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14. ABSTRACT This course presents instruction regarding the basic legal concepts pertaining to the authority of the government and its personnel to enter into contracts; statutorily mandated competition requirements; contract formation (sealed bidding and competitive negotiation), including basic contract types, labor standards, and socioeconomic policies; contract performance, including modification, termination, inspection, and acceptance; disputes, including remedies of unsuccessful offerors and appeals; and introduction to procurement fraud.						
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CONTRACT ATTORNEYS COURSE DESKBOOK

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THE JUDGE ADVOCATE GENERAL'S SCHOOL

CONTRACT AND FISCAL LAW DEPARTMENT

BIOGRAPHIES OF PROFESSORS

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B.A., The Ohio State University (summa cum laude) 1992; J.D., University of Toledo College of Law, 1995; Air Force Judge Advocate Staff Officer Course, 1996; Squadron Officer's School, 2001; Air Command and Staff College, 2004; LL.M., Military Law, The Judge Advocate General's School, 2005. Career Highlights: Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, 314th Airlift Wing, Little Rock Air Force Base, Arkansas, 2003-2004; Staff Judge Advocate, 64th Air Expeditionary Wing (Qatar), February-July 2003; Chief of Claims, Office of the Staff Judge Advocate, 314th Airlift Wing, Little Rock Air Force Base, Arkansas, 2001-2002; Area Defense Counsel, Air Force Legal Services Agency, Charleston Air Force Base, South Carolina, 1999-2001; Chief, Adverse Actions, Office of the Staff Judge Advocate, 437th Air Mobility Wing, Charleston Air Force Base, South Carolina, 1998-1999; Chief, Contract and Environmental Law; and Chief, Legal Assistance and Adverse Actions, Office of the Staff Judge Advocate, 27th Fighter Wing, Cannon Air Force Base, New Mexico, 1995-1998. Prior to her commissioning in the U.S. Air Force, Major Lawson enlisted in the U.S. Army in 1984 as a SIGINT voice interceptor (Arabic language); she served on active duty with the 101st Airborne (Air Assault Division) at Fort Campbell, KY and then as an activated reservist with the 82d Airborne Division at Fort Bragg, NC during Desert Shield/Desert Storm. Member of State Bar of Ohio; admitted to practice before the U.S. Court of Criminal Appeals for the Armed Forces.

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BIOGRAPHIES OF RESERVE PROFESSORS

MAJOR DANIELLE M. CONWAY (USAR), Associate Professor of Law & Director, Hawai'i Procurement Institute, The University of Hawai'i, William S. Richardson School of Law; Of Counsel, Intellectual Property & Government Contracts, Alston Hunt Floyd & Ing, Honolulu, Hawaii; B.S., New York University, Stern School of Business, 1989; J.D. (cum laude), Howard University School of Law, 1992; dual LL.M., Government Procurement Law & Environmental Law, George Washington University Law School, 1996; Judge Advocate Officer Basic Course, 1993; Judge Advocate Officer Advanced Course, 2000; Command General Staff College, 2005. Career Highlights: 2004 University of Hawai'i Regents' Medal Recipient for Excellence in Teaching; 2003-2004 Outstanding Professor of the Year, William S. Richardson School of Law. Assistant Professor of Law, The University of Memphis, Cecil C. Humphreys School of Law, 1998-2000; Instructor of Law, Georgetown University Law Center, 1996-1998; Assistant Counsel for Policy, Information, and Programs, 1995-1996 & Assistant Counsel for Procurement, 1993-1995, Headquarters, U.S. Army Corps of Engineers, Office of the Chief Counsel, Honors Program. Significant publications appear in the Asian Pacific Law & Policy Journal, the Santa Clara Law Review, the University of Richmond Law Review, the Washington University Global Studies Law Review, and the Howard Law Journal. Admitted to the Bars of the Commonwealth of Pennsylvania, the State of New Jersey, the United States District Court for the District of New Jersey, the District of Columbia, the United States Court of Military Review, and the State of Hawai'i (pending).

MAJOR KATHERINE E. WHITE (USAR), Associate Professor of Law, Wayne State University Law School. B.S.E. Princeton University, 1988; J.D., University of Washington, 1991, LL.M., Intellectual Property Law, George Washington University Law School, 1996. After graduating from law school, Major White served on active duty in the U.S. Army Corps of Engineers, Office of the Chief Counsel's Honors Program. After leaving active duty, she clerked for the Honorable Randall R. Rader, Circuit Judge for the United States Court of Appeals for the Federal Circuit. She received the Fulbright Senior Scholar Award for 1999-2000, hosted by the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law in Munich, Germany. Elected in November 1998, Major White currently serves as a member of the University of Michigan Board of Regents. Major White served on the United States Patent and Trademark Patent Public Advisory Committee from 2000-2002. From 2001-2002, Major White served as a White House Fellow, serving as Special Counsel to the Secretary of Agriculture, Ann M. Veneman.

MAJOR STEVEN L. SCHOONER (USAR), Associate Professor and Co-Director of the Government Procurement Law Program, George Washington University School of Law. Previously: Associate Administrator for Procurement Law and Legislation, Office of Federal Procurement Policy (OFPP); Trial Attorney, Commercial Litigation Branch, Department of Justice; Commissioner, Armed Services Board of Contract Appeals; practice with private law firms. B.A. from Rice University, J.D. from the College of William and Mary, and LL.M. from the George Washington University. Adjunct Professor, Contract and Fiscal Law Department, The Judge Advocate General's School. Fellow and Member of the Board of Advisors of the National Contract Management Association (NCMA); Certified Professional Contracts Manager (CPCM); Faculty Advisor, the American Bar Association's Public Contract Law Journal; Editorial Board, Public Procurement Law Review (UK); and Advisory Board, The Government Contractor. Co-author (with Professor Ralph C. Nash, Jr.) of The Government Contracts Reference Book: A Comprehensive Guide To The Language of Procurement (published by George Washington University, 2d ed., 1998; 1st ed., 1992).

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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 (e.g., : simplified acquisition, sealed bidding, contracting by negotiation).
 - d. Contract types.
 - e. Socioeconomic policies.
 - f. Protests.
 - g. Procurement fraud.

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.

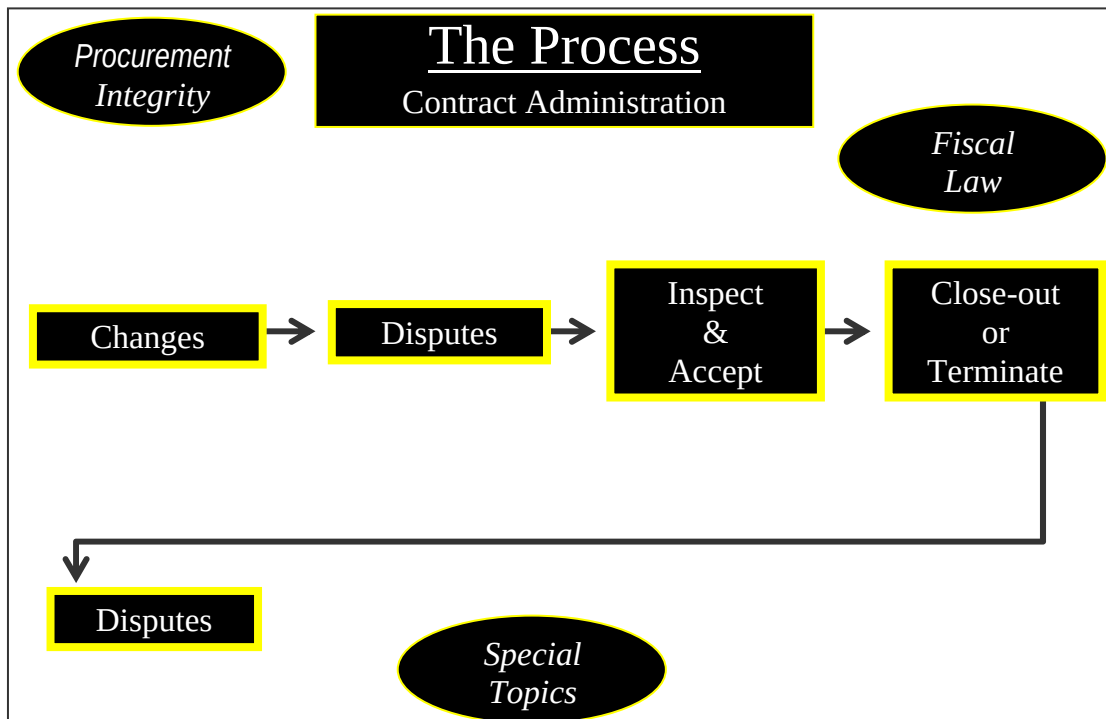
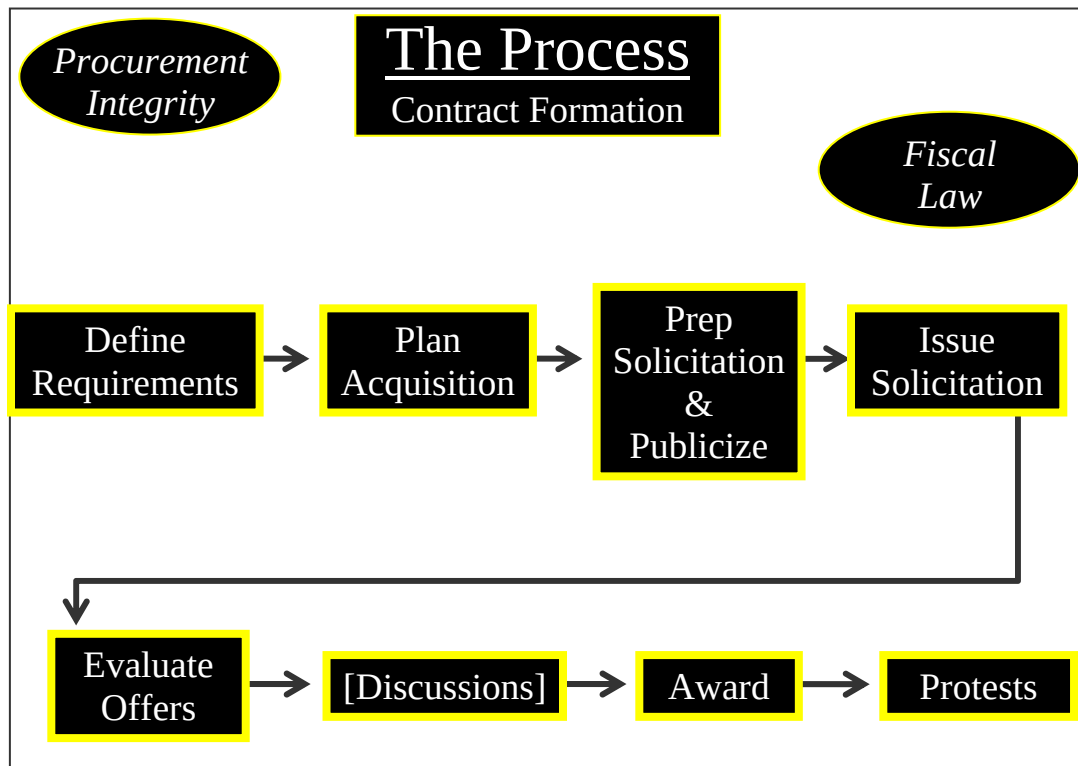
LTC Ralph Tremaglio
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- d. Contract claims and disputes.
- e. Environmental contracting issues.
- f. Procurement integrity and ethics in government contracting.
- g. Alternative disputes resolution (ADR).

C. Instructional Material.

- 1. Government Contract Law Deskbook, Volume I and Volume II.
- 2. Includes seminar problems that require the application of the general principles discussed in the conference sessions.
- 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.

II. OVERVIEW OF THE GOVERNMENT 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 his contract comes within the terms of the law. The Floyd Acceptances, 74 U.S. 666, 680 (1868).

IV. ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW.

- A. Objectives of Government Contracting (See Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002) available at (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620)).

1. Core Principles: Competition, Transparency, Integrity, Fairness.
2. Socioeconomic Policies: i.e., Labor Standards, Federal Acquisition Regulation (FAR) Part 22; Foreign Acquisition, FAR Part 25; Small Business Programs, FAR Part 19; Other Socioeconomic Programs, FAR Part 26.
3. Customer Satisfaction.

- B. The Procurement Environment: The Acquisition Workforce

- C. Public Policy and Contract Clauses

1. Clauses required by statute or regulation will be incorporated into a contract by operation of law. Voices R Us, ASBCA Nos. 51026, 51070, 98-1 BCA ¶ 29,660; 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. Empresa de Viacao Terceireense, ASBCA No. 49827, 00-1 BCA ¶ 30,796; Charles Beseler Co., ASBCA No. 22669, 78-2 BCA ¶ 13,483 (where contracting officer acts beyond scope of actual authority, Government not bound by his acts).
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, cannot be ratified, and contractors may not recover costs incurred during performance. Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659; Godley v. United States, 5 F.3d 1473 (Fed. Cir. 1993).

V. 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, 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) 5101.602-2.

VI. CONTINUING EDUCATION FOR THE CONTRACT AND FISCAL LAW PROFESSIONALS

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. Summer course is a two week course. Spring course is a 7 day course with Operational Contracting subjects taught in the Operational Contracting Course which immediately follows for 2 ½ days.
 - c. If you have substantial contract law experience and take this as a refresher, please keep the purpose of this course in mind.
2. Operational Contracting Course.
 - a. Assumes students have taken the basic contract instruction for attorneys either in the form of the CAC or the Graduate Course core curriculum.
 - b. Offered once a year
 - c. Operational focus of contracting.
3. Fiscal Law / Comptroller Accreditation 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 numerous times a year -- twice times here, up to 150 students; once by satellite from the TJAGLCs up to 2700 students; 3-5 times at various locations throughout the world; 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 focus changes with each iteration of the course.

- b. Usually offered in alternate years opposite the Contract Litigation Course (next course Spring 2008); 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. Usually, offered in alternate years with the Advanced Contract Law Course (next course April 2007); 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 June 2008); up to 150 students per course; 2 ½ days.
- C. Annual Updates.
 - 1. Government Contract and Fiscal 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 250 students per course; 3 ½ days.
 - 2. US Army Europe (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.

VII. 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

CONTRACT FORMAT AND THE FAR SYSTEM

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ATTACHMENT 1: SAMPLE CONTRACT REVIEW CHECKLIST

ATTACHMENT 2: SAMPLE SOLICITATION

CHAPTER 2

CONTRACT FORMAT AND THE FAR SYSTEM

I. INTRODUCTION TO CONTRACT REVIEW.

- A. The key to successful contract review is to integrate yourself into the acquisition from the very beginning (proactive vs. reactive lawyering).
- B. Every acquisition starts with *Acquisition Planning*. See Federal Acquisition Regulation (FAR) Part 7; Defense Federal Acquisition Regulation Supplement (DFARS) Part 207. Be a part of the *Acquisition Planning Team*. Establish a rapport with your supported contracting office / resource management office.
- C. Checklists.
 - 1. You will find contract review checklists to be very helpful when first start reviewing contracts. If your office does not already have one, borrow one from another office.
 - 2. A basic contract review checklist is at Attachment A.
 - 3. A very thorough web-based contract review checklist, conveniently based upon Air Force Form 3019, Contract File Content Checklist, has been provided by the Office of the Staff Judge Advocate, Electronic Systems Center, Hanscom Air Force Base, Massachusetts, and is available at: <https://centernet.hanscom.af.mil/JA/CRG/checklist.htm>.

II. CONTRACT FORMAT

A. Standard Procurement System (SPS).

B. Uniform Contract Format.

1. Divided into Four Parts.

a. Part I – The Schedule: Sections A-H.

b. Part II – Contract Clauses: Section I.

c. Part III – List of Documents, Exhibits and other Attachments: Section J.

d. Part IV – Representations and Instructions: Sections K-M.

2. Section A: Solicitation/Contract Form (SF 33).

Contains administrative information pertinent to the solicitation (i.e., solicitation number, proposal due date, government points of contact, table of contents, etc.)

3. Section B: Supplies or Services and Prices/Cost.

Contains a brief description of the supplies and services and quantities required, the unit prices, and total prices. This description of supplies, services, quantities, and associated pricing is referred to and identified with a specific contract line item number (CLIN or CLINs).

4. Section C: Description/Specifications/Statement of Work.

Contains a more elaborate description of the items contained in Section B, and describes what the government's substantive requirements are and what the contractor is to accomplish/deliver.

5. Section D: Packaging and Marking (Only for Supplies).

Contains specific information on requirements for packaging and marking of items to be delivered.

6. Section E: Inspection and Acceptance (IAW).

Contains information on how the government will inspect and conditions for acceptance of items and services to be delivered under the contract.

7. Section F: Deliveries or Performance.

Specifies the requirement for time, place, and method of delivery or performance for items and services to be delivered under the contract.

8. Section G: Contract Administration Data.

Contains accounting and appropriations data and required contract administration information and instructions.

9. Section H: Special Contract Requirements.

Contains contractual requirements that are not included in other parts of the contract, including special clauses that only pertain to that particular acquisition.

10. Section I: Contract Clauses.

Contains all clauses required by law or regulation. They are commonly referred to as “boilerplate” clauses because they are normally inserted into most contracts.

11. Section J: List of Attachments.

Contains or lists documents, attachments, or exhibits that are a material part of the contract. Some examples of these documents are the

specifications, the contract data requirements list (CDRL), and/or checklists of mandatory minimum requirements..

12. Section K: Representations, Certifications and other Statements of Offerors.

Contains representations, certifications, and other information required from each contractor. Some examples are: Procurement Integrity Certification, Small Business Certification, Place of Performance, and Ownership.

13. Section L: Instructions, Conditions and Notices to Offerors.

Tells the offerors what is to be provided in their proposal and how it should be formatted. It guides offerors in preparing their proposals, outlines what the government plans to buy, and emphasizes any government special interest items or constraints.

14. Section M: Evaluation Factors for Award.

Forms the basis for evaluating each offeror's proposal. It informs offerors of the relative order of importance of assigned criteria so that an integrated assessment can be made of each offeror's proposal.

III. FEDERAL ACQUISITION REGULATION (FAR) SYSTEM.

A. Federal Acquisition Regulation (FAR).

1. The FAR became effective on 1 April 1984. The FAR replaced the Defense Acquisition Regulation (DAR), the Federal Procurement Regulation (FPR), and the NASA Procurement Regulation (NASAPR).
2. The General Services Administration (GSA) has been tasked with the responsibility for publishing the FAR and any updates to it. [FAR 1.201-2](#).
3. Locating the FAR.

- a. The Government Printing Office (GPO) previously printed periodic updates to the FAR in the form of Federal Acquisition Circulars (FAC). Effective 31 December 2000, the GPO no longer produces printed copies of the FACs or updated versions of the FAR. See [65 Fed. Reg. 56,452 \(18 September 2000\)](#).
- b. Currently only electronic versions of the FAR and the FACs are available. The FAR is found at Chapter 1 of Title 48 of the Code of Federal Regulations (C.F.R.). Proposed and final changes to the FAR are published electronically in the Federal Register.
- c. The official electronic version of the FAR (maintained by GSA) is available at <http://www.arnet.gov/far/> [Note: this site also permits you to sign up for an electronic notification of proposed and final changes to the FAR]. The Air Force FAR Site contains a very user-friendly version of the FAR as well as several supplements. It is found at: <http://farsite.hill.af.mil/>.

B. Departmental and Agency Supplemental Regulations. [FAR Subpart 1.3](#).

1. Agencies are permitted to issue regulations that implement or supplement the FAR.
2. Most agencies have some form of supplemental regulation. The FAR requires these supplements to be published in Title 48 of the C.F.R. [FAR 1.303](#). The following chart shows the location within Title 48 for each of the respective agency supplementation:

<u>Chapter</u>	<u>Agency/Department</u>
2	Defense FAR Supplement (DFARS). The DFARS was completely revised in 1991. Available at each of the following sites: http://www.acq.osd.mil/dp/dars/dfars.html and http://farsite.hill.af.mil/VFDFARA.HTM .
3	Health and Human Services.
4	Agriculture.
5	General Services Administration.
6	State.
7	Agency for International Development.

8	Veterans Affairs.
9	Energy. Available at http://farsite.hill.af.mil/vfdoea.htm/
10	Treasury.
12	Transportation.
13	Commerce.
14	Interior.
15	Environmental Protection Agency.
16	Office of Personnel Management (Federal Employees Health Benefits).
17	Office of Personnel Management.
18	National Aeronautics and Space Administration (NASA). Available at: http://farsite.hill.af.mil/VFnasaa.HTM .
19	Broadcasting Board of Governors.
20	Nuclear Regulatory Commission.
21	Office of Personnel Management (Federal Employees Group Life Insurance).
23	Social Security Administration.
24	Housing and Urban Development.
25	National Science Foundation.
28	Justice.
29	Labor.
30	Homeland Security.
34	Education.
44	Federal Emergency Management Agency (FEMA).
51	Army FAR Supplement (AFARS). Also available at: http://farsite.hill.af.mil/vfafara.htm .
52	Navy Acquisition Procedures Supplement (NAPS). Also available at http://farsite.hill.af.mil/vfnapsa.htm .
53	Air Force FAR Supplement (AFFARS). Also available at: http://farsite.hill.af.mil/vfaffara.htm .
54	Defense Logistics Acquisition Regulation Supplement (DLAR).

C. Layout of the FAR.

1. The FAR is divided into eight (8) subchapters and fifty-three (53) parts. Parts are further divided into subparts, sections, and subsections.
2. The FAR organizational system applies to the FAR and all agency supplements to the FAR. See [FAR 1.303](#).

Subchapter A: General

Part 1:	Federal Acquisition Regulation System
Part 2:	Definitions of Words and Terms
Part 3:	Improper Business Practices and Personal Conflicts of Interest
Part 4:	Administrative Matters

Subchapter B: Acquisition Planning

Part 5:	Publicizing Contract Actions
Part 6:	Competition Requirements
Part 7:	Acquisition Planning
Part 8:	Required Sources of Supplies and Services
Part 9:	Contractor Qualifications
Part 10:	Market Research
Part 11:	Describing Agency Needs
Part 12:	Acquisition of Commercial Items

Subchapter C: Contracting Methods and Contract Types

Part 13:	Simplified Acquisition Procedures
Part 14:	Sealed Bidding
Part 15:	Contracting by Negotiation
Part 16:	Types of Contracts
Part 17:	Special Contracting Methods
Part 18:	[Reserved]

Subchapter D: Socioeconomic Programs

Part 19:	Small Business Programs
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
Subchapter E: General Contracting Requirements	
Part 27:	Patents, Data, and Copyrights
Part 28:	Bonds and Insurance
Part 29:	Taxes
Part 30:	Cost Accounting Standards Administration
Part 31:	Contract Cost Principles and Procedures
Part 32:	Contract Financing
Part 33:	Protests, Disputes, and Appeals
Subchapter F: Special Categories of Contracting	
Part 34:	Major System Acquisition
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 Technology
Part 40:	[Reserved]
Part 41:	Acquisition of Utility Services
Subchapter G: Contract Management	
Part 42:	Contract Administration and Audit Services
Part 43:	Contract Modifications
Part 44:	Subcontracting Policies and Procedures

Part 45:	Government Property
Part 46:	Quality Assurance
Part 47:	Transportation
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

3. Arrangement. The digits to the left of the decimal point represent the part number. The digits to the right of the decimal point AND to the left of the dash represent the subpart and section. The digits to the right of the dash represent the subsection. See [FAR 1.105-2](#).

Example: FAR 45.303-2. We are dealing with FAR Part 45. The Subpart is 45.3. The Section is 45.303 and the subsection is 45.303-2.

4. Correlation Between FAR Parts and Clauses/Provisions. All clauses and provisions are found in FAR Subpart 52.2. As a result, they each begin with “52.2.” The next two digits in each clause or provision corresponds to the FAR Part in which that particular clause or provision is discussed and prescribed. The number following the hyphen is assigned sequentially and relates to the number of clauses and provisions related to that FAR Part. See [FAR 52.101\(b\)](#).

Example: FAR 52.245-2 (prescribed by FAR 45.303-2). This was the second clause developed dealing with Government Property (the subject of FAR Part 45).

5. How to Determine if a Clause or Provision Should Be Included in the Contract. Each clause or provision listed in the FAR cross-references a FAR Section that prescribes when it should or may be included into a contract. The “FAR Matrix” summarizes these prescriptions. It is found at: <http://www.arnet.gov/far/current/matrix/Matrix.pdf>

6. Correlation Between FAR and Agency Supplements. Agency FAR Supplements that further implement something that is also addressed in the FAR must be numbered to correspond to the appropriate FAR number. Agency FAR Supplements that supplement the FAR (discuss something not addressed in the FAR) must utilize the numbers 70 and up. See FAR 1.303(a).

Example: FAR 45.407 discusses contractor use of government equipment. The portion of the DFARS addressing this same topic is found at DFARS 245.407. The portion of the AFARS further implementing this topic is found at AFARS 5145.407. FAR 6.303-2 addresses what needs to be included in a justification and approval document (for other than full & open competition). It does not prescribe the actual format, however. The Army has developed a standardized format for its justification and approval documents. AFARS 5106.303-2-90 provides the supplemental requirement to use this format which is contained in the supplemental form AFARS 5153.9005.

ATTACHMENT 1: SAMPLE CONTRACT REVIEW CHECKLIST

SOLICITATION/CONTRACT AWARD CHECKLIST

NOTE: The following checklist is a “broad brush” tool designed to GENERALLY assist you in conducting solicitation and contract award reviews. DO NOT use this checklist as a substitute for examining the relevant statutes and regulations.

Section I--Solicitation Documentation

1. Purchase Request.

- _____ a. Is it in the file?
- _____ b. Is the desired delivery or start date consistent with the date stated in the IFB/RFP?
- _____ c. Does the description of the desired supplies or services correspond to that of the IFB/RFP?
- _____ d. Does the purchase request contain a proper fund citation?
- _____ e. Are funds properly certified as available for obligation?
- _____ f. Are the funds cited proper as to purpose? 31 U.S.C § 1301.
- _____ g. Are the funds cited current and within their period of availability? 31 U.S.C. § 1552.
- _____ h. Are the funds cited of sufficient amount to avoid Anti-Deficiency Act issues? 31 U.S.C. §§ 1341, 1511-1517.
- _____ i. Is the procurement a severable services contract to which the provisions of 10 U.S.C. § 2410a apply?
- _____ j. If appropriate, does the solicitation contain the either the Availability of Funds clause at FAR 52.232-18 or the Availability of Funds for the Next Fiscal Year at FAR 52.232-19 (one year indefinite quantity contracts)?

2. Method of Acquisition.

- _____ a. What is the proposed method of acquisition?
- _____ b. Is the “sealed bidding” method required? FAR 6.401(a).
- _____ c. Has the activity excluded sources? If so, have applicable competition requirements been met? FAR Subpart 6.2.
- _____ d. Has the activity proposed meeting its requirements without obtaining full and open competition? FAR Subpart 6.3.
- _____ e. Does a statutory exception permit other than full and open competition? FAR 6.302.
- _____ f. If other than full and open competition is proposed, has the contracting officer prepared the required justification and include all required information? FAR 6.303. Does it make sense?
- _____ g. Have the appropriate officials reviewed and approved the justification? FAR 6.304.
- _____ h. Is this a contract for supplies, services, or construction amounting to \$100,000 or less (\$1,000,000 in a contingency), triggering the simplified acquisition procedures? FAR 2.101; FAR Part 13.
- _____ i. May the activity meet its needs via the required source priorities listed in FAR Part 8?

3. Publicizing the Solicitation.

- _____ a. Has the contracting officer published the solicitation as required by FAR 5.101 and FAR Subpart 5.2?
- _____ b. Has the activity allowed adequate time for publication? FAR 5.203.
- _____ c. If acquiring commercial items, does the combined synopsis/solicitation procedure apply? FAR 12.603.

4. Solicitation Instructions.

- _____ a. Does the solicitation state the date, time, and place for submitting offers? Is the notation on the cover sheet consistent with the SF 33?
- _____ b. Is the time for submitting offers adequate? FAR 14.202-1.
- _____ c. Are the required clauses listed in FAR 14.201 (for IFBs) or FAR 15.209 and FAR 15.408 (for RFPs) and the matrix at FAR 52 included in the solicitation?
- _____ d. If a construction contract, have the special requirements and procedures of FAR Part 36 been followed?

5. Evaluation Factors.

- _____ 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 evaluation 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? FAR 15.304(c)(3); FAR 15.305(a)(2).

6. Pricing.

- _____ a. Is the method of pricing clear?
- _____ b. Are appropriate audit clauses included in the solicitation? FAR 14.201-7; FAR 15.408.
- _____ c. Does the Truth in Negotiations Act apply to this solicitation or request? FAR Subpart 15.4; FAR 15.403.
- _____ d. If the Truth in Negotiations Act applies, does the solicitation contain the required clauses? FAR 15.408.

7. Contract Type.

- _____ a. Is the proposed type of contract appropriate? FAR 14.104; FAR 16.102.
- _____ b. If the proposed contract is for personal services, has the determination concerning personal services been executed? FAR 37.103. Does a statutory exception permit the use of a personal services contract? FAR 37.104; 5 U.S.C. § 3109 and 10 U.S.C. § 129b.
- _____ c. If the proposed contract is a requirements contract, is the estimated total quantity stated? Is the estimate reasonable? If feasible, does the solicitation also state the maximum quantity? FAR 16.503. Is appropriate ordering and delivery information set out? FAR 16.506. Are required clauses included in the solicitation? FAR 16.506.
- _____ d. If the proposed contract is an indefinite quantity type contract, are the minimum and maximum quantities stated and reasonable? FAR 16.504. Is appropriate ordering and delivery information set out? FAR 16.505. Are required clauses included in the solicitation? FAR 16.506.
- _____ e. Does the preference for multiple awards apply? FAR 16.504(c).

8. Purchase Description or Specifications.

- _____ a. Are the purchase descriptions or specifications adequate and unambiguous? FAR 11.002; FAR 14.201-2(b) and (c); FAR 15.203.
- _____ b. If a brand name or equal specification is used, is it properly used? FAR 11.104. ?
- _____ c. Are the provisions required by FAR 11.204 included in the solicitation?

9. Descriptive Data and Samples.

- _____ a. Will bidders be required to submit descriptive data or bid samples with their bids?
- _____ b. If so, have the requirements of FAR 14.202-4 and FAR 14.202-5 been met?

10. Packing, Inspection, and Delivery.

- _____ a. Is there an F.O.B. point? FAR 46.505.

- _____ b. Are appropriate quality control requirements identified? FAR 46.202.
- _____ c. Is there a point of preliminary inspection and acceptance? FAR 46.402.
- _____ d. Is there a point of final inspection? FAR 46.403.
- _____ e. Have the place of acceptance and the activity or individual to make acceptance been specified? FAR 46.502; FAR 46.503.
- _____ f. Is the delivery schedule reasonable? FAR 11.402.

11. Bonds and Liquidated Damages.

- _____ a. Are bonds required? FAR Part 28.
- _____ b. If so, are the requirements clearly stated in the specification?
- _____ c. Is there a liquidated damages clause? Does it conform to the requirements of FAR 11.502. Is the amount reasonable? Are required clauses incorporated? FAR 11.503.

12. Government-Furnished Property.

- _____ a. Will the government furnish any type of property, real or personal, in the performance of the contract?
- _____ b. If so, is the property clearly identified in the schedule or specifications? Is the date of delivery clearly specified?
- _____ c. Has the contractor's property accountability system been reviewed and found adequate? FAR 45.104.
- _____ d. Are the contractor's and the government's responsibilities and liabilities stated clearly? FAR 52.245-2; FAR 52.245-5.
- _____ e. Have applicable requirements of FAR Part 45 been met? Are required clauses present?

Small Business Issues.

- _____ a. Is the procurement one that has been set-aside for small businesses? FAR Subpart 19.5. If so, is the procurement a total set-aside pursuant to FAR 19.502-2 or a partial set-aside pursuant to FAR 19.502-3?
- _____ b. Is the procurement appropriate for a “small disadvantaged business” participating as part of the Small Business Administration’s “8(a) Program”? FAR Subpart 19.8. If so, does the entity meet the eligibility criteria for 8(a) participation?
- _____ c. If the solicitation contains bundled requirements, has the activity satisfied the requirements of FAR 7.107, FAR 10.001, FAR 15.305, and FAR 19.101, 19.202-1?
- _____ d. Does the solicitation contain the small business certification? FAR 19.301.
- _____ e. Does the solicitation contain the proper Standard Industrial Classification code or North American Industry Classification System code? FAR 19.102.

14. Environmental Issues.

- _____ a. Has the government considered energy efficiency and conservation in drafting its specifications and statement of work? FAR 23.203.
- _____ b. Has the government considered procuring items containing recycled or recovered materials? FAR 23.401.
- _____ c. Has the government considered procuring environmentally preferable and energy-efficient products and services? FAR 23.700.
- _____ d. Do the contract specifications require the use of an ozone-depleting substance? FAR 23.803; DFARS 207.105.
- _____ e. Do the Toxic Chemical Reporting requirements apply to the solicitation (for contracts exceeding \$100,000)? FAR 23.906.

15. Labor Standards.

- _____ a. Does the Davis-Bacon Act or the Service Contract Act apply to this acquisition? FAR Subparts 22.4 and 22.10.
- _____ b. If so, have the proper clauses and wage rate determinations been incorporated into the solicitation?

16. Clarity and Completeness.

- _____ a. Have you read the entire solicitation?
- _____ b. Do you understand it?
- _____ c. Are there any ambiguities?
- _____ d. Is it complete?
- _____ e. Are the provisions, requirements, clauses, etc. consistent?
- _____ f. Are there any unusual provisions or clauses in the solicitation? Do you understand them? Do they apply?

Section II--Contract Award Checklist

1. Sealed Bid Contracts.

- _____ a. Review the previous legal review of the solicitation. Has the contracting activity made all required or recommended corrections?
- _____ b. Did the contracting officer amend the solicitation? If so, did the contracting officer distribute amendments properly? FAR 14.208.
- _____ c. Has a bid abstract been prepared? FAR 14.403. Is it complete? Does it disclose any problems?
- _____ d. Is the lowest bid responsive? FAR 14.301; FAR 14.404-1; FAR 14.103-2(d). Are there any apparent irregularities?
- _____ e. Is there reason to believe that the low bidder made a mistake? FAR 14.407. Has the contracting officer verified the bid?
- _____ f. Has the contracting officer properly determined the low bidder? FAR 14.408-1.
- _____ g. Is the price fair and reasonable? FAR 14.408-2.

- _____ h. Has the contracting officer properly determined the low bidder to be responsible? FAR 14.408-2; FAR Subpart 9.1.
- _____ i. If the low bidder is a small business that the contracting officer has found non-responsible, has the contracting officer referred the matter to the SBA? FAR 19.601. If so, has the SBA issued or denied a Certificate of Competency to the offeror? FAR 19.602-2.
- _____ j. Did the contracting officer address any late or improperly submitted bids? FAR Subpart 14.4.
- _____ k. **Are sufficient and proper funds cited?**
- _____ l. Has the activity incorporated all required clauses and any applicable special clauses?
- _____ m. Is the proposed contract clear and unambiguous? Does it accurately reflect the requiring activity's needs?
- _____ n. If a construction contract, have FAR Part 36 requirements been satisfied?
- _____ o. If the acquisition required a synopsis in the fedbizopps.gov, is there evidence of that synopsis in the file? Was the synopsis proper?

2. Negotiated Contracts.

- _____ a. Review the previous legal review of the RFP. Have all required or recommended corrections been made?
- _____ b. Were any amendments made to the RFP? If so, were they prepared and distributed properly? FAR 15.206.
- _____ c. Was any pre-proposal conference conducted properly? FAR 15.201.
- _____ d. Did the contracting officer address any late or improperly submitted proposals? FAR 15.208.
- _____ e. Has an abstract of proposals been prepared? Is it complete? Does it reveal any problems?
- _____ f. Is a pre-negotiation Business Clearance Memorandum (BCM) required? Is it complete? Does it reveal any problems?

- _____ g. Were discussions conducted? FAR 15.209; FAR 15.306. If not, did the solicitation contain a clause notifying offerors that the government intended to award without discussions? FAR 15.209(a). If so, were discussions held with all offerors in the properly determined competitive range? FAR 15.209(a); FAR 15.306(c).
- _____ h. **Were proposals evaluated in accordance with the factors set forth in the request for proposals? FAR 15.305; FAR 15.303.**
- _____ i. Did the contracting officer properly address any changes to the government's requirements? FAR 15.206.
- _____ j. Were applicable source selection procedures followed and documented? FAR 15.308; FAR 15.305.
- _____ k. If applicable, did the contracting officer address make or buy proposals? FAR 15.407-2.
- _____ l. If the Truth in Negotiations Act applies, has the contractor submitted a proper certification? Is it complete and signed? FAR 15.406-2.
- _____ m. Is a post-negotiation Business Clearance Memorandum (BCM) required? Is it complete? Does it reveal any problems?
- _____ n. Are all negotiated prices set forth in the contract?
- _____ o. Has the contracting officer incorporated required and special clauses in the proposed contract?
- _____ p. Is the proposed price fair and reasonable?
- _____ q. **Are sufficient and proper funds cited?**
- _____ r. Is the proposed contract clear and unambiguous? Does it make sense? Does it reflect the requiring activity's needs?
- _____ s. If a construction contract, has the contracting officer satisfied the requirements of FAR Part 36 (and supplements)?

ATTACHMENT 2: SAMPLE SOLICITATION

SOLICITATION, OFFER AND AWARD				1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)		RATING		PAGE 1 OF 55 PAGES		
2. CONTRACT NO.		3. SOLICITATION NO. DASG60-03-R-0010		4. TYPE OF SOLICITATION [] SEALED BID (IFB) [X] NEGOTIATED (RFP)		5. DATE ISSUED 11 Jun 2003		6. REQUISITION/PURCHASE NO. DS1031		
7. ISSUED BY US ARMY SPACE & MISSILE DEFENSE COMMAND SMDC-CM-AK, TULLIE MILLER 256-955-3699 PO BOX 1500 HUNTSVILLE AL 35807-3801 CODE W31RPD TEL: 256-955-3699 FAX: 256-955-4240				8. ADDRESS OFFER TO (If other than Item 7) CODE See Item 7 TEL: FAX:						
NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".										
SOLICITATION										
9. Sealed offers in original and <u>5</u> 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 <u>106 Wynn Drive, Hvl, AL</u> until <u>03:00 PM</u> local time <u>25 Jul 2003</u> (Hour) (Date)										
CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.										
10. FOR INFORMATION CALL:		A. NAME TULLIE M. MILLER		B. TELEPHONE (Include area code) (NO COLLECT CALLS) 256-955-3699			C. E-MAIL ADDRESS tullie.miller@smdc.army.mil			
11. TABLE OF CONTENTS										
(X)	SEC.	DESCRIPTION			PAGE(S)	(X)	SEC.	DESCRIPTION		
PART I - THE SCHEDULE					PART II - CONTRACT CLAUSES					
X	A	SOLICITATION/ CONTRACT FORM			1	X	I	CONTRACT CLAUSES		
X	B	SUPPLIES OR SERVICES AND PRICES/ COSTS			2 - 5	PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS				
	C	DESCRIPTION/ SPECS./ WORK STATEMENT				X	J	LIST OF ATTACHMENTS		
	D	PACKAGING AND MARKING				PART IV - REPRESENTATIONS AND INSTRUCTIONS				
X	E	INSPECTION AND ACCEPTANCE			6	X	K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS		
X	F	DELIVERIES OR PERFORMANCE			7					
X	G	CONTRACT ADMINISTRATION DATA			8 - 11	X	L	INSTRS., CONDS., AND NOTICES TO OFFERORS		
X	H	SPECIAL CONTRACT REQUIREMENTS			12 - 16	X	M	EVALUATION FACTORS FOR AWARD		
OFFER (Must be fully completed by offeror)										
NOTE: 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)										
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.	
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) TEL: EMAIL:						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.										

Section B - Supplies or Services and Prices

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0001	Basic Effort CPFF Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof. PURCHASE REQUEST NUMBER: DS1031	29,978	DPPH		
ESTIMATED COST					
FIXED FEE					
TOTAL EST COST + FEE					

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0002	Data Items CPFF Contract Data Requirements List (CDRL), DD Form 1423, consisting of Line Items Nos *001 through *004, incorporated herein and attached as set forth in Section J. CLIN 0002 is applicable to all Option CLINs, if exercised. This CLIN is Not Separately Priced. PURCHASE REQUEST NUMBER: DS1031				
ESTIMATED COST					
FIXED FEE					
TOTAL EST COST + FEE					

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0003		14,213	DPPH		
OPTION	Option I				
	CPFF				
	Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.				
	PURCHASE REQUEST NUMBER: DS1031				
				ESTIMATED COST	
				FIXED FEE	
				TOTAL EST COST + FEE	

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0004		13,749	DPPH		
OPTION	Option II				
	CPFF				
	Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.				
	PURCHASE REQUEST NUMBER: DS1031				
				ESTIMATED COST	
				FIXED FEE	
				TOTAL EST COST + FEE	

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0005		13,295	DPPH		
OPTION	Option III				
	CPFF				
	Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.				
	PURCHASE REQUEST NUMBER: DS1031				
ESTIMATED COST					
FIXED FEE					
TOTAL EST COST + FEE					

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0006		12,848	DPPH		
OPTION	Option IV				
	CPFF				
	Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof.				
	PURCHASE REQUEST NUMBER: DS1031				
ESTIMATED COST					
FIXED FEE					
TOTAL EST COST + FEE					

FOB: Destination

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0007 OPTION	Option V CPFF Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof. PURCHASE REQUEST NUMBER: DS1031	12,408	DPPH		
ESTIMATED COST					
FIXED FEE					
TOTAL EST COST + FEE					

FOB: Destination

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LEVEL OF EFFORT:

a. In the performance of CLINs 0001/0002 and optional CLINs 0003, 0004, 0005, 0006, and 0007, if exercised, of this contract, the contractor shall provide direct productive person hours (DPPH) level of effort, as set forth below, within the time period as set forth in Section F hereof:

<u>LABOR CATEGORY</u>	<u>DIRECT PRODUCTIVE PERSON HOURS LEVEL OF EFFORT</u>
0001/0002 Basic	29,978
0003/0002 (Option I)	14,213
0004/0002 (Option II)	13,749
0005/0002 (Option III)	13,295
0006/0002 (Option IV)	12,848
0007/0002 (Option V)	12,408

b. DPPH are defined as prime contractor, consultant, and subcontractor actual direct labor hours exclusive of vacation, holiday, sick leave, and other absences.

c. In accordance with FAR 16.306(d)(2), entitlement to the total fixed fee is subject to the certification by the contractor to the Administrative Contracting Officer that he has exerted the total level of effort as stated in each voucher has provided the reports called for, and the effort performed and reports provided are considered satisfactory by the Government.

Section E - Inspection and Acceptance

CLAUSES INCORPORATED BY REFERENCE

52.246-5	Inspection Of Services Cost-Reimbursement	APR 1984

Section F - Deliveries or Performance

CLAUSES INCORPORATED BY REFERENCE

52.242-15

Stop-Work Order

AUG 1989

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PERIOD OF PERFORMANCE:

a. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0001 and 0002 within twenty-four (24) months after the effective date of the contract.

b. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0003 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

c. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0004 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

d. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0005 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

e. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0006 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

f. The contractor shall provide all level of effort, material/equipment, data, and reports required by CLINs 0007 and 0002, if exercised, within twelve (12) months after the effective date of the option exercise.

DELIVERY OF DATA:

a. All data shall be delivered IAW FAR 52.247-34, F.O.B. Destination, as specified in Block 14 of DD Form 1423. The contractor shall furnish the Contracting Officer one (1) copy of the transmittal letters submitting data requirements to the Technical Monitor.

b. Acceptance by the Government of all items delivered hereunder shall be at destination.

Section G - Contract Administration Data

CLAUSES INCORPORATED BY REFERENCE

252.242-7000 Postaward Conference

DEC 1991

CLAUSES INCORPORATED BY FULL TEXT

INVOICING AND VOUCHERING:

a. When authorized by the Defense Contract Audit Agency (DCAA) in accordance with DFARS 242.803(b)(i)(C), the contractor may submit interim vouchers directly to paying offices. Such authorization does not extend to the first and final vouchers. Submit first vouchers to the cognizant DCAA office. Final vouchers will be submitted to the ACO with a copy to DCAA.

b. Upon written notification to the contractor, DCAA may rescind the direct submission authority.

c. Should the contractor decline to submit interim vouchers directly to paying offices or if the contractor receives written notification that DCAA has rescinded the direct submission authority, public vouchers, together with any necessary supporting documentation, shall be submitted to the cognizant Defense Contract Audit Agency (DCAA) Office, prior to payment by the Finance and Accounting Office specified in Block 12, Page 1, Section A, of Standard Form 26.

d. The contractor shall identify on each public voucher: (1) the accounting classification reference number (ACRN) assigned to the accounting classification which pertains to the charges billed, e.g. "ACRN: AA;" (2) the contract line item number (CLIN) which pertains to the charges billed, and (3) the contract number. In addition, the Department of Defense requires that the Taxpayer Identification Number (TIN) be placed on all certified payment vouchers, including non-profit organizations, when submitting payment to the disbursing office. The only exception is foreign vendors, which will have the word "foreign" in the TIN field. Invoices will be returned to the vendor without payment if a TIN is not provided. Therefore also include in the address block, the Tax Identification Number, a point of contact, and the telephone number.

e. The contractor may include in provisional vouchers fixed fee based on the percentage of level of effort hours exerted to the total level of effort hours stipulated in Section B, subject to the withholding reserve of the contract clause titled "Fixed Fee."

f. A copy of each voucher, together with any necessary supporting documentation, shall also be submitted to the issuing office specified in Block 5, Page 1, Section A of Standard Form 26, concurrently with submission to the DCAA.

g. The Paying Office shall ensure that the voucher is disbursed for each ACRN as indicated on the voucher (or as specified herein).

CONTRACT ADMINISTRATION: Administration of this contract will be performed by the cognizant office as shown in Block 6, Page 1, Section A, of Standard Form 26. No changes, deviations, or waivers shall be effective without a modification of the contract executed by the Contracting Officer or his duly authorized representative authorizing such changes, deviations, or waivers.

IDENTIFICATION OF CORRESPONDENCE: All correspondence and data submitted by the contractor under this contract shall reference the contract number.

CONTRACTING ACTIVITY REPRESENTATIVES:

	Contractual Matters
NAME:	Tullie Miller
ORGANIZATION CODE:	SMDC-CM-AK
TELEPHONE NUMBERS: COMMERCIAL:	(256) 955-3699
DEFENSE SWITCHED NETWORK (DSN):	645-3699
EMAIL:	Tullie.miller@smdc.army.mil

IMPLEMENTATION OF AND EXPLANATION OF THE RELATIONSHIP OF THE LIMITATION OF FUNDS (LOF) CLAUSE TO FEE OBLIGATIONS: The amount of funds estimated to be required for full performance, including fee(s); the amount of funds allotted pursuant to the Contract Clause hereof entitled, Limitations of Funds; the amount of funds currently obligated for fee; and the estimated period of performance covered by the funds allotted are set forth below. Amounts obligated for fee are separate from and are not to be commingled with the amounts allotted for costs and are not available to the contractor to cover costs in excess of those allotted to the contract for cost.

a. CLINs 0001 and 0002: (Basic Effort)

- (1) Amount Required for Full Funding,
Including Fee(s): \$_____
- (2) Amount Allotted Under the LOF Clause
for Payment of Costs: \$_____
- (3) Amount Separately Obligated for
Payment of Fee: \$_____
- (4) Total Amount Allotted and Obligated: \$_____
- (5) Net Amount Required for Full Funding: \$_____
- (6) Estimated Period of Performance
the Allotted Amount Will Cover: \$_____

b. CLINs 0003 and 0002: (If exercised)

- (1) Amount Required for Full Funding,
Including Fee(s): \$_____
- (2) Amount Allotted Under the LOF Clause
for Payment of Costs: \$_____

- (3) Amount Separately Obligated for Payment of Fee: \$_____
- (4) Total Amount Allotted and Obligated: \$_____
- (5) Net Amount Required for Full Funding: \$_____
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$_____
- c. CLINs 0004 and 0002: (If exercised)
- (1) Amount Required for Full Funding, Including Fee(s): \$_____
- (2) Amount Allotted Under the LOF Clause for Payment of Costs: \$_____
- (3) Amount Separately Obligated for Payment of Fee: \$_____
- (4) Total Amount Allotted and Obligated: \$_____
- (5) Net Amount Required for Full Funding: \$_____
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$_____
- d. CLINs 0005 and 0002: (If exercised)
- (1) Amount Required for Full Funding, Including Fee(s): \$_____
- (2) Amount Allotted Under the LOF Clause for Payment of Costs: \$_____
- (3) Amount Separately Obligated for Payment of Fee: \$_____
- (4) Total Amount Allotted and Obligated: \$_____
- (5) Net Amount Required for Full Funding: \$_____
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$_____
- e. CLINs 0006 and 0002: (If exercised)
- (1) Amount Required for Full Funding, Including Fee(s): \$_____
- (2) Amount Allotted Under the LOF Clause

- for Payment of Costs: \$_____
- (3) Amount Separately Obligated for Payment of Fee: \$_____
- (4) Total Amount Allotted and Obligated: \$_____
- (5) Net Amount Required for Full Funding: \$_____
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$_____
- f. CLINs 0007 and 0002: (If exercised)
- (1) Amount Required for Full Funding, Including Fee(s): \$_____
- (2) Amount Allotted Under the LOF Clause for Payment of Costs: \$_____
- (3) Amount Separately Obligated for Payment of Fee: \$_____
- (4) Total Amount Allotted and Obligated: \$_____
- (5) Net Amount Required for Full Funding: \$_____
- (6) Estimated Period of Performance the Allotted Amount Will Cover: \$_____

Section H - Special Contract Requirements

OPTIONS:

Option CLINs 0003/0002 (Option I), CLINs 0004/0002 (Option II), CLINs 0005/0002 (Option III), CLINs 0006/0002 (Option IV), and CLINs 0007/0002 (Option V) may be exercised by the Contracting Officer by issuance of a unilateral modification to this contract. The parties agree that the option shall be considered to have been exercised, for the purpose of the contract, at the time the Government issues the modification. The contractor shall incur no costs, chargeable to the option until the contracting officer has provided written notification that the option has been exercised. Option CLINs 0003/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0001 and 0002. Option CLINs 0004/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0003 and 0002. Option CLINs 0005/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0004 and 0002. Option CLINs 0006/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0005 and 0002. Option CLINs 0007/0002 if exercised, may be exercised at any time during the period of performance of CLINs 0006 and 0002.

The Government may exercise the Option CLINs in multiple increments until the total amount of DPPH specified for each option set have been ordered by such option exercise. All effort required shall be performed within the specified period of performance and the option shall be incorporated at the established rate specified below. For purpose of the option exercise under the option CLINs, the composite rate per hour that will be utilized is as follows:

	<u>Rate</u>
CLINs 0003/0002	
CLINs 0004/0002	To Be Determined
CLINs 0005/0002	
CLINS 0006/0002	
CLINS 0007/0002	

The exercise of any portion of the option must be accomplished in accordance with the requirements of this clause. All contract terms and conditions apply during the option periods (if exercised).

WAGE DETERMINATION

Service Contract Act Wage Determination No: 1994-2007, Rev 23, Area: Alabama Counties of Colbert, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan, and Winston, dated 28 May 02, is incorporated herein as set forth in Part III, Section J, hereof.

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PUBLIC RELEASE OF INFORMATION:

a. In accordance with DFARS 252.204-7000, Disclosure of Information, The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless the Contractor has written approval or the information is otherwise in the public domain before the date of release.

b. Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Technical Monitor noted in the contract, Section H,

at least 45 days before the proposed date for release. All material to be cleared shall be sent by certified mail/return receipt requested to:

U.S. Army Space and Missile Defense Command
ATTN: Insert Technical Office POC
P. O. Box 1500
Huntsville, AL 35807-3801

c. The Technical Monitor shall process the request in accordance with SMDC form 614-R.

d. If there is no response within 30 days, the Contractor shall resubmit the request to:

U.S. Army Space and Missile Defense Command
ATTN: SMDC-PA
P. O. Box 1500
Huntsville, AL 35807-3801

e. The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor.

DISTRIBUTION CONTROL OF TECHNICAL INFORMATION:

a. The following terms applicable to this clause are defined as follows:

(1) Technical Document. Any recorded information that conveys scientific and technical information or technical data.

(2) Scientific and Technical Information. Communicable knowledge or information resulting from or pertaining to conducting and managing a scientific or engineering research effort.

(3) Technical Data. Recorded information related to experimental, developmental, or engineering works that can be used to define an engineering or manufacturing process or to design, procure, produce, support, maintain, operate, repair, or overhaul material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer printouts. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog-item identifications, and related information and computer software documentation.

b. Except as may otherwise be set forth in the Contract Data Requirements List (CDRL), DD Form 1423, (i) the distribution of any technical document prepared under this contract, in any stage of development or completion, is prohibited without the approval of the Contracting Officer and (ii) all technical documents prepared under this contract shall initially be marked with the following distribution statement, warning, and destruction notice:

(1) DISTRIBUTION STATEMENT F - Further dissemination only as directed by SMDC-IM-PA or higher DOD authority.

(2) WARNING - This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Sec 2751 et seq.) or the Export Administration Act of 1979, as amended, Title 50, U.S.C., app 2401 et seq. Violation of these export laws are subject to severe criminal penalties. Disseminate in accordance with provisions of DOD Directive 5230.25.

(3) DESTRUCTION NOTICE - For classified documents, follow the procedures in DOD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), Chapter 5, Section 7, or DOD 5200.1-R, Information Security Program Regulation, Chapter IX. For unclassified, limited documents, destroy by any method that will prevent disclosure of contents or reconstruction of the document.

c. As a part of the review of preliminary or working draft technical documents, the Government will determine if a distribution statement less restrictive than the statement specified above would provide adequate protection. If so, the Government's approval/comments will provide specific instructions on the distribution statement to be marked on the final technical documents before primary distribution.

TECHNICAL COGNIZANCE AND TECHNICAL DIRECTION:

a. The U.S. Army Space and Missile Defense Command is the cognizant Government technical organization for this contract and will provide technical direction as defined herein. Technical direction shall be exercised by the following Project Engineer:

Name	Office symbol	Phone Number

TO BE DETERMINED

b. Technical direction, as defined in this clause is the process by which the progress of the contractor's technical efforts are reviewed and evaluated and guidance for the continuation of the effort is provided by the Government. It also includes technical discussions and, to the extent required and specified elsewhere in this contract, defining interfaces between contractors; approving test plans; approving preliminary and critical design reviews; participating in meetings; providing technical and management information; and responding to request for research and development planning data on all matters pertaining to this contract. The contractor agrees to accept technical direction only in the form and procedure set forth herein below.

c. Except for routine discussions having no impact on contractor performance, any and all technical direction described in paragraph b. above shall only be authorized and binding on the contractor when issued in writing and signed by a Government official designated in a. above. The Technical Direction shall not effect or result in a change within the meaning of the "CHANGES" clause, or any other change in the Scope of Work, price, schedule, or the level of effort required by the contract. Such changes must be executed by the Contracting Officer as a Modification-Change Order, or as a Modification-Supplemental Agreement, as appropriate. It is emphasized that such changes are outside the authority of the Government officials designated in a. above who are not authorized to issue any directions which authorize the contractor to exceed or perform less than the contract requirements. Notwithstanding any provision to the contrary in any Technical Directive, the estimated cost of this contract, and, if this contract is incrementally funded, the amount of funds allotted, shall not be increased or deemed to be increased by issuance thereof.

H-. KEY PERSONNEL:

a. The key personnel listed in paragraph b below are considered to be critical to the successful performance of this contract. Prior to replacing these key personnel, the contractor shall obtain written consent of the contracting officer. In order to obtain such consent, the contractor must provide advance notice of the proposed changes and must demonstrate that the qualifications of the proposed substitute personnel are generally equivalent to or better than the qualifications of the personnel being replaced.

b. Key Personnel List:

<u>NAME</u>	<u>POSITION</u>
TO BE DETERMINED	

(This list shall be negotiated by the parties. Personnel identified as key individuals in the offeror's proposal shall be candidates for this list, however, it is not intended that all such proposed key individuals must be listed in this clause.)

CONTRACT SECURITY CLASSIFICATION:

- a. This contract is unclassified and does not contain security requirements or a Contract Security Classification Specification, DD Form 254.
- b. In accordance with restrictions required by Executive Order 12470, the Arms Export Control Act (Title 22, USC) (Sec 275), the International Traffic in Arms Regulation (ITAR), or DoD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure, no foreign nationals will be permitted to work on a contract without the express permission of the Contracting Officer.
- c. Should the government determine that the technology has developed to a point where the information warrants protection under Executive Order 12958, Classified National Security Information, a DD Form 254 and an approved classification guide will be issued to the contractor and appropriate steps will be taken under the contract to protect the material.

MINIMUM INSURANCE LIABILITY: Pursuant to the requirements of the contract clause 52.228-7, “Insurance – Liability to Third Persons,” the contractor shall obtain and maintain at least the following kinds of insurance and minimum liability coverage during any period of contract performance:

- a. Workman’s Compensation and Employers’ Liability Insurance: Compliance with applicable workmen’s compensation and occupational disease statutes is required. Employers’ liability coverage in the minimum amount of \$100,000 is required.
- b. General Liability Insurance: Bodily injury liability insurance, in the minimum limits of \$500,000 per occurrence, is required on the comprehensive form of policy; however, property damage liability insurance is not required.
- c. Automobile Liability Insurance: This insurance is required on the comprehensive form of policy and shall provide bodily injury liability and property damage liability covering the operation of all automobiles used in connection with the performance of the contract. At least the minimum limits of \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage is required.

PATENTS - REPORTING OF SUBJECT INVENTIONS:

- a. The interim and final invention reports shall be submitted on DD Form 882, Report of Inventions and Subcontracts, see <http://www.smdc.army.mil/Contracts/Contracts.html> and click on the Special Announcements link to see the instructions. In accordance with DFARS 252.227-7039 and FAR 52.227-11, interim reports shall be furnished every twelve (12) months and final reports shall be furnished within three (3) months after completion of the contracted work. In accordance with FAR 27.305-3(e), when a contractor fails to disclose a subject invention the applicable withholding of payments provision may be invoked.
- b. The contractor shall include the clause at DFARS 252.227-7039 in all subcontracts with small businesses and non profit organizations, regardless of tier, for experimental, developmental, or research work.
- c. The prime contractor shall account for the interim and final invention reports submitted by the subcontractor.

YEAR 2000 COMPLIANCE:

The Contractor shall ensure products provided under this contract, to include hardware, software, firmware, and middleware, whether acting alone or combined as a system, are Year 2000 compliant as defined in FAR Part 39.

Section I - Contract Clauses

CLAUSES INCORPORATED BY REFERENCE

52.202-1	Definitions	DEC 2001
52.203-3	Gratuities	APR 1984
52.203-5	Covenant Against Contingent Fees	APR 1984
52.203-6	Restrictions On Subcontractor Sales To The Government	JUL 1995
52.203-7	Anti-Kickback Procedures	JUL 1995
52.203-8	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity	JAN 1997
52.203-10	Price Or Fee Adjustment For Illegal Or Improper Activity	JAN 1997
52.203-12	Limitation On Payments To Influence Certain Federal Transactions	JUN 1997
52.204-4	Printed or Copied Double-Sided on Recycled Paper	AUG 2000
52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment	JUL 1995
52.211-15	Defense Priority And Allocation Requirements	SEP 1990
52.215-2	Audit and Records--Negotiation	JUN 1999
52.215-8	Order of Precedence--Uniform Contract Format	OCT 1997
52.215-10	Price Reduction for Defective Cost or Pricing Data	OCT 1997
52.215-12	Subcontractor Cost or Pricing Data	OCT 1997
52.215-13	Subcontractor Cost or Pricing Data--Modifications	OCT 1997
52.215-14	Integrity of Unit Prices	OCT 1997
52.215-15	Pension Adjustments and Asset Reversions	DEC 1998
52.215-16	Facilities Capital Cost of Money	OCT 1997
52.215-17	Waiver of Facilities Capital Cost of Money	OCT 1997
52.215-18	Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other than Pensions	OCT 1997
52.215-20 Alt IV	Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (Oct 1997) - Alternate IV	OCT 1997
52.216-7	Allowable Cost And Payment	DEC 2002
52.216-8	Fixed Fee	MAR 1997
52.217-8	Option To Extend Services	NOV 1999
52.217-9	Option To Extend The Term Of The Contract	MAR 2000
52.219-6	Notice Of Total Small Business Set-Aside	JUL 1996
52.219-8	Utilization of Small Business Concerns	OCT 2000
52.219-14	Limitations On Subcontracting	DEC 1996
52.222-3	Convict Labor	AUG 1996
52.222-21	Prohibition Of Segregated Facilities	FEB 1999
52.222-26	Equal Opportunity	APR 2002
52.222-35	Equal Opportunity For Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans	DEC 2001
52.222-36	Affirmative Action For Workers With Disabilities	JUN 1998
52.222-37	Employment Reports On Special Disabled Veterans, Veterans Of The Vietnam Era, and Other Eligible Veterans	DEC 2001
52.222-41	Service Contract Act Of 1965, As Amended	MAY 1989
52.223-6	Drug Free Workplace	MAY 2001
52.223-14	Toxic Chemical Release Reporting	OCT 2000
52.225-13	Restrictions on Certain Foreign Purchases	JUL 2000
52.226-1	Utilization Of Indian Organizations And Indian-Owned Economic Enterprises	JUN 2000

52.227-2	Notice And Assistance Regarding Patent And Copyright Infringement	AUG 1996
52.228-7	Insurance--Liability To Third Persons	MAR 1996
52.232-9	Limitation On Withholding Of Payments	APR 1984
52.232-17	Interest	JUN 1996
52.232-22	Limitation Of Funds	APR 1984
52.232-23	Assignment Of Claims	JAN 1986
52.232-25	Prompt Payment	FEB 2002
52.232-33	Payment by Electronic Funds Transfer--Central Contractor Registration	MAY 1999
52.233-1	Disputes	JUL 2002
52.233-3 Alt I	Protest After Award (Aug 1996) - Alternate I	JUN 1985
52.237-3	Continuity Of Services	JAN 1991
52.242-1	Notice of Intent to Disallow Costs	APR 1984
52.242-3	Penalties for Unallowable Costs	MAY 2001
52.242-13	Bankruptcy	JUL 1995
52.243-2 Alt II	Changes--Cost Reimbursement (Aug 1987) - Alternate II	APR 1984
52.243-3	Changes--Time-And-Material Or Labor-Hours	SEP 2000
52.244-2	Subcontracts	AUG 1998
52.244-5	Competition In Subcontracting	DEC 1996
52.245-5	Government Property (Cost-Reimbursement Time-And-Materials, Or Labor Hour Contracts)	JAN 1986
52.246-25	Limitation Of Liability--Services	FEB 1997
52.247-1	Commercial Bill Of Lading Notations	APR 1984
52.249-6	Termination (Cost Reimbursement)	SEP 1996
52.249-14	Excusable Delays	APR 1984
252.203-7001	Prohibition On Persons Convicted of Fraud or Other Defense-Contract-Related Felonies	MAR 1999
252.203-7002	Display Of DOD Hotline Poster	DEC 1991
252.204-7000	Disclosure Of Information	DEC 1991
252.204-7003	Control Of Government Personnel Work Product	APR 1992
252.204-7004	Required Central Contractor Registration	NOV 2001
252.205-7000	Provisions Of Information To Cooperative Agreement Holders	DEC 1991
252.209-7000	Acquisition From Subcontractors Subject To On-Site Inspection Under The Intermediate Range Nuclear Forces (INF) Treaty	NOV 1995
252.212-7000	Offeror Representations and Certifications- Commercial Items	NOV 1995
252.215-7002	Cost Estimating System Requirements	OCT 1998
252.223-7004	Drug Free Work Force	SEP 1988
252.225-7012	Preference For Certain Domestic Commodities	FEB 2003
252.225-7016	Restriction On Acquisition Of Ball and Roller Bearings	APR 2003
252.226-7001	Utilization of Indian Organizations and Indian-Owned Economic Enterprises--DoD Contracts	SEP 2001
252.227-7034	Patents--Subcontracts	APR 1984
252.227-7039	Patents--Reporting Of Subject Inventions	APR 1990
252.231-7000	Supplemental Cost Principles	DEC 1991
252.232-7009	Mandatory Payment by Governmentwide Commercial Purchase Card	JUL 2000
252.244-7000	Subcontracts for Commercial Items and Commercial Components (DoD Contracts)	MAR 2000
252.245-7001	Reports Of Government Property	MAY 1994
252.246-7000	Material Inspection And Receiving Report	MAR 2003

252.247-7023 Alt III Transportation of Supplies by Sea (May 2002) Alternate III MAY 2002
 252.251-7000 Ordering From Government Supply Sources OCT 2002

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52.215-19 NOTIFICATION OF OWNERSHIP CHANGES (OCT 1997)

(a) The Contractor shall make the following notifications in writing:

(1) When the Contractor becomes aware that a change in its ownership has occurred, or is certain to occur, that could result in changes in the valuation of its capitalized assets in the accounting records, the Contractor shall notify the Administrative Contracting Officer (ACO) within 30 days.

(2) The Contractor shall also notify the ACO within 30 days whenever changes to asset valuations or any other cost changes have occurred or are certain to occur as a result of a change in ownership.

(b) The Contractor shall--

(1) Maintain current, accurate, and complete inventory records of assets and their costs;

(2) Provide the ACO or designated representative ready access to the records upon request;

(3) Ensure that all individual and grouped assets, their capitalized values, accumulated depreciation or amortization, and remaining useful lives are identified accurately before and after each of the Contractor's ownership changes; and

(4) Retain and continue to maintain depreciation and amortization schedules based on the asset records maintained before each Contractor ownership change.

The Contractor shall include the substance of this clause in all subcontracts under this contract that meet the applicability requirement of FAR 15.408(k).

(End of clause)

52.222-42 STATEMENT OF EQUIVALENT RATES FOR FEDERAL HIRES (MAY 1989)

In compliance with the Service Contract Act of 1965, as amended, and the regulations of the Secretary of Labor (29 CFR Part 4), this clause identifies the classes of service employees expected to be employed under the contract and states the wages and fringe benefits payable to each if they were employed by the contracting agency subject to the provisions of 5 U.S.C. 5341 or 5332.

THIS STATEMENT IS FOR INFORMATION ONLY: IT IS NOT A WAGE DETERMINATION

Employee Class

Monetary Wage-Fringe Benefits

(End of clause)

52.244-6 SUBCONTRACTS FOR COMMERCIAL ITEMS (MAY 2002)

(a) Definitions.

"Commercial item", has the meaning contained in the clause at 52.202-1, Definitions.

"Subcontract", includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor at any tier.

(b) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under this contract.

(c) (1) The Contractor shall insert the following clauses in subcontracts for commercial items:

(i) 52.219-8, Utilization of Small Business Concerns (OCT 2000) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds \$500,000 (\$1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

(iii) 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans (DEC 2001) (38 U.S.C. 4212(a)).

(iv) 52.222-36, Affirmative Action for Workers with Disabilities (JUN 1998) (29 U.S.C. 793).

(v) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (JUN 2000) (46 U.S.C. Appx 1241) (flowdown not required for subcontracts awarded beginning May 1, 1996).

(2) While not required, the Contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(d) The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract.

(End of clause)

52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

www.arnet.gov

(End of clause)

52.252-6 AUTHORIZED DEVIATIONS IN CLAUSES (APR 1984)

(a) The use in this solicitation or contract of any Federal Acquisition Regulation (48 CFR Chapter 1) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the clause.

(b) The use in this solicitation or contract of any insert regulation name (48 CFR) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of clause)

Section J - List of Documents, Exhibits and Other Attachments

CLAUSES INCORPORATED BY FULL TEXT

PART III - LIST OF DOCUMENTS, EXHIBITS, AND OTHER ATTACHMENTSSECTION J - LIST OF ATTACHMENTS

<u>TITLE</u>	<u>DATE</u>	<u>#OF PAGES</u>
Information to Offerors or Quotes (DD Form 1707)	N/A	1
Contract Facilities Capital Cost of Money	N/A	1
Disclosure of Lobbying Activities (SF-LLL)	N/A	1
Scope of Work, SW-IM-06-03, Display Services	01 Apr 03	13
Contract Data Requirement List (DD Form 1443) Exhibit A with Distribution and Data Items	11 Mar 03	8
Wage Determination No: 1994-2007 Rev. 23	28 May 02	18
Past Performance Evaluation Forms (Note in Section M that this form will be used as a guide to evaluate past performance.)	N/A	7
Past Performance Evaluation Letter	N/A	1
The Section K Representations, Certifications, and other Statements of offeror submitted by contractor in response to RFP DASG60-03-R-0010 will be incorporated Into the resultant contract by reference.		

Section K - Representations, Certifications and Other Statements of Offerors

DEVIATION FOR FAR 52.203-11

Deviation CD 90-O0001 applies to FAR 52.203-11; see the following website:

<http://www.acq.osd.mil/dp/dars/classdev.html>

CLAUSES INCORPORATED BY REFERENCE

52.203-11	Certification And Disclosure Regarding Payments To Influence Certain Federal Transactions	APR 1991
52.222-38	Compliance With Veterans' Employment Reporting Requirements	DEC 2001

CLAUSES INCORPORATED BY FULL TEXT

52.204-3 TAXPAYER IDENTIFICATION (OCT 1998)

(a) Definitions.

“Common parent,” as used in this provision, means that corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member.

“Taxpayer Identification Number (TIN),” as used in this provision, means the number required by the Internal Revenue Service (IRS) to be used by the offeror in reporting income tax and other returns. The TIN may be either a Social Security Number or an Employer Identification Number.

(b) All offerors must submit the information required in paragraphs (d) through (f) of this provision to comply with debt collection requirements of 31 U.S.C. 7701(c) and 3325(d), reporting requirements of 26 U.S.C. 6041, 6041A, and 6050M, and implementing regulations issued by the IRS. If the resulting contract is subject to the payment reporting requirements described in Federal Acquisition Regulation (FAR) 4.904, the failure or refusal by the offeror to furnish the information may result in a 31 percent reduction of payments otherwise due under the contract.

(c) The TIN may be used by the Government to collect and report on any delinquent amounts arising out of the offeror's relationship with the Government (31 U.S.C. 7701(c)(3)). If the resulting contract is subject to the payment reporting requirements described in FAR 4.904, the TIN provided hereunder may be matched with IRS records to verify the accuracy of the offeror's TIN.

(d) Taxpayer Identification Number (TIN).

___ TIN: _____

___ TIN has been applied for.

___ TIN is not required because:

☐ Offeror is a nonresident alien, foreign corporation, or foreign partnership that does not have income effectively connected with the conduct of a trade or business in the United States and does not have an office or place of business or a fiscal paying agent in the United States;

☐ Offeror is an agency or instrumentality of a foreign government;

☐ Offeror is an agency or instrumentality of the Federal Government.

(e) Type of organization.

☐ Sole proprietorship;

☐ Partnership;

☐ Corporate entity (not tax-exempt);

☐ Corporate entity (tax-exempt);

☐ Government entity (Federal, State, or local);

☐ Foreign government;

☐ International organization per 26 CFR 1.6049-4;

☐ Other _____

(f) Common parent.

☐ Offeror is not owned or controlled by a common parent as defined in paragraph (a) of this provision.

☐ Name and TIN of common parent:

Name _____

TIN _____

(End of provision)

52.209-5 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS (DEC 2001)

(a)(1) The Offeror certifies, to the best of its knowledge and belief, that--

(i) The Offeror and/or any of its Principals--

(A) Are () are not () presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have () have not (), within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and

(C) Are () are not () presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subdivision (a)(1)(i)(B) of this provision.

(ii) The Offeror has () has not (), within a three-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER SECTION 1001, TITLE 18, UNITED STATES CODE.

(b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the certification will be considered in connection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)

52.215-6 PLACE OF PERFORMANCE (OCT 1997)

(a) The offeror or respondent, in the performance of any contract resulting from this solicitation, () intends, () does not intend (check applicable block) to use one or more plants or facilities located at a different address from the address of the offeror or respondent as indicated in this proposal or response to request for information.

(b) If the offeror or respondent checks "intends" in paragraph (a) of this provision, it shall insert in the following spaces the required information:

Place of Performance(Street Address, City, State, County, Zip Code)	Name and Address of Owner and Operator of the Plant or Facility if Other Than Offeror or Respondent

(End of provision)

52.219-1 SMALL BUSINESS PROGRAM REPRESENTATIONS (APR 2002)

(a)(1) The North American Industry Classification System (NAICS) code for this acquisition is (541430).

(2) The small business size standard is 6 Million Dollars.

(3) The small business size standard for a concern which submits an offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is 500 employees.

(b) Representations. (1) The offeror represents as part of its offer that it () is, () is not a small business concern.

(2) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents, for general statistical purposes, that it () is, () is not a small disadvantaged business concern as defined in 13 CFR 124.1002.

(3) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents as part of its offer that it () is, () is not a women-owned small business concern.

(4) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents as part of its offer that it () is, () is not a veteran-owned small business concern.

(5) (Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (b)(4) of this provision.) The offeror represents as part of its offer that it () is, () is not a service-disabled veteran-owned small business concern.

(6) (Complete only if the offeror represented itself as a small business concern in paragraph (b)(1) of this provision.) The offeror represents, as part of its offer, that--

(i) It () is, () is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material change in ownership and control, principal office, or HUBZone employee percentage has occurred since it was certified by the Small Business Administration in accordance with 13 CFR part 126; and

(ii) It () is, () is not a joint venture that complies with the requirements of 13 CFR part 126, and the representation in paragraph (b)(6)(i) of this provision is accurate for the HUBZone small business concern or concerns that are participating in the joint venture. (The offeror shall enter the name or names of the HUBZone small business concern or concerns that are participating in the joint venture: _____.) Each HUBZone small business concern participating in the joint venture shall submit a separate signed copy of the HUBZone representation.

(c) Definitions. As used in this provision--

Service-disabled veteran-owned small business concern--

(1) Means a small business concern--

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

"Small business concern," means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR Part 121 and the size standard in paragraph (a) of this provision.

Veteran-owned small business concern means a small business concern--

(1) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans.

"Women-owned small business concern," means a small business concern --

(1) That is at least 51 percent owned by one or more women; in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and

(2) Whose management and daily business operations are controlled by one or more women.

(d) Notice.

(1) If this solicitation is for supplies and has been set aside, in whole or in part, for small business concerns, then the clause in this solicitation providing notice of the set-aside contains restrictions on the source of the end items to be furnished.

(2) Under 15 U.S.C. 645(d), any person who misrepresents a firm's status as a small, HUBZone small, small disadvantaged, or women-owned small business concern in order to obtain a contract to be awarded under the preference programs established pursuant to section 8(a), 8(d), 9, or 15 of the Small Business Act or any other provision of Federal law that specifically references section 8(d) for a definition of program eligibility, shall--

(i) Be punished by imposition of fine, imprisonment, or both;

(ii) Be subject to administrative remedies, including suspension and debarment; and

(iii) Be ineligible for participation in programs conducted under the authority of the Act.

(End of provision)

52.222-22 PREVIOUS CONTRACTS AND COMPLIANCE REPORTS (FEB 1999)

The offeror represents that --

(a) () It has, () has not participated in a previous contract or subcontract subject to the Equal Opportunity clause of this solicitation;

(b) () It has, () has not, filed all required compliance reports; and

(c) Representations indicating submission of required compliance reports, signed by proposed subcontractors, will be obtained before subcontract awards.

(End of provision)

52.222-25 AFFIRMATIVE ACTION COMPLIANCE (FEB 1984)

The offeror represents that

(a) ☐ it has developed and has on file, ☐ has not developed and does not have on file, at each establishment, affirmative action programs required by the rules and regulations of the Secretary of Labor (41 CFR 60-1 and 60-2), or

(b) ☐ has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

(End of provision)

52.223-13 CERTIFICATION OF TOXIC CHEMICAL RELEASE REPORTING (OCT 2000)

(a) Submission of this certification is a prerequisite for making or entering into this contract imposed by Executive Order 12969, August 8, 1995.

(b) By signing this offer, the offeror certifies that--

(1) As the owner or operator of facilities that will be used in the performance of this contract that are subject to the filing and reporting requirements described in section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11023) and section 6607 of the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13106), the offeror will file and continue to file for such facilities for the life of the contract the Toxic Chemical Release Inventory Form (Form R) as described in sections 313(a) and (g) of EPCRA and section 6607 of PPA; or

(2) None of its owned or operated facilities to be used in the performance of this contract is subject to the Form R filing and reporting requirements because each such facility is exempt for at least one of the following reasons:
(Check each block that is applicable.)

() (i) The facility does not manufacture, process or otherwise use any toxic chemicals listed under section 313(c) of EPCRA, 42 U.S.C. 11023(c);

() (ii) The facility does not have 10 or more full-time employees as specified in section 313.(b)(1)(A) of EPCRA 42 U.S.C. 11023(b)(1)(A);

() (iii) The facility does not meet the reporting thresholds of toxic chemicals established under section 313(f) of EPCRA, 42 U.S.C. 11023(f) (including the alternate thresholds at 40 CFR 372.27, provided an appropriate certification form has been filed with EPA);

() (iv) The facility does not fall within Standard Industrial Classification Code (SIC) major groups 20 through 39 or their corresponding North American Industry Classification System (NAICS) sectors 31 through 33; or

() (v) The facility is not located within any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Northern Mariana Islands, or any other territory or possession over which the United States has jurisdiction.

(End of clause)

52.225-2 BUY AMERICAN ACT CERTIFICATE (MAY 2002)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product as defined in the clause of this solicitation entitled “Buy American Act --Supplies” and that the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic and products.

(b) Foreign End Products:

Line Item No.:-----

Country of Origin:-----

(List as necessary)

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation.

(End of provision)

52.227-6 ROYALTY INFORMATION (APR 1984)

(a) Cost or charges for royalties. When the response to this solicitation contains costs or charges for royalties totaling more than \$250, the following information shall be included in the response relating to each separate item of royalty or license fee:

(1) Name and address of licensor.

(2) Date of license agreement.

(3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable.

(4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable.

(5) Percentage or dollar rate of royalty per unit.

(6) Unit price of contract item.

(7) Number of units.

(8) Total dollar amount of royalties.

(b) Copies of current licenses. In addition, if specifically requested by the Contracting Officer before execution of the contract, the offeror shall furnish a copy of the current license agreement and an identification of applicable claims of specific patents.

(End of provision)

252.209-7001 DISCLOSURE OF OWNERSHIP OR CONTROL BY THE GOVERNMENT OF A TERRORIST COUNTRY (MAR 1998)

(a) "Definitions."

As used in this provision --

(a) "Government of a terrorist country" includes the state and the government of a terrorist country, as well as any political subdivision, agency, or instrumentality thereof.

(2) "Terrorist country" means a country determined by the Secretary of State, under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(i)(A)), to be a country the government of which has repeatedly provided support for such acts of international terrorism. As of the date of this provision, terrorist countries include: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.

(3) "Significant interest" means --

(i) Ownership of or beneficial interest in 5 percent or more of the firm's or subsidiary's securities. Beneficial interest includes holding 5 percent or more of any class of the firm's securities in "nominee shares," "street names," or some other method of holding securities that does not disclose the beneficial owner;

(ii) Holding a management position in the firm, such as a director or officer;

(iii) Ability to control or influence the election, appointment, or tenure of directors or officers in the firm;

(iv) Ownership of 10 percent or more of the assets of a firm such as equipment, buildings, real estate, or other tangible assets of the firm; or

(v) Holding 50 percent or more of the indebtedness of a firm.

(b) "Prohibition on award."

In accordance with 10 U.S.C. 2327, no contract may be awarded to a firm or a subsidiary of a firm if the government of a terrorist country has a significant interest in the firm or subsidiary or, in the case of a subsidiary, the firm that owns the subsidiary, unless a waiver is granted by the Secretary of Defense.

(c) "Disclosure."

If the government of a terrorist country has a significant interest in the Offeror or a subsidiary of the Offeror, the Offeror shall disclose such interest in an attachment to its offer. If the Offeror is a subsidiary, it shall also disclose any significant interest the government of a terrorist country has in any firm that owns or controls the subsidiary. The disclosure shall include --

(1) Identification of each government holding a significant interest; and

(2) A description of the significant interest held by each government.

(End of provision)

252.247-7022 REPRESENTATION OF EXTENT OF TRANSPORTATION BY SEA (AUG 1992)

(a) The Offeror shall indicate by checking the appropriate blank in paragraph (b) of this provision whether transportation of supplies by sea is anticipated under the resultant contract. The term supplies is defined in the Transportation of Supplies by Sea clause of this solicitation.

(b) Representation. The Offeror represents that it:

____ (1) Does anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

____ (2) Does not anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

(c) Any contract resulting from this solicitation will include the Transportation of Supplies by Sea clause. If the Offeror represents that it will not use ocean transportation, the resulting contract will also include the Defense FAR Supplement clause at 252.247-7024, Notification of Transportation of Supplies by Sea.

(End of provision)

Section L - Instructions, Conditions and Notices to Bidders

CLAUSES INCORPORATED BY REFERENCE

52.207-2	Notice Of Cost Comparison (Negotiated)	FEB 1993
52.211-14	Notice Of Priority Rating For National Defense Use	SEP 1990
52.215-1	Instructions to Offerors--Competitive Acquisition	MAY 2001
52.215-16	Facilities Capital Cost of Money	OCT 1997
52.215-20 Alt IV	Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (Oct 1997) - Alternate IV	OCT 1997
52.222-46	Evaluation Of Compensation For Professional Employees	FEB 1993
52.237-10	Identification of Uncompensated Overtime	OCT 1997

CLAUSES INCORPORATED BY FULL TEXT

52.204-6 DATA UNIVERSAL NUMBERING SYSTEM (DUNS) NUMBER (JUN 99)

(a) The offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "DUNS" followed by the DUNS number that identifies the offeror's name and address exactly as stated in the offer.

(b) If the offeror does not have a DUNS number, it should contact Dun and Bradstreet directly to obtain one. A DUNS number will be provided immediately by telephone at no charge to the offeror. For information on obtaining a DUNS number, the offeror, if located within the United States, should call Dun and Bradstreet at 1-800-333-0505. The offeror should be prepared to provide the following information:

- (1) Company name.
- (2) Company address.
- (3) Company telephone number.
- (4) Line of business.
- (5) Chief executive officer/key manager.
- (6) Date the company was started.
- (7) Number of people employed by the company.
- (8) Company affiliation.

(c) Offerors located outside the United States may obtain the location and phone number of the local Dun and Bradstreet Information Services office from the Internet Home Page at <http://www.customerservice@dnb.com>. If an offeror is unable to locate a local service center, it may send an e-mail to Dun and Bradstreet at globalinfo@mail.dnb.com.

(End of provision)

52.216-1 TYPE OF CONTRACT (APR 1984)

The Government contemplates award of a CPFF/LOE contract resulting from this solicitation.

(End of clause)

52.233-2 SERVICE OF PROTEST (AUG 1996)

(a) Protests, as defined in section 33.101 of the Federal Acquisition Regulation, that are filed directly with an agency, and copies of any protests that are filed with the General Accounting Office (GAO), shall be served on the Contracting Officer by obtaining written and dated acknowledgment of receipt from:

U.S. Army Space and Missile Defense Command
Contracting and Acquisition Management Office
SMDC-CM-AK
Room Number: 1D2100
106 Wynn Drive
Huntsville, AL 35805-1957

(b) The copy of any protest shall be received in the office designated above within one day of filing a protest with the GAO.

(End of provision)

52.252-1 SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (FEB 1998)

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of submitting the full text of those provisions, the offeror may identify the provision by paragraph identifier and provide the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this/these address(es):

www.arnet.gov

(End of provision)

52.252-5 AUTHORIZED DEVIATIONS IN PROVISIONS (APR 1984)

(a) The use in this solicitation of any Federal Acquisition Regulation (48 CFR Chapter 1) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the provision.

(c) The use in this solicitation of any _____ (48 CFR Chapter _____) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of provision)

SPECIAL INSTRUCTIONS FOR PREPARATION OF PROPOSALS:

A. SUBMISSION OF PROPOSALS: In addition to copies required in paragraph below entitled "General", your response to this solicitation shall be submitted as follows:

One (1) copy of the cost and technical proposals and one (1) copy of SF 33 and Section K, Representations, Certifications, and Other Statements of Offerors, to both your cognizant DCAA Auditor and ACO, whose name, address and telephone number the offeror shall provide below:

ACO: _____

DCAA:

B. INSTRUCTIONS FOR THE COMPLETION OF SOLICITATION PART I - THE SCHEDULE: The offeror shall complete the blank spaces in the following solicitation Schedule sections hereof:

- (1). SF 33: Complete Items 12 through 18 as applicable.
- (2). Insert the total dollar amount proposed for "CLIN 0001" and "TOTAL."
- (3) (a) Insert estimated cost dollar amount proposed, exclusive of fixed fee in subparagraph a.
- (b) Insert fixed fee dollar amount proposed in subparagraph b.
- (c) Insert the total contract dollar amount proposed in subparagraph c.

GENERAL:

- A. For purposes of this RFP, a page is defined as a standard 8 1/2" x 11" sheet of paper. Pitch shall be 10 to 12, or equivalent. "Newspaper copy type" style (two column format is permissible.) 1-inch margin, all sides; single-spaced. Foldouts are permissible; however, each 8 1/2" x 11" fold will count as one page. All pages shall be numbered. Print both sides of the paper, head to head.

		NUMBER OF COPIES		NUMBER OF PAGES
		PAPER	COMPUTER DISK	
Volume I	General	5	1	15
Volume II	Technical (Do Not Include Resume and Sample Pages)	5	1	25
Volume III	Management	5	1	15
Volume IV	Cost – No Limit	3	2	

B. Award without discussion. The Government reserves the right to award the contract without discussions, based on proposal submissions.

C. All electronic data must be for Office 2000, virus free, on 3.5 (1.44mb) floppy disk, 3,8" (100 MB) iomega Zip disk drive, and/or on Compact Disk (CD). If files are compressed, they must be self-extracting-archives (no software needed to decompress. If files contain links, the link must be intact and maintained through all revisions. One of your disk copies for your Cost Volume may be write protected. The remaining copy shall not be read/write/password protected. The diskettes containing cost data shall contain all formulas used in building up your proposal. Your electronic spreadsheet shall contain your cost element breakdown by Contract Line Item Number (CLIN) as well as a spreadsheet that roll-ups to a Grand Total Summary by cost element.

VOLUME DESCRIPTION:

1. *Volume I - General:* The General Volume shall consist of an actual offer to enter into a contract to perform the desired work. It will include representations, certifications, and acknowledgments, pertinent to the Scope of Work. No technical data shall be included in this volume. This volume will not be evaluated.

All materials submitted under this RFP is as follows:

a. Mailing Address:

United States Army Space & Missile Defense Command
ATTN: SMDC-CM-AK/Tullie Miller
P.O. Box 1500
Huntsville, AL 35807

b. Street Address:

United State Army Space & Missile Defense Command
ATTN: SMDC-CM-AK/Tullie Miller
06 Wynn Drive, NW
Huntsville, AL 35805-1990

For deliveries to the facility, please leave submissions at the loading dock. Point of Contact is Ms. Tullie Miller, 955-3699.

All documentation shall be provided not later than the due date specified on DD form 1707.

2. *Volume II - Technical:* Submissions included in the Technical Volume will include the following:

A. Detailed description of the offeror's activities pertaining to one (1) or more previous display efforts accomplished under other contracts. This information should be submitted in the following format:

Purpose or goal of project: Describe the purpose or the message, which was to be conveyed by the display, the target audience(s), and the types of locations where the display was used.

Rational for selection of various media: Describe the reason for the selection of the various media used for the display and associated materials.

Description of activities: Describe offeror's activities for each phase listed below; provide name of subcontractor(s) and describe the activities performed by all subcontractors who worked under offeror's direction; or indicate N/A" for "not applicable" if the particular phase was not performed by the offeror or the offeror's subcontractor. This description shall be broken out into the six (6) phases A-F, which are described in SOW paragraph 3, (i.e.

preliminary concept definition, detailed final design, fabrication, maintenance and updates, storage, and delivery and operation).

Samples to demonstrate proficiency and artistic ability in various media: Samples submitted will be limited to: paper; VHS videotape; Compact Disc, CD; and Digital Video Disc, DVD. Paper samples of the following types of materials shall be no larger than 8 1/2" x 11": Copies of layouts or drawings; photographs or computer printouts of art work or completed displays; actual or copies of printed brochures or flyers; and photographs of three dimensional promotional items (do not submit actual items). Videotapes of the following shall be 1/2" standard VHS format: video productions, animation sequences, computer demos, or footage showing displays or associated materials. The offeror shall furnish only one (1) set of the referenced samples and these samples are not included in the page limitation. All samples must be clearly marked with the offeror's name. Materials, which are not labeled, will not be considered.

B. A list of key personnel with a brief description of which duties they will perform as related to the six (6) phases A-F of SOW paragraph 3. Include a brief resume of the background experience of all personnel listed, addressing experience pertinent to the proposed effort. Include in the resume the individual's company personnel classification AND the cost proposal classification. Resumes shall be restricted to three 8 1/2" x 11" page submissions per individual. A sample resume is at Attachment 1.

For key personnel who are not employed by the offeror at the time of the proposal submission, the offeror shall submit a letter of intent, including individual's requested/offered salary, signed by the individual and attached to the resume. For proposal preparation purposes, key personnel are described as the; Project Manager, Art Director, Illustrator/Graphic Computer Specialist, General Designer, Assistant Director, Videographer and Script Writer. If the Offeror does not currently employ or does not plan to employ any one or more of these categories of labor, but plans to subcontract for these services, these plans should be discussed in the "management proposal" section.

C. The offeror shall provide detailed description and/or pictorial diagram of the facilities, equipment, materials, and software available for accomplishment of the Scope of Work under this contract. The offeror may also include information relating to subcontractors.

3. Volume III – Management Proposal

A. Provide a comprehensive description of the proposed management structure and approach for accomplishing the SOW effort. The offeror shall describe the organization's structure, to include major subcontractors, and describe how these organizational elements relate to the overall corporate structure. The offeror shall also provide a description of a management plan and strategy for handling the activities and allocating resources under this particular contract. This description shall be broken out into the six (6) phases A-F, which are described in SOW paragraph 3. This shall include: (i) The responsibilities, lines of authority, and span of control; (ii) the relationship among the prime contractor and subcontractors and the process for assigning SOW; (iii) the flow of information among the offeror's contractor team, requiring activities, and external organizations. The offeror shall indicate the process for managing and controlling subcontractors to include the reporting and review requirements imposed and the process for timely incorporation of subcontractor financial information into the prime's data. The offeror shall indicate the management control system established for effective planning and control of resources, to include the processes for: Scheduling, budgeting, and accumulation of cost; identifying cost and schedule problems; performing estimates of completion; and providing timely detailed performance status reports to management and the Government.

B. The offeror shall provide a summary of not more than 5 previous government or private sector contracts performed over the past five years, which were similar to this requirement. The offeror shall also provide contract numbers and name of client. The proposal shall include a statement as to whether these contracts were successfully completed with regards to cost, schedules, and performance.

C. The offeror shall submit past performance data, as specified below, directly to the address listed below, not later than two weeks after the RFP release date:

U.S. Army Space and Missile Defense Command
 RFP# DASG60-03-R-0010
 P.O. Box 1500, SMD-CM-AK
 Huntsville, AL 35807-3801

- (1) The offeror shall submit a brief synopsis of not more than the five most relevant and similar contracts performed during the past 5 years by the offeror and by each subcontractor (work done, as both prime and subcontractor may be included). The input shall be in the following format:

Contracting Activity and Address
 Procuring Contracting Officer's name, office symbol, telephone number, and fax number
 Technical Point of Contact's name, office symbol, telephone number, and fax number
 Contract number and SOW title
 Type of contract
 Contract Price
 Contract Period of performance

- (2) For each of the not more than 5 referenced contracts included in the synopsis for the offeror and each subcontractor, the offeror shall submit a narrative description that shall include, but is not limited to, a brief description of the following:

SOW;
 Management complexity;
 Performance objective achieved
 Performance/personnel problems encountered and their solutions; and
 Cost overrun or schedule delay encountered

D. The offeror shall complete Section I and II of the attachment Past Performance Questionnaire Form for each of the referenced contracts. The Past Performance Form for each referenced contract shall then be submitted by the offeror to the applicable Procuring Contracting Officer (PCO) not later than two weeks after the RFP release date, utilizing letter from the SMD PCO set forth in the attachment. The PCO shall be requested to complete Section III Evaluation and submit the completed form directly to the address above not later than 30 days from the RFP release date. The offeror is responsible for any necessary follow-up to the PCO to ensure timely submission of the completed Past Performance Evaluation Form.

4. *Volume IV - Cost*: The cost proposal shall be submitted based upon labor hours and rates for labor categories. The proposal shall also include pricing for storage by cost per cubic foot based on an estimated volume of 11,000 Cubic Feet.

Delivery Instructions: Offeror's shall submit three (3) written copies of the cost proposal and two (2) copies of the cost proposal. Offerors shall save the Cost Volume on a separate diskette/CD from the Technical/Management Volumes. All electronic submissions must be readable using the Microsoft Windows operating system and Microsoft Office 2000 or greater, and be virus free. If files are compressed, they must be self-extracting-archives (no software needed to decompress). If files contain links, the links must be intact and maintained through all revisions. One of your disk copies for your Cost Volume may be write protected. The remaining copies shall not be read/write/password protected. Include the following on the "Cost Diskettes":

- 1) A breakdown of cost by CLIN by Contractor Year by Cost Element. Roll the CFY breakdown into a total CLIN breakdown. Roll the CLIN breakdown into a Grand Summary. EACH summary shall be broken down into hours, rates and dollars. Furnish supporting breakdowns for each cost element, consistent with your cost accounting system. INCLUDE THE FORMULAS in your spreadsheets.

2) Any computations you used to develop your labor and/or indirect rates. INCLUDE THE FORMULAS in your spreadsheets.

In accordance with 15.402, 15.403-1, and 15.403-5(a)(1), certified cost or pricing data are not required based on the fact that adequate competition is expected for this procurement.

In accordance with 15.408(l) and clause 52.2115-20, alternate (IV), the following instructions are provided.

Sample cost proposal spreadsheets can be found at www.smdc.army.mil; click on Business, then Special Announcements, then Sample Spreadsheet.

The proposal shall be based upon labor hours and rates, indirect rates, subcontract costs, etc. that are reasonable and achievable.

By submitting your proposal, you grant the Contracting Officer or an authorized representative the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual information (regardless of form or whether the information is specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.

FAILURE TO COMPLY WITH RFP REQUIREMENTS FOR COST INFORMATION MAY RESULT IN AN ADVERSE ASSESSMENT OF YOUR PROPOSAL AND REDUCE OR ELIMINATE YOUR CHANCE OF BEING SELECTED FOR AWARD. WHEN AN OFFEROR FAILS TO FURNISH COST INFORMATION REQUIRED BY THE RFP, THE GOVERNMENT MAY UTILIZE COMPARABLE COST INFORMATION FROM OTHER SOURCES FOR PURPOSES OF COMPLETING ITS EVALUATION. UNDER THESE CIRCUMSTANCES, THE OFFEROR BEARS FULL RESPONSIBILITY FOR ANY ADVERSE EVALUATION IMPACT WHICH MAY RESULT FROM HIS FAILURE TO FURNISH COST INFORMATION REQUIRED BY THE RFP.

SECTION I

Include an index showing section number, title, and proposal page number.

SECTION II

For pricing purposes, provide an estimated start date of 1 Oct 03. Include the proposed contract type and period of performance. Submit with your proposal any information reasonably required to explain your estimating process, including the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and the nature and amount of any contingencies included in the proposed price. Provide any other General Information that may be beneficial in evaluation of your proposal.

Section III:

Provide the following information:

- (1) Solicitation number;
- (2) Name, address, and e-mail address of offeror;
- (3) Name, telephone number, and e-mail address of point of contact at contractor's facility;

- (4) Name, address, voice telephone number of contract administration office;
- (5) Name, address, voice telephone number, fax number, and e-mail address of cognizant Defense Contract Audit Agency;
- (6) Type of contract (that is CPFF Level of Effort);
- (7) Proposed cost; profit or fee dollars, cost of money dollars, and total for overall contract;
- (8) Place(s) and period(s) of performance;
- (9) Whether you will require the use of Government property in the performance of the contract, and, if so, what property;
- (10) Whether your organization is operating under an accounting system that has been approved for cost type contracts. Whether your organization is subject to cost accounting standards; whether your organization has submitted a CASB Disclosure Statement, and if it has been determined adequate; whether you have been notified that you are or may be in noncompliance with your Disclosure Statement or CAS, and, if yes, an explanation; whether any aspect of this proposal is inconsistent with your disclosed practices or applicable CAS, and, if so, an explanation; and whether the proposal is consistent with your established estimating and accounting principles and procedures and FAR Part 31, Cost Principles, and, if not, an explanation;
- (11) A listing by Line Item Number of each line item's applicable cost, fee, COM, and total dollars;
- (12) Date of submission; and
- (13) Name, title and signature of authorized representative.

SECTION IV

Provide a Cost Element Breakdown by **Contract Line Item Number** (CLIN) by Contractor Fiscal Year (CFY). Roll the CFY breakdown into a total CLIN breakdown. Roll the CLIN breakdown into a Grand Summary. EACH summary shall be broken down into hours, rates, and dollars. Furnish supporting breakdowns for each cost element, consistent with your cost accounting system.

SECTION V

LOE Hours

Following are the Government's estimated breakdowns of the DPPH level of effort under this solicitation/contract. The estimates are by Government Fiscal Year (GFY). These exact breakdowns shall be used by offerors for proposal preparation purposes. The resultant contract shall contain the total DPPH shown below for each CLIN without any such labor category or fiscal year breakdowns. THERE SHALL BE NO DEVIATION PROPOSED FROM THE HOURS AND BREAKDOWNS SHOWN BELOW. The cost proposal shall reflect a proposed price based upon the delineated hours.

a. Estimated Fiscal Year Breakdown:

If you split up the hours between you and your subcontractors, provide a chart showing the hours proposed by you and your subcontractors; show that the total proposed equals the amount delineated in the RFP.

CLIN	OPTION	GOVT FY		TOTAL HRS
0001	BASIC	04-05		29,978
0002	DATA			
0003	OPT. 01	06		14,213
0004	OPT. 02	07		13,749
0005	OPT. 03	08		13,295
0006	OPT. 04	09		12,848
0007	OPT. 05	10		12,408
			TOTAL HOURS	96,491

SECTION VI

NOTE: The following labor rate tables are to be used as guidelines. If you must compute your rates in another manner, the following shows the level of detail at which you are required to provide your proposed cost.

Example of the type of information needed if you compute future labor rates by straight escalation and you don't have a forward pricing rate agreement/forward pricing rates that preclude(s) your using this method.

Labor Rates Section

Provide a time-phased breakdown of labor rates by Contractor Labor Category title (as recognized by DCAA) for each CLIN and each CFY, as follows. Furnish bases for estimates.

TABLE 1 - CLIN Level, Contractor Fiscal Year Level

	Base Labor Rate ^b	Escalation Rate ^c	Number of Months ^d at proposed escalation rate	Provide Month/year to which you are escalating	Escalated Labor Rate
Contractor Labor Cat^a					
Contractor Labor Cat^a					

TABLE 1 Continued - CLIN Level, Contractor Fiscal Year Level

	Uncompensated O/T Percentage ^e	Rate Include Uncomp O/T
Contractor Labor Cat^a		
Contractor Labor Cat^a		

^aContractor Labor Category - Provide contractor category rates or names of individuals, as applicable.

^bBase Labor Rate – Show base labor rates by contractor labor category. Provide effective date of payroll register from which base labor rates were obtained. For time periods after the first period, provide starting date of base rate.

^cEscalation Rate - Provide source of escalation - e.g. Data Resources Incorporated recommendations, company experience (provide escalation rates experienced over the last two years, if applicable), etc. Add escalation rate and number of month columns as necessary to accommodate for different escalation rates as necessary for each time period.

^dNumber of Months at the proposed escalation rate - Begin escalating at payroll register date. Be clear regarding your “escalating from” and your “escalating to” dates. Show that your number of months equal that time period if not obvious.

^eUncompensated Rate - Provide uncompensated overtime percentage; example of computation follows, including number of hours per week which are proposed as uncompensated hours.

45 hours proposed on a 40 hour work week basis = $45/40 = 12.5\%$ uncompensated overtime percentage.

OR

Contractor, provide the following rationale if you are proposing future labor rates in accordance with a forward pricing rate agreement/forward pricing rates. If agreement has been reached with Government representatives on use of forward pricing rates/factors, identify the agreement, include a copy, and describe its nature.

Contractor FY Level

Labor Rate by CFY	Effective Date of Rate	Time Period
Contractor Labor		
Cat^a		
Contractor Labor		
Cat^a		

^aContractor Labor Category - Provide contractor category rates or names of individuals, as applicable.

Provide uncompensated overtime percentage; example of computation follows, including number of hours per week which are proposed as uncompensated hours.

45 hours proposed on a 40 hour work week basis = $45/40 = 12.5\%$ uncompensated overtime percentage.

SECTION VII

Indirect Rates

1. Provide a breakdown of indirect rates by Contractor Category title (as recognized by DCAA) for each CLIN, broken down as follows.

Indirect Rate by CFY	Effective Date of Rate	Time Period
Contractor Labor		
Cat		
Contractor Labor		
Cat		

2. State whether the indirect rate is applicable to this contract only or whether it is to be spread across several of your contracts.

3. Will award of this contract materially affect any of your indirect rates? If no, so state. If yes, describe which will be affected and how and insure that DCAA has a copy of the rates used in your proposal and the applicable backup to the rates.

4. Provide the actuals for the last two (2) years for all indirect rates that you are proposing. If a comparison of this procurement's rates to prior year rates is not applicable, so state and state reason for differences.

5. Provide the computations (i.e. breakdown of expenses, base) for each proposed indirect rate. Show trends and budgetary data to provide a basis for evaluating the reasonableness of proposed rates.

6. If agreement has been reached with Government representatives on use of forward pricing rates/factors, so state.

SECTION VIII

Interdivisional Transfers

If Interdivisional transfers of cost are applicable, provide the following:

-Information required by Sections I, II, III, IV, VI, and VII (above) and relating to the interdivisional transfer cost.

Subcontracts

Note: For purposes of the following requirements, the total cost by vendor is the pertinent referenced dollar amount.

For non-commercial subcontract proposals for which competition was not obtained and whose proposed cost falls between the cost and pricing threshold at 15.403-4(a)(1), and the lower of either \$10,000,000 or more or both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, provide the following:

a) In accordance with FAR 15.404-3, submit a detailed price or cost analysis of each subcontractor at the time of submittal of your written cost proposal. If you received information from DCAA or DCMC regarding the subcontractor's rates, provide either the verbal or written record of your conversation including: the person with whom you spoke; their telephone number; a copy of the information provided and the date of receipt of the information.

Provide a breakdown of the subcontract proposal that is sufficiently adequate for the Government reviewer to understand exceptions taken by the prime contractor to the subcontractor's proposal.

b) If the prime contractor is unable to obtain sufficient data from the contractor or from DCAA to perform an adequate price/cost analysis of the subcontractor's proposal, submit information relating to Sections I, II, III, IV, VI, and VII above to the Government at the time of submittal of your proposal.

c) Whether the subcontractor has an adequate accounting system. Whether the subcontractor has an approved purchasing system.

d) Whether the prime contractor has negotiated with the subcontractor. If negotiations have taken place, provide the negotiation memorandum, including the concessions made by both parties, the original proposed price, the negotiated price.

For non-commercial subcontract proposals for which competition was not obtained and whose proposed cost falls between the cost and pricing threshold at 15.403-4(a)(1), and the lower of either \$10,000,000 or more or both more than the pertinent cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price, provide the following:

Have the subcontractor provide (either through you or directly to the Contracting Officer) the information required by Sections I, II, III, IV, VI, and VII (above) and relating to the subcontract cost.

- If competition was received for an item provide quotes from each vendor showing comparable pricing. Provide data showing the degree of competition and the basis for establishing the source and reasonableness of price for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding, or expected to exceed, the appropriate threshold set forth at FAR 15.403-4 priced on the basis of adequate price competition.

- If the item is a commercial item in accordance with FAR Part 2.101,

a) - furnish backup that shows the price for which the item was offered or sold to the public (i.e. catalogues, invoices where it was previously sold to the public, etc.).

b) - provide evidence (e.g. purchase orders) that the item(s) was sold to the public.

c) - If there are differences between the cost of the item offered/sold to the public and the cost in the proposal, provide complete, detailed, backed-up data regarding the differences.

SECTION IX

The government's estimate of direct travel costs required to perform the contract is shown below. Any indirect charges applicable to these direct travel costs are in addition to these costs and shall be identified separately in the offeror's cost proposal. For proposal preparation purposes, the offeror's proposed travel prices shall include the direct travel costs shown below and the offeror's proposed indirect costs that are associated with these direct travel costs. The cost proposal shall reflect a proposed price based upon the delineated travel cost.

CLIN <u>0001</u>	\$60,000
CLIN <u>0003</u>	\$30,000
CLIN <u>0004</u>	\$30,000
CLIN <u>0005</u>	\$30,000
CLIN <u>0006</u>	\$30,000
CLIN <u>0007</u>	\$30,000

If the cost of travel is split between you and your subcontractors, provide a chart showing the travel cost proposed by you and that proposed by your subcontractor(s); show that the total proposed direct travel cost exactly equals the amount delineated in the RFP.

SECTION X

Materials pricing includes but is not limited to exhibit structure, ancillary equipment to include, display tables, computer hardware and software, video monitors, multi-media equipment, video and audio cables, etc. This does not include routine/recurring materials and ODC costs which are ordinarily associated with the contractor's services. Therefore, the contractor's facilities costs are not allowable under these CLINs.

The government's estimate of material required to perform the contract is shown below. Any indirect charges applicable to these costs shall be in addition to the cost identified below and shall be identified separately in the offeror's cost proposal. For proposal preparation purposes, the offeror's proposed prices shall include the material costs shown below and the offeror's proposed indirect costs that are associated with these ODC costs. The cost proposal shall reflect a proposed price based upon the delineated material cost.

CLIN <u>0001</u>	\$430,949
CLIN <u>0003</u>	\$215,474
CLIN <u>0004</u>	\$215,474
CLIN <u>0005</u>	\$215,474
CLIN <u>0006</u>	\$215,474
CLIN <u>0007</u>	\$215,474

If the cost of material is split between you and your subcontractor(s), provide a chart showing the material cost proposed by you and that proposed by your subcontractor(s); show that the total proposed direct cost of material exactly equals the amount delineated in the RFP.

Section XI**Facilities Capital Cost of Money**

When you elect to claim facilities capital cost of money as an allowable cost, you must submit Form CASB-CMF and a DD Form 1861-1 for each Cost Accounting Period applicable to this proposal (see FAR 31.205-10.) Insure that your calculations are based on the latest Treasury Rate (rates are updated every January and July) and that you have included your percent distribution of Land, Building and Equipment.

SECTION XII**Fee/Profit**

Provide your proposed fee/profit percentage and base.

SECTION XIII

Request for Rate Information Form

Complete the following Request for Rate Information Form and include with your cost proposal. The form will be used to request rate information on your firm from the Defense Contract Audit Agency with cognizance over you.

Request for Rate Information

Note: Complete this form for every Prime Contractor proposal, every interDivisional proposal, and every non-commercial, non-competitive Subcontract Proposal over \$550,000 for which the prime contractor has not submitted an adequate detailed cost and price analysis.

Note to contractor: Please verify that this is the correct DCAA and DCMC that has cognizance over you and that you are providing their latest correct addresses and phone numbers.)

DCAA Address

DCMC Address

Voice Phone Number: ()

Voice Phone Number: ()

E-Mail Address:

E-Mail Address:

Fax Phone Number: ()

Fax Phone Number: ()

Type of Contract: CPFF () CPFF LOE () CPAF () CPAF LOE ()
CPIF () CPIF LOE () FPI () FPI LOE () FFP () FFP LOE () OTHER _____ ()

Proposed \$ Amount:

(Note to contractor: If this is not a straight addition to a contract or new contract, provide explanation, i.e. \$ _____ Deleted from contract; \$ _____ Added to contract; \$ Net change to contract _____.)

Proposal Identifying Numbers:

(Note to contractor: Such as RFP number, Contractor Proposal No. - Explain type of identifier.)

Contractor Name:

Contractor Address:

(Note to contractor: include division and zip code)

Prime Contractor () Subcontractor ()

If subcontractor, provide Prime contractor name:

Small Business () Large Business () 8a Contractor ()

Title of Effort:

(Note to contractor: Include any applicable contract modification numbers here.)

Point of Contact at Contractor's Facility:

POC's phone number:

POC's E-Mail Address:

POC's Fax number:

Note to contractor: Provide in the following chart **ALL** rates,

(Direct, Indirect and Other Direct Cost rates) which are included in your proposal. Insure that DCAA has a complete “full-up” copy of your proposal. Also insure that DCAA has the backup to all proposed rates.

<u>Category</u>	<u>Base* in Proposal to Which Rate is Applied</u>	<u>Proposed Rate</u>	<u>Contractor Fiscal Year</u>
(Note to contractor: Include full description to enable DCAA to identify category referenced)			

Examples of Bases: For Direct Labor the base might be hours; for Overhead the base might be Direct Labor Dollars; For Fee the base might be Labor plus Overhead plus Other Direct Cost.

Type of System	Applicability to this contract	If applicable, Date of Approval, Point of Contact and POC phone number
Accounting System		
Cost Accounting Standards Disclosure Statement		
Purchasing System		
Estimating System		
Material Management Accounting System		

In the space below, list and explain all Non-Compliance with Cost Accounting Standards issues as well as Accounting, Estimating, Material and Purchasing System deficiencies. Also explain their applicability to this proposal and actions taken by you to correct the deficiencies (or comments on the deficiencies).

SECTION XIV

50% Rule

CALCULATION FOR “FIFTY PERCENT” RULE:

a. In accordance with FAR 52.219-14, LIMITATION ON SUBCONTRACTING, DEC 96, this provision applies to small business restricted awards only.

b. The contractor shall furnish a matrix depicting the total allocation of DPPHs and their associated price/hour between the prime* and each subcontractor or consultant. The price/hour includes the following elements:

- 1.) Direct Labor
- 2.) Direct Labor Overhead
- 3.) General & Administrative

If the prime* adds any indirect costs to a subcontractor’s or consultant’s proposed price, that additional dollar amount must be added to the subcontractor’s price for purposes of 50% rule calculations.

*The term “prime” may include Joint Ventures and Teams in certain situations. See the following Code of Federal Regulation (CFR) citations for detailed guidance as to those situations:

- 13 CFR 125.6 (g)
- 13 CFR121.103 (f)(3)
- 13 CFR124.513 and
- 13 CFR126.616

<u>CLIN</u> _____	<u>Prime</u>	<u>Subcontractors</u>		
		<u>Sub 1</u>	<u>Sub 2</u>	<u>....Total Subs</u>
# of Labor Hours				
Labor Hour \$s				
Labor O/H \$s				
Applicable G&A \$s				
Total Dollars				

<u>CLIN</u> _____	<u>Prime</u>	<u>Subcontractors</u>		
		<u>Sub 1</u>	<u>Sub 2</u>	<u>....Total Subs</u>
# of Labor Hours				
Labor Hour \$s				
Labor O/H \$s				
Applicable G&A \$s				
Total Dollars				

<u>TOTAL CONTRACT</u>	<u>Prime</u>	<u>Subcontractors</u>		
		<u>Sub 1</u>	<u>Sub 2</u>	<u>...Total Subs</u>
# of Labor Hours				
Labor Hour \$s				
Labor O/H \$s				
Applicable G&A \$s				
Total Dollars				

ATTACHMENT 1
RESUME FORMAT

NAME: COMPANY:

SECURITY CLEARANCE AND DATE GRANTED:

PROPOSED GOVERNMENT LABOR CATEGORY (SEE RFP):

COMPANY PERSONNEL CLASSIFICATION:

LABOR CATEGORY CLASSIFICATION IN COST PROPOSAL:

THE MOST SIGNIFICANT SOW RELATED TECHNICAL ACCOMPLISHMENT IN THE LAST 5 YEARS:

THE MOST SALIENT SKILL THAT RELATES TO THE PROPOSED EFFORT:

EDUCATION:

SPECIAL TRAINING:

EXPERIENCE: (For each employee, in reverse chronological order, list the inclusive dates, employer, and a brief description of the task performed and job titled. The inclusive dates, duties and level of responsibility should be identified for each job title.)

RELATED EXPERIENCE: (Specify experience pertaining to the duties they will perform related to the six (6) phases A-F of SOW paragraph 3.)

Section M - Evaluation Factors for Award

CLAUSES INCORPORATED BY FULL TEXT

EVALUATION AREAS/FACTORS/SUBFACTORS:

M-1. GENERAL. The Government will make award to the responsible offeror whose conforming offer represents the best value for the Government, considering the technical, management, total evaluated probable cost, and other factors set forth below. The Government will evaluate offers by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the options. The Government may choose not to afford offerors an opportunity to revise or modify their offers before award of a contract. The Government reserves the right to award based on initial proposals.

M-2. EVALUATION AREAS/FACTORSSUBFACTORS.

A. Technical Area – The technical quality of the offeror’s submission in meeting the requirements of the statement of work will be evaluated using the following factors:

1. Portfolio – The information provided in the Purpose or Goal(s) of the special instructions (i.e. the message, the target audience(s), and the types of locations where previous displays were used) will provide the basis for the evaluation of the offeror’s detailed written description of activities performed during previous display efforts.

a. Accomplishment of Goals. The following will be assessed to determine to what extent the purpose and goal(s) were accomplished with specific attention to:

- (1) Appropriateness of the media(s) selected;
- (2) Success of message conveyance;
- (3) Effective use of resources and manpower throughout each phase of display services.

b. Overall Impact of Display. Samples submitted showing work accomplished on past efforts will be used to evaluate overall display design and impact in terms of the following:

(1) Degree to which the display demonstrates attention getting features which would attract viewers and hold their interest;

(2) Whether the display appears as a cohesive unit with successful integration of the various media and design elements complementing each other and working together to convey the message(s).

c. Demonstrated Proficiency. Samples submitted showing work accomplished on previous efforts will also be assessed in terms of the demonstrated proficiency and artistic ability in the following:

(1) Fabrication techniques in terms of sturdy construction which will withstand the rigors of packing and unpacking repeatedly and innovative use of standard and new materials to create visual impact or to hold down costs;

(2) Graphic elements and type styles in terms of eye appeal, and appropriateness to the message being conveyed and the target audience(s);

(3) Photographic materials in terms of composition, and print quality;

- (4) Illustrations in terms of composition and mastery of media and technique;
- (5) Printed promotional materials in terms of layout design and printing quality;
- (6) Computer graphic demos, video and interactive video presentations in terms of impact and effectiveness; demonstrated mastery of various media (i.e. video production, animation, printed materials, creation of original art and photography); and successful use of design elements, (i.e. colors, type styles, artwork and photographs) and the overall impact of the display.

2. Personnel – The Government will assess the qualifications of the offeror's proposed representative personnel on the basis of their resumes against the requirements of the RFP. Evaluation will be inclusive of both personnel in the employ of offerors and personnel who might be, if such resumes are accompanied by a Letter of Commitment signed by the individual. The Government plans to evaluate whether the offeror has demonstrated sufficient understanding of the potential personnel qualifications required to perform tasks delineated in the SOW. The offeror's proposal will be evaluated in terms of proposed personnel's educational background, including degrees, certificates, and on-the-job training; and in terms of recent experience in similar efforts as an indicator of potential success in accomplishing the requirements of the SOW.

3. Facility and Equipment – The offeror's proposal will be evaluated on the facility, equipment, materials, and software available for production of displays and all associated materials for display storage.

B. Management Area – The offeror's proposed management approach will be evaluated using the following factors:

1. Organization Structure – The offeror's proposal will be evaluated to determine the extent to which it demonstrates a sound management approach suited to the successful accomplishment of the requirements of the SOW. The roles of any team members and subcontractors will be included in this evaluation. Emphasis will be placed on the following: organizational structure, management approach, responsiveness to requirements, allocation of resources, and organizational skills evident in offeror's proposed strategy to meet the complex requirements of this SOW.

2. Past Performance

a. Past performance information identified or provided by an offeror, as well as information obtained from any other sources, will be evaluated as one indicator of an offeror's ability to perform the resulting contract successfully. Consideration will be given to past and current Federal, State, and local government and private contracts for efforts similar to this Display Service requirement. If required, the Source Selection Authority will determine the relevance of similar past performance information.

b. The currency and relevance of past performance information; source of the information; context of the data; general trends in contractor's performance; and problems encountered on the identified contracts and the offeror's corrective action will be taken into consideration. Past performance evaluation will also take into account information regarding predecessor companies, key personnel who have relevant experience, and/or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

c. Satisfaction of client and successful completion of contract with regards to cost, schedules, and performance will be considered to determine the offeror's ability to meet the requirements of this sow.

- d. In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror will not be evaluated favorably or unfavorably in past performance.

C. Cost Area. The Cost Area includes two evaluation factors: Cost Realism and Total Evaluated Probable Cost (TEPC).

1. Cost Realism: The proposal will be analyzed to assess the likelihood that the technical and management approaches proposed could be accomplished at the cost proposed. This is a measure of the programmatic risk based on the technical/management approach. The results of the cost realism assessment will be applied to the evaluation of the technical and management areas to aid in assessing the offeror's understanding of the magnitude and complexity of the contract requirements. The cost realism assessment is utilized in developing TEPC.

2. TEPC: The proposal will be evaluated to develop the government's estimate of the most probable cost of successfully completing the contract using the technical and management approaches proposed. TEPC consists of the government's estimate of the realistic cost of completing the offeror's proposal, to include the government's assessment of program risk (including cost realism), and additional costs to the government such as government furnished property, government furnished information, transportation, and other related cost factors.

M-3. RELATIVE IMPORTANCE OF EVALUATION CRITERIA

A. Technical Area - The Technical area is significantly more important than the Management area. The Personnel factor is slightly less important than the Portfolio factor; the Facility & Equipment factor is slightly less important than the Personnel factor.

B. Management Area - The Management area factors are of approximately equal importance.

C. Cost Area - The Cost Area, which will not be rated or scored, is a substantial evaluation criteria; however, it is less important than the Technical and Management Areas combined.

D. Cost realism is a very important consideration in the evaluation of the technical and management areas. Poor cost realism may result in a lower evaluation of the technical or management areas. Offerors submitting cost proposals that are so unrealistically high or low as to preclude a reasonable chance of being selected for award may be excluded from the competitive range.

E. The Government will select for award the proposal which is most advantageous to the government considering the technical, management, and cost areas. The government may select for award the offeror whose total evaluated probable cost is not necessarily the lowest, but whose technical and management proposals are sufficiently more advantageous to the government so as to justify the payment of additional costs. Conversely, the government may select for award the offeror whose total TEPC is lower than one or more other proposals or when other offerors' technical/management proposals are not sufficiently more advantageous so as to justify the payment of additional costs.

Department of the Army

U.S. Army Space and Missile

Defense Command

P.O. Box 1500

Huntsville, AL 35807-3801

Display Services

Scope of Work # SW-IM-06-03.

01 APR 03

U.S. Army Space and Missile Defense Command
Huntsville, Alabama 35807-3801

SCOPE OF WORK

DISPLAY SERVICES

1.0 INTRODUCTION

The U.S. Army Space and Missile Defense Command (USASMDC) has the requirement to provide at various locations and times, clear, concise, accurate and understandable depictions of various aspects of its ongoing missions, function, tasks, technical efforts, historical commentary, and Command status. Messages shall be communicated in the form of displays utilizing various media and techniques which are tailored to the specific circumstance. These messages and specific information will be conveyed to various audiences which may include people from other government agencies, industry, allies, educational institutions and the general public. Locations may include government, industry, and military meetings, technical trade shows, symposiums, and conferences held throughout the United States, and Internationally. Each display will be unique; most will be prepared as traveling displays while others will be prepared for permanent installation in a government facility.

2.0 GENERAL

The contractor shall provide complete display services. This includes providing displays and transporting and operating the displays as described in this Scope of Work, henceforth identified as the SOW. A display is defined as the facade and superstructure, ancillary structures such as pedestals, carpets, and signage. Displays may also include associated materials, described in this SOW, which are not

necessarily a permanent part of the display and may change or develop from one show to another.

2.1 Visits to the government facility for meetings to deliver designs, or displays for acceptance will be accomplished during government working hours (0800-1630), unless otherwise specified by the Technical Directive, (TD). Display operations may require travel time on weekends and holidays.

2.2 All work shall be performed in response to TD's, issued by the Government's Contracting Officer's Technical Monitor (TM). Notice of each display requirement may be provided orally with confirming written technical directive provided prior to commencement of each phase of the project. Each display project shall be divided into six (6) specific requirement phases, A-F, listed below and described in detail in SOW, paragraph 3.

- A - Preliminary Concept Definition
- B - Detailed Final Design
- C - Fabrication
- D - Maintenance and Updates
- E - Storage
- F - Delivery and Operation

For each display project, the TM will issue TD's requesting the contractor to perform all six (6) phases or select only those phases which are required. Delivery date shall be determined by the government. Project milestones shall be proposed by the contractor and approved by the TM.

2.3 The contractor shall furnish all management, administration, labor, data, supplies, material, tools, vehicles, equipment, and

facilities necessary to perform the display services set forth in SOW, paragraph 3.

2.4 Display structures purchased or created under the contract shall be either those available commercially, or fabricated by the contractor, or combination thereof, as approved by the TM.

2.5 Each display shall be one cohesive unit and utilize high quality, large photographs, original art, graphics, signage, lighting, video or computer graphic programs, and promotional materials which are attention getting and convey the message in an appropriate manner. All design elements, colors, and type styles must be tailored to enhance the impact of the message.

2.6 The deliverable items provided under this contract may include but are not limited to; display booths, stands and backdrops; carpet and furnishings; tools and electronic equipment; original art work, photographic prints and signage; video tape programs, interactive video, animation sequences, computer graphics, virtual reality demos, music or other audio effects; printed materials or promotional items; and scale models.

2.6.1 For both static and traveling displays the contractor shall provide adequate electrical support and arrange for electrical installation and hookup of lighting, video components, computers, and other electrical equipment at the installation site. The contractor shall insure continual operation of all electrical equipment which is part of the display.

2.6.2 For both static and traveling displays the contractor shall consider security for display equipment and models if the display will be used in an area, such as a shopping center, where it will be exposed

to large numbers of people or where it will be left unattended for periods of time. Security will be accomplished by providing locking storage areas for tools and supplies within the display structure. Also electrical equipment will be operated from enclosed areas of the display; models will be viewed inside clear plastic enclosures.

2.6.3. The design of permanently mounted displays (wall-mounted or free-standing) will be of a static configuration as opposed to traveling displays which must be flexible in design. The contractor shall ship or transport the displays and install them.

2.6.3.1 The design of traveling displays shall be flexible in size and shape so displays may be reconfigured for the various exhibit locations. The designs may include the use of audio-visual and computer equipment. Emphasis will be placed on the use of lightweight materials, to reduce shipping and drayage costs. All traveling display designs will include a quick and cost-effective method of changing graphics to appeal to a specific audience.

2.6.4 All displays must be high quality and constructed with tough, durable material (i.e.; chip and scratch resistant which will hold up through continual cycles of packing, shipping, unpacking, set-up, tear-down, repacking, returning to storage). The display shall be constructed in a manner which will allow disassembly and packing into sturdy, Air Transport Association of America (ATA) - approved, or equivalent, shipping containers. Containers shall provide secure storage for all display components. The maximum size of a display, when packed and readied for shipment, will be no larger than one which would fit into a 48'- 52' moving van. The contractor shall ensure that all shipping containers have adequate provisions for lifting and are marked with information such as gross weight and lifting requirements as necessary.

2.6.4.1 Each concept shall minimize the need for assembly and disassembly hardware and tools. The display will be easily transportable and easily reconfigured with minimum manpower or special equipment requirements. Setup time should not exceed 20 hours. This time will not count loading and unloading time.

2.6.4.2 Displays which are permanently installed, shall be shipped or transported by the contractor. The contractor shall accomplish installation with or without government supervision, shall arrange and supervise contract labor, and shall arrange for all necessary services, (i.e. dock time, electrical requirements, drayage or disposal of shipping crates).

2.6.4.3 Displays which are in an active travel status, shall be reconfigured as necessary by the contractor to suit different exhibit or show locations. The contractor shall complete and file all necessary show forms, order ancillary at-show materials, organize and pack display materials for shipment, arrange for shipping or transport, load the exhibit onto the carrier, and transport and accompany display to remote locations. At the specified show location, the contractor shall manage set-up and installation of display, audio-visual equipment and scale models with or without government supervision. The contractor shall arrange and supervise contract labor, arrange all necessary show services, (i.e. dock time, electrical requirements, drayage or storage of equipment and packing cases). The contractor shall remain on-site to insure the proper functioning of the display, shall make all needed on-site repairs, and shall provide all needed supplies for complete exhibit operations. The contractor shall not be required to represent the government, or to answer the public's questions, about the display or display messages. At the conclusion of

the event, the contractor shall disassemble, repack, transport, and return the display materials to storage.

3.0 REQUIREMENTS FOR DISPLAY SERVICES

3.1 Preliminary Concept Definition (Phase A). Based on information provided by the TM, the contractor shall develop preliminary messages or themes for the display project. After the final message or theme is selected by the TM, the contractor shall prepare preliminary design concepts and strategies. The contractor will show how various display elements could be designed, integrated, and configured, to communicate the desired message to include, but not limited to, the following:

3.1.1 Concepts will include design alternatives (two to five) in the form of scale drawings, two- and three-dimensional computer generated, white or blank models of proposed display designs, sketches of art work with equipment and lighting specifications, and material and color samples.

3.1.2 The concept shall include options for using video or other programs or demonstrations, as required.

3.1.3 The concept shall include options for using appropriate promotional materials to augment the display imagery and messages to include brochures, leaflets, fact sheets, posters, lithographs, and other promotional items.

3.1.4 The concept definition effort shall include a cost estimate for all of the phases of display production as directed in the TD. The contractor shall prepare these separate cost estimates for each of the

design options ordered. The following further defines these cost estimates:

3.1.4.1 The estimate for each Phase (except Phase E - Storage) shall include a labor cost summary with a description of the work to be performed, a designation of the labor categories that will perform the work, the estimated number of hours, and the cost for each category.

3.1.4.2 The estimate for Phase C (Fabrication) and Phase D (Maintenance and Updates) shall include a cost estimate for materials. The contractor shall list materials with the estimated quantity and cost of each.

3.1.4.3 The estimate for Phase E (Storage) shall include the estimated number of cubic feet needed to store the exhibits. Estimate to be based on a minimum of 11,000 cubic ft., a value which currently represents the amount of space required to store the existing exhibits currently in inventory.

3.1.4.4 The estimate for Phase F (Delivery of Display and Operation) shall include estimates for the cost for the delivery, set-up, and operations, of the display at all local and non-local events specified by the TM. The estimate shall include a description of the activity, and the category of labor expected to perform the delivery or operation and the number of hours required to complete the requirements defined by the TM. Types of labor activities performed in conjunction with the operation of the display may include, but are not limited to, planning/arrangements, local display transport, non-local display transport, event labor, drayage, per diem, lodging, and travel/transportation costs.

3.2 The TM shall indicate in writing approval of Phase A with a TD to proceed with Detailed Final Design (Phase B). After the TM approval of preliminary concept, the contractor will provide a final display design to include, but not limited to, the following:

3.2.1 The contractor shall provide a detailed drawing or a scale model of the display configuration with drawings or color composites of proposed art work, photographs, signage and text styles as required by the government.

3.2.2 The contractor shall provide a complete draft of the script for video programs; story boards for animation sequences; and script/diagrams of screens for graphic or interactive graphic presentations as required by the TM.

3.2.3 The contractor shall provide full color drawings and layout of graphics, photographs, and text to be used in any printed materials in the form of proof copy. The contractor shall provide detailed drawings or other representation of promotional items as required by the government.

3.2.4 Display materials must be approved, prior to purchase or lease, by the TM. All informational materials, including photographs, art work, video scripts, printed and promotion materials, must be approved by the TM and cleared for public release prior to fabrication, printing or production. The TM will arrange for the materials to receive this clearance by the government Public Affairs and Security offices. Once the information has been cleared for public release, the TM will notify the contractor of this clearance with a written order to proceed with Fabrication (Phase C). Once information has been cleared by the Command Public Affairs Office; PAO, it does not have to be

cleared again for later use if it is used in its original cleared context.

3.3 Display Fabrication (Phase C) shall not commence until approval of Phase B and clearance for public release of the final design and content of display and associated materials by the government. Typical materials may include but are not limited to plywood, hinges and locks, adhesives and resins, masonite, plexi-sheets, lighting fixtures, rheostats, wiring and accessories, laminate, fiberglass, structural foam; for storage containers, carpet, paint, computer-cut vinyl letters, crate materials, tools and cleaning materials; to travel with exhibit, crate materials, plastic panels, shipping for photos and materials, and photo print mounting. The contractor shall schedule regular in-process reviews for the TM to monitor the progress and approve various stages of fabrication.

3.3.1 The contractor will fabricate all materials which conform to the representations which were approved in Phase B, to include, but not limited to, the following:

3.3.1.1 The contractor shall produce a completed display structure including electrical components, art work, photographs, and signage, by providing the necessary materials and support services required.

3.3.1.2 The contractor may be required to produce completed videos and interactive computer presentations and video or computer support services for specific displays.

3.3.1.3 The contractor may be required to produce promotional materials and printing support services for specific displays.

3.3.2 The display shall be delivered for acceptance as described in paragraph 3.6.1. Acceptance will include complete assembly, demonstration, and operation of the finished display. The contractor will demonstrate to TM that all requirements have been met and the display is fully functional.

3.3.2.1 The contractor shall demonstrate the methods required to assemble, disassemble and operate the display and all of its subsystems (video, audio, computer, demos, lighting, etc.). The contractor shall also provide as part of the display, a concise set of instructions that pictorially describes the assembly and the disassembly of the display.

3.3.2.2 The TM may elect to inspect and test all work called for by a TD. The TM may choose to visit the contractor's facilities to review progress pertaining to the requirements outlined in the TD. The contractor shall furnish all reasonable assistance for the safety of visitors during inspections on the contractor's premises. The TM shall perform inspections in a manner that will not unduly delay the work.

3.3.3 Upon final approval of a video tape, CD, or DVD, the contractor will deliver a master file and copies of the medium. Quantities for copies, as directed by the TM. These copies will contain either single or multiple dubs in a continuous loop.

3.3.4 Upon final approval of the promotional materials, the contractor will secure or produce promotional items in a quantity of not greater than five hundred (500) copies. The master may be a film negative or digital printing file as determined by the TM and will be maintained by the contractor.

3.4 Display Maintenance and Update (Phase D). The contractor shall provide the following services:

3.4.1 The contractor shall maintain the display in an operating condition equal to the condition at the time display was accepted by the TM.

3.4.2 The contractor shall provide ongoing support as needed to keep the display updated and in good condition. Updates will include, but not be limited to, new art work, photographs, text, audio, video, or printed materials. Additions or modifications to an existing display structure or display elements constitute an update. Reconfiguration of the display to fit into varying-sized display spaces is considered part of display operation and is not an update.

3.5 Display Storage (Phase E). The contractor shall store the display and all associated materials when not in use. The display shall be stored at a location which is fully accessible should any of the display items be needed at short notice.

3.6 Display Delivery and Operation (Phase F). The contractor will provide the resources to coordinate the necessary arrangements for complete display operations. These include, but are not limited to the following:

3.6.1 The completed display will be delivered, for final acceptance, to USASSDC at 106 Wynn Drive, Huntsville, AL unless directed otherwise. Delivery will be made as directed in TD by the TM and visiting Contractor personnel shall comply with all applicable government security requirements.

4.0 OTHER REQUIREMENTS

Upon completion of the contract, the contractor shall fully account for and deliver to the TM all display elements, shipping containers, supporting tools and equipment, computer disks and paper files, as well as any other materials that have been purchased or created under the contract.

5.0 DATA REQUIREMENTS

5.1 DATA AND REPORTS

The contractor shall submit data and reports in accordance with the DD 1423 (CDRL) attached to the contract. The contractor shall present briefings of contract work at the direction of the TM.

5.2 DELIVERY

All media submitted to the TM under this contract in the form of automated information system (AIS) media (e.g., diskette, CD's, DVD's, tapes, etc.) shall be free of viruses that could cause damage, disruption, or degradation of the AIS. The contractor shall test such media for viruses prior to delivery. All subcontracts shall include this requirement at any tier when the data to be delivered is in the form of AIS media.

6.0 CONTROL OF TECHNICAL AND OPERATIONAL INFORMATION AND DATA

All contractor documents in support of this requirement shall be reviewed and marked in accordance with DOD Directive 5230.24, Distribution Statements on Technical Documents, and MIL STD 1806.

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WAIS Document Retrieval 94-2007 AL, HUNTSVILLE
DASG60-03-R-0010

06/04/02

FOR OFFICIAL USE ONLY BY FEDERAL AGENCIES PARTICIPATING IN MOU WITH DOL
WASHINGTON D.C. 20210William W. Gross
DirectorDivision of
Wage DeterminationsWage Determination No.: 1994-2007
Revision No.: 23
Date of Last Revision: 05/28/2002

States: Alabama, Tennessee

Area: Alabama Counties of Colbert, Franklin, Jackson, Lauderdale, Lawrence,
Limestone,
Madison, Marion, Marshall, Morgan, Winston
Tennessee Counties of Giles, Lawrence, Lincoln, Moore, Wayne

Fringe Benefits Required Follow the Occupational Listing

OCCUPATION TITLE	MINIMUM WAGE RATE
Administrative Support and Clerical Occupations	
Accounting Clerk I	8.76
Accounting Clerk II	10.55
Accounting Clerk III	13.41
Accounting Clerk IV	16.77
Court Reporter	13.58
Dispatcher, Motor Vehicle	14.03
Document Preparation Clerk	12.18
Duplicating Machine Operator	12.18
Film/Tape Librarian	10.72
General Clerk I	8.65
General Clerk II	9.73
General Clerk III	10.42
General Clerk IV	12.19
Housing Referral Assistant	16.22
Key Entry Operator I	9.37
Key Entry Operator II	11.16
Messenger (Courier)	7.39
Order Clerk I	10.22
Order Clerk II	13.88
Personnel Assistant (Employment) I	9.17
Personnel Assistant (Employment) II	12.09
Personnel Assistant (Employment) III	13.51
Personnel Assistant (Employment) IV	13.73
Production Control Clerk	16.25
Rental Clerk	10.72
Scheduler, Maintenance	11.51
Secretary I	11.51
Secretary II	13.58
Secretary III	16.22
Secretary IV	19.75
Secretary V	21.92
Service Order Dispatcher	11.89
Stenographer I	13.44
Stenographer II	15.24
Supply Technician	19.75
Survey Worker (Interviewer)	13.58
Switchboard Operator-Receptionist	8.57
Test Examiner	13.58

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Test Proctor	13.58
Travel Clerk I	8.22
Travel Clerk II	8.71
Travel Clerk III	9.29
Word Processor I	11.10
Word Processor II	12.46
Word Processor III	13.93
Automatic Data Processing Occupations	
Computer Data Librarian	9.81
Computer Operator I	12.14
Computer Operator II	13.55
Computer Operator III	17.17
Computer Operator IV	17.91
Computer Operator V	19.83
Computer Programmer I (1)	16.22
Computer Programmer II (1)	19.10
Computer Programmer III (1)	22.79
Computer Programmer IV (1)	27.57
Computer Systems Analyst I (1)	24.64
Computer Systems Analyst II (1)	27.62
Computer Systems Analyst III (1)	27.62
Peripheral Equipment Operator	12.14
Automotive Service Occupations	
Automotive Body Repairer, Fiberglass	17.50
Automotive Glass Installer	15.94
Automotive Worker	15.94
Electrician, Automotive	16.73
Mobile Equipment Servicer	14.45
Motor Equipment Metal Mechanic	17.50
Motor Equipment Metal Worker	15.94
Motor Vehicle Mechanic	15.98
Motor Vehicle Mechanic Helper	12.52
Motor Vehicle Upholstery Worker	15.22
Motor Vehicle Wrecker	15.94
Painter, Automotive	15.28
Radiator Repair Specialist	15.94
Tire Repairer	12.75
Transmission Repair Specialist	17.50
Food Preparation and Service Occupations	
Baker	9.96
Cook I	7.87
Cook II	8.85
Dishwasher	6.95
Food Service Worker	6.95
Meat Cutter	9.99
Waiter/Waitress	6.82
Furniture Maintenance and Repair Occupations	
Electrostatic Spray Painter	17.56
Furniture Handler	13.94
Furniture Refinisher	17.56
Furniture Refinisher Helper	14.41
Furniture Repairer, Minor	15.98
Upholsterer	17.56
General Services and Support Occupations	
Cleaner, Vehicles	7.99
Elevator Operator	8.06
Gardener	10.22
House Keeping Aid I	7.13
House Keeping Aid II	8.62
Janitor	8.06
Laborer, Grounds Maintenance	8.44
Maid or Houseman	6.63
Pest Controller	9.09

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Refuse Collector	8.44
Tractor Operator	10.19
Window Cleaner	8.24
Health Occupations	
Dental Assistant	10.98
Emergency Medical Technician (EMT)/Paramedic/Ambulance Driver	11.88
Licensed Practical Nurse I	11.17
Licensed Practical Nurse II	12.54
Licensed Practical Nurse III	14.04
Medical Assistant	9.81
Medical Laboratory Technician	12.53
Medical Record Clerk	11.28
Medical Record Technician	13.60
Nursing Assistant I	7.75
Nursing Assistant II	8.71
Nursing Assistant III	9.50
Nursing Assistant IV	10.66
Pharmacy Technician	12.24
Phlebotomist	11.28
Registered Nurse I	14.90
Registered Nurse II	18.23
Registered Nurse II, Specialist	18.23
Registered Nurse III	22.05
Registered Nurse III, Anesthetist	22.05
Registered Nurse IV	26.43
Information and Arts Occupations	
Audiovisual Librarian	21.15
Exhibits Specialist I	17.77
Exhibits Specialist II	21.76
Exhibits Specialist III	26.45
Illustrator I	17.77
Illustrator II	21.76
Illustrator III	26.45
Librarian	19.27
Library Technician	14.28
Photographer I	13.01
Photographer II	15.02
Photographer III	17.99
Photographer IV	22.00
Photographer V	26.70
Laundry, Dry Cleaning, Pressing and Related Occupations	
Assembler	6.94
Counter Attendant	6.94
Dry Cleaner	7.29
Finisher, Flatwork, Machine	6.94
Presser, Hand	6.94
Presser, Machine, Drycleaning	6.94
Presser, Machine, Shirts	6.94
Presser, Machine, Wearing Apparel, Laundry	7.32
Sewing Machine Operator	7.64
Tailor	8.36
Washer, Machine	7.46
Machine Tool Operation and Repair Occupations	
Machine-Tool Operator (Toolroom)	18.68
Tool and Die Maker	22.78
Material Handling and Packing Occupations	
Forklift Operator	14.82
Fuel Distribution System Operator	16.43
Material Coordinator	16.25
Material Expediter	16.25
Material Handling Laborer	9.58
Order Filler	10.87
Production Line Worker (Food Processing)	11.57

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Shipping Packer	10.89
Shipping/Receiving Clerk	10.51
Stock Clerk (Shelf Stocker; Store Worker II)	12.11
Store Worker I	8.93
Tools and Parts Attendant	12.44
Warehouse Specialist	11.57
Mechanics and Maintenance and Repair Occupations	
Aircraft Mechanic	18.38
Aircraft Mechanic Helper	14.41
Aircraft Quality Control Inspector	20.21
Aircraft Servicer	15.98
Aircraft Worker	16.75
Appliance Mechanic	17.56
Bicycle Repairer	14.66
Cable Splicer	18.38
Carpenter, Maintenance	17.56
Carpet Layer	16.75
Electrician, Maintenance	20.61
Electronics Technician, Maintenance I	14.82
Electronics Technician, Maintenance II	25.55
Electronics Technician, Maintenance III	26.62
Fabric Worker	15.98
Fire Alarm System Mechanic	18.38
Fire Extinguisher Repairer	15.72
Fuel Distribution System Mechanic	18.38
General Maintenance Worker	16.43
Heating, Refrigeration and Air Conditioning Mechanic	18.38
Heavy Equipment Mechanic	18.38
Heavy Equipment Operator	17.87
Instrument Mechanic	18.38
Laborer	8.89
Locksmith	17.56
Machinery Maintenance Mechanic	20.72
Machinist, Maintenance	16.92
Maintenance Trades Helper	14.41
Millwright	18.38
Office Appliance Repairer	17.56
Painter, Aircraft	17.56
Painter, Maintenance	17.56
Pipefitter, Maintenance	18.38
Plumber, Maintenance	17.56
Pneudraulic Systems Mechanic	18.38
Rigger	18.38
Scale Mechanic	16.75
Sheet-Metal Worker, Maintenance	18.38
Small Engine Mechanic	16.75
Telecommunication Mechanic I	18.38
Telecommunication Mechanic II	20.21
Telephone Lineman	18.38
Welder, Combination, Maintenance	18.38
Well Driller	18.38
Woodcraft Worker	18.38
Woodworker	16.43
Miscellaneous Occupations	
Animal Caretaker	7.19
Carnival Equipment Operator	7.70
Carnival Equipment Repairer	8.09
Carnival Worker	6.38
Cashier	6.50
Desk Clerk	6.90
Embalmer	18.01
Lifeguard	9.46
Mortician	17.26

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Park Attendant (Aide)	10.21
Photofinishing Worker (Photo Lab Tech., Darkroom Tech)	8.87
Recreation Specialist	11.14
Recycling Worker	10.10
Sales Clerk	8.87
School Crossing Guard (Crosswalk Attendant)	7.12
Sport Official	8.87
Survey Party Chief (Chief of Party)	12.11
Surveying Aide	7.45
Surveying Technician (Instr. Person/Surveyor Asst./Instr.)	10.21
Swimming Pool Operator	9.72
Vending Machine Attendant	8.48
Vending Machine Repairer	9.72
Vending Machine Repairer Helper	8.48
Personal Needs Occupations	
Child Care Attendant	6.95
Child Care Center Clerk	8.68
Chore Aid	6.82
Homemaker	11.01
Plant and System Operation Occupations	
Boiler Tender	18.86
Sewage Plant Operator	17.56
Stationary Engineer	18.86
Ventilation Equipment Tender	14.41
Water Treatment Plant Operator	17.56
Protective Service Occupations	
Alarm Monitor	11.60
Corrections Officer	12.80
Court Security Officer	10.88
Detention Officer	12.80
Firefighter	9.62
Guard I	8.73
Guard II	12.11
Police Officer	15.64
Stevedoring/Longshoremen Occupations	
Blocker and Bracer	13.48
Hatch Tender	13.48
Line Handler	13.68
Stevedore I	11.66
Stevedore II	14.13
Technical Occupations	
Air Traffic Control Specialist, Center (2)	28.33
Air Traffic Control Specialist, Station (2)	19.54
Air Traffic Control Specialist, Terminal (2)	21.51
Archeological Technician I	15.69
Archeological Technician II	17.56
Archeological Technician III	21.76
Cartographic Technician	22.32
Civil Engineering Technician	20.75
Computer Based Training (CBT) Specialist/ Instructor	24.00
Drafter I	13.99
Drafter II	15.69
Drafter III	17.77
Drafter IV	21.76
Engineering Technician I	12.79
Engineering Technician II	15.89
Engineering Technician III	19.09
Engineering Technician IV	26.34
Engineering Technician V	30.74
Engineering Technician VI	37.17
Environmental Technician	16.67
Flight Simulator/Instructor (Pilot)	26.49
Graphic Artist	19.39

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Instructor	19.27
Laboratory Technician	14.09
Mathematical Technician	21.61
Paralegal/Legal Assistant I	13.59
Paralegal/Legal Assistant II	17.18
Paralegal/Legal Assistant III	20.96
Paralegal/Legal Assistant IV	25.37
Photooptics Technician	19.16
Technical Writer	23.07
Unexploded (UXO) Safety Escort	19.14
Unexploded (UXO) Sweep Personnel	19.14
Unexploded Ordnance (UXO) Technician I	19.14
Unexploded Ordnance (UXO) Technician II	23.15
Unexploded Ordnance (UXO) Technician III	27.74
Weather Observer, Combined Upper Air and Surface Programs (3)	16.72
Weather Observer, Senior (3)	17.08
Weather Observer, Upper Air (3)	16.72
Transportation/ Mobile Equipment Operation Occupations	
Bus Driver	12.67
Parking and Lot Attendant	8.18
Shuttle Bus Driver	11.97
Taxi Driver	9.91
Truckdriver, Heavy Truck	14.71
Truckdriver, Light Truck	11.97
Truckdriver, Medium Truck	13.56
Truckdriver, Tractor-Trailer	15.01

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: \$2.15 an hour or \$86.00 a week or \$372.67 a month

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 10 years, and 4 after 20 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4.174)

THE OCCUPATIONS WHICH HAVE PARENTHESES AFTER THEM RECEIVE THE FOLLOWING BENEFITS (as numbered):

- 1) Does not apply to employees employed in a bona fide executive, administrative, or professional capacity as defined and delineated in 29 CFR 541. (See CFR 4.156)
- 2) APPLICABLE TO AIR TRAFFIC CONTROLLERS ONLY - NIGHT DIFFERENTIAL: An employee is entitled to pay for all work performed between the hours of 6:00 P.M. and 6:00 A.M.

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at the rate of basic pay plus a night pay differential amounting to 10 percent of the rate of basic pay.

3) WEATHER OBSERVERS - NIGHT PAY & SUNDAY PAY: If you work at night as part of a regular tour of duty, you will earn a night differential and receive an additional 10% of basic pay for any hours worked between 6pm and 6am. If you are a full-time employed (40 hours a week) and Sunday is part of your regularly scheduled workweek, you are paid at your rate of basic pay plus a Sunday premium of 25% of your basic rate for each hour of Sunday work which is not overtime (i.e. occasional work on Sunday outside the normal tour of duty is considered overtime work).

HAZARDOUS PAY DIFFERENTIAL: An 8 percent differential is applicable to employees employed in a position that represents a high degree of hazard when working with or in close proximity to ordnance, explosives, and incendiary materials. This includes work such as screening, blending, dying, mixing, and pressing of sensitive ordnance, explosives, and pyrotechnic compositions such as lead azide, black powder and photoflash powder. All dry-house activities involving propellants or explosives. Demilitarization, modification, renovation, demolition, and maintenance operations on sensitive ordnance, explosives and incendiary materials. All operations involving regrading and cleaning of artillery ranges.

A 4 percent differential is applicable to employees employed in a position that represents a low degree of hazard when working with, or in close proximity to ordnance, (or employees possibly adjacent to) explosives and incendiary materials which involves potential injury such as laceration of hands, face, or arms of the employee engaged in the operation, irritation of the skin, minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used. All operations involving, unloading, storage, and hauling of ordnance, explosive, and incendiary ordnance material other than small arms ammunition. These differentials are only applicable to work that has been specifically designated by the agency for ordnance, explosives, and incendiary material differential pay.

**** UNIFORM ALLOWANCE ****

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces

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the hourly rate below that required by the wage determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of \$3.35 per week (or \$.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial laundering in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

** NOTES APPLYING TO THIS WAGE DETERMINATION **

Source of Occupational Title and Descriptions:

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations," Fourth Edition, January 1993, as amended by the Third Supplement, dated March 1997, unless otherwise indicated. This publication may be obtained from the Superintendent of Documents, at 202-783-3238, or by writing to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Copies of specific job descriptions may also be obtained from the appropriate contracting officer.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form 1444 (SF 1444)}

Conformance Process:

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications

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Listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} When multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

- 1) When preparing the bid, the contractor identifies the need for a conformed occupation(s) and computes a proposed rate(s).
- 2) After contract award, the contractor prepares a written report listing in order proposed classification title(s), a Federal grade equivalency (FGE) for each proposed classification(s), job description(s), and rationale for proposed wage rate(s), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.
- 3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).
- 4) Within 30 days of receipt, the Wage and Hour Division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.
- 5) The contracting officer transmits the Wage and Hour decision to the contractor.
- 6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included

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in an established wage determination. Conformances may not be used to artificially split, combine, or subdivide classifications listed in the wage determination.

PAST PERFORMANCE QUESTIONNAIRE

I. CONTRACT IDENTIFICATION

A. CONTRACTOR _____

B. CONTRACT NUMBER _____

C. CONTRACT TYPE _____

COMPETITIVE () YES () NO

FOLLOW-ON () YES () NO

D. PERIOD OF PERFORMANCE _____

ESTIMATED COST	FEE	TOTAL VALUE

E. INITIAL CONTRACT COST _____

F. CURRENT CONTRACT COST _____

G. PRODUCT DESCRIPTION
AND/OR SERVICE PROVIDED:

II. AGENCY IDENTIFICATION

A. PROCURING CONTRACTING OFFICER'S NAME, OFFICE SYMBOL,
TELEPHONE NUMBER, AND FAX NUMBER

B. TECHNICAL POINT OF CONTACT'S NAME, OFFICE SYMBOL, TELEPHONE
NUMBER, AND FAX NUMBER

C. CONTRACTING ACTIVITY AND ADDRESS

D. GEOGRAPHIC DISTRIBUTION OF SERVICES UNDER THIS CONTRACT
I.E. LOCAL, NATIONWIDE, WORLDWIDE

E. NUMBER OF LOCATIONS SERVICED BY THIS CONTRACT _____

III. EVALUATION

A. PERFORMANCE HISTORY

1. To what extent did the contractor adhere to contract delivery schedules?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

2. To what extent did the contractor submit required reports and documentation in a timely manner?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

3. To what extent were the contractor's reports and documentation accurate and complete?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

4. To what extent was the contractor able to solve contract performance problems without extensive guidance from government counterparts?

Considerably successful _____

Generally successful _____

Little success _____

No success _____

Comment: _____

5. To what extent did the contractor display initiative in meeting requirements?

Displayed considerable initiative _____

Displayed some initiative _____

Displayed little initiative _____

Displayed no initiative _____

Comment: _____

6. Did the contractor commit adequate resources in timely fashion to the contract to meet the requirement and to successfully solve problems?

Provided abundant resources _____

Provided sufficient resources _____

Provided minimal resources _____

Provided insufficient resources _____

Comment: _____

7. To what extent did the contractor submit change orders and other required proposals in a timely manner?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

8. To what extent did the contractor respond positively and promptly to technical directions, contract change orders, etc.?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

9. To what extent was the contractor's problem tracking/reporting documentation timely, accurate and or appropriate content?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

10. To what extent was the contractor effective in interfacing with the Government's staff?

Extremely effective _____

Generally effective _____

Generally ineffective _____

Extremely ineffective _____

Comment: _____

B. TERMINATION HISTORY

11. Has this contract been partially or completely terminated for default or convenience?

_____ Yes _____ Default _____ Convenience

_____ No

If yes, explain (e.g., inability to meet cost, performance, or delivery schedule).

12. Are there any pending terminations?

_____ Yes _____ No

If yes, explain and indicate the status.

C. EXPERIENCE HISTORY

13. How effective has the contractor been in identifying user requirements?

Extremely effective _____

Generally effective _____

Generally ineffective _____

Extremely ineffective _____

Comment: _____

14. To what extent did the contractor coordinate, integrate, and provide for effective subcontractor management?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

15. To what extent did the contractor provide timely technical assistance, both on-site and off-site, when responding to problems encountered in the field?

Considerably surpassed minimum requirements _____

Exceeded minimum requirements _____

Met minimum requirements _____

Less than minimum requirements _____

Comment: _____

D. COST MANAGEMENT

16. To what extent did the contractor meet the proposed cost estimates?

Less than estimated cost _____

Comparatively equal to estimate _____

Exceeded the costs _____

Considerably surpassed estimate _____

Comment: _____

NARRATIVE SUMMARY

Use this section to explain additional information not included above.

CHAPTER 3

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CHAPTER 3

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.

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); OAo Corp. v. United States, 17 Cl. Ct. 91 (1989).

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). (Government unable to obtain damages for an unperformed oral contract for carriage.)
- 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. RMTS 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 surrounding circumstances, their tacit understanding." Baltimore & Ohio R.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. OA 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.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 applies 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), 10 U.S.C. § 2304; 41 U.S.C. § 403.
 - 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. 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.
7. 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. (The FAR and its supplements are available at <http://farsite.hill.af.mil>).
- 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 Marine Corps Acquisition Regulation Supplement (NMCARS).
 - e. The AFARS, AFFARS, and NMCARS 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 over 60 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 5101.601(4).
- (2) The Air Force and the Navy also permit delegation of contracting authority to certain deputies. AFFARS 5301.601-92; NMCARS 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 Contracting Officer's Technical Officer (COTR) or Quality Assurance Representative (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); Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002) (military recruiters lacked the authority to bind the government to promises of free lifetime medical care).
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); Johnson Management Group CFC v. Martinez, 308 F.3d. 1245 (Fed. Cir. 2002) (contracting officer was without authority to waive a government lien on equipment purchased with government funds).

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) (Assistant U.S. Attorney lacked authority to forgive plaintiff's farm loan in exchange for cooperation in foreclosure action); Austin v. United States, 51 Fed.Cl. 718 (2002) (employees of the US Marshall Service possessed no authority to bind the government beyond the scope of the Witness Security Program).
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 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); Digicon Corp. v. United States, 56 Fed. Cl. 425 (2003) (COFC found "institutional ratification" where Air Force issued task orders and accepted products and services from appellant over a sixteen month period).

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. The government 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 5101.602-3(b)(3)(A)); and
 - b. Chiefs of Contracting Offices (for amounts of \$10,000 or less) (AFARS 5101.602-3(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; NMCARS 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 did 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 Government Accountability 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 4

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CHAPTER 4

FUNDING AND FUND LIMITATIONS

I. INTRODUCTION.

- A. Source of Funding and Fund Limitations. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. This Constitutional “power of the purse” includes the power to establish restrictions and conditions on the use of funds appropriated. To curb fiscal abuses by the executive departments, Congress has enacted additional fiscal controls through statute.
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. . . .”
 3. The “Purpose Statute,” 31 U.S.C. § 1301. The Purpose Statute provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.
 4. The Antideficiency Act (ADA), 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519 (2000), consists of several statutes that authorize administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds.
 5. Congress and the Department of Defense (DoD) have agreed informally to additional restrictions. The DoD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation.

LTC Michael Norris
157th Contract Attorneys’ Course
March 2007

B. The Basic Fiscal Limitations.

1. An agency may obligate and expend appropriations only for a proper **purpose**;
2. 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); and
3. An agency may not obligate more than the **amount** appropriated by the Congress.

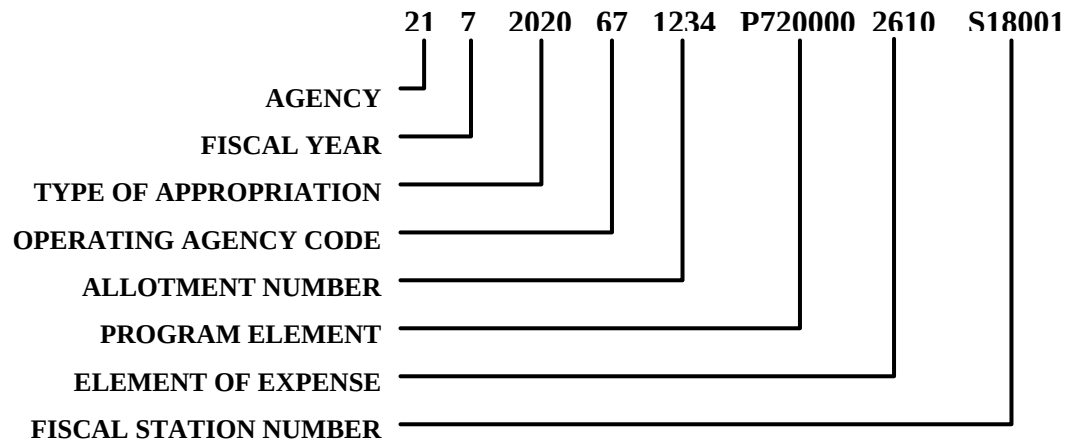
C. The Fiscal Law Philosophy: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” United States v. MacCollom, 426 U.S. 317 (1976).

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. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation.
- C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amount of 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. xvii.
- D. Budget Authority. Agencies do not receive cash to fund their programs and activities. Instead, Congress grants “budget authority,” also called obligational authority. Budget authority means “the authority provided by Federal law to incur financial obligations. . . .” 2 U.S.C. § 622(2).

- E. Contract Authority. Contract authority 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).
- F. Authorization Act. An authorization act is a statute, passed annually by Congress, that authorizes the appropriation of funds for programs and activities. An authorization act does not provide budget authority. That authority stems from the appropriations act. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.
- G. Appropriations Act. An appropriation is a statutory authorization to “incur obligations and make payments out of the U.S. Treasury for specified purposes.” An appropriations act is the most common form of budget authority.
 - 1. 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.
 - 2. 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 (3d ed,) p. 2-16, GAO-04-261SP (2004).
- H. Comptroller General and Government Accountability Office (GAO).
 - 1. Investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.
 - 2. The GAO was established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.
 - 3. The Comptroller General issues opinions and reports to federal agencies concerning the propriety of appropriated fund obligations or expenditures.

- I. Accounting Classifications. 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. 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 following is a sample fund cite:



1. The first two digits represent the military department. In the example above, the “21” denotes the Department of the Army. For the Air Force, these two digits will be 57; for the Navy, 17; and for the Department of Defense, 97.
2. The third digit shows the fiscal year/period of availability of the appropriation. The “7” in the example shown indicates FY 2007 funds. Installation contracting typically uses annual appropriations. Other fiscal year designators encountered less frequently include:
 - a. Third Digit = X = No year appropriation. This appropriation is available for obligation indefinitely.
 - b. Third Digit = 6/9 = Multi-year appropriation. In this example, funds were appropriated in FY 2006 and remain available through FY 2009.
3. The next four digits reveal the type of the appropriation. The following designators are used within DOD fund citations:

Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	21*2010	17*1453	17*1105	57*3500	N/A
Reserve Personnel	21*2070	17*1405	17*1108	57*3700	N/A
National Guard Personnel	21*2060	N/A	N/A	57*3850	N/A
Operations & Maintenance	21*2020	17*1804	17*1106	57*3400	97*0100
Operations & Maintenance, Reserve	21*2080	17*1806	17*1107	57*3740	N/A
Operations & Maintenance, National Guard	21*2065	N/A	N/A	57*3840	N/A
Procurement, Aircraft	21*2031	17*1506		57*3010	N/A
Procurement, Missiles	21*2032	17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)	17*1109	57*3020	N/A
Procurement, Weapons & Tracked Vehicles	21*2033			N/A	N/A
Procurement, Other	21*2035			17*1810	57*3080
Procurement, Ammunition	21*2034	17*1508		57*3011	N/A
Shipbuilding & Conversion	N/A	17*1611		N/A	N/A
Res., Develop., Test, & Eval.7	21*2040	17*1319		57*3600	97*0400
Military Construction	21*2050	17*1205		57*3300	97*0500
Family Housing Construction	21*0702	17*0703		57*0704	97*0706
Reserve Construction	21*2086	17*1235		57*3730	N/A
National Guard Construction	21*2085	N/A	N/A	57*3830	N/A

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year.
For example, Operations & Maintenance, Army funds for FY2007 would be depicted as 2172020.

** Source for the codes found in Table 2-1: DOD FMR, vol. 6B, App. A (Nov. 2001), available at:
<http://www.dod.mil/comptroller/fmr/06b/06BApxA.pdf>.

III. AVAILABILITY AS TO PURPOSE.

- A. The “Purpose Statute” provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. 31 U.S.C. § 1301(a).
 - 1. 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. Rather, agencies have 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).
 - 2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).
- B. The “Necessary Expense” Doctrine (the 3-part test for a proper purpose). Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The GAO applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation:
 - 1. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.
 - 2. The expenditure must not be prohibited by law.
 - 3. The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

Principles of Fed. Appropriations Law, vol. I, ch. 4, 4-21, GAO-04-261SP (3d ed. 2004). See Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services, B-306424, 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006).

C. Application of the Necessary Expense Test.

1. The first prong of the “necessary expense” test has been articulated in some other, slightly different ways as well. See Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (“an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function”); Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005) (“the expenditure must be reasonably related to the purposes that Congress intended the appropriation to fulfill”). However, the basic concept has remained the same: the important thing is the relationship between the expenditure to the appropriation sought to be charged.
2. The concept of “necessary expense” is a relative one, and determinations are fact/agency/purpose/appropriation specific. See Federal Executive Board – Appropriations – Employee Tax Returns – Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129; Use of Appropriated Funds for an Employee Electronic Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).
3. 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). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).
4. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See Customs and Border Protection—Relocation Expenses, B-306748, 2006 U.S. Comp. Gen. LEXIS 134 (July 6, 2006). An agency’s determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO looks at “whether the expenditure falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range.” Implementation of Army Safety Program, B-223608 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

D. Determining the Purpose of a Specific Appropriation.

1. Appropriations Acts. (<http://thomas.loc.gov/home/approp>)
 - a. An appropriation is a statutory authorization to incur obligations and make payments out of the Treasury for specified purposes. Aside from any emergency supplemental appropriations, Congress generally enacts thirteen (13) appropriations acts annually, two of which are devoted specifically to DOD: The Department of Defense Appropriation Act, and the Military Construction Appropriations Act. Within these two acts, the DoD has nearly 100 separate appropriations available to it for different purposes.
 - b. 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 & Maintenance (O&M) – used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;
 - (2) Personnel – used for 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."
 - c. By regulation, the DoD has assigned most types of expenditures to a specific appropriation. See DFAS-IN Manual 37-100-XXXX, The Army Management Structure (August XXXX). The manual is reissued every FY. XXXX= appropriate FY.
2. Authorization Act. (<http://thomas.loc.gov>)

- a. Annual authorization acts generally precede DoD's appropriations acts. There is no general requirement to have an authorization in order for an appropriation to occur. However, Congress has by statute created certain situations in which it must authorize an appropriation. For example, 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and RDT&E "unless funds therefore have been specifically authorized by law."
 - b. The authorization act may clarify the intended purpose of a specific appropriation, or contain restrictions on using appropriated funds.
3. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. This organic legislation provides the agency with authority (but not the money) to conduct the program, function, or mission and to utilize appropriated funds to do so.
4. Miscellaneous Statutory Provisions. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds. For example, 10 U.S.C. § 2246 prohibits DOD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.
5. Legislative History. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. This includes the text of the bill itself, conference and committee reports, floor debates, and hearings.
 - a. Legislative history can be useful for resolving ambiguities or confirming the intent of Congress where the statute fails to clearly convey Congress' intent, but may not be used to justify an otherwise improper expenditure. When confronted with a statute plain and unambiguous on its face, courts ordinarily do not look to the legislative history as a guide to its meaning. Tennessee Valley Authority v. Hill, 437 U.S. 153, 191 (1978); see also Lincoln v. Vigil, 508 U.S. 182, 192 (1993); Thompson v. Cherokee Nation of Oklahoma, 334 F.3d 1075 (Fed. Cir. 2003).

- 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. Budget Request Documentation.

- a. Agencies are required to justify their budget requests. Within DOD, Volumes 2A and 2B of the DOD FMR provide guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation.
- b. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purposes requested, unless otherwise prohibited.

7. Agency Regulations.

- a. When Congress enacts organic legislation, it rarely prescribes exactly how the agency is to carry out that new mission. Instead, Congress leaves it up to the agency to implement the authority in agency-level regulations.
- b. If the agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines that appropriated funds may be used for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous.

c. Agency-level regulations may also place restrictions on the use of appropriated funds. For example, although the GAO has sanctioned the use of appropriated funds to purchase commercially-produced business cards for agency employees, each of the military departments have implemented policies that permit only recruiters and criminal investigators to purchase them (everyone else must produce their business cards in-house, using their own card stock and printers).

8. Case Law. Comptroller General opinions are a valuable source of guidance as to the propriety of appropriated fund obligations or expenditures for particular purposes. While not technically binding on the Executive Branch, these opinions are nonetheless deemed authoritative.

E. Expense/Investment Threshold.

1. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. See [DOD FMR, vol. 2A, ch. 1, para. 010201](#). Common examples of expenses include civilian employee labor, rental charges for equipment and facilities, fuel, maintenance and repair of equipment, utilities, office supplies, and various services.
2. Investments are “costs to acquire capital assets,” [DOD FMR, vol. 2A, ch. 1, para. 010201.D.2](#), or assets which will benefit both current and future periods and generally have a long life span. Investments are normally financed with procurement appropriations.
3. Exception Permitting Purchase of Investments With O&M Funds. In each year’s Defense Appropriation Act, Congress has permitted DOD to utilize its Operation and Maintenance appropriations to purchase investment items having a unit cost that is less than a certain threshold. See e.g., Department of Defense Appropriation Act, 2007, Pub. L. No. 109-249, § 8031, 120 Stat. 1257 (Sep. 29, 2006) (current threshold is \$250,000). See also [DOD FMR, vol. 2A, ch. 1, para. 010201.D.1](#) (implementing the \$250,000 threshold).

4. Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.
- a. Agencies must consider the “system” concept when evaluating the procurement of items. The determination of what constitutes a “system” must be based on the **primary function** of the items 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, only if the primary function of the end item is to operate independently.
 - d. Do not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.
 - e. Example: An agency is acquiring 200 stand-alone computers and software at \$2,000 each (for a total of \$400,000). The appropriate color of money for the purchase of the 200 computers is determined by deciding whether the primary function of the computers is to operate as independent workstations (i.e., 200 systems) or as part of a larger system. If the computers are designed to primarily operate independently, they should be considered as separate end items and applied against the expense/investment criteria individually. If they function as a component of a larger system (i.e., interconnected and primarily designed to operate as one), then they should be considered a system and the total cost applied against the expense/investment criteria.

IV. AVAILABILITY AS TO TIME.

- A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552. An appropriation is available for obligation for a definite period of time. An agency must obligate funds within their period of availability. If an agency fails to obligate funds before they expire, those funds are no longer available for new obligations.
1. 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.
 2. There are some important exceptions to the general prohibition against obligating funds after the period of availability.
 - a. Protests. Upon a protest, the appropriation that would have funded the contract remains available for obligation for 100 days after a final ruling on the protest. 31 U.S.C. § 1558(a). This statutory provision is incorporated at FAR 33.102(c).
 - b. Terminations for default. See Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).
 - c. Terminations for convenience, pursuant to a court order or agency determination of erroneous award. Navy, Replacement Contract, B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117; Matter of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).
- B. The “Bona Fide Needs” Rule. Agencies may obligate appropriated funds only for requirements that represent bona fide needs of an appropriation’s period of availability. 31 U.S.C. § 1502(a). See U.S. Dep’t of Education’s Use of Fiscal Year Appropriations to Award Multiple Year Grants, B-289801, 2002 U.S. Comp. Gen. LEXIS 258 (Dec. 30, 2002); National Park Serv. Soil Surveys, B-282601, 1999 U.S. Comp. Gen. LEXIS 254 (Sept. 27, 1999).
- C. Bona Fide Needs Rule Applied to Supply Contracts.

1. 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. Maintenance Serv. and Sales Corp., B-242019, 70 Comp. Gen. 664 (1991); 64 Comp. Gen. 359 (1985).
2. Exceptions. Supply needs of a future fiscal year are the bona fide needs of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the lead-time exception and the stock-level exception. DOD Reg. 7000.14-R, vol. 3, para. 080303.
 - a. Stock-Level Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year. A bona fide need for stock exists when there is a present requirement for items to meet authorized stock levels (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.). To Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965); DOD Financial Management Regulation 7000.14-R, vol. 3, chapter 8., para. 080303A.
 - b. Lead-Time Exception. This exception recognizes that agencies may need and contract for an item in a current FY, but cannot physically obtain the item in the current FY due to the lead time necessary to produce and/or deliver it. There are two variants that comprise the lead time exception.
 - (1) Delivery Time. If an agency cannot obtain materials in the same FY in which they are needed and contracted for, delivery in the next FY does not violate the Bona Fide Needs Rule as long as the time between contracting and delivery is not be excessive, and the procurement is not be for standard, commercial items readily available from other sources. Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 (1959).

- (2) Production Lead-Time. An agency may contract in one FY for delivery and use in the subsequent FY if the item cannot be obtained on the open market at the time needed for use, so long as the intervening period is necessary for the production. Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen. 155 (1957).

D. Bona Fide Needs Rule Applied to Service Contracts.

1. General Rule. Services are generally the bona fide need of the fiscal year in which they are performed. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). This general rule applies where the services are “severable.” A service is severable if it can be separated into components that independently meet a separate need of the government. Examples include grounds and facilities maintenance, dining facility services, and transportation services. Most service contracts are severable. Therefore, as a general rule, use current funds to obtain current services.
2. Statutory Exception for Severable Services. 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. See 41 U.S.C. § 253l. The Coast Guard’s authority is at 10 U.S.C. § 2410a(b).
3. Nonseverable Services. If the services are nonseverable (i.e., a contract that seeks a single or unified outcome, product, or report), agencies must obligate funds for the entire undertaking at contract award, even if performance will cross fiscal years. 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); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, B-219829, 65 Comp. Gen. 741 (1986) (contract for study and report on psychological problems among Vietnam veterans was nonseverable).

V. LIMITATIONS BASED UPON AMOUNT.

- A. The Antideficiency Act (ADA), 31 U.S.C. §§ 1341-44, 1511-17, prohibits:

1. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).
 2. Making or authorizing expenditures or incurring obligations in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. § 1517(a).
 - a. Apportionment. The Office of Management and Budget (OMB) apportions funds over their period of availability to agencies for obligation. 31 U.S.C. § 1512. This means that OMB divides the funds up into quarterly installments, to prevent agencies from obligating the entire fiscal year's appropriations too quickly and needing supplemental appropriations.
 - b. Formal Administrative Subdivisions. The ADA also requires agencies to establish certain administrative controls of apportioned funds. 31 U.S.C. § 1514. These formal limits are referred to as allocations and allotments. In the Army, the Operating Agency/Major Command (MACOM) generally is the lowest command level at which the formal administrative subdivisions of funds are maintained for O&M appropriations.
 - c. Informal Administrative Subdivisions. DFAS-IN 37-1, ch. 3, para. 031402. Agencies may further subdivide funds at lower levels, e.g., within an installation. These subdivisions are generally informal targets or allowances. These are not formal subdivisions of funds, and obligating in excess of these limits does not, in itself, violate the ADA.
 3. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).
 4. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342.
- B. Investigating Violations. If an Antideficiency Act 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.

1. The commander must submit a flash report within fifteen working days of discovery of the violation.
 2. The MACOM commander must appoint a “team of experts,” including members from the financial management and legal communities, to conduct a preliminary investigation.
 3. 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.
 4. The head of the agency must report to the President and Congress whenever a violation of 31 U.S.C. §§ 11(a), 1342, or 1517 is discovered. OMB Cir. A-34, para. 32.2; DOD 7000.14-R, Vol. 14, ch. 7, para. A. The head of the agency must also now report the violation to GAO, per 31 USC § 1351 (as amended by Consolidated Appropriations Act, 2005).
 5. Individuals responsible for an Antideficiency Act violation shall be sanctioned commensurate with the circumstances and the severity of the violation. See DOD 7000.14-R, Vol. 14, ch. 9; see also 31 U.S.C. §§ 1349(a).
- C. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.).
1. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Army’s Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat’l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).
 2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). But see T. Head & Co. v. Dep’t of Educ., GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.

3. Examples of Voluntary Services Authorized by Law
 - a. 5 U.S.C. § 593 (agencies may accept voluntary services in support of alternative dispute resolution).
 - b. 5 U.S.C. § 3111 (student intern programs).
 - c. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).
 - d. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).
 - e. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).
 - f. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).
4. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs.—Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.
5. Gratuitous Services Distinguished.

- a. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

- b. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev.—Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

- c. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program—State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). But see Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

D. Voluntary Creditor Rule.

1. Definition. A voluntary creditor is one who uses personal funds to pay a perceived valid obligation of the government.

2. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

3. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, July 21, 1999 (unpub.) (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, Aug. 14, 1989 (unpub.); Claim of Bradley G. Baxter, B-232686, Dec. 7, 1988 (unpub.); Irving M. Miller, B-210986, May 21, 1984 (unpub.); Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine); see also DFAS-IN 37-1, ch. 9, para. 092037; cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, July 22, 1991 (unpub.). Claims are recoverable if:

- a. The claimant shows a public necessity;
- b. The underlying expenditure is authorized;
- c. The claim is for goods or services; and
- d. The expenditure is not for a personal use item.

E. Augmentation of Appropriations & Miscellaneous Receipts.

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. An augmentation normally violates one or more of the following provisions:
 - (1) U.S. Constitution, Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but 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 practicable without any deduction for any charge or claim.”

2. Types of Augmentation.

- a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

Example: If the Air Force were to buy air-to-air missiles using its “Procurement, Ammunition, Air Force” appropriation instead of its more specific “Procurement, Missiles, Air Force” appropriation, this would enable it to purchase a greater quantity of missiles (some using the missile appropriation and some using the ammunition appropriation) than Congress desired.

- b. Augmenting an appropriation by retaining government funds received from another source.

- (1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See *Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def.*, 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at [10 U.S.C. § 2646](#) – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); *Interest Earned on Unauthorized Loans of Fed. Grant Funds*, B-246502, 71 Comp. Gen. 387 (1992); But see *Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties*, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).
 - (2) Expending the retained funds generally violates the constitutional requirement for an appropriation. See *Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees*, B-222989, 67 Comp. Gen. 443 (1988).
3. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:
 - a. Economy Act. [31 U.S.C. § 1535](#) authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. [31 U.S.C. § 1536](#) specifically indicates that the servicing agency should credit monies received from the ordering agency to the “appropriation or fund against which charges were made to fill the order.” See also [41 U.S.C. § 23](#) (providing similar intra-DOD project order authority).
 - b. Foreign Assistance Act. [22 U.S.C. § 2392](#) authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.

- c. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See [10 U.S.C. § 2208](#); [National Technical Info. Serv.](#), B-243710, 71 Comp. Gen. 224 (1992); [Administrator, Veterans Admin.](#), B-116651, 40 Comp. Gen. 356 (1960).
- d. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. [16 U.S.C. § 579c](#); [USDA Forest Serv. – Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees](#), B-226132, 67 Comp. Gen. 276 (1988); [National Park Serv. – Disposition of Performance Bond Forfeited to Gov’t by Defaulting Contractor](#), B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).
- e. Defense Gifts. [10 U.S.C. § 2608](#). The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.
- f. Health Care Recoveries. [10 U.S.C. § 1095\(g\)](#). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.
- g. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned.” [42 U.S.C. § 2651](#). The U.S. Army Claims Service takes the position that such recoveries should be credited to the installation’s operation and maintenance account. See [Affirmative Claims Note, Lost Wages under the Federal Medical Care Recovery Act, ARMY LAW., Dec, 1996, at 38](#).

- h. Military Leases of Real or Personal Property. [10 U.S.C. § 2667\(d\)\(1\)](#). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.
 - i. Damage to Real Property. [10 U.S.C. § 2782](#). Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.
 - j. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. [10 U.S.C. § 2575](#). Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.
 - k. Host nation contributions to relocate armed forces within a host country. [10 U.S.C. § 2350k](#).
 - l. Government Credit Card Refunds. This is temporary authority provided in section 8065 of the FY 2007 Defense Appropriations Act (Pub. Law 109-289), which states that refunds attributable to the use of the Government travel card and Government Purchase Card may be credited to the O&M and RDT&E accounts of the Department of Defense “which are current when the refunds are received.”
 - m. Conference Fees. [10 U.S.C. § 2262](#). Congress recently (in section 1051 of the FY 2007 Defense Authorization Act) authorized the Department of Defense to collect fees from conference participants and to use those collected fees to pay the costs of the conference. Any amounts collected in excess of the actual costs of the conference must still be deposited into the Treasury as miscellaneous receipts. NOTE: this new statutory authority contains reporting requirements, and has not yet been implemented within DoD as of the time of this writing.
4. GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:

- a. Replacement Contracts. An agency may retain recovered excess procurement costs to fund replacement contracts. Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).
- (1) This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.
 - (2) The replacement contract must be coextensive with the original contract, i.e., the agency may reprocore only those goods and services that would have been provided under the original contract.
 - (3) Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.
- b. Refunds.
- (1) Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice – Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee's property for which agency has paid employee's claim); International Natural Rubber Org. – Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1982).
 - (2) Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency – Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).

- (3) Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency – Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).
- (4) Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr. Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); To The Sec'y of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-174, GAO-06-382SP (3d ed. 2006); Appropriation Accounting—Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).
- c. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).
- d. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

- e. Nonreimbursable Details. The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985). However, as exceptions to this rule, nonreimbursable details are permitted under the following circumstances:
 - (1) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1988 U.S. Comp. Gen. LEXIS 1695 (Jan. 30, 1987).
 - (2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency’s mission. Details to Congressional Comm’ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334 (Apr. 11, 1988).
 - (3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Department of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

VI. TYPICAL QUESTIONABLE EXPENSES AND COMMON PROBLEMS

- A. Agencies may have specific guidance about “questionable” expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1., ch. 4, §§ K-O (24 December 2002).
- B. Clothing/Apparel. Buying clothing for individual employees generally does not materially contribute to an agency’s mission performance. Clothing is, therefore, generally considered a personal expense unless a statute provides to the contrary. See IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).

1. Statutorily-Created Exceptions. See 5 U.S.C. § 7903 (authorizing purchase of special clothing, for government benefit, which protects against hazards); 5 U.S.C. § 5901 (authorizing purchase of uniforms for employees of civilian agencies); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). See also Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, 2002 U.S. Comp. Gen. LEXIS 261 (Oct. 3, 2002); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng'rs, B-289683, 2002 U.S. Comp. Gen. LEXIS 259 (Oct. 7, 2002) (both providing an excellent overview of each of these authorities).
 2. Opinions and Regulations On-point. White House Communications Agency--Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.--Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).
- C. Food. Buying food for individual employees--at least those who are not away from their official duty station on travel status--is generally not considered a "necessary expense," as it does not materially contribute to an agency's mission performance. As a result, food is generally considered a personal expense. See Department of the Army--Claim of the Hyatt Regency Hotel, B-230382, 1989 U.S. Comp. Gen. LEXIS 1494 (Dec. 22, 1989) (determining coffee and doughnuts to be an unauthorized entertainment expense).
1. Food as Part of Facility Rental Cost. GAO has indicated that it is permissible for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably priced to the fees of other facilities that do not include food as part of their rental fee. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, 1999 U.S. Comp. Gen. LEXIS 249 (Dec. 1, 1999).

2. “Light Refreshments” at Government-Sponsored Conferences. Absent a statutory exception (see below), agencies cannot pay for light refreshments at government-sponsored conferences for employees who are not in a travel status Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 U.S. Comp. Gen. LEXIS 224 (Jan. 27, 2003). Previously, by means of the Federal Travel Regulation, GSA had advised agencies that they could use appropriated funds to pay for refreshments for both travelers and nontravelers at conferences if the majority of the attendees were in a travel status. See 41 C.F.R. § 301-74.11.
3. Statutory-based Exceptions.
 - a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DOD may pay service members a basic allowance for subsistence.

- b. Formal Meetings and Conferences. Under the Government Employees Training Act, [5 U.S.C. § 4110](#), an agency may pay for “expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.” Meals for attendees can be considered legitimate expenses of attendance under this statute if: 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. See National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).
- (1) For purposes of this exception, a “formal” conference or meeting must have sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and **must involve topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants**. National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005); Corps of Engineers – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (May 12, 1993). **Thus, this exception does not apply to purely internal government business meetings/conferences.**
- (2) Because this exception is based on 5 U.S.C. 4110, it does **not apply to military members (it applies only to civilian employees)**. But see JFTR, ch. 4, para. U4510, which 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 the limits of the PDS.

- c. Training. Under [5 U.S.C. § 4109](#) (applicable to civilian employees) and [10 U.S.C. § 4301](#) and [10 U.S.C. § 9301](#) (applicable to service members), the government may provide meals when it is “necessary to achieve the objectives of a training program.” See Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992).
- (1) This generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. See, Coast Guard – Coffee Break Refreshments at Training Exercise – Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (Jun. 16, 1993). See also Pension Benefit Guar. Corp. – Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996) (food was not needed for employee to obtain the full benefit of training because it was provided during an ice-breaker rather than during actual training). In many GAO opinions, the application of this rule appears to be indistinguishable from the 3-part test for Formal Conferences and Meetings under 5 U.S.C. § 4110.
- (2) The Training exception requires that the event be genuine “training,” rather than merely a meeting or conference. The GAO and other auditors will not merely defer to an agency’s characterization of a meeting as “training.” Instead, they will closely scrutinize the event to ensure it was a valid program of instruction as opposed to an internal business meeting. See Corps of Eng’rs – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (1993) (determining that quarterly managers meetings of the Corps did not constitute “training”).
- (3) This exception is often utilized to provide small “samples” of ethnic foods during an ethnic or cultural awareness program. See Army – Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). See also U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program, B-301184 (January 15, 2004) (“samplings” of food cannot amount to a full buffet lunch).

- d. Award Ceremonies. Under 5 U.S.C. §§ 4503-4504 (civilian employees incentive awards act), federal agencies may “incur necessary expenses” including purchasing food to honor an individual that is given an incentive award.
- (1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending \$20.00 per attendee for a luncheon given to honor awardees under 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 under 5 U.S.C. § 4503, which expressly permits agency to “incur necessary expense for the honorary recognition. . .”).
- (2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1 June 2000). See also AFI 65-601, vol. 1, para. 4.31.
- (3) **NOTE:** Food may also be provided at ceremonies honoring military recipients of military cash awards under 10 U.S.C. § 1124 (Military Cash Awards), which also contains the “incur necessary expenses” language. However, military cash awards are very rare. Typical military awards, such as medals, trophies, badges, etc., are governed by a separate statute (10 U.S.C. § 1125) which does not have the express “incur necessary expenses” language. Therefore, food may not be purchased with appropriated funds for a typical military awards ceremony.

4. Food as an Expense of Hosting Government-Sponsored Conferences. GAO-sanctioned exception which permits an agency hosting a formal conference to provide food to attendees at the conference. See National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).
 - a. Meals and refreshments for attendees can be considered legitimate expenses of hosting the formal conference if their attendance is administratively determined necessary to achieve the conference objectives, and:
 - (1) the meals and refreshments are incidental to the formal conference;
 - (2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendees' full participation in essential discussions, lectures, or speeches concerning the purpose of the formal conference; and
 - (3) the meals and refreshments are part of a formal conference that includes not just the discussions, speeches, lectures, or other business that take place when the meals/refreshments are served, but also includes substantial functions occurring separately from when the food is served.
 - b. As with the "Formal Meetings and Conferences" Exception, the conference must have sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and must involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants.
 - c. Unlike the "Formal Meetings and Conferences" exception, which permits an agency to pay the cost of meals for their civilian employees who attend formal conferences as an expense of their attendance, this exception permits an agency hosting a formal conference to pay the cost of meals/refreshments for all attendees administratively determined to be necessary to achieve the conference objectives – including non-agency attendees and even private citizen attendees – as an expense of hosting the conference.

5. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. See discussion *infra* Part X of this chapter for an overview.

D. Bottled Water.

1. General Rule. Bottled water generally does not materially contribute to an agency's mission accomplishment, and is ordinarily considered a personal expense. Decision of the Comptroller General, B-147622, U.S. Comp. Gen. LEXIS 2140 (Dec. 7, 1961).
2. Exception Where Water is Unhealthy or Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unhealthy or unpotable. See United States Agency for Int'l Dev.--Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).
3. Relevant Regulations. See also DOD FMR, vol. 10, ch. 12, para. 120203 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.45 (discussing the same); AR 30-22, para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, even in the context of a deployment / contingency).
4. Water Coolers. As distinguished from the water itself, which must be purchased with personal funds unless the building has no potable water, agencies may use appropriated funds to purchase water coolers as "Food Storage Equipment" (see discussion in next paragraph below), but arguably only under severely limited circumstances. There is arguably no valid purpose for water coolers in buildings that are already equipped with chilled water fountains or with refrigerators that dispense chilled water or ice. Where the facility is not so equipped, water coolers may be purchased with appropriated funds so long as the primary benefit of its use accrues to the organization. Under those circumstances, the water in the cooler must be available for use by all employees, including those who did not chip in for the water.

E. Workplace Food Storage and Preparation Equipment (i.e., microwave ovens, refrigerators, coffee pots).

1. Recent Development. The purchase of kitchen equipment may be authorized when the agency determines that the primary benefit of its use accrues to the agency by serving a valid operational purpose, such as providing for an efficient working environment or meeting health needs of employees, notwithstanding a collateral benefit to the employees. Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993, U.S. Comp. Gen. LEXIS 292 (June 25, 2004). (Note: agencies should establish policies for uniform procurement and use of such equipment).
 2. The 2004 GAO decision here represented a significant departure from earlier cases, which held that food storage and preparation equipment did not materially contribute to an agency's mission performance, and which permitted such purchases under more restrictive circumstances where the agency could identify a specific need. See, e.g., Central Intelligence Agency-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (determining that commercial facilities were not proximately available when the nearest one was a 15-minute commute away from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining commercial facilities were unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).
 3. Where food preparation and storage equipment is purchased consistent with this GAO decision and agency regulations and policies, the equipment must be placed in common areas where it is available for use by all personnel.
- F. Personal Office Furniture and Equipment. Ordinary office equipment (*i.e.*, chairs, desks, similar normal office equipment) is reasonably necessary to carry out an agency's mission, and as such, appropriated funds may be used to purchase such items. See Purchase of Heavy Duty Office Chair, B-215640, 1985 U.S. Comp. Gen. LEXIS 1805 (Jan. 14, 1985) (authorizing purchase of a heavy-duty chair for an employee who needed extra physical support--he weighed over 300 pounds and had broken 15 regular chairs--because an office chair is not "personal equipment" but is an item the government is normally expected to provide to its employees, and the chair was available from the Federal Supply Schedule).

1. Special Equipment/Health-Related Items. The cost of special equipment, including health-related items, to enable an employee to qualify himself to perform his official duties constitutes a personal expense of the employee and, as such, is generally not payable from appropriated funds absent specific statutory authority. While the equipment may be necessary for that particular individual to perform his/her duties, it is not essential to the transaction of official business from the government's standpoint. Internal Revenue Serv.--Purchase of Air Purifier with Imprest Funds, B-203553, 61 Comp. Gen. 634 (1982) (disapproving reimbursement for air purifier to be used in the office of an employee suffering from allergies); Roy C. Brooks--Cost of special equipment-automobile and sacro-ease positioner, B-187246, 1977 U.S. Comp. Gen. LEXIS 221 (Jun. 15, 1977) (disapproving reimbursement of special car and chair for employee with a non-job related back injury).

 2. The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. Pursuant to the Rehabilitation Act, federal agencies are required to make "reasonable accommodations" for the known physical or mental limitations of qualified employees with disabilities. See 29 C.F.R. §§ 1614.203(b), 1630.9(a). Thus, agencies may use appropriated funds to purchase equipment for its **qualified handicap employees** if doing so is a reasonable accommodation. See Bonneville Power Admin.--Wheelchair Van Transp. Expenses for Disabled Employee, B-243300, 1991 U.S. Comp. Gen. LEXIS 1067 (Sept. 17, 1991); Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee, B-240271, 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990).;
- G. Entertainment. Entertaining federal employees or other individuals generally does not materially contribute to an agency's mission performance. As a result, entertainment expenses are generally considered to be a personal expense. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (considering fireworks to be unauthorized entertainment).
1. Statutory-based Exceptions. Congress occasionally provides permanent or one-time authority to entertain. See Claim of Karl Pusch, B-182357, 1975 U.S. Comp. Gen. LEXIS 1463 (Dec. 9, 1975) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club--twice); Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct "interpretive demonstrations" at the 1988 Annual Golden Spike Railroader's Festival).

2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv.--Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training).
 3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. See discussion *infra* Part X of this chapter for an overview. See also To The Honorable Michael Rhode, Jr., B-250884, 1993 U.S. Comp. Gen. LEXIS 481 (Mar. 18, 1993) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).
- H. Decorations. Under the “necessary expense” analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining that Christmas cards, as well as holiday greetings letters, were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.26.2. Note: Practitioners should also consider the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.).

I. Business Cards.

1. Relevant GAO Decisions. Under a “necessary expense” analysis, the GAO has found permissible the use of appropriated funds to purchase business cards for agency employees. See Jerome J. Markiewicz, B-280759, Nov. 5, 1998, 98-2 CPD ¶ 114 (purchase of business cards with appropriated funds for government employees who regularly deal with public or outside organizations is a proper “necessary expense”). This decision reversed a long history of GAO decisions holding that business cards were a personal expense because they did not materially contribute to an agency’s mission accomplishment. See, e.g., Forest Serv.--Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).
2. Army Policy. Army Regulation 25-30, para. 7-11 (15 May 2002). Army policy authorizes the printing of business cards at government expense.
 - a. Business cards must be necessary to perform official duties and to facilitate business communications. When appropriated funds are used, individual offices are responsible for funding the cost of procuring business cards. Cards will be procured using the most economical authorized method.
 - b. Commercially printed business cards are authorized but are restricted generally to designated investigators and recruiters. A Brigadier General (BG) or SES equivalent must approve commercial procurement and printing of business cards. Cards commercially procured with appropriated funds will be procured through the Document Automated Printing Service. Such cards must be limited to a single ink color, unless a BG or SES equivalent has granted an exception and only when the use of more than one color provides demonstrable value and serves a functional purpose. 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.
 - c. 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.

3. Air Force Policy. AFI 65-601, vol. 1, para. 4.36. Appropriated funds may be used for the printing of business cards, using personal computers, existing software and agency-purchased card stock, for use in connection with official communications. Additionally, the purchase of business cards from the Lighthouse for the Blind, Inc., a Javits-Wagner-O'Day participating non-profit agency, is authorized when the organization determines that costs are equivalent or less to purchase cards rather than to produce them on a personal computer. The instruction allows certain agencies to purchase cards commercially for recruiting duties.

J. Telephone Installation and Expenses.

1. Statutory Prohibition. Even though telephones might ordinarily be considered a "necessary expense," appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. See 31 U.S.C. § 1348; see also Centers for Disease Control and Prevention--Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director's residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).
2. Exceptions for DOD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. See 31 U.S.C. § 1348(a)(2), (c). See also Timothy R. Manns--Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed). DOD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. See 10 U.S.C. § 1588(f).

3. Exception for Data Transmission Lines. If the phone will be used to transmit data, the above prohibition does not apply. See Federal Commc'ns Comm'n--Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).
4. Mobile or Cellular Phones. The above statutory prohibition only applies to telephones installed in a personal residence and therefore does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. See Nuclear Regulatory Comm'n: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, 2003 U.S. Comp. Gen. LEXIS 240 (Mar. 6, 2003) B-291076, Mar. 6, 2003; Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate B-287524, 2001 U.S. Comp. Gen. LEXIS 202 (Oct. 22, 2001) (indicating that the agency may not pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data).
5. Exception for Teleworking. In 1995, Congress authorized federal agencies to install telephones and other necessary equipment in personal residences for purposes of teleworking. See Pub. L. No. 104-52, § 620. Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: <http://www.telework.gov>. The Air Force also has some additional guidance found in AFI 65-601, vol I, para 4.24.6.

- K. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds. Alan Pacanowski - Reimbursement of Fines for Traffic Violations, B-231981, 1989 U.S. Comp. Gen. LEXIS 635 (May 19, 1989). Where the fine itself is not reimbursable, related legal fees are similarly nonreimbursable. 57 Comp. Gen. 270 (1978).
1. "Necessary Expense" Exception. If, in carrying out its mission, an agency requires one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a necessary expense and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, 1992 U.S. Comp. Gen. LEXIS 1279 (Nov. 3, 1992) (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).
 2. Agency Fines. Agencies may also pay fines imposed upon the agency itself if Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).
- L. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, expenses necessary to qualify a government employee to do his or her job are generally personal expenses and not chargeable to appropriated funds See A. N. Ross, Federal Trade Commission, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable). See also AFI 65-601, vol. 1, para. 4.47.
1. Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency--Request for Advance Decision, B-257895, 1994 U.S. Comp. Gen. LEXIS 844 (Oct. 28, 1994) (drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force--Appropriations--Reimbursement for Costs of Licenses or Certificates, B-252467, 73 Comp. Gen. 171 (1994) (license necessary to comply with state-established environmental standards).

2. Recent Statutory Development. In 2001, Congress enacted legislation permitting agencies to use appropriations for “expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials.” Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at 5 U.S.C. § 5757. The statutory language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them
 3. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. This memorandum is available at: <http://www.asmc certification.com/ documents/Army-Reimbursement-Policy-20030620.pdf>. See also: <http://www.hq.usace.army.mil/cehr/d/ traindevelop/USACE-credentials-policy-aug03.pdf> (Corps of Engineers implementing guidance); Scope of Professional Credentials Statute, B-302548, Aug. 20, 2004 (GAO analysis of the scope of 5 U.S.C. § 5757).
- M. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase “mementos” or personal gifts. See EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992) (requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:
1. Awards For Service Members. Congress has provided specific statutory authority for SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions.” 10 U.S.C. § 1125.
 - a. The Army has implemented this statute in AR 600-8-22, Military Awards (11 Dec. 2006). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e., the Army Achievement Medal, the Meritorious Service Medal, the Purple Heart, etc).

- b. Chapter 11 of the regulation allows the presentation of other nontraditional awards for “excellence in accomplishments or competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, for example, tank gunnery, weapons competition, and military aerial competition.”
- c. These awards “may be made on a one-time basis where the achievement is unique and clearly contributes to increased effectiveness.” See AR 600-8-22, para. 11-2b.
- d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other “similar devices.” The MACOM commander or head of the principal HQDA agency, or delegate, must approve the trophies and similar devices to be awarded within their command or agency. See AR 600-8-22, para. 1-7d; see also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual "Peacekeeper Challenge").
- e. Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders’ coins, see Major Kathryn R. Sommercamp, *Commanders’ Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6.
- f. The Air Force and Navy/Marine Corps have similar awards guidance. See generally AFPD 36-28, Awards and Decorations Programs, (1 Aug. 1997); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). See also AFI 65-601, vol. 1, para. 4.29; OpJAGAF 1999/23, 1 Apr. 1999.

2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. See Chapter 45 of Title 5 of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503.
 - a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1 June 2000).
 - b. Non-Cash Awards. The statute technically states that the “head of an agency **may pay a cash award** to, and incur necessary expense for the honorary recognition of” one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. Curiously, the GAO has sanctioned the giving of non-cash awards to civilian employees. See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, 1980 U.S. Comp. Gen. LEXIS (Aug. 27, 1980) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments. In such circumstances, the award is not the food just an incidental expense incurred to honor the awardee.

- N. Use of Office Equipment. Lorraine Lewis, Esq., B-277678, 1999 U.S. Comp. Gen. LEXIS 104 (Jan. 4, 1999) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management Memorandum, Subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum may be found at: http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPMReserves.htm. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS'N L. REV., May 2001 (found at: http://www.roa.org/home/law_review_25.asp) (providing a good overview of this authority).
- O. Passenger Carrier Use. 31 U.S.C. § 1344; 41 C.F.R. 101-6.5 and 101-38.3.
1. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not violations of the ADA, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).
 2. Exceptions.
 - a. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.
 - (1) The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).

- (2) The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).
 - b. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.
 - c. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, Dec. 8, 1983 (unpub.).
3. Penalties.
- a. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).
 - b. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a \$10,000 fine).

VII. MILITARY CONSTRUCTION.

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

- B. Specified Military Construction (MILCON) Program -- projects costing over \$1.5 million.
1. Congress authorizes these projects by location and funds them in a lump sum by service. The Army's principle appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.
 2. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by specific individual projects.
- C. Unspecified Minor Military Construction (MMC) Program -- military construction projects costing between \$750,000 and \$1.5 million. 10 U.S.C. § 2805(a).
1. 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.
 2. The Service Secretary concerned uses these funds for minor projects not specifically approved by Congress.
 3. Statute and regulations require approval by the Secretary of the Department and notice to Congress before a minor military construction project exceeding \$750,000 is commenced.
 4. If a military construction project is intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening, an unspecified minor military construction project may have an approved cost equal to or less than \$1.5 million.
- D. O&M Construction: Minor Military Construction projects costing less than \$750,000. 10 U.S.C. § 2805(c); DOD Dir. 4270.36; AR 415-15, para. 1-6.c.(1).
1. The Secretary of a military department may use O&M funds to finance Unspecified Minor Military Construction projects costing less than:

- a. \$1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety. 10 U.S.C. § 2801(b).
 - b. \$750,000 if the project is intended for any other purpose.
 2. Construction includes alteration, conversion, addition, expansion, and replacement of existing facilities, plus site preparation and installed equipment.
 3. Project splitting is prohibited. The Honorable Michael B. Donley, B-234326.15, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (Air Force improperly split into multiple projects, a project involving a group of twelve related buildings).
 4. Using O&M funds for construction in excess of the \$750,000 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).
- E. Maintenance and repair projects.
1. DOD funds these projects with O&M appropriations.
 2. “Maintenance” is work required to preserve and maintain a real property facility in such condition that it may be used effectively for its designated functional purpose. Maintenance includes work done to prevent damage which would be more costly to restore than to prevent. Maintenance includes work to sustain components. Examples include renewal of disposable filters, painting, caulking, refastening loose siding, and sealing bituminous pavements. “Preventive maintenance” (PM) is routine, recurring work performed on all real property facilities. PM is systematic inspection, care, and servicing of equipment, utility plants and systems, buildings, structures, and grounds facilities for detecting and correcting incipient failures and accomplishing minor maintenance. See AR 420-10, Glossary.
 3. DOD guidance. Memorandum, Office of the Secretary of Defense, Comptroller, 2 July 97, subject: Definition for Repair and Maintenance.

- a. 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.
 - b. 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.
 - c. 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.
4. Army guidance. See AR 420-10, Management of Installation Directorates of Public Works; see also DA Pamphlet 420-11, Project Definition and Work Classification.
- a. A facility must be in a failed or failing condition to be considered for a repair project.
 - b. 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.
 - c. 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.

5. 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.
 6. Improperly classifying work as maintenance or repair, rather than construction, may lead to exceeding the \$750,000 project limit.
- F. 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).
1. Congress has prohibited the use of O&M for minor construction outside the U.S. on Joint Chiefs of Staff (JCS) directed exercises.
 2. 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.
 3. 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.
- G. Combat and Contingency Related O&M Funded Construction. Within the last few years, significant changes have taken place in the funding of combat and contingency related construction. In order to understand the current state of the law it is necessary to examine these changes as they have taken place.
1. Prior to April 2003, per Army policy, use of O&M funds in excess of the \$750,000 threshold discussed above was proper when erecting structures/facilities in direct support of combat or contingency operations declared pursuant to 10 U.S.C. § 101(a)(13)(A). See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applied only if the construction

was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale was that O&M funds were the primary funding source supporting contingency or combat operations; therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper.

2. On 27 February 2003, DoD issued similar guidance. See Memorandum, Under Secretary of Defense, (Comptroller), Subject: Availability of Operation and Maintenance Appropriations for Construction, (27 Feb. 2003). The DoD memorandum, in effect, adopted the Army's policy as articulated in the 22 February 2000 memorandum at the DoD level.
3. On 16 April 2003 the President signed the Emergency Wartime Supplemental Appropriation for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). The act's accompanying conference report stated, in rather harsh language, the conferees' legal objections to the Under Secretary of Defense (Comptroller)'s 27 February 2003 policy memorandum. The conference report had the practical effect of invalidating the policy guidance articulated in both the 22 February 2000 Deputy General Counsel (Ethics & Fiscal), Department of the Army Memorandum, as well as the 27 February 2003 Under Secretary of Defense (Comptroller) Memorandum.
4. On 6 November 2003 the President signed the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003). Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determines:
 - a. the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism;
 - b. the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence;
 - c. the United States has no intention of using the construction after the operational requirements have been satisfied; and,

- d. the level of construction is the minimum necessary to meet the temporary operational requirements. Pursuant to the act, this temporary funding authority was limited to \$150 million.
- 5. On 24 November 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the authorization act increased the amount of O&M funds DoD could spend on contingency and combat related construction in FY 04 to \$200 million, and adopted, unchanged, the determination requirements of the 04 Emergency Supplemental Appropriation .
- 6. On 1 April 2004, the Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act. See Memorandum, Deputy Secretary of State, Subject: Use of Operation and Maintenance Appropriations for Construction during Fiscal Year 2004 (1 April 2004). Pursuant to this guidance, Military Departments or Defense Agencies are to submit candidate construction projects exceeding \$750,000 to the Under Secretary of Defense (Comptroller). The request will include a description and the estimated cost of the project, and include a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project. The memorandum provides a draft format to be used for project requests, and is available on the “News & Events” page of the Defense Procurement and Acquisition Policy website, at:
<http://www.acq.osd.mil/dpap/general/newsandevents.htm>.
- 7. Section 2810 of the Ronald W. Reagan National Defense Authorization Act for 2005 extended DOD’s funding authority to use O&M funds for such projects into FY 2005, limited to \$200 million for the fiscal year. See Pub. L. 108-767, 118 Stat. 1811. Section 2809 of the 2006 National Defense Authorization Act for FY 2006 (Pub.L. 109-163) reduced the authority for such projects back to \$100 million. Section 2802 of the John Warner National Defense Authorization Act for Fiscal Yaer 2007 (Pub. L. 109-364) extended the authority through 2007. So for the current fiscal year at least, the temporary statutory authority continues.

8. Bottom Line. As a result of recent congressional developments, DoD can no longer fund combat and contingency related construction projects costing in excess of \$750,000 without first identifying clear, affirmative legislative authority. Section 2802 of the FY 07 Defense Authorization Act presently provides such authority. However, this authority is temporary, and is limited in scope and funding. fine).

VIII. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS (INCLUDING OFFICIAL REPRESENTATION FUNDS)

- A. Definition. Emergency and extraordinary expense funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.
- B. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438.

C. Appropriations Language.

1. For DOD, Congress provides emergency and extraordinary funds as a separate item in the applicable operation and maintenance appropriation.

Example: In FY 2007, Congress provided the following Operation and Maintenance appropriation to the Army: "For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and **not to exceed \$11,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes**, \$22,397,581,000" (emphasis added)

2. Not all agencies receive emergency and extraordinary funds. If Congress does not specifically grant an agency emergency and extraordinary funds, that agency may not use other appropriations for such purposes. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989).

D. Statutory Background.

1. [10 U.S.C. § 127](#). Emergency and extraordinary expenses.
 - a. Authorizes the Secretary of Defense and the Secretary of a military department to spend emergency and extraordinary expenses funds for "any purpose he determines to be proper, and such a determination is final and conclusive."
 - b. Requires a quarterly report of such expenditures to the Congress.
 - c. Congressional notice requirement. In response to a \$5 million payment to North Korea in the mid-90s using DOD emergency and extraordinary expense funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on our use of these funds:
 - (1) If the amount to be expended exceeds \$1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.
 - (2) If the amount exceeds \$500,000 (but is less than \$1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.
2. Other executive agencies may have similar authority. See, e.g., [22 U.S.C. § 2671](#) (authorizing the State Department to pay for "unforeseen emergencies").

E. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DOD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:

1. Official Representation (Protocol). This subset of emergency and extraordinary expense funds are available to extend official courtesies to authorized guests, including dignitaries and officials of foreign governments, senior U.S. Government officials, senior officials of state and local governments, and certain other distinguished and prominent citizens.

- a. DOD Regulations: [DOD Directive 7250.13, Official Representation Funds \(17 Feb. 2004, w/ change January 12, 2005\); DOD FMR, vol. 10, ch. 12, para. 120222.B.](#)
 - b. Army Regulation: [AR 37-47, Representation Funds of the Secretary of the Army \(12 March 2004\).](#)
 - c. Air Force Regulation: [AFI 65-603, Official Representation Funds: Guidance and Procedures \(17 Feb. 2004\).](#)
 - d. Navy Regulation: [SECNAV 7042.7, Guidelines for Use of Official Representation Funds \(5 Nov. 1998\).](#)
2. Criminal Investigation Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during criminal investigations or crime prevention.
- a. Army Regulation: [AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities \(15 Apr. 1983\).](#)
 - b. [Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations, para. 1.18 \(1 Dec. 1999\)](#) (governing counterintelligence and investigative contingency funds, also known as C-funds).
3. Intelligence Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during intelligence investigations.
- a. Army Regulation: AR 381-141(C), [Intelligence Contingency Funds](#) (30 July 1990).
 - b. [Air Force Regulation: AFI 71-101, Criminal Investigations, para. 1.18 \(1 Dec. 1999\)](#) (governing counterintelligence and investigative contingency funds, also known as C-funds).

4. Other Miscellaneous Expenses (other than official representation). This subset of emergency and extraordinary expense funds are available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. [AR 37-47, para. 1-5b](#). Other examples include:
 - a. Acquisition of weapons from Panamanian civilians. (currently considered to be a proper expenditure of operation and maintenance funds);
 - b. Reward for search teams at the Gander air crash; and
 - c. Mitigation of erroneous tax withholding of soldiers' pay.

F. Use of Official Representation Funds.

1. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. [DOD Directive 7250.13, para. 3.1](#); [AR 37-47, para. 2-1](#); [AFI 65-603, para. 1](#); [SECNAVINST 7042.7J, para. 6](#). Official courtesies are subject to required ratios of authorized guests to DOD personnel. See, e.g., [DOD Directive 7250.13, para. E2.4.3](#); [AR 37-47, paras. 2-1b and 2-5](#). Official courtesies are defined as:
 - a. Hosting of authorized guests to maintain the standing and prestige of the United States;
 - b. Luncheons, dinners, and receptions at DOD events held in honor of authorized guests;
 - c. Luncheons, dinners, and receptions for local authorized guests to maintain civic or community relations;
 - d. Receptions for local authorized guests to meet with newly assigned commanders or appropriate senior officials;

- e. Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and visits by foreign vessels to U.S. ports;
- f. Official functions in observance of foreign national holidays and similar occasions in foreign countries; and
- g. Dedication of facilities.

2. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.

- a. Gifts to non-DOD authorized guests may cost no more than \$305.00. See [DOD Directive 7250.13, para. E.2.4.1.8](#) (which cross references [22 U.S.C. § 2694](#) which in turn cross references [5 U.S.C. § 7342](#); the amount established in the latter statute is revised by GSA once every three years to take inflation into account and was most recently raised to \$305) See also [AR 37-47, para. 2-4c](#); [AFI 65-603, para. 4](#); [SECNAVINST 7042.7J, para. 6c\(1\)](#).
- b. If the guest is from within DOD and is one of the specified individuals listed in [Enclosure 1 to DOD Directive 7250.13](#), then the command may present him or her with only a memento valued at no more than \$40.00. Enclosure 2 to DOD Directive 7250.13, para. E2.4.2.10.
- c. **NOTE:** While the DoD Directive cited above permits the command to give specified DOD distinguished guests mementos costing less than \$40.00, Army Regulation, in quite clear language, precludes giving any gift or memento to DOD personnel: “ORFs will not be used to purchase gifts or mementos of any kind for presentation to, or acceptance by, DOD personnel. Under no circumstances may gifts or mementos for DOD personnel be purchased with ORFs.” AR 37-47, para. 2-9d.

3. Levels of expenditures. Levels of expenditures are to be “modest.” [DOD Directive 7250.13, para. E2.2.1.2.4.2](#); [AR 37-47, para. 2-4a](#); [AFI 65-603, para. 2.1](#). Army Regulation prohibits spending in excess of \$20,000 per event (an entire visit by an authorized guest constitutes one event for purposes of this threshold). [AR 37-47, para. 2-4b](#).
4. Prohibitions on Using Representational Funds. [DOD Directive 7250.13, para. E2.4.2](#); [AR 37-47, para. 2-10](#); [AFI 65-603, para. 7.2](#); [SECNAVINST 7042.7J, para. 6d](#).
 - a. Any use not specifically authorized by regulation requires an exception to policy (or for Air Force, advance approval of the Secretary of the Air Force). [AR 37-47, para. 2-10](#); [AFI 65-603, para. 12](#).
 - b. Exceptions will not be granted for the following:
 - (1) Classified projects and intelligence projects;
 - (2) Entertainment of DOD personnel, except as specifically authorized by regulation;
 - (3) Membership fees and dues;
 - (4) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);
 - (5) Gifts and mementos an authorized guest wishes to present to another;
 - (6) Personal items (clothing, cigarettes, souvenirs);
 - (7) Guest telephone bills;

- (8) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and
- (9) Repair, maintenance, and renovation of DOD facilities.

See [AR 37-47, para. 2-10](#).

- c. Use for retirements and change of command ceremonies is generally prohibited, but can be permitted as an exception if approved in advance by the Service Secretary. [DOD Directive 7250.13, para. E2.4.2.5](#); [AR 37-47, para. 2-3c](#); [SECNAVINST 7042.7J, para. 6d\(10\)](#); United States Army School of the Americas – Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished from change of command ceremony).
- 5. Community Relations and Public Affairs Funds. [AR 360-1, para. 4-5](#). Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

IX. CONCLUSION.

CHAPTER 5
COMPETITION

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CHAPTER 5

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

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that apply to agencies other than the DOD, the individual military departments, the DOT, and NASA.

- 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. The FAR provisions that govern these types of procurements set forth the applicable competition requirements:
 - 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, GSBICA 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.:
 - (1) 18 U.S.C. §§ 4121-4128 and FAR Subpart 8.6 (acquisitions from Federal Prison Industries, Inc.);
 - (2) FAR Subpart 8.4 (Federal Supply Schedules);

- (3) 41 U.S.C. §§ 46-48c and 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; reversing G.S.A. Board of Contract Appeals decision granting the protest); VMC Behavioral Healthcare Services v. U.S., 50 Fed. Cl. 328 (2001) (a modification which increased the number of employees on a services contract did not exceed the scope of the original contract when the original solicitation put potential bidders on notice that the number of employees to be covered could have been increased); Northrop Grumman Corp. v. U.S., 50 Fed. Cl. 443 (2001); 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. But see Makro Janitorial Svcs, Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (holding that a task order for housekeeping services improperly exceeded the scope of a contract for preventive maintenance and inventory); 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). Recent cases include: CESC Plaza LP v. United States, 52 Fed. Cl. 91 (2002); Northrop Grumman Corp. v. United States, 50 Fed. Cl. 443 (2001); HG Properties A, LP, Comp. Gen. B-290416, B-290416.2, July 25, 2002, 2002 CPD 128; Atlantic Coast Contracting, Inc., Comp. Gen. B-288969.4, June 21, 2002, 2002 CPD 104; Symetrics Industries, Inc., Comp. Gen. B-289606, Apr. 8, 2002, 2002 CPD 65; Engineering and Professional Servs., Inc., Comp. Gen. B-289331, Jan. 28, 2002, 2002 CPD 24; Specialty Marine, Comp. Gen. B-293871, B-293871.2, June 17, 2004, 2004 CPD 130; Information Ventures, Comp. Gen. B-293743, May 20, 2004, 2004 CPD 97; Firearms Training, Comp. Gen. B-292819.2, et al., Apr. 26, 2004, 2004 CPD 107; Computers Universal, Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD 78; Anteon Corp, Comp. Gen. B-293523, Mar. 29, 2004, 2004 CPD 51; CourtSmart Digital, Comp. Gen. B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD 79.
- 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; Corel Corp. v. United States, Civil Action No. 99-3348, (D.D.C., Mem. Op. & Order filed Sept. 17, 2001), at <http://www.dcd.uscourts.gov/99-3348.pdf>. 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. Reprocurement Contracts. FAR 49.402-6.

- a. 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.
 - (1) 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 reprocurments after a default”).
 - (2) 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.
- b. 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.

- c. 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.
- 3. The Competition in Contracting Act (and therefore FAR Part 6) does not apply to all federal agencies. CICA does not apply to the U.S. Postal Service, United States v. Elec. Data Sys. Fed. Corp., 857 F.2d 1444, 1446 (Fed. Cir. 1988), or to the Federal Aviation Administration, 49 U.S.C. 40110(d).
- 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. 41 U.S.C. § 403 and FAR 2.101.
 - 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.
4. Unfair Competitive Advantage. Competition must be conducted on an equal basis. Bath Iron Works Corp., B-290470; B-290470.2, 2002 U.S. Comp. Gen. LEXIS 122 (Aug. 19, 2002) (“Offerors must be treated equally and be provided with a common basis” to prepare their offers). An “unfair competitive advantage” can arise in a variety of different factual contexts:
- a. Organizational Conflict of Interest. FAR Part 9.5. An organizational conflict of interest occurs where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage. Federal Acquisition Regulation (FAR) § 9.501. Contracting officials are to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR § 9.504(a)(2). Deutsch Bank, B-289111, 2001 CPD ¶ 210 (Dec. 12, 2001).
 - b. An unfair competitive advantage exists where a contractor competing for award of any federal contract possesses --(1) Proprietary information that was obtained from a Government official without proper authorization; or (2) Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract. FAR 9.505(b).

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.
 - (3) Competition under FAR 6.203 cannot be restricted to only certain small businesses. Department of the Army Request for Modification of Recommendation, Comp. Gen. B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 (CICA allows for the exclusion of non-small business concerns to further the

Small Business Act, but it still requires “competitive procedures” for small business set-asides. Such procedures must allow all responsible eligible business concerns [i.e., small business concerns] to submit offers.)

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); Worldwide Language Resources, Inc; SOS International Ltd. Gen. B-296984; B-296984.2; B-296984.3; B-296984.4; B-296993; B-296993.2; B-296993.3; B-296993.4; Nov. 14, 2005, 2005 CPD ¶ 206 (Justification and Approval for sole source award of bilingual-bicultural advisors revealed lack of advance planning and not unusual and compelling circumstances); Bausch & Lomb, Inc., B-298444, 2006 U.S. Comp. Gen. LEXIS 147 (Sept. 21, 2006). 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); Bannum, Inc., Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD 61 (while the agency’s planning ultimately was unsuccessful, this was due to unanticipated events, not a lack of planning).

- (a) To avoid a finding of “lack of advanced planning” agencies must make reasonable efforts to obtain competition. Heros, Inc., Comp. Gen. B-292043,

June 9, 2003, 2003 CPD ¶ 111 (Agencies “must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole source situation when they could reasonably take steps to enhance competition.”)

- (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.

(c) 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; 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. But see, Lockheed Martin Systems Integration—Owego, B-287190.2, B-287190.3, 2001 CPD ¶ 110, 2001 U.S. Comp. Gen. LEXIS 103 (May 25, 2001) (when an agency relies on this exception, the agency must give other sources “notice of its intentions, and an opportunity to respond to the agency’s requirements.” The agency must “adequately apprise” prospective sources of its needs so that those sources have a “meaningful opportunity to demonstrate their ability” to satisfy the agency’s needs. When the agency gave “misleading guidance” which prejudiced the protestor, GAO invalidated the sole source award.); 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.

(c) 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.

The DFARS PGI provides:

206.302-2 Unusual and compelling urgency.

(b) Application. The circumstances under which use of this authority may be appropriate include, but are not limited to, the following:

(i) Supplies, services, or construction needed at once because of fire, flood, explosion, or other disaster.

(ii) Essential equipment or repair needed at once to— (A) Comply with orders for a ship; (B) Perform the operational mission of an aircraft; or (C) Preclude impairment of launch capabilities or mission performance of missiles or missile support equipment.

(iii) Construction needed at once to preserve a structure or its contents from damage.

See, 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; BlueStar Battery Sys. Corp., B-270111.2, B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67. But see, Signals and Systems, Inc., B-288107, 2001 U.S. Comp. Gen. LEXIS 149 (Sept., 21, 2001) (“urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement.” Since the Army did not know how many items it needed to replace, the Army also could not know what “minimum quantity” it needed. Further, the Army made no reasonable effort to discover how many items would have to be replaced. Therefore, GAO sustained the protest that the Army purchased more units than were necessary); 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.,

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

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.
 - (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**). See also, Spherix, Inc. v. United States, 58 Fed. Cl. 351 (2003).
- 3. Justifications and Approvals (J&As) for Other Than Full and Open Competition. FAR 6.303; FAR 6.304; DFARS 206.303; DFARS 206.304; AFARS 5106.303; AFARS 5106.304. Two helpful J&A Guides are: Air Force Guide to Developing and Processing Justification and

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)).

Approval (J&A) Documents, available at <http://www.safaq.hq.af.mil/contracting/toolkit/part06/word/5306-j-and-a.doc> and Air Force Materiel Command Justification and Approval Preparation Guide and Template), available at <https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/guides/jaguide.doc>.

- 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.
 - (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;

² 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 5106.303-1(d).

- (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. Sabreliner Corp., B-288030, Sep. 13, 2001, 2001 Comp. Gen. LEXIS 154 (inaccuracies and inconsistencies in the J & A and between the J & A and other documentation invalidated the sole source award).
 - (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
 - (c) Describe the required supplies or services and state their estimated value;
 - (d) Identify the applicable statutory exception;

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

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

- (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;
 - (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

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.

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.
 - (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

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).

- (c) The approval official for proposed contract actions greater than \$10,000,000, but not exceeding \$50,000,000 (most agencies) or \$75,000,000 (DoD, NASA, Coast Guard) is the head of the contracting activity or his designee.⁹
- (d) The approval official for proposed contract actions greater than \$50,000,000 (most agencies) or \$75,000,000 (DoD, NASA, Coast Guard) 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).

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

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 civilian employee at least equivalent to a major general. DFARS 206.304.

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:
 - (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

¹¹ The ASA (ALT) appoints the Army Competition Advocate General. The Deputy Assistant Secretary of the Army for Procurement (SAAL-ZP) is the Army Competition Advocate General (ACAG). AFARS 6.501.

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 2.101. "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(d)(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-, and
 - (c) Before soliciting offers for acquisitions that could lead to a bundled contract (15 U.S.C. 644(e)(2)(A)).
 - 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. Specifications that set forth precise measurements, tolerances, materials, in-process and finished product tests, quality control measures, inspection requirements, and other specific information. The Government Contracts Reference Book 185-186 (2d Ed. 1998).
- b. Performance specifications. Specifications that indicate what the final product must be capable of accomplishing rather than how the product is to be built. The Government Contracts Reference Book 394 (2d Ed. 1998).
- c. Purchase descriptions. A description of the essential physical characteristics and functions required to meet the government's requirements. The Government Contracts Reference Book 426 (2d Ed. 1998).
- (1) Brand Name or Equal Purchase Description. Identifies a product by its brand name and model or part number . . . and permits offers on products essentially equal to the specified brand name. The Government Contracts Reference Book 67 (2d Ed. 1998).
- 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. Only include restrictive provisions or conditions to the extent they satisfy the agency's needs or are required by law. See Systems Management, Inc., Qualimetrics, Inc., Comp. Gen. B-287032.4; B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 (the Air Force violated CICA when it "overstated its minimum needs in requiring" an FAA-certified weather observation system and then "either waived or relaxed this requirement" by awarding to a vendor whose system was not FAA-certified); 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).
 - d. In recent years the number of GAO bid protests alleging unduly restrictive specifications has decreased from eight to nine per year to four or five per year. From 2002 to 2003 the GAO heard seventeen bid protests alleging unduly restrictive specifications. See Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; Mark Dunning Industries, Inc., Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46; Prisoner Transport. Servs., LLC, Comp. Gen. B-292179, et. al., June 27, 2003, 2003 CPD ¶ 121; MCI Worldcom Deutschland GmbH, Comp. Gen. B-291418, et. al., Jan. 2, 2003, 2003 CPD ¶ 1; More recently there have been fewer challenges to alleged unduly restrictive specifications and the majority of those challenges have been denied. See, Teximara, Inc., Comp. Gen. B-293221.2, July 9, 2004, 2004 CPD ¶ 151; Reedsport Machine & Fabrication, Comp. Gen. B-293110.2, Apr. 13, 2004, 2004 CPD ¶ 91; Ocean Svs., LLC, Comp. Gen. B-2922511.2, Nov. 6, 2003, 2003 CPD ¶ 206; and, NVT

Technologies, Inc., Comp. Gen. B-292302.3, Oct. 20, 2003, 2003 CPD ¶ 174.

- e. In FY 2006 the Comptroller heard several protests involving allegations of unduly restrictive government specifications. The GAO reaffirmed the requirement that the specification must reasonably address the requiring activities needs. Bristol Group, Inc.-Union Station Venture, Comp. Gen B-298110, Jun. 2, 2006, 2006 CPD ¶ 89 (finding a requirement that office space be within within 2500 walkable linear feet of amenities was reasonable given the employees only had 30 minutes for lunch); Paramount Group, Inc. Comp. Gen. B-298082, Jun. 15, 2006, 2006 CPD ¶ 98 (requirement for preexisting individual offices to be torn down to create a large open spaced office for the agency to configure its offices reasonable given that it provided the agency flexibility and it allowed the agency to more easily compare the offers). But see MadahCom, Inc. Comp. Gen. B-298277, Aug. 7, 2006, 2006 CPD ¶ 119 (declaring a requirement for APCO 25 standard for radio transmissions as unduly restrictive for a mass notification system since they agency was unable to articulate how the requirement was reasonably related to the system).

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) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances. FAR 11.104(a).
- (2) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements. FAR 11.104(b).
 - (a) 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).

b. Items Peculiar to one Manufacturer. Agency requirements shall not be written so as to require a particular brand-name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless --

- (1) The particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or can not be modified to meet, the agency's needs;
- (2) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1); and
- (3) The basis for not providing for maximum practicable competition is documented in the file when the acquisition

is awarded using simplified acquisition procedures. FAR 11.105.

c. 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. Arora Group, Inc., B-288127, Sep. 14, 2001, 2001 CPD ¶ 154; ; Flow Tech., Inc., B-228281, Dec. 29, 1987, 67 Comp. Gen. 161, 87-2 CPD ¶ 633. As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD 109.
- (2) Issues raised by ambiguous (defective) specifications:
 - (a) Adequacy of competition.
 - (b) Contract interpretation.
 - (c) Constructive change.

d. 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 Apex Support Services, Inc., B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD 202 (unnecessary bonding requirements); CHE Consulting, Inc., B-284110 et. al., Feb. 18, 2000, 2000 CPD ¶ 51; 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); 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. But see, e.g., Marlen C. Robb & Son Boatyard & Marina, Inc., B-256316, June 6, 1994, 94-1 CPD ¶ 351 (Denying the protest and providing "an agency properly may restrict a procurement to offerors within a specified area if the restriction is reasonably necessary for the agency to meet its needs. The determination of the proper scope of a geographic restriction is a matter of the agency's judgment which we will review in order to assure that it has a reasonable basis"); H & F Enters., B-251581.2, July 13, 1993, 93-2 CPD ¶ 16.
- (c) Specifications that exceed the agency's minimum needs. But see, Trilectron Indus., B-248475, Aug. 27, 1992, 92-2 CPD ¶ 130 (denying protest and providing "determinations of the agency's minimum needs and the best method of accommodating those needs are primarily matters within the agency's discretion. Where, as here, a specification is challenged as unduly restrictive of competition, we will review the record to determine whether the restriction imposed is reasonably related to the agency's minimum needs.");

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) Improperly bundled specifications. Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; EDP Enterprises, Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93 (bundling food services, with the “unrelated base, vehicle and aircraft maintenance services,” restricted competition; because the agency bundled the requirements for administrative convenience, the specification violated the CICA); But see, AirTrak Travel, Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117, and USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224 (in both decisions GAO denied allegations that bundled specifications violated CICA, because the agencies convinced GAO that mission-related reasons justified bundling requirements).

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. FedBizOpps.gov. FAR 5.101(a)(1).

- (1) Commerce Business Daily phased out in favor of FedBizOpps.gov.

In the past, synopses were posted in the Commerce Business Daily. Effective 1 October 2001, all agencies had to use one, single electronic portal to publicize government-wide procurements greater than \$25,000. Designated “FedBizOpps.gov,” the web site is “the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public.” From 1 October 2001 till 1 January 2002, agencies posted their solicitations on FedBizOpps.gov and in the Commerce Business Daily (CBD). Beginning 1 January 2002, agencies no longer needed to post solicitations in the CBD and now agencies may rely solely on the web site. Electronic Commerce in Federal Procurement, 66 Fed. Reg. 27,407 (May 16, 2001) (to be codified at 48 C.F.R. pts. 2, 4-7, 9, 12-14, 19, 22, 34-36).

- (2) Contracting officers must synopsize proposed contract actions expected to exceed \$25,000 in FedBizOpps.gov. unless:

(a) The contracting officer determines that one or more of the fourteen 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.

- (3) Contracting officers must wait at least:

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

- (b) if the proposed action is expected to exceed the simplified acquisition threshold, 30 days after issuing the solicitation to open bids or receive initial proposals. FAR 5.203.

(4) Commercial Item Acquisitions

- (a) CO may establish a shorter period for issuance of the solicitation or use the combined synopsis and solicitation procedure. 5.203(a).

- (b) CO must establish a reasonable opportunity to respond (rather than the 30 days required for non-commercial items above the simplified acquisition threshold). FAR 5.203(b).

- (5) The decision not to synopsise 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.

- (6) If the agency fails to synopsise (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; RIL, B-251436, Mar. 10, 1993, 93-1 CPD ¶ 223. But see, Kendall Healthcare Products Co., B-289381, February 19, 2002, 2002 Comp. Gen. LEXIS 23 (misclassifying procurement in CBD did not deny protestor opportunity to compete).

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. Pre-solicitation Notices. FAR 14.205. A contracting officer may send pre-solicitation notices to concerns on the solicitation mailing list. The notice shall (a) Specify the final date for receipt of requests for a complete bid set, (b) Briefly describe the requirement and furnish other essential information to enable concerns to determine whether they have an interest in the invitation, and normally not include drawings, plans, and specifications.
4. Solicitation Mailing Lists (Bidders Lists). Prior to 25 August 2003, the FAR required contracting officers to establish solicitation mailing lists to ensure access to adequate sources of supplies and services. The Civilian Agency Acquisition Council and Defense Acquisition Regulations Council eliminated the Standard Form 129 (SF 129), Solicitation Mailing List effective 25 August 2003. The Central Contract Registry, “a centrally located, searchable database, accessible via the Internet,” is a contracting officer’s “tool of choice for developing, maintaining, and providing sources for future procurements.” FedBizOpps.gov, “through its interested vendors list, has the capability to generate a list of vendors who are interested in a specific solicitation.” Federal Acquisition Regulation; Elimination of the Standard Form 129, Solicitation Mailing List Application, 68 Fed. Reg. 43,855 (July 24, 2003). For solicitations that used Solicitation Mailing Lists (i.e. before 25 August 2003), the following rules apply:
 - a. 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 6

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CHAPTER 6

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. CONTRACT TYPES - CATEGORIZED BY PRICE.

- A. Fixed-Price Contracts. [FAR Subpart 16.2](#).
 - 1. 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).

2. 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 see* American Tel. and Tel. Co. v. United States, 48 Fed. Cl. 156 (2000) (upholding completed FP contract for developmental contract despite stated prohibition contained in FY 1987 Appropriations Act).
3. Firm-Fixed-Price Contracts (FFP). FAR 16.202.
 - 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 1, page 3).
 - 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](#).

**Fixed Price
= \$50**



Figure 1

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	
\$40	
\$80	
\$10	

Discussion Problem: 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?

3. Fixed-Price Contracts with Economic Price Adjustment (FP w/ EPA). [FAR 16.203](#); [FAR 52.216-2](#); [FAR 52.216-3](#); and [FAR 52.216-4](#).
 - a. Provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. See Transportes Especiales de Automoviles, S.A. (T.E.A.S.A.), ASBCA No. 43851, 93-2 B.C.A. 25,745 (stating that “EPA provisions in government contracts serve an important purpose, protecting both parties from certain specified contingencies.”); MAPCO Alaska Petroleum v. United States, 27 Fed. Cl. 405 (1992) (indicating the potential price revision serves the further salutary purpose of minimizing the need for contingencies in offers and, therefore, reducing offer prices).
 - 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) Cost indexes of labor or material (not shown). 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. See [DFARS 216.203-4\(d\)](#).

- (2) Based on published or otherwise established prices of specific items or the contract end items (not shown). Adjustments should normally be restricted to industry-wide contingencies. See FAR 52.216-2 (standard supplies) and FAR 52.216-3 (semi standard supplies); DFARS 216.203-4 (indicating one should ordinarily only use EPA clauses when contract exceeds simplified acquisition threshold and delivery will not be completed within six months of contract award). The CAFC recently held that market-based EPA clauses are permitted under the FAR. Tesoro Hawaii Corp., et. al v. United States, 405 F.3d 1339 (2005).
- (3) Actual costs of labor or material (see Figure 2, page 6). 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 that 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).
- (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 to regulations. See Beta Sys., 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).

Fixed Price = \$50

A price adjustment of plus 3-10% or minus 3-100% will be made depending upon fluctuations in the price of raw materials/labor.

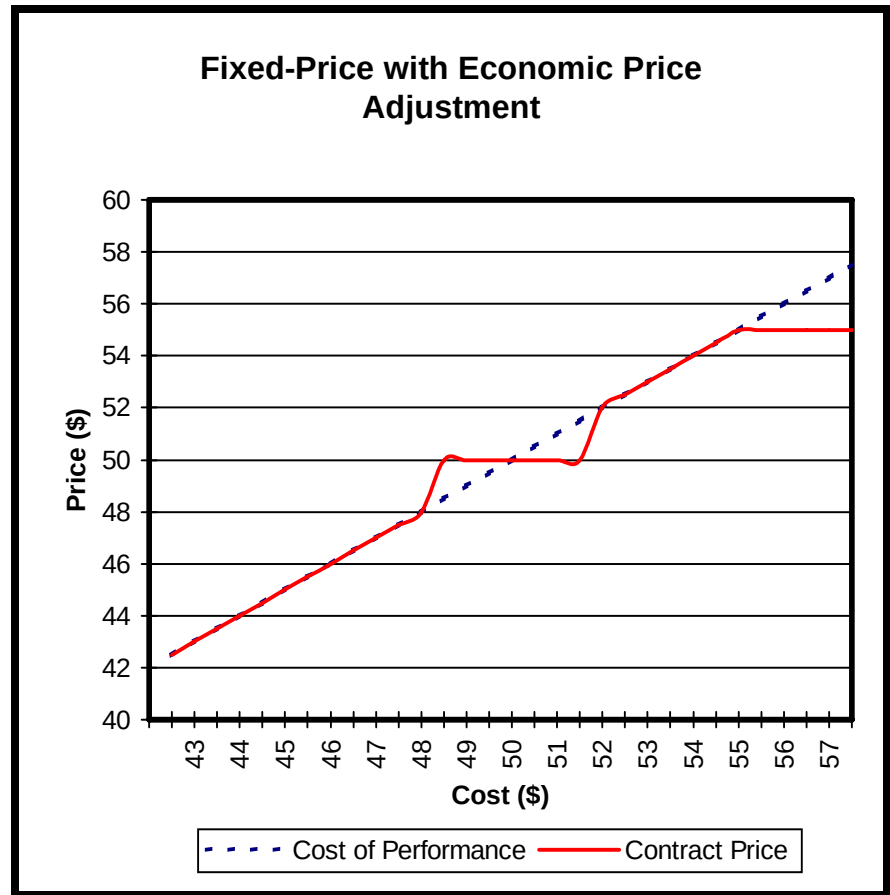


Figure 2

If due to price fluctuations recognized by the EPA clause, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	
\$51	
\$53	
\$55	
\$56	
\$49	
\$47	
\$43	

- (5) Alternatively, a party may be entitled to fair market value, or *quantum valebant* recovery. Gold Line Ref., Ltd. v. United States, 54 Fed. Cl. 285 (2002) (quantum valebant relief OR reformation of clause to further parties' intent "to adjust prices in accordance with the FAR"); Barrett Ref. Corp. v. United States, 242 F.3d 1055 (Fed. Cir. 2001).
 - 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 Incentive (FPI) Contracts (see Figure 3, page 8). [FAR 16.204](#); [FAR 16.403](#); [FAR 52.216-16](#); and [FAR 52.216-17](#). 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.
- 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

- d. 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](#). 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). [FAR 16.403\(a\)](#).
 - (1) FPI (firm target) specifies a target cost, a target profit, a price ceiling, and a profit adjustment formula. [FAR 16.403-1](#); [FAR 52.216-16](#).
 - (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. [FAR 16.403-2](#); [FAR 52.216-17](#).

Target Cost = \$45
Target Profit = \$ 5
Target Price = \$50

The contractor's share of any overrun = 60%.

The contractor's share of any underrun = 40%.

Ceiling Price = \$53

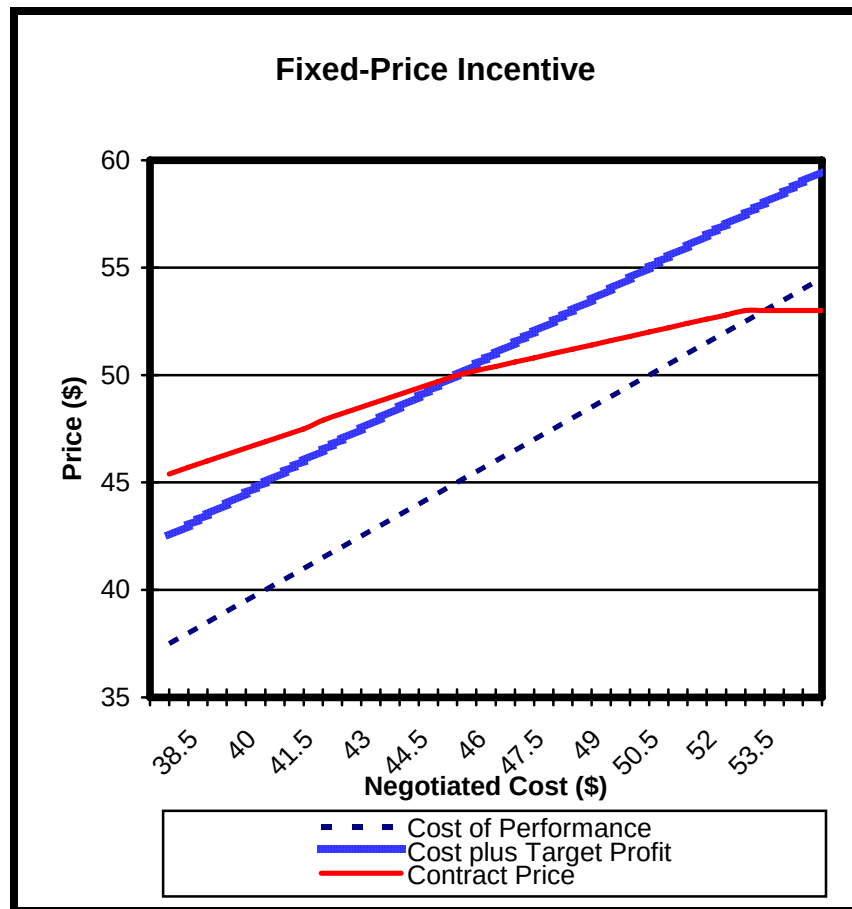


Figure 3

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$45.00	
\$47.50	
\$50.00	
\$52.50	
\$55.00	
\$42.50	
\$40.00	
\$37.50	

5. Fixed-Price Contracts with Award Fees. [FAR 16.404](#).
- 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 (see Figure 4, page 11). Unlike the Cost-Reimbursement with Award Fee type, see section II.B.3, there is no base fee.
 - b. The contract must provide for periodic evaluation of the contractor's performance against an award fee plan. The [Air Force Award Fee Guide](#), which can be found at <http://www.safaq.hq.af.mil/contracting/toolkit/part16/acrobat/award-feeguide.pdf> and the [National Aeronautics And Space Administration Award Fee Contracting Guide](#), available at <http://www.hq.nasa.gov/office/procurement/regs/afguide.html> both contain helpful guidance on setting up award fee evaluation plans.
 - 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.

Fixed Price = \$50

Potential Award Fee = \$5

Total Price will be between \$50 and \$55.

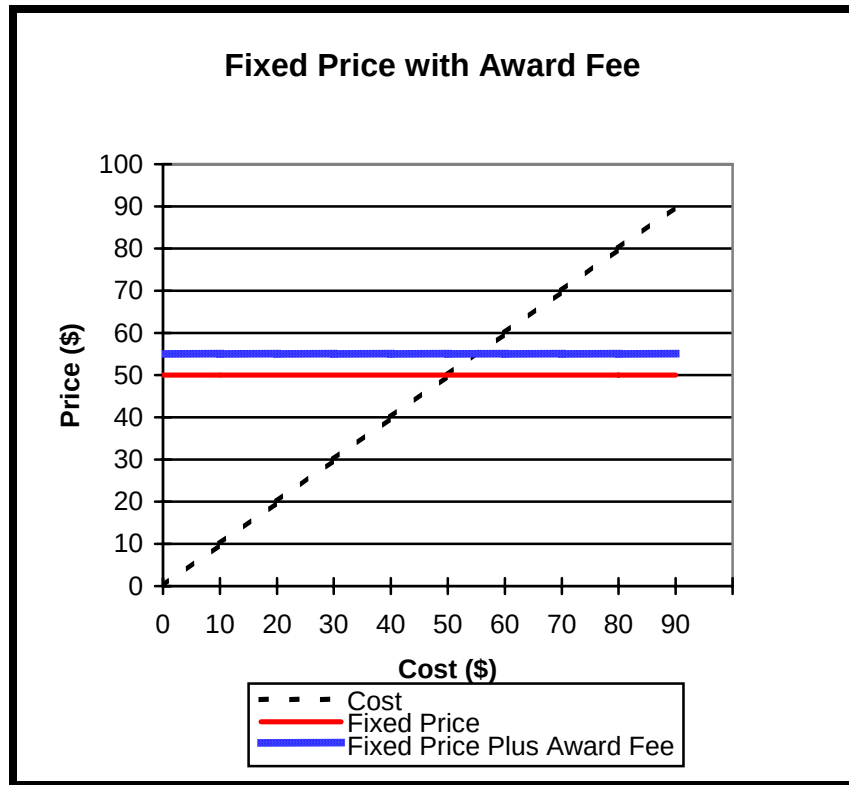


Figure 4

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	\$50 plus the award fee
\$40	\$50 plus the award fee
\$80	\$50 plus the award fee
If in performing the contract, the contractor performs:	Then the contractor is entitled to the following amount of money:
Exceptionally	\$54-55
Very Good	\$52-54
Fair	\$50-52
Poor	\$50

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, establish an estimate of total cost for the purpose of obligating funds, and establish 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. The government bears that majority of cost or performance risk. In a cost-reimbursement type contract, a contractor is only required to use its "best efforts" to perform. A contractor will be reimbursed its allowable costs, regardless of how well it performs the contract. General Dynamics Corp. v. United States, 671 F.2d 474, 480-81 (Ct. Cl. 1982), McDonnell Douglas Corp. v. United States, 27 Fed. Cl. 295, 299 (1997) (noting that "...the focus of a cost-reimbursement contract is contractor input, not output.")
7. 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, [FAR 52.232-20](#) (if the contract is fully funded); or the Limitation of Funds clause, [FAR 52.232-22](#) (if the contract is incrementally funded).
 - 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. JJM Sys., Inc., ASBCA No. 51152, 03-1 BCA ¶ 32,192; Titan Corp. v. West, 129 F.3d 1479 (Fed. Cir. 1997); Advanced Materials, Inc., 108 F.3d 307 (Fed. Cir. 1997). Exceptions to this rule include:
- (1) The overrun was unforeseeable. Johnson Controls World Servs, Inc. v. United States, 48 Fed. Cl. 479 (2001); 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); F2 Assoc., Inc., ASBCA No. 52397, 01-2 BCA ¶ 31,530. To establish unforeseeability, the contractor must establish that it maintained an adequate accounting system. SMS Agoura Sys., Inc., ASBCA No. 50451, 97-2 BCA ¶ 29,203 (contractor foreclosed from arguing unforeseeability by prior decision).
 - (2) Estoppel. Am. Elec. Labs., 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); Advanced Materials, Inc., 108 F.3d 307 (Fed. Cir. 1997) (unsuccessfully asserted); F2 Assoc., Inc., ASBCA No. 52397, 01-2 BCA ¶ 31,530 (unsuccessfully asserted).

8. Cost-Plus-Fixed-Fee (CPFF) Contracts (see Figure 5, page 15).
[FAR 16.306](#); [FAR 52.216-8](#).

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.

**Estimated Cost @
Time of Award =
\$50**

Fixed Fee = \$5

Cost Ceiling = \$80

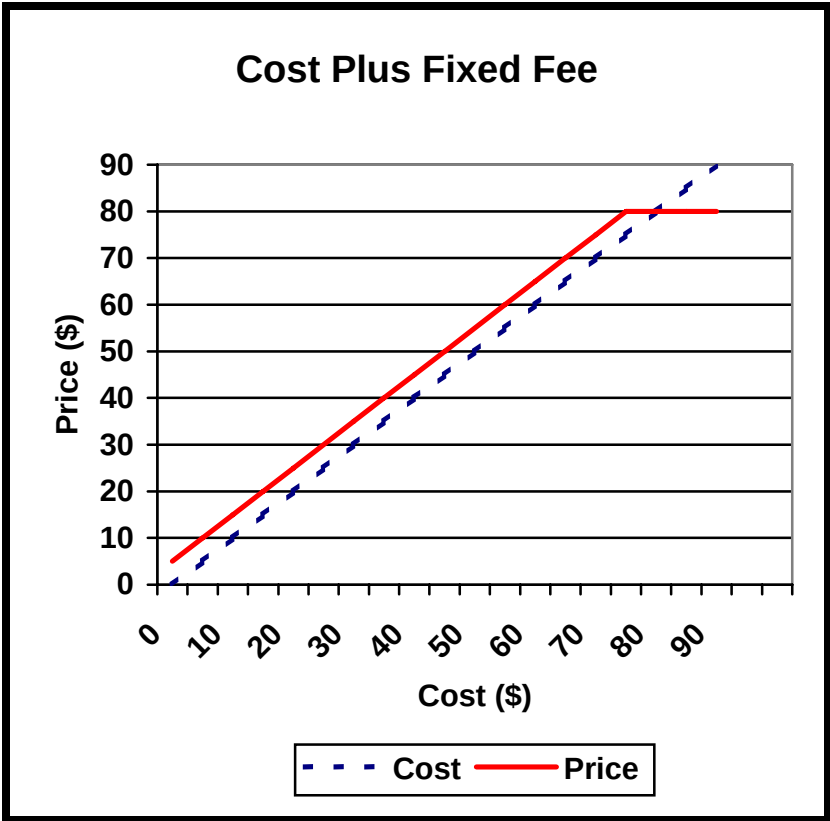


Figure 5

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	
\$40	
\$70	
\$80	

Discussion Problem: The US Army Intelligence and Security Command (INSCOM) issued a solicitation for a new computer system for its headquarters building at Fort Belvoir. 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, INSCOM 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 INSCOM required. The contractor suggested that INSCOM award a cost-plus-fixed-fee (CPFF) contract. Additionally, the contractor suggested that INSCOM 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 INSCOM respond?

9. Cost-Plus-Incentive-Fee (CPIF) Contracts. [FAR 16.304](#); [FAR 16.405-1](#); and [FAR 52.216-10](#).
 - a. The CPIF specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula (see Figure 6, page 18). After contract performance, the fee is determined in accordance with the formula. See *Bechtel Hanford, Inc.*, B-292288, *et. al*, 2003 CPD ¶ 199.
 - 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).
 - a. The government may combine technical incentives with cost incentives. [FAR 16.405-1\(b\)\(2\)](#). The contract must have cost constraints to avoid rewarding a contractor for achieving incentives which outweigh the value to the government. [FAR 16.402-4 \(b\)](#).

- b. If a contractor meets the contract criteria for achieving the maximum fee, the government must pay that fee despite minor problems with the contract. *North American Rockwell Corp.*, ASBCA No. 14329, 72-1 BCA ¶ 9207 (1971) (Government could not award a zero fee due to minor discrepancies when contractor met the target weight for a fuel-tank, which was the sole incentive criteria).
- c. A contractor is not entitled to a portion of the incentive fee upon termination of a CPIF contract for convenience. [FAR 49.115 \(b\)\(2\)](#).

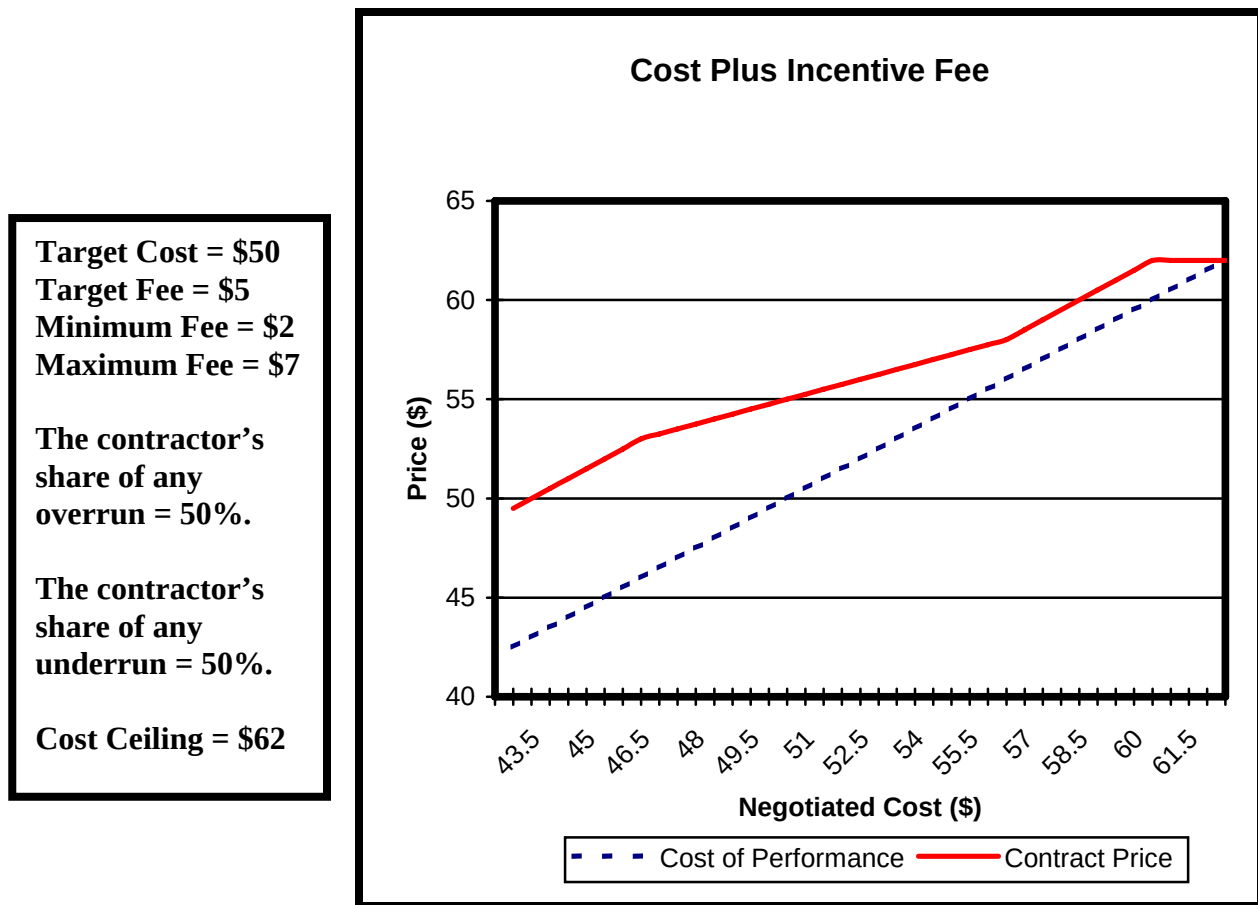


Figure 6

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50.00	
\$55.00	
\$57.50	
\$60.00	
\$62.00	
\$47.50	
\$45.00	

10. Cost-Plus-Award-Fee (CPAF) Contracts. [FAR 16.305](#) and [FAR 16.405-2](#). 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 (see Figure 7 below).
 - a. 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\(c\)\(ii\)](#).
 - b. 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](#). The Air Force Award Fee Guide (Mar. 02) and the National Aeronautics And Space Administration Award Fee Contracting Guide (Jun. 27, 01), discussed *supra* both contain helpful guidance on setting up award fee evaluation plans.

- c. The FAR requires that an appropriate award-fee clause be inserted in solicitations and contracts when an award-fee contract is contemplated, and that the clause '[e]xpressly provide[s] that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the government.' [FAR 16.406 \(e\)\(3\)](#). There is no such boilerplate clause in the FAR and therefore such a clause must be written manually. An award fee plan is included in the solicitation which describes the structure, evaluation methods, and timing of evaluations. Generally, award fee contracts require a fee-determining official, an award-fee board (typical members include the KO and a JA), and performance monitors (who evaluate technical areas and are not members of the board). See NASA and Air Force Award Fee Guides.
- d. Since the available award fee during the evaluation period must be earned, the contractor begins each evaluation period with 0% of the available award fee and works up to the evaluated fee for each evaluation period. [AFARS 5116.4052\(b\)\(2\)](#). If performance is deemed either unsatisfactory or marginal, no award fee is earned. [DFARS 216.405-2\(a\)\(i\)](#)
- e. 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. [FAR 16.405-2\(b\)\(3\)](#).
- f. Unilateral changes to award-fee plans can be made before the start of an evaluation period with written notification by the KO. Changes to the plan during the evaluation plan can only be done through bilateral modifications. See Air Force Award Fee Guide.
- g. A contractor is entitled to unpaid award fee attributable to completed performance when the government terminates a cost-plus-award fee contract for convenience. Northrop Grumman Corp. v. Goldin, 136 F.3d 1479 (Fed. Cir. 1998).
- h. 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)

**Estimated Cost @
Time of Award =
\$50**

Fixed Fee = \$1

Award Fee = \$4

Cost Ceiling = \$60

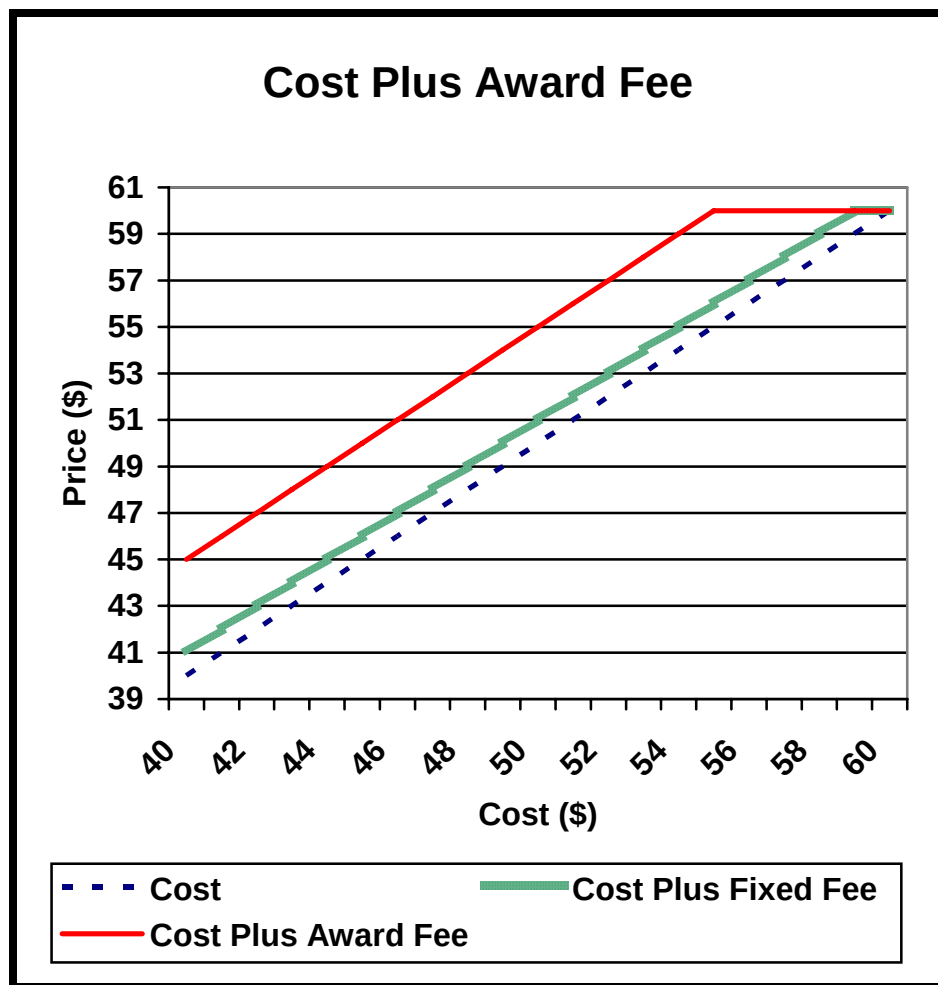


Figure 7

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	\$51 (+ up to \$4 of award fee)
\$55	\$56 (+ up to \$4 of award fee)
\$57	\$58 (+ up to \$4 of award fee)
\$60	\$61 (+ up to \$4 of award fee)
\$50 and performs exceptionally	\$55???
\$50 and performs very well	\$54???
\$50 and performs poorly	\$51???

11. Cost Contracts. [FAR 16.302](#); [FAR 52.216-11](#).

- a. The contractor receives its allowable costs but no fee (see Figure 8 below).
- b. May be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations, and for facilities contracts.

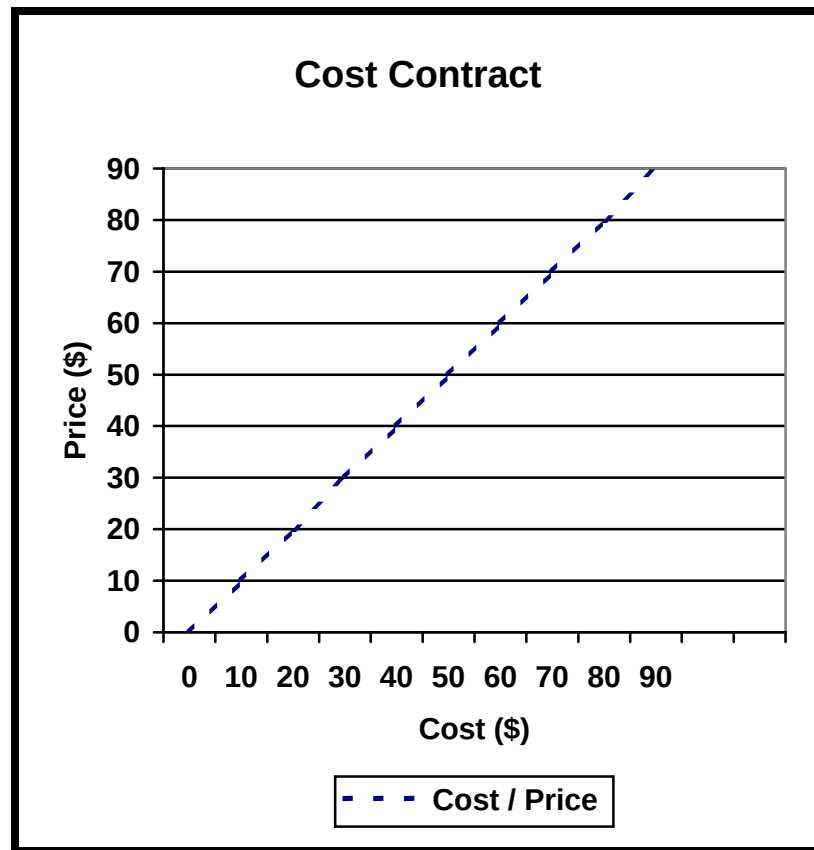


Figure 8

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	\$50
\$60	\$60
\$30	\$30
\$100	???

12. Cost-Sharing Contracts. [FAR 16.303](#); [FAR 52.216-12](#).

- a. The contractor is reimbursed only for an agreed-upon portion of its allowable cost (see Figure 9 below).
- b. Normally used where the contractor will receive substantial benefit from the effort.

**Contractor is paid
80% of negotiated
costs.**

Cost Ceiling = \$60

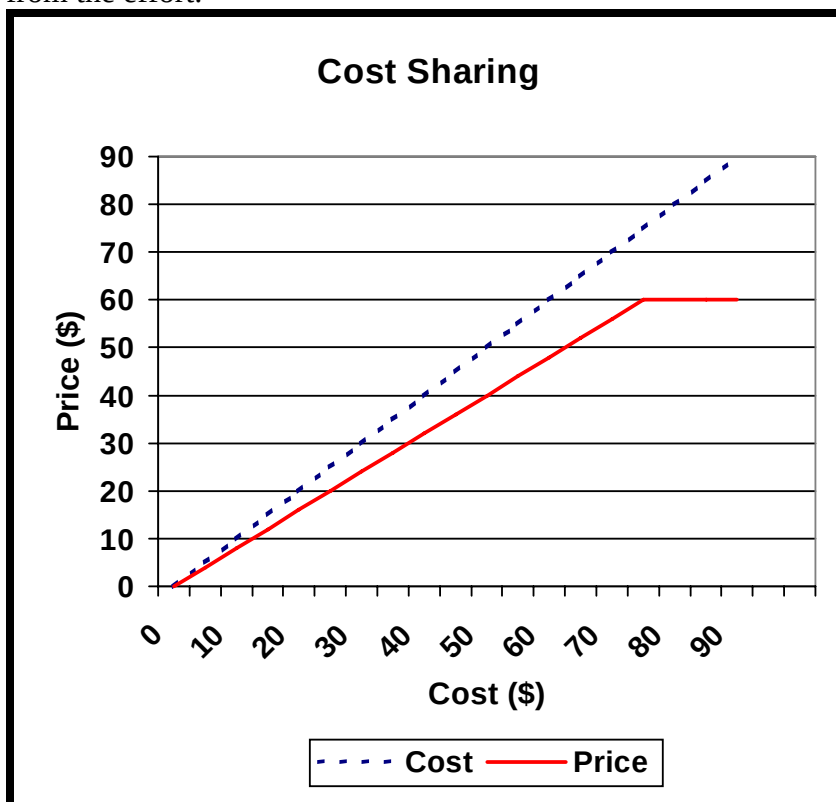


Figure 9

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:
\$50	\$40
\$60	\$48
\$70	\$56
\$80	???

C. Time-and-Materials and Labor-Hour Contracts. [FAR Subpart 16.6](#).

1. Application. Use these contracts when it is not possible at contract award to estimate accurately or to anticipate with any reasonable degree of confidence the extent or duration of the work. [FAR 16.601\(b\)](#); [FAR 16.602](#).
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. [FAR 16.601\(b\)\(1\)](#); [FAR 16.602](#). CACI, Inc. v. General Services Administration, GSBGA No. 15588, 03-1 BCA ¶ 32,106.
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. [FAR 16.601\(c\)](#); [FAR 16.602](#).
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. [FAR 16.602](#).

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\(d\)\(2\)](#). Similar to the firm-fixed-price level-of-effort contract except that the contract price equals the cost incurred plus a fee. The contractor is required to provide a specific level of effort over a specific period of time.

E. Award Term Contracts. Similar to award fee contracts, a contractor earns the right, upon a determination of exceptional performance, to have the contract's term or duration extended for an additional period of time. The contract's term can also be reduced for poor performance. There has been no guidance from the FAR on this type of contract. The Air Force Material Command issued an Award Fee & Award Term Guide, dated December 2002, which contains useful guidance.

- 1. The process for earning additional periods is similar to award fees. Generally, a Term Determining Official, an Award Term Review Board, and Performance Monitors should be identified within the solicitation.
- 2. A point ceiling (+100) and a floor (-100) will be set up to incentivize the contractor's performance. Hitting either threshold will either increase or decrease the term of the contract. For example, two Very Good evaluations (80 points for each) in a row would earn another year of performance. The 60 points would carry over to the next evaluation period.

III. CONTRACT TYPES - INDEFINITE DELIVERY CONTRACTS.

- A. Indefinite Delivery Contracts. [FAR Subpart 16.5](#).
 - 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](#); [FAR 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. Indefinite-Quantity Contracts Generally. [FAR 16.504](#).
 - 1. Indefinite or variable quantity contracts permit flexibility in both quantities and delivery schedules.
 - 2. These contracts permit ordering of supplies or services after requirements materialize.
 - 3. An indefinite quantity contract must be either a requirements or an ID/IQ contract. See *Satellite Servs., Inc.*, B-280945, B-280945.2, 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](#); [FAR 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. Datalect Computer Servs. Inc. v. United States, 56 Fed. Cl. 178 (2003) (finding agency breached its requirements contract covering computer maintenance services where agency later obtained extended warranty from equipment manufacturer covering same items); Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (Navy diverted rodent pest control services); T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442 (finding that Ft. Carson breached its requirements contract covering the operation of an auto parts store when certain tenant units elected to order their parts from cheaper suppliers).
 - b. The Government also may breach the contract if it performs the contracted-for work in-house. C&S Park Serv., Inc., ENGBCA Nos. 3624, 3625, 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). The Government deferral or backlogging of its orders such that it does not order its actual requirements from a contractor is also a breach of a requirements contract. R&W Flammann GmbH, ASBCA Nos. 53204, 53205, 02-2 BCA ¶ 32,044.

- c. Contractors may receive lost profits as a measure of damages when the Government purchases supplies or services from an outside source. See T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442; Carroll Auto., ASBCA No. 50993, 98-2 BCA ¶ 29,864.
 - d. The Government cannot escape liability for the breach of a requirements contract by retroactively asserting constructive termination for convenience. T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442; Carroll Auto., ASBCA No. 50993, 98-2 BCA ¶ 29,864 (Government invoked constructive T4C theory two years after contract performance); Tornccello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (Ct. Cl. 1982).
2. A requirements contract must contain [FAR 52.216-21](#). If the Government inadvertently or intentionally omits this clause, a court or board will examine other intrinsic / extrinsic evidence to determine whether it is a requirements contract. See, e.g., Centurion Elecs. Serv., ASBCA No. 51956, 03-1 BCA ¶ 32,097 (holding that a contract to do all repairs on automated data processing equipment and associated network equipment at Fort Leavenworth was a requirements contract despite omission of requisite clause).
 3. 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\(a\)\(1\)](#). The estimate is not a guarantee or a warranty of a specific quantity. Shader Contractors, Inc. v. United States, 149 Ct. Cl. 535, 276 F.2d 1, 7 (Ct. Cl. 1960).
 - 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). The standard is for the government to base its estimates on "all relevant information that is reasonably available to it." Womack v. United States, 182 Ct. Cl. 399, 401, 389 F.2d 793, 801 (1968).

- b. The estimates can be based on personal experience as long as it is reasonable. National Salvage & Service Corp., ASBCA No. 53750 (Jun. 18, 2004).
- c. The GAO will sustain a protest if a solicitation contains flawed estimates. Beldon Roofing & Remodeling Co., B-277651, Nov. 7, 1997, CPD 97-2 ¶ 131 (recommending cancellation of IFB where solicitation failed to provide realistic quantity estimates).
- d. Failure to use available data or calculate the estimates with due care may also entitle the contractor to additional compensation. See Hi-Shear Tech. Corp. v. United States, 53 Fed. Cl. 420 (2002) (noting the government “is not free to carelessly guess at its needs” and that it must calculate its estimates based upon “all relevant information that is reasonably available to it.”); S.P.L. Spare Parts Logistics, Inc., ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982; Crown Laundry & Dry Cleaners v. United States, 29 Fed. Cl. 506 (1993) (finding the government was negligent where estimates were exaggerated and not based on historical data); and Contract Mgmt., Inc., ASBCA No. 44885, 95-2 BCA ¶ 27,886 (granting relief under the Changes clause where Government failed to revise estimates between solicitation and award to reflect funding shortfalls).
- e. Contractors are generally not entitled to lost profits for negligent estimates. Recovery is generally limited to reliance damages and a price adjustment. See Rumsfeld, v. Applied Companies, Inc., 325 F.3d 1329 (Fed. Cir. 2003), and Everett Plywood v. United States, 190 Ct. Cl. 80, 419 F.2d 425 (Ct. Cl. 1969) (contractor entitled to adjustment of the contract price applied to the volume of timber actually cut). The purpose of a damages award is to put the non-breaching party in as good a position as it would have been but for the breach. S.P.L. Spare Parts Logistics, Inc., ASBCA Nos. 54435, 54360, 06-1 BCA ¶ 33,135.
- f. A negligent estimate that was too low may result in a constructive change to the contract. Chemical Technology v. United States, 227 Ct. Cl. 120, 645 F.2d 934 (1981).

4. 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 1369 (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); Shear Tech. Corp. v. United States, 53 Fed. Cl. 420 (2002); Maggie's Landscaping, Inc., ASBCA Nos. 52462, 52463 (June 2, 2004) (Government had valid reasons to reduce orders, to include dry and wet conditions).
 - 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 1369, 1372 (Fed. Cir. 1998) (citing Empire Gas Corp. v. Am. 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 Servs., 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 (CAAS).¹ [10 U.S.C. § 2304b\(e\)\(2\)](#); [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 is impracticable. See para. III.E.9b, infra.

¹ "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 (including those of an engineering or technical nature). All advisory and assistance services are

- E. Indefinite-Quantity/Indefinite-Delivery Contracts (also called ID/IQ or Minimum Quantity Contracts). [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 CW Government Travel, Inc., B-295530 (\$2500 minimum adequate when it represented several hundred transactions in travel services); Wade Howell, d.b.a. Howell Constr. v. United States, 51 Fed. Cl. 516 (2002); 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”² per contract carrier was adequate consideration to bind the parties). If the contract contains option year(s), only the base period of performance must contain a non-nominal minimum to constitute adequate consideration. Varilease Technology Group, Inc. v. United States, 289 F.3d 795 (Fed. Cir. 2002)

classified as: Management and professional support services; Studies, analyses and evaluations; or Engineering and technical services. [FAR 2.101](#). See also [DOD Directive 4205.2, Acquiring And Managing Contracted Advisory And Assistance Services \(CAAS\) \(10 Feb. 92\)](#); as well as [AR 5-14, Management of Contracted Advisory and Assistance Services \(15 Jan. 93\)](#).

² Meaning Forty-Foot Equivalent Unit, an FEU is an industry term for cargo volumes measuring 8 feet high, 8 feet wide, and 40 feet deep.

4. The contractor is entitled to receive only the guaranteed minimum. Travel Centre v. Barram, 236 F.3d 1316 (Fed. Cir. 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; but see Community Consulting Int’l., ASBCA No. 53489, 02-2 BCA ¶31,940 (granting summary judgment on a breach of contract claim despite the government satisfying the minimum requirement). The corrected quantum must account for the amount the contractor would have spent to perform the unordered work. Bannum, Inc., DOTBCA 4452, 06-1 BCA ¶ 33,228.
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 Hermes Consolidated, Inc. d/b/a Wyoming Refining Co., ASBCA Nos. 52308, 52309, 2002 ASBCA LEXIS 11 (partial T4C with eight days left in ordering period proper) and Montana Ref. 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. 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. White v. Delta Contr. Int’l, Inc., 285 F.3d 1040, 43 (Fed. Cir. 2002) (noting that “the general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation”); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (holding the contractor was not entitled to receive the difference between the guaranteed minimum and requiring the parties to determine an appropriate quantum); AJT Assocs., Inc., ASBCA No. 50240, 97-1 BCA ¶ 28,823 (holding the contractor was only entitled to 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 Eng'g, 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 16.506(a)(4) and 16.506 (f) & (6) set 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) are 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
- (5) 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 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. Ordering periods. DFARS 217.204.
- a. The ordering period for a task or delivery order contract may be up to five years. DFARS 217.204(e)(i)(A).
 - b. Options or modifications may extend a contract, not to exceed ten years unless
 - 1. The head of the agency determines in writing that exceptional circumstances require a longer period.
 - 2. DoD must submit a report to Congress concerning any approved extensions. DFARS 217.204(e)(i)(B) & (C) and (ii).
 - c. These limitations do not apply to:
 - 1. Contracts awarded under other statutory authority.
 - 2. Advisory and assistance service task order contracts.
 - 3. Definite quantity contracts.
 - 4. GSA schedule contracts.
 - 5. Multi-agency contracts awarded by other than NASA, DoD, or the Coast Guard.
 - d. Approval is needed from the senior procurement executive before issuing any order if performance is expected more than one-year beyond the authorized limit. DFARS 217.204(e)(iv).

11. 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\(b\)](#).
 - (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 if: there is an urgent need; there is only one capable source, the order is a logical follow-on to a previously placed order, or the order is necessary to satisfy a minimum guarantee. [FAR 16.505\(b\)\(2\)](#).
 - (3) [DFARS 208.404-70](#) requires that any order off of a Federal Supply Schedule (FSS) in excess of \$100,000 be made on a competitive basis. The Contracting Officer must either: issue the notice to as many schedule holders as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that proposals will be received from at least 3 sources that offer the required work; or contact all schedule holders that offer the required work by informing them of the opportunity for award.
 - (4) [DFARS 216.505-70](#) requires any task order in excess of \$100,000 placed under a non-FSS multiple award contract (MAC) also be made on a competitive basis. All awardees that offer the required work must be provide a copy of the description of work, the basis upon which the contracting officer will make the selection, and given the opportunity to submit a proposal.

- (1) 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).
- (2) Any sole source order under the FSS or MAC requires approval consistent with the approval levels in FAR 6.304. See Memorandum, Director, Defense Procurement and Acquisition Policy, to Senior Procurement Executives & Directors of Defense Agencies, subject: Approval Levels for Sole Source Orders Under FSS and MACs (13 Sep. 04). *See also*, Chapter 5, Contract Attorneys Course Deskbook.
- (3) Protests concerning orders.
 - (a) The issuance of a task or delivery order is generally not protestable.³ Exceptions include:
 - (1) Where an agency conducts a downselection (selection of one of multiple contractors for continued performance). See Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23.

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." [10 U.S.C. § 2304c\(d\)](#). See also 4 C.F.R. § 21.5(a) (providing that the administration of an existing contract is within the purview of the contracting agency, and is an invalid basis for a GAO protest). *But see Group Seven Associates, LLC v. United States*, COFC No. 05-867C (Oct. 13, 2005) (looking at the merits and denying the protest, although noting that jurisdiction was "doubtful.")

- (2) Where an agency conducts a competition among ID/IQ contractors and arrives at its source selection using negotiated procurement procedures. CourtSmart Digital Sys., Inc., B-292995.2, B-292995.3, Feb. 13, 2004; COMARK Fed. Sys., B-278343, B-178343.2, Jan. 20, 1998.
 - (3) A competition is held between an ID/IQ contractor (or BPA holder) and another vendor. AudioCARE Sys., B-283985, Jan. 31, 2000, 2000 CPD ¶ 24.
 - (4) The order exceeds the contract's scope of work. See Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51; Symlicity Corp., B-291902, Apr. 29, 2003 (purchase order improper when it included items not part of the vendor's Federal Supply Schedule contract); Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping services beyond scope of preventive maintenance contract).
 - (5) The protest challenges the transfer to an ID/IQ contract the acquisition of services that had been previously set aside for small businesses. LBM, Inc., B-290682, Sep. 18, 2002, 2002 CPD ¶ 157.
- (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\(b\)\(5\)](#).

Discussion Problem: 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?

IV. LETTER CONTRACTS. [FAR 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. Letter contracts are also known as Undefined Contract Actions (UCA).
- 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.⁴ [10 U.S.C. § 2326](#); [DFARS 217.7404-3](#).

⁴ [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.

D. 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.](#)

E. Restrictions: Letter contracts shall not

1. Commit the Government to a definitive contract in excess of funds available at the time of contract.
2. Be entered into without competition when required.
3. Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract.

[FAR 16-603-3.](#)

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

G. The Air Force has added a Mandatory Procedure tracking UCAs and definitization schedules. Any failure to definitize within one year must be report to the Deputy Assistant Secretary of the Air Force for Contracting. [AFFARS MP5317.7404-3.](#)

V. **OPTIONS.** [FAR SUBPART 17.2.](#)

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.

B. Use of Options. [FAR 17.202.](#)

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. See FAR 17.204(e). See also 10 U.S.C. 2306b and FAR Subpart 17.1 (limiting multi-year contracts); 10 U.S.C. 2306c and FAR 17.204(e) (limiting certain service Ks); 41 U.S.C. 353(d) and FAR 22.1002-1 (limiting contracts falling under the SCA to 5 years in length); see also 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); 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 Servs., 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 Ref. 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.
 - a. The Contracting Officer may exercise an option only after determining that:

- (1) Funds are available;⁵
 - (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;⁶ 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.

2. The government must exercise the option according to its terms.

⁵ 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).

⁶ 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\(e\)](#).

- a. The government may not include new terms in the option. See 4737 Connor Co., L.L.C. v. United States, 2003 U.S. App. LEXIS 3289 (Fed. Cir. 2003) (option exercise was invalid where the Government added a termination provision not present in the base period of the contract at the time of exercise of the option); VARO, Inc., ASBCA No. 47945, 47946, 96-1 BCA ¶ 28,161 (inclusion of eight additional contract clauses in option exercise invalidated the option).
 - b. The government must follow the option mechanics in the contract to include timing of notice. See Lockheed Martin Corp. v. Walker, 149 F.3d 1377 (Fed. Cir. 1998) (Government wrongfully exercised options out of sequence); 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 board invalidated the option); and White Sands Construction, Inc., ASBCA Nos. 51875, 54029 (Apr. 16, 2004) (Exercise improper when preliminary notice of intent to exercise mailed on last day available and contractor received it after the deadline). Compare 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 Sys., 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-238597.2, 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 Adver., Inc., ASBCA No. 51075, 99-2 ¶ 30,439 (summary judgment to Government); Pennyrile Plumbing, Inc., ASBCA Nos. 44555, 47086, 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).

VI. 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 [FAR 14.104](#).
2. 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\(b\)](#).
3. Commercial items. Agencies must use firm-fixed-price contracts or fixed-price contracts with economic price adjustment to acquire commercial items. As long as the contract utilized is either a firm-fixed-price contract or fixed-price contract with economic price adjustment, however, it may also contain terms permitting indefinite delivery. [FAR 12.207](#). Agencies may also utilize award fee or performance or delivery incentives when the award fee or incentive is based solely on factors other than cost. [FAR 12.207](#); [FAR 16.202-1](#); [FAR 16.203-1](#).

B. Factors to Consider.

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 10, below).

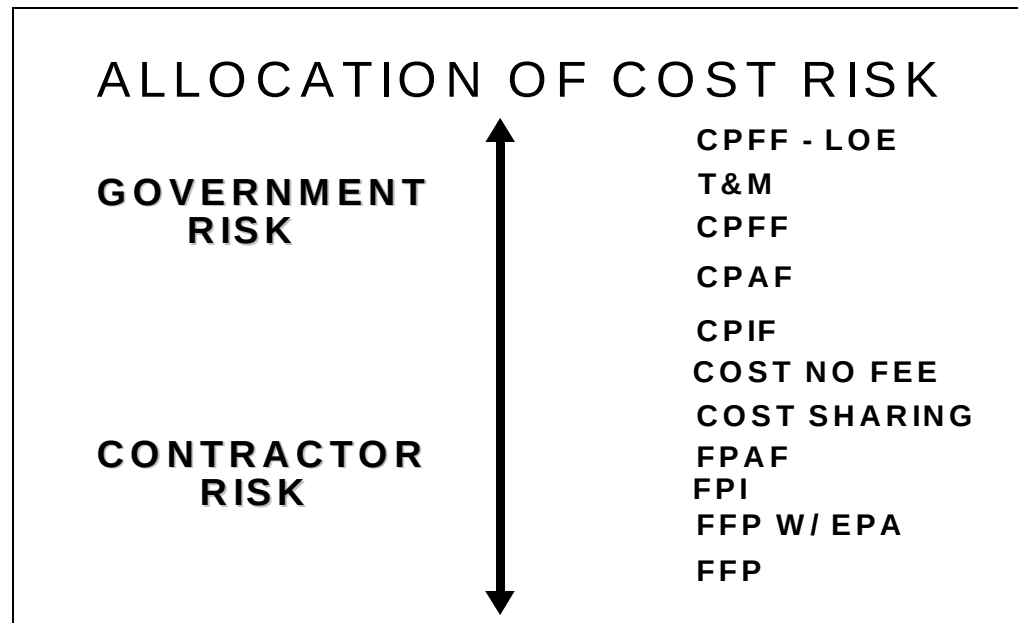


Figure 10

3. Selection of a contract type is ultimately left to the reasonable discretion of the contracting officer. Diversified Tech. & Servs. of Virginia, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 (change from cost-reimbursement to fixed-price found reasonable).
4. There are numerous factors that the contracting officer should consider in selecting the contract type. [FAR 16.104](#).
 - a. Availability of price competition.
 - b. The accuracy of price or cost analysis.

- c. The type and complexity of the requirement.
- d. Urgency of the requirement.
- 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.

- 5. 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\(c\)](#).

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

- 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. See also Alisa Corp., AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952 (finding contractor was entitled to *quantum valebant* basis of recovery where contract was determined to be an illegal CPPC contract).
- 3. Compare The Dep't of Labor-Request for Advance Decision, B-211213, Apr. 21, 1983, 62 Comp. Gen. 337, 83-1 CPD ¶ 429 (finding the contract was a prohibited CPPC) with Tero Tek Int'l, Inc., B-228548, Feb. 10, 1988, 88-1 CPD ¶ 132 (determining the travel entitlement was not uncertain so therefore CPPC was not present).
 - 4. Contract modifications. If the government directs the contractor to perform additional work not covered within the scope of the original contract, the contractor is entitled to additional fee. This scenario does not fall within the statutory prohibition on CPPC contracts. Digicon Corp., GSBGA No. 14257-COM, 98-2 BCA ¶ 29,988.

D. Performance-Based Acquisitions FAR Subpart 37.6

1. Focuses on results rather than methods (i.e. “how the work is to be accomplished or how many work hours). FAR 37.602(b)(1).
Performance-based contracts for services shall include:
 - a. A performance work statement (PWS)
 - b. Measurable performance standards *and* a method of assessing performance against those standards
 - c. Performance incentives when appropriate. FAR 37.601
2. There are two ways to generate the PWS. Either the government creates the PWS or prepares a statement of objectives (SOO) from which the contractor generates the PWS along with its offer. The SOO does not become part of the contract. The minimum elements of the SOO are:
 - a. Purpose;
 - b. Scope or mission;
 - c. Period or place of performance;
 - d. Background;
 - e. Performance objectives; and
 - f. Any operating constraints. FAR 37.602 (c).
- 3.. Depends on quality assurance plans to measure and monitor performance prepared by either the government or submitted by the contractor. FAR 37.604.

4. The ideal contract type is one that incorporate positive and/or negative performance incentives which correlate with the quality assurance plan. FPIF are useful types for performance-based contracts.
5. The DoD has a *Guidebook on Performance-Based Service Acquisitions* located at <http://www.acq.osd.mil/dpap/Docs/pbsaguide010201.pdf> . Another guide is the *Seven Steps to Performance-Based Service Acquisitions*, http://www.acquisition.gov/comp/seven_steps/home.html.

VII. CONCLUSION.

CHAPTER 7

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CHAPTER 7

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.

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 North American Industry Classification System (NAICS) 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 NAICS code selection as a matter of right to the SBA's Office of Hearings and Appeals (OHA). The appellant must exhaust the OHA appeal process before seeking judicial review in court. See 67 Fed. Reg. 47,244 (July 18, 2002).
 - c. The contracting officer need not delay bid opening or contract award pending a NAICS code appeal. See Aleman Food Serv., Inc., B-216803, Mar. 6, 1985, 85-1 CPD ¶ 277. If the SBA finds the original NAICS 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.

3. Small business certification. FAR 19.301.

- a. Self-certification. To be eligible for award as a small business, an offeror must represent, in good faith, that it is a small business at the time of the certification. Randolph 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. *But see* CMS Info. Servs., Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132 (holding that agency may properly require firms to certify their size status as of the time they submit their quotes for an indefinite delivery/indefinite quantity (IDIQ) task order).

- 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, the SBA, or another interested party (includes the contracting officer) 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. Agencies need not suspend contract action pending appeals to OHA. If an activity awards to a firm that the Area Office initially finds is “small,” the activity need not terminate the contract if the SBA OHA later reverses the Area Office’s determination. FAR 19.302(i); 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. FAR 15.503(a)(2) and FAR 19.302(d)(1); 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. Late protests (and timely protests filed after contract award) generally do not apply to the current contract. FAR 19.302(j). See Chapman Law Firm v. United States, 63 Fed. Cl. 25 (2004). 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. 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. 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. **Responsibility defined:** Prospective contractors must have adequate resources, be capable of complying with proposed delivery schedule, have a satisfactory performance record; have a satisfactory record of business integrity and ethics; have the necessary organization, experience, accountability measures, etc; have the necessary production/technical equipment/facilities; & be qualified and eligible to receive award. (FAR 9.104)

3. 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).
4. 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.
5. 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.
6. 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.
7. 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, GSBICA 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;
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 when an agency determines that a small business contractor is nonresponsible based solely on a pass/fail evaluation of the firm's past performance. See Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003. 2003 CPD ¶ 33.

D. 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; Quality Hotel Offshore, B-290046, May 31, 2002, 2002 CPD ¶ 91.
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 \$3,000 and \$100,000. FAR 19.502-2(a):
 - (a) Each acquisition that has an anticipated dollar value exceeding \$3,000, 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 reprourement 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 (SDBs). 15 U.S.C. § 637(a).

- a. By Memorandum of Understanding (MOU), 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). This MOU is no longer in effect. On 30 July 2002, DOD issued a final rule allowing it to bypass SBA and contract directly with 8(a) SDBs on behalf of the SBA. The final rule delegates only the authority to sign contracts on behalf of the SBA. The SBA remains the prime contractor on all 8(a) contracts, continues to determine eligibility of concerns for contract award, and retains appeal rights under FAR 19.810. See 67 Fed. Reg. 49255, July 30, 2002. See also DFARS 219.800(a) and FAR 19.8
- b. 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
- c. 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).
- d. The firm must have an approved business plan. 15 U.S.C. § 636(j)(10)(1).
- e. 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. § 124.504(c)(1)-(3)(2004). See Designer Assocs., B-293226, Feb. 12, 2004. 2004 ¶; C. Martin Co., Inc., B-292662, Nov. 6, 2003, CPD ¶ 2007; John Blood, B-280318-19, Aug. 31, 1998, 98-2 CPD ¶ 58; McNeil Technologies, Inc., B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40.

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 generally 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 NAICS codes or \$3 million for all other codes. See 13 C.F.R. § 124.506(a); FAR § 19.805-1(a)(2). 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., GSBICA 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, GSBICA 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.

¹. Press release highlighting agreement available at <http://ftp.sbaonline.sba.gov/news/current00/00-58.pdf>.

- (2) Agencies that buy from a Federal Supply Schedule 8(a) contractor may count the purchase toward the agency's small business goals.
- 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.

- i. The SBA has broad discretion in selecting procurements for the 8(a) program; the GAO will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of the government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3)(2004). See American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37; Comint Sys. Corp., B-274853, B-274853.2, Jan. 8, 1997, 97-2, CPD ¶ 14.

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. Cf. American Federation of Government Employees (AFL-CIO) v. United States, 195 F. Supp. 2d 4 (D.D.C. 2002) (holding that the rational basis standard is still applicable to “political” (Native-American) rather than racial classifications).
2. Post-Adarand Reactions and Initiatives. See 49 C.F.R. § 26 (2000) (current DOT regulations implementing DBE program).
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); Sherbrooke Turf Inc. v. Minn. Dep’t of Transp., 2001 U.S. Dist. LEXIS 19565 (Nov. 14, 2001).
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). Adarand Constructors, Inc., v. Slater, 228 F. 3d 1147 (10th Cir. 2000); Adarand Constructors, Inc. v. Mineta, 122 S. Ct. 511 (2001) (cert. dismissed).

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 NAICS 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. See Rothe Development Corporation v. U.S. Department of Defense, 2001 U.S. App. LEXIS 18751 (Aug. 20, 2001) (holding that the price evaluation adjustment is subject to *Adarand* “strict scrutiny” analysis).
 - 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(b)(1-2).
 - 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(a).
- 4. Protesting a representation of disadvantaged business status. FAR 19.305.
- 5. DOD's Approach.
 - a. 10 U.S.C. § 2323(e)(2), as amended by section 801 of the Strom Thurmond Defense Authorization Act of 1999 provided that the price evaluation adjustment would only apply when DOD fails to achieve its goal of awarding five percent of its total contract dollars to small disadvantaged businesses in the previous fiscal year. The price evaluation adjustment has been suspended since that time and DOD extended the suspension from Feb. 24, 2003, to Feb. 23, 2004.

6. Civilian Agencies (other than NASA and Coast Guard) suspended the price preference in December 2004. See Memorandum, Chief Acquisition Officer, U.S. Small Business Administration, to Chief Acquisition Officers and Senior Procurement Executives, subject: Suspension of Price Evaluation Adjustment for Small and Disadvantaged Business at Civilian Agencies (22 Dec 2004).
- D. HUBZone. HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592). Incorporated at FAR Subpart 19.13.
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, FAR 19.1301, *et. seq.*
 2. Benefits to HUBZone Small Business Concerns:
 - a. Price preference of 10% generally applied in acquisitions expected to exceed the simplified acquisition threshold against non-HUBZone SBCs or other small-business concerns. FAR 19.1307.
 - b. Mandatory set-aside for HUBZone SBCs where acquisition exceeds simplified acquisition threshold; and two or more HUBZone SBCs expected to compete; and award will be made at fair market price. FAR 19.1305. See also, SWR Inc., Comp. Gen. Dec. B-294266, 2004 CPD 219.
 - c. Permissive set-aside under same circumstances as para. B above where acquisition above micro-purchase threshold, but below simplified acquisition threshold. FAR 19.1305.
 3. The program applies to all federal departments and agencies that employ contracting officers. 13 C.F.R. § 126.101.
 4. 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;

- b. Principal office must be in a HUBZONE (See *Mark Dunning Industries, Inc. v. U.S.*, 64 Fed. Cl. 374 (2005) (holding that a “principal office” under HUBZone regulations can be very different than the typical company headquarters. “Principal office is where the greatest number of employees at any one location perform their work); and
 - c. At least 35 % of the SBC’s employees working on the contract must reside in the HUBZone and the concern must certify that it will attempt to maintain this percentage during the performance of any HUBZone contract.
- 5. 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.
- 6. 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.
- 7. Certification. 13 C.F.R. § 126.300. A SBC must apply to the SBA for certification.
- 8. 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.

9. 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.
 10. 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.
 11. 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.
 12. Protest Procedures. FAR 19.306; 13 C.F.R. § 126.801.
- E. 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).

F. Service Disables, Veteran Owned Small Businesses. FAR 19.14

1. FAR 19.14
2. Set-Asides authorized.
3. Sole Source awards authorized.

IV. COMPETITION ISSUES

A. Contract Bundling. FAR 2.101, Definitions; FAR 7.107.

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); USA Info. Sys., Inc., B-291417, Dec. 30, 2002, 2002 CPD ¶ 224..
2. On 26 July 2000, the SBA issued a final rule addressing contract bundling. 65 Fed. Reg. 45,831 (2000). The rule attempts to rein in bundled contracts that are too large and thus restrict competition for small businesses. Codified at 13 C.F.R. § 125.2 (2004).
3. Key parts of the new rule on contract bundling.

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.

- 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. *See e.g., Phoenix Scientific Corp.*, B-286817, Feb. 24, 2001, 2001 CPD ¶ 24.
- 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.”
- d. FAR 7.104(d)(2) requires acquisition planning to prevent “**substantial bundling**” if estimated contract order exceeds \$7 million (DoD); \$5 million (NASA, GSA, DOE); and \$2 million for all other agencies.
- e. An agency may find a bundled requirement “necessary and justified” if it will derive more benefit from bundling than from not bundling. *See TRS Research*, B-290644, Sept. 13, 2002, 2002 CPD ¶ 159.
- f. 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:
 - (1) Benefits equivalent to 10% if the contract value (including options) is \$75 million or less; or
 - (2) Benefits equivalent to 5% or \$7.5 million, whichever is greater, if the contract value (including options) is over \$75 million.
 - (3) 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.

- g. The final rule on bundling does not apply to cost comparison studies conducted under OMB Circular A-76.
 - h. The bundling rules apply to multiple awards of IDIQ contracts and to Federal Supply Schedule orders (changed in 2003).
 - i. Bundling rules do NOT apply to contracts awarded and performed entirely outside the United States.
- 4. Reference. On 17 January 2002, the Office of Small and Disadvantaged Business Utilization (now Office of Small Business Programs) released a benefit analysis guidebook that assists DoD acquisition teams considering contract bundling. Available at <http://www.acq.osd.mil/osbp/>.

B. Tiered / Cascading Set-Asides

- 1. Tiered or Cascading set-asides are set-asides where the KO informs prospective offerors that only offers from a certain socio-economic status bidder will be considered if two or more responsible offers are received from such offerors. If two or more such offers are not received, then the KO goes to a next “tier” of socio-economic status until either a class with two responsible bids at a fair market price. If no tier has two such offers, then the competition is open to all offers.
- 2. Problems.
 - a. Abdicates government’s market research responsibilities.
 - b. Places too much market research and risk on contractors who may spend bid and proposal preparation cost, and yet never have their offer considered if the competition never makes it to their tier.
- 3. **Statutory Solution.**
 - a. Section 816 of the 2007 National Defense Authorization Act provides that:

- (1) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts.
- (2) Elements.--The guidance prescribed under subsection (a) shall include a prohibition on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract unless the contracting officer—
 - (a) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;
 - (b) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and
 - (c) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

- b. 71 Fed.Reg. 53042, sets out DFARS Interim Rule to implement the Act (effective date 8 September 2006).

V. THE RANDOLPH-SHEPPARD ACT

A. REFERENCES

1. The Randolph-Sheppard Act for the Blind 20 U.S.C. §§ 107-107f.
2. U.S. DEPT. OF DEFENSE, DIRECTIVE 1125.3, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (7 Apr. 1978) [hereinafter DOD DIR. 1125.3]

3. 34 C.F.R. Part 395, Vending Facility Program for the Blind on Federal Property (Department of Education).
4. 32 C.F.R. Part 260, Vending Facility Program for the Blind on Federal Property (Department of Defense).
5. Gaydos, *The Randolph-Sheppard Act: A Trap for the Unwary Judge Advocate*, ARMY LAW. Feb. 1984, at 21.

B. History of the RSA.

1. Purpose. The purpose of the Randolph-Sheppard Act was to provide blind persons with remunerative employment, enlarge the economic opportunities of the blind, and stimulate the blind to greater efforts in making themselves self-supporting. 20 U.S.C. § 107a.
2. Original Act. Act of June 20, 1936, Pub. L. No. 732, 49 Stat. 1559.
 - a. The purpose of the Act was for federal agencies to give blind vendors the authorization to operate in federal buildings.
 - b. The Act gave agency heads the discretion to exclude blind vendors from their building if the vending stands could not be properly and satisfactorily operated by blind persons.
 - c. Location of the stand, type of stand and issuing the license were all subject to approval of the federal agency in charge of the building.
 - d. Office of Education, Department of Interior, was designated to administer the program, and could designate state commissions or agencies to perform licensing functions. Department of Education Regulations appear to take precedence over other agency regulations in the event of a conflict.
61 Fed. Reg. 4,629, February 7, 1996.
3. The 1954 Amendments. Act of Aug. 3, 1954, Pub. L. No. 565m, 68 Stat. 663 (1954).

- a. The invention of vending machines served as an impetus to re-examine the Act. The amendments also showed concern for expanding the opportunities of the blind.
 - b. The amendments made three main changes to the act:
 - (1) The vending program was changed from federal *buildings* to federal *properties*. Federal property was defined as “any building, land, or other real property owned, leased, or occupied by any department or agency of the United States.” The Act applies to all federal activities—whether appropriated or nonappropriated activities.
 - (2) Agencies were required to give blind persons a preference, so far as feasible, when deciding who could operate vending stands on federal property.
 - (3) This preference was protected by requiring agencies to write regulations assuring the preference.
 - c. The “so far as feasible” language still gave agencies wide discretion in administering the Act, and reality fell far short of Congressional intent to expand the blind vending program.
- 4. The 1974 Amendments. Act of Dec 7, 1974, Pub. L. No. 516, 88 Stat. 1623 (1974).
 - a. Impetus—the proliferation of automatic vending machines and lack of enthusiasm for the Act by federal agencies.
 - b. Comptroller General study showcased the abuses and ineffectiveness of the Act. Review of Vending Operations on Federally Controlled Property, Comp. Gen. Rpt. No. B-176886 (Sept. 27, 1973).

C. Current Act

- 1. The current RSA imposes several substantive and procedural controls. The Act mandated three main substantive provisions:

- a. Give blind vendors priority on federal property;
 - b. New buildings to include satisfactory sites for blind vendors; and
 - c. Require paying some vending machine income to the blind.
2. Priority to Blind Vendors.
- a. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency. 20 U.S.C. § 107(b).
 - b. The Secretary of Education, the Commissioner of Rehabilitative Services Administration, and the federal agencies shall prescribe regulations which assure priority.
 - c. Vending facilities are defined as “automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment...[which is]...necessary for the sale of articles or services...and which may be operated by blind licensees.” 20 U.S.C. § 107e(7).
 - (1) Vending facilities typically sell newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises, and include the vending or exchange of chances for any State lottery. 20 U.S.C. § 107a(a)(5). See, e.g., Conduct on the Pentagon Reservation, 32 C.F.R. Parts 40b and 234, para. 234.16, exempting sale of lottery tickets by Randolph-Sheppard vending facilities from the general prohibition of gambling.
 - (2) Vending machines are defined as coin or currency operated machines that dispense articles or services, except for items of a recreational nature, such as jukeboxes, pinball machines, electronic game machines, pool tables, and telephones. 32 C.F.R. § 260.6(q).

- (3) The Act's definition of vending facilities lumps vending machines, vending stands, and cafeterias into the same definition. Despite this single definition, DOD once treated vending machines and vending stands much differently from cafeteria operations.
- (4) Opportunities regarding vending machines and stands are the burden of the State Licensing Agency (SLA). The SLA must seek out and apply for a permit. The installation has no affirmative obligation until the permit request is received. Once received, the blind vendor has priority unless the interests of the U.S. are adversely affected.³

D. Arbitration Procedures

- 1. Arbitration procedures. Two roads to arbitration:
 - a. Grievances of Blind vendors. A dissatisfied blind vendor may submit a request to the SLA for a full evidentiary hearing on any action arising from the operation or administration of the vending facility program. 20 U.S.C. § 107d-1. If the blind vendor is dissatisfied with the decision made by the SLA, the vendor may file a complaint with the Secretary of Education who shall convene a panel to arbitrate the dispute.

³ The DOD regulation, 32 CFR § 260.3(i), requires notification to the SLA at least 60 days prior to the intended acquisition, alteration, or renovation of agency buildings. Opportunities regarding cafeterias must be solicited by sending the SLA a copy of each solicitation. If the proposal is not within the competitive range, the award may be made to another offeror. If the submitted proposal is within the competitive range, the blind vendor receives the contract unless the award adversely affects the interests of the U.S., or if the vendor does not have the capacity to operate a cafeteria in such a manner as to provide food service at a comparable cost and quality as other providers.

- b. Complaints by the SLA. SLA may file a complaint with the Secretary of Education if it determines that the agency is failing to comply with the Randolph-Sheppard Act or its implementing regulations. Upon filing of such a complaint the Secretary convenes a panel to arbitrate. The panel's decision is final and binding on the parties, except that appeal may be made under the Administrative Procedure Act. 20 U.S.C. § 107d-1(b) and 20 U.S.C. § 107d-2(a). **NOTE:** The arbitration procedures do not provide the blind vendors with a cause of action against any agency. The blind vendors have an avenue to complain of wrongs by the SLA. The SLA has a forum to complain against a federal agency, which it believes is in violation of the act.

E. Protests to the Government Accountability Office

- 1. Relationship to the Small Business Act's 8(a) Provisions. The requirements of the Randolph-Sheppard Act take precedence over the 8(a) program. Triple P. Services, Inc., Recon., B-250465.8, December 30, 1993, 93-2 CPD ¶ 347 (denying challenge to agency's decision to withdraw and 8(a) set aside and to proceed under the Randolph-Sheppard Act). But see Intermark, B-290925, Oct. 23, 2002 (holding that the Army improperly withdrew a small-business set-aside solicitation for food services at Fort Rucker and reissued a solicitation for RSA businesses. GAO recommended a "cascading" set of priorities whereby competition is limited to small business concerns, with the SLA receiving award if its proposal is found to be within the competitive range).
- 2. Protest by State Licensing Agency. The GAO will not consider a protest lodged by an SLA, because binding arbitration is the appropriate statutory remedy for the SLA. Mississippi State Department of Rehabilitation Services, B-250783.8, Sept. 7, 1994 (unpub).

F. Controversial Issues

- 1. Burger King and McDonald's restaurants on military installations. AAFES Burger King and McDonald's franchise agreements violated two provisions of the Randolph-Sheppard Act:
 - a. DOD failed to notify state licensing agencies of its intention to solicit bids for vending facilities, and

- b. DOD's solicitation for nationally franchised fast food restaurants constituted a limitation on the placement or operation of a vending facility. DOD violated the Randolph-Sheppard Act by failing to seek the Secretary of Education's approval for such limitation.
- c. Arbitration Panel's remedy:
 - (1) AAFES must contact the SLA in each state with a Burger King facility to establish a procedure acceptable to the SLA for identifying, training, and installing blind vendors as managers of all current and future Burger King operations. Additionally, DOD should give the SLA 120 days written notice of any new Burger King operations.
 - (2) AAFES will provide the appropriate SAL with 120 days notice of any new McDonald's facility. The SLA must determine whether it wishes to exercise its priority and to provide funds to build and operate a new McDonald's facility. 60 Fed. Reg. 4406, January 23, 1995. See also Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (Fed. Cir. 1986). SLA sued protesting contracts between AAFES and Burger King, and the Navy Exchange Service and McDonald's. The court remanded to the District Court with an order to dismiss, because the SLA had failed to exhaust administrative remedies.

G. Applicability to Military Mess Hall Contracts.

- 1. The Government Accountability Office has determined that the Randolph-Sheppard Act applies to military dining facilities. In doing so, the GAO focused on the regulatory definition of "cafeteria." In addition the GAO gave significant weight to the regulatory interpretation of the Department of Education and to interpretations by certain high level officials within DOD. Department of the Air Force—Reconsideration, B-250465.6, June 4, 1993, 93-1 CPD ¶ 431. The applicability of the Randolph-Sheppard Act to mess halls remains a topic of considerable debate.
- 2. In NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001), the Fourth Circuit affirmed a District Court holding that the Act applied to military "mess hall services." Court relied heavily on the DOD position that Randolph-Sheppard applies.

3. In Automated Comm'n Sys., Inc. v. United States, 49 Fed. Cl. 570 (2001), the Court of Federal Claims (COFC) refused to hear a challenge to the validity of DOD Directive 1125.3, which mandated the RSA preference for dining facility contracts. COFC concluded that only federal district courts may hear a challenge to the validity of procurement statutes and regulations under their federal question and declaratory judgment authorities. COFC also held that the more specific RSA preference takes precedence over less-specific statutes, specifically, the HUBZone preference.

VI. 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 25.003.
 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 25.103(b); 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 25.103(a). 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 25.4; 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., GSBGA 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 225.401-70. 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, 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.
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 225.401-70.
 5. The Caribbean Basin Economic Recovery Act authorizes the purchase. 19 U.S.C. §§ 2701-05; FAR 25.400.

6. The product is for use outside the United States. 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 25.105; DFARS 225.103(c); FAR 225.5. 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 225.502.
 - 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 25.103.
4. Application of the restriction. The restriction applies to the material in the form that the contractor brings it to the construction site. 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 25.206.
 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*.
- H. The Berry Amendment. 10 U.S.C.S. § 2533a (LEXIS 2006). The “Berry Amendment” is a 65-year-old American industrial protectionist law that required DOD to buy certain listed items only from domestic sources. The statute is more draconian in its requirements than the Buy American Act because the Berry Amendment contains fewer exceptions.
 1. Among the listed items under the Berry Amendment are: food; clothing, and material components, thereof; tents, cotton and other natural fiber products, canvas, or wool; specialty metals (deleted, and re-inserted under specific criteria in FY 07 NDAA); and hand and measuring tools.

2. The Beret Saga. See 43 THE GOV'T CONTRACTOR 18 at ¶ 191 (Associate Professor Stephen L. Schooner, George Washington University Law School, and Judge Advocate (USAR), discussing the purchase of berets.
3. Result of beret saga: Berry Amendment amended so that only Service Secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority.
4. The National Defense Authorization Act of 2007 added section 2533b, to title 10.⁴ The new law follows immediately the traditional Berry Amendment provisions at 10 U.S.C. §2533a. The new provisions, titled "Requirement to buy strategic materials critical to national security from American sources; exceptions," deletes "specialty metals" from the listed items in § 2533a and creates a whole new section to address specialty metals. The new section provides that the use of appropriated funds may not be used to purchase the following end items, *or components thereof*, containing specialty metal not melted or produced in the United States: aircraft; missile and space systems; ships; tank and automotive items; weapon systems; ammunition; or specialty metals themselves that are purchased by DOD or a prime DOD contractor.⁵
5. The new law provides exceptions for some purchases including: procurements of commercially available electronic components whose specialty metal content is *de minimis* compared to the value of the overall item; procurements under the simplified acquisition threshold; procurements outside the United States in support of combat or contingency operations; procurements where purchase under other than competitive procedures has been approved for urgent and compelling urgency; and procurements where the Secretary of Defense or a military department determines that "compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed."⁶

⁴ *Id.*

⁵ *Id.* (emph. added). The Act defines specialty metals to include steel, nickel, iron-nickel, cobalt based alloys, titanium, and zirconium. *Id.* U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 252.225-7014 (July 1, 2006) [hereinafter DFARS] also contains certain restrictions on the use of proper specialty metals on DOD contracts.

⁶ National Defense Authorization Act for FY 2007, § 842, Pub. L. 364, 120 Stat. § 2083 (2006).

VII. CONCLUSION.

CHAPTER 8

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Chapter 8

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 Marine Corps Acquisition Regulation Supplement (NMCARS), 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.
- 3. Standard Form 30 - Amendment of Solicitation; Modification of Contract.

- B. Specifications.
 - 1. Clear, complete, and definite.
 - 2. Minimum needs of the government.
 - 3. Preference for Commercial Items. FAR 12.000 and FAR 12.101(b).
- C. Definition. “Offer” means “bid” in sealed bidding. FAR 2.101.
- 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 2.101. See generally Far Subpart 6.1.
- B. Methods of Soliciting Potential Bidders. FAR 5.101; FAR 5.102. DoD uses three primary methods to promote competition: the Government Point of Entry, Solicitation or Bidders Mailing Lists, and copies of the solicitations posted in public places.
 - 1. Government Point of Entry (GPE) <http://www.fedbizopps.gov>. FAR Subpart 5.2. The contracting officer may not issue a solicitation until at least 15 days after publication in the GPE. Further, when synopsis in the GPE 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. Solicitation Mailing Lists (Bidders Mailing Lists). FAR 14.205.
 - a. Prior to 25 August 2003. Contracting activities previously developed sources through the use of the SML. Such lists consisted of firms known to supply particular goods or services. When a requirement existed for an item for which a SML exists, the contracting agency would send copies of the IFB to firms on the list. Failure to solicit a contractor that requested to be included on the list could require resolicitation. Applied Constr. Technology, B-251762, May 4, 1993, 93-1 CPD ¶ 365. If the SML was excessively long, the contracting officer could rotate portions of the list for separate acquisitions. The rules required the contracting officers to use a different portion of large lists for separate acquisitions, solicit any contractor added to the list since the last solicitation, (Holiday Inn, Inc., B-249673-2, Dec. 22, 1992, 92-2 CPD ¶ 428), and solicit 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).
 - b. **Effective 25 August 2003**, the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council eliminated the SML and the applicable form, the Standard Form 129 (SF 129). The Central Contract Registry, "a centrally located, searchable database, accessible via the Internet," is a contracting officer's "tool of choice for developing, maintaining, and providing sources for future procurements." FedBizOpps.gov, "through its interested vendors list, has the capability to generate a list of vendors who are interested in a specific solicitation." Federal Acquisition Regulation; Elimination of the Standard Form 129, Solicitation Mailing List Application, 68 Fed. Reg. 43,855 (July 24, 2003).
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 sustained 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 Gebäudereinigungsgesellschaft, 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 14.301.

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. FAR 12.208(c). 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 14.201-6(j) & 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. 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). J. L. Malone & Associates, B-290282, July 2, 2002, (receipt of a bid by a contractor, at the direction of the contracting officer, satisfied receipt and control by the government).
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. Consideration of the bid would not compromise the integrity of the competitive procurement system. See Richards Painting Co., B-232678, Jan. 25, 1989, 89-1 CPD ¶ 76 (late bid should be considered when bid **opening** room was in a different location than bid **receipt** room, protestor arrived at bid **receipt** location before the time set for bid opening, the room was locked, there was no sign directing bidder to the bid opening room and protestor arrived at bid opening room 3 minutes late). See also, 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); but see Able 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(b)(2); 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)(1). See Para. VII.G, infra.

3. Transmission of modifications or withdrawals of bids. FAR 14.303 and FAR 52.214-7(e).
 - 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.
2. Award made on basis of lowest price offered.
3. Evaluating Bids with Options. Evaluate bid prices by adding the total price of the options to the price of the basic requirement, unless such an evaluation is not in "the government's best interests". FAR 17.206. Kruger Construction Inc., Comp. Gen. B-286960, Mar. 15, 2001, 2001 CPD ¶ 43 (not in the government's best interests to add two option prices when options were alternative). See also, TNT Industrial Contractors, Inc., B-288331, Sep. 25, 2001, 2001 CPD ¶ 155.

4. 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).

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. Tel-Instrument Electronics Corp. 56 Fed. Cl. 174, Apr. 8, 2003, (a bid conditioned on the use of equipment not included in the solicitation, requiring special payment terms, or limiting its warranty obligation modifies a material requirement and is nonresponsive); New Shawmut Timber Co., Comp. Gen. B-286881, Feb. 26, 2001, 2001 CPD ¶ 42 (blank line item “rendered the bid equivocal regarding whether [protestor] intended to obligate itself to perform that element of the requirement.” Bid was nonresponsive.) 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). All Seasons Construction, Inc. v. United States, 55 Fed. Cl. 175 (2003), (All documents accompanying a bid bond, including the power of attorney appointing the attorney-in-fact, must unequivocally establish, at bid opening, that the bond is enforceable against the surety).
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.

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 committed 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. FAR 14.404-2(b). 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). 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 Env'tl. 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, GSBICA 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. Interstate Rock Products, Inc. v. United States, 50 Fed. Cl. 349 (2001) (COFC seconded a long line of GAO decisions holding that “the penal sum [of a bid bond] is a material term of the contract (the bid bond) and therefore its omission is a material defect rendering the bid nonresponsive); Schrepfer Industries, Inc., B-286825, Feb. 12, 2001, 01 CPD ¶ 23 (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). But see, FAR 28.101-4(c) (setting forth nine exceptions to the FAR’s general requirement to reject bids with noncompliant bid guarantees) and South Atlantic Construction Company, LLC., Comp. Gen. B-286592.2, Apr. 13, 2001, 2001 CPD ¶ 63.

 - 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., B234685, 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). Great Lakes Dredge & Dock Company, B-290158, June 17, 2002, 2002 CPD ¶ 100 (the terms of the solicitation cannot convert a matter of responsibility into one of responsiveness).
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. 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 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. See 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 supplemental 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 bid is clearly based on the IFB as amended, or the amendment is a matter of form or has a negligible impact on the cost of contract performance. 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, 01 CPD ¶ 13 (amendments “clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged.” Amendment revising inaccurate information in bid schedule regarding number, types of, and response times applicable to service calls was material;); Environmediation Srvc., 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); Lumus Construction, Inc., B-287480, June 25, 2001, 2001 CPD ¶ 108 (Where an “amendment does not impose any legal obligations on the bidder different from those imposed by the original solicitation,” the amendment is not material); Jackson Enterprises, Comp. Gen. B-286688, Feb. 5, 2001, 2001 CPD ¶ 25; 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.

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); C-Cubed Corporation, B-289867, Apr. 26, 2002, 2002 CPD ¶ 72 (agency may cancel a solicitation after bid opening if the IFB fails to reflect the agency’s needs).
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; Chenga Management, B-290598, Aug. 8, 2002, 02-1 CPD ¶ 143 (specifications that are impossible to perform provide a basis to cancel the IFB after bid opening).
 - 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 Baker Support Servs., Inc.; Mgmt. Technical Servs., Inc., B-256192.3, Sept. 2, 1994, 95-1 CPD ¶ 75; Ryon, Inc., B-256752.2, Oct. 27, 1994, 94-2 CPD ¶ 163.
4. Before canceling 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.

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 may be 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 that are **NOT** correctable.
 - a. Errors in judgment. 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. 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). 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 rescission 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. 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; 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); 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).
 - (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). Will H. Hall and Son, Inc. v. United States, 54 Fed. Cl. 436 (2002), (a contractor's 'careless' reliance on a subcontractor's quote that excluded a price for a portion of the work solicited is a correctable mistake).
 - (b) Bidder can refer to such things as: (i) bidder's file copy of the bid; (ii) original work papers; (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 14.407-3(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) Withdrawal rather than correction 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.

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. Bender Shipbuilding & Repair Company v. United States, 297 F.3d 1358 (Fed. Cir. 2002), (upholding contracting officer's determination that awardee was responsible even though awardee filed for Chapter 11 Bankruptcy reorganization); Global Crossing telecommunications, Inc., B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102 (upholding contracting officer's determination that a prospective contractor who filed for Chapter 11 was not responsible).
 - (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; Soft 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 nonresponsibility determination where moving contractor had previously failed to conduct pre-move 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, 01 CPD ¶ 12 (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 (excluding construction) exceeding \$10 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 9.502(c); 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. Prior to 1 January 2003, GAO would 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. The GAO amended its Bid Protest Regulations and now will consider a protest challenging that the definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 67 Fed. Reg. 79,833 (Dec. 31, 2002). See Impresa Construzioni Geom. Domenico Garufi, 52 Fed. Cl. 421 (2002) (finding the contracting officer failed to conduct an independent and informed 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 14.408-1(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 52.214-22; 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.

IX. CONCLUSION.

CHAPTER 9
NEGOTIATIONS

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CHAPTER 9
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. Background.

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 the 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.

	<u>Sealed Bidding</u>	<u>Negotiations</u>
<u>Evaluation Criteria</u>	Price and Price-Related Factors	Price and Non-Price Factors
<u>Responsiveness</u>	Determined at Bid Opening	N/A
<u>Responsibility</u>	Based on Pre-Award Survey; SBA May Issue COC	May be Evaluated Comparatively Based on Disclosed Factors
<u>Contract Type</u>	FFP or FP w/EPA	Any Type
<u>Discussions</u>	Prohibited	Required (Unless Properly Awarding w/o

		Discussions)
<u>Right to Withdraw</u>	Firm Bid Rule	No Firm Bid Rule
<u>Public Bid Opening</u>	Yes	No
<u>Flexibility to Use Judgment</u>	None	Much
<u>Late Offer/Modifications</u>	Narrow Exceptions	Narrow Exceptions
<u>Past Performance</u>	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. The Army's Source Selection Guide is available at: <http://www.amc.army.mil/amc/rda/rda-ap/docs/assg-2001.pdf>.
 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. Env'tl. & 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. While procuring agencies are required to identify the significant evaluation factors and subfactors, they are not required to identify the various aspects of each factor which might be taken into account, provided that such aspects are reasonably related to or encompassed by the RFP's stated evaluation criteria. NCLN20, Inc., B-287692, July 25, 2001, 2001 CPD ¶ 136.
- e. 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 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 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. The government must also consider quality in every source selection. See FAR 15.304(c)(2).
 - (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' 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) The OFFP publishes [A Guide to Best Practices for Past Performance](http://www.whitehouse.gov/omb/procurement/contract_perf/best_practice_re_past_perf.html), May 2000 (available at http://www.whitehouse.gov/omb/procurement/contract_perf/best_practice_re_past_perf.html). The Office of the Under Secretary of Defense for Acquisition, Technology and Logistics issues [A Guide to Collection and Use of Past Performance Information](https://apps.altess.army.mil/ppims/prod/common/DI/SAPPIDeskbookJul03.pdf) (available at <https://apps.altess.army.mil/ppims/prod/common/DI/SAPPIDeskbookJul03.pdf>). The Air Force also has a very good [Past Performance Evaluation Guide](https://www.safaq.hq.af.mil/contracting/affars/5315/informational/IG5315.305(a)(2).doc) (available at [https://www.safaq.hq.af.mil/contracting/affars/5315/informational/IG5315.305\(a\)\(2\).doc](https://www.safaq.hq.af.mil/contracting/affars/5315/informational/IG5315.305(a)(2).doc)).
- (2) FAR Requirements. 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.
 - (b) On January 29, 1999, the Director of Defense Procurement issued a class deviation. DAR Tracking Number: 99-O0002. For the Department of Defense, past performance is mandatory only for the following contracts:
 - (i) Systems & operation support > \$5 million.
 - (ii) Services, information technology, or science & technology > \$1 million.
 - (iii) Fuels or health care > \$100,000.
 - (c) The contracting officer may make a determination that past performance is not an appropriate evaluation factor even if the contract falls in either category (a) or (b).

- (d) 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.

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) DOD 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 52.219-9, Small Business Subcontracting Plan (see FAR 19.708; see also FAR 15.304(c)(4)), 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 weights¹ 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.

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.

¹ On 5 March 2001, Mr. Elgart, Acting Deputy Assistant Secretary of the Army (Procurement), issued a memorandum prohibiting the use of numerical weighting to evaluate proposals in the Army. Numerical weighting is no longer an authorized method of expressing the relative importance of factors and subfactors. Evaluation factors and subfactors must be definable in readily understood qualitative terms (i.e., adjectival, colors, or other indicators, but not numbers). See AFARS 5115.304(b)(2)(iv).

- (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.
 - (a) Used only when requirements are clearly defined and risk of unsuccessful performance is minimal
 - (b) Technical factors are “Go”/”No Go”.
 - (c) A cost technical tradeoff is not permitted; award will go to the lowest price offer which means the minimum technical standards. FAR 15.101-2.
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 options unless the agency 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. Exchanges with Industry before Receipt of Proposals. The FAR encourages the early exchange of information among all interested parties to improve the understanding of the government’s requirements and industry capabilities, provided the exchanges are consistent with procurement integrity requirements. See FAR 15.201. There are many ways an agency may promote the early exchange of information, including:

1. industry/small business conferences;
2. draft RFPs;
3. requests for information (RFIs);
4. site visits.

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. But see FAR 12.603 and FAR 5.203, for streamlined requirements for commercial items.

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. See FAR 15.206(g).
- (3) Timing:
 - (a) Before established time and date for receipt of proposals, amendment goes to all parties receiving the solicitation. FAR 15.206 (b).

(b) After established time and date for receipt of proposals, amendment goes to all offerors that have not been eliminated from the competition. FAR 15.206 (c).

(4) If the change is so substantial to exceed what prospective offerors reasonable could have anticipated, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. FAR 15.206 (e).

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 the solicitation, even if the offer pre-dates the solicitation. STG Inc., B-285910, 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, it must notify offerors and allow sufficient time to submit new proposals 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. *Haskell Company*, B-292756, Nov. 19, 2003, 2003 CPD ¶ 202 (key is whether the government could verify that a timely proposal was submitted).

- (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. See FAR 14.304.

- 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 before award. 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. Lost proposals. The GAO will only recommend reopening a competition if a lost proposal is the result of systemic failure resulting in multiple or repetitive instances of lost information. Project Resources, B-297968, 2006 U.S. Comp. Gen. LEXIS 58, (Mar. 31, 2006)
- 6. 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. When oral presentations are required, the solicitation shall provide offerors with sufficient information to prepare them. FAR 15.102(d). The following are examples of info that may be put into the solicitation:
 - (1) The types of information to be presented orally and the associated evaluation factors that will be used;
 - (2) The qualifications for personnel required to provide the presentation;
 - (3) Requirements, limitations and / or prohibitions on supplemental written material or other media;
 - (4) The location, date, and time;

- (5) Time restrictions; or
- (6) Scope and content of exchanges between the Government and the offeror, to include whether or not discussions will be permitted. *Id.*

- b. The FAR does not require a particular method of recording what occurred during oral presentations, but agencies must maintain a record adequate to permit meaningful review. See Checchi & Co. Consulting, Inc., B-285777, Oct. 10, 2000, 2001 CPD ¶ 132.
- c. Offerors must reduce their oral presentations to writing where they include material terms and conditions.

7. 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.

- 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 (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. On 1 April 2002, the Office of Federal Procurement Policy instructed all federal agencies that the "filing of protests, the filing of claims, or the use of Alternative Dispute Resolution, must not be considered by an agency in either past performance or source selection decisions."²
- i. A "cost/technical trade-off" evaluation requires evaluation of differences in technical merit beyond RFP's minimum requirements. See Johnson Controls World Servs., Inc.; Meridian Mgmt., B-281287.5; B-281287.6; B-281287.7, June 21, 1999, 2001 CPD ¶ 3.
- j. In reviewing protests against allegedly improper evaluations, the GAO will examine the record to determine whether the agency's evaluation was reasonable and in accordance with the solicitation's stated evaluation criteria. MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8.

2. Evaluating Cost/Price.

- 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.

² Memorandum, Angela B. Styles, Administrator, Office of Federal Procurement Policy, to Senior Procurement Executives, subject: Protests, Claims, and Alternative Dispute Resolution (ADR) as Factors in Past Performance and Source Selection Decisions (Apr. 1, 2002).

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 RFP 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 Futures 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).

³ Probable cost is the proposed cost adjusted for cost realism.

- (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) Agencies should also reconcile differences between the cost realism analysis and the technical evaluation scores. Information Ventures, Inc., B-297276.2; B-297276.3; B-297276.4, 2006 U.S. Comp. Gen. LEXIS 47 (Mar. 1, 2006) (agency praised technical proposal’s “more than adequate” staffing while lowering hours of program director because of “unrealistic expectations.”).
 - e. Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. A price reasonableness analysis can be difficult for indefinite quantity contracts. An agency can use historical data to develop estimates for delivery items in the ID/IQ contract. R&G Food Service, Inc., d/b/a Port-A-Pit Catering, Comp. Gen. B-296435.4, B-296435.9, Sept. 15, 2005; 2005 CPD ¶194. Another method is to construct notional or hypothetical work orders. Dept. of Agriculture—Reconsideration, 2005 CPD ¶ 51.
3. Scoring Technical and Management Factors. See FAR 15.305(a).

- 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. An agency may adopt any 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.⁴ 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).

⁴ See supra note 1 for Army policy regarding use of numerical scoring.

- (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 when performing technical evaluation. 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.
 - e. Ratings are merely guides for intelligent decision making in the procurement process. See Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281281.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11. The focus in the source selection decision should be the underlying bases for the ratings, considered in a fair and equitable manner consistent with the terms of the RFP. See Mechanical Equipment Company, Inc., et al., B-292789.2, *et al.*, Dec. 15, 2003.
4. Evaluating Past Performance or Experience. See John Brown U.S. Servs., Inc., B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 (comparing the evaluation of past performance and past experience). See also the OFFP, DoD, and AF guidance, supra at III (B)(2)(c)(1)(c).
- a. Using the Experience of Others. Agencies may attribute the past performance or experience of parents, affiliates, subsidiaries, officers, and team members, although doing so can be difficult. See U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, 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 Galetton 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 Bros. 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. The GAO also sustained a protest in which the past performance evaluation merely averaged scores derived from the past performance questionnaires without additional analysis of the past performance data. Clean Harbors Environmental Services, Inc., Comp. Gen. B-296176.2, December 9, 2005, 2005 CPD ¶222.
- 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.

- g. The Air Force has issued a guide on Performance Price Tradeoffs dated May 2005 which can be found at <https://www.safaq.hq.af.mil/contracting/affars/5315/informational/archive/ppt-guide-may05.doc>.
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 Myers Investigative and Security Services, Inc., B-288468, Nov. 8, 2001, 2001 CPD ¶ 189 (finding unreasonable an award based on the agency's unequal treatment in assessing the past performance of the protestor and awardee).
 6. Products of the Evaluation Process.
 - a. Evaluation Report.
 - (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 not 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.
 - 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).
- 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 to 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) The parties' actions control the determination of whether "discussions" have been held and not the characterization by the agency. See Priority One Services, Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 (finding "discussions" occurred where awardee was allowed to revise its technical proposal, even though the source selection document characterized the communication as a "clarification").

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 amendment. 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).

- 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. FAR 15.306(b)(2) and (3).
 - 4. The parties, however, cannot use communications to permit an offeror to revise its proposal. FAR 15.306(b)(2).
 - 5. The contracting officer must communicate with offerors who will be excluded from the competitive range because of adverse past performance information. Such communications must give an offeror an opportunity to respond to adverse past performance information to which it has not previously had an opportunity to respond. FAR 15.306(1)(i).
 - 6. The contracting officer may also communicate with offerors who are neither clearly in nor clearly out of the competitive range. FAR 15.306(b)(1)(ii). The contracting officer may address “gray areas” in an offeror’s proposal (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes). FAR 15.306(b)(3).
- J. Establishing the Competitive Range. FAR 15.306(c).
- 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 (or SSA) 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.
 - 3. 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.
 - 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).
4. 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. See FAR 15.306(c)(2).
 - 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, 1990, 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. In the past, agencies generally included any proposal in the competitive range that had a reasonable chance of receiving award. With the FAR rewrite in 1997, the drafters intended to permit a competitive range more limited than under the “reasonable chance of receiving award” standard. See SDS Petroleum Prods., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59.
5. 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:
 - 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.
6. The contracting officer must continually reassess the competitive range. If after discussions have begun, an offeror is no longer considered to be among the most highly rated, the contracting officer may eliminate that offeror from the competitive range despite not discussing all material aspects in the proposal. The excluded offeror will not receive an opportunity to submit a proposal revision. FAR 15.306(d)(5).
7. Common Errors.
 - a. Reducing competitive range to one proposal. A competitive range of one is not “per se” illegal or improper. See Clean Svs. 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.

- 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 ManTech Telecomm & Info. Sys.Corp., 49 Fed. Cl. 57 (2001).
 - (2) The concept of “responsiveness” is incompatible with the concept of a competitive range. See Consolidated Controls Corp., B-185979, Sept. 21, 1976, 76-2 CPD ¶ 261.

K. Conducting Discussions. FAR 15.306(d).

- 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). See Cherokee Info. Sys., B-287270, April 12, 2001, 2001 CPD ¶ 61 (citing The Pragma Group, B-255236, et al., Feb 18, 1994, 94-1 CPD ¶ 124).
 - c. At a minimum, the contracting officer must notify each offeror in the competitive range of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had the opportunity to respond. FAR 15.306(d)(3). But see FAR 15.306(d)(5) (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 15.001. 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 Encon Mgmt., Inc., B-234679, June 23, 1989, 89-1 CPD ¶ 595 (business experience).
- (d) The contracting officer does not have to 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 15.001. 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).
 - (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").
 - (d) The contracting officer does not have to inform offeror that its cost/price is too high where the agency does not consider the price unreasonable or a significant weakness or deficiency. See JWK Int'l Corp. v. United States, 279 F.3d 985 (Fed. Cir. 2002); SOS Interpreting, Ltd., B-287477.2, May 16, 2001, 2001 CPD ¶ 84.
- (3) Other Aspects of an Offeror's Proposal. Although the FAR used to require contracting officers to discuss other material aspects, the rule now is that contracting officer are "encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award (emphasis added). FAR 15.306(d)(3)

- 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).
- e. An agency is not obligated to spoon-feed an offeror. ITT Fed. Sys. Int'l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7.
- f. An agency is not obligated to conduct successive rounds of discussions until all proposal defects have been corrected. OMV Med., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61 at 4.

3. Limitations on Exchanges.

- a. FAR Limitations. 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.⁵
 - (3) The agency may not reveal an offeror's prices without the offeror's permission.
 - (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).

⁵ This prohibition includes any information that would compromise an offeror's intellectual property (e.g., an offeror's unique technology or an offeror's innovative or unique use of a commercial item). FAR 15.306(e)(2).

- 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.
- (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. Technical transfusion involves the government disclosure of one offeror's proposal to another to help that offeror improve its proposal.
 - (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) The government's estimated price will not be disclosed in the RFP.⁶ FAR 15.306(e)(3) allows discussion of price. See National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.

⁶ In the area of construction contracting the FAR requires disclosure of the magnitude of the project in terms of physical characteristics and estimated price range, but not a precise dollar amount (i.e. a range of \$100,000 to \$250,000). See FAR 36.204.

- (i) 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. FAR 15.306(e)(3)
- (ii) 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)

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); Creative Information Technologies, B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 (holding that discussions must deal with the underlying cause and that notifying an offeror that its price was overstated was insufficient).

- (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). FAR 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 FPRs even if the offerors' prices were disclosed through an earlier protest if additional FPRs 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 International Resources Group, B-286663, Jan. 31, 2001, 2001 CPD ¶ 35 (citing Patriot Contract Servs., LLC et al., B-278276 et al., Sept 22, 1998, 98-2 CPD ¶ 77).
4. An agency is not obligated to reopen negotiations to give an offeror the opportunity to remedy a defect that first appears in a revised proposal. American Sys. Corp., B-292755, B-292755.2, Dec. 3, 2003.
5. However, any agency must reopen discussions if the agency realizes, while reviewing an offeror's final proposal revision, that a problem in the initial proposal was vital to the source selection decision but not raised with the offeror during discussions. Al Long Ford, Comp. Gen. B-297807, Apr. 12, 2006, 2006 CPD ¶ 67.

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 a material solicitation requirement is technically unacceptable and cannot form the basis of award. Farmland National Beef, B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31. 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 trade-off analysis is essential to any source selection decision using a trade-off (rather than a lowest-priced, technically acceptable) basis of award. See Special Operations Group, Inc., B-287013; B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73. More than a mere conclusion, however, is required to support the analysis. See Shumaker Trucking and Excavating Contractors, B-290732, 2002 U.S. Comp. Gen. LEXIS 151 (Sept. 25, 2002) (finding the award decision unreasonable where the “agency mechanically applied the solicitation’s evaluation method” and provided no analysis of the advantages to the awardee’s proposal); Beacon Auto Parts, B-287483, June 13, 2001, 2001 CPD ¶ 116 (finding that a determination that a price is “fair and reasonable” doesn’t equal a best-value determination); 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.
 - d. The Army prohibits recommendations to the Source Selection Authority from any individual or body regarding award, to include a rank order of offerors. AFARS 5115.101.

7. The source selection authority (SSA) need not personally write the decision memorandum. See Latecoere Int'l Ltd., B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70. However, the source selection decision must represent the SSA's independent judgment. FAR 15.308.⁷
8. The GAO reviews source selection decisions for reasonableness, consistency with the RFP's evaluation criteria, and adequacy of supporting documentation. See AIU North America, Inc., B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39; Cortland Memorial Hospital, B-286890, Mar. 5, 2001, 2001 CPD ¶ 48 and Wackenhut Servs, Inc., B-286037; B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 (emphasizing the importance of contemporaneous documentation). 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.

⁷ In the Army, SSAs "shall not receive a recommendation from any individual or body as to whom shall receive the award and additionally shall not receive a rank order or order of merit list pertaining to the offers being evaluated." AFARS 5115.101.

- e. SSA's may disagree with the analyses of and conclusions reached by evaluators, however, they must be reasonable when doing so and adequately support their source selection decision. *DynCorp Int'l LLC*, B-289863.2, May 13, 2002, 2002 CPD ¶ 83 (finding no support in the record for the SSA to question the weaknesses in the awardee's proposal as identified by the evaluation teams).
 - 9. The standard of review for the Court of Federal Claims is whether the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A)(2); Cubic Applications, Inc. v. U.S., 37 Fed. Cl. 339, 342 (1997).
- N. Debriefings. 10 U.S.C. § 2305(b)(5); 41 U.S.C. § 253b(e); FAR 15.505-506.
- 1. Notices to Unsuccessful Offerors. FAR 15.503.
 - a. Preaward Notices of Exclusion from the Competitive Range.
 - (1) The contracting officer must provide prompt, written notice to offerors excluded or eliminated from the competitive range, stating the basis for the determination and that revisions will not be considered. 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 not 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) Within 3 days after the contract award date, the contracting officer must notify in writing unsuccessful offerors.
- (2) The notice must include the number of offerors solicited, the number of proposals received, the names and addresses of the awardee(s), the awarded items, quantities, unit prices,⁸ 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 notice of exclusion.
 - (b) If the offeror does not meet this deadline, the offeror is not entitled to 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.

⁸ As a result of the decision in *MCI WorldCom v. GSA*, 163 F. Supp. 2d 28 (D.C. 2001), which addressed the treatment of unit prices under exemption 4 of the Freedom of Information Act, FAR 15.503(b)(1)(iv) may be revised to clarify the release of unit prices. See Federal Acquisition Regulation; Debriefing – Competitive Acquisitions, 68 Fed. Reg. 5778 (Feb. 4, 2003).

- (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).
- (5) A summary of the debriefing is to be included in the contract file.

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 automatically extend the deadlines for 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 significant weak or deficient factors in the offeror’s proposal;
 - (b) The overall evaluated cost or price,⁹ and technical rating, if applicable, of the awardee and the debriefed offeror, and past performance information on the debriefed offeror;
 - (c) The overall rankings of all of the offerors;
 - (d) A summary of the rationale for the award decision;

⁹ As a result of the decision in *MCI WorldCom v. GSA*, 163 F. Supp. 2d 28 (D.C. 2001), which addressed the treatment of unit prices under exemption 4 of the Freedom of Information Act, FAR 15.506(d) may be revised to clarify the release of unit prices. See Federal Acquisition Regulation; Debriefing – Competitive Acquisitions, 68 Fed. Reg. 5778 (Feb. 4, 2003).

- (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 not 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 Freedom of Information Act, including the names of individuals providing past performance information.
- (5) A summary of the debriefing must be included in the contract file.
- (6) 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 10

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CHAPTER 10

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 or services in the amount of \$100,000 or less using simplified acquisition procedures. FAR 2.101.

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157th Contract Attorneys' Course
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The threshold is \$250,000 inside the US and \$1,000,000 outside the US if the head of the agency determines the acquisition for supplies or services are to be used to in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. FAR 2.101. The 2005 National Defense Authorization Act, § 822.

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, the aggregate amount of which does not exceed \$3,000, except that in the case of construction the limit is \$2,000 and in the case of acquisitions subject to the Service Contracts Act the limit is \$2,500. FAR 2.101. If the head of the agency determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack the micro-purchase threshold is **\$15,000** for any contract to be awarded and performed, or purchase to be made, **inside the U.S.**; and **\$25,000** for any contract to be awarded and performed , or purchase to be made **outside the U.S.**. FAR 2.101; FAR 13.201(g). The 2005 National Defense Authorization Act, § 822.

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.
4. Avoid unnecessary burdens for agencies and contractors.

- 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.
 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(c).
 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(c). See L.A. Systems v. Department of the Army, GSBICA 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 (IDIQ contract) even though total value of the services were expected to exceed \$100,000 because actual requirement was indeterminate and prior competitive solicitation did not result in reasonable offers).

D. Commercial Item Test Program.

1. Authority.

¹ In support of contingency operations defined by 10 U.S.C. § 101(a)(13) or to facilitate defense against or recovery from NBC or radiological attack, the simplified acquisition threshold increases to \$250,000 for purchase made in the U.S. or \$1,000,000 for purchase made outside the U.S.. Service Acquisition Reform Act of 2003, Pub. L. 108-136, § 1443; increased thresholds in National Defense Authorization Act for 2005, Pub. L. 108-375, § 817; and FAR 2.101 and DFARS 213.000.

- 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 \$5,500,000. Pub.L. 104-106, § 4202(a)(1)(A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5, as amended by .
- b. Authority to issue solicitations under the test program was to expire on January 1, 2004. However, Congress extended the period of the test program several times: first to January 1, 2006, See National Defense Authorization Act for Fiscal Year 2004 § 1443, Pub. L. No. 108-136, 117 Stat. 1675 (2003); and currently to **January 1, 2008**. See National Defense Authorization Act for 2005 § 817, Pub. L. 108-375.
- c. For a **contingency operation** or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the \$5,500,000 commercial item test program threshold is **11,000,000**. See National Defense Authorization Act, 2004, Pub. L. No. 108-136, 117 Stat. 1675 (2003).

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 (Competition). 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 \$550,000, 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 \$550,000, 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-15 or above, or the senior procurement executive (depending on dollar value). 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 \$3,000, 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.
 - 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.

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.

- 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 (\$10,000-\$25,000, post in public place; >\$25,000, synopsized in FedBizOpps.gov).
- 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 responsible sources 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 \$3,000 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(g).

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 13.004. 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.
 - 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:

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.

- (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. FAR 13.106-1(c)
- (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); Eastman Kodak Co., B-271009, May 8, 1976, 96-1 CPD 215.

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). But See KPMG Consulting, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 (agency may, if not prohibited by solicitation, consider a late quote).
- 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.
- (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 fairly and in accordance with the terms of the solicitation. Kathryn Huddleston & Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 167; Finlen Complex Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167.

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).

- 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 and Documentation. FAR 13.106-3

- 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. FAR 13.303-2(b-c).

- 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:
 - (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.

⁵ All schedule contracts contain BPA provisions. FAR 8.404(b)(4).

- (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 \$5,500,000 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 Regulation⁶ 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).
 - 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.

⁶ DOD 7000.14-R, Volume 5, Disbursing Policy and Procedures.

⁷ Part 4, Chapter 3000, section 3020.

1. Purpose. The purchase card is funded with appropriated funds. The government-wide commercial purchase card is authorized for use in making and/or paying for purchases of supplies, services, or construction.⁸ DOD contracting officers must use the card for all acquisitions at or below \$3,000. DOD FMR Vol.5, ¶ 0210.
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.
 - b. To place task or delivery orders (if authorized in the basic contract, basic ordering agreement, or BPA);
 - c. To make payments when the contractor agrees to accept payment by the card.

⁸ DOD's purchase card limit is \$25,000 for contingency, humanitarian, or peacekeeping operations. DFARS 213.301(2); 70 Fed. Reg. 75411 (Dec. 20, 2005).

- 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.

3. “Control Weaknesses”. Several GAO reports and a DOD IG Audit Report have identified control weaknesses that leave agencies vulnerable to fraud and abuse. DOD IG Audit Report, Controls Over the DoD Purchase Card Program, Rept. No. D-2002-075, 29 March 2002; GAO Rept. No. 02-676T, Government Purchase Cards: Control Weaknesses Expose Agencies to Fraud and Abuse, (May 1, 2002); GAO Rept. No. 02-506T, Purchase Cards: Continued Control Weaknesses Leave Two Navy Units vulnerable to Fraud and Abuse, March 13, 2002. Problem areas include:

- a. Lack of Training (for cardholders and approving officials).
- b. Selecting Cardholders and Assigning Approving Officials.
- c. Inadequate Review and Approval.
- d. Setting Spending Limits. Splitting purchases to avoid spending limits.
- e. Purchases made after accounts closed.

4. Practical Pointers

a. Training, Training, Training. Sample Training Slides and Web-based training:

- (1) AMC Purchase Card Tutorial:
<http://www.amc.army.mil/amc/rda/rda-ap/impactut.html>
- (2) Ft. Lewis DOC: <http://www.lewis.army.mil/doc/>

- b. Issue cards only to employees who need them.
- c. Authorizing officials should be responsible for 5-7 cardholders.
- d. Authorizing official should not be a cardholder.
- e. Watch single purchase and monthly spending limits.
- f. Closely monitor use of convenience checks.

- E. Electronic Commerce. An exploding growth area. More than 1,300 federal “e-government” initiatives. *See* www.govexec.com/dailyfed/0101/012401j2plain.htm. In December 2002, the President established an e-government office within the White House Office of Management and Budget. *See* www.govexec.com/dailyfed/1202/121702td1.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. Effective 1 October 2001, mandatory 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/ecom/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. Two reported cases: Royal Hawaiian Movers, B-288653, Oct. 31, 2001, 2001 U.S. Comp. Gen. LEXIS 165; Pacific Island Movers, B-287643.2, July 19, 2001, 2001 CPD P. 126.

7. Internet failure may not excuse late delivery of contractor's proposal. Performance Construction, Inc., B-286192, Oct. 30, 2000, 2000 CPD.¶ 180.
8. Section 508 Disabilities Initiative Takes Effect. As of June 25, 2001, government contracts awarded for electronic and information technology (EIT) must contain technology that is accessible to disabled federal employees and disabled members of the public. 66 Fed. Reg. 20,894 (Apr. 25, 2001).

VI. CONCLUSION.

CHAPTER 11

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CHAPTER 11

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); <http://www.acq.osd.mil/dpap/Docs/cotsreport.pdf>.
 - E. DOD's Commercial Item Handbook;
<http://www.acq.osd.mil/dpap/Docs/cihandbooks.pdf>

MAJ Michael Devine
157th Contract Attorneys' Course
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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. Agencies shall use firm-fixed-price (FFP) contracts or fixed price contracts with economic price adjustments (FP/EPA). Award fees and performance or delivery incentives in FFP and FP/EPA contracts permitted if based solely on factors other than cost. 68 Fed. Reg. 13,201 (Mar. 18, 2003).

IV. DEFINITIONS. 41 U.S.C. § 403(12); 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 (defined as commercial items).

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).
3. The National Defense Authorization Act, 2004, § 1431, authorizes commercial item treatment for a performance-based contract or a performance-based task order for the procurement of services if: (a) the contract or task order is not estimated to exceed \$25,000,000; (b) the contract or task order sets forth specifically each task to be performed and for each task defines the task in measurable, mission-related terms, identifies the specific end products or output to be achieved and contains firm, fixed prices for specific tasks to be performed or outcomes to be achieved; (c) the source of the services provides similar services to the general public under terms and conditions similar to those offered to the federal government.

- 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. Construction as a Commercial Item. The Administrator of the Office of Federal Procurement Policy issued a July 3, 2003 memorandum indicating commercial item acquisition policies in FAR Part 12 “should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services.”
- F. 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. COMMERCIAL ITEM TEST PROGRAM.

A. Authority.

1. 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 \$5,500,000. Pub.L. 104-106, § 4202(a)(1)(A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5, as amended by .
2. Authority to issue solicitations under the test program was to expire on January 1, 2004. However, Congress extended the period of the test program several times: first to January 1, 2006, See National Defense Authorization Act for Fiscal Year 2004 § 1443, Pub. L. No. 108-136, 117 Stat. 1675 (2003); and currently to **January 1, 2008**. See National Defense Authorization Act for 2005 § 817, Pub. L. 108-375.
3. For a **contingency operation** or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the \$5,500,000 commercial item test program threshold is **11,000,000**. See National Defense Authorization Act, 2004, Pub. L. No. 108-136, 117 Stat. 1675 (2003).

B. Use.

1. For the period of the test, contracting activities are to use simplified acquisition procedures to the maximum extent practicable. FAR 13.500(b).
2. 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).

C. Special Documentation Requirements. FAR 13.501.

1. Sole source acquisitions. Acquisitions conducted under simplified acquisition procedures are exempt from the requirements in FAR Part 6 (Competition). 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.
 - a. For a proposed contract exceeding \$100,000 but not exceeding \$550,000, 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.
 - b. For a proposed contract exceeding \$550,000, 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-15 or above, or the senior procurement executive (depending on dollar value). This authority is not delegable further.
2. Contract file documentation. The contract file shall include:
 - a. 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;
 - b. The number of offers received;
 - c. An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and
 - d. Any approved justification to conduct a sole-source acquisition.

VI. PRIORITY SOURCES FOR COMMERCIAL ITEMS.

- A. Supplies. FAR 8.002(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. FPI, previously a mandatory source of supplies and services which they were a contractor for, is now a **qualified mandatory** source pursuant to Section 637 of Division H of the Consolidated Appropriations Act, 2005 (Public Law 108-447) (incorporated at FAR 8.602 and 8.605). Provides that none of the funds made available under that or any other Act for fiscal year 2005 and each fiscal year thereafter shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc. (FPI), unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency. **Contracting officers are required to conduct market research to determine whether UNICOR products are comparable to products available in the commercial market in terms of price, quality and time of delivery.** If UNICOR products are not comparable, use competitive procedures to acquire the product. Agencies are required to rate FPI performance, and compare it to the private sector. Federal Acquisition Regulation; Past Performance Evaluation of Federal Prison Industries Clearances, 68 Fed. Reg. 28,905 (May 22, 2003)(to be codified at 48 C.F.R. pts.8 and 42). At or below the micro-purchase threshold, \$3,000, federal agencies may purchase products from private industry without obtaining a clearance from FPI. In addition, a clearance is not required if delivery is required within 10 days. Federal Acquisition Regulation; Increased Federal Prison Industries, Inc. Waiver Threshold, 68 Fed. Reg. 28,095 (May 22, 2003) (to be codified at 48 C.F.R. pt. 8).
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, but see Murray-Benjamin Electric Company, LP, B-298481, 2006; U.S. Comp. Gen. LEXIS 143 (Sept. 7, 2006) GAO denied a protest holding that “while the list of required sources found in FAR § 8.002 places non-mandatory FSS contracts above commercial sources in priority, it does not *require* an agency to order from the FSS.” The GSA interpretation of FAR § 8.002 is that the optional FSS schedules² are a “preferred source of supply for Government agencies. As such, Government agencies should first consider whether it can best fulfill its requirements through the use of an FSS schedule contractor. Where it can do so, agencies are should generally use the FSS schedule in accordance with the procedures set forth in 48 C.F.R. § 8.401 *et seq.*”
7. Optional use Federal Supply Schedules (FAR 8.4). See www.fss.gsa.gov; and
8. Commercial sources.

B. Services. FAR 8.002(a)(2).

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).

VII. FEDERAL SUPPLY SCHEDULES.

A. Background.

² While FAR 8.002 still lists mandatory and optional schedules as separate priority sources, mandatory schedules have not been in use by GSA since the mid-1990s. Today, all schedules are “optional use,” but are still listed as a required source of supply. Telephone Conversation with Roger Waldron, Acting Senior Procurement Executive, General Services Administration (Oct. 19, 2006).

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). But see Reep, Inc., B-290665, Sep. 17, 2002, 2002 CPD ¶ 158 (to satisfy the statutory obligation of competitive acquisitions . . . “an agency is required to consider reasonably available information . . . typically by reviewing the prices of at least three schedule vendors.” The agency failed to meets its obligation by not awarding to a vendor providing the best value to the government at the lowest overall cost.)
4. Therefore, an agency need not seek further competition, synopsise 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, 2000 CPD ¶ 139 (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 FSS³.

³ Unfortunately, many contracting officers do not follow GSA’s established procedures when using the FSS. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-01-125, NOT FOLLOWING PROCEDURES UNDERMINES BEST PRICING UNDER GSA’S SCHEDULE (Nov. 2000).

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)(ii).
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. If an agency places an order against a FSS contract, then all items or supplies ordered must be covered by the vendor's FSS contract (no "off the schedule buys"). Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89; Omniplex World Servs., Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199.
5. Thresholds.
 - a. At or under \$3000. Agencies can place an order with any FSS contractor. FAR 8.405-1(b)(1).
 - b. Above \$3,000, but below the "maximum order threshold." FAR 8.405-1(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 \$3,000, 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.
6. 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) 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 judgment 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.
 - (2) 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.
 - (3) 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).
 - (4) However, the language of 10 U.S.C. § 2304c(d) (restricting protests against most task or delivery orders)⁴ does not apply to FSS orders. Severn Companies, Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181, at 2 n.1.
- 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!").

7. Disadvantages.

⁴ "[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.

- a. Must pay GSA's "service charge" (a 1% "Industrial Funding Fee," included in the vendor's quoted price). On January 1, 2004 the fee will be reduced to .075 percent.
- 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.

VIII. 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. FAR 5.203(a)(1); or
 - b. Use a combined synopsis/solicitation procedure. FAR 5.203(a)(2).

- (1) FAR 12.603 provides the procedures for the use of a combined synopsis/solicitation document. The combined synopsis/solicitation must have less than 12,000 textual characters (approximately three and one-half single spaced pages).
 - (2) The combined 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.

IX. 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 includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices. FAR 12.301(b)(3).
- 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 of FAR 52-212-4 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.

X. 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. FAR 12.404.

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.

XI. 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.

XII. CONCLUSION.

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157th Contract Attorneys' Course
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CHAPTER 12

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CHAPTER 12
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, available at:
<http://www.acq.osd.mil/dpap/contractpricing/index.htm>.
3. The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a and 41 U.S.C. § 254b.
4. DCAA Contract Audit Manual (CAM). available at:
<http://www.dcaa.mil/cam.htm>.

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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 14.408-2; 15.404-1(a). In sealed bid procurements, the contracting officer is directed to use the price analysis techniques in FAR 15. 404-1(b) as a guideline.
- B. Definitions. FAR 2.101.
 - 1. “Price Analysis” is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. FAR 15.404-1(b).
 - 2. “Cost analysis” is the review and evaluation of the separate cost elements and profit in an offeror’s or contractor’s proposal (including cost or pricing data or information other than cost or pricing data), and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. FAR 15.404-1(c).
 - 3. "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.
 - 4. “Information other than cost or pricing data” refers to information that the contractor (or subcontractor) is not required to certify IAW FAR 15.406-2, 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.

5. 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. Sealed Bidding: Determining Price Reasonableness

1. Along with determining contractor responsibility, contracting officers shall determine that the prices offered are reasonable before awarding the contract. The contracting officer is directed to use the price analysis techniques in FAR 15.404-1(b) as guidelines. FAR 14.408-2(a).
2. The price analysis shall also consider whether bids are materially unbalanced as described in FAR 15.404-1(g). FAR 14.408-2(b). Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more CLINs is significantly over or understated as indicated by the application of cost or price analysis techniques. (Cost analysis techniques would not be used in a sealed bid procurement.) The contracting officer will only reject a bid if there is a determination that the unbalanced prices pose an unacceptable risk in paying unreasonably high prices for contract performance. FAR 15.404-1(g).

D. Competitive Negotiations: Determining Price Reasonableness

1. The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable. The different analytical techniques of FAR 15.404-1 are used singly or in combination to ensure the final price is fair and reasonable. FAR 15.404-1(a).
2. The price analysis techniques of FAR 15.404-1(b) are used when cost or pricing data are not required. FAR 15.404-1(a)(2).
3. The cost analysis techniques of FAR 15.404-1(c) are used to evaluate the reasonableness of individual cost elements when cost or pricing data are required and also used when information other than cost or pricing data is required. FAR 15.404-1(a)(2) and (3).

E. 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).

F. 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. FAR 15.403-3(c)(1) 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.² After using information from sources other than the offeror and the contracting officer is not able to make a determination that the price is fair and reasonable, the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis.³
2. 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. FAR 15.403-3(a)(4).
3. The contracting officer must limit requests for sales data to sales for similar items during a relevant time period.
4. 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.
5. 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).

² 64 Fed. Reg. at 51,836 (amending FAR 15.403-3(c) and 13.106-3(a)(2)(iii)). This FAR provision had originally been an interim rule amending the FAR to implement sections of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, §§ 803, 808, 112 Stat. 1920 (1998). See Federal Acquisition Circular (FAC) 97-14, FAR Case 98-300, Determination of Price Reasonableness and Commerciality (visited 1 April 2003), *available at* <http://farsite.hill.af.mil>.

³ In 1999, the GAO issued a report reviewing how the DOD prices commercial items. 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. GOVERNMENT ACCOUNTABILITY 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.

- 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.

IV. TRUTH IN NEGOTIATIONS ACT.

- A. Evolution.
1. May 1959 – The Government Accountability 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.
 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 not 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 \$500,000⁴ (except an undefinitized action such as a letter contract);

⁴The 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).

- b. Award of a subcontract at any tier expected to exceed \$500,000 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 adjustment⁵ expected to exceed \$500,000 (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.

- 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).

⁵ 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).

- 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.⁶ 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).

- (a) Adequate price competition exists if the government reasonably expected that two or more responsible offerors, competing independently, would submit offers; and

⁶ 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).

- (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.⁷
- (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.

⁷ 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 CAM 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. DCAA CAM ¶ 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. DCAA CAM ¶ 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 F.2d 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)⁸ 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.

⁸ 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;⁹ and
 - (c) Apply the appropriate interest rate.¹⁰

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.

⁹ 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).

¹⁰ 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.

CHAPTER 13

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"The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly. On occasion, bidders or others interested in government procurements may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that they have been unfairly denied a contract or an opportunity to compete for a contract."

OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE,
BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (8th ed. 2006)

I. REFERENCES.

- A. Competition in Contracting Act (CICA), 31 U.S.C. §§3551-3556.
- B. Tucker Act, 28 U.S.C. §1491.
- C. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. §1491(a)(3).
- D. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, §12, 110 Stat. 3870, 3874 (1996), 28 U.S.C. §1491(b)(1).
- E. Government Accountability Office (GAO) Protest Regulations, 4 C.F.R. Part 21.
- F. Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 33.1.
- G. Agency FAR Supplements. See Appendix A for listing.
- H. Rules of the United States Court of Federal Claims (RCFC), available at <http://www.uscfc.uscourts.gov/Rules/06.06.20%20RULES%20FINAL%20-%20JUNE%202006.pdf>.
- I. Bid Protests at GAO: A Descriptive Guide (8th ed. 2006), Office of General Counsel, U.S. GAO (GAO-06-797SP). Available at <http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf>.

II. INTRODUCTION.

- A. Protest Defined.** A “protest” is a written objection by an interested party to a solicitation or other agency request for bids or offers, cancellation of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. FAR 33.101.
- B. Background.** The protest system established by the Competition in Contracting Act of 1984 (CICA) and implemented by Government Accountability 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.
- C. Jurisdiction.** Multiple fora. An unsuccessful offeror may protest to the agency, the GAO, or the United States Court of Federal Claims (COFC). See Appendix B. Section III of this outline addresses protests filed with the agency, Section IV addresses protest filed with the GAO, and Section V addresses protests filed with the COFC.
- D. Remedies.**
1. Generally, protest fora can recommend or direct such remedial action as will bring the procurement into compliance with relevant acquisition laws and regulations. However, normally award of neither contract award nor lost profits is available.
 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.

III. AGENCY PROTESTS.

A. Authority.

1. Agency protests are protests filed¹ directly with the contracting officer or other cognizant government official within the agency. These protests are governed by FAR 33.103, AFARS 5133.103, NMCARS 5233.103, AFFARS 5333.103.
2. Contracting officers **must consider all protests and seek legal advice** regarding all protests filed with the agency. FAR 33.102(a).

B. Procedures. 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.” Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995). FAR 33.103 implements this Order.

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

¹FAR 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 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). Agencies are responsible for implementing procedures for this review.
- 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**. FAR 33.103(e).
 - 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 - Regulatory Stay.
 - 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.”

²See 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. *See infra* paragraph IV.E.1.g.
2. 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 by 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 COFC (see Appendix B). 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) (2005).

³In 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).

⁴In 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 GOVERNMENT ACCOUNTABILITY OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (8th ed. 2006). **The reader can obtain a free copy of this booklet by accessing the GAO Internet Homepage at: <http://www.gao.gov> (direct PDF link: <http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf>).**

IV. GOVERNMENT ACCOUNTABILITY 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. 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 AFARS 5133.104; AFFARS 5333.104; NMCARS 5233.104; DLAD 33.104.
- C. Who May Protest?**
1. 31 U.S.C. § 3551(1) and 4 C.F.R. § 21.1(a) (2005) 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)(1) (2005).
 - 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**.

- (1) Next-in-Line. A bidder or offeror who is “**next-in-line**” for award is most likely an interested party. If a protester cannot receive award if it prevails on the merits, it is not an interested party. International Data Prods., Corp., B-274654, Dec. 26, 1996, 97-1 CPD ¶ 34 (protesters rated eighth and ninth in overall technical merit were interested parties because improper technical evaluation alleged and lower-priced than awardee); Comspace Corp., B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186 (contractor not in line for award where electronic quote not properly transmitted); Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 (protester not an interested party where an intervening offeror has a higher technical score and a lower cost); Recon Optical, Inc., B-272239, July 17, 1996, 96-2 CPD ¶ 21 (recipients of multiple award contracts may not protest the other’s award); Watkins Sec. Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108 (highest priced of three technically equal bidders was not in line for award).
- (2) A high-priced bidder may be able to demonstrate that all lower-priced bidders would be ineligible for award, thus becoming the next-in-line. Professional Medical Prods., Inc., B-231743, July 1, 1988, 88-2 CPD ¶ 2.
- (3) In a “best value” or negotiated procurement, the GAO determines whether a protester is an interested party by examining the probable result if the protest is successful. Government Tech. Servs., Inc., B-258082, Sept. 2, 1994, 94-2 BCA ¶ 93 (protester not an interested party where it failed to challenge higher-ranked intervening offerors); Rome Research Corp., B-245797, Sept. 22, 1992, 92-2 CPD ¶ 194.

- (4) Opportunity to Compete. An actual bidder, not next-in-line for award, is an interested party if it would **regain the opportunity to compete** if the GAO sustains its protest. This occurs if the GAO could recommend resolicitation. Teltara, Inc., B-245806, Jan. 30, 1992, 92-1 CPD ¶ 128 (eventual 11th low bidder protested – before bid opening - the adequacy of the solicitation’s provisions concerning a prior collective bargaining agreement; remedy might be resolicitation); Remtech, Inc., B-240402, Jan. 4, 1991, 91-1 CPD ¶ 35 (protest by nonresponsive second low bidder challenged IFB as unduly restrictive – filed before bid opening; interested party because remedy is resolicitation).
3. **Intervenors.** Immediately after receipt of the protest notice, the agency must notify awardee (post-award protest) or all offerors who have a “substantial prospect” of receiving award if the protest is denied (pre-award protest). 4 C.F.R. § 21.0(b), § 21.3(a) (2005). Generally if award has been made, GAO will only allow the awardee to intervene. If award has not been made, GAO will determine whether to allow a specific firm to intervene upon its request.

D. What May Be Protested?

1. The protester must allege a violation of a procurement statute or regulation. 31 U.S.C. § 3552. The GAO will also review allegations of unreasonable agency actions. S.D.M. Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288 (simplified acquisition using defective FACNET system failed to promote competition “to the maximum extent practicable” in violation of CICA). This includes the termination of a contract where the protest alleges the government’s termination was based upon improprieties associated with contract award (sometimes referred to as a “reverse protest”). 4 C.F.R. § 21.1(a) (2005); Severn Cos., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181.

2. The GAO generally will NOT consider protests on the following matters:

- a. **Contract Administration.** 4 C.F.R. § 21.5(a) (2005). Health Care Waste Servs., B-266302, Jan. 19, 1996, 96-1 CPD ¶ 13 (registration or licensing requirement a performance obligation and not one of responsibility); JA & Assocs., B-256280, Aug. 19, 1994, 95-1 CPD ¶ 136 (decision to novate contract to another firm rather than recompet); Caltech Serv. Corp., B-240726, Jan. 22, 1992, 92-1 CPD ¶ 94 (modification of contract unless it is a cardinal change); Casecraft, Inc., B-226796, June 30, 1987, 87-1 CPD ¶ 647 (decision to terminate a contract for default); but see Marvin J. Perry & Assocs., B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128 (GAO asserts jurisdiction over agency acceptance of different quality office furniture that was shipped by mistake); Sippican, Inc., B-257047, Nov. 13, 1995, 95-2 CPD ¶ 220 (GAO will review agency exercise of contract option). Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978, 41 U.S.C. §§601-613.
- b. **Small Business Size and Industrial Classification Determinations.** 4 C.F.R. § 21.5(b)(1) (2005). Challenges to size or status of small businesses are left to exclusive review by the Small Business Administration. 15 U.S.C. 637(b)(6). Lawyers Advantage Title Group, Inc., B-275946, Apr. 17, 1997, 97-1 CPD ¶ 143; Columbia Research Corp., B-247073, June 4, 1992, 92-1 CPD ¶ 492.
- c. **Small Business Certificate of Competency (COC) Determinations.** 4 C.F.R. § 21.5(b)(2) (2005). Issuance of, or refusal to issue, a certificate of competency will generally not be reviewed by GAO. Exceptions, interpreted narrowly in deference to the SBA, are: (1) protests which show bad faith by government officials, (2) protests that allege that the SBA failed to follow its own regulations, or (3) protests that allege that the SBA failed to consider vital information.

- d. **Procurements Under Section 8(a) of the Small Business Act** (i.e., small disadvantaged business contracts). 4 C.F.R. § 21.5(b)(3) (2005). 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. 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) (2005). The determination that a bidder or offeror is capable of performing is largely committed to the KO's discretion. Imaging Equip. Servs., Inc., B-247197, Jan. 13, 1992, 92-1 CPD ¶ 62.
- (1) Exception: Where definitive responsibility criteria in the solicitation were not met. 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. But See Impresa Construzione Geom. Domenico Garufi v. U.S., 238 F.3d 1324 (Fed. Cir. 2001) (the CAFC held that the COFC's standard of review for responsibility determinations would be those set forth in the Administrative Procedures Act, i.e., would include one requiring lack of rational basis or a procurement procedure involving a violation of a statute or regulation).
- (3) Exception: Where there is evidence that the contracting officer failed to consider available relevant information, or otherwise violated a pertinent statute or regulation. See 67 Fed. Reg. 251, Dec. 31, 2002 at 79,835-36.
- f. **Procurement Integrity Act Violations.** 4 C.F.R. § 21.5(d) (2005); 41 U.S.C. § 423. 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. See, e.g., SRS Techs., B-277366, July 30, 1997, 97-2 CPD ¶ 42.

- g. **Procurements by Non-Federal Agencies** (e.g., United States Postal Service, Federal Deposit Insurance Corporation (FDIC), nonappropriated fund activities [NAFIs]). 4 C.F.R. § 21.5(g) (2005). 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 (2005). The GAO will also consider such a protest if agency officials were involved to such an extent that it really was a procurement “by” an executive agency.
- h. **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) (2005). See RGB Display Corporation, B-284699, May 17, 2000, 2000 CPD ¶ 80. 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).
- i. **Debarment & Suspension Issues.** 4 C.F.R. §21.5(i) (2005). The GAO does not review protests that an agency improperly suspended or debarred a contractor. See Shinwha Electronics, B-290603, Sept. 3, 2002, 2002 CPD ¶ 154.
- j. **Judicial Proceedings.** 4 C.F.R. §21.11 (2005). 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, e.g., dismissed with prejudice. Cecile Indus., Inc., B-211475, Sept. 23, 1983, 83-2 CPD ¶ 367.

- k. **Task and Delivery Orders.** The Federal Acquisition Streamlining Act (FASA) (pertinent portions codified at 10 U.S.C. § 2304c and 41 U.S.C. §253j) prohibits protests associated with the issuance of a task or delivery order except when the order “increases the scope, period, or maximum value” of the underlying contract. See, e.g., Military Agency Services Pty., Ltd., B-290414, Aug. 1, 2003, 2002 CPD ¶ 130. See also A&D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126 (2006). 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. The COFC also decided that protests of FSS orders are not prohibited by the FASA. Idea International, Inc. v. United States, 74 Fed. Cl. 129 (2006). Additionally, the GAO will hear cases involving the “downselect” of multiple awardees, if 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. Procurement. GAO only considers protests of “procurements.”

- 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). See also Starfleet Marine Transportation, Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 (GAO holding that it had jurisdiction of a mixed transaction involving both the "sale" of a business opportunity and the procurement of services); Government of Harford County, Md., B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81.

- 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) (2005); Assets Recovery Sys., Inc., B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67. See also Catholic University of America v. United States, 49 Fed. Cl. 795 (2001) (COFC holding that the Administrative Dispute Resolution Act's (ADRA) amendment to the Tucker Act broadened its scope of post-award protests to include solicitation of government assets).
- 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. § 102); 4 C.F.R. § 21.0(c) (2005). 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) (2005). 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) (2005).

- (3) The United States Postal Service (USPS). 4 C.F.R. § 21.5(g) (2005). The USPS is not a federal agency under procurement law; therefore, the GAO does not hear USPS protests. But See Emery WorldWide Airlines, Inc. v. Federal Express Corp., 264 F.3d 1071 (2001) (the **Court of Appeals for the Federal Circuit** held that the USPS was a federal agency as specified by the Administrative Dispute Resolution Act of 1996, 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) (2005). 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 of federal agency personnel in the procurement 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).

- f. Procurements subject to the Federal Aviation Administration's (FAA) Acquisition Management System (AMS) are specifically exempt from GAO jurisdiction. 49 U.S.C. §40110(d)(2)(F). This exemption originally covered only procurements of equipment, supplies, and materials; thus, the GAO maintained jurisdiction and decided protests filed concerning the procurement of services. Congress has since extended the exemption to cover services also. Pub. L. No. 109-90, 119 Stat. 2064 *et seq.*, Title V, Sec. 515. Procurements by the Transportation Security Administration (TSA) are covered by the AMS; GAO has no jurisdiction over TSA procurements. Knowledge Connections, Inc., B-298172 (2006).

E. When Must a Protest Be Filed?

- 1. Time limits on protests are set forth in 4 C.F.R. § 21.2 (2005).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) (2005); 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). Protest filed prior to bid opening or closing date for receipt of initial proposals timely even when protester learned the basis of its protest more than ten days prior to protest filing. MadahCom, Inc., B-297261.2 (2005).

⁵Under 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) (2005).

- b. Protesters **challenging a Government-wide point of entry (GPE) or 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). Only publication in the official public medium (FedBizOpps or CBD) will constitute constructive notice. Worldwide Language Resources, Inc., B-296993.4 (2005) (publishing notice of procurement on DefenseLink.mil will NOT provide constructive notice.)
- 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) (2005). This rule applies even with tight timelines. WareOnEarth Commc'ns, Inc., B-298408 (2006) (protest not timely filed when filed after revised due date from amendment despite only four days between solicitation amendment and proposal due date.)
- 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 15.505 and 15.506. In such cases, protesters may not file a protest prior to the debriefing date offered by the agency. 4 C.F.R. §21.2(a)(2). 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(a)(2) (2005); 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. Note that if a protester files its protest within five days of the offered debrief, protester will also be entitled to stay contract performance. 31 U.S.C. § 3553(d)(4)(B); FAR 33.104(c). 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 (whichever is earlier) knowledge of the basis for protest. 4 C.F.R. § 21.2(a)(2) (2005). 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) If the contractor previously filed a timely agency protest, a subsequent GAO protest must be filed within 10 days of actual or constructive (whichever is earlier) knowledge of the initial adverse agency decision. 4 C.F.R. § 21.2(a)(3) (2005). 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. See also Raith Engineering and Manufacturing Co, W.L.L., B-298333.3 (2007).

- (2) 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) (2005). 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. 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) (2005).
- 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, 99-2 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, 99-2 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 Statutory Stay. 31 U.S.C. § 3553(c) and (d).

1. Pre-award Protests: An agency may not award a contract after receiving notice **FROM THE GAO** of a timely-filed protest. 31 U.S.C. § 3553(c); 4 C.F.R. § 21.6 (2005); FAR 33.104(b).
2. Post-award Protests: The contracting officer shall suspend contract performance immediately when the agency receives notice **FROM THE GAO** of a protest filed **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 (2005); FAR 33.104(c).
3. 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]).
4. “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.

G. “The CICA Override”—Relief From The CICA Stay. 31 U.S.C. § 3553(c) and (d); FAR 33.104(b) and (c); AFARS 5133.104; AFFARS 5333.104. While paragraphs (1) and (2) below provide the *general* approval authority, the Army requires the override to be approved by the Deputy Assistant Secretary of the Army (Policy and Procurement). AFARS 5133.104.

1. Pre-Award Protest Stay: The head of the contracting activity may, on a nondelegable basis, authorize the award of a contract:
 - a. 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**
 - b. The agency is likely to award the contract within 30 days of the written override determination.
2. 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:
 - a. Continued performance of the contract is **in the best interests of the United States**; or
 - b. Urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General.
3. In either instance, if the agency is going to override the automatic stay, it must notify the GAO. 31 U.S.C. 3553(c). See also Banknote Corp. of America, Inc., B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53 (GAO will not review the override decision).

4. Override decisions **are** subject to judicial review at the COFC. See Alion Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005) (Court upheld override after stating that overrides are reviewable by the Court). See also, Cigna Gov't Services, LLC v. United States, 70 Fed. Cl. 100 (2006) (reinstating the CICA Stay finding that the override was arbitrary and capricious); Advanced Systems Development, Inc. v. United States, 72 Fed. Cl. 25 (2006) (same); Automation Technologies, Inc v. United States, 72 Fed. Cl. 723 (2006) (same).
5. An agency's decision to override a CICA stay based upon its determination that such action is in the "best interests" of the United States is subject to judicial review. Alion Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005). Prior cases in the district courts had split on this issue, with some finding that "best interests" is nonjusticiable. 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

H. 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 concerns 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).

I. Scope of GAO Review.

⁶See 63 FED. CONT. REP. 561-2 (1995) for a discussion of this case.

⁷For 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).

⁸This 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 GOVERNMENT ACCOUNTABILITY OFFICE, *Principles of Federal Appropriations Law* 5-89 (3d ed. 2004).

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. Burden of Proof. 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.
3. Agency Record. 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. Substantive Review. 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. Bad Faith. If the protest alleges bad faith, GAO begins from a presumption that 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 Issues.

- a. When challenging the timeliness of a protest, the burden is on the government. The GAO will generally resolve factual disputes regarding timeliness of protest filing in favor of the protester if there is at least a reasonable degree of evidence to support protester's version of the facts. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65 (disagreement over when protester knew or should have known of basis for protest).
 - b. 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) (2005); Foerster Instruments, Inc., B-241685, Nov. 18, 1991, 91-2 CPD ¶ 464.
 - c. When there is a doubt as to whether a protest is timely, GAO will generally consider the protest. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 405.
7. Unduly Restrictive Requirement. 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).
 8. Prejudice. 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., Bath Iron Works Corp., B-290470, Aug. 19, 2002, 2002 CPD ¶ 133 (denying protester's use of a decommissioned destroyer for at-sea testing, while at the same time accepting awardee's proposed use constituted unequal treatment, but did not result in competitive prejudice); 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).

J. Bid Protest Procedures.

1. The Protest. 4 C.F.R. § 21.1 (2005).
 - a. Protests must be **written**. E-Mail filings are accepted.
 - 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, email, 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 Env'tl. 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) (2005); 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) (2005). 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) (2005); 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) (2005).
4. Agency List of Documents. 4 C.F.R. §21.3(c). 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) (2005); 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(e) (2005).

- a. Mandatory contents of an agency report. 4 C.F.R. § 21.3(d) (2005).
- (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.
 - (9) Documents requested by the protester.
 - (10) **A legal memorandum suitable for forwarding to GAO;**
 - (11) An index of all relevant documents provided under the protest.
- b. 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).
- c. 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) (2005).

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) (2005).
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 (2005).
 - 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) (2005).
 - c. 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) (2005).
 - (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).

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) (2005). See also "GAO Orders Protester to Comply With Agency's Document Request," 61 FED. CONT. REP. 409 (1994).

- (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, and 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) (2005). 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 to the GAO for *in camera* review. 4 C.F.R. § 21.4(b) (2005).
- 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) (2005). 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) (2005).
 - 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) (2005).

- (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) (2005).
 - 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) (2005).
- 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(a) (2005).
12. Express Option. 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10 (2005).
 - a. Decision in 65 days.
 - b. The protester, agency, or other interested party may request, or on GAO's own initiative, 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 following schedule applies under the express option 4 C.F.R. § 21.10(d) (2005):
 - (1) Agency Report due within 20 days after notice from GAO of express option.
 - (2) Protester's comments on Agency Report due within 5 days of receiving Agency Report.
 - (3) GAO may alter the schedule if the case becomes no longer appropriate for the express option.

K. 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).

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>.

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) (2005):
 - a. Refrain from exercising options under an existing contract;
 - b. Terminate an existing contract;
 - c. Recompete the contract;
 - d. Issue a new solicitation;
 - e. Award 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) (2005).
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) (2005). 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).

L. 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) (2005). 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, 2000 CPD ¶ 123 (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 (or should have learned) that GAO has closed the protest based on the agency's decision to take corrective action. 4 C.F.R. § 21.8(e)(2005). Dev Tech Sys., Inc., B-284860.4, Aug. 23, 2002, CPD ¶ 150.
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) (2005). 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. If the agency and protester fail to agree on the amount of costs the agency will pay, the protester may request that GAO recommend an amount. In such cases, GAO may also recommend payment of costs associated with pursuing this GAO amount recommendation. 4 C.F.R. § 21.8(f)(2) (2005); 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 (EAJA) standards do **not** apply. Attorneys' fees (for other than small business concerns) are limited to not more than \$150 per hour, "unless the agency determines based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 31 U.S.C. § 3554(c)(2)(B)(2004). See also Sodexho Mgmt., Inc. --- Costs, B-289605.3, Aug. 6, 2003. 2003 CPD ¶ 136. 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 This amount is equal to GS15 Step 10, not the highest amount paid by any federal agency for any expert in any forum at any time. ITT Federal Services Int'l Corp., B-296783.4 (2006).

5. Unlike the EAJA, a protestor need not be a "prevailing party" where a "judicial imprimatur" is necessary to cause a change in the legal relationship between the parties. Georgia Power Company, B-289211.5, May 2, 2002, 2002 CPD ¶ 81 (rejecting the agency's argument that the Supreme Court's holding in Buckhannon Bd. and Care Home, Inc., v. W. VA. Dep't of HHR, 532 U.S. 598 (2001) rejecting the "catalyst theory" to fee-shifting statutes, applied to the Competition in Contracting Act).

6. As a general rule, a protester is reimbursed costs incurred with respect to all protest issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.---Costs, B-291670.6, May 12, 2003. 2003 CPD ¶ 100. Department of the Army --- Modification of the Remedy, B-292768.5, Mar. 25, 2004. 2004 CPD ¶ 74. 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); Interface Flooring Sys., Inc. --- Claim for Attorneys Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106.

¹²The 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.

7. 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*. Department of Commerce—Recon., B-238452, Oct. 22, 1990, 90-2 CPD ¶ 322.
8. 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). See also Galen Medical Associates, Inc., B-288661.6, July 22, 2002, 2002 CPD ¶ 56 (GAO recommending that the agency reimburse the protestor \$110.65 out of the \$159,195.32 claim due to a lack of documentation).
9. Bid Preparation Costs. 4 C.F.R. § 21.8(d)(2) (2005).
 - a. 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.
 - b. 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).
10. **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.

M. “Appeal” of the GAO Decision.

1. Reconsideration of GAO Decisions. 4 C.F.R. §21.4(b). 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. 4 C.F.R. § 21.14 (2005). Rehashing previous arguments is not fruitful. 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. Judicial Appeal.
 - a. 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).

- b. 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 Government Accountability Office").

V. 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. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) [hereinafter “ADRA”]. Effective December 31, 1996, ADRA provides jurisdiction to the Court of Federal Claims 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).

- c. The ADRA also gave jurisdiction to the federal district courts, but this jurisdiction included a sunset provision of 1 January 2001. Congress did not act to extend the federal district court jurisdiction.

B. COFC Rules. The COFC issued rules (RCFC), which prescribe the conduct of cases before the Court. Available at <http://www.uscfc.uscourts.gov/rules.htm>. Appendix C of the RCFC provides procedural guidance specifically tailored for bid protest litigation to enhance the overall effectiveness of protest resolution at the COFC. (The guidance provided by Appendix C of the RCFC is cited throughout the remainder of this outline section.)

C. Who May Protest?

1. Interested Party. The COFC appears to follow the same definition as that used in GAO protests. CC Distributions, 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”). The **Court of Appeals for the Federal Circuit (CAFC)** has apparently resolved the issue of who is an “interested party” by adopting the GAO definition. See Am. Fed’n Gov’t Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (Construing that the Section 1491(b)(1) did not adopt the APA’s liberal standing standards, but rather the narrow standards set forth in Section 3551(2)). See also, Myers Investigative & Sec Serv., Inc. v United States, 2002 U.S. App. LEXIS 237 (January 8, 2002).
2. Intervenors. The COFC allows parties to intervene as a matter of right and allows permissive intervention. RCFC 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 C12. 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. Effect of GAO 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(b). 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). It will not, however, review a protest alleging that GAO did not follow its own bid protest procedures. Advance Construction Services, Inc., v. U.S., 51 Fed. Cl. 362 (2002).

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 as soon as practicable following the filing of the TRO application. RCFC C9.

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 ABF Freight System Inc. v. U.S., 2003 U.S. Claims LEXIS 36, Feb. 26, 2003; see generally 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 C9-C15 provide 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).

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. The court looks to whether the agency acted arbitrarily, capriciously, or not otherwise in accordance with law. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997). See also Impresa Construzioni Geom. Domenico Garufi v. United States, 283 F.3d 1324 (Fed. Cir. 2001) (allowing for review of a contracting officer’s affirmative responsibility determination if there has been a violation of a statute or regulation, *or alternatively, if the agency determination lacked a rational basis*).
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 Government Accountability 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). RCFC C22 encourages early production of the “core documents” of the administrative record to “expedite the final resolution of the case.”

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 (this will most likely be the FedBizOpps announcement, but the RCFC still refers to the CBD);
- e. Solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers (BAFO) (the RCFC still refers to BAFO);
- 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 competitive 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). 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 RCFC incorporate the Federal Rules of Civil Procedure (FRCP) applicable to civil actions tried by a federal district court sitting without a jury to the extent practicable.
3. Additionally, the plaintiff must be represented by counsel who is admitted to practice before the court. RCFC 83.1. Finast Metal Prods., Inc. v. United States, 12 Cl. Ct. 759 (1987). RCFC C25 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.
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. The COFC 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.” RCFC C2.
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, C10. Additionally, any application must have with it the proposed order, affidavits, supporting memoranda, and other documents upon which the protester intends to rely. RCFC C10.
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 7.2(a). Responses to Rule 12(b) and 12(c) motions and summary judgment motions must be filed within 28 days of service. RCFC 7.2(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 C4-C7. 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. Sanctions. The COFC may impose sanctions under RCFC 11(c) if a “[p]leading, motion or other paper is signed in violation this rule. . .” RCFC 11(c). 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. Only those attorneys fees associated with the litigation are recoverable. Cox v. United States, 17 Cl. Ct. 29 (1989). See also 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).
3. The Demise of the “**Catalyst Theory**.” Need more than a “voluntary change in the defendant’s conduct” to qualify as a “prevailing party.” Now there must be a “judicially sanctioned change in the parties’ relationship” to be considered a “prevailing party” under fee-shifting statutes. See Brickwood Contractors, Inc. v. U.S., 288 F.3d 1371 (Fed. Cir. 2002) (holding the Supreme Court’s decision in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of HHR, 532 U.S. 598 (2001) was applicable to EAJA).

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).

VI. 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. Cases that were filed prior to 1 January 2001 may remain in the district courts.

APPENDIX A. AGENCY FAR SUPPLEMENTS.

The following Supplements contain provisions addressing protests:

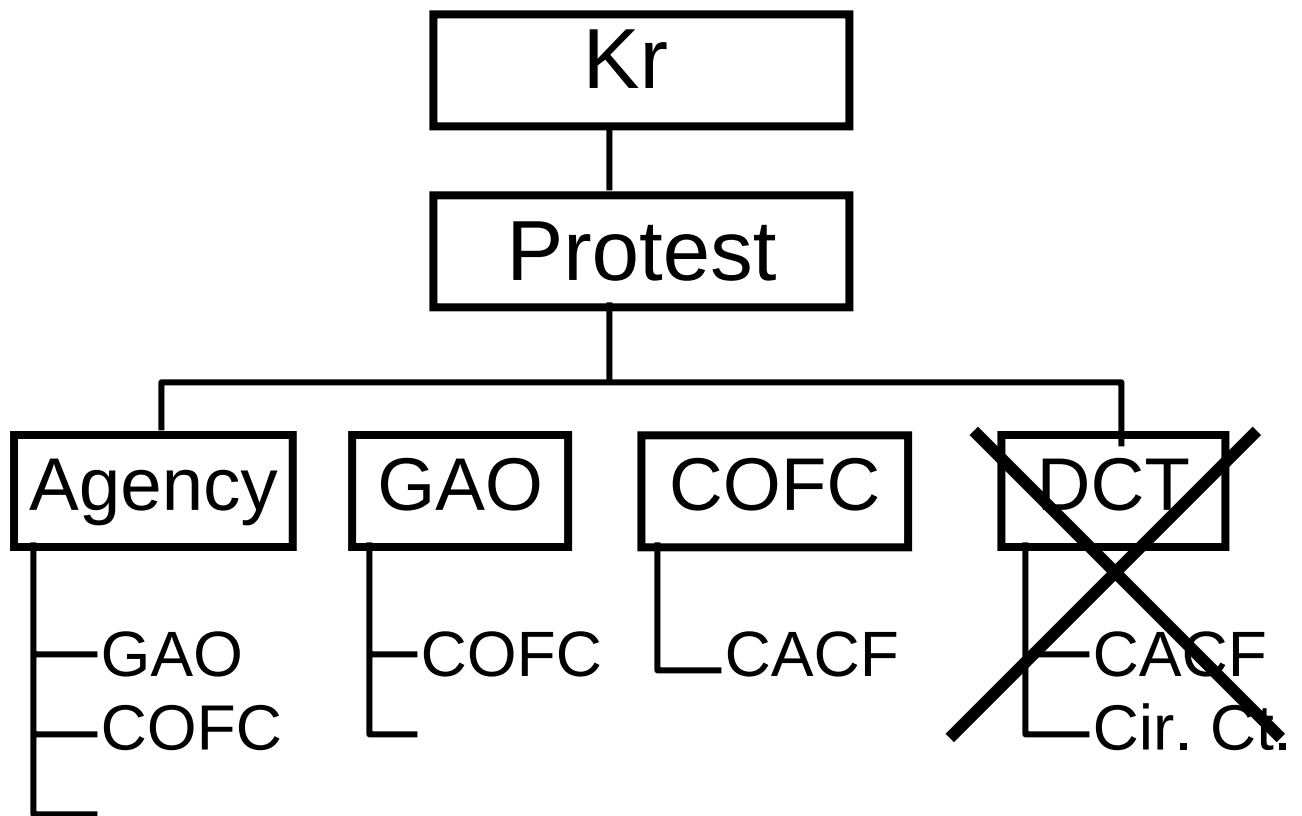
1. Army FAR Supplement (AFARS), 48 C.F.R. Subpart 5133.1.
2. Navy Marine Corps Acquisition Regulation Supplement (NMCARS), 48 C.F.R. Subpart 5233.1.
3. Air Force FAR Supplement (AFFARS), 48 C.F.R. Subpart 5333.1.
4. Defense Logistics Acquisition Directive (DLAD), 48 C.F.R. Subpart 5433.1
5. Special Operations Command FAR Supplement (SOFARS), 48 C.F.R. Subpart 5633.1.
6. Department of Agriculture Acquisition Regulation (AGAR), 48 C.F.R. Subpart 433.1.
7. US Agency for International Development (USAID) Acquisition Regulation (AIDAR), 48 C.F.R. Subpart 733.1.
8. Department of Commerce Acquisition Regulation (CAR), 48 C.F.R. Subpart 1333.1.
9. Department of Energy Acquisition Regulation (DEAR), 48. C.F.R. Subpart 933.1.
10. Department of the Interior Acquisition Regulation (DIAR), 48 C.F.R. Subpart 1433.1.
11. Department of Labor Acquisition Regulation (DOLAR), 48 C.F.R. Subpart 2933.1.

12. Department of State Acquisition Regulation (DOSAR), 48 C.F.R. Subpart 633.1.
13. Department of the Treasury Acquisition Regulation (DTAR), 48 C.F.R. Subpart 1033.1.
14. Department of Education Acquisition Regulation (EDAR), 48 C.F.R. Subpart 3433.1.
15. Environmental Protection Agency Acquisition Regulation (EPAAR), 48 C.F.R. Subpart 1533.1.
16. General Services Administration Acquisition Regulation (GSAR), 48 C.F.R. Subpart 533.1.
17. Department of Health and Human Services Acquisition Regulation (HHSAR), 48 C.F.R. 333.1.
18. Department of Housing and Urban Development Acquisition Regulation (HUDAR), 48 C.F.R. 2433.1.
19. Justice Acquisition Regulation (JAR), 48 C.F.R. Subpart 2833.1.
20. National Aeronautics and Space Administration (NASA) FAR Supplement (NFS), 48 C.F.R. Subpart 1833.1.
21. Nuclear Regulatory Commission Acquisition Regulation (NRCAR), 48 C.F.R. Subpart 2033.1.
22. Department of Transportation Acquisition Regulation (TAR), 48 C.F.R. Subpart 1233.1.
23. Veterans Affairs Acquisition Regulation (VAAR), 48 C.F.R. Subpart 833.1.

APPENDIX B. BID PROTEST FORUMS.

Bid Protests

Multiple Forums



Appendix

CHAPTER 14

COMPETITIVE SOURCING AND PRIVATIZATION

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CHAPTER 14

COMPETITIVE SOURCING AND PRIVATIZATION

I. COMPETITIVE SOURCING.¹

A. Origins and Development.

1. 1955: The Bureau of the Budget (predecessor of the Office of Management and Budget (OMB)) issued a series of bulletins establishing the federal policy to obtain goods and services from the private sector. See Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities, ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter Circular A-76 (1999)].
2. 1966: The OMB first issued Circular A-76, which restated the federal policy and the principle that “[i]n the process of governing, the Government should not compete with its citizens.” The OMB revised the Circular in 1967, 1979, 1983, and again in 1999. See Circular A-76 (1999), ¶ 4.a.
3. 1996: The OMB issued a Revised Supplemental Handbook setting forth procedures for determining whether commercial activities should be performed under contract by a commercial source or in house using government employees. In June 1999, OMB updated the Revised Supplemental Handbook. See Circular A-76 (1999), ¶ 1.²

B. Past Legislative Roadblocks.

1. The National Defense Authorization Act for Fiscal Year (FY) 1989 allowed installation commanders to decide whether to study commercial activities for outsourcing. Pub. L. No. 101-189, § 1319a)(1), 103 Stat.

¹ While referred to in the past as “contracting out” or “outsourcing,” the current and preferred term-of-art is “competitive sourcing.”

² The Circular A-76 (1999), Revised Supplemental Handbook, and associated updates issued through OMB Transmittal Memoranda are available at <http://www.whitehouse.gov/omb/circulars/index.html>.

1352, 1560 (1989). Codified at 10 U.S.C. § 2468, this law expired on 30 September 1995. Most commanders opted not to conduct such studies due to costs in terms of money, employee morale, and workforce control.

2. The Department of Defense (DOD) Appropriations Act for FY 1991 prohibited funding Circular A-76 studies. See Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.³
3. The National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost comparison studies under Circular A-76. See Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992) and Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

C. DOD and Competitive Sourcing.

1. 1993: National Performance Review (NPR). Part of Vice President Gore's "reinventing government" initiative, the NPR stated public agencies should compete "for their customers . . . with the private sector." AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).
2. 1997: Quadrennial Defense Review (QDR). Addressing the issue of maintaining combat readiness, the QDR urged outsourcing defense support functions in order to focus on essential tasks while also lowering costs. WILLIAMS S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997).
3. 1997: Defense Reform Initiative (DRI). Expanding upon the QDR, the DRI recommended outsourcing more in-house functions and established outsourcing goals for DOD. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997).

³ While not a "roadblock," a recurring limitation in recent DOD Appropriations Acts prohibits the use of funds on Circular A-76 studies if the DOD component has exceeded twenty-four months to perform a single function study, or thirty months to perform a multi-function study. See Department of Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8021, 119 Stat. 2680 (2005). The thirty-month limitation represents a change from prior years, as previously Congress provided forty-eight months for multi-function studies. See e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8022, 116 Stat. 1519, 1541 (2002).

4. Between Fiscal Year (FY) 1997 and FY 2001, DOD had completed approximately 780 sourcing decisions involving more than 46,000 government positions (approximately 34,000 civilian positions and 12,000 military provisions). See GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002) *available at* www.gao.gov.
5. During 2004, DOD completed 70 sourcing decisions affecting over 8,200 jobs; **ninety percent** of these sourcing decisions resulted in in-house performance. The average number of civilian employees affected per standard competition was 136; the average number of civilian employees affected per streamlined competition was 30. The function that was the most frequent focus of sourcing decisions in 2004 was base facilities support and management. See, OMB, REPORT ON COMPETITIVE SOURCING RESULTS: FISCAL YEAR 2004 (May 2005), *available at* www.whitehouse.gov/omb.
6. During 2005, DOD completed 35 sourcing decisions affecting 2,500 jobs; **seventy-one percent** of these sourcing decisions resulted in in-house performance. The average number of civilian employees affected per standard competition was 244; the average number of civilian employees affected per streamlined competition was 12. The function that was the most frequent focus of sourcing decisions in 2005 was maintenance and repair of buildings and structures. As of April 2006, DOD had already announced additional planned competitions for 2006 which will affect over 10,000 civilian positions. See, OMB, REPORT ON COMPETITIVE SOURCING RESULTS: FISCAL YEAR 2005 (April 2006), *available at* www.whitehouse.gov/omb.

D. Program Criticism.

1. In response to increasing criticism of the Circular A-76 process by both the public and private sectors, Congress, in Section 832 of the National Defense Authorization Act for FY 2001, tasked the Comptroller General to convene a panel of experts to study the Circular A-76 policies and procedures and to make appropriate recommendations as to possible changes. Pub. L. No. 106-398, 114 Stat. 1654, 1654A-220 (Oct. 30, 2000).
2. On 30 April 2002, the Commercial Activities Panel (CAP) released its final report, identifying weaknesses, as well as strengths, in the Circular A-76 procedures and making recommended changes. GEN. ACCT. OFF.,

COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002), available at www.gao.gov.

3. Proposed Revision to Circular A-76. Based in part on the recommendations made by the CAP, on 19 November 2002, OMB published proposed changes to Circular A-76 and sought comments. See Office of Management and Budget; Performance of Commercial Activities, 67 Fed. Reg. 69,769 (Nov. 19, 2002). Over 700 individuals/organizations/agencies submitted comments to OMB regarding the proposed changes.⁴

E. Recent Developments.

1. Following the receipt and consideration of the numerous comments received in response to the Proposed Revision, the OMB issued the “new” Circular A-76, effective 29 May 2003, superseding and rescinding the prior Circular A-76, the Revised Supplemental Handbook, OMB Circular A-76 Transmittal Memoranda Nos. 1-25, and Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental Functions*, Sept. 23, 1992. See Federal Office of Management and Budget Circular A-76 (Revised), Performance of Commercial Activities, ¶ 2 (May 23, 2003) [hereinafter Circular A-76 (Revised)].⁵
2. In general, the Circular A-76 (Revised) aims to:
 - a. provide new guidance for developing inventories of commercial and inherently governmental functions;
 - b. strengthen application of public-private competition;
 - c. incorporate “FAR-like” provisions; and

⁴ The Proposed Revision to OMB Circular A-76 and the public comments received in response during the thirty-day notice period are available at <http://www.whitehouse.gov/omb/circulars/index.html>.

⁵ For additional discussion of the procedures and changes implemented by the Circular A-76 (Revised), see discussion *infra* at Part IV. The full text of Circular A-76 (2003) is available on-line at <http://www.whitehouse.gov/omb/circulars/index.html>.

- d. increase accountability.⁶
3. Applicability. The Circular A-76 (Revised) applies to all inventories required and streamlined and standard competitions initiated after the “effective date” (i.e., 29 May 2003). Circular A-76 (Revised) ¶ 6.
- a. Direct conversions initiated but not completed by the effective date must be converted to the streamlined or standard competitions under Revised Circular A-76. Circular A-76 (Revised) ¶ 7.a.
 - b. Initiated cost comparisons for which solicitations have not been issued prior to the effective date must also be converted to standard competitions under the Circular A-76 (Revised), or, at the agency’s discretion, converted to streamlined competitions under the new rules. Circular A-76 (Revised) ¶ 7.b.
 - c. The rules in effect prior to issuance of the Revised Circular A-76 shall apply to all cost comparisons for which solicitations have already been issued, unless agencies elect to convert to the new procedures. Circular A-76 (Revised) ¶ 7.c.

II. AGENCY ACTIVITY INVENTORY.

- A. Key Terms. The heart and soul of competitive sourcing rests on whether a governmental activity/function is categorized as commercial or inherently governmental in nature.
- 1. Commercial Activity. A recurring service that could be performed by the private sector. Circular A-76 (Revised), Attachment A, ¶ B.2.
 - 2. Inherently Governmental Activities. An activity so intimately related to the public interest as to mandate performance by government personnel. Such “activities require the exercise of substantial discretion in applying

⁶ See Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003). The Federal Register notice provides a good overview of the changes made by the issuance of the Circular A-76 (Revised), as well as OMB’s reasoning for some of the changes.

government authority and/or making decisions for the government.”⁷
Circular A-76 (Revised), Attachment A, ¶ B.1.a. Inherently governmental activities fall into two broad categories:

- a. The exercise of sovereign government authority.
 - b. The establishment of procedures and processes related to the oversight of monetary transactions or entitlements.
- B. Inventory Requirement. Federal executive agencies are required to prepare annual inventories categorizing all activities performed by government personnel as either commercial or inherently governmental. The requirement is based on statute and the Circular A-76 (Revised).
- 1. Statutory Requirement - Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).
 - a. Codifies the definition of “inherently governmental” activity.
 - b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities. After mutual consultation, both OMB and the agency must make the list of commercial activities public. The agency must also forward the list to Congress.
 - c. Provides “interested parties” the chance to challenge the list within 30 days after its publication. The “interested party” list includes a broad range of potential challengers to include the private sector, representatives of business/professional groups that include private sector sources, government employees, and the head of any labor organization referred to in 5 U.S.C. § 7103(a)(4).
 - 2. Circular A-76 (Revised) Inventory Requirements.

⁷ Cf. Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)), which states the term “inherently governmental function” includes activities that merely require the “exercise of discretion.”

- a. Requires agencies to submit to OMB by 30 June each year an inventory of commercial activities, an inventory of inherently governmental activities, as well as an inventory summary report. Circular A-76 (Revised), Attachment A, ¶ A.2.
- b. After OMB review and consultation, agencies will make both the inventory of commercial activities and the inventory of inherently governmental functions available to Congress and the public unless the information is classified or protected for national security reasons. Circular A-76 (Revised), Attachment A, ¶ A.4.
- c. Categorization of Activities.
 - (1) The agency competitive sourcing official (CSO)⁸ must justify in writing any designation of an activity as inherently governmental. The justification will be provided to OMB and to the public, upon request. Circular A-76 (Revised), Attachment A, ¶ B.1.
 - (2) Agencies must use one of six reason codes to identify the reason for government performance of a commercial activity.⁹ When using reason code A, the CSO must provide sufficient written justification, which will be made available to OMB and the public, upon request. Circular A-76 (Revised), Attachment A, ¶ C.2.

⁸ The CSO is an assistant secretary or equivalent level official within an agency responsible for implementing the policies and procedures of the circular. Circular A-76 (Revised) ¶ 4.f. For the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The DOD CSO has in turn appointed DOD Component CSOs and charged them with providing Circular A-76 (Revised) implementation guidance within their respective Components. Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Assistant Secretary of the Army (Installations and Environment) et al., subject: Responsibilities of the DOD CSO and Component CSOs (29 Mar. 2004).

⁹ The six reason codes include the following:

Reason code A – “commercial activity is not appropriate for private sector performance”;
 Reason code B – “commercial activity is suitable for a streamlined or standard competition”;
 Reason code C – “commercial activity is subject of an in-progress streamlined or standard competition”;
 Reason code D – “commercial activity is performed by government personnel as the result of a streamlined or standard competition . . . within the past five years”;
 Reason code E – “commercial activity is pending an agency approved restructuring decision (e.g., base closure, realignment).

d. Challenge Process.

- (1) The head of the agency must designate an inventory challenge authority and an inventory appeal authority.
 - (a) Inventory Challenge Authorities. Must be “agency officials at the same level as, or a higher level than, the individual who prepared the inventory.” Circular A-76 (Revised), Attachment A, ¶ D.1.a.
 - (b) Inventory Appeal Authorities. Must be “agency officials who are independent and at a higher level in the agency than inventory challenge authorities.” Circular A-76 (Revised), Attachment A, ¶ D.1.b.
- (2) Inventory challenges are limited to “classification of an activity as inherently governmental or commercial” or to the “application of reason codes.” Circular A-76 (Revised), Attachment A, ¶ D.2.¹⁰

III. “OLD” CIRCULAR A-76 (See Attachment 1).

A. Resources.

1. OMB Guidance. Circular A-76 (1999), Revised Supplemental Handbook, OMB Transmittal Memoranda 1-25.

Reason code F – “commercial activity is performed by government personnel due to a statutory prohibition against private sector performance.”

Circular A-76 (Revised), Attachment A, ¶ C.1, Figure A2.

¹⁰ Originally the Circular A-76 (Revised) stated interested parties could only challenge “reclassifications” of activities. The OMB issued a technical correction, however, revising Attachment A, paragraph D.2 by deleting the word “reclassification” and inserting “classification.” Office of Mgmt. & Budget, Technical Correction to Office of Management and Budget Circular No. A-76, “Performance of Commercial Activities,” 68 Fed. Reg. 48,961, 48,962 (Aug. 15, 2003).

2. DOD Guidance.¹¹

- a. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
- b. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985 through Change 3 dated 6 Oct. 1995).
- c. U.S. Dep't of Defense, Department of Defense Strategic and Competitive Sourcing Programs Interim Guidance (Apr. 3, 2000).

3. Military Department Guidance.

- a. U.S. Dep't of Army, Reg. 5-20, Commercial Activities Program (1 Oct. 1997).¹²
- b. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (31 Jul. 1998).
- c. U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program (19 Jul. 2001).
- d. U.S. Dep't of Navy, Instr. 4860.7C, Navy Commercial Activities Program (7 June 1999).
- e. Marine Corps Order 4860.3D W/CH 1, Commercial Activities Program (14 Jan 92).

B. Key Players/Terms.

¹¹ The DOD Directive, Instruction, Interim Guidance, as well as the applicable regulations, instructions, and guidance of the various Armed Services are available at DOD's SHARE A-76 website located at <http://sharea76.fedworx.org/inst/sharea76.nsf/CONTDEFLOOK/HOME-INDEX>.

¹² On 23 May 2005, the Army issued a new AR 5-20, Competitive Sourcing Program, which implements the changes made by the Circular A-76 (Revised). The new AR is available at <http://www.usapa.army.mil/> by going to the "Official Publications" link then "New Releases."

1. Congress. The DOD must notify Congress “before commencing to analyze” a commercial activity for possible change to performance by the private sector if more than 50 civilian employees perform the function. 10 U.S.C. § 2461(b).¹³
2. Performance Work Statement (PWS). The PWS defines the agency’s needs, the performance standards and measures, and the timeframe for performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ C.
3. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ D.
4. Cost Comparison Study Team. A group of functional experts in the agency who prepare plans and develop the agency’s cost estimate. The team is responsible for developing:
 - a. The Management Plan, which defines the overall structure for the MEO. This organizational structure serves as the government’s proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.1.
 - b. The Most Efficient Organization, which describes the way the government will perform the commercial activity and at what cost. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.2.
5. MEO Certification Official. An individual, organizationally independent of the function under study or at least two levels above the most senior official included in the MEO, who certifies the Management Plan as reflecting the government’s MEO. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.3.
6. Independent Review Officer (IRO). The PWS, Management Plan, QASP, cost estimates, and supporting documentation are forwarded to the agency IRO. The IRO certifies compliance with applicable procedures and ensures the data establishes the MEO can perform the requirements of the PWS and that all costs are justified. Revised Supplemental Handbook, Part I, Chapter 3, ¶ I.

¹³ As this is a statutory requirement it still applies to DOD under the Circular A-76 (Revised) procedures.

7. Administrative Appeal Authority (AAA). An individual, independent of the activity under review or at least two organization levels above the MEO certification official, responsible for the administrative appeal process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.3.

C. Competition Procedures.

1. Direct Conversions. Activities with 10 or fewer full time equivalent employees (FTEs) may be converted without a cost comparison study. Revised Supplemental Handbook, Part I, Chapter 1, ¶ C.6.
2. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures, if it will serve the equity and fairness purposes of the Circular A-76. Revised Supplemental Handbook, Part II, Chapter 5.¹⁴
3. Cost Comparisons. If direct conversion or streamlined cost comparison procedures are inapplicable, the agency must conduct a full cost comparison study. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ A.1.

D. Seeking/Evaluating Offers in Cost Comparisons.

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods provided under the FAR (e.g., sealed bidding, negotiated procurements). Revised Supplement Handbook, Part I, Chapter 3, ¶ H.1.
2. Solicitation/Evaluation. The agency issues a solicitation based on the PWS to seek bids/offers from the private sector. FAR 7.304(c).

¹⁴ A recurring provision in the DOD Appropriations Act prohibits the DOD from converting to contractor performance any function involving more than 10 civilian employees until a “most efficient and cost effective organization analysis is completed . . .” Congress has granted the DOD a waiver to this analysis requirement, if directly converting performance of those functions to: 1) a Javits-Wagner-O’Day (JWOD) Act firm that employs blind or severely handicapped employees; or 2) a firm that is at least fifty-one percent owned by an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8014(b), 118 Stat. 951, 972 (2004).

- a. For sealed bid procurements, the contracting officer opens all bids and the government's in-house cost estimate and enters the apparent low bid on the Cost Comparison Form. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.1; FAR 7.306(a).
 - b. For negotiated procurements, the Source Selection Authority (SSA) evaluates and selects the private sector offeror that represents the "most advantageous proposal" in accordance with the solicitation's stated evaluation criteria. The cost of this proposal is compared against the government's in-house cost estimate. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.3; FAR 7.306(b).
3. "Cost/Technical Trade-Offs" in Negotiated Procurements. Negotiated procurements contemplating a "cost/technical trade-off" evaluation involve an additional step. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.
 - a. Source Selection Authority. After the SSA reviews the private sector offers and identifies the offer that represents the "best value" to the government, the contracting officer submits to the SSA the government's management plan (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶¶ H.3.c-d; see also, NWT, Inc.; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158.
 - b. Independent Review Officer. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the IRO. This review assures that the government's in-house cost estimate is based upon the same scope of work and performance levels as the "best value" private sector offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.e.

E. Choosing the Winner.

1. The private offeror "wins" if its proposal costs beat the in-house cost estimate by a minimum cost differential of:

- a. 10 percent of personnel costs, or
 - b. \$10 million over the performance period, whichever is less.
 - c. The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part II, Chapter 4, ¶ A.1.
2. Otherwise, the MEO “wins” and the agency continues performance of the commercial activity in-house, using the staffing proposed by the MEO.

F. Post-Award Review.

1. Administrative Appeals Process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K; DODI 4100.33, ¶ 5.7; DOD Interim Guidance, Attach. 5; FAR 7.307.
- a. Circular A-76 (1999) requires agencies to develop an internal administrative appeal process for challenges to cost comparison decisions.
 - (1) Generally, the agency must receive the appeal within 20 calendar days of announcement of tentative decision, which may be extended for complex studies. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.1.b. See FAR 52.207-2 (providing for a public review period of 15-30 working days, depending upon the complexity of the matter).
 - (2) The appeal must be based on noncompliance with the requirements and procedures of Circular A-76 or specific line items on the Cost Comparison Form.

- b. All “interested parties” need to review the tentative cost-comparison decision and all supporting documentation and immediately identify and bring to the attention of the Administrative Appeals Board any potential errors that, if corrected, would provide for a more accurate determination. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). “Interested parties” in this context includes affected federal employees/unions and the apparent winner of the tentative decision. Id. See also Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.2.
 - c. Decision on Appeal. The agency should provide for a decision within 30 days after the Administrative Appeal Authority receives the appeal. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.8.
 - 2. Protests to the Government Accountability Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.
 - a. Standing.
 - (1) Only an “interested party” as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).
 - (2) Affected federal employees/unions do not have standing to challenge Circular A-76 decisions at GAO, because affected employees/unions are not “actual or prospective bidders” and thus not “interested parties” under CICA. American Fed’n of Gov’t Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed’n of Gov’t Employees, B-223323, 86-1 CPD ¶ 572; American Fed’n of Gov’t Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.

b. Timing.

- (1) The protester must exhaust the agency appeal process. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). See also BAE Sys., B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 (stating GAO adopted as policy, for the sake of comity and efficiency, the requirement for protestors to exhaust the available appeal process); Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process).
- (2) The protester must file the protest with GAO within 10 working days of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3); See Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (continuing to pursue protest with agency does not toll 10 day limit).

c. Standard of Review.

- (1) When reviewing cost comparison decisions, the GAO applies the following standard of review:
 - (a) whether the agency conducted the cost comparison reasonably;
 - (b) whether the agency complied with applicable procedures; and
 - (c) if the agency failed to follow procedures, whether the failure could have materially affected the outcome of the cost comparison. See Trajen, Inc. B-284310.2, Mar. 28, 2000, 2000 U.S. Comp. Gen. LEXIS 44.

- (2) Within reason, agencies will be accorded discretion in their cost comparison studies. See, e.g., RTS Travel Serv., B-283055, Sept. 23, 1999 (finding the agency properly adjusted the contractor's price for contract administration costs); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (finding the agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the Management Plan and MEO).

3. Federal Court Challenges.

- a. Jurisdiction. The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provides the U.S. Court of Federal Claims (COFC) jurisdiction to hear pre-award and post-award bid protests.
- b. Standing.
 - (1) Only an "interested party" under the ADRA has standing to challenge procurement decisions. The Court of Appeals for the Federal Circuit (CAFC) established that "interested party" should be limited to those parties covered by CICA. American Fed'n of Gov't Employees, et al v. United States, 258 F.3d 1294 (2001). Adopting the same CICA standard used by GAO, this case definitively answered the question of which standard to use in determining whether federal employees have standing in the Court of Federal Claims.
 - (2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities.

- (a) AFGE, AFL-CIO, Local 1482 v. United States, 46 Fed. Cl. 586 (2000) (holding federal employees/union lacked standing as they were not within the zone of interests protected by the statutes they alleged were violated). Cf. AFGE, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999) (holding federal employees/unions at Rock Island Arsenal did not have standing under 10 U.S.C. § 2462 to challenge the Army's decision to award two contracts to private contractors, but had standing under the Arsenal Act (10 U.S.C. § 2542)).
- (b) AFGE v. Clinton, 180 F.3d 727 (6th Cir. 1999) (holding federal employees/union lacked standing to protest agency's decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).
- (c) NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding displaced federal workers/unions do not have standing to challenge the A-76 cost comparison process); cf. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).
- (d) Grievances. Circular A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, IRS v. Federal Labor Relations Authority, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, IRS v. Federal Labor Relations Authority, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, Fort Carson, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

4. Problem Areas/Issues.

- a. Ensuring the government Management Plan/MEO can meet the PWS requirements. See e.g., BAE Systems, B-287189, May 14, 2001, 2001 CPD ¶ 86 (finding the IRO failed to properly carry out his responsibility to ensure the MEO met the minimum PWS requirements and that it was properly adjusted to meet those performance levels).
- b. Ensuring the accuracy and fairness for the costs of in-house and contractor performance. See e.g., Del-Jen Inc., B-287273.2, Jan. 23, 2002, 2002 CPD ¶ 27 (determining the agency understated the administration costs of in-house performance and overstated the administration of contractor performance).
- c. Ensuring a “level playing field” in “cost/technical trade-off” negotiated procurements. See e.g., DynCorp Tech. Services, LLC, B-284833.3, July 17, 2001, 2001 CPD ¶ 112 (sustaining protest where the agency identified an “accelerated performance schedule” as a strength in the selected private sector proposal but did not require the MEO to equal this performance level).
- d. Avoiding Organizational Conflicts of Interest (OCI). An OCI arises when, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. FAR Subpart 9.5.
 - (1) Historically, OCI rules were applied to contractors; however, in 1999 the GAO found that government employees involved in Circular A-76 cost comparison study had an OCI that tainted the evaluation process, rendering it defective. See DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19 (finding an OCI where 14 of 16 agency evaluators held positions that were the subject of the study).

- (2) In 2000, OMB amended the Revised Supplemental Handbook and implemented new rules prohibiting employees whose positions are subject to a cost comparison study from participating as evaluators in the study. Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000).
- (3) In December 2001, the GAO found an OCI where an agency employee and private consultant wrote and edited both the PWS and the in-house Management Plan. The Jones/Hill Joint Venture, B-286194.4, B-286194.5; B-286184.6, Dec. 5, 2001, 2001 CPD ¶ 194. Upon reconsideration, the GAO modified its recommended corrective action for addressing the OCI issue in the Jones/Hill decision, stating its recommendation only applied prospectively. Department of the Navy – Reconsideration, B-286194.7, May 29, 2002.

G. Final Decision and Implementation.

1. After all appeals/protests have been resolved, the decision summary is sent to the Secretary of Defense (SECDEF) for approval and notice is forwarded to Congress. See 10 U.S.C. § 2461(a). The FY 2003 National Defense Authorization Act amends 10 U.S.C. § 2461 to require the SECDEF to notify Congress of the outcome of a competitive sourcing study, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.¹⁵
2. If the private sector offer wins, the contracting officer awards the contract. If the MEO wins the cost study, the solicitation is cancelled and the MEO implemented in accordance with the Management Plan.
3. Contractor Implementation.
 - a. Reviews. Contracted commercial activities are monitored to ensure that performance is satisfactory and cost effective.

¹⁵ Bob Stump National Defense Authorization Act for FY 2003, Pub. L. No. 107-314, § 331, 116 Stat. 2458, 2512 (2002). Again, as this is a statutory requirement it still applies to the DOD under the Circular A-76 (Revised) procedures.

- b. If the contractor defaults during the first year:
 - (1) The contracting officer will award the work to the next lowest offeror that participated in the cost comparison study, if feasible.
 - (2) If it is not feasible to award to the next lowest offeror, the contracting officer “will immediately resolicit to conduct a revised and updated cost comparison.” Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.
 - (3) If the contractor defaults after the first year, the contracting officer should seek interim contract support. If interim support is not feasible, in-house performance may be authorized by the commander on a temporary/emergency basis. See AFI 38-203, para. 19.7.

4. MEO Implementation.

- a. When performance is retained in-house, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented or the MEO fails to perform, the contracting officer will award to the next lowest offeror if feasible, or immediately resolicit to conduct a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1, 7.
- b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year, although adjustments may be made for formal mission or scope of work changes. Revised Supplemental Handbook, Part I, Chapter 3, para. L.2.
- c. Agencies must review at least 20 percent of the functions retained in-house as the result of a cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

IV. CIRCULAR A-76 (REVISED) (See Attachments 2, 3 & 4).

A. Resources.

1. OMB Guidance. OMB Circular A-76 (2003).
2. DOD Guidance.¹⁶
 - a. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
 - b. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985 through Change 3 dated 6 Oct. 1995).
 - c. U.S. Dep't of Defense, Department of Defense Strategic and Competitive Sourcing Programs Interim Guidance (Apr. 3, 2000).
3. Military Department Guidance.
 - a. U.S. Dep't of Army, Reg. 5-20, Competitive Sourcing Program (23 May 2005).
 - b. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (31 Jul. 1998).
 - c. U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program (19 Jul. 2001).
 - d. U.S. Dep't of Navy, Instr. 4860.7D, Navy Commercial Activities Program (28 September 2005).

B. Key Players/Terms.

¹⁶ The DOD Directive, Instruction, Interim Guidance, as well as the applicable regulations, instructions, and guidance of the various Armed Services are available at DOD's SHARE A-76 website located at <http://sharea76.fedworx.org/inst/sharea76.nsf/CONTDEFLOOK/HOME-INDEX>.

1. Agency Tender. The agency management plan submitted in response to and in accordance with the requirements in a solicitation. The agency tender includes an MEO, agency cost estimate, MEO quality control and phase-in plans, and any subcontracts. Circular A-76 (Revised), Attachment D.
2. Agency Tender Official (ATO). An inherently governmental official with decision-making authority who is responsible for developing, certifying, and representing the agency tender. The ATO also designates members of the **MEO Team** and is considered a “directly interested party” for contest purposes. The ATO must be independent of the contracting officer, SSA/SSEB, and the PWS team. Circular A-76 (Revised), Attachment B, ¶ A.8.a.
 - a. Conflict of Interest Avoidance. *Directly affected government personnel* (i.e. employees whose positions are being competed) may participate on the MEO Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. See attachment 4 (this outline).
3. Contracting Officer (CO). An inherently governmental official who is a member of the PWS team and is responsible for issuing the solicitation and the source selection methodology. The CO must be independent of the ATO, MEO team, and the human resource advisor (HRA). Circular A-76 (Revised), Attachment B, ¶ a.8.b and Attachment D.
4. PWS Team Leader. An inherently governmental official, independent of the ATO, HRO, and MEO team, who develops the PWS and QASP, determines government-furnished property, and assists the CO in developing the solicitation. Responsible for appointing members of the **PWS Team**. Circular A-76 (Revised), Attachment B, ¶ a.8.c.
 - a. Conflict of Interest Avoidance. *Directly affected government personnel* (i.e. employees whose positions are being competed) may participate on the PWS Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. See attachment 4 (this outline).
5. Human Resource Advisor (HRA). An inherently governmental official and human resource expert. The HRA must be independent of the CO, SSA, PWS team, and SSEB. As a member of the MEO team, the HRA assists the ATO and MEO team in developing the agency tender. The

HRA is also responsible for employee and labor-relations requirements. Circular A-76 (Revised), Attachment B, ¶ a.8.d.

6. **Source Selection Authority (SSA)**. An inherently governmental official appointed IAW FAR 15.303. The SSA must be independent of the ATO, HRA, and MEO team. Responsible for appointing members of the **Source Selection Evaluation Board Team (SSEB Team)**.

a. Conflict of Interest Avoidance. *Directly affected personnel* (i.e. employees whose positions are being competed) and other personnel (including but not limited to the ATO, HRA, MEO team members, advisors, and consultants) *with knowledge of the agency tender* shall not participate in any manner on the SSEB Team (as member or as advisors). So, PWS Team members (so long as they are not directly-affected personnel) may participate on the SSEB Team. Additionally, MEO Team members (because they have direct knowledge of the MEO) may not participate on the SSEB Team. See attachment 4 (this outline).

C. Competition Procedures.

1. Previously, agencies could “directly convert” to contractor performance functions performed by 10 or fewer full-time equivalents (FTEs). The Revised Circular A-76 eliminates the use of “direct conversions.” Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,136 (May 29, 2003).¹⁷
2. Streamlined Competitions. The new “streamlined competition” process must be used for activities performed by 65 or fewer FTEs “and/or any number of military personnel,” unless the agency elects to use the standard competition. Circular A-76 (Revised), Attachment B, ¶¶ A.5.b and C. The streamlined competition process includes:

¹⁷ While the Circular A-76 (Revised) eliminates “direct conversions” recall that Congress permits the DOD to directly convert performance of functions to: 1) Javits-Wagner-O’Day (JWOD) Act firms that employ blind or severely handicapped employees; or 2) firms that are at least fifty-one percent owned by an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8014(b), 119 Stat. 2680 (2005).

- a. Determining the Cost of Agency Performance. An agency may determine the agency cost estimate on the incumbent activity; “however, an agency is encouraged to develop a more efficient organization, which may be an MEO.” Circular A-76 (Revised), Attachment B, ¶ C.1.a.¹⁸
 - b. Determining the Cost of Private Sector/Public Reimbursable Performance. An agency may use documented market research or solicit proposals IAW the FAR, to include using simplified acquisition tools. Circular A-76 (Revised), Attachment B, ¶ C.1.b; Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,137 (May 29, 2003).
 - c. Establishing Cost Estimate Firewalls. The individual(s) preparing the in-house cost estimate and the individual(s) soliciting private sector/public reimbursable cost estimates must be different and may not share information. Circular A-76 (Revised), Attachment B, ¶ C.1.d.
 - d. Implementing the Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a “letter of obligation” with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ C.3.a.
3. Standard Competitions. The new “standard competition” procedures must be used for commercial activities performed by more than 65 FTEs. Circular A-76 (Revised), Attachment B, ¶ A.5.
 - a. Solicitation. When issuing a solicitation, the agency must comply with the FAR and clearly identify all the evaluation factors.

¹⁸ Though civilian agencies have historically been able to determine the estimated cost of in-house performance without creating an MEO, the DOD’s ability to do so is limited. Recall that the DOD generally must complete a “most efficient and cost effective organization analysis” prior to converting any function that involves *more than 10 civilian employees*. See Department of Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8014(a), 119 Stat. 2680 (2005). Note, however, that the Department of Defense Authorization Act for FY 2006, Pub. L. 109-163, § 341, 119 Stat. 3136 (2005) and 10 U.S.C. § 2461(a), Pub. L. No. 109-163 (2006), conflict with the FY 2006 DOD Appropriations Act on the minimum number of civilian employees that must be affected making the creation of an MEO mandatory. These provisions state that DOD must complete an “MEO” prior to converting any function that involves *10 or more civilian employees*. Thus, DOD should rely on the language (of “10 or more”—vice “more than 10”) contained in the FY 2006 DOD Authorization Act and in 10 U.S.C. 2461(a).

- (1) The solicitation must state the agency tender is not required to include certain information such as a subcontracting plan goals, licensing or other certifications, or past performance information (unless the agency tender is based on an MEO implemented IAW the circular). Circular A-76 (Revised), Attachment B, ¶ D.3.a(4).
- (2) The solicitation closing date will be the same for private sector offers and agency tenders. Circular A-76 (Revised), Attachment B, ¶ D.3.a(5). If the ATO anticipates the agency tender will be submitted late, the ATO must notify the CO. The CO must then consult with the CSO to determine if amending the closing date is in the best interest of the government. Circular A-76 (Revised), Attachment B, ¶ D.4.a(2).

b. Source Selection.

- (1) In addition to sealed bidding and negotiated procurements based on a lowest priced technically acceptable source selections IAW the FAR, the Circular A-76 (Revised) also permits:
 - (a) Phased Evaluation Source Selections.
 - (i) Phase One - only technical factors are considered and all prospective providers (private sector, public reimbursable sources, and the agency tender) may propose alternative performance standards. If the SSA accepts an alternate performance standard, the solicitation is amended and revised proposals are requested. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.
 - (ii) Phase Two – the SSA makes the performance decision after a price/cost realism analyses on all offers/tenders determined technically acceptable. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.

- (b) Cost-Technical Tradeoff Source Selections. May only be used in a standard competitions for (1) information technology activities, (2) commercial activities performed by the private sector, (3) new requirements, and (4) segregable expansions. Circular A-76 (Revised), Attachment B, ¶ D.5.b.3.
 - (2) The agency tender is evaluated concurrently with the private sector proposals and may be excluded from a standard competition if materially deficient. Circular A-76 (Revised), Attachment B, ¶ D.5.c.1.
 - (a) If the CO conducts exchanges with the private sector offerors and the ATO, such exchanges must be IAW FAR 15.306, except that exchanges with the ATO must be in writing and the CO must maintain records of all such correspondence. Circular A-76 (Revised), Attachment B, ¶ D.5.c.2.
 - (b) If an ATO is unable to correct a material deficiency, “the CSO may advise the SSA to exclude the agency tender from the standard competition.” Circular A-76 (Revised), Attachment B, ¶ D.5.c.3.
 - (3) All standard competitions will include the cost conversion differential (i.e., 10% of personnel costs or \$10 million, whichever is less). Circular A-76 (Revised), Attachment B, ¶ D.5.c.4.¹⁹
- c. Implementing a Performance Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a “letter of

¹⁹ As stated above, the “10% or \$10 million” conversion differential requires the DOD to apply the differential in all competitions (streamlined or standard) involving 10 or more civilian employees. See, Department of Defense Authorization Act for FY 2006, Pub. L. 109-163, § 341, 119 Stat. 3136 (2005) and 10 U.S.C. § 2461(a) , Pub. L. No. 109-163 (2006). Additionally, the Department of Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8014(a), 119 Stat. 2680 (2005) contains a limitation that states the contractor cannot receive an advantage for a proposal that reduces DOD costs by “not making an employer-sponsored health insurance plan available” to the workers who will perform the work under the proposal, or by “offering to such workers an employer-sponsored health benefits plan that the requires the employer to contribute less towards the premiums” than the amount paid by the DOD under chapter 89, title 5 of the United States Code. Id.

obligation” with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ D.6.f.

d. Contests.²⁰

- (1) A “directly interested party” (i.e., the agency tender official, a single individual appointed by a majority of directly affected employees, a private sector offeror, or the certifying official of a public reimbursable tender) may contest certain actions in a standard competition. Circular A-76 (Revised), Attachment B, ¶ F.1.
- (2) All such challenges will now be governed by the agency appeal procedures found at FAR 33.103. Circular A-76 (Revised), Attachment B, ¶ F.1.
- (3) No party may contest any aspect of a streamlined competition. Circular A-76 (Revised), Attachment B, ¶ F.2.

e. Protests.

- (1) Shortly after OMB issued the Circular A-76 (Revised), GAO published a notice in the Federal Register requesting comments on whether the GAO should accept jurisdiction over bid protests submitted by the Agency Tender Official and/or an “agent” for affected employees. Government Accountability Office; Administrative Practices and Procedures; Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35.411 (June 13, 2003).

²⁰ A “contest” is the term the OMB Circular A-76 (Revised) uses to describe what is referred to in FAR Part 33 as an agency-level protest.

- (2) In April 2004, the GAO ruled that notwithstanding the changes in the Circular A-76 (Revised), the in-house competitors in public/private competitions are not offerors and, therefore, under the current language of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), no representative of an in-house competitor is an “interested party” eligible to maintain a protest before the GAO. *Dan Dufrene et al.*, B-293590.2 et al. (April 19, 2004).²¹
- (3) In response, Congress included section 326 in the Ronald W. Reagan National Defense Authorization Act, 2005 (2005 NDAA), and granted ATOs limited, yet significant bid protest rights. Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004).
 - (a) Amends the CICA’s definition of “interested party” by specifying that term includes ATOs in public-private competitions involving more than sixty-five FTEs. *See* 31 U.S.C. § 3551(2).
 - (b) States that ATOs “shall file a protest” in a public-private competition at the request of a majority of the affected federal civilian employees “unless the [ATO] determines that there is no reasonable basis for the protest.” The ATO’s determination whether to file a protest “is not subject to administrative or judicial review,” however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.
 - (c) Additionally, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may “intervene” in the protest.

²¹ Recognizing the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to the GAO, while an unsuccessful public-sector competitor does not, the Comptroller General sent a letter to Congress suggesting that Congress may wish to consider amending the CICA to provide for MEO standing. *Dan Dufrene et al.*, B-293590.2 (April 19, 2004). The letter also suggested that any amendment to the CICA specify who would be authorized to protest on the MEO’s behalf: the ATO, affected employees (either individually or in a representative capacity), and/or employees’ union representatives. *Id.* On 18 May 2004, a bipartisan group of senators introduced legislation that would amend the CICA’s definition of “interested party” to include the ATO and any one person selected as a representative by a majority of the affected federal employees. S. 2438, 108th Cong. (2004).

- (4) On 14 April 2005, the GAO amended its Bid Protest Regulations by revising the definition of “interested party” and “intervenor” IAW with the 2005 NDAA. 70 Fed. Reg. 19,679 (Apr. 14, 2005).

4. Timeframes.

- a. Streamlined Competitions. Must be completed within 90 calendar days from “public announcement” to “performance decision,” unless the agency CSO grants an extension not to exceed 45 days. Circular A-76 (Revised), Attachment B, ¶ C.2.
- b. Standard Competitions. Must not exceed 12 months from “public announcement” to “performance decision,” unless the CSO grants a time limit waiver not to exceed 6 months. Circular A-76 (Revised), Attachment B, ¶ D.1.
- c. Preliminary Planning. Because time frames for completing competitions have been reduced, preliminary planning takes on increased importance. The new rules state that prior to public announcement (start date)²² of a streamlined or standard competition, the agency must complete several preliminary planning steps to include: scoping the activities and FTEs to be competed, grouping business activities, assessing the availability of workload data, determining the incumbent activities baseline costs, establishing schedules, and appointing the various competition officials. Circular A-76 (Revised), Attachment B, ¶ A.

D. Post Competition Accountability.

1. Monitoring. After implementing a performance decision, the agency must monitor performance IAW with the performance periods stated in the solicitation. The CO will make option year exercise determinations IAW FAR 17.207. Circular A-76 (Revised), Attachment B, ¶¶ E.4 and 5.
2. Terminations for Failure to Perform. The CO must follow the cure notice and show cause notification procedures consistent with FAR Part 49 prior

²² DOD has a statutory requirement to notify Congress “before commencing a public-private competition” of the function to be competed, the location of the proposed competition, the number of civilian employees potentially affected, and the anticipated length of the competition. 10 U.S.C. § 2461(b).

to issuing a notice of termination. Circular A-76 (Revised), Attachment B, ¶ E.6.

V. CIVILIAN PERSONNEL ISSUES.

- A. Employee Consultation. By statute, the DOD must consult with affected employees. In the case of affected employees represented by a union, consultation with union representatives satisfies this requirement. 10 U.S.C. § 2467(b).
- B. Right-of-First-Refusal of Employment.
 - 1. The CO must include the Right-of-First-Refusal of Employment clause in the solicitation. See Circular A-76 (Revised), Attachment B, ¶ D.6.f.1.b; Revised Supplemental Handbook, Part I, Chapter 3, ¶ G.4; and FAR 7.305.
 - 2. The clause, at FAR 52.207-3, requires:
 - a. The contractor to give the government employees, who have been or will be adversely affected or separated due to the resulting contract award, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-government employment conflict of interest standards.
 - b. Within 10 days after contract award, the contracting officer must provide the contractor a list of government employees who have been or will be adversely affected or separated as a result of contract award.
 - c. Within 120 days after contract performance begins, the contractor must report to the contracting officer the names of displaced employees who are hired within 90 days after contract performance begins.

C. Right-of-First-Refusal and the Financial Conflict of Interest Laws.

1. Employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact their participation, as well as, when and if they may exercise their Right-of-First Refusal.
2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.
 - a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during a Circular A-76 competition.
 - b. Reporting Employment Contacts (41 U.S.C. § 423(c)).
 - (1) FAR 3.104-1(iv) generally excludes from the scope of “personally and substantially” the following employee duties during an OMB Cir. A-76 study:
 - (a) Management studies;
 - (b) Preparation of in-house cost-estimates;
 - (c) Preparation of the MEO; or
 - (d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.
 - (2) PWS role. Consider the employee’s role. If strictly limited to furnishing data or technical support to others developing the PWS, then they are not “personally and substantially” participating. See FAR 3.104-1(iv). If the PWS role exceeds that of data and technical support, then the restriction would apply.

c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.

(1) Applies to contracts exceeding \$10 million, and

(a) Employees in any of these positions:

(i) Procuring contracting officer;

(ii) Administrative Contracting Officer;

(iii) Source Selection Authority;

(iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding \$10 million;

(ii) Award modification of contract or subcontract exceeding \$10 million;

(iii) Award task or delivery order exceeding \$10 million;

(iv) Establish overhead rates on contract exceeding \$10 million;

- (v) Approve contract payments exceeding \$10 million; or
 - (vi) Pay or settle a contract claim exceeding \$10 million.
 - (2) No exception exists to the one-year ban for offers of employment pursuant to the Right-of-First-Refusal. Thus, employees performing any of the listed duties or making the listed decisions on a cost comparison resulting in a contract exceeding \$10 million are barred for one year after performing such duties from accepting compensation/employment opportunities from the contractor via the Right-of-First-Refusal.
- 3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a “particular matter” affecting the officer or employee’s personal or imputed financial interests.
 - a. Cost comparisons conducted under OMB Cir. A-76 are “particular matters” under 18 U.S.C. § 208.
 - b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a “direct and predictable” effect on their financial interests. This determination is very fact specific.
- 4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the “intent to influence.”
 - a. The ban may be lifetime, for two years, or for one year, depending on the employee’s involvement in the matter.

- b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves “specific parties.”
- c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the Right-of-First-Refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

VI. HOUSING PRIVATIZATION.

- A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership and not just a transfer of performance.
- B. Authority. 10 U.S.C. §§ 2871-85 provides permanent authority for military housing privatization.²³
 - 1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.
 - 2. Service Secretaries may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:
 - a. Direct loans and loan guarantees to private entities.
 - b. Build/lease authority.
 - c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.

²³ Originally granted in 1996 as “temporary” legislation, this authority was made permanent by the FY 2005 National Defense Authorization Act. Pub. L. No. 108-375, § 2805, 115 Stat. 1012 (2005).

- d. Rental guarantees.
 - e. Differential lease payments.
 - f. Conveyance or lease of existing properties and facilities to private entities.
 - 3. Establishment of Department of Defense housing funds.
 - a. The Department of Defense Family Housing Improvement Fund.
 - b. The Department of Defense Military Unaccompanied Housing Improvement Fund.
- C. Implementation.
 - 1. The service conveys ownership of existing housing units, and leases the land upon which the units reside for up to 50 years.
 - 2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.
 - 3. The contractual agreement may include provisions regarding:
 - a. The amount of rent the contractor may charge military occupants (rent control).
 - b. The manner in which soldiers will make payment (allotment).
 - c. Rental deposits.
 - d. Loan guarantees to the contractor in the event of a base closure or realignment.
 - e. Whether soldiers are required to live there.

- f. The circumstances under which the contractor may lease units to nonmilitary occupants.

D. Issues and Concerns.²⁴

- 1. Making the transition positive for occupants; including keeping residents informed during the process.
- 2. Loss of control over family housing.
- 3. The effect of long-term agreements.
 - a. Future of installation as a potential candidate for housing privatization.
 - (1) DOD must determine if base a candidate for closure.
 - (2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.
 - b. Potential for poor performance or nonperformance by contractors.
 - (1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.
 - (2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

²⁴ See Government Accountability Office, Military Housing: Management Improvements Needed As Privatization Pace Quickens, Report No. GAO-02-624 (June 2002); Government Accountability Office, Military Housing: Continued Concerns in Implementing the Privatization Initiative, NSIAD-00-71 (March 30, 2000); Government Accountability Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998).

4. Effect on federal employees.
 - a. The privatization of housing will result in the elimination of those government employee positions that support family housing.
 - b. Privatization is not subject to Circular A-76.
5. Prospect of civilians living on base.
 - a. Civilians allowed to rent units not rented by military families.
 - b. This prospect raises some issues, such as security concerns and law enforcement roles.

VII. UTILITIES PRIVATIZATION.

- A. Authority. 10 U.S.C. § 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.
- B. Implementation.
 1. In 1998, DOD set a goal of privatizing all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique mission/security reasons or when privatization is uneconomical. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems (23 Dec. 1998).
 2. In October 2002, DOD revised its goal and replaced DRID #49 with updated guidance. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. The Revised Guidance Memo establishes 30 September 2005 as the date by which “Defense Components shall

complete a privatization evaluation of each system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law.” In addition to revising the milestones for utilities privatization, the Revised Guidance Memo addresses:

- a. updated guidance concerning the issuance of solicitations and the source selection considerations in utilities privatization;
 - b. DOD’s position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the Government’s utility systems;
 - c. new instruction on conducting the economic analysis, including a class deviation from the cost principle at FAR 31.205-20 authorized by DOD for “utilities privatization contracts under which previously Government-owned utility systems are conveyed by a Military Department or Defense Agency to a contractor;” and
 - d. the authority granted the Service Secretaries to include “reversionary clauses” in transaction documents to provide for ownership to revert to the Government in the event of default or abandonment by the contractor.
3. Requests for exemption from utility systems privatization, based on unique mission or safety reasons or where privatization is determined to be uneconomical, must be approved by the Service Secretary.
 4. Agencies must use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C. § 2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. § 2688(c)(3).
 5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. § 2688(c).

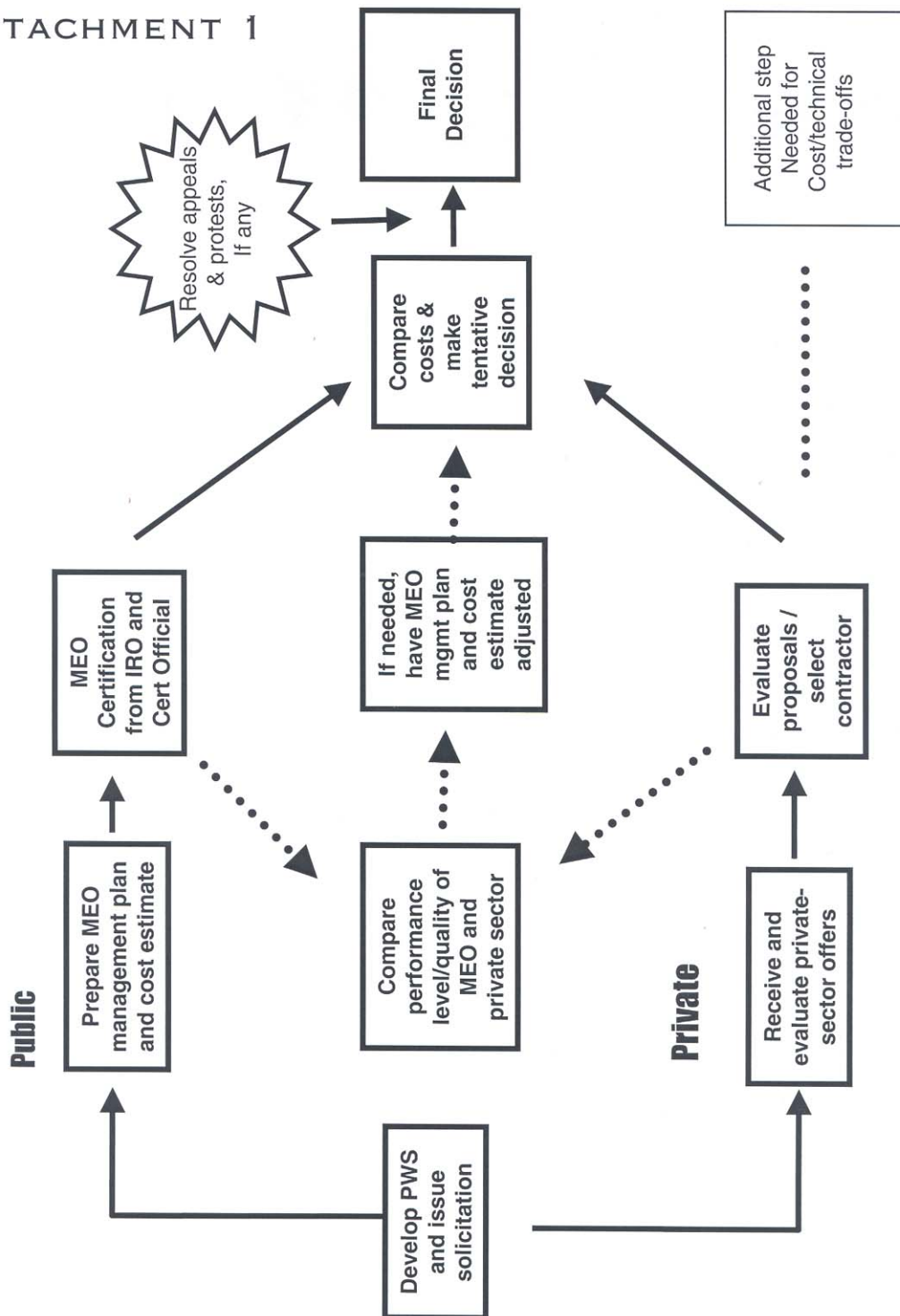
6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.
7. Installations must notify Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the DOD concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. § 2688(e).

C. Issues and Concerns.

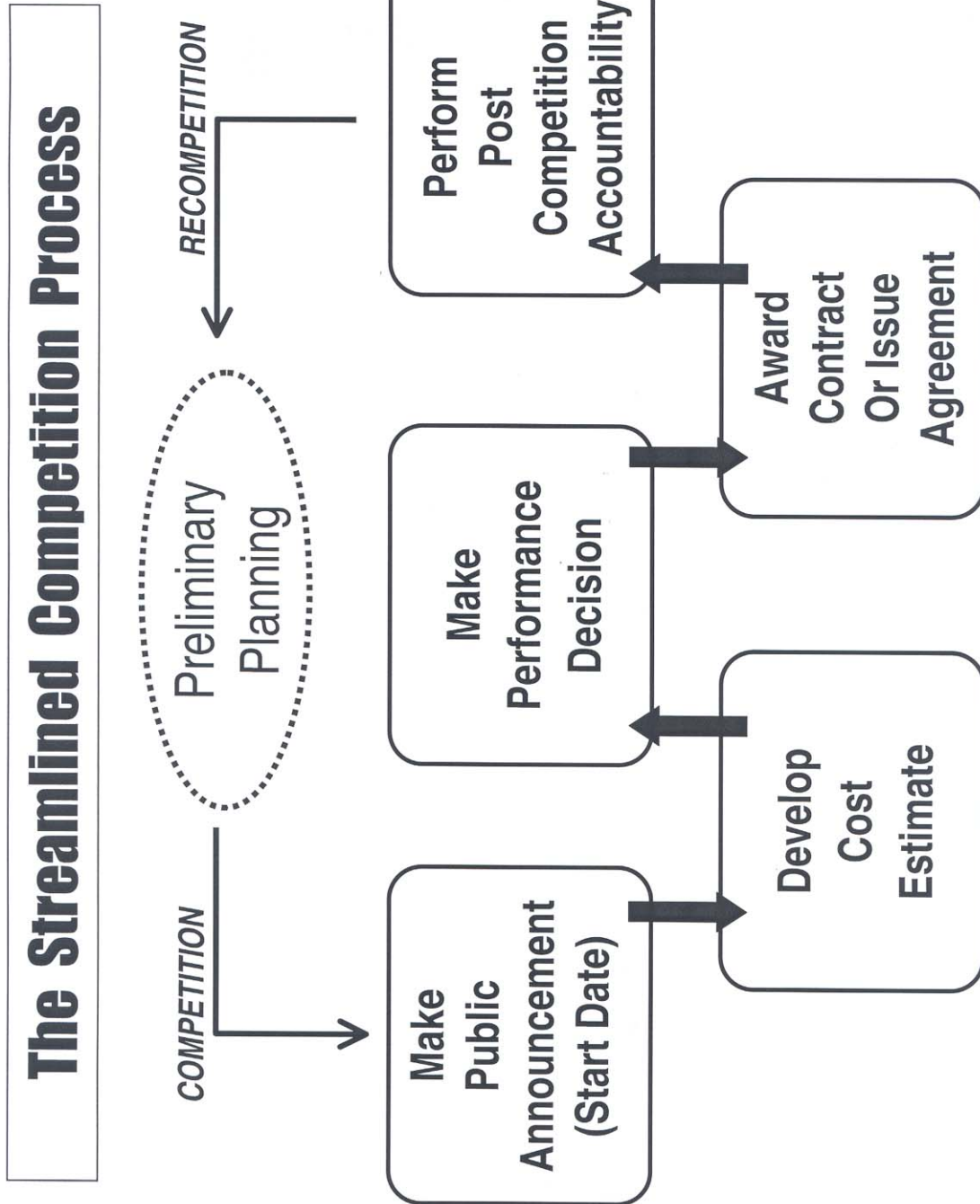
1. Effect of State Law and Regulation. State utility laws and regulations, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply in federal utility privatization cases. See Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity); see also Baltimore Gas & Electric v. United States, US District Court, District of Maryland, No AMD 00-2599 Mar. 12, 2001 (following the earlier GAO decision and finding no requirement for the Army to use sole-source procedures for the conveyance of utilities distribution systems and procurement of utilities distribution services). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).
2. Utility Bundling. An agency may employ restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.
3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are an option. Revised Guidance Memo, supra.

VIII. CONCLUSION.

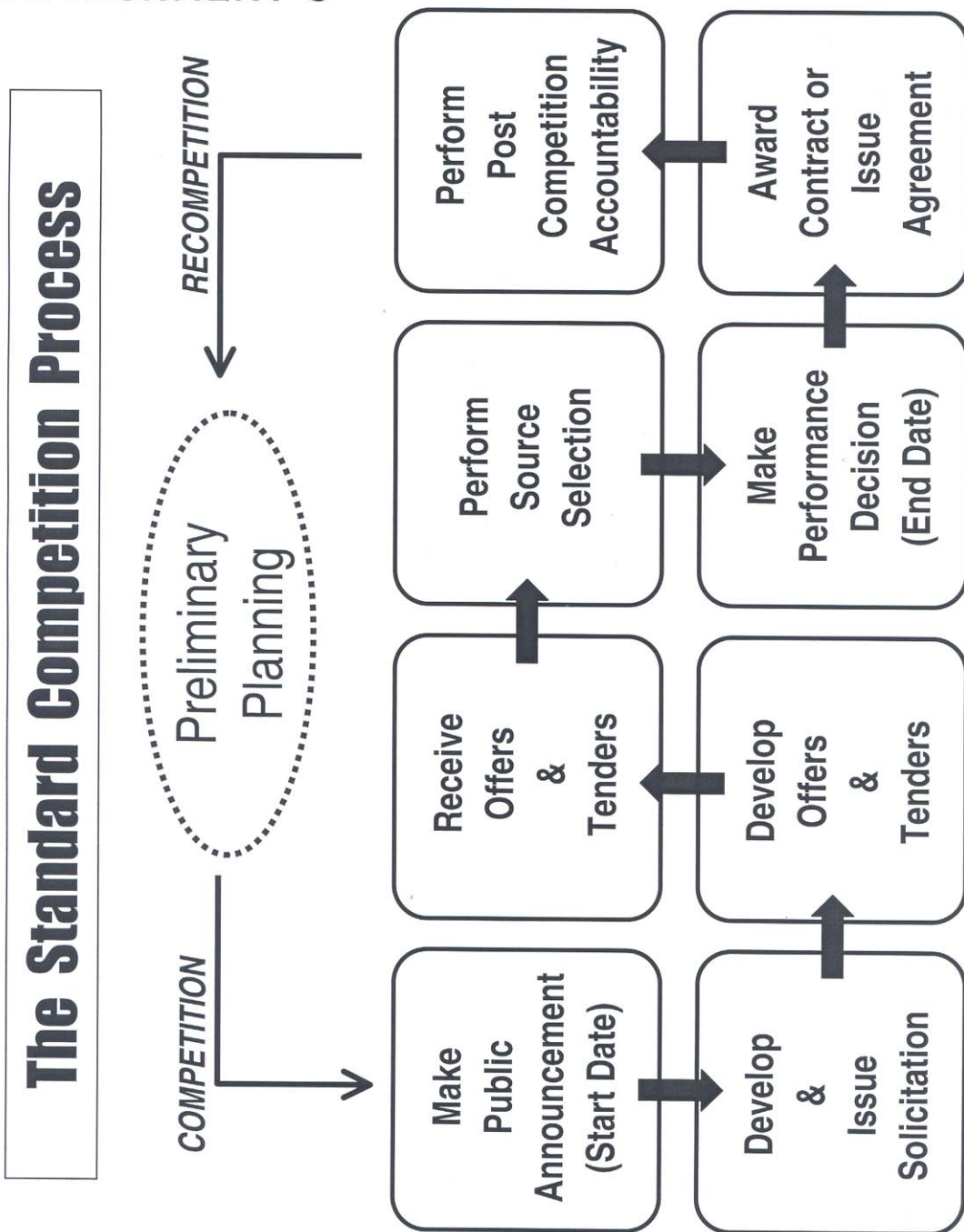
ATTACHMENT 1



Process under "Old" Circular A-76 (1999 version)



Process under “New” Circular A-76 (2003 version)



Process under “New” Circular A-76 (2003 version)

Attachment 4

Which A-76 Teams May Share Members
Without Violating the Conflict of Interest Rules
(OMB Circular A-76, dated May 29, 2003)*

	PWS Team	MEO Team	SSEB Team
PWS Team	NA	No ²⁵	Depends ²⁶
MEO Team	No ²⁷	NA	Depends ²⁸
SSEB Team	Depends ²⁹	Depends ³⁰	NA

*The purpose of this chart is to show which of the three “teams” (PWS Team, MEO Team, and SSEB Team) in an OMB Circular A-76 competition may share some of the same members. Note that there are other conflict of interest rules which are not addressed by this chart.

²⁵ PWS Team and MEO Team may NOT share the same members. See OMB Cir. A-76, Atch B, para D(2).

²⁶ PWS and SSEB Teams may share members so long as the PWS Team members that are serving on the SSEB Team are not directly-affected employees. See OMB Cir. A-76, Atch B, para D(2).

²⁷ See footnote 25.

²⁸ MEO and SSEB Teams may share members so long as those MEO members serving on SSEB Team are not directly-affected employees and so long as those MEO members serving on the SSEB Team have no knowledge of the agency tender. *Since most MEO Team members will have direct knowledge of the agency tender, normally, MEO and SSEB Teams will not be able to share members.* See OMB Cir. A-76, Atch B, para D(2).

²⁹ See footnote 26.

³⁰ See footnote 28.

What You Always Wanted to Know About the New OMB Circular A-76, but Were Too Confused to Ask. (created 10/2/03)

**(From Federal Acquisition Officers Institute,
http://sra.digiscript.com/presentation/index.cfm?media_id=15325)**

1. I keep hearing about OMB Circular No. A-76. What is it?

OMB Circular No. A-76 sets the policies and procedures that executive branch agencies must use in identifying commercial-type activities and determining whether these activities are best provided by the private sector, by government employees, or by another agency through a fee-for-service agreement. The term typically used to describe this process is “competitive sourcing.” On May 29, 2003, the Office of Management and Budget unveiled long-awaited revisions to OMB Circular A-76, which went into effect immediately. The new revisions made a fundamental policy change to make the circular more friendly to the federal worker by doing away with the longstanding presumption that all commercial-type activities in government belong in the private sector. The new emphasis is simply on getting the best value for the citizen, irrespective of who performs the work.

2. Why is competitive sourcing such a hot issue?

“Competitive sourcing” is one of five key elements of the President’s Management Agenda. Under competitive sourcing, executive agencies must study some of the commercial activities currently performed by federal employees. Since one possible outcome of these studies is that some government employees may be reassigned or lose their jobs, there is understandably general concern in the federal workforce.

3. How do people know if their job is going to be studied?

The new Circular requires an agency to make a formal public announcement for each competition. An agency will notify affected employees, and the employees’ unions, that their jobs will be part of the study before the formal announcement. Depending on the particular situation, this advance notice may be weeks or months before the formal announcement.

4. If my job is going to be studied, what are the odds that I’ll lose my job?

Experience has shown that the government wins the competitions more than half of the time. As agencies gain more experience with competitive sourcing procedures, it is likely that the government will win an even greater percentage of the competitions. Long experience at the state and local government levels has shown that even when the government loses a competition, a relatively small percent of employees actually lose their jobs. Normal attrition, retirements, and transfers are common instead.

5. Does competitive sourcing do any good for anybody?

The government spends billions of dollars every year for commercial services provided by government employees. Competition can easily result in savings of an average of 30 percent, whether government employees or private sector employees ultimately do the work. At the Defense Department, a survey of the results of hundreds of competitions done since 1994 showed savings averaging 42 percent. These savings can be re-invested in pursuit of the agency mission. This means there is enormous potential for more productive use of available funding, with no reduction in quality of service. It makes sense to periodically evaluate whether or not any organization is organized in the best possible way to accomplish its mission. This self-examination is fundamentally what public-private competition is intended to achieve.

6. How long is this competitive sourcing initiative going to continue?

It will continue indefinitely, because agencies will always have a need to explore ways to better accomplish their mission and stretch their budgets.

7. What's the difference between a commercial function and an inherently governmental function?

An inherently governmental function is defined as an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. A commercial activity is a service that could be performed by the private sector, because it is **not** so intimately related to the public interest. As a result, commercial activities, unlike inherently governmental activities, can be subject to competition.

8. How do government employees know whether they are performing commercial or inherently governmental activities?

The **Federal Activities Inventory Reform (FAIR) Act**—requires executive agencies to make an annual accounting of the commercial activities performed by federal employees and submit them to the Office of Management and Budget (OMB). The new Circular requires that agencies also account for inherently governmental activities performed by federal employees. The agency lists that result from this are referred to as “FAIR Act Inventories.” After OMB reviews and approves an agency’s inventory, the agency must post it on its public web site. Keep in mind that the inventory reflects **activities**, which are not the same thing as **positions**. One single employee may perform both inherently governmental and commercial activities.

9. How is the new Circular different from the previous one?

The new Circular—

- Establishes specific deadlines for completing studies—12 months in most cases for standard competitions, and 90 days for streamlined competitions. Under the old Circular, studies could drag on for years and prolong the uncertainty for both employees and prospective contractors.
- Eliminates direct conversions as an option for agencies to meet their competitive sourcing goals. A direct conversion was when an agency contracted out a function being performed by government employees without determining whether private or public performance of the function was the most cost effective. This could be unfair to employees and also might not be the best result for the taxpayer. Agencies must now use either streamlined or standard competitions, thereby protecting both employees and taxpayers.
- Creates a more flexible streamlined competition process. Under the old process, agencies had to identify four existing federal contracts to estimate the cost for private sector performance. Agencies can now do their studies in a more practical way, with the costs of the study more in line with the size of the activities being studied.
- Requires agencies to appoint competition officials with specific responsibilities. For standard competitions, for example, an agency must appoint a human resources advisor (HRA); an agency tender official (ATO); a performance work statement (PWS) team leader; a source selection authority (SSA); and a contracting officer (CO). This clearer description of roles makes the whole study process more transparent and fairer to all involved.

10. Once an agency decides it wants to compete a function, what comes next?

An agency needs to decide whether to conduct a streamlined competition or a standard competition. If 65 or fewer FTE are involved, the agency has the option of conducting a streamlined competition. If more than 65 FTE are involved, the agency must conduct a standard competition. The agency then needs to consult with any affected employees and their unions.

11. What happens in a streamlined competition?

In a streamlined competition, an agency determines an estimated contract price for performing the work by an outside contractor. The agency has a fair amount of latitude in determining the estimated contract price. For example, the agency may solicit proposals from prospective contractors (although this is not required) or may instead conduct more informal market research, including basing the estimate on contractor prices from multiple award schedule contracts.

The agency also determines how much it costs to perform the function in-house, with government employees. The agency can cost either the existing organization or develop a plan to streamline the organization (called a “most efficient organization,” or MEO) and base its in-house cost estimate on that plan. After the costs for both the public and private sectors are compared, the organization that costs the least wins. A streamlined competition must be completed—which means a decision is made to keep the work in-house or contract it out—within 90 days from the date it was publicly announced.

12. That sounds like a tight time frame. Is there any way an agency can get an extension on the deadline?

Yes. The agency’s Competitive Sourcing Official, who is responsible for implementing the Circular within the agency, can grant a time limit extension of 45 days for a streamlined competition that involves a solicitation or development of a MEO, for a maximum of 135 days from the date the competition is announced until a decision is made. The new Circular also allows the Competitive Sourcing official to extend the deadline beyond 135 days with prior written approval from OMB.

13. How does an agency go about figuring how much it costs to perform the function in-house? Are there any rules?

Yes, there are rules. Attachment C of the Circular spells out the detailed process that agencies must use for both streamlined and standard competitions in estimating the cost of performance by a government agency. Agencies are required to use COMPARE—computer software that incorporates the costing procedures of the Circular—to develop their cost estimates. Agency officials must certify that the cost estimate is accurate and has been calculated in accordance with the Circular.

14. What is a standard competition?

In a standard competition an agency selects a service provider based on formal offers submitted in response to an agency contract solicitation. The government submits its own offer along with prospective private contractors. In a standard competition, the government organization develops what is called a “most efficient organization” or MEO, where the agency develops the staffing plan that will form the basis for the agency’s offer in the competition. The MEO typically involves streamlining of the existing organization and is designed to place the government in the best competitive position against the private sector offerors.

A standard competition must be completed within 12 months of the date that it was publicly announced. The Competitive Sourcing Official can extend this deadline by an additional 6 months, and, as in a streamlined competition, this deadline could be extended even further with OMB’s prior written approval.

In a standard competition, unlike a streamlined competition, there is a *conversion differential*, which is added to the costs of the non-incumbent competitors. The conversion differential is the lesser of 10 percent of the MEO’s personnel-related costs or \$10 million over all the performance periods stated in the solicitation. This is intended to preclude moving work from one provider to another where estimated savings are marginal and captures non-quantifiable costs related to a conversion, such as disruption and decreased productivity.

15. Who wins the competition? The lowest-cost bidder?

Not necessarily. The new Circular provides that an agency may choose from several different procedures for determining the winner of a competition, and two of these give an agency leeway to take non-cost factors into account. However, cost will in all cases continue to be an important factor, often the most important factor, in selection decisions.

16. The Circular requires the competitive sourcing official to appoint competition officials for every standard competition and, as appropriate, for streamlined competitions. What are the names of the officials and what are their roles?

- The agency competitive sourcing official (CSO), as mentioned above, is responsible for implementation of the new Circular within the agency. This person is typically a senior official in the agency.
- The agency tender official (ATO) is responsible for developing the agency offer (the MEO submitted in response to a solicitation for a standard competition), and represents the government team's offer during source selection.
- The human resources advisor (HRA) is a human resources expert who is responsible for assisting the agency tender official in human resource-related matters related to the agency bid.
- The performance work statement (PWS) team leader develops the performance work statement and quality assurance plan, determines if the government will furnish property, and assists the contracting officer in developing the solicitation;
- The source selection authority (SSA) is responsible for determining the winner.
- The contracting officer (CO) is responsible for issuance of the solicitation and the source selection evaluation, and serves as a member of the performance work statement team.

17. If the government loses a competition against the private sector, do the affected employees have any chance of being hired by the contractor who won the competition?

Yes. The Circular requires that where the agency is the incumbent provider of the service and a contractor wins the competition, the contractor shall give government employees who have been or will be adversely affected or separated as a result of the award of the contract the right of first refusal for employment openings under the contract in positions for which they are qualified (so long as no post-government employment conflicts of interest are involved).

While this does not require the contractor to hire any government employee, it prohibits the contractor from hiring anyone else without first offering vacant positions to qualified displaced government employees. It is important to understand that the federal government cannot tell a private contractor whom to hire; neither can the government

dictate a private contractor's hiring process. The "right of first refusal" is not a job guarantee for displaced government employees.

CHAPTER 15

CONTRACT TERMINATIONS FOR CONVENIENCE

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CHAPTER 15

CONTRACT TERMINATIONS FOR CONVENIENCE

I. INTRODUCTION.

A. References and Definition.

1. FAR Part 49.
2. FAR 52.249-1 through 52.249-7.
3. Definition: "Termination for convenience" means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest. FAR 2.101.

B. Historical Development. See Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996) (court traces history of government's right to terminate contracts for convenience).

1. Inherent Authority.

- a. The government has inherent authority to suspend contracts. United States v. Corliss Steam Engine Co., 91 U.S. 321 (1875).
- b. A contractor can recover breach of contract damages, which include anticipatory (lost) profits, as a result of a termination based on inherent authority. United States v. Speed, 75 U.S. 77 (1868).

2. Statutory and Regulatory Authority.

- a. Terminations for the government's convenience developed as a tool to avoid enormous procurements upon completion of a war

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157th Contract Attorneys' Course
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effort. See Dent Act, 40 Stat. 1272 (1919); Contract Settlement Act of 1944, 58 Stat. 649.

- b. Settlement of war related contracts led to the federal procurement policy that the parties to a federal contract must bilaterally agree that the government can terminate a contract for convenience.
- c. Convenience termination clauses preclude the contractor from recovering anticipatory or lost profits when the government in good faith terminates the contract for its convenience.

II. THE RIGHT TO TERMINATE FOR CONVENIENCE.

- A. Termination is for the convenience of the government. When a contractor is performing at a loss, termination may be beneficial to the contractor, but the government has no duty to the contractor to exercise the government's right to terminate for the contractor's benefit. Contact Int'l Corp., ASBCA No. 44636, 95-2 BCA ¶ 27,887; Rotair Indus., ASBCA No. 27571, 84-2 BCA ¶ 17,417.
- B. Termination for Convenience Clauses. FAR 52.249-1 through 52.249-7.
 - 1. The FAR provides various termination for convenience clauses. The proper clause for a specific contract is dependent upon the type and dollar amount of the contract. See FAR Subpart 49.5.
 - a. Contracts for commercial items and simplified acquisitions for other than commercial items include unique convenience termination provisions that, for the most part, are not covered by Subpart 49.5. See 52.212-4 and 52.213-4.
 - b. "Short form" clauses govern fixed-price contracts not to exceed \$100,000. Settlement is governed by FAR Part 49. See Arrow, Inc., ASBCA No. 41330, 94-1 BCA ¶ 26,353 (board denied claim for useful value of special machinery and equipment because service contract properly contained short form termination clause).

- c. Fixed-price contract “long form” clauses (contracts exceeding \$100,000). These clauses specify contractor obligations and termination settlement provisions.
 - d. Cost reimbursement contract clauses. These clauses cover both convenience and default terminations, and specify detailed termination settlement provisions. See FAR 52.249-6.
- 2. The clauses give the government a right to terminate a contract, in whole or in part, when in the government's interest.
- 3. The clauses also provide the contractor with a monetary remedy.
 - a. The contractor is entitled to:
 - (1) the contract price for completed supplies or services accepted by the government;
 - (2) reasonable costs incurred in the performance of the work terminated, to include a fair and reasonable profit (unless the contractor would have sustained a loss on the contract if the entire contract had been completed); and
 - (3) reasonable costs of settlement of the work terminated. See FAR 52.249-2(g).
 - b. The cost principles of FAR Part 31 in effect on the date of the contract shall govern the claimed costs.
 - c. Exclusive of settlement costs, the contractor's recovery may not exceed the total contract price.
 - d. The contractor cannot recover anticipated (lost) profits or consequential damages, which would be recoverable under common law breach of contract principles. FAR 49.202(a).

- C. The “Christian Doctrine.” A mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law. G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963) (termination for convenience clause read into the contract by operation of law).
1. The Christian doctrine does not turn on whether clause was intentionally or inadvertently omitted, but on whether procurement policies are being avoided or evaded, deliberately or negligently, by lesser officials. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993) (Buy American Act (BAA) clause for construction contract read into contract after it had been stricken and erroneously replaced by the BAA supply clause).
 2. The Christian doctrine applies only to mandatory clauses reflecting significant public procurement policies. Michael Grinberg, DOT BCA No. 1543, 87-1 BCA ¶ 19,573 (board refused to incorporate by operation of law a discretionary T4C clause).
 3. The Christian doctrine does not apply when the contract includes an authorized deviation from the standard termination for convenience clause. Montana Refining Co., ASBCA No. 44250, 94-2 BCA ¶ 26,656 (ID/IQ contract with a stated minimum quantity included deviation in T4C clause that agency would not be liable for unordered quantities of fuel "unless otherwise stated in the contract").
 4. When a contract lacks a termination clause, an agency can’t limit termination settlement costs by arguing that the Short Form termination clause applies. Empres de Viacao Terceireense, ASBCA No. 49827, 00-1 BCA ¶ 30,796 (ASBCA noted that use of the Short Form clause was predicated on a contracting officer’s determination and exercise of discretion, which was lacking in this case).

5. Impact of other Termination Clauses: Existence of “Termination on Notice” clause in contract modification, did not render Termination for Convenience clause meaningless. Dart Advantage Warehousing, Inc. v. United States, 52 Fed. Cl. 694 (2002) (clause with such ancient lineage, reflecting deeply ingrained public procurement policy, and applied to contracts with the force and effect of law even when omitted, should not be materially modified or summarily rendered meaningless without good cause).

D. Convenience Terminations Imposed by Law.

1. Termination by Conversion.

- a. The termination for default clauses provide that an erroneous default termination converts to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c).
- b. However, if the government acted in bad faith while terminating a contract for default, courts and boards will award common law breach damages rather than the usual termination for convenience costs. See Apex Int’l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (finding 20 breaches, ASBCA holds Navy liable for breach damages).

2. Constructive Termination for Convenience.

- a. A government directive to end performance of work will not be considered a breach but rather a convenience termination if the action could lawfully fall under that clause, even if the government mistakenly thinks a contract invalid, erroneously thinks the contract can be terminated on other grounds, or wrongly calls a directive to stop work a "cancellation." G.C. Casebolt Co. v. United States, 421 F.2d 710 (Ct. Cl. 1970); John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963).

- b. The constructive termination for convenience doctrine is based on the concept that a contracting party who is sued for breach may ordinarily defend on the ground that there existed at the time of the breach a legal excuse for nonperformance, although that party was then ignorant of the fact. College Point Boat Corp. v. United States, 267 U.S. 12 (1925).
- c. However, the government cannot use the constructive termination for convenience theory to retroactively terminate a fully performed contract in an effort to limit its liability for failing to order the contract's minimum amount of goods or services. Ace-Federal Reporting, Inc., v. Barram, 226 F.3d 1329 (Fed. Cir. 2000); Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647.
- d. Further, the government may not require bidders to agree in advance that the government's failure to order the contract's minimum quantity will be treated as a termination for convenience. Southwest Lab. of Okla., Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368.

3. Deductive Change versus Partial Termination for Convenience.

- a. The contracting officer must determine whether deleted work is a deductive change or a termination for convenience.
- b. This distinction is important because it determines whether the measure of the contractor's recovery is under the contract's changes clause or the termination for convenience clause.
- c. Generally, the courts and boards will not overturn the contracting officer's determination that the deleted work is a deductive change if the parties consistently treated the deletion as such. Dollar Roofing, ASBCA No. 36461, 92-1 BCA ¶ 24,695. But see Griffin Servs., Inc., GSBCA No. 11022, 92-3 BCA ¶ 25,181 (board characterized deleted work as a partial termination for convenience, but ordered recovery based on the changes clause).

- d. If the contractor disputes the contracting officer's treatment of the deletion, courts and boards will examine the relative significance of the deleted work.
 - (1) If major portions of the work are deleted and no additional work is substituted in its place, the termination for convenience clause must be used. Nager Elec. Co. v. United States, 442 F.2d 936 (Ct. Cl. 1971).
 - (2) Courts and boards will treat the deletion of relatively minor and segregable items of work as a deductive change. Lionsgate Corp., ENG BCA No. 5425, 90-2 BCA ¶ 22,730.

III. THE DECISION TO TERMINATE FOR CONVENIENCE.

A. Regulatory Guidance.

- 1. The FAR clauses give the government the right to terminate a contract in whole or in part if the contracting officer determines that termination is in the government's interest. See John Massman Contracting Co. v. United States, 23 Cl. Ct. 24 (1991) (no duty to terminate when it would be in the contractor's best interest).
- 2. The FAR provides no guidance on factors that the contracting officer should consider when determining whether termination is "in the government's interest." FAR 49.101(b) and the convenience termination clauses merely provide that contracting officers shall terminate contracts only when it is in the government's interest to do so.
- 3. The right to terminate "comprehends termination in a host of variable and unspecified situations" and is not limited to situations where there is a "decrease in the need for the item purchased." John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).
- 4. A "cardinal change" in the government's requirements is not a prerequisite to a termination for convenience. T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).

5. The FAR does provide guidance concerning circumstances in which contracting officers normally **cannot or should not** use a convenience termination. For example, a negotiated no-cost settlement is appropriate instead of a termination for convenience or default when
 - a. The contractor will accept it;
 - b. Government property was not furnished; and,
 - c. There are no outstanding payments due to the contractor, debts due by the contractor to the government, or other contractor obligations. FAR 49.101(b).
6. The government normally should not terminate a contract, but should allow it to run to completion, when the price of the undelivered balance of the contract is less than \$5,000. FAR 49.101(c).
7. There is no requirement to give the contractor a hearing before the termination decision. Melvin R. Kessler, PSBCA No. 2820, 92-2 BCA ¶ 24,857.
8. Notice of termination. When terminating a contract for convenience, the termination contracting officer (TCO) must provide notice to the contractor, the contract administration office, and any known assignee, guarantor, or surety of the contractor. Notice shall be made by certified mail or hand delivery. FAR 49.102.
9. Contractor duties after receipt of notice of termination. FAR 49.104. The contractor is required generally to:
 - a. Stop work immediately and stop placing subcontracts;
 - b. Terminate all subcontracts;
 - c. Immediately advise the TCO of any special circumstances precluding work stoppage;

- d. Perform any continued portion of the contract and submit promptly any request for equitable adjustment to the price;
- e. Protect and preserve property in the contractor's possession;
- f. Notify TCO in writing concerning any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;
- g. Settle subcontract proposals;
- h. Promptly submit own termination settlement proposal; and
- i. Dispose of termination inventory as directed or authorized by TCO.

10. Duties of TCO after notice of termination. FAR 49.105.

- a. Direct the action required of the prime contractor;
- b. Examine the contractor's settlement proposal (and when appropriate, the settlement proposals of subcontractors);
- c. Promptly negotiate settlement agreement (or settle by determination for the elements that cannot be agreed upon, if unable to negotiate a complete settlement).

B. Standard of Review.

- 1. The courts and boards recognize the government's broad right to terminate a contract for convenience. It is not the province of the courts to decide de novo whether termination of the contract was the best course of action. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

2. The "Kalvar" test. To find that a termination for convenience in legal effect is a breach of contract, a contractor must prove bad faith or clear abuse of discretion. This is sometimes referred to as the "Kalvar" test. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990); Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976); TLT Constr. Corp., ASBCA No. 40501, 93-3 BCA ¶ 25,978 (inept government actions do not constitute bad faith); Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000).¹

- a. Bad faith.

- (1) Boards and courts presume that contracting officers act conscientiously in the discharge of their duties. Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).
- (2) To succeed on this theory, a contractor must show through "well nigh-irrefragable proof," tantamount to evidence of some specific intent to injure the contractor, that the contracting officer acted in bad faith. Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976). A recent example of bad faith is found in Bill Hubbard v. United States, 52 Fed. Cl. 192 (2002) (It was "clear to the court that the stated reasons for [moving the plaintiff's office location] were pretextual, and that the move was engineered in bad faith, without regard, indeed, with deliberate and bad faith disregard, for the legitimate business interests" of the plaintiff).

¹ The court applied the tests for finding a termination improper that were suggested by the Federal Circuit in Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996). The court found that the National Aeronautics and Space Administration (NASA) did not terminate Northrop's Space Station contract "simply to acquire a better bargain from another source," nor did NASA enter its contract with Northrop with no intent of fulfilling its promises.

- (3) Standard of Proof: Overcoming the presumption that the government acts in good faith requires “clear and convincing” evidence. Am-Pro Protective Services, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002) (Protestor’s “belated assertions, with no corroborating evidence, therefore fall short of the clear and convincing or highly probable (formerly described as well-nigh irrefragable) threshold.”).

b. Abuse of discretion.

- (1) A contracting officer’s decision to terminate for convenience cannot be arbitrary or capricious.
- (2) The Court of Claims (predecessor to the Court of Appeals for the Federal Circuit) cited four factors to apply in determining whether a contracting officer’s discretionary decision is arbitrary or capricious. Keco Indus. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). These factors are:
 - (a) Evidence of subjective bad faith on the part of the government official;
 - (b) Lack of a reasonable basis for the decision;
 - (c) The amount of discretion given to the government official; *i.e.*, the greater the discretion granted, the more difficult it is to prove that the decision was arbitrary and capricious; and,
 - (d) A proven violation of an applicable statute or regulation (this factor alone may be enough to show that the conduct was arbitrary and capricious).

3. The Torncello “change in circumstances” test.
- a. In 1982, a plurality of the Court of Claims articulated a different test for the sufficiency of a convenience termination. The test is known as the "change in circumstances" test. Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (T4C clause could not be used to avoid paying anticipated profits unless there was some change in circumstances between time of award and termination). Critics of the “change in circumstances” test charged that the court should have applied the “Kalvar” test.
 - b. The Court of Appeals for the Federal Circuit subsequently characterized Torncello as a "bad faith" case. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990) ("[Torncello] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.") This rationale had been applied by the ASBCA prior to the Federal Circuit's decision. See Dr. Richard L. Simmons, ASBCA No. 34049, 87-3 BCA ¶ 19,984; Tamp Corp., ASBCA No. 25692, 84-2 BCA ¶ 17,460.
 - c. Moreover, the court has refused to extend Torncello to situations in which the government contracts in good faith while having knowledge of facts putting it on notice that termination may be appropriate in the future. See Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed. Cir. 1995).
 - d. Contractors occasionally still argue the change in circumstances test, though unsuccessfully. See T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).

4. Effect of Improper Termination.

- a. By terminating in bad faith or arbitrarily and capriciously, the government breaches the contract, permitting the contractor to recover breach of contract damages, including anticipatory (lost) profits. See Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190 (government breached contract by exercising option year of contract while knowing that it would award a commercial activities contract or perform the work in house).
- b. The general rule is to place the injured party in as good a position as the one he would have been in had the breaching party fully performed. Remote and consequential damages are not recoverable. Travel Centre v. General Services Administration, GSBCA No. 14057, 99-2 BCA ¶ 30,521 (board denies contractor claims of lost future net income and value of business closed as result of contract termination). But see Energy Capital Corp. v. United States, 47 Fed. Cl. 382 (2000) (awarding \$8.78 million in lost profits to new venture).

C. Revocation of a Termination for Convenience.

1. Reinstatement of the contract. FAR 49.102(d).

- a. A terminated portion of a contract may be reinstated in whole or in part if the contracting officer determines in writing that there is a requirement for the terminated items and that the reinstatement is advantageous to the government. To the Administrator, Gen. Servs. Admin., 34 Comp. Gen. 343 (1955).
- b. The written consent of the contractor is required. The contracting officer may not reinstate a contract unilaterally.

2. A termination for default cannot be substituted for a termination for convenience. Roged, Inc., ASBCA No. 20702, 76-2 BCA ¶ 12,018; But see Amwest Surety Ins. Co., ENG BCA No. 6036, 94-2 BCA ¶ 26,648 (substitution allowed where government issued “conditional” termination for convenience).

IV. CONVENIENCE TERMINATION SETTLEMENTS.

A. Procedures. FAR Part 49.

1. After termination for convenience, the parties must:
 - a. Stop the work.
 - b. Dispose of termination inventory.
 - c. Adjust the contract price.
2. Timing of the termination settlement proposal.
 - a. The contractor must submit its termination proposal within **one year** of notice of the termination for convenience. FAR 49.206-1; 52.249-2(j); The Swanson Group, ASBCA No. 52109, 01-1 BCA ¶ 31,164; Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637 (Fed. Cir. 1989) (“we cannot hold that Congress wanted to prevent parties from agreeing to terms that would further expedite the claim resolution process.”); Industrial Data Link Corp., ASBCA No. 49348, 98-1 BCA ¶ 29,634, aff’d 194 F.3d 1337 (Fed. Cir., 1999); Harris Corp., ASBCA No. 37940, 90-3 BCA ¶ 23,257.
 - b. Timely submittal is defined as mailing the proposal within one year after receipt of the termination notice. Voices R Us, Inc., ASBCA No. 51565, 99-1 BCA ¶ 30,213 (denying Government’s summary judgment motion for failure to provide evidence that fax notice of termination was sent to and received by contractor); Jo-Bar Mfg. Corp., ASBCA No. 39572, 93-2 BCA ¶ 25,756 (finding timely mailing despite lack of government receipt).
 - c. If a contractor fails to submit its termination settlement proposal within the required time period, or any extension granted by the contracting officer, the contracting officer may then unilaterally determine the amount due the contractor. FAR 49.109-7.

- d. Refusal to grant an extension of time to submit a settlement proposal is not a decision that can be appealed. Cedar Constr., ASBCA No. 42178, 92-2 BCA ¶ 24,896.

B. Amount of Settlement.

1. Methods of settlement. FAR 49.103.

- a. Bilateral negotiations between the contractor and the government.
- b. Unilateral determination of the government. FAR 49.109-7. This method is appropriate only when the contractor fails to submit a proposal or a settlement cannot be reached by agreement.

2. Bases of settlement. The two bases for settlement proposals are the inventory basis (the preferred method), and the total cost basis. FAR 49.206-2.

- a. Inventory basis. Settlement proposal must itemize separately:
 - (1) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;
 - (2) Charges such as engineering costs, initial costs, and general administrative costs;
 - (3) Costs of settlements with subcontractors;
 - (4) Settlement expenses; and
 - (5) Other proper charges;
 - (6) An allowance for profit or adjustment for loss must be made to complete the gross settlement proposal.

- b. Total cost basis. Used only when approved in advance by the TCO and when use of inventory basis is impracticable or will unduly delay settlement, as when production has not commenced and accumulated costs represent planning and preproduction expenses.
- 3. Convenience termination settlements are based on costs incurred in the performance of terminated work, plus a fair and reasonable profit on the incurred costs, plus settlement expenses. See FAR 31.205-42; Teems, Inc. v. General Services Administration, GSBCA No. 14090, 98-1 BCA ¶ 29,357.
- 4. The contractor has the burden of establishing its proposed settlement amount. FAR 49.109-7(c); American Geometrics Constr. Co., ASBCA No. 37734, 92-1 BCA ¶ 24,545.
- 5. As a general rule, a termination for convenience converts the terminated portion of a fixed-price contract to a cost-reimbursement type of contract, so costs on the settlement proposal are determined under FAR Part 31 Cost Principles and Procedures. See FAR 31.205-42 – Termination Costs (these principles to be used in conjunction with other cost principles in Subpart 31.2), which lists the following categories of costs:
 - a. Common items;
 - b. Costs continuing after termination;
 - c. Initial costs;
 - d. Loss of useful value of special tooling and machinery;
 - e. Rental under unexpired leases;
 - f. Alteration of leased property;
 - g. Settlement expenses; and

- h. Subcontractor claims.
- 6. The cost principles must be applied subject to the fairness principle set forth at FAR 49.201(a), which states:
 - a. A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. See Ralcon, Inc., ASBCA No. 43176, 94-2 BCA ¶ 26,935 (rejecting contracting officer's use of DFARS weighted guidelines, and instead requiring use of factors at FAR 49.202 to determine reasonable profit).
 - b. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement. See Codex Corp. v. United States, 226 Ct. Cl. 693 (1981) (board decision disallowing pre-contract costs based on strict application of cost principles was remanded for further consideration by the board based on the court's determination that cost principles must be applied "subject to" the fairness concept in FAR 49.201). See also J.W. Cook & Sons, ASBCA No. 39691, 92-3 BCA ¶ 25,053 (board definition of "fairness").
- 7. Cost of Termination Inventory. Except for normal spoilage and except to the extent that the government assumed the risk of loss, the Contracting Officer shall exclude from the amounts due the contractor the fair value of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government. FAR 52.249-2(h). See Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (contractor can't recover "simply by pleading ignorance" of fate of materials); Industrial Tectonics Bearings Corp. v. United States, 44 Fed. Cl. 115 (1999) ("fair value" means "fair market value" and not the amount sought by the contractor).

8. Common items.

- a. FAR 31.205-42(a) provides that “[t]he costs of items reasonably usable on the contractor’s other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss.”
- b. Courts and boards have applied this provision to more than just materiel costs. Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979) (cost of butter wrapping machine not allowed in a partial termination of a butter packing contract); Hugo Auchter GmbH, ASBCA No. 39642, 91-1 BCA ¶ 23,645 (general purpose off-the-shelf computer equipment).

9. Subcontract Settlements. FAR 49.108.

- a. Upon termination of a prime contract, the prime and each subcontractor are responsible for prompt settlement of the settlement proposals of their immediate subcontractors. FAR 49.108-1.
- b. Such subcontractor recovery amounts are allowable as part of the prime’s termination for convenience settlement with the government. FAR 31.205-42(h).
- c. The TCO shall examine each subcontract settlement to determine that it was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract. FAR 49.108-3(c). A contractor’s settlement with a subcontractor must be done at “arm’s-length”, or it may be disallowed. Bos’n Towing & Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864 (denying claim for costs of terminating charter of tug boats).

10. Offsets. See Applied Companies v. United States, 37 Fed. Cl. 749 (1997) (Army properly withheld \$1.9 million from termination settlement due to overpayments on another contract).

11. Settlement Expenses. FAR 31.205-42(g).

- a. Accounting, legal, clerical, and similar costs reasonably necessary for: (1) the preparation and presentation, including supporting data, of settlement claims to the contracting officer; and (2) the termination and settlement of subcontracts.
- b. Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.
- c. Indirect costs related to salary and wages incurred as settlement expenses in a and b above; normally limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

12. Loss Contracts.

- a. A contracting officer may not allow profit in settling a termination claim if it appears that the contractor would have incurred a loss had the entire contract been completed. FAR 49.203.
- b. If the contractor would have suffered a loss on the contract in the absence of the termination, the contractor may recover only the same percentage of costs incurred as would have been recovered had the contract gone to completion. The rate of loss is applied to costs incurred to determine the cost recovery. FAR 49.203.
- c. The government has the burden of proving that the contractor would have incurred a loss at contract completion. Balimoy Mfg. Co. of Venice, ASBCA Nos. 47140 and 48165, 98-2 BCA ¶ 30,017, aff'd, 2000 U.S. App. LEXIS 26702 (Fed. Cir. 2000); R&B Bewachungs, GmbH, ASBCA No. 42214, 92-3 BCA ¶ 25,105.
- d. The target price of the fixed items, rather than the ceiling price, is used to compute the loss adjustment ratio for a convenience termination of a contract with both firm fixed price items and fixed price incentive fee line items. Boeing Defense & Space Group, ASBCA No. 51773, 98-2 BCA ¶ 30,069.

C. Special Considerations.

1. Merger. Claims against the government are generally merged with the termination for convenience settlement proposal; therefore, it is not necessary to distinguish equitable adjustment costs from normal performance costs unless the contract is in a loss status. Worsham Constr. Co., ASBCA No. 25907, 85-2 BCA ¶ 18,016.
2. Equitable adjustments. In cases of partial terminations a contractor may request an equitable adjustment for the continued portion of the contract. See 52.249-2(l) (requiring proposal to be submitted within 90 days of effective date of termination unless extended in writing by KO); Varo Inc., ASBCA Nos. 47945, 47946, 98-1 BCA ¶ 29,484 (affirmative defense of untimeliness waived where not raised until third day of hearing).
3. Mutual fault. If both the government and the contractor are responsible for the causes resulting in termination of a contract, contractors have been denied full recovery of termination costs.
 - a. In Dynalelectron Corp. v. United States, 518 F.2d 594 (Ct. Cl. 1975), the court allowed the contractor only one-half of the allowable termination for convenience costs because the contractor was at fault in continuing to incur costs while trying to meet impossible government specifications without notifying the government of its efforts.
 - b. In Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361, the board denied termination for convenience recovery because of the contractor's deficient administration of the contract. The board noted that under the default clause, if the default is determined to be improper, "the rights and obligations of the parties shall be the same as if a notice of termination for convenience of the government had been issued. We may exercise our equitable powers, however, to fashion, in circumstances where both parties share in the blame for the predicament which engenders an appeal, a remedy which apportions costs fairly."

4. When does a T4C proposal become a claim?
 - a. Once the parties reach an “impasse” in settlement negotiations, a request that the contracting officer render a final decision is implicit in the contractor’s settlement proposal.
 - b. Once the parties reach an impasse, the proposal becomes a claim under the Contract Disputes Act. James M. Ellet Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996); Rex Systems, Inc. v. Cohen, 224 F.3d 1367 (Fed. Cir. 2000) (no impasse entitling contractor to interest despite taking 2 ½ years to settle the termination); Mediatrix Interactive Technologies, Inc., ASBCA No. 43961, 99-2 BCA ¶ 30,318.

D. Limitations on Termination for Convenience Settlements.

1. Overall contract price for fixed-price contracts.
 - a. The total settlement may not exceed the contract price (less payments made or to be made under the contract) - plus the amount of the settlement expenses. FAR 49.207; FAR 52.249-2; Tom Shaw, Inc., ENG BCA No. 5540, 93-2 BCA ¶ 25,742. See also Alta Constr. Co., PSBCA No. 1463, 92-2 BCA ¶ 24,824.
 - b. Compare Okaw Indus., ASBCA No. 17863, 77-2 BCA ¶12,793 (the contract price of items terminated on an indefinite quantity contract is the price of the ordered quantity, not of the estimated quantity, where the government has ordered the minimum quantity) with Aviation Specialists, Inc., DOT BCA No. 1967, 91-1 BCA ¶ 23,534 (the only reasonable measure of the maximum recovery under a requirements contract is the government estimate.)
2. Add the cost of valid pending claims for government delay, defective specifications, etc., to the original contract price to establish the “ceiling” of convenience termination recovery. See, e.g., Wolfe Constr. Co., ENG BCA No. 5309, 88-3 BCA ¶ 21,122.

3. A contractor is not entitled to anticipatory profits or consequential damages. FAR 49.202; Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979); Centennial Leasing Corp., ASBCA No. 49217, 96-2 BCA ¶ 28,571.

E. Commercial Items – Termination For Convenience

1. Background. The Federal Acquisition Streamlining Act, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.
2. Policy. The contracting officer should exercise the government's right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. FAR 12.403(b).
3. When the contracting officer terminates for convenience a commercial item contract, the contractor shall be paid -- (i) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination, and (ii) Any charges the contractor can demonstrate directly resulted from the termination. The contractor may demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in Part 31. The Government does not have any right to audit the contractor's records solely because of the termination for convenience. FAR 12.403(d).
4. Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement. FAR 12.403(d).

F. Fiscal Considerations

1. An agency must analyze each contract that it plans to terminate for convenience to determine whether termination for convenience or completion of the contract is less costly or otherwise in the best interests of the government.
2. An agency must determine whether the convenience termination settlement would be governed by standard FAR convenience termination clause provisions, or by contract specific terms, such as termination ceilings, multi-year contract termination costs, or other specific contractual terms.
3. The general rule is that a prior year's funding obligation is extinguished upon termination of a contract, and those funds will **not** remain available to fund a replacement contract in a subsequent year where a contracting officer terminates a contract for the convenience of the government. The contracting officer must deobligate all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD Financial Management Regulation 7000.14-R, vol. 3, ch. 8, para. 080512.
4. Exceptions to the general rule.
 - a. Funds originally obligated in one fiscal year for a contract that is later terminated for convenience in response to a court order or to a determination by the Government Accountability Office or other competent authority that the award was improper, can remain available in a subsequent fiscal year to fund a replacement contract. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).
 - b. Funds originally obligated in one fiscal year for a contract that is later terminated for convenience as a result of the contracting officer's determination that the award was clearly erroneous, can remain available in a subsequent fiscal year to fund a replacement contract. Navy, Replacement Contract, B-238548, 70 Comp. Gen. 230 (1991).

- c. The two exceptions above apply subject to the following conditions:
 - (1) The original award was made in good faith;
 - (2) The agency has a continuing bona fide need for the goods or services involved;
 - (3) The replacement contract is of the same size and scope as the original contract;
 - (4) The replacement contract is executed without undue delay after the original contract is terminated for convenience; and
 - (5) If the termination for convenience is issued by the contracting officer, the contracting officer's determination that the award was improper is supported by findings of fact and law.
- 5. Bid protests or court challenge. Funds available for obligation for a contract at the time of a GAO protest, agency protest, or court action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action. A ruling is considered "final" on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080608. See also OFFICE OF THE GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, Principles of Federal Appropriations Law 5-89 (3d ed. 2004).

V. CONCLUSION.

CHAPTER 16

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CHAPTER 16

CONTRACT TERMINATIONS FOR DEFAULT

I. INTRODUCTION.

- A. General. Courts and boards hold the government to a high standard when terminating a contract for default because of the adverse impact such an action has on a contractor. Indeed, judges often describe terminations for default as a “contractual death sentence.” Unfortunately, government officials frequently fail to follow prescribed procedures, rendering default terminations subject to reversal on appeal. Prior to issuing a default termination notice, contracting officers must have a valid basis for the termination, must issue proper notices, must account for the contractor’s excusable delay, must act with due diligence, and must make a reasonable determination while exercising independent judgment. Attorneys play a critical role in this process, ensuring that all legal requirements are met and the termination decision receives the care and attention it deserves.
- B. Definition of Default. A contractor’s unexcused present or prospective failure to perform in accordance with the contract’s terms, specifications, or delivery schedule constitutes contractual default under government contracts. See FAR 49.401.
- C. Review of Default Terminations by the Courts and Boards.
 - 1. “[A] termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and in the presence of solid evidence.” Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992).
 - 2. Burden of Proof.
 - a. It is the government’s burden to prove, by a preponderance of the evidence, that the termination for default was proper. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264.

- b. A contractor's technical default is not determinative of its propriety. The Government must exercise its discretion reasonably to terminate a contract for default. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).
- c. Once the government has met its burden of demonstrating the appropriateness of the default, the contractor has the burden of proof that its failure to perform was the result of causes beyond its control and without fault on its part. International Elec. Corp. v. United States, 646 F.2d 496 (Ct. Cl. 1981); Composite Int'l, Inc., ASBCA No. 43359, 93-2 BCA ¶ 25,747.

II. THE RIGHT TO TERMINATE FOR DEFAULT.

A. Contractual Rights.

- 1. The FAR contains various Default clauses for use in government contracts that identify the conditions that permit the government to terminate a contract for default.
- 2. The clauses contain different bases for termination and different notice requirements. For example, the Fixed-Price Supply and Service clause (FAR 52.249-8) is different from the Fixed-Price Construction clause (FAR 52.249-10).

B. Common-Law Doctrine.

- 1. The standard FAR Default clauses provide: "The rights and remedies of the government in this clause are in addition to any other rights and remedies provided by law or under this contract." See FAR 52.249-8(h) and FAR 52.249-10(d).
- 2. Courts commonly cite the above-quoted provision to support termination based on common-law doctrines such as anticipatory repudiation. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985); All-State Constr., Inc., ASBCA No. 50586, 06-2 BCA ¶ 33,344 (contractor's failure to diligently perform pending resolution of a dispute, as required by the Disputes clause, is a material breach for which termination is proper under the government's common law rights reserved in 52.249-10(d)).

III. GROUNDS FOR TERMINATION.

A. Failure to Deliver or Perform on Time.

1. This ground is commonly referred to as an “(a)(1)(i)” termination. FAR 52.249-8(a)(1)(i); 52.249-10(a).
2. Generally, time is of the essence in all government contracts containing fixed dates for delivery or performance. Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151
3. When a contract does not specify delivery dates (or those dates have been waived), actual delivery could constitute the “delivery date” for purposes of the T4D clause. Aerometals, Inc., ASBCA No. 53688, 2003 ASBCA LEXIS 74 (June 25, 2003).
4. Compliance with specifications.
 - (a) The government is entitled to strict compliance with its specifications. Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992); Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053.
 - (b) However, courts and boards recognize the common-law principles of **substantial compliance** (supply) and **substantial completion** (construction) to protect the contractor where timely performance departs in minor respects from that required by the contract. If the contractor substantially complies with the contract, the government must give the contractor additional time to correct the defects prior to terminating for default. Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966); FD Constr. Co., ASBCA No. 41441, 91-2 BCA ¶ 23,983 (contractor not protected under doctrine of substantial completion because it abandoned the work and refused to complete punchlist and administrative items).

B. Failure to Make Progress so as to Endanger Performance.

1. Supply and Service. The Default clauses for fixed-price supply and service contracts and cost-reimbursement contracts provide for termination when the contractor fails to make progress so as to endanger performance. This is commonly referred to as an “(a)(1)(ii)” termination. FAR 52.249-8(a)(1)(ii); FAR 52.249-6(a).
2. Construction. The Default clause for fixed-price construction contracts provides for termination when the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in the contract. FAR 52.249-10(a).
3. Proof.
 - a. The government is not required to show that it was impossible for the contractor to complete performance. California Dredging Co., ENG BCA No. 5532, 92-1 BCA ¶ 24,475.
 - b. Rather, the contracting officer must have a **reasonable belief** that there is no reasonable likelihood that the contractor can perform the entire contract effort within the time remaining for contract performance. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (upholding the lower court's conversion of the T4D to a T4C where government did not determine whether contractor could complete work within the required time, or determine how long it would take a follow-on contractor to do the work); Pipe Tech, Inc., ENG BCA No. 5959, 94-2 BCA ¶ 26,649 (termination improper where 92% of contract performance time remained and procurement contractor fully performed within the time allowed in defaulted contract).
 - c. Prior to termination, the contracting officer should analyze progress problems against a specified completion date, adjusted to account for any government-caused delays. Technocratica, ASBCA No. 44134, 94-2 BCA ¶ 26,606 (termination for “poor progress” improper).

- d. Factors to consider include, but are not limited to: “a comparison of the percentage of work completed and” the time remaining before completion is due; “the contractor’s failure to meet progress milestones”; “problems with subcontractors and suppliers”; “the contractor’s financial situation”; and, the contractor’s past performance. McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1010 (Fed. Cir. 2003)

C. Failure to Perform Any Other Provision of the Contract.

1. Supply and Service. The default clause in fixed-price supply and service contracts specifically provides this ground for termination. It is commonly referred to as an “(a)(1)(iii)” termination. FAR 52.249-8(a)(1)(iii).
2. Construction. This basis does not exist under the construction clauses. See FAR 52.249-10. However, the courts and boards may sustain default terminations of construction contracts on this ground by reasoning that the failure to perform the "other provision" renders the contractor unable to perform the work with the diligence required to insure timely completion. Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 ("The Government, reasonably we conclude, had no alternative but to stop performance based on ETC's failure to maintain the proper amount of insurance coverage. Under the circumstances ETC was unable to perform and/or prosecute the work with the diligence required to insure completion within the performance period.").
3. Courts and boards will not sustain a default termination unless that “other provision” of the contract is a “material” or “significant” requirement. Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981 (noncompliance with first article manufacture requirements not deemed material under facts).
4. Examples.
 - a. Failure to employ drivers with valid licenses. Maywood Cab Service, Inc., VACAB No. 1210, 77-2 BCA ¶ 12,751.

- b. Failure to obtain (or provide proof of) liability insurance. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179; UMM, Inc., ENG BCA No. 5330, 87-2 BCA ¶ 19,893 (mowing services contract).
 - c. Violation of the Buy American Act. HR Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.
 - d. Failure to comply with statement of work. 4-D and Chizoma, Inc., ASBCA Nos. 49550, 49598, 00-1 BCA ¶ 30,782 (failure to properly videotape sewer line).
 - e. Failure to retain records under Payrolls and Basic Records Clause justified default under the Davis-Bacon Act. Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994).
 - f. Failure to provide a quality control plan. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179
- D. Other Contract clauses providing independent basis to terminate for default.
- 1. FAR 52.203-3 (Gratuities clause);
 - 2. FAR 52.209-5 (Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters). See Spread Information Sciences, Inc., ASBCA No. 48438, 96-1 BCA ¶ 27,996.
 - 3. FAR 52.222-26 (Equal Opportunity clause);
 - 4. FAR 52.228-1 (Bid Guarantee clause);
 - 5. FAR 52.246-2 (Inspection clause).

E. Anticipatory Repudiation.

1. Each party to a contract has the common-law right to terminate a contract upon actual or anticipatory repudiation of the contract by the other party. Restatement (Second) of Contracts § 250; Uniform Commercial Code § 210; Dingley v. Oler, 117 U.S. 490 (1886). See also, Franconia Associates, et al., v. United States, 122 S. Ct. 1993 (2002) (discussing the difference between an immediate breach and repudiation in the context of a federal housing loan program).
2. This common-law basis for default applies to all government contracts, since contract clauses generally do not address or supersede this principle. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).
 - a. Anticipatory repudiation must be express. United States v. DeKonty Corp., 922 F.2d 826 (Fed. Cir. 1991) (must be absolute refusal, distinctly and unequivocally communicated); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (no repudiation where contractor did not continue performance due to government's failure to issue appropriate instructions).
 - b. Anticipatory repudiation must be unequivocal and manifest either a clear intention not to perform or an inability to perform the contract. Ateron Corp., ASBCA No. 46352, 94-3 BCA ¶ 27,229 (contractor's statement that continued contract performance is impossible constituted repudiation). Compare Swiss Prods., Inc., ASBCA No. 40031, 93-3 BCA ¶ 26,163 (contractor's refusal to perform until government provided advance payments constitutes repudiation), with Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762 (no repudiation where contractor's statement that "government financing must be provided to assure contract completion" was not precondition to resumed performance).
3. Abandonment is actual repudiation. Compare Ortec Sys., Inc., ASBCA No. 43467, 92-2 BCA ¶ 24,859 (termination proper when work force left site and contractor failed to respond to phone calls), with Western States Mgmt. Servs., Inc., ASBCA No. 40212, 92-1 BCA ¶ 24,714 (no abandonment when contractor was unable to perform by unreasonable start date established after disestablishment of original start date).

F. Demand For Assurance.

1. Failure by one party to give adequate assurances that it would complete a contract is a valid basis for a default termination under common-law. Restatement (Second) of Contracts § 251; Uniform Commercial Code § 2-609.
2. This basis for termination applies to government contracts. Danzig v. AEC Corp., 224 F.3d 1333 (Fed. Cir. 2000) (AEC's letter responses and conduct following the Navy's cure notice supported T4D); Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762; National Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266. But see Ranco Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11923, 94-2 BCA ¶ 26,678 (board questions whether demand for assurance under UCC § 2-609 applies to construction contracts).
3. The government's "cure notice" may be the equivalent of a demand for assurance. Hannon Elec. Co. v. United States, 31 Fed. Cl. 135 (1994) (contractor's failure to provide adequate assurance in response to cure notice justified default termination); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

G. Defending a termination action.

1. When a contractor appeals a final decision terminating a contract for default, the government is not bound by the contracting officer's reasons for the termination as stated in the termination notice.
2. If a proper ground for the default termination existed at the time of the termination, regardless of whether the contracting officer relied on or was even aware of that basis, the termination is proper. See Glazer Construction Co. v. United States, 52 Fed. Cl. 513 (2002) (COFC upheld a termination for default based on Davis-Bacon Act violations committed before, but discovered after, the government issued the default termination notice); Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994) (violations of Davis-Bacon Act); Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985) (fraud); Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073 (government not required to give notice to contractor when unaware of basis for termination).

IV. NOTICE REQUIREMENTS.

A. Cure Notice.

1. For fixed-price supply or service contracts, research and development contracts, and cost-reimbursement contracts, the government must notify the contractor, in writing, of its failure to make progress ((a)(1)(ii)) or its failure to perform any other provision of the contract ((a)(1)(iii)) and give the contractor 10 days in which to cure such failure before it may terminate the contract. FAR 52.249-6; FAR 52.249-8; FAR 52.249-9. See FAR 49.607(a).
 - a. A proper cure notice must inform the contractor in writing:
 - (1) That the government intends to terminate the contract for default;
 - (2) Of the reasons for the termination; and
 - (3) That the contractor has a right to cure the specified deficiencies within the cure period (10 days).
 - b. To support a default decision, the cure notice must clearly identify the nature and extent of the performance failure. Lanzen Fabricating, Inc., ASBCA No. 40328, 93-3 BCA ¶ 26,079 (show cause notice did not serve as cure notice for purposes of (a)(1)(ii) termination because it didn't specify failures to be cured); Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361 (notice directed contractor to provide acceptable drawings without specifying what the contractor had to do to make the drawings acceptable).
 - c. The government must give the contractor a minimum of ten days to cure the deficiency. Red Sea Trading Assoc., ASBCA No. 36360, 91-1 BCA ¶ 23,567 (the ten day period need not be specifically stated in the notice if a minimum of ten days was actually afforded the contractor).

2. The government may terminate cost-reimbursement contracts for default if the contractor defaults in performing the contract and fails to cure the defect in performance within ten days of receiving a proper cure notice from the contracting officer. FAR 52.249-6(a)(2).
3. A cure notice is **NOT** required before:
 - a. Terminating for failure to timely deliver goods. Delta Indus., DOT BCA No. 2602, 94-1 BCA ¶ 26,318 (government rejected desks that did not meet contract specifications).
 - b. Terminating pursuant to an independent clause of the contract not requiring notice. See “K” Servs., ASBCA No. 41791, 92-1 BCA ¶ 24,568 (default under FAR 52.209-5 for false certification regarding debarment status of contractor's principal).
 - c. Terminating based on the contractor’s anticipatory repudiation of the contract. Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241; Scott Aviation, ASBCA No. 40776, 91-3 BCA ¶ 24,123.
 - d. Terminating construction contracts. FAR 52.249-10; Professional Services Supplier, Inc. v. United States, 45 Fed. Cl. 808, 810 (2000) (no cure notice required before a fixed price construction contract may be terminated for default). Although not required, the government frequently provides the contractor a cure notice prior to terminating these contracts. See Hillebrand Constr. of the Midwest, Inc., ASBCA No. 45853, 95-1 BCA ¶ 27,464 (failure to provide submittals); Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (concerning contractor's failure to provide proof of insurance).

B. Show Cause Notice. If a termination for default appears appropriate, the government **should, if practicable**, notify the contractor in writing of the possibility of the termination. FAR 49.402-3(e)(1). This notice is referred to as a “show cause” notice. FAR 49.607.

1. The show cause notice should:

- a. Call the contractor’s attention to its contractual liabilities if the contract is terminated for default.
- b. Request the contractor to show cause why the contract should not be terminated for default.
- c. State that the failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists.

2. The default clauses do not require the use of a show cause notice. See FAR 52.249-8 (Supply and Service); FAR 52.249-9 (Research and Development); FAR 52.249-10 (Construction); Alberts Assocs., ASBCA No. 45329, 95-1 BCA ¶ 27,480.

- a. The contracting officer is not required to include every subsequently advanced reason for the termination in the show cause notice because the government is under no obligation to issue the notice. Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.
- b. However, the courts and boards may require a “show cause” notice if its use was practicable. Udis v. United States, 7 Cl. Ct. 379 (1985); Enginetics Corp., ASBCA No. 40834, 92-2 BCA ¶ 24,965 (denying government's motion for summary judgment while noting government's failure to issue show cause notice).
- c. If the government issues a show cause notice, it need not give the contractor ten days to respond. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448 (six days was sufficient in construction default case).

V. CONTRACTOR DEFENSES TO A TERMINATION FOR DEFAULT.

A. Excusable Delay.

1. A contractor's failure to deliver or to perform on a fixed-price supply or service contract is excusable if the failure is beyond the control and without the fault or negligence of the contractor. FAR 52.249-8(c).
2. For construction contracts, the contractor is excused if the delay arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor, and the contractor, within 10 days from the beginning of any delay (unless extended by the contracting officer), notifies the contracting officer in writing of the causes of delay. FAR 52.249-10(b).
3. The contractor has the burden of proving that its failure to perform was excusable. The contractor must show:
 - a. The occurrence of an event was unforeseeable (construction only), beyond its control, and without its fault or negligence. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491; Charles H. Siever, ASBCA No. 24814, 83-1 BCA ¶ 16,242.
 - b. Timely performance was actually prevented by the claimed excuse. Sonora Mfg., ASBCA No. 31587, 91-1 BCA ¶ 23,444; Beekman Indus., ASBCA No. 30280, 87-3 BCA ¶ 20,118.
 - c. The specific period of delay caused by the event. Conquest Constr., Inc., PSBCA No. 2350, 90-1 BCA ¶ 22,605.
4. The Default clauses specifically identify some causes of excusable delay. These include:
 - a. Acts of God (AKA "force majeure") or of the public enemy. See Nogler Tree Farm, AGBCA No. 81-104-1, 81-2 BCA ¶ 15,315 (eruption of Mount St. Helens volcano); Centennial Leasing v. Gen. Servs. Admin., GSBCA No. 12037, 94-1 BCA ¶ 26,398 (death of chief operating officer not an act of God).

- b. Acts of the government in either its sovereign or contractual capacity.
 - (1) Sovereign capacity refers to public acts of the government not directed to the contract. Home Entertainment, Inc., ASBCA No. 50791, 99-2 BCA ¶ 30,550 (analysis of “sovereign act” relating to expulsion orders in Panama); Woo Lim Constr. Co., ASBCA No. 13887, 70-2 BCA ¶ 8451 (imposition of security restrictions in a hostile area).
 - (2) Acts of the government in its contractual capacity are most common and include delays caused by such things as defective specifications, unreasonable government inspections and late delivery of government furnished property. See Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (government failed to respond to contractor’s request for directions); John Glenn, ASBCA No. 31260, 91-3 BCA ¶ 24,054 (government issued faulty performance directions).
- c. Fires. Hawk Mfg. Co., GSBCA No. 4025, 74-2 BCA ¶ 10,764 (lack of facilities rather than a plant fire caused contractor's failure to timely deliver).
- d. Floods. Wayne Constr., ENG BCA No. 4942, 91-1 BCA ¶ 23,535 (storm damage to a dike entitled contractor to time extension).
- e. Epidemics and quarantine restrictions. Ace Elecs. Assoc., ASBCA No. 11496, 67-2 BCA ¶ 6456 (denying relief based on allegation that flu epidemic caused a 30% to 40% rate of absenteeism, without showing that it contributed to delay).
- f. Strikes, freight embargoes, and similar work stoppages. Woodington Corp., ASBCA No. 37885, 91-1 BCA ¶ 23,579 (delay not excused where steel strike at U.S. Steel had been ongoing for two months prior to contractor's bid, subcontractor ordered steel after strike ended, and other steel manufacturers were not on strike). But see, NTC Group, Inc., ASBCA Nos. 53720, 53721, 53722, 04-2 BCA 32,706 (labor conspiracy, akin to a strike was a valid defense to default termination).

- g. Unusually severe weather. Only unusually severe weather, as compared to the past weather in the area for that season, excuses performance. See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720 (contractor not entitled to day for day delay because some rain delay was to be expected); TCH Indus., AGBCA No. 88-224-1, 91-3 BCA ¶ 24,364 (eight inches of snow in northern Idaho in November is neither unusual nor unforeseeable).

- h. Acts of another contractor in performance of a contract for the government (construction contracts). FAR 52.249-10(b)(1); Modern Home Mfg. Corp., ASBCA No. 6523, 66-1 BCA ¶ 5367 (housing contractor entitled to extension because site not prepared in accordance with contract specifications).

- i. Defaults or delays by subcontractors or suppliers.
 - (1) Construction. If the delay of a subcontractor or supplier at any tier arises from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractor or supplier, and the contractor notifies the contracting officer within ten days from the beginning of the delay, it may be excusable. FAR 52.249-10(b).

 - (2) Supply and Services contracts, and cost-reimbursement contracts. FAR 52.249-8(d); FAR 52.249-6(b); FAR 52.249-14(b). The general rule is that if a failure to perform is caused by the default of a subcontractor or supplier at any tier, the default is excusable if:
 - (a) The cause of the default was beyond the control and without the fault or negligence of either the contractor or the subcontractor, See General Injectables & Vaccines, Inc., ASBCA No. 54930, 06-2 BCA ¶ 33,401 (contractor not excused from failure to provide flu vaccine despite worldwide vaccine unavailability because the contractor's supplier—the vaccine manufacturer—caused the unavailability of the vaccine); and

- (b) The subcontracted supplies or services were not obtainable from other sources in time for the contractor to meet the required delivery schedule. Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (contractor failed to show it made all reasonable attempts to locate an alternate supplier); CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (default upheld where plating could have been provided by another subcontractor but prime refused to pay higher price).

5. Additional excuses commonly asserted by contractors include:

- a. Material breach of contract by the government. Todd-Grace, Inc., ASBCA No. 34469, 92-1 BCA ¶ 24,742 (breach of implied duty to not interfere with contractor); Bogue Elec. Mfg. Co., ASBCA No. 25184, 86-2 BCA ¶ 18,925 (defective government-furnished equipment).
- b. Lack of financial capability. Contractors are responsible for having sufficient financial resources to perform a contract.
 - (1) Generally, this is not an excuse. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491 (contractor had deteriorating financial base unconnected to the contract).
 - (2) If the financial difficulties are caused by wrongful acts of the government, however, the delay may be excused. All-State Construction, Inc., ASBCA No. 50586, 02-1 BCA 31,794 (withholding progress payments above the amount allowed by the FAR was improper; ASBCA converted T4D into T4C); Nexus Constr. Co., ASBCA No. 31070, 91-3 BCA ¶ 24,303 (default converted because government's refusal to release progress payments constituted material breach of contract).
- c. Bankruptcy. Although filing a petition of bankruptcy is not an excuse, it precludes termination. Communications Technology Applications, Inc., ASBCA No. 41573, 92-3 BCA ¶ 25,211 (government's right to terminate stayed when bankruptcy filed, not when government notified); See also, Carter Industries, DOTBCA

No. 4108, 02-1 BCA 31,738.

- d. Small business. A-Greater New Jersey Movers, Inc., ASBCA No. 54745, 06-1 BCA ¶ 33,179 (“The Board does not accord special treatment in determining whether the burden of proof has been met to a contractor because of its status as a small business”); Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151 (no excuse for failure to meet delivery date).
 - e. Impossibility or Commercial impracticability. To establish commercial impracticability, the contractor must show it can perform only at excessive and unreasonable cost – simple economic hardship is not sufficient. CleanServ Executive Services, Inc., ASBCA No. 47781, 96-1 BCA ¶ 28,027. Compare Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472 (performance might take 17 years and cost \$400 million, rather than 2 years and \$16.9 million), with CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (no commercial impracticability where costs increased 105%).
6. If a delay is found to be excusable, the contractor is entitled to additional time and/or money. Batteast Constr. Co., ASBCA No. 35818, 92-1 BCA ¶ 24,697. **NOTE:** Constructive acceleration of the delivery date often occurs when the contracting officer, using a threat of termination, directs compliance with the contract delivery or performance date without an extension for the time period attributable to an excusable delay.

B. Waiver.

- 1. Waiver of the right to terminate for default occurs if: (1) the government fails to terminate a contract within a reasonable period of time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the government's knowledge and implied or express consent. Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838; Motorola Computer Sys., Inc., ASBCA No. 26794, 87-3 BCA ¶ 20,032.

2. Absent government manifestation that a performance date is no longer enforceable, the waiver doctrine generally does not apply to construction contracts. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.
 - a. Construction contracts typically include a payment clause entitling the contractor to payment for work performed subsequent to the specified completion date.
 - b. Construction contracts also typically include a liquidated damage clause that entitles the government to money for late completion.
 - c. As a consequence, detrimental reliance usually can't be found merely from government forbearance and continued contractor performance. Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510. *But see*, B.V. Construction, Inc., ASBCA Nos. 47766, 49337, 50553, 04-1 BCA 32,604 (the lack of a liquidated damages clause coupled with the government's apparent complete lack of concern over the completion date, caused the ASBCA to find the government elected to waive the right to terminate the contract).
3. Reasonable period of time.
 - a. Forbearance is the period of time during which the Government investigates the reasons for the contractor's failure to meet the contract requirements. The government may "forbear" for a reasonable period after the default occurs before taking some action. Reasonableness depends on the specific facts of each case. Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (although forbearance for 42 days after show cause notice was "somewhat long," T4D sustained because government did not encourage contractor to continue working and contractor did not perform substantial work during that period).
 - b. Government actions inconsistent with forbearance may waive a delivery date. Applied Cos., ASBCA No. 43210, 94-2 BCA ¶ 26,837 (government waived delivery date for First Article Test Report by seeking information, making progress payments, directing the contractor to rerun tests, and incorporating engineering change proposals into the contract after the delivery date); Kitco, Inc., ASBCA No. 38184, 91-3 BCA ¶ 24,190 (no

clear delivery schedule established after partial termination for convenience resulted in waiver of right to terminate for default based on untimely deliveries); Beta Engineering, Inc., ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879 (after contractor missed a First Article Test delivery deadline, the government left itself without an enforceable schedule by failing to terminate, encouraging continued performance, and leaving contractor “in limbo” about a new delivery schedule).

- c. Contracting officers should use show cause notices to avoid waiver arguments. See Charles H. Siever Co., ASBCA No. 24814, 83-1 BCA ¶ 16,242 (using timely show cause notice preserved right to terminate despite four month forbearance period).

4. Detrimental Reliance.

- a. The contractor must show detrimental reliance on the government’s inaction before the government will be deemed to have waived the delivery schedule. Ordnance Parts Eng’g Co., ASBCA No. 44327, 93-2 BCA ¶ 25,690 (no detrimental reliance where contractor repudiated contract).
- b. Where the contractor customarily continued performance after a missed delivery date, a board has found no inducement by the government. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230.

5. Reestablishing the delivery schedule.

- a. The government should reestablish a delivery schedule if it believes it waived the original schedule. FAR 49.402-3(c). Proper reestablishment of a delivery schedule also reestablishes the government's right to terminate for default.
- b. A delivery schedule can be reestablished either bilaterally or unilaterally. Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302 (formal modification not required, but new delivery date must be reasonable and specific).

- (1) A new delivery date established bilaterally is presumed to be reasonable. Trans World Optics, Inc., ASBCA No. 35976, 89-3 BCA ¶ 21,895; Sermor, Inc., *supra* (by agreeing to new delivery schedule, contractor waives excusable delay).
 - (2) A new delivery date the government unilaterally establishes must in fact be reasonable in light of the contractor's abilities in order to be enforceable. Rowe, Inc., GSBCA No. 14211, 01-2 BCA 31,630 (The board made an "objective determination" from "the standpoint of the performance capabilities of the contractor at the time the notice [was] given" and found the new delivery date was reasonable); McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311 (2001) (reestablished schedule was reasonable); Oklahoma Aerotronics, Inc., ASBCA No. 25605, 87-2 BCA ¶ 19,917 (unilateral date for first article delivery unreasonable).
 - (3) The schedule proposed by the contractor is presumed reasonable. Tampa Brass Aluminum Corp., ASBCA No. 41314, 92-2 BCA ¶ 24,865 (termination proper because unreasonable schedule was proposed by the contractor). *But see* S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 (schedule proposed within 24 hours of contracting officer's demand, by contractor having technical problems, was not reasonable).
- c. A cure notice, by itself, does not reestablish a waived delivery schedule. Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079.
6. If a contract requires multiple deliveries, each successive increment represents a severable obligation to deliver on the contract delivery date. Thus, the government may accept late delivery of one or more installments without waiving the delivery date for future installments. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230; Allstate Leisure Prods., Inc., ASBCA No. 40532, 94-3 BCA ¶ 26,992.

VI. THE DECISION TO TERMINATE FOR DEFAULT.

A. Discretionary Act.

1. Standard of Review.

- a. The standard FAR clauses generally grant the government the authority to terminate, which shall be exercised only after review by contracting and technical personnel, and by counsel, to ensure propriety of the proposed action. FAR 49.402-3 (a).
- b. Contracting officers must exercise discretion. The default clauses do not **compel** termination; rather, they **permit** termination for default if such action is appropriate in the business judgment of the responsible government officials. Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968) (Navy improperly terminated a contract because of pressure from a Congressional committee, rather than its own assessment of the government's and contractor's interests).
- c. Contractors may challenge the default termination decision on the basis that the terminating official abused his discretion or acted in bad faith. Marshall Associated Contractors, Inc., & Columbia Excavating, Inc., (J.V.), IBCA Nos. 1091, 3433, 3434, 3435, 01-1 BCA ¶ 31248 (abuse of discretion to terminate for default a contract with defective specifications, when the reprourement contractor received relaxed treatment); Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

2. Burden of proof.

- a. The Government has the burden of establishing the propriety of a default termination. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). A finding of technical default is not determinative on the issue of the propriety of a default termination. Walsky Constr. Co., ASBCA No. 41541, 94-2 BCA ¶ 26,698.

- b. Courts and boards review the KO's actions according to the circumstances as they existed at the time of the default. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491.
- c. Once the Government establishes that the contractor was in default, the contractor bears the burden of proving that the termination was an abuse of discretion or done in bad faith.

(1) Abuse of Discretion.

- (a) Abuse of discretion (also referred to as “arbitrary and capricious” conduct) may be ascertained by looking at the following factors:
 - (i) subjective bad faith on the part of the Government;
 - (ii) no reasonable basis for the decision;
 - (iii) the degree of discretion entrusted to the deciding official;
 - (iv) violation of an applicable statute or regulation. United States Fidelity & Guaranty Co. v. U.S., 676 F.2d 622 (Ct. Cl. 1982); Quality Environment Systems, Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060.
- (b) The contractor bears the burden of showing an abuse of discretion. Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264, aff'd on recon., 94-2 BCA ¶ 26,698 (lieutenant colonel's directive to the contracting officer “tainted the termination”); see also Libertatia Assoc., Inc. v. United States, 46 Fed. Cl. 702 (2000) (once default is established, burden shifts to contractor to show its failure to perform is excusable).

- (c) Recent examples of abuse of discretion: Ryste & Ricas, Inc., ASBCA No. 51841, 02-2 BCA ¶ 31,883 and Bison Trucking and Equipment Company, ASBCA No. 53390, 01-2 BCA ¶31,654.

(2) Bad Faith.

- (a) Contractors asserting that government officials acted in “bad faith” must meet a higher standard of proof. The courts and boards require “clear and convincing evidence”¹ of “malice” or “designedly oppressive conduct” to overcome the presumption that public officials act in good faith in the exercise of their powers and responsibilities. See Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234 (Fed. Cir. 2002); Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Apex Int’l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842, aff’d on recon., 94-2 BCA ¶ 26,852 (Navy officials acted in bad faith by “declaring war” against the contractor; contractor entitled to breach damages).
- (b) Government officials are presumed to have acted conscientiously in making a default termination decision. Mindeco Corp., ASBCA No. 45207, 94-1 BCA ¶ 26,410; Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491.

¹ This “‘clear and convincing’ or ‘highly probable’ (formerly described as ‘well-nigh irrefragable’)” standard was recently articulated by the Federal Circuit in Am-Pro Protective Agency, Inc., v. United States, 281 F.3d 1234, 1243 (Fed. Cir. 2002). For years, contractors alleging bad faith by the government needed “well-nigh irrefragable proof” to overcome the strong presumption that government officials acted in good faith. “In fact, for almost 50 years this court and its predecessor have repeated that we are ‘loath to find to the contrary [of good faith], and it takes, and should take, well-nigh irrefragable proof to induce us to do so.’” *Id.* at 1239 (quoting Schaefer v. United States, 224 Ct. Cl. 541, 633 F.2d 945, 948-49 (Ct. Cl. 1980)) (also citing Grover v. United States, 200 Ct. Cl. 337, 344 (1973); Kalvar [Corp. Inc., v. United States], 543 F.2d 1298, 1302, 211 Ct. Cl. 192 (1976); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756, 770 (Ct. Cl. 1982); T&M Distribs., Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999)).

- (c) Proof of bad faith requires specific intent to retaliate against or injure plaintiff to support an allegation of bad faith. Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (although government's administration of the contract was "seriously flawed," no bad faith).

B. Regulatory guidance. The FAR provides detailed procedures which the contracting officer should follow to terminate a contract.

1. Contracting officers should consider alternatives to termination. FAR 49.402-4. The following, among others, are available in lieu of termination for default when in the Government's interest:
 - (a) permit the contractor, the surety, or the guarantor, to continue performance under a revised schedule;
 - (b) permit the contractor to continue performance by means of a subcontract or other business arrangement;
 - (c) if the requirement no longer exists and the contractor is not liable to the government for damages, execute a no-cost termination.
2. The FAR provides detailed procedures for terminating a contract for default. FAR 49.402-3. When a default termination is being considered, the Government shall decide which termination action to take only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action. Failure to conduct such a review, while risky, will not automatically overturn a default decision. National Med. Staffing, Inc., ASBCA No. 40391, 92-2 BCA ¶ 24,837 (contracting officer acted within her discretion despite her failure to consult with technical personnel and counsel prior to termination).
3. Before terminating a contractor for default, the contracting officer should comply with the pertinent notice requirements (cure notice or show cause notice). FAR 49.402-3(c)(d)(e). Additional notice to the following third parties may be required:

- a. Surety. If a notice to terminate for default appears imminent, the contracting officer shall provide a written notice to the surety. If the contractor is subsequently terminated, the contracting officer shall sent a copy of the notice to the surety. FAR 49.402-3(e)(2).
 - b. Small Business Administration. When the contractor is a small business, send a copy of any show cause or cure notice to the contracting office's small business specialist and the Small Business Regional Office nearest the contractor. FAR 49.402-3(e)(4).
4. FAR 49.402-3(f) states that the contracting officer shall consider the following factors in determining whether to terminate a contract for default:
- a. The terms of the contract and applicable laws and regulations.
 - b. The specific failure of the contractor and the excuses for the failure.
 - c. The availability of the supplies or services from other sources.
 - d. The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
 - e. The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
 - f. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
 - g. Any other pertinent facts and circumstances.

5. Failure of the contracting officer to consider factors at FAR 49.402-3(f) may result in a defective termination. See DCX, Inc., 79 F.3d 132 (Fed. Cir. 1996) (although contracting officer's failure to consider one or more FAR 49.402-3(f) factors does not automatically require conversion to termination for convenience, such failure may aid the court or board in determining whether the contracting officer abused his discretion); Phoenix Petroleum Company, ASBCA No. 42763, 96-2 BCA ¶ 28,284 (failure to analyze FAR factors does not entitle contractor to relief; factors are not a prerequisite to a valid termination).
6. Failure to consider all information available prior to issuing a termination notice could be an abuse of discretion. Jamco Constructors, Inc., VABCA No. 3271, 94-1 BCA ¶ 26,405, aff'd on recon., 94-2 BCA ¶ 26,792 (contracting officer abused discretion by failing to reconcile contradictory information and "blindly" accepting technical representative's estimates for completion of the contract by another contractor).
7. The contracting officer must explain the decision to terminate a contract for default in a memorandum for the contract file. FAR 49.402-5. The memorandum should recount the factors at FAR 49.402-3(f).
8. The Default Termination Notice.
 - (a) Contents of the termination notice. FAR 49.102; FAR 49.402-3(g). The written notice must clearly state:
 - (1) The contract number and date;
 - (2) The acts or omissions constituting the default;
 - (3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;
 - (4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;

- (5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;
 - (6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
 - (7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause. FAR 49.402-3(g).
 - (8) FAR 49.102(a) provides that the notice shall also include any special instructions and the steps the contractor should take to minimize the impact on personnel (including reduction in work force notice of FAR 49.601-2(g)).
- (b) A default termination is a final decision that can be appealed. Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988).
- (1) The termination notification must give notice to the contractor of right to appeal the default termination. Failure to properly advise the contractor of its appeal rights may prevent the “appeals clock” from starting if the contractor can show detrimental reliance. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).
 - (2) When mailed, the notice shall be sent by certified mail, return receipt requested. When hand delivered, a written acknowledgement shall be obtained from the contractor. FAR 49.102(a). A default termination notice is effective when delivered to the contractor. Fred Schwartz, ASBCA No. 20724, 76-1 BCA ¶ 11,916.

VII. RIGHTS AND LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT.

A. Contractor Liability. Upon termination of a contract, the contractor is liable to the government for any excess costs incurred in acquiring supplies or services similar to those terminated for default (see FAR 49.402-6) and for any other damages, whether or not repurchase is effected (see FAR 49.402-7). FAR 49.402-2(e).

1. Excess Reprocurement Costs.

a. Under fixed-price supply and service contracts, the government can acquire supplies or services similar to those terminated and the contractor will be liable for any excess costs of those supplies or services. FAR 49.402-6; FAR 52.249-8(b); Ed Grimes, GSBCA No. 7652, 89-1 BCA ¶ 21,528.

b. The government must show that its assessment was proper by establishing the following:

(1) The reprocured supplies or services are the same as or similar to those involved in the termination. International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994.

(2) The government actually incurred excess costs. Sequal, Inc., ASBCA No. 30838, 88-1 BCA ¶ 20,382; and

(3) The government acted reasonably to minimize the excess costs resulting from the default. Daubert Chem. Co., ASBCA No. 46752, 94-2 BCA ¶ 26,741 (government acted reasonably where it reprocured quickly, obtained seven bids, and awarded to lowest bidder).

c. Mitigation of damages. The government has an affirmative duty to mitigate damages on repurchase. Ronald L. Collier, ASBCA No. 26972, 89-1 BCA ¶ 21,328; Kessler Chem., Inc., ASBCA No. 25293, 81-1 BCA ¶ 14,949.

- (1) If the repurchase is for a quantity of goods in excess of the quantity that was terminated for default, the contracting officer may not charge the defaulting contractor for excess costs beyond the undelivered quantity terminated for default. FAR 49.402-6(a).
 - (2) If a repurchase is for a quantity not in excess of the quantity that was terminated, the government shall repurchase at as reasonable a price as practicable. FAR 49.402-6(b). The KO may use any terms and acquisition method deemed appropriate for the repurchase. 52.249-8(b). See Al Bosgraaf Son's, ASBCA No. 45526, 94-2 BCA ¶ 26,913 (reprocurement by modification of another contract inadequate to mitigate costs); International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 (may award a reprocurement contract to the next-low offeror on the original solicitation when there is a short time span between the original competition and default).
 - (3) The government is not required to invite bids on repurchase solicitations from a defaulted contractor. Montage Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176.
- d. When the repurchase is defective, the defaulting contractor may be relieved of liability for excess costs. Ross McDonald Contracting, GmbH, ASBCA No. 38154, 94-1 BCA ¶ 26,316 (government failed to mitigate damages when exercising option on reprocurement contract); Astra Prods. Co. of Tampa, ASBCA No. 24474, 82-1 BCA ¶ 15,497.
- e. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess reprocurement costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955). Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914 (GSBCA confirms validity of the Fulford doctrine for post-CDA terminations). See D. Moody & Co. v. United States, 5 Cl. Ct. 70 (1984); Kellner Equip., Inc., ASBCA No. 26006, 82-2 BCA ¶ 16,077.

2. Liquidated Damages. Liquidated damages serve as a contractually agreed upon substitute for actual damages caused by late delivery or late completion of work. The government may recover both liquidated damages and an assessment of excess costs (either for reprocurement or for completion of the work) from a contractor upon terminating a contract for default. FAR 49.402-7.
 - a. The common law rule that liquidated damages will not be enforced if they constitute a penalty applies to government acquisitions. Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir. 1965).
 - b. A liquidated damages clause will be enforced as reasonable where, at the inception of the contract, the damages are based on a reasonable forecast of possible damages in the event of failure of performance. American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009.
 - c. If a contract does not have a liquidated damages clause or if the liquidated damages provision of a contract is unenforceable because it is punitive, the government may recover actual damages to the extent that they are proved. FAR 52.249-10.
3. Common law damages.
 - a. The government may also recover common law damages, which may be in lieu of or in addition to excess costs assessed under the default termination clause. FAR 52.249-8(h); Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985) (government awarded common law damages after failing to prove excess reprocurement costs); Hideca Trading, Inc., ASBCA No. 24161, 87-3 BCA ¶ 20,040 (despite failure to reprocure, government entitled to damages at the difference between the contract price and the market price for oil for the period 60 to 90 days after the default termination).
 - b. The government has the burden of proving that the damages are foreseeable, direct, material, or the proximate result of the contractor's breach of contract. ERG Consultants, Inc., VABCA No. 3223, 92-2 BCA ¶ 24,905 (damages must be foreseeable); Gibson Forestry, AGBCA No. 87-325-1, 91-2 BCA ¶ 23,874.

4. Unliquidated advance and progress payments. The government is entitled to repayment by the contractor of advance and progress payments, if any, attributable to the undelivered work. Smith Aircraft Co., ASBCA No. 39316, 90-1 BCA ¶ 22,475.

B. The Government's Liabilities.

1. Upon termination of a fixed-price supply contract for default, the government is liable only for the contract price for completed supplies delivered and accepted. FAR 52.249-8(f).
2. Upon termination of a fixed-price service contract or of a fixed-price construction contract, the government is liable only for the reasonable value of work done before termination, whether or not the services or construction have been contractually accepted by the government. Sphinx Int'l, Inc., ASBCA No. 38784, 90-3 BCA ¶ 22,952.
3. The government may also require the contractor to transfer title and deliver to the government its manufacturing materials, for which the government will pay the reasonable value. FAR 52.249-8(e); FAR 52.249-10(a).
4. Upon termination for default of a cost-reimbursement contract, the government is generally liable for all of the reasonable, allowable, and allocable costs incurred by the contractor, whether or not accepted by the government, plus a percentage of the contract fee. The fee is somewhat limited, however, as the amount of the contract fee payable to the contractor is based on the work accepted by the government, rather than on the amount of work done by the contractor. FAR 52.249-6.

VIII. TERMINATION OF COMMERCIAL ITEM CONTRACTS: “TERMINATION FOR CAUSE”

- A. Background. The Federal Acquisition Streamlining Act, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.
- B. Applicable Rules for Terminations for Cause. The clause at FAR 52.212-4 permits the government to terminate a contract for a commercial item for cause. This clause contains concepts that are in some ways different from “traditional” termination rules contained in FAR Part 49. Consequently, the requirements of FAR Part 49 do not apply when terminating contracts for commercial items. Contracting officers, however, may continue to follow Part 49 as guidance to the extent that Part 49 does not conflict with FAR 12.403 and FAR 52.212-4. FAR 12.403(a).
- C. Policy. The contracting officer should exercise the government’s right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. Further, the contracting officer should consult counsel prior to terminating for cause. FAR 12.403(b).
- D. Termination for Cause Highlights. FAR 12.403; FAR 52.212-4.
 - 1. Grounds. Under the rules, a contractor may be terminated for cause “in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms or conditions, or fails to provide the government, upon request, with adequate assurances of future performance.” FAR 52.212-4(m).
 - 2. Excusable Delay. Contractors are required to notify contracting officers as soon as reasonably possible after the commencement of excusable delay. FAR 52.212-4(f). In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. FAR 12.403(c).

3. Rights and Remedies:

- a. The government's rights and remedies after a termination for cause shall include all the remedies available to any buyer in the commercial market place. The government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess procurement costs together with any incidental or consequential damages incurred because of the termination. FAR 12.403(c)(2).
 - b. In the event of a termination for cause, the Government shall not be liable for supplies or services not accepted. FAR 52.212-4(m).
 - c. If a Board determines that the government improperly terminated for cause, such termination will be deemed a termination for convenience. FAR 52.212-4(m).
4. Procedure to terminate for cause. The CO shall send the contractor written notification. FAR 12.403(c)(3).

IX. MISCELLANEOUS.

A. Portion of the Contract That May Be Terminated for Default.

- 1. Total or partial termination. A default termination may be total or partial. FAR 52.249-8(a)(1); Balimoy Mfg. Co. of Venice v. United States, 2000 U.S. App. LEXIS 26702 (Fed. Cir 2000).
- 2. Severable contract requirements. Where a contract includes severable undertakings, default on one effort may not justify termination of the entire contract. T.C. Sarah C. Bell, ENG BCA No. 5872, 92-3 BCA ¶ 25,076.

- B. Availability of Funds. Funds that have been obligated but have not been disbursed at the time of termination for default and funds recovered as excess costs on a defaulted contract remain available for a replacement contract awarded in a subsequent fiscal year. Funding of Replacement Contracts, B-198074, July 15, 1981, 81-2 CPD ¶ 33; Bureau of Prisons-Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sep. 28, 1983, 84-1 CPD ¶ 91.
- C. Conversion to T4C. All FAR default clauses provide that an erroneous default termination will be converted to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c); FAR 52.249-6(b). But see Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (board refuses to limit recovery to termination for convenience costs where government officials acted in bad faith; contractor entitled to breach damages).
- D. T4C Proposals while T4D appeal is pending.
 - 1. A contractor, prior to the default being overturned, can submit a termination for convenience settlement proposal to the contracting officer. The proposals will be treated as Contract Disputes Act claims.² McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285 (1997); Balimoy Mfg. Co. of Venice, ASBCA No. 49,730, 96-2 BCA ¶ 28,605.
 - 2. An appeal of a convenience settlement proposal will be dismissed without prejudice to reinstatement if the appeal of a default termination is pending. Poly Design, Inc., ASBCA No. 50862, 98-1 BCA ¶ 29,458.

X. CONCLUSION.

² The demand for termination for convenience costs from the contracting officer who terminated the contract for default demonstrates the "impasse" required to convert a proposal into a claim.

CHAPTER 17

INSPECTION, ACCEPTANCE, AND WARRANTY

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CHAPTER 17

INSPECTION, ACCEPTANCE, AND WARRANTY

I. INTRODUCTION.

A fundamental goal of the acquisition process is to obtain quality goods and services. In furtherance of this goal, the government inspects tendered supplies or services to insure that they conform with contract requirements. While the right to inspect and test is very broad, it is not without limits. Frequently, government inspectors perform unreasonable inspections, rendering the government liable to the contractor for additional costs. Proper inspections are critical, because once the government accepts a product or service, it cannot revoke its acceptance except in narrowly defined circumstances. Attorneys can contribute to the success of the government procurement process by working with government inspectors and contracting officers to insure that each of these individuals understands the government's rights and obligations regarding inspection, acceptance, and warranty under government contracts.

II. FUNDAMENTAL CONCEPTS OF INSPECTION AND TESTING.

A. General.

1. The inspection clauses, which are remedy granting clauses, vest the government with significant rights and remedies. FAR 52.246-2 - 52.246-12.
2. In any dispute, the parties must identify the correct theory of recovery and applicable contractual provisions. The theory of recovery normally flows from a contractual provision. See Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207 (government denial of cost reimbursement rejected-board noted government's failure to cite Inspection clause).

B. Origin of the Government's Right to Inspect.

1. The government has the right to inspect to ensure that it receives conforming goods and services. FAR Part 46. The particular inspection clauses contained in a contract, if any, determine the government's right to inspect a contractor's performance.
2. Contract inspections fall into three general categories, depending on the extent of quality assurance needed by the government for the acquisition involved. These include:
 - a. Government reliance on inspection by the contractor (FAR 46.202-2);
 - b. Standard inspection requirements (FAR 46.202-3); and
 - c. Higher-level contract quality requirements (FAR 46.202-4).
3. The FAR contains several different inspection clauses. In determining which clause to use, consider:
 - a. The contract type (e.g., fixed-price, cost-reimbursement, time-and-materials, and labor-hour); and
 - b. The nature of the item procured (e.g., supply, service, construction, transportation, or research and development).
4. Depending upon the specific clauses in the contract, the government has the right to inspect and test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. See, e.g., FAR 52.246-2 (supplies-fixed-price), -4 (services-fixed-price), -5 (services-cost-reimbursement), -6 (time-and-materials and labor-hour), -8 (R&D-cost-reimbursement), -9 (R&D), -10 (facilities), and -12 (construction).

C. Operation of the Inspection Clauses.

1. Definitions.

- a. “Government contract quality assurance” is “the various functions, including inspection, performed by the Government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.” FAR 46.101
- b. “Testing” is “that element of inspection that determines the properties or elements of products, including the functional operation of supplies or their components, by the application of established scientific principles and procedures.” FAR 46.101

2. The government may require a contractor to maintain an inspection system that is adequate to ensure delivery of supplies and services that conform to the requirements of the contract. David B. Lilly Co., ASBCA No. 34678, 92-2 BCA ¶ 24,973 (government ordered contractor to submit new inspection plan to eliminate systemic shortcomings in the inspection process).

3. Inspection and testing must *reasonably relate* to the determination of whether performance is in compliance with contractual requirements.

- a. Contractually specified inspections or tests are presumed reasonable unless they conflict with other contract requirements. General Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.
- b. If the contract specifies a test, the government may not require a higher level of performance than measured by the method specified. United Technologies Corp., Sikorsky Aircraft Div. v. United States, 27 Fed. Cl. 393 (1992).

- c. The government may use tests other than those specified in the contract provided the tests do not impose a more stringent standard of performance. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (use of rolling straightedge permitted after initial inspection determined that road was substantially nonconforming); Puroflow Corp., ASBCA No. 36058, 93-3 BCA ¶ 26,191 (board upholds government's rejection of First Article Test Report for contractor's failure to perform an unspecified test).

- d. Absent contractually specified tests, the government may use any tests that do not impose different or more stringent standards than those required by the contract. Space Craft, Inc., ASBCA No. 47997, 98-1 BCA ¶ 29,341 (government reasonably measured welds on clamp assemblies); Davey Compressor Co., ASBCA No. 38671, 94-1 BCA ¶ 26,433; Al Johnson Constr. Co., ENG BCA No. 4170, 87-2 BCA ¶ 19,952.

- e. If the contract specifies no particular tests, consider the following factors in selecting a test or inspection technique:
 - (1) Consider the intended use of the product or service. A-Nam Cong Ty, ASBCA No. 14200, 70-1 BCA ¶ 8,106 (unreasonable to test coastal water barges on the high seas while fully loaded).

 - (2) Measure compliance with contractual requirements, and inform the contractor of the standards it must meet. Service Eng'g Co., ASBCA No. 40275, 94-1 BCA ¶ 26,382 (board refused to impose a military standard on contract for ship repair, where contract simply required workmanship in accordance with "best commercial marine practice"); Tester Corp., ASBCA No. 21312, 78-2 BCA ¶ 13,373, mot. for recon. denied, 79-1 BCA ¶ 13,725.

 - (3) Use standard industry tests, if available. DiCecco, Inc., ASBCA No. 11944, 69-2 BCA ¶ 7,821 (use of USDA mushroom standards upheld). But see Chelan Packing Co., ASBCA No. 14419, 72-1 BCA ¶ 9,290 (government inspector failed to apply industry standard properly).

- (4) The government must inspect and test correctly. Baifield Indus., Div. of A-T-O, Inc., ASBCA No. 13418, 77-1 BCA ¶ 12,308 (cartridge cases/rounds fired at excessive pressure).
- (5) Generally, the government is not required to perform inspections. Cannon Structures, Inc., AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059.
 - (a) The government's failure to discover defects during inspection does not relieve the contractor of the requirement to tender conforming supplies. FAR 52.246-2(c); George Ledford Constr., Inc., ENGBCA No. 6218, 97-2 BCA ¶ 29,172.
 - (b) However, the government may not unreasonably deny a contractor's request to perform preliminary or additional testing. Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (no liability for defective fuel tank because government refused to allow a preliminary water test not prohibited by the contract); Praoil, S.R.L., ASBCA No. 41499, 94-2 BCA ¶ 26,840 (government unreasonably refused contractor's request, per industry practice, to perform retest of fuel; termination for default overturned).
- (6) Requiring a contractor to perform tests not specified in the contract may entitle the contractor to an equitable adjustment of the contract price. CBI NA-CON, Inc., ASBCA No. 42268, 93-3 BCA ¶ 26,187.

4. Costs

- a. The burden of paying for testing depends on the clause used in the contract
 - (1) For supplies, generally the contractor pays for all reasonable facilities and assistance for the safe and convenient performance of Government inspectors. FAR 52.246-2 (d).
 - (a) The Government pays for all expenses for inspections or tests at other than the contractor or subcontractor's premises. FAR 52.246-2 (d).
 - (b) If supplies are not ready for tests or inspections, the contractor may be charged for the additional costs of re-inspection or tests. FAR 52.246-2 (e)(1).
 - (c) The contractor may also be charged for additional costs of inspection following a prior rejection. FAR 52.246-2 (e)(2).
 - (2) For services, the contractor and subcontractors are required to furnish, at no additional costs, reasonable facilities and assistance for the safe and convenient performance of tests or inspections on the premises of the contractor or subcontractor. FAR 52.246-4 (d).
 - (3) For construction, the contractor shall furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing safe and convenient inspection and tests as may be required.
 - (a) If the work is not ready for tests or inspections or following a prior rejection, the contractor may be charged for the additional costs of re-inspection or tests. FAR 52.246-12 (e).

- (b) The Government is required to perform tests and inspections in a manner that will not unnecessarily delay the work. FAR 52.246-12 (e).
 - (c) The Government may engage in destructive testing, i.e. examining already completed work by removing it or tearing it out. The contractor must promptly furnish all necessary facilities, labor, or material.
 - (i) If the work is defective, the contractor must defray the expenses of the examination and satisfactory reconstruction.
 - (ii) If the work meets contract requirements, the contractor will receive an equitable adjustment for the additional services involved in the test and reconstruction, to include an extension of time if completion of the work was delayed by the test.
- b. If a test is found to be unreasonable, courts and boards may find that the government assumed the risk of loss resulting from an unreasonable test. See Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148.

III. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.

A. Introduction.

1. The inspection clauses give the government significant remedies. FAR 46.407; FAR 52.246; DFARS 246.407
2. The government's remedies under the inspection clauses operate in two phases. Initially, the government may demand correction of deficiencies. If this proves to be unsuccessful, the government may obtain corrective action from other sources.
3. Under the inspection clauses, the government's remedies depend upon when the contractor delivers nonconforming goods or services.

B. Defective Performance **BEFORE** the Required Delivery Date.

1. If the contractor delivers defective goods or services before the required delivery date, the government may:
 - a. Reject the tendered product or performance. Andrews, Large & Whidden, Inc. and Farmville Mfg. Corp., ASBCA No. 30060, 88-2 BCA ¶ 20,542 (government demand for replacement of non-conforming windows sustained); But see Centric/Jones Constr., IBCA No. 3139, 94-1 BCA ¶ 26,404 (government failed to prove that rejected work was noncompliant with specifications; contractor entitled to equitable adjustment for performing additional tests to secure government acceptance);
 - b. Require the contractor to correct the nonconforming goods or service, giving the contractor a reasonable opportunity to do so. Premiere Bldg. Servs., Inc., B-255858, Apr. 12, 1994, 94-1 CPD ¶ 252 (government may charge reinspection costs to contractor); or,

- c. Accept the nonconforming goods or services at a reduced price. Federal Boiler Co., ASBCA No. 40314, 94-1 BCA ¶ 26,381 (change in cost of performance to the contractor, not the damages to the government, is the basis for adjustment); Blount Bros. Corp., ASBCA No. 29862, 88-2 BCA ¶ 20,644 (government entitled to a credit totaling the amount saved by contractor for using nonconforming concrete). See also Valley Asphalt Corp., ASBCA No. 17595, 74-2 BCA ¶ 10,680 (although runway built to wrong elevation, only nominal price reduction allowed because no loss in value to the government).
 - 2. The government may not terminate the contract for default based on the tender of nonconforming goods or services before the required delivery date.
- C. Defective Performance **ON** the Required Delivery Date.
 - 1. If the contractor delivers nonconforming goods or services on the required delivery date, the government may:
 - a. Reject or require correction of the nonconforming goods or services;
 - b. Reduce the contract price and accept the nonconforming product; or
 - c. Terminate for default if performance is not in substantial compliance with the contract requirements. See FAR 52.249-6 to 52.249-10. When the government terminates a contract for default, it acquires rights and remedies under the Termination Clause, including the right to reprocure supplies or services similar to those terminated and charge the contractor the additional costs. See FAR 52.249-8(b).
 - 2. If the contractor has complied substantially with the requirements of the contract, the government must give the contractor notice and the opportunity to correct minor defects before terminating the contract for default. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

D. Defective Performance **AFTER** the Required Delivery Date.

1. Generally, the government may terminate the contract for default.
2. If the contractor has complied substantially with the requirements of the contract, albeit after the required delivery date, the government should give the contractor notice of the defects and an opportunity to correct them. See Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) (late nonconforming goods may substantially comply with contract requirements).
3. The government may accept nonconforming goods or services at a reduced price.

E. Remedies if the Contractor Fails to Correct Defective Performance.

If the contractor fails to correct defective performance after receiving notice and a reasonable opportunity to correct the work, the government may:

1. Contract with a commercial source to correct or replace the defective goods or services (obtaining funding is often difficult and may make this remedy impracticable), George Bernadot Co., ASBCA No. 42943, 94-3 BCA ¶ 27,242; Zimcon Professionals, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 (Government may contract with a commercial source to correct or replace the defective goods or services and may charge cost of correction to original contractor);
2. Correct or replace the defective goods or services itself;
3. Accept the nonconforming goods or services at a reduced price, or;
4. Terminate the contract for default. FAR 52.246-4(f); Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593.

F. Special Rules for Service Contracts.

1. The inspection clause for fixed-price service contracts, FAR 52.246-4, is different than FAR 52.246-2, which pertains to fixed-price supply contracts.
2. The government's remedies depend on whether it is possible for the contractor to perform the services correctly.
 - a. Normally, the government should permit the contractor to re-perform the services and correct the deficiencies, if possible. Pearl Properties, HUD BCA No. 95-C-118-C4, 96-1 BCA ¶ 28,219 (government's failure to give contractor notice and an opportunity to correct deficient performance waived right to reduce payment).
 - b. Otherwise, the government may:
 - (1) Require the contractor to take adequate steps to ensure future compliance with the contract requirements; and
 - (2) Reduce the contract price to reflect the reduced value of services received. Teltara, Inc., ASBCA No. 42256, 94-1 BCA ¶ 26,485 (government properly used random sampling inspections to calculate contract price reductions); Orlando Williams, ASBCA No. 26099, 84-1 BCA ¶ 16,983 (although termination for default (T4D) of janitorial contract was sustained, the government acted unreasonably by withholding maximum payments when some work had been performed satisfactorily). Even if it reduces the contract price, the government may also recover consequential damages. Hamilton Securities Advisory Servs., Inc. v. United States, 46 Fed. Cl. 164 (2000).

- c. Authorities disagree about whether the same failure in contract performance can support both a reduction in contract price and a termination for default. Compare W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14,256 (monthly deductions due to poor performance waived right to T4D during those months) and Wainwright Transfer Co., ASBCA No. 23311, 80-1 BCA ¶ 14,313 (deduction for HHG shipments precluded termination) with Cervetto Bldg. Maint. Co. v. United States, 2 Cl. Ct. 299 (1983) (reduction in contract price and termination cumulative remedies).

IV. STRICT COMPLIANCE VS. SUBSTANTIAL COMPLIANCE.

A. Strict Compliance.

1. As a general rule, the government is entitled to strict compliance with its specifications. Blake Constr. Co. v. United States, 28 Fed. Cl. 672 (1993); De Narde Construction Co., ASBCA No. 50288, 00-2 BCA ¶ 30,929 (government entitled to type of rebar it ordered, even if contrary to trade practice). See also Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985); Ace Precision Indus., ASBCA No. 40307, 93-2 BCA ¶ 25,629 (government rejection of line block final assemblies that failed to meet contract specifications was proper). But see Zeller Zentralheizungsbau GmbH, ASBCA No. 43109, 94-2 BCA ¶ 26,657 (government improperly rejected contractor's use of "equal" equipment where contract failed to list salient characteristics of brand name equipment).
2. Contractors must comply with specifications even if they vary from standard commercial practice. R.B. Wright Constr. Co. v. United States, 919 F.2d 1569 (Fed. Cir. 1990) (contract required three coats over painted surface although commercial practice was to apply only two); Graham Constr., Inc., ASBCA No. 37641, 91-2 BCA ¶ 23,721 (specification requiring redundant performance sustained).
3. Slight defects are still defects. Mech-Con Corp., GSBCA No. 8415, 88-3 BCA ¶ 20,889 (installation of 2" pipe insulation did not satisfy 1½" requirement).

B. Substantial Compliance.

1. “Substantial compliance” is a judicially created concept to avoid the harsh result of termination for default based upon a minor breach, and to avoid economic waste. The concept originated in construction contracts and has been extended to other types of contracts. See Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).
2. Substantial compliance gives the contractor the right to attempt to cure defective performance. The elements of substantial compliance are:
 - a. Timely delivery;
 - b. Contractor’s good faith belief that it has complied with the contract’s requirements, See Louisiana Lamps & Shades, ASBCA No. 45294, 95-1 BCA ¶ 27,577 (no substantial compliance because contractor had attempted unsuccessfully to persuade government to permit substitution of American-made sockets for specified German-made sockets);
 - c. Minor defects;
 - d. Defects that can be corrected within a reasonable time; and
 - e. Time is not of the essence, i.e., the government does not require strict compliance with the delivery schedule.
3. Generally, the doctrine of substantial compliance does not require the government to accept defective performance by the contractor. Cosmos Eng’rs, Inc., ASBCA No. 19780, 77-2 BCA ¶ 12,713.

C. Economic Waste.

1. The doctrine of economic waste requires the government to accept noncompliant construction if the work, as completed, is suitable for its intended purpose and the cost of correction would far exceed the gain that would be realized. Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 965 (1993); A.D. Roe Co., Inc., ASBCA No. 48782, 99-2 BCA ¶ 30,398 (economic waste is exception to general rule that government can insist on strict compliance with contract terms).

2. To be “suitable for its intended purpose,” the work must substantially comply with the contract. Amtech Reliable Elevator Co. v. General Servs. Admin., GSBCA No. 13184, 95-2 BCA ¶ 27,821 (no economic waste where contractor used conduits for fire alarm wiring which were not as sturdy as required by specifications and lacked sufficient structural integrity); Triple M Contractors, ASBCA No. 42945, 94-3 BCA ¶ 27,003 (no economic waste where initial placement of reinforcing materials in drainage gutters reduced useful life from 25 to 20 years); Shirley Constr. Corp., ASBCA No. 41908, 93-3 BCA ¶ 26,245 (concrete slab not in substantial compliance even though it could support the design load; without substantial compliance, doctrine of economic waste inapplicable); Valenzuela Engineering, Inc., ASBCA No. 53608, 53936, 04-1 BCA ¶ 32,517 (absent expert testimony, government can demand strict performance for structure designed to contain explosions).

D. Timing of Termination

1. Except in those rare situations involving economic waste, the doctrine of substantial compliance affects only **when** the government may terminate for default.

2. It does not preclude termination for default if the contractor fails to correct defective performance. The government:
 - a. Must give the contractor a reasonable amount of time to correct its work, including, if necessary, an extension beyond the original required delivery date.

- b. May terminate for default if the contractor fails to correct defects within a reasonable period of time. Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593 (termination for default justified by contractor's repeated refusal to correct defective roof panels).

E. Substantial Compliance and Late Delivery?

- 1. Radiation Technology, supra, established the concept of substantial compliance for the timely delivery of nonconforming goods. Franklin E. Penny Co. v. United States, supra, arguably expanded the concept to include late delivery of nonconforming goods.
- 2. The courts and boards have not widely followed Penny; however, they have not overruled it.

V. PROBLEM AREAS IN TESTING AND INSPECTION.

A. Claims Resulting from Unreasonable Inspections.

- 1. Government inspections may give rise to equitable adjustment claims if they delay the contractor's performance or cause additional work. The government:
 - a. Must perform reasonable inspections. FAR 52.246-2. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (more sophisticated test than specified, rolling straightedge, was reasonable).

- b. Must avoid overzealous inspections. The government may not inspect to a level beyond that authorized by the contract. Overzealous inspection may impact adversely upon the government's ability to reject the contractor's performance, to assess liquidated damages, or to otherwise assert its rights under the contract. See The Libertatia Associates, Inc., 46 Fed. Cl. 702 (2000) (COR told contractor's employees that he was Jesus Christ and that CO was God); Gary Aircraft Corp., ASBCA No. 21731, 91-3 BCA ¶ 24,122 ("overnight change" in inspection standards was unreasonable); Donohoe Constr. Co., ASBCA No. 47310, 98-2 BCA ¶ 30,076, motion for reconsideration granted in part on other grounds, ASBCA No. 47310, 99-1 BCA ¶ 30,387 (government quality control manager unreasonably rejected proposed schedules, ignored contractor submissions for weeks, and told contractor he would "get even" with him).
- c. Must resolve ambiguities involving inspection requirements in a timely manner. P & M Indus., ASBCA No. 38759, 93-1 BCA ¶ 25,471.
- d. Must exercise reasonable care when performing tests and inspections prior to acceptance of products or services, and may not rely solely on destructive testing of products after acceptance to discover a deficiency it could have discovered before acceptance. Ahern Painting Contractors, Inc., GSBCA No. 7912, 90-1 BCA ¶ 22,291.

2. Improper inspections:

- a. May excuse a contractor's delay, thereby delaying or preventing termination for default. Puma Chem. Co., GSBCA No. 5254, 81-1 BCA ¶ 14,844 (contractor justified in refusing to proceed when government test procedures subjected contractor to unreasonable risk of rejection).

- b. May justify claims for increased costs of performance under the delay of work or changes clauses in the contract. See, e.g., Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173 (contract specified joint inspection, however, government conducted multiple inspections and bombarded contractor with “punch lists”); H.G. Reynolds Co., ASBCA No. 42351, 93-2 BCA ¶ 25,797; Harris Sys. Int’l, Inc., ASBCA No. 33280, 88-2 BCA ¶ 20,641 (10% “spot mopping” specified, government demanded 100% for “uniform appearance”). But see Trans Western Polymers, Inc. v. Gen. Servs. Admin., GSBCA No. 12440, 95-1 BCA ¶ 27,381 (government properly performed lot by lot inspection after contractor failed to maintain quality control system); Space Dynamics Corp., ASBCA No. 19118, 78-1 BCA ¶ 12,885 (defects in aircraft carrier catapult assemblies justified increased government inspection).
 - c. May give rise to a claim of government breach of contract. Adams v. United States, 358 F.2d 986 (Ct. Cl. 1966) (government breached contract when inspector disregarded inspection plan, doubled inspection points, complicated construction, delayed work, increased standards, and demanded a higher quality tent pin than specified); Electro-Chem Etch Metal Markings, Inc., GSBCA No. 11785, 93-3 BCA ¶ 26,148. But see Southland Constr. Co., VABCA No. 2217, 89-1 BCA ¶ 21,548 (government engineer’s “harsh and vulgar” language, when appellant contributed to the tense atmosphere, did not justify refusal to continue work) Olympia Reinigung GmbH, ASBCA Nos. 50913, 51225, 51258, 02-2 BCA ¶ 32,050 (allegation of aggressive government inspections did not render contract termination for default arbitrary or capricious).
- 3. It is a constructive change to test a standard commercial item to a higher level of performance than is required in commercial practice. Max Blau & Sons, Inc., GSBCA No. 9827, 91-1 BCA ¶ 23,626 (insistence on extensive deburring and additional paint on a commercial cabinet was a constructive change).
 - 4. Government breach of its duty to cooperate with the contractor may shift the cost of damages caused by testing to the government. See Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (government refusal to permit reasonable, preliminary test proposed by contractor shifted the risk of loss to the government).

- B. Waiver, Prior Course of Dealing, and Other Acts Affecting Testing and Inspection.
1. By his actions, an authorized government official may waive contractual requirements if the contractor reasonably believes that a required specification has been suspended or waived. Gresham & Co. v. United States, 470 F.2d 542, 554 (Ct. Cl. 1972), Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000).
 2. The government may also be estopped from enforcing a contract requirement. The elements of equitable estoppel are:
 - a. Authorized government official;
 - b. Knowledge by government official of true facts;
 - c. Ignorance by contractor of true facts; and
 - d. Detrimental reliance by the contractor. Longmire Coal Corp., ASBCA No. 31569, 86-3 BCA ¶ 19,110.
 3. Normally, previous government acceptance of similar nonconforming performance is insufficient to demonstrate waiver of specifications.
 - a. Government acceptance of nonconforming performance by other contractors normally does not waive contractual requirements. Moore Elec. Co., ASBCA No. 33828, 87-3 BCA ¶ 20,039 (government's allowing deviation to another contractor on prior contract for light pole installation did not constitute waiver, even where both contractors used the same subcontractor).
 - b. Government acceptance of nonconforming performance by the same contractor normally does not waive contractual requirements. Basic Marine, Inc., ENG BCA No. 5299, 87-1 BCA ¶ 19,426.

4. Numerous government acceptances of similar nonconforming performance by the same contractor may waive the requirements of that particular specification. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972) (acceptance of dishwashers without detergent dispensers eventually waived requirement to equip with dispensers); Astro Dynamics, Inc., ASBCA No. 28381, 88-3 BCA ¶ 20,832 (acceptance of seven shipments of rocket tubes with improper dimensions precluded termination for default for same reason on the eighth shipment). But see Kvass Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (Navy's acceptance on four prior construction contracts of "expansion compensation devices" for a heat distribution system did not waive contract requirement for "expansion loops").
5. Generally, an inspector's failure to require correction of defects is insufficient to waive the right to demand correction. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752 (government not bound by an inspector's unauthorized agreement to accept improper type of paint if a second coat was applied).

VI. ACCEPTANCE.

A. Definition.

Acceptance is the "act of an authorized representative of the government that asserts ownership of identified supplies tendered or approves specific services rendered as partial or complete performance of the contract." FAR 46.101.

B. General Principles of Acceptance.

1. Acceptance is conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided for in the contract, e.g., warranties. FAR 52.246-2(k); Hogan Constr., Inc., ASBCA No. 39014, 95-1 BCA ¶ 27,398 (government improperly terminated contract for default after acceptance).
2. Acceptance entitles the contractor to payment and is the event that marks the passage of title from the contractor to the government.

3. The government generally uses a DD Form 250 to expressly accept tendered goods or services.
4. The government may impliedly accept goods or services by:
 - a. Making final payment. Norwood Precision Prods., ASBCA No. 24083, 80-1 BCA ¶ 14,405. See also Farruggio Constr. Co., DOT CAB No. 75-2-75-2E, 77-2 BCA ¶ 12,760 (progress payments on wharf sheeting contract did not shift ownership and risk of loss to the government). Note, however, that payment, even if no more monies are due under a contract, does not necessarily constitute final acceptance. Spectrum Leasing Corp., GSBCA No. 7347, 90-3 BCA ¶ 22,984 (no acceptance because contract provided that final testing and acceptance would occur after the last payment). See also Ortech, Inc., ASBCA No. 52228, 00-1 BCA ¶ 30,764 (A contractor's acceptance of final payment from the government may preclude a later claim by the contractor).
 - b. Unreasonably delaying acceptance. See, e.g., Cudahy Packing Co. v. United States, 75 F. Supp. 239 (Ct. Cl. 1948) (government took two months to reject eggs); Mann Chem. Labs, Inc. v. United States, 182 F. Supp. 40 (D. Mass. 1960).
 - c. Using or changing a product. Ateron Corp., ASBCA No. 46,867, 96-1 BCA ¶ 28,165 (government use of products inconsistent with contractor's ownership); The Interlake Cos. v. General Servs. Admin., GSBCA No. 11876, 93-2 BCA ¶ 25,813 (government improperly rejected material handling system after government changes rendered computer's preprogrammed logic useless).
5. Unconditional acceptance of partial deliveries may waive the right to demand that the final product perform satisfactorily. See Infotec Dev., Inc., ASBCA No. 31809, 91-2 BCA ¶ 23,909 (multi-year contract for Minuteman Missile software).

6. As a general rule, contractors bear the risk of loss or damage to the contract work prior to acceptance. See FAR 52.246-16, Responsibility for Supplies (supply); FAR 52.236-7, Permits and Responsibilities (construction). See also Meisel Rohrbau GmbH, ASBCA No. 40012, 92-1 BCA ¶ 24,716 (damage caused by children); DeRalco Corp., ASBCA No. 41306, 91-1 BCA ¶ 23,576 (structure destroyed by 180 MPH hurricane winds although construction was 97% complete and only required to withstand 100 MPH winds); G&C Enterprises, Inc. v. United States, 55 Fed. Cl. 424 (2003) (no formal acceptance where structure destroyed by windstorm after project 99% complete and Army had begun partial occupation) .
 - a. If the contract specifies f.o.b. destination, the contractor bears the risk of loss during shipment even if the government accepted the supplies prior to shipment. FAR 52.246-16; KAL M.E.I. Mfg. & Trade Ltd., ASBCA No. 44367, 94-1 BCA ¶ 26,582 (contractor liable for full purchase price of cover assemblies lost in transit, even though cover assemblies had only scrap value).
 - b. In construction contracts, the government may use and possess the building prior to completion. FAR 52.236-11, Use and Possession Prior to Completion. The contractor is relieved of responsibility for loss of or damage to work resulting from the government's possession or use. See Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223 (government responsible for damaged cooling tower when damage occurred while tower was in its sole possession and control).

C. Exceptions to the Finality of Acceptance.

1. Latent defects may enable the government to avoid the finality of acceptance. To be latent, a defect must have been:
 - a. Unknown to the government. See Gavco Corp., ASBCA No. 29763, 88-3 BCA ¶ 21,095;

- b. In existence at the time of acceptance. See Santa Barbara Research Ctr., ASBCA No. 27831, 88-3 BCA ¶ 21,098; mot. for recon. denied, 89-3 BCA ¶ 22,020 (failure to prove crystalline growths were in laser diodes at the time of acceptance and not reasonably discoverable); and
 - c. Not discoverable by a reasonable inspection. Munson Hammerhead Boats, ASBCA No. 51377, 00-2 BCA ¶ 31,143 (defects in boat surface, under paint and deck covering, not reasonably discoverable by government till four months later); Stewart & Stevenson Services, Inc., ASBCA No. 52140, 00-2 BCA ¶ 31,041 (government could revoke acceptance even though products passed all tests specified in contract); Wickham Contracting Co., ASBCA No. 32392, 88-2 BCA ¶ 20,559 (failed spliced telephone and power cables were latent defects and not discoverable); Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436 (mahogany plywood was not a latent defect because a visual examination would have disclosed); *But see Perkin-Elmer Corp. v. United States*, 47 Fed. Cl. 672 (2000) (six years was too long to wait before revoking acceptance based on latent defect).
2. Contractor fraud allows the government to avoid the finality of acceptance. See D&H Constr. Co., ASBCA No. 37482, 89-3 BCA ¶ 22,070 (contractors' use of counterfeited National Sanitation Foundation and Underwriters' Laboratories labels constituted fraud). To establish fraud, the government must prove that:
 - a. The contractor intended to deceive the government;
 - b. The contractor misrepresented a material fact; and
 - c. The government relied on the misrepresentation to its detriment. BMV – Combat Sys. Div. Of Harsco Corp., 38 Fed.Cl. 109 (1997) (contractor's knowing misrepresentation of adequate testing was fraud); United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972).
3. A gross mistake amounting to fraud may avoid the finality of acceptance. The elements of a gross mistake amounting to fraud are—

- a. A major error causing the government to accept nonconforming performance;
 - b. The contractor's misrepresentation of a fact, Bender GmbH, ASBCA No. 52266, 2004-1 B.C.A. (CCH) ¶ 32,474 (repeated false invoices in "wonton disregard of the facts" allowed government to revoke final acceptance); and
 - c. Detrimental government reliance on the misrepresentation. Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612 (gross mistake amounting to fraud established where the government relied on Z.A.N. to verify watch caliber and Z.A.N. accepted watches from subcontractor without proof that the caliber was correct);
4. Warranties. Warranties operate to revoke acceptance if the nonconformity is covered by the warranty.
 5. Revocation of Acceptance.
 - a. Once the government revokes acceptance, its normal rights under the inspection, disputes, and default clauses of the contract are revived. FAR 52.246-2(l) (Inspection-Supply clause expressly revives rights); Spandome Corp. v. United States, 32 Fed. Cl. 626 (1995) (government revoked acceptance, requested contractor to repair structure, and demanded return of purchase price when contractor refused); Jo-Bar Mfg. Corp., ASBCA No. 17774, 73-2 BCA ¶ 10,311 (contractor's failure to heat treat aircraft bolts entitled government to recover purchase price paid). Cf. FAR 52.246-12 (Inspection-Construction clause is silent on reviving rights).
 - b. Failure to timely exercise revocation rights may waive the government's contractual right to revoke acceptance. Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000) (Air Force attempted to revoke acceptance of "portable wear metal analyzer" six years after acceptance; Court of Federal Claims held the six-year delay in revoking acceptance was unreasonable, thus prohibiting government recovery on the claim).

VII. WARRANTY.

A. General Principles.

1. Warranties may extend the period for conclusive government acceptance. FAR 46.7; DFARS 246.7; AR 700-139, ARMY WARRANTY PROGRAM (9 Feb 04).
2. Warranties may be express or implied. Fru-Con Constr. Corp., 42 Fed. Cl. 94 (1998) (design specifications result in an implied warranty; no implied warranty with performance specifications because of the broader discretion afforded the contractor in their implementation).
3. Normally, warranties are defined by the time and scope of coverage.
4. The use of warranties is not mandatory. FAR 46.703. In determining whether a warranty is appropriate for a specific acquisition, consider:
 - a. Nature and use of the supplies or services;
 - b. Cost;
 - c. Administration and enforcement;
 - d. Trade practice; and
 - e. Reduced quality assurance requirements, if any.
 - f. GSA schedule contracts may no longer routinely provide commercial warranties.

B. Asserting Warranty Claims.

1. When asserting a warranty claim, the government must prove:

- a. That there was a defect when the contractor completed performance. Vistacon Inc. v. General Servs. Admin., GSBCA No. 12580, 94-2 BCA ¶ 26,887;
 - b. That the warranted defect was the most probable cause of the failure. Hogan Constr., Inc., ASBCA No. 38801, 95-1 BCA ¶ 27,396, A.S. McGaughan Co., PSBCA No. 2750, 90-3 BCA ¶ 23,229; R.B. Hazard, Inc., ASBCA No. 41061, 91-2 BCA ¶ 23,709 (government denied recovery under warranty theory because it failed to prove that pump failure was not the result of government misuse and that defective material or workmanship was the most probable cause of the damage);
 - c. That the defect was within the scope of the warranty;
 - d. That the defect arose during the warranty period;
 - e. That the contractor received notice of the defect and its breach of the warranty, Land O’Frost, ASBCA Nos. 55012, 55241, 2003 B.C.A. (CCH) ¶ 32,395 (Army’s warranty claim failed to provide specific notice of a defect covered by the warranty); and
 - f. The cost to repair the defect, if not corrected by the contractor. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752. See Globe Corp., ASBCA No. 45131, 93-3 BCA ¶ 25,968 (board reduced government’s claim against the contractor because the government inconsistently allocated the cost of repairing the defects).
2. The government may invalidate a warranty through improper maintenance, operation, or alteration.
 3. A difficult problem in administering warranties on government contracts is identifying and reporting defects covered by the warranty.
 4. Warranty clauses survive acceptance. Shelby’s Gourmet Foods, ASBCA No. 49883, 01-1 BCA ¶ 31,200 (government entitled to reject defective “quick-cooking rolled oats” under warranty even after initial acceptance).

C. Remedies for Breach of Warranty.

The FAR provides the basic outline for governmental remedies. See FAR 52.246-17 and 52.246-18. If the contractor breaches a warranty clause, the government may—

1. Order the contractor to repair or replace the defective product;
2. Retain the defective product at a reduced price;
3. Correct the defect in-house or by contract if the contractor refuses to honor the warranty; or
4. Permit an equitable adjustment in the contract price. However, the adjustment cannot reduce the price below the scrap value of the product.

D. Mitigation of Damages.

1. The government must attempt to mitigate its damages.
2. The government may recover consequential damages. Norfolk Shipbldg. and Drydock Corp., ASBCA No. 21560, 80-2 BCA ¶ 14,613 (government entitled to cost of repairs caused by ruptured fuel tank).

CHAPTER 18

ETHICS IN GOVERNMENT CONTRACTING

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CHAPTER 18

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.

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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 (July 1, 2006).
 7. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. Part 203 (July 1, 2006).
- 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).
 1. 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 or funds are concentrated. 5 C.F.R. § 2640.201(b)(1).
 2. An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund and the aggregate market value of interests in any sector fund or funds does not exceed \$50,000. 5 C.F.R. § 2640.201(b)(2)(ii).
 - (3) De Minimis. 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 \$15,000. 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. Penalties. 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. Section 27 of the PIA has been implemented through FAR 3.104-2. This provision of the FAR 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 PIA, nevertheless there will be instances where the employee will be considered to be participating personally and substantially for purposes of 18 USC 208." FAR 3.104-2(b).
- 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 3.104-4. 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 3.104-5.
 - 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 3.104-5(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 3.104-1. Note that FAR 3.104-1 has been 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 3.104-1.

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 3.104-3.
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 3.104-6.

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 52.203-7. Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations. FAR 52.203-9.

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 3.104-7.

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 all 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 15.506(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

- 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 Statutory 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.

APPENDIX C

ALPHABETICAL LISTING OF CONTRACT & FISCAL ABBREVIATIONS

A

AAA.....	U.S. Army Audit Agency
ACAB	Army Contract Adjustment Board
ACA	Army Contracting Agency
ACO	Administrative Contracting Officer
ACSA.....	Acquisition and Cross Servicing Agreement
ADA.....	Anti-Deficiency Act
ADPE	Automatic Data Processing Equipment
ADR.....	Alternative Dispute Resolution
AECA.....	Arms Export Control Act
AFARS.....	Army Federal Acquisition Regulation Supplement
AFFARS	Air Force Federal Acquisition Regulation Supplement
AGBCA.....	Department of Agriculture Board of Contract Appeals
AL	Acquisition Letter
ANA.....	Afghan National Army
APF	Appropriated Funds
AP Plan	Advance Procurement Plan
AR.....	Army Regulation
ASA(ALT)	Assistant Secretary of the Army for Acquisition, Logistics and Technology
ASBCA	Armed Services Board of Contract Appeals
ASPA	Armed Services Procurement Act of 1947
ASPM.....	Armed Services Pricing Manual
ASPR.....	Armed Services Procurement Regulation (replaced by the DAR)
ASSF	Afghan Security Forces Fund

B

BAA	Buy American Act or Broad Agency Announcement
BCA	Board of Contract Appeals
BCM.....	Business Clearance Memorandum
BOA	Basic Ordering Agreement
BPA.....	Blanket Purchase Agreement
BPD.....	Board of Contract Appeals Bid Protest Decisions

C

CAP	Commercial Activities Program
CAFC	U.S. Court of Appeals for the Federal Circuit
CAS	Cost Accounting Standards
CBA	Collective Bargaining Agreement
CBCA.....	Civilian Board of Contract Appeals
CCCI	Central Criminal Court of Iraq
CCH	Commerce Clearing House
CCIF.....	Combatant Commander's Initiative Fund
CDA	Contract Disputes Act of 1978
CERP.....	Commander's Emergency Response Program
CFR	Code of Federal Regulations
CICA	Competition in Contracting Act
CKO	Contingency Contracting Officer
CLEAs.....	Civilian Law Enforcement Agencies
CN	Congressional Notification
CO	Contracting Officer
COC	Certificate of Competency
COFC	U.S. Court of Federal Claims (formerly U.S. Claims Court)
COR	Contracting Officer's Representative
COTR.....	Contracting Officer's Technical Representative
CPA.....	Coalition Provisional Authority
CPAF.....	Cost-Plus-Award-Fee
CPD.....	Comptroller General's Procurement Decisions
CPFF	Cost-Plus-Fixed-Fee
CPIF	Cost-Plus-Incentive-Fee
CPPC.....	Cost-Plus-A-Percentage-of-Cost
CQB/CQC	Close Quarter Battle/Close Quarter Combat Training
CRA	Continuing Resolution Act
CWAS	Contractor Weighted Average Share
CWAS-NA.....	Contractor Weighted Average Share - Not Applicable
CWHASSA	Contract Work Hours and Safety Standards Act

D

DA.....	Department of the Army
DAC	Defense Acquisition Circular
DA Form	Department of the Army Form
DAR	Defense Acquisition Regulation (replaced by the FAR)
DARC	Defense Acquisition Regulatory Council
DCCEP.....	Developing County Exercise Program
DBA	Davis-Bacon Act; Defense Base Act
DCA	Defense Communications Agency

DCAA Defense Contract Audit Agency
 DCMAO..... Defense Contract Management Office
 DCMA..... Defense Contract Management Agency (formerly DCMC)
 DCMCR Defense Contract Management Command Region
 DCO Defense Coordinating Officer (DOMOPS)
 DEAR..... Department of Energy Acquisition Regulation
 DFARS..... Defense Federal Acquisition Regulation Supplement
 DFAS Defense Finance and Accounting Service
 D&F Determinations and Findings
 DLA Defense Logistics Agency
 DLAAR..... Defense Logistics Agency Acquisition Regulation
 DOD..... Department of Defense
 DOE Department of Energy
 DOI Department of Interior
 DOL Department of Labor
 DOMOPS..... Domestic Operations
 DOT Department of Transportation
 DOT CAB Department of Transportation Contract Appeals Board
 DPA..... Delegation of Procurement Authority
 DPC..... Defense Procurement Circular (replaced by the DAC)
 DPRO..... Defense Plant Representative's Office
 DSCA..... Defense Security Cooperation Agency

E

EAJA..... Equal Access to Justice Act
 EBCA..... Department of Energy Board of Contract Appeals
 EDA Excess Defense Articles
 EEE Emergency and Extraordinary Expenses ("triple-e")
 EEO..... Equal Employment Opportunity
 ESF..... Emergency Support Functions (DOMOPS)
 ENG BCA U.S. Army Corps of Engineers Board of Contract Appeals
 E.O. Executive Order
 8(a) Section 8(a) of the Small Business Act

F

FAA..... Foreign Assistance Act
 FAC..... Federal Acquisition Circular
 FAR..... Federal Acquisition Regulation
 FARA..... The Federal Acquisition Reform Act of 1996
 FASA The Federal Acquisition Streamlining Act of 1994
 FCAA..... The Federal Courts Administration Act of 1992
 FCIA The Federal Courts Improvement Act of 1982

FCO..... Federal Coordinating Officer (DOMOPS)
 FFP..... Firm-Fixed-Price
 FIPR..... Federal Information Processing Resources
 FIRMR..... Federal Information Resource Management Regulation
 FLSA..... Fair Labor Standards Act of 1938
 FMFP..... Foreign Military Financing Program
 FMR..... Financial Management Regulation (DoD 7000.14-R)
 FMS..... Foreign Military Sales
 FOAA..... Foreign Operations Appropriations Act
 FP/EPA..... Fixed Price Contract with Economic Price Adjustment
 FPASA..... Federal Property and Administrative Services Act
 FPD..... Federal Court Procurement Decisions
 FPI..... Federal Prison Industries (AKA UNICOR); or Fixed Price Incentive Contract
 FPR..... Federal Procurement Regulation (now FAR); Final Proposal Revision
 FSS..... Federal Supply Schedule
 FUSMO..... Funding U.S. Military Operations
 FY..... Fiscal Year

G

GAO..... Government Accountability Office
 GBL..... Government Bill of Lading
 G&A..... General and Administrative Costs
 GFE..... Government Furnished Equipment
 GFM..... Government Furnished Material
 GFP..... Government Furnished Property
 GOCO..... Government-Owned, Contractor-Operated
 GOGO..... Government-Owned, Government-Operated
 GPE..... Government-wide Point of Entry
 GPO..... Government Printing Office
 GSA..... General Services Administration
 GSAR..... General Services Administration Acquisition Regulation
 GSBCA..... General Services Administration Board of Contract Appeals
 GWAC..... Government-Wide Agency Contract

H

HA (or HAO)..... Humanitarian Assistance (Other) (10 USC § 2561)
 HCA..... Humanitarian and Civic Assistance (10 USC § 401)
 HCA..... Head of Contracting Activity
 HIDTA..... High Intensity Drug Trafficking Area
 HUD BCA..... Department of Housing and Urban Development Board of Contract Appeals

I

IAW.....	Inspection, Acceptance & Warranty
IBCA.....	Department of Interior Board of Contract Appeals
ICC.....	International Criminal Court
ID/IQ.....	Indefinite Demand, Indefinite Quantity
IFB	Invitation for Bids
IFF.....	Iraq Freedom Fund
IGA.....	Intra-governmental Acquisitions
IGO	International Governmental Organization
IL&FM.....	Installation, Logistics and Financial Management
IMET.....	International Military Education and Training
IMPAC.....	International Merchant Purchase Authorization Card
IP	Iraqi Police
IRRF.....	Iraq Relief and Reconstruction Fund
ISF.....	Iraq Security Forces
ISSF.....	Iraq Security Forces Fund
IRT	Innovative Readiness Training
ITMRA.....	The Information Technology Management and Reform Act of 1996

J

J&A.....	Justification and Approval
JA	Judge Advocate
JAGC.....	Judge Advocate General's Corps
JCC-I/A.....	Joint Contracting Command – Iraq/Afghanistan
JDOMS	Joint Director of Military Support (DOMOPS)
JWOD.....	Javits-Wagner-O'Day Act

K

K.....	Contract
KO.....	Contracting Officer
Kr, or Kor.....	Contractor

L

LBCA.....	Department of Labor Board of Contract Appeals
LOE.....	Level of Effort
LPTA.....	Lowest Price Technically Acceptable
LSSS	Logistic Supplies Support and Services
L&S.....	Lift and Sustain

M

MA Mission Assignment (DOMOPS)
 MAST Military Assistance to Safety and Traffic (DOMOPS)
 MILCON..... Military Construction
 MIPR..... Military Interdepartmental Purchase Request
 MCA Military Construction Appropriation Act
 MMCA..... Minor Military Construction, Army
 MNC-I..... Multinational Corps - Iraq
 MNF-I Multinational Forces - Iraq
 MNSTC-I Multinational Security Transition Command - Iraq
 MOUT..... Military Operations in Urban Terrain Training

N

NAF..... Nonappropriated Fund
 NAFI Nonappropriated Fund Instrumentality
 NAFTA North American Free Trade Agreement
 NASA..... National Aeronautics and Space Administration
 NASA BCA National Aeronautics and Space Administration Board
 of Contracts Appeals (dissolved in 1993 and merged with ASBCA)
 NCD Navy Contract Directives
 NDAA..... National Defense Authorization Act (generally)
 NMCARS..... Navy Marine Corps Acquisition Regulation Supplement
 NIB/NISH..... National Industries for the Blind/National Industries for the Severely Disabled
 NSN..... National Stock Number

O

OASD..... Office of the Assistant Secretary of Defense
 OCOTF Overseas Contingency Operations Transfer Fund
 OFCC Office of Federal Contract Compliance
 OFDA..... Office for Foreign Disaster Assistance
 OFPP Office of Federal Procurement Policy
 OHDACA Overseas Humanitarian, Disaster and Civic Assistance (Appropriation)
 O&M..... Operation & Maintenance
 OMA Operation & Maintenance, Army
 OPA..... Other Procurement, Army
 ORHA Office of Reconstruction and Humanitarian Assistance
 OSD..... Office of the Secretary of Defense

P

PARC Principal Assistant Responsible for Contracting
 PCO..... Procuring Contracting Officer

PDD..... Presidential Decision Directive
PIL..... Procurement Information Letter (replaced by AL)
POTUS..... President of the United States
PR&C..... Purchase Request and Commitment
PSBCA..... U.S. Postal Service Boards of Contract Appeals
PWD..... Procurement Work Directive
PWS Performance Work Statement

Q

QPL Qualified Products List

R

R&D..... Research and Development
RD&A..... Research, Development and Acquisition
RDT&E Research, Development, Test, and Evaluation
RFP Request for Proposals
RFQ..... Request for Quotations
RS..... Revised Statutes
Rule 4 File (R4) . Administrative Record Required by Rule Four of the Procedures of the
Armed Services Board of Contract Appeals. *See* DFARS, App A.

S

SAP Simplified Acquisition Procedures
SBA..... Small Business Administration
SBP Small Business Programs Office
SCA..... McNamara-O'Hara Service Contract Act of 1965
SDB..... Small Disadvantaged Business
SOW..... Statement of Work (now referred to as a PWS)
SSA Source Selection Authority
SSAC..... Source Selection Advisory Council
SSEB..... Source Selection Evaluation Board
SSP.....Source Selection Plan

T

T&M.....Time-and-Materials Contract
TAA Trade Agreements Act
TALF..... Trial Attorney Litigation File
TAR..... Department of Transportation Acquisition Regulation
TCO..... Termination Contracting Officer
T for C..... Termination for Convenience (usually written T4C or T/C)

T for D..... Termination for Default (usually written T4D or T/D)
T&E..... Train and Equip
TINA..... Truth in Negotiations Act

U

UCA.....Undefinitized Contract Action, or letter contract
UMMIPS..... Uniform Material Movement and Issue Priority System
UNICOR..... A priority source under FAR Part 8; aka Federal Prison Industries (FPI)
UNPA..... United Nations Participation Act
USAID US Agency for International Development
USAREUR..... U.S. Army, Europe
USD (A&T) Under Secretary of Defense for Acquisition & Technology

V

VABCA..... Department of Veterans Affairs Board of Contract Appeals
VACAB..... Department of Veterans Affairs Contract Appeals Board

W

WHA Walsh-Healey Act
WRD Wage Rate Determination