



PROGRAM MATERIALS
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Navigating Government Contracting, Procurement, and Bids

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Navigating Government Contracting, Procurement, and Bids

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Learning Objectives

- How is contracting with the Federal Government different from commercial contracting?
- What are the major laws that govern government contracting?
- How is bidding for Government work different than its commercial counterpart?
- What special dispute resolution procedures apply to Government contracts and contractors
- What are the risks to contractors that don't understand their legal and contractual obligations?

In some ways, Government Contracting is like any other contracting . . .

- Offer
- Acceptance
- Capacity to contract
- Meeting of the minds
- Consideration
- Interpretation rules

But the Government gives itself unilateral powers

- Changes
- Disputes
- Terminations
- Audits and investigations

Government Contracting is highly regulated . . .

- Office of Federal Procurement Policy Act of 1974
 - Procurement Integrity Act (§27 of the OFPP Act)
- Contract Disputes Act of 1978
- Competition in Contracting Act of 1984
- Federal Acquisition Streamlining Act of 1994
- Small Business Act
- Buy American Act / Trade Agreements Act
- Bayh-Dole Act (Patent & Trademark Law Amendments Act)

More laws, plus regulations and executive orders

- Service Contract Act
- Davis-Bacon Act
- Anti-Deficiency Act
- Federal Acquisition Regulation
- Establishing Paid Sick Leave for Federal Contractors (E.O. 13706)

Many of the requirements change with the political winds . . .

- ~~Executive Order 11246~~
- ~~Increasing the Minimum Wage for Federal Contractors (E.O. 14026)~~
- ~~Nondisplacement of Qualified Workers Under Service Contracts (E.O. 14055)~~
- Ending Illegal Discrimination and Restoring Merit-Based Opportunity (E.O. 14173)
- Addressing DEI Discrimination by Federal Contractors (E.O. 14398)

The Federal Acquisition Regulation (“FAR”)

- Title 48 of the Code of Federal Regulations
- Uniform policies and procedures for acquisition by all executive agencies.
- The Federal Acquisition Regulations System consists of:
 - The Federal Acquisition Regulation (FAR), and
 - Agency acquisition regulations that implement or supplement the FAR.
- Many agencies have “internal agency guidance.”
- “Revolutionary FAR Overhaul” (RFO)

Publicizing Requirements (FAR Part 5)

- <https://sam.gov/content/opportunities>
 - (requires a free account)
 - Solicitations
 - Amendments
 - Notices
 - Requests for information
- Prospective contractors are on notice of all postings

Types of competition (FAR Part 6)

- Full and Open Competition
- Full and Open Competition After Exclusion of Sources
 - Set-Asides for Small Business Concerns
- Other Than Full and Open Competition
 - Circumstances Permitting Other Than Full and Open Competition
 - Justifications

Procurement integrity (FAR Part 3)

- A person must not knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. (FAR 3.104-3(b))
 - Penalties include prison, criminal and civil fines and contract cancellation
 - May also violate federal and state trade secret laws

Procurement integrity (cont.)

- Limitation on the payment of funds to Influence federal transactions
- Whistleblower protections for contractor employees
- Post-Government employment restrictions
 - Agency ethics opinions
- Contingent fees

Contractor code of business ethics (FAR Part 3)

- A covered contractor shall—
 - Have a written code of business ethics and conduct;
 - Make a copy available to each employee performing the contract;
 - Exercise due diligence to prevent and detect criminal conduct;
 - Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law;
 - Timely disclose credible evidence of certain crimes;
 - Establish an ongoing business ethics awareness and compliance program; and
 - Conduct effective training programs relating to compliance.

Making source selection decisions (FAR Part 15)

- Basis of award
 - “Best value”
 - “Low-price, technically acceptable”
 - Low-price, responsive

Making source selection decisions (FAR Part 15)

- Typical Evaluation criteria - Not all criteria are used in every procurement.
 - Technical approach -- How? Why?
 - Management, personnel -- Who?
 - Experience -- Have you done it before?
 - Past Performance -- How well have you done it before?
 - Small business
 - Price / cost?

Contractor qualifications (FAR Part 9)

- Responsible Prospective Contractors
- Debarment, Suspension, and Ineligibility
- Organizational and Consultant Conflicts of Interest
 - Providing Systems Engineering and Technical Direction
 - Preparing Specifications or Work Statements
 - Providing Evaluation Services
 - Obtaining Access to Proprietary Information

Bid protest basics (FAR Part 33)

- Types
 - Pre-Proposal
 - Post-Evaluation
 - Pre-Award
 - Post-Award
- Strict timeliness requirements
- Most protests are denied because of immense agency discretion
- “Corrective action”

Common pre-proposal protest grounds (FAR Part 33)

- Solicitation improprieties
 - Ambiguities
 - Overly restrictive, anti-competitive specifications or requirements
 - Response time is too short
 - Improper clauses included
 - Solicitation is improperly set aside or not set aside
 - Bias (but ...)

Common post-evaluation protest grounds (FAR Part 33)

- Evaluation and failure to make award
 - Failure to follow evaluation criteria or other RFP requirements
 - Failure to make a proper tradeoff/best value analysis
 - Improper assignment of weaknesses/failure to assign strengths to your proposal
 - Improper assignment of strengths/failure to assign weaknesses to the awardee's proposal
 - Cost/price realism
 - Definitive responsibility criteria ("compliance")
 - Bias (but ...)

Size issues (FAR Part 19)

- Size Standards
- Determination of Small Business Status for Small Business Programs
- Set-Asides for Small Business
- The Small Business Subcontracting Program
- Contracting with the Small Business Administration (The 8(a) Program)
- Service-Disabled Veteran-Owned Small Business Procurement Program
- Women-Owned Small Business (WOSB) Program

Cost issues (FAR Part 31)

- Determining Allowability
- Determining Reasonableness
- Determining Allocability
- Accounting for Unallowable Costs
- Direct Costs
- Indirect Costs

Selected cost principles (FAR Part 31)

- Compensation for Personal Services
- Interest and Other Financial Costs
- Labor Relations Costs
- Professional and Consultant Service Costs
- Training and Education Costs
- Costs Related to Legal and Other Proceedings
- Research and Development Costs

Contract Administration (FAR Part 42)

- Contractor Performance Assessment Report (CPAR)
- Novation and Change of Name
- Audits

Changes (FAR Part 43)

- Contracting Officer may at any time “make changes within the general scope of this contract”
 - Constructive changes
 - Notice requirements
- Request for equitable adjustment
 - Change order accounting

Contract disputes (FAR Part 33)

- Routine request for payment vs. “claim”
- Initiation of a claim
- Duty to continue performance
- Contractor certification
- Interest on claims
- Contracting officer’s decision
- Appeals
 - Board of Contract Appeals
 - U.S. Court of Federal Claims)

Termination for convenience (FAR Part 49)

- May be exercised “in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government’s interest.”
- Contractor must stop work, mitigate damages
- Termination settlement proposal
 - Work accepted by Government plus markups
 - Termination costs

Termination for default (FAR Part 49)

- If contractor fails to --
 - Deliver the supplies or to perform the services within the time specified;
 - Make progress, so as to endanger performance of this contract; or
 - Perform any of the other provisions of this contract.
- Cure notice for failure to make progress
- Re-procurement costs
- Appeal; convert to T/C

False claims

- It is a crime to--
 - Knowingly present, or cause to be presented, a false or fraudulent claim for payment or approval; or
 - Knowingly make, use, or cause to be made or used, a false record or statement material to a false or fraudulent claim.
- An invoice is a “claim”

False claims (cont.)

- Accusations of making a false claim could be triggered by--
 - Issues of product quality
 - Failure to comply with the Buy American Act
 - Not providing the promised labor qualifications
 - Failure to adhere to the letter of your promises

Key Takeaways

- Government contracting shares basic principles of other contracting.
- But it is highly regulated.
- Also, the Government gives itself many rights ordinary contractors could never negotiate.
- The consequences of breaches can include contractual damages, debarment from contracting, and civil and criminal penalties.

Where do I get more information?



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***Please contact me to receive a free copy of my
“Subcontract Negotiation Quick Reference
Guide”***