

## INTRODUCTION TO CONTRACTING

**1. INTRODUCTION.** Contracting is the principal means used by the Government to acquire goods and services from the private sector. The Government generally follows the common law of contracts, however, there are many special rules, regulations, and clauses that are unique to the Government. Everyone involved in acquisition must have a basic knowledge of the process if his contribution is to be effective.

**2. OBJECTIVES.** After completion of this block of instruction, the student should be able to:

- a. Recognize the essential elements of a contract.
- b. Discuss the concepts of actual and apparent authority as they apply to contracting officers.
- c. Discuss and compare the various methods of contracting, including sealed bidding, negotiation and simplified acquisitions.
- d. Compare the terms "responsiveness" and "responsibility" as they apply to the various contracting methods.

### **3. BACKGROUND.**

a. Contractors dealing with the Government find themselves in a dilemma. On the one hand, the Government is often treated in the same manner as any other contracting party, but on the other hand, it is entitled to special treatment since Government contracts serve the public interest and spend taxpayer money. Part of that special treatment means that Government contracts are often more complicated than contracts in the private sector. Complex statutes and regulations govern their award and performance.

b. The Federal Acquisition Regulation (FAR) is the single acquisition regulation for use by all Federal executive agencies in contracting for supplies and services with appropriated funds. The FAR is prepared, issued, and maintained by a council consisting of designees representing the Secretary of Defense, the Administrator of General Services Administration, and the Administrator for the National Aeronautics and Space Administration. Agencies are allowed to issue regulations which complement or supplement the FAR.

**4. CONTRACTING METHODS.** The Government uses a number of contracting methods, including sealed bidding, negotiation, and simplified acquisitions. **Sealed bidding** is the statutorily preferred contracting method, and it does work very well for a niche of competitive requirements. **Negotiation** is the most flexible method and allows comparative evaluation of offers, discussions, and award to other than the lowest-priced offer. **Simplified acquisition** procedures provide streamlined and simplified rules for contracting when the estimated cost of the requirement is below certain dollar thresholds.

## 5. SEALED BIDDING.

a. The major characteristics of sealed bidding are competition, public opening and recording of bids, and contract awards **based solely on price**. Sealed bidding is statutorily **required** if **all** of the following conditions exist:

- (1) **Time** permits the solicitation, submission, and evaluation of sealed bids.
- (2) The award will be made on the basis of **price** and other price-related factors.
- (3) It is not necessary to conduct **discussions** with the responding offerors about their bids.
- (4) There is a reasonable expectation of receiving **more than one** sealed bid.

b. Primarily because no discussions are allowed, sealed bidding is a very formal, inflexible means of contracting. The Government must explicitly state its requirements, and the bidders must submit unequivocal bids. Since sealed bidding requires very definitive specifications or statements of work, this method is generally only used for the acquisition of items that have reached the **production phase** of their own life cycle such as **commercial, standard, or off-the-shelf end items**. Sealed bidding is also used for acquiring services having a counterpart in the private sector. The availability of firm specifications and/or statements of work normally mean that little or no technical risk is involved. Sealed bidding is used primarily in the Operational Support phase of the life cycle for support items, although it can also be used in the Production, Fielding and Deployment phase for assemblies, components, and subcomponents.

c. When sealed bidding is the method, the contracting officer issues a solicitation called an **Invitation for Bid (IFB)**. Bids received are retained unopened until the exact time for bid opening arrives. At that time the bids are publicly opened, all prices are exposed, evaluated and award is made to the **lowest, responsive, responsible bidder**. Everyone then knows who the apparent low bidder is. However, while the Government is indeed looking for the lowest price, there are two other tests applied: **responsiveness** and **responsibility**.

d. A bid received in response to an IFB must stand-alone and **comply with all the terms and conditions** of the solicitation. The bid must **comply in all material respects** with the IFB, to include the method of submission, i.e., the bid must be **responsive** to the **solicitation**. That is, it must respond perfectly to the instructions in the IFB. If a bidder changes any term or condition in an IFB, or does not agree with all the requirements, his bid, if otherwise low, will be found to be **non-responsive** and will no longer be considered for award. Failure to price a line item, crossing out a contract clause, changing the delivery date or the quantity, or attempting to negotiate or submit descriptive literature with a bid could all result in a bid being found non-responsive. Responsiveness means that the bidder's offer meets the requirements of the IFB exactly. The requirement for responsiveness enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system. **The issue of responsiveness is relevant only to the sealed bidding method of contracting.**

e. The firm with the lowest, responsive bid is next evaluated to determine if the firm is responsible. **Responsibility** means that the potential contractor has the **technical and financial capabilities** to perform the contract. This principle applies to **all proposed contracts**. The contracting officer makes a determination of responsibility before award using any and all information available to make that determination. The information may be on hand, readily available, or obtainable from commercial sources. If information is lacking or is insufficient, the contracting officer will request Defense Contract Management Agency (DCMA) to perform a **pre-award survey**, an evaluation of the capability of the prospective contractor. Signing the contract constitutes a determination by the contracting officer that the prospective contractor is responsible with respect to that contract. When the contracting officer makes a determination of non-responsibility, he does so in writing.

## 6. NEGOTIATION.

a. The Government uses negotiation as the contracting method when any one of the four statutory requirements for sealed bidding is missing. The decision to negotiate involves a contracting officer's business judgment, which will not be upset unless it is unreasonable. The contracting officer issues a **Request for Proposal (RFP)** as the solicitation. Many activities issue a Request for Quotation (RFQ) if the action is sole-source. The Government may award the contract based on any factors it chooses, provided all potential offerors are advised in the RFP just how a winner will be selected. The winner is frequently selected on factors other than the lowest price or estimated cost (i.e. technical and management factors, past performance, etc.). The evaluation process is inherently subjective. The actual selection of a winner may be done by the contracting officer, or through a formal source selection process. The fact that another contracting officer or another agency reasonably might have made another selection does not mean that the selection made was unreasonable. Virtually all of the Government's requirements in the solicitation are subject to discussions/negotiations with potential contractors.

b. There are a number of differences between sealed bidding and negotiation. In negotiation the Government can allow companies to offer individual, differing solutions to its needs. The offers submitted are not publicly opened, but are closely held. The Government then evaluates the merits of the solutions contained in the offers, and holds discussions before deciding which offer or offers to accept. For acquisition category programs, negotiation is usually used throughout the Life Cycle Model. In the first three phases there is significant technical risk, and in the production phase any competition is usually not limited to price only, so sealed bidding cannot be used. Since offerors are allowed to revise their proposals, negotiation is much more flexible and informal in many respects than sealed bidding. However, there are still many rules or procedures involved in negotiation that are designed to assure that all offerors are treated equally.

c. **Responsiveness** is not an issue in negotiation. If an offeror changes a term or condition in the RFP, the parties can still discuss and clarify the change. In some cases, the other offerors may have to be notified and be given the opportunity to revise their proposals. After the close of discussions and evaluation of revised proposals, an apparently successful offeror will emerge. This offeror must pass the same test of **responsibility** as is applied in sealed bidding.

**7. SIMPLIFIED ACQUISITIONS.** Simplified acquisitions are acquisitions of supplies, services, or construction in the amount of \$100,000 or less using simplified acquisition procedures to include imprest funds, purchase orders, credit cards, and blanket purchase agreements. Contracting activities use simplified acquisitions to the maximum extent practicable because they save time, reduce administrative costs, promote efficiency and economy in contracting, and simplified acquisitions increase opportunities for small business concerns. When using simplified acquisitions, solicitations may be either oral or electronic and the deadline for submission of responses to solicitations may be any reasonable time based on the circumstances of the requirement. Simplified acquisitions are exempt from the Competition in Contracting Act.

a. **Micro-purchase** means an acquisition of supplies or services (except construction), the aggregate amount of which does not exceed \$2,500 (except that in the case of construction the limit is \$2,000). FAR 2.101. The commercial purchase card is the preferred method for individual **micro purchases** below \$2,500, *IF* the requirement is authorized for local purchase, and *IF* the supplies or services are not available from required sources such as, agency inventories, Federal Prison Industries, Inc., or the Committee for Purchase From People Who Are Blind or Severely Disabled. Micropurchase authority is generally delegated to individuals who will use the supplies or services being purchased. Individuals delegated this authority are appointed in writing in accordance with agency procedures.

b. **Simplified Acquisition Threshold.** Contracting activities use streamlined procedures for buying supplies and services, including construction, research and development, and commercial items when the aggregate amount of the purchase is not expected to exceed the simplified acquisition threshold (currently \$100,000). The document issued is usually a unilateral purchase order, but a formal two-party contract might be used if there were complicated requirements such as those relating to: security classifications, technical inspections or tests, specification changes, Government-furnished property, insurance, and patents. Electronic purchasing techniques are used to the maximum extent practicable. Contracting officers use whatever combination of contracting methods and procedures will accomplish the purchase in the most suitable, efficient, and economical manner. At the discretion of the contracting officer, one or more, but not necessarily all, of the evaluation procedures prescribed by the FAR for sealed bidding or negotiation may be used. Factors other than price may be used so long as they are disclosed to all offerors.

c. **Test Program for Certain Commercial Items.** Congress created the authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000. Authority to issue solicitation under the test program was to expire on January 1, 2000. However, the Administration requested an extension because it did not have enough information to assess the program's effectiveness. Accordingly, Congress extended the period of the test program until January 1, 2002. There are some procedural differences between the procedures used for this special program and those used below \$100,000; specifically, a special contract format is used instead of the usual purchase order, and a justification and approval is required for sole-source acquisitions.

## 8. COMPETITION IN GOVERNMENT CONTRACTING.

a. Under the Competition in Contracting Act of 1984 (CICA), the **policy** is, with limited exceptions, that contracting officers will promote and provide for **full and open competition (FAOC)** through use of the competitive procedures or combination of competitive procedures that is best suited to the circumstances of the contract action. **Full and open competition** means that all responsible offerors are allowed to compete (FAR 6.1). The competitive procedures available are sealed bidding, negotiation, a combination of competitive procedures, and several other procedures that are acceptable in special circumstances. Contracting Officers must use good judgment in selecting the procedure that best meets the needs of the Government. FAOC does not apply to contracts awarded using simplified acquisition procedures, and micro-purchases.

b. Agencies are allowed to exclude particular sources under certain circumstances, and then provide for full and open competition among the sources remaining. This is called **full and open competition after exclusion of sources**. Agencies use this type of competition when they set-aside, i.e., reserve, an acquisition for specified sources. The set-aside might be for small businesses, in which case large businesses would be the excluded sources, or it might be for small disadvantaged businesses participating in a specific Small Business Administration program known as the 8(a) program. Agencies may also exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for the supplies or services being acquired.

c. Contracting without providing for FAOC or FAOC after exclusion of sources is a violation of statute, unless permitted by one of the following circumstances: (1) Only one responsible source and no other supplies or services will satisfy agency requirements, (2) unusual and compelling urgency, (3) industrial mobilization; engineering, development, or research capability; or expert services (4) international agreement (5) authorized or required by statute, (6) national security or (7) public interest.

## 9. PROTESTS.

a. A **protest** is a written objection from an offeror, or potential offeror, to a solicitation or to a proposed or actual award. A protest may challenge the terms and conditions of a solicitation or the application of rules and procedures in determining the winning contractor. The protest procedures provide a mechanism by which the challenge can be considered by the agency or by the General Accounting Office (GAO). Protesters are urged to seek resolution of their complaints initially within the agency. This may mean either filing a protest directly with the contracting officer, or following special agency protest procedures. While agency protests are encouraged, protesters do have the right to file directly with GAO (FAR 33).

b. **Effect of a protest.** When the agency has received notice from GAO of a preaward protest filed directly with GAO, **a contract may not be awarded** unless authorized by the Head of the Contracting Activity (HCA). The HCA may authorize award upon a written finding that

urgent and compelling circumstances, which significantly affect the interest of the United States, will not permit awaiting the decision of the GAO, and award is likely to occur within 30 calendar days of the written finding.

## 10. THE CONTRACTING PROCESS.

a. The contracting process begins when the requiring activity prepares a **purchase request** that is later sent to the contracting officer. The purchase request includes all information necessary to describe the requirement such as statements of work, specifications, quantities, and time and place of delivery. It also includes funds.

b. Upon receipt of the request, the contracting officer reviews it for adequacy and compliance with policy, regulations, and business acumen, and then decides which **contracting method** should be used. The way the requiring activity describes its need is probably the most crucial factor in making this decision. (These two steps may be performed concurrently by a Contracting Integrated Process Team, or may be done separately as described).

c. Next, the contracting officer prepares the **solicitation**, publicizes it, and distributes it to potential sources. An IFB is used if sealed bidding is appropriate; an RFP or RFQ is used for negotiation. The choice of solicitation indicates to the contracting community which rules will be followed throughout the acquisition. Most solicitations are publicized in the *Commerce Business Daily*, a Government publication that lists solicitations and awards over the simplified acquisition threshold.

d. The choice of contracting method assists in the determination of **contract type**. If sealed bidding is chosen, then only two contract types are permitted—firm-fixed-price or fixed-price with economic price adjustment. Any contract type may be used in negotiation as long as any limitations on a particular type are not exceeded.

e. After contractor **responses** are received, they must be **evaluated** in order to decide which response best meets the Government's needs. Determining which contractor should get the award is critical to the acquisition process and requires the contracting officer to use mature business judgment and experience. He must thoroughly analyze and evaluate all offers that have been received in response to the solicitation. He must consider such factors such as price, delivery, conformity to specifications, and any other elements or requirements that were addressed in the solicitation. When negotiation is the contracting method, evaluation is usually followed by discussions.

f. Upon completion of the evaluation and/or discussions, the contracting officer **awards** a contract. If sealed bidding is used, then the lowest, responsive, responsible bidder wins, and this decision is usually made by the contracting officer. Formal source selection is used for competitive acquisition category programs, and the contracting officer does not make the selection decision, although he does sign the contract. For most other negotiated acquisitions, the contracting officer makes the final decision. Following the contract award decision, the contracting officer obtains any required approvals, makes a determination of responsibility, and signs the contract.

**11. CONTRACT ADMINISTRATION.** The purchasing cycle does not end with the award of the contract. This phase is followed by the extremely important function of administering the contract. To ensure the successful implementation of this responsibility, it is the policy of DoD to require contracting officers to use, to the fullest possible extent, the assistance provided by the Defense Contract Management Agency (DCMA). Contract Administration encompasses all those functions to be performed after award of the contract; therefore, both the DCMA contracting officer and the contracting activity contracting officer will be involved. Contract administration must be the result of mutual coordinated effort between the two. Some of the more important contract administration functions are discussed below.

a. **Contract modifications.** These are any alterations to the specifications, delivery point, rate of delivery, contract period, price, quantity, or other contract provision of an existing contract. Modifications are accomplished either through a mutual written agreement or by a unilateral written order of the contracting officer. Examples of contract modifications are change orders, supplemental agreements, and administrative changes.

b. **Quality assurance.** Government quality assurance is designed to ensure that a contractor has fulfilled his contractual obligations pertaining to the quality requirements of his contract. Quality assurance may involve examination of a contractor's systems as well as inspection, testing, and acceptance.

c. **Terminations.** Most contracts are terminated by completion of the contract requirements. However, Government contracts can be terminated for default, when the contractor fails to abide by the terms and conditions of the contract, or for the convenience of the Government, when requirements or circumstances change.

**12. SUMMARY.** This overview has briefly discussed the entire Government contracting process, and the basic responsibilities of those involved in the process. Contracting for the Government is much more complicated than most people imagine, and because it involves taxpayer monies, it receives much scrutiny and publicity. Therefore, it is imperative that everyone knows as much as possible about the process. Like any team sport, the contracting process depends on all the players knowing the rules, and working together to reach a common objective. This overview has been written to provide a basic foundation of knowledge upon which subsequent contracting instruction will build and expand.

## Comparison of Sealed Bidding and Negotiation

### Sealed Bidding

Requiring activity recognizes need, obtains funding, prepares a description of the requirements, lists desired quantities and delivery schedule, and furnishes purchase request to contracting officer.

Requirements are firm. Tend to be commercial, off-the-shelf, standard items or standard services.

Required when: time permits; award based on price; no discussions required; competition.

Invitation for Bid (IFB).

Bid opening. Firm bid rule applies. Bids are public information. Bidders committed to bid price for period of time after bid opening.

Evaluation. No talks with contractor. Selection of low bidder is made on basis of lowest evaluated price.

Price analysis.

Responsiveness. Bid must comply with IFB.

Responsibility. Firm must be capable.

Award. Contracting Officer signs.

Sealed bidding is very formal and inflexible. Used where technical risk is low.

### Negotiation

Same.

Requirements range from firm to very general. Any type of item or service can be bought.

Available whenever any one of the sealed bidding requirements is missing.

Request for Proposal (RFP).

Closing date. Contractor may withdraw proposals any time prior to award. Proposals are confidential.

Evaluation. Contracting officer negotiates with contractor(s). All areas open for discussion. Selection can be made on any basis chosen by the contracting officer and detailed in the RFP. Normally not the lowest price.

Price analysis or cost analysis.

Does not apply.

Same.

Same. (May have formal selection procedures.)

Negotiation less formal and more flexible. Used for procurements involving technical risk and/or when sealed bidding is not appropriate.

