

Introduction to Contracting with the Federal Government

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Definition: What is a Contract?

- A Promise or set of Promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
- An agreement between two or more competent parties in which an offer is made and accepted, and each party benefits. The agreement can be formal, informal, written, oral or just plain understood.
- Voluntary, deliberate, and legally enforceable (binding) agreement between two or more competent parties, evidenced by:
 - (1) an offer,
 - (2) acceptance of the offer, and a
 - (3) valid (legal and valuable) consideration.

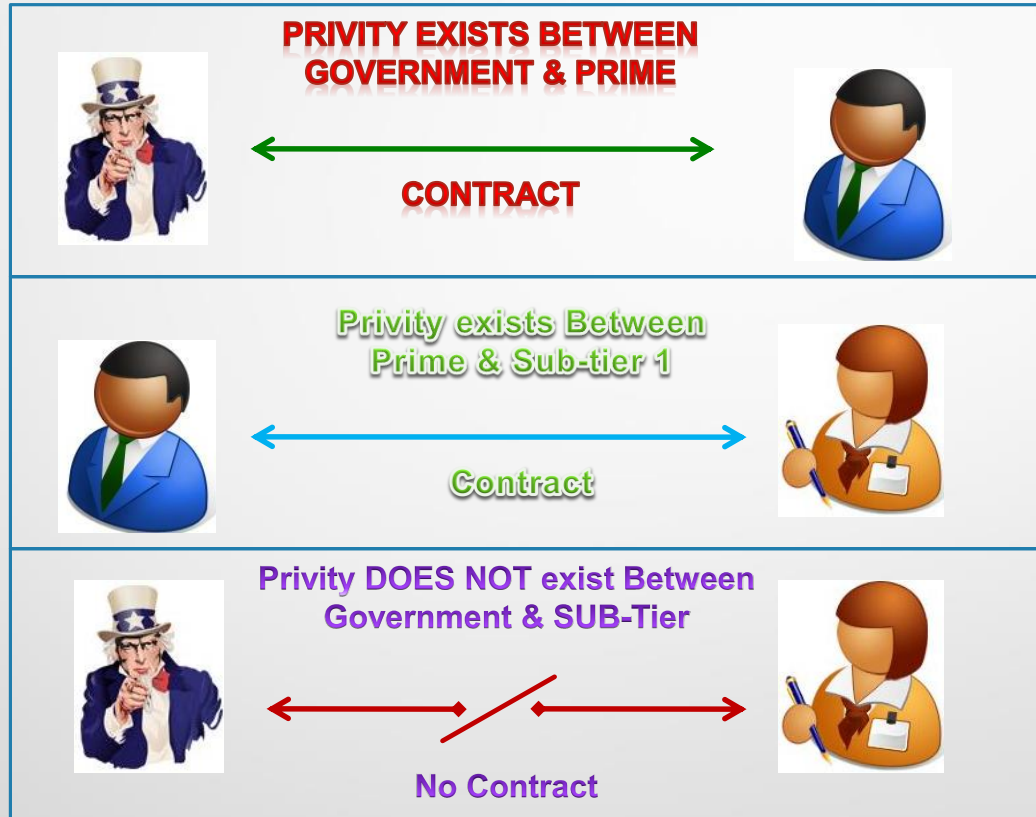
Required Elements of a Contract

- **Capacity:**
 - The parties must have the capacity/authority to enter into a contract
- **Mutual Assent:**
 - Parties must mutually assent to be bound to the contract terms by both having an “Offer” and “Acceptance” of offer.
- **Consideration:**
 - Parties must provide consideration/value to each other (Perform ‘x’ for ‘y’)
- **Lawful Purpose:**
 - A contract must be for a lawful purpose.
- **Terms:**
 - The terms must be certain and clear.
- **Form:**
 - The formation of the contract must be of a type permitted by law.

Federal Acquisition Regulation:

- FAR PART 2: “Contract” means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, 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. For discussion of various types of contracts, see part 16.
- FAR 44.101: A contract entered into by a subcontractor to furnish supplies or services *for performance of* a prime contract or subcontract. It includes, but is not limited to, purchase orders and changes and modifications to purchase orders.

Privity Of Contract



Distinctions between Commercial and Federal Contracting: Commercial

- Commercial Contracting:
 - Private Money
 - Governed mainly by local and State law
 - Price normally determined by the market
- Selling/Buying Commercially: Formal written 'Contract' not always required.
 - Uniform Commercial Code (UCC) generally applies
 - Is not a Federally directed 'universal' code
 - Each state legislatures (except LA) has enacted a version of it
 - But it is not uniform - nominal variations by state
 - Creates substantial implied rights (Warranties / Damages)
 - Applies to purchases/sale of "goods"
 - N/A to services contracts

Federal Contracting:

- Uses Public Money, not Private (Taxes – Entitlements and Discretionary)
 - Special financing options available
- Governed by Federal Law/Statutes and Regulations (FAR)
 - Very Specific Terminology to be aware of
- Special Rules of Conduct: Mandatory Terms
 - Some Commercial practices disallowed in Government Contracting
 - Federal Government audit requirements
 - Specific Terms must be flowed to lower tier vendors
- Federal Government Buyer has special privilege concept known as 'Sovereign Immunity'
 - Changes
 - Terminations

Federal Contracting:

- Cost Accounting Standards *may* apply
 - Applicability depends on size standards / thresholds / products
- Quality Assurance:
 - Contractor must establish specified levels of Quality Assurance Requirements for Certifications & Representations
- Subject to Government agency audits
 - Contractor records, rates, pricing, Quality Assurance
- Enforcement and Consequences:
 - Government has broad enforcement powers and can impose consequences for contract and business conduct violations.

Governance of Federal Contracting

- All Federal Contracting is authorized by Statutory Law: Office of Federal Procurement Policy Act, 41 U.S.C. 401 et seq.
 - Federal Acquisition Regulation (FAR)
 - Supplements:
 - Defense Federal Acquisition Regulation Supplement (DFARs)
 - Many other agency specific supplements

Federal Acquisition Regulations

- The Federal Acquisition Regulations (FAR)
 - Code of Federal Regulations (CFR) Title 48 authorizes the FAR.
 - Codification of uniform policies for Fed Government. purchases.
 - FAR 1.102(a): "The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives."
 - FAR is applicable to Federal Contracting with appropriated funding.
 - FAR is not Applicable to Grants, Cooperative Agreements or Non-appropriated Fund (NAF) activities.
 - FAR is applicable to Sub-Contracts through Flow-down requirements, although 'Privity' is between the Prime and the Sub-Contractor, not the Government and Subcontractor
 - Christian Doctrine: From "G.L. Christian & Associates v. US 1963"
Contract Clauses that express deeply significant public policy are 'read into' a contract even in the case where it is omitted from the written document. For Example: Termination for convenience

Appropriated Funds

- One Major Difference between Government Contracting and Commercial Contracting is the use of Appropriated Funds:
 - Government procurements use funds budgeted by the “Executive Branch”, and approved by the “Legislative Branch”
 - Anti-Deficiency Act requires the Government to have approved funding ‘in hand’ for all contract actions. (FAR 52.232-20 Limitation of Cost Clause)

Government Sovereignty

- The Concept of Federal Government Sovereignty is a major difference between Commercial and Government Contracting:
- The Government has legislated requirements for contracting with itself that would require specific negotiation within Commercial contracting:
 - i.e. Changes Clause
 - i.e. Terminations
 - i.e. Required Public Policy Requirements
 - The use of businesses classified as “Small” and “Disadvantaged” business
 - Use of Domestic sources (Buy American)
 - Business Ethics – required self reporting

Government Sovereignty – Changes Clause

- Changes Clause: FAR 52.243
 - Allows Government to make unilateral changes within the general scope of the contract.
 - Designs/Specifications; Method of Work, Method of Shipment; Place of delivery
 - Description of service; Time or Place of performance
 - Equitable adjustment may be negotiated
 - Price and / or schedule

Government Sovereignty – Terminations for Convenience

- Effect of Termination for Convenience on a business:
 - Requirement goes away
 - Contractor is reimbursed for fair and reasonable costs incurred (allowable, applicable and allocable) and appropriate share of fee
 - Product and Material need to be dispositioned in settlement process
 - No negative effect on Contractor's past performance record

Government Sovereignty – Terminations for Default

- Effect of Termination for Default on a business:
 - Government is not liable for the contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments
 - The contractor is liable to the Government for any excess costs incurred in acquiring supplies and services similar to those terminated for default
 - Default becomes part of the contractor's past performance record which will harm the contractor's ability to compete on future contracts.
 - Depending on reason for default, there could be cause for debarment from future Government contracts.

Government Sovereignty – Requirement to uphold public policy (Small Business requirements)

- **FAR 19.702 Statutory requirements.**
 - Any contractor receiving a contract with a value greater than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance.

Being a SMALL BUSINESS in Federal Contracting

- **SMALL IS GOOD – WHY?**
 - Federal agencies and large federal prime contractors have **SMALL BUSINESS GOALS**
 - Large Prime Contractors have **SMALL BUSINESS SUBCONTRACTING PLANS** – these plans layout the prime contractors agreed to goals
 - FAR Part 19
<https://www.acquisition.gov/?q=/browse/far/19>

SMALL BUSINESS PROGRAMS

- Federal Goals (similar but not the same for the Prime Contractor):
 - 23 percent of prime contracts for [small businesses](#) [based on NAICS codes];
 - 5 percent of prime and subcontracts for [women-owned small businesses](#);
 - 5 percent of prime contracts and subcontracts for [Small Disadvantaged Businesses](#) [8(a) program];
 - 3 percent of prime contracts and subcontracts for [HUBZone small businesses](#);
 - 3 percent of prime and subcontracts for [service-disabled veteran-owned small businesses](#).



Government

Program Goals & Performance

Small Business Maximum Practicable (MaxPrac) Opportunity Analysis Model

Small Business Program Goals

Prime Contracting Goals	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Small Business	22.28%	22.50%	22.50%	21.35%	21.60%	21.26%
HUBZone Small Business	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%
Service-Disabled Veteran-Owned Small Business	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%
Small Disadvantaged Business*	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%
Women-Owned Small Business	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%
Subcontracting	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Small Business	31.7%	36.7%	36.7%	36.7%	36.0%	34.5%
HUBZone Small Business	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%
Service-Disabled Veteran-Owned Small Business	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%
Small Disadvantaged Business	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%
Women-Owned Small Business	5.0%	5.0%	5.0%	5.0%	5.0%	5.0%

* Small Disadvantaged Business awards include 8(a) awards

*** HUBZone subcontracting program does not require a DoD-wide goal but requires the negotiation of HUBZone goals in all DoD contracts and subcontracts that require "Small Business Subcontracting Plans." However, SBA has assigned a DoD subcontracting goal of 3.0% for FY 2008

Small Business Liaison Officer - SBLO

- SBLO – in short – is responsible for a firms small business subcontracting program, i.e., developing, preparing, and executing individual subcontracting plans, monitoring performance relative to the particular plan and periodic reporting requirements
- Every large Federal contractor with large contracts is required to have
- Know who they are
- <http://www.acq.osd.mil/osbp/docs/DoDPrimeContractorsJuly2015Final.xlsx> list of Prime Contractors for DOD 2014 – contact information may be outdated

Who can bind the Government?

- Only an agent of the Government who is within the scope of their authority can bind the government to a contract.
 - Contracting Officers are provided Warrants that define the Authority delegated to them from the Head of the Contracting Activity. They can bind the Government:
 - Procuring Contracting Officer: (PCO)
 - Administrative Contracting Officer (ACO)
 - Termination Contracting Officer (TCO)
 - Other Government Officials such as Contracting Officer Technical Rep (COTR) or Quality Assurance Rep (QAR) are not authorized to bind the government and can therefore not change the scope of contracts
- Subcontractor to a Prime or other tier Subcontractor:
 - DO YOU KNOW WHO CAN 'Contractually' Bind your customer?

Considerations for Contracting Officers Making Federal Procurements

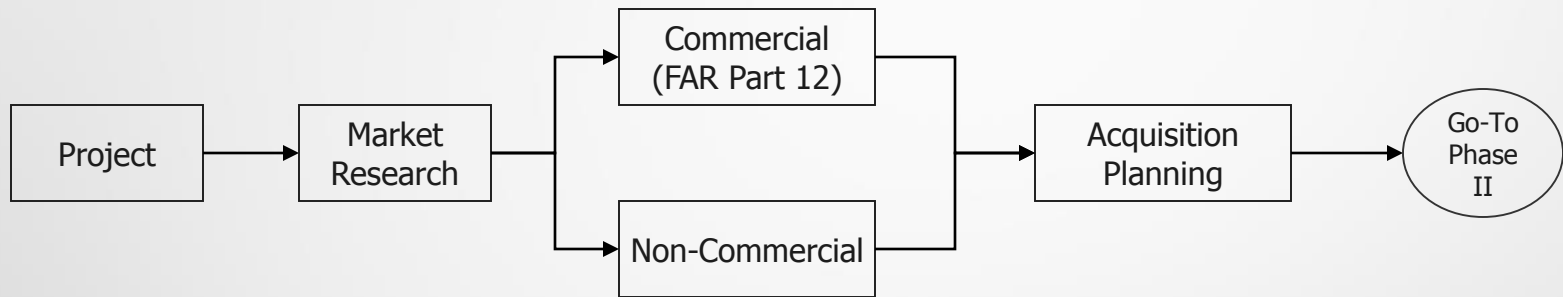
- Socioeconomic Programs / Requirements:
 - Small/Disadvantaged Set-asides
 - (Minority, Woman-owned, Veteran, Handicapped)
 - Maintaining or Mobilization of nations capacity (2nd Source issues)
- Full and Open Competition
 - All reasonable sources are permitted to compete
 - Sealed Bidding
 - Negotiation
- Sole Source or Limited Source

Federal Government: Basic Acquisition Process

- Define Need
- Analyze Requirement
- Source Selection
- Solicit: IFB, RFQ, RFP
- Evaluate
 - (Clarifications, Down-selects, Negotiate, Certify)
- AWARD
- Perform Effort
 - Modifications / Changes
- Completion & Close Out
 - Fulfilled Requirements or Terminations

Government Source Selection Road Map

- Phase 1: Pre-solicitation Planning

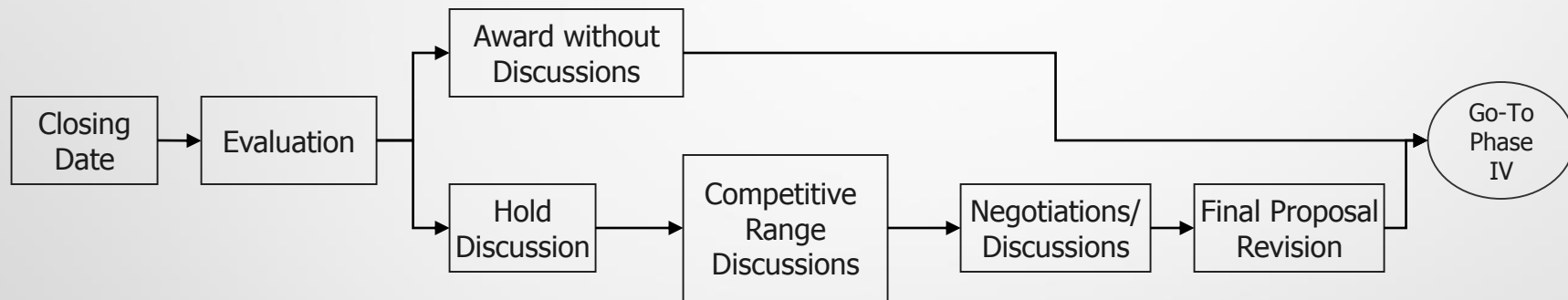


- Phase 2: Solicitation Prep and Release

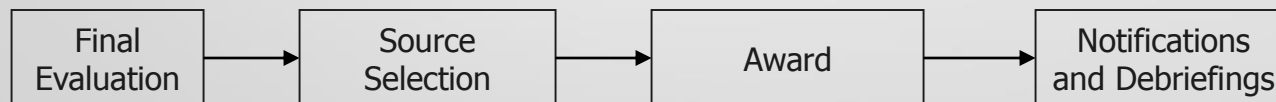


Government Source Selection Road Map

- Phase 3: Proposal Evaluation/Negotiation



- Phase 4: Source Selection & Award



Types of Procurements

- General Services Administration (GSA) Schedules: FAR Part 8
- Commercial Items: FAR Part 12
- Simplified Acquisitions: FAR Part 13
- Sealed Bidding: FAR Part 14
- Negotiated Contracts: FAR Part 15
- Special Contracting Methods: FAR Part 17
- Emergency Acquisitions: FAR Part 18

Types of Contracts – FAR Part 16

- FAR prohibits “cost plus percentage of cost” arrangements
- Fixed Price: FFP, FPIF, FPAF
 - Payment made to the price agreed with the calculations if other than Fixed Fee
 - Agreed to Scope of Work Must be accomplished regardless of cost performance.
- Cost Reimbursable: CPFF, CPIF, CPAF, Cost Share
 - Payment of incurred Cost (Direct, G&A, OH) + Fee
 - Requires Good-Faith Effort toward goal but not completion. (Scope of objectives)
- Time & Materials or Labor Hour
 - Negotiate fixed rates / hour of labor up front
 - Non-labor: Materials at cost (Including OH/Handling); Travel at raw cost only

Types of Contracts – FAR Part 16

- Agreements
 - Basic agreement: written instrument of understanding that contemplates separate future contracts. Often allows for several contracting groups to place contracts referencing it.
 - Basic Ordering Agreement (BOA): Similar to the Basic Agreement, authorizes orders to be placed referencing the T&C's, but may require pricing to be provided/negotiated for the material/ services at the time required.
- Indefinite Delivery Contracts
 - Provides for upfront negotiation of Terms & Conditions, Prices, estimated quantities and effective timeframe without obligating the Government
- Letter Contracts
 - Written preliminary contractual instrument that authorizes the contractor to begin performing immediately
 - Allows effort to commence while final contract is definitized
 - Must contain maximum liability of the Government (not to exceed price)

Contracting Theory: Contract Type by Risk

Government Risk	High Risk Low Risk					
Contractor Risk	Low Risk High Risk					
Requirement Definition	Loosely Defined Highly Defined					
Production Stages	Concept Studies / Basic Research	Exploratory Development	Test Demonstration	Full Scale Development	Full Production	Follow-on Production
Contract Type	Various Cost Reimbursement Contracts	CPFF CPAF	CPIF, CPAF, FPIF	CPIF, FPIF or FFP	FFP, FPIF or FPEPA	FFP, FPIF or FPEPA

Topics, topics and more topics

- This presentation has just scratched the surface of doing business with the Federal Government. There are an almost endless supply of topics not covered here:
 - **Being a Subcontractor in the Federal Supply Chain, nuances to being a prime.**
 - FAR Clauses, Supplement Clauses, SEC rules and Laws of the land
 - ITAR / EAR – Is there an export
 - DPAS – Defense Priority Allocation System
 - Audits
 - Government Property
 - Intellectual property
 - Commercial verses not commercial, Supply, Service, Construction, A&E
 - Disputes
 - Bidding, Winning and Losing – Debriefs, Past Performance,
 - Claims
 - Cybersecurity; Conflict minerals, Counterfeit Parts, US Sources and trade agreements.
 - Executive compensation reporting
 - And on, and on, and on (and on).

Considerations for a Contractor (Prime or Sub-tier)

- KNOW THY CONTRACT! (legally binding document)
 - Type of Contract - Terms & Conditions
 - Invoicing / Financing
 - All specifications
 - Timeframes
 - Inspection Requirements: including Package/Packing/Shipping
- PERFORMANCE! This is tracked and impacts future opportunities.
 - To schedule / cost / quality
 - Ability to handle changes / Flexibility
- Communication with your Customer
 - Know who to talk with for what issues
 - Know who has authority for what type of changes

Questions?

- Thank you for your attention!