contact with corporate officials involved in competitive decision-making); Mine Safety Appliance Co., B-242379.2, Nov. 27, 1991, 91-2 CPD ¶ 506 (retained counsel).

(2) The GAO grants access to protected information upon application by an individual. The individual must submit a certification of the lack of involvement in the competitive decision-making process and a detailed statement in support of the certification. Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543.

(3) The GAO may report violations of the protective order to the appropriate bar association of the attorney who violated the order, or may ban the attorney from GAO practice. Additionally, a party whose protected information is disclosed improperly retains all of its remedies at law or equity, including breach of contract. 4 C.F.R. § 21.4(d) (1998). See also "GAO Sanctions 2 Attorneys for Violating Terms of Protective Order by Releasing Pricing Info," 65 FED. CONT. REP. 17 (1996).

(4) If the GAO does not issue a protective order, the government has somewhat more latitude in determining the contents of the administrative report. If the government chooses to withhold any documents from the report, it must include in the report a list of the documents withheld and the reasons therefor. The agency must furnish all relevant documents and all documents specifically requested by the protester. Absent a protective order, the agency may withhold protected information and submit such information to the GAO for *in camera* review. 4 C.F.R. § 21.4(b) (1998).

e. If the agency fails to produce all relevant or requested documents, the GAO may impose sanctions. Among the possible sanctions are:

(1) Providing the document to the protester or to other interested parties.

(2) Drawing adverse inferences against the agency. Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162. (GAO refused to draw an adverse inference when an agency searched for and was unable to find a document that protester speculated should be in the files).

(3) Prohibiting the government from using facts or arguments related to the unreleased documents.

8. Protester must comment on the agency report within 10 days of receipt. Failure to comment or request a decision on the record will result in dismissal. 4 C.F.R. § 21.3(i) (1998). Keymiaee Aero-Tech, Inc., B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153; Piedmont Sys., Inc., B-249801, Oct. 28, 1992, 92-2 CPD ¶ 305 (agency's office sign-in log used to establish date when protester's attorney received agency report); Aeroflex Int'l, Inc., B-243603, Oct. 7, 1991, 91-1 CPD ¶ 311 (protester held to deadline even though the agency was late in submitting its report); Kinross Mfg. Co., B-232182, Sept. 30, 1988, 88-2 CPD ¶ 309.

9. Hearings. On its own initiative or upon the request of the protester, the government, or any interested party, the GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why the requester believes a hearing is necessary and why the matter cannot be resolved without oral testimony. 4 C.F.R. § 21.7(a) (1998).

   a. The GAO officer has the discretion to determine whether or not to hold a hearing and the scope of the hearing.[10] Jack Faucett Assocs.--Recon., B-254421, Aug. 11, 1994, 94-2 CPD ¶ 72.

      (1) As a general rule, the GAO conducts hearings where there is a factual dispute between the parties which cannot be resolved without oral examination or without assessing witness credibility, or where an issue is so complex that developing the protest record through a hearing is more efficient and less burdensome than proceeding with written pleadings only. Southwest Marine, Inc., B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56 (as a result of improper destruction of evaluation documentation by agency, GAO requested hearing to determine adequacy of agency award decision); see also Allied Signal, Inc., B-275032, Jan. 17, 1997, 97-1 CPD ¶ 136 (protest involving tactical intelligence system required hearing and technical assistance from GAO staff).

[10]According to the GAO's procedural rules, hearings are ordinarily conducted in Washington, D.C. The rule further notes that hearings may also be conducted by telephone. 4 C.F.R. § 21.7(c) (1998).

(2) Absent evidence that a protest record is questionable or incomplete, the GAO will not hold a hearing "merely to permit the protester to reiterate its protest allegations orally or otherwise embark on a fishing expedition for additional grounds of protest" since such action would undermine GAO's ability to resolve protests expeditiously and without undue disruption of the procurement process. Town Dev., Inc., B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155.

b. The GAO may hold pre-hearing conferences to resolve procedural matters, including the scope of discovery, the issues to be considered, and the need for or conduct of a hearing. 4 C.F.R. § 21.7(b) (1998).

c. Note that the GAO may draw an adverse inference if a witness fails to appear at a hearing or fails to answer a relevant question. This rule applies to the protester, interested parties and the agency. 4 C.F.R. § 21.7(f) (1998).

10. Alternative Dispute Resolution. The GAO has two available forms of alternative dispute resolution (ADR) – Negotiation Assistance and Outcome Prediction.

a. Negotiation Assistance. The GAO attorney will assist the parties with reaching a "win/win" situation. This type of ADR occurs usually with protests challenging a solicitation term or a cost claim.

b. Outcome Prediction. The GAO attorney will inform the parties of what he or she believes will be the protest decision. The losing party can then decide whether to withdraw or continue with the protest. Outcome prediction may involve an entire protest or certain issues of a multi-issue protest. The single most important criterion in outcome prediction is the GAO attorney's confidence in the likely outcome of the protest.

c. For more information on GAO's use of ADR techniques, see *GAO's Use of "Negotiation Assistance: and "Outcome Prediction" as ADR Techniques*, Federal Contracts Report, vol. 71, page 72.

11. The GAO will issue a decision within 100 days after the filing of the protest.[11] 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9.

12. Express Option. 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10 (1998).

a. Decision in 65 days.

b. The protester, agency, or other interested party may request the express option in writing within five days after the protest is filed. The GAO has discretion to decide whether to grant the request. Generally, the GAO reserves use of this expedited procedure for protests involving relatively straightforward facts and issues.

c. The GAO has considerable flexibility in how a protest under the express option is conducted, to include accelerating the protest schedule and issuing a summary decision. 4 C.F.R. § 21.10(e) (1998).

J. Remedies.

1. GAO decisions are "recommendations." 31 U.S.C. § 3554; Rice Servs., Ltd. v. United States, 25 Cl. Ct. 366 (1992); Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).

2. Agencies that choose not to implement GAO's recommendations fully within 60 days of a decision must report this fact to the GAO. FAR 33.104(g). The GAO, in turn, must report all instances of agency refusal to accept its recommendation to Congress. 31 U.S.C. § 3554(e).

3. The GAO may recommend that an agency grant the following remedies (4 C.F.R. § 21.8):

a. Refrain from exercising options under an existing contract;

[11] **PRACTICE TIP:** Parties to the protest may check on the status of their protest by calling GAO's bid protest status line at (202) 512-5436. Additionally, quick access to newly issued decisions can be obtained from the GAO Internet Homepage at: http://www.gao.gov.

b. Termination of an existing contract;

c. Recompete the contract;

d. Issue a new solicitation;

e. Award of the contract consistent with statute and regulation; or

f. Such other recommendation(s) as the GAO determines necessary to promote compliance with CICA.

4. Impact of a Recommended Remedy. In crafting its recommendation, the GAO will consider all circumstances surrounding the procurement, to include: the seriousness of the deficiency; the degree of prejudice to other parties or the integrity of the procurement process; the good faith of the parties; the extent of contract performance; the cost to the government; the urgency of the procurement; and the impact on the agency's mission. 4 C.F.R. § 21.8(b).

5. CICA Override. However, where the head of the contracting activity decides to continue contract performance because it represents the best interests of the government, the GAO "shall" make its recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 4 C.F.R. § 21.8(c). Department of the Navy – Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 (Navy contends that "it may not be able to afford" costs associated with GAO recommendation).

K. Protest Costs, Attorneys Fees, and Bid Preparation Costs.

1. The GAO will issue a declaration on the entitlement to costs of pursuing the protest, to include attorneys fees, in each case after agencies take corrective action. 4 C.F.R. § 21.8(d) (1998). The recovery of protest costs is neither an "award" to protester nor is it a "penalty" imposed upon the agency, but is "intended to relieve protesters of the financial burden of vindicating the public interest." Defense Logistics Agency—Recon., B-270228, Aug. 21, 1996, 96-2 CPD ¶ 80.

a. In practice, if the agency takes remedial action promptly, GAO generally will not award fees. See J.A. Jones Management Servs., Inc., - - Costs B-284909.4, Jul. 31, 2000 (GAO declined to recommend reimbursement of costs where agency took corrective action promptly to supplemental protest allegation); Tidewater Marine, Inc.—Request for Costs, B-270602, Aug. 21, 1996, 96-2 CPD ¶ 81 (the determination of when the agency was on notice of error is "critical"); see also LORS Medical Corp., B-270269, Apr. 2, 1996, 96-1 CPD ¶ 171 (timely agency action measured from filing of initial protest, not time of alleged improper action by agency). The GAO has stated that, in general, if the agency takes corrective action by the due date of the agency report, such remedial action is timely. Kertzman Contracting, Inc., B-259461, May 3, 1995, 95-1 CPD ¶ 226 (agency's decision to take corrective action one day before agency report due was "precisely the kind of prompt reaction" GAO regulations encourage); Holiday Inn - Laurel—Entitlement to Costs, B-265646, Nov. 20, 1995, 95-2 CPD ¶ 233 (agency took corrective action five days after comments filed by protester).

b. If the agency delays taking corrective action unreasonably, however, the GAO will award fees. Griner's-A-One Pipeline Servs., B-255078, July 22, 1994, 94-2 CPD ¶ 41, (corrective action taken two weeks following filing of agency administrative report found untimely). The GAO will consider the complexity of the protested procurement in determining what is timely agency action. Lynch Machiner Co., Inc., B-256279, July 11, 1994, 94-2 CPD ¶ 15 (protester's request for costs denied where agency corrective action taken three months following filing of protest complaint).

c. Agency corrective action must result in some competitive benefit to the protester. Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100 (protester not entitled to fees and costs where the agency cancels a competitive solicitation and proposes to replace it with a sole source acquisition; no corrective action taken in response to the protest).

d. Protester must file its request for declaration of entitlement to costs with the GAO within 15 days after learning that the agency is taking corrective action. 4 C.F.R. § 21.8(e) (1998). Moon Eng'g, B-247053, Aug. 27, 1992, 92-2 CPD § 129.

2. If the GAO determines that the protester is entitled to recover its costs:

   a. The protester must submit a claim for costs within 60 days of the receipt of the GAO decision. Failure to file within 60 days may result in forfeiture of the right to costs. 4 C.F.R. § 21.8(f) (1998). See Aalco Forwarding, Inc., B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 (protesters' failure to file an **adequately** supported initial claim within the 60-day period resulted in forfeiture of right to recover costs). See also Dual Inc. - - Costs, B-280719.3, Apr. 28, 2000 (rejecting claim for costs where claim was filed with contracting agency more than 60 days after protester's counsel received a protected copy of protest decision under a protective order).

   b. Recovery of costs is limited to those costs incurred in pursuing the claim before the GAO. 4 C.F.R. § 21.8(f)(2) (1998); DIVERCO, Inc.—Claim for Costs, B-240639, May 21, 1992, 92-1 CPD ¶ 460.

3. Interest on costs is not recoverable. Techniarts Eng'g—Claim for Costs, B-234434, Aug. 24, 1990, 90-2 CPD ¶ 152.

4. Amount of attorney's fees and protest costs is determined by reasonableness. See, e.g., JAFIT Enters., Inc. – Claim for Costs, B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125 (GAO allowed only 15% of protest costs and fees). Equal Access to Justice Act standards do **not** apply. Attorneys' fees are limited to not more than $150 per hour. Similarly, fees for experts and consultants are capped at "the highest rate of compensation for expert witness paid by the Federal Government." 31 U.S.C. § 3554(c)(2); FAR 33.104(h).[12]

[12]The FAR refers to 5 U.S.C. § 3109 and Expert and Consultant Appointments, 60 Fed. Reg. 45649, Sept. 1, 1995, citing 5 C.F.R. § 304.105.

5. As a general rule, a protester is reimbursed costs incurred with respect to all protest issues pursued, not merely those upon which it prevails. Price Waterhouse - - Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38. The GAO has limited award of costs to successful protesters where part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest. TRESP Associates, Inc. - - Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 (no need to allocate attorneys' fees between sustained protest and those issues not addressed where all issues related to same core allegation that was sustained).

6. A protester may recover costs on a sustained protest despite the fact that the protester did not raise the issue that the GAO found to be dispositive. The GAO may award costs even though the protest is sustained on a theory raised by the GAO *sua sponte*. The GAO limits this theory of recovery, however, to those issues that are not so separate and distinct as to constitute a separate protest. Department of Commerce—Recon., B-238452, Oct. 22, 1990, 90-2 CPD ¶ 322.

7. The protester must document its claim for attorneys fees. Consolidated Bell, Inc., B-220425, Mar. 25, 1991, 91-1 CPD ¶ 325 (claim for $376,110 reduced to $490 because no reliable supporting documentation).

8. Bid Preparation Costs. 4 C.F.R. § 21.8(d)(2) (1998).

   a. Anticipatory profits are not recoverable. Keco Indus., Inc. v. United States, 192 Ct. Cl. 773, 784 (1970); DaNeal Constr., Inc., B-208469, Dec. 14, 1983, 83-2 CPD ¶ 682.

   b. GAO has awarded bid preparation costs when no other practical relief was feasible. See, e.g., Tri Tool, Inc.—Modification of Remedy, B-265649.3, Oct. 9, 1996, 96-2 CPD ¶ 139.

   c. As with claims for legal fees, the protester must document its claim for bid preparation and protest costs. A protester may not recover profit on the labor costs associated with prosecuting a protest or preparing a bid. Innovative Refrigeration Concepts — Claim for Costs, B-258655.2, July 16, 1997, 97-2 CPD ¶ 19 (protester failed to show that claimed rates for employees reflected actual rates of compensation).

L. "Appeal" of the GAO Decision.

1. Reconsideration of GAO Decisions. The request for reconsideration must be submitted to the GAO within 10 days of learning of the basis for the request or when such grounds should have been known, whichever is earlier. Speedy Food Serv., Inc.—Recon., B-274406, Jan. 3, 1997, 97-1 CPD ¶ 5 (request for reconsideration untimely where it was filed more than 10 days after protester noted the initial decision on GAO's Internet site). The requester must state the factual and legal grounds upon which it seeks reconsideration. Rehashing previous arguments is not fruitful. 4 C.F.R. § 21.14 (1998); Banks Firefighters Catering, B-257547, Mar. 6, 1995, 95-1 CPD ¶ 129; Windward Moving & Storage Co.—Recon., B-247558, Mar. 31, 1992, 92-1 CPD ¶ 326.

2. Requests for reconsideration must be based upon new facts, unavailable at the time of the initial protest. The GAO does not allow piecemeal development of protest issues. Consultants on Family Addiction — Recon., B-274924.3, June 12, 1997, 97-1 CPD & 213; Department of the Army — Recon., B-254979, Sept. 26, 1994, 94-2 CPD ¶ 114.

3. The GAO will not act on a motion for reconsideration if the underlying procurement is the subject of federal court litigation, unless the court has indicated interest in the GAO's opinion. Department of the Navy, B-253129, Sept. 30, 1993, 96-2 CPD ¶ 175.

4. A protester always may seek judicial review of an agency action under the Administrative Procedures Act. Courts may, however, give great deference to the GAO in light of its considerable procurement expertise. Shoals American Indus., Inc. v. United States, 877 F.2d 883 (11th Cir. 1989). But see California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).

5. This deference is not absolute. A court may still find an agency decision to lack a rational basis, even if the agency complies with the GAO's recommendations in a bid protest. Firth Constr. Co. v. United States, 36 Fed. Cl. 268, 271-72 (1996); Advanced Distribution Sys., Inc. v. United States, 34 Fed. Cl. 598, 604 n. 7 (1995); see also Mark Dunning Indus. v. Perry, 890 F. Supp. 1504 (M.D. Ala. 1995) (court holds that "uncritical deference" to GAO decisions is inappropriate). But see Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (Federal Circuit notes that "it is the usual policy, if not the obligation, of procuring departments to accommodate themselves to positions formally taken by the General Accounting Office").

IV. UNITED STATES COURT OF FEDERAL CLAIMS.

A. Statutory Authority.

1. Tucker Act. The Tucker Act grants the U.S. Court of Federal Claims (COFC) jurisdiction to decide any claim for damages against the United States founded upon the Constitution, Act of Congress, agency regulation, or express or implied-in-fact contract with the United States not sounding in tort. 28 U.S.C. § 1491.

2. Federal Courts Improvement Act of 1982. The COFC also was granted authority by the Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3), "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper" (i.e., injunctive relief).

3. Administrative Dispute Resolution Act of 1996. On 30 September 1996, Congress passed the Administrative Dispute Resolution Act of 1996. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) [hereinafter "ADRA"]. Effective December 31, 1996, ADRA provides jurisdiction to both the Court of Federal Claims and the federal district courts to hear pre-award and post-award bid protests. Specifically, the COFC has jurisdiction to hear protests by interested parties that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).

a. The ADRA directs the COFC to "give due regard" to national security/defense interests and "the need" for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)).

b. The COFC has indicated that it will apply bid protest law developed by the U.S. District Court of the District of Columbia under the "Scanwell doctrine." (Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970)). See United States Court of Federal Claims, Court Approved Guidelines for Procurement Protest Cases (Dec. 11, 1996).

B. General Order No. 38. On 7 May 1998, the COFC issued General Order No. 38, which describes standard bid protest practices before the court. General Order No. 38 provides procedural guidance specifically tailored for bid protest litigation to enhance the overall effectiveness of protest resolution at the COFC. General Order No. 38, United States Court of Federal Claims. (The guidance provided by General Order No. 38 is cited throughout the remainder of this outline section.)

C. Who May Protest?

1. Interested Party. In its guidelines, the COFC states that for procurement protests, an interested party "is defined in 31 U.S.C. § 3551(2)," which is the same definition as that used in GAO protests. COFC Guidelines Preamble. CC Distribs., Inc. v. United States, 38 Fed.Cl. 771 (1997); *but see* CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (noting that "there is not a perfect joinder between the GAO's definition of interested party and the Tucker Act's jurisdictional waiver").

2. Intervenors. The COFC allows parties to intervene as a matter of right and allows permissive intervention. Rules of the United States Court of Federal Claims (RCFCs), Rule 24.

a. Intervention of Right. Allowed when the right of intervention is mandated by statute or the applicant for intervention has an interest relating to the property or transaction that is the subject of the protest. RCFC 24(a). Case law developed by the U.S. District Court of the District of Columbia suggests that the protester must be able to demonstrate some "injury-in-fact" or otherwise be within the "zone of interest" of the statute or regulation to have standing before the court. See Scanwell Lab. Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). See also Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir. 1981).

b. Permissive Intervention. The COFC may allow permissive intervention by parties with a claim or question of law or fact that is "in common" with that of the main action. The court will consider whether such intervention will "unduly delay or prejudice the adjudication" of the main action. RCFC 24(b).

c. Intervention by the Proposed Awardee. An "apparent successful bidder" may enter an appearance at any hearing on an application for injunctive relief . RCFC 65(f). But see Anderson Columbia Envtl., Inc., 42 Fed. Cl. 880 (1999) (holding that contract awardee was not permitted to intervene as its interests were represented adequately by an existing party, i.e., the government).

3. The court permits third party practice. RCFC 14.

4. Effect of Judicial Proceedings. A protester may file its protest with the COFC despite the fact that it was the subject of a GAO protest.

D. What May Be Protested? The ADRA of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C. § 1491).

1. An "interested party" may challenge the terms of a solicitation, a proposed award, the actual contract award, or any alleged violation of statute or regulation associated with a procurement or proposed procurement. 28 U.S.C. § 1491(a). See CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (protester has standing to challenge out-of-scope contract change).

2. The COFC has jurisdiction to hear both pre- and post-award protests. 28 U.S.C. § 1491(b)(1).

E. When Must a Protest Be Filed?

1. Unlike protests filed with the GAO, the COFC currently has no specific timeliness requirement. Generally, however, one would expect protests to be filed very quickly in order to demonstrate the immediate and irreparable harm necessary to obtain injunctive relief. Hence, the COFC will "typically" schedule a temporary restraining order (TRO) hearing within one business day of filing of the TRO application. COFC Guidelines ¶ 7.

2. Defective Solicitation. The COFC appears to have adopted the GAO rule that the agency must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals.** See Aerolease Long Beach v. United States, 31 Fed. Cl. 342 (1994), aff'd 39 F.3d 1198 (Fed. Cir. 1994); see also 4 C.F.R. § 21.2(a)(1) (1998).

3. Absent a need to show immediate and irreparable harm, actions must be commenced within six years of the date the right of action first accrues. 28 U.S.C. § 2401(a).

F. Temporary Restraining Orders and Preliminary Injunctions.

1. RCFC 65(a) provides for Temporary Restraining Orders and Preliminary Injunctions. The court applies the traditional four-element test. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 41 CCF ¶ 77,078 (Fed.Cl. 1997); Magnavox Elec. Sys., Co. v. United States, 26 Cl. Ct. 1373, 1378 (1992); We Care, Inc. v. Ultra-Mark, Int'l Corp., 930 F.2d 1567 (Fed. Cir. 1991); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983). These elements are:

   a. Likelihood of success on the merits; Cincom Sys., Inc. v. United States, 37 Fed. Cl. 266 (1997) (court considered fact that plaintiff lost in earlier GAO protest);

   b. Degree of immediate irreparable injury if relief is not granted; Magellan Corp. v. United States, 27 Fed. Cl. 446, 448 (1993) (no irreparable harm if protester will have other opportunities to supply product);

c. Degree of harm to the party being enjoined if relief is granted; Magellan Corp. v. United States, 27 Fed.Cl. 446, 448 (1993); Rockwell Int'l Corp. v. United States, 4 Cl. Ct. 1, 6 (1983) (injunctive relief should be denied when national security and defense concerns are raised); and,

d. Impact of the injunction on public policy considerations. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 37 Fed. Cl. 266 (1997) citing Southwest Marine, Inc. v. United States, 3 Cl. Ct. 611, 613 (1983) (public policy places national security/defense interests over public interest in fair and open competition).

3. Posting of Bonds and Securities. A protester must post bond via an "acceptable surety" in order to obtain a preliminary injunction. The COFC determines the sum of the bond security. This security covers the potential costs and damages incurred by the agency if the court subsequently finds that the government was unlawfully enjoined or restrained. RCFC 65(c).

a. If the agency voluntarily agrees to withhold award or contract performance, there is no bonding requirement. COFC Guidelines ¶ 6.

b. Only bonding companies holding certificates of authority from the Secretary of the Treasury are "acceptable sureties." RCFC 65.1.

4. In its published guidelines, the COFC has indicated that it will handle TRO hearings involving out-of-town attorneys via teleconference. The guidance further states that "the judge might require the Government to appear in person, in any event." COFC Guidelines ¶ 7.

G. Standard of Review.

1. The COFC will review the agency's action pursuant to the Administrative Procedures Act (APA). 5 U.S.C. § 706. Hence, the court looks to whether the agency acted arbitrarily, capriciously, or not otherwise in accordance with law. COFC Guidelines Preamble. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997).

2. The plaintiff must demonstrate either that the agency decision-making process lacks a rational basis or that there is a clear and prejudicial violation of applicable statutes or regulations. Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996); Magellan Corp. v. United States, 27 Fed. Cl. 446 (1993); RADVA Corp. v. United States, 17 Cl. Ct. 812 (1989). The court will consider any one, or all, of the following four factors in determining whether the agency abused its discretion or acted in an arbitrary or capricious manner:

   a. Subjective bad faith on the part of the agency official;

   b. Absence of a reasonable basis for the agency decision or action;

   c. Amount of discretion given by procurement statute or regulation to the agency official; and

   d. Proven violation of pertinent statutes or regulations. See Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988).

3. To obtain a permanent injunction, the plaintiff must show by a preponderance of the evidence that the challenged action is irrational, unreasonable, or violates an acquisition statute or regulation. See Isratex, Inc. v. United States, 25 Cl. Ct. 223 (1992); see also Logicon, Inc., 22 Cl. Ct. 776 (1991) (plaintiff need only demonstrate likelihood of success on the merits for temporary restraining order).

4. The court may give decisions by the General Accounting Office great deference. Honeywell, Inc. v. United States, 870 F.2d 644 (Fed Cir. 1989). This deference, however, is not absolute. See Health Sys. Mktg. & Dev. Corp. v. United States, 26 Cl. Ct. 1322 (1992); California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).

H. Agency Administrative Record. The court accomplishes its review "based upon an examination of the 'whole record' before the agency." Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997). General Order No. 38 encourages early production of the "core documents" of the administrative record to "expedite the final resolution of the case." General Order No. 38, United States Court of Federal Claims.

1. Core Documents. The "core documents" of the Administrative Record include, as appropriate, the:

   a. Agency's procurement request, purchase request, or statement of requirements;

   b. Agency's source selection plan;

   c. Bid abstract or prospectus of bid;

   d. Commerce Business Daily or other public announcement of the procurement;

   e. Solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers;

   f. Documents and information provided to bidders during any pre-bid or pre-proposal conference;

   g. Agency's responses to any questions about or requests for clarification of the solicitation;

h. Agency's estimates of the cost of performance;

i. Correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;

j. Records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;

k. Records of the results of any bid opening or oral motion auction in which the protester, awardee, or other interested parties participated;

l. Protester's, awardee's, and other interested parties' offers, proposals, or other responses to the solicitation;

m. Agency's comptetitive range determination, including supporting documentation;

n. Agency's evaluations of the protester's, awardee's, or other interested parties' offers, or other responses to the solicitation, proposals, including supporting documentation;

o. Agency's source selection decision, including supporting documentation;

p. Pre-award audits, if any, or surveys of the offerors;

q. Notification of contract award and executed contract;

r. Documents relating to any pre- or post-award debriefing;

s. Documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest;

t. Justifications, approvals, determinations and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and

u. The record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.

2. Supplementing the Administrative Record. The COFC may allow supplementation of the administrative record in limited circumstances. Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997) citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) ("little weight" given "*post hoc* rationalizations by the agency"); Graphicdata, LLC v. United States, 37 Fed. Cl. 771, 779 (1997). Among the reasons recognized by the COFC for supplementing the administrative record include:

a. When the agency action is not adequately explained in the record before the court;

b. When the agency failed to consider factors which are relevant to its final decision;

c. When the agency considered evidence not included in the record;

d. When the case is so complex that additional evidence will enhance understanding of the issues;

e. Where evidence arising after the agency action shows whether the decision was correct;

f. Cases where the agency is sued for failure to take action;

g. Cases arising under the National Environmental Policy Act; and

h. Cases where relief is at issue, particularly with respect to injunctive relief.

I. Procedures.

1. The court conducts a civil proceeding without a jury, substantially similar to proceedings in federal district courts. As noted above, the court has its own rules of procedure.

2. The COFC follows the Federal Rules of Civil Procedure "to the extent possible." RCFC 1(b). Consequently, RCFCs correspond to their counterparts within the Federal Rules of Civil Procedure. The rules with decimals, e.g., Rule 65.1, represent modifications to the federal rules.

3. Additionally, the plaintiff must be represented by counsel who is admitted to practice before the court. RCFC 81(a). Finast Metal Prods., Inc. v. United States, 12 Cl. Ct. 759 (1987). General Order No. 38 allows counsel who are not yet members of the COFC bar to make initial filings in a bid protest case (i.e., complaint and other accompanying pleadings), "conditioned upon counsel's prompt pursuit of admission to practice" before the COFC. General Order No. 38, United States Court of Federal Claims.

4. Notification. The protester must hand deliver two copies of all pleadings to the Department of Justice (DOJ), Commercial Litigation Branch, Civil Division. Additionally, the protester must notify by telephone and serve counsel for the "apparent successful bidder" any application for injunctive relief.

5. Requirement for Pre-Filing Notification. General Order No. 38 requires the protester to provide **at least** 24-hours advance notice of the protest filing to the DOJ, the COFC, the procuring agency, and any awardee(s). This requirement allows DOJ time to assign an attorney to the case and permits the COFC to identify the necessary assets to process the case. Although failure to provide pre-filing notice is not jurisdictional, it is "likely to delay the initial processing of the case." General Order No. 38, United States Court of Federal Claims.

6. Initial Filings. As stated above, the protester generally initiates the COFC protest process with the filing of an application for injunctive relief. Specifically, the protest commences with the filing of a complaint. RCFC 3(a). Generally, the complaint is accompanied by the application for injunctive relief. RCFC 65. Additionally, any application must have with it the proposed order, affidavits, supporting memoranda, and other documents upon which the protester intends to rely. RCFC 65(f).

7. Initial Status Conference. The COFC will conduct an initial status conference to address pre-hearing matters, to include: identification of interested parties; any requests for injunctive relief and protective orders; the administrative file; and establishing a timetable for resolution of the protest. The COFC will schedule the initial status conference as soon as practicable following the filing of the complaint.

8. Agency Response. The government must respond to the protester's complaint within 60 days of filing. RCFC 12. Responses to motions must be accomplished within 14 days of service. RCFC 83.2(a). Responses to Rule 12(b) and 12(c) motions and summary judgment motions must be filed within 28 days of service. RCFC 83.2(c).

9. Discovery. The APA mandates that the court's decision should be based upon the agency record. 5 U.S.C. § 706; Camp. v. Pitts, 411 U.S. 138 (1973). Yet, the COFC has authorized limited discovery. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339 (1997) (deposition of contracting officer allowed); Aero Corp., S.A. v. United States, 38 Fed. Cl. 408 (1997) (in light of contemporaneous written explanations supporting procurement decision, deposing procurement officials improper).

10. Protective Orders. The COFC may issue protective orders upon motion by a party to either prevent discovery or to protect proprietary/source selection sensitive information from disclosure. RCFC 26(c). See General Order No. 38, United States Court of Federal Claims. But see Modern Technologies Corp. v. United States, 44 Fed. Cl. 319 (1998) (parties ordered to make available to the public documents that were filed previously under seal pursuant to a protective order because the proprietary and source-selection information had "minimal current value").

11. Hearings. Trial is mandatory unless the case is appropriate for summary judgment or otherwise has been dismissed. RCFC 39(a). If the case goes to trial, the hearing must be held at a location that is most convenient and least expensive for the public. 28 U.S.C. § 173.

12. Briefs. If a protest goes to trial, the COFC frequently requests post-hearing briefs. The format, content, and number of copies for submission of briefs are detailed in the court's procedural rules. RCFC 82-83.

13. Sanctions. The COFC must impose mandatory sanctions under RCFC 11 if a "[p]leading, motion or other paper is signed in violation this rule. . ." RCFC 11. The court **shall** impose sanctions on the person who signed the document in question, a represented party, or both. Id. See Miller Holzwarth, Inc v. United States and Optex Sys., 44 Fed. Cl. 156 (1999) (protester and its representative "effectively misled" the court, the government, and the awardee/intervenor by failing to disclose that it possessed source-selection information at the time that it filed its pleading).

J. Remedies.

1. Equitable relief, i.e., temporary restraining orders, preliminary injunctions, permanent injunctions, and declaratory judgment, is available. Protesters commencing action in this court usually seek injunctive relief.

2. Reasonable bid preparation costs are recoverable. Rockwell Int'l Corp. v. United States, 8 Cl. Ct. 662 (1985).

3. Anticipatory profits are not recoverable. Heyer Prods. Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956); Compubahn, Inc. v. United States, 33 Fed. Cl. 677 (1995).

4. The cost of preparing for performance of an anticipated contract is not recoverable. Celtech, Inc. v. United States, 24 Cl. Ct. 269 (1991).

5. The cost of developing a prototype may be recovered. Coflexip & Servs., Inc. v. United States, 961 F.2d 951 (Fed. Cir. 1992).

K. Attorneys Fees and Protest Costs.

1. The court may award attorneys fees and protest costs pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A); Crux Computer Corp. v. United States, 24 Cl. Ct. 223 (1991); Bailey v. United States, 1 Cl. Ct. 69 (1983).

2. The traditional rule is that only those attorneys fees associated with the litigation are recoverable. Cox v. United States, 17 Cl. Ct. 29 (1989). But see Levernier Constr. Co. v. United States, 21 Cl. Ct. 683 (1990), rev'd 947 F.2d 497 (Fed. Cir. 1991) (costs associated with hiring an expert witness to pursue a claim with the contracting officer, prior to the litigation, not recoverable).

L. Appeals. Appeals from decisions of the Court of Federal Claims are taken to the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3).

V. FEDERAL DISTRICT COURTS.

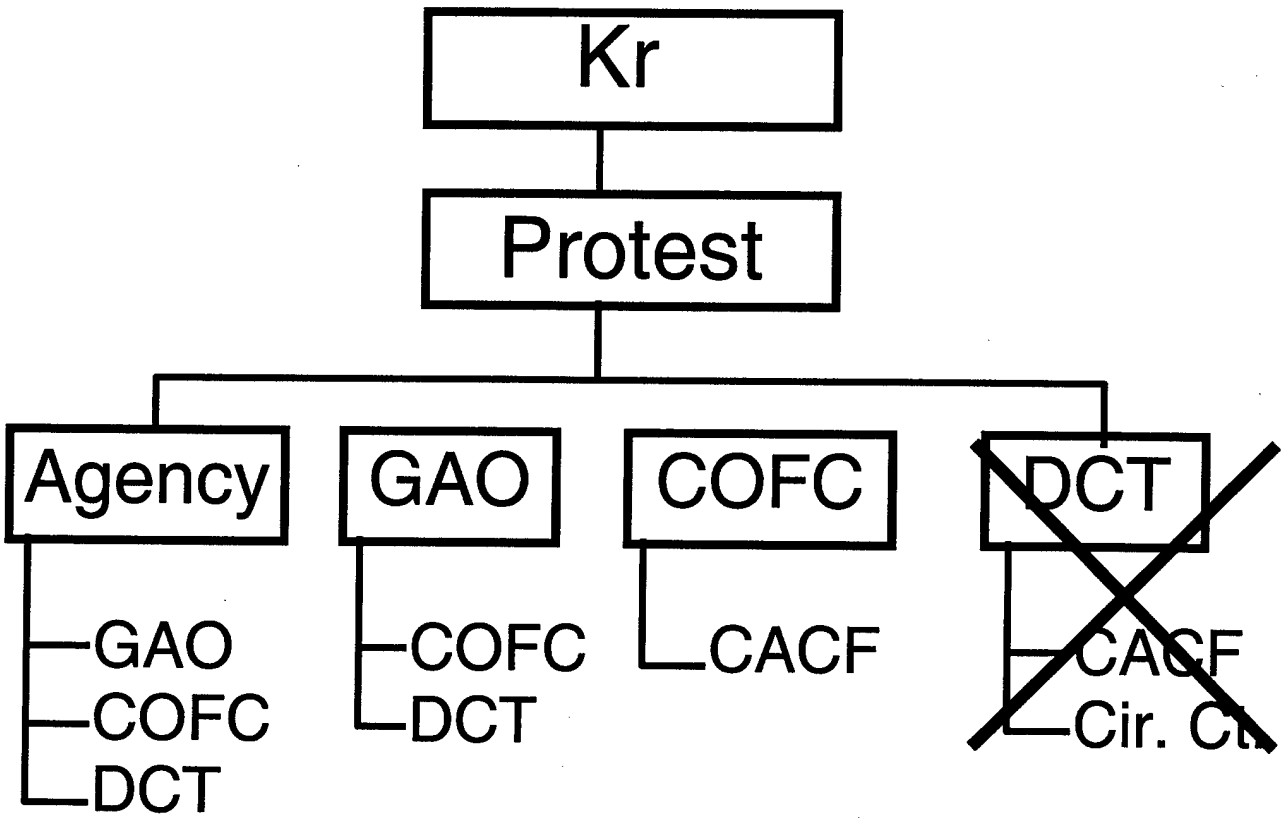
Prior to ADRA, federal district courts reviewed challenges to agency procurement decisions pursuant to the Administrative Procedures Act. 5 U.S.C. § 702. This authority was popularly known as the "Scanwell Doctrine." Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The ADRA granted the federal district courts jurisdictional authority to hear pre-award and post-award bid protests. As with the COFC, the ADRA directed the district courts to "give due regard" to national security/defense interests and "the need" for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)). However, ADRA provided also for the "sunset" of the district courts bid protest jurisdiction as of 1 January 2001, unless Congress acted affirmatively to extend the jurisdiction. Congress did not extend the bid protest jurisdiction, and so it appears that the district courts can no longer review bid protests. A question still remains, and continues to be debated, as to whether the district courts retained bid protest jurisdiction under the "Scanwell" doctrine.

VI. CONCLUSION.

Bid Protests

Multiple Forums



Appendix

Chapter 14
Selected Labor Standards

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CHAPTER 14

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CHAPTER 14

SELECTED LABOR STANDARDS

I. INTRODUCTION.

II. FAIR LABOR STANDARDS ACT OF 1938 (FLSA). 29 U.S.C. §§ 201-219; FAR Subpart 22.10.

A. Application.

1. The FLSA was the first federal wage-hour law having general applicability; its application is not limited to government contracts.

2. The FLSA covers employees engaged in interstate commerce and the production of goods for interstate commerce.

B. Purposes.

1. The statute specifies a federal minimum wage.

2. It requires payment of overtime wages.

3. The FLSA restricts the use of child labor.

III. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA). 40 U.S.C. §§ 327-333; FAR Subpart 22.3; FAR 22.403-3; DFARS Subpart 222.3.

A. Application.

1. Types of employees covered--laborers and mechanics.

LTC Tim Pendolino
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2. The CWHSSA applies to construction and service contracts in excess of $100,000.

3. The CWHSSA usually does not apply to supply contracts. FAR 22.305(c).

B. Purposes.

1. CWHSSA establishes a forty-hour work week and requires the payment of overtime wages for public works and other covered contracts. See Maitland Bros. Inc., ENG BCA No. 5782, 94-1 BCA ¶ 26,473.

2. CWHSSA specifies health and safety requirements.

C. Government Policy. It is government policy that contractors perform without using overtime. FAR 22.103-2. The government will not reimburse the contractor for overtime payments unless the contracting officer determines that overtime is in the government's interest. FAR 52.222-2. Consult agency regulations for guidance on disposition of withheld funds. See, e.g., Defense Finance and Accounting Service-Indianapolis Regulation 37-1, ch. 9, para. 092028.B.2 [hereinafter DFAS-IN 37-1].

IV. COPELAND (ANTI-KICKBACK) ACT. 18 U.S.C. § 874; 40 U.S.C. § 276c; 29 C.F.R. Part 3; FAR 22.403-2.

A. Application.

1. The Anti-Kickback Act protects the wages of any person engaged in the construction or repair of a public building or public work (including projects that are financed at least in part by federal loans or grants).

2. The Act requires prime contractors and subcontractors to submit a weekly statement of compliance pertaining to the wages paid to each employee during the preceding week. FAR 22.403-2; FAR 52.222-10.

B. Purpose. The Act prohibits employers from exacting "kickbacks" from employees as a condition of employment.

C. Recordkeeping Requirements. The Anti-Kickback Act requires contractors and subcontractors to submit weekly payroll reports and statements of compliance. Both the contractors and the agency must keep these records for three years after completion of the contract. FAR 22.406-6.

V. **DAVIS-BACON ACT (DBA).** 40 U.S.C. §§ 276a to 276a-7; 29 C.F.R. Part 5; FAR Subpart 22.4; DFARS Subpart 222.4.

A. Statutory Requirements. 40 U.S.C. § 276a; FAR 22.403-1.

1. Contractors must pay mechanics and laborers a "prevailing wage rate" on federal construction projects performed in the United States that exceed $2,000.

2. The prevailing wage rate is the key to the Davis-Bacon labor standards. The Department of Labor determines the minimum wage, which normally is based on the wage paid to the majority of a class of employees in an area. 29 C.F.R. § 1.2 (1999).

a. A wage determination is not subject to review by the General Accounting Office or boards of contract appeals. See American Fed'n of Labor - Congress of Indus. Org., Bldg., and Constr. Trades Dep't, B-211189, Apr. 12, 1983, 83-1 CPD ¶ 386; Woodington Corp., ASBCA No. 34053, 87-3 BCA ¶ 19,957; but see Inter-Con Sec. Sys., Inc., ASBCA No. 46251, 95-1 BCA ¶ 27,424 (finding board has jurisdiction to consider effect of wage rate determination on contractual rights of a party).

b. "Wages" under the terms of the DBA include the basic hourly pay rates plus fringe benefits.

B. Application. FAR 22.402.

1. The DBA applies to federal contracts involving construction of public buildings or public works.

a. "Public building" or "public work" means a construction or repair project that is carried on by the authority, or with the funds, of a federal agency to serve the interests of the general public.

b. The DBA applies only to construction activity performed at the work site.

c. The "site of the work" is limited to the geographical confines of the construction jobsite, but this is a fluid concept. See L.P. Cavett Co. v. Dep't of Labor, 101 F.3d 1111 (6th Cir. 1996); Ball, Ball, and Brossamer, Inc. v. Reich, 24 F.3d 1447 (D.C. Cir 1994), rev'g Ball, Ball, and Brossamer, Inc. v. Martin, Sec'y of Labor, 800 F. Supp. 967 (D.D.C. 1992); see also Bechtel Constructors Corp., DOL ARB No. 95-045A, July 15, 1996. DOL finally changed its regulations in response to these decisions in late 2000. See 65 Fed. Reg. 80,268 (Dec. 20, 2000) (amending 5 CFR §§ 5.2j and 5.2l).

d. Transportation of materials to and from the site is not considered "construction" covered by the DBA. See 65 Fed. Reg. 80,268 (Dec. 20, 2000) (amending 29 C.F.R. § 5.2(j) (1)(iv) and 5.2(j)(2)); Building & Constr. Trades Dep't, AFL-CIO v. Department of Labor Wage Appeals Board, 932 F.2d 985 (D.C. Cir. 1991), rev'g 747 F. Supp. 26 (D.D.C. 1990) (holding invalid CFR provision that included as "construction" transportation of materials and supplies to and from the site); but see 29 C.F.R.§ 3.2(b) (1999); FAR 22.401.

2. Dual Coverage. See FAR 22.402(b); DFARS 222.402-70.

a. The DBA also may apply to construction work performed under a non-construction contract, e.g., installation support contracts. Apply DBA standards if the contract requires a substantial and segregable amount of construction, repair, painting, alteration, or renovation.

b. The DBA applies to repairs but not to maintenance. The DFARS provides a bright line test to determine whether work is maintenance (Service Contract Act work) or repair (Davis-Bacon Act work). If a service order requires 32 or more work hours, the work is "repair." Otherwise, consider the work to be "maintenance." For painting, the work is subject to the DBA if the service order requires painting of 200 square feet or more, regardless of work hours.

3. Non-Dual Coverage. The DBA does not apply to construction work to be performed as part of non-construction contracts, if:

a. The construction work is incidental to other contract requirements; or

b. The construction work is so merged with nonconstruction work, or so fragmented in terms of the locations or time spans in which it is to be performed, that it cannot be segregated as a separate contractual requirement.

C. Employees Covered and Exempted. 29 C.F.R. § 5.2(m) (1999); FAR 22.401.

1. "Laborers or mechanics" are covered, including:

a. Manual laborers employed by a contractor or subcontractor at any tier. Cf. Ken's Carpets Unlimited v. Interstate Landscaping, Inc., 37 F.3d 1500 (6th Cir. 1994) (non-precedential) (holding prime contractor alone responsible for DBA wages where prime failed to include proper clauses in subcontract); and

b. Working foremen who devote more than 20 percent of their time during a workweek to performing duties as a laborer or mechanic.

2. Office workers, superintendents, technical engineers, scientific workers, and other professionals, executives, and administrative personnel are exempt. 29 C.F.R. Part 541.

D. Types of Wage Determinations. 29 C.F.R. § 1.6 (1999); FAR 22.404-1.

1. General Wage Determinations. 29 C.F.R. §§ 1.5(b) and 1.6(a)(2) (1999); FAR 22.404-1(a). A general wage determination contains prevailing wage rates for the types of construction specified in the determination, and is used in contracts performed within a specified geographical area. General wage determinations remain valid until modified or canceled by the Department of Labor.

2. Project Wage Determinations. 29 C.F.R. § 1.6(a)(1) (1999); FAR 22.404-1(b).

a. The contracting officer uses a project wage determination when no general wage determination applies to the work. The determination is effective for 180 calendar days from the date of its issuance. Once incorporated into a contract, the project wage determination is effective for the duration of that contract.

b. If the project wage determination expires, the contracting officer must follow special procedures; these vary depending on whether the activity contracted by sealed bidding or negotiation. FAR 22.404-5.

E. Procedures for Obtaining Wage Determinations. FAR 22.404-3.

1. General requirements.

a. If a general wage determination is applicable to the project, the agency may use it without notifying DOL. These wage determinations are available on the Internet. Go to http://acqnet.sarda.army.mil or your respective civilian agency website. The Government Printing Office (GPO) also publishes and supplements the general wage determinations.

b. If necessary, a contracting officer may request that DOL establish a recurring general wage determination.

c. A contracting officer may request a project wage determination from DOL by specifying the location of the project and including a detailed description of the types of construction involved and the estimated cost of the project.

d. Processing time for wage rate determinations is at least 30 days.

e. DOL (Wage and Hour Division) defines types of construction for use in selecting proper wage rate schedules. FAR 22.404-2(c).

2. If possible, the contracting officer must include the proper wage rate determination in each solicitation covered by the DBA.

a. Solicitations issued without a wage rate determination must advise that the contracting officer will issue a schedule of minimum wage rates as an amendment to the solicitation. FAR 22.404-4(a). If an offeror fails to acknowledge an amendment to an IFB that adds or modifies a wage rate, the offer may be nonresponsive. ABC Project Mgmt., Inc., B-274796.2, Feb. 14, 1997, 97-1 CPD ¶ 74.

b. If the activity uses sealed bidding, it may not open bids until a reasonable time after furnishing the wage determination to all bidders.

c. In negotiated acquisitions, the contracting officer may open the proposals and conduct negotiations before obtaining the wage determination, but must include the wage determination in the solicitation before calling for final proposal revisions. FAR 22.404-4(c).

F. Failure to Incorporate a Wage Determination. If the contracting officer fails to incorporate a wage determination in a contract upon award, the contracting officer must:

1. Modify the contract to incorporate the required wage rate determination, retroactive to the date of award, and equitably adjust the contract price, if appropriate. FAR 22.404-9(b)(1). See BellSouth Comm. Sys., Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231; or

2. Terminate the contract. FAR 22.404-9(b)(2). Sunspot Garden Ctr. & Country Craft Gift Shop, B-237065.2, Feb. 26, 1990, 90-1 CPD ¶ 224.

G. Modifications of Wage Determinations. FAR 22.404-6.

1. DOL may modify a general or project wage determination. The requirement to include a modification in a solicitation or contract depends upon when the agency receives notice of the modification and the method of acquisition.

a. General determinations. Actual receipt or constructive notice.

b. Project determinations. Actual receipt by the agency.

2. Sealed Bidding. FAR 22.404-6(b).

a. Before bid opening, a modification is effective if:

(1) The agency actually receives it, or DOL publishes notice of the modification in the Federal Register, 10 or more calendar days before the bid opening date; or

(2) The agency actually receives it, or DOL publishes notice, less than 10 calendar days before the date of bid opening, unless the contracting officer finds there is insufficient time before bid opening to notify prospective bidders.

b. If the contracting officer receives an effective modification before bid opening, the contracting officer must extend the opening and permit bidders to revise their offers. FAR 22.404-6(b)(3).

c. If notice of a modification to a general wage determination is published in the Federal Register or posted on the Internet after bid opening, but before award, the modification is effective only if award is not made within 90 days of opening. FAR 22.404-6(b)(6). See Twigg Corp. v. General Servs. Admin., GSBCA No. 14639, 99-1 BCA ¶ 30,217 (holding contractor entitled to an equitable adjustment where agency failed to incorporate revised wage determination).

d. The contracting officer receives an effective rate modification after bid opening, but before award. The contracting officer must:

(1) Award the contract and incorporate the new determination to be effective on the date of contract award; or

(2) Cancel the solicitation.

e. The contracting officer receives an effective rate modification after award. The contracting officer shall change the contract to incorporate the wage modification retroactive to the date of award. FAR 22.404-6(b)(5).

3. Contracting by Negotiation. FAR 22.404-6(c).

a. Any modification received by the contracting agency or published in the Federal Register before award is effective. FAR 22.404-6(c)(1).

b. The contracting officer receives an effective rate modification before award. The contracting officer must amend the solicitation to include the modification and must allow prospective offerors to revise their proposals if the closing date for receipt of proposals has not yet passed. If the closing date has passed, the contracting officer must notify offerors who submitted proposals. FAR 22.404-6(c)(2).

c. The contracting officer receives an effective modification after award. The contracting officer must change the contract to incorporate the rate modification. FAR 22.404-6(c)(3).

H. Contract Administration--Compliance Checks and Investigations.

1. The contracting officer must make checks and conduct investigations to ensure compliance with the DBA requirements. FAR 22.406-7; DFARS 222.406-1.

2. Regular compliance checks include:

   a. Employee interviews;

   b. On-site inspections;

   c. Payroll reviews; and

   d. Comparison of information gathered during checks with available data, e.g., inspector reports and construction activity logs.

3. The contracting officer must conduct special compliance checks when inconsistencies, errors, or omissions are discovered during regular checks or if complaints are filed.

4. Labor Standards Investigations. FAR 22.406-8; DFARS 222.406-8.

   a. The contracting agency investigates when compliance checks indicate that violations are substantial in amount, willful, or uncorrected. The DOL also may perform or request an investigation.

   b. The contracting officer notifies the contractor of preliminary findings, proposed corrective actions, and certain contractor rights. FAR 22.406-8(c).

   c. The contracting officer forwards a report to the agency head who, in certain cases, must forward it to DOL. If the contracting officer finds substantial evidence of criminal activity, the agency head must forward the report to the U.S. Attorney General.

I. Withholding and Suspending Contract Payments. FAR 22.406-9.

1. The contracting officer shall withhold contract payments if the contracting officer believes a violation of the DBA has occurred, or upon request by the DOL. 29 C.F.R. § 5.5(a)(2)(1999); FAR 22.406-9(a)(1) (allowing cross-withholding). See M.E. McGeary Co., ASBCA No. 36788, 90-1 BCA ¶ 22,512; see also DFAS-IN 37-1, ch. 9, para. 092028.B.1. (prescribing procedures for disposition of withheld funds).

2. The contracting officer shall suspend any further payment, advance, or guarantee of funds otherwise due to a contractor if a contractor or subcontractor fails or refuses to comply with the DBA.

J. Disputes Relating to DBA Enforcement. FAR 22.406-10; FAR 52.222-14.

1. The DOL settles labor disputes that are not resolved at the local level. Labor disputes are not reviewable under the Disputes clause. Emerald Maint., Inc. v. United States, 925 F.2d 1425 (Fed. Cir. 1991); Page Constr. Co., ASBCA No. 39685, 90-3 BCA ¶ 23,012; M.E. McGeary Co., supra.

2. Boards of contract appeals and courts review claims relating to labor disputes if the dispute is based on the contractual rights and obligations of the parties. See, e.g., MMC Constr., Inc., ASBCA No. 50,863, 99-1 BCA ¶ 30,322 (assuming jurisdiction over claim for excessive DBA wage withholding); Commissary Servs. Corp., ASBCA No. 48613, 97-1 BCA ¶ 28,749 (assuming jurisdiction over dispute regarding DBA offset when ultimate issue was whether same prime contractor was involved in both contracts); American Maint. Co., ASBCA No. 42011, 92-2 BCA ¶ 24,806 (assuming jurisdiction over contractor's claim for reimbursement of fringe benefits); Central Paving, Inc., ASBCA No. 38658, 90-1 BCA ¶ 22,305 (assuming jurisdiction over claim that original wage rate information in contract was incorrect). Cf. Page Constr. Co., ASBCA No. 39685, 90-3 BCA ¶ 23,012 (declining jurisdiction over claim that government breached statutory obligation).

3. Federal district courts have jurisdiction to review DOL's implementation of the DBA, i.e., district courts entertain appeals from DOL decisions. See, e.g., Building and Constr. Trades Dep't, AFL-CIO v. Secretary of Labor, 747 F. Supp. 26 (D.D.C. 1990).

VI. MCNAMARA-O'HARA SERVICE CONTRACT ACT OF 1965 (SCA). 41 U.S.C. §§ 351-358; 29 C.F.R. Part 4; FAR Subpart 22.10; DFARS Subpart 222.10.

A. Statutory Requirements.

1. Contractors performing any service contract shall pay their employees not less than the FLSA minimum wage.

2. Service contracts over $2,500 shall contain mandatory provisions regarding minimum wages and fringe benefits, safe and sanitary working conditions, notification to employees of the minimum allowable compensation, and equivalent federal employee classifications and wage rates. However, even if omitted from the solicitation, the SCA and applicable wage determinations are binding on contractors. Kleenco, Inc., ASBCA No. 44348, 93-2 BCA ¶ 25,619; Miller's Moving Co., ASBCA No. 43114, 92-1 BCA ¶ 24,707.

3. For contracts over $2,500, the minimum wage and fringe benefits are based on either:

   a. Wage and fringe benefit determinations issued by DOL (FAR 22.1002-2), or

   b. Wages and fringe benefits established by a predecessor contractor's collective bargaining agreement (CBA). 29 C.F.R. §§ 4.5 and 4.152 (1999); FAR 22.1002-3.

B. Application. FAR 22.1002; FAR 22.1003. The SCA applies to:

1. Service contracts.

   a. "Service contract" means any federal contract, except as exempted by the SCA, the principal purpose of which is to furnish services through the use of service employees. 29 C.F.R. § 4.111 (1999); FAR 22.1001. See Ober United Travel Agency, Inc. v. United States Department of Labor, 135 F.3d 822 (D.C. Cir. 1998) (holding that SCA applies to concession contracts for travel services).

b. The SCA applies only to service contracts performed in the United States. 29 C.F.R. § 4.112(a) (1999); FAR 22.1003-2. "United States" includes any state, the District of Columbia, Puerto Rico, and certain possessions and territories.

c. The SCA does not apply if the principal purpose of a contract is to provide something other than services of the character contemplated by the SCA. Further, the SCA is not applicable to services performed incidentally to a non-service contract. J.L. Assocs., B-236698.2, Jan. 17, 1990, 90-1 CPD ¶ 60. See Westbrook Indus., Inc., B-248854, Sept. 28, 1992, 92-2 CPD ¶ 213 (finding reasonable an agency determination that rental of washers and dryers was not subject to SCA).

2. Performed by service employees.

a. The SCA applies only to service employees. "Service employee" means any person engaged in the performance of a service contract or subcontract, other than persons employed in bona fide executive, administrative, or professional capacities. 29 C.F.R. § 4.113 (1999); FAR 22.1001. See 29 C.F.R. Part 541 (defines executives, professionals, and others).

b. The term "service employee" includes all nonexempt persons engaged in the performance of a service contract regardless of any contractual relationship alleged to exist between a contractor or subcontractor and such persons. 29 C.F.R. §§ 4.113 and 4.155 (1999); FAR 22.1001.

C. Statutory Exemptions and Dual Coverage Under the Service Contract Act. 41 U.S.C. § 356; 29 C.F.R. §§ 4.115 to 4.122 (1999); FAR 22.1003-3.

1. Davis-Bacon Act (DBA) coverage.

a. The SCA does not apply if the principal purpose of a contract is to obtain construction work. In such a situation, the DBA covers all work done under the contract, including any incidental service-type work.

b. Dual Coverage. The DBA requires contracting officers to incorporate DBA provisions and clauses into a service contract if there is a substantial amount of segregable construction work.

2. Walsh-Healy Public Contracts Act of 1938 (WHA) coverage.

a. The SCA does not apply if the principal purpose of the contract is the manufacture or delivery of supplies, materials, or equipment.

b. Dual Coverage. Some work under a service contract may be exempt from the SCA because it entails the manufacture or delivery of supplies, materials, or equipment.

3. Miscellaneous statutory exemptions. See FAR 22.1003-3.

D. Administrative Variances and Exemptions.

1. The DOL may establish reasonable variations, tolerances, and exemptions from SCA provisions. 41 U.S.C. § 353(b).

2. Requirements exempted from SCA coverage by the DOL are found at 29 C.F.R. § 4.123 (1999) and FAR 22.1003-4.

3. New Rules for Commercial Items Contracts.

a. Under very limited circumstances, contracts and subcontracts for certain types of commercial services may be exempted from SCA coverage. See 66 Fed. Reg. 5,327 (Jan. 19, 2001) (amending 29 CFR § 4.123(e)).

b. Eight categories of services are potentially exempt under the new rule. 29 CFR §§ 4.123(e)(1) and (e)(2)(i) (2001).

c. The exemption applies only when all of seven criteria are satisfied. 29 CFR § 4.123(e)(2)(ii) (2001).

E. Compensation Standards Under the SCA.

1. Regardless of the amount of a contract or subcontract, a contractor or subcontractor on a contract covered by the SCA must pay service employees at least the minimum wage specified by the FLSA. 29 C.F.R. §§ 4.159 and 4.160 (1999); FAR 22.1002-4.

2. Service contracts over $2,500. 29 C.F.R. §§ 4.161 through 4.163 (1999); FAR 22.1002.

a. A contractor must pay service employees not less than the wage rate issued by DOL for the contract. See General Sec. Servs. Corp., B-280959, Dec. 11, 1998, 98-2 CPD ¶ 143 (holding that agencies may require offerors to propose rates greater than the DOL wage determination). Cf. Ashford v. United States, 43 Fed. Cl. 1 (1997) (holding contractor bound by CBA rates incorporated in contract, even though the CBA was void).

b. If there is no wage determination or effective CBA, the FLSA minimum wage applies.

F. Obtaining Wage Determinations. FAR 22.1007 and 22.1008; DFARS 222.1008; 29 C.F.R. § 4.143 (1999).

1. The contracting officer must obtain wage determinations for:

a. Each new solicitation and contract exceeding $2,500;

b. A contract modification that increases the contract to over $2,500;

c. An extension of the contract pursuant to an option clause or otherwise; or

d. Changes to the scope of a contract that affect labor requirements significantly.

2. On multiple year contracts in excess of $2,500, the contracting officer must request a wage determination annually if funding is annual, or biennially if funding is not subject to annual appropriations.

3. Wage determinations (WD) now may be obtained on-line (e.g., DOD activities may obtain electronic WDs by going to the homepage at: http://acqnet.sarda.army.mil).

   a. Contracting officers may include the Internet WD in the solicitation or modification. These WDs should be obtained no earlier than 15 days before issuance of a solicitation.

   b. The contracting officer must provide DOL a copy of the WD so DOL can confirm its propriety. The contracting officer may proceed with the acquisition, however, unless DOL advises otherwise.

4. Likewise, if a WD is not available on the Internet or the "successor contract" rule applies (see para. G.; infra), the contracting officer must request a WD from DOL by submitting a SF 98.

   a. DOL then issues a WD, and the contracting officer must include it in the solicitation and contract. FAR 22.1012-1. Information Handling Servs., Inc., B-240011, Oct. 19, 1990, 90-2 CPD ¶ 306. Cf. Allen-Norris-Vance Enter., B-243115, July 5, 1991, 91-2 CPD ¶ 23 (contractor that quotes rates below those set forth in the WD is eligible for award).

   b. The contracting officer must request a WD not less than 60 days before initiation or renewal of an acquisition action. If an action is for a nonrecurring or unknown requirement and advance planning was not possible, only 30 days advance notice is required. FAR 22.1008-7.

G. "Successor Contract" Rule.

1. If an activity competes a new contract for substantially the same services and the contract is to be performed in the same locality, the successor contractor must pay wages and fringe benefits at least equal to those contained in a CBA effective under the previous contract. 29 C.F.R. § 4.163 (1999); FAR 22.1008-3(b). See Klate Holt Co. v. International Bhd. of Elec. Workers, 868 F.2d 671 (4th Cir. 1989); Professional Servs. Unified, Inc., ASBCA No. 45799, 94-1 BCA ¶ 26,580.

2. A new CBA will not apply to the follow-on contract if:

   a. The incumbent enters into a CBA that will not be effective until after the incumbent's contract expires;

   b. The agency has timely notified the incumbent contractor and bargaining agent of the applicable acquisition dates, but the agency has not received timely notice of the terms of a new CBA. FAR 22.1008-3(c); see, Tecom, Inc., ASBCA No. 51591, 2001-1 BCA ¶ 31,156; or

   c. DOL determines that the CBA was not negotiated in good faith or that the rates set by the CBA vary substantially from the prevailing rates. Vigilantes, Inc. v. United States, 968 F.2d 1412 (1st Cir. 1992).

3. The "Successor Contract" rule applies only to the base period of the follow-on contract. After the base period, the contractor and the employee bargaining unit may renegotiate the CBA. Per the regulations, each option period, for example, is considered a new contract. 29 C.F.R. §§ 4.143; 4.145 (1999). See Fort Hood Barbers Assn. v. Herman, 137 F.3d 302 (5th Cir. 1998) (holding contractor required to pay wages no less than those in the preceding contract's CBA only for the first two years of a follow-on multi-year contract); but see American Maritime Officers v. Hart, No. 99-1054 (D.D.C. Oct. 14, 1999) (unpub.) (holding that a predecessor contractor's CBA applied to the entire term of a follow-on multiyear contract).

H. Right of First Refusal. FAR Subpart 22.12. See Executive Order 12,933; 59 Fed. Reg. 53,559 (1994).

1. A successor contractor on a contract for maintenance of public buildings must offer the predecessor contractor's employees a right of first refusal for positions the employees are qualified for.

2. Applies only to "public buildings." This does not include buildings on military installations. FAR 22.1202.

I. Price Adjustments for Wage Rate Increases. FAR 52.222-43; 52.222-44.

1. If the FLSA minimum wage rate is amended or a wage rate incorporated upon exercise of an option increases labor costs, the contractor is entitled to a price adjustment. Adjustments are allowed only for increases due to congressional or DOL action. See United States v. Serv. Ventures, Inc., 899 F.2d 1 (Fed. Cir. 1990); Williams Servs., Inc., ASBCA No. 41121, 91-1 BCA ¶ 23,486; see also Gricoski Detective Agency, GSBCA No. 8901, 90-3 BCA ¶ 23,131 (disallowing adjustment because contract included priced option years and contractor failed to factor vacation pay costs into option year prices). Cf. Sterling Servs., Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714 (allowing partial relief on claim arising from corrected wage determination).

a. Adjustments for increased wages arising out of a CBA negotiated during contract performance are not retroactive to date of CBA execution. Adjustments in these cases are required only upon option exercise. See Ameriko, Inc., d/b/a Ameriko Maint. Co., ASBCA No. 50356, 98-1 BCA ¶ 29,505 (holding contractor was not entitled to price adjustment for increase in base year wages where increase was due to CBA executed after contract award); Classico Cleaning Contractors, Inc., DOTBCA No. 2786, 98-1 BCA ¶ 29,648 (holding contractor could not recover during first option year for increases under CBA executed during same year).

b. A contractor is not entitled to a price adjustment for the increased costs of complying with a wage determination that existed at the time of contract award. Holmes & Narver Servs., ASBCA No. 40111, 93-3 BCA ¶ 26,246 (holding contractor could not recover cost of complying with wage determination that had not changed). See Johnson Controls World Servs., Inc., ASBCA No. 40233, 96-2 BCA ¶ 28,548 (agency not liable for failing to inform contractor of previously disapproved conformance request).

2. Recovery under the price adjustment clauses is limited to the types of costs set forth expressly therein. See FAR 52.222-43; FAR 52.222-44 (limiting recovery to wages, fringe benefits, social security and unemployment taxes, and workers' compensation insurance); see also All Star/SAB Pacific, J.V., ASBCA No. 50,856, 98-2 BCA ¶ 29,958 (holding state excise taxes occasioned by a wage rate increase were not compensable).

3. Not all adjustments for increased wage rates, however, are made under the FAR "price adjustment" clauses. If a contractor shows that recovery is based on a clause other than a price adjustment clause, e.g., changes clause, the price adjustment clause limitations are inapplicable.

a. The parties may agree to wage revisions outside the terms of the price adjustment clauses. Security Servs. Inc. v. General Servs. Admin., GSBCA No. 11052, 93-2 BCA ¶ 25,667.

b. The price adjustment clauses may not apply where the adjustment occurred during base year of contract and was not due to a FLSA minimum wage increase. See, e.g., Lockheed Support Sys., Inc. v. United States, 36 Fed. Cl. 424 (1996) (holding that price adjustment clause did not apply to a wage rate price adjustment made four months after the start of a contract); Professional Servs. Unified, Inc., ASBCA No. 45799, 94-1 BCA ¶ 26,580 (price adjustment clause inapplicable where adjustment occurred after contract award).

4. Mutual mistake concerning employee classification or the propriety of a wage determination may shift the cost burden to the government. See, e.g., Richlin Sec. Serv. Co., DOTBCA Nos. 3034, 3035, 98-1 BCA ¶ 29,651 (mutual mistake as to employee classification).

VII. WALSH-HEALEY PUBLIC CONTRACTS ACT OF 1936 (WHA). 41 U.S.C. §§ 35-45; 41 C.F.R. Parts 50-201 to 50-210; FAR Subpart 22.6; DFARS Subpart 222.6.

A. Section 7201 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), eliminated the requirement that contractors must be a regular dealer or manufacturer of the items to be furnished under a contract. See Federal Acquisition Circular 97-1, 62 Fed. Reg. 44,802 (1997).

B. What is Left?

1. Wage Rate Determinations. 41 U.S.C. § 35(a).

a. Under the WHA, DOL determines the prevailing minimum wages based on similar wages in the applicable industry and locale in which the supplies are to be manufactured or furnished under a contract. 41 U.S.C. § 35(b). Presently, however, there is no wage rate determination activity under the Act.

b. The FLSA minimum wage is the Walsh-Healey Act wage rate.

2. Overtime Provisions. 41 U.S.C. § 35(b).

3. Child and Convict Labor. 41 U.S.C. § 35(c).

4. Health and Safety Requirements. 41 U.S.C. § 35(d).

VIII. REMEDIES FOR LABOR STANDARDS VIOLATIONS.

A. Termination for Default.

1. WHA - 41 U.S.C. § 36.

2. DBA - 40 U.S.C. § 276a-1. See Kelso v. Kirk Bros. Mech. Contractors, Inc., 16 F.3d 1173 (Fed. Cir. 1994); Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073, aff'd sub nom Quality Granite Constr. Co. v. Aspin, 26 F.3d 138 (Fed. Cir. 1994)(non-precedential).

3. SCA - 41 U.S.C. § 352(c).

4. CWHSSA - 40 U.S.C. § 333(b) (after DOL makes a determination of noncompliance).

B. Debarment.

1. WHA - 41 U.S.C. § 37; 41 C.F.R. § 50-203.1 (1999) (violation of stipulations or representations of the Act).

2. DBA - 40 U.S.C. § 276a-2(a); 29 C.F.R. § 5.12 (1999) (for disregard of its obligations to employees or subcontractors under the Act).

3. SCA - 41 U.S.C. § 354(a) (providing that absent unusual circumstances, no contract shall be awarded to contractors who violate the SCA). See 29 C.F.R. § 4.188(b)(3) (i)-(ii); Dantran Inc. v. Department of Labor, 171 F.3d 58 (1st Cir. 1999) (holding debarment unwarranted for SCA violation where mitigating circumstances and no aggravating factors were present).

4. CWHSSA - 40 U.S.C. § 333; 29 C.F.R. § 5.12 (1999) (for aggravated or willful violation).

C. Withholding Contract Funds.

1. WHA - 41 U.S.C. § 36 (held in account and paid directly to employees on order of DOL).

2. DBA - 40 U.S.C. § 276a-2 (turned over to GAO, which may pay employees directly).

3. SCA - 41 U.S.C. § 352(a); 29 C.F.R. § 4.187 (1999) (turned over to DOL on order); Castle Bldg. Maint., Inc., GSBCA No. 10003, 90-3 BCA ¶ 23,271; National Sec. Serv. Co., DOT CAB No. 1033, 80-1 BCA ¶ 14,268. See Jeanneate M. Bailey v. Dep't of Labor, 810 F. Supp. 261 (Alaska D.C., 1993) (contracting officer's withholding of underpaid SCA wages arising under another contract was unconstitutional denial of contractor's due process).

4. CWHSSA - 40 U.S.C. § 328(b)(2) (held in account and paid directly to employees).

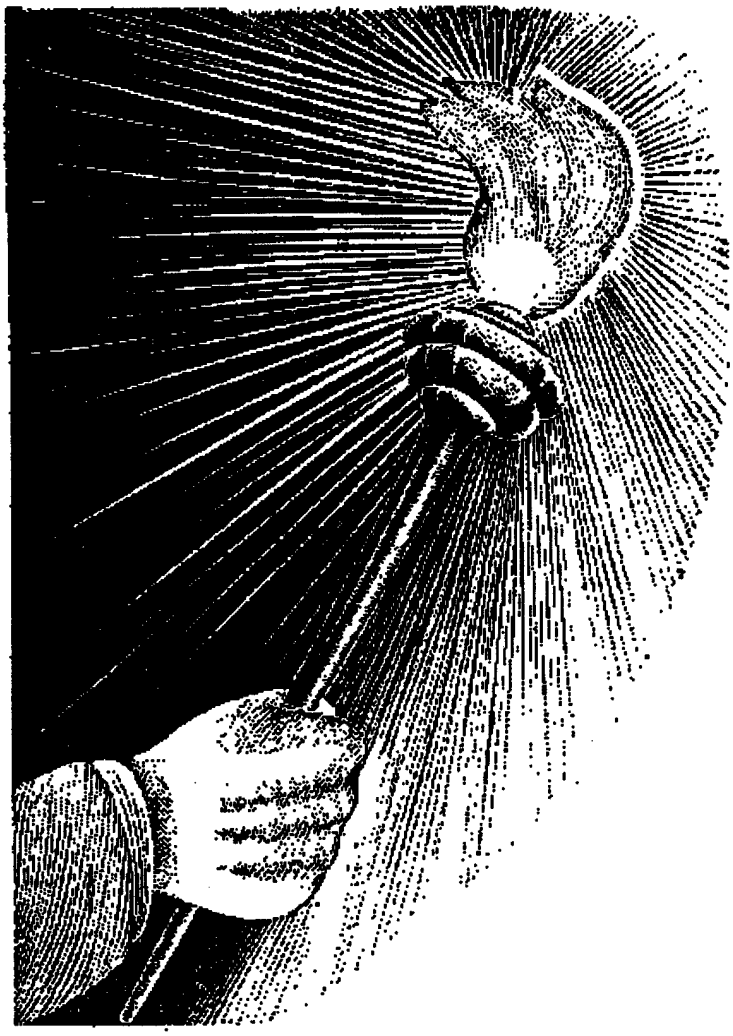
D. Liquidated Damages ($10.00 a day for each employee paid improperly).

1. WHA - 41 U.S.C. § 36.

2. DBA/SCA (per CWHSSA) - 40 U.S.C. § 328(b)(2); United States v. Munsey Trust Co., 332 U.S. 234 (1947); To the Secretary of the Air Force, B-123227, 48 Comp. Gen. 387 (1968).

IX. CONCLUSION.

Chapter 15
Ethics in Government Contracting



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CHAPTER 15

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CHAPTER 15

ETHICS IN GOVERNMENT CONTRACTING

"Always do right. This will gratify some people and astonish the rest."
Mark Twain

I. REFERENCES.

A. Statutes.

1. 18 U.S.C. § 208, Acts Affecting A Personal Financial Interest.

2. 41 U.S.C. § 423, The Procurement Integrity Act.

3. 18 U.S.C. § 207, Restrictions On Former Officers, Employers, And Elected Officials of The Executive And Legislative Branches.

B. Regulations.

1. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.

2. 5 C.F.R. Part 2637, Regulations Concerning Post Employment Conflict of Interests. These regulations only apply to employees who left Federal service before 1 January 1991. The Office of Government Ethics, however, continues to rely on them for issuing guidance for employees who left Federal service after 1 January 1991.

3. 5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions.

Major Karen White, USAF
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April/May 2001

4. 5 C.F.R. Part 2640, Interpretations, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208.

5. OGE Memorandum, Revised Materials Relating to 18 U.S.C. § 207 (5 Nov. 1992).

6. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. Part 3 (June 1997).

7. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. Part 203 (Apr. 1, 1984).

C. Directives: U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993).

II. INTRODUCTION. Upon completing this instruction, the student will understand:

A. The conflict of interest prohibitions of 18 U.S.C. § 208.

B. The coverage of the Procurement Integrity Act.

C. The procurement related restrictions on seeking and accepting employment when leaving government service.

III. FINANCIAL CONFLICTS OF INTEREST. 18 U.S.C. § 208; 5 C.F.R. § 2635.402(a). Prohibits an employee from participating **personally and substantially** in his or her official capacity in any **particular matter** in which he or she has a **financial interest**, if the particular matter will have a **direct and predictable effect** on that interest.

A. The financial conflict of interest prohibitions apply in three key situations.

1. An employee may not work on an assignment that will affect the employee's financial interests, or the financial interests of the employee's spouse or minor child.

2. An employee may not work on an assignment that will affect the financial interests of a partner or organization where the employee serves as an officer, director, employee, general partner, or trustee.

3. An employee may not work on an assignment that will affect the financial interest of someone with whom the employee either has an arrangement for employment or is negotiating for employment.

B. Definition of key terms.

1. Financial Interests. Defined as stocks, bonds, leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c)(1). The statute specifically defines negotiating for employment as a financial interest. Thus, negotiating for employment is the same as owning stock in a company.

2. Personally. Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2635.402(b)(4).

3. Substantially. Defined as an employee's involvement that is significant to the matter. 5 C.F.R. § 2635.402(b)(4).

4. Particular Matter. Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2635.402(b)(3).

5. Direct and Predictable Effect. Defined as a close, causal link between the official decision or action and its effect on the financial interest. 5 C.F.R. § 2635.402(b)(1).

C. The financial interest of the following persons are imputed to the employee:

1. The employee's spouse;

2. The employee's minor child;

3. The employee's general partner;

4. An organization or entity which the employee serves as an officer, director, trustee, general partner, or employee; and

5. A person with whom the employee is negotiating for employment or has an arrangement concerning prospective employment.
5 C.F.R. § 2635.402(b)(2).

D. This statute does not apply to enlisted members, but the Joint Ethics Regulation (JER) subjects enlisted members to similar regulatory prohibitions. See JER, para. 5-301. Regulatory implementation of 18 U.S.C. § 208 is found in the JER, Chapter 2 and Chapter 5, and in 5 C.F.R § 2640.

E. Options for employees with conflicting financial interests.

1. Disqualification. With the approval of his or her supervisor, the employee must change duties to eliminate any contact or actions affecting that company. 5 C.F.R. 2635.402(c); 5 C.F.R. 2640.103(d).

2. Waiver. An employee otherwise disqualified by 18 U.S.C. § 208(a) may be permitted to participate personally and substantially in a particular matter if the disqualifying interest is the subject of a waiver. Waivers may be "individual" or "blanket." 5 C.F.R. § 2635.402(d).

a. Individual Waivers. The rules for individual waivers are at 5 C.F.R. § 2635.402(d)(2) and 5 C.F.R. § 2640.301. An agency may grant an individual waiver on a case-by-case basis after the employee fully discloses the financial interest to the agency. The criterion is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2635.402(d)(2)(ii); 5 C.F.R. § 2640.301(a).

b. Blanket (or regulatory) Waivers. The rules for blanket waivers are at 5 C.F.R. § 2640. Blanket waivers include the following:

(1) Diversified Mutual Funds. Diversified funds do not concentrate in any industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(a). Owning a diversified mutual fund does not create a conflict of interest. 5 C.F.R. § 2640.201(a).

(2) Sector Funds. Sector funds are those funds that concentrate in an industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(q). Owning a sector fund may create a conflict of interest, but there is a regulatory exemption if the holding that creates the conflict is not invested in the sector where the fund is concentrated. 5 C.F.R. § 2640.201(b).

(3) De Minimus. Regulations create a *de minimis* exception for ownership by the employee, spouse, or minor child in:

(a) Publicly traded securities; and

(b) The aggregate value of the holdings of the employee, spouse, or minor child does not exceed $5,000. 5 C.F.R. § 2640.202(a).

3. Divestiture. The employee may sell the conflicting financial interest to eliminate the conflict. 5 C.F.R. § 2640.103(e).

F. Negotiating for employment. The term "negotiating" is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).

1. Any discussion, however tentative, is negotiating for employment.

2. The Office of Government Ethics (OGE) regulations contain additional requirements for disqualification of employees who are "seeking employment." 5 C.F.R. §§ 2635.601 - 2635.606. "Seeking employment" is a term broader than "negotiating for employment" found in 18 U.S.C. § 208.

3. Negotiating for employment is the same as buying stock in a company. Any discussion, however tentative, is negotiating for employment. Something as simple as going to lunch to discuss future prospects could be the basis for a conflict of interest. If an employee could own stock in a company without creating a conflict of interest with his official duties, then that person may negotiate for employment with that company. No special action is required.

4. Conflicts of interest are always analyzed in the present tense. If an employee interviews for a position and decides not to work for that company, then he or she is free to later work on matters affecting that company.

5. An employee begins "seeking employment" if he or she has directly or indirectly:

   a. Engaged in employment negotiations with any person. "Negotiations" means discussing or communicating with another person, or that person's agent, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).

   b. Made an unsolicited communication to any person or that person's agent, about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).

   c. Made a response other than rejection to an unsolicited communication from any person or that person's agent about possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).

6. An employee has not begun "seeking employment" if he or she makes an unsolicited communication for the following reasons:

   a. For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii)(A).

b. For the sole purpose of submitting a résumé or employment proposal only as part of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).

7. An employee is no longer "seeking employment" under the following circumstances:

a. The employee rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).

b. Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).

8. Disqualification and Waiver.

a. With the approval of his or her supervisor, the employee must change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 604(a)-(b). Written notice of the disqualification is required.

b. An employee may participate personally and substantially in a particular matter having a direct and predictable impact on the financial interests of the prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. § 208(b)(1) or (b)(3). The waivers are described in 5 C.F.R. § 2635.402(d) and 5 C.F.R. Part 2640.

G. Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years. In addition, a fine of $50,000 to $250,000 is possible. See 18 U.S.C. § 3571.

IV. THE PROCUREMENT INTEGRITY ACT (PIA) AS CHANGED BY THE CLINGER-COHEN ACT.

Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996). Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423, has been completely rewritten by the Clinger-Cohen Act of 1996. Changes have been made to FAR, Part 3, and to the DFARS.

A. Background Information about the amended Procurement Integrity Act (PIA).

1. Effective date: 1 January 1997.

2. The basic provisions of the new statute are set forth in FAR 3.104-2.

a. Prohibitions on disclosing and obtaining procurement information apply beginning 1 January 1997 to:

(1) Every competitive federal procurement for supplies or services,

(2) From non-Federal sources,

(3) Using appropriated funds.

b. Requirement to report employment contacts applies beginning 1 January 1997 to competitive federal procurements above the simplified acquisition threshold ($100,000).

c. Post-employment restrictions apply to former officials for services provided or decisions made on or after 1 January 1997.

d. Former officials who left government service before 1 January 1997 are subject to the restrictions of the Procurement Integrity Act as it existed prior to its amendment.

3. Interference with duties. An official who refuses to cease employment discussions is subject to administrative actions in accordance with 5 C.F.R. § 2635.604(d) (annual leave, leave without pay, or other appropriate administrative action), if the disqualification interferes substantially with the official's ability to perform his or her assigned duties. FAR 3.104-11(c). See Smith v. Dep't of Interior, 6 M.S.P.R. 84 (1981) (employee who violated conflict of interest regulations by acting in official capacity in matters affecting his financial interests is subject to removal).

4. Coverage. Applies to "persons," "agency officials," and "former officials" as defined in the PIA.

5. Department of Defense Guidance from the Procurement Integrity Tiger Team.

   a. Memorandum, Director, DOD Standards of Conduct Office, to Members of the DOD Ethics Community, subject: Guidance on Application of the Procurement Integrity Law and Regulations (28 Aug. 1998).

   b. Memorandum, Director, DOD Standards of Conduct Office, to Members of the DOD Ethics Community, subject: Guidance on Application of Procurement Integrity Compensation Ban to Program Managers (19 Aug. 1999).

   c. Both documents are available at <http://www.defenselink.mil/dodgc/defense_ethics/dod_oge/>.

6. On 29 Mar 2000, the Civilian Agency Acquisition Council and the Defense Acquisition Council proposed to amend the FAR to rewrite procurement integrity language. The provisions remain mostly the same. New language reminds employees that "while their participation in a Federal agency procurement may not be considered "participating personally and substantially in a Federal agency procurement" for purposes of certain requirements in the Procurement Integrity Act, nevertheless there will be instances where the employee will be considered to be participating personally and substantially for purposes of 18 USC 208." (65 Fed. Reg. 16,757, Mar. 29, 2000.)

B. Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.

1. Restrictions on Disclosure of Information. 41 U.S.C. § 423(a). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:

   a. Present or former federal officials;

   b. Persons (such as contractor employees) who are currently advising the federal government with respect to a procurement;

   c. Persons (such as contractor employees) who have advised the federal government with respect to a procurement, but are no longer doing so; and

   d. Persons who have access to such information by virtue of their office, employment, or relationship.

2. Restrictions on Obtaining Information. 41 U.S.C. § 423(b). Persons (other than as provided by law) are forbidden from obtaining contractor bid or proposal information or source selection information.

3. Contractor Bid or Proposal Information. 41 U.S.C. § 423(f)(1). Defined as any of the following:

   a. Cost or pricing data;

   b. Indirect costs or labor rates;

   c. Proprietary information marked in accordance with applicable law or regulation; and

d. Information marked by the contractor as such in accordance with applicable law or regulation. If the contracting officer disagrees, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-5(d). See Chrysler Corp. v. Brown, 441 U.S. 281 (1979); CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).

4. Source Selection Information. 41 U.S.C. § 423(f)(2). Defined as any of the following:

a. Bid prices before bid opening;

b. Proposed costs or prices in negotiated procurement;

c. Source selection plans;

d. Technical evaluation plans;

e. Technical evaluations of proposals;

f. Cost or price evaluations of proposals;

g. Competitive range determinations;

h. Rankings of bids, proposals, or competitors;

i. Reports and evaluations of source selection panels, boards, or advisory councils; and

j. Other information marked as source selection information if release would jeopardize the integrity of the competition.

C. Reporting Non-Federal Employment Contacts.

1. Mandatory Reporting Requirement. 41 U.S.C. § 423(c). An agency official who is **participating personally and substantially** in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if the contact is through an agent or intermediary. FAR 3.104-6(a).

a. Report must be in writing.

b. Report must be made to supervisor and designated agency ethics official.

(1) Designated agency ethics official in accordance with 5 C.F.R. § 2638.201.

(2) Deputy agency ethics officials in accordance with 5 C.F.R. § 2638.204 if authorized to give ethics advisory opinions.

(3) Alternate designated agency ethics officials in accordance with 5 C.F.R. § 2638.202(b). See FAR 3.104-3.

c. Additional Requirements. The agency official **must**:

(1) Promptly reject employment; or

(2) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208.

(a) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the HCA or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-6(b).

(b) Note: 18 U.S.C. § 208 requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts.

2. Both officials and bidders who engage in prohibited employment contacts are subject to criminal penalties and administrative actions.

3. Participating personally and substantially means active and significant involvement in:

   a. Drafting, reviewing, or approving a statement of work;

   b. Preparing or developing the solicitation;

   c. Evaluating bids or proposals, or selecting a source;

   d. Negotiating price or terms and conditions of the contract; or

   e. Reviewing and approving the award of the contract.
   FAR 3.104-3. Note that FAR 3.104-3 is being changed to harmonize it with 5 C.F.R. § 2635.402(b)(4).

4. The following activities are generally considered **not** to constitute personal and substantial participation:

   a. Certain agency level boards, panels, or advisory committees;

   b. General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;

   c. Clerical functions in support of a particular procurement; and

d. For OMB Circular A-76 cost comparisons:

(1) Participating in management studies;

(2) Preparing in-house cost estimates;

(3) Preparing "most efficient organization" (MEO) analyses; and

(4) Furnishing data or technical support **to be used by others** in the development of performance standards, statements of work, or specifications. FAR 3.104-3.

D. Post-Government Employment Restrictions.

1. A one-year ban prohibits certain persons from accepting compensation from the awardee. "Compensation" means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Indirect compensation is compensation paid to another entity specifically for services rendered by the individual. FAR 3.103-3. The ban applies to both competitively awarded and non-competitively awarded procurements. FAR 3.104-3.

2. The one year ban applies to persons who serve in any of the following seven positions on a contract **in excess of $10 million**:

a. Procuring Contracting Officer (PCO);

b. Source Selection Authority (SSA);

c. Members of the Source Selection Evaluation Board (SSEB);

d. Chief of a financial or technical evaluation team;

e. Program Manager;

f. Deputy Program Manager; and

g. Administrative Contracting Officer (ACO).

3. The one year ban also applies to anyone who "personally makes" any of the following seven types of decisions:

a. The decision to award a contract **in excess of $10 million**;

b. The decision to award a subcontract **in excess of $10 million**;

c. The decision to award a modification of a contract or subcontract **in excess of $10 million**;

d. The decision to award a task order or delivery order **in excess of $10 million**;

e. The decision to establish overhead or other rates valued **in excess of $10 million**;

f. The decision to approve issuing a payment or payments **in excess of $10 million**; and

g. The decision to pay or settle a claim **in excess of $10 million.**

4. The Ban Period.

a. If the former official was in a specified position (source selection type) on the date of contractor selection, but not on the date of award, the ban begins on the date of selection.

b. If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.

c. If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.

d. If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-8.

5. In "excess of $10 million" means:

a. The value or estimated value of the contract including options;

b. The total estimated value of all orders under an indefinite-delivery, indefinite-quantity contract, or a requirements contract;

c. Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

d. The value of a delivery order, task order, or order under a Basic Ordering Agreement;

e. The amount paid, or to be paid, in a settlement of a claim; or

f. The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base. See FAR 3.104-3.

6. The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services.

7. Ethics Advisory Opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she would be precluded from accepting compensation from a particular contractor. FAR 3.104-7(a).

E. Penalties and Sanctions.

1. Criminal Penalties. Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage.

2. Civil Penalties.

a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment.

b. Civil penalty is up to $50,000 (individuals) and up to $500,000 (organizations) plus twice the amount of compensation received or offered.

3. If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. A new contract clause advises contractors of the potential for cancellation or rescission of a contract, recovery of any penalty prescribed by law, and recovery of any amount expended under the contract. FAR 52.203-8. Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations. FAR 52.203-10.

4. A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the Procurement Integrity Act); see also NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed.Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).

5. Limitation on Protests. 41 U.S.C. § 423(g). No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency within 14 days of its discovery of the possible violation. FAR 33.102(f).

6. Contracting Officer's Duty to Take Action on Possible Violations.

   a. Determine impact of violation on award or source selection.

   b. If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.

   c. If impact on procurement, forward information to the Head of the Contracting Activity (HCA) or designee. Take further action in accordance with HCA's instructions. FAR 3.104-10.

V. REPRESENTATIONAL PROHIBITIONS. 18 U.S.C. § 207.

A. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees which may reasonably give the appearance of making unfair use of their prior employment and affiliations.

1. A former employee involved in a particular matter while working for the government must not "switch sides" after leaving government service to represent another person on that matter. 5 C.F.R. § 2637.101.

2. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The regulations state that the statute is not designed to discourage government employees from moving to and from private positions. Rather, such a "flow of skills" promotes efficiency and communication between the government and the private sector, and is essential to the success of many government programs. The statute bars only certain acts "detrimental to public confidence." 5 C.F.R. § 2637.101.

B. 18 U.S.C. § 207 applies to <u>all</u> former officers and civilian employees whether or not retired, but **does not apply to enlisted personnel** because they are not included in the definition of "officer or employee" in 18 U.S.C. § 202. Note: Employees on terminal leave must also heed the representation restrictions of 18 U.S.C. § 205, which applies to current government employees.

C. 18 U.S.C. § 207 imposes a **lifetime prohibition** on the former employee against communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

1. The government is a party, or has a direct and substantial interest in the matter;

2. The former officer or employee participated personally and substantially in the matter while in his official capacity; and

3. At the time of the participation, specific parties other than the government were involved.

4. Note that when the term "lifetime" is used, it refers to the lifetime of the particular matter. To the extent the particular matter is of limited duration, so is the coverage of the statute. Further, it is important to distinguish among particular matters. The statute does not apply to a broad category of programs when the specific elements may be treated as severable.

D. 18 U.S.C. § 207 prohibits, for **two years** after leaving federal service, a former employee from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

1. The government is a party, or has a direct and substantial interest in the matter;

2. The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service; and

3. At the time of the participation, specific parties other than the government were involved.

E. 18 U.S.C. § 207(c) prohibits, for **one year** after leaving federal service, "senior employees" (general or flag officers and SES Level V and VI) from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

1. The matter involves the department or agency the officer or employee served during his last year of federal service as a senior employee; and

2. The person represented by the former officer or employee seeks official action by the department or agency concerning the matter.

3. Thus, a Navy Admiral is prohibited from communicating, as an official action, with Navy officials. However, the officer may communicate with representatives of other services and OSD.

F. 18 U.S.C. § 207 **does not** prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity.

1. The statute does not bar behind the scenes involvement.

2. A former employee may ask questions about the status of a particular matter, request publicly available documents, or communicate factual information unrelated to an adversarial proceeding.

G. Military officers on terminal leave are still on active duty. While they may begin a job with another employer during this time, their exclusive loyalty must remain with the government until their retirement pay date. Two restrictions apply to non-government employment during terminal leave:

1. All officers and employees are prohibited from representing anyone in any matter in a U.S. forum, or in any claim against the United States. 18 U.S.C. § 205.

2. Commissioned officers are prohibited from holding a state or local government office, or otherwise exercising sovereign authority. 10 U.S.C. § 973. This does not prohibit employment by a state or local government; it only prohibits the exercise of governmental authority. For example, a police officer or judge exercises governmental authority; a motor pool chief does not.

VI. DEALING WITH CONTRACTORS.

A. General Rule. Government business shall be conducted in a manner that is above reproach, with complete impartiality, and with preferential treatment for none. FAR 3.101-1.

B. Some pre-contract contacts with industry are permissible, and in fact are encouraged where the information exchange is beneficial (e.g., necessary to learn of industry's capabilities or to keep them informed of our future needs). FAR Part 5. Some examples are:

1. Research and development. Agencies will inform industrial, educational, research, and non-profit organizations of current and future military RDT&E requirements. However, a contracting officer will supervise the release of the information. AR 70-35, para. 1-5.

2. Unsolicited proposals. Companies are encouraged to make contacts with agencies before submitting proprietary data or spending extensive effort or money on these efforts. FAR 15.604.

VII. RELEASE OF ACQUISITION INFORMATION.

A. The integrity of the acquisition process requires a high level of business security.

B. Contracting officers may make available the maximum amount of information to the public except information (FAR 5.401(b)):

1. On plans that would provide undue discriminatory advantage to private or personal interests.

2. Received in confidence from offerors. 18 U.S.C. § 1905; FAR 15.503(b)(v); FAR 15.506(e).

3. Otherwise requiring protection under the Freedom of Information Act.

4. Pertaining to internal agency communications (e.g., technical reviews).

C. Information regarding unclassified long-range acquisition estimates is releasable as far in advance as practicable. FAR 5.404.

D. General limitations on release of acquisition information. FAR 14.203-2; FAR 15.201.

1. Agencies should furnish identical information to all prospective contractors.

2. Agencies should release information as nearly simultaneously as possible, and only through designated officials (i.e., the contracting officer).

3. Agencies should not give out advance information concerning future solicitations to anyone.

VIII. FOREIGN GOVERNMENT EMPLOYMENT (U.S. CONSTITUTION)

A. Retired military members must obtain a waiver to work for a foreign government.

1. 37 U.S.C. § 908 allows foreign government employment with approval of the Service Secretary. Note that these waivers often take 3 or 4 months to be approved, so plan accordingly.

2. This Constitutional requirement applies to employment by corporations owned or controlled by foreign governments, but does not apply to independent foreign companies. It does not preclude retired officers from working as an independent consultant to a foreign government, as long as they are careful to maintain their independence.

3. When seeking employment outside of the DOD contractor community, a military retiree should always ask, "Is this company owned or controlled by a foreign government?"

B. Retired officers who represent a foreign government or foreign entity may be required to register as a foreign agent. 22 U.S.C. § 611; 28 CFR § 5.2. The Registration Unit, Criminal Division, Department of Justice, Washington, D.C. 20530, (202) 514-1219, can provide further information.

IX. MISCELLANEOUS PROVISIONS.

A. Use of Title. Retirees may use military rank in private commercial or political activities as long as their retired status is clearly indicated, no appearance of DOD endorsement is created, and DOD is not otherwise discredited by the use. JER, para. 2-304.

B. Wearing the uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. AR 670-1, para. 29-4.

C. SF 278s. Termination Public Financial Disclosure Reports must be filed within 30 days of retirement.

D. Inside Information. All former officers and employees must protect "inside information," trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. §§ 794.

E. Gifts from Foreign Governments. Military retirees and their immediate families may not retain gifts of more than $260 in value from foreign governments. 5 U.S.C. § 7342.

F. Travel, Meals & Reimbursements. Government employees may accept travel expenses to attend job interviews if such expenses are customarily paid to all similarly situated job applicants. These payments must be reported on Schedule B of the SF 278. 5 C.F.R. § 2635.204(e)(3).

X. CONCLUSION.

A. The ethical rules governing procurement officials are stricter than the general rules governing federal employees.

B. You must be familiar with the various ethical rules stated in the Procurement Integrity Act and other statutes governing employment of former federal employees.

Chapter 16
Construction Contracting

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CHAPTER 16

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CHAPTER 16

CONSTRUCTION CONTRACTING

I. INTRODUCTION. Following this block of instruction, students should:

A. Understand the unique clauses and procedures used in construction contracting.

B. Understand how to analyze common legal issues that arise in construction contracting.

II. REFERENCES.

A. Federal Regulations.

1. Federal Acquisition Regulation (FAR) Part 36.

2. Defense Federal Acquisition Regulation Supplement (DFARS) Part 236.

3. Army Federal Acquisition Regulation Supplement (AFARS) Part 36.

4. Air Force Federal Acquisition Regulation Supplement (AFFARS) Part 5336.

5. Navy Acquisition Procedures Supplement (NAPS) Part 5236.

B. Army Regulations (AR).

1. AR 210-50, Housing Management (26 Feb. 1999).

2. AR 415-15, Army Military Construction Program Development and Execution (4 Sept. 1998).

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3. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (15 Apr. 1998).

4. AR 420-10, Management of Installation Directorates of Public Works (15 Apr. 1997).

5. AR 420-18, Facilities Engineering Material, Equipment, and Relocatable Building Management (3 Jan. 1992) [hereinafter AR 420-18].

6. DA Pam 415-15, Army Military Construction Program Development and Execution (25 Oct. 1999) [hereinafter DA Pam 415-15].

7. DA Pam 420-11, Project Definition and Work Classification (7 October 1994) [hereinafter DA Pam 420-11].

C. Air Force Policy Directives (AFPD) and Air Force Instructions (AFI).

1. AFPD 32-90, Real Property Management (Sept. 1993).

2. AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994).

3. AFI 32-1031, Operations Management (1 July 1997).

4. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (1 Sept. 1999).

5. AFI 32-6001, Family Housing Management (26 Apr. 1994).

6. AFI 32-6002, Family Housing Planning, Programming, Design, and Construction (27 May 1997).

7. AFI 65-601, vol. 1, Budget Guidance and Procedures (21 Oct. 1994).

D. Navy Regulation. OPNAVINST 11010.20F, Facilities Projects Manual (7 June 1996).

E. Richard J. Bednar, John Cibinic, Jr., Ralph C. Nash, Jr., et al., Construction Contracting, published by The George Washington University Government Contracts Program, 1991.

III. CONCEPTS.

A. Definitions.

1. Construction.

a. Statutory Definition. 10 U.S.C. § 2801(a). The term "military construction" includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation."[1]

b. Regulatory Definitions.

(1) FAR 36.102. The term "construction" refers to the construction, alteration, or repair of buildings, structures, or other real property.

(a) Construction includes dredging, excavating, and painting.

(b) Construction does not include work performed on vessels, aircraft, or other items of personal property.

[1] The term "military installation" means "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense." 10 U.S.C. § 2801(c)(2).

(2) Service Regulations. See, e.g., AR 415-15, Glossary, sec. II; AR 415-32, Glossary, sec. II; AR 420-10, Glossary, sec. II; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20F, ch. 6, para. 6.1.1. The term "construction" includes:

(a) The erection, installation, or assembly of a new facility; [2]

(b) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility;

(c) The relocation of a facility from one site to another;

(d) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and

(e) Related site preparation, excavation, filling, landscaping, and other land improvements.

2. Military Construction Project. 10 U.S.C. § 2801(b). The term "military construction project" includes "all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility . . . ."

[2] The term "facility" means "a building, structure, or other improvement to real property." 10 U.S.C. § 2801(c)(1).

B. Fiscal Distinctions.

1. As a general rule, the government funds projects costing less than $500,000 with Operations and Maintenance (O&M) funds; projects costing more than $500,000, but less than $1.5 million, with Unspecified Minor Military Construction (UMMC) funds; and projects costing more than $1.5 million with Military Construction (MILCON) funds. 10 U.S.C. §§ 2802, 2805. See Military Construction Appropriations Act, 1999, 2000, Pub. L. No. 106-52, 113 Stat. 259 (1999).

2. For fiscal law purposes, "construction" does not include repair or maintenance. Therefore, the government may fund repair and maintenance projects with O&M funds, regardless of the cost. AR 420-10, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20F, paras. 3.1.1 and 4.1.1.

3. The government must award construction contracts in accordance with FAR Part 36, DFARS Part 236, and any applicable service supplement, regardless of the funding source.

C. Contracting Procedures.

1. As with most procurements, the government must take certain steps to procure construction properly.

2. These steps normally include:

a. Deciding which acquisition method to use;

b. Deciding which type of contract to use;

c. Deciding what, if any, pre-bid communications are required (or otherwise warranted);

d. Deciding what information and which clauses to place in the solicitation;

e. Deciding which contractor should receive the award; and

f. Administering the contract.

IV. METHODS OF ACQUIRING CONSTRUCTION.

A. Sealed Bidding. FAR 6.401; FAR 36.103. Contracting officers must use sealed bidding procedures to acquire construction if:

1. Time permits;

2. Award will be made on the basis of price and price-related factors;

3. Discussions are not necessary; and

4. There is a reasonable expectation of receiving more than one bid.

B. Negotiated Procedures. FAR 6.401; FAR 36.103.

1. Contracting officers must use negotiated procedures to acquire construction if:

a. Time does not permit the use of seal bidding procedures;

b. Award will not be made on the basis of price and price-related factors;

c. Discussions are necessary, or

d. There is not a reasonable expectation of receiving more than one bid.

See Michael C. Avino, Inc., B-250689, Feb. 17, 1993, 93-1 CPD ¶ 148; see also Pardee Constr. Co., B-256414, June 13, 1994, 94-1 CPD ¶ 372.

2. Contracting officers may use negotiated procedures to acquire construction outside the United States, its possessions, or Puerto Rico, even if sealed bidding is otherwise required.

3. Contracting officers must use negotiated procedures to acquire architect-engineer services.

C. Job Order Contracting. AFARS Subpart 17.90. See Schnorr-Stafford Constr., Inc., B-227323, Aug. 12, 1987, 87-2 CPD ¶ 153; Salmon & Assoc., B-227079, Aug. 12, 1987, 87-2 CPD ¶ 152.

1. A job order contract (JOC) is an indefinite-delivery, indefinite-quantity contract used to acquire real property maintenance/repair and minor construction at the installation level.

2. The government develops task specifications and a unit price book. The contractor then multiplies the government's unit price by its own coefficient (e.g., profit + overhead) to arrive at its bid/proposal price.

3. After contract award, the parties enter into bilateral task orders for individual projects based on the tasks and prices specified in the JOC.[3]

4. Limitations.

a. The government should not use a JOC for projects with an estimated value less than $2,000, or greater than $300,000. AFARS 17.9000(a).

b. The government cannot use a JOC to acquire installation facilities engineering support services (e.g., custodial or ground maintenance services). AFARS 17.9002(b).

c. The government cannot use a JOC to acquire architect-engineer services. AFARS 17.9002(b).

[3] Each task order becomes a fixed-price, lump sum contract. AFARS 17.9003-1(e).

d. The government should not use a JOC to acquire work:

(1) Normally set aside for small and disadvantaged businesses;

(2) Traditionally covered by requirements contracts (e.g., painting, roofing, etc.);

(3) Covered by contracts awarded under the Commercial Activities Program; or

(4) The government can effectively and economically accomplish in-house.

AFARS 17.9003-3(c).

D. Design-Build Contracting. 10 U.S.C. § 305a; 41 U.S.C. § 253m; FAR Subpart 36.3.

1. Background. In the past, a contracting officer could not award a contract to build a project to the firm that designed the project unless the agency head or the agency head's delegee approved. FAR 36.209. See Lawlor Corp., B-241945.2, Mar. 28, 1991, 70 Comp. Gen. 375, 91-1 CPD ¶ 335. In 1995, however, Congress established new, two-phase design-build selection procedures that allow the same firm to design and build a project. National Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1995).

2. Definitions. FAR 36.102.

a. "Design" is the process of defining the construction requirement, producing the technical specifications and drawings, and preparing the construction cost estimate.

b. "Design-bid-build" is the traditional method of construction contracting in which design and construction are sequential and contracted for separately, with two contracts and two contractors.

c. "Design-build" is the new method of construction contracting in which design and construction are combined in a single contract with a single contractor.

d. "Two-phase design-build" is a "design-build" method of construction contracting in which the government selects a limited number of offerors in Phase One to submit detailed proposals in Phase Two.

3. Policy. FAR 36.104. See FAR 36.301(b).

a. A contracting officer may use either design-bid-build or design-build procedures to acquire construction.

b. Unless a contracting officer decides to use design-bid-build (or another authorized acquisition procedure), the contracting officer must use two-phase design-build procedures to acquire construction if:

(1) The contracting officer anticipates receiving three or more offers;

(2) Offerors must perform a substantial amount of design work (and incur substantial expenses) before they can develop their price proposals; and

(3) The contracting officer has considered the factors set forth in FAR 36.301(b)(2), including:

(a) The extent to which the agency has adequately defined its project requirements;

(b) The time constraints for delivery;

(c) The capability and experience of potential offerors;

(d) The suitability of the project for two-phase design-build procedures;

(e) The capability of the agency to manage the two-phase selection process;

(f) Other criteria established by the head of the contracting activity (HCA).

4. Procedures. FAR 36.303.

a. The agency may issue one solicitation covering both phases, or two solicitations in sequence.

b. Phase One. FAR 36.303-1.

(1) The agency evaluates Phase One proposals to determine which offerors the agency will ask to submit Phase Two proposals.

(2) The Phase One solicitation must include:

(a) The scope of work;

(b) The Phase One evaluation factors (e.g., technical approach, technical qualifications, etc.);

(c) The Phase Two evaluation factors; and

(d) A statement regarding the maximum number of offerors the government intends to include in the competitive range.[4]

[4] This number should not exceed 5 unless the contracting officer determines that including more than 5 offerors in the competitive range is in the government's best interests. FAR 36.303-1(a)(4).

c. Phase Two. FAR 36.303-2. The contracting officer awards one contract using competitive negotiation procedures.

V. CONTRACT TYPES.

A. Firm Fixed-Price (FFP) Contracts. FAR 36.207.

1. Agencies normally award FFP contracts for construction.

2. The contracting officer may require pricing on a lump-sum, unit price, or combination basis.

a. With lump sum pricing, the agency pays a lump sum for:

(1) The total project; or

(2) Defined portions of the project.

b. With unit pricing, the agency pays a unit price for a specified quantity of work units.

c. Agencies must use lump-sum pricing unless:

(1) The contract involves large quantities of work such as grading, paving, building outside utilities, or site preparation;

(2) The agency cannot estimate the quantities of work adequately;

(3) The estimated quantities of work may change significantly during construction; or

(4) Offerors would have to expend spend a lot of time/money to develop adequate estimates.

B. Fixed-Price Contracts with Economic Price Adjustment Clauses (FP w/EPA). FAR 36.207(c). Agencies may use this type of contract if:

1. The use of an EPA clause is customary for the type of work the agency is acquiring;

2. A significant number of offerors would not bid unless the agency included an EPA clause in the contract; or

3. Offerors would include unwarranted contingencies in their prices unless the agency included an EPA clause in the contract.

C. Cost-Reimbursement Contracts. See Military Construction Appropriations Act, 2001, Pub. L. No. 106-246, § 101, 114 Stat. 511 (2000); DFARS 236.271; AFARS 36.271; AFFARS 5336.271; NAPS 5236.271. The Assistant Secretary of Defense (Production and Logistics) (ASD(P&D)) must approve the award of a cost-plus-fixed-fee contract for construction if:

1. The activity uses military construction appropriations;

2. Performance will occur in the United States (Alaska excluded); and

3. The acquiring activity expects the contract to exceed $25,000.

D. Incentive and Other "Fee" Contracts. FAR 36.208. Activities cannot use incentive, cost-plus-fixed-fee, or other fee contracts at the same work site with firm fixed-price contracts without the approval of the HCA.

VI. PRE-BID COMMUNICATIONS.

A. Presolicitation Notices. FAR 36.213-2; FAR 36.701(a); FAR 53.301-1417, Standard Form (SF) 1417, Presolicitation Notice (Construction Contract).

1. The contracting officer must send presolicitation notices to prospective bidders if the proposed contract is expected to equal or exceed $100,000.

2. Contents. FAR 36.213-2(b). Among other things, presolicitation notices must:

a. Describe the magnitude of the project;[5]

b. State the location of the proposed work;

c. Include relevant dates (e.g., the proposed bid opening date and the proposed contract completion date);

d. State where contractors can inspect the contract plans without charge;[6]

e. Specify a date by which bidders should submit requests for the solicitation;

f. State whether the government intends to restrict award to small businesses; and

g. Specify the amount the government intends to charge for solicitation documents, if any.

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[5] The contracting officer cannot disclose the government cost estimate; however, the contracting officer can state the magnitude of the project in terms of physical characteristics and estimated price range. FAR 36.204; DFARS 236.204. The Estimated price ranges are as follows:

(a) Less than $25,000.
(b) Between $25,000 and $100,000.
(c) Between $100,000 and $250,000.
(d) Between $250,000 and $500,000.
(e) Between $500,000 and $1,000,000.
(f) Between $1,000,000 and $5,000,000.
(g) Between $5,000,000 and $10,000,000.
(h) More than $10,000,000.

FAR 36.204 -- Disclosure of the Magnitude of Construction Projects. The DFARS provides ranges between $10,000,000 and 500,000,000. (the additional ranges are: $10M - $25M, $25M - $100 M, $100M - $250M, and $250M - $500M.) DFARS 236.204.

[6] Beginning on 17 August 2000, the Contracting Officer may provide contract drawings and specifications solely in electronic format. DFARS 252.236-70001.

3. Distribution. FAR 36.211.

a. The contracting officer should send presolicitation notices to:

(1) Contractors on the bidders list; and

(2) Organizations that maintain display rooms for such information.

b. The contracting officer determines the geographical range of distribution.

B. Commerce Business Daily (CBD). FAR 36.213(b)(9). The contracting officer must also publish the presolicitation notice in the CBD.

VII. SOLICITATION.

A. Forms. FAR 36.701; FAR 53.301-1442, SF 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair); DFARS 236.701.

1. The contracting officer uses a SF 1442 in lieu of a SF 33.

2. If a bidder fails to return this form with its offer, the offer is nonresponsive. See C.J.M. Contractors, Inc., B-250493.2, Nov. 24, 1992, 92-2 CPD ¶ 376.

B. Statutory Limitations. FAR 36.205; DFARS 252.236-7006.

1. The solicitation must include any statutory cost limitations. See K.C. Brandon Constr., B-245934, Feb. 3, 1992, 92-1 CPD ¶ 139.[7]

2. The government must normally reject any offer that:

a. Exceeds the applicable statutory limitations;[8] or

b. Is only within the statutory limitations because it is materially unbalanced.

See William G. Tadlock Constr., B-252580, June 29, 1993, 93-1 CPD ¶ 502; H. Angelo & Co., B-249412, Nov. 13, 1992, 92-2 CPD ¶ 344.

3. Some statutory limitations are waivable. See 10 U.S.C. § 2853; see also TECOM, Inc., B-240421, Nov. 9, 1990, 90-2 CPD ¶ 386.

C. Site Familiarization Clauses.

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[7] FAR 36.205 -- Statutory Cost Limitations.

(a) Contracts for construction shall not be awarded at a cost to the Government --
(1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or
(2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.
(b) Solicitations containing one or more items subject to statutory cost limitations shall state --
(1) The applicable cost limitation for each affected item in a separate schedule;
(2) That an offer which does not contain separately-priced schedules will not be considered; and
(3) That the price on each schedule shall include an approximate apportionment of all estimated direct costs, allocable indirect costs, and profit.
(c) The Government shall reject an offer if its prices exceed applicable statutory limitations, unless laws or agency procedures provide pertinent exemptions. However, if it is in the Government's interest, the contracting officer may include a provision in the solicitation which permits the award of separate contracts for individual items whose prices are within or subject to applicable statutory limitations.
(d) The Government shall also reject an offer if its prices are within statutory limitations only because it is materially unbalanced. An offer is unbalanced if its prices are significantly less than cost for some work, and overstated for other work.

[8] The contracting officer may award separate contracts for individual items whose prices are within the applicable statutory limitations if: (1) the contracting officer included a provision that permits such awards in the solicitation; and (2) such awards are in the government's interest. FAR 36.205(c); FAR 52.214-19.

1. Site Investigation and Conditions Affecting the Work. FAR 36.210; FAR 36.503; FAR 52.236-3.

a. By submitting a bid, a contractor acknowledges that it has investigated the job site and the conditions affecting the proposed work.

b. Among other things, a contractor is suppose to investigate:

(1) Conditions bearing upon transportation, disposal, handling, and storage of materials;

(2) The availability of labor, water, electric power, and roads;

(3) Uncertainties of weather, river stages, tides, and similar physical conditions at the site;

(4) The conformation and condition of the ground;

(5) The character of needed equipment and facilities;

(6) The character, quality, and quantity of discoverable surface and subsurface materials and/or obstacles;

See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720; Fred Burgos Constr. Co., ASBCA No. 41395, 91-2 BCA ¶ 23,706.

c. A contractor need not hire its own geologists or conduct extensive engineering efforts to verify conditions that it can reasonably infer from the solicitation or a site visit. See Michael-Mark Ltd., IBCA No. 2697, 94-1 BCA ¶ 26,453.

d. A contractor must perform at the contract price if the contractor could have discovered a condition by a reasonable site investigation. See Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 193 (1987); Avisco, Inc., ENG BCA No. 5802, 93-3 BCA ¶ 26,172; Signal Contracting, Inc., ASBCA No. 44963, 93-2 BCA ¶ 25,877; cf. I.M.I., Inc., B-233863, Jan. 11, 1989, 89-1 CPD ¶ 30.

e. The government is not normally bound by the contractor's interpretation of government data and representations not included in the solicitation. See Eagle Contracting, Inc., AGBCA No. 88-225-1, 92-3 BCA ¶ 25,018.

2. Physical Data. FAR 36.504; FAR 52.236-4.

a. The contracting officer may provide physical data for the convenience of the contractor.

b. The government is not responsible for a contractor's erroneous interpretations or conclusions. But see United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585 (Ct. Cl. 1966).

3. Changes After Bid Closing Date. The government is normally responsible for increased performance costs caused by changes at a site after the date of bid submission, even if offerors agree to extend the bid acceptance period. See Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.

D. Bid Guarantees. FAR 28.101; FAR 52.228-1; FAR 53.301-24, SF 24, Bid Bond.

1. A bid guarantee ensures that a bidder will:

a. Not withdraw its bid during the bid acceptance period; and

b. Execute a written contract and furnish other required bonds at the time of contract award.

2. Requirement. FAR 28.101-1.

a. The contracting officer must normally require a bid guarantee whenever the solicitation requires performance and payment bonds.

b. The chief of the contracting office, however, may waive the requirement to provide a bid guarantee if the chief of the contracting office determines that it not in the government's best interest to require a bid guarantee (e.g., for overseas construction, emergency acquisitions, and sole-source contracts).

3. Form.

a. The bid guarantee must be in the form required by the solicitation. See HR Gen. Maint. Corp. B-260404, May 16, 1995, 95-1 CPD ¶ 247; Concord Analysis, Inc., B-239730, Dec. 4, 1990, 90-2 CPD ¶ 452. But see Mid-South Metals, Inc., B-257056, Aug. 23, 1994, 94-2 CPD ¶ 78.

b. The FAR permits offerors to use surety bonds, postal money orders, certified checks, cashier's checks, irrevocable letters of credit, U.S. bonds, and/or cash. FAR 52.228-1. See Treasury Dep't Cir. 570 (listing acceptable commercial sureties).

c. If a bidder uses an individual surety, the surety must provide a security interest in acceptable assets equal to the penal sum of the bond. FAR 28.203.

(1) The adequacy of an individual surety's offering is a matter of responsibility, not responsiveness. See Gene Quigley, Jr., B-241565, Feb. 19, 1991, 70 Comp. Gen. 273, 91-1 CPD ¶ 182. But see Harrison Realty Corp., B-254461.2, 93-2 CPD ¶ 345.

(2) A bidder may not be its own individual surety. See Astor V. Bolden, B-257038, Apr. 26, 1994, 94-1 CPD ¶ 288.

4. Penal Amount. FAR 28.101-2 (b). The bid bond must equal 20% of the bid, but not exceed $3,000,000. But see FAR 28.101-4(c).

5. The contracting officer may not accept a bid accompanied by an apparently unenforceable guarantee. Conservatek Indus., Inc., B-254927, Jan. 26, 1994, 94-1 CPD ¶ 42; MKB Constructors, Inc., B-255098, Jan. 10, 1994, 94-1 CPD ¶ 10; Arlington Constr., Inc., B-252535, July 9, 1993, 93-2 CPD ¶ 10; Cherokee Enter., Inc., B-252948, June 3, 1993, 93-1 CPD ¶ 429; Hugo Key & Son, Inc., B-245227, Aug. 22, 1991, 91-2 CPD ¶ 189; Techno Eng'g & Constr., B-243932, July 23, 1991, 91-2 CPD ¶ 87; Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476; Bird Constr., B-240002, Sept. 19, 1990, 90-2 CPD ¶ 234.

6. Noncompliance with Bid Guarantee Requirements. FAR 28.101-4.

   a. Noncompliance with bid guarantee requirements normally renders a bid nonresponsive. See Alarm Control Co., B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472.

   b. The contracting officer, however, may waive the requirement to submit a bid guarantee under 9 circumstances. FAR 28.101-4(c). See Rufus Murray Commercial Roofing Sys., B-258761, Feb. 14, 1995, 95-1 CPD ¶ 83; Apex Servs., Inc., B-255118, Feb. 9, 1994, 94-1 CPD ¶ 95.

E. Pre-Bid Conferences. FAR 14.207. Contracting officers may hold pre-bid conferences when necessary to brief bidders and explain complex specifications and requirements; however, client control is critical. See Cessna Aircraft Co., ASBCA No. 48118, 95-1 BCA ¶ 27,560.

F. Bid/Proposal Preparation Time. FAR 36.213-3. The contracting officer must give bidders ample time to conduct site visits, obtain subcontractor bids, examine data, and prepare estimates. See Raymond Int'l of Del., Inc., ASBCA No. 13121, 70-1 BCA ¶ 8,341.

VIII. AWARD.

A. Responsiveness Issues.

1. A bid is nonresponsive if it exceeds a statutory dollar limitation. FAR 36.205(c); DFARS 252.236-7006. See Ward Constr. Co., B-240064, July 30, 1990, 90-2 CPD ¶ 87; Wynn Constr. Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184.

2. A bid is nonresponsive if the bidder fails to comply with the bid guarantee requirements. FAR 28.101-4(a). See Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476. But see FAR 28.101-4(c) (listing the nine circumstances under which the contracting officer may waive the requirement to submit a bid guarantee).

3. A bid is nonresponsive if the bidder offers a shorter bid acceptance period than the solicitation requires. See SF 1442, Block 13D.

4. A bid is nonresponsive if the bidder fails to acknowledge a material amendment. See Dutra Constr. Co., B-241202, Jan. 31, 1991, 91-1 CPD ¶ 97.

5. A bid is nonresponsive if the bidder fails to acknowledge a Davis-Bacon wage rate amendment unless the offeror is bound by a wage rate equal to or greater than the new rate. See Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304; Fast Elec. Contractors, Inc., B-223823, Dec. 2, 1986, 86-2 CPD ¶ 627.

6. A bid is nonresponsive if the bidder equivocates on the requirement to obtain permits and licenses. See Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

7. A bid is nonresponsive if it is materially unbalanced. FAR 36.205(d); FAR 52.214-19.

   a. The government may reject a bid if the bid prices are materially unbalanced between line items, or between subline items.

b. A bid is materially unbalanced when:

(1) The bid is based on prices that are significantly less than cost for some work, and significantly greater than cost for other work and there is reasonable doubt that the bid will result in the lowest overall cost to the government; or

(2) The bid is so unbalanced that it is tantamount to allowing the contractor to recover money in advance of performing the work.

B. Responsibility Issues.

1. Prequalification of Sources. DFARS 236.272. The contracting officer may establish a list of contractors that are qualified to perform a specific contract and limit competition to those contractors.

a. The HCA must: (1) determine that the project is so urgent or complex that prequalification is necessary; and (2) approve the prequalification procedures.

b. If the contracting officer finds a small business unqualified for responsibility reasons, the contracting officer must refer the matter to the Small Business Administration (SBA) for a preliminary recommendation.

c. If the SBA determines that the small business is responsible, the contracting officer must allow it to submit a proposal.

2. Performance Evaluation Reports. FAR 36.201; FAR 53.301-1420, SF 1420, Performance Evaluation, Construction Contracts; DFARS 236.201; AFARS 36.201; DD Form 2628, Performance Evaluation (Construction).

   a. Contracting activities must prepare performance evaluation reports for:

      (1) Construction contracts valued at $500,000 or more;[9] and

      (2) Default terminated construction contracts valued at $10,000 or more.

   b. Upon their completion, contracting activities must send performance evaluation reports to: U.S. Army Corps Of Engineers, Portland District, ATTN: CENWP-CT-I, P.O. Box 2946, Portland, OR 97208-2946. Available on-line at: http://www.nwp.usace.army.mil/ct/i/. You may also reach this data through: www.usace.army.mil.

   c. Contracting officers may use performance evaluation reports as part of their preaward survey.[10]

3. Small Businesses. FAR 19.602-1. Before a contracting officer can reject a small business as nonresponsible, the contracting officer must refer the matter to the SBA for a Certificate of Competency (COC).

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[9] In the Army, contracting activities must prepare performance evaluation reports for each order placed under a JOC of $100,000 or more. AFARS 36.201.

[10] Within DOD, the contracting officer must use performance evaluation reports if the agency expects the proposed contract to exceed $1 million. DFARS 236.201.

4. Performance of Work by Contractor. FAR 36.501; FAR 52.236-1.

a. Whether a contractor intends to perform the contractually required percentage of work with its own forces is normally a matter of responsibility, not responsiveness. See Luther Constr. Co., B-241719, Jan. 28, 1991, 91-1 CPD ¶ 76. But see Blount, Inc. v. United States, 22 Cl. Ct. 221 (1990); C. Iber & Sons, Inc., B-247920.2, Aug. 12, 1992, 92-2 CPD ¶ 99.

b. FAR clause 52.236-1 (Performance of Work by the Contractor) does not apply to small business or 8(a) set-asides. FAR 36.501(b). But see FAR clause 52.219-14.

C. Price Evaluation.

1. The contracting officer must evaluate additive items properly. DFARS 236.303-70; DFARS 252.236-7007.

2. The contracting officer must award the contract to the bidder who submits the low bid for the base project and the additive items which, in order of priority, provide the most features within the applicable funding constraints.

3. The contracting officer must select the low bidder based on the funding available at the time of bid opening. See Huntington Constr., Inc., B-230604, June 30, 1988, 67 Comp. Gen. 499, 88-1 CPD ¶ 619; Applicators Inc., B-270162, Feb. 1, 1996, 96-1 CPD ¶ 32.

IX. CONTRACT ADMINISTRATION.

A. Preconstruction Orientation. FAR 36.212. See FAR 52.236-26; see also FAR 22.406-1; DFARS 222.406-1.

1. The contracting officer must inform successful offerors of significant matters of interest (e.g., statutory matters, subcontracting plan requirements, contract administration matters, etc.).

2. The contracting officer may issue an explanatory preconstruction letter or hold a preconstruction conference.

B. Performance and Payment Bonds.

1. Requirements. 40 U.S.C. §§ 270a-270f; FAR 28.102-1.

a. Contracts Over $100,000. FAR 28.102-1(a); FAR 28.102-3(a); FAR 52.228-15. The contractor must provide performance and payment bonds before it can begin work. See TLC Servs., Inc., B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.

b. Contracts Between $25,000 and $100,000. FAR 28.102-1(b); FAR 28.102-3(b); FAR 52.228-13.

(1) The contracting officer must select two or more of the following payment protections:

(a) Payment bonds;

(b) Irrevocable letters of credit;[11]

(c) Tripartite escrow agreements; or

(d) Certificates of deposit.

(2) The contractor must submit one of the selected payment protections before it can begin work.

[11] The contracting officer is suppose to give "particular consideration" to including irrevocable letters of credit as one of the selected payment protections. FAR 28.102-1(b).

2. Performance Bonds. FAR 28.102-2(a); FAR 52.228-15; FAR 53.301-25, SF 25, Performance Bond.

a. Performance bonds protect the government.

b. The penal amount of the bond is normally 100% of the original contract price.

(1) The contracting officer may reduce the penal amount if the contracting officer determines that a lesser amount adequately protects the government.

(2) The contracting officer may require additional protection if the contract price increases.

3. Payment Bonds. FAR 28.102-2(b); FAR 52.228-15; FAR 53.301-25-A, SF 25-A, Payment Bond.

a. Payment bonds protect subcontractors and suppliers.

b. The penal amount must equal 100% of the original contract price unless the contracting officer determines, in writing, that requiring a payment bond in that amount is impractical.

(1) If the contracting officer determines that requiring a payment bond in an amount equal to 100% of the original contract price is impractical, the contracting officer must set the penal amount of the bond.

(2) The amount of the payment bond may never be less than the amount of the performance bond.

See Construction Industry Payment Protection Act of 1999, Pub. L. No. 106-49, 113 Stat. 231.

4. Noncompliance with Bond Requirements. Failure to provide acceptable bonds justifies terminating the contract for default. FAR 52.228-1. See Pacific Sunset Builders, Inc., ASBCA No. 39312, 93-3 BCA ¶ 25,923.

5. Withholding Contract Payments. FAR 28.106-7.

   a. During Contract Performance. The contracting officer should not withhold payments. FAR 28.106-7(a). But see Balboa Ins. Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985); National Surety Corp., 31 Fed. Cl. 565 (1994); Dan F. Harrison Constr., Inc., ASBCA No. 41572, 91-2 BCA ¶ 23,949.

   b. After Contract Completion. The contracting officer must withhold final payment if the surety provides written notice regarding the contractor's failure to pay its subcontractors or suppliers.

      (1) The surety must agree to hold the government harmless.

      (2) The contracting officer may release final payment if:

         (a) The parties reach an agreement; or

         (b) A court determines the parties' rights.

   c. Labor Violations. See generally FAR Part 22.

6. Waiver Provisions. 10 U.S.C. §§ 270a(b) and 270e; FAR 28.102-1(a).

   a. The contracting officer may waive the requirement to provide performance and payment bonds if:

      (1) The contractor performs the work in a foreign country and the contracting officer determines that it is impracticable to require the contractor to provide the bonds; or

      (2) The Miller Act (or another statute) authorizes the waiver.

b. The Service Secretaries may waive the requirement to provide performance and payment bonds for cost-type contracts.

C. Differing Site Conditions (DSC). FAR 52.236-2.

1. This clause allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition.

2. There are two types of differing site conditions. See Consolidated Constr., Inc., GSBCA No. 8871, 88-2 BCA ¶ 20,811.

a. Type I Differing Site Conditions. To recover for a Type I condition, the contractor must prove that:

(1) The contract either implicitly or explicitly indicated a particular site condition. See Franklin Pavkov Constr. Co., HUD BCA No. 93-C-C13, 94-3 BCA ¶ 27,078; Glagola Constr. Co., Inc., ASBCA No. 45579, 93-3 BCA ¶ 26,179; Konoike Constr. Co., ASBCA No. 36342, 91-1 BCA ¶ 23,440; cf. Jack L. Olsen, Inc., AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767.

(2) The contractor reasonably interpreted and relied on the contract indications. See R.D. Brown Contractors, Inc., ASBCA No. 43973, 93-1 BCA ¶ 25,368.

(3) The contractor encountered latent or subsurface conditions that differed materially from those indicated in the contract. See Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639.

(4) The claimed costs were attributable solely to the differing site condition. See P.J. Dick, Inc., GSBCA No. 12036, 94-3 BCA ¶ 27,073.

b. Type II Differing Site Conditions. To recover for a Type II condition, the contractor must prove that:

(1) The conditions encountered were unusual physical conditions that were unknown at the time of contract award. See Walser v. United States, 23 Cl. Ct. 591 (1991); Gulf Coast Trailing Co., ENG BCA No. 5795, 94-2 BCA ¶ 26,921; Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472.

(2) The conditions differed materially from those ordinarily encountered. See Green Constr. Co., ASBCA No. 46157, 94-1 BCA ¶ 26,572; Virginia Beach Air Conditioning Corp., ASBCA No. 42538, 92-1 BCA ¶ 24,432; Arctic Slope, Alaska Gen./SKW Eskimos, Inc., ENG BCA No. 5023, 90-2 BCA ¶ 22,850.

3. The DSC clause only covers conditions existing at the time of contract award. Acts of nature occurring after contract award are not differing site conditions. See Arundel Corp. v. United States, 96 Ct. Cl. 77, 354 F.2d 252 (1942); Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; PK Contractors, Inc., ENG BCA No. 4901, 92-1 BCA ¶ 24,583. But see Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.

4. The contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation. See O.K. Johnson Elec. Co., VABCA No. 3464, 94-1 BCA ¶ 26,505; cf. Urban General Contractors, Inc., ASBCA No. 49653, 96-2 BCA ¶ 28,516; Indelsea, S.A., ENG BCA No. PCC-117, 95-2 BCA ¶ 27,633; Steele Contractors, Inc., ENG BCA No. 6043, 95-2 BCA ¶ 27,653; Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190.

5. The contractor cannot create its own differing site condition. See Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359.

6. The contractor must prove its damages. See H.V. Allen Co., ASBCA No. 40645, 91-1 BCA ¶ 23,393; see also Praught Constr. Corp., ASBCA No. 39670, 93-2 BCA ¶ 25,896.

7. The contractor must promptly notify the government. See Engineering Tech. Consultants, S.A., ASBCA No. 43376, 92-3 BCA ¶ 25,100.

a. Untimely notification may bar a differing site condition claim if the late notice prejudices the government. See Moon Constr. Co. v. General Servs. Admin., GSBCA No. 11766, 93-3 BCA ¶ 26,017; see also Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491; Meisel Rohrbau, ASBCA No. 35566, 92-1 BCA ¶ 24,434; Holloway Constr., Holloway Sand & Gravel Co., ENG BCA No. 4805, 89-2 BCA ¶ 21,713.

b. If the government's defense to a differing site condition claim is made more difficult—but not impossible—by the late notice, courts and boards will normally waive the notice requirement and place a heavier burden of persuasion on the contractor. See Glagola Constr. Co., ASBCA No. 45579, 93-3 BCA ¶ 26,179.

c. When the government is on notice of differing site conditions, but takes no exception to the contractor's notice or its corrective actions, the government must pay the contractor's increased costs. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865.

d. Lack of notice of a differing site condition will not bar a contractor's recovery when the government breaches its duty to cooperate by failing to designate an inspector to whom the contractor may give notice during scheduled weekend work. See Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466.

8. Final payment bars an unreserved differing site condition claim. FAR 52.236-2(d).

D. Variations in Estimated Quantity. FAR 52.211-18.

1. A fixed-price contract may include estimated quantities for unit-priced items of work.

2. If the actual quantity of a unit-priced item varies more than 15% above or below the estimated quantity, the contracting officer must equitably adjust the contract based on "any increase or decrease in costs due solely to the variation." See Clement-Mtarri Cos., ASBCA No. 38170, 92-3 BCA ¶ 25,192, aff'd sub nom., Shannon v. Clement-Mtarri Cos., No. 93-1268, 12 FPD ¶ 114 (Fed. Cir. 1993); cf. Westland Mechanical, Inc., ASBCA No. 48844, 96-2 BCA ¶ 28,419.

3. Whether a party may demand repricing of work that falls outside the 15% range, or whether the original contract unit price controls, is now settled. Adjustments are based on the difference between the unit cost of the original work, and the unit cost of the work outside the allowable variation range. Foley Co. v. United States, 11 F.3d 1092 (Fed. Cir. 1993). But see TECOM, Inc., ASBCA No. 44122, 94-1 BCA ¶ 26,483.

4. The contractor may request a performance period extension if the variation in the estimated quantity causes an increase in the performance period.

E. Suspension of Work. FAR 52.242-14.

1. The contracting officer may suspend, interrupt, or delay work for the convenience of the government. See Valquest Contracting, Inc., ASBCA No. 32454, 91-1 BCA ¶ 23,381.

2. A government delay is compensable if:

a. It is unreasonable. See Southwest Constr. Corp., ENG BCA No. 5286, 94-3 BCA ¶ 27,120; C&C Plumbing & Heating, ASBCA No. 44270, 94-3 BCA ¶ 27,063; Kimmins Contracting Corp., ASBCA No. 46390, 94-2 BCA ¶ 26,869; F.G. Haggerty Plumbing Co., VABCA No. 4482, 95-2 BCA ¶ 27,671.

b. The contracting officer orders it. See Mergentime Corp., ENG BCA No. 5765, 92-2 BCA ¶ 25,007; Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145. But see Fruehauf Corp. v. United States, 218 Ct. Cl. 456, 587 F.2d 486 (1978); Asphalt Roads & Materials Co., ASBCA No. 43625, 95-1 BCA ¶ 27,544; Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728; Lane Constr. Corp., ENG BCA No. 5834, 94-1 BCA ¶ 26,358.

c. The contractor has not caused the suspension by its (or its subcontractor's) negligence or failure to perform. See Hvac Constr. Co., Inc. v. United States, 28 Fed. Cl. 690 (1993).

d. The cost of performance increases. See Missile Sys., Inc., ASBCA No. 46079, 94-3 BCA ¶ 27,091; Frazier-Fleming Co., ASBCA No. 34537, 91-1 BCA ¶ 23,378.

3. The contractor may be entitled to delay costs (even if it finishes work on time) if it proves that it planned to finish the work early, but was delayed by the government. See Oneida Constr., Inc., ASBCA No. 44194, 94-3 BCA ¶ 27,237; Labco Constr., Inc., AGBCA No. 90-115-1, 94-2 BCA ¶ 26,910.

4. The contractor may not recover delay costs where the government provides greater access to a work site for a portion of the performance period, without binding the government to increased access for the duration of the entire contract, and the government then restricts access to the original contract requirements. Atherton Construction, Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968. (In a family housing renovation contract, the government provided access to more than the contractually required 14 dwelling units for a period of 48 days. Unilateral action by the government, no recovery allowed.)

5. A contractor may be entitled to a performance period extension even if the delay is reasonable. A contractor also may raise government delay as a defense to a default termination or an assessment of liquidated damages. See Farr Bros., Inc., ASBCA No. 42658, 92-2 BCA ¶ 24,991.

6. If both the contractor and the government contribute to a delay and the causes of the delay are so intertwined that the periods and costs of delay cannot be apportioned clearly, neither party can recover for the delay. See Wilner v. United States, 994 F.2d 783, 786 (Fed. Cir. 1993); cf. G. Bliudzius Contractors, ASBCA No. 42366, 93-3 BCA ¶ 26,074.

7. Profit is not recoverable and final payment bars unreserved suspension claims.

8. The clause limits suspensions to 45 days, but suspensions beyond 45 days are treated no different than the initial 45-day suspension. See Debcon, Inc., ASBCA No. 45050, 93-3 BCA ¶ 25,906.

9. Constructive Suspensions.

   a. A constructive suspension of work may arise if:

      (1) The government fails to issue a notice to proceed within a reasonable time after contract award. See Marine Constr. & Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286.

      (2) The government fails to provide timely guidance following a reasonable request for direction. See Tayag Bros. Enters., Inc., ASBCA No. 42097, 94-2 BCA ¶ 26,962.

   b. A contractor may not recover delay costs for more than 20 days unless the contractor notifies the government of the delay. FAR 52.242-14. This rule, however, is subject to a prejudice test.

F. Permits and Responsibilities. FAR 52.236-7.

1. A contractor must obtain applicable permits and licenses (and comply with applicable laws and regulations) at no additional cost to the government. See GEM Eng'g Co., DOT BCA No. 2574, 94-3 BCA ¶ 27,202; C'n R Indus. of Jacksonville, Inc., ASBCA No. 42209, 91-2 BCA ¶ 23,970; Holk Dev., Inc., ASBCA No. 40137, 90-2 BCA ¶ 22,852. But see Hills Materials v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491.

2. Normally, licensing is a question of responsibility, not responsiveness. See Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154; Computer Support Sys., Inc., B-239034, Aug. 2, 1990, 69 Comp. Gen. 645, 90-2 CPD ¶ 94. But see Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

3. A contractor assumes the risk of loss or damage to its equipment.[12] In addition, a contractor is responsible for injuries to third persons. See Potashnick Constr., Inc., ENG BCA No. 5551, 92-2 BCA ¶ 24,985; Aulson Roofing, Inc., ASBCA No. 37677, 91-1 BCA ¶ 23,720.

4. A contractor is responsible for work in progress until the government accepts it. See Labco Constr., Inc., ASBCA No. 44945, 93-3 BCA ¶ 26,027; Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646; D.J. Barclay & Co., ASBCA No. 28908, 88-2 BCA ¶ 20,741. But see Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223; Joseph Beck & Assocs., ASBCA No. 31126, 88-1 BCA ¶ 20,428.

G. Specifications and Drawings. FAR 52.236-21; DFARS 252.236-7001.

1. The omission or misdescription of details of work that are necessary to carry out the intent of the contract drawings and specifications (or are customarily performed) does not relieve a contractor from its obligation to perform the omitted or misdescribed details of work. A contractor must perform as if the drawings and specifications describe the details fully and correctly. See Wood & Co. v. Dep't of Treasury, GSBCA No. 12452-TD, 94-1 BCA ¶ 26,365; Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032.

2. The contractor must review all drawings before beginning work, and the contractor is responsible for any errors that a reasonable review would have detected. M.A. Mortenson Co., ASBCA 50,383, 00-2 BCA ¶ 30,936, (denying Mortenson's claim based on omissions in construction drawings), But see Wick Constr. Co., ASBCA No. 35378, 89-1 BCA ¶ 21,239.

[12] The contractor may bear similar responsibilities under a Government Furnished Property clause. FAR 52.245-4. See Technical Servs. K.H. Nehlsen GmbH, ASBCA No. 43869, 94-1 BCA ¶ 26,377.

3. If the specifications contain provisions that conflict with the contract drawings, the specifications govern. The parties may rely on this order of precedence regardless of whether an ambiguity is patent. See Hensel Phelps Constr. Co., 886 F.2d 1296 (Fed. Cir. 1989); Shemya Constructors, ASBCA No. 45251, 94-1 BCA ¶ 26,346; Rohr, Inc., ASBCA No. 44193, 93-2 BCA ¶ 25,871. But see J.S. Alberici Constr. Co v. General Servs. Admin, GSBCA No. 12386, 94-2 BCA ¶ 26,776. Contracts that contain specifications for alternative CLINs are not conflicting. Fort Myer Construction Corporation v. U.S., Fed. Cir. 2000 (unpub. 24 Jan 2000).

H. Liquidated Damages (LDs). FAR 11.502; FAR 36.206; FAR 52.211-12, DFARS Subpart 211.5.

1. The government may assess LDs if:

a. The parties intended to provide for LDs;

b. Anticipated damages attributable to untimely performance were uncertain or difficult to quantify at the time of award; and

c. The LDs bear a reasonable relationship to anticipated government losses resulting from delayed completion.

See D.E.W., Inc., ASBCA No. 38392, 92-2 BCA ¶ 24,840; Brooks Lumber Co., ASBCA No. 40743, 91-2 BCA ¶ 23,984; JEM Dev. Corp., ASBCA No. 42645, 91-3 BCA ¶ 24,428; Dave's Excavation, ASBCA No. 35956, 88-3 BCA ¶ 20,911; see also Kingston Constructors Inc. v. Washington Area Transport Authority, 930 F. Supp. 951 (Fed. Cir 1996); P&D Contractors, Inc. v. United States, 25 Cl. Ct. 237 (1992).

2. If the damage forecast was reasonable, the government may assess LDs even if it did not incur any actual damages. See Cegers v. United States, 7 Cl. Ct. 615 (1985); American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009. But see Atlantic Maint. Co., ASBCA No. 40454, 96-2 BCA ¶ 28,323. Using a rate from an agency manual that is part of its procurement regulations is presumed reasonable. See Fred A. Arnold, Inc. v. United States, 18 Cl. Ct. 1 (1989), aff'd in part, 979 F.2d 217 (Fed. Cir. 1992); JEM Dev. Corp., ASBCA No. 45912, 94-1 BCA ¶ 26,407.

3. The government may not assess LDs if a project is substantially complete. See Hill Constr. Corp., ASBCA No. 43615, 93-3 BCA ¶ 25,973; Wilton Corp., ASBCA No. 39876, 93-2 BCA ¶ 25,897.

4. The government may not assess LDs if it is partly responsible for the completion delay. See H.G. Reynolds Co., Inc., ASBCA No. 42351, 93-2 BCA ¶ 25,797.

5. A contractor may be excused from LDs if it shows that the delay was: (a) excusable or beyond its control; and (b) without the fault or negligence of it or its subcontractors. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865.

6. Contracting officers must ensure that project completion dates are reasonable to avoid having contractors "pad" their bids to protect against LDs.

7. Another contract clause that sets an alternate rate of compensation for standby time may be enforceable, even if it is quite high, if it serves a different purpose in the contract than a liquidated damages clause. See Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.

I. Use/Possession Prior to Completion. FAR 52.236-11.

1. The government may take possession of a construction project prior to its completion (beneficial occupancy).

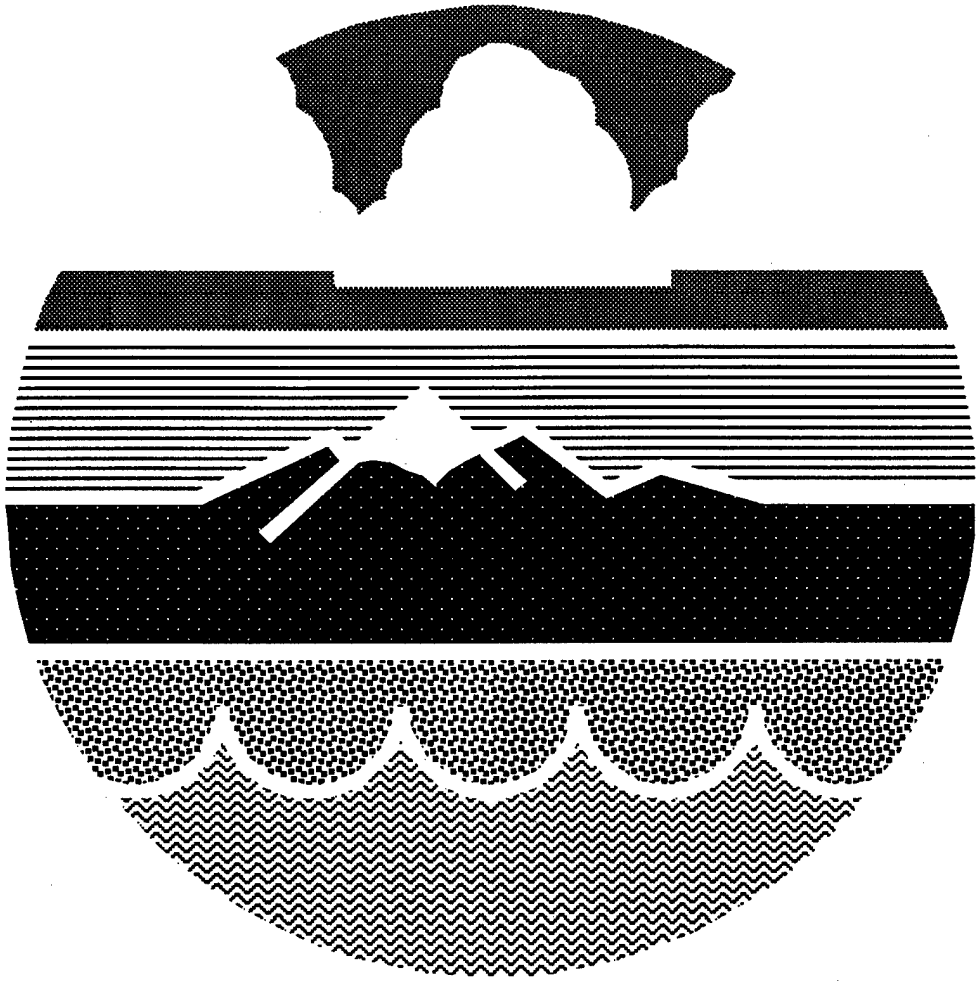
2. Possession does not necessarily constitute acceptance. See Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646. The contractor must complete a project as required by the contract, including all "punch list" items. See Toombs & Co., ASBCA No. 34590, 91-1 BCA ¶ 23,403.

3. The contractor is not responsible for any loss or damage that the government causes. See Fraser Eng'g Co., supra.

4. The contractor may be due an equitable adjustment if possession by the government causes a delay.

X. CONCLUSION.

Chapter 17
Environmental Contracting



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CHAPTER 17

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CHAPTER 17

ENVIRONMENTAL CONTRACTING

I. **OBJECTIVES**. Following this block of instruction, the student will:

A. Understand the government's obligation to eliminate environmentally hazardous substances from the goods and services it procures;

B. Understand the government's obligation to require the use of recycled materials to the maximum extent practicable; and

C. Know the contracting processes that implement the government's environmental obligations.

II. INTRODUCTION.

In the post-Cold War era, DOD's approach to environmental problems must rest on two basic premises. First, our national security must include protection of the environment, and environmental concerns must be fully integrated into our defense policies. Second, to protect our nation we must also have a strong economy; protecting the environment and growing the economy must go hand in hand.

- Secretary of Defense Les Aspin, Report on the Bottom-Up Review, October 1993.

A. Impact of Environmental Laws on the Federal Procurement Process. Congress and the President, recognizing the influential effect of the billions of dollars spent through the federal procurement process, view this process as a vehicle for environmental change. These efforts fall into two distinct categories:

1. Environmentally Safe Contracting. There are several statutes and executive orders that require the purchase of certain environmentally sound goods and services. The intent of these statutes is to create and sustain markets for these goods and services.

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2. Restrictions on Purchases. There are also requirements that restrict purchases of environmentally harmful goods and services in order to limit or phase-out their use by federal agencies.

B. Overview of the Issues.

1. Compliance vs. Clean-Up. Environmental issues in federal procurement generally arise in two contexts.

a. First, agencies must ensure that their procurement practices and contractors comply with current environmental requirements (environmentally safe contracting and purchase restrictions, discussed above, are included in this context).

b. Second, issues arise regarding proportionate responsibility and funding when agencies or their contractors become obligated to clean up contaminated sites.

2. Scope of the Problem. In July 1993, the General Accounting Office (GAO) reported that, as of February 1993, federal agencies reported owning or operating over 1,900 contaminated facilities, including military installations. Since then, the number has increased.

III. ENVIRONMENTALLY RESPONSIBLE CONTRACTING AND COMPETITION.

A. General Requirements.

1. Full and Open Competition. With limited exceptions, contracting officers shall promote full and open competition through the use of competitive procedures in soliciting offers and awarding government contracts. 10 U.S.C. § 2304(a)(1); 41 U.S.C. § 253(a)(1); FAR Subpart 6.1.

2. Defined. "Full and open competition" means that all responsible sources are permitted to compete. FAR 6.003. Full and open competition may not actually achieve competition.

B. Specifications and Competition.

1. Agencies must specify their needs, based on market research, in a manner that permits full and open competition and includes restrictive provisions or conditions only to the extent necessary to satisfy the minimum needs of the agency or as authorized by law. 10 U.S.C. § 2305(a)(1); 41 U.S.C. § 253a(a); FAR 10.002. See Red River Service Corp., B-279250, May 26, 1998, 98-1 CPD ¶ 142 (holding that agencies must specify needs in a manner to achieve full and open competition).

2. Specifications must:

a. Permit full and open competition.

b. Be restrictive only to the extent necessary.

c. State minimum needs or requirements authorized by law.

3. Unduly Restrictive Specifications.

a. Agencies may use restrictive provisions to meet their minimum needs. 10 U.S.C. § 2305(a)(1)(B); 41 U.S.C. § 253a(a) (2)(B); Dixon Pest Control, Inc., B-248725, Aug. 27, 1992, 92-2 CPD ¶ 132.

b. Common examples of restrictive specifications:

(1) Specifications written around a specific product. Ressler Assocs., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230.

(2) Geographical restrictions that result in availability only from a sole source. But specifications that impose geographical restrictions are not "unduly" restrictive if the restriction furthers a federal policy. See, e.g., H&F Enters., B-251581.2, July 13, 1993, 93-2 CPD ¶ 16 (finding federal policy of preserving inner cities furthered by limiting competition for leased office space to inner city cites).

(3) Specifications that exceed the agency's minimum needs. CardioMetrix, B-248295, Aug. 14, 1992, 92-2 CPD ¶ 107.

C. Environmental Issues. The easiest way to comply with the various environmental purchasing preference requirements is to use specifications that restrict competition to those sources who can supply items meeting the mandated requirements. Balanced against this strategy is the requirement that specifications cannot unduly restrict competition.

D. General Rule. To implement a collateral policy (such as environmental protection) that restricts the number of offerors eligible for award, the General Accounting Office (GAO) held originally that an agency needed a clear grant of authority from Congress. To the Sec'y of Defense, B-148930, 42 Comp. Gen. 1 (1962) (requiring labor rates not mandated by statute was improper). Subsequently, the GAO held that a specification is not unduly restrictive if it furthers a strong express or implied public policy. Quality Lawn Maintenance, B-270690, June 27, 1996, 96-1 CPD ¶ 289 (holding it reasonable for GSA to require a small business to employ an on-staff certified horticulturist to be qualified for a landscape maintenance contract, because the requirement met those of a Presidential directive); American Can Co., B-187658, Mar. 17, 1977, 77-1 CPD ¶ 196 (upholding reclaimed fiber content requirement).

1. If the government decides to restrict competition based on its consideration of the environment, the GAO will not disturb the government's decision even when a protester alleges that the required product or service is actually harmful to the environment. Integrated Forest Mgmt., B-204106, Jan. 4, 1982, 82-1 CPD ¶ 6.

2. Executive Order 13101 requires agencies to procure recycled and environmentally sound products. Exec. Order 13101 (63 Fed. Reg. 45,558 (1998)). This policy parallels environmental statutes and GAO decisions that are generally supportive of restrictive specifications to further environmental goals. The order expresses a strong federal policy that justifies use of environmental specifications that may narrow the competition for federal requirements. Ocuto Blacktop & Paving Company, Inc., B-284165, Mar. 1, 2000, 2000 CPD ¶ 32 (upholding preference for local environmental restoration and mitigation contractors when work is associated with a BRAC action).

3. Specifications that are more environmentally restrictive than required by current law are not necessarily unduly restrictive. See Trilectron Indus., B-248475, Aug. 27, 1992, 92-2 CPD ¶ 130 (holding that agency requirement for use of an air conditioner refrigerant with an ozone depletion potential of zero was reasonable, even though it prevents protester from competing).

4. If the government decides to restrict competition based on its consideration of the environment, the GAO normally will not disturb the government's decision even when a protester alleges that the required product or service is actually harmful to the environment. Integrated Forest Mgmt., B-204106, Jan. 4, 1982, 82-1 CPD ¶ 6. But see Bardex Corp., B-252208, June 14, 1993, 93-1 CPD ¶ 461 (sustaining protest because agency could not show that protester's product was unable to satisfy the agency's environmental concerns).

5. Protesters have been generally unsuccessful in contending that the government should have imposed more restrictive requirements. See, e.g., Trimble Navigation Ltd., B-247913, July 19, 1992, 92-2 CPD ¶ 17; Container Prods. Corp., B-232953, Feb. 6, 1989, 89-1 CPD ¶ 117. The GAO has applied this rule even though the protester had a clear statutory and regulatory basis for its argument to restrict competition in furtherance of environmental policies. Sunbelt I, B-214414.2, Jan. 29, 1985, 85-1 CPD ¶ 113.

IV. PROCUREMENT OF ITEMS COMPOSED OF RECOVERED MATERIALS.

A. Statutory Requirements. "Federal agencies must procure items composed of the highest percentage of recovered materials practicable, . . . consistent with maintaining a satisfactory level of competition." 42 U.S.C. § 6962; FAR 23.403.

B. Executive Order 13101. On 14 September 1998, President Clinton signed Executive Order 13101. This new Executive Order superceded Executive Order 12873. The stated goal of 13101 is to improve the federal government's use of recycled products and environmentally preferable products and services. 63 Fed. Reg. 49641.

C. Definitions.

1. Recovered Materials. Waste material and by-products, which have been recovered from solid waste, but not materials, generated from and commonly reused within an original manufacturing process. Office of Federal Procurement Policy (OFPP) Policy Letter No. 92-4, 57 Fed. Reg. 53,362; FAR 23.402, Exec. Order 13101, § 205.

2. Environmentally Preferable. Products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the product or service. Exec. Order 13101, § 201.

3. Postconsumer material. A material or finished product that has served its intended use and has been discarded for disposal or recovery, having completed its life as a consumer item. Postconsumer material is a part of the broader category of recovered material. Exec. Order 13101, § 203.

4. Acquisition. The acquiring by contract with appropriated funds for supplies or services including construction by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, and contract administration. Exec. Order 13101, § 204.

5. Recycling. Ability of a product or material to be recovered from, or otherwise diverted from, the solid waste stream for the purpose of recycling. Exec. Order 13101, § 206.

6. Waste Prevention. Any change in the design, manufacturing, purchase or use of materials or products, including packaging, to reduce their amount of toxicity before they are discarded. Waste prevention also refers to the reuse of products or materials. Exec. Order 13101, § 208.

7. Waste Reduction. Preventing or decreasing the amount of waste being generated through waste prevention, recycling, or purchasing recycled and environmentally preferable products. Exec. Order 13101, § 209.

8. Life Cycle Cost. The amortized annual cost of a product, including capital costs, installation costs, operating costs, maintenance costs, and disposal costs discounted over the lifetime of the product. Exec. Order 13101, § 210.

9. Pollution Prevention. Source reduction and other practices that reduce or eliminate the creation of pollutants through: a) increased efficiency in the use of raw materials, energy, water, or other resources; or b) protection of natural resources by conservation. Exec. Order 13101, § 212.

10. Cost-Effective Procurement Preference. A program that favors, where price and other factors are equal, the procurement of products and services that are more environmentally sound or energy-efficient than other competing products and services. OFPP Ltr. 92-4, para. 4f.

11. Bio-based Products. These are products made from renewable resources. The EPA considers these products to have many positive environmental aspects and should be looked at by agencies when making environmentally preferable purchases. However, federal purchasers should not assume all bio-based products are automatically environmentally preferable. Exec. Order 13101, § 504.

D. Agency Responsibilities. Agencies must consider energy conservation and efficiency data along with estimated cost and other evaluation factors, in the development of purchase requests and solicitations. OFPP Ltr. 92-4, para. 6(a); FAR 7.103. These factors should be considered in acquisition planning for all procurement and in the evaluation and award of contract. Program and acquisition managers should take an active role in these activities. Exec. Order 13101. In discharging this responsibility, agencies must:

1. Use product descriptions and specifications that reflect cost-effective use of recycled products, recovered materials, remanufactured products, and energy-efficient goods and services. Exec. Order No. 13101, § 501; OFPP Ltr. 92-4, para. 7.a.(4); FAR 23.401(b).

2. Require that offerors certify the percentage of recovered material used when the agency awards contracts wholly or in part on the basis of utilization of recovered materials. 42 U.S.C. § 962c(3)(A); OFPP Ltr. 92-4, para. 7.a.(6); FAR 52.223-4, -9.

3. Use life cycle cost analysis whenever feasible and appropriate, to assist in making source selection decisions. OFPP Ltr. 92-4, para. 7.a.(3); AFI 32-7080, para. 1.3.1.3.

4. When drafting or reviewing specifications, the agency must ensure that the specifications:

   a. Do not exclude the use of recovered materials;

   b. Do not unnecessarily require the item to be manufactured from virgin materials;

   c. Require the use of recovered materials and environmentally sound components to the maximum extent practicable without jeopardizing the intended end use of the item. OFPP Ltr. 92-4, para. 7a.(7); and

   d. Consider the use of biobased products, reuse of products, life cycle cost, recyclability, waste prevention, and ultimate disposal. Exec. Order 13101, § 401.

E. Implementation.

1. OFPP Policy Letter No. 92-4 states that it is the policy of the federal government that executive agencies implement cost-effective procurement preference programs favoring the purchase of environmentally sound, energy-efficient products and services. OFPP Ltr. No. 92-4, para. 6.

2. OFPP Policy Letter No. 92-4 states that "it is expected that agencies will take all appropriate actions . . . to implement those aspects of the policy that are not dependent upon regulatory change." OFPP Ltr. No. 92-4, para. 10.

3. Developing a Preference Program. 42 U.S.C. § 6962(i)(3); OFPP Ltr. 92-4, para. c.(1)(e). In developing a preference program, agencies must consider the following options:

a. Provide open competition between products made of virgin materials and products containing recovered materials and provide a preference to the latter; or

b. For guideline items, establish minimum content standards that identify the minimum content of recovered materials that an item must contain.

4. Sealed Bidding. Since agencies cannot consider factors unrelated to price in awarding sealed bid contracts, preferences for environmentally sound goods and services are relevant during the acquisition planning process or when the agency receives two equally priced bids.

F. Affirmative Procurement Programs. 42 U.S.C. § 6962; Executive Order No. 13101; OFPP Ltr. 92-4, para. 7c. FAR 23.404 & 23.7. Within one year after publication of guidelines issued pursuant to 42 U.S.C. § 6962(e), each procuring agency must develop an "affirmative procurement program" which will assure that items composed of recovered materials will be purchased to the maximum extent practicable. 42 U.S.C. § 6962(i). The use of the guideline-specified material must not "jeopardize the intended end use of the item." 42 U.S.C. § 6962 (d)(2). AFI 32-7080, para. 3.5.

1. Currently the EPA has listed 55 items that can be made with recovered materials.

a. The 55 items include five items listed previously: cement and concrete containing fly ash (40 C.F.R. § 249), paper products (50 Fed. Reg. 14,076), re-refined lubricating oil (40 C.F.R. § 252), retread tires (40 C.F.R. § 253), and building insulation containing recovered materials (40 C.F.R. § 248).

b. The items EPA has listed recently include: engine coolants, structural fiberboard, laminated paperboard, carpet, floor tile, patio blocks, cement and concrete containing ground granulated blast furnace slag, traffic cones, traffic barricades, playground surfaces, running tracks, hydraulic mulch, yard trimmings compost, office recycling containers, office waste receptacles, plastic desktop accessories, toner cartridges, binders, carpet cushions, flowable fill, railroad grad crossing surfaces, park and recreational furniture, playground equipment, food waste compost, plastic lumber landscaping timbers and posts, solid plastic binders, plastic clipboards, plastic file folders, plastic clip portfolios, plastic presentations folders, absorbents and adsorbents, awards and plaques, industrial drums, mats, signage, manual-grade strapping and plastic trash bags. See 64 Fed. Reg. 22,023 (1999); 63 Fed. Reg. 45,558 (1998), 61 Fed. Reg. 57,748 (1996).

2. Applicability. Agencies shall ensure that their affirmative procurement programs require 100 percent of their purchases meet or exceed the EPA guidelines. The statutory requirement to purchase EPA guideline items only applies to procurements over $10,000 or where the purchased quantity of such items, or of functionally equivalent items, procured in the prior fiscal year exceeds $10,000. The broader requirement for recovered material purchases has no price threshold.

3. Effective 1 January 1999, Executive Order 13101 required agencies to use paper made with a minimum of 30 per cent post consumer (recycled) content. Exec. Order 13101 § 505. If this paper is not reasonably available, does not meet performance standards, or is cost prohibitive, the agency must purchase paper containing no less than 20 percent post consumer material.

4. Executive Order No. 13101 directs federal agencies to implement the EPA procurement guidelines for re-refined lubricating oil and retread tires. It specifically requires that product managers revise specifications to maximize procurement of these items. Exec. Order 13101 § 507(a).

5. These requirements not only apply to acquisition of products and services but also to leasing and construction contracts. Exec. Order 13101, § 702.

5. Executive Order No. 13101 directs the EPA to develop a process for designating items that contain recovered materials so that agencies can give a preference to these items in their procurement.

G. Exceptions. 42 U.S.C. § 6962; FAR 23.404(b), AFI 32-7080, para. 3.5.3. Under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6901i, a procurement is not subject to these requirements if the procuring contracting officer determines that the items meeting the statutory requirements:

1. Are not available competitively within a reasonable time frame;

2. Do not meet appropriate performance standards; or

3. Are only available at an unreasonable price. Exec. Order 13101, § 402.

H. Contractor Responsibilities. On June 20, 1996, the FAR Council adopted a final rule, which encourages contractors to maximize the use of double-sided copying on recycled paper when submitting written documents related to an acquisition. FAR 4.301 and FAR 52.204-4. The rule encourages contractors to use high-speed copier paper, offset paper, computer printout paper, carbonless paper, file folders, white woven envelopes, and other uncoated printed and writing paper made with a minimum of 20 per cent post-consumer (recycled) content. Contracts that provide for contractor operation of a government owned or leased facility and/or contracts that provide for contractor or other support services at government owned or operated facilities awarded by executive agencies shall include provisions that obligate the contractor to comply with the provisions of Exec. Order 13101. Exec. Order 13101, § 701.

I. EPA Guidance on Environmentally Preferable Purchasing. As required by Exec. Order 13101, on 20 August 1999, the EPA published its final guidance on environmentally preferable purchasing for executive agencies. The guidance is designed to help executive agencies meet their obligations to identify and purchase environmentally preferable products and services. Executive agencies are directed by Exec. Order 13101 to use the principles and concepts in the EPA Guidance. The guidance applies to all acquisition types (supplies, services, buildings and systems). 64 Fed. Reg. 45,809 (1999).

1. Guiding Principles. The EPA has developed five guiding principles. Applicability of these principles should vary depending on factors such as type and complexity of product or service being purchased, whether or not the product or service is commercially available, the type of procurement method used (negotiated, sealed bidding, simplified acquisition, IMPAC card, etc.), the time frame for the requirement, and the cost involved. Agency personnel should use their professional judgment and common sense when assessing a product or service's performance, cost, or availability. EPA Guidance, § IV.

2. The Guiding Principles are as follows:

   a. Environmental considerations should become part of normal purchasing practice consistent with such traditional factors as product safety, price, performance, and availability.

   b. Consideration of environmental preferability should begin early in the acquisition process and be rooted in the ethic of pollution prevention, which strives to eliminate or reduce, up-front, potential risks to human health and the environment.

   c. A product or service's environmental preferability is a function of multiple attributes from a life cycle perspective.

   d. Determining environmental preferability might involve comparing environmental impacts. In comparing environmental impacts, federal agencies should consider: the reversibility and geographic scale of the environmental impacts, the degree of difference among competing products or services, and the overriding importance of protecting human health.

   e. Comprehensive, accurate, and meaningful information about the environmental performance of products or services is necessary in order to determine environmental preferability.

V. OZONE DEPLETING SUBSTANCES.

A. Background.

1. In 1977, Congress amended the Clean Air Act Amendments to add provisions for Ozone Protection.

2. In May 1977, the Toxic Substances Control Act added aerosol products containing chloroflurocarbons (CFCs).

3. In 1985, the Vienna Convention met and discussed protection of the ozone layer. In 1987, the rules, which we now follow, were adopted during the Montreal Convention on Ozone Protection. The United States is a party to the Montreal Protocol, which is an international treaty requiring the phase-out the use and production of Ozone Depleting Substances (ODS). The largest 24 nations in the world are signatories to the Montreal Protocol. The Protocol states that the signatory governments agree to phase-out their use of products containing ODS. Congress adopted these provisions as law in the 1987 and 1990 Amendments to the Clean Air Act.

B. Products Containing ODSs.

1. Halons are primarily used as firefighting agents in aircraft engines, cargo departments, and passenger compartments; in flightline wheeled units and crash and rescue vehicles; and for vector control in some missile systems.

2. Chlorofluorocarbons are primarily used as refrigerants, weapon systems, medical sterilization, insulation, packing foam, and cleaning solvents.

3. Methyl chloroform and methyl bromide are used for cleaning and degreasing, and for electronics manufacturing. Carbon tetrachloride is used as a cleaning solvent.

C. Statutory Prohibition. § 326(a) of the FY 1993 Authorization Act, Pub. L. No. 102-484, 106 Stat. 2315 (hereinafter Pub. L. 102-484) provides:

No [DOD] contract awarded after June 1, 1993, may include a specification or standard that requires the use of a class I [ODS] or that can be met only through the use of such a substance unless the inclusion of the specification or standard in the contract is approved by the senior acquisition official (SAO) for the procurement covered by the contract. See Exec. Order No. 12843, 58 Fed. Reg. 21,881 (1993); DFARS 210.002-71(a); AFFARS 5310.002-71(90)(a).

D. Definitions.

1. A "Class I ozone depleting substance" means any substance listed under § 602(a) of the Clean Air Act. 42 U.S.C. § 7671a(a). See Protection of Stratospheric Ozone, 40 C.F.R. part 82, Appendix A (1997).

2. On June 20, 1996, the FAR Council adopted a final ODS rule (61 Fed. Reg. 31,645 (1996)) which changed the definition of ODS. The definition now reads "any substance designated as Class I by the EPA, including but not limited to chloroflourocarbons, halons, carbon tetrachloride, and methyl chloroform; or any substance designated as Class II by the EPA, including but not limited to hydrochloroflourocarbons." FAR 23.802.

3. Senior Acquisition Official (SAO). The person with contracting authority for the contracting activity involved who is a general or flag officer or a member of the senior executive service. DFARS 210.002-71(a). See Memorandum, Assistant Secretary of the Army for Research, Development, and Acquisition, subject: Ozone Depleting Substances (2 July 1993) [hereinafter July SARDA Memorandum]. Air Force policy designates the Assistant Secretary of the Air Force for Acquisition, Logistics, and Engineering as SAOs within their respective areas of responsibility. See Air Force ODC Interim Waiver Application, Approval Procedures, and Reporting Requirements (14 July 1993) [hereinafter AF Waiver Letter].

4. Approved Technical Representative (ATR). The person with authority to certify that no suitable ODS substitute or alternative technology is currently available. The SAO relies on this certification to authorize including the specification or standard that requires ODS. See Memorandum, Assistant Secretary of the Army, subject: Elimination of Ozone-Depleting Chemicals (20 May 1993) [hereinafter Army ODS Policy Letter].

E. Nature of Requirement. Section 326 of Pub. L. 102-484 only prohibits federal contracting activities from requiring the use of ODS. See FAR 23.803.

1. Contractors may choose to use ODS on their own initiative. The agency complies with the statute if it did not specify that an ODS must be used, has not phrased the requirement in such a way that it can only be met through the use of an ODS, or did not require the contractor to deliver an ODS. See AF Waiver Letter; Army ODS Policy Letter.

2. Contractor screening.

a. In addition to the screening conducted by the government, the contracting officer should encourage contractors to share with the government any special knowledge they have regarding ODS required at any level of contract performance. See July SARDA Memorandum.

b. Agencies should ensure that their solicitations and contracts do not obligate contractors to identify ODS use in production, performance, or in the end item. See Memorandum, Director of Defense Procurement, Subject: Ozone-Depleting Substances, (20 Oct. 1993). See AFFARS 5352.210-9000 (encouraging but not requiring offerors to identify ODS use).

c. The Defense Acquisition Regulatory Council has provided the following guidance:

> Buying activities are still requesting certifications from contractors regarding the absence of [ODS]. This is improper, since no paperwork clearance has been received from OMB to collect this information, and Executive Order 12843 requires only the government agencies stop mandating the use of ODS. Contracting activities should immediately cease this practice. DAR Council Report, 3 September 1993.

d. If the government learns of ODS use through contractor identification, the generally applicable rules pertaining to ATR review and SAO approval are required prior to further use.

3. The DOD has issued a list of military specifications and standards that require the use of ODS. See Department of Defense Policy Memorandum, subject: Ozone Depleting Chemicals (20 May 1993) [hereinafter ODS Policy Letter].

a. No contract awarded after 1 June 1993 may include a listed specification or standard unless the appropriate authority has granted a waiver.

b. Agencies must screen all new contract actions and solicitations for specifications and standards identified by the DOD as requiring the use of ODS.

(1) This initial review does not have to be performed by the ATR. July SARDA Memorandum.

(2) If the initial reviewer determines that the specifications and standards are not on the DOD list, the reviewer should submit a statement to the contracting office stating his/her conclusion. See July SARDA Memorandum.

(3) The reviewer should submit this statement to the contracting office with the requirements document and the contract file should contain both documents. See July SARDA Memorandum.

c. The ATR must review all solicitations and existing contracts to determine if they include specifications or standards that require use of Class I ODS. See Memorandum, Assistant Secretary of the Army for Research, Development, and Acquisition, subject: Implementation of the Requirements of the National Defense Authorization Act for FY 93 (9 June 1993) [hereinafter June SARDA Memorandum].

4. The DOD is emphasizing the use of commercial practices and performance-based specifications to minimize the use of military specifications and standards. To the extent these initiatives are implemented, such an emphasis could reduce the review and revision effort, because fewer military specifications and standards would need to be reviewed. General Accounting Office, Pollution Prevention, Status of DOD's Efforts, Report No. GAO/NSIAD-95-13 (1994).

5. If the solicitation prohibits using ODS in the manufacturing process or as components in the end item, but the contractor chooses to use them, the contracting officer must find these offers non-responsive.

F. The DOD Policies.

1. See DFARS 207.105(b)(15), Contents of Written Acquisition Plans. This regulation requires written acquisition plans to discuss actions taken to ensure "either elimination of or authorization to use Class I ozone-depleting chemicals."

2. Air Force Policy. On 7 January 1993, the Secretary of the Air Force issued a policy letter implementing § 326 of Public Law 102-484. See Air Force ODC Policy Letter (7 Jan. 1993) [hereinafter AF ODC Policy Letter]. See also AFFARS 5310.002-71(90). The Policy Letter established the following requirements:

a. Prohibits purchasing fire extinguishers containing halon for use inside Air Force facilities.

b. Aircraft in development must not be designed to include halon but must incorporate alternatives under development.

c. Prohibits the acquisition of facility air conditioning systems and other refrigeration and aircraft support equipment using ODSs as of 1 January 1993.

d. Prohibits the acquisition of commercial vehicles with air conditioning equipment containing ODSs after 1 June 1993. Requires service contracts for servicing air conditioning units in existing vehicles to comply with the Clean Air Act (42 U.S.C. §§ 7401-7671q) requirements for recycling ODS.

e. Requires installations to replace refrigerators and other domestic equipment with non-ODS equipment when the ODS-containing equipment has reached the end of its economic life. Installations may purchase recycled ODSs from commercial sources to maintain this equipment.

f. Prohibits acquiring solvents containing ODS' and supplies requiring ODS solvents for maintenance or operation purposes after 1 April 1994.

g. Prohibits local acquisition of any ODS-containing product without a waiver.

G. Executive Order 12843. On 21 April 1993, the President issued an executive order titled, "Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances," Exec. Order 12843, Fed. Reg. 21,881 (1993). This order addresses many of the same concerns as § 326 of Pub. L. No. 102-484 and the implementing DFARS provisions discussed above. The executive order states that:

1. It is federal policy that federal agencies give a preference to the procurement of alternative chemicals, products, and manufacturing processes that reduce overall risks to human health and the environment by lessening the depletion of ozone in the upper atmosphere. Exec. Order 12843, § 3. (This requirement is now embodied in FAR 23.803(a)(2)). For example, the Secretary of the Air Force has directed SAF/AQ and AF/LG to implement procedures making non-use of ODS a salient characteristic of any item or process. ODS Policy Ltr.

2. Federal agencies, where economically practicable, must minimize the procurement of products containing or manufactured with Class I ODS and maximize the use of safe alternatives. Exec. Order 12843, § 3(a). (This requirement is now embodied in FAR 23.803(a)(2)). See, e.g., AFI 32-7080, para. 2.4.3.

3. Agencies must amend existing contracts, "to the extent permitted by law," and, where practicable, make them consistent with the phaseout schedules for Class I substances. Exec. Order 12843, § 3(b).

3. The order does not create any right or benefit, substantive or procedural, enforceable by a non-federal party against the United States, its officers or employees, or any other person. Exec. Order 12843, § 9.

H. Waivers.

1. Section 326(a) of Pub. L. No. 102-484, states that contracts must not include a specification or standard that requires the use of a class I ODS or that can be met only through the use of such a substance unless the SAO approves the inclusion of the specification or standard in the contract. See Exec. Order 12843, 58 Fed. Reg. 21,881 (1993); DFARS 210.002-71(a); AFFARS 5310.002-71(90)(a); AFI 32-7080, para. 3.1.3.

2. Waiver Authority. The differing guidance from various sources has hampered the ability to decide who may grant waivers.

a. The FY 93 Authorization Act stated that only the SAO may grant waivers pertaining to contracts awarded after 1 June 1993, but that the "SAO or designee" could grant waivers pertaining to contracts awarded before 1 June 1993 (modifications). Pub. L. 102-484, §§ 326(a)(1), 326(a)(2)(B).

b. DFARS 210.002-71 establishes a stricter standard. It requires that waivers in both situations be authorized at a level no lower than a general or flag officer or a member of the SES. DFARS 210.002-71(a) and 210.002-71(b)(3). See DOD Policy Memorandum, Ozone Depleting Chemicals (20 May 1993).

c. On 26 May 1993, the Secretary of the Air Force issued AFAC 92-29 establishing the waiver authority at the secretarial level. The Army has not so limited itself and follows the DFARS standard.

d. After the phase out dates of the Montreal Protocol, only the President may grant production waivers. 42 U.S.C. § 7671c(f). Thus, agencies must send requests for a production waiver through command channels to the President. The phase out date for halon was 1 January 1994; the phase out date for chlorofluorocarbon, methyl chloroform, and carbon tetrachloride was 1 January 1996. The phase out date for methyl bromide is 1 January 2005 (64 Fed. Reg. 29,240 (1999)).

3. Exercise of Waiver Authority.

a. Waivers are for the purpose of awarding contracts when a suitable substitute is not available. Waivers are not to allow business as usual.

b. Some agencies will grant class waivers to address immediate requirements to award contracts where an agency-wide or command wide need exits, or when delay in awarding contracts has the potential to immediately impact the agency's mission. See AF Waiver Letter; Army Acquisition Executive Memorandum (20 Jan. 1993) [hereinafter Army Waiver Letter].

c. The authorized official may approve specifications or standards that require ODS use only if the official determines (after ATR certification) that a suitable substitute for the Class I ODS is not currently available. Pub. L. 102-484, § 326(a)(1).

d. If the requiring activity determines that the contract does not require a Class I ODS, then the requiring activity must provide a written statement to the contracting officer. This statement must indicate that the agency does not require the contractor to deliver a separately identifiable Class I ODS or use Class I ODS' in the contract performance. AFFARS 5310.002-71(90)(c).

e. Waivers cannot be used to negate a specific prohibition. For example, purchasing fire extinguishers containing halon for use inside Air Force facilities is prohibited. Waivers should not be sought for such acquisitions.

4. Exceptions.

a. A waiver is not required for off-the-shelf items, even if they include ODS in their production. These items were not "developed from military specifications," although DOD activities may use them for military purposes. Thus, a contracting activity does not violate § 326(a) of Pub. L. No. 102-484 by contracting for off-the-shelf items produced with or including ODS, because the government did not require the use of the ODS. AF Waiver Letter; Army ODS Policy Letter.

b. Waivers are not required for government acquisition or use of ODS-containing products already in DOD inventories. AF Waiver Letter. In the Air Force, however, waivers are required to obtain ODS from the Defense Logistics Agency ODS bank for mission critical applications.

I. Recent Developments. On 5 March 1998, the EPA issued a final rule governing the manufacture of halon blends. 63 Fed. Reg. 11,084 (1998). The final rule:

1. Bans the manufacture of halon blends;

2. Prohibits the intentional release of halons during technician training;

3. Prohibits the intentional release of halons during the testing, repair, and disposal of halon-containing equipment; and

4. Requires proper training of technicians about reducing emissions and disposing of halons and halon-containing equipment.

J. Defense Logistics Agency (DLA) ODS Bank.

1. Statutory Requirement. The FY 93 National Defense Authorization Act requires the DLA Director to evaluate the quantity of Class I and Class II ODSs used within the DOD, determine the quantity of ODS-containing items in DOD inventories, and determine the quantity and type of ODSs that must be stockpiled after 1995 to ensure their availability for mission critical use. Pub. L. 102-484, § 325.

2. ODS Acquired Through the DLA ODS Bank.

a. Halons. Halon needed to meet mission critical applications must be obtained by using existing stocks or from the DLA ODS Bank. See AF ODC Policy Letter.

b. Chlorofluorocarbons. CFCs needed to meet mission critical use must be obtained by using existing stocks, or from the DLA ODS Bank. See AF ODC Policy Letter.

c. Solvents. No solvent containing ODS shall be considered mission critical.

3. Commercial Acquisition of ODS. Agencies may purchase recycled ODSs from commercial sources only if the DLA ODS Bank is unable to meet agency needs. See AF ODC Policy Letter.

K. Contract Review Checklist. Because several layers of rules pertaining to ODS impact the federal procurement process, attorneys reviewing contracts should consider the following items:

1. Review by the Requiring Activity. If the requiring activity has determined that the specifications and standards are not on the DOD list of specifications and standards requiring use of ODS, the file should contain a statement from the reviewer. See July SARDA Memo.

2. ATR Review. The file should contain a statement from the ATR. This statement may take essentially two forms:

   a. If the ATR determines that the contract does not require the use of an ODS, but that such use is an option, the ATR statement should be accompanied by a statement from the SAO recommending that the contracting officer amend the specification or standard to require the contractor to give preference to non-ODC alternatives; or

   b. If the ATR determines that the contract requires the use of an ODS, the file should contain a certification from the ATR that either a known substitute exists or that there are no known substitutes.

3. SAO Determination. If the contract requires the use of an ODS, the file must contain a document from the SAO approving either the use of an ODS substitute or the use of the required ODS.

4. MAJCOM/MACOM Review. If a contracting office uses locally drafted ODS clauses, it should obtain approval from the appropriate MAJCOM/MACOM before incorporating such clauses into a contract.

5. When reviewing statements of work and specifications, be especially alert to requirements for refrigerants, solvents, and halons. See generally Captain Walter C. Roberts, ODS-An Odious Burden, The Air Force Reporter, September 1993, at 7.

VI. HAZARDOUS MATERIAL POLLUTION PREVENTION. DOD DIRECTIVE 4210.15, Hazardous Material Pollution Prevention (27 July 1989).

A. The DOD Policy. When procuring hazardous substances, DOD agencies must select, use, and manage hazardous material over its life-cycle so that DOD incurs the lowest cost required to protect human health and the environment. Emphasis must be on less use of hazardous materials in processes and products, as distinguished from end-of-pipe management of hazardous waste. DOD Dir. 4210.15, para. (D).

B. Implementing Provisions. Heads of DOD components must revise specifications and standards requiring the use of a hazardous material when a less hazardous alternative is available. DOD Dir. 4210.15 para. F(4)(b)-(d); AFI 32-7080, para. 2.1. Available alternatives include:

1. Substituting less hazardous or nonhazardous material;

2. Redesigning a component so that hazardous material is not needed in its manufacture, use, or maintenance;

3. Modifying processes or procedures, including the use of waste as raw material in other manufacturing. DOD Dir. 4210.15, encl. 1, para. 7.

C. Economic Analysis. Heads of DOD components must evaluate hazardous materials decisions by economic analysis techniques that consider cost factors and intangible factors.

1. Cost factors refer to the direct and indirect costs attributable to hazardous material that are encountered in operations such as acquisition, manufacture, supply, use, storage, inventory control, treatment, recycling, emission control, training, work place safety, labeling, hazard assessments, engineering controls, personal protective equipment, medical monitoring, regulatory overhead, spill contingency, disposal, remedial action, and liability.

2. Intangible factors include influences bearing on the use or effects of hazardous material, which may not be reduced to monetary terms. For example, the quality of defense and the quality of environment both have intangible characteristics that are not mutually exclusive but which could be overriding factors in a hazardous material issue. Other intangible factors include public emotion and potential litigation.

D. Contractor Responsibilities. FAR 23.9 & 23.10.

1. The FAR Council published a final rule requiring federal agency contractors to publicly report on toxic chemicals released into the environment. The final rule amends FAR Parts 23 and 52 to reflect these changes.

2. The FAR requires owner\operators of a facility subject to the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. § 11001, and the Pollution Prevention Act (PPA), 42 U.S.C. § 3101, to report and file Toxic Chemical Release Inventory Forms (Form R) with the Environmental Protection Agency (EPA). FAR 23.903. Offerors must submit certifications regarding only those facilities that the offeror owns or operates and that the contractor intends to use in performing a government contract.

3. The FAR requires that solicitations for competitive contracts, expected to exceed $100,000 including all options, include as award eligibility criterion, a certification by the offeror. FAR 23.906. In the certification, the contractor must state one of the following:

   a. That, as the owner or operator of facilities to be used in the performance of the contract, the offeror will file and continue to file the Form R if awarded the contract; or

   b. That the facilities to be used in the contract are exempt. Exemptions include the following:

      (1) The contractor does not process, manufacture, or use toxic chemicals;

(2) The contractor does not have 10 or more full time employees; or

(3) The contractor does not fall within the requisite Standard Industrial Classification (SIC) codes, or their corresponding North American Industry Classifications System (NAICS) sectors.

c. If it is not practicable to include the solicitation provision in a given solicitation or class of solicitation, the HCA must approve such a determination. If the solicitation has an estimated value in excess of $500,000, the agency must consult with the EPA's Director of the Environmental Assistance Division, Office of Pollution Prevention and Toxic Substances. FAR 23.906(b).

d. If a contractor fails to file the necessary forms or files incomplete information, the EPA may recommend to the HCA that the contract be terminated for convenience. FAR 23.906(b).

4. Executive Order 13148. On 21 April 2000, President Clinton signed Executive Order 13148, Greening the Government Through Leadership in Environmental Management. This new Executive Order mandates reductions in toxic chemicals, hazardous substances, and Other Pollutants, and Ozone-Depleting Substances.

a. Section 204 requires a reduction in Form R reported releases and off-site transfers of toxic chemicals by 10% annually, or by 40% overall by December 31, 2006.

b. Section 205 requires a reduction in hazardous and radioactive waste generation 50% overall by December 31, 2006.

c. Section 206 requires the phase out of the procurement of Class I Ozone-Depleting Substances for all nonexcepted uses by December 31, 2006.

d. Section 401(b) requires Environmental Management Systems (EMS) to be implemented at all appropriate agency facilities (including GOCOs). This requirement is to be met by 31 December 2005.

e. Section 704 requires agencies to have acquisition practices in place that conform with the guidance in the Presidential Memorandum on Environmentally and Economically Beneficial Landscape Practices on Federal Landscaped Grounds (60 Fed. Reg. 40837).

VII. ENERGY EFFICIENT REQUIREMENTS.

A. Computer Equipment. Exec. Order 13123, Greening the Government Through Efficient Energy Management, 63 Fed. Reg. 49643 (1999).

1. General Requirements.

a. Agencies must ensure that all acquisitions of microcomputers (including personal computers, monitors and printers) meet "EPA Energy Star" requirements for energy efficiency. Agency heads may grant case-by-case exemptions based on the commercial availability of qualifying equipment, significant cost differences between qualifying and non-qualifying equipment, the agency's performance requirements, and the agency's mission. Exec. Order 13123, § 403(b).

b. Under EPA's Energy Star program, computers, printers, and monitors must include an automatic low-power standby feature. The problem with this rule is that these computers do not work on a LAN system.

2. Implementation. Specifications must require that microcomputers be equipped with the energy efficient low-power standby feature as defined by the EPA Energy Star computers program.

3. Judicial Review. Executive Order No. 13123 states that "[t]his order does not create any right or benefit, substantive or procedural, enforceable by an non-Federal party against the United States, its officers or employees, or any other person."

4. All new computer acquisitions must be Year 2000 (Y2K) compliant. Executive Order 13073, 63 Fed. Reg. 6467 (1998).

B. Efficient Energy Management. Executive order 13123 challenges federal agencies to be more energy efficient: "The Federal Government, as the Nation's largest energy consumer, shall significantly improve its energy management in order to save taxpayer dollars and reduce emissions that contribute to air pollution and global climate change." See also 42 U.S.C. § 6361(a)(1).

1. The executive order promotes the increased use of "energy-savings performance contracts." These are contracts that provide for the "performance of services for the design, acquisition, financing, installation, testing, operation, and where appropriate, maintenance and repair, of an identified energy or water conservation measure or series of measures at one or more locations." Thus, the contractor must implement measures to save energy. Payment to the contractor is contingent upon realizing a guaranteed stream of future energy and cost savings. See 42 U.S.C. § 8256, § 8287, and 10 U.S.C. §2865.

2. In addition, the executive order establishes a Public and Private Advisory Committee to provide input on federal energy. For example, the committee will advise agencies on how to increase the use of energy-saving performance contracts; how to streamline the purchase of "Energy Star" and other energy efficient products; how to improve building designs and reduce energy use; and how to enhance the use of efficient and renewable energy technologies at federal facilities. The executive order also requires agencies to consider life-cycle costs when buying energy efficient goods and services.

3. Goals. Energy Efficiency. Reduce energy consumption (30 percent of baseline by 2005 and 35 percent of baseline by 2010). Reduce consumption at industrial facilities and laboratories (20 percent of baseline by 2005 and 25 percent of baseline by 2010). Expand the use of renewable energy. In the area of petroleum, switch to natural gas or institute measures that improve efficiency. Reduce all use from source and increase water conservation. See FAR 23.703(b)(2).

4. Definitions:

a. Energy-Savings Performance Contract. A contract that provides for the performance of services for the design, acquisition, financing, installation, testing, operation, and where appropriate, maintenance and repair, of an identified energy or water conservation measure or series of measures at one or more locations. Exec. Order 13123, § 703. See also 42 U.S.C. § 8256, § 8287, and 10 U.S.C. §2865.

b. Facility. Any individual building or collection of buildings, grounds, or structure, as well as any fixture or part thereof, including the associated energy or water-consuming support systems, which is constructed, renovated, or purchased in whole or in part for use by the federal government. It includes leased facilities where the federal government has a purchase option or facilities planned for purchase. "Facility" also includes any building that is 100 percent leased for use by the federal government where the federal government pays directly or indirectly for the utility costs associated with its leased space. It also includes government owned contractor operated facilities. Exec. Order 13123, § 705.

c. Life-cycle costs. The sum of the present values of investment costs, capital costs, installation costs, energy costs, operating costs, maintenance costs, and disposal costs, over the lifetime of the project, product, or measure. Exec. Order 13123, § 707. 42 U.S.C. § 8262g.

d. Life-cycle cost effective. The life-cycle costs of a product, project, or measure are estimated to be equal to or less than the current standard practice or product. Exec. Order 13123, § 708.

e. Mobile Equipment. All federally owned ships, aircraft, and nonroad vehicles. Exec. Order 13123, § 709.

f. Renewable Energy. Energy produced by solar, wind, geothermal, and biomass power. Exec. Order 13123, § 710.

g. Renewable Energy Technology. Technologies that use renewable energy to provide light, heat, cooling, or mechanical or electrical energy for use in facilities or other activities. The term also means the use of integrated whole-building designs that rely upon renewable energy resources, including passive solar design. Exec. Order 13123, § 711.

h. Source Energy. Energy that is used at a site and consumed in producing and in delivering energy to a site, including, but not limited to, power generation, transmission, and distribution losses, and that is used to perform a specific function, such as space conditioning, lighting, or water heating. Exec. Order 13123, § 712.

i. Utility Energy-Efficiency Service. Demand side management services provided by a utility to improve the efficiency of use of the commodity being distributed. Services can include, but are not limited to, energy efficiency and renewable energy product auditing, financing, design, installation, operation, maintenance, and monitoring. Exec. Order 13123, § 714.

3. Applicability. This executive order applies to all federal departments and agencies. It applies to all contract types (negotiations, sealed bidding, simplified acquisitions). It also applies to all acquisitions (construction, products, and services). Exec. Order 13123, § 308.

4. Implementation.

a. Life-Cycle Cost Analysis. Agencies shall use life-cycle cost analysis in making decisions about their investments in products, services, construction and other projects to lower the federal government's costs and to reduce energy and water consumption. Agencies shall also retire inefficient equipment on an accelerated basis where replacement results in lower life-cycle costs. Exec. Order 13123, § 401. See FAR 23.703(b)(2).

b. Financing Mechanisms. Agencies shall maximize their use of available alternative financing contracting mechanisms, including Energy-Savings Performance Contracts and utility energy-efficiency service contracts, when life-cycle cost effective, to reduce energy use and cost in their facilities and operations. Exec. Order 13123, § 403.

c. Energy Star Requirements. Agencies shall select, where life-cycle cost-effective energy star and other energy efficient product when acquiring energy using products. For product groups where Energy Star requirements are not yet available, agencies shall select products that are in the upper 25 percent of energy efficiency as designated by the Federal Energy Management Program. Exec. Order § 403.

d. Other Energy Management Strategies and Tools. Exec. Order 13123, § 403.

(1) Industrial Facility Efficiency Improvements. Agencies shall explore efficiency opportunities in industrial facilities for steam systems, boiler operation, air compressor systems, industrial processes, and fuel switching, including co-generation and other efficiency and renewable energy technologies.

(2) Highly Efficient Systems. Agencies shall implement district energy systems, and other highly efficient systems, in new construction or retrofit projects when life cycle cost effective. Agencies shall consider combined cooling, heat, and power when upgrading and assessing facility power needs.

3) Off-Grid Generation. Agencies shall use off-grid generations systems, including solar hot water, solar electric, solar outdoor lighting, small wind turbines, fuel cells, and other off-grid alternatives where life cycle cost effective.

d. Electricity Use. Each agency shall strive to use electricity from clean, efficient, and renewable energy sources. When selecting electricity providers, agencies shall purchase electricity from sources that use high efficiency electric generating technologies when life cycle cost effective. Agencies shall consider the greenhouse gas intensity of the source of the electricity and strive to minimize the greenhouse intensity of purchased electricity. Agencies should include provisions for the purchase of electricity from renewable energy sources as a component of their requests for bids whenever procuring electricity. Agencies may use savings from energy efficiency projects to pay additional incremental costs of electricity from renewable energy sources. Exec. Order 13123, § 404.

e. Mobile Equipment. Agencies shall consider enhanced use of alternative or renewable based fuels. Exec. Order 13123, § 405.

VIII. THE NOISE CONTROL ACT OF 1972. 42 U.S.C. §§ 4901-4918.

A. Definition. A low-noise emission product is: "[A]ny product which emits noise in amounts significantly below the levels specified in noise emission standards under regulations applicable under § 4905 of this title at the time of procurement to that type of product." 42 U.S.C. § 4914(a)(3).

B. Requirements. The EPA must determine that a product is a "suitable substitute" for a currently procured item and the GSA must determine that the cost of the product is no more than 125 per cent of the retail cost of the product for which it is a substitute. Once these determinations are made, federal agencies must procure these items in preference to their non-certified substitutes. 42 U.S.C. § 4914.

C. Implementation.

1. The EPA has promulgated regulations for the low-noise products preference at 40 C.F.R. § 203. EPA's regulations exempt from its requirements aircraft and certain aircraft components, military weapons designed for combat use, certain National Aeronautics and Space Administration (NASA) rockets, and government experimental machinery and equipment. 40 C.F.R. § 203.1(a)(4) (1995).

2. Before a product may be certified as a low-noise emission product, the product must be one for which the EPA has promulgated low-noise standards under § 6 of the Act. 40 C.F.R. § 203.4 (a)(1)(1995). To date, EPA has only promulgated standards pertaining to motorcycles (40 C.F.R. § 205.152, 1995), portable air compressors (40 C.F.R. § 204.52 (1995)), and medium and heavy duty trucks (40 C.F.R. § 205.52 (1995)).

3. DOD agencies have formally incorporated the Noise Control Act's low-noise emission products procurement preference into their environmental noise abatement programs. See, e.g., AR 200-1. Under AR 200-1, the Army must:

a. Procure commercial equipment and products, or those adapted for military use, that are in compliance with established federal noise standards and give priority to use of low-noise-emission products within reasonable cost and mission limitations; and

b. Incorporate noise control provisions in the design and procurement of vehicles, aircraft, weapons systems and military equipment for use in combat operations to the extent that essential operational capabilities are not significantly impaired.

IX. ENERGY POLICY AND CONSERVATION ACT OF 1975 (EPCA), 42 U.S.C. §§ 6201-6422.

A. Statutory Requirements. The EPCA provides that the President shall:

[E]stablish or coordinate Federal agency actions to develop mandatory standards with respect to energy conservation and energy efficiency to govern procurement policies and decisions of the Federal Government and all Federal agencies, and shall take such steps as are necessary to cause such standards to be implemented. 42 U.S.C. § 6361(a)(1).

1. The statute prescribes energy conservation standards for various consumer-type products. Federal agencies purchasing such products must ensure that their specifications incorporate these standards. 42 U.S.C. § 6295.

2. Any person may commence a civil action against any federal agency where there is an alleged failure of such agency to perform any nondiscretionary act or duty under the EPCA that is not discretionary. United States District Courts have jurisdiction over such actions, without regard to the amount in controversy. 42 U.S.C. § 6305(a).

B. Implementation. The EPCA is implemented by Exec. Order No. 11912 § 3 (41 Fed. Reg. 15,825 (1976)); and Exec. Order 12759 § 5 (56 Fed. Reg. 16,257 (1991)). Section 5 of Executive Order 12759 requires that each agency select for procurement those energy consuming goods or products which are the most life cycle cost-effective, pursuant to the requirements of the Federal Acquisition Regulation. See OFPP Letter 94-2 (57 Fed. Reg. 53,365 (1992)).

C. FAR Requirements. FAR 23.203 sets forth the policy that energy conservation and efficiency criteria be applied to acquisitions "whenever the results would be meaningful, practical, and consistent with agency programs and needs." Agencies must consider energy conservation and efficiency criteria "along with price and other relevant factors" when preparing specifications and making awards. When acquiring "covered products," agencies must consider energy use and efficiency labels and energy efficiency standards. See also FAR 23.703(b)(2) & (5).

X. WEBSITES.

The following list of websites should be helpful in meting your environmental contracting requirements:

Air Force Affirmative Procurement Homepage	http://www.afcee.brooks.af.mil/eq/programs/progpage.asp?rbox=False&type=program&groupcode=0&progid=1
Alternative Fuels	http://www.afdc.doe.gov
Biobased Products and Bioenergy	http://www.bioproducts-bioenergy.gov
Comprehensive Procurement Guidelines	http://www.epa.gov/cpg
Defense Environmental Network & Information Exchange	https://denix.cecer.army.mil/denix/denix.html
DoD E-mall: Commercial Catalog items with recognized Environmental Standards. The Environmental Attribute Code (ENAC).	https://www.emallmom01.dla.mil/scripts/info/news/GreenVendorCatalogItems.asp
DoD E-mall: Hazardous / Environmental Attributes of National Stock Numbered (NSN) Items	https://www.emallmom01.dla.mil/scripts/info/news/texthazard.asp
Defense Logistics Information Service (DLIS/DLA) Environmental Products (EPRO)	http://www.epro.dlis.dla.mil/
DLA Environmental Products	http://www.dscr.dla.mil/PRODUCTS/EPA/Eppcat.htm
DLA Defense Supply Center Richmond (DSCR) Hazardous Materials Information System (HMIS) Database.	http://www.dscr.dla.mil/hmis/hmishome.htm
Energy Management	http://www.eren.doe.gov/femp
Environmentally Preferable Purchasing	http://www.epa.gov/oppt/epp
EPA Comprehensive Procurement Guidelines	http://www.epa.gov/epaoswer/non-hw/procure/
EPA Energy Star hompage	http://www.epa.gov/energystar/
EPA Environmentally Preferable Purchasing	http://www.epa.gov/oppt/epp/database.htm
Executive Orders	http://www.whitehouse.gov
Federal Energy Management Program (DOE)	http://www.eren.doe.gov/femp/
GSA: Think Green/Green products from GSA.	http://pub.fss.gsa.gov/environ/
Ozone Depletion	http://www.epa.gov/docs/ozone/index.html
Office of the Federal Environmental Executive	http://www.ofee.gov/
Pollution Prevention	http://es.epa.gov/oeca/main/compdata/ppre.html
Right-to-Know	http://www.epa.gov/opptintr/tri
Recycling, Waste Prevention and Federal Acquisition	http://www.ofee.gov

XI. CONCLUSION.

APPENDIX A

ENVIRONMENTAL STATUTES

There are several other environmental statutes that procurement attorneys should consider when awarding a contract. Some of the more relevant ones are listed for your use.

- Environmental Pesticide Control, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136 to 136y.
- Toxic Substances Control, Toxic Substances Control Act, 15 U.S.C.A. §§ 2601 to 2692.
- Coastal Zone Management, Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451 to 1464.
- Endangered Species, Endangered Species Act of 1973, 16 U.S.C.A. §§ 1531 to 1544.
- Forest and Rangeland Resources, Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C.A. §§ 1600 to 1614; Forest and Rangeland Renewable Resources Research Act of 1978, 16 U.S.C.A. §§ 1641 to 1647; Renewable Resources Extension Act of 1978, 16 U.S.C.A. §§ 1671 to 1676; and Wood Residue Utilization Act of 1980, 16 U.S.C.A. §§ 1681 to 1687.
- Surface Mining Control and Reclamation, Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §§ 1201, 1202, 1211, 1221 to 1230a, 1231 to 1243, 1251 to 1279, 1281, 1291 to 1309, 1311 to 1316, 1321 to 1328.
- Water Pollution Prevention and Control, Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 to 1387.
- Ocean Dumping, Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C.A. §§ 1401 to 1445.
- Oil Pollution, Oil Pollution Act of 1990, 33 U.S.C.A. §§ 2701 to 2761.
- Safety of Public Water Systems, Public Health Service Act, 42 U.S.C.A. §§ 300f to 300j-26.
- National Environmental Policy, National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321 to 4370d.
- Solid Waste Disposal, Solid Waste Disposal Act, 42 U.S.C.A. §§ 6901 to 6992k.
- Air Pollution Prevention and Control, Clean Air Act, 42 U.S.C.A. §§ 7401 to 7671q.
- Environmental Response, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, CERCLA, 42 U.S.C.A. §§ 9601 to 9675.
- Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C.A. §§ 11001 to 11050.
- Federal Land Policy and Management, Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1701 to 1784.
- Occupational Safety and Health Act, 29 U.S.C.A. § 651 et seq.

APPENDIX B

ENVIRONMENTAL CONTRACTING

CHECKLIST[1]

Section I—General Contract Procedures for Environmental Issues

1. References. Ensure availability of the following references tools:

   a. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k.

   b. Executive Order 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition; Executive Order 13148, Greening the Government through Leadership in Environmental Management; Executive Order 13149, Greening the Government through Federal Fleet and Transportation Efficiency.

   c. Office of Federal Procurement Policy Letter 92-4, 57 Fed. Reg. 53,362 (1992), Procurement of Environmentally Sound and Energy Efficient Products and Services

   d. Federal Acquisition Regulation Part 23

   e. General Accounting Office Bid Protest decisions. Federal Court Cases.

2. Acquisition Planning.

   a. Has the activity considered all environmental issues as part of the acquisition planning for the buy? Executive Order 13101, section 410; FAR part 7.

   b. Has the contracting officer conducted market research to obtain information on the availability of environmentally sound products and services that meet the agency needs? FAR 10.001.

   c. Has the contracting officer conducted a market survey to find sources for environmentally sound products and services? FAR 7.101.

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1 This checklist was compiled by the students of the Environmental Contracting Elective, 48th Graduate Course, under the direction of Maj Mary Beth Harney, USAF.

3. Drafting Specifications.

a. Has the activity chosen the procurement method (sealed bidding versus negotiated acquisition) that best promotes the environmental factors for the acquisition?

b. Has the activity defined adequately the minimum needs to include, where appropriate, environmental factors?

c. Where appropriate, has the activity included relevant performance specifications? OFPP Policy Letter 91-2.

d. Do the specifications promote full and open competition without being unduly restrictive?

e. If the specifications limit competition, do they promote a collateral policy of protecting the environment? See Quality Lawn Maintenance, B-270690, June 27, 1996, 96-1 CPD ¶ 289; Integrated Forest Management, B-204106, Jan. 4, 1982, 92-1 CPD ¶ 6; American Can Co., B-187658, Mar. 17, 1977, 77-1 CPD ¶ 196; Ocuto Blacktop & Paving Company, Inc., B-284165, Mar. 1, 2000, 2000 CPD ¶ 32.

4. Responsibility and Award.

a. Does the solicitation state the evaluation factors that will be used to determine award? FAR 14.101(e) and FAR 14.201-8 (for IFBs); FAR 15.304 (for RFPs).

b. Are the evaluation factors clear, reasonable, and not unduly restrictive?

c. In competitive proposals or negotiations, are all factors identified, including cost or price and any significant subfactors that will be considered? Is the relative importance of each disclosed? FAR 15.304 and FAR 15.305.

d. If past performance is required as an evaluation factor, has it been included properly? FAR 15.304(c)(3); FAR 15.305(a)(2).

e. For a negotiated procurement, do the evaluation factors in the Request for Proposals consider:

(1) The offeror's overall environmental stewardship?

(2) The offeror's past performance to determine if the offeror is environmentally competent? See Federal Environmental Services, B-250135, May 24, 1993, 93-1 CPD ¶ 398.

(3) The offeror's ability to find, evaluate, and obtain environmentally sound products and services?

f. For a sealed bid, has the contracting officer made a determination of the bidder's overall responsibility by considering the general responsibility factors in FAR 9.1?

(1) Has the contracting officer conducted a pre-award survey?

(2) Has the contracting officer considered the bidder's past environmental performance record, such as observing environmental standards, using environmentally sound products and services, and minimizing environmental damage? See Standard Tank Cleaning, B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3.

g. Is the bidder or offeror on the Environmental Protection Agency's List of Violators? See DFARS 209.405(b).

Section II: Substantive Areas

1. Ozone Depleting Substances.

a. References.

(1) National Defense Authorization Act for FY 1993, Pub. L. No. 102-484, §§ 325-326.

(2) Executive Order 12843, 58 Fed. Reg. 21,881 (1993), Procurement Policies and Requirements for Federal Agencies for Ozone-Depleting Substances.

(3) FAR Subpart 23.8.

(4) U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 211.271.

b. Contract Screening.

(1) Does the contract contain a specification (MILSPEC) or standard that requires the use of a Class I ozone depleting substance or can only be met through the use of an ozone depleting substance?

(2) If the contract does contain a MILSPEC or standard requiring the use of an ozone-depleting substance, has the contracting officer forwarded the file to the Approved Technical Representative (ATR) for review?

c. Approved Technical Representative Review.

(1) Did the ATR find that the contract does not require ODS? If so, did the ATR forward the file back to the contracting officer for processing?

(2) Did the ATR find that the contract does require ODS? If so, did the ATR forward the file back to the contracting officer with direction to amend the solicitation? Did the ATR include a certification in the file stating that either an ODS substitute exists or no known ODS substitute exists?

(3) Upon receiving the file from the ATR, did the contracting officer amend the solicitation to remove the use of ODS?

(4) If the contracting officer did not amend the solicitation to remove the use of ODS, did the contracting officer request a waiver from the Senior Acquisition Official?

d. Waiver and Senior Acquisition Official Review.

(1) Did the SAO review the solicitation and waiver request to determine whether or not a suitable substitute for the ODS is available?

(2) Is the waiver request submitted to negate a specific prohibition against using ozone depleting substances? If so, the waiver request is improper.

(3) Is the ozone depleting substance available off-the-shelf? If so, a waiver is not required.

2. Affirmative Procurement.

a. References.

(1) Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k.

(2) Executive Order 13,101, 64 Fed. Reg. 49,643 (1998), Greening the Government through Waste Prevention, Recycling, and Federal Acquisition.

(3) Office of Federal Procurement Policy Letter 92-4, 57 Fed. Reg. 53,362 (1992), Procurement of Environmentally Sound and Energy Efficient Products and Services.

(4) Environmental Protection Agency Comprehensive Procurement Guidelines. (http://www.epa.gov/cpg/)

(5) Environmental Protection Agency Guidance on Environmentally Preferable Purchasing, 64 Fed. Reg. 45,810 (1999).

(6) FAR Subpart 23.4.

(7) FAR Subpart 23.7.

b. Has the contracting officer considered the purchase of environmentally preferable products as part of the procurement? 42 U.S.C. § 6962; FAR 23.403.

c. Are the specifications drafted to comply with the goals of affirmative procurement? See OFPP Policy Letter 92-4. Review the specifications for the following points:

(1) Whether the specifications exclude improperly the use of recovered materials;

(2) Whether the specifications do not unnecessarily require the item to be manufactured from virgin materials; and

(3) Whether the specifications require the use of recovered materials to the maximum extent practicable without jeopardizing the end use of the item.

d. Does the value of the procurement exceed $10,000? If so, has the contracting officer complied with the requirement to purchase EPA Comprehensive Procurement Guideline items? FAR 23.405(a).

e. If the contracting officer has not complied with the EPA Comprehensive Procurement Guideline items, does an exception apply, which is documented in the contract file? See 42 U.S.C. § 6962(c); FAR 23.405(c). The exceptions are as follows:

(1) The items are not available in a reasonable period of time;

(2) The items fail to meet the performance standards in the specifications or fail to meet the reasonable performance standards of the procuring agencies;

(3) The items are available only at an unreasonable price; or

(4) The items are not available from a sufficient number of sources to maintain a satisfactory level of competition.

f. Has the contracting officer considered the EPA's Guidance on Environmentally Preferable Purchasing during the solicitation process? See 64 Fed. Reg. 45,810 (1999). The five key principles from the EPA's Guidance are as follows:

(1) Agencies should consider environmental factors as a routine part of the acquisition;

(2) Agencies should ground their environmental purchasing strategies in the "ethic of pollution prevention" by reducing waste and pollution at the source;

(3) Agencies should consider life-cycle costs of a product or service to determine its overall positive and negative environmental impact;

(4) Agencies should compare the environmental impacts of competing products and services to select the one that is most environmentally preferable; and

(5) Agencies should gather comprehensive information about the environmental performance of products and services.

g. Does the solicitation include the provision at FAR 52.223-4, Recovered Material Certification? If so, does it also include the clause at FAR 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products? FAR 23.406.

3. Energy Efficient Requirements.

a. References.

(1) Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6201-6422.

(2) Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k.

(3) Executive Order 13,123, 64 Fed. Reg. 30,851 (1999), Greening the Government Through Efficient Energy Management.

(4) Executive Order 12,579, 56 Fed. Reg. 16,257 (1991)

(5) Executive Order 11,912, 41 Fed. Reg. 15,825 (1976).

(6) FAR subpt. 23.2.

(7) FAR subpt. 23.7.

b. Has the activity considered the energy-efficiency of the procured services and products as part of the solicitation? Do the plans, drawings, specifications, and product descriptions show that the activity considered energy conservation and efficiency data? FAR 23.203; FAR 23.703(b)(1).

c. Does the solicitation show that the agency considered the use of "energy-savings performance contracts" during the acquisition planning phase of the solicitation? Exec. Order 13,123, 64 Fed. Reg. at 30,851.

d. Has the activity considered the life-cycle cost of the products or services? FAR 23.703(b)(5); Exec. Order 13,123, 64 Fed. Reg. at 30,851.

e. Is the procurement for a "covered product" as defined in FAR 23.202 and 42 U.S.C. § 6292)b)? If so, does the product have an energy efficient standard, as defined by FAR 23.202?

4. The Noise Control Act of 1972.

a. References.

(1) The Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918.

(2) 40 C.F.R. § 203.

b. Is the activity purchasing a product that meets the noise emission standards identified by the Environmental Protection Agency? Alternatively, is the activity purchasing a product that may exceed the EPA's noise emission standards?

c. Is the product exempt from the Noise Control Act because it is a military weapon designed for combat use, or an aircraft or aircraft component? 42 U.S.C. § 4902(3).

d. Is there a certified, low noise emission product available as a "suitable substitute" for the procured product? If so, does the substitute not exceed 125% of the retail cost of the product that it will replace? 42 U.S.C. § 4914.

5. Emergency Planning and Community Right to Know Act/Pollution Prevention Act Requirements.

a. References.

(1) Emergency Planning and Right to Know Act or 1986, 42 U.S.C. § 11001-11050.

(2) Pollution Prevention act of 1990, 42 U.S.C. § 13101-13109.

(3) Executive Order 12969, 60 Fed. Reg. 50,738 (1995), Federal Acquisition and Community Right to Know.

b. Is the solicitation for a competitive contract expected to exceed $100,000 (including options)? If so, does the solicitation include, as an award criterion, a certification by the offeror that:

(1) It will file the Toxic Chemical Release Inventory Form (Form R) as the owner or operator of the facilities used for contract performance; or

(2) It will not file the Form R because the facilities used for contract performance are exempt from the filing requirements. 42 U.S.C. § 11023; 42 U.S.C. § 6607; FAR 23.906(a)(1)-(2).

c. If applicable, does the contract contain the clause at FAR 52.223.13, Certification of Toxic Chemical Release Reporting? FAR 23.907.

d. If the solicitation contains the provision at FAR 52.223-13, does the solicitation also contain the clause at FAR 52.223-14, Toxic Chemical Reporting? FAR 23.097(b).

Environmental Clean-Up

1. References.

   a. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9670.

   b. Defense Environmental Restoration Program, 10 U.S.C. § 2701.

   c. Executive Order 12,580.

   d. Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901.

2. Does the solicitation contain requirements for environmental clean-up?

3. Has the CERCLA environmental response action process been completed? This includes the following procedures:

   a. Removal process;

   b. Remedial action process;

   c. Remedial investigation;

   d. Feasibility study;

   e. Proposed plan;

   f. Responsiveness summary;

   g. Record of decision;

   h. Remedial design; and

   i. Remedial action.

4. Is there any potential regulatory overlap between CERCLA and RCRA that may impact the solicitation?

5. Have all potentially responsible parties (PRP) under CERCLA been identified? See Cheryl Lynch Nilsson, Defense Contractor Recovery of Cleanup Costs at Contractor Owned and Operated Facilities, 38 A.F. L. Rev. 1 (1994). These include the following:

   a. Current owners and operators of the facility (current owners and operators);

   b. Former owners and operators of the facility during the time any hazardous substance was disposed of at the facility (former owners and operators);

   c. Persons who arranged for the disposal or treatment of hazardous substances that they owned or possessed at a facility (generators and arrangers); and

   d. Persons who accepted hazardous substances for transport to disposal or treatment facilities (transporters).