

Government Procurement & Contracting TOAL Conference October, 2018

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Where to Go - References

- Library of Congress: Contract Attorney's Desk book – 2014 (2 Volumes): Volume I:
https://www.loc.gov/rr/frd/Military_Law/pdf/CA-D-2014_V-1.pdf
- Federal Acquisition Regulation (FAR) and supplements:
 - <https://farsite.hill.af.mil/vmfara.htm>
 - <https://acquisition.gov/browsefar>
- National Contract Management Association (NCMA): <https://www.ncmahq.org>

Legislation

- Split in Legislative Authority between DoD and GSA/Civilian Agencies
 - Armed Service Procurement Act of 1947 for DoD
 - Federal Property and Administrative Services Act of 1949 for all other agencies
 - Some applicability to DoD
 - Title 10, US Code (Department of Defense) versus Title 41 (Public Contracts)
 - DoD specific: Each Year: Section 800 et seq, DoD Annual Authorization Acts
- Significant Statutes:
 - Truth in Negotiations Act (TINA) (1962)
 - Competition in Contracting Act (CICA) (1984)
 - Procurement Integrity Act (Office of Federal Procurement Policy Act of 1988), codified at 41 USC 423 et seq.
 - Federal Acquisition Streamlining Act (FASA)(1994)
 - Clinger-Cohen Act (1998)
 - Tucker Act (1887)
 - Contract Disputes Act of 1978

Regulatory

- Executive Orders
- Federal Acquisition Regulation (FAR)
- Agency FAR Supplements/Implementing Regulations (e.g., DFARS, AFARS, GSARS)
 - Contracting activities can prescribe additional implementing instructions/regulations
- Code of Federal Regulations provisions
 - E.g., 13 CFR (Small Business) and 29 CFR (Labor)
- Other:
 - GAO Bid Protest Rules: <https://www.gao.gov/legal/bid-protests>
 - Rules of the ASBCA and CBCA
 - Federal Rules of Civil Procedure

FAR and Supplements

- FAR is the regulatory compilation of government contract regulations and required clauses that are applicable to the entire federal government.
- Each agency has its own supplement.
- For DoD:
 - There is the DoD FAR Supplement (DFARS)
 - The DFARS PGI (Procedures, Guidance and Information)
 - Military Department Supplements

FAR and Supplements

or Cracking the Contracting DaVinci Code

- FAR is organized into separate topic parts
 - E.g.: Source selections for negotiated contracts are in FAR Part 15; Termination are in FAR Part 49...
- Each agency supplement is keyed to the same FAR reference number
 - E.g.: FAR 15.304 provides federal wide guidance on evaluation factors and subfactors.
 - DFARS 215.304 provides DoD-wide guidance
 - AFARS 5115.304 provides Army-wide guidance
- FAR Part 52 contains required clauses to be incorporated into applicable contracts.

FAR Topics

- 1: FAR System/KO 2: Definitions
- 3: Improper Practices 4: K Administration
- 5: Publicizing Ks 6: Competition
- 7: Acquisition Plans 8: Required Sources/GSA
- 9: KR Qualifications 10: Market Research
- 11: Describe Needs 12: Commercial Items
- 13: Simplified Acqs 14: Sealed Bids
- 15: Negotiated Acqs 16: Contract Types

FAR Topics

- 17: Special K Methods
- 19: Small Business
- 22: Labor Laws
- 24: FOIA/PA
- 26: Other Socio
- 28: Bonds/Insurance
- 30: Cost Accounting Std
- 32: Contract Financing
- 34: Major System Acqs
- 36: Construction
- 18: Emergency Acqs
- 20-21: Reserved
- 23: Misc topics: OSHA...
- 25: Foreign Acqs/Buy USA
- 27: Intellectual Property
- 29: Taxes
- 31: Cost Principles
- 33: Protests & Appeals
- 35: Research & Development
- 37: Service Contracts

FAR Topics

- 38: Fed Schedule Ks
- 39: Information Tech
- 40: Reserved
- 41: Utilities
- 42: K Admin/Audits
- 43: Contract Mods
- 44: Subcontracts
- 45: Govt Property
- 46: Quality Assurance/Inspections
- 47: Transportation
- 48: Value Engineering
- 49: Terminations
- 50: Extraordinary K Acts
- 51: KRs use of Govt Ks
- 52: Required clauses
- 53: Forms

FAR and Supplements

- FAR Part 52 contains required clauses to be incorporated into applicable contracts.
- FAR Part 52 is keyed to the substantive topic area covered in the FAR.
- E.g.: FAR Part 49 concerns terminations
 - FAR 49.402 provides guidance on default terminations of fixed price contracts
 - FAR 49.504 specifies the clauses to be used for default terminations
 - FAR 52.249-8 contains the actual clause for default terminations of fixed price supply and service contracts

Key Players

- Contracting Officers (KOs)
 - Only contracting officers have the authority to award, change, or terminate contracts (to the extent of their delegated authority)
 - KOs are “warranted”, i.e., appointed in writing on SF 1402. The warrants may include dollar other other limitations or be “unrestricted.”
 - Before awarding a contract, the KO must ensure all laws, executive orders, regulations and other applicable procedures have been met.
- Contracting Officer Representatives (CORs)
 - CORs are appointed by contracting officers to monitor and administer contracts.
 - CORs do not have authority to make or issue contract changes.

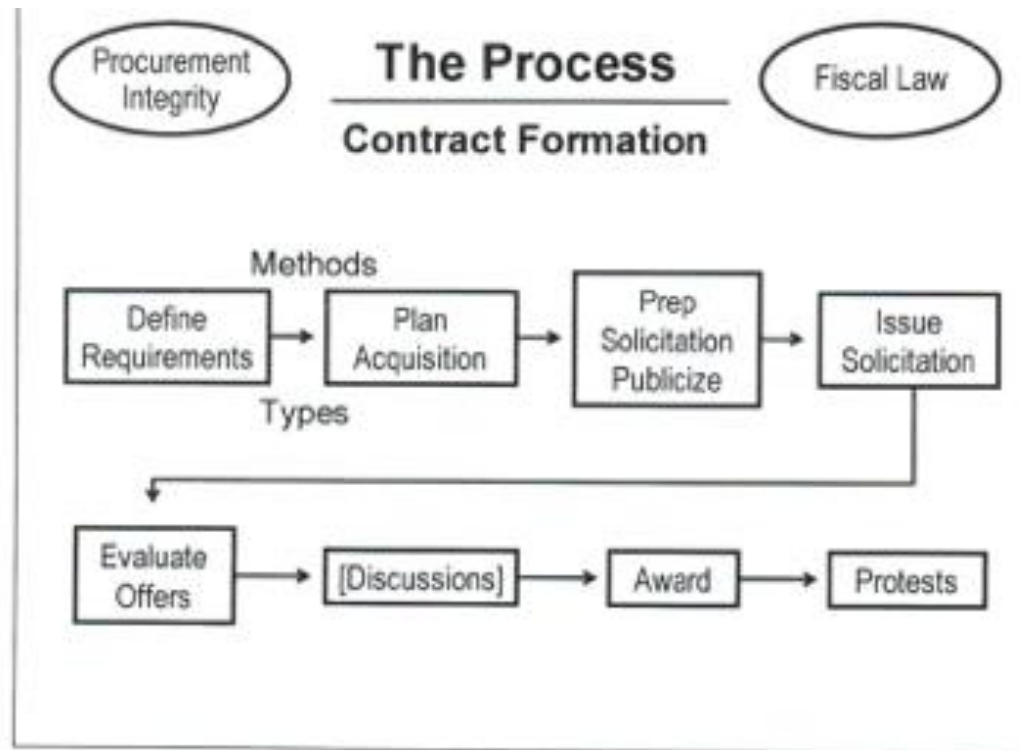
So before beginning

- Ask who are you dealing with and what their authority is:
 - Only contracting officers can obligate the US
- There are procedures which allow the government to pay for commitments made by unauthorized persons. Drawbacks:
 - They are time-consuming and delay payment
 - They may require retention of counsel

Key Contracting Objectives

- Transparency and preserving the integrity of the federal contracting process
- Integrity
- Competition
- Socio-economic policies
- Prevention of fraud

Contract Formation Process



Pre-Issuance of Solicitation – Pt I

- Customer Responsibilities (before submission to the KO)
 - Market research
 - Requirements: Specifications
 - IGCE (independent government cost estimate)
 - Funding
- KO Planning/Pre-Solicitation Issuance
 - Other Acquisition Sources
 - Mandatory Sources
 - GSA Schedule Contracts (FAR Subpart 8.4)
 - All contracts have been previously competed and prices are fair and reasonable
 - Can place/compete orders on all GSA contracts
 - Under simplified acquisition threshold (SAT): only three schedule contractors
 - Over SAT: use of GSA e-Buy option
 - Interagency acquisitions

Pre-Issuance of Solicitation – Pt II

- KO Planning/Pre-Solicitation Issuance
 - Acquisition Plan
 - Contract types
 - Fixed price versus cost contracts
 - Fixed price contracts place maximum performance risk on the KR
 - Appropriate when specifications are reasonably definite
 - Cost contracts place risk on government
 - Contractor reimbursed for its costs
 - Contractor only required to provide its “best efforts”
 - Time & Materials
 - Letter Contracts

Pre-Issuance of Solicitation – Pt III

- KO Planning/Pre-Solicitation Issuance
 - Contract types (continued)
 - Incentives
 - Fixed Fee/Award Fee/Incentive Fee
 - Contract Structure
 - Appropriations limitations and One-year performance periods
 - Use of Options and Multiyear contracts
 - Indefinite Delivery Contracts

Pre-Issuance of Solicitation – Pt IV

- Competition (CICA): Statutory Requirement for Full and Open Competition
 - Seven sole source/limited source exceptions
 - Only one source can meet agency requirements
 - » Another award would result in substantial duplication of costs not recoverable thru competition or award would result in unacceptable delays
 - » Unsolicited research proposals
 - » Patent/data rights
 - » Brand name purchases
 - Unusual or compelling urgency
 - To further industrial mobilization or maintain essential engineering and R&D capabilities provided by educational or nonprofit institutions or FFRDCs
 - International Agreements
 - Statutory Exceptions
 - National Security
 - Public Interest

Pre-Issuance of Solicitation – Pt V

- KO Planning/Pre-Solicitation Issuance
 - Commercial Items/Services
 - Statutory Preference
 - Includes items customarily used by the general public and that have been sold or offered for sale to the general public
 - Includes services offered and sold competitively in substantial quantities in the commercial market place based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions
 - Publication in FedBizOps:
 - 15 days notice before issuing solicitation
 - 30 days for preparation of proposals
 - Small business: Setasides & goals
 - Labor Laws: DOL wage rates

Simplified Acquisitions

- Simplified Acquisitions
 - For purchases at or below \$150K (\$250K for DoD; higher limits for ops and NBC)
 - Exempt from CICA requirements: Rule of 3!
 - Setaside for small business, except for micropurchases
 - Micropurchases:
 - \$3500 (\$10K for DoD) except \$2K for construction; \$2.5K for services
 - Higher limits for contingency ops and NBC;
 - \$10K for supplies and services from institutions of higher education, nonprofits or independent research organizations. Higher limit as determined by agency head consistent with clean audit under Single Audit requirements
- Examples include
 - Requests for quotations and purchase orders
 - Blanket Purchase Agreements (BPAs)
 - Government Credit card
 - Purchases of commercial items up to \$7M

Sealed Bidding

- Sealed Bidding (IFBs)
 - Public Opening of all timely received bids
 - Award to lowest bidder
 - Issues:
 - Late bids
 - Mistakes in Bids
 - IFB Cancellation

Negotiated Contracts – Pt I

- Negotiated Contracts
 - Pre-RFP events: contacts with industry: Q&As
 - Tips:
 - Section L: Comply strictly with all proposal submission requirements (page limits, etc.)
 - RFP: Identify all requirements and ensure they are specifically addressed in your proposal (cross-walk)
 - Review evaluation factors and Section M—Basis of award
 - Evaluation Factors
 - Must include quality (technical or other); past performance and price
 - Should state the relative importance of the evaluation factors and subfactors
 - » If not disclosed, all factors are considered equal in weight
 - Must state the relative importance of all non-price factors compared to price
 - Award with or without discussions
 - If award without discussions: put your best foot forward; you are not entitled to a second chance/discussions

Negotiated Contracts - Part II

- Source Selection & Award Methods
 - Best Value – permits tradeoffs between quality, past performance and price/cost
 - Low Price Technically Acceptable (LPTA)
- Source Selection bodies (SSEB/SSAC/SSA) and ethics
- Clarifications and exchanges
- Competitive Range Determination and Discussions
- Discussions:
 - Must inform each offeror of proposal deficiencies and serious weaknesses
 - KO has discretion as discuss further issues but must not be misleading
- Revised Proposals follow
- Source Selection Decision
- Documentation
- Award
- Debriefings

Contract Pricing

- Cost Contract requirements:
 - Contractor must maintain acceptable accounting system
 - Must comply with contract audit standards (CAS) (FAR Part 30)
 - Government will only pay costs that are reasonable, allowable (FAR Part 31), and allocable
- Contract Pricing
 - For cost contracts may be required to furnish cost and pricing data; ditto for modifications (can include fixed price contracts)
 - Cost/price reasonableness (prices too high)
 - Cost/price realism (prices too low and inadequate to support the level of performance proposed)

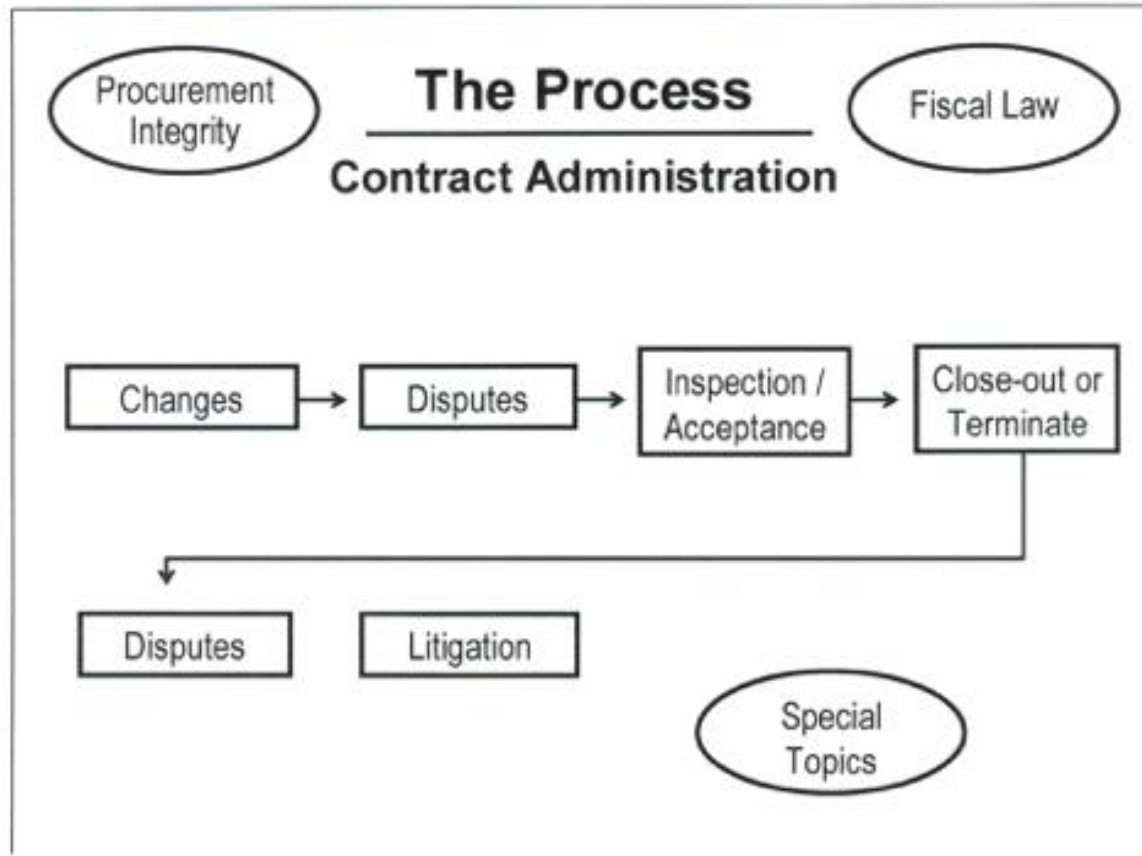
Contract Award and Protests

- KO can only award to a contractor which is responsive and responsible (capable of performing), and has not been debarred or suspended.
 - Small businesses can appeal non-responsibility determinations to SBA
- Award notification to disappointed offerors:
 - Triggers contractor obligation to request debriefings (3 days)
 - Triggers contractor obligation to file protests with GAO and COFC
 - Protest timeliness standards:
 - Protests of solicitation terms and conditions or lack of competition must be filed before proposals are submitted!!
 - GAO Protests of contract awards:
 - Must file within 10 days of notification of award
 - Must file within 10 days after a completed debriefing
 - To stop performance, protest must be filed within 10 days of award or 5 days after a completed debriefing
 - In all other instances, must file within 10 days of an adverse governmental action

Protests: 4 Forums Available

- Contracting Officer
- Agency: Goal is to decide protests within 35 days
- GAO: Protest unit consists of attorneys
 - Basis of protest must be violation of statute or procurement procedure (no ‘taint fair’ protests)
 - Protester must be an interested party (or in line for award)
 - GAO won’t consider contract administration, small business, or responsibility issues; and will dismiss protests if same issues raised in another forum (e.g., COFC). GAO will consider allegations that a modification is outside the contract’s scope
 - Government has 30 days to respond: can take corrective action as opposed to filing report
 - Contractor has 10 days to file response and raise supplemental protest grounds
 - GAO has 100 days to decide protests
 - Motions for reconsideration: very unlikely to succeed
- COFC:
 - Contractor can file protest directly with COFC; or after receiving an adverse GAO decision
 - Government has 60 days to respond to complaint; 28 days to summary judgment motions
 - Decision based on the written record: little augmentation or discovery permitted
- Role of Court of Appeals for Federal Circuit: hears appeals from COFC only

Contract Administration Process



Contract Admin and Claims

- Contract Admin
 - Role of the KO and COR
 - Inspection and Acceptance
 - Changes and Obligation to Continue Performance
 - Terminations (T4D/T4C)
 - Contract Disputes Act:
 - Must file claim with KO before appealing to ASBCA, CBCA, or COFC
 - Certified claims must be filed with the KO within 6 years of claim accrual
 - Includes government claims
 - KO has 60 days to respond (unless more time is needed); deemed denials.
 - KO issues a final decision which is binding on the parties unless appealed
 - Contractor must appeal within 90 days to the boards; 1 year to COFC

Contract Appeals

- Claims (appeals)
 - Appeals to the ASBCA/CBCA:
 - Claims resolution can be lengthy (litigation with full discovery)
 - Expedited and accelerated appeals procedures exist for claims under \$100K (\$150K for small businesses) with faster decision times.
 - COFC:
 - Cannot appeal adverse BCA decision to COFC
 - Litigation with full discovery
 - CAFC: can hear timely appeals from BCA and COFC decisions

Educational Service Agreements (ESAs)

- Authorized at DFARS Subpart 237.72
- ESAs are not contracts but ordering agreements under which the Government can order educational services
- DFARS establishes the ESA format
- Government agrees to pay normal tuition and fees for students enrolled under the institution's normal rules.
- ESAs are indefinite in duration until terminated
- Institution must provide copies of catalogs