

Commercial Items & Services

Volk Field

July 29, 2015

FAR Part 1 – principles/purpose

- Maximizing the use of commercial products and services;
- Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and
- Promoting competition;
- Minimize administrative operating costs;
- Conduct business with integrity, fairness, and openness; and
- Fulfill public policy objectives.

Role of the Acquisition Team

FAR Subpart 1.102-4

- (a) Government members of the Team must be empowered to make acquisition decisions within their areas of responsibility, including selection, negotiation, and administration of contracts consistent with the Guiding Principles.
- (b) In particular, the contracting officer must have the authority to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, on a specific contract.

Critical Terms

- “May” denotes the permissive. However, the words “no person may...” mean that no person is required, authorized, or permitted to do the act described.
- “Must” (see “shall”).
- “Shall” means the imperative.
- “Should” means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance.

FAR Part 2 – Definitions of Words and Terms

Commercial items – relative importance

- On a day in FBO (between Monday, July 27 and Tuesday, July 28)

Description	~1330	1530	2145
Notices posted	2,418	2,620	2,962
Notices categorized as Synopsis/Solicitation	813	877	989
Synopsis/Solicitations identified as Total Small Business Set aside	427	465	520

General Services Administration Schedule Programs

- The General Services Administration (GSA) has broad authority over the acquisition of personal property and nonpersonal services for other government agencies. Section 501(b)(1)(A) of title 40, United States Code,¹ provides that GSA—

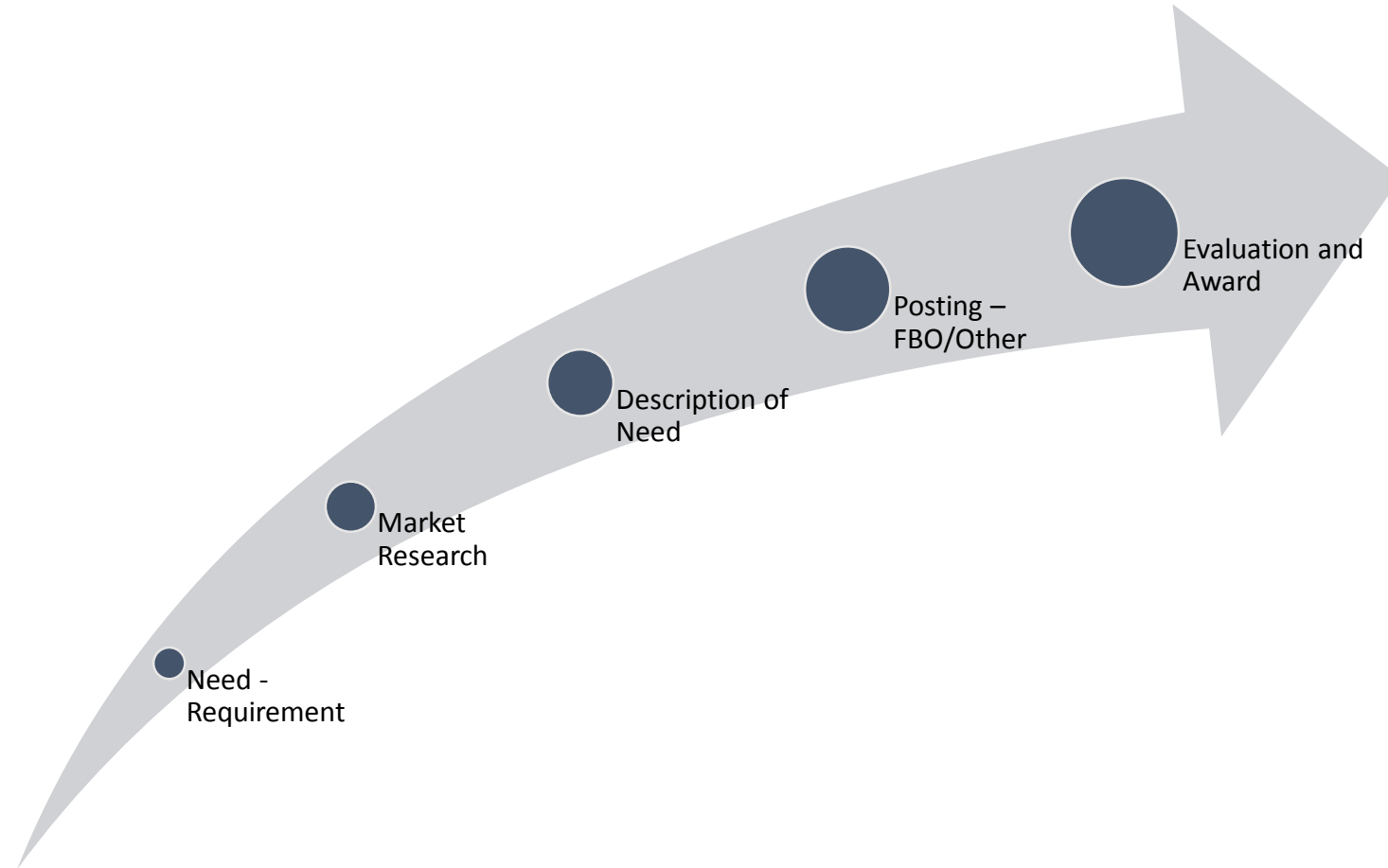
“shall procure and supply personal property and nonpersonal services for executive agencies to use in the proper discharge of their responsibilities, and perform functions related to procurement and supply including contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting.”

Source: Principles of Federal Appropriations Law – Volume III

Commercial Procedures – streamlined, but!

FAR	Description
Part 2	Definitions of Words and Terms
Part 3	Improper Business Practices and Personal Conflicts of Interest
Part 4	Administrative Matters
Part 5	Publicizing Contract Actions
Part 8	Required Sources of Supplies and Services
Part 9	Contractor Qualifications
Part 10	Market Research
Part 12	Acquisition of Commercial Items
Part 13	Simplified Acquisition Procedures
Part 15	Contracting by Negotiation
Part 16	Sealed Bidding
Part 22	Application of Labor Laws to Government Acquisitions
Part 37	Service Contracting
Part 52	Solicitation Provisions and Contract Clauses

Procurement – key elements



Bona Fide needs rule

- Over a century ago, the Comptroller of the Treasury stated, “An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such an appropriation.” 8 Comp. Dec. 346, 348 (1901).
- The *bona fide* needs rule is one of the fundamental principles of appropriations law: A fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made.

Anti-deficiency Act

- In considering what may and may not be done before the start of a fiscal year, it is necessary to keep in mind the Antideficiency Act, which prohibits obligations or expenditures in advance of appropriations, 31 U.S.C. § 1341(a), and apportionments, 31 U.S.C. § 1517(a).⁵ By virtue of this law, certainly no obligations may be incurred before the appropriation act is enacted and amounts apportioned to the agency, unless specifically authorized by law.

Source: Federal Appropriations Law Volume III page 564

Procurement Priorities (FAR Subpart 8.002)

(1) Supplies.

(i) Inventories of the requiring agency.

(ii) Excess from other agencies (see [subpart 8.1](#)).

(iii) Federal Prison Industries, Inc. (see [subpart 8.6](#)).

(iv) Supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see [subpart 8.7](#)).

(v) 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.

(2) Services. Services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see [subpart 8.7](#)).

(b) Sources other than those listed in paragraph (a) of this section may be used as prescribed in 41 CFR 101-26.301 and in an unusual and compelling urgency as prescribed in [6.302-2](#) and in 41 CFR 101-25.101-5.

(c) The statutory obligation for Government agencies to satisfy their requirements for supplies or services available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies when contractors purchase the supplies or services for Government use.

Policy

- Use Commercial Items!
 - Determine availability
 - Commercial and/or nondevelopmental items
 - Acquire when available
 - Require primes and subcontractors --- at all tiers to incorporate them to the maximum extent practicable --- in items supplied to the agency

Applicable FAR part - 12

- Commercial items defined – FAR Part 2 definition
- Part 12 applies to acquisition of supplies and/or services
- Part 12 shall take precedence when other parts of the FAR are inconsistent with Part 12
- Part 2 language – “purposes other than government purposes”
 - “--- are those that are not unique to a government.”

FAR Part 12 – does not apply

- --- to the acquisition of commercial items-
 1. At or below the micro-purchase threshold (\$3,000, Oct 1 revised to \$3,500)
 2. Using Standard Form 44 – (PO-Invoice-Voucher)
 3. Using the imprest fund – (similar to Petty Cash)
 4. Using the Government wide commercial purchase card as a method of purchase rather than only as a method of payment
 5. Directly from another Federal agency

Description of need

- 12.202 Market research and description of agency need
 - (b) The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services may be suitable.
 - Acquisitions above the Simplified Acquisition Threshold (\$150,000)
 - Statement of need
 - Will describe the type of product or service to be acquired
 - Explain how the agency intends to use the product or service
 - Function to be performed, performance requirement or essential physical characteristics

PERFORMANCE BASED SERVICE CONTRACT— GROUNDS MAINTENANCE -1

- This solicitation contains a work statement for a performance-based service. This means that the Government has described WHAT is to be accomplished, not HOW to accomplish it, and states a basis for determining whether finished work meets the Government quality requirements. It does not state detailed procedures for accomplishing the requirement unless there are safety, security or communication requirements.
- It is the responsibility of the Contractor to ensure that they build into their bid/proposal price the necessary hours that it will take to meet the performance standards specified.
- Solicitation Number: EA-133C-15-RQ-0784

PERFORMANCE BASED SERVICE CONTRACT— GROUNDS MAINTENANCE -2

- THIS IS A COMBINED SYNOPSIS/SOLICITATION FOR COMMERCIAL ITEMS PREPARED IN ACCORDANCE WITH THE FORMAT IN FAR SUBPART 12.6, AS SUPPLEMENTED WITH ADDITIONAL INFORMATION INCLUDED IN THIS NOTICE. THIS ANNOUNCEMENT CONSTITUTES THE ONLY SOLICITATION; QUOTES ARE BEING REQUESTED AND A WRITTEN SOLICITATION WILL NOT BE ISSUED. This synopsis/solicitation **EA-133C-15-RQ-0784** constitutes a Request for Quotation (RFQ) and incorporates provisions and clauses in effect through Federal Acquisition Circular 2005-83.

Legal effect of quotations

(a) A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.

(b) When appropriate, the contracting officer may ask the supplier to indicate acceptance of an order by notification to the Government, preferably in writing, as defined at [2.101](#). In other circumstances, the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred.

(c) If the Government issues an order resulting from a quotation, the Government may (by written notice to the supplier, at any time before acceptance occurs) withdraw, amend, or cancel its offer. (See [13.302-4](#) for procedures on termination or cancellation of purchase orders.)

Second example

- **Description:** USPFO for Utah This is a combined synopsis/solicitation for commercial items prepared in accordance with the format in Subpart 12.6, as supplemented with additional information included in this notice. This announcement constitutes the only solicitation; proposals are being requested and a written solicitation will not be issued. This is a combined synopsis/solicitation for commercial items prepared in accordance with the format in FAR Subpart 12.6, in conjunction with FAR 13.5, as applicable, and as supplemented with additional information included in this notice. This announcement constitutes the only solicitation; bids are being requested and a written solicitation will not be issued. The solicitation number is W911YP-15-T-1007 and is issued as an invitation for bids (IFB), unless otherwise indicated herein.

Current opportunity - Medical Supplies

- Solicitation Number: HSBP1014R0046
- Information Contact: Amanda R. Freeman, Phone (202)344-1904, Email amanda.freeman@dhs.gov
- URL: <https://www.fbo.gov/spg/DHS/USCS/PDDC20229/HSBP1014R0046/listing.html>
- Set-aside: Partial Small Business
- NAICS Code: 423450
- Description: The Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) intends to issue a Request for Proposal (RFP) for medical supplies. CBP and other DHS Components require vendor(s) to supply medical supplies used by personnel to train for and perform medical treatments, tests, and operations. Supplies are those used in a pre-hospital, emergency medical services (EMS) context, and oftentimes in an austere, remote environment. This is a strategic sourcing initiative that will result in a multiple award DHS-wide Blanket Purchase Agreement (BPA) available to all Components for use. Upon award, this contract vehicle will be mandatory for use per DHS Directive 060-01. Other DHS Components that use medical supplies include Federal Protective Service (FPS), Federal Emergency Management Agency (FEMA), Federal Law Enforcement Training Center (FLETC), Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), U.S. Coast Guard (USCG), and U.S. Secret Service (USSS). CBP will utilize a partial small business set-aside under NAICS code 423450 and issue the solicitation in accordance with FAR Part 12

Evaluation Factors

- Evaluation factors, in order of importance:
 - (1) Offeror's capability to provide a quality product that meets the Government's needs within the time period of August 17- 20th 2015;
 - (2) Past performance, caliber of offeror's performance on previous contracts of a similar nature; and
 - (3) Total cost or price.

Offers

- May allow for fewer than 30 days response time
 - Unless the procurement is covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement
- If adequate, request existing product literature from offerors of commercial items in lieu of unique technical proposals
- Should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items.
- Shall evaluate each product as a separate offer

Procedures evaluation and award

- Shall use the policies unique to the acquisition of commercial items in conjunction with
 - The policies and procedures for solicitation, evaluation and award in
 - Part 13 Simplified Acquisition
 - Part 14 Sealed Bidding
 - Part 15 Contracting by Negotiation
 - May use streamlined policies in 12.603
 - > \$150,000 but less than \$6.5 million (\$12 million described in 13.500(e) shall employ simplified procedures authorized by Subpart 13.5 to the maximum extent possible.

Past Performance

- Past performance should be an important element of every evaluation and contract award for commercial items.
- Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal government in accordance with the policies and procedures contained in (as applicable)
 - Subpart 9.1
 - Subpart 13.106
 - Subpart 15.3

Responsible

- **9.103 Policy.**
- (a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.
- (b) No purchase or award shall 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 shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with [subpart 19.6](#), Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act ([15 U.S.C. 637](#)) applies, see [subpart 19.8](#).)

Contract Quality Assurance

- Reliance on Contractor's existing QA system
- This substitutes for Government inspection and testing before tender for acceptance (formal presenting of the items)
- Use in-process inspection to match customary market practices
- In-process inspection by the Government shall be conducted in a manner consistent with commercial practice

Determination of price reasonableness

- Contracting Officer must establish price reasonableness
- Should be aware of customary commercial terms and conditions
- Commercial item price factors
 - Speed of delivery
 - Length and extent of warranty
 - Limitations of seller's liability
 - Quantities ordered
 - Length of the performance period
 - Specific requirements
- Ensure contract terms, conditions, and prices are commensurate with the Government's need

Other commercial practices

- Common practice for terms and conditions to be written from the buyer's and seller's particular perspectives
- T&C's in part 12 attempt to balance the interests
- Market research may indicate other commercial practices that are appropriate for the acquisition of the particular item.
- These practices should be considered for incorporation into the solicitation and contract
- If determined to be appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order

Follow on thought

- The FAR outlines procurement policies and procedures that are used by members of the Acquisition Team. If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority. Contracting officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound.

Contact Information

Marc N. Violante

Wisconsin Procurement Institute

Email: marcv@wispro.org

Phone: 920-456-9990