2014

CONTRACT ATTORNEYS DESKBOOK

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THE JUDGE ADVOCATE GENERAL'S SCHOOL
CONTRACT AND FISCAL LAW DEPARTMENT

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Carolina 2003-2004; Company Executive Officer, A/319th Military Intelligence Battalion, Bagram, Afghanistan, 2002-2003, Fort Bragg, North Carolina, 2002. Member of the Bar of North Carolina.

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Chapter 1
Introduction to Government Contract Law

2014 Contract Attorneys Deskbook

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CHAPTER 1

INTRODUCTION TO GOVERNMENT CONTRACT LAW

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CHAPTER 1

INTRODUCTION TO GOVERNMENT CONTRACT LAW

I. COURSE OVERVIEW

This course and deskbook are broken down into the two parts of Government Contracting - Contract Formation and Contract Administration. These phases are not necessarily distinct and are broken out separately only to aid understanding. Practitioners must realize that these steps often run together or are out of sequence. Early and frequent attorney involvement in any and all of these steps will often prevent problems from arising in subsequent steps. A graphic of these phases can be found at Section II below.

A. Part I - Contract Formation. Contract Formation entails the process and requirements for procuring goods and services on behalf of the Government. The formation phase concerns issues that arise primarily when entering into a contract. It generally begins with the process of defining the Government's requirements.

1. Major topics include:

a. Authority – what individuals have the authority to bind the Government in a contract action.

b. Competition – what are the minimum requirements to solicit competition among contractors to fill the Government's needs, and are there any applicable exceptions.

c. Methods of acquisition (e.g., simplified acquisition, sealed bidding, contracting by negotiation) – what contracting method will be used to solicit bids, quotes, or proposals, and how will those responses be evaluated against each other in order to select a winner.

d. Contract types – how will the contract be structured and what are the pricing mechanisms.

e. Socioeconomic policies – are there public policy concerns or requirements that apply.

f. Protests – has the Government followed all applicable regulations and its own procurement approach such that an award is both fair and prudent.

(1) Procurement fraud – has the procurement been tainted by unethical or illegal conduct.

B. Part II - Contract Administration. Part II of the course, contract administration, concerns contract performance and other special topics. Once the contract is awarded, numerous oversight and management responsibilities continue to ensure the Government gets what it bargained for, and to protect the Contractor against unfair treatment. The administration phase concerns issues that arise primarily during performance of a contract.

1. Major topics include:

a. Contract changes – how do changed requirements affect an existing contract.

b. Inspection and acceptance – how does the Government ensure it gets the quality and quantity of goods and services it contracted for.

c. Terminations for default and for the convenience of the government – when can the Government terminate a contract.

d. Contract claims and disputes – how are disagreements between the contractor and the Government resolved.

e. Procurement integrity and ethics in government contracting – are contracts administered fairly, ethically, and legally.

f. Alternative Dispute Resolution (ADR) – are there alternate forums to resolve contractor/Government disputes.

C. Deployment Contracting and Contingency Contractor Personnel –there are unique policies and procedures that apply to federal procurements in a contingency environment.

1. Government Contract Law Deskbook, Volume I and Volume II. Electronic versions are available on the TJAGLCS Contract and Fiscal Law Department's webpage on JAGCNet and the Library of Congress' website (http://www.loc.gov/rr/frd/Military_Law/military-legal-resources-home.html).

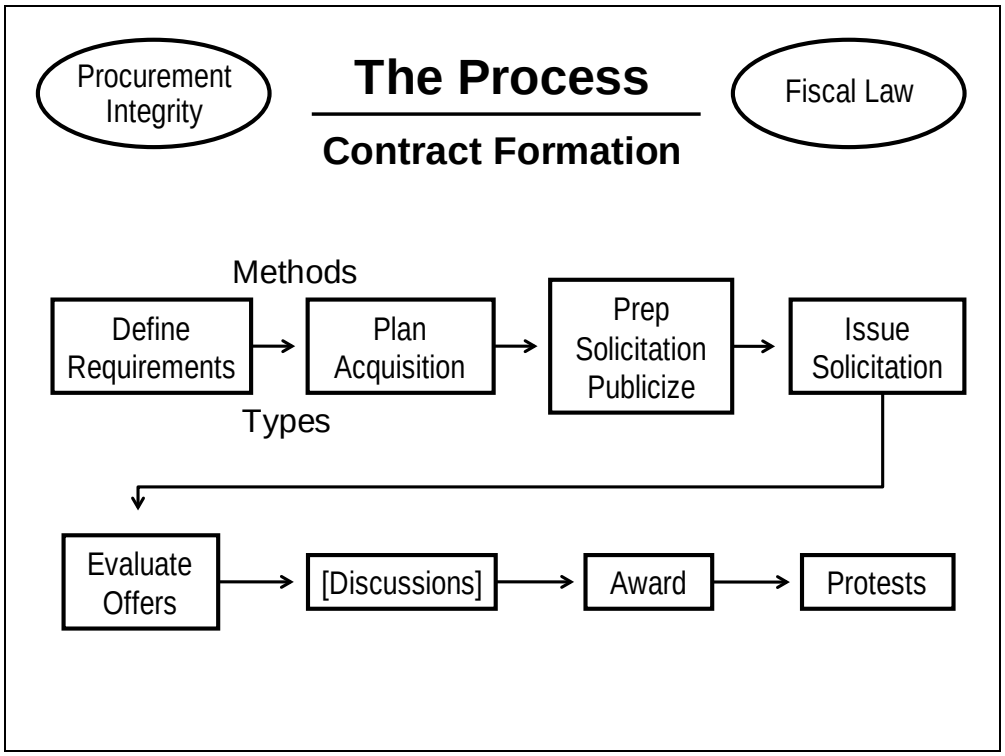
2. Other Great Resources.

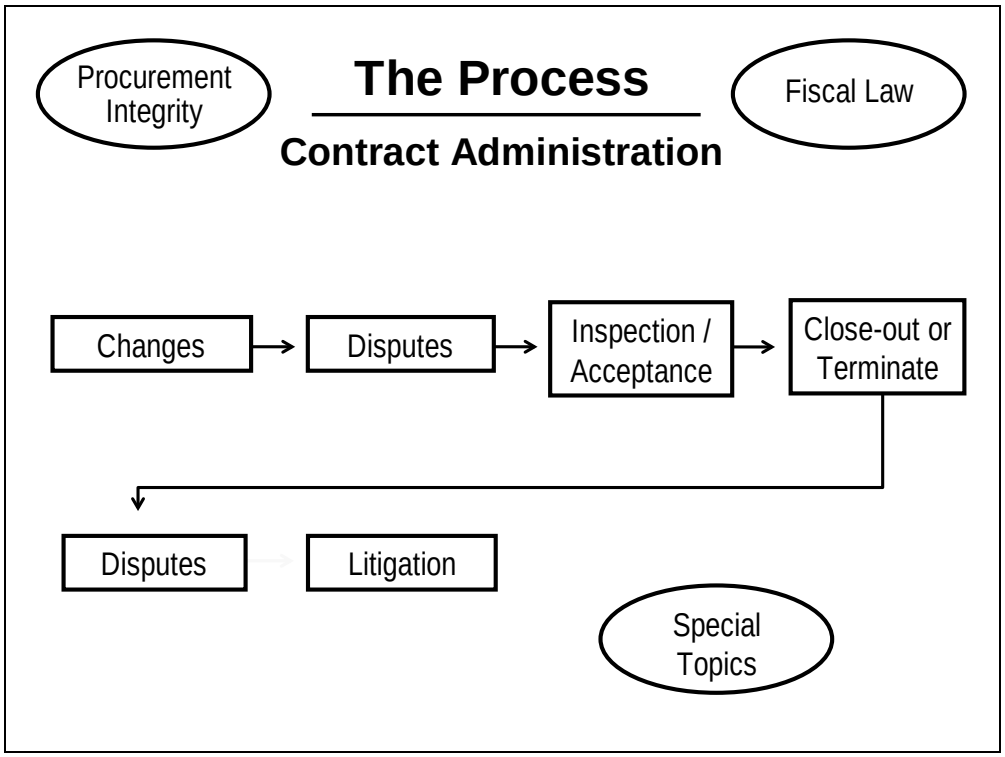
a. John Cibinic, Jr., and Ralph C. Nash, Formation of Government Contracts, published by Government Contracts Program, George Washington University, 3d edition, 1998.

b. Cibinic, Nash, and Nagle, Administration of Government Contracts, published by The George Washington University, 4th edition, 2006.

3. A listing of some contract law terminology and common abbreviations is found at Appendix A of the Government Contract Law Deskbook, Volume I. For further information, definitions, and explanations, *see* Nash, Schooner, O'Brien-Debakey, and Edwards, The Government Contracts Reference Book, published by The George Washington University, 3d edition, 2007.

II. OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS





III. COMMERCIAL/GOVERNMENT CONTRACT COMPARISON.

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

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

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

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

C. Agency Supplements. Numerous agency and command-level supplements provide additional direction and constraint over the public procurement process. *See* Chapter 2, Contract Format and the FAR.

IV. ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW

A. Objectives of Government Contracting (*See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002) available at (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620). In a short but insightful article, Professor Schooner describes various objectives and principles of a public contracting system. These principles are sometimes difficult to harmonize and may create points of friction for practitioners. A few of the objectives and principles are highlighted below and are recurring themes throughout the Contract Attorney's Deskbook and federal acquisition regulations.

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

2. Socioeconomic Policies: e.g., Labor Standards, FAR Part 22; Foreign Acquisition, FAR Part 25; Small Business Programs, FAR Part 19; Other Socioeconomic Programs, FAR Part 26.

3. Customer Satisfaction.

B. The Procurement Environment: The Acquisition Workforce. The Government's ability to efficiently procure quality goods and services at reasonable prices is directly tied to the size and quality of the acquisition workforce. Numerous initiatives have been launched in recent years to establish specific education and training standards for civilian and military contracting professionals (*see, e.g.*, Defense Acquisition Workforce Development Fund (DAWDF) Sec. 852 of the 2008 National Defense Authorization Act, Public Law No. 110-181). Contract attorneys are not typically considered part of the acquisition workforce (but they are a recognized member of any acquisition team and bring a unique skill set that can help detect, avoid, and resolve problems. Contracts Attorneys must work with the various other participants in the acquisition process (*see* Section VII below for a listing of the various players typically involved in the procurement process).

C. Public Policy and Contract Clauses

1. Clauses required by statute or regulation will be incorporated into a contract by operation of law. Voices R Us, ASBCA Nos. 51026, 51070, 98-1 BCA ¶ 29,660; G. L. Christian & Assoc. v. United States, 160 Ct. Cl. 1,312 F.2d 418, cert. denied, 375 U.S. 954 (1963) (regulations published in the Federal Register and issued under statutory authority have the force and effect of law).

2. Clauses included in a contract in violation of statutory or regulatory criteria will be read out of a contract. Empresa de Viacao Terceirense, ASBCA No. 49827, 00-1 BCA ¶ 30,796; Charles Beseler Co., ASBCA No. 22669, 78-2 BCA ¶ 13,483 (where contracting officer acts beyond scope of actual authority, Government not bound by his acts).

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

4. Contracts tainted by fraud in the inducement may be void ab initio, cannot be ratified, and contractors may not recover costs incurred during performance. Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659; Godley v. United States, 5 F.3d 1473 (Fed. Cir. 1993).

V. CONTRACT ATTORNEY ROLES

A. Advisor to the Commander and the Contracting Officer.

1. Advise on formation and administration phase issues.

2. Advise on fiscal law issues.

B. Litigator.

1. Protect the record (whether formation or administration).

2. Litigate protests.

3. Litigate disputes.

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

C. Fraud Fighter.

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

2. Provide litigation support for fraud cases.

D. Business Counselor.

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

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

3. Counsel is part of the contracting officer's team. FAR 1.603-2, 15.303(b)(1). Army policy requires counsel to participate fully in the entire acquisition process, from acquisition planning through contract completion or termination and close out. Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2.

VI. CONTINUING EDUCATION FOR CONTRACT LAW PROFESSIONALS

A. Basic Courses.

1. Contract Attorneys Course (CAC).

a. Provides instruction on basic legal concepts pertaining to government contract law.

b. The course is offered annually and lasts two weeks.

2. Fiscal Law Course.

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

b. The course is offered annually and lasts 4 ½ days.

B. Advanced Courses.

1. Government Contract and Fiscal Law New Developments Course.

a. This course covers significant Government procurement law developments in legislation, case law, and policy, and provides advanced instruction on selected topics.

b. The course is offered annually and lasts 3 ½ days.

c. Course attendance is limited to senior-level contract law attorneys.

2. Procurement Fraud Course.

a. This course provides amplifying guidance and instruction on current policies and trends for procurement attorneys who serve as procurement fraud advisors.

b. The course is offered every other year (even years) and lasts 2.5 days.

c. Course is administered in conjunction with the Army's Procurement Fraud Branch.

VII. CONCLUSION.

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

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Chapter 2
Contract Format and the FAR System

2014 Contract Attorneys Deskbook

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CHAPTER 2

CONTRACT FORMAT AND THE FAR

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CHAPTER 2

CONTRACT FORMAT AND THE FAR

I. INTRODUCTION TO CONTRACT REVIEW

A. The key to successful contract review is to integrate yourself into the acquisition from the very beginning (proactive vs. reactive lawyering).

B. Every acquisition starts with *Acquisition Planning*. See Federal Acquisition Regulation (FAR) Part 7; Defense Federal Acquisition Regulation Supplement (DFARS) Part 207. Be a part of the *Acquisition Planning Team*. Establish a rapport with your supported contracting office / resource management office. The FAR can be found at http://www.acquisition.gov/far/. The FAR, DFARS, Army, Navy, Air Force, Marine, and other agencies' regulations can be found at http://farsite.hill.af.mil/.

C. Checklists.

1. You will find contract review checklists to be very helpful when you first start reviewing contracts. If your office does not already have checklists, contact another office.

2. A basic contract review checklist is at Attachment 1.

D. Legal Reviews.

1. Contracting officers must obtain legal advice during all phases of acquisitions. Legal counsel shall review proposed contracting actions in accordance with locally established procedures and as otherwise required by law, regulation, or policy. The AFARS 5101.602-2 does not include a list of actions requiring legal review, but the AFFARS 5301.602-2 does include a list that can be used as a good reference for the types of matters that a contracting officer must obtain legal advice, coordination, and review for, regardless of dollar amount:

(a) When there is doubt or controversy about the interpretation or application of statutes, directives, and regulations;

(b) When using or applying unique or unusual contract provisions;

(c) When actions are likely to be subject to public scrutiny or receive higher-level agency attention;

(d) When a protest or claim is likely;

(e) When contemplating the use of alternative dispute resolution;

(f) Use of liquidated damages provisions in contracts for other than construction;

(g) Award fee or award term plans;

(h) Source selection decisions and supporting documentation for actions accomplished pursuant to the requirements of MP5315.3;

(i) Issues dealing with licensing, technical data rights and patents;\

(j) Mistakes in bid (See FAR 14.407);

(k) Protests before and after award;

(l) Ratifications;

(m) Disputes;

(n) Contractor claims;

(o) Termination for default/cause;

(p) Terminations for convenience, except cancellations or terminations of purchase orders;

(q) Debarment or suspension actions;

(r) Individual or class deviations; and,

(s) Any other legal issue at the discretion of the Contracting Officer or supporting legal office.

(t) All Justifications and Approvals (J&A) requests for actions expected to exceed $650,000

2. In addition to the general conditions identified in 5301.602-2(c)(i)(A) above, contracting officers must obtain legal review on Operational contract actions based on dollar figure.

II. CONTRACT FORMAT

A. Standard Procurement System (SPS).

B. Uniform Contract Format. Standard Form 33 (SF 33, General Services Administration (GSA)) "Solicitation, Offer and Award," can be found at http://www.gsa.gov/portal/forms/type/SF. DoD forms, SFs, Service forms, and

instructions can be found at
http://www.acq.osd.mil/dpap/ccap/cc/jcchb/html/forms.html.

1. Divided into Four Parts.

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

   b. Part II – Contract Clauses: Section I.

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

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

2. Section A: Solicitation/Contract Form (SF 33).
   Contains administrative information pertinent to the solicitation (i.e., solicitation number, proposal due date, government points of contact, table of contents, etc.).

3. Section B: Supplies or Services and Prices/Cost.
   Contains a brief description of the supplies and services and quantities required, the unit prices, and total prices. This description of supplies, services, quantities, and associated pricing is referred to and identified with a specific contract line item number (CLIN or CLINs).

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

5. Section D: Packaging and Marking (Only for Supplies).
   Contains specific information on requirements for packaging and marking of items to be delivered.

6. Section E: Inspection and Acceptance (IAW).
   Contains information on how the government will inspect and conditions for acceptance of items and services to be delivered under the contract.

7. Section F: Deliveries or Performance.
   Specifies the requirement for time, place, and method of delivery or performance for items and services to be delivered under the contract.

8. Section G: Contract Administration Data.
   Contains accounting and appropriations data and required contract administration information and instructions.

9. Section H: Special Contract Requirements.
Contains contractual requirements that are not included in other parts of the contract, including special clauses that only pertain to that particular acquisition.

10. Section I: Contract Clauses.
Contains all clauses required by law or regulation. They are commonly referred to as "boilerplate" clauses because they are normally inserted into most contracts.

11. Section J: List of Attachments.
Contains or lists documents, attachments, or exhibits that are a material part of the contract. Some examples of these documents are the specifications, the contract data requirements list (CDRL), and/or checklists of mandatory minimum requirements.

12. Section K: Representations, Certifications and other Statements of Offerors.
Contains representations, certifications, and other information required from each contractor. Some examples are: Procurement Integrity Certification, Small Business Certification, Place of Performance, and Ownership.

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

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

III. FEDERAL ACQUISITION REGULATION (FAR) SYSTEM

A. Federal Acquisition Regulation (FAR).

1. The FAR became effective on 1 April 1984. The FAR replaced the Defense Acquisition Regulation (DAR), the Federal Procurement Regulation (FPR), and the NASA Procurement Regulation (NASAPR).

2. The General Services Administration (GSA) has been tasked with the responsibility for publishing the FAR and any updates to it. FAR 1.201-2.

3. Locating the FAR.

a. The Government Printing Office (GPO) previously printed periodic updates to the FAR in the form of Federal Acquisition Circulars (FAC). Effective 31 December 2000, the GPO no longer produces printed copies of the FACs or updated versions of the FAR. See 65 Fed. Reg. 56,452 (18 September 2000).

b. Currently only electronic versions of the FAR and the FACs are available. The FAR is found at Chapter 1 of Title 48 of the Code of Federal Regulations (C.F.R.). Proposed and final changes to the FAR are published electronically in the Federal Register.

c. The official electronic version of the FAR (maintained by GSA) is available at https://acquisition.gov/far/index.html. The Air Force FAR Site also contains a user-friendly version of the FAR as well as several supplements. It is found at: http://farsite.hill.af.mil/.

B. Departmental and Agency Supplemental Regulations. FAR Subpart 1.3.

1. Agencies are permitted to issue regulations that implement or supplement the FAR.

2. Most agencies have some form of supplemental regulation. The FAR requires these supplements to be published in Title 48 of the C.F.R. FAR 1.303. The following chart shows the location within Title 48 for each of the respective agency supplementation:

Chapter	Agency/Department
2	Defense FAR Supplement (DFARS).
3	Health and Human Services.
4	Agriculture.
5	General Services Administration.
6	State.
7	Agency for International Development.
8	Veterans Affairs.
9	Energy.
10	Treasury.
12	Transportation.
13	Commerce.
14	Interior.
15	Environmental Protection Agency.
16	Office of Personnel Management (Federal Employees Health Benefits).

17	Office of Personnel Management.
18	National Aeronautics and Space Administration (NASA).
19	Broadcasting Board of Governors.
20	Nuclear Regulatory Commission.
21	Office of Personnel Management (Federal Employees Group Life Insurance).
23	Social Security Administration.
24	Housing and Urban Development.
25	National Science Foundation.
28	Justice.
29	Labor.
30	Homeland Security.
34	Education.
44	Federal Emergency Management Agency (FEMA).
51	Army FAR Supplement (AFARS).
52	Navy Acquisition Procedures Supplement (NAPS).
53	Air Force FAR Supplement (AFFARS).
54	Defense Logistics Acquisition Regulation Supplement (DLAR).

C. Layout of the FAR.

1. The FAR is divided into 8 subchapters and 53 parts. Parts are further divided into subparts, sections, and subsections. This organizational system applies to the FAR and all agency supplements to the FAR.

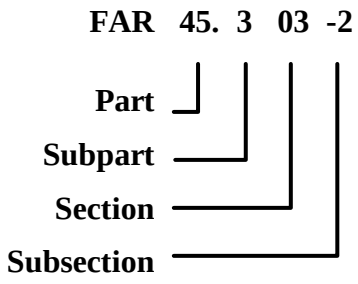
	Subchapter A: General
Part 1:	Federal Acquisition Regulation System
Part 2:	Definitions of Words and Terms
Part 3:	Improper Business Practices and Personal Conflicts of Interest
Part 4:	Administrative Matters
	Subchapter B: Acquisition Planning
Part 5:	Publicizing Contract Actions
Part 6:	Competition Requirements
Part 7:	Acquisition Planning
Part 8:	Required Sources of Supplies and Services

Part 9:	Contractor Qualifications
Part 10:	Market Research
Part 11:	Describing Agency Needs
Part 12:	Acquisition of Commercial Items
	Subchapter C: Contracting Methods and Contract Types
Part 13:	Simplified Acquisition Procedures
Part 14:	Sealed Bidding
Part 15:	Contracting by Negotiation
Part 16:	Types of Contracts
Part 17:	Special Contracting Methods
Part 18:	Emergency Acquisitions
	Subchapter D: Socioeconomic Programs
Part 19:	Small Business Programs
Part 20:	[Reserved]
Part 21:	[Reserved]
Part 22:	Application of Labor Law to Government Acquisitions
Part 23:	Environment, Conservation, Occupational Safety, and Drug-Free Workplace
Part 24:	Protection of Privacy and Freedom of Information
Part 25:	Foreign Acquisition
Part 26:	Other Socioeconomic Programs
	Subchapter E: General Contracting Requirements
Part 27:	Patents, Data, and Copyrights
Part 28:	Bonds and Insurance
Part 29:	Taxes
Part 30:	Cost Accounting Standards Administration
Part 31:	Contract Cost Principles and Procedures
Part 32:	Contract Financing
Part 33:	Protests, Disputes, and Appeals
	Subchapter F: Special Categories of Contracting
Part 34:	Major System Acquisition
Part 35:	Research and Development Contracting
Part 36:	Construction and Architect-Engineer Contracts
Part 37:	Service Contracting

Part 38:	Federal Supply Schedule Contracting
Part 39:	Acquisition of Information Technology
Part 40:	[Reserved]
Part 41:	Acquisition of Utility Services
	Subchapter G: Contract Management
Part 42:	Contract Administration and Audit Services
Part 43:	Contract Modifications
Part 44:	Subcontracting Policies and Procedures
Part 45:	Government Property
Part 46:	Quality Assurance
Part 47:	Transportation
Part 48:	Value Engineering
Part 49:	Termination of Contracts
Part 50:	Extraordinary Contractual Actions
Part 51:	Use of Government Sources by Contractors
	Subchapter H: Clauses and Forms
Part 52:	Solicitation Provisions and Contract Clauses
Part 53:	Forms

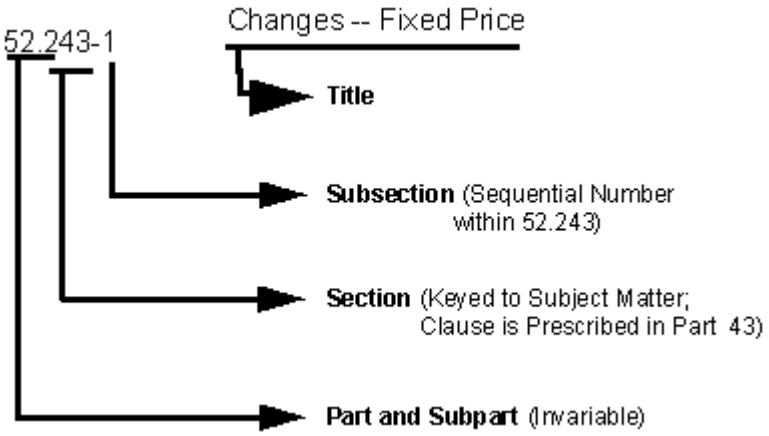
2. Arrangement. The digits to the left of the decimal point represent the part number. The digits to the right of the decimal point AND to the left of the dash represent the subpart and section. The digits to the right of the dash represent the subsection. See FAR 1.105-2.

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



3. Correlation Between FAR Parts and Clauses/Provisions. All FAR clauses and provisions are found in 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 clause or provision is then completed by a hyphen and a sequential number assigned within each section of Subpart 52.2. See FAR 52.101(b).

Example: FAR 52.245-2. This is a clause (as shown by the "52.2") that deals with Government Property (as shown by the "45," indicating that it is prescribed in FAR Part 45). The "-2" is simply the sequential number of the clause within Section 52.245, and does not correlate to any other portion of the FAR.



4. 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://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/Far/FAR52Ma.htm?zoom_highlight=matrix A 22 April 2013 memorandum from the Under Secretary of Defense, Acquisition, Technology, and Logistics, implements Defense-wide use of the contract Clause Logic Service (CLS). The memorandum can be found at http://www.acq.osd.mil/dpap/policy/policyvault/USA001481-13-DPAP.pdf. CLS can be found at https://clauselogic.altess.army.mil/.

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

Example: FAR 45.407 discusses contractor use of government equipment. The portion of the DFARS addressing this same topic is found at DFARS 245.407 (the "2" denotes the Defense FAR Supplement, which is found at Chapter 2 of Title 48, C.F.R.). Similarly, the portion of the AFARS further implementing this topic is found at AFARS 5145.407 (the "51" denotes the Army FAR Supplement, which is found at Chapter 51 of Title 48, C.F.R.).

Example: FAR 6.303-2 addresses the required contents of a justification and approval (J&A) document (for other than full & open competition). AFARS 5106.303-2 supplements that information by requiring that a copy of the approved acquisition plan also be attached to the J&A. FAR Part 53 provides forms for use in acquisition, but does not contain a form for J&As. AFARS 5153.9005 supplements the FAR by adding a standardized format for J&A documents.

ATTACHMENT 1: SAMPLE CONTRACT REVIEW CHECKLIST

SOLICITATION/CONTRACT AWARD CHECKLIST

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

Section I--Solicitation Documentation

1. *Purchase Request.*

_____ a. Is it in the file?

_____ b. Is the desired delivery or start date consistent with the date stated in the IFB/RFP?

_____ c. Does the description of the desired supplies or services correspond to that of the IFB/RFP?

_____ d. Does the purchase request contain a proper fund citation?

_____ e. Are funds properly certified as available for obligation?

_____ f. Are the funds cited proper as to purpose? 31 U.S.C § 1301.

_____ g. Are the funds cited current and within their period of availability? 31 U.S.C. § 1552.

_____ h. Are the funds cited of sufficient amount to avoid Anti-Deficiency Act issues? 31 U.S.C. §§ 1341, 1511-1517.

_____ i. Is the procurement a severable services contract to which the provisions of 10 U.S.C. § 2410a apply?

_____ j. If appropriate, does the solicitation contain the either the Availability of Funds clause at FAR 52.232-18 or the Availability of Funds for the Next Fiscal Year at FAR 52.232-19 (one year indefinite quantity contracts)?

2. *Method of Acquisition.*

_____ a. What is the proposed method of acquisition?

_____ b. Is the "sealed bidding" method required? FAR 6.401(a).

_____ c. Has the activity excluded sources? If so, have applicable competition requirements been met? FAR Subpart 6.2.

_____ d. Has the activity proposed meeting its requirements without obtaining full and open competition? FAR Subpart 6.3.

_____ e. Does a statutory exception permit other than full and open competition? FAR 6.302.

_____ f. If other than full and open competition is proposed, has the contracting officer prepared the required justification and include all required information? FAR 6.303. Does it make sense?

_____ g. Have the appropriate officials reviewed and approved the justification? FAR 6.304.

_____ h. Is this a contract for supplies, services, or construction amounting to $100,000 or less ($1,000,000 in a contingency), triggering the simplified acquisition procedures? FAR 2.101; FAR Part 13.

_____ i. May the activity meet its needs via the required source priorities listed in FAR Part 8?

3. *Publicizing the Solicitation.*

_____ a. Has the contracting officer published the solicitation as required by FAR 5.101 and FAR Subpart 5.2?

_____ b. Has the activity allowed adequate time for publication? FAR 5.203.

_____ c. If acquiring commercial items, does the combined synopsis/solicitation procedure apply? FAR 12.603.

4. *Solicitation Instructions.*

_____ a. Does the solicitation state the date, time, and place for submitting offers? Is the notation on the cover sheet consistent with the SF 33?

_____ b. Is the time for submitting offers adequate? FAR 14.202-1.

_____ c. Are the required clauses listed in FAR 14.201 (for IFBs) or FAR 15.209 and FAR 15.408 (for RFPs) and the matrix at FAR 52 included in the solicitation?

_____ d. If a construction contract, have the special requirements and procedures of FAR Part 36 been followed?

5. *Evaluation Factors*.

_____ a. Does the solicitation state the evaluation factors that will be used to determine award? FAR 14.101(e) and FAR 14.201-8 (for IFBs); FAR 15.304 (for RFPs).

_____ b. Are the evaluation factors clear, reasonable, and not unduly restrictive?

_____ c. In competitive proposals or negotiations, are all evaluation factors identified, including cost or price and any significant subfactors that will be considered? Is the relative importance of each disclosed? FAR 15.304 and FAR 15.305.

_____ d. If past performance is required as an evaluation factor, has it been included? FAR 15.304(c)(3); FAR 15.305(a)(2).

6. *Pricing*.

_____ a. Is the method of pricing clear?

_____ b. Are appropriate audit clauses included in the solicitation? FAR 14.201-7; FAR 15.408.

_____ c. Does the Truth in Negotiations Act apply to this solicitation or request? FAR Subpart 15.4; FAR 15.403.

_____ d. If the Truth in Negotiations Act applies, does the solicitation contain the required clauses? FAR 15.408.

7. *Contract Type*.

_____ a. Is the proposed type of contract appropriate? FAR 14.104; FAR 16.102.

_____ b. If the proposed contract is for personal services, has the determination concerning personal services been executed? FAR 37.103. Does a statutory exception permit the use of a personal services contract? FAR 37.104; 5 U.S.C. § 3109 and 10 U.S.C. § 129b.

_____ c. If the proposed contract is a requirements contract, is the estimated total quantity stated? Is the estimate reasonable? If feasible, does the solicitation also state the maximum quantity? FAR 16.503. Is appropriate ordering and delivery information set out? FAR 16.506. Are required clauses included in the solicitation? FAR 16.506.

_____ d. If the proposed contract is an indefinite quantity type contract, are the minimum and maximum quantities stated and reasonable? FAR 16.504. Is appropriate ordering and delivery information set out? FAR 16.505. Are required clauses included in the solicitation? FAR 16.506.

_____ e. Does the preference for multiple awards apply? FAR 16.504(c).

8. *Purchase Description or Specifications.*

_____ a. Are the purchase descriptions or specifications adequate and unambiguous? FAR 11.002; FAR 14.201-2(b) and (c); FAR 15.203.

_____ b. If a brand name or equal specification is used, is it properly used? FAR 11.104. ?

_____ c. Are the provisions required by FAR 11.204 included in the solicitation?

9. *Descriptive Data and Samples.*

_____ a. Will bidders be required to submit descriptive data or bid samples with their bids?

_____ b. If so, have the requirements of FAR 14.202-4 and FAR 14.202-5 been met?

10. *Packing, Inspection, and Delivery.*

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

_____ b. Are appropriate quality control requirements identified? FAR 46.202.

_____ c. Is there a point of preliminary inspection and acceptance? FAR 46.402.

_____ d. Is there a point of final inspection? FAR 46.403.

_____ e. Have the place of acceptance and the activity or individual to make acceptance been specified? FAR 46.502; FAR 46.503.

_____ f. Is the delivery schedule reasonable? FAR 11.402.

11. *Bonds and Liquidated Damages.*

_____ a. Are bonds required? FAR Part 28.

_____ b. If so, are the requirements clearly stated in the specification?

_____ c. Is there a liquidated damages clause? Does it conform to the requirements of FAR 11.502. Is the amount reasonable? Are required clauses incorporated? FAR 11.503.

12. *Government-Furnished Property.*

_____ a. Will the government furnish any type of property, real or personal, in the performance of the contract?

_____ b. If so, is the property clearly identified in the schedule or specifications? Is the date of delivery clearly specified?

_____ c. Has the contractor's property accountability system been reviewed and found adequate? FAR 45.104.

_____ d. Are the contractor's and the government's responsibilities and liabilities stated clearly? FAR 52.245-2; FAR 52.245-5.

_____ e. Have applicable requirements of FAR Part 45 been met? Are required clauses present?

13. *Small Business Issues.*

_____ a. Is the procurement one that has been set-aside for small businesses? FAR Subpart 19.5. If so, is the procurement a total set-aside pursuant to FAR 19.502-2 or a partial set-aside pursuant to FAR 19.502-3?

_____ b. Is the procurement appropriate for a "small disadvantaged business" participating as part of the Small Business Administration's "8(a) Program"? FAR Subpart 19.8. If so, does the entity meet the eligibility criteria for 8(a) participation?

_____ c. If the solicitation contains bundled requirements, has the activity satisfied the requirements of FAR 7.107, FAR 10.001, FAR 15.305, and FAR 19.101, 19.202-1?

_____ d. Does the solicitation contain the small business certification? FAR 19.301.

_____ e. Does the solicitation contain the proper Standard Industrial Classification code or North American Industry Classification System code? FAR 19.102.

14. *Environmental Issues.*

_____ a. Has the government considered energy efficiency and conservation in drafting its specifications and statement of work? FAR 23.203.

_____ b. Has the government considered procuring items containing recycled or recovered materials? FAR 23.401.

_____ c. Has the government considered procuring environmentally preferable and energy-efficient products and services? FAR 23.700.

_____ d. Do the contract specifications require the use of an ozone-depleting substance? FAR 23.803; DFARS 207.105.

_____ e. Do the Toxic Chemical Reporting requirements apply to the solicitation (for contracts exceeding $100,000)? FAR 23.906.

15. *Labor Standards.*

_____ a. Does the Davis-Bacon Act or the Service Contract Act apply to this acquisition? FAR Subparts 22.4 and 22.10.

_____ b. If so, have the proper clauses and wage rate determinations been incorporated into the solicitation?

16. *Clarity and Completeness.*

_____ a. Have you read the entire solicitation?

_____ b. Do you understand it?

_____ c. Are there any ambiguities?

_____ d. Is it complete?

_____ e. Are the provisions, requirements, clauses, etc. consistent?

_____ f. Are there any unusual provisions or clauses in the solicitation? Do you understand them? Do they apply?

Section II--Contract Award Checklist

1. *Sealed Bid Contracts.*

_____ a. Review the previous legal review of the solicitation. Has the contracting activity made all required or recommended corrections?

_____ b. Did the contracting officer amend the solicitation? If so, did the contracting officer distribute amendments properly? FAR 14.208.

_____ c. Has a bid abstract been prepared? FAR 14.403. Is it complete? Does it disclose any problems?

_____ d. Is the lowest bid responsive? FAR 14.301; FAR 14.404-1; FAR 14.103-2(d). Are there any apparent irregularities?

_____ e. Is there reason to believe that the low bidder made a mistake? FAR 14.407. Has the contracting officer verified the bid?

_____ f. Has the contracting officer properly determined the low bidder? FAR 14.408-1.

_____ g. Is the price fair and reasonable? FAR 14.408-2.

_____ h. Has the contracting officer properly determined the low bidder to be responsible? FAR 14.408-2; FAR Subpart 9.1.

_____ i. If the low bidder is a small business that the contracting officer has found non-responsible, has the contracting officer referred the matter to the SBA? FAR 19.601. If so, has the SBA issued or denied a Certificate of Competency to the offeror? FAR 19.602-2.

_____ j. Did the contracting officer address any late or improperly submitted bids? FAR Subpart 14.4.

_____ k. **Are sufficient and proper funds cited?**

_____ l. Has the activity incorporated all required clauses and any applicable special clauses?

_____ m. Is the proposed contract clear and unambiguous? Does it accurately reflect the requiring activity's needs?

_____ n. If a construction contract, have FAR Part 36 requirements been satisfied?

_____ o. If the acquisition required a synopsis in the fedbizopps.gov, is there evidence of that synopsis in the file? Was the synopsis proper?

2. *Negotiated Contracts.*

_____ a. Review the previous legal review of the RFP. Have all required or recommended corrections been made?

_____ b. Were any amendments made to the RFP? If so, were they prepared and distributed properly? FAR 15.206.

_____ c. Was any pre-proposal conference conducted properly? FAR 15.201.

_____ d. Did the contracting officer address any late or improperly submitted proposals? FAR 15.208.

_____ e. Has an abstract of proposals been prepared? Is it complete? Does it reveal any problems?

_____ f. Is a pre-negotiation Business Clearance Memorandum (BCM) required? Is it complete? Does it reveal any problems?

_____ g. Were discussions conducted? FAR 15.209; FAR 15.306. If not, did the solicitation contain a clause notifying offerors that the government intended to award without discussions? FAR 15.209(a). If so, were discussions held with all offerors in the properly determined competitive range? FAR 15.209(a); FAR 15.306(c).

_____ h. **Were proposals evaluated in accordance with the factors set forth in the request for proposals? FAR 15.305; FAR 15.303.**

_____ i. Did the contracting officer properly address any changes to the government's requirements? FAR 15.206.

_____ j. Were applicable source selection procedures followed and documented? FAR 15.308; FAR 15.305.

_____ k. If applicable, did the contracting officer address make or buy proposals? FAR 15.407-2.

_____ l. If the Truth in Negotiations Act applies, has the contractor submitted a proper certification? Is it complete and signed? FAR 15.406-2.

_____ m. Is a post-negotiation Business Clearance Memorandum (BCM) required? Is it complete? Does it reveal any problems?

_____ n. Are all negotiated prices set forth in the contract?

_____ o. Has the contracting officer incorporated required and special clauses in the proposed contract?

_____ p. Is the proposed price fair and reasonable?

_____ q. **Are sufficient and proper funds cited?**

_____ r. Is the proposed contract clear and unambiguous? Does it make sense? Does it reflect the requiring activity's needs?

_____ s. If a construction contract, has the contracting officer satisfied the requirements of FAR Part 36 (and supplements)?

ATTACHMENT 2: SAMPLE SOLICITATION

SOLICITATION, OFFER AND AWARD

1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)	RATING	PAGE 1 OF PAGES 57

2. CONTRACT NO.	3. SOLICITATION NO.	4. TYPE OF SOLICITATION	5. DATE ISSUED	6. REQUISITION/PURCHASE NO.
	HQ0034-07-R-1058	[ ] SEALED BID (IFB) [X] NEGOTIATED (RFP)	21 Dec 2007	KRS1017071323

7. ISSUED BY	8. ADDRESS OFFER TO (If other than Item 7)
WHS ACQUISITION & PROCUREMENT OFFICE 1777 NORTH KENT ST SUITE 12063 ARLINGTON VA 22209 CODE HQ0034 TEL: FAX:	See Item 7 CODE TEL: FAX:

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and_____ copies for furnishing the supplies or services in the Schedule will be received at the place specified in Item 8, or if handcarried, in the depository located in See Solicitation Section L until 02:30 PM (Hour) local time 06 Feb 2008 (Date)

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL:	A. NAME	B. TELEPHONE (Include area code) (NO COLLECT CALLS)	C. E-MAIL ADDRESS
	KORTNEE STEWART	703-696-3858	kortnee.stewart.ctr@whs.mil

11. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				**PART II - CONTRACT CLAUSES**	
X	A	SOLICITATION/ CONTRACT FORM	1	X	I	CONTRACT CLAUSES	32 - 35
X	B	SUPPLIES OR SERVICES AND PRICES/ COSTS	2 - 3			**PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS**	
X	C	DESCRIPTION/ SPECS./ WORK STATEMENT	4 - 21	X	J	LIST OF ATTACHMENTS	36 - 40
	D	PACKAGING AND MARKING				**PART IV - REPRESENTATIONS AND INSTRUCTIONS**	
X	E	INSPECTION AND ACCEPTANCE	22 - 23	X	K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	41 - 43
X	F	DELIVERIES OR PERFORMANCE	24				
X	G	CONTRACT ADMINISTRATION DATA	25 - 27	X	L	INSTRS., CONDS., AND NOTICES TO OFFERORS	44 - 54
X	H	SPECIAL CONTRACT REQUIREMENTS	28 - 31	X	M	EVALUATION FACTORS FOR AWARD	55 - 57

OFFER (Must be fully completed by offeror)

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if this offer is accepted within_____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

13. DISCOUNT FOR PROMPT PAYMENT (See Section I, Clause No. 52.232-8)

14. ACKNOWLEDGMENT OF AMENDMENTS (The offeror acknowledges receipt of amendments to the SOLICITATION for offerors and related documents numbered and dated):

AMENDMENT NO.	DATE	AMENDMENT NO.	DATE

15A. NAME AND ADDRESS OF OFFEROR	CODE	FACILITY	16. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print)

15B. TELEPHONE NO (Include area code)	15C. CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE - ENTER SUCH ADDRESS IN SCHEDULE.	17. SIGNATURE	18. OFFER DATE
	☐		

AWARD (To be completed by Government)

19. ACCEPTED AS TO ITEMS NUMBERED	20. AMOUNT	21. ACCOUNTING AND APPROPRIATION

22. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION:	23. SUBMIT INVOICES TO ADDRESS SHOWN IN (4 copies unless otherwise specified)	ITEM
☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253(c)( )		

24. ADMINISTERED BY (If other than Item 7) CODE	25. PAYMENT WILL BE MADE BY CODE

26. NAME OF CONTRACTING OFFICER (Type or print)	27. UNITED STATES OF AMERICA	28. AWARD DATE
TEL: EMAIL:	(Signature of Contracting Officer)	

IMPORTANT - Award will be made on this Form, or on Standard Form 26, or by other authorized official written notice.

Previous Edition is Unusable

33-134

STANDARD FORM 33 (REV. 9-97)
Prescribed by GSA
FAR (48 CFR) 53.214(c)

Section B - Supplies or Services and Prices

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0001		12	Months		
	Pentagon Custodial - Base Year FFP Period of Performance: Base Year 1 Sept 2014 – 30 Aug 2015. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0002		12	Months		
	Pentagon Custodial - Option Year One FFP Period of Performance: Option Year One 1 Sep 2015 – 30 Aug 2016. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0003		12	Months		
	Pentagon Custodial - Option Year Two FFP Period of Performance: Option Year Two 1 Sep 2016 – 30 Aug 2017. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0004		12	Months		
	Pentagon Custodial - Option Year Three FFP Period of Performance: Option Year Three 1 Sep 2017 – 30 Aug 2018 PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0005		12	Months		
	Pentagon Custodial - Option Year Four FFP Period of Performance: Option Year Four 1 Sep 2018 – 30 Aug 2019. PURCHASE REQUEST NUMBER: KRS1017071323				
				NET AMT	

Section C - Descriptions and Specifications

PERFORMANCE WORK STATEMENT
Section C: Performance Work Statement
December 5, 2007

Part 1: General Information

1.1 Introduction

The purpose of this contract is to fulfill a need of the Pentagon for custodial services. The Pentagon is the headquarters of the United States Department of Defense (DoD) and the world's largest low-rise office building. It is at once a building, an institution, and a national symbol.

1.2 Background

This contract follows the fifth year of a five-year contract. This contract is offered as a one-year contract with a possible additional four option years depending on the Contractor's performance and/or other factors. This is a firm-fixed-price contract with line items for additional work such as additional carpet cleaning. Existing problems include the large number of people that work in the Pentagon, the sheer size of the Pentagon, and the high level of Pentagon security. Historically, the following performance issues characterize contracts of this type:

- Excessive noise generated by trash removal
- Lack of contractor coordination when servicing secure areas
- Inadequate supervision
- Mishandling of recyclable materials
- Response to government requests for unscheduled cleaning
- Inadequate contractor quality control

In providing the required end results for this contract, the Government will use CPARS to assess performance and reward the contractor for meeting contract requirements and avoiding the historic non-performance issues noted above. In order to earn the highest ratings, the contractor must have "substantially exceeded the contract performance requirements without commensurate additional costs to the Government." This principle should guide the contractor's efforts to achieve the standards of this contract.

1.3 Objectives

The objective of this contract is to provide the Pentagon with high quality, timely, proactive and responsive custodial services.

1.4 Scope

The Pentagon presently houses approximately 26,000 military and civilian employees and about 3,000 non-defense support personnel dedicated to protecting our national interests. The

Pentagon sits on 34 acres of land including the five-acre center court, making a footprint large enough to accommodate five Capitol buildings. In spite of the Pentagon's tremendous size, it takes only seven minutes to walk between any two points of the building because of its unique design.

There are approximately 6,600,000 gross square feet of space, 280 restrooms, 7,750 windows, 130 stairways, 40 escalators, elevators, 17.5 miles of corridors, and 700 water fountains. These figures are approximate, and are subject to change as the renovation is completed.

The Pentagon custodial requirements will be met by two contracts; this contract and a NISH contract, with which coordination will often be required. This contract will be responsible for providing service for the 2nd floor of the Pentagon, the Metro Entrance, the outside trash removal, and the PENREN trailers not housed in the PENREN Compound. Attachment J-C1 details the specific area responsibilities covered by this contract. This contract has four major functional areas to be performed:

Interior cleaning
Exterior cleaning including parking lots and sidewalks
Trash/Recyclable Material Management
Miscellaneous services

The following types of cleaning are required:

Basic cleaning service: Basic cleaning services require cleaning of an area only when the appearance of that particular area falls below the stated standard specified in the Performance Matrix.

Scheduled cleaning service: Service performed on a contractor determined schedule.

Continuous cleaning service: Custodial services on a continuous process due to the large volume of traffic or high profile of occupants.

Spot cleaning: Localized cleaning in response to a customer service request or Contractor identified requirement.

The contractor may employ any cost-effective, flexible combination of cleaning types so long as the areas are maintained in accordance with the contract standards. The Pentagon is not a typical commercial office building requiring only scheduled custodial services. The occupants of the Pentagon demand a high standard of cleaning that may require an aggressive contractor inspection system that quickly identifies areas that fall below required standards. Some areas may necessitate continuous cleaning in order to maintain the standards. The contract requires close monitoring of all areas, especially when weather or other circumstances cause areas to repeatedly fall below standards. The use of scheduled services alone may not be sufficient to maintain areas in a consistently clean state, especially high use, public areas.

The Government intends to aggressively assess the effectiveness of the Contractor's continuous inspection system required by FAR 52.246-4 Inspection of Services Fixed Price to detect and correct instances of failing to meet contract standards.

A "reasonable person" standard will be used in assessing the contractor's ability to ensure the areas present the appearance one would expect in a high profile environment. The Government does not desire surfaces or containers to be cleaned unnecessarily. By the same token, the Government does not believe that merely vacuuming or sweeping once a day meets the required standard of a clean and neat appearance if area's appearance declines.

The Pentagon has been identified as the "Energy Efficient and Environmentally Sensitive Showcase Building" for the Department of Defense (DoD) worldwide. The Pentagon is one of the most visible elements of this showcase designation for the general public, national, and international dignitaries alike. Custodial services are a major factor in maintaining this standing.

The contractor is expected to use green cleaning as a holistic approach to janitorial services, taking into account:

(1) the health, safety, and environmental risks of products and processes associated with cleaning; (2) the mission and use of the facility to be cleaned and the behavior of facility occupants; and (3) the cleaning, maintenance, and sanitation needs of the facility.

The government desires the process of cleaning that involves alternative products, applying those products in different ways, and evaluating and/or changing behaviors associated with how buildings are used to reduce risks while maintaining a satisfactory level of cleanliness and disinfection.

When blocks of space totaling 10,000 square feet or more are expected to remain unoccupied for 30 calendar days or longer, deductions will be made from the monthly payment due the Contractor. The Contracting Officer (CO) will give the Contractor a written notice of the effective date the areas are to be dropped from or returned to the normal cleaning schedule at least three full working days in advance of this date.

The period of deducting for unoccupied space will begin on the effective date as stipulated in writing by the CO and will continue until the effective date on which the cleaning is resumed. The 10,000 square feet may be made up of small blocks of non-contiguous space. Subsequent blocks of space less than 10,000 square feet in the same vicinity may be added after the initial 10,000 square-feet threshold is met.

When adding or deducting space the Government will utilize the square foot unit price for General, Executive, restrooms and other areas to accomplish additions/deductions for the base and each option year. Unit prices are specified in Section B, Attachment J-B1 – J-B6.

The Pentagon Reservation is undergoing extensive renovation. As a consequence the workload in terms of square footage and equipment type and number may significantly change during the contract period.

The performance of the contract requires TOP SECRET FACILITY CLEARANCE with selected contractor personnel requiring TOP SECRET clearances (see Attachment J-C2, "Contract Security Classification Specification").

1.5 Applicable Documents

Publications	Title
Federal Hazard Communication Program (29 CFR 1910.1200)	http://www.ilpi.com/msds/osha/1910_1200.html
Hazardous waste operations and emergency response. - 1910.120	http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9765
Contractor Performance Assessment Report System (CPARS)	http://cpars.navy.mil/
Green Seal Product Standards	GS-37: GS Environmental Standard for General Purpose, Bathroom, and Glass Cleaners Used for Industrial and Institutional GS-40: Floor Care Products GS-08 Household Cleaners

Part 2: Definitions

After hours: The hours of the day following the normal working hours of 7:00AM to 4:30PM, Monday through Friday
Basic cleaning services: Requires cleaning only when dirt, debris, etc., are visible.
Carpet: Includes wall-to-wall, carpet tile, room-size rugs, area rugs, elevator and entrance floor mats.
Clean window: Includes washing interior and exterior glass, and all window surfaces including head, sash, sills, sun and insect screens (where applicable), and removal of all grit, dust, dirt, stains, insects, finger marks, streaks, spots, cloudy film and graffiti.
Clean: Free of dirt, film, graffiti, smudges, spots, streaks, debris, stains, dust, soil, gum, cobwebs, other foreign matter, excessive moisture, mold, and mildew; and is odor-free.
Clinical cleaning services: Requires cleaning to remove all soil, including bacteria.
Disinfect: The process of cleaning to remove germs and/or cause of infection.

Damaged: Operation of device mechanically impaired or otherwise diminished from original state in a noticeable way to include, but not limited to, unsecured, sharp edges, cracks, or noticeably marred.
Disinfect: Clean so as to destroy disease carrying microorganisms and prevent infection.
Emergency Condition: A situation calling for immediate response to address a critical situation.

Executive Office Areas Space: These areas require regularly scheduled cleaning of surfaces regardless of whether dirt is visible.
Exterior cleaning: The cleaning of surfaces outside of the building to include hard surfaces such as parking lots, bus shelters, taxi stands, guard booths, walkways, stairways, elevators, entrances, doors, glass and windows, smoker ash urns, and trash pickup
Green Cleaning: A comprehensive approach to cleaning designed to reduce the impacts on the health of a building's occupants and workers, and reducing the environmental impact from the products selected for and used in the cleaning process.
Interior cleaning: The cleaning of surfaces inside of the building to include hard surfaces in restrooms, sink rooms, kitchenettes, stairways, elevators, escalators, entrances, and drinking fountains.
Quiet: Non-audible to occupants of adjacent offices.
Regular hours: Monday – Friday, 0700 to 1700 hours, excluding Federal Holidays and weekends.
Scheduled cleaning services: Requires service on a regular schedule whether dirt is visible or not.
Secured Space: Areas requiring secret or higher clearances for access.
Spot Cleaning: Perform the standard cleaning functions not specifically listed but necessary to maintain the satisfactory level of cleanliness, to perform standard cleaning functions more often than planned frequency due to outside conditions.
Surfaces: In addition to walls, floors, and ceilings, surfaces include area rugs, carpets, restroom stall partitions, doors, windows, window frames, sills, air-returns, vents, corners, furniture, glass, glass desktops partitions, computer centers, pictures, blinds, bookcases, stairs, and recycle and trash receptacles.

Part 3: Government Furnished

The Government will provide limited storage space within the building for the contractor. The space is subject to change in both location and square footage.

Any existing equipment within the space assigned to the Contractor such as clothes lockers, tables, benches, chairs, etc., placed in the building by the Government may be used by the Contractor during the term of the contract provided written authorization is received in advance from the Contracting Officer Representative (COR). The Contractor shall maintain Government provided space in a neat, clean, and orderly fashion, and return the space to the Government at the expiration of the contract in the same condition as at the beginning of its use. The Government will not be responsible for any damage or loss to the Contractor's stored supplies, materials, or equipment.

The Government will provide access to sink rooms (with utility sinks), where available, at various points throughout the building. The Contractor shall keep sink rooms clean and orderly, and shall not use these rooms as employee break rooms or for storing equipment including mops, brooms, dust cloths, and other custodial items. The Contractor shall keep sink room doors closed and the light(s) and water turned off when not in use.

The Government will provide hot and cold water as necessary for the Contractor to perform the requirements herein and limited to the normal water supply provided in the building.

The Government will provide space in the building, furniture, and furnishings (to include a telephone and one computer for restricted use) for a Project Manager/Supervisor's office to be used for official business in the performance of this contract. The computer and telephones supplied by the Government are to be used only for work related activities and communications within or between the buildings. The Contractor or its employees shall not use the computer or telephones in any manner for personal advantage, business gain, or other personal endeavor. The Contractor shall arrange with the telephone company for the installation of private business telephone line(s) for its personal or business use, and shall pay all costs for the installation and maintenance of it.

The Government will furnish office desktop and public recycling containers. The Contractor shall distribute containers as needed to the appropriate locations as directed by the COR or the Recycling Program Manager.

The Government will provide ice melt for snow and ice removal.

Part 4: Contractor Furnished

Unless otherwise specified, the Contractor shall furnish all supplies, materials, and equipment necessary for the performance of work under this contract. All supplies and materials shall be of a type and quality that conform to applicable Federal specifications and standards and, to the extent feasible and reasonable, include the exclusive use of bio-based products. All dispensers/receptacles shall be considered, as is condition upon start date of the contract. All dispensers and receptacles are defined as, but not limited to sanitary napkin receptacles, toilet seat cover dispensers, toilet paper dispensers, paper towel dispensers and soap dispensers. The contractor shall buy and replace broken or damaged items for the remainder of the contract. All supplies, materials, and equipment to be used in the work described herein are subject to the approval of the COR.

The Contractor shall submit to the COR a list indicating the name of the manufacturer, the brand name, and the intended use of each of the materials, proposed for use in the performance of its work. The Contractor shall not use any materials, chemicals, or compounds which the COR determines would be unsuitable for the intended purpose or harmful to the surfaces to which applied or, as might be the case for such items as paper or soap products, unsatisfactory for use by occupants. The Contractor shall utilize products and material made from bio-based materials (e.g., bio-based cleaners, bio-based degreasers, bio-based laundry detergent) to the maximum

extent possible without jeopardizing the intended end use or detracting from the overall quality delivered to the end user. For the bio-based content products evaluation, all non-chemical products proposed for use under this contract must conform to the Department of Agriculture (USDA) Designated Bio-based Products List (DBPL) whenever practicable. Contractors should provide data for their bio-based solvents and cleaners to document bio-based content, and source of bio-based material (i.e. particular crop or livestock).

Any material which the COR suspects does not meet Federal specifications or standards shall be tested at the Contractor's expense by an independent testing laboratory qualified to perform such tests as are required. A copy of the laboratory report giving the results of the test and a sample of each product, if requested, shall be submitted to the COR. These products shall meet the requirements established by applicable Federal specifications and standards or be considered unacceptable for use.

Material Safety Data Sheets (MSDS). The Contractor shall comply with all applicable provisions of the Federal Hazard Communication Program (29 CFR 1910.1200). The Contractor shall provide the COR with a MSDS for each material in use or stored on the Pentagon Reservation. In addition, within 30 days of contract award, the Contractor shall provide the COR with the approximate quantities (i.e., ± ten percent) and the location(s) of all materials requiring an MSDS stored by the Contractor on the Pentagon Reservation. The Contractor shall update this information at least once each quarter or more frequently when quantities for any material change by more than ten percent for any single product. The Pentagon Building Manager or CO reserves the right to disapprove of any materials, chemicals or degreasers.

Restroom Soap: The Contractor shall provide a restroom soap that is green seal approved. Antimicrobial institutional hand cleanser may be provided only upon approval of the COR.

Environmentally Preferred Products (EPP): The Contractor shall meet or exceed the mandatory environmental preferable criteria and required consistencies and incorporated in the Contractor’s Stewardship Plan as specified in paragraph C-6.9.1 for all of the chemical cleaning-products used during the performance of the contract.

Cleaning Equipment: The Contractor shall furnish all necessary cleaning equipment. The Contractor shall use only vacuums equipped with HEPA filters for work performed under this contract. The Contractor shall not use equipment powered by combustion engines (e.g., gasoline, propane, CNG, diesel) for use or storage in areas other than locations approved, in advance, by the COR.

The Contractor shall furnish carts and containers constructed from noncombustible or flame resistant products that fall within established guidelines for the collection and/or storage of waste materials and recyclables.

Uniforms: The Contractor shall require its employees, supervisors and sub-contractors to wear distinctive uniform clothing and shall assure that every employee is in uniform upon contract start date. Employees shall wear uniforms consisting of shirts and trousers, coveralls, or smocks for

men, and dresses, and blouses with skirts or slacks, or smocks, as appropriate, for women. The uniform shall have the Contractor's name, easily identifiable, permanently attached above the waist. The color or color combination of the Contractor's uniforms worn on the Pentagon Reservation shall be approved, in advance, by the COR. Unless the performance of a particular task requires otherwise, the Contractor's employees shall maintain an appearance that is neat and clean, and reflects favorably upon both the Contractor and the Department of Defense.

Equipment Markings: All contractor equipment to include vacuums, trash carts, mop ringers, etc. shall be professionally and permanently stenciled. Handwritten company names, individual worker's name, etc. will not be permitted and will require the subject item to be removed from service.

Part 5: Specific Requirements

The Contractor shall provide custodial services that result in a building appearance and sanitation level consistent with show casing the Pentagon as a building, institution, and national defense symbol for the general public, and national and international dignitaries.

The contractor shall meet or exceed all performance-based requirements detailed in the Performance-based Matrix at C.5.5. Each requirement has associated measurable performance standards.

5.1 Interior Cleaning. The Contractor shall clean, to include spot cleaning, the interior spaces consistent with standards in the Performance Based Matrix at C.5.5. Areas requiring cleaning are listed below.

5.1.1 Restrooms. The Contractor shall clean all restroom, showers, kitchenettes surfaces.

5.1.2 Office and Conference Spaces. The Contractor shall clean all general, Executive, and Secure Office and Conference Space surfaces.

The Contractor shall submit to the COR a schedule to shampoo all carpet in renovated space every two years. The Contractor shall report all worn out carpet to the COR. Upon space renovation, additional carpet cleaning requirements may be added to the contract.

5.1.3 Entrances/Lobbies, and Corridors. The Contractor shall clean entrances, lobbies, and corridors. SECDEF Corridor at the River and Mall Entrances and their lobbies and joining corridors are high profile areas.

5.1.4 Stairways/Stairwells. The Contractor shall clean all stairwells and stairs, landings, railings, ledges, and grille surfaces.

5.1.5 Loading Areas (including platforms and docks). The Contractor shall clean all surfaces.

5.1.6 Elevators (passenger and freight) and Escalators. The Contractor shall clean interior elevators and escalators .

5.1.7 Vending Areas. The Contractor shall clean all floor and wall surfaces. While vending machine equipment sanitation is the responsibility of the vending machine supplier, the Contractor shall clean vending areas.

5.1.8 Drinking Fountains. The Contractor shall clean all surfaces .

5.1.9 Grease Traps. The Contractor shall pump, pressure wash and clean grease traps with the result(s) described in the Performance-based Matrix.

The Contractor shall dispose of all material/waste in accordance with applicable Federal, Commonwealth of Virginia, and local rules/regulations. Copies of all waste manifests for Pentagon solid wastes will be provided to the COR.

The Contractor shall provide the COR all required information to gain access to the Pentagon Reservation no less than 48 hours prior to start of work during normal duty hours. Any delay or non-performance due to the contractor failing to coordinate with the COR shall be at no cost to the Government.

The Contractor shall perform this requirement each alternate Saturday for the duration of this contract between the hours of 7:00AM and 4:30PM unless otherwise requested by the CO or COR. The Contractor shall shift the hours of performance to meet the needs of the Government upon receiving a 24 hour notification at no additional cost to the Government. The Contractor shall sign in/out with the COR.

The Contractor shall inform the COR if more frequent cleaning is required to allow for proper scheduling.

The Contractor shall only use electrical portable pump and pressure-washing equipment.

Grease trap locations are indicated in the list below:

Equipment Location List	**Number of Grease Traps**
G2-1 Food Service Loading Dock	1
G2-2 PLC2 Kitchen	1
G2-3 Corridor 3&4 Elevator Bank	1
G2-4 Corridor 5, D Ring	1
G2-5 Corridor 7&8 Elevator Bank	1
G2-6 Corridor 7, E Ring	1
G2-7 Corridor 8, Basement	1
G2-8 Corridor 8, C Ring Mechanical Room	TBD

5.2 Exterior Cleaning. The Contractor shall clean the exterior spaces identified below.

5.2.1 Elevators. The Contractor shall clean all exterior passenger elevators.

5.2.2 Windows (interior and exterior). The Contractor shall clean all interior windows on the 2nd Floor, and all exterior window sides of the entire building to include glass, frames, and ledges. The Contractor shall clean the ten (10) METRO awnings after hours. The Contractor shall submit a detailed work schedule to the COR no less than fourteen (14) calendar days before the start of work.

The Contractor shall adhere to the following minimum window washing schedule requirements:

April 15 – May 30	Clean all windows + 5100 SF of additional glass
July 1 – July 25	Clean 350 windows (obstructed windows, bus stops, taxi stands, kiss & drop shelters, and Metro awnings)
Aug 1 – Aug 15	Clean 350 windows (obstructed windows, bus stops, taxi stands, kiss & drop shelters, and Metro awnings)
Sept 15 – Oct 30	Clean all windows + 5100 SF of additional glass
Within 48 hours	Clean up to 25 windows and/or 1000 SF of glass (2X/YR)

5.2.3 Guard Booths, Trailers, Outbuildings and Bus Shelters. The Contractor shall clean all surfaces.

5.2.4 Loading Areas. The Contractor shall clean all surfaces. The Contractor shall not store products or equipment on the loading areas.

5.2.5 Exterior Surfaces. Contractor shall clean center courtyard, steps, walk-off mats, landings, parking lots, pavement, concrete drive surfaces, and sidewalks.

5.2.6 Smoker Ash Urns. Contractor shall clean smoker ash urns.

5.3 Trash/Recyclable Material Management. The Contractor shall collect trash and recyclables, and service recycling bins. The Contractor shall supply additional trash containers for special bulk-trash requests and special events. The Contractor shall not dispose of recycled material as refuse. The Contractor shall remove obvious contaminants when emptying recycle bins.

5.4 Miscellaneous Services.

5.4.1 Emergency Service. In the event the Project Manager or Designated Representative is notified that an emergency condition exists, the Contractor shall position appropriate resources at the site of the emergency within 15 minutes during normal work hours and within 90 minutes after normal working hours.

5.4.2 Customer Service Requests. The Contractor shall have customer service requests corrected within 45 minutes or sooner of notification during normal working hours. The Pentagon Building Management Office (PBMO) will receive service call requests from building occupants and notify the Contractor of the work required. Historically, tasks included providing appropriate waste and recycling receptacles for special tasks, servicing restrooms, cleaning, waste removal, emptying recycling containers, and other miscellaneous requests for janitorial services.

5.4.3 Response to Occupant Complaints.

The COR, the PBMO, or the Building Operations Command Center (BOCC) will report all complaints to the Contractor. The Contractor shall respond within 15 minutes to complaints and resolve problem within 30 minutes. The Contractor shall submit written documentation of service follow-up and response time to the COR within 24 hours of service completion.

5.4.4 Special Events. The Contractor shall provide and monitor portable restroom facilities as well as cleaning and servicing. The contractor shall also provide and monitor trash receptacles to prevent overflowing in the designated areas. The Contractor shall monitor and clean designated areas specified prior to, during, and at the completion of the event

5.4.5 Snow and Ice Removal. During regular hours, the Contractor shall clear entranceways, stairs, sidewalks, bus and shuttle shelters, pedestrian bridges of snow and ice. Contractor shall clear and de-ice passageways and steps for modular buildings and trailers.

Performance-Based Matrix				
Desired End Result(s)	**Feature(s) of end result to be surveyed.**	**The required performance level for each feature. "What success looks like"**	**Quality Assurance Inspection Method**	**Incentive**

The Contractor shall provide custodial services that result in a building appearance and sanitation level consistent with show casing the Pentagon as a building, institution, and national defense symbol for the general public, and national and international dignitaries. Contractor Inspection System required by 52.246-4 achieves performance standards. 7.11	**De-icing and snow removal** **5.4.5**	All surfaces continually free of ice and snow. Contractor provides appropriate snow removal equipment and in sufficient quantities to ensure snow does not accumulate.	Methods include but are not limited to 100% inspection, random sampling, planned sampling, incidental inspections and validated customer complaints.	Payment of contract price if performance meets requirements. Final and interim CPARS performance evaluations for use in future Government source selections.
	Floors **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.6** **5.1.7** **5.2.1** **5.2.3** **5.2.4**	Floors are clean and appear uniform, and/or sanitation-related safety hazards. Baseboards are free of floor cleaning residues or marks. All items moved during cleaning are in their original position. Terrazzo floors are clean and have high luster. Elevator floors have high luster. Elevator pit not used for floor sweepings or drains.		
	Re-waxed floors **5.1.2** **5.1.3** **5.1.7**	Stripped floor: Floor is ready for the reapplication of sealer and floor finish, i.e., free of dirt, stains, deposits, wax, finish, water, and cleaning solutions. Sealed floor: Uniform appearance, with all evidence of splashing on baseboards and furniture/fixtures completely removed. Re-waxed floor: Floors have a uniform high gloss shine. All moved items during stripping, sealing, and waxing are in their original position. Floors meet or exceed 0.5 – 0.6 slip/trip/fall coefficient.		

	Walls/Ceiling **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.6** **5.1.7** **5.2.1** **5.2.3** **5.2.4**	All surfaces are clean. Surfaces are not damaged during cleaning operations.		
	Doors **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.6** **5.1.7** **5.2.1** **5.2.3** **5.2.4**	All door surfaces are clean. Door handles and plates are free of tarnish, streaks, stains, and hand marks. Elevator door tracks clean.		
	Drinking Fountains **5.1.3** **5.1.8**	All surfaces, including orifices, bubblers, and drains are clean and disinfected.		
	Glass to include mirror and Plexiglas, and plain glass **5.1.1** **5.1.3** **5.1.4** **5.1.6** **5.2.2** **5.2.3**	All surfaces are clean.		
	Walk-off mats **5.2.5**	Walk-off mats are appropriately placed and clean, with no moisture or grit underneath.		

	Restrooms, showers, kitchenettes **5.1.1**	All surfaces fixtures are clean. Metal surfaces polished. All product dispensers are functional and not damaged. Paper and soap products are stocked so that supplies do not run out before the next service. COR notified whenever graffiti cannot be removed. Restroom floors are clean but not waxed.		
	Trash Containers **5.1.1** **5.1.2** **5.1.3** **5.1.4** **5.1.5** **5.1.7** **5.2.3** **5.2.5** **5.3**	No trash containers, including sanitary-napkin receptacle, overflow. The area surrounding the container is clean. The container is clean. All trash that falls while removing collected trash is removed. Plastic trashcan liners are replaced as necessary. Trash containers are in original locations after emptied. Items near trash receptacles marked "TRASH" are removed. Trash is not transferred from cart to cart in Corridor space. All collected trash is placed a Government compacter located outside on the RDF loading dock. The area surrounding compacter is clean. Wheels are quiet.		

	Recycle Bins **5.1.3** **5.1.7** **5.2.5**	No recycle bin is full. The bin exterior and interior are clean. The area surrounding the bin is clean and clear of recyclables. Bins in need of repair or missing are reported to the COR within 24 hours. Recyclables are not disposed of as trash. All recyclables that fall during removal are retrieved and properly handled. The plastic recycle bin liner is replaced as necessary. The recycle bin is in its original location after emptied. Recyclables are not transferred from cart to cart in Corridor space. All collected recyclables are placed and contained in the nearest Government provided designated container located outside the building. The area surrounding each container is clean.		
	Trash/Recycle Carts **5.3**	Carts are clearly labeled. Carts are clean and in good repair. Cart wheels are quiet. No carts are parked in Corridors full or unattended. Carts are not loaded to obstruct vision of operator. Trash/Recyclables are not staged in Corridors. Wheels are quiet.		
	Loading Areas **5.1.5** **5.2.4**	Loading areas are kept clean.		
	Interior walk-off mats **5.1.3**	Mats are placed in original position. Mats are clean.		
	Windows **5.2.2**	Cleaning scheduled between 7:30 A.M. to 8:30 P.M., Monday through Friday, excluding Government holidays unless COR approval obtained. Cleaning schedule is coordinated with tenants.		

		Interior and exterior window sides are clean.		
	Carpet surface **5.1.2** **5.1.3**	Carpet is clean per Original Equipment Manufacturer (OEM). Carpet is clean and free of excess moisture, after shampooing. There are no soap residues on any surfaces. "Caution – Wet Floor" signs posted while carpet is wet. Damaged carpet or un-removable stains are reported to the COR within twenty-four (24) hours.		
	Escalator steps **5.1.6**	Steps cleaned in accordance with Original Equipment Manufacturer (OEM) requirements.		
	Pavement/ Concrete Drive surfaces **5.2.5**	Surfaces are clean and power/pressure washed as necessary. K9 checkpoint clean and free of accumulated petroleum products. All debris is picked up and removed. No debris is put in the planting beds. No debris/trash is transported through the building from the outside en-route to the RDF.		
	Entrance surfaces **5.1.4** **5.2.3** **5.2.5**	During regular hours, entrances are clean. Metal doorknobs, push bars, kick plates, railings, and other metal surfaces are clean and polished. Wood surfaces are clean and polished. Surfaces are clear of snow/ice.		
	Smoker Ash Urns **5.2.6**	100 percent of all butts are removed. Cinders are dry and surface level.		

	Grease Traps **5.1.9**	Grease Traps are free of grease, liquids, and/or solid materials. All spills are properly managed. The trap area and spill areas are sanitized. Each trap is in proper working order at work completion. No overflows are caused by lack of cleaning.		
	Business Relationship	100 percent of the time, the Contractor cooperative, committed to customer satisfaction, and has a business-like concern for the interest of the customer.		
	Safety **7.7**	Emergency assistance numbers and instructions are conspicuously posted. An effective and active safety, first aid, hazardous material handling, blood-borne pathogen, and asbestos awareness training schedule is performed. Contractor employees are familiar with all building fire alarm messages. All accidents reported, OSHA supplemental form 101 submitted, and full cooperation given to the COR. All oil or hazardous substance spills are reported to the COR and or the Building Manager. All personnel use the proper Personal Protective Equipment for the task at hand. All PPE meets NIOSH, MSHA, and ANSI requirements. All PPE is maintained and clean. Employees, occupants, and visitors protected from injury using OSHA standards.		

	Plan **Report accuracy** **Cause of breech** **Corrective Action** **Trends** **Independent audit**	95 percent plan requirements were followed. 100 percent of all reports accurately reflect task performance Actual cause of performance problem correctly identified 95% of the time. Corrective actions implemented in a timely manner and satisfactory resolve performance problem Performance trends accurately identified and appropriately acted upon Inspection system independently audited to ensure validity of results.		

Part 6: Administrative Requirements

6.1 Clearances. The Contractor shall provide employees with a Top Secret Clearance for service in secured spaces.

6.2 Suitability Check. The Contractor shall provide NCIC cleared personnel.

6.3 Personnel. When contract work is in progress, the Contractor PM or alternate shall be available at all times during normal hours of operation to receive notices, reports, or requests from the COR or his authorized representative. All Contractor personnel shall have the ability to speak, read and understand English to successfully perform the task(s).

6.3.1 Project Manager. The PM shall have the ability to speak and understand English clearly.

6.3.3 Supervisors. All supervisors shall have the ability to speak and understand English clearly. At least one supervisor shall be present at the work site at all times when contract work is in progress and shall have the authority to act for the Contractor on a day-to-day basis and to sign inspection reports and all other correspondence on behalf of the Contractor.

6.4 Emergency Procedures.
Contractor shall coordinate with the PBMO to develop procedures for the Contractor's role in the event of an emergency evacuation of one or all buildings. Contractor shall ensure all employees

are organized, trained, and participate in building fire and civil defense drills. Contractor shall ensure that all employees report fire, hazardous conditions, maintenance deficiencies, graffiti, and evidence of pests.

6.5 Energy Conservation. Contractor shall fully support and participate in the energy-conservation program within the facilities. Ensure contractor personnel use lights or other energy-consuming equipment only in areas where and when work is actually being performed, and that lights are turned off, and equipment secured when not in use or needed. Fully support and participate in the recycling program within the Pentagon.

6.6 Contractor Employee Training. Contractor shall provide at contract start for COR acceptance with a comprehensive employee training plan that ensures all employees are aware of appropriate behavior while working on a Government facility. Suggested topics:

- Emergency Awareness
- Health and Safety
- Do not adjust mechanical equipment controls for heating, ventilation, and air-conditioning systems.
- Turn off water faucets and valves when not needed.
- Close windows and turn off lights and fans when not in use.
- Turn in found articles to the COR.
- Notify security personnel on duty when an unauthorized or suspicious person is seen on the premises.
- Report safety hazards immediately and maintenance deficiencies promptly.
- Report immediately conditions or circumstances that prevent the accomplishment of assigned work.
- First Aid
- Blood-borne Pathogen
- Asbestos-Awareness.
- Use, handling, and storage of hazardous materials according to the Hazard Communication Standard (29 CFR 1910.1200)
- First Responder Awareness training (29 CFR 1910.120 (q))

6.7 Meetings. The Contractor shall notify the COR at least three days in advance of all safety meetings. The Contractor shall review the effectiveness of the safety effort, resolve current health and safety problems, provide a forum for planning safe operations and activities, and update the accident prevention program.

6.8 Damage to Government Property. The Contractor shall immediately report any damage of Government Property to the COR. The Contractor shall be responsible for any damage caused by Contractor operations.

6.9 Quality Control (QC). The Contractor shall institute a complete QC Program to ensure that the requirements of this contract are fulfilled as specified. At minimum, the Contractor shall include the following elements in the program:

- A comprehensive inspection system of all the scheduled and unscheduled services required in this document.
- The name(s) and contact information of the designated QC Inspector(s) and their backups who will be performing the inspections.
- A proactive methodology to identify and correct problems before the COR and/or other PBMO personnel identify or are made aware of such problems.
- An organized, current file of all Contractor conducted inspections, corrective actions taken, and follow-up inspections.
- Government receipt of all QC reports same day generated.

6.10 Environmental Management. In order to comply with federally mandated environmental preference programs and Department of Defense (DOD) "Green Procurement Program" (GPP) policy, the Government requires the use of environmentally preferable products and services. These program elements include: recovered material products, energy and water efficient products, alternative fuels and fuel efficiency, bio-based products, non-ozone depleting substances, priority chemicals, and environmentally preferable products. These program elements are described on the Office of the Federal Environment Executive website (http://www.ofee.gov).

Products and Materials. Custodial cleaning products required in the performance of this SOW shall meet as a minimum, Green Seal Product Standards (http://www.greenseal.org/findaproduct/index.cfm). If it is determined that a product does not meet Government performance requirements, the contractor shall submit a proposed alternative that would meet the performance requirements with the lowest environmental impact for evaluation and acceptance. Products that fall under the Environmental Protection Agency (EPA) Comprehensive Procurement Guidelines (CPG) (http://www.epa.gov/cpg) shall meet the minimum recovered (recycled) content. Bio-based products shall be used upon issuance of the bio-based product listing from the United States Department of Agriculture (USDA) (http://www.usda.gov). The contractor shall purchase and use Energy Star or other energy efficient items listed on the Department of Energy's Federal Energy Management Program (FEMP) Product Energy Efficiency Recommendations product list. Supplements or amendments to listed publications from any organizational level may be issued during the life of the contract. Before implementing any change that will result in a change to the contract price, the contractor shall submit to the Contracting Officer a price proposal within 30 calendar days following receipt of the change. An equitable adjustment (increase or decrease) will be negotiated, if applicable, under the "Changes" clause of the contract.

7.0 Required Submittals and Reports.

7.1 Management and Environmental Stewardship Plan (MESP). Within 10 days after contract award the Contractor shall submit a MESP for approval by the CO. The Contractor shall make such revisions to the MESP as are deemed necessary by the CO. The MESP will be reviewed and updated annually, and as required by the Contracting Officer. The Contractor shall include in the MESP:

- Their written policy stating its commitment to environmental management, employee health and safety, and the use of environmentally preferable products.

- The establishment and facilitation of a Stewardship Task Force to be composed of Contractor and Government representatives to convene quarterly at minimum, to review all aspects of performance involving specific undertakings of this MESP
- A comprehensive list of materials, their associated label and MSDS, and the intended purpose of each material to be used on this contract. Once this materials list is approved by the CO, the Contractor shall only use materials from this list in the building. Any alternative material must be approved in writing by the CO.
- A plan of how it will keep abreast of the development and increasing availability of EPP and how EPP products will be incorporated into contract performance.
- A plan of how it will conform to the Comprehensive Procurement Guidelines (CPG) published by EPA with respect to recovered material products. The Contractor shall update its MESP to accommodate CPG revisions. The Contractor shall estimate the quantities of recycled-content and EPP that shall be purchased during the term of this Contract.
- Name of individual identified as Stewardship Coordinator who will serve as the point person for all environmental performance issues and participate in the Government's Stewardship Task Force Committee. ((ASTM Standard (Stewardship in the Cleaning of Commercial and Institutional Buildings))

7.2 Waste Minimization and Recycling Program (WMRP). The Contractor shall implement a WMRP designed to minimize the Contractor's on-site generation of non-recyclable waste generated during contract performance within 30 days of contract award. The Contractor shall use the recycling plan developed by the Government as a guide in defining their program. The Contractor shall also include in the WMRP enhancement of the separation of recyclable materials from non-recyclable waste generated by the building, detailing collection-point- and/or post-collection-point-separation of recyclable materials. The Contractor shall:

- Monitor the volume of waste managed and recyclables recovered
- Determine the rate(s) of participation in offices throughout the buildings
- Define activities to promote occupant participation and discourage contamination of recovered materials
- Ensure that the Contractor's personnel observe and promote the WMRP
- Establish procedures to recover and recycle the following materials; at a minimum: aluminum containers (e.g., beverage cans), containers of Polyethylene Terephthalate (PETE-1) or High Density Polyethylene (HDPE-2) plastic (e.g., drink bottles), clear, green and brown glass bottles and jars, white and mixed office paper, newspaper, cardboard, telephone and other books, toner/ink cartridges, and scrap metal, including steel containers.

7.3 Hazardous Material Storage. The Contractor shall define and submit a plan for hazardous material storage in conformance with good housekeeping practices, the National Fire Prevention Association (NFPA) Code, and applicable federal and municipal regulations.

7.4 Hazardous Waste Disposal. The Contractor's Plan shall define and submit proper hazardous waste identification and disposal procedures in accordance with federal Resource Conservation

and Recovery Act (RCRA) regulations and the Virginia Department of Environmental Quality (VDEQ).

7.5 Communication Policies. The Contractor shall define and submit strategies to receive feedback from building occupants on operations and complaints, and to give self-help guidance to building occupants. The Contractor shall first have these strategies and communications approved by the Stewardship Task Force or the CO.

7.6 Inclement Weather. The Contractor shall submit contingency plans for inclement weather.

7.7 Health and Safety Plan. Within 10 days after contract award the Contractor shall submit a Health and Safety Plan for approval by the CO. The Contractor's Health and Safety Plan shall ensure a safe environment is provided for all Contractor personnel, building occupants, and visitors. The CO will review the proposed program for compliance with OSHA and contract requirements. The Contractor shall include:

- A schedule of safety meetings
- First-aid procedures
- An outline of each work phase, the hazards associated with each phase, and the methods proposed to ensure property protection, and public, building occupant, and Contractor employee safety.
- A comprehensive training schedule, both initial and continuing.
- An emergency situation plan for events such as such as employee strikes, floods, fires, explosions, power outages, spills, and wind storms. The Contractor shall take into consideration existing government emergency plans, the nature of activities, site conditions, and degree of exposure of persons and property.

7.8 Staffing Plan. Within 10 days after contract award the Contractor shall submit a staffing plan to the CO that identifies all personnel expected to be employed in the performance of this contract. Additionally the plan shall identify key personnel including the roles and responsibilities of the staff.

7.9 Cleaning Schedule. The Contractor shall detail and submit a schedule of all daily cleaning.

7.10 Trash/Recyclable Materials Removal Plan. The Contractor shall provide a plan for trash and recyclable materials removal. The Contractor shall include in this plan the schedule, transportation process, and the number of carts to be used for each type of waste.

7.11 Quality Control (QC) Plan. Within 10 days after contract award the Contractor shall submit a QC Plan for CO review and approval.

7.12 Daily Report. The Contractor shall personally submit daily QC reports to the COR within 24 hours of all work performed. The Contractor shall notify the COR of deficiencies and problems such as, but not limited to plumbing, leaks, lighting replacement, elevator and escalator malfunctions, damaged, missing, or required recycling containers, sanitary dispensers, safety

hazards, health hazards, fire hazards, non-removable stains and methods used to accomplish resolution immediately.

7.13 Monthly Report. The Contractor shall electronically submit a monthly report to the COR by the tenth (10th) calendar day of the following month detailing the performance of the Contractor. The Contractor shall include, but is not limited to the following information

- A general performance overview of the month
- Updates/progress reports of any pertinent schedules
- Accurate amounts of each cleaning product used
- Accurate amounts of all restroom supplies used
- A calendar of events, plans, meetings, and/or special situations for the next 60 days
- Special activities accomplished, e.g., safety training
- Volume of waste managed and recyclables recovered
- Condition of each grease trap, a list of discrepancies found during each performance period, and an accurate amount of waste removed from each trap.
- If applicable, proof of proper disposal of hazardous waste(s) manifest(s).
- Documentation (to include list of attendees) of any training required by law

7.14 Coordination With Other Custodial Contractors. The Contractor shall coordinate as required with the AbilityOne (NISH) Contractor performing custodial services in the Pentagon.

7.15 Ordering Additional Services. Using the unit prices in Section B, "Schedule of Prices", the Government may modify this contract to add additional custodial services such as additional carpet cleaning, additional support of special events or additional custodial services required in the event of an emergency. Additional custodial services may be required anywhere in the Pentagon. Additional services may be required on a short or long term basis.

Section E - Inspection and Acceptance

INSPECTION AND ACCEPTANCE TERMS

Supplies/services will be inspected/accepted at:

CLIN	INSPECT AT	INSPECT BY	ACCEPT AT	ACCEPT BY
0001	Destination	Government	Destination	Government
0002	Destination	Government	Destination	Government
0003	Destination	Government	Destination	Government
0004	Destination	Government	Destination	Government
0005	Destination	Government	Destination	Government

CLAUSES INCORPORATED BY REFERENCE

52.246-16	Responsibility For Supplies	APR 1984
252.246-7000	Material Inspection And Receiving Report	MAR 2003

CLAUSES INCORPORATED BY FULL TEXT

52.246-4 INSPECTION OF SERVICES--FIXED-PRICE (AUG 1996)

(a) Definitions. "Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service or (2) terminate the contract for default.

(End of clause)

FAILURE TO PERFORM SERVICES

E-1 CONSEQUENCES OF CONTRACTOR'S FAILURE TO PERFORM SERVICES

The Contractor shall perform all of the contract requirements. The Contractor is responsible for maintaining an effective Quality Control Program during the course of the contract. Failure to maintain adequate quality control may result in Termination for Default. The Government may apply one or more surveillance methods to determine Contractor compliance and may deduct an amount from the Contractor's invoice or otherwise withhold payment for unsatisfactory or nonperformed work. Surveillance methods include, but are not limited to, 100% inspection, random sampling, planned sampling, incidental inspections and validated customer complaints. The Government reserves the right to change surveillance methods at any time during the contract without notice to the Contractor. In the case of unsatisfactory or nonperformed work, the Government:

i. may give the Contractor written notice of observed deficiencies prior to deducting for unsatisfactory or nonperformed work and/or assessing other damages. Such written notice shall not be a prerequisite for withholding payment for nonperformed work.
ii. may, at its option, allow the Contractor an opportunity to reperform the unsatisfactory or nonperformed work, at no additional cost to the Government. In the case of daily work, corrective action must be completed within 30 minutes following notice to the Contractor by the Government. In the case of other work, corrective action must be completed within twenty-four hours of notice. Reperformance by the Contractor does not waive the Government's right to terminate for nonperformance in accordance with FAR clause 52.249-8, "Default (Fixed-Price Supply and Service)" of Section I and all other remedies for default as may be provided by law.
iii. Shall deduct from the Contractor's monthly invoice all amounts associated with the unsatisfactory or nonperformed work at the prices set out in the Schedule and any accompanying exhibits or provided by other provisions of this contract, unless the Contractor is required to

reperform and satisfactorily completes the work. In addition to deducting for unsatisfactory or nonperformed work the Government will total the square footage of all interior space where service has been unsatisfactory or service has not been performed, compare it to the Assignable Square Footage (Attachment J-C1) and deduct, as liquidated damages, an additional 5% of the Contractor's monthly invoice amount if the total square footage of unsatisfactory or nonperformed work exceeds 5% of the Assignable Square Footage.

iv. may, at its option, perform the work by Government personnel or by other means. The Government will reduce the amount of payment to the Contractor, by the amount paid to any Government personnel (based on wages, retirement and fringe benefits) plus material, or by the actual costs incurred to accomplish the work by other means. If the actual costs cannot be readily determined, the prices set out in the Schedule and any accompanying exhibits will be used as the basis for the deduction.

Section F - Deliveries or Performance

DELIVERY INFORMATION

CLIN	DELIVERY DATE	QUANTITY	SHIP TO ADDRESS	UIC
0001	POP 01-SEP 14 TO 30-AUG-2015	N/A	FEDERAL FACILITIES DIVISION DAVID BROWN REMOTE DELIVERY FACILITY 100 WASHINTON BLVD. ARLINGTON VA 22201 703-697-7351 FOB: Destination	HQ0015
0002	POP 01-SEP 15 TO 30-AUG-2016	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015
0003	POP 01-SEP 16 TO 30-AUG-2017	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015
0004	POP 01-SEP 17 TO 30-AUG-2018	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015
0005	POP 01-SEP 18 TO 30-AUG-2019	N/A	(SAME AS PREVIOUS LOCATION) FOB: Destination	HQ0015

CLAUSES INCORPORATED BY REFERENCE

52.242-15	Stop-Work Order	AUG 1989
52.242-17	Government Delay Of Work	APR 1984

Section G - Contract Administration Data

CLAUSES INCORPORATED BY FULL TEXT

252.201-7000 CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991)

(a) "Definition. Contracting officer's representative" means an individual designated in accordance with subsection 201.602-2 of the Defense Federal Acquisition Regulation Supplement and authorized in writing by the contracting officer to perform specific technical or administrative functions.

(b) If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(End of clause)

CONTRACTING OFFICER’S REPRESENTATIVE (COR)

The COR is a representative for the Government with limited authority who has been designated in writing by the Contracting Officer to provide technical direction, clarification, and guidance with respect to existing specifications and statement of work (SOW)/statement of objectives (SOO) as established in the contract. The COR also monitors the progress and quality of the Contractor’s performance for payment purposes. The COR shall promptly report Contractor performance discrepancies and suggested corrective actions to the Contracting Officer for resolution.

The COR is NOT authorized to take any direct or indirect actions or make any commitments that will result in changes to price, quantity, quality, schedule, place of performance, delivery or any other terms or conditions of the written contract.

The Contractor is responsible for promptly providing written notification to the Contracting Officer if it believes the COR has requested or directed any change to the existing contract (or task/delivery order). No action shall be taken by the Contractor for any proposed change to the contract until the Contracting Officer has issued a written directive or written modification to the contract (or task/delivery order). The Government will not accept and is not liable for any alleged change to the contract unless the change is included in a written contract modification or directive signed by the Contracting Officer.

If the Contracting Officer has designated an Alternate COR (ACOR), the ACOR may act only in the absence of the COR (due to such reasons as leave, official travel, or other reasons for which the COR is expected to be gone and not readily accessible for the day).

COR authority IS NOT delegable.

INVOICING INSTRUCTIONS (WHS, A&PO Mar 2007)

In compliance with DFARS 252.232-7003, "Electronic Submission of Payment Request (March 2003)", Washington Headquarters Services, Acquisition & Procurement Office (WHS, A&PO) utilizes WAWF-RA to electronically process vendor request for payment. The web based system is located at https://wawf.eb.mil, which provides the technology for government contractors and authorized Department of Defense (DOD) personnel to generate, capture and process receipt and payment-related documentation in a paperless environment. The contractor is required to utilize this system when submitting invoices and receiving reports under this contract. Submission of hard copy DD250/Invoice/Public Vouchers (SF1034) will no longer be accepted for payment.

The contractor shall (i) ensure an Electronic Business Point of Contract is designated in Central Contractor Registration at http://www.ccr.gov/ and (ii) register to use WAWF-RA at https://wawf.eb.mil
within ten (10) days after award of the contract or modification incorporating WAWF-RA into the contract. The designated CCR EB point of contact is responsible for activating the company's CAGE code on WAWF by calling 1-866-618-5988. Once the company CCR EB is activated, the CCR EB will self-register on the WAWF and follow the instructions for a group administrator. Step by step instructions to register are available at http://wawf.eb.mil.

The contractor is directed to select either "Invoice as 2-in-1" for services only or "Invoice and Receiving Report (Combo)" for supplies or any combination of goods and services. Both types of invoices fulfill the requirement for submission of the Material Inspection and Receiving Report, DD Form 250.

Back up documentation may be attached to the invoice in WAWF under the "Misc Info" tab. Fill in all applicable information under each tab.

The following required information should automatically pre-populate in WAWF; if it does not populate, or does not populate correctly, enter the following information:

"Issue by DoDAAC" field enter **HQ0034**

"Admin DoDAAC" field enter **HQ0034**

"Payment DoDAAC" field enter **To Be Determined**

"Service Acceptor/Extension" or "Ship to/ Extension" field enter **HQ0015**

"Inspect By DoDAAC/ EXT" fields **Leave Blank**

"LPO DoDAAC/ EXT" fields **Leave Blank**

Contractor shall verify that the DoDAACs automatically populated by the WAWF-RA system match the above information. If these DoDAACs do not match then the contractor shall correct the field(s) and notify the contracting officer of the discrepancy (ies).

Take special care when entering Line Item information . The Line Item tab is where you will detail your request for payment and material/services that were provided based upon the contract. Be sure to fill in the following items exactly as they appear in the contract:

- ☐ Item Number: If the contract schedule has more than one ACRN listed as sub items under the applicable Contract Line Item Number (CLIN), use the 6 character, separately identified Sub Line Item Number (SLIN) (e.g. – 0001AA) or Informational SLIN (e.g. – 000101), otherwise use the 4 character CLIN (e.g. – 0001).
- ☐ ACRN: Fill-in the applicable 2 alpha character ACRN that is associated with the CLIN or SLIN.

Note – DO NOT INVOICE FOR MORE THAN IS STILL AVAILABLE UNDER ANY CLIN/SLIN/ ACRN.

- ☐ Unit Price
- ☐ Unit of Measure

Shipment numbers must be formatted as follows:

Three (3) alpha characters followed by four (4) numeric characters.

For Services, enter 'SER' followed by the last 4 digits of the invoice number.

For Construction, enter 'CON' followed by the last 4 digits of the invoice number.

For Supplies, enter 'SUP' followed by the last 4 digits of the invoice number.

If the invoice number is less than 4 digits, enter leading zeros.

Before closing out of an invoice session in WAWF-RA but after submitting your document or documents, the contractor will be prompted to send additional email notifications. Contractor shall click on "Send More Email Notification" on the page that appears. Add the following email address kortnee.stewart.ctr@whs.mil in the first email address block and add any other additional email addresses desired in the following blocks. This additional notification to the government is important to ensure that all appropriate persons are aware that the invoice documents have been submitted into the WAWF-RA system.

If you have any questions regarding WAWF, please contact the WAWF Help Desk at 1-866-618-5988.

Section G - Contract Administration

G-1 DESIGNATION OF PRINCIPAL CONTRACTING OFFICER

The Principal Contracting Officer for this contract is:

Supervisory Contracting Officer,
Facilities Support Services Team
WHS Acquistion and Procurement Office
1777 North Kent St.
Arilington, VA 22209

Section H - Special Contract Requirements

CLAUSES INCORPORATED BY REFERENCE

252.247-7006 Removal of Contractor's Employees DEC 1991

SPECIAL CONTRACT REQUIREMENTS

H-1 SECURITY REQUIREMENTS

a. Security Classification Guidance

All Security Classification Guidance is provided on DD Form 254, Department of Defense Contract Security Classification Specification (hereafter referred to as the DD 254) at Attachment J-C2. Any changes or additional security classification guidance shall be provided to the Contractor in writing, through updates and modifications to the DD 254. At no time will the Government issue classification guidance in any other form (verbal, e-mail, etc.).

b. Facility Security Clearance (FCL)

Performance of this contract requires a TOP SECRET facility clearance. The Contractor’s Facility Security Officer (FSO) shall report, in writing, to the Contracting Officer any changes in the Contractor’s security status throughout the contract period of performance.

c. Personnel Security Clearance (PCL)

Contractor employees assigned to this project require a PCL at the level (Confidential, Secret or Top Secret) identified in block 1.a of the DD Form 254. Prior to assignment of Contractor employees to this project, the Contractor’s FSO shall submit PCL validation through use of a Visit Authorization Request (VAR) for each employee, in accordance with DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM) to the designated security representative.

Changes in PCL status of Contractor employees shall be forwarded in writing to the Contracting Officer and the designated security representative.

d. Sub-Contractors

Subcontractors shall comply with the same security requirements as the Contractor. The Contractor shall issue DD 254s to each subcontractor reflecting the same security requirements applicable to the prime contract. The contractor shall also sponsor subcontractor(s) for an FCL and associated PCL(s) required in accordance with the DD 254.

H-2 DoD BUILDING PASS ISSUANCE

a. All personnel employed by a civilian commercial firm to perform work whose activity at any time requires passage into Government-occupied portions of the Pentagon or any other DoD facility on or off the Pentagon Reservation, shall be required to obtain a Temporary Department of Defense (DoD) Building Pass/Access Card.

b. The Contractor shall be responsible for having each employee requiring a Temporary DoD Building Pass/Access Card prepare the necessary applications, advising personnel of their obligations, filing the applications with the Contracting Officer, maintaining personnel files and re-filing applications for personnel in the event that clearances must later be extended. Personnel requiring a Temporary DOD Building Pass/Access Card must be either a citizen of the United States of America (USA) or a foreign national authorized to work in the USA under federal immigration and naturalization laws.

c. The Government will issue DoD building passes to eligible persons upon the completion of a National Criminal Information Check (NCIC) or National Agency Check (NAC). This is a search of the nationwide computerized information system established as a service to all criminal justice agencies. Processing of completed applications for initial pass issuance or renewal of existing passes will require three to five working days.

H-3 LOCAL INSURANCE

a. In accordance with the contract clause entitled "Insurance—Work on a Government Installation", FAR 52.228-5, the Contractor shall procure and maintain during the entire period of its performance under this contract, as a minimum, the following insurance:

Type	**Amount**
Comprehensive General Liability:	
Bodily Injury or Death	$500,000 per occurance
Motor Vehicle Liability (for each vehicle):	
Bodiliy Injury or Death	$200,000 per person
	$500,000 per occurance
Property Damage	$20,000 per occurance
Workers' Compensation & Employer's Liability	$100,000 per person *

*Worker's Compensation and Employer's Liability: Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so co-mingled with a contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least $100,000 shall be required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers.

b. Prior to the commencement of work hereunder, the Contractor shall furnish to the Contracting Officer a certificate of written statement of the above required insurance. The policies evidencing required insurance shall contain an endorsement to the effect that cancellation, or any material change in policies adversely affecting the interests of the Government in such insurance, shall not be effective for such period as may be prescribed by the laws of the State in which this contract is to be performed and in no event less than thirty (30) days after written notice thereof to the Contracting Officer.

c. The Contractor agrees to insert the substance of this clause, including this paragraph, in all subcontracts hereunder.

H-4 COMPLIANCE WITH PENTAGON REGULATIONS

The site of the work is on a Federal Reservation Complex and the Contractor shall observe rules and regulations issued by the Director, Washington Headquarters Service (WHS) covering general safety, security, sanitary requirements, pollution and noise control, traffic regulations and parking. Information regarding requirements may be obtained by contacting the Contracting Officer, who will provide such information or assist in obtaining it from the appropriate authorities.

H-5 UTILITY SERVICES

a. Utility Services furnished to the Contractor by the Government from the Government's existing system outlets and/or supplies will be at no cost to the contractor. (See FAR Clause 52-236-14, Availability and Use of Utility Services.)

b. The Contractor shall make his/her own arrangements for services and coordinate with the Inspector any requirements that would cause a disruption in the electrical or water supply. NOTE: all disruption of services concerning electrical or water supply must be coordinated with the inspector and scheduled by the inspector prior to disconnection.

H-6 IDENTIFICATION OF EMPLOYEES

All Contractor and subcontractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression that they are Government officials. All documents or reports produced by the Contractor shall be marked as contractor products or otherwise indicate that contractor participation is disclosed.

H-7 SUBSTITUTION OF KEY PERSONNEL

a. A requirement of this contract is to maintain stability of personnel proposed in order to provide quality services. The contractor agrees to assign only those key personnel whose resumes were submitted and approved and who are necessary to fulfill the requirements of the contract. No changes in key personnel, including but not limited to the substitution or addition of key personnel, shall be made except in accordance with this clause.

b. If key personnel become unavailable for work under the contract for whatever reason for a continuous period exceeding thirty (30) working days, or are expected to devote substantially less effort to the work than indicated in the proposal, the contractor shall propose a substitution for such personnel in accordance with paragraph (d) below.

c. The contractor agrees that changes in key personnel will not be made unless necessitated by compelling reasons. Compelling reasons include, but are not limited to, serious illness, death, termination of employment, declination of an offer of employment (for those individuals proposed as contingent hires), and family friendly / maternity leave. When the contractor determines that compelling reason to change key personnel exists, the contractor shall submit a request in accordance with subparagraph (d) below to the Contracting Officer and obtain Contracting Officer approval prior to changing key personnel.

d. All proposals to change or add key personnel shall be submitted, in writing, to the Contracting Officer not less than fifteen (15) days prior to the date of the proposed substitution/addition. In those situations where a security clearance is required, the request must be submitted not less than thirty (30) days prior to the date of the proposed substitution/addition. Each proposal or request shall provide a detailed explanation of the circumstances necessitating the proposed change, the resume of the individual proposed for substitution or addition, information regarding the financial impact of the change, and any other relevant information. All proposed substitutes (no matter when they are proposed during the performance period) shall have qualifications that are equal to or higher than the qualifications of the person being replaced.

e. The Contracting Officer shall evaluate requests to change or add key personnel and will approve/disapprove the request in writing and so notify the contractor.

f. If the Contracting Officer determines that the suitable and timely replacement of personnel who have been reassigned, terminated, or have otherwise become unavailable to perform under the contract is not reasonably forthcoming, or that the resultant reduction of productive effort would impair the successful completion of the contract, the contract may be terminated for default or for the convenience of the Government, as appropriate. Alternatively, at the Contracting Officer's discretion, if the Contracting Officer finds the Contractor to be at fault for the condition, the Contracting Officer may adjust the contract price or fixed fee downward to compensate the Government for any delay, loss, or damage as a result of the Contractor's action.

g. Noncompliance with the provisions of this clause will be considered a material breach of the terms and conditions of this contract for which the Government may seek any and all appropriate remedies including Termination for Default pursuant to FAR Clause 52.249-8, "Default (Fixed-Price Supply and Service)."

H-8 <u>WORK STOPPAGES FOR OFFICIAL CEREMONIES</u>

The Contractor shall provide for work stoppages as required for official ceremonies in the facility. A schedule of known ceremonies can be obtained from the Contracting Officer. The Contractor shall provide for a total of 4 days of work stoppages due to this requirement

H-9 DELIVERIES

a. All deliveries shall be processed through the Pentagon Remote Delivery Facility (RDF) site. The following information must be submitted to the COR or designated security representative 24 hours prior to scheduled delivery

(1) Name of driver & passenger (if any)
(2) Name of company
(3) State of vehicle registration and license number
(4) Contents of delivery

b. Security personnel staff the RDF from 4:30 AM until 5:30 PM (M-F) and 6:30 AM until 1:30 PM (Sat only). Arrangements can be made for deliveries outside of the hours by coordinating with the COR.

H-10 WORK BY OTHER CONTRACTORS

The Government has awarded and will award other contracts for similar and specialized work, which is outside the scope of this contract or outside the scope of the awarded options. These contracts will involve additional work at or near the site of the work under this contract. The contractor shall fully coordinate its work with the work of other Government contractors (hereafter called OGCs) and with the Contracting Officer. The Contractor shall carefully adapt its schedule and performance of the work under this contract to accommodate the work of the OGCs, and shall take coordination direction from the Contracting Officer. The OGCs will be placed under similar contracting conditions regarding coordination. The Contractor shall make every reasonable effort to avoid interference with the performance of work by the OGCs, as scheduled by the OGCs or by the Government.

Section I - Contract Clauses

CLAUSES INCORPORATED BY REFERENCE

52.202-1	Definitions	JUL 2004
52.203-3	Gratuities	APR 1984
52.203-5	Covenant Against Contingent Fees	APR 1984
52.203-6	Restrictions On Subcontractor Sales To The Government	SEP 2006
52.203-7	Anti-Kickback Procedures	JUL 1995
52.203-8	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity	JAN 1997
52.203-10	Price Or Fee Adjustment For Illegal Or Improper Activity	JAN 1997
52.203-12	Limitation On Payments To Influence Certain Federal Transactions	SEP 2005
52.204-4	Printed or Copied Double-Sided on Recycled Paper	AUG 2000
52.204-7	Central Contractor Registration	JUL 2006
52.204-9	Personal Identity Verification of Contractor Personnel	NOV 2006
52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment	SEP 2006
52.211-5	Material Requirements	AUG 2000
52.215-2	Audit and Records--Negotiation	JUN 1999
52.215-8	Order of Precedence--Uniform Contract Format	OCT 1997
52.215-19	Notification of Ownership Changes	OCT 1997
52.219-6	Notice Of Total Small Business Set-Aside	JUN 2003
52.219-8	Utilization of Small Business Concerns	MAY 2004
52.219-9	Small Business Subcontracting Plan	SEP 2007
52.222-3	Convict Labor	JUN 2003
52.222-4	Contract Work Hours and Safety Standards Act - Overtime Compensation	JUL 2005
52.222-21	Prohibition Of Segregated Facilities	FEB 1999
52.222-26	Equal Opportunity	MAR 2007
52.222-35	Equal Opportunity For Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans	SEP 2006
52.222-36	Affirmative Action For Workers With Disabilities	JUN 1998
52.222-37	Employment Reports On Special Disabled Veterans, Veterans Of The Vietnam Era, and Other Eligible Veterans	SEP 2006
52.222-39	Notification of Employee Rights Concerning Payment of Union Dues or Fees	DEC 2004
52.222-41	Service Contract Act Of 1965, As Amended	JUL 2005

52.222-43	Fair Labor Standards Act And Service Contract Act - Price Adjustment (Multiple Year And Option)	NOV 2006
52.223-5	Pollution Prevention and Right-to-Know Information	AUG 2003
52.223-6	Drug-Free Workplace	MAY 2001
52.223-10	Waste Reduction Program	AUG 2000
52.223-13	Certification of Toxic Chemical Release Reporting	AUG 2003
52.223-14	Toxic Chemical Release Reporting	AUG 2003
52.225-13	Restrictions on Certain Foreign Purchases	FEB 2006
52.226-1	Utilization Of Indian Organizations And Indian-Owned Economic Enterprises	JUN 2000
52.227-1	Authorization and Consent	JUL 1995
52.228-5	Insurance - Work On A Government Installation	JAN 1997
52.229-3	Federal, State And Local Taxes	APR 2003
52.232-1	Payments	APR 1984
52.232-8	Discounts For Prompt Payment	FEB 2002
52.232-9	Limitation On Withholding Of Payments	APR 1984
52.232-11	Extras	APR 1984
52.232-17	Interest	JUN 1996
52.232-18	Availability Of Funds	APR 1984
52.232-23	Assignment Of Claims	JAN 1986
52.232-25	Prompt Payment	OCT 2003
52.232-33	Payment by Electronic Funds Transfer--Central Contractor Registration	OCT 2003
52.232-35	Designation of Office for Government Receipt of Electronic Funds Transfer Information	MAY 1999
52.233-1	Disputes	JUL 2002
52.233-3	Protest After Award	AUG 1996
52.233-4	Applicable Law for Breach of Contract Claim	OCT 2004
52.237-2	Protection Of Government Buildings, Equipment, And Vegetation	APR 1984
52.237-3	Continuity Of Services	JAN 1991
52.242-13	Bankruptcy	JUL 1995
52.243-1	Changes--Fixed Price	AUG 1987
52.243-1 Alt II	Changes--Fixed-Price (Aug 1987) - Alternate II	APR 1984
52.244-5	Competition In Subcontracting	DEC 1996
52.244-6	Subcontracts for Commercial Items	MAR 2007
52.246-25	Limitation Of Liability--Services	FEB 1997
52.248-1	Value Engineering	FEB 2000
52.249-2 Alt II	Termination For Convenience Of The Government (Fixed Price) (May 2004) - Alternate II	SEP 1996
52.249-8	Default (Fixed-Price Supply & Service)	APR 1984
52.253-1	Computer Generated Forms	JAN 1991

252.204-7000	Disclosure Of Information	DEC 1991
252.204-7003	Control Of Government Personnel Work Product	APR 1992
252.204-7004 Alt A	Central Contractor Registration (52.204-7) Alternate A	NOV 2003
252.205-7000	Provision Of Information To Cooperative Agreement Holders	DEC 1991
252.209-7001	Disclosure of Ownership or Control by the Government of a Terrorist Country	OCT 2006
252.209-7002	Disclosure Of Ownership Or Control By A Foreign Government	JUN 2005
252.209-7004	Subcontracting With Firms That Are Owned or Controlled By The Government of a Terrorist Country	DEC 2006
252.215-7000	Pricing Adjustments	DEC 1991
252.219-7003	Small Business Subcontracting Plan (DOD Contracts)	APR 2007
252.223-7006	Prohibition On Storage And Disposal Of Toxic And Hazardous Materials	APR 1993
252.225-7002	Qualifying Country Sources As Subcontractors	APR 2003
252.225-7012	Preference For Certain Domestic Commodities	JAN 2007
252.225-7031	Secondary Arab Boycott Of Israel	JUN 2005
252.226-7001	Utilization of Indian Organizations and Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns	SEP 2004
252.232-7003	Electronic Submission of Payment Requests	MAR 2007
252.232-7010	Levies on Contract Payments	DEC 2006
252.241-7001	Government Access	DEC 1991
252.243-7001	Pricing Of Contract Modifications	DEC 1991
252.243-7002	Requests for Equitable Adjustment	MAR 1998
252.244-7000	Subcontracts for Commercial Items and Commercial Components (DoD Contracts)	JAN 2007
252.247-7023	Transportation of Supplies by Sea	MAY 2002

CLAUSES INCORPORATED BY FULL TEXT

52.217-8 OPTION TO EXTEND SERVICES (NOV 1999)

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within the current Period of Performance.

(End of Clause)

52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within the current Period of Performance; provided that the Government gives the Contractor a preliminary written notice of its intent to extend before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 60 months (not including any extension authorized under FAR clause 52.217-8).

(End of Clause)

52.245-2 GOVERNMENT PROPERTY INSTALLATION OPERATION SERVICES (JUNE 2007)

(a) This Government Property listed in paragraph (e) of this clause is furnished to the Contractor in an ``as-is, where is" condition. The Government makes no warranty regarding the suitability for use of the Government property specified in this contract. The Contractor shall be afforded the opportunity to inspect the Government property as specified in the solicitation.

(b) The Government bears no responsibility for repair or replacement of any lost, damaged or destroyed Government property. If any or all of the Government property is lost, damaged or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. The Contractor shall have title to all replacement property and shall continue to be responsible for contract performance.

(c) Unless the Contracting Officer determines otherwise, the Government abandons all rights and title to unserviceable and scrap property resulting from contract performance. Upon notification to the Contracting Officer, the Contractor shall remove such property from the Government premises and dispose of it at Contractor expense.

(d) Except as provided in this clause, Government property furnished under this contract shall be governed by the Government Property clause of this contract.

(e) Government property provided under this clause:

Performance Work Statement C-1 Section 3.
(End of clause)

52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es): http://acquisition.gov/far/index.html - or - http://farsite.hill.af.mil/VFDFARA.HTM

(End of clause)

52.252-6 AUTHORIZED DEVIATIONS IN CLAUSES (APR 1984)

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

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

(End of clause)

252.204-7001 COMMERCIAL AND GOVERNMENT ENTITY (CAGE) CODE REPORTING (AUG 1999)

(a) The offeror is requested to enter its CAGE code on its offer in the block with its name and address. The CAGE code entered must be for that name and address. Enter “CAGE” before the number.

(b) If the offeror does not have a CAGE code, it may ask the Contracting Officer to request one from the Defense Logistics Information Service (DLIS). The Contracting Officer will--

(1) Ask the Contractor to complete section B of a DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code;

(2) Complete section A and forward the form to DLIS; and

(3) Notify the Contractor of its assigned CAGE code.

(c) Do not delay submission of the offer pending receipt of a CAGE code.

(End of provision)

Section J - List of Documents, Exhibits and Other Attachments

J-B1 - J-B5 ATTACHMENTS

Attachment J-B1 - Schedule of Prices/Deductions

Base Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B2 - Schedule of Prices/Deductions

Option Period One Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		

Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B3 - Schedule of Prices/Deductions
Option Period Two Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,94	sq ft		

	0			
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B4 - Schedule of Prices/Deductions
Option Period Three Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		
Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

Attachment J-B5 - Schedule of Prices/Deductions
Option Period Four Performance Period

Area	Estimated Quantity	Unit	Unit Price	Total
Pentagon				
Restrooms	51,192	sq ft		
Corridors	83,517	sq ft		
Stairwells	11,164	sq ft		
Escalators	1,547	sq ft		

Elevators	4,439	sq ft		
Metro Entrance 1st Floor	20,926	sq ft		
Senior Executive Offices	36,188	sq ft		
Executive Offices	36,959	sq ft		
General Offices	506,059	sq ft		
Conference Rooms/Class Rooms/Training Rooms	17,972	sq ft		
Laboratories	736	sq ft		
Structurally Changed Spaces	7,112	sq ft		
Communication Rooms	34,338	sq ft		
Butler Building	22,621	sq ft		
Total Interior	834,770	sq ft		
Exterior Grounds	6,098,400	sq ft		
Window Cleaning	1,240	ea		
*Total	7,767,940	sq ft		
*The contractor's total price must match the total price for the CLINS in Section B.				
Unit Price for Additional Carpet Cleaning	1	sq yd		

NOTICE OF WAGE DETERMINATION

Any contract awarded as a result of this solicitation will be subject to Wage Determination CBA-2014-0091.

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ATTACHMENT 3 J-C1

ESTIMATED BUILDING AREA MEASUREMENTS*

Internal Assignable Square Footage on 04/01/14 (2nd Floor)	**931,881**
External Square Footage	**5,100,000**
Pentagon Estimated Square Footages (2nd Floor)	
Restrooms	51,192
Corridors	83,517
Stairwells	11,164
Escalators	1,547
Elevators	4,439
Metro Entrance 1st Floor	20,926
Senior Executive Offices	36,188
Executive Offices	36,959
General Offices	506,059
Conference Rooms/Class Rooms/ Training Rooms	17,972
Laboratories	736
Structurally Changed Spaces	7,112
Communications	34,338
Estimated Carpeted Area	
Pentagon (2nd Floor)	639,364 (71,040 SY)
Floor Mats	5,000 (556 SY)
Estimated Window Count	
Interior Window Sides	540
Exterior Window Sides	6,925
Additional Glass SF	5,500

*All estimates are based on the renovation schedule and square footage estimates provided by PENREN and/or reported on FIMS. PENREN estimates Corridors 9 to 1 to be closed for renovation on 04/01/2014.

J-L1 ATTACHMENT
Past Performance Data Sheet
**See Separate Attachment.

J-L2 ATTACHMENT
Past Performance Questionnaire
**See Separate Attachment.

J-C2 ATTACHMENT
Contract Security Classification – DD254
**See Separate Attachment.

Section K - Representations, Certifications and Other Statements of Offerors

CLAUSES INCORPORATED BY REFERENCE

52.203-11	Certification And Disclosure Regarding Payments To Influence Certain Federal Transactions	SEP 2005
252.209-7001	Disclosure of Ownership or Control by the Government of a Terrorist Country	OCT 2006
252.209-7002	Disclosure Of Ownership Or Control By A Foreign Government	JUN 2005

CLAUSES INCORPORATED BY FULL TEXT

52.203-2 CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (APR 1985)

(a) The offeror certifies that --

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to –

(i) Those prices,

(ii) The intention to submit an offer, or

(iii) The methods of factors used to calculate the prices offered:

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory --

(1) Is the person in the offeror's organization responsible for determining the prices offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) of this provision; or

(2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) of this provison

_____ (insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization);

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) above have not participated, and will not participate, in any action contrary to subparagraphs (a)(1) through (a)(3) above; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to subparagraphs (a)(1) through (a)(3) of this provision.

(c) If the offeror deletes or modifies subparagraph (a)(2) of this provision, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure. (End of clause)

52.204-8 ANNUAL REPRESENTATIONS AND CERTIFICATIONS (JAN 2006)

(a)(1) The North American Industry Classification System (NAICS) code for this acquisition is 561720.

(2) The small business size standard is $15 Million.

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

(b)(1) If the clause at 52.204-7, Central Contractor Registration, is included in this solicitation, paragraph (c) of this provision applies.

(2) If the clause at 52.204-7 is not included in this solicitation, and the offeror is currently registered in CCR, and has completed the ORCA electronically, the offeror may choose to use paragraph (b) of this provision instead of completing the corresponding individual representations and certifications in the solicitation. The offeror shall indicate which option applies by checking one of the following boxes:

(_x_) Paragraph (c) applies.

(__) Paragraph (c) does not apply and the offeror has completed the individual representations and certifications in the solicitation.

(c) The offeror has completed the annual representations and certifications electronically via the Online Representations and Certifications Application (ORCA) website at http://orca.bpn.gov. After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically have been entered or

updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [offeror to insert changes, identifying change by clause number, title, date]. These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

FAR Clause	Title	Date	Change

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.
(End of Provision)

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

The offeror represents that --

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

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

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

(End of provision)

REPS & CERTS

K-1 AUTHORIZED NEGOTIATORS

The offeror or quoter represents that the following persons are authorized to negotiate on its behalf with the Government in connection with this request for proposals or quotations: (List names, titles, and telephone numbers of the authorized negotiators).

K-2 PERIOD OF ACCEPTANCE FOR OFFERS

In compliance with the solicitation, the offeror agrees, if this offer is accepted within 90 calendar days from the date specified in the solicitation for receipt of offers, to furnish any or all items on which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

Section L - Instructions, Conditions and Notices to Bidders

CLAUSES INCORPORATED BY REFERENCE

52.204-6	Data Universal Numbering System (DUNS) Number	OCT 2003
52.222-24	Preaward On-Site Equal Opportunity Compliance Evaluation	FEB 1999
52.237-1	Site Visit	APR 1984
252.204-7001	Commercial And Government Entity (CAGE) Code Reporting	AUG 1999

CLAUSES INCORPORATED BY FULL TEXT

52.215-1 INSTRUCTIONS TO OFFERORS--COMPETITIVE ACQUISITION (JAN 2004)

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

“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.

“In writing or written” means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

“Proposal modification” is a change made to a proposal before the solicitation's closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

“Proposal revision” is a change to a proposal made after the solicitation closing date, at the request of or as allowed by a Contracting Officer as the result of negotiations.

“Time”, if stated as a number of days, is calculated using calendar days, unless otherwise specified, and will include Saturdays, Sundays, and legal holidays. However, if the last day falls on a Saturday, Sunday, or legal holiday, then the period shall include the next working day.

(b) Amendments to solicitations. If this solicitation is amended, all terms and conditions that are not amended remain unchanged. Offerors shall acknowledge receipt of any amendment to this solicitation by the date and time specified in the amendment(s).

(c) Submission, modification, revision, and withdrawal of proposals. (1) Unless other methods (e.g., electronic commerce or facsimile) are permitted in the solicitation, proposals and

modifications to proposals shall be submitted in paper media in sealed envelopes or packages (i) addressed to the office specified in the solicitation, and (ii) showing the time and date specified for receipt, the solicitation number, and the name and address of the offeror. Offerors using commercial carriers should ensure that the proposal is marked on the outermost wrapper with the information in paragraphs (c)(1)(i) and (c)(1)(ii) of this provision.

(2) The first page of the proposal must show--

(i) The solicitation number;

(ii) The name, address, and telephone and facsimile numbers of the offeror (and electronic address if available);

(iii) A statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation and agreement to furnish any or all items upon which prices are offered at the price set opposite each item;

(iv) Names, titles, and telephone and facsimile numbers (and electronic addresses if available) of persons authorized to negotiate on the offeror's behalf with the Government in connection with this solicitation; and

(v) Name, title, and signature of person authorized to sign the proposal. Proposals signed by an agent shall be accompanied by evidence of that agent's authority, unless that evidence has been previously furnished to the issuing office.

(3) Submission, modification, or revision, of proposals.

(i) Offerors are responsible for submitting proposals, and any modifications, or revisions, so as to reach the Government office designated in the solicitation by the time specified in the solicitation. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.

(ii)(A) Any proposal, modification, or revision received at the Government office designated in the solicitation after the exact time specified for receipt of offers is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and--

(1) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

(2) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or

(3) It is the only proposal received.

(B) However, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(iii) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(iv) If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(v) Proposals may be withdrawn by written notice received at any time before award. Oral proposals in response to oral solicitations may be withdrawn orally. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile received at any time before award, subject to the conditions specified in the provision at 52.215-5, Facsimile Proposals. Proposals may be withdrawn in person by an offeror or an authorized representative, if the identity of the person requesting withdrawal is established and the person signs a receipt for the proposal before award.

(4) Unless otherwise specified in the solicitation, the offeror may propose to provide any item or combination of items.

(5) Offerors shall submit proposals in response to this solicitation in English, unless otherwise permitted by the solicitation, and in U.S. dollars, unless the provision at FAR 52.225-17, Evaluation of Foreign Currency Offers, is included in the solicitation.

(6) Offerors may submit modifications to their proposals at any time before the solicitation closing date and time, and may submit modifications in response to an amendment, or to correct a mistake at any time before award.

(7) Offerors may submit revised proposals only if requested or allowed by the Contracting Officer.

(8) Proposals may be withdrawn at any time before award. Withdrawals are effective upon receipt of notice by the Contracting Officer.

(d) Offer expiration date. Proposals in response to this solicitation will be valid for the number of days specified on the solicitation cover sheet (unless a different period is proposed by the offeror).

(e) Restriction on disclosure and use of data. Offerors that include in their proposals data that

they do not want disclosed to the public for any purpose, or used by the Government except for evaluation purposes, shall--

(1) Mark the title page with the following legend: This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed--in whole or in part--for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of--or in connection with-- the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]; and

(2) Mark each sheet of data it wishes to restrict with the following legend: Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

(f) Contract award. (1) The Government intends to award a contract or contracts resulting from this solicitation to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the solicitation.

(2) The Government may reject any or all proposals if such action is in the Government's interest.

(3) The Government may waive informalities and minor irregularities in proposals received.

(4) The Government intends to evaluate proposals and award a contract without discussions with offerors (except clarifications as described in FAR 15.306(a)). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

(5) The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the proposal.

(6) The Government reserves the right to make multiple awards if, after considering the additional administrative costs, it is in the Government's best interest to do so.

(7) Exchanges with offerors after receipt of a proposal do not constitute a rejection or counteroffer by the Government.

(8) The Government may determine that a proposal is unacceptable if the prices proposed are materially unbalanced between line items or subline items. Unbalanced pricing exists when,

despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated as indicated by the application of cost or price analysis techniques. A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government.

(9) If a cost realism analysis is performed, cost realism may be considered by the source selection authority in evaluating performance or schedule risk.

(10) A written award or acceptance of proposal mailed or otherwise furnished to the successful offeror within the time specified in the proposal shall result in a binding contract without further action by either party.

(11) If a post-award debriefing is given to requesting offerors, the Government shall disclose the following information, if applicable:

(i) The agency's evaluation of the significant weak or deficient factors in the debriefed offeror's offer.

(ii) The overall evaluated cost or price and technical rating of the successful and the debriefed offeror and past performance information on the debriefed offeror.

(iii) The overall ranking of all offerors, when any ranking was developed by the agency during source selection.

(iv) A summary of the rationale for award.

(v) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror.

(vi) Reasonable responses to relevant questions posed by the debriefed offeror as to whether source-selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(End of provision)

52.215-20 REQUIREMENTS FOR COST OR PRICING DATA OR INFORMATION OTHER THAN COST OR PRICING DATA (OCT 1997)

(a) Exceptions from cost or pricing data. (1) In lieu of submitting cost or pricing data, offerors may submit a written request for exception by submitting the information described in the following subparagraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable.

(i) Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition. Such information may include--

(A) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;

(B) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market;

(C) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

(2) The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation , access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

(b) Requirements for cost or pricing data. If the offeror is not granted an exception from the requirement to submit cost or pricing data, the following applies:

(1) The offeror shall prepare and submit cost or pricing data and supporting attachments in accordance with Table 15-2 of FAR 15.408.

As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(End of provision)

52.215-20 REQUIREMENTS FOR COST OR PRICING DATA OR INFORMATION

OTHER THAN COST OR PRICING DATA (OCT 1997)—ALTERNATE IV (OCT 1997)

(a) Submission of cost or pricing data is not required.

(b) Provide Schedule of Prices/Deductions (see J-B1 – J-B5 Attachments).

(End of provision)

52.216-1 TYPE OF CONTRACT (APR 1984)

The Government contemplates award of a Firm Fixed Price contract resulting from this solicitation.

(End of provision)

52.233-2 SERVICE OF PROTEST (SEP 2006)

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

Washington Headquarters Services / Acquisition & Procurement Office
Contracting Officer: Mr. David Julian
1777 North Kent Street, Suite 12063
Arlington, VA 22201

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

(End of provision)

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

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of submitting the full text of those provisions, the offeror may identify the provision by paragraph identifier and provide

the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this/these address(es):

http://acquisition.gov/far/index.html - or - http://farsite.hill.af.mil/VFDFARA.HTM

(End of provision)

52.252-5 AUTHORIZED DEVIATIONS IN PROVISIONS (APR 1984)

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

(b)The use in this solicitation of any Federal Acquisition Regulation (48 CFR Chapter 1-2) provision with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of provision)

INSTRUCTIONS TO OFFERORS

L-1 PRE-AWARD SURVEY

A pre-award survey may be conducted when the Contracting Officer determines it to be in the Government's interest.

L-2 DEADLINE FOR RECEIPT OF QUESTIONS FROM PROSPECTIVE OFFERORS

Potential offerors may submit questions in writing, regarding the performance work statement and the terms and conditions of this solicitation, by mail, courier, email or fax, but questions must be received in the office designated below **no later than 4:00 PM local time on 16 July 2014.**

Submit questions to:

Ms. Kortnee Stewart, Contract Specialist
WHS Acquisition and Procurement Office
1777 North Kent St.
Suite 12063
Arlington, VA 22209
FAX: 703-696-4164
Email: kortnee.stewart.ctr@whs.mil

L-3 ADDRESS AND OFFER DUE DATE

Proposals, in the quantities specified, shall be received at:

WHS Acquisition & Procurement Office
Attn: Ms. Kortnee Stewart
1777 North Kent St.
Arlington, VA 22209

Offers shall be received in the office identified above by 2:30 PM local time on 06 August 2014.
Late submissions will not be accepted.

L-4 SITE VISIT AND PRE-PROPOSAL CONFERENCE

Offerors are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. A site visit and pre-proposal conference is scheduled for **10:00 AM on 10 July 2014**. Details regarding the location and procedures for access will be issued by amendment.

L-5 PROPOSAL PREPARATION

Offerors must submit offers using the following submission guidance and information. Failure of an offeror to address any items listed may make the offer unacceptable and may result in its not being considered for award.

a. Offer shall remain firm for at least 90 calendar days (offeror shall enter 90 in Block 12 of the SF33) and can be submitted via FEDEX, United States Postal Service (USPS), U.S. Mail, or another commercial carrier; however, the use of USPS is not recommended as the single method of submission. Offers shall be submitted to the address in paragraph L-3 above.

b. Neither telegraphic nor facsimile offers will be considered; however, offers may be modified by written, telegraphic, or facsimile notice, if that notice is received by the time specified for receipt of offers.

c. Offerors must submit one original and three (3) copies of their technical (Volume I), one original and one copy of their price proposal, past performance and business information (Volume II), including all attachments, on separate CD-ROMs using Microsoft Office 2000 or 2003 compatible format.

L-6 GENERAL PROPOSAL REQUIREMENTS

a. All proposals must clearly and convincingly demonstrate that the offeror has a thorough understanding of the requirements and associated risks, and is able, willing, and competent to devote the resources necessary to meet or exceed the requirements.

b. Should any aspect of the Contractor's proposal change after submission but prior to award, the Contractor shall promptly notify the Contracting Officer of the change. Note that substantial changes may require dismissal of the proposal from consideration.

c. Offer's outside wrapper shall clearly indicate that it is a submission under this solicitation.

L-7 GENERAL PROPOSAL CONTENT

Each proposal shall contain the following:

i. Standard Form 33, or equivalent. Failure to do so may lead to rejection of the offer.
ii. Cover Letter. All offerors shall submit a cover letter including a concise statement of what is being proposed The statement should be complete, not more than two pages, and should clearly indicate reasons why a contract should be awarded to the offeror, with appropriate summary of highlights and references to the body of the proposal. This letter shall outline and explain any deviations, exceptions, or conditional assumptions taken to the requirements of this solicitation. Further, sufficient amplification and justification to permit evaluation must support any deviations, exceptions, or conditional assumptions. To the extent that there is any inconsistency between the terms and conditions of the solicitation and those proposed by the offeror, which inconsistency has not been clearly disclosed to the Government by the offeror, the Government's terms and conditions shall control in the event that a contract is awarded.
iii. Technical Proposal – Volume I (provide one original and 3 copies).
iv. Price Proposal, Past Performance Data and Business Information – Volume II (provide one original and one copy).

L-8 TECHNICAL PROPOSAL – VOLUME I

a. Proposal Contents. The technical proposal must demonstrate an ability to comply with all requirements in the solicitation. General statements that the Offeror can or will comply with the requirements, that standard procedures will be used, that well known techniques will be used, or paraphrases of the RFP's Statement of Work/Specification in whole or in part, **will not** constitute compliance. Failure to conform to any of the requirements of the RFP may form the basis for rejection of the proposal.

b. Proposal Length. The Technical Proposal must not exceed 75 pages, single-sided; including the original technical proposal and additional or change pages submitted with an offeror's final proposal revision, excluding foldouts, blank pages, title pages, tab indices and table of contents. Changed pages shall be clearly identified as such and should be provided on colored paper with the revisions clearly marked. If the offeror elects to submit a complete revised technical proposal, revisions must be clearly identified. Each page shall be 8 ½ x 11 inches, doubled-spaced, 12-point font, with one-inch margins. This limit extends to all introductory comments, overviews, text,

illustrations, graphics, appendices and other pertinent information. Graphics and appendices must be single-spaced. Graphics are exempt from the 12-point font and one-inch margin requirements. Plans and Drawings are not included in the 75-page limit. The Technical Proposal must be bound separately in a binder and all foldouts must be in sleeves and placed in the binder. Claims as to proprietary data must specifically identify page(s), paragraph(s), sentence(s), and must not be generalized. Pages shall be numbered and paragraphs identified by a commonly used and consistent system to assist in referencing specific areas of the proposal. Pages shall also have a header or footer that contains at a minimum, contractor name and solicitation number. Enclosures must be identified on all pages.

c. Technical Information. Offeror shall address their technical capability to adequately perform the requirements set forth in Section C. At a minimum, the proposal shall provide information supporting the Contractor's ability to meet contract requirements in the areas listed below (keyed to the Evaluation Factors in Section M).

Factor	Subfactor	Specific Instructions
(1) Technical Requirements	Subfactor a. "Possession of a Top Secret Facility Clearance (Evaluated on a Pass/Fail Basis)	Provide a copy of the offerors Defense Security Service Facility Clearance letter documenting possession of a Top Secret Facility Clearance.
(1) Technical Requirements	Subfactor b. "Adequacy, Feasibility and Technical Merit"	Provide an overview of the offerors method and approach for delivering quality custodial services to the Pentagon.
(1) Technical Requirements	Subfactor c. "Proposed Methodology"	Provide an overview of the offeror's and any major subcontractors proposed method for meeting the performance requirements including capabilities and skills. Provide an overview of the offeror's plans for addressing the general historic performance issues identified in Section C, paragraph 1.2.

Factor	Subfactor	Specific Instructions
(1) Technical Requirements	Subfactor d.”Technical Experience and Capability”	Summarize the offeror’s and any major subcontractors experience and qualifications in providing custodial services of a similar type and magnitude.
(2) Management	Subfactor a. “Key Personnel and Organizational Structure”	Describe the offerors organizational structure proposed for managing this contract. Provide organizational charts and resumes of key personnel.
(2) Management	Subfactor b. “Quality System”	Provide a draft Quality Control Plan.
(2) Management	Subfactor c. “Management and Environmental Stewardship”	Provide a draft Management and Environmental Stewardship Plan
(2) Management	Subfactor d. “Health and Safety”	Provide a draft Health and Safety Plan
(2) Management	Subfactor e.”Ability of Organization to Respond to Problems”	Summarize the ability of the offerors organizational structure to respond to problems, mitigate risk and maintain performance.

Factor	Subfactor	Specific Instructions
(3) Past Performance		See paragraph L-9 below.
(4) Participation of Small Businesses, HUBZone Small Businesses, Small Disadvantaged Businesses and Women-Owned Small Business Concerns		Outline plan to award subcontracts to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in performance of the contract.

L-9 PAST PERFORMANCE PROPOSAL – VOLUME II

a. The Offeror past performance proposal must address corporate past performance in performing projects similar in size and scope to the effort required by Section C. The Contractor's relevant Past Performance will be evaluated to assess the extent of its ability to perform the contract successfully (quality of product or service, accuracy and completeness, timeliness of delivery/work, business relations, customer satisfaction, key personnel and staffing (including subcontractors/partners).

b. Offeror shall submit a Past Performance Data Sheet, Section J, Attachment J-L1, for three (3) Government or commercial contracts for services directly related or similar to the services required in Section C. Information for contracts or subcontracts shall be for relevant contracts and subcontracts currently in process or completed within the past five (5) years. Specifically address the following items:
i. The nature of the effort
ii. The tasks performed, including the deliverables, as they relate to Section C
iii. Timeliness of deliveries
iv. The extent of involvement (as a prime versus a subcontractor)
v. The period of performance
vi. The utilization of subcontractor technical support versus in-house technical support
vii. Remote site management experience
viii. Point of contact, phone and fax number for each contact listed

c. The Offeror shall complete the top portion of page 1, Section J, Attachment J-L2, Past Performance Questionnaire, and send it to each of the three (3) customers for the contracts

identified above on Attachment J-L1. As stated in Attachment J-L2, the reference will complete this form and return it directly to the Government by the solicitation closing date.

d. In accordance with FAR 15.305(a)(2)(iv), an Offeror without a record of relevant past performance or for whom information on past performance is not available will not be evaluated favorably or unfavorably on past performance (neutral evaluation).

e. The Government will consider past or current contracts (including Federal, State and local government and private) for efforts similar to the Government requirement. The Government will consider information provided on problems encountered on the identified contracts and associated corrective actions. Contractors with a negative past performance rating will be afforded an opportunity to address alleged deficiencies. The Government may also consider information obtained from any other sources when evaluating past performance. Failure of a contractor to disclose a relevant Government contract with poor past performance may affect the contractor's past performance rating.

f. The Government may consider past performance information regarding predecessor companies, key personnel who have relevant experience or subcontractors that will perform major or critical aspects of the requirement when such information is relevant.

g. Evaluation of past performance will include an evaluation of the contractor's past performance in complying with the requirements of FAR clauses 52.219-8, and DFARS 252.219-7003, as applicable.

L-10 PRICE PROPOSAL – VOLUME II

Proposal Contents: The price proposal shall consist of the following:
i. Completed SF33
ii. Completed Section B
iii. Completed Attachment, Schedule of Prices/Deductions, J-B1 – J-B5
iv. Completed Section K (Representations and Certifications)

L-11 SECURITY

This procurement is restricted to offerors with an active TOP SECRET facility clearance granted by a Military Department. Offers received from firms that do not have an active TOP SECRET FACILITY clearance will not be considered.

L-12 SPECIAL NOTICE TO OFFERORS

a. Failure to submit any of the information requested by this solicitation may be cause for unfavorable consideration.

b. Upon receipt, all proposals become Government property.

c. After award, the Government reserves the right to publish any and/or all technical and cost related submissions provided by the successful Offeror (s) in any Government database or publication.

L-13 CONFIDENTIAL INFORMATION

The Freedom of Information Act (FOIA) and its amendments have resulted in an increasing number of requests from outside the Government for copies of contract qualifications and proposals submitted to federal agencies. If an offeror's submissions contain information that he/she believes should be withheld from such requestors under FOIA on the grounds that they contain "trade secrets and commercial or financial information" [5 USC§552(b)(4)], the offeror should mark its submissions in the following manner: i. The following notice should be placed on the title page: "Some parts of this document, as identified on individual pages, are considered by the submitter to be privileged or confidential trade secrets or commercial or financial information not subject to mandatory disclosure under the Freedom of Information Act. Material considered privileged or confidential on such grounds is contained on page(s) _____". ii. Each individual item considered privileged or confidential under FOIA should be marked with the following notice: "The data or information is considered confidential or privileged, and is not subject to mandatory disclosure under the Freedom of Information Act"

Section M - Evaluation Factors for Award

CLAUSES INCORPORATED BY REFERENCE

52.217-5	Evaluation Of Options	JUL 1990
52.232-15	Progress Payments Not Included	APR 1984

EVALUATION FACTORS

M-1 BASIS FOR AWARD

Award will be made to the responsible offeror whose offer, conforming to the solicitation, represents the best overall value to the Government, given the outcome of the Government's evaluation of each offeror's technical proposal, socioeconomic program utilization proposal, past performance and price proposal. In selecting the best overall offer for award, the Government will consider the quality offered, which includes all non-price factors, for the evaluated price. The relative quality of offers will be based upon the Government's evaluation of the offeror's ability to exceed the minimum performance requirements of this solicitation and the risk of nonperformance, defective performance or late performance under the resulting contract. The quality of offers will be compared to the differences in the overall price to the Government. The Government may award on the basis of a proposal with superior ratings even though it may result

in a higher price to the Government. No award will be made to an offeror who has received a marginal or unsatisfactory rating in any factor or subfactor.

M-2 EVALUATION FACTORS

The offer must be realistic in both technical approach and total price. Offers that are unrealistic in terms of technical approach or unrealistically low in price will be considered indicative of a lack of understanding of the complexity and risk in the contract requirements. Unrealistic offers will not be considered for award.

The ability of the offeror to perform all aspects of the anticipated contract from inception to completion will be considered as part of the overall "realism" evaluation. Pursuant to FAR 52.215-1(f), Instructions to Offerors-Competitive Acquisition (JAN 2004), the Government may evaluate offers and award contract(s) without discussions with offerors. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary.

To arrive at the best value decision, the Technical Evaluation Committee (TEC) will evaluate the technical factors and the Source Selection Authority (SSA) will base the source selection decision on an integrated assessment of the submitted proposals in accordance with the evaluation factors and sub-factors established within the solicitation. The SSA may select a higher-priced offeror if that offeror is evaluated to have a superior technical and management approach, and a demonstrated past performance record that outweighs the benefits of any price difference.

In selecting the best overall offer, the following factors will be considered: (1) technical, (2) management, (3) past performance, (4) Participation of Small Businesses, HUBZone Small Businesses, Small Disadvantaged Businesses and Women-Owned Small Business Concerns and (5) price to the Government. All factors and sub-factors are listed in descending order of importance. When combined, the non-price factors are slightly more important than price. Price will become increasingly important as the non-price evaluation factors become increasingly equal. Price will not be a numerically weighted factor in the evaluation of proposals and the importance of price does not bear a linear relationship to the importance of the technical proposal and past performance. The importance of price in the evaluation for award will depend upon the differences in evaluated technical quality and in past performance among offerors and, as stated above, will increase as the differences decrease. The following evaluation factors will be used for this source selection:

(1) Technical Requirements:

a. Possession of a Top Secret Facility Clearance (Evaluated on a Pass/Fail Basis)
b. Adequacy, Feasibility and Technical Merit
c. Proposed Methodology
d. Technical Experience and Capability

(2) Management:

a. Key Personnel and Organizational Structure
b. Quality System

c. Management and Environmental Stewardship
d. Health and Safety
e. Ability of Organization to Respond to Problems

(3) Past Performance

(4) Participation of Small Businesses, HUBZone Small Businesses, Small Disadvantaged Businesses and Women-Owned Small Business Concerns

(5) Price

Proposals will be evaluated and ranked considering the following:

(1) Technical:

a. Security Clearance. This evaluation subfactor will consider if the offeror has an active Top Secret Facility Clearance as evidenced by a copy of its Defense Security Facility Clearance (DSSFC) letter provided with their proposal. This subfactor will be evaluated on a pass/fail basis. **Offerors not having an active Top Secret Facility Clearance will not be evaluated for award.**

b. Adequacy, Feasibility and Technical Merit. This technical evaluation subfactor will consider the adequacy, feasibility and technical merit of the Contractor's method and approach for delivering quality custodial services to the Pentagon including the Contractor's understanding of and approach to meeting overall requirements as described in Section C.

c. Proposed Methodology. This technical evaluation subfactor will consider the offeror's proposed methodology for meeting the performance requirements including the offeror's and any major subcontractor's capabilities and skills. Evaluation of this subfactor will also consider the offerors methodology for addressing the general historic performance issues identified in Section C, paragraph 1.2.

d. Technical Experience and Capability. This technical subfactor will consider the offeror's and major subcontractor's depth of experience and qualifications in delivering quality custodial services similar in scope and type as those specified in Section C.

(2) Management:

a. Key Personnel and Organizational Structure. This management subfactor will consider the relevant experience and ability of the current corporate management structure and organization, including key personnel and changes to the organization, proposed for managing performance of the contract. Evaluation will consider the ability of the company to establish organizational controls and procedures to ensure a safe and hazard free work environment. Evaluation of this subfactor will also include an evaluation of major subcontractors' management structure and their

relevant experience and ability to perform the requirements of the proposed contract as well as the plan for obtaining and retaining key staff.

b. Quality System: This subfactor will consider the proposed quality system that will be used in the performance of this contract and how well the offeror demonstrates that it will meet the requirements of Section C. Consideration shall be given to whether the offeror has achieved certification or whether it is pursuing certification to an internationally accepted and certified quality system and when certification to that system is anticipated.

c. Management and Environmental Stewardship: This subfactor will consider the offerors commitment to environmental management, employee health and safety, and the use of environmentally preferable products.

d. Health and Safety: This subfactor will consider the offerors commitment to a safe environment for Contractor personnel, building occupants and visitors.

e. Ability of Organization to Respond to Problems: Organizational structure's ability to respond to rapidly emerging problems to include how the organization will evaluate problems and coordinate implementation of risk mitigation strategies to maintain performance, quality, and schedule.

(3) Past Performance. Each offeror's past performance will be evaluated as part of the Government's overall evaluation of best value. At a minimum, this evaluation will take into account past performance information submitted as a part of each offeror's proposal including information regarding predecessor companies, key personnel who have relevant experience and subcontractors that will perform major or critical aspects of the requirement. For those offerors without a record of relevant past performance or for whom information on past performance is not available, the offeror will receive a neutral past performance rating. Offerors with a negative past performance rating will be afforded an opportunity to address alleged deficiencies.

(4) Participation of Small Businesses. The offeror will be evaluated on the extent to which it plans to participate, through joint ventures, teaming arrangements, and subcontracts, with small businesses (SB), HUBZone small businesses (HUBZone), small disadvantaged businesses (SDB), women-owned small businesses (WOSB), and service disabled veteran-owned small businesses (SDVOSB) in the performance of the contract.

(5) Price

General. Price will not be a numerically weighted factor in the evaluation of proposals; neither will importance of price bear a linear relationship to technical proposals. The Government's decision as to which individual offer(s) represents the best value will be made after considering the overall cost to the Government and comparing the other evaluation factors addressed in each proposal. The Government may make an award to an offeror with a proposal that contains superior technical features even if such a decision results in additional price to the Government. Pricing will also be evaluated to determine whether it is materially unbalanced. As the difference

in the evaluated quality among the offers with the highest rated combination of technical and past performance decreases, the importance of price as an evaluation factor shall increase, and may become the determinative factor for making award. Pursuant to FAR 52.215-1(f)(4), Instructions to Offerors-Competitive Acquisition (JAN 2004), the Government may evaluate offers and award contract(s) without discussions with offerors. The offeror's Fixed Price CLINs shall be evaluated by summing the total Firm Fixed Price line item for each year of the contract (base plus options). Fixed price proposals will be reviewed for reasonableness, affordability, and realism to determine whether they reflect an understanding of the requirements or contain apparent mistakes. The offeror's proposed approach must be consistent with the cost/price proposal. As part of the cost/price evaluation, proposals may be reviewed to identify any significant unbalanced pricing including unbalancing in the Schedule of Prices. In accordance with FAR 15.404-1(g), Unbalanced Pricing, a proposal may be rejected if the Contracting Officer determines the lack of balance poses an unacceptable risk to the Government. If applicable, the cost/price proposals will also be evaluated to ensure they comply with the standards set for non-exempt employees established by the Department of Labor (DOL) through the Services Contract Act, 41 USC 351 et sig.; its implementing regulations; and the appropriate wage determination issued by the DOL. These standards include, but are not limited to, minimum direct labor rates, minimum health and welfare benefits per hour, and minimum vacation and holiday hours. Cost may play an additional role since considerations of cost in terms of best value and affordability may be controlling in circumstances where two or more proposals are otherwise adjudged equal or when a technically superior proposal is at a cost that the Government cannot afford.

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ATTACHMENT 4 J-L1

PAST PERFORMANCE DATA

1. Complete Name of Reference (Government agency, commercial firm, or other organization)	
2. Complete Address of Reference	
3. Contract Number or other control number	4. Date of contract
5. Date work was begun	6. Date work was completed
7. Contract type, initial contract price, estimated cost and fee, or target cost and profit or fee	8. Final amount invoiced or amount invoiced to date
9a. Reference/Technical point of contact (name, title, address, telephone no. and email address)	9b. Reference/Contracting point of contact (name, title, address, telephone no. and email address)
10. Location of work (country, state or province, county, city)	
11. Current status of contract (choose one): [ ] Ongoing [ ] Complete [ ] Terminated for Convenience [ ] Terminated for Default [ ] Other (explain)	
12. Provide brief information describing the contract and the relevancy of the effort to be performed in accordance with the SOW and requirements of the solicitation. Provide an estimated % of relevancy of the referenced contract to the requirements set forth in this solicitation. Relevance shall address the following areas: Provision of layberth facility and associated services. Relevance can be discussed in further detail on the attached summary description as set forth in block 14 below.	
13a. Did this contract require a Small Business Subcontracting Plan pursuant to FAR 52.219-9? Yes ____, No_____. 13b. If "Yes" to 13a, have you regularly submitted SF 294/295 reports on time? 13c. Attach a copy of your most recently submitted SF 294.	
14. Provide a summary description of contract work, not to exceed two pages in length. Describe the nature and scope of work, its relevancy to this contract, and a description of any problems encountered and your corrective actions. Attach the explanation to this form.	

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ATTACHMENT 5 J-L2

PAST PERFORMANCE QUESTIONNAIRE
Source Selection Sensitive
See FAR 2.101 and 3.104

TO: _____ **FACSIMILE:**_____

PHONE:_____ **EMAIL:**_____

Information Request

Washington Headquarters Services is currently in the process of soliciting offers for a contract for the provision of Custodial Services. [CONTRACTOR NAME] provided your name and organization as a reference regarding [CONTRACT DESCRIPTION past performance under [CONTRACT NO.]. Specifically, we are looking for past performance information in the following areas:

a.) Quality of Service
b.) Timeliness or Scheduling of Service
c.) Business Relations/Customer Satisfaction
d.) Key Personnel and Staffing (Including Subcontractors)

In order for our team to compile its evaluation, we request that you complete the attached survey form and email it, and any other pertinent information by [SOLICITATION CLOSING DATE] to Kortnee Stewart kortnee.stewart.ctr@whs.mil
Information can also be sent via facsimile to the attention of Kortnee Steward at FAX: (703) 696-4164.

For your convenience, a cover sheet for use in mailing/faxing is provided below.

Washington Headquarters Services, Acquisition and Procurement Office
Attn: Kortnee Stewart
1777 North Kent At.
Suite 12063
Arlington, VA 22209

From: (Name and Address of Firm) _____
_____
_____
(Point of Contact Name)
_____
(Facsimile/Phone Number) _____
(E-mail Address) _____

To (Point of Contact Name) __Kortnee Stewart_____
(Facsimile/Phone Number) __(703) 696-3858 FAX: (703) 696-4164____
(E-mail Address) __kortnee.stewart.ctr@whs.mil_____

PAST PERFORMANCE QUESTIONNAIRE
SOURCE SELECTION SENSITIVE

See FAR 2.101 and 3.104

CONTRACTOR PERFORMANCE EVALUATION SURVEY

CONTRACTOR NAME:_____CONTRACT NUMBER:_____

EVALUATION PERIOD:_____CONTRACT VALUE: $_____

1. Please describe the service/supply provided by the Contractor for your firm.

2. Please provide ratings and comments regarding the Contractor's performance in each area below using the following ratings: Exceptional (E), Very Good (VG), Satisfactory (S), Marginal (M), or Unsatisfactory (U). See next page for definition of ratings. **For all ratings EXCEPT "Satisfactory," please provide a brief explanation.**

		Exceptional	Very Good	Satisfactory	Marginal	Unsatisfactory
OVERALL PAST PERFORMANCE RATING Please provide an overall rating of the contractor's past performance for the referenced contract/delivery order.						
a.) Quality of Service:						
Conformance to contract requirements, appropriateness of personnel, accuracy of reports, and technical excellence.						
b.) Timeliness or Scheduling of Service/Deliveries:						
Timeliness of performance, met interim milestones, reliable, responsive to technical and contractual direction as to scheduling.						
c.) Business Relations/Customer Satisfaction						
Effective management, prompt notification of problems, reasonable/cooperative behavior, proactive, timely award and management of subcontracts, effective small business/small disadvantaged business						
d.) Key Personnel and Staffing (Including Subcontractors)						
Quality of key personnel and how well key personnel managed their portion of the contract.						

3. Would you hire this contractor to provide services for your organization in the future? _____ Please provide comments using additional pages, if desired.

Signed:_____

Print Name: _____

PAST PERFORMANCE DEFINITIONS

The following definitions are to be used when assessing past performance:

EXCEPTIONAL/VERY LOW PERFORMANCE RISK (E)

No doubt exists that the offeror will successfully perform the required effort.

VERY GOOD/LOW PERFORMANCE RISK (VG)

Little doubt exists that the offeror will successfully perform the required effort.

SATISFACTORY/MODERATE PERFORMANCE RISK (S)

Some doubt exists that the offeror will successfully perform the required effort.

MARGINAL/HIGH PERFORMANCE RISK (M)

Substantial doubt exists that the offeror will successfully perform the required effort.

UNSATISFACTORY/VERY HIGH PERFORMANCE RISK (U)

Extreme doubt exists that the offeror will successfully perform the required effort.

NEUTRAL (N)

The offeror, its subcontractors or team members and/or its key personnel have no significant performance record relevant or identifiable to the services to be performed.

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ATTACHMENT 6 J-C2

DEPARTMENT OF DEFENSE

CONTRACT SECURITY CLASSIFICATION SPECIFICATION

(The requirements of the DoD Industrial Security Manual apply to all security aspects of this effort.)

1. CLEARANCE AND SAFEGUARDING

a. FACILITY CLEARANCE REQUIRED: TOP SECRET

b. LEVEL OF SAFEGUARDING REQUIRED: NONE

2. THIS SPECIFICATION IS FOR: *(x and complete as applicable)*

☐	a. PRIME CONTRACT NUMBER	
☐	b. SUBCONTRACT NUMBER	
☒	c. SOLICITATION OR OTHER NUMBER: HQ0034-07-R-1058	DUE DATE *(YYMMDD)*: 080206

3. THIS SPECIFICATION IS: *(x and complete as applicable)*

☒	a. ORIGINAL (Complete date in all cases)		DATE *(YYMMDD)*: 071218
☐	b. REVISED (Supersedes all previous specs)	Revision No.	DATE *(YYMMDD)*
☐	c. FINAL (Complete item 5 in all cases)		DATE *(YYMMDD)*

4. THIS IS A FOLLOW-ON CONTRACT? ☒ YES ☐ NO. **If Yes, complete the following:**

Classified material received or generated under MDA948-03-C-0001 ***(Preceding Contract Number)* is transferred to this follow-on contract.**

5. IS THIS A FINAL DD FORM 254? ☐ YES ☒ NO. **If Yes, complete the following:**

In response to the contractor's request dated_____, retention of the identified classified material is authorized for the period of_____

6. CONTRACTOR *(Include Commercial and Government Entity (CAGE) Code)*

a. NAME, ADDRESS, AND ZIP CODE	b. CAGE CODE	c. COGNIZANT SECURITY OFFICE *(Name, Address, and Zip Code)*

7. SUBCONTRACTOR

a. NAME, ADDRESS, AND ZIP CODE	b. CAGE CODE	c. COGNIZANT SECURITY OFFICE *(Name, Address, and Zip code)*

8. ACTUAL PERFORMANCE

a. LOCATION	b. CAGE CODE	c. COGNIZANT SECURITY OFFICE *(Name, Address, and Zip Code)*

9. GENERAL IDENTIFICATION OF THIS PROCUREMENT

The purpose of this procurement is to hire a contractor to perform the custodial duties for the Pentagon.

10. THIS CONTRACT WILL REQUIRE ACCESS TO:	YES	NO
a. COMMUNICATIONS SECURITY (COMSEC) INFORMATION	☐	☒
b. RESTRICTED DATA	☐	☒
c. CRITICAL NUCLEAR WEAPON DESIGN INFORMATION	☐	☒
d. FORMERLY RESTRICTED DATA	☐	☒
e. INTELLIGENCE INFORMATION	☐	☒
(1) Sensitive Compartmented Information (SCI)	☐	☐
(2) Non-SCI	☐	☐
f. SPECIAL ACCESS INFORMATION	☐	☒
g. NATO INFORMATION	☐	☒
h. FOREIGN GOVERNMENT INFORMATION	☐	☒
i. LIMITED DISSEMINATION INFORMATION	☐	☒
j. FOR OFFICIAL USE ONLY INFORMATION	☐	☒
k. OTHER *(Specify)*	☒	☐

11. IN PERFORMING THIS CONTRACT, THE CONTRACTOR WILL:	YES	NO
a. HAVE ACCESS TO CLASSIFIED INFORMATION ONLY AT ANOTHER CONTRACTOR'S FACILITY OR A GOVERNMENT ACTIVITY	☒	☐
b. RECEIVE CLASSIFIED DOCUMENTS ONLY	☐	☒
c. RECEIVE AND GENERATE CLASSIFIED MATERIAL	☐	☒
d. FABRICATE, MODIFY, OR STORE CLASSIFIED HARDWARE	☐	☒
e. PERFORM SERVICES ONLY	☒	☐
f. HAVE ACCESS TO U.S. CLASSIFIED INFORMATION OUTSIDE THE U.S., PUERTO RICO, U.S. POSSESSIONS AND TRUST TERRITORIES	☐	☒
g. BE AUTHORIZED TO USE THE SERVICES OF DEFENSE TECHNICAL INFORMATION CENTER (DTIC) OR OTHER SECONDARY DISTRIBUTION CENTER	☐	☒
h. REQUIRE A COMSEC ACCOUNT	☐	☒
i. HAVE TEMPEST REQUIREMENTS	☐	☒
j. HAVE OPERATIONS SECURITY (OPSEC) REQUIREMENTS	☐	☒
k. BE AUTHORIZED TO USE THE DEFENSE COURIER SERVICE	☐	☒
l. OTHER *(Specify)*	☒	☐

DD FORM 254 Front

12. PUBLIC RELEASE. Any information *(classified or unclassified)* pertaining to this contract shall not be released for public dissemination except as provided by the INISPOM or unless it has been approved for public release by appropriate U.S. Government authority. Proposed public releases shall be submitted for approval prior to release

☐ Direct ☒ Through *(Specify)*: Directorate Freedom of Information and Security Review
1155 Defense Pentagon, RM 2C757
Washington, DC 20301-1155

to the Directorate for Freedom of Information and Security Review, Office of the Assistant Secretary of Defense (Public Affairs)* for review.
***In the case of non-DoD User Agencies, requests for disclosure shall be submitted to that agency.**

13. SECURITY GUIDANCE. The security classification guidance needed for this classified effort is identified below. If any difficulty is encountered in applying this guidance or if any other contributing factor indicates a need for changes in this guidance, the contractor is authorized and encouraged to provide recommended changes; to challenge the guidance or the classification assigned to any information or material furnished or generated under this contract; and to submit any questions for interpretation of this guidance to the official identified below. Pending final decision, the information involved shall be handled and protected at the highest level of classification assigned or recommended. *(Fill in as appropriate for the classified effort. Attach, or forward under separate correspondence, any documents/guides/extracts referenced herein. Add additional pages as needed to provide complete guidance.)*

4. The solicitation is for a follow-on to contract MDA946-03-C-0001. Contract MDA946-03-C-0001 required a TOP SECRET facility clearance. However, no classified material was received or generated under this contract.

10. The contractor will be required to enter secure spaces to perform custodial tasks such as trash removal, vacuuming, dusting, window washing, carpet cleaning, etc.

11a. Due to the nature of the service, the contractor will have access to some general scheduling information of high-ranking officials visiting the Pentagon.

11b.
The contractor will enter secure spaces and be expected to provide the custodial services to the Pentagon's needs.

PFPA Industrial Security Manager Cheryl Richardson

14. ADDITIONAL SECURITY REQUIREMENTS. Requirements, in addition to NISPOM requirements, are established for this contract. *(If Yes, identify the pertinent contractual clauses in the contract document itself, or provide any appropriate statement which identifies the additional requirements. Provide a copy of the requirements to the cognizant security office. Use Item 13 if additional space is needed.)* ☐ Yes ☒ No

15. INSPECTIONS. Elements of this contract are outside the inspection responsibility of the cognizant security office. *(If Yes, explain and identify specific areas or elements carved out and the activity responsible for inspections. Use Item 13 if additional space is needed.)* ☐ Yes ☒ No

16. CERTIFICATION AND SIGNATURE. Security requirements stated herein are complete and adequate for safeguarding the classified information to be released or generated under this classified effort. All questions shall be referred to the official named below.

a. TYPED NAME OF CERTIFYING OFFICIAL	b. TITLE	c. TELEPHONE *(Include Area Code)*
David Julian	Contracting Officer	703-696-3871

d. ADDRESS *(Include Zip Code)*
WHS Acquisition & Procurement Office
1155 Defense Pentagon
Arlington, VA 20301-1155

e. SIGNATURE

17. REQUIRED DISTRIBUTION
- ☒ a. CONTRACTOR
- ☐ b. SUBCONTRACTOR
- ☒ c. COGNIZANT SECURITY OFFICE FOR PRIME AND SUBCONTRACTOR
- ☐ d. U.S. ACTIVITY RESPONSIBLE FOR OVERSEAS SECURITY ADMINISTRATION
- ☒ e. ADMINSTRATIVE CONTRACTING OFFICER
- ☒ f. OTHERS AS NECESSARY

DD FORM 254 Reverse

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES	
J	1	2

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
0001	03-Jan-2008	KRS1017071323	

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than item 6)	CODE
WHS ACQUISITION & PROCUREMENT OFFICE 1777 NORTH KENT ST SUITE 12063 ARLINGTON VA 22209	HQ0034	See Item 6	

8. NAME AND ADDRESS OF CONTRACTOR (No., Street, County, State and Zip Code)			
		X	9A. AMENDMENT OF SOLICITATION NO. HQ0034-07-R-1058
		X	9B. DATED (SEE ITEM 11) 21-Dec-2007
			10A. MOD. OF CONTRACT/ORDER NO.
			10B. DATED (SEE ITEM 13)
CODE	FACILITY CODE		

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

[X] The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offer [ ] is extended, [X] is not extended.

Offer must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended by one of the following methods: (a) By completing Items 8 and 15, and returning 1 copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS.
IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(B).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor [ ] is not, [ ] is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

The purpose of this Amendment is to provide details for the scheduled site visit 10 January 2008 - 10:00 AM, and Incorporate Attachment J-C2.

See Continuation Sheet

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print) TEL: EMAIL:	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA BY (Signature of Contracting Officer)	16C. DATE SIGNED 03-Jan-2008

EXCEPTION TO SF 30
APPROVED BY OIRM 11-84

30-105-04

STANDARD FORM 30 (Rev. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

SECTION SF 30 BLOCK 14 CONTINUATION PAGE

SUMMARY OF CHANGES

SECTION L - INSTRUCTIONS, CONDITIONS AND NOTICES TO BIDDERS

The following have been added by full text:
SITE VISIT INFORMATION

A site visit has been scheduled for January 10, 2008 @ 10:00 A.M. The site visit will be followed by a brief pre-proposal conference. All contractors are strongly suggested to attend the site visit. Each contractor is allowed only two individuals for attendance. All attendees are required to meet at the Pentagon Metro entrance (outside) at least 15 minutes prior to the scheduled start of the site visit. Attendees shall submit company name, individuals name, a valid driver's license number including state of issue, and Social Security number in advance for access to the building unless they currently have a Pentagon access badge. Two forms of picture identification shall be required to be shown upon arrival. All required information will need to be forwarded to Mr. Tom Boardman at tom.boardman@whs.mil by 12:00 P.M. on 8 January 2008.

(End of Summary of Changes)

Chapter 3
Authority to Contract

2014 Contract Attorneys Deskbook

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CHAPTER 3

AUTHORITY TO CONTRACT

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CHAPTER 3

AUTHORITY TO CONTRACT

I. INTRODUCTION

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

II. OBJECTIVES

Following this block of instruction, students should:

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

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

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

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

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

III. METHODS OF CONTRACT FORMATION

A. FAR Definition of a Contract: A contract is a mutually binding legal relationship obligating the seller to furnish supplies and services (including construction) and the buyer to pay for them. It includes all types of commitments obligating the government to expend appropriated funds and, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under

which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C.6301, *et seq*. FAR 2.101

B. Express Contract.

1. An express contract is a contract whose terms the parties have explicitly set out. BLACK'S LAW DICTIONARY (9th ed. 2009).

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

   a. mutual intent to contract;

   b. offer and acceptance; and

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

Allen Orchards v. United States, 749 F. 2d 1571, 1575 (Fed. Cir. 1984); OAO Corp. v. United States, 17 Cl. Ct. 91 (1989).

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

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

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

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

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

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

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

C. Implied Contracts

1. Implied-in-Fact Contract.

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

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

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

2. Implied-in-Law Contract.

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

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

IV. AUTHORITY OF AGENCIES

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

1. Not be prohibited by law; and

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

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

1. Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. §§ 251-260. FPASA was repealed and now has provisions contained in Revised Titles, see 40 USCA §§ 101-2, 111-13, 121-26, 301-4, 311-13, 321-23, 501-29, 541-59, 571-74, 581-93, 601-11, 701-5, 901-5, 1101-4; 41 USCA §§ 102-3, 105-16, 151-53, 3101-6, 3301, 3303-11, 3501-8, 3701-8, 3901-3, 3905, 4101, 4103, 4105, 4106, 4301-10, 4501-6, 4709. The FPASA governs the acquisition of all property and services by all executive agencies except DOD, Coast Guard, NASA, and any agency specifically exempted by 40 U.S.C. § 474 or any other law.

2. Office of Federal Procurement Policy Act (OFPPA), 41 U.S.C. § 401 et. seq. OFPPA was repealed and now has provisions contained in a Revised Title, see 41 USCA §§ 102-5, 107-16, 131-34, 1101-2, 1121-22, 1124-27, 1130-31, 1301-4, 1311-12, 1501-6, 1701-3, 1705, 1707-12, 1901-3, 1905-8, 2101-7, 2301-2, 2305-10, 2312, 7105. This legislation

apples to all executive branch agencies, and created the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget. The Administrator of the OFPP is given responsibility to "provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies." 41 U.S.C. § 1121(a).

3. Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304; 41 U.S.C. § 403.

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

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

4. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243. FASA amended various sections of the statutes described above.

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

6. Annual DOD Authorization and Appropriation Acts.

C. Regulatory

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

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

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

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

2. Agency regulations. The FAR system consists of the FAR and the agency regulations that implement or supplement it. The following regulations supplement the FAR. (The FAR and its supplements are available at http://farsite.hill.af.mil).

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

b. Army Federal Acquisition Regulation Supplement (AFARS).

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

d. Navy Marine Corps Acquisition Regulation Supplement (NMCARS).

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

3. Major command and local command regulations.

V. AUTHORITY OF PERSONNEL

A. Contracting Authority

1. Agency Head

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

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

2. Heads of Contracting Activities (HCAs)

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

b. There are over 60 DOD contracting activities, plus others who possess contracting authority delegated by the heads of the various defense agencies. Examples of DOD contracting activities include U.S. Army Intelligence and Security Command, Naval Air Systems Command, and Air Force Materiel Command. DFARS 202.101.

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

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

(1) In the Army, HCAs appoint a Principal Assistant Responsible for Contracting (PARC) as the senior staff official of the contracting function within the contracting activity. The PARC has direct access to the HCA and should be one organizational level above the contracting office(s) within the HCA's command. AFARS 5101.601(4).

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

3. Contracting officers

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

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

4. Contracting Officer Representatives (COR).

a. Contracting officers may authorize selected individuals to perform specific technical or administrative functions relating to the contract. A COR may also be referred to as a Contracting Officer's Technical Officer (COTR) or Quality Assurance Representative (QAR).

b. Typical COR designations do not authorize CORs to take any action, such as modification of the contract that obligates the payment of money. See AFARS 5153.9001, Sample COR designation.

B. Actual Authority

1. The government is bound only by government agents acting within the actual scope of their authority to contract. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (government agent lacked authority to bind government to wheat insurance contract not authorized under Wheat Crop Insurance Regulations); Hawkins & Powers Aviation, Inc. v. United States, 46 Fed. Cl. 238 (2000) (assistant director of Forest Service lacked authority to modify aircraft contract); Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002) (military recruiters lacked the authority to bind the government to promises of free lifetime medical care).

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

3. The acts of government agents which exceed their contracting authority do not bind the government. See HTC Indus., Inc., ASBCA No. 40562, 93-1 BCA ¶ 25,560 (contractor denied recovery although contracting officer's technical representative encouraged continued performance despite cost overrun on the cost plus fixed-fee contract); Johnson Management Group CFC v. Martinez, 308 F.3d. 1245 (Fed. Cir. 2002) (contracting officer was without authority to waive a government lien on equipment purchased with government funds).

C. Apparent Authority

1. Definition. Authority that a third party reasonably believes an agent has, based on the third party's dealings with the principal, even thought the principal did not confer or intent to confer with the authority. BLACK'S LAW DICTIONARY (9th ed. 2009).

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 to pay informant in witness protection program a stipend or damages resulting from the informants move.

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

VI. THEORIES THAT BIND THE GOVERNMENT

The following are often used in combination to support a contractor's claim of a binding contract action.

A. Implied authority

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

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

3. Contracting authority is integral to an employee's duties when:

   a. The employee cannot perform his assigned tasks without such authority, and

   b. The relevant agency's regulations do not grant the authority to other agency employees. SGS-92-X003 v. United States, 74 Fed. Cl. 637 (2006).

4. However, contract changes cannot be an "integral part" of an employee's duties if the contract explicitly reserves or prohibits that authority. Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007) (despite his assigned responsibilities and the Navy's indications that he had authority to make contract changes, Program Manager did not have express or implied authority where the contract's clauses explicitly granted to the contracting officer the exclusive authority to modify the contract). Aero-Abre, Inc., v. United States, 39 Fed. Cl. 654 (1997) (No implied actual authority where a regulation, contract, or letter expressly prohibits an employee from possessing 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).

2. Implied. A court or board may find ratification by implication where a contracting officer has actual or constructive knowledge of the unauthorized commitment and adopts the act as his own. The contracting officer's failure to process a claim under the procedures of FAR 1.602-3 does not preclude ratification by implication. Reliable Disposal Co., ASBCA No. 40100, 91-2 BCA ¶ 23,895 (KO ratified unauthorized commitment by requesting payment of the contractor's invoice); Tripod, Inc., ASBCA No. 25104, 89-1 BCA ¶ 21,305 (KO's knowledge of contractor's complaints and review of inspection reports evidenced implicit ratification); Digicon Corp. v. United States, 56 Fed. Cl. 425 (2003) (COFC found "institutional ratification" where Air Force issued task orders and accepted products and services from appellant over a sixteen month period).

C. Imputed Knowledge.

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

2. When the relationship between two persons creates a presumption that one would have informed the contracting officer of certain events, the boards may impute the knowledge of the person making the unauthorized

commitment to the contracting officer. Sociometrics, Inc., ASBCA No. 51620, 00-1 BCA ¶ 30,620 ("While the [contract] option was not formally exercised, the parties conducted themselves as if it was."); Leiden Corp., ASBCA No. 26136, 83-2 BCA ¶ 16,612 ("It would be inane indeed to suppose that [the government inspector] was at the site for no purpose.")

D. Equitable Estoppel

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

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

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

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

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

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

3. If asserted against the government, appellant must demonstrate government affirmative misconduct as a prerequisite for invoking equitable estoppel. Zacharin v. United States, (213 F.3d 1366) (Fed. Cir. 2001); Rumsfeld v. United Technologies Corp., 315 F. 3d 1361 (Fed. Cir. 2003); Appeal of F Splashnote Systems, Inc., 12-1 BCA ¶ 34899, Nov. 29, 2011; and Appeal of F Unitech Services Group, Inc., 16 ASBCA No. 56482, May 22, 2012.

4. However, See Mabus v. General Dynamics C4 Systems, Inc., 633 F.3d 1356 (Fed. Cir. Feb. 4, 2011), which, citing A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020 (Fed. Cir. 1992), replaced the four-part estoppel test with a three-part test requiring proof of:

   a. Misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it;

   b. Reliance upon this conduct; and

c. Due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

VII. UNAUTHORIZED COMMITMENTS

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

B. Ratification.

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

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, without the authority to redelegate, to the following individuals.

a. PARC (for amounts of $100,000 or less) (AFARS 5101.602-3(b)(3)(A)); and

b. Chiefs of Contracting Offices (for amounts of $10,000 or less) (AFARS 5101.602-3(b)(3)(B)).

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

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

1. Requests for extraordinary contractual relief.

a. Contractors may request extraordinary contractual relief in the interest of national defense. FAR Part 50.

b. FAR 50.103-2(c) authorizes, under certain circumstances, informal commitments to be formalized for payment where, for example, the contractor, in good faith reliance on a government employee's apparent authority, furnishes supplies or services to the agency. Radio Corporation of America, ACAB No. 1224, 4 ECR ¶ 28 (1982) (contractor granted $648,747 in relief for providing, under an informal commitment with the Army, maintenance, repair, and support services for electronic weapon system test stations).

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

2. Doubtful Claims

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

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

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

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

(2) The government received and accepted a benefit;

(3) The firm acted in good faith; and

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

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

e. The Claims Division at the Defense Office of Hearings and Appeals (DOHA) settles claims under 31 U.S.C. 3702 for the Department of Defense. DOHA decisions can be found at www.defenselink.mil/dodgc/doha.

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

VIII. CONCLUSION

Contract authority is a foundational element of the government acquisitions process. Contract Attorney's should be prepared to educate and train members of their organization on the importance of ensuring that all commitments on behalf of the government originate from an individual who has appropriate authority and comply with all regulatory requirements.

Chapter 4
Funding & Funding Limitations

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CHAPTER 4

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CHAPTER 4

FUNDING AND FUND LIMITATIONS

I. INTRODUCTION

A. Source of Funding and Fund Limitations. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. This Constitutional "power of the purse" includes the power to establish restrictions and conditions on the use of funds appropriated. To curb fiscal abuses by the executive departments, Congress has also enacted additional fiscal controls through statute.

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

2. U.S. Constitution, Art. I, § 9, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ."

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

4. The Antideficiency Act (ADA), 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519, consists of several statutes that authorize administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds.

5. Congress and the Department of Defense (DoD) have agreed informally to additional restrictions. The DoD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation.

B. The Basic Fiscal Limitations.

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

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

3. An agency may not obligate more than the **amount** appropriated by the Congress, amounts apportioned to the agency, or in excess of the amount permitted by agency regulation.

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

II. KEY TERMINOLOGY

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

B. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amount of orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. DOD Financial Management Regulation 7000.14, Glossary, p. 21 (hereinafter, "DOD FMR").

C. Period of Availability. Most appropriations are available for obligation for a limited period of time. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation.

D. Budget Authority. Agencies do not receive cash to fund their programs and activities. Instead, Congress grants "budget authority," also called obligational authority. Budget authority means "the authority provided by Federal law to incur financial obligations. . . ." 2 U.S.C. § 622(2).

E. Contract Authority. Contract authority is a limited form of "budget authority." Contract authority permits agencies to obligate funds in advance of appropriations but not to disburse those funds absent appropriations authority. See, e.g., 41 U.S.C. § 6301 (Feed and Forage Act).

F. Authorization Act. An authorization act is a statute, typically passed annually, by Congress that authorizes the appropriation of funds for programs and activities. An authorization act does not provide budget authority. That authority stems from the appropriations act. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

G. Appropriations Act. An appropriation is a statutory authorization to "incur obligations and make payments out of the U.S. Treasury for specified purposes." An appropriations act is the most common form of budget authority.

1. The Army receives the bulk of its funds from two annual Appropriations Acts: (1) the Department of Defense Appropriations Act; and (2) the Military Construction Appropriations Act.

2. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. Principles of Fed. Appropriations Law, Vol. I (3d ed,) p. 2-16, GAO-04-261SP (2004).

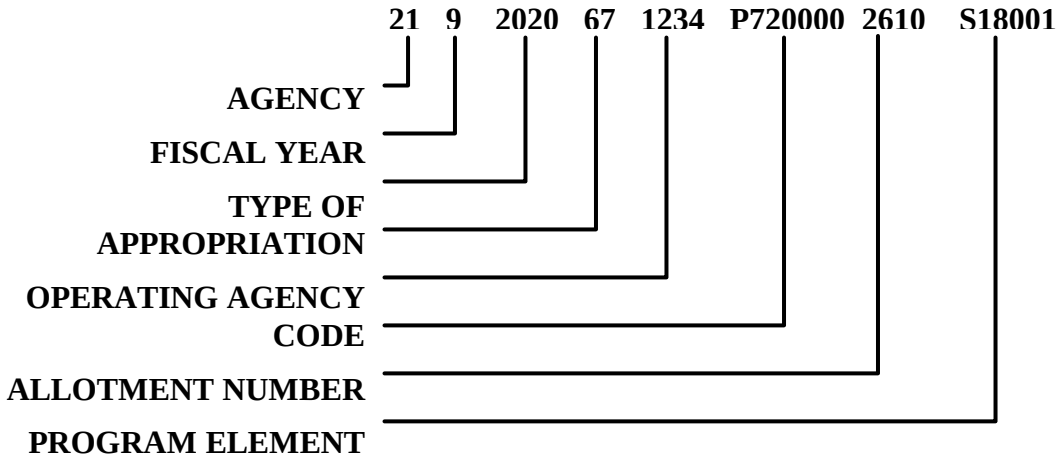
H. Comptroller General and Government Accountability Office (GAO).

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

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

3. The Comptroller General issues opinions and reports to federal agencies concerning the propriety of appropriated fund obligations or expenditures.

I. Accounting Classifications. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to ensure that funds are used correctly. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications. The following is a sample fund cite:



1. The first two digits represent the military department. In the example above, the "**21**" denotes the Department of the Army. For the Air Force, these two digits will be **57**; for the Navy, **17**; and for the Department of Defense, **97**.

2. The third digit shows the fiscal year/period of availability of the appropriation. The "9" in the example shown indicates FY 2009 funds. Installation contracting typically uses annual appropriations. Other fiscal year designators encountered less frequently include:

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

   b. Third Digit = 9/1 = Multi-year appropriation (in this case, a 3 year appropriation). In this example, funds were appropriated in FY 2009 and remain available through FY 2011.

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

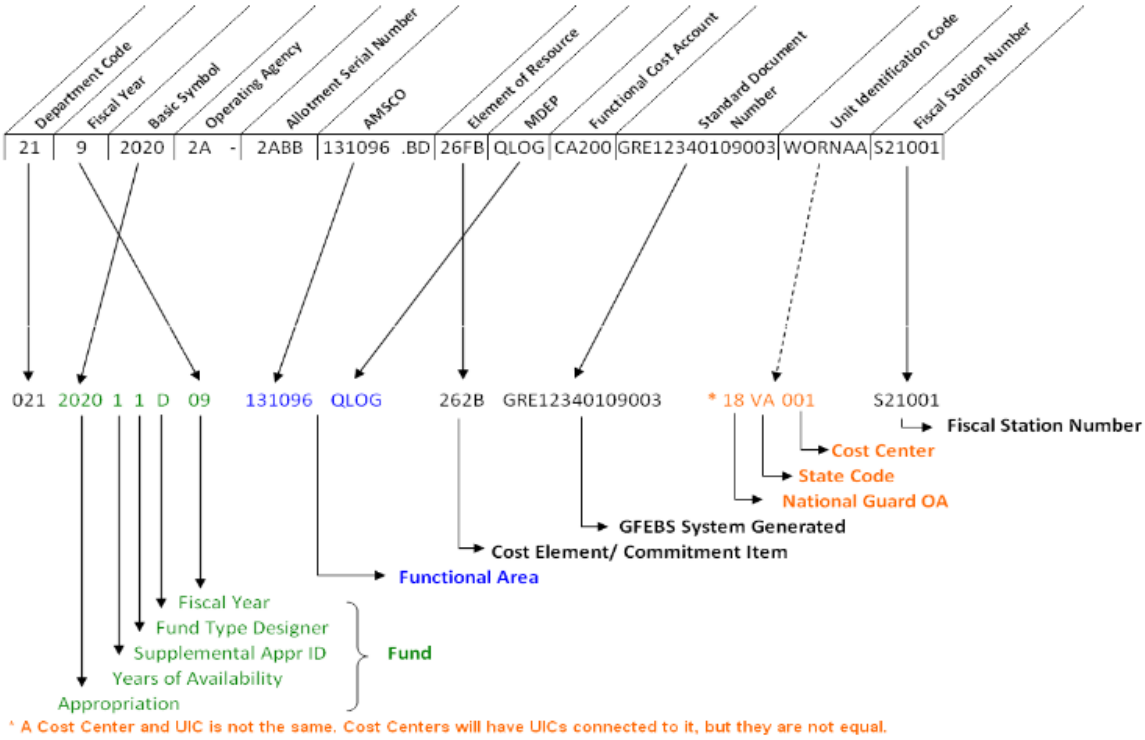
Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	**21*2010**	**17*1453**	**17*1105**	**57*3500**	**N/A**
Reserve Personnel	**21*2070**	**17*1405**	**17*1108**	**57*3700**	**N/A**

National Guard Personnel	**21*2060**	**N/A**	**N/A**	**57*3850**	**N/A**
Operations & Maintenance	**21*2020**	**17*1804**	**17*1106**	**57*3400**	**97*0100**
Operations & Maintenance, Reserve	**21*2080**	**17*1806**	**17*1107**	**57*3740**	**N/A**
Operations & Maintenance, National Guard	**21*2065**	**N/A**	**N/A**	**57*3840**	**N/A**
Procurement, Aircraft	**21*2031**	**17*1506**		**57*3010**	**N/A**
Procurement, Missiles	**21*2032**	**17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)**	**17*1109**	**57*3020**	**N/A**
Procurement, Weapons & Tracked Vehicles	**21*2033**			**N/A**	**N/A**
Procurement, Other	**21*2035**	**17*1810**		**57*3080**	**97*0300**
Procurement, Ammunition	**21*2034**	**17*1508**		**57*3011**	**N/A**
Shipbuilding & Conversion	**N/A**	**17*1611**		**N/A**	**N/A**
Res., Develop., Test, & Eval.7	**21*2040**	**17*1319**		**57*3600**	**97*0400**
Military Construction	**21*2050**	**17*1205**		**57*3300**	**97*0500**
Family Housing Construction	**21*0702**	**17*0703**		**57*0704**	**97*0706**
Reserve Construction	**21*2086**	**17*1235**		**57*3730**	**N/A**
National Guard Construction	**21*2085**	**N/A**	**N/A**	**57*3830**	**N/A**

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year. For example, Operations & Maintenance, Army funds for FY2009 would be depicted as 2192020.

** This chart is derived from the archived version of the DOD FMR, vol. 6B, App. A.

J. General Fund Enterprise Business System (GFEBS). The Army has transitioned to GFEBS, which will modify the way information is captured, summarized, reviewed and presented. Among the changes is a new line of accounting (LOA). Information can be found in the FY 2014 Army Funds Management Data Reference Guide, ch. 4, available at the website for Office of the Assistant Secretary of the Army (Financial Management and Comptroller). Below is a comparison of the new LOA with the legacy LOA.



III. AVAILABILITY AS TO PURPOSE

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

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

2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).

B. The "Necessary Expense" Doctrine (the 3-part test for a proper purpose). Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The GAO applies a three-part test to determine whether an expenditure is a "necessary expense" of a particular appropriation:

1. The expenditure must bear a **logical relationship** to the appropriation sought to be charged. In other words, it must make a direct contribution to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.

2. The expenditure must **not be prohibited by law**.

3. The expenditure must **not be otherwise provided for**; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

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

C. Application of the Necessary Expense Test.

1. The first prong of the "necessary expense" test has been articulated in some other, slightly different ways as well. See Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) ("an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function"); Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005) ("the expenditure must be reasonably related to the purposes that Congress intended the appropriation to fulfill"). However, the basic concept has remained the same: the important thing is the relationship between the expenditure to the appropriation sought to be charged.

2. The concept of "necessary expense" is a relative one, and determinations are fact/agency/purpose/appropriation specific. See Federal Executive Board – Appropriations – Employee Tax Returns – Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129; Use of Appropriated Funds for

an Employee Electronic Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).

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

4. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See Customs and Border Protection—Relocation Expenses, B-306748, 2006 U.S. Comp. Gen. LEXIS 134 (July 6, 2006). An agency's determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO looks at "whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range." Implementation of Army Safety Program, B-223608 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

D. Determining the Purpose of a Specific Appropriation.

1. Appropriations Acts. (beta.congress.gov/legislation/appropriations)

a. An appropriation is a statutory authorization to incur obligations and make payments out of the Treasury for specified purposes. [1] Aside from any emergency supplemental appropriations, Congress generally enacts twelve (12) appropriations acts annually, two of which are devoted specifically to DoD: The Department of Defense Appropriation Act, and the Military Construction Appropriations Act. [2] Within these two acts, the DoD has nearly 100 separate appropriations available to it for different purposes.

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

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

[1] See A Glossary Of Terms Used In The Federal Budget Process, p.13-14, GAO-05-734SP (September 2005).

[2] As of late, Congress has relied upon Omnibus, Continuing Resolutions, or Consolidated Appropriations Acts. See e.g., Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (hereinafter, "FY 14 Appropriations Act").

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

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

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

c. By regulation, the DoD has assigned most types of expenditures to a specific appropriation. See DFAS-IN Manual 37-100-XXXX, The Army Management Structure (August XXXX). The manual is reissued every FY. [XXXX = appropriate FY].

2. Authorization Act.

a. Annual authorization acts generally precede DoD's appropriations acts. There is no general requirement to have an authorization in order for an appropriation to occur. However, Congress has by statute created certain situations in which it must authorize an appropriation. For example, 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and RDT&E "unless funds therefore have been specifically authorized by law." However, there are no practical consequences if Congress appropriates funds without an authorization anyway, as such a statute is "essentially a congressional mandate to itself." Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-41, GAO-04-261SP (3d ed. 2004).

b. The authorization act may clarify the intended purpose of a specific appropriation, or contain restrictions on using appropriated funds. An authorization act does not provide budget authority.

3. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. This organic legislation provides the agency with authority (but not the money) to conduct the program, function, or mission and to utilize appropriated funds to do so.

4. Miscellaneous Statutory Provisions. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds. For example, 10 U.S.C. § 2491a prohibits DOD from

using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.

5. Legislative History. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. This includes the text of the bill itself, conference and committee reports, floor debates, and hearings.

   a. Legislative history can be useful for resolving ambiguities or confirming the intent of Congress. However, Congress's "authoritative statement is the statutory text, not the legislative history." Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005).

   b. If the underlying statute clearly conveys Congress' intent, however, agencies will not be further restricted by what is included in legislative history. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); ANGUS Chem. Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127 (stating that "there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into law that which is not there"); Navy – Re-enlistment Gifts, 2006 U.S. Comp. Gen. LEXIS 165 (Use of legislative history to "illuminate intent," as opposed to "writing into the law that which is not there."); SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 (indicating that if Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (indicating the Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force's F-16 to enable it to be capable of carrier operations was the prerequisite for the Navy's use of $20 million in funds provided for a Navy fighter). See also Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006)(rejecting claims for expert fees which were based solely on legislative history and not mentioned in the statute under which the claims were brought).

   c. Legislative history also may not support an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992, 1992 U.S. Comp. Gen. LEXIS 1104 (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with

salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

6. Budget Request Documentation.

a. Agencies are required to justify their budget requests. Within DoD, Volumes 2A and 2B of the DOD FMR provide guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation.

b. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purposes requested, unless otherwise prohibited.

c. Agencies generally place their past and current year budget submissions on the web. The Defense-wide budget materials can be found at http://comptroller.defense.gov/Budget2014.html. The Army's budget materials can be found at http://asafm.army.mil/offices/office.aspx?officecode=1200.

7. Agency Regulations.

a. When Congress enacts organic legislation, it rarely prescribes exactly how the agency is to carry out that new mission. Instead, Congress leaves it up to the agency to implement the authority in agency-level regulations.

b. If the agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines that appropriated funds may be used for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).

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

produce their business cards in-house, using their own card stock and printers).

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

E. Expense/Investment Threshold.

1. Expenses are costs of resources consumed in operating and maintaining DoD, and are normally financed with O&M appropriations. See DOD FMR, vol. 2A, ch. 1, para. 010201. Common examples of expenses include civilian employee labor, rental charges for equipment and facilities, fuel, maintenance and repair of equipment, utilities, office supplies, and various services.

2. Investments are "costs to acquire capital assets," or assets which will benefit both current and future periods and generally have a long life span. DOD FMR, vol. 2A, ch. 1, para. 010201.D.2. Investments are normally financed with procurement appropriations.

3. Exception Permitting Purchase of Investments With O&M Funds. In each year's Defense Appropriation Act, Congress has permitted DoD to utilize its O&M appropriations to purchase investment items having a unit cost that is less than a certain threshold. See e.g., FY 14 Appropriations Act (current threshold is $250,000).[3] See also DOD FMR, vol. 2A, ch. 1, para. 010201.D.1 (implementing the $250,000 threshold).

4. Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

a. Agencies must consider the "system" concept when evaluating the procurement of items. The determination of what constitutes a

[3] Since 2008, Congress has allowed for an increase to $500,000 for Combatant Commanders engaged in contingency operations overseas upon SECDEF approval. See FY 14 Appropriations Act, § 9010. CENTCOM has historically received approval to use the $500,000 threshold in support of contingency operations. However, this increased threshold requires a determination by SECDEF each fiscal year and the determination does not always happen contemporaneously with the passage of the Appropriations Act. JAs must verify that SECDEF has made the determination before advising that the increased threshold is in effect.

"system" must be based on the **primary function** of the items to be acquired, as stated in the approved requirements document.

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

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

d. Agencies may not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.

e. Example: An agency is acquiring 200 stand-alone computers and software at $2,000 each (for a total of $400,000). The appropriate color of money for the purchase of the 200 computers is determined by deciding whether the primary function of the computers is to operate as independent workstations (i.e., 200 systems) or as part of a larger system. If the computers are designed to primarily operate independently, they should be considered as separate end items and applied against the expense/ investment criteria individually. If they function as a component of a larger system (i.e., interconnected and primarily designed to operate as one), then they should be considered a system and the total cost applied against the expense/investment criteria.

IV. AVAILABILITY AS TO TIME

A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552. An appropriation is typically available for obligation for a definite period of time. An agency must incur a legal obligation to pay money within an appropriation's period of availability. If an agency fails to obligate funds before they expire, those funds are no longer available for new obligations.

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

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

a. Bid Protests. Funds available for obligation on a contract at the time a protest is filed shall remain available for obligation for 100 calendar days after the date on which the final ruling is made on the protest. This authority applies to protests filed with the agency, at the Government Accountability Office, or in the Court of Federal Claims. See 31 U.S.C. § 1558; FAR 33.102(c); DFAS-IN 37-1, para. 080606.

b. Terminations for default. If a contract or order is terminated for default, and the bona fide need still exists, then the originally obligated funds remain available for obligation for a re-procurement, even if they otherwise would have expired. See DOD FMR, Vol. 3, paragraph 080303.D; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976). Note that certain restrictions and limitations apply.

c. Terminations for convenience, pursuant to a court order or agency determination of erroneous award. Generally, a termination for convenience of the government extinguishes the availability of prior year funds remaining on the contract, but such funds may be used in certain instances. DOD FMR, vol. 3, ch. 10, para. 100206. Navy, Replacement Contract, B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117; Matter of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988). Again, note that certain restrictions and limitations may apply.

B. The "Bona Fide Needs" Rule.

1. Government agencies may not purchase goods or services they do not require. Because appropriations are generally only available for limited periods of time, it is important to understand when an agency actually requires a good or service. 31 U.S.C. § 1552. Until that requirement (need) accrues, no authorization exists to obligate appropriated funds. Once the need accrues, an agency may only obligate appropriated funds that are current at that time.

2. The "Bona Fide Needs" rule is a timing rule that requires **both the timing of the obligation and the bona fide need to be within the fund's period of availability**. See DOD FMR, Vol. 3, Ch. 8, para. 080303.A; DFAS-IN Reg. 37-1, para. 070501.

3. **Current year money for current year needs**. "The basic principle is that payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year." Principles of Fed. Appropriations Law, vol. I, p. 5-14, GAO-04-261SP (3d ed. 2004)

C. Bona Fide Needs Rule Applied to Supply Contracts.

1. Supplies are generally a bona fide need in the period in which they are used. Orders for supplies are proper only when the supplies are actually required. Thus, supplies needed for operations during a given fiscal year are bona fide needs of that year. Maintenance Serv. and Sales Corp., B-242019, 70 Comp. Gen. 664 (1991); 64 Comp. Gen. 359 (1985).

2. Exceptions. Supply needs of a future fiscal year are the bona fide needs of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the lead-time exception and the stock-level exception. DOD FMR, vol. 3, ch. 8, para. 080303.

a. Stock-Level Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year. A bona fide need for stock exists when there is a present requirement for items to meet authorized stock levels (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.). To Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965); DOD FMR, vol. 3, ch. 8, para. 080303A. However, fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

b. Lead-Time Exception. This exception recognizes that agencies may need and contract for an item in a current FY, but cannot physically obtain the item in the current FY due to the lead time necessary to produce and/or deliver it. There are two variants that comprise the lead time exception.

(1) Delivery Lead-Time. If an agency cannot obtain materials in the same FY in which they are needed and contracted for, delivery in the next FY does not violate the "Bona Fide Needs" rule as long as the time between contracting and delivery is not excessive, and the procurement is not for standard, commercial items readily available from other sources. DOD FMR vol. 3, ch. 8, para. 080303B; Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 (1959).

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

155 (1957). The procurement must not be for standard commercial items readily available from other sources. DOD FMR vol. 3, ch. 8, para. 080303B.

D. Bona Fide Needs Rule Applied to Service Contracts.

1. General Rule. Services are generally the bona fide need of the fiscal year in which they are performed. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). Thus, in general, services must be funded with funds current as of the date the service is performed.

2. Severable services.

a. A service is severable if it can be separated into components that independently meet a separate need of the government. The services are continuing or recurring in nature. Examples include grounds and facilities maintenance, dining facility services, and transportation services. Most service contracts are severable.

b. Absent an exception, the default rule for severable services is to fund them with current year funds from the date of award through the end of the fiscal year.

c. Statutory Exception for Severable Services. 10 U.S.C. § 2410a permits DOD agencies to award severable service contracts for a period not to exceed 12 months at any time during the fiscal year, funded completely with current appropriations. This statutory exception essentially swallows the general rule. Non-DOD agencies have similar authority. See 41 U.S.C. § 253L. This statutory exception provides flexibility to annual funds so that all contracts do not have to end on 30 September, but it only applies to annual year funds. It cannot be used to extend the period of availability of an expiring multiple year appropriation. Severable Services Contract, B-317636, 2009 CPD ¶ 89 (Apr. 21, 2009).

3. Nonseverable Services. If the services are nonseverable (i.e., a contract that seeks a single or unified outcome, product, or report), agencies must obligate funds for the entire undertaking at contract award, even if performance will cross fiscal years. See Incremental Funding of U.S. Fish & Wildlife Serv. Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (work on an environmental impact statement properly crossed fiscal years); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, B-219829, 65 Comp. Gen. 741 (1986) (contract for

study and report on psychological problems among Vietnam veterans was nonseverable).

V. LIMITATIONS BASED UPON AMOUNT

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

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

2. Making or authorizing expenditures or incurring obligations in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. § 1517(a).

a. Apportionment. The Office of Management and Budget (OMB) apportions funds over their period of availability to agencies for obligation. 31 U.S.C. § 1512. This means that OMB divides the funds up into quarterly installments, to prevent agencies from obligating the entire fiscal year's appropriations too quickly and needing supplemental appropriations.

b. Formal Administrative Subdivisions. The ADA also requires agencies to establish certain administrative controls of apportioned funds. 31 U.S.C. § 1514. These formal limits are referred to as allocations and allotments. In the Army, the Operating Agency/Army Command (ACOM) generally is the lowest command level at which the formal administrative subdivisions of funds are maintained for O&M appropriations.

c. Informal Administrative Subdivisions. DFAS-IN 37-1, ch. 3, para. 031402. Agencies may further subdivide funds at lower levels, e.g., within an installation. These subdivisions are generally informal targets or allowances. These are not formal subdivisions of funds, and obligating in excess of these limits does not, in itself, violate the ADA.

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

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

B. Correcting a Potential ADA Violation. The use of the wrong color of money (in violation of the Purpose Statute), or the use of the wrong fiscal year funds, will not result in an ADA violation if the error can be properly corrected. The accounts can be adjusted to replace the erroneously-obligated funds with the proper funds

(correct color, year, and amount) without having an ADA violation if these two conditions are met:

1. The proper funds were available at the time of the obligation; and

2. The proper funds are available at the time of correction;

See DoD FMR Vol 14, ch. 2, 020202.B. (changing the traditional 3-part ADA Correction Test to a 2-part test), To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Interagency Agreements—Obligation of Funds under an Indefinite Delivery, Indefinite Quantity Contract, B-308969 (May 31, 2007); Principles of Fed. Appropriations Law, vol. II, ch. 6, pages 6-79 to 6-80, GAO-06-382SP (3d ed. 2006) (discussing the correction of a violation by making an appropriate adjustment of accounts).

C. Investigating and Reporting Violations. If an Antideficiency Act violation is suspected, the agency must investigate to identify the responsible individual.

1. The DOD FMR contains the primary DOD guidance regarding investigation and reporting of ADA violations. According to the FMR, an individual learning of or detecting a suspected ADA violation must report within two weeks the possible violation to his/her chain of command.[4]

2. The first step in the investigation process is a preliminary review to gather basic facts and establish whether an Antideficiency Act violation "may have occurred." DOD FMR, vol. 14, ch. 3, para. 0302. The focus is on the potential violation, not on corrective actions. In the Army, the investigating officer is normally appointed by the installation commander or applicable Army Command (ACOM) commander. DFAS-IN 37-1, ch. 4, para. 040204. The results of the preliminary review should be forwarded to the applicable DOD component Comptroller.

3. If the DOD component Comptroller determines there is a potential violation, a formal investigation must be initiated. If no violation is found, the preliminary review completes the investigation process.

4. The purpose of the formal investigation is to determine the relevant facts and circumstances of the suspected violation – if a violation has occurred, what caused the violation, what the appropriate corrective actions and lessons learned might be, and who was responsible. DOD FMR, vol. 14, ch. 4, para. 0401. The relevant commander approves and appoints an

[4] Army practitioners should note that DFAS-IN 37-1 (applying solely to the Army) requires that individuals detecting a possible violation must "inform the Director for Resource Management (DRM)" who will then *immediately* notify the responsible commander. *See* Defense Finance and Accounting Service Reg. 37-1, Finance and Accounting Policy Implementation, ch. 4, para. 040204. For the remainder of this outline, the text refers to DOD FMR requirements, which apply to all services.

adequately trained and qualified individual to conduct the formal investigation. DOD FMR vol. 14, ch. 4, para. 040201.

5. The investigation report *must* assign responsibility for the violation to "one or more individuals" so that "appropriate administrative or disciplinary action" may be imposed. DOD FMR, vol. 14, ch. 5, para. 050302. Generally, the responsible party will be the highest ranking official in the decision-making process who had actual or constructive knowledge of the actions taken and the impropriety or questionable nature of such actions. See To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.

6. At the conclusion of the formal investigation, the Report of Violation will be forwarded to OSD Comptroller. If OSD Comptroller agrees with the report, it will prepare notification letters to the President (through the Director of OMB), Congress, and the GAO. OMB Cir. A-11, para. 145.7; DOD FMR, vol. 14, ch. 7, para. 0705.

7. The GAO maintains an online database of all reported ADA violations. See www.gao.gov/legal/antideficiency.html.

D. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. 31 U.S.C. § 1342; To Glenn English, B-223857, Feb. 27, 1987 (unpub.).

1. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June 2007; Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).

2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). But see T. Head & Co. v. Dep't of Educ., GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.

3. Examples of Voluntary Services Authorized by Law

a. 5 U.S.C. § 593 (agencies may accept voluntary services in support of alternative dispute resolution).

b. 5 U.S.C. § 3111 (student intern programs).

c. 10 U.S.C. § 1588 (implemented in DODI 1100.21) (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

d. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).

e. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

f. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).

4. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs.—Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

5. Gratuitous Services Distinguished.

a. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. See Sam Fox at 4; Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

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

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

E. Augmentation of Appropriations & Miscellaneous Receipts.

1. General rule: Augmentation of appropriations is not permitted.

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

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

(1) U.S. Constitution, Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

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

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

2. Types of Augmentation.

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

Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

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

(1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at 10 U.S.C. § 2646 – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992); But see Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).

(2) Expending the retained funds generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988).

3. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

a. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. 31 U.S.C. § 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the "appropriation or fund against which charges were made to fill the order." See also 41 U.S.C. § 6307 (providing similar intra-DOD project order authority.

b. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.

c. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).

d. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. 16 U.S.C. § 579c; USDA Forest Serv. – Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv. – Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).

e. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.

f. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

g. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts "shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned." 42 U.S.C. § 2651. The U.S. Army Claims Service takes the position that such recoveries should be credited to the installation's operation and maintenance account. See Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

h. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(d)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the

military department and used for facility maintenance, repair, or environmental restoration.

i. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

j. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.

k. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.

l. Government Credit Card and Travel Refunds. Section 8067 of the FY 2008 Defense Appropriations Act (Pub. Law 110-116) granted permanent authority ("in the current fiscal year and hereafter . . .) to credit refunds attributable to the use of the Government travel card, the Government Purchase Card, and Government travel arranged by Government Contracted Travel Management Centers, to the O&M and RDT&E accounts of the Department of Defense "which are current when the refunds are received."

m. Conference Fees. 10 U.S.C. § 2262. Congress recently (in section 1051 of the FY 2007 Defense Authorization Act) authorized the Department of Defense to collect fees from conference participants and to use those collected fees to pay the costs of the conference. Any amounts collected in excess of the actual costs of the conference must still be deposited into the Treasury as miscellaneous receipts. NOTE: this new statutory authority contains reporting requirements, and has not yet been implemented within DoD as of the time of this writing.

4. GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the GAO recognizes other exceptions to the Miscellaneous Receipts Statute, including:

a. Replacement Contracts. An agency may retain recovered excess reprocurement costs to fund replacement contracts. Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).

(1) This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.

(2) The replacement contract must be coextensive with the original contract, i.e., the agency may reprocure only those goods and services that would have been provided under the original contract.

(3) Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

b. Refunds.

(1) Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice – Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee's property for which agency has paid employee's claim); International Natural Rubber Org. – Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1982).

(2) Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency – Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).

(3) Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency – Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).

(4) Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr.

Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-174, GAO-06-382SP (3d ed. 2006); Appropriation Accounting —Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

c. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations — Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).

d. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

e. Nonreimbursable Details. The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985). However, as exceptions to this rule, nonreimbursable details are permitted under the following circumstances:

(1) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1987 U.S. Comp. Gen. LEXIS 1695.

(2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. Details to Congressional Comm'ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334.

(3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Dept. of

Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

VI. TYPICAL QUESTIONABLE EXPENSES AND COMMON PROBLEMS

A. Agencies may have specific guidance about "questionable" expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1, ch. 10 (16 Aug 2012).

B. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency's mission performance. Therefore, clothing is generally considered a personal expense unless a statute provides to the contrary. See IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).

1. Statutorily-Created Exceptions. See 5 U.S.C. § 7903 (authorizing purchase of special clothing, for personnel, which protects them against hazards in the performance of their duties); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). See also Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (discussing the rules for purchasing clothing); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng's, B-289683, Oct. 7, 2002 (unpub.) (discussing all three authorities).

2. Opinions and Regulations On-point. See also White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).

C. Food. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency's mission performance. See 31 U.S.C. § 1345 stating that except as provided by law, an appropriation may not be used for subsistence expenses at a meeting, but that this prohibition does not apply to expenses of an employee of the government carrying out an official duty. As a result, food is generally considered a personal expense. See Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense).

1. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is permissible for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and competitively priced to the fees of other facilities that do not include food as part of their rental fee. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, 1999 U.S. Comp. Gen. LEXIS 249 (Dec. 1, 1999).

2. Regulatory-based "Light Refreshments" Exception.

a. In a 2003 opinion, the GAO all but eliminated the "Light Refreshment" exception by prohibiting agencies from paying for refreshments given to any personnel *NOT* on travel status. See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 U.S. Comp. Gen. LEXIS 224, (Jan. 27, 2003).

b. This decision was somewhat reversed two years later in National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 03, 2005) ("NIH opinion"). In that case, the GAO authorized the use of appropriated funds for light refreshments, even for individuals *NOT* in travel status, under certain criteria.[5]

[5] If 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only

c. The Department of Justice, Office of Legal Counsel (OLC) prohibited the executive branch from following the NIH opinion. http://www.justice.gov/olc/2007/epa-light-refreshments13.pdf. OLC opined that "meetings" as used in 31 U.S.C. § 1345 included formal conferences sponsored by government agencies and that "subsistence expenses" included meals and light refreshments.[6] Therefore the 31 U.S.C. § 1345 prohibits conference attendees, who are from the local PDS area, from utilizing "light refreshment exception." The OLC opinion controls the activities of agencies of the federal government even though it is more restrictive than the opinions given by the GAO.

3. Statutory-based Exceptions.

a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DOD may pay service members a basic allowance for subsistence.

b. Meetings and Conferences. Under the Government Employees Training Act, 5 U.S.C. § 4110, there is authority for the government to pay for "expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."

(1) Conference Sponsored by Non-Federal Entities. Costs associated with meals included in a conference fee can be considered legitimate expenses of attendance under this statute if: 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. See National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

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the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42, at 3, (Mar. 03, 2005).

[6] Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 32 Op. Off. Legal Counsel 1, 5 (2007).

(a) For purposes of this exception, the conference or meeting **must not be purely internal government business meetings/conferences**. National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005). Moreover, luncheons disguised as meetings or conferences cannot utilize 5 U.S.C. § 4110. See B-21570, Mar. 22, 1985, 64 Comp. Gen. 406, 408. This authority does not specifically authorize agencies to pay the expenses, including food, of non-governmental employees

(b) As this authority is based on 5 U.S.C. § 4110, it does not apply to military members (it applies only to civilian employees). But see JFTR, ch. 4, para. U4510, which authorizes military members to be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside the physical limits of the PDS.

(c) The OLC opinion may impact the ability of a civilian, who is not in a travel status, to utilize this authority. See Section IX.C.2.c. above.

(2) Government Sponsored Conference. As part of the NIH opinion, the GAO authorized agencies to pay for the expenses, including food, of conference attendees from other agencies, and even *non-governmental organizations*, at "formal conferences." National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

(a) As part of the decision, the GAO applied the same 5 U.S.C. § 4110 criteria[7] to "formal conferences," but also required sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and stated that the conference must involve **topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants**.

(b) The OLC opinion may impact the ability of an agency to utilize this authority. See Section IX.C.2.c. above.

[7] *See* Section IX.C.3.b.

(3) Recent Army Guidance. Since late 2011, the Army has become more restrictive on use of appropriated funds for conferences, generally. Be sure to check for the latest Army (or DoD) guidance in this area, to include, Army Directive 2014-01, "Army Conference Policy" (18 DEC 13), Supplemental Conference Guidance and Data Call for Proposed FY 13 Conference, 29 October 2012, and Army Directive 2011-20- Department of Army Conferences (14 October 2011). Under these standards, it is much hard to pay for any food at an approved conference.

c. Training. Under 5 U.S.C. § 4109 (applicable to civilian employees) and 10 U.S.C. § 4301 and 10 U.S.C. § 9301 (applicable to service members), the government may provide meals when it is "necessary to achieve the objectives of a training program." See U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mary 9, 2009), Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992); Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003, 2003 U.S. Comp. Gen. LEXIS 224 (including a discussion of providing food, in general, where it furthers the needs of the training program).

(1) This generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. See Coast Guard – Coffee Break Refreshments at Training Exercise – Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (Jun. 16, 1993). See also Pension Benefit Guar. Corp. – Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996) (food was not needed for employee to obtain the full benefit of training because it was provided during an ice-breaker rather than during actual training). In many GAO opinions, the application of this rule appears to be indistinguishable from the 3-part test for Formal Conferences and Meetings under 5 U.S.C. § 4110.

(2) This exception may even apply to non-federal employees if they are necessary to the training and taking a lunch break separately from the government employees would hurt the training. See U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mary 9, 2009) (stating that there was no objection if the Garrison Commander involved in an anti-terrorism training exercise determined that the provision of food to nonfederal participants, including host national first responders, allowed federal and nonfederal personnel to train to work in a coordinated fashion without separating for food breaks, as, most likely, they would in an actual antiterrorism response).

(3) The Training exception requires that the event be genuine "training," rather than merely a meeting or conference. The GAO and other auditors will not merely defer to an agency's characterization of a meeting as "training." Instead, they will closely scrutinize the event to ensure it was a valid program of instruction as opposed to an internal business meeting. See Corps of Eng'rs – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (1993) (determining that quarterly managers meetings of the Corps did not constitute "training").

(4) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. See Army – Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). See also U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program, B-301184 (January 15, 2004) ("samplings" of food cannot amount to a full buffet lunch and must be related to the culture being celebrated); AFI 65-601, vol. 1, para. 4.26.1.2.

d. Award Ceremonies (for Civilian Incentive Awards). Under 5 U.S.C. §§ 4503-4505 (civilian employees incentive awards), federal agencies may "incur necessary expenses" including purchasing food to honor an individual who is given an incentive award.

(1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending $20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies under 5 U.S.C. § 4503, which expressly permits agency to "incur necessary expense for the honorary recognition . . . .").

(2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DoD civilians must also be done in accordance with DODI 1400.25, Volume 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).

(3) Military Awards. Food may also be provided at ceremonies honoring military recipients of military cash awards under 10 U.S.C. §1124 (Military Cash Awards), which also contains the "incur necessary expenses" language. However, military cash awards are very rare. Typical military awards, such as medals, badges, trophies, etc., are governed by a separate statute (10 U.S.C. § 1125) which does not have the express "incur necessary expenses" language. Therefore, food may not be purchased with appropriated funds for a typical military awards ceremony.

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

D. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.

1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is

unwholesome or unpotable. See United States Agency for Int'l Dev. – Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).

2. GAO-Sanctioned Exception Where Duty is in Remote Area With No Access to Potable Water. Agencies have the discretion to decide between providing water in coolers or jugs for transport or by providing bottled water at remote sites without access to potable water. The agency must administratively determine that the best way to provide the water is by using bottled water. Dept. of the Army – Use of Appropriations for Bottled Water, B-310502, Feb. 4, 2008, 2008 U.S. Comp. Gen. LEXIS 38. See also Dept. of the Army, Military Surface Deployment and Distribution Command – Use of Appropriations for Bottled Water, B-318588, Sept. 29, 2009 (allowing purchase of bottled water for use at temporary work sites where potable water is not available).

3. Bottled Water as a Condition of Employment. Even if providing bottled water to union employees had become a condition of employment, once drinking water is potable, the agency does not have the authority to continue to provide bottled water. An agency cannot bargain over a matter that is inconsistent with federal law. United States Department Of The Navy, Naval Undersea Warfare Center Division Newport, Rhode Island v. Federal Labor Relations Authority, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

4. Relevant Regulations. See also DOD FMR, vol. 10, ch. 12, para. 120324 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.58 (discussing the same); AR 30-22, para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, except in the context of a deployment / contingency).

5. Water Coolers. As distinguished from the water itself, which must be purchased with personal funds unless the building has no potable water, agencies may use appropriated funds to purchase water coolers as "Food Storage Equipment" (see discussion in next paragraph below), but arguably only under severely limited circumstances. There is arguably no valid purpose for water coolers in buildings that are already equipped with chilled water fountains or with refrigerators that dispense chilled water or ice. Where the facility is not so equipped, water coolers may be purchased with appropriated funds so long as the primary benefit of its use accrues to the organization. Under those circumstances, the water in the cooler must be available for use by all employees, including those who did not chip in for the water.

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

1. In June 2004 the GAO reversed its own precedent[8] and held that food storage/preparation equipment reasonably relates to the efficient performance of agency activities, and thus appropriated funds could be spent for these items regardless of the availability of commercial eating facilities. See Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). The Comptroller General observed that food storage/preparation equipment provided a benefit to the agency holding that they "increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment." Further, the opinion noted that such equipment "is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies."

[8] See e.g., Central Intelligence Agency – Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (commercial facilities were not proximately available when the nearest one was a 15-minute commute from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (commercial facilities unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

2. Bottom line: Food preparation and storage equipment may be purchased with appropriated funds, so long as the primary benefit of its use accrues to the agency and the equipment is placed in common areas where it is available for use by all personnel. (Note: agency regulations and policies should be consulted prior to applying this decision.)

F. Personal Office Furniture and Equipment. Ordinary office equipment is reasonably necessary to carry out an agency's mission, so appropriated funds may be used to purchase such items, so long as they serve the needs of the majority of that agency's employees. If the equipment serves the needs of only a single individual or a specific group of individuals, then it is considered a personal expense rather than a "necessary expense" of the agency. This is true even if the equipment is essential for a particular employee to perform his or her job. Under such a scenario, it is the needs of that particular individual that causes the item to be necessary. The item is not "essential to the transaction of official business from the Government's standpoint." Internal Revenue Service – Purchase of Air Purifier with Imprest Funds, B-203553, 61 Comp. Gen. 634 (1982) (disapproving reimbursement for air purifier to be used in the office of an employee suffering from allergies); See also Roy C. Brooks – Cost of special equipment-automobile and sacro-ease positioner, B-187246, 1977 U.S. Comp. Gen. LEXIS 221 (Jun. 15, 1977) (disapproving reimbursement of special car and chair for employee with a non-job related back injury); Cf. Office of Personnel Mgt. – Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (allowing reimbursement for air purifiers to be used in common areas, thus benefiting the needs of all building occupants).

1. Federal Supply Schedule Exception. If the desired equipment is available on the Federal Supply Schedule, the agency may use appropriated funds to purchase it even if the chair does not serve the needs of the majority of workers. See Purchase of Heavy Duty Office Chair, B-215640, 1985 U.S. Comp. Gen. LEXIS 1805 (Jan. 14, 1985) (allowing reimbursement for a heavy-duty office chair normally used only by air traffic controllers since the chair was available on FSS).

2. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., requires federal agencies to implement programs to expand employment opportunities for handicapped individuals. The regulations implementing this Act require agencies to make "reasonable accommodations" to include purchasing special equipment or devices in order to carry out these programs. See 29 C.F.R. 32.3 ("Definitions"). Thus, agencies may purchase equipment for its **qualified handicap employees** as a reasonable accommodation. See Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee, B-240271, 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990) (authorizing purchase); see also Equal Employment Opportunity Commission – Special Equipment for Handicapped Employees, B-203553, 63 Comp. Gen. 115 (1983) (agency could not purchase air purifier for person with allergies because the person did not meet the regulatory definition of a handicapped individual).

G. Entertainment. Entertaining people generally does not materially contribute to an agency's mission performance. As a result, entertainment expenses are generally considered to be a personal expense. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (determining fireworks to be unauthorized entertainment); Liability of Alexander Tripp, B-304233, Aug. 8, 2005, 2005 U.S. Comp. Gen. LEXIS 158 (Sunset dinner cruise in conjunction with staff retreat a "personal expense"; official held not personally liable where he was not properly designated by the agency as a certifying officer).

1. Statutory-based Exceptions. Congress does occasionally provide authority to entertain. See Claim of Karl Pusch, B-182357, 1975 U.S. Comp. Gen. LEXIS 1463 (Dec. 9, 1975) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club -- twice); Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct "interpretive demonstrations" at the 1988 Annual Golden Spike Railroader's Festival).

2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv. – Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training); U.S. International Trade Commission – Cultural Awareness, B-278805, Jul. 1999, 1999 U.S. Comp. Gen. LEXIS 211 (Int'l Trade Comm'n funds were available to pay for musical performance at cultural awareness event, subject to time limits on reimbursement.).

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. See To The Honorable Michael Rhode, Jr., B-250884, 1993 U.S. Comp. Gen. LEXIS 481 (March 18, 1993) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

H. Decorations. Under a "necessary expense" analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin – Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining that Christmas cards and holiday greetings letters were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.28.2. 41 C.F.R. § 101.26.103-2 (2003) governs the purchase decorative items for federal buildings. Note: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, etc.).

I. Business Cards. Under a "necessary expense" analysis, the GAO has sanctioned the purchase of business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds **for government employees who regularly deal with public or outside organizations** is a proper "necessary expense").

1. This decision reversed a long history of Comptroller General decisions holding that business cards were a personal expense because they did not materially contribute to an agency's mission accomplishment. See, e.g.,

Forest Serv. – Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

2. See Section VII.B.3 for a discussion on the more restrictive agency regulations on purchasing business cards.

J. Telephones. Even though telephones might ordinarily be considered a "necessary expense," appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. See 31 U.S.C. § 1348; see also Centers for Disease Control and Prevention – Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director's residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).

1. Exceptions for DoD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. See 31 U.S.C. § 1348(a)(2) and (c). See also Timothy R. Manns – Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters of National Park Service employee allowed, using same rationale). DoD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. See 10 U.S.C. § 1588(f).

2. Exception for Data Transmission Lines. If the phone will be used to transmit data, the above prohibition does not apply. See Federal Commc'ns Comm'n – Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).

3. Cell Phones. The prohibition on installing telephones in a personal residence does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with

any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. See Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate, B-287524, 2001 U.S. Comp. Gen. LEXIS 202 (Oct. 22, 2001) (agency may not pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data); see also Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, 2003 U.S. Comp. Gen. LEXIS 240 (March 6, 2003).

4. Exception for Teleworking. In 1995, Congress authorized federal agencies to install telephones and other *necessary equipment* in personal residences for purposes of teleworking. See Pub. L. No. 104-52, § 620 (Codified at 31 U.S.C., § 1348). Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: http://www.telework.gov/. The Air Force also has some additional guidance found in AFI 65-601, vol. I, sec. 4I.

K. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds. Alan Pacanowski - Reimbursement of Fines for Traffic Violations, B-231981, 1989 U.S. Comp. Gen. LEXIS 635 (May 19, 1989); To the Honorable Ralph Regula, B-250880, Nov. 3, 1992, 1992 U.S. Comp. Gen. LEXIS 1279 (Fines imposed on Government employees driving Government vehicles also a personal expense). Where the fine itself is not reimbursable, related legal fees are similarly nonreimbursable. In the Matter of Attorney's Fees in Traffic Offense, B-186857, Feb. 9, 1978, 57 Comp. Gen. 270.

1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, 1992 U.S. Comp. Gen. LEXIS 1279 (Nov. 3, 1992) (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).

2. Agencies may also pay fines imposed upon the agency itself if Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

L. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that employees incur to obtain licenses or certificates enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. See A. N. Ross, Federal Trade Commission, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable); Colonel Dempsey, B-277033, Jun. 27, 1997, 1997 U.S. Comp. Gen. LEXIS 410 (Fee for state physician's license, DEA certifications not payable, even where advantageous for the Government). But see AFI 65-601, vol. 1, para. 4.60 (Payment for *certain* licenses and certificates, where not used to qualify individuals for employment, allowed).

1. GAO Sanctioned Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency – Request for Advance Decision, B-257895, 1994 U.S. Comp. Gen. LEXIS 844 (Oct. 28, 1994) (allowing drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations – Reimbursement for Costs of Licenses or Certificates, B-252467, 73 Comp. Gen. 171 (1994) (approving payment of licenses necessary to comply with state-established environmental standards); Dept. of the Army – Availability of Funds for Security Clearance Expenses, B-307316, Sep. 7, 2006, 2006 U.S. Comp. Gen. LEXIS 144 (agreeing that costs associated with service-member renouncing foreign citizenship in order to obtain security clearance payable are allowable).

2. Professional Credentials. In 2001, Congress enacted legislation permitting agencies to use appropriations for "expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials." Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at 5 U.S.C. § 5757. The statutory

language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them. *See* AFI 65-601, vol. 1, para. 4.47. But see Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (prohibiting payment for an employee's membership in a professional association not required for licensing). In 2006, the military received similar authority, codified at: 10 U.S.C. § 2015.

3. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. http://cpol.army.mil/library/train/tld-062003.html This authority may be redelegated at the discretion of the MACOM Commanders. Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (GAO analysis of the scope of 5 U.S.C. § 5757).

M. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase "mementos" or personal gifts. See EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992) (requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds); See also Purchase of Baseball Caps by Dept. of Energy, B-260260, Dec. 28, 1995, 96-2 Com. Gen. Proc. Dec. ¶ 131 (disallowing the purchase of baseball caps where there was no direct link to the purpose of the appropriation established). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

1. Awards For Service Members. Congress has provided specific authority for the SECDEF to "award medals, trophies, badges, and similar devices" for "excellence in accomplishments or competitions." 10 U.S.C. § 1125.

a. The Army has implemented this statute in AR 600-8-22, Military Awards (11 Dec. 2006). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, etc).

b. Chapter 11 of the regulation allows the presentation of other nontraditional awards for "excellence in accomplishments or competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, for example, tank gunnery, weapons competition, and military aerial competition."

c. While the regulation discusses contests and events of a continuing nature, awards "may be made on a one-time basis where the achievement is unique and clearly contributes to increased effectiveness." See AR 600-8-22, para. 11-2b.

d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other "similar devices." However, the ACOM/ASCC commander or head of the principal HQDA agency, or delegee, must approve the trophies and similar devices to be awarded within their command or agency. See AR 600-8-22, para. 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (belt buckles may be purchased as awards for the annual "Peacekeeper Challenge").

e. Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders' coins, see Major Kathryn R. Sommercamp, *Commanders' Coins: Worth Their Weight in Gold?*, Army Law., Nov. 1997, at 6.

f. The Air Force and Navy/Marine Corps have similar awards guidance. See generally AFPD 36-28, Awards and Decorations Programs, (Jul 30, 2012); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). See also AFI 65-601, vol. 1, para. 4.31.2.

2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. See Chapter 45 of Title 5 of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503.

a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, (June 2010). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).

b. Non-Cash Awards. The statute technically states that the "head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of" one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. The GAO has sanctioned the giving of non-cash awards to civilian employees. See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, 1980 U.S. Comp. Gen. LEXIS (Aug. 27, 1980) (stating that desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements); Nat'l Security Agency – Availability of Appropriations to Purchase Food as a Non-Monetary Award, B-271511, Mar. 4, 1997, 1997 U.S. Comp. Gen. LEXIS 105 (deciding that food vouchers may be given to civilian employees as awards). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments under 5 U.S.C. § 4503. In such circumstances, the award is not the food; the food is just an incidental expense incurred to honor the awardee.

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors.

N. Use of Office Equipment. Governed by the Joint Ethics Regulation, DOD 5500.07-R (Nov. 17, 2011), Standards of Conduct, DOD Directive 5500.07 (Nov. 29, 2007), 5 C.F.R. § 2635, and 5. C.F.R. Part 3601. The use of government property to respond to National Guard, Reserve matters is authorized, within certain restrictions. Lorraine Lewis, Esq., B-277678, 1999 U.S. Comp. Gen. LEXIS 104 (Jan. 4, 1999) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See 5 C.F.R. § 251.202; see also Office of Personnel Management memorandum, Subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum is on file with the Contract and Fiscal Law Department. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, Reserve Officers Ass'n L. Rev., May 2001 (providing a good overview of this authority).

O. Expenditures for New or Additional Duties.

1. If during the middle of a fiscal year, legislation or an executive order imposes new or additional duties upon an agency and Congress does not provide that agency with a supplemental appropriation specifically covering that new function, may current appropriations be charged?

2. Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation? The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Director, Nat'l Sci. Found., B-158371, 46 Comp. Gen. 604 (1967).

VII. MILITARY CONSTRUCTION

A. Congressional oversight of the Military Construction Program, and construction throughout the Federal Government, is extensive and pervasive. For example, no contract relating to erection, repair, or furnishing of a public building or to make any public improvement shall require the government to pay more than the amount specifically appropriated for the activity covered by the contract. 41 U.S.C. § 6303. There are different categories of construction work with distinct funding requirements.

B. Specified Military Construction (MILCON) Program -- projects costing over $2 million.

1. Congress authorizes and funds these projects by location. The Army's principle appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.

2. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by specific individual projects.

C. Unspecified Minor Military Construction (UMMC) Program -- military construction projects costing between $750,000 and $2 million. 10 U.S.C. § 2805(a).

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

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

3. Statute and regulations require approval by the Secretary of the Department and notice to Congress before a minor military construction project exceeding $750,000 is commenced.

4. If a military construction project is intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening, an unspecified minor military construction project may have an approved cost equal to or less than $3 million.

D. O&M Construction: Minor Military Construction projects costing less than $750,000. 10 U.S.C. § 2805(c); DOD Dir. 4270.36; AR 415-15, para. 1-6.c.(1).

1. The Secretary of a military department may use O&M funds to finance Unspecified Minor Military Construction projects costing not more than $750,000.

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

3. Project splitting is prohibited. The Honorable Michael B. Donley, B-234326.15, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (Air Force improperly split into multiple projects, a project involving a group of twelve related buildings).

4. Using O&M funds for construction in excess of the $750,000 project limit violates the Purpose Statute and may result in a violation of the Antideficiency Act. See DOD Accounting Manual 7220.9-M, Ch. 21, para. E.4.e; AFR 177-16, para. 23c; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

E. Maintenance and repair projects. **Maintenance and repair projects are not construction**. AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20F, ch. 3, para. 3.1.1, and ch. 4, para 4.1.1. Therefore, maintenance and repair projects are not subject to the $750,000 O&M limitation on construction.[9] See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for "an entire single-purpose facility or one or more functional areas of a multipurpose facility"). DOD funds these projects with O&M appropriations.

1. Definitions.

[9] But see 10 U.S.C. § 2811. If the estimated cost of a repair project exceeds $7.5 million, the Secretary concerned must approve the project in advance. 10 U.S.C. § 2811(b). The Secretary must then notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2811(d).

a. Maintenance.

(1) AR 420-1, Glossary, sec. II, defines maintenance as the "work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose." It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See also DA Pam 420-11, para. 1-6a.

(2) AFI 32-1032, para. 4.1.1, defines maintenance as "work required to preserve real property and real property systems or components and prevent premature failure or wearing out of the same." It includes: (a) work required to prevent and arrest component deterioration; and (b) landscaping or planting work that is not capitalized. See AFI 65-601, vol. 1, attachment 1.

(a) OPNAVINST 11010.20F, para. 4.1.1, defines maintenance as "the day-to-day, periodic, or scheduled work required to preserve or return a real property facility to such a condition that it may be used for its designated purpose."

(b) The term "maintenance" includes work undertaken to prevent damage to a facility that would be more costly to repair (e.g., waterproofing and painting interior and exterior walls; seal-coating asphalt pavement; resealing joints in runway concrete pavement; dredging to previously established depths; and cleaning storage tanks).

(c) Maintenance differs from repair in that maintenance does not involve the replacement of major component parts of a facility. It is the work done to:

(i) Minimize or correct wear; and

(ii) Ensure the maximum reliability and useful life of the facility or component.

b. Repair.

(1) Statutory Definition. 10 U.S.C. § 2811(e). A "repair project" is defined as a project to restore a real property

facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(2) DoD Definition. DOD FMR, vol. 2B, ch. 8, para. 080105. See also Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/Budget), subject: Definition for Maintenance and Repair (2 July 1997) [hereinafter DOD Repair Memorandum]. The term "repair" means to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(a) When repairing a facility, the military department or agency may:

(i) Repair components of the facility by replacement; and

(ii) Use replacements that meet current building standards or code requirements.[10]

(b) The term "repair" includes:

(i) Interior rearrangements that do not affect load-bearing walls; and

(ii) The restoration of an existing facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (e.g., accessibility, health, safety, or environmental).

(c) The term "repair" does not include additions, new facilities, and functional conversions. See 10 U.S.C. § 2811(c).

(d) Army Definition. AR 420-1, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 1-7. See Memorandum, Assistant Chief of Staff for Installation Management,

[10] DOD FMR, vol. 2B, ch. 8, para. 080105, and AR 420-1, para. 4-17b, provide the same example. Both state that "heating, ventilation, and air conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and can provide for more capacity that the original unit due to increased demands and standards." See DA Pam 420-11, para. 1-7h (stating that the Army should use energy and water saving materials whenever feasible).

subject: New Definition of "Repair" (4 Aug. 1997) [hereinafter DA Repair Memorandum]. The term "repair" means to restore a facility or a facility component to such a condition that the Army may use it effectively for its designated functional purpose.

(e) The DA Repair Memorandum states that: "The new definition is more liberal and expands [the Army's] ability to provide adequate facilities for [its] soldiers and civilians;" however, the DA Repair Memorandum also states that: "**A facility must exist and be in a failed or failing condition in order to be considered for a repair project**." See DA Pam 420-11, para. 1-7e (stating that "[r]epair means that the facility or facility component has failed, or is in the incipient stages of failing, or is no longer performing the functions for which it was designated").

(f) The term **"repair"** includes:

(i) Overhauling, reprocessing, or replacing deteriorated components, parts, or materials;

(ii) Correcting deficiencies in failed or failing components to meet current building standards or code requirements if the Army can perform the work more economically by performing it concurrently with the restoration of other failed or failing components;[11]

(iii) Relocating or reconfiguring components (e.g., partitions, windows, and doors) during a major repair project if they are replacements for existing components;[12]

(iv) Relocating or reconfiguring utility systems during a major repair project to meet current building standards or code requirements if

[11] The DA Repair Memorandum indicates that the Army can add a sprinkler system or air conditioning to bring a facility up to applicable standards or codes, provided the facility is in a failed or failing condition.

[12] A major repair project would include gutting the interior of a building.

the total area or population served by the utility system remains the same; and

(v) Incorporating additional components during a major repair project if: (a) the system is in a failed or failing condition;[13] and (b) incorporating the additional components makes the replacement system safer and more efficient.

(g) The term "repair" does not include:

(i) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;

(ii) Increasing the quantities of components for functional reasons;

(iii) Extending utilities or protective systems to areas not previously served;

(iv) Increasing exterior building dimensions; or

(v) Completely replacing a facility.

(3) Air Force Definition. AFI 32-1032, paras. 4.1.2 and 5.1.2. See AFI 65-601, vol. 1, attch 1. The term "repair" means to restore real property, real property systems, and real property components to such a condition that the Air Force may use it effectively for its designated functional purpose. However, AFI 32-1032, para. 4.1.2, specifically states that real property, real property systems, and real property components "need not have failed to permit a repair project." (emphasis added).

(a) The term "repair" includes:

(i) Replacing existing heating, ventilation, and air conditioning equipment with "functionally sized," state-of-the-art equipment;

[13] Under certain circumstances, the Army may classify a utility system or component as "failing" if it is energy inefficient or technologically obsolete. See AR 420-1, Glossary, sec. II.

(ii) Rearranging or restoring the interior of a facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (e.g., accessibility, health, safety, seismic, security, or fire);[14]

(iii) Removing or treating hazardous substances for environmental restoration purposes unless the work supports a construction project;

(iv) Replacing one type of roofing system with a more reliable or economical type of roofing system;

(v) Installing exterior appurtenances (e.g., fire escapes, elevators, ramps, etc.) to meet current building standards, code requirements, and/or access laws; and

(vi) Installing force protection measures outside the footprint of the facility.

(b) The term "repair" does not include:

(i) Expanding a facility's foundation beyond its current footprint;

(ii) Elevating or expanding the "functional space" of a facility;

(iii) Increasing the "total volume" of a facility;

(iv) Installing previously uninstalled equipment unless required to comply with accessibility, health, safety, seismic, security, or fire standards and codes;

(v) Relocating a facility;

(vi) Upgrading unpaved surfaces;

[14] Moving load-bearing walls is construction. AFI 32-1032, para. 4.1.2.1.2.

(vii) Increasing the dimensions of paved surfaces unless required to comply with Air Force standards or applicable code requirements;

(viii) Changing the permanent route of real property transportation systems;

(ix) Installing walkways, roadway curbs, gutters, underground storm sewers, bicycle paths, jogging paths, etc;

(x) Completely replacing the vertical section of a facility and a substantial portion of its foundation;

(xi) Completely replacing a facility;

(xii) Converting a facility or portion of a facility from one functional purpose to another;15 or

(xiii) Repairing a facility if the repair work exceeds 70% of the facility's replacement cost.[16]

c. Navy Definition. OPNAVINST 11010.20F, para. 3.1.1.[17] The term "repair" refers to "the return of a real property facility to such condition that it may be effectively utilized for its designated purposes, by overhaul, reconstruction, or replacement of constituent parts or materials which are damaged or deteriorated to the point where they may not be economically maintained."

(1) The term "repair" includes:[18]

(a) The modification or addition of building or facility components or materials to meet current safety, building, or environmental codes (e.g., correcting seismic or life safety deficiencies; installing fire

[15] Repair work required regardless of a functional conversion may still be repair work. AFI 32-1032, para. 5.1.2.3.2.

[16] This limit does not apply to facilities on a national or state historic register. In addition, the SAF/MII can waive it under appropriate circumstances. AFI 32-1032, para. 5.1.2.3.2.

[17] This regulatory provision pre-dates the DoD's new definition of repair. See DOD Repair Memorandum.

[18] OPNAVINST 11010.20F, para. 3.1.3, contains several additional examples of repair projects.

protection; and removing asbestos containing materials);

(b) Minor additions to components in existing facilities to return the facilities to their customary state of operating efficiency (e.g., installing additional partitions while repairing deteriorated partitions);

(c) The replacement of components with higher quality or more durable components if the replacement does not substantially increase the capacity or change the function of the component;

(d) The replacement of energy consuming equipment with more efficient equipment if:

(i) The shore activity can recover the additional cost through cost savings within 10 years;

(ii) The replacement does not substantially increase the capacity of the equipment; and

(iii) The new equipment provides the same end product (e.g., heating, cooling, lighting, etc.).

(2) The term "repair" does not include:

(a) Additions, expansions, alterations, or modifications required solely to meet new purposes or missions;

(b) The extension of facility systems or components to areas the shore activity is not repairing and/or areas not previously served;

(c) Increases to exterior facility dimensions or utility plant capacity; and

(d) Alterations to quarters to meet current DOD or Navy design standards.

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

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

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

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

G. Combat and Contingency Related O&M Funded Construction.

1. O&M funded contingency construction started with section 2808 of the FY 04 NDAA and has been extended and modified by each NDAA since 2004 (including National Defense Authorization Act, 2014).

a. Authority derived from the National Defense Authorization Act- the Secretary of Defense may obligate appropriated funds available for operation and maintenance to carry out a construction project inside the area of responsibility of the United States Central Command or the area of responsibility and area of interest of Combined Joint Task Force-Horn of Africa that the Secretary determines meets each of the following conditions:

(1) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation.

(2) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence, unless the military installation is located in Afghanistan, for which projects using this authority may be carried out at installations deemed as supporting a long-term presence.

(3) The United States has no intention of using the construction after the operational requirements have been satisfied.

(4) The level of construction is the minimum necessary to meet the temporary operational requirements.

b. Notification of Obligation of Funds. Before using appropriated funds available for operation and maintenance to carry out a construction project outside the United States that has an estimated cost in excess of the amounts authorized for unspecified minor military construction projects under section 2805(c) of title 10, United States Code, the Secretary of Defense shall submit to the congressional committees specified in subsection (f) a notice regarding the construction project. The project may be carried out only after the end of:

(1) the 10-day period beginning on the date the notice is received by the committees or, if earlier,

(2) the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of title 10, United States Code. The notice shall include the following:

(a) Certification that the conditions specified in subsection (a) are satisfied with regard to the construction project.

(b) A description of the purpose for which appropriated funds available for operation and maintenance are being obligated.

(c) All relevant documentation detailing the construction project.

(d) An estimate of the total amount obligated for the construction.

c. Annual Limitation on Use of Authority.—

(1) The total cost of the construction projects carried out under the authority of this section using, in whole or in part, appropriated funds available for operation and maintenance shall not exceed $100,000,000 in a fiscal year.

(2) The Secretary of Defense may authorize the obligation of not more than an additional $10,000,000 of appropriated

funds available for operation and maintenance for a fiscal year if the Secretary determines that the additional funds are needed for costs associated with contract closeouts. Funds obligated under this paragraph are not subject to the limitation in the second sentence of paragraph (1).

d. Other Contingency Construction Authority.

(1) See 10 U.S.C. § 2804. See DOD Dir. 4270.5; AR 420-1, para. 4-9; AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20G, para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

(a) Scope of Authority. The Secretary of Defense may use this authority—or permit the Secretary of a military department to use this authority—to carry out contingency construction projects not otherwise authorized by law.

(b) Proper Appropriation. Funds are specifically appropriated for construction under 10 U.S.C. § 2804.

(c) Requirements for Use.

Before using this authority, the SECDEF must determine that deferral of the project until the next Military Construction Appropriations Act would be inconsistent with National security or National interest.

(2) In addition, the SECDEF must:

(a) Notify the appropriate committees of Congress; and

(b) Wait 21 days.

(3) Limitations.

(a) Legislative History. H.R. Rep. No. 97-612 (1982).

(i) The legislative history of the MCCA indicates that the Secretaries of the military departments should use this authority only for extraordinary projects that develop unexpectedly.

(ii) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.

(b) DoD Limitations.

(i) DOD Dir. 4270.5, para. 4.2, requires the Heads of DOD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.

(ii) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.4, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

(c) Army Limitations. AR 420-1, para. 4-9b(6).

(i) The Army generally reserves this authority for projects that support multi-service requirements.

(ii) Commanders should normally process urgent projects that support only one service under 10 U.S.C. § 2803.

(d) Air Force Limitations. AFI 32-1021, para. 5.2.3.1.

(i) The use of this authority is rare.

(ii) The Air Force must consider using its 10 U.S.C. § 2803 authority first.

2. Train and Equip Related Construction: Section 1201 of the 2013 NDAA (as modified in the 2014 NDAA) expanded the authority normally contained in the train and equip provisions allowed in section 1206 of the 2006 NDAA by adding authority to conduct "small scale military construction activities."

a. Limitations

(1) Not more than $750,00 may be obligated for small scale military construction activities; and

(2) Not more than $25,000,000 may be obligated or expended for small-scale military construction activities under all programs authorized under this authority.

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

A. Definition. Emergency and extraordinary expense funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.

B. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438.

C. Appropriations Language.

1. For DOD, Congress provides emergency and extraordinary funds as a separate item in the applicable operation and maintenance appropriation. For example, in FY 2014, Congress provide the following O&M to the Army: "For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; ***and not to exceed $12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes***, $30,768,069,000 (emphasis added)."

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

D. Statutory Background.

1. 10 U.S.C. § 127. Emergency and extraordinary expenses.

a. Authorizes the Secretary of Defense and the Secretary of a military department to spend emergency and extraordinary expenses funds

for "any purpose he determines to be proper, and such a determination is final and conclusive."

b. Requires a quarterly report of such expenditures to the Congress.

c. Congressional notice requirement. In response to a $5 million payment to North Korea in the mid-90s using DOD emergency and extraordinary expense funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on our use of these funds:

(1) If the amount to be expended exceeds $1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.

(2) If the amount exceeds $500,000 (but is less than $1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.

2. Other executive agencies may have similar authority. See, e.g., 22 U.S.C. § 2671 (authorizing the State Department to pay for "unforeseen emergencies").

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

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

a. DOD Regulations: DOD Instruction 7250.13, Official Representation Funds (30 June 2009); DOD FMR, vol. 10, ch. 12, para. 120322.B.

b. Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (9 Sept.2012).

c. Air Force Regulation: AFI 65-603, Official Representation Funds: Guidance and Procedures (24 Aug. 2011).

d. Navy Regulation: SECNAV 7042.7K, Guidelines for Use of Official Representation Funds (25 May 2006).

2. Criminal Investigation Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during criminal investigations or crime prevention.

a. Army Regulation: AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities (30 Aug. 2011).

b. Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations, para. 1.18 (8 Apr. 2011).

3. Intelligence Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during intelligence investigations.

a. Army Regulation: AR 381-141(C), Intelligence Contingency Funds (30 July 1990).

b. Air Force Regulation: AFI 71-101, Criminal Investigations, (8 Nov. 2011).

4. Other Miscellaneous Expenses (other than official representation). This subset of emergency and extraordinary expense funds are available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. AR 37-47, para. 1-5b. Other examples include:

a. Acquisition of weapons from Panamanian civilians. (currently considered to be a proper expenditure of operation and maintenance funds);

b. Reward for search teams at the Gander air crash; and

c. Mitigation of erroneous tax withholding of soldiers' pay.

F. Use of Official Representation Funds.

1. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. DOD Directive 7250.13, Enc. 3; AR 37-47, para. 2-1. Official courtesies are subject to required ratios of authorized guests to DOD personnel. See, e.g., DOD Instruction 7250.13, para. E2.4.3; AR 37-47, paras. 2-1b and 2-5. Official courtesies are defined as:

a. Hosting of authorized guests to maintain the standing and prestige of the United States;

b. Luncheons, dinners, and receptions at DOD events held in honor of authorized guests;

c. Luncheons, dinners, and receptions for local authorized guests to maintain civic or community relations;

d. Receptions for local authorized guests to meet with newly assigned commanders or appropriate senior officials;

e. Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and visits by foreign vessels to U.S. ports;

f. Official functions in observance of foreign national holidays and similar occasions in foreign countries; and

g. Dedication of facilities.

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

a. Gifts to non-DOD authorized guests may cost no more than $335.00. See DOD Instruction 7250.13, Encl. 3 (which cross references 22 U.S.C. § 2694, which in turn cross references 5 U.S.C. § 7342; the amount established in the latter statute is revised by GSA.

b. If the guest is from within DOD and is one of the specified individuals listed in Enclosure 1 to DOD Instruction 7250.13, then the command may present him or her with only a memento valued at no more than $40.00. Enclosure 2 to DOD Directive 7250.13, para. E2.4.2.10.

3. Levels of expenditures. Levels of expenditures are to be "modest." DOD Instruction 7250.13, para. E2.2.1.2.4.2; AR 37-47, para. 2-4a; AFI 65-603, para. 2.1. Army Regulation prohibits spending in excess of $20,000 per event (an entire visit by an authorized guest constitutes one event for purposes of this threshold). AR 37-47, para. 2-4b.

4. Prohibitions on Using Representational Funds. DOD Instruction 7250.13, para. E2.4.2; AR 37-47, para. 2-10; AFI 65-603, para. 7.2; SECNAVINST 7042.7K, para. 9.

a. Any use not specifically authorized by regulation requires an exception to policy (or for Air Force, advance approval of the

Secretary of the Air Force). AR 37-47, para. 2-10; AFI 65-603, para. 7.2.

b. Exceptions will not be granted for the following:

(1) Classified projects and intelligence projects;

(2) Entertainment of DOD personnel, except as specifically authorized by regulation;

(3) Membership fees and dues;

(4) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);

(5) Gifts and mementos an authorized guest wishes to present to another;

(6) Personal items (clothing, cigarettes, souvenirs);

(7) Guest telephone bills;

(8) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and

(9) Repair, maintenance, and renovation of DOD facilities.

See AR 37-47, para. 2-10.

5. Community Relations and Public Affairs Funds. AR 360-1, para. 4-5. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

IX. CONCLUSION

Chapter 5
Competition

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CHAPTER 5

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CHAPTER 5

COMPETITION

I. INTRODUCTION

A. Competition Promotes the Public Interest. "As every individual, therefore, endeavors as much he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labors to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention." Adam Smith, *The Wealth of Nations*, (ed. Edwin Canaan, University of Chicago Press, 1976) pp. 477.

B. Competition Yields Value. A competitive procurement process produces the best value for the government – it enables agencies to acquire high quality goods and services with the most favorable contract terms for the best possible price. See generally Professor Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUBLIC PROCUREMENT LAW REVIEW 103 (2002) (found at: http://scholarship.law.gwu.edu/cgi/viewcontent.cgi? article=1101&context=faculty_publications) (discussing competition as an overarching principle of government procurement).

II. COMPETITION REQUIREMENTS

A. The Competition in Contracting Act of 1984. Pub. L. No. 98-369, Division B, Title VII, §§ 2701-2753, 98 Stat. 1175 (July 18, 1984) [hereinafter CICA].

1. Beginning in 1983, Congress began to look for ways to increase the use of competition in government contracting. In 1984 Congress passed the Competition in Contracting Act (CICA) to increase competition in government contracting and to impose more stringent restrictions on the award of noncompetitive–sole-source–contracts. While the Senate originally proposed a marketplace standard of "effective competition" (whereby two or more contractors acting independent of each other, and the Government, submit bids or proposals), Congress ultimately adopted the more stringent "full and open competition" requirement. H.R. Rep. No. 98-369, at 1421, reprinted in 1984 U.S.C.C.A.N. (98 Stat.) 2109-2110. Ultimately, 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 Competition Pendulum. Following CICA, Congress periodically revisited the amount of competition applicable to government contracting in an effort to strike a balance between efficient, commercial-like contracting procedures and maximizing the use of full and open competition. In the 1990s, Congress significantly diminished the amount of competition required for certain acquisition methods and contract types, to include simplified acquisitions, commercial items, and indefinite delivery contracts, through passage of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA] and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA]. More recently, due in part to perceived excesses resulting from certain provisions of the FASA and FARA, Congress reinvigorated competition, in particular in the area of indefinite delivery contracting. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3,236-39 (2008); Memorandum from Shay Assad, Director, Defense Procurement and Acquisition Policy, Improving Competition in Defense Procurements – Amplifying Guidance (Apr. 27, 2011), http://www.acq.osd.mil/dpap/policy/policyvault/USA002080-11-DPAP.pdf; Memorandum from Richard Ginman, Director, Defense Procurement and Acquisition Policy, Contingency Competition Goals and Competition Reviews of Certain Omnibus Contracts, (Feb. 17, 2012), http://www.acq.osd.mil/dpap/policy/policyvault/USA000907-12-DPAP.pdf. Notwithstanding these pendulum swings, the fundamental, general rule of the CICA has remained unchanged: **Agencies must conduct acquisitions on the basis of full and open competition to the maximum extent practicable.**

3. The CICA, as amended by the FASA, FARA and other acts, is located in several titles of the United States Code, including:

   a. Various sections of 10 U.S.C. §§ 2202, 2301-2314, 2381, and 2383 detail the competition requirements that apply to the Department of Defense (DOD), the individual military departments (i.e., Departments of Army, Air Force, and Navy), the Department of Homeland Security (DHS) (i.e., the Coast Guard), and the National Aeronautics and Space Administration (NASA).

   b. Various sections of title 41 of the U.S. Code, including §§ 1101-1102, 1121-1131, 1301-1304, 1311-1312, 1701-1713, 3101-3106, 3301-3311.

(1) 41 U.S.C. § 1101 establishes the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget to provide leadership and guidance in the development of procurement policies and systems.

(2) 41 U.S.C. § 1708 requires agencies to publicize procurement actions by publishing or posting procurement notices.

(3) 41 U.S.C. § 1705 requires agencies to appoint competition advocates.

4. 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), the Air Force Federal Acquisition Regulation Supplement (AFFARS)) – 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 8 – Requires Sources of Supplies or Services;

e. FAR Part 10 – Market Research;

f. FAR Part 11 – Describing Agency Needs;

g. FAR Part 12 – Acquisition of Commercial Items;

h. FAR Part 13 – Simplified Acquisition Procedures; and

i. FAR Subpart 16.5 – Indefinite Delivery Contracts.

B. Congressional Scheme

1. The overarching goal of CICA is to achieve competition to the maximum extent practicable by opening the procurement process to all capable contractors who want to do business with the Government.

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

a. Full and Open Competition. FAR Subpart 6.1.

b. Full and Open Competition After Exclusion of Sources. FAR Subpart 6.2.

c. Other Than Full and Open Competition. FAR Subpart 6.3.

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

C. Full and Open Competition. 10 U.S.C. § 2304(a)(1); 41 U.S.C. § 3301(a)(1); FAR Subpart 6.1.

1. Definition. 41 U.S.C. § 107 and FAR 2.101.

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

b. Full and open competition does not require agencies to achieve actual competition. The standard is that interested parties are afforded the opportunity to submit bids or proposals – agencies are not required to receive more than one bid or proposal.

2. Policy. FAR 6.101.

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

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

3. Examples of competitive procedures that promote full and open competition include (FAR 6.102):

a. Sealed bids. FAR Part 14.

b. Competitive proposals (i.e., negotiation). FAR Part 15.

c. Combination of competitive procedures (e.g., two-step sealed bidding).

d. Other competitive procedures (i.e., the Federal Supply Schedule).

4. Unfair Competitive Advantage. Competition must be conducted on an equal basis. The Eloret Corp., B-402696.2, Jul. 16, 2010, 2010 CPD ¶ 182 (stating a fundamental principle of government procurement is

that competitions are held on a equal basis – meaning offerors are treated equally and are provided a common basis to prepare proposals). An "unfair competitive advantage" or organizational conflict of interest, can arise in a variety of different factual contexts. See 2014 Contract Attorney's Deskbook, Chapter 34, Responsibility, Timeliness, and Organizational Conflicts of Interest for more information.

D. Full and Open Competition After Exclusion of Sources. 10 U.S.C. § 2304(b); 41 U.S.C. § 3303(b); FAR Subpart 6.2; DFARS Subpart 206.2.

1. In the CICA, Congress recognized that there were certain situations where the field of competition should be limited to certain groups.

a. The CICA allows an agency to "provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service" as long as the agency head made the determination. The CICA, § 303(b)(1), codified at 10 U.S.C. § 2304(b)(1) and 41 U.S.C. § 3303(b)(1).

b. Congress also recognized that an agency may limit competition in order to fulfill the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns. The CICA, § 303(2), codified at 10 U.S.C. § 2304(b)(2) and 41 U.S.C. § 3303(b)(2).

2. This policy is enacted through FAR Subpart 6.2 which prescribes the policies and procedures for full and open competition after excluding one or more source.

a. The policy allows contracting officers, under limited circumstances, to exclude one or more sources from a particular contract action.

b. After excluding these sources, a contracting officer must use competitive (e.g. sealed bids, competitive proposals, or combination of competitive procedures) to promote full and open competition among non-excluded offerors. See FAR Sections 6.201 and 6.102.

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

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

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

(a) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition.

(b) Be in the interest of national defense in having facilities, producers, manufacturers, or other suppliers available to furnish necessary supplies and services in the event of a national emergency or industrial mobilization. Hawker Eternacell, Inc., Comp. Gen. B-283586, 1999 U.S. Comp. Gen. LEXIS 202 (Nov. 23, 1999); Martin Elecs. Inc., Comp. Gen. B-219803, Nov. 1, 1985, 85-2 CPD ¶ 504.

(c) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or nonprofit institution, or federally funded research and development center.

(d) Ensure the continuous availability of a reliable source of supply or services. E.g. PWC Logistics Servs. Corp., B-400660, Jan. 6, 2009, 2009 CPD ¶ 167 (rejecting a challenge to a DOD decision to split the logistics support contract for the Iraq AOR into two contracts and reserve the right under FAR 6.202(a) to deny both contracts to a single contractor).

(e) Satisfy projected needs based on history of high demand.

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

(2) The agency head must support the decision to exclude one or more sources with written determinations and findings (D&F). FAR 6.202(b)(1). The D&F is a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain governmental action. It consists of a determination (a conclusion) that is supported by the findings (statements of fact or

rationale). See FAR Subpart 1.7; see also DFARS 206.202(b); DFARS PGI 206.202(b) (providing sample format and listing required contents).

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

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

(3) In DOD, agencies may use this exception to totally or partially exclude a particular source from a contract action. DFARS 206.202(a).

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

(1) A contracting officer may limit competition to small business concerns to satisfy statutory or regulatory requirements. A "set aside for small business" is the reserving of an acquisition exclusively for participation by small business concerns. See FAR Subpart 19.5.

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

(3) Competition under FAR 6.203 cannot be restricted to only *certain* small businesses. Department of the Army Request for Modification of Recommendation, Comp. Gen. B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 (stating that while the CICA allows for the exclusion of non-small business concerns to further the Small Business Act, it still requires "full and open competition among eligible small business concerns." Such procedures must allow all responsible eligible business concerns [i.e., small business concerns] to submit offers.).

(4) FAR Subpart 6.2 contains similar additional set-aside guidance for other small business concerns as follows:

(a) FAR 6.204—Set-asides for Section 8(a) competitions;

(b) FAR 6.205—Set-asides for HUBZone small business concerns;

(c) FAR 6.206—Set-asides for service-disabled veteran-owned small business concerns;

(d) FAR 6.207—Set-asides for local firms during a major disaster or emergency.

E. Other Than Full and Open Competition. 10 U.S.C. § 2304(c); 41 U.S.C. § 3304; FAR Subpart 6.3; DFARS Subpart 206.3; AFARS Subpart 6.3.

1. Policy. FAR 6.301.

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

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

c. Agencies cannot justify non-competitive procurements based on:

(1) A lack of advance planning. 10 U.S.C. § 2304(f)(4)(A); FAR 6.301(c)(1).

(a) Noncompetitive procedures may not be justified on an agency's failure to conduct advanced planning. RBC Bearings, Inc., Comp. Gen. B-401661, Oct. 27, 2009, 2009 CPD ¶ 207 (finding Army's failure to qualify a source for 10 years amply established a failure to conduct adequate and reasonable advanced planning); VSE Corp., Comp. Gen. B-290452.3, May 23, 2005, 2005 CPD ¶ 103 (disapproving award of sole source bridge contract in part due to agency's failure to conduct advanced planning); Worldwide Language Resources, Inc, Comp. Gen. B-296984, Nov. 14, 2005, 2005 CPD ¶ 206 (determining that a justification and approval for sole source award of bilingual-bicultural advisors contract revealed lack of advance planning and not unusual and compelling circumstances).

(b) Advanced planning must be reasonable, not completely error free. Pegasus Global Strategic Solutions, LLC, Comp. Gen. B 400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (upholding sole source based on unusual and compelling urgency notwithstanding errors in agency planning); Bannum, Inc., Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD ¶ 61 (finding

that while the agency's planning ultimately was unsuccessful, this was due to unanticipated events, not a lack of planning); Diversified Tech. & Servs. of Virginia, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 (refusing to fault the Department of Agriculture where the procurement was delayed by the agency's efforts to implement a long-term acquisition plan).

(c) To avoid a finding of "lack of advanced planning" agencies must make reasonable efforts to obtain competition. Heros, Inc., Comp. Gen. B-292043, June 9, 2003, 2003 CPD ¶ 111 (stating agencies "must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole source situation when they could reasonably take steps to enhance competition."); see also Raytheon Co. - Integrated Defense Sys., Comp. Gen. B-400610, Dec. 22, 2008, 2009 CPD ¶ 8 (finding Navy's follow-on, sole source award of three contracts to modernize automated portions of the Aegis Combat System and make the software commercial-off-the-shelf (COTS) compatible promoted competition and did not constitute a lack of advanced planning).

(2) Concerns related to the amount of funds. 10 U.S.C. § 2304(f)(4)(A); FAR 6.301(c)(2). Cf. AAI ACL Tech., Inc., B-258679.4, Nov. 28, 1995, 95-2 CPD ¶ 243 (distinguishing the expiration of funds from the unavailability of funds).

(a) The contracting officer must solicit offers from as many potential sources as is practicable under the circumstances. FAR 6.301(d); Bausch & Lomb, Inc., Comp. Gen. B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 (rejecting sole source award despite presence of unusual and compelling urgency where agency failed to consider other available sources that expressed an interest); Kahn Indus., Inc., B-251777, May 3, 1993, 93-1 CPD ¶ 356 (holding that it was unreasonable to deliberately exclude a known source simply because other agency personnel

failed to provide the source's telephone number).

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

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

a. Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements. 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 3304(a)(1); FAR 6.302-1; DFARS 206.302-1; AFARS 5106.302-1.

(1) DOD, NASA, and the Coast Guard.

(a) The agency is not required to provide for full and open competition if:

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

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

(b) Smith and Wesson, Inc., B-400479, Nov., 20, 2008, 2008 CPD ¶ 215 (upholding the rationality of the agency's decision to purchase Glock firearms for the Pakistani military as the Pakistanis already had a logistics system to support the weapons and supporting a new firearm would be overly burdensome); Cubic Defense Sys., Inc. v. United States, 45 Fed. Cl. 239 (1999); Metric Sys. Corp. v. United States, 42 Fed. Cl. 306 (1998); Datacom, Inc., Comp. Gen. B-274175., Nov. 25, 1996, 96-2 CPD ¶ 199; But see Lockheed Martin Sys. Integration—Owego, Comp. Gen. B-287190.2, May 25, 2001, 2001 CPD ¶ 110 (when an agency relies on this exception, the agency must give other sources "notice of its intentions, and an opportunity to respond to the agency's requirements." The agency must "adequately apprise" prospective sources of its needs so that those sources have a "meaningful opportunity to demonstrate their ability" to satisfy the agency's needs. When the agency gave "misleading

guidance" which prejudiced the protestor, GAO invalidated the sole source award); National Aerospace Group, Inc., Comp. Gen. B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 (sustaining protest where the Defense Logistics Agency's documentation failed to show that only the specific product would satisfy the agency's need).

(2) Other Agencies.

(a) The agency is not required to provide for full and open competition if:

(i) There is only one responsible source (as opposed to "a limited number"); and

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

(3) Unsolicited, unique and innovate proposals may form the basis for a sole source award. See FAR 6.302-1(a)(2)(i). But see, DFARS 206.302-1.

(4) Follow-On Contracts. Supplies (and highly specialized services for the DOD, NASA, and Coast Guard, FAR 6.302-1(a)(2)(iii)) may be deemed available only from the original source in follow-on contracts for the continued development or production of a major weapon system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in:

(a) Substantial duplication of cost to the Government that is not expected to be recovered through competition, or

(b) Unacceptable delays in fulfilling agency requirements. FAR 6.302-1(a)(2)(ii); Raytheon Co. - Integrated Defense Sys., Comp. Gen. B-400610, Dec. 22, 2008, 2009 CPD ¶ 8 (upholding follow-on sole source award to incumbent contractor of Aegis Combat System because award to any other offeror would lead to unacceptable delay).

(5) Use in preference to the public interest exception. Do not use if any other exception to full and open competition applies. FAR 6.302-1(b).

(6) Limitations. FAR 6.302-1(d).

(a) Must be supported by a written justification and approval (J&A). J&A must be posted on fbo.gov, along with a synopsis (if required), within 14 days after award, and remain up for 30 days. FAR 6.303 thru 6.305. McAfee, Inc. v. United States, 111 Fed. Cl. 696 (2013) (sustaining protest where the Air Force's discrete procurement actions consisting of in-scope modifications and brand name solicitations implemented a broader scheme of standardization that evidenced a predicate decision to adopt a sole source system *without* the required J&A).

(b) Must publish noticed required by FAR 5.201 and consider any bids, proposals, quotations, or capability statements received.

b. Unusual or Compelling Urgency. 10 U.S.C. § 2304(a)(2); 41 U.S.C. § 3304(c)(2); FAR 6.302-2; DFARS 206.302-2; AFARS 5106.302-2.

(1) An agency is not required to provide for full and open competition if:

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

(b) The government will be seriously injured, financially or otherwise, unless the agency can limit the number of sources from which it solicits offers.

(2) The DFARS Procedures, Guidance, and Information (PGI) 206.302-2 provide circumstances under which unusual and compelling urgency may be appropriate. They include, but are not limited to:

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

(b) Essential equipment or repair needed at once to–

(i) Comply with orders for a ship

(ii) Perform the operational mission of an aircraft, or

(iii) Preclude impairment of launch capabilities or mission performance of missiles or missile support equipment.

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

(d) Purchase requests citing an issue priority designator under DOD 4140.1-R, DOD Materiel Management Regulation, of 4 or higher, or citing "Electronic Warfare QRC Priority."

(3) Limitations.

(a) Must be supported by a J&A which may be made and approved after contract award. The J&A must be published to fbo.gov within 30 days of contract award, and remain posted for 30 days. FAR 6.302-2(c)(1) and 6.305(b).

(b) Agencies must request offers from as many sources as practicable under the circumstances. FAR 6.302-2(c)(2); Pegasus Global Strategic Solutions, Inc., Comp. Gen. B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (holding that although the agency must request offers from as many as sources as practicable, the agency may properly not consider offers from those firms that it reasonably believes cannot perform the work in a combat environment); Bausch & Lomb, Inc., Comp. Gen. B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 (sustaining protest where the agency could not explain why there was not time to open the competition to a limited number of offerors on an expedited basis).

(c) Period of Performance. FAR 6.302-2(d). For acquisitions greater than the simplified acquisition threshold, the period of performance:

(i) May not exceed the time necessary:

a. To meet the unusual and compelling requirements of the work to be performed under the contract; and

b. For the agency to enter into another contract for the required goods and services through the use of competitive procedures.

(ii) May not exceed one year unless the head of an agency entering into the contract determines that exceptional circumstances apply.

(4) Common situations. Camden Shipping Corp., B-406171, B-406323, Feb. 27, 2012, 2012 CPD ¶ 76 (allowing a "bridge contract" where only the incumbent could ensure uninterrupted operation of the vessel); Pegasus Global Strategic Solutions, LLC, Comp. Gen. B 400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (upholding out-of-scope modification of counter improvised explosive device electronic warfare system contract on the basis of an unusual and compelling urgency); T-L-C Sys., Comp. Gen. B-400369, Oct. 23, 2008, 2008 CPD ¶ 195 (finding that failure of fire alarm system justified sole source award of contract limited to only those fire alarms which malfunctioned); J&J Colombia Serv., Comp. Gen. B-299595.3, June 26, 2007, 2007 CPD ¶ 126 (upholding award of sole-source bridge contract where award of a long-term contract was delayed by litigation and agency reasonably determined that only the incumbent contractor could perform the urgently required services.

(5) Common Problems. RBC Bearings, Inc., Comp. Gen. B-401661, Oct. 27, 2009, 2009 CPD ¶ 207 (disapproving agency's actions where an agency failure to approve an alternative source caused the lack of advanced planning and created the unusual and compelling urgency); Bausch & Lomb, Inc., Comp. Gen. B-298444, Sept. 21, 2006, 2006 CPD ¶ 135 (sustaining protest where the agency could not explain why there was not time to open the competition to a *limited number of offerors* on an expedited basis);

Signals and Sys., Inc., Comp. Gen. B-288107, Sept., 21, 2001, 2001 CPD ¶168 (stating that an "urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement." Since the Army did not know how many items it needed to replace, the Army also could not know what "minimum quantity" it needed. Further, the Army made no reasonable effort to discover how many items would have to be replaced. Therefore, GAO sustained the protest that the Army purchased more units than were necessary); National Aerospace Group, Inc., Comp. Gen. B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 (finding that agency documentation failed to show that need was of an unusual and compelling urgency).

c. Industrial Mobilization; Engineering, Developmental, or Research Capability; or Expert Services. 10 U.S.C. § 2304(c)(3); 41 U.S.C. § 3304(a)(3); FAR 6.302-3; AFARS 5106.302-3.

(1) An agency is not required to provide for full and open competition if it must limit competition to:

(a) Maintain facilities, producers, manufacturers, or suppliers to furnish supplies or services in the event of a national emergency or industrial mobilization. Ridgeline Ind., Inc., B-402105, Jan. 7, 2010, 2010 CPD ¶ 22 (approving of DLA's use of FAR 6.302-3 to purchase tents from one vendor, who was one of only six military specification tent vendors in the nation, to ensure the companies continued viability); Coulson Aviation (USA) Inc., Comp. Gen. B-409356.2-6), Mar. 31, 2014 (finding that a sole source award for industrial mobilization lacked adequate justification when the J&A was devoid of evidence that the awardee required a contract to remain a viable source of supply).

(b) To establish or maintain an essential engineering, research or development capability to be provided by an educational institution, nonprofit institution, or federally funded research and development center, or

(c) Acquire the services of an expert or neutral person for any current or anticipated litigation or dispute. See SEMCOR, Inc., B-279794, July 23, 1998, 98-2 CPD ¶ 43 (defining "expert").

(2) Limitations. Must be supported by a written J&A posted to fbo.gov within 14 days of the award, and remain for 30 days. FAR 6.302-3(c).

d. International Agreement. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 3304(a)(4); FAR 6.302-4.

(1) An agency is not required to provide for full and open competition if it is precluded by:

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

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

(2) Limitations. Except for DOD, NASA, and the Coast Guard, must be supported by a written J&A posted to the GPE for 30 days. FAR 6.302-4(c). For DOD, the head of the contracting activity must prepare a document describing the terms of an agreement, treaty, or written directions, such as a Letter of Offer and Acceptance in a Foreign Military Sales case, that have the effect of requiring the use of other than competitive procedures. DFARS 206.302-4.

e. Authorized or required by statute. 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 3304(a)(5); FAR 6.302-5; DFARS 206.302-5.

(1) An agency is not required to provide for full and open competition if:

(a) A statute authorizes or requires the agency to procure the supplies or services from another agency or a specified source.[1] OR

(i) Federal Prison Industries 18 U.S.C. § 4124; FAR Subpart 8.6;

(ii) Qualified Non-profit Agencies for the Blind or other severally disabled. 41 U.S.C. §§ 8501-8506; FAR Subpart 8.7.

(iii) Government Printing and Binding. 44 U.S.C. §§ 501-504, FAR Subpart 8.8.

(iv) Sole source awards under Section 8(a). 15 U.S.C. 637; FAR Subpart 19.8.

(v) Sole source awards under the HUBZone Act. 15 U.S.C. 657a; FAR 19.1306.

(vi) Sole source awards under the Veterans Benefits Act of 2003. 15 U.S.C. 657f.

(b) The agency needs a brand name commercial item for authorized resale by a commissary or similar facilities. FAR 6.302-5(a)(2) and (c)(3).

(2) Limitations: Contracts awarded using this authority must be supported by a J&A posted to the GPE for 30 days except:

(a) Brand name commercial items for authorized resale (e.g., commissary);

(b) Qualified Non-profit Agencies for the Blind or other severally disabled. 41 U.S.C. §§ 8501-8506; FAR Subpart 8.7.

(c) Sole source awards under the 8(a) Program. 15 U.S.C. § 637; FAR Subpart 19.8. But see FAR 6.303-1(b) (requiring a J&A for sole source

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

procurements in excess of $20 million under the 8(a) program).

(d) Situations where a statute expressly requires the procurement be made from a specified source. If a statute only authorizes the procurement, a J&A must be prepared. FAR 6.302-5(c)(2).

(3) Contingency Contracting Authorities. To bolster operations Afghanistan, Congress created statutory exceptions to the use of full and open competition in certain well-defined circumstances. These exceptions to competition do not fit neatly within the FAR Part 6 framework, often intermixing set-asides (FAR Subpart 6.2) with other than full and open competition (FAR Subpart 6.3). Primary authorities include:

(a) Afghanistan First Program.

(i) Authority. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3, 266 (Jan. 28, 2008) as amended by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §842, 126 Stat. 1632 (Jan. 2, 2013) (striking Iraq).

(ii) Authorizes a preference or set-aside for goods or services from Afghanistan as well as the use of other than competitive procedures to award a contract to a particular source or sources from Iraq or Afghanistan.

(iii) Requires written determinations as set forth in DFARS 225.7703-2. A J&A is not required. 225.7703-1(b).

(iv) See Kuwait Leaders Gen. Trading & Contracting Co., Comp. Gen. B-401015.2, May 21, 2009, 2009 CPD ¶ 113 (finding that agency properly excluded non-Iraqi business from a competition while the preference for Iraq was still in effect).

(v) But see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 892, 122 Stat. 3, 270, codified at 10 U.S.C. § 2304 note (requiring the use of full and open competition for the acquisition of small arms supplied to Afghanistan).

(b) Temporary Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan.

(i) Authority. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 801, 123 Stat. 2 as amended by the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §841, 126 Stat. 1845 (Jan. 2, 2013). Implemented at DFARS 225.7704 and 225.7799

(ii) Authorizes limiting competition to or establishing a preference for products and services that are from one or more countries along a major route of supply to Afghanistan.

(iii) Requires a written determination (as opposed to a J&A.)

(iv) Covered counties include Georgia, Kyrgyzstan, Pakistan, Armenia, Azerbaijan, Kazakhstan, Tajikistan, Uzbekistan, and. Turkmenistan

(v) Authority expires on December 31, 2015. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §832, 127 Stat. 814 (Jan. 2, 2013).

(vi) This authority is in addition to the authority for the Afghanistan First Program.

f. National Security. 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 3304(a)(6); FAR 6.302-6. An agency is not required to provide for full and open competition if disclosure of the government's

needs would compromise national security (e.g., would violate security requirements). However, the mere fact that an acquisition is classified, or requires contractors to access classified data to submit offers or perform the contract, does not justify limiting competition. Contracts awarded under this exception require a written Justification and Approval as described in subpart 6.303. Agencies are still required to request offers from as many potential sources as practicable under the circumstances.

g. Public Interest. 10 U.S.C. § 2304(c)(7); 41 U.S.C.§ 3304(a)(7); FAR 6.302-7; DFARS 206.302-7. An agency is not required to provide for full and open competition if the agency head determines that full and open competition is not in the public interest.

(1) The agency head must support the determination to use this authority with a written D&F. The D&F must be made on an individual basis, not a class basis.

(2) The agency must notify Congress at least 30 days before contract award. Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000) (holding that NASA's use of the public interest exception required Congressional **notice**, and not Congressional **consent**). See also Spherix, Inc. v. United States, 58 Fed. Cl. 351 (2003).

(3) May not be used if any other authority in FAR 6.302 applies. But see, Sikorsky Aircraft Corp, B-403471.3, Nov. 5, 2010, 2010 CPD ¶ 271 (finding agency decision to purchase M-17 aircraft for the Afghani Army using FAR 6.302-7 over 6.302-1 reasonable and therefore unobjectionable).

3. The use of Other than Full and Open Competition requires written documentation to explicitly state why one of the exceptions applies. Exceptions one (one source) through six (national interest) require J&As for Other Than Full and Open Competition except as expressly provided in FAR 6.302 and discussed supra in Section II.E.2.(e) See FAR 6.303; FAR 6.304; DFARS 206.303; DFARS 206.304; AFARS 5106.303; AFARS 5106.304. Exception seven (public interest) requires a determination and finding as previously described supra in Section II.E.2.g.

a. Basic Requirements. 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. FAR 6.303-1(a).

(1) Individual v. Class Justification. FAR 6.303-1(d); AFARS 5106.303-1(c). The contracting officer must prepare the justification on an individual basis for contracts awarded pursuant to the "public interest" exception (FAR 6.302-7). Otherwise, the contracting officer may prepare the justification on either an individual or class basis.

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

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

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

b. Contents. FAR 6.303-2; DFARS 206.303-2; AFARS 5106.303-2 and 5106.303-2-90.

(1) Format. AFARS 5153.9005.[3]

(2) The J&A should be a stand-alone document. FAR 6.303-2; Sabreliner Corp., Comp. Gen. B-288030, Sep. 13, 2001, 2001 CPD ¶ 170 (holding that inaccuracies and inconsistencies in the J&A and between the J&A and other documentation invalidated the sole source award). But see, Argon ST, Inc, B-402908.2, Aug. 11, 2010, 2011 CPD ¶ 4 (rejecting a challenge to a J&A despite a clear error of fact, as the rest of the J&A supports the use of 6.302-2).

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

[2] If the contract exceeds $85.5 million, the agency must forward the justification to the approval authority no later than 7 calendar days after contract award. AFARS 5106.303-1(d).

[3] The format specified in AFARS 5153.9005 is mandatory for contract actions greater than $78.5 million. Note that as of 1 May 2012, the AFARS has not been updated to reflect the statutorily required inflation adjustment to $85.5 million.

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

(3) At a minimum, under FAR 6.303-2(b), the justification must:

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

(b) Describe the action being approved;

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

(d) Identify the applicable statutory exception;

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

(f) Describe the efforts made to solicit offers from as many potential sources as practicable, including whether a notice was or will be published as required by FAR Subpart 5.2, and if not, which exception under FAR 5.202 applies;

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

(h) Describe any market research conducted (see FAR Part 10), or state why no market research was conducted;

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

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

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

(iii) Data, estimated costs, or other rationale to explain the nature and extent of the potential injury to the government if the cited exception is the "unusual and compelling urgency" exception (FAR 6.302-2).[4]

(j) List any sources that expressed an interest in the acquisition in writing;[5]

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

(l) Include a certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief. FAR 6.303-1(b); DFARS 206.303-1(b).

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

c. Approval. FAR 6.304(a); DFARS 206.304; AFARS 5106.304.

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

(2) Approving officials.

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[4] The justification should include a description of the procurement history and the government's plan to ensure that the prime contractor obtains as much competition as possible at the subcontractor level in single source acquisitions. AFARS 5153.9005.

[5] If applicable, state: "To date, no other sources have written to express an interest." In sole source acquisitions, if other sources expressed an interest, explain why the other sources were rejected. AFARS 5153.9005. See Centre Mfg. Co., Comp. Gen. B-255347.2, Mar. 2, 1994, 94-1 CPD ¶ 162 (denying protest where agency's failure to list interested sources did not prejudice protester).

(a) The approval official for proposed contract actions not exceeding $650,000 is the contracting officer.

(b) The approval official for proposed contract actions greater than $650,000, but not exceeding $12,500,000, is normally the competition advocate.

(c) The approval official for proposed contract actions greater than $12,500,000, but not exceeding $62,500,000 (most agencies) or $85,500,000 (DOD, NASA, Coast Guard) is the head of the contracting activity or his designee.[6]

(d) The approval official for proposed contract actions greater than $62,500,000 (most agencies) or $85,500,000 (DOD, NASA, Coast Guard) is the agency's senior procurement executive.[7]

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

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

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

d. Requirement to Amend the Justification. AFARS 5106.303-1-90. Prior to contract award, the contracting officer must prepare an amended J&A if:

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[6] The designee must be a general officer, a flag officer, or in a grade above GS15. FAR 6.304(a)(3).

[7] "Senior Procurement Executive" means: Under Secretary of Defense (Acquisition, Technology, and Logistics); Assistant Secretary of the Army (Acquisition, Technology, and Logistics); Assistant Secretary of the Navy (Research, Development and Acquisition); Assistant Secretary of the Air Force (Acquisition). DFARS 202.101. The directors of the defense agencies have been delegated authority to act as senior procurement executives for their respective agencies. (The list of agencies is found in DFARS 202.101.) See also DFARS 206.304.

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

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

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

III. IMPLEMENTATION OF COMPETITION REQUIREMENTS

A. Competition Advocates. 41 U.S.C. § 1705; FAR Subpart 6.5; AFARS Subpart 5106.5; U.S. Dep't of Army, Reg. 715-31, Army Competition Advocacy Program (9 Jun2 1989) [hereinafter AR 715-31].

1. Requirement. FAR 6.501; AFARS 5106.501. The head of each agency must designate a competition advocate for the agency itself, and for each procuring activity within the agency.[8] The designated officer or employee must:

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

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

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

2. Duties and Responsibilities. FAR 6.502. Competition advocates generally must promote the acquisition of commercial items and the use of full and open competition as well as challenge barriers to

[8] The Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA(ALT)) appoints the Army Competition Advocate General. The Deputy Assistant Secretary of the Army for Procurement (SAAL-ZP) is the Army Competition Advocate General (ACAG). The ACAG has delegated to HCAs the authority to appoint the Special Competition Advocates (SCAs) at Army procuring activities and their alternates. This authority shall not be redelegated. Designation of competition advocates at contracting offices subordinate to contracting activities must depend on the nature of the contracting mission of the office, the volume of significant contracting actions, the complexity of acquisition planning and other responsibilities of such local advocates. Competition advocates may be appointed on a part-time basis. AFARS 5106.501.

competition. For example, competition advocates must challenge unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

a. Agency Competition Advocate. FAR 6.502(b). The agency competition advocates must:

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

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

(3) Recommend goals and plans for increasing competition.

b. Special Competition Advocates. AFARS 5106.502; AR 715-31, para. 1.13. In the Army, HCAs appoint Special Competition Advocates at procuring activities. Their duties include, but are not necessarily limited to, the duties set forth in FAR 6.502 and AFARS 5106.502.

c. Local Competition Advocates. AFARS 5105.501; AR 715-31, para. 1.14.

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

B. Acquisition Planning. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. § 3306; 41 U.S.C. § 3307; FAR Part 7; DFARS Part 207.

1. "Acquisition planning" is the process of coordinating and integrating the efforts of the agency's acquisition personnel through a comprehensive plan that provides an overall strategy for managing the acquisition and fulfilling the agency's need in a timely and cost effective manner. FAR 2.101.

2. Proper acquisition planning should include communications with industry. See Memorandum from Office of Federal Procurement

Policy, "Myth-Busting": Addressing Misconceptions To Improve Communication With Industry During the Acquisition Process, (February 2, 2011), available at http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf; Memorandum from Office of Federal Procurement Policy, "Myth-Busting 2": Addressing Misconceptions To Improve Communication With Industry During the Acquisition Process, (May 2, 2012), available at http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/myth-busting-2-addressing-misconceptions-and-further-improving-communication-during-the-acquisition-process.pdf.

3. In accordance with FAR 7.102(a), agencies must perform acquisition planning and conduct market research (see FAR Part 10) for all acquisitions to promote (FAR 7.102(a)):

   a. The acquisition of commercial or nondevelopmental items to the maximum extent practicable (10 U.S.C. § 2377; 41 U.S.C. § 3307(d)); and

   b. Full and open competition (or competition to the maximum extent practicable). 10 U.S.C. § 2305(a)(1)(A); 41 U.S.C. § 3306(a)(1)); 41 U.S.C. § 3307(b).

4. Agencies must integrate the efforts of all personnel for significant aspects of the procurement in order to meet the Government's needs in the most effective, economical, and timely manner. FAR 7.102(b).

5. Acquisition planning should begin as soon as the agency identifies its needs. Wherever possible, agency personnel should avoid issuing requirements on an urgent basis, or with unrealistic delivery or performance schedules, as these generally restrict competition and increase prices. FAR 7.104.

6. Written acquisition plans are not required for every acquisition. FAR 7.103(d). However the DFARS requires a written acquisition plan for (DFARS 207.103(d)(i)):

   a. Development acquisitions (as defined in FAR 35.001—Research and Development Contracting) when the total cost of all contracts for the acquisition program is estimated at $10 million or more;

   b. Production and service acquisitions when the total cost of all contracts for the acquisition program will be $50 million or more for all years or $25 million or more for any fiscal year; and

c. Other acquisitions that the agency considers appropriate.

d. The specific contents of a written acquisition plan will vary; however, it must identify decision milestones and address all the technical, business, management, and other significant considerations that will control the acquisition. FAR 7.105; DFARS 207.105. In general it addresses the acquisition background (statement of need) and the plan of action.

C. Market Research. 10 U.S.C. § 2305; 10 U.S.C. § 2377; 41 U.S.C. §3306; 41 U.S.C. § 3307; FAR Part 10.

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

2. The process begins with a description of the Government's needs stated in terms sufficient to allow contracting personnel to conduct market research. FAR 10.002(a).

3. When conducting market research, agencies should not request potential sources to submit more than the minimum information necessary. FAR 10.001(b)

4. Policy. FAR 10.001. Agencies must conduct market research "appropriate to the circumstances" before:

a. Developing new requirements documents by the agency;

b. Soliciting offers for acquisitions with an estimated value that exceeds the simplified acquisition threshold;

c. Soliciting offers for acquisitions with an estimated value of less than the simplified acquisition threshold if adequate information is not available and the circumstances justify the cost;

d. Soliciting offers for acquisitions that could lead to a bundled contract (15 U.S.C. § 644(e)(2));

e. Awarding a task or delivery order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract (*e.g.*, GWACs, MACs) for a noncommercial item in excess of the simplified acquisition threshold; and

f. On an ongoing basis, take advantage (to the maximum extent practicable) of commercially available market research methods in order to effectively identify the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency in furtherance of-

(1) A contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and

(2) Disaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities.

(3) See DNO Inc., Comp. Gen. B-406256, Mar. 22, 2012, 2012 CPD ¶ 136 (protest challenging the agency's decision not to set aside for small business concerns was sustained when the agency failed to perform adequate market research to ascertain whether two responsible small businesses would submit offers).

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

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

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

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

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

(5) Ensure maximum practicable use of recovered materials (see Subpart 23.4) and promote energy conservation and efficiency;

(6) Whether bundling is necessary and justified (see 15 U.S.C. 644(e)(2); FAR 7.107); and

(7) Assess the availability of electronic and information technology that meets all or part of the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR Part 1194 (see Subpart 39.2).

5. Procedures. FAR 10.002. The extent of market research will vary, but involves obtaining information specific to the item being acquired. It should include:

   a. Whether the Government needs can be met by:

   b. Items customarily available in the commercial marketplace. See Verizon Wireless, Comp. Gen. B-406854, Sept. 17, 2012, 2012 CPD ¶ 260 (sustaining a protest where the agency failed to perform adequate market research in support of the terms of a solicitation for commercial products and services).

   c. Commercial Items that may be modified.

   d. Items used exclusively for governmental purposes.

   e. Customary practices regarding customizing, modifying, or tailoring items to meet customer needs.

   f. Customary practices for things like warranty, buyer financing, discounts, contract type considering the nature and risk associated with the requirement etc. under which commercial sales of the product or services are made.

   g. Requirements of any laws and regulations unique to the item being acquired.

   h. Availability of items that contain recovered materials and items that are energy efficient.

   i. Distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates.

   j. Size and status of potential sources.

6. Acceptable market research techniques include:

   a. Contacting knowledgeable government and/or industry personnel;

   b. Reviewing the results of market research for the same or similar supplies or services;

   c. Publishing formal requests for information;

   d. Querying government data bases;

   e. Participating in interactive, on-line communications with government and/or industry personnel;

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

g. Reviewing catalogs and other product literature;

h. Conducting interchange meetings; and/or

i. Holding presolicitation conferences with potential offerors.

D. Developing Specifications. 10 U.S.C. § 2305; 41 U.S.C. § 3306(a); FAR Part 11; DFARS Part 211.

1. Types of Specifications.

a. Design specifications. Specifications that set forth precise measurements, tolerances, materials, in-process and finished product tests, quality control measures, inspection requirements, and other specific information. Ralph C. Nash et al., The Government Contracts Reference Book 196 (3d Ed. 2007).

b. Performance specifications. Technical requirements that set forth the operational characteristics of an item. They indicate what the final product must be capable of accomplishing rather than how the product is to be built or what its measurements, tolerances, or other design characteristics must be. Ralph C. Nash et al., The Government Contracts Reference Book 432 (3d Ed. 2007).

c. Purchase descriptions. A description of the essential physical characteristics and functions required to meet the government's requirements. Ralph C. Nash et al, The Government Contracts Reference Book 468 (3d Ed. 2007). E.g., Brand Name or Equal Purchase Description identifies a product by its brand name and model or part number or other appropriate nomenclature by which it is offered for sale and permits offers on products essentially equal to the specified brand name product. FAR 11.104

d. Mixed specifications.

2. Policy. Agencies are required to develop specifications that (FAR 11.002(a)):

a. Permit full and open competition;

b. State the agency's minimum needs; and

c. Only include restrictive provisions or conditions to the extent they satisfy the agency's needs or are authorized by law. See 10 USC § 2305(a)(1)(B). See, e.g., Cryo Technologies, B-406003, Jan. 18, 2012, 2012 CPD ¶ 29 (holding the solicitation requirement to be reasonably necessary to meet the agency's needs); CESC Skyline, LLC, Comp. Gen. B-402520, May 3, 2010, 2010 CPD ¶ 101 (rejecting protestor's contention that accelerated occupancy deadlines for leased space in a solicitation was unduly restrictive of competition).

d. To the maximum extent practicable, acquisition officials shall:

(1) State requirements for supplies and services in terms of functions to be performed, performance required; or essential physical characteristics.

(2) Define requirements in terms that encourage offerors to supply commercial and non-developmental items.

3. Compliance with statutory and regulatory competition policy.

a. Specifications must provide a common basis for competition.

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

4. Common Pre-Award Problems Relating to Specifications.

a. Brand Name or Equal Purchase Descriptions.

(1) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances. FAR 11.104(a).

(2) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those ***salient*** physical, functional, or performance characteristics of the brand name item that an "equal" item must meet to be acceptable for award.

Use brand name or equal descriptions when the salient characteristics are firm requirements. FAR 11.104(b).

(3) Failure of a solicitation to list an item's salient characteristics improperly restricts competition by precluding potential offerors of equal products from determining what characteristics are considered essential for its item to be accepted, and cancellation of the solicitation is required. California Industrial Facilities Resources, Inc., d/b/a CAMSS Shelters, B-403397.3, Mar., 21, 2011, 2011 CPD ¶ 71; Critical Process Filtration, Inc., Comp. Gen. B-400750, Jan. 22, 2009, 2009 CPD ¶ 25; T-L-C Sys, Comp. Gen. B-227470, Sept. 21, 1987, 87-2 CPD ¶ 283; But see MediaNow., Inc, B-405067, Jun. 28, 2011, 2011 CPD ¶ 133 (upholding a rejection of "equal" products when their "equal" did not meet all of the salient characteristics).

(4) November 28, 2007 and December 19, 2007 memoranda from the Office of Federal Procurement Policy restricting the use of "brand name or equal" unless advantageous or necessary to meet agency needs, available at www.whitehouse.gov/omb/procurement_index_memo

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

(1) The particular brand name**,** product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs;

(2) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1); and

(3) The basis for not providing for maximum practicable competition is documented in the file when the acquisition is awarded using simplified acquisition procedures. FAR 11.105.

c. Unduly Restrictive Specifications.

(1) Specifications must promote full and open competition. Agencies may only include restrictive provisions to meet their minimum needs. 10 U.S.C § 2305(a)(1)(B); 41 U.S.C. § 3306(a)(2)(B). See Bristol Group, Inc.-Union Station Venture, Comp. Gen B-298110, Jun. 2, 2006, 2006 CPD ¶ 89 (finding a requirement that office space be within 2500 walkable linear feet of amenities was reasonable given the employees only had 30 minutes for lunch); Paramount Group, Inc., Comp. Gen. B-298082, Jun. 15, 2006, 2006 CPD ¶ 98 (requirement for preexisting individual offices to be torn down to create a large open spaced office for the agency to configure its offices reasonable given that it provided the agency flexibility and it allowed the agency to more easily compare the offers); and Northwest Airport Management, LP, B-404098.2, Jan. 5, 2011, 2011 CPD ¶ 1 (finding the restrictive specifications concerning "unique and special lease requirements" reasonably relate to the agency's need).

(2) Common examples of restrictive specifications:

(a) Specifications written around a specific product. MadahCom, Inc., Comp. Gen. B-298277, Aug. 7, 2006, 2006 CPD ¶ 119 (declaring a requirement for APCO 25 standard for radio transmissions as unduly restrictive for a mass notification system since they agency was unable to articulate how the requirement was reasonably related to the system); Ressler Assoc., Comp. Gen. B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230; and Desktop Alert, Inc., B-408196, Jul., 22, 2013 (finding a requirement for AtHoc software as unduly restrictive for a mass notification system since they agency was unable to articulate how the requirement was reasonably related to the system).

(b) Geographical restrictions that limit competition to a single source and do not further a federal policy. But see, e.g., Marlen C. Robb & Son Boatyard & Marina, Inc., Comp. Gen. B-256316, June 6, 1994, 94-1 CPD ¶ 351 (denying the protest and providing "an agency properly may restrict a procurement to offerors within a

specified area if the restriction is reasonably necessary for the agency to meet its needs. The determination of the proper scope of a geographic restriction is a matter of the agency's judgment which we will review in order to assure that it has a reasonable basis."); and H & F Enterprises, Comp. Gen. B-251581.2, July 13, 1993, 93-2 CPD ¶ 16.

(c) Specifications that exceed the agency's minimum needs. Total Health Resources, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 (finding a requirement for the prime contractor, and not a subcontractor, to possess the requisite counseling experience as unduly restrictive); Iyabak Construction, LLC, B-409196, Feb. 6, 2014 (finding the refusal to consider affiliate experience, even when offerors demonstrate the affiliate will participate meaningfully, unduly restrictive when the agency fails to provide a reasonable basis);. But see Emax Financial, B-408260, Jul. 25, 2013, (denying a protest where the Navy more favorably rated offerors with program specific experience because the restrictive specification reasonable related to the agency's need).

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

(e) Improperly bundled specifications. Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; EDP Enterprises, Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93 (bundling food services, with the "unrelated base, vehicle and aircraft maintenance services," restricted competition; because the agency bundled the requirements for administrative convenience, the specification violated the CICA). But see AirTrak Travel,

Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117; and USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224 (denying in both decisions allegations that bundled specifications violated CICA, because the agencies convinced GAO that mission-related reasons justified bundling requirements).

d. Ambiguous Specifications.

(1) Specifications or purchase descriptions that are subject to two or more reasonable interpretations are ambiguous and require the amendment or cancellation of the solicitation. Guzar Mirbachakot Transportation v. US, No. 11-519C (COFC) Mar. 29, 2012 (holding that the solicitation that required the documents to be turned in as MS Word files, or Adobe PDF files was ambiguous as to whether a zipped file of MS Word and Adobe PDF files was acceptable) CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 (stating a contracting agency must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis); and Aurora Group, Inc., Comp. Gen. B-288127, Sep. 14, 2001, 2001 CPD ¶ 154. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD 109.

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

(a) Adequacy of competition.

(b) Contract interpretation.

(c) Constructive change.

E. Publicizing Contract Actions. 41 U.S.C. § 1708; FAR Part 5; DFARS Subpart 205.

1. Policy. FAR 5.002. Publicizing contract actions increases competition. FAR 5.002(a). But see Interproperty Investments, Inc., Comp. Gen. B-281600, Mar. 8, 1999, 99-1 CPD ¶ 55 (holding that an agency's diligent good-faith effort to comply with publicizing requirements was sufficient); and Aluminum Specialties, Inc. t/a Hercules Fence Co., Comp. Gen. B-281024, Nov. 20, 1998, 98-2 CPD

¶ 116 (holding that there was no requirement for the agency to exceed publicizing requirements, even if it had done so in the past).

2. See 2014 Contract Attorney's Deskbook, Chapter 34, Responsibility, Timeliness, and Organizational Conflicts of Interest for more information.

IV. WHEN FAR PART 6 DOES NOT APPLY

A. The provisions of FAR Part 6 do not apply to certain types of procurements. FAR 6.001. The FAR provisions that govern these types of procurements set forth the applicable competition requirements:

1. Simplified acquisitions.

a. Acquisitions made using simplified acquisition procedures are exempt from the competition requirements of FAR Part 6. FAR 6.001(a); FAR Part 13. FAR Part 13 details the reduced competition requirements applicable to simplified acquisitions, to include the limited determinations the contracting officer must make to solicit from a single source. FAR 13.106-1(b).

b. An agency may neither improperly fragment its requirements in order to use simplified acquisition procedures nor may it use simplified acquisition procedures for requirements that should reasonably be valued above the simplified acquisition threshold to avoid the requirement for full and open competition. Critical Process Filtration, Inc., Comp. Gen. B-400750, Jan. 22, 2009, 2009 CPD ¶ 25.

2. Contracts awarded using contracting procedures (other than those addressed in FAR Part 6) authorized by statute. FAR 6.001(b).

a. For example, personal service contracts for health care, as authorized by 10 U.S.C. § 1091, fall within this exception. See DFARS 206.001(b) and 237.104(b)(ii).

b. This specific exemption does not address 18 U.S.C. §§ 4121-4128 and FAR Subpart 8.6 (acquisitions from Federal Prison Industries); 41 U.S.C. § 259(b)(3) and FAR Subpart 8.4 (Federal Supply Schedules); or 41 U.S.C. §§ 46-48c and FAR Subpart 8.7 (acquisitions from nonprofit agencies employing people who are blind or severely disabled), which were discussed in Section II.E.2(e) of this deskbook.

3. Contract modifications within the scope and under the terms of an existing contract, to include the exercise of priced options that were

evaluated as part of the initial competition. FAR 6.001(c) and 17.207(f).

a. Rationale. The existing contract against which a modification is made was awarded in accordance with FAR Part 6. Since an in-scope modification lies within the scope and terms of the existing contract, it is not again subject to FAR Part 6. Overseas Lease Group, Inc., Comp. Gen. B-402111, Jan. 19, 2010, 2010 CPD ¶ 34 (finding that a lease for non-tactical and up-armored vehicles included within its terms unarmored vehicles and stating that contract modifications are beyond GAO's bid protest jurisdiction unless the modification is outside the scope of the original contract). See AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (asking "whether the changed contract is materially different from the competed contract?" and holding that a modification adding T3 circuits was within the scope of a comprehensive contract for telecommunication services). See also Ceradyne, Inc. v. United States, 103 Fed. Cl. 1, 2 (Fed. Cl. 2012).

b. Out-of-Scope Modifications. Contract modifications beyond the scope of an existing contract must be awarded in accordance with FAR Part 6. Pegasus Global Strategic Solutions, Inc., Comp. Gen. B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 (approving FAR Part 6 sole source, out-of-scope modification to an existing contract on the basis of an unusual and compelling urgency following agency's prior failed attempt to characterize the modification as an in-scope change to the existing contract).

(1) Options.

(a) To fall within this exception to FAR Part 6, options must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract. FAR 6.001(c) and 17.207(f); see Magnum Opus Techs., Inc. v. United States, 94 Fed.Cl. 512 (2010) (enjoining Air Force from exercising future options under multiple award ID/IQ contract and directing a future competition under FAR Part 6 where "not to exceed pricing" was removed from options after contract award resulting in an undeterminable price for the options in violation of FAR 17.207(f)).

(b) If the option was not evaluated as part of the initial competition, to include an option to extend services under FAR Clause 52.217-8, then exercise of the option is subject to the competition requirements of FAR Part 6 as opposed to the more limited determinations contained in FAR 17.207. See Major Contracting Serv., Inc., Comp. Gen. B-401472, Sept. 14, 2009, 2009 CPD ¶ 170, aff'd upon reconsideration Dep't of Army—Reconsideration, Comp. Gen. B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 (determining that an unpriced option to extend services under FAR Clause 52.217-8 was not evaluated as part of the initial competition and therefore was subject to the competition requirements of FAR Part 6). For a discussion of the determinations required before exercise of a properly evaluated option, see FAR 17.207; Nutriom, LLC, Comp. Gen. B-402511, May 11, 2010, 2010 WL 1915264.

4. Orders placed under requirements, definite-quantity contracts, and indefinite quantity contracts, and orders placed against task order and delivery order contracts entered into pursuant to FAR 16.5.

a. Requirement and definite quantity contracts. FAR 6.001(d); FAR 16.502 to 16.503.

b. Orders placed under indefinite quantity contracts that were entered into pursuant to FAR Part 6 when:

(1) The contract was awarded under FAR 6.1 (Full and Open Competition) or 6.2 (Full and Open Competition After Exclusion of Sources) and all responsible sources were realistically permitted to compete for the requirements contained in the order; or

(2) The contract was awarded under FAR 6.3 (Other than Full and Open Competition) and the required justification adequately covers the requirements contained in the order. FAR 6.001(e); FAR 16.504.

c. Orders placed against task order and delivery order contracts entered into pursuant to FAR 16.5. Note that while not subject to FAR Part 6, orders placed under multiple award contracts (or MACs) pursuant to FAR Subpart 16.5 have some competition-like requirements based upon the dollar amount of

the order. These competition-like requirements are referred to as a "fair opportunity to be considered."

(1) Orders over $3,000 up to $150,000 require the contracting officer to provide each awardee a relatively minimal "fair opportunity to be considered." See FAR 16.505(b)(1)(i).

(2) Fair opportunity procedures for orders exceeding $150,000 up to $5 million placed by or on behalf of DOD (except architecture engineering services – see FAR Subpart 36.6) require the placement of orders on a "competitive basis." FAR 16.505(b)(1)(iii); DFARS 216.505-70(b). This means that the contracting officer shall provide fair notice of intent to make the purchase, including a description of the supplies or services and the basis on which the contracting officer will make the selection, and afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered. FAR 16.505(b)(1)(iii)(B); DFARS 216.505-70.

(3) Fair Opportunity procedures for orders exceeding $5,000,000 include "Enhanced Competition" under FAR 16.505(b)(1)(iv):

(a) A notice of the task or delivery order that includes a clear statement of the agency's requirement;

(b) A reasonable period of time to provide a proposal in response to the notice;

(c) Disclosure of the significant factors and subfactors, including cost and price, that the agency expects to consider in evaluating such proposals and their relative importance;

(d) In the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

(e) An opportunity for a post-award debriefing. FAR 16.505(b)(1)(iii).

(4) FAR 16.505(b)(2) exceptions to the fair opportunity standard include:

(a) Urgency;

(b) Only one awardee capable of providing the requirement;

(c) Efficiency or logical follow on;

(d) Necessary to achieve the minimum guarantee;

(e) For greater than simplified acquisition threshold, a statute expressly authorizes or requires a specific source;

(f) Contracting officers, at their discretion, set aside an order for a small business concern identified in FAR 19.000(a)(3).

(g) Exceptions are properly justified under FAR 16.505(b)(2)(ii).

d. Rationale. The overarching contract against which the task or delivery order is placed was subject to a FAR Part 6 competition. Since the future issuance of a task and delivery order was necessarily evaluated as part of the original competition, the issuance is not subject to a second round of competition (except as noted above for MACs).

(1) If an order increases the scope, period, or maximum value of the contract under which the order is issued, then the order is subject to FAR Part 6. See FAR 16.505a(10)(i)(A); Datamill, Inc. v. United States, 91 Fed. Cl. 740 (Mar. 23, 2010); DynCorp Int'l, LLC, B-402349, Mar. 15, 2010, 2010 CPD ¶ 39 (holding task order for general law enforcement and counter insurgency training improperly exceeded the scope of a counter drug task order contract);

(2) Note that GAO now has protest jurisdiction over any order valued in excess of $10 million place against a contract, in addition to the scope-based jurisdiction referenced in subparagraph (1) immediately above. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383 § 825; FAR 16.505(a)(10)(i)(B), National Defense Authorization

Act for Fiscal Year 2012, Pub. L. No. 112-81 § 813. Both extensions are set to sunset September 30, 2016.

e. Federal Supply Schedule (FSS). Directed and managed by the General Services Administration (GSA), the FSS or Multiple Award Schedule (MAS) Program consists of numerous indefinite delivery contracts to provide supplies and services at stated prices for a given period of time. FAR 8.402. Agencies obtain goods and services by placing orders with a schedule contractor utilizing the procedures set forth in FAR Subpart 8.4. Orders placed under the Federal Supply Schedules, utilizing the procedures provided at FAR Subpart 8.4, are considered to be issued using full and open competition. FAR 6.102(d)(3); FAR 8.404(a).

B. The provisions of FAR Part 6 do not apply to reprocurement contracts. FAR 49.402-6.

1. When supplies or services are still required after termination, the contracting officer shall repurchase the same or similar supplies or services at a reasonable price and against the contractor's account as soon as practicable.

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

a. The GAO will review the reasonableness of an agency's acquisition method against the standard specified in FAR 49.402-6(b). See Derm-Buro, Inc., B- 400558, Dec. 11, 2008, 2008 CPD ¶ 226 ("[T]he statutes and regulations governing federal procurements are not strictly applicable to reprocurements of defaulted requirements.").

b. If there is a relatively short period of time between the original competition and the termination for default, it is reasonable to award the subsequent contract to the second or third lowest offeror of the original solicitation at its original price. Vereinigte Gebäudereinigungsgesellschaft, Comp. Gen. B-280805, Nov. 23, 1998, 98-2 CPD ¶ 117 (holding that an agency could modify the contract requirements in its reprocurement without resolicitation); Bud Mahas Constr., B-235261, Aug 21, 1989, 89-2 CPD ¶ 160 (allowing the agency, on reprocurement after T4D to change from a small business set aside to unrestricted).

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

4. Contracting officers may, but are not required to, solicit the defaulted contractor. Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 241 (holding that the agency may properly exclude a defaulted contractor from a reprocurement regardless of whether the T4D is under challenge).

C. The Competition in Contracting Act (and therefore FAR Part 6) does not apply to all federal agencies. CICA does not apply to the U.S. Postal Service, United States v. Elec. Data Sys. Fed. Corp., 857 F.2d 1444, 1446 (Fed. Cir. 1988), or to the Federal Aviation Administration, 49 U.S.C. 40110(d).

V. CONCLUSION

The Competition in Contracting Act establishes a statutory preference for competition that shapes government procurement from acquisition planning, through market research, to developing specifications and publicizing. FAR Part 6 implements this competition preference by establishing three levels of competition: full and open competition; full and open competition after the exclusion of sources; and other than full and open competition.

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Chapter 6
Types of Contracts

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CHAPTER 6

TYPES OF CONTRACTS

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CHAPTER 6

TYPES OF CONTRACTS

I. OBJECTIVES

Following this block of instruction, the student should:

1. Understand the common contract types by structure.

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

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

4. Recognize a Cost-Plus-Percentage-of-Cost contract and understand it is a prohibited contract type.

II. GENERAL INFORMATION

A. Why Types? A wide selection of contract types is available to the government in order to provide needed flexibility in acquiring the large variety and volume of supplies and services required by agencies. FAR 16.101(a). Contract types vary according to:

1. The degree and timing of the responsibility assumed by the contractor for the costs of performance; FAR 16.101(a)(1) and

2. The amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals. FAR 16.101(a)(2).

B. Categories. Contract Types can be categorized by Structure and also by Price.

1. When categorized by structure, there are basic contracts with or without option years, indefinite delivery contract structures, letter contracts and basic ordering or purchasing agreements (covered in the simplified acquisition instruction).

2. When categorized by price, there are two basic types of contracts: Fixed-Price Contract Types and Cost Reimbursement Contract Types. FAR 16.101(b). The selection of contract type's price structure will allocate risk to either the government or the contractor. Firm fixed price contracts allocate to the contractor the full responsibility for the

performance costs and resulting profit (or loss). Cost contracts allocate minimal responsibility for the contractor to control costs. For more discussion, see figure 10 on page 61 and the discussion on selection of contract types.

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

III. CONTRACT TYPES – CATEGORIZED BY STRUCTURE.

A. Base Contract + Option Periods.

1. Base Contract. Most contracts are awarded with a base contract period and one or more option periods. A common structure is a one fiscal year base contract with four one-fiscal-year options where each option may be unilaterally exercised at the government's option during a specified period of time.

2. Definition of an Option. FAR 17.201. 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.

3. Total Contract Period.

   a. Generally, a contract, including all options, may not exceed five years. See FAR 17.204(e). See also 10 U.S.C. § 2306b and FAR Subpart 17.1 (limiting multi-year contracts); 10 U.S.C. § 2306c and FAR 17.204(e) (limiting certain service Ks); 41 U.S.C. § 6707(d) and FAR 22.1002-1 (limiting contracts falling under the SCA to 5 years in length); see also Delco Elec. Corp., B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391 (use of options with delivery dates seven and half years later does not violate FAR 17.204(e), because the five year limit applies to five years' requirements in a supply contract);

Freightliner, ASBCA No. 42982, 94-1 BCA ¶ 26,538 (option valid if exercised within five years of award).

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

c. The contract shall state the period within which the option may be exercised. The period may extend beyond the contract completion date for service contracts. The contract shall specify limits on the purchase of additional supplies or services, or the overall duration of the term of the contract.

d. Use of Options. FAR 17.202.

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

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

(a) The foreseeable requirements involve:

(i) Minimum economic quantities; and

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

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

(3) The contracting officer shall not employ options if:

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

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

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

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

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

e. Evaluation of options. Normally offers for option quantities or periods are included in the solicitation and evaluated when awarding the basic contract. FAR 17.206(a). The total price of the contract includes all the option periods.

(1) If the option was not evaluated during the basic contract, it may not be exercised without an approved exception to full and open competition under the Competition in Contracting Act (CICA). See Major Contracting Services, Inc., Comp. Gen. B-401472, Sept. 14, 2009.

(2) An agency may only exclude options from evaluation if it would not be in the best interest of the government and this determination is approved at a level above the contracting officer. FAR 17.206(b).

f. Contract Extensions.

(1) If an option is not evaluated as part of the initial competition, exercise of the option amounts to a "contract extension beyond the scope of the contract, and therefore effectively constitutes a new procurement" which is subject to the CICA's competition requirements. Major Contracting Services, Inc, B-401472, 14 Sept 2009.

(2) "Bridge Contracts." Often a "bridge" contract involves a contract extension for a period of time while a follow-on contract is being competed. These "bridge" contracts are subject to CICA's competition requirements. By statute, failure to adequately plan for a procurement in advance is not a proper justification for a competition exception. 41 USC § 3304(e)(5)(A); VSE Corp.; Johnson Controls World Serv., Inc., 2005 CPD ¶ 103; Techno-Sciences, Inc., B-257686, 31 Oct. 1994; Laidlaw Environmental Services (GS), B-249452, 23 Nov. 1992.

g. Exercising Options.

(1) Exception from competition. The exercise of an option permits an agency to satisfy current needs for goods and services without going back through full competitive procedures. Banknote Corp. of America, Inc, Comp. Gen B-250151, Dec. 14, 1992. Thus, the government must comply with applicable statutes and regulations before exercising an option. Golden West Ref. Co., EBCA No. C-9208134, 94-3 BCA ¶ 27,184 (option exercise invalid because statute required award to bidder under a new procurement); New England Tank Indus. of N.H., Inc., ASBCA No. 26474, 90-2 BCA ¶ 22,892 (option exercise invalid because of agency's failure to follow DOD regulation by improperly obligating stock funds); see FAR 17.207.

(2) The Contracting Officer may exercise an option only after determining that:

(a) Funds are available;[1]

(b) The requirement fills an existing need;

(c) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered;[2] and

(d) The option was synopsized in accordance with Part 5 unless exempted under that Part (ie. Option was part of the original solicitation that was competed under CICA).

(3) To determine whether it is appropriate to exercise the option instead of re-competing the need, the Contracting Officer shall make the determination to exercise the option on the basis of one of the following:

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

---

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

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

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

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

(4) The government must exercise the option according to its terms.

(a) The government may not include new terms in the option without meeting CICA requirements. See 4737 Connor Co., L.L.C. v. United States, 2003 U.S. App. LEXIS 3289 (Fed. Cir. 2003) (option exercise was invalid where the Government added a termination provision not present in the base period of the contract at the time of exercise of the option); VARO, Inc., ASBCA No. 47945, 47946, 96-1 BCA ¶ 28,161 (inclusion of eight additional contract clauses in option exercise invalidated the option).

(b) The government must follow the option mechanics in the contract to include timing of notice. See Lockheed Martin Corp. v. Walker, 149 F.3d 1377 (Fed. Cir. 1998) (Government wrongfully exercised options out of sequence); The Boeing Co., ASBCA No. 37579, 90-3 BCA ¶ 23,202 (Navy failed to exercise the option within the 60 days allowed in the contract and the board invalidated the option); and White Sands Construction, Inc., ASBCA Nos. 51875, 54029 (Apr. 16, 2004) (Exercise improper when preliminary notice of intent to exercise mailed on last day available and contractor received it after the deadline). Compare The Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997) (exercise of option on 1 Oct. proper).

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

(6) The government has the discretion to decide whether to exercise an option.

(a) Decision not to exercise.

(i) The decision not to exercise an option is generally not a protestable issue since it involves a matter of contract administration. See Young-Robinson Assoc., Inc., B-242229, Mar. 22, 1991, 91-1 CPD ¶ 319 (contractor cannot protest agency's failure to exercise an option because it is a matter of contract administration); but see Mine Safety Appliances Co., B-238597.2, July 5, 1990, 69 Comp. Gen. 562, 90-2 CPD ¶ 11 (GAO reviewed option exercise which was, in effect, a source selection between parallel development contracts).

(ii) A contractor may file a claim under the Disputes clause, but must establish that the Government abused its discretion or acted in bad faith. See Kirk/Marsland Adver., Inc., ASBCA No. 51075, 99-2 ¶ 30,439 (summary judgment to Government); Pennyrile Plumbing, Inc., ASBCA Nos. 44555, 47086, 96-1 BCA ¶ 28,044 (no bad faith or abuse of discretion).

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

B. **Indefinite Delivery Type Contracts** – Three Types. FAR Subpart 16.5. FAR 16.501-2(a) recognizes three types of indefinite delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity/indefinite delivery contracts. All three types permit Government stocks to be maintained at minimum levels, and permit direct shipment to users.

1. **Terminology**. 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.

2. **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.

3. **Requirements Contracts**. FAR 16.503; FAR 52.216-21.

a. 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).

b. The Government breaches the contract when it purchases its requirements from another source. Datalect Computer Servs. Inc. v. United States, 56 Fed. Cl. 178 (2003) (finding agency breached its requirements contract covering computer maintenance services where agency later obtained extended warranty from equipment manufacturer covering same items); Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (Navy diverted rodent pest control services); T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442 (finding that Ft. Carson breached its requirements contract covering the operation of an auto parts store when certain tenant units elected to order their parts from cheaper suppliers).

c. The Government may also breach the contract if it performs the contracted-for work in-house. C&S Park Serv., Inc., ENGBCA Nos. 3624, 3625, 78-1 BCA ¶ 13,134 (failure to order mowing services in a timely fashion combined with use of government employees to perform mowing services entitled contractor to equitable adjustment under changes clause). The Government deferral or backlogging of its orders such that it does not order

its actual requirements from a contractor is also a breach of a requirements contract. R&W Flammann GmbH, ASBCA Nos. 53204, 53205, 02-2 BCA ¶ 32,044.

d. Contractors may receive lost profits as a measure of damages when the Government purchases supplies or services from an outside source. See T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442; Carroll Auto., ASBCA No. 50993, 98-2 BCA ¶ 29,864.

e. The Government cannot escape liability for the breach of a requirements contract by retroactively asserting constructive termination for convenience. T&M Distributors, Inc., ASBCA No. 51279, 01-2 BCA ¶ 31,442; Carroll Auto., ASBCA No. 50993, 98-2 BCA ¶ 29,864 (Government invoked constructive Termination for Convenience (T4C) theory two years after contract performance); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (Ct. Cl. 1982).

f. A requirements contract must contain FAR 52.216-21. If the Government inadvertently or intentionally omits this clause, a court or board will examine other intrinsic / extrinsic evidence to determine whether it is a requirements contract. See, e.g., Centurion Elecs. Serv., ASBCA No. 51956, 03-1 BCA ¶ 32,097 (holding that a contract to do all repairs on automated data processing equipment and associated network equipment at Fort Leavenworth was a requirements contract despite omission of requisite clause).

g. The Contracting Officer shall state a realistic estimated total quantity in the solicitation and resulting contract. The estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The estimate may be obtained from records of previous requirements and consumption, or by other means, and should be based on the most current information available. FAR 16.503(a)(1). The estimate is not a guarantee or a warranty of a specific quantity. Shader Contractors, Inc. v. United States, 149 Ct. Cl. 535, 276 F.2d 1, 7 (Ct. Cl. 1960).

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

available to it." Womack v. United States, 182 Ct. Cl 399, 401, 389 F.2d 793, 801 (1968).

i. The estimates can be based on personal experience as long as it is reasonable. National Salvage & Service Corp., ASBCA No. 53750 (Jun. 18, 2004).

j. The GAO will sustain a protest if a solicitation contains flawed estimates. Beldon Roofing & Remodeling Co., B-277651, Nov. 7, 1997, CPD 97-2 ¶ 131 (recommending cancellation of invitation for bids (IFB) where solicitation failed to provide realistic quantity estimates).

k. Failure to use available data or calculate the estimates with due care may also entitle the contractor to additional compensation. See Hi-Shear Tech. Corp. v. United States, 53 Fed. Cl. 420 (2002) (noting the government "is not free to carelessly guess at its needs" and that it must calculate its estimates based upon "all relevant information that is reasonably available to it."); S.P.L. Spare Parts Logistics, Inc, ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982; Crown Laundry & Dry Cleaners v. United States, 29 Fed. Cl. 506 (1993) (finding the government was negligent where estimates were exaggerated and not based on historical data); and Contract Mgmt., Inc., ASBCA No. 44885, 95-2 BCA ¶ 27,886 (granting relief under the Changes clause where Government failed to revise estimates between solicitation and award to reflect funding shortfalls).

l. Contractors are generally not entitled to lost profits for negligent estimates. Recovery is generally limited to reliance damages and a price adjustment. See Rumsfeld, v. Applied Companies, Inc., 325 F.3d 1329 (Fed. Cir. 2003), and Everett Plywood v. United States, 190 Ct. Cl. 80, 419 F.2d 425 (Ct. Cl. 1969) (contractor entitled to adjustment of the contract price applied to the volume of timber actually cut). The purpose of a damages award is to put the non-breaching party in as good a position as it would have been but for the breach. *S.P.L. Spare Parts Logistics, Inc.,* ASBCA Nos. 54435, 54360, 06-1 BCA ¶ 33,135.

m. A negligent estimate that was too low may result in a constructive change to the contract. Chemical Technology v. United States, 227 Ct. Cl. 120, 645 F.2d 934 (1981).

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

(1) The Government acts in good faith if it has a valid business reason for varying its requirements, other than dissatisfaction with the contract. Technical Assistance Int'l, Inc. v. United States, 150 F.3d 1369 (Fed. Cir. 1998) (no breach or constructive change where Government diminished need for vehicle maintenance and repair work by increasing rate at which it added new vehicles into the installation fleet); Shear Tech. Corp. v. United States, 53 Fed. Cl. 420 (2002); Maggie's Landscaping, Inc., ASBCA Nos. 52462, 52463 (June 2, 2004) (Government had valid reasons to reduce orders, to include dry and wet conditions).

(2) "Bad faith" includes actions "motivated solely by a reassessment of the balance of the advantages and disadvantages under the contract" such that the buyer decreases its requirements to avoid its obligations under the contract. Technical Assistance Int'l, Inc. v. United States, 150 F.3d 1369, 1372 (Fed. Cir. 1998) (citing Empire Gas Corp. v. Am. Bakeries Co., 840 F. 2d 1333, 1341 (7th Cir. 1988)).

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

Limits on use of Requirements Contracts for Advisory and Assistance Services (CAAS).[3] 10 U.S.C. § 2304b(e)(2); FAR 16.503(d). Activities may not issue solicitations for requirements contracts for advisory and assistance services in excess of three years and $10 million, including all options, unless the contracting officer determines in writing that the use of the multiple award procedures is impracticable. See para. III.E.9b, infra.

4. **Indefinite-Quantity/Indefinite-Delivery Contracts (also called ID/IQ or Minimum Quantity Contracts).** FAR 16.504.

[3] "Advisory and assistance services" means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision making; management and administration; program and/or program management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering or technical nature). All advisory and assistance services are classified as: Management and professional support services; Studies, analyses and evaluations; or Engineering and technical services. FAR 2.101. See also DOD Directive 4205.2, Acquiring And Managing Contracted Advisory And Assistance Services (CAAS) (10 Feb. 92); as well as AR 5-14, Management of Contracted Advisory and Assistance Services (15 Jan. 93).

a. Generally.

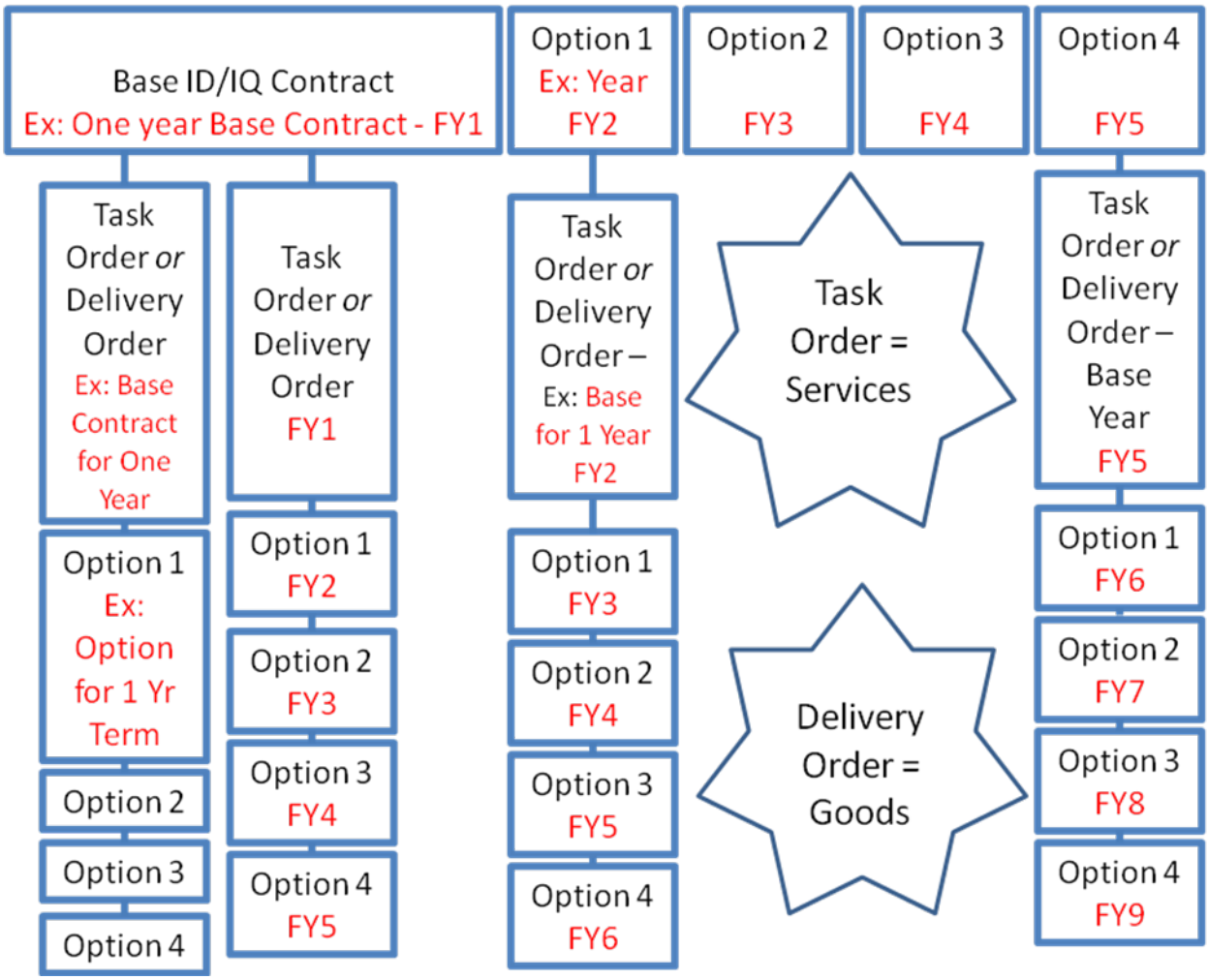
(1) Indefinite or variable quantity contracts permit flexibility in both quantities and delivery schedules.

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

(3) An indefinite quantity contract must be either a requirements or an ID/IQ contract. See Satellite Servs., Inc., B-280945, B-280945.2, B-280945.3, Dec. 4, 1998, 98-2 CPD ¶ 125 (solicitation flawed where it neither guaranteed a minimum quantity nor operated as a requirements contract).

b. 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).

Example of an ID/IQ Contract Structure



c. 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).

d. In order for the contract to be binding, the minimum quantity in the contract must be more than a nominal quantity. FAR 16.504(a)(2). See CW Government Travel, Inc., B-295530 ($2500 minimum adequate when it represented several hundred transactions in travel services); Wade Howell, d.b.a. Howell Constr, v. United States, 51 Fed. Cl. 516 (2002); Aalco Forwarding, Inc., et. al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 ($25,000 minimum for moving and storage services); Sea-Land Serv. Inc., B-278404.2 Feb. 9, 1998, 98-1 CPD ¶ 47 (after considering the acquisition as a whole, found guarantee of one "FEU"[4] per contract carrier was adequate consideration to bind the parties). If the contract contains option year(s), only the base period of performance must contain a non-nominal minimum to constitute adequate consideration. Varilease Technology Group, Inc. v. United States, 289 F.3d 795 (Fed. Cir. 2002)

e. The contractor is entitled to receive only the guaranteed minimum. Travel Centre v. Barram, 236 F.3d 1316 (Fed. Cir. 2001) (holding that agency met contract minimum so "its less than ideal contracting tactics fail to constitute a breach"); Crown Laundry & Dry Cleaners, Inc., ASBCA No. 39982, 90-3 BCA ¶ 22,993; but see Community Consulting Int'l., ASBCA No. 53489, 02-2 BCA ¶31,940 (granting summary judgment on a breach of contract claim despite the government satisfying the minimum requirement). The corrected quantum must account for the amount the contractor would have spent to perform the unordered work. Bannum, Inc., DOTBCA 4452, 06-1 BCA ¶ 33,228.

f. The government may not retroactively use the Termination for Convenience clause to avoid damages for its failure to order

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

the minimum quantity. Compare Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) (termination many months after contract completion where minimum not ordered was invalid), and PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (contracting officer may not terminate an indefinite-quantity contract for convenience after end of contract term), with Hermes Consolidated, Inc. d/b/a Wyoming Refining Co., ASBCA Nos. 52308, 52309, 2002 ASBCA LEXIS 11 (partial T4C with eight days left in ordering period proper) and Montana Ref. Co., ASBCA No. 50515, 00-1 BCA ¶ 30,694 (partial T4C proper when Government reduced quantity estimate for jet fuel eight months into a twelve month contract).

g. The contractor must prove the damages suffered when the Government fails to order the minimum quantity. The standard rule of damages is to place the contractor in as good a position as it would have been had it performed the contract. White v. Delta Contr. Int'l., Inc., 285 F.3d 1040, 43 (Fed. Cir. 2002) (noting that "the general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation"); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (holding the contractor was not entitled to receive the difference between the guaranteed minimum and requiring the parties to determine an appropriate quantum); AJT Assocs., Inc., ASBCA No. 50240, 97-1 BCA ¶ 28,823 (holding the contractor was only entitled to lost profits on unordered minimum quantity).

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

i. FAR 16.506(a)(4) and 16.506 (f) & (6) set forth several requirements for indefinite-quantity solicitations and contracts, including the use of FAR 52.216-27, Single or Multiple Awards, and FAR 52.216-28, Multiple Awards for Advisory and Assistance Services.

j. Statutory Limitation on Awarding Sole-Source ID/IQ's: Section 843 of the 2008 NDAA limited DoD's ability to award large, sole-source ID/IQ contracts. Section 843 modified Title

10 by prohibiting the award of any ID/IQ estimated to exceed $100 million (including options), unless the head of the agency determines, in writing, that:

(1) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(2) the contract provides only for firm, fixed price task orders or delivery orders for— products for which unit prices are established in the contract, or services for which prices are established in the contract for the specific tasks to be performed;

(3) only one source is qualified and capable of performing the work at a reasonable price to the government; or

(4) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

(5) Finally, the head of the agency must notify Congress within 30 days after any written determination authorizing the award of an ID/IQ estimated to exceed $100 million.

k. Policy Preference for Multiple-Award ID/IQs: FAR 16.504(c)(1)(i) establishes a preference for making multiple awards of indefinite-quantity contracts under a single solicitation for similar supplies or services. See Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170 (GAO ruled that the government must make multiple awards in CAAS indefinite delivery/indefinite quantity type of contracts). The contracting officer must document the decision whether or not to make multiple awards in the acquisition plan or contract file.

(1) A contracting officer must give preference to giving multiple awards for ID/IQs, unless one or more of the conditions specified in FAR 16.504(c)(1)(ii)(B) are present:

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

(b) Based on the contracting officer's knowledge of the market, more favorable terms and

conditions, including pricing, will be provided if a single award is made;

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

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

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

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

(2) For advisory and assistance services contracts exceeding three years and $12.5 million, including all options, the contracting officer must make multiple awards unless (FAR 16.504(c)(2)):

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

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

(c) Only one offer is received; or

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

l. Ordering periods. DFARS 217.204.

(1) The ordering period for a task or delivery order contract may be up to five years. DFARS 217.204(e)(i)(A).

(2) Options or modifications may extend a contract, not to exceed ten years unless

(a) The head of the agency determines in writing that exceptional circumstances require a longer period.

(b) DoD must submit a report to Congress concerning any approved extensions. DFARS 217.204(e)(i)(B) & (C) and (ii).

(c) These limitations do not apply to:

(i) Contracts awarded under other statutory authority.

(ii) Advisory and assistance service task order contracts.

(iii) Definite quantity contracts.

(iv) GSA schedule contracts.

(v) Multi-agency contracts awarded by other than NASA, DoD, or the Coast Guard.

(d) Approval is needed from the senior procurement executive before issuing any order if performance is expected to extend more than one-year beyond the authorized limit. DFARS 217.204(e)(iv).

m. Placing Orders. FAR 16.505.

(1) 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.

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

(a) Fair Opportunity to be Considered. Each awardee must be given a "fair opportunity to be considered for each order in excess of $3,000." FAR 16.505(b)(1)(i). See also Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170.

(b) Fair Opportunity to be Considered for ID/IQ Orders of $5,000,000 or less. The KO has broad discretion in developing order placement procedures that will satisfy the requirement to provide each contractor a "fair opportunity to be considered." The KO should use streamlined procedures, including oral presentations. Additionally, the KO need not contact each of the multiple ID/IQ awardees before selecting an order awardee, if the KO has the information necessary to ensure that all ID/IQ awardees have a fair opportunity to compete for each order. FAR 16.16.505(b)(1)(ii).

(c) Fair Opportunity to be Considered for ID/IQ Orders exceeding $5,000,000. Section 843 of the FY 2008 NDAA modified 10 U.S.C. § 2304c to require enhanced competition for orders in excess of $5,000,000. In essence, orders exceeding $5,000,000 must be "competed" among the ID/IQ awardees. KO's do not satisfy the requirement to provide a fair opportunity be considered unless the KO provides each ID/IQ awardee:

(i) a notice of the task or delivery order that includes a clear statement of the agency's requirements;

(ii) a reasonable period of time to provide a proposal in response to the notice;

(iii) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in

evaluating such proposals and their relative importance;

(iv) in the case of an order award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

(v) an opportunity for a post award debriefing consistent with the requirements of 10 U.S.C. 2305(b)(5). The post award debriefing requirements of 10 U.S.C. 2305(b)(4) are currently implemented in FAR 15.506, Postaward Debriefing of Offerors.

(d) Exceptions to the Requirement to provide a Fair Opportunity to be Considered. Awardees need not be given a fair 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).

(e) DFARS 208.404-70 requires that any order off of a Federal Supply Schedule (FSS) in excess of $100,000 be made on a competitive basis. The Contracting Officer must either: issue the notice to as many schedule holders as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that proposals will be received from at least 3 sources that offer the required work; or contact all schedule holders that offer the required work by informing them of the opportunity for award.

(f) DFARS 216.505-70 requires any task order in excess of $150,000 placed under a non-FSS multiple award contract (MAC) also be made on a competitive basis. All awardees that offer the required work must be provide a copy of the description of work, the basis upon which the contracting officer will make the selection, and given the opportunity to submit a proposal.

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

(h) Any sole source order under the FSS or MAC requires approval consistent with the approval levels in FAR 6.304. *See* Memorandum, Director, Defense Procurement and Acquisition Policy, to Senior Procurement Executives & Directors of Defense Agencies, subject: Approval Levels for Sole Source Orders Under FSS and MACs (13 Sep. 04). *See also*, Chapter 5, Contract Attorneys Course Deskbook.

n. Protests concerning task orders. The issuance of a task or delivery order is generally not protestable.[5] Exceptions include:

(1) Task orders whose value exceeds $10,000,000. See 10 U.S.C. § 2304c (sunset of bid protest jurisdiction eliminated for DOD.) But see 41 U.S.C. § 4106(f)(1) (susetting bid protest jurisdiction on 30 September 2016) .

(2) Where an agency conducts a downselection (selection of one of multiple contractors for continued performance). See Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23.

(3) Where an agency conducts a competition among ID/IQ contractors and arrives at its source selection using negotiated procurement procedures. CourtSmart

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

Digital Sys., Inc., B-292995.2, B-292995.3, Feb. 13, 2004; COMARK Fed. Sys., B-278343, B-178343.2, Jan. 20, 1998.

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

(5) The order exceeds the contract's scope of work. See Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51; Symplicity Corp., B-291902, Apr. 29, 2003 (purchase order improper when it included items not part of the vendor's Federal Supply Schedule contract); Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping services beyond scope of preventive maintenance contract).

(6) The protest challenges the transfer to an ID/IQ contract the acquisition of services that had been previously set aside for small businesses. LBM, Inc., B-290682, Sep. 18, 2002, 2002 CPD ¶ 157.

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

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

Is the government liable?

C. **LETTER CONTRACTS**. **FAR 16.603**.

1. Use. Letter contracts are used when the Government's interests demand that the contractor be given a binding commitment so that work can start immediately, and negotiating a definitive contract is not possible in sufficient time to meet the requirement. Letter contracts are also known as **Undefinitized Contract Actions** (UCA).

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

3. Definitization. The parties must definitize the contract (agree upon contractual terms, specifications, and price) by the earlier of the end of the 180 day period after the date of the letter contract, or the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.[6] 10 U.S.C. § 2326; DFARS 217.7404-3.

4. The maximum liability of the Government shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization, but shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official who authorized the letter contract. 10 U.S.C. § 2326(b)(2); FAR 16.603-2(d); DFARS 217.7404-4.

5. Restrictions: Letter contracts shall not

   a. Commit the Government to a definitive contract in excess of funds available at the time of contract.

   b. Be entered into without competition when required.

   c. Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. FAR 16-603-3.

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

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

7. The Air Force has added a Mandatory Procedure tracking UCAs and definitization schedules. Any failure to definitize within one year must be reported to the Deputy Assistant Secretary of the Air Force for Contracting. AFFARS MP5317.7404-3.

IV. CONTRACT TYPES - CATEGORIZED BY PRICE

A. **Fixed-Price Contracts**. FAR Subpart 16.2.

1. General. Fixed Price (FP) contracts provide for a firm price, or in appropriate cases, an adjustable price. FAR 16.201. Fixed-price contracts that provide for an adjustable price may include a ceiling price, a target price (including a target cost), or both. The most common types of fixed price contracts include: Firm, Fixed Price (FFP), Fixed Price with Economic Price Adjustment (EPA), Fixed Price with Award Fee, and Fixed Price Incentive Fee (FPIF) contracts.

2. Use. Use of a FP contract is normally inappropriate for research and development work, and has been limited by DOD Appropriations Acts. See FAR 35.006 (c) (the use of cost-reimbursement contracts is usually appropriate for R&D contracts); but see American Tel. and Tel. Co. v. United States, 48 Fed. Cl. 156 (2000) (upholding completed FP contract for developmental contract despite stated prohibition contained in FY 1987 Appropriations Act).

3. **Firm-Fixed-Price Contracts** (FFP). FAR 16.202.

   a. A FFP contract is not subject to any adjustment on the basis of the contractor's cost experience on the contract. It provides maximum incentive for the contractor to control costs, perform effectively, and impose a minimum administrative burden on the contracting parties. FAR 16.202-1. (See Figure 1, page 3). The contractor promises to perform at a fixed-price, and bears the responsibility for increased costs of performance. The contractor also accepts the benefit of decreased costs associated with the items to be delivered under the contract. Appeals of New Era Contract Sales, Inc., ASBCA Nos. 56661, 56662, 56663, April 4, 2011 (failure of subcontractor to honor previously quoted prices does not excuse prime contractor); Chevron U.S.A., Inc., ASBCA No. 32323, 90-1 BCA ¶ 22,602 (the risk of increased performance costs in a fixed-price contract is on the contractor absent a clause stating otherwise).

   b. An FFP is appropriate for use when acquiring commercial items or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications when

the contracting officer can establish fair and reasonable prices at the outset, such as when:

(1) There is adequate price competition;

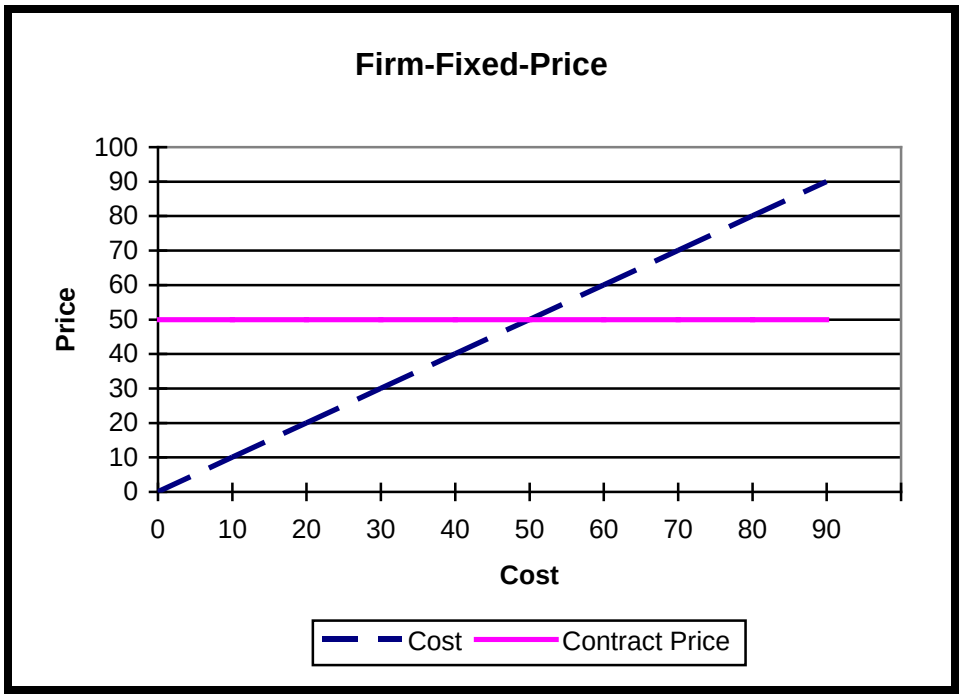
(2) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data;

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

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

Figure 1

Fixed Price = $50



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

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

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

4. **Fixed-Price Contracts with Economic Price Adjustment (FP w/ EPA).** FAR 16.203; FAR 52.216-2; FAR 52.216-3; and FAR 52.216-4.

a. Provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. See Transportes Especiales de Automoviles, S.A. (T.E.A.S.A.), ASBCA No. 43851, 93-2 B.C.A. 25,745 (stating that "EPA provisions in government contracts serve an important purpose, protecting both parties from certain specified contingencies."); MAPCO Alaska Petroleum v. United States, 27 Fed. Cl. 405 (1992) (indicating the potential price revision serves the further salutary purpose of minimizing the need for contingencies in offers and, therefore, reducing offer prices).

b. May be used when the contracting officer determines:

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

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

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

(1) Cost indexes of labor or material (not shown). The standards or indexes are specifically identified in the contract. There is no standard FAR clause prescribed when using this method. The DFARS provides extensive guidelines for use of indexes. See DFARS 216.203-4(d).

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

(3) Actual costs of labor or material (see Figure 2, page 31). Price adjustments should be limited to contingencies beyond the contractor's control. The contractor is to provide notice to the contracting officer within 60 days of an increase or decrease, or any additional period designated in writing by the contracting officer. Prior to final delivery of all contract line items, there shall be no adjustment for any change in the rates of pay for labor (including fringe benefits) or unit prices for material that would not result in a net change of at least 3% of the then-current contract price. FAR 52.216-4(c)(3). The aggregate of the increases in any contract unit price made under the clause shall not exceed 10 percent of the original unit price; there is no limitation on the amount of decreases. FAR 52.216-4(c)(4).

(4) EPA clauses must be constructed to provide the contractor with the protection envisioned by regulation. Courts and boards may reform EPA clauses to conform to regulations. See Beta Sys., Inc. v. United States, 838 F.2d 1179 (Fed. Cir. 1988) (reformation appropriate where chosen index failed to achieve purpose of EPA clause); Craft Mach. Works, Inc., ASBCA No. 35167, 90-3 BCA ¶ 23,095 (EPA clause did not provide contractor with inflationary adjustment from a base period paralleling the beginning of the contract, as contemplated by regulations).

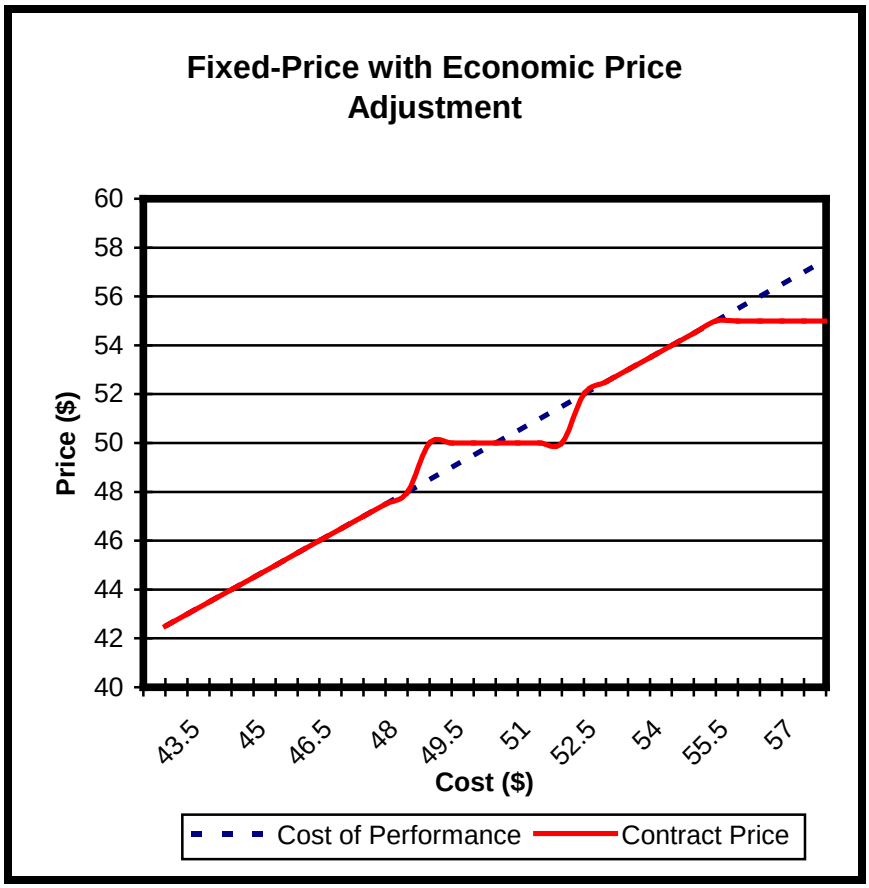
Figure 2

Fixed Price = $50

An EPA will be made if qualifying costs exceed 3% of the contract price.

By contract clause, the maximum upward adjustment is capped at 10% of the contract price.

A downward EPA will be made if costs are 3% to 100% lower than the contract price. There is no cap on downward EPA.



If due to price fluctuations recognized by the EPA clause, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:	Explanation
$43	$50 – EPA $7 = $43.00	There is no cap on economic price adjustments that reduce the contract price. Here, the reduced cost of performance qualifies for an adjustment and the government should pay the Ktr only $43.00.
$47	$50 – EPA $3 = $47.00	Ktr receives less than the full fixed price because the reduction in costs has exceeded 3% of the contract price. Here, 3% of $50.00 is $1.50. The cost of performance is less than $48.50 so this contract qualifies for a $3 contract adjustment. The government should pay the Ktr only $47.00.
$49	$50	Ktr receives the full Fixed Price because the reduction in costs has not exceeded 3% of the contract price. Here, 3% of $50.00 is $1.50, so the cost of performance must be below $48.50 to qualify for an adjustment.
$50	$50	Ktr receives the Fixed Price but has not qualified for any adjustment.
$51	$50	Ktr receives the Fixed Price with no Adjustment because the increase in costs has not exceeded 3% of the contract price. Here, 3% of $50.00 is $1.50, so the increase in cost must exceed $51.50 before an adjustment is made to the contract price.
$53	$50 + EPA $3 = $53.00	Ktr receives an Adjustment because the increase in costs has exceeded 3% of the contract price. The Ktr receives an additional $3.00 as an Economic Price Adjustment (EPA).
$55	$50 + EPA $5 = $55.00	Costs have exceeded 3% of the contract price but have not exceeded the ceiling price on the contract, so the Ktr receives an EPA for the full amount of its costs.
$56	$50 + EPA Ceiling $5 = $55	Costs have exceeded 3% of the contract price and the 10% contract ceiling price of $55.00. Ktr is limited to an EPA of $5.00 because that is the K ceiling.

(5) Alternatively, a party may be entitled to fair market value, or *quantum valebant* recovery. Gold Line Ref., Ltd. v. United States, 54 Fed. Cl. 285 (2002) (quantum valebant relief OR reformation of clause to further parties' intent "to adjust prices in accordance with the FAR); Barrett Ref. Corp. v. United States, 242 F.3d 1055 (Fed. Cir. 2001).

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

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

a. Award Fee contracts are a type of incentive contract. With this type of contract, the contractor receives a negotiated fixed price (which includes normal profit) for satisfactory contract performance. Award fee (if any) will be paid in addition to that fixed price (see Figure 3, page 37). Unlike the Cost-Reimbursement with Award Fee type (see section II.B.3), there is no base fee.

b. 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.

c. Determination and Finding (D&F). FAR 16.401(d). A determination and finding, signed by the head of the contracting activity, is required. The D&F must justify that the use of this type of contract is in the best interests of the government. It must address all of the following suitability items:

(1) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(2) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(3) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the D&F. FAR 16.401(e).

d. The contract must provide for periodic evaluation of the contractor's performance against an award fee plan. The Air Force Award Fee Guide, which can be found at http://www.safaq.hq.af.mil/contracting/toolkit/part16/acrobat/award-feeguide.pdf and the National Aeronautics And Space Administration Award Fee Contracting Guide, available at http://www.hq.nasa.gov/office/procurement/regs/afguidee.html both contain helpful guidance on setting up award fee evaluation plans.

e. Funding Limitations: On 17 October 2006, the President enacted the 2007 National Defense Authorization Act (NDAA); Section 814 of the 2007 NDAA required the Secretary of Defense to issue guidance for the appropriate use of award fees in all DoD acquisitions.[7]

f. In 24 April 2007, the Director, Defense Procurement and Acquisition Policy issued the required guidance on the proper use of award fees and the DoD award fee criteria.[8] The required DoD award fee criteria is reflected in the chart below:

[7] John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083, Sec. 814 (Oct. 17, 2006).

[8] *See* Appendix A: DPAP Memo pn Proper Use of Award Fee Contracts and Award Fee Provisions.

Rating	**Definition of Rating**	**Award Fee**
Unsatisfactory	Contractor had failed to meet the basic (minimum essential) requirements of the contract.	0%
Satisfactory	Contractor has met the basic (minimum essential) requirements of the contract.	No Greater than 50%
Good	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 50% of the award fee criteria established in the award fee plan.	50% - 75%
Excellent	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 75% of the award fee criteria established in the award fee plan.	75% - 90%
Outstanding	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 90% of the award fee criteria established in the award fee plan.	90% - 100%

g. Section 8117 of the 2008 DoD Appropriations Act, enacted by the President on 13 November 2007, contained the funding limitation that "[n]one of the funds appropriated or otherwise made available by this Act may be obligated or expended to provide award fees to any defense contractor contrary to the provisions of section 814 of the National Defense Authorization Act, Fiscal Year 2007 (Public Law 109-364)."

h. As a result of Sec. 8117, any obligations or expenditures for DoD contract award fees that do not conform with the DoD award fee criteria are not only policy violations, but likely per se (uncorrectable) Antideficiency Act violations as well.

i. FAR Policy Requirements. The following conditions must be present before a fixed price contract with award fee may be used:

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

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

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

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

Figure 3

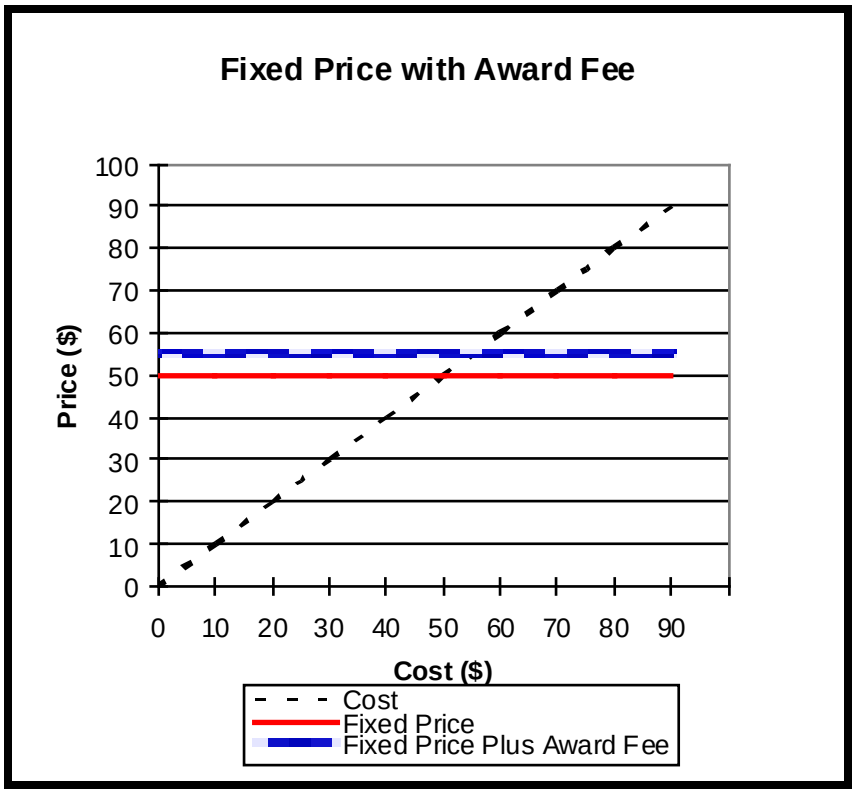
Fixed Price = $50

Potential Award Fee = $5

Total Price for this contract will be between $50 and $55.

The Maximum that the Ktr can earn is $55.00. ($50.00 Fixed Price plus 100% of the $5 Award Fee).

The Minimum the Ktr can earn is $50.00, which is the fixed price of the K.



If in performing the contract, the contractor incurs costs of:	**Then the contractor is entitled to the following amount of money:**
$50	$50 plus % of the award fee
$40	$50 plus % of the award fee
$80	$50 plus % of the award fee
If in performing the contract, the contractor performs:	**Then the contractor is entitled to the following amount of money:**
Outstanding (90-100% of the $5 Award Fee)	$54.50 - $55.00
Excellent (75-90% of the $5 Award Fee)	$53.75 - $54.50
Good (50-75% of the $5 Award Fee)	$52.50 - $53.75
Satisfactory (No greater than 50% of the $5 Award Fee)	$50 - $52.50
Unsatisfactory (0% of the $5 Award Fee)	$50

6. **Fixed-Price Incentive (FPI) Contracts** (see Figure 4, page 40). 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. Because the profit varies inversely the cost, this contract type provides a positive, calculable profit incentive for the contractor to control costs. FAR 16.403-1(a).

a. The contractor must complete a specified amount of work for a fixed-price. The contractor can increase its profit through cost-reduction measures.

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

c. Use the FPI contract only when:

(1) A FFP contract is not suitable;

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

d. If the contract also includes incentives on technical performance and/or delivery, the performance requirements provide a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work. FAR 16.403. Individual line items may have separate incentive provisions. DFARS 216.403(b)(3).

e. The parties may use either FPI (firm target) or FPI (successive targets). FAR 16.403(a).

(1) FPI (firm target) specifies a target cost, a target profit, a price ceiling, and a profit adjustment formula. FAR 16.403-1; FAR 52.216-16.

(2) FPI (successive targets) specifies an initial target cost, an initial target profit, an initial profit adjustment formula, the production point at which the firm target cost and profit will be negotiated, and a ceiling price. FAR 16.403-2; FAR 52.216-17.

f. Terms of Art with Firm Target Incentive Contracts: The following elements are negotiated at the outset.

(1) Target Cost: The parties negotiate at the outset a firm target cost of performance for the acquisition that is fair and reasonable.

(2) Target Profit: The parties negotiate at the outset a firm target profit for the acquisition that is fair and reasonable.

(3) Profit Adjustment Formula: A formula, established at the outset, that will provide a fair and reasonable incentive for the contractor to assume an appropriate share of the risk. When the contractor completes performance, the parties determine what the final cost of performance was. Then, the final price is determined by applying the established formula. When the final cost to the contractor is less than the target cost, application of the formula results in a final profit greater than the target profit. When the final cost to the contractor is more than target cost, application of the formula results in a final profit less than the target profit, even a net loss. FAR 16.403-1(a).

(4) Price Ceiling (but not a profit ceiling or floor): The Ceiling Price is established at the outset, and it combines both cost and profit. It is the maximum price that the government may pay to the contractor, except for any adjustment under other contract clauses (like the changes clause). If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss. FAR 16.403-1(a). Because this is a hard figure, the FPIC should be used when the parties can accurately estimate the cost of performance. Generally negotiated as a percentage of target cots, normal ceiling prices range from 115 to 135% of Target Cost. If ceiling prices are as high as 150% of the target cost, then a Cost-Plus-Incentive-Fee contract may be more appropriate. See Formation of Government Contracts, 3rd Edition, John Cibinic and Ralph Nash, p. 1132, 1998.

Figure 4

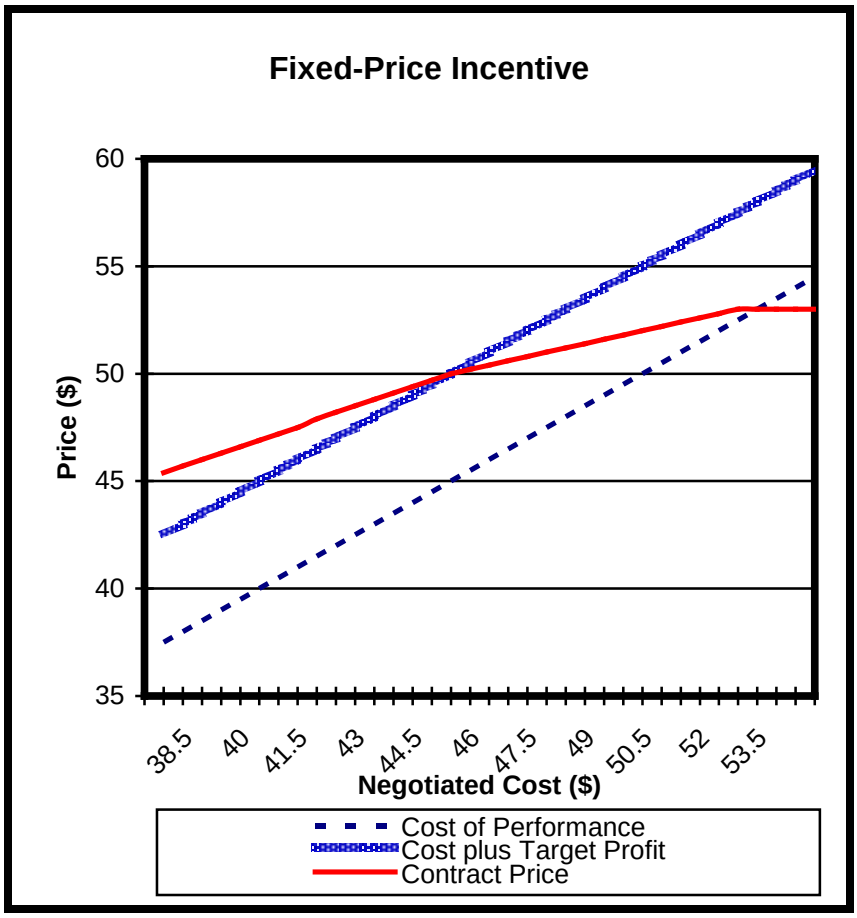
Target Cost (TC) = $45
Target Profit (TP) = $ 5
Target Price = $50

Ceiling Price (CP) = $53

Price Adj (PA) Formula: 60/40 split

Cost Overrun: The Ktr is paid for only 60% of its actual costs (AC) that exceed the target cost.

Cost Underrun: If Ktr costs are less than the target cost, the difference is computed. The Ktr receives 40% of the difference, plus the target profit.



If in performing the contract, the Ktr incurs costs:	Then the Ktr is entitled to the following amount of money:	Explanation
$45.00	$50.00	Ktr TC $45 + $5 TP = $50
$47.50	$51.00	60% of the $2.50 AC overrun = $1.50 $45 TC + 1.5 Ktr share = 46.5 + $5 TP = $51.50
$50.00	$52.00	60% PA of the $5 cost overrun = $3.00 $45 TC + $3 Ktr share = $48 + $5 TP = $52.00
$52.50	$53.00	60% PA of the $7.5 cost overrun = $4.50 $45 TC + $4.5 Ktr share = $49.5 + $5 TP = $54.50 but Ktr only receives the $53.00 ceiling price.
$55.00	$53.00	Ktr costs exceed ceiling price, which is the max the Ktr can receive. Ktr is operating at a loss.
$42.50	$48.50	$45.00 TC - $42.50 AC = $2.50 X 40% PA = $1.00 Ktr receives $42.50 + $1 PA = $43.50 + $5TP = $48.50
$40.00	$47	$45 TC - $40 AC = $5 X 40% PA = $2 Ktr receives $40 AC +$2 PA = $42 + $5 TP = $47
$37.50	$45.50	$45 TC - $37.5AC = $7.5 X 40% PA = 3 Ktr receives $37.5 AC + $3 PA = $40.5 + $5 TP = $45.50

B. Cost-Reimbursement Contracts. FAR Subpart 16.3.

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

a. 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.

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

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

d. 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).

e. The government bears that majority of cost or performance risk. In a cost-reimbursement type contract, a contractor is only required to use its "best efforts" to perform. A contractor will be reimbursed its allowable costs, regardless of how well it performs the contractor. General Dynamics Corp. v. United States, 671 F.2d 474, 480-81 (Ct. Cl. 1982), McDonnell Douglas Corp. v. United States, 27 Fed. Cl. 295, 299 (1997) (noting that ". . .the focus of a cost-reimbursement contract is contractor input, not output.")

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

(1) The contractor must have an adequate cost accounting system. FAR 16.301-3. See CrystaComm, Inc., ASBCA No. 37177, 90-2 BCA ¶ 22,692 (contractor failed to establish required cost accounting system).

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

(3) May not be used for acquisition of commercial items.

(4) 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).

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

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

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

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

(c) The contract is to be terminated; or

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

(7) The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. JJM Sys., Inc., ASBCA No. 51152, 03-1 BCA ¶ 32,192; Titan Corp. v. West, 129 F.3d 1479 (Fed. Cir. 1997); Advanced Materials, Inc., 108 F.3d 307 (Fed. Cir. 1997). Exceptions to this rule include:

(a) The overrun was unforeseeable. Johnson Controls World Servs, Inc. v. United States, 48 Fed. Cl. 479 (2001); RMI, Inc. v. United States, 800 F.2d 246 (Fed. Cir. 1986) (burden is on contractor to show overrun was not reasonably foreseeable during time of contract

performance); F2 Assoc., Inc., ASBCA No. 52397, 01-2 BCA ¶ 31,530. To establish that the cost overrun was unforeseeable, the contractor must establish that it maintained an adequate accounting system. SMS Agoura Sys., Inc., ASBCA No. 50451, 97-2 BCA ¶ 29,203 (contractor foreclosed from arguing unforeseen cost overrun by prior decision).

(b) Estoppel. Am. Elec. Labs., Inc. v. United States, 774 F.2d 1110 (Fed. Cir. 1985) (partial estoppel where Government induced continued performance through representations of additional availability of funds); Advanced Materials, Inc., 108 F.3d 307 (Fed. Cir. 1997) (unsuccessfully asserted); F2 Assoc., Inc., ASBCA No. 52397, 01-2 BCA ¶ 31,530 (unsuccessfully asserted).

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

a. 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).

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

(1) Payment is on a predetermined percentage rate;

(2) The percentage rate is applied to actual performance costs (as opposed to estimated or target performance costs determined at the outset);

(3) The Contractor's entitlement is uncertain at the time of award; and

(4) The Contractor's entitlement increases commensurately with increased performance costs. See also Alisa Corp., AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952 (finding contractor was entitled to quantum valebant

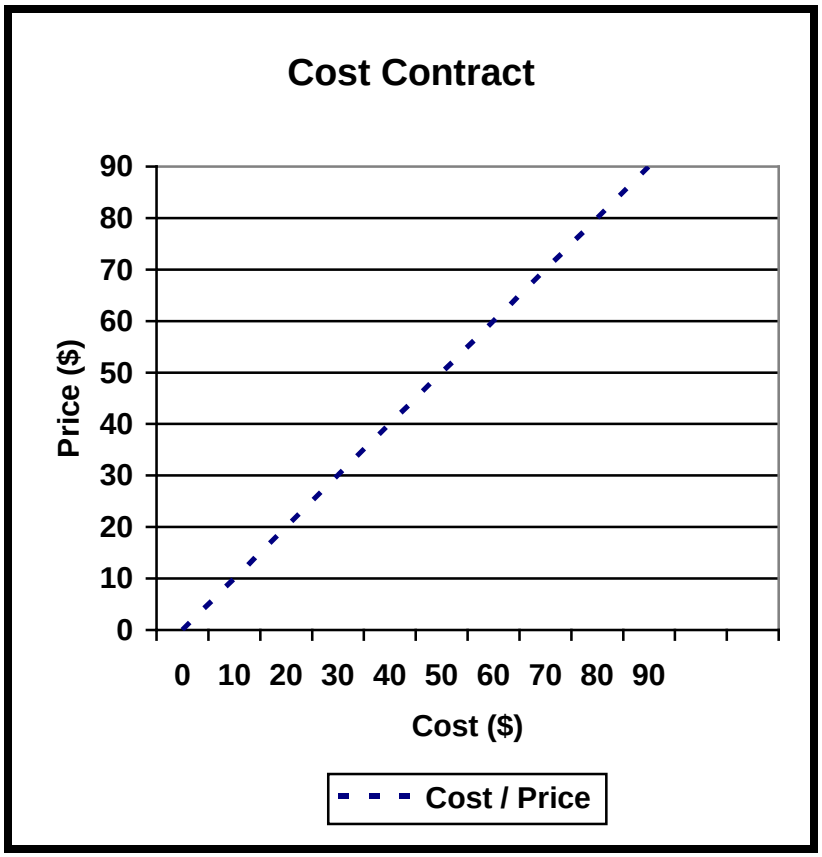
basis of recovery where contract was determined to be an illegal CPPC contract).

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

d. Contract modifications. If the government directs the contractor to perform additional work not covered within the scope of the original contract, the contractor is entitled to additional fee. This scenario does not fall within the statutory prohibition on CPPC contracts. Digicon Corp., GSBCA No. 14257-COM, 98-2 BCA ¶ 29,988.

3. **Cost Contracts**. FAR 16.302; FAR 52.216-11. The contractor receives its allowable costs but no fee (see Figure 5, page 45) may be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations, and for facilities contracts.

Figure 5



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

4. Cost-Sharing Contracts. FAR 16.303; FAR 52.216-12.

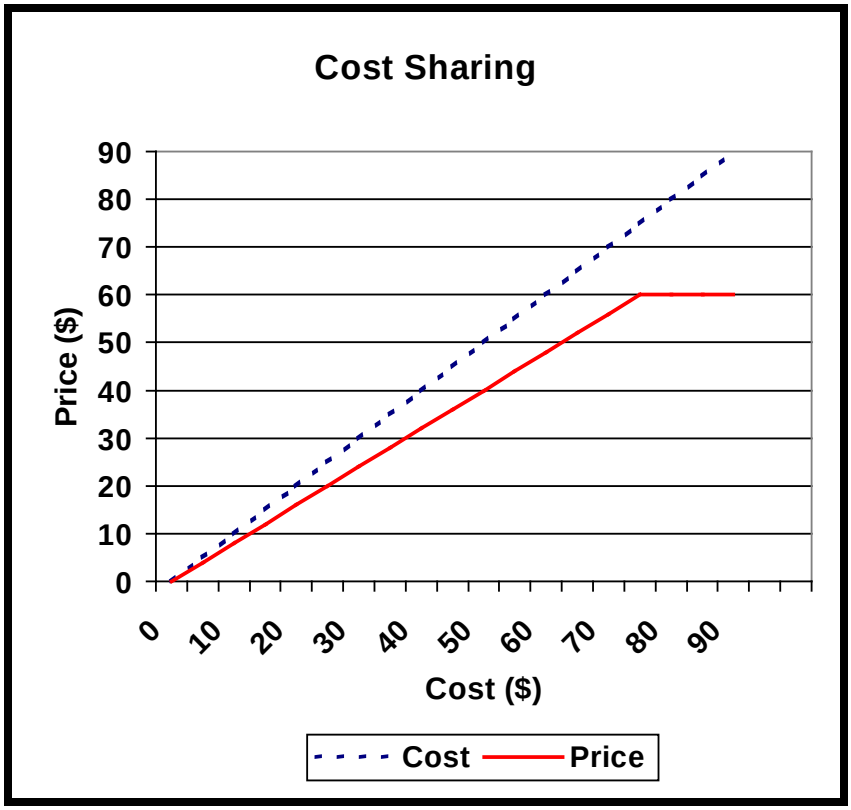
a. The contractor is reimbursed only for an agreed-upon portion of its allowable cost (see Figure 6 below).

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

FIGURE 6.

Contractor is paid 80% of negotiated costs.

Cost Ceiling = $60



a)

b)

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

5. **Cost-Plus-Fixed-Fee (CPFF) Contracts** (see Figure 7, page 49). FAR 16.306; FAR 52.216-8.

a. Definition. The contract price is the contractor's allowable costs, plus a fixed fee that is negotiated and set prior to award. The fixed fee does not vary with actual costs, but may be adjusted as a result of changes in the work to be performed under the contract. FAR 16.306(a).

b. Use. This contract type permits contracting for efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs. FAR 16.306(a). Often used for research or preliminary exploration or study when the level of effort is unknown or for development and test contracts where it is impractical to use a cost-plus-incentive-fee contract.

c. Limitation on Maximum Fee for CPFF contracts. 10 U.S.C. § 2306(d); 41 U.S.C. § 3905; FAR 15.404-4(c)(4).

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

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

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

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

d. Forms. A CPFF contract may take one of two forms: Completion or Term.

(1) The completion form describes the scope of work by stating a definite goal or target with a specific end product. The fixed fee is payable upon completion and delivery of the specified end product.

(2) The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under a term

form, the fixed fee is payable at the expiration of the agreed-upon period if performance is satisfactory. FAR 16.306(d).

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

How should INSCOM respond?

Estimated Cost @ Time of Award = $50

Fixed Fee = $5

Cost Ceiling = $75

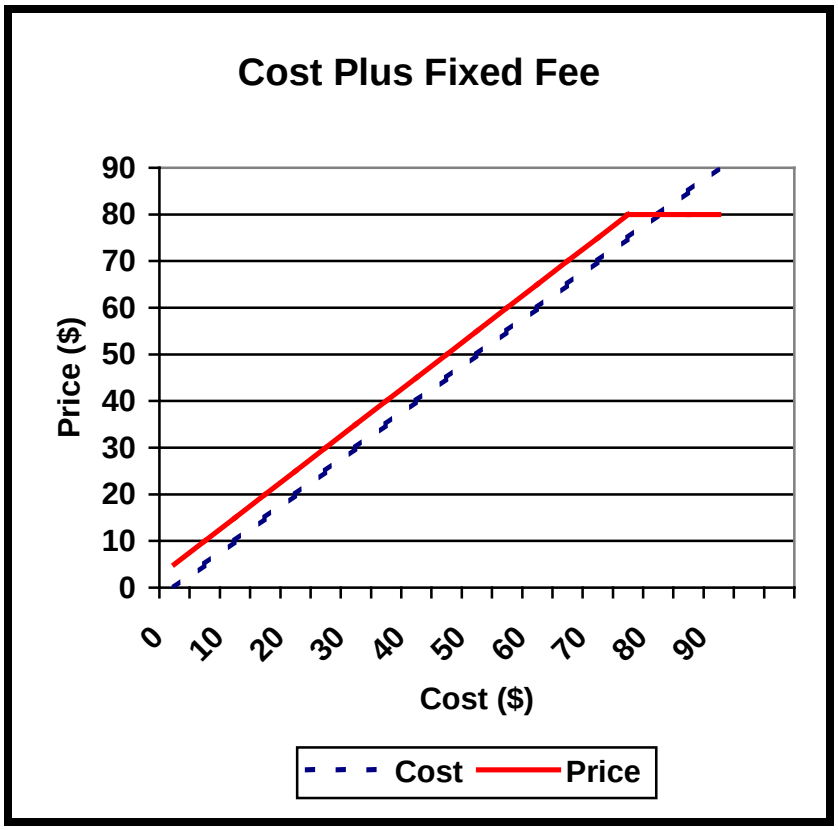


Figure 7

If in performing the contract, the contractor incurs costs of:	**Then the contractor is entitled to the following amount of money:**
$50	$50 + $5 Fixed Fee = $55
$40	$40 + $5 Fixed Fee = $45
$70	$70 + $5 Fixed Fee = $75
$80	$75 cost ceiling + $5 Fixed Fee = $80
$90	$75 cost ceiling + $5 Fixed Fee = $80

6. **Cost-Plus-Award-Fee (CPAF) Contracts**. FAR 16.305 and FAR 16.405-2.

a. The contractor receives its costs plus a fee consisting of a base amount (which may be zero) and an award amount based upon a judgmental evaluation by the Government sufficient to provide motivation for excellent contract performance (see Figure 8, page 54).

Rating	**Definition of Rating**	**Award Fee**
Unsatisfactory	Contractor had failed to meet the basic (minimum essential) requirements of the contract.	0%
Satisfactory	Contractor has met the basic (minimum essential) requirements of the contract.	No Greater than 50%
Good	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 50% of the award fee criteria established in the award fee plan.	50% - 75%
Excellent	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 75% of the award fee criteria established in the award fee plan.	75% - 90%
Outstanding	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 90% of the award fee criteria established in the award fee plan.	90% - 100%

b. Determination and Finding (D&F). FAR 16.401(d). A determination and finding, signed by the head of the contracting activity, is required. The D&F must justify that the use of this type of contract is in the best interests of the government. It must address all of the following suitability items:

(1) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(2) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(3) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the D&F. FAR 16.401(e).

c. Funding Limitations: On 17 October 2006, the President enacted the 2007 National Defense Authorization Act (NDAA); Section 814 of the 2007 NDAA required the Secretary of Defense to issue guidance for the appropriate use of award fees in all DoD acquisitions.[9]

d. On 24 April 2007, the Director, Defense Procurement and Acquisition Policy issued the required guidance on the proper use of award fees and the DoD award fee criteria.[10] The required DoD award fee criteria is reflected in the chart above:

e. Section 8117 of the 2008 DoD Appropriations Act, enacted by the President on 13 November 2007, contained the funding limitation that "[n]one of the funds appropriated or otherwise made available by this Act may be obligated or expended to provide award fees to any defense contractor contrary to the provisions of section 814 of the National Defense Authorization Act, Fiscal Year 2007 (Public Law 109-364)."

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[9] John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083, Sec. 814 (Oct. 17, 2006).

[10] *See* Appendix A: DPAP Memo on Proper Use of Award Fee Contracts and Award Fee Provisions.

f. As a result of Sec. 8117, any obligations or expenditures for DoD contract award fees that do not conform with the DoD award fee criteria are not only policy violations, but also *per se* (uncorrectable) Antideficiency Act violations as well.

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

h. Award fee. The DFARS lists sample performance evaluation criteria in a table that includes time of delivery, quality of work, and effectiveness in controlling and/or reducing costs. See DFARS Part 216, Table 16-1. The Air Force Award Fee Guide (Mar. 02) and the National Aeronautics And Space Administration Award Fee Contracting Guide (Jun. 27, 01), discussed *supra* both contain helpful guidance on developing award fee evaluation plans.

i. The FAR requires that an appropriate award-fee clause be inserted in solicitations and contracts when an award-fee contract is contemplated, and that the clause ''[e]xpressly provide[s] that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the government.'' FAR 16.406 (e)(3). There is no such boilerplate clause in the FAR and therefore such a clause must be written manually. An award fee plan is included in the solicitation which describes the structure, evaluation methods, and timing of evaluations. Generally, award fee contracts require a fee-determining official, an award-fee board (typical members include the KO and a JA), and performance monitors (who evaluate technical areas and are not members of the board). See NASA and Air Force Award Fee Guides.

j. Since the available award fee during the evaluation period must be earned, the contractor begins each evaluation period with 0% of the available award fee and works up to the evaluated fee for each evaluation period. AFARS 5116.4052(b)(2). If performance is deemed either unsatisfactory or marginal, no award fee is earned. DFARS 216.405-2(a)(i).

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

l. Unilateral changes to award-fee plans can be made before the start of an evaluation period with written notification by the KO. Changes to the plan during the evaluation plan can only be done through bilateral modifications. See Air Force Award Fee Guide.

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

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

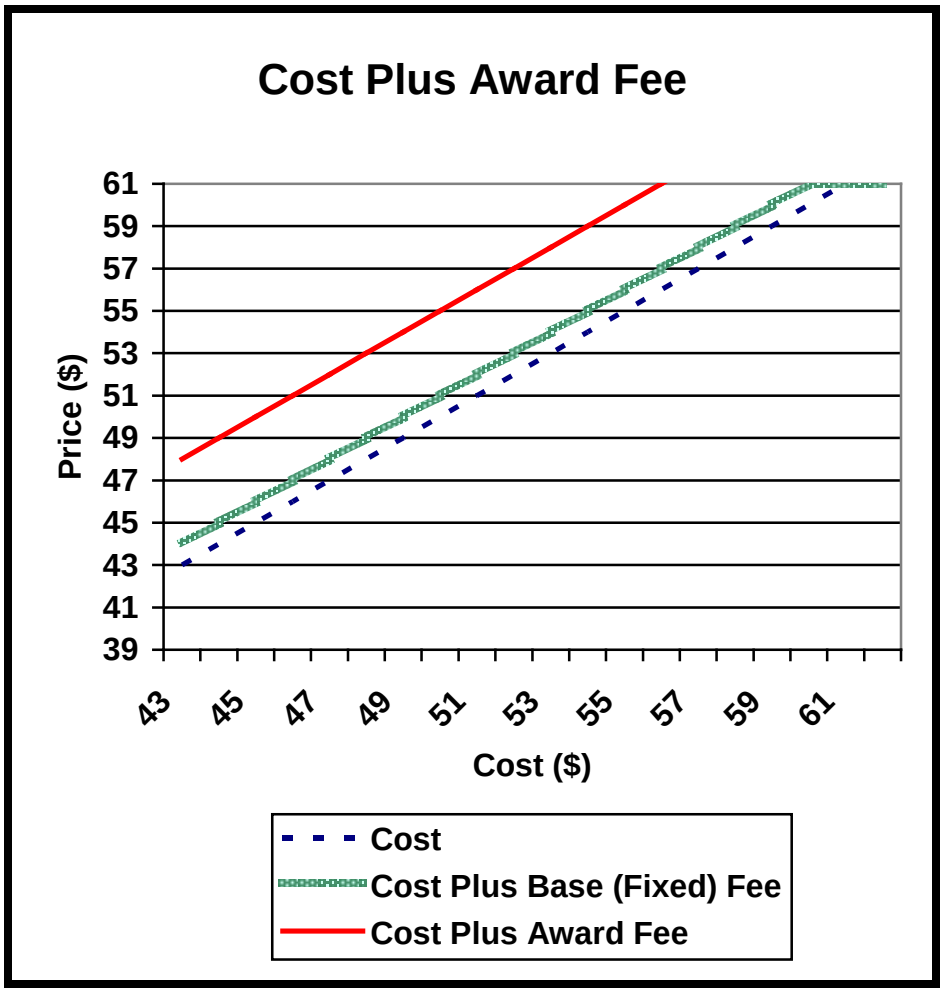
FIGURE 8.

Estimated Cost @ Time of Award = $50

Base Fee = $1

Award Fee = $4

Cost Ceiling = $60



If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:	Notes
$50	$51 + up to $4 of award fee	
$55	$56 + up to $4 of award fee	
$57	$58 + up to $4 of award fee	While $60 is the cost ceiling, in cost contracts the cost ceiling is typically exclusive of any fee. (See FAR 52.232-20).
$60	$60 + $1 base fee + up to $4 of the award fee	$60 is the cost ceiling. See comment above.
$68	$60 + $1 base fee + up to $4 of the award fee	
If in performing the contract at $50 in cost, the contractor performs:	**Then the contractor is entitled to the following amount of money:**	
Outstanding (90-100%)	$54.60-$55	$1 Base Fee + 90-100% of the $4 Award Fee
Excellent (75-90%)	$54-$54.60	$1 Base Fee + 75-90% of the $4 Award Fee
Good (50-75%)	$53-$54	$1 Base Fee + 50-75% of the $4 Award Fee
Satisfactory (No greater than 50%)	$51-$53	$1 Base Fee + no more than 50% of the $4 Award Fee
Unsatisfactory (0%)	$51	$1 Base Fee + None of the $4 Award Fee

7. Cost-Plus-Incentive-Fee (CPIF) Contracts. FAR 16.304; FAR 16.405-1; and FAR 52.216-10.

a. The CPIF specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula (see Figure 9, page 57). After contract performance, the fee is determined in accordance with the formula. See Bechtel Hanford, Inc., B-292288, et. al, 2003 CPD ¶ 199.

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

c. The government may combine technical incentives with cost incentives. FAR 16.405-1(b)(2). The contract must have cost constraints to avoid rewarding a contractor for achieving incentives which outweigh the value to the government. FAR 16.402-4 (b).

d. If a contractor meets the contract criteria for achieving the maximum fee, the government must pay that fee despite minor problems with the contract. North American Rockwell Corp., ASBCA No. 14329, 72-1 BCA ¶ 9207 (1971) (Government could not award a zero fee due to minor discrepancies when contractor met the target weight for a fuel-tank, which was the sole incentive criteria).

e. A contractor is not entitled to a portion of the incentive fee upon termination of a CPIF contract for convenience. FAR 49.115 (b)(2).

Target Cost (TC) = $50
Target Fee (TF) = $5

Cost Ceiling (CC): $60 (120% TC)

Minimum Fee (MF) = $2
Maximum Fee (MxF) = $7

Fee Ajustment (FA) formula: 50/50 split

Cost Overrun: The 50/50 FA formula decreases the $5 TF until the Ktr is only receiving the $2 MF. Also, the gov't will only pay actual costs up to the $60.00 CC.

Cost Underrun: The 50/50 FA formula increases the $5 TF until the Ktr tops out at the $7 MxF.

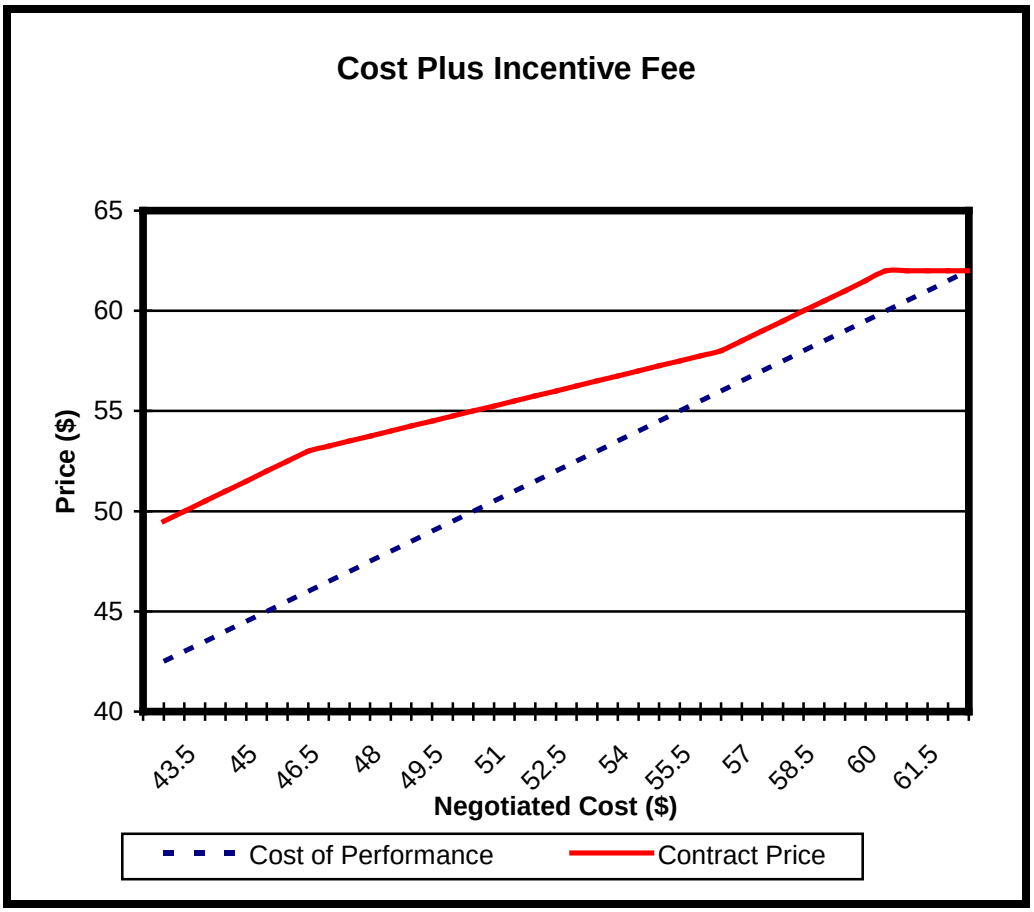


Figure 9

If in performing the contract, the contractor incurs costs of:	Then the contractor is entitled to the following amount of money:	Notes/Explanation:
$50.00	$55.00	TC $50 + TF $5 = $55.00
$55.00	$57.50	50% of $5 cost overrun = $2.50 FA to TF Actual Costs (AC) $55 + TF $5 - FA$2.50 = $57.50
$57.50	$59.50	50% of the $7.50 cost overrun = $3.75 TF $5 – FA $3.75 = $1.25 which is lower than MF $2 AC $57.50 + MF $2 = $59.50
$60.00	$62.00	50% of the $10 cost overrun = $5 FA so Ktr = MF $2 AC $60 + MF $2 = $62
$62.00	$62.00	50% of the $12 cost overrun = $6 FA, so Ktr = $2 MF AC exceed Cost Ceiling (CC) so costs are limited to $60 CC $60 + MF $2 = $62
$47.50	$55.75	50% of the $2.5 cost underrun = $1.25 FA AC $47.50 + FA $1.25 + TF $ 5= $53.75
$45.00	$52.50	50% of the $5 cost underrun = $2.50 FA which would push the fee over the MxF $7. So Ktr gets MxF $7.00 AC $45 + MxF $7 = $52.00

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

a. Application. Use these contracts when it is not possible at contract award to estimate accurately or to anticipate with any reasonable degree of confidence the extent or duration of the work. FAR 16.601(b); FAR 16.602.

b. Type. The FAR Council recently specified that T&M and LH contracts are neither fixed-price contracts nor cost-reimbursement contracts, but they constitute their own unique contract type. Federal Register, Vol. 77, No.1, Jan 2012.

c. Government Surveillance. Appropriate surveillance is required to assure that the contractor is using efficient methods to perform these contracts, which provide no positive profit incentive for a contractor to control costs or ensure labor efficiency. FAR 16.601(b)(1); FAR 16.602. CACI, Inc. v. General Services Administration, GSBCA No. 15588, 03-1 BCA ¶ 32,106.

d. Limitation on use. The contracting officer must execute a D&F that no other contract type is suitable, and include a contract price ceiling. This includes Federal Supply Schedule contracts. FAR 8.404(h)(3)(i); FAR 16.601(c); FAR 16.602.

e. Types.

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

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

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

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

(ii) An optional pricing method described at FAR 16.601(b)(3) may be used when the contractor is providing material it sells regularly to the general public in the

ordinary course of business, and several other requirements are met.

(c) Labor-hour contracts. Differs from T&M contracts only in that the contractor does not supply the materials. FAR 16.602.

C. Miscellaneous Contract Types

1. Level of Effort Contracts.

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

b. Cost-plus-fixed-fee-term form contract. FAR 16.306(d)(2). Similar to the firm-fixed-price level-of-effort contract except that the contract price equals the cost incurred plus a fee. The contractor is required to provide a specific level of effort over a specific period of time.

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

a. The process for earning additional periods is similar to award fees. Generally, a Term Determining Official, an Award Term Review Board, and Performance Monitors should be identified within the solicitation.

b. A point ceiling (+100) and a floor (-100) will be set up to incentivize the contractor's performance. Performing to either threshold will either increase or decrease the term of the contract. For example, two Very Good evaluations (80 points for each) in a row would earn another year of performance. The 60 points would carry over to the next evaluation period.

V. SELECTION OF CONTRACT TYPE

A. Factors to Consider.

1. Regulatory Limitations.

   a. 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.

   b. 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).

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

2. Negotiation. Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. FAR 16.103(a). (See Figure 10, page 61).

3. Allocation of Risk. Certain contract types distribute the risk of a contract cost overrun differently. For example, a firm fixed price contract places the risk of a cost overrun solely on the contractor. While the level of effort contract type places more of the risk of a cost overrun on the government.

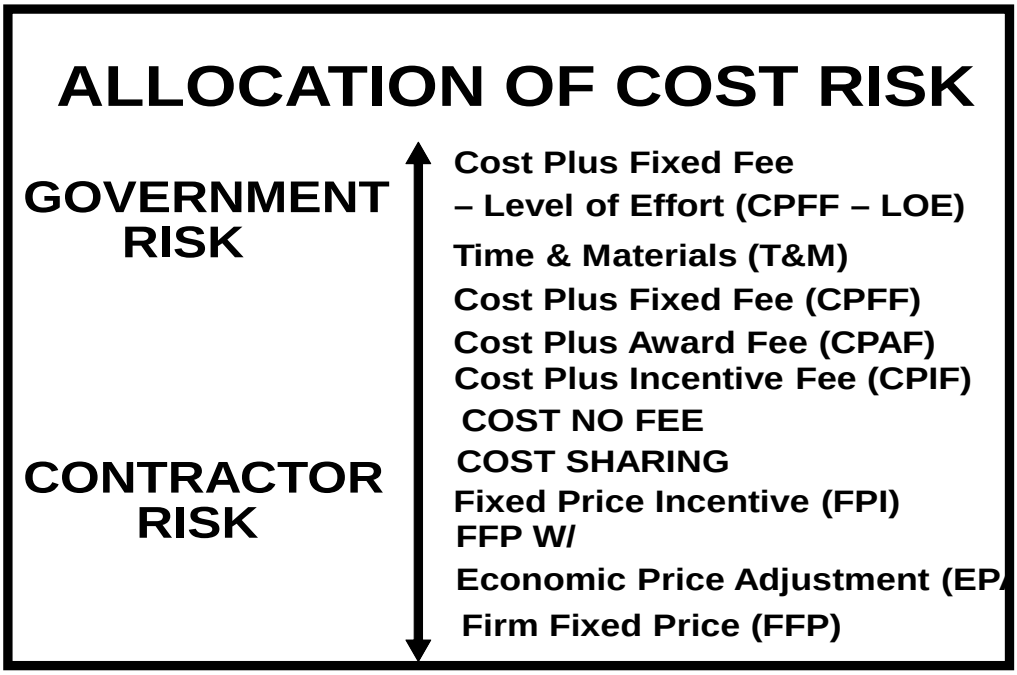


Figure 10

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

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

(1) Availability of price competition.

(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.

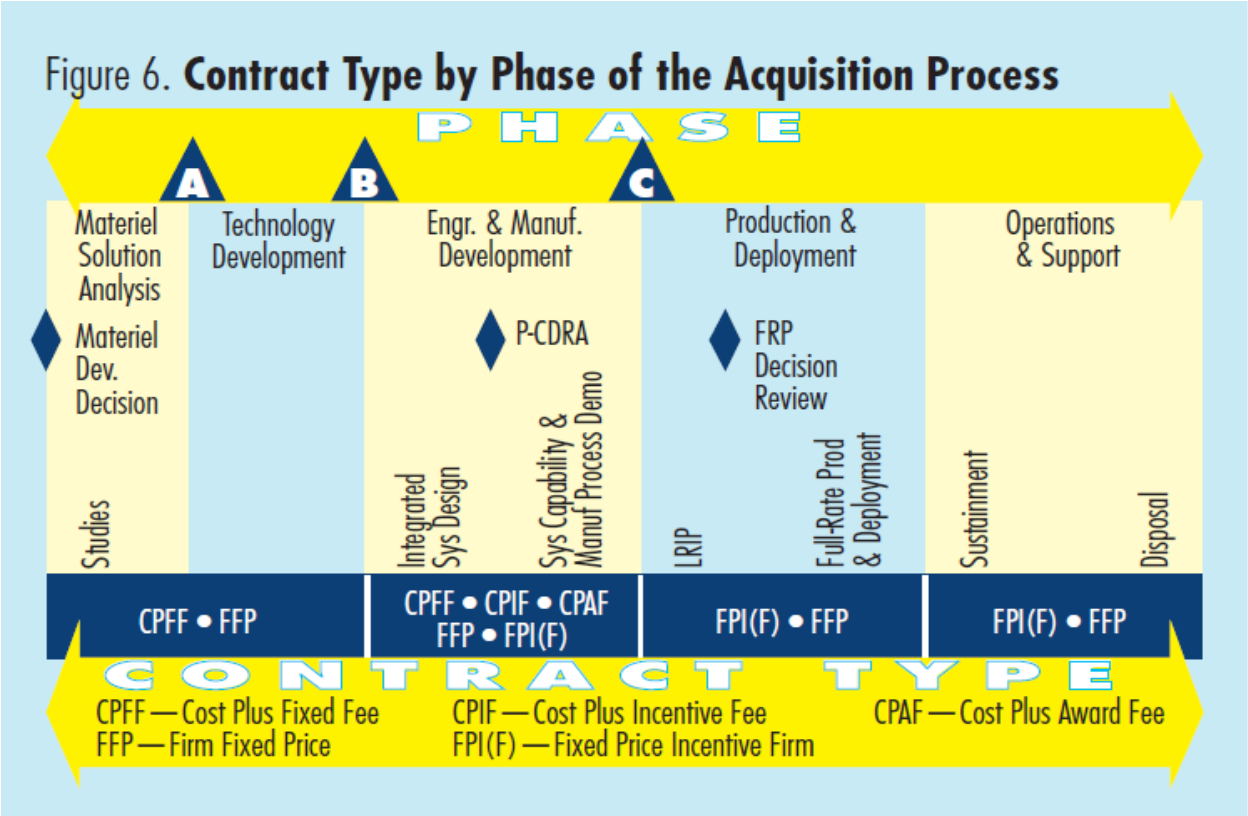
(8) Concurrent contracts.

(9) Extent and nature of proposed subcontracting.

(10) Acquisition history.

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

c. Common Contract Type by Phase of the Acquisition Process. For a more complete description of the acquisition process and Milestones A, B, and C, please see DODI 5000.02.



VI. PERFORMANCE-BASED ACQUISITIONS FAR SUBPART 37.6

A. Focuses on results rather than methods (i.e. "how the work it to be accomplished or how many work hours). FAR 37.602(b)(1). Performance-based contracts for services shall include:

1. A performance work statement (PWS)

2. Measurable performance standards and a method of assessing performance against those standards

3. Performance incentives when appropriate. FAR 37.601

4. There are two ways to generate the PWS. Either the government creates the PWS or prepares a statement of objectives (SOO) from which the contractor generates the PWS along with its offer. The SOO does not become part of the contract. The minimum elements of the SOO are:

   a. Purpose;

   b. Scope or mission;

   c. Period or place of performance;

   d. Background;

   e. Performance objectives; and

   f. Any operating constraints. FAR 37.602 (c).

5. Depends on quality assurance plans to measure and monitor performance prepared by either the government or submitted by the contractor. FAR 37.604.

6. The ideal contract type is one that incorporates positive and/or negative performance incentives which correlate with the quality assurance plan. FPIF are useful types for performance-based contracts.

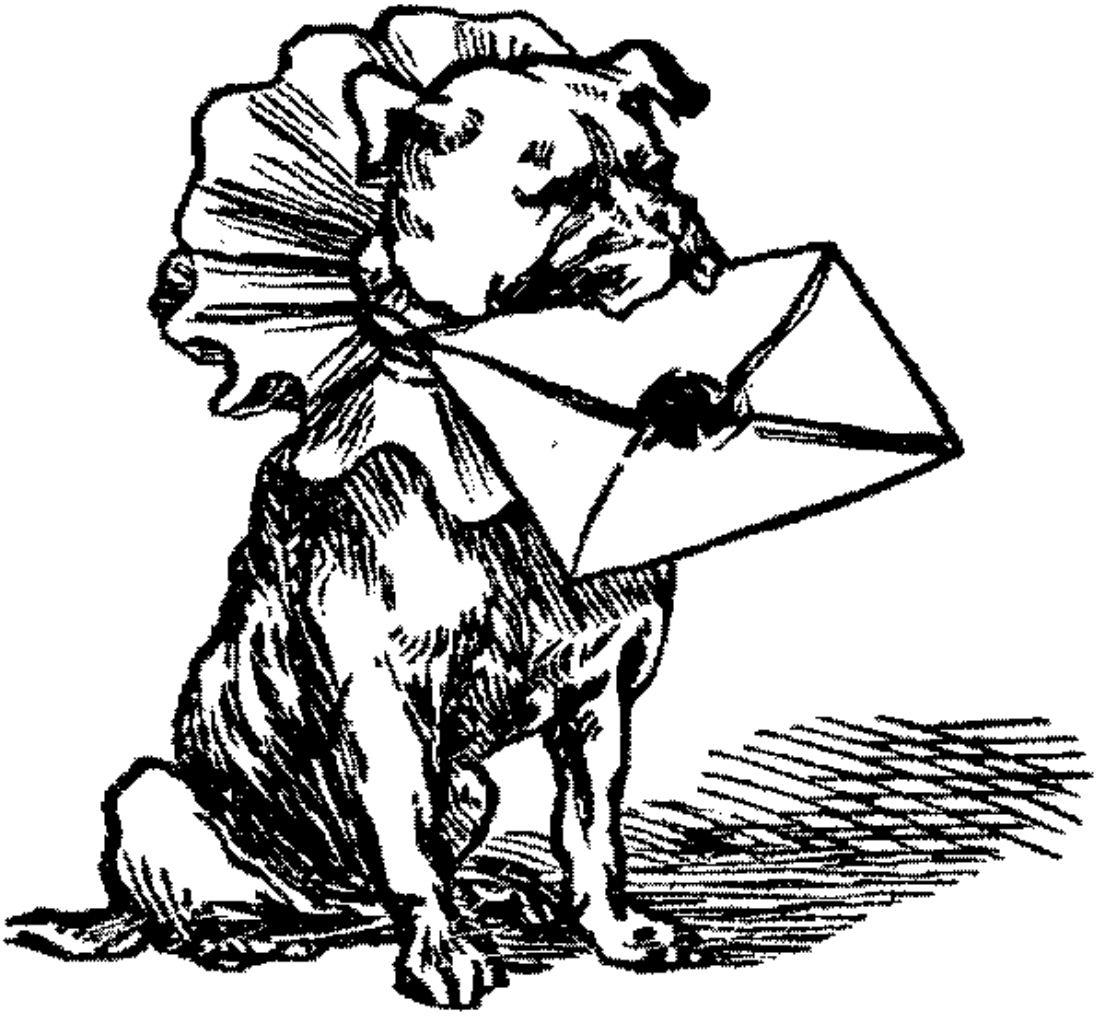
B. Resources

1. FAR 16.4, DFARS 216.1, and DFARS PGI 216.4

2. The DoD has a *Guidebook on Performance-Based Service Acquisitions* located at http://www.acq.osd.mil/dpap/Docs/pbsaguide010201.pdf . Another guide is the *Seven Steps to Performance-Based Service Acquisitions*, http://www.acquisition.gov/comp/seven_steps/home.html.

3. The DOD has established the Award and Incentive Fees Community of Practice under the Defense Acquisition University https://acc.dau.mil/awardandincentivefees.

Chapter 7
Sealed Bidding



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CHAPTER 7

SEALED BIDDING

I. INTRODUCTION

The purpose of these statutes and regulations is to give all persons equal right to compete for government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis.

United States v. Brookridge Farm, Inc., 111 F.2d 461, 463 (10th Cir. 1940).

II. THREE CONTRACT METHODS

A. Sealed Bidding. FAR Part 14.

B. Contracting by Negotiation. FAR Part 15.

C. Simplified Acquisition Procedures. FAR Part 13.

III. FRAMEWORK OF THE SEALED BIDDING PROCESS

A. Overview:

1. Sealed bidding is the oldest method of contracting in the United States. For many years, it was the contracting method of choice. Today, it is the least used method but it remains foundational to an adequate understanding of government contract law in the United States. For an excellent history of sealed bidding in government contracting, see "A History of Government Contracting" by James F. Nagle. See also 2 Stat. 536; 6 Ops. Atty. Gen. 99, 1853 WL 2170; 2 Ops. Atty. Gen. 257, 1829 WL 449.

2. Sealed bidding is a method of contracting where contracts are awarded to:

   a. The LOWEST PRICED

   b. RESPONSIVE BID

   c. Submitted by a RESPONSIBLE BIDDER. FAR 14.103-1(d).

3. Contract Types: Bids must be firm fixed price (FFP) or firm fixed price with economic price adjustment (FFP w/EPA). FAR 14.104.

B. Current Statutes

1. DoD, Coast Guard, and NASA –10 U.S.C. §§ 2302 *et al.*

2. Other federal agencies – 41 U.S.C. §§ 3301 *et al.*

C. Current Regulations

1. FAR Part 14 – Sealed Bidding.

2. DoD and agency regulations:

a. Defense FAR Supplement (DFARS), Part 214 – Sealed Bidding.

b. Air Force FAR Supplement (AFFARS), Part 5314 – Sealed Bidding.

c. Army FAR Supplement (AFARS), Part 5114 – Sealed Bidding

d. Navy Marine Corps Acquisition Regulation Supplement (NMCARS), Part 5214 – Sealed Bidding.

e. Defense Logistics Acquisition Directive (DLAD), DLAD Part 14 – Sealed Bidding.

D. Mandatory Use of Sealed Bidding

1. Agencies are **required** to use sealed bidding where all elements enumerated in these parallel statutory structures for the use of sealed bidding procedures are present. 10 U.S.C. § 2304(a)(2); 41 U.S.C. § 3301(b)(1); FAR 6.401(a); FAR 14.103-1; see Racal Filter Technologies, Inc., B-240579, 90-2 CPD ¶ 453 (Comp. Gen. Dec. 4, 1990) (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, 91-1 CPD ¶ 45 (Comp. Gen. Jan. 16, 1991) (use of sealed bidding procedures for ordnance site survey was proper)

2. **The Racal Factors** – The head of an agency **shall** solicit sealed bids if—

a. Time permits the solicitation, submission, and evaluation of sealed bids;

a. The award will be made on the basis of price and other price-related factors [see FAR 14.201-8];

b. It is not necessary to conduct discussions with the responding sources about their bids; and

c. There is a reasonable expectation of receiving more than one sealed bid.

3. Negotiated procedures are only authorized if sealed bids are not appropriate under FAR 6.401(a). FAR 6.401(b)(1); see Racal Filter Technologies, Inc., B-240579, , 90-2 CPD ¶ 453 (Comp. Gen. Dec. 4, 1990); see also UBX Int'l, Inc., B-241028, 91-1 CPD ¶ 45 (Comp. Gen. Jan. 16, 1991),.

4. The determination as to whether circumstances support the use of negotiated procedures is largely a discretionary matter within the purview of the contracting officer.

a. While the decision to employ negotiated procedures involves the exercise of a business judgment, such decisions must still be reasonable. Essex Electro Eng'rs, Inc., B-221114, 86-1 CPD ¶ 92 (Comp. Gen. Jan. 27, 1986). An agency must reasonably conclude that the conditions requiring use of sealed bidding are not present. F&H Mfg. Corp., B-244997, 91-2 CPD ¶ 520 (Comp. Gen. Dec. 6, 1991.

b. If the contracting officer decides that negotiated procurement is necessary, the contracting officer must explain briefly which of the four requirements for sealed bidding is not met. I.T.S. Corp., B-243223, 91-2 CPD ¶ 55 (Comp. Gen. July 15, 1991).

c. The fact that the requirement was previously procured through sealed bidding procedures is not material to whether the contracting officer's decision was reasonable. Id.; see also Victor Graphics, Inc., B-238290, 90-1 CPD ¶ 407 (Comp. Gen. Apr. 20, 1990) (agency's past practice is not a basis for questioning its application of otherwise correct procurement procedures).

5. Case Study

Facts. Offeror A protested the use of negotiated procedures by the agency, arguing that the agency was required to use sealed bidding procedures under CICA. The solicitation called for construction of an intake canal as part of a flood control project. *All previous canal construction projects were awarded using price or price related factors only*. This time, the agency chose negotiated procedures because it decided to consider six non-price related factors as equal to the price factor. The non-price related factors were past performance, technical approach, duration, personnel experience, project management, and small business subcontracting plan. The agency was also using a compressed time frame because of the urgency of improving flood control in a hurricane stricken area. The solicitation also stated the agency could elect to hold discussions. In considering Offeror A's protest, GAO evaluated the **reasonableness** of the agency's decision to use negotiated procedures. What should the result be?

Negotiated Procurement OK. GAO held that the agency reasonably concluded the procurement required the use of negotiated procedures. The use of the new non-price factors was warranted because of the need to move quickly to restore flood control capabilities to the region. Ceres Environmental Services, Inc., B-310902, 2008 CPD ¶ 48, (Comp. Gen. Mar. 3, 2008) (agency properly used negotiated procedures where compressed time schedule increased the complexity of a project normally awarded by sealed bidding); see Comfort Inn South, B-270819.2, 96-1 CPD ¶ 225 (Comp. Gen. May 14, 1996) (negotiated procedures okay where, after 10 years of using sealed bidding, agency changed to the use of negotiated procedures to consider past performance as a non-price factor in selection of a contractor to provide accommodations for military applicants); TLT Constr. Corp., B-286226, 2000 CPD ¶ 179 (Comp. Gen. Nov. 7, 2000) (complex coordination and scheduling requirements provided reasonable support for negotiated procurement); W.B. Jolley, B-234490, 89-1 CPD ¶ 512 (Comp. Gen. May 26, 1989) (decision to consolidate numerous, diverse services into one contract created a complex procurement justifying use of negotiated procurement procedures).

E. Overview of Sealed Bidding Process: The Five Phases. FAR 14.101.

1. Preparation of the invitation for bids (IFB)
2. Publicizing the invitation for bids
3. Submission of bids
4. Evaluation of bids
5. Contract award

IV. PREPARATION OF INVITATION FOR BIDS

A. Format of the IFB

1. Uniform Contract Format. FAR 14.201-1.

2. Standard Form 33 - Solicitation, Offer and Award.

3. Standard Form 30 - Amendment of Solicitation; Modification of Contract.

B. Specifications

1. Clear, complete, and definite

2. Minimum needs of the government ("no gold plating")

3. Preference for commercial items. FAR 12.000 and FAR 12.101(b).

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

D. Contract Type: Contracting officers may use only **firm fixed-price** and **fixed-price with economic price adjustment** contracts in sealed bidding acquisitions. FAR 14.104.

V. PUBLICIZING THE INVITATION FOR BIDS (IFB)

A. Policy on Publicizing Contract Actions. FAR 5.002. Prior to awarding government contracts, agencies must comply with the publicizing requirements of FAR Part 5. Publicizing contract actions increases competition, broadens industry participation, and assists small business concerns in obtaining contracts and subcontracts.

B. The publication requirements mandated by FAR 5.02 are covered in Fiscal Law Desk book Chapter 34.

C. Late receipt of IFB. Failure of a potential bidder to receive an IFB in time to submit a bid, or to receive a requested solicitation at all, does not require postponement of bid opening **unless** adequate competition is not obtained. See Family Carpet Serv. Inc., B-243942.3, 92-1 CPD ¶ 255 (Comp. Gen. Mar. 3, 1992); see also Educational Planning & Advice, B-274513, 96-2 CPD ¶ 173 (Comp. Gen. Nov. 5, 1996) (refusal to postpone bid opening during a hurricane was not an abuse of discretion where adequate competition was achieved and agency remained open for business); Lewis Jamison Inc. & Assocs., B-252198, 93-1 CPD ¶ 433 (Comp. Gen. June 4, 1993) (GAO denies protest where contractor had "last clear opportunity" to avoid being precluded from competing). But see Applied Constr. Technology, B-251762, 93-1 CPD ¶ 365 (Comp. Gen. May 4, 1993) (although agenc y received 10 bids in response to IFB, GAO sustained protest where agency failed to solicit contractor it had advised would be included on its bidder's mailing list). Fa ilure to Provide Actual Notice to a Bidder (including the incumbent).

D. Failure to Provide Actual Notice to a Bidder (including the incumbent)

1. Historical. At one time (**but no longer**), the FAR required that "bids shall be solicited from . . . the previously successful bidder." See superseded FAR §§ 14.205-4 and 15.403. During that time, failure to give notice of a solicitation for supplies or services to a contractor currently providing such supplies or services (i.e., the incumbent) had occasionally been fatal to the solicitation, unless the agency:

   a. Made a diligent, good-faith effort to comply with statutory and regulatory requirements regarding notice of the acquisition and distribution of solicitation materials; and

   b. Obtained reasonable prices (competition). Transwestern Helicopters, Inc., B-235187, 89-2 CPD ¶ 95 (Comp. Gen. July 28, 1989) (although the agency failed inadvertently to solicit incumbent contractor, the agency made reasonable efforts to publicize the solicitation, which resulted in 25 bids); but see Professional Ambulance, Inc., B-248474, 92-2 CPD ¶ 145 (Comp. Gen. Sep. 1, 1992) (agency failed to solicit the incumbent and received only three proposals; GAO recommended resolicitation).

2. Current. If the solicitation is posted on FedBizOpps (the current GPE), then the agency has fulfilled any obligation it might have to solicit the incumbent contractor.

   a. The FAR provides guidance on notification procedures. See FAR Part 5. However, beyond the notification procedures, **the current FAR does not require actual notice to incumbent contractors**.

      (1) The agency has an affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them. Optelec U.S., Inc., B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008) (publicizing on the GPE generally meets this affirmative obligation).

      (2) Concurrent with the agency's obligations, prospective contractors must avail themselves of every reasonable opportunity to obtain the solicitation document. See Id.; See also, Laboratory Sys. Servs., Inc., B-258883, 95-1 CPD ¶ 90 (Comp. Gen. Feb. 15, 1995).

      (3) In protests, GAO will consider whether the agency or the protester had the last clear opportunity to avoid the protester's being precluded from competing. Optelec U.S.,

Inc., B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008) (once advised the solicitation would be posted on FedBizOpps, it was the protestor's responsibility to take whatever steps were necessary to obtain it); Wind Gap Knitwear, Inc., B-276669, 97-2 CPD ¶ 14 (Comp. Gen. July 10, 1997) (although protestor had not received the actual notice of the solicitation, it was aware of the estimated agency closing date for offers and so it was unreasonable for the protestor to delay contacting the agency about its nonreceipt of the solicitation until after the actual closing date).

(4) DBI Waste Systems, Inc., B-400687, 2009 CPD ¶ 15 (Comp. Gen. Jan. 12, 2009) (protest that notice of solicitation on Government Point of Entry (GPE) was inadequate because incumbent protester was not notified and lacked internet access was denied).

b. If agency posts solicitation on the GPE, contractor is on constructive notice of the RFP, even if contractor never received actual notice.

(1) PR Newswire Association, LLC, B-400430, 2008 CPD ¶ 178 (Comp. Gen. Sep. 26, 2008) (GAO held the agency's posting on FedBizOpps put PR Newswire on constructive notice even though a competitor received actual notice because of a prior bid protest agreement. Actual notice of solicitation to incumbent, PR Newswire was not required; posting of solicitation on GPE provided constructive notice).

(2) CBMC, Inc. B-295586, 2005 CPD ¶ 2 (Comp. Gen. Jan. 6, 2005) (FedBizOpps website places prospective contractors on constructive notice of contract awards); Aluminum Specialties, Inc. t/a Hercules Fence Co., B-281024, 98-2 CPD ¶ 116 (Comp. Gen. Nov. 20, 1998) (notice in Commerce Business Daily – formerly the official public medium for identifying proposed contract actions and now replaced by 0FedBizOpps – provides constructive notice of solicitation and contents).

c. Once an agency posts a solicitation on the GPE, it is solely the incumbent contractor's responsibility to take whatever steps are necessary to obtain the solicitation.

d. **Case Study**:

Facts. A bidder requests that the agency provide it with a copy of the solicitation. The agency tells the bidder to register on FedBizOpps for information on the procurement. The bidder registers and also signs up on FedBizOpps to receive an email notice when the solicitation was posted. However, FedBizOpps discontinues its email notification feature and the bidder does not receive notice when the solicitation is posted. The bidder receives actual notice of the solicitation on the day proposals are due. As a result, its bid is late and the agency rejects the bid. The bidder requests that GAO recommend that its offer be considered because the bidder did not received actual notice of the solicitation until the day that proposals were due. Should the bidder's late bid be considered?

No. Once the agency posts the solicitation on FedBizOpps, it becomes the contractor's sole responsibility to monitor the website for the posting of the solicitation. A bidder's decision to use any e-mail notification function on FedBizOpps was at the bidder's own risk. It did not operate to shift responsibility from the contractor to the agency. Optelec U.S., Inc., B-400349, 2008 CPD ¶ 192 (Comp. Gen. Oct. 16, 2008).

VI. SUBMISSION OF BIDS

A. Safeguarding Bids. FAR 14.401.

1. Bids (including bid modifications) received before the time set for bid opening, shall be kept secure, and generally, must remain unopened in a locked bid box, a safe, or in a secured, restricted-access electronic bid box. FAR 14.401.

2. A bidder generally is not entitled to relief if the agency negligently loses its bid. Vereinigte Gebäudereinigungsgesellschaft, B-252546, 93-1 CPD ¶ 454 (Comp. Gen. June 11, 1993),.

B. To be considered for award, a bid must be **RESPONSIVE** to the solicitation, *i.e.*, comply in all material respects with the IFB, to include method, time and place of submission. FAR 14.301(a). Reasons for specific requirements:

1. Equality of treatment of bidders.

2. Preserve integrity of system.

3. Convenience of the government.

C. Method of Submission. FAR 14.301.

1. To be considered for award, a bid must be **RESPONSIVE** to the solicitation, *i.e.*, comply in all material respects with the IFB, to include the method of submission. FAR 14.301(a). This enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system. Id.; LORS Medical Corp., B-259829.2, 95-1 CPD ¶ 222 (Comp. Gen. Apr. 25, 1995) (bidder's failure to return two pages of IFB does not render bid nonresponsive; submission of signed SF 33 incorporates all pertinent provisions).

   a. General Rule – Bidders may submit their bids by any written means permitted by the solicitation.

   b. Unless the solicitation specifically allows it, the contracting officer may not consider telegraphic bids, *i.e.*, those submitted by telegram or by mailgram. FAR 14.301(b); MIMCO, Inc., B-210647.2, 84-1 CPD ¶ 22 (Comp. Gen. Dec. 27, 1983) (telegraphic bid, which contrary to solicitation requirement makes no mention of bidder's intent to be bound by all terms and conditions, is nonresponsive).

   c. The government will not consider facsimile bids unless permitted by the solicitation. FAR 14.301(c); FAR 14.202-7; Richcon Fed. Contractors, Inc., B-403223, 2010 CPB ¶ 192 (Comp. Gen. Aug. 12, 2010) (agency properly rejected quote that was submitted by facsimile because the request for quotations contained a clause prohibiting this method of submission); Recreonics Corp., B-246339, 92-1 CPD ¶ 249 (Comp. Gen. Mar. 2, 1992) (bid properly rejected for bidder's use of fax machine to transmit acknowledgement of solicitation amendment); but see Brazos Roofing, Inc., B-275113, 97-1 CPD ¶ 43 (Comp. Gen. Jan. 23, 1997) (bidder not penalized for agency's inoperable FAX machine); PBM Constr. Inc., B-271344, 96-1 CPD ¶ 216 (Comp. Gen. May 8, 1996) (ineffective faxed modification had no effect on the original bid, which remained available for acceptance); International Shelter Sys., B-245466, 92-1 CPD ¶ 38 (Comp. Gen. Jan. 8, 1992) (hand-delivered facsimile of bid modification is not a facsimile transmission).

   d. **Government failure to follow solicitation provisions**. If an agency exercises discretion to waive solicitation requirements *informally*, does it put itself at risk of a sustained protest for manipulating the competitive process?

   e. Case Study

Facts: Solicitation for food distribution services with three offerors competing. Solicitation did not allow proposals to be submitted by email. It did allow faxes, hand-deliver and mail. However, the agency informally accepted email submission from all three offerors at one time or another. Offeror A sent its final revised proposal by email about 2 ½ hours late. Agency excluded Offeror A because it used email and because it was late. Offeror A protested to GAO. What result?

GAO denied. The protest was late. LaBatt Food Service, Inc., B-310939.6, 2008 CPD ¶ 162, (Comp. Gen. Aug. 19, 2008). Offeror A protests to COFC. What result?

COFC sustained. FAR 15.208(a) provides offeror's may use any transmission method authorized by the solicitation. Email was not authorized. If the agency had followed the FAR, the agency would have had to disqualify all three offeror's at one time or another. Thus, the contract would have had to be recompeted. Offeror A was significantly prejudiced and so had standing to challenge the award of the contract to Offeror B. COFC found the Agency abused their discretion. COFC wrote, "There is a public interest in saluting the language of solicitations. If the agency wants to change the language, use a formal amendment . . . agency discretion to waive solicitation requirements, at different times in the same procurement, and perhaps toward one offeror and not another, renders the procurement process subject to manipulation and unfair competitive advantage." LaBatt Food Service, Inc. v. U.S., 84 Fed. Cl. 50, 65 (2008). The Government appeals to CAFC. What result?

CAFC reversed. Holding that Offeror A did not have standing to challenge the award to Offeror B because Offeror A was not prejudiced by the agency's error of informally allowing email proposals. In order for Offeror A to be prejudiced, it must be harmed by the government error and the informal acceptance of email proposals. While an error, there was no harm to Offeror A. One or more of all the offerors were retained in the competition because the agency informally allowed email submissions. The fact that Offeror A's submission was late is an independent free standing ground to eliminate Offeror A from the competition. LaBatt Food Service v. U.S., 577 F.3d 1375 (Fed. Cir. 2009).

D. Time and Place of Submission. FAR 14.302.

1. Bids shall be submitted so that they will be **received in the office designated** in the IFB not later than the **exact time set** for opening of bids. FAR 14.302(a); 14.304(a)

2. Place of submission = as specified in the IFB. FAR 14.302(a); 14.304(a).

a. FAR 14.302(a); see Rodale Electr. Corp., B-221727, 86-1 CPD ¶ 342 (Comp. Gen. Apr. 7, 1986) (an offer is later if it does not arrive at the place designated in the solicitation for the receipt of proposals by the designated time.); J.E. Steigerwald Co., Inc., B-

218536, 85-1 CPD ¶ 453 (Comp. Gen. Apr. 19, 1985) (receipt at other places within the agency, such a the mailroom, is not sufficient); CSLA, Inc., B-255177, 94-1 CPD ¶ 63 (Comp. Gen. Jan. 10, 1994) (hand-carried proposal was "late" where it was delivered via commercial carrier to the *mailing* address rather than the address for *hand-carried* proposals and was received by the contracting officer after the closing time for receipt of proposals); Carolina Archaeological Serv., B-224818, 86-2 CPD ¶ 662 (Comp. Gen. Dec. 9, 1986),.

3. Time of submission = as specified in the IFB. FAR 14.302(a); 14.304(a).

a. The official designated as the bid opening officer shall decide when the time set for bid opening has arrived and shall inform those present of that decision. FAR 14.402-1; Action Serv. Corp., B-254861, 94-1 CPD ¶ 33 (Comp. Gen. Jan. 24, 1994) (the bid opening officer is authorized to decide when the time set for opening has arrived by informing those present of that decision; the officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable); J. C. Kimberly Co., B-255018.2, 94-1 CPD ¶ 79 (Comp. Gen. Feb. 8, 1994); Chattanooga Office Supply Co., B-228062, 87-2 CPD ¶ 221 (Comp. Gen. Sept. 3, 1987) (bid delivered 30 seconds after bid opening officer declared the arrival of the bid opening time is late);

b. The bid opening officer's declaration of the bid opening time is determinative unless it is shown to be unreasonable. U.S. Aerospace, Inc., B-403464, B-403464.2, 2010 CPD ¶ 255 (Comp. Gen. Oct. 2, 2010) (the official time maintained by the agency is controlling absent a showing that it was unreasonable); Lani Eko & Company, CPAs, PLLC, B-404863, 2008 CPD ¶ 118 (Comp. Gen. June 6, 2011) (nothing inherently unreasonable with the agency's use of a security guard desk phone clock to determine the solicitation's closing time; no requirement for the time maintained by the agency to be synchronized with protester's personal cell phone or any other phone); General Eng'g Corp., B-245476, 92-1 CPD ¶ 45 (Comp. Gen. Jan. 9, 1992) (may reasonably rely on the bid opening room clock when declaring bid opening time).

c. If the bid opening officer has not declared bid opening time, a bid is timely if delivered by the end of the minute specified for bid opening. Amfel Constr., Inc., B-233493.2, 89-1 CPD ¶ 477 (Comp. Gen. May 18, 1989) (bid delivered within 20-50 seconds after bid opening clock "clicked" to the bid opening time was timely where bid opening officer had not declared bid submission period ended); Reliable Builders, Inc., B-249908.2, 93-1 CPD ¶

116 (Comp. Gen. Feb. 9, 1993) (bid which was time/date stamped one minute past time set for bid opening was timely since bidder relinquished control of bid at the exact time set for bid opening).

d. Arbitrary early or late bid opening is improper. Chestnut Hill Constr. Inc, B-216891, 85-1 CPD ¶ 443 (Comp. Gen. Apr. 18, 1985) (importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that would be obtained by considering a late bid); William F. Wilke, Inc., B-185544, 77-1 CPD ¶ 197 (Comp. Gen. Mar. 18, 1977).

4. Postponement of bid opening. FAR 14.208; FAR 14.402-3.

a. The government may postpone bid opening **before** the scheduled bid opening time by issuing an amendment to the IFB. FAR 14.208(a).

b. The government may postpone bid opening even **after** the time scheduled for bid opening if:

(1) **Segment of bids have been delayed in the mails.** The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence. FAR 14.402-3(a)(1); see Ling Dynamic Sys., Inc., B-252091, 93-1 CPD ¶ 407 (Comp. Gen. May 24, 1993). The contracting officer publicly must announce postponement of bid opening and issue an amendment. FAR 14.402-3(b).

(2) **Emergency or unanticipated events** interrupt normal governmental processes so that the conduct of bid opening as scheduled is impractical. FAR 14.402-3(a)(2). If urgent requirements preclude amendment of the solicitation:

(a) the time for bid opening is deemed extended until the same time of day on the first normal work day on which Government processes resume; and

(b) the time of actual bid opening is the cutoff time for determining late bids. FAR 14.402-3(c).

(c) Hunter Contracting Co., B-402575, 2010 CPD ¶ 93 (Comp. Gen. Mar. 31, 2010) (exception does not apply to a mailed proposal that was not delivered due to a snow storm because the government office

was open and receiving proposals at the time proposals were due).

(d) Conscoop—Consorzia v. US, 62 Fed. Cl. 219 (2004) (exception applied if normal government processes were interrupted); but see Watterson Constr. Co. v US, 98 Fed.Cl. 84, 2011 WL 1137330 (Fed. Cl. Mar. 29, 2011) (recognizing no disruption in government processes but holding that the e-mail "storm" causing delay of delivery of e-mails constituted an "unanticipated event").

(e) Case Study:

Facts: Proposals were due by 2 p.m. on the designated day. Severe snowstorms closed the government in Washington D.C. on a day when proposals were scheduled to be received. The agency received proposals on the next day that the Government was open and resumed its normal processes. The agency continued to receive proposals until the designated time (i.e., 2 p.m.) even though there was an authorized two-hour delayed arrival/unscheduled leave policy for government employees that day. Protester submitted its bid at 2:24 p.m. Is the bid late?

Yes. Held that agency acted reasonably as authorized by FAR § 52.212-1(f)(4) (Instructions to Offerors--Commercial Items (June 2008)); the fact that a two hour delayed arrival/unscheduled leave policy for government employees was authorized for that day did not mean normal government processes had not resumed. CFS-INC, JV, B-401809.2, 2010 CPD ¶ 85 (Comp. Gen. Mar. 31, 2010).

E. Amendment of IFB

1. The government must display amendments in the bid room and must send, before the time for bid opening, a copy of the amendment to everyone that received a copy of the original IFB. FAR 14.208(a).

2. Before amending an IFB, the period of time remaining until bid opening and the need to extend this period shall be considered and must be confirmed in the amendment. FAR 14.208(b).

3. If the government furnishes information to one prospective bidder concerning an IFB, it must furnish that same information to all other bidders as an amendment if (1) such information is necessary for bidders to submit bids or (2) the lack of such information would be prejudicial to uninformed bidders. FAR 14.208(c). See Phillip Sitz Constr., B-245941, 92-1 CPD ¶ 101 (Comp. Gen. Jan. 22, 1992); see also Republic Flooring, B-242962, 91-1 CPD ¶ 579 (Comp. Gen. June 18, 1991).

F. The Firm Bid Rule

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

2. Firm Bid Rule:

a. After bid opening, bidders **may not withdraw** their bids during the period specified in the IFB, but must hold their bids open for government acceptance during the stated period. FAR 14.201-6(j) & 52.214-16.

b. If the solicitation requires a minimum bid acceptance period, a bid that offers a shorter acceptance period than the minimum is **nonresponsive**. See Banknote Corp. of America, Inc., B-278514, 98-1 CPD ¶ 41(Comp. Gen. Feb. 4, 1998) (bidder offered 60-day bid acceptance period when solicitation required 180 days and solicitation advised bidders to disregard 60-day bid acceptance period provision contained elsewhere in the solicitation); see also Hyman Brickle & Son, Inc., B-245646, 91-2 CPD ¶ 264 (Comp. Gen. Sept. 20, 1991) (30-day acceptance period offered instead of the required 120 days).

c. The bid acceptance period is a **material solicitation requirement**. The government may not waive the bid acceptance period because it affects the bidder's price. Valley Constr. Co., B-243811, 91-2 CPD ¶ 138 (Comp. Gen. Aug. 7, 1991) (60 day period required, 30-day period offered).

d. A bid that fails to offer an unequivocal minimum bid acceptance period is ambiguous and nonresponsive. See John P. Ingram Jr. & Assoc., B-250548, 93-1 CPD ¶ 117 (Comp. Gen. Feb. 9, 1993) (bid ambiguous even where bidder acknowledged amendment which changed minimum bid acceptance period); but see Connecticut Laminating Company, Inc., B-274949.2, 99-2 CPD ¶ 108 (Comp. Gen. Dec. 13, 1999) (bid without bid acceptance period is construed as open for a reasonable period of time and is acceptable where solicitation did not require any minimum bid acceptance period).

e. Exceptions

(1) The government may accept a **solitary bid** that offers less than the minimum acceptance period. Professional Materials Handling Co., -- Recon ., B- 205969 (Comp. Gen. May 28, 1982).

(2) After the bid acceptance period expires, the bidder may extend the acceptance period only where the bidder would not obtain an advantage over other bidders. FAR 14-404-1(d). See Capital Hill Reporting, Inc., B-254011.4, 94-1 CPD ¶ 232 (Comp. Gen. Mar. 17, 1994) (agency may properly request bidders to extend acceptance period, even where acceptance period has expired thus reviving expired bids, where such action does not compromise the integrity of the bidding system); see also NECCO, Inc., B-258131, 94-2 CPD ¶ 218 (Comp. Gen. Nov. 30, 1994) (bidder ineligible for award where bid expired due to bidder's offering a shorter extension period than requested by the agency and award was not made until a subsequent date, despite bidder's subsequent unilateral extension at the expiration of its first extension period).

G. Treatment of Late Bids, Bid Modifications, and Bid Withdrawals. FAR 14.304. "The Late Bid Rule."

1. Definition of "late" –

a. 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).

b. If the IFB does not specify a time, the time for receipt is 4:30 P.M., local time, for the designated government office. Id.

2. Timeliness of Bids and Solicitations. Both sealed bids and negotiated procurement proposals must be timely. Failure to submit either before the time specified in the IFB or IFP may make the bid or proposal "late" and therefore not eligible for award. More in-depth discussion of timeliness and exception to the "late is late" rule can be found in Chapter 34 of this Desk book.

H. Modifications and Withdrawals of Bids.

1. When may offerors modify their bids?

a. **Before** bid opening: Bidders may modify their bids at any time before bid opening. FAR 14.303; FAR 52.214-7.

b. **After** bid opening: Bidders may modify their bids only if:

(1) One of the exceptions to the Late Bid Rule applies to the modification. FAR 14.304(b)(1); FAR 52.214-7(b). See FAR exceptions to Late Bid Rule at FAR

14.304(b)(1)(i), (ii), and (b)(2). Government Frustration Rule. I & E Constr. Co., B-186766, 76-2 CPD ¶ 139 (Comp. Gen. Aug. 9, 1976).

(2) The government may also accept a late modification to an otherwise successful bid if it is more favorable to the government. FAR 14.304(b)(2); FAR 52.214-7(b)(2); Environmental Tectonics Corp., B-225474, 87-1 CPD ¶ 175 (Comp. Gen. Feb. 17, 1987).

2. When may offerors withdraw their bids?

a. **Before** bid opening: Bidders may withdraw their bids at any time before bid opening. FAR 14.303 and 14.304(e); FAR 52.214-7.

b. **After** bid opening. Because of the Firm Bid Rule, bidders generally may withdraw their bids **only if** one of the exceptions to the Late Bid Rule applies. FAR 14.304(b)(1); FAR 52.214-7(b)(1).

3. The exceptions to the late bid rule apply to bid modifications and bid withdrawals only if the modification or withdrawal is received **prior to contract award**, unless it is a modification of the successful offeror's bid that makes its terms more favorable to the Government. FAR 14.304(b)(1); FAR 14.304(b)(2).

4. Transmission of modifications or withdrawals of bids. FAR 14.303 and FAR 52.214-7(e).

a. Offerors may modify or withdraw their bids by any method authorized by the solicitation, which must be received in the office designated in the invitation for bids before the exact time set for bid opening. FAR 14.303(a). See R.F. Lusa & Sons Sheetmetal, Inc., B-281180.2, 98-2 CPD ¶ 157 Comp. Gen. Dec. 29, 1998) (unsigned/uninitiated inscription on outside envelope of bid not an effective bid modification because method was not authorized by the solicitation).

VII. EVALUATION OF BIDS.

A. Evaluation of **PRICE** – Lowest Priced Bid

1. Award made on basis of lowest price offered.

2. Contracting officer evaluates price and price-related factors. FAR 14.201-8.

3. The bidder must offer a firm, fixed price. FAR 14.104.

4. Evaluating Bids with Options. Evaluate bid prices by adding the total price of the options to the price of the basic requirement, unless such an evaluation is not in "the government's best interests." FAR 17.206. Kruger Construction Inc., Comp. Gen. B-286960, 2001 CPD ¶ 43 (Comp. Gen. Mar. 15, 2001) (not in the government's best interests to add two option prices when options were alternative). See also, TNT Industrial Contractors, Inc., B-288331, 2001 CPD ¶ 155 (Comp. Gen. Sep. 25, 2001).

5. Check for Unbalanced Pricing. A materially unbalanced bid contains inflated prices for some contract line items and below-cost prices for other line items, and gives rise to a reasonable doubt that award will result in the lowest overall cost to the government. FAR 14.404-2(g); LBCO, Inc., B-254995, 94-1 CPD ¶ 57 (Comp. Gen. Feb. 1, 1994) (inflated first article prices); Semont Travel, Inc., B-291179, 2002 CPD ¶ 200 (Comp. Gen. Nov. 20, 2002). The government **may reject** a materially unbalanced bid if the bid poses an **unreasonable risk** to the government. FAR 14.404-2(g) A materially unbalanced bid may be unreasonable if it will result in unreasonably high prices for contract performance. FAR 14.404-2(f) Cherokee Painting, LLC, B-311020.3, 2009 CPD ¶ 18 (Comp. Gen. January 14, 2009); Accumark Inc., B-310814, 2008 CPD ¶ 68 (Comp. Gen. Feb. 13, 2008).

6. Unreasonably Low Pricing. The contracting officer must always determine that the prices offered are reasonable in light of all prevailing circumstances before awarding a contract. Particular care should be taken if only one bid is received. FAR 14.408-2.

   a. If a price appears unreasonably low, it could indicate an error. The contracting officer should immediately request the bidder verify the bid. The bidder should be advised, as appropriate, that its bid is so much lower than the other bids or the government's estimate as to indicate a possibility of error. FAR 14.407-3. See below for discussion on bid mistakes.

   b. Unreasonably low prices can pose a serious risk to the government if the contractor doesn't understand the work, cuts corners on product quality or defaults on the work part way through performance. FAR 9.103(c). An unreasonably low price may render the bidder non-responsible in some instances. See Atlantic Maint., Inc., B-239621.2, 90-1 CPD ¶ 523 (Comp. Gen. Jun. 1, 1990) (an unreasonably low price may render bidder non-responsible); but see The Galveston Aviation Weather Partnership, B-252014.2, 93-1 CPD ¶ 370 (Comp. Gen. May 5, 1993) (below-

cost bid not legally objectionable, even when offering labor rates lower than those required by the Service Contract Act.) For a further discussion of how responsibility determinations are made, see below.

c. The Contracting officer has the option of rejecting a bid if he determines, in writing, that the price is unreasonable. He may consider not only the total price of the bid, but also the prices for individual line items. FAR 14.404-2(f).

d. If the contracting officer rejects the bid and the firm protests, GAO considers the determination of price reasonableness to be within the agency's discretion and it will not be disturbed unless the determination is unreasonable or the record shows that it is the result of fraud or bad faith on the part of the contracting officials. See G. Marine Diesel Corp., B-238703, B-238704, 90-1 CPD ¶ 515 (Comp. Gen. May 31, 1990); Joint Venture Penauille/BMAR & Associates, LLC, B-311200, B-311200.2, 2008 CPD ¶ 118 (Comp. Gen. May 12, 2008) (protest sustained where agency concluded, without explanation, that a low price suggested a lack of understanding of the requirements).

B. Evaluation of **RESPONSIVENESS** of Bids. 10 U.S.C. § 2305.

1. Rule. The government may accept only a responsive bid.

a. 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.

b. 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, 86-2 CPD ¶ 678 (Comp. Gen. Dec. 17, 1986).

2. When is responsiveness determined?

a. The contracting officer determines the responsiveness of each bid at the **time of bid opening** by ascertaining whether the bid meets all of the IFB's essential requirements. See Gelco Payment Sys., Inc., B-234957, 89-2 CPD ¶ 27 (Comp. Gen. July 10, 1989). See also Stanger Indus. Inc., B-279380, 98-1 CPD ¶157 (Comp. Gen. June 4, 1998) (agency improperly rejected low bid that used unamended bid schedule that had been corrected by amendment where bidder acknowledged amendments and bid itself committed bidder to perform in accordance with IFB requirements).

2. What is a responsive bid?

b. A bid is "responsive" if it unequivocally offers to provide the requested supplies or services IAW the terms and conditions outlined in the IFB.

c. A bid is "responsive" unless something on the face of the bid limits, reduces, or modifies the obligation to perform in accordance with the terms of the invitation.

3. Essential requirements of responsiveness. FAR 14.301; FAR 14.404-2; FAR 14.405.

a. **Price**. The bidder must offer a firm, fixed price, including all fees and taxes. FAR 14.404-2(d); United States Coast Guard—Advance Decision, B-252396, 93-1 CPD ¶ 286 (Comp. Gen. Mar. 31, 1993) (bid nonresponsive where price included fee of $1,000 per hour for "additional unscheduled testing" by government); J & W Welding & Fabrication, B-209430, 83-1 CPD ¶ 92 (Comp. Gen. Jan. 25, 1983) (bid was nonresponsive where bid price included a term stating "plus 5% sales tax if applicable").

b. **Quantity**. The bidder must offer the quantity required in the IFB. FAR 14.404-2(b). Inscom Elec. Corp., B-225221, 87-1 CPD ¶ 116 (Comp. Gen. Feb. 4, 1987) (bid limited government's right to reduce quantity under the IFB); Pluribus Prod., Inc., B-224435, 86-2 CPD ¶ 536 (Comp. Gen. Nov. 7, 1986).

c. **Quality**. The bidder must agree to meet the quality requirements of the IFB, no more – no less. FAR 14.404-2(b); Dow Electr. Inc. v. US, 98 Fed. Cl. 688, 2011 WL 2184957 (Fed. Cl. June 2, 2011) (because agency was not obligated to participate in any discussions once bids were submitted, agency properly rejected bid where bidder proposed electrical panels that it argues were equivalent to those required in the IFB); Reliable Mechanical, Inc; Way Eng'g Co., B-258231, 94-2 CPD ¶ 263 (Comp. Gen. Dec. 29, 1994) (bidder offered chiller system which did not meet specifications); Wyoming Weavers, Inc., B-229669.3, 88-1 CPD ¶ 519 (Comp. Gen. June 2, 1988).

d. **Delivery**. The bidder must agree to the delivery schedule. FAR 14.404-2(c); Valley Forge Flag Company, Inc., B-283130, 99-2 CPD ¶54 (Comp. Gen. Sept. 22, 1999) (bid nonresponsive where bidder inserts delivery schedule in bid that differs from that requested in the IFB); Viereck Co., B-256175, 94-1 CPD ¶ 310 (Comp. Gen. May 16, 1994) (bid nonresponsive where bidder

agreed to 60-day delivery date only if the cover page of the contract were faxed on the day of contract award). But see Image Contracting, B-253038, 93-2 CPD ¶ 95 (Comp. Gen. Aug. 11, 1993) (bidder's failure to designate which of two locations it intended to deliver did not render bid nonresponsive where IFB permitted delivery to either location).

4. Other bases for rejection of bids for being nonresponsive.

a. Signature on bid.

(1) General rule: Failure to sign the bid is not a minor irregularity, and the government must reject the unsigned bid. See Firth Constr. Co. v. United States, 36 Fed. Cl. 268 (1996) (no signature on SF 1442); Power Master Elec. Co., B-223995, 86-2 CPD ¶ 615 (Comp. Gen. Nov. 26, 1986) (typewritten name); Valencia Technical Serv., Inc., B-223288, 86-2 CPD ¶ 40 (Comp. Gen. July 7, 1986) ("Blank" signature block); but see PCI/RCI v. United States, 36 Fed. Cl. 761 (1996) (one partner may bind a joint venture).

(2) **Exception**. If the bidder has manifested an intent to be bound by the bid, the failure to sign is a minor irregularity. FAR 14.405(c).

(a) Adopted alternative. A & E Indus., B-239846, 90-1 CPD ¶ 527 (Comp. Gen. May 31, 1990) (bid signed with a rubber stamp signature must be accompanied by evidence authorizing use of the rubber stamp signature).

(b) Other signed materials included in bid. Johnny F. Smith Truck & Dragline Serv., Inc., B-252136, 93-1 CPD ¶ 427 (Comp. Gen. June 3, 1993) (signed certificate of procurement integrity); Tilley Constructors & Eng'rs, Inc., B-251335.2, 93-1 CPD ¶ 289 (Comp. Gen. Apr. 2, 1993); Cable Consultants, Inc., B-215138, 84-2 CPD ¶ 127 (Comp. Gen. July 30,1984).

b. Failure to acknowledge amendment of IFB.

(1) General rule: Failure to acknowledge a **material** amendment renders the bid nonresponsive. MG Mako, Inc., B-404758, 2011 CPD ¶ 88 (Comp. Gen. Apr. 28, 2011).

(2) Exception: An amendment that is nonessential or trivial need not be acknowledged. FAR 14.405(d)(2); Lumus Construction, Inc., B-287480, 2001 CPD ¶ 108 (Comp. Gen. June 25, 2001) (Where an "amendment does not impose any legal obligations on the bidder different from those imposed by the original solicitation," the amendment is not material); Jackson Enterprises, B-286688, 2001 CPD ¶ 25 (Comp. Gen. Feb. 5, 2001); L&R Rail Serv., B-256341, 94-1 CPD ¶ 356 (Comp. Gen. June 10, 1994) (amendment decreasing cost of performance not material); Day & Night Janitorial & Maid Serv., Inc., B-240881, 91-1 CPD ¶ 1 (Comp. Gen. Jan. 2, 1991) (negligible effect on price, quantity, quality, or delivery).

(3) Materiality. An amendment is material if it imposes legal obligations on a party that are different from those contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality, or delivery. ECI Defense Group, B-400177; B-400177.2, 2008 CPD ¶ 141 (Comp. Gen. July 25, 2008) (finding a material amendment where the amendment changed the guaranteed minimum quantity for the base year of a contract from 25 percent to 99 percent of the total estimated quantity under the contract.)

(4) See Christolow Fire Protection Sys., B-286585, 2001 CPD ¶ 13 (Comp. Gen. Jan. 12, 2001) (Amendments "clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged." Amendment revising inaccurate information in bid schedule regarding number, types of, and response times applicable to service calls was material;); Environmediation Srvcs., LLC, B-280643, 98-2 CPD ¶ 103 (Comp. Gen. Nov. 2, 1998); see also Logistics & Computer Consultants Inc., B-253949, 93-2 CPD ¶ 250 (Comp. Gen. Oct. 26, 1993) (amendment placing additional obligations on contractor under a management contract); Safe-T-Play, Inc., B-250682.2, 93-1 CPD ¶ 292 (Comp. Gen. Apr. 5, 1993), (amendment classifying workers under Davis-Bacon Act).

(5) Even if an amendment has no clear effect on the contract price, it is material if it changes the legal relationship of the parties. Specialty Contractors, Inc., B-258451, 95-1 CPD ¶ 38 (Comp. Gen. Jan. 24, 1995) (amendment changing color of roofing panels was material); Anacomp, Inc.,

B-256788, 94-2 CPD ¶ 44 (Comp. Gen. July 27, 1994) (amendment requiring contractor to pickup computer tapes on "next business day" when regular pickup day was a federal holiday); Favino Mechanical Constr., Ltd., B-237511, 90-1 CPD ¶ 174 (Comp. Gen. Feb. 9, 1990) (amendment incorporating Order of Precedence clause).

(6) How does a bidder acknowledge an amendment?

(a) In writing only. Oral acknowledgement of an amendment is insufficient. Alcon, Inc., B-228409, 88-1 CPD ¶ 114 (Comp. Gen. Feb. 5, 1988).

(b) Formal acknowledgement.

(i) Sign and return a copy of the amendment to the contracting officer.

(ii) Standard Form 33, Block 14.

(iii) Notify the government by letter or by telegram of receipt of the amendment.

(c) Constructive acknowledgement. The contracting officer may accept a bid that clearly indicates that the bidder received the amendment. C Constr. Co., B-228038, 87-2 CPD ¶ 534 (Comp. Gen. Dec. 2, 1987) .

c. Failure to strictly follow the IFB instructions. ATR Logistics Co. LLC, B-402606, 2010 CPD ¶ 140 (Comp. Gen. June 15, 2010) (bid failed to comply in all material respects with IFB where IFB required unit prices for each CLIN; amendment added a sub-CLIN to each CLIN; bidder acknowledged amendment but did not revise bidding schedule); SNAP, Inc., B-402746, 2010 CPD ¶ 165 (Comp. Gen. July 16, 2010) (agency properly rejected proposal where proposals did not redact all identifying information as required by the solicitation).

d. Ambiguous, indefinite, or uncertain bids. FAR 14.404-2(d); Dow Electr. Inc. v. US, 98 Fed. Cl. 688, 2011 WL 2184957 (Fed. Cl. June 2, 2011) (properly rejected bid where discussions would have been necessary to determine whether proposed electrical panels were equivalent to those required in the IFB); Trade-Winds Envtl. Restoration, Inc., B-259091, 95-1 CPD ¶ 127 (Comp. Gen. Mar. 3, 1995) (bid contained inconsistent prices); Caldwell & Santmyer, Inc., B-260628, 95-2 CPD ¶ 1 (Comp. Gen. July 3, 1995)

(uncertainty as to identity of bidder); Reid & Gary Strickland Co., B-239700, 90-2 CPD ¶ 222 (Comp. Gen. Sept. 17, 1990) (notation in bid ambiguous); New Shawmut Timber Co., B-286881, 2001 CPD ¶ 42 (Comp. Gen. Feb. 26, 2001) (bid was nonresponsive where blank line item "rendered the bid equivocal regarding whether [protestor] intended to obligate itself to perform that element of the requirement")

e. Variation of acceptance period. John's Janitorial Serv., B-219194, 85-2 CPD ¶ 20 (Comp. Gen. July 2, 1985).

f. Placing a "confidential" stamp on bid. Concept Automation, Inc. v. General Accounting Office, GSBCA No. 11688-P, Mar. 31, 1992, 92-2 BCA ¶ 24,937. But see North Am. Resource Recovery Corp., B-254485, 93-2 CPD ¶ 327 (Comp. Gen. Dec. 17, 1993) ("proprietary data" notation on cover of bid did not restrict public disclosure of the bid where no pages of the bid were marked as proprietary).

g. Bid conditioned on receipt of local license. National Ambulance Co., B-184439, 75-2 CPD ¶ 413 (Comp. Gen. Dec. 29, 1975).

h. Requiring government to make progress payments. Vertiflite, Inc., B-256366, 94-1 CPD ¶ 304 (Comp. Gen. May 12, 1994).

i. Failure to furnish required or adequate bid guarantee.

(1) Bid Guarantee. A form of security ensuring that a bidder will, (1) not withdraw a bid within the period specified for acceptance, and (2) if required, execute a written contract and furnish payment and performance bonds within the time period specified in the solicitation. FAR § 28.001.

(2) A bid guarantee is also available to offset the cost of reprocurement of the goods and services. Where the guarantee is in the form of a bid bond, it secures the liability of the surety to the government if the holder of the bond fails to fulfill these obligations. The surety for a bid bond can be either an individual surety or a corporate surety, although there are different requirements for each. Paradise Constr. Co., B-289144, 2001 CPD ¶ 192 (Comp. Gen. Nov. 26, 2001). See FAR Part 28 generally.

(3) Policy. Where a solicitation requires a bidder to submit a bid guarantee with the bid, and the bidder fails to do so (and no exception applies), the bid must be rejected. Affording a bidder the opportunity to supply its bid

guarantee later provides the bidder the option of accepting or rejecting the award by either correcting or not correcting a deficiency after award, which would be inconsistent with the sealed bidding system. Simont S.p.A., B-400481, 2008 CPD ¶ 179 (Comp. Gen. Oct. 1, 2008) (Agency properly found bidder non-responsive for failing to submit a bid guarantee notwithstanding a patent error to a mislabeled IFB amendment stated a bid guarantee was being deleted.)

(4) Interstate Rock Products, Inc. v. United States, 50 Fed. Cl. 349 (2001) (COFC seconded a long line of GAO decisions holding that "the penal sum [of a bid bond] is a material term of the contract (the bid bond) and therefore its omission is a material defect rendering the bid nonresponsive); Schrepfer Industries, Inc., B-286825, 2001 CPD ¶ 23 (Comp. Gen. Feb. 12, 2001) (photocopied power of attorney unacceptable); Quantum Constr., Inc., B-255049, 93-2 CPD ¶ 304 (Comp. Gen. Dec. 1, 1993) (defective power of attorney submitted with bid bond); Kinetic Builders, Inc., B-223594, 86-2 CPD ¶ 342 (Comp. Gen. Sept. 24, 1986) (bond referenced another solicitation number); Clyde McHenry, Inc., B-224169, 86-2 CPD ¶ 352 (Comp. Gen. Sept. 25, 1986) (surety's obligation under bond unclear). But see, FAR 28.101-4(c) (setting forth nine exceptions to the FAR's general requirement to reject bids with noncompliant bid guarantees); South Atlantic Construction Company, LLC., B-286592.2, 2001 CPD ¶ 63 (Comp. Gen. Apr. 13, 2001); Hostetter, Keach & Cassada Constr.,LLC, B-403329, 2010 CPB ¶ 246 (Comp. Gen. Oct. 15, 2010) (responsive despite discrepancy in the names of the bidder and bid bond principal where the record shows that the two are the same entity so that it is certain that the surety would be liable to the government).

(5) All Seasons Construction, Inc. v. United States, 55 Fed. Cl. 175 (2003) (all documents accompanying a bid bond, including the power of attorney appointing the attorney-in-fact, must unequivocally establish, at bid opening, that the bond is enforceable against the surety).

(6) Example: An individual surety with assets described as an "allocated portion of $191,350,000.00 of previously mined, extracted, stockpiled and marketable coal, located on property X" is not a valid bid bond because the assets are not able to be placed in an escrow account. The government's interest in a security asset in escrow must be

made perfect through filing, rather than by taking possession. Tip Top Construction Corporation, B-311305, 2008 CPD ¶ 91 (Comp. Gen. May 2, 2008). FAR 28.203-1.

(7) Example: Bidder's pledge of allocated portion of previously mined, extracted, stockpiled, and marketable coal located on surety's property was not acceptable asset under FAR 28.203-2(b, c) because coal was a speculative asset with value highly dependent upon variables such as type, quality, and provenance of coal proffered, rather than assert that was readily marketable with identifiable value and liquidity. Tip Top Constr. Corp. v. United States, 563 F.3d 1338 (2009).

j. Exception to liquidated damages. Dubie-Clark Co., B-186918, 76-2 CPD ¶ 194 (Comp. Gen. Aug. 26, 1976).

k. Solicitation requires freight on board (F.O.B.) *destination* (contractor responsible for shipping costs and liability); bid states F.O.B. *origin* (government responsible for shipping costs and liability). Taylor-Forge Eng'd Sys., Inc., B-236408, 89-2 CPD ¶ 421 (Comp. Gen. Nov. 3, 1989).

l. Descriptive Literature. Contracting Officers must not require bidders to furnish descriptive literature unless it is needed before award to determine whether the products offered meet the specifications and to establish exactly what the bidder proposes to furnish. *See* FAR 14.202-5 and 52.214-21. Adrian Supply Co., B-250767, 93-1 CPD ¶ 131 (Comp. Gen. Feb. 12, 1993). **NOTE**: The contracting officer generally should disregard **unsolicited** descriptive literature. However, if the unsolicited literature raises questions reasonably as to whether the offered product complies with a material requirement of the IFB, the bid should be rejected as nonresponsive. FAR 14.202-5(e); FAR 14.202-4(f); Delta Chem. Corp., B-255543, 94-1 CPD ¶ 175 (Comp. Gen.)Mar. 4, 1994); Amjay Chems., B-252502, 93-1 CPD ¶ 426 (Comp. Gen. May 28, 1993).

m. Conditional terms. Tel-Instrument Electronics Corp. 56 Fed. Cl. 174, Apr. 8, 2003 (a bid conditioned on the use of equipment not included in the solicitation, requiring special payment terms, or limiting its warranty obligation modifies a material requirement and is nonresponsive); New Dimension Masonry, Inc., B-258876, 95-1 CPD ¶ 102 (Comp. Gen. Feb. 21, 1995) (statements in cover

letter limiting rights of the government expressly reserved in the solicitation conditioned the bid).

n. Objection to indemnification requirements changed legal relationship anticipated in IFB. Metric Sys. Corp., B-256343, 94-1 CPD ¶ 360 (Comp. Gen. June 10, 1994) (bidder's exception to IFB indemnification requirements changed legal relationship between parties).

C. Minor Informalities or Irregularities in Bids. FAR 14.405.

1. Rule. Discretionary decision—the contracting officer shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the government's advantage. FAR 14.405; Excavation Constr. Inc. v. US, 494 F.2d 1289 (Ct. Cl. 1974).

2. What is a minor irregularity?

a. **Definition**: A minor informality or irregularity is merely a matter of form, not of substance. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of supplies or services acquired. FAR 14.405.

b. To determine whether a defect or variation is immaterial, review the facts of the case with the following considerations:

(1) whether item is divisible from solicitation requirements;

(2) whether cost of item is *de minimis* as to contractor's total cost; and

(3) whether waiver or correction clearly would not affect competitive standing of bidders.

Red John's Stone Inc., B-280974, 98-2 CPD ¶ 135 (Comp. Gen. Dec. 14, 1998).

c. Examples of minor irregularities.

(1) Failure to return the number of copies of signed bids required by the IFB. FAR 14.405(a).

(2) Failure to furnish required information concerning the number of an employer's employees. FAR 14.405(b)

(3) Failure to sign the bid if it is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid; or the firm submitting a bid has formally adopted or authorized, before date of bid opening, the execution of documents by typewritten, printed, or stamped signature, submitted evidence of the authorization and the bid carries such a signature. FAR 14.405(c).

(4) Failure to submit employer identification number. Dyneteria, Inc., B-186823, 76-2 CPD ¶ 338 (Comp. Gen. Oct. 18, 1976).

(5) Mere discrepancy in the names of the bidder and bid bond principal is a minor informality where the record shows that the two are the same entity so that it is certain that the surety would be liable to the government. Hostetter, Keach & Cassada Constr.,LLC, B-403329, 2010 CPB ¶ 246 (Comp. Gen. Oct. 15, 2010).

(6) Use of abbreviated corporate name if the bid otherwise establishes the identity of the party to be bound by contract award. Americorp, B-232688, 88-2 CPD ¶ 515 (Comp. Gen. Nov. 23, 1988) (bid also gave Federal Employee Identification Number).

(7) Failure to certify as a small business on a small business set-aside. See J. Morris & Assocs., B-259767, 95-1 CPD ¶ 213 (Comp. Gen. Apr. 25, 1995) (bidder may correct erroneous certification after bid opening where a bidder's actual status is clear).

(8) Failure to initial bid correction. Durden & Fulton, Inc., B-192203, 78-2 CPD ¶ 172 (Comp. Gen. Sept. 5, 1978).

(9) Failure to price individually each line item on a contract to be awarded on an "all or none" basis. See Seaward Corp., B-237107.2, 90-1 CPD ¶ 552 (Comp. Gen. June 13, 1990); *see also* Vista Contracting, Inc., B-255267, Jan. 7, 1994, 94-1 CPD ¶ 61 (failure to indicate cumulative bid price where bid pricing schedule is complete and bidder's total price offer is easily determined on face of bid documents).

(10) Failure to furnish information with bid, if the information is not necessary to evaluate bid and bidder is bound to perform in accordance with the IFB. W.M. Schlosser Co., B-258284, 94-2 CPD ¶ 234 (Comp. Gen. Dec. 12, 1994)

(equipment history not submitted); *but see* Booth & Assocs., Inc. - - Advisory Opinion, B-277477.2, 98-1 CPD ¶104 (Comp. Gen. Mar. 27, 1998) (agency properly reinstated bid previously rejected as non-responsive where bidder failed to include completed supplemental schedule of hourly rates but schedule was not used in the bid price evaluation and omission did not affect the bidder's promise to perform as specified).

(11) Negligible variation in quantity. Alco Envtl. Servs., Inc., ASBCA No. 43183, 94-1 BCA ¶ 26,261 (variation in IFB quantity of .27 percent).

(12) Failure to acknowledge amendment of the solicitation if the bid is clearly based on the IFB as amended, or the amendment is a matter of form or has a negligible impact on the cost of contract performance. See FAR 14.405(d).

3. Statutory/Regulatory Compliance.

a. Licenses and permits.

(1) When a solicitation contains a **general** condition that the contractor comply with state and local licensing requirements, the contracting officer need not inquire into what those requirements may be or whether the bidder will comply. James C. Bateman Petroleum Serv., Inc., B-232325, 88-2 CPD ¶ 170 (Comp. Gen. Aug. 22, 1988); but see International Serv. Assocs., B-253050, 93-2 CPD ¶ 82 (Comp. Gen. Aug. 4, 1993) (where agency determines that small business will not meet licensing requirement, referral to SBA required).

(2) On the other hand, when a solicitation requires **specific** compliance with state and local regulations, compliance with such regulations is a pre-requisite to award. Washington Petrol Serv., Inc., B-195900, 80-2 CPD ¶ 132 (Comp. Gen. Aug. 19, 1980); James C. Bateman Petroleum Serv., Inc., B-232325, 88-2 CPD ¶ 170 (Comp. Gen. Aug. 22, 1988).

b. Statutory certification requirements.

(1) Small business concerns. The contractor must certify its status as a small business to be eligible for award as a small business. FAR 19.301.

(2) Equal opportunity compliance. Contractors must certify that they will comply with "equal opportunity" statutory requirements. In addition, contracting officers must obtain pre-award clearances from the Department of Labor for equal opportunity compliance before awarding any contract (excluding construction) exceeding $10 million. FAR Subpart 22.8. Solicitations may require the contractor to develop and file an affirmative action plan. FAR 52.222-22 and FAR 52.222-25; Westinghouse Elec. Corp., B-228140, 88-1 CPD ¶ 6 (Comp. Gen. Jan. 6, 1988).

(3) Submission of lobby certification. Tennier Indus., B-239025, 90-2 CPD ¶ 25 (Comp. Gen. July 16, 1990).

c. Organizational conflicts of interest. FAR 9.5. Government policy precludes award of a contract, without some restriction on future activities, if the contractor would have an actual or potential unfair competitive advantage, or if the contractor would be biased in making judgments in performance of the work. Necessary restrictions on future activities of a contractor are incorporated in the contract in one or more organizational conflict of interest clauses. FAR 9.502(c); The Analytic Sciences Corp., B-218074, 85-1 CPD ¶ 464 (Comp. Gen. Apr. 23, 1985). For more information see Chapter 34.

D. Mistakes in Bids Asserted Before Award. FAR 14.407-1.

1. General rule.

a. A bidder bears the consequences of a mistake in its bid unless the contracting officer has **actual or constructive notice** of the mistake prior to award. Advanced Images, Inc., B-209438.2, 83-1 CPD ¶ 495 (Comp. Gen. May 10, 1983).

b. After bid opening, the government may permit the bidder to remedy certain substantive mistakes affecting price and price-related factors by correction or withdrawal of the bid.

2. Mistakes in bid that **ARE** correctable.

a. A clerical or arithmetical error apparent on its face in the bid normally is correctable or may be a basis for withdrawal. FAR 14.407-2.

b. FAR examples: obvious misplacement of a decimal point; obviously incorrect discounts; obvious reversal of the price F.O.B.

destination and price F.O.B. origin; and obvious mistake in designation of unit. FAR 14.407-2(a)(1)-(4).

c. United Digital Networks, Inc., B-222422, 86-2 CPD ¶ 79 (Comp. Gen. July 17, 1986) (multiplication error); but see Virginia Beach Air Conditioning Corp., B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990) (bid susceptible to two interpretations—correction improper);

3. Mistakes in bid that are **NOT** correctable.

a. Errors in judgment. R.P. Richards Constr. Co., B-274859.2, 97-1 CPD ¶ 39 (Comp. Gen. Jan. 22, 1997) (bidder's misreading of a subcontractor quote and reliance on its own extremely low estimate for certain work were mistakes in judgment); Central Builders, Inc., B-229744, 88-1 CPD ¶ 195 (Comp. Gen. Feb. 25, 1988) (bid may not be corrected after bid opening where the bid submitted was the bid intended, even though it was later discovered that the bid was revised lower based upon an erroneous interpretation of the specifications)

b. Omission of items from the bid. McGhee Constr., Inc., B-255863, 94-1 CPD ¶ 254 (Comp. Gen. Apr. 13, 1994) (bid may not be corrected after bid opening where the bidder did not intend to include in its bid any additional amounts for the work involved); but see Pacific Components, Inc., B-252585, 93-1 CPD ¶ 478 (Comp. Gen. June 21, 1993) (bid correction permitted to revise bid upwards for mistake due to omissions from subcontractor quotation).

c. Nonresponsive bid. FAR 14.407-3. Temp Air Co., Inc., B-279837, 98-2 CPD ¶ 1 (Comp. Gen. Jul. 2, 1998) (bid could not be made responsive by post-bid opening explanation or correction).

d. Virginia Beach Air Conditioning Corp., B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990) (bid susceptible to two interpretations—correction improper).

4. Only the government and the bidder responsible for the alleged mistake have standing to raise the issue of a mistake. Reliable Trash Serv., Inc., B-258208, 94-2 CPD ¶ 252 (Comp. Gen. Dec. 20, 1994).

5. Contracting Officer's responsibilities.

a. **Examine each bid for mistakes**. FAR 14.407-1; Andy Elec. Co.—Recon., B-194610.2, 81-2 CPD ¶ 111 (Comp. Gen. Aug. 10, 1981).

(1) **Actual** notice of mistake in a bid. FAR 14.407-3.

(2) **Constructive** notice of mistake in a bid, *e.g.*, price disparity among bids or comparison with government estimate. R.J. Sanders, Inc. v. United States, 24 Cl. Ct. 288 (1991) (bid 32% below government estimate insufficient to place contracting officer on notice of mistake in bid); Central Mechanical, Inc., B-206250, 82-2 CPD ¶ 547 (Comp. Gen. Dec. 20, 1982) (allocation of price out of proportion to other bidders).

b. Verify bid if reason to believe contains a mistake. FAR 14.407-1 and 14.407-3(g)

(1) When does the duty arise? CTA Inc. v. U.S. 44 Fed.Cl. 684, 694 (Fed. Cl. 1999) (government's duty to warn arises only when the government either knew or should have known that a bid contains a mathematical or typographical error or is based on a misreading of the contract specifications).

(2) How does the contracting office put the bidder on notice? To ensure that the bidder is put on notice of the suspected mistake, the contracting officer must advise the bidder of all disclosable information that leads the contracting officer to believe that there is a mistake in the bid. Liebherr Crane Corp., ASBCA No. 24707, 85-3 BCA ¶ 18,353, aff'd 810 F.2d 1153 (Fed. Cir. 1987) (procedure inadequate); but see Foley Co., B-258659, 95-1 CPD ¶ 58 (Comp. Gen. Feb. 8, 1995) (bidder should be allowed an opportunity to explain its bid); DWS, Inc., ASBCA No. 29743, 93-1 BCA ¶ 25,404 (particular price need not be mentioned in bid verification notice).

(3) What is the effect of bidder verification? Verification generally binds the contractor unless the discrepancy is so great that acceptance of the bid would be unfair to the submitter or to other bidders. Trataros Constr., Inc., B-254600, 94-1 CPD ¶ 1 (Comp. Gen. Jan. 4, 1994) (contracting officer properly rejected verified bid that was far out of line with other bids and the government estimate). But see Foley Co., B-258659, 95-1 CPD ¶ 58

(Comp. Gen. Feb. 8, 1995) (government improperly rejected low bid where there was no evidence of mistake); Aztech Elec., Inc. and Rod's Elec., Inc., B-223630, 86-2 CPD ¶ 368 (Comp. Gen. Sept. 30, 1986) (below-cost bid is a matter of business judgment, not an obvious error requiring rejection).

(4) What if the contracting officer fails to obtain adequate verification? If the contracting officer fails to obtain adequate verification of a bid for which the government has actual or constructive notice of a mistake, the contractor may seek additional compensation or rescission of the contract. See, e.g., Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.

c. The contracting officer may not award a contract to a bidder when the contracting officer has actual or constructive notice of a mistake in the bid, unless the mistake is waived or the bid is properly corrected in accordance with agency procedures. Sealtite Corp., ASBCA No. 25805, 83-1 BCA ¶ 16,243.

6. **Correction of mistakes PRIOR** to award. FAR 14.407-2; 14.407-3.

a. The bidder alleging the mistake has the burden of proof. VA—Advance Decision, B-225815.2, 87-2 CPD ¶ 362 (Comp. Gen. Oct. 15, 1987).

b. Apparent clerical mistakes. FAR 14.407-2.

(1) General Rule: Contracting officer may correct, before award, any clerical mistake apparent on the face of the bid. FAR 14.407-2(a).

(2) However, the contracting officer must first obtain verification of the bid from the bidder. FAR 14.407-2(a).

(3) Brazos Roofing, Inc., B-275319, 97-1 CPD ¶ 66 (Comp. Gen. Feb. 7, 1997) (incorrect entry of base price used in calculation of option year prices was an obvious transcription error); Action Serv. Corp., B-254861, 94-1 CPD ¶ 33 (Comp. Gen. Jan. 24, 1994) (additional zero); Sovran Constr. Co., B-242104, 91-1 CPD ¶ 295 (Comp. Gen. Mar. 18, 1991) (cumulative pricing); Engle Acoustic & Tile, Inc., B-190467, 78-1 CPD ¶ 72 (Comp. Gen. Jan. 27, 1978) (misplaced decimal point); Dependable

Janitorial Serv. & Supply Co., B-188812, 77-2 CPD ¶ 20 (Comp. Gen. July 13, 1977) (discrepancy between unit and total prices); B&P Printing, Inc., B-188511, 77-1 CPD ¶ 387 (Comp. Gen. June 2, 1977) (comma rather than period making bid reasonably subject to two interpretations only one of which was low bid, bidder may not explain mistake).

c. Other mistakes disclosed before award. FAR 14.407-3.

(1) Correction by low bidder.

(a) Burden of proof: The low bidder must show by clear and convincing evidence: (i) the existence of a mistake in its bid; and (ii) the bid actually intended or that the intended bid would fall within a narrow range of uncertainty and remain low. FAR 14.407-3.

(b) Permissible evidence: Bidder can refer to such things as: (i) bidder's file copy of the bid; (ii) original work papers; (iii) a subcontractor's or supplier's quotes; or (iv) published price lists. FAR 14.407-3(g)(2).

(c) Example: Shoemaker & Alexander, Inc., B-241066, 91-1 CPD ¶ 41 (Comp. Gen. Jan. 15, 1991) (upward correction of a mistake in bid resulting from alleged failure to include proper subcontractor costs is permissible where evidence consisting of the bidder's worksheets, the subcontractor's quotations, and an adding machine tape clearly and convincingly demonstrate both the existence of a mistake and the intended bid, and the bid as corrected remained below the next low bid by approximately 3 percent).

(d) Other examples: Three O Constr., S.E., B-255749, 94-1 CPD ¶ 216 (Comp. Gen. Mar. 28, 1994) (no clear and convincing evidence where bidder gave conflicting explanations for mistake); Will H. Hall and Son, Inc. v. United States, 54 Fed. Cl. 436 (2002), (contractor's "careless" reliance on a subcontractor's quote that excluded a price for a portion of the work solicited is a correctable mistake); Circle, Inc., B-279896, 98-2 CPD ¶ 67 (Comp. Gen. July 29, 1998)(correction not

permitted where agency reasonably found that discrepancies in the worksheets, as well as other evidence provided, did not establish intended bid)

(2) Correction of a bid that **displaces a lower bidder**.

(a) Burden of proof: Bidder must show by clear and convincing evidence: (a) the existence of a mistake; and (b) the bid actually intended. FAR 14.407-3; J & J Maint., Inc., B-251355, 93-1 CPD ¶ 187 (Comp. Gen. Mar. 1, 1993) (correction permitted where unit price clearly is out of line with both the government estimate and the prices offered by the other bidders, and only the extended price reasonably can be regarded as having been the intended bid); Virginia Beach Air Conditioning Corp., B-237172, 90-1 CPD ¶ 78 (Comp. Gen. Jan. 19, 1990); Eagle Elec., B-228500, 88-1 CPD ¶ 116 (Comp. Gen. Feb. 5, 1988).

(b) **Limitation on proof** - the bidder can prove a mistake only from the solicitation (IFB) and the bid submitted, not from any other sources. Bay Pacific Pipelines, Inc., B-265659, 95-2 CPD ¶ 272 (Comp. Gen. Dec. 18, 1995).

Example: The Navy issued an IFB for dredging services at a submarine base. The IFB required bidders to supply both unit prices and extended prices for 10 line items with a total of the extended prices for lines. Bidders had to submit an original and one copy of their bids. At bid opening, there were two bidders. Bidder A showed a "lump sum" mobilization line item as $425,000 per item and an extended price of $1,425,000. (Lump sum meant the unit price and extended price should have been identical.) Bidder A's total price reflected that the mobilization line item price should have been $1,425,000. Bidder A's handwritten copy of its bid reflected $1,425,000 in both the unit and the extended line item blocks. However, the IFB stated "in the event there is a difference between a unit price and the extended total, the unit price will be held to be the intended bid." Bidder B protests that the Navy should reject Bidder A's bid. Can Bidder A correct its line item price to $1,425,000?

Yes. There is considerable evidence from the bid itself that Bidder A made a clerical mistake by mistakenly omitting the digit "1" from its mobilization unit price on the "original" bid. The intended bid was readily discernable. Notwithstanding solicitation provisions that give precedence to unit prices, an obviously erroneous unit price can be corrected to correspond to an extended total price where the corrected unit price is the only reasonable interpretation of the bid. Cashman Dredging and Marine Contracting Co. LLP, B-401547, 2009 CPD ¶ 179 (Comp. Gen. Aug. 31, 2009).

d. Action permitted when a bidder presents clear and convincing evidence of a mistake, but not as to the bid intended; or evidence that reasonably supports the existence of a mistake, but is not clear and convincing. Advanced Images, Inc., B-209438.2, 83-1 CPD ¶ 495 (Comp. Gen. May 10, 1983).

(1) The bidder may withdraw the bid, IAW FAR 14.407-3(c).

(2) The bidder may correct the bid where it is clear the intended bid would fall within a narrow range of uncertainty and remain the low bid. Conner Bros. Constr. Co., B-228232.2, 88-1 CPD ¶ 103 (Comp. Gen. Feb. 3, 1988); Department of the Interior—Mistake in Bid Claim, B-222681, 86-2 CPD ¶ 98 (Comp. Gen. July 23, 1986).

(3) The bidder may waive the bid mistake if it is clear that the intended bid would remain low. William G. Tadlock Constr., B-251996, 93-1 CPD ¶ 382 (Comp. Gen. May 13, 1993) (waiver not permitted where insufficient evidence of intended bid price and that it would remain the low bid); Hercules Demolition Corp. of Virginia, B-223583, 86-2 CPD ¶ 292 (Comp. Gen. Sep. 12, 1986); LABCO Constr., Inc., B-219437, 85-2 CPD ¶ 240 (Comp. Gen. Aug. 28, 1985).

e. Once a bidder asserts a mistake, the agency head or designee may disallow withdrawal or correction of the bid if the bidder fails to prove the mistake. FAR 14.407-3(d); Duro Paper Bag Mfg. Co., B-217227, 86-1 CPD ¶ 6 (Comp. Gen. Jan. 3, 1986).

f. Approval levels for corrections or withdrawals of bids.

(1) Apparent clerical errors: The contracting officer. FAR 14.407-2.

(2) Withdrawal of a bid on clear and convincing evidence of a mistake, but not of the intended bid: An official above the contracting officer. FAR 14.407-3(c).

(3) Correction of a bid on clear and convincing evidence both of the mistake and of the bid intended: The agency head or delegee. FAR 14.407-3(a), FAR 14.407-3(e). **Caveat:** If correction would displace a lower bid, the government shall not permit the correction unless the mistake and the intended bid are both ascertainable substantially from the IFB and the bid submitted. FAR 14.407-3(a).

(4) Withdrawal rather than correction of a low bidder's bid: If (a) a bidder requests permission to withdraw a bid rather than correct it, (b) the evidence is clear and convincing both as to the mistake in the bid and the bid intended, and (c) the bid, both as uncorrected and as corrected, is the lowest received, the agency head or designee may determine to correct the bid and not permit its withdrawal. FAR 14.407-3(b).

(5) Neither correction nor withdrawal. If the evidence does not warrant correction or withdrawal, the agency head may refuse to permit either withdrawal or correction. FAR 14.407-3(d).

(6) Heads of agencies may delegate their authority to correct or permit withdrawal of bids without power of redelegation. FAR 14.407-3(e). This authority has been delegated to specified authorities within Defense Departments and Agencies. *See* individual Agency FAR Supplements.

E. **Mistakes asserted AFTER** award. FAR 14.407-4; FAR 33.2 (Disputes and Appeals).

1. If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed under the procedures of FAR 33.2 and FAR 14.407-4.

2. The mistake may be corrected by contract modification *IF*:

a. Correcting the mistake would be **favorable** to the government without changing the essential requirements of the specifications. FAR 14.407-4(a).

b. The contractor demonstrates by **clear and convincing** evidence that a mistake in bid was made and it must be clear the mistake was mutual or, if unilateral, so apparent as to have charged the

contracting officer with notice of the probability of the mistake. FAR 14.407-4(c); Government Micro Resources, Inc. v. Department of Treasury, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (government on constructive notice of mistake where contractor's price exceeded government estimate by 62% and comparison quote by 33%); Kitco, Inc., ASBCA No. 45347, 93-3 BCA ¶ 26,153 (mistake must be clear cut clerical or arithmetical error, or misreading of specifications, not mistake of judgment); Liebherr Crane Corp., 810 F.2d 1153 (Fed. Cir. 1987) (no relief for unilateral errors in business judgment).

3. The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence. *See* Government Micro Resources, Inc. v. Department of Treasury, GSBCA No. 12364-TD, 94-2 BCA ¶ 26,680 (board awards contractor recovery on *quantum valebant* basis).

4. The government may (FAR 14.407-4(b)):

   a. Rescind the contract.

   b. Reform (modify) the contract to:

      (1) Delete the items involved in the mistake; or

      (2) Increase the price IF the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original IFB.

   c. Make no change if the evidence does not warrant deleting the items or increasing the price.

   d. Note: The requirement under FAR 14.407-4(c) must be met where the Government intends to rescind or reform the contract pursuant to FAR 14.407-4(b)

   e. Approval Levels. *See* individual Agency FAR Supplements.

5. Contract Reformation.

   a. To show entitlement to reformation, the contractor must prove (i) a clear agreement between the parties and (ii) an error in reducing the agreement to writing. Gould, Inc. v. United States, 19 Cl. Ct. 257, 264 (1990)

   b. Reformation is a form of equitable relief that applies to mistakes made in reducing the parties' intentions to writing, but not to

mistakes that the parties made in forming the agreement. Hence, reformation is not available for contract formation mistakes. Gould, Inc. v. United States, 19 Cl. Ct. 257, 269 (1990) (reformation not permitted where plaintiff complains of a mistake in the forming the agreement, not in reducing the parties' agreement to writing).

c. The contractor must prove four elements in a claim for reformation based on mutual mistake. Management & Training Corp. v. General Servs. Admin., GSBCA No. 11182, 93-2 BCA ¶ 25,814; Gould, Inc. v. United States, 19 Cl. Ct. 257, 269 (1990). These elements are:

(1) The parties to the contract were mistaken in their belief regarding a fact. See Dairyland Power Co-op v. United States, 16 F.3d 1197 (1994) (mistake must relate to an existing fact, not future events);

(2) The mistake involved a basic assumption of the contract;

(3) The mistake had a material effect on the bargain; and

(4) The contract did not put the risk of mistake on the party seeking reformation.

d. The contractor must prove five elements in a claim for reformation based on the unilateral mistake of the bidder. Red Gold, Inc., Appellant v. Dept. of Agriculture, Respondent, CBCA 2639, July 06, 2012, 2012 WL 2869697. These elements are:

(1) Mistake in fact occurred prior to contract award;

(2) Mistake was clear cut clerical or mathematical error or misreading of the specifications;

(3) Prior to the award, the Government knew or should of known that a mistake had been made;

(4) The Government did not request bid verification; and

(5) Proof of the intended bid. *See also* FAR 14.407-4.

6. Mistakes alleged after award are subject to the Contract Disputes Act of 1978 and the Disputes and Appeals provisions of the FAR; FAR Subpart 33.2; ABJ Servs., B-254155, 93-2 CPD ¶ 53 (Comp. Gen. July 23, 1993) (the GAO will not review a mistake in bid claim alleged by the contractor after award).

7. Extraordinary contractual relief under Public Law No. 85-804. National Defense Contracts Act, 72 Stat. 972, 50 U.S.C. § 1431-1435; DFARS Subpart 250.

F. Rejection of All Bids—Cancellation of the IFB.

1. **Prior** to bid opening, almost any reason will justify cancellation of an invitation for bids if the cancellation is "in the public interest." FAR 14.209.

2. **After** bid opening, the government may not cancel an IFB unless there is a **compelling reason** to reject all bids and cancel the invitation. FAR 14.404-1(a)(1); P. Francini & Co., Inc. v. U.S., 2 Cl.Ct. 7, 10 (Cl.Ct.,1983) (citing Massman Construction Co. v. United States, 102 Ct. Cl. 699, 719 (1945) ("to have a set of bids discarded after they are opened and each bidder has learned his competitor's prices is a serious matter, and it should not be permitted except for cogent reasons.").

3. Examples of compelling reasons to cancel.

a. Violation of statute. Sunrise International Group, B-252892.3, 93-2 CPD ¶ 160 (Comp. Gen. Sep. 14, 1993) (agency's failure to allow 30 days in IFB for submission of bids in violation of CICA was compelling reason to cancel IFB).

b. Insufficient funds. Michelle F. Evans, B-259165, 95-1 CPD ¶ 139 (Comp. Gen. Mar. 6, 1995) (management of funds is a matter of agency judgment); Armed Forces Sports Officials, Inc., B-251409, 93-1 CPD ¶ 261 (Comp. Gen. Mar. 23, 1993) (no requirement for agency to seek increase in funds where all bids exceed amount available for procurement).

c. Requirement disappeared. Zwick Energy Research Org., Inc., B-237520.3, 91-1 CPD ¶ 72 (Comp. Gen. Jan. 25, 1991) (specification required engines driven by gasoline; agency directive required diesel).

d. Specifications are defective and fail to state the government's minimum needs, or unreasonably exclude potential bidders. McGhee Constr., Inc., B-250073.3, 93-1 CPD ¶ 379 (Comp. Gen. May 13, 1993); Control Corp.; Control Data Sys., Inc.—Protest and Entitlement to Costs, B-251224.2, 93-1 CPD ¶ 353 (Comp. Gen. May 3, 1993) (compelling reason to cancel procurement where solicitation overstated service call response time needed); Digitize, Inc., B-235206.3, 90-1 CPD ¶ 403 (Comp. Gen. Oct. 5, 1989) (agency determined government needs satisfied by products meeting less restrictive specifications and award to protestor would

not be fair to competitors); Chenga Management, B-290598, 2002-1 CPD ¶ 143 (Comp. Gen. Aug. 8, 2002) (specifications that are impossible to perform in required time period provide a basis to cancel the IFB after bid opening); Grot, Inc., B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the "awardable range" and agency concluded that specifications were unclear).

e. Agency determines to perform the services in-house. Mastery Learning Sys., B-258277.2, 95-1 CPD ¶ 54 (Comp. Gen. Jan. 27, 1995) (agency reasonably determined performing services in-house was in its best interest because it would assure continuity of services).

f. Time delay of litigation. P. Francini & Co. v. United States, 2 Cl. Ct. 7 (1983) (cancellation was justified in light of the delay that would have attended an appeal of the court's preliminary injunction and taken longer to resolve than resoliciting the IFB); but see Northern Virginia Van Co. Inc. v. U.S., 3 Cl. Ct. 237, 242 (1983).

g. All bids unreasonable in price. California Shorthand Reporting, B-250302.2, 93-1 CPD ¶ 202 (Comp. Gen. Mar. 4, 1993); Grot, Inc., B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the "awardable range" and agency concluded that specifications were unclear).

h. Eliminate appearance of unfair competitive advantage. P&C Constr., B-251793, 93-1 CPD ¶ 361 (Comp. Gen. Apr. 30, 1993).

i. Failure to incorporate wage rate determination. JC&N Maint., Inc., B-253876, 93-2 CPD ¶ 253 (Comp. Gen. Nov. 1, 1993) (wage determination received after bid opening, but prior to award).

j. Failure to set aside a procurement for small businesses or small disadvantaged businesses when required. Baker Support Servs., Inc.; Mgmt. Technical Servs., Inc., B-256192.3, 95-1 CPD ¶ 75 (Comp. Gen. Sept. 2, 1994); Ryon, Inc., B-256752.2, 94-2 CPD ¶ 163 (Comp. Gen. Oct. 27, 1994).

k. Grot, Inc., B-276979.2, 97-2 CPD ¶ 50 (Comp. Gen. Aug. 14, 1997) (cancellation proper where all bids exceeded the "awardable range" and agency concluded that specifications were unclear); Site Support Services, Inc., B-270229, 96-1 CPD ¶ 74 (Comp. Gen. Feb. 13, 1996) (cancellation proper where IFB contained incorrect government estimate of services needed); Canadian

Commercial Corp./ Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 (no compelling reason to cancel simply because some terms of IFB are somehow deficient when solicitation read as a whole only has one reasonable interpretation); US Rentals, B-238090, 90-1 CPD ¶ 367 (Comp. Gen. Apr. 5, 1990) (contracting officer cannot deliberately let bid acceptance period expire as a vehicle for cancellation); C-Cubed Corporation, B-289867, 2002 CPD ¶ 72 (Comp. Gen. Apr. 26, 2002) (agency may cancel a solicitation after bid opening if the IFB fails to reflect the agency's needs).

4. Before canceling the IFB, the contracting officer must consider any prejudice to bidders. If cancellation will affect bidders' competitive standing, such prejudicial effect on competition may offset the compelling reason for cancellation. Canadian Commercial Corp./ Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202.

5. If an agency relies on an improper basis to cancel a solicitation, the cancellation may be upheld if another proper basis for the cancellation exists. Shields Enters. v. United States, 28 Fed. Cl. 615 (1993).

6. Cancellation of the IFB may be post-award. Control Corp., B-251224.2, 93-1 CPD ¶ 353 (Comp. Gen. May 3, 1993).

VIII. AWARD OF THE CONTRACT.

A. Statutory standard. The contracting officer shall award with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and other price-related factors included in the solicitation. 10 U.S.C. § 2305(b)(3); 41 U.S.C. § 3701, *et seq*; FAR 14.408-1.

B. 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).

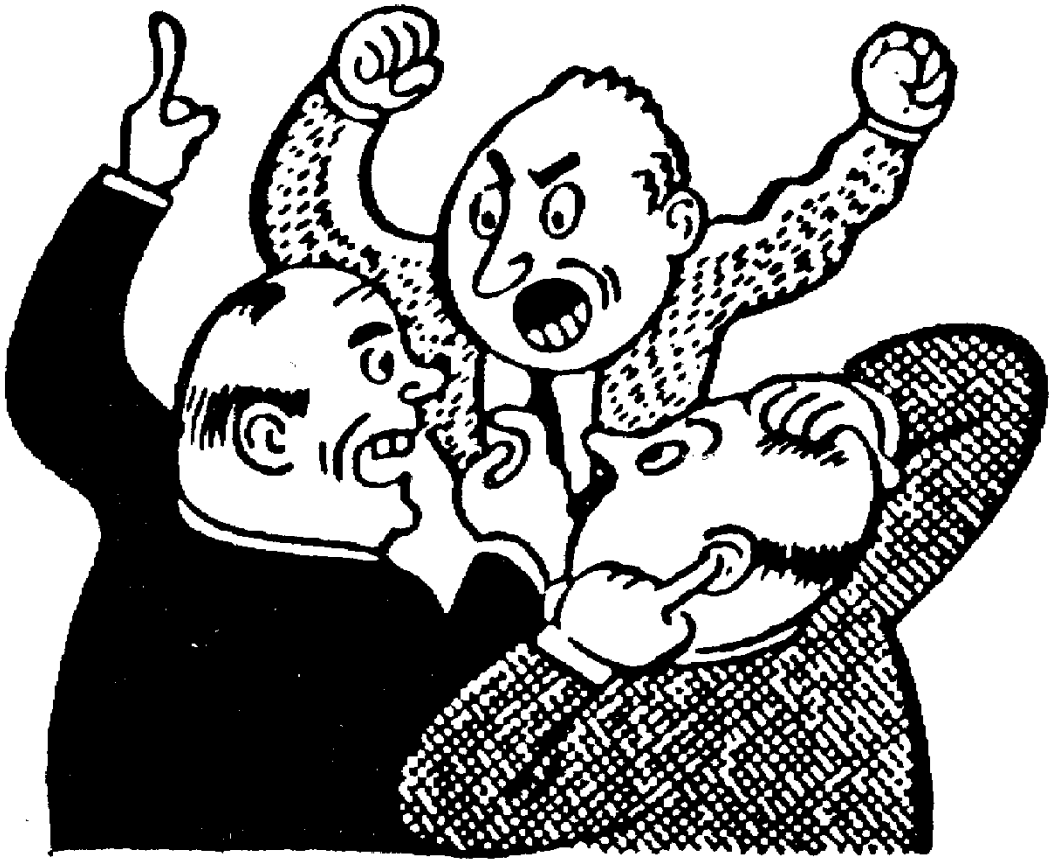
C. Multiple awards. If the IFB does not prohibit partial bids, the government must make multiple awards when they will result in the lowest cost to the government. FAR 52.214-22; WeatherExperts, Inc., B-255103, 94-1 CPD ¶ 93 (Comp. Gen. Feb. 9, 1994) (required to make multiple awards, rather than an aggregate award, under an IFB for services which contains four separate items, each covering a separate location, where the IFB permitted bids on single locations and did not require an aggregate award, and where multiple awards will result in a lower price than an aggregate award).

D. An agency may not award a contract to an entity other than that which submitted a bid. Gravely & Rodriguez, B-256506, 94-1 CPD ¶ 234 (Comp. Gen. Mar. 28, 1994) (sole proprietorship submitted bid, partnership sought award).

E. The "mail box" rule applies to award of federal contracts. Award is effective upon mailing (or otherwise furnishing the award document) to the successful offeror. FAR 14.408-1(c)(1). Singleton Contracting Corp., IBCA 1770-1-84, 86-2 BCA ¶ 18,800 (notice of award and request to withdraw bid mailed on same day; award upheld); Kleen-Rite Corp., B-190160, 78-2 CPD ¶ 2, (Comp. Gen. July 3, 1978).

IX. CONCLUSION

Chapter 8
Negotiated Procurements



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CHAPTER 8

NEGOTIATED PROCUREMENTS AND SOURCE SELECTION

I. INTRODUCTION

A. Assisting at all stages of the procurement process is critical for the contract attorney.

1. Helping prepare acquisition documents is one of the paramount roles for the contract attorney.

2. It is important for the contract attorney to help avoid problems by becoming involved early on during the extensive planning process required when agencies conduct a competitively negotiated procurement.

3. The contract attorney must understand the procedures used to conduct a competitively negotiated source selection.

4. Contract attorneys should look for ways to simplify the process whenever possible.

5. Contract attorneys should help their agency's avoid some of the common problem areas in awarding competitively negotiated procurements.

6. Contract attorneys should help their agencies assert maximum flexibility and not fear subjectivity (a/k/a business judgment); contract attorneys should help their agencies adequately explain and document such judgments.

B. Background.

1. In the past, negotiated procurements were known as "open market purchases." These procurements were authorized only in emergencies.

2. The Army Air Corps began using negotiated procurements in the 1930s to develop and acquire aircraft.

3. Negotiated procurements became universal during World War II. The Armed Services Procurement Act of 1947 authorized negotiated procurements for peacetime use if one of seventeen exceptions to formal advertising (now sealed bidding) applied.

4. In 1962, Congress codified agency regulations that required contractors to submit cost/pricing data for certain procurements to aid in the negotiation process.

5. The Competition in Contracting Act (CICA) of 1984 expanded the use of negotiated procurements by eliminating the traditional preference for formal advertising (now sealed bidding).

6. In the early 1990s, Congress: (a) modified the procedures for awarding contracts on initial proposals; (b) expanded debriefings; and (c) made other minor procedural changes in the negotiated procurement process.

7. In 1997, the Federal Acquisition Regulation (FAR) Part 15 rewrite effort resulted in significant changes to the rules regarding: (a) exchanges with industry; (b) the permissible scope of discussions; and (c) the competitive range determination.

II. CHOOSING NEGOTIATIONS.

A. Sealed Bidding or Competitive Negotiations. The CICA eliminated the historical preference for formal advertising (now sealed bidding). Statutory criteria now determine which procedures to use.

B. Criteria for Selecting Competitive Negotiations. 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 253(a)(2). The CICA provides that, in determining the appropriate competitive procedure, agencies:

1. Shall solicit sealed bids <u>if</u>:

   a. Time permits the solicitation, submission, and evaluation of sealed bids;

   b. The award will be made solely on the basis of price and other price-related factors;

   c. It is unnecessary to conduct discussions with responding sources about their bids; and

   d. There is a reasonable expectation of receiving more than one sealed bid.

2. Shall request competitive proposals <u>if</u> sealed bids are not appropriate under B.1, above. <u>See also</u> FAR 6.401 (listing these same criteria).

3. Competitive proposals are the default for contracts awarded and performed outside the United States. <u>See</u> FAR 6.401(b)(2) (directing the use of

competitive proposals for contracts to be made and performed outside the United States and its outlying areas unless discussions are not required and the use of sealed bids are otherwise appropriate).

4. Contracting Officer's Discretion.

   a. The decision to use competitive negotiations under FAR Part 15 is largely a discretionary matter within the purview of the contracting officer's business judgment, which will not be upset unless it is unreasonable.

   b. For the decision to be considered reasonable, the contracting officer must demonstrate that one or more of the sealed bidding criteria is not present. See Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1364 (Fed. Cir. 2009) (reversing the trial court and holding that the contracting officer reasonably included non-price evaluation factors in the RFP and concluded that sealed bidding was not required); see also Ceres Envtl. Serv., Inc., B-310902, Mar. 3, 2008, 2008 CPD ¶ 148 (finding that the Corps of Engineers reasonably concluded it needed to evaluate non-price factors, to include a possible price/technical tradeoff, in a canal construction project despite previous canal construction projects having been awarded under sealed bidding); Specialized Contract Serv., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90 (finding that the Army reasonably concluded it needed to evaluate more than price in procuring meal and lodging services). Compare Racal Corp., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (finding that the possible need to hold discussions to assess offerors' understanding did not justify the use of negotiated procedures where the Army did not require offerors to submit technical proposal), with Enviroclean Sys., B-278261, Dec. 24, 1997, 97-2 CPD ¶ 172 (finding that the Army reasonably concluded that discussions might be required before award).

5. A Request for Proposals (RFP) by any other name is still a RFP. Balimoy Mfg. Co. of Venice, Inc., B-253287.2, Oct. 5, 1993, 93-2 CPD ¶ 207 (finding that a purported IFB that calls for the evaluation of factors other than price is not an IFB and is not a proper matter for protest post-award). Any inconsistency between labeling a solicitation an IFB and providing for consideration of non-price factors may only be protested prior to bid opening when the inconsistencies are apparent on the face of the solicitation. *Id*.

C. Comparing the Two Methods.

	Sealed Bidding	Negotiations
Evaluation Criteria	Price and Price-Related Factors	Price and Non-Price Factors
Responsiveness	Determined at Bid Opening	N/A
Responsibility	Based on Pre-Award Survey; SBA May Issue COC	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

III. ACQUISITION PLANNING.

A. Key Definitions.

1. Acquisition Planning. The process through which efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency's need, including developing a strategy for managing the acquisition. FAR § 2.101.

2. Market Research. The attempts of an agency to ascertain whether other qualified sources and commercial or non-developmental items exist that are capable of meeting the government's requirement. FAR § 2.101; FAR 10.001; DFARS 201.001.

3. Source Selection Process. The process of soliciting and evaluating proposals for award in a competitively negotiated environment. Army Materiel Command (AMC) Pamphlet 715-3.

B. Policy. Agencies shall perform acquisition planning and conduct market research to promote full and open competition, or if full and open competition is not required, to promote competition to the maximum extent practicable. FAR § 7.102; see 10 U.S.C. § 2305(a)(1)(A)(ii).

C. General Principles.

1. Begin Planning Early.

a. Planning should start before the fiscal year in which the contract will be awarded. Begin planning when the need is identified. FAR § 7.104(a).

b. A lack of advance planning does not justify using other than competitive acquisition procedures. 10 U.S.C. § 2304(f)(5); see, e.g., Major Contracting Svcs., Inc., B-401472, Sep. 14, 2009, 2009 CPD ¶ 170 (sustaining a protest that the Army improperly extended a contract on a sole source basis due to inadequate advance planning).

D. Responsibilities.

1. The program manager or other official responsible for the program has overall responsibility for acquisition planning. Defense Federal Acquisition Regulation Supplement (DFARS) § 207.103(g).

2. Agency heads must ensure that an increasing level of formality in the planning process is used as acquisitions become more costly and complex. FAR § 7.103(d).

E. Written Acquisition Plans.

1. Written acquisition plans are required for:

a. Development acquisitions exceeding $10 million total cost for the acquisition program.

b. Production or service acquisitions when the total cost of all program contracts will exceed $50 million for all years, or $25 million in a single year. DFARS § 207.103(d)(i)(B).

c. Acquisition Planning Resources

(1) FAR subpart 7.1 and DFARS subpart 207.1.

(2) Department of Defense Source Selection Procedures, March 4, 2011: www.acq.osd.mil/dpap/policy/policyvault/USA007183-10-DPAP.pdf.

(3) Army Source Selection Supplement (AS3) to the Department of Defense Source Selection Procedures, December 21, 2012: http://www.spd.usace.army.mil/Portals/13/docs/Small_Business/Army%20Source%20Selection%20Supplement%20(Dec%202012).pdf

(4) Defense Acquisition University Sample Format: http://webcache.googleusercontent.com/search?q=cache:sQ7mgTJiZrwJ:https://acc.dau.mil/GetAttachment.aspx%3Fid%3D31482%26pname%3Dfile%26aid%3D5708+dau+%22acquisition+plan%22&cd=2&hl=en&ct=clnk&gl=us.

(5) Navy Acquisition Planning Guide: https://acquisition.navy.mil/content/view/full/5004.

(6) Department of Homeland Security: http://www.dhs.gov/xlibrary/assets/DHS_ACQ_Planning_Guide_Notice_05-02.pdf.

F. Source Selection Plan. Source selection plans are internal agency working documents. An agency's evaluation of proposals must be reasonable and consistent with the solicitation's stated evaluation criteria. An agency's failure to adhere to its source selection plan does not provide a viable basis of protest because offerors have no rights in an agency's source selection plan. Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9; All Star-Cabaco Enter., Joint Venture, B-290133, B-290133.2, June 25, 2002, 2002 CPD ¶127. For a discussion on source selection plans, see AFARS, Appendix AA, Army Source Selection Manual, Chapter 3, Source Selection Plan.

IV. PLANNING CONSIDERATIONS.

A. Acquisition Background and Objectives. FAR § 7.105.

1. Statement of Need.

2. Cost.

3. Capability or performance.

4. Delivery or performance-period times.

5. Trade-offs.

6. Risks.

7. Acquisition Streamlining.

B. Plan of Action. FAR § 7.105(b).

1. Identification of potential sources.

2. Competition – How will full and open competition be obtained? If it will not be obtained, what justifies other than full and open competition?

3. Source-selection procedures – the timing for submission and evaluation of proposals and the relationship of evaluation factors to the attainment of the acquisition objectives. See FAR Subpart 15.3.

4. Contracting considerations:

a. Contract Types.

b. Multiyear contracting, options, special contracting methods.

c. Special contract clauses, solicitation provisions, or FAR deviations.

d. Consolidation. DFARS § 207.170 and 15 USC 657q.

(1) The 2013 NDAA, Pub. L. 103-355, repealed the former consolidation statute, 10 U.S.C. 2382, which is implemented by DFARS 207.170.

(2) The relevant portion of the 2013 NDAA amended the Small Business Act, and is codified at 15 U.S.C. 657q. Under the statute, the term "consolidation of contract requirements," with respect to contract requirements of a Federal agency, means a use of a solicitation to obtain offers for a single contract or a multiple award contract (A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or (B) to satisfy requirements of the Federal

agency for construction projects to be performed at 2 or more discrete sites.

(a) **Note the focus on construction projects in (B), which is different than the previous definition at 10 U.S.C. 2382 and DFARS 207.170.

(b) Under the statute, the head of a Federal agency may not carry out an acquisition strategy that includes a consolidation of contract requirements of the Federal agency with a total value of more than $2,000,000, unless the senior procurement executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy has conducted market research, identified alternative approaches, made a written determination that consolidation is necessary and justified, identified any negative impact on small business concerns, and ensure that steps will be taken to include small business concerns in the acquisition strategy.

(3) Under the DFARS, "consolidation" means the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency or activity for supplies or services that previously have been provided to, or performed for, that department, agency or activity under two or more separate contracts. DFARS § 207.170-2.

(a) Per the DFARS, agencies shall not consolidate contract requirements with an estimated total value exceeding $6 million unless the acquisition strategy includes (1) the results of the market research; (2) an identification of any alternative contracting approaches that would involve a lesser degree of consolidation; and (3) a determination by the senior procurement executive that the consolidation is necessary and justified. DFARS § 207.170-3(a).

(b) DFARS § 207.170-3(a) articulates the categories of benefits that may justify consolidation of contract requirements, but cautions that savings in administrative or personnel costs alone do not constitute a sufficient justification for a

consolidation of contract requirements unless such savings would be considered "substantial."

(c) DoD has issued a Class Deviation 2013-O0021, regarding Contract Consolidation. This class deviation lowers the dollar threshold as set forth at DFARS 207.170-3(a) from $6 million to $2 million. This class deviation is effective until incorporated into the FAR and/or DFARS, or rescinded.

e. Performance-based service contracts. Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis. See FAR §§ 37.102(a), 16.505(a)(3).

(1) In general, agencies must use performance based acquisition methods to the maximum extent practicable. FAR § 37.102(a).

(2) Section 821 of the FY 2001 National Defense Authorization Act established a preference for performance-based service contracts (PBSC). Pub. L. No. 106-398, §821, 114 Stat. 1654 (2000).

(3) The Government Accountability Office concluded that while agencies are utilizing performance-based contracting, more guidance was needed to increase agency understanding of PBSCs and how to best take advantage of the methodology. GEN. ACCT. OFF., REP. NO. GAO-02-1049, *Contract Management: Guidance Needed for Performance-Based Service Contracting* (Sept. 2002).

5. Funding.

6. Inherently Governmental functions. (FAR § 7.5)

7. Government-furnished property and information. (FAR § 45.102)

8. Environmental Considerations.

9. Prohibition on personal service contracts (FAR § 37.104).

C. Peer Reviews

1. DoD acquisitions valued at $1 billion or more – The Office of the Director, Defense and Acquisition Policy (DPAP), will organize teams of reviewers

and facilitate Peer Reviews for solicitations and contracts valued at $1 billion or more. DFARS § 201.170(a).

a. Pre-award Peer Review of solicitations valued at $1 billion or more (including options) are required for all acquisitions. DFARS § 201.170(a)(1)(i).

b. Post-award Peer Reviews will be conducted for all contracts for services valued at $1 billion or more (including options). DFARS § 201.170(a)(1)(ii).

c. Peer Reviews will be conducted using the procedures at PGI 201.170.

2. DoD acquisitions valued at less than $1 billion – The military departments, defense agencies and DoD field activities shall establish procedures for Pre-Award and Post-Award Peer Reviews of solicitations and contracts valued at less than $1 billion. DFARS § 201.170(b).

a. For the Army, all solicitations and contracts with an estimated value greater than $50 million will be approved through a Solicitation Review Board (SRB) and Contract Review Board (CRB). The contracting activity's Principal Assistant Responsible for Contracting (PARC) will establish procedures for contract actions with an estimated value of $50 million or less. AFARS § 5101.170(b).

b. Post-Award Peer Reviews for services contracts shall occur when the contract value is $500 million or more. AFARS § 5101.170(b)(2).

V. PREPARING SOLICITATIONS AND RECEIVING INITIAL PROPOSALS.

A. Developing a Request for Proposals (RFP). The three major sections of an RFP are: Specifications (Section C), Instructions to Offerors (Section L), and Evaluation Criteria (Section M). See FAR 15.204-2 to 15.204-5 (briefly describing Sections A thru M of an RFP). Contracting activities should develop these three sections simultaneously so that they are tightly integrated.

1. Section B lays out the pricing and contract line item structure of the procurement including quantities.

2. Section C describes the required work and is referred to as a statement of work or performance work statement.

3. Section H contains special contract clauses applicable to the current acquisition (e.g., special warranty requirements, key personnel).

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

   a. Well written Instructions may reduce the need for discussions merely to understand the offerors' proposals.

   b. Instructions also make the evaluation process more efficient by dictating page limits, paper size, organization, and content. [NOTE: An offeror ignores these instructions and limitations at its peril. See Mathews Assocs., Inc., B-299205, Mar. 5, 2007, 2007 CPD ¶ 47 (upholding Army's rejection of an electronically submitted proposal where the proposal exceeded the margin limit set forth in the solicitation and concluding there is nothing unfair, or unduly burdensome, about requiring offerors to assume the risks associated with submitting proposals that do not comply with clearly stated solicitation formatting requirements); Coffman Specialists, Inc., B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ 77 (finding that the agency reasonably downgraded a proposal that failed to comply with solicitation's formatting requirement); see also U.S. Envtl. & Indus., Inc., B-257349, July 28, 1994, 94-2 CPD ¶ 51 (concluding that the agency properly excluded the protester from the competitive range after adjusting its proposal length for type size smaller than the minimum allowed and refusing to consider the "excess" pages)].

   c. Instructions should avoid requesting surplus information and simply request information that will be evaluated in Section M. Well written proposal instructions and Section M evaluation criteria should be consistent and read well together.

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

   a. The criteria must be detailed enough to address all aspects of the required work, yet not so detailed as to mask differences in proposals. FAR 15.304 discusses evaluation factors and significant subfactors, to include factors that must be considered by the agency and therefore referenced in Section M.

   b. Solicitations must provide offerors enough information to compete equally and intelligently, but they need not give precise details of the government's evaluation plan. See QualMed, Inc., B-254397.13, July 20, 1994, 94-2 CPD ¶ 33.

c. Evaluation scheme must include an adequate basis to determine cost to the government of competing proposals. S.J. Thomas Co, Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

B. Drafting Evaluation Criteria.

1. Statutory Requirements.

a. 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 253a(b) require each solicitation to include a statement regarding:

(1) All the significant factors and subfactors the agency reasonably expects to consider in evaluating the proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors), and

(2) The relative importance of each factor and subfactor.

See FAR 15.304(d).

b. 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) further require agency heads to:

(1) Clearly establish the relative importance of the evaluation factors and subfactors, including the quality factors and subfactors (e.g., technical capability, management capacity, prior experience, and past performance);

(2) Include cost/price as an evaluation factor; and

(3) Disclose whether all of the non-cost and non-price factors, when combined, are:

(a) Significantly more important than cost/price;

(b) Approximately equal in importance to cost/price; or

(c) Significantly less important than cost/price.

See FAR 15.304(d), (e).

2. Mandatory Requirements for Evaluation Factors.

a. Cost or Price. 10 U.S.C. § 2305(a)(3)(A)(ii); 41 U.S.C. § 253a(c)(1)(B); FAR 15.304(c)(1). Agencies must evaluate cost/price in every source selection.

(1) While cost/price need not be the most important evaluation factor, cost or price must always be a factor. See Medical Staffing Joint Venture, B-400705.2, B-400705.3, Mar. 13, 2009, 2009 CPD ¶ 71 (stating that the evaluation criteria must provide for a reasonable assessment of the cost of performance of competing proposals);

(2) But see RTF/TCI/EAI Joint Venture, B-280422.3, Dec. 29, 1998, 98-2 CPD ¶ 162 (denying a protest alleging failure to consider price because the protestor was unable to show prejudice from Army's error).

(3) This requirement extends to the evaluation of Indefinite Delivery / Indefinite Quantity ("ID/IQ") Contracts. CW Govt. Travel, Inc. – Reconsideration, B-295530, July 25, 2005, 2005 CPD ¶ 139 (sustaining a protest where the agency's use of a sample task order for evaluation purposes for an ID/IQ did not bind the offers to the prices used in the sample task and therefore did not consider price); accord S.J. Thomas Co, Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

b. Technical and Management (i.e., Quality) Factors. The government must also consider quality in every source selection. See FAR 15.304(c)(2).

(1) The term "quality" refers to evaluation factors other than cost/price (e.g., technical capability, management capability, prior experience, and past performance). See 10 U.S.C. § 2305(a)(3)(A)(i); 41 U.S.C. § 253a(c)(1)(A); see also FAR 15.304(c)(2) (adding personnel qualifications and compliance with solicitation requirements as "quality" evaluation factors).

(2) FAR 15.304(a) recommends tailoring the evaluation factors and subfactors to the acquisition, and FAR 15.304(b) recommends including only evaluation factors and significant subfactors that:

(a) Represent key areas that the agency plans to consider in making the award decision;[1] and

(b) Permit the agency to compare competing proposals meaningfully.

c. Past Performance.

(1) Statutory Requirements.

(a) The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1091, 108 Stat. 3243, 3272 [hereinafter FASA], added a note to 41 U.S.C. § 405 expressing Congress' belief that agencies should use past performance as an evaluation factor because it is an indicator of an offeror's ability to perform successfully on future contracts.

(b) The FASA also directed the Administrator OFPP to provide guidance to executive agencies regarding the use of past performance 41 U.S.C. § 405(j).

(c) The Office of Federal Procurement Policy (OFPP) in May 2000 published a guide titled Best Practices for Collecting and Using Current and Past Performance Information, available at: http://www.whitehouse.gov/omb/best_practice_re_past_perf/.

(2) FAR Requirement. FAR 15.304(c)(3); FAR 15.305(a)(2).

(a) Agencies must include past performance as an evaluation factor in all RFPs expected to exceed the simplified acquisition threshold.

(b) On September 24, 2013, the Director of Defense Procurement and Acquisition Policy (DPAP) issued a class deviation. See DFARS 215.304. DARS Tracking Number 2013-O00184, available at: http://www.acq.osd.mil/dpap/dars/class_deviations.html. For the Department of Defense, past

[1] It is Army policy to establish the absolute minimum number of factors necessary for evaluation of proposals. Factors and subfactors must be limited to those which (a) are expected to surface real and measurable discriminators between offerors, and (b) have enough value to warrant the payment of a meaningful cost/price premium to obtain the measured discrimination. AFARS 5115.304(b)(2).

performance is mandatory only for the following contracts:

(i) Systems & operation support > $5 million.

(ii) Services, information technology, or science & technology > $1 million.

(iii) For all other acquisitions expected to exceed the simplified acquisition threshold.

(c) The contracting officer may make a determination that past performance is not an appropriate evaluation factor even if the contract falls in either category *(a) or (b) above*. The contracting officer must document why past performance is not an appropriate evaluation factor. FAR § 15.304(c)(3).

(d) The RFP must:

(i) Describe how the agency plans to evaluate past performance, including how it will evaluate offerors with no relevant performance history;

(ii) Provide offerors with an opportunity to identify past or current contracts for similar work; and

(iii) Provide offerors an opportunity to provide information regarding any problems they encountered on the identified contracts and their corrective actions.

(e) Contrasted with Past Experience.

(i) Past Performance is **HOW** well the offeror performed on previous efforts.

(ii) Experience evaluation is **WHAT** past experience the offeror possesses and brings to the current procurement.

(iii) Example. GAO denied a protest claiming that an agency failed to consider negative information regarding the awardee's past

performance where the solicitation specifically provided for evaluation of past experience, *but not* past performance. Highland Engineering, Inc., B-402634, June 8, 2010, 2010 CPD ¶ 137.

(iv) A cautionary note is warranted to avoid double counting/penalizing an offeror if evaluating both past performance and experience. See GlassLock, Inc., B-299931, Oct. 10, 2007, 2007 CPD ¶ P 216.

(v) Small Business Participation.

(3) FAR Requirements. FAR 15.304(c)(4). Agencies must evaluate the extent to which small disadvantaged business concerns will participate in the performance of:

(a) Unrestricted acquisitions expected to exceed $650,000; and

(b) Construction contracts expected to exceed $1.5 million.

But see FAR 19.201 and FAR 19.1202 (imposing additional limitations).

(4) DOD Requirements. DFARS 215.304. Agencies must evaluate the extent to which small businesses, historically black colleges, and minority institutions will participate in the performance of the contract if:

(a) The FAR requires the use of FAR 52.219-9, Small Business Subcontracting Plan (see FAR 19.708; see also FAR 15.304(c)(4)), and

(b) The agency plans to award the contract on a tradeoff as opposed to lowest price technically acceptable basis.

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

a. Agencies must disclose the relative importance of all significant evaluation factors and subfactors and describe at a minimum whether the non-price factors when combined are:

(1) Significantly more important than cost/price, OR

(2) Significantly less important than cost/price, OR

(3) Approximately equal to cost/price. FAR § 15.304(e).

b. Agencies should disclose the relative order of importance either by:

(1) Providing percentages or numerical weights[2] in the RFP;

(2) Providing an algebraic paragraph;

(3) Listing the factors or subfactors in descending order of importance; or

(4) Using a narrative statement.

c. The GAO presumes the listed factors are equal if the RFP does not state their relative order of importance.

(1) For example, in Fintrac, Inc., B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191, the RFP listed the major evaluation factors in "descending order of importance" but was silent as to the weight of the subfactors. GAO stated that where a solicitation does not disclose the relative weight of evaluation factors or subfactors in the solicitation, they are presumed approximately equal in importance or weight. See also Bio-Rad Labs., Inc., B-297553, Feb. 15, 2006, 2007 CPD ¶ 58 (finding that where an agency failed to inform offerors it was conducting the procurement as a simplified acquisition and conducted the acquisition in a manner indistinguishable from a negotiated procurement, offerors could reasonably presume listed subfactors were approximately equal in importance).

(2) The better practice is to state the relative order of importance expressly.

(3) Agencies should rely on the "presumed equal" line of cases only when a RFP inadvertently fails to state the factors' relative order of importance. See LLH & Assoc., LLC, B-297804, Mar. 6, 2006, 2006 CPD ¶ 52; Meridian

[2] Numerical weighting is no longer an authorized method of expressing the relative importance of factors and subfactors in the Army. Evaluation factors and subfactors must be definable in readily understood qualitative terms (i.e., adjectival, colors, or other indicators, but not numbers) and represent key areas of importance to be considered in the source selection process. See AFARS 5115.304(b)(2)(D).

Corporation, B-246330, B-246330.3, July 19, 1993, 93-2 CPD ¶ 29 (applying the "equal" presumption).

d. Agencies need not disclose their specific rating methodology in the RFP. FAR 15.304(d); see D.N. American, Inc., B-292557, Sept. 25, 2003, 2003 CPD ¶ 188 (noting that unlike evaluation factors for award, an agency is not required to disclose its specific rating methodology such as the color-coded scheme used to rate offerors' proposals in the case); ABB Power Generation, Inc., B-272681, Oct. 25, 1996, 96-2 CPD ¶ 183.

e. GO/NO GO. The FAR does not prohibit a pure pass/fail method. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131. Because pass/fail criteria imply a minimum acceptable level, these levels should appear in the RFP. See Nat'l Test Pilot Sch., B-237503, Feb. 27, 1990, 90-1 CPD ¶ 238 (holding that award to the low-cost, technically acceptable proposal was inconsistent with the statement that the technical factors were more important than cost); see also CXR Telecom, B-249610.5, Apr. 9, 1993, 93-1 CPD ¶ 308 (discouraging benchmarks that lead to the automatic exclusion of otherwise potentially acceptable offerors but noting that benchmarks within the discussion process provide an opportunity to highlight and correct deficiencies).

4. Requirement to Disclose Basis of Award. FAR 15.101-1; FAR 15.101-2.

a. Agencies must disclose how they intend to make the award decision.

b. Best Value Continuum. An agency may obtain the best value by using any one or a combination of source selection approaches as the relative importance of cost or price may vary in different types of acquisitions. FAR 15.101.

c. Agencies generally choose the Tradeoff process or the lowest price technically acceptable to achieve best value.

(1) The Tradeoff process. FAR 15.101-1.

(a) Appropriate where it may be in the best interests of the government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

(b) Permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal.

(c) The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file.

(2) Lowest Price Technically Acceptable (LPTA). FAR 15.101-2. The LPTA process is similar to sealed bidding with award going to the lowest priced technically acceptable offer. The big difference, however, between sealed bidding and LPTA is that discussions can be held to ensure offerors understand the requirements and to help determine acceptability.

(a) Used only when requirements are clearly defined and risk of unsuccessful performance is minimal.

(b) Technical factors are "Go"/"No Go." Proposals are rated only for acceptability and are not ranked using the non-cost/price factors.

(c) A cost technical tradeoff is not permitted; award will go to the lowest price offer which meets the minimum technical standards. FAR 15.101-2. No additional credit will be awarded.

(d) Past performance must be considered as pass/fail (or neutral if no past performance) unless waived IAW FAR 15.304(c)(3)(iv).

5. Problem Issues When Drafting Evaluation Factors.

a. Options.

(1) The evaluation factors should address all evaluated options clearly. FAR 17.203. A solicitation that fails to state whether the agency will evaluate options is defective. See generally FAR Subpart 17.2. See also Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 (sustaining a protest where the agency failed to inform offerors that it would not evaluate options due to a change in its requirements).

(2) Agencies must evaluate options at the time of award; otherwise, they cannot exercise options unless the agency prepares a Justification and Approval (J&A) for the use of other than full and open competition under FAR Part 6. FAR 17.207(f); see Major Contracting Serv., Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170, aff'd upon reconsideration Dep't of Army—Reconsideration, B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 (determining that an unpriced option to extend services under FAR Clause 52.217-8 was not evaluated as part of the initial competition and therefore was subject to the competition requirements of FAR Part 6).

(3) If the option quantities/periods change during solicitation, the agency may cancel or amend the solicitation. Saturn Landscape Plus, Inc., B-297450.3, Apr. 18, 2006, 2006 CPD ¶ 70 (finding no basis to question the agency's reasonable decision to cancel the solicitation and issue a revised solicitation to reflect reduced option periods).

(4) Variable Option Quantities are problematic because agencies must evaluate option prices at the time of award. Agencies use variable option quantities due to funding uncertainty. Consider averaging all option prices to determine evaluated price.

b. Key Personnel.

(1) A contractor's personnel are very important in a service contract.

(2) Evaluation criteria should address:

(a) The education, training, and experience of the proposed employee(s);

(b) The amount of time the proposed employee(s) will actually perform under the contract;

(c) The likelihood that the proposed employee(s) will agree to work for the contractor; and

(d) The impact of utilizing the proposed employee(s) on the contractor's other contracts.

See Biospherics, Inc., B-253891.2, Nov. 24, 1993, 93-2 CPD ¶ 333; cf. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 (finding that the awardee's misrepresentation of the availability of key personnel justified overturning the award). But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 (concluding that it was not improper for an offeror to provide a substitute where it did not propose the key employee knowing that he would be unavailable).

(3) Agencies should request resumes, hiring or employment agreements, and proposed responsibilities in the RFP.

(4) To avoid problems during performance, the solicitation should contain a contract clause in Section H providing that key personnel can only be replaced with personnel of equal qualifications after contracting officer approval.

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," (The clause at FAR 52.215-1 (f)(4) satisfies this requirement) ***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." (The clause at FAR 52.215-1 Alternate I (f)(4) satisfies this requirement)

2. Statutes and regulations provide no guidance on whether an agency should award with or without discussions. Contracting officers should consider factors indicating that discussions may be necessary (e.g., procurement history, competition, contract type, specification clarity, etc.). Discussions may be as short or as long as required, but offerors must be given an opportunity to revise proposals after discussions end.

3. The primary objective of discussions is to maximize the government's ability to obtain best value, based on the requirement and evaluation factors set forth in the solicitation. FAR 15.306(d)(2).

4. For the Department of Defense, the Director, Defense Procurement and Acquisition Policy, issued a memorandum on 8 January 2008 directing that awards should be made without discussions only in limited circumstances, generally routine, simple procurements. The memorandum is available at http://www.acq.osd.mil/dpap/policy/policyvault/2007-1480-DPAP.pdf.

5. A protest challenging the failure to include the correct notice in the solicitation is untimely if filed after the date for receipt of initial proposals. See Warren Pumps, Inc., B-248145.2, Sept. 18, 1992, 92-2 CPD ¶ 187.

D. Exchanges with Industry Before Receipt of Proposals. The FAR encourages the early exchange of information among all interested parties to improve the understanding of the government's requirements and industry capabilities, provided the exchanges are consistent with procurement integrity requirements. See FAR 15.201. There are many ways an agency may promote the early exchange of information, including:

1. Industry day or industry/small business conferences;

2. Draft RFPs with invitation to provide comments to the contracting officer;

3. Requests for information (RFIs); and

4. Site visits.

E. Submission of Initial Proposals.

1. Proposal Preparation Time.

a. Agencies must give potential offerors at least 30 days after they issue the solicitation to submit initial proposals for contracts over the simplified acquisition threshold. 41 U.S.C. § 416; 15 U.S.C. § 637(e)(3); FAR 5.203(c). But see FAR 12.603 and FAR 5.203 for streamlined requirements for commercial items. For research and development contracts, agencies must give potential offerors at least 45 days after the solicitation is issued to submit initial proposals. FAR 5.203(e).

b. Amendments.

(1) An agency must amend the RFP if it changes its requirements (or terms and conditions) significantly. FAR 15.206; see Digital Techs., Inc., B-291657.3, Nov. 18, 2004, 2004 CPD ¶ 235 (upholding agency's decision to amend solicitation to account for a 40 percent increase in the amount of equipment to be maintained); Northrop Grumman Info. Tech., Inc.,. B-295526, et al., Mar. 16, 2005, 2005 CPD ¶ 45 (sustaining a protest when the Government should have amended the solicitation (but did not) to reflect that the agency was unlikely to exercise options).

(2) After amending the RFP, the agency must give prospective offerors a reasonable time to modify their proposals, considering the complexity of the acquisition, the agency's needs, etc. See FAR 15.206(g).

(3) Timing:

(a) ***Before*** established time and date for receipt of proposals, amendment goes to all parties receiving the solicitation. FAR 15.206(b).

(b) ***After*** established time and date for receipt of proposals, amendment goes to all offerors that have not been eliminated from the competition. FAR 15.206(c).

(4) If the change is so substantial that it exceeds what prospective offerors reasonably could have anticipated, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. FAR 15.206(e). An agency has broad authority to cancel a solicitation and need only establish a reasonable basis for cancellation. See Trade Links General Trading & Contracting, B-405182, Sept. 1, 2011, 2011 CPD ¶ 165.

2. Early "Proposals."

a. FAR 2.101 defines "offer" as a "response to a solicitation,that, if accepted, would bind the offeror to perform the resultant contract."

b. Agencies must evaluate offers that respond to the solicitation, even if the offer pre-dates the solicitation. STG Inc., B-285910, Sept. 20, 2000, 2000 CPD ¶ 155.

c. If an agency wants to preclude evaluation of proposals received prior to the RFP issue date, it must notify offerors and allow sufficient time to submit new proposals by the closing date. Id.

3. Late Proposals. FAR 15.208; FAR 52.215-1.

a. A proposal is late if the agency does not receive it by the time and date specified in the RFP. FAR 15.208; Haskell Company, B-292756, Nov. 19, 2003, 2003 CPD ¶ 202 (key is whether the government could verify that a timely proposal was submitted).

(1) If no time is stated, 4:30 p.m. local time is presumed. FAR 15.208(a).

(2) FAR 15.208 and FAR 52.215-1 set forth the circumstances under which an agency may consider a late proposal.

(3) The late proposal rules mirror the late bid rules. See FAR 14.304.

(4) Example. Proposal properly rejected as late where the proposal was received by email after the closing time for proposals and no exception permitted evaluation of the late proposal. Alalamiah Technology Group, B-402707.2, June 29, 2010, 2010 CPD 148.

b. Both technical and price proposals are due before the closing time. See Inland Serv. Corp., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266.

c. The underlying policy of the late proposal rule is to avoid confusion and ensure fair and equal competition. Therefore, a proposal is not late when an agency timely receives at least one complete copy of the proposal prior to closing time. See Tishman Constr. Corp., B-292097, May 29, 2003, 2003 CPD ¶ 94 (finding proposal timely submitted where contractor timely submitted electronic proposal but failed to timely submit identical paper proposal IAW the solicitation).

d. Agencies must retain late proposals unopened in the contracting office. FAR 15.208(g).

4. No "Firm Bid Rule." An offeror may withdraw its proposal at any time before award. FAR 15.208(e), FAR 52.215-1(c)(8). The agency, however, only has a reasonable time in which to accept a proposal. See

Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 324, 91-1 CPD ¶ 242 (holding that 13 months was too long).

5. Lost proposals. The GAO will only recommend reopening a competition if a lost proposal is the result of systemic failure resulting in multiple or repetitive instances of lost information. Project Res., Inc., B-297968, Mar. 31, 2006, 2006 CPD ¶ 58.

6. Oral Presentations. FAR 15.102. A solicitation may require or permit, at the agency's discretion, oral presentations as part of the proposal process.

   a. Offerors may present oral presentations as part of the proposal process. See NW Ayer, Inc., B-248654, Sept. 3, 1992, 92-2 CPD ¶ 154. They may occur at anytime in the acquisition process and are subject to the same restrictions as written information regarding timing and content. FAR 15.102(a). When oral presentations are required, the solicitation shall provide offerors with sufficient information to prepare them. FAR 15.102(d). The following are examples of information that may be put into the solicitation:

      (1) The types of information to be presented orally and the associated evaluation factors that will be used;

      (2) The qualifications for personnel required to provide the presentation;

      (3) Requirements, limitations and / or prohibitions on supplemental written material or other media;

      (4) The location, date, and time;

      (5) Time restrictions; or

      (6) Scope and content of exchanges between the Government and the offeror, to include whether or not discussions will be permitted. *Id.*

   b. The method and level of detail of the record of any oral presentation is within the discretion of the source selection authority. FAR 15.102(e). While the FAR does not require a particular method of recording what occurred during oral presentations, agencies must maintain a record adequate to permit meaningful review. See Checchi & Co. Consulting, Inc., B-285777, Oct. 10, 2000, 2001 CPD 132. (Practice tip: video recording of oral presentations helps capture both audio and visual

portions of the presentation and creates a record that it is helpful to refer back to when evaluating proposals and defending any protests.).

c. When an oral presentation includes information that will be included in the contract as a material term or condition, the information must be reduced to writing. The oral presentation cannot be incorporated by reference. FAR 15.102(f).

d. **Cautionary note**: Agency questions during oral presentations could be interpreted as discussions. In Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57, GAO held if agency personnel comment on, or raise substantive questions about a proposal during an oral presentation, and afford an opportunity to revise a proposal in light of the agency's comments, then discussions have occurred.

7. Confidentiality

b. 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).

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

VI. SOURCE SELECTION FAR SUBPART 15.3

A. The objective of source selection is to select the proposal that represents the best value to the Government (as defined by the Government). FAR §15.302. Because the agency's award decision must be consistent with the terms of the solicitation, the agency must ensure that its solicitation fully supports the "best value" objective.

B. Responsibilities FAR § 15.303; Army Source Selection Supplement, December 21, 2012 at Para 1.4.

C. Agency heads are responsible for source selection. The contracting officer is normally designated the source selection authority unless the agency head appoints another individual for a particular acquisition or group of acquisitions.

1. The Source Selection Authority must:

a. Establish an evaluation team, tailored for the particular acquisition. The composition of an evaluation team is left to the agency's discretion and the GAO will not review it absent a showing of conflict of interest or bias. See University Research Corp., B-253725.4, Oct. 26, 1993, 93-2 CPD ¶ 259; Symtech Corp., B-285358, Aug. 21, 2000, 2000 CPD ¶ 143; see also FAR 15.303 (providing that the source selection authority shall establish an evaluation team, tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers).

b. Approve the acquisition plan and source selection strategy.

c. Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation.

d. Consider the recommendation of the advisory boards and panels.

e. Select the source that provides the best value to the Government.

D. Proposal Evaluations Generally. FAR 15.305.

1. Evaluators must read and consider the entire proposal. Intown Properties, Inc., B-262236.2, B-262237.1, Jan. 18, 1996, 96-1 CPD ¶ 89 (record failed to demonstrate whether agency had considered information contained in offeror's best and final offer).

2. 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. If evaluators give credit to one offeror, they should give like credit to another offeror for the same provision. Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 (sustaining protest where the agency evaluated awardee's and the protester's proposals unequally by crediting the awardee for a specialty subcontractor, but not similarly crediting the protester who proposed the same subcontractor).

3. Evaluators must avoid double-scoring or exaggerating the importance of a factor beyond its disclosed weight. See J.A. Jones Mgmt. Servs., B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244; cf. Glasslock, Inc., B-299931, B-299931.2, Oct. 10, 2007, 2007 CPD ¶ 216 (reaffirming principle in the context of a RFQ). Compare Source One Mngt., Inc., B-278044, et al., June 12, 1998, 98-2 CPD ¶ 11 (stating that an agency is not precluded from considering an element of a proposal under more than

one evaluation criterion where the element is relevant and reasonably related to each criterion under which it is considered.)

4. Evaluators must evaluate compliance with the stated requirements. If an offeror proposes a better—but noncompliant—solution, the agency should amend the RFP and solicit new proposals, provided the agency can do so without disclosing proprietary data. FAR 15.206(d); see Beta Analytics, Int'l, Inc. v. U.S., 44 Fed. Cl. 131 (1999); GTS Duratek, Inc., B-280511.2, B-285011.3, Oct. 19, 1998, 98-2 CPD ¶ 130; Labat-Anderson Inc., B-246071, Feb. 18, 1992, 92-1 CPD ¶ 193; cf. United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 (holding that substantial changes required the agency to cancel and reissue the RFP).

5. Evaluators may consider matters outside the offerors' proposals if their consideration of such matters is not unreasonable or contrary to the stated evaluation criteria. See Intermagnetics Gen. Corp. Recon., B-255741.4, Sept. 27, 1994, 94-2 CPD ¶ 119.

6. Evaluation factors and subfactors represent the key areas of importance and support the evaluators in making meaningful discrimination between and among competing offerors' proposals. Accordingly, the "relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file." FAR §15.305(a).

7. The agency's evaluation must be reasonable and consistent with the stated evaluation criteria. A common evaluation error occurs when the agency's evaluation is inconsistent with the solicitation's stated evaluation approach. The failure to use stated evaluation criteria, the use of unstated evaluation criteria, or unstated minimum criteria, in the evaluation of offerors' proposals is generally fatal to an agency's source selection decision.

   a. While the agency has significant discretion to determine which evaluation factors and subfactors to use, evaluators have **no** discretion to deviate from the solicitation's stated evaluation criteria. See, e.g., Y & K Maintenance, Inc., B-405310.6, Feb 2, 2012, 2012 CPD ¶ 93 (sustaining a protest because the agency failed to evaluate the experience of the awardee's key personnel consistent with the RFP's stated evaluation criteria).

   b. Protest sustained where solicitation provided that agency would conduct extensive testing on product samples, however agency failed to conduct testing on awardee's product and accepted

awardee's unsubstantiated representation its product met solicitation's requirements. Ashbury Intl. Group, Inc., B-401123: B-401123.2, June 1, 2009, 2009 CPD ¶ 140.

c. Protest sustained based on a flawed technical evaluation where the agency considered an undisclosed evaluation criterion--transition risk--in assuming that any non-incumbent contractor would likely cause mistakes in performance that would result in costs for the agency. Consolidated Eng'g Servs., Inc., B-311313, June 10, 2008, 2008 CPD ¶ 146.

8. Unstated Evaluation Factors

a. Agencies occasionally omit either: (1) significant evaluation factors and subfactors; (2) their relative importance; or (3) both. See Omniplex World Servs. Corp., B-290996.2, Jan. 27, 2003, 2003 CPD ¶ 7 (finding an agency improperly relied on an unstated minimum requirement to exclude an offeror from the competitive range). But see Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 (finding no prejudice even though the evaluation committee applied different weights to the evaluation factors without disclosing them); cf. Danville-Findorff, Ltd, B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232 (finding no prejudice even though the agency listed the relative importance of an evaluation factor as 60 in the RFP, used 40 as the weight during evaluation, and used the "extra" 20 points for an unannounced evaluation factor). (Note that while the Government prevailed in these cases, it only prevailed because Government counsel clearly demonstrated to GAO that no prejudice befell the unsuccessful offerror due to these problems.).

b. While procuring agencies are required to identify the significant evaluation factors and subfactors in a solicitation, they are not required to identify every aspect of each factor that might be taken into account; rather, agencies may take into account considerations, even if unstated, that are reasonably related to or encompassed by the stated evaluation criteria. SCS Refrigerated Servs. LLC, B-298790, B-298790.1, B-298790.3, Nov. 29, 2006, 2006 CPD ¶ 186 (finding that the location of an offeror's back-up suppliers and the certainty of its relationships with back-up suppliers were reasonably related to a production capability/distribution plan subfactor which required offerors to provide detailed descriptions of their contingency plans for delays that could impact the delivery of food items to commissaries); NCLN20, Inc., B-287692, July 25, 2001, 2001 CPD ¶ 136 (finding that organizational and start-up

plans were logically related to and properly considered under a stated staffing plan factor).

c. The GAO will generally excuse an agency's failure to specifically identify more than one subfactor ***only if*** the subfactors are: (1) reasonably related to the stated criteria; and (2) of relatively equal importance. See Johnson Controls World Servs., Inc., B-257431, Oct. 5, 1994, 94-2 CPD ¶ 222 (finding that "efficiency" was reasonably encompassed within the disclosed factors); AWD Tech., Inc., B-250081.2, Feb. 1, 1993, 93-1 CPD ¶ 83 (finding that the agency properly considered work on similar superfund sites under the solicitation's past project experience factor even though the agency did not specifically list it as a subfactor).

d. The GAO, however, has held that an agency must disclose reasonably related subfactors if the agency gives them significant weight. See Lloyd H. Kessler, Inc., B-284693, May 24, 2000, 2000 CPD ¶ 96 (finding that agency was required to disclose in the solicitation a subfactor to evaluate a particular type of experience under the experience factor where the subfactor constituted 40 percent of the technical evaluation); Devres, Inc., B-224017, 66 Comp. Gen. 121, 86-2 CPD ¶ 652 (1986) (concluding that an agency must disclose subfactors that have a greater weight than reasonably related disclosed factors).

E. Cost and Price Evaluation.

1. 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.

2. The cost to the government, expressed in terms of price or cost, shall be evaluated in every source selection. FAR § 15.304(c)(1). An agency's cost or price evaluation is directly related to the financial risk that the government bears because of the contract type it has chosen.

3. Evaluation scheme must be reasonable, and provide an objective basis for comparing cost to government. SmithKline Beecham Corp., B-283939, Jan. 27, 2000, 2000 CPD ¶ 19.

4. While cost or price to the Government need not be the most important evaluation factor, cost or price must always be a factor and taken into account in all award decisions, as well as all competitive range determinations.

5. Evaluating Firm Fixed-Price Contracts. FAR 15.305(a)(1).

a. Generally. When an agency contemplates the award of a fixed-price contract, the government's liability is fixed and the contractor bears the risk and responsibility for the actual costs of performance. FAR §16.202-1. As a result, the agency's analysis of price must take into account that the government's liability is contractually limited to the offeror's proposed price.

b. Price Reasonableness. A price reasonableness analysis determines whether an offeror's price is fair and reasonable to the government, and focuses primarily on whether the offered price is too high (not too low). CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207; SDV Solutions, Inc., B-402309, Feb. 1, 2010, 2010 CPD ¶ 48. The concern that an offeror submitted a price that is "too low" is not a valid part of a price reasonableness evaluation; similarly, the allegation that an awardee submitted an unreasonably low price does not provide a basis upon which to sustain a protest because there is no prohibition against an agency accepting a below-cost proposal for a fixed-price contract. See First Enter., B-292967, Jan. 7, 2004, 2004 CPD ¶ 11.

c. Comparing proposed prices usually satisfies the requirement to perform a price analysis because an offeror's proposed price is also its probable price. See Ball Technical Prods. Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. But see Triple P Servs., Inc., B-271629.3, July 22, 1996, 96-2 CPD ¶ 30 (indicating that an agency may evaluate the reasonableness of the offeror's low price to assess its understanding of the solicitation requirements if the RFP permits the agency to evaluate offerors' understanding of requirements as part of technical evaluation).

d. Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. Price analysis can be difficult for indefinite quantity contracts. If an agency possesses historical data on billings under prior ID/IQ contracts, the agency may develop estimates based on these and apply it to the price analysis. R&G Food Serv., Inc., d/b/a Port-A-Pit Catering, B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶194. Another method is to construct notional or hypothetical work orders. Dept. of Agriculture—Reconsideration, B-296435.12, Nov. 3, 2005, 2005 CPD ¶ 201.

e. Price Realism. A price realism analysis is not ordinarily part of an agency's price evaluation because of the allocation of risk associated with a fixed-price contract. The analysis is entirely

optional unless expressly required by the solicitation. Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87.

(1) The price realism is to be used when, among other things, new requirements may not be fully understood by competing offerors. FAR § 15.404-1(d)(3); Analytic Strategies, B-404840, May 5, 2011, 2011 CPD ¶ 99 ("An agency may, in its discretion, provide for a price realism analysis for the purpose of assessing whether an offeror's price is so low as to evince a lack of understanding of the contract requirements or for assessing risk inherent in an offeror's approach.").

(2) To the extent an agency elects to perform a realism analysis as part of the award of a fixed-price contract, its purpose is not to evaluate an offeror's price, but to measure an offeror's understanding of the solicitation's requirements; further, the offered prices **may not be adjusted** as a result of the analysis. FAR §15.404-1(d)(3); IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 (sustaining protest challenging the agency's evaluation of offerors' price and cost proposals where the agency improperly adjusted upward portions of the protester's fixed-price proposals); ITT Elec. Sys. Radar Recon. & Acoustic Sys., B-405608, Dec. 5, 2011, 2012 CPD ¶ 7 ("Where, as here, an RFP provides for the award of a fixed price contract, the contracting agency may not adjust offerors' prices for purposes of evaluation.").

(3) Agencies may use a variety of methods to evaluate price realism, including analyzing pricing information proposed by the offeror and comparing proposals received to one another, to previously proposed or historically paid prices, or to an independent government estimate. The nature **a**nd extent of an agency's price realism analysis are within the agency's discretion unless the solicitation commits to a particular evaluation method. Gen. Dynamics, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217.

(4) While it is within an agency's discretion to provide for a price realism analysis in awarding a fixed-price contract to assess understanding or risk, offerors competing for such an award must be given reasonable notice that a business decision to submit low pricing will be considered as reflecting on their understanding or the risk associated with

their proposals. Emergint Techs., Inc., B–407006, Oct. 18, 2012, 2012 CPD ¶295 at 5–6.

(1) Where there is no relevant evaluation criterion pertaining to price realism, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, i.e., the offeror's ability and capacity to perform successfully at its offered price. Flight Safety Servs. Corp., B–403831, B–403831.2, Dec. 9, 2010, 2010 CPD ¶294 at 5.

(2) Absent a solicitation provision for a fixed-priced contract requiring a price realism analysis, no such analysis is required or permitted. PAE Government Services, Inc., B-407818, Mar. 5, 2013, 2013 CPD ¶91.

6. Evaluating Cost Reimbursement Contracts

a. Cost Reasonableness Analysis. A cost reasonableness analysis is used to evaluate the reasonableness of individual cost elements when cost or pricing data, or information other than cost or pricing data, are required. FAR §15.404-1(a)(3), (4). As with price reasonableness, cost reasonableness is used to determine that the offeror's overall cost is fair and reasonable to the government (*i.e.*, not too high).

b. Cost Realism Analysis (Generally). When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed costs of contract performance are not considered controlling because, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its reasonable, allowable, and allocable costs. FAR § 16.301-1; FAR 15.404-1(d); Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶112.

(1) Agencies should perform a cost realism analysis and evaluate an offeror's probable cost of accomplishing the solicited work, rather than its proposed cost.[3] See FAR 15.404-1(d); see also Kinton, Inc., B-228260.2, Feb. 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112 (indicating that it is improper for an agency to award based on probable

[3] Probable cost is the proposed cost adjusted for cost realism.

costs without a detailed cost analysis or discussions with the offeror).

(2) A cost realism analysis is used to determine the extent to which an offeror's proposed costs represent what the contract performance should cost, assuming reasonable economy and efficiency. FAR §§15.305(a)(1), 15.404-1(d)(1), (2); Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81; The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147.

(3) Further, an offeror's proposed costs should be adjusted when appropriate based on the results of the cost realism analysis. FAR §15.404-1(d)(2)(ii); Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 (sustaining protest where, among other things, contracting officer failed to take into account the cost adjustments recommended by the agency's cost evaluation and instead considered only the offeror's proposed cost in the agency's source selection decision).

(4) If an agency needs to perform a cost realism analysis, the agency should base any adjustments to the offered price on identifiable costs to the government (e.g., in-house costs or life-cycle costs). See FAR 15.404-1(d); see also Futures Group Int'l, B-281274.5, Mar. 10, 2000, 134 (2000, 2000 CPD ¶ 148) (cost realism analysis must consider all information reasonably available at the time of evaluation, not just what offeror submits).

(5) A cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's proposal. FAR §15.404-1(d)(1); Advanced Commc'ns Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3.

(6) Agencies should consider all cost elements. It is unreasonable to ignore unpriced "other cost items," even if the exact cost of the items is not known. See Trandes Corp., B-256975.3, Oct. 25, 1994, 94-2 CPD ¶ 221; cf.

Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.

(7) Cost realism need not achieve scientific certainty; rather, it must provide some measure of confidence that the conclusions about the most probable costs are reasonable and realistic in view of other cost information reasonably available to the agency at the time of its evaluation. GAO reviews an agency's judgment only to see if the cost realism evaluation was reasonably based, not arbitrary, and adequately documented. Metro Mach. Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132.

(8) Agencies should evaluate cost realism consistently from one proposal to the next.

(9) However, agencies may not apply estimated adjustment factors mechanically. A proper cost realism analysis requires the agency to analyze each offeror's proposal independently based on its particular circumstances, approach, personnel, and other unique factors. See Honeywell Technology Solutions, Inc., B-292354, B-292388, Sept. 2, 2003, 2005 CPD ¶ 107; Metro Mach. Corp., B-297879.2, May 3, 2006, 2006 CPD ¶ 80.

(10) Agencies should also reconcile differences between the cost realism analysis and the technical evaluation scores. Information Ventures, Inc., B-297276.2 et al., Mar. 1, 2006, 2006 CPD ¶ 45 (agency praised technical proposal's "more than adequate" staffing while lowering hours of program director because of "unrealistic expectations").

(11) Agencies must document their cost realism analysis. See KPMG LLP, B-406409, et. seq., May 21, 2012, 2012 WL 2020396 (explaining that GAO "will sustain a protest where the cost realism analysis [is] not adequately documented").

F. Scoring Quality Factors (e.g., Technical and Management). See FAR 15.305(a).

1. 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 v. United States, 693 F. Supp. 1232 (D.D.C. 1988). At a minimum, an agency must give better proposals higher scores. See Trijicon, Inc., B-244546, Oct. 25, 1991, 71 Comp. Gen. 41, 91-2 CPD ¶ 375 (concluding that the agency failed to rate proposals that exceeded

the minimum requirements higher than those offering the minimum). An agency may give higher scores to proposals that exceed the minimum requirements, even if the RFP does not disclose how much extra credit will be given under each subfactor. See PCB Piezotronics, Inc., B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286.

2. Evaluation ratings, whether numeric, color, or adjectival, are but guides to, and not a substitute for, intelligent decision making. C & B Constr., Inc. B-401988.2, 2010, Jan. 6, 2010, 2010 CPD ¶ 1. Evaluation ratings are tools to assist source selection officials in evaluating proposals; they do not mandate automatic selection of a particular proposal. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec.18, 2002, 2003 CPD ¶ 16.

a. **Numerical**.[4] An agency may use point scores to rate individual evaluation factors. But see C & B Constr., Inc. B-401988.2, 2010, Jan. 6, 2010CPD ¶ 1 (sustaining protest where record provided no contemporaneous tradeoff comparing offeror to awardee other than on the basis of point scores); Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002,2002 CPD ¶ 169 (sustaining protest where agency relied on point scores and failed to document in source selection decision any comparison of protester's lower-priced and lower-rated proposal to awardee's higher-priced, higher-rated proposal).

b. **Adjectives**. An agency may use adjectives (e.g., excellent, good, satisfactory, marginal, and unsatisfactory)—either alone or in conjunction with other rating methods—to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. See Hunt Bldg. Corp., B-276370, June 6, 1997, 98-1 CPD ¶ 101 (denying a challenge to the assigned adjectival ratings where the evaluators adequately documented the different features offered by each firm and conveyed the comparative merits of the proposals to the selection official); see also FAR 15.305(a); Biospherics Incorp., B-278508.4, et al., Oct 6, 1998, 98-2 CPD ¶ 96 (holding that while adjectival ratings and point scores are useful guides to decision making, they must be supported by documentation of the relative differences between proposals).

c. **Colors**. An agency may use colors in lieu of adjectives to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. See Ferguson-Williams, Inc., B-231827, Oct. 12, 1988, 88-2 CPD ¶ 344.

[4] See supra note 2 for Army policy regarding use of numerical scoring.

d. **Dollars**. This system translates the technical evaluation factors into dollars that are added or subtracted from the evaluated price to get a final dollar price adjusted for technical quality. See DynCorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69. Must be described in the solicitation's Section M, award criteria, to be utilized.

3. **But remember**: The focus in the source selection decision should be the underlying bases for the ratings, including a comparison of the advantages and disadvantages associated with the specific content of competing proposals, considered in a fair and equitable manner consistent with the terms of the RFP. See Gap Solutions, Inc., B-310564, Jan. 4, 2008, 2008 CPD¶ 26; Mechanical Equipment Company, Inc., et al., B-292789.2, et al., Dec. 15, 2003, 2004 CPD ¶ 192.

4. Agencies possess considerable discretion in evaluating proposals, and particularly in making scoring decisions. See MiTech, Inc., B-275078, Jan. 23, 1997, 97-1 CPD ¶ 208 (indicating that the GAO will not rescore proposals; it will only review them to ensure that the agency's evaluation is reasonable and consistent with the stated evaluation criteria); see also Control Systems Research, Inc., B-299546.2, Aug. 31, 2007, 2007 CPD ¶ 193 (stating that GAO will not substitute its judgment for that of the agency in evaluating management and technical areas); Antarctic Support Associates v. United States, 46 Fed. Cl. 145 (2000) (citing precedent of requiring "great deference" in judicial review of technical matters).

5. Narrative. An agency must provide a narrative to rate the strengths, weaknesses, and risks of each proposal. The narrative provides the basis for the source selection decision; therefore, the narrative should accurately reflect the proposals relative strengths, weaknesses, deficiencies and importance of these to the evaluation factors.

6. Agencies must reconcile adverse information when performing technical evaluation. See Maritime Berthing, Inc., B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89; see also Carson Helicopter Servs., Inc., B-299720, B-299720.2, July 30, 2007, 2007 CPD ¶ 142 (stating that an agency may not accept at face value a proposal's promise to meet a material requirement when there is significant countervailing evidence that was, or should have been, reasonably known to the agency evaluators that should have created doubt whether the offeror would or could comply with that requirement).

7. Responsibility Concerns. A responsibility determination is not strictly part of the technical evaluation, but the evaluation process may include consideration of responsibility matters. See Applied Eng'g Servs., Inc., B-256268.5, Feb. 22, 1995, 95-1 CPD ¶ 108. If responsibility matters

are considered without a comparative evaluation of offers, however, a small business found technically unacceptable may appeal to the SBA for a COC. See Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38. If evaluators express concern with an offeror's responsibility, the evaluators should provide input to the contracting officer for use in making a responsibility determination. For a more detailed discussion on evaluating responsibility, see infra Subpart VI.P.

8. In DoD, the ratings are governed by the Department of Defense Source Selection Procedures, March 4, 2011, and the Army is governed by the Supplement (AS3) to the DoD Source Selection Procedures.

G. Past Performance Evaluation.

1. Past performance is generally required to be evaluated in all source selections for negotiated competitive acquisitions issued on or after January 1, 1999. See FAR §§ 15.304(c), 15.305(a)(2).

2. Past Performance Evaluation System. FAR Subpart 42.15.

a. Agencies must establish procedures for collecting and maintaining performance information on contractors. FAR 42.1502. These procedures should provide for input from technical offices, contracting offices, and end users. FAR 42.1503.

b. Agencies must prepare performance evaluation reports for each contract in excess of $150,000. FAR 42.1502.

3. Sources of Past Performance Information.

a. Agencies may consider their own past experience with an offeror rather than relying solely on the furnished references. See Birdwell Bros. Painting and Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129.

b. An agency is not limited to considering past performance information provided by an offeror as part of its proposal, but may also consider other sources, such as:

(1) Contractor Performance Assessment Reporting System (CPARS) (http://www.cpars.csd.disa.mil/cparsmain.htm); and

(2) Past Performance Information Retrieval System (PPIRS) (www.ppirs.gov/).

(3) The primary purpose of the CPARS is to ensure that current and accurate data on contractor performance is available for use in source selections through PPIRS. Agencies use the CPARS database to collect and document contractor performance information consistent with the DoD CPARS Guide and the procedures at FAR 42.1503. Once the CPARS process is complete, this CPAR is loaded to PPIRS, which can be accessed by contracting officers and agency officials on source selection boards. .

c. In KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447, an agency properly considered extrinsic past performance evidence when past performance was a disclosed evaluation factor. In fact, ignoring extrinsic evidence may be improper. See SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33; cf. Aviation Constructors, Inc., B-244794, Nov. 12, 1991, 91-2 CPD ¶ 448.

d. Information that is personally known by agency evaluators. Evaluators may consider and rely upon their personal knowledge in the course of evaluating an offeror's past performance. Del-Jen Int'l Corp., B-297960, May 5, 2006, 2006 CPD ¶ 81; NVT Techs., Inc., B-297524, B-297524.2, Feb. 2, 2006, 2006 CPD ¶ 36; see TPL, Inc., B-297136.10, B-297136.11, May 2005, 2005 CPD ¶ (finding that a conflict of interest does not exist where the same contracting agency or contracting agency employees prepare both an offeror's past performance reference and perform the evaluation of offerors' proposals).

e. "Too close at hand." In fact, GAO has determined that, in certain circumstances, agency evaluators involved in the source selection process ***cannot ignore*** past performance information of which they are personally aware. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶34; Northeast Military Sales., Inc., B-404153, Jan. 2011, 2011 CPD ¶2 (sustaining a protest challenging an agency's assessment of the awardee's past performance as exceptional where the agency failed to consider adverse past performance information of which it was aware).

f. GAO has charged an agency with responsibility for considering such outside information where the record has demonstrated that the information in question was "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider this information." International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114; G. Marine Diesel; Phillyship, B-232619, Jan. 27, 1989, 89-1 CPD ¶90; GTS

Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130. The protester, however, must demonstrate that agency source selection officials ***were aware or should have been aware*** of the adverse information to sustain a protest on this basis. Carthage Area Hospital, Inc., B-402345, Mar. 16, 2010, 2010 CPD ¶ 90.

4. Past Performance Evaluation Considerations. An agency's evaluation of an offeror's past performance must be reasonable and consistent with the stated evaluation criteria. An agency's past performance evaluation should also take into account: (a) the relevance of an offeror's past performance; (b) the quality of an offeror's past performance; and (c) the source objectivity of an offeror's past performance information.

a. Relevance of Past Performance. An agency must determine what if any weight to give to an offeror's past performance reference by determining its degree of relevance to the contract requirements.

(1) "Same or Similar." When an RFP states the agency will evaluate whether an offeror's past performance reference is "same or similar" as part of determining relevancy, an agency must examine if the reference is same or similar in both size and scope to the awarded contract. Si-Nor, Inc., B-292748.2 et al., Jan. 7, 2004, 2004 CPD ¶ 10 (finding in part a prior contract which represented less than 7 percent of the solicitation requirements was not similar in size, scope, and complexity); Continental RPVs, B-292768.2, B-292678.3, Dec.11, 2003, 2004 CPD ¶ 56 (finding prior contracts no larger than 4 percent of the solicitation requirements were not similar or relevant); Kamon Dayron, Inc., B-292997, Jan. 15, 2004, 2004 CPD ¶ 101; Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70; KMR, LLC, B-292860, Dec. 22, 2003, 2003 CPD ¶ 233.

(2) Recency. An agency may consider the recency of an offeror's past performance reference as part of determining its overall relevance. See Knoll, Inc., B-294986.3, B-294986.4, Mar. 18, 2005, 2005 CPD ¶ 63; FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 (agency was not, per the terms of the RFP, required to consider offeror's past performance performed after solicitation closing date and before contract award).

(3) Duration. An agency may consider the duration of an offeror's past performance reference as part of determining

its relevance. Chenega Tech. Prods., LLC., B-295451.5, June 22, 2005, 2005 CPD ¶ 123 (agency properly gave little weight to an offeror's past performance reference that had been performed for only one month); SWR, Inc.--Protest & Costs, B-294266.2 et al., Apr. 22, 2005, 2005 CPD ¶ 94; EastCo Bldg. Servs., Inc., B-275334, B-275334.2, Feb. 10, 1997, 97-1 CPD ¶ 83.

(4) Geographic Location. Geographic location can be considered as part of determining past performance relevance. Si-Nor, Inc., B-292748.2 et al., Jan. 7, 2004, 2004 CPD ¶ 10 (agency properly took into account the different geographic location of the prior worked performed when considering the relevance of the offeror's past performance).

(5) Different Technical Approach. The fact that an offeror utilized a different technical approach under the prior contract does not affect the relevance of an offeror's past performance. AC Techs., Inc., B-293013, B-293013.2, Jan. 14, 2004, 2004 CPD ¶26.

(6) All References. Unless a solicitation states otherwise, there is generally no requirement that an agency obtain or consider all of an offeror's references in the past performance evaluation. Dismas Charities, B-298390, Aug. 21, 2006, 2006 CPD ¶ 131; BTC Contract Servs., Inc., B-295877, May 11, 2005, 2005 CPD ¶ 96 (agency considered the most relevant seven references submitted).

b. Quality of Past Performance. An agency should first determine the relevance of an offeror's past performance reference before considering the quality of performance. In determining past performance quality, factors that may be considered include:

(1) timeliness of performance;

(2) cost control;

(3) customer satisfaction; and

(4) performance trends. Yang Enters., Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65; Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70.

c. Source Objectivity of Past Performance Information. An agency should also consider the source of an offeror's past performance information, to determine its objectivity. See Metro Machine Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 (agency properly considered the fact that prime contractor had furnished the past performance ratings for its proposed subcontractors); Hughes Missile Sys. Co., B-259255.4, May 12, 1995, 95-1 CPD ¶ 283.

d. Agencies must make rational—rather than mechanical—comparative past performance evaluations. In Green Valley Transportation, Inc., B-285283, Aug. 9, 2000, 2000 CPD ¶ 133, GAO found unreasonable an agency's use of absolute numbers of performance problems, without considering the "size of the universe of performance" where problems occurred. The GAO also sustained a protest in which the past performance evaluation merely averaged scores derived from the past performance questionnaires without additional analysis of the past performance data. Clean Harbors Environmental Services, Inc., Comp. Gen. B-296176.2, Dec. 9, 2005, 2005 CPD ¶222.

e. Lack of past performance history should not bar new firms from competing for government contracts. See Espey Mfg. & Elecs. Corp., B-254738, Mar. 8, 1994, 94-1 CPD ¶ 180; cf. Laidlaw Envtl. Servs., Inc., B-256346, June 14, 1994, 94-1 CPD ¶ 365 (permitting the agency to give credit for commercial past performance if it is equivalent to comparable prior government experience). Agencies must give a neutral rating to firms "without a record of relevant past performance." FAR 15.305(a)(2)(iv); see Excalibur Sys., Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13 (stating that while a neutral rating does not preclude award to a higher-priced, higher technically-rated offeror in a best value procurement, an agency may nevertheless award a contract to a lower-priced offeror without a past performance history where the solicitation provides that price alone would be considered in evaluating first time offerors); see also Blue Rock Structures, Inc., B-287960.2, B-287960.3, Oct. 10, 2001, 2001 CPD ¶ 184.

f. Past Performance Attribution; Using the Experience of Others. In many instances it is necessary for agencies to consider the proper attribution of an offeror's past performance references. As a general rule, the agency's evaluation should carefully examine the role(s) to be performed by the entity in question under the contract being awarded when determining the relevance of the past performance reference. Agencies may attribute the past

performance or experience of parents, affiliates, subsidiaries, officers, and team members, although doing so can be difficult. See U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, Oklahoma County Newspapers, Inc., B-270849, May 6, 1996, 96-1 CPD ¶ 213; Tuscon Mobilephone, Inc., B-258408.3, June 5, 1995, 95-1 CPD ¶ 267.

(1) Joint Venture Partners. Base Techs., Inc., B-293061.2, B-293061.3, Jan. 28, 2004, 2004 CPD ¶ 31 (agency may consider the references of one joint venture partner in evaluating a joint venture offeror's past performance where they are reasonably predictive of performance of the joint venture entity); JACO & MCC Joint Venture, LLP, B-293354.2, May 18, 2004, 2004 CPD ¶ 122 (agency may consider the past performance history of individual joint venture partners in evaluating the joint venture's proposal where solicitation does not preclude that and both joint venture partners will be performing work under the contract).

(2) Subcontractors. AC Techs., Inc., B-293013, B-293013.2, Jan. 14, 2004, 2004 CPD ¶ 26 (agency reasonably considered the performance of contracts performed by awardee's subcontractor where nothing in the solicitation prohibited the agency from considering subcontractor's prior contracts). However, solicitation must permit attribution of subcontractor to the prime

(3) Individuals to a new company as offeror. United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶146 (agency properly considered the relevant experience and past performance history of key individuals and predecessor companies in evaluating the past performance of a newly-created company); see Interstate Gen. Gov't Contractors, Inc., B-290137.2, June 21, 2002, 2002 CPD ¶ 105; SDS Int'l, B-285822, B-285822.2, Sept. 29, 2000, 2000 CPD ¶ 167.

(4) Parent companies to a subsidiary as offeror. Aerosol Monitoring & Analysis, Inc., B-296197, June 30, 2005, 2005 CPD ¶ 132 (agency properly may attribute the past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror); Universal Bldg. Maint., Inc.,

B-282456, July 15, 1999, 99-2 CPD ¶ 32 (agency improperly attributed past performance of parent company or its other subsidiaries to awardee where record does not establish that parent company or subsidiaries will be involved in the performance of the protested contract).

g. Agencies may not downgrade past performance rating based on offeror's history of filing claims. See AmClyde Engineered Prods. Co., Inc., B-282271, June 21, 1999, 99-2 CPD ¶ 5. On 1 April 2002, the Office of Federal Procurement Policy instructed all federal agencies that the "filing of protests, the filing of claims, or the use of Alternative Dispute Resolution, must not be considered by an agency in either past performance or source selection decisions."[5]

h. Evaluating Past Performance or Experience. See John Brown U.S. Servs., Inc., B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 (comparing the evaluation of past performance and past experience).

i. Comparative Evaluations of Small Businesses' Past Performance.

(1) If an agency comparatively evaluates offerors' past performance, small businesses may not use the SBA's Certificate of Competency (COC) procedures to review the evaluation. See Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148; Smith of Galeton Gloves, Inc., B-271686, July 24, 1996, 96-2 CPD ¶ 36.

(2) If an agency fails to state that it will consider responsibility-type factors, small businesses may seek a COC. See Envirosol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295; Flight Int'l Group, Inc., B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.

(3) If an agency uses pass/fail scoring for a responsibility-type factor, small businesses may seek a COC. See Clegg Indus., Inc., B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145; Meeks Disposal Corp., B-299576, B-299576.2, June 28, 2007, 2007 CPD ¶ 127 (stating in dicta a small business may seek a COC when an agency uses an acceptable/neutral/

[5] Memorandum, Angela B. Styles, Administrator, Office of Federal Procurement Policy, to Senior Procurement Executives, subject: Protests, Claims, and Alternative Dispute Resolution (ADR) as Factors in Past Performance and Source Selection Decisions (Apr. 1, 2002), available at http://www.whitehouse.gov/omb/procurement/publications/ pastperfmemo.pdf.

unacceptable rating scheme to evaluate corporate experience).

j. Agencies must clarify adverse past performance information when there is a clear basis to question the past performance information. See A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 145. Agencies also must clarify adverse past performance if an offeror may be excluded from the competitive range as well as when an offeror has not previously had an opportunity to respond to adverse past performance. FAR 15.306(1)(i).

H. Products of the Evaluation Process.

1. Evaluation Report.

a. The evaluators must prepare a report of their evaluation. See Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482. The relative strengths, deficiencies, significant weaknesses, and risk supporting proposal evaluation shall be documented in the contract file. FAR 15.305(a); see also FAR 15.308 (establishing a similar requirement for the source selection decision).

b. The contracting officer should retain all evaluation records. See FAR 4.801; FAR 4.802; FAR 4.803; Southwest Marine, Inc., B-265865.3, Jan. 23, 1996, 96-1 CPD ¶ 56 (stating that where an agency fails to document or retain evaluation materials, it bears the risk that there is an inadequate supporting rationale in the record for the source selection decision and that GAO will conclude the agency had a reasonable basis for the decision); see also Technology Concepts Design, Inc. B-403949.2, March 25, 2011, 2011 CPD ¶ 78 (sustaining a protest where the agency did not provide adequate supporting rationale in the record for GAO to conclude that the agency's evaluation of the protester's proposal was reasonable).

c. If evaluators use numerical scoring, they should explain the scores. See J.A. Jones Mgmt Servs, Inc., B-276864, Jul. 24, 1997, 97-2 CPD ¶ 47; TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239; S-Cubed, B-242871, June 17, 1991, 91-1 CPD ¶ 571.

d. Evaluators should ensure that their evaluations are reasonable. See DNL Properties, Inc., B-253614.2, Oct. 12, 1993, 93-2 CPD ¶ 301.

2. Deficiencies. The initial evaluation must identify all parts of the proposals that fail to meet the government's minimum requirements.

3. Advantages and Disadvantages. The initial evaluation should identify the positive and negative aspects of acceptable proposals.

4. Questions and Items for Negotiation. The initial evaluation should identify areas where discussions are necessary/desirable.

I. Award Without Discussion.

1. An agency may not award on initial proposals if it:

a. States its intent to hold discussions in the solicitation; or

b. Fails to state its intent to award without discussions in the solicitation.

2. A proper award on initial proposals need not result in the lowest overall cost to the government (depending on the stated evaluation criteria).

3. To award without discussions, an agency must:

a. Give notice in the solicitation that it intends to award without discussions;

b. Select a proposal for award which complies with all of the material requirements of the solicitation;

c. Properly evaluate the selected proposal in accordance with the evaluation factors and subfactors set forth in the solicitation;

d. Not have a contracting officer determination that discussions are necessary; and

e. Not conduct discussions with any offeror, other than for the purpose of minor clarifications.

See TRI-COR Indus., B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137.

4. Discussions v. Clarifications. FAR 15.306(a), (d).

(1) An agency may not award on initial proposals if it conducts discussions with any offeror. See To the Sec'y of the Navy,

B-170751, 50 Comp. Gen. 202 (1970); see also Strategic Analysis, Inc., 939 F. Supp. 18 (D.D.C. 1996) (concluding that communications with one offeror concerning the employment status of its proposed key personnel were discussions). But see Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996) (refusing to sustain a protest because the protester could not show that there was a "reasonable likelihood" that it would have been awarded the contract in the absence of the improper discussions).

(2) "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); FAR 15.306(d). Discussions may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. FAR 15.306(d).

(a) The COFC has found "mutual exchange" a key element in defining discussions. See Cubic Defense Sys., Inc. v. United States, 45 Fed. Cl. 450 (2000) (finding that an offeror's submission of data that had been previously addressed and anticipated by an agency, without requests for further clarification by the agency, lacks the element of mutual exchange that is explicit in the FAR's treatment of discussions).

(b) The GAO has focused on "opportunity to revise" as the key element distinguishing discussions from clarifications. See MG Indus., B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17.

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).

(a) Clarifications include:

(i) The opportunity to clarify—rather than revise—certain aspects of an offeror's

proposal (e.g., the relevance of past performance information to which the offeror has not previously had an opportunity to respond); and

(ii) The opportunity to resolve minor irregularities, informalities, or clerical errors.

(iii) The parties' actions control the determination of whether "discussions" have been held and not the characterization by the agency. See Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 (finding "discussions" occurred where awardee was allowed to revise its technical proposal, even though the source selection document characterized the communication as a "clarification").

c. Examples.

(1) The following are "discussions:"

(a) The substitution of resumes for key personnel. See University of S.C., B-240208, Sept. 21, 1990, 90-2 CPD ¶ 249; Allied Mgmt. of Texas, Inc., B-232736.2, May 22, 1989, 89-1 CPD ¶ 485. But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95; Park Tower Mgmt. v. United States, 67 Fed. Cl. 548 (2005) (holding that where agency contacted offeror to "clarify" whether it still intended to hire incumbent personnel, offeror's provision of additional information regarding its staffing and management plan did not transform the agency request into a discussion because the agency did not intend for the offeror to modify its proposal when it contacted the offeror).

(b) Allowing an offeror to explain a warranty provision that results in a revision of its proposal. See Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

(2) The following were not "discussions:"

(a) Audits. See Data Mgmt. Servs., Inc., B-237009, Jan. 12, 1990, 69 Comp. Gen. 112, 90-1 CPD ¶ 51; see also SecureNet Co. Ltd. v. United States, 72 Fed. Cl. 800 (2006) (holding that agency's request of offeror's labor rates were clarifications because the agency did not intend for the offeror to modify its proposal as a result of the contact).

(b) Allowing an offeror to correct a minor math error, correct a certification, or acknowledge a non-material amendment. See E. Frye Enters., Inc., B-258699, Feb. 13, 1995, 95-1 CPD ¶ 64; cf. Telos Field Eng'g, B-253492.2, Nov. 16, 1993, 93-2 CPD ¶ 275.

(c) A request to extend the proposal acceptance period. See GPSI-Tidewater, Inc., B-247342, May 6, 1992, 92-1 CDP ¶ 425.

(d) An inquiry as to whether figures in a proposal were stated on an annual or monthly basis that did not provide the offeror an opportunity to alter its proposal. Int'l Res. Recovery, Inc., v. United States, 64 Fed. Cl. 150 (2005).

(e) Responsibility inquiries. Gen. Dynamics—Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 (holding that requests for information relating to an offeror's responsibility, rather than proposal evaluation, does not constitute discussions); see also Computer Sciences Corp., B-298494.2, et al., May 10, 2007, 2007 CPD ¶ 103 (stating that exchanges concerning an offeror's small business subcontracting plan are not discussions when they are evaluated as part of an agency's responsibility determination, but that such exchanges constitute discussions when incorporated into an agency's technical evaluation plan); Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 (analogizing pre-award exchanges reference the adequacy of an offeror's mitigation plan to a responsibility determination, which does not constitute discussions).

(f) See Dyncorp Int'l LLC v. United States, 76. Cl. 528 (2007) (providing a lengthy discussion on the differences between clarifications and discussions to conclude that three evaluation notices requesting information related to mission capability were not discussions).

d. Minor clerical errors should be readily apparent to both parties. If the agency needs an answer before award, the question probably rises to the level of discussions. See CIGNA Gov't Servs., LLC, B-297915.2, May 4, 2006, 2006 CPD 73 ¶ (finding that request to confirm hours in level of effort template that results in an offeror stating the hours were "grossly overstated" and the provision of corrections constituted discussions); University of Dayton Research Inst., B-296946.6, June 15, 2006, 2006 CPD ¶ 102 (finding that the correction of evaluation rates and reconciliation of printed and electronic versions of subcontractor rates are not clarifications where several offerors thereby make dozens of changes to the rates initially proposed).

J. Determination to Conduct Discussions.

1. To conduct discussions with one or more offerors after stating an intent to award without discussions, the contracting officer must find that discussions are necessary and document this conclusion in writing. 10 U.S.C. § 2305(b); 41 U.S.C. § 253a(b)(2)(B)(i); FAR 15.306(a)(3).

2. Statutes and implementing regulations provide little guidance for making this determination. A contracting officer should consider factors such as favorable but noncompliant proposals, unclear proposals, incomplete proposals, unreasonable costs/prices, suspected mistakes, and changes/ clarifications to specifications. See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339.

3. The agency has wide discretion in deciding not to hold discussions, and an agency's decision to ***not*** hold discussions is generally not a matter that GAO will review. Booz Allen Hamilton, Inc., B-405993, B-40599.2, Jan 19, 2012, 2012 CPD ¶ 30.[6]

K. Communications. FAR 15.306(b).

[6] But see the DoD DPAP memorandum dated 8 January 2008 directing that awards should be made without discussions only in limited circumstances, generally routine, simple procurements. See http://www.acq.osd.mil/dpap/policy/policyvault/2007-1480-DPAP.pdf

1. "Communications" are limited "exchanges of information, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range." FAR 15.306(b).

   a. These exchanges are limited to offerors whose:

      (1) past performance information is preventing them from being in the competitive range, and

      (2) exclusion / inclusion in the competitive range is uncertain.

   b. The communications should "enhance Government understanding . . . ; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process." FAR 15.306(b)(2).

   c. Communications "are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range." FAR 15.306(b)(2) and (3). Interestingly, FAR 15.306(b)(3)(i) references FAR 14.407, mistakes in bids. Therefore, mistakes in bid case law can be used to help Contracting Officers determine when they can engage in communications to help establish the competitive range.

2. The parties, however, cannot use communications to permit an offeror to revise its proposal. FAR 15.306(b)(2).

3. The contracting officer <u>must</u> communicate with offerors who will be excluded from the competitive range because of adverse past performance information. Such communications must give an offeror an opportunity to respond to adverse past performance information to which it has not previously had an opportunity to respond. FAR 15.306(b).

4. The contracting officer may also communicate with offerors who are neither clearly in nor clearly out of the competitive range. FAR 15.306(b)(1)(ii). The contracting officer may address "gray areas" in an offeror's proposal (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes). FAR 15.306(b)(3).

L. Establishing the Competitive Range. FAR 15.306(c).

1. The competitive range is the group of offerors with whom the contracting officer will conduct discussions and from whom the agency will seek revised proposals.

2. The contracting officer (or SSA) may establish the competitive range any time after the initial evaluation of proposals. See SMB, Inc., B-252575.2, July 30, 1993, 93-2 CPD ¶ 72.

3. The contracting officer must consider all of the evaluation factors (***including cost/price***) in making the competitive range determination. See Kathpal Techs., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6; Arc–Tech, Inc., B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53.

   a. The contracting officer may exclude a proposal from the competitive range despite its lower cost or the weight accorded cost in the RFP if the proposal is technically unacceptable. See Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.

   b. The contracting officer may exclude an unacceptable proposal that requires major revisions to become acceptable if including the proposal in the competitive range would be tantamount to allowing the offeror to submit a new proposal. See Harris Data Commc'ns v. United States, 2 Cl. Ct. 229 (1983), aff'd, 723 F.2d 69 (Fed. Cir. 1983); see also Strategic Sciences and Tech., Inc., B-257980, 94-2 CPD ¶ 194 (holding that it was reasonable for the agency to exclude an offeror who proposed inexperienced key personnel—which was the most important criteria—from the competitive range); InterAmerica Research Assocs., Inc., B-253698.2, Nov. 19, 1993, 93-2 CPD ¶ 288 (holding that it was proper for the agency to exclude an offeror that merely repeated back language from solicitation and failed to provide required information).

4. The contracting officer must include all of the "most highly rated proposals" in the competitive range unless the contracting officer decides to reduce the competitive range for purposes of efficiency. See FAR 15.306(c)(2).

   a. The GAO ordinarily gives great deference to the agency. To prevail, a protester must show that the decision to exclude it was: (1) clearly unreasonable; or (2) inconsistent with the stated evaluation factors. See Mainstream Eng'g Corp., B-251444, Apr. 8, 1993, 93-1 CPD ¶ 307; cf. Intertec Aviation, B-239672, Sept. 19, 1990, 69 Comp. Gen. 717, 90-2 CPD ¶ 232 (holding that the agency improperly excluded an offeror from the competitive range where its alleged technical deficiencies were minor, its cost was competitive, and the agency's action seriously reduced available competition).

b. If the contracting officer has any doubts about whether to exclude a proposal from the competitive range, the contracting officer should leave it out. In the past, agencies generally included any proposal in the competitive range that had a reasonable chance of receiving award. With the FAR rewrite in 1997, the drafters intended to permit a competitive range more limited than under the "reasonable chance of receiving award" standard. See SDS Petroleum Prods., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59.

5. The contracting officer may limit the number of proposals in the competitive range to "the greatest number that will permit an efficient competition among the most highly rated offerors" **only if**:

   a. The agency notified offerors in the solicitation that the contracting officer may limit the competitive range for purposes of efficiency; and

   b. The contracting officer determines that the number of proposals the contracting officer would normally include in the competitive range is too high to permit efficient competition.

6. The contracting officer must continually reassess the competitive range. If after discussions have begun, an offeror is no longer considered to be among the most highly rated, the contracting officer may eliminate that offeror from the competitive range despite not discussing all material aspects in the proposal. The excluded offeror will not receive an opportunity to submit a proposal revision. FAR 15.306(d)(3).

7. Common Errors.

   a. Reducing competitive range to one proposal.

      (1) A competitive range of one is not "per se" illegal or improper. See Clean Servs. Co., B-281141.3, Feb. 16, 1999, 99-1 CPD ¶ 36; SDS Petroleum Prods., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 (concluding that the new standard for establishing the competitive range does not preclude a range of one per se).

      (2) However, a contracting officer's decision to reduce a competitive range to one offeror will receive "close scrutiny." See L-3 Commc'ns EOTech., Inc., 83 Fed. Cl. 643, 2008; Dynamic Mktg. Servs., B-279697, July 13, 1998, 98-2 CPD ¶ 84.

(3) Under FAR 52.215-20 and DFARS 252.215-7008, Agencies may be required to request certified cost and pricing data from the lone offeror in certain circumstances.

b. Eliminating a technically acceptable proposal from the competitive range without taking into account or evaluating cost or price. See Kathpal Techs., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6; SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33.

c. Excluding an offeror from the competitive range for omissions that the offeror could easily correct during discussions. See Dynalantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101.

d. Using predetermined cutoff scores. See DOT Sys., Inc., B-186192, July 1, 1976, 76-2 CPD ¶3.

e. Excluding an offeror from the competitive range for "nonresponsiveness."

(1) An offeror may cure a material defect in its initial offer during negotiations; therefore, material defects do not necessarily require exclusion from the competitive range. See ManTech Telecomm & Info. Sys. Corp., 49 Fed. Cl. 57 (2001).

(2) The concept of "responsiveness" is incompatible with the concept of a competitive range. See Consolidated Controls Corp., B-185979, Sept. 21, 1976, 76-2 CPD ¶ 261.

M. Conducting Discussions. FAR 15.306(d).

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

a. The contracting officer may not hold discussions with only one offeror. See Computer Sciences Corp., B-298494.2, et al., May 10, 2007, 2007 CPD ¶ 103 (finding that when an agency conducts discussions with one offeror, it must conduct discussions with all other offerors whose proposals are in the competitive range, and those discussions must be meaningful; that is, the discussions must identify deficiencies and significant weaknesses in each offeror's proposal); Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 (stating that the "acid test" of whether discussions have been held is whether an offeror was provided the opportunity to modify/revise its proposal).

b. The contracting officer may hold face-to-face discussions with some—but not all—offerors, provided the offerors with whom the contracting officer did not hold face-to-face discussions are not prejudiced. See Data Sys. Analysts, Inc., B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.

c. In a lowest-priced, technically acceptable solicitation, an agency is not required to conduct discussions with an offeror already determined technically acceptable, provided that offeror is given the opportunity to submit a revised proposal. Commercial Design Grp., Inc., B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 (finding there was no prejudice where agency held discussions with deficient offerors but not technically acceptable protestor in a LPTA acquisition).

2. The contracting officer determines the scope and extent of the discussions; however, it is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. See The Boeing Co., B–311344 et al., June 18, 2008, 2008 CPD ¶114 at 49; Biospherics, Inc. v. United States, 48 Fed. Cl. 1 (2000); Multimax, Inc, et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 ("mechanistic" application of formula); AT&T Corp, B-299542.2, B-299542.4, Nov. 16, 2007, 2007 CPD ¶ (concluding discussions not reasonable where agency determines protester's staffing is unreasonable but fails to identify the scope of the agency's concerns in discussions.

a. The contracting officer must discuss any matter that the RFP states the agency will discuss. See Daun-Ray Casuals, Inc., B-255217.3, 94-2 CPD ¶ 42 (holding that the agency's failure to provide an offeror with an opportunity to discuss adverse past performance information was improper—even though the offeror received a satisfactory rating—because the RFP indicated that offerors would be allowed to address unfavorable reports).

b. The contracting officer must tailor discussions to the offeror's proposal. FAR 15.306(d)(1), (e)(1); see Metropolitan Interpreters and Translators, Inc., B-403912.4, May 31, 2011, 2012 CPD ¶ 130 ("Although discussions may not be conducted in a manner that favors one offeror over another, discussions need not be identical among offerors; rather, discussions are to be tailored to each offeror's proposal.").

c. At a minimum, the contracting officer must notify each offeror in the competitive range of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not

yet had the opportunity to respond. FAR 15.306(d)(3). An agency failed to conduct meaningful discussions when discussions were limited to cost proposals and the discussions failed to identify significant weaknesses or deficiencies identified in the protester's technical proposal. Burchick Constr. Co., B-400342, Oct. 6, 2008, 2009 CPD ¶ 203. But see FAR 15.306(d)(5) (indicating that the contracting officer may eliminate an offeror's proposal from the competitive range after discussions have begun, even if the contracting officer has not discussed all material aspects of the offeror's proposal or given the offeror an opportunity to revise it).

(1) Deficiencies.

(a) The FAR defines a "deficiency" as "a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level." FAR 15.001.

(b) The contracting officer does ***not*** have to specifically identify each deficiency. Instead, the contracting officer merely has to lead the contractor into areas requiring improvement. See Du & Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156; Arctic Slope World Servs., Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75. An agency's failure to advise an offeror, in some way, of material proposal deficiencies vitiates the meaningfulness of the discussions. There is, however, no requirement that all areas of a proposal which could have a competitive impact be addressed in discussions. Dynacs Eng'g Co., Inc. v. United States, 48 Fed. Cl. 124 (2000); see Info. Sys. Tech. Corp., B-289313, Feb. 5, 2002, 2002 CPD ¶ 36 (stating that agencies need not conduct all encompassing discussions, or discuss every element of a proposal receiving less than a maximum rating).

(c) The contracting officer does ***not*** have to point out a deficiency if discussions cannot improve it. See Specialized Tech. Servs., Inc., B-247489, B-247489.2, June 11, 1992, 92-1 CPD ¶ 510; Eng'g Inc., B-257822, B-257822.5, Aug. 18, 1995, 95-2 CPD ¶ 130 (business experience).

(d) The contracting officer does ***not*** have to inquire into omissions or business decisions on matters clearly addressed in the solicitation. See Wade Perrow Constr., B-255332.2, Apr. 19, 1994, 94-1 CPD ¶ 266; Nat'l Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.

(e) The contracting officer does ***not*** have to actually "bargain" with an offeror. See Northwest Reg'l Educ. Lab., B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74. But cf. FAR 15.306(d) (indicating that negotiations may include bargaining).

(2) Significant Weaknesses.

(a) A "significant weakness" is "a flaw that appreciably increases the risk of unsuccessful contract performance." FAR 15.001. Examples include:

(i) Flaws that cause the agency to rate a factor as marginal or poor;

(ii) Flaws that cause the agency to rate the risk of unsuccessful contract performance as moderate to high; and

(iii) Relatively minor flaws that have a significant cumulative impact (e.g., minor flaws in several areas that impact the overall rating).

(b) The contracting officer does ***not*** have to identify every aspect of an offeror's technically acceptable proposal that received less than a maximum score. See Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222; SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462, recon. denied, B-252476.3, Oct. 27, 1993, 93-2 CPD ¶ 251.

(c) In addition, the contracting officer does ***not*** have to advise an offeror of a minor weakness that the agency does not consider significant, even if it subsequently becomes a determinative factor between two closely ranked proposals. See Brown & Root, Inc. & Perini Corp., A Joint Venture, B-270505.2, Sept. 12, 1996, 96-2 CPD ¶ 143; cf.

Prof'l Servs. Grp., B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 (holding that the discussions were inadequate where "deficient" staffing was not revealed because the agency perceived it to be a mere "weakness").

(d) The contracting officer does ***not*** have to inform offeror that its cost/price is too high where the agency does not consider the price unreasonable or a significant weakness or deficiency. See JWK Int'l Corp. v. United States, 279 F.3d 985 (Fed. Cir. 2002); SOS Interpreting, Ltd., B-287477.2, May 16, 2001, 2001 CPD ¶ 84.

(3) Other Aspects of an Offeror's Proposal. Although the FAR used to require contracting officers to discuss other material aspects, the rule now is that contracting officer are "encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR 15.306(d)(3).

d. Since the purpose of discussions is to maximize the agency's ability to obtain the best value, the contracting officer should do more than the minimum necessary to satisfy the requirement for meaningful discussions. See FAR 15.306(d)(2).

e. To satisfy the requirement for meaningful discussions, an agency need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required, nor is the agency obligated to "spoon-feed" an offeror as to each and every item that could be revised to improve its proposal. L–3 Commc'ns Corp ., BT Fuze Prods. Div., B–299227, B–299227.2, Mar. 14, 2007, 2007 CPD ¶83 at 19; Robbins–Gioia, LLC, B-402199 et al., Feb. 3, 2010, 2010 CPD ¶ 67 n.5; Labarge Elecs., B-266210, Feb. 9, 1996, 96-1 CPD ¶ 58 at 6 ("While agencies generally are required to conduct meaningful discussions by leading offerors into the areas of their proposals requiring amplification, this does not mean that an agency must 'spoon-feed' an offeror as to each and every item that must be revised, added, deleted, or otherwise addressed to improve a proposal.").

3. Limitations on Exchanges.

a. FAR Limitations. FAR 15.306(e).

(1) The agency may not favor one offeror over another.

(2) The agency may not disclose an offeror's technical solution to another offeror.[7]

(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).

b. Other Prohibitions. The FAR no longer includes specific prohibitions on technical leveling, technical transfusion, and auctioning; however, the Procurement Integrity Act and the Trade Secrets Act still apply.

(1) Technical leveling involves helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion. See Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

(2) Technical Transfusion. Technical transfusion involves the government disclosure of one offeror's proposal to another to help that offeror improve its proposal.

(3) Auctioning.

(a) Auctioning involves the practice of promoting price bidding between offerors by indicating the price offerors must beat, obtaining multiple proposal revisions, disclosing other offerors' prices, etc.

(b) Auctioning is not inherently illegal. See Nick Chorak Mowing., B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82. Moreover, the GAO usually finds that preserving the integrity of the competitive process outweighs the risks posed by an auction. See Navcom Defense Elecs., Inc., B-276163.3, Oct. 31,

[7] This prohibition includes any information that would compromise an offeror's intellectual property (e.g., an offeror's unique technology or an offeror's innovative or unique use of a commercial item). FAR 15.306(e)(2).

1997, 97-2 CPD ¶ 126; Baytex Marine Commc'n, Inc., B-237183, Feb. 8, 1990, 90-1 CPD ¶ 164.

(c) The government's estimated price will not be disclosed in the RFP.[8] However, FAR 15.306(e)(3) allows discussion of price. See Nat'l Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16. While FAR § 15.306(e)(3) gives the contracting officer the discretion to inform an offeror its price is too high (or too low), it does not require that the contracting officer do so. HSG Philipp Holzmann Technischer, B-289607, Mar. 22, 2002, 2002 CPD ¶ 67.

c. Fairness Considerations.

(1) Discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. See Metro Mach. Corp., B-281872.2, Apr. 22, 1999, 99-1 CPD ¶ 101 (finding that a question about a proposal that did not reasonably put the offeror on notice of agency's actual concern was not adequate discussions); see also Velos, Inc., B-400500 et al. Nov. 28, 2008, 2010 CPD ¶ 3 (Agency agreed software license was acceptable, then rejected the protester's revised proposal because the agency, after final proposal submission, determined same license was unacceptable); SRS Tech., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 (concluding that the Navy mislead the offeror by telling it that its prices were too low when all it needed was better support for its offered prices); Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 (concluding that the agency misled the offeror and caused it to raise its price by telling it that its price was below the government estimate); DTH Mgmt. Grp., B-252879.2, Oct. 15, 1993, 93-2 CPD ¶ 227 (concluding that the agency mislead an offeror by telling it that its price was below the government estimate when it knew that the government estimate was faulty); Creative Info. Techs., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 (holding that discussions must deal with the underlying cause and that notifying an offeror that its price was overstated was insufficient).

[8] In the area of construction contracting the FAR requires disclosure of the magnitude of the project in terms of physical characteristics and estimated price range, but not a precise dollar amount (e.g., a range of $100,000 to $250,000). See FAR 36.204.

(2) The contracting officer must provide similar information to all of the offerors. See Securiguard, Inc., B-249939, Dec. 21, 1992, 93-1 CPD ¶ 362; Grumman Data Sys. Corp. v. Sec'y of the Army, No. 91-1379, slip op. (D.D.C. June 28, 1991) (agency gave out answers, but not questions, misleading other offerors); SeaSpace Corp., B-241564, Feb. 15, 1991, 70 Comp. Gen. 268, 91-1 CPD ¶ 179.

(3) All offerors must be given the opportunity to revise their proposals following discussions. Raytheon Co., B-404998, July 25, 2011, 2011 CPD ¶ 232 (sustaining a protest where discussions were conducted but the protester was nor provided with an opportunity to address and revise a significant weakness identified in its proposal, even though an awardee had been given the opportunity to revise its proposal).

N. Final Proposal Revisions (Formerly Known as Best and Final Offers or BAFOs). FAR 15.307.

1. Requesting final proposal revisions concludes discussions. The request must notify offerors that:

a. Discussions are over;

b. They may submit final proposal revisions to clarify and document any understandings reached during negotiations;

c. They must submit their final proposal revisions in writing;

d. They must submit their final proposal revisions by the common cutoff date/time; and

e. The government intends to award the contract without requesting further revisions.

2. Agencies do not have to reopen discussions to address deficiencies introduced in the final proposal revision. Sabre Systems, Inc., B-402040.2, B-402040.3, June 1, 2010, 2010 CPD ¶ 128; Smith Detection, Inc., B-298838, B-298838.2, Dec. 22, 2006, 2007 CPD ¶ 5; Ouachita Mowing, Inc., B-276075, May 8, 1997, 97-1 CPD ¶ 167.

a. Agencies, however, must reopen discussions in appropriate cases. See Al Long Ford, B-297807, Apr. 12, 2006, 2006 CPD ¶ 67 (finding that an agency must reopen discussion if it realizes, while reviewing an offeror's final proposal revision, that a problem in the

initial proposal was vital to the source selection decision but not raised with the offeror during discussion); TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 (holding that the agency erred in not conducting additional discussions where there were significant inconsistencies between technical and cost proposals that required resolution); cf. Dairy Maid Dairy, Inc., B-251758.3, May 24, 1993, 93-1 CPD ¶ 404 (holding that a post-BAFO amendment that changed the contract type from a requirements contract to a definite quantity contract was a material change that required a second round of BAFOs); Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276 (holding that the contracting officer properly requested additional BAFOs after amending the RFP).

b. Agencies may request additional FPRs even if the offerors' prices were disclosed through an earlier protest if additional FPRs are necessary to protect the integrity of the competitive process. BNF Tech., Inc., B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258.

3. If the agency reopens discussions with one offeror, the agency must reopen discussions with all of the remaining offerors. See Lockheed Martin, B-292836.8 et al., Nov. 24, 2004, 2005 CPD ¶ 27; Int'l Res. Grp., B-286663, Jan. 31, 2001, 2001 CPD ¶ 35.

O. Source Selection Decision. FAR § 15.308.

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

a. Bias in the selection decision is improper. See Latecoere Int'l v. United States, 19 F.3d 1342 (11th Cir. 1994) (stating that bias against a French firm "infected the decision not to award it the contract").

b. There is no requirement that the same evaluators who evaluated the initial proposals also evaluate the final proposals. See Med. Serv. Corp. Int'l, B-255205.2, Apr. 4, 1994, 94-1 CPD ¶ 305.

2. The source selection decision should be based on the solicitation's evaluation factors and significant subfactors that were previously tailored to the current acquisition. The solicitation must have already notified offerors in the solicitation whether award will be made on the basis of lowest priced, technically acceptable proposals, or on the basis of a price/technical (or cost/technical) tradeoff analysis. FAR §§ 15.101-1, 15.101-2; see also AMC Pam. 715-3. While agencies have broad discretion in making source selection decisions, their decisions must be

rationale and consistent with the evaluation criteria in the RFP. See Liberty Power Corp., B-295502, Mar. 14, 2005, 2005 CPD ¶ 61 (stating that agencies may not announce one basis for evaluation and award in the RFP and then evaluate proposals and make award on a different basis); Marquette Med. Sys. Inc., B-277827.5, B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90; Found. Health Fed. Servs., Inc., B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3; see also FAR 15.305(a).

3. A proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis of award. Stewart Distribs., B-298975, Jan. 17, 2007, 2007 CPD ¶ 27; Farmland Nat'l Beef, B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31. If the agency wants to accept an offer that does not comply with the material solicitation requirements, the agency must issue a written amendment and give all of the remaining offerors an opportunity to submit revised proposals. FAR 15.206(d); see Beta Analytics Int'l, Inc. v. U.S., 44 Fed. Cl. 131 (U.S. Ct Fed. Cl. 1999); 4th Dimension Software, Inc., B-251936, May 13, 1993, 93-1 CPD ¶ 420.

4. The source selection process is inherently subjective.

   a. The fact that an agency reasonably might have made another selection does not mean that the selection made was unreasonable. See Red R. Serv. Corp., B-253671.4, Apr. 22, 1994, 94-1 CPD ¶ 385. However, the decision must be based on accurate information. See CRA Associated, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.

   b. Point scoring techniques do not make the evaluation process objective. See VSE Corp., B-224397, Oct. 3, 1986, 86-2 CPD ¶ 392. Therefore, the RFP should not state that award will be made based on the proposal receiving the most points. See Harrison Sys. Ltd., B-212675, May 25, 1984, 84-1 CPD ¶ 572. See also DOD Source Selection Guide pg. 12 which prohibits using numerical weighting of factors and subfactors. https://acc.dau.mil/docs/dodssp/Source%20selelction%20document%20(3).pdf

5. A cost/technical trade-off analysis is essential to any source selection decision using a trade-off (rather than a lowest-priced, technically acceptable) basis of award. See Special Operations Grp., Inc., B-287013; B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73.

a. Agencies should make the cost/technical tradeoff decision after receiving final proposals if final proposals were requested. See Halter Marine, Inc., B-255429, Mar. 1, 1994, 94-1 CPD ¶ 161.

b. A "cost/technical trade-off" evaluation requires evaluation of differences in technical merit beyond the RFP's minimum requirements. See Johnson Controls World Servs., Inc., B-281287.5 et al., June 21, 1999, 2001 CPD ¶ 3.

6. Agencies have broad discretion in the source selection process, but the source selection decision must be adequately documented, and it must be consistent with the evaluation criteria and applied consistently to each offerors' proposal.

a. Agencies have broad discretion in making cost/technical tradeoffs, so long as they are rational and consistent with the stated evaluation criteria and adequately documented. See Chenega Tech. Prods., LLC, B-295451.5, June 22, 2005, 2005 CPD ¶123; Leach Mgmt. Consulting Corp., B-292493.2, Oct. 3, 2003, 2003 CPD ¶175.

b. The source selection decision document should also demonstrate that the evaluation criteria was applied equally to all offerors. See Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶141 (sustaining a protest when the agency evaluated the awardee's and the protestor's proposals unequally by crediting the awardee for the experience and past performance of a subcontractor but not similarly crediting the protester, who had proposed the same subcontractor).

c. In the cost/technical trade off the extent to which one is sacrificed for the other is tested for rationality and consistency with the stated evaluation factors. See Tenderfoot Sock Co., Inc., B-293088.2, July 30, 2004, 2004 CPD ¶ 147; see also Synectic Solutions, Inc., B-299086, Feb. 7, 2007, 2007 CPD ¶ 36 (stating that an agency retains the discretion to select a higher priced, higher technically rated proposal if doing so is reasonably found to be in the government's best interests and is consistent with the solicitation's stated evaluation scheme); Widnall v. B3H Corp., 75 F. 3d 1577 (Fed. Cir. 1996) (stating that "review of a best value agency procurement is limited to independently determining if the agency's decision was grounded in reason").

d. More than a mere conclusion, however, is required to support the analysis. See Shumaker Trucking and Excavating Contractors, B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 (finding the award

decision unreasonable where the "agency mechanically applied the solicitation's evaluation method" and provided no analysis of the advantages to the awardee's proposal); Technology Concepts Design, Inc. B-403949.2, March 25, 2011, 2011 CPD ¶ 78 (sustaining a protest where the agency did not provide adequate supporting rationale in the record for GAO to conclude that the agency's evaluation of the protester's proposal was reasonable); Beacon Auto Parts, B-287483, June 13, 2001, 2001 CPD ¶ 116 (finding that a determination that a price is "fair and reasonable" doesn't equal a best-value determination); ITT Fed. Svs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76; Redstone Tech. Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181.

e. Beware of tradeoff techniques that distort the relative importance of the various evaluation criteria (e.g., "Dollars per Point"). See Billy G. Bassett, B-237331, Feb. 20, 1990, 90-1 CPD ¶ 195; T. H. Taylor, Inc., B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.

f. A cost/technical tradeoff analysis may consider relevant matters not disclosed in the RFP as tools to assist in making the tradeoff. See Sys. Research and Applications Corp, B-257939, Feb. 28, 1995, 95-1 CPD ¶ 214; Advanced Mgmt., Inc., B-251273.2, Apr. 2, 1993, 93-1 CPD ¶ 288 (holding that it is permissible to consider that loss of efficiency in awarding to a new contractor would reduce effective price difference between the contractor and the incumbent).

7. The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. The decision must be the SSA's ***independent judgment.*** FAR 15.308. However, the SSA need not personally write the source selection decision memorandum. See Latecoere Int'l Ltd., B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70.

a. While the related FAR provisions suggest the source selection decision is made by a single person, some noted government contract experts "believe the source selection decision is a team decision, and . . . that is as it should be." Ralph C. Nash & John Cibinic, *The Source Selection Decision: Who Makes It?*, 16 NASH & CIBINIC REP. 5 (2002).

b. Compare Army Federal Acquisition Regulation Supplement (AFARS) § 5115.101, which states the SSA, *independently exercising prudent business judgment*, arrives at a Source Selection Decision based on the offeror(s) who proffers the best value to the

Government. *The SSA shall not receive a recommendation from any individual or body as to whom shall receive the award and additionally shall not receive a rank order or order of merit list pertaining to the offers being evaluated.*

c. Source selection officials have considerable discretion in making the selection decision, including tradeoffs: The selection decision is subject to review only for rationality and consistency with the stated evaluation criteria. See KPMG Consulting LPP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196; Johnson Controls World Servs., Inc., B-289942; B-289942.2, May 24, 2002, 2002 CPD ¶ 88;

d. SSA can disagree with the majority of the evaluators and accept one of the minority's recommendation for award. GAO upheld the SSA's selection for award where the SSA reached a reasoned conclusion, supported by the record, that the awardee's lower-priced, lower-rated proposal deserved a higher technical rating than was assigned by the majority and that proposal represented the best value to the government. TruLogic, Inc, B-297252.3, Jan. 30, 2006, 2006 CPD ¶ 29.

e. An agency's source selection decision cannot be based on a mechanical comparison of the offerors' technical scores or ratings per se, but must rest upon a qualitative assessment of the underlying technical differences among the competing proposals (i.e., "look behind the ratings"). C&B Constr., Inc., B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1; Metro Machine Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112; The MIL Corp., B-294836, Dec.30, 2004, 2005 CPD ¶ 29.

8. A well-written source selection memorandum should contain:

a. A summary of the evaluation criteria and their relative importance;

b. A statement of the decision maker's own evaluation of each of the proposals: (1) adopting recommendations of others or stating a personal evaluation; and (2) identifying major advantages and disadvantages of each proposal (see J&J Maintenance Inc., B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106); **and**

c. A description of the reasons for choosing the successful offeror, comparing differences in cost with differences in technical factors.

(1) The source selection decision memorandum must include the rationale for any trade-off made, "including benefits associated with additional costs." FAR §§ 15.101-1(c) and 15.308; Midland Supply, Inc., B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2 (finding an agency's award unreasonable where it mechanically compares total point scores and provides no documentation or explanation to support the cost/technical tradeoff); Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 (finding it improper to rely on a purely mathematical price/technical tradeoff methodology).

(2) This explanation of any tradeoffs made, including the benefits associated with additional costs can be given by the SSA in the source selection decision, or it can be evidenced from the documents on which the source selection decision is based. TRW, Inc., B-260788.2, Aug. 2, 1995, 96-1 CPD ¶ 11. The source selection decision memorandum should indicate what evaluation documents it relies upon.

P. GAO Review. 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. Innovative Tech. Corp., B-401689, et al., Nov. 9, 2009, 2009 CPD ¶ 235.

1. Reasonable and in Accordance with Evaluation Criteria.

a. In reviewing an agency's evaluation, GAO will not reevaluate the proposals. Rather, it will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation and applicable procurement laws and regulation. AHNTECH, Inc., B-295973, May 11, 2005, 2005 CPD ¶ 89. An offeror's mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68; C. Lawrence Constr. Co., B-287066, Mar. 30, 2001, 2001 CPD.

b. In a negotiated procurement for award on a trade-off basis, which provided for the evaluation of the degree to which offerors' proposals met or exceeded requirements, protest was sustained where the agency failed to qualitatively assess the merits of the offerors' differing approaches. Sys. Research and Applications Corp., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶28.

c. Reliance on the scores of evaluators alone, without looking at strengths and weaknesses of each proposal, may be unreasonable. See Midland Supply, Inc., B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2; SDA, Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320.

d. The source selection authority need not accept the findings and conclusions of the agency evaluators, so long as the SSA's reason for doing so is reasonable, consistent with the stated evaluation criteria, and sufficiently documented. SAMS El Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44; Earl Indus., B-309996, B-309996.4, Nov. 5, 2007, 2007 CPD ¶ 203; DynCorp Int'l LLC, B-289863.2, May 13, 2002, 2002 CPD ¶ 83 (finding no support in the record for the SSA to question the weaknesses in the awardee's proposal as identified by the evaluation teams).

(1) The SSA may consider proposals to be technically equivalent, notwithstanding different evaluation ratings, and award to the lower cost offeror. See Camber Corp., B-293930; B-293930.2, July 7, 2004, 2004 CPD ¶ 144; PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD 148

(2) Conversely, the SSA may reasonably consider one proposal to be technically superior to another notwithstanding equivalent evaluation ratings. See Vantage Assocs., Inc., B-290802.2, Feb. 3, 2003, 2003 CPD ¶ 32; Science & Eng'g Servs., Inc., B-276620, July 3, 1997, 97-2 CPD ¶ 43.

e. Gen. Dynamics One Source, LLC, B-400340.5, B-400340.6, Jan. 20, 2010, 2010 CPD P 45. The agency failed to evaluate disparity between staffing offered in awardee's technical proposal and its price proposal, as well failed to evaluate awardee's ability to hire incumbent's employees (as it proposed) at the low labor rates in its price proposal. GAO sustained the protest and found unreasonable the agency's failure to consider this price realism concern in both the price and technical evaluations.

f. Ahtna Support and Training. Servs., B-400947.2, May 15, 2009, 2009 CPD ¶ 119 (sustaining protest where the agency evaluated the awardee and the protester unequally by crediting the awardee with the experience of its subcontractor, but not similarly crediting the protester with the experience of its subcontractor, even though the agency viewed both subcontractors as having relevant experience).

2. Adequacy of Supporting Documentation.

a. Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 (sustaining protest that the agency's evaluation and source selection decision were unreasonable where the agency described the protester's demonstration as "problem plagued," but the agency's record lacked adequate documentation to support its findings and, as a result, GAO could not determine if the agency's evaluation was reasonable).

b. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2007 CPD ¶ 65 (finding SSA's evaluation of offeror's management approach unreasonable where the agency reached a conclusion regarding the offeror's staffing plan that was inconsistent with the underlying evaluation findings and provided no explanation for this inconsistency, and then relied on this conclusion as a material part of its best value tradeoff determination); Cortland Mem'l Hosp., B-286890, Mar. 5, 2001, 2001 CPD ¶ 48; Wackenhut Servs., Inc., B-286037; B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 (emphasizing the importance of contemporaneous documentation).

c. C&B Constr., Inc., B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1 (protest challenging award to the higher priced, higher technically-rated vendor sustained where the contemporaneous evaluation record consists of numerical scores assigned to each vendor's quotation, and lacks any information to show a basis for those scores, or a reasoned basis for any tradeoff judgments made in the source selection).

d. In one case, a SSA's source selection decision to award to a substantially lower scored offeror, whose cost was only slightly lower, was not adequately justified. TRW, Inc., B-234558, June 21, 1989, 68 Comp. Gen. 512, 89-1 CPD ¶ 584. However, after the SSA's reconsideration, the same outcome was adequately supported. TRW, Inc., B-234558.2, Dec. 18, 1989, 89-2 CPD ¶ 560.

e. Honeywell Tech. Solutions, Inc., B-400771; B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49. Having decided to consider a particular contract performed by the awardee, the agency was required to evaluate the relevance of that contract consistent with the evaluation criteria in the RFP, i.e., the degree of similarity in size, content and complexity between an offeror's past performance information and the RFP requirements. Here, there was nothing in

the contemporaneous record to suggest that the agency engaged in such an analysis.

3. The standard of review for the Court of Federal Claims is whether the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A)(2); Cubic Applications, Inc. v. U.S., 37 Fed. Cl. 339, 342 (1997).

Q. Responsibility Determination.

1. A contract may only be awarded to a responsible prospective contractor. FAR § 9.103(a). No award can be made unless the contracting officer makes an affirmative determination of responsibility; in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is required to make a determination of nonresponsibility. FAR §9.103(b). A finding of responsibility requires, among other things, that the potential contractor have adequate financial resources, a satisfactory record of performance, integrity, and business ethics, and the necessary organization, experience and technical skills to perform the contract. FAR § 9.104-1.

2. "Negative" vs. "Affirmative" Responsibility Determinations.

a. Negative Responsibility Determinations.

(1) Since the agency must bear the brunt of any difficulties experienced in obtaining the required performance, contracting officers have broad discretion and business judgment in reaching nonresponsibility determinations, and GAO will not question such a determination unless a protester can establish that the determination lacked any reasonable basis. See XO Commc'ns, Inc., B-290981, Oct. 22, 2002, 2002 CPD ¶ 179; Global Crossing Telecomms., Inc., B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102.

(2) Small Business Responsibility. If the contracting officer determines that a small business lacks certain elements of responsibility, under FAR 9.105-2 (a)(2) the contracting officer must comply with FAR Subpart 19.6 and refer the determination to the SBA.

b. Affirmative Responsibility Determinations

(1) Pre-Garufi. Although the FAR requires the contracting officer to make an affirmative determination of

responsibility before contract award, prior to 2001 a disappointed offeror challenging such a determination found the contracting officer's decision nearly unassailable.

(a) Previously, the GAO quickly disposed of such challenges (see e.g., SatoTravel, B-287655, July 5, 2001, 2001 CPD ¶ 111) by simply referencing its Bid Protest Regulations, which provided that: because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of the government officials. 4 C.F.R. § 21.5 (2002).

(b) Similarly, the COFC had been equally inhospitable to affirmative responsibility challengers. See, e.g., Trilon Educ. Corp. v. United States, 578 F. 2d 1356 (Cl. Ct. 1978); News Printing Co., Inc. v. United States, 46 Fed. Cl. 740 (2000).

(2) Impresa Construzioni Geom. Domenico Garufi v. United States (Garufi), 238 F.3d 1324 (Fed. Cir. 2001).

(a) In Garufi, the CAFC stated the standard of review in cases challenging agency affirmative responsibility determinations should be whether "there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis." Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324 (Fed. Cir. 2001).

(b) Applying this standard to the facts of the case, however, CAFC found it could not assess the reasonableness of the contracting officer's determination "because the contracting officer's reasoning supporting that determination is not apparent from the record." Garufi, 238 F.3d at 1337.

(c) On remand, the COFC sustained the protest, having determined the "contracting officer, based on his deposition testimony, . . . failed to conduct an

independent and informed responsibility determination." Impresa Construzioni Geom. Domenico Garufi, 52 Fed. Cl. 421, 427 (2002).

(3) Post-Garufi.

(a) As the standard set forth by CAFC in Garufi conflicted with the GAO's Bid Protest Regulation addressing affirmative responsibility determinations, the GAO changed its rule. Applicable to all bid protests filed after 1 January 2003, the final rule permits GAO review of such challenges "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." 4 C.F.R. § 21 (c)

(b) In Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177, the GAO relied on the new exception to entertain and sustain the protestor's challenge to a contracting officer's affirmative responsibility determination. The GAO noted that, while contracting officers need not explain the basis for responsibility determinations, "documents and reports supporting a determination of responsibility and nonresponsibility . . . must be included in the contracting file."

(c) Compare the result in Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 (citing evaluation of awardee's past performance, the agency was aware of and considered awardee's failed performance on another program, as well as Justice Department investigation into that program. GAO's review could not conclude that the agency failed to consider all relevant information when making a responsibility determination.). See also FN Mfg., Inc., B-297172, B-297182.2, Dec. 1, 2005, 2005 CPD ¶ 212.

(d) Attribution of subcontractor expericne to prime contractor in responsibility determination. Protest sustained when awardee did not meet solicitation's responsibility criterion requiring at least 5 years

general contractor experience where solicitation language not reasonably interpreted as permitting use of a subcontractor's experience to satisfy the requirement. J2A[2] JV, LLC, B-401663.4, Apr. 19, 2010, 2010 CPD ¶ 102.

VII. DEBRIEFINGS

A. Purpose

1. 10 U.S.C. § 2305(b)(5-6); FAR § 15.505-506. See AMC Pam. 715-3, App. F (providing guidelines for conducting debriefings).

2. Inform the offeror of its significant weaknesses and deficiencies, and

3. Provide essential information in a post-award debriefing on the rationale for the source selection decision.

B. Preaward Debriefings. FAR § 15.505.

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

2. An offeror must submit a written request for a debriefing within 3days after receipt of the notice of exclusion from the competition.

3. The contracting officer must "make every effort" to conduct the preaward debriefing as soon as practicable.

4. The contracting officer may delay the debriefing until after contract award if the contracting officer concludes that delaying the debriefing is in the best interests of the government. See Global Eng'g. & Const. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (declining to review the contracting officer's determination).

5. At a minimum, preaward debriefings must include:

a. The agency's evaluation of significant elements of the offeror's proposal;

b. A summary of the agency's rationale for excluding the offeror; and

c. Reasonable responses to relevant questions.

6. Preaward debriefings must not include:

   a. The number of offerors;

   b. The identity of other offerors;

   c. The content of other offerors' proposals;

   d. The ranking of other offerors;

   e. The evaluation of other offerors; or

   f. Any of the information prohibited in FAR §15.506(e).

C. Postaward Debriefings. FAR § 15.506.

1. An unsuccessful offeror may request a postaward debriefing.

   a. An offeror must submit a written request for a debriefing within 3 days of the date it receives its postaward notice.

   b. The agency may accommodate untimely requests; however, the agency decision to do so does not extend the deadlines for filing protests.

2. "To the maximum extent practicable," the contracting officer must conduct the postaward debriefing within 5 days of the date the agency receives a timely request.

3. At a minimum, postaward debriefings must include:

   a. The agency's evaluation of the deficiencies and significant weaknesses in the offeror's proposal;

   b. The overall ratings of the debriefed offeror and the successful offeror;

   c. The overall rankings of all of the offerors;

   d. A summary of the rationale for the award decision;

   e. The make and model number of any commercial item(s) the successful offeror will deliver; and

   f. Reasonable responses to relevant questions.

4. Postaward debriefings must not include:

a. A point-by-point comparison of the debriefed offeror's proposal with other offerors' proposal; or

b. Any information prohibited from disclosure under FAR §24.202 or exempt from release under the Freedom of Information Act, including the names of individuals providing reference information about an offeror's past performance.

5. General Considerations:

a. The contracting officer should normally chair any debriefing session held.

b. Debriefings may be done orally, in writing, or by any other method acceptable to the contracting officer.

c. Tailor debriefings to emphasize the fairness of the source selection procedures.

d. Point out deficiencies that the contracting officer discussed but the offeror failed to correct.

e. Documentation. An official summary of all preaward and postaward debriefings shall be included in the contract file. FAR §§-15.505(g), 15.506(f).

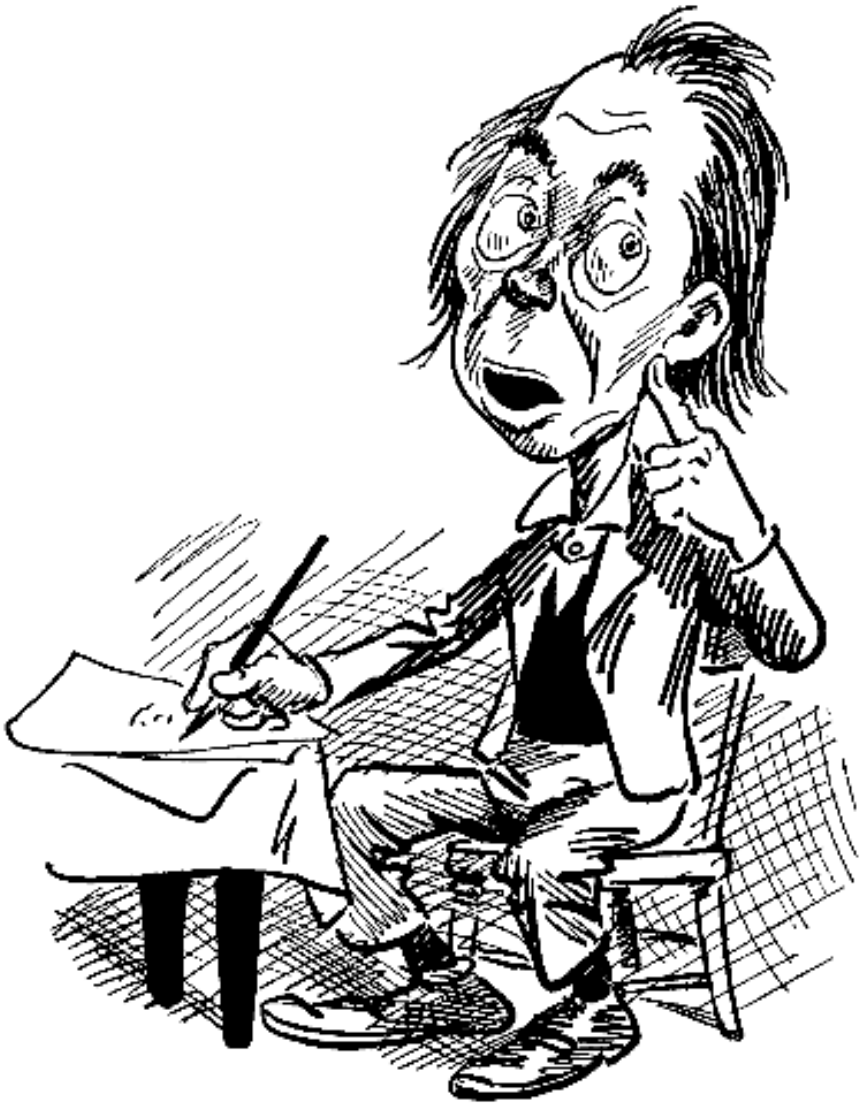
f. Point out areas for improvement of future proposals.

g. Statements made by the agency at a debriefing that are inaccurate (i.e., inconsistent with the contemporaneous evaluation documents) may give rise to a bid protest challenging the agency's evaluation of proposals, but do not provide a basis for sustaining such a protest. GAO looks to see whether the agency's evaluation of proposals, as evidenced by the contemporaneous evaluation documents, was reasonable and consistent with the stated evaluation criteria. Debriefing misstatements do not invalidate the contemporaneous evaluation documents.

h. Agencies should look to debriefings as a means to prevent bid protests. A well conducted debriefing can head off many protests. GAO dismisses protests where the protestor alleges that a debriefing was inadequate because a debriefing is a procedural matter which does not involve the award's validity. Raydar & Associates, Inc., B-401447, Sept. 1, 2009,2009 CPD ¶ 180

CONCLUSION

Chapter 9
Simplified Acquisition Procedures



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CHAPTER 9

SIMPLIFIED ACQUISITIONS

I. INTRODUCTION

Following this block of instruction, students should:

A. Understand that Simplified Acquisitions streamline the acquisition process and can result in substantial savings of time and money to the Government.

B. Understand how Simplified Acquisitions differ from the Sealed Bidding and Negotiated Procurement methods of acquisitions.

C. Understand when you can use Simplified Acquisitions, and the different competition requirements and thresholds that apply to different Simplified Acquisition procedures.

D. Understand the various simplified acquisitions procedures and the situations when each procedure should be used.

II. REFERENCES

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

B. Federal Acquisition Regulation (hereinafter FAR) Part 13, Simplified Acquisition Procedures.

C. FAR Part 8, Required Sources of Supplies and Services.

D. FAR Part 5, Publicizing Contract Actions.

E. FAR Part 2, Definitions of Words and Terms.

F. Defense Federal Acquisition Regulation Supplement (DFARS) Part 213, Simplified Acquisitions Procedures.

G. DOD Financial Management Regulation (FMR), Volume 5, 0204, Imprest Funds (May 2012).

H. DOD Financial Management Regulation (FMR), Volume 10, Chapter 23, Purchase Card Payments (Sep 2010).

I. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.

III. OVERVIEW

A. What is a Simplified Acquisition? To streamline the federal procurement process, in 1994, Congress authorized the use of a simplified acquisition process for purchases of supplies and services under certain thresholds. The goal was to allow agency officials to expedite the evaluation and selection processes and keep documentation to a minimum.[1]

B. Simplified acquisition procedures are those procedures prescribed in Part 13 of the FAR, Part 213 of the DFARS, and agency FAR supplements for making simplified acquisitions. The simplified acquisition procedures include the use of SF 1449 (Solicitation / Contract / Order for Commercial Items), SF18 (Request for Quotation), purchase orders, blanket purchase agreements (BPA's), imprest funds, and government purchase cards (GPC's are basically government credit cards).

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

1. Reduce administrative costs;

2. Improve opportunities for small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns to obtain a fair proportion of government contracts;

3. Promote efficiency and economy in contracting;

4. Avoid unnecessary burdens for agencies and contractors.

D. Thresholds. There are basically four different categories of purchases authorized to use a form of the simplified acquisition procedures. Three of the four categories are primarily defined by thresholds. The following chart summarizes the thresholds, which are then further defined below the chart:

[1] GAO Report to Congressional Committees, September 2003, Contract Management, No Reliable Data to Measure Benefits of the Simplified Acquisition Test Program, GAO-03-1068, pg. 2.

Simplified Acquisition Method	Normal Thresholds	Purchase made (or awarded & performed) inside the U.S. in support of a contingency operation or to facilitate the defense against or recovery from NBCR	Purchase made (or awarded & performed) outside[2] the U.S in support of a contingency operation or NBCR recovery.
Micro-Purchase	$3,000[3]	$15,000	$30,000
SAP	$150,000[4]	$300,000	$1,000,000
Commercial Items[5]	[$6,500,000]	[$12,000,000]	[$12,000,000]

1. Simplified Acquisition Threshold. Acquisitions of supplies or services in the amount of $150,000 or less are called simplified acquisitions. They may use the simplified acquisition procedures (SAP) listed in FAR Part 13. FAR 2.101.

   a. The Simplified Acquisition threshold increases to **$300,000** for contract awards and purchases **inside the U.S.** if the head of the agency determines the acquisition of supplies or services is to be used to in support of a *contingency operation* or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (NBCR). FAR 2.101.

   b. The Simplified Acquisition threshold increases to **$300,000** for contract awards and purchases **outside the U.S.** if the head of the contracting activity determines the acquisition of supplies or services is to be used to in support of a *humanitarian or peacekeeping operation*, as defined in FAR 2.101.

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[2] Section 843 of the National Defense Authorization Act for Fiscal Year 2012 permits DoD to designate a single lead contracting activity inside the United States to act as a "reach-back contracting authority" in support of OEF and Operation New Dawn. The single reach-back contracting authority may use the increased thresholds available to support contingencies even if the contracts are awarded inside the United States.

[3] Per the definition in FAR 2.101, the micro-purchase threshold is $2,000 for purchase of construction subject to the Davis-Bacon Act and $2,500 for purchase of services subject to the Service Contract Act.

[4] A DoD Class Deviation (DARS Tracking Number: 2011-O0009), effective March 28, 2011, raised the Simplified Acquisition Threshold to $300,000 "when soliciting or awarding contracts to be awarded and performed outside the United States, or making purchases outside the United States, for acquisitions of supplies and services that, as determined by the head of the contracting activity, are to be used to support a *humanitarian or peacekeeping operation*, as defined at FAR 2.101" (emphasis added). The Class Deviation has since been incorporated into the Simplified Acquisition definition at DFARS 202.101.

[5] Authority for the CITP lapsed on 1 Jan 2012, but was reauthorized by section 822 of the 2013 NDAA. Authority for the program will lapse on 1 Jan 2015, absent Congressional action to re-extend the program or to make it permanent. Curiously, the NDAA provision that reauthorized the program included an effective date of 1 January 2012, which in effect retroactively authorizes the program for all of 2012 (i.e. between the date the authority originally lapsed (1 Jan 2012) and the date the NDAA was signed into law (2 Jan 2013)). Whether this retroactive effect has any practical importance remains to be seen. For more information, see Chapter 10.

c. The Simplified Acquisition threshold increases to **$1,000,000** for contract awards and purchases **outside the U.S.** if the head of the agency determines the acquisition of supplies or services is to be used to in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. FAR 2.101. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.

2. Micro Purchase Threshold. Acquisition of supplies or services, the aggregate amount of which does not exceed **$3,000** are called micro purchases. In the case of construction, the limit is $2,000 and in the case of acquisitions subject to the Service Contract Act the limit is $2,500.[6] FAR 2.101.

a. If the head of the agency determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack the micro-purchase threshold increases to **$15,000** for any contract to be awarded and performed, or purchase to be made **inside the U.S.** FAR 2.101; FAR 13.201(g). Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.

b. If the head of the agency determines the acquisitions of supplies or services is in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack the micro-purchase threshold increases to **$30,000** for any contract to be awarded and performed, or purchase to be made **outside the U.S**. FAR 2.101; FAR 13.201(g). Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 822.

(1) Purchases using this authority must have a clear and direct relationship to the support of a contingency operation or the defense against or recovery from nuclear, biological, chemical, or radiological attack.

[6] Effective September 28, 2006, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (FAR Councils) adjusted general micro-purchase for inflation from $2,500 to $3,000, pursuant to Pub. L. No. 108-375, § 807. The FAR Councils could not adjust the micro-purchase thresholds for non-exempt service contracts and construction contracts because of limitation created by the Service Contract Act and the Davis-Bacon Wage Act. *See* Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 57,363.

(2) The government-wide commercial purchase card is the preferred method of making micro-purchases, although any of the contract vehicles may be used if agency procedures allow it. FAR 13.201(b). NOTE: As of 31 July 2000, DoD requires the use of the government purchase card (GPC) for all purchases at or below the micro-purchase threshold. 65 Fed. Reg. 46,625 (2000). See DFARS 213.270 (for exceptions to the policy); see AFARS 5113.270-90 (for agency specific requirements for the purchase card program).

(3) No provisions or clauses are required for micro-purchases, but they may be used. FAR Part 8 DOES apply to micro-purchases. FAR 13.201(d).

(4) Competition is not required if the authorized individual considers the price reasonable. To the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.203(a).

3. Commercial Item Test Program Threshold.[7] Congress created a Commercial Item Test Program (CITP) 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 **$6,500,000**. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4202(a) (1) (A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5.[8]

a. For a **contingency operation** or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the $6,500,000 commercial item test program threshold increases to **$12,000,000**. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1443.

b. For the period of the CITP test, contracting activities are to use simplified acquisition procedures to the maximum extent practicable. FAR 13.500(b).

c. Congress created the CITP authority to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). Therefore,

[7] *See* footnote 5 above.

[8] Effective October 1, 2010, the FAR Councils adjusted the maximum purchase threshold for the Commercial Items Test Program for inflation from $5.5 million to $6.5 million. *See* Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 75 Fed. Reg. 53169-01.

agencies should take advantage of the simplified acquisition method of acquisition whenever possible in conjunction with the CITP authority. *See* East West Research, Inc., B-239516, Aug. 29, 1990, 90-2 CPD ¶ 178 (In keeping with their purpose promoting efficiency and economy in contracting small purchase procedures are specifically excepted from the full and open competition requirements of the Competition in Contracting Act of 1984 and the mandatory use of commercial item descriptions); *see also* American Eurocopter Corporation, B-283700, Dec. 16, 1999, 99-2 CPD P 110 (agency used authority of FAR 13.5 to purchase a Bell Helicopter).

d. On January 15, 2013 the Defense Procurement and Acquisition Policy (DPAP) authorized a class deviation from FAR Subpart 13.5, "Test Program For Certain Commercial Items," **whereby extending authority to issue solicitations under this Subpart from January 1, 2012, to January 1, 2015** [9].

e. ***Section 821: Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items*** – This provision **extends to 2015 the "test program**" in which an agency may use simplified procedures to purchase commercial items in amounts greater than the simplified acquisition threshold, but not exceeding $6,500,000 ($12,000,000 for acquisitions in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack) .

f. Section 822: Fiscal Year 2013 National Defense Authorization Act -renewed and extended the test program which allows agencies to use simplified acquisition procedures for certain commercial items above the simplified acquisition threshold. The deviation is effective immediately and will remain in effect until incorporated into the FAR or otherwise rescinded.

4. Personal Services. If an agency has specific statutory authority to acquire personal services, that agency may use simplified acquisition procedures to acquire those services. FAR 13.003 and FAR 37.104.

[9] Director, DPAP memo of 15 January 2013, DARS Tracking Number: 2013-O0004, Class Deviation—Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items, available at http://www.acq.osd.mil/dpap/policy/policyvault/USA000244-13-DPAP.pdf.

IV. DEFINITIONS.

A. Authorized Individual. A person who has been granted authority under agency procedures to acquire supplies and services in accordance with the simplified acquisition procedures of FAR Part 13. FAR 13.001.

B. Commercial Item Test Program (CITP).[10] A program designed to implement the federal government's preference for the acquisition of commercial items by establishing acquisition policies more closely resembling those of the commercial marketplace. In general, this program allows for the procurement of commercial items using simplified acquisition procedures as long as the commercial item costs less than $6,500,000. See FAR Part 13.5 and Chapter 10 of the Contract Attorneys Deskbook for a comprehensive outline. **Note that the authority to issue solicitations and to use the increased thresholds under the Test Program for Certain Commercial Items was extended to January 1, 2015.**

C. Contingency Operation. For purposes of determining the applicable simplified acquisition threshold, a contingency operation is a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operation, or hostilities against an enemy of the United States or against an opposing military force; or a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of 10 U.S.C. chapter 15 of 10 USC or any other provision of law during a war or during a national emergency declared by the President or Congress. FAR 2.101 and 10 U.S.C. § 101(a)(13).

D. Governmentwide Commercial Purchase Card. A purchase card, similar in nature to a commercial credit card, issued to authorized agency personnel to use to acquire and to pay for supplies and services. FAR 13.001.

E. "In support of." For purposes of determining applicable simplified acquisition threshold, the determination as to whether the supplies or services are to be used in support of such a contingency operation is to be made by the head of the agency, which for the Army is the Assistant Secretary of the Army (Acquisition, Logistics and Technology). FAR 2.101. By memorandum dated March 24, 2004, the ASA(ALT) delegated this authority down to each Head of Contracting Activity, who may further delegate this authority down to "any official in procurement channels, who is at least one level above the contracting officer." Typically, the authority is re-delegated down to the Directors of Contracting or to the chiefs of contracting offices.

[10] *See* footnote 5 above.

F. Imprest Fund. 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.

G. Humanitarian or Peacekeeping Operation. A military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing (10 U.S.C. § 2302(8) and 41 U.S.C § 153(2)). FAR 2.101.

H. Purchase Order. A government offer to buy certain supplies or services, including construction and research and development, upon specified terms and conditions, using simplified acquisition procedures. FAR 2.101.

I. Request for Quotes (RFQ). When a contracting officer solicits vendors to fill an agency need while using simplified acquisitions procedures, the solicitation is called a Request for Quotes. Vendors' responses to fill the agency needs are called "quotes." A quotation is not an offer, and consequently, cannot be accepted by the government to form a binding contract. The order by the government is the offer. When the contractor accepts the government's order, a legal contract is formed. FAR 13.004.

V. WHEN TO USE SAP – OVERVIEW OF POLICY PRE-REQUISITES

A. General Rule: Agencies **shall use** simplified acquisition procedures to the "maximum extent practicable" for all purchases of supplies or services not exceeding the simplified acquisition threshold (including purchases at or below the micro-purchase threshold). FAR 13.003(a).[11]

B. Overview of Pre-Requisites. There are pre-requisites to using SAP.

1. Agencies shall **not** use simplified acquisition procedures to acquire supplies and services initially estimated to exceed the simplified acquisition threshold, or that will, in fact, exceed it. FAR 13.003(c).

a. Options. Options may be included in simplified acquisitions but the threshold value of the acquisition is determined by

[11] In support of contingency operations defined by 10 U.S.C. § 101(a)(13), or to facilitate defense against or recovery from NBC or radiological attack, the simplified acquisition threshold increases to $300,000 for purchase made in the U.S., or $1,000,000 for purchase made outside the U.S. Service Acquisition Reform Act of 2003, Pub. L. No. 108-136, § 1443; increased thresholds in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 817; and FAR 2.101 and DFARS 202.101. In support of "humanitarian or peacekeeping" operations, the Simplified Acquisition Threshold is $300,000 for purchases made, or contracts to be awarded and performed, outside the United States. *See* note 4 *supra*.

adding the value of the base contract and all options. FAR 13.106-1(e).

2. Agencies shall **not** divide requirements that exceed the simplified acquisition threshold into multiple purchases merely to justify using simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003(c).

   a. *See* L.A. Systems v. Department of the Army, GSBCA 13472-P, 96-1 BCA ¶ 28,220 (Government improperly fragmented purchase of computer upgrades into four parts because agency knew that all four upgrades were necessary and were, therefore, one requirement).

   b. *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 when it used an IDIQ contract, even though total value of the services were expected to exceed $100,000, because actual requirement was indeterminate and a prior competitive solicitation did not result in reasonable offers); Mas-Hamilton Group, Inc., B-249049, Oct. 20, 1992, 72 Comp. Gen. 6, 92-2 CPD ¶ 259 (Where an agency was not in a position to proceed with fully competitive award for critical items, agency's utilization of small purchase procedures to make interim, emergency filler buys on an as-needed, urgent basis was not improper).

3. If other existing ID/IQ contracts or other existing contracts would satisfy the agency's requirement, the agency must order off the other contract. FAR 13.003(a)(2) & (3).

4. Required Supply or Service: If agency's requirement can be met by using a required source of supply or a required source of services under FAR Part 8, then the agency must acquire the item in that manner. FAR 13.003(a)(1)

5. Small Business Set-Aside. All acquisitions exceeding the micro-purchase threshold but under the simplified acquisition threshold are reserved exclusively for small business concerns and **shall** be set aside. FAR 13.003(b).

VI. PRE-REQUISITE: REQUIRED SOURCES OF SUPPLIES AND SERVICES

A. FAR Policy for Required Sources of Supplies and Services. **Prior to competing a contract for supplies or services** through ***ANY*** method of acquisition (Simplified Acquisitions, Sealed Bidding, or Negotiations),

agencies must determine whether they can satisfy their needs through Required Sources of Supplies and Services under FAR Part 8. (e.g., Federal Prison Industries, Committee for Purchase from People who are Blind or Severely Disabled, and Federal Supply Schedule contracts).[12] FAR 8.002.[13]

B. Required Sources of Supplies. Agencies **shall satisfy** requirements for supplies in the descending order of priority listed below (FAR 8.002(a)(1):

1. First, Agency inventories;

2. Second, Excess from other agencies (see FAR Subpart 8.1);

3. Third, Federal Prison Industries, Inc. (FPI) (see FAR Subpart 8.6).

a. FPI (also referred to as UNICOR) is a self-supporting, wholly owned government corporation that provides training and employment for Federal penal and correctional prisoners through the creation and sale of its supplies and services to government agencies. FPI diversifies its supplies and services to minimize adverse impact on private industry. FAR 8.601; 18 U.S.C. §§ 4121-4128 (2006). See www.unicor.gov.

b. Although FAR 8.002 lists FPI/UNICOR as a mandatory supply source, due to statutory changes, FPI is now a qualified mandatory source pursuant to Section 637 of Division H of the Consolidated Appropriations Act, 2005 (Public Law 108-447). National Defense Authorization Act (NDAA) for FY 2002, Pub. L. No. 107-107, div. a, Title VIII, § 811(a)(1), 115 Stat. 1180-81 (2001), as amended by the NDAA for FY 2008, Pub. L. No. 110-181, Div. A, Title VIII, § 827, 122 Stat. 228-29 (2008)(appearing at 10 U.S.C. § 2410n (b)).

(1) The 2005 CAA provided that none of the funds made available under that or any other Act for fiscal year 2005 *and each fiscal year thereafter* shall be expended for the purchase of a product or service offered by FPI, unless the agency making the purchase determines that

[12] Federal Supply Schedule is no longer mandatory, but is a preferred method of purchasing. See Murray-Benjamin Elec. Co., LLP, B-298481, 2006 U.S. Comp. Gen. LEXIS 143 (Sept. 7, 2006).

[13] DoD, GSA, and NASA are proposing to amend the FAR part 8. FAR part 8 requires Federal agencies to satisfy their requirements for supplies and services from or through a list of sources in order of priority. This proposed rule would amend FAR part 8 by revising FAR 8.000, 8.002, 8.003, and 8.004, eliminating outdated categories, and distinguishing between Government sources (*e.g.*, Federal Supply Schedules (FSS)) and private-sector sources. *See* FAR Case 2009–024, Prioritizing Sources of Supplies and Services for Use by the Government, Proposed rule, 76 Fed. Reg. 34634, June 14, 2011.

the offered product or service provides the best value to the buying agency.

(2) The statutory guidance has been implemented at FAR 8.602 and 8.605.

c. Procedures for FPI Procurements.

(1) Market Research Requirement. Prior to procuring from FPI/UNICOR, agencies are unilaterally required to conduct market research to determine whether UNICOR products are comparable to products available in the commercial market in terms of price, quality and time of delivery. FAR 8.602 (a)(1).[14]

(2) Written D&F. The contracting officer must prepare a written determination with supporting rationale comparing the FPI item to supplies available from the private sector in terms of price, quality, and time of delivery. **If the FPI item is comparable**, the agency shall purchase the item from FPI unless the agency has one of the waivers or exceptions below. FAR 8.602(a)(2).

(a) Waivers. FPI may grant a waiver for purchase of supplies in the FPI Schedule from another source. There are two types of waivers: General and Formal. FAR 8.604.

(b) Exceptions. Purchase from FPI is not required and a waiver is not needed if:

(i) Public exigency requires immediate delivery or performance;

(ii) Suitable used or excess supplies are available;

(iii) The supplies are acquired and used outside the United States;

(iv) Items total $3,000 or less (below the micro purchase threshold);

[14] The arbitration provisions of 18 U.S.C. § 4124(b) do not apply to the initial market research decision conducted by the agency. However, once the agency finds that FPI is not comparable and decides to acquire the item using any of the authorized procedures, any dispute regarding price, quality, character, or suitability of supplies produced by FPI are subject to arbitration as specified in 18 U.S.C. § 4124. Arbitration decisions are final and binding on all parties. FAR 8.602(d).

(v) Acquiring services; or

(vi) FPI already offers exclusively on a competitive (non-mandatory) basis, as identified in the FPI schedule. FAR 8.605.

(3) If FPI products are <u>not comparable</u>, an agency must acquire the item (FAR 8.602(a)(4)(ii):

(a) Using Competitive Procedures in FAR 6.102, 19.5 or Part 13;

OR

(b) Using the fair opportunity procedures in FAR 16.505, if placing an order under a multiple award delivery-order contract.

(4) In both cases, the agency MUST include FPI in the solicitation process and consider a timely offer from FPI. Posting the solicitation on FedBizOps is adequate notice. If the solicitation is not posted on FedBizOps, then a copy of the solicitation must be sent to FPI. FAR 8.602(a)(4).

(5) If the agency is using the fair opportunity procedures in FAR 16.505 or using the multiple award schedule issued pursuant to FAR Subpart 8.4, the agency must also provide FPI the item description or specification, the evaluation factors that will be used as the basis for source selection AND consider a timely offer from FPI. FAR 8.602(a)(4)(iii).

(6) Agencies are to award to the source offering the best value to the government. If FPI is determined to be the best value, order from FPI. FAR 8.602(a)(4)(iv).

d. If agencies do procure supplies via FPI/UNICOR (after making the above determinations and findings), they are **<u>required</u>** to rate FPI performance, and compare it to the private sector. FAR 8.606.

e. **DOD Restrictions**. Section 827 of the NDAA Fiscal Year 2008 (Pub. Law. 110-181) required DoD to use competitive procedures when procuring products for which FPI has a significant market share. The statute's implementing regulation is at DFARS 208.602-70. FPI is treated as having a

"significant market share" if FPI's share of the Department of Defense market is greater than 5 percent. In that case, DoD must acquire the item (FAR 208.602-70(c):

(1) Using Competitive Procedures in FAR 6.102, 19.5 or Part 13; OR

(2) Using the fair opportunity procedures in FAR 16.505, if placing an order under a multiple award delivery-order contract; AND

(3) The agency MUST include FPI in the solicitation process, consider a timely offer from FPI, and make an award in accord with FAR 8.602(a)(4)(ii) through (v.)

(4) A list of the federal supply classification codes of items for which FPI has more than a 5% share is maintained at http://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html#federal_prison (last visited 29 Jun 2014).

(a) *Case Study*. GAO has found DOD reasonably exercised its discretion in implementing the 2008 NDAA when it established an effective date that began 30 days after its issuance of an amended list of product categories for which FPI has a significant share. After DoD issued an amendment adding shirts to the list, but prior to the effective date of the amendment, the Defense Supply Center Philadelphia (DSCP) non-competitively issued a solicitation to FPI. DSCP had previously completed a comparability assessment, determined FPI's products were comparable and decided to award to FPI. GAO found DSCP properly followed DoD's implementation instructions. Ashland Sales & Service Co., B-401481, 15 Sept. 2009, 2009 CPD ¶ 186.

4. Fourth, supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (Ability One) (FAR 8.002(a)(1)(iv).

a. Ability One markets its supplies available through the Skilcraft® brand name. *See* www.jwod.org[15] and FAR Subpart 8.7;

b. Contractors who purchase supplies and services for U.S. Government use, must also purchase supplies and services from Ability One. FAR 8.002(c) and FAR 52.208-9.

5. Fifth, wholesale supply sources, such as stock programs of the General Services Administration (GSA) (*see* 41 CFR 101-26.3), the Defense Logistics Agency (*see* 41 CFR 101-26.6), the Department of Veterans Affairs (*see* 41 CFR 101-26.704), and military inventory control points (FAR 8.002(a)(1)(v).

6. Sixth, Mandatory Use Federal Supply Schedules (FSS) (*see* FAR Subpart 8.4). *See* http://www.gsa.gov/portal/category/100615. The GSA competes and maintains all FSS.

a. Although FAR 8.002 lists mandatory FSS as a required supply source, the GSA has not maintained a mandatory FSS since the 1990's.[16]

b. GAO has reiterated that the current GSA's FSS are not mandatory. *See* Murray-Benjamin Electric Company, LLP, B-298481, Sept. 7, 2006; 2006 CPD ¶ 129. GAO denied a protest holding that "while the list of required sources found in FAR § 8.002 places non-mandatory FSS contracts above commercial sources in priority, it does not *require* an agency to order from the FSS." [17]

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[15] Effective September 28, 2006, the Javits-Wagner-O'Day (JWOD) required source program changed its name to AbilityOne. Some AbilityOne products can also be found on GSA's Federal Supply Schedules.

[16] While FAR 8.002 still lists mandatory and optional schedules as separate priority sources, mandatory schedules have not been in use by GSA since the mid-1990s. Today, all schedules are "optional use," even though FAR 8.002 still lists "mandatory use" FSS (Telephone Interview with Roger Waldron, Acting Senior Procurement Executive, General Services Administration (Oct. 19, 2006)). *See also* notes 11 and 12, *supra*.

[17] *See* Murray-Benjamin Electric Company, LLP, B-298481, Sept. 7, 2006; U.S. Comp. Gen. LEXIS 143, at note 5: As explained by GSA, while agencies are encouraged to use the FSS, where an agency concludes that it is in its best interests to meet its needs through an open-market procurement, it is free to do so. GSA Comments at 1. *MBE asserts that DLA did not make a "best interests" determination, but we are aware of no legal requirement--and MBE cites none--that an agency do so.* In any case, such a determination *is implicit from the record*. DLA explains that this acquisition is for critical application items used on a critical weapons system--nuclear power plants, weapons system code 21N--and will result in moving inventory control into the hands of the contractor. Agency Report (AR) ¶¶ 28-29. For these reasons, DLA determined that it is necessary to make a determination of best value among competing proposals. (Emphasis added).

7. Seventh, *Optional Use* Federal Supply Schedules (*see* FAR Subpart 8.4).[18]

   a. The GSA's interpretation of FAR § 8.002 is that the optional FSS schedules are a "*preferred* source of supply for Government agencies. . . ." There are currently no mandatory FSS, however.

   b. The GSA FSS policy is that Government agencies should first consider whether it can best fulfill its requirements through the use of an FSS schedule contractor. Where possible, agencies should generally use the FSS schedule in accordance with the procedures set forth in FAR 8.401 *et seq*. *See* Murray-Benjamin Electric Company, LLP, B-298481, Sept. 7, 2006; 2006 CPD P 129.

   c. On 13 May 2014, DoD issued a class deviation clarifying that ordering activity contracting officers are responsible for making a determination of fair and reasonable pricing when using Federal Supply Schedules for individual orders. Office of the Under Secretary of Defense-Acquisition, Technology, and Logistics, Class Deviation—Determination of Fair and Reasonable Prices When Using Federal Supply Schedule Contracts, DARS Tracking Number: 2014-O00011 (13 May 2014).

8. Commercial sources of supplies (including educational and nonprofit institutions). Once a Contracting Officer determines that the supply requirement cannot be filled with a required source, then he/she may compete the requirement via one of the three acquisition methods (Simplified Acquisition Procedures, Sealed Bidding, Contracting by Negotiation). FAR 8.004(b)

9. Statutory Sole Sources. In addition to the priority list for Required Sources of Supplies and Services in FAR 8.002, agencies must procure some types of supplies and services from statutory sole sources. These required supply and services procurements include: Helium (FAR Subpart 8.5), Printing Services and Related Supplies (FAR Subpart 8.8), and Leasing of Motor Vehicles (FAR Subpart 8.11)

10. Bottom Line on Required Sources of Supply. Due to the significant restrictions on the use of FPI/UNICOR, the fact that there are no longer any mandatory FSS, and the flexibility that the GAO has given agencies in determining whether to use Optional FSS, contracting offices should focus on whether the Committee for Purchase From

[18] *See* GSA website "Welcome to GSA Schedules" *available at* http://www.gsa.gov/portal/category/100615 for an overview of Federal Supply Schedule policies and procedures.

People Who Are Blind or Severely Disabled (Ability One/JWOD) can meet their supply needs prior to competing an acquisition.

C. Required Sources of Services.

1. Agencies shall satisfy requirements for services in the descending order of priority listed below:

   a. Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see FAR Subpart 8.7);[19]

   b. Mandatory Federal Supply Schedules[20] (see FAR Subpart 8.4);[21]

   c. Optional use Federal Supply Schedules (see FAR Subpart 8.4);

   d. Federal Prison Industries, Inc. (see FAR Subpart 8.6);[22]

   e. Commercial Sources of Services (including educational and nonprofit institutions). Once a Contracting Officer determines that the service requirement cannot be filled with a required source,[23] then he/she may compete the requirement via one of the three acquisition methods (Simplified Acquisitions, Sealed Bidding, and Negotiations).

2. The same constraints apply to the priority list for Required Sources of Services as discussed in section VI.B. for Required Sources of Supplies.

3. Bottom Line on Required Sources of Services. Due to the significant restrictions on the use of FPI/UNICOR, the fact that there are no longer any mandatory FSS, and the flexibility that the GAO has given agencies in determining whether to use Optional FSS, contracting offices should focus on whether the Committee for Purchase From

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[19] AbilityOne provides both supplies and services to the federal government.

[20] Although called the "Federal Supply Schedule," the FSS includes services as well as supplies.

[21] *See supra* note 15 (The GSA no longer maintains "mandatory use" FSS).

[22] *See supra* Section VI.B.3. (Federal Prison Industries) (FPI/UNICOR is a "*qualified mandatory RSS*." Agencies may not meet their supply or service requirements via FPI *unless* the agency determines that FPI provides the best value to the agency).

[23] In addition to the priority list for Required Sources of Supplies and Services in FAR 8.002, agencies must procure some types of supplies and services from statutory sole sources. These required supply and services procurements include: Helium (FAR Subpart 8.5), Printing Services and Related Supplies (FAR Subpart 8.8), and Leasing of Motor Vehicles (FAR Subpart 8.11).

People Who Are Blind or Severely Disabled (Ability One/JWOD) can meet their services needs prior to competing an acquisition.

VII. PRE-REQUISITE: SMALL-BUSINESS SET-ASIDES

A. General Rule. Simplified acquisitions exceeding the micro-purchase threshold but under the simplified acquisition threshold are reserved exclusively for small business concerns. FAR 13.003(b).

1. Exceptions. In general, the set-aside requirement above does not apply when:

a. The small business set-aside requirement does not apply to purchases from required sources of supply under FAR Part 8. FAR 19.502-1(b).

b. Purchases occur outside the United States, its territories and possessions, Puerto Rico, and the District of Columbia. FAR 19.000(b).

c. 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. This is called the Rule of Two. FAR 19.502-2(b)(1). However, there are small business programs that permit or require awards to small business even where the Rule of Two is not met.

2. For a more complete discussion of small business set-asides, please refer to the Chapter 13.

VIII. COMPETITION REQUIREMENTS.

A. General Rules. FAR 13.104; FAR 13.106-1.

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. § 3301.

2. For simplified acquisitions, CICA requires only that agencies obtain competition to the "**maximum extent practicable**" to obtain supplies and services from the source whose offer is the most advantageous to the government, considering the administrative cost of the purchase. 10 U.S.C. § 2304(g)(3); 41 U.S.C. §§ 3301, 111; FAR 13.104.

B. Defining "maximum extent practicable."

1. Agency must make reasonable efforts, consistent with efficiency and economy, to give responsible sources the opportunity to compete.

a. FAR 13.104 no longer contains a provision that the solicitation of three or more vendors is required to ensure competition to the maximum extent practicable when using simplified acquisition procedures.

(1) Contracting officers, however, should consider using solicitation of at least three sources to promote competition to the maximum extent practicable; and

(2) Whenever possible they should request quotations or offers from two sources not included in the previous solicitation.

b. If not providing access to notice through the single government-wide point of entry, competition requirements ordinarily can be obtained by soliciting quotes from sources within the local trade area. FAR 13.104(b).

c. Vendors who ask to compete should be afforded a reasonable opportunity to compete. Proper publication of a solicitation on FEDBIZOPS will satisfy agency's obligation to encourage maximum competition.

(1) PR Newswire Assn, LLC, B-400430, 26 Sept. 2008 (incumbent claimed no actual notice, GAO ruled post on FEDBIZOPS put PR Newswire on constructive notice); Optelec U.S. Inc., B-400349, B400349.2, 16 Oct. 2008 (Optelec found solicitation day before proposals due, GAO held once advised solicitation would be posted on FEDBIZOPS, it was Optelec's responsibility to obtain it).

(2) Gateway Cable Co., B-223157, Sep. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333 (agency failed to satisfy competition to the maximum extent practicable when it failed to solicit the protesting vendor, who called the contracting officer 19 times in regards to an acquisition requirement).

(3) While the "maximum extent practicable" standard can generally be met through the solicitation of at least three sources, an agency may not deliberately fail to solicit a responsible source that has expressed interest

in competing without a reasonable basis for questioning the source's ability to meet the agency's needs. Solutions Lucid Group, LLC, B-400967, Comp. Gen., Apr. 2, 2009 (Vendor exclusion for use of non-domestic products on prior purchase order unreasonable when domestic requirement no longer applied to current purchase); Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 (Deliberate vendor exclusion from competition for a BPA order not decided by GAO because Vendor unable to show it would have had a substantial chance of award, but for the agency's actions); Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140 (Deliberate exclusion of incumbent from solicitation for two-month interim services contract unreasonable where incumbent asked to compete and incumbent's alleged poor past performance was unsupported by the record).

d. Contracting officers should generally solicit the incumbent.

(1) An agency's failure to solicit an incumbent, however, is not an automatic violation of the requirement to promote competition to the maximum extent practicable.

(2) Rather, the determinative question is whether an agency, that deliberately excluded a firm that expressed an interest in competing, acted reasonably. PR Newswire Assn, LLC, B-400430, 26 Sept. 2008, 2008 CPD ¶ 178 (incumbent claimed no actual notice, GAO ruled post on FEDBIZOPS put PR Newswire on constructive notice).

C. Considerations for soliciting competition.

1. Contracting officers shall not:

a. solicit quotations based on personal preference (FAR 13.104(a)(1)); or

b. restrict solicitation to suppliers of well-known and widely distributed makes or brands (FAR 13.104(a)(2)). An agency should not include restrictive provisions, such as specifying a particular manufacturer's product, unless it is absolutely necessary to satisfy the agency's needs.[24] *See* American

[24] FAR 13.106-3 and 13.501 outline file documentation requirements that explain the use of brand name specifications or other circumstances that explain the absence of competition.

Eurocopter Corporation, B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 (finding reasonable the solicitation for a Bell Helicopter model 407); *But see* Delta International, Inc., B-284364.2, May 11, 2000, 2000-1 CPD ¶ 78 (agency could not justify how only one type of x-ray system would meet its needs). *See also*, FAR 11.104.

2. Before requesting quotes, FAR 13.106-1(a) requires the contracting officer to consider:

   a. The nature of the article or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or is relatively noncompetitive;

   b. The availability of an electronic commerce method that employs widespread electronic public notice;

   c. The urgency of the proposed purchase;

   d. The dollar value of the proposed purchase; and

   e. Past experience concerning specific dealers' prices.

3. Sole source Acquisitions (including Brand Name).

   a. For items under the SAP threshold, an agency may limit a Request For Quotes (RFQ) to a single source ONLY IF the contacting officer has determined that only one source is reasonably available (e.g., urgency, exclusive licensing agreements, brand name, or industrial mobilization). FAR 13.106-1(b). A formal justification and approval (J&A) is not required by the FAR, but FAR 13.106-3 does require the explanation of the absence of competition.

   b. For commercial items in excess of the SAP threshold, a formal J&A is required pursuant to the requirements listed in FAR 13.501(a). FAR 13.106-1(b)(2).

   c. Agencies must furnish potential offerors a reasonable opportunity to respond to the agency's notice of intent to award on a sole source basis. *See* Jack Faucett Associates, Inc., B-279347, June 3, 1998, 98-1 CPD ¶ 155 (unreasonable to issue purchase order one day after providing FACNET notice of intent to sole-source award); Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 (1 1/2 business days does not provide potential sources with a reasonable opportunity to respond, particularly where the record does not show a need for the short response period and the agency knew

of the requirement well in advance of issuing the notice). Similarly, FAR 5.102(a)(6) requires publication of a brand name justification.

4. Micro-purchases & Competition. FAR 13.203.

a. Competition is not required for a micro-purchase if the contracting officer determines that the price is reasonable. FAR 13.203(a)(2); Michael Ritschard, B-276820, Jul. 28, 1997, 97-2 CPD ¶ 32 (contracting officer properly sought quotes from two of five known sources, and made award).

b. To the maximum extent practicable, micro-purchases shall be distributed equitably among qualified suppliers. FAR 13.202(a)(1). *See* Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258 (agency properly distributed orthopedic business based on a rotation list).

IX. SIMPLIFIED ACQUISITION METHOD OF CONTRACTING.

A. Policy. Authorized individuals shall make purchases in the simplified manner that is most suitable, efficient, and economical based on the circumstances of each acquisition. FAR 13.003(g). In some cases, agencies delegate authority to use simplified acquisition procedures below the contracting officer to these "Authorized Individuals."

B. Request for Quotations – Legal Formation of the contract.

1. In simplified acquisitions, the government solicits quotes. A quotation is not an offer, and can't be accepted by the government to form a binding contract. FAR 13.004(a); Eastman Kodak Co., B-271009, May 8, 1996, 96-1 CPD ¶ 215 (contending that the cancellation was unreasonable due to a lack of planning. GAO held that DOT properly cancelled the solicitation after determining that: (1) the solicitation did not meet its needs; and (2) more relaxed specifications would result in more savings and competition. Accordingly, the protest was denied.).

2. Offer. After considering the quotes, if the government is interested, it submits an order, which is a legal offer to buy supplies or services under specified terms and conditions. A supplier creates a contract when it accepts the government's order. FAR 13.004(a). C&M Mach. Prods., Inc., ASBCA No. 39635, 90-2 BCA ¶ 22,787 (bidder's response to purchase order proposing a new price was a counteroffer that the government could accept or reject). *See*, Kingdomware

Technologies, B-407628, January, 2013, the agency is not required to remove all uncertainty from the mind of every prospective vendor.

3. Acceptance. FAR 13.004(b). A contractor may accept a government order by:

   a. notifying the government, preferably in writing;

   b. furnishing supplies or services; or

   c. proceeding with work to the point where substantial performance has occurred.

      (1) When does substantial performance occur?[25] *See* the case study following "Cancellation of an RFQ" below.

      (2) Sunshine Cordage Corp., ASBCA 38904, 90-1 BCA 22,382 at 112,471 (Oct. 18, 1989)(citing Klass Engineering, Inc., ASBCA 22052, 78-2 BCA 13,236, at 64,716, modified and aff'd on recon., 78-2 BCA 13,463. *See also*, Tefft, Kelly and Motley, Inc., GSBCA 6562, 83-1 BCA 16,177, at 80,388 (1982) (teaching contractor entitled to compensation for preparation expense incurred before government terminated contract).

4. Cancellation of an RFQ. A contracting agency needs a reasonable basis to support a decision to cancel an RFQ. Deva & Assoc. PC, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at. 3.

   a. A reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs, or where there is a material increase in the services needed to satisfy the agency's requirements. Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 3.

   b. A solicitation may be cancelled where, during the course of the procurement, the item or services involved are discovered to be on, or have been added to, the JWOD procurement list. Best Foam Fabricators, Inc., B-259905.3, Jun. 16, 1995, 95-1 CPD ¶ 275 at 2 (Item added to the list on 1 January during the procurement and agency properly canceled the procurement on

[25] "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 555 (3d ed. 2007).

30 January when original awardee could not perform.) *But see* OSC Solutions, Inc., B-401498, Sept. 14, 2009 (RFQ may not be cancelled and a BPA sole-sourced to the Industries of the Blind under the authority of the JWOD Act when an item is not yet added to the JWOD procurement list).

c. Cancellation versus Termination. If acceptance of an order has occurred, the agency must terminate the contract rather than cancel it. Termination normally involves a monetary settlement for the vendor. FAR 13.302-4.

Case Study: GSA solicited quotes for instructors to teach a four-week acquisition course in Arlington, Virginia. GI, who was just one of several vendors, sent a quote for $6800. GSA issued the purchase order to GI on April 21. On May 11, GSA gave GI the course materials and GI began reviewing them immediately. May 18, a losing vendor filed a protest with GAO protesting the award to GI. On May 27, GSA canceled the purchase order with GI. GAO dismissed the protest on 2 June after GSA stated it canceled the order due to the use of "defective evaluation criteria" in the selection of instructors. GI filed a T4C settlement proposal to recover $3,849.20, based on an hourly teaching rate of $50.00 per hour. GI stated he incurred 61 hours of preparation time plus overhead expenses. GSA paid GI a total settlement of $425.00. GI appealed to the ASBCA.

Question: Did GI accept the government's purchase order by substantial performance such that there was a binding contract?

At trial, the government requested dismissal arguing that GI had not "accepted" the government's purchase order so no legally binding contract existed. The ASBCA stated "so long as the contractor does not ask to change the terms of the contract after issuance of a purchase order, acceptance of an offer occurs once the contractor commences 'substantial performance' of the order, which in turn creates a binding contract." In this case, the ASBCA found that acceptance had occurred by examining the actions of both parties. ASBCA stated that when the government provided GI the course materials and they received and began reviewing them, acceptance had occurred. The ASBCA also noted that by paying $425.00, the contracting officer had correctly decided a binding contract existed (there could be no settlement if there was no contract). The ASBCA eventually awarded GI a termination settlement of $2,236.92. Giancola & Associates vs. GSA, GSBCA 12128, Feb. 5, 1993.

C. Authority to Combine Methods of Contracting.

1. For acquisitions under the simplified acquisition threshold for other than commercial items, authorized individuals may use any appropriate combination of the procedures in FAR part 13 (simplified acquisitions), Part 14 (sealed bidding), Part 15 (competitive negotiations), Part 35 (research and development contracting), or Part 36 (construction and architect-engineer contracts). FAR 13.003(g)(1).

2. For acquisitions of commercial items under the CITP threshold, authorized individuals shall make purchases using any appropriate combination of FAR Part 12 (commercial items), Part 13 (simplified acquisitions), Part 14 (sealed bidding), and Part 15 (competitive negotiations). FAR 13.003(g)(2).

D. Evaluation Procedures & Criteria.

1. Evaluations must be conducted fairly and in accordance with the terms of the solicitation. Kathryn Huddleston & Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD¶ 57; Finlen Complex Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167; Diebold, Inc., B-404823, Jun 2, 2011, "it is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals." When using simplified acquisitions, agencies must still follow stated evaluation criteria. Low & Associates, Inc., B-297444.2, Apr. 13, 2006, 2006 CPD ¶ 76 (LAI successfully protested Nat'l Science Foundation award claiming agency waived material solicitation requirements).

   a. Sea Box, Inc., B-405711.2, 2012 CPD ¶ 116 (Comp. Gen. Mar. 18, 2012) (GAO will review allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation.) Also see, Novex Enterprises, B-407914, April 5, 2013, (The protester argues that it was improper to consider PTI's shorter delivery schedule, this argument has no merit because the solicitation specifically provided for the consideration of both price and non-price factors in the award decision, and also stated that one of the non-price factors was offered delivery).

   b. Agency unreasonably evaluated the protester's bid of an equal product under a brand name or equal solicitation conducted under simplified acquisition procedures where the solicitation lacked salient characteristics and the equal product was not shown to be significantly different from the brand name

product. See, Veterans Healthcare Supply Solutions, Inc., B-407223.2, December 13, 2012.

2. Evaluation Procedures. The contracting officer has broad discretion in fashioning suitable evaluation criteria. The procedures in FAR Part 14 (sealed bidding) and Part 15 (competitive negotiations) are NOT mandatory. At the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in FAR Part 14 or 15 may be used. FAR 13.106-2(b). *See* Cromartie and Breakfield, B-279859, Jul. 27, 1998, 98-2 CPD ¶ 32 (upholding rejection of quote using Part 14 procedures for suspected mistake). When the contracting officer uses procedures outlined in Parts 14 or 15, GAO will evaluate the government's conduct in light of the standards outlined in those Parts. *See* ERIE Strayer Company, B-406131, Feb. 21, 2012 (sustaining a protest when the government had communications with one contractor that amounted to discussions under Part 15, but did not have communications or discussions with the protestor; "Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should fairly and reasonably treat offerors in the conduct of those procedures."). See Tipton Textile Rental, Inc., B-406372, May 9, 2012, (GAO sustained the protest because once the agency opened discussions, the discussions had to be meaningful and they were not.)

3. Contracting officers shall consider all quotations that are timely received. FAR 13.003(h)(3).

   a. The Government can solicit and receive new quotations any time before contract formation, unless a request for quotations establishes a firm closing date. Technology Advancement Group, B-238273, May 1, 1990, 90-1 CPD ¶ 439; ATF Constr. Co., Inc., B-260829, July 18, 1995, 95-2 CPD ¶ 29.

   b. When a purchase order has been issued prior to receipt of a quote, the agency's decision not to consider the quote is unobjectionable. Comspace Corp. B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186.

   c. Agency was not obligated to consider vendor's quote where the record shows that the agency did not receive written verification of information related to the quote and the vendor was advised that failure to respond would constitute withdrawal of quote. B&S Transport, Inc., B-407589, Dec. 27 2012.

4. If a solicitation contains no evaluation factors other than price, price is the sole evaluation criterion. AMBAC International, B-234281, May 23, 1989, 89-1 CPD ¶ 492 (price was the only term solicited from each participating contractor).

5. 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.[26] Contracting officers may conduct comparative evaluations of offers. FAR 13.106-2(b)(3); *See* United Marine International LLC, B-281512, Feb. 22, 1999, 99-1 CPD ¶ 44 (discussions not required).

6. Evaluation of other factors, such as past performance:

   a. Does not require the creation or existence of a formal data base; and

   b. 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)(3); *See* MAC's General Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 (reasonable to use protester's default termination under a prior contract as basis for selecting a higher quote for award); Environmental Tectonics Corp., B-280573.2, Dec. 1, 1998, 98-2 CPD ¶ 140 (Navy properly considered evidence of past performance from sources not listed in vendor's quotation).

E. Award and Documentation. FAR 13.106-3

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

2. Price Reasonableness. The contracting officer must determine that a price is fair and reasonable before making a contract award. The protester challenges the agency's price realism evaluation, arguing that CWS's price is so low that this should have raised significant concerns with CWS's understanding of the PWS. Protestor generally disagrees with the agency's price realism judgment and argues that the agency should have documented more detailed analysis, the protester does not

[26] Some documentation in the contract file to support the award decision is still required (*see* FAR 13.106-3 and documentation discussion *infra*).

show that the agency acted unreasonably - Protest Denied. See, Preferred Systems Solutions, Inc., B-407234; B-407234.2, November 30, 2012.

3. Documentation.

a. Documentation should be kept to a minimum. FAR 13.106-3(b) provides examples of the types of information that should be recorded.[27]

b. The contracting officer ***must*** include a statement in the contract file supporting the award decision if other than price-related factors were considered in selecting the supplier. FAR 13.106-3(b)(3)(ii); *See* Universal Building Maintenance, Inc, B-282456, Jul. 15, 1999, 99-2 CPD ¶ 32 (protest sustained because contracting officer failed to document award selection, and FAR Parts 12 and 13 required some explanation of the award decision). *See also*, Resource Dimensions, LLC, B-404536, Feb. 24, 2011, 2011 CPD ¶ 50 (sustaining a protest where an agency used SAP and oral presentations, but the agency failed to provide adequate supporting rationale in the record for GAO to conclude the agency acted reasonably).

F. Authority to Innovate. Contracting Officers shall use innovative approaches, to the maximum extent practicable, in awarding contracts using simplified acquisition procedures. FAR 13.003(h)(4).

1. Example of an Innovative Approach: Reverse auctions. Prospective contractors bid down the price in real time to compete to provide the product sought by the government. *See* Thomas F. Burke, *Online Reverse Auctions*, West Group Briefing Papers (Oct. 2000). Tremendous growth potential, yet no statutory or regulatory guidance.

a. There are few reported GAO cases dealing directly with reverse auctions: *See, e.g.*, Royal Hawaiian Movers, B-288653, Oct. 31, 2001, 2001 CPD ¶ 182; Pacific Island Movers, B-287643.2, July 19, 2001, 2001 CPD ¶ 126.

b. In general, the use of reverse auctions has been sustained by GAO. *See* MTB Group, B-295463, Feb. 23, 2005 (concluding that procurement using reverse auction format is permissible because agency is conducting reverse auction under simplified acquisition procedures which encourage use of innovative

[27] For oral solicitations, the contracting office should generally maintain records of oral price quotations, including the names of the suppliers contacted and the prices and other terms and conditions quoted by each. For written solicitations, the contracting office should generally maintain notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data. FAR 13.106-3(b)(1) and (b)(2).

procedures). There has been some recent criticism of reverse auctions however in that: they typically require contractors to disclose their prices to each other (contractors are informed whether they are the current low bidder, but don't see the name of the low-bidding contractor or the actual bid price until close of the auction); the pricing competition saves money for the government but reduces prices to levels that small business cannot afford; and reverse auctions fail to take into account past performance and other non-price factors that help the government achieve the best value on a specific procurement.

c. Additionally, the GAO has held that internet failure may not excuse late delivery of contractor's proposal. Performance Construction, Inc., B-286192, Oct. 30, 2000, 2000 CPD. ¶ 180. This rule could affect reverse auctions, which are exclusively conducted using electronic forums (*see, e.g.,* www.feddbid.com – FedBid is a commercial vendor that hosts many of the reverse auctions used by federal agencies).

X. PUBLICIZING AGENCY CONTRACT ACTIONS. FAR PART 5.

A. Policy. Prior to awarding government contracts, agencies must comply with the publicizing requirements of FAR Part 5.[28]

B. Exception for contract actions outside the United States. The contracting officer need not submit a notice to the government point of entry (GPE) if the proposed contract action is by a defense agency and the proposed contract action will be made and performed outside the United States and its outlying areas, and only local sources will be solicited. This exception does NOT apply to proposed contract actions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement. FAR 5.202(a)(12).

C. Definitions.

1. Publicizing means to disseminate information in a public forum so that potential vendors are informed of the agency's need, and the agency's proposed contract action. As the value of the anticipated acquisition increases, agencies have to meet more stringent requirements to ensure the proposed contract action is disseminated to the public.

2. Posting is a limited form of publicizing where a contracting officer informs the public of a proposed contract action by displaying a summary of the anticipated solicitation (a synopsis), or displaying the

[28] *See infra*, Appendix B: Publicizing and Synopsis Requirements for Government Procurements (containing a chart that summarizes publicizing and synopsis requirements for all methods of acquisitions depending on the value of the procurement).

actual solicitation, in a public place (usually a "contract action display board" outside the contracting office), or by an equivalent electronic means (usually a contracting office webpage).

3. A synopsis is a notice to the public that summarizes the anticipated solicitation. At a minimum, a synopsis must include: a clear and concise description of the supplies or services that the agency needs, the description must not be unnecessarily restrictive of competition, and the description should allow prospective offerors to make an informed business judgment as to whether they should seek more information (a copy of the solicitation) and/or offer to fulfill the agency need. FAR 5.207(c).

4. A solicitation means any request to submit offers or quotations to the Government. Solicitations under sealed bid procedures are called "invitations for bids" or IFB. Solicitations under negotiated procedures are called "requests for proposals" or RFP. Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer (FAR 2.101), but most frequently take the form of a "request for quotation" or RFQ.

D. Publicizing Requirements. Contracting officers must publicize proposed contract actions as follows:

1. For proposed contract actions expected to exceed the Simplified Acquisitions Threshold (SAT), agencies must synopsize on the Government-wide Point of Entry (GPE)[29] for at least **15 days**, and then issue a solicitation and allow at least **30 days** to respond. FAR 5.203.

2. For proposed contract actions expected to exceed $25,000 but less than the Simplified Acquisitions Threshold (SAT), agencies must synopsize on the GPE for at least **15 days**, and then issue a solicitation and allow a "reasonable opportunity to respond." FAR 5.203. *This can be less than 30 days.*

3. For proposed contract actions expected to exceed $15,000, but not expected to exceed $25,000, agencies must post (displayed in a public place or by an appropriate and equivalent electronic means), a synopsis of the solicitation, *or the actual solicitation*, for at least **10 days**. If a contracting officer posts a synopsis, then they must allow "a reasonable opportunity to respond" after issuing the solicitation. FAR 5.101(a)(2).

4. Synopsis requirements. FAR 5.207.

[29] The GPE is available online at the Federal Business Opportunities website, *available at* www.fbo.gov.

a. The synopsis must include a statement that all responsible sources may submit a response, which, if timely received, must be considered by the agency.

b. The synopsis must be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later.

c. If solicitations are posted instead of a synopsis, the contracting officer may employ various methods of satisfying the description of supplies or services required by FAR 5.207(c). For example, the contracting officer may meet the requirements of 5.207(c) by stamping the solicitation, by a cover sheet to the solicitation, or by placing a general statement in the display room. FAR 5.101(a)(2)(i).

d. Exception to Posting Requirement. If an agency issues an oral solicitation (as opposed to a written solicitation), it needs not comply with the public posting/display requirements. FAR 5.101(a)(2)(ii). Oral solicitations, however, should only be used for non-complex requirements.

5. For proposed contract actions less than $15,000 and/or the micro-purchase threshold, there are no required publicizing requirements.

6. When acquiring commercial items whose value exceeds $25,000, the contracting officer may publicize the agency need, at his/her discretion, in one of two ways:

a. Combined Synopsis/Solicitation: Agencies may issue a combined synopsis/solicitation on the GPE in accordance with the procedures detailed at FAR 12.603. The agency issues a combined synopsis/solicitation and then provides a "reasonable response time." *See* FAR 5.203(a)(2), FAR 12.603(a) and 12.603(c)(3).

b. Shortened Synopsis/Solicitation: Agencies may issue a separate synopsis and solicitation on the GPE. The synopsis must remain on the GPE for a "reasonable time period," *which may be less than 15 days*. The agency should then issue the solicitation on the GPE, providing potential vendors a "reasonable opportunity to respond" to the solicitation, *which may be less than 30 days*. FAR 5.203

c. Reasonable Response Time. Contracting officers shall establish deadlines for the submission of responses to solicitations that afford suppliers a reasonable period of time to respond. FAR

13.003(h)(2). *See* American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable); Military Agency Services Pty., Ltd., B-290414 et al., Aug. 1, 2002 (finding near immediate response period (24 hours) reasonable where publication requirements did not apply overseas, only prices were requested, all requested sources timely submitted quotes and due to security concerns, agency routinely received and filled requests for picket boat services within a 72 hour period). *But see* KPMG Consulting, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196 (agency may, if not prohibited by solicitation, consider a late quote).

E. Methods of soliciting quotes.

1. Oral. FAR 13.106-1(c).

a. Contracting officers shall solicit quotes orally to the maximum extent practicable, if:

(1) The acquisition does not exceed the simplified acquisition threshold;

(2) It is more efficient than soliciting through available electronic commerce alternatives; and

(3) Notice is not required under FAR 5.101.

b. It may not be practicable for actions exceeding $30,000 unless covered by an exception in FAR 5.202.

c. The contracting officer shall issue a written solicitation for construction requirements exceeding $2,000. FAR 13.106-1(d).

2. Electronic Commerce.

a. Agencies shall use electronic commerce when practicable and cost-effective. FAR 13.003(f); FAR Subpart 4.5.

b. Drawings and lengthy specifications can be provided off-line in hard copy or through other appropriate means. FAR 13.003(f).

c. This is an exploding growth area involving numerous "e-government" initiatives.

(1) In December 2002, the President established an e-government office within the White House Office of

Management and Budget. E-Government Act of 2002, Pub. L. No. 107-347.

(2) On May 12, 2004, the Office of Federal Procurement Policy issued a memorandum on the subject of "Utilization of Commercially Available Online Procurement Services," which encouraged agencies to take advantage of these services for the acquisition of commercial items, including goods and services.

(3) Electronic Signatures in federal procurement. 65 Fed. Reg. 65,698 (Nov. 1, 2000) (*see* FAR 2.101 and 4.502).

(4) Effective 1 October 2001, mandatory single point of electronic access to government-wide procurement opportunities. *See* www.fbo.gov.

(5) Section 508 of the Rehabilitation Act of 1973. As of June 25, 2001, government contracts awarded for electronic and information technology (EIT) must contain technology that is accessible to disabled federal employees and disabled members of the public ("508 Compliant"). 66 Fed. Reg. 20,894 (Apr. 25, 2001); *see also* FAR 39.2.

(6) *See* OMB Office of E-Government & Information Technology, for more information and current policies (available at http://www.whitehouse.gov/omb/e-gov).

3. Written. FAR 13.106-1(d).

a. Contracting officers shall issue a written solicitation for construction requirements exceeding $2,000.

b. If obtaining electronic or oral quotations is uneconomical, contracting officers should issue paper solicitations for contract actions likely to exceed $30,000.

XI. PURCHASING TECHNIQUES

A. General. There are four basic simplified acquisition options for procuring items: Purchase Orders (FAR 13.302 and 13.306); Blanket Purchase Agreements (FAR 13.303); Imprest Funds (FAR 13.305); and Governmentwide Commercial Purchase Card (government credit card) (FAR 13.301).

B. Purchase Orders. FAR 13.302.

1. Definition. A purchase order is a government offer to buy certain supplies, services, or construction, from commercial sources, upon specified terms and conditions. FAR 13.004. A purchase order is different than a delivery order, which is placed against an established contract (*e.g.* a delivery order for supplies might be placed against an existing indefinite delivery type contract; a task order is used to order services from and indefinite delivery contract).

2. Forms. FAR 13.307.

a. SF 1449, Solicitation/Contract/Order.

(1) The SF 1449 is a multipurpose form used for negotiated purchases of supplies or services, delivery or task orders, inspection and receiving reports, and invoices.

(2) Contracting officers use this form for purchases of commercial items. Per DFARS 213.307, if SF 1449 is not used, DD Form 1155 (Order for Supplies or Services) should be used. FAR 13.307 and FAR 12.204.

(3) Except when quotations are solicited electronically or orally, the SF 1449, SF 18, or an agency automated form is used to request quotations.

b. SF 44 Purchase Order – Invoice Voucher. This is a multipurpose pocket-size purchase order form designed primarily for on-the-spot, over-the-counter purchase of supplies and nonpersonal services while away from the purchasing office or at isolated activities. FAR 13.306. Due to the increased use and acceptance of the Governmentwide Commercial Purchase Card, the use of the SF44 within DoD is typically limited to purchases of: fuel and oil; overseas transactions in support of a contingency environment; and purchases in support of certain intelligence activities. DFARS 213.306(a)(1).

(1) Because the SF 44 is used only for on-the-spot purchases of supplies or services that are immediately available, no clauses are used with this form. Properly authorized field ordering officers[30] may also use the SF44, but only up to the micro-purchase threshold.

[30] *See also*, Handbook 09-16, Field Ordering Officer and Paying Agent TTPs, *available at* http://usacac.army.mil/cac2/call/docs/09-16/09-16.pdf.

(2) This form may be used only if all of the following conditions are satisfied:

(a) The amount of the purchase is at or below the micro-purchase threshold, except for purchases made under unusual and compelling urgency or in support of contingency operations. Agencies may establish higher dollar limitations for specific activities or items;

(b) The supplies or services are immediately available;

(c) One delivery and one payment will be made; AND

(d) Its use is determined to be more economical and efficient than use of other simplified acquisition procedures. FAR 13.306(a).

3. General Rules for Purchase Orders.

a. Purchase Orders are generally issued on a fixed price basis. FAR 13.302-1(a). However, the FAR does provide guidelines for an "unpriced purchase order method" in FAR 13.302-2.

b. FAR 12.207 governs contract types for the acquisition of commercial items.

c. Purchase orders shall:

(1) Specify the quantity of supplies or scope of services ordered.

(2) Contain a determinable date by which delivery or performance is required.

(3) Provide for inspection as prescribed in FAR Part 46. Generally, inspection and acceptance should be at destination.

(4) Specify F.O.B. destination for supplies within the continental United States unless there are valid reasons to the contrary. FAR 13.302-1(b).

4. Unpriced Purchase Orders. FAR 13.302-2.

a. An unpriced purchase order is an order for supplies or services where the price is not established when the order is issued. A realistic monetary limitation, either for each line item or for the total order, shall be placed on each unpriced purchase order.

b. It may be used only when it is impractical to obtain pricing in advance AND the purchase is for

(1) Repairs to equipment requiring disassembly to determine the nature and extent of repairs;

(2) Material available from only one source and for which cost cannot be readily established; OR

(3) Supplies or services for which prices are known to be competitive, but exact prices are not known (*e.g.*, miscellaneous repair parts, maintenance agreements).

5. Termination or cancellation of purchase orders. FAR 13.302-4.

a. The government may withdraw, amend, or cancel an order at any time before acceptance. See Alsace Industrial, Inc., ASBCA No. 51708, 99-1 BCA ¶ 30,220 (holding that the government's offer under the unilateral purchase order lapsed by its own terms when Alsace failed to deliver on time); Master Research & Mfg., Inc., ASBCA No. 46341, 94-2 BCA ¶ 26,747.

b. If the contractor has not accepted a purchase order in writing, the contracting officer may notify the contractor in writing, and:

(1) Cancel the purchase order, if the contractor accepts the cancellation; or

(2) Process the termination action if the contractor does not accept the cancellation or claims that it incurred costs as a result of beginning performance. FAR 13.302-4(b). *But see* Rex Sys., Inc., ASBCA No. 45301, 93-3 BCA ¶ 26,065 (contractor's substantial performance only required government to keep its unilateral purchase order offer open until the delivery date, after which the government could cancel when goods were not timely delivered).

c. Once the contractor accepts a purchase order in writing, the government cannot cancel it; the contracting officer must terminate the contract in accordance with:

(1) FAR 12.403(d) and 52.212-4(l) for commercial items; or

(2) FAR Part 49 and 52.213-4 for other than commercial items.

C. Blanket Purchase Agreements. FAR 13.303.

1. Definition. 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).

a. 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. Zhengxing v. U.S, 71 Fed. Cl. 732 (2006) (discussing that it is well settled that a BPA is not a contract); Modern Systems Technology Corp. v. United States, 24 Cl.Ct. 360 (1991) (Judge Bruggink provides comprehensive analysis of legal effect of a BPA in granting summary judgment to Postal Service in breach claim); Envirosolve, LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 (for a summary of the law surrounding BPAs); Prod. Packaging, ASBCA No. 53662, 03-2 BCA ¶ 32,388 (ASBCA 2003) (stating "it is well established that a BPA is not a contract. Rather, a BPA is nothing more than an agreement of terms by which the government could purchase.").

b. BPAs may be issued without a commitment of funds; however, a commitment and an obligation of funds must separately support each order placed under a BPA. FAR 13.303-1(c).

c. Blanket purchase agreements should include the maximum possible discounts, allow for adequate documentation of individual transactions, and provide for periodic billing. FAR 13.303-2(d).

d. Since a BPA is not a contract, there is no established jurisdiction under the Contract Disputes Act (CDA). Zhengxing v. U.S., 71 Fed. Cl. 732, 739 (2006); Julian Freeman, ASBCA No. 46675, Oct. 27, 1994, 94-3 BCA ¶ 135,906.

2. Limits on BPA usage.

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

b. If there is an insufficient number of BPAs to ensure maximum practicable competition for a particular purchase, the contracting officer must solicit from other sources or create additional BPAs. FAR 13.303-5(d). *Compare* Logan, LLC, B-294974.6, Dec. 1, 2006, 2006 CPD ¶ 188 (There is no requirement that an agency conduct further competition among the BPA holders in connection with each individual purchase order subsequently issued under the BPAs, when the BPAs were originally competitively established).

c. A BPA may be properly established when:

(1) There is a wide variety of items in a broad class of supplies and services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.

(2) There is a need to provide commercial sources of supply for one or more offices or projects that do not have or need authority to purchase otherwise.

(3) Use of BPAs would avoid the writing of numerous purchase orders.

(4) There is no existing requirements contract for the same supply or service that the contracting activity is legally obligated to use. FAR 13.303-2(a).

3. Establishment of BPAs. FAR 13.303-2(b-c).

a. After determining a BPA to be advantageous, contracting officers shall:

(1) Establish the parameters of the BPA. Will the agreement be limited to individually identified items, or will it merely identify broad commodity groups or classes of goods and services?

(2) Consider quality suppliers who have provided numerous purchases at or below the simplified acquisition threshold.

b. BPAs may be established with:

(1) More than one supplier for goods and services of the same type to provide maximum practicable competition.

(2) A single source from which numerous individual purchases at or below the simplified acquisition threshold will likely be made. This may be a useful tool in a contingency operation where vendor choices may be limited, and contract personnel can negotiate the terms for subsequent orders in advance of, or concurrent with, a deployment.

(3) The FAR authorizes the creation of BPAs under the Federal Supply Schedule (FSS) "if not inconsistent with the terms of the applicable schedule contract." FAR 13.303-2(c)(3).

(a) FAR 8.405-3 provides detailed guidance for creating a BPA under the FSS. Among other things, it provides:

(i) Ordering activities shall establish BPAs to fill repetitive needs or supplies and services with the schedule contractor(s) that can provide the supply or service that represents the best value;

(ii) Ordering activities may consider factors then price when determining best value (such as past performance, special features, warranty considerations, delivery terms, environmental concerns, etc.);

(iii) Ordering offices shall, to the maximum extent practicable, give preference to establishing multiple-award BPAs rather than single-award BPAs. FAR 8.405-3(b) provides additional guidance for awarding BPAs pursuant to a competitive process. When single award BPAs are appropriate, FAR 8.405-3(a)(3) provides additional limitations and guidance;

(iv) BPAs should address the frequency of ordering and invoicing, discounts, and delivery locations and times.

(v) Ordering offices should specify the procedures for placing orders or calls against a BPA.

(b) GSA provides information regarding BPAs and GSA schedules and a sample BPA format for agencies to use. *See* Appendix B (also *available at* http://www.gsa.gov/portal/content/199353).

(c) Benefits of establishing BPAs with a FSS contractor.

(i) It can reduce costs. Agencies can seek further price reductions from the FSS contract price.

(ii) It can streamline the ordering process. A study of the FSS process revealed that it was faster to place an order against a BPA than it was to place an order under a FSS.

(iii) Purchases against BPAs established under GSA multiple award schedule contracts can exceed the simplified acquisition threshold and the $6,500,000 limit of FAR 13.5. FAR 13.303-5(b)(1).

4. Review of BPAs. The contracting officer who entered into the BPA shall (FAR 13.303-6):

a. Ensure it is reviewed at least annually and updated if necessary;

b. Maintain awareness in market conditions, sources of supply, and other pertinent factors that warrant new arrangements or modifications of existing arrangements; and

c. Review a sufficient random sample of orders at least annually to make sure authorized procedures are being followed.

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

1. Definition. An imprest fund is a "cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts." FAR 13.001.

2. DOD Policy. DOD does not support the use of cash payments from imprest funds. This policy is based, in part, on the mandatory electronic funds transfer requirements of the Debt Collection Improvement Act of 1996 (Pub. L. 104-134). DFARS 213.305-1(1).

3. DOD Use.

a. Use of imprest funds must comply with the conditions stated in the DOD Financial Management Regulation (DOD 7000.14-R, Volume 5, Chapter 2, Disbursing Offices, Officers, and Agents (*see* para. 0204, discussing Imprest Funds specifically).), the Treasury Financial Manual (TFM, Vol.1, Part 4, Chapter 3000, section 3020), FAR 13.305, and DFARS 213.305.

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 213.305-3(d)(i). Approval is required from the Director for Financial Commerce, Office of the Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller). DFARS 213.305-3(d)(ii).

c. The DoD FMR explains that "Imprest funds are generally not authorized for DoD activities. Exceptions are allowed for contingency and classified operations. Submit specific requests for exception in accordance with Chapter 1 [of DoD FMR, Vol. 5]. Include adequate justification and demonstrate that the use of a government purchase card, third party draft, purchase card convenience check, government travel card, or other reasonable alternatives are not feasible for the specific situation." DoD FMR Vol. 5, Chapter 2, para. 020402.

d. When specifically authorized, DFARS 213.305-3(d)(iii), provides that imprest funds can be used without further approval for:

(1) Overseas transactions at or below the micro-purchase threshold in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. § 2302(7); and

(2) Classified transactions.

e. The DoD FMR provides additional limitations on the use of, and safeguarding of imprest funds on the rare occasions that they are authorized. *See generally*, DoD FMR Vol. 5, Chapter 2, para. 0204.

E. Government-wide Commercial Purchase Card. FAR 13.301; DFARS 213.270; DFARS 213.301.

1. Purpose. The government-wide commercial purchase card (GCPC or GPC) is a government-managed charge card used by specific authorized individuals to make purchases on behalf of the government. Like any other contract, purchases made with the GPC obligate appropriated funds. The GPC is authorized for use in making and/or paying for purchases of supplies, services, or construction.[31] DOD contracting officers must use the card for all acquisitions at or below $3,000 unless a specific exception applies. DFARS 213.270.

2. Use. Agencies shall use the GPC and electronic purchasing techniques to the maximum extent practicable in conducting simplified acquisitions. FAR 13.003(e).

3. Implementation.

a. Currently, the General Services Administration (GSA) runs this initiative through the SmartPay purchase charge card program. Information on this program can be found at https://smartpay.gsa.gov/program-coordinators/card-basics (last visited 29 Jun 2014).

b. Agencies using government-wide commercial purchase cards shall establish procedures for use and control of the card. FAR 13.301(b). Procedures and purchasing authority differ among agencies (i.e., AFARS 5113.202, 5113.270).

c. Agencies must have effective training programs in place to avoid card abuses. For example, cardholders may be bypassing required sources of supply. See Memorandum, Administrator of the Office of Federal Procurement Policy, to Agency Senior Procurement executives, subject: Applicability of the Javits-Wagner-O'Day Program for Micro purchases (Feb. 16, 1999) (clarifies that JWOD's status as a priority source under FAR 8.7 applies to micro purchases).

d. A new Army GPC SOP was published on 3 May 2013 and supersedes previous policy. The new SOP has been added to the AFARS as Appendix EE (available at http://farsite.hill.af.mil/vfafara.htm).

[31] DOD's purchase card limit is $25,000 if the criteria in DFARS 213.301(2) are met. DFARS 213.301(3) permits a contracting officer supporting a contingency, humanitarian, or peacekeeping operation to make purchases that exceed the micro-purchase threshold but do not exceed the SAT so long as other stated criteria are met.

4. Required Sources. GPC Cardholders must still abide by the FAR's provisions for required sources of supply and services. Some of those requirements are listed below:

   a. FAR Part 8 Required Sources of Supply and Services.

   b. FAR Part 41 Public Utility Services

   c. Printing and related supplies. FAR 8.8

   d. Leased motor vehicles FAR 8.11.

   e. Strategic and critical materials (metals and ores) from inventories exceeding Defense National Stockpile requirements;

   f. Helium FAR 8.5

   g. Micro-purchases may be procured from small businesses, but a set aside for small businesses is not required.

5. Restrictions.

   a. Agency specific policies may restrict what GPC holders can purchase.[32] Most agencies will restrict cash advances.

   b. The GPC may not be used to purchase long-term rental or lease of land or buildings.

   c. The GPC may not be used for travel or travel related expenses. However, conference rooms, meeting spaces, local transportation services such as metro fare cards, subway tokens and shuttle services can be purchased.

   d. Contracting officers may not use the GPC to purchase goods or services exceeding the micro-purchase threshold if the contractor has a delinquent debt flag in the Central Contractor Registration (CCR) database. FAC 2005-38, 74 FR 65600, 12/10/2009, effective 2/1/2010; FAR 32.1108.

      (1) Contracting officer's must check the CCR database when the contract or order is over the micro-purchase threshold, even if purchasing from GSA. GPC holders

[32] For example, ASA(ALT) memo of 31 Oct 2011, "Mandatory Use of Blanket Purchase Agreements (BPAs) for Office Supplies," requires cardholders to use established Army-wide BPAs to fill needs for office supplies, absent one of several listed exceptions. Memo available at http://www.jrtc-polk.army.mil/doc/NEWwebpagecontents/GPC/ASA(ALT)BPAmemo.pdf.

are exempt as long as the purchase is under the micro-purchase threshold.

(2) This rule does not apply to individual travel charge cards or centrally billed accounts for travel/transportation services.

(3) Contracting officer's shall not use the presence of the CCR debt flag to exclude a contractor from receipt of contract award or placement of an order. Instead, other payment methods (like an electronic funds transfer) must be pursued. If the Contractor pays the debt, then GPC may be used as a payment method. FAR 32.1108; FAC 2005-38, 74 FR 65600, 12/10/2009, effective 2/1/2010.

(4) Why? This restriction is in place so that the government can increase its ability to recoup funds when a contractor owes the government funds. Since the GPC system employs a 3rd party (the charge card company) to pay for good and services, a direct offset between a debtor contractor and the government is not practicable.

6. 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.

d. Additional uses and guidance for DoD are described above and are included in DFARS 213.301.

e. As a general rule, ***DO NOT ISSUE THE GPC TO CONTRACTORS!*** AFI 64-117, Air Force Government Purchase Card Program (20 September 2011); FAR 13.301(a); FAR 1.603-3. But see GPC SOP dtd 3 May 2013, para. 1-5, providing that certain contractors working under cost type contracts may request a GPC.

7. "Control Weaknesses." Several GAO reports and a DOD IG Audit Report have identified control weaknesses that leave agencies vulnerable to fraud and abuse. DOD IG Audit Report, Controls Over the DoD Purchase Card Program, Rept. No. D-2002-075, 29 March

2002; GAO Rept. No. 02-676T, Government Purchase Cards: Control Weaknesses Expose Agencies to Fraud and Abuse, (May 1, 2002); GAO Rept. No. 02-506T, Governmentwide Purchase Cards: Actions Needed to Strengthen Internal Controls to Reduce Fraudulent, Improper, and Abusive Purchases, March, 2008. Problem areas include:

a. Lack of Training for both GPC cardholders and issuing/approving officials.

b. Selecting Cardholders and Assigning Approving Officials. Cardholders should be mature, responsible individuals. Approving Officials should be individuals with some supervisory responsibility over individual cardholders.

c. Inadequate Internal Controls. Poor review and approval procedures lead to fraudulent transactions and mistakes. Internal controls must also account for the management and accounting of personal property after purchase to ensure that an otherwise legitimate purchase is not converted to personal use.

d. Splitting purchases to avoid spending limits. Splitting a known requirement into multiple smaller procurements under the micro-purchase threshold is an impermissible, but tempting pitfall for cardholders and commands.

8. Practical Pointers

a. Training. Online training is available from the GSA SmartPay website at http:www.gsa.gov.

b. Issue cards only to GOVERNMENT employees (NOT contractors) who are authorized and trained to use the GPC.

c. Authorizing officials should be responsible for no more then 5-7 cardholders. Authorizing officials should have some supervisory responsibility over their cardholders.

d. Authorizing officials should not also be a cardholder.

e. Scrutinize single purchases and monthly spending limits.

f. Closely monitor the use of convenience checks.

XII. USING THE FEDERAL SUPPLY SCHEDULES (FSS)

A. Background.

1. The General Services Administration (GSA) manages the FSS program pursuant to the Section 201 of the Federal Property Administrative Services Act of 1949. A FSS is also known as a multiple award schedule (MAS).

2. The Federal Supply Schedule (FSS) program provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. The FSS program provides over four million commercial off-the-shelf products and services, at stated prices, for given periods of time.

3. Congress recognizes the multiple award schedule (MAS) program as a full and open competition procedure if participation in the program has been open to all responsible sources and orders and contracts under the program result in the lowest overall cost alternative to the United States. 10 U.S.C. § 2302(2)(C). But see Reep, Inc., B-290665, Sep. 17, 2002, 2002 CPD ¶ 158 (to satisfy the statutory obligation of competitive acquisitions . . . "an agency is required to consider reasonably available information . . . typically by reviewing the prices of at least three schedule vendors." The agency failed to meets its obligation by not awarding to a vendor providing the best value to the government at the lowest overall cost.).

4. Therefore, an agency need not take certain additional actions, such as:

a. NO need to seek further competition outside the FSS itself.

(1) But see Draeger Safety, Inc., B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139 (though the government need not seek further competition when buying from the FSS, if it asks for competition among FSS vendors, it must give those vendors sufficient details about the solicitation to allow them to compete intelligently and fairly).

(2) **For DoD agencies**, Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, as implemented by DFARS 208.405-70, requires each order of supplies or services under the FSS (including FSS BPAs) exceeding $150,000 to be placed on a competitive basis, unless the requirement is waived based upon a justification prepared in accordance with FAR 8.405-6. Placing an order on a

"competitive basis" requires a contracting officer to provide fair notice of the intent to make the purchase, including a description of the supplies/services along with the source selection criteria, to:

(a) As many schedule contractors as practicable to ensure the receipt of at least three qualified offerors. The contracting officer must then actually receive three qualified offers or determine in writing that no additional contractors can fulfill the requirements. DFARS 208.405-70(c)(1). All offers received must then be fairly considered;

<u>or</u>

(b) All contractors offering the required supplies/services under the applicable schedule. If such notification is provided, the contracting officer must then afford schedule holders a fair opportunity to submit an offer and to have it fairly considered. DFARS 208.405-70(c)(2). Note PGI 208.405-70(1) states that posting an RFQ on GSA's "eBuy" (www.gsaAdvantage.gov) "is one medium of providing fair notice to all contractors as required by DFARS 208.405-70(c)(2)."

b. Generally, NO Synopsis requirement under FAR Part 5. FAR 8.404(a).[33]

c. No separate determination of fair and reasonable pricing (FAR 8.404(d)), <u>except for</u> price evaluation required by 8.405-2(d), which states that when services require a statement of work, the ordering activity is responsible for considering the level of effort and the labor mix proposed to perform a specific task being ordered, and for determining that the total price is reasonable. However, on 13 May 2014, DoD issued a class deviation clarifying that ordering activity contracting officers are responsible for making a determination of fair and reasonable pricing when using Federal Supply Schedules for individual orders. Office of the Under Secretary of Defense-

[33] See FAR 8.404(g)(1) which does require publication of contract actions funded in whole or in part by the American Recovery and Reinvestment Act of 2009. FAR 8.404(g)(2) requires publication when an order is awarded, or a BPA is established, with an estimated value in excess of the SAT, and it is supported by a limited sources justification.

Acquisition, Technology, and Logistics, Class Deviation—Determination of Fair and Reasonable Prices When Using Federal Supply Schedule Contracts, DARS Tracking Number: 2014-O00011 (13 May 2014).

d. NO small business set-asides in accordance with FAR 19.5. FAR 8.405-5. *See* Global Analytic Information Technology Services, Inc., B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53 (Small business set-aside requirements in FAR Part 19 do not apply to FSS Schedules). However, orders placed with small business concerns may still be credited toward an organization's small business goals. FAR 8.405-5(b). Further, activities may consider socio-economic status during competitively awarded orders or BPAs. FAR 8.405-5(c).

e. NO responsibility determination for FSS order. *See* Advance Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 (an ordering agency is not required to make a responsibility determination each time it places a task or delivery order).

f. However, the FAR was amended effective April 2, 2012, that adopted as final, with changes, the interim rule, 76 Fed. Reg. 14548 (Mar. 16, 2011), which implemented a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 to enhance competition in the purchase of supplies and services by all executive agencies under multiple-award contracts. For each purchase of supplies or services in excess of the simplified threshold under a multiple-award contract, the rule requires the provision of fair notice of intent to make a purchase (including a description of the work to be performed and the basis on which the selection will be made) to all contractors offering such supplies or services under the multiple-award contract. [34]

[34] In addition, the rule requires that all contractors responding to the notice be afforded a fair opportunity to make an offer and have that offer fairly considered by the purchasing official. A notice may be provided to fewer than all contractors offering such supplies or services under a multiple-award contract only if the notice is provided to as many contractors as practicable. When notice is provided to fewer than all the contractors, a purchase cannot be made unless: (i) offers were received from at least three qualified contractors; or (ii) a contracting officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so. 76 Fed. Reg. 14548 (Mar. 16, 2011)

B. Ordering under the FSS.

1. **For DoD agencies**, Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 107-107, as implemented by DFARS 208.405-70, requires departments and agencies to review and approve orders placed for supplies or services under non-DoD contracts, whether through direct acquisition or assisted acquisitions, when the amount of the order exceeds the simplified acquisition threshold. Before placing an order against these non-DoD contract vehicles, which include FSS, contracting officers must consider various factors and determine the acquisition is in the best interest of DoD. *See* Director, Defense Procurement and Acquisition Policy (DPAP), memos of 24 Aug 2009 (Interagency Acquisition Update); 25 Apr 2013) (Support Agreements); and (17 June 2005) (Proper Use of Non-DoD Contracts); *see also* Memorandum, Principal Deputy Under Secretary of Defense (Comptroller) & Acting Under Secretary of Defense (Acquisition, Technology & Logistics), Subject: Proper Use of Non-DoD Contracts (Oct. 29, 2004); Memorandum, Assistant Secretary of the Army (Financial Management and Comptroller) & Secretary of the Army (Acquisition, Logistics, and Technology), Subject: Proper Use of Non-Department of Defense (Non-DoD) Contracts (July 12, 2005) (**establishes Army policy for reviewing and use of non-DoD contracts vehicles**). A summary of current Interagency Acquisition Policy and links to many of the memos referenced above can be found at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html. *See also*, DFARS 217.802.

2. 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. Even though GSA has already determined prices to be fair and reasonable, Agencies may always seek additional discounts. FAR 8.404(d).

3. An agency must reasonably ensure that the selection meets its needs by considering reasonably available information about products offered under FSS contracts. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

4. If an agency places an order against an expired FSS contract, it may result in an improper sole-source award. DRS Precision Echo, Inc., B-284080; B-284080.2, Feb. 14, 2000, 2000 CPD ¶ 26.

5. If an agency places an order against an FSS contract, then all items or supplies ordered must be covered by the vendor's FSS contract (no

"off the schedule buys"). Science Appl. Internat'l Corp., B-401773, Nov. 10, 2009, 2009 CPD ¶ 229 (holding agencies could not submit purchase order to FSS vendor when two of six items were not on the FSS contract at the time of the order but were added prior to the delivery date); Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 (Agency can not award to a vendor whose labor categories are outside the scope of its FSS contract); Omniplex World Servs., Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 (BPA improper when the services are not within the scope of the offeror's FSS contract). *See also* FAR 8.402(f), which explains that items not on FSS schedule may be added to FSS orders only if those added items meet all applicable competition and procurement regulations. *See also*, Rapiscan Systems, Inc., B-401773.2, B-401773.3, March 15, 2010 (explaining that the "sole exception to [the FAR 8.402(f)] requirement is for items that do not exceed the micro-purchase threshold of $3,000, since such items properly may be purchased outside the normal competition requirements in any case.").

6. Thresholds.

a. *At or under the micro-purchase threshold (MPT).* Agencies can place an order with any FSS contractor. FAR 8.405-1(b).

b. *Above the micro-purchase threshold, but below the simplified acquisition threshold (SAT).* Procedures vary slightly depending on whether a statement of work is required. *See* FAR 8.405-1 and 8.405-2.

(1) *Orders exceeding the MPT but not exceeding the SAT, and which do NOT require a statement of work (SOW).* FAR 8.405-1(c). Activities shall place the order with the schedule contractor that represents the best value. Before placing orders, the activity shall:

(a) Consider reasonably available information using the "GSA Advantage!" on-line shopping service, by reviewing catalogs/pricelists of at least three schedule contractors, or by requesting quotes from at least three schedule contractors; or

(b) Document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons specified in FAR 8.405-6(a):

(i) An urgent and compelling need exists;

(ii) Only one source is capable of providing the required supplies or services because they are unique or highly specialized; or

(iii) In the interests of economy and efficiency, the new work is a logical follow-on to a previous FSS order. The previous FSS order must have been placed in accordance with proper ordering procedures and must not have been ordered as a sole-source or limited source order.

(2) *Orders exceeding the MPT but not exceeding the SAT, and which DO require a statement of work (SOW).* FAR 8.405-2(c)(2). Activities shall place the order with the schedule contractor that represents the best value. Before placing orders, the activity shall:

(a) Develop a SOW in accordance with FAR 8.405-2(b) (*i.e.*, they shall include: descriptions of work to be performed; deliverables schedules; performance standards; location of work; period of performance; special requirements; and whenever possible, shall be performance-based);

(b) Provide an RFQ to at least three schedule contractors that offer services that will meet or exceed the agency's needs, or document circumstances for restricting consideration based on one of the reasons specified in FAR 8.405-6(a) (urgent and compelling need; only one source capable; logical follow-on); and

(c) Specify the type of order (*i.e.* firm-fixed-price, labor-hour) for the services specified in the SOW. The KO should establish firm-fixed prices, as appropriate.

(3) *Above the simplified acquisition threshold (SAT).* Procedures vary slightly depending on whether a statement of work is required. *See* FAR 8.405-1 and 8.405-2.

(4) *Orders exceeding the SAT and which do NOT require a statement of work (SOW).* FAR 8.405-1(d). Each order

shall be placed on a competitive basis unless a justification is prepared and approved in accordance with FAR 8.405-6.

(a) Activities shall place the order with the schedule contractor that represents the best value and may consider a variety of factors (*see* FAR 8.405-1(f)). Before placing orders, the activity shall:

(i) Post an RFQ on e-Buy to afford all relevant schedule contractors offering the required supplies or services an opportunity to submit a quote; or

(ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research, to reasonably ensure that quotes will be received from at least three contractors. When fewer than three quotes are received, the KO shall prepare a written determination explaining that no additional contractors could be identified despite reasonable efforts to do so.

(b) Activities shall ensure that all quotes received are fairly considered and award is made in accordance with the evaluation criteria set out in the RFQ. The basis for the award decision, and other required aspects of the procurement must be documented in the contract file. FAR 8.405-1(g).

(5) *Orders exceeding the SAT and which DO require a statement of work (SOW).* FAR 8.405-2(c)(3). In addition to the requirements for an order between the MPT and SAT that requires a SOW as stated above, each order above the SAT shall be placed on a competitive basis unless a justification is prepared and approved in accordance with FAR 8.405-6.

(a) Activities shall place the order with the schedule contractor that represents the best value and may consider a variety of factors (*see* FAR 8.405-2(d)). Before placing orders, the activity

shall prepare an RFQ that includes the SOW and evaluation criteria. The activity must then:

(i) Post an RFQ on e-Buy to afford all relevant schedule contractors offering the required supplies or services an opportunity to submit a quote; or

(ii) Provide the RFQ to as many schedule contractors as practicable, consistent with market research, to reasonably ensure that quotes will be received from at least three contractors. When fewer than three quotes are received, the KO shall prepare a written determination explaining that no additional contractors could be identified despite reasonable efforts to do so.

(b) Activities shall ensure that all quotes received are fairly considered and award is made in accordance with the evaluation criteria set out in the RFQ. The basis for the award decision, and other required aspects of the procurement must be documented in the contract file. FAR 8.405-2(f). Note the documentation for this type of order must consider the level of effort and labor mix in order to determine if price is reasonable.

(c) Time and materials and labor hour orders for services require additional determinations and findings. *See* FAR 8.405-2(e) and 8.404(h).

7. Advantages of FSS ordering.

a. Reduce the time of buying.

b. Reduce the cost of buying. Agencies can fill recurring needs while taking advantage of quantity discounts associated with government-wide purchasing.

c. While not protest proof, ordering from a FSS should diminish the chances of a successful protest.

(1) Whether the agency satisfies a requirement through an order placed against a MAS contract/BPA or through an open market purchase from commercial sources is a matter of business judgment that the GAO will not

question unless there is a clear abuse of discretion. AMRAY, Inc., B-210490, Feb. 7, 1983, 83-1 CPD ¶ 135.

(2) An agency may consider administrative costs in deciding whether to proceed with a MAS order, even though it knows it can satisfy requirements at a lower cost through a competitive procurement. Precise Copier Services, B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25.

(3) The GAO will review orders to ensure the choice of a vendor is reasonable. Commercial Drapery Contractors, Inc., B-271222, June 27, 1996, 96-1 CPD ¶ 290 (protest sustained where agency's initial failure to follow proper order procedures resulted in "need" to issue order to higher priced vendor, on the basis it was now the only vendor that could meet delivery schedule).

(4) Section 843 of the 2008 NDAA granted GAO the authority to review bid protests of task or delivery orders over $10 million. This authority was later codified at 41 U.S.C. § 253j(e) (now 41 U.S.C. § 4106(f)) for civilian agencies and 10 U.S.C. § 2304c(e) for DoD. Prior to the enactment of section 843, a protest of a task or delivery order was only authorized on the grounds that the order increased the scope, period, or maximum value of the contract under which the order was issued. As of 2013, only the civilian codification of section 843 contains a sunset provision. The GAO's authority to review bid protests for civilian agencies has been reset to 30 Sep 2016.

d. GSA awards and administers the contract (not the order). Problems with orders should be resolved directly with the contractor. Failing that, complaints concerning deficiencies can be lodged with GSA telephonically (1-800-488-3111) or electronically (through "GSA Advantage!").

8. Disadvantages.

a. Must pay GSA's "service charge" or "Industrial Funding Fee" which funds GSA's costs associated with running the FSS program. Since January 1, 2004 the "Industrial Funding Fee" has been .075 percent. This fee is built into the cost of the

supplies or services procured and is not paid as a separate line item.

b. Agencies cannot order "incidentals" on Federal Supply Schedule orders.

(1) In ATA Defense Industries, Inc., 38 Fed. Cl. 489 (1997), the Court of Federal Claims ruled that "bundling" non-schedule products with schedule products violated the Competition in Contracting Act. The contract in question involved the upgrade of two target ranges at Fort Stewart, Georgia. The non-schedule items amounted to thirty-five percent of the contract value.

(2) Prior to 1999, the GAO allowed incidental purchases of non-schedule items in appropriate circumstances. ViON Corp., B-275063.2, Feb. 4, 1997, 97-1 CPD ¶ 53 (authorizing purchase of various cables, clamps, and controller cards necessary for the operation of CPUs ordered from the schedule).

(3) The GAO has concluded, in light of the COFC's analysis in ATA, that there is no statutory basis for the incidental test it enunciated in ViON. Agencies must comply with regulations governing purchases of non-FSS items, such as those concerning competition requirements, to justify including those items on a FSS delivery order. Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18.

(4) FAR 8.402(f) permits adding "open market items" (i.e. items not on FSS schedule) to FSS orders provided that all other applicable acquisition regulations regarding the non-FSS items have been complied with (publicizing – Part 5; competition – Part 6; commercial item procurement – Part 12; method of procurement – Part 13, 14, or 15; and small business programs – Part 19). Non-FSS items must also be fairly and reasonably priced, must be clearly identified as non-FSS items on the order, and the order must contain all clauses applicable to non-FSS orders. Note that if the amount of non-schedule items does not exceed the micro-purchase threshold, these items may be added (*see* Rapiscan Systems, Inc., B-401773.2, B-401773.3, March 15, 2010 (explaining the "micro-purchase exception") and Section XII.B.5 above.

XIII. CONCLUSION.

APPENDIX A:

PUBLICIZING SYNOPSIS/ SOLICITATION REQUIREMENTS AND SIMPLIFIED ACQUISITION THRESHOLD CHARTS

Publicizing Synopsis/Solicitation and Response Time Requirements[1]

Amount of Acquisition	Non-Commercial Items	Commercial Items
$0 – Micro-purchase Threshold[2]	NA	NA
>$3K - $15K	NA[3]	NA
>$15K - $25K	Post synopsis or solicitation electronically or in public place for at least 10 days, unless soliciting orally (FAR 5.101(a)(2)).[4] If KO posts a synopsis, allow "reasonable opportunity to respond" after issuing solicitation.	Same as >15K - $25K Non-Comm Items
>$25K- $SAT[5]	Synopsize on GPE[6] for 15 days. Then issue solicitation[7] and allow a "reasonable opportunity to respond." (FAR 5.201(b)(1)(i) and 5.203(b).	**Option #1:** Synopsize on GPE for "reasonable period" (can be less than 15 days). Then, issue solicitation and allow "reasonable opportunity to respond" (can be less than 30 days) (FAR 5.203(a)(1), (b), and (c). **Option #2:** Use combined synopsis/solicitation procedure (there is no separate synopsis and solicitation). KO will establish a "reasonable response time." (FAR 5.203(a)(2) and 12.603(a) and (c)(3)(ii).
>$SAT	Synopsize on GPE for 15 days (FAR 5.203(a)). Issue solicitation and allow 30 days to respond (FAR 5.101(a)(1) and 5.203(c)).	Same as $25K - $SAT Comm Items above.

1. "Publicizing" or "notice" requirements are satisfied by posting a synopsis (i.e., summary) of a planned solicitation for the required period and in appropriate locations. The "solicitation response time" is the period starting the first day a solicitation is posted or mailed to potential offerors.
2. Generally the micro-purchase threshold is $3K; for construction it is $2K; for acquisitions subject to the Service Contracts Act it is $2.5K; in support of contingency ops/or NBCR defense it is $15K for inside the U.S. and $30K for outside the U.S.
3. No written solicitations required. Oral solicitations should be used to the "maximum extent practicable." FAR 13.106-1(c).
4. Oral solicitation for requirements estimated between $15K - $25K should be used for non-complex requirements only.
5. "SAT" means "simplified acquisition threshold" under FAR Part 13 – normally $150K. See simplified acquisition threshold chart on page 2.
6. Government-wide Point of Entry (GPE). The GPE is located at www.fedbizops.com.
7. "Issue solicitation" means to publicize it on GPE, or by other electronic means, or to send it to potential offerors.

Simplified Acquisitions Thresholds

	Standard Threshold[1]	Purchases made or contracts awarded and performed *INSIDE* the U.S. in support of "contingency operation" or for NBC defense	Purchases made or contracts awarded and performed *OUTSIDE* the U.S. in support of "contingency operation" or for NBC defense
Micro Purchase	$3,000 [2]	$15K	$30K
Simplified Acquisition[3]	$150K	$300K	$1M[4]
Commercial Item Test Program (CITP)[5]	>$150K and ≤ $6.5M	>$150K and ≤ $12M	>$150K and ≤$12M

1. Technically, the CITP does NOT increase the SAT. The CITP, however, does authorize the use of simplified acquisition procedures for commercial items up to a certain value even though they exceed the SAT.
2. The micro purchase threshold is limited to $2k for construction services subject to the Davis-Bacon Act, and to $2.5k for services subject to the Service Contract Act.
3. These are acquisitions of supplies or services in the amount of $150K or less using simplified acquisition procedures. FAR 2.101. "Simplified acquisition procedures" (SAP) are those described in FAR 13 (i.e., purchase orders, government purchase cards, BPA's, and imprest funds). If using SAP, then acquisitions are exempt from FAR Part 6 (competition) and there is no requirement to achieve "full and open competition." However, sole source acquisitions using SAP must still be justified in writing per FAR 13.501 and approved by a KO or head of procuring activity.
4. A DoD Class Deviation (DARS Tracking Number: 2011-O0009), effective March 28, 2011, raised the Simplified Acquisition Threshold to $300,000 "when soliciting or awarding contracts to be awarded and performed outside the United States, or making purchases outside the United States, for acquisitions of supplies and services that, as determined by the head of the contracting activity, are to be used to support a *humanitarian or peacekeeping operation*, as defined at FAR 2.101" (emphasis added). The Class Deviation has since been incorporated into the definition at DFARS 202.101.
5. CITP allows the use of SAP to purchase commercial item supplies and services for amounts greater than the SAT but not greater than $6.5M, or $12M if in support of contingency operations or to facilitate defense against or recovery from NBCR attack. FAR 13.500(e). Authority for the CITP lapsed on 1 Jan 2012, but was reauthorized by section 822 of the 2013 NDAA. Authority for the program will lapse on 1 Jan 2015, absent Congressional action to re-extend the program or to make it permanent. Curiously, the NDAA provision that reauthorized the program included an effective date of 1 January 2012, which in effect retroactively authorizes the program for all of 2012 (i.e. between the date the authority originally lapsed (1 Jan 2012) and the date the NDAA was signed into law (2 Jan 2013)). Whether this retroactive effect has any practical importance remains to be seen.

APPENDIX B:

Sample GSA Blanket Purchase Agreement Format

SAMPLE BPA FORMAT

BPA NUMBER _____

(CUSTOMER NAME)
BLANKET PURCHASE AGREEMENT

Pursuant to GSA Federal Supply Schedule Contract Number(s)_____ and Federal Acquisition Regulation (FAR) 8.405-3, Blanket Purchase Agreements (BPAs), the Contractor agrees to the following terms of a BPA EXCLUSIVELY WITH ____(*Ordering Agency*)____:

(1) The following contract services/products can be ordered under this BPA. All orders placed against this BPA are subject to the terms and conditions of the contract, except as noted below:

ITEM (Model/Part Number or Type of Service)	SPECIAL BPA DISCOUNT/PRICE
_____	_____
_____	_____

(2) Delivery:

DESTINATION	DELIVERY SCHEDULE/DATES
_____	_____
_____	_____

(3) The Government estimates, but does not guarantee, that the volume of purchases through this agreement will be _____.

(4) This BPA does not obligate any funds.

(5) This BPA expires on _____or at the end of the contract period, whichever is earlier.

(6) The following office(s) is hereby authorized to place orders under this BPA:

OFFICE	POINT OF CONTACT
_____	_____
_____	_____

(7) Orders will be placed against this BPA via Electronic Data Interchange (EDI), FAX, paper, or oral communications.

(8) Unless otherwise agreed to, all deliveries under this BPA must be accompanied by delivery tickets or sales slips that must contain the following information as a minimum:

(a) Name of Contractor;

(b) Contract Number;

(c) BPA Number;

(d) Model Number or National Stock Number (NSN);

(e) Task/Delivery Order Number;

(f) Date of Purchase;

(g) Quantity, Unit Price, and Extension of Each Item (unit prices and extensions need not be shown when incompatible with the use of automated systems; provided, that the invoice is itemized to show the information); and

(h) Date of Shipment.

(9) The requirements of a proper invoice are as specified in the Federal Supply Schedule contract. Invoices will be submitted to the address specified within the task/delivery order transmission issued against this BPA.

(10) The terms and conditions included in this BPA apply to all purchases made pursuant to it. In the event of an inconsistency between the provisions of this BPA and the Contractor's invoice, the provisions of this BPA will take precedence.

Chapter 10
Commercial Item Acquisition

2014 Contract Attorneys Deskbook

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CHAPTER 10

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CHAPTER 10

COMMERCIAL ITEMS

I. INTRODUCTION

Following this block of instruction, the students should:

1. Understand the government's emphasis on purchasing commercial items.

2. Understand the FAR definition of a commercial item.

3. Understand the methods that can be used to acquire commercial items.

4. Understand that the acquisition of commercial items streamlines all contracting methods.

II. REFERENCES

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

2. Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA].

3. Federal Acquisition Regulation (FAR) Part 8, Required Sources of Supplies and Services; FAR Part 12, Acquisition of Commercial Items; FAR Part 13, Simplified Acquisition Procedures.

4. Assistant Secretary of Defense (Command, Control, Communications & Intelligence) and Under Secretary of Defense (Acquisition, Technology & Logistics), COMMERCIAL ITEM ACQUISITIONS: CONSIDERATIONS AND LESSONS LEARNED (June 26, 2000); http://www.acq.osd.mil/dpap/Docs/cotsreport.pdf.

   DOD's Commercial Item Handbook, Version 1.0, November 2001 http://www.acq.osd.mil/dpap/Docs/cihandbooks.pdf (last visited June 13, 2013). *See also* Commercial Item Handbook, Version 2.0 (draft) available at http://www.acq.osd.mil/dpap/cpic/draftcihandbook08012011.docx (last visited June 13, 2014).

III. GENERAL COMMERCIAL ITEMS POLICY.

A. The Federal Government Prefers to Buy Commercial Items.

B. FASA. Title VIII of the Federal Acquisition Streamlining Act of 1994 ("FASA," 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.

C. FAR Part 12. If a supply or service meets the definition of a commercial item, then agencies SHALL use the procedures outlined in FAR Part 12. FAR 12.102(a).

D. Market Research. Agencies shall conduct market research to determine whether commercial items or non-developmental items are available, that can meet the agency's requirements. FAR 12.101(a).

E. Contracts for the acquisition of commercial items are subject to the policies in other parts of the FAR. However, if parts of the FAR conflict, FAR Part 12 takes precedence for the acquisition of commercial items. FAR 12.102(c).

F. Required Sources of Supplies or Services (RSS), FAR Part 8. As with all acquisitions (including the acquisition of Commercial Items), FAR Part 8 provides a priority listing of Required Sources. Prior to executing a commercial items acquisition, agencies must attempt to meet their needs through the Required Sources of Supplies and Services (including commercial items) listed in FAR Part 8.[1]

G. Contracting Officers and Commercial Items Acquisitions. Contracting officers shall use the policies of Part 12 in conjunction with the policies and procedures for solicitation, evaluation, and award prescribed under Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; and Part 15, Contracting by Negotiation as appropriate for the particular acquisition. FAR 12.102(b).

H. Contractors. The Government shall require prime contractors and sub-contractors to incorporate, to the maximum extent practicable, commercial items or non-developmental items as components of items supplied to the agency. FAR 12.101(c).

I. Required Contract Types. FAR 12.207(a). In general, agencies shall use firm-fixed-price (FFP) contracts or fixed price contracts with economic price

[1] *See* Simplified Acquisitions chapter of this desk book for a more detailed explanation of FAR Part 8 and required sources of supply.

adjustments (FP/EPA) for the acquisition of commercial items. *See* Northrop Grumman Technical Services, Inc., B-406523, June 22, 2012, CPD ¶ 197; Northrop Grumman protested the terms of an Air Force solicitation on the grounds that the solicitation unduly restricted competition and deviated from customary commercial practices. The protester argued that the RFP deviated from standard commercial practice by requiring a 90-day transition period and fixed-price CLINs, while excluding an economic price adjustment clause. GAO denied the protest. [2]

1. Award fees and performance or delivery incentives in FFP and FP/EPA contracts are permitted if based solely on factors other than cost. FAR 12.207(d).

2. Indefinite-delivery contracts may be used as specified in FAR 12.207(c) when:

   a. The prices are established based on a FFP or FP with EPA basis, OR

   b. Rates are established for commercial services acquired on a time-and-materials (T&M) or labor-hour (LH) basis.

      (1) Contracting Officers shall, to the maximum extent practicable, also structure the contract to allow issuance of orders on a FFP or FP w/EPA basis.

      (2) Each T&M or LH order requires a Determination & Finding (D&F) as specified at FAR 12.207(b).

      (3) If the ID/IQ only allows for T&M or LH orders, a D&F is required to support why providing for an alternative FFP or FP w/EPA pricing structure is not practicable. The D&F shall be approved one level above the contracting officer. *See infra*, III.A.3. and FAR 12.207(b)(2) for detailed guidance on specific D&F requirements.

3. A T&M or LH contract may be used as specified in FAR 12.207(b), but only when several criteria are met.

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[2] Although the protester argued that some RFI respondents had suggested using a time-and-materials CLIN, government policy disfavors this acquisition approach unless no other contract type is suitable. In this case, Northrop Grumman failed to show that a fixed-price CLIN was unsuitable under the circumstances. GAO also rejected Northrop Grumman's argument that the RFP was flawed because it is standard commercial practice to fix prices for one year and include an economic price adjustment for later years. GAO stated that an agency's decision regarding whether or not to include an economic price adjustment clause is reviewed only where it is shown to be arbitrary and capricious. Moreover, although the FAR favors the use of these clauses, they are not mandatory. Given that the agency's market research informed its formation of the RFP, GAO found that exclusion of an economic price adjustment clause did not violate commercial practice.

a. Among these criteria, the contracting officer must execute a determinations and findings (D&F) document certifying that no other contract type is suitable for the requirements, the contract or task order must include a ceiling price that the contractor exceeds at its own risk, and that ceiling price cannot be increased unless the contracting officer executes another D&F establishing that the change is in the best interest of the procuring agency. FAR 12.207(b)(ii).

b. Congress further restricted DoD's use of T&M or LH contracts in §805 of the NDAA for FY2008 (Pub. L. 110-181). DFARS 212.207 implements these restrictions by limiting use of these contract types to <u>only</u> the following:

(1) Services acquired for support of commercial items, as described in paragraph (5) of the definition of commercial item at FAR 2.101 (installation, maintenance, repair, and training services related to other commercial items).

(2) Emergency Repair Services.

(3) Any other commercial services only to the extent that the Head of the Agency approves a written D&F finding that:

(a) The services are commercial services as defined in paragraph (6) of the commercial item definition;

(b) The offeror has submitted sufficient information[3] for the contracting officer to comply with FAR 15.403-1(c)(3)(ii);

(c) Such services are commonly sold to the general public through use of T&M and LH; and

(d) The use of a T&M and LH type contract is in the best interest of the government. *See* DFARS 212.207(b).

[3] FAR 15.403-1(c)(3) outlines a general exception for cost and pricing data if supplies or services meet the definition of "Commercial Item" prescribed in FAR 2.101. However, legislative changes have eroded this general exception for commercial items, particularly for those items that are not sold in substantial quantities in the commercial market place and items that include "minor" modifications. In both cases, cost and pricing data may in fact be required to aid the contracting officer in a determination of price reasonableness.

IV. DEFINITIONS

41 U.S.C. § 103; FAR 2.101.

A. General. The definition of "commercial item" at FAR 2.101 includes both supplies and services. To aid understanding, section IV. B describes items, and section IV.C. below, describes services. Note that FAR 12.102(f) expands the definition of "commercial items" at FAR 2.101 to include certain supplies or services related to defense or recovery from nuclear, biological, chemical, or radiological attack. FAR 12.102(g) expands the definition of "commercial items" even further, to include certain performance-based services.

B. Commercial Items. *See* FAR 2.101.

1. Any item, other than real property, that is of a type[4] customarily used by the general public or by non-governmental entities for purposes other than governmental purposes; and:

   a. Has been sold, leased, or licensed to the general public; or

   b. Has been offered for sale, lease, or license to the general public. *See* Matter of Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 (actual sale or license to general public not required for commercial item classification; determination of commercial item status is discretionary agency decision).

2. Any item that evolved from an item described in subsection 1 of this section (above) through advances in technology or performance and is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements specified in the Government solicitation.

   a. Any item that would satisfy a criterion expressed in subsection 1 and/or 2 of this section (above) but for:

[4] There has been a great deal of criticism regarding the language "of a type." Many critics argue that this language is too broad and allows the government to procure various goods and services that are in no way "commercial." Critics contend that broadening the scope of commercial items undercuts the ability of contracting officers to assess price reasonableness since commercial item acquisitions are generally exempt from the requirements to submit cost and pricing data (*see* note 3 *supra*). Further, these questionable commercial items are not truly subject to the forces of a competitive market place, and as such, the government is likely to overpay for these items. The 2007 Report of the Acquisition Advisory Panel (available at https://www.acquisition.gov/comp/aap/documents/Chapter1.pdf) in fact, recommended that the "definition of standalone commercial services in FAR 2.101 should be amended to delete the phrase 'of a type' in the first sentence of the definition." Recent attempts to revise the definition to address the concerns related to "of a type" commercial items have failed. It remains to be seen whether Congress will amend the current definition.

b. Modifications of a type customarily available in the commercial marketplace. *See* NABCO, Inc., B-293027, B-293027.2, Jan. 15, 2004, 2004 CPD ¶ 15 (protest denied where solicitation required door modification on proposed commercial item explosive ordinance disposal containment vessel was made previously available to awardee's other commercial customers, therefore meeting the definition's "of a type" requirement).

c. Minor modifications of a type not customarily available in the commercial marketplace made to meet federal government requirements.[5]

(1) "Minor" modifications are modifications that do not significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process. Matter of Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 (combining commercial hardware with commercial software in new configuration, never before offered, did not alter "non-governmental function or essential physical characteristics").

(2) Factors to be considered in determining whether a modification is minor include the value and size of the modification, and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor.[6]

3. Any combination of items meeting the criteria expressed in subsections (1), (2), or (3) above, that are of a type customarily combined and sold in combination to the general public.

4. A non-developmental item (NDI), 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. Non-developmental items include:

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[5] Modifications of this type may require the submission of cost and pricing data if the acquisition is funded by DoD, NASA, or the Coast Guard, and the cost of the modification exceeds specified thresholds or percentages. *See* FAR 15.403-1(c)(3)(iii).

[6] *See, e.g.*, DoD IG Report D-2004-064, Acquisition of the Boeing KC-767A Tanker Aircraft, Mar. 29, 2004, for an example of the analysis and potential controversy that may arise as a result of classifying a modification as a "minor modification of a type not customarily available in the commercial marketplace" (available at http://www.dodig.mil/audit/reports/fy04/04-064.pdf).

a. Any previously developed item of supply used exclusively for governmental purposes by a federal agency, a state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement; (See Matter of: Avtron Manufacturing, Inc. B-280758, (Nov. 16, 1998); (see Matter of: Trimble Navigation, Ltd. B-271882; B-271882.2 Aug. 1996) or

b. Any item described in paragraph a. above that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; (See Lucent Technologies World Services Inc., Mar. 2005) (With regard to the definition of NDI, the parties agree that the TETRA devices are commercial items, in that they are sold commercially. The parties dispute, however, whether the TETRA devices are NDI, as that term is used in the FAR.) or

c. Any item of supply being produced that does not meet the requirements of paragraph a. or b. above solely because the item is not yet in use. Trimble Navigation, Ltd., B-271882, August 26, 1996, 96-2 CPD ¶ 102 (award improper where awardee offered a GPS receiver that required major design and development work to meet a material requirement of the solicitation that the receiver be a NDI).

d. **DFARS Case 2011-D03, *Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items* (DFARS Case 2011D034)**, Final rule, 77 Fed. Reg. 2653, January 19, 2012. DoD adopted as final, without change, an interim rule amending the DFARS establishing a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with streamlined procedures. [7]

e. **DFARS Case 2014-D007, Defense Federal Acquisition Regulation Supplement: Extension of Pilot Program on**

[7] Under the pilot program, DoD may enter into contracts with nontraditional defense contractors for the purpose of: enabling DoD to acquire items that otherwise might not have been available to DoD; assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and, protecting the interests of the United States in paying fair and reasonable prices for the items or items acquired. The purpose is to test whether streamlined procedures similar to those available for Commercial Items, can be an effective incentive for nontraditional contractors to channel investment and innovation into areas useful to DoD and provide items developed exclusively at private expense to meet validated military requirements. There is a statutory definition of the term nontraditional contractor at 10 U.S.C. 2302, which outlines the criteria that must be met by a prospective contractor to be eligible for the pilot program, and includes the criterion that the entity may not be currently performing, or has performed, "any contract or subcontracts" for DoD subject to full coverage under the cost accounting standards.

Acquisition of Military-Purpose Nondevelopmental Items (DFARS Case 2014-D007). Amends DFARS 212.7102-3 to implement section 866 of the NDAA for Fiscal Year 2014 by extending expiration date of the pilot program for acquisition of military-purpose nondevelopmental items from January 6, 2016, to December 31, 2019.

C. Commercial Services Defined as Commercial Items.

1. Definition. There are several types of services that qualify as commercial items.

a. Installation services, maintenance services, repair services, training services, and other services, IF

(1) Those services are procured for support of an item (other than real property and NDI's) that otherwise meets the definition of a commercial item (see above). It does not matter whether the services are provided by the same source or at the same time as the item;

AND

(2) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government. FAR 2.101 (See Sletager, Inc., B-237676, 90-1 CPD ¶ 298 at 3, Mar. 15, 1990 (finding painting and surface preparation services can be a commercial item because they are sold to the general public in the course of normal business operations based on market prices).

b. 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 or specific outcomes to be achieved and under standard commercial terms and conditions.

(1) This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. *See* Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474 (1999) (holding there was no market price for radioactive waste disposal services).

(2) "Catalog price" means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public.

(3) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

2. When purchasing services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are **of a type** offered and sold competitively in substantial quantities in the commercial marketplace, **they may be considered commercial items ONLY** if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services. FAR 15.403-1(c)(3)(ii); Section 868, Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, Pub. L. 110-417, 14 Oct 2008. *See* Contract Pricing outline for more information on how contracting officers are to make this determination

3. The exception for performance-based services contract expired November 24, 2013.[8]

D. Nuclear, Biological, Chemical, or Radiological Defense or Attack. Per FAR 12.102(f), in addition to the definitions of commercial items and commercial services above, contracting officers may treat **any** acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items. *See* FAR 12.102(f)(2) for limitations.

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[8] 41 U.S.C. 2310 as implemented in FAR 12.102(g), authorized commercial item treatment for a services contract or a task order for the procurement of non-commercial services if the action:
i. Is entered into on or before November 24, 2013;
ii. Has a value of $29.5 million or less;
iii. Meets the definition of performance-based acquisition at FAR 2.101;
iv. Uses a quality assurance surveillance plan;
v. Includes performance incentives where appropriate;
vi. Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and
vii. Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

E. Over-Reliance on Commercial Items Definition – Documentation Requirement.

1. On September 29, 2006, the DoD Office of the Inspector (IG) general issued a reported criticizing the DoD's reliance on the very broad definition of "commercial item" to purchase defense systems. Among the many identified problems, the IG found that contracting officers were not adequately justifying the commercial nature of their contracts. U.S. Dep't of Def., Off. Of the Inspector Gen., D-2006-115, Commercial Contracting for the Acquisition of Defense Systems (Sept. 29, 2006).

2. In response to this finding, the Office of Defense Procurement and Acquisition Policy (DPAP) issued a memorandum directing that contracting officers shall document in writing their determinations that the commercial items definition has been met for all acquisition using FAR Part 12 that exceed $1 million. Memorandum, Director, Defense Procurement and Acquisition Policy, Subject: Commercial Item Determination (Mar. 2, 2007).

3. DoD issued a final rule amending the DFARS to require approval by one level above the contracting officer for commercial item determinations for acquisitions exceeding $1 million when the determination is based on "of a type" or "offered for sale" language in the definition of commercial items in FAR 2.101. The rule also clarifies approval requirements for determinations for acquisitions of services exceeding $1 million using FAR Part 12 procedures but which do not meet the definition of services covered in the definition of commercial items. 77 Fed. Reg. 14480 (Mar. 12, 2012).

4. DFARS 212.102 was updated effective 12 March 2012. The updated section strengthens the requirement to document in writing, a determination that an item or service in excess of $1 million meets the commercial item definition. In particular, it now specifically requires such determinations that rely on subsections (1)(ii) ["offered for sale"], (3) ["minor modifications"], (4)[items that when combined meet other aspects of the definition], and (6)[services of a type offered for sale"], of the commercial items definition in FAR 2.101, to be approved at one level above the contracting officer. This requirement is now implemented through DFARS 212.102 and DoD PGI 212.102.

5. **New Construction is generally NOT a Commercial Item**. The Administrator of the Office of Federal Procurement Policy issued a July 3, 2003 memorandum indicating commercial item acquisition policies in FAR Part 12 "*should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services*." See Appendix A. FAR Part 12 lacks clauses for handling

critical circumstances common to construction efforts, especially those involving new construction or non-routine alteration and repair services. Agencies are reminded that when they proceed with a construction acquisition under *either* Part 36 or Part 12, they must adhere to the policies of FAR Subpart 22.4.

F. Commercially Available Off-the-Shelf Item (COTS). A COTS item is a commercial item that has not been modified in any way from its commercial design when it is sold to the government. FAR 2.101. In effect, COTS are a subset of commercial items in that they are:

1. A commercial item of supply;

2. Sold in substantial quantities in the commercial marketplace; and

3. Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. See Chant Engineering Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 ("[n]ew equipment like Chant's proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment.").

G. Component. Any item supplied to the federal government as part of an end item or of another component. FAR 2.101.

V. COMMERCIAL ITEM TEST PROGRAM (CITP)

A. Authority

1. Congress created CITP to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). *See also* American Eurocopter Corporation, B-283700, Dec. 16, 1999, 1999 U.S. Comp. Gen. LEXIS 222 (agency used authority of FAR 13.5 to purchase a Bell Helicopter).

2. The CITP is located in FAR 13.5 – Test Program for Certain Commercial Items. For the period of the test, contracting activities must use simplified acquisition procedures to the maximum extent practicable when purchasing supplies or services that meet the commercial items definition. FAR 13.500(b).

3. Congress created the authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and

services[9] for amounts greater than the simplified acquisition threshold but not greater than $6,500,000. FAR 13.500(a).

4. For a **contingency operation** or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the $6,500,000 commercial item test program threshold is **$12,000,000**.

5. For Fiscal Year 2012, Congress did not renew and extend the CITP, allowing the sunset provision to go into effect on 1 January 2012 and effectively eliminating the CITP as a tool in Contracting Officers' toolboxes.

6. However, Congress included a renewal and extension of the CITP in the FY 2013 NDAA, which was signed into law by the President on 2 January 2013. Section 821 of the FY 2013 NDAA renewed the CITP while including a new sunset provision for 1 January 2015, unless otherwise renewed or extended.

7. The CITP can be found at FAR 13.5.

B. Contract File Documentation Requirements for Commercial Items Acquisitions. In addition to other documentation requirements outlined in FAR Part 13 and FAR 13.501(b requires that the contract file shall include:

1. A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR 13.5 were used;

2. The number of offers received;

3. An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and

4. Any approved justification to conduct a sole-source acquisition. *See* FAR 13.501(a) below.

5. A fully and adequately documented market research and rationale to support a conclusion that the solicitation is for a commercial item, as defined in FAR 2.101. Particular care must be taken to document determinations involving:

a. "Modifications of a type customarily available in the marketplace," and

[9] National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 4202(a)(1)(A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5.

b. Items only "offered for sale, lease, or license to the general public," but not yet actually sold, leased, or licenses to the general public. DoD PGI 212.102.

C. Justification & Approval Requirements for "Sole Source" or Brand Name Commercial Items Acquisitions.

1. Sole Source Policy. Acquisitions conducted under simplified acquisition procedures are exempt from the competition requirements of FAR Part 6. Contracting officers, however, shall not conduct sole source acquisitions, as defined in FAR 6.003, unless the need to do so is justified in writing and approved at the levels specified in FAR 13.501(a).

a. A Justification & Approval (J&A) is required for brand name acquisitions of commercial items. FAR 13.501(a). The requirements are the same as for sole source acquisitions (discussed above).

b. Kindgomware Technologies, B-407757, Jan. 31, 2013 (finding that VA's limited source justification was reasonable where the agency adequately documented its need for emergency communication software that performed a number of required functions and was compatible with a system used by the Navy).

c. American Eurocopter Corporation, B-283700, Dec. 16, 1999 (finding that DOE was reasonable in restricting a commercial item competition to a specific make and model of helicopter, where, given the nature of the agency's flight mission and its organization, standardization of the agency's fleet was necessary for safety reasons.)

2. Documentation requirements when conducting a Sole Source Commercial Items Acquisition:

a. For a proposed contract exceeding $150,000, but not exceeding $650,000, the contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in agency procedures.

b. For a proposed contract exceeding $650,000 but not exceeding $12.5 million, the approval authority is the competition advocate for the procuring activity, the head of the procuring activity, or a designee who is a general or flag officer, a civilian serving in a grade above GS-15, or the senior

procurement executive of the agency. This authority is not delegable further.

c. For amounts greater than $12.5 million, but not exceeding $62.5 million, (See FAR 13.501, (a) & (b), or for DoD, NASA, and the Coast Guard, not exceeding $85.5 million, the head of the procuring activity or the official described in 6.304(a)(3) or (a)(4) must approve the justification and approval. This authority is not delegable.

d. For a proposed contract exceeding $62.5 million, or, for DoD, NASA, and the Coast Guard, $85.5 million, the official described in 6.304(a)(4) must approve the justification and approval. This authority is not delegable except as provided in 6.304(a)(4).

e. Contracts file documentation. The contract file must include -- (1) A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR subpart 13.5 were used; (2) The number of offers received; (3) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and (4) Any justification approved under paragraph (a) of this section.

VI. COMPETITION PROCEDURES.

A. Streamlined Solicitation of Commercial Items. Streamlined procedures allow the contracting officer to expedite[10] the acquisition process of preparing and issuing solicitations and evaluating offers when purchasing commercial items. FAR 12.601.

[10] A November 24, 2010 DPAP memo (Improving Competition in Defense Procurements) and an April 27, 2011 memo amplifying the original memo, lays out additional requirements in certain cases *above the SAT* when only one offer is received. The guidance applies to "all competitive procurements of supplies and services above the SAT including commercial items and construction." Specifically, it covers procurements conducted under FAR parts/subparts 8.4 (Federal Supply Schedules), 12 (Commercial Items), 13.5 (Commercial Items Test Program), 14 (Sealed Bidding), 15 (Contracting by Negotiation), and 16.5 (Indefinite Delivery Contracts). The memos provide that: unless an exception applies or a waiver is granted: [1] if the solicitation was advertised for fewer than 30 days and only one offer is received, then the contracting officer shall cancel the solicitation and resolicit for an additional period of at least 30 days; or [2] if a solicitation allowed at least 30 days for receipt of offers and only one offer was received, then the contracting officer shall not depend on the standard at FAR 15.403-1(c)(1)(ii) (expectation of adequate price competition) in determining price to be fair and reasonable, instead using FAR 15.404-1 (price and cost analysis) to make that determination. Authority to waive this requirement has been delegated to the HCA, and can be further delegated no lower than one level above the contracting officer. Memos *available at* http://www.acq.osd.mil/dpap/policy/policyvault/USA002080-11-DPAP.pdf.

1. 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,

2. Use a combined synopsis/solicitation procedure under FAR 12.603.

   (1) The combined synopsis/solicitation is only appropriate where the solicitation is relatively simple. It is not recommended for use when lengthy addenda to the solicitation are necessary.

   (2) Do not use the Standard Form 1449 when issuing the solicitation.

   (3) Amendments to the solicitation are published in the same manner as the initial synopsis/solicitation. FAR 12.603(c)(4).

3. Response time. FAR 5.203(b).

   a. The contracting officer shall establish a solicitation response time that affords potential offerors a <u>reasonable opportunity to respond</u> to commercial item acquisitions. *See* <u>American Artisan Productions, Inc</u>., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable); <u>GIBBCO LLC</u>, B-401890, Dec. 14, 2009 (finding 22 day response period reasonable)

   b. The contracting officer should consider the circumstances of the individual acquisition, such as its complexity, commerciality, availability, and urgency, when establishing the solicitation response time.

B. <u>Streamlined Evaluation of Offers. FAR 12.602</u>

1. When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at FAR 52.212-2, Evaluation-Commercial Items in solicitations for 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. When using Part 13 procedures in conjunction with Part 12, contracting officers are not required to describe the relative importance of evaluation factors.

   a. For many commercial items, proper evaluation will only require consideration of an item's technical capability (the ability of the item to meet the agency's need), price, and past performance.

(1) Technical capability may be evaluated by how well the proposed product meets the Government requirement instead of predetermined subfactors.

(2) A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features, and warranty provisions.

b. Past performance shall be evaluated in accordance with the procedures in FAR 13.106 or subpart 15.3, as applicable.

C. Award. Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered. FAR 12.602(c).

1. Universal Building Maintenance, Inc., B-282456, July 15, 1999, 99-2 CPD § 32 (GSA failed to document its source selection decision; failed to conduct a proper cost/technical tradeoff in selecting the awardee's proposal; and improperly attributed the past performance of the awardee's parent company to the awardee, since the record did not establish that the parent company would be involved in the performance of the contract).[11]

2. Midland Supply, Inc., B298720; B-298720.2, Nov. 29, 2006 (protest sustained by GAO under a best value procurement where selection of lower technically rated, lower-priced proposal was determined to be improper where the record showed that the selection decision was based on a mechanical comparison of offerors' total point scores and lacked any documentation indicating that a price/technical tradeoff was made.)

3. Reverse Auctions. Reverse auctions[12] 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.

4. Commercial item acquisitions lend themselves to reverse auctions because technical information is not needed unless the contracting officer deems it necessary. Even in those instances, existing product literature may suffice.

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[11] *See also*: Tiger Enterprises, Inc., B-293951, July 26, 2004; Checchi and Co. Consulting, Inc. , B-285777, Oct. 10, 2000, 2001 CPD 132 at 6; Matrix Intl Logistics, Inc., B-272388, B-272388.2, Dec. 9, 1996, 97-2 CPD 89 at 5

[12] *See also*, discussion of Reverse Auctions in the Simplified Acquisitions Chapter of this Desk Book.

5. Commercial item acquisitions lend themselves to reverse auctions because the contracting officer has only to ensure that an offeror's product is generally suitable for agency needs and that the offeror's past performance indicates that the offeror is a responsible source.

VII. CONTRACT CLAUSES FOR COMMERCIAL ITEMS

A. FAR 12.301 -- Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items. (a) In accordance with 41 U.S.C. 3307 contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses -- (1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) Determined to be consistent with customary commercial practice.

1. 52.212-1 Instructions to Offerors -- Commercial Items. This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard. Use the provision with its Alternate II in solicitations for acquisitions for which small disadvantaged business procurement mechanisms are authorized on a regional basis.

2. Evaluation Factors: The contracting officer can use 52.212-2 Evaluation – Commercial items, which is as provision that provides a list of evaluation factors and is a fill-in format for evaluation factors for the acquisition of commercial items; OR the contracting officer may include a similar provision containing all evaluation factors required by 13.106, Subpart 14.2 or Subpart 15.3, as an addendum (see 12.302(d)).

a. See Also DFARS 212.602 Streamlined evaluation of offers**.** (b)(i) For the acquisition of transportation and transportation-related services, also consider evaluating offers in accordance with the criteria at 247.206(1). (ii) For the acquisition of transportation in supply contracts that will include a significant requirement for transportation of items outside the contiguous United States, also evaluate offers in accordance with the criterion at 247.301-71. (iii) For the direct purchase of ocean transportation services, also evaluate offers in accordance with the criteria at 247.573-2(c).

b. The Contracting Officer has tremendous discretion to identify and include significant evaluation factors, such as: Technical capability of the item offered to meet the Government's

requirement/s; price; past performance (see FAR 15.304); small disadvantaged business participation; and include them in the relative order of importance of the evaluation factors, such as in descending order of importance.

c. A written notice of award or acceptance of an offer.

3. 52.212-3 -- Offeror Representations and Certifications -- *Commercial Items.* This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard.

   a. DFAR 212.301,(ii) -- Commercial Items, in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.7603), indicate on an addendum that "The certification in paragraph (b) of the provision at 252.212-7000 does not apply to this solicitation."

   b. DFAR 212.301, (iii) Use the clause at 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

4. 52.212-4 – Contract Terms and Conditions – Commercial Items. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference (see Block 27, SF 1449). Use this clause with its Alternate I when a time-and-materials or labor-hour contract will be awarded. The contracting officer may tailor this clause in accordance with 12.302.

5. 52.212-5-- Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items. This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212-5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as

directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

6. Tailoring of provisions and clauses. Before a contracting officer tailors a clause or includes a term or condition that is inconsistent with customary commercial practice for the acquisition, he must obtain a waiver under agency procedures. FAR 12.302(c). The request for waiver must describe the customary practice, support the need to include the inconsistent term, and include a determination that use of the customary practice is inconsistent with the government's needs. A waiver can be requested for an individual or class of contracts for an item. For DoD, the Head of the Contracting Activity is the approval authority for waivers under FAR 12.302(c). DFARS 212.302(c).

   a. Tailoring shall be executed by adding an addendum to both the solicitation and the contract. See FAR 12.302(d); see also Diebold, Inc., B-404823, June 2, 2011 ("a contracting officer exercising the authority to change the terms and conditions must do so in manner that gives all offerrors an equal opportunity to compete by publishing the tailored clauses in the initial solicitation's addenda or by providing an amendment to the solicitation to include revised terms and conditions").

   b. Certain clauses of FAR 52.212-4 implement statutory requirements and shall not be tailored by the contracting officer include: Assignments Clause, Disputes Clause Payment Clause, Invoices Clause, Other Compliances Clause, and Compliance with laws unique to Government contracts Clause. See Smelkinson Sysco Food Services, B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 (protest sustained where agency failed to conduct market research before incorporating an "interorganizational transfers clause"). 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).[13] See, CW Government Travel, Inc. v. U.S. and Concur Technologies, No. 11-298C, (Fed. Cl., 2011) (holding that the government's insistence on a fixed, 15-year pricing schedule was inconsistent with customary commercial practice, was in violation of FAR 12.301(a), and was unsupported by market research).

[13] DFARS 212.301(f) lists numerous provisions and clauses unique to DoD solicitations and contracts for the acquisition of commercial items.

c. **See Also DFARS 212.302** - *Tailoring inconsistent with customary commercial practice*. The head of the contracting activity is the approval authority within the DoD for waivers under FAR 12.302(c).

B. Use of DFARs clauses for Commercial Items.

a. DFARS 212.301[14] has several clauses and provisions that the contracting officer shall consider.

b. When using FAR part 12 procedures for acquisitions exceeding $1 million in value, except for acquisitions made pursuant to FAR 12.102(f)(1), the contracting officer **shall**— (A) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101 or meets the criteria at FAR 12.102(g)(1); (B) Include the written determination in the contract file; and (C) Obtain approval at one level above the contracting officer when a commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the "commercial item" definition at FAR 2.101. (ii) Follow the procedures at PGI 212.102(a) regarding file documentation. (See DFAR 212.102)

c.

VIII. UNIQUE TERMS AND CONDITIONS FOR COMMERCIAL ITEMS.

A. Acceptance FAR 12.402; FAR 52.212-4.

1. Generally, the government relies on a contractor's assurance that commercial items conform to contract requirements. The government always retains right to reject nonconforming items.

2. Other acceptance procedures may be appropriate for the acquisition of complex commercial items, or items used in critical applications. The contracting officer should include alternative inspection procedures in an addendum to the SF 1449, and must examine closely the terms of any express warranty.

[14] See DoD Class Deviation 2013-O0019, Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System, issued September 25, 2013. This class deviation allows the contracting officer to use the SPS clause logic capability to automatically select the clauses that are applicable to the specific solicitation and contract. The contracting officer shall ensure that the deviation clause is incorporated into these solicitations and contracts because the deviation clause fulfills the statutory requirements on auditing and subcontract clauses applicable to commercial items. The deviation also authorizes adjustments to the deviation clause required by future changes to the clause at 52.212-5 that are published in the FAR. This deviation is effective for five years, or until otherwise rescinded.

B. Termination.[15]

1. FAR Clause 52.212-4, Contract Terms and Conditions - Commercial Items, permits government termination of a commercial items contract either for convenience of the government or for cause. *See* FAR 12.403(c)-(d).

2. This clause contains termination concepts different from the standard FAR Part 49 termination clauses.

   a. Contracting officers may use FAR Part 49 as guidance to the extent Part 49 does not conflict with FAR Part 12 and the termination language in FAR 52.212-4.

   b. AFARS 5112.403 - **5112.403 Termination** Submit PGI 212.403 reports no later than 10 calendar days after issuance of any notice of termination for cause or default, to the Army Contracting and Transformation Enterprise Systems Directorate , SAAL-PX, at the address included in 5101.290(b)(5). Electronic submissions are authorized.

C. Warranties. The government's post-award rights contained in 52.212-4 include the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. FAR 12.404 provides guidance for both implied warranties[16] and express warranties.

1. Implied warranty of merchantability. Provides that an item is reasonably fit for the ordinary purposes for which such items are used.

2. Implied Warranty of Fitness for a Particular Purpose. Provides that an item is fit for use for the particular purpose for which the government will use the item. The seller must know the purpose for which the government will use the item, and the government must have relied upon the contractor's skill and judgment that the item would be appropriate for that purpose.

3. Express warranties. Contracting officers are required to take advantage of commercial warranties.

   a. Solicitations shall require offerors to offer the government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.

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[15] *See* the Termination for Default and Termination for Convenience Chapters of this Desk Book for more information. Also note that termination for default of a commercial contract are called Terminations for Cause.
[16] FAR 12.404(a)(3) directs contracting officers to consult with legal counsel prior to asserting any claim for breach of an implied warranty.

b. Solicitations may specify minimum warranty terms.

c. Express warranties the Government intends to rely on must meet the needs of the Government and therefore should be analyzed by the contracting officer for adequacy of coverage (e.g. scope of coverage and length of warranty), effectiveness of post-award administration, and cost effectiveness.

D. Contract Financing. If customary market practice includes buyer contract financing, the contracting officer may offer government financing IAW FAR Part 32. FAR 12.210.

E. Technical Data. FAR Part 27. *See* the Intellectual Property Outline for more information.

1. "Technical Data" means recorded information of a scientific or technical nature (including computer databases and computer software documentation). This term does **not** include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. It includes recorded information of scientific or technical nature that is included in computer databases. FAR 2.101

2. Policy. The government shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. FAR 12.211.[17]

a. The contracting officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. *Id*. By statute, Congress has established the presumption that commercial items are developed at private expense. 10 USC 2320(b)(1).

b. DFAR 212.7003 -- **Technical data and computer software.** For purposes of establishing delivery requirements and license rights for technical data under 227.7102 and for computer software under 227.7202, there shall be a rebuttable presumption that items or processes acquired under a contract or subcontract awarded in accordance with 212.7002 were developed in part with Federal funds and in part at private expense (i.e., mixed funding)

c. The Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics puts out a very helpful pamphlet on intellectual property entitled, "Intellectual Property: Navigating Through Commercial Waters." *See*

[17] *See* DFARS 227.7102 and 212.211 for DoD policy for acquiring technical data for commercial items.

http://www.acq.osd.mil/dpap/specificpolicy/intelprop.pdf (last visited June 2014).

F. Commercial Computer Software[18]

1. Definition. Any computer software that is a commercial item. FAR 2.101.

2. Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the government's needs. FAR 12.212(a).

IX. INFORMATION TECHNOLOGY.

A. References.

1. Clinger-Cohen Act of 1996 (formerly called Information Technology Management Reform Act (ITMRA)), 40 U.S.C. § 1401

2. Sec 803 of the Duncan Hunter National Defense Authorization Act of Fiscal Year 2009 (Pub. L. 110-417), Oct. 14, 2008.

3. FAR Part 39, Acquisition of Information Technology; FAR Part 27, Patents, Data, and Copyrights

4. OMB Circular No. A-127, Financial Management Systems.

5. OMB circular No. A-130, Management of Federal Information Resources (Nov. 28, 2000).

6. OMB Memo, Software Acquisition, July 1, 2004.

7. OMB SmartBUY Policy, 2003-16, "Reducing Cost and Improving Quality in Federal Purchases of Commercial Software," Jun 5, 2003.

8. Department of Defense Directive (DODD) 8000.01, Management of the Department of Defense Information Enterprise, Feb. 10, 2009 (note the Feb. 2002 version is canceled);

9. DODD 5144.1, Asst. Sec. of Def. for Networks and Information Integration/DoD Chief Information Officer (ASD(NII)/DoD CIO), May 2, 2005;

10. DODD 5000.01, The Defense Acquisition System, May 12, 2003.

[18] *See*, Intellectual Property Chapter of this Desk Book for more information.

11. Department of Defense Instruction (DODI) 4630.8, Procedures for Interoperability and Supportability of Information Technology (IT) and National Security Systems (NSS), June 30, 2004;

12. DoDI 5000.02, Operation of the Defense Acquisition System, Dec. 8, 2008.

13. Note: DoDD 8100.01, Global Information Grid (GIG) Overarching Policy, (Sept. 19, 2000) is CANCELED.

14. Assistance Secretary of the Defense (ASD) Memo, DOD Chief Information Officer (CIO) Guidance and Policy Memorandum – Acquiring Commercially Available Software, July 26, 2000. See Memo at http://www.esi.mil (resource library; policy corner).

15. ASD Memo, DoD support for the Smart BUY Initiative, Dec. 22, 2005 (SmartBUY is a government-wide enterprise software initiative led by OMB to streamline the acquisition process and provide best priced, standards-compliant commercial software).

16. DFARS 239, Acquisition of Information Technology; DFARS 208.74, Enterprise Software Agreements; DoD Procedures, Guidance and Information (PGI) 208.7403; DFARS 212.212, Special Requirements for Acquisition of Commercial Items.

17. Army Regulations 25-1, Army Knowledge Management and Information Technology, 4 Dec 2008; Department of the Army Pamphlet 25-1-1, Information Technology Support and Services, 25 October 2006; the Army's Computer Hardware Enterprise Software and Solutions (CHESS) website contains a wealth of information and should be checked for the most up to date references, https://chess.army.mil (last visited June 2013).

18. DA Memo, Enterprise Software Agreements, Dec. 29, 2006.

19. 40 U.S.C. §11302; 10 USC §2223 and §2224; 29 USC §794d;

B. Definition: Information Technology means any equipment or interconnected system(s) or sub-system(s) of equipment that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency. FAR 2.101.

1. For purposes of this definition, equipment is used by an agency if it is used by the agency directly or is used by a contractor under a contract with the agency that requires its use or to a significant extent, its use in the performance of a service, or in the furnishing of a product.

2. It includes computers, ancillary equipment (including peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.

3. It does not include any equipment that is acquired by a contractor incidental to a contract; or that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment, such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology. FAR 2.101.

4. Information technology includes financial management systems. FAR 39.000(a).

C. Overview. There are numerous statutes, rules and policy memos for buying Information Technology that vary by agency and by service. This guidance changes often, so you will need to check the most current guidance. Close communications with technical experts, staff sections (G-6), and end-users, is especially important in this area. The general framework is listed below.

1. The Director of the Office of Management and Budget (OMB) is statutorily responsible for promoting and improving the acquisition, use, security, and disposal of IT by the federal government. The Director also designates one or more heads of executive agencies as the executive agent for government-wide acquisitions of information technology. 40 U.S.C. 11302.

a. SmartBUY Initiative. SmartBUY is a government-wide enterprise software initiative led by OMB to streamline the acquisition process and provide best-priced, standards-compliant, commercial software.

(1) SmartBUY does not mandate the use of a particular brand, rather, it mandates the use of the cost-effective common vehicle when an agency decides to purchase the software of a designated brand.

(2) The General Services Administration (GSA) is designated as the executive agent for the SmartBUY

initiative and leads the interagency team in negotiating government-wide enterprise agreements for software.

2. Department of Defense.

a. By statute, Congress has directed DoD to ensure that contracting officials identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software. Sec. 803, Duncan Hunter NDAA for FY 2009, Oct. 14, 2008 (Pub.L. 110-417); DFARS 212.212.

b. DOD implements OMB's SmartBUY initiative through the DoD Enterprise Software Initiative (DoD ESI). Since approximately 1998, DOD has mandated that its departments and agencies fulfill requirements for commercial software and related services, such as software maintenance, in accordance with the DoD Enterprise Software Initiative (ESI). *See* Web Site at http://www.esi.mil (last visited June 2012). OSD Memo, SmartBUY, Dec. 22, 2005.

(1) The ESI program is managed by the DoD Chief Information Officer (CIO), whose stated vision for the program is "point and click information technology shopping at lowest cost."

(2) ESI promotes the use of enterprise software agreements (ESAs) with contractors that allow DoD to obtain favorable terms and pricing for commercial software and related services. ESI does not dictate the products or services to be acquired. DFARS 208.7402.

(3) DoD ESI allows DoD Components to enter into Enterprise software agreements (ESAs) that manage the acquisition of commercially available software in a manner that reduces the cost of acquiring and maintaining software products.

(4) DoD must acquire commercial software from one of the existing ESI or SmartBUY agreements listed on the ESI web site (http://www.esi.mil).

(a) If software or services are available from a DoD ESA, requiring activities must purchase their item from DoD, provided the prices represent the best value to the Government.

(b) If the existing ESAs do not represent the best value, the software product manager (SPM) shall be given an opportunity to provide the same or a better value to the Government under the ESAs before the contracting officer may continue with alternate acquisition methods. PGI 208.7403.

(c) If there is no ESI or SmartBUY agreement yet in place for the commercial software your agency wants to purchase, then consult with the ESI Team prior to negotiating directly with software publishers or resellers for large requirement.

3. Department of the Army (DA)

a. The Army implements DoD's ESI program through its Information Technology, E-Commerce and Commercial Contracting Center (ITEC4). ITEC4 provides worldwide information technology contracting support and procures enterprise information technology support and equipment for Army and DoD activities. ITEC4 falls under the Army Contracting Command's National Capital Region (ACC-NCR). The Army mandates (*see* AR 25-1) use of its Computer Hardware, Enterprise, Software & Solutions (CHESS) (formerly the Army Small Computer Program (ASCP)) as the primary source for Army commercial IT purchases including commercial COTS software, desktops, notebook computers and video teleconferencing equipment, regardless of dollar value. The CHESS enterprise solutions consists of various multiple-award contract suites applicable to different categories of IT services. *See* CHESS Overview and History, available at https://chess.army.mil/CMS/a/ABTCHESS_HIS (last Accessed June 2014).

b. Waivers. U.S. Army organizations wishing to use a non-CHESS source may request a waiver through the CHESS website at https://chess.army.mil. Justifications for waivers must provide a rationale to explain the extenuating circumstances or unique configurations required by mission and not available through CHESS contracts.

4. Department of the Navy (DON)

a. DON CIO Message DTG 021419Z FEB 99, DON Information Technology Enterprise Wide Investment Policy;

b. Asst. Sec. of the Navy (Research, Development and Acquisition) Memo, Department of Defense ESI and Microsoft Server Enterprise Agreement, Jan. 29, 2001;

c. DON Memo, Navy Shore-Based Oracle Database Enterprise License Agreement, 29 Sept. 2004;

d. OPNAV Instruction 5230.26, Information Technology (IT) Budget Stewardship Review Execution and Funding Realignment Recommendation Policy, 17 Mar. 2008.

5. Department of the Air Force. *See* Department of the Air Force Memo, Air Force Policy for DoD ESI Agreement Use, 15 April 2001.

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APPENDIX

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL PROCUREMENT POLICY

July 3, 2003

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES

FROM: Angela B. Styles
Administrator

SUBJECT: Applicability of FAR Part 12 to Construction Acquisitions

Questions periodically arise as to whether construction needs may be acquired using the policies of FAR Part 12, which addresses the acquisition of commercial items. For the reasons discussed below, Part 12, as currently promulgated, should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services. In accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions. Part 36 incorporates provisions and clauses that are generally consistent with customary commercial practices in the construction industry. Part 12 could be used in limited circumstances involving construction contracting -- primarily for routine alteration and repair services as well as for acquisitions of commercial construction materials and associated ancillary services.

The provisions and clauses in FAR Part 36 address all fundamental aspects of construction contracting. Part 36 applies well-established commercial principles that are designed to result in an equitable distribution of risk between the government and contractors. In doing so, Part 36 enables agencies to gain easy access to marketplace capabilities.

By contrast, FAR Part 12 lacks clauses for handling critical circumstances common to construction efforts, especially those involving new construction or non-routine alteration and repair services. Clauses that would typically be expected in these efforts include those addressing differing site conditions, change orders, and suspension of work. The gap in coverage reflects the fact that construction contracting was not generally contemplated when Part 12 was promulgated. New construction projects and complex alteration and repair, in particular, involve a high degree of variability, including innumerable combinations of site requirements, weather and physical conditions, labor availability, and schedules. The current coverage in Part 12 fails to allocate risk in a manner that takes into account the nature of these activities.

Contracting for new construction or complex alternations and repair work without the protections of the Part 36 provisions and clauses would likely force contractors to include contingencies in their offers that would unnecessarily drive up construction costs

borne by the taxpayer. Increased risk also could discourage contractors from bidding on federal projects. Small businesses, who may lack the financial ability to take on higher levels of risk, may find participation in federal construction contracting to be especially difficult which, in turn, could deprive agencies of the innovation and ingenuity that small businesses offer when given the chance to compete. Simply put, if Part 36 is not used, an agency may be hard pressed to obtain the marketplace competition needed to negotiate fair and reasonable prices on these construction projects.

This memorandum is not intended to limit the goal of FAR Part 12, which is to ensure agencies are effectively positioned to take full advantage of the commercial marketplace and the value and efficiencies the marketplace generates. In fact, Part 12 clauses generally are suited for certain types of construction activities that lack the level of variability found in new construction and complex alteration and repair. In particular, Part 12 generally may be suited for routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services, as well as for purchases of commercial construction material and associated ancillary services. Of course, as part of acquisition planning, contracting officers need to consider the particular circumstances of a given acquisition (e.g., the likelihood of a differing site condition) to determine if the current clauses in Part 12 properly allocate risk.

Agencies are reminded that when they proceed with a construction acquisition under *either* Part 36 or Part 12, they must adhere to the policies of FAR Subpart 22.4. This subpart addresses labor standards for contracts involving construction.

I appreciate your careful consideration of this memorandum and ask that you distribute the memorandum widely to contracting, program, legal, and other agency personnel responsible for construction contracting within your agency. I also ask that you promptly review any agency guidance on the applicability of FAR Part 12 to construction acquisitions and change or rescind agency guidance, as necessary, to ensure consistency with this memorandum. Questions regarding this memorandum may be referred to Mathew Blum of my staff at (202) 395-4953.

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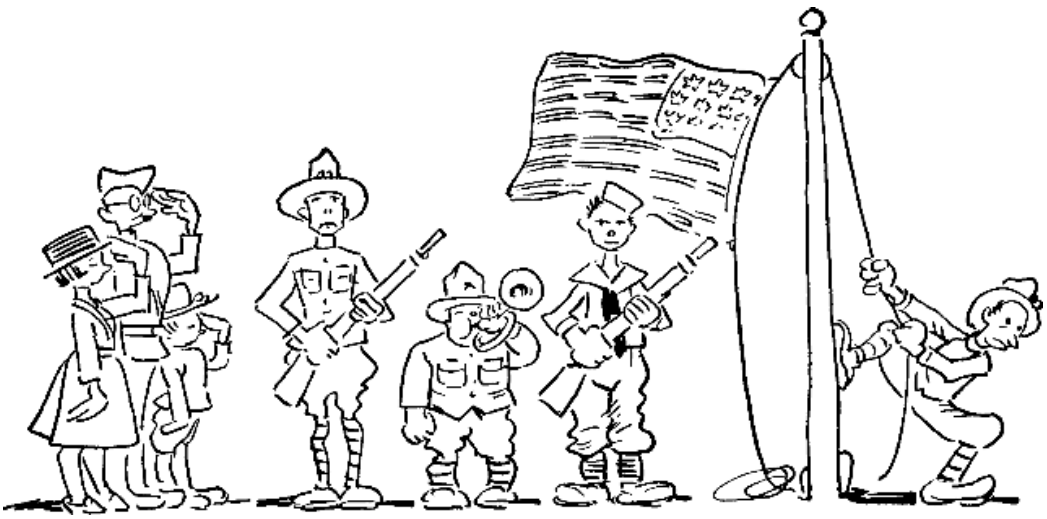
Chapter 11
Interagency Acquisitions



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CHAPTER 11

INTERAGENCY ACQUISITIONS

I. INTRODUCTION

A. Key References.

1. FAR Subpart 17.5; 17.7.

2. Department of Defense Financial Management Regulation (DoD FMR), volume 11A, chapters 1-4.

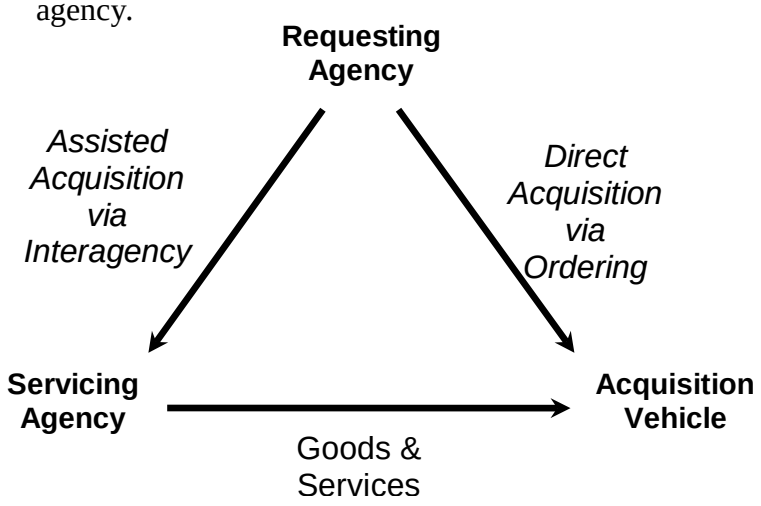
3. Department of Defense Instruction (DoDI) 4000.19, *Support Agreements* (April 25, 2013).

B. Interagency Acquisition (IA): the procedure by which an agency needing supplies or services (the *requesting agency* or *ordering agency*) obtains them through another federal government agency (the *servicing agency* or *performing agency*).

1. Interagency Acquisition types.

a. Direct Acquisitions: the requesting agency places an order directly against a servicing agency's contract.

b. Assisted Acquisitions: the servicing agency and requesting agency enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on behalf of the requesting agency, such as awarding a contract or issuing a task or delivery order, to satisfy the requirements of the requesting agency.



2. Determination of Best Procurement Approach. For all direct acquisitions and assisted acquisitions subject to the FAR,[1] a determination must be made that an interagency acquisition is the best procurement approach.

a. Assisted Acquisitions. Prior to requesting that another agency conduct an acquisition on its behalf, the requesting agency shall make a determination that the use of an interagency acquisition represents the best procurement approach. This determination requires the requesting agency's contracting office to concur that using the acquisition services of another agency satisfies the following criteria: meet the requesting agency's schedule, performance, and delivery requirements; is cost effective (taking into account the reasonableness of the servicing agency's fees); and, will result in the use of funds in accordance with appropriation limitations and compliance with the requesting agency's laws and policies. FAR 17.502-1(a)(1).

b. Direct acquisitions. Prior to placing an order directly against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach. This determination requires the requesting agency's contracting office to consider numerous factors including: the contract vehicle's suitability; the contract vehicle's value, including administrative cost savings from using an existing contract, prices, the number of vendors, and reasonable vehicle access fees; and, the requesting agency's expertise at placing orders and administering them against the selected contract vehicle. FAR 17.502-1(a)(2).

C. Interagency Agreements.

1. Assisted Acquisitions. Prior to the issuance of a solicitation under an assisted acquisition, the servicing and requesting agencies shall sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties. The agreement should cover roles and responsibilities for acquisition planning, contract execution, and contract administration. It should also include any unique terms and conditions[2] of the requesting agency that must be incorporated into the order or contract awarded by the assisting agency. If there are no unique terms or conditions, the agreement should so state. A copy of the

[1] FAR 17.500(c) excludes interagency reimbursable work (other than acquisition assistance), interagency activities where contracting is incidental to the purpose of the transaction, and orders of $500,000 or less issued against Federal Supply Schedules, from the application of FAR 17.5.

[2] FAR 17.7 outlines many of the unique terms and conditions that apply when a non-Defense agency procures supplies and services on behalf of a DoD entity.

interagency agreement, prepared in accordance with current OFPP guidance, must be included in the files of both the servicing and requesting agencies. FAR 17.502-1(b).

2. Direct Acquisitions. Since the requesting agency administers its own order under a direct acquisition, an interagency agreement is not required under the FAR. FAR 17.502-1(b)(2).

D. Contract Vehicles: Interagency acquisitions are often arranged using indefinite delivery/indefinite quantity contracts, under FAR Subpart 16.5 authority, and rely upon task or delivery orders to acquire goods and/or services. Contract vehicles used most frequently to support interagency acquisitions are the General Services Administration's Schedules (the Federal Supply Schedules), government-wide acquisition contracts or GWACs and multi-agency contracts or MACs (a task or delivery order contract established by one agency for use by other agencies IAW the Economy Act). In addition to best procurement determinations, in order to establish new multi-agency or government-wide acquisition contracts, a business-case analysis must be prepared and approved in accordance with current Office of Federal Procurement Policy (OFPP) guidance. FAR 17.502-1(c). [3]

E. Fiscal Policy: Unless authorized by Congress, interagency transactions are generally prohibited.

1. Under 31 U.S.C. § 1301, a federal agency must use its appropriated funds for the purposes for which the appropriations were made (a.k.a., the "Purpose Statue"). Unless authorized by Congress, funds appropriated for the needs of one federal agency may not be used to fund goods and services for the use of another federal agency.

a. From the standpoint of the requesting agency, receiving goods or services funded by another agency's appropriations without reimbursing the servicing agency would constitute an improper augmentation of the requesting agency's funds.

b. Funds sent by the requesting agency to the servicing agency as reimbursement for goods or services provided could not be retained and spent by the servicing agency, but instead would have to be turned over to the Treasury under 31 U.S.C. § 3302(b) (a.k.a., the Miscellaneous Receipts statute).

2. Congress has provided several statutory authorities for interagency acquisitions, allowing agencies to avoid these fiscal law limitations.

[3] *See also*, OFPP Memorandum, "Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions," 29 Sept. 2011.

a. The Economy Act: 31 U.S.C. §§ 1535-1536. This is the general authority for interagency acquisitions, but is used only when more specific authority does not apply. *See* FAR 17.502-2(b).

b. The Project Order Statute: 41 U.S.C. § 6307.

c. Other Non-Economy Act Authorities: Government Employees Training Act (GETA), Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWAC), and other required sources.

F. Practitioner's Note.

1. While the statutory requirements driving interagency acquisitions are fairly straightforward, this is an area of law that is predominately regulatory driven. Those practicing in this area need to be keenly aware as to whether the governing regulations have been updated.

2. Moreover, the regulatory framework for interagency acquisitions is incredibly fact-specific. Depending on the nature of the transaction, certain regulations may or may not apply.

II. THE ECONOMY ACT (31 U.S.C. §§ 1535-1536)

A. Purpose: Provides authority for federal agencies to order goods and services from other federal agencies, or with a major organizational unit within the same agency, if: [4]

1. Funds are available;

2. The head of the ordering agency or unit decides the order is in the best interests of the government;

3. The agency or unit filling the order can provide or get by contract the goods or services; **and**

4. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.[5]

B. Authorized Uses.

[4] 31 U.S.C. §1535(a) ; DoD FMR, vol. 11A, ch. 3, para. 030102 and 030103.A. The Economy Act was passed in 1932 as an effort to obtain economies of scale and eliminate overlapping activities within the federal government.

[5] *See Dictaphone Corp.*, B-244691.2, 92-2 Comp. Gen. Proc. Dec. ¶ 380 (Nov. 25, 1992). *See also*, DoD FMR, vol. 11a, ch. 3, para. 030104.A.

1. Inter-service Support: orders placed between DoD activities, including those: (1) between military departments; or (2) between military departments and other defense agencies.[6] (a.k.a., intra-agency support within DoD).

2. Intra-service Support: orders placed between major organizational unit within the same service (*e.g.* Army Material Command and CENTCOM).[7]

3. Intra-governmental Support: orders placed with non-DoD federal agencies. (a.k.a., interagency support).

4. The Economy Act applies only in the absence of a more specific acquisition authority. (FAR 17.502-2(b)).[8]

C. Determinations and Findings (D&F) Requirements. FAR Subpart 17.502-2(c); DoD FMR vol. 11A, ch. 3, para. 030302.

1. Basic Determinations. All Economy Act orders must be supported with a written D&F by the requesting agency stating that:

a. The use of an interagency acquisition is in the government's best interest (FAR 17.502-2(c)(1)(i));

b. The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. FAR 17.502-2(c)(1)(ii)) **and**

c. A statement that at least one of the three following circumstances apply:

(1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services;

(2) The servicing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or

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[6] *See* FAR 2.101 (defining executive agencies as including military departments); *Obligation of Funds under Military Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980); DoD FMR, vol. 11A, ch. 3, para. 030103.

[7] The term "major organizational unit" is not a term defined by the DoD FMR or other pertinent DoD regulations.

[8] *See also, An Interagency Agreement—Admin. Office of the U.S. Courts*, B-186535, 55 Comp. Gen. 1497 (1976).

(3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. (FAR 17.502-2(c)(1)(iii) *See also* DoD FMR, vol. 11A, ch. 3, para. 030202.B.[9]

2. DoD-specific Determinations.

a. Interservice (a.k.a. Intra-Agency) Support. DoD activities shall render requested support to other DoD activities when the requesting activity head determines (1) it would be in the government's best interest and (2) the servicing activity head determines that capabilities exist to render support without jeopardizing assignment missions. DoD FMR, vol. 11A, ch. 3, para. 030203.

b. Intragovernmental (a.k.a. Interagency) Support. DoD activities may enter into support agreements with non-DoD federal activities when the major organizational unit head ordering the support determines that (1) funding is available to pay for the support, (2) it is in the government's best interest, (3) the supplying activity is able to provide the support, (4) the support cannot be provided as conveniently or economically by a commercial enterprise, and (5) it does not conflict with any other agency's authority. This authority may be delegated no lower than the SES or flag officer levels. DoD FMR, vol. 11A, ch. 3, para. 030204.[10]

c. NOTE: In Economy Act transactions *between* DoD activities, DoDI 4000.19 and DoD FMR vol. 11A, ch. 3, para. 030303 indicates that if the transaction is documented on a DD Form 1144 support agreement and is signed by the head of the requiring and supplying activity, then no further D&F is required. If there is not support agreement, a D&F is required. More on this below.

3. D&F Approval Authority. FAR 17.502-2(c)(2).

a. The D&F must be approved by a contracting officer of the requesting agency with the authority to contract for the supplies or services ordered (or by another official designated by the agency head).

[9] The current version of DoD FMR, vol. 11A, ch. 3, para. 030202.B, specifies that one of these statements would need to be included in D&Fs if the transaction contemplates a contract action by a non-DoD servicing agency. Note, however, that the current version of the FAR would seem to require broader application to *all* D&Fs. Despite this inconsistency, a best practice may be to include these statements in all D&Fs, regardless of whether the Economy Act transition requires a contract action or not.

[10] Note the more robust determinations required when ordering outside of DoD.

b. If the servicing agency is not covered by the FAR, then the D&F must be approved by the requesting agency's Senior Procurement Executive. FAR 17.502-2(a)(2).

c. The requesting agency shall furnish a copy of the D&F to the servicing agency with the order.

d. DoD-specific Requirements. DoD FMR vol. 11A, ch. 3, paras. 030303 and 030304.

(1) While the FAR permits the contracting officer to sign the D&F, the DoD FMR requires a higher signatory authority.

(2) For Intra-Agency support, it is the "head of the major organizational unit ordering the support" that must make such a determination. However, this authority is, presumably, delegable, given the language in para. 030304. Moreover, the FMR provides that the D&F requirement may be "accomplished by signing a Support Agreement (blocks 8 and 9 on DD 1144, 'Support Agreement')" and that "no further written determinations are generally required for agreements between DoD Activities." Note that the signatory provided in blocks 8 and 9 are for the 'Comptroller'. DoD FMR vol. 11A, ch. 3, para. 030303.

(3) For Interagency support, it is the "head of the major organizational unit ordering the support" that signs the D&F. Note, however, that the FMR does not provide that signing blocks 8 and 9 on the DD 1144 will suffice, and that the authority may not be delegated below Senior Executive Service, Flag, or General Officer levels. DoD FMR, vol. 11A, ch. 3, para. 030304.

D. Additional Determinations by DoD Policy.

1. Using a non-DoD contract to procure goods or services in excess of the simplified acquisition threshold requires determinations in addition to the D&F. *See* FAR 17.7 and DFARS 217.7802.[11]

a. A DoD acquisition official may place an order, make a purchase, or otherwise acquire supplies or services for DoD in excess of the simplified acquisition threshold through a non-DoD agency **only** if the head of the non-DoD agency has certified that the non-DoD

[11] *See* Appendix A which provides a collection of memoranda applicable to use of non-DoD contracts under both Economy Act and non-Economy Act authorities. These and other applicable memoranda related to interagency acquisitions can be found on the Defense Procurement and Acquisition Policy (DPAP) webpage under "Interagency Acquisition" *available at* http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

agency will comply with defense procurement requirements for the fiscal year to include applicable DoD financial management regulations.

b. Acknowledging differences between the military departments, current IA-related policies may require additional attestations:

(1) The order is in the best interest of the military department considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

(2) The supplies or services to be provided are within the scope of the non-DoD contract;

(3) The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and

(4) The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable procurement statutes, regulations, and directives.

c. The officials with authority to make these determinations are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).

E. Fiscal Matters.

1. Economy Act orders are funded either on a reimbursable basis or by a direct fund citation basis. The ordering agency must pay the actual costs of the goods or services provided. 31 U.S.C. § 1535(b); DoD FMR, vol. 11A, ch. 3, para. 030501 and 030601.[12]

a. Actual costs include:

[12] Typically, between DoD Components, a DD Form 448, Military Interdepartmental Purchase Request (MIPR) is used to place the order. A DD Form 448-1, "Acceptance of MIPR" is used to show acceptance. *See also*, *Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network*, B-238024, 70 Comp. Gen. 592 (1991). However, note that the MIPR, alone, will not satisfy the D&F requirements.

(1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased. DoD FMR, vol. 11A, ch. 3, para. 030601 and vol. 11A, ch. 1, para. 010203;[13] and

(2) Indirect costs, to the extent they are funded out of currently available appropriations, bear a significant relationship to providing the goods or services, and benefit the ordering agency. DoD FMR, vol. 11A, ch. 3, para. 030601.[14]

(3) DoD activities not funded by working capital funds normally do not charge indirect costs to other DoD activities. DoD FMR, vol. 11A, ch. 3, para. 030601.[15]

b. When providing goods or services via a contract, the servicing agency may not require payment of a fee or charge which exceeds the actual cost of entering into and administering the contract. FAR 17.502-2(d)(4); DoD FMR, vol. 11A, ch. 3, para. 030601.

c. Payments by the requesting agency are credited to the appropriation or fund that the servicing agency used to fill the order. 31 U.S.C. § 1536; 10 U.S.C.§ 2205.

d. Economy Act orders may **NOT** be used to circumvent the fiscal principles of purpose, time, and amount for appropriations. It is the responsibility of the requesting agency to certify that the funds used are proper for the purpose of the order and for a bona fide need in the fiscal year for which the appropriation is available.[16]

2. Obligation and Deobligation of Funds.

a. Obligation.

(1) Reimbursable Order: the requesting agency obligates funds current when the performing activity accepts the

[13] *See Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978). *See GSA Recovery of SLUC Costs for Storage of IRS Records*, B-211953, Dec. 7, 1984 (unpub.) (storage costs); *David P. Holmes*, B-250377, Jan. 28, 1993 (unpub.) (inventory, transportation, and labor costs).

[14] *See Washington Nat'l Airport, supra* (depreciation and interest); *Obligation of Funds Under Mil. Interdep'tal Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980) (supervisory and administrative expenses).

[15] This tenet of IA support is reiterated in DoD Instruction 4000.19, *Interservice and Intragovernmental Support*, para. 4.a.5 (Apr. 25, 2013). A DoD Working Capital Fund is a revolving, reimbursable operations fund established by 10 U.S.C. § 2208 to sell support goods and services to DoD and other users with the intent to be zero-profit. *See* DoD FMR vol. 11B, chp 1-2.

[16] DoD FMR vol. 11A, ch. 3, para. 030105. *See also*, FAR 17.501(b).

reimbursable order. 31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030404.A.

(2) Direct Citation Order: the servicing agency will provide a copy of the contract or other obligating document to the requesting agency. This will provide the documentation required to record the obligation. DFAS-IN Reg. 37-1, para. 081207.A.7.e.

b. Deobligation.

(1) At the end of the period of availability of the requesting agency's appropriation, funds must be deobligated to the extent that the servicing agency has not itself incurred obligations by: (1) providing the goods or services; or (2) by entering into an authorized contract with another entity to provide the requested goods or services. 31 U.S.C. § 1535(d).[17]

(2) This deobligation requirement is intended to prevent misusing the Economy Act to "park" funds with another agency in order to extend an appropriation's availability.

F. Ordering Procedures.[18]

1. An Economy Act order may be placed on any form that is acceptable to both the requesting and servicing agencies. FAR 17.503(b).

a. DoD ordering activities typically use DD Form 448, Military Interdepartmental Purchase Request (MIPR), to place Economy Act orders. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR. Note, again, that a MIPR, by itself, will not satisfy the D&F requirements otherwise required.

b. An Economy Act order may be placed on DD Form 1144 or any form that is acceptable to both parties. If the MIPR or DD Form 1144 is not used, the terms of the supporting interagency agreement will determine the method of acceptance. DoD FMR, vol. 11A, ch. 3, para. 030501.

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[17] *See* GAO Redbook, vol. III, ch. 12 (3rd Ed.), pp. 12-43 to 12-50.

[18] *See* FAR 17.503; DoD FMR, vol. 11A, ch. 3. In addition, individual agencies will have their own policies for ordering. Note that DoDI 4000.19, *Support Agreements* has limited applicability here, as the DoDI does not apply to "Interagency assisted acquisitions that are defined as a type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency's behalf, such as awarding and administering a contract, task order, or delivery order, in accordance with sub-part 2.101 of the Federal Acquisition Regulation."

2. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself. DoD FMR, vol. 11A, ch. 3, para. 030401. Minimum order requirements under FAR 17.503(b) and DoD FMR, vol. 11A, ch. 3, para. 030501 include:

   a. Specific description of the supplies or services required;

   b. Delivery requirements,

   c. Fund citation (either direct or reimbursable);

   d. Payment provision; and

   e. Acquisition authority as may be appropriate.

3. The requesting agency shall furnish a copy of the required D&F to the servicing agency with the request for order. FAR 17.502-2(c)(3).

   a. When the requesting agency is within DoD, a copy of the executed D&F shall also be furnished to the servicing agency as an attachment to the order.

   b. When a DoD contracting office is acting as the servicing agency, a copy of the executed D&F shall be obtained from the requesting agency and placed in the contract file for the Economy Act order. DFARS 217.503(d).

4. The work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing agency. DoD FMR, vol. 11A, ch. 3, para. 030405. The requesting agency should therefore ensure in advance of placing an order that such capability exists.

5. Although the servicing activity may require advance payment for all or part of the estimated cost of the supplies or services,[19] DoD policy generally prohibits the practice of advance payment unless the DoD components are specifically authorized by law, legislative action, or Presidential authorization.[20]

G. Recurring Interagency Support. DoDI 4000.19 (if applicable).

1. Each party to a reimbursable support agreement will annually review the agreement for financial impacts. DoDI 4000.19, Encl. 3, para. 1.e.(1)).

[19] 31 U.S.C. § 1535(d); FAR 17.502-2(d); DoD FMR, vol. 11A, ch. 3, para. 030502.

[20] Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007 (Appendix B).

2. In DoD, recurring interagency support that requires reimbursement should be documented on a DD Form 1144, Support Agreement, or similar format that contains all the information required on the form. DoDI 4000.19, Encl. 3, para. 2.a.(1).

3. Reimbursement may not be charged for provided support that has been included in the supplier's budget process. DoDI 4000.19, Encl. 3, para. 4.a.(2).

4. Support provided by the supplier for the benefit of the supplier's component that also benefits other activities without increasing the cost is not reimbursable. DoDI 4000.19, Encl. 3, para. 4.a.(3).

5. Support is reimbursable to the extent that provision of the specified support for a receiver increases the support supplier's direct costs. These costs must be measurable and directly attributable to the support received and should be expressed in units of support appropriate to the type of service calculation of reimbursement charges. DoDI 4000.19, Encl. 3, para. 4.a.(4).

6. Indirect costs are not normally reimbursable between DoD components. Indirect costs may be included in reimbursement charges to the extent they have a significant relationship to providing the support and benefit the receiver. DoDI 4000.19, Encl. 3, para. 4.a.(5).

7. Costs associated with common use infrastructure are non-reimbursable, except for support provided solely for the benefit of one or more receivers. DoDI 4000.19, Encl. 3, para. 4.a.(6).

H. Interagency Details of Personnel.

1. General Rule: Details of employees from one agency to another must be done under Economy Act authority on a reimbursable basis.[21]

2. Exception: Details of employees may be made on a non-reimbursable basis when: (1) specifically authorized by law; (2) the detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission; or (3) the detail is for a brief period and entails minimal cost.[22] For this exception to apply, the statute must not only authorize the transfer, but also the nonreimbursement. (*Matter of: Nonreimbursable Transfer of*

[21] The detail must be on a reimbursable basis in order to avoid a violation of the Purpose Statute and an improper augmentation of the appropriations of the agency making use of the detailed employees. Note that other detail statutes may apply.

[22] *See Department of Health & Human Servs. Detail of Office of Community Servs. Employees*, B-211373, 64 Comp. Gen. 370 (1985).

Administrative Law Judges, B-221585, 65 Comp. Gen. 635 (June 9, 1986)).

I. Limitations.

1. Funding Limitations. An agency shall not use an interagency acquisition to circumvent any conditions or limitations imposed on the funds. FAR 17.501(b).

2. Disputes. The requesting and servicing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third party forum. FAR 17.503(c). DoD components will resolve support agreement differences and disputes with federal agencies through their chains of command. DoDI 4000.19, Encl. 3, para. 3.c.(2).

3. CICA Compliance. The requesting agency may not procure from a servicing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5); 41 U.S.C. § 253(f)(5); *Valenzuela Eng'g, Inc.*, B-277979, 98-1 Comp. Gen. Proc. Dec. ¶ 51 (Jan. 26, 1998).

III. THE PROJECT ORDERS STATUTE (41 U.S.C. § 6307)

A. Purpose: A "project order" is a specific, definite and certain order issued under the authority contained in 41 U.S.C. § 6307.

1. Allows DoD to place orders or contracts pertaining to approved projects with Government-owned establishments. All orders or contracts for work placed with government owned establishments shall be considered as obligations in the same manner as prescribed for similar orders or contracts placed with commercial manufacturers or private contractors. These orders are considered to be obligations "in the same manner as provided for similar orders or contracts placed with…private contractors."

a. The term "approved projects" in the statute simply refers to projects approved by officials having legal authority to do so. DoD FMR, vol. 11A, ch. 2, para. 020103.

b. A "project order" is a specific, definite, and certain order issued under the Project Order Statute. DoD FMR, vol 11A, ch.2, para 020301.

2. Within DoD, regulatory guidance on project orders is found at DoD FMR, vol. 11A, ch. 2, and DFAS-IN Regulation 37-1, ch. 12, para. 1208.[23]

[23] The Coast Guard has similar project order authority, at 14 U.S.C. § 151.

B. Applicability.

1. DoD-Owned Establishment. Although the language of the statute refers broadly to "Government-owned establishments," it applies only to transactions between military departments and government-owned, government-operated (GOGO) establishments within DoD. DoD FMR, vol. 11A, ch. 2, para. 020303.

2. GOGO establishments include:

   a. Equipment overhaul or maintenance shops, manufacturing or processing plants or shops, research and development laboratories, computer software design activities, testing facilities, proving grounds, and engineering and construction activities. DoD FMR, vol. 11A, ch. 2, para. 020303.

   b. GAO decisions have also "found arsenals, factories, and shipyards owned by the military to be GOGOs." *Matter of John J. Kominski*, B-246773, 72 Comp. Gen. 172 (1993).

3. Government-Operated.

   a. The DoD-owned establishment must substantially do the work in-house.

   b. While the DoD-owned establishment may contract for incidental goods or services pursuant to a project order, the GOGO must itself incur costs of not less than 51% of the total costs attributable to performing the work. DoD FMR, vol. 11A, ch. 2, para. 020515.

4. Nonseverable Work Only.

   a. Under DoD FMR, vol. 11A, ch. 2, para. 020509, activities may use project orders only for nonseverable or "entire" efforts that call for a single or unified outcome or product, such as the manufacture, production, assembly, rebuild, reconditioning, overhaul, alteration, or modification of:

      (1) Ships, aircraft, and vehicles of all kinds;

      (2) Guided missiles and other weapon systems;

      (3) Ammunition;

      (4) Clothing;

      (5) Machinery and equipment for use in such operations;

(6) Other military and operating supplies and equipment (including components and spare parts);

(7) Construction or conversion of buildings and other structures, utility and communication systems, and other public works;

(8) Development of software programs and automated systems when the purpose of the order is to acquire a specific end-product; and

(9) Production of engineering and construction related products and services.

5. Activities may not use project orders for:

a. Severable services, such as custodial, security, fire protection, or refuse collection;

b. Routine maintenance in general, such as grounds maintenance, heat and air conditioning maintenance, or other real property maintenance;

c. Services such as education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, utilities, or communications; or

d. Efforts where the stated or primary purpose of the order is to acquire a level of effort (e.g., 100 hours, or one year) rather than a specific, definite, and certain end-product;

C. Fiscal Matters.

1. Obligation of Funds.

a. A project order is a valid and recordable obligation of the requesting agency when the order is issued and accepted. DoD FMR, vol. 11A, ch. 2, para. 020301.A. [24]

b. The project order must serve a valid *bona fide need* that exists in the fiscal year in which the project order is issued. DoD FMR, vol. 11A, ch. 2, para. 020508.

2. Deobligation of Funds.

[24] Providing the obligation otherwise meets the criteria for recording an obligation contained in 31 U.S.C. § 1501(a) (the "Recording Statute").

a. Unlike orders under the Economy Act, there is no general requirement to deobligate the funds if the servicing agency has not performed before the expiration of the funds' period of availability. 41 U.S.C. § 6307.

b. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.

c. If evidence existed at the time of acceptance and is documented in the file, then there are no consequences if the servicing agency subsequent fails to begin work within the 90 days unless that delay extends beyond 1 January of the following calendar year.

(1) If work on a project order does not begin, or is not expected to begin, by January 1 of the following calendar year, then the project order must be returned for cancellation and the funds deobligated.

(2) If it is documented that the delay is unavoidable and could not have been foreseen at the time of project order acceptance, and that documentation is retained for audit review, then the project order can be retained and executed. DoD FMR, vol. 11A, ch. 2, para. 020510.B.

D. Ordering Procedures.

1. Project orders are analogous to contracts placed with commercial vendors and, similar to such contracts, must be specific, definite, and certain both as to the work and the terms of the order itself. DoD FMR, vol. 11A, ch. 2, para. 020506.

2. Project orders shall be issued on a reimbursable basis only (no direct cite orders). DoD FMR, vol. 11A, ch. 2, para. 020519. The project order may be on a fixed-price or costs-incurred (cost-reimbursement) basis.

3. The MIPR is normally used for issuing and accepting project orders.

a. The DoD FMR states that although "the use of a specific project order form is not prescribed," activities shall use the "Universal Order Format" described in DoD FMR, vol.11A, ch. 1, whenever practicable. DoD FMR, vol. 11A, ch. 2, para. 020302.

b. The Army, however, requires that project orders be issued on a MIPR. DFAS-IN Reg. 37-1, para. 120803.A.

4. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.

5. Because project orders are not made under the authority of the Economy Act, there is no requirement for determinations and findings (D&F).[25]

IV. OTHER NON-ECONOMY ACT AUTHORITIES.

A. Purpose: Provides specific statutory authority for interagency acquisitions allowing DoD to obtain goods and services from a non-DoD agency outside of the Economy Act. When any of these specified, non-Economy Act authorities apply, they must be used instead of the Economy Act.

B. Fiscal Matters.

1. Obligation of Funds. The requesting agency records an obligation upon meeting all the following criteria:[26]

a. A binding agreement, in writing, between the agencies;

b. For a purpose authorized by law;

c. Serve a bona fide need of the fiscal year or years in which the funds are available for new obligations;[27]

d. Executed before the end of the period of availability of the appropriation used; and

e. Provides for specific goods to be delivered or specific services to be supplied.

2. De-obligating Funds.

a. General Rule: the order is generally treated like a contract with a private vendor in that requesting agency does not have to deobligate its funds if the servicing agency has not performed or

[25] *See also*, FAR 17.500(c), which excludes interagency reimbursable work performed by federal employees from the requirements of FAR 17.5.

[26] DoD FMR vol. 11A, ch. 18, para. 180301.

[27] While *bona fide need* is generally a determination of the requesting agency and not that of the servicing agency, a servicing agency can refuse to accept a non-Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. (DoD FMR, vol. 11A, ch. 18, para. 180208).

incurred obligations at the end of the funds' period of availability.[28]

b. DoD Policy: In response to several GAO and DoD Inspector General audits indicating contracting and fiscal abuses with DoD agencies' use of interagency acquisitions, the DoD has issued policy that severely restricts the flexibility that these non-Economy Act authorities provide and now applies a deobligation requirement similar to that of the Economy Act. DoD FMR, vol. 11A, ch. 18, para. 180302.[29]

(1) General: Expired funds must be returned by the servicing agency and deobligated by the requesting agency to the extent that the servicing agency has not:

(a) Provided the goods or services (or incurred actual expenses in providing the goods or services); or

(b) Entered into a contract with another entity to provide the goods or services before the funds expired, subject to the bona fides need rule.

(2) Non-severable services: the contract must be funded entirely with funds available for new obligations at the time the contract was awarded, even though performance may extend across fiscal years. DoD FMR, vol. 11A, ch. 18, para. 180302.C.

(3) Severable Services: one-year funds may be used to fund up to twelve months of continuous severable services beginning in the fiscal year of award and crossing fiscal years under the authority of 10 U.S.C. § 2410a. DoD FMR, vol. 11A, ch. 18, para. 180302.B.[30]

(4) Goods: if the contract is for goods that were not delivered within the funds period of availability, the funds must be

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[28] *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157

[29] Office of the Under Secretary of Defense (Comptroller) memorandum, Subject: Non-Economy Act Orders, dated October 16, 2006. (Appendix C).

[30] The funding availability period does not start upon obligation of the funds by the servicing agency, but upon obligation of the funds by the requesting agency. *See* DoD FMR, vol. 11A, ch. 18, para. 180203.F (requiring a statement on the funding document that states: "all funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but *no later than one year after the acceptance of the order, or upon completion of the order, which ever is earlier*.")(emphasis added). Therefore, a DoD requesting activity can still "lose" funds if the servicing agency does not award a contract promptly after acceptance of the order.

deobligated and current funds used, unless the goods could not be delivered because of delivery, production or manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the contracting parties at the time of contracting. DoD FMR, vol. 11A, ch. 18, para. 180302.A.

3. Advance Payment. [31]

a. DoD agencies are prohibited from making advance payments to non-DoD agencies unless specifically authorized by law. DoD FMR, vol. 11A, ch. 18, para. 180209.

b. For those few exceptions where DoD is specifically authorized to advance funds, the specific appropriation or law authorizing the advance must be cited on the obligating and/or interagency agreement documents and orders, and any unused amounts of the advance must be collected from the servicing agency immediately and returned to the fund from which originally made. DoD FMR, vol. 11A, ch. 18, para. 180209.

C. DoD Policy for non-DoD orders.[32]

1. If the non-Economy Act order is over the simplified acquisition threshold (SAT), additional Service Component regulatory requirements may apply.

2. Non-Economy Act orders may be placed with a non-DoD agency for goods or services if:[33]

a. Proper funds are available;

b. The non-Economy Act order does not conflict with another agency's designated responsibilities (*e.g.*, real properly lease agreements with GSA);

c. The requesting agency determines the order is in the best interest of the Department; and

d. The servicing agency is able and authorized to provide the ordered goods or services.

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[31] Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007, *available at* http://www.acq.osd.mil/dpap/specificpolicy/attachments/advance-payments-20070307.pdf.

[32] *See generally*, DoD FMR, vol. 11A, ch. 18.

[33] DoD FMR, vol. 11A, ch. 18, para. 180202

3. Best Interest Determination.

a. Each requirement must be evaluated to ensure that non-Economy Act orders are in the DoD's best interest. Factors to consider include: satisfying customer requirements; schedule, performance, and delivery requirements; cost effectiveness, taking into account the discounts and fees; and contract administration, to include oversight. DoD FMR, vol. 11A, ch. 18, para. 180204; *see also* FAR 17.502-1(a) requiring a determination of best procurement approach and consideration of similar factors.

b. If the order exceeds the SAT, then the best interest determination must be documented in accordance with individual service component requirements.

D. Content of Orders. DoD FMR, vol. 11A, ch. 18, para. 180203.

1. A firm, clear, specific, and complete description of the goods or services ordered;

2. Specific performance or delivery requirements;

3. A proper fund citation;

4. Payment terms and conditions;

5. The specific non-Economy Act statutory authority used;

6. *For severable services*: "These funds are available for severable service requirements crossing fiscal years for a period not to exceed one year, where the period of any resultant contract for services commences this fiscal year. All funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but no later than one year after the acceptance of the order or upon completion of the order, which ever is earlier."

7. *For goods and non-severable services*: "I certify that the goods or non-severable services to be acquired under this agreement are a necessary expense of the appropriation charged, and represent a bona fide need of the fiscal year in which these funds are obligated."

8. The requesting agency's DoD Activity Address Code (DODAAC).

9. Contracting Officer Review. If the non-Economy Act order is in excess of $500,000, it must be reviewed by a DoD warranted contracting officer prior to sending the order to the funds certifier or issuing the MIPR. DoD FMR, vol. 11A, ch. 18, para. 180206.

E. Commonly used non-Economy Act transaction authorities.

1. Government Employees Training Act (GETA). 5 U.S.C. § 4104.

a. Purpose: permits agencies to provide training to employees of other federal agencies on a reimbursable basis.

(1) Servicing agency is authorized to collect and to retain a fee to offset the costs associated with training the employees of other agencies.

(2) Reimbursement is NOT authorized for training of other agency employees if funds are already provided for interagency training in its appropriation.[34]

b. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.

c. Limitation: Non-government personnel.

(1) This authority applies only to transactions between federal government agencies; therefore, it does not authorize the provision of training to non-government personnel.

(2) The Comptroller General has not objected to federal agencies providing training to non-government personnel on a space-available basis incidental to the necessary and authorized training of government personnel, but the non-government personnel must reimburse the government for the costs of that training, and the agency providing the training must deposit the fees collected in the Treasury as miscellaneous receipts.[35]

2. Federal Supply Schedules (FSS). 41 U.S.C. 251 *et seq* -- The Federal Property and Administrative Services Act of 1949; 40 U.S.C. § 501; FAR Subpart 8.4.

a. Purpose: authorizes the General Services Administration (GSA) to enter into contracts for government-wide use outside of the restrictions of the Economy Act.

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[34] Office of Personnel Management, Training Policy Handbook: Authorities and Guidelines 26, May 11, 2007.

[35] *Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses*, B-271894, 1997 U.S. Comp. Gen. LEXIS 252; *To the Secretary of Commerce*, B-151540, 42 Comp. Gen. 673 (1963).

(1) The FSS program (also known as the GSA Schedules Program or the Multiple Award Schedule Program) provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.

(2) The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards thousands of government-wide ID/IQ contracts for over 11 million commercial items and services.

(3) Agencies place orders or establish blanket purchasing agreements against these Schedule contracts.

b. The procedures of FAR 17.5 do not apply to orders of $500,000 or less issued against Federal Supply Schedules. FAR 17.500(c)(2).

c. Ordering Guidelines: FAR Subpart 8.4 provides detailed guidance on the use of FSS, including ordering procedures for services requiring or not requiring a statement of work, establishing blanket purchase agreements under an FSS contract, and the limited "competition" requirements for FSS orders (*see also* DFARS 208.405-70, for competition requirements for DoD orders exceeding the SAT).

d. DoD Policy: contracting officers must: (1) consider labor rates as well as labor hours and labor mixes when establishing a fair and reasonable price for an order; (2) evaluate proposed prices for both services and products when awarding combination orders; (3) seek discounts and explain why if they were not obtained; and (4) solicit as many contractors as practicable.[36]

3. Committee for Purchase From People Who Are Blind or Severely Disabled. 41 U.S.C. §§ 46-48c – The Javits-Wagner-O'Day Act (JWOD Act); 41 C.F.R. Part 51; FAR Subpart 8.7.

a. Purpose: Provides authority to orchestrate agencies' purchase of goods and services provided by nonprofit agencies employing people who are blind or severely disabled.

[36] Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Use of Federal Supply Schedules and Market Research, dated January 28, 2005 *available at* http://www.acq.osd.mil/dpap/specificpolicy/DPAP%20Memo%20dtd%20Jan%2028%202005.pdf .

b. Program Oversight: the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) oversees the AbilityOne program (formerly known as the JWOD Program).

c. Ordering Requirements:

(1) The JWOD Act requires agencies to purchase supplies or services on the Procurement List maintained by the Committee (this list may be accessed at http://www.abilityone.gov), at prices established by the Committee, from AbilityOne nonprofit agencies if they are available within the period required.

(2) These supplies or services may be purchased from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee.

4. Federal Prison Industries, Inc. (FPI or UNICOR). 18 U.S.C. §§ 4121-4128; FAR Subpart 8.6.

a. Originally required federal departments and agencies to purchase products of FPI that met requirements and were available at market price or less, unless FPI granted a waiver for purchase of the supplies from another source. 10 U.S.C. § 2410n.[37]

b. Current Requirements:

(1) The law has changed in recent years, minimizing the "mandatory source" nature of FPI.[38]

(2) When acquiring an item for which FPI has a significant market share DoD must use competitive procedures or fair opportunity procedures under the FAR to procure the product.[39] (DFARS 208.602-70.

(3) If FPI does not have a significant market share, comply with procedures under FAR 8.602.

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[37] FPI products are listed in the FPI Schedule, at http://www.unicor.gov. FPI also offers services, though agencies have never been required to procure services from FPI.

[38] National Defense Authorization Act for FY2002, Pub. L. No. 107-107; Bob Stump National Defense Authorization Act for FY2003, Pub. L. No. 107-314; Consolidated Appropriations Act of 2004, Pub. L. No. 108-199.

[39] Significant market share is defined as "FPI share of the Department of Defense market is greater than five percent." See Appendix E, Office of the Under Secretary of Defense (AT&L) Policy Memorandum, Subject: Competition Requirements for Purchases from Federal Prison Industries, dated 28 March 2008.

(a) Before purchasing products from FPI, agencies must conduct market research to determine whether the FPI item is comparable to supplies available from the private sector in terms of price, quality, and time of delivery. This is a unilateral determination of the contracting officer that is not subject to review by FPI. FAR 8.602.

(b) If the FPI item is determined not to be comparable, then agencies should acquire the items using normal contracting (i.e., competitive) procedures, and no waiver from FPI is required.

(c) If the FPI item is comparable, then the agency must obtain a waiver to purchase the item from other sources, except when:

(i) Public exigency requires immediate delivery or performance;

(ii) Used or excess supplies are available;

(iii) The supplies are acquired and used outside the United States;

(iv) Acquiring supplies totaling $2,500 or less; or

(v) Acquiring services.

5. The Clinger-Cohen Act of 1996. 40 U.S.C. § 11302.

a. Purpose: Requires the Director, Office of Management and Budget (OMB) to improve the way the federal government acquires and manages information technology by designating one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.

(1) Government-Wide Acquisition Contracts (GWACs) are multiple award task order or delivery order contracts used by other agencies to procure information technology products and services outside of the Economy Act. (FAR 2.101).

(2) To use GWACs, agencies may either obtain a delegation of authority from the GWAC Center or work through a procurement support operation such as GSA's Office of Assisted Acquisition Services.

b. Presently, five agencies serve as executive agents to award and administer GWACs pursuant to OMB designation: GSA, Department of Commerce, NASA, the National Institutes of Health, and the Environmental Protection Agency. These agencies operate approximately 13 GWACs as follows:

Government-wide Acquisition Contracts (GWACs)[40]

Managing Agency	Vehicle	Available Information Technology Products and Services	Agency website address for more information
1. Commerce	Commerce Information Technology Solutions (COMMITS) NexGen	Wide range of services from small businesses	http://oam.ocs.doc.gov/commits/index.html
2. EPA	Recycling Electronics and Asset Disposition (READ) Services	Services associated with recycling of electronic equipment and disposal of excess or obsolete electronic equipment in an environmentally responsible manner	http://www.epa.gov/oam/read/
3. GSA	Applications and Support for Widely-diverse End User Requirements (ANSWER)	Full-service support	www.gsa.gov/gwacs
4. GSA	HUBZone	Services from historically underutilized business zone (HUBZone) contractors	www.gsa.gov/gwacs
5. GSA	Information Technology Omnibus Procurement (ITOP II)	Information systems engineering and security support; systems operations and management	www.gsa.gov/gwacs
6. GSA	Millennia	Services to support large systems integration and software development projects	www.gsa.gov/gwacs
7. GSA	Millennia Lite	Planning, studies, and assessment; high end services; mission support; legacy systems migration; new enterprise systems development	www.gsa.gov/gwacs
8. GSA	STARS	Services from disadvantaged small businesses	www.gsa.gov/gwacs
9. GSA	Veterans Technology Services	Information systems engineering and systems operations and maintenance from service-disabled veteran-owned small businesses.	www.gsa.gov/gwacs
10. HHS- NIH	Chief Information Officer Solutions & Partners 2 Innovations (CIO-SP2i)	Hardware; software development; systems integration; technical support services	http://olao.od.nih.gov/Acquisitions/ MultipleVehicleContracts/GWACs/
11. HHS- NIH	Electronic Commodities Store (ECS III)	Commercial-off-the-shelf products; software; maintenance; peripherals	http://olao.od.nih.gov/Acquisitions/ MultipleVehicleContracts/GWACs/
12. HHS- NIH	Image World2 *New Dimensions* (IW2nd)	Imaging and document management services	http://olao.od.nih.gov/Acquisitions/ MultipleVehicleContracts/GWACs/
13. NASA	Scientific Engineering	High-end scientific and engineering	http://www.sewp.nasa.gov/

[40] http://www.whitehouse.gov/omb/procurement/interagency_acq/gwac_list.pdf

	Workstation Procurement (SEWP)	products	

6. Franchise Funds. The Government Management Reform Act of 1994, Pub. L. No. 103-356, Title IV, § 403, 103 Stat. 3413 (Oct. 13, 1994).

a. Purpose: Authorizes OMB's Director to establish six franchise fund pilot programs to provide common administrative support services on a competitive and fee basis.

(1) OMB designated pilots at Department of Interior, Department of Treasury, Department of Commerce, Environmental Protection Agency, Veterans Affairs, and Department of Health and Human Services.

(2) DoD activities frequently use Interior's GovWork and Treasury's FedSource. [41]

b. Operating Details:

(1) Franchise funds are revolving, self-supporting businesslike enterprises that provide a variety of common administrative services, such as payroll processing, information technology support, employee assistance programs, and contracting services.

(2) To cover their costs, the franchise funds charge fees for services. Unlike other revolving funds, the laws authorizing each franchise fund allow them to charge for a reasonable operating reserve and to retain up to 4 percent of total annual income for acquisition of capital equipment and financial management improvements.

c. Recent Change: although these pilots were to expire at the end of fiscal year 1999, they have been extended several times.

(1) Recently, the termination provision at section 403(f) was amended so as to be limited to the DHS Working Capital Fund. (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Title VII, § 730, 121 Stat. 1844 (Dec. 26, 2007)).

[41] A previous DoD-wide prohibition on purchases in excess of $100,000 through GovWorks imposed on June 14, 2007, has since been rescinded. *See* Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, subject: Revision to DoD Prohibition to Order, Purchase, or Otherwise Procure Property or Services through the Acquisition Services directorate of the Department of Interior's National Business Center locations, Herndon, Virginia (formerly known as GovWorks and now known as AQD-Herndon) and Sierra Vista, Arizona (formerly known as Southwest Branch and now known as ACQ-Sierra Vista), dated March 28, 2008. However, this memo imposed a new restriction on acquisition of furniture.

(2) Because the termination provision no longer applies to the other franchise fund pilot programs, the others are now apparently permanent.

d. NOTE: while the deobligation requirements of the Economy Act do not apply, various audits have identified contracting and fiscal abuses with DoD's use of franchise funds.[42] Accordingly, the deobligation policies described in section IV.B supra, would apply here as well.

V. DOD POLICY ON USE OF NON-DOD CONTRACTS.[43]

A. General Policy: "use of non-DoD contracts and the services of assisting agencies to meet DoD requirements, when it is done properly, is in the best interest of the Department, and necessary to meet our needs."[44]

B. Requirements For Use of Non-DoD Contracts Over the Simplified Acquisition Threshold.[45]

1. The policies of the Military Departments require certain written determinations or certifications prior to using a non-DoD contract for goods or services over $150,000 (under the Economy Act or under any non-Economy Act authority, to include orders against GSA's FSS).

2. The officials with authority to make these determinations/certifications are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).

3. This requirement is separate and distinct from the D&F required for Economy Act transactions, but may be combined with the D&F for

[42] *See, e.g.*, GOVERNMENT ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: FRANCHISE FUNDS PROVIDE CONVENIENCE, BUT VALUE TO DOD IS NOT DEMONSTRATED, GAO-05-456 (July 2005); *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157.

[43] Common policy applicable for Economy Act and non-Economy Act transactions.

[44] *See e.g.*, Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Interagency Acquisition, dated January 18, 2008 *available at* http://www.acq.osd.mil/dpap/policy/policyvault/2007-0203-dpap.pdf.

[45] *See e.g.*, Office of the Secretary of Defense memorandum, Subject: Proper Use of Non-DoD Contracts, dated October 29, 2004 *available at* http://www.acq.osd.mil/dpap/specificpolicy/attachments/2005-0924-DPAP.pdf .

approval by an official with authority to make all determinations and issue all approvals.

4. While there are differences between Service Components, most require the following findings:

   a. The order is in the Service Component's best interest considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

   b. The supplies or services to be provided are within the scope of the non-DoD contract;

   c. The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and

   d. The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable statutes, regulations, and directives.

5. Several of the Army's unique requirements are as follows:

   a. For all non-DoD orders over the SAT, the required written certification must be prepared with the assistance (and written coordination) of the Army contracting officer and the fund certifying official.

   b. For direct acquisitions of services, the requiring activity must also obtain written concurrence from the non-DoD contracting officer at the servicing agency that the services are within the scope of the contract (unless the Army contracting office has access to the non-DoD contract document), and the Army contracting officer must obtain written coordination from supporting legal counsel.

   c. For assisted acquisitions of both supplies and services:

      (1) The requiring activity must first consult with the Army contracting office, which will advise regarding the various DoD contractual options available to obtain the goods or services, and which will provide any unique terms, conditions and requirements that must be incorporated into the resultant non-DoD order to comply with DoD rules.

(2) The fund authorizing official must annotate the MIPR with the following statement: "This requirement has been processed in accordance with Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (Public Law 108-375) and the Army Policy memorandum on Proper Use of Non-Department of Defense contracts, dated July 12, 2005. The order is properly funded (correct appropriation and year), and it is in compliance with Army procedures for placement of orders on the Army's behalf by a non-DoD organization."

(3) The head of the requiring activity shall obtain written coordination from supporting legal counsel prior to sending the order to the servicing agency.

(4) The requiring activity must also provide a copy of the certification to the non-DoD contracting officer.

C. Certifications. Under DFARS 217.7802, the requesting agency may not procure from a non-DoD servicing agency that fails to comply with DoD procurement laws and regulations unless the Under Secretary of Defense determines in writing that "it is necessary in the interest of the Department of Defense to continue to procure property and services through the non-defense agency during such fiscal year." (Pub. L. No. 110-181 (2008 National Defense Authorization Act, § 801)).[46] Certifications from non-DoD agencies indicating that they will comply with defense procurement and financial management regulations are maintained at: http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

D. Interagency Agreements. Prior to the issuance of a solicitation arising from an assisted acquisition, the servicing agency and the requesting agency shall both sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties.[47] (FAR 17.502-1(b)).

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[46] *See e.g.*, Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Delegation of Authority under Section 801 of the National Defense Authorization Act for Fiscal Year 2008, dated July 19, 2008 *available at* https://dap.dau.mil/policy/Documents/Policy/Internal%20Controls%20for%20Procurements%20for%20DOD%20by%20Certain%20Non-DOD%20Agencies.pdf. *See also* Office of the Under Secretary of Defense (AT&L) memorandum, Subject: National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110-181, Section 801, *Internal Controls for Procurements on Behalf of the Department of Defense by Certain Non-Defense Agencies, Requests for "Waiver,"* dated September 18, 2009 *available at* http://www.acq.osd.mil/dpap/policy/policyvault/USA004969-09-DPAP.pdf.

[47] Since the requesting agency administers an order in a direct acquisition themselves, there is generally no need for a written interagency agreement outlining roles and responsibilities as there is in an assisted acquisition. *See* FAR 17.502-1(b)(2).

1. An interagency agreement should cover roles and responsibilities related to acquisition planning, contract execution, and contract administration. It should also cover procedures for resolution of disputes that may arise.[48]

2. DoD agencies are specifically required to use an Agreement for all assisted IAs regardless of dollar value. Additionally, DoD agencies must include specific enumerated elements or utilize a model agreement per Office of Federal Procurement Policy Memo.[49]

VI. CONCLUSION

[48] FAR 17.503(c); *see also* Office of Federal Procurement Policy Memorandum, Subject: Improving the Management and Use of Interagency Acquisitions, dated June 6, 2008, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/iac_revised.pdf.

[49] *See* Office of the Under Secretary of Defense (AT&L) Memorandum, Subject: Meeting Department of Defense Requirements Through Interagency Acquisition, dated October 31, 2008 *available at* http://www.acq.osd.mil/dpap/policy/policyvault/USA000871-08-DPAP.pdf . This memo does not eliminate requirements under FAR 17.5 or DFARS 217.78, which take precedence in any conflict with OFPP guidance.

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Chapter 12
Contract Pricing

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CHAPTER 12

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CHAPTER 12

CONTRACT PRICING

I. INTRODUCTION

A. Objectives

Following this block of instruction, the student should:

1. Understand the purpose of the Truth in Negotiations Act (TINA) and how it is implemented, including regulatory guidance and case law interpreting that guidance.

2. Understand the various methods used by the Government to establish price reasonableness of a contract award, to include the different types of contractor pricing information available to determine price reasonableness, and when to require its submission.

3. Understand what defective pricing is and the remedies available to the Government.

B. References

1. The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, and also found at 41 U.S.C. Chapter 35 – Truthful Cost or Pricing Data [formerly codified in Title 41 at §§ 254b(a) – 254b(h)]. The language of 41 U.S.C. Chapter 35 essentially mirrors 10 U.S.C. § 2306a with minor modifications.

2. Federal Acquisition Regulation (FAR) Subpart 15.4.

3. Department of Defense FAR Supplement (DFARS) Subpart 215.4, Contract Pricing; DFARS Procedures, Guidance, and Information (PGI) 215.4, Contract Pricing.

4. DoD Contract Pricing Reference Guides, a five volume set maintained by the Undersecretary of Defense for Acquisition, Technology, and Logistics Office of the Deputy Director of Defense Procurement and Acquisition Policy for Cost, Pricing, and Finance; and developed jointly by the Federal Acquisition Institute and the Air Force Institute of Technology, located at: www.acq.osd.mil/dpap/cpic/cp/contract_pricing_reference_guides.html. These guides are not directive and should be considered informational only. FAR 15.404-1(a)(7).

5. Defense Contract Audit Agency (DCAA) Manual 7640.1, The DCAA's Contract Audit Manual, provides technical audit guidance and techniques, audit standards, and technical policies and procedures followed by DCAA personnel in the execution of a contract audit. Its material is instructive for some aspects of contract pricing. It is also referred to as the "CAM." It is available at: http://www.dcaa.mil/cam.html.

II. DEFINITIONS

A. "**Cost or Pricing Data**" is a legal term of art.[1] It is all facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement upon price. It is also defined in the FAR's definitions section, 2.101. Cost or pricing data are:

1. More than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.

2. Factual – not judgmental – and verifiable. While cost or pricing data do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. See also DCAA Manual 7640.1 ¶ 14-104.4.

B. "**Certified Cost or Pricing Data**" as defined at FAR 2.101 means "cost or pricing data" required to be submitted in accordance with FAR 15.403-4 and 15.403-5 and have been certified, or is required to be certified, in accordance with 15.406-2. This certification states that, to the best of the person's knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements in accordance with 10 U.S.C. 2306a and 41 U.S.C. Chapter 35.

1. When TINA requires "cost or pricing data," it is always required to be certified. The format for certification is found at FAR 15.406-2.

2. When certified cost or pricing data is required, the contracting officer will always do a cost analysis, and sometimes will also perform a price analysis to determine if the price is fair and reasonable based on market research or comparison of proposed prices received in response to a solicitation.

[1] The FAR definitions for cost or pricing data, certified cost or pricing data, and data other than certified cost and pricing data were redefined in August 2010 in order to clarify the existing authority. Court cases prior to this time may refer to only two categories: "Cost or Pricing Data" and "Information Other Than Cost or Pricing Data." See FAC 2005-45; FAR Case 2005-036; Fed. Reg. Vol 75, No. 167, 53135 – 53153.

C. "**Data Other Than Certified Cost or Pricing Data**" or "DOTCCPD" means pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism. Such data may include the identical types of data as certified cost or pricing data, consistent with Table 15-2 of FAR 15.408, but without the certification. The data may also include, for example, sales data and any information reasonably required to explain the offeror's estimation process, including, but not limited to, (1) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and (2) the nature and amount of any contingencies included in the proposed prices. See FAR 2.101

1. This type of data is never required to be certified.

2. When adequate price competition exists, generally no additional data is necessary. The contracting officer will always do a price analysis for commercial item procurements and, in some situations, may also do a limited cost analysis to determine if the price is fair and reasonable.

3. When this type of data is requested, if the Contractor fails to provide the data, it is generally ineligible for award. FAR 15.403-3(a)(4).

D. Note that this data can include information that has been excluded from "cost and pricing data" by definition or by court ruling. So, for example, judgmental information may be requested as DOTCCPD.

E. "**Price**" is cost plus any fee or profit applicable to the contract type. FAR 15.401.

F. "**Pricing**" is the process of establishing a reasonable amount or amounts to be paid for supplies or services. FAR 2.101

III. GENERAL PRICING CONCEPTS

A. Concept Number One – Purchase supplies and services at fair and reasonable prices.

1. It is Government policy to purchase supplies and services at fair and reasonable prices.

2. Contracting officers are responsible to ensure the Government purchases supplies and services from responsible sources at fair and reasonable prices. **The contracting officer is responsible for evaluating the reasonableness of offered prices.** FAR 15.402(a) & 15.404-1(a)(1).

a. The contracting officer's primary concern is the overall price the Government will actually pay. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. FAR 15.405(b).

b. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government. Therefore, the contracting officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result – a price that is fair and reasonable to both the Government and the contractor. FAR 15.405(b).

3. In certain situations, **TINA requires contractors to make disclosures of information** to the contracting officer so the Government can determine it is getting a fair and reasonable price.

B. Concept Number Two. Obtain necessary information in the least burdensome manner possible, given the circumstances of each procurement.

1. **In establishing the reasonableness of offered prices, the contracting officer must NOT obtain more information than is necessary**. Contracting officers must not require unnecessarily the submission of cost or pricing data. FAR 15.402(a).

2. The FAR balances the Government's desire for a fair and reasonable price against the burdensome administrative cost associated with contractor disclosures under TINA. Unnecessary requirements for cost or pricing data increase proposal preparation costs, extend acquisition lead-time, and waste both contractor and Government resources. FAR 15.402(a)(3).

3. Order of Precedence. To the extent cost or pricing data is not required by TINA, the contracting officer must generally use the following order of precedence when requesting information to determine price reasonableness. FAR 15.402(a)(2)(i) & FAR 15.402(a)(2)(ii):

a. First, request no additional information if the agreed upon price is based upon **adequate price competition**. FAR 15.402(a)(2)(i).

(1) If an unusual circumstance leads the contracting officer to conclude that additional information is required to determine price reasonableness, then:

(2) Additional information shall be obtained from sources other than the offeror(s), to the maximum extent practicable. FAR 15.403-3(b).

(3) The contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches. FAR 15.403-3(b).

b. Second, if adequate price competition among competing offerors is not present, request additional price information from sources other than the offeror(s), to the maximum extent practicable. Other steps for obtaining comparison prices are in FAR 15.402(a)(2)(ii)(A).

(1) This can mean requesting information related to prices, relying first upon:

(a) Information available within the Government, such as independent Government estimates;

(b) Information obtained from sources other than the offeror, and if necessary;

(c) Information related to prices includes established catalog or market prices or previous contract prices;

(d) Limited Information obtained from the offeror. When there is NOT adequate price competition and prices are NOT set by law or regulation, the contracting officer may find it is necessary to obtain information from the offeror to evaluate price reasonableness. In that case, the contracting officer shall require, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously.

c. Third, request other than certified data if needed to determine fair and reasonable price. FAR 15.402(a)(2)(ii)(B).

d. Fourth, request certified cost or pricing data, if authorized. Under TINA's threshold, the contracting officer should use every means available to determine a fair and reasonable price before requesting certified cost or pricing data. FAR 15.402(a)(3). See also FAR 15.403-1(a) & (b) for other limitations on obtaining certified data.

C. Concept Number Three. Contracting officers use a variety of proposal analysis techniques to determine if a proposed contract is fair and reasonable. The objective of proposal analysis is to ensure the final agreed-to price is fair and reasonable. FAR 15.404-1(a). Other implementing regulations and guidance controls when the contracting officer can or must use particular techniques.

1. In general there are four categories of proposal analysis techniques:

   a. Price analysis techniques – Is the overall price fair & reasonable?

   b. Cost analysis techniques – Are underlying costs fair & reasonable?

   c. Cost realism analysis – Are the contractor's proposed costs realistic?

   d. Technical analysis – Does the Government need specialized resources to do this?

2. In general, price each contract separately and independently.

   a. To ensure a fair and reasonable price, the contracting officer may use analytical techniques and procedures singly or in combination with others. The complexity and circumstances of each acquisition should determine the level of detail. The contracting officer may request the advice and assistance of other experts to ensure an appropriate analysis is performed. FAR 15.404-1(a)(1) & FAR 15.404-1(a)(5).

   b. Do not use proposed price reductions under other contracts as an evaluation factor. FAR 15.402(b)(1).

   c. Do not consider losses or profits realized or anticipated under other contracts. FAR 15.402(b)(2).

   d. Do not include contingencies in a contract price to the extent that the contract provides for a price adjustment based upon the occurrence of the contingency. FAR 15.402(c).

3. "**Price Analysis**" is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. FAR 15.404-1(b)(1). A price analysis is required on procurements where a contractor is not required to submit certified cost or pricing data. FAR 15.404-1(a)(2). When a contractor submits certified cost or pricing data, a "cost analysis" is required, but a price analysis is still recommended to verify the overall price is fair and reasonable. FAR 15.404.1(a)(3).

a. Non-exclusive list of price analysis techniques. There are various price analysis techniques and procedures used by the contracting officer to examine and evaluate a proposed price to determine if it is fair and reasonable.

(1) Comparison of proposed prices received in response to a solicitation. This is used whenever there is adequate price competition. This is a preferred technique. FAR15.404-1(b)(2)(i); FAR 15.404-1(b)(3).

(2) Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This is a preferred technique. FAR 15.404-1(b)(2)(ii); FAR 15.404-1(b)(3).

(3) Application of parametric estimating methods or rough yardsticks to highlight significant inconsistencies that warrant additional pricing inquiry. Example: Price per square foot. FAR 15.404-1(b)(2)(iii).

(4) Comparison with published price lists, similar indices, and discount or rebate arrangements. FAR 15.404-1(b)(2)(iv).

(5) Comparison of proposed prices with independent Government cost estimates. FAR 15.404-1(b)(2)(v).

(a) The FAR does not define independent Government cost estimate (IGCE), nor does it provide what constitutes an independent Government estimate (IGE), but both terms are used within the FAR. Part 15 is the only FAR part to use IGCE, with other areas of the FAR using the term IGE.

(b) Normally, this estimate is completed prior to release of the solicitation to the public for competition, or prior to any offer to purchase being made. Often, the contracting officer's representative (COR) or the contracting officer's technical representative (COTR) prepares it with assistance from the supporting contracting office.

(c) FAR Sections 36.203 and 36.605, pertaining to architect-engineering work and construction, are the only sections of the FAR to require that an IGE be

performed. Some Federal agencies require an IGE to be performed for procurements exceeding amounts set for the simplified acquisition threshold. See The Defense COR Handbook, Appendix 6, at https://acc.dau.mil/communitybrowser.aspx?id=475206 and the Assistant Secretary of the Army (ALT) Memorandum for PARCs and Policy Chiefs, Number 12-26, dated 13 April 2012.

(d) Regarding simplified acquisition procurements, FAR 13.106-3(a)(2)(vi) provides that a contracting officer may use comparison to an IGE as the basis for a statement of price reasonableness, if only one quotation or offer is received.

(6) Comparison of proposed prices with prices obtained through market research for similar items. FAR 15.404-1(b)(2)(vi).

(7) Analysis of DOTCCPD provided by the offeror. FAR 15.404-1(b)(2)(vii).

b. **"Value Analysis"** can give insight into the relative worth of a product. It can be used in conjunction with the seven price analysis techniques listed above. FAR 15.404-1(b)(4). It is a technique created by Lawrence D. Miles in the 1940's and is based upon the application of a function analysis to component parts of a product to find ways to reduce component costs.

4. **"Cost analysis**" is an analysis by the contracting officer that reviews and evaluates separate cost elements and profit within a proposal in order to assist in determining whether the Government has been presented with a fair and reasonable price, or whether there is cost realism (explained below). FAR 15.404-1(c). Cost analysis is required when a contractor must provide certified cost and pricing data. FAR 15.404-1(a)(3). Its use is optional when DOTCCPD is instead being reviewed. FAR 15.404-1(a)(4). It requires the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. FAR 15.404-1(c).

a. The various cost analysis techniques and procedures provided at FAR 15.404-1(c)(2):

(1) Verification of cost or pricing data and evaluation of cost elements, including –

(a) The necessity for, and reasonableness of, proposed costs, including allowances for contingencies;

(b) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data;

(c) Reasonableness of estimates generated by appropriately calibrated and validated parametric models or cost-estimating relationships; and

(d) Application of audited or negotiated indirect cost rates, labor rates, and cost of money or other factors.

(2) Evaluation of the effect of the offeror's current practices upon future costs to ensure the effects of inefficient or uneconomical past practices are not projected into the future. This should include trend analysis of basic labor and material costs when pricing production of recently developed complex equipment. FAR 15.404-1(c)(2)(ii).

(3) Comparison of costs proposed by the offeror for individual cost elements with –

(a) Actual costs previously incurred by the same offeror;

(b) Previous cost estimates from the offeror or from other offerors for the same or similar items;

(c) Other cost estimates received in response to the Government's request;

(d) Independent Government cost estimates (IGCE) by technical personnel; and

(e) Forecasts of planned expenditures. FAR 15.404-1(c)(2)(iii).

(4) Verification that the cost submissions are in accordance with contract cost principles, FAR Part 31, and Cost Accounting Standards (CAS), where applicable. FAR 15.404-1(c)(2)(iv).

(5) Review of whether cost or pricing data necessary to make the proposal suitable for negotiation has not been submitted or identified in writing. FAR 15.404-1(c)(2)(v).

(6) To evaluate subcontractor costs, analysis of the results of any "Make-Or-Buy" program reviews. A Make-Or-Buy program review looks at whether a contractor should make a component or subcontract the work. It is generally used only on contracts over $12.5 million that also require cost or pricing data. FAR 15.404-1(c)(2)(vi) & FAR 15.407-2.

(7) "Should-Cost" Reviews. FAR 15.407-4. Should-Cost Reviews are a specialized form of cost analysis that evaluate the economy and efficiency of the contractor's existing work force, methods, materials, equipment, real property, operating systems, and management. They differ from traditional evaluation methods because they do not assume a contractor's historical costs reflect efficient and economical operation. There are two types of should-cost reviews:

(a) Program Should-Cost Review. This review is used to evaluate significant elements of direct costs, such as labor and material. It also evaluates indirect costs that are usually associated with the production of major systems. A separate audit report is also required for this review. See FAR 15.407-4(b).

(b) Overhead Should-Cost Review. This review is used to evaluate indirect costs, such as fringe benefits, shipping and receiving, real property and equipment, depreciation, plant maintenance and security, taxes, and general and administrative expenses. A separate audit report is also required for this review. See FAR 15.407-4(c).

5. **"Cost realism analysis**" is mandatory on all cost-reimbursement contracts. They are optional on fixed price incentive contracts and some other competitive contracts. The objective is to determine the probable cost of performance for each offeror in order to ensure the final price is fair and reasonable. FAR 15.404-1(d).

a. Definition. "Cost realism" is a proposal analysis technique used by the contracting officer to independently review and evaluate specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are:

(1) Realistic for the work to be performed;

(2) Reflective of a clear understanding of the requirements; and

(3) Consistent with the unique methods of performance and materials described in the technical proposal. FAR 2.101 and FAR 15.404-1(d).

b. Probable Cost of Performance. The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost is used to evaluate which contract is the best value to the Government. FAR 15.404-1(d)(2)(i).

c. A cost realism analysis may also be used on:

(1) Competitive fixed-price incentive contracts

(2) In exceptional cases, on other competitive fixed price type contracts when:

(a) New requirements may not be fully understood by competing offerors;

(b) There are quality concerns; or

(c) Past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. FAR 15.404-1(d)(3).

d. Results of a cost realism analysis may be used in performance risk assessments and responsibility determinations. However, the offered prices shall not be adjusted as a result of the analysis and

the proposals shall be evaluated using the criteria in the solicitation. FAR 15.404-1(d)(3).

e. Cost realism generally addresses whether a cost estimate is too low, while price reasonableness generally addresses whether a price is too high. First Enterprise v. United States, 611 Fed. Cl. 109, 123 (2004).

6. "**Technical Analysis**" is a proposal analysis technique used by the contracting officer when personnel with specialized knowledge, skills, experience or capability in engineering, science, or management are needed to assist the contracting officer in determining the need for and the reasonableness of the resources proposed for use by a contractor, assuming a reasonable economy and efficiency of resources. FAR 15.404-1(e)(1).

a. At a minimum, the analysis includes:

(1) The types and quantities of material proposed;

(2) The need for the types and quantities of labor hours the contractor is proposing to use, and the labor mix; and

(3) Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis. FAR 15.404-1(e)(2).

b. The contracting officer should request technical price evaluative assistance in evaluating items that are "similar to" items to be purchased, or commercial items that are "of a type" as those to be procured, or requiring minor modifications from that of proposed deliverables. FAR 15.404-1(e)(3).

IV. TRUTH IN NEGOTIATIONS ACT (TINA) - INTRODUCTION

A. Evolution

1. May 1959 – The Government Accountability Office (GAO) reported a large number of overpricing cases.

2. October 1959 – DoD revised the Armed Services Procurement Regulation (ASPR), a predecessor to the FAR, to require contractors to provide a

Certificate of Current Cost or Pricing Data during contract negotiations. In 1961, DoD added a price reduction clause to the ASPR.

3. 1962 – Congress passed TINA. Pub. L. No. 87-653, 76 Stat. 528 (1962) (codified at 10 U.S.C. § 2306f). TINA applied to DoD, the Coast Guard, and NASA. Public Law 89-369 extended TINA's reach to all Executive Branch Departments and Agencies.

4. Significant amendments to TINA occurred in 1986 (Pub. L. No. 99-661, 100 Stat. 3946), 1994 (the Federal Acquisition Streamlining Act of 1994 (FASA)), and 1996 (the Clinger-Cohen Act of 1996, a.k.a. the Federal Acquisition Reform Act of 1996 (FARA)).

5. **TINA is currently codified at 10 U.S.C. § 2306a and 41 U.S.C. Chapter 35. It is covered in FAR 15.403**.

B. Purpose

1. TINA requires contractors, sub-contractors and prospective contractors to provide the Government with information on the costs ("cost or pricing data") of a procurement in certain limited circumstances. If the information provided is not accurate, complete, and current, the Government has the right to certain remedies against the contractor.

2. TINA's purpose is to level the negotiation playing field by ensuring that Government negotiators have access to the same pricing information as the contractor's negotiators. The purpose of TINA is <u>not</u> to detect fraud. However, this result is often an ancillary effect.

3. "The objective of these provisions is to require truth in negotiating. Although not all elements of costs are ascertainable at the time a contract is entered into, those costs that can be known should be furnished currently, accurately, and completely. If the costs that can be determined are not furnished accurately, completely, and as currently as is practicable, the Government should have the right to revise the price downward to compensate for the erroneous, incomplete, or out-of-date information." S. REP. NO. 1884, at 3 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2476, 2478.

4. "In enacting the Truth in Negotiations Act, Congress recognized that in a noncompetitive atmosphere, contractors had little motivation to base their prices upon the lowest possible costs." <u>Hardie-Tynes Mfg. Co.</u>, ASBCA No. 20367, 76-1 B.C.A. para. 11,827, at 56,475, 56,480. TINA was designed to prevent and avoid "situations in which inaccurate, incomplete,

or noncurrent information is known by the contractor, but withheld from the Government to its detriment." Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342, 1346 (Ct. Cl.1973). Contractors must certify '"to the best of their knowledge and belief, that the 'cost or pricing data [they] submitted [to the Government] was accurate, complete and current.'" Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1402 (Fed. Cir. 1986) (brackets in original) (citing TINA). "When a contractor has breached its duty to disclose such data . . . the Government is entitled to a downward price adjustment in the amount of the overstated costs." Unisys Corp. v. United States, 888 F.2d 841, 844-845 (1989) (citing M-R-S Mfg. Co. v. United States, 492 F.2d 835 (Ct. Cl. 1974)).

5. TINA sets a threshold, as well as other limits, for obtaining cost and pricing data. The threshold is adjusted for inflation and rounded to the nearest $50,000 every five years. It is currently $700,000.[2]
Note: FAR Case 2008-024 adjusted the cost and pricing threshold to $700,000. This adjustment is effective 01 October 2010.

V. TINA - REQUIREMENTS FOR COST OR PRICING DATA

A. Disclosure Requirements. Contractors submit cost or pricing data only for large-dollar, negotiated contract actions. Disclosure can be either mandatory or nonmandatory.

1. **Mandatory disclosure.** 10 U.S.C. § 2306a(a)(1); 41 U.S.C. § 3502(a); FAR 15.403-4(a)(1). Unless an exception applies, the contracting officer must require the contractor or applicable subcontractor to submit certified cost or pricing data before accomplishing any of the following actions:

a. Award of a negotiated contract expected to exceed $700,000 (except undefinitized actions such as a letter contracts);

[2] The formula is "[e]ffective on October 1 of each year that is divisible by 5, each amount set forth in paragraph (1) shall be adjusted to the amount that is equal to the fiscal year 1994 constant dollar value of the amount set forth. Any amount, as so adjusted, that is not evenly divisible by $50,000 shall be rounded to the nearest multiple of $50,000. In the case of an amount that is evenly divisible by $25,000 but not evenly divisible by $50,000, the amount shall be rounded to the next higher multiple of $50,000." Section 1201 of the Federal Acquisition Streamline Act of 1994 (FASA), P.L. 130-355, 108 Stat. 3243; see also 65 Fed. Reg. 60,553. The threshold was adjusted effective October 2010 pursuant to the statutory requirement to keep it constant in terms of fiscal year 1994 dollars. See 65 Fed. Reg. 60,553; see also, 10 U.S.C. § 2306a(a)(7) and 41 U.S.C. § 3502(g).

b. Award of a subcontract at any tier expected to exceed $700,000 if the Government required the prime contractor and each higher-tier subcontractor to submit certified cost or pricing data;[3]

c. Modification of:

(1) Any sealed bid or negotiated prime contract involving a price adjustment[4] expected to exceed $700,000 (regardless of whether cost or pricing data was initially required); or

(2) Subcontract at any tier involving a price adjustment expected to exceed $700,000 if the Government required the prime contractor and each higher-tier subcontractor to furnish cost or pricing data under the original contract or subcontract.

d. Negotiated final pricing actions such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts are considered contract modifications requiring cost or pricing data if:

(1) The total final price agreement for such settlements or agreements exceeds $700,000; or

(1) The partial termination settlement plus the estimate to complete the continued portion of the contract exceeds $700,000. See also FAR 49.105(c)(15).

2. Nonmandatory

10 U.S.C. § 2306a(c); 41 U.S.C. § 3504(a).

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[3] If the head of contracting activity (HCA) has waived the requirement for submission of certified cost or pricing data for the prime contractor or one of its higher-tier subcontractors, the prime contractor or higher-tier subcontractor is considered to have been required to submit cost or pricing data for the purpose of this rule, although data was not actually submitted by the prime contractor or higher-tier subcontractor due to the waiver. Consequently, a lower-tier subcontractor expected to exceed the $700,000 threshold must submit cost or pricing data, unless an exception applies or the waiver specifically includes that lower-tier subcontractor. FAR 15.403-1(c)(4).

[4] Price adjustment amounts must include both increases and decreases. For example, a $100,000 net modification resulting from a decrease of $300,000 and an increase of $400,000 qualifies as a $700,000 price adjustment necessitating cost or pricing data. This requirement does not apply when unrelated and separately priced changes (for which cost or pricing data would not otherwise be required) are included in one modification for administrative convenience. FAR 15.403-4(a)(1)(iii).

a. Unless prohibited because an exception applies, the head of the contracting activity (HCA) can authorize a contracting officer to obtain cost or pricing data for pricing actions expected to cost between the simplified acquisition threshold and $700,000 if the HCA finds that it necessary to determine whether the price is fair and reasonable and is factually supported. The HCA's decision must be documented in writing and is may not be further delegated. FAR 15.403-4(a)(2).

B. Six Exceptions to the Certified Cost or Pricing Data Requirements

1. Simplified Acquisitions. FAR 15.403-1(a). A contracting officer cannot require a contractor to submit certified cost or pricing data for a procurement that is at or below the simplified acquisition threshold.

2. Adequate Price Competition. 10 U.S.C. § 2306a(b)(1)(A)(i); 41 U.S.C. § 3503(a)(1)(A); FAR 15.403-1(b)(1) and (c)(1). A contracting officer cannot require a contractor to submit cost or pricing data if the agreed upon price is based upon adequate price competition.

a. Definition of adequate price competition if <u>two or more offers</u> are received. FAR 15.403-1(c)(1)(i).

(1) Adequate price competition exists if two or more responsible offerors, competing independently, submitted responsive offers; <u>and</u>

(2) The Government will award the contract to the offeror whose proposal represented the best value, and in which price was a substantial factor in the source selection. FAR 15.403-1(c)(1)(i)(A); <u>and</u>

(3) The contracting officer did not find the successful offeror's price unreasonable.[5] <u>See</u> <u>Serv-Air, Inc.</u>, B-189884, Sept. 25, 1978, 78-2 CPD ¶ 223, <u>aff'd on recons.</u>, Mar. 29, 1979, 79-1 CPD ¶ 212 (holding that cost or pricing data was not required because there was adequate price competition); <u>cf</u>. <u>Litton Sys., Inc., Amecom Div.</u>, ASBCA No. 35914, 96-1 BCA ¶ 28,201 (denying the contractor's motion for summary judgment because a dispute of fact existed regarding whether there was adequate price competition).

[5] The contracting officer must: (1) support any finding that the successful offeror's price was unreasonable with a statement of facts; and (2) obtain approval at a level above the contracting officer. FAR 15.403-1(c)(1)(i)(B).

b. Definition of adequate price competition if one offer received. FAR 15.403-1(c)(1)(ii).

(1) Adequate price competition exists if the Government reasonably expected that two or more responsible offerors, competing independently, would submit offers; and

(2) Even though the Government only received one proposal, the contracting officer reasonably concluded that the offeror submitted its offer with the expectation of competition.[6]

(3) **See Appendix A for additional rules applying to DoD.**

c. Adequate price competition when there is current or recent prices for the same or similar items. FAR 15.403-1(c)(1)(iii). Adequate price competition exists if price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition. See Norris Industries, Inc., ASBCA No. 15442, 74-1 BCA ¶ 10,482 (concluding that there was not adequate price competition where only one recent previous contract was for a quantity comparable to current contract).

(1) **See Appendix A for additional rules applying to DoD.**

d. Requiring a contractor to submit certified cost or pricing data when there is adequate competition may be an abuse of the contracting officer's discretion. See United Technologies Corp., Pratt & Whitney, ASBCA No. 51410, 99-2 BCA ¶ 30,444 (rejecting Air Force's contention that the contracting officer had absolute discretion both to require certified cost or pricing data and to include a price adjustment clause where the price was negotiated based upon adequate price competition).

[6] The contracting officer can reasonably conclude that the offeror submitted its offer with the expectation of competition if circumstances indicate that the offeror: (1) believed that at least one other offeror was capable of submitting a meaningful offer; and (2) had no reason to believe that other potential offerors did not intend to submit offers; and the determination that the proposed price is based on adequate competition is reasonable, and is approved at a level above the contracting officer. FAR 15.403-1(c)(1)(ii)(A)(B).

3. Prices set by law or regulation. FAR 15.403-1(c)(2). Pronouncements in the form of periodic rulings, reviews, or similar actions of a Government body, or embodied in the laws, are sufficient to set a price.

4. Commercial items.

   a. Acquisitions of items meeting the commercial item definition in FAR 2.101 are exempt from the requirement for cost or pricing data. FAR 15.403-1(c)(3).

   b. The Department of Defense must annually report to Congress all commercial item procurements over $15,000,000 that received an exemption from the cost or pricing data requirements. DFARS 215.403-1(c)(3)(B).

5. Modifications to commercial items. When minor modifications to commercial items do not make the item "non-commercial," then:

   a. If funded by an agency other than DoD, NASA, or Coast Guard, no cost or pricing data is required. FAR 15.403-1(c)(3)(iii)(A).

   b. If funded by DoD, NASA, or the Coast Guard, cost or pricing data is only required if the total price of all such modifications under a particular contract action exceed the greater of $700,000 or five percent of the contract's total price. FAR 15.403-1(c)(3)(iii)(C).

   c. When purchasing **services** that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, they may be considered commercial items ONLY if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services. FAR 15.403-1(c)(3)(ii); Section 868, Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, Pub. L. 110-417, 14 Oct 2008.

      (1) In order to make this determination, the contracting officer may request that the offeror submit prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers; and

      (2) If the contracting officer determines that the information described above is not sufficient to determine the

reasonableness of price, other relevant information regarding the basis for price or cost, including information on labor costs, material costs and overhead rates may be requested. FAR 15.403-1(c)(3)(ii)(B)&(C).

6. Waivers

a. The HCA, without power of delegation, may waive in writing the requirement for cost or pricing data in exceptional cases if the price can be determined to be fair and reasonable without submission of cost or pricing data.[7] FAR 15.403-1(c)(4).

(1) Example: If cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated information, a waiver may be granted.

b. DoD has additional restrictions on waivers. DFAR 215.403-1(c)(4). The HCA may apply the exceptional circumstance waiver authority only after making a determination that:

(1) The property or services cannot reasonably be obtained under the contract, sub-contract, or modification, without the waiver;

(2) The price can be determined to be fair and reasonable without the submission of certified cost or pricing data; and

(3) There are demonstrated benefits to granting the waiver. See PGI 215.403-1(c)(4)(A) for DoD procedures.

(4) An annual report to Congress is required for all waivers granted under FAR 15.403-1(b)(4), for any commercial item contract, subcontract, or modification expected to have a value of over $15 million.

7. Other exceptions

a. Exercise of an option. The exercise of an option at the price established at contract award or initial negotiation does not require cost or pricing data. FAR 15.403-2(a).

[7] See Footnote 3, *supra*.

b. Interim Billings: Proposals used solely for overrun funding or interim billing price adjustments. FAR 15.403-2(b).

c. Defense of NBC attack. Any acquisition of supplies or services that the HCA determines are used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, will be treated as a commercial item and will be exempt from certified cost or pricing data. If the contract exceeds $17.5 million and is awarded upon a sole source basis, then cost or pricing data requirements apply. FAR 12.102(f)(1) and FAR 12.102(f)(2)(ii).

C. Defining Cost or Pricing Data. See FAR Section 2.101, Definitions.

1. Examples of cost or pricing data:

a. Vendor quotations;

b. Nonrecurring costs: Those costs which are generally incurred on a one-time basis and include such costs as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, preproduction engineering, initial spoilage and rework, and specialized work force training. This is different from recurring costs that vary with the quantity being produced, such as labor and materials. Separately defined at FAR 17.103;

c. Information on changes in production methods and in production or purchasing volume;

d. Data supporting projections of business prospects and objectives and related operational costs;

e. Unit-cost trends such as those associated with labor efficiency;

f. Make-or-buy decisions. This term refers to the prime contractor's decisions regarding whether to use subcontracting to ensure the lowest overall cost to the Government. The term "make item" refers to an item or work effort produced or performed by the prime contractor rather than "buying" the item from a subcontractor.

(1) "Make-or-buy program" is separately defined at FAR 2.101 and is separately covered in Subpart 15.4 at FAR 15.407-2;

g. Estimated resources to attain business goals; and

h. Information on management decisions that could have a significant bearing upon costs. For example, the comparative analysis by which a particular vendor was selected.

2. Board of Contract Appeals guidance on applicable test for determining cost or pricing data.

a. According to the Armed Services Board of Contract Appeals (ASBCA), the statutory and regulatory definitions "plainly denote" a more expansive interpretation of cost or pricing data than routine corporate policy, practice, and procedures.

b. The test is an **objective**, **reasonable person** test. "What a particular contractor, in a given case, in fact considered or would have considered significant, is not controlling." United Techs. Corp./Pratt & Whitney, ASBCA No. 43645, 94-3 BCA ¶ 27,241. See Plessey Indus., ASBCA No. 16720, 74-1 BCA ¶ 10,603 at 50,278.

c. The determination must be made from the perspective of the date of the certificate of cost or pricing data, not with the benefit of hindsight. Appeals of Lockheed Corporation, ASBCA Nos. 36420, 27495 and 39195, 95-2 BCA ¶27,722 at 27,770.

d. Whether a particular item is cost or pricing data is a factual question. Appeal of PAE International, ASBCA 20595, 76-2 BCA 12044 (1976).

3. Cost or pricing data must be **factual** versus judgmental.

a. Cost or pricing data are factual, not judgmental, and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data. They are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. FAR 2.101; Appeal of PAE International, ASBCA 20595, 76-2 BCA 12044 (1976).

b. Factual information is discrete, quantifiable information that can be verified and audited. Estimates and judgments, by their very nature, cannot be verified. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842.

c. These distinctions are often difficult to make. Information that mixes fact and judgment may require disclosure because of the underlying factual information. See, e.g., Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195; cf. Litton Sys., Inc., Amecom Div., ASBCA No. 36509, 92-2 BCA ¶ 24,842 (holding that reports regarding estimated labor hours were not required to be disclosed because they were "pure judgment").

d. Cost or pricing data may in some instance include information that would be considered judgmental if the facts and data are so intertwined with judgments that the judgments must be disclosed to make the facts or data meaningful. A decision to act upon judgmental data, should be disclosed even if not yet implemented. H.R. Conf. Rep. No. 446, 100th Cong., 1st Sess. 657.

e. **Management decisions** are generally a conglomeration of facts and judgment. See, e.g., Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722. To determine whether management decisions could reasonably be expected to have a significant bearing upon costs and, therefore, be classified as cost or pricing data, one should consider the following factors:

(1) Did management actually make a "decision?" Kisco Co., ASBCA No. 18432, 76-2 BCA ¶12,147.

(2) Was the management decision made by a person or group with the authority to approve or disapprove actions affecting costs?

(3) Did the management decision require some sort of "action" affecting the relevant cost element, or was the "decision" more along the lines of preliminary planning for possible future action?

(4) Is there a substantial relationship between the management decision and the relevant cost element?

(5) Is the management decision the type of decision that prudent buyers and sellers would reasonably expect to affect price negotiations significantly?

(6) A management decision to act, which has not been implemented, may be cost or pricing data in certain circumstances. Appeals of Lockheed Corporation, ASBCA

Nos. 36420, 37495 and 39195, 95-2 BCA ¶27,722; H.R. Conf. Rep. No. 100-446, 100th Cong., 1st Sess. 657, reprinted in 1987 U.S. Code Cong. & Admin News 1769; see Boeing Co, ASBCA No. 33881, 92-1 BCA ¶24,414 and Appeal of Millipore Corp, GSBCA no. 9453, 91-1 BCA 23,345 (1991) (finding a contractor's imminent plans to revise its dealer discount program to be cost or pricing data).

4. Cost or pricing data must be significant.

a. The contractor must disclose the data if a reasonable person (i.e., a prudent buyer or seller) would expect it to have a significant effect upon price negotiations. Plessey Indus., Inc., ASBCA No. 16720, 74-1 BCA ¶ 10,603.

b. Prior purchases of similar items may be "significant data." Kisco Co., ASBCA No. 18432, 76-2 ¶ 12,147; Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121.

c. The duty to disclose extends not only to data that the contractor knows it will use, but also to data that the contractor thinks it might use. If a reasonable person would consider the data in determining cost or price, the data is significant and the contractor must disclose it. Hardie-Tynes Mfg., Co., ASBCA No. 20717, 76-2 BCA ¶ 12,121; P.A.L. Sys. Co., GSBCA No. 10858, 91-3 BCA ¶ 24,259 (holding that a contractor should have disclosed vendor discounts even though the Government was not entitled to them).

d. The amount of the overpricing is not determinative of whether the information is significant. See Conrac Corp. v. United States, 558 F.2d 994 (1977) (holding that the Government was entitled to a refund totaling one-tenth of one percent of the total contract price); Kaiser Aerospace & Elecs. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489 (holding that the Government was entitled to a refund totaling two-tenths of one percent of the total contract price); but see, Boeing Co., ASBCA No. 33881, 92-1 BCA ¶ 24,414 (holding that a $268 overstatement on a $1.7 billion contract was "*de minimis*").

e. The DCAA Contract Audit Manual (DCAA CAM) states that potential defective pricing price adjustments of five percent of the contract value or $50,000, whichever is less, should normally be

considered immaterial by auditors. DCAA CAM ¶ 14-120.1. These materiality criteria do not apply when:

(1) A contractor's deficient estimating practices results in recurring defective pricing; or

(2) The potential price adjustment is due to a systemic deficiency which affects all contracts priced during the period. DCAA CAM ¶ 14-120.1.

5. Court and Board Decisions

a. Receipt of additional sealed bids from suppliers was held to be cost and pricing data because knowledge of undisclosed bids clearly was information that a prudent buyer or seller would reasonably expect to affect price negotiations. Aerojet Solid Propulsion Co. v. White, 291 F.3d 1328 (Fed. Cir. 2002).

b. A contractor's computer generated report, used as an estimating tool for system unit costs at a given period of time, was found to be cost or pricing data, even though the selection of that estimating tool at that time was a judgment and the results were estimates. Appeal of Texas Instruments, Inc., ASBCA 23678, 87-3 BCA 20195 (1987).

D. Submission of Cost and Pricing Data

1. Procedural requirements

a. Format. FAR 15.403-5.

(1) In the past, contractors used a Standard Form (SF) 1411, Contract Pricing Proposal Cover Sheet, to submit cost or pricing data; however, this form is obsolete.

(2) Today, the contracting officer can:

(a) Require contractors to submit cost or pricing data in the format specified in FAR 15.408, Table 15-2;

(b) Specify an alternate format; or

(c) Allow contractors to use their own format.

b. Submitting the certified cost or pricing data.

(1) Contractors must ensure they submit the data to the proper Government official, generally the contracting officer or the contracting officer's authorized representative. 10 U.S.C. § 2306a(a)(3); 41 U.S.C. § 3502(c).

(2) The boards often look at whether the person to whom the disclosure was made participated in the negotiation of the contract. See Singer Co., Librascope Div. v. United States, 217 Cl. Ct. 225, 576 F.2d 905 (1978) (holding that disclosure to the auditor was not sufficient where the auditor was not involved in the negotiations); Sylvania Elec. Prods., Inc. v. United States, 479 F.2d 1342 (Ct. Cl. 1973) (holding that disclosure to the ACO was not sufficient where the ACO had no connection with the proposal and the contractor did not ask the ACO to forward the data to the PCO); cf. Texas Instruments, Inc., ASBCA No. 30836, 89-1 BCA ¶ 21,489 (holding that disclosure to the ACO was sufficient where the ACO was involved in the negotiation of the disputed rates and knew that the subject contract was being negotiated); Litton Sys., Inc., Amecom Div., ASBCA Nos. 34435, et. al., 93-2 BCA ¶ 25,707 (holding that disclosure of indirect cost actuals to resident auditor based upon established practice was sufficient disclosure though auditor did not participate in negotiations).

c. Adequate Disclosure. A contractor can meet its obligation if it provides the data physically to the Government and discloses the significance of the data to the negotiation process. M-R-S Manufacturing Co. v. United States, 492 F.2d 835 (Ct. Ct. 1974).

(1) The contractor must advise Government representatives of the kind and content of the data and their bearing upon the prospective contractor's proposal. Texas Instruments, Inc., ASBCA No. 23678, 87-3 BCA ¶ 20,195.

(2) Making records available to the Government may constitute adequate disclosure. Appeals of McDonnell Douglas Helicopter Sys., ASBCA No. 50447, 50448, 50449, 2000 BCA¶ 31,082 (furnishing or making available historical reports to DCAA resident auditor and DLA in-plant

personnel in connection to Apache procurement make-buy decisions held adequate).

(3) Knowledge by the other party of the data's existence is no defense to a failure to provide data. Grumman Aerospace Corp., ASBCA No. 35188, 90-2 BCA ¶ 22,842 (prime contractor's alleged knowledge of subcontractor reports not sufficient because subcontractor was obligated to physically deliver the data).

2. Obligation to Update Data

a. The contractor is obligated to disclose data in existence as of the date of price agreement. Facts occurring before price agreement and coming to the negotiator's attention after that date must be disclosed before award if they were "reasonably available" before the price agreement date.

b. The contractor's duty to provide updated data is not limited to the personal knowledge of its negotiators. Data within the contractor's (or subcontractor's) organization are considered readily available.

c. Near the time of price agreement, a contractor sometimes conducts internal "sweeps" of cost or pricing data to ensure it meets its disclosure requirements.

3. Certification of the Certified Cost or Pricing Data

a. Requirement. FAR 15.406-2. When cost or pricing data is required, the contractor must submit a Certificate of Current Cost or Pricing Data using the format found at FAR 15.406-2(a). See 10 U.S.C. § 2306a(a)(2) and 41 U.S.C. § 3502(b)(requiring any person who submits cost or pricing data to certify that the data is accurate, complete, and current).

b. Due date for certificate. The certificate is due as soon as practicable after the date the parties conclude negotiations and agree to a contract price. FAR 15.406-2(a).

c. Failure to submit certificate. A contractor's failure to certify its cost or pricing data does not relieve it of liability for defective pricing. 10 U.S.C. § 2306a(f)(2); 41 U.S.C. § 3507(b); see S.T. Research Corp., ASBCA No. 29070, 84-3 BCA ¶ 17,568.

VI. DATA OTHER THAN CERTIFIED COST OR PRICING DATA

A. Application: Even if an exception to cost or pricing data applies to an acquisition, the contracting officer is still required to determine price reasonableness. In order to make this determination, the contracting officer may require data other than certified cost or pricing data, including information related to prices and cost information that would otherwise be defined as cost or pricing data, if certified.

1. General requirements. 10 U.S.C. § 2306a(d); 41 U.S.C. § 3505; FAR 15.403-3(a). The contracting officer shall –

   a. Obtain whatever data are available from Government or other secondary sources, using it to determine fair and reasonable price;

   b. Require submission of DOTCCPD from the offeror to the extent necessary to determine a fair and reasonable price, if determined that adequate data from sources other than the offeror are not available. This includes requiring data from an offeror to support cost realism analysis;

   c. Consider whether cost data are necessary to determine a fair and reasonable price when there is not adequate price competition;

   d. Require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold;[8] and

   e. Consider the guidance in Section 3.3, Chapter 3, Volume I of the DoD Contract Pricing Reference Guide to determine data an offeror shall be required to submit.

   f. The contractor's format for submitting the data shall be used, ensuring that the data used to support price negotiations are sufficiently current. Requests for updated data should be limited to data that affects adequacy of the proposal for negotiations, such as changes in price lists.

2. Adequate price competition. FAR 15.403-3(b).

   a. Additional information is not required to determine price reasonableness and/or cost realism when adequate price competition, defined at FAR 15.403-1(c)(1), exists.

[8] This requirement does not apply if offeror's proposed price is: (1) based on adequate price competition; or (2) set by law or regulation. FAR 15.403-1(b)(1)&(2).

b. If there are unusual circumstances where it is concluded that additional data are necessary in determining price reasonableness, the contracting officer must obtain the information from sources other than the offeror to the maximum extent practicable.

c. The contracting officer may request data other than certified cost or pricing data to:

(1) Determine the cost realism of competing offers; and/or

(2) Evaluate competing approaches.

B. Submission of Data Other Than Certified Cost or Pricing Data. FAR 15.403-3(a)(2); FAR 15.403-5(a)(3) and (b)(2); FAR 15.408(l) and (m).

1. The contracting officer must state the requirement to submit data other than certified cost or pricing data in the solicitation. See FAR 52.215-20 (Requirements for Certified Cost or Pricing Data or Data Other than Certified Cost or Pricing Data); FAR 52.215-21 (Requirements for Certified Cost or Pricing Data or Data Other than Certified Cost or Pricing Data – Modifications).

2. If the contracting officer requires the submission of data other than certified cost or pricing data, the contractor may submit the information in its own format unless the contracting officer concludes that the use of a specific format is essential and describes the required format in the solicitation.

3. The offeror is not required to certify data other than certified cost or pricing data.

4. A contractor or subcontractor who fails to submit requested DOTCCPD is ineligible for award. FAR 15.403-3(a)(4). The HCA may determine that it is in the best interest of the Government to make the award to that offeror after considering:

a. The effort made to obtain the data;

b. The need for the item or service;

c. The increased cost or significant harm to the Government if award is not made.

VII. CONTRACT PRICING BY METHOD OF CONTRACTING

A. Sealed Bidding. FAR 14.408-2 and FAR 15.404-1(b).

1. Certified cost or pricing data is not required for contracts obtained initially by sealed bidding when two or more offerors, competing independently, submit priced offers satisfying requirements. FAR 15.403-1(c)(1). Modifications, however, may require cost or pricing data if they are over the threshold and an exception does not apply. FAR 15.403-4(a)(1)(iii).

2. Contracting officer must determine the prices offered are reasonable in light of all prevailing circumstances before awarding the contract. Particular care should be taken if only one bid is received. FAR 14.408-2.

3. Price analysis techniques may be used as guidelines. The contracting officer must consider whether the bids are unbalanced. FAR 15.404-1(g).

   a. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more Contract Line Item Numbers (CLINs) are significantly over or understated.

   b. The contracting officer may reject a bid if it is determined that the unbalanced prices pose an unacceptable risk. FAR 15.404-1(g)(3).

B. Simplified Acquisitions. FAR Part 13.

1. The contracting officer shall not request certified cost or pricing data for items at or under the simplified acquisition threshold. FAR 15.403-1(a).

2. Micropurchases. FAR 13.202.

   a. To the extent possible, micro-purchases shall be distributed equitably among qualified suppliers.

   b. Micropurchases may be awarded without soliciting competitive quotations if the authorized purchaser considers the price to be reasonable. If competitive quotations were solicited and award was made to other than the low quoter, documentation to support the purchase may be limited to identification of the solicited concerns and an explanation for the award decision. FAR 13.202(b).

   c. The administrative cost of verifying the reasonableness of the purchase price may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify price reasonableness need only be taken if the authorized purchaser:

(1) Suspects the price may not be reasonable; or

(2) No comparable pricing information is readily available for that item. FAR 13.202(a)(3).

3. Price reasonableness for simplified acquisitions. FAR 13.106-3.

a. The contracting officer should evaluate price and other factors in an efficient and minimally burdensome manner. The contracting officer must determine the proposed price is fair and reasonable.

b. Whenever possible, base price reasonableness upon competitive quotations.

If only **one response** is received, include a statement of price reasonableness in the contract file. The statement may be based upon (1) market research, (2) comparison of proposed price with prices found reasonable on previous purchases, (3) current price lists, catalogs, or advertisements, (4) a comparison of similar items in a related industry, (5) the contracting officer's personal knowledge of the item being purchased, (6) comparison to an independent Government estimate, or (7) any reasonable basis.

C. Commercial Items - 10 U.S.C. § 2306a(d)(2); 41 U.S.C. § 3505(b)(1); FAR 15.403-1(c)(3); FAR 15.403-3(c); and defined at FAR 2.101.

1. At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable. FAR 15.403-3(c).

a. The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable.[9]

b. The contracting officer must establish price reasonableness in accordance with FAR 13.106-3 (Simplified Acquisition Procedures), FAR 14.408-2 (Sealed Bidding), or FAR Part 15.4 (Contract Pricing), as applicable.

(1) The contracting officer should be aware of customary commercial terms and conditions when pricing commercial items.

[9] In an evaluation of how DoD prices commercial items, the GAO identified problems with the Government's price analysis. In more than half of the purchases, the contracting officer compared the offered price with the offeror's catalog price, or with the price paid in previous procurements. The Government negotiated lower prices in only three of the thirty-three cases. Government Accountability Office, Contract Management: DoD Pricing of Commercial Items Needs Continued Emphasis, Report No. GAO/NSIAD-99-90 (June 24, 1999).

(2) The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.

(3) Commercial item prices are affected by the following factors: speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements.

c. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit DOTCCPD for further analysis.

(1) Requests for sales data must be limited to data for the same or similar items during a relevant time period; and

(2) To the maximum extent possible, requests for data other than certified cost or pricing data must be limited in scope to include only information that is in the form regularly maintained by the offeror as part of its commercial operations. FAR 15.403-3(c)(2).

2. The contracting officer may not request certified cost or pricing data for commercial items as long as the Government is not modifying it. FAR 15.403-1(c)(3).

d. If the contracting officer determines a claimed commercial item is non-commercial, and no other exception or waiver applies, cost or pricing data is required.

e. When minor modifications to commercial items do not make the item “non-commercial,” then:

(1) If funded by an agency other than DoD, NASA, or Coast Guard, no cost or pricing data is required. FAR 15.403-1(c)(3)(iii)(A).

(2) If funded by DoD, NASA, or the Coast Guard, cost or pricing data is only required if the total price of all such modifications under a particular contract action exceed the greater of $700,000 or five percent of the total price of the contract. FAR 15.403-1(c)(3)(iii)(C).

2. If an item is procured by a sole source award of less than $17.5 million to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack and only qualifies as a commercial item pursuant to FAR 12.102(f)(1), then the item is exempt from cost or pricing data requirements. FAR 15.403-1(c)(3)(iv).

D. Competitive Negotiations.

1. The contracting officer is responsible to determine price reasonableness for the prime contract, including subcontracts. The contracting officer may request the advice and assistance of other experts to ensure that an appropriate analysis is performed. The contracting officer is responsible to follow all the pricing policies previously discussed in this outline. FAR 15.404-3 and 15.404-1(a)(5).

2. A price analysis is required whenever TINA does not require certified cost or pricing data. When certified cost or pricing data is required, a price analysis is also recommended to verify the overall price is fair and reasonable. A cost analysis is required when TINA requires certified cost or pricing data in order to evaluate the reasonableness of individual cost elements. FAR 15.404-1(a)(2) & (3).

3. Data other than certified cost or pricing data. See Section VI, *supra*.

VIII. DEFECTIVE PRICING

A. Definition defective cost or pricing data: It is cost or pricing data that, as of the date of agreement on the price of the contract (or another date as agreed to), is subsequently discovered to have been inaccurate, incomplete, or noncurrent. 10 U.S.C. § 2306a(e)(1)(B); 41 U.S.C. § 3506(a)(2). Under TINA and contract price reduction clauses, the Government is entitled to an adjustment in the contract price, to include profit or fee, when it relied upon defective cost or pricing data.

B. Audit Rights. Subsequent to award of a negotiated contract under which the contractor submitted cost or pricing data, the Government has several rights to audit the contractor's records.

1. Contracting agency's right.

a. Statutory basis. 10 U.S.C. § 2306a(g); 41 U.S.C. § 3508. For the purpose of evaluating the accuracy, completeness and currency of cost or pricing data, TINA gives the head of an agency, acting through an authorized representative, the right to examine contractor (or subcontractor) records. This right is identical to the

rights given to the head of an agency under 10 U.S.C. § 2313(a)(2) and 41 U.S.C. § 4706(b)(2).

b. Definitions. 10 U.S.C. § 2313(i); 41 U.S.C. § 4706(a). The term "records" includes "books, documents, accounting procedures and practices, and any other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form."

c. Examination authority. 10 U.S.C. § 2313(a)(2), (e)-(f); 41 U.S.C. § 4706(b)(2), (f)-(g).

(1) The head of an agency, acting through an authorized representative, has the right to examine all records related to:

(a) The proposal for the contract (or subcontract);

(b) The discussions conducted on the proposal;

(c) The pricing of the contract (or subcontract); or

(d) The performance of the contract (or subcontract).

(2) The examination right expires three years after final payment on the contract.

(3) The examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.

d. Contract clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding) and FAR 52.215-2 (Audit and Records – Negotiation) both state that the contracting officer, an authorized representative of the contracting officer, and the Comptroller General, have the right to examine and audit the contractor's records for specific information when cost or pricing data has been submitted.

e. Subpoena power. 10 U.S.C. § 2313(b); 41 U.S.C. § 4706(c)(1).

(1) The Director of DCAA[10] can subpoena any of the records that 10 U.S.C. § 2313(a) gives the HCA the right to examine.

(2) The Director of the DCAA can enforce this subpoena power by seeking an order from an appropriate U.S. district court.

(3) DCAA's subpoena power does not extend to a contractor's internal audit reports. United States v. Newport News Shipbldg. and Dry Dock Co., 837 F.2d 162 (4th Cir. 1988) (Newport News I).

(a) Internal audits are not related to a particular contract.

(b) Internal audits contain the subjective evaluations of the contractor's audit staff.

(4) DCAA's subpoena power is aimed at obtaining objective data upon which to evaluate the specific costs a contractor charged to the Government.

(1) DCAA's subpoena power extends to a contractor's federal income tax returns and other financial data. United States v. Newport News Shipbldg. and Dry Dock Co., 862 F.2d 464 (4th Cir. 1988) (Newport News II).

(5) DCAA's subpoena power is not limited to records relating to a contractor's pricing practices.

(6) DCAA's subpoena power extends to objective factual records relating to overhead costs that the contractor may pass on to the Government.

(7) DCAA's subpoena power also extends to a contractor's work papers for its federal income tax returns and financial statements. United States v. Newport News Shipbldg. and

[10] For civilian agencies, this right extends to the Inspector General of an executive agency, or upon the request of the head of an executive agency, the Director of the DCAA or the Inspector General of the General Services Administration. 41 U.S.C. § 4706(c)(1).

Dry Dock Co., 737 F. Supp. 897 (E.D. Va. 1989) (Newport News III), aff'd, 900 F.2d 257 (4th Cir. 1990).

2. Comptroller General's right.

a. Statutory basis. 10 U.S.C. § 2313(c), (e)-(f); 41 U.S.C. § 4706(d), (f)-(g). The Comptroller General (or the Comptroller General's authorized representative) has the right "to examine any records of the contractor, or any of its subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract…"

b. Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) expanded the Comptroller General's rights. Effective October 14, 2009, the Comptroller General may interview current employees regarding transactions being examined during an audit of contracting records. This right does not apply to commercial items contracts. FAC 2005-37, FAR Case 2008-026.

c. The Comptroller General's examination right only applies to contracts awarded using other than sealed bid procedures. The Comptroller General's examination right expires three years after final payment on the contract.

d. The Comptroller General's examination right does not apply to contracts (or subcontracts) that do not exceed the simplified acquisition threshold.

e. Contract clauses. FAR 52.214-26 (Audit and Records – Sealed Bidding); FAR 52.215-2 (Audit and Records – Negotiation).

f. Subpoena power. 31 U.S.C. § 716.

(1) The Comptroller General has the power to subpoena the records of a person to whom the Comptroller General has access by law or agreement.

(2) The Comptroller General can enforce this subpoena power by seeking an order from an appropriate U.S. district court. United States v. McDonnell-Douglas Corp., 751 F.2d 220 (8th Cir. 1984).

g. Scope of the Comptroller General's examination right.

(1) The term "contract," as used in the statute, embraces not only the specific terms and conditions of a contract, but also the general subject matter of the contract. Hewlett-Packard Co. v. United States, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968).

(2) For cost-based contracts, the Comptroller General's examination right is extremely broad; however, for fixed-price contracts, the books or records must bear directly on the question of whether the Government paid a fair price for the goods or services. Bowsher v. Merck & Co., 460 U.S. 824 (1983).

3. Inspector General's right. 5 U.S.C. App. 3 § 6.

a. Statutory basis. 5 U.S.C. App. 3 § 6(a)(1).

(1) The Inspector General of an agency has the right "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material . . . which relate to programs and operations with respect to which that Inspector General has responsibilities…"

(2) This statutory right requires no contractual implementation.

b. Subpoena power. 5 U.S.C. App. 3 § 6(a)(4).

(1) The Inspector General has the power to subpoena all data and documentary evidence necessary to perform the Inspector General's duties.

(2) The Inspector General can enforce this subpoena power by seeking an order from an appropriate U.S. district court.

c. Scope of the Inspector General's right. The scope of the Inspector General's right is extremely broad and includes internal audit reports. United States v. Westinghouse Elec. Corp., 788 F.2d 164 (3d Cir. 1986).

4. FY 2012 NDAA, Section 842 – The Secretary of Defense, upon written determination, may examine any records of a covered contract, grant, or cooperative agreement to ensure that funds available under said agreement are not subject to extortion or corruption; and are not being provided to persons or entities actively supporting an insurgency or actively opposing United States or coalition forces in a contingency operation.

5. Obstruction of a Federal audit. 18 U.S.C. § 1516.

a. This statute does not increase or enhance the Government's audit rights.

b. The statute makes it a crime for anyone to influence, obstruct, or impede a Government auditor (full or part-time Government/ contractual employee) with the intent to deceive or defraud the Government.

IX. DEFECTIVE PRICING REMEDIES

A. Contractual

1. Price adjustment. The Government can reduce the contract price if the Government discovers that a contractor, prospective subcontractor, or actual subcontractor submitted defective cost or pricing data. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 3506(a)(1); and FAR 15.407-1(b)(1).

a. Amount. 10 U.S.C. § 2306a(e)(1)(A); 41 U.S.C. § 3506(a)(1); FAR 15.407-1(b)(1); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).

(1) The Government can reduce the contract price by any significant amount by which the contract price was increased because of the defective cost or pricing data. Unisys Corp. v. United States, 888 F.2d 841 (Fed. Cir. 1989); Kaiser Aerospace & Elec. Corp., ASBCA No. 32098, 90-1 BCA ¶ 22,489; Etowah Mfg. Co., ASBCA No. 27267, 88-3 BCA ¶ 21,054.

(2) Profit or fee can be included in the price reduction.

(3) Interest. The Government can recover interest on any overpayments it made because of the defective cost or pricing data. 10 U.S.C. § 2306a(f)(1)(A); 41 U.S.C. § 3507(a)(1); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification). The contracting officer must:

(a) Determine the amount of the overpayments;

(b) Determine the date the overpayment was made;[11] and

(c) Apply the appropriate interest rate.[12]

b. Defective subcontractor data. FAR 15.407-1(e)-(f).

(1) The Government can reduce the prime contract price regardless of whether the defective subcontractor data supported subcontract cost estimates or firm agreements between the subcontractor and the prime.

(2) If the prime contractor uses defective subcontractor data, but subcontracts with a lower priced subcontractor (or fails to subcontract at all), the Government can only reduce the prime contract price by the difference between the subcontract price the prime contractor used to price the contract and:

(a) The actual subcontract price if the contractor subcontracted with a lower priced subcontractor; or

(b) The contractor's actual cost if the contractor failed to subcontract the work.

(3) The Government can disallow payments to subcontractors when these payments result from defective cost or pricing data under:

(a) Cost-reimbursement contracts; and

(b) All fixed-price contracts except firm fixed-price contracts and fixed-price contracts with economic price adjustments (e.g., fixed-price incentive contracts and fixed-price award fee contracts).

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[11] For prime contracts, the date of overpayment is the date the Government paid for a completed and accepted contract item. For subcontracts, date of overpayment is the date the Government paid the prime contractor for progress billings or deliveries that included a completed and accepted subcontract item. FAR 15.407-1(b)(7)(ii).

[12] The Secretary of the Treasury sets interest rates on a quarterly basis. 26 U.S.C. § 6621(a),(b). Effective 4 August 2011, FAR Case 2009-034 changed FAR 52.214-27, FAR 52.215-10 and FAR 52.215-11 to require "interest compounded daily as required by 26 USC 6622" to Government overpayments as a result of defective cost or pricing data. This rule replaces the term "simple interest" and aligns with a Court of Appeals for the Federal Circuit decision in Gates v. Raytheon Co., 584 F.3d 1062 (Fed. Cir. 2009).

2. If the Government fails to include a price reduction clause in the contract, courts and boards will read them in pursuant to the Christian Doctrine. University of California, San Francisco, VABCA No. 4661, 97-1 BCA ¶ 28,642; Palmetto Enterprises, Inc., ASBCA No. 22839, 79-1 BCA ¶ 13,736.

3. A defective pricing claim is not subject to the normal six-year statute of limitations. Radiation Sys., Inc., ASBCA No. 41065, 91-2 BCA ¶ 23,971.

4. A defective pricing claim cannot be asserted by the Government as an affirmative defense to a contractor's money claim. Computer Network Sys., Inc., GSBCA No. 11368, 93-1 BCA ¶ 25,260.

5. Penalties. 10 U.S.C. § 2306a(f)(1)(B); 41 U.S.C. § 3507(a)(2); FAR 15.407-1(b)(7); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).

   a. The Government can collect penalty amounts where the contractor (or subcontractor) knowingly submitted defective cost or pricing data.

   b. The contracting officer can obtain a penalty amount equal to the amount of the overpayment.

   c. The contracting officer must consult an attorney before assessing any penalty.

6. Government's burden of proof. The Government bears the burden of proof in a defective pricing case. General Dynamics Corp., ASBCA No. 32660, 93-1 BCA ¶ 25,378. To meet its burden, the Government must prove that:

   a. The information meets the definition of cost or pricing data;

   b. The information existed before the date of agreement on price;

   c. The data was reasonably available before the date of agreement on price;

   d. The data the contractor (or subcontractor) submitted was not accurate, complete, or current;

e. The undisclosed data was the type that prudent buyers or sellers would have reasonably expected to have a significant effect upon price negotiations;

f. The Government relied on the defective data; and

g. The Government's reliance on the defective data caused an increase in the contract price.

7. Once the Government establishes nondisclosure of cost and pricing data, there is a rebuttable presumption of prejudice.

a. The contractor must then demonstrate that the Government would not have relied upon this information.

b. Once demonstrated, the burden of showing detrimental reliance shifts back to the Government.

c. Hence, the ultimate burden of showing prejudice rests with the Government.

8. The ASBCA often views defective pricing cases as "too complicated" to resolve by summary judgment. Grumman Aerospace Corp., ASBCA No. 35185, 92-3 BCA ¶ 25,059; McDonnell Douglas Helicopter Co., ASBCA No. 41378, 92-1 BCA ¶ 24,655; but see Rosemount, Inc., ASBCA No. 37520, 95-2 BCA ¶ 27,770 (granting the contractor's motion for summary judgment because the Government failed to meet its burden of proof).

9. Successful defenses to price reductions.

a. The information at issue was not cost or pricing data.

b. The Government did not rely on the defective data. 10 U.S.C. § 2306a(e)(2); 41 U.S.C. § 3506(b).

c. The price offered by the contractor was a "floor" below which the contractor would not have gone.

10. Unsuccessful defenses to price reductions. 10 U.S.C. § 2306a(e)(3); 41 U.S.C. § 3506(c); FAR 15.407-1(b)(3).

a. The contractor (or subcontractor) was a sole source supplier or otherwise was in a superior bargaining position.

b. The contracting officer should have known that the cost or pricing data the contractor (or subcontractor) submitted was defective. FMC Corp., ASBCA No. 30069, 87-1 BCA ¶ 19,544.

c. The contract price was based upon total cost and there was no agreement about the cost of each item procured under the contract.

d. The contractor (or subcontractor) did not submit a Certificate of Current Cost or Pricing Data.

11. Offsets. 10 U.S.C. § 2306a(e)(4)(A)-(B); 41 U.S.C. § 3506(d); FAR 15.407-1(b)(4)-(6); FAR 52.215-10 (Price Reduction for Defective Cost or Pricing Data); FAR 52.215-11 (Price Reduction for Defective Cost or Pricing Data – Modification).

a. The contracting officer must allow an offset for any understated cost or pricing data the contractor (or subcontractor) submitted.

b. The amount of the offset may equal, but not exceed, the amount of the Government's claim for overstated cost or pricing data arising out of the same pricing action.

c. The offset does not have to be in the same cost grouping as the overstated cost or pricing data (e.g. material, direct labor, or indirect costs).

d. The contractor must prove that the higher cost or pricing data:

(1) Was available before the "as of" date specified on the Certificate of Current Cost or Pricing Data; and

(2) Was not submitted.

e. The contractor is not entitled to an offset under two circumstances:

(1) The contractor knew that its cost or pricing data was understated before the "as of" date specified on the Certificate of Current Cost or Pricing Data. See United Tech. Corp.,Pratt & Whitney v. Peters, No. 98-1400, 1999 U.S. App. LEXIS 15490 (Fed. Cir. July 12, 1999) (affirming in part ASBCA's denial of offsets for "sweep" data intentionally withheld from Government).

(a) Prior to the 1986 TINA amendments, contractors could obtain offsets for intentional understatements.

See United States v. Rogerson Aircraft Controls, 785 F.2d 296 (Fed. Cir. 1986) (holding that a contractor, under pre-1986 TINA, could offset intentional understatements that were "completely known to the Government at the time of the negotiations and in no way hindered or deceived the Government").

(b) Even under the pre-1986 TINA, the offset must be based upon cost or pricing data. Errors in judgment cannot serve as a basis for an offset. See AM General Corp., ASBCA No. 48476, 99-1 BCA ¶ 30,130 (characterizing contractor's decision to amortize nonrecurring costs of HMMWV production as "at most, errors of judgment" that failed to support an offset).

(2) The Government proves that submission of the data before the "as of" date specified on the Certificate of Current Cost or Pricing Data would not have increased the contract price in the amount of the proposed offset.

B. Administrative Remedies

1. Termination of the contract. FAR Part 49; Joseph Morton Co. v. United States, 3 Cl. Ct. 120 (1983), aff'd, 757 F.2d 1273 (Fed. Cir. 1985).

2. Suspension and debarment. FAR Subpart 9.4; DFARS Subpart 209.4.

3. Cancellation of the contract. 18 U.S.C. § 218; FAR Subpart 3.7.

4. The Program Fraud Civil Remedies Act of 1986. 31 U.S.C. §§ 3801-3812; DOD Dir. 5505.5 (Aug. 30, 1988).

C. Judicial remedies.

1. Criminal.

a. False Claims Act. 18 U.S.C. § 287. See Communication Equip. and Contracting Co., Inc. v. United States, 37 CCF ¶ 76,195 (Cl. Ct. 1991) (unpub.) (holding that TINA does not preempt the False Claims Act so as to limit the Government's remedies).

b. False Statement Act. 18 U.S.C. § 1001. See, e.g., United States v. Shah, 44 F.3d 285 (5th Cir. 1995).

c. The Major Fraud Act. 18 U.S.C. § 1031.

2. Civil.

a. False Claims Act. 10 U.S.C. §§ 3729-33. Civil penalty between $5,500 and $11,000, plus treble damages. 10 U.S.C. §§ 3729(a).

D. Fraud indicators. DOD Inspector General's web link found at http://www.dodig.mil/resources/fraud/scenarios.html.

1. High incidence of persistent defective pricing.

2. Continued failure to correct known system deficiencies.

3. Consistent failure to update cost or pricing data with knowledge that past activity showed that prices have decreased.

4. Failure to make complete disclosure of data known to responsible personnel.

5. Protracted delay in updating cost or pricing data to preclude possible price reduction.

6. Repeated denial by responsible contractor employees of the existence of historical records that are later found to exist.

7. Repeated utilization of unqualified personnel to develop cost or pricing data used in estimating process.

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APPENDIX

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION, TECHNOLOGY AND LOGISTICS

APR 27 2011

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Improving Competition in Defense Procurements – Amplifying Guidance

My attached November 24, 2010, memorandum "Improving Competition in Defense Procurements" provided implementing guidance for the direction provided in the USD(AT&L) memorandum "Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending" dated September 14, 2010. The focus of my memorandum was on maximizing competition in situations where only one offer is received in a procurement utilizing competitive procedures. The purpose of this memorandum is to amplify that guidance in response to questions that have been raised.

The policy guidance set out in the November 24, 2010, memorandum is applicable to all competitive procurements of supplies and services above the Simplified Acquisition Threshold (SAT), including commercial items and construction. Further, it covers procurements accomplished under the procedures in Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) parts/subparts 8.4, 12, 13.5, 14, 15, and 16.5. Exceptions to this policy are procurements in support of emergency acquisitions for contingency operations, humanitarian assistance, disaster relief, peacekeeping operations, or recovery from nuclear, biological, chemical, or radiological attacks against the United States. However, the use of these exceptions does not mitigate the need for competition nor the requirement for a determination that the price is fair and reasonable.

Unless an exception applies or a waiver is granted, the following procedures apply:

- If the solicitation was advertised for fewer than 30 days and only one offer is received, then the contracting officer shall cancel and resolicit for an additional period of at least 30 days; or

- If a solicitation allowed at least 30 days for receipt of offers and only one offer was received, then the contracting officer shall not depend on the standard at FAR 15.403-1(c)(ii) in determining the price to be fair and reasonable. Rather, the contracting officer shall use price or cost analysis in accordance with FAR 15.404-1 to make that determination. If the contracting officer believes that it is necessary to enter into negotiations with an offeror, the basis for these negotiations shall be either certified cost or pricing data or data other than certified cost or pricing data, as appropriate, in accordance with FAR 15.403-1(c), DFARS 215-403-1(c) and FAR 15.403-3(b). The negotiated price should not exceed the offered price.

Waivers to the policy requirement to resolicit or the requirement to conduct negotiations are permitted. The waiver authority is the Head of the Contracting Activity (HCA). However, the HCA may delegate this authority to not lower than one level above the contracting officer.

I recognize that implementation of this policy may have the unintended consequence of increasing the contracting community's workload, but given today's scarcity of resources we need to ensure effective competition to the maximum extent possible. Every dollar saved through effective competition benefits the warfighter and the taxpayers. Should you have additional questions on this policy, please contact Mr. Larry McLaury at 703-697-6710 or e-mail address larry.mclaury@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

NOV 24 2010

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Improving Competition in Defense Procurements

This memorandum provides additional guidance for competitive situations in which only one offer is received in response to a solicitation and is based on the direction provided in the USD(AT&L) memorandum "Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending" dated September 14, 2010. To maximize the savings that are obtained through competition, contracting officers will no longer use the standard at FAR 15.403-1(c)(1)(ii) or (iii) to determine that the offered price is based on adequate competition when only one offer is received.

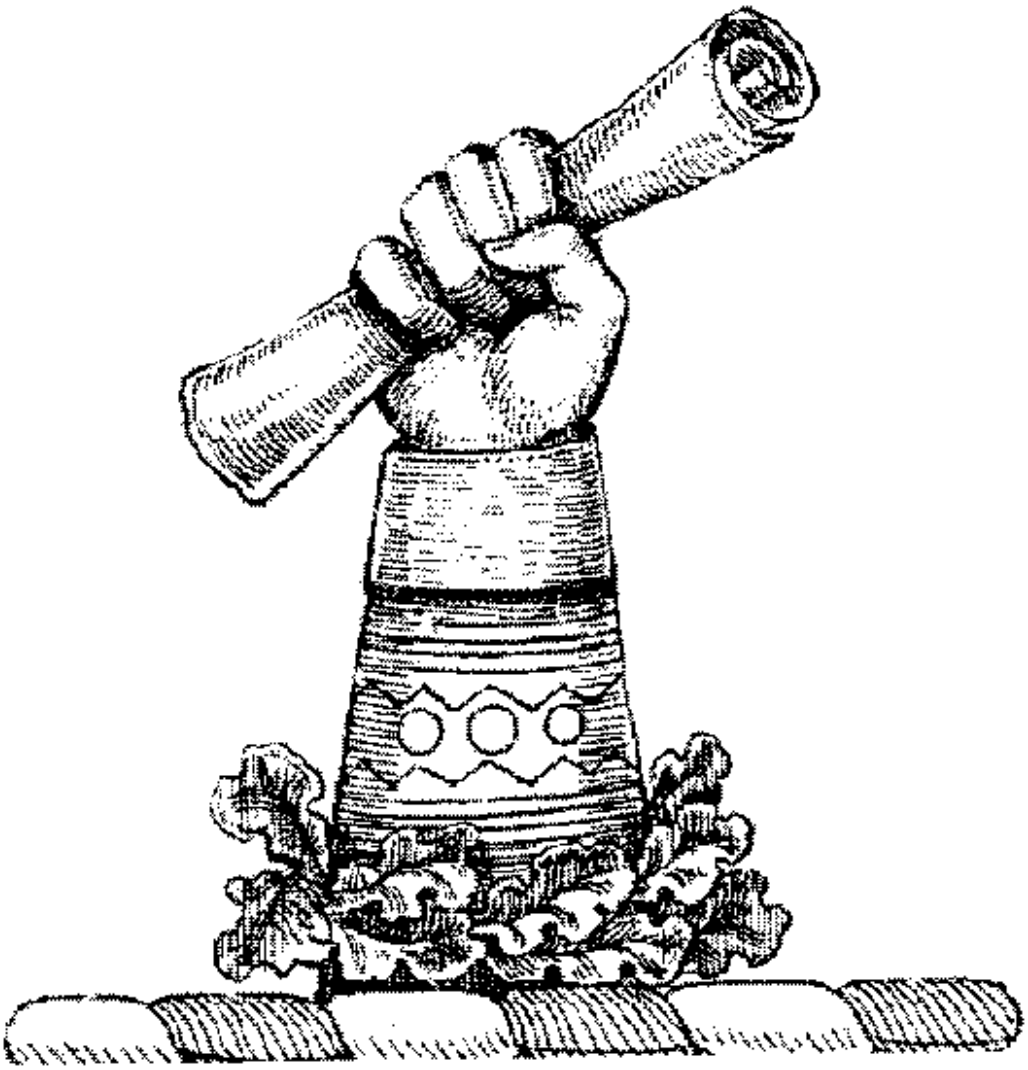
Effective immediately, you will ensure that if a solicitation was open for less than 30 days and only one offer was received, the contracting officer shall re-advertise the solicitation for a minimum of an additional 30 days, unless a waiver is obtained from the head of the contracting activity. Further, if the solicitation was open for at least 30 days, or has been re-advertised and still only one offer is received, the contracting officer shall conduct negotiations with the offeror, unless this requirement is specifically waived by the head of the contracting activity. The basis for these negotiations shall be either certified cost or pricing data or other than certified cost or pricing data, as appropriate. In no event, should the negotiated price exceed the price originally offered.

Contracting officers shall document the results of the negotiations in the Business Clearance/Pricing Negotiation Memorandum in accordance with FAR 15.406-3 and DFARS PGI 215.406-3 in the same manner as any negotiated procurement. Contract Review Boards or other similar review mechanisms should be used to ensure the Business Clearance/Pricing Negotiation Memorandum documents the process and supports the negotiated price as being fair and reasonable. The Peer Reviews conducted post award will be the mechanism for assessing the application of this process.

The intent of this guidance is to ensure more effective competition that will result in more effective use of the Department's resources and savings for the taxpayer. Should you have any questions, please contact Mrs. Susan Hildner at 703-697-0895, or at Susan.Hildner@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Chapter 13
Socioeconomic Policies



2014 Contract Attorneys Deskbook

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CHAPTER 13

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CHAPTER 13

SOCIOECONOMIC POLICIES

I. INTRODUCTION

A. Vision of the Acquisition Process

1. Deliver on a timely basis…

2. the best value product or service to the customer,

3. while maintaining the public's trust…

4. and fulfilling **public policy** objectives. FAR 1.102(a) (emphasis added).

II. POLICY AND PROCEDURE IN SUPPORT OF SMALL BUSINESS

A. **Policy**.[1] 15 U.S.C. §§ 631-650; FAR 19.201.

1. Place a "fair proportion"[2] of acquisitions (prime contracts) with small business concerns.

2. Promote maximum subcontracting opportunity for small businesses. FAR 19.702. Prime contractors must agree to provide small businesses the "maximum practicable opportunity to participate in subcontracts."

---

[1] Congress declared its policy in promoting small businesses in 15 U.S.C. § 631. "The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. *Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.* It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a *fair proportion* of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) *be placed with small-business enterprises*, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation." (italics added).

[2] The goal for small businesses is that not less than **23%** of the total value of all government prime contract awards should go to small businesses. 15 U.S.C. § 644(g). The goal for service-disabled veteran-owned small businesses is not less than **3%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g). The goal for HUBZone small businesses is not less than **3%** of the total value of all government prime contract awards. 15 U.S.C. § 644(g). The goal for women-owned small businesses is not less than **5%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g). The goal for socially and economically disadvantaged individual-owned small businesses is not less than **5%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g).

3. **Small business defined**. FAR 2.101; FAR 19.001 and 15 U.S.C. § 632.

   a. Independently owned and operated;

   b. Not dominant in field in which it is bidding on government contracts; and,

   c. Meets applicable size standards under FAR 19.102.

4. Most Small Business Programs only apply in the United States or its outlying areas (i.e. Puerto Rico, Guam, U.S. Virgin Islands, American Samoa and others listed in FAR 2.101). See FAR 19.000(b). Note, however, that FAR Part 19.6 (Certificates of Competency and Determinations of Responsibility) does apply worldwide.

B. Size Standards and Size Determination Procedures

1. The Small Business Administration (SBA) establishes small business size standards on an industry-by-industry basis. FAR 19.102(a); see also 13 C.F.R. 121.

2. Small business size standards are applied by classifying the product or service being acquired in the industry whose definition best describes the principal nature of the product or service being acquired. FAR 19.102(b).

3. **NAICS Classification.** To establish the applicable size standard, the contracting officer adopts an appropriate product or service classification called a North American Industry Classification System (NAICS) code and *includes it in the solicitation for all acquisitions exceeding the micropurchase threshold.*[3] FAR 19.102. The NAICS Manual which explains and defines the codes (from 13 C.F.R. 121.201) is available on the internet at http://www.census.gov/eos/www/naics/.

   a. This NAICS classification establishes the applicable size standard for the acquisition. The contracting officer then specifies in the solicitation this NAICS size standard classification so offerors can appropriately represent themselves as small or large when responding to the solicitation.

   b. For size standard purposes, a product or service shall be classified in only one NAICS code, whose definition best describes the principal nature of the product or service. FAR 19.102(b)(c); Technica Corp., SBA No. NAICS-5248, June 20, 2011.

[3] The micropurchase threshold is generally $3,000, but it could be $15,000 or $30,000 depending on certain conditions. See Contract Attorney's Deskbook, Chapter 9, Simplified Acquisitions.

c. **NAICS Code Appeals.** The contracting officer's NAICS code designation is final unless appealed directly to the SBA's Office of Hearings and Appeals (OHA) located in Washington, D.C. Any interested party adversely affected by a NAICS code designation may appeal the contracting officer's NAICS code selection in writing as a matter of right to the SBA's OHA **no later than 10 calendar days after** the issuance of the initial solicitation; the SBA will summarily dismiss an untimely appeal. The appellant must exhaust the OHA appeal process before seeking judicial review. 13 C.F.R. Part 121.1103, and FAR 19.303(c).

d. **Delay of opening offers or contract award pending a NAICS code appeal.** See Aleman Food Serv., Inc., B-216803, Mar. 6, 1985, 85-1 CPD ¶ 277. If the SBA finds the original NAICS code improper, the contracting officer must amend the solicitation to reflect the SBA's decision *only* if the contracting officer receives the SBA determination before the date offers are due. If the contracting officer receives the SBA's decision after the date that offers are due, then that decision will apply only to future solicitation of the same products and services. See FAR 19.303(c)(5).

e. The GAO does not review NAICS Code appeals (a.k.a. "classification" protests). A-P-T Research, Inc.—Costs, B-298352.3, Sep. 28, 2006, 2007 Comp. Gen. Proc. Dec. P60 (stating that "our Bid Protest Regulations provide that 'challenges of the selected standard industrial classification may be reviewed *solely* by the Small Business Administration'"); Tri-Way Sec. & Escort Serv., Inc., B-238115.2, Apr. 10, 1990, 90-1 CPD ¶ 380; JC Computer Servs., Inc. v. Nuclear Regulatory Comm'n, GSBCA No. 12731-P, 94-2 BCA ¶ 26,712; Cleveland Telecommunications Corporation, B-247964, July 23, 1992, 92-2 CPD ¶ 47. However, GAO may recommend an agency comply with an OHA decision that an agency ignores. Eagle Home Medical Corp., B-402387, Mar. 29, 2010.

4. **Small business certification**. Representations. FAR 19.301.

a. Self-certification. "To be eligible for award as a small business, an offeror must represent, in good faith, that it is a small business at the time of the written representation." FAR 19.301. See also Randolph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39; United Power Corp., B-239330, May 22, 1990, 90-1 CPD ¶ 494. The "contracting officer shall accept an offeror's representation . . . that it is a small business unless" another offeror challenges the representation or the contracting officer has reason

to question the representation. FAR 19.301. AMI Constr., B-286351, Dec. 27, 2000.

b. SBA certification. The offeror's representation that it is a small business is not binding on the SBA. If an offeror's status as a small business is challenged, then the SBA will evaluate the business' status and make a determination, which is binding on the contracting officer. FAR 19.301-1(c). MTB Investments, Inc., B-275696, March 17, 1997, 97-1 CPD ¶ 112; Olympus Corp., B-225875, Apr. 14, 1987, 87-1 CPD ¶ 407.

c. If an acquisition is set-aside for small business, the failure of the bidder to certify its status ***does not***, in and of itself, render the bid nonresponsive. Last Camp Timber, B-238250, May 10, 1990, 90-1 CPD ¶ 461; Concorde Battery Corp., B-235119, June 30, 1989, 89-2 CPD ¶ 17.

d. Neither the FAR nor the SBA regulations require a firm to re-certify size status before an agency exercises an option where the agency awarded the original contract on a set-aside basis. See Vantex Serv. Corp., B-251102, Mar. 10, 1993, 93-1 CPD ¶ 221. *But see* CMS Info. Servs., Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132 (holding that agency may properly require firms to certify their size status as of the time they submit their quotes for an indefinite delivery/indefinite quantity (IDIQ) task order). But see 13 C.F.R. § 121.404(g) regarding novations or mergers.

e. If a contractor misrepresents its status as a small business ***intentionally***, the contract is void or voidable. C&D Constr., Inc., ASBCA No. 38661, 90-3 BCA ¶ 23,256; J.E.T.S., Inc., ASBCA No. 28642, 87-1 BCA ¶ 19,569, aff'd, J.E.T.S., Inc. v. United States, 838 F.2d 1196 (Fed. Cir. 1988). Cf. Danac, Inc., ASBCA No. 30227, 92-1 BCA ¶ 24,519. Additionally, such a misrepresentation may be a false statement under 18 U.S.C. § 1001 and 15 U.S.C. § 645.

f. Self-certification only applies to status as a small business, minority-owned business, woman-owned business, veteran-owned business, and service-disabled veteran-owned business. SBA certification and approval are *required* for entrance into the 8(a) business development program, and the HUBZone program.

5. **Size status protests** (a.k.a. protesting representation of being a "small business"). FAR 19.302.

a. Per 19.302(a), "an offeror, the SBA, or another interested party [includes the contracting officer] may challenge *the sma*ll business

representation of an offeror in a specific offer. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA."

b. A protest is "timely" if received by the contracting officer by close of business of the 5th business day either (1) after bid opening in a sealed bid acquisition or (2) after the protester receives notice of the proposed awardee's identity in a negotiated acquisition. A size status protest filed by either the contracting officer or by the SBA is always timely whether filed before or after contract award. FAR 19.302. 13 C.F.R. § 121.1004(b),(c). Alliance Detective & Security Service, Inc. B-299342, Apr. 13, 2007, 2007 Comp Gen. 564; Eagle Design and Mgmt., Inc., B-239833, Sept. 28, 1990, 90-2 CPD ¶ 259; United Power Corp., B-239330, May 22, 1990, 90-1 CPD ¶ 494.

(1) The contracting officer ***must forward the protest*** (whether timely or not) to the SBA Government Contracting Area Office for the geographic area where the principal office of the business in question is located and ***must withhold award*** until: (1) the SBA has made a size determination or (2) 10 business days have elapsed since SBA's receipt of the protest, whichever occurs first, absent a finding of urgency. FAR 19.302(h)(1). Alliance Detective & Security Service, Inc. B-299342, Apr. 13, 2007, 2007 Comp Gen. 56.[5] Aquasis Servs., Inc., B-240841.2, June 24, 1991, 91-1 CPD ¶ 592.

(2) The SBA Government Contracting Area Office ***must rule within 10 business days*** or the contracting officer may proceed with award. FAR 19.302(h)(1). Systems Research and Application Corp., B-270708, Apr. 15, 1996, 96-1 CPD ¶ 186; International Ordnance, Inc., B-240224, July 17, 1990, 90-2 CPD ¶ 32. Even if the 10 days have passed and whether or not award has been made, if the SBA rules that

[4] The GAO reiterated that an SBA protest is always timely. In this case, a Department of Homeland Security (DHS) contracting officer awarded a contract to C&D Security Management, Inc. (C&D) despite pending size status protests. The GAO found timely an SBA size status protest filed over two months after the contracting officer notified the offerors that he intended to award to C&D. Further, because the SBA protest was timely, the GAO found that the SBA's determination that C&D was not a small business applied to the procurement at issue and so, C&D was not eligible for award. While GAO considered recommending that the contracting officer terminate the contract with C&D, because C&D had already incurred substantial performance costs, GAO recommended that DHS allow C&D to perform during the base performance period, but that it not exercise any of the options available under the contract.

[5] In this case, the GAO found that a DHS contracting officer's award of a contract before referring two size status protests to SBA was improper in that he failed to withhold award as required under FAR 19.302.

the awardee is not a small business, the agency should consider that ruling, and award or continue to allow performance at its own peril. ALATEC, B-298730, Dec. 4, 2006, 2006 CPD ¶ 191; Hydroid LLC, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20.[6] The FAR permits the contracting officer to, when practical, continue to withhold award until the SBA's determination is received. FAR 19.302(h)(1).

(3) When the SBA Government Contracting Area Office makes its determination within 10 business days, that determination is final, unless appealed. Award may be made on the basis of the SBA's determination. FAR 19.302(g)(2).

(4) The SBA Government Contracting Area Office decisions are appealable to the Office of Hearings and Appeals within the time limits contained in Subpart C of Part 13 C.F.R. 134. Agencies need not suspend contract action pending appeals to OHA. If an activity awards to a firm that the Area Office initially finds is "small," the activity need not terminate the contract if the SBA OHA later reverses the Area Office's determination. The SBA's OHA will inform the contracting officer of its ruling on the appeal. If the SBA's decision is received *prior to award*, then that decision will apply to the pending acquisition. SBA OHA's decisions received *after award* shall not apply to that acquisition, however, the SBA OHA may consider this decision in future actions. FAR 19.302(i); McCaffery & Whitener, Inc., B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168; Verify, Inc., B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107.

c. In negotiated small business set-asides, the agency must inform each unsuccessful offeror prior to award of the name and location of the apparent successful offeror. FAR 15.503(a)(2) and FAR 19.302(d)(1); Resource Applications, Inc., B-271079, August 12, 1996, 96-2 CPD ¶ 61; Phillips Nat'l, Inc., B-253875, Nov. 1, 1993, 93-2 CPD ¶ 252.

d. As discussed above, late size status protests (and timely protests filed after contract award) generally do not apply to the current contract under competition; rather, the protest will be considered

[6] These cases stand for the proposition that even where the requirements of 19.302 have been met by the agency, termination may be appropriate where: 1) a timely protest was filed; 2) the area office found the business not small and there was no appeal of the SBA ruling, and; 3) there are no countervailing circumstances that weigh in favor of allowing a 'not small' business to continue performance. In short, letting a 'known' large business perform a small-business set-aside is going to be frowned upon by GAO.

for future actions. FAR 19.302(j). See Chapman Law Firm v. United States, 63 Fed. Cl. 25 (2004). But see Adams Indus. Servs., Inc., B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56 (protester filed protest after award; however, under the circumstances of this procurement, simplified acquisition procedures did not require the agency to issue a pre-award notice to unsuccessful vendors. Since the protest was filed within 5 days after the protester received notice of the issuance of a purchase order to the awardee, the protest was considered timely).

e. The GAO does not review size protests. McCaffery & Whitener, Inc., supra (stating that the Small Business Act . . . gives the SBA, not our Office, the exclusive and conclusive authority to determine matters of small business size status for federal procurement); DynaLantic Corp., B-402326, Mar. 15, 2010, 2010 CPD ¶ 103; Hughes Group Sol., B-408781.2, Mar. 5, 2014, 2014 CPD ¶ 91.

f. Courts will not overrule a SBA determination unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with law or regulation. STELLACOM, Inc, v. United States, 24 Cl. Ct. 213 (1991).

C. Responsibility Determinations and Certificates of Competency (COCs).

1. 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, DFARS PGI 219.6.

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

3. **Responsibility defined:** Prospective contractors must have adequate resources, be capable of complying with proposed delivery schedules, have a satisfactory performance record; have a satisfactory record of business integrity and ethics; have the necessary organization, experience, accountability measures, etc; have the necessary production/technical equipment/facilities; and be qualified and eligible to receive award. FAR 9.104.

4. **Certificate of Competency Program.** This program empowers the SBA to certify to a contracting officer that a small business is responsible so that it can perform a particular government contract. *If the contracting officer finds a small business nonresponsible, he or she* ***must*** *forward the matter to the SBA Government Contracting Area Office immediately and must withhold award* (for 15 business days after receipt by SBA). FAR

19.602-1(a)(2). Then the SBA will notify the business of the contracting officer's determination and offer the business the opportunity to apply for a COC. If the business applies for a COC, then the SBA will either ***issue a COC*** (if it finds the business responsible) or the SBA will ***deny the COC***. FAR 19.602-2.

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

   a. The burden is on the offeror to apply for a COC. FAR 19.602-2(a). Thomas & Sons Bldg. Contr., Inc., B-252970.2, June 22, 1993, 93-1 CPD ¶ 482.

   b. The contracting officer may appeal a decision to issue a COC if the contracting officer and the SBA disagree regarding a small business concern's ability to perform. For COCs valued between $100,000 and $25,000,000, the SBA Associate Administrator for Government Contracting will make the final determination on whether to issue a COC. For COCs valued over $25,000,000, the SBA Headquarters will make the final determination. See FAR 19.602-3; AFARS 5119.602-3; Holiday Inn-Laurel—Protest and Request for Costs, B-270860.3, B-270860.4, May 30, 1996, 96-2 CPD ¶ 259.

6. The contracting officer "shall" award to another offeror if the SBA does not issue a COC within 15 business days of receiving a referral. FAR 19.602-4(c); Mid-America Eng'g and Mfg., B-247146, Apr. 30, 1992, 92-1 CPD ¶ 414. Cf. Saco Defense, Inc., B-240603, Dec. 6, 1990, 90-2 CPD ¶ 462.

7. If the SBA refuses to issue a COC, the contracting officer need not refer the case back to the SBA upon presentation of new evidence by the contractor. Discount Mailers, Inc., B-259117, Mar. 7, 1995, 95-1 CPD ¶ 140.

8. Once the SBA issues a COC, it is ***conclusive*** as to all elements of responsibility. So, once the contracting officer receives notice of the COC, the contracting officer ***must*** award the contract to the small business. FAR 19.602-4. GAO review of the COC process is limited to determining whether government officials acted in bad faith or failed to consider vital information. The Gerard Co., B-274051, Nov. 8, 1996, 96-2 CPD ¶ 177; UAV Sys., Inc., B-255281, Feb. 17, 1994, 94-1 CPD ¶ 121; J&J Maint., Inc., B-251355.2, May 7, 1993, 93-1 CPD ¶ 373.

9. The COC procedure does not apply when an agency declines to exercise an option due to responsibility-type concerns. E. Huttenbauer & Son, Inc., B-258018.3, Mar. 20, 1995, 95-1 CPD ¶ 148.

10. The COC procedure generally does not apply when the contracting officer rejects a technically unacceptable offer. See Paragon Dynamics, Inc., B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248; Pais Janitorial Serv. & Supplies, Inc., B-244157, June 18, 1991, 91-1 CPD ¶ 581; compare with Fabritech, Inc., B-298247, July 27, 2006.

11. The COC procedure applies when an agency determines that a small business contractor is nonresponsible based solely on a pass/fail evaluation of the firm's past performance. See Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003. 2003 CPD ¶ 33.

D. Regular Small Business Set-Asides

FAR Subpart 19.5.

1. The decision to set aside a procurement for participation only by small businesses is a business judgment within the discretion of the contracting officer, which will not be disturbed absent a showing that it was unreasonable with that discretion limited by various provisions of law and regulation.[7] The SBA may also *sua sponte* recommend that a certain acquisition be set aside for small businesses. FAR 19.501; Neal R. Gross & Co., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53; Espey Mfg. & Elecs. Corp., B-254738.3, Mar. 8, 1994, 94-1 CPD ¶ 180.

2. The agency must exercise its discretion reasonably and in accordance with statutory and regulatory requirements. DCT Inc., B-252479, July 1, 1993, 93-2 CPD ¶ 1; Neal R. Gross & Co., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53; Quality Hotel Offshore, B-290046, May 31, 2002, 2002 CPD ¶ 91.

3. DFARS 219.201(d) requires small business specialist review of all acquisitions over $10,000, except those restricted for exclusive small business participation under FAR 19.502-2 (which *may* be reviewed). PGI 219.201(d)(10).

4. Types of set-asides:

a. Total Set-Asides

(1) Acquisitions between $3,000 and $150,000. 15 U.S.C. § 644(j), 13 CFR 125.2(f)(1), and FAR 19.502-2(a).

[7] Under FAR 19.203, SDVOSB, HUBZone, WOSB and 8(a) requirements take priority over small business concerns generally. *See also* OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB MEMO. NO. 09-23, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2009) (stating that for Executive Branch agencies "the applicable SBA 'parity' regulations remain binding and in effect as validly-promulgated implementations of the governing statutes."; *see also* DIRECTOR, DEFENSE PROCUREMENT AND ACQUISITION, MEMO RE: SMALL BUSINESS ADMINISTRATION PARITY REGULATION, May 8, 2010 (updating similar 29 July 2009 Memo). See also Section IV of this chapter.

Acquisitions in this range are ***automatically*** reserved for small business concerns and the contracting officer ***shall*** set aside any acquisition with an anticipated dollar value exceeding $3,000 but not greater than $150,000 for small businesses unless an exception applies.[8]

(a) Exceptions.

(i) 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 "market prices, quality, and delivery."

(ii) Overseas? Latvian Connection, LLC, B-408633, Sept. 18, 2013, 2013 CPD ¶ 224. The Small Business Act does not require agencies to set aside for small businesses located outside the U.S. procurements valued under the simplified acquisition threshold when the SBA is silent and FAR Part 19 is expressly limited to the United States (FAR 19.000(b)).

(2) Acquisitions over $150,000.[9] FAR 19.502-2(b). The contracting officer ***shall*** set aside any acquisition over $150,000 for small business participation ***if*** the contracting officer reasonably expects that:

(a) "Offers will be obtained from at least two responsible small businesses" and, [10]

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[8] The actual statutory language states, "Each contract for the purchase of goods and services that has an anticipated value greater than $2,500 [raised to $3,000; see FAR 19.502-2(a)] but not greater than $100,000 [raised to $150,000; *Id*] shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the good or services being purchased."

[9] FAR 19.502-2(b) also applies to multiple-award ID/IQ delivery orders. *Delex Systems, Inc*. Comp. Gen. B-400403, Oct. 8, 2008 (opining that each order is considered an acquisition and therefore the Rule of Two applies, at least where there are small businesses among the ID/IQ awardees).

[10] Note that the actual FAR language states:

> (b) The contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that –
>
> (1) offers will be obtained from at least two responsible business concerns offering the products of different small business concerns . . .

(b) "Award will be made at fair market prices." Adams & Assoc., v. United States, 741 F.3D 102, 110 (Fed. Cir. 2014).

(3) Is there any real difference? While the language in the FAR is similar, the real difference lies in the interaction with other SBA programs. For acquisitions over $150,000, the contracting officer MUST consider the 8(a), HUBZone, WOSB, and SDVOSB programs before using a small business set aside (See Parts III and IV).

b. **Partial**. FAR 19.502-3; Aalco Forwarding, Inc., et. al., B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75. The contracting officer ***shall*** 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. (Note if the contracting officer only expects one capable small business to respond, then a partial set aside will not be made, unless authorized by the head of the contracting activity); and

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

(5) Note: A partial set aside will not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond to the solicitation (FAR 19.502-3(5)).

5. Limitations on Subcontracting by Small Businesses. If the agency sets aside an acquisition, certain subcontracting and domestic end item limitations apply to the small business awardee. See 15 U.S.C. § 657s, 13 C.F.R. § 125.6 and FAR 52.219-14. See also Innovative Refrigeration Concepts, B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61; Adrian Supply Co.,

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FAR 19.502-2. The language "offering the products of different small business concerns" is often overlooked by courts and boards without explanation. *See e.g. FFTF Restoration Co., LLC v. United States*, 86 Fed. Cl. 226 (Fed. Cl. 2009). Though outside the scope of this outline, practitioners should note the non-manufacturer rule in 13 C.F.R. 121.406.

B-257261, Sept. 15, 1994, 95-1 CPD ¶ 21; Kaysam Worldwide, Inc., B-247743, June 8, 1992, 92-1 CPD ¶ 500.

a. Services. The contractor may not expend on subcontractors more than 50% of the amount paid to the concern under the contract.

b. Supplies.

(1) The contractor (other than a regular dealer in such supplies) may not expend on subcontractors more than 50% of the amount, less the cost of materials, paid to the concern under the contract.

(2) In the case of a regular dealer in supplies, the dealer mush supply the product of a domestic small business, unless waived.

c. Construction. Section 1651 of the 2013 NDAA required the SBA to establish requirements for general and specialty construction. As of the summer of 2013, the SBA had not done so. The prior regulation, which is still in effect, requires at least 15% of the cost of the contract to be spent on in-house employees for general construction and 25% of the cost of the contract on in-house employees for special trade construction.

d. If the contract includes both service and supply requirements, look to whichever is the greatest percentage and then apply the above rules.

e. Similarly situated entities. The Sec. 1651 of the 2013 NDAA also amended the treatment of "similarly situated entities." Contract amounts expended by a covered small business on a similarly situated small business shall not be considered subcontracted for purchases of the thresholds. E.g., if a 8(a) subcontracts to another 8(a), it is treated for purposes of the threshold as if the prime was doing that work.

6. Rejecting SBA set-aside recommendations and withdrawal of set-asides. FAR 19.505, 19.506.

a. The contracting officer may reject a SBA recommendation or withdraw a set-aside before award, however, the contracting officer must notify the SBA of the rejection. The SBA may then appeal the rejection to the head of the contracting activity. FAR 19.505, DFARS 219.505, and AFARS 5119.505.

b. The FAR sets forth notice and appeal procedures for resolving disagreements between the agency and the SBA. If the contracting

agency and the SBA disagree, the contracting agency has the final word on set-aside or withdrawal decisions.

c. Potential offerors also may challenge the contracting officer's decision to issue unrestricted solicitations or withdraw set-asides. DMS Pharmaceutical Group, Inc., B-406305, 2012 CPD ¶ 140; Aerostructures, Inc., B-280284, Sep. 15, 1998, 98-2 CPD ¶ 71; American Imaging Servs., B-238969, July 19, 1990, 90-2 CPD ¶ 51.

d. If the activity receives ***no*** small business offers or the contracting officer determines that award would be "detrimental to the public interest," the contracting officer may not simply award the contract to a large business but rather, must withdraw the solicitation and resolicit on an unrestricted basis (allowing the potential for both small and large businesses to compete). FAR 19.506. Western Filter Corp., B-247212, May 11, 1992, 92-1 CPD ¶ 436; CompuMed, B-242118, Jan. 8, 1991, 91-1 CPD ¶ 19; Ideal Serv., Inc., B-238927.2, Oct. 26, 1990, 90-2 CPD ¶ 335.

7. An agency is not required to set aside the reprocurement of a defaulted contract. FAR 49.405. Premier Petro-Chemical, Inc., B-244324, Aug. 27, 1991, 91-2 CPD ¶ 205.

III. PROGRAMS FOR SMALL DISADVANTAGED BUSINESSES

A. **Contracting with the SBA's "8(a)" Business Development Program**. 15 U.S.C. § 637(a); 13 C.F.R. Part 124; FAR Subpart 19.8.

1. **Policy**. 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). The purpose of the 8(a) program is to "assist eligible small disadvantaged business concerns [to] compete in the American economy through business development." 13 C.F.R.§ 124.1.

a. By Partnership Agreement (PA), dated 27 Sept. 2012, between DOD and the SBA, the SBA delegated its authority to DOD to enter into 8(a) prime contracts with 8(a) contractors. The PA can be found with DFARS PGI 219.800. Per the PA, the DOD contracting officers can bypass the SBA and contract ***directly*** with 8(a) SDBs on behalf of the SBA. The DOD contracting officers ***only*** have 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* DFARS 219.800.

b. Either the SBA or the contracting activity may initiate selection of a requirement or a specific contractor for an 8(a) acquisition. FAR 19.803; DFARS PGI 219.803

c. Businesses must meet the criteria set forth in 13 C.F.R. §§ 124.101 - 124.112 to be eligible under the 8(a) program. FAR 19.802; Autek Sys. Corp., 835 F. Supp. 13 (D.D.C. 1993), aff'd, 43 F.3d 712 (D.C. Cir. 1994).

(1) The firm must be "owned and controlled by…socially ***and*** economically disadvantaged individuals." 13 C.F.R. § 124.101. The regulations require 51% ownership and control by one or more individuals who are ***both*** socially ***and*** economically disadvantaged. 13 C.F.R. § 124.105. *See also* Software Sys. Assoc. v. Saiki, No. 92-1776 (D.D.C. June 24, 1993) 19,932 F.3d 1143; SRS Technologies v. United States, No. 95-0801 (D.D.C. July 18, 1995) 894 F.Supp. 8.

(a) "**Socially disadvantaged**" individuals are those who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control." 13 C.F.R. § 124.103(a).

(i) There is a "rebuttable presumption" that members of the following designated groups are socially disadvantaged: Black Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians), Asian Pacific Americans, among others. 13 C.F.R. § 124.103(b)(1).

(ii) Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by a "preponderance of the evidence." 13 C.F.R § 124.103(c)(1). Previously, individuals not members of designated groups needed to prove social

disadvantage by "clear and convincing evidence."

(b) "**Economically disadvantaged**" individuals are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished credit capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.104(a).

(i) In considering diminished capital and credit opportunities, the SBA will consider such factors as:

a. Personal income for the last two years;

b. Personal net worth and the fair market value of all assets; and

c. Financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification.

(ii) Net Worth. 13 C.F.R. § 124.104(c). For initial 8(a) eligibility, the net worth of an individual claiming disadvantage must be *less than $250,000*. For continued 8(a) eligibility, net worth must be *less than $750,000*. (Note "net worth" excludes the value of the primary personal residence)

(2) The firm must possess the "potential for success." 15 U.S.C. § 637(a)(7) and 13 C.F.R. § 124.107. One aspect of "potential for success" is the requirement that the firm must have been in business for two full years in the industry for which it seeks certification. The SBA is responsible for determining which firms are eligible for the 8(a) program. The SBA has reasonable discretion to deny participation in the 8(a) program to clearly unqualified firms as long as applications receive careful and thorough review. See Neuma Corp. v. Abdnor, 713 F. Supp. 1 (D.D.C. 1989).

d. The firm must have an approved business plan. 15 U.S.C. § 636(j)(10)(A)(i).

e. Generally, per 13 C.F.R. § 124.504, the SBA will not accept a procurement for award as an 8(a) contract if:

(1) An activity already has issued a solicitation with the intent to set aside the procurement for small businesses or SDBs prior to offering the requirement to SBA;

(2) The SBA determines that inclusion of a requirement in the 8(a) program will affect a small business or SDB adversely. 13 C.F.R. § 124.504(c)(1)-(3)(2004). See Designer Assocs., B-293226, Feb. 12, 2004. 2004 ¶; C. Martin Co., Inc., B-292662, Nov. 6, 2003, CPD ¶ 2007; John Blood, B-280318, Aug. 31, 1998, 98-2 CPD ¶ 58; McNeil Technologies, Inc., B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40.

2. **Procedures**. 13 C.F.R. § 124.

a. If the activity decides that an 8(a) contract is feasible and desirable, it offers SBA an opportunity to participate. Contracts currently performed by an 8(a) via the 8(a) BD program must remain in the 8(a) BD program unless the SBA allows the requirement to be released. This includes follow on contracts. *See* 13 C.F.R. §124.505.

b. Contracts may be awarded to the SBA (or directly to the 8(a) contractor for DoD) for performance by eligible 8(a) firms "on either a sole source or competitive basis." FAR 19.800(b).

c. If the SBA accepts, the agency or the SBA chooses a contractor, or eligible firms compete for award. See Defense Logistics Agency and Small Bus. Admin. Contract No. DLA100-78-C-5201, B-225175, Feb. 4, 1987, 87-1 CPD ¶ 115. Frequently, SBA chooses only one contractor to perform. If so, such a sole-source acquisition is an exception to "full and open competition" authorized under FAR Part 6.2 (referred to as "full and open competition after exclusion of sources").

d. Per FAR 19.805-1, activities must generally compete larger 8(a) acquisitions if:

(1) The activity expects offers from two eligible, responsible 8(a) firms at a fair market price, see Horioka Enters., B-259483, Dec. 20, 1994, 94-2 CPD ¶ 255; ***and***

(2) The value of the contract is expected to exceed $6.5 million for actions assigned manufacturing NAICS codes or $4 million for all other codes. See 13 C.F.R. § 124.506(a);

FAR § 19.805-1(a)(2). The threshold applies to the agency's estimate of the total value of the contract, including all options.

(3) Where the acquisition exceeds these thresholds, the SBA may still accept the acquisition for sole-source award if:

(a) There is no reasonable expectation that at least two eligible 8(a) firms will submit fair market offers; or

(b) The SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaskan Native Corporation. FAR 19-805-1(b). In DOD, this also includes Native Hawaiian Organizations. FAR 219.805-1(b)(2).

(4) The contracting officer must prepare a written Justification & Approval (J&A) to sole source to an 8(a) if an acquisition exceeds $20 million. FAR 19.808-1; FAR 6.303. Any sole source to an 8(a) with a value over $20 million must be approved by an appropriate agency official (as currently defined by FAR 6.304) and made public after award. FAR 6.303.

e. The COC procedures do not apply to sole source 8(a) acquisitions. DAE Corp. v. SBA, 958 F.2d 436 (1992); Action Serv. Corp. v. Garrett, 797 F. Supp. 82 (D.P.R. 1992); Joa Quin Mfg. Corp., B-255298, Feb. 23, 1994, 94-1 CPD ¶ 140; Aviation Sys. & Mfg., Inc., B-250625.3, Feb. 18, 1993, 93-1 CPD ¶ 155; Alamo Contracting Enters., B-249265.2, Nov. 20, 1992, 92-2 CPD ¶ 358.

f. Subcontracting limitations apply to competitive 8(a) acquisitions.[11] 13 C.F.R. § 125.6; See FAR 52.219-14; Tonya, Inc. v. United States, 28 Fed. Cl. 727 (1993); Jasper Painting Serv., Inc., B-251092, Mar. 4, 1993, 93-1 CPD ¶ 204.

g. Partnership between General Services Administration (GSA) and SBA.[12]

(1) SBA agreed to accept all 8(a) firms in GSA's Multiple Award Schedule Program.

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

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[11] *See* Section II.C.5 *infra* for more information of subcontracting limitations.

[12.] Press release highlighting agreement available at http://ftp.sbaonline.sba.gov/news/current00/00-58.pdf.

h. Graduation from 8(a) program. A firm "graduates" from the 8(a) program when it "completes its nine year term of participation in the 8(a) business development program." This nine year term may be shortened by termination, early graduation, or voluntary graduation under 13 C.F.R. § 124.3. See Gutierrez-Palmenberg, Inc., B-255797.3, Aug. 11, 1994, 94-2 CPD ¶ 158.

(1) 8(a) time period upheld. Minority Bus. Legal Defense & Educ. Funds, Inc. v. Small Bus. Admin., 557 F. Supp. 37 (D.D.C. 1982). No abuse of discretion by refusing to keep a contractor in 8(a) program beyond nine years. Woerner v. United States, 934 F.2d 1277 (App. D.C. 1991).

i. GAO Protests

(1) GAO normally will not review a contracting officer's decision to set aside a procurement under the 8(a) program absent a showing of possible bad faith on the part of the government officials or that regulations may have been violated. 4 C.F.R. § 21.5(b)(3). See American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37; Comint Sys. Corp., B-274853, B-274853.2, Jan. 8, 1997, 97-2, CPD ¶ 14. See also, Rothe Computer Solutions, B-299452, May 9, 2007.

(2) The GAO will not consider challenges to an award of an 8(a) contract by contractors that are not eligible for the program or particular acquisition. 13 C.F.R. § 124.1007(a); CW Constr. Servs. & Materials, Inc., B-279724, July 15, 1998, 98-2 CPD ¶ 20 (SBA reasonably determined that protestor was ineligible for award of 8(a) construction contract because it failed to provide sufficient information to show that it established and maintained an office within geographical area specified in solicitation as required by SBA regulations); AVW Elec. Sys., Inc., B-252399, May 17, 1993, 93-1 CPD ¶ 386. Likewise, the GAO will not consider challenges to a SBA decision that an 8(a) contractor is not competent to perform a contract. L. Washington & Assocs., B-255162, Oct. 19, 1993, 93-2 CPD ¶ 254.

3. **Mentor/Protégé Program**. 13 C.F.R. § 124.520.

a. The Mentor/Protégé Program is designed to encourage approved mentors to provide various forms of assistance to eligible 8(a) contractors. The purpose of mentor/protégé relationship is to enhance the capabilities of the protégé and to improve its ability to

successfully compete for contracts. (Sec. 1641 of the 2013 National Defense Authorization Act provided a statutory framework for a mentor-protégé program for agencies other than the DOD, which already had a program in place.) This assistance may include:

(1) Technical and/or management assistance;

(2) Financial assistance in the form of equity investments and/or loans;

(3) Subcontracts; and

(4) Joint ventures arrangements.

b. Mentors. Any concern that demonstrates a commitment and the ability to assist an 8(a) contractor may act as a mentor. "This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program participation, other small businesses, and large businesses." 13 C.F.R. § 124.520(b).

c. A mentor benefits from the relationship in that it may:

(1) Joint venture as a small business for any government procurement;

(2) Own an equity interest in the protégé firm up to 40%; and

(3) Qualify for other assistance by the SBA.

B. Challenges to the 8(a) Program

1. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (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" (e.g. Native-American) rather than racial classifications).

2. Post-Adarand Reactions and Initiatives. *See* 49 C.F.R. § 26 (current DOT regulations implementing Disadvantaged Business Enterprise program).

3. Post-Adarand Cases. Sherbrooke Turf Inc. v. Minn. Dep't of Transp., 2001 U.S. Dist. LEXIS 19565 (Nov. 14, 2001); Cache Valley Elec. Co. v.

State of Utah, 149 F.3d 1119 (10th Cir. 1998); Cortez III Serv. Corp. v. National Aeronautics & Space Admin., 950 F. Supp. 357 (D.D.C. 1996); Ellsworth Associates v. U.S, 917 F. Supp. 841 (D.D.C. 1996).

4. Adarand on Remand. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997). But see Adarand Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999); Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722 (2000). Adarand Constructors, Inc., v. Slater, 228 F. 3d 1147 (10th Cir. 2000).

5. Rothe Development Corporation v. Department of Defense, 545 F.3d 1023 (2008). In this decision the United States Court of Appeals, Federal Circuit held that 10 U.S.C. § 2323, granting evaluation preferences to small disadvantaged businesses (SDBs), failed to withstand strict scrutiny analysis and violated the equal protection clause. The court found that there was not sufficient evidence to show a national pattern of discrimination in either private or public contracting. This was a fact-specific case and does not unequivocally rule out any future SDB-like programs. In accordance with class deviation 2010-O0006, March 12, 2010, non DOD KOs can utilize FAR 19.11, DFARS 219.11, which was based upon 10 U.S.C. § 2323.

C. Historically Underutilized Business Zone (HUBZone).

HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592). Incorporated at FAR Subpart 19.13.

1. The purpose of the HUBZone program is to provide federal contracting assistance for **qualified small business concerns** located in historically **underutilized business zones** in an effort to increase employment opportunities. 13 C.F.R. § 126.100, FAR 19.1301, *et. seq.*

2. The program applies to all federal departments and agencies that employ contracting officers. 13 C.F.R. § 126.101.

3. Benefits to HUBZone Small Business Concerns (SBCs) include price preferences and set asides.

4. Methods of Acquisition:

   a. Awards to qualified HUBZone SBCs through **full and open competition**. For these acquisitions, a price preference of 10% is generally applied in acquisitions expected to exceed the simplified acquisition threshold against non-HUBZone SBCs or other small-business concerns. The price preference is applied by adding a factor of 10% to all offers except: (1) offers from HUBZone small businesses and (2) otherwise successful offers from other small businesses. FAR 19.1307.

b. **Set aside awards**; FAR 19.1305.

(1) **Order of Precedence.** There is no longer any order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15). FAR 19.203.

(2) **Permissive set-asides**. For these acquisitions, a contracting officer **may** set aside an acquisition that exceeds the micro-purchase threshold for competition restricted to HUBZone SBCs if the contracting officer has a reasonable expectation that: (1) he/she will receive offers from two or more HUBZone SBCs and (2) award will be made at fair market price. FAR 19.1305(a).

c. **Sole source awards** to HUBZone SBCs. FAR 19.1306. A contracting officer **may** award a contract to a HUBZone SBC on a sole source basis if: (1) only one HUBZone SBC can satisfy the requirement, (2) the anticipated price of the contract (including options) will not exceed $6.5M for NAICS codes for manufacturing or $4M for any other NAICS codes, (3) the requirement is not being performed by another HUBZone SBC, (4) the acquisition is greater than the simplified acquisition threshold, (5) the HUBZone SBC has been determined to be a responsible contractor, and (6) award can be made at a fair and reasonable price.

5. Requirements to be a Qualified HUBZone Small Business Concern[13] (SBC). 13 C.F.R. § 126.103 and FAR 19.1303.

a. The concern must be a HUBZone SBC as defined by 13 C.F.R. § 126.103;

[13] HUBZone small business concern (HUBZone SBC) means an SBC that is: (1) At least 51% owned and controlled by 1 or more persons, each of whom is a United States citizen; or (2) An Alaskan Native Corporation (ANC) owned and controlled by Natives (as determined pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1)) or; (3) A direct or indirect subsidiary corporation, joint venture, or partnership of an ANC qualifying pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2) of the ANCSA, 43 U.S.C. 1626(e)(2)); or (4) Wholly owned by one or more Indian Tribal Governments, or by a corporation that is wholly owned by one or more Indian Tribal Governments; or (5) a small business that is owned in part by one or more Indian Tribal Governments or in part by a corporation that is wholly owned by one of more Indian Tribal Governments, if all other owners are either U.S. citizens or small businesses; or (6) a small business that is wholly owned by a CDC or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs; or (7) a small business that is a small agricultural cooperative organized or incorporated in the United States, wholly owned by one or more small agricultural cooperatives organized or incorporated in the United States or owned in part by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or United States citizens. 13 C.F.R. § 126.103.

b. At least 35 percent of the concern's employees must reside in a HUBZone, and the HUBZone SBC must certify that it will attempt to maintain this percentage during the performance of any HUBZone contract it receives. 13 C.F.R. § 126.200.

c. If the SBA determines that a concern is a qualified HUBZone SBC, it will issue a certification to that effect and will add the concern to the List of Qualified HUBZone SBCs. This list can be found on the internet at the SBA's HUBZone website: https://eweb1.sba.gov/hubzone/internet/index.cfm. A firm on that list is eligible for HUBZone program preference without regard to the place of performance. The concern must appear on the list to be considered a HUBZone SBC.

d. A joint venture may be considered a HUBZone SBC if the concern meets the criteria in 13 C.F.R. 126.616.

e. An owner of a HUBZone SBC is a person who owns any legal or equitable interest in the concern. More specifically, SBCs included: corporations, partnerships, sole proprietorships and limited liability companies. 13 C.F.R. § 126.201.

6. **Size standards**. 13 C.F.R. § 126.203. At time of application for certification, a HUBZone SBC must meet SBA's size standards for its primary industry classification.

7. **Certification**. 13 C.F.R. § 126.300. A SBC must apply to the SBA for certification to be considered a HUBZone SBC.

8. **Subcontracting Limitations**. See section II.D.5. *infra*, for the subcontracting rules that reflect the 2013 NDAA amendments.

9. **Protest Procedures**. FAR 19.306; 13 C.F.R. § 126.801.

a. Protests based upon type of acquisition. For sole source acquisitions, the SBA or the contracting officer may protest the apparently successful offeror's HUBZone SBC status. For all other acquisitions, an offeror, the SBA, or the contracting officer may protest the apparently successful offeror's HUBZone SBC status.

b. Who May Protest and When to Protest. FAR 19.306.

(1) An offeror must submit its protest in writing to the contracting officer no later than (1) the 5th business day after bid opening or (2) the 5th business day after notification by the contracting officer of the apparently successful offeror. The contracting officer will forward the

offeror's protest to the SBA's Associate Administrator for the HUBZone Program for decision. Premature protests will be returned to the protester.

(2) Protests submitted by a contracting officer or by the SBA must be submitted in writing to the SBA's Associate Administrator for the HUBZone Program for a decision.

(3) The SBA will determine the HUBZone status of the protested HUBZone small business within 15 business days after receiving the protest. The SBA's decision is final unless overturned on appeal by the SBA's Associate Deputy Administrator for Government Contracting and 8(a) Business Development. If the SBA does not contact the contracting officer with its decision within 15 business days, the contracting officer may award the contract to the apparently successful offeror.

D. Service-Disabled, Veteran-Owned Small Businesses. FAR 19.14; 13 C.F.R.§ 125.8 to 125.29

1. The purpose of the Service-Disabled Veteran-Owned Small Business (SDVOSB) Program is to provide federal contracting assistance to these businesses. Status as a SDVOSB is determined in accordance with 13 C.F.R. Parts 125.8-125.13. FAR 19.14. SDVOSB status protests are handled similar to HUBZone status protests, discussed supra, sec. III.C.9.; FAR 19.307.

2. **Set-Asides authorized**. A contracting officer ***may*** set aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVOSB concerns if the contracting officer has a reasonable expectation that: (1) offers will be received from two or more SDVOSBs and (2) award will be made at a fair market price.

3. **Sole Source awards authorized**. A contracting officer **may** award contracts to SDVOSBs on a sole source basis if: (1) only one such business can satisfy the requirement, (2) the anticipated award price of the contract (including options) will not exceed $6M for a requirement with a NAICS code for manufacturing or $3.5M for all other NAICS codes, (3) the SDVOSB has been determined to be responsible, and (4) award can be made at a fair and reasonable price. 13 C.F.R.§ 125.20

E. The Women-Owned Small Business (WOSB) Program. 15 U.S.C. § 637(m); FAR 19.15.

1. Subpart 19.15 was added to the FAR to address recent statutory amendments and changes in the SBA's regulations concerning the women-owned small business program. The Small Business Act had

previously established a Government-wide goal for participation by women-owned and controlled small business concerns. The goal is not less than 5 % of the total value of all prime and subcontracts awards each fiscal year.[14]

2. Status as an economically disadvantaged women-owned small business (EDWOSB) or WOSB concern is determined in accordance with 13 CFR part 127. FAR 19.1503(a). EDWOSB and WOSB status protests are handled similar to HUBZone status protests, discussed supra, p. 22. FAR 19.308.

3. **Set-Asides for EDWOSBs and WOSBs**. The contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to EDWOSB or WOSB concerns eligible under the WOSB Program in those NAICS codes in which SBA has determined that women-owned small business concerns are underrepresented or substantially underrepresented in Federal procurement, as specified on SBA's Web site at http://www.sba.gov/WOSB. FAR 19.1505; 13 C.F.R. Part 127.

   a. For requirements in NAICS codes designated by SBA as underrepresented, a contracting officer may restrict competition to EDWOSB concerns or qualified WOSBs if the contracting officer has a reasonable expectation that (1) two or more WOSB or EDWOSB concerns will submit offers; and (2) the award will be made at a fair and reasonable price. The dollar limitations on WOSB set-asides were removed in accordance with section 1697 of the 2013 National Defense Authorization Act. See also DPAP Class Deviation 2013-O0013.

   b. The contracting officer may make an award, if only one acceptable offer is received from a qualified EDWOSB or WOSB concern, but if no acceptable offers are received from an EDWOSB or WOSB concern, the set-aside shall be withdrawn and the requirement, if still valid, must be considered for set aside in accordance with 19.203 and subpart 19.5. FAR 19.1505(d),(f)

4. **Sole Source Awards Not Authorized**. There is no independent authority to make a sole source award to WOSBs or EDWOSB.

[14] On 23 May 2000, President Clinton signed Executive Order 13,157, 65 Fed. Reg. 34,035 (2000), highlighting his commitment to expanding opportunities for Women Owned Small Businesses. The EO sets out several steps Executive Agencies should take to increase contracting opportunities.

IV. CHOOSING THE CORRECT SET ASIDE

A. **The order of precedence controversy**. Recent Amendment to the FAR have settled a long-running controversy between all three branches of Government concerning the proper order of precedence for set-asides among small business socioeconomic concerns.

1. Previously, there was much confusion about the order of precedence among SB programs. This confusion arose out of the statutory language of the HUBZone statute, which provides that "a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price." 15 U.S.C. 657a(b)(2)(B).

2. The GAO previously held that, if there was a reasonable expectation that two or more HUBZones would perform the contract at a fair market value, then the HUBZone statute's mandatory language *required* agencies to use a HUBZone set-aside prior to considering a SDVOSB or 8(a) set-aside. International Program Group, Inc., Comp. Gen. B-400278; B-400308, Sept. 19, 2008; Mission Critical Solutions, Comp. Gen. B-401057, May 4, 2009.

3. On 10 July 09, the Office of Management and Budget issued a memorandum to the heads of all Executive Branch agencies and departments stating that pending a legal analysis of the GAO's basis for its recent decisions, they were to follow the SBA's regulations which call for parity between the HUBZone, 8(a) and SDVOSB programs. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB MEMO. NO. 09-23, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2009). On 21 August 09, the Department of Justice (DoJ) issued a memorandum directing Executive Branch agencies to follow the SBA regulations, finding that they are reasonable and binding, and reminding agencies that GAO decisions are not binding on the Executive Branch. OFFICE OF THE DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, MEMORANDUM OPINION FOR SARA LIPSCOMB (2009).

4. The COFC eventually sided with the GAO holding that the plain language of the HUBZone statute required the use of HUBZone contracting when the requirements were met, and rejecting DoJ's (and SBA's) parity arguments. See *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010) (providing a thorough description of the controversy between the executive, legislative (GAO) and judiciary concerning the order of precedence for set-asides between the various small-business socioeconomic concerns).

B. **Congress steps in**. On March 16, 2011, the FAR Council issued implementing Section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111-240), clarifying that there is no order of precedence among the HUBZone, 8(a) and SDVOSB programs.

C. ***There is no longer any order of precedence***. After an additional amendment to the FAR to incorporate the WOSB program, FAR 19.203 now states, unequivocally, that "there is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15)."

D. Contracting Officer's Discretion. This change to the FAR allows contracting officers to freely choose among available SB socioeconomic concerns when determining whether to set-aside an acquisition, provided the relevant criteria is met (as outlined above).

V. COMPETITION ISSUES

A. Contract Bundling. FAR 7.107; DFARS 207.170; 15 U.S.C. § 657q; 13 C.F.R. § 125.2

1. Contract bundling is the practice of combining two or more procurement requirements, which were previously provided or performed under separate smaller contracts, into a solicitation for a *single contract* that is likely to be unsuitable for award to a small business due to:

   a. The diversity, size, or specialized nature of the elements of the performance specified;

   b. The aggregate dollar value of the anticipated award;

   c. The geographical dispersion of the contract performance sites; or

   d. Any combination of the factors described above;

   15 U.S.C. § 632(o)(2); FAR 2.101; 13 C.F.R. § 125.2(d); USA Info. Sys., Inc., B-291417, Dec. 30, 2002, 2002 CPD ¶ 224.

2. A "separate smaller contract" means a contract that has been performed by one or more small business concerns or that was *suitable for award* to one or more small business concerns. FAR 2.101.

3. The bundling rules apply to multiple awards of IDIQ contracts and to Federal Supply Schedule orders. A "single contract" includes indefinite-

quantity contracts and any *order* placed against an indefinite quantity contract. FAR 2.101.

4. **Bundling is not *per se* prohibited**. In fact, bundling may provide substantial benefits to the Government. However, because of the potential negative impact on small business participation, the "head of the agency *must* conduct market research to determine whether bundling is **necessary and justified**." Market research may indicate that bundling is necessary and justified if an agency or the government would derive "**measurably substantial benefits**." FAR 7.107(a).

5. The DOD has restricted bundling when the total cost of the contract exceeds $6 million unless the acquisition strategy includes:

   a. Results of market research;

   b. Identification of any alternative contract approach that would involved a lesser degree of consolidation; and

   c. Determination by the senior procurement executive that consolidation is necessary and justified. This determination must be included in the contract file. DFARS 207.170-3.

   d. The 2013 NDAA, Pub. L. 103-355, repealed the former consolidation statute, 10 U.S.C. 2382, which was implemented by DFARS 207.170. However, the DFARS provision has not been repealed or amended at this time. Thus, we currently have two different definitions of consolidation; until the FAR/DAR councils resolve this, we must operate under both of them to the extent possible, giving priority to the statute if there is a conflict.

6. In addition, the SBA has tried to reign in bundled contracts. See 13 C.F.R. § 125.2 (2013).

7. Key parts of the rules on contract bundling. 13 C.F.R. § 125.2; FAR 7.107; FAR 2.101.

   a. Permits "teaming" among two or more small firms, who may then submit an offer on a bundled contract.

   b. Requires the agency to submit to the SBA for review any statement of work containing bundled requirements. If the SBA concludes that the bundled requirements are too large, it may appeal to the agency. See e.g., Phoenix Scientific Corp., B-286817, Feb. 24, 2001, 2001 CPD ¶ 24.

   c. In determining "measurably substantial benefits" for the purpose of assessing whether bundling is "necessary and justified," the agency

should look to the following factors: cost savings or price reduction, quality improvements, reduction in the acquisition cycle, better terms or conditions, or other benefits. An agency may find a bundled requirement "necessary and justified" if it will derive more benefit from bundling than from not bundling. See TRS Research, B-290644, Sept. 13, 2002, 2002 CPD ¶ 159.

d. Per FAR 7.107, an agency may determine that bundling is "necessary and justified" if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits from:

(1) Benefits equivalent to 10% if the contract value (including options) is $94 million or less; or

(2) Benefits equivalent to 5% or $9.4 million, whichever is greater, if the contract value (including options) is over $94 million.

e. Reducing only administrative or personnel costs does not justify bundling unless those costs are expected to be at least 10 percent of the estimated contract (including options) of the bundled requirements. FAR 7.107(d)

f. FAR 7.104(d)(2) requires acquisition planning to prevent "**substantial bundling** if estimated contract order exceeds $8 million (DoD); $6 million (NASA, GSA, DOE); and $2.5 million for all other agencies.

g. Bundling rules do NOT apply to contracts awarded and performed entirely outside the United States.

8. Notification of bundling of DoD contracts. DFARS 205.205-70

a. When a proposed acquisition is funded entirely using DoD funds and potentially involves bundling, the contracting officer shall, **at least 30 days prior to the release of a solicitation or 30 days prior to placing an order without a solicitation**, publish in FedBizOpps.gov a notification of the intent to bundle the requirement.

b. In addition, if the agency has determined that measurably substantial benefits are expected to be derived as a result of bundling, the notification **shall** include a brief description of those benefits.

c. This requirement is in addition to the notification requirements concerning bundling at FAR 10.001(c)(2)(i) and (ii).

9. Reference. In October 2007, the Office of Small Business Programs released a benefit analysis guidebook that assists DoD acquisition teams considering contract bundling.

B. Tiered / Cascading Set-Asides

1. "Tiered" or "cascading set-asides" are set-asides where the contracting officer informs prospective offerors that he/she will award the contract to only certain socio-economic status offerors so long as two or more responsible offers are received from such offerors. On the other hand, if two or more such offers are not received, then the contracting officer will then award the contract to the next "tier" of socio-economic status offerors so long as two or more responsible offers are received from such offerors. If no tier has two such offers, then the contracting officer will award the contract on the basis of full and open competition. Carriage Abstract, Inc., B-290676, B-290676.2, Aug. 15, 2002, 2002 CPD ¶ 148.

2. Problems:

a. Abdicates government's market research responsibilities.

b. Places too much market research and risk on contractors who may spend bid and proposal preparation cost, and yet never have their offer considered if the competition never makes it to their tier.[15]

3. Statutory Solution

a. Section 816 of the 2006 National Defense Authorization Act provides that:

(1) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts.

(2) Elements.--The guidance prescribed under subsection (a) shall include a prohibition on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for

[15] Some industry groups say cascading set aside acquisitions are unfair because in such acquisitions, contracting officers may never consider offers from bigger companies. One industry representative explained, "You spend all this bid and proposal money and you thought you had a chance of winning, and, oops, there was a HUBZone," said Cathy Garman, senior vice president of public policy at the Contract Services Association. Ms. Garman said that if she operated a medium or large business, she would not present an offer on a solicitation advertising a cascading set aside. *New Acquisition Strategy Alarms Industry*, June 29, 2005, Government Executive, at http:www.govexec.com.

a task or delivery order under a contract **unless** the contracting officer—

(a) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;

(b) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and

(c) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

b. DFARS implemented the Act via amendments to DFARS 202.101, 210.001, 213.106-1-70, 215.203-70, 219.1102 and 219.1307. See 71 Fed. Reg. 53042.

C. Multiple Award Contracts.

1. Small business set asides also apply to IDIQ contracts. Regardless of whether the overall contract was restricted, a KO may set aside a task/delivery order for small business concerns. FAR 19.504-4.

2. This implements Sec. 1331 of Public Law 111-240.

VI. THE RANDOLPH-SHEPPARD ACT

A. REFERENCES

1. The Randolph-Sheppard Act for the Blind (RSA) 20 U.S.C. §§ 107-107f.

2. U.S. DEPT. OF DEFENSE, INSTRUCTION 1125.03, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (2009) [hereinafter DODI 1125.03].

3. 34 C.F.R. Part 395, Vending Facility Program for the Blind on Federal Property (Department of Education).

4. Gaydos, *The Randolph-Sheppard Act: A Trap for the Unwary Judge Advocate*, ARMY LAW. Feb. 1984, at 21.

B. History of the Randolph-Sheppard Act for the Blind

1. The Current RSA—Generally

a. Purpose. The purpose of the Randolph-Sheppard Act is to "provide blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." Specifically, under this act, "blind persons [are] licensed …to operate vending facilities on any Federal property." 20 U.S.C. § 107(a)

b. Preferences for the blind. The statute gives a preference for "blind vendors licensed by a State agency" in the "operation of vending facilities on Federal property…wherever feasible." 20 U.S.C. § 107(a).

2. Original Act. Act of June 20, 1936, Pub. L. No. 732, 49 Stat. 1559.

a. The purpose of the Act was for federal agencies to give blind vendors the authorization to operate in federal buildings.

b. The Act gave agency heads the discretion to exclude blind vendors from their building if the vending stands could not be properly and satisfactorily operated by blind persons.

c. Location of the stand, type of stand and issuing the license were all subject to approval of the federal agency in charge of the building.

d. Office of Education, Department of Interior, was designated to administer the program, and could designate state commissions or agencies to perform licensing functions. Department of Education Regulations appear to take precedence over other agency regulations in the event of a conflict. 61 Fed. Reg. 4,629, February 7, 1996.

3. The 1954 Amendments. Act of Aug. 3, 1954, Pub. L. No. 565m, 68 Stat. 663 (1954).

a. The invention of vending machines served as an impetus to re-examine the Act. The amendments also showed concern for expanding the opportunities of the blind.

b. The amendments made three main changes to the act:

(1) The vending program was changed from federal *buildings* to federal *properties*. "Federal property" was defined as "any building, land, or other real property owned, leased, or occupied by any department, agency or instrumentality of the United States…including the Department of Defense." This definition is also the current definition. The Act applies to all federal activities—whether appropriated or nonappropriated.

(2) Agencies were required to give blind persons a preference, "wherever feasible," when deciding who could operate vending stands on federal property.

(3) This preference was protected by requiring agencies to write regulations assuring the preference.

c. The "wherever feasible" language still gave agencies wide discretion in administering the Act, and in reality, fell far short of Congressional intent to expand the blind vending program.

4. The 1974 Amendments. Act of Dec 7, 1974, Pub. L. No. 516, 88 Stat. 1623 (1974).

a. Impetus—the proliferation of automatic vending machines and lack of enthusiasm for the Act by federal agencies.

b. Comptroller General study showcased the abuses and ineffectiveness of the Act. Review of Vending Operations on Federally Controlled Property, Comp. Gen. Rpt. No. B-176886 (Sept. 27, 1973).

C. Current Act

1. The current RSA imposes several substantive and procedural controls. Key definitions are included in the regulations issued pursuant to the Act.[16] The Act mandated three main substantive provisions:

[16] Key Definitions.

a. Blind person: a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses as determined by a physician or optometrist. 20 U.S.C. § 107e.

b. Blind Licensee: a blind person licensed by the state licensing agency to operate a vending facility on federal property. 34 C.F.R. 395.1.

c. License: a written instrument issued by the state licensing agency, to a blind person, authorizing that person to operate a vending facility on Federal property. 34 C.F.R. 395.1.

d. State licensing agency: the state agency designated by the U.S. Secretary of Education to issue licenses to blind persons for the operation of vending facilities on Federal property. 34 C.F.R. 395.1.

a. Give blind vendors priority on federal property for the operation of "vending facilities" so long as the blind vendor has been issued a "license" by the state licensing agency and in DOD, the blind vendor's state licensing agency has been issued a "permit" (See definitions in footnote);

b. New buildings to include satisfactory sites for blind vendors; and

c. Require paying some vending machine income to the blind.

2. Priority Given to Blind Vendors

a. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency. 20 U.S.C. § 107(b).

b. The Secretary of Education, the Commissioner of Rehabilitative Services Administration, and the federal agencies shall prescribe regulations which assure priority.

c. ***"Vending facilities"*** has a very broad definition and includes automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment…[which is]…necessary for the sale of articles or services…and which may be operated by blind licensees." 20 U.S.C. § 107e(7).

(1) Vending facilities typically sell newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises, and include the vending or exchange of chances for any State lottery. 20 U.S.C. § 107a(a)(5) 32 C.F.R. § 395.1(x). See, e.g., Conduct on the Pentagon Reservation, 32 C.F.R. Parts 40b and 234, para. 234.16, exempting sale of lottery tickets by Randolph-Sheppard vending facilities from the general prohibition of gambling.

(2) Vending machines (a type of "vending facility") are defined as a "coin or currency operated machine that dispense articles or services, except that machines providing services of a recreational nature (e.g. jukeboxes, pinball machines, electronic game machines, pool tables, shuffle boards, etc.) and telephones are not considered to be vending machines." DODI 1125.03, encl 1, para E1.1.17.

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e. Permit: the official written approval to establish and operate a vending facility request by and issued to a state licensing agency by the Head of a DOD Component. DODI 1125.3, encl 1, para.E1.1.11.

(3) The blind vendor may only receive these preferences under the RSA regarding vending facilities if the State Licensing Agency (SLA) issues the blind vendor a "license." **Additionally, in DoD, the SLA must seek out and apply for a permit to operate on a DoD installation.** The DOD installation has no affirmative obligation until the DOD Component issues a permit to the SLA. Once issued, the blind vendor has priority unless the interests of the U.S. are adversely affected. DODI 1125.03, encl 2.

D. Arbitration Procedures

1. Arbitration procedures. Two roads to arbitration:

a. Grievances of Blind Licensee. A dissatisfied blind licensee may submit a request to the SLA for a full evidentiary hearing on any action arising from the operation or administration of the vending facility program. 20 U.S.C. § 107d-1. If the blind licensee is dissatisfied with the decision made by the SLA, the vendor may file a complaint with the Secretary of Education who shall convene a panel to arbitrate the dispute; this decision is final and binding on the parties, except that appeal may be made under the Administrative Procedure Act.

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

E. Protests to the Government Accountability Office (GAO)

1. Relationship to the Small Business Act's 8(a) Provisions. The *requirements of the Randolph-Sheppard Act take precedence over the 8(a) program*. Triple P. Services, Inc., Recon., B-250465.8, December 30, 1993, 93-2 CPD ¶ 347 (denying challenge to agency's decision to withdraw and 8(a) set aside and to proceed under the Randolph-Sheppard Act). But see Intermark, B-290925, Oct. 23, 2002 (holding that the Army improperly withdrew a small-business set-aside solicitation for food services at Fort Rucker and reissued a solicitation on a full and open

competition basis allowing for RSA businesses to compete. GAO sustained incumbent small business contractor's protest stating there was no proper basis for withdrawing the small business set aside. GAO recommended that the agency's acquisition include both small businesses and the SLA using a "cascading" set of priorities whereby competition is limited to small business concerns and the SLA, with the SLA receiving award if its proposal is found to be within the competitive range).

2. Protest by State Licensing Agency (on behalf of blind vendors). The GAO will not normally consider a protest lodged by an SLA, because binding arbitration is the appropriate statutory remedy for the SLA. Washington State Department of Services for the Blind, B-293698.2, Apr. 27, 2004 (dismissing a protest filed by the SLA stating that the RSA "vests exclusive authority with the Secretary [of Education] regarding complaints by SLAs concerning a federal agency's compliance with the Act, including challenges to agency decisions to reject proposals in response to a solicitation"); Mississippi State Department of Rehabilitation Services, B-250783.8, Sept. 7, 1994 (unpub).

F. Controversial Issues

1. Burger King and McDonald's restaurants on military installations. 60 Fed. Reg. 4406, January 23, 1995. An arbitration panel convened in 1991 under the RSA decided that AAFES Burger King and the Navy's McDonald's franchise agreements violated two provisions of the Randolph-Sheppard Act.

a. DoD failed to notify state licensing agencies of its intention to solicit bids for vending facilities (i.e. Burger King and McDonalds), and

b. DoD's solicitation for nationally franchised fast food restaurants constituted a limitation on the placement or operation of a vending facility. DoD violated the Randolph-Sheppard Act by failing to seek the Secretary of Education's approval for such limitation.

c. Arbitration Panel's remedy:

(1) AAFES must contact the SLA in each state with a Burger King facility to establish a procedure acceptable to the SLA for identifying, training, and installing blind vendors as managers of all current and future Burger King operations. Additionally, DoD should give the SLA 120 days written notice of any new Burger King operations.

(2) Navy Resale and Services Support Office (NAVRESSO) will provide the appropriate SLA with 120 days notice of any new McDonald's facility to be established on a Navy

installation. The SLA must determine whether it wishes to exercise its priority and to provide funds to build and operate a new McDonald's facility. 60 Fed. Reg. 4406, January 23, 1995. See also Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (Fed. Cir. 1986). SLA sued protesting contracts between AAFES and Burger King, and the Navy Exchange Service and McDonald's. The court remanded to the District Court with an order to dismiss, because the SLA had failed to exhaust administrative remedies.

G. Applicability to Military Mess Hall Contracts

1. The Government Accountability Office has determined that the Randolph-Sheppard Act applies to military dining facilities. In doing so, the GAO focused on the regulatory definition of "cafeteria." In addition the GAO gave significant weight to the regulatory interpretation of the Department of Education and to interpretations by certain high level officials within DOD. Department of the Air Force—Reconsideration, B-250465.6, June 4, 1993, 93-1 CPD ¶ 431. See also Intermark, B-290925, Oct. 23, 2002 (GAO sustained protest by offeror in Army dining facility contract where Army applied RSA preference). The applicability of the Randolph-Sheppard Act to mess halls remains a topic of considerable debate.

2. In NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001), the Fourth Circuit affirmed a District Court holding that the Act applied to military "mess hall services." Court relied heavily on the DoD position that Randolph-Sheppard applies.

3. In Automated Comm'n Sys., Inc. v. United States, 49 Fed. Cl. 570 (2001), the Court of Federal Claims (COFC) refused to hear a challenge to the validity of DOD Directive 1125.03, which mandates the RSA preference for DOD dining facility contracts. COFC concluded that only federal district courts may hear a challenge to the validity of procurement statutes and regulations under their federal question and declaratory judgment authorities. COFC also held that the more specific RSA preference takes precedence over less-specific statutes, specifically, the HUBZone preference.

VII. THE BUY AMERICAN ACT (BAA)

A. Origin and Purpose

41 U.S.C. §§ 8302-8305 (1995); Executive Order 10582 (1954), as amended by Executive Order 12608 (1987). FAR Part 25. The Act was passed during the Depression of the 1930s and was designed to save and create jobs for American workers.

B. Domestic Preference

Preference for Domestic End Products and Domestic Construction Materials. FAR 25.001.

1. As a general rule, under the BAA, agencies may acquire only domestic end products. Unless another law or regulation prohibits the purchase of foreign end items, however, the contracting officer may not reject as nonresponsive an offer of such items.

2. The prohibition against the purchase of foreign goods does not apply if: the product is not available in sufficient commercial quantities; domestic preference would be inconsistent with the public interest; the product is for use outside the United States; the cost of the domestic product would be unreasonable; or the product is for commissary resale. The Trade Agreements Act and the North American Free Trade Agreement may also provide exceptions to the Buy American Act. The prohibition also does not apply to contracts procuring supplies where the contract value is under the micro-purchase threshold. FAR 25.100.

C. Definitions and Applicability

1. Manufactured domestic end products (FAR 25.003) are those articles, materials, and supplies acquired for public use under the contract that are:

   a. Manufactured in the United States. General Kinetics, Inc, Cryptek Div., B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445 ("manufacture" means completion of the article in the form required for use by the government); A. Hirsh, Inc., B-237466, Feb. 28, 1990, 69 Comp. Gen. 307, 90-1 CPD ¶ 247 (manufacturing occurs when material undergoes a substantial change).

2. Comprised of "substantially all" domestic components (cost of components mined, produced or manufactured in the U.S. must exceed 50% of the cost of all components). For DOD, the components may be domestic or qualifying country components. See DFARS 252.225-7001.

3. An ***unmanufactured*** domestic end product must be mined or produced in the United States. FAR 25.003. Geography determines the origin of an unmanufactured end product. 41 U.S.C. § 10a and §10b.

4. The nationality of the company that manufactures an end item is irrelevant. Military Optic, Inc., B-245010.3, Jan. 16, 1992, 92-1 CPD ¶ 78. What is relevant under the BAA is whether an item is manufactured, mined or produced in the U.S. FAR 25.001.

5. ***Components*** are articles, materials and supplies incorporated directly into the end product. FAR 25.003. Orlite Eng'g Co., B-229615, Mar. 23, 1988, 88-1 CPD ¶ 300; Yohar Supply Co., B-225480, Feb. 11, 1987, 66 Comp. Gen. 251, 87-1 CPD ¶ 152.

   a. Parts are not components, and their origin is not considered in this evaluation. Hamilton Watch Co., B-179939, June 6, 1974, 74-1 CPD ¶ 306.

   b. A "component" under the BAA is either entirely foreign or entirely domestic. A component is domestic only if it is manufactured in the United States. Computer Hut Int'l, Inc., B-249421, Nov. 23, 1992, 92-2 CPD ¶ 364.

   c. A foreign-made component may become domestic if it undergoes substantial remanufacturing in the United States. General Kinetics, Inc, Cryptek Div., B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445.

   d. ***Material*** that undergoes manufacturing is not a "component" if the material is so transformed that it loses its original identity. See Orlite Eng'g and Yohar Supply Co., supra.

   e. The cost of components includes transportation costs to the place of incorporation into the end product, and any applicable duty. FAR 25.101; DFARS 252.225-7001(a)(5)(ii). Component costs do **NOT** include:

      (1) Packaging costs, S.F. Durst & Co., B-160627, 46 Comp. Gen. 784 (1967);

      (2) The cost of testing after manufacture, Patterson Pump Co., B-200165, Dec. 31, 1980, 80-2 CPD ¶ 453; Bell Helicopter Textron, B-195268, 59 Comp. Gen. 158 (1979); or

      (3) The cost of combining components into an end product, To the Secretary of the Interior, B-123891, 35 Comp. Gen. 7 (1955).

6. Qualifying country end products/components

   a. DoD does not apply the restrictions of the BAA when acquiring equipment or supplies that are mined, produced, or manufactured in "qualifying countries." Qualifying countries are countries with which we have reciprocal defense agreements. They are enumerated in DFARS 225.872-1(a).

b. A manufactured, qualifying country end product must contain over 50 % (by cost) components mined, produced, or manufactured in the qualifying country or the United States. DFARS 252.225-7009(a)(7).

c. Qualifying country items thus receive a "double benefit" under the BAA. First, qualifying country components may be incorporated into a product manufactured in the United States to become a domestic end product. Second, products manufactured by a qualifying country are exempt from the BAA.

D. Certification Requirement

1. A contractor certifies by its offer that each end product is domestic and/or indicates which end products are foreign. FAR 52.225-2; DFARS 252.225-7006.

2. The contracting officer may rely on the offeror's certification that its product is domestic, unless, prior to award, the contracting officer has reason to question the certification. New York Elevator Co., B-250992, Mar. 3, 1993, 93-1 CPD ¶ 196 (construction materials); Barcode Indus., B-240173. Oct. 16, 1990, 90-2 CPD ¶ 299; American Instr. Corp., B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287. See also, Klinge Corp. v. United States and Sea Box, Inc., No. 08-134C, slip op. at 15 (Fed. Cl. June 10, 2008) (applied to TAA certification).

E. Exceptions to the Buy American Act

As a general rule, the Buy American Act does not apply in the following situations:

1. The contract is procuring supplies, where the contract value is under the micro-purchase threshold. FAR 25.100.

2. The required products are not available in sufficient commercial quantities. FAR 25.103(b). For a list of items determined to be "unavailable," See FAR 25.104. See also Midwest Dynamometer & Eng'g Co., B-252168, May 24, 1993, 93-1 CPD ¶ 408.

3. The agency head (or designee) determines that domestic preference is inconsistent with the public interest. FAR 25.103(a). DoD has determined that it is inconsistent with the public interest to apply the BAA to qualifying countries. Technical Sys. Inc., B-225143, Mar. 3, 1987, 66 Comp. Gen. 297, 87-1 CPD ¶ 240.

4. The Trade Agreements Act (TAA) authorizes the purchase. 19 U.S.C. §§ 2501-82; FAR 25.4; Olympic Container Corp., B-250403, Jan. 29,

1993, 93-1 CPD ¶ 89; Becton Dickinson AcuteCare, B-238942, July 20, 1990, 90-2 CPD ¶ 55; IBM Corp., GSBCA No. 10532-P, 90-2 BCA ¶ 22,824.

a. If the TAA applies to the purchase, only domestic products, products from **designated** foreign countries, qualifying country products, and products which, though comprised of over 50% foreign components, are "substantially transformed" in the United States or a designated country, are eligible for award. See Compuadd Corp. v. Dep't of the Air Force, GSBCA No. 12021-P, 93-2 BCA ¶ 25,811 ("manufacturing" standard of the BAA is less stringent than "substantial transformation" required under TAA); Hung Myung (USA) Ltd., B-244686, Nov. 7, 1991, 71 Comp. Gen. 64, 91-2 CPD ¶ 434; TLT-Babcock, Inc., B-244423, Sept. 13, 1991, 91-2 CPD ¶ 242.

(1) To be a substantial transformation there must be a new and different end product. For instance, attaching handles to a pot would not be sufficient. Ralph C. Nash, *INTERPRETING THE TRADE AGREEMENTS ACT*: *Conflicting Decisions* 22 No. 8 Nash & Cibinic Rep. 45, 2008.

b. The TAA applies only if the estimated cost of an acquisition equals or exceeds the threshold set by the U.S. Trade Representative.

c. The TAA does **not** apply to DOD unless the DFARS lists the product, **even** if the threshold is met. See DFARS 225.401-70. If the TAA does not apply, the acquisition is subject to the BAA. See, e.g., Hung Myung (USA) Ltd., B-244686, Nov. 7, 1991, 91-2 CPD ¶ 434; General Kinetics, Inc, Cryptek Div., B-242052.2, May 7, 1991, 91-1 CPD ¶ 445.

d. Because of the component test, the definition of "domestic end product" under the BAA is more restrictive than the definition of "U.S. made end product" under the TAA. Thus, for DoD, if an offeror submits a U.S. made end product, the BAA evaluation factor still may apply.

5. The North American Free Trade Agreement (NAFTA) Implementation Act authorizes the purchase. Pub. L. No. 103-182, 107 Stat. 2057 (1993); FAR 25.402. Note, however, that NAFTA does not apply to DOD procurements unless the DFARS lists the product. See DFARS 225.401-70.

6. The Caribbean Basin Economic Recovery Act authorizes the purchase. 19 U.S.C. §§ 2701-05; FAR 25.400.

7. The product is for use outside the United States. Note: under the Balance of Payments Program, an agency must buy domestic even if the end item is to be used overseas. A number of exceptions allow purchase of foreign products under this program. If both domestic and foreign products are offered, and if the low domestic price exceeds the low foreign price by more than 50%, the contracting officer must buy the foreign item. FAR Subpart 25.3; DFARS Subpart 225.3.

8. The cost of the domestic product is unreasonable. FAR 25.105; DFARS 225.103(c); FAR 225.5. Although cost reasonableness normally is a preaward determination, an agency may also make this determination after award. John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989).

a. Civilian agencies

(1) If an offer of a non-domestic product is low and a large business offers the lowest-priced, domestic product, increase the non-domestic product by 6%.

(2) If an offer of a non-domestic product is low and a small business offers the lowest-priced, domestic product, increase the non-domestic product by 12%.

b. DoD agencies increase offers of non-domestic, non-qualifying country products by 50%, regardless of the size of the business that offers the lowest-priced, domestic end product. Under the DFARS, if application of the differential does not result in award on a domestic product, disregard the differential and evaluate offers at face value. DFARS 225.502.

c. Do not apply the evaluation factor to post-delivery services such as installation, testing, and training. Dynatest Consulting, Inc., B-257822.4, Mar. 1, 1995, 95-1 CPD ¶ 167.

d. In a negotiated procurement, agencies may award to a firm offering a technically superior but higher priced non-domestic, non-qualifying country product. STD Research Corp., B-252073.2, May 24, 1993, 93-1 CPD ¶ 406.

9. Resale. The contracting officer may purchase foreign end project specifically for commissary resale. FAR 25.103.

F. Construction Materials

41 U.S.C. § 8303; FAR Subpart 25.2.

1. This portion of the BAA applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

2. The Act requires construction contractors to use only domestic construction materials for construction contracts performed in the United States.

3. "Construction material" is an article, material, or supply rough to the construction site b a contractor or subcontractor for incorporation into the building or work. FAR 25.003.

4. Exceptions. This restriction does not apply if:

   a. The cost would be unreasonable, as determined by the head of agency;

   b. The agency head (or delegee) determines that use of a particular domestic construction material would be impracticable; or,

   c. The material is not available in sufficient commercial quantities. See FAR 25.103.

5. Application of the restriction. The restriction applies to the material in the form that the contractor brings it to the construction site. See S.J. Amoroso Constr. Co. v. United States, 26 Cl. Ct. 759 (1992), aff'd, 12 F.3d 1072 (Fed. Cir. 1993); Mauldin-Dorfmeier Constr., Inc., ASBCA No. 43633, 93-2 BCA ¶ 25,790 (board distinguishes "components" from "construction materials"); Mid-American Elevator Co., B-237282, Jan. 29, 1990, 90-1 CPD ¶ 125.

6. Post-Award Exceptions

   a. Contractors may formally request waiver of the BAA, however, normally, the contractor must request such a waiver prior to contract award. C. Sanchez & Son v. United States, 6 F.3d 1539 (Fed. Cir. 1993) (contractor failed to formally request waiver of BAA; claim for equitable adjustment for supplying domestic wire denied).

   b. Failure to grant a request for waiver may be an abuse of discretion. John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989) (contracting officer abused discretion by denying post-award request for waiver of BAA, where price of domestic materials exceeded price of foreign materials plus differential).

7. The DOD qualifying country source provisions do *not* apply to construction materials. DFARS 225.872-2(b).

G. Remedies for Buy American Act Violations

1. If the agency head finds a violation of the Buy American Act—Construction Materials, the findings and the name of the contractor are made public. The contracting officer may had contractual actions against the offender, including, but not limited to termination for default and suspension/debarment. FAR 25.206.

2. Termination of the contract for default is proper if the contractor's product does not contain over 50% (by cost) domestic or qualifying country components. H&R Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.

3. A contractor is not entitled to an equitable adjustment for providing domestic end items if required by the BAA. Valentec Wells, Inc., ASBCA No. 41659, 91-3 BCA ¶ 24,168; LaCoste Builders, Inc., ASBCA No. 29884, 88-1 BCA ¶ 20,360; C. Sanchez & Son v. United States, supra.

H. The Berry Amendment

10 U.S.C. § 2533a. The "Berry Amendment" is an industrial protectionist law that requires DOD to buy certain listed items only from domestic sources. The statute is more draconian in its requirements than the Buy American Act because the Berry Amendment contains fewer exceptions.

1. The Berry Amendment requires DOD to procure the following items that are "grown, reprocessed, reused, or produced" in the U.S.: food; clothing, and material components, thereof; tents, cotton and other natural fiber products, canvas, or wool; specialty metals (located at 10 U.S.C. § 2533b); and hand and measuring tools.

2. The Beret Saga. See 43 The Gov't Contractor 18 at ¶ 191 (Associate Professor Stephen L. Schooner, George Washington University Law School, and Judge Advocate (USAR retired), discussing the purchase of berets).

3. Result of beret saga: Berry Amendment amended so that only Service Secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority. The Berry Amendment "does not apply to the extent that the Secretary of Defense or the Secretary of the military department covered determines that satisfactory and sufficient quantity of any such article or item…cannot be procured as and when needed at United States market prices." 10 U.S.C. § 2533a(c)

4. The National Defense Authorization Act of 2007 added section § 2533b, to title 10.[17]

   a. Entitled "Requirement to buy strategic materials critical to national security from American sources; exceptions," these provisions were deleted from § 2533a and placed in § 2533b to address specialty metals. The new section provides that appropriated funds may not be used to purchase the following end items, *or components thereof*, containing specialty metal not melted or produced in the United States: aircraft; missile and space systems; ships; tank and automotive items; weapon systems; ammunition; or specialty metals themselves that are purchased by DOD or a prime DOD contractor.[18]

   b. The law provides exceptions for some purchases including: procurements of commercially available electronic components whose specialty metal content is *de minimis* compared to the value of the overall item; procurements under the simplified acquisition threshold; procurements outside the United States in support of combat or contingency operations; procurements where purchase under other than competitive procedures has been approved for urgent and compelling urgency; and procurements where the Secretary of Defense or a military department determines that "compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed."[19]

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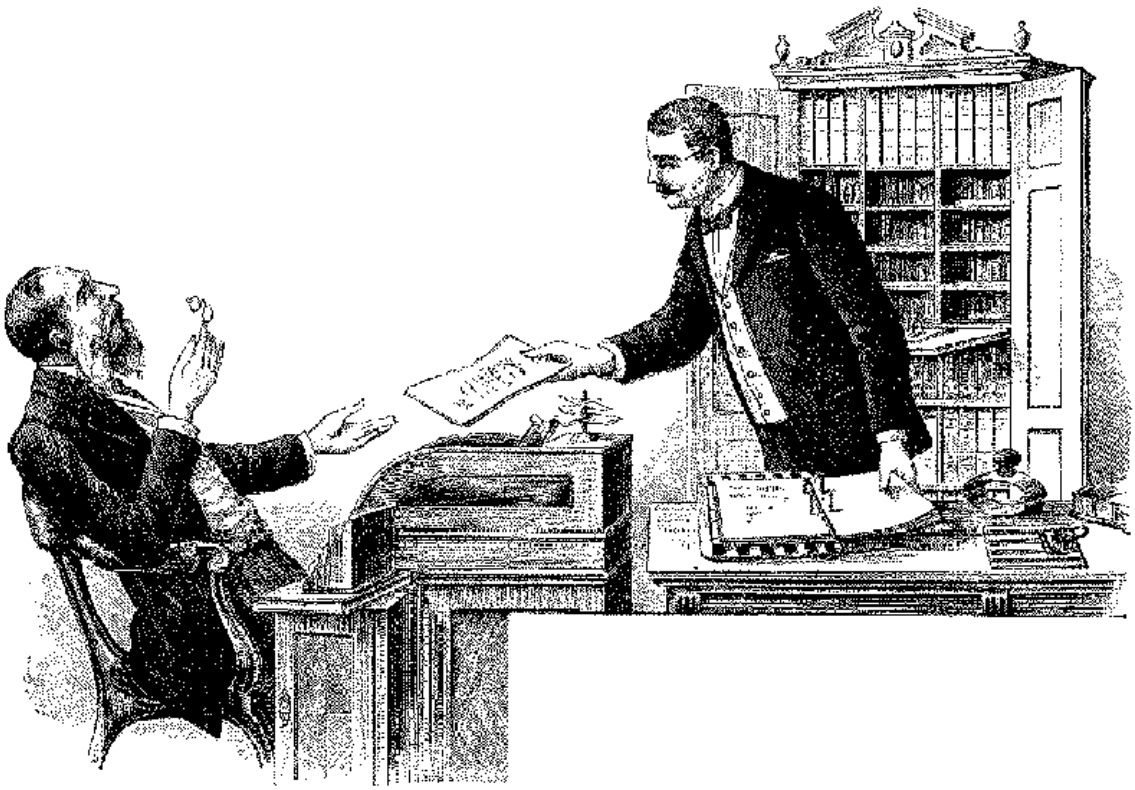
[17] *Id*.

[18] *Id*. (emph. added). The Act defines "specialty metals" to include steel, nickel, iron-nickel, cobalt based alloys, titanium, and zirconium. *Id*. U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 225-7003) also contains certain restrictions on the use of proper specialty metals on DOD contracts.

[19] National Defense Authorization Act for FY 2007, § 842, Pub. L. 364, 120 Stat. § 2083 (2006).

Chapter 14
Selected Labor Standards



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CHAPTER 14

LABOR STANDARDS

I. INTRODUCTION

A. Labor laws exist to prevent exploitation of the employees working on Government contracts and to eliminate the wage-depressing tendencies of the federal procurement process. This chapter summarizes these labor laws and the current application to Government contracts. Knowledge of the basic requirements will enable contract attorneys to advise contract officers on labor standards to ensure contractor compliance in order to avoid labor disputes that could cause costly delays in performance of contracts.

B. Each Service has a designated Agency labor advisor to advise contracting agency officials on Federal contract labor matters. See FAR 22.1001 and 22.1003-7; DFARS 222.001; and http://www.wdol.gov/ala.aspx for names and phone numbers. The Defense Procurement and Acquisition Policy (DPAP) office has a helpful website to assist government officials. See http://www.acq.osd.mil/dpap/cpic/cp/labor_information.html.

II. FAIR LABOR STANDARDS ACT OF 1938 (FLSA)

29 U.S.C. §§ 201-219, 29 CFR Part 500-899, FAR Subpart 22.102-4

A. Covered Workers:

1. General Applicability. Almost every employee in the United States is covered by the FLSA. Its application is not limited to government contracts.

2. "Exempted Employees." Executive, Administrative, Professional, Computer, and Outside Sales Employees that meet the following standards are exempted from the wage and overtime requirements of the FLSA. (*See* Exemption Test in 29 CFR Part 541).

a. Salary Level: earning an income of a minimum of $455/week are exempt.

b. Salary Basis: receives regularly predetermined amount of compensation each pay period that does not vary based on the quality or quantity of work performed.

c. Job Duties: in addition to salary basis and level, there are minimum standards that must be met for each category to qualify as exempt.

(1) Executive (29 CFR Part 541.100)

(2) Administrative (29 CFR Part 541.200)

(3) Professional (29 CFR Part 541.300)

(4) Computer Analysts, Programmers, Software Engineers, or similarly skilled workers (29 CFR Part 541.400)

(5) Outside Sales (CFR Part 541.500)

B. Requirements.

1. Federal Minimum Wage: employers must pay all covered nonexempt employees a minimum of $7.25 per hour (current rate through July 2014 under 29 USC §206).

2. Overtime Pay.

a. Employers must pay for any work performed over 40 hours in a work week at a rate not less than one and one half times the regular rate of pay (29 USC §207).

b. Practitioner's Note: Federal Government policy requires that contractors perform contracts without the use of overtime when practicable unless overall costs are lower for the Government or when necessary to meet urgent program needs. (*See* FAR 22.103-2 and 22.103-3 for procedures to include overtime in contracts.)

3. Record Keeping. All employers with FLSA covered employees must make, keep, and preserve certain records, to include wages, hours, conditions and practices of employment. There is no particular form required (29 USC § 211; 29 CFR Part 516).

4. Child Labor. Must be at least 16 years old to work in most non-farm occupations covered under the FLSA and at least 18 years old to work in non-farm hazardous jobs. (29 CFR Part 570)

C. Enforcement. Department of Labor (DoL) Wage and Hour Division enforces the requirements of the FLSA (*See* 29 U.S.C. § 204).

III. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA)

40 U.S.C. §§ 3701 et seq., 29 CFR Part 5, FAR Subpart 22.3, FAR 22.403-3, FAR 52.222-4
DFARS Subpart 222.3

A. Covered Workers.

1. Laborers and Mechanics.

2. Includes: apprentices, trainees, helpers, watchmen, guards, firefighters, and workmen who perform services in connection with dredging or rock excavation in rivers and harbors (but not seamen).

3. Working on construction and service contracts in excess of $150,000.[1]

4. Exemptions.

a. Contracts valued at or below $150,000

b. Commercial items.

c. Transportation or transmission of intelligence.

d. Work performed outside the US.

e. Supplies.

5. Specific exemption by the Secretary of Labor in special circumstances, such as public interest or to avoid serious impairment of government business.

B. Requirements.

1. Standard workweek: 40 hours of labor.

2. Overtime pay:

a. Minimum of 1.5 times basic rate of pay for any hours in excess of 40 hours.

[1] Although the CWHSSA directs applicability to contracts in excess of $100,000, in accordance with section 807 of the 2005 National Defense Authorization Act, the FAR Council must review and adjust all acquisition-related thresholds for inflation every five years (except for the Davis Bacon Act and Services Contract Act). Effective 1 October 2010, FAR 22.305 was amended to $150,000. *See* 75 Fed. Reg. 53133.

b. Practitioner's Note: Federal Government policy requires that contractors perform contracts without the use of overtime when practicable unless overall costs are lower for the Government or when necessary to meet urgent program needs. (*See* FAR 22.103-2 and 22.103-3 for procedures to include overtime in contracts.)

3. Certain health and safety requirements for construction industry (see 40 U.S.C. §3704 and 29 CFR 5.14-5.15).

4. For 3 years following contract completion, contractors and subcontractors must maintain the payroll and basic payroll records for each laborer and mechanic working on a contract. (*See* FAR 52.222-4(d)).

C. Enforcement.

1. Contracting Agency: when used in conjunction with the Davis Bacon Act.

2. Department of Labor: when used in conjunction with the Service Contract Act.

D. Remedies for Violations.

1. Termination for Default: After investigation and non-compliance found. (40 U.S.C. §3703; FAR 49.401).

2. Debarment: upon finding of aggravated or willful violation. (40 U.S.C. §3703; 29 CFR § 5.12).

3. Liquidated Damages: contracting officer assesses at a rate of $10 for each affected employee per calendar day on which the employer required or permitted the employee to work in excess of 40 hours without paying required overtime. (40 U.S.C. §3703; 29 CFR § 5.8; FAR 22.302 and 52.222-4(b)).

a. Violations are investigated by DoL. The DoL report is ordinarily sent to the agency labor advisor who contacts the contracting office to collect the assessed Liquidated Damages.

b. Liquidated Damages are considered miscellaneous receipts and must go back to the Treasury under the Miscellaneous Receipts Statute.

4. <u>Withholding Contract Funds</u>:

a. Contracting officer withholds from payments due to contractor sufficient funds to satisfy subcontractor liabilities for unpaid wages and liquidated damages. (40 U.S.C. §3703; 29 CFR § 5.9; FAR 22.302 and 52.222-4(c)).

b. Consult agency regulations for guidance on disposition of withheld funds.

IV. COPELAND (ANTI-KICKBACK) ACT

18 U.S.C. § 874, 40 U.S.C. § 3145, 29 C.F.R. Part 3, FAR 22.403-2

A. Covered Workers. Any person engaged in the construction or repair of a public building or public work (including projects that are financed at least in part by federal loans or grants).

B. Requirements.

1. Purpose: Prohibits employers from exacting "kickbacks" from employees as a condition of employment.

2. Reporting: For contracts in excess of $2000, every covered contractor and subcontractor must provide the contracting officer with a weekly statement of compliance for wages paid to each laborer and mechanic during the preceding week. (*See* FAR 22.403-2; FAR 22.407(a)(5); FAR 52.222-10).

3. Recordkeeping: both the contractors and the agency must keep payroll records for three years after completion of the contract. (*See* FAR 22.406-6).

4. Contracts must contain the clause at FAR 52.222-10 requiring contractors and subcontractors to comply with regulations issued under the act.

C. Enforcement.

1. Contracting Agency: conducts day-to-day enforcement (because linked to Davis Bacon Act covered contracts).

2. Department of Labor Wage and Hour Division administers the provisions of the Act.

D. Remedies.

1. Civil and or Criminal Prosecution: up to 5 years imprisonment and/or $5000 fine.

2. Termination for Default: based on willful falsification of statement of compliance.

3. Debarment: based on willful falsification of statement of compliance.

V. DAVIS-BACON ACT (DBA)

40 U.S.C. §§ 3141-3144, 29 C.F.R. Part 5, FAR Subpart 22.4, DFARS Subpart 222.4.

A. Covered Workers and Contracts. 29 C.F.R. § 5.2(m) (1999); FAR 22.401.

1. Laborers or mechanics. (*See* FAR 22.401).

a. Workers, employed by a contractor or subcontractor at any tier, [2] whose duties are manual or physical in nature, including:

(1) Apprentices, trainees, helpers;

(2) Watchmen and guards (only for contracts also subject to CWHSSA);

(3) Working foremen who devote more than 20 percent of their time during a workweek to performing duties as a laborer or mechanic; and

(4) Every person performing duties of laborer or mechanic, regardless of contractual relationship.

b. Exempted Employees: does NOT include workers with duties that are primarily executive, supervisory, administrative, or clerical in nature (*See* 29 C.F.R. Part 541).

2. Working on federal construction, alteration, or repair of public buildings or public works contracts performed in the United States that exceed $2,000.

a. "Public building" or "public work" means a construction or repair project that is carried on by the authority, or with the funds, of a federal agency to serve the interests of the general public.

b. "Site of the work." FAR 22.401

[2] The act applies to workers employed by a contractor or subcontractor at any tier. Cf. Ken's Carpets Unlimited v. Interstate Landscaping, Inc., 37 F.3d 1500 (6th Cir. 1994) (non-precedential) (holding prime contractor alone responsible for DBA wages where prime failed to include proper clauses in subcontract).

(1) The primary site of the work. The physical place or places where the construction called for in the contract will remain when on it is completed; and

(2) The secondary site of the work, if any. Any other site located in the U.S. where a significant portion of the building or work is constructed, if it is established specifically for the performance of the contract or project.

(3) This definition includes fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided that they are: (1) dedicated exclusively (or nearly so) to performance of the contract or project, and (2) adjacent (or virtually adjacent) to the primary or secondary site of the work.

c. Construction, Alteration, or Repair means all types of work done by covered workers on a particular building or work at the site, including:

(1) Altering, remodeling, installation on the site of work of items fabricated off-site;

(a) Carpeting. If carpet installation is performed in connection with construction or general renovation project, DBA applies.

(b) Environmental Cleanup. Involves substantial excavation and reclamation or elaborate landscaping activity. Does not apply to simple grading and planting of trees, shrubs, and lawn unless in conjunction with substantial excavation and reclamation.

(2) Painting and decorating;

(a) Asbestos and/or Paint Removal. DBA applies unless asbestos or paint is removed prior to demolition. If prior to demolition, Service Contract Act applies.

(b) Refinishing wood floors or concrete sealant application.

(c) For painting, the work is subject to the DBA if the service order requires painting of 200 square feet or more, regardless of work hours.

(3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;

(4) Transportation of materials within the site of the work (e.g., between the primary and secondary sites) is considered "construction" covered by the DBA.

(5) Transportation of materials to and from the site is not considered "construction" covered by the DBA.[3]

(6) Practitioner's Note: Maintenance vs. Repairs. The DFARS provides a bright line test to determine whether work is maintenance (Service Contract Act work) or repair (Davis-Bacon Act work). If a service order requires 32 or more work hours, the work is "repair." Otherwise, consider the work to be "maintenance."

3. Non-Construction Contract Coverage. (*See* FAR 22.402(b); DFARS 222.402-70).

a. Apply DBA standards if the contract requires a substantial and segregable amount of construction, repair, painting, alteration, or renovation that also exceeds the DBA monetary threshold of $2000.

(1) Construction work that is merely incidental to other contract requirements does not qualify for DBA coverage.

(2) Construction work that is so merged with non-construction work, or so fragmented in terms of the locations or time spans in which it is to be performed, that it cannot be segregated as a separate contractual requirement, does not qualify for DBA coverage.

b. Supply Contracts where there is more than a minor or incidental amount of construction. For example, an information technology acquisition may include infrastructure improvements to the facility as well as the purchase of the various computers, servers, network cabling, and other hardware.

[3] See 29 C.F.R. § 5.2(j) (1)(iv) and 5.2(j)(2)); Building & Constr. Trades Dep't, AFL-CIO v. Department of Labor Wage Appeals Board, 932 F.2d 985 (D.C. Cir. 1991), rev'g 747 F. Supp. 26 (D.D.C. 1990).

B. Requirements. (*See* 40 U.S.C. § 3142; FAR 22.403-1).

1. Contractors must pay mechanics and laborers a "prevailing wage rate" on federal construction projects performed in the United States that exceed $2,000.

   a. Coverage is determined on the contract level. Meaning, any subsequent task orders or subcontracts that are less than $2000 are still covered by the DBA once it was determined that the work on the overarching contract exceeded $2000.

   b. The Department of Labor determines the prevailing wage rate, which normally is based on the wage paid to the majority of a class of employees in an area. (*See* 29 C.F.R. § 1.2).

   c. A wage determination is not subject to review by the Government Accountability Office or boards of contract appeals.[4]

   d. "Wages" include the basic hourly pay rates plus fringe benefits.

2. Wage Determinations. (*See* 29 C.F.R. § 1.6; FAR 22.404-1; FAR 22.404-3).

   a. General Wage Determinations. (*See* 29 C.F.R. §§ 1.5(b) and 1.6(a)(2); FAR 22.404-1(a)).

      (1) Contains prevailing wage rates for the types of construction specified in the determination, and is used in contracts performed within a specified geographical area.

      (2) Remain valid until modified or canceled by the Department of Labor.[5]

      (3) General wage determinations incorporated into a contract remain effective for the life of a contract unless the contracting officer exercises an option to extend the term of the contract (FAR 22.404-12).

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[4] See American Fed'n of Labor - Congress of Indus. Org., Bldg., and Constr. Trades Dep't, B-211189, Apr. 12, 1983, 83-1 CPD ¶ 386; Woodington Corp., ASBCA No. 34053, 87-3 BCA ¶ 19,957; but see Inter-Con Sec. Sys., Inc., ASBCA No. 46251, 95-1 BCA ¶ 27,424 (finding board has jurisdiction to consider effect of wage rate determination on contractual rights of a party).

[5] Current determinations are published by the Wage and Hour Division on their website at www.wdol.gov.

(4) If a general wage determination is applicable to the project, the agency may use it without notifying DoL (FAR 22.404-3(a)).[6]

b. Project Wage Determinations. 29 C.F.R. § 1.6(a)(1); FAR 22.404-1(b).

(1) Issued at the specific request of a contracting agency only when no general wage determination applies.

(2) The determination is effective for 180 calendar days from date of issuance. If it expires, the contracting officer must follow special procedures for extension of the 180 day life depending on whether sealed bidding or negotiation was used (FAR 22.404-5).

(3) Once incorporated into a contract, the project wage determination is effective for the duration of that contract unless the contracting officer exercises an option to extend the term of the contract (FAR 22.404-12).

(4) Contracting officers may request a project wage determination from DoL by specifying the location of the project and including a detailed description of the types of construction involved and the estimated cost of the project.

(5) Processing time for a project wage rate determinations is at least 30 days.

3. Contract Process.

a. Solicitations.

(1) The contracting officer must include the appropriate wage rate determination and designate the work to which each determination applies in each solicitation covered by the DBA.

(2) When the construction site is unknown at the time of a contract award, the contracting officer will incorporate the most current DBA wage determination at the issuance of each task order.

[6] DoL (Wage and Hour Division) defines types of construction for use in selecting proper wage rate schedules. (FAR 22.404-2(c)).

(3) Solicitations issued without a wage rate determination must advise that the contracting officer will issue a schedule of minimum wage rates as an amendment to the solicitation. FAR 22.404-4(a).[7]

(a) Sealed Bidding: may not open bids until a reasonable time after furnishing the wage determination to all bidders.

(b) Negotiated Procurements: may open the proposals and conduct negotiations before obtaining the wage determination, but must include the wage determination in the solicitation before calling for final proposal revisions. FAR 22.404-4(c).

b. When the contract is awarded without required wage determination, the contracting officer must:

(1) Modify the contract to incorporate the required wage rate determination, retroactive to the date of award, and equitably adjust the contract price, if appropriate. (FAR 22.404-9(b)(1); or

(2) Terminate the contract. (FAR 22.404-9(b)(2)).

4. Modifications of Wage Determinations. (FAR 22.404-6).

a. General Rule: the requirement to include a DOL wage determination modification in a solicitation depends upon when the agency "receives" notice.

(1) General wage determinations: receipt by the agency of actual written notice or constructive notice (publication on the WDOL: http://www.wdol.gov), whichever occurs first.

(2) Project wage determinations: actual receipt by the agency.

(3) Practitioner Note: "agency" receipt is broadly defined. It is not dependent on when the contracting officer receives notice (as that may occur later). Contracting officers should continually monitor the WDOL website for any modifications of wage determinations that may affect a solicitation.

[7] If an offeror fails to acknowledge an amendment to an IFB that adds or modifies a wage rate, the offer may be nonresponsive. ABC Project Mgmt., Inc., B-274796.2, Feb. 14, 1997, 97-1 CPD ¶ 74.

b. Sealed Bidding. FAR 22.404-6(b).

(1) Before bid opening, a modification is effective if:

(a) ≥ 10 calendar days before bid opening date: the contracting agency receives it, or DoL publishes notice of the modification on the WDOL.

(b) < 10 calendar days before bid opening: the contracting agency receives it, or DoL publishes notice on the WDOL, unless the contracting officer finds there is insufficient time before bid opening to notify prospective bidders.

(c) Practitioner's Note: when modifications of the wage determination for the primary site of work are effective before bid opening, the contracting officer must permit bidders to amend their bids. If necessary, bid opening must be postponed.

(2) After bid opening, but before an award, a modification is effective if:

(a) Award is not made within 90 days after bid opening. FAR 22.404-6(b)(6).[8]

(b) Practitioner's Note: when modifications of wage determinations for the primary site of work are effective after bid opening, but before award, the contracting officer must:

(i) Award the contract and incorporate the effective determination on the date of contract award; or

(ii) Cancel the solicitation in accordance with FAR 14.404-1.

(3) If the contracting officer receives an effective modification after award, the contracting officer must modify the contract to incorporate the wage modification retroactive to the date of award and equitably adjust the contract price. (FAR 22.404-6(b)(5)).

[8] See Twigg Corp. v. General Servs. Admin., GSBCA No. 14639, 99-1 BCA ¶ 30,217 (holding contractor entitled to an equitable adjustment where agency failed to incorporate revised wage determination).

c. Negotiated Procurements. FAR 22.404-6(c).

(1) A modification of a wage determination before award <u>is effective</u> if:

(a) Received by the contracting agency or published on the WDOL. FAR 22.404-6(c)(1).

(b) If the contracting officer receives and effective modification before award, the solicitation must be amended to incorporate the new wage determination. FAR 22.404-6(c)(2)

(i) If closing date has not passed, all prospective offerors who were sent solicitations must be given a reasonable opportunity to revise proposals.

(ii) If closing date has passed, all offerors who submitted proposals must be given a reasonable opportunity to revise proposals.

(2) An effective modification of a wage determination received after award requires the contracting officer to do the following: (FAR 22.404-6(c)(3)).

(a) (a) Modify the contract to incorporate the rate modification retroactive to the date of award, and

(b) Equitably adjust the contract price.

5. Contracts with Options.

a. Wage determinations must be updated when contract options are exercised to extend the term of the contract. The contracting officer must modify the contract to incorporate these updates (FAR 22.404-12(a)).

b. Whether or not updated wage determinations will result in a contract price adjustment depends on type of contract and the contract clause incorporated by the contracting officer. (FAR 22.404-12(c), 52.222-30, 52.222-31, 52.222-32).

C. Enforcement. While Department of Labor retains administrative and oversight enforcement, day-to-day enforcement is by the Contracting Agency.

1. Contracting Agency: Compliance Checks and Investigations. (FAR 22.406-7; DFARS 222.406-1).

a. Regular compliance checks:

(1) Employee interviews;

(2) On-site inspections;

(3) Payroll reviews; and

(4) Comparison of information gathered during checks with available data, e.g., inspector reports and construction activity logs.

b. Special compliance checks:

(1) When inconsistencies, errors, or omissions are discovered during regular checks; or

(2) Complaints are filed.

c. Labor Standards Investigations. (FAR 22.406-8; DFARS 222.406-8).

(1) The contracting agency investigates when compliance checks indicate that violations are substantial in amount, willful, or uncorrected. (NOTE: DoL also may perform or request an investigation).

(2) The contracting officer notifies the contractor of preliminary findings, proposed corrective actions, and certain contractor rights. FAR 22.406-8(c).

(3) The contracting officer forwards a report to the agency head who, must forward to DoL in the following circumstances:

(a) Contractor/subcontractor underpaid by $1000 or more.

(b) Contracting officer believes violations are aggravated or willful.

(c) Contractor/subcontractor has not made restitution.

(d) Future compliance has not been assured.

(4) If the contracting officer finds substantial evidence of criminal activity, the agency head must forward the report to the U.S. Attorney General.

2. Department of Labor (DoL).

a. Upon receipt of a complaint, DoL immediately refers the complaint to the Contracting Agency for enforcement action (see below on investigation and resolution).

b. If Contracting Agency Enforcement attempts fail, DoL reviews the investigative file for final attempt at resolution of disputes concerning the labor standards provisions of the contract. (FAR 22.406-10; FAR 52.222-14).

c. The Board of Contract Appeals and federal courts review claims relating to labor disputes if the dispute is based on the contractual rights and obligations of parties.[9]

d. Federal district courts have jurisdiction to review appeals of DoL's implementation of the DBA.[10]

D. Military Privatized Housing Initiative (MHPI).

1. The Army, Navy, and Air Force are improving the conditions of military housing in a project referred to as the Military Housing Privatization Initiatve (MHPI). Under this initiative, in most instances, a private developer leases the land for a long term and then is responsible for constructing or renovating existing housing developments using military rental referrals to fund and maintain the newly renovated and privatized developments. Each Service has agreed to include DBA provisions and applicable wage determinations in all MHPI contracts and has agreed that all developers will be required to comply with the DBA labor standard provisions.

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[9] See, e.g., MMC Constr., Inc., ASBCA No. 50,863, 99-1 BCA ¶ 30,322 (claim for excessive DBA wage withholding); Commissary Servs. Corp., ASBCA No. 48613, 97-1 BCA¶ 28,749 (dispute regarding DBA offset when ultimate issue was whether same prime contractor was involved in both contracts); American Maint. Co., ASBCA No. 42011, 92-2 BCA ¶ 24,806 (claim for reimbursement of fringe benefits); Central Paving, Inc., ASBCA No. 38658, 90-1 BCA ¶ 22,305 (claim that original wage rate information in contract was incorrect). Cf. Page Constr. Co., ASBCA No. 39685, 90-3 BCA ¶ 23,012 (declining jurisdiction over claim that government breached statutory obligation).

[10] See, e.g., Building and Constr. Trades Dep't, AFL-CIO v. Secretary of Labor, 747 F. Supp. 26 (D.D.C. 1990).

2. The Installation Housing Asset Manager administers the application of DBA to MHPI.[11]

E. Remedies.

1. Suspending Contract Payments. The contracting officer shall suspend any further payment, advance, or guarantee of funds otherwise due to a contractor if a contractor or subcontractor fails or refuses to comply with the DBA (FAR 22.406-9).

2. Withholding contract payments. The contracting officer shall withhold contract payments if the contracting officer believes a violation of the DBA has occurred, or upon request by the DoL. (40 U.S.C. § 3142(c)(3); 29 C.F.R. § 5.5(a)(2)(1999); FAR 22.406-9(a)(1)).[12]

3. Termination for Default (40 U.S.C. § 3143).

4. Debarment. The contractor may be debarred for disregard of its obligations to employees or subcontracts. (40 U.S.C. § 3144; 29 C.F.R. § 5.12).

5. Liquidated Damages. $10/day for each employee paid improperly, per the CWHSSA. (40 U.S.C. § 3703).

VI. MCNAMARA-O'HARA SERVICE CONTRACT ACT OF 1965 (SCA)

41 U.S.C. §§ 6702-6706 (formerly cited as 41 U.S.C. §§351-358)
29 C.F.R. Part 4
FAR Subpart 22.10
DFARS Subpart 222.10.

A. Covered Workers and Contracts. FAR 22.1002; FAR 22.1003.

1. Service Contracts (41 U.S.C. § 6702; FAR 22.1001)

a. Contracts made by the federal government;

[11] Army Assistant Chief of Staff for Installation Management (ACSIM) has prepared a Portfolio and Asset Manager's Handbook that identifies the duties and responsibilities of the Asset Manager to include DBA compliance procedures.

[12] See Westchester Fire Insurance Co., v. United States, 52 Fed. Cl. 57 (2002) (although contract terminated five months earlier, contracting officer was required to withhold funds per DoL request).

b. Amount >$2500; and

c. Principal purpose to furnish services through the use of service employees. (See 29 CFR § 4.130 and FAR 22.1003-5 for examples of service contracts covered).

(1) SCA does NOT apply if the principle purpose of the contract is to provide something other than services, or the services performed are merely incidental to a non-service contract.[13]

(2) "Service employee" (41 U.S.C. 6701).

(a) any person engaged in the performance of a service contract or subcontract;

(b) regardless of the existence of a contractual relationship with a contractor or subcontractor; but

(c) does NOT include persons employed in bona fide executive, administrative, or professional capacities.

2. Exemptions. (41 U.S.C. § 6702; 29 C.F.R. §§ 4.115 to 4.122; FAR 22.1003-3.

a. Contracts principally for the construction, alteration, or repair (including painting and decorating of public buildings or public works).

(1) These are covered by the Davis-Bacon Act (DBA).

(2) NOTE: Contracting officers must incorporate DBA provisions and clauses into a service contract if there is a substantial amount of segregable construction work.

b. Contracts principally for the manufacture or delivery of supplies, materials or equipment.

[13] For example: (1) Rental of building office space is not a covered service contract even where the rental agreement includes janitorial services; however, the SCA does apply if janitorial services are contracted for separately; (2) Rental of vehicles alone is for a tangible item and not a covered service; however, the SCA does apply if rental is for vehicles with operators ; (3) Contracts for printing, reproduction, and duplicating are ordinarily for the principal purpose of furnishing written materials rather than the furnishing of reproduction services through the use of service employees; however, in some cases, the terms, conditions, and circumstances of the procurement may be such that the facts would show its purpose to be chiefly the furnishing of services (e.g. repair services, typesetting, photocopying, editing, etc.). *See* 29 CFR §4.134.

(1) These are covered by the Walsh-Healy Public Contracts Act of 1938 (WHA).

(2) Note: some work under a service contract may be exempt from the SCA because it entails the manufacture or delivery of supplies, materials, or equipment.

c. Contracts for transporting freight or personnel by vessel, aircraft, bus truck, express, railroad, or oil or gas pipelines where published tariffs are in effect.

d. Contracts for public utility services.

e. Contracts for furnishing services by radio, telegraph, telephone, or cable companies subject to the Communications Act of 1934.

f. Employment contracts providing for direct services to a Federal agency by an individual or individuals.

g. Contracts for principally for operating postal contract stations for the US Postal Service.

3. Administrative Limitations, Variances and Exemptions.

a. The DoL may establish reasonable variations, tolerances, and exemptions from SCA provisions (41 U.S.C. § 6707). DoL must find that:[14]

(1) necessary in the public interest, or

(2) avoids serious impairment of federal government business, and

(3) is within the overall purpose of protecting prevailing labor standards.

b. When services are to be performed by both non-exempt and exempt employees, if a substantial portion (20% or more) of the services are performed by non-exempt employees, then the SCA applies to that work performed by those employees.

B. Requirements.

1. Covered service contracts must contain mandatory provisions regarding:

[14] Current DoL exemptions are found at 29 CFR § 4.123 and FAR 22.1003-4.

a. Minimum wages (29 C.F.R. §§ 4.161 through 4.163 ; FAR 22.1002-2):

(1) A contractor must pay service employees not less than the prevailing wage rate determination issued by DoL for the contract, or

(2) In accordance with the collective bargaining agreement (CBA), or

(3) If there is no wage determination or an effective Collective Bargaining Agreement, the FLSA minimum wage applies.

b. Fringe benefits,[15]

c. Safe and sanitary working conditions,

d. Notification to employees of the minimum allowable compensation, and

e. Equivalent federal employee classifications and wage rates.

2. Wage Determinations. (FAR 22.1007 and 22.1008; DFARS 222.1008; 29 C.F.R. § 4.143; http://www.wdol.gov).

a. The contracting officer must obtain wage determinations for:

(1) Each new solicitation and contract exceeding $2,500;

(2) A contract modification that increases the contract to over $2,500;

(a) And extends the contract pursuant to an option clause or otherwise; or

(b) Changes to the scope of a contract that affect labor requirements significantly.

(3) On multiple year contracts in excess of $2,500, obtain

(a) Annually if funding is annual, or

[15] Examples of those provided include medical/hospital care, pensions, workers compensation, unemployment benefits, life insurance, disability pay, and those not otherwise required under federal, state or local law.

(b) Biennially if funding is not subject to annual appropriations and its proposed term exceeds two years.

b. Proper Wage Determination (FAR 22.1008-1).

(1) General Rule: use the prevailing wage determination for the area or locality of contract performance from the WDOL database.

(2) Specific Wage Determination: where no standard prevailing wage determination is available, the contracting officer must request a contract specific determination from DoL.

(3) If DoL does not issue a WD to cover SCA employees, then the FLSA provisions apply. (41 U.S.C. § 6704).

c. Modifications of Wage Determinations. (29 CFR § 4.5(a)(2)).

(1) Sealed bidding.

(a) If WD/CBA revision is received 10 days or more before bid opening, then incorporate the revision into the solicitation.

(b) If WD/CBA revision is received less than 10 days before bid opening OR a special rule applies (see FAR 22.1014), do not incorporate the WD/CBA revision into the solicitation, unless the Contracting Officer finds that there is reasonable time to notify bidders.

(2) Negotiations.

(a) If WD/CBA revision is received before award of contract or modification to exercise an option or to extend the contract, then incorporate the revision into the solicitation or the existing contract to be effective the first day of the new period of performance.

(b) If WD/CBA revision is received after award of contract or modification to exercise option or to extend the contract, and performance starts within

30 days, then do not incorporate the new or revised WD/CBA.

(c) If WD/CBA is received after award and performance starts more than 30 days after award or modification, then incorporate the WD/CBA revision.

3. Successor Contract Rule. (41 U.S.C. § 6707(c); FAR 22.1008-2)

a. Must pay wages and fringe benefits at least equal to those contained in a CBA <u>effective</u> under the previous contract for:

(1) new contracts for substantially the same services,

(2) performed in the same locality,

b. Limitations. (FAR 22.1008-2(c)).

(1) CBA is NOT effective if it does not become effective until after the expiration of the incumbent's contract.

(2) Where contracting officer has given timely notice to both incumbent contractor and the collective bargaining agent of the applicable acquisition dates, the terms of new/revised CBA are NOT effective if:

(a) Sealed bidding:

(i) Contracting agency receives notice of the terms of the CBA less than 10 days before bid opening, and

(ii) there is not reasonable time to notify bidders

(b) Negotiations.

(i) Contracting agency receives notice of the terms of the CBA after award and

(ii) Start of performance is within 30 days

(iii) CBA applies if received by contract agency after award, performance starts more than 30 days from date of award, and it is received

no later than 10 days prior to start of performance..

(3) If DoL determines that the CBA was not negotiated in good faith or that the rates set by the CBA vary substantially from the prevailing rates, then CBA does not apply.

(4) The "Successor Contract" rule applies only to the base period of the follow-on contract. After the base period, the contractor and the employee bargaining unit may renegotiate the CBA. (29 C.F.R. §§ 4.143; 4.145)

4. Nondisplacement of Qualified Workers. (Executive Order 13495; 29 CFR § 9; FAR 22.12).

a. Service contracts over the simplified acquisition threshold, with some exceptions, must include FAR 52.222-17 requiring the successor contractor and its subcontractors to offer the employees of the predecessor contractor:

(1) Right of first refusal of employment under the successor contract in positions for which they are qualified,

(2) if their employment will be terminated as a result of the award of the successor contract.

b. Successor contractor is permitted to hire fewer employees than its predecessor, and is not required to hire employees who it believes has failed to perform well under the predecessor contract.

c. Not less than 30 days before the completion of the contract, the predecessor contractor (incumbent) must provide a certified list of service employees to the contracting officer to facilitate the hiring process. FAR 22.1204.

d. DoL Wage and Hour Division (WHD) has authority to investigate complaints per 29 CFR § 9.23 and has a dedicated email address for such complaints (displaced@dol.gov). The contracting officer shall cooperate with DoL representatives in the examination of records, interviews with service employees, and all other aspects of the investigation as undertaken by DoL. FAR 22.1024.

5. Price Adjustments Contract Clauses. (FAR 52.222-43; 52.222-44).

a. Adjustments are allowed only for increases due to congressional or DoL action. If the FLSA minimum wage rate is amended or a

wage rate incorporated upon exercise of an option increases labor costs, the contractor is entitled to a price adjustment.[16]

(1) Adjustments for increased wages arising out of a CBA negotiated during contract performance are not retroactive to date of CBA execution. Adjustments in these cases are required only upon option exercise.[17]

(2) A contractor is not entitled to a price adjustment for the increased costs of complying with a wage determination that existed at the time of contract award.[18]

b. It is the contractor's responsibility to submit a detailed proposal to adjust the contract price to comply with a modified or new WD or CBA.

(1) The contractor is only entitled to an adjustment when it demonstrates there is a causal relationship between the new or modified WD and the increased cost it incurs in wage and fringe benefits to its service employees.

(2) Contract price may also be adjusted downward when voluntarily made by the contractor. Request must be made within 30 days of the new or modified WD incorporated into the contract.

c. Recovery under the price adjustment clauses is limited to wages, fringe benefits, social security, unemployment taxes, and workers' compensation. It will NOT include general or administrative costs, overhead, or profit.

d. Limitations.

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[16] See United States v. Serv. Ventures, Inc., 899 F.2d 1 (Fed. Cir. 1990); Williams Servs., Inc., ASBCA No. 41121, 91-1 BCA ¶ 23,486; see also Gricoski Detective Agency, GSBCA No. 8901, 90-3 BCA ¶ 23,131 (disallowing adjustment because contract included priced option years and contractor failed to factor vacation pay costs into option year prices). Cf. Sterling Servs., Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714 (allowing partial relief on claim arising from corrected wage determination).

[17] See Ameriko, Inc., d/b/a Ameriko Maint. Co., ASBCA No. 50356, 98-1 BCA ¶ 29,505 (holding contractor was not entitled to price adjustment for increase in base year wages where increase was due to CBA executed after contract award); Classico Cleaning Contractors, Inc., DOTBCA No. 2786, 98-1 BCA ¶ 29,648 (holding contractor could not recover during first option year for increases under CBA executed during same year). Phoenix Management, Inc., ASBCA No. 53409, 02-1 BCA¶ 31,704 (agency required to comply with DoL wage determination because contracting officer failed to seek clarification regarding employees included in the CBA).

[18] Holmes & Narver Servs., ASBCA No. 40111, 93-3 BCA ¶ 26,246 (holding contractor could not recover cost of complying with wage determination that had not changed). See Johnson Controls World Servs., Inc., ASBCA No. 40233, 96-2 BCA ¶ 28,548 (agency not liable for failing to inform contractor of previously disapproved conformance request).

(1) Not all adjustments for increased wage rates are made under the FAR "price adjustment" clauses. The contractor may be able to show that recovery is based on a clause other than a price adjustment clause (e.g., changes clause).[19]

(2) Mutual mistake concerning employee classification or the propriety of a wage determination may shift the cost burden to the government.[20]

C. Enforcement.

1. DoL enforces SCA compliance.

2. Contracting Agency responsibility is to ensure that the proper labor standard clauses and appropriate wage determinations are in the contract.

D. Remedies.

1. Termination for Default. 41 U.S.C. § 6705(c).

2. Three Year Prohibition on New Contracts. (41 U.S.C. § 6706).

3. Withholding of Contract Funds. (41 U.S.C. § 6705; 29 C.F.R. § 4.187).

VII. WALSH-HEALEY PUBLIC CONTRACTS ACT OF 1936 (WHA)

41 U.S.C. §§ 6501-6511 (previously cited as 41 U.S.C. §§ 35-45)
41 C.F.R. Parts 50-201 to 50-210
FAR Subpart 22.6
DFARS Subpart 222.6.

A. Covered Workers and Contracts.

[19] For example, the parties may agree to wage revisions outside the terms of the price adjustment clauses. Security Servs. Inc. v. General Servs. Admin., GSBCA No. 11052, 93-2 BCA ¶ 25,667; The price adjustment clauses may not apply where the adjustment occurred during base year of contract and was not due to a FLSA minimum wage increase. See, e.g., Lockheed Support Sys., Inc. v. United States, 36 Fed. Cl. 424 (1996) (holding that price adjustment clause did not apply to a wage rate price adjustment made four months after the start of a contract); Professional Servs. Unified, Inc., ASBCA No. 45799, 94-1 BCA ¶ 26,580 (price adjustment clause inapplicable where adjustment occurred after contract award).

[20] See, e.g., Richlin Sec. Serv. Co., DOTBCA Nos. 3034, 3035, 98-1 BCA¶ 29,651 (mutual mistake as to employee classification).

1. Contracts for manufacture or furnishing of materials, supplies, articles, and equipment that exceed $15,000.

2. Exemptions.

   a. Perishables, including livestock, dairy, and nursery products.

   b. Agricultural or farm products processed for first sale by the original producer.

   c. Agricultural commodities or products purchased under contract by the Secretary of Agriculture.

   d. Public utility services.

   e. Supplies manufactured outside the US.

   f. Newspapers, magazines, or periodicals contracted for with sales agents or publisher representatives

   g. Open market items usually with commercial items or where immediate delivery is required by public urgency for commercial services.

3. Dual Coverage.

   a. When supplies and services are under the same contract, WHA and SCA may apply to different portions of the procurement. (29 CFR 4.117, and 29 CFR 4.131 – 4.132).

   b. If installation of supplies is "minor and incidental," then DBA will not be required. If installation requires more than an incidental amount of construction, DBA will likely be required for that portion of contract performance. (FAR 22.402(b) and 29 CFR 4.116).

B. Requirements. (41 U.S.C. § 6502).

1. Must pay the prevailing minimum wage.

   a. DoL determines based on similar wages in the applicable industry and locale in which the supplies are to be manufactured or furnished under a contract.

b. Presently, however, there is no wage rate determination activity under the Act. The FLSA minimum wage is the Walsh-Healey Act wage rate.

2. Overtime Provisions. Maximum workweek is established as 40 hours.

3. Child and Convict Labor. No one under the age of 16 or incarcerated individual.

4. Health and Safety Requirements.

C. Enforcement by DoL.

D. Remedies. (41 U.S.C. § 6503-6504)

1. Termination for Default.

2. Three Year Prohibition on New Contracts.

3. Withholding Contract Funds.

4. Liquidated Damages ($10.00 a day for each employee paid improperly).

VIII. DEFENSE BASE ACT

42 U.S.C. § 1651
FAR 28.3.

A. Covered Workers and Contracts.

1. Applies to following employees:

a. Performing services outside of the US.

b. Engaged in US government funded public works business outside US.

c. Public works or military contract with a foreign government which has been deemed necessary to US national security.

d. Provide services funded by US government outside realm of regular military issue or channels.

e. Any subcontractor of prime involved in a contract that qualifies under a-d supra.

2. Used in conjunction with the Longshore and Harbor Workers' Compensation Act of 1927, 33 USC 901 et seq. and War Hazards Compensation Act, 42 USC 1701 et seq.

   a. Created to force uniformity of benefits and remedies available to longshoremen and harbor workers.

   b. May be waived by the Secretary of Labor.

B. Requirements.

1. Covers injury or death of covered employees.

2. Requires contractor to obtain Defense Base Act insurance prior to performance of contract.

3. Provides injury benefits such as medical care, disability compensation, and death benefits.

4. Provides minimum insurance coverage for covered employees.

C. Contract Actions.

1. Insert 52.228-3 in applicable contracts.

2. Insert 52.228-4 when the Secretary of Labor waives applicability of the Defense Base Act. A list of countries that Defense Base Act Waivers as well as procedures for requesting a waiver can be found at the DPAP website (http://www.acq.osd.mil/dpap/sitemap.html).

D. Enforcement. Office of Workers' Compensation Program (OWCP), DoL.

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Chapter 15
Competitive Sourcing & Privatization

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CHAPTER 15

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CHAPTER 15

COMPETITIVE SOURCING AND PRIVATIZATION

I. COMPETITIVE SOURCING[1]

A. Origins and Development of Circular A-76

1. 1955: The Bureau of the Budget (predecessor of the Office of Management and Budget (OMB)) issued a series of bulletins establishing the federal policy to obtain goods and services from the private sector. See Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities, ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter Circular A-76 (1999)]. [2]

2. 1966: The OMB first issued Circular A-76, which restated the federal policy and the principle that "[i]n the process of governing, the Government should not compete with its citizens." The OMB revised the Circular in 1967, 1979, 1983, and again in 1999. See Circular A-76 (1999), ¶ 4.a.

3. 1996: The OMB issued a Revised Supplemental Handbook setting forth procedures for determining whether commercial activities should be performed under contract by a commercial source or in house using government employees. In June 1999, OMB updated the Revised Supplemental Handbook. See Circular A-76 (1999), ¶ 1.

4. 2003: The OMB issued the current version of OMB Circular A-76 superseding the prior circular and any related guidance.[3]

5. 2009: By the spring of 2009 public-private competitions which would convert federal employee jobs into contractor jobs under Circular A-76 had been suspended, and in most cases remain so.[4] Competitive sourcing is currently only permitted in DoD where the result is to determine how to best source work that is not currently performed by federal employees (i.e. new work, or work currently done by contractors). In March 2009,

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[1] While referred to in the past as "contracting out" or "outsourcing," this outline will use the term-of-art "competitive sourcing." Competitive sourcing as used herein describes the implementation of procedures whereby a federal agency formally compares the performance of a commercial activity by government employees against performance by the private sector, to determine which is more cost-effective.

[2] The full text of Circular A-76 (2003) is available on-line at http://www.whitehouse.gov/omb/circulars_index-procure [hereinafter Circular A-76 (Revised)].

[3] Circular A-76 (Revised), *supra* note 2.

[4] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 737 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 325 (2009).

President Obama reiterated the importance of Congress' taskings and further directed the OMB to "clarify when governmental outsourcing of services is, and is not, appropriate, consistent with section 321 of the 2009 NDAA."[5]

6. 2010: In the National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010), Congress imposed a temporary moratorium on new competitions involving functions currently performed by DoD civilian employees until, among other things, DoD reviewed and reported to Congress on various aspects of its public-private competition policies.[6] DoD complied with the statutory requirements in conducting its review of public-private competitions and in submitting its June 2011 report to Congress. Specifically, the report addressed the five required topics:

   a. compliance with a new requirement expanding competition requirements to activities with fewer than 10 federal employees;

   b. actions taken in response to issues raised by the DoD Inspector General (IG) in a 2008 report;

   c. the ability of existing systems to provide comprehensive and reliable data on the cost and quality of functions subject to public-private competition;

   d. the appropriateness of certain cost differentials and factors, such as the overhead rate, used in public-private competitions; and

   e. the adequacy of DoD policies regarding mandatory recompetitions of work previously awarded to employee groups.

7. 2011: In response, to the directive of 2009, OMB (OFPP) issued Policy Letter 11-01.[7] Policy Letter 11-01 is the most recent attempt to define inherently governmental function and subsequently, what functions may and may not be outsourced. In essence, Policy Letter 11-01 prohibits outsourcing "inherently governmental functions" and cautions against

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[5] Memorandum of the President to the Heads of Exec. Dep'ts and Agencies, subject: Government Contracting (Mar. 4, 2009), *available at* http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government.

[6] Pub. L. No. 111-84 § 325 (2009).

[7] OFFICE OF FED. PROCUREMENT POL., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OFPP POL. LETTER 11-01, PERFORMANCE OF INHERENTLY GOVERNMENTAL AND CRITICAL FUNCTIONS (2011) [hereinafter POLICY LETTER 11-01]. On February 13, 2012, OFPP published a correction to POLICY LETTER 11-01. POLICY LETTER 11-01 was originally addressed only to the Civil Executive Branch Departments and Agencies. *See* 77 Fed. Reg. 29, 7609 (Feb. 13, 2012) (extending the application of POLICY LETTER 11-01 to Defense Executive Branch Departments and Agencies). (Sec. C, Public Comments to the Notice of Final Policy Letter). The OFPP published its proposed policy letter on March 31, 2010 for public comments. More than 30,000 public and private organizations and/or citizens submitted comments and recommendations. Some recommendations were adopted by OFPP and incorporated into POLICY LETTER 11-01. A review of Section C, Public Comments, is instructive and may be used as a resource when dealing with Closely Associated and Critical Functions.

outsourcing "closely associated with inherently governmental functions" and "critical functions." Policy Letter 11-01 is composed of six parts, but for purposes of this primer, only three of the parts relevant parts are discussed below.[8]

8. 2011: In addition to the important Policy Letter 11-01 issued by OFPP referenced above, the GAO published in 2011, DOD MET STATUTORY REPORTING REQUIREMENTS ON PUBLIC-PRIVATE COMPETITIONS which was a review of the 2010 competitive sourcing review conducted by DoD.[9]

9. 2011: Although not controlling, an interesting review of the discussion surrounding Inherently Governmental Functions, can be found in Congressional Research Service, INHERENTLY GOVERNMENTAL FUNCTIONS AND OTHER WORK RESERVED FOR PERFORMANCE BY FEDERAL GOVERNMENT EMPLOYEES: THE OBAMA ADMINISTRATION'S PROPOSED POLICY LETTER, Oct. 1, 2011

B. Legislative Roadblocks

1. Legislative hurdles to the use of Circular A-76 studies are not a new phenomenon. The National Defense Authorization Act for Fiscal Year (FY) 1989 allowed installation commanders to decide whether to study commercial activities for outsourcing. Pub. L. No. 101-189, § 1319(a)(1), 103 Stat. 1352, 1560 (1989). Codified at 10 U.S.C. § 2468, this law expired on 30 September 1995. Most commanders opted not to conduct such studies due to costs in terms of money, employee morale, and workforce control.

2. The Department of Defense (DoD) Appropriations Act for FY 1991 prohibited funding Circular A-76 studies. See Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.[10]

3. The National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DoD from entering into contracts stemming from cost

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[8] *See* id. The components not discussed in this primer are generally procedural and only apply once a determination is made to compete out Closely Associated Functions and Critical Functions for contractors to perform. The purpose of this primer is to provide sufficient knowledge of POLICY LETTER 11-01 for the reader to recognize when they are dealing with Inherently Governmental Functions, Closely Associated Functions, and Critical Functions. If the reader is able to spot these issues as they arise, the reader may return to POLICY LETTER 11-01 to determine what procedural safeguards are required.

[9] GAO-11-923R (2011).

[10] While not a "roadblock," a recurring limitation in DOD Appropriations Acts prohibited the use of funds on Circular A-76 studies if the DOD component exceeded twenty-four months to perform a single function study, or thirty months to perform a multi-function study. See Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8021, 121 Stat. 1295 (2007); Department of Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8021, 119 Stat. 2680 (2005). The thirty-month limitation represents a change from prior years, as previously Congress provided forty-eight months for multi-function studies. See e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8022, 116 Stat. 1519, 1541 (2002).

comparison studies under Circular A-76. See Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992) and Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

4. Recently, as noted above, the Omnibus Appropriations Act, 2009, prohibited the funding of any new studies funded from *any* source.[11] Similar prohibitions and limitations have occurred in all DoD authorizations/appropriations since.[12] [13]

5. DoD is far from the only federal agency to which these limitations were applied.[14] The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII, General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014 (Public Law 113-76). Furthermore, the DoD specific suspension of public-private competitions remains in effect per section 325 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. No. 111-84).[15]

C. Government-wide use of Competitive Sourcing through 2007

Until 2009, the OMB issued an annual report on competitive sourcing describing the competitive sourcing efforts throughout the government for the past fiscal year. The table below indicates government-wide numbers for previous fiscal years.

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[11] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 737 (2009) ("None of the funds appropriated or otherwise made available by this or any other Act may be used to begin or announce a study or public-private competition regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of Management and Budget Circular A–76 or any other administrative regulation, directive, or policy.").

[12] National Defense Authorization Act for Fiscal Year 2010, 2010, Pub. L. No. 111-84, § 325 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8117 (2009).

[13] The government-wide moratorium on use of funds for public-private competitions was extended through Fiscal Year 2012 by section 733, Title VII (General Provisions-Government-wide Departments, Agencies, and Corporations) of Division C (Financial Services and General Governmental Appropriations Act, 2012) of P.L. 112-74, the Consolidated Appropriations Act, 2012. See. http://www.asamra.army.mil/scra/documents/2014%20Update%20on%20OMB%20Circular%20A-76%20Public-Private%20Competition%20Prohibitions%20(10%20February%202014).pdf

[14] *See e.g.* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 § 735 (2009).

[15] Office of the Assistant Secretary of Defense (OASD) Memo, "Update on OMB Circular A-76 Public-Private Competition Prohibitions - FY 2014" dated 10 February 2014.

	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Sourcing Competitions	662	217	181	183	132
FTE's Affected	17,000+	13,000+	10,000+	6,000+	4,000+
Retained In-house	89%	91%	83%	87%	73%

Source: OMB, Report on Competitive Sourcing Results: Fiscal Year 2004 (May 2005); OMB, Report on Competitive Sourcing Results: Fiscal Year 2005 (April 2006); OMB, Report on Competitive Sourcing Results: Fiscal Year 2006 (May 2007); OMB, Report on Competitive Sourcing Results: Fiscal Year 2007 (May 2008).

D. So what did not fall under Circular A-76?

7. Inapplicability. Agencies were not required to conduct A-76 competitions under the following circumstances:

a. Private sector performance of a "new requirement"[16];

b. Private sector performance of a segregable expansion[17] of an existing commercial activity performed by government personnel; or

c. Continued private sector performance of a commercial activity (i.e. following contract award after an A-76 competition or otherwise). Circular A-76 (Revised) ¶ 5.d.

Note: Circular A-76 (Revised) ¶ 5.d. mandates that before government personnel may perform a "new requirement," an expansion to an existing commercial activity, or an activity performed by the private sector, the agency must conduct a competition which determines that government personnel should perform this activity.[18] ***However***: 10 U.S.C. § 2463(c) specifically prohibits SECDEF from conducting an A-76 (or other such)

[16] Circular A-76 (Revised) Atch D. A "new requirement" is defined as "[a]n agency's newly established need for a commercial product or service that is not performed by (1) the agency with government personnel; (2) a fee-for-service agreement with public reimbursable source; or (3) a contract with the private sector. Any activity that is performed by the agency and is reengineered, reorganized, modernized, upgraded, expanded or changed to become more efficient, but still essentially provides the same service is *not* considered a new requirement." Id.

[17] Circular A-76 (Revised) Attach D. An "expansion" is defined as "an increase in the operating costs of an existing commercial activity based on modernization, replacement, upgrade or increased workload. An expansion of an existing commercial activity is an increase of 30 percent or more in the activity's operating costs (including the cost of FTEs) or total capital investment." Id. In contrast, a "segregable expansion" is defined as "an increase to an existing commercial activity that can be separately competed." Id.

[18] The new AR 5-20, effective 27 July 2008, has the same, arguably "illegal" mandate. U.S. DEP'T OF ARMY, REG. 5-20, COMPETITIVE SOURCING PROGRAM para. 2-6 (27 June 2008).

competition before assigning the function to DoD civilians (not to mention the plethora of acts mentioned above which have suspended A-76 studies in general).

8. Application to wartime and contingencies. "The DoD Competitive Sourcing Official[19] (without delegation) shall determine if this [A-76] circular applies during times of a declared war or military mobilization." Circular A-76 (Revised) ¶ 5.h.

E. DoD and Competitive Sourcing

9. 1993: National Performance Review (NPR). Part of Vice President Gore's "Reinventing Government" initiative, the NPR stated public agencies should compete "for their customers . . . with the private sector." AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).

10. 1997: Quadrennial Defense Review (QDR). Addressing the issue of maintaining combat readiness, the QDR urged outsourcing defense support functions in order to focus on essential tasks while also lowering costs. WILLIAMS S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997).

11. 1997: Defense Reform Initiative (DRI). Expanding upon the QDR, the DRI recommended outsourcing more in-house functions and established outsourcing goals for DoD. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997).

12. Between Fiscal Year (FY) 1997 and FY 2001, DoD had completed approximately 780 sourcing decisions involving more than 46,000 full-time equivalent (FTE) positions (approximately 34,000 civilian positions and 12,000 military provisions). See GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002) *available at* www.gao.gov.

13. From FY 2003 to 2007, DoD completed 208 sourcing competitions affecting 20,520 full-time equivalent positions. The most commonly

[19] The Competitive Sourcing Official (CSO) is an assistant secretary or equivalent level official within an agency responsible for implementing the policies and procedures of the circular. Circular A-76 (Revised) ¶ 4.f. For the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The DOD CSO has in turn appointed DOD Component CSOs (CCSOs) and charged them with providing Circular A-76 (Revised) implementation guidance within their respective Components. Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Assistant Secretary of the Army (Installations and Environment) et al., subject: Responsibilities of the DOD CSO and Component CSOs (29 Mar. 2004).

competed functions in that timeframe include: maintenance/property management, logistics, health services, and finance & accounting. OMB calculates the actual savings to the department to date from completed competitions to be $1.2B, with a projected net savings of $17,000 per FTE competed. In FY 2007, only 42% of DoD's competed positions were kept in-house (based on a percentage of FTE's competed). In contrast, only 22 percent of the FTE's competed by DoD during FY 2006 were kept in-house (compared to 73% and 87% government-wide, respectively, as shown in the table above). See, OMB, REPORT ON COMPETITIVE SOURCING RESULTS: FISCAL YEAR 2007 (May 2008), *available at* http://www.whitehouse.gov/omb/procurement_commercial_service_mgmt.

14. DoD released a new instruction implementing many of the procedural and policy changes which requires the use of DTM compare which is very similar to the A-76 competitions. This instruction is DODI 7041.04 Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).

a. When determining workforce mix the instruction recognizes that 10 U.S.C. §§ 129a, 2330a, 2461, and 2463, DODI 1100.22, "Policy and Procedures for Determining Workforce Mix," April 12, 2010, Office of Management and Budget Circular A-76, and Office of Federal Procurement Policy letter 11-01 are particularly relevant to decisions on workforce mix.[20] Cost analysts must consult these references when determining workforce mix options.[21]

(1) If a manpower analysis shows that a **new or expanded mission** requirement is not inherently governmental or exempt from private-sector performance, as required by § 2463, the official responsible for the function(s) in question will conduct a cost comparison using the business rules prescribed in DODI 7041.04 Enclosure 3 to determine which would cost less: DoD civilian employees or a private-sector contractor. [22]

(2) When considering conversion from contractor to government performance (**In-sourcing**) the analysis must first determine if the function was inherently governmental or exempted by § 2463. If the function is not exempted and not inherently governmental then to convert to DoD civilian employee performance a cost comparison using the business rules prescribed in this DODI 7041.04 Enclosure 3 must be done to determine whether DoD civilian employees or a private sector contractor would perform the function at a lower cost.

[20] DODI 7041.04 Enclosure 3, Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).
[21] Id.
[22] Id

Conversions must meet the cost differential requirements set by § 2463.[23]

(3) For manpower conversions between military and DoD civilian where manpower may be either military or DoD civilian performance based, and can be converted from one to the other as needed in accordance the analysis should be done IAW DODI 1100.22. Although cost is not the only factor in such decisions, analysts may be asked to estimate the cost impact of the conversions. In such cases, an analyst will conduct a cost comparison using the business rules prescribed in DODI7041.04, Enclosure 3, to estimate the cost of converting a function from military to DoD civilian performance or from DoD civilian to military performance.[24]

(4) For conversions from government to contractor performance (**outsourcing**) DoD Components are required to conduct public-private competitions in accordance with OMB A-76, 10 USC 2461, and other applicable laws and regulations, in determining whether to convert a commercial activity performed by any number of civilian DoD personnel to private-sector performance.[25] Note currently there is a moratorium on A-76 studies.[26]

II. AGENCY ACTIVITY INVENTORY

A. Key Terms

The heart and soul of competitive sourcing rests on whether a governmental activity/function is categorized as commercial or inherently governmental in nature.

1. Commercial Activity. A recurring service that could be performed by the private sector. Circular A-76 (Revised), Attachment A, ¶ B.2. Some examples include functions that are primarily ministerial and internal in nature (i.e. building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet maintenance, routine electrical or mechanical services).[27] **If a service is determined to be a "commercial activity," then that service *MAY* be subject to a streamlined or standard competition under OMB Circular A-76**. Circular A-76 (Revised) ¶ 4.c.

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[23] Id.
[24] Id.
[25] Id.
[26] *See Supra* note 13.
[27] Cf. Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

2. Inherently Governmental Activities.[28] An activity so intimately related to the public interest as to mandate performance by government personnel. Such "activities require the exercise of *substantial* discretion in applying government authority and/or making decisions for the government." Circular A-76 (Revised), Attachment A, ¶ B.1.a. (emphasis added). **If a service is determined to be an "inherently governmental activity," then that service *MAY NOT* be subject to a competition under OMB Circular A-76**. Circular A-76 (Revised) ¶ 4.b.

a. Policy Letter 11-01 provides three methods to determining whether the work in question is an inherently governmental function: does it satisfy the definition, is it one of the examples and, even if the answer to the first two questions above is no, does it fall under one of the catch-all test?[29]

b. Policy Letter 11-01's definition of inherently governmental function is not a new definition but rather adopts the definition contained in the FAIR Act.[30] The policy's standardized definition of inherently governmental function is "a function that is so intimately related to the public interest as to require performance by Federal Government Employees."[31] As additional guidance, Policy Letter 11-01 states inherently government functions "includes functions that require *either* the exercise of discretion in applying Federal Government authority *or* the making of value judgments in making decisions for the Federal Government."[32]

c. Policy Letter 11-01, Appendix A: Examples of Inherently Governmental Functions. The list contains 24 historically and commonly accepted examples of inherently governmental functions[33] the primary purpose of the list is illustrative in nature and not intended to be interpreted as an exhaustive list.[34]

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[28] Additionally, absent specific authority to do so, the Federal Acquisition Regulation (FAR) generally prohibits the award of any contract for the performance of inherently governmental activities stating "contracts shall not be used for the performance of inherently governmental functions." FAR 7.503(a).
[29] POLICY LETTER 11-01., *supra* note 6 para. 5-1(a).
[30] *See* FAIR ACT, *supra* note 27, § 5, 2384-5.
[31] Id. para. 3.
[32] Id. para. 3(a) (emphasis added).
[33] Id.
[34] Id.

d. Policy Letter 11-01, Catch-All Tests: Nature of the Function and Exercise of Discretion Tests. The OFPP created a third method for making inherently governmental functions determination.[35] This third method involves applying two separate tests: the nature of the function test and the exercise of discretion test.[36] Under the nature of the functions test, a function is inherently governmental when it involves the exercise of the Government's sovereign powers.[37] This test does not look to see whether the work has the ability to exercise discretion, but rather classifies work based "strictly on its uniquely governmental nature."[38] In contrast, the exercise-of-discretion test classifies work as inherently governmental when the work leaves room for the actor to commit the government to a certain course of action where "two or more alternative courses of action exist."[39]

3. Inherently governmental activities fall into two broad categories:

a. The exercise of sovereign government authority. For example, exercise of command, prosecuting those accused of crimes, investigating crimes, awarding contracts, or to otherwise determine, advance, or protect the United States' interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, etc.[40]

b. The establishment of procedures and processes related to the oversight of monetary transactions or entitlements. For example, making the decision to pay claims against the government, disbursing appropriated funds, or developing policies for the disbursement of appropriated funds.[41]

4. Closely Associated Functions.[42] Closely associated functions are not *per se* inherently governmental but may become so when the nature of the functions impacts or impinges on a federal employee's ability to execute inherently governmental powers.[43]

5. Policy Letter 11-01, Appendix B: Examples of Closely Associated Functions. Closely associated functions may be competed out to

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[35] Id. para. 5-1(a).
[36] Id. paras. 5-1(a)(1)(i)-(ii).
[37] Id. para. 5-1(a)(1)(i) (listing representing the government at governmental functions and engaging in law enforcement and judicial type activities as examples of inherently governmental functions).
[38] Id.
[39] Id. para. 5-1(a)(1)(ii).
[40] See FAIR Act, *supra*, note 27.
[41] Id.
[42] Id. para. 5-1(a)(2).
[43] Id. para. 5-2(a)(2).

contractors to perform but before doing so, agencies are required to at least consider reserving these functions for federal employees.[44]

6. Critical Functions. Critical function is "a function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations"[45] and typically "are recurring and long-term in duration."[46] Critical functions are defined as those functions that are critical to the mission and operations of an agency. Does not necessarily require the exercise of discretion or making of a value judgment that may bind the government, but it may depending on the size of the office, capacities of other employees, etc.

B. Inventory Requirements

Federal executive agencies are required to prepare annual inventories categorizing all activities performed by government personnel as either commercial or inherently governmental. The requirement is based on statute and the Circular A-76 (Revised).

1. Statutory Requirement - Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

   a. Codifies the definition of "inherently governmental" activity.

   b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities. After mutual consultation, both OMB and the agency must make the list of commercial activities public. The agency must also forward the list to Congress.

   c. Provides "interested parties" the chance to challenge the list within 30 days after its publication. The "interested party" list includes a broad range of potential challengers to include the private sector, representatives of business/professional groups that include private sector sources, government employees, and the head of any labor organization referred to in 5 U.S.C. § 7103(a)(4).

2. Circular A-76 (Revised) Inventory Requirements.

   a. Requires agencies to submit to OMB by 30 June each year an inventory of commercial activities, an inventory of inherently

[44] Id.
[45] Id. para. 3(b).
[46] Id.

governmental activities, as well as an inventory summary report. Circular A-76 (Revised), Attachment A, ¶ A.2.

b. After OMB review and consultation, agencies will make both the inventory of commercial activities and the inventory of inherently governmental functions available to Congress and the public unless the information is classified or protected for national security reasons. Circular A-76 (Revised), Attachment A, ¶ A.4.

c. Categorization of Activities.

(1) The agency competitive sourcing official (CSO)[47] must justify in writing any designation of an activity as inherently governmental. The justification will be provided to OMB and to the public, upon request. Circular A-76 (Revised), Attachment A, ¶ B.1.

(2) Agencies must use one of six reason codes to identify the reason for government performance of a commercial activity.[48] When using reason code A, the CSO must provide sufficient written justification, which will be made available to OMB and the public, upon request. Circular A-76 (Revised), Attachment A, ¶ C.2.

d. Challenge Process.

(1) The head of the agency must designate an inventory challenge authority and an inventory appeal authority.

(a) Inventory Challenge Authorities. Must be "agency officials at the same level as, or a higher level than, the individual who prepared the inventory." Circular A-76 (Revised), Attachment A, ¶ D.1.a.

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[47] For explanation of CSO, see *supra* note 19.

[48] The six reason codes include the following:

Reason code A – "commercial activity is not appropriate for private sector performance pursuant to a written determination by the CSO."

Reason code B – "commercial activity is suitable for a streamlined or standard competition."

Reason code C – "commercial activity is subject of an in-progress streamlined or standard competition."

Reason code D – "commercial activity is performed by government personnel as the result of a streamlined or standard competition . . . within the past five years."

Reason code E – "commercial activity is pending an agency approved restructuring decision (e.g., closure, realignment)."

Reason code F – "commercial activity is performed by government personnel due to a statutory prohibition against private sector performance."

Circular A-76 (Revised), Attachment A, ¶ C.1, Figure A2.

(b) Inventory Appeal Authorities. Must be "agency officials who are independent and at a higher level in the agency than inventory challenge authorities." Circular A-76 (Revised), Attachment A, ¶ D.1.b.

(2) Inventory challenges are limited to "classification of an activity as inherently governmental or commercial" or to the "application of reason codes." Circular A-76 (Revised), Attachment A, ¶ D.2.[49]

III. OMB CIRCULAR A-76 (REVISED)[50]

A. Resources

1. Statutes.

a. 10 U.S.C. § 2461 (Public-Private Competition Required Before Conversion to Contractor Performance).

b. 10 U.S.C. § 2462 (Reports on Public-Private Competition).

c. 10 U.S.C. § 2463 (Guidelines and Procedures for Use of Civilian Employees to Perform DoD Functions).

d. 31 U.S.C. § 501 note (Federal Activities Inventory Reform Act).

e. Annual DoD Appropriations and Authorization Acts.

2. OMB Guidance. OMB Circular A-76 (2003).[51]

3. DoD Guidance.[52]

a. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).

b. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985 through Change 3 dated 6 Oct. 1995).

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[49] Originally Circular A-76 (Revised) stated interested parties could only challenge "reclassifications" of activities. The OMB issued a technical correction, however, revising Attachment A, paragraph D.2 by deleting the word "reclassification" and inserting "classification." Office of Mgmt. & Budget, Technical Correction to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities," 68 Fed. Reg. 48,961, 48,962 (Aug. 15, 2003).

[50] Attachments 1, 2, and 3 at the end of this outline pertain to the revised circular.

[51] Circular A-76 (Revised), *supra* note 1. OMB has since amended this Circular without changing the date, the latest amendment being the 2006 version.

[52] The applicable regulations, instructions, and guidance of the Department of the Army can be found at http://www.asamra.army.mil/scra/

c. U.S. Dep't of Defense, Department of Defense Strategic and Competitive Sourcing Programs Interim Guidance (Apr. 3, 2000).

d. U.S. Dep't of Defense Instruction (DODI) 7041.04, Estimating and Comparing the Full Costs of Civilian and Active Duty Military Manpower and Contract Support (3 July 2013).[53]

4. Military Department Guidance.

a. U.S. Dep't of Army, Reg. 5-20, Competitive Sourcing Program (27 June 2008).

b. U.S. Dep't of Army, Pam. 5-20, Competitive Sourcing Implementation Instructions (27 June 2008).

c. U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program (20 June 2008).

d. U.S. Dep't of Navy, Instr. 4860.7D, Navy Commercial Activities Program (28 September 2005).

B. Key Players/Terms

1. Most Efficient Organization (MEO). The staffing plan of the agency tender, developed to represent the agency's most efficient and cost-effective organization. An MEO is required for a standard competition and may include a mix of government personnel and MEO subcontracts. Circular A-76 (Revised), Attachment D. Note that while under Circular A-76 (Revised), an MEO is not required for any streamlined competitions, federal law requires DoD to create an MEO for all competitions affecting 10 or more FTEs.[54]

2. Performance Work Statement (PWS). A statement in the solicitation that identifies the technical, functional, and performance characteristics of the agency's requirements. The PWS is performance-based and describes the agency's needs (the "what"), not the specific methods for meeting those needs (the "how"). The PWS identifies essential outcomes to be achieved, specifies the agency's required performance standards, and specifies the location, units, quality, and timeliness of the work. Circular A-76 (Revised), Attachment D.

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[53] http://www.asamra.army.mil/scra/documents/DoDI%207041.04%20Estimating%20and%20Comparing%20the%20Full%20Costs%20of%20Civilian%20and%20Active%20Duty%20Military%20Manpower%20and%20Contract%20Support%20(3%20July%202013).pdf

[54] *See* Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8015(b), 121 Stat. 1295 (2007); 10 U.S.C. § 2461(a) (stating that DOD must complete an "MEO" (among other requirements) prior to converting any function that involves *10 or more civilian employees.*) There is an exception to 10 U.S.C. § 2461 for JWOD procurements and nonprofit agencies for the blind or severely handicapped. 10 U.S.C. § 2461(d). *See also infra* notes 56, 57 and 59.

3. Agency Tender. The agency management plan submitted in response to and in accordance with the requirements in a solicitation. The agency tender includes a most-efficient organization (MEO), agency cost estimate, MEO quality control and phase-in plans, and any subcontracts. Circular A-76 (Revised), Attachment D.

4. Agency Tender Official (ATO). An inherently governmental official with decision-making authority who is responsible for developing, certifying, and representing the agency tender. The ATO also designates members of the **MEO Team** and is considered a "directly interested party" for contest purposes. The ATO must be independent of the contracting officer, Source Selection Authority/Source Selection Evaluation Board, and the PWS Team. Circular A-76 (Revised), Attachment B, ¶ A.8.a.

5. **MEO Team**. (Conflict of Interest Avoidance) Directly affected government personnel (i.e. employees whose positions are being competed) may participate on the MEO Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. Circular A-76 (Revised), Attachment B, ¶ D.2. (emphasis added). See also Attachment 5 (this outline).

6. Contracting Officer (CO). An inherently governmental official who is a member of the PWS Team and is responsible for issuing the solicitation and the source selection methodology. The CO must be independent of the ATO, MEO Team, and the Human Resource Advisor (HRA). Circular A-76 (Revised), Attachment B, ¶ A.8.b and Attachment D.

7. PWS Team Leader. An inherently governmental official, independent of the ATO, Human Resource Advisor (HRA), and MEO team, who develops the PWS and the quality assurance surveillance plan, determines government-furnished property, and assists the CO in developing the solicitation. Responsible for appointing members of the **PWS Team**. Circular A-76 (Revised), Attachment B, ¶ A.8.c.

8. **PWS Team.** (Conflict of Interest Avoidance) *Directly affected government personnel* (i.e. employees whose positions are being competed) may participate on the PWS Team. However, to avoid any appearance of a conflict of interest, members of the MEO Team shall not be members of the PWS Team. Circular A-76 (Revised), Attachment B, ¶ D.2. See also attachment 5 (this outline).

9. Human Resource Advisor (HRA). An inherently governmental official and human resource expert. The HRA must be independent of the CO, the Source Selection Authority (SSA), the PWS Team, and the Source Selection Evaluation Board (SSEB). As a member of the MEO Team, the HRA assists the ATO and MEO Team in developing the agency tender.

The HRA is also responsible for employee and labor-relations requirements. Circular A-76 (Revised), Attachment B, ¶ A.8.d.

10. Source Selection Authority (SSA). An inherently governmental official appointed IAW FAR 15.303. The SSA must be independent of the ATO, HRA, and MEO team. Responsible for appointing members of the **Source Selection Evaluation Board (SSEB) Team**.

11. **Source Selection Evaluation Board (SSEB) Team**. (Conflict of Interest Avoidance) *Directly affected personnel* (i.e. employees whose positions are being competed) and other personnel (including but not limited to the ATO, HRA, MEO team members, advisors, and consultants) *with knowledge of the agency tender* shall not participate in any manner on the SSEB Team (as member or as advisors). So, PWS Team members (so long as they are not directly-affected personnel) may participate on the SSEB Team. Additionally, MEO Team members (because they have direct knowledge of the MEO) generally may not participate on the SSEB Team. Circular A-76 (Revised), Attachment B, ¶ D.2. See also Attachment 5 (this outline).[55]

C. Competition Procedures

1. Previously, agencies could "directly convert" to contractor performance functions performed by 10 or fewer full-time equivalents (FTEs). The Revised Circular A-76 eliminates the use of "direct conversions." Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,136 (May 29, 2003).[56] Under the current circular, the only two authorized competition procedures are "streamlined competitions" and "standard competitions."

2. **Streamlined Competitions**. The new "streamlined competition" process may be used for activities performed by 65 or fewer FTEs[57] "and/or any

[55] *But see* AR 5-20, para 4-1 (stating "members of the MEO team…will not be members of the PWS team and the SSEB").

[56] While the Circular A-76 (Revised) eliminates "direct conversions", Congress permits DOD to directly convert performance through a recurring provision in appropriation acts, to functions that: 1) are Javits-Wagner-O'Day (JWOD) Act procurements; 2) are converted to performance by qualified nonprofit firms for the blind or severely handicapped employees in accordance with JWOD; or 3) firms that are at least fifty-one percent owned by an Indian tribe or a Native Hawaiian organization. *See* Department of Defense Appropriations Act for FY 2008, Pub. L. No. 110-116, § 8015(b), 121 Stat. 1295 (2007).

[57] Note that for DOD, 10 U.S.C. § 2461 effectively changes the threshold. In DOD, if a commercial activity is being performed "by 10 or more Department of Defense civilian employees," then the agency must: (1) develop an agency tender and MEO, (2) issue a solicitation, (3) utilize a cost conversion differential in determining whether to award a contract, and (4) submit a report to Congress prior to commencing the competition. So, although DOD could still use streamlined competitions for those competitions affected 65 or less FTEs, the statute discourages streamlined competitions where the number of FTEs performing the commercial activity is 10 or more since the time period for streamlined competitions is only 90 days (vice 12 months for a standard competition). *See* 10 U.S.C. § 2461 (Westlaw 2008); *see also* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015, 121 Stat. 1295 (2007). In 2008, an amendment to 41 U.S.C. § 403 added similar requirements for non-

number of military personnel," or the agency may elect to use the standard competition. Circular A-76 (Revised), Attachment B, ¶¶ A.5.b. Recent Army and Air Force guidance allow the use of the streamlined process only for competitions of less than 10 FTEs.[58] The streamlined competition process includes:

a. Determining the Cost of Agency Performance. An agency may determine the agency cost estimate on the incumbent activity; "however, an agency is encouraged to develop a more efficient organization, which may be an MEO." Circular A-76 (Revised), Attachment B, ¶ C.1.a.[59]

b. Determining the Cost of Private Sector/Public Reimbursable Performance. An agency may use documented market research or solicit proposals IAW the FAR, to include using simplified acquisition tools. Circular A-76 (Revised), Attachment B, ¶ C.1.b; Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,137 (May 29, 2003).

c. Establishing Cost Estimate Firewalls. The individual(s) preparing the in-house cost estimate and the individual(s) soliciting private sector/public reimbursable cost estimates must be different and may not share information. Circular A-76 (Revised), Attachment B, ¶ C.1.d.

d. Implementing the Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation"

DOD competitions where the commercial activity is being performed "by 10 or more agency civilian employees". *See* 41 U.S.C. § 403 (Westlaw 2008); *see also* Department of Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 271, 122 Stat. 62 (2008); *cf. infra* note 27.

[58] Though the Army has recently published a new AR and DA PAM, the two conflict on their guidance. *Compare* U.S. DEP'T OF ARMY, REG. 5-20, COMPETITIVE SOURCING PROGRAM Figure 2-2 (27 June 2008), *with* U.S. DEP'T OF ARMY, PAM. 5-20, COMPETITIVE SOURCING IMPLEMENTATION INSTRUCTIONS Figure 2-2 (27 June 2008). It appears however, that the intent, for the reasons in note 57 *supra*, was to limit streamlined competitions to those involving less than 10 FTEs. Similar guidance can be found in U.S. DEP'T OF AIR FORCE, INST. 38-203, COMMERCIAL ACTIVITIES PROGRAM paras. 3.5.1.4 and 3.5.1.5 (20 June 2008).

[59] Though civilian agencies have historically been able to determine the estimated cost of in-house performance without creating an MEO, DOD's ability to do so is limited. Recall that DOD (and other executive agencies pursuant to 41 U.S.C. § 403) generally must complete a "most efficient and cost effective organization analysis" prior to converting any function that involves *more than 10 civilian employees*. *See supra* note 57. Note, however, that 10 U.S.C. § 2461(a), conflicts with the annual appropriation act language on the minimum number of civilian employees that must be affected to make the creation of an MEO (and other requirements) mandatory. The annual appropriations acts' requirements apply to the conversion of any function that involves *more than 10 DOD civilian employees* (instead of "*10 or more*" from the statute). Thus, practitioners, faced with exactly 10 FTEs, should look at the most recent appropriations act for guidance. *Compare* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015(a), 121 Stat. 1295 (2007) *with* 10 U.S.C. § 2461(a)(1) (Westlaw 2008).

with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ C.3.a.

e. **Protests**. See discussion below in paragraph 3.e. (Standard Competition Protests) regarding changes made by the National Defense Authorization Act of 2008 to the Competition in Contracting Act (CICA) for protests. The amended CICA grants GAO jurisdiction to hear protests in both streamlined and standard competitions.

3. **Standard Competitions**. The new "standard competition" procedures must be used for commercial activities performed by more than 65 FTEs. Circular A-76 (Revised), Attachment B, ¶ A.5.[60]

a. Solicitation. When issuing a solicitation, the agency must comply with the FAR and clearly identify all the evaluation factors.

(1) The solicitation must state that the agency tender is not required to include certain information such as subcontracting plan goals, licensing or other certifications, or past performance information (unless the agency tender is based on an MEO implemented IAW the circular). Circular A-76 (Revised), Attachment B, ¶ D.3.a(4).

(2) The solicitation closing date will be the same for private sector offers and agency tenders. Circular A-76 (Revised), Attachment B, ¶ D.3.a(5). If the ATO anticipates the agency tender will be submitted late, the ATO must notify the CO. The CO must then consult with the CSO to determine if amending the closing date is in the best interest of the government. Circular A-76 (Revised), Attachment B, ¶ D.4.a(2).

4. Source Selection.

(1) In addition to sealed bidding and negotiated procurements based on a lowest priced technically acceptable source selections IAW the FAR, the Circular A-76 (Revised) also permits:

b. Phased Evaluation Source Selections.

(i) Phase One - only technical factors are considered and all prospective providers (private sector, public reimbursable sources, and the agency tender) may propose

[60] *See supra* note 48.

alternative performance standards. If the SSA accepts an alternate performance standard, the solicitation is amended and revised proposals are requested. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.(a).

(ii) Phase Two – the SSA makes the performance decision after the CO conducts price analysis and cost realism on all offers/tenders determined technically acceptable. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.(b).

(b) Cost-Technical Tradeoff Source Selections. May only be used in standard competitions for (1) information technology activities, (2) commercial activities performed by the private sector, (3) new requirements, and (4) segregable expansions. Circular A-76 (Revised), Attachment B, ¶ D.5.b.3.[61]

(2) The agency tender is evaluated concurrently with the private sector proposals and may be excluded from a standard competition if materially deficient. Circular A-76 (Revised), Attachment B, ¶ D.5.c.1.

(a) If the CO conducts exchanges with the private sector offerors and the ATO, such exchanges must be IAW FAR 15.306, except that exchanges with the ATO must be in writing and the CO must maintain records of all such correspondence. Circular A-76 (Revised), Attachment B, ¶ D.5.c.2.

(b) If an ATO is unable to correct a material deficiency, "the CSO may advise the SSA to exclude the agency tender from the standard competition." Circular A-76 (Revised), Attachment B, ¶ D.5.c.3.

(3) All standard competitions will include the cost conversion differential (i.e., 10% of personnel costs or $10 million, whichever is less). Circular A-76 (Revised), Attachment B, ¶ D.5.c.4.[62]

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[61] Note that the cost conversion differential effectively precludes the use of this method. *See infra* text at (3) below; *infra* note 30.

[62] As stated above, the "10% or $10 million" conversion differential requires the agencies to apply the differential in all competitions (streamlined or standard) involving ten or more (or more than ten) civilian employees. *See supra*

c. Implementing a Performance Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation" with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ D.6.f.

d. Contests.[63]

e. A "directly interested party" (i.e., the agency tender official, a single individual appointed by a majority of directly affected employees, a private sector offeror, or the certifying official of a public reimbursable tender) may contest certain actions in a **standard competition**. Matters that may be contested include: (1) the solicitation, (2) the cancellation of a solicitation, (3) a determination to exclude a tender or offer from a standard competition and (4) a performance decision. Circular A-76 (Revised), Attachment B, ¶ F.1.

(1) All such challenges will now be governed by the agency appeal procedures found at FAR 33.103. Circular A-76 (Revised), Attachment B, ¶ F.1.

(2) **No party** (private or government) **may contest** any aspect of **a streamlined competition**. Circular A-76 (Revised), Attachment B, ¶ F.2.

f. Protests

(1) Historical development of protest rights involving A-76 competitions.

(a) An "interested party" under the Competition in Contracting Act (CICA) may protest certain actions concerning a competition (streamlined or standard) conducted under OMB Circular A-76. Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000).

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notes 57 and 59. Additionally, both 10 U.S.C. §2461 and the Department of Defense Appropriations Act for FY 2008 contain a limitation that states the contractor cannot receive an advantage for a proposal that reduces DOD costs by "not making an employer-sponsored health insurance plan available" to the workers who will perform the work under the proposal, or by "offering to such workers an employer-sponsored health benefits plan that the requires the employer to contribute less towards the premiums" than the amount paid by the DOD under chapter 89, title 5 of the United States Code. *See* Department of Defense Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-116, § 8015(a)(3), 121 Stat. 1295 (2007); 10 U.S.C. § 2461(a)(1)(G).

[63] A "contest" is the term the OMB Circular A-76 (Revised) uses to describe what is referred to in FAR Part 33 as an agency-level protest.

(b) Shortly after OMB issued the Circular A-76 (Revised), GAO published a notice in the Federal Register requesting comments on whether the GAO should accept jurisdiction over bid protests submitted by the Agency Tender Official and/or an "agent" for affected employees. Government Accountability Office; Administrative Practices and Procedures; Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35.411 (June 13, 2003).

(c) In April 2004, the GAO ruled that notwithstanding the changes in the Circular A-76 (Revised), the in-house competitors in public/private competitions are not offerors and, therefore, under the current language of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000), no representative of an in-house competitor is an "interested party" eligible to maintain a protest before the GAO. Dan Dufrene et al., B-293590.2 et al. (April 19, 2004).[64]

(d) In response, Congress included Section 326 in the Ronald W. Reagan National Defense Authorization Act, 2005 (2005 NDAA), and granted ATOs limited, yet significant bid protest rights. Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004).

(i) Amended the CICA definition of "interested party" by specifying that the term includes ATOs in public-private competitions involving more than sixty-five FTEs. *See* 31 U.S.C. § 3551(2).

(ii) Stated that ATOs "shall file a protest" in a public-private competition at the request of a majority of the affected federal civilian employees "unless the [ATO] determines that there is no reasonable basis for the protest." The ATO's determination whether to file a protest "is not subject to

[64] Recognizing the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to the GAO, while an unsuccessful public-sector competitor does not, the Comptroller General sent a letter to Congress suggesting that Congress may wish to consider amending the CICA to provide for MEO standing. Dan Dufrene et al., B-293590.2 (April 19, 2004). The letter also suggested that any amendment to the CICA specify who would be authorized to protest on the MEO's behalf: the ATO, affected employees (either individually or in a representative capacity), and/or employees' union representatives. *Id.*

administrative or judicial review," however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.

(e) Additionally, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may have "intervened" in the protest.

(f) On 14 April 2005, the GAO amended its Bid Protest Regulations by revising the definition of "interested party" and "intervenor" IAW with the 2005 NDAA. 70 Fed. Reg. 19,679 (Apr. 14, 2005).

(2) On 28 January 2008, Congress significantly expanded protest rights for civilian employees involved in an A-76 competition pursuant to Section 326 of the National Defense Authorization Act of Fiscal Year 2008 (2008 NDAA) by again re-defining "interested party" under CICA. Pub. L. No. 110-181, § 326 (a), 122 Stat. 62 (2008). The 2008 NDAA thus amended CICA (31 U.S.C. § 3551) at paragraph (2) to state that an interested party with respect to a competition under OMB Circular A-76 includes:

(a) "Any official who submitted the agency tender in such [a] competition;" and

(b) "Any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest. . .has been designated as the agent of the Federal employees by a majority of such employees."

This new language gives the GAO jurisdiction to hear a protest filed by the ATO or a representative elected by a majority of the affected employees on behalf of the losing employees, without regard to whether or not sixty-five FTEs are involved.

5. Timeframes

a. Streamlined Competitions. Must be completed within 90 calendar days from "public announcement" to "performance decision," unless the agency CSO grants an extension not to exceed 45 days. Circular A-76 (Revised), Attachment B, ¶ C.2.[65]

b. Standard Competitions. Must not exceed 12 months from "public announcement" to "performance decision," unless the CSO grants a time limit waiver not to exceed 6 months. Circular A-76 (Revised), Attachment B, ¶ D.1.[66]

c. Preliminary Planning. Because time frames for completing competitions have been reduced, preliminary planning takes on increased importance. The new rules state that prior to public announcement (start date)[67] of a streamlined or standard competition, the agency must complete several preliminary planning steps to include: scoping the activities and FTEs to be competed, grouping business activities, assessing the availability of workload data, determining the incumbent activities baseline costs, establishing schedules, and appointing the various competition officials. Circular A-76 (Revised), Attachment B, ¶ A.

D. Final Decision and Implementation

1. After all appeals/protests have been resolved, the decision summary is sent to the Secretary of Defense (SECDEF) for approval and notice is forwarded to Congress. See 10 U.S.C. § 2462. This provision requires the SECDEF to notify Congress of the outcome of a competitive sourcing study which affects 10 or more FTEs, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.

2. Contractor Implementation. If the private sector offer wins, the contracting officer awards the contract. Circular A-76 (Revised), Attachment B, ¶ D.

3. MEO Implementation. If the agency tender wins, then the contracting officer will issue a "letter of obligation" to an "official responsible for performance of the MEO." Circular A-76 (Revised), Attachment B, ¶ D.

E. Post Competition Accountability

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[65] *See supra* note 10.

[66] Id.

[67] Recall that both DOD and other federal agencies have a statutory requirement to notify Congress "before commencing a public-private competition" if the competition will involve 10 or more FTES of: (1) the function to be competed, (2) the location of the proposed competition, (3) the number of civilian employees potentially affected, and (4) the anticipated length and cost of the competition. 10 U.S.C. § 2461(b) and 41 U.S.C. § 401.

1. Monitoring. After implementing a performance decision, the agency must monitor performance IAW with the performance periods stated in the solicitation. The CO will make option year exercise determinations (for either contract performance or MEO performance) IAW FAR 17.207. Circular A-76 (Revised), Attachment B, ¶¶ E.4 and 5.

2. Terminations for Failure to Perform. The CO must follow the cure notice and show cause notification procedures consistent with FAR Part 49 prior to issuing a notice of termination. Circular A-76 (Revised), Attachment B, ¶ E.6. According to the circular, the CO may terminate a contract or a letter of obligation for failure to perform.

F. Follow-on Competition

1. Following contractor performance. After a commercial activity has been subjected to an A-76 competition and a private sector offeror has been awarded a contract, the commercial activity **does not** have to be competed again under A-76. After performance of the contract, the agency may simply re-solicit private sector offerors under the applicable provisions of the FAR. Circular A-76 (Revised), 5d.[68]

2. Following MEO performance. In contrast, pursuant to Circular A-76 (Revised), if a commercial activity is subject to a competition and the agency's employees were issued a letter of obligation, then the commercial activity **does** have to be competed again. So, after performance of the MEO under the letter of obligation, the agency must re-initiate the entire A-76 process. Circular A-76 (Revised), Attachment B, ¶ E.5. Ostensibly, this requirement supports the underlying presumption in the circular that "the longstanding policy of the federal government has been to rely on the private sector for needed commercial services." Circular A-76 (Revised). **<u>However</u>**, the 2008 NDAA amended 10 U.S.C. § 2461, adding a section that specifically exempts DoD from the requirement to recompete such functions. 10 U.S.C. § 2461(a)(4).

G. Exclusions (When Does OMB Circular Not Apply?)

In the Army, the following are excluded from using OMB Circular A-76 per AR 5-20, paragraph 2-2: [69]

a. Depot-level maintenance of mission-essential material at Army depots.

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[68] *But see* 10 U.S.C. §2463 (Westlaw 2008) (calling for increased consideration of "insourcing" requirements, especially where those requirements have been recently outsourced).

[69] Additionally, while Outside the Continental United States (excluding Alaska and Hawaii), commanders "may use…OMB Circular A-76 procedures…when doing so conforms to applicable law, treaties and international agreements."

b. Installations that are 180 days from closure.

c. Production operations performed in government-owned plants

d. Privatizations (such as housing and utility privatizations).

H. Latest Changes

The most recent changes to the law regarding competitions in DoD, performed under OMB Circular A-76, came as part of the National Defense Authorization Act (NDAA) of 2008 **(Practitioners should read these provisions of the NDAA in their entirety).**

1. The NDAA of 2008 made significant changes to DoD A-76 competitions. See NDAA of 2008, Pub. L. No. 110-181, §§ 322-342, 122 Stat. 62 (2008).

2. The following highlights some of these changes:

a. Section 322 (Modification to Public-Private Competition Requirements Before Conversion to Contractor Performance). Amends 10 U.S.C. §2461 by stating that a private offeror in a competition shall not receive an advantage over an agency tender by reducing the health or retirement benefits afforded to employees. Specifically, there can be no advantage given for:

(1) "[N]ot making an employer-sponsored health insurance plan" for workers who would be employed to perform the commercial activity if the work was transferred to contract performance;

(2) "[O]ffering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less toward the premium…than the amount that is paid by the DoD;" and

(3) "[O]ffering to such workers a retirement benefit that, in any year, costs less than the annual retirement cost factor applicable to civilian employees of the DoD."

Additionally, Section 322 adds a requirement for monthly consultation with, and consideration of the views of, those civilian employees who will be affected by the potential conversion. This consultation is to occur during the development and preparation of the performance work statement and the management efficiency study.

b. Section 323 (Public-Private Competition at End of Period Specified in Performance Agreement Not Required). Amends 10 U.S.C. § 2461 by stating that where the agency tender "wins" the A-76 competition and DoD civilian employees perform the activity pursuant to a "letter of obligation" (LOO), at the end of LOO's performance period, DoD is not required to conduct another A-76 competition. This provision supersedes (for DoD) the OMB Circular A-76 general requirement that the agency conduct another competition at the end of a performance period under a LOO. *See* Circular A-76, para 5(d).[70]

c. Section 324 (Guidelines on Insourcing New and Contracted Out Functions). Amends 10 U.S.C. § 2462 by stating that the Secretary of Defense shall issue guidance "to ensure that consideration is given to using, on a regular basis, DoD civilian employees to perform new functions and functions that are performed by contractors and could be performed by DoD civilian employees." This provision thus requires special consideration be given to performance by DoD civilian employees of not only new functions, but also commercial activities that are being currently performed by contractors. So, this provision encourages, "insourcing" (transferring to in-house performance work that is being performed by a contractor). Specifically, this section states that "special consideration" must be given to using DoD employees to perform any function that:

(1) Is currently "performed by a contractor" *and* (a) "has been performed by DoD employees at any time during the past 10 years"; or (b) "is a function closely associated with performance of an inherently governmental function"; or (c) "has been performed pursuant to a contract awarded on a non-competitive basis"; or (d) "has performed poorly as determined by a contracting officer"; or

(2) Is a "new requirement."

d. Section 325 (Restriction of OMB Influence Over DoD Public-Private Competitions). States that OMB may not direct DoD "to prepare for, undertake, continue, or complete a public-private competition or direct conversion" of a DoD function to performance by a contactor pursuant to OMB Circular A-76. Thus, this provision explicitly curtails the authority that OMB (an arm of the executive branch) has over DoD in A-76 competitions.

[70] *See also supra* Sec. III.F.2.

e. Section 326 (Bid Protests by Federal Employees in Actions Under OMB Circular A-76). See earlier discussion on page 22 (Sec. C.4.f(2)), regarding changes to bid protest rights.

3. Continual provisions in each fiscal year have extended the prohibition to conduct A-76 competitions, not only within DoD.[71]

a. In FY2010, NDAA Section 322 amended language in 10 U.S.C. § 2461(a) that limited the duration of an A-77 competition to 24 months, with the possibility to extend that competition to 33 months if DoD notified Congress that an extension was needed.[72]

b. In FY2010, NDAA Section 325 extended the prohibition on A-76 competitions. Section 325 also required DoD to report to Congress on the status of its previous competitions under 10 U.S.C. § 2461, the actions it planned to take to address the DoD IG report, the appropriateness of the cost differential used; and the adequacy of DoD's policies. In addition, DoD was required to certify that it had completed its report and has implemented a plan for future A-76 competitions and/or services that could fall under the A-76 purview.[73]

c. In FY2011, NDAA section 8103 prohibited A-76 competitions except when certain conditions were met, such as completing all reporting and certifications required under section 325 of NDAA FY10.[74]

d. NDAA FY2012, Section 733 prohibited funds from being used to begin or announce a study or public-private competition.[75]

e. The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014,[76] and the DoD specific suspension of public-private competitions remains in effect per section 325 of the National Defense Authorization Act for Fiscal Year 2010.[77] Practitioners

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[71] See. *Infra*. Section I.A.5. The government-wide moratorium, including the Department of Defense, on the use of funds for public-private competitions was extended for FY 2014 by section 737 (Title VII, General Provisions - Government-wide) of Division E- Financial Services and General Government Appropriations of the Consolidated Appropriations Act, 2014 (Public Law 113-76).
[72] Pub. L. No. 111-84.
[73] Id.
[74] Pub. L. No. 112-10.
[75] Pub. L. No.112-74.
[76] Pub. L. No. 113-76
[77] Pub. L. No. 111-84

should check all current policies and review OASD Memo, dated 10 February 2014, "Update on OMB Circular A-76 Public-Private Competition Prohibitions - FY 2014" at http://www.asamra.army.mil/scra/documents/2014%20Update%20on%20OMB%20Circular%20A-76%20Public-Private%20Competition%20Prohibitions%20(10%20February%202014).pdf.

IV. CIVILIAN PERSONNEL ISSUES

A. Employee Consultation

By statute, the DoD must consult with affected employees. In the case of affected employees represented by a union, consultation with union representatives satisfies this requirement. 10 U.S.C. § 2461(a)(4).

B. Right-of-First-Refusal of Employment

1. The CO must include the Right-of-First-Refusal of Employment clause in the solicitation. See Circular A-76 (Revised), Attachment B, ¶ D.6.f.1.b; Revised Supplemental Handbook, Part I, Chapter 3, ¶ G.4; and FAR 7.305.

2. The clause, at FAR 52.207-3, requires:

a. The contractor to give the government employees, who have been or will be adversely affected or separated due to the resulting contract award, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-government employment conflict of interest standards.

b. Within 10 days after contract award, the contracting officer must provide the contractor a list of government employees who have been or will be adversely affected or separated as a result of contract award.

c. Within 120 days after contract performance begins, the contractor must report to the contracting officer the names of displaced employees who are hired within 90 days after contract performance begins.

C. Right-of-First-Refusal and the Financial Conflict of Interest Laws

1. Employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact their participation, as well as, when and if they may exercise their Right-of-First Refusal.

2. Procurement Integrity Act, 41 U.S.C. § 2101 et seq.; FAR 3.104.

a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 2102(a)-(b)). These provisions apply to all federal employees, regardless of their role during a Circular A-76 competition.

b. Reporting Employment Contacts (41 U.S.C. § 2103(a)).

(1) FAR 3.104-1(iv) generally excludes from the scope of "personally and substantially" the following employee duties during an OMB Cir. A-76 study:

(a) Management studies;

(b) Preparation of in-house cost-estimates;

(c) Preparation of the MEO; or

(d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.

(2) PWS role. Consider the employee's role. If strictly limited to furnishing data or technical support to others developing the PWS, then they are not "personally and substantially" participating. See FAR 3.104-1(iv). If the PWS role exceeds that of data and technical support, then the restriction would apply.

c. Post-Employment Restrictions (41 U.S.C. § 2104). Bans certain employees for one year from accepting compensation.

(1) Applies to contracts exceeding $10 million, and

(a) Employees in any of these positions:

(i) Procuring contracting officer;

(ii) Administrative Contracting Officer;

(iii) Source Selection Authority;

(iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding $10 million;

(ii) Award modification of contract or subcontract exceeding $10 million;

(iii) Award task or delivery order exceeding $10 million;

(iv) Establish overhead rates on contract exceeding $10 million;

(v) Approve contract payments exceeding $10 million; or

(vi) Pay or settle a contract claim exceeding $10 million.

(2) No exception exists to the one-year ban for offers of employment pursuant to the Right-of-First-Refusal. Thus, employees performing any of the listed duties or making the listed decisions on a cost comparison resulting in a contract exceeding $10 million are barred for one year after performing such duties from accepting compensation/employment opportunities from the contractor via the Right-of-First-Refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a "particular matter" affecting the officer or employee's personal or imputed financial interests.

a. Cost comparisons conducted under OMB Cir. A-76 are "particular matters" under 18 U.S.C. § 208.

b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a "direct and predictable" effect on their financial interests. This determination is very fact specific.

4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do

not prohibit employment; they only prohibit communications and appearances with the "intent to influence."

a. The ban may be lifetime, for two years, or for one year, depending on the employee's involvement in the matter.

b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves "specific parties."

c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the Right-of-First-Refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

V. HOUSING PRIVATIZATION

A. Generally

Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership and not just a transfer of performance.

B. Authority

1. 10 U.S.C. §§ 2871-85 provides permanent authority for military housing privatization.[78] This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.

2. Service Secretaries may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:

   a. Direct loans and loan guarantees to private entities.

   b. Build/lease authority.

   c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.

[78] Originally granted in 1996 as "temporary" legislation, this authority was made permanent by the FY 2005 National Defense Authorization Act. Pub. L. No. 108-375, § 2805, 115 Stat. 1012 (2005).

d. Rental guarantees.

e. Differential lease payments.

f. Conveyance or lease of existing properties and facilities to private entities.

3. Establishment of Department of Defense housing funds.

a. The Department of Defense Family Housing Improvement Fund.[79]

b. The Department of Defense Military Unaccompanied Housing Improvement Fund.[80]

C. Implementation

1. The service conveys ownership of existing housing units, and leases the land upon which the units reside for up to 50 years.

2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.

3. The contractual agreement may include provisions regarding:

a. The amount of rent the contractor may charge military occupants (rent control).

b. The manner in which soldiers will make payment (allotment).

c. Rental deposits.

d. Loan guarantees to the contractor in the event of a base closure or realignment.

e. Whether soldiers are required to live there.

f. The circumstances under which the contractor may lease units to nonmilitary occupants.

g. Termination provisions and criteria.

D. Issues and Concerns[81]

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[79] 10 U.S.C. § 2883(a)(1).
[80] 10 U.S.C. § 2883(a)(2).
[81] *See* Government Accountability Office, Military Housing: Management Issues Require Attention as the Privatization Program Matures, Report No. GAO-06-438 (April 2006); Government Accountability Office, Military Housing: Management Improvements Needed As Privatization Pace Quickens, Report No. GAO-02-624 (June

1. Making the transition positive for occupants; including keeping residents informed during the process.

2. Loss of control over family housing.

3. The effect of long-term agreements.

   a. Future of installation as a potential candidate for housing privatization.

      (1) DoD must determine if base a candidate for closure.

      (2) If not, then DoD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.

   b. Potential for poor performance or nonperformance by contractors.

      (1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.

      (2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

4. Effect on federal employees

   a. The privatization of housing will result in the elimination of those government employee positions that support family housing.

   b. Privatization is not subject to Circular A-76.

5. Prospect of civilians living on base.

   a. Civilians are allowed to rent units not rented by military families.

   b. This prospect raises some issues, such as security concerns and law enforcement roles.

VI. UTILITIES PRIVATIZATION

2002); Government Accountability Office, Military Housing: Continued Concerns in Implementing the Privatization Initiative, NSIAD-00-71 (March 30, 2000); Government Accountability Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998).

A. Authority

10 U.S.C. § 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.

B. Implementation

1. In 1998, DoD set a goal of privatizing all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique mission/security reasons or when privatization is uneconomical. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems (23 Dec. 1998).

2. In October 2002, DoD revised its goal and replaced DRID #49 with updated guidance. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. The Revised Guidance Memo establishes 30 September 2005 as the date by which "Defense Components shall complete a privatization evaluation of each system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law." In addition to revising the milestones for utilities privatization, the Revised Guidance Memo addresses:

   a. Updated guidance concerning the issuance of solicitations and the source selection considerations in utilities privatization;

   b. DoD's position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the Government's utility systems;

   c. New instruction on conducting the economic analysis, including a class deviation from the cost principle at FAR 31.205-20 authorized by DoD for "utilities privatization contracts under which previously Government-owned utility systems are <u>conveyed</u> by a Military Department or Defense Agency to a contractor;" and

   d. The authority granted the Service Secretaries to include "reversionary clauses" in transaction documents to provide for ownership to revert to the Government in the event of default or abandonment by the contractor.

3. On 2 November 2005, the Undersecretary of Defense for Acquisition, Technology and Logistics issued a supplemental guidance. This guidance stated that "each Component shall provide the DUSD(I&E) [Deputy Under Secretary of Defense for Installations and Environment] with a plan of action and timeline by November 18, 2005 for the completion of all remaining evaluations. The Components shall continue to conduct privatization evaluations and provide quarterly updates to DUSD(I&E) until all remaining evaluations are complete." Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Supplemental Guidance for the Utilities Privatization Program (2 Nov. 2005).

4. Requests for exemption from utility systems privatization, based on unique mission or safety reasons or where privatization is determined to be uneconomical, must be approved by the Service Secretary.

5. Agencies must use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C.§ 2688(b). DoD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. § 2688(c)(3).

6. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. § 2688(c).

7. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.

8. Installations must notify Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the DoD concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. § 2688(e).

C. Issues and Concerns

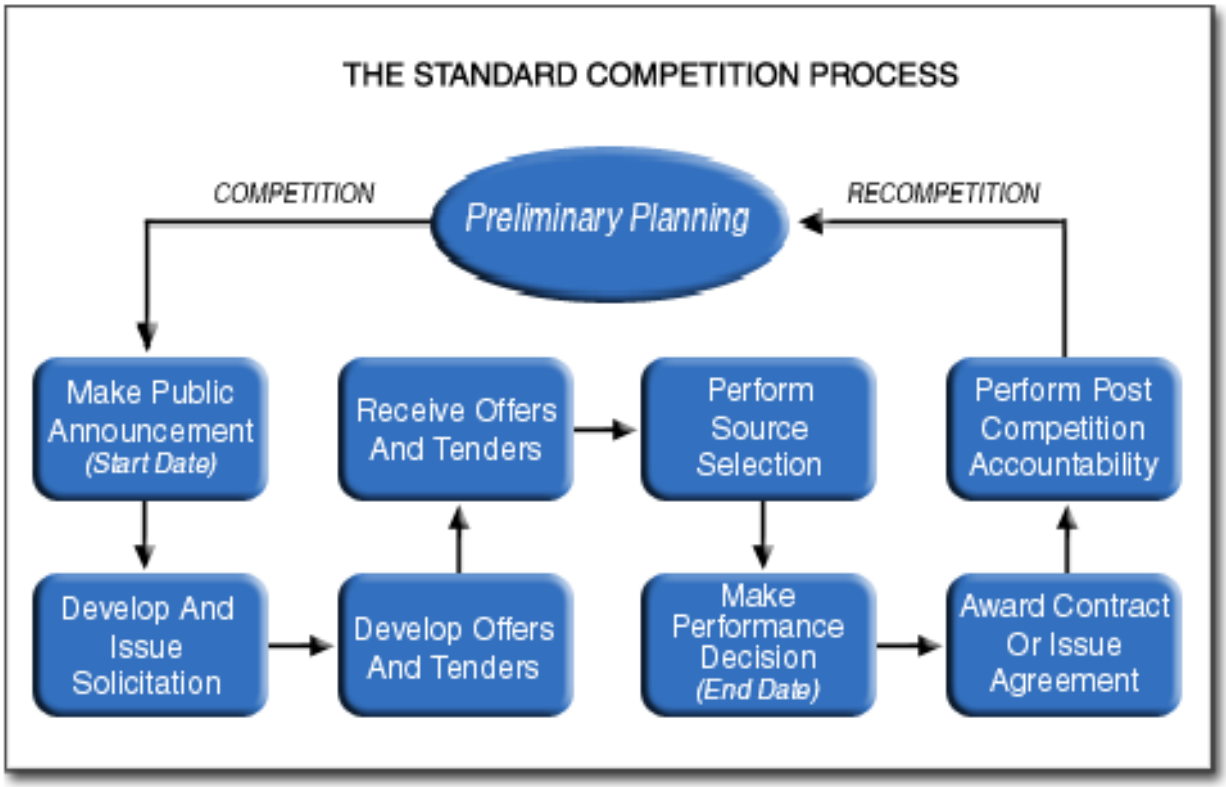
1. Effect of State Law and Regulation. State utility laws and regulations, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply in federal utility privatization cases. See Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity); see also Baltimore Gas & Electric v. United States, US District Court, District of Maryland, No AMD 00-2599 Mar. 12, 2001 (following the earlier GAO decision and finding no requirement for the Army to use sole-source procedures for the conveyance of utilities distribution systems and procurement of utilities distribution services). The DoD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).

2. Utility Bundling. An agency may employ restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.

3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are an option. Revised Guidance Memo, supra.

VII. CONCLUSION

ATTACHMENT 1 (STANDARD COMPETITION)



Standard Competition Process under Circular A-76 (Revised)

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ATTACHMENT 2 (CONFLICT OF INTEREST TABLE)

Which A-76 Teams May Share Members
Without Violating the Conflict of Interest Rules
(OMB Circular A-76, dated May 29, 2003)*

	PWS Team	**MEO Team**	**SSEB Team**
PWS Team	*NA*	No[82]	Depends[83]
MEO Team	No[84]	*NA*	Depends[85]
SSEB Team	Depends[86]	Depends[87]	*NA*

*The purpose of this chart is to show which of the three "teams" (PWS Team, MEO Team, and SSEB Team) in an OMB Circular A-76 competition may—or may not—share some of the same members. Note that there are other conflict of interest rules which are not addressed by this chart.

[82] PWS Team and MEO Team may NOT share the same members. See OMB Cir. A-76, Attach B, para D(2).
[83] PWS and SSEB Teams may share members so long as the PWS Team members that are serving on the SSEB Team are not directly-affected employees. See OMB Cir. A-76, Atch B, para D(2).
[84] PWS Team and MEO Team may NOT share the same members. See OMB Cir. A-76, Attach B, para D(2).
[85] MEO and SSEB Teams may generally not share members *since most MEO Team members will have direct knowledge of the agency tender*. See OMB Cir. A-76, Atch B, para D(2). But see AR 5-20, para 4-1 which states "members of the MEO team…will not be members of the PWS team and the SSEB."
[86] PWS and SSEB Teams may share members so long as the PWS Team members that are serving on the SSEB Team are not directly-affected employees. See OMB Cir. A-76, Atch B, para D(2).
[87] MEO and SSEB Teams may generally not share members *since most MEO Team members will have direct knowledge of the agency tender*. See OMB Cir. A-76, Atch B, para D(2). But see AR 5-20, para 4-1 which states "members of the MEO team…will not be members of the PWS team and the SSEB."

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Chapter 16
Intellectual Property

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CHAPTER 16

INTELLECTUAL PROPERTY

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CHAPTER 16

INTELLECTUAL PROPERTY

I. REFERENCES

A. 10 U.S.C. §§ 2320-2321, Rights in Technical Data and Validation of Proprietary Data Restrictions.

B. Title 15, Chapter 22, United States Code, Trademarks.

C. Title 17, United States Code, Copyrights.

D. Title 35, United States Code, Patents.

E. 41 U.S.C. §§ 2302, 4703, Rights in Technical Data and Validation of Proprietary Data Restrictions.

F. Federal Acquisition Regulation (FAR), Part 27, Patents, Data, and Copyrights.

G. Department of Defense FAR Supplement (DFARS), Part 227, Patents, Data, and Copyrights.

H. Department of Defense, Intellectual Property: Navigating Through Commercial Waters (Version 1.1, Oct. 15, 2001), *available at* http://www.acq.osd.mil/dpap/docs/intelprop.pdf.

I. DoD Open Systems Architecture Contract Guidebook for Program Managers (Version 1.1, June 2013), *available at* https://acc.dau.mil/adl/en-US/664093/file/73330/OSAGuidebook%20v%201_1%20final.pdf.

J. Ralph C. Nash, Jr. & Leonard Rawicz, *Intellectual Property in Government Contracts* (CCH 6th ed. 2008). A one-volume treatise.

K. Matthew S. Simchak & David A. Vogel, *Licensing Software and Technology to the U.S. Government: The Complete Guide to Rights to Intellectual Property in Prime Contracts and Subcontracts* (2000). A one-volume treatise (out of print).

L. Nguyen, Gomulkiewicz & Conway-Jones, *Intellectual Property, Software & Information Licensing: Law and Practice* (BNA 2006 & 2013 Cum. Supp.). A one-volume treatise.

II. OVERVIEW

A. Intellectual property ("IP") refers to creations of the mind. Despite the term property, IP is better characterized as a proprietary interest in intangibles. The term intellectual property is used in reference to, *inter alia*, inventions, literary and artistic works, symbols, names, images, and designs.

B. IP has value because international treaties, federal and state laws, and contracts (including licenses) recognize ownership interests therein and provide exclusive rights to the owners thereof.

C. The policies supporting the protection of IP are myriad and, at times, contrary to other important policies such as competition and the public good. These policies include, but are not limited to, the following: providing incentives to inventors/authors to encourage scientific and technological advances, innovation, and creativity; providing a *quid pro quo* between inventors/authors and the public; promoting consumer protection; and upholding the standard of commercial ethics.

D. From a contractor's perspective, IP is a valuable corporate asset that can be used to generate revenue, create a competitive advantage, create barriers to entry by competitors, and act as a deterrent to litigation.

E. The Government also needs to consider IP issues during the acquisition planning process to help promote competition, reduce lifecycle/O&M costs, and reduce reprocurement costs. *See* United States Government Accountability Office, *Defense Contracting: Early Attention in the Acquisition Process Needed to Enhance Competition* (GAO-14-395) (May 2014).

1. From a competition standpoint, IP considerations can dovetail with open systems and open architecture acquisition approaches. It is important to keep in mind, however, that full and open competition can (and probably should) be achieved without trying to "level the playing field" and nullify the competitive advantage that IP affords certain offerors. *See Mortara Instrument, Inc.*, B-272461, 96-2 CPD 212 (Oct. 18, 1996).

2. Fiscal considerations can be particularly important in a more austere environment, where federal agencies are routinely being asked to do more with less.

3. There are also those of the view that respecting and protecting IP rights fosters national security through its impact on the economy. *See* Reggie Ash, *Protecting Intellectual Property and the Nation's Economic Security*, Landslide, Vol. 6, No. 5 at 20-24 (May/June 2004).

III. TYPES OF INTELLECTUAL PROPERTY

A. Patents.[1]

1. Art. I, § 8, cl. 8 of the U.S. Constitution authorizes the patent system in order "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their

[1] This outline reflects the amendments to the Patent Act made by the Leahy-Smith America Invents Act ("AIA") (Pub. L. No. 112-29). For information regarding pre-AIA patent law, please consult a version of this outline from 2012 or earlier.

respective writings and discoveries." Based upon this authority, Congress enacted the Patent Act of 1952, now codified as amended at Title 35, United States Code.

2. A patent is a written instrument issued by the U.S. Patent and Trademark Office (PTO), an agency of the Department of Commerce.

3. Types of patents:

   a. Plant (*e.g.*, a new variety of rose bush). *See* 35 U.S.C. §§ 161-164.

   b. Design (*e.g.*, a new ornamental/non-functional design for a piece of furniture). *See* 35 U.S.C. §§ 171-173.

   c. Utility. *See* 35 U.S.C. §§ 100-157. Can be a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101.

4. An issued patent bestows a government-granted monopoly to an inventor and grants the inventor the right to exclude all others from practicing the invention (*e.g.*, making, using, selling, or importing the invention or offering the invention for sale) for a period of 20 years from the date the patent application is filed. *See* 35 U.S.C. §§ 154, 271.

5. To receive the exclusive rights associated with a patent, the inventor must make an application to the PTO and submit to an examination process. As part of the process, the inventor must provide a sufficiently detailed written description of the invention. This written description, or "specification," must describe the invention in a manner that enables a person skilled in the art to practice the invention without undue experimentation. It must also disclose the subjective best mode of practicing the invention. *See* 35 U.S.C. § 112(a). Failure to disclose the best mode, however, is no longer a defense to a charge of infringement. *See* 35 U.S.C. § 282(b)(3)(A).

6. An invention is patentable if it is:

   a. Patent-eligible subject matter (*see* 35 U.S.C. § 101).

      (1) The Supreme Court has held that "anything under the sun that is made by man" qualifies as statutory subject matter. *Diamond v. Diehr*, 450 U.S. 175 (1981).

      (2) More recently, the Supreme Court has emphasized that the only exclusions from statutory subject matter are laws of nature, physical phenomena, and abstract ideas. *See Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

(3) The test used to determine whether an invention is an abstract idea remains unsettled. *See CLS Bank Int'l v. Alice Corp. Pty. Ltd.*, 717 F.3d 1269 (Fed. Cir.) (*en banc*), *cert. granted*, 134 S. Ct. 734 (2013).[2] This issue most often arises where the invention sought to be patented is a method, and in particular a "business method." In these circumstances, the PTO will apply the so-called "machine-or-transformation" test set forth by the Federal Circuit in *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (*en banc*). The Supreme Court, however, has rejected the notion that the machine-or-transformation test is dispositive of patent eligibility. *See Bilski*, 130 S. Ct. at 3227.[3]

b. Useful (*see* 35 U.S.C. § 101). This is an exceptionally low hurdle. For most inventions, it requires little more than a single, credible, real-world use for the invention. The invention need not be marketable, work particularly well, or have industrial applicability in order to be useful.

c. Novel (*see* 35 U.S.C. § 102).

(1) Novelty requires that the invention be different than any single thing that came before.

(2) An invention is not novel if it was patented, described in a printed publication, in public use, on sale, or otherwise available to the public prior to the application for patent. *See* 35 U.S.C. § 102(a)(1). Subject to certain limitations (*see* 35 U.S.C. § 102(b)(2)), issued patents and published patent applications are deemed effective as prior art as of the date they were ***filed***, not the day they actually ***published***. *See* 35 U.S.C. § 102(a)(2).

(3) Most countries apply an "absolute novelty" standard, such that any of the acts described above are immediate and absolute bars to patentability. The United States, however, has a substantially unique exception to the absolute novelty standard allowing, under certain circumstances, a one-year grace period to file a patent application following a disclosure by the inventor or by one who obtained the

[2] Oral argument in *Alice Corp.* occurred on March 31, 2014. The Supreme Court's decision was not available at the time of printing.

[3] As a practical matter, the PTO continues to apply the machine-or-transformation test when examining patents. *See* Memorandum from Robert W. Bahr, Acting Associate Commissioner for Patent Examination Policy, to Patent Examining Corps; subject: Interim Guidance for Determining Subject Matter Eligibility for Process Claims in View of *Bilski v. Kappos* (July 27, 2010), *available at* http://www.uspto.gov/patents/law/exam/bilski_guidance_27jul2010.pdf.

disclosure from the inventor. *See* 35 U.S.C. § 102(b)(1). As noted above, additional exceptions limit the retroactive applicability of issued patents and published applications. *See* 35 U.S.C. § 102(b)(2).

d. Non-obvious (*see* 35 U.S.C. § 103). The obviousness analysis considers whether the invention is sufficiently different than the state of the art when viewed through the eyes of one of ordinary skill in the art. Certain objective evidence, such as commercial success or copying, can also be considered as part of the obviousness analysis. *See Graham v. John Deere Co.*, 383 U.S. 1 (1966).

B. Trade Secrets.

1. Trade secret protection is primarily a matter of state law. To protect trade secrets from misappropriation, the various states rely on some or all of the following sources:

a. State common law and/or statutes.

b. The Restatement (First) of Torts §§ 757-759.

c. The Uniform Trade Secrets Act.

d. The Restatement (Third) of Unfair Competition §§ 39-45.

2. Although trade secret protection lies with the states, there are some federal statutes that punish trade secret theft in limited circumstances. Two of these federal acts are better known than the others: The Economic Espionage Act, which makes it a crime to steal trade secrets, and The Prohibition on Disclosure of Confidential Information, which makes it a crime for a Federal Government employee to release confidential or proprietary information gained during the course of her employment. *See* 18 U.S.C. §§ 1831-1839 and 18 U.S.C. § 1905, respectively. Recent amendments to the Economic Espionage Act, contained in the Theft of Trade Secrets Clarification Act of 2012 and the Foreign and Economic Espionage Penalty Enhancement Act of 2012, have strengthened the federal protections for trade secrets.

a. The Theft of Trade Secrets Clarification Act of 2012 makes express coverage for trade secrets that are services. It also expands coverage to products and services "used in or intended for use in" interstate commerce, rather than the more limited "produced for or placed in" interstate commerce.

b. The Foreign and Economic Espionage Penalty Enhancement Act of 2012 increases penalties for violations of the EEA ten fold.

3. The Uniform Trade Secrets Act (UTSA) has been adopted in some form by nearly every state, the District of Columbia, and the U.S. Virgin Islands. This uniform act represents a largely accepted legal framework for the protection of trade secrets and commercial industry.

4. Although the precise definition will vary from state to state, a "trade secret" is generally defined as information that derives independent economic value from not being generally known to, or readily ascertainable by proper means by, others. To preserve a trade secret, the owner thereof must make reasonable efforts to maintain its secrecy. UTSA § 1(4).

    a. A substantial amount of trade secret litigation centers on whether the company seeking protection took reasonable measures to keep the information a secret.

        (1) The only way an owner of a trade secret can economically benefit from it is to sell access to that information to others.

        (2) As long as the disclosure is made to a recipient who agrees to keep the information confidential, the trade secret retains its protection.

    b. There is no limit to how long a trade secret may last; duration depends only upon how long it remains secret and retains independent economic value as a result of its secrecy.

5. Trade secrets do not protect against independent discovery by others. Nor do they protect against reverse engineering (though trade secret owners will typically include a contractual prohibition against reverse engineering when sharing their trade secrets with others).

6. By their nature, trade secrets cannot co-exist with patents. Various factors will inform the decision of which form of protection is more appropriate for a particular piece of IP:

    a. How quickly the market moves/how quickly the IP will become obsolete;

    b. How easy it is to maintain the secret in light of reverse engineering efforts, the likelihood of independent discovery, and the level of access the public will have to articles embodying the trade secret (and whether they can be bound by contract not to reverse engineer the secret);

    c. How easy it is to detect infringement/misappropriation; and

    d. Whether foreign protection is desired.

C. Copyrights.

1. Like the patent system, the copyright system is authorized by Art. I, § 8, cl. 8 of the U.S. Constitution.

2. Congress extensively amended copyright laws in 1976. Prior to 1976, there was a dual federal and state system of copyright protection. The Copyright Act of 1976 preempted state copyright laws. *See* 17 U.S.C. § 301. Some residual, copyright-like state law claims survive, however.

3. The Register of Copyrights within the Library of Congress (LOC) is the Government agency that has oversight responsibility for the copyright system. 17 U.S.C. § 701.

4. Copyright laws give the author of an original work of authorship fixed in a tangible medium of expression (*see* 17 U.S.C. § 102) a bundle of five exclusive rights (*see* 17 U.S.C. § 106):

   a. Reproduce the copyrighted work;

   b. Prepare derivative works based upon the original work;

   c. Distribute copies of the work to others;

   d. Perform the work in public; and

   e. Display the work in public.

5. The types of original works that may be copyrighted include, but are not limited to (*see* 17 U.S.C. § 102(a)):

   a. Literary works;

   b. Musical works, including any accompanying words;

   c. Dramatic works, including any accompanying music;

   d. Pantomimes and choreographic works;

   e. Pictorial, graphic, and sculptural works;

   f. Motion pictures and other audiovisual works;

   g. Sound recordings; and

   h. Architectural works.

6. The term of this right varies. For a sole author who created a work after 1998, the term is for the life of the author plus 70 years. Alternate terms

depend upon when the work was created, whether there was more than one author, whether the work was done anonymously, and whether the work qualifies as a "work made for hire." 17 U.S.C. §§ 302-305.

7. Although the work has to be "original," the statute does not define the term. Courts have interpreted the term to merely require that the work be independently created and possess some modicum of creativity (*e.g.*, a very low hurdle). Unlike patents, the work need not entail more than an obvious revision to existing art. *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340 (1991). The strength of the copyright, however, is related to the level of originality in the work.

8. An author may place the world on notice that s/he is claiming a copyright in the work by placing a notice on all distributed copies of the work. This notice commonly consists of the symbol "©" followed by the year the work was first published and the name of the copyright owner. 17 U.S.C. § 401. Distribution of material without the copyright notice may invalidate the copyright under certain circumstances. 17 U.S.C. § 405(a). Even where the copyright is not invalidated, the author will not be able to recover royalties from an innocent infringer, one who was unaware of the copyright. 17 U.S.C. § 405(b).

9. Authors may (but are not required to) register for a copyright in a work by depositing a copy of the work at the LOC for review. 17 U.S.C. § 407(a). Registration is a prerequisite to suit in federal court (that is, to enforcement of the copyright). Moreover, unless a work is timely registered, certain remedies for copyright infringement will not be available. 17 U.S.C. §§ 411-412.

10. No copyright subsists in US Government works (that is, works, like this outline, created by officers and employees of the US Government in the scope of their official duties). The Government can, however, own copyrights. 17 U.S.C. § 105.

D. Trademarks.

1. The Patent and Copyright provision of the U.S. Constitution does not expressly grant Congress any authority to enact Trademark Laws.

2. In 1870, Congress, relying upon its inherent authority under the Constitution's Interstate Commerce Clause, enacted the first federal trademark statute, but it opted not to preempt state law. The Lanham Act of 1946 established the current federal trademark law. The Lanham Act continues to co-exist with state and common law, allowing trademark owners to enforce their rights under multiple, co-existing regimes of protection.

3. Trademark law allows manufacturers and service providers to use marks that distinguish their goods or services from the goods and services of others and to restrict others from using confusingly similar marks. 15 U.S.C. § 1125.

4. Types of marks:

   a. Trademarks. Used to identify the source or origin of goods.

   b. Service marks. Used to identify the source or origin of services.

   c. Collective marks. Used by members of an organization or group to distinguish their products or services from non-group members.

   d. Certification marks. Used to show the product or service meets certain characteristics or function levels.

5. The first user of an "inherently distinctive" mark, or of a "descriptive" mark that has acquired "secondary meaning" (*e.g.*, a mark that, once descriptive, has nonetheless acquired distinctiveness), has the right to continue to make use of that mark so long as the mark is used in commerce in association with goods or services. The first user can exclude others from, *inter alia*:

   a. Using the mark in a confusingly similar manner (*e.g.*, selling a similar product under the same mark);

   b. Using confusingly similar marks (*e.g.*, selling a similar product under a similar mark); and

   c. Diluting the value of the mark (*e.g.*, tarnishing the value of a mark by associating it with pornographic material).

6. Registration of the mark with the PTO is not required to gain these rights, but doing so establishes *prima facie* evidence of the registrant's exclusive right to use the mark. 15 U.S.C. § 1115. If the user registers the mark and makes continuous usage of the mark for five years, the *user's* right to the continued use of the mark, upon application, may become uncontestable. 15 U.S.C. § 1065.

7. The Government achieves some trademark-like protection through statutes other than the Lanham Act. *See, e.g.*, 14 U.S.C. § 639 ("USCG," "USCGR," "Coast Guard," and the like); 18 U.S.C. § 711 (Smokey Bear). The Government also owns federally registered trademarks, particularly after 1999 amendments clarified that the Government can register marks.

8. The Departments of Defense and Homeland Security have special authority to use the proceeds earned by licensing certain of its trademarks

for morale, welfare, and recreation activities. *See* 10 U.S.C. § 2260. As a result, there is an increased focus on military "branding."

9. Trademark considerations also appear in the procurement context, such as when contractors attempt to register (or actually succeed in registering) marks that have an association with the Government (*e.g.*, HUMVEE, which AM General has registered in connection with numerous goods and services beyond the military vehicle). Brand name or equal solicitations also implicate trademarks.

E. Multiple Avenues of Protection. Many innovations/creative concepts may be protected under more than one of the above areas.

1. Opting to protect under one regime often will not prevent later protection under an alternate regime, so long as requirements are met and terms of protection have not expired.

2. Sometimes inventors will have to choose among alternate regimes, such as between patent protection and trade secret protection.

IV. RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE – HISTORICAL BACKGROUND AND FUNDAMENTAL PRINCIPLES

A. Purpose, Policy, and Historical Background. *See* FAR 27.402 (data generally); DFARS 227.7102-1 (commercial technical data); DFARS 227.7103-1 (non-commercial technical data); DFARS 227.7202-1 (commercial computer software); DFARS 227.7203-1 (non-commercial computer software).

1. "Rights in technical data and computer software" is not a separate area of intellectual property. Rather, it is a merger of copyright law, trade secret law, and contract law.

2. There are two separate regimes:

a. The technical data and computer software regime for defense agencies is set forth in Part 227 of the DFARS, with the corresponding clauses at DFARS 252.227.

b. The data regime for civilian agencies is set forth in Part 27 of the FAR, with the corresponding clauses at FAR 52.227.

c. FAR 27/52.227 and DFARS 227/252.227 do not both apply. The Department of Defense is exempt from FAR Part 27 and the clauses at FAR 52.227. *See* FAR 27.400; DFARS 227.400.

d. It is important to understand which regime controls your procurement, because the FAR and DFARS take antithetical approaches to contractor IP.

3. There are numerous purposes underlying the technical data and computer software regimes, including:

   a. Fulfilling certain responsibilities for disseminating and publishing results of activities;

   b. Ensuring appropriate utilization of the results of research, development, and demonstration activities, including the dissemination of technical information to foster subsequent technological developments;

   c. Acquiring maintenance and repair from other than the original equipment manufacturer (OEM); and

   d. Planning for competitive reprocurement.

4. Historical Development

   a. Prior to World War II, there was no standing military, so there was also no need to maintain, repair, and replace large quantities of equipment. The first technical data regulation was issued in 1955 and provided the Government with complete access to data. *See Bell Helicopter Textron*, ASBCA 21192, 85-3 BCA ¶ 18,415. This was unacceptable to many contractors, who gradually refused to do work for the Government (at least, not at a reasonable price).

   b. The current system was established in 1984 as part of the drastic overhaul that Congress made to the government contracts process in the Competition in Contracting Act and the Defense Procurement Reform Act. Congress believed a lack of technical data forced the Government to reprocure on a sole-source basis with the original manufacturer, thus causing inflated prices. Some of these same criticisms survive today. *See* United States Government Accountability Office, *Defense Contracting: Early Attention in the Acquisition Process Needed to Enhance Competition* (GAO-14-395) (May 2014).

   c. The Government adopted the policy that it is not in its best interest to use its bargaining power to obtain unlimited rights to use all of a contractor's technical data. Rather, the policy is to balance the interests in establishing rights to technical data when the contractor has developed items, components, or processes partially or fully at private expense.

   d. The relevant statutes (*e.g.*, 10 U.S.C. § 2320 and 41 U.S.C. § 2302) speak only to the Government's rights in technical data and are silent as to the Government's rights in computer software.

Computer software, however, is generally treated analogous to technical data. *See generally infra*.

B. Fundamental Principles

1. Ownership vs. License: The Government rarely takes ownership of contractor IP. Typically, the contractor retains ownership of its IP, subject to a non-exclusive Government license. The scope of the Government's license depends on several factors discussed below.

2. Distinguishing Between Deliverables and Rights: Deliverables are the items of IP that the contractor is required to deliver as an element of contract performance (*e.g.*, a particular technical data package or drawing; a particular piece of computer software). Rights are what the Government is permitted to do with those deliverables. The Government may also have rights in items of technical data or computer software that are not deliverables; this situation is often referred to as "inchoate rights."

3. Taking the Minimum Necessary: The Government should take only the minimum necessary deliverables and the minimum necessary rights in those deliverables in order to meet its needs. *See, e.g.*, FAR 27.402; DFARS 227.7103-1; DFARS 227.7203-1.

4. The Doctrine of Segregability: Under contracts with defense agencies (that is, contracts subject to DFARS Part 227), rights determinations can be made at the sub-item or sub-component level for technical data (*see* DFARS 227.7103-4(b)) and as to "the lowest segregable portion of the software or documentation" for computer software and computer software documentation (DFARS 227.72-3-4(b)). The concept of segregability does not exist in FAR Part 27.

C. Important Distinctions

1. Is the contract subject to FAR Part 27 or DFARS Part 227?

2. Is the procurement commercial or non-commercial?

3. Is the item in question technical data or computer software?

V. RIGHTS IN TECHNICAL DATA – DEFENSE AGENCIES – NON-COMMERCIAL PROCUREMENTS (DFARS 252.227-7013)

A. Definition. *See* 10 U.S.C. § 2302(4); DFARS 252.227-7013(a)(14).

1. "Technical data" is recorded information, regardless of the form or method of the recording, of a scientific or technical nature.

2. "Technical data" includes computer software documentation and computer databases (but not computer software).

3. "Technical data" does not include data incidental to contract information, such as financial or management information (*e.g.*, cost and pricing data). Nor does it include unrecorded information (*e.g.*, general "know how" or "show how").

4. "Technical data" also does not include the end item itself. *See Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 381 n.16 (2005). As a result, absent an express contractual prohibition, the Government is free to reverse engineer items and components or provide those items and components to third parties to do the same; indeed, reverse engineering is expressly contemplated as a viable alternative when a contractor is unwilling or unable to grant the Government a sufficient license. *See* DFARS 227.7103-5(d)(2)(iii). This is the case even if the contractor properly asserted restrictions in the technical data corresponding to the item or component.

B. Standard Licenses.

1. Unlimited Rights: The rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do the same. DFARS 252.227-7013(a)(16).

   a. This is the broadest of the standard licenses and, though the contractor retains ownership of the technical data, the contractor has likely lost any trade secret protection and may have difficulty commercializing the technical data.

   b. The license belongs to the Government, so it is the Government's option whether or not to further disclose the technical data. Thus, even though the Government could give the technical data to a competitor to use commercially, the competitor cannot, absent a grant from the Government, simply use the technical data.

2. Government Purpose Rights: Government purpose rights provide the Government with unlimited in house rights and allow the Government to release or disclose the technical data outside the Government and authorize third parties to use, modify, reproduce, release, perform, display, or disclose the technical data for government purposes. DFARS 252.227-7013(a)(13).

   a. "Government purposes" means any activity in which the Government is a party. It includes competitive procurement, but excludes commercial purposes. DFARS 252.227-7013(a)(12).

b. By default, government purpose rights become unlimited rights five years after execution of the contract, option, or the like that requires delivery of the technical data. 10 U.S.C. § 2320(c); DFARS 227.7103-5(b)(2)-(3); DFARS 252.227-7013(b)(2)(ii). The five-year sunset period can be, and often is, extended by mutual agreement of the parties.

c. When and for so long as the Government has government purpose rights, the contractor retains the exclusive right to license the technical data to others for commercial purposes. DFARS 252.227-7013(b)(2)(iv).

d. Disclosure of government purpose rights technical data outside the Government must either be subject to the non-disclosure agreement at DFARS 227.7103-7 or to a Government contractor receiving access to the technical data for performance of a Government contract that contains DFARS 252.227-7025. DFARS 252.227-7013(b)(2)(iii).

3. Limited Rights: Limited rights provide the Government with unlimited in house rights but restrict the Government from releasing or disclosing the technical data outside the Government except in limited circumstances. The two most common circumstances where outside disclosures are permitted are disclosures necessary for emergency repair and overhaul and disclosures to covered government support contractors. DFARS 252.227-7013(a)(14).

a. A covered government support contractor is a technical assistance/advisory services contractor acting in support of the Government's management and oversight of a program or effort. The covered government support contractor cannot be affiliated with or a direct competitor of the prime contractor or a first-tier subcontractor in furnishing end items or services of the type developed or produced on the effort. DFARS 252.227-7013(a)(5).

(1) The covered government support contractor is subject to the additional restrictions set forth in DFARS 252.227-7025.

(2) At the discretion of the owner of the technical data being disclosed to the covered government support contractor, the covered government support contractor can be required to enter into a non-disclosure agreement directly with the technical data owner (consistent with DFARS 252.227-7025).

(3) The Government must notify the technical data owner of any disclosures to covered government support contractors.

b. 10 U.S.C. § 2320 was recently amended to allow disclosures of limited rights technical data when necessary to segregate or reintegrate an item or process from or with other items or processes. *See* 10 U.S.C. § 2320(a)(2)(D). Such disclosures are subject to similar restrictions as disclosures to covered government support contractors. This amendment to the statute has not yet been implemented in the DFARS.

C. Specifically Negotiated License Rights. The Government and the contractor may modify the standard licenses so long as the Government receives no less than limited rights in the technical data. 10 U.S.C. § 2320(a)(2) and (c); DFARS 227.7103-5(d); DFARS 252.227-7013(b)(4).

D. Rights Allocations: The Funding Test

1. The Government's default rights in many types of non-commercial technical data are dictated by the source of development funding for the item, component, or process to which the technical data pertains. To determine the appropriate default license, three elements must be analyzed: (i) whether the technical data pertains to items, components, or processes; (ii) whether the item, component, or process qualifies as "developed;" and (iii) what source of funds was used to accomplish the development. DFARS 227.7103-4.

2. Pertaining to Items, Components, or Processes

a. For technical data that pertains to items, components, or processes, the default scope of the license is determined by the source of funds used to develop the item, component, or process. This is not necessarily the same source of funds used to develop the technical data itself. DFARS 227.7103-4(a)(2).

b. An item, component, or process is considered all-inclusive, referring to the end product that resulted from private development and every separable intermediate level of assembly and to every separable piece part down to the smallest level. DFARS 227.7103-4(b); *Bell Helicopter Textron*, ASBCA 21192, 85-3 BCA ¶ 18,415.

(1) The concept of identifying privately-funded, severable portions of end products (*e.g.*, any individual part, component, subassembly, assembly, or subsystem) is referred to as segregability. *See* Section IV.B.4, *supra*.

(2) Segregability permits contractors to assert restrictions in any piece of technical data that pertains to an element of

the product or service that has been developed partially or wholly at private expense. *Cf. Ervin & Assoc., Inc. v. United States*, 59 Fed. Cl. 267 (2004) (finding that an entire package of technical data was provided with unlimited rights because some government funds were used to create the package; the court did not consider that some elements of the package were developed at private expense).

3. Developed. DFARS 252.227-7013(a)(7).

   a. An item, component, or process is "developed" when it exists and is workable (*e.g.*, the item has been constructed or the process practiced).

   b. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the art that there is a high probability that it will operate as intended. The level of proof required will depend upon the nature of the item and the state of the art, but workability generally does not require that the item, component, or process be at a stage where it could be offered for sale or sold on the commercial market. Nor does workability require a reduction to practice within the meaning of patent law.

4. The Source of Funds Determination.

   a. Exclusively at Private Expense. An item, component, or process is developed exclusively at private expense if development was accomplished entirely with costs charged to indirect cost pools and/or costs not allocated to a Government contract. DFARS 252.227-7013(a)(8).

      (1) The costs of independent research and development (IR&D) costs and bid and proposal costs are not considered Government funds. 10 U.S.C. § 2320(a)(3); DFARS 252.227-7013(a)(8) and (10). *Compare Boeing Co. v. United States*, 69 Fed. Cl. 397 (2006) (work properly charged to IR&D project so Government was not entitled to patent rights) *with United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218 (D. Md. 1995) (work improperly charged to IR&D) *and United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539 (E.D. Va. 2003) (holding contractor improperly charged costs of designing commercial vessels to IR&D).

      (2) Contractors must ensure that their IR&D charges are consistent with their disclosed accounting practices. *See*

ATK Thiokol, Inc. v. United States, 598 F.3d 1329 (Fed. Cir. 2010).

(3) Under a firm-fixed-price contract, development costs in excess of the firm-fixed-price are not considered private expense. DFARS 252.227-7013(a)(8)(ii).

b. Exclusively at Government Expense. An item, component, or process is developed exclusively at Government expense if it is not developed exclusively or partially at private expense. DFARS 252.227-7013(a)(9).

c. Mixed Funding. An item, component, or process is developed with mixed funding if development is accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a Government contract and partially with costs charged directly to a Government contract. DFARS 252.227-7013(a)(10).

d. Under the doctrine of segregability, the source of funds determination is made at the lowest level possible, allowing the contractor to assert funding-based restrictions in technical data pertaining to a "segregable sub-item, subcomponent, or portion of a process." *See* DFARS 252.227-7013(a)(8)(i); Section IV.B.4, *supra*.

E. Default Rights Allocations

1. Unlimited Rights (DFARS 252.227-7013(b)(1)). The Government shall have unlimited rights in the following technical data:

a. Technical data pertaining to items, components, or processes developed exclusively at Government expense;

b. Studies, analyses, test data, or similar data that are produced for the contract when the work was specified as an element of contract performance;

c. Technical data created exclusive with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

d. Form, fit, and function data;

e. Data necessary for operations, maintenance, installation, or training purposes (OMIT data), other than detailed manufacturing or process data;

f. Corrections or changes to technical data furnished to the contractor by the Government;

g. Technical data that is otherwise publicly available or released/disclosed by the contractor without restriction;

h. Technical data in which the Government has obtained unlimited rights under another contract or as a result of negotiation; and

i. Technical data furnished with government purpose rights and the restrictions have expired.

2. Government Purpose Rights (DFARS 252.227-7013(b)(2)). The Government shall have government purpose rights in the following technical data:

   a. Technical data pertaining to items, components, or processes developed with mixed funding (except when the Government is entitled to unlimited rights as set forth above); and

   b. Technical data created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

3. Limited Rights (DFARS 252.227-7013(b)(3)). The Government shall have limited rights in the following technical data:

   a. Technical data pertaining to items, components, or processes developed exclusively at private expense (except when the Government is entitled to unlimited rights as set forth above); and

   b. Technical data created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

4. Contractors cannot be required to provide the Government with additional rights beyond those to which the Government is entitled as a condition of contract award. DFARS 227.7103-1(c). For example, the Government cannot condition eligibility for award on receiving unlimited rights where the contractor is entitled to assert government purpose or limited rights. The Government can, however, consider the rights a contractor is willing to grant when making its source selection decision, provided such consideration is consistent with the established evaluation criteria. For example, assuming the evaluation criteria so provide, the Government can rate a proposal that offers government purpose rights higher than a proposal that offers only limited rights as part of its cost-technical tradeoff analysis.

F. Subcontractor technical data is subject to the same rules discussed above. DFARS 252.227-7013(k).

1. Prime contractors and higher-tier subcontractors are required to flow down the appropriate clauses ***without alteration of the parties***. That is, the rights allocation clauses allocate rights as between the Government and a contractor at any tier, and not as between contractors at various tiers.

2. Prime contractors and higher-tier subcontractors are required to satisfy their obligations to the Government, but they are not permitted to use their position to leverage greater rights for themselves. Separate consideration is required if a prime contractor or higher-tier subcontractor wishes to license technical data from a downstream contractor or supplier.

3. Subcontractors are also permitted to submit their technical data directly to the Government. 10 U.S.C. § 2320(a)(1); DFARS 227.7103-15; DFARS 252.227-7013(k)(3).

VI. RIGHTS IN COMPUTER SOFTWARE – DEFENSE AGENCIES – NON-COMMERCIAL PROCUREMENTS (DFARS 252.227-7014)

A. The Government's rights in non-commercial computer software generally parallel its rights in non-commercial technical data, such that Section V of this outline generally applies to non-commercial computer software *mutatis mutandis*.[4] This section highlights certain salient points and differences unique to acquisitions of non-commercial computer software.

B. Definition. *See* DFARS 252.227-7014(a)(4).

1. "Computer software" means computer programs, source code, source code listings, object code listings, design details, algorithms, and the like that would enable the software to be reproduced, recreated, or recompiled.

2. "Computer software" excludes computer software documentation and computer databases, which are technical data instead.

C. Standard Licenses.

1. Unlimited Rights: Generally the same as unlimited rights in technical data. *See* DFARS 252.227-7014(a)(16); Section V.B.1, *supra*.

[4] A rule to streamline DFARS Part 227 by, *inter alia*, combining the clauses for technical data and computer software was proposed in 2010. *See* 75 Fed. Reg. 59412 (Sept. 27, 2010); Nicole J. Owren-Wiest and Scott A. Felder, *DoD Proposes Comprehensive DFARS Rewrite to "Clarify & Streamline" Rules Related to Government Rights in Technical Data & Computer Software, Patents & Copyrights* (Sept. 27, 2010), *available at* http://www.wileyrein.com/publications.cfm?sp=articles&id=6383. As of the publication of this outline, the corresponding DFARS case (2010-D001) is no longer listed as open. *See* Open DFARS Cases as of May 19, 2014, *available at* http://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf.

2. Government Purpose Rights: Generally the same as government purpose rights in technical data. *See* DFARS 252.227-7014(a)(12); Section V.B.2, *supra*.

3. Restricted Rights: Analogous to limited rights in technical data. *See* DFARS 252.227-7-14(a)(15); Section V.B.3, *supra*.

   a. Limited rights allow the Government to use the software on one computer at one time, unless otherwise permitted, and to make a minimal number of archive copies.

   b. The Government is permitted to modify the software, but the modifications are themselves subject to restricted rights.

   c. Contractors performing service contracts are permitted to use the software to diagnose and correct deficiencies, to modify the software to enable a program to be combined with other programs, or to respond to urgent tactical situations, provided that such contractors are subjected to further restrictions similar to those applicable to the release or disclosure of limited rights technical data.

D. Specifically Negotiated License Rights. As with acquisitions of non-commercial technical data, the parties are free to specifically negotiate a license for non-commercial computer software, provided the Government never receives less than restricted rights. DFARS 252.227-7014(b)(4).

E. Rights Allocations: The Funding Test for Computer Software

1. In general, the funding test applies to non-commercial computer software just as it does to non-commercial technical data. This includes the doctrine of segregability. *See* Section V.D, *supra*.

2. The definition of "developed" is slightly different in the computer software context. *See* DFARS 252.227-7014(a)(7).

   a. A computer program (*i.e.*, a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or set of operations) is developed when the program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose.

   b. Computer software (anything other than a computer program) is developed when it has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art

that the software can reasonably be expected to perform its intended purpose.

c. Computer software documentation (which is a species of technical data, not a species of computer software) is developed when it has been written in sufficient detail to comply with contractual requirements.

F. Default Rights Allocations

1. Unlimited Rights (DFARS 252.227-7014(b)(1)). The Government shall have unlimited rights in the following:

a. Computer software developed exclusively at Government expense;

b. Computer software documentation required to be delivered under the contract;

c. Corrections or changes to computer software or computer software documentation furnished to the contractor by the Government;

d. Computer software or computer software documentation obtained with unlimited rights under another contract or as a result of negotiations; and

e. Computer software furnished with restrictions that have expired.

2. Government Purpose Rights (DFARS 252.227-7014(b)(2)). The Government shall have government purpose rights in computer software developed with mixed funding (except when the Government is entitled to unlimited rights as set forth above).

3. Restricted Rights (DFARS 252.227-7014(b)(3)). The Government shall have restricted rights in computer software developed exclusively at private expense (except when the Government is entitled to unlimited rights as set forth above).

G. The rules regarding subcontractor computer software are analogous to those applicable to subcontractor technical data. *See* DFARS 252.227-7014(k); Section V.F, *supra*.

VII. RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE – DEFENSE AGENCIES – COMMERCIAL PROCUREMENTS

A. Commercial Technical Data (DFARS 252.227-7015)

1. As a matter of policy, the Government only acquires the technical data customarily provided to the public with a commercial item or process.

DFARS 227.7102-1(a). Exceptions include form, fit, and function data; data required for repair or maintenance of commercial items or processes; data required for the proper installation, operation, or handling of a commercial item; and data that describe the modifications made at Government expense to a commercial item or process in order to meet Government requirements. *Id.*

2. The Government receives unlimited rights in the following technical data (DFARS 252.227-7015(b)(1)):

   a. Technical data that have been provided to the Government or others without further restriction, except in the case of a transfer of ownership (*e.g.*, an acquisition of the intellectual property by another company);

   b. Form, fit, and function data;

   c. Corrections and changes to technical data furnished to the contractor by the Government;

   d. OMIT data (other than detailed manufacturing or process data); and

   e. Technical data provided with unlimited rights in a prior contract or agreement.

3. For all other commercial technical data, the Government is subject to similar restrictions as with non-commercial technical data subject to limited rights. *See* DFARS 252.227-7015(b)(2).

   a. The Government may use, modify, reproduce, release, perform, display, or disclose the technical data only within the Government.

   b. The Government shall not use the technical data to manufacture additional quantities of the commercial item.

   c. The Government may release or disclose the technical data for emergency repair or overhaul or to a covered government support contractor.

4. The parties can also negotiate specific license rights in commercial technical data. DFARS 252.227-7015(c).

5. The theory for the default allocation of rights is that commercial items are most typically developed exclusively at private expense.

a. The non-commercial rules (*e.g.*, DFARS 252.227-7013) will apply in the event some or all of the commercial item was developed at Government expense. *See* DFARS 227.7102-4(b).

b. For purposes of validation of and challenges to a contractor's assertion of restrictions on technical data, the following funding presumptions will apply:

(1) Commercial items are generally presumed to have been developed exclusively at private expense; *except*

(2) Major systems and subsystems/components thereof are *not* presumed to have been developed exclusively at private expense; *unless*

(a) A major system is defined in FAR 2.101 as a system having estimated research, development, test, and evaluation costs in excess of $189.5 million *or* a total acquisition cost in excess of $890 million.

(b) The agency head can also designate something a "major system."

(3) It is a commercial-off-the-shelf (COTS) item, component, or process.

6. The rules applicable to subcontractors are analogous to those discussed above in connection with non-commercial technical data. *See* Section V.F, *supra*.

B. Commercial Computer Software (No Clause)

1. Under DFARS 227.7102-1, the Government licenses commercial computer software subject to the same license as any other commercial licensee unless that license is inconsistent with federal law or otherwise does not meet the Government's needs. The license must be incorporated into the contract.

2. There are a number of common commercial license clauses that are objectionable to the Government. These include:

a. Click-wrap and shrink-wrap license terms;

b. Open-ended indemnification by the licensee. Per new FAR 52.212-4, such clauses are unenforceable against the Government and are severed from the agreement, unless otherwise authorized by law;

c. Choice of law and choice of forum clauses;

d. Contractual limitations on actions;

e. Automatic renewal terms;

f. Warranty terms (particularly limitations on warranties);

g. Injunctive relief for breach by the licensee;

h. Clauses that permit immediate, unilateral termination by the licensor for breaches by the licensee;

i. Clauses that permit the licensor to unilaterally modify the license terms or terms of service;

j. Clauses that impose liability on the licensee for the licensor's taxes; and

k. Certain confidentiality provisions.

VIII. DATA RIGHTS – CIVILIAN AGENCIES

A. The FAR has a single clause, FAR 52.227-14, that controls the Government's rights in "data," without expressly differentiating between commercial or non-commercial The FAR generally does not differentiate between commercial and non-commercial data or between technical data and computer software. FAR 52.227-14 does not, however, apply to commercial computer software.

1. "Data" means recorded information, regardless of form or the media on which it may be recorded.

2. "Data" includes both technical data and computer software, which are defined similarly to the DFARS. *See* Sections V.A and VI.B, *supra*.

3. "Data" does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

B. The FAR expressly includes only unlimited rights, limited rights (for technical data) and restricted rights (for computer software). The FAR does not expressly recognize the concepts of government purpose rights, specifically negotiated license rights, or segregability.

C. In addition, the default manner in which the FAR allows a contractor to protect its data is by ***withholding*** that data from delivery to the Government and delivering form, fit, and function data in its place. FAR 52.227-14(g). Indeed, under the standard FAR clause, the Government receives unlimited rights in all data

delivered under contract. This is in contrast to the DFARS model, which allows the contractor to deliver certain technical data and/or computer software subject to restrictions.

D. The Government shall have unlimited rights in the following data (FAR 52.227-14(b)(1)):

1. Data first produced in the performance of the contract;

   a. FAR 52.227-14 does not include a funding test. The current wisdom, however, is to nonetheless adopt a "source of funding" approach for such data.

   b. FAR 52.227-14 also does not make delivery a requirement. Thus, FAR 52.227-14 leaves open the possibility that the Government will have inchoate rights in data first produced in the performance of the contract.

2. Form, fit, and function data delivered under the contract;

3. Data delivered under the contract (except for restricted computer software) that constitute manuals or instructional and training material for OMIT or repair of items, components, or processes delivered or furnished for use under the contract; and

4. All other data delivered under the contract, unless provided otherwise as limited rights data or restricted computer software.

E. Limited Rights Technical Data and Restricted Computer Software

1. Limited rights technical data is data, other than computer software, that embodies trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications to the same. FAR 52.227-14(a).

   a. If delivered in accordance with Alternates I and II, limited rights technical data can only be used and disclosed within the Government, except for manufacturing purposes, and in accordance with the additional Government rights negotiated and incorporated into the contract.

   b. Absent Alternates I and II, limited rights technical data can only be protected by withholding it and delivering form, fit, and function data (subject to unlimited rights) instead.

2. Restricted computer software is computer software developed at private expense and that is trade secret, commercial or financial and confidential

or privileged, or is copyrighted computer software, including minor modifications to the same. FAR 52.22-14(a).

a. If delivered in accordance with Alternates I and III, restricted rights computer software can only be used on the computer for which acquired. Additional Government rights can be negotiated and incorporated into the contract.

b. Absent Alternates I and III, restricted rights computer software can only be protected by withholding it and delivering form, fit, and function data (subject to unlimited rights) instead. In the software context, form, fit, and function data is data identifying the source, functional characteristics, and performance requirements, but excluding source code, algorithms, processes, formulas, and flow charts.

F. Commercial Computer Software

1. The Government licenses commercial computer software subject to the same license as any other commercial licensee unless that license is inconsistent with federal law or otherwise does not meet the Government's needs. The license must be incorporated into the contract. FAR 12.212.

2. If there is confusion as to whether the Government's needs are satisfied or whether the customary commercial license is consistent with federal law, the Government may include the clause at FAR 52.227-19. FAR 27.405-3; FAR 27.409(g).

	Commercial Technical Data	Commercial Software	Non-commercial Technical Data	Non-commercial Software
Defense	252.227-7015 (252.227-7013 for elements developed at Government expense)	No clause; adopt standard commercial license unless inconsistent with federal law or does not meet needs	252.227-7013	252.227-7014
Civilian	52.227-14	Adopt standard commercial license unless inconsistent with federal law or does not meet needs; can use 52.227-19	52.227-14	52.227-14

Table 1: Summary of Applicable Clauses

IX. RIGHTS IN SPECIAL WORKS AND EXISTING WORKS

A. The Special Works clauses concern works created under contract such as books, computer databases, and the like and are used when the Government has a specific need to limit distribution and use of such works or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the works. FAR 27.405-1; *see also* DFARS 227.7106. Unlike the clauses discussed above, the Special Works clauses not only grant the Government unlimited rights in the works, they also allow the Government to require the contractor to assign its copyright in the works to the Government and to restrict the contractor's use of the works. FAR 52.227-17; DFARS 252.227-7020.

B. The Existing Works clauses are used when the Government is acquiring an existing work without modification. FAR 27.405; *see also* DFARS 227.7105. At least under the DFARS, the considerations for the use of the Existing Works clause are similar to those for the Special Works clause. The Existing Works clauses grant the Government a broad license to distribute, publicly perform, and publicly display the work, and also require the contractor to indemnify the Government under certain circumstances. FAR 52.227-18; DFARS 252.227-7021.

X. DATA RIGHTS IN PRACTICE

A. Contractor Identification and Assertion of Restrictions

1. Contractors' restrictions on the Government's rights in their technical data and/or computer software are not self-executing and depend upon proper pre- and post-award identification and the application of prescribed markings. In other words, the Government receives unlimited rights in technical data and computer software unless the contractor takes affirmative steps to limit such rights.

2. Contractors identify technical data and/or computer software in which the Government will have less than unlimited rights by including with their offer a listing of all data in which the Government will not have unlimited rights. *See* FAR 52.227-15; DFARS 252.227-7017.

   a. FAR 52.227-15 requires the offeror to represent either (1) that data required to be delivered under the contract qualifies as limited rights technical data or restricted rights computer software or (2) that none of the data to be delivered under the contract qualifies as limited rights technical data or restricted rights computer software.

   b. DFARS 252.227-7017 requires offerors to identify, to the extent known at the time the offer is submitted, the technical data and/or computer software that the offeror and its actual or potential

subcontractors and suppliers assert should be furnished with restrictions.

(1) Assertions at all tiers are submitted as an attachment to the offer in a prescribed tabular format, dated and signed by an authorized representative of the offeror.

(2) If the proposal is successful, the assertion table is attached to the contract.

(3) Additional data to be provided with restrictions may be identified and added to the assertion table after award only if the addition is based on new information or was inadvertently omitted.

B. Marking of Technical Data and Computer Software

1. Contractors may only assert restrictions by marking the deliverable technical data or computer software with an appropriate legend. The only "appropriate" legends are those set forth in the rights allocation clauses themselves. FAR 52.227-14(g)(3) (Alt. II); FAR 52.227-14(g)(4)(i) (Alt. III); DFARS 252.227-7013(f); DFARS 252.227-7014(f).

a. Contractors are prohibited from delivering technical data and computer software with restrictive markings unless that data is identified on the assertion table or other attachment to the contract. *See* DFARS 252.227-7013(e)(2); DFARS 252.227-7014(e)(2).

b. Contractors are required to have procedures that ensure that restrictive legends are only used when appropriate and to have records that justify the validity of any restrictive legends. *See* DFARS 252.227-7013(g); DFARS 252.227-7014(g).

c. The marking must be conspicuous and legible. It must appear on the transmittal document or storage container and on each page of printed material where applicable. *See* DFARS 252.227-7013(f)(1). For software, the restrictive legend should also be embedded in the software (*e.g.*, on splash screens) and the code (*e.g.*, headers), except where doing so could impair the usability of such software in combat situations or simulations. *See* DFARS 252.227-7014(f)(1).

2. If technical data or computer software are delivered ***without restrictive markings of any sort***, then they are presumed to be delivered with unlimited rights. DFARS 227.7103-10(c); DFARS 227.7203-10(c). The contractor can request permission to correct this defect, at its expense, within six months (or longer, at the contracting officer's discretion) after the unmarked data is delivered.

a. The contractor must identify the technical data or computer software to be marked, demonstrate that the omission of markings was inadvertent, justify the proposed markings, and acknowledge in writing that that Government is not liable for any disclosure, use, or release of the data made before the markings were added or resulting from the lack of markings.

b. The contracting officer should only grant the request where the data has not yet been distributed absent compatible restrictions on its use or disclosure.

3. If technical data or computer software are delivered with ***non-conforming markings*** (*i.e.*, markings that do not match a prescribed legend), the Government must notify the contractor of the non-conformity. If the non-conforming legend is not corrected or removed within 60 days, the Government may remove, ignore, or correct the non-conforming marking. DFARS 252.227-7013(h); DFARS 252.227-7014(h). This process can sometimes constitute a claim over which the Boards of Contract Appeals have jurisdiction. *See Alenia North America, Inc.*, ASBCA No. 57935, 2013 WL 1871512 (Mar. 26, 2013); Scott A. Felder and Nicole J. Owren-Wiest, *ASBCA Confirms Jurisdiction Over Data Rights Challenge*, Government Contracts Issue Update (Summer 2013), *available at* http://www.wileyrein.com/publications.cfm?sp=articles&id=8929&newsletter=3.

C. Validation and Challenges of Restrictive Markings

1. Contracts that include the delivery of technical data or computer software will include a clause that allows the Government to challenge and validate the contractor's asserted restrictions. *See* FAR 52.227-14(e) (data); DFARS 252.227-7019 (computer software); DFARS 252.227-7037 (technical data).

2. General Procedure

a. The challenge process begins when the contracting officer has "reasonable grounds to challenge the validity of an asserted restriction." DFARS 227.7103-13(c)(1); *see also* DFARS 227.7203-13. Where the presumption of development at private expense applies (*see* Section VII.A.5.b, *supra*), the Government cannot initiate a challenge unless it can demonstrate that it contributed development. DFARS 227.7103-13(c)(1).

b. Prior to initiating a challenge, the contracting officer can request that the contractor provide a written justification for any restriction asserted and can request further information (*e.g.*, contracts, correspondence, engineering documents, accounting and financial

records) as necessary to justify the basis for the contractor's asserted restrictions. DFARS 252.227-7019(d); DFARS 252.227-7037(d). If the contracting officer determines that reasonable grounds exist to question the validity of the marking, the contracting officer can initiate a challenge.

c. To initiate the challenge, the contracting officer sends a written notice to the contractor. DFARS 252.227-7019(g); DFARS 252.227-7037(e).

(1) The notice must state specific grounds for challenging the contractor's asserted restriction.

(2) The contractor is required to provide a response justifying the restrictive marking within 60 days. It is within the contracting officer's discretion to extend this deadline.

(3) A prior contracting officer's final decision sustaining the validity of an identical restrictive marking within three years shall be conclusive justification for the restrictive marking.

d. The contractor's response to the challenge notice constitutes a claim under the Contract Disputes Act and is required to be certified in the form prescribed by FAR 33.207 regardless of amount.

e. Following the contractor's response (or after the period for response has elapsed with no response), the contracting officer will issue a final decision.

(1) If the contracting officer finds that the restriction is valid, then the Government will be bound by the contracting officer's finding.

(2) If the contracting officer finds that the restriction is not justified, then the Government will be bound by the restrictive marking for 90 days, pending the contractor's decision to appeal the contracting officer's final decision to the Court of Federal Claims or the Board of Contract Appeals, and until final disposition if the decision is appealed.

f. The Government's right to challenge a contractor's asserted restrictions lasts for three years after final payment on the contract. *See* DFARS 252.227-7037(i).

D. Deferred Delivery and Deferred Ordering of Non-Commercial Technical Data and Computer Software

1. Deferred Delivery. Several versions of an item or process may be developed before the Government ultimately finalizes the item for production and fielding. The Government may not want or need data related to every iteration. To accommodate these considerations, the DFARS Deferred Delivery clause (DFARS 252.227-7026) permits the Government to defer delivery of data for up to two years after contract termination. The data should be identified in the contract as "deferred delivery."

2. Deferred Ordering. It is also sometimes the case that the Government may not know at contract award what data it will require, or even whether it will require data at all. The Deferred Ordering clauses (FAR 52.227-16; DFARS 252.227-7027) allow the Government to order technical data and computer software generated in performance of the contract for up to three years after contract termination.

a. The deferred ordered data is subject to the rights allocation clauses otherwise in the contract.

b. The contractor is compensated only for the cost of converting the data into its prescribed form and for the costs of reproduction and delivery. The contractor is not entitled to additional consideration for the deferred ordered data itself.

XI. RIGHTS IN BID AND PROPOSAL DATA

A. Unsolicited Proposals (FAR Subpart 15.6)

1. Generally, the Government shall not use data, concepts, ideas, or other parts of an unsolicited proposal as the basis for a solicitation or negotiation with other firms, unless the offeror is notified and agrees. FAR 15.608(a).

2. The Government shall not disclose restrictively marked unsolicited proposal data. FAR 15.608(b).

a. If an offeror desires to protected information in the unsolicited proposal from disclosure, the offeror is required to mark the title page and each subsequent page with the prescribed legends. FAR 15.609.

b. If any other legend is used, the Government is required to return the unsolicited proposal with a letter indicating that it will review the proposal if it is resubmitted with the prescribed legend. FAR 15.609(c).

B. Successful Proposals

1. FAR 52.215-1(e)(1) allows offerors to restrict the Government's rights in data contained in proposals. As with unsolicited proposals, the offeror is required to mark the proposal with a restrictive legend.

2. FAR 52.227-23 allows the Government to obtain unlimited rights in technical data in successful proposals, except as specified by the offeror/awardee by specifically identifying the page(s) containing technical data excluded from this grant of unlimited rights. *See* FAR 27.407; 27.409(*l*).

3. The rules are more restrictive for DoD-solicited proposals. *See* DFARS 252.227-7016.

a. For bid and proposal information other than technical data and/or computer software to be delivered under the contract:

(1) Pre-award, the Government may copy and use the information for evaluation purposes only and may not disclose it to others unless such person is authorized by the contracting officer or the agency head to receive the information.

(2) Post-award, the Government may use and disclose the information within the Government.

(3) There is no prescribed legend to effect these restrictions. Many contractors, however, will borrow the restrictive legend from the FAR as a best practice.

b. For technical data and/or computer software deliverables, the Government's rights are dictated by the rights allocation clause(s) contained in the contract (*e.g.*, DFARS 252.277-7013, -7014, and/or -7015).

XII. RIGHTS IN PATENTS UNDER GOVERNMENT CONTRACTS

A. The FAR and DFARS distinguish between the Government's rights in a contractor's technical data and computer software, on the one hand, and the Government's rights in a contractor's patents, on the other hand. *See* FAR 52.227-14(i); DFARS 252.227-7013(i); DFARS 252.227-7014(i).

B. The Bayh-Dole Act, codified as amended at 35 U.S.C. §§ 200-212, is the primary source of rights and duties in this area.

1. Prior to World War II, industry, not the Federal Government, was the leader in research and development (R&D) funding. After World War II,

the Government's desire to maintain a standing military, explore space, and develop nuclear energy caused it to become the largest sponsor of R&D.

2. There was initially a great deal of disparity among the federal agencies concerning who took what rights in a patent. Some agencies took title to the patent, while others left ownership with the inventor and merely required a license.

3. To remedy the disparity and to attract more contractors to participate in the Government's "information industrial complex," Congress passed the Bayh-Dole Act in 1980, which gave the patent title to the inventor and required the agency to take certain rights in the invention. 35 U.S.C. § 200.

4. Only small and non-profit firms fall under the Bayh-Dole Act. 35 U.S.C. § 201(c). Congress feared that granting title in inventions to large firms would enable them to monopolize their respective technological fields.

5. A 1983 Presidential Memorandum extended coverage of the Act to large, for-profit firms as well. Presidential Memorandum on Governmental Patent Policy to the Heads of Executive Departments and Agencies, Feb. 18, 1983 (reprinted in 1983 Public Papers 248). This memo may be waived under certain circumstances.

C. The requirements of the Bayh-Dole Act apply to "subject inventions," which are [1] inventions; [2] of the contractor; [3] conceived or first actually reduced to practice; [4] in the performance of work under a funding agreement. 35 U.S.C. § 201(e).

1. An "invention" is something that is or may be patentable. 35 U.S.C. § 201(d).

2. An invention is "of the contractor" if the contractor (or a contractor employee) is an inventor.

3. The terms "conception" and "actual reduction to practice" have their ordinary patent law meanings.

a. "Conception" is "the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice[.]" *Townsend v. Smith*, 36 F.2d 292, 295 (C.C.P.A. 1930).

b. "Actual reduction to practice" occurs when the invention is embodied in a physical form used to demonstrate its workability.

(1) The invention is embodied when the physical form has all of the claimed elements.

(2) The invention is workable when it has been tested to the extent necessary to show that the invention will perform as intended beyond a probability of failure. Perfection is not required.

4. Work is "in the performance of work under a funding agreement" if it occurs during and related to the work specified by the funding agreement.

D. Procedural Requirements. The Bayh-Dole Act includes certain procedural requirements relative to subject inventions. These requirements are implemented in patent rights clauses. *See, e.g.*, 37 C.F.R. Part 401; FAR 52.227-11; FAR 52.227-13; DFARS 252.227-7038. Thus, a contractor's specific obligations vis-à-vis a subject invention will be spelled out in the contract itself. Generally, however, the obligations include:

1. Disclosure of Subject Inventions. The contractor must timely disclose subject inventions to the Government. 35 U.S.C. § 202(c)(1); FAR 52.227-11(c); FAR 52.227-13(c)(1)(iii); FAR 52.227-13(e). The purpose of the disclosure requirement is to protect the Government's interests in potentially patentable inventions under both domestic and international laws.

a. The statute requires disclosure within a reasonable time.

b. The standard patent rights clause (*i.e.*, FAR 52.227-11) provides that disclosure must be made within two months after the inventor discloses the invention to the contractor or six months after the contractor otherwise becomes aware of the invention.

c. The disclosure must have sufficient technical detail to convey a clear understanding of the subject invention. It must also provide information as to any potentially novelty-defeating acts (*e.g.*, publications, on-sale activities, and the like).

d. No particular form of disclosure is specified in either the standard patent clause or the FAR patent rights clauses. *See Campbell Plastics Eng'g & Mfg., Inc. v. Brownlee*, 389 F.3d 1243 (Fed. Cir. 2004). Within the Department of Defense, disclosure may be made on a DD Form 882, Report of Inventions and Subcontracts. *See* DFARS 227.304-1.

2. Election of Title. Once the contractor has disclosed the subject invention to the Government, the contractor must decide whether it wishes to retain title to the invention. FAR 27.302(b)(1). By statute, this election must be done within two years of disclosure of the subject invention. 35 U.S.C.

§ 202(c)(2); FAR 52.227-11(c)(2). This deadline can be shortened if there has been a potentially novelty-defeating event.

3. Filing of Patent Application. If the contractor elects to retain title, it is required to timely file a United States patent application (*e.g.*, within one year of any novelty defeating event). 35 U.S.C. § 202(c)(3); FAR 52.227-11(c)(3). Optionally, the contractor can file foreign and international counterpart applications.

4. Additional procedural requirements will be spelled out in the contract's patent rights clause.

5. The contractor can request, and the contracting officer can grant, extensions of time to the deadlines for disclosure of subject inventions, election of title, and filing of patent applications. Under a first-to-file system, however, such extensions may jeopardize the Government's rights. *See* Scott A. Felder and Rachel K. Hunnicutt, *Where AIA Meets Bayh-Dole Act: Beware the Ticking Clock*, Law360 (Oct. 29, 2013), *available at* http://www.wileyrein.com/publications.cfm?sp=articles&id=9198.

E. Allocation of Rights.

1. If the contractor elects title, the Government is granted a "nonexclusive, nontransferable, irrevocable, paid-up license" to practice, or have practiced for or on behalf of the United States, the subject invention throughout the world. 35 U.S.C. § 202(c)(4); FAR 27.302(c); FAR 52.227-11(d)(2); FAR 52.227-13(c)(1). Note that this license is to the *invention*, not to a *patent on the invention*.

2. If the contractor does not elect title, or fails to meet a deadline (*e.g.*, fails to timely file a patent application), the Government can take title to the invention. FAR 52.227-11(d)(1).

3. The Government can also take title in countries where the contractor decides not to file a patent application and in countries where the contractor abandons its efforts to secure patent protection. FAR 52.227-11(d)(1).

4. When the Government takes title, the contractor will generally be granted a revocable, nonexclusive, paid-up, worldwide license to the invention. FAR 27.302(i).

F. March-in rights. March-in rights are reservations by the funding agency in elected subject inventions that permit the agency to require the contractor to grant licenses to responsible applicants on reasonable terms. 35 U.S.C. § 203; FAR 27.302(f); FAR 52.227-11(h). The contractor is given procedural due process, including the right to be heard and an opportunity for oral arguments. There is

also a mandate that only the head of the agency can exercise these march-in rights. 35 U.S.C. § 203(2); FAR 27.302(f); FAR 27.304-1(g). To date, no agency has ever exercised its march-in rights.

G. Domestic Licensing. Contractors are prohibited from exclusively licensing their patented invention to US firms unwilling to "substantially manufacture" their product within the U.S. 35 U.S.C. § 204; FAR 27.302(g); FAR 52.227-11(g); FAR 52.227-13(h). There are exceptions if the contractor can demonstrate it was unable to find a domestic licensee or that domestic manufacturing is not commercially feasible. 35 U.S.C. § 204; FAR 27.302(g); FAR 52.227-11(g); FAR 52.227-13(h). For example, if a contractor develops a new bulletproof material that it patents, it is generally required to license that invention only to firms willing to manufacture bulletproof vests within the US.

H. Applicability to Subcontractors

1. The Bayh-Dole Act prevents prime contractors from obtaining rights in subcontractor inventions within the subcontract itself. 35 U.S.C. § 202(a); FAR 27.304-3; FAR 52.227-11(k); FAR 52.227-13(i).

2. The contractor may obtain rights in subcontractor inventions but must do so outside of the subcontract and must pay some additional compensation to the subcontractor. FAR 27.304-4; FAR 52.227-11(k); FAR 52.227-13(i).

3. These same protections are also given to lower tier subcontractors. FAR 52.227-11(k); DFARS 252.227-7038.

4. Put simply, the Bayh-Dole Act establishes the allocation of rights in an invention between the *Government* and a contractor at any tier, and does not allocate rights in an invention as between contractors at various tiers.

I. Use of FAR 52.227-13. The basic patent rights clause is FAR 52.227-11, which allows the contractor to elect to retain title. In certain circumstances, however, FAR 52.227-13 is used instead. The clause at FAR 52.227-13 requires the contractor to assign title to the Government, subject to a license back.

1. The contractor's minimum license is a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government retains title, unless the contractor fails to make the required Bayh-Dole disclosure. FAR 52.227-13(d).

2. The contractor can request, and the Government can grant, greater rights to the contractor, up to and including allowing the contractor to retain ownership. FAR 52.227-13(b)(2).

3. If the contractor is allowed to retain ownership after a greater rights determination, the Government receives a nonexclusive, nontransferable, irrevocable, paid-up, worldwide license to practice the invention or have the invention practiced on its behalf. FAR 52.227-13(c). The Government also receives march-in rights. *Id.*

4. Reasons to Use FAR 52.227-13.

   a. The contractor is not in the US;

   b. The contractor has no place of business in the US;

   c. The contractor is subject to the control of a foreign government;

   d. The invention relates to foreign intelligence or counterintelligence activities;

   e. The invention relates to a Department of Energy Government Owned-Contractor Operated facility for nuclear propulsion or weapons programs; or

   f. Other exceptional circumstances.

XIII. GOVERNMENT USE OF PATENTS

A. Contractor Background Patents

1. "Background patents" are patents that the contractor brings to the table. They are not expressly addressed by the FAR or DFARS. Nonetheless, many contractors will choose to place the Government on notice of their background IP, and the rights (if any) the Government will receive therein. Often, contractors use a format similar to that found in DFARS 252.227-7017 for technical data and computer software.

2. The ownership of background patents may provide a contractor a competitive advantage in the procurement process. Ownership of a patent, however, is not, in and of itself, sufficient to justify a sole-source award to the patent owner.

B. Third-Party Patents.

1. Contractors may need to utilize inventions made by others when working on Government contracts. Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. FAR 27.102(b).

2. In the ideal case, the parties will identify, up front, any patents that will need to be practiced in performing the contract. This allows offerors to

seek a license and include the same in their proposal. Certain requirements are imposed upon patent royalties that the contractor may need to pay as a result. *See* DFARS 252.227-6.

3. Most cases, however, are not ideal. Instead, the parties discover during contract performance that they are practicing a third-party's patent. To address this situation, many Government contracts include three types of clauses: Authorization and Consent (*e.g.*, FAR 52.227-1); Notice and Assistance (*e.g.*, FAR 52.227-2); and Indemnification (*e.g.*, FAR 52.227-3 to -5).

   a. Authorization and consent.

      (1) Authorization and consent may be express (*e.g.*, by contract clause) or implied (*e.g.*, by the Government's conduct). It may be broad (*e.g.*, FAR 52.227-1 Alt. I) or narrow (*e.g.*, FAR 52.227-1). It may also be provided up front (*e.g.*, in the contract) or after the fact (*e.g.*, by the Government inserting itself into litigation between the patentee and the contractor).

      (2) A contractor's use or manufacture of a patented invention for the Government and with the authorization of the Government is deemed use or manufacture for the United States. 28 U.S.C. § 1498(a).

   b. Indemnification.

      (1) Just because the Government accepts liability for its contractors' acts of infringement in the first instance does not mean that the contractor can escape liability for patent infringement entirely. By including an indemnification clause in the contract, the Government can shift the burden of infringement back to the contractor

      (2) Indemnification can be blanket (*e.g.*, FAR 52.227-3), or by specific inclusion and/or exclusion of particular patents (*e.g.*, FAR 52.227-3, Alt. I and Alt. II). Indemnification is, however, always a contractual question.

C. Remedies for Aggrieved Patentees.

1. Judicial Remedy

   a. The sole remedy for use of manufacture of a patented invention by or for the United States is an action at the Court of Federal Claims for the patentee's reasonable and entire compensation. 28 U.S.C. § 1498(a).

b. "Reasonable and entire compensation" is most typically measured as a reasonable royalty for the use or manufacture, though other measures, such as lost profits and cost savings to the Government, have been used in limited circumstances. It also includes attorneys' fees and costs under many circumstances.

c. A patent owner cannot enjoin use of a patented invention by a Government contractor operating with the authorization and consent of the Government. 28 U.S.C. § 1498; 10 U.S.C. § 2386. The patent owner is required to accept a reasonable amount of compensation for the infringement instead.

2. Administrative Remedy (DoD Only)

a. 10 U.S.C. § 2386, which permits DoD appropriations to be used to procure intellectual property licenses, allows DoD to settle patent infringement claims administratively.

b. The administrative claim procedures are set forth at DFARS Subpart 227.70.

c. An advantage of the administrative claims process is that it potentially allows the parties to avoid the time and expense of litigation.

d. Disadvantages of the administrative claims process include "piecemeal" settlements (*e.g.*, settlement on an agency-by-agency basis instead of a Government-wide settlement brokered by the Department of Justice) and the use of agency appropriations (vs. the Judgment Fund for Department of Justice settlements).

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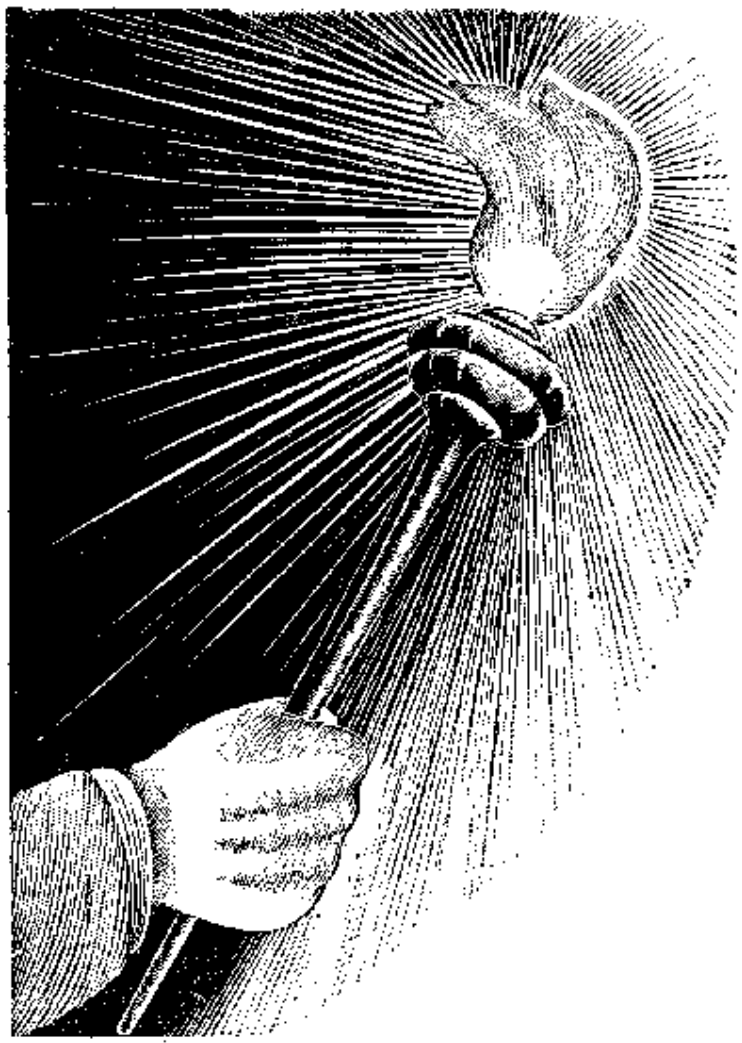
Chapter 17
Ethics in Government Contracting



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CHAPTER 17

ETHICS IN GOVERNMENT CONTRACTING

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CHAPTER 17

ETHICS IN GOVERNMENT CONTRACTING

"Always do right. This will gratify some people and astonish the rest."
Mark Twain

I. REFERENCES

A. Statutes

1. 18 U.S.C. § 208, Acts Affecting A Personal Financial Interest.

2. 41 U.S.C. § 2101 et seq., The Procurement Integrity Act.

3. 18 U.S.C. § 207, Restrictions on Former Officers, Employers, and Elected Officials of the Executive and Legislative Branches.

B. Regulations

1. 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.

2. 5 C.F.R. Part 2637, Regulations Concerning Post Employment Conflict of Interests. These regulations only apply to employees who left Federal service before 1 January 1991. The Office of Government Ethics (OGE), however, continues to rely on them for issuing guidance for employees who left Federal service after 1 January 1991.

3. 5 C.F.R. Part 2640, Interpretations, Exemptions and Waiver Guidance Concerning 18 U.S.C. § 208.

4. 5 C.F.R. Part 2641, Post-Employment Conflict of Interest Restrictions.

5. OGE Memorandum, Summary of Post-Employment Restriction of 18 U.S.C. § 207 (July 29, 2004).

6. Federal Acquisition Regulation (FAR) Part 3 (May 24, 1 2014).

7. Department of Defense (DoD) Defense Federal Acquisition Regulation Supplement (DFARS) Part 203 (July 1, 2011).

8. National Defense Authorization Act for Fiscal Year 2004 (PL 108-136), Section 1125.

C. Directives.

DoD Directive (DODI) 5500.07-R, Joint Ethics Regulation (JER), including changes 1-7 (Nov. 17, 2011).

II. FOCUS AREAS.

A. The conflict of interest prohibitions of 18 U.S.C. § 208.

B. The coverage of the Procurement Integrity Act.

C. The procurement related restrictions on seeking and accepting employment when leaving government service.

III. FINANCIAL CONFLICTS OF INTEREST.

An employee is prohibited from participating personally and substantially in his or her official capacity in any particular matter in which he or she has a financial interest, if the particular matter will have a direct and predictable effect on that interest. 18 U.S.C. § 208; 5 C.F.R. § 2635.402(a).

A. **Applicability**. The financial conflict of interest prohibitions apply in three key situations. Generally, the employee may not work on an assignment that will affect the financial interests of:

1. The employee or of the employee's spouse or minor child.

2. A partner or organization where the employee serves as an officer, director, employee, general partner, or trustee.

3. Someone with whom the employee either has an arrangement for employment or is negotiating for employment.

B. Definitions.

1. **Financial interests.** Defined as stocks, bonds, partnership interests, fee and leasehold interests, mineral and property rights, deeds of trust, liens, options, or commodity futures. 5 C.F.R. § 2635.403(c)(1). The statute specifically defines negotiating for employment as a financial interest. Thus, negotiating for employment is the same as owning stock in a company.

2. **Personally.** Defined as direct participation, or direct and active supervision of a subordinate. 5 C.F.R. § 2635.402(b)(4).

3. **Substantially.** Defined as an employee's involvement that is significant to the matter. 5 C.F.R. § 2635.402(b)(4).

4. **Particular matter.** Defined as a matter involving deliberation, decision, or action focused on the interests of specific persons, or an identifiable class of persons. However, matters of broad agency policy are not particular matters. 5 C.F.R. § 2635.402(b)(3).

5. **Direct and Predictable Effect.** Defined as a close, causal link between the official decision or action and its effect on the financial interest.
5 C.F.R. § 2635.402(b)(1).

C. Imputed Interests.

Under 5 C.F.R. § 2635.402(b)(2), the financial interests of the following persons are imputed to the employee:

1. The employee's spouse;

2. The employee's minor child;

3. The employee's general partner;

4. An organization or entity which the employee serves as an officer, director, trustee, general partner, or employee; and

5. A person with whom the employee is negotiating for employment or has an arrangement concerning prospective employment.

D. Enlisted Members.

18 U.S.C. § 208 does not apply to enlisted members, but the Joint Ethics Regulation (JER) subjects enlisted members to similar regulatory prohibitions. See JER, paras. 1-300.(1)(a) and 5-301. Regulatory implementation of 18 U.S.C. § 208 is found in chapters 2 and 5 of the JER and at 5 C.F.R § 2640.

E. Options for employees with conflicting financial interests.

1. Disqualification. With written notice to, and the approval of, his or her supervisor, the employee must change duties to eliminate any contact or actions affecting that company. 5 C.F.R. § 2635.402(c), 5 C.F.R. § 2640.103(d); JER, para. 2-204.

2. Waiver. An employee otherwise disqualified by 18 U.S.C. § 208(a) may be permitted to participate personally and substantially in a particular matter if the disqualifying interest is the subject of a waiver. Waivers may be "individual" or "blanket." Waivers are appropriate if all other options are inadequate or inappropriate. 5 C.F.R. § 2635.402(d).

a. Individual Waivers. The rules for individual waivers are at 5 C.F.R. § 2635.402(d)(2), 5 C.F.R. § 2640.301, and JER, para. 5-302. An agency may grant an individual waiver on a case-by-case basis after the employee fully discloses the financial interest to the agency. The criterion is whether the employee's conflicting financial interest is not so substantial as to affect the integrity of his or her service to the agency. 5 C.F.R. § 2635.402(d)(2)(ii); 5 C.F.R. § 2640.301(a).

b. Blanket (or Regulatory) Waivers. The rules for blanket waivers are at 5 C.F.R. § 2640, Subpart B. Blanket waivers include the following:

(1) Diversified Mutual Funds. Diversified funds do not concentrate in any industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(a). Owning a diversified mutual fund does not create a financial conflict of interest. 5 C.F.R. § 2640.201(a).

(2) Sector Funds. Sector funds are those funds that concentrate in an industry, business, or single country other than the United States. 5 C.F.R. § 2640.102(q).

(a) Owning a sector fund may create a conflict of interest, but there is a regulatory exemption if the holding that creates the conflict is not invested in the sector where the fund or funds are concentrated. 5 C.F.R. § 2640.201(b)(1).

(b) An employee may participate in a particular matter affecting one or more holdings of a sector mutual fund where the disqualifying financial interest in the matter arises because of ownership of an interest in the fund and the aggregate market value of interests in any sector fund or funds does not exceed $50,000. 5 C.F.R. § 2640.201(b)(2).

(3) De Minimus. Regulations create a *de minimis* exception for ownership by the employee, spouse, or minor child in:

c. Publicly traded securities, or long-term Federal government securities, or municipal securities; and

(1) The aggregate value of the holdings of the employee, spouse, or minor child does not exceed $15,000. 5 C.F.R. § 2640.202(a).

3. Divestiture. The employee may sell the conflicting financial interest to eliminate the conflict. 5 C.F.R. § 2640.103(e).

F. Negotiating for Employment.

1. The term "negotiating" is interpreted broadly. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991).

2. No special action is required. Any discussion regarding opportunities, however tentative, may be negotiating for employment. Something as simple as going to lunch to discuss future prospects could be the basis for a conflict of interest.

3. Negotiating for employment is the same as buying stock in a company. If an employee could own stock in a company without creating a conflict of interest with his official duties (e.g., the company does not do business with the government), then that person may negotiate for employment with that company.

4. Conflicts of interest are always analyzed in the present tense. If an employee interviews for a position and decides not to work for that company, then he or she is free to later work on matters affecting that company.

5. **Seeking Employment.**

a. OGE regulations contain additional requirements for disqualification of employees who are "seeking employment." 5 C.F.R. §§ 2635.601 - 2635.606. "Seeking employment" is a term broader than "negotiating for employment" found in 18 U.S.C. § 208.

b. An employee begins "seeking employment" if he or she has directly or indirectly:

(1) Engaged in employment negotiations with any person. "Negotiations" means discussing or communicating with another person, or that person's agent, with the goal of reaching an agreement for employment. This term is not limited to discussing specific terms and conditions of employment. 5 C.F.R. § 2635.603(b)(1)(i).

(2) Made an unsolicited communication to any person or that person's agent, about possible employment. 5 C.F.R. § 2635.603(b)(1)(ii).

(3) Made a response other than an immediate rejection to an unsolicited communication from any person or that person's agent about possible employment. 5 C.F.R. § 2635.603(b)(1)(iii).

c. An employee has not begun "seeking employment" if he or she makes an unsolicited communication for the following reasons:

(1) For the sole purpose of requesting a job application. 5 C.F.R. § 2635.603(b)(1)(ii)(A).

(2) For the sole purpose of submitting a résumé or employment proposal only as part of an industry or other discrete class. 5 C.F.R. § 2635.603(b)(1)(ii)(B).

d. An employee is no longer "seeking employment" under the following circumstances:

(1) The employee or prospective employer rejects the possibility of employment and all discussions have terminated. 5 C.F.R. § 2635.603(b)(2)(i). However, a statement by the employee that merely defers discussions until the foreseeable future does not reject or close employment discussions. 5 C.F.R. § 2635.603(b)(3).

(2) Two months have lapsed after the employee has submitted an unsolicited résumé or employment proposal with no response from the prospective employer. 5 C.F.R. § 2635.603(b)(2)(ii).

6. The Stop Trading on Congressional Knowledge Act.

a. During 2011, Congress faced increased scrutiny regarding the lack or restrictions imposed on legislators' trading activity. As a result, Congress passed the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. No. 112-105, 126 Stat. 291 (2012)

b. The STOCK Act includes a provision that applies to OGE 278 filers who are negotiating, or have secured, future employment or compensation.

c. OGE 278 filers may not directly negotiate, or have any agreement of future employment or compensation, unless such individual, within 3 business days after the commencement of such negotiation or agreement of future employment or compensation, files with the individual's supervising ethics

office a statement, signed by such individual, regarding such negotiations or agreement, including the name of the private entity or entities involved in such negotiations or agreement, and the date such negotiations or agreement commenced.

d. OGE 278 filers shall recuse themselves whenever there is a conflict of interest, or appearance of a conflict of interest, for such individual with respect to the subject matter of the required statement, and shall notify the individual's supervising ethics office of such recusal.

7. Disqualification and Waiver.

a. With the approval of his or her supervisor, the employee must change duties to eliminate any contact or actions with the prospective employer. 5 C.F.R. § 2635.604(a)-(b). Written notice of the disqualification is required.

b. An employee may participate personally and substantially in a particular matter having a direct and predictable impact on the financial interests of the prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. § 208(b)(1) or (b)(3). The waivers are described in 5 C.F.R. § 2635.402(d) and 5 C.F.R. Part 2640.

G. Penalties.

1. Violating 18 U.S.C. § 208 may result in imprisonment up to one year, or, if willful, five years.

2. In addition, a fine of $5000 to $250,000 is possible. See 18 U.S.C. § 3571.

3. FAR 3.1004(a) and 52.203-13 require contractor reporting of conflicts of interests that violate 18 U.S.C. § 208.

IV. THE PROCUREMENT INTEGRITY ACT (PIA) AS CHANGED BY THE CLINGER-COHEN ACT.

Pub. L. No. 104-106, §§ 4001-4402, 110 stat. 186, 659-665 (1996). Section 27, Office of Federal Procurement Policy Act (OFPPA) amendments of 1988, 41 U.S.C. § 423, has been completely rewritten by the Clinger-Cohen Act of 1996. Changes have been made to FAR, part 3, and to the DFARS.

A. Background of the Amended Procurement Integrity Act (PIA).

1. Effective date: January 1, 1997.

2. The basic provisions of the new statute are set forth in FAR 3.104-2.

   a. Prohibitions on disclosing and obtaining procurement information apply beginning January 1, 1997 to:

      (1) Every competitive federal procurement for supplies or services,

      (2) From non-Federal sources,

      (3) Using appropriated funds.

   b. Requirement to report employment contacts applies beginning January 1, 1997 to competitive federal procurements above the simplified acquisition threshold ($150,000).

   c. Post-employment restrictions apply to former officials for services provided or decisions made on or after January 1, 1997.

   d. Former officials who left government service before January 1, 1997 are subject to the restrictions of the PIA as it existed prior to its amendment.

3. Interference with duties. An official who refuses to cease employment discussions is subject to administrative actions in accordance with 5 C.F.R. § 2635.604(d) (annual leave, leave without pay, or other appropriate administrative action), if the disqualification interferes substantially with the official's ability to perform his or her assigned duties. FAR 3.104-11(c). See Smith v. Dep't of Interior, 6 M.S.P.R. 84 (1981) (employee who violated conflict of interest regulations by acting in official capacity in matters affecting his financial interests is subject to removal).

4. Coverage. Applies to "persons," "agency officials," and "former officials" as defined in the PIA. See GEO Group, Inc. v. United States, 100 Fed. Cl. 223 (2011) (finding that the PIA, as well as the organizational conflict of interest rules, do not cover situations in which a bidder directly obtains information from a competing bidder).

5. Section 27 of the PIA has been implemented through FAR 3.104-2. This provision of the FAR reminds employees that while their participation in a Federal agency procurement may not be considered "participating personally and substantially in a Federal agency procurement" for purposes of certain requirements in the PIA, nevertheless there will be instances where the employee will be considered to be participating personally and substantially for purposes of 18 USC 208. FAR 3.104-2(b).

6. Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.

7. Restrictions on disclosure of information. 41 U.S.C. § 2102(a). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:

   a. Present or former federal officials;

   b. Persons (such as contractor employees) who are currently advising the federal government with respect to a procurement;

   c. Persons (such as contractor employees) who have advised the federal government with respect to a procurement, but are no longer doing so; and

   d. Persons who have access to contractor bid or proposal information by virtue of their office, employment, or relationship.

8. Restrictions on obtaining information. 41 U.S.C. § 2102(b). Persons (other than as provided by law) are forbidden from knowingly obtaining contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

9. Contractor bid or proposal information. 41 U.S.C. § 2101(2). Defined as any of the following that has not been disclosed publicly:

   a. Cost or pricing data as defined in 10 U.S.C. § 2306a and 41 U.S.C. § 3501(a);

   b. Indirect costs or labor rates;

   c. Proprietary information marked in accordance with applicable law or regulation; and

   d. Information marked by the contractor as "contractor bid or proposal information" in accordance with applicable law or regulation. If the contracting officer disagrees, he or she must give the contractor notice and an opportunity to respond prior to release of marked information. FAR 3.104-4. See Chrysler Corp. v. Brown, 441 U.S. 281 (1979); CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. den. 485 U.S. 917 (1988).

10. Source Selection Information. 41 U.S.C. § 2101(7). Defined as any of the following that has not been disclosed publicly:

a. Bid prices before bid opening;

b. Proposed costs or prices in negotiated procurement;

c. Source selection plans;

d. Technical evaluation plans;

e. Technical evaluations of proposals;

f. Cost or price evaluations of proposals;

g. Competitive range determinations that identify proposals that have a reasonable chance of being selected for award;

h. Rankings of bids, proposals, or competitors;

i. Reports and evaluations of source selection panels, boards, or advisory councils; and

j. Other information marked as "source selection information" if release would jeopardize the integrity of the competition.

B. Reporting Non-Federal Employment Contacts.

1. Mandatory Reporting Requirement. 41 U.S.C. § 2103(a). An agency official who is participating personally and substantially in an acquisition over the simplified acquisition threshold must report employment contacts with bidders or offerors. Reporting may be required even if the contact is through an agent or intermediary. FAR 3.104-5.

a. Report must be in writing.

b. Report must be made to supervisor and designated agency ethics official.

(1) Designated agency ethics official in accordance with 5 C.F.R. § 2638.201.

(2) Deputy agency ethics officials in accordance with 5 C.F.R. § 2638.204 if authorized to give ethics advisory opinions.

(3) Alternate designated agency ethics officials in accordance with 5 C.F.R. § 2638.202(b). See FAR 3.104-3.

c. Additional requirements. The agency official must:

(1) Promptly reject employment; or

(2) Disqualify him/herself from the procurement until authorized to resume participation in accordance with 18 U.S.C. § 208.

(a) Disqualification notice. Employees who disqualify themselves must submit a disqualification notice to the head of the contracting activity (HCA) or designee, with copies to the contracting officer, source selection authority, and immediate supervisor. FAR 3.104-5(b).

(b) Note: 18 U.S.C. § 208 (Financial Conflict of Interest) requires employee disqualification from participation in a particular matter if the employee has certain financial interests in addition to those which arise from employment contacts.

2. Both officials and bidders who engage in prohibited employment contacts are subject to criminal penalties and administrative actions.

3. Participating personally and substantially means active and significant involvement in:

a. Drafting, reviewing, or approving a statement of work;

b. Preparing or developing the solicitation;

c. Evaluating bids or proposals, or selecting a source;

d. Negotiating price or terms and conditions of the contract; or

e. Reviewing and approving the award of the contract. FAR 3.104-1.

4. The following activities are generally considered **not** to constitute personal and substantial participation:

a. Certain agency level boards, panels, or advisory committees that make recommendations regarding approaches for satisfying broad agency-level missions or objectives;

b. General, technical, engineering, or scientific effort of broad applicability and not directly associated with a particular procurement;

c. Clerical functions in support of a particular procurement; and

d. For OMB Circular A-76 cost comparisons: participating in management studies; preparing in-house cost estimates; preparing "most efficient organization" (MEO) analyses; and furnishing data or technical support **to be used by others** in the development of performance standards, statements of work, or specifications. FAR 3.104-1.

C. **Post-Government Employment Restriction**. See FAR 3.104-3(d).

1. **One-Year Ban.** 41 U.S.C. § 2104(a). A former official of a Federal agency may not accept compensation as an employee, officer, director, or consultant from a contractor that has been awarded a contract **in excess of $10 million** (inclusive of options), within a **period of one-year** after such former official served, with respect to that contract, as:

a. Contracting officer (procuring or administrating CO),

b. Source Selection Authority (SSA),

c. Member of the Source Selection Evaluation Board (SSEB),

d. The chief of a financial or technical evaluation team, or

e. Program manager or deputy program manager.

f. This one-year ban also applies with to a government official that personally made a decision with respect to that contract to—

(1) Award a contract, subcontract, modification of a contract or subcontract, or issue a task order or delivery order in excess of $10 million;

(2) Establish overhead or other rates valued in excess of $10 million;

(3) Approve a contract payment or payments in excess of $10 million; or

(4) Pay or settle a claim in excess of $10 million.

2. Start of the One-Year Ban Period.

a. If the former official was in a specified position (source selection type) on the date of contractor selection, but not on the date of award, the ban begins on the date of selection.

b. If the former official was in a specified position (source selection type) on the date of award, the ban begins on the date of award.

c. If the former official was in specified position (program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.

d. If the former official personally made certain decisions (award, establish overhead rates, approve payment, settle claim), the ban begins on date of decision. FAR 3.104-3.

3. In "excess of $10 million" means:

a. The value or estimated value of the contract including options;

b. The total estimated value of all orders under an indefinite-delivery, indefinite-quantity contract, or a requirements contract;

c. Any multiple award schedule contract, unless the contracting officer documents a lower estimate;

d. The value of a delivery order, task order, or order under a Basic Ordering Agreement;

e. The amount paid, or to be paid, in a settlement of a claim; or

f. The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base. See FAR 3.104-3.

4. The one-year ban does not prohibit an employee from working for any division or affiliate that does not produce the same or similar product or services. 41 U.S.C. § 423(d)(2).

5. Ethics Advisory Opinion. Agency officials and former agency officials may request an advisory opinion as to whether he or she is

precluded from accepting compensation from a particular contractor. FAR 3.104-6.

D. Penalties and Sanctions. FAR 3.104-7 and 3.104-8.

1. Criminal Penalties. Violating the prohibition on disclosing or obtaining procurement information may result in confinement for up to five years and a fine if done in exchange for something of value, or to obtain or give a competitive advantage.

2. Civil Penalties.

   a. The Attorney General may take civil action for wrongfully disclosing or obtaining procurement information, failing to report employment contacts, or accepting prohibited employment.

   b. Civil penalty is up to $50,000 (individuals) and up to $500,000 (organizations) plus twice the amount of compensation received or offered.

3. If violations occur, the agency shall consider cancellation of the procurement, rescission of the contract, suspension or debarment, adverse personnel action, and recovery of amounts expended by the agency under the contract. A new contract clause advises contractors of the potential for cancellation or rescission of a contract, recovery of any penalty prescribed by law, and recovery of any amount expended under the contract. FAR 52.203-8. Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations. FAR 52.203-10.

4. A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process. See Compliance Corp., B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, aff'd on recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435; Compliance Corp. v. United States, 22 Cl. Ct. 193 (1990), aff'd, 960 F.2d 157 (Fed. Cir. 1992) (contracting officer has discretion to disqualify from competition a bidder who obtained proprietary information through industrial espionage not amounting to a violation of the PIA); see also NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process).

5. Limitation on protests. 41 U.S.C. § 2106. No person may file a protest, and GAO may not consider a protest, alleging a PIA violation unless the protester first reported the alleged violation to the agency

within 14 days of its discovery of the possible violation. FAR 33.102(f); see also 41 U.S.C. §§ 2102 – 2104.

6. Contracting officer's duty to take action on possible violations.

   a. Determine impact of violation on award or source selection.

   b. If no impact, forward information to individual designated by agency. Proceed with procurement, subject to contrary instructions.

   c. If impact on procurement, forward information to the HCA or designee. Take further action in accordance with HCA's instructions. FAR 3.104-7.

V. REPRESENTATIONAL PROHIBITIONS.

A. General Rule.

1. 18 U.S.C. § 207 and its implementing regulations bar certain acts by former employees that may reasonably give the appearance of making unfair use of their prior employment and affiliations.

2. A former employee involved in a particular matter while working for the government must not "switch sides" after leaving government service to represent another person on that matter. 5 C.F.R. § 2637.101.

3. 18 U.S.C. § 207 does not bar a former employee from working for any public or private employer after government service. The regulations state that the statute is not designed to discourage government employees from moving to and from private positions. Rather, such a "flow of skills" promotes efficiency and communication between the government and the private sector, and is essential to the success of many government programs. The statute bars only certain acts "detrimental to public confidence." 5 C.F.R. § 2637.101.

B. **Lifetime Ban**.

1. 18 U.S.C. § 207(a)(1) imposes a lifetime prohibition on the former employee against communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

   a. The government is a party, or has a direct and substantial interest in the matter;

b. The former officer or employee participated personally and substantially in the matter while in his official capacity; and

c. At the time of the participation, specific parties other than the government were involved.

d. Note that when the term "lifetime" is used, it refers to the lifetime of the particular matter. To the extent the particular matter is of limited duration, so is the coverage of the statute. Further, it is important to distinguish among particular matters. The statute does not apply to a broad category of programs when the specific elements may be treated as severable.

C. **Two-Year Ban**.

1. 18 U.S.C. § 207(a)(1) prohibits, for two years after leaving federal service, a former employee from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

a. The government is a party, or has a direct and substantial interest in the matter; and

b. The former officer or employee knew or should have known that the matter was pending under his official responsibility during the one year period prior to leaving federal service.

c. At the time of participation, specific parties other than the government were involved.

D. **One-Year Ban**.

1. 18 U.S.C. § 207(c) prohibits, for one year after leaving federal service, certain "senior employees" (determined by specified pay thresholds, typically general officer or SES-level) from communicating or appearing with the intent to influence a particular matter, on behalf of anyone other than the government, when:

a. The communication or appearance involves the department or agency the officer or employee served during his last year of federal service as a senior employee; and

b. The person represented by the former officer or employee seeks official action by the department or agency concerning the matter.

2. 18 U.S.C. § 207(h) permits DoD to be divided into components for purposes of restrictions imposed by § 207(c). Thus, a Navy Admiral is

prohibited from communicating, with the intent to influence official action, with Department of Navy officials. However, the officer may communicate with representatives of other services and OSD (unless he was assigned to a joint command during his last year of service).

E. 18 U.S.C. § 207 does not prohibit an employee from working for any entity, but it does restrict how a former employee may work for the entity.

1. The statute does not bar behind the scenes involvement. But see January 19, 2001 opinion from the Department of Justice to OGE suggesting that a former employee who is the sole proprietor of a business "working behind the scenes" may constitute "communication with the intent to influence" Government decisions. http://www.justice.gov/olc/207cfinal.htm.

2. A former employee may ask questions about the status of a particular matter, request publicly available documents, or communicate factual information unrelated to an adversarial proceeding.

F. Military officers on terminal leave.

1. Military officers on terminal leave are still on active duty. While they may begin a job with another employer during this time, their exclusive loyalty must remain with the government until their retirement or ETS pay date.

2. Two restrictions apply to non-government employment during terminal leave:

a. All officers and employees are prohibited from representing anyone in any matter in a U.S. forum, or in any claim against the United States. 18 U.S.C. § 205.

b. Commissioned officers are prohibited from holding a state or local government office, or otherwise exercising sovereign authority. 10 U.S.C. § 973. This does not prohibit employment by a state or local government; it only prohibits the exercise of governmental authority. For example, a police officer or judge exercises governmental authority; a motor pool chief does not.

VI. SECTION 847 OF PUB. L. 110-181 - COVERED DOD EMPLOYEES

A. On January 15, 2009, the Department of Defense (DoD) issued an interim rule enacting Section 847 of Pub. L. 110-181 and requiring certain "Covered DOD officials" to acquire an ethics opinion letter prior to going to work for a DoD contractor. DFARS 203.171-3

B. The DFARS defines covered DoD officals as DoD personnel who leave or left federal service on or after January 28, 2008, and who meet either of the following two service criteria:

1. They served

   a. As a Presidential Appointee;

   b. In the Senior Executive Service; or

   c. In a general or flag officer position in the pay grade of 0-7 or higher.
   and

   d. They participated personally and substantially in an acquisition as defined in Title 41 of the U.S. Code with a value in excess of $10 million, or they served in one of several specified positions, such as a source selection authority; or,

2. They served in one of several specified positions including:

   a. program manager (or deputy),

   b. contracting officer (administrative or procuring), or

   c. source selection authority or source selection evaluation board member for a contract with a value in excess of $10 million. DFARS 252.203-7000.

C. Pursuant to DFARS 203.171-3, if these covered DoD officials, within two years after leaving DoD service, expect to receive compensation from a DoD contractor, they must first request a written opinion from the appropriate DoD ethics counselor. This opinion letter must advise the covered DoD official of any post-employment restrictions on activities that the official may undertake on behalf of a contractor.

D. This rule also applies to DoD contractors, who, under a change to DFARS clause 252.203-7000, are charged with policing compliance with this new rule and must ensure that the covered DoD officials they recruit comply with this new provision. Under this rule, DoD contractors are prohibited from compensating a covered DoD official without first verifying that the official requested and received a written opinion letter from the appropriate ethics counselor, or properly requested an opinion letter at least 30 days prior to receiving compensation. Knowing failure to do so is now specifically designated as a basis for suspension or debarment.

VII. DEALING WITH CONTRACTORS.

A. General Rule. Government business shall be conducted in a manner that is above reproach, with complete impartiality, and with preferential treatment for none. FAR 3.101-1.

B. Some pre-contract contacts with industry are permissible, and in fact are encouraged where the information exchange is beneficial (e.g., necessary to learn of industry's capabilities or to keep them informed of our future needs). FAR Part 5. Some examples are:

1. Research and development. Agencies will inform industrial, educational, research, and non-profit organizations of current and future military RDT&E requirements. However, a contracting officer will supervise the release of the information. AR 70-38, para. 1-5.

2. Unsolicited proposals. Companies are encouraged to make contacts with agencies before submitting proprietary data or spending extensive effort or money on these efforts. FAR 15.604.

VIII. RELEASE OF ACQUISITION INFORMATION.

A. The integrity of the acquisition process requires a high level of business security.

B. Contracting officers may make available the maximum amount of information to the public except information (FAR 5.401(b)):

1. On plans that would provide undue discriminatory advantage to private or personal interests.

2. Received in confidence from offerors. 18 U.S.C. § 1905; FAR 15.506(e).

3. Otherwise requiring protection under the Freedom of Information Act.

4. Pertaining to internal agency communications (e.g., technical reviews).

C. Information regarding unclassified long-range acquisition estimates is releasable as far in advance as practicable. FAR 5.404.

D. General limitations on release of acquisition information. FAR 14.203-2; FAR 15.201.

1. Agencies should furnish identical information to all prospective contractors.

2. Agencies should release information as nearly simultaneously as possible, and only through designated officials (i.e., the contracting officer).

3. Agencies should not give out advance information concerning future solicitations to anyone.

IX. FOREIGN GOVERNMENT EMPLOYMENT

A. Retired military members must obtain a waiver to work for a foreign government.

1. 37 U.S.C. § 908 allows foreign government employment with approval of the Service Secretary and the Secretary of State.

2. This statutory requirement applies to employment by corporations owned or controlled by foreign governments, but does not apply to independent foreign companies. It does not preclude retired officers from working as an independent consultant to a foreign government, as long as they are careful to maintain their independence.

3. When seeking employment outside of the DOD contractor community, a military retiree should always ask, "Is this company owned or controlled by a foreign government?"

B. Retired officers who represent a foreign government or foreign entity may be required to register as a foreign agent. 22 U.S.C. § 611; 28 CFR § 5.2.

X. MISCELLANEOUS PROVISIONS.

A. Use of title. Retirees may use military rank in private commercial or political activities as long as their retired status is clearly indicated, no appearance of DOD endorsement is created, and DOD is not otherwise discredited by the use. JER, para. 2-304.

B. Wearing the uniform. Retirees may only wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social, or ceremonial occasions. AR 670-1, para. 29-4.

C. OGE 278s. Termination Public Financial Disclosure Reports must be filed within 30 days of retirement.

D. Inside Information. All former officers and employees must protect "inside information," trade secrets, classified information, and procurement sensitive information after leaving federal service. 18 U.S.C. § 794.

E. Gifts from Foreign Governments. Military retirees and their immediate families may not retain gifts of more than "minimal value" ($335 as of February 2011) from foreign governments. 5 U.S.C. § 7342.

F. Travel, Meals & Reimbursements. Government employees may accept travel expenses to attend job interviews if such expenses are customarily paid to all similarly situated job applicants. These payments must be reported on Schedule B of the OGE 278. 5 C.F.R. § 2635.204(e)(3).

G. On October 5, 2012, the President signed the Government Charge Card Abuse Prevention Act, Pub. L No. 112-194, into law. The Act amends 10 U.S.C. § 2784 to implement changes to government charge card policies, including:

1. Card holders may not be approving official for their own purchases.

2. Charges must be reconciled with receipts and supporting documentation.

3. Agencies must have appropriate penalties for violations, up to and including dismissal from employment.

4. New reporting requirements to OMB for certain violations.

5. Credit checks and minimum credit score before travel cards can be issued.

XI. CONTRACTOR PERSONAL CONFLICTS OF INTEREST

A. **Background.** In November 2011, DoD issued a final rule amending the FAR to include a new subpart (FAR 3.11) and new contract clause (52.203-16) addressing personal conflicts of interest of Federal contractor and subcontractor employees performing "acquisition functions closely associated with inherently governmental functions." The new rule implements the Duncan Hunter National Defense Authorization Act, 41 U.S.C. § 2303.

B. **Rule.** The new rule requires Federal government contractors and qualifying subcontractors to:

1. Screen covered employees for personal conflicts of interest through the use of disclosure forms;

2. Assign only employees without personal conflicts to perform certain tasks under government contracts;

3. Ensure that employees do not use non-public information for personal gain;

4. Report violations to their contracting officer.

C. **Applicability.** The new FAR clause 52.203-16, Preventing Personal Conflicts of Interest, must be included in Federal contracts and task or delivery orders issued after December 2, 2011 that require contractor employees to perform tasks closely associated with "inherently governmental functions." The new rule does not apply to commercial item contracts.

D. **Definitions.** See new FAR Subpart 3.11.

XII. CONCLUSION.

A. The ethical rules governing procurement officials are stricter than the general rules governing federal employees.

B. You must be familiar with the various ethical rules stated in the PIA and other statutes governing employment of former Federal employees.

Chapter 18A
Bid Protests

2014 Contract Attorneys Deskbook

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CHAPTER 18A

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CHAPTER 18A

BID PROTESTS

"The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly. On occasion, bidders or others interested in government procurements may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that they have been unfairly denied a contract or an opportunity to compete for a contract."

OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (9th ed. 2009)

I. REFERENCES

A. Competition in Contracting Act (CICA), 31 U.S.C. §§3551-3556.

B. Tucker Act, 28 U.S.C. §1491.

C. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. §1491(a)(3).

D. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, §12, 110 Stat. 3870, 3874 (1996), 28 U.S.C. §1491(b)(1).

E. Government Accountability Office (GAO) Protest Regulations, 4 C.F.R. Part 21.

F. Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 33.1.

G. Agency FAR Supplements. See Appendix A for listing.

H. Rules of the United States Court of Federal Claims (RCFC), available at http://www.uscfc.uscourts.gov/sites/default/files/court_info/20120702_rules/12.07.02%20FINAL%20VERSION%20OF%20RULES.pdf

I. Bid Protests at GAO: A Descriptive Guide (9th ed. 2009), Office of General Counsel, U.S. GAO (GAO-09-471SP). Available at http://www.gao.gov/products/GAO-09-471SP.

II. INTRODUCTION

A. **Protest Defined.** A "protest" is a written objection by an interested party to a solicitation or other agency request for bids or offers, cancellation of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. FAR 33.101.

B. **Background.** The protest system established by the Competition in Contracting Act of 1984 (CICA) and implemented by Government Accountability Office (GAO) Bid Protest Regulations is designed to provide for the expeditious resolution of protests with only minimal disruption to the procurement process. DataVault Corp., B-249054, Aug. 27, 1992, 92-2 CPD ¶ 133.

C. **Jurisdiction.** Multiple fora. An interested party may protest to the agency, the GAO, or the United States Court of Federal Claims (COFC). See Appendix B. Section III of this outline addresses protests filed with the agency, Section IV addresses protests filed with the GAO, and Section V addresses protests filed with the COFC.

D. **Remedies**.

1. Generally, protest fora can recommend or direct such remedial action as will bring the procurement into compliance with relevant acquisition laws and regulations. Normally however, neither directed contract award nor lost profits is available. Remedies are discussed further in Section IV, paragraph K, *infra*.

2. Injunctive or Similar Relief. Whether the filing of a protest to challenge a contract solicitation or an award creates an automatic stay or suspension of any work on the procurement is of critical importance and varies from forum to forum. Such relief is discussed in the Section for the relevant forum, *infra*.

III. AGENCY PROTESTS.

A. **Background and Policy.** In late 1995, President Clinton issued an Executive Order directing all executive agencies to establish alternative disputes resolution (ADR) procedures for bid protests. The order directs agency heads to create a system that, "to the maximum extent possible," will allow for the "inexpensive, informal, procedurally simple, and expeditious resolution of protests." Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995). FAR 33.103 implements this Order.

1. Open and frank discussions. Prior to the submission of a protest, all parties shall use "their best efforts" to resolve issues and concerns raised by an "interested party" **at the contracting officer level**. "Best efforts" include conducting "open and frank discussions" among the parties.

2. Objectives. FAR 33.103(d). The goal of an effective agency protest system is to:

   a. resolve agency protests effectively;

   b. help build confidence in the federal acquisition system; and

   c. reduce protests to the GAO and other judicial protest fora.

B. Authority.

1. Agency protests are protests filed[1] directly with the contracting officer or other cognizant government official within the agency. These protests are governed by FAR 33.103, and agency supplements such as AFARS 5133.103, NMCARS 5233.103, AFFARS 5333.103. See Appendix A for a complete list of agency FAR supplement protest references.

2. Contracting officers **must consider all protests and seek legal advice** regarding all protests filed with the agency. FAR 33.102(a).

C. Procedures.

1. Procedures tend to be informal and flexible.

   a. Protests must be clear and concise. Failure to submit a coherent protest may be grounds for dismissal. FAR 33.103(d)(1).

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[1]FAR 33.101 defines "filed" to mean:

> [t]he complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

b. "Interested parties" may request review at a "level above the contracting officer" of any decision by the contracting officer that allegedly violated applicable statute or regulation and, thus, prejudiced the offeror. FAR 33.103(d)(4). Agencies are responsible for implementing procedures for this review.

2. Timing of Protests.

a. Protests challenging the propriety of a solicitation must be filed **prior to bid opening or the closing date for receipt of proposals**. FAR 33.103(e).

b. In all other cases, the protests must be filed with the agency **within 10 days of when the protester knew or should have known of the basis for the protest**. For "significant issues" raised by the protester, however, the agency has the discretion to consider the merits of a protest that is otherwise untimely. FAR 33.103(e).

3. Suspension of Procurement - Regulatory Stay.

a. Pre-Award Stay. The contracting officer **shall not** make award if an agency protest is filed before award. FAR 33.103(f)(1) imposes an administrative stay of the contract award.

(1) The agency may override the stay if one of the following applies:

(a) contract award is justified in light of "urgent and compelling" reasons; or

(b) a prompt award is in "the best interests of the Government."

(2) The override decision must be made in writing and then approved by an agency official "at a level above the contracting officer" or another official pursuant to agency procedures. FAR 33.103(f)(1).

(3) If the contracting officer elects to withhold award, he must inform all interested parties of that decision. If appropriate, the contracting officer should obtain extensions of bid/proposal acceptance times from the offerors. If the contracting officer cannot obtain extensions, he should consider an override of the stay and proceed with making contract award. FAR 33.103(f)(2).

b. Post-Award Stay. If the agency receives a protest within 10 days of contract award or 5 days of a "required" debriefing date offered by the agency,[2] the contracting officer shall suspend contract performance immediately. FAR 33.103(f)(3).

(1) The agency may override the stay if one of the following applies:

(a) contract performance is justified in light of "urgent and compelling" reasons; or

(b) contract performance is in "the best interests of the Government."

(2) The override determination must be made in writing and then approved by an agency official "at a level above the contracting officer" or another official pursuant to agency procedures. FAR 33.103(f)(3).

4. Protesters are **not required** to exhaust agency administrative remedies.

D. Processing Protests.

1. Protesters generally present protests to the contracting officer, but they may also request an independent review of the protest at a level above the contracting officer, in accordance with agency procedures. Solicitations should advise offerors of this option. FAR 33.103(d)(4).

a. Agency procedures shall inform the protester whether this independent review is an alternative to consideration by the contracting officer or an "appeal" of a contracting officer's protest decision.

b. Agencies shall designate the official who will conduct this independent review. The official need not be in the supervisory chain of the contracting officer. However, "when practicable," the official designated to conduct the independent review "should" not have previous "personal involvement" in the procurement.

c. **NOTE:** If this "independent review" is an appeal of the contracting officer's initial protest decision, it does **NOT** extend GAO's timeliness requirements. *See infra* paragraph IV.E.1.g.

[2] See FAR 15.505 and FAR 15.506.

2. Agencies "shall make their best efforts" to resolve agency protests within 35 days of filing. FAR 33.103(g).

3. Discovery. To the extent permitted by law and regulation, the agency and the protester may exchange information relevant to the protest. FAR 33.103(g).

4. The agency decision shall be "well reasoned" and "provide sufficient factual detail explaining the agency position." The agency must provide the protester a written copy of the decision via a method that provides evidence of receipt. FAR 33.103(h).

E. **Remedies.** FAR 33.102.

1. Failure to Comply with Applicable Law or Regulation. FAR 33.102(b). If the agency head determines that, as a result of a protest, a solicitation, proposed award, or award is improper, he may:

   a. take any action that the GAO could have "recommended," had the protest been filed with the GAO; and,

   b. award costs to the protester for prosecution of the protest.

2. Misrepresentation by Awardee. If, as a result of awardee's **intentional** or **negligent** misstatement, misrepresentation, or miscertification, a post-award protest is sustained, the agency head may require the awardee to reimburse the government's costs associated with the protest. The government may recover this debt by offsetting the amount against **any** payment due the awardee under **any** contract between the awardee and the government.[3] This provision also applies to GAO protests. FAR 33.102(b)(3).

3. Follow-On Protest. If unhappy with the agency decision, the protester may file its protest with either the GAO or COFC (see Appendix B). If the vendor elects to proceed to the GAO, it must file its protest within 10 days of receiving notice of the agency's **initial adverse action**.[4] 4 C.F.R. § 21.2(a)(3).

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[3] In determining the liability of the awardee, the contracting officer shall take into consideration "the amount of the debt, the degree of fault, and the costs of collection." FAR 33.102(b)(3)(ii).

[4] In its Descriptive Guide, the GAO advises that it applies a "straightforward" interpretation of what constitutes notice of adverse agency action. Specific examples include: bid opening; receipt of proposals; rejection of a bid or proposal; or contract award. OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (9th ed. 2009). Available at: **http://www.gao.gov/assets/210/203631.pdf**.

IV. GOVERNMENT ACCOUNTABILITY OFFICE (GAO).

A. **Statutory Authority.** The Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56, is the current statutory authority for GAO bid protests of federal agency procurements. 31 U.S.C. § 3533 authorizes GAO to issue implementing regulations.

B. **Regulatory Authority.** The GAO's bid protest rules are set forth at 4 C.F.R. Part 21. FAR provisions governing GAO bid protests are at FAR 33.104. Agency FAR supplements contain regulatory procedures for managing GAO protests. See generally AFARS 5133.104; AFFARS 5333.104; NMCARS 5233.104; DLAD 33.104. See also Appendix A, listing all agency FAR supplement protest references.

C. **Who May Protest?**

1. 31 U.S.C. § 3551(1) and 4 C.F.R. § 21.1(a) provide that an "interested party" may protest to the GAO.

2. An "**interested party**" is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 31 U.S.C § 3551(2); 4 C.F.R. § 21.0(a)(1).

a. **Before** bid opening or proposal submission due date, a protester must be a **prospective bidder or offeror with a direct economic interest**. A prospective bidder or offeror is one who has expressed an interest in competing. Integral Sys., Inc., B-405303, Aug. 16, 2011, 2011 CPD ¶ 161. ITT Elec. Sys., Inc., B-406405, B-406405.2, May 21, 2012, 2012 CPD ¶ 174.

b. **After** bid opening or the submission of proposals, a protester must be an **actual bidder or offeror with a direct economic interest**.

(1) Next-in-Line. A bidder or offeror who is "**next-in-line**" for award is most likely an interested party. However, if a protester cannot receive award if it prevails on the merits, it is not an interested party. Comspace Corp., B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186 (contractor not in line for award where electronic quote not properly transmitted); Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 (protester not an interested party where an intervening offeror has a higher technical score and a lower cost); Watkins Sec. Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108 (highest priced of three technically equal bidders was not in line for award); International Data

Prods., Corp., B-274654, Dec. 26, 1996, 97-1 CPD ¶ 34 (protesters rated eighth and ninth in overall technical merit were interested parties because improper technical evaluation alleged and lower-priced than awardee); Recon Optical, Inc., B-272239, July 17, 1996, 96-2 CPD ¶ 21 (recipients of multiple award contracts may not protest the other's award); Metson Marine Servs, Inc.,B-299705, July 20, 2007, 2007 CPD ¶ 159 (offeror reasonably found to be ineligible for award lacks interested party status).

(2) A high-priced bidder may be able to demonstrate that all lower-priced bidders would be ineligible for award, thus becoming the next-in-line. Professional Medical Prods., Inc., B-231743, July 1, 1988, 88-2 CPD ¶ 2.

(3) In a "best value" negotiated procurement, the GAO determines whether a protester is an interested party by examining the probable result if the protest is successful. Government Tech. Servs., Inc., B-258082, Sept. 2, 1994, 94-2 BCA ¶ 93 (protester not an interested party where it failed to challenge higher-ranked intervening offerors); Rome Research Corp., B-245797, Sept. 22, 1992, 92-2 CPD ¶ 194.

(4) Opportunity to Compete. An actual bidder, not next-in-line for award, is an interested party if it would **regain the opportunity to compete** if the GAO sustains its protest. This occurs if the GAO could recommend resolicitation. Teltara, Inc., B-245806, Jan. 30, 1992, 92-1 CPD ¶ 128 (eventual 11th low bidder protested – before bid opening - the adequacy of the solicitation's provisions concerning a prior collective bargaining agreement; remedy might be resolicitation); Remtech, Inc., B-240402, Jan. 4, 1991, 91-1 CPD ¶ 35 (protest by nonresponsive second low bidder challenged IFB as unduly restrictive – filed before bid opening; interested party because remedy is resolicitation).

3. **Intervenors**. Immediately after receipt of the protest notice, the agency must notify the awardee (post-award protest) or all offerors who have a "substantial prospect" of receiving award if the protest is denied (pre-award protest). 4 C.F.R. § 21.0(b), § 21.3(a). Generally if award has been made, GAO will only allow the awardee to intervene. If award has not been made, GAO will determine whether to allow a specific firm to intervene upon its request.

D. What May Be Protested?

1. The protester must allege a violation of a procurement statute or regulation. 31 U.S.C. § 3552. The GAO will also review allegations of unreasonable agency actions. S.D.M. Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288 (simplified acquisition using defective FACNET system failed to promote competition "to the maximum extent practicable" in violation of CICA). This includes the termination of a contract where the protest alleges the government's termination was based upon improprieties associated with contract award (sometimes referred to as a "reverse protest"). 4 C.F.R. § 21.1(a) (2005); Severn Cos., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181.

2. The GAO generally will NOT consider protests on the following matters:

   a. **Contract Administration.** 4 C.F.R. § 21.5(a). Health Care Waste Servs., B-266302, Jan. 19, 1996, 96-1 CPD ¶ 13 (registration or licensing requirement a performance obligation and not one of responsibility); JA & Assocs., B-256280, Aug. 19, 1994, 95-1 CPD ¶ 136 (decision to novate contract to another firm rather than recompete); Caltech Serv. Corp., B-240726, Jan. 22, 1992, 92-1 CPD ¶ 94 (modification of contract, unless it is a cardinal change thus requiring competition); Casecraft, Inc., B-226796, June 30, 1987, 87-1 CPD ¶ 647 (decision to terminate a contract for default); but see Marvin J. Perry & Assocs., B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128 (GAO asserts jurisdiction over agency acceptance of different quality office furniture that was shipped by mistake); Sippican, Inc., B-257047, Nov. 13, 1995, 95-2 CPD ¶ 220 (GAO will review agency exercise of contract option); CACI Tech., Inc., B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 (whether key personnel perform on contract is matter of contract administration, absent "bait and switch.").

   b. **Small Business Size and Industrial Classification Determinations.** 4 C.F.R. § 21.5(b)(1). Challenges to size or status of small businesses are left to exclusive review by the Small Business Administration. 15 U.S.C. 637(b)(6). Lawyers Advantage Title Group, Inc., B-275946, Apr. 17, 1997, 97-1 CPD ¶ 143; Columbia Research Corp., B-247073, June 4, 1992, 92-1 CPD ¶ 492; Sea Box, Inc., B-408182.5, Jan. 10, 2014, 2014 CPD ¶ 27 (GAO will consider protester challenging agency's decision not to refer matter to SBA, when proposal, on its face, shows offeror not small business).

   c. **Small Business Certificate of Competency (COC) Determinations.** 4 C.F.R. § 21.5(b)(2). Issuance of, or refusal to

issue, a certificate of competency will generally not be reviewed by GAO. Exceptions, interpreted narrowly in deference to the SBA, are: (1) protests which show bad faith by government officials, (2) protests that allege that the SBA failed to follow its own regulations, or (3) protests that allege that the SBA failed to consider vital information.

d. **Procurements Under Section 8(a) of the Small Business Act** (i.e., small disadvantaged business contracts). 4 C.F.R. § 21.5(b)(3). The GAO will review a decision to place a procurement under the 8(a) program only for possible bad faith by agency officials or a violation of applicable law or regulation. See Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178. See also Security Consultants Group, Inc., B-276405.2, June. 9, 1997, 97-1 CPD ¶ 207 (protest sustained where agency failed to provide complete and accurate information of all vendors eligible for an 8(a) award).

e. **Affirmative Responsibility Determinations.** 4 C.F.R. § 21.5(c). The determination that a bidder or offeror is capable of performing is largely committed to the KO's discretion. Imaging Equip. Servs., Inc., B-247197, Jan. 13, 1992, 92-1 CPD ¶ 62. GAO will not review contracting officer's determination, even for reasonableness, as such a review would accord too little weight to the agency's discretion in this area. SumCo Eco-Contracting LLC, B-409434, B-409434.2, Apr. 15, 2014, 2014 CPD ¶ 129

(1) Exception: Where definitive responsibility criteria in the solicitation were not met. King-Fisher Co., B-236687, Feb. 12, 1990, 90-1 CPD ¶ 177.

(2) Exception: Where protester alleges fraud or bad faith. HLJ Management Group, Inc., B-225843, Mar. 24, 1989, 89-1 CPD ¶ 299. But See Impresa Construzione Geom. Domenico Garufi v. U.S., 238 F.3d 1324 (Fed. Cir. 2001) (the CAFC held that the COFC's standard of review for responsibility determinations would be those set forth in the Administrative Procedures Act, i.e., would include one requiring lack of rational basis or a procurement procedure involving a violation of a statute or regulation).

(3) Exception: Where there is evidence that the contracting officer failed to consider available relevant information, or otherwise violated a pertinent statute or regulation. PMO Partnership Joint Venture, B-401973.3, B-401973.5, Jan. 14, 2010, 2010 CPD ¶ 29.

f. **Procurement Integrity Act Violations.** 4 C.F.R. § 21.5(d); 41 U.S.C. § 423. The protester must first report information supporting allegations involving violations of the Procurement Integrity Act to the agency within 14 days after the protester first discovered the possible violation. See, e.g., SRS Techs., B-277366, July 30, 1997, 97-2 CPD ¶ 42. Y&K Maint., Inc., B-405310.6, Feb. 2, 2012, 2012 ¶ 93.

g. **Procurements by Non-Federal Agencies** (e.g., United States Postal Service, Federal Deposit Insurance Corporation (FDIC), nonappropriated fund activities [NAFIs]). 4 C.F.R. § 21.5(g). The GAO will consider a protest involving a non-federal agency if the agency involved has agreed in writing to have the protest decided by the GAO. 4 C.F.R. § 21.13. The GAO will also consider such a protest if agency officials were involved to such an extent that it really was a procurement "by" an executive agency. Asiel Enterprises, Inc., B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205 (considered whether NAFI used as a conduit to circumvent CICA).

h. **Subcontractor Protests.** The GAO will not consider subcontractor protests unless requested to do so by the procuring agency. 4 C.F.R. § 21.5(h). See RGB Display Corporation, B-284699, May 17, 2000, 2000 CPD ¶ 80. See also Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103. However, the GAO will review subcontract procurements where the subcontract is "by" the government. See supra RGB Display Corporation (subcontract procurement is "by" the government where agency handles substantially all the substantive aspects of the procurement and the prime contractor acts merely as a conduit for the government).

i. **Debarment & Suspension Issues**. 4 C.F.R. §21.5(i). The GAO does not review protests that an agency improperly suspended or debarred a contractor. See Shinwha Electronics, B-290603, Sept. 3, 2002, 2002 CPD ¶ 154.

j. **Judicial Proceedings.** 4 C.F.R. §21.11. The GAO will not hear protests that are the subject of pending federal court litigation unless requested by the court. SRS Techs., B-254425, May 11, 1995, 95-1 CPD ¶ 239; Snowblast-Sicard, Inc., B-230983, Aug. 30, 1989, 89-2 CPD ¶ 190. The GAO also will not hear a protest that has been finally adjudicated, e.g., dismissed with prejudice. Cecile Indus., Inc., B-211475, Sept. 23, 1983, 83-2 CPD ¶ 367.

k. **Task and Delivery Orders.** Section 843 of the FY 2008 NDAA authorized protests exclusively to the GAO when (1) the order increases the scope, period, or maximum value of the contract under which the order is issued; or (2) the order is valued in excess of $10,000,000 (this provision has been extended indefinitely by the FY 2013 NDAA for Title 10 contracts, but only until 30 September 2016 for Title 41 contracts per FY 2012 NDAA). (See Appendix C) Previously, the Federal Acquisition Streamlining Act (FASA) (pertinent portions codified at 10 U.S.C. § 2304c and 41 U.S.C. §253j) prohibited protests associated with the issuance of a task or delivery order except when the order "increases the scope, period, or maximum value" of the underlying contract. See, e.g., Military Agency Services Pty., Ltd., B-290414, Aug. 1, 2003, 2002 CPD ¶ 130. *See also* A&D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126 (2006). The GAO, however, has held that it has protest jurisdiction over task and delivery orders placed under Federal Supply Schedule (FSS) contracts. Severn Co., Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2-3, n.1. The COFC also decided that protests of FSS orders are not prohibited by the FASA. Idea International, Inc. v. United States, 74 Fed. Cl. 129 (2006). Additionally, the GAO will hear cases involving the "downselect" of multiple awardees, if that determination is implemented by the issuance of task and delivery orders. See Electro-Voice, Inc., B-278319; Jan. 15, 1998, 98-1 CPD ¶ 23. See also Teledyne-Commodore, LLC - - Reconsideration, B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121.

3. **Procurement**. GAO only considers protests of "procurements."

a. A procurement of property or services by a federal agency. 31 U.S.C. § 3551. New York Tel. Co., B-236023, Nov. 7, 1989, 89-2 CPD ¶ 435 (solicitation to install pay phones is an acquisition of a service). The transaction, however, must relate to the agency's mission or result in a benefit to the government. Maritime Global Bank Group, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 (Navy agreement with a bank to provide on-base banking services not a procurement). See also Starfleet Marine Transportation, Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 (GAO holding that it had jurisdiction of a mixed transaction involving both the "sale" of a business opportunity and the procurement of services); Government of Harford County, Md., B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81.

b. Sales of government property are excluded. Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534 (sale of property by FHA not a procurement of property or services); Columbia Communications

Corp., B-236904, Sept. 18, 1989, 89-2 CPD ¶ 242 (GAO declined to review a sale of satellite communications services). The GAO will consider protests involving such sales, however, if the agency involved has agreed in writing to allow GAO to decide the dispute. 4 C.F.R. § 21.13(a) (2005); Assets Recovery Sys., Inc., B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67. See also Catholic University of America v. United States, 49 Fed. Cl. 795 (2001) (COFC holding that the Administrative Dispute Resolution Act's (ADRA) amendment to the Tucker Act broadened its scope of post-award protests to include solicitation of government assets).

c. The GAO has also considered a protest despite the lack of a solicitation or a contract when the agency held "extensive discussions" with a firm and then decided not to issue a solicitation. Health Servs. Mktg. & Dev. Co., B-241830, Mar. 5, 1991, 91-1 CPD ¶ 247. Accord RJP Ltd., B-246678, Mar. 27, 1992, 92-1 CPD ¶ 310.

d. A "Federal Agency" includes executive, legislative, or judicial branch agencies. 31 U.S.C. § 3551(3) (specifically refers to the definition in the Federal Property and Administrative Services Act of 1949 at 40 U.S.C. § 102); 4 C.F.R. § 21.0(c) (2005). However, it excludes:

(1) The Senate, House of Representatives, the Architect of the Capitol, and activities under his direction. 40 U.S.C. § 472(b); 4 C.F.R. § 21.0(c) (2005). Court Reporting Servs., Inc., B-259492, Dec. 12, 1994, 94-2 CPD ¶ 236.

(2) Government corporations identified in 31 U.S.C. § 9101 that are only partially owned by the United States, e.g., FDIC. 31 U.S.C. § 3501; Cablelink, B-250066, Aug. 28, 1992, 92-2 CPD ¶ 135. This exclusion does not apply to wholly government-owned corporations, e.g., TVA. See Kennan Auction Co., B-248965, June 9, 1992, 92-1 CPD ¶ 503 (Resolution Trust Corporation); Monarch Water Sys., Inc., B-218441, Aug. 8, 1985, 85-2 CPD ¶ 146. See also 4 C.F.R. § 21.5(g) (2005).

(3) The United States Postal Service (USPS). 4 C.F.R. § 21.5(g) (2005). The USPS is not a federal agency under procurement law; therefore, the GAO does not hear USPS protests. But See Emery WorldWide Airlines, Inc. v. Federal Express Corp., 264 F.3d 1071 (2001) (the **Court of Appeals for the Federal Circuit** held that the USPS was a federal agency as specified by the Administrative Dispute

Resolution Act of 1996, not federal procurement law, therefore the Postal Service is not exempt from the court's bid protest jurisdiction as it is from GAO's).

e. Generally, the GAO does not view procurements by nonappropriated fund instrumentalities (NAFIs) as "agency procurements." 4 C.F.R. § 21.5(g) (2005). The Brunswick Bowling & Billiards Corp., B-224280, Sept. 12, 1986, 86-2 CPD ¶ 295.

(1) The GAO **will** consider procurements conducted by federal agencies (i.e., processed by an agency contracting officer) on behalf of a NAFI, even if no appropriated funds are to be obligated. Premier Vending, Inc., B-256560, July 5, 1994, 94-2 CPD ¶ 8; Americable Int'l, Inc., B-251614, Apr. 20, 1993, 93-1 CPD ¶ 336.

(2) The GAO will consider a protest involving a NAFI-conducted procurement if there is evidence of pervasive involvement of federal agency personnel in the procurement and the NAFI is acting merely as a conduit for the federal agency. Asiel Enterprises, Inc., B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205 (considered whether NAFI used as a conduit to circumvent CICA).

(3) GAO has jurisdiction to consider protest challenging terms of solicitation for the award of a lease of federal property where the record shows that the agency will receive benefit in connection with the award of the lease, such that the agency is, in effect, conducting a procurement for goods and services. Blue Origin LLC, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289.

f. Procurements subject to the Federal Aviation Administration's (FAA) Acquisition Management System (AMS) are specifically exempt from GAO jurisdiction. 49 U.S.C. §40110(d)(2)(F). This exemption originally covered only procurements of equipment, supplies, and materials; thus, the GAO maintained jurisdiction and decided protests filed concerning the procurement of services. Congress has since extended the exemption to cover services also. Pub. L. No. 109-90, 119 Stat. 2064 *et seq*, Title V, Sec. 515. Procurements by the Transportation Security Administration (TSA) are covered by the AMS; GAO has no jurisdiction over TSA procurements. Knowledge Connections, Inc., B-298172 (2006).

E. When Must a Protest Be Filed?

1. Time limits on protests are set forth in 4 C.F.R. § 21.2. [5]

a. **Defective Solicitation**. GAO must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals**. 4 C.F.R. § 21.2(a)(1); Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 (untimely challenge of agency failure to include mandatory clause indicating whether agency will conduct discussions prior to making award). Protests filed prior to bid opening or closing date for receipt of initial proposals are timely even when protester learned the basis of its protest more than ten days prior to protest filing. MadahCom, Inc.--Recon., B-297261.2, Nov. 21, 2005, 2005 CPD ¶ 209.

b. Protesters **challenging a Government-wide point of entry (GPE) notice of intent** to make a sole source award must **first** respond to the notice in a timely manner. See Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32 (unless the specification is so restrictive as to preclude a response, the protester must first express interest to the agency); see also PPG Indus., Inc., B-272126, June 24, 1996, 96-1 CPD ¶ 285, fn. 1 (timeliness of protests challenging Commerce Business Daily (CBD) notices discussed). Only publication in the official public medium [Federal Business Opportunities (FedBizOpps)] will constitute constructive notice. Worldwide Language Resources, Inc.; SOS Int'l Ltd., B-296993 et al., Nov. 14, 2005, 2005 CPD ¶ 206 (publishing notice of procurement on DefenseLink.mil will NOT provide constructive notice.)

c. When an **amendment to a solicitation** provides the basis for the protest, then the protest must be filed by the next due date for revised proposals. 4 C.F.R. § 21.2(a)(1). This rule applies even with tight timelines. WareOnEarth Commc'ns, Inc., B-298408, Jul. 11, 2006, 2006 CPD ¶ 107 (protest not timely filed when filed after revised due date from amendment despite only four days between solicitation amendment and proposal due date.)

[5] Under the GAO bid protest rules, "days" are calendar days. In computing a period of time for protest purposes, do not count the day on which the period begins. When the last day falls on a weekend day or federal holiday, the period extends to the next working day. 4 C.F.R. § 21.0(e).

d. **Required Debriefing.** Procurements involving competitive proposals carry with them the obligation to debrief the losing offerors, if the debriefing is timely requested. See FAR 15.505 and 15.506. In such cases, protesters may not file a protest prior to the debriefing date offered by the agency. 4 C.F.R. §21.2(a)(2). The protester, however, must file its protest no later than 10 days "after the date on which the debriefing is held." 4 C.F.R. § 21.2(a)(2); Fumigadora Popular, S.A., B-276676, Apr. 21, 1997, 97-1 CPD ¶ 151 (protest filed four days after debriefing of **sealed bid procurement** not timely); The Real Estate Center, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74.

e. **Government Delay of Pre-Award Debriefings.** The agency may delay pre-award debriefings until after award when it is in "the government's best interests." If the agency decides to delay a pre-award debriefing that is otherwise timely requested and required, the protester is entitled to a post-award debriefing and the extended protest time frame. Note that if a protester files its protest within five days of the offered debrief, protester will also be entitled to stay contract performance. 31 U.S.C. § 3553(d)(4)(B); FAR 33.104(c). Global Eng'g & Constr. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (protest of exclusion from competitive range).

f. Protests based on **any other matter** must be submitted within 10 days after receiving actual or constructive (whichever is earlier) knowledge of the basis for protest. 4 C.F.R. § 21.2(a)(2). Learjet, Inc., B-274385, Dec. 6, 1996, 96-2 CPD ¶ 215 (interpretation of solicitation untimely); L. Washington & Assocs., Inc., B-274749, Nov. 18, 1996, 96-2 CPD ¶ 191 (untimely protest of elimination from competitive range); SNAP, Inc., B-409609, B-409609.3, June 20, 2014, 2014 WL 2873756 (protest grounds untimely when protester should have known protest ground from debriefing, but waited until comments to file supplemental protest).

g. Protests initially filed with the agency:

(1) If the protester previously filed a timely agency protest, a subsequent GAO protest must be filed within 10 days of actual or constructive (whichever is earlier) knowledge of the initial adverse agency decision. 4 C.F.R. § 21.2(a)(3) (2005). Consolidated Mgt. Servs., Inc.--Recon., B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76 (oral notice of adverse agency action starts protest time period.) **Continuing to pursue agency protest after initial adverse decision does not toll the GAO time limitations**. Telestar Int'l Corp.--

Recon., B-247029, Jan. 14, 1992, 92-1 CPD ¶ 69. See also Raith Engineering and Manufacturing Co, W.L.L., B-298333.3 (2007). Adverse agency action includes a determination by the agency that it lacks jurisdiction over protest issue. Logis-Tech, Inc., B-407687, Jan. 24, 2013, 2013 CPD ¶ 41.

(2) The agency protest must generally be filed within the same time restrictions applicable to GAO protests, unless the agency has established more restrictive time frames. 4 C.F.R. § 21.2(a)(3). Orbit Advanced Techs., Inc., B-275046, Dec. 10, 1996, 96-2 CPD ¶ 228 (protest dismissed where protester's agency-level protest untimely even though it would have been timely under GAO rules); IBP, Inc., B-275259, Nov. 4, 1996, 96-2 CPD ¶ 169.

2. Protesters must use due diligence to obtain the information necessary to pursue the protest. See Automated Medical Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 (protest based on FOIA-disclosed information not timely where protester failed to request debriefing); Products for Industry, B-257463, Oct. 6, 1994, 94-2 CPD ¶ 128 (protest challenging contract award untimely where protester failed to attend bid opening and did not make any post-bid attempt to examine awardee's bid); Adrian Supply Co.--Recon., B-242819, Oct. 9, 1991, 91-2 CPD ¶ 321 (use of FOIA request rather than the more expeditious document production rules of the GAO may result in the dismissal of a protest for lack of due diligence and untimeliness). **But see** Geo-Centers, Inc., B-276033, May 5, 1997, 97-1 CPD ¶ 182 (protest filed three months after contract award and two months after debriefing is **timely** where the information was obtained via a FOIA request that was filed immediately after the debriefing).

3. Exceptions for otherwise untimely protests. 4 C.F.R. § 21.2(c).

a. **Significant Issue Exception**: The GAO may consider a late protest if it involves an issue significant to the procurement system. See Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-2 CPD ¶ 18; Premier Vending, Inc., B-256560, Jul. 5, 1994, 94-2 CPD ¶ 8. Cyberdata Techs, Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230.

b. Significant issues generally: 1) have not been previously considered; and 2) are of widespread interest to the procurement community. Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-2 CPD ¶ 18. DynCorp, Inc., B-240980, Oct. 17, 1990, 90-2 CPD ¶ 310. Matter of: Tiger Truck, LLC, B-400685, Jan 14, 2009, 2009 CPD ¶ 19.

c. The GAO may consider a protest if there is good cause, beyond the protester's control, for the lateness. A.R.E. Mfg. Co., B-246161, Feb. 21, 1992, 92-1 CPD ¶ 210; Surface Combustion, Inc.--Recon., B-230112, Mar. 3, 1988, 88-1 CPD ¶ 230.

F. "The CICA Stay"—Automatic Statutory Stay. 31 U.S.C. § 3553(c) and (d).

1. Pre-award Protests: An agency may not award a contract after receiving notice **FROM THE GAO** of a timely-filed protest. 31 U.S.C. § 3553(c); 4 C.F.R. § 21.6; FAR 33.104(b).

2. Post-award Protests: The contracting officer shall suspend contract performance immediately when the agency receives notice **FROM THE GAO** of a protest filed **within 10 days of the date of contract award or within five days AFTER THE DATE OFFERED for the required post-award debriefing**. The CICA stay applies under either deadline, whichever is the later. 31 U.S.C. § 3553(d); 4 C.F.R. § 21.6; FAR 33.104(c).

3. The automatic stay is triggered **only** by notice from GAO. See McDonald Welding v. Webb, 829 F.2d 593 (6th Cir. 1987); Survival Technology Inc. v. Marsh, 719 F. Supp. 18 (D.D.C. 1989). See also Florida Professional Review Org., B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17 (no duty to suspend performance where protest filed on eighth day after award [Friday] but GAO notified agency of protest on eleventh day after award [Monday]). Note that the FASA changed the rules, now allowing for a deadline falling on a weekend or holiday to extend to the next business day.

4. "Proposed Award" Protests: An agency's decision to cancel a solicitation based upon the determination that the costs associated with contract performance would be cheaper if performed in-house (i.e., by federal employees) may be subject to the CICA stay. See Inter-Con Sec. Sys., Inc. v. Widnall, No. C 94-20442 RMW, 1994 U.S. Dist. LEXIS 10995 (D.C. Cal. July 11, 1994); Aspen Sys. Corp., B-228590, Feb. 18, 1988, 88-1 CPD ¶ 166. In reviewing a protest of an in-house cost comparison, the GAO will look to whether the agency complied with applicable procedures in selecting in-house performance over contracting. DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543.

G. **"The CICA Override"—Relief From The CICA Stay.** 31 U.S.C. § 3553(c) and (d); FAR 33.104(b) and (c); AFARS 5133.104; AFFARS 5333.104. While paragraphs (1) and (2) below provide the *general* approval authority, the Army requires the override to be approved by the Deputy Assistant Secretary of the Army (Policy and Procurement). AFARS 5133.104.

1. Pre-Award Protest Stay: The head of the contracting activity (HCA) may, on a nondelegable basis, authorize the award of a contract:

   a. Upon a written finding that urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General; **AND**

   b. The agency is likely to award the contract within 30 days of the written override determination.

2. Post-Award Protest Stay: The HCA may, on a nondelegable basis, authorize **continued performance** under a previously awarded contract upon a written finding that:

   a. Continued performance of the contract is **in the best interests of the United States**; or

   b. Urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General.

   NOTE: If a protest is sustained where the agency authorized continued performance under the best interests exception, GAO will make recommendations without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(b)(2).

3. In either instance, if the agency is going to override the automatic stay, it must notify the GAO. 31 U.S.C. 3553(c). See also Banknote Corp. of America, Inc., B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53 (GAO will not review the override decision).

4. Override decisions **are** subject to judicial review at the COFC. See Alion Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005) (Court upheld override after stating that overrides are reviewable by the Court). See also, Cigna Gov't Services, LLC v. United States, 70 Fed. Cl. 100 (2006) (reinstating the CICA Stay finding that the override was arbitrary and capricious); Advanced Systems Development, Inc. v. United States, 72 Fed. Cl. 25 (2006) (same); Automation Technologies, Inc v. United States, 72 Fed. Cl. 723 (2006) (same). See also, URS Federal Services, Inc. v. United States, COFC No. 11-790, Filed December 30, 2011, where the COFC reviewed an override determination considering four factors: (1) whether significant adverse consequences will necessarily occur if the stay is not overridden, (2) conversely, whether reasonable alternatives to the override exist that would adequately address the circumstances presented, (3) how the potential cost of proceeding with the override, including the costs associated with the potential that the

GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency's needs, and (4) the impact of the override on competition and the integrity of the procurement system, as reflected in the Competition in Contracting Act.

5. An agency's decision to override a CICA stay based upon its determination that such action is in the "best interests" of the United States is subject to judicial review. Alion Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005).

H. **Availability of Funds.** The "end-of-fiscal-year spending spree" results in a large volume of protest action during the August-November time frame. To allay concerns about the loss of funds pending protest resolution, 31 U.S.C. § 1558 provides that funds will not expire for 100 days following resolution of the bid protest.[6] FAR 33.102(c).

I. Scope of GAO Review.

1. The scope of GAO's review of protests is similar to that of the Administrative Procedures Act. 5 U.S.C. § 706. GAO does not conduct a *de novo* review. Instead, it reviews the agency's actions for violations of procurement statutes or regulations, arbitrary or capricious actions, or abuse of discretion. New Breed Leasing Corp., B-274201, Nov. 26, 1996, 96-2 CPD ¶ 202 (agency violated CICA due to lack of reasonable advanced planning); current GAO case law reviews agency actions for reasonableness, consistency with the solicitation, applicable procurement statutes and regulations. See, e.g., Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶263.

2. Burden of Proof. The protester generally has the burden of demonstrating the agency action is clearly unreasonable. The Saxon Corp., B-232694, Jan. 9, 1989, 89-1 CPD ¶ 17.

3. Agency Record. When conducting its review, the GAO will consider the **entire** record surrounding agency conduct, to include statements and arguments made in response to the protest. AT&T Corp., B-260447, Mar. 4, 1996, 96-1 CPD ¶ 200. The agency may not, however, for the first time in a protest, provide its rationale for the decision in a request for reconsideration. Department of the Army—Recon., B-240647, Feb. 26, 1991, 91-1 CPD ¶ 211. GAO will give little weight to post-protest documents that constitute reevaluations and redeterminations prepared in the heat of an adversarial process. Boeing Sikorsky Aircraft Support,

[6]This authority applies to protests filed with the agency, at the GAO, or in a federal court. 31 U.S.C. § 1558. See also OFFICE OF THE GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, Principles of Federal Appropriations Law 5-89 (3d ed. 2004).

B-277263.2, B-277263.3, Sept. 29, 1997, 97–2 CPD ¶ 91. However, GAO will consider post-protest explanations of the record that are credible and consistent with the contemporaneous record. Mgmt Sys. Int'l, Inc., B-409415, B- 409415.2, Apr. 10, 2014, 2014 CPD ¶ 117.

4. Substantive Review. As part of its review, the GAO has demonstrated a willingness to probe factual allegations and assumptions underlying agency determinations or award decisions. See, e.g., Redstone Tech. Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181; Secure Servs. Tech., Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421 (GAO conducted a comparative analysis of competitors' proposals and the alleged deficiencies in them and sustained the protest when it determined that the agency had not evaluated the proposals in a consistent manner); Frank E. Basil, Inc., B-238354, May 22, 1990, 90-1 CPD ¶ 492 (GAO reviewed source selection plan).

5. Bad Faith. Government officials are presumed to act in good faith. Allegation of bias or bad faith must be supported by convincing proof. GAO will not consider allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶111; Empire Veteran Group, Inc., B-408866.2, B-408866.3, Dec. 17, 2013, 2013 CPD ¶ 294.

6. Timeliness Issues.

   a. The GAO will generally resolve factual disputes regarding timeliness of protest filing in favor of the protester if there is at least a reasonable degree of evidence to support protester's version of the facts. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65 (disagreement over when protester knew or should have known of basis for protest).

   b. The protester is required to include "all the information needed to demonstrate timeliness." 4 C.F.R. § 21.2(b); Foerster Instruments, Inc., B-241685, Nov. 18, 1991, 91-2 CPD ¶ 464.

   c. When there is a doubt as to whether a protest is timely, GAO will generally consider the protest. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 405.

7. Unduly Restrictive Requirement. Where a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the specification and the agency's need for the restriction, the agency has the responsibility of establishing that the restrictive specification is reasonably necessary to meet its legitimate needs. J. Squared Inc., d/b/a University Loft Co., B-408388, Aug. 27, 2013, 2013

CPD ¶ 201. Once the agency establishes support for the challenged solicitation term, the burden shifts to the protester to show that it is clearly unreasonable. Id.

8. Prejudice. To prevail, a protester must demonstrate prejudice. To meet this requirement, a protester must show that but for the agency error, there existed "a substantial chance" that the offeror would have been awarded the contract. Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). See, e.g.,Bath Iron Works Corp., B-290470, Aug. 19, 2002, 2002 CPD ¶ 133 (denying protester's use of a decommissioned destroyer for at-sea testing, while at the same time accepting awardee's proposed use constituted unequal treatment, but did not result in competitive prejudice). GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54. GAO resolves any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.-Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84.

J. Bid Protest Procedures.

1. The Protest. 4 C.F.R. § 21.1.

a. Protests must be **written**. E-Mail filings are accepted.

b. Although the GAO does not require formal pleadings submitted in a specific technical format, a protest, at a minimum, shall:

(1) include the name, address, email, telephone and facsimile (fax) numbers of the protester (or its representative);

(2) be signed by the protester or its representative;

(3) identify the contracting agency and the solicitation and/or contract number;

(4) **provide a detailed legal and factual statement of the grounds of protest, to include copies of relevant documents;**

(5) provide all information demonstrating the protester is an interested party and that the protest is timely;

(6) specifically request a decision by the Comptroller General; and

(7) state the form of relief requested.

c. If appropriate, the protest may also include:

(1) a request for a protective order;

(2) a request for specific documents relevant to the protest; and,

(3) a request for a hearing.

d. The GAO may dismiss a protest which is frivolous, or which does not state a valid ground for a protest. 31 U.S.C. ¶ 3554(a)(4); Federal Computer Int'l Corp.--Recon., B-257618, July 14, 1994, 94-2 CPD ¶ 24 (mere allegation of improper agency evaluation made "on information and belief" not adequate); see also Siebe Envtl. Controls, B-275999, Feb. 12, 1997, 97-1 CPD ¶ 70 ("information and belief" allegations not adequate even though government delayed debriefing regarding competitive range exclusion); BNL, Inc., B-409450, B-409450.3, May 1, 2014, 2014 CPD ¶ 138 (knowledge of awardee proposal not required, but the protester must provide some basis to support its allegation of improper agency action).

(1) At a minimum, a protester must make a *prima facie* case asserting improper agency action. Brackett Aircraft Radio, B-244831, Dec. 27, 1991, 91-2 CPD ¶ 585. Protester must present either allegations or evidence sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action. Systems Dynamics Int'l, Inc.-Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251.

(2) Generalized allegations of impropriety are not sufficient to sustain the protester's burden under the GAO's Bid Protest Rules. See 4 C.F.R. § 21.5(f); Bridgeview Mfg., B-246351, Oct. 25, 1991, 91-2 CPD ¶ 378; Palmetto Container Corp., B-237534, Nov. 5, 1989, 89-2 CPD ¶ 447.

(3) The protester must show material harm. Tek Contracting, Inc., B-245590, Jan. 17, 1992, 92-1 CPD ¶ 90 (protest that certification requirement was unduly restrictive is denied where protester's product was not certified by any entity); IDG Architects, B-235487, Sept. 18, 1989, 89-2 CPD ¶ 236.

e. The protest must include sufficient information to demonstrate that it is timely. The GAO will not permit protesters to introduce for the first time, in a motion for reconsideration, evidence to demonstrate timeliness. 4 C.F.R. § 21.2(b) (2005). Management Eng'g Assoc.--Recon., B-245284, Oct. 1, 1991, 91-2 CPD ¶ 276.

2. The protester must provide the contracting activity timely notice of the protest. This notification allows the agency to prepare its administrative report for the protest.

   a. The agency must receive a complete copy of the protest and all attachments no later than one day after the protest is filed with the GAO. 4 C.F.R. § 21.1(e); Rocky Mountain Ventures, B-241870.4, Feb. 13, 1991, 91-1 CPD ¶ 169 (failure to give timely notice may result in dismissal of the protest).

   b. The GAO will not dismiss a protest, absent prejudice, if the protester fails to timely provide the agency a copy of the protest document. Arlington Pub. Schs., B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16 (although protester late in providing agency protest documents, agency already knew of protest and its underlying bases).

3. The GAO generally provides immediate telephonic notice of a protest to the agency's protest litigation division. **It is this notice by the GAO that triggers the CICA stay**, discussed above. 4 C.F.R. § 21.3(a).

4. Agency List of Documents. 4 C.F.R. §21.3(c). In response to a protester's request for production of documents, the agency must provide to all interested parties and the GAO **at least five days prior to submission of the administrative report** a list of:

   a. Documents or portions of documents which the agency has released to the protester or intends to produce in its report; and

   b. Documents which the agency intends to withhold from the protester and the reasons underlying this decision.

   c. Parties to the protest must then file any objections to the agency list within two days of receipt of the list.

5. Agency's Administrative Report. The agency must **file an administrative report within 30 days** of telephonic notice by the GAO. 4 C.F.R. § 21.3(c); FAR 33.104(a)(3)(i). Subject to any protective order, discussed below, the agency will provide copies of the administrative report simultaneously to the GAO, protester(s), and any intervenors. 4 C.F.R. § 21.3(e).

a. Contents of an agency report, as relevant to the protest grounds alleged. 4 C.F.R. § 21.3(d).

(1) The protest.

(2) The protester's proposal or bid.

(3) The successful proposal or bid.

(4) The solicitation.

(5) The abstract of bids or offers.

(6) A statement of facts by the contracting officer.

(7) All evaluation documents.

(8) All relevant documents.

(9) Documents requested by the protester.

(10) **A legal memorandum suitable for forwarding to GAO**;

(11) An index of all relevant documents provided under the protest.

b. Agencies must include all relevant documents in the administrative report. See Federal Bureau of Investigation-Recon., B-245551, June 11, 1992, 92-1 CPD ¶ 507 (incomplete report misled GAO about procurement's status).

c. Late agency reports. Given the relatively tight time constraints associated with the protest process, the GAO will consider agency requests for extensions of time on a case-by-case basis. 4 C.F.R. § 21.3(f).

6. Document Production.[7] Except as otherwise authorized by GAO, all requests for documents must be filed with GAO and the contracting agency no later than two days after their existence or relevance is known or should have been known, whichever is earlier. The agency then must either provide the documents or explain why production is not appropriate. 4 C.F.R. § 21.3(g).

[7] **PRACTICE TIP:** Keep in mind that the government has every right to request relevant documents from the protester. See 4 C.F.R. 21.3(d) (2005). See also "GAO Orders Protester to Comply With Agency's Document Request," 61 FED. CONT. REP. 409 (1994).

7. Protective Orders. Either on its own initiative or at the request of a party to the protest, the GAO may issue a protective order controlling the treatment of protected information. 4 C.F.R. § 21.4.

a. The protective order is designed to limit access to trade secrets, confidential business information, and information that would result in an unfair competitive advantage.

b. The request for a protective order should be filed as soon as possible. It is the responsibility of protester's counsel to request issuance of a protective order and submit timely applications for admission under the order. 4 C.F.R. § 21.4(a).

c. Individuals seeking access to protected information may not be involved in the competitive decision-making process of the protester or interested party. 4 C.F.R. § 21.4(c).

(1) Protesters may retain outside counsel or use in-house counsel, so long as counsel is not involved in the competitive decision-making process. Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222 (access to protected material appropriate even though in-house counsel has regular contact with corporate officials involved in competitive decision-making); Mine Safety Appliance Co., B-242379.2, Nov. 27, 1991, 91-2 CPD ¶ 506 (retained counsel).

(2) The GAO grants access to protected information upon application by an individual. The individual must submit a certification of the lack of involvement in the competitive decision-making process and a detailed statement in support of the certification. Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543.

(3) The GAO may report violations of the protective order to the appropriate bar association of the attorney who violated the order, and may ban the attorney from GAO practice. Additionally, a party whose protected information is disclosed improperly retains all of its remedies at law or equity, including breach of contract. 4 C.F.R. § 21.4(d). See also "GAO Sanctions 2 Attorneys for Violating Terms of Protective Order by Releasing Pricing Info," 65 FED. CONT. REP. 17 (1996). GAO may dismiss protests for violation of the protective order. PWC Logistics Sers Co. KSC(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25.

(4) If the GAO does not issue a protective order, the government has somewhat more latitude in determining the contents of the administrative report. If the government chooses to withhold any documents from the report, it must include in the report a list of the documents withheld and the basis for not producing the documents. The agency must furnish all relevant documents and all documents specifically requested by the protester to the GAO for *in camera* review. 4 C.F.R. § 21.4(b).

d. If the agency fails to produce all relevant or requested documents, the GAO may impose sanctions. Among the possible sanctions are:

(1) Providing the document to the protester or to other interested parties.

(2) Drawing adverse inferences against the agency. Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162 (GAO refused to draw an adverse inference when an agency searched for and was unable to find a document that protester speculated should be in the files).

(3) Prohibiting the government from using facts or arguments related to the unreleased documents.

8. Protester must comment on the agency report within 10 days of receipt. Failure to comment or request a decision on the record will result in dismissal. 4 C.F.R. § 21.3(i). Keymiaee Aero-Tech, Inc., B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153; Piedmont Sys., Inc., B-249801, Oct. 28, 1992, 92-2 CPD ¶ 305 (agency's office sign-in log used to establish date when protester's attorney received agency report); Aeroflex Int'l, Inc., B-243603, Oct. 7, 1991, 91-1 CPD ¶ 311 (protester held to deadline even though the agency was late in submitting its report); Kinross Mfg. Co., B-232182, Sept. 30, 1988, 88-2 CPD ¶ 309.

9. Hearings. On its own initiative or upon the request of the protester, the government, or any interested party, the GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why the requester believes a hearing is necessary and why the matter cannot be resolved without oral testimony. 4 C.F.R. § 21.7(a).

a. The GAO officer has the discretion to determine whether or not to hold a hearing and the scope of the hearing.[8] Jack Faucett Assocs.--Recon., B-254421, Aug. 11, 1994, 94-2 CPD ¶ 72.

(1) As a general rule, the GAO conducts hearings where there is a factual dispute between the parties which cannot be resolved without oral examination or without assessing witness credibility, or where an issue is so complex that developing the protest record through a hearing is more efficient and less burdensome than proceeding with written pleadings only. Southwest Marine, Inc., B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56 (as a result of improper destruction of evaluation documentation by agency, GAO requested hearing to determine adequacy of agency award decision); see also Allied Signal, Inc., B-275032, Jan. 17, 1997, 97-1 CPD ¶ 136 (protest involving tactical intelligence system required hearing and technical assistance from GAO staff).

(2) Absent evidence that a protest record is questionable or incomplete, the GAO will not hold a hearing "merely to permit the protester to reiterate its protest allegations orally or otherwise embark on a fishing expedition for additional grounds of protest" since such action would undermine GAO's ability to resolve protests expeditiously and without undue disruption of the procurement process. Town Dev., Inc., B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155.

b. The GAO may hold pre-hearing conferences to resolve procedural matters, including the scope of discovery, the issues to be considered, and the need for or conduct of a hearing. 4 C.F.R. § 21.7(b).

c. Note that the GAO may draw an adverse inference if a witness fails to appear at a hearing or fails to answer a relevant question. This rule applies to the protester, interested parties and the agency. 4 C.F.R. § 21.7(f).

10. Alternative Dispute Resolution. The GAO has three available forms of alternative dispute resolution (ADR) – Negotiation Assistance, Litigation Risk Assessment and Outcome Prediction.

[8]According to the GAO's procedural rules, hearings are ordinarily conducted in Washington, D.C. The rule further notes that hearings may also be conducted by telephone. 4 C.F.R. § 21.7(c).

a. Negotiation Assistance. The GAO attorney will assist the parties with reaching a "win/win" situation. This type of ADR occurs usually with protests challenging a solicitation term or a cost claim.

b. Litigation Risk Assessment. The GAO attorney will identify risks with respect to the positions of each party to the protest. Generally, less formal than outcome prediction and can be conducted at an earlier stage in the protest.

c. Outcome Prediction. The GAO attorney will inform the parties of what he or she believes will be the protest decision. The losing party can then decide whether to withdraw or continue with the protest. Outcome prediction may involve an entire protest or certain issues of a multi-issue protest. The single most important criterion in outcome prediction is the GAO attorney's confidence in the likely outcome of the protest.

11. The GAO will issue a decision within 100 days after the filing of the protest.[9] 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9(a).

12. Express Option. 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10.

a. Decision in 65 days.

b. The protester, agency, or other interested party may request the express option in writing within five days after the protest is filed. The GAO has discretion to decide whether to grant the request. The GAO may also use the express option on its own initiative. Generally, the GAO reserves use of this expedited procedure for protests involving relatively straightforward facts and issues.

c. The following schedule applies under the express option (4 C.F.R. § 21.10(d)):

(1) Agency Report due within 20 days after notice from GAO of express option;

(2) Protester's comments on Agency Report due within 5 days of receiving Agency Report;

[9]**PRACTICE TIP:** Parties to the protest may check on the status of their protest by calling GAO's bid protest status line at (202) 512-5436. Additionally, quick access to newly issued decisions can be obtained from the GAO Internet Homepage at: http://www.gao.gov.

(3) GAO may alter the schedule if the case becomes no longer appropriate for the express option.

K. Remedies.

1. GAO decisions are "recommendations." 31 U.S.C. § 3554; Rice Servs., Ltd. v. United States, 25 Cl. Ct. 366 (1992); Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).

2. Agencies that do not implement GAO's recommendations fully within 60 days of a decision must report this fact to the GAO. FAR 33.104(g). The GAO, in turn, must report all instances of agency refusal to accept its recommendation to Congress. 31 U.S.C. § 3554(e).

3. The GAO may recommend that an agency grant the following remedies (4 C.F.R. § 21.8):

   a. Refrain from exercising options under an existing contract;

   b. Terminate an existing contract;

   c. Recompete the contract;

   d. Issue a new solicitation;

   e. Award the contract consistent with statute and regulation; or

   f. Such other recommendation(s) as the GAO determines necessary to promote compliance with CICA.

4. Impact of a Recommended Remedy. In crafting its recommendation, the GAO will consider all circumstances surrounding the procurement, to include: the seriousness of the deficiency; the degree of prejudice to other parties or the integrity of the procurement process; the good faith of the parties; the extent of contract performance; the cost to the government; the urgency of the procurement; and the impact on the agency's mission. 4 C.F.R. § 21.8(b).

5. CICA Override. However, where the head of the contracting activity decides to continue contract performance because it represents the best interests of the government, the GAO "shall" make its recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 4 C.F.R. § 21.8(c). Department of the Navy – Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 (Navy contends that "it may not be able to afford" costs associated with GAO recommendation).

L. Protest Costs, Attorneys Fees, and Bid Preparation Costs.

1. The GAO will issue a declaration on the entitlement to costs of pursuing the protest, to include attorneys fees, in each case after agencies take corrective action. 4 C.F.R. § 21.8(d). The recovery of protest costs is neither an "award" to protester nor is it a "penalty" imposed upon the agency, but is "intended to relieve protesters of the financial burden of vindicating the public interest." Defense Logistics Agency-Recon., B-270228, Aug. 21, 1996, 96-2 CPD ¶ 80.

a. In practice, if the agency takes remedial action promptly, GAO generally will not award fees. See J.A. Jones Management Servs., Inc.,-Costs B-284909.4, Jul. 31, 2000, 2000 CPD ¶ 123 (GAO declined to recommend reimbursement of costs where agency took corrective action promptly to supplemental protest allegation); Tidewater Marine, Inc.-Costs, B-270602, Aug. 21, 1996, 96-2 CPD ¶ 81 (the determination of when the agency was on notice of error is "critical"); see also LORS Medical Corp., B-270269, Apr. 2, 1996, 96-1 CPD ¶ 171 (timely agency action measured from filing of initial protest, not time of alleged improper action by agency). The GAO has stated that, in general, if the agency takes corrective action by the due date of the agency report, such remedial action is timely. Kertzman Contracting, Inc., B-259461, May 3, 1995, 95-1 CPD ¶ 226 (agency's decision to take corrective action one day before agency report due was "precisely the kind of prompt reaction" GAO regulations encourage); Holiday Inn - Laurel-Entitlement to Costs, B-265646, Nov. 20, 1995, 95-2 CPD ¶ 233 (agency took corrective action five days after comments filed by protester).

b. If the agency delays taking corrective action unreasonably, however, the GAO will award fees. Griner's-A-One Pipeline Servs., B-255078, July 22, 1994, 94-2 CPD ¶ 41, (corrective action taken two weeks following filing of agency administrative report found untimely). The GAO will consider the complexity of the protested procurement in determining what is timely agency action. Lynch Machiner Co., Inc., B-256279, July 11, 1994, 94-2 CPD ¶ 15 (protester's request for costs denied where agency corrective action taken three months following filing of protest complaint).

c. GAO will not award costs unless the protest was clearly meritorious, even if the agency does not take timely corrective action. Professional Security Corporation-Costs, B-407022.5, March 10, 2014, 2014 CPD ¶ 96.

d. GAO may limit recommendation of costs to meritorious protest issues where unsuccessful protest issues are clearly severable from the successful issues as to essentially constitute a separate protest. Carney, Inc.-Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82.

e. Agency corrective action must result in some competitive benefit to the protester. Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100 (protester not entitled to fees and costs where the agency cancels a competitive solicitation and proposes to replace it with a sole source acquisition; no corrective action taken in response to the protest).

f. Protester must file its request for declaration of entitlement to costs with the GAO within 15 days after learning (or when it should have learned) that GAO has closed the protest based on the agency's decision to take corrective action. 4 C.F.R. § 21.8(e). Dev Tech Sys., Inc., B-284860.4, Aug. 23, 2002, CPD ¶ 150.

2. If the GAO determines that the protester is entitled to recover its costs:

a. The protester must submit a claim for costs within 60 days of the receipt of the GAO decision. Failure to file within 60 days may result in forfeiture of the right to costs. 4 C.F.R. § 21.8(f). See Aalco Forwarding, Inc., B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 (protesters' failure to file an **adequately** supported initial claim within the 60-day period resulted in forfeiture of right to recover costs). See also Dual Inc. - - Costs, B-280719.3, Apr. 28, 2000 (rejecting claim for costs where claim was filed with contracting agency more than 60 days after protester's counsel received a protected copy of protest decision under a protective order).

b. If the agency and protester fail to agree on the amount of costs the agency will pay, the protester may request that GAO recommend an amount. In such cases, GAO may also recommend payment of costs associated with pursuing this GAO amount recommendation. 4 C.F.R. § 21.8(f)(2) (2005); DIVERCO, Inc.-Claim for Costs, B-240639, May 21, 1992, 92-1 CPD ¶ 460.

3. Interest on costs is not recoverable. Techniarts Eng'g-Claim for Costs, B-234434, Aug. 24, 1990, 90-2 CPD ¶ 152.

4. Amount of attorney's fees and protest costs is determined by reasonableness. See, e.g., JAFIT Enters., Inc. – Claim for Costs, B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125 (GAO allowed only 15% of protest costs and fees). Equal Access to Justice Act (EAJA) standards do

not apply. Attorneys' fees (for other than small business concerns) are limited to not more than $150 per hour, "unless the agency determines based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 31 U.S.C. § 3554(c)(2)(B). See also Sodexho Mgmt., Inc.-Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136. Similarly, fees for experts and consultants are capped at "the highest rate of compensation for expert witness paid by the Federal Government." 31 U.S.C. § 3554(c)(2); FAR 33.104(h).[10] This amount is equal to GS15 Step 10, not the highest amount paid by any federal agency for any expert in any forum at any time. Dept of the Army; ITT Federal Services Int'l Corp., B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72.

5. Unlike the EAJA, a protestor need not be a "prevailing party" where a "judicial imprimatur" is necessary to cause a change in the legal relationship between the parties. Georgia Power Company, B-289211.5, May 2, 2002, 2002 CPD ¶ 81 (rejecting the agency's argument that the Supreme Court's holding in Buckhannon Bd. and Care Home, Inc., v. W. VA. Dep't of HHR, 532 U.S. 598 (2001) rejecting the "catalyst theory" to fee-shifting statutes, applied to the Competition in Contracting Act).

6. As a general rule, a protester is reimbursed costs incurred with respect to all protest issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.-Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100. Department of the Army-Modification of the Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶74. The GAO has limited award of costs to successful protesters where part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest. TRESP Associates, Inc.-Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 (no need to allocate attorneys' fees between sustained protest and those issues not addressed where all issues related to same core allegation that was sustained); Interface Flooring Sys., Inc.-Claim for Attorneys Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106.

7. A protester may recover costs on a sustained protest despite the fact that the protester did not raise the issue that the GAO found to be dispositive. The GAO may award costs even though the protest is sustained on a theory raised by the GAO *sua sponte*. Department of Commerce-Recon., B-238452, Oct. 22, 1990, 90-2 CPD ¶ 322.

[10] The FAR refers to 5 U.S.C. § 3109 and Expert and Consultant Appointments, 60 Fed. Reg. 45649, Sept. 1, 1995, citing 5 C.F.R. § 304.105.

8. The protester must document its claim for attorney's fees. Consolidated Bell, Inc., B-220425, Mar. 25, 1991, 91-1 CPD ¶ 325 (claim for $376,110 reduced to $490 because no reliable supporting documentation). See also Galen Medical Associates, Inc., B-288661.6, July 22, 2002, 2002 CPD ¶ 56 (GAO recommending that the agency reimburse the protestor $110.65 out of the $159,195.32 claim due to a lack of documentation).

9. Bid Preparation Costs. 4 C.F.R. § 21.8(d)(2).

   a. GAO has awarded bid preparation costs when no other practical relief was feasible. See, e.g., Tri Tool, Inc.-Modification of Remedy, B-265649.3, Oct. 9, 1996, 96-2 CPD ¶ 139.

   b. As with claims for legal fees, the protester must document its claim for bid preparation and protest costs. A protester may not recover profit on the labor costs associated with prosecuting a protest or preparing a bid. Innovative Refrigeration Concepts-Claim for Costs, B-258655.2, July 16, 1997, 97-2 CPD ¶ 19 (protester failed to show that claimed rates for employees reflected actual rates of compensation).

10. **Anticipatory profits are not recoverable**. Keco Indus., Inc. v. United States, 192 Ct. Cl. 773, 784 (1970); DaNeal Constr., Inc., B-208469, Dec. 14, 1983, 83-2 CPD ¶ 682.

M. "Appeal" of the GAO Decision.

1. Reconsideration of GAO Decisions. 4 C.F.R. §21.4(b). The request for reconsideration must be submitted to the GAO within 10 days of learning of the basis for the request or when such grounds should have been known, whichever is earlier. Speedy Food Serv., Inc.-Recon., B-274406, Jan. 3, 1997, 97-1 CPD ¶ 5 (request for reconsideration untimely where it was filed more than 10 days after protester noted the initial decision on GAO's Internet site). The requester must state the factual and legal grounds upon which it seeks reconsideration. 4 C.F.R. § 21.14. Rehashing previous arguments is not fruitful. Banks Firefighters Catering, B-257547, Mar. 6, 1995, 95-1 CPD ¶ 129; Windward Moving & Storage Co.-Recon., B-247558, Mar. 31, 1992, 92-1 CPD ¶ 326.

2. Requests for reconsideration must be based upon new facts, unavailable at the time of the initial protest. The GAO does not allow piecemeal development of protest issues. Consultants on Family Addiction -Recon., B-274924.3, June 12, 1997, 97-1 CPD ¶ 213; Department of the Army - Recon., B-254979, Sept. 26, 1994, 94-2 CPD ¶ 114.

3. The GAO will not act on a motion for reconsideration if the underlying procurement is the subject of federal court litigation, unless the court has

indicated interest in the GAO's opinion. Department of the Navy, B-253129, Sept. 30, 1993, 96-2 CPD ¶ 175.

4. Judicial Appeal.

a. A protester always may seek judicial review of an agency action under the Administrative Procedures Act. Courts may, however, give great deference to the GAO in light of its considerable procurement expertise. Shoals American Indus., Inc. v. United States, 877 F.2d 883 (11th Cir. 1989). But see California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).

b. This deference is not absolute. A court may still find an agency decision to lack a rational basis, even if the agency complies with the GAO's recommendations in a bid protest. Firth Constr. Co. v. United States, 36 Fed. Cl. 268, 271-72 (1996); Advanced Distribution Sys., Inc. v. United States, 34 Fed. Cl. 598, 604 n. 7 (1995); see also Mark Dunning Indus. v. Perry, 890 F. Supp. 1504 (M.D. Ala. 1995) (court holds that "uncritical deference" to GAO decisions is inappropriate). But see Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (Federal Circuit notes that "it is the usual policy, if not the obligation, of procuring departments to accommodate themselves to positions formally taken by the Government Accountability Office").

V. UNITED STATES COURT OF FEDERAL CLAIMS.

A. Statutory Authority.

1. Tucker Act. The Tucker Act grants the U.S. Court of Federal Claims (COFC) jurisdiction to decide any claim for damages against the United States founded upon the Constitution, Act of Congress, agency regulation, or express or implied-in-fact contract with the United States not sounding in tort. 28 U.S.C. § 1491.

2. Federal Courts Improvement Act of 1982. The COFC also was granted authority by the Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3), "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper" (i.e., injunctive relief).

3. Administrative Dispute Resolution Act of 1996. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) [hereinafter "ADRA"]. Effective December 31, 1996, ADRA provides jurisdiction to the Court of Federal Claims to hear pre-award and post-award bid protests. Specifically, the COFC has jurisdiction to hear protests by interested parties that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).

   a. The ADRA directs the COFC to "give due regard" to national security/defense interests and "the need" for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)).

   b. The COFC has indicated that it will apply bid protest law developed by the U.S. District Court of the District of Columbia under the "Scanwell doctrine." (Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970)). See United States Court of Federal Claims, Court Approved Guidelines for Procurement Protest Cases (Dec. 11, 1996).

   c. The ADRA also gave jurisdiction to the federal district courts, but this jurisdiction included a sunset provision of 1 January 2001. Congress did not act to extend the federal district court jurisdiction.

B. **COFC Rules.** The COFC issued rules (RCFC), which prescribe the conduct of cases before the Court. Available at *http://www.uscfc.uscourts.gov/rules.htm*. Appendix C of the RCFC provides procedural guidance specifically tailored for bid protest litigation to enhance the overall effectiveness of protest resolution at the COFC. (The guidance provided by Appendix C of the RCFC is cited throughout the remainder of this outline section.)

C. Who May Protest?

1. Interested Party. The COFC appears to follow the same definition as that used in GAO protests. CC Distribs., Inc. v. United States, 38 Fed.Cl. 771 (1997); but see CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (noting that "there is not a perfect joinder between the GAO's definition of interested party and the Tucker Act's jurisdictional waiver"). The **Court of Appeals for the Federal Circuit (CAFC)** has apparently resolved the issue of who is an "interested party" by adopting the GAO definition. See Am. Fed.'n Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (Construing that Section 1491(b)(1) did not adopt the APA's liberal standing standards, but rather the narrow standards set forth in Section 3551(2)). See also, Myers Investigative & Sec Serv., Inc. v United States, 2002 U.S. App. LEXIS 237 (January 8, 2002).

2. **Intervenors.** The COFC allows parties to intervene as a matter of right and allows permissive intervention. RCFC 24.

a. Intervention of Right. Allowed when the right of intervention is mandated by statute or the applicant for intervention has an interest relating to the property or transaction that is the subject of the protest. RCFC 24(a). Case law developed by the U.S. District Court of the District of Columbia suggests that the protester must be able to demonstrate some "injury-in-fact" or otherwise be within the "zone of interest" of the statute or regulation to have standing before the court. See Scanwell Lab. Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). See also Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir. 1981).

b. Permissive Intervention. The COFC may allow permissive intervention by parties with a claim or question of law or fact that is "in common" with that of the main action. The court will consider whether such intervention will "unduly delay or prejudice the adjudication" of the main action. RCFC 24(b).

c. Intervention by the Proposed Awardee. An "apparent successful bidder" may enter an appearance at any hearing on an application for injunctive relief. RCFC C12. But see Anderson Columbia Envtl., Inc., 42 Fed. Cl. 880 (1999) (holding that contract awardee was not permitted to intervene as its interests were represented adequately by an existing party, i.e., the government).

3. Effect of GAO Proceedings. A protester may file its protest with the COFC despite the fact that it was the subject of a GAO protest.

D. **What May Be Protested?** The ADRA of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C. § 1491).

1. An "interested party" may challenge the terms of a solicitation, a proposed award, the actual contract award, or any alleged violation of statute or regulation associated with a procurement or proposed procurement. 28 U.S.C. § 1491(b). See CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (protester has standing to challenge out-of-scope contract change).

2. The COFC has jurisdiction to hear both pre- and post-award protests. 28 U.S.C. § 1491(b)(1). It will not, however, review a protest alleging that GAO did not follow its own bid protest procedures. Advance Construction Services, Inc., v. U.S., 51 Fed. Cl. 362 (2002).

E. When Must a Protest Be Filed?

1. Unlike protests filed with the GAO, the COFC currently has no specific timeliness requirement. Generally, however, one would expect protests to be filed very quickly in order to demonstrate the immediate and irreparable harm necessary to obtain injunctive relief. Hence, the COFC will typically schedule a temporary restraining order (TRO) hearing as soon as practicable following the filing of the TRO application. RCFC C9.

2. Defective Solicitation. The COFC appears to have adopted the GAO rule that the agency must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals**. See Aerolease Long Beach v. United States, 31 Fed. Cl. 342 (1994), aff'd 39 F.3d 1198 (Fed. Cir. 1994); see also ABF Freight System Inc. v. U.S., 2003 U.S. Claims LEXIS 36, Feb. 26, 2003; see generally 4 C.F.R. § 21.2(a)(1) (1998).

3. Absent a need to show immediate and irreparable harm, actions must be commenced within six years of the date the right of action first accrues. 28 U.S.C. § 2401(a).

F. Temporary Restraining Orders and Preliminary Injunctions.

1. RCFC C9-C15 provide for Temporary Restraining Orders and Preliminary Injunctions. The court applies the traditional four-element test. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 41 CCF ¶ 77,078 (Fed.Cl. 1997); Magnavox Elec. Sys., Co. v. United States, 26 Cl. Ct. 1373, 1378 (1992); We Care, Inc. v. Ultra-Mark, Int'l Corp., 930 F.2d 1567 (Fed. Cir. 1991); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983). These elements are:

   a. Likelihood of success on the merits; Cincom Sys., Inc. v. United States, 37 Fed. Cl. 266 (1997) (court considered fact that plaintiff lost in earlier GAO protest);

   b. Degree of immediate irreparable injury if relief is not granted; Magellan Corp. v. United States, 27 Fed. Cl. 446, 448 (1993) (no irreparable harm if protester will have other opportunities to supply product);

   c. Degree of harm to the party being enjoined if relief is granted; Magellan Corp. v. United States, 27 Fed.Cl. 446, 448 (1993); Rockwell Int'l Corp. v. United States, 4 Cl. Ct. 1, 6 (1983) (injunctive relief should be denied when national security and defense concerns are raised); and,

d. Impact of the injunction on public policy considerations. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 37 Fed. Cl. 266 (1997), citing Southwest Marine, Inc. v. United States, 3 Cl. Ct. 611, 613 (1983) (public policy places national security/defense interests over public interest in fair and open competition).

2. Posting of Bonds and Securities. A protester must post bond via an "acceptable surety" in order to obtain a preliminary injunction. The COFC determines the sum of the bond security. This security covers the potential costs and damages incurred by the agency if the court subsequently finds that the government was unlawfully enjoined or restrained. RCFC 65(c).

G. Standard of Review.

1. The COFC will review the agency's action pursuant to the Administrative Procedures Act (APA). 5 U.S.C. § 706. The court looks to whether the agency acted arbitrarily, capriciously, or not otherwise in accordance with law. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997). See also Impresa Construzioni Geom. Domenico Garufi v. United States, 283 F.3d 1324 (Fed. Cir. 2001) (allowing for review of a contracting officer's affirmative responsibility determination if there has been a violation of a statute or regulation, *or alternatively, if the agency determination lacked a rational basis*).

2. The plaintiff must demonstrate either that the agency decision-making process lacks a rational basis or that there is a clear and prejudicial violation of applicable statutes or regulations. Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996); Magellan Corp. v. United States, 27 Fed. Cl. 446 (1993); RADVA Corp. v. United States, 17 Cl. Ct. 812 (1989). The court will consider any one, or all, of the following four factors in determining whether the agency abused its discretion or acted in an arbitrary or capricious manner:

a. Subjective bad faith on the part of the agency official;

b. Absence of a reasonable basis for the agency decision or action;

c. Amount of discretion given by procurement statute or regulation to the agency official; and

d. Proven violation of pertinent statutes or regulations. See Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988).

3. To obtain a permanent injunction, the plaintiff must show by a preponderance of the evidence that the challenged action is irrational, unreasonable, or violates an acquisition statute or regulation. See Isratex,

Inc. v. United States, 25 Cl. Ct. 223 (1992); see also Logicon, Inc., 22 Cl. Ct. 776 (1991) (plaintiff need only demonstrate likelihood of success on the merits for temporary restraining order).

4. The court may give decisions by the Government Accountability Office great deference. Honeywell, Inc. v. United States, 870 F.2d 644 (Fed Cir. 1989). This deference, however, is not absolute. See Health Sys. Mktg. & Dev. Corp. v. United States, 26 Cl. Ct. 1322 (1992); California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).

H. Agency Administrative Record. The court accomplishes its review "based upon an examination of the 'whole record' before the agency." Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997). RCFC C22 encourages early production of the "core documents" of the administrative record to "expedite the final resolution of the case."

1. Core Documents. The "core documents" of the Administrative Record include, as appropriate, the:

a. Agency's procurement request, purchase request, or statement of requirements;

b. Agency's source selection plan;

c. Bid abstract or prospectus of bid;

d. Commerce Business Daily or other public announcement of the procurement (this will most likely be the FedBizOpps announcement, but the RCFC still refers to the CBD);

e. Solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers (BAFO) (the RCFC still refers to BAFO);

f. Documents and information provided to bidders during any pre-bid or pre-proposal conference;

g. Agency's responses to any questions about or requests for clarification of the solicitation;

h. Agency's estimates of the cost of performance;

i. Correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;

j. Records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;

k. Records of the results of any bid opening or oral motion auction in which the protester, awardee, or other interested parties participated;

l. Protester's, awardees', and other interested parties' offers, proposals, or other responses to the solicitation;

m. Agency's competitive range determination, including supporting documentation;

n. Agency's evaluations of the protester's, awardees', or other interested parties' offers, or other responses to the solicitation, proposals, including supporting documentation;

o. Agency's source selection decision, including supporting documentation;

p. Pre-award audits, if any, or surveys of the offerors;

q. Notification of contract award and executed contract;

r. Documents relating to any pre- or post-award debriefing;

s. Documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest;

t. Justifications, approvals, determinations and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and

u. The record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.

2. Supplementing the Administrative Record. The COFC may allow supplementation of the administrative record in limited circumstances. Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997) citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) ("little weight" given "*post hoc* rationalizations by the agency"); Graphicdata, LLC v. United States, 37 Fed. Cl. 771, 779 (1997). The reasons recognized by the COFC for supplementing the administrative record include:

a. When the agency action is not adequately explained in the record before the court;

b. When the agency failed to consider factors which are relevant to its final decision;

c. When the agency considered evidence not included in the record;

d. When the case is so complex that additional evidence will enhance understanding of the issues;

e. Where evidence arising after the agency action shows whether the decision was correct;

f. Cases where the agency is sued for failure to take action;

g. Cases arising under the National Environmental Policy Act; and

h. Cases where relief is at issue, particularly with respect to injunctive relief.

I. Procedures.

1. The court conducts a civil proceeding without a jury, substantially similar to proceedings in federal district courts. As noted above, the court has its own rules of procedure.

2. The RCFC incorporate the Federal Rules of Civil Procedure (FRCP) applicable to civil actions tried by a federal district court sitting without a jury to the extent practicable.

3. Additionally, the plaintiff must be represented by counsel who is admitted to practice before the court. RCFC 83.1. Finast Metal Prods., Inc. v. United States, 12 Cl. Ct. 759 (1987). RCFC C25 allows counsel who are not yet members of the COFC bar to make initial filings in a bid protest case (i.e., complaint and other accompanying pleadings), "conditioned upon counsel's prompt pursuit of admission to practice" before the COFC.

4. Notification. The protester must hand deliver two copies of all pleadings to the Department of Justice (DOJ), Commercial Litigation Branch, Civil Division. Additionally, the protester must notify by telephone and serve counsel for the "apparent successful bidder" any application for injunctive relief.

5. Requirement for Pre-Filing Notification. The COFC requires the protester to provide **at least** 24-hours advance notice of the protest filing to the DOJ, the COFC, the procuring agency, and any awardee(s). This

requirement allows DOJ time to assign an attorney to the case and permits the COFC to identify the necessary assets to process the case. Although failure to provide pre-filing notice is not jurisdictional, it is "likely to delay the initial processing of the case." RCFC C2.

6. Initial Filings. As stated above, the protester generally initiates the COFC protest process with the filing of an application for injunctive relief. Specifically, the protest commences with the filing of a complaint. RCFC 3(a). Generally, the complaint is accompanied by the application for injunctive relief. RCFC 65, C10. Additionally, any application must have with it the proposed order, affidavits, supporting memoranda, and other documents upon which the protester intends to rely. RCFC C10.

7. Initial Status Conference. The COFC will conduct an initial status conference to address pre-hearing matters, to include: identification of interested parties; any requests for injunctive relief and protective orders; the administrative file; and establishing a timetable for resolution of the protest. The COFC will schedule the initial status conference as soon as practicable following the filing of the complaint.

8. Agency Response. The government must respond to the protester's complaint within 60 days of filing. RCFC 12. Responses to motions must be accomplished within 14 days of service. RCFC 7.2(a). Responses to Rule 12(b) and 12(c) motions and summary judgment motions must be filed within 28 days of service. RCFC 7.2(c).

9. Discovery. The APA mandates that the court's decision should be based upon the agency record. 5 U.S.C. § 706; Camp. v. Pitts, 411 U.S. 138 (1973). Yet, the COFC has authorized limited discovery. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339 (1997) (deposition of contracting officer allowed); Aero Corp., S.A. v. United States, 38 Fed. Cl. 408 (1997) (in light of contemporaneous written explanations supporting procurement decision, deposing procurement officials improper).

10. Protective Orders. The COFC may issue protective orders upon motion by a party to either prevent discovery or to protect proprietary/source selection sensitive information from disclosure. RCFC C4-C7. But see Modern Technologies Corp. v. United States, 44 Fed. Cl. 319 (1998) (parties ordered to make available to the public documents that were filed previously under seal pursuant to a protective order because the proprietary and source-selection information had "minimal current value").

11. Sanctions. The COFC may impose sanctions under RCFC 11(c) if a "[p]leading, motion or other paper is signed in violation this rule. . ."

RCFC 11(c). See Miller Holzwarth, Inc v. United States and Optex Sys., 44 Fed. Cl. 156 (1999) (protester and its representative "effectively misled" the court, the government, and the awardee/intervenor by failing to disclose that it possessed source-selection information at the time that it filed its pleading).

J. Remedies.

1. Equitable relief, i.e., temporary restraining orders, preliminary injunctions, permanent injunctions, and declaratory judgment, is available. Protesters commencing action in this court usually seek injunctive relief.

2. Reasonable bid preparation costs are recoverable. Rockwell Int'l Corp. v. United States, 8 Cl. Ct. 662 (1985).

3. Anticipatory profits are not recoverable. Heyer Prods. Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956); Compubahn, Inc. v. United States, 33 Fed. Cl. 677 (1995).

4. The cost of preparing for performance of an anticipated contract is not recoverable. Celtech, Inc. v. United States, 24 Cl. Ct. 269 (1991).

5. The cost of developing a prototype may be recovered. Coflexip & Servs., Inc. v. United States, 961 F.2d 951 (Fed. Cir. 1992).

K. Attorneys Fees and Protest Costs.

1. The court may award attorneys fees and protest costs pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A); Crux Computer Corp. v. United States, 24 Cl. Ct. 223 (1991); Bailey v. United States, 1 Cl. Ct. 69 (1983).

2. Only those attorneys fees associated with the litigation are recoverable. Cox v. United States, 17 Cl. Ct. 29 (1989). See also Levernier Constr. Co. v. United States, 21 Cl. Ct. 683 (1990), rev'd 947 F.2d 497 (Fed. Cir. 1991) (costs associated with hiring an expert witness to pursue a claim with the contracting officer, prior to the litigation, not recoverable).

3. The Demise of the "**Catalyst Theory**." Need more than a "voluntary change in the defendant's conduct" to qualify as a "prevailing party." Now there must be a "judicially sanctioned change in the parties' relationship" to be considered a "prevailing party" under fee-shifting statutes. See Brickwood Contractors, Inc. v. U.S., 288 F.3d 1371 (Fed. Cir. 2002) (holding the Supreme Court's decision in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of HHR, 532 U.S. 598 (2001) was applicable to EAJA).

L. **Appeals.** Appeals from decisions of the Court of Federal Claims are taken to the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3).

VI. FEDERAL DISTRICT COURTS.

Prior to ADRA, federal district courts reviewed challenges to agency procurement decisions pursuant to the Administrative Procedures Act. 5 U.S.C. § 702. This authority was popularly known as the "Scanwell Doctrine." Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The ADRA granted the federal district courts jurisdictional authority to hear pre-award and post-award bid protests. As with the COFC, the ADRA directed the district courts to "give due regard" to national security/defense interests and "the need" for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)). However, the ADRA also provided for the "sunset" of the district courts bid protest jurisdiction as of 1 January 2001, unless Congress acted affirmatively to extend the jurisdiction. Congress did not extend the bid protest jurisdiction.

Note however, that the United States Court of Appeals for the Federal Circuit recently held that federal district courts retained their implied-in-fact jurisdiction over nonprocurement solicitations. Resource Conservation Group, LLC v. U.S, 597 F.3d 1238, (Fed.Cir. 2010).

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APPENDIX A AGENCY FAR SUPPLEMENTS

The following Supplements contain provisions addressing protests:

1. Army FAR Supplement (AFARS), 48 C.F.R. Subpart 5133.1.

2. Navy Marine Corps Acquisition Regulation Supplement (NMCARS), 48 C.F.R. Subpart 5233.1.

3. Air Force FAR Supplement (AFFARS), 48 C.F.R. Subpart 5333.1.

4. Defense Logistics Acquisition Directive (DLAD), 48 C.F.R. Subpart 5433.1

5. Special Operations Command FAR Supplement (SOFARS), 48 C.F.R. Subpart 5633.1.

6. Department of Agriculture Acquisition Regulation (AGAR), 48 C.F.R. Subpart 433.1.

7. US Agency for International Development (USAID) Acquisition Regulation (AIDAR), 48 C.F.R. Subpart 733.1.

8. Department of Commerce Acquisition Regulation (CAR), 48 C.F.R. Subpart 1333.1.

9. Department of Energy Acquisition Regulation (DEAR), 48. C.F.R. Subpart 933.1.

10. Department of the Interior Acquisition Regulation (DIAR), 48 C.F.R. Subpart 1433.1.

11. Department of Labor Acquisition Regulation (DOLAR), 48 C.F.R. Subpart 2933.1.

12. Department of State Acquisition Regulation (DOSAR), 48 C.F.R. Subpart 633.1.

13. Department of the Treasury Acquisition Regulation (DTAR), 48 C.F.R. Subpart 1033.1.

14. Department of Education Acquisition Regulation (EDAR), 48 C.F.R. Subpart 3433.1.

15. Environmental Protection Agency Acquisition Regulation (EPAAR), 48 C.F.R. Subpart 1533.1.

16. General Services Administration Acquisition Regulation (GSAR), 48 C.F.R. Subpart 533.1.

17. Department of Health and Human Services Acquisition Regulation (HHSAR), 48 C.F.R. 333.1.

18. Department of Housing and Urban Development Acquisition Regulation (HUDAR), 48 C.F.R. 2433.1.

19. Justice Acquisition Regulation (JAR), 48 C.F.R. Subpart 2833.1.

20. National Aeronautics and Space Administration (NASA) FAR Supplement (NFS), 48 C.F.R. Subpart 1833.1.

21. Nuclear Regulatory Commission Acquisition Regulation (NRCAR), 48 C.F.R. Subpart 2033.1.

22. Department of Transportation Acquisition Regulation (TAR), 48 C.F.R. Subpart 1233.1.

23. Veterans Affairs Acquisition Regulation (VAAR), 48 C.F.R. Subpart 833.1.

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Chapter 18B
CDA Litigation at COFC

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CHAPTER 18B

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CHAPTER 18B

CONTRACT DISPUTES ACT AND BID PROTEST

LITIGATION AT THE COURT OF FEDERAL CLAIMS ("COFC")

I. INTRODUCTION.

A. Court of national jurisdiction, established in 1855 to handle certain types of claims against the United States.

B. Jurisdiction – Suits primarily for money, arising out of money-mandating statutes, Constitutional provisions, Executive orders, Executive agency regulations, and contracts.[1]

1. 26% - Government contracts (10% bid protests).

2. 8% - Civilian and military pay.

3. 8% - tax refunds (concurrent jurisdiction with United States district courts).

4. 5% - Fifth Amendment takings, including environmental and natural resource issues.

5. 42% - Vaccine compensation claims. 42 U.S.C. § 300aa-12.

6. 11% - Miscellaneous.

a. Various claims pursuant to statutory loan guarantee or benefit programs, including those brought by states and localities, and foreign governments.

b. Congressional reference cases. 28 U.S.C. § 1492.

c. Intellectual property claims against the United States (and its contractors). 28 U.S.C. § 1498.

d. Indian Tribe claims. 28 U.S.C. § 1505.

C. Limitation on Remedies

[1] Most recent available data for Fiscal Year (FY) 2012, located at: http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/G02ASep12.pdf

1. Generally, money damages. However, monetary relief in a bid protest is limited to bid preparation and proposal costs. 28 U.S.C. § 1491(b)(2)

2. Pursuant to the Tucker Act, the Court may provide limited forms of equitable relief, including:

   a. Reformation in aid of a monetary judgment, or rescission instead of monetary damages. John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981); Rash v. United States, 360 F.2d 940 (1966).

   b. "[T]o grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief" in bid protest cases. 28 U.S.C. § 1491(b)(2).

   c. Records correction incident to a monetary award, such as correcting military records to reflect a Court finding of unlawful separation. See 28 U.S.C. § 1491(a)(2).

   d. Pursuant to the Contract Disputes Act ("CDA"), the COFC also may entertain certain nonmonetary disputes.

3. The Court may award Equal Access to Justice Act ("EAJA") attorney fees. 28 U.S.C. § 2412.

D. Composition. 28 U.S.C. §§ 171-172.

1. Composed of 16 judges (currently 10 judges, also 7 senior judges).

2. Chief Judge is Patricia Elaine Campbell-Smith.

3. President appoints judges for 15-year term with advice and consent of the Senate. President may reappoint after initial term expires.

4. The Court of Appeals for the Federal Circuit ("CAFC") may remove a judge for incompetence, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.

E. Location.

1. 717 Madison Place, N.W., Washington, D.C. (across from White House and Treasury).

2. Routinely schedules trials throughout the country, 28 U.S.C. §§ 173 ("times and places of the sessions of the [COFC] shall be prescribed with a view to securing reasonable opportunity to citizens to appear … with as

little inconvenience and expense to citizens as is practicable"), 2503(c) ("[h]earings shall, if convenient, be held in the counties where the witnesses reside"), and 2505 ("Any judge of the [COFC] may sit at any place within the United States to take evidence and enter judgment.") The Court also conducts telephonic hearings, motions, and status conferences.

3. Unlike the boards for contract appeals ("BCAs"), however, prior to 1992, the COFC could not conduct trials in foreign countries. 28 U.S.C. § 2505; In re United States, 877 F.2d 1568 (Fed. Cir. 1989). The Federal Courts Administration Act ("FCAA") of 1992 remedied this. See 28 U.S.C. § 798(b).

F. Case Load.

1. FY 2012, the COFC terminated 3,391 cases. The total amount claimed was $46,408,652,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of $810,147,115. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of $3,542,332. The Court had 91 bid protests.

2. FY 2008, the COFC disposed of 872 complaints (including Congressional Reference) and 294 vaccine petitions. The total amount claimed was $10,108,961,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of $1,287,014,725.40 of which $31,835,607.84 carried interest. The Court had 92 bid protests.

3. In FY 2006, the Court rendered judgments in more than 900 cases and awarded $1.9 billion in damages.

4. In FY 2003, the Court disposed of 732 complaints, including 45 bid protests, and awarded judgments totaling $ 878 million on claims totaling $ 40 billion against the Government.

5. Web site (includes judges' bios): http://www.uscfc.uscourts.gov//

II. HISTORY OF THE COURT.

A. Pre-Civil War.

1. Before 1855, Government contractors had no forum in which to sue the United States.

2. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612.

3. However, the service secretaries continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

B. Civil War Reforms.

1. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765.

2. In 1887, Congress passed the Tucker Act to expand and clarify the Court's jurisdiction. Act of March 3, 1887, 24 Stat. 505 (codified at 28 U.S.C. § 1491).

a. The court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). For the first time, a Government contractor could sue the United States as a matter of right.

b. Note: district courts have concurrent jurisdiction with COFC to the extent such claims do not exceed $10,000. 28 U.S.C. § 1346(a)(2) (Little Tucker Act).

C. Agencies Respond.

1. Agencies responded to the Court of Claim's increased oversight by adding clauses to Government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact.

2. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878).

3. The tension between the agencies' desire to decide contract disputes without outside interference and the contractors' desire to resolve disputes in the Court of Claims continued until 1978.

4. This tension resulted in considerable litigation and a substantial body of case law.

D. The Supreme Court Weighs In.

1. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual and legal decisions issued under disputes clauses by agency boards of contract appeals.

2. The Supreme Court further held that the Court of Claims could not review board decisions de novo.

E. Congress Reacts.

1. In 1954, Congress passed the Wunderlich Act, 41 U.S.C. §§ 321-322, to reaffirm the Court of Claims' authority to review factual and legal decisions by agency boards of contract appeals.

2. At about the same time, Congress changed the Court of Claims from an Article I (legislative) court to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953).

F. The Supreme Court Weighs In Again.

1. In United States v. Carlo Bianchi & Co, 373 U.S. 709 (1963), the Supreme Court held that boards of contract appeals were the sole forum for considering de novo disputes "arising under" a remedy granting clause in the contract.

2. Three years later, the Supreme Court reaffirmed its conclusion in Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).

3. As a result, agency boards of contract appeals began to play a more significant role in the resolution of contract disputes.

G. The Contract Disputes Act (CDA) of 1978.

1. Pub. L. No. 95-563, 92 Stat. 2383 (codified, as amended, at 41 U.S.C. § 7101 et seq.).

2. In 1978, Congress passed the CDA to make the claims and disputes process more consistent and efficient.

3. The CDA replaced the previous disputes resolution system with a comprehensive statutory scheme.

H. Federal Courts Improvement Act of 1982.

1. Pub. L. No. 97-164, 96 Stat. 25 (codified 28 U.S.C. §§ 171 et seq., 1494-97, 1499-1503).

2. In 1982, Congress overhauled the Court of Claims and created a new Article I (legislative) court -- named the United States Claims Court -- from the old Trial Division of the Court of Claims. Congress then merged the old Appellate Division of the Court of Claims with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit ("CAFC").

I. Federal Courts Administration Act of 1992

1. Pub. L. No. 102-572, 106 Stat. 4506. For legislative history, see, inter alia, S. Rep. No. 102-342, 102d Cong., 2d Sess. (July 27, 1992); H. Rep. No. 102-1006 (October 3, 1992); Senator Heflin's remarks, Volume 138 Cong. Rec. No. 144, at S17798-99 (October 8, 1992).

2. In 1992, Congress changed the name of the Claims Court to the United States Court of Federal Claims ("COFC").

3. Congress expanded the jurisdiction of the COFC to include the adjudication of nonmonetary disputes.

> The COFC has jurisdiction "to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)).

J. The Federal Acquisition Streamlining Act of 1994 ("FASA")

1. Pub. L. No.103-355, 108 Stat. 3243 (1994), slightly altered the Court's jurisdiction.

2. The COFC may direct that the contracting officer render a decision formerly, only the boards of contract appeals (BCAs) previously could. FASA § 2351(e), amending 41 U.S.C. § 605(c)(4) (now § 7103.)

3. District courts may request advisory opinions from BCAs. On matters concerning contract interpretation (any issue that could be the proper subject of a contracting officer's final decision), district courts may request that the appropriate agency BCA provide (in a timely manner) an advisory opinion. FASA § 2354, amending 41 U.S.C. § 609 (now 7107(f)). FASA does not permit Federal district courts to request an advisory opinion from the COFC.)

K. The Administrative Dispute Resolution Act of 1996 ("ADRA")

1. Pub. L. No. 104-320, § 12 (1996), significantly altered COFC and U.S. District Court "bid protest jurisdiction." 28 U.S.C. § 1491(b) permits COFC to "render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

2. Jurisdiction extends to actions "in connection with a procurement or proposed procurement," has been interpreted broadly by the court, to include such actions as agency CICA stay overrides. RAMCOR Services Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed.Cir.1999).

3. Statutorily-Prescribed Standing Requirement("interested party").

   a. "Interested party" has same meaning as in CICA (actual or prospective bidder whose direct economic interest would be affected by an award). AFGE, AFL-CIO v. United States, 258 F.3d 1294 (2001).

   b. This means protester must submit a bid/proposal, Impresa Construcioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334 (Fed. Cir. 2001); not be a bidder ranked below second in an agency's evaluation, United States v. IBM Corp., 892 F.2d 1006 (Fed. Cir. 1989); and be responsive. Ryan Co. v. United States, 43 Fed. Cl. 646 (1999) (citing IBM), and MCI Telecom. Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989)).

4. Empowered the Court to grant declaratory and injunctive relief to fashion a remedy. Monetary relief, however, is limited to bid preparation and proposal costs.

5. Granted same jurisdiction to district courts until January 1, 2001, unless jurisdiction was renewed.

6. Administrative Procedures Act (APA) standard of review, i.e. "arbitrary, capricious, an abuse of discretion." 5 U.S.C. § 706(2)(A).

III. PRACTICAL EFFECTS ON LITIGATION.

A. The Judge.

1. 28 U.S.C. § 173.

2. One judge presides and decides - NO JURY TRIALS. Rules of the Court of Federal Claims ("RCFC") 38 & 39.

B. The Plaintiff.

1. RCFC 17.

2. Individuals may represent themselves or members of their immediate family. Any other party must be represented by an attorney who is admitted to practice in the COFC. RCFC 83.1(a)(3).

3. Note: at ASBCA atty. not required.

C. The Defendant = "The United States."

1. Counsel = Department of Justice ("DOJ"). 28 U.S.C. §§ 516, 518-519. The DOJ has plenary authority to settle cases pending in the COFC. See 28 U.S.C. § 516; see also Executive Business Media v. Dept. of Defense, 3 F.3d 759 (4th Cir. 1993).

2. The National Courts Section of the Civil Division's Commercial Litigation Branch, located in Washington, D.C., represents the Government in all contract actions.

D. Practical Effect Upon Agency Once Case If Filed.

1. The agency loses authority over the case's disposition.

2. The contracting officer loses authority to decide or settle claims arising out of the same operative facts. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993).

3. The agency counsel, because there is only one "attorney of record" per party, appears "of counsel," and plays a different role than s/he would at the board or even a district court, where SAUSA appointments are commonplace.

4. Effect of "United States" as defendant. Who is DOJ's client?

E. Applicable Law.

1. Statutes and Federal common law, unless matter controlled by state law, e.g., property rights.

2. Stare Decisis.

a. Supreme Court.

b. United States Court of Appeals for the Federal Circuit.

c. United States Court of Claims. South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982) (en banc).

d. Judges not bound by the decisions of the other COFC judges.

e. Unpublished decisions may be cited.

3. Procedural Rules

a. The Rules of the Court of Federal Claims ("RCFC"), which are based upon the Federal Rules of Civil Procedure, are published as an appendix to Title 28 of the United States Code.

b. Special Orders – The old version of RCFC 1 permitted the judges to "regulate the applicable practice in any manner not inconsistent with these rules." Thus, most judges adopted specialized procedural orders, regulating enlargements of time, dispositive motions in lieu of answers, other dispositive motion requirements, mandatory disclosure, joint preliminary status reports, preliminary status conferences, discovery, experts, and submissions. Although the new rules do not specifically address this practice, many judges still issue special orders.

F. Electronic docket.

1. Public Access to Court Electronic Records ("PACER") is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet.

2. CM/ECF stands for Case Management / Electronic Case Files. It is a joint project of the Administrative Office of the U.S. Courts and the Federal courts to replace existing case management systems with a new system based on current technology, new software and increased functionality. This new system allows us to offer web access to the Court's docket 24 hours a day, 7 days a week and to allow electronic document filing in designated cases.

3. Electronic docket basically mandates that the agency have scanning capabilities.

IV. COFC JURISDICTIONAL ISSUES.

A. Waiver of Sovereign Immunity.

Tucker Act waives sovereign immunity, but the "substantive right" claimed, whether it be the Constitution, an Act of Congress, a mandatory provision of regulatory law, or a contract, must be one which "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967).

B. Tucker Act - General.

1. Must be brought within six years of date claim arose. 28 U.S.C. § 2501; Soriano v. United States, 352 U.S. 270, 273 (1956); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988). This is jurisdictional.

2. Equitable tolling: Irwin v. Veterans Admin., 498 U.S. 89 (1990) (rebuttable presumption that equitable tolling may be applied against the United States in the same manner as against private parties); Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998). But see, John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) (holding that 28 U.S.C. § 2501 is jurisdictional and thus equitable tolling and estoppel do not extend the six-year statute of limitations embedded in 28 U.S.C. § 2501).

3. NAFIs:

a. **OLD RULE:** Generally must involve an appropriated fund activity. AINS, Inc. v. United States, 365 F.3d 1333 (Fed. Cir.2004); Furash & Company v. United States, 252 F.3d 1336 (Fed. Cir. 2001); El-Sheikh v. United States, 177 F.3d 1321 (Fed. Cir. 1999)(finding that Tucker Act jurisdiction over NAFIs is limited to claims based upon a contract, but holding that jurisdiction may be supplied through another statute waiving sovereign immunity, such as the FLSA).

b. **NEW RULE:** Federal Circuit just held, en banc, that Tucker Act jurisdiction encompasses NAFs. See Slattery v. United States, 635 F.3d 1298 (2011).

4. Money claimed must be presently due and payable. United States v. King, 395 U.S. 1, 3 (1969).

5. May not also be pending in any other court. 28 U.S.C. § 1500; Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc).

6. May not grow out of or be dependent upon a treaty. 28 U.S.C. § 1502.

7. May not be brought by a subject of a foreign government unless the foreign government accords to citizens of the United States the right to prosecute claims against that government in its courts. 28 U.S.C. § 2502; Zalcmanis v. United States, 146 Ct. Cl. 254 (1959).

C. Tucker Act - Claims Founded Upon Contract.

1. Must demonstrate elements necessary to establish the existence of a contract (e.g., meeting of minds, consideration). E.g., Somali Dev. Bank v. United States, 205 Ct. Cl. at 751, 508 F.2d at 822; Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649, 673-74, 428 F.2d 1241, 1255 (1970); ATL, Inc. v. United States, 4 Cl. Ct. 672, 675 (1984), aff'd, 735 F.2d 1343 (Fed. Cir. 1984).

2. Must demonstrate that it was entered into by authorized Government official. E.g., City of El Centro v. United States, 922 F.2d 816 (Fed. Cir. 1990).

3. Must demonstrate "privity of contract." Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1557 (Fed. Cir. 1983); see Cienega Gardens, et al. v. United States, 162 F.3d 1123, 1129-30 (Fed. Cir. 1998).

4. If "implied," must be implied-in-fact, not implied- in-law. Merritt v. United States, 267 U.S. 338, 341 (1925); Tree Farm Dev. Corp. v. United States, 218 Ct. Cl. 308, 316, 585 F.2d 493, 498 (1978); Algonac Manufacturing Co. v. United States, 192 Ct. Cl. 649, 674, 428 F.2d 1241, 1256 (1970).

5. Cannot be for the performance of covert or secret services; not all "agreements" within Congress' contemplation of contract claims under Tucker Act. Totten v. United States, 92 U.S. 105 (1875); Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988).

6. "Grants" which create formal obligations have been found sufficient for jurisdiction even though they do not appear to satisfy all elements necessary for a contract; however, Government bound only by its express undertakings. Missouri Health & Med. Organization v. United States, 226 Ct. Cl. 274 (1981); Thermalon Indust., Ltd. v. United States, 34 Fed. Cl. 411 (1995).

D. Claims Founded Upon Statute Or Regulation.

1. Civilian personnel pay claims: e.g., Equal Pay Act, 5 U.S.C. § 5101; Federal Employment Pay Act, 5 U.S.C. § 5542 et seq.; Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

2. Military personnel pay claims: A service member's status in the armed forces is defined by the statutes and regulations which form the member's right to statutory pay and allowances. Bell v. United States, 366 U.S. 393 (1961).

E. Claims for Money Unlawfully Exacted Or Retained. Jurisdiction to entertain claim for return of money paid by claimant under protest upon grounds illegally exacted or retained. Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996).

F. Constitutional Provisions and Statutes That Do Not Waive Sovereign Immunity

1. 1st, 4th, and 5th Amendments (except Takings Clause).

2. Administrative Procedure Act. Califano v. Sanders, 430 U.S. 99, 107 (1977)

3. Declaratory Judgment Act (28 U.S.C. § 2201). United States v. King, 395 U.S. 1, 5 (1969).

V. BID PROTESTS AT THE COURT OF FEDERAL CLAIMS

A. COFC jurisdiction to entertain a bid protest must be "in connection with a procurement."

1. The Tucker Act, 28 U.S.C. § 1491(b), as amended by Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 (October 19, 1996), section 12, provides the Court "jurisdiction to render judgment on an action by an interested party objecting to a **solicitation** by a Federal agency for bids or proposals for a proposed contract or a **proposed award** or the **award** of a contract or any **alleged violation of statute or regulation** in connection with a procurement or a proposed procurement."

2. This jurisdictional mandate has been broadly construed by the Federal Circuit. See Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), Weeks Marine, Inc. v. United States, 575 F.3d 1352 (Fed. Cir. 2009), and Resource Conservation Group, LLC v. United States, 597 F.3d 1238 (Fed. Cir. 2010).

3. COFC bid protest jurisdiction includes pre-award and post-award protests.

a. Pre-award**:** protests can challenge such things as: an agency's anticipated contract award to an identified low bidder or apparent successful offeror; requirements in a solicitation; alleged de facto sole source specifications; elimination of an offeror from (or improper inclusion of an offeror in) a competitive range; responsiveness and responsibility determinations; any change or

amendment to a solicitation that is alleged to prejudice the litigant; any purported illegality or regulatory violation within the solicitation process; etc.

b. Post-award: protests generally can raise the same challenges as a pre-award protest and, in addition, can challenge the award decision. However, "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a § 1491(b) action." Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007). Moreover, post-award, the relief available may be limited, as a practical and equitable matter, if a protest is filed long after award. This does not, however, necessarily make the protest untimely.

4. Relief.

a. COFC injunctive authority allows Court to issue temporary restraining orders for a maximum of 28 days, a preliminary or permanent injunction, and may award bid and proposal preparation costs if the plaintiff is successful on the merits. PGBA, LLC v. United States, 389 F.3d 1219, 1225-27 (Fed. Cir. 2004). Purely declaratory relief is usually of minimal significance in bid protests. Any coercive order of the court requiring an agency to do, or not do, something in connection with a procurement is treated as injunctive relief and requires weighing the equities. PGBA, 389 F.3d at 1228.

b. Court's grant of relief may include ordering the termination of a contract that has been awarded, the court cannot order a contract award to a particular bidder. United Int'l Investig. Servs., Inc. v. United States, 41 Fed. Cl. 312, 323-24 (1998) (citing Hydro Eng'g, Inc. v. United States, 37 Fed. Cl. 448, 461 (1997), and Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970)).

Practice Tip: Pursuant to RCFC 65(c) the Court must have plaintiff post a bond if a TRO/PI is issued. However, the Court has discretion on the amount of the bond, so we have the burden of establishing the amount of damages that will be incurred during the pendency of the injunction. Plan to have a declaration by the contracting officer addressing the costs, and any other harm the agency will suffer, in the event the procurement is enjoined.

5. Override of the automatic stay in CICA.

a. The Competition in Contract Act ("CICA"), 31 U.S.C. § 3553, requires the agency to suspend performance of the contract during the pendency of the GAO protest. 31 U.S.C. § 3553(d)(3)(A) and (B). However, CICA permits agency to override the stay provision if agency finds in a determination and findings ("D & F") that continued performance is (1) in the best interests of the United States, or (2) urgent and compelling circumstances that significantly affect interests of the United States will not permit delay. Id. at § 3353(d)(3)(C).

b. COFC may review. RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1291 (Fed. Cir. 1999); Unisys Corp. v. United States, 2009 WL 5098195 *6 (Fed. Cl. 2009); Spherix, Inc. v. United States, 62 Fed. Cl. 497, 503-04 (2003).

c. Override decisions are highly scrutinized by the Court. Recent decisions have applied the "arbitrary and capricious" standard rather than those announced in Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705 (2006). See PMTech, Inc. v. United States, 95 Fed. Cl. 330 (2010), Planetspace, Inc. v. United States, 86 Fed. Cl. 566 (2009), The Analysis Group, LLC v. United States, 2009 WL 3747171, 3 Fed. Cl. (2009), and Frontline Healthcare Workers Safety Foundation, Ltd. v. United State, 2010 WL 637790, 1, Fed. Cl. (2010).

d. If your agency is considering an override, contact us before the D & F is finalized.

B. Standard of Review.

1. Limited to Administrative Record.

a. The scope of the review is limited to the administrative record. Bannum, Inc. v. United States, 404 F.3d 1346, 1355-56 (Fed. Cir. 2005) (the court resolves issues of law and decides all necessary issues of fact based upon the administrative record created before the agency); see also, Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (the proper focus of the court's scrutiny is the agency's articulated rationale for the decision, and the administrative record underlying it); Cincom Sys., Inc. v. Untied States, 37 Fed. Cl. 663, 671 (1997).

b. RCFC 52.1(b) provides the standard for review of agency action on the basis of the administrative record. See, A & D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126, 131 (2006).

c. Pursuant to RCFC 52,1(b), the court decides whether "given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." Id. (citing Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005).

d. The plaintiff bears the burden of meeting this standard by a preponderance of the evidence. Rotech Healthcare, Inc. v. United States, 71 Fed. Cl. 393, 401 (2006).

2. Administrative Procedure Act.

a. Judicial review of the agency's actions in a bid protest is not a de novo proceeding.

b. In the bid protest context, the Court resolves challenges to agency actions under the standards provided in the Administrative Procedure Act, 5 U.S.C. § 706. *See* 28 U.S.C. § 1491(b)(4) (incorporating by reference Administrative Procedure Act's standard of review); Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005); Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

c. The Court's standard of review in bid protests is "highly deferential." Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057 Fed. Cir. 2000).

d. An agency's contracting decision may be set aside only if it is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." The Centech Group, Inc. v. Untied States, 554 F.3d 1029, 1037 (Fed. Cir. 2009); Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001); see also, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds by, Califano v. Sanders, 430 U.S. 99 (1977); The Cube Corp. v. United States, 46 Fed. Cl. 368, 374 (2000).

e. Pursuant to this standard, the court may set aside a procurement decision upon the protester's showing that "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001); Galen Med. Assoc., Inc. v. United States, 369 F.3d 1324, 1329-31 (Fed. Cir. 2004) (decision set aside only if there has been a "clear and prejudicial" violation of law or the agency's decision lacks a rational basis).

3. Presumption of Regularity.

a. In evaluating an agency's decision, the court "is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (quotations omitted) ("If the court finds a reasonable basis for the agency's action, the Court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.")

b. An agency's procurement decisions are entitled to a "presumption of regularity," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), and the Court should not substitute its judgment for that of the agency. Redland Genstar, Inc. v. Untied States, 39 Fed. Cl. 220 (1997); Cincom Sys., Inc. v. Untied States, 37 Fed. Cl. 663, 672 (1997).

c. The disappointed bidder "bears a heavy burden" and the procurement officer is "entitled to exercise discretion upon a broad range of issues confronting [her]." Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

d. This burden "is not met by reliance on [the] pleadings along, or by conclusory allegations and generalities." Bromley Contracting Co. v. United States, 15 Cl. Ct. 100, 105 (1988); see also Campbell v. United States, 2 Cl. Ct. 247, 249 (1983).

4. Agency Action In Response to GAO Recommendation

a. Where an agency follows a GAO recommendation, even if the GAO recommendation is different from the initial decision of the contracting officer, the agency's decision shall be deemed "proper unless the [GAO's] decision was itself irrational." Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989); see also The Centech Group, Inc. v. Untied States, 554 F.3d 1029, 1039 (Fed. Cir. 2009).

b. The Court will only "inquire whether the GAO decision was rational and the agency justifiably relied upon it." SP Sys., Inc. v. United States, 86 Fed. Cl. 1, 13 (2009) (citing Honeywell, Inc. v. United States, 870 F.2d 644, 647 (Fed. Cir. 1989).

c. GAO decisions are "traditionally treated with a high degree of deference, especially in bid protest actions." Grunley Walsh Int'l LLC v. United States, 78 Fed. Cl. 35, 39 (2007) (citations omitted).

Even upon the demonstration of a significant error, a protester must still establish that it was prejudiced and that, but for the error, there was a substantial chance that it would have received the award. Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (citing Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996)).

C. Standard for injunctive relief.

1. Four elements:

a. Plaintiff is likely to succeed on the merits;

b. Plaintiff will suffer irreparable harm;

c. Plaintiff's harm outweighs the harm to the government; and

d. Public interest favors equitable relief.

2. Only difference in a preliminary and permanent injunction is a plaintiff must show likelihood of success on merits for a preliminary injunction and actual success on the merits for a permanent injunction.

3. In a recent case, Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010), the Supreme Court held that the "drastic and extraordinary remedy" of injunctive relief should not be "granted as a matter of course." Id. at 2761. Importantly, the Supreme Court further held "is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test[.]" Id.

D. The Administrative Record.

1. What is included:

a. Appendix C, RCFC, contains the Court's procedures in bid protest proceedings. Paragraph VII of Appendix C provides a fairly comprehensive list of the information that should be included in the record.

Practice tip: Be familiar with the requirements of Appendix C. As soon as you *think* a procurement may result in a COFC protest, begin to compile the material listed in Appendix C for inclusion in the administrative record. The agency is responsible for organizing the documents and providing an index.

b. The agency should compile the full administrative record that was before it at the time it made the decision under review. James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

c. The Court should generally have before it the same information that was before the agency when it made its decision. Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 154 (1997).

d. Thus, the administrative record should consist of the material that the agency developed and considered, directly or indirectly, in making the challenged decision. Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002); Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs., 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Pac. Shores Subdiv., Cal. Water Dist. v. U. S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 4 (D.D.C. 2006)); Tafas v. Dudas, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008).

e. The agency should include all materials that might have influenced its decision, not just the documents upon which it relied. Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002) (include materials considered or relied upon); Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275-76 (D. Colo. 2010) (If decision based upon the work of subordinates, include the materials considered by the subordinates).

f. GAO proceedings – Appendix C ¶ 22 of the Rules of the Court of Federal Claims enlarges the usual scope of an administrative record by including the entire record of a timely protest with the GAO, pursuant to the Competition in Contracting Act, 31 U.S.C. § 3553(d)(3). This can include, among other things, post hoc testimony and evidence.

g. An agency may not exclude from the administrative record documents that reflect pertinent but unfavorable information. Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).

However, the administrative need not include underlying source documents that were not themselves considered by the agency. Sequoia Forestkeeper v. U. S. Forest Serv., No. 09-392, 2010 WL 2464857, at *6 (E.D. Cal. June 12, 2010).

2. What is NOT included:

a. The administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege. Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1457-58 (1st Cir. 1992); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 143 (D.D.C. 2002) ("Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision.").

b. The general rule is that these documents are not logged as withheld because they are not part of the administrative record. Amfac Resorts LLC v. Dept. of Interior, 143 F. Supp. 2d 7, 13 (D.D.C. 2001) ("deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record"); New York v. Salazar, 701 F. Supp. 2d 224, 236 (N.D.N.Y. 2010) ("as a matter of law, privileged documents are not part of the administrative record"); Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007); but see *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275-76, n.10 (D. Colo. 2010) (requiring privilege log); Miami Nation of Indians of Ind. v. Babbitt, 979 F. Supp. 771, 778 (N.D. Ind. 1996) (requiring the Government to seek a protective order to assert deliberative process privilege).

c. **Internal memoranda** (*e.g.*, e-mail messages and draft documents) made during the **decisional process** are not included in a record. Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689, 693 (D.C. Cir. 1947); see San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 45 (D.C. Cir.) (en banc) ("We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions."), cert. denied, 479 U.S. 923 (1986). There are exceptions to this rule. New York v. Salazar, 701 F. Supp. 2d 224, 238 (N.D.N.Y. 2010) (where decision-making process is itself the subject of the litigation); In re Subpoena Duces Tecum Served on the Office of the Comptroller, 156 F.3d 1279, 1280 (D.C. Cir. 1998); see also National Courier Ass'n v. Bd. of Governors, 516 F.2d 1229, 1242 (D.C. Cir. 1975).

d. EXCEPTION: Internal and deliberative memoranda may be required in an administrative record where a protestor makes an initial showing to support an allegation of bad faith; i.e., when the

Court has determined the plaintiff has made a well-grounded attack upon the decision-making process itself.

3. Supplementation

a. Definitions.

(1) Supplement. A protester seeks to supplement, or go beyond, the record when the protester moves to include material in the administrative record that was not before the decision maker, *i.e.*, material that does not belong in the record. Supplementing the administrative record with extra-record evidence is different from correcting or completing the administrative record.

(2) Correct or Amend. A protester seeks to complete, or correct, the record when the protester moves to include in the administrative record material that *should have been* included, but was nonetheless inadvertently omitted.

b. General Rule. Courts generally deny requests to supplement the administrative record.

(1) Supplementation is not permitted because extra-record or ex-post facts and opinions simply are not relevant to the Court's inquiry. See, e.g., Emerald Coast Finest Produce, Inc. v. United States, 76 Fed. Cl. 445, 448-49 (2007) (refusing to add to the record declarations not considered by the agency when making its award decision); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (court considers only those materials that were "before the decision-making authority at the time of its decision."); Axiom Resource Management, Inc. v. United States, 564 F.3d 1374, 1379 (2009) (judicial review is generally limited to "the administrative record already in existence, not some new record made initially in the reviewing court"); L-3 Communications EOTech, Inc. v. United States, 87 Fed. Cl. 656, 672 (2009) (no "unfettered right to submit declarations giving its commentary on every aspect of the … process, and to have those declarations included in the administrative record[.]").

(2) Supplementing the administrative record is "an unusual action that is rarely appropriate." Weiss v. Kempthorne, No. 08-1031, 2009 WL 2095997, at *3 (W.D. Mich. July

13, 2009); Am. Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008); Medina Co. Envtl. Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010).

c. Supplementation Post-Axiom:

(1) In Axiom, CAFC reiterated the restrictive approach to supplementing the administrative record.[2]

(2) Supplementation of the administrative record is **available only** when "the omission of extra-record evidence precludes **effective judicial review**." Axiom, 564 F.3d at 1379; see also Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), aff'd, 398 F.3d 1342 (Fed. Cir. 2005) ("exceptions to the general rule against extra-record evidence are based on necessity, rather than convenience, and should be triggered only where the omission of extra-record evidence precludes effective judicial review.")

(3) Allowing supplementation of the record, without first evaluating whether the record is sufficient to permit meaningful review is an abuse of discretion. Axiom, 564 F.3d at 1380 ("the trial court abused its discretion in this case" by failing "to make the required threshold determination of whether additional evidence was necessary.")

(4) Therefore, before any supplementation is allowed, the Court first makes a threshold determination of "whether supplementation of the record [is] necessary in order not 'to frustrate effective judicial review.'" Axiom, 564 F.3d at 1379 (quoting Camp v. Pitts, 411 U.S. 138, 142-43 (1973)).

E. What to Expect After Protest Is Filed.

1. Process starts with 24 hour advance notice filed by plaintiff.

[2] Before Axiom, this court "frequently . . . adopted and applied [eight] exceptions to the review of outside evidence" based on the District of Columbia Circuit's decision in Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989). Protection Strategies, Inc. v. United States, 76 Fed. Cl. 225, 234 (2007). In Axiom, the Federal Circuit repudiated the Esch factors and described a far more restrictive approach to supplementation. 564 F.3d at 1380.

a. Appendix C, ¶ 3, RCFC, requires plaintiff to file a 24-hour notice with our office that identifies the procuring agency, contact information for the contracting officer and agency counsel, whether plaintiff is seeking a TRO or preliminary injunction ("TRO/PI"), whether plaintiff has discussed the TRO/PI with our office, whether there was a GAO protest, and whether a protective order will be needed.

a. Failure to file 24-hour notice is not a jurisdictional defect.

2. Upon receipt of the 24-hour notice, the case is assigned to a DOJ trial attorney, who will contact the contracting officer and agency counsel directly prior to filing a notice of appearance ("NOA") with COFC.

3. This is time-sensitive matter and COFC will act with a sense of urgency and hold a scheduling teleconference for either the same day or the day after the NOA is filed.

a. Agency counsel and, in some cases, the contracting officer, should expect to participate in the initial teleconference.

b. Court typically concerned with:

(1) Addressing TRO/PI if raised by plaintiff (will agency voluntarily stay proceedings?);

(2) Status of the procurement (pre or post award?);

(3) Determining if there will be an intervenor;

(4) Setting a briefing schedule, which includes filing of the administrative record; and

(5) Did protester initially file at the GAO?

Practice Tip: If there was a GAO protest, please send the legal memorandum and contracting officer statement directly to the assigned trial attorney as soon as possible to expedite the learning curve.

F. Protective Orders:

1. Order limiting the disclosure of source selection, proprietary, and other protected information to those persons admitted to that order. The order also governs how such information is to be identified and disposed of

when the case is over. The COFC regularly issues these orders, although in at least one case, the COFC denied the request of the government and the apparent awardee to issue a protective order and ordered the release of the government's evaluation documentation relating to the protester's proposal to the protester. See Pike's Peak Family Housing, Inc. v. United States, 40 Fed. Cl. 673 (1998).

2. Once the order is issued, one gets admitted to the order by submitting an appropriate application. Form 8 of the RCFC Appendix contains a model protective order and Form 9 of the RCFC Appendix is a model application for access by outside counsel, inside counsel, and outside experts.

3. Ordinarily, objections must be made within 2 business days of receipt of a given application. If no objections are made within 2 business days, the applicant is automatically admitted to the protective order.

4. COFC, DOJ, and agency personnel are automatically admitted.

5. Most judges request or accept proposed redactions from court orders and opinions and decide what protected information to redact. See, e.g., WinStar Communications, Inc. v. United States, 41 Fed. Cl. 748, 750 n.1 (1998). Recently, COFC has scrutinized proposed redactions closely. See, e.g., Akal Sec., Inc. v. United States, 87 Fed. Cl. 311, 314 n.1 (2009).

VI. THE CONTRACT DISPUTES ACT OF 1978. 41 U.S.C. §§ 7101-7109.

A. Applicability.

1. 41 U.S.C. § 7102.

2. The CDA applies to all express or implied contracts an executive agency enters into for:

a. The procurement of property, other than real property in being;

b. The procurement of services;

c. The procurement of construction, alteration, repair or maintenance of real property; or

d. The disposal of personal property.

3. It has been the law that the CDA does not normally apply to contracts funded solely with nonappropriated funds (NAFs), with the exception of contracts with the exchanges listed in the Tucker Act. 41 U.S.C. § 7102(a); 28 U.S.C. 1491(a)(1). Recently, however, the Federal Circuit has held, en banc, that Tucker Act jurisdiction encompasses NAFs. See Slattery v. United States, 635 F.3d 1298 (2011).

B. Jurisdictional prerequisites:

1. Contractor has submitted a proper claim to the contracting officer, or

2. The Government has submitted a proper claim (e.g., termination, LDs, demand for money).

3. The contracting officer has issued a final decision, or is deemed by inaction to have denied the claim. Tri-Central, Inc. v. United States, 230 Ct. Cl. 842, 845 (1982); Paragon Energy Corp. v. United States, 227 Ct. Cl. 176 (1981).

4. The COFC considers the case de novo. 41 U.S.C. § 7104(b)(4). A contracting officer's findings are not binding on the Court, or the Government, nor are omissions by the contracting officer. Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir.1994). Thus, so long as the information was available to the Government, the COFC may consider it in reviewing the contracting officer's decision. For example, a termination for default may be sustained at the COFC upon any ground existing at the time of termination, even one not then known to the contracting officer. See Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1357 (Fed. Cir. 2004).

5. The CDA is a waiver of sovereign immunity for the payment of interest. Interest accrues from the date the contracting officer receives the claim until the contractor receives its money.

6. Not limited to monetary damages.

a. COFC possesses jurisdiction to render judgments in "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued" pursuant to the CDA. 28 U.S.C.A. § 1491(a).

b. In recent years, COFC has used this authority to review questions of contract administration, such as performance evaluations. See

Todd Const. L.P. v. United States, 85 Fed. Cl. 34 (2008), 94 Fed. Cl. 100 (2010); BLR Group of America, Inc. v. United States, 84 Fed. Cl. 634 (2008).

7. Subcontractors:

a. Generally cannot directly bring a CDA challenge, because there is no privity of contract with the United States, unless the prime contractor is a "mere government agent." United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550-51 (Fed. Cir. 1983).

b. While subcontractors that were third-party beneficiaries of the contract between the Government and the prime contractor cannot proceed under the CDA, they may bring a similar claim in COFC under the Tucker Act. Winter v. FloorPro, Inc., 570 F.3d 1367 (Fed. Cir. 2009).

Sureties: CDA or Equitable Subrogation. National Surety v. United States, 118 F.3d 1543 (Fed. Cir. 1997); Fireman's Fund Ins. Co. v. United States, 909 F.2d 495 (Fed. Cir. 1990).

C. Statute of Limitations.

1. For contracts awarded on or after October 1, 1995, a contractor must submit its claim within six years of the date the claim accrues. 41 U.S.C. § 7103(a)(4). This statute of limitations provision does not apply to Government claims based on contractor claims involving fraud.

2. Complaint filing. The contractor must file its complaint in the COFC within 12 months of the date it received the contracting officer's final decision. 41 U.S.C. § 7104(b)(3). See Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991).

3. Reconsideration by the Contracting Officer. A timely request made to the contracting officer for reconsideration of a decision, that results in an actual reconsideration, suspends the "finality" of the decision, and provides a new statute of limitations period. See Bookman v. United States, 197 Ct. Cl. 108, 112 (1972).

4. "Deemed Denied." No statute of limitations?

a. Under the CDA, upon receipt of a written claim from a contractor, a contracting officer must issue a final decision within sixty days. 41 U.S.C. § 7103(f). If the Contracting Officer fails to issue a decision within the requisite time period, the claim may be deemed denied. 41 U.S.C. § 7103(f)(5).

b. If no decision is issued, the Court of Federal Claims has held that CDA's one-year statute of limitations does not begin to run and the Tucker Act's six year statute of limitations does not apply, because the claim remains a CDA claim. See Environmental Safety Consultants, Inc. v. United States, 95 Fed. Cl. 77 (2010); System Planning v. United States, 95 Fed. Cl. 1 (2010).

D. Consolidation of Suits.

If two or more actions arising from one contract are filed in COFC and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, COFC may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved. 41 U.S.C. § 7107(d).

E. Relationship Between COFC and the Boards

1. 41 U.S.C. §§ 7104(a),(b)(1).

2. The CDA provides alternative forums for challenging a contracting officer's final decision.

3. Once a contractor files its appeal with a particular forum, this election is normally binding and the contractor may no longer pursue its claim in the other forum. See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

4. The "election doctrine" does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. See Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989) (holding that the contractor's untimely appeal to the Agriculture Board of Contract Appeals did not preclude it from pursing a timely suit in the Claims Court).

5. Decisions of the boards of contract appeals are not binding upon the COFC. See General Electric Co., Aerospace Group v. United States, 929 F.2d 679, 682 (Fed. Cir. 1991).

VII. CONCLUSION.

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