CHAPTER 40

INTRODUCTION TO GOVERNMENT CONTRACTING: CONTRACT FORMATION

INTRODUCTION TO GOVERNMENT CONTRACTING AND CONTRACT FORMATION 6

OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS. 6

I. OVERVIEW OF GOVERNMENT CONTRACTING 6

A. Part I - Contract Formation. 6

B. Part II - Contract Performance: 7

C. The Parties at the Installation/Base Camp. 7

II. ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW. 7

A. Objectives of Government Contracting 7

B. The Procurement Environment: The Acquisition Workforce 7

C. Clauses required by statute or regulation: Christian Doctrine 7

III. CONTRACT ATTORNEY ROLES. 8

IV. CONTINUING EDUCATION FOR THE CONTRACT AND FISCAL LAW PROFESSIONALS 8

GOVERNMENT CONTRACT REVIEW 10

I. CONTRACT LEGAL REVIEWS 10

II. WHAT'S IN A CONTRACT? 10

III. FEDERAL ACQUISITION REGULATION (FAR) SYSTEM. 11

AUTHORITY TO CONTRACT 16

I. AUTHORITY OF PERSONNEL. 16

A. Contracting Authority. 16

B. Contracting officers 16

C. Contracting Officer Representatives (COR). 17

II. ACTUAL AUTHORITY. 17

III. APPARENT AUTHORITY. 17

IV. OTHER THEORIES THAT BIND THE GOVERNMENT. 18
V. UNAUTHORIZED COMMITMENTS. 18
A. Definition. 18
B. Ratification. 18
COMPETITION 20
I. COMPETITION REQUIREMENTS. 20
A. The Competition in Contracting Act of 1984. 20
B. Congressional Scheme. 20
C. Applicability of FAR Part 6. 20
D. Full and Open Competition. 21
E. Full and Open Competition After Exclusion of Sources. 21
F. Other Than Full and Open Competition. 21
II. IMPLEMENTATION OF COMPETITION REQUIREMENTS. 23
A. Competition Advocates. 23
B. Acquisition Planning. 23
C. Market Research. 23
D. Developing Specifications. 23
E. Publicizing Contract Actions. 23
TYPES OF CONTRACTS 24
I. CONTRACT TYPES - CATEGORIZED BY PRICE. 24
A. Fixed-Price Contracts. 24
B. Cost-Reimbursement Contracts. 25
C. Time-and-Materials and Labor-Hour Contracts. 26
D. Level of Effort Contracts. 26
II. CONTRACT TYPES - INDEFINITE DELIVERY CONTRACTS. 26
A. Indefinite Delivery Contracts. 26
B. Definite-Quantity/Indefinite-Delivery Contracts. 27
C. Indefinite-Quantity Contracts Generally. 27
D. Requirements or an ID/IQ contract? 27
E. Requirements Contracts. 27
F. Indefinite-Quantity/Indefinite-Delivery Contracts (ID/IQ) 27

III. LETTER CONTRACTS. FAR 16.603. 28
IV. OPTIONS. FAR SUBPART 17.2. 29
V. SELECTION OF CONTRACT TYPE. 29
A. Regulatory Limitations. 29
B. Factors to Consider. 29
C. Discretion of the contracting officer. 30
D. Factors 30
E. Changing circumstances. 30
F. Statutory Prohibition Against Cost-Plus-Percentage-of-Cost (CPPC) Contracts. 31
SOCIOECONOMIC POLICIES 32
I. POLICY AND PROCEDURE IN SUPPORT OF SMALL BUSINESS. 32
A. Policy. 15 U.S.C. §§ 631-650; FAR 19.201 32
B. Size Determination Procedures. 32
C. Competition Issues: Contract Bundling. 32
D. Responsibility Determinations and Certificates of Competency (COCs). 32
E. Regular Small Business Set-Asides. FAR Subpart 19.5. 32
II. PROGRAMS FOR SMALL DISADVANTAGED BUSINESSES. 33
A. Contracting with the SBA's "8(a)" Business Development Program. 33
B. Challenge to the 8(a) program. 34
C. Small Disadvantaged Business (SDBs) Procurements. 34
D. Assisting Women-Owned Enterprises. 34
E. HUBZone. 34
III. THE RANDOLPH-SHEPPARD ACT 35
IV. THE BUY AMERICAN ACT (BAA). 35
METHODS OF CONTRACTING I: SEALED BIDDING 36
I. THREE CONTRACT METHODS. 36
A. Simplified Acquisition Procedures. FAR Part 13. 36
B. Sealed Bidding. FAR Part 14. 36
C. Negotiations. FAR Part 15. 36
II. SEALED BIDDING REQUIRED? 36
III. PREPARATION OF INVITATION FOR BIDS. 36

IV. PUBLICIZING THE INVITATION FOR BIDS. 37
V. SUBMISSION OF BIDS. 37
VI. EVALUATION OF BIDS. 39
VII. AWARD OF THE CONTRACT. 40

METHODS OF CONTRACTING II: NEGOTIATIONS 42

I. INTRODUCTION -- COMPARING SEALED BIDDING AND NEGOTIATED PROCUREMENTS 42
II. CONDUCTING COMPETITIVE NEGOTIATIONS. 42
A. Developing a Request for Proposals (RFP). 42
B. Drafting Evaluation Criteria. 42
C. Notice of Intent to Hold Discussions. 43
D. Submission of Initial Proposals. 44
E. Evaluation of Initial Proposals. 44
F. Award Without Discussions. 45
G. Determination to Conduct Discussions. 46
H. Communications. FAR 15.306(b). 46
I. Establishing the Competitive Range. FAR 15.306(c). 46
J. Conducting Discussions. FAR 15.306(d). 47
K. Final Proposal Revisions. 48
L. Selection for Award. 48
M. Debriefings. 48

METHODS OF CONTRACTING III: SIMPLIFIED ACQUISITION PROCEDURES .. 49

I. WHEN TO USE SIMPLIFIED ACQUISITION PROCEDURES. 49
A. Definitions. 49
B. Policy. 49
C. Commercial Item Test Program. 50
II. SIMPLIFIED ACQUISITION PROCEDURES. 50
A. Small Business Set-Aside Requirement. 50
B. Synopsis and Posting requirements. 50
C. Competition Requirements. 51
III. SIMPLIFIED ACQUISITION METHODS. 51

A. Most suitable, efficient, and economical. 51
B. Purchase Orders. 51
C. Blanket Purchase Agreements. 53
D. Imprest Funds. 54
E. Government-wide Commercial Purchase Card. 55

COMMERCIAL ITEM ACQUISITIONS 56

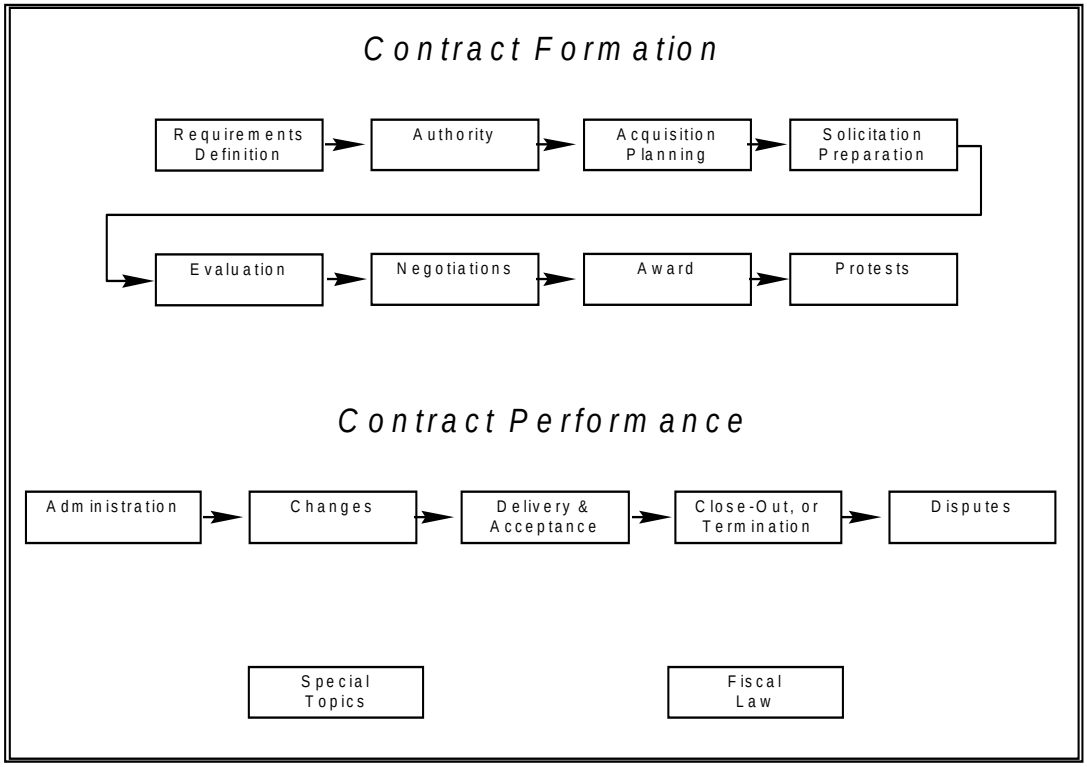
I. POLICY 56
II. DEFINITIONS. 41 U.S.C. § 403(12); FAR PART 2.101 56
III. FEDERAL SUPPLY SCHEDULES (FSS). 57
IV. SPECIAL COMMERCIAL PROCEDURES 58
V. CONTRACT CLAUSES FOR COMMERCIAL ITEMS 58

APPENDIX A: AGENCY FAR SUPPLEMENTS 60

Introduction to Government Contracting: Contract Formation

OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS.

The Contracting Process



I. OVERVIEW OF GOVERNMENT CONTRACTING

A. Part I - Contract Formation. The formation phase concerns issues that arise primarily when entering into a contract.

1. Major topics include: Authority; Competition; Methods of acquisition: simplified acquisition, sealed bidding, and negotiations; Contract types; Socioeconomic policies; Protests;

B. Part II - Contract Performance: The administration phase concerns issues that arise primarily during performance of a contract.

1. Major topics include: Contract changes; Inspection and acceptance; Terminations for default and for the convenience of the government; Contract claims and disputes.

C. The Parties at the Installation/Base Camp.

1. **Certifying Officer**. An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. (S)he is responsible for the correctness of the facts and computations, and the legality of payment. DFAS-IN 37-1, Glossary.

2. **Fund Managers**. Individuals who manage financial resources to include major activity, sub-activity directors, and their representatives who are delegated fund certification responsibility. DFAS-IN 37-1, Glossary.

3. **Contracting Officer**. An employee of the Government, authorized to enter into, administer, and/or terminate contracts. FAR 2.101 and DFAS-IN Reg. 37-1, Glossary.

4. **Program Manager**. Individual who manages an acquisition program.

II. ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW.

A. Objectives of Government Contracting (See, Steve Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002) available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=283370).

1. Core Principles: Competition, Transparency, Integrity, Fairness.

2. Socio-economic Policies: i.e. Labor Standards, see FAR Part 22 ;Foreign Acquisition, See FAR Part 25; Small Business, see FAR Part 19; Other Socioeconomic Policies, see FAR Part 26.

3. Customer Satisfaction; Speed; Administrative Efficiency.

B. The Procurement Environment: The Acquisition Workforce

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

III. CONTRACT ATTORNEY ROLES.

A. Advisor to the Commander and the Contracting Officer. Advise on formation and administration phase issues. Advise on fiscal law issues.

B. Litigator. Litigate protests & disputes. Litigate collateral matters before federal bankruptcy, district, and circuit courts.

C. Fraud Fighter. Advise how to prevent, detect, and correct fraud, waste, and abuse. Provide litigation support for fraud cases.

D. Business Counselor. Ensure the commander and contracting officer exercise sound business judgment. Provide opinions on the exercise of sound business practices. Counsel is part of the contracting officer's team. FAR 1.602-2; FAR 15.303(b)(1). Army policy requires counsel to participate fully in the entire acquisition process, from acquisition planning through contract completion or termination and close out. Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2.

IV. CONTINUING EDUCATION FOR THE CONTRACT AND FISCAL LAW PROFESSIONALS

A. Basic Courses.

1. **Contract Attorneys Course (CAC).** Basic instruction for attorneys new to the practice of contract law. Offered twice a year; two week course. If you have substantial contract law experience and take this as a refresher, please keep the purpose of this course in mind.

2. **Fiscal Law / Comptroller Accreditation Course.** 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. Offered numerous times a year -- three times here, up to 150 students; once by satellite from the Air Force Judge Advocate General's School, Maxwell AFB, AL, up to 2700 students; 3-5 times at various locations throughout the world; 4 ½ days.

B. Advanced Courses.

1. **Advanced Contract Law Course (next course March 2004).** Covers specialized acquisition topics. Intended for attorneys with more than one year of contract law experience. Usually offered in alternate years opposite the Contract Litigation Course; up to 150 students per course; 4 ½ days. The March 2004 course will focus on Intellectual Property and Non-Far Transactions.

2. Contract Litigation Course (next course March 2005). Instruction on various aspects of federal litigation before the General Accounting Office, federal courts,

and the boards of contract appeals. Usually, offered in alternate years with the Advanced Contract Law Course up to 150 students per course; 4 ½ days.

3. Procurement Fraud Course. Instruction on criminal, civil, administrative, and contractual remedies used to combat procurement fraud. Offered every other year (next course June 2004); up to 150 students per course; 2 ½ days.

C. Annual Updates.

1. Government Contract and Fiscal Law Symposium. Annual survey of developments in legislation, case law, administrative decisions, and DOD policy for experienced contract law attorneys. Offered in December at The Judge Advocate General's School; up to 250 students per course; 3 ½ or 4 ½ days.

2. USAREUR Contract/Fiscal Law Course. 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. Offered annually in Germany; 50 students per course; 4 - 4 ½ days.

GOVERNMENT CONTRACT REVIEW

I. CONTRACT LEGAL REVIEWS.

A. Checklists. You/your legal office need to have checklists. If you do not have one, borrow one from another office.

B. Example.

1. See Attachment A. This is the most in-depth version of a contract review checklist that I have been able to locate. It was prepared by the Electronic Systems Command Staff Judge Advocate's Office at Hanscom Air Force Base.

2. You can see the entire set of checklists at: https://centernet.hanscom.af.mil/JA/CRG/checklist.htmContent.

II. WHAT'S IN A CONTRACT?

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 RFP (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 is to be accomplished, but does not prescribe how the tasks are to be performed. Unless, of course, government uses performance specifications or a service contract where we describe what it is we want accomplished.

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 statement of work (SOW) and the contract data requirements list (CDRL).

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 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 41 of the C.F.R. FAR 1.303. The chart at Annex A shows the location within Title 41 for each of the respective agency supplementation.

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 Regulations 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: Specifications, Standards, and Other Purchase Descriptions
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
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 Resources

Part 40: [Reserved]
Part 41: Acquisition of Utility Services.

Subchapter G: Contract Management
Part 42: Contract Administration
Part 43: Contract Modifications
Part 44: Subcontracting Policies and Procedures
Part 45: Government Property
Part 46: Quality Assurance
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
Appendix: Cost Accounting Standards

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.

a) **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).

a) **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).

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.

AUTHORITY TO CONTRACT

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).

I. 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 fForce. DFARS 202.101.

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

2. Heads of Contracting Activities (HCAs).

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

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

c) HCAs are contracting officers by virtue of their position. See FAR 1.601; FAR 2.101. HCAs may delegate some of their contracting authority to deputies.

d) 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).

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

B. Contracting officers.

1. 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.

2. 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).

C. Contracting Officer Representatives (COR).

1. 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).

2. 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.

II. ACTUAL AUTHORITY.

A. 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).

B. 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).

C. 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).

III. 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).

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

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).

C. Imputed Knowledge.

D. Equitable Estoppel.

V. 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.

3. Army HCAs may delegate the authority to approve ratification actions.

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.

2. 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.

COMPETITION

I. 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.

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

1. There are three possible levels of competition in the acquisition process. Agencies must achieve competition to the maximum extent practicable at each level of competition.

a) Full and Open Competition.

b) Full and Open Competition After Exclusion of Sources.

c) Other Than Full and Open 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

b) Contracts awarded using contracting procedures authorized by statute.

c) Contract modifications within the scope of the original contract.

d) Orders placed under requirements or definite-quantity contracts. Orders placed under indefinite-quantity contracts entered into pursuant to FAR Part 6. Orders placed under task or delivery order contracts entered into pursuant to FAR Subpart 16.5.

e) Reprocurement Contracts. FAR 49.402-6.

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. "Full and open competition" refers to a contract action in which all responsible sources are permitted to compete. Full and open competition may not actually achieve competition.

2. Policy. FAR 6.101. 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). 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: Sealed bidding. FAR Part 14; Contracting by negotiation. FAR Part 15.

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. 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.

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

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 ?? 5106.3.

1. Policy. FAR 6.301. Executive agencies cannot contract without providing for full and open competition unless one of the statutory exceptions listed in FAR 6.302 applies.

a) Agencies cannot justify contracting without providing for full and open competition based on:

(a) A lack of advance planning.

(b) Concerns regarding the availability of funds.

b) The contracting officer must solicit offers from as many potential sources as is practicable under the circumstances.

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.

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.

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.

d) International Agreement. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(c)(4); FAR 6.302-4.

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.

f) National Security. 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 253(c)(6); FAR 6.302-6.

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.

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 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. The dollar value of the contract will determine who the approval authority is.

II. 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.

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.

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.

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

1. Types of Specifications.

   a) Design specifications.

   b) Performance specifications.

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

   d) Mixed specifications.

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

   a) Permit full and open competition;

   b) State the agency's minimum needs; and

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

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

TYPES OF CONTRACTS

I. CONTRACT TYPES - CATEGORIZED BY PRICE.

A. Fixed-Price Contracts. FAR Subpart 16.2. The contractor promises to perform at a fixed-price, and bears the responsibility for increased costs of performance.

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

a) 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:

b) There is adequate price competition;

c) 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;

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

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

2. Fixed-Price 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.

b) May be used when the contracting officer determines:

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

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

3. Fixed-Price Incentive (FPI) Contracts. 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.

4. 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.

b) The contract must provide for periodic evaluation of the contractor's performance against an award fee plan. The Air Force Award Fee Guide and the National Aeronautics And Space Administration Award Fee Contracting Guide 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.

B. Cost-Reimbursement Contracts. FAR Subpart 16.3.

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

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

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

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

c) 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).

3. 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.

d) 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).

4. Cost-Plus-Fixed-Fee (CPFF) Contracts. FAR 16.306; FAR 52.216-8. The contract price is the contractor's allowable costs, plus a fixed fee that is negotiated and set prior to award.

5. Cost-Plus-Incentive-Fee (CPIF) Contracts. FAR 16.304; FAR 16.405-1; and FAR 52.216-10. The CPIF specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee is determined in accordance with the formula.

a) 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).

6. 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.

7. Cost Contracts. FAR 16.302; FAR 52.216-11. The contractor receives its allowable costs but no fee.

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

D. Level of Effort Contracts.

II. CONTRACT TYPES - INDEFINITE DELIVERY CONTRACTS.

A. Indefinite Delivery Contracts. FAR Subpart 16.5. FAR 16.501-2(a) recognizes three types of indefinite delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts.

1. 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. Indefinite or variable quantity contracts permit flexibility in both quantities and delivery schedules. These contracts permit ordering of supplies or services after requirements materialize.

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

1. 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.

E. Requirements Contracts. FAR 16.503; FAR 52.216-21. 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).

1. The Government breaches the contract when it purchases its requirements from another source.

2. The Contracting Officer shall state a realistic estimated total quantity in the solicitation and resulting contract.

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

F. 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.

4. The contractor is entitled to receive only the guaranteed minimum.

5. 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) Protests concerning orders. The issuance of a task or delivery order is generally not protestable.[1]

III. 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.

[1] "[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).

IV. 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.

V. 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. Effective 17 April 2003, agencies may also utilize award fee or incentive terms in those firm-fixed-price contracts / fixed-price contracts with economic price adjustments. 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).

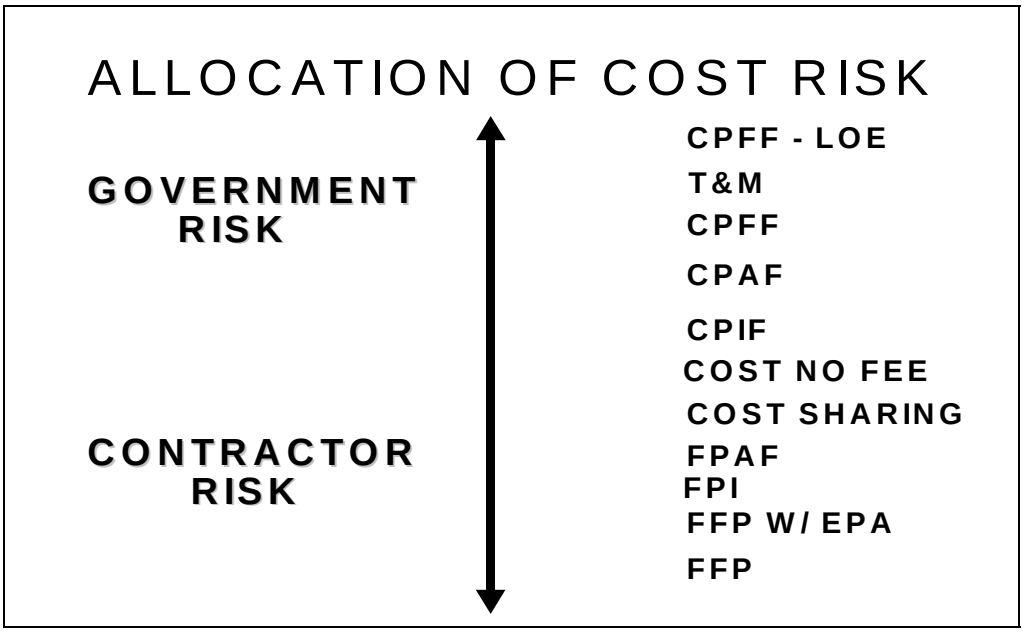


Figure 10

C. Selection of a contract type is ultimate 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).

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

1. Whether price competition is available.
2. The accuracy of price or cost analysis.
3. The type and complexity of the requirement.
4. Urgency of the requirement.
5. Period of performance or length of production run.
6. Contractor's technical capability and financial responsibility.
7. Adequacy of the contractor's accounting system.
8. Concurrent contracts.
9. Extent and nature of proposed subcontracting.
10. Acquisition history.

E. 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).

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

1. 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.

SOCIOECONOMIC POLICIES

I. 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. Independently owned and operated; Not dominant in field; and, Meets applicable size standards.

B. Size Determination Procedures. 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.

C. Competition Issues: Contract Bundling. 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). 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.

D. Responsibility Determinations and Certificates of Competency (COCs). Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7101, 108 Stat. 3243, 3367 [hereinafter FASA] (repealing § 804, National Defense Authorization Act, 1993, Pub. L. No. 102-484), 106 Stat. 2315, 2447 (1992); FAR Subpart 19.6.

1. The contracting officer must determine an offeror's responsibility. FAR 9.103(b).

2. If the contracting officer finds a small business nonresponsible, he must forward the matter to the SBA Contracting Area Office immediately. FAR 19.602-1(a)(2).

3. The SBA issues a COC if it finds that the offeror is responsible.

4. 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.

E. Regular Small Business Set-Asides. FAR Subpart 19.5.

1. The decision to set aside a procurement is within the "discretion" of the agency. FAR 19.501.

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. Types of set-asides.

a) Total Set-Asides.

(1) Acquisitions over $100,000. FAR 19.502-2(b). The contracting officer shall set-aside any acquisition over $100,000 for small business participation when:

(a) The contracting officer reasonably expects to receive offers from two or more responsible small businesses, and,

(b) Award will be made at a fair market price.

(2) Acquisitions between $2,500 and $100,000. FAR 19.502-2(a):

(a) Each acquisition that has an anticipated dollar value exceeding $2,500, but not over $100,000, is automatically reserved for small business concerns.

(b) Exceptions. There is no requirement to set aside if there is no reasonable expectation of receiving offers from two or more responsible small businesses that will be competitive in terms of price, quality, and delivery schedule.

b) Partial. FAR 19.502-3; Aalco Forwarding, Inc., et. al., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75. The contracting officer must set aside a portion of an acquisition, except for construction, for exclusive small business participation when:

(1) A total set-aside is not appropriate;

(2) The requirement is severable into two or more economic production runs or reasonable lots;

(3) One or more small business concerns are expected to have the technical competence and capacity to satisfy the requirement at a fair market price; and

(4) The acquisition is not subject to simplified acquisition procedures.

II. 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. 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).

1. 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

a) 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). 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).

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).

C. Small Disadvantaged Business (SDBs) Procurements. FAR Part 19.

D. Assisting Women-Owned Enterprises. 15 U.S.C. § 644(g).

E. HUBZone. HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592).

III. THE RANDOLPH-SHEPPARD 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.

IV. THE BUY AMERICAN ACT (BAA).

A. Preference for Domestic Products/Services. 41 U.S.C. §§ 10a-10d (1995); Executive Order 10582 (1954), as amended, Executive Order 11051 (1962); FAR Part 25. As a general rule, under the BAA, agencies may acquire only domestic end items.

1. 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.

B. Definitions and Applicability. FAR 25.003.

1. H. The Berry Amendment 10 U.S.C. § 2241 (2000). Restricts DOD's expenditure of funds on clothing to purchases from domestic firms.

METHODS OF CONTRACTING I: Sealed Bidding

"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).

I. THREE CONTRACT METHODS.

A. Simplified Acquisition Procedures. FAR Part 13.

B. Sealed Bidding. FAR Part 14.

C. Negotiations. FAR Part 15.

II. SEALED BIDDING REQUIRED?

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. Overview of Sealed Bidding Process: The Five Phases. FAR 14.101: Preparation of the Invitation for Bids (IFB); Publicizing the Invitation for Bids; Submission of Bids; Evaluation of Bids; Contract Award.

III. PREPARATION OF INVITATION FOR BIDS.

A. Specifications: Clear, complete, and definite; Minimum needs of the government; Preference for Commercial Items. FAR 12.000 and FAR 12.101(b).

B. Definition. "Offer" means "bid" in sealed bidding. FAR 2.101.

C. 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.

IV. 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. Method of Soliciting Potential Bidders. FAR 5.101; FAR 5.102. The primary method to promote competition is to post a notice on the Government Point of Entry, (GPE) http://www.fedbizopps.gov. FAR Subpart 5.2.

V. SUBMISSION OF BIDS.

A. Safeguarding Bids. FAR 14.401. 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.

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).

C. Time and Place of Submission. FAR 14.301.

1. Reasons for specific requirements: Equality of treatment of bidders; Preserve integrity of system; 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).

D. The Firm Bid Rule. Distinguish common law rule, which allows an offeror to withdraw an offer any time prior to acceptance. See Restatement (Second) of Contracts § 42 (1981). 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.

E. Treatment of Late Bids, 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).

2. 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. .

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).

c) This rule has no statutory or regulatory basis; rather, the GAO fashioned the rule under its bid protest authority.

VI. EVALUATION OF BIDS.

A. Evaluation of Price. Contracting officer evaluates price and price-related factors. FAR 14.201-8. Award made on basis of lowest price offered.

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.

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.

5. Essential requirements of responsiveness. FAR 14.301; FAR 14.404-2; FAR 14.405; **Price**; **Quantity**. **Quality**; **Delivery**.

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.

VII. AWARD OF THE CONTRACT.

A. Evaluation of the Responsibility of the Successful Bidder. 10 U.S.C. § 2305; 41 U.S.C. § 253b. Government acquisition policy requires that the contracting officer make an affirmative determination of responsibility prior to award. FAR 9.103.

1. General rule. The contracting officer may award only to a responsible bidder. FAR 9.103(a).

2. 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.

3. 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.: Financial resources.; Delivery or performance schedule: Performance record.

(1) 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. An example is to require that a prospective contractor have a specified number of years of experience performing the same or similar work.

C. Responsibility Determination Procedures.

1. Sources of information. The contracting officer must obtain sufficient information to determine responsibility. FAR 9.105.

2. Standards of review of contracting officer determinations of responsibility. 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).

a) 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).

D. Award of the Contract. 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).

1. 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).

METHODS OF CONTRACTING II: Negotiations

I. INTRODUCTION -- COMPARING SEALED BIDDING AND NEGOTIATED PROCUREMENTS

	Sealed Bidding	**Negotiations**
Evaluation Criteria	Price and Price-Related Factors	Price and Non-Price Factors
Responsiveness	Determined at Bid Opening	N/A
Responsibility	Based on Pre-Award Survey; SBA May Issue COC	May be Evaluated Comparatively Based on Disclosed Factors
Contract Type	FFP or FP w/EPA	Any Type
Discussions	Prohibited	Required (Unless Properly Awarding w/o Discussions)
Right to Withdraw	Firm Bid Rule	No Firm Bid Rule
Public Bid Opening	Yes	No
Flexibility to Use Judgment	None	Much
Late Offer/Modifications	Narrow Exceptions	Narrow Exceptions
Past Performance	Evaluated on a Pass/Fail Basis as Part of the Responsibility Determination	Included as an Evaluation Factor; Comparatively Assessed; Separate from the Responsibility Determination

II. 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.

1. Section C describes the required work.

2. Section L describes what information offerors should provide in their proposals and prescribes the format.

3. Section M describes how the government will evaluate proposals.

B. Drafting Evaluation Criteria.

1. Statutory Requirements.

a) 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 253a(b) (See FAR 15.304(d)) 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.

b) 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) (See FAR 15.304(e)) 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.

2. Mandatory Evaluation Factors.

a) Cost or Price.

b) Technical and Management (i.e., Quality) Factors.

c) Past Performance.

d) Small Business Participation.

3. Requirement to Disclose Relative Importance. FAR 15.304(d).

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. Agencies generally choose:

(1) The tradeoff process; or

(2) The lowest price technically acceptable process.

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."

D. Submission of Initial Proposals.

1. Proposal Preparation Time. 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.

2. Amendments. An agency must amend the RFP if it changes its requirements (or terms and conditions) significantly. FAR 15.206 (b).

3. No "Firm Bid Rule." An offeror may withdraw its proposal at any time. FAR 52.215-1(c)(8). The agency, however, only has a reasonable time in which to accept a proposal. See Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 324, 91-1 CPD ¶ 242 (holding that 13 months was too long).

4. Oral Presentations. FAR 15.102. Offerors may present oral presentations as part of the proposal process. See NW Ayer, Inc., B-248654, 92-2 CPD ¶ 154.

5. Confidentiality. 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). Agencies must safeguard proposals from unauthorized disclosure. FAR 15.207(b).

E. Evaluation of Initial Proposals.

1. General Considerations.

a) 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.

b) 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.

c) 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).

d) 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.

e) 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. 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.

3. Scoring Technical and Management Factors. See FAR 15.305(a).

a) 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. Typical Rating Methods: Adjectives; Colors; Narrative.

4. Evaluating Past Performance or Experience.

a) Past Performance Evaluation System. FAR Subpart 42.15. 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 make rational—rather than mechanical—comparative past performance evaluations.

5. Products of the Evaluation Process.

a) Evaluation Report, including: Deficiencies, Advantages and Disadvantages, Questions and Items for Negotiation, Competitive Range Recommendation.

F. Award Without Discussions.

1. 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.

2. 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).

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).

G. Determination to Conduct Discussions. 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).

H. 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).

I. 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 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.

3. 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). If the contracting officer has any doubts about whether to exclude a proposal from the competitive range, the contracting officer should leave it out.

J. Conducting Discussions. FAR 15.306(d). The contracting officer must conduct oral or written discussions with each offeror in the competitive range. FAR 15.306(d)(1).

1. The contracting officer determines the scope and extent of the discussions; however, the discussion must be fair and meaningful.

a) 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

b) 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).

2. 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.

(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).

K. 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.

L. Selection for Award.

1. Agencies must evaluate final proposals using the evaluation factors set forth in the solicitation.

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).

3. The evaluation process is inherently subjective.

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.

5. The selection decision documentation must include the rationale for any trade-off made, "including benefits associated with additional costs." FAR 15.308;

M. Debriefings. 10 U.S.C. § 2305(b)(5); 41 U.S.C. § 253b(e); FAR 15.505-506.

1. Preaward Debriefings. FAR 15.505. An offeror excluded from the competitive range (or otherwise eliminated from consideration for award) may request a preaward debriefing.

2. Postaward Debriefings. FAR 15.506. An unsuccessful offeror may request a postaward debriefing.

METHODS OF CONTRACTING III: SIMPLIFIED ACQUISITION PROCEDURES

I. WHEN TO USE SIMPLIFIED ACQUISITION PROCEDURES.

A. Definitions.

1. Simplified acquisitions are acquisitions of supplies, service or construction in the amount of $100,000 or less using simplified acquisition procedures. The threshold is $200,000 in a contingency, humanitarian or peacekeeping operation for any contract awarded and performed, or purchase to be made outside the United States. FAR 2.101.

a) Temporarily, the threshold is $250,000 inside the US and $500,000 outside the US for acquisitions to facilitate the defense against or recovery from terrorism, biological, chemical, or radiological attack against the US, by or for DOD, in support of a contingency operation. FAR 2.101. Pub. L. No. 107-314, 116 Stat. 1675 (2003).

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 $2,500, except that in the case of construction the limit is $2,000. FAR 2.101. For acquisitions of supplies and services to facilitate the defense against terrorism or biological or chemical attack against the US, by or for the DOD, the micro-purchase threshold was $15,000. FAR 2.101; FAR 13.201(g). The 2004 National Defense Authorization Act, § 1443, authorized the continuation of this special emergency procurement authority. Pub. L. No. 107-314, 116 Stat. 1675 (2003).

B. 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).[2]

1. 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(dc). See L.A. Systems v. Department of the Army, GSBCA 13472-P, 96-1 BCA ¶ 28,220 (Government

[2] In support of contingency operations defined by 10 U.S.C. § 101(a)(13), the simplified acquisition threshold increases to $200,000. FASA § 1502 (amending 10 U.S.C. § 2302(7)); DFARS 213.000.

improperly fragmented purchase of computer upgrades into four parts because agency knew that all four upgrades were necessary and were therefore one requirement). But see Petchem, Inc. v. United States, 99 F.Supp. 2d 50 (D.D.C. 2000) (Navy did not violate CICA by purchasing tugboat services on a piecemeal basis even though total value of the services exceeded $100,000).

C. Commercial Item Test Program. Congress created the authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold but not greater than $5,000,000. Pub.L. 104-106, § 4202(a)(1)(A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5. Authority to issue solicitations under the test program was to expire on January 1, 2004. However, Congress extended the period of the test program until January 1, 2006. See National Defense Authorization Act for Fiscal Year 2004 § 1443, Pub. L. No. 107-314, 116 Stat. 1675 (2003). For a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the $5,000,000 commercial item test program threshold is 10,000,000. See National Defense Authorization Act, 2004, Pub. L. No. 107-314, 116 Stat. 1675 (2003).

II. SIMPLIFIED ACQUISITION PROCEDURES.

A. Small Business Set-Aside Requirement. FAR 13.003(b). Any acquisition for supplies or services that has an anticipated dollar value exceeding $2,500, but not over $100,000, is automatically reserved for small business concerns.[3] FAR 13.003(b)(1); FAR 19.502-2. 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).

B. Synopsis and Posting requirements. FAR 13.105. Activities must meet the posting and synopsis requirements of FAR 5.101 and 5.203 ($10,000-$25,000, post in public

[3] 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.

place; >$25,000, synopsize in FedBizOpps.gov). 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. Competition standard.

1. 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). 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." Agency must make reasonable efforts, consistent with efficiency and economy, to give a responsible source the opportunity to compete. Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333.

a) 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.

b) Purchases of $2,500 or less ("micro-purchases"). FAR 13.202. To the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.202(a)(1). Competition is not required for a micro-purchase if the contracting officer determines that the price is reasonable. FAR 13.202(a)(2). DoD requires the use of the government credit card for all purchases at or below the micropurchase threshold. 65 Fed. Reg. 46,625 (2000).

III. SIMPLIFIED ACQUISITION METHODS.

A. "Authorized individuals"[4] shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003.

B. Purchase Orders. FAR 13.302. Definition. A purchase order is a government offer to buy certain supplies, services, or construction, from commercial sources, upon specified terms and conditions. FAR 13.0014. A purchase order is different than a delivery order, which is placed against an established contract.

1. Considerations for soliciting competition.

[4] 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.

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: solicit quotations based on personal preference; or restrict solicitation to suppliers of well-known and widely distributed makes or brands. FAR 13.104(a).

c) 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).

2. Methods of soliciting quotes. Oral. FAR 13.106-1(c); Electronic; Written. FAR 13.106-1(d).

3. Legal effect of quotes. A quotation is not an offer, and can't be accepted by the government to form a binding contract. FAR 13.004(a).

a) 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.

b) Acceptance. FAR 13.004(b). A contractor may accept a government order by: notifying the government, preferably in writing; furnishing supplies or services; or proceeding with work to the point where substantial performance has occurred. [5]

4. Evaluations.

a) Evaluations must be conducted based on the factors set forth in the solicitation. American Artisan Productions, Inc., B-278450, Jan. 30, 1998, 1998 U.S. Comp. Gen. LEXIS 29; National Aerospace Group, Inc., B-281958, May 10, 1999, 99-1 CPD ¶ 82 (rejecting lower quote because vendor had no prior performance history was unreasonable because the determination was inconsistent with the stated evaluation scheme).

b) The contracting officer has broad discretion in fashioning suitable evaluation criteria. At the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in FAR Parts 14 or 15 may be used. FAR 13.106-2(b). See Cromartie and Breakfield, B-

[5] "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).

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).

5. 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).

c) Notice to unsuccessful vendors shall be provided if requested. FAR 13.106-3(c) and (d).

C. Blanket Purchase Agreements. FAR 13.303. 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).

1. 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.

2. Limits on BPA usage. The use of a BPA does not justify purchasing from only one source or avoiding small business set-asides. FAR 13.303-5(c).

3. A BPA may be properly established when:

a) 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.

b) 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.

c) BPAs may be established with: More than one supplier for goods and services of the same type to provide maximum practicable competition.

d) 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.

e) 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).[6]

D. Imprest Funds. FAR Part 13.305; DFARS 213.305. 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.

1. 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).

2. DOD Use. Imprest funds can be used without further approval for:

a) 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 Classified transactions. 213.305-3(d)(ii).

[6] All schedule contracts contain BPA provisions. FAR 8.404(b)(4).

b) 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).

E. Government-wide Commercial Purchase Card. FAR 13.301.

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.[7] DOD contracting officers must use the card for all acquisitions at or below $2,500. DOD FMR Vol.5, ¶ 0210.

2. 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.

3. Do not give the card to contractors. FAR 13.301(a); FAR 1.603-3.

4. "Control Weaknesses". Several GAO reports and a DOD IG Audit Report have identified control weaknesses that leave agencies vulnerable to fraud and abuse. Problem areas include: Lack of Training (for cardholders and approving officials); Selecting Cardholders and Assigning Approving Officials; Inadequate Review and Approval; Setting Spending Limits. Splitting purchases to avoid spending limits; Purchases made after accounts closed;

5. Practical Pointers: Training; Issue cards only to employees who need them; Authorizing officials should be responsible for 5-7 cardholders; Authorizing official should not be a cardholder; Watch single purchase and monthly spending limits; Closely monitor use of convenience checks.

[7] DOD's purchase card limit is $200,000 for contingency, humanitarian, or peacekeeping operations. DFARS 213.301(2); 66 Fed. Reg. 55,123 (Nov. 1, 2001). However, the AFARS currently retains a $2,500 limit for most purchases. AFARS 5113.270.

COMMERCIAL ITEM ACQUISITIONS

I. 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. The acquisition policies resemble those of the commercial marketplace.

B. 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).

C. 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).

II. DEFINITIONS. 41 U.S.C. § 403(12); FAR PART 2.101

A. Commercial Item. FAR 2.101. Any item, other than real property, that is of a type customarily used for non-governmental purposes and that: Has been sold, leased, or licensed to the general public; or Has been offered for sale, lease, or license to the general public.

1. Any item that evolved from an item described above 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.

2. Any item that would satisfy a criterion expressed above in paragraphs (A) or (1) of this definition but for: Modifications of a type customarily available in the commercial marketplace.

3. 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.

4. Commercial Services (defined as commercial items). 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.

III. FEDERAL SUPPLY SCHEDULES (FSS).

A. Background.. A FSS is also known as a multiple award schedule (MAS). 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.

B. 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.

C. Therefore, an agency need not seek further competition, synopsize the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides in accordance with FAR 19.5

D. Ordering under the FSS[8].

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. Thresholds.

a) At or Under $2500. Agencies can place an order with <u>any</u> FSS contractor. FAR 8.404(b)(1).

(1) Above $2500, but below the "maximum order threshold." FAR 8.404(b)(2). Consider reasonably available information using the "GSA Advantage!" on-line shopping service, or Review catalogs/pricelists of at least three schedule contractors and select the best value vendor.

b) Above the maximum order threshold. Follow same procedures as for orders above $2500, but below the "maximum order threshold," <u>and</u> Review additional schedule contractor's catalogs/pricelists, or use "GSA Advantage!"; Seek price reduction from best value contractor; Order from contractor offering best value and lowest overall cost alternative. An order can still be placed even without price reductions.

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[8] Unfortunately, many contracting officers do not follow GSA's established procedures when using the FSS. GENERAL ACCOUNTING OFFICE, GAO-01-125, NOT FOLLOWING PROCEDURES UNDERMINES BEST PRICING UNDER GSA'S SCHEDULE (Nov. 2000).

3. Advantages of FSS ordering: Reduce the time of buying. Reduce the cost of buying. Agencies can fill recurring needs while taking advantage of quantity discounts associated with government-wide purchasing. While not protest proof, ordering from a FSS should diminish the chances of a successful protest.

IV. 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. 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 Use a combined synopsis/solicitation procedure. FAR 5.203(a)(2).

a) FAR 12.603 provides the procedures for the use of a combined synopsis/solicitation document. The combined synopsis/solicitation is only appropriate where the solicitation is relatively simple.

b) Response time. FAR 5.203(b). The contracting officer shall establish a solicitation response time that affords potential offerors a <u>reasonable opportunity to respond</u> to commercial item acquisitions.

2. Streamlined Evaluation of Offers. 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. 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.

B. 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.

V. 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).

The Players

GOVERNMENT	CONTRACTOR
Commander	Owner / CEO / Shareholders
Comptroller	Banker & Finance
Requiring Activity	Marketers
User	Production
Technical Activity	Engineering
Contracts Office	Contract Administration
Small Business Advocate	Purchasing
Competition Advocate	Subcontractors Suppliers
Legal Office	In-House / Outside Counsel
Contract Administration Office	Quality Assurance
Defense Contract Audit Agency	Internal Auditors

Appendix A: Agency FAR Supplements

B. The following chart shows the location within Title 41 for each of the respective agency supplementation:

Chapter	Agency/Department
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 Regulation (GSAR)
6	State.
7	Agency For International Development.
8	Veterans Affairs.
9	Department of Energy Acquisition Regulation (DEAR). Available at: http://farsite.hill.af.mil/vfdoea.htm/
10	Treasury.
12	Transportation Acquisition Regulation (TAR).
13	Commerce.
14	Interior.
15	Environmental Protection Agency.
16	Office of Personnel Management.
17	NASA FAR Supplement (NFS). Available at: http://farsite.hill.af.mil/VFnasaa.HTM.
19	United States Information Agency.
22	Small Business Administration.
24	Housing And Urban Development.
25	National Science Foundation.
28	Justice.
29	Department of Labor.
35	Panama Canal Commission.

44	Federal Emergency Management Agency.

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).