

The following article, "The Basics of Government Contracting-A Primer," by Richard D. Lieberman, originally appeared in 11 Eagle 50 (September/October 1992), the magazine of the American Hardware Manufacturers Association.

The Basics of Government Contracts—A Primer

In 1991, the Federal Government spent more than \$210 billion for supplies, services, construction, research and development. More than 31,000 federal procurement officials took 20 million individual actions—awarding contracts, placing orders, making small purchases and modifying or terminating existing contracts. The Government contracts for an incredible variety of goods and services, ranging from high-technology programs like the Strategic Defense Initiative (also known as "Star Wars") and the B-2 (Stealth) Bomber, to other aircraft, ships, missiles, vehicles, and more mundane items like ropes, chains, cables, pumps, plumbing, valves, hand tools, instruments, furniture, toiletries, live animals, motion pictures, health services, real estate, insurance and food. This article discusses some of the basics of Government contracts, including key laws and regulations, the different types of Government contracts, how they are publicized and competed, bidder qualifications, contract administration, and controversies in contract award and performance. Because of the complexity of the process, a Government contractor is well advised to obtain the assistance of an experienced Government contract attorney.

Laws, Regulations and Key Personnel

An extensive set of laws governs the formation (award) of contracts, the performance of contracts and the settlement of disputes arising during the award and performance of the contracts. Several key statutes are discussed in this article. The Federal Acquisition Regulation ("FAR") is a comprehensive set of rules that implements the procurement laws and applies to all executive agency purchases. The FAR is supplemented by more than 20 agency acquisition regulations,

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such as the Department of Defense ("DOD") FAR Supplement and the General Services Administration Acquisition Regulation. The FAR and the agency supplements are more than 4,900 pages long.

The Government Contracting Officer ("CO") is crucial to the entire process and of immense importance to a Government contractor. CO's must comply with all applicable laws and regulations and have authority to bind the Government and to enter into, modify, administer and terminate contracts. The CO

A Mini-Glossary of Government

Abstract of bids	A list of bidders for a sealed bid procurement showing their prices
ASBCA	Armed Services Board of Contract Appeals, the largest of the Boards of Contract Appeals ("BCA")
BAFO	Best and Final Offer (in negotiated procurement)
Buy American Act	Federal law which carries out the preference for Act use of American-made materials and domestically manufactured goods
CBD	Commerce Business Daily (an official daily list of U.S. Government procurement invitations, contract awards, subcontracting leads, sales of surplus property and foreign business opportunities)
CICA	Competition in Contracting Act of 1984 (the basic federal law designed to promote full and open competition in the award of government contracts)
Claim	A written demand seeking payment of a sum of money or other relief pertinent to a government contract
Contract Disputes Act	Comprehensive federal statute which establishes procedures for adjudicating government contract disputes
CO	Contracting Officer (a person with legal authority to bind the government on matters involving a particular contract)
COC	Certificate of Competency (issued by the SBA to denote that a small business is deemed responsible in connection with a particular procurement)

can call upon a team of specialists for help, including quality assurance representatives, buyers, cost analysts and auditors.

Types of Contracts

CO's use two principal types of contracts: fixed price contracts and cost-reimbursement contracts. Under a fixed price contract, the Government agrees at contract to pay a specific price (which includes the contractor's profit) for completed work and delivered products. Under a cost-reimbursement contract, the Government pays the allowable costs actually incurred by the con-

The Government advertises all federal procurement over \$25,000 in digest form in the Commerce Business Daily, a daily newspaper published by the Department of Commerce

tractor, plus some type of fee (contractor's profit). Obviously, a fixed price contract offers the greatest

risk of potential loss to a contractor, as well as a great potential for profit. A cost-reimbursement contract eliminates most of the contractor's risk and also limits its profits.

Fixed price contracts are used primarily for standard or modified commercial items, while cost-reimbursement contracts are used where there are substantial uncertainties in contract performance, such as in research and development contracts to develop high technology systems. Both fixed price and cost-reimbursement contracts may contain incentives which increase or decrease the contractor's profit or fee depending upon the contractor's performance in holding down costs, improving technical performance or making early deliveries. These are known as fixed-price-incentive contracts and cost-plus-incentive-fee contracts.

Obtaining Information on Government Contracts

Virtually every federal agency will supply information on its purchasing activities upon request. Two general publications are "Doing Business With The Federal Government," which can be obtained from the General Services Administration, Federal Supply Office, Washington, D.C. 20405; and "U.S. Government Purchasing & Sales Directory," which can be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Except for small purchases (under \$25,000), Government contracting opportunities are normally advertised through a solicitation, known as an Invitation For Bid ("IFB") or a Request For Proposal ("RFP"). IFB's are used for sealed bid procurements, while RFP's are used for negotiated procurements. (See chart). The Government advertises all federal procurements over \$25,000 in digest form in the *Commerce Business Daily* ("CBD"), a

Contract Terms and Acronyms

DCAA	Defense Contract Audit Agency (audits most DOD and non-DOD contacts)
DOD	Department of Defense (includes Army, Navy, Air Force, Marine Corps, Defense Logistics Agency and other Defense agencies)
FAR	Federal Acquisition Regulation (uniform, government-wide set of regulations governing all government contracting)
GAO	General Accounting Office (government agency, headed by the Comptroller General of the U.S., which renders opinions on disbursement of government funds and decides the merits of protests regarding contract awards)
GSA	General Services Administration
IFB	Invitation for bids (a solicitation for a procurement using sealed bidding)
Negotiated Procurement	Contracting through the use of competitive proposals, discussions and BAFO's
Protest	A written objection to a solicitation or to a proposed or actual award of a contract
Responsible	A contractor capable of performing a contract that has a satisfactory record of integrity and performance
Responsive	A bid that conforms with and commits to meet the material terms of an IFB
RFP	Request for proposals (a solicitation for a negotiated procurement)
Sealed bidding	Procurement by obtaining sealed bids and awarding the contract to the lowest priced responsible bidder whose bid is responsive
SBA	Small Business Administration
Solicitation	An IFB or RFP

Government Contracts: What You Need to Know

daily newspaper published by the Department of Commerce which can be obtained by writing to the Superintendent of Documents. Interested contractors may obtain any solicitation from the contracting officer listed in the CBD. Contractors may also obtain solicitations by requesting that they be placed on an agency's "Solicitation Mailing List," using a standard federal form known as SF 129, available from the agency.

Competition in Contract Formation

The Competition in Contracting Act of 1984 ("CICA"), the basic law governing contract formation, explicitly requires full and open competition by all responsible sources. CICA permits noncompetitive awards in very limited situations, such as where there is only one possible source or where an unusual or compelling urgency exists.

Competition is achieved through two different methods of procurement—sealed bidding using IFB's and negotiated procurement using RFP's. In the first method, bidders submit sealed bids that are publicly opened and abstracted (announced) at a stated time and place. Award is made to the lowest-price responsible bidder whose bid conforms to the solicitation.

Negotiated procurements are used where the award will be made on the basis of factors in addition to price, such as technical excellence, innovation, special expertise, etc., and where it may be necessary to conduct discussions with offerors about their proposals. Negotiation is frequently used for research and development of new systems where each contractor takes a different approach to meeting the Government's requirements. The solicitation includes evaluation factors to be used by the agency in

comparing the proposals. Normally, the agency holds discussions with all offerors capable of receiving the award, known as those in the "competitive range." After discussions, the offerors in the competitive range are asked to submit a Best and Final Offer ("BAFO"), that in-

cludes changes brought about by the discussions and that represents the offeror's lowest price.

Contractor and Bid Qualification

Regardless of the competitive method used, the Government is

Some Typical Contract Types

CONTRACT TYPE	EXPLANATION AND TYPICAL USE	CONTRACTOR COST RISK
Firm fixed price ("FFP")	Price remains unchanged, regardless of actual cost experience. There must be clear specifications. Particularly suited for standard or modified commercial items.	Highest risk to contractor, but also high potential profit.
Fixed Price incentive ("FPI")	Contains formula under which profit or loss will vary based upon actual cost experience and performance. May include cost or performance incentives.	Moderate risk to contractor; gives contractor incentive to manage efficiently.
Cost plus fixed fee ("CPFF")	Contract is reimbursed for all allowable costs, plus a fixed fee set in the contract. Contractor will be subject to frequent surveillance (audits). Normally used in uncertain situations, such as research and development of high technology items.	Very low risk for contractor, which is guaranteed a profit (the fee).
Cost plus incentive fee ("CPIF")	Contractor is reimbursed for all allowable costs, and receives a fee that varies based on actual cost experience and/or performance (e.g., higher fee for greater speed or quality, etc.)	Low risk, although contractor may lose most or all fee for poor performance. Used where it is possible to motivate contractor with target cost and fee adjustment formula

permitted to award contracts only to responsible contractors. A responsible contractor is one that, at the time an award is made, had (1) the financial capacity, training, skills, equipment, and other attributes needed to perform the contract; (2) a satisfactory performance record; and (3) a satisfactory record of integrity and business ethics. An agency that finds a prospective *small business* awardee to be non-responsible is required to refer the contractor to the Small Business Administration ("SBA") for a Certificate of Competency ("COC") determination. If SBA finds the contractor responsible, it will issue the COC, thereby overriding the agen-

"Disappointed bidders who believe that the Government has violated the laws, regulations or the conditions of a solicitation may protest the procurement in several different forums . . ."

cy's determination of non-responsibility. Government contractors who fail to perform properly, or who commit crimes or

other acts indicating that they are not responsible, may be temporarily suspended or debarred for a period of three years or more from receiving any new Government contracts.

While all contractors must be responsible, in sealed bid procurements, the bid itself must also be responsive. This means that, at the time the bid is opened, it must comply in all material respects with the IFB. This compliance ensures that each bid will offer the exact same good or service to the Government, so that the award can be based solely on the lowest price. In competitive negotiation there is no such thing as responsiveness, since each offeror may propose a different solution to the Government's requirements, and the agency will evaluate every offer separately.

Major Agencies and Categories in Federal Procurement

In 1991, the federal government bought \$210 billion worth of goods and services. The Department of Defense accounted for \$149 billion (71 percent), and all civilian agencies accounted for \$61 billion (29 percent) of that total. Purchases by major agencies and category are shown below.

Agency	TOP BUYERS 1991 Procurement (\$billions)
Defense	
Army	34.7
Navy	40.9
Air Force	43.6
Defense Logistics Agency	11.5
Non-Defense	
Department of Energy	18.2
National Aeronautics and Space Administration	11.7
General Services Administration	4.7
Department of Transportation	2.9
Department of Agriculture	2.4

BREAKDOWN BY PRODUCT AND SERVICE CATEGORY

Product or Service	1991 Procurement (\$billions)
Research and development	27.9
Other services	58.8
Supplies and equipment	85.3
Construction	17.6
Other	20.4

Award Controversies

Not surprisingly, because of the highly competitive nature of most Government procurements, controversies arise. Although the number of controversies is small (only about 3,000-4,000 per year out of 20 million contract actions), they are more prevalent on the larger procurements for major systems and computers. Disappointed bidders who believe that the Government has violated the laws, regulations or the conditions of a solicitation may protest the procurement in several different forums, including the Government agency itself, at the General Accounting Office ("GAO"), the General Services Board of Contract Appeals (for automatic data processing procurements only), in U.S. District Court or at the U.S. Claims Court. Whenever a bid protest is contemplated, it is always advisable to obtain the assistance of an experienced Government contracts attorney.

Between 10 and 30 percent of all protests are winners. A winning protester may be awarded the contract (instead of the firm selected by the agency), obtain a recompeti-

Challenges, Opportunities in 'Government Work'

tion, have the award split, or merely obtain the cost of submitting the protest.

Contract Administration, Claims
Once a contract has been awarded, many different issues may crop up during performance. Typically, there will be changes or delays that give rise to additional costs. One of the fundamental principles of Government contracting is that the Government has the right to make unilateral modifications or changes to the contract and the contractor must perform as requested. However, the contractor is entitled to an "equitable adjustment," or a claim for additional costs resulting from the Government's modification or change. Delays also frequently result in claims and requests for equitable adjustments.

During the performance of a contract, the Government will insist on strict compliance with the requirements and specifications, and carefully inspect and formally accept goods that are delivered. If the Government refuses to accept something furnished, the contractor will not be paid for the work.

When a contractor fails to live up to his contract, the Government may terminate the contract for default and cease making payments under the contract. After a default termination, the Government may repurchase the same supplies or services from a different contractor, and charge the additional costs to the defaulted contractor.

Government contracts include a unique provision not found in commercial contracts—the ability of the Government to terminate the contract for any reason. The "termination for convenience of the Government" exists because of the Government's need to end contracts when its requirements are eliminated, such as when a war ends or when Congress eliminates a

program. When the Government terminates a contract for its convenience, although the contractor loses the balance of the business, the Government pays the costs the contractor incurred up to termination plus a reasonable profit thereon.

Disputes in the administration of contracts are covered by a disputes clause and by the Contract Disputes Act of 1978 ("CDA"). The CDA requires that a contracting officer make an initial decision on any claim or dispute. The contractor may then appeal the decision to one of the Boards of Contract Appeal ("BCA") or to the U.S. Claims Court. Disputes often revolve around claims, delays, failure to meet specifications or testing, etc.

Socioeconomic Policies

Many collateral policies that further socioeconomic purposes are an integral part of both the award and the performance of Government contracts. These include preferences and set-asides for small businesses and small disadvantaged business pursuant to the Small Business Act, preferences such as those contained in the Buy American Act. In addition, Government contracts require adherence to labor laws such as the Davis-Bacon Act, the Service Contract Act and the Contract Work Hours and Safety Standards Act, as well as environmental laws such as the Clean Air and Clean Water Acts, and the Drug Free Workplace Act.

Audits, Investigations and Reviews

During the past ten years, the Government has dramatically increased the scrutiny of its contractors. The number of contract auditors of the Defense Contract Audit Agency ("DCAA"), which audits defense and non-defense contracts, and in the 60 Offices of Inspector General ("OIG") throughout the federal Government, has more than dou-

bled. The entire Government procurement process has become "criminalized," and what formerly were mere contract disputes now frequently result in criminal investigations. Every time a contractor makes a certification in its bid, submits an invoice, or provides a test or delivery certification, the contractor is subjecting itself to a potentially false statement or false claim, both of which are crimes.

Conclusion

From award through termination, Government contracting is complex, subject to a wide variety of laws and regulations, and includes its own vocabulary and terminology. Competition is generally required in awarding contracts, and is achieved with both sealed bids and competitive negotiation. Award controversies are settled through bid protests submitted by disappointed bidders. During performance, the contractor must fully comply with all of the terms of the contract, and must also make any changes requested by the Government. However, contractors can make claims for the impact of changes, and can utilize the disputes procedures to obtain Government payment, where necessary. Finally, contractors must be evermindful about the need for compliance with contractual, legal and regulatory requirements in order to avoid potential criminal investigation and prosecution.

This article was prepared by Richard D. Lieberman, Esq., a Partner in the Washington, D.C. office of Sullivan & Worcester who concentrates on Government Contracts. This article does not constitute legal advice as to any particular transaction.