CONTRACTING BY NEGOTIATION

TEXT REFERENCE

FEDERAL ACQUISITION INSTITUTE

CURRICULUM OF PROCUREMENT
TRAINING COURSES

CURRENT THROUGH

FAC 90-20

OFFICE OF ACQUISITION POLICY

GENERAL SERVICES ADMINISTRATION

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INTRODUCTION

THE FEDERAL ACQUISITION INSTITUTE (FAI) CURRICULUM

Courses

In FY91, the FAI began providing acquisition trainers and educators with instructional materials for a new Contract Management curriculum. This curriculum includes the following courses, listed in a recommended order of attendance.

1. Introduction to Contracting*
2. Procurement Planning*
3. Small Purchases
4. Contracting By Sealed Bidding*
5. Price Analysis*
6. Contracting By Negotiation*
7. Cost Analysis*
8. Contract Negotiation Techniques**
9. Contract Administration*
10. Contract Law
11. Types of Contracts
12. Source Selection*
13. Advanced Negotiation Procedures***
14. Advanced Cost and Price Analysis**
15. Advanced Contract Administration***
16. Termination

Specialized Courses
(in alphabetical order)

1. Acquisition of FIPS Resources***
2. Contracting for Architect/Engineer Services*
3. Construction Contracting*
4. Managing the Contracting Activity

Offerors

Each of the above courses will be offered by the GSA Interagency Training Center. Other Federal acquisition trainers and educators may incorporate FAI instructional materials in their respective curricula (generally under different course titles than the above).

* Currently available (as of 4-94).
** Projected to be available as of 12-1-94.
*** Projected for delivery in FY95

THE PURPOSE OF THE FAI CURRICULUM

Help you accomplish the goals of the Federal Acquisition Process

As a Contract Specialist, your primary goals are to:

1. Obtain the optimum market response to requirements for supplies and services, in terms of:
   - Quality.
   - Timeliness.
   - Price.

   While -
   - Accomplishing socioeconomic objectives.
   - Minimizing business and technical risks.
   - Maximizing competition.
   - Maintaining integrity.

2. Assure that purchased supplies and services are:
   - Delivered or performed when and where specified in the contract.
   - Acceptable, in terms of conforming to the contract's specifications or statement of work.
   - Promptly and properly reimbursed.
   - Furnished in compliance with other terms and conditions of the contract.

Help you perform your duties

To accomplish these goals, Contract Specialists perform 78 principal duties. Collectively, these duties constitute the Federal acquisition process. Exhibit I-1 maps the acquisition process and relates each duty to the overall process. The FAI curricula has been designed to systematically develop your skill at every duty in Exhibit I-1, in the context of accomplishing the overall goals of the Federal Acquisition Process.

Your challenge

Your challenge is to become proficient at the duties in Exhibit I-1. Granted, you may presently perform only a subset of the duties. In terms of your career, however, learning the entire range of duties will improve your competitiveness for a great variety of contracting positions, including managerial positions. From the standpoint of the Government, you will be better able to perform any one duty if you have first hand knowledge of how the duty affects, and is in turn affected by, the performance of the other duties.

CHARACTERISTICS OF THE FAI CURRICULUM COURSES

- Each course in the curriculum will build on the skills and knowledge taught in prior courses.
- Each course covers specific duties and is designed to provide skill in performing those duties.
- Generally, there is a separate lesson for each duty, with a corresponding chapter in the Text/Reference.
- In most cases, the instructor will introduce the duty, its purpose (learning objective), applicable policies, and standards for performance.
- Next, the instructor will walk you through a flowchart of the steps in performing the duty.
- You will perform selected steps in-class, using case studies and other such exercises.
- You will be tested.
- For each duty, the Text/Reference will serve as a desk reference, with flowcharts, steps in performance, and job aids.
- Practicums (i.e., self-instructional exercises) will be available at a later date to reinforce the in-class learning back on-the-job.
- Specialized courses will not reteach the basic acquisition process but will rather concentrate on the unique regulations and procedures for procuring FIPS Resources, A&E, or Construction.

PRESOLICITATION PHASE

Determination of Need	Initiating the Procure-ment	Analysis of Re-quirement	Sourcing
Determining Needs 1. Forecasting Require-ments 2. Acquisition Planning	**Processing the PR** 3. Purchase Requests 4. Funding **Market Research** 5. Market Research	**Analyzing Require-ments** 6. Specifications 7. Statements of Work 8. Services	**Extent of Competition** 9. Sources 10. Set-Asides 11. 8(a) Procurements 12. Competition Require-ments 13. Unsolicited Proposals **Selection Factors** 14. Lease vs. Purchase 15. Price Related Factors 16. Technical Evaluation Factors **Method and Plan for the Procurement** 17. Method of Procurement 18. Procurement Planning

SOLICITATION-AWARD PHASE

Solicitation	Evaluation— Sealed Bidding	Evaluation— Negotiation	Award
Terms and Conditions 19. Contract Types 20. Letter Contracts 21. Contract Financing 22. Use of Government Property and Supply Sources 23. Need For Bonds 24. Solicitation Pre-para-tion **Soliciting Offers** 25. Publicizing Proposed Procurements 26. Preaward Inquiries 27. Prebid/Preproposal Conferences 28. Amending Solicita-tions 29. Cancelling Solicita-tions	**Bid Evaluation** 30. Processing Bids 31. Bid Acceptance Periods 32. Late Offers 33. Bid Prices 34. Responsiveness	**Proposal Evaluation** 35. Processing Proposals 36. Technical Evaluation 37. Price Objectives 38. Cost and Pricing Data 39. Audits 40. Cost Analysis 41. Evaluating Other Terms and Con-ditions 42. Competitive Range **Discussions** 43. Factfinding 44. Negotiation Strategy 45. Conducting Nego-tia-tions	**Selection for Award** 46. Mistakes in Offers 47. Responsibility 48. Subcontracting Requirements 49. Preparing Awards **Executing Awards** 50. Award 51. Debriefing **Protests** 52. Protests **Fraud and Exclusion** 53. Fraud and Exclusion

Exhibit I-1. Federal Acquisition Process Chart.

POST-AWARD ADMINISTRATION PHASE

Start-Up	Quality Assurance	Payment and Accounting	Closeout
Planning 54. Contract Administra - tion Planning 55. Post-Award Orienta - tions **Ordering** 56. Ordering Against Contracts and Agreements **Subcontracting** 57. Consent to Sub - contracts	**Monitoring and Problem Solving** 58. Monitoring, Inspec - tion, and Acceptance 59. Delays 60. Stop Work 61. Remedies **Property** 62. Property Adminis -tra - tion **Reporting Perfor -mance Problems** 63. Reporting Perfor -mance Problems	**Payment** 64. Limitation of Costs 65. Payment 66. Unallowable Costs 67. Assignment of Claims 68. Collecting Contrac -tor Debts 69. Progress Payments 70. Price and Fee Ad - justments **Accounting** 71. Accounting and Cost Estimating Systems 72. Cost Accounting Standards 73. Defective Pricing	**Closeout** 74. Closeout

POST-AWARD ADMINISTRATION PHASE (Con't)

Contract Modi- fication	Termination	Claims	
Modifications/Options 75. Contract Modifica -tions	**Termination** 76. Termination 77. Bonds	**Claims** 78. Claims	

Exhibit I-1. Federal Acquisition Process Chart (continued)

OVERVIEW OF NEGOTIATIONS

Duties	The following duties are covered in this course: • Preparing SOW and Solicitation • Preparing Source Selection Plan • Selecting Contract Type • Conducting Preproposal Conferences • Amending/Cancelling Solicitations • Processing Proposals • Determining Responsiveness • Analyzing Technical Evaluations • Analyzing Audits • Performing Cost Analysis • Establishing Competitive Range • Conducting Factfinding • Conducting Negotiations • Preparing Awards • Debriefing This edition of the Negotiations Text / Reference is current through FAC 90-20.
Length	One weeks (5 days)
Daily Hours	8:00 to 3:55. Earlier on Friday
Who Should Attend	Contract Specialists (GS-5 to GS-9) who have successfully completed: • Introduction to Contracting, • Procurement Planning, and • Sealed Bidding.

USING THE TEXT / REFERENCE IN THE CLASSROOM

Performance-Oriented

This Text/Reference and the related classroom materials are performance-oriented. The Text/Reference provides a step by step guide to performing the duties. In the classroom, you will have opportunities to practice performance of the duties - using the Text/Reference as your guide - through the use of such instructional techniques as interactive viewgraphs and case studies.

Interactive Viewgraphs

An interactive viewgraph is a slide on the overhead projector that requires a response from the class. For example, if the instructor is showing a decision table, the "then" side would be empty and you would help fill out the answers. Or perhaps the slide asks a particular question about a list of conditions shown on the slide. Most viewgraphs are represented in the Text/Reference as an Exhibit.

Case Studies

Case studies are written as scenarios or stories about particular procurement situations. There are several questions that follow the scenarios relating to the case and the particular lesson. Sometimes you have to use information in the Text/Reference to complete a case study.

Reading Assignments

There will be an in-class lesson for most of the chapters in this Text/Reference. You are responsible for assigned readings from the chapter. You will spend minimal time listening to lectures. Our philosophy is that you learn best by doing the tasks under simulated conditions.

Testing

There will be one, closed book written test. It will contain approximately 50 questions and will be administered on the last day of class. The test should take no more than 75 minutes. All test questions were developed to verify the learning acquired from the course learning objectives which appear on the second page of each chapter in the Text/Reference.

USING THE TEXT / REFERENCE AT YOUR JOB SITE

Ease of Use

The Text/Reference was developed to be used at your job site as well as in the classroom. Its step by step approach, FAR references, structured writing, and index are all designed for the easy and quick retrieval of information about the contracting process. Each Text/Reference is "dated" by indicating which FAC of the FAR system it is current through. This lets you know exactly how up to date it is. You may contact the FAI for updates or annotate your own copy as FAR policy changes.

FAR References

Most FAR references are boxed and appear in the left column opposite related text. Where appropriate FAR references also appear under the title of Exhibits.

Icons of file folders are placed in the left column opposite text indicating a need to document the contract file or opposite documents which must be placed in the contract file. The number on the icon corresponds to the suggested file numbering system in the FAR at §4.803(a) which many agencies have adopted. (See Chapter 15.5 for listing.)

B-

This identifier is placed opposite text for which there is a recent GAO decision that elaborates an issue with an actual case study. This is experimental, and we welcome any comments on its use. (E.g, do we need to put a copy of the decision in an appendix to make it useful?; how current do decisions need to be?)

The book has not yet been written that does not contain some typos, incorrect citations, missing information, or technical inaccuracies. If this book is helpful to you, and you would like to help make it better, please send any corrections you recommend to the FAI in care of GSA-VF, 18th and F Sts., NW, Washington, DC, 20405.

The training materials used in this course were developed by the Federal Acquisition Institute using the Macintosh II family of computers, Aldus PageMaker 5.0 for the Text/Reference,Word 5.0 for the Classroom Exercises and Instructor Guide, and Microsoft Powerpoint 3.0 for viewgraphs.

CHAPTER 1

PROCUREMENT PLANNING REVIEW

PLAN NOW OR PROTESTS LATER

As a contract specialist, your primary responsibility up to this point was to assist a senior contract specialist by researching prior contracts as preparation for drafting solicitations. Today, the Contracting Officer has given you a purchase request (PR) that would be your responsibility beginning with presolicitation considerations through award. From an initial glance at the PR you observe that it is a combination supply and service requirement, rather detailed, and estimated to cost $500,000.

Wanting to do a good job, you decide to draw up a list of areas for consideration prior to drafting a solicitation.

What would be the primary areas you would focus your attention on?

INTRODUCTION FOR PROCUREMENT PLANNING REVIEW

Presolicitation Phase

During the presolicitation phase of a contract, critical decisions are made concerning the acquisition strategy to be utilized.

Once the requiring activity has

- determined the need,
- developed the statement of work (SOW), and
- obtained adequate funding,

the requirement package is then forwarded to the contracting office. At this point, it becomes a joint effort of both the requiring and contracting activity:

The **requiring activity** will handle such technical aspects as further describing what is needed, providing additional funding and evaluating technical proposals.

The **contracting officer** will select the method of procurement, and with the assistance of other personnel such as lawyers and accountants will manage the procurement to ensure compliance with applicable laws and regulations.

Areas of Consideration

The Procurement Planning Course of the FAI Curriculum of Procurement Training Courses covers the presolicitation phase. Listed in Exhibit 1-1 are the steps in procurement planning. The list may not be all inclusive as Agency policies and directives may require additional procedures. Following the exhibit, there is a discussion of the **major** steps in procurement planning.

STEPS IN PROCUREMENT PLANNING

Step	Outcome(s)	Impact On Negotiation
1. Review Purchase Requests (PRs).	• Accepts the PR or returns the PR to the requiring activity. • Requests additional information from the requiring activity where necessary to complete the PR.	Procurement cannot proceed until required data and signatures are obtained.
2. Review funds available for the procurement.	• Determines if funds are available to commit the Government on a contractual action.	The procurement process may proceed only if the right type of funds have been obligated, the amount of funding is sufficient to cover the Independent Government cost estimate, and the funds will not expire before the contract can be awarded.
3. Conduct market research.	• Obtains data from acquisition histories and other in-house sources. • As necessary, collects and compiles additional market data.	This step provides the raw data to make and support all subsequent decisions in the procurement planning phase—-including the decision on method of procurement—and in soliciting and evaluating proposals.
4. Review the Statement of Work.	Critiques the proposed specification or purchase description and recommends any necessary changes.	• Must be sufficient to yield the best market response in terms of competition, quality, timeliness, price and the actual minimum functional need. • Poorly crafted specifications can force the Government to amend or cancel the RFP or pay unnecessarily high prices.
5. Identify requests for services.	• Screens out unauthorized requests for personal services. • Screens out unauthorized or improper requests for advisory and assistance services. • For work covered by the Service Contract Act, identifies required skill classifications and prepares requests for wage determinations.	The type of service being procured impacts clause selection for Part II of the RFP.
6. Identify sources.	Selects the required source or develops a source list.	If there is a required source, you will order against that source rather than soliciting proposals from the open market.

Exhibit 1-1

Step	Outcome(s)	Impact on Negotiation
7. Analyze the ability of small business and/or labor surplus sources to meet the need.	• Determines whether to procure from an 8(a) firm. • Determines whether a set aside is required for the procurement. • Identifies the type of set aside (if any).	If the decision is to go 8(a), the procurement becomes a sole source negotiation.* A decision to set aside, in part or in whole, impacts clause selection for Part II of the RFP. It also has ramifications for determining the responsibility of the offeror.
8. Review proposed technical evaluation factors.	• Determines if technical/business management evaluation factors are required. • Critiques proposed technical/business management evaluation factors and recommend changes to the requiring activity.	Only includes, other than lowest price, those technical/management evaluation factors that have an impact on source selection.
9. Prepare source selection plans.	• Determines potential for awarding more than one contract. • Identifies factors for evaluating price and the formula for applying the factors. • Determines the overall evaluation weight of technical/business management evaluation factors (when the selection will not be solely on price and price-related factors).	Maximizes competition and ensures impartial and comprehensive evaluation of proposals.
10. Establish the extent of competition.	• Determines whether full and open competition after the exclusion of sources is permitted. • Determines whether other than full and open competition is permitted.	Full and open competition required unless justification for other than full and open competition is authorized.
11. Select the method of procurement.	Chooses one of the following: • A small purchase procedure. • Sealed bidding. • Two-step sealed bidding. • Negotiations.	If the decision is negotiated procurement, the *Negotiations* text/reference is the one to read.
12. Analyze lease vs. purchase alternatives.	Chooses to solicit one of the following: • Lease. • Purchase. • Both (the Government reserving the right to lease or purchase based on offers received.	This decision also impacts Section M, Part III of the RFP.
13. Plan the procurement.	• Determines whether a plan is necessary. • Updates or prepares a procurement plan.	Such plans typically include milestones for issuing and awarding the contract.

* Under certain circumstances, the procurement can be competed among qualified 8(a) contractors.

1.1 Purchase Request Review

A Purchase Request (PR) is a means of communicating what has to be acquired through contracting. A PR must be reviewed by you, the contract specialist, and any omissions or major deficiencies must be resolved prior to accepting the PR and establishing a contract file. Once the PR is accepted by the contracting office, the Procurement Administrative Lead Time or PALT starts. PALT is used as a performance measurement tool at contracting offices as it establishes the length of time it takes to award a contract on a given requirement.

When any of the elements listed in Exhibit 1-2 are unacceptable in content, or are missing, the PR must be corrected by/or returned to the requiring activity.

ELEMENTS OF A PURCHASE REQUEST

ELEMENTS TO CONSIDER	THEN IDENTIFY:
Approvals & Reviews	All signed approvals are in accordance with Agency policy
Funding	If source and amount of funds are acceptable
Quantity	Basis for Section B of the Uniform Contract Format (UCF) and independent cost estimate
Statement of Work	Adequacy and completeness and/or restrictive features
Packaging/Marking	Any special packaging, packing, or preservation needs
Inspection/Acceptance	Who will accept and where
Delivery/Shipment	When, where and how delivery will be made
Contract Administration	Project officer and any special reporting requirements
Special Provisions/Clauses	Requirements such as options, warranties, etc.
Technical Evaluation	If award will be based on “price” or “best value”
Sources	If single source, that the justification is attached
Procurement Plan	Whether Agency policy requires any plan

Exhibit 1-2

1.2 Market Research and Developing a Source List

The extent of market research and analysis should be commensurate with such factors as urgency, estimated dollar value, complexity, and past experience.

Purpose

Market Research is used ① to promote the Government policy on full and open competition and ② to support business decisions during the entire contracting process.

SOURCES OF DATA COLLECTION

1. Acquisition Histories
2. Catalogs, periodicals, etc.
3. Government buyers, technical experts
4. Suppliers, manufacturers
5. Trade and Professional associations
6. Non-profit and testing organizations

Exhibit 1-3

TYPE OF DATA NEEDED

FAR 11.004

- Availability of commercial products to meet the Government needs.
- Potential cost of modifying commercial products to meet particular needs.
- Number of sales and length of time over which they must occur to provide reasonable assurance that a particular product is reliable.
- Number of firms in market.
- Trends in supply/demand.
- Production and delivery leadtimes.
- Technological/product changes and forecasts.
- Trends in market prices.
- Factors that affect market prices (e.g., cost of money, raw materials prices).
- Current suppliers to the Government
- Other potential buyers.
- Trends in Government demand
- Problems and issues in the award and administration of previous contracts.

Exhibit 1-4

Source Lists

A source list should include all eligible and qualified concerns that are considered capable of filling the requirements of a particular acquisition.

STEP 1

Determine availability from required sources in descending order of precedence as indicated in Exhibit 1-5.

REQUIRED SOURCES

FAR 8.001

- Agency Inventory
- Excess Personal Property
- Federal Prison Industries, Inc.
- Products from the Committee for purchase from the Blind and other Severely Handicapped
- Stock Programs: GSA, DLA, VA, Agency
- Mandatory Federal Supply Schedules
- Mandatory GSA Term Contracts (Services)
- Mandatory Agency indefinite delivery contracts
- Specified sources (i.e., ADP, public utility, etc.)
- Optional Use FSS and GSA Term Contracts

Exhibit 1-5

STEP 2

If required source cannot meet the need, prepare justification for non-use.

STEP 3

Prepare commercial source list based on:

- Solicitation Mailing List Application (SF 129)
- Sources provided with Purchase Request
- Existing mailing lists (centralized and hand lists)
- Prior procurements for similar supplies/services
- Directories and other publications
- SBA source list
- QPL lists
- Trade associations
- Responses to synopses
- Advertisements
- Market surveys

1.3 Statement of Work

FAR Part 10

The statement of work includes the specification or purchase description that is the heart of each acquisition action. It ① delineates the requirements for a product, process, or service and ② establishes criteria by which the Government can determine if the contract requirements have been met.

Responsibility

The **requiring activity** is responsible for

the preparation and content of the SOW.

As the **contract specialist**, you are responsible for

reviewing the SOW as to its sufficiency for use in such acquisition matters as method of procurement, contract type, source selection criteria, competition status, etc.

You will either:

- accept the SOW as written,
- work with the technical personnel to correct deficiencies, or
- reject the SOW if unsatisfactory.

Where necessary, obtain a picture, drawing, diagram or other graphic representation of the requirement.

Exhibit 1-6 lists examples of inadequate SOWs requiring changes in order to yield the best market response (in terms of competition, quality, timeliness, price and the actual minimum functional need).

Additional areas to consider are listed in Exhibit 1-7.

INADEQUATE STATEMENTS OF WORK

- Wrong type of specification (functional, performance, design).
- Wrong type of purchase description (commercial item description, brand name or equal, or formal purchase description).
- Failure to indicate salient physical, functional, or other characteristics of items being sought as "Brand Name or Equal".
- Improper format
- Restrictive or impractical requirements (in terms of the market's capabilities).
- Nonessential or obsolete requirements.
- Ambiguous or vague terms.
- Unclear division of responsibilities between parties.
- Omissions.
- So general that inadequate products/services are not screened out.
- Government made responsible for supporting functions that contractors can provide at lower cost.

Exhibit 1-6

ADDITIONAL AREAS TO CONSIDER

- Packaging, packing, preservation and marking.
- Inspection and acceptance criteria and requirements.
- Delivery/shipment requirements.
- Contract Administration requirements.

Exhibit 1-7

1.4 Request for Services

A service contract directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task (See Exhibit 1-8) rather than to furnish an end item of supply.

EXAMPLES OF SERVICES

FAR 37.101

- Maintenance, overhaul, repair, modification, etc. of supplies, systems, or equipment
- Routine recurring maintenance of real property
- Housekeeping and base services
- Advisory and Assistance services
- Operation of Government-owned equipment, facilities and systems
- Communication services
- Architect-Engineering
- Transportation and related services
- Research and development

Exhibit 1-8

Personal Service Contracts

As a contract specialist, you must make the determination as to whether the requested services are personal or non-personal in nature. A personal services contract means

FAR 37.101

> "a contract that , by its express terms or as administered, makes the contractor personnel appear, in effect, [to be] Government employees."

Agencies shall not award personal services contracts unless specifically authorized by statute to do so.

The factors illustrated in Exhibit 1-9 should be used as a guide in assessing whether or not a proposed contract is personal in nature. Whenever the services require direct or indirect supervision, the courts usually will find that the services are personal.

FACTORS TO ASSESS PERSONAL SERVICES

FAR 37.104(d)

1. Performance on site
2. Principal tools and equipment furnished by the Government
3. Services are applied directly to the integral effort of Agencies or an organizational subpart in furtherance of assigned function or mission.
4. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
5. The need for the type of service provided can reasonably be expected to last beyond 1 year.
6. The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to:

   - Adequately protect the Government's interest;
   - Retain control of the function involved; **or**
   - Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Exhibit 1-9

Service Contract Act Wage Determination

FAR 22.10

The Service Contract Act (SCA) of 1965, as amended, requires that a

SF98 "Notice of Intention to Make a Service Contract and Response to Notice"

be sent to the Department of Labor (DOL) during the planning stages of a procurement for services covered by the SCA.

Wage Determination

The DOL will determine the prevailing wages and fringe benefits applicable to employment in a given locality. These rates must be incorporated in the solicitation and resulting contract for services covered by the SCA.

1.5 Technical Evaluation

FAR 14.201-5(c)
FAR 15.406-5(c)

The technical evaluation factors that apply to a particular acquisition are established by the Requiring Activity. Price or cost to the Government is included as an evaluation factor in every contract action, however, the quality of the product or service may be a more important factor, and the offerors must be so informed. These other factors may consist of:

- Technical excellence
- Management capability
- Personnel qualifications
- Prior experience
- Performance scheduling

1.6 Source Selection Plan

A detailed source selection plan should be developed to spell out how evaluators will actually evaluate and score proposals according to the evaluation criteria set forth in the Request for Proposals (RFP).

Evaluators will apply price-related factors (See Exhibit 1-10) and technical factors.

Chapter 3 of this text will offer greater detail on:

- describing standards for technical evaluation factors and improving the reliability and validity of special standards of responsibility, and

- the process of determining the overall weights for technical and business management factors versus price in source selection plans.

PRICE-RELATED FACTORS

- Incremental pricing
- Family buy pricing
- Government furnished property costs
- Options/Multiyear pricing
- Lease vs. Purchase costs
- Economic Price Adjustments
- Transportation costs
- Maintenance, warranty, repairs, training, installation, supplemental supplies
- Expected energy costs
- Estimated quantities
- Life cycle costs
- Buy American factors

Exhibit 1-10

1.7 Competition Requirements

FAR 6.101

Contracting **without** providing for

1. full and open competition, or
2. full and open competition after exclusion of sources

is a violation of the Competition in Contracting Act of 1984, unless permitted by one of the exceptions cited in Exhibit 1-11. For each contract awarded without providing for full and open competition, the contract file must contain a reference to the specific authority under which it was so awarded.

CIRCUMSTANCES PERMITTING OTHER THAN FULL AND OPEN COMPETITION

FAR 6.302

1. Only One Responsible Source
2. Unusual and Compelling Urgency
3. Industrial Mobilization; or Experimental, Developmental, Research Work
4. International Agreement
5. Authorized or Required by Statute
6. National Security
7. Public Interest

Exhibit 1-11

Justifications

A contracting officer may **not** ① commence negotiations for a sole source contract, ② commence negotiations for a contract resulting from an unsolicited proposal, or ③ award any other contract without providing for full and open competition unless the contracting officer:

- Justifies the use of such actions in writing,
- Certifies the accuracy and completeness of the justification, and
- Obtains the approval indicated in Exhibit 1-12.

Technical and requirements personnel are responsible for providing and certifying as accurate and complete the necessary data to support their recommendation for other than full and open competition.

APPROVAL LEVELS

FAR 6.304

UNDER $100,000:	CONTRACTING OFFICER
Exceptions:	a. Contracts citing the authority of International Agreement or Authorized/Required by Statute. b. Public Utilities when such services are available from only one source. c. Contracts for educational services from nonprofit institutions.
OVER $100,000 TO $1 MILLION:	PROCURING ACTIVITY COMPETITION ADVOCATE
OVER $1 MILLION TO $10 MILLION:	HEAD OF PROCURING ACTIVITY OR A DESIGNEE
OVER $10 MILLION:	AGENCY SENIOR PROCUREMENT EXECUTIVE

Exhibit 1-12

Exclusion of Sources

FAR Subpart 6.2

The Competition in Contracting Act does allow for full and open competition after exclusion of one or more sources in order to:

1. Establish or maintain alternate sources.
2. Set-aside contracts for small business and labor surplus areas.
3. Provide for 8(a) competition.

See Appendix A for copy of chapter on Competition from the Procurement Planning text / reference.

1.8 Set-aside Determinations

The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A determination to make a set-aside may be made unilaterally (by the contracting officer) or jointly (by a Small Business Administration (SBA) representative and the contracting officer). The order of precedence for making a set-aside is presented in Exhibit 1-13.

SET-ASIDE ORDER OF PRECEDENCE

FAR 19.504

1. Total Set-Aside Small Business/Labor Surplus
2. Total Set-Aside for Small Business
3. Partial Set-Aside Small Business/Labor Surplus
4. Partial Set-Aside Small Business
5. Total Labor Surplus for Concerns not Small Business

Exhibit 1-13

Steps in Establishing Set-asides

Step 1. Review acquisition history to determine:

- Class set-aside exists
- Repetitive set-aside exists
- Joint set-aside recommended by SBA

Step 2. Review source list to determine number of:

- Small business sources
- Small disadvantaged business sources
- Potential sources in labor surplus areas.

Step 3. Determine capabilities of small businesses to meet the Government's need.

- Production capabilities
- Market prices
- Lead times
- Ability to meet the technical requirement

Step 4. Prepare justification for set-aside decision and obtain required approvals (if any).

- Withdrawal or modification of Class Set-aside
- Withdrawal or modification of Repetitive Set-aside
- Joint Set-Aside
- Unilateral Set-Aside
- Rejection of Set-Aside

Step 5. Determine the appropriate Standard Industrial Classification (SIC) code and applicable size standard. Select and prepare set-aside provisions and clauses for the solicitation and select appropriate "Note" for Commerce Business Daily (CBD) synopsis.

1.9 Method of Procurement

FAR Subpart 6.4

When it has been determined that the requirement cannot be met by utilizing Small Purchase procedures or ordering against an existing contract, you, the contract specialist, must decide which of the two (2) principal methods of procurement to select: **sealed bidding or negotiation**.

CRITERIA FOR SELECTING SEALED BIDDING

1. Anticipate obtaining more than one offer.
2. Sufficient time to synopsize, solicit, submit offers and evaluate sealed bids.
3. Award on price and price-related factors only.
4. Discussions with offerors about their bid is **not** necessary.

Exhibit 1-14

Negotiations

FAR Part 15

If one or more of the conditions in Exhibit 1-14 for selecting sealed bidding are absent, you must explain the absence in a memorandum for file and proceed with the procurement using negotiation procedures.

The major difference between sealed bidding and negotiated procurement is the opportunity in the latter method to conduct written or oral discussions following the initial submission of responses by interested vendors. These discussions are referred to as negotiations. Exhibit 1-15 compares the sealed bidding and negotiation methods of procurement. A major difference for the offerors is that, in negotiations, a great deal more information may have to be supplied with a proposal; whereas in sealed bidding, only a bid schedule is required.

Two-step Sealed Bidding

FAR Subpart 14.5

Two step sealed bidding is a **combination of sealed bidding and negotiation** procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. Step one consists of the request for, submission, evaluation and (if necessary) discussion of a technical proposal. No pricing is involved. Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Award is made to the low responsible and responsive bidder.

COMPARISON OF SEALED BIDDING VS. NEGOTIATION

ACTION	SEALED BIDDING	NEGOTIATION
SOLICITATION	IFB	RFP
RESPONSE	Bid	Proposal
RESPONSE DATE	Bid Opening	Closing Date
WITHDRAWAL	Prior to Opening	Prior to Award
SPECIFICATIONS	Precise/Accurate	Flexible
RESPONSIBILITY	Mandatory	Mandatory
RESPONSIVENESS	Mandatory	Negotiable
PRICE OBJECTIVES	Price Analysis	Price/Cost Analysis
DISCUSSIONS	Not Allowed	Allowable
CONTRACT TYPE	FFP or FP/EPA	Any Type
COMPETITION	Mandatory	Exceptions Permitted
AWARD	Lowest Bid	Greatest Value

Exhibit 1-15

1.10 Procurement Plan

The need for planning by contracting and requiring activity personnel cannot be overemphasized. The key to successful contract award is the basic understanding by all parties of both:

- the nature of the supplies/services to be acquired, and
- the source evaluation/selection and contracting process to be employed.

Procurement plans are prepared by contract specialists and generally include milestones.

Exhibit 1-16 lists key actions to be taken prior to issuing a solicitation. Related data may be obtained from:

- the requiring activity,
- procurement history on needed supplies/services, and
- market research.

Exhibit 1-17 is a milestone chart for negotiated procurements.

Agency policies and procedures may require the addition of action items to these charts. Agency procedures will also indicate when a written plan is required and to what extent higher level approval of the plan must be obtained.

PROCUREMENT PLAN

1. Project Title/Number/Cost Estimate

2. Review of the Statement of Work
   Include a brief description. If applicable, address potential problems, issues and recommendations to be resolved.

3. Review Technical/Business Management Evaluation Factors;
   Describe factors for ranking proposals. Identify whether award will be made on the basis of "lowest price" or "best value".

4. Review Source Selection Plan
   Identify potential for multiple award, price related factors to be evaluated and overall weights on "best value" vs. price.

5. Recommended Sources.
   If appropriate, attach list of sources.

6. Competition
   Address what steps are being taken to increase competition. If sole source, describe justification for restricting competition.

7. Business/Economic Development Program
   Describe consideration given to award as a set-aside.

8. Method of Procurement
   Determine if method is to be Sealed Bidding or Negotiated and the rationale used in selection.

9. Lease vs. Purchase
   Address rationale for determining one or both methods.

10. Type of Contract
    Provide rationale for selection.

11. Government Furnished Property (GFP)/Data
    Identify property/data, its impact on competition and difference in total cost to Government with and without GFP.

12. Special Terms/Conditions
    Identify special clauses and provisions (i.e.: options, warranties, etc.).

13. Contract Administration
    Identify contract performance monitoring required. Attach Contract Administration Plan

Exhibit 1-16

MILESTONE CHART

ACTION	BEGIN DATE	COMPLETION DATE Planned	Actual
1. PR Review			
2. Small Business/ 8(a) Review			
3. Final SOW			
4. Special Approvals			
5. Justifications/Approvals			
6. Determination/Findings			
7. Synopsis Issued			
8. RFP Released			
9. Preproposal Conference			
10. Closing Date			
11. Evaluation of Proposals			
Technical Activity			
Contracting Activity			
12. Audit Request			
13. Price/Cost Analysis			
14. Competitive Range			
15. Subcontract Plan			
16. Negotiations			
17. Best & Final Offers (BAFO)			
18. Evaluation of BAFO			
19. Preaward Survey			
20. EEO Clearance			
21. Responsibility			
22. Final Contract Document			
23. Legal Review			
24. Contract Clearance			
25. Notification of Award			
26. Debriefing			
27. Notice to Proceed			
28. Administration Assigned			
29. Other:			

Exhibit 1-17

PRESOLICITATION CONSIDERATIONS CHECKLIST

___1. Are all elements of the Purchase Request included and acceptable?

- Approvals and Reviews
- Quantity
- Packaging/Marking
- Delivery/Shipment
- Special Provisions/Clauses
- Sources
- Funding
- Description
- Inspection and Acceptance
- Contract Administration
- Technical Evaluation Factors
- Procurement Plan

___2. Has a Procurement Plan of Action and Milestone chart been completed?

___3. Has market research been conducted?

___4. Can required sources meet the need? If not, has a commercial list been completed?

___5. Is there a clear description of the supplies or services to be furnished and have all discrepancies and omissions been corrected?

___6. Has the SIC code and size standard been identified?

___7. If the requirement is for services, is the service personal or non-personal? If personal, does proper statutory authority exist to make the procurement ? If applicable, has a SF98 been prepared and forwarded to DOL?

___8. Have the technical evaluation factors been identified?

___9. Has a source selection plan been developed?

___10. Is the requirement competitive? If not, has justification been provided for other than full and open competition?

___11. Has a set-aside determination been made?

___12. Has the method of procurement been determined? If Sealed Bidding was **not** selected, has a memorandum for file been prepared?

___13. Other Agency procedures completed?

READY! SET! GOOD START!!!

At the beginning of this chapter, we discussed drawing up a list of areas to consider prior to drafting a solicitation. In the introduction to this chapter, the major areas to consider were listed in Exhibit 1-1. In turn, each area was discussed in a brief review of the Procurement Planning Course. The sample Procurement Plan of Action provided in Exhibit 1-16 covers the minimum areas that must be addressed in a procurement plan. Agency guidelines and procedures must be reviewed to ensure the plan is complete. Finally, the checklist provides questions that need to be answered to ensure you've addressed all of the presolicitation considerations. Based on these pre-solicitation considerations, you have decided that your $500,000 requirement can best be procured utilizing negotiation procedures because:

1. *The PR described technical evaluation factors that are other than just price or price-related factors.*

2. *Discussion concerning technical proposals will be necessary.*

Your first task toward issuing a Request for Proposals is to review the SOW which will be discussed in Chapter 2.

CHAPTER 2

STATEMENT OF WORK

THE "PR" IS NOT ALL THAT CLEAR

While reviewing the PR described in Chapter 1, you discover that the inspection and acceptance criteria are not sufficiently specific of location and methodology and that some of the required tasks are not adequately described. You call the Requiring Activity and talk to the Project Manager to obtain clarification. He states that he has provided all the information that he has available in the PR and would appreciate any help from you to make the SOW adequate.

What would your recommendations be concerning the inspection and acceptance criteria?

If the Project Manager couldn't come up with enough information to describe the required tasks more clearly, where and to whom could you go to test and improve the statement of work?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Critique statements of work (SOW) and related elements of the purchase request.

Individual:

2.1 Research acquisition history and markets for similar/same requirements.

2.2 Describe the elements in a statement of work.

2.3 Critique proposed statement of work identifying inadequacies.

2.4 Determine whether used or reconditioned materials, former Government surplus property, or residual inventory would be acceptable in meeting the need.

2.5 Critique related elements of the purchase request from data obtained from acquisition histories and market research.

2.6 Discuss recommendations with the requiring activity and obtain agreement on final statement of work changes.

2.7 Select techniques for testing and improving the Government's description of the need and determining or sparking the private sector's interest in meeting the need.

2.8 Implement selected techniques for testing and improving the Government's description.

INTRODUCTION FOR SOWs

Policy

FAR 10.002

Agencies in specifying needs in the RFP shall:

- Ensure that requirements are stated in terms of design, function, or performance;
- Develop specifications and purchase descriptions using market research in a manner designed to promote full and open competition, with due regard to the nature of the supplies or services to be acquired; and,
- Not include restrictive provisions or conditions except to the extent necessary to satisfy minimum needs or as authorized by law.

Purpose

The statement of work (SOW) is that part of the Request For Proposals (RFP) or of the resulting contract that:

- Describes the system, item or objective to be developed or produced (i.e., the work to be done);
- Sets forth the methods by which the Government determines that its requirements have been met; and,
- Identifies the technical and management data to be delivered under the contract.

If the work statement does not present exactly what is wanted, or does not state it well, it could generate many contract management problems for both the Contracting Officer and the Requiring Activity.

Impact

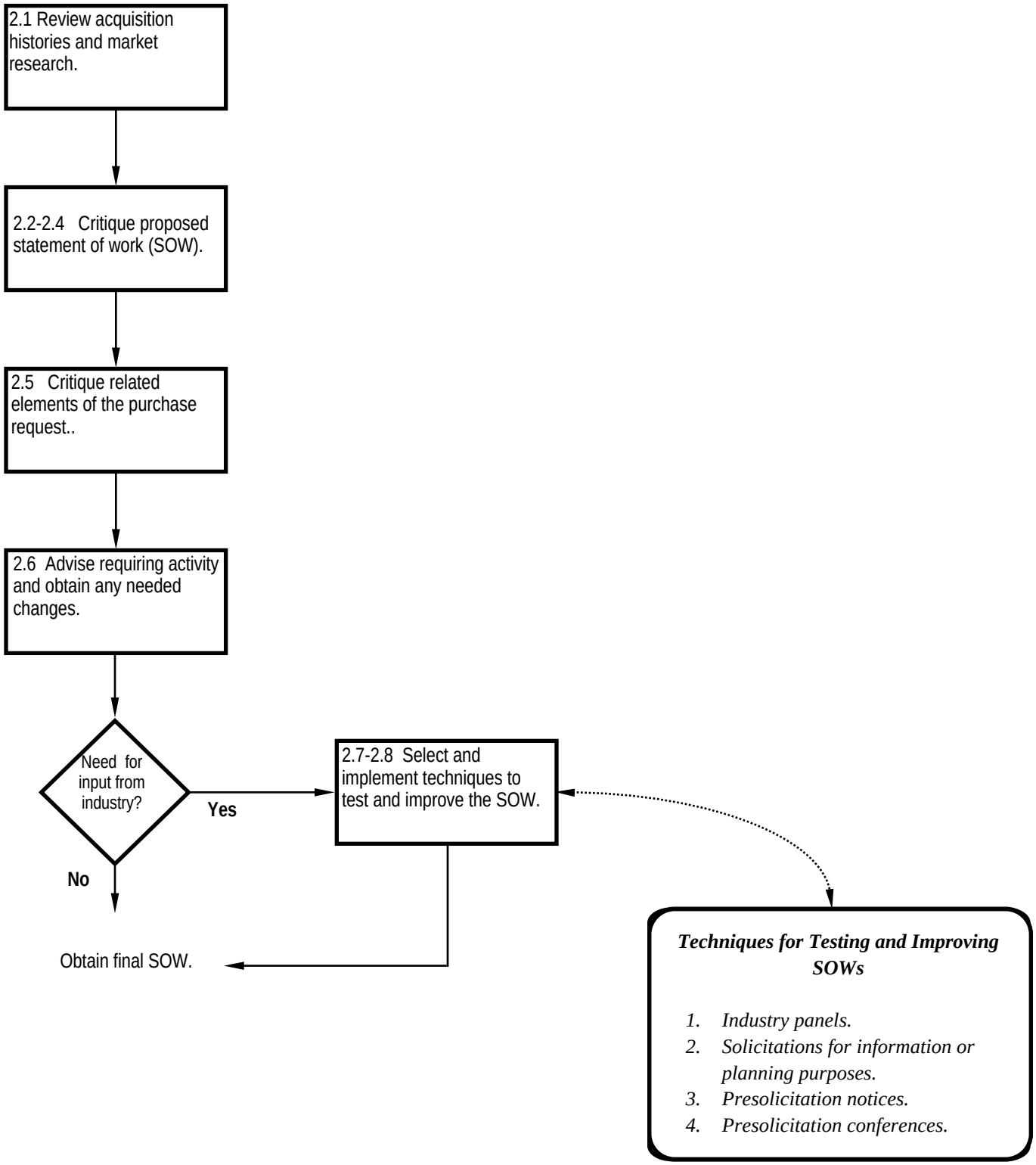
There are many areas that the SOW impacts:

- Extent of competition
- Source selection factors
- Type of contract
- Contractor's effort
- Number and size of "Changes"
- Performance measurement

Steps in Performance

The steps in reviewing the SOW are charted on the next page. Following the flowchart, each step is discussed in turn.

STEPS IN REVIEWING STATEMENTS OF WORK



STEPS IN REVIEWING SOWs

2.1 Research Acquisition History and Markets

Part of your responsibility as a contract specialist is to conduct Market Research (Chapter 1.2) and develop a Procurement Plan (Chapter 1.10). By doing so you compile a valuable source of information which you can use to evaluate a SOW in terms of the market's capabilities. Exhibit 2-1 lists the kinds of market information that will assist you in developing recommendations for improvement in the Government's requirement to yield the best market response.

MARKET DATA

- Available products and services to meet the minimum functional needs.
- Current and potential suppliers.
- Trends in supply/demand.
- Production and/or delivery leadtimes.
- Factors that affect market prices.
- SOW used by Government and industrial buyers.
- Problems, issues, and recommendations from award and administration of previous contracts.
- Feedback from suppliers on previous contracts.
- Private sector practices in acquiring goods/services for similar requirements.

Exhibit 2-1

2.2 Describe the Elements of a SOW

Although it is the Requiring Activity's responsibility to draft the SOW, you, as the contract specialist, must have a clear understanding of what you are buying in order to negotiate costs, terms, and conditions. Formats for work statements vary widely, but they should always describe:

- Scope/Background/Objectives
- Contractor Tasks
- Contract End Items

As illustrated in Exhibit 2-2, you should always ask and have answered the who, what, when, how, and where in the SOW and related aspects of the PR.

WHO IS RESPONSIBLE? WHAT IS REQUIRED?
WHEN IS IT REQUIRED? HOW IS IT TO BE DONE?
WHERE IS IT ACCOMPLISHED OR NEEDED?

ELEMENTS OF A SOW

SCOPE/BACKGROUND/OBJECTIVE:

Scope: Quick overview of what the SOW covers.
Background: If applicable, a brief description of the problem(s) to be solved or the need giving rise to this requirement.
Objectives: What the overall effect this requirement will achieve.

CONTRACTOR TASKS: Defines and explains the work to be performed.

- Main steps the contractor will complete, and the sequence in which the work will be performed.
- Level of effort (if applicable).
- Reference to related studies, documentation and specifications.
- Design/functional/performance characteristics (e.g., common nomenclature, kind of material, electrical data, dimensions, size, capacity, principles of operation, restrictive conditions, intended use).
- Quality assurance requirements.
- Support equipment for contract end items.
- Government/contractor furnished property, facilities, equipment, services required.
- Government/contractor furnished documentation.

CONTRACT END ITEMS: Provides requirements related to the product or service deliverable.

- Inspection and acceptance criteria
- Data Requirements (reports, technical data, etc.)
- Packing, packaging, and marking requirements
- Delivery schedules or period of performance
- Contract administration functions
- Other data pertinent to requirement(s)

Exhibit 2-2

2.3 Critique SOW for Inadequacies

The SOW is often read and interpreted by persons of varied backgrounds, such as lawyers, engineers, cost estimators, production and quality control specialists, inspectors, and contract managers. Therefore, the SOW must be stated such that ① more than one interpretation is impossible and ② the prospective contractor has no doubt as to what must be accomplished.

Now that you have familiarized yourself with the various elements of a SOW, you should screen each area carefully to identify any inadequacies. Examples of inadequacies that can occur in SOW's are illustrated in Exhibit 2-3.

INADEQUATE SOW

- Ambiguous or vague terms.
- Unclear division of responsibilities between parties.
- Restrictive or impractical requirements (in terms of the market's capabilities).
- Omissions.
- Too weak to screen out products or services that do not meet minimum needs.
- Wrong type of specification (functional, performance, design).
- Improper format.
- Nonessential or obsolete requirements.

Exhibit 2-3

Careful distinction must be drawn between level-of-effort SOWs, which essentially require the furnishing of technical effort and a report on the results thereof, and task completion SOWs, which often require development of tangible end items designed to meet specific performance characteristics.

Exhibit 2-4, illustrated on the next two pages, provides you with a sample checklist for determining if a SOW is adequate. Ensure that the responses to the checklist are to your satisfaction before proceeding any further. Your agency guidelines and procedures should also be considered when reviewing a SOW.

CHECKLIST FOR DETERMINING SOW ADEQUACY

	COMMENT
1. Is the requirement clearly described as design or performance and in a language that can be understood by all parties?	
2. If background, other introductory information, or referenced documents are to be included, are they relevant and distinguishable from the contract objective and the contract tasks?	
3. Are the task descriptions, technical evaluation criteria, and proposal instructions adequate for proposal preparation?	
4. Is the SOW sufficiently specific to permit the Government and the contractor to make a list of manpower and resources needed and to estimate costs?	
5. Are specific duties of the contractor stated in such a way that he/she knows what is required?	
6. Is the requirement over-specified? It should specify only the results required and let the contractor find the best method of attainment. Are included special clauses reasonable?	
7. Are any FED/MIL specifications or exhibits applicable? If so, are they properly cited with latest available revision?	
8. Are all the obligations of the Government carefully delineated (i.e., approval actions, documentation, etc.)?	
9. Does the SOW sole source work?	
10. Will the contractor require access to a Government facility or use Government Furnished Property?	
11. Have management requirements (e.g., PERT charts) and schedules for reporting been enumerated, and are they excessive?	
12. Will the Project Manager or Contracting Officer's Representative who monitors performance and signs the acceptance report be able to tell whether the contractor has complied?	

Exhibit 2-4.

SOW ADEQUACY CHECKLIST (con't)

	COMMENT
13. Would progress payments or incremental invoicing and/or payment be applicable?	
14. If Inspection and Acceptance procedures are too lenient or too vague, would First Article testing be appropriate?	
15. Are delivery/performance schedules too restrictive? Would relaxing the schedule permit more offerors or allow small businesses an opportunity to respond?	
16. Is there specific direction as to how the contractor's progress will be monitored (i.e., site inspection, progress reports, etc.)?	

Exhibit 2-4 (Cont.)

Responses to the checklist should be recorded to assist you in preparing your recommendations for additions, deletions, or changes to the requiring activity.

2.4 Used, Reconditioned, Surplus, or Residual Inventory

While you have been critiquing the SOW to determine adequacy, you may have become aware of material that will be needed to perform the requirement.

FAR 10.010

> "Generally, all contractually furnished supplies and their components, including former Government property, will be new, including recycled ... materials. However, agencies may acquire used or reconditioned material, former Government surplus property, or residual inventory conforming to the solicitation's requirements, if the contracting officer determines that it is acceptable. When such a determination is made, the solicitation shall clearly identify the supplies or their components that need not be new along with the necessary details on their acceptability."

Exhibit 2-5 describes the applicable FAR clauses to be utilized.

APPLICABLE CLAUSES - NEW or USED MATERIAL

FAR 52.210-5,-6, -7

- New Material
- Listing of Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property
- Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property

Exhibit 2-5

Contracting officers shall consider the following when determining whether used or reconditioned materials, former Government surplus property, or residual inventory are acceptable:

- Safety of persons or property
- Total cost to the Government (including maintenance, inspection, testing, and useful life).
- Performance requirements.
- Availability and costs of new materials and components.

You must ensure that the prices paid for such items are reasonable. When a contract calls for material to be furnished at cost, the allowable charge for former Government surplus property shall not exceed the cost at which the contractor acquired the property.

2.5 Critique Related Elements of the PR

There are certain related elements in the PR that are tied closely to the SOW. The elements are stated in Exhibit 2-6, which is followed by a more detailed discussion of each element.

PR ELEMENTS

- Packaging, packing, preservation, and marking
- Inspection and acceptance criteria
- Delivery/shipment requirements
- Contract administration requirements

Exhibit 2-6

At the end of section 2.5, a checklist covering each area is provided in Exhibit 2-10.

2.5.1 Packaging, Packing, Preservation, and Marking.

FAR 10.004(e)

Agency regulations specify directions or requirements for packaging, packing, preservation and marking. Agencies must ensure that material or data to be delivered under contract shall be packed and marked to prevent deterioration and damage during shipping, handling and storage.

2.5.2 Inspection and Acceptance Criteria

FAR 46.103

As the contract specialist, you are responsible for obtaining from the requiring activity the specifications for inspection, testing, and other contract quality requirements essential to ensure the integrity of the supplies or services.

Although contracts generally make contractors responsible for performing inspection before tendering supplies to the Government, there are situations in which contracts will provide for specialized inspection (Exhibit 2-7) to be performed solely by the Government prior to delivery to destination.

SPECIALIZED INSPECTIONS

- Use of specialized test equipment or facilities not ordinarily available in suppliers' plants or commercial laboratories (i.e., environmental tests, ballistic testing of ammunition, simulated tests).
- Contracts that require Government testing for first article approval (FAR 9.3).
- Plant or site inspections for time & material/labor hour, research and development, or construction contracts.

Exhibit 2-7

Acceptance Criteria

FAR 46.501

Acceptance:

- constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements,
- takes place before delivery, at the time of delivery, or after delivery, depending on the provisions of the terms and conditions of the contract, and
- is evidenced usually by execution of an acceptance certificate on an inspection or receiving report form or commercial shipping document/packing list.

Place of acceptance

FAR 46.503

Each contract shall specify the place of acceptance. Contracts that provide for Government contract quality assurance at:

1. **Source** shall ordinarily provide for acceptance at source, and
2. **Destination** shall ordinarily provide for acceptance at destination.

Supplies accepted at a place other than destination shall not be reinspected at destination except for examination for quantity, damage in transit, and possible substitution or fraud.

Certificate of Conformance

FAR 46.504

A certificate of conformance may be used in certain instances **instead of source inspection** at the discretion of the contracting officer when:

- Small losses would be incurred in the event of a defect, or
- Because of the contractor's reputation or past performance, it is likely that the supplies or services furnished will be acceptable and any defective work would be replaced, corrected, or repaired without contest, or
- It is in the Government's best interest.

Title to goods

FAR 46.505

Title to supplies shall pass to the Government upon formal acceptance regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

2.5.3 Delivery/Shipment Requirements There are numerous areas to consider when establishing a contract delivery or performance schedule:

DELIVERY CONSIDERATIONS

FAR 12.102

- Urgency of need.
- Production time.
- Market conditions.
- Transportation time.
- Industry practices.
- Capabilities of small business concerns.
- Administrative time for obtaining and evaluating offers and for awarding contracts.
- Time for contractors to comply with any conditions precedent to contract performance.
- Time for the Government to perform its obligations under the contract (e.g., furnishing Government property).

Exhibit 2-8

Delivery or performance schedules may be expressed in various terms:

DELIVERY TERMS

FAR 12.103

- Specific calendar dates.
- Specific periods from the date of the contract.
- Specific periods from the date of receipt by the contractor of the notice of award or acceptance by the Government.
- Specific time for delivery after receipt by the contractor of each individual order issued under the contract, as in indefinite delivery type contracts and GSA schedules.
- Multiple completion dates. (In any given contract, separate completion dates may be established for separable items of work.)

Exhibit 2-9

Shipping

FAR 47.301

Transportation and traffic management factors are important in awarding and administering contracts to ensure that

- acquisitions are made on the basis most advantageous to the Government, and
- supplies arrive in good condition and on time at the required place.

As a contract specialist, it's your responsibility to ensure that the requiring activity considers all transportation factors and provides information and instructions reflecting transportation factors applicable to the particular acquisition. **Consult your transportation officer for assistance.**

The major areas of consideration in shipping are determining ① the responsibility and basis for payment of freight charges and ② the point at which title for goods passes to the Government.

2.5.4 Contract Administration Requirements

FAR 42.202

Contract administration may be performed by the contracting officer who awarded the contract or by an administrative contracting officer (ACO). As an alternative, administration may be assigned to an external agency such as the Defense Contract Management Command.

The contracting officer may delegate to one or more representatives responsibility to perform specified functions such as:

- quality assurance,
- production,
- price analysis,
- finance, or
- various engineering and technical specialities.

These representatives may not enter into or modify a contract or otherwise perform functions reserved for a contracting officer. **Designations of ACOs and contracting officers representatives must be in writing and communicated to the contractor.**

FAR 42.302

There are 67 normal functions designated in the FAR for the ACO to perform plus 10 additional functions when specifically authorized by the contracting officer. Referral should be made to these duties when designating contract administration functions.

STEPS IN CHECKING SOW TO RELATED PR ELEMENTS		
	YES	NO
1. PACKAGING, PACKING, PRESERVATION, AND MARKING		
Do your agency procedures and guidelines apply to the requirements of packaging, packing, preservation, and marking in this purchase request.		
Does the SOW refer to special considerations (i.e. classified documentation, hazardous materials, oversized material, etc.)?		
Has the requiring activity provided adequate specifications for packaging, packing, preservation, and marking?		
2. INSPECTION/ACCEPTANCE		
Are standard inspection clauses applicable?		
Would first article testing be applicable?		
Would inspections at various phases of performance be preferable?		
Has place of inspection been designated?		
Has a primary person or activity been designated as being responsible for inspection?		
Has criteria been established as to what constitutes acceptance?		
Has point and place of acceptance been identified?		
Would Certificate of Conformance be acceptable?		
Has a primary person been designated as being responsible for acceptance?		

Exhibit 2-10

STEPS IN CHECKING SOW (con't.)		
	YES	NO
3. DELIVERY/SHIPMENT		
Is the delivery performance schedule reasonable in terms of the contractor's ability to comply?		
Is the schedule so restrictive that it would possibly limit offers, increase costs, or eliminate small business capabilities?		
Are multiple delivery times acceptable?		
Is there more than one place of delivery and have they been adequately identified?		
Have the point of delivery and shipping address been designated with a complete and correct address?		
Has a method of shipment been designated?		
4. CONTRACT ADMINISTRATION		
Has a contract administration office been identified and are its responsibilities compatible with the SOW?		
Does the requirement call for a Contracting Officer's Representative (COR) and has a person been so identified?		
Have the responsibilities of the COR been delineated?		
Have the invoicing procedures been included and has the paying office been designated?		

Exhibit 2-10 (cont.)

2.6 Discuss Recommendations with Requiring Activity

You have now critiqued the SOW and reviewed the checklists in Exhibits 2-4 and 2-10.

It is now your responsibility to **communicate with the requiring activity** on:

- The adequacy of the SOW to communicate minimum needs.
- Product capability.
- Product failures and deficiencies from past history records.
- Suggestions for correcting the SOW.

There are **several approaches** to use when discussing the SOW with the requiring activity:

- Ask leading questions (how?, who?, what?, where?, when?)
- Play devil's advocate (would all the offerors approach this proposal the same way? or, would an offeror claim the requirement is over restrictive?)
- Provide "straw man" alternatives (what if?, why can't this be done?, etc.)

PROBLEMS RESOLVED???

You have completed the review of the SOW for inadequacies and communicated your concerns and recommendations to the Requiring Activity. It was agreed that site inspections would be the appropriate approach and acceptance would be on multiple performance completion dates that could be identified as separable items of work. The problem of making the tasks clearer was still unresolved. The Project Manager asked if potential offerors could be contacted prior to the issuance of the Request For Proposal (RFP) to assist in improving the description.

What is the proper procedure for soliciting information from the private sector?

2.7 Select Technique to Improve Description of Need

When the requirement is for a new or complex product or service, it is often in the Government's best interest to consult with major businesses to improve the description of need(s), or to test and determine the private sector's interest in meeting the need. Exhibit 2-11 lists the available techniques, and under what circumstances they should be used.

DECISION TABLE
Selecting Techniques for Testing and Improving Government Description of Need(s).

SELECT	*IF:*
Industry Panel	• The need can be identified but the most beneficial approach is unknown. • Input from experts in industry would eliminate non-essential or obsolete requirements. • It will test the market's capabilities to perform the requirement.
Solicitation for Information or Planning Purposes	• There is a need for written responses. • A more economical or less formal means of obtaining information cannot be obtained from potential sources. • There is a possibility that there could be several approaches to obtaining the final product.
Presolicitation Notices	• There is a need to develop or identify sources. • Additional information is needed to test market's capabilities. • There will be a presolicitation conference followed by a formal solicitation.
Presolicitation Conference	• Additional insights from the contractors could produce an improved SOW that would result in a more incisive solicitation document. • Information as to the nature and size of the procurement may generate more competition. • Submission of proposals would be time consuming and costly, advance planning by the contractors may be necessary. • There is a need to identify interested sources to solicit.

Exhibit 2-11

Depending on the complexity of the requirement and information already available, you should recommend to the requiring activity the technique(s) that would best enhance the market's capability or interest in meeting the needs.

2.8 Implement Techniques

As the contract specialist, you are jointly responsible with the requiring activity for selecting, initiating, and controlling the procedures on any selected method of testing and improving the Government's description of needs.

Industry Panels

Close coordination with the requiring activity is required when convening panels to obtain adequate and complete specifications/SOW. Exhibit 2-12 describes the steps in utilizing industry panels to improve the Government's description of need(s).

Solicitations for Information or Planning Purposes

FAR 15.402(d)

When the Government issues a Request for Proposals (RFP) to prospective offerors, the response received is an offer that can be accepted to create a binding contract. An RFP shall not be used as a solicitation for information and/or planning purposes.

FAR 15.405

If it is necessary to obtain written information to test or improve the description of needs or for planning purposes, a written solicitation for information or planning purposes may be issued **IF**:

- The contracting officer determines in writing that this procedure is justified; and
- It is approved at a level higher than the contracting officer.

When preparing a solicitation to be issued for information and/or planning purposes, you must insert on the face of the document the provision entitled:

FAR 52.215-3

Solicitation for Information or Planning Purposes.

This clause, in effect, puts the contractor on notice that the Government does not intend to award a contract on the basis of this solicitation or otherwise pay for the information solicited.

Written solicitations for information and/or planning purposes often become costly and time consuming to both the contractor and the Government; therefore, a more economical and less formal means of obtaining information is usually preferred.

STEPS IN UTILIZING INDUSTRY PANELS

1. PUBLICIZE PANEL MEETING SCHEDULE:

   To obtain broad coverage, this should be synopsized in the Commerce Business Daily (CBD). If authorized by Agency regulations, other media formats may be utilized (i.e., newspapers, trade journals, etc).

2. SELECT MEMBERS:

   Based on response from publicizing the meeting, recommendations from the Requiring Activity and data obtained from market research, select a representative sample of suppliers and acknowledged leaders in industry.

3. BRIEF REQUIRING ACTIVITY ON THEIR ROLES:

   They should be able to address such areas as known problems with the requirement, previous approaches and/or failures if applicable and respond to questions of a technical nature.

4. ESTABLISH GOALS OF THE PANEL:

   Identify the objective of the meeting and what information should be forthcoming to accomplish the objective.

5. LEAD DISCUSSIONS:

   This does not necessarily mean that as a contract specialist you get into technical discussions with the panel or other participants, but to act as a panel moderator if necessary, to ensure all needed areas are covered.

6. DISSEMINATION OF INFORMATION:

   Make all information provided to the panel, along with complete transcripts of the panel sessions, available to other interested parties, along with all comments and recommendations from the panel.

Exhibit 2-12

Presolicitation Notices

Whenever a requirement is complex and the available description of need and/or the sources sought are limited, the best recourse for you to consider is issuing a presolicitation notice, the purposes of which are described in Exhibit 2-13:

PURPOSES OF A PRESOLICITATION NOTICE

FAR 15.404

- Develop or identify interested sources;
- Request preliminary information based on a general description of the supplies or services involved;
- Explain complicated specifications and requirements to interested sources;
- Aid prospective contractors in later submitting proposals without undue expenditure of effort, time, and money.

Exhibit 2-13

Presolicitation notices shall be synopsized in the CBD.

- Define as explicitly as possible the information to be furnished in the response;
- Indicate whether it is contemplated that the presolicitation notice will be followed by a conference and a formal solicitation;
- Request an expression of interest in the contemplated acquisition by a specified date.

In complex acquisitions, the presolicitation notice may also request information pertaining to management, engineering, and production capabilities. Detailed drawings, specifications, or plans will not normally be included with a presolicitation notice.

Responses to a presolicitation notice may eliminate the need for further communications prior to release of the official RFP, by providing a basis for modifying the SOW.

Presolicitation Conferences

The presolicitation notice may have announced that a presolicitation conference will be held for your requirement. **Do not use the conference to prequalify offerors**. Presolicitation conferences provide:

- Background information as to what has been accomplished to date in the development of the system or equipment, its present state of technology, feasibility, and producibility;
- Information as to the nature and size of the procurement (this may generate wider competition from both prime and subcontractors);
- Additional insights for the Government into contractor thinking with the result that a more incisive SOW can be written.
- Companies, interested in submitting an offer, have the opportunity to do the advance planning necessary for submitting a meaningful proposal.

When considering the use of presolicitation conferences, the procedures described in Exhibit 2-14 should provide assistance in developing an adequate SOW and/or providing a list of sources interested in receiving the RFP.

PRESOLICITATION CONFERENCE PROCEDURES

Obtain approval at a level above the contracting officer.

Synopsize and mail presolicitation notices to prospective industry participants.

Identify and brief legal, technical and other participants on their roles.

Open conference and brief participants on the proposed requirement.

Answer questions.

Obtain verbal feedback on SOW.

Document all questions and responses.

Identify interest in submitting offers.

Exhibit 2-14

The responses from the presolicitation notice and the presolicitation conference, and the questions you have raised in reviewing the inadequacies of the SOW must be submitted to the requiring activity. Any modifications or changes to the SOW have to be obtained in writing from the requiring activity prior to issuing an RFP.

THE FINAL SOW

At the beginning of this chapter, we discussed the problems you discovered in the Inspection and Acceptance criteria and the areas of contractor tasks. Having resolved the Inspection and Acceptance problem to the Requiring Activity's satisfaction, you are now ready to advise the Project Manager on the best approach to obtain an adequate SOW. You both have agreed that private industry has performed a similar type requirement in the past for other agencies. Based on the fact that background information and insights into the contractor thinking could improve the SOW, it was agreed that a presolicitation notice requesting information on engineering and management capabilities in performance would eliminate the vagueness and restrictive features.

To meet the deadlines established in your individual Procurement Plan, you immediately drafted a presolicitation notice to be synopsized in the Commerce Business Daily. You are now ready to review the technical evaluation factors and prepare a source selection plan which will be discussed in Chapter 3.

Summary:

DECISION TABLE ON CRITIQUING STATEMENTS OF WORK	
When performance is:	Then:
Researching acquisition history	Collect data to develop recommendations to improve SOW (Exhibit 2-1).
Review of elements of SOW	Ensure all elements that are applicable are provided (Exhibit 2-2).
Critiquing for inadequacies	Identify areas that could be construed as having more than one interpretation or as being inadequate (Exhibit 2-3 and 2-4).
Determining use of used, reconditioned, reconditioned, surplus or residual inventory	Consider safety of persons/property, total cost to Government, performance requirements and availability/cost of new materials. Apply applicable clause (Exhibit 2-5).
Critiquing related elements of the PR	Review each area for applicability and adequacy (Exhibit 2-10).
Selecting technique to improve description of need(s)	Recommend to the requiring activity the technique that would best enhance the market's capabilities or interest (Exhibit 2-11.
Selecting industry panel technique	Publicize panel meeting schedule, select members, brief members on their roles, establish goals, lead discussions, disseminate acquired information (Exhibit 2-12).
Selecting solicitation for information or planning purposes	If justified, obtain approval at level above contracting officer. Insert Clause 52.215-3 on face of the solicitation.
Selecting presolicitation notices	Determine the purpose (Exhibit 2-13) and synopsize in accordance with FAR 5.204. When preparing formal solicitation, ensure all who responded affirmatively receives a RFP.
Selecting presolicitation conference	**Do not** use the conference to prequalify offerors. Obtain approval at a level above the contracting officer and synopsize. Proceed with conference in accordance with Agency procedures or as described in Exhibit 2-14.

CHAPTER 3

TECHNICAL EVALUATION
&
SOURCE SELECTION PLAN

WHO'S THE BEST ONE FOR THE JOB?

After receipt of responses to the presolicitation notice discussed in Chapter 2, the requiring activity provided you with a final statement of work that is acceptable. You began to match the requirements of the SOW to the technical evaluation factors that had previously been submitted.

You discover that the requiring activity did not identify what factors, if any, were being considered in the area of business management and the relative importance of those factors. In addition, sufficient information for a formal source selection plan had not been submitted with the requirement.

What information would you recommend be provided by the requiring activity for the business management evaluation factors?

What information is necessary to prepare a formal source selection plan?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Advise and assist requiring activity in formulating technical evaluation criteria. Prepare a source selection plan.

Individual:

TECHNICAL EVALUATION

3.1.1 Research factors used for comparable procurements.

3.1.2 Critique factors for determining acceptability.

3.1.3 Determine whether award will be based on “lowest price” or “greatest value”.

3.1.4 Critique factors for ranking proposals.

3.1.5 Obtain agreement on the factors

3.1.6 Incorporate factors in the solicitation.

SOURCE SELECTION PLAN

3.2.1 Determine overall weight for technical and business management factors versus price.

3.2.2 Prepare source selection plan for a formal source selection.

INTRODUCTION FOR TECHNICAL EVALUATION

Definition of Evaluation Factors

FAR 15.605(b)

Price, quality (i.e., technical excellence and business management), and other RFP criteria against which proposals are analyzed and ranked. Business management factors include prior experience, personnel qualifications, management capability, past performance, and schedule compliance.

Policy on Use of Evaluation Factors

FAR 15.605(c)

While lowest evaluated price is properly the deciding factor in many source selections, the Government may select the source whose proposal offers the greatest value in terms of quality and other factors.

Quality (i.e., technical excellence and business management) and other evaluation factors shall be described in a manner that informs all concerned parties, the method by which:

- proposals will be evaluated and
- source(s) will be selected; and that
- award may be made on other than low price.

Definition of Technical Proposal

FAR 14.501(b)

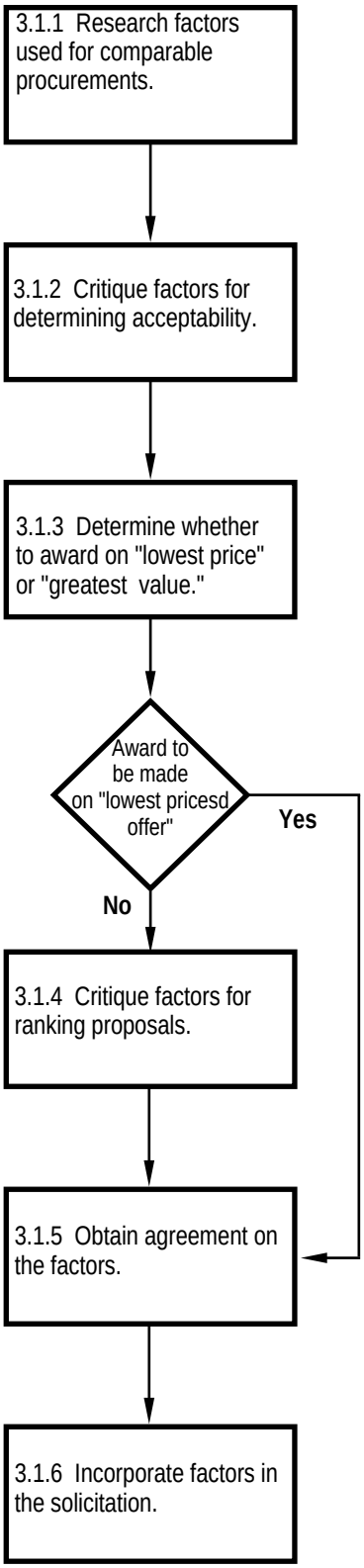
The part of an offer that includes requirements such as the engineering approach, special manufacturing processes, special testing techniques, etc. It is often separate from the cost or price proposal especially when a two step procurement is contemplated.

Steps in Performance

The steps in determining technical evaluation factors are charted on the next page. Following the flowchart, each step is discussed in Subchapter 3.1.

The source selection procedures flowchart and discussion will be addressed in Subchapter 3.2.

STEPS IN DETERMINING TECHNICAL EVALUATION FACTORS



STEPS IN DETERMINING TECHNICAL EVALUATION FACTORS

3.1 TECHNICAL EVALUATION FACTORS

3.1.1 Research Technical Evaluation Factors

Once again, market research will play an important part in supporting your decisions concerning evaluation factors. Begin your research by identifying the types of factors that are typically used in comparable procurements.

FAR 35.007(e)

As an example, for R&D procurements, the following **typical factors** should be used in determining ① technical competence:

- Offeror's understanding of the scope of work
- Approach proposed to accomplish the technical objectives
- Availability and competence of experienced technical personnel
- Offeror's experience
- Pertinent novel technical ideas
- Availability of research, test, lab, or shop facilities;

FAR 35.007(f)

and ② management capability:

- Past performance
- Subcontracting practices
- Cost management techniques.

Many of these factors are often used for other types of procurements as well.

You may wish to present a list of typical evaluation factors to the requiring activity as an aid in composing the factors that will apply to the specific procurement. For each type of factor, you may also wish to have on hand one or two good examples of well written factors that meet the following **standards**:

1. Reliability - Using the factors independently from one another, technically competent individuals would evaluate the same proposal consistently.

2. Validity - The factors are in fact predictive of ability to perform the work of the contract, in terms of satisfying the Government's minimum functional need.

It may also be possible to identify factors that more specifically match the work to be procured. Using the research techniques described in Chapter 1.2, obtain such factors from:

- Past or present contracts for comparable requirements,
- Professional associations,
- Private sector buyers, and/or
- Government buyers and other technical experts.

Past Experience with Evaluation Factors

In addition to identifying potential evaluation factors, you should also evaluate how well specific evaluation factors have worked in like procurements, as indicated in Exhibit 3-1.

AREAS TO RESEARCH

- How have the factors fared in protests and court tests?
- Was competition limited due to complexity of the evaluation factors?
- Has the "state-of-the-art" advanced so as to make previously used factors obsolete?
- Were there numerous amendments to a previous, similar requirement to clarify or redefine evaluation criteria?
- Was the past contract for comparable requirements successfully completed as a result of the use of good evaluation factors?
- Do professional associations require special standards (i.e., education, experience, licensing, etc.) to be able to perform the function?
- Were alternate factors suggested by offerors approaches to the technical proposal offered in the past procurement? Were these alternatives acceptable and could they be incorporated in the current requirement?

Exhibit 3-1

FAR 4.801(c)(3)(i)

Be sure to place any new market information you may obtain in your market research file for future use or reference.

3.1.2 Critique Factors for Determining Acceptability

In addition to general standards of responsibility that all prospective contractors must possess, the requiring activity may determine that there are special standards of responsibility and related techni-

cal/business management factors that must be met to ensure satisfactory contract performance.

FAR 9.104-2

> "When it is necessary for a particular acquisition or class of acquisitions, the contracting officer shall develop, with assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertize or specialized facilities are needed for adequate contract performance."

Special Standards

B-237860

Special standards criteria, should be **used only when**

special experience,
facilities, or
other factors

are essential to the program performance aspects of the procurement. The criteria must be ① clearly stated and ② restricted to elements which are essential to successful completion of the contract work. Stated another way, they are "go/no go" criteria which depict the minimum qualifications for a particular procurement.

Examples are provided in Exhibit 3-2.

ADEQUATE SPECIAL STANDARDS

1. Solicitation Objective: Modify and upgrade an existing Level I nuclear power submarine propulsion plant to a Level II plant.

Qualifications: Offeror must currently be licensed by the Atomic Energy Commission (AEC) to build, operate and maintain a Level II nuclear power plant.

2. Solicitation Objective: Provide feasibility study on aerodynamic stability of the XRO plane.

Qualifications: Possess (or provide evidence of commitment to possess) a facility and equipment to provide wind tunnel experiments up to 1,600 mph velocity on a 50 foot wide by 100 foot length span of 20 gauge steel material. This requirement must be available for the duration of the contract.

Exhibit 3-2

Often requiring activities describe minimum special standards inaccurately. Examples are listed in Exhibit 3-3.

UNSATISFACTORY SPECIAL STANDARDS

1. Offeror must have experience operating warehouse services at major government facility of comparable scope to this effort.

Problem: How much experience is required? Would 5 years versus 3 years provide a better contractor? If an offeror operated a smaller facility of comparable scope, would he/she be disqualified without further evaluation?

2. Offeror shall have a minimum of 15 years corporate experience in the field of required technical services.

Problem: If an offeror only had 13 years corporate experience, should he/she be disqualified without further evaluation? Perhaps he/she has more highly qualified technical personnel to perform technical services than an offeror with 15 years corporate experience.

Exhibit 3-3

The situations described in Exhibit 3-3 show that experience should be evaluated as to degrees of experience using specific, measurable statements.

Other Evaluation Factors

It is the use of evaluation factors that is the primary method of determining which proposal represents the best value to the Government.

There are no restrictions on the kinds of evaluation factors which may be used, as long as they are disclosed in the RFP and relate to the objectives of the procurement. The specific factors used will depend on the particular requirement, however, they will generally fall into **two major categories**:

1. Quality
   - technical
   - business/management
2. Price or Cost

B-236601

FAR 15.605(b)

> "The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials. However, price or cost to the Government shall be included as an evaluation factor in every source selection."

Quality Factors

B-244997

Quality also shall be addressed in every source selection. In many procurements - especially when procuring commercial supplies on a firm fixed price basis - "quality" is a matter of assuring ① that offers are responsive to the specification and ② that offerors meet the General and any Special Standards of Responsibility. In other cases, RFPs further define quality in terms of such factors as:

B-237555

- technical excellence
- management capability
- personnel qualifications
- prior experience
- past performance
- schedule compliance
- cost realism (may also be included)

These evaluation factors are applied in

determining the acceptability of the offeror's technical and business management proposal, and

rating offers against measurable standards (See Section 3.1.4).

Exhibit 3-4 gives examples for each factor of the kind of information that is solicited from offerors and evaluated by the contract specialist. This information is evaluated to identify the significant aspects of each proposal rather than identifying the relatively unimportant differences to be expected when multiple proposals are received.

INFORMATION TO BE EVALUATED

FACTOR	INFORMATION REQUIRED
Technical	• Offerors understanding of the problem • Innovative solutions • Current state-of-the-art techniques • Tests proposed (if applicable) • Key personnel and experience
Business Management	• Management/financial capability • Management control system (quality, cost, schedule) • Past performance on similar projects • Organizational structure and how it relates to the requirement • Possession of necessary facilities
Cost	• Certified cost and pricing data (if required) • Accounting system and how it applies to the requirement

Exhibit 3-4

To ensure fairness to all prospective offerors, you must be able to determine that the special standards of responsibility and evaluation factors are reliable and valid. Problem areas that you may encounter while making your critique are described in Exhibit 3-5.

PROBLEM AREAS

Special Standards of Responsibility and Evaluation Factors that:

- Are vague or ambiguous.
- Fail to clearly differentiate acceptable from unacceptable proposals.
- Are not consistent with statement of work and proposal submission instructions (e.g., obtaining capability in excess of the Government's minimum need).
- Have no self-evident relationship to the statement of work and would unduly restrict competition.
- Appear to be arbitrary and capricious and have not been substantiated in supporting documents and rationale.

Exhibit 3-5

3.1.3 Determine Basis of Award

There are two basic approaches to evaluating proposals that are appropriate for use in conjunction with selecting a source:

FAR 15.605

1. Lowest price, or
2. Greatest value.

Lowest Price

In this approach to source selection:

① technical evaluation factors are applied only on a "go/no-go" basis to identify technically acceptable proposals.
② unacceptable proposals are removed from consideration, and
③ price and price-related factors alone are applied to rank the proposals and select the proposal in line for award.

The lowest priced acceptable proposal approach is **similar to Two Step Sealed Bidding**. However, when the negotiated method of procurement is used, discussions or negotiations may be conducted not only regarding technical proposals, but also as to price.

Greatest Value

In this approach to source selection:

① technical evaluation factors are applied in rating proposals,
② unacceptable proposals are removed from consideration,
③ best and final offers (BAFO's) are ranked on both technical evaluation and price-related factors specified in the RFP, and
√ award is made to the offeror whose proposal represents the greatest value to the Government as defined by all factors.

As a consequence, the proposal in line for award will not necessarily be the proposal with the lowest evaluated price or the lowest estimated total cost. If the award goes to a proposal with a higher price, source selection officials must document the value analysis that justifies the expenditure of additional funds.

When selecting on greatest value, some technical factors may be applied only in determining the competitive range (i.e., on a go/no-go basis). Others may be applied only in ranking proposals within the competitive range. Still other factors may serve both purposes.

The "greatest value" approach provides the source selection authority with the **greatest amount of flexibility** to select the offeror whose performance is expected to best meet the stated Government

requirements. This approach should be used where the technical expertise of the contractor is of particular importance.

Evaluation and award of a contract made on the basis of "greatest value" is appropriate when:

- Applicable laws/regulations require agencies to rate proposals for the specified supplies or services on technical/business management factors, **or**

- The Government cannot describe the minimum needs in terms that will allow selection on price or price related factors alone

Examples of the latter include:

- The Government cannot warrant that the specification or statement of work as written will work.

- Selecting firms with higher technical capabilities will increase the probability of satisfying the Government's minimum need.

- There is no clear-cut method of determining whether marginal offerors are capable of performance.

Research and Development contracts are directed toward objectives for which the work or methods cannot be precisely described in advance. As a consequence, requiring activities cannot draw a clear-cut line between acceptable and unacceptable proposals - all that can be said for certain is that some proposals have a greater probability of success than others.

FAR 35.008(a)

> "Generally an R&D contract should be awarded to that organization ... that proposes the best ideas or concepts and has the highest competence in the specific field of science or technology involved. However, an award should not be made to obtain capabilities that exceed those needed for successful performance of the work."

3.1.4 Critique Factors for Ranking Proposals

The evaluation of proposals is done at the factor or subfactor level. These factors and subfactors are used by comparing proposals against measurable objective standards for each level, not by comparing proposals against each other. Be cautioned that the

inclusion of a large number of factors and subfactors to which all bidders must comply could create a leveling of the final technical rating so that the spread between the best and worst proposal would be deceptively small.

Factors, Subfactors, Standards

Factors: Primary factors should be relevant, measurable and essential. The number of factors should be kept to a minimum; only the most important factors should be included.

Subfactors: Subfactors are used to describe the primary factors and to assist offerors in reaching an understanding of exactly what information the Government is seeking. Again, the number of subfactors should be kept to a minimum.

Standards: Standards serve as positive indicators of the minimum performance or compliance acceptable to enable a contractor to meet the requirements of the solicitation. Standards shall be prepared for factors or subfactors and may be expressed either in quantitative or qualitative terms: examples in Exhibit 3-6.

FACTORS, SUBFACTORS, AND STANDARDS

QUANTITATIVE TERMS

Factor: Business/Management **Subfactor**: Past Experience

Standard: The offeror has performed work similar to that described in the solicitation under at least three contracts of comparable size within the last five years. A contract is comparable in size if it is within 15 percent of the estimated cost of the contract to be awarded as a result of this solicitation.

QUALITATIVE TERMS

Factor: Technical Approach **Subfactor:** Understanding of the problem

Standard: Understands the requirements by expressing the concept of the entire operation clearly showing a grasp of the range and complexity of the work including but not limited to:

- Nature of equipment to be serviced and maintained
- Services to be rendered
- Need for automated scheduling/tracking/reporting

Exhibit 3-6

Once the factors, subfactors and standards have been identified, ensure that they are sufficient and complete in meeting the government's need as expressed in the statement of work or specifications.

Ranking and Weighting Factors

FAR 15.605(e)

Offerors must be informed in the solicitation of all evaluation factors and their relative importance. Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. Normal practice is to set forth such **evaluation factors in Section "M" of solicitations**, with a "proposal requirements" provision in Section "L".

Ranking

The solicitation must provide some narrative indication of the relative importance of the evaluation factors. Examples of statements that are appropriate in describing the relative importance of evaluation factors are shown in Exhibit 3-7. Agency guidelines or the requiring activity's preference in describing this area of relative importance should also be considered.

Scoring

There are three principle methods of scoring evaluations that the requiring activity may select for their particular requirement:

1. Numerical: Points are assigned to factors and can be further broken down to the subfactor level. The more important the factor, the higher the number of points.

2. Adjectival: Descriptions such as Excellent, Good, Average or Above Normal, Normal, and Below Normal are used. Variations of these adjectival words can be used. Each adjective must also contain the standard that must be met to achieve that weight.

3. Color Coding: Four levels of ratings are used which are defined prior to evaluating, i.e.,

blue: exceeds specified performance or capability
green: meets standards, good probability of success
yellow: weak, low probability of success but correctable
red: not minimally acceptable

Whatever rating or scoring system is used, it is important to ensure that the descriptions permit significant differences to prevent leveling of evaluations.

EXAMPLES OF STATEMENTS OF RELATIVE IMPORTANCE

GREATEST VALUE CONCEPT

1. The Government will make award to the responsible offeror(s) whose offer conforms to the solicitation and is the most advantageous to the Government, considering the cost or price and technical factors listed below. For this solicitation, technical quality is equally important as cost or price. When technical proposals are evaluated as essentially equal, cost or price may be the deciding factor. When cost or price proposals are evaluated as essentially equal, technical quality may be the deciding factor. The technical evaluation factors listed below are of equal importance:

(List technical evaluation factors)

GREATEST VALUE CONCEPT

2. The Government will make award to the responsible offeror(s) whose offer conforms to the solicitation and is the most advantageous to the Government, considering the cost or price and technical factors listed below. Proposals will be evaluated based on the following technical evaluation factors which are listed in descending order of importance:

(List technical evaluation factors)

Price is less important than the combined weight of the technical factors listed above.

LOWEST-PRICED ACCEPTABLE PROPOSAL

3. The Government will make award to the responsible offeror(s) submitting the lowest-priced technically acceptable proposal. The Government will first review unpriced technical proposals to determine which are acceptable to the Government or could, after discussions, be made acceptable to the Government. Price proposals for offerors that have submitted technically acceptable proposals will then be evaluated. In order to be considered technically acceptable, proposals must meet the following minimum requirements:

(List minimum requirements)

Exhibit 3-7

Responsibilities

Requiring activity: Provide the rationale for factors, subfactors, standards, and scoring.

Contract specialist: Coordinate with the requiring activity to ensure that the evaluation factors clearly relate to the specifications or statement of work, being neither more nor less restrictive than necessary to determine an offeror's proposal as being acceptable or unacceptable.

3.1.5 Obtain Agreement on Factors

To prepare a proper and complete solicitation, you must be able to advise the requiring activity of all changes necessary to improve the reliability and validity of the evaluation factors. Discussions with the requiring activity should address:

- A summary outline of strengths and weaknesses
- Questions that need clarifying
- An analysis of each factor

Problem areas that you should be aware of, recognize, and document for possible changes are described in Exhibit 3-8.

PROBLEMS IN FACTORS, SUBFACTORS, STANDARDS, OR RATING AND WEIGHTING METHODS

- Vague or ambiguous descriptors.

- Inconsistencies with the statement of work and proposal submission instructions (e.g., obtaining capability in excess of the Government's minimum need).

- Absence of any relationship to the statement of work.

- Appearance of arbitrariness or capriciousness (e.g., absence of supporting documentation and rationale).

- Missing elements (e.g, factors that are missing standards or measures of relative importance).

- Logical fallacies (e.g., weights for subfactors that exceed the total points allotted for the factor).

Exhibit 3-8

3.1.6 Incorporate Factors into Solicitation

When agreement has been reached with the requiring activity, incorporate the special standards of responsibility (if any) and the evaluation factors into the solicitation. Disclose the rank order (i.e., relative importance) with the evaluation factors in Section "M".

SUMMARY DECISION TABLE ON EVALUATION FACTORS

When Performance is:	Then:
Researching factors used for comparable procurements,	Collect data from Market Research. Document areas considered (Exhibit 3-1).
Critiquing factors for determining acceptability,	Determine if special standards of responsibility (qualifications) and evaluation factors are valid and reliable.
Determining whether to award on "lowest price" or "greatest value",	Select "lowest price" award basis when all evaluation factors except price can be evaluated on a "go/no go" basis. Select "greatest value" award basis when the objective is to select the proposal that offers the most for the money, not necessarily to select the lowest price.
Critiquing factors for rating proposals,	Ensure factors, subfactors and standards are relevant, essential and measurable (Exhibit 3-6). Ensure the statements of relative importance are compatible with the factors, subfactors and standards (Exhibit 3-7). Coordinate with the requiring activity to ensure that the evaluation factors and their weightings clearly relate to the statement of work or specifications.
Obtaining agreement on the factors,	Discuss with requiring activity and resolve problems that may have arisen from critiquing the factors, subfactors, standards, or ranking and weighting methods.
Incorporating factors in the solicitation,	Incorporate special standards of responsibility. Disclose relative importance of evaluation factors.

DISCERNING THE BEST FROM THE AVERAGE

The project manager from the requiring activity has provided written confirmation on your recommendations for business management evaluation factors. He concurred that the management control system and past performance on similar projects were the most relevant factors to be considered.

The Source Selection Authority and the Source Selection Evaluation Board have been designated in accordance with agency policy.

Now, what all goes into the Source Selection Plan?

INTRODUCTION FOR SOURCE SELECTION PLAN

Purpose of Source Selection:

FAR 15.603

Source selection procedures are designed to:

- maximize competition
- minimize the complexity of the solicitation and the evaluation
- ensure impartial and complete evaluation of all proposals
- facilitate selection of the source whose proposal has the highest degree of realism and whose performance is expected to best meet stated Government requirements.

Responsibilities:

FAR 15.604

Agency head:	Establishing guidelines and procedures for source selection.
Cognizant technical official:	Technical requirements related to the source selection process.
Contracting officer:	Contractual actions related to the source selection process.

Why Establish Guidelines?

Agency guidelines and procedures are established to:

- fulfill public responsibilities to be impartial and fair,
- promote competition by establishing and observing “rules of the game", and
- avoid protests and delays in performance/delivery.

Source selection, as the basis for determining the method of award, can be divided into <u>three general categories</u>:

(1) more than one award
(2) award based on price-related factors
(3) award based on "greatest value"

Subchapter 3.2 will review the Evaluation Factors discussed in Subchapter 3.1 as they relate to the preparation of a formal source selection plan for making an award based on "greatest value".

Steps in Performance:

The steps in source selection planning are charted on the next page. Following the chart, each step in the "greatest value" approach is discussed in detail.

STEPS IN SOURCE SELECTION PLANNING

A. MORE THAN ONE AWARD

1 Identify the number of awards that might be made.

2 Identify and select related provisions.

Options

1. Single award of all line items.
2. Separate single award for each line item or group of items.
3. Progressive awards.
4. Multiple awards.
5. Partial set-asides.

B. AWARD BASED ON PRICE-RELATED FACTORS

1 Identify applicable price-related factors (if any).

2 Develop formula for evaluating prices.

3 Select and complete method of award provisions.

Factors That Might Be Applied

1. Incremental pricing (see Part A for multiple awards).
2. Family buy pricing (see Part A for multiple awards).
4. Government furnished property costs.
5. Options and/or multiyear pricing.
6. Lease vs. Purchase costs.
7. Economic Price Adjustments.
8. Transportation costs.
9. Expected costs for maintenance, warranty, repairs, training, installation, manuals, spares, and supplemental supplies.
10. Expected energy costs.
11. Estimated quantities.
12. Life cycle cost (i.e., expected life, salvage value; discounted total cost of ownership).

C. AWARD ON "GREATEST VALUE"

3.2.1 Determine overall weight for technical & business management factors vs. price.

3.2.2 Prepare source selection plan for a formal source selection.

STEPS IN SOURCE SELECTION PLANNING

3.2. SOURCE SELECTION PLAN

3.2.1 Determine Overall Weights

Agencies and contract activities develop guidelines and procedures for applying different approaches to the weighting of evaluation factors as they apply to their specific needs.

Assigning numerical weights to the technical and business management evaluation factors or the supporting subfactors is the responsibility of the requiring activity.

Numerical weights are assigned based on the statements of relative importance. The weight given price vs. technical/business management factors is a function of

- the technical and business management risk, and
- unknowns (in terms of meeting the requirement).

Selecting a firm with stronger technical capabilities is a way of mitigating risk of marginal performance. The higher the risk and unknowns, the higher the technical weight, and vice versa. (This consideration is also a factor in selecting a contract type.)

As the contract specialist, it is your responsibility to ensure that the documentation required to support source selection evaluation ranking and weighting factors is adequate.

Examples of ways to assign and apply weight to evaluation factors and subfactors follow on the next two pages. Usually, a technical to cost ratio is established first, as provided for in Exhibit 3-9. The application of these weights is demonstrated on page 3-23.

3.2.2 Prepare Source Selection Plan

The composition of the source selection team varies among the different agencies and with the size of the procurement.

At a minimum, the team will consist of the contracting officer and the cognizant technical person of the requiring activity.

FAR 15.612

> "The source selection process is considered formal when a specific evaluation group structure is established to evaluate proposals and select the source for contract award. ... The source selection organization typically consists of an evaluation board, advisory council, and designated source selection authority at a management level above that of the contracting officer."

EXAMPLES OF WEIGHT ASSIGNMENT

Technical/Cost Ratios = 90/10 to 80/20

Normally **R&D** efforts. Involves much cost/schedule performance uncertainty. Usually unique, first time nonrecurring efforts. Cost is only used to distinguish amongst technical proposals of virtually identical worth.

Technical/Cost Ratios = 80/20 to 70/30

SOWs are characterized by greater application of **existing technology/concepts** and yield a more highly defined product than pure R&D. Still some potential for alternate approaches.

Technical/Cost Ratios = 70/30 to 60/40

Usually "white collar or **professional services**". Little need for alternate technical or management approaches. Involves individual discretion/judgement rather than application of purely mechanical skills.

FURTHER BREAKDOWN COULD BE DESCRIBED AS:

Key personnel	30%
Experience/past performance	20%
Operation/organization plan	20%
	70%
Cost factors	30%

$$\frac{\text{Evaluated Score}}{\text{Highest Offered Score}} \times \text{Weight} = \text{Total Technical Score}$$

+

$$\frac{\text{Lowest Price}}{\text{Offered Price}} \times \text{Weight} = \frac{\text{Total Cost Score}}{\text{Total Score}}$$

Exhibit 3-9

ABSTRACT OF TOTAL EVALUATION USING 70/30 TECHNICAL/COST RATIO

CONTRACTOR: A

Ranking	Points Allowed	Evaluated Score	x	Weight	= Total Score
Key personnel	70	60	x	30	1800
Experience/ past performance	15	12	x	20	240
Operation/organ- ization plans	15	10	x	20	200
TOTAL					2240

Proposed Cost - $1,260,000

CONTRACTOR: B

Ranking	Points Allowed	Evaluated Score	x	Weight	= Total Score
Key personnel	70	66	x	30	1980
Experience/ past performance	15	12	x	20	240
Operation/organ- ization plans	15	10	x	20	200
TOTAL					2420

Proposed Cost - $1,550,000

Contractor A:

$\frac{2240}{2420}$ X 70 = 65.1 Tech Score

$\frac{\$1,260,000}{\$1,260,000}$ X 30 = 30 Cost Score

TOTAL SCORE 95.1

Contractor B:

$\frac{2420}{2420}$ X 70 = 70 Tech Score

$\frac{\$1,260,000}{\$1,550,000}$ X 30 = 24 Cost Score

TOTAL SCORE 94.0

Contractor A: 95.1 Award
Contractor B: 94.0

Responsibilities:

① The official to be responsible for the source selection shall be formally designated as the **Source Selection Authority (SSA)**.
② The source selection authority formally establishes an **evaluation group** structure (e.g., Board) appropriate to the requirement.
③ Before conducting any presolicitation conferences or issuing the solicitation, the source selection authority should approve a source selection plan.

Evaluation of Proposals Outside the Government

There may be special circumstances when evaluation of proposals may be performed outside the Government. This would occur when subject matter expertise is not available within the Government.

FAR 15.413-2(f)

Agency implementing regulations must provide for the following:

- Agency Head approves outside evaluation.
- Evaluators agree in writing that proposal information will not be further disclosed.
- Restrictive legends are applied, as appropriate, to any written material prepared by the evaluators.
- Evaluators return all written materials to the Government.
- All possible conflicts of interest are avoided.
- Procurement Integrity Certifications are obtained.

Source Selection Plan

The formal source selection plan serves several useful **purposes**:

- Translates the objectives stated in the procurement plan into a specific approach for soliciting and evaluating proposals.

- Communicates this approach as the recommendation of the contracting officer and the source selection evaluation group to the SSA.

- Serves as a charter for the source selection evaluation board.

- Provides essential guidance to writers of the RFP regarding what should be emphasized in the solicitation.

- Describes the evaluation factors to be used, weighting of factors, and the methodology to be used by evaluators in evaluating the proposals.

As a minimum, the Source Selection Plan shall include the data described in Exhibit 3-10.

SOURCE SELECTION PLAN

FAR 15.612(c)

1. Description of property or service to be acquired.
2. Description of organization structure including:
   - Duties of the SSA and the Board
   - Nominations for staffing of the Board by individual name and field of expertise
3. Proposed presolicitation activities, e.g., conferences.
4. Summary of the acquisition strategy:
   - Type of contract
   - Incentives or other special features to be included in the contract
5. Statement of the proposed evaluation factors and their relative importance (Exhibit 3-7).
6. Description of evaluation process, methodology, techniques, and standards to be used (i.e., scoring plans.)
7. Schedule of significant milestone events such as:
   - Approval of Source Selection Plan by SSA
   - Release of RFP
   - Proposals due & evaluation starts
   - Evaluation complete
   - SSA briefed on evaluation
   - SSA decision
   - Contract review
   - Execution/award

Exhibit 3-10

READY TO SOLICIT OFFERS?

Your formal source selection plan is prepared and the Source Selection Authority has signed off on it. You will make sure that every member of the Source Selection Evaluation Board has a copy. Now you have to take this and all the other information you have gathered up to this point and prepare a solicitation to request proposals. The next chapters will describe some of the decisions you have to make in order to prepare the RFP.

CHAPTER 4

CONTRACT TYPES

WHO'S RESPONSIBLE FOR RECOMMENDING THIS?

While preparing a solicitation for technical services, you noted that the requiring activity requested a cost-plus-fixed-fee contract based solely on the fact that the prior three year contract was the same.

Is this a satisfactory reason?

What facts or reasoning dictate the type of contract to be used on a given requirement?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Select and, where required, justify type of contract.

Individual:

4.1 Determine if data from market research supports use of firm-fixed-price contract.

4.2 Perform risk analysis.

4.3 Estimate the impact of the potential high risk cost factors on the overall total cost of performance and profit margins.

4.4 Select one of the basic types of contracts or agreements.

4.5 For fixed-price contracts, select a method of ordering.

4.6 For fixed-price contracts, select a pricing arrangement.

4.7 For cost-reimbursement contracts, select a fee arrangement.

4.8 Document rationale for the selected type of contract and draft any necessary determination and findings.

INTRODUCTION FOR CONTRACT TYPES

Policy

For negotiated procurements, the contracting officer is given broad discretion in selecting the type of contract, but is

FAR 16.102

prohibited from using cost-plus-percentage-of-cost contracts.

This prohibition also applies to subcontractors when the prime contract is other than firm-fixed-price.

Negotiated contracts may be of any type or combination of types that will promote the Government's interest. However, there is no magic formula or template yet devised that can automatically match a contract type to any contracting circumstances and still consistently promote the best interests of the Government.

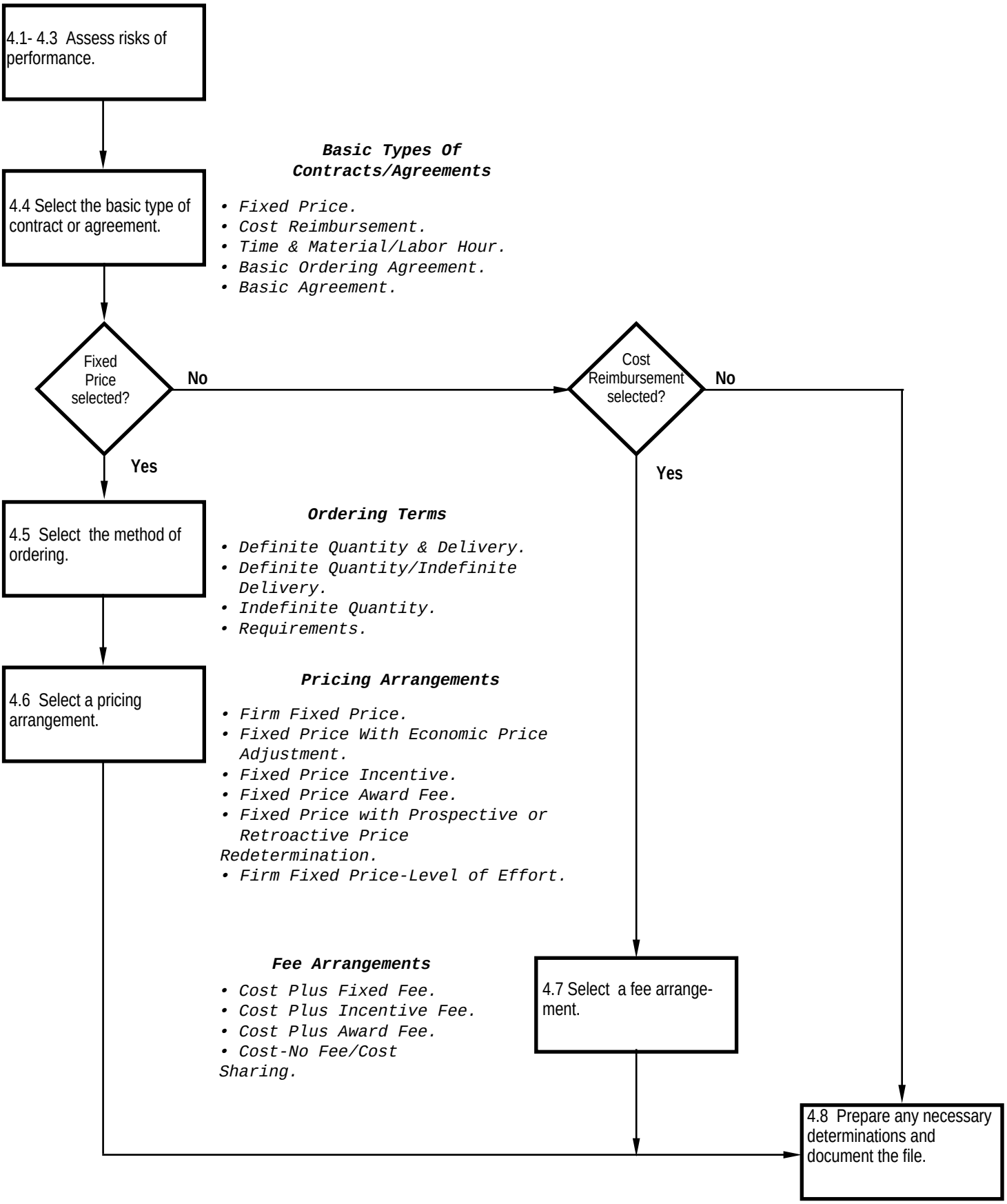
Sound mature judgement by the most qualified procurement personnel, considering the importance and magnitude of the contemplated contract, is essential.

The selection of contract type is generally a **matter for negotiation**. Type of contract and pricing are interrelated and should be considered together in negotiation. Because the type of contract affects the resulting price to the Government, use of an appropriate type is of primary importance in obtaining fair and reasonable prices.

Steps in Performance

The steps in selecting the contract type are charted on the next page. Following the flow chart, each step is discussed in turn.

STEPS IN SELECTING THE CONTRACT TYPE



STEPS IN SELECTING THE CONTRACT TYPE

4.1 Analyze Market Research

The data collected from your market research has been a valuable source of help up to this point. Now you need to determine if this data supports the use of a fixed-price (FP) contract.

Normally a fixed-price contract is used when the following apply:

- Using commercial specification or specification which firms are experienced in meeting.
- Adequate price competition resulting in fair and reasonable prices.
- Stable market conditions over life of the contract.
- Past success with FP in achieving desired results (quality, price, competition, delivery and acceptance).
- FP represents standard industry practice for the goods or services to be procured.

4.2 Perform Risk Analysis

You should also analyze the cost risks associated with your procurement. Exhibit 4-1 lists factors to consider in selecting and negotiating the contract type. You analyze these factors to determine which are low risk and which are high risk for the Government and the contractor. **Risk analysis** can be thought of as

> the degree of confidence with which a contractor's cost estimator should be able to predict the impact of each factor.

Some factors are controlled by the Government and some by the contractor and others by the market.

Exhibit 4-1.

4.3 Estimate Risk Impact on Cost

Having identified those factors which are potentially high risk cost factors, you need to estimate the impact they will have on the overall total cost of performance and profit margins. If the aggregate impact is relatively insignificant, establish a firm fixed price contract. Selection of other contract types will depend on:

- which factors are uncertain,
- the impact of such uncertainty on the overall cost, and
- the cost of contract administration.

Selection of the best contract type will ① provide for a reasonable allocation of risk between both parties, and ② ensure that the contractor has the maximum incentive to reduce costs and also to comply with the terms of the contract.

Exhibit 4-2 on Contract Types provides some guidelines and examples for each major contract type.

4.4 Basic Types of Contracts or Agreements

The phrase - Type of Contract - lends itself to several connotations; for example,

- compensation arrangement (firm-fixed-price, cost-plus-fixed-fee, time and materials, etc.)
- form and structure (letter, delivery order, etc.)
- end purpose (supply, service, etc.)
- method of ordering (indefinite quantity, requirements, etc.)
- any combination

Contract types are grouped into two broad categories:

1. FIXED-PRICE
2. COST-REIMBURSEMENT

FAR 16.101(b)

"The specific contract types range from firm-fixed-price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to cost plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between are the various incentive type contracts in which the contractor's responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance."

Exhibit 4-2

Exhibit 4-2

4.4.1 Fixed-Price

A fixed-priced contract can be either firm-fixed price (FFP) or fixed-price subject to certain contingencies that are specified in certain clauses in the contract.

Select a fixed-price contract when cost estimators are able to forecast the total cost of performance for the period of performance with a fair degree of accuracy and confidence.

Fixed-price contracts are generally the most preferred as they share a common element: the contractor guarantees performance of the contracted work as a condition for being paid by the Government.

4.4.2 Cost Reimbursement

Select a cost-reimbursement contract when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy for any type of fixed price contract (e.g., the type and/or number of resources necessary to meet the Government's requirements cannot be predicted with any reasonable degree of confidence). Cost-reimbursement contracts are typically for

research,
preliminary exploration or study, or
development and testing.

The Government assumes the risk for all allowable and allocable costs incurred (up to a pre-established "limitation of costs" clause). In the cost-reimbursement arena, the contractor is liable only for delivering its "best efforts", not successful performance.

4.4.3 Time-and-Material or Labor-Hour

FAR 16.601

Select a time-and-material or labor-hour contract when the type and/or number of resources necessary per job cannot be predicted with any reasonable degree of confidence. Generally use such contracts for markets in which price competition typically occurs on the basis of per hour rates (e.g., repair services). Use labor-hour contracts when materials are not supplied by the contractor.

The Government assumes all risks except for fluctuations in hourly rates that include wages, overhead, general and administrative expenses, and profit. Constant government surveillance is necessary. There is a "ceiling price", but it functions more like the "limitation of costs" provision of a cost-reimbursement contract.

4.4.4 Basic Ordering Agreement

FAR 16.703

A basic ordering agreement (BOA) is <u>not</u> a contract. It is a written instrument of understanding, negotiated between an agency or contracting activity and a contractor that contains:

(1) terms and clauses applying to future contracts (orders) between the parties during its term,

(2) a description, as specific as practicable, of supplies or services to be provided, **and**

(3) methods for pricing, issuing and delivering future orders

Select a BOA when the number and/or type of resources necessary for each order cannot be predicted with confidence prior to the placement of the BOA. Also, quantities to be procured per each designated location and/or delivery schedules are likely to be unstable or unknown over the life of the agreement and are significant to overall price.

A contracting officer representing any Government agency listed in a basic ordering agreement may issue orders for required supplies or services covered by that agreement. Before issuing an order under a BOA, the contracting officer must:

- Obtain competition in accordance with FAR Part 6.
- If the order is being placed after competition, ensure that use of the BOA is not prejudicial to other offerors.
- Sign or obtain any applicable justifications and approvals, any determination and findings, and comply with other requirements, as if the order were a contract awarded independently of a BOA.

4.4.5 Basic Agreement

As with a BOA, a Basic Agreement (BA) is not a contract.

Select a BA when a substantial number of separate contracts (fixed price or cost-reimbursement) may be awarded to a contractor over the given period and significant recurring negotiation problems are likely.

FAR 16.702

BA's should contain clauses required for negotiated contracts by:

- statute, Executive Order, the FAR, and
- other clauses prescribed in agency acquisition regulations that the parties agree to include in each contract as applicable.

They should also provide for discontinuing their future applicability upon 30 days written notice by either party.

BAs may be changed only by modifying the agreement itself and not by a contract incorporating the agreement. Discontinuing or modifying a BA does not effect any prior contract incorporating the BA. A basic agreement may not:

- Cite appropriations or obligate funds
- State or imply any agreement by the Government to place future contracts or orders with the contractor
- Be used in any manner to restrict competition

4.5 For FP Contracts, Select a Method of Ordering

The definite-quantity, definite-delivery ordering method is probably the most commonly used. However, the indefinite-delivery ordering methods permit:

- maintenance of stock at minimum levels,
- direct shipment to users, and
- flexibility,

while limiting the Government's obligation.

4.5.1 Definite-Quantity/Definite-Delivery

Select a definite-quantity/definite-delivery contract when quantities to be procured and delivery schedules are known or likely to be stable over the life of the contract.

4.5.2 Definite-Quantity/Indefinite-Delivery

FAR 16.502

Select a definite-quantity/indefinite-delivery contract when:

- definite quantity will be required during the contract period, and
- supplies or services are regularly available or can be made available on upon short notice, and
- deliveries can be scheduled at designated locations upon order.

4.5.3 Indefinite-Quantity/Indefinite-Delivery

FAR 16.504

Select an indefinite-quantity contract when:

- Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and
- it is inadvisable for the Government to commit itself for more than a minimum quantity.

An indefinite-quantity contract should be used for products or services when a recurring need is anticipated. Funds for other than the stated minimum quantity are obligated by each delivery order, not by the contract itself.

4.5.4 Requirements Contract

FAR 16.503

Select a requirements contract when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period. Provides for filling all actual requirements of designated Government activities for specified supplies or services during a specified period, with deliveries to be scheduled by placing orders with the contractor. Funds are obligated by each delivery order, not by the contract itself.

4.6 For FP Contracts, Select a Pricing Arrangement

Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. However, the final price to the Government is either fixed at the outset or subject to the same contingencies no matter to whom award is made.

The types are characterized by variations in assumption of cost responsibility for performance by the Government and the contractor, and the amount and type of profit incentive offered the contractor to achieve or exceed specified standards or goals.

4.6.1 Firm-Fixed-Price

FAR 16.202

Select a firm-fixed-price contract when acquiring commercial products or commercial-type products or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications.

Establish a firm-fixed pricing arrangement when you can establish fair and reasonable prices at the outset, such as when:

(a) there is adequate price competition

(b) there are price comparisons of the same or similar requirements made on a competitive basis or supported by cost or pricing data;

(c) available cost or pricing information permits realistic estimates of the probable costs of performance; **or**

(d) performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.

Firm fixed-price is the preferred contract type as it provides a price which is not subject to any adjustment due to the cost experience of the contractor in performing the contract.

4.6.2 Fixed-Price with Economic Price Adjustment

FAR 16.203

Select a fixed-price contract with economic price adjustment (FP/EPA) when:

- there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period for contract performance; **and**
- contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract.

An FP/EPA contract provides for an upward or downward price adjustment upon the occurrence of specified contingencies, normally beyond the contractor's control. The following chart shows the three general types and identifies the appropriate FAR clauses to use with each:

Established Prices	FAR 52.216-2 Standard Supplies FAR 52.216-3 Semi-Standard Supplies
Actual Costs of Labor or Material	FAR 52.216-4
Cost Indexes of Labor or Material	Agency Developed

Price adjustments based on established prices should generally be restricted to industry-wide contingencies.

They must also provide that:

- A base be established from which the price adjustment will be made.
- The contingencies that will trigger the price adjustment must be stated in the contract.

The aggregate increases of any unit price should not exceed 10% of the original unit price. There is no percentage limitation on the amount of decreases that may be made.

Use of an FP/EPA contract reduces the contractor's risk because he or she is afforded protection against industry-wide increases in some costs. By the same token, however the contractor foregoes the possibility of making a "windfall" profit due to falling costs or the benefits of having established a firm-fixed-price contract in a falling market.

4.6.3 Fixed-Price-Award-Fee

In fixed-price-award-fee contracts, an additional amount of fee (i.e., percentage of price) may be added to the price, based on judgmental measures of productivity. Such contracts are especially suitable for services.

Select fixed-price-award-fee when performance indicators (i.e., inspection/acceptance criteria) are inherently judgmental (e.g., what is clean?). Only select fixed-price-award-fee contracts when relating fee to performance would have significant impact on the contractor's performance, relative to the cost of administering the award provision.

4.6.4 Fixed-Price Incentive

Incentive contracts are designed to obtain specific objectives by:

- establishing reasonable and attainable targets (cost plus profit)
- including an incentive arrangement that will motivate a contractor to control cost and discourage inefficiency and waste.

Most incentive contracts include only cost **incentives** which take the form of a profit or fee adjustment formula. When circumstances warrant, technical, performance, or delivery incentives may be used in addition to cost.

They should never be used where:

- Cost or pricing data, adequate for setting firm targets, are not available at the time of initial contract negotiations or at a point early in contract performance.
- The sole or principal purpose is to shift substantially all cost responsibility to the Government.

There are **two types of fixed-price incentive contracts** :

1. FIRM TARGET
2. SUCCESSIVE TARGET

Firm Target:

FAR 16.403-1

Provides for adjustment of profit and establishment of the final contract price by a formula based on the relationship which the final negotiated total costs bear to the total target costs.

The parties negotiate at the outset:

1. Target Cost (TC) + Target Profit (TP) = Target Price
2. Price ceiling
3. Share formula for establishing final profit and price.

B-236622.2

Final cost (FC) is negotiated after performance of the contract and the final contract price is then established in accordance with the formula.

Where the final cost is less than target cost, application of the formula results in a final profit greater than the target profit;

Where the final cost is more than target cost, application of the formula results in a final profit less than the target profit, or even a net loss.

Because of the inverse relationship between cost and profit, the formula provides the contractor with a calculable profit incentive to control costs,

Exhibit 4-4 illustrates an example of the mechanics of determining final profit and price.

FIXED-PRICE INCENTIVE FIRM TARGET EXAMPLE

	Negotiated	Contract completion
TC	$1,000,000	
TP	100,000	Actual cost $900,000
PC	1,300,000	Saved 100,000 from TC
Share Formula	70/30	

Contractors Share		Government's Share
30% of $100,000 = $30,000		70% of $100,000 = $70,000 Saved
Plus TP	$100,000	
Total profit	$130,000	

Total Contract Cost	$900,000
Total Contract Profit	130,000
Total Contract Price	l,030,000

Exhibit 4-4

Successive Target:

FAR 16.403-2

Provides for adjustment of profit upon reaching a certain production point. Successive targets are used, and there is a ceiling and floor for the firm target profit.

This type of contract is used infrequently. It is designed for:

- first or second production quantity of a newly developed item
- long leadtime requirements for a follow-on quantity of a new system before design or production stability has been achieved
- cost or pricing data are inadequate to permit negotiation of fixed prices or realistic firm targets.

Parties negotiate at the outset:

1. Initial Target Cost (ITC)
2. Initial Target Profit (ITP)
3. Price Share Formula - with ceiling & floor on firm target profit
4. Ceiling Price
5. Production Point - prior to delivery of first item

The final contract price is established by a formula based on the relationship which final negotiated costs bear to total target cost after an identified production point is reached. Parties then negotiate a firm-fixed price or fixed-price incentive firm target contract.

Exhibit 4-5 illustrates an example of the mechanics of determining final profit and price.

FIXED PRICE INCENTIVE SUCCESSIVE TARGET EXAMPLE

Initial Target Cost	$15,000,000
Initial Target Profit	1,200,000
Initial Target Price	16,200,000
Price Share Formula	95/5
Ceiling of Firm Target Profit	1,350,000
Floor of Firm Target Profit	1,050,000
Ceiling Price	19,500,000

Production Point - date prior to delivery of 1st item

When production point was reached, final negotiated cost was $14,500,000.

FFP Negotiated		FPIF Negotiated	
ITC	$15,000,000	Target cost	$14,500,000
Actual cost	14,500,000	Target Profit	1,225,000
Savings	500,000	Target Price	15,725,000
Contractor's Share	5%= 25,000	Ceiling Price	16,700,000
		Share Formula	60/40

Initial Target Profit	1,200,000
Contractor's Share	25,000
Firm Profit	1,225,000
Cost	14,500,000
Total Contract Cost	$15,725,000

Final Settlement at Contract completion would be calculated in the manner described for FPI Firm Target.

Exhibit 4-5

4.6.5 Fixed-Price Redetermination

Redeterminable contracts provide a means of shifting certain indefinite risks from the contractor to the Government to exclude contingency allowances from the initially negotiated price. Redetermination is usually applied to acquisitions in which:

- Adequate estimates of material and labor quantities are not initially available
- Existing specifications are not accurate enough to set a firm-fixed-price for the life of the contract
- Sound initial estimates of the total cost of performance cannot be made.

There are **two types of redeterminable contracts**:

1. PROSPECTIVE
2. RETROACTIVE

Prospective

FAR 16.205

Provides for a firm fixed-price for an initial period of contract deliveries or performance and for prospective redetermination, at a stated time or times during performance, of the price for subsequent periods of time.

The initial period should be the longest period for which it is possible to negotiate a fair and reasonable firm-fixed-price. Each subsequent pricing period should be at least 12 months. Period parameters can be expressed in terms of

units delivered, or
as a calendar date

but generally end on the last day of a month.

The redeterminable prospective contract may provide for a price ceiling where appropriate for the total contract or for each or any redetermination. (Any ceiling price, if established, is subject to adjustment only by reason of the operation of other contract clauses; e.g., the Changes clause). Redetermination can result in a price increase or decrease.

Exhibit 4-6 provides a graphic example of prospective price redetermination. In essence, you have two or more firm-fixed-priced negotiations in succession on one contract.

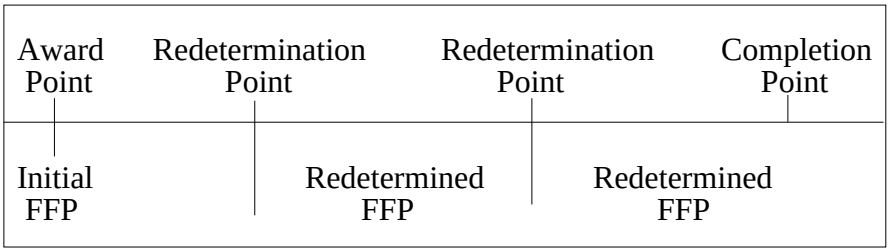


Exhibit 4-6

Retroactive
FAR 16.206

Provides for fixed-ceiling-price contract with retroactive price redetermination after completion of the contract.

The mandatory price ceiling should represent a reasonable degree of risk sharing by the contractor.

This type of contract has been limited to research and development contracts with an estimated cost of $100,000 or less and must have written approval from a higher level than the head of a contracting activity.

4.6.6 Firm-Fixed-Price, Level-of-Effort Term

FAR 16.207

Requires the contractor to provide a specified level of effort, over a stated period of time, on work that can be stated only in general terms, and the Government to pay the contractor a fixed dollar amount.

This type of contracting is suitable for investigation or study in a specific research and development area. The final product is usually a report. Payment to the contractor is based on the effort expended and not on the content or results of the report.

This type of contract is used when:

- the work can be stated only in general terms,
- the required level of effort is identified and agreed upon in advance,
- there is reasonable assurance that the intended result cannot be achieved by expending less than the stipulated effort, and
- the contracting price cannot exceed $100,000 (unless approved by the chief of the contracting office).

4.7 For Cost Contracts, Select a Fee Arrangement

Under a fixed-price contract, the contractor guarantees performance and must perform within any ceiling price. Redeterminations of cost or price are negotiated. Under a cost-reimbursement contract, the contractor merely agrees to exert its best efforts to perform within the estimated cost. Actual costs incurred are audited; all allowable costs are reimbursed.

An estimate of total costs is established for the purpose of obligation of funds and establishing a ceiling which the contractor may not exceed (except at its own risk) without prior approval or subsequent ratification of the contracting officer.

Fee Limitations

FAR 15.903(d)

There are certain statutory fee limitations applicable to cost-plus-fixed-fee contracts. Fees shall not exceed:

- 15 percent of the contract's estimated cost, excluding fee, for experimental, developmental, or research work.
- 10 percent of the contract's estimated cost, excluding fee, for other cost-plus-fixed-fee contracts.

The statutory limitations shall apply also to the maximum fees on cost-plus-incentive-fee and cost-plus-award-fee contracts unless a deviation has been authorized in accordance with FAR Subpart 1.4.

4.7.1 Cost-Plus-Fixed-Fee

A cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract.

FAR 16.306

The fixed-fee, once negotiated, does not vary with actual costs, but may be adjusted as a result of any subsequent changes in the work or services to be performed under the contract.

The cost-plus-fixed-fee contract may take one of **two basic forms**: "completion" or "term". Completion, because of differences in obligation assumed by the contractor, is preferred over the term form.

Completion Form

1. The scope of work is a clearly defined task with a definite goal or target expressed and with a specific end-product required.

2. The contractor must complete and deliver the specified end-product as a condition for payment of the entire fixed-fee established for the work and within the established cost if possible.

Term Form

1. The scope of work is in general terms and obligates the contractor to devote a specified level of effort for a stated period of time.

2. The fixed-fee is payable at the termination of the agreed period of time upon certification by the contractor that he has exerted the level of effort specified in the contract and such performance is considered satisfactory by the Government.

4.7.2 Cost-Plus-Incentive-Fee

FAR 16.404-1

A cost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs.

The cost-plus-incentive-fee (CPIF) contract is similar to the fixed-price incentive contract in many respects, except as follows:

- the maximum fee the contractor can receive is subject to FAR limitations, unless a deviation has been obtained.
- both maximum and minimum fee levels are negotiated.

Parties negotiate at the outset:

(1) a target cost and a target fee
(2) a minimum and maximum fee
(3) a fee adjustment formula

After performance of the contract, the fee payable to the contractor is determined in accordance with the formula. Exhibit 4-7 illustrates examples of a cost overrun and a cost underrun on a CPIF contract.

NEGOTIATE AT THE OUTSET

Target Cost	$1,000,000
Target Fee	70,000
Minimum Fee	35,000
Maximum Fee	100,000
Fee Adjustment	75/25

UNDERRUN

Costs	$900,000
Savings	100,000
Contractor Share 25% =	25,000
Target Fee	70,000
Share	+ 25,000
Final Fee	95,000
Costs	900,000
Contract Price	$995,000

OVERRUN

Costs	$1,200,000
Deficit	- 200,000
Contractor Share 25% =	- 50,000
Target Fee	70,000
Share	- 50,000
Final Fee	~~20,000~~
Minimum Fee	35,000
Costs	1,200,000
Contract Price	$1,235,000

Exhibit 4-7

4.7.3 Cost-Plus-Award-Fee

FAR 16.404-2

A cost-reimbursement contract that provides for a fee consisting of:

(1) a base amount fixed at inception of the contract (Agencies may establish a maximum base fee.), and
(2) an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in such areas as quality, timeliness, technical ingenuity, and cost effective management.

At contract completion, the amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination is made unilaterally by the Government and is not subject to the Disputes clause.

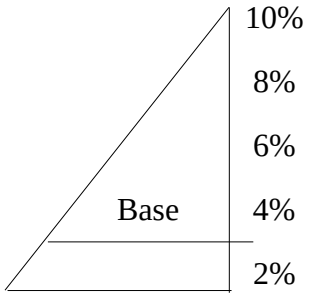
Elements of a cost-plus-award-fee (CPAF) contract are:

1. Estimated cost
2. Base fee (does not vary with performance)
3. Award fee
4. Maximum fee (base fee plus award fee pool)
5. Performance criteria
6. Fee payment plan

Exhibit 4-8 provides a graphic example of the CPAF plan.

NEGOTIATE AT THE OUTSET

Estimated cost	$1,000,000
Base Fee	30,000 (3% of estimated cost)
Award Fee	70,000 (7% of estimated cost)
Maximum fee	l00,000 (10% of estimated cost)
Performance Criteria	



Base Fee - 3%
Award Fee - 7%
Maximum Fee - 10%

When the Government makes a unilateral judgement that the contractor's performance was rated at only 50% of the performance quality, the contractor would only receive only 50% of the award fee ($35,000) plus base fee ($30,000) for a total fee of $65,000.

Exhibit 4-8

4.7.4 Cost & Cost-Sharing Contracts

FAR 16.302

Cost Contract provides for payment to the contractor of allowable costs incurred in the performance of the contract but the contractor receives no fee.

Because of the no profit feature, this type of contract has limited appeal, for example:

- research contracts with educational institutions, or
- contracts providing facilities to contractors.

FAR 16.303

Cost-Sharing Contract provides for reimbursement to the contractor for only an agreed portion of his allowable costs, and the contractor receives no fee.

The contractor agrees to absorb a portion of the costs of performance in the expectation of substantial compensating benefits.

It is designed for use in research and development contracts only when there is a high probability that the contractor will receive substantial present or future commercial benefits.

Examples: 1. Air Force: C-135 becomes Boeing 707.
(98% cost) (2% cost)

2. NASA: Dehydrated juice becomes Tang.

4.8 Document the File

When the government assumes any responsibility for cost of performance, it is the contracting officer's responsibility to assure the contractor's accounting system is adequate enough to:

Verify Contractor's Accounting System

- Determine reimbursable costs under
  1. cost-reimbursement contracts and subcontracts performed by commercial organizations
  2. the cost-reimbursement portion of time and materials contracts except when material is priced on a basis other than at cost.
- Determine price revisions under fixed-price incentive contracts
- Redetermine price for price redetermination contracts
- Determine price changes and other contract modifications.

A preaward survey of a prospective contractor's accounting system can be requested by the contracting officer utilizing SF 1408, Preaward Survey of Prospective Contractor Accounting System.

As a contract specialist, it is your responsibility to ensure that each contract file includes documentation to show why the particular contract type was selected. Exceptions to this requirement are:

FAR 16.103(d)

1. small purchases
2. contracts on a firm fixed-price basis (other than those for major systems or research and development)
3. awards on the set-aside portion of sealed bid partial set-asides for small business or labor surplus area concerns.

A Determination and Findings is additional documentation that is required for certain types of contracts.

Exhibit 4-9 lists D&F's, other documentation, and/or approval levels required by FAR for each type of contract. Agency procedures and guidelines should be consulted for additional requirements in all cases.

DOCUMENTATION FOR SELECTION OF CONTRACT TYPE

CONTRACT TYPE	D & F	OTHER DOCUMENTATION	APPROVAL LEVEL
FFP	-	Yes for Major Systems or R & D	See Agency Procedures
FP/EPA	-	Yes	CO
FPI	Yes	-	See Agency Procedures
FPR/P-	-	-	-
FPR/R	-	Yes	HCA
FP/LOE	-	Yes, Over $100,000	Chief of Contract Office
CPFF	Yes	-	See Agency Procedures
CPIF	Yes	-	See Agency Procedures
CPAF	Yes	-	See Agency Procedures
C/CS	Yes	-	See Agency Procedures
T&M/LH	Yes	-	CO
BOA	-	-	-

Exhibit 4-9

CHAPTER 5

GFP, BONDS, RFP

HAVE I CONVINCED YOU?

After reviewing the data from market research and contract administration files from previous contracts, you recommend to the requiring activity that a FPI-Firm Target might be a more suitable contract type because:

1. The contractor should assume more responsibility for the cost of performance based on the fact there are fewer unknown areas of actual cost or performance. Since some areas of performance still have risks, contemplating the use of a fixed price contract would either restrict competition or cause offerors to propose higher priced proposals.

2. There is sufficient cost and pricing data available to establish reasonable firm targets and still provide an incentive to the contractor with a reasonable profit adjustment formula.

The Project Manager from the requiring activity agreed that a FPI-Firm Target contract would reduce the overall cost of the contract and that the contract administrative personnel would be able to obtain sufficient cost data to negotiate final costs.

While you were both on the subject of how to save the Government money, he posed the question of furnishing Government property to perform certain functions in the contract.

Does furnishing Government property always cut costs for the Government?

Are there other advantages to furnishing property?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Determine whether to furnish Government Property and authorize contractors to use Government sources of supply.
Determine bonding requirements and obtain bonds.
Select provisions and clauses for the Request for Proposals and assemble the RFP.

Individual:

GOVERNMENT FURNISHED PROPERTY

5.1.1 Identify Government property that might be furnished to contractors.

5.1.2 Determine whether to furnish property.

5.1.3 Provide for Government Furnished Property (GFP) in the solicitation.

5.1.4 Identify supplies or services that are available from Government sources.

5.1.5 Determine whether to authorize contractors' use of Government sources.

5.1.6 Incorporate the appropriate clause in the solicitation.

5.1.7 Notify the contractor and Government sources.

BONDS

5.2.1 Determine need for bonds in other than construction contracts.

5.2.2 Select type(s) and amount(s) of bonds.

5.2.3 Include appropriate provision/clause in the solicitation.

5.2.4 Accept or reject surety bonds.

5.2.5 Accept or reject proposals to substitute other securities.

RFP

5.3.1. Determine whether to solicit by an RFQ, orally, by letter RFP, or a formal RFP.

5.3.2. Establish closing dates and time.

5.3.3. Determine whether the Uniform Contract Format (UCF) is required.

5.3.4. Prepare the RFP.

5.3.5. Obtain necessary approvals.

INTRODUCTION FOR GFP

There are three ways the Government may furnish property to contractors.

Government Furnished Property (GFP)

FAR 45.101

(1) directly from its own warehouses or production facilities,

or

(2) by authorizing the contractor to requisition material via the various Government supply systems.

or

Contractor Acquired Property (CAP)

(3) by the contractor acquiring it through his normal purchasing channels and then, introducing it into production.

In all instances, the Government retains title to the property.

"Property" means all property, both real and personal. It includes facilities, material, special tooling, special test equipment, and agency-peculiar property.

Policy

FAR 45.102

If contractors possess Government property, agencies shall:

(1) eliminate any competitive advantage that might arise from using such property

(2) require contractors to use Government property in performing Government contracts

(3) permit the property to be used only when authorized

(4) charge rental when property is authorized for use on other than a rent-free basis

(5) require contractors to be responsible and accountable for and keep official records of Government property in their possession

(6) require contractors to provide justification for retaining Government property not currently in use

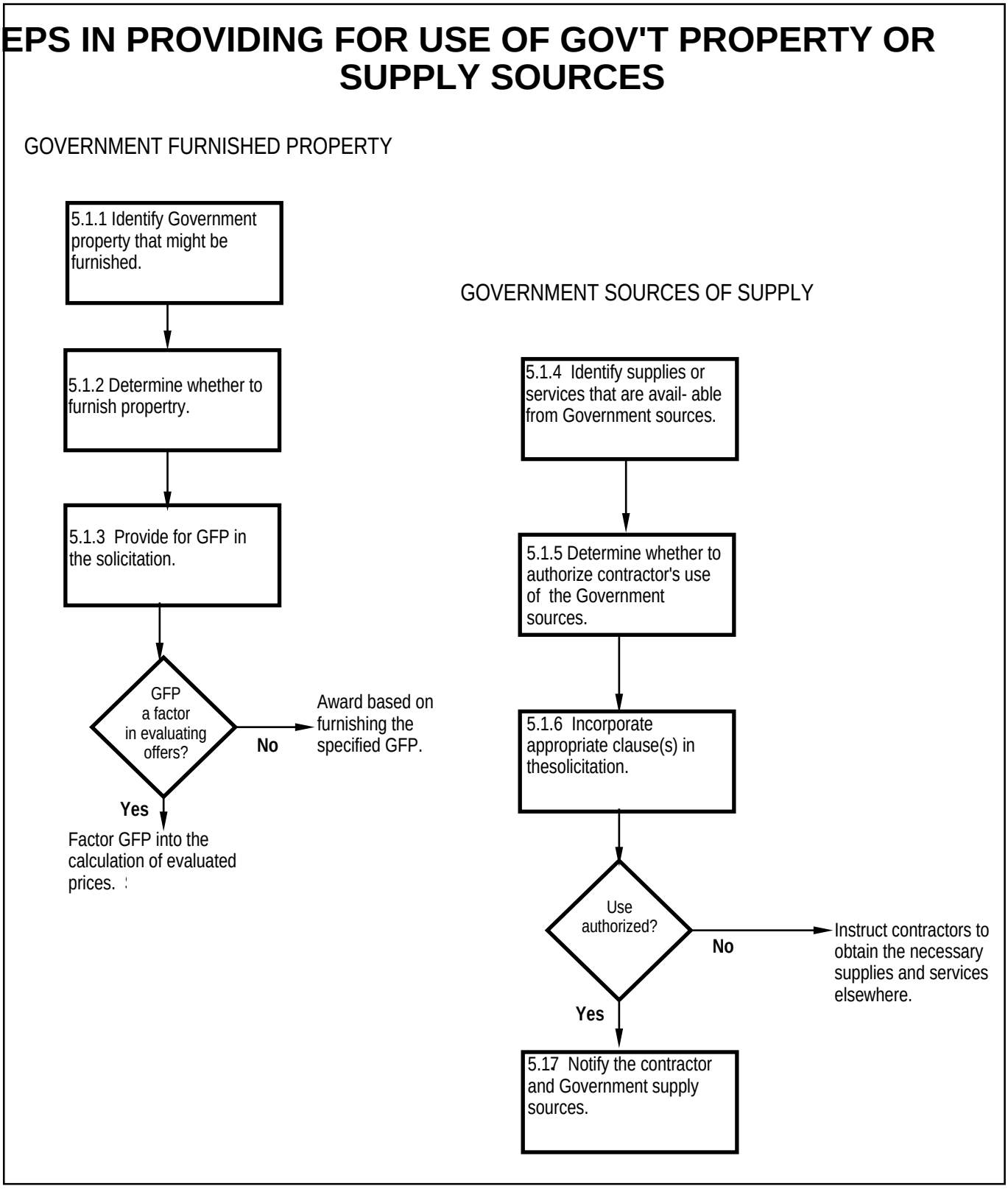
Steps In Performance

The steps in determining the use of Government property and supply sources are charted on the next page. Following these flow charts, each step is discussed in turn in Subchapter 5.1.

The flowcharts and discussions for bonds and preparing the RFP are addressed in Subchapters 5.2 and 5.3.

NOTE: Text material on GFP and Bonds is not part of "Contracting by Negotiation" course but is included in T/R book for reference purposes. These task areas will be taught in the "Advanced Negotiation Procedures" course.

STEPS IN PROVIDING FOR USE OF GOV'T PROPERTY OR SUPPLY SOURCES



STEPS IN DETERMINING WHETHER TO FURNISH GOVERNMENT PROPERTY AND SUPPLY SOURCES

5.1 GOVERNMENT FURNISHED PROPERTY

5.1.1 Identify Government Property for Use by Contractors

One major issue facing the contracting officer is whether to offer GFP under a particular procurement. The use of GFP may be identified by:

- a review of the prior procurement
- a recommendation from the requiring activity
- a suggestion from the contractor

Even where GFP use is indicated, the contracting officers decision must be based on weighing other considerations.

5.1.2 Determine Whether to Furnish Property.

In deciding whether to furnish Government property, the possible advantages and disadvantages should be carefully considered.

Exhibit 5-1-1 describes the advantages and reasons for furnishing Government property to contractors.

In comparison, Exhibit 5-1-2 explains the concerns and disadvantages you should consider before determining if Government property should be furnished.

[redacted]

1. Promotes competition by reducing the need for a larger capital investment by the contractor.
2. Helps maintain standardization.
3. Broadens industrial base.
4. Reduces direct costs, indirect costs, and fee.
5. Allows use of classified equipment that would otherwise inhibit the acquisition.
6. Allows use of material not available from any other source.
7. Expedites production for long lead time items.
8. Increases participation of Small Businesses.

Exhibit 5-1-1

DISADVANTAGES OF FURNISHING GOVERNMENT PROPERTY

1. Increases administrative burden for the Government.
2. GFP may not be suitable for intended use (implied warranty).
3. May increase cost of contract due to possible late delivery or failure to deliver on the part of the Government.
4. Government assumes more responsibility for contract performance.

Exhibit 5-1-2

5.1.3 Provide for GFP in the Solicitation

When property has been identified as available for use or to be acquired by the contractor, such information shall be included in the solicitation as follows:

STEP 1. Specify the property in sufficient detail to enable offerors to evaluate it accurately. This description is normally inserted in Section C or H of the solicitation.

STEP 2. Provide the applicable Government property clauses in Section I of the solicitation, for example:

FAR 45.106

52.245-1 - Property Records

52.245-2 - Government Property (Fixed-Price Contracts)

52.245-4 - Government Furnished Property (Short Form)

52.245-5 - Government Furnished Property (Cost Reimbursable, Time & Material, Labor Hour Contracts)

52.245-6 - Demolition Services

There are additional clauses for facilities, special tooling, and test equipment.

STEP 3. Identify and include in the solicitation any special instructions for security, liability, maintenance and/or property controls that are applicable to the property.

FAR 45.202

STEP 4. Insert in Section M of the solicitation the evaluation factors that will be considered:

- Rental equivalents
- Other costs specified as either dollar amounts or formulas applicable to:
  - reactivation from storage
  - rehabilitation and conversion
  - making property available on an F.O.B. basis

5.1.4 Identify Supplies/ Services Available from Government Sources

There are several Government sources that have supplies or services available for use by contractors:

- GSA FEDSTRIP program
  - Tools
  - Lab equipment

FAR 51.102 (c)

- DOD MILSTRIP program
  - Fuels
  - Stockpile materials
- Bureau of Mines, Department of Interior for Helium
- Department of Veterans Affairs Supply Sources
  - Medical supplies
  - Printing machine toner
- Other Agency Supply Sources
  - Lock boxes (Post Office type)
  - Airline tickets

Contractors with fixed-price Government contracts that require protection of security classified information may acquire security equipment through GSA sources.

5.1.5 Authorize Contractor's Use of Government Sources

If it is in the Government's interest, and if supplies or services required in the performance of a Government contract are available from Government supply sources, you may authorize contractors to use these sources in performing:

FAR 51.101

1. Government cost-reimbursement contracts
2. Other types of negotiated contracts when the agency determines that a substantial dollar portion of the contractor's contracts are of a Government cost-reimbursement nature.

Determination and Finding

Before issuing an authorization to a contractor to use Government supply sources, a written finding shall be placed in the contract file to support the authorization. The determination shall be based on, but not limited to, the following:

FAR 51.102 (a)

1. The administrative cost of placing orders with Government supply sources and the program impact of delay factors, if any.
2. The lower cost of items available through Government supply sources.
3. Suitability of items available through Government supply sources.

4. Delivery factors such as cost and time.
5. Recommendations of the contractor.

5.1.6 Incorporate Clause in the Solicitation

For solicitations and contracts in which the contractor is authorized to acquire supplies or services from a Government supply source, insert the following clause:

FAR 52.251-1, Government Supply Sources

If a facilities contract is contemplated, use Alternate 1.

FAR 51.102(d)

Request from the supplying agency, the activity address codes or approvals for the contractor's use of the supply source.

5.1.7 Notify Contractor and Government Source(s).

FAR 51.102(e)

Written authorization from the contracting officer to the contractor should contain the following:

- Contract number(s)
- Period of authorization
- Need to use MILSTRIP, FEDSTRIP, OF 347, etc.
- Other limitations as appropriate
- Instructions on proper use of Government sources of supply

Where appropriate, notify the GSA regional office or military activity.

NOT IN OUR BEST INTEREST

After obtaining the list of Government property that the requiring activity recommended to be furnished, you recommend that Government Furnished Property should not be included in the contract. This decision is based on:

1. The data obtained from market research which shows that the material required for performance was also used as a standard commercial practice by all qualified contractors, and

2. The additional burden to administer the contract by both the Government and the contractor was not cost effective.

INTRODUCTION FOR BONDS

Policy

Generally, agencies shall not require performance and payment bonds for other than construction contracts. However, under certain circumstances, the Government may require indemnification against loss, damage or liability arising from an unknown or contingency event in a supply or service contract.

No bond shall be required after the contract has been awarded if it was not specifically required in the contract. When required, the contractor must furnish all bonds before receiving a notice to proceed with the work.

Bond means

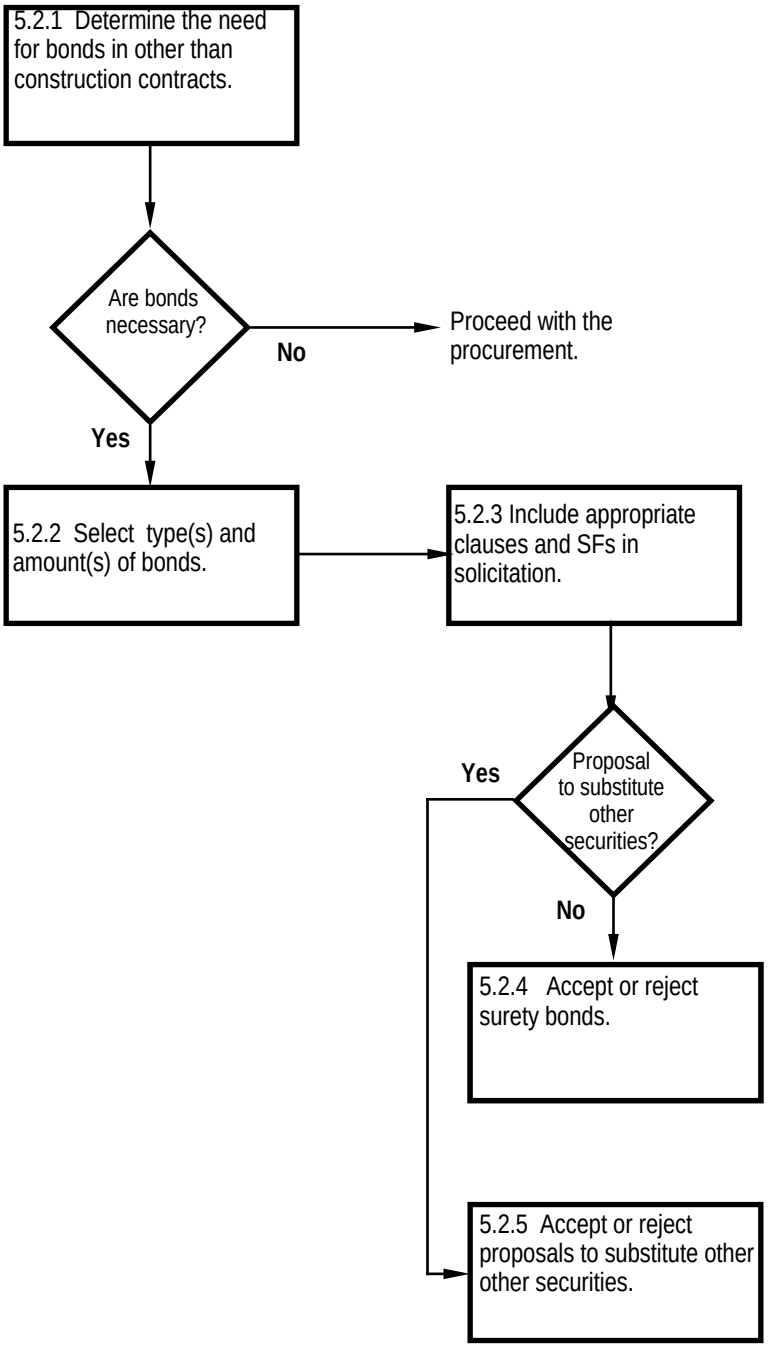
FAR 28.001

> "a written instrument executed by a bidder or contractor (the principal) and a second party (the surety) to assure fulfillment of the principal's obligations to a third party (the Government). If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the Government."

Steps in Performance

The steps in determining the need for and obtaining bonds are charted on the next page. Following the flowchart, each step is discussed in turn.

STEPS IN OBTAINING BONDS



STEPS IN OBTAINING BONDS

5.2 BONDS

5.2.1 Determine Need for Bonds

While preparing a requirement for solicitation, concern may arise with regards to the need for additional assurance that the contractor will perform satisfactorily.

Determine if additional protection is required, as follows:

STEP 1. Research acquisition histories for possible problems with contract completion or recovery of reprocurement costs.

STEP 2. Review market research data for:

- Number of sales and length of time offered to provide reason able assurance that a particular product/service is reliable.
- Market practices with respect to bonds.
- Production and delivery leadtimes.
- Technological/product changes and forecasts.
- Factors that affect market prices (e.g., cost of money, raw material prices).
- Laws and regulations applicable to the product/service.

STEP 3. Identify high risk markets, especially when:

- Government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (i.e., Government Owned - Contractor Operated (GOCO) facilities contract).

- A contractor sells assets to or merges with another concern, and the Government, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

- Substantial progress payments are made before delivery of end items starts.

Bonds should only be used for high risk markets where any additional price for obtaining bonds or adverse impact on competition is offset by reduction of the Government's risk through screening out marginal offerors.

5.2.2 Select Type(s) and Amount(s) of Bonds.

FAR 28.001

Depending on the type of additional protection required, there are several types of bonds or combinations you may select:

- Performance Bond
- Annual Performance Bond
- Payment Bond
- Advance Payment Bond
- Patent Infringement Bond
- Bid Guarantee

Performance Bond

Secures the performance and fulfillment of the contractor's obligations under the contract.

When a performance bond is required the **solicitation must state**:

1. Requirement for the bond
2. Penal sum of the bond (fixed sum or % of contract price)
3. Deadline for submitting bond (usually 10 days after award)

The contractor must not be given notice to proceed with the work until an acceptable performance bond has been delivered to the contracting officer.

FAR 28.103-2

The following **situations may warrant a performance bond**:

1. GFP or funds are to be provided to the contractor.
2. Contractor sells assets to or merges with another concern.
3. Substantial progress payments are made.
4. Contracts are for demolition, dismantling, or removal of improvements.

Annual Performance Bond

Single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor’s obligations under contracts (other than construction contracts) requiring bonds entered into during a specific Government fiscal year.

FAR 28.104

When the penal sums obligated by contracts are approximately equal to or exceed the penal sum of the annual performance bond, an additional bond will be required to cover additional contracts.

Payment Bond

Assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract.

A payment bond is required only when a performance bond is required.

Advance Payment Bond

Secures fulfillment of the contractor's obligations under an advance payment provision.

Requirements for use of an advance payment bond:

- Contract contains an advance payment provision
- Performance bond is not furnished
- Contracting officer determines the amount of the bond
- HCA approves use of the bond.

Patent Infringement Bond

Secures fulfillment of the contractor's obligations under a patent provision.

Requirements for use of a patent infringement bond:

- Financial responsibility of the contractor is unknown or doubtful
- Performance bond is not furnished
- Contracting officer determines the amount of the bond
- HCA approves use of the bond.

Bid Guarantees

FAR 28.101

Form of security assuring that the bidder will not withdraw a bid within the period of acceptance and will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements within the time specified in the bid.

Requirements for use of bid guarantees

- Required only when a performance bond or a performance and payment bond is required; otherwise their use is prohibited. The chief of the contracting office may waive requirement if not in the best interest of the Government.
- Contracting Officer determines amount that is adequate to protect the Government from loss should the successful bidder fail to execute further contractual documents and bonds as required.

  - shall be at least 20 % of contract price but not exceed $3 million.

Bid guarantees may be used in both the sealed bidding and the negotiation method of procurement. Noncompliance with bid guarantee provisions in negotiation ① requires rejection if an initial proposal award is to be made without discussion, or ② can be addressed during discussion. Under certain conditions, the CO may waive noncompliance with bid guarantee requirements.

5.2.3 Include Clauses and SFs in the Solicitation

FAR clause 52.228-2, Additional Bond Security, and 52.228-11, Pledges of Assets, must be included in solicitations and contracts when bonds are required. If a bid guarantee is also required, then FAR clause 52.228-1, Bid Guarantee, must be inserted in solicitations and contracts.

FAR 28.106-1

The standard forms that shall be used when a bid bond, payment bond, or a performance bond is required include:

- SF 24 Bid Bond
- SF 25 Performance Bond
- SF 25-A Payment Bond
- SF 28 Affidavit of Individual Surety
- SF 34 Annual Bid Bond
- SF 35 Annual Performance Bond
- SF 1416 Payment Bond for other than Construction

5.2.4 Accept or Reject Surety for Bonds

Surety means an individual or corporation legally liable for the debt, default, or failure of a principal to satisfy a contractual obligation.

The **types of sureties** are:

1. An individual surety is one person, as distinguished from a business entity, who is liable for the entire penal amount of the bond.
2. A corporate surety is licensed under various insurance laws and, under its charter, has legal power to act as surety for others.
3. A cosurety is one of two or more sureties that are jointly liable for the penal sum of the bond. A limit of liability for each surety may be stated.

Accept or reject surety for bond, by determining that the bond:

- Is properly signed and notarized.
- Conforms with requirements (value, name, etc.).

FAR 28.202

- If a corporate surety, the surety is on the Treasury's list of acceptable Sureties and within the limit of its underwriting authority (dollar level and localities for which the Surety has been approved). Otherwise, the amount that exceeds the specified limit must be coinsured or reinsured in amounts that do not exceed the underwriting limits of the coinsurers or reinsurers.

B-237073.2

FAR 28.203

- If an individual surety, it has been signed by one, two, or three individuals and backed by evidence that the pledged assets, when combined, equal or exceed the penal amount of the bond. SF 28, Affidavit of Individual Surety, must also be executed by each surety.

The individual surety may be accepted only if one of the following **acceptable assets** is provided to the Government:

FAR 28.203-2

1. Cash
2. US Government Securities
3. Stocks and Bonds traded on US Security Exchange
4. Real Property owned in fee simple in US
5. Irrevocable Letters of Credit

Unacceptable assets include:

B-236927

1. Notes or accounts receivable
2. Foreign Securities
3. Real property: residence, concurrent ownership, foreign
4. Personal property
5. Stocks and bonds in a concern of the contractor
6. Corporate assets
7. Speculative assets
8. Letters of Credit

5.2.5 Accept or Reject Proposals to Substitute other Securities

The contractor may deposit other types of security instead of furnishing corporate or individual sureties on performance and payment bonds. When any other types of security are deposited, a statement shall be incorporated in the bond form pledging the security.

FAR 28.204

Examples of other securities are:

- US Bonds or Notes
- Certified or Cashier's Checks
- Bank Drafts
- Post Office Money Order
- Cash

Proffered securities must be liquid and will be held by the Government for the same period of time as a bond would have been in force, **with no interest**.

INTRODUCTION FOR REQUEST FOR PROPOSALS

What is an RFP?

An RFP is a solicitation document, drafted by a Government agency, that contains a description of what the Government wants to buy and all the solicitation provisions and contract clauses that will govern the contract when it is awarded.

The RFP is used in the negotiation process. In negotiation, there may be extensive discussions with offerors, and the CO may change the requirements for what he/she is buying based on the discussions with offerors. The CO in negotiation may award a contract to other than the low offeror, if the RFP states that this is a possibility.

Purpose of the RFP

The purpose of the RFP is to communicate Government requirements to prospective contractors in order to stimulate proposals which will facilitate the selection of the source(s) best qualified to fulfill the requirements in the manner most advantageous to the Government.

What is the UCF?

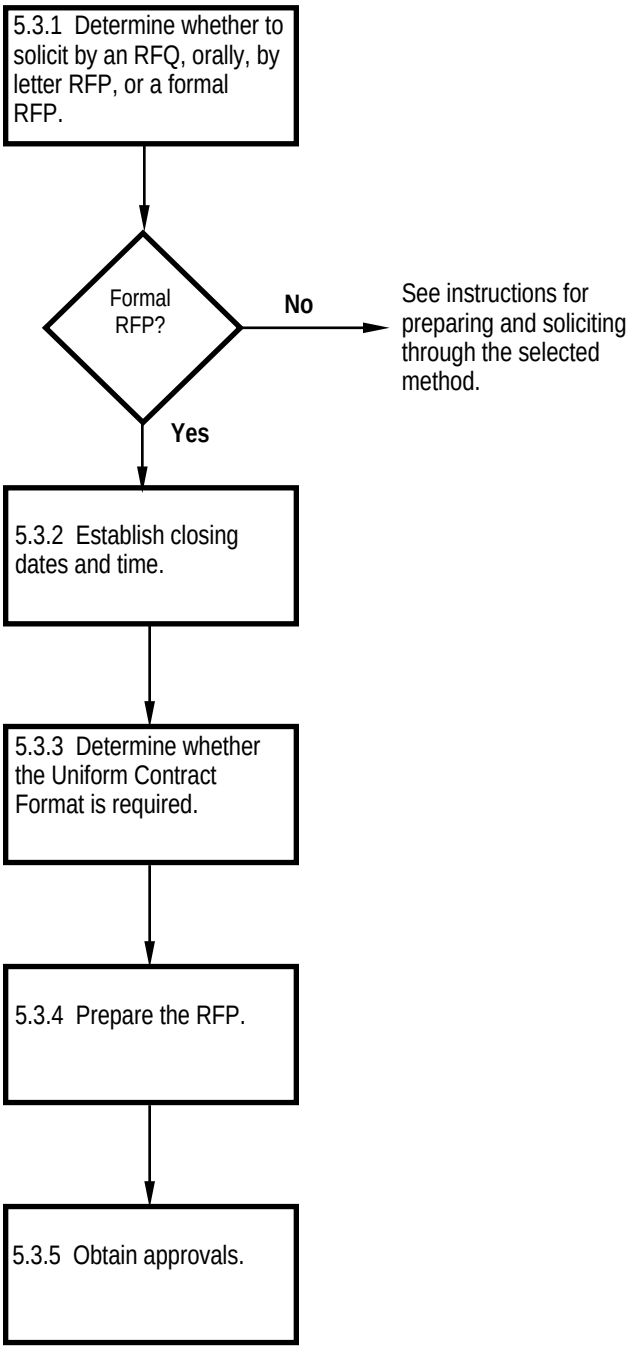
The Uniform Contract Format (UCF) prescribes a 4-part, 13-section format to facilitate the preparation of the RFP and contract and the reference to, and use of, those documents by offerors and contractors.

Steps in Performance

The steps in preparing an RFP are charted on the next page. Following the flowchart, each step is discussed in turn.

NOTE: Shaded text in this subchapter denotes tasks that are the same as in the sealed bidding method of procurement, and the text itself is taken from the Sealed Bidding Text/Reference.

STEPS IN PREPARING RFPs



STEPS IN PREPARING RFPs

5.3 RFP

5.3.1 Determine How to Solicit

Contracting by the negotiation method provides flexibility in the process of soliciting proposals. Depending on the circumstances and/or need, you may select:

Request For Quotations (RFQ)
Oral Negotiations
Letter RFP
Formal RFP

Exhibit 5-3-1 describes which method to select when conditions warrant the selection.

DECISION TABLE FOR SELECTING METHOD OF SOLICITATION

FAR 15.402

SELECT	WHEN
RFQ	Price, delivery or other market information is necessary for planning purposes; the Government doesn't intend to award on the basis of the RFQ*. Use SF 18, Request for Quotes.
ORAL B-236640.2	Ordering perishable substances or a written solicitation would delay the acquisition of supplies or services to the detriment of the Government.
LETTER RFP	Unless prohibited by agency regulations, can be used when negotiations are conducted under circumstances permitting other than full and open competition.
FORMAL RFP	Requirements listed above do not apply. Use Standard Form 33 or other agency approved forms.

Exhibit 5-3-1

* **NOTE**: A quotation received in response to an RFQ is not an offer and cannot be accepted by the Government to create a binding contract.

5.3.2 Establish Closing Dates and Times

To maximize competition, you must allow sufficient time between the issuance of the RFP and the closing date for receipt of proposals. This time permits offerors to properly prepare and submit their proposals. Consider the following factors when determining the closing date and time for receipt of proposals:

- Complexity of the requirement.
- Urgency of the Government's requirement.
- Subcontracting possibilities.
- Geographic location of offerors.
- Use of pre-solicitation notices
- Seasonal workload requirements that may impact on an offeror's time for preparation of a proposal.
- Mailing time for the transmittal of both the RFQ and the proposal.

The time for preparation and submission of proposals shall **not** be less than 30 days from the date of issuance of a synopsized RFP. The requirements for publicizing and synopsizing RFPs are discussed in Chapter 6.1.3.4 of this textbook.

5.3.3 Determine if Uniform Contract Format (UCF) is Required

Prepare a formal RFP using the UCF to the maximum extent possible. The UCF prescribes a 4-part, 13-section document (Exhibit 5-3-2). Its use facilitates a logical, orderly, standard presentation of all information and documentation necessary to:

- Describe the requirement
- Invite proposals conforming to the RFP
- Inform offerors of the evaluation factors
- Form a contract

UNIFORM CONTRACT FORMAT

FAR 15.406-1

Part I - The Schedule

Section	Title
A	Solicitation/Contract Form
B	Supplies or Services and Prices/Costs
C	Description/Specifications/Statement of Work
D	Packaging and Marking
E	Inspection and Acceptance
F	Deliveries or Performance
G	Contract Administration Data
H	Special Contract Requirements

Part II - Contract Clauses

Section	Title
I	Contract Clauses

Part III - List of Documents, Exhibits, and other Attachments

Section	Title
J	List of Documents, Exhibits, and other Attachments

Part IV - Representations and Instructions

Section	Title
K	Representations, Certifications, and other Statements of Offerors
L	Instructions, Conditions, and Notices to Offerors
M	Evaluation Factors for Award

Exhibit 5-3-2

Exceptions to the UCF

Even though the UCF is generally the correct format to use in preparing an RFP, there are times when the UCF is not required, as follows:

FAR 15.406-1(a)

- Basic Agreements
- Construction and A&E
- Shipbuilding and related activities
- Subsistence items
- Supplies or services requiring special contract forms prescribed in other FAR parts that are inconsistent with the UCF
- Letter RFPs
- Exempted by Agency Head
- Simplified contract format

5.3.4 Prepare the RFP

Each section of the UCF requires specific types of information that must be included by the Government and the offeror. The following subsections discuss these requirements generally using this structure:

- Purpose
- Contents
- References
- Explanation (if applicable)

Part I The Schedule

Section A — Solicitation/Contract Form

Purpose: Provides basic information on the RFP. Serves as the award document if executed by the Contracting Officer

Contents:
> Solicitation number
> Name and address of issuing authority
> Number of pages
> Where proposals are to be sent
> Date, hour, and place of closing
> Type of solicitation
> Minimum bid acceptance period, if applicable
> Discount for prompt payment
> Acknowledgement of amendments
> Name and address of offeror
> Name and telephone number of buyer
> Table of contents filled out, showing page numbers
> Place for name and address of offeror
> Place for name and title of person authorized to sign
> Place for signature of offeror
> Place for telephone number of offeror
> Includes award portion in lower segment of form
> Offer acceptance period

References: FAR 15.406 — Preparing RFPs

Explanation: The contract specialist can find most of the information necessary to fill in this section from the purchase request and from the contracting office. The SF 33 is the proper form, but an offeror may use its own form or a letter to submit an offer. A proposal submitted on a form other than the SF 33 may be considered for award only if the offeror accepts all terms and conditions of the RFP.

Section B — Supplies or Services and Prices/Costs

Purpose: Briefly describes the supplies or services to be acquired. Provides the location in the RFP for the offerors to fill in their priced offers.

Contents:
> A brief description of the supplies/services to be provided
> Item number/part number
> Incidental deliveries (manuals or reports)
> Term of contract

References: No specific FAR sections

Explanation: Optional Form (OF) 336 - Continuation Sheet may be used to supplement Standard Forms.

Section C — Description/Specifications/Statement of Work

Purpose: Supplements the brief description in Section B

Contents: Detailed statement of work/specifications (e.g., Commercial Item Description) necessary for a clear and concise description of the supplies/services outlined in Section B.

References: FAR Part 10 - Specifications, Standards, and other Purchase Descriptions

Explanation: Check to ensure that specifications reflect minimum needs and promote full and open competition, whenever possible.

Section D — Packaging and Marking

Purpose: Describes packaging and marketing requirements.

Contents:
> Packaging (paper carton, metal container)
> Preservation (water sealed, salt water protection
> Packing (nesting for sensitive electronic parts, styrofoam)
> Marking ("Handle with Care", "Store at Room Temperature")

References: FAR 10.004(e) on packaging and marking requirements

Explanation: Dependent upon FAR and agency requirements concerning packaging and marking to prevent deterioration and damage.

Section E — Inspection and Acceptance

Purpose: Describes how quality and reliability requirements are part of the specifications.

Contents:
> Any special or specific inspection requirements not covered by contract clauses or by specifications
> Consider need to comply with the Prompt Payment Act

Examples:

- 52.246-11, Higher Level Contract Qualification Requirement (Government Specifications)
- 52.246-15, Certificate of Conformance

References: FAR 46.2 - Contract Quality Requirements
FAR 46.3 - Contract Clauses

Explanation: Include all inspection, quality assurance, and reliability requirements. Inspection of supplies.

Section F — Deliveries or Performance

Purpose: Establishes the date(s) for delivery of supplies or the period of performance of services. Measures the acceptability of a contractor's performance against time as well as specification/quality requirements.

Contents: > Time for delivery or performance
> Place of performance

Examples:

• 52.212-13, Stop Work Order
• 52.212-15, Government Delay of Work

References: FAR 12.1 - Delivery or Performance Schedules

Explanation: To be used for specific or alternate delivery, performance, or acceptance requirements. Other examples of clauses to include may be liquidated damages and transportation clauses (i.e., F.O.B. origin) when appropriate.

Section G — Contract Administration Data

Purpose: Identifies the name and location of the Government activity that will (1) administer the awarded contract and (2) make payments under the contract. Directs the contractor where to send invoices and other contract administration matters.

Contents: > Name, address, telephone # of the payment office
> Accounting and appropriations data

References: FAR 42.3 - Contract Administration Office Functions

Explanation: Include any required contract administration or instructions other than those addressed in Section A.

Section H — Special Contract Requirements

Purpose: Provides a special location for requirements that may occur on a contract-by-contract basis (e.g., special security requirements pertaining to classified materials).

Contents:
> Special paragraph numbering system
> Reference documents
> Experience Qualifications. (If requirements for acquisition are highly specialized, minimum standards must be addressed for verification of experience of offerors.)

References: No specific FAR sections

Explanation: Include anything in this section that is not included in Part II, Section I, Contract Clauses, or in other sections of the UCF.

Part II Contract Clauses

Section I — Contract Clauses

Purpose: Locates all clauses that are applicable to the RFP into one section.

Contents: All clauses prescribed by the FAR and your agency's supplement to the FAR that are required or appropriate for the particular RFP.

Examples:

Contract Execution and Interpretation
52.215-33 Order of Precedence
Improper Business Practices
52.203-3 Gratuities
Bonds and Insurance Requirements
52.228-6 Insurance - Immunity from Tort Liability
Inspection, Acceptance, and Performance Requirements
52.242-2 Production Progress Reports
Type of Contract
52.216-8 Fixed Fee (Cost Reimbursement Contract)
Options/Multiyear Contracting
52.217-1 Limitation of Price and Contractor Obligations
Set Asides
52.219-11 Special 8(a) Contract Conditions
Contractor Purchasing and Subcontracting Requirements
52.219-9 Small Business and Small Disadvantaged Business Subcontracting Plan.
Labor/Management Requirements
52.207-3 Right of First Refusal of Employment
52.222-41 Service Contract Act of 1965, as amended.

Patents and Rights in Data
52.227-10 Filing of Patent Applications
Payments
52.232-16 Progress Payments
Taxes and Duties
52.229-4 Federal, State, and Local Taxes (Non-competitive Contract)
Allowable Costs and Accounting for Costs
52.216-7 Allowable Costs
52.242-1 Notice of Intent to Disallow Costs
Pricing Certifications & Defective Pricing
52.215-22 Price Reduction for Defective Cost or Pricing Data
Audit Rights
52.215-2 Audit - Negotiation
Modifications
52.243-2 Changes - Cost Reimbursement
Terminations
52.249-2 Termination for Convenience of the Government (Fixed-price)

References: FAR 52.2 contains references for prescriptions for the use of clauses. Your agency's supplement to the FAR might contain additional prescriptions.

FAR 52.3 provides a matrix of clauses and provisions that contains a column for each principle type and/or purpose of contract.

Part III List of Documents, Exhibits, and Other Attachments

Section J — List of Documents, Exhibits and other Attachments

Purpose: Provides a central location for any special information or requirements not appropriate for including in other sections.

Contents: Title, date, and number of pages for each attached document, exhibit, or other attachment.

References: No specific FAR sections

Explanation: Special information might include name and address for contractor to send for technical data or specifications required to perform.

Part IV Representations and Instructions

Section K — Representations and Instructions

Purpose: Determines whether or not an offeror is eligible for award (e.g., is offeror a small business? a manufacturer or dealer?)

Contents: Provisions that require representations, certifications, or submission of other information by offerors. Many of the actions require the checking of an appropriate box or filling in a blank.

Examples:

Information about the Firm

52.215-6 Type of Business Organization
52.215-11 Authorized Negotiators
52.223-5 Certification Regarding Drug-Free Workplace

Ability to meet Qualification Requirements

52.209-1 Qualification Requirements

References: FAR 52.3 - Provision and Clause Matrix
FAR 53.3 - Illustration of Forms

Explanation: Most provisions in Section K are included in full text.

Section L — Instructions, Conditions, and Notices to Offerors

B-244143

Purpose: Describes special requirements pertaining to preparation and submission of proposal. Instructs prospective offerors to submit technical proposals in severable parts (separation of technical and cost/pricing data).

Contents:
- Provisions for submission of proposals
- Special qualification standards
- Licensing requirements
- Bid guarantees; performance or payment bond.

Examples: Provisions that affect the award of a contract but do not become a physical part of the contract:

- 52.215-5 Solicitation Definitions
- 52.215-13 Preparation of Offers
- 52.215-17 Telegraphic Proposals

References: FAR 15.406-5(b)

Section M - Evaluation Factors for Award

Purpose: Tells the prospective offerors how proposals will be evaluated.

Contents: Price related factors such as:

- Multiple award considerations
- Options
- Transportation costs
- Economic price adjustment

Technical/management evaluation criteria such as:

- Factors and subfactors
- Relative importance the Government places on those factors and subfactors.

References: FAR 15.605 — Evaluation factors

Explanation: Selection of the successful offeror can be based only on those evaluation factors stated in the RFP.

5.3.4.1 Select Contract Clauses and Solicitation Provisions

Difference

FAR 15.407

The RFP contains both solicitation provisions and contract clauses. The difference between a contract clause and a solicitation provision is that, generally, contract clauses apply to the awarded contract, whereas solicitation provisions apply to the RFP instructions to offerors for submitting proposals. Part IV of the UCF contains the solicitation provisions that are placed in the IFB. Upon award of the contract, the CO shall not physically include Part IV in the resulting contract, but shall retain it in the contract file. Section K (Representations, Certifications, and other Statements of Offerors) of Part IV is, however, incorporated in the resultant contract by reference even though not physically attached.

5.3.4.2 Determine the Provisions and Clauses that Go into an RFP

FAR 52.101(a)

You need to utilize the FAR, especially Subpart 52.3 which is the Provision and Clause Matrix, and your agency clause manual and/or FAR supplement to determine which solicitation provisions or contract clauses are to go into an RFP. Some solicitation provisions and contract clauses are required in all RFPs. Some are required where applicable. Some are optional.

The FAR Provision and Clause Matrix is arranged by provision and clause number and lists the:

- Required solicitation provisions
- Required-When-Applicable solicitation provisions
- Optional solicitation provisions
- Required contract clauses
- Required-When-Applicable contract clauses
- Optional contract clauses

In addition, the matrix provides:

- Clause/provision incorporated by reference or full text
- UCF section location
- Clause/provision number
- FAR text reference
- Clause/provision title

This information and other key decisions can be found in the Purchase Request and the acquisition or procurement plan.

Agency Clause Manuals

The large amount of clauses and provisions that go into an RFP can be somewhat overwhelming. You may wonder how you will learn which clauses or provisions are appropriate for any given solicitation. Most agencies maintain clause manuals and have available separate RFP packages for supplies, services, construction, and special item buys. A senior contract specialist and legal counsel generally work closely to maintain these packages and keep them up-to-date. This alleviates the frustration that can occur for the new contract specialist when choosing clauses and provisions for a solicitation.

5.3.4.3 Determine When a Clause is Applicable

FAR 52.203.1

The clauses included in the RFP are those that are required by law or regulation. Clauses inserted in Section I of the UCF are not inserted in any of the other sections. The CO is responsible for the selection of clauses based on the considerations above and the particular use of the clause as set forth in the FAR.

As an example, one of the first clauses listed in the Provision and Clause Matrix is entitled "Officials Not To Benefit." This clause states that no member of Congress shall benefit from the contract. The clause must be included in all RFPs except those related to agriculture.

Required and Required-When-Applicable Clauses

There are certain clauses that are Required and certain clauses that are Required-When-Applicable to various RFPs. The following list shows the Required clauses that must be included in the RFP for Firm-Fixed Price Supply or Service contracts:

- 52.202-1, Definitions
- 52.203-5, Covenant Against Contingent Fees
- 52.203-6, Restriction on Subcontractor Sales to the Government
- 52.233-3, Protest After Award
- 52.243-1, Changes—Fixed Price

You should incorporate Required-When-Applicable clauses (either in full text or by reference) depending on the specific requirements that you want to place in the RFP.

For example, suppose you are purchasing supplies using a negotiated, firm-fixed price contract expected to exceed $100,000 and decide you need an audit clause. You would be required to include the clause, 52.215-2—Audit-Negotiation, and not the clause, 52.214-26—Audit-Sealed Bidding , because the latter clause is used for a different method of procurement.

Clauses Used In Special Situations

At times there are special situations requiring specific contract clauses, for example the following list provides clauses included in RFPs that are expected to exceed $100,000*.

- 52.215-22 Price Reduction for Defective Cost or Pricing Data
- 52.215-23 Price Reduction for Defective Cost or Pricing Data-Modifications
- 52.215-24 Subcontractor Cost or Pricing Data
- 52.215-25 Subcontractor Cost or Pricing Data-Modifications

Alternates to FAR Clauses

There are FAR alternates to some contract clauses. For example, the FAR clause on the First Article Approval—Contractor Testing has two alternates. The following decision table shows how to select the appropriate version of the clause.

DECISION TABLE: CLAUSE WITH ALTERNATES

IF RFP REQUIRES:	THEN USE CLAUSE:
A first article approval and Contractor to conduct the first article test, and:	52.209-3—First Article Approval-Contractor Testing;
Contractor to produce the first article and the production quantity at the same facility, and/or:	Add Alternate I paragraph (h) to the basic clause;
Contractor to purchase material or start production for paragraph (g) of the basic clause before the first article approval,	Substitute Alternate II paragraph (g).

Exhibit 5-3-3

* $500,000 for DOD, NASA, and Coast Guard

At each Government agency contract activity there is a senior contract specialist who helps prepare RFP packages, and he/she will be glad to help you make these alternate clause selections.

Contract Clauses Incorporated in Full Text or by Reference

FAR 52.102

The fourth column of the FAR Provision and Clause Matrix shows whether you should incorporate the contract clause by reference or in full text. When a contract clause is incorporated by reference, it means that the clause number is referenced in the RFP. Even though it is only referenced, it is still part of the contract because you stated the reference. When a contract clause is incorporated in full text, the entire clause is stated in the RFP. Normally, most clauses will be incorporated by reference. However, if requested, provide the prospective offeror with a copy of the full text of any clause that is incorporated by reference. (Solicitation provisions are also included in full text or by reference.)

5.3.4.4 Complete Contract Clauses

In some clauses in an RFP, the CO may have to fill out some of the "blanks" before the RFP is issued. For example, in FAR 52.212-9 (Variation in Quantity), if the CO determines that a variation in quantity will be allowed, he/she must indicate the percent increase or decrease in the blank provided at paragraph (b).

5.3.4.5 Determine When a Provision is Applicable

FAR 15.407(c & d)

FAR 19.304

The following provisions are required in all RFPs:

- 52.215-5, Solicitation Definitions
- 52.215-6, Type of Business Organization
- 52.215-7, Unnecessarily Elaborate Proposals or Quotations
- 52.215-8, Amendments to Solicitations
- 52.215-9, Submission of Offers
- 52.215-10, Late Submissions, Modifications, and Withdrawals ...
- 52.215-11, Authorized Negotiators
- 52,215-12, Restriction on Disclosure and Use of Data
- 52.215-13, Preparation of Offers
- 52.215-14, Explanation to Prospective Offerors
- 52.215-15, Failure to Submit Offer
- 52.215-16, Contract Award
- 52.219-1, Small Business Concern Representation
- 52.219-2, Small Disadvantaged Business Concern Representation
- 52.219-3, Women-Owned Small Business Representation
- 52-219-22, SIC Code and Small Busniess Size Standard

Other provisions are used in an RFP when applicable. The provisions are used when needed, based on the particular situation. The following are examples of required provisions that (when applicable) are incorporated in the RFP:

• 52.215-20, Place of Performance

In all RFPs, except those in which the place of performance is specified by the Government.

• 52.215-9, Period for Acceptance of Offer

To be used in RFPs that are not issued on SF33 or SF1447 except ① those for construction work or ② in which the Government specifies a minimum acceptance period.

Many of the provisions are prescribed where a particular subject is discussed in the FAR, such as:

• 52.207-4 Economic Purchase Quantity — Supplies

If the CO does not have economic order data for a given item, this provision should be included in the RFP. This provision invites offerors to state an opinion on whether the quantities of supplies on which offers are requested in the solicitation are economically advantageous to the Government. If the offeror believes that acquisition in different quantities is(are) more favorable to the Government, then they are invited to recommend an economic purchase quantity. If different quantities are recommended, a total and a unit price must be offered for applicable items.

Supplies should be procured in quantities that result in total and/or unit costs that are most advantageous to the Government if it is practical to do so, and the quantities do not exceed the quantities reasonably expected to fulfill agency needs. Sometimes, however, your agency's need for a particular quantity might not coincide with a quantity that is economically feasible for a manufacturer or supplier to produce or deliver. For example, a requirement for 50 gallons of a special solvent might be more economically filled by an order for 55 gallons if the solvent is normally prepared in 55 gallon (drum) quantities.

Exhibit 5-3-4 shows several examples of different clauses and provisions and how they are incorporated.

EXAMPLES OF CLAUSES AND PROVISIONS INCORPORATED BY FULL TEXT OR BY REFERENCE

Clauses - (Section I of the UCF)

52.215-2	Audit - Negotiation	By Reference
52.215-22	Price Reduction ...	By Reference
52.215-24	Subcontractor Cost	By Reference
52.222-36	Affirmative Action for Handicapped Workers	By Reference
52.232-25	Prompt Payment Act	By Reference
52.252-4	Alterations in Contract	Full Text

Provisions - (Section K of the UCF)

52.207-4	Economic Purchase Quantity ...	Full Text
52.209-1	Qualification Requirements	Full Text
52.215-6	Type of Business	Full Text
52.215-20	Place of Performance	Full Text
52.219-3	Women-Owned Small Business ...	Full Text

Provisions - (Section L of the UCF)

52.210-1	Availability of Specs. Listed in the GSA Index of Fed. Specs. and Standards ...	Full Text
52.215-5	Solicitation Definitions	By Reference
52.215-8	Amendments to Solicitations	By Reference
52.218-18	Facsimile Proposals	By Reference

Exhibit 5-3-4

5.3.4.6 Deviations from FAR Clauses or Provisions

FAR 1.402

A deviation from the FAR is the issuance or use of a policy, procedure, solicitation provision, contract clause, method, or practice of conducting an acquisition action of any kind that is inconsistent with the FAR.

Conforming with the FAR gives the Government's contracting process discipline, uniformity, and consistency . However, sometimes either the process or the particular procurement might be enhanced by deviating from a FAR requirement. Two important statements contained in that policy are:

> "The development and testing of new techniques and methods of acquisition should not be stifled simply because such action would require a FAR deviation."

> "Unless precluded by law, executive order, or specific regulation, deviations from the FAR may be granted ... when necessary to meet the specific needs and requirements of each agency."

Often, deviations are requested in connection with delivery, testing, and patent clauses; and evaluation or multiple technical proposal provisions. Indiscriminate requests for deviations are discouraged. However, if you believe that deviating from an existing clause, provision, policy, or procedure would improve a proposed procurement, recommend to the CO that a deviation be granted. Handle any deviation from the FAR in accordance with the procedures prescribed in the FAR and in your agency's supplement to the FAR. Class deviations are also permitted.

FAR 1.404

5.3.4.7 Simplified Contract Format

FAR 15.416

For firm-fixed price contracts (or FP with EPA), you may decide to use the simplified contract format which allows you flexibility in preparing the solicitation/contract. To the extent possible the following format should be used.

1. SOLICITATION/CONTRACT FORM

- Use SF 1447, Solicitation/Contract, as the first page.

2. CONTRACT SCHEDULE (for each line item)

- Line item number
- Description of supplies or services
- Quantity and unit of issue
- Unit price and amount
- Packaging and marking requirements
- Inspection, acceptance, quality assurance
- Place and date of delivery, period of performance
- Item peculiar performance

3. CLAUSES

- Clauses required by regulation
- Clauses absolutely necessary for the acquisition

4. LIST OF DOCUMENTS and ATTACHMENTS, if needed.

5. REPRESENTATIONS and INSTRUCTIONS

- Representations and certifications
- Instructions, conditions, and notices
- Evaluation factors for award, including any significant subfactors.

FAR 15.406-1(b)

Upon award the provisions in 5 above need not be physically included in the resulting contract. Award by acceptance of an offer on the award portion of SF 1447 incorporates the representations, certifications, and other statements of offerors in the resultant contract by reference.

5.3.5 Obtain Approvals

Before issuing the RFP, you may need to obtain

- legal,
- requiring activity,
- technical, or
- management

concurrence. The purpose of the review is to detect and correct discrepancies or ambiguities that could restrict competition or result in excessive amendments to the solicitation.

Agency implementation of the FAR usually requires that the contracting officer obtain some level of approval or concurrence. These requirements vary from agency to agency and may take effect at differing dollar thresholds. Such reviews could be for:

- Solicitations for other than full and open competition,
- Oral Solicitations, or
- Requirements for other than fixed-priced contracts.

In many contracting activities, solicitation documents at prescribed dollar thresholds must be reviewed by counsel to ensure legal sufficiency.

FAR 19.202-1

A copy of the "proposed acquisition package" must be provided to the SBA 30 days prior to solicitation issuance if

it is unlikely a small business concern can compete even though they are the current contractor.*

A statement must be included explaining why the proposed acquisition cannot:

- be divided into reasonably small lots to permit offers on quantities less than the total requirement;
- have delivery schedules established on a realistic basis, that encourage small business participation; or
- be structured so as to make it likely that small business can compete.

FAR 19.402(c)(2)

SBA must respond within 15 days with any recommendation for an alternative contracting method that would increase small business prime contracting opportunities.

* For construction, the issue revolves around the consolidation of discrete construction projects.

CHAPTER 6

PUBLICIZING
&
PREAWARD INQUIRIES

THE CO DENIES YOUR REQUEST TO ISSUE THE RFP

The contract file you submitted to the contracting officer for review prior to issuing a solicitation for technical services has been returned with the following annotations:

1. There is no documentation as to your decision not to synopsize the proposed contract action in the Commerce Business Daily (CBD).

> *What are the exceptions to synopsizing in the CBD?*

2. There is no indication of what method you will use to publicize the requirement.

> *If you don't synopsize, what method(s) will you be able to utilize to publicize the requirement?*

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Select and implement the method of publicizing the proposed procurement. Respond to inquiries concerning solicitations.

Individual:

PUBLICIZING

6.1.1 Determine the need for synopsizing.

6.1.2 Identify whether an exception to the synopsis requirement applies.

6.1.3 Prepare and forward a synopsis.

6.1.4 If needed, select and implement other methods of publicizing.

6.1.5 Issue the solicitation to interested parties.

PREAWARD INQUIRIES

6.2.1 Inform Government personnel of their roles in responding to inquiries.

6.2.2 Identify information that may not be divulged.

6.2.3 Respond to verbal inquiries.

6.2.4 Review inquiries and conduct necessary factfinding.

6.2.5 Provide followup response.

INTRODUCTION FOR PUBLICIZING

Why Publicize?

FAR 5.002

Contract actions are publicized in order to:

- Increase competition
- Broaden industry participation in meeting Government requirements; and
- Assist small business concerns, disadvantaged business concerns, and labor surplus area concerns in obtaining contracts and subcontracts.

What is a Synopsis?

A condensed statement of an agency's proposed contract action or an announcement of a contract award which is publicized in the Commerce Business Daily (CBD), Synopsis of U.S. Government Proposed Procurement, Sales, and Contract Awards.

What is the CBD?

FAR 5.101

The CBD is the public notification media in which U.S. Government agencies identify proposed contract actions and contract awards. The CBD is published by the U.S. Department of Commerce in five or six daily editions per week, as necessary.

Other Ways to Publicize

FAR 5.101(b)

In addition to synopsizing in the CBD, there are several other methods used for publicizing proposed contract actions, such as print and electronic media.

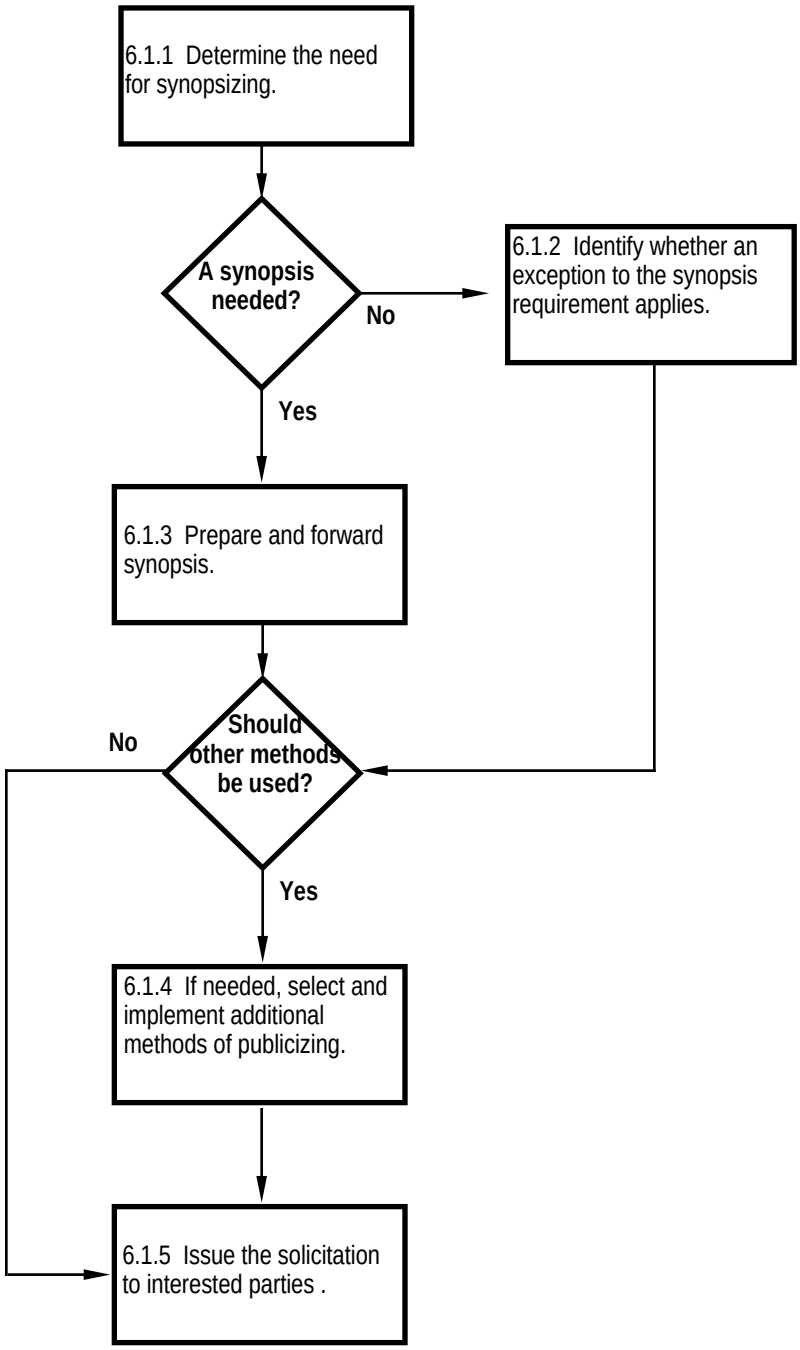
Steps in Performance

The steps in publicizing RFPs are charted on the next page. Following the flowchart, each step is discussed in turn in Subchapter 6.1

The flowchart and discussion for responding to preaward inquiries is addressed in Subchapter 6.2.

NOTE: Shaded text in this chapter denotes tasks that are the same as in the sealed bidding method of procurement, and the text itself is taken from the Sealed Bidding Text/Reference.

STEPS IN PUBLICIZING SOLICITATIONS



STEPS IN PUBLICIZING RFPs

6.1 PUBLICIZING RFPS

6.1.1 Determine the Need for Synopsizing

A synopsis is a condensed statement of an agency's proposed contract action. It is published in the Commerce Business Daily (CBD) and used to announce RFPs and contract awards.

Exhibit 6-1-1 lists the circumstances under which the synopsis of a proposed contract action is required.

CIRCUMSTANCES UNDER WHICH A SYNOPSIS IS REQUIRED

FAR 5.201 (b)

If the proposed contract action:

- Is expected to exceed $25,000, or
- Is for modification of an existing contract for additional supplies or services and the proposed modification exceeds $25,000.
- Is an effort to locate private commercial sources for cost comparison purposes under OMB Circular A-76.
- Is any dollar amount and it would be advantageous to the Government to synopsize in the CBD.

Exhibit 6-1-1

FAR 5.101(a)(2)

For contract actions between $10,000 ($5,000 for Defense activites) and $25,000, you do not need to synopsize, but you must display a notice of the solicitation or a copy of the solicitation at your contracting office.

6.1.2 Exceptions to Synopsizing

Even though the circumstances that require synopsizing may exist, there are several exceptions to the requirements for synopsizing, as indicated in Exhibit 6-1-2.

EXCEPTIONS TO SYNOPSIZING

FAR 5.202

1. When synopsizing might disclose national classified information.
2. When the requirement is for perishable subsistence supplies, and advance notice is not appropriate.
3. When the requirement is for a brand-name commercial item for authorized resale.
4. When the action is made under the terms of an existing contract that was previously synopsized in sufficient detail to comply with the correct procedure for synopsizing.
5. When the action is by a defense agency and will be made and performed outside the U.S., its possessions, or Puerto Rico, and only local sources will be solicited.
6. When there is an unusual or compelling urgency.
7. When an international agreement requires acquisition from specified sources.
8. When expressly authorized or required by statute.
9. When for utility services, other than telecommunications, and only one source is available.
10. When placing an order under a requirements contract.
11. When accepting a proposal under the Small Business Innovation Development Act of 1982.
12. When considering an unsolicited research proposal and publication would improperly disclose proprietary information or the originality of thought and innovativeness.

Exhibit 6-1-2

In addition to the above exceptions, the head of an agency can make the decision that advance notice is not appropriate or reasonable, after consulting with Office of Federal Procurement Policy and SBA. The use of any of these exceptions must be documented in the contract file.

OOPS! MY ERROR

You now recognize that you were in error in thinking that since the requirement was sole source, you didn't have to synopsize. None of the exceptions to synopsizing are applicable, so you prepare a synopsis to forward to the CBD. In addition to synopsizing, you are considering contacting the local trade association to request their mailing list for companies performing this type of service.

6.1.3 Prepare and Forward Synopsis

FAR 5.207

General guidelines for preparing a synopsis are as follows:

- Use conventional typing with abbreviations, capitalization, and punctuation all grammatically correct.
- Each synopsis shall include all 17 format items. Do not include the title for the format item.
- Begin each line flush left and use double-spaced lines between each format item. If more than one synopsis is to be sent at one time, separate each synopsis with four line spaces and begin each synopsis with format item number 1.
- Minimize abbreviations or acronyms to only those most commonly recognized.

If you are telecommunicating the synopsis, the hard copy and electronic copy should follow an identical sequence and form, even though the typing style (i.e., font) will be different for the telecommunicated synopsis.

6.1.3.1 Format Items

General guidelines for formatting all 17 items are:

- A new line of text is used for each format item.
- Precede each format item with the number of the item followed by a period (e.g., 1.).
- Following the period, there must be two spaces before beginning the entry.
- Next, type the appropriate information for each format item.
- Conclude each format item with two exclamation points (!!).

Other guidelines include:

- When a format item is inapplicable (i.e., some items are pertinent only to solicitations and some are pertinent only to awards), leave two spaces after the item number period and type “N/A.”
- Conclude each complete synopsis, following item 17, with 5 asterisks (e.g., *****).

Exhibit 6-1-3 on the next page shows an example of the 17-item synopsis.

EXAMPLE OF THE 17-ITEM SYNOPSIS

1. Action Code	1. P!!
2. Date	2. 0925!!
3. Year	3. 85!!
4. Federal Information Processing Standard (FIPS) Number	4. 57936!!
5. Contracting Office Zip Code	5. 19111-5096!!
6. Classification Code	6. 95!!
7. Contracting Office Address	7. Defense Industrial Supply Center, 700 Robins Ave., Philadelphia, PA 19111-5096!!
8. Subject	8. 95—Steel Plate!!
9. Proposed Solicitation Number	9. DLA500-86-B-0090!!
10. Opening/Closing Response Date	10. 111585!!
11. Contact Point/Contracting Officer	11. Contact, Mary Drake, 215/697-XXXX/Contracting Officer, Larry Bird, 215/697-XXXX!!
12. Contract Award and Solicitation Number	12. N/A!!
13. Contract Award Dollar Amount	13. N/A!!
14. Contract Line Item Number	14. N/A!!
15. Contract Award Date	15. N/A!!
16. Contractor	16. N/A!!
17. Description	17. NSN9515-00-237-5342, Spec MIL-S-226988,0.1875 in thk, 96 in w. 240 in lg. Carbon steel. 45,000 lbs. Del to NSY Philadelphia, PA, NSC Norfolk, VA. Del by 1 Oct 86. When calling, be prepared to state name, address and solicitation number. See note 9. All responsible sources may submit an offer which will be considered. *****

Exhibit 6-1-3

There follows a brief explanation of each of the 17 items in the synopsis format.

1. ACTION CODE

Description: A single alphabetic letter denoting the specific action related in the synopsis.

Application: Choices are limited to the following:

- P = Pre-solicitation Notice/ Procurement
- A = Award Announcement
- M = Modification of a previously announced procurement action
- R = Sources Sought (includes A-76 services and architect-engineer contracts)
- N/A = If none of standard codes apply, enter N/A.

2. DATE

Description: Date the synopsis is transmitted to the CBD for publication.

Application:

- Use a four-digit number indicating month in two digits and date in two digits (MMDD).
- All four spaces must be used with preceding" 0" for months January through September (e.g., 0502 for May 2).

3. YEAR

Description: Two numeric digits denoting the calendar year of the synopsis.

Application: Use the last two digits of the year (e.g., 87 for 1987).

4. FEDERAL INFORMATION PROCESSING STANDARD (FIPS) NUMBER

Description: Agency code number identifying the sending agency.

Application:

- Normally a four or five character field.
- Usually numeric, but may contain one or more alphabetic characters.
- Reference: FIPS publication 95, National Bureau of Standards. This publication identifies federal agencies and related organizations.

5. CONTRACTING OFFICE ZIP CODE	Description:	Geographic zip code for the contracting office.
	Application:	• Up to nine characters may be entered. • When using nine digit zip codes, separate the first five digits and last four digits with a dash (e.g., 00000-0000).
6. CLASSIFICATION CODE	Description:	Service or supply code number (see FAR 5.207(g) for codes).
	Application:	• Each synopsis should classify the services or supplies under one grouping. • If the action is for a multiplicity of goods and/or services, the preparer should group the action under the category best defining the overall acquisition based upon value. • Synopsis will be rejected if no code or more than one code is provided.
7. CONTRACTING OFFICE ADDRESS	Description:	The complete name and address of the contracting office.
	Application:	Field length is open, but generally not expected to exceed 90 alpha-numeric characters.
8. SUBJECT	Description:	A brief title description of services, supplies, or projects required by the agency. (200 character spaces available)
	Application:	Insert classification code for Item 6 and the brief title.
	Explanation:	This will appear in the CBD as the bold-faced title in the first line of Item 17, the description.
9. PROPOSED SOLICITATION NUMBER	Description:	Agency number for control, tracking, and identification.
	Explanation:	For solicitations only; if not a solicitation, enter N/A.

10. OPENING/CLOSING RESPONSE DATE	Description:	Issuing agency's deadline for receipt of proposals or responses.
	Application:	Use a six-digit date (e.g., MMDDYY).
	Explanation:	• Explanation may appear in text of synopsis in Item 17. • For solicitations only; if not a solicitation, enter N/A.
11. CONTACT POINT/CONTRACTING OFFICER	Description:	• Includes name and telephone number of contact. • Also includes name and telephone number of CO if different.
	Application:	This entry may be alpha-numeric and up to 320 character blocks.
12. CONTRACT AWARD AND SOLICITATION NUMBER	Description:	The award, solicitation, or project reference number assigned by the agency to provide a reference for offerors/subcontractors.
	Application:	This entry may be alpha-numeric and up to 200 character blocks, plus slashes and dashes.
	Explanation:	For awards only; if not an award, enter N/A.
13. CONTRACT AWARD DOLLAR AMOUNT	Description:	The actual award amount for the contract.
	Application:	• A ten-digit numeric field. • Enter whole dollars only.
	Explanation:	• For awards only; if not an award, enter N/A. • Output will be preceded by a dollar sign ($).

14. CONTRACT LINE ITEM NUMBER	Description:	A "line item number" is an identifying number for an item of supply or service specified in the RFP for which the offeror must propose a price.
	Application:	Use alpha-numeric characters with dashes and slashes. Character field not to exceed 32 spaces.
	Explanation:	• For awards—as desired only; if not an award, enter N/A. • If sufficient space is not available, enter N/A and insert the contract line item number(s) in format item 17.
15. CONTRACT AWARD DATE	Description:	This item shows the date the award is made.
	Application:	Use a six-digit entry (e.g., MMDDYY).
	Explanation:	For awards only; if not an award, enter N/A.
16. CONTRACTOR	Description:	Name and address of successful offeror.
	Application:	400 character spaces are allowed for full identification.
	Explanation:	For awards only; if not an award, enter N/A.
17. DESCRIPTION	Description:	This block of space is open-ended for entry of the substantive description of the contract action. (Insert N/A when syopsizing awards.)
	Application:	See 6.1.3.2

6.1.3.2 Application of Format Item 17

In preparing a synopsis for an RFP, the CO must ensure that Item 17—DESCRIPTION— includes a clear and concise description of the supplies or services to be acquired that is not necessarily restrictive of competition and will allow a prospective offeror to make informed business judgements as to whether a copy of the solicitation should be requested. It should also include the following, to the extent applicable, in sequence:

FAR 5.207(c)

- Name of supply/service.
- National Stock Number (NSN), if assigned.
- Specification and whether offeror, its product, or service must:
  - Meet a qualification requirement in order to be eligible for award, and
  - Identify the office from which additional information about the qualification requirement may be obtained.
- Manufacturer, including part number, drawing number, etc.
- Size, dimensions, or other form, fit, or functional description.
- Predominant material of manufacture.
- Quantity, including any options for additional quantities.
- Unit of issue.
- Destination information.
- Delivery schedule.
- Duration of contract period, including any option periods if CO anticipates that option will be exercised.
- Machine number and routing instructions for alternate means of accepting requests for solicitations (e.g., facsimile machine, Telex).

- Brief details with respect to: location, scope of services required, cost range and limitations, type of contract, estimated starting and completion dates, and any significant evaluation factors for architect/engineer projects and other projects for which the supply or service codes are insufficient.

- Numbered notes (see Section 6.1.3.3).

- When applicable, insert a statement justifying other than full and open competition, and identify the intended source(s).

- Insert a statement that all responsible sources may submit a proposal or quotation, which shall be considered by the agency.

- Provide the machine number and routing instructions when alternate means (facsimile, telex, etc.) are authorized

If the proposed acquisition provides for a total small business or labor surplus area set-aside, state the following in the synopsis under Item 17:

> "The proposed contract listed here is a 100-percent small business (and/or labor surplus area) set-aside."

If the proposed contract is a partial set-aside, state the following:

> "An additional quantity of _____ is being reserved for _____ [insert small business and/or labor surplus area as appropriate] concerns under a partial determination."

6.1.3.3 Numbered Notes

In addition to the information required in Item 17, you may have to cite a Numbered Note (i.e., footnote) at the end of the synopsis. A Numbered Note is used to describe:

FAR 5.207(e)

- How to respond to the synopsis of a proposed contract.
- The qualifications a prospective contractor must have to be considered for an award.
- Instructions for small business or labor surplus area set asides.
- Sole source award (Numbered Note 22).
- Trade Agreements Act of 1979 (Numbered Note 12).

The first issue of the CBD each week lists all current "Numbered Notes." When one or more of the Notes applies to a synopsis, the CO should reference the note at the end of Item 17 of the synopsis (e.g., "See Note(s) _____."). New Notes may be added to the list only when they apply to more than one agency.

6.1.3.4 Forward the Synopsis

In forwarding a synopsis to the CBD, you should:

- Transmit by electronic means whenever feasible.
- Transmit electronically using ASCII Code.
- Contact your agency's communication center for the appropriate transmission instructions or services.

When electronic transmission is not feasible, send synopses to the CBD via mail or other physical delivery of hard copy; address it to:

U.S. Department of Commerce
Commerce Business Daily
P.O. Box 5999
Chicago, IL 60680

Time Requirements for Publicizing

Step 1: The synopsis, if required to solicit, is sent to the CBD.

Step 1A: COs may, unless there is evidence to the contrary, assume that notice has been published 10 days (6 days if electronically transmitted) following transmittal of the synopsis to the CBD. This assumption is based on the CBD's confirmation that publication does occur within these time frames.

FAR 5.203(f)

If by chance a notice has not been published within these time frames, the CO should consider whether the date for receipt of offers can be extended or whether circumstances are sufficiently compelling to justify proceeding with the contract action.

FAR 5.203(a)

Step 2: The synopsis must be published in the CBD at least 15 days prior to the issuance of the RFP.

Step 3: 15 days after the synopsis has been published in the CBD, you can issue the RFP to any interested parties.

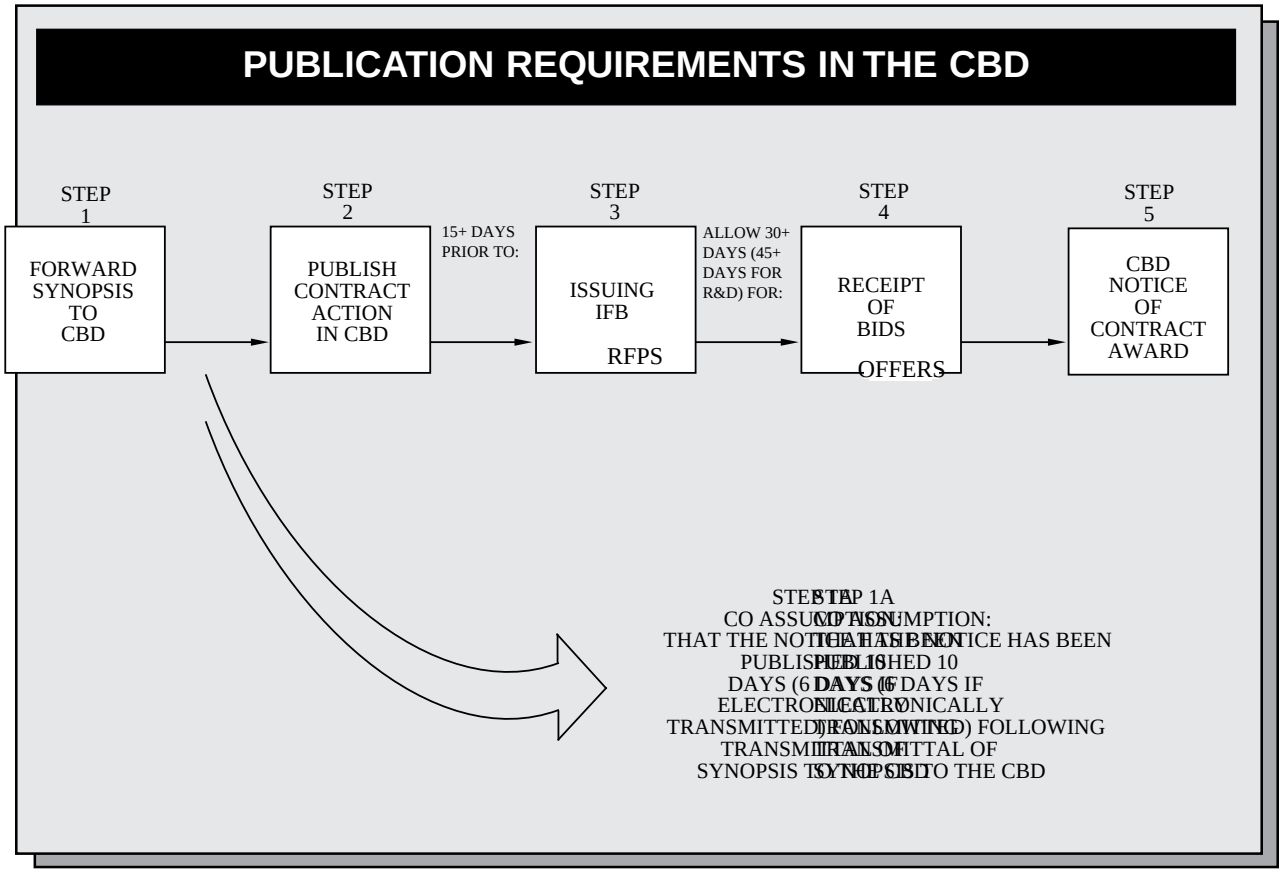


Exhibit 6-1-4

FAR 5.203(b)

Step 4: After the RFP is issued, agencies shall allow at least 30 days response time for receipt of offers.

Other situations:

FAR 5.203(c)

- Agencies shall allow at least 30 days response time from the date of the published notice of intent to contract for architect-engineer services or before issuance of an order under a basic ordering agreement or similar arrangement.

FAR 5.203(d)

- Agencies shall allow at least 45 days response time for receipt of offers from the date of the published notice for contract actions categorized as research and development.

Exhibit 6-1-5 illustrates how to use a calender to determine the amount of time to allow in publicizing the contract.

TIME REQUIREMENTS USING A CALENDER

1989

FEBRUARY

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28				

MARCH

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

Feb 1: Send synopsis to CBD by electronic means.

Feb 7: CO can assume that the synopsis has been published in the CBD. (Start 15 day count.)

Feb 22: Issue the RFP.

Mar 24: Due date for receipt of offers.

Exhibit 6-1-5

The time requirements illustrated are minimum times. When planning your time for receipt of offers, be sure that the closing date for receipt of offers does not fall on a non-workday (i.e., weekend/ holiday). Also, when appropriate, attempt to allow more than 30 days response time for receipt of offers. That will give prospective contractors more time to prepare their offers, possibly resulting in more competition and lower prices.

6.1.4. Publicize the Requirement by Other Methods

Other methods of publicizing RFPs may include:

- Preparing periodic handouts that list proposed contracts and displaying them in a public place at the contract office. This requirement is mandated for contract actions between $10,000 and $25,000.
- Assisting local trade associations in disseminating information to their members.
- Making brief announcements of proposed contracts to newspapers, trade journals, magazines, or other communications media for publication without cost to the Government.

FAR Subpart 5.5

- Using paid advertisements.
- If required by agency regulation, posting a copy of the RFP in a public place (but not before the issue date). A public place would include the contracting activity's bulletin board, bid room, or business service center.

When considering whether or not to use other methods of publicizing contract actions, recall the introduction to this chapter. Your objective is to "get the word out" that you have a requirement to fulfill for your agency, and to do that in a timely cost-effective manner. Therefore, assess these factors to help you determine what additional publicizing is necessary or appropriate:

- The extent to which you need to increase competition,
- The importance of the action,
- The dollar value of the contract action, and
- The complexity of the requirement.

The procedures to use with the other methods of publicizing that are listed under Section 6.1.4 are as follows:

- Preparing periodic handouts. This method relies upon the technical or requirements organizations having adequate acquisition plans. By reviewing those plans, you can, or they can, prepare a listing of anticipated needs for, perhaps, the next fiscal quarter or year. The handout is not an invitation and does not negate the need to synopsize in the CBD. This method is useful when you anticipate repetitive buys of the same or similar items because the prospective contractor may plan ahead to fulfill your needs— perhaps at lower prices.
- Assisting local trade associations. Often, one of the functions of a trade association is to assist members in getting new business. If you are not getting as much competition as you believe is desirable (e.g., building maintenance), check to see if there is an Association of Building Maintenance Contractors (the Association may have already contacted you). If so, they might give you names for your mailing list or offer to publish your RFP announcement in their trade journal free of charge.
- Making brief announcements in newspapers, etc. Some of the more aggressive publications contact procuring activities and volunteer to publish notices of RFPs free of charge. Or, you may make the contact and ask them to publish the notices, free of charge. Your agency's public affairs office might be of assistance.
- Paid advertisements. You will rarely need to use paid advertisements in order to boost competition unless you are selling rather than buying. For example, GSA places paid advertisements to announce the sale of surplus property. This is necessary because the sales are to the public in general, and CBD notices and solicitation mailing lists will not reach prospective buyers. In the event, however, that you decide to use paid advertisements, you will need a contract or delivery order to pay for the advertising and accompanying art work, if any.
- If required by agency regulations. This is similar to the first bullet. While the use of periodic handouts is designed for small purchases, you shall use those same procedures for large purchases if required by agency regulations to do so.

6.1.5 Issue the Solicitation to Interested Parties

After the RFP has been prepared and reviewed for accuracy and completeness, you should initiate the process for release of the RFP. A summary of the steps to be taken in that process are listed below.

STEP 1 Prepare the synopsis.

STEP 2 Forward the synopsis to the U.S. Dept. of Commerce.

(NOTE: It is possible to expedite this process by releasing the synopsis prior to final preparation of the RFP.)

FAR 14.205

STEP 3 Fifteen days after the notice has been published in the CBD (or 15 days after expiration of the 6/10 day period), release the RFP:

-To those prospective offerors who have requested it as a result of having read the CBD notice,
-To those firms who are on your solicitation mailing list, including other public agencies, and
-To those firms who request it as a result of other publicizing actions or simply because they know about it and ask for a copy of the RFP.

STEP 4 Maintain a reasonable number of copies of the RFP so that, upon request, potential sources not initially solicited can be mailed or provided copies of the RFP.

STEP 5 Ensure that RFPs involving classified information are handled asprescribed by agency regulations.

STEP 6 If the contracting office is located in the United States and the security classification permits, send RFPs and related correspondence to foreign addresses by international air mail.

The RFP — How Many Copies?

Determining the number of copies of a RFP that may be needed will take some thought on your part. The demand for copies might run from a very few (10-20 copies) to many (40-60 copies, or more). To help determine how many copies to prepare, you should consider several factors:

- Historical data as to the response on previous purchases of the same or similar items.

- Number of names to be used from the Solicitation Mailing List.
- Dollar value of the proposed contract.
- Time allowed for submission of offers.
- Any geographical limitation (such as labor surplus area) in RFP.
- Extent to which you have used, in addition to the CBD, other methods of publicizing.
- Limitations, such as a small business or labor surplus area set-aside.
- Number needed for internal and file copies and those needed for making award.
- Number to be mailed out to each offeror, (i.e. for submission of original and 1 or 2 copies of offer).

You are required to maintain a reasonable number of copies so that you can promptly fill your planned needs as well as a reasonable number of additional requests. For these additional requests:

- Provide copies on a “first-come-first-served” basis for pickup at your contracting office. Those copies are generally for the benefit of publishers, trade associations, information services, and other members of the public that have a legitimate interest in the procurement.
- Retain a copy of the RFP for review by and duplication for those requesting copies after the initial quantity is exhausted. You are allowed to charge a fee for these copies, not exceeding the actual cost of duplication.

The name and address of everyone who picks up a solicitation should be recorded. In this way each organization that receives a solicitation will also receive an amendment or notice of extension.

WHAT CAN I SAY?

The solicitation you synopsized for technical services has been "out on the street" for 7 days when you begin to receive phone calls from various prospective offerors. The questions are:

1. *How much information is required to meet the minimum qualifications?*

2. *Will I (the offeror) be able to amplify the information concerning technical approach after submission of my proposal?*

3. *The SOW appears ambiguous and contrary to standard industry practice. Can the offeror obtain clarification from the requiring activity?*

How do you respond to these questions?

Even though there are 37 days left before closing date, should you respond orally to these questions?

INTRODUCTION FOR PREAWARD INQUIRIES

What are Preaward Inquiries?

Preaward inquiries are questions and comments from prospective offerors on publicized proposed contract actions before issuance of the RFP or on ambiguous specifications, terms, and/or conditions in the RFP.

In responding to preaward inquiries, you must preserve the integrity of the acquisition process by ensuring:

- That all prospective contractors are treated equally,
- That all prospective contractors offer on an equal footing,
- That no one prospective contractor is given a competitive advantage over any other prospective contractor .

Policy on Release of Information

FAR 5.401

Generally, all Government personnel who participate in the acquisition process "may make available maximum information to the public, except information -

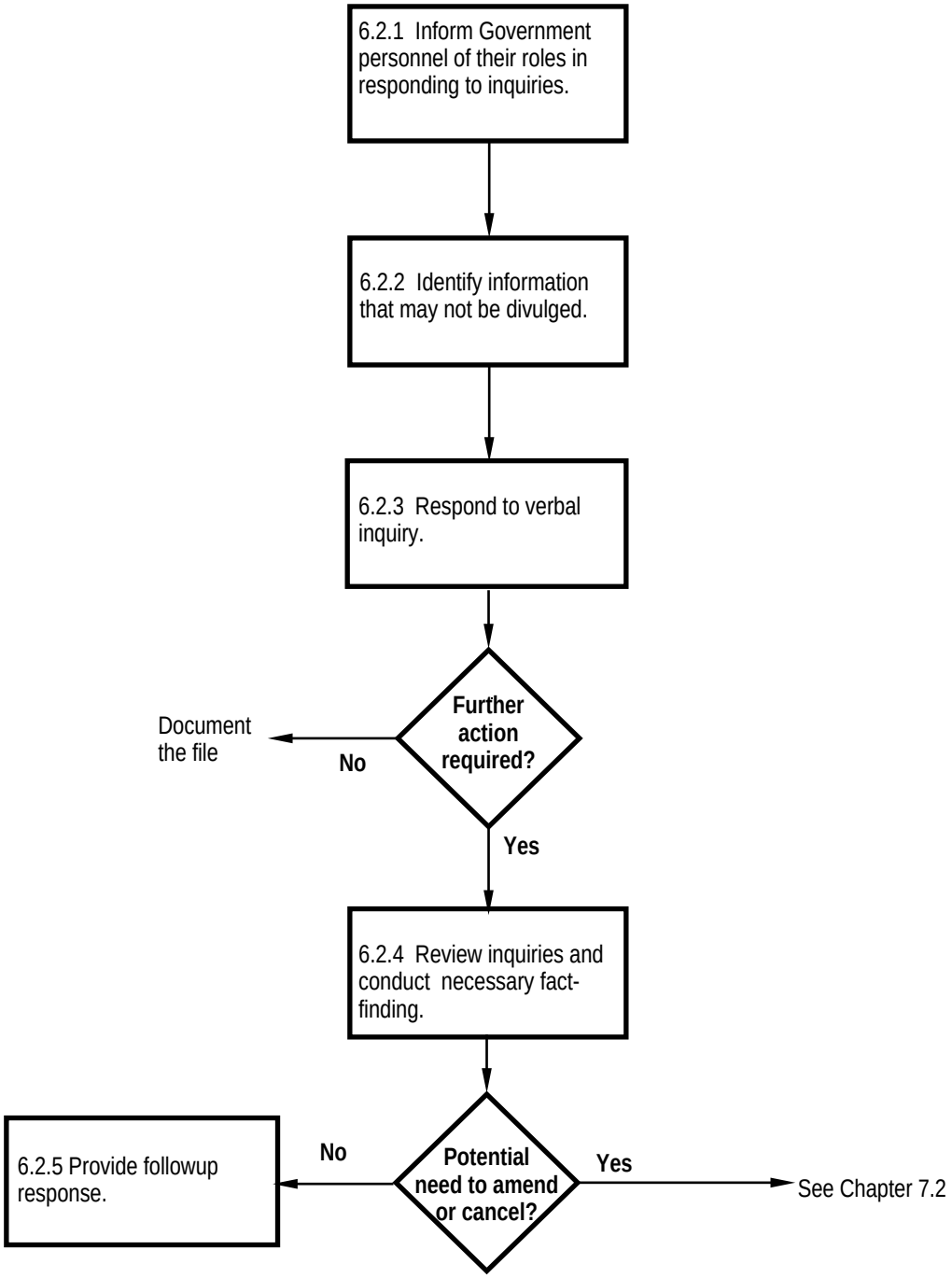
1. On plans that would provide undue or discriminatory advantage to private or personal interests;
2. Received in confidence from an offeror;
3. Otherwise requiring protection under Freedom of Information Act or Privacy Act; or
4. Pertaining to internal agency communications (e.g., technical reviews, contracting authority or recommendations referring thereto)."

Past experience shows that undisciplined responses to inquiries can undermine the acquisition process and often result in protests alleging unfair treatment.

Steps in Responding to Preaward Inquiries

The steps in responding to preaward inquiries are charted on the next page. Following the flowchart, each step is discussed in turn.

STEPS IN RESPONDING TO PREAWARD INQUIRIES



STEPS IN RESPONDING TO PREAWARD INQUIRIES

6.2 RESPOND TO PREAWARD INQUIRIES

6.2.1 Inform Government Personnel of Their Role

Identify who may answer an inquiry:

1. The CO.
2. Others specifically authorized to do so may communicate with or furnish information to prospective contractors concerning a proposed acquisition.
3. You, as a contract specialist acting on behalf of the CO, are authorized to release such information.
4. You should make it clear to persons in your organization that any inquiries, either oral or written, that are received from prospective offerors or others should be referred to you for appropriate action. Caution such persons against furnishing any information that alone or together with other information might afford any one prospective contractor a competitive advantage over another prospective contractor.
5. It is quite likely, however, that you will have to obtain information from the cognizant requirements or technical personnel for use in responding to inquiries if, in fact, it is appropriate to divulge the information requested in the inquiry.

Instruct all personnel to inform the contracting officer of any unauthorized release of information so that applicable steps may be taken to either document the contract file or issue an amendment to all offerors.

Some inquiries do not pertain to the substance of the RFP and may be answered without prejudice to other prospective contractors. You must exercise the utmost care and judgment when deciding whether or not to answer what you believe is a “harmless” inquiry. The test to apply is simply: “Is this general information, the release of which will not be prejudicial to other prospective offerors?” Some examples of general information “which would **not** require an amendment to the RFP” are listed in Exhibit 6-2-1.

GENERAL INFORMATION THAT CAN BE RELEASED

- Explaining the meaning of a standard clause or provision
- Where to obtain copies of specifications
- Directions to the office receiving proposals
- Location of pre-proposal conference (if applicable)

Exhibit 6-2-1

There is no way to predict the questions you might be asked; therefore, apply the test or ask the CO for guidance. If in doubt, ask the CO.

Before RFP is Issued

FAR 14.211(a)

FAR 15.404(b)

Normally, the preaward inquiries that you are most concerned about are those that occur after you issue the IFB. However, for some acquisitions (or a program or series of acquisitions) agencies find it useful to release limited information before the RFP is issued. The authorized methods for releasing acquisition information prior to the RFP are:

- Use of a presolicitation notice particularly when proposal sets are large and expensive. The notice gives information that offerors can use to determine whether or not they want to request a proposal set when the RFP is released. This procedure is particularly suitable when solicitation mailing lists are lengthy.
- When publicizing long-range acquisition requirements that will assist industry planning and that include locating additional sources of supply.

Inquiries that result from the above types of releases are usually more general in nature and do not involve “preferential” information. Within the government, acquisition information shall be restricted to those having a legitimate interest or a need-to-know.

After RFP is Issued

After you have issued the RFP, it is quite likely that you will receive inquiries about various aspects of the RFP. Some of these inquiries may come directly to you and some may be referred to you by the requirements or technical personnel. These inquiries will relate specifically to the RFP and must be carefully considered.

FAR 15.413-1

Only ① the contracting officer, ② the contracting officer's superiors having contractual authority, or ③ others specifically authorized shall transmit technical or other information and conduct discussions with prospective contractors. Unlike sealed bidding, the contracting officer can address many inquiries during negotiation discussions.

6.2.2 Identify Information that may not be Divulged

Information, however, which should not be disclosed is listed in Exhibit 6-2-2.

INFORMATION NOT TO BE RELEASED
• Additional information relative to the Statement of Work or a specification
• Clarification of a requirement or interpretation of an alleged ambiguity
• An opinion of whether an alternate item will be acceptable
• Government Cost Estimate
• Information on an offeror’s responsibility
• Number and names of offerors
• Proprietary and source selection information. See FAR 3.104-5.

Exhibit 6-2-2

If answering any of these inquiries would appear to give the inquirers any insight or knowledge that the other prospective contractors do not have, you should not answer the inquiry.

When you are considering how to answer an inquiry, ask yourself whether or not the information requested is essential to understanding the RFP or whether it is just "good-to-know" information that would help the inquirer to prepare a more competitive offer. If it is the latter, do not give an answer. A simple, polite response to the latter inquiry is that:

> "We do not believe the information requested is essential to the preparation of a responsive offer."

Other bases for formal or informal communications between the CO and the offeror may exist in any given RFP. In all cases, the objective of the CO should be to ensure that no information is revealed which creates a preference for a particular offeror or prejudices any of the competitors.

Freedom of Information Act (FOIA)

FAR 24.2

B-236640.2

You might receive a request for information that is based on the requester's opinion that this information can be obtained under FOIA even though it might not be obtainable under the FAR. Because the FOIA is complex and might be interpreted somewhat differently by executive agencies, you should:

1. Refer to your agency's FAR Supplement for guidance in responding to a request for information under the FOIA, and

2. Refer the request to the officials in your agency that have FOIA responsibility.

3. If you are uncertain as to whom to refer the request to, consult with your legal department.

6.2.3 Respond to Verbal Inquiries

The inquiry that you receive may be written or verbal. The way you respond will be influenced by the nature of the inquiry and by the time remaining until the date set for receipt of proposals. If the inquiry pertains to general information, you may respond in the way most convenient to you (i.e., a letter or phone call).

A frequent inquiry is whether or not you can extend the date for receipt of offers. Ask why more time is needed. If the answer is that:

- the inquirer is very busy and needs more time, or
- the RFP was overlooked for several days, or
- the vendors have been too slow with their quotes, or
- other reasons revolving around the inquirer's ability to respond

your answer should be something like:

> "We believe we have allowed sufficient time, we must meet the acquisition schedule, and the other prospective contractors have not requested more time."

If, however, the inquirer alleges that the work is

- complex,
- proposal preparation will take more than the minimum time, or
- the incumbent or previous contractor has an unfair advantage,

you should delay your answer, consult with the CO, then decide how to respond to the inquiry.

6.2.4 Review Inquiries and Conduct Necessary Factfinding

When an inquiry pertains to explanations or interpretations that are not of a general nature such as the specifications or evaluation criteria, you must notify the contractor of the following:

FAR 52.215-14

1. The request must be in writing, and
2. Be received in time to allow a reply before submission of offers are due.
3. Oral explanations and instructions are not binding on the Government; and
4. If any information is necessary in submitting offers, or lack of it would be prejudicial to other offerors, that information would be furnished as an amendment to the RFP to all prospective offerors.

In addition, you will most likely have to do some factfinding in order to respond:

- obtain the necessary information from the technical or requirements personnel,
- consult with the CO or legal staff as necessary, and
- determine the appropriate response.

6.2.5 Provide a Followup Response

The fact that you have to do some research indicates that you will probably provide the information to more than just the person who made the inquiry.

For example, if the inquiry involves the clarification of a specification, you should take the following action:

- Consult the technical or requirements personnel regarding the clarification needed (if any).
- If it is determined that no clarification is necessary, so notify the inquirer and document the file.
- If a clarification is necessary, put the question asked and the answer given in writing. Send all parties issued an RFP a copy of that document.
- If time is of the essence (the receipt of offers date is near) give oral notification to all, followed by a written confirmation.

If answering any of these inquiries would appear to give the inquirer any insight or knowledge that the other prospective contractors do not have, you should not answer the inquiry.

Amending/Cancelling

However, if any such inquiries lead to a finding that the RFP is deficient as written, consideration should be given to amending or cancelling the RFP. (Subchapter 7.2).

Pre-proposal Conference

When it appears that an amendment to the solicitation would be innovative or complex, or the prospective offerors do not appear to have a reliable understanding of the requirement, you should consider conducting a pre-proposal conference. (Subchapter 7.1)

Document the File

Your documentation on responding to inquiries is extremely important. It is best to prepare file documentation immediately and not rely on your memory later "when you have more time." Items or events to document include:

- A notation of verbal inquiries received (e.g., names, dates, nature of inquiries).
- Written inquiries.
- Your response and the basis for it (e.g., names, dates).
- Memos regarding factfinding (e.g., whom you consulted, rationales, who made the final decision).
- Copies of any correspondence, including to/from and dates.

I'LL TALK TO YOU LATER

After reviewing the oral questions from the prospective offerors, you determine that responses to questions (1) and (2) would not be prejudicial to other offerors provided you responded in a manner such as :

(1) "The information necessary to meet the minimum qualifications is spelled out in Section L of the RFP, and the relative importance in evaluating your proposal is described in Section M. I am not authorized to assist you in preparing your proposal except to direct your attention to the clauses and provisions of the solicitation."

(2) " The Government reserves the right to award a contract on the basis of initial offers received without discussion. This statement is part of the provision at FAR 52.215-16, Contract Award."

For question (3), however, immediate response should not be given other than to say you will conduct a factfinding session and provide an accurate and complete response.

After consulting with the contracting officer and the requiring activity, it is determined that a pre-proposal conference should be held to clarify the statement of work.

CHAPTER 7

PRE-PROPOSAL CONFERENCES
&
AMENDING / CANCELLING RFPs

THE CASE OF THE PRE-PROPOSAL CONFERENCE

A contract specialist receives numerous calls from prospective offerors concerning the specifications of a particular RFP. The large number of questions generated by the RFP leads the contract specialist to believe that there is some defect or deficiency in the RFP. The CO determines that a pre-proposal conference would clarify the matter and benefit both the government and prospective contractors. At the conference, the CO and the prospective offerors agree as to how to interpret the specifications. In a few weeks, offers are received and a contract is awarded. A protest is submitted by one of the offerors who was not at the pre-proposal conference and was unaware of the clarifications made at the conference until after award.

Do you think that the protest will be upheld?

What, if anything did the contract specialist not do that should have been done?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Determine the need for and conduct a pre-proposal conference.
Determine whether to amend, cancel, or make no changes to the RFP.
Prepare amendments or cancel the RFP.

Individual:

PRE-PROPOSAL CONFERENCE

7.1.1 Determine the need for a pre-proposal conference.

7.1.2 Develop agenda and invite attendees.

7.1.3 Brief technical personnel.

7.1.4 Prepare opening briefing for the conference.

7.1.5 Conduct and record conference.

AMENDING/CANCELLING RFPs

7.2.1 Determine whether to amend, cancel, or make no changes to the solicitation.

IF AMEND,

7.2.2 Determine whether to extend the date for receipt of offers.

7.2.3 Prepare and issue an amendment to the solicitation.

IF CANCEL,

7.2.4 Prepare and issue notice of cancellation.

INTRODUCTION FOR PRE-PROPOSAL CONFERENCES

Policy

FAR 15.409

After a solicitation has been issued, but prior to offers being submitted, the Government may use a pre-proposal conference in

> "complex negotiated acquisitions to explain or clarify complicated specifications and requirements."

The conference shall not be used to prequalify or preselect prospective contractors. Caution, control, and good judgment must be exercised by the contracting officer and all Government personnel in attendance.

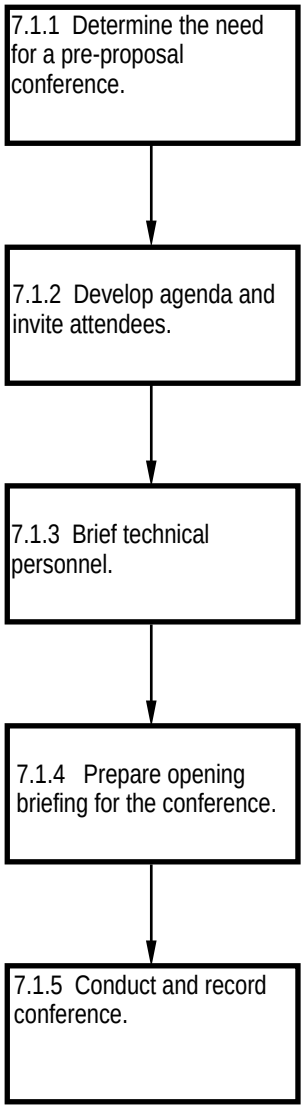
Steps in Performance:

The steps in conducting a pre-proposal conference are charted on the next page. Following the flowchart each step is discussed in turn in Subchapter 7.1.

The flowchart and discussion for amending/cancelling an RFP is addressed in Subchapter 7.2.

STEPS IN

CONDUCTING PRE-PROPOSAL CONFERENCES



STEPS IN CONDUCTING PRE-PROPOSAL CONFERENCES

7.1 PRE-PROPOSAL CONFERENCES

7.1.1 Determine Need for a Pre-proposal Conference

After issuing a solicitation, it is the contracting officer's responsibility to determine if a pre-proposal conference should be held when it is apparent that contractors do not have a reliable or valid understanding of the contract's requirement.

This decision can be based on factors such as:

FAR 37.110(a)

- Complex requirement and/or technical evaluation criteria
- Need of contractors to physically inspect work sites, property to be furnished by the Government, etc.
- Revision to requirement
- Long periods of time between awards
- Contractor inquiries suggesting that key terms and conditions are vague, ambiguous, or unattractive to industry
- Dollar amount

7.1.2 Develop Agenda and Invite Attendees

When a decision is made to hold a pre-proposal conference, the contracting officer is required to make the necessary arrangements by taking the following **Steps**:

1. Develop the agenda:
   - Briefing on solicitation
   - Presentation of prepared responses to questions submitted in advance
   - Questions and answers from the floor
2. If notice was not in the solicitation, give all prospective offerors who received the solicitation adequate notice of the time, place, nature, and scope (include agenda) of the conference.
3. If time allows, request prospective offerors to submit written questions in advance. Prepared answers can then be delivered during the conference.
4. Arrange for technical and legal personnel to attend the conference, if appropriate.

7.1.3 Brief Technical Personnel

When technical personnel from the requiring activity are required to attend the conference, the contracting officer or designated representative should inform them of:

- What their role will be in the conference.
- What the agenda will be when conducting the conference.
- What the limits are in providing information to attendees.

Refer submitted written technical questions to technical personnel for research and preparation of written comments.

7.1.4 Prepare Opening Briefing for the Conference

The opening briefing on the solicitation should cover:

- Background and other facts not covered in the solicitation.
- Description of the requirement and evaluation factors in Section M of the RFP.
- Emphasis on special terms and conditions not ordinarily included.
- If the method of procurement has changed since the previous contract, describe the process.
- Government's positions on potentially controversial issues (e.g., why not set aside for small business).
- Invitation to ask questions or express concerns with the solicitation.

During this opening briefing, you should be very careful not to make any statement that conflicts with the solicitation.

7.1.5 Conduct and Record the Conference

The contracting officer or a designated representative shall:

1. Conduct the pre-proposal conference.
2. Furnish all prospective offerors identical information concerning the proposed acquisition.
3. Make a complete record of the conference.
4. Promptly furnish a copy of the record to all prospective offerors.

Conferees shall be advised that:

> **Remarks and explanations at the conference shall not qualify the terms of the solicitation;**
> and
> **Terms of the solicitation and specifications remain unchanged unless the solicitation is amended in writing.**

A pre-proposal conference should never be used as a substitute for amending a defective or ambiguous RFP. As the contracting officer's representative, you must now make a determination whether to:

① amend the solicitation,
② cancel the solicitation, or
③ leave the solicitation as is,

based on the information recorded during the conference.

If only one or two prospective offerors attend the conference, contact other potential offerors and determine if there is any additional problem with the procurement.

AND THE "WINNER" IS....

Let's look back at the protest question. Can you answer it now based on the information you have just read?

The protest will be upheld because all of the prospective offerors were not furnished the information discussed at the pre-proposal conference. Pre-proposal conferences shall never be used as a substitute for amending a defective or ambiguous invitation.

AMEND, CANCEL, OR LEAVE ALONE?

Now suppose, immediately following the pre-proposal conference, the project manager reviewed the comments offered by the technical personnel, and determined that a clarification is needed that would result in minor additions to the SOW.

Should the solicitation be cancelled and reissued, amended, or left "as is" to negotiate the additions after proposals are received?

INTRODUCTION FOR CANCELLING/AMENDING RFPs

Amending RFPs

To amend an RFP you use an SF 30. This form describes how the RFP is changed (i.e., addition or deletion of quantities, correct or incorrect statements, etc.). The amendment becomes a part of the RFP and of the resulting contract. Amendments can be issued before or after the date for receipt of proposals. If the amendment, or subsequent amendments are of such a magnitude or complexity, you may want to cancel the RFP and start over, including republicizing.

Amendments are not necessary just because a prospective contractor has a question or suggests that an amendment should be issued. You must

evaluate the situation,
consult with others, and then
make your recommendation to the CO.

Amendments are expensive and time consuming and should not be issued unless necessary. However, if an amendment is appropriate, by all means issue it.

Cancelling RFPs

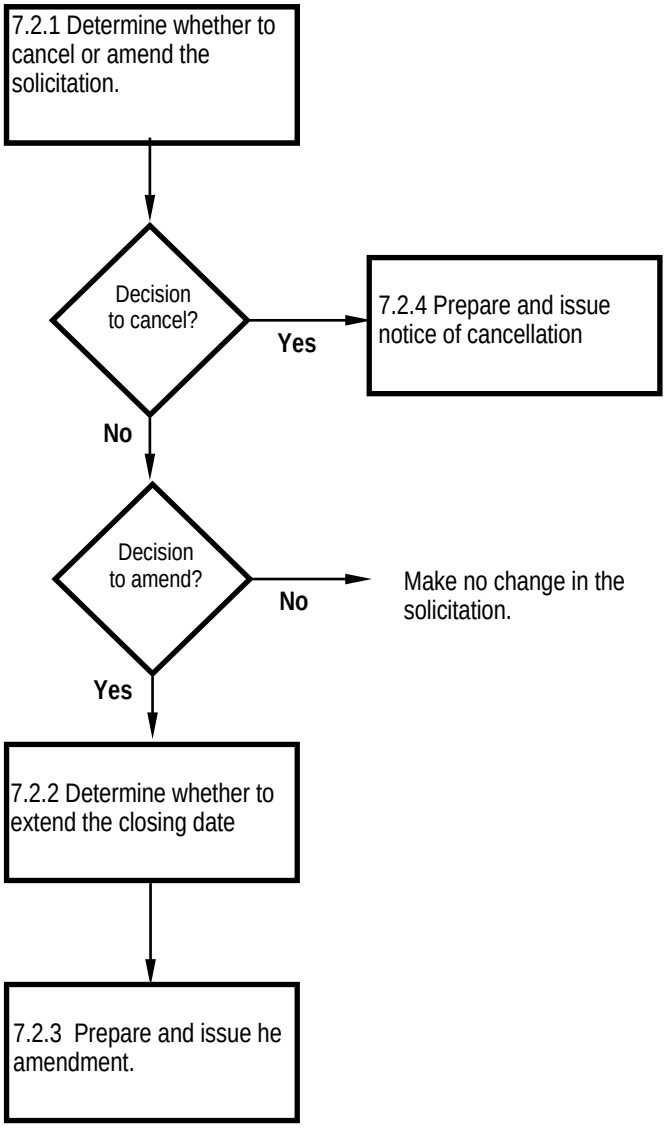
The cancellation of an RFP also involves time, money, and effort for both the Government and the prospective offerors. Therefore, if a cancellation becomes necessary, take prompt action. Avoid cancellations unless they are clearly necessary or in the public interest.

Steps in Performance

The steps in amending RFPs are charted on the next page. Following the flowchart, each step is discussed in turn.

NOTE: Shaded text in this subchapter denotes tasks that are the same as in the sealed bidding method of procurement, and the shaded text itself is taken from the Sealed Bidding Text/ Reference.

STEPS IN AMENDING/CANCELLING RFPS



STEPS IN AMENDING/CANCELLING RFPs

7.2 AMENDING / CANCELLING RFPS

7.2.1 Determine Whether to Cancel or Amend the RFP

After the RFP is issued, you might receive numerous inquiries concerning the RFP. If the inquiries persist, you might have to determine whether or not to amend the RFP or cancel the RFP and either return the requirement to the requiring activity or resolicit using a new RFP. Problems with the RFP might also become apparent as the result of further "in-house" review, such as:

- changed requirements within the requiring activity or
- new acquisition regulations within the contracting office.

Generally, problems with the RFP are traceable to, or stem from, the specifications or statement of work in Section C and price-related factors in Section M of the RFP.

You might find it necessary to make changes in specifications, delivery schedules, closing date for receipt of offers, quantities, or to correct ambiguities or defects in the RFP. Amendments might be necessary as the result of a revised purchase request issued by the requiring activity (e.g., a rewritten specification). Administrative changes to an RFP (e.g., a new date for receipt of offers) deemed necessary by the CO might also result in an amendment.

Problems with RFPs may come to light in a variety of ways:

WAYS TO IDENTIFY PROBLEMS WITH ISSUED RFPs

- Offeror Inquiries
- Pre-proposal Conferences
- Technical Evaluations
- Factfinding Conferences

Exhibit 7-2-1

Potential Problems with Issued RFPs

When faced with a large number of inquiries after release of the RFP but before the date for receipt of offers, you should reexamine the RFP to determine what the problem is and then decide how to resolve it. Exhibit 7-2-2 gives examples of what to look for when making a decision on whether to amend or cancel an RFP.

POTENTIAL PROBLEMS WITH ISSUED SOLICITATIONS

- Incomplete, inaccurate, or missing terms, conditions, or data.
- Terms or conditions that are being misinterpreted by potential offerors (vague or ambiguous).
- Release of additional data that was not sent to all potential offerors.
- One or more offerors identified terms or conditions (especially elements of the specification) which are inferior to possible alternatives.
- Terms and conditions that unnecessarily restrict competition or otherwise discriminate against some potential offerors.
- The notice of contract action was not published at least 15 days before issuance of the RFP (in which case an amendment may be necessary to postpone the closing date or justify urgency for keeping the closing date as is).

Exhibit 7-2-2

Problems Discovered "In-house"

Problems with the RFP are often detected by offerors; however, the requiring activity or other Government officials may also discover problems with the RFP or ask that the RFP be amended because:

- The number of units to be purchased should be increased or decreased.
- A decision has been made to change the specifications or statement of work.

- The place or time for delivery has changed.
- A price-related evaluation factor is to be included.
- The date, time, or place for receipt of offers should be changed or corrected.

Whatever the circumstance, you must amend the solicitation in order to change it. Any such change must be accomplished by issuing an SF 30.

IF AMEND

7.2.2 Determine Whether to Extend Date for Receipt of Offers

B-242240

If you decide to amend a solicitation, you must next decide whether to extend the closing date for receipt of offers. Sound business judgement must be used so that the extension does not limit competition. **Many protests occur when prospective offerors perceive extensions (or the refusal to extend a closing date) as favoring certain competitors.** When extending the date for receipt of offers, consider the following:

1. Time required to amend the RFP and distribute it, and
2. Time required for the prospective offerors to make any necessary changes to their proposals.

If the time available before closing is insufficient, extend the closing date. If the conditions warrant, you may notify prospective offerors by telegram or telephone of the planned change and of the extension. In addition, **you must confirm the changes in a written amendment to the RFP**.

The amendment must be sent to all the prospective offerors to whom you sent the RFP.

7.2.3 Prepare and Issue Amendment

The SF 30, Amendment of Solicitation/Modification of Contract, is prescribed for use when amending a solicitation (and modifying contracts). Instructions for filling out the SF 30 are provided on the back of the form. Items that must be included are shown in Exhibit 7-2-3.

PREPARING THE SF 30

Be sure to:

- Include the number of the solicitation that you are amending, as well as amendment number.
- Indicate whether or not the date and time set for receipt of offers is extended.
- Show the new date and time set for receipt of offers.
- Clearly show what the amendment does to the RFP — changes, additions, corrections, etc.
- Put all changes under the appropriate UCF heading.
- Attach any new specifications, drawings, etc., and clearly mark them as replacements to existing pages or additions thereto.

Exhibit 7-2-3

BETTER NOW THAN LATER

After conferring with the Project Manager on the changes to the SOW and on the recommendation of the contracting officer, you decide to amend the solicitation. Because the closing date is in two weeks and several offerors are located across country, you also decide to extend the closing date an additional 10 days.

After the amendment has been prepared, you should issue the amendment using the following guidelines.

- If proposals are not yet due, send a copy to every firm that received a solicitation.
- If proposals have been received, send a copy to all responding offerors.
- If the competitive range has been established, send a copy to offerors that are in the range.

FAR 15.410 (c)

Any information given to a prospective offeror shall be furnished promptly to all other prospective offerors as a solicitation amendment if the:

① information is necessary for submitting proposals, or

② lack of it would be prejudicial to a prospective offeror.

An example of a SF 30 and the instructions on the back of the form are shown on the next two pages.

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUESTING/PURCHASE REQ. NO.	5. PROJECT NO. *(If applicable)*

6. ISSUED BY CODE

7. ADMINISTERED BY *(If other than Item 6)* CODE

8. NAME AND ADDRESS OF CONTRACTOR *(No., street, country, State and Zip Code)*

CODE FACILITY CODE

(✓) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED

10A. MODIFICATION OF CONTRACT/ORDER NO.

10B. DATED *(SEE ITEM 13)*

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TOT HE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA *(If required)*

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(✓) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: *(Specify authority)* THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES *(such as changes in paying office, appropriation date, etc.)* SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.102(b).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

D. OTHER *(Specify type of modification and authority)*

E. IMPORTANT: Contractor ☐ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION *(Organized by UCF section headings, including solicitation/contract subject matter where feasible.)*

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER *(Type or print)*		16A. NAME AND TITLE OF CONTRACTING OFFICER *(Type or print)*	
15B. CONTRACTOR/OFFEROR *(Signature of person authorized to sign)*	15C. DATE SIGNED	16B. UNITED STATE OF AMERICA BY _____ *(Signature of Contracting Officer)*	16C. DATE SIGNED

STANDARD FORM 30 (REV. 10-83
Prescribed by GSA
FAR (48 CFR) 53.243

Exhibit 7-2-4

INSTRUCTIONS

Instructions for items other than those that are self-explanatory, are as follows:

(a) Item 1 (Contract ID Code). Insert the contract type identification code that appears in the title block of the contract being modified.

(b) Item 3 (Effective Date).

(1) For a solicitation amendment, change order, or administrative change, the effective date shall be the issue date of the amendment, change order, or administrative change.

(2) For a supplemental agreement, the effective date shall be the date agreed to by the contracting parties.

(3) For a modification issued as an initial or confirming notice of termination for the convenience of the Government, the effective date and the modification number of the confirming notice shall be the same as the effective date and modification number of the initial notice.

(4) For a modification converting a termination for default to a termination for the convenience of the Government, the effective date shall be the same as the effective date of the termination for default.

(5) For a modification confirming the contracting officer's determination of the amount due in settlement of a contract termination, the effective date shall be the same as the effective date of the initial decision.

(c) Item 6 (Issued By). Insert the name and address of the issuing office. If applicable, insert the appropriate issuing office code in the code block.

(d) Item 8 (Name and Address of Contractor). For modifications to a contract or order, enter the contractor's name, address, and code as shown in the original contract or order, unless changed by this or a previous modification.

(e) Items 9. (Amendment of Solicitation No. —Dated) and 10. (Modification of Contract/Order No. —Dated). Check the appropriate box and in the corresponding blanks insert the number and date of the original solicitation, contract, or order.

(f) Item 12 (Accounting and Appropriation Data). When appropriate, indicate the impact of the modification on each affected accounting classification by inserting one of the following entries:

(1) Accounting classification .....
Net increase $ .....

(2) Accounting classification .....
Net decrease $.....

NOTE: If there are changes to multiple accounting classifications that cannot be placed in block 12, insert an asterisk and the words "See continuation sheet".

(g) Item 13. Check the appropriate box to indicate the type of modification. Insert in the corresponding blank the authority under which the modification is issued. Check whether or not contractor must sign this document. (See FAR 43.103.)

(h) Item 14 (Description of Amendment/Modification).

(1) Organize amendments or modifications under the appropriate Uniform Contract Format (UCF) section headings from the applicable solicitation or contract. The UCF table of contents, however, shall not be set forth in this document.

(2) Indicate the impact of the modification on the overall total contract price by inserting one of the following entries:

(i) Total contract price increased by $.....

(ii) Total contract price decreased by $.....

(iii) Total contract price unchanged.

(3) State reason for modification.

(4) When removing, reinstating, or adding funds, identify the contract items and accounting classifications.

(5) When the SF 30 is used to reflect a determination by the contracting officer of the amount due in settlement of a contract terminated for the convenience of the Government, the entry in Item 14 of the modification may be limited to —

(i) A reference to the letter determination; and

(ii) A statement of the net amount determined to be due in settlement of the contract.

(6) Include subject matter or short title of solicitation/contract where feasible.

(i) Item 16B. The contracting officer's signature is not required on solicitation amendments. The contracting officer's signature is normally affixed last on supplemental agreements.

7.2.4 Prepare and Issue Notice of Cancellation

In certain instances, it may be necessary to cancel a solicitation either before or after the closing date for receipt of offerors.

When, for example, amendments to the RFP are very extensive (i.e., the overall scope of the work has changed to such an extent that the original synopsis and/or RFP no longer validly describe the requirements) then a new RFP is desirable. Instances of decisions related to the cancellation of RFPs follow and are outlined in Exhibit 7-2-5*.

Must Cancel

RFPs must specifically cite specifications and standards that apply to the work to be performed. Those documents are generally included as part of the RFP package. If, after opening the offers, it is discovered that the specifications were not available or that they were not clearly or completely identified, you must cancel the RFP. Without a clear description of the work, all offerors may not be competing on the same footing and a low offer maybe meaningless.

If the CO makes a determination to cancel, action should be taken as indicated in the following two categories:

May Cancel

Category 1: In these situations, the CO shall cancel the RFP and may resolicit if the need still exists.

- **Inadequate or ambiguous specifications were cited in the** RFP. If you resolicit, ensure that this deficiency is completely overcome.

- **Specifications were revised**. If you resolicit, ensure that the revised specifications are clearly identified and that the "old" specifications do not reenter the system. Emphasize to the requirements personnel that they must provide you with firm specifications; point out the problems caused by a cancellation.

- **The solicitation did not provide for consideration of all factors of cost to the Government**, such as cost of transporting Government-furnished property to offerors' plants. If price-related factors are not stated, they cannot be used as an evaluation factor, and the Government may not obtain the most favorable transaction. A prospective offeror might or might not submit an offer, depending on the effect that factor has on its

* Exhibit 7-2-4 reserved

CANCELLING RFPs

MUST CANCEL

- Non-availability or non-identification of specifications.

MAY CANCEL

1. Instances where the CO may cancel and resolicit:

   - Inadequate or ambiguous specifications were cited in the RFP.
   - Specifications revised.
   - All factors of cost to the Government not included in the RFP.
   - Offers indicate that needs can be met by less expensive articles.
   - Other reasons clearly in the public interest.

2. Other instances where the CO may cancel, but not resolicit:

   - A-76 cost comparison shows performance more economical in-house.
   - Supplies or services no longer required.

SHOULD NOT CANCEL

- Due solely to increased requirements for the items being acquired.
- Prospective offeror is inadvertently not solicited.

Exhibit 7-2-5

competitive position. If it is appropriate to use a price-related factor(s), be sure it is included in the resolicitation.

- **Offers received indicate that the needs of the Government can be satisfied by a less expensive article than was solicited**. Sometimes offerors will ask for a waiver of certain requirements, or offer alternative items that they claim will result in meeting the Government's needs at a lower price. If there is enough indication that the Government's needs can be met less expensively by specifying a different article, you should resolicit and specify the different article. Concurrence of the requirements organization must first be obtained.

- **Cancellation was made for reason clearly in the public interest.** Situations include an undesirable environmental impact if award is made under the current RFP, or perhaps changes in international relations and cancellation and resolicitation is desirable. Also, if all offers are otherwise unreasonable.

Category 2: In these situations, the CO shall cancel and not resolicit.

FAR Subpart 7.3

- **A cost comparison as prescribed in OMB Circular A-76 shows that performance by the Government is more economical**. If the Government in effect "gets the award", the RFP will be cancelled, and the work will be performed by the Government.
- **The supplies or services being contracted for are no longer required**.

Should Not Cancel

In the following situations, the CO should not cancel the solicitation.

- Due solely to increased requirements for the items being acquired
- Prospective offeror is inadvertently not solicited due to an oversight: the general rule is that such failure is not sufficient reason to require rejection of all offers and cancellation of the RFP and subsequent readvertisement.

Avoid cancellations unless they are clearly necessary or in the public interest.

Cancellation notices are generally prepared in letter form or by completing an SF 30 and include the information provided in Exhibit 7-2-6.

INCLUDE IN THE CANCELLATION NOTICE

- The solicitation number.
- A brief description of the supplies or services cancelled.
- Reasons for cancelling the RFP.
- A statement that the addressee will be given the opportunity to offer on any future requirements for the work or services cancelled.

Exhibit 7-2-6

When you cancel a solicitation before the closing date, you must return, unopened, any offers received with the notice of cancellation. Send the cancellation notice to all prospective offerors to whom the RFP was sent. If you receive any more offers (those in the mail before the cancellation) be sure to return them unopened to the sender.

Synopsize Cancellation

Publishing a cancellation synopsis in the CBD is good procurement practice and may be required by agency policy. However, the FAR does not require that a cancellation synopsis be written. If the cancelled solicitation is going to be resolicited, synopsize the cancellation in conjunction with the synopsis for the resolicitation.

Document the File

After the cancellation notice has been released, you should document the contract file as follows:

- Reasons for the cancellation.
- A copy of the cancellation notice.
- Related letters, memos, etc.
- Number of RFPs distributed.
- Number of offers received.

CHAPTER 8

PROCESSING PROPOSALS
&
REVIEWING TECHNICAL EVALUATIONS

DELAYED CONSIDERATIONS

Your solicitation closed yesterday at 4:30 PM. At that time two proposals had been received and recorded. A proposal from the WeSell Company arrives in the morning mail today.

Can you accept this proposal to be considered for award?

What is done with the proposal if it can not be considered?

Later during the day you receive a call from an anxious offeror who calls to verify your receipt of the WeSell proposal. Wanting to assess the competition, he casually asks you how many other proposals were submitted.

Do you give him this information?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Determine timeliness, completeness and responsiveness of proposals.
Analyze technical evaluation reviews.

Individual:

PROCESSING PROPOSALS

8.1.1 Receive, open, and record proposals.

8.1.2 Safeguard proposals against unauthorized disclosure.

8.1.3 Review proposals for completeness and identify variances from the RFP's terms and conditions.

8.1.4 Reject proposals that cannot be made responsive.

8.1.5 Designate individuals to review proposals and request their assistance.

TECHNICAL EVALUATIONS

8.2.1 Instruct technical evaluators.

8.2.2 Obtain and review the technical evaluation report.

8.2.3 Brief the source selection evaluation board.

8.2.4 Obtain technical rankings and supporting documentation for proposals.

INTRODUCTION FOR PROCESSING PROPOSALS

Policy

FAR 15.411

During the period between the receipt of proposals and award of a contract, the Government bears the responsibility for assuring that proposals are properly handled:

- Follow procedures similar to those used in the handling and safeguarding of sealed bids, and/or
- Generally follow your agency procedures.

The primary concern in handling proposals is safeguarding the content of the proposed contractors' offers from all unauthorized personnel, both in the Government and in industry. Generally, unclassified and "confidential" proposals are locked in file cabinets until the designated time set to receive offers.

The major difference between sealed bidding and negotiation at this point is that the latter method does not involve a public opening and inspection of proposals.

Each proposal received must be reviewed for responsiveness. Qualified personnel are then selected to evaluate technical acceptability and compliance.

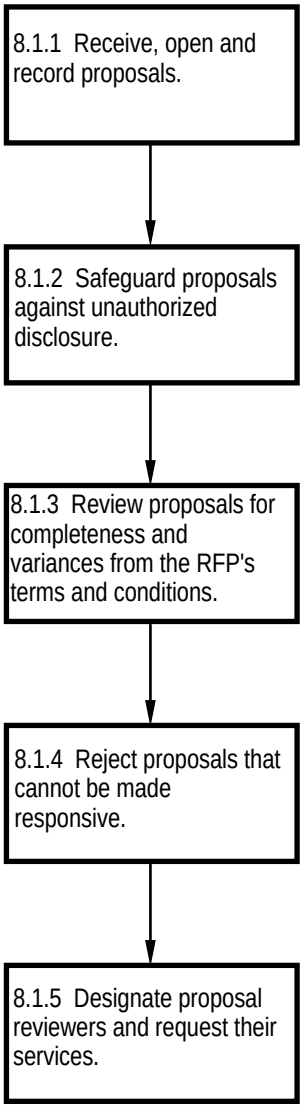
Steps in Performance:

The steps in processing proposals are charted on the next page. Following the flowchart each step is discussed in turn in Subchapter 8.1.

The flowchart and discussion for reviewing technical evaluations is addressed in Subchapter 8.2.

NOTE: Shaded text in this subchapter denotes tasks that are the same as in the sealed bidding method of procurement, and the shaded text itself is taken from the Sealed Bidding Text/Reference.

STEPS IN PROCESSING PROPOSALS



STEPS IN PROCESSING PROPOSALS

8.1 PROCESSING PROPOSALS

8.1.1 Receive, Open, and Record Proposals

Offerors may submit their proposals in a variety of ways:

- regular mail,
- certified/registered mail,
- messenger,
- USPS express mail or commercial express mail,
- facsimile.

FAR 15.412

Solicitations state that proposals must be received by the **exact** time and date set for receipt of offers. Any method used by offerors other than:

- certified, registered mail sent 5 days prior to receipt of offers, or
- USPS express mail sent 2 days prior to receipt of offers

is done at their own risk.

As proposals arrive at the place designated in the solicitation, a receiving official will follow the steps in Exhibit 8-1-1.

SECURING PROPOSALS

Steps to secure proposals:

1. Time stamp proposals.
2. Record receipt in a log.
3. Secure in a locked box or safe with log.
4. DO NOT OPEN PROPOSALS.
5. Provide information to Government employees only on a "need to know" basis.

Exhibit 8-1-1

Envelopes that are

- not marked, or
- marked as proposals, but do not identify the offeror or the solicitation

may be opened **solely for identification**. In these cases, the envelope shall include the opener's signature and position title and shall be delivered to the designated contracting official.

This official shall immediately write on the envelope:

- an explanation of the opening,
- the date and time opened, and
- the solicitation number.

The official should then immediately sign and reseal the envelope. No information contained in the envelope shall be discussed before the time set for receipt of offers.

Late Proposals

Proposals submitted after the due date and time specified in the RFP are a perennial source of protests. It is the offerors' responsibility to ensure the timely arrival of proposals at the designated place set for receipt of proposals. Acceptance of a late proposal, no matter how minor the apparent discrepancy, provides a basis for protest by any other offeror.

FAR 15.412

However, there are a few **exceptions to the policy of "late is late."** Late proposals, and any modifications* thereto, can be accepted only if they are received before award is made and they fall under one of the following situations:

FAR 52.215-10

B-237160.2

- Sent by registered or certified mail not later than five calendar days before the closing date.
- Sent by mail (or telegram or facsimile), and the Government determines lateness was due to mishandling by the Government.
- Sent by U. S. Postal Service Express Mail Next Day Service no later than 5:00 PM two federal working days prior to the closing date.
- A modification to an otherwise successful proposal may be considered at any time, if the modification would be more favorable to the Government.
- Is the only proposal received.

Acceptable evidence to establish the date of mailing a late proposal or withdrawal sent either by registered or certified mail (or Express Mail Next Day Service: for USPS Express Mail, the date entered by the post

* Modification, as used in this section, means a modification of a proposal, including a final modification in response to the contracting officer's request for "best and final offers". The term does not include normal revisions of offers made during the conduct of negotiations by offerors selected for discussions.

office receiving clerk on the Express Mail label is also required) is:

> "a U.S. or Canadian Postal Service postmark on the envelop or wrapper and on the original receipt."

The date must be legible in order to be considered, therefore, offerors should request the postal clerk to place a hand cancellation "bull's eye" postmark on both the receipt and the envelope wrapper.

When a late proposal or modification is received and it is clear from available information that it cannot be considered for award, you should promptly notify the offeror that it was received late and will not be considered. However, when a late submission is sent to a contracting office by registered or certified mail or by USPS Express Mail and is received before award, the offeror should be promptly notified as follows:

"Your offer in response to Request for Proposal Number_____ dated_____for _____(insert subject matter or short title) was received after the time for opening as specified in the solicitation. Accordingly, your offer will not be opened or considered for award unless there is received from you by _____ (insert date) the original post office receipt for (insert one of the following, as appropriate):

(a) registered or certified mail showing a date of mailing not later than the fifth calendar day before the date specified for opening (e.g., a bid submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th or earlier); or

(b) USPS Express Mail showing a date of mailing not later than 5:00PM two Federal working days prior to the date specified for opening."

The notice need not be given if the proposed contract is to be awarded within a few days.

FAR 52.215-36

If the contracting office is located outside the United States or Canada, the Late Submissions, Modifications, and Withdrawal of Proposals (Overseas) provision is used in the Solicitation. It does not make reference to the above U.S. or Canadian Postal Service procedures.

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Hold all unaccepted late proposals and modifications unopened, until after award, and retain them with other unsuccessful proposals. Document the file in accordance with Exhibit 8-1-2.

LATE PROPOSAL DOCUMENTATION

- Date of mailing, filing or delivery.
- Date and hour of receipt.
- Whether or not considered for award.
- Envelope, wrapper or other evidence of date of submission.

Exhibit 8-1-2

Withdrawal of Proposals

Proposals may be withdrawn by written notice received at any time before award. Proposals may be withdrawn in person by an offeror or an authorized representative known to the Government.

Open and Record Proposals

FAR 25.405(c)

As soon as possible after the closing date, privately open (i.e., not a "public" opening) and record proposal information. Some agencies prescribe the use of SF 1409, Abstract of Offers. If the Trade Agreements Act applies to the procurement, the competitve offers shall be opened in the presence of an impartial witness, whose name shall be recorded in the contract file.

8.1.2 Safeguard Proposals

FAR 15.413

Unlike sealed bidding, in a negotiated procurement most information concerning the proposals received should be made available only to Government employees having a legitimate interest. The information you should safeguard includes the following:

- Number of proposals received.
- Identity of offerors.
- Information contained in the proposals.
- Any restriction placed on disclosure and use of data by an offeror.

Sometimes, prospective contractors may submit proposals with descriptive literature or material or special technical data for which they have a **proprietary interest**. Typically, they do not want this information disclosed to the public or used by the Government for any

purpose other than the evaluation of their offers. Prospective contractors may mark each sheet of technical data they wish to restrict with the following legend:

FAR 52.215-12

> "This proposal contains data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed - in whole or in part - for any purpose other than to evaluate this proposal. If, however, a contract is awarded to this offeror as a result of - or in conjunction with - the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [*insert numbers or other identification of sheets]."*

Contracting personnel may not refuse to consider any proposal merely because the data submitted with it are marked in this way.

FAR 3.104-5(c)

Whether the proposal is so marked or not, you must ① determine if the proposal contains proprietary or source selection information, and ② mark the cover page and each page containing source selection information with the legend:

> "SOURCE SELECTION INFORMATION - SEE FAR 3.104".

Exhibit 8-1-3 provides some guidelines on source selection information.

SOURCE SELECTION INFORMATION

FAR 3.104-4(k)(2)

1. Proposed costs or prices submitted for an RFP.
2. Source selection plans.
3. Technical evaluation plans.
4. Technical evaluation of proposals.
5. Cost or price evaluations of proposals.
6. Competitive range determinations.
7. Rankings of proposals.
8. Reports/evaluations of source selection panels, boards, etc.
9. Other information marked "SOURCE SELECTION INFORMATION - SEE FAR 3.104" by the offeror.

Exhibit 8-1-3

8.1.3 Review Proposals for Completeness

B-238980

Under a negotiated acquisition, <u>any contractual terms and provisions may be subject to negotiation</u>. Accordingly, you are permitted great latitude in considering offers that fail to conform to the solicitation or which qualify or suggest alternatives for the Government's stated requirements. It is your responsibility to review all timely proposals to identify:

- any minor irregularities and informalities,
- any substantive differences between the RFP and the proposal's terms and conditions, or
- inconsistencies and errors of quantitative or other reasoning.

Examples of minor irregularities and informalities include but are not limited to the failure of an offeror to:

FAR 4.102

- Provide information concerning the number of its employees.
- Return the number of copies of signed offers required by solicitation
- Furnish affidavits concerning parent company and affiliates.
- Execute the certifications with respect to Equal Opportunity and Affirmative Action Programs.

In a negotiated procurement, clarifications can be initiated either by you or the offeror to eliminate minor irregularities or apparent clerical mistakes. However, it is your responsibility to verify any variances between the offeror's proposal and the RFP.

Exhibit 8-1-4 lists examples of some important certifications and representations to check in the proposal.

CERTS & REPS	
• Procurement Integrity (Mod. or Service)	FAR 52.203-8 (9 or 13)
• Debarment, Suspension, etc.	FAR 52.209-5
• Small Business Concern	FAR 52.219-1
• Small Disadvantaged Business Concern	FAR 52.219-2
• Women-Owned Small Business	FAR 52.219-3
• Walsh-Healy	FAR 52.222-19
• Clean Air and Water	FAR 52.223-1
• Buy American	FAR 52.225-1

Exhibit 8-1-4

8.1.4 Reject Proposals that Cannot be Made Responsive

In sealed bidding, all bids, at bid opening, must be responsive in order to be eligible for award. The term **responsive** refers to a bid's:

> compliance in all material respects with the solicitation such as price, delivery, quality or quantity.

B-244717.2

In negotiations, however, responsiveness is not a requirement that must be met by the closing date. Offerors have the opportunity to bring proposals in compliance before award.

However, offers may not be considered for award if the offeror will not permit action or agreement that will allow the proposal to be made responsive to the RFP. **For example**:

FAR 52.203-2

> Collusion: All proposals may be rejected if collusion, bad faith, or a lack of independent, open competition is evident. The offeror is required to certify that prices in the offer have been arrived at without consultation or communication or agreement with any other offeror in competition relating to those prices. Reject the offer if the offeror refuses to make the required certification.

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Another example, illustrated in Exhibit 8-1-5, lists the steps you should take in reviewing the Contingent Fee Representation.

CONTINGENT FEE

FAR 52-203-4 B-246175

Step 1: Ensure offeror has completed both representations.
Step 2: Consider failure to complete the representations a minor informality and afford the offeror another opportunity to comply.
Step 3: If the offeror still does not furnish the representations, reject the offer.
Step 4: If the offeror completed the representations negatively, accept the representation, unless there is a reason to question its accuracy, and proceed with the contractual action.
Step 5: If the offeror completed the representations affirmatively, secure a completed SF 119, Statement of Contingent or Other Fees.

Exhibit 8-1-5

8.1.5 Designate Proposal Reviewers

In the evaluation stage, numerous specialists are available to you for advice. Depending on the complexity and technical requirements of the RFP, you may want to request the assistance of a specialist in one or more of the following disciplines:

FAR 15.805-1

- Technical
- Legal
- Contract pricing
- Packaging
- Audit
- Engineering traffic management
- Contract administration
- Financial
- Quality control
- Other

In many acquisitions, much of the cooperation or teamwork among these individuals will occur informally at conferences or meetings. Perhaps the simplest form of request is a telephone call to the legal staff to check on contractual wording or to the auditor to review factors in a cost proposal. A more formal request would involve a written memorandum to the cognizant specialist which details the tasks to be performed or the areas to be reviewed. **Remember, you should provide information only to Government officials who have a "need-to-know".**

SAVED BY THE MAIL

Having seen proof that the proposal was sent by USPS Express mail two days prior to the closing date for the receipt of offers, you accept the WeSell proposal for consideration and so advise the nervous offeror. You do not provide any additional information, however, such as the number of competitors.

You have completed your review of the responsiveness of the proposals and listed all major or minor discrepancies you want to discuss with each offeror.

Are you ready to begin these discussions?

What about the technical information that was submitted with each proposal?

Evaluating technical proposals is covered in the second part of this chapter.

ACCEPTABLE EXCEPTIONS

During the technical evaluation, it was discovered that the WeSell technical proposal deviated from the original technical requirements. However, the approach still satisfied the Government's minimum needs.

Can the WeSell proposal still be determined acceptable?

How will the two other offerors be affected?

INTRODUCTION FOR TECHNICAL EVALUATIONS

Definition

After the proposals submitted by prospective contractors in response to a particular solicitation have been received, stored, and tabulated, they must then be evaluated.

FAR 15.608

> " Proposal evaluation is an assessment of both the proposal and the offeror's ability (as conveyed by the proposal) to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation."

When technical proposals are solicited from prospective contractors, technical or engineering personnel in the cognizant requiring activity are responsible for ① evaluating these proposals on the basis of technical factors and ② recommending the firms for subsequent award. <u>The evaluation may be conducted by an individual or a panel/team.</u>

Technical evaluations should be directed both to the

- proposal itself, and
- contractor's capabilities in relation to it.

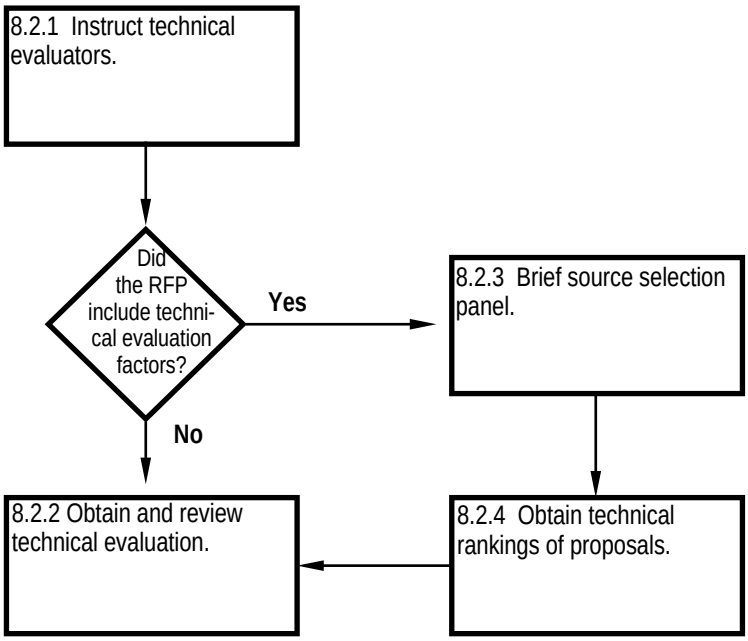
A contractor may submit a proposal that is conceptually brilliant, yet at the same time is marked by an inadequate allocation of manhours, skilled personnel, or physical resources. Of course, **deficiencies in the way the contractor proposes to do the work may often be corrected during negotiations.**

Your job, as the contract specialist, is to review the conclusions of a technical evaluation and ensure that they fully support the evaluation criteria set forth in the solicitation.

Steps in Performance

The flowchart and discussion for obtaining and reviewing technical evaluations are outlined in Subchapter 8.2.

STEPS IN REVIEWING TECHNICAL EVALUATIONS



8.2 TECHNICAL EVALUATIONS

8.2.1 Instruct Technical Evaluators

The technical evaluation of proposals must be conducted as objectively as possible and should not be influenced by pricing or other nontechnical factors. Therefore, separate the cost and pricing information from the technical in the proposal before forwarding the latter to your technical evaluation panel.

You must inform technical personnel in writing of ① their responsibilities and ② the contracting officer's concerns when conducting the evaluation. You may want the following issues addressed in your memorandum forwarding the technical proposals for review:

- A determination of each proposal's **technical acceptability** using one of the following designation:
  - acceptable
  - reasonably susceptible of being made acceptable
  - unacceptable
- Reporting of specific deficiencies in the technical proposal.

FAR 15.805-4

- Analysis of data needed for **cost or price analysis**
  - quantities and kinds of material proposed
  - need for the number and kinds of labor hours and the labor mix,
  - special tooling and facilities proposed
  - reasonableness of proposed scrap and spoilage factors
  - any other pertinent data.
- Need for **factfinding** to clarify offerors' proposals and, if necessary, specifics on what must be asked of the offeror.
- Need to **amend the RFP**, and, if necessary, the nature of any such amendment.
- **Signature of the evaluator(s)**, as required by agency policy, on summary evaluation report.

B-243875

Stress to the evaluators that determinations of technical acceptability should be based:

solely on provisions and clauses in the RFP:

- statement of work,
- any special standards of responsibility, and/or
- technical factors for evaluating acceptability.

Factual support for all determinations and conclusions must be provided in the report.

B-244528.2

A report bearing the statement "technically acceptable" that does not address the above areas is not sufficient and should be returned for a complete analysis.*

8.2.2 Review Technical Evaluation Report

After you review the evaluation report, you will want to resolve any questions generated by your review by contacting the technical evaluator(s). Typical areas of inquiry include:

- **Determination of acceptability**.

  Review the report to ensure that the evaluators compared the proposals to the solicitation and the source selection plan only and not to another offeror.

- **Major strengths or weaknesses**; Examples include:
  - Offeror's understanding of the problem
  - Innovative solutions
  - Current state of the art techniques
  - Proposed tests
  - Key personnel and experience.

- **Position on proposed resources**.

  Ensure that the soundness of the technical approach is evaluated on the basis of both the feasibility of the technical approach described in the proposal and the level of resources to be applied.

  (Understanding the evaluator's position on the reasonableness of the resources such as the labor mix and hours is important, because they become factors in the evaluation of the cost proposal (e.g., audit report) when the quantity, quality, and pay rates of the direct labor as well as materials, subcontracts, and indirect input are assessed for reasonableness and realism.)

- **The need for factfinding or to amend the RFP**.

  Upon completion of the initial evaluation, there may be areas of the proposal that the technical evaluators indicate are unclear and require additional facts in order to complete the analysis. For a complete understanding of the proposal, you may request clarifications and/or additional substantiating data if there is an indication that a deficiency exists.

  (During a factfinding session with the offeror prior to negotia-

* Upon receipt of Best and Final Offers, a supplemental report may be requested on revised technical proposals.

tions, you should only clarify areas of the proposal in which the intent or meaning is in question. If a proposal is submitted without sufficient detail to permit technical evaluation and a complete rewrite is necessary, you can reject it as technically unacceptable.)

If an offeror submits a proposal that deviates from the original requirements, but is still considered to be the most advantageous to the Government in accordance with the evaluation criteria, **you may**

-modify the requirements of the solicitation, **by**

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-issuing a written amendment to all responding offerors to allow them to submit new or amended proposals on the basis of the revised requirements, **without**

-revealing to the other offerors the solution proposed or any other information that should be protected (i.e., proprietary), **and if**

-the proposal submitted drastically deviates from the RFP, you may be required to cancel and reissue the entire solicitation.

Negotiation Objectives

If it is determined that negotiations will be held, you must contact offerors and allow them an opportunity to correct deficiencies in their technical proposals that prevent them from meeting the Government's minimum needs. You need to obtain sufficient factual data from the technical evaluators to establish and justify any technical negotiation objectives. This information will help you prepare an agenda, as indicated in Exhibit 8-2-1, for discussions with the offerors.

AGENDA FOR HOLDING DISCUSSIONS

(1) Control all discussions.

(2) Advise the offeror of deficiencies in the proposal so that the offeror is given an opportunity to satisfy the Government's requirement.

(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal.

(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process.

(5) Provide the offeror an opportunity to submit any cost or price, technical or other revisions to the proposal that may result from the discussions.

Exhibit 8-2-1

You must make sure your discussions are not prejudicial to any offeror; therefore, ensure that neither you nor any government personnel take part in technical leveling or technical transfusion.

a. Technical Leveling

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helping an offeror to bring his/her proposal up to the level of other proposals by repeated rounds of discussion, while pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal.

b. Technical Transfusion

disclosure by the Government of technical information from one proposal that results in improvement of a competing proposal.

8.2.3 Brief Source Selection Evaluation Board

If you are using **formal source selection procedures**, boards or panels or other groups will have been established to evaluate proposals and make recommendations for contract award. In large complex acquisitions, the board may even contain committees and subcommittees to perform management and technical evaluations.

When you inform the source selection evaluation board of their responsibilies, include the following points:

- Stress importance of adhering to evaluation factors stated in the solicitation such as the statement of work (SOW), evaluation factors in Section M of the RFP including any special standards of responsibility, and related aspects of the schedule.
- No contact with any offerors or on-site visits regarding a proposal under source selection evaluation unless approved by the contracting officer.
- Necessity to safeguard all information in proposals and protect source selection information on a strict need-to-know basis.
- Numerical weights are established for ranking purposes, not for determining acceptability.

Thoroughly and correctly answer all questions from board members on the evaluation process.

8.2.4 Obtain Technical Rankings of Proposals

When technical evaluation is necessary beyond ensuring that the proposals meet the minimum requirements in the solicitation, the cognizant technical official, in documenting the ranking of technical evaluations, shall include:

FAR 15.608 (a)(2)

- Basis for evaluation,
- Analysis of the proposal's strengths and weaknesses against each technical evaluation factor,
- A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible, and
- Summary of findings.

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Technical rankings must be based solely on the RFP's evaluation factors and the agreed upon ranking methodology. Rankings should be reliable and valid. **Proposals must not be rated against each other.**

CHAPTER 9

PRICE OBJECTIVES

YOUR GUESS IS AS GOOD AS MINE

Anxious to start evaluating your proposals for price, you examine the offers and notice that the estimate submitted with the purchase request is much higher than the proposed prices. When you ask the requisitioner how this figure was developed, you get the following response:

> *"That's the figure we had in the budget for this little project of mine. Whether the job will actually cost that much is up to the offerors. I don't see why this amount is important at this point. I don't have a crystal ball."*

How can the pre-solicitation price estimate be important when evaluating known proposed prices?

What other techniques are used for evaluating prices?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Analyze market conditions and pricing data.
Develop and support the Government's prenegotiation position on price.

Individual:

9.1 Estimate price level or value.

9.2 Identify price-related factors.

9.3 Compute an evaluated price for each proposal.

9.4 Develop prenegotiation positions on price.

9.5 Determine the need for factfinding, cost data, or discussions.

INTRODUCTION FOR PRICE OBJECTIVES

Estimate

FAR 15.803(b)

Before issuing a solicitation, the contracting officer shall:

> "develop an estimate of the proper price level or value of the supplies or services to be purchased. Estimates can range from simple budgetary estimates to complex estimates based on inspection of the product itself and review of such items as drawings, specifications, and prior data."

Price Objectives

FAR 15.805-1(b)

To determine what constitutes a fair and reasonable prenegotiation price objective for a procurement, you will need to perform either a price analysis or a combination of price and cost analyses. (Cost analysis is covered in Chapter 11.) In price analysis, you must compare evaluated prices to such indicators as

- competitive offers,
- published price lists,
- prior offers for same or similar items, and
- Government estimates.

Definition of Price Analysis

FAR 15.801

> "The process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit."

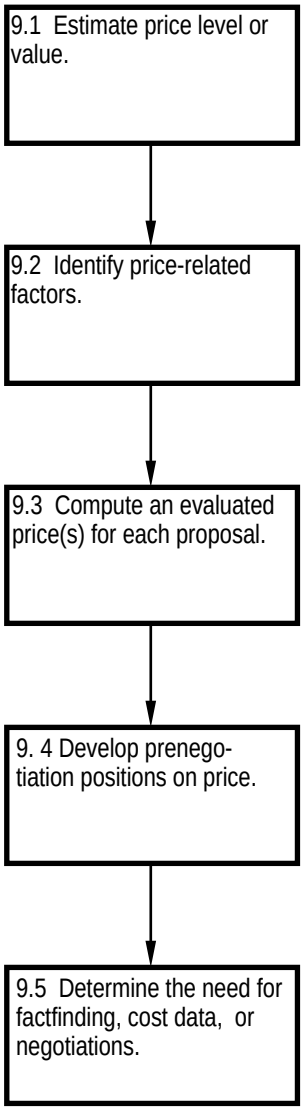
The method and degree of price analysis required depends upon the facts surrounding the particular situation.

Steps in Performance:

The steps in developing pricing objectives are charted on the next page. Following the flowchart, each step is discussed in turn.

NOTE: Shaded text in this subchapter denotes tasks that are the same as in the sealed bidding method of procurement, and the shaded text itself for the most part is taken from the Sealed Bidding Text/Reference.

STEPS IN DEVELOPING PRICE OBJECTIVES



STEPS IN DEVELOPING PRICE OBJECTIVES

9.1 Estimate Price Level or Value

Prior to submitting a purchase request, the requiring activity prepares

> an independent cost estimate approximating the price level or value of the supplies or services to be solicited.

This estimate will normally be based on the using organization's analysis of the requirement. You will find this estimate on the purchase request forms and in supporting documentation.

FAR 15. 803(b)

However, in order for this estimate to be useful to you, its basis and reliability must be established, **prior to issuing the RFP**. Some questions you may need to have answered to evaluate how the estimate was made include:

- What was the source of information?
- What information and techniques were used?
- How reliable were earlier estimates?

Too often, PR cost estimates are not reliable.

Stock list prices, a frequently used source, can be misleading unless they are continually updated and annotated to indicate quantity and production rate. Lacking any other basis the requisitioner may occasionally make an outright guess--obviously not a basis for a reliable price comparison.

Examples of reliable estimating techniques are listed and discussed in Exhibit 9-1.

Prior Purchases

Price data from prior purchases made by your activity or others can be especially useful in estimating a presolicitation range of probable offers. Make sure this information is adjusted for suspected changes that may have occurred in market prices and review market trends. To provide support for perceptions about ① prices, ② market trends, and ③ advances in technology, such resources as:

- newspapers
- market indices
- trade journals
- published prices of commodities
- competitive published price lists
- discount or rebate arrangements

can be used to do your **market research**.

RELIABLE ESTIMATING TECHNIQUES

ANALOGY - Estimates based on the fact that items that are similar in some respects will probably be similar in price.

EXPERT OPINION - Contract specialists who repeatedly procure a given commodity (or class of commodities) will have a better insight into the price reasonableness of that commodity than would a contract specialist who only occasionally buys that item.

PARAMETRIC ESTIMATES - These range from general rules of thumb or "yardsticks", developed from practical experience, to complex formulas developed from detailed statistical analysis of past projects. Whatever their complexity, they use the performance or physical characteristics of an item to estimate its price.

For example, to estimate building a two-story brick house with a basement, $60/square foot may be used to estimate the price. Depend on this estimate if:

1. There is a logical relationship between the product characteristics and the cost of the work;
2. The data used is verifiable from actual records;
3. The relationship is statistically valid; and
4. The relationship must have been reasonably accurate in past predicting.

ENGINEERING BREAKDOWNS - By using an in-depth study of specifications and drawings, a physical inspection or teardown of the item or similar item, or analysis of similar work, an estimator can get a clear picture of the item or service to be performed and relate it to price.

Exhibit 9-1

9.2 Identify Price-related Factors

At times, you can determine the lowest priced offer simply by looking at the bottom line. For other procurements, the lowest priced items actually might cost the Government more than a higher priced item when the cost of ownership is considered.

> **For example:** Brand A might cost $100 less to purchase but cost $300 more a year in electricity than Brand B.

Hence, like any other consumer, the Government needs the flexibility to select that offer or combination of offers* that represents the "best buy" in terms of lowest total cost to the Government over the expected life of the deliverable. Price-related factors provide the Government that flexibility.

Include Factors in the RFP

To be fair to the offerors, the Government **must** tell offerors in the solicitation which price-related factors, if any, will apply in determining the lowest overall cost to the Government. One of your roles in source selection planning is to select price-related factors for the procurement. Therefore, if you choose to use special price-related evaluation factors for award, be sure to:

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- Clearly state the factor(s) in Section M of the RFP, and
- Have a realistic, dependable formula for computing a price or cost for each such factor.

Some of the more commonly applied factors are shown in Exhibit 9-2.

* Unless otherwise provided in the RFP, offers may be submitted for quantities less than those specified. The Government, therefore, reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the proposal (e.g., "all or none").

COMMONLY APPLIED PRICE-RELATED FACTORS

1. **Foreseeable costs or delays**.
   - Transportation costs
   - Cost of furnishing Government property to the contractor
   - Prices for various options
   - Submission of separate prices for leasing the item versus buying
   - Proposed or expected costs for maintenance, warranty, repairs, training, installation, manuals, spares, and supplemental supplies.
   - Expected energy costs
   - Life cycle costs (i.e., expected life, salvage value, discounted total cost of ownership)
2. **Changes requested by an offeror, provided the offer is not rejected**.
   - Assumed Economic Price Adjustments (if offerors propose different terms than established in the solicitation).
3. **Advantages or disadvantages from making more than one award**.
   - Incremental pricing (i.e., separate prices for different lots--such as one price for the first 100 of the item and a separate price for the next 500).
   - Family buy pricing: separate prices for different combinations of line items.
   - Administrative cost for making multiple awards is $500 per FAR 52.215-34.
4. **Federal, state, and local taxes.** (Request assistance from the agency-designated counsel in resolving tax matters.)
   - Federal excise taxes may be imposed on certain motor-vehicle articles, tires and inner tubes, gasoline, lubricating oils, coal, fishing equipment, firearms, shells, and cartridges sold by manufacturers, producers, or importers.
   - State and local taxes may result in special contract considerations.
5. **Origin of supplies**
   - Buy American Act
   - Trade Agreements Act
6. **Quantity Discounts**
   - All or None

Exhibit 9-2

9.3 Determine the Evaluated Prices

The evaluated price is the price that will actually be used in evaluating an offer against other offers. Suppose that the RFP requires that the offerors submit an FOB origin price. To that price, transportation costs (from freight rate specialists) have to be added. The sum of the proposed price and the price-related factor(s) [i.e., transportation costs] is the evaluated price.

For example:

Company B is the apparent low offeror. However, delivery is FOB origin, meaning the Government will pay delivery charges to the destination. The cost of shipping from Company A is $900 and the cost of shipping from Company B is $2100. The price-related factor (transportation) would result in total costs to the Government as follows:

- Company A--$60,000 + $ 900 = $60,900
- Company B--$59,200 + $2100 = $61,300

Accordingly, it would be in the "best interests of the Government" to award to Company A.

The importance of advising the offerors of the evaluation process cannot be overstressed in as much as the Government will:

FAR 52.215-16(a)

"award the contract to the responsible offeror whose offer, conforming to the RFP, will be most advantageous to the Government, cost or price and other factors ... considered."

NOTE: Examples of the determination of evaluated prices using the price-related factors in Exhibit 9-2 can be found in Chapter 5.6 of the Sealed Bidding text reference.

9.4 Develop Prenegotiation Position on Price

STEP 1: Identify relevant historical pricing data and data on market trends and prices.

The key to price analysis is market research. The information you compiled in conducting your market research (See Chapter 1.2) will be extremely useful during this stage of the evaluation process.

1. Use information from previous purchases.
2. Verify market prices and trends from
   - current advertisements,
   - trade publications containing prices, and
   - other users of the product or service to see what they are paying.

Automated information showing

- price
- contract terms
- contractor
- quantity
- date
- delivery schedules

is generally available and continually being improved for market research purposes.

STEP 2: Select techniques for comparing prices.

After determining the evaluated price, you must now consider how fair and reasonable it is. You accomplish this task through price analysis, a comparison of evaluated prices using the more common techniques shown in Exhibit 9-3. Following the Exhibit, each is discussed in more

PRICE ANALYSIS TECHNIQUES

FAR 15.805-2

- Compare proposed prices received in response to the solicitation.
- Compare prior proposed prices and contract prices with current prices for the same or similar items or services.
- Use of rough "yardsticks" (e.g., dollars per pound) to highlight significant inconsistencies that warrant additional pricing inquiry.
- Compare with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.
- Compare proposed prices with the independent Government estimate(s).

Exhibit 9-3

detail. A sound price analysis will be based on comparisons of several different types of data obtained from sources other than the low offerors.

Competition

Pricing theory is based on the principle that full and open competition ensures a fair and reasonable price. For this to be true, there must be adequate price competition. **Price competition exists if** each of the following conditions are met:

FAR 15.804-3(b)

1. Offers are solicited.
2. Two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's requirements.
3. These offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

Although competitors are motivated to estimate their costs accurately yet propose a price that is low enough to win the competition,

> the mere presence of competition is inadequate to assure the proposed prices are fair and reasonable.

However, there is substantially greater assurance that a low price is reasonable when the number of responsive, responsible offers increases. A comparison of the offers alone does not establish reasonableness of the low offerors but the existence of "adequate price competition".

Historical Data

Comparative price analysis can involve comparing a proposed price with historical quotes or contract prices for the same or a similar item. The fact that an historical price exists does not automatically make it a valid basis for comparison. What must you know to insure that it is? The basic questions to consider are:

- How did the procurement situation affect the price fairness and reasonableness at the time of purchase?
- How have the conditions changed?

<u>Don't assume that the historical price was fair and reasonable</u>. Investigate the conditions that were present that may have affected the award decision. Some factors to analyze are listed in Exhibit 9-4.

FACTORS THAT AFFECT HISTORICAL PRICES

FAR 15.805-2(b)

Delivery Schedule - Determine if the delivery schedule was routine or accelerated. In an emergency situation, the Government may very well pay a premium for quick or unusual delivery.

Quantity - You can usually assume that the larger the quantity procured, the smaller the unit price. However, when available quantities are limited, prices will likely increase as the quantity purchased increases.

Start-Up Costs - Tooling, engineering and other start-up costs once expended should not be duplicated. Therefore, you should exclude these non-recurring costs from your price analysis base.

Dollar Value Changes - Price index numbers can provide you with a tool to analyze the effect of the changing value of the dollar on price. Price index numbers usually depict historical price changes with respect to time and can then be used to analyze, compare, and predict prices for a specific product or service in a different time frame.

Other - Differences in specifications, Government-furnished property, or experienced trends of improvement in production efficiency.

Exhibit 9-4

Historical price comparison is a starting point that may reveal differences that require explanation before a final price decision can be made.

Rough Yardsticks

"Rough yardstick" comparisons such as dollars

- per pound,
- per square foot,
- per loaded labor-hour and
- other similar units

have increased with the development and use of quantitative analysis in contract pricing. The estimates are useful in identifying gross inconsistencies that signal the need to alter assumptions developed from other comparisons and establish a common denominator between dissimilar offers.

As the availability of “hard” pricing information decreases, the use and importance of this type of estimating, often rises.

A corollary method is parametric estimating which reflects changes in prices as physical or performance parameter(s) are changed.

Published Price Lists

A **catalog price** is generally for an item or service unique to the seller, although there may be similar items or services available from others.

A **market price** is generally for an item or service that is generic in nature and not particularly unique to the seller.

The interaction of supply and demand in the marketplace establishes the competitive prices.

Use of catalog or market prices to determine fair and reasonable prices cannot be accomplished until you confirm that the price meets the four criteria listed below:

FAR 15.804-3(c)

1. There must be an established catalog or market price.
2. The buy must be for a commercial item or service.
3. It must be sold in substantial quantities.
4. It must be sold to the general public.

Determining if the item has been sold in substantial quantities to the general public is the most difficult part of your job.

- You may be able to spot a few items regularly sold at retail, or know of some used in commercial products. However, many of the items the Government buys aren't so easily identified.

- You must rely heavily on information furnished by the contractor. A contractor's sales summary from a recent monthly, quarterly, or other sales period should enable you to determine if the item or service is sold at catalog prices in significant quantities to the general public. The period used should extend back only far enough to provide a representative sample of average sales.

Independent Government Estimate

A comparison with a Government estimate can be used to ① verify assumptions or ② identify potential discrepancies. As stated in

Section 9.1, the basis for the estimate and its reliability must be established before the estimate can be utilized. The important things to find out are:

- how the estimate was made,
- what information and tools were used,
- where the information came from, and
- how earlier estimates stack up against resulting contract prices.

It may also help to know who made the estimate.

Other techniques that may assist you in evaluating prices include:

Visual analysis - A visual inspection of an item, or the drawing of an item, in order to determine an approximate estimate of the probable value. Visual analysis is concerned with the obvious external features of the product and requires nothing more than a comparison of the product with other products by sight.

Value analysis - Systematic and objective evaluation of the function of a product and its related costs. Its purpose is to ensure optimum value.

Product variation adjustments - Adjust prices due to differences in materials, size, tolerances, etc.

Economic ordering quantities - Specific order levels may substantially affect a contractor cost. It may be more economical to buy 100 items than it would be to buy 95 to 97 items; therefore, it may be feasible to over purchase in order to take advantage of lower costs on a per unit basis.

Ratio analysis - Ratios or cost patterns show the relationship between products. For example, a new product may be compared to one with which cost experience has been developed.

Trend analysis - This method assumes that prices will follow the same pattern or trend that they have shown in the past.
Therefore, by employing linear regression techniques to historical data, future prices may be predicted.

FAR 15.814(d)

First article testing comparison to determine if offers are unbalanced.

Shelf item vs. special production - Start-up costs may increase the price of items produced especially for the Government when compared to standard commercial or off-the-shelf items.

Learning curve - This technique is developed from the observation that individuals performing repetitive tasks exhibit a rate of improvement due to increased manual dexterity which in turn lowers prices.

A thorough treatment of the subject of price analysis can be found in the text reference for the Price Analysis course.

STEP 3: Establish prenegotiation positions on price.

Price analysis makes it possible for you to establish sound pricing objectives for your negotiation sessions with the offerors.

FAR 15.807(a)

"The process of determining prenegotiation objectives helps the contracting officer to judge the overall reasonableness of proposed prices and to negotiate a fair and reasonable price..."

The objectives represent your desired **settlement or target position.**

When an objective has been decided based on a particular set of conditions, it is a reflection of the best judgment at the time and does not mean that it must remain rigid. Usually, you will want to plan more than one position. Other positions are necessary so that you may have some "bargaining room" or have an opportunity to "feel out" the contractor through the interchange of information.

Besides the objective, you should have a **minimum price position**.

This minimum can be determined as the objective which reflects the lowest probable price, not just a "nice low figure".

You should also establish a **maximum price position**.

This highest reasonable price is necessary if your objectives cannot be achieved.

The distance between the minimum and maximum price positions is bargaining space.

You must find defensible points for each of the positions using data derived from application of your selected price analysis techniques. Compute the range by using "what if" analysis.

> **For example:** The item you are purchasing is petroleum based. When you examine the overall economy you find that overall prices have decreased from the time of your historical data to the current time based on your price index number application analysis. But "what if" foreign forces have increased oil prices. Your minimum position may be the lower amount due to the index application and your maximum amount will be an amount that reflects an increase due to the oil.

When the most important contingencies or "what if's" have been considered, your range may be narrowed or widened.

9.5 Determine Need for Discussions

While conducting your price analysis, you will be thinking about several other issues which will require a decision on your part:

1. Will certified cost or pricing data be necessary?
2. Will it be necessary to do some factfinding?
3. Can the contract be awarded without discussions?
4. Can a competitive range be established?

Each of these tasks will be described in some detail in subsequent chapters. The answers to these questions will determine the length of the "negotiation" segment of the procurement process.

Certified Cost or Pricing Data

You have a right to obtain data needed to make a decision on price. If the pricing data available are not sufficient to establish a fair and reasonable price, you may need to request certified cost or pricing data from the offeror(s).

FAR 15.804-2(a)(3)

> This information consists of all facts which can reasonably be expected to contribute to making sound estimates or judgements of future costs or projections.

Requiring certified cost or pricing data may result in a need for an audit as well.

Factfinding

Your position on price is not realistic until there is a common understanding concerning the facts. When you receive information from sources during your research that is inconsistent with the information received from the contractor or the data submitted are incomplete, the contractor should be questioned during a fact-finding session. A session may reveal differences of interpretations of information or it may reveal problem areas which need clarification.

Discussions

Upon completion of your proposal evaluation, you must decide whether to hold discussions, i.e. negotiate, or proceed to contract award without discussions. Discussion means

FAR 15.601

> "any oral or written communication between you and an offeror that (a) involves information essential for determining the acceptability of a proposal or (b) provides the offeror an opportunity to revise or modify its proposal."

If the solicitation notified all offerors of the possibility that award might be made without discussions, they need not be held in acquisitions--

FAR 15.610

1. In which prices are fixed by law or regulation;
2. Of the set-aside portion of a partial set-aside; or
3. In which it can be clearly demonstrated that acceptance of the most favorable initial proposal without discussion would result in the lowest overall cost to the Government at a fair and reasonable price.

Otherwise discussions shall be held and completely controlled by the contracting officer.

Competitive Range

Having decided to hold discussions, you must now decide which offerors will be selected for negotiations. This is accomplished by determining who is within the "competitive range."

FAR 15.609 (a)

The competitive range

> "shall be determined on the basis of cost or price and other factors stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award."

Even though the basis for inclusion appears to be objective, oftentimes

the contracting officer must make a judgemental decision, which may well be protested. The purpose of establishing a competitive range, however, is to avoid unnecessarily wasting both the offeror's and the Government's time and money.

Analyzing evaluated prices, therefore, involves much more than just establishing prenegotiation objectives. The **thoroughness of your market research and the application of the appropriate price analysis techniques** will ultimately determine the soundness and price reasonableness of your contract.

CHAPTER 10

PRICE-RELATED CERTIFICATES & AUDITS

DATA DEFICIENCY

After determining that two of the proposals you received could not be included in the competitive range, you are left with only the WeSell proposal. Unfortunately, you can not use competition now to determine this $500,000 price to be fair and reasonable and the other methods of price analysis do not produce concrete results. You decide to get cost or pricing data from WeSell to support the proposed price. When you inform WeSell of the need for additional data, WeSell submits a Standard Form 1412 claiming the price offered is based on an established catalog price and does not provide you with the cost or pricing data you requested. Must WeSell comply with your request?

Is this document alone enough to support a fair and reasonable price?

What other data or forms may WeSell have to provide if the Standard Form 1412 is not sufficient?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Determine the necessity for and obtain certificates of current cost or pricing data and certificates of commercial pricing.
Determine the need for, request, and review audit reports; resolve questions on audits with auditors.

Individual:

PRICE RELATED CERTIFICATES

10.1.1 Determine whether certified cost or pricing data are required.

10.1.2 Determine whether the offeror is exempt from the requirement to certify data.

10.1.3 Request and obtain data for cost or price analysis.

10.1.4 Identify inaccurate, incomplete, or non-current data and request new data.

10.1.5 Obtain a properly executed Certificate of Current Cost or Pricing Data.

10.1.6 Determine whether to require the Certificate of Commercial Pricing.

10.1.7 Determine whether to exempt offerors from the requirement.

10.1.8 Establish the time period to be covered by the certificate.

10.1.9 Verify the certificate prior to agreement on price.

AUDITS

10.2.1 Determine whether to request an audit.

10.2.2 Request the audit.

10.2.3 Assist auditors in obtaining data.

10.2.4 Review the report.

INTRODUCTION TO PRICE-RELATED CERTIFICATES

Policy

FAR 15.804-4

Certificates of Current Cost or Pricing Data

> "When certified cost or pricing data are required, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data."

This certificate states that the data submitted to the contracting officer to help determine a fair and reasonable price are accurate, current, and complete **as of the date of agreement on price**.

FAR 15.813-3

Certificates of Commercial Pricing

> "...offerors [are required] to certify that prices offered for parts or components are not more than their lowest commercial prices..."

This requirement is accomplished on a Certificate of Commercial Pricing. DOD, NASA, and Coast Guard are exempt from the requirement to obtain certificates of commercial pricing.

Each of the above certifications were established to arm the contracting officer with the appropriate information needed to prevent the Government from paying unreasonable prices and to provide a legal obligation for data submission by the contractor.

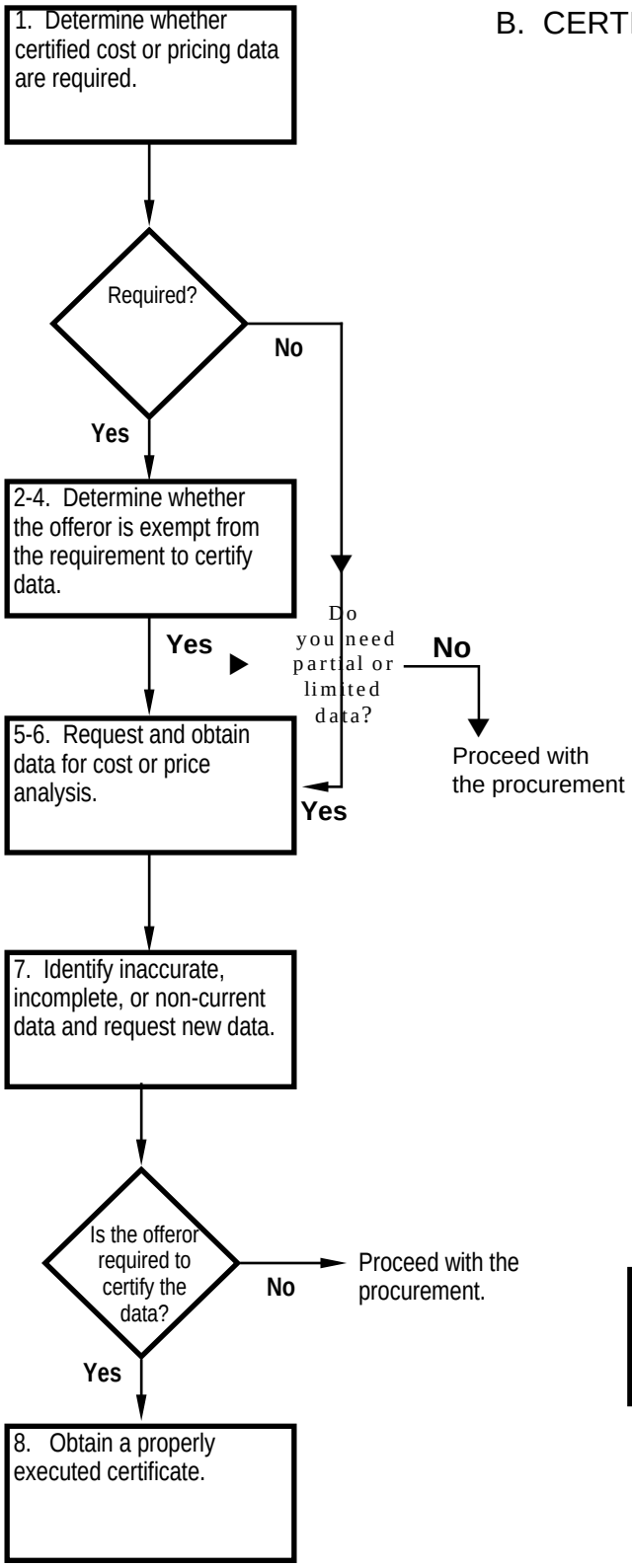
Steps in Performance

The steps in obtaining price-related certificates are charted on the next page. Following the flowcharts, each step is discussed in turn in Subchapter 10.1.

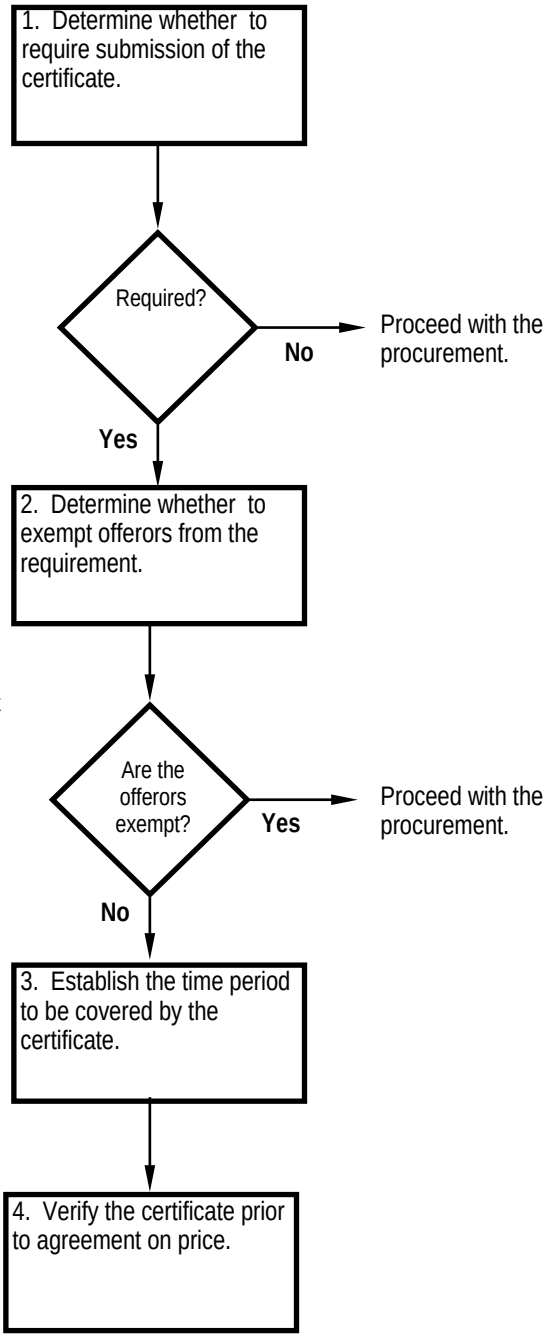
The flowchart and discussion for obtaining and reviewing audits are found in Subchapter 10.2.

STEPS IN OBTAINING PRICE-RELATED CERTIFICATES

A. CERTIFICATES OF CURRENT COST OR PRICING DATA



B. CERTIFICATES OF COMMERCIAL PRICING



STEPS IN OBTAINING PRICE RELATED CERTIFICATES

10.1 PRICE RELATED CERTIFICATES

10.1.1 Determine Need for Certified C & P Data

FAR 15.802

The Truth in Negotiations Act of 1962 requires

1. a prime contractor or any subcontractor to submit and certify cost or pricing data under certain circumstances, and
2. the inclusion of contract clauses that provide for reduction of the contract price by any significant amounts that such price was increased because of submission of contractor or subcontractor defective cost or pricing data.

Cost or pricing data consists of

1. all facts which can reasonably be expected to contribute to making sound estimates of future costs, as well as
2. the evaluation of costs already incurred.

Cost or pricing data is factual information which can be verified.

FAR 15.801

Examples of such data consists of:

- Historical accounting data
- Vendor quotations
- Nonrecurring costs
- Changes in production methods
- Changes in production or procurement volume
- Unit cost trends such as those associated with labor efficiency
- Make-or-Buy decisions
- Other management decisions which could reasonably be expected to have a significant bearing on the costs of the proposed contract.

FAR 15.804-2

Unless an offeror is otherwise exempt, **certified cost or pricing data are required before** accomplishing any of the following actions:

1. Award of any negotiated contract (except for unpriced actions such as letter contracts) expected to exceed $100,000*.
2. Modification of any contract involving an aggregate price adjustment in excess of $100,000*.
3. Award of a subcontract at any tier, if the contractor and each higher tier subcontractor have been required to furnish certified cost or pricing data, when the subcontract is expected to exceed $100,000*.
4. Modification to any subcontract involving an aggregate price adjustment in excess of $100,000*.
5. Award of a contract between $25,000 and $100,000* and the contracting officer justifies in writing the requirement for cost/pricing data.

Subcontractors

FAR 15.806-2

Prospective subcontractors must also submit certified cost or pricing data, provided the contractor must submit certified data **and**:

1. estimate of subcontract exceeds $1,000,000; or
2. estimate of subcontract exceeds $100,000 and exceeds the prime contractor's proposed price by 10%; or
3. considered necessary for adequately pricing the prime.

10.1.2 Determine if Exemption Allowed

FAR 15.804-3(a)

Submission or certification of cost or pricing data shall not be required when the contracting officer determines that prices are:

1. Based on adequate price competition,
2. Based on established catalog or market prices of commercial items sold in substantial quantities to the general public, or
3. Set by law or regulation.

Adequate Price Competition

FAR 15.804-3(b)

If price competition exists, you may presume it is adequate unless:

"(i) The solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete;
(ii) The low offeror has such a decided advantage that it is practically immune from competition;
(iii) There is a finding...that the lowest price is unreasonable."

A price is based on adequate price competition if it

- results directly from price competition or
- price analysis alone clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or substantially the same items purchased in comparable quantities, terms, conditions under contracts that resulted from adequate price competition.

Catalog or Market Prices

FAR 15.804-3(c)

Offerors can claim an exemption from submitting certified cost or pricing data **if prices are based on**

catalog or market prices, or regulated prices.

Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, is prescribed for use in helping decide whether a proposal should be exempt. (See Exhibit 10-1.) Information needed to make the determination should be included on this form and submitted by the contractor. Just the submission of an SF 1412 is not enough, however; you will need to verify the claim for exemption.

CLAIM FOR EXEMPTION FROM SUBMISSION OF CERTIFIED COST OR PRICING DATA		FORM APPROVED OMB NO. 3090-0116
1. OFFEROR (*Name, address, ZIP code)*	3. SOLICITATION NO.	
	4. ITEM OF SUPPLIES AND/OR SERVICES TO BE FURNISHED	
2. DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED	5. QUANTITY	6. TOTAL AMOUNT PROPOSED FOR ITEM $

By submission of this form the offeror claims exemption from requirements for submitting certified cost or pricing data on the basis that the price offered is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public or is a price set by law or regulation (see FAR 15.804-3). Complete Section I, II, or III below as applicable

SECTION I - CATALOG PRICE *(See Instructions for items 7 thru 11 on reverse>)*

7. CATALOG IDENTIFICATION AND DATE	8. SALES PERIOD COVERED FROM	TO

9. CATEGORIES OF SALES	TOTAL UNITS SOLD*	10. REMARKS
a. U.S., Government sales		
b. Sales at catalog price to general public		
c Other sales to general public		

**If your accounting system does not provide precise information, insert your best estimate and explain the basis for it in Item 10, REMARKS> Continue on a separate sheet, if necessary.*

11. LIST THREE SALES OF THE ITEM OFFERED

SALES CATEGORY	DATE	NO. OF UNITS SOLD	PRICE/UNIT
a. ❑ B ❑ C			$
b. ❑ B ❑ C			$
c. ❑ B ❑ C			$

SECTION II - MARKET PRICE (*See Instructions for Item 12 on reverse)*

12. SET FORTH THE SOURCE AND DATE OR PERIOD OF THE MARKET QUOTATION OR OTHER BASE FOR MARKET PRICE, THE BASE AMOUNT AND APPLICABLE DISCOUNTS.

SECTION III - LAW OR REGULATION (*See instructions for Item 13 on reverse)*

13. IDENTIFY THE LAW OR REGULATION ESTABLISHING THE PRICE OFFERED

REPRESENTATION *(See Instructions for Item 14 on reverse.)*

The offeror represents that all statements made above and on attachments submitted are accurate and are submitted for the purpose of claiming exemption from requirements for submitting certified cost or pricing data. The offeror also represents that, except as stated in an attachment, a like claim for exemption involving the same or a substantially similar item has not been denied by a Government Contracting Officer within the last 2 years. Pending consideration of the proposal supported by this submission and, if this proposal or modification of it is accepted by the Government, until the expiration of 3 years from the date of final payment under a contract resulting from this proposal, the Contracting Officer or any other authorized employee of the United States Government is granted access to books, records, documents, and other supporting data that will permit verification of the claim.

14. TYPED NAME, TITLE, AND FIRM	15. SIGNATURE	16. DATE OF SUBMISSION

NSN 7540-01-142-0946
1412-101

STANDARD FORM 1412 (10-83)
Prescribed by GSA
FAR (48 CFR) 53.215-2(b)

Section I of SF 1412 provides space for the offeror to

1. identify current* catalog prices and information, and
2. attach a copy of the catalog or appropriate pages therefrom.

Section II of SF 1412 provides space for the offeror to identify the

1. source and date or period of the market quotation, or
2. other base for market price, the base amount, and applicable discounts.

Some prices may require special analysis of any added or deleted features. Pricing data requirements will apply to these factors, provided the base price can be determined to be fair and reasonable, based on the market prices. The steps you should follow in analyzing an offeror's claim for exemption are as follows:

STEP 1: Determine if price(s) is an <u>established catalog price,</u>

- regularly maintained by the seller as a catalog, price list, etc.
- published or otherwise available for inspection by customers,
- for which sales are current or were last made to the general public.

STEP 1a: Or determine if price(s) is an <u>established market price,</u>

- as a result of freebargaining between buyers and sellers
- that can be verified from data independent of offeror.

STEP 1b: Or determine if price(s) is <u>based on</u> catalog or market price.

- item is sufficiently similar to catalog or market item, so that
- price difference can be identified without cost analysis.

STEP 2: Determine if item(s) is a <u>commercial item</u>.

- supplies/services used for other than Government purposes, and
- sold or traded regularly to the general public.

STEP 3: Determine if item(s) is <u>sold in substantial quantitie</u>s.

- supply sales sufficient to constitute real commercial market
- services using regular employees and equipment.

STEP 4: Determine if item(s) is sold to the <u>general publi</u>c.

- significant buyers other than Government or offeror affiliates, and
- not for Government end use.

* "This period should include the most recent regular monthly, quarterly, or other period for which sales are reasonably available and should extend back only far enough to provide a total period representative of average sales."

In order to quantify substantial sales to the general public, SF 1412 requires that catalog sales information be provided in three categories:

FAR 15.804-3(f)

1. **Category A** sales are items sold to the U.S. Government or to contractors for U.S. Government use (i.e., sales directly to U.S. Government prime contractors, subcontractors, or supplier at any tier, for use as an end item, or as part of an end item by the U.S. Government).
2. **Category B** sales are items sold to the general public at catalog prices.
3. **Category C** sales are items sold to the general public at other than catalog prices.

Normally, then, sales to the general public should be regarded as substantial and an exemption granted if both of the following criteria are met:

- Category B and C sales are not negligible in themselves and comprise 55% or more of the total of Category A, B, and C sales, **and**
- Category B sales total 75% or more of the total of Category B and C sales.

On the other hand, an exemption rarely should be granted if either of the following occurs:

- Category B and C sales total less than 35% of the total of Category A, B, and C sales,
  or
- Category B sales are less than 55% of the total of Category B and C sales.

When percentages fall between those stated above, a thorough investigation must be done before deciding to grant an exemption. Exhibit 10-2 shows how these categories may be used in the exemption.

COST DATA EXEMPTIONS FOR CATALOG PRICING			
SALES CATEGORY COMPARISONS	**RARELY EXEMPT** If either of the following are true.	**REQUIRES INVESTIGATION**	**USUALLY EXEMPT** If both of the following are true.
B + C Sales / Total sales (A+B+C)	Less than 35%	35% - 55%	55% or more
B Sales / B + C Sales	Less than 55%	55% - 75%	75% or more

Exhibit 10-2

EXAMPLE 1

Alpha Corporation submitted an SF 1412 which contained the information shown below to support a claim for an exemption.

SALES CATEGORIES:

A: U. S. Government	40,000 units
B: Catalog price to the general public	50,000 units
C: Other than catalog price to general public	10,000 units

$$\frac{\text{B + C sales}}{\text{Total sales}} = \frac{50{,}000u + l0{,}000u}{l00{,}000u} = 60\%$$

$$\frac{\text{B sales}}{\text{B + C sales}} = \frac{50{,}000u}{60{,}000u} = 83\%$$

Since both percentages fall within the Usually Exempt range, you would normally grant the claim for exemption.

EXAMPLE 2

Beta, Incorporated submitted an SF 1412 with the following information to support a claim for an exemption:

SALES CATEGORIES:

A:	U. S. Government	80,000 units
B:	Catalog price to the general public	50,000 units
C:	Other catalog price to the general public	10,000 units

$$\frac{\text{B + C sales}}{\text{Total sales}} = \frac{50{,}000\text{u} + 10{,}000\text{u}}{140{,}000\text{u}} = 43\%$$

$$\frac{\text{B Sales}}{\text{B + C sales}} = \frac{50{,}000\text{u}}{60{,}000\text{u}} = 83\%$$

Since only one of the percentages falls under the Usually Exempt column and the other falls within the Requires Investigation range, you are responsible for getting more information about the commercial item prior to deciding whether an exemption should be granted.

There are many factors to consider when faced with an "investigate" decision.

For example, Category B or C sales may include substantial sales to state, local or foreign governments under circumstances where there may not be a true competitive market place.

If your examination of the conditions under which the sales were made leads you to conclude that a true competitive market place does not exist, your only recourse may be to obtain cost or pricing data.

Another factor to consider during your investigation is alternate products or services which may satisfy the requirement.

For example, assume you are buying 1000 cameras and the purchase request specifies brand X. The vendor quotes a catalog price of $150 each and tells you:

- 45% of his sales were in Categories B and C, and
- 90% of these were Category B sales.

The catalog shows a price of $175 each, and his lowest price, in quantities of 100, is $165.

Step 1: Find out why brand X was specified. You may find the requisitioner has concern for some salient characteristics such as reliability and size. Brands Y and Z will meet all requirements,

but brand X is preferred because it is used in training and has the highest reliability.

Step 2: Investigate Brand Y's catalog price to learn that it is $149.50 and, like brand X, is sold in substantial quantities to the general public.

Step 3: Investigate Brand Z to learn that it is not a catalog item but was bought in small quantities for $200 each, based on cost analysis.

Under these circumstances, you could probably conclude the buy is exempt, and $150 is a good price for brand X.

Regulated Prices

FAR 15.804-3(d)

Section III of SF 1412 provides space for the contractor to

1. identify the law or regulation establishing the price offered, and
2. attach a copy of the controlling document (ruling, review, or similar action of a governmental body) unless it was previously submitted.

FAR 15.804-3(e)

The contracting officer may grant an exemption and need not require the submission of SF 1412 when:

1. The Government has acted favorably on an exemption claim for the same or similar items within the past year;
2. Special arrangements have been made for repetitive acquisitions;
3. When you find evidence, before solicitation, that the item has an acceptable established catalog or market price or a price set by law or regulation. Evidence may include:
   - recent submissions by offerors or
   - the contracting officer's knowledge of market conditions, prevailing prices, or sources.

You must record the facts for the basis of your decision to exempt in a memorandum for the contract file.

10.1.3 Obtain C & P Data

FAR 15.804-6

You are permitted to obtain cost or pricing data whenever it is necessary to establish the fairness and reasonableness of prices. When you discover a need for this information, notify the offeror (if not already required by the solicitation) and specify:

- whether certification will be required,
- the form in which the data is to be submitted, and
- the extent of data needed as you may need only partial or limited cost or pricing data in some situations.

For example, if the item purchased is a modification of a commercial item, cost data concerning the modification may be enough to determine reasonableness of price.

To submit the certified cost or pricing data supporting the proposal, the offeror typically uses the SF 1411, Contract Pricing Proposal Cover Sheet, (see Exhibit 10-3). Subcontractors, when applicable, also use SF 1411. With this submission of data, the offeror must furnish a narrative which

- explains the proposal arrangement,
- details the transition from the known, factual data to the estimated price, and
- identifies the added protection for the uncertainties of the future.

Refusal to Submit

The certification of cost or pricing data is a very time consuming and costly procedure, and occasionally offerors refuse to provide or certify it. If required, you can not complete a contract action without this data. <u>You must withhold any pending awards or price adjustments and refer the matter to a higher authority.</u> The agency head or designee has the authority to grant a waiver to the requirement for the submission of the data. However, this is only done in exceptional cases:

For example, the product or service is a priority requirement and this supplier is the only feasible source.

In average situations you would negotiate with an alternate source.

CONTRACT PRICING PROPOSAL COVER SHEET	1. SOLICITATION /CONTRACT/ MODIFICATION NO. NAS1234	FORM APPROVED OMB NO. 9000-0013

NOTE: This form is used in contract actions if submission of cost or pricing data is required. *(See FAR 15.804-6(b)*

2. NAME AND ADDRESS OF OFFEROR (Include ZIP Code)	3A. NAME AND TITLE OF OFFEROR'S POINT OF CONTACT	3B. TELEPHONE NO.
Wesley Electronics 333 Broad Street Alpha, Mississippi 39999		

4. TYPE OF CONTRACT ACTION *(Check)*

X	A. NEW CONTRACT		D. LETTER CONTR.
	B. CHANGE ORDER		E. UNPRICED ORDER
	C. PRICE REVISION REDETERMINATION		F. OTHER (*Specify)*

5. TYPE OF CONTRACT *(Check)*	6. PROPOSED COST (A+B=C)		
[X] **FFP** ❑ CPFF ❑ CPIF ❑ CPAF ❑ FPI OTHER *(SPECIFY)*	A. COST **$4,098,379**	B. PROFIT/FEE **$636,964**	C. TOTAL **$4,735,343**

7. PLACE(S) AND PERIOD(S) OF PERFORMANCE
Alpha, Mississippi , Aug. X8 - X9

8. List and reference the identification, quantity and total price proposed for each contract line item. A line item cost breakdown supporting this recap is required unless otherwise specified by the Contracting Officer (*Continue on reverse, and then on plain paper, if necessary. Use same headings.*

A. LINE ITEM #	B. IDENTIFICATION	C. QUANTITY	D. TOTAL $	E. REF
1.	**RT/ARC 1984 Transceiver**	**50**	**$4,735,343**	**Proposal Summary**

9. PROVIDE NAME, ADDRESS, AND TELEPHONE NUMBER FOR THE FOLLOWING (*If available)*

A. CONTRACT ADMINISTRATION OFFICE	B. AUDIT OFFICE
Defense Logistics Agency (DLA) Alpha MI, 39999	DCAA, Bayou Region, Bayou LO 59999

10. WILL YOU REQUIRE THE USE OF ANY GOVERNMENT PROPERTY IN THE PERFORMANCE OF THIS WORK? (*If "Yes", identify)*	11A. DO YOU REQUIRE GOVT. CONTRACT FINANCING TO PERFORM THIS PROPOSED CONTRACT? (*If "Yes," complete 11B)*	11B. TYPE OF FINANCING
[X] **Yes** [ ] **No**	[X] **Yes** [ ] **No**	[ ] ADVANCE PAYMENTS [X] PROGRESS PAYMENTS ❑ GUARANTEED LOANS

12 HAVE YOU BEEN AWARDED ANY CONTRACTS OR SUBCONTRACTS FOR THE SAME OR SIMILAR ITEMS WITHIN THE PAST 3 YEARS?	13 IS THIS PROPOSAL CONSISTENT WITH YOUR ESTAB-LISHED ESTIMATING AND ACCOUNTING PRACTICES AND PROCEDURES AND FAR PART 31 COST PRINCIPLES *(If "No", explain)*
[X] **Yes** [ ] **No**	[X] **Yes** [ ] **No**

14. COST ACCOUNTING STANDARDS BOARD (CASB) DATA (Public Law 91-379 as amended and FAR Part 30)

A. WILL THIS CONTRACT ACTION BE SUBJECT TO CASB REGULATIONS? (*If "No," explain in proposal)*	B. HAVE YOU SUBMITTED A CASB DISCLOSURE STATEMENT (CASB DS-1 OR 2)? (*If "Yes," specify in proposal the office to which submitted and if determine to be adequate*)
[X] **Yes** [ ] **No**	[X] **Yes** [ ] **No**
C. HAVE YOU BEEN NOTIFIED THAT YOU ARE OR MAY BE IN NON WITH YOUR DISCLOSURE STATEMENT OR COST ACCOUNTING STANDARDS? (*If "Yes," explain in proposal)*	D. IS ANY ASPECT OF THIS PROPOSAL INCONSISTENT WITH YOUR DISCLOSED PRACTICES OR APPLICABLE COST ACCOUNTING STANDARDS? (*If "Yes," explain in proposal)*
[ ] **Yes** [x] **No**	[ ] **Yes** [x] **No**

This proposal is submitted in response to the RFP, contract, modification, etc. in Item 1 and reflects our best estimates and/or actual costs as of this date and conforms with the instructions in FAR 15.804-6(b(2), Table 15-2. By submitting this proposal, the offeror, if selected for negotiation, grants the contracting officer or an authorized representative the right to examine, at any time before award, those books, records, documents and other types of factual information, regardless of form or whether such supporting documentation is specifically referenced or included in the proposal as the basis for pricing, that will permit an adequate evaluation of the proposed price.

15. NAME AND TITLE ***(Type)***	16. NAME OF FIRM
I. M. DeBoss	Wesley Electronics

17. SIGNATURE	DATE OF SUBMISSION
	1 July 19X8

NSN 7540-01-142-9845 1411-102 STANDARD FORM 1411 (REV 7-87)
PRESCRIBED BY GSA
FAR (48 CFR) 53.215-2(C)

Exhibit 10-13

10.1.4 Identify Defective Data

Cost or pricing data is defective when it is found to be inaccurate, noncurrent, or incomplete. It can have a serious impact on the contractor as well as the Government.

Preaward

Reviewing the data carefully prior to award will save the Government the time and expense of recovering undeserved dollars at a later time. If you learn that any portion of the data is defective prior to award, you must immediately bring the matter to the attention of the prospective contractor. This is done whether the defective data will increase or decrease the contract price. To ensure a thorough review, you will want to:

- Request that auditors verify data provided by the contractor
- Double check contractor's data during price and/or cost analysis
- Question suspect data during negotiations
- Require submission of corrected data or make allowance for incorrect data.

FAR 15.804-7(b)

Postaward

Whenever the certified cost or pricing data is found to be inaccurate, noncurrent, or incomplete, the Government is entitled to an adjustment of the negotiated price, in accordance with the following two clauses:

52.215-22, Price Reduction for Defective Cost or Pricing Data
52.215-23, Price Reduction for Defective Cost or Pricing Data - Modifications

10.1.5 Obtain Certificate

At the conclusion of negotiations, you must ensure proper certification for the submitted cost or pricing data received from the offeror. The data should be certified as of the date of final agreement on price. Do not confuse this date with the

- contract award date,
- contract's effective date, or
- date of the contracting officer's signature.

17

The price agreement date is the date negotiations ceased and is commonly referred to as the day you and the contractor "shake hands." A properly executed "Certificate of Current Cost or Pricing Data" should be obtained as soon as practicable after that date. Exhibit 10-4 is a copy of the Certificate.

COPY OF CERTIFICATE

FAR 15.804-4(a)

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15.801 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.804-2) submitted, either actually or by specific identification in writing, to the contracting officer or to the contracting officer's representative in support of_____ * are accurate, complete, and current as of_____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm .....

Signature .....

Name .....

Title .....

Date of execution*** .....

* Identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g. RFP No.)

** Insert the day, month, and year when price negotiations were concluded and price agreement reached.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

Exhibit 10-4

10.1.6 Certificates of Commercial Pricing

The Government should not purchase "parts or components*" offered for sale to the public at prices exceeding the lowest price at which such items are sold by the contractor. **Commercial pricing certificates are required** to be submitted with any offer for any parts or components normally sold to the public when it is submitted in connection with the following:

FAR 15.813-4

1. Contracts not awarded on the basis of full and open competition.
2. Modifications to contracts for additional parts or components. (Parts or components within the scope and under the terms and conditions of the contract are not included.)
3. Ordering under the provisioning line item of a contract or under a basic ordering agreement.
4. Definitization of a letter contract, unpriced order, etc.
5. Modification issued pursuant to the Changes clause that results in the providing of new or different parts or components.

10.1.7 Determine if Exemption Allowed

You are not to require a certificate under the following conditions:

FAR 15.813-5

FAR 15.813-1

a. Simplified small purchase procedure are used;
b. An acquisition under a GSA Multiple Award schedule
c. An order is placed under an indefinite delivery contract;
d. The contracting officer determines a certificate is not appropriate due to national security considerations or differences in quantities, quality, delivery, or terms and conditions;
e. DOD, NASA, & Coast Guard are exempt from this requirement.

10.1.8 Time Period for Certificate

After receiving the Certificate of Commercial Pricing for parts or components (See Exhibit 10-5), you should assess market conditions to determine whether the standard 60 day time period specified is appropriate. If the frequency of price fluctuations or other circumstances indicate that a shorter or longer time period is appropriate, you should modify the time period.

10.1.9 Verify Certificate

You must also review the certificate to identify any aspect that may be inaccurate, incomplete, or misleading based on your price analysis, discussions with the contractor, and/or the submission of a new or revised proposal. You may want to consider the following actions in conducting your review:

- Double check data in certificate when performing price analysis.
- Question suspect certificates during the negotiations.
- Require submission of new certificate before agreeing on price.

* Per FAR 15.813-2, "Parts or Components" are defined as "any individual part, component, assembly, subassembly, or subsystem integral to a major system ..."

FAR 15.813-6(d)

If after award you learn or suspect that a certificate is inaccurate, incomplete, or misleading, the contracting officer shall

- request an audit, and
- if she/he determines that the certificate is inaccurate, incomplete, or misleading, then
- the Government is entitled to a price adjustment for the overcharge.

However, keep in mind that possession of a contractor's Certificate of Commercial Pricing is not a substitute for examining and analyzing a contractor's proposal.

COPY OF CERTIFICATE

CERTIFICATE OF COMMERCIAL PRICING FOR PARTS OR COMPONENTS

FAR 52.215-32

(l) Unless justified in (2) below, by submission of this offer/proposal, the Offeror/Contractor certifies that the prices offered for those items of supply (whether or not separately identified) that the Contractor offers for sale to the public are no higher than any lower price charged to any other customer, including any governmental instrumentality, during the preceding 60 days.

(2) All parts or components for which prices offered are higher than any lower price charged to any other customer during the preceding 60 days are identified below (including the amount(s) by which such offered prices are higher) and a written justification for the differences is attached.

Part or Component	Price Difference
_____	_____
_____	_____
_____	_____
_____	_____

Offer/Proposal No. _____
Time period for sales data _____
Firm _____
Typed name and signature _____
Title_____
Date _____

Exhibit 10-5

SUPPORT SYSTEM

The sales information on WeSell's SF 1412 did not support an exemption from submission of cost or pricing data. You notify WeSell and receive the certified data you requested on an SF 1411. After briefly looking it over, you realize you will need assistance in analyzing this information.

What type of assistance is available to you?

What are the proper procedures for requesting this support?

INTRODUCTION TO OBTAINING AUDITS

FAR 15.805-5

The ultimate price or cost analysis is performed by the contracting officer and his immediate staff. However, initial analysis is done by many other employees depending on the agency and the resources available. Personnel such as

- administrative contracting officers
- quality assurance representatives
- small business specialists
- legal specialists
- contract auditors
- price analysts
- engineers

are available to provide field pricing support, which may also include an audit by the cognizant contract audit activity.

FAR 15.801

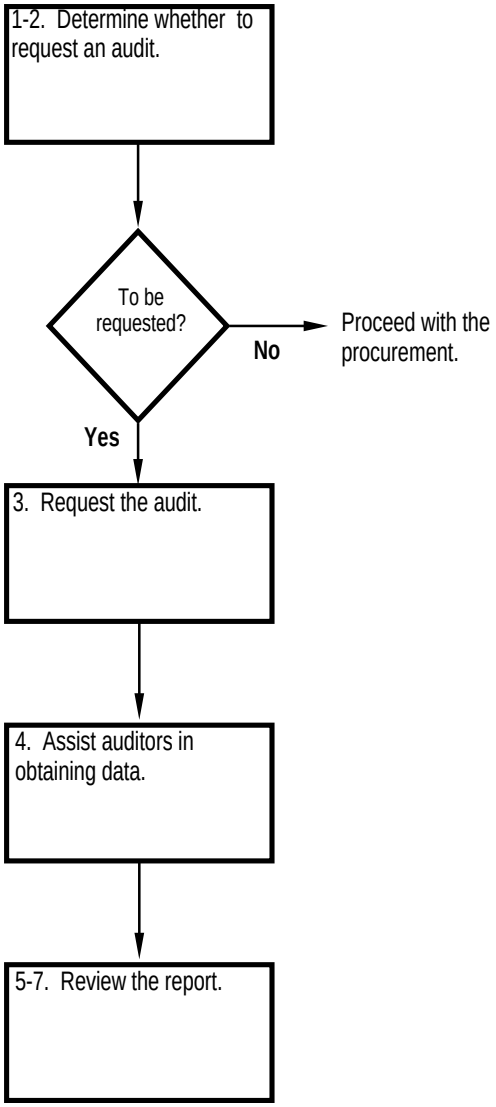
Field pricing support means

> "a review and evaluation of the contractor's or subcontractor's proposal by any or all field pricing support personnel."

Steps in Performance

The steps in obtaining audits are charted on the next page. Following the flowcharts, each step is discussed in turn in Subchapter 10.2.

STEPS IN OBTAINING AUDITS



STEPS IN OBTAINING AUDITS

10.2 AUDITS

10.2.1 Determine Need for an Audit

You should directly request an audit by a cognizant audit office

1. when field pricing support* is not available or is exempted by agency regulations, and additional information is necessary to determine the reasonableness of proposed costs or prices, or
2. to review a request for exemption from need to submit certified cost/pricing data.

Only request audits when required or when the expected benefits from an audit outweigh cost, time, and other factors.

Subcontractors

The following criteria can be used for determining whether to request an audit of subcontractor:

- Business relationship between prime and subcontractor is not independent.
- Prime is sole source and subcontractor's portion of cost is substantial.
- Prime has been denied access to subcontractor's books.
- Contracting officer determines need because of size, etc.

10.2.2 Request Audit

To ensure that you get the data you need to complete your cost or price analysis, bring all significant areas of concern to the auditor's attention when submitting your written audit request. You will want to address the following issues, at a minimum:

- The extent of support needed - Indicate the necessity for a full audit or for less detailed support such as rate verification. The amount and type of data required should help you to determine the degree of assistance.

---

* Field pricing reports are intended to give you a detailed analysis of the proposal, for use during contract negotiations. Contracting officers are to request a field pricing report before

> negotiating any contract or modification resulting from a proposal in **excess of $500,000** when cost or pricing data are required. [FAR 15.805-5]

This report is also required when stipulated by agency policy or when prices cannot otherwise be reasonably analyzed.

- Specific areas for which input is required.
  Examples include:
  - direct labor rates
  - indirect cost pool compositions
  - indirect cost projections
  - distribution of facilities capital
  - facilities capital cost of money factors
- Information needed to perform review
  Examples include:
  - the offeror's proposal
  - applicable portions of the solicitation, particularly those describing requirements and delivery schedules.
- Deadline for receipt of report - A deadline set for approximately 30 days after submission of your request is typical. Avoid unrealistic deadlines as they may reduce the quality of the audit and make it impossible to establish the fairness and reasonableness of the price.

10.2.3 Assist Auditors in Obtaining Data

FAR 52.215-2

Only auditors have general access to an offeror's books and financial records. The Audit-Negotiation clause gives the Government the right to audit. Usually, auditors have an offeror's full cooperation when obtaining data; however, there are occasions when less willing offerors are encountered. In this event, follow the following steps:

STEP 1: You will receive oral notification, followed up in writing, if an auditor is denied access to an offeror's records or is provided cost or pricing data which is too deficient to apply.

STEP 2: You should immediately contact the offeror upon receipt of this written notification and attempt to secure the data and/or elicit corrective action.

STEP 3: If the offeror persists in refusing to provide the data, and the data is essential for fair and reasonable price determination, you must withhold the award or (price adjustment) and refer the contract action to a higher authority.

STEP 4: Document the details of the attempts made to resolve the matter and a statement of the practicability of obtaining the supplies or services from another source.

10.2.4 Review the Report

FAR 15.805-5(e)

As a minimum, the audit report shall include the following:

- Findings on specific areas listed in the contracting officer's request.
- Offeror's basis and method used for preparing the proposal.
- Inventory of all submissions of cost or pricing data.
- Significant cost/pricing data not submitted but known to the auditor.
- Cost/pricing data which are not accurate, complete, and current; cost representations that are unsupported.
- Quantification of dollar effect of technical analysis findings.
- Assessment of offeror's estimating and accounting systems.
- Extent to which auditor has discussed discrepancies or mistakes of fact in the proposal with the offeror.

FAR 15.805-5(k)

Be sure to obtain with the report a list of all persons who have been provided access to proprietary or source selection information.

After receiving the field pricing and/or audit reports, you will want to review them. While performing your review, do the following:

- Extract relevant facts.
- Identify missing or insufficiently documented findings of fact.
- Identify any fallacies (quantitative or logical) in the auditor's report.
- Identify inconsistencies between audit findings and other available data (e.g., from proposal or market research).

Understanding the reports before completing your cost or price analysis is important. Free and open communication between you, the cognizant auditor, and the administrative contracting officer is not only encouraged but advised. Do not delay in contacting the audit agency or field pricing office to:

- Resolve any questions with the report.
- Submit any new information to the price analyst and/or auditor for review and possible issuance of supplemental report.
- Invite the auditor and/or price analyst to be on negotiation team.

Audits are considered advisory reports. After reviewing your own research and the input from other sources, you may discover that you take exception to some of a report's findings and recommendations. If your negotiation objectives deviate from the auditor's advice, document your rationale for each difference.

CHAPTER 11

COST ANALYSIS

ANALYZE THE SITUATION

The audit and field pricing support reports are in. They contain a wealth of information on each cost element of the WeSell proposal. You must now use all data to perform cost analysis. You want to complete this cost analysis as quickly as possible as the requirement has now become urgent.

Should it be your task to determine whether a cost should be incurred or whether the proposed costs are allowable?

What factors are used to determine allowability of costs?

What techniques are used to analyze each cost element?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Analyze proposed elements of cost to develop prenegotiation ranges on major elements of cost.

Individual:

11.1 Collect data and verify the adequacy of offeror's estimating systems.

11.2 Identify the offeror's "contingencies" and other planning assumptions.

11.3 Draft "should cost" positions on offeror's plans for performing work.

11.4 Establish prenegotiation objectives for each element of cost.

11.5 Establish prenegotiation positions for profit or fee.

11.6 Establish prenegotiation positions on the total cost/price (including profit).

11.7 Establish prenegotiation positions on ceiling prices or parameters for adjusting price or fee.

11.8 Document rationale and factual support for prenegotiation positions.

INTRODUCTION TO COST ANALYSIS

Definition

FAR 15.801

Cost analysis means the

> "review and evaluation of the separate cost elements and proposed profit of (a) an offeror's or contractor's cost or pricing data and (b) the judgemental factors applied in projecting from the data to the estimated costs in order to form an opinion on the degree to which the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency."

Policy

FAR 15.805-1(b)

When cost or pricing data are required, the contracting officer:

- shall make a cost analysis to evaluate the reasonableness of individual cost elements, and in addition
- should make a price analysis to ensure that the overall price offered is fair and reasonable.

Objectives

FAR 15.805-3

The objectives of cost analysis include:

- Verification of data and evaluation of cost elements,
- Evaluation of effect of offeror's current practices on future costs,
- Comparison of proposed costs with historical costs or independent estimates,
- Verification that proposed costs are in accordance with cost principles, and
- Determination that data are accurate, complete, and current.

Steps in Performance

The steps in performing cost analysis are charted on the next page. Following the flowchart, each step is discussed in turn.

STEPS IN COST ANALYSIS

1-2 Collect data; verify adequacy of estimating system.

3 Identify the offeror's planning assumptions and contingencies.

4 Draft overall "should cost" positions on the contractor's plan of work.

5-9 Establish prenegotiation objectives for each element of cost.

Elements Of Cost:

1. Direct Material.
2. Material Overhead.
3. Direct Labor.
4. Other Direct.
5. Indirect (including G&A).

10 Establish prenegotiation positions for profit or fee.

11 Establish a prenegotiation position on the total price and/or cost (including profit).

12-16 Establish prenegotiation positions on ceiling prices and/or parameters for adjusting price or fee.

17 Document rationale and factual support for prengotiation positions.

STEPS IN COST ANALYSIS

11.1 Collect Data

To perform cost analysis you must first compile all of the data that you have gathered concerning the procurement. Review the audit and field pricing reports, all analyses, and any other information that may bear on each element of cost such as:

- Historical data (including actual costs, if any, previously incurred by the same contractor);
- Data from previous estimates from the offeror or other offerors for the same or similar items;
- Data provided by technical evaluators; and
- Forecasts or planned expenditures.

Question the report preparers about any information that requires clarification. It is critical that you possess a thorough understanding of all information in order to develop a realistic cost position.

Verify Adequacy of Estimating System

One way of facilitating cost analysis is to verify that contractor proposals are based on adequate estimating systems. The consistent preparation of proposals using an acceptable estimating system benefits both the Government and the contractor by increasing the accuracy and reliability of individual proposals.

FAR 15.811

If you have an offeror or contractor that does several million dollars worth of business with the Government, you may want to ask your audit activity to review the contractor's estimating systems or methods and provide you with an estimating system survey report covering the following:

- Source of data for estimates and the procedures for ensuring that the data are accurate, current, and complete;
- Documentation developed and maintained in support of the estimate;
- Assignment of responsibilities for originating, reviewing, and approving estimates;
- Procedures followed for developing estimates for direct and indirect cost elements;
- Extent of coordination and communication between organizational elements responsible for the estimate; and
- Management support, including estimate approval, establishment of controls, and training programs.

Upon completion of the review, the auditor will forward the estimating system survey report and an official notice of required corrective action to your office. Deficiencies in the estimating system which are not corrected by the offeror should be taken into consideration when analyzing the proposal and conducting negotiations.

11.2 Identify Offeror's Contingencies

FAR 31.205-7

Contract pricing proposals are estimated based on a prediction of the cost of future events:

- Some events you know will occur, and you can predict them with some measure of confidence.
- For others, you only know they may occur.

If there is reasonable certainty that these events will take place, the proposal should provide for them as well. These possible or probable events are called contingencies.

Contingencies, or risks of performance, take many forms, and you may find one or more in a proposal. Some examples are shown in Exhibit 11-1.

COMMON CONTINGENCIES INCLUDED IN PROPOSALS

- Labor or material price escalation
- Shortages of labor or materials
- Problems in retooling to meet Government specifications
- Potential problems in testing new software
- Potential strikes
- Changes in overhead bases

Exhibit 11-1

In analyzing costs, you should attempt to isolate such contingencies and identify the amounts estimated to cover them. Your objective is to negotiate a realistic pricing arrangement based upon knowledge of all current and correct cost or pricing data available to the contractor and you at the time of negotiation. Your knowledge of the facts should strengthen your forecast of what it should cost to do the job.

11.3 Draft "Should Cost" Position

FAR 15.810

A specialized form of cost analysis used primarily on major contracts is "should cost" analysis. This process differs from conventional cost analysis in that it does not challenge the offeror's projections of current costs but rather **evaluates and challenges a contractor's management and operating systems**.

This coordinated analysis reviews the contractor's activities (e.g., manufacturing, engineering, accounting, cost estimating, make or-buy, purchasing, organizational structure, and any other element of cost and management control) required for contract performance.

The process of "should cost" analysis is to:

- Identify uneconomic or inefficient practices in the contractor's management and operations,
- Quantify their impact on cost, and
- Develop realistic price objectives for negotiation that reflect the outcome of the findings.

Factors that are important in selecting a proposed contract for "should cost" analysis include:

- Lack of adequate price competition.
- Sufficient time for the analysis.
- Procurement of significant dollar value.
- Availability of personnel with special skills.
- Tasks sufficiently well-known and defined.

"Should cost" positions may be developed on the contractor's proposals for:

- Tasks and subtasks
- Facilities
- Hardware and software
- Management and operating systems
- Subcontract and vendor management
- Methods
- Equipment

11.4 Establish Prenegotiation Objectives

FAR 31.201-1

The total cost (which excludes profit or fee) of a contract is the sum of the allowable

- direct (contract specific) costs,
- indirect (contract non-specific) costs, and
- costs of money

allocable to the contract (less any credits).

FAR 31.201-2

In establishing a negotiation objective on each element of cost, you must determine if it is allowable by considering the following factors:

1. REASONABLENESS:

   A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by an ordinary prudent person in the conduct of a competitive business.

2. ALLOCABILITY:

FAR 31.001

   The assignment of an item of cost to one or more cost objectives, including both direct assignment of cost and the reassignment of a share from an indirect cost pool.

FAR PART 30

3. ACCOUNTING STANDARDS AND PRACTICES:

   The method for allocating indirect costs must be in accordance with the standards promulgated by the Cost Accounting Standards Board, if applicable to the contract; otherwise, the method must be in accordance with generally accepted accounting principles.

FAR 31.205

4. COST PRINCIPLES:

   A particular cost must not be prohibited according to the contract cost principles and procedures.

5. TERMS OF THE SOLICITATION OR CONTRACT.

Direct Material

What a company calls direct material in a proposal usually will depend on its accounting and estimating practices.

- Much of what is included as direct material will have been purchased from <u>outside sources</u> such as suppliers, vendors, agents, distributors, manufacturers, and others.
- Some of the materials may have been produced in other plants, divisions, or <u>organizations of the contractor</u>.

The basic information necessary to estimate the costs of any material category is ① the quantity of the material and ② the prices that the contractor will pay.

TYPES OF DIRECT MATERIALS:

1. Raw Materials. Raw or processed materials in a form that requires further processing.

Examples: sheet metal, castings, forgings and raw plastics for injection molding.

2. Standard Commercial Items. Items that are regularly used for non-government purposes. These items may be made by the prime contractor and held in inventory or they may be made by some other source.

Example: auto parts for leased vehicles.

3. Purchased Parts. Components and assemblies that are made in accordance with the supplier's specifications and sold to the prime contractor. Purchased parts are similar to standard commercial items, except that purchased parts are not regularly used for non-government purposes.

Example: special circuit boards for military applications only.

4. Interdivisional Transfers. Materials sold or transferred between a prime contractor's sister divisions, subsidiaries or affiliates and the prime. Typically, the transfers are at cost unless the item in question is produced and sold on a regular basis to other manufacturers.

5. Subcontracted Items. Parts, components, and assemblies produced by another contractor in accordance with the prime contractor's specifications, designs or directions. These items may only be used on the prime's end item.

Example: landing gear for a C-130 aircraft.

Your job in analyzing material costs is to find out:

- what is included in the material cost and
- how the costs were estimated.

The questions you want to ask include:

- How were material requirements determined? (Eliminate requirements that could be considered goldplating.)
- How were the quantities computed and priced? (Make sure they are reasonable in comparison to the specifications.)
- If and how estimated quantities and prices were adjusted? (Adjust prices if Government furnished property is involved.)

For manufacturing contracts involving items that are fully designed, the contractor may prepare a bill of materials (BOM), which is a

> descriptive and quantitative listing of materials, supplies, parts and components required to produce a complete item.

The size of the BOM will determine the amount of analysis required:

- Small - evaluate each of the items thoroughly.
- Large - statistical sampling techniques are required.

A typical bill of materials contains the following information:

- part number
- quantity per end item
- unit price
- scrap factor
- nomenclature
- total quantity
- total price

The example shown in Exhibit 11-2 contains all of these.

PART NO.	NOMENCLATURE	QUANTITY PER END ITEM*	SCRAP FACTOR	TOTAL QTY	UNIT PRICE	TOTAL PRICE
987	Housing Casting (Vendor: PIC Co. PO # 361622. 20 Dec 87 lowest of three bids)	1 each	4.6%	471	$84.75	$39,917.26
988	Bearing, X-Design (Vendor: SurCo inc. PO # 36166. 20 Dec 87 only qualified source cost analysis completed.)	2 each	4.5%	941	$14.89	$14,011.49
989	Gear. 14-Tooth (Vendor: Beecher Co. lowest of all four bids REF: bid file #8443)	4 each	7.86%	1942	$6.27	$12,176.34
990-1	Gear Link Chain 12-Guage, Interlock	1 each	1.0%	455	$22.46	$10,219.30

* 450 end items are required for each Part No.

Exhibit 11-2

Part Number - Check this item against parts lists to verify the part belongs to the end item.

Nomenclature - Ensure that the descriptions match the part numbers. Otherwise, the number or the name could be wrong.

Quantity Per End Item - Verify that the quantity accurately reflects the specification. Mistakes on quantity per end item can dramatically distort costs.

Scrap Factor - A scrap factor is the percentage of additional material required to make an item because of loss from breakage in handling, spoilage, theft, accident, or the production process. Review this area to determine the appropriate scrap factor for a particular product and manufacturing process.

FAR 15.812

Unit Price - Make comparisons to previous purchases either by the contractor or the Government; to catalog or market prices; to competitive quotes; etc. Comparisons assist in determining whether the unit price is fair and reasonable.

Total Quantity and Total Price - Do not forget to check the contractor's math. Mistakes can be made in the computations.

Looking at the Bearing, X- Design in Exhibit 11-2, you can see how the calculations were made and if they are correct:

• TO CHECK THE TOTAL QUANTITY: Multiply the quantity per end item by one plus the scrap factor percentage; then multiply that result by the total number of end items.

Quantity per end item	x	1+scrap factor %	= Subtotal
2	x	1.045	= 2.09

Subtotal	x	No. of end items	= Total Quantity
2.09	x	450	= 940.50

• TO CHECK THE TOTAL PRICE: Multiply the unit price by the total quantity. (Since half an item can not be ordered, the total quantity of 940.50 is rounded up to 941.)

Unit Price	x	Total Quantity	= Total Price
$14.89	x	941	= $14,011.49

FAR 15.7

Additional questions to answer include:

- Does the contractor have an approved make or buy program?
- Do catalog items pass the test for exemption from cost or pricing data?
- Has the contractor negotiated lower prices with vendors in the past? If so, how much lower?

FAR 15.805-1(c)

- Did the prime complete a cost analysis on subcontracted items?
- Did the prime try to get competition for those items listed as sole source?
- On parts made in-house, are overhead, G & A, and profit already included in the unit price?

Contracts with large quantities and types of materials will require extensive analysis. Request support from personnel such as price analysts, auditors, administrative contracting officers and technical evaluators when necessary.

Material Overhead

The priced bill of materials is not necessarily the total material cost incurred on a contract. Typically, you must add on related overhead costs that are in essence operating or handling costs. They include but are not limited to:

- Transportation-in
- Storage costs
- Receiving and inspection costs
- Purchasing expenses
- Issuing to production costs

Contractors use three methods to recover these costs; therefore, your analytical technique should fit the contractor's specific treatment.

1. **Direct charge**: When material handling costs are identified with specific items and quantities of materials, they are charged to the product.

2. **Overhead charge:** When it is difficult to identify these costs with specific items or materials, they may be treated as material overhead and allocated to the items that initially created the charge.

3. **Manufacturing overhead**: Material handling costs may be budgeted and charged as a part of manufacturing overhead. However, costs such as purchasing and quality assurance may be included in the general and administrative expenses instead of manufacturing overhead.

Direct Labor

There are two factors to consider in evaluating direct labor cost: ① number of hours to be worked, and ② wages to be paid.

HOURS

In reviewing the hours proposed, it is important to note that there are patterns of incidence of various types of labor. You must determine

- if the estimate of hours is based on proper planning, and
- if it contemplates the sound use of labor and reasonable expectations and efficiency.

Techniques to determine reasonable expectations include:

Historical Data

It may be possible to compare the hours estimated by the contractor on previous contracts with the figures actually experienced. If the actual figures have been consistently very close to the estimates and the same estimating methods are still being employed, you may view the new estimates with corresponding confidence.

Learning Curves

Certain types of production activity are subject to a learning or improvement process. As sequential units are produced, the hours required for the production of a unit get progressively less. Moreover, the reduction in hours required takes place in a constant and predictable manner, so that if the hours required for the production of units at one stage of production are known, the hours required at a later stage can be reliably predicted.

Standard Time Studies and Methods-Time Studies

In standard time studies, a worker performing a given operation is timed with a stopwatch. After they are timed, the operations needed to manufacture a product are adjusted for average worker efficiency and added to established worker allowances. This gives a total manufacturing time for the product. Of course, if the time study is to be at all realistic, the product must be in production, and a degree of productive efficiency must have been attained.

In methods-time studies, tables of times for performing such motions as reach, move, turn, grasp, position, disengage, release, and so forth, under different conditions and for varying distances have been worked out and standardized. In this way a standard unit production time can

be determined. The unit production time depends on the production method employed, as it does in a standard time study. Improvement in the production method should result in lower production times. This system is useful for estimating direct labor costs when a standard time study would be impossible and when the production process is of a relatively simple nature.

WAGE RATES

Your responsibility is to ensure ① that estimated wage rates are those that will actually be paid, and ② that they are fair and reasonable. The rate paid for each hour's work will vary with the nature of the work, and for work of the same nature, rates vary as a result of four general factors:

Variation with Geographical Location

Wage rates for similar efforts vary greatly from place to place. Someone may make $40,000 a year as a computer programmer in a large city, while a programmer in rural Kansas may earn $25,000. This variation results from the supply and demand for labor for an industry or skill. Thus, you should verify that the wage rate proposed applies to the location where contract performance is to occur. You can compare proposed wage rates with those in published tables, adjusted for inflation. Differences should be justified and explained by the contractor, or rates should be adjusted for the Government negotiation objective.

Variation in Skills

Both the nature and degree of skill required have a bearing on wage rates. As required skills increase, the general trend is for wages to increase. This is particularly true for trade, where masters of the trade will far out earn apprentices. A proposed rate should not be accepted unless it is consistent with the value of the contract effort involved.

Time Period of the Contract

Due to inflation, and other factors, wage rates tend to increase over time. In addition, this movement may be accentuated by labor shortages and unions. You should obtain data on labor contract and upcoming labor negotiations when evaluating proposed wage rates.

Conditions in the Contractor's Workforce

Every organization has an informal organization that is apparent to an observer. From these observations, you may foresee changing conditions. For example, some aerospace companies have a high degree of turnover because people follow the work and competent people are in demand. The cost and influx of new, untrained personnel can have a great effect on wage rates. Thus, turnover, labor unrest, and vacation policies all affect labor rates. Try to quantify these factors.

Other Direct Costs

There are times when it makes sense to charge a cost directly to a contract that is usually treated as an overhead expense. There are also certain types of effort that some companies treat as indirect expense and others classify as direct. These types of costs may be proposed as other direct costs; for example:

- special insurance
- start-up costs
- training expenses
- special travel expenses
- transportation
- packaging and packing

FIRST STEP in evaluating these costs is to question the need for the special treatment of any cost charged directly to the contract which the contractor usually classifies as indirect. (Inflated direct cost charges lead to higher bottom line prices.)

SECOND STEP is to verify that these costs are not also included in the indirect expense pools or under other cost categories. Once you are sure that they are classified properly, try to assess the overall reasonableness and applicability of the proposed costs.

For example, packaging and packing may be proposed at five cents per widget for 20,000 widgets. The key question to ask is: Should packaging and packing cost five cents per item? This amount may be realistic for other products, but if the requirement for this contract is to dump all the widgets in a barrel and ship them to your activity, it is highly doubtful that the five-cent charge is appropriate.

The point is that no matter how many accounting records and how much cost history the contractor has, you must question the proposed costs if they do not make sense.

INDIRECTLY, SPEAKING

To complete your analysis of labor and material, you must determine that costs are allowable, reasonable, and properly allocated by using various techniques such as learning curves and BOM examinations. You are now ready to analyze the indirect cost position. The audit report questioned the manufacturing overhead rate which was proposed at 200%. You notice that it is much higher than what has been proposed by other offerors under previous solicitations.

How can you determine what a good overhead or indirect cost rate should be?

Can a comparison of percentages provide a good estimate?

Indirect Costs

Indirect costs are necessary support costs which cannot be identified with a specific contract. Therefore, these costs must be allocated to contracts through the overhead process. The ultimate goal of overhead allocation is to ensure that indirect costs are "equitably distributed" to all contracts.

This allocation is accomplished by using an indirect cost rate for each individual cost pool. (A cost pool is an account that contains a group of indirect expenses.)

Contractors maintain pools of indirect costs in a variety of categories depending on the nature of their work and the size of the organization. Common groupings of indirect costs are:

- **Manufacturing** Overhead - all items of production except direct materials, direct labor, and other direct costs.
- **Engineering** Overhead - includes the costs of directing and supporting activities of the engineering department.
- **Material** Overhead - contains the expenses related to handling materials.
- **General and Administrative Expenses** (G&A) - consists of the costs of a company's executive offices and staff.

Each pool will contain only those indirect expenses that relate to that grouping. A typical cost pool for engineering is shown in Exhibit 11-3.

ENGINEERING OVERHEAD PROJECTION

ACCOUNT TITLE	YEAR ENDED Dec 31, 19x3
Indirect Salaries and Wages:	
Engineering salaries-indirect	$13,193,438
Blueprinting	744,419
Shop clerks & timekeepers	608,583
Tool crib	941,502
Training	845,191
Watchmen and janitors	833,079
Receiving and inspection	416,613
Maintenance, building & grounds	245,947
Machinery and equipment	2,314,142
Plant rearrangement	1,247,312
Field installation	1,126,787
Purchasing	768,888
Vacation expense and holiday pay	4,830,012
Other indirect	772,205
Supplies and Expense:	
Engineering supplies and expense	$ 1,315,725
Engineering Blueprints	240,254
Traveling expenses	2,147,062
Shop Supplies	2,267,490
Perishable tools	345,931
Insurance & misc. taxes	635,069
Group insurance premium	1,977,173
FICA, unemployment & work compensation	3,753,582
Rent	605,376
Training	265,533
Maintenance, building & grounds	305,408
Machinery and equipment	2,409,725
Purchased water and gas	350,903
Plant rearrangement	1,491,788
Purchased power and light	1,655,967
Depreciation	3,055,743
Experimental hangar and field expense	208,639
Group annuity premium	6,469,635
Manufacturing services	1,755,941
Sundry other engineering expense	3,706
Income from scrap sales and cafeterias	(124,183)
Total Engineering Overhead (A)	$63,248,444
Total Direct Labor Dollar Base (B)	$37,429,000
ENGINEERING OVERHEAD RATE (A) ÷ (B)	168.98%

Exhibit 11-3

Indirect costs are accumulated over a period of time (usually the contractor's fiscal year), and are uniformly charged as a percentage of an allocation base to all of the work of the contractor during that period. Types of allocation bases:

- direct labor dollars
- direct labor hours
- units of production
- material
- processing costs
- total manufacturing costs

Examples of selecting allocation bases:

- For manufacturing & engineering ☛ direct labor dollars.
- For G&A ☛ total manufacturing costs.

However, the contractor has the discretion to select a base that most accurately allocates indirect costs to all work being performed.

Firms choose different bases depending on their particular accounting systems. In general, the allocation base should have the following characteristics:

- Produces a rate resulting in an equitable allocation of indirect costs among the different cost objectives.
- Application is consistent from year to year and from contract to contract.
- Complies with cost accounting principles and cost accounting standards.

The development of an accurate overhead rate is critical in pricing a contract:

- Too high a rate can lead to excess contractor profits on firm fixed priced contracts and bloated budgets on cost reimbursable contracts.
- Too low a rate can lead to major losses on firm fixed priced contracts and cost overruns on cost reimbursable contracts.

Ideally, a contractor's overhead rate will be one that permits recovery of exactly 100% of incurred indirect costs.

Computing Overhead Rate

The universally accepted formula for computing overhead rates is "pool divided by allocation base equals rate." The computation for a sample engineering overhead rate follows:

$$\frac{\text{Engineering pool dollars}}{\text{Engineering direct labor dollars}} = \text{overhead rate}$$

$$\frac{\$63,248,444}{\$37,429,000} = 168.98\% \text{ of engineering direct labor \$.}$$

In evaluating overhead rates, never assume a rate may be too high or too low, because it is outside "normal parameters."

> One contractor may use an accounting system method which results in an engineering rate of 200% and another may use an accounting system which results in a rate of 80%. The 200% rate may be low and the 80% rate may be excessive.

This results from the contractor's authority in determining whether various types of costs will be charged directly or indirectly and also the allowability of those costs which are charged indirectly. This illustrates the <u>importance of evaluating the characteristics and composition of the base as well as the pool</u>.

Since actual overhead pool and base amounts cannot be determined until the close of an accounting period, estimated or billing rates will be used to price contracts.

FAR 42.704

> **Billing rates** are tentative overhead rates established for interim reimbursement purposes during the life of the contract.

They may be negotiated rates or rates acceptable to the contracting officer. Any payments received by contractors are subject to appropriate adjustment when final actual rates are established.

FAR 16.403(d)

☞ **NOTE:** This adjustment applies to cost reimbursement and fixed price incentive contracts.

FINAL EXAMINATIONS

Estimated pools and bases should support all of the proposed indirect cost rates. Careful examination of each could minimize unearned contractor profits. When you have established positions on all direct and indirect costs, your cost analysis is still not complete.

What other evaluations must be performed?

11.5 Establish Prenegotiation Objectives on Profit

Profit is the basic motive of a business enterprise. Therefore, from the Government's point of view, profit has two important roles:

1. Induce a company to undertake performance of a contract by offering prospects of monetary reward.
2. Persuade the company to perform more effectively under the contract, than it otherwise might, by affording it the opportunity to earn even more profit.

FAR 15.902

You must establish prenegotiation profit or fee objectives in all contract actions requiring cost analysis. Agencies making noncompetitive awards over $100,000 that aggregate to $50 million or more each year must adopt a "structured approach" to profit negotiation. Agencies must consider the following factors when developing their structured approaches:

FAR 15.905

- Contractor effort
- Contract cost risk
- Federal socioeconomic programs
- Capital investments
- Cost-control and other past accomplishments
- Independent development.

Instead of independently establishing its own profit procedures, your agency may have adopted another agency's procedures. Many agencies follow a structured approach similar to the **Weighted Guidelines Method** developed by the Department of Defense. This formula is usually modified to fit the programs of the specific agency.

The structured approach your agency adopts must allow the tailoring of profit on an individual contract or modification to fit the particular circumstances of that contractual action.

Regardless of the result achieved using a structured approach, you may not accept an overall profit or fee objective

- higher than that proposed by the prospective contractor or
- exceeding statutory or regulatory limits.

See Exhibit 11-4 for fee limitations.

FEE LIMITATIONS

FAR 15.903(d)

The statutory limitations on price or fee are:

1. Not more than fifteen percent (15%) of the estimated cost of a cost-plus-fixed-fee contract, excluding the fee, for experimental, developmental or research work.

2. For architect-engineering services for public works or utilities, the contract price for production and delivery of designs, plans, drawings and specifications cannot exceed six percent (6%) of the estimated cost of construction of the public work or utility, excluding fee; and,

3. Not more than ten percent (10%) of the estimated cost, excluding fee, for cost-plus-fixed-fee contracts.

Limitations 1 and 3 also apply to the maximum fees on cost-plus-incentive-fee (CPIF) and cost-plus-award-fee (CPAF) contracts. However, the agency head or designee may waive those limitations for a specific CPIF or CPAF contract.

Exhibit 11-4

11.6 Establish a Pre-negotiation Position on the Total Price

Cost analysis alone is not sufficient to determine price reasonableness. A price analysis subsequent to cost analysis must be done to get a complete overall picture.

To illustrate the importance of the final price analysis, suppose you were asked to evaluate a proposal for building a car. The proposal could look something like this:

Material	$1,500
Labor	3,000
Overhead	2,500
Miscellaneous	1,000
Profit	500
Start-up costs	$2,000,000
Total Price	$2,008,500

Based on cost analysis alone, you would very likely determine that the proposal is indeed reasonable. Each element could be considered necessary and reasonable, even the $2 million for start-up, assuming that this contractor has never built a car before. But, obviously, the

total price is not reasonable, since you could obtain a car elsewhere for much less. This can only be seen through price analysis, not cost analysis.

So while price analysis alone can be adequate to make a determination of reasonableness, cost analysis alone usually cannot.

11.7 Establish Prenegotiation Positions on Ceiling Prices

When the proposal you have completed analyzing is for a firm-fixed price contract, you are ready to prepare for negotiations. However, for other contract types, there may be some additional contractual elements that you need to identify and identify objectives for.

Exhibit 11-5 shows these necessary additional elements needed for some compensation arrangements. (See Chapter 4 if you need a review of the mechanics of each contract type.)

COST RELATED CONTRACT ELEMENTS

CON'T. TYPE	CEILING PRICE	MIN. FEE	MAX. FEE	TGT. COST	TGT. PROFIT	BASE FEE	AWD. FEE	SHARE RATIO
T & M	X							
LBR. HR.	X							
FPIF	X			X	X			X
FPIS	X			X	X			X
FPR (R)	X							
FPR (P)	X							
CPFF*				X				
CPIF		X	X	X	X**			X
CPAF			X	X		X	X	

Exhibit 11-5

* Fixed Fee is negotiated.
** Target "fee" in the case of CPIF.

Ceiling Price - This is the maximum obligation above which the Government will not pay. Compute the ceiling price by adding the estimate of the most pessimistic cost to the most pessimistic profit. These points represent the worst case that the Government is willing to accept. The contractor assumes all cost responsibility at this point.

☞ **NOTE:** Cost reimbursable contracts contain a limitation of costs amount which is technically not a ceiling price but requires the contractor to take full responsibility for spending on costs greater than the limit without contracting officer approval.

Minimum Fee - This is the fee that is fair for the most pessimistic cost estimate. Regardless of performance outcome, the contractor will receive in fee dollars no less than the minimum.

Maximum Fee - The reasonable fee at the most optimistic cost is the maximum fee. The most optimistic cost is the best case estimate. The contract will receive no more than the maximum fee dollars regardless of performance. Maximum fees must not be set above statutory limits.

Target Cost - A good target cost is one that represents an equal chance of the contractor either overrunning or underrunning costs.

Target Fee/Profit - An amount considered to be fair and reasonable based on the target cost.

Base Fee - Minimum fee for the given performance. This fee is given regardless of the specific ratings the contractor may receive on the evaluation schedule. Set this fee low. Base fees should not exceed 3% of estimated costs but may be as low as zero.

Award Fee - An amount in addition to the base amount sufficient to provide motivation for excellence in contract performance. The sum of base and award fees must not exceed statutory limits.

Share Ratio - This arrangement reflects the sharing of cost responsibility between the Government and the contractor. The ratio should reflect the cost risks involved, as evidenced by the magnitude of potential overruns and underruns for the specific effort.

Compute an **underrun share ratio** by using the formula:

$$\frac{\text{Target Profit - Most Optimistic Profit}}{\text{Target Cost - Most Optimistic Cost}} = \text{Contractor's Share of the Underrun.}$$

$$\frac{100 - 120}{1000 - 800} = \frac{-20}{200} = -.1 \text{ or } 10\%$$

The negative sign indicates the inverse nature of the relationship between cost and profit, and the .1 or 10% is the contractor's share of the underrun. The Government's share is 100% minus the contractor's share or 90%.

The underrun share ratio in this case is represented by the ratio 90/10.

(Underrun share ratios are computed for FPIF contracts only.)

Compute an **overrun share ratio** in the same manner. Substitute the appropriate data into the overrun share formula to obtain the sharing arrangement for an overrun.

$$\frac{\text{Target Profit - Most Pessimistic Profit}}{\text{Target Cost - Most Pessimistic Cost}} = \text{Contractor's Share of the Overrun}$$

$$\frac{100 - 50}{1000 - 1200} = \frac{50}{-200} = -.25 \text{ or } 25\%$$

The overrun share ratio is therefore 75/25.

11.8 Document Rationale for Prenegotiation Positions

FAR 15.807

The basis for your established positions is supported by written evidence. In documenting the prenegotiation objectives resulting from your cost analysis, address the following:

- Pertinent issues to be negotiated
- Cost objectives
- Profit or fee objective.

NEGOTIATION FOUNDATION

A thorough cost analysis should provide you with a basis for understanding how the company proposes to do the work. It should also determine what estimating assumptions were made in preparing the proposal. Ultimately, this understanding will form the basis for conducting your price negotiations.

CHAPTER 12

COMPETITIVE RANGE FACTFINDING NEGOTIATION STRATEGY

FIRST ROUND CUTS

One of the offerors, eliminated earlier from the competitive range, is upset. She demands an explanation for removal from consideration. You inform the offeror that the proposal is technically unacceptable as proposed. She replies, "I knew there were some flaws in the proposal; however, I thought we could correct them at some other point during the negotiation process. There is no way anyone can beat my price."

What are the reasons for eliminating a proposal from the competitive range?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Establish the competitive range.
Conduct/participate in factfinding sessions.
Develop prenegotiation objectives, strategies, and tactics.

Individual:

COMPETITIVE RANGE

12.1.1 Determine whether to award without discussions.

12.1.2 Establish the initial competitive range.

12.1.3 Notify appropriate offerors of decision not to consider their proposals further.

FACTFINDING

12.2.1 Identify data needed from the offeror to complete analysis.

12.2.2 Determine method of factfinding.

12.2.3 Prepare for factfinding.

12.2.4 Conduct factfinding session.

NEGOTIATION STRATEGY

12.3.1 Review prenegotiation objectives.

12.3.2 Research offeror's probable strategy and tactics.

12.3.3 Prepare a prenegotiation plan.

12.3.4 Rehearse the negotiation plan.

12.3.5 Prepare negotiation agenda.

INTRODUCTION TO COMPETITIVE RANGE

Policy

You will need to determine which proposals are in the competitive range for the purpose of conducting written or oral discussions.

FAR 15.609(a)

> "The competitive range shall be determined on the basis of cost or price analysis and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award."

Determining the competitive range:

1. Eliminates offers which do not have a reasonable chance of selection for award; and

B-241372.3

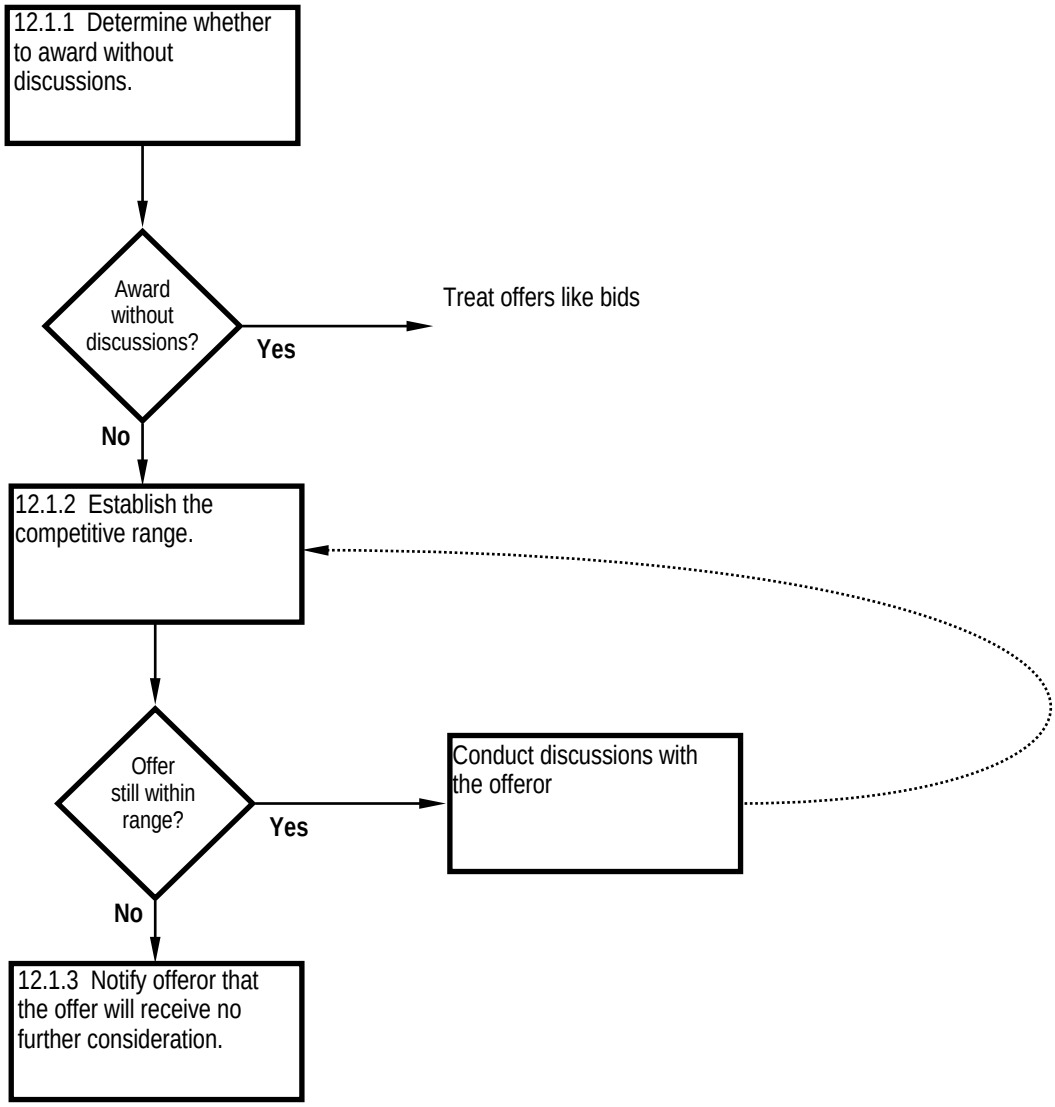
2. Prevents Government and industry from spending time and money on negotiations which have no reasonable expectation of leading to selection and award.

Steps in Performance

The steps in establishing the competitive range are charted on the next page. Following the flowcharts, each step is discussed in turn in subchapter 12.1.

The flowchart and discussion for factfinding and planning negotiation strategy are found in subchapters 12.2 and 12.3 respectively.

STEPS IN ESTABLISHING THE COMPETITIVE RANGE



STEPS IN ESTABLISHING COMPETITIVE RANGE

12.1 COMPETITIVE RANGE

12.1.1 Determine Whether to Award Without Discussions

B-240333

FAR 15.610(a)(3)

Upon the completion of technical and cost evaluations, you must decide whether to proceed to contract award without oral or written discussions or to establish a competitive range and conduct such discussions. You would generally award on initial proposals when the lowest priced, responsive proposal from a responsible offeror:

- Offers a price that is fixed by law or regulation.
- Provides a fair and reasonable price on the set aside portion of a partial set aside.
- Is priced at or near the Government's most optimistic prenegotiation position on price.

Even though the above criteria may be met, you always have the discretion to proceed to oral or written discussions--it is not automatic. You should not make award without further exploration and discussions when:

B-242440

1. There is uncertainty as to the pricing or technical aspects of any proposals, or

B-239287

2. The circumstances of the competition, including the pattern of prices obtained, reasonably put you on notice that award on the basis of initial proposals may not result in the lowest overall cost to the Government.

Notice in the Solicitation

Award on initial proposals is not permitted unless the solicitation informs offerors of the need to submit their best proposal initially. Include the standard CONTRACT AWARD clause in all RFPs to alert potential contractors of the possibility of award without discussions. This clause states:

FAR 52.215-16

> "(c) The Government may award a contract on the basis of initial offers received, without discussion. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

DOD, NASA, and Coast Guard must use Alternate II or III to this clause which informs the offerors that it is your "intention" to award either with or without discussions.

B-237201.3

When you decide that an award will be made without discusions, be careful of any communication with offerors. Award on the basis of initial proposals is prohibited once discussion has been conducted with one or more offerors. Even simple communication may require you to hold discussions with all offerors; **for example**:

- Request for extension of an expired offer.
- Verbal acknowledgement of an amendment.
- Confirmation of a price.
- Request for compliance with requirement for bid guarantee.

FAR 28.101-4(b)

On the other hand, the following are generally not considered to be discussions:

- Verification of offers pursuant to a suspected mistake.
- Provision of general information not prejudicial to other offerors.

12.1.2 Establish Competitive Range

FAR 15.610(b)

Your determination of which offers fall within the competitive range is important, because if you do not award on initial proposals, you are required to conduct oral and written discussion with all offerors in the competitive range. The competitive range is established by comparing the submitted proposals with:

- each other, and
- the Government's requirements.

B-239906

A proposal which might be capable of meeting the Government's requirements, if revised, can be excluded from the competitive range, if based on the array of technical scores or prices of all offerors, the proposal clearly does not have a real chance of being selected for award.

> **For example**, its technical score is far lower than that of the next higher-scoring offeror, and its price is higher than that of any of the offerors in the competitive range.

Steps in Determining Range

Step 1 Identify offers which are outside the technical range.

Since oral or written discussions provide an opportunity for the correction of deficiencies, you may not exclude a proposal from discussions solely because it fails to conform to the solicitation.

- However, you may omit offers which require major modifications or revisions*. Therefore, exclude from the competitive range any proposal which is considered "grossly deficient", i.e., it is rated so low that "any attempt to upgrade it to an acceptable level would require an unreasonable and unfair degree of assistance on the part of the Government."

B-228494

- A technically unacceptable proposal may be excluded from the competitive range irrespective of its low offered price.

Step 2 Identify offers whose evaluated prices are outside the price range.

B-239116 or B-243767

- You may determine a technically acceptable proposal to be outside the competitive range if the evaluated price exceeds the highest reasonable price, and you believe that it could not be reduced sufficiently without detracting from its technical acceptability.
- Proposals which are significantly beneath the lowest reasonable price may also be excluded from the competitive range if the proposal is judged technically unacceptable.

Step 3 When selecting on greatest value, exclude offers that rank well behind other proposals, having accounted for all evaluation factors including price.

SORRY CHARLIE

You tell the offeror that the proposal did not contain just a few flaws but it needed major revisions for acceptability. She pleads for you to let her submit a revised proposal to correct the deficiencies.

What do you tell her?

* If firm is small business and technically unacceptable, you may exclude without referring to SBA. (See B-237325)

Borderline Offer

When a proposal falls just outside of the range, you may determine that the offeror could be induced through negotiations to bring it into the competitive range. Make that determination by considering:

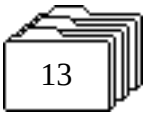
- Offeror's previous track record.
- Degree outside the range.
- Number of offers.
- Number of offers that would remain in the range.
- Nature of technical deficiencies.
- Results of first round of negotiations.
- Possibility of significant cost savings.

12.1.3 Notify Offerors Outside Competitive Range

When there is any doubt as to whether or not a proposal should be in the competitive range, it is better to include it and avoid protest actions.

FAR 15.1001(b)(1)

Once you decide to exclude a proposal from the competitive range, you must notify the offeror in writing of the decision not to consider the proposal further. The notice should at least:



1. Include, in general terms, the basis for the determination that the proposal is not acceptable, and

2. Advise that revisions to the proposal will not be considered.

JUST THE FACTS

The WeSell technical proposal contains some weaknesses, and there are some inconsistencies between the cost information submitted and your cost analysis research. Your contracting officer recommends factfinding as a way to clarify these areas.

How will you conduct factfinding?

What skills are necessary to conduct a successful session?

INTRODUCTION TO FACTFINDING

Objective

To determine the factual basis and estimating assumptions used by the offeror to formulate its proposal.

During a factfinding session, the focus should be on obtaining information and clearing up misunderstanding or erroneous assumptions that could impede upcoming negotiations.

Some of the actions that will occur during factfinding are:

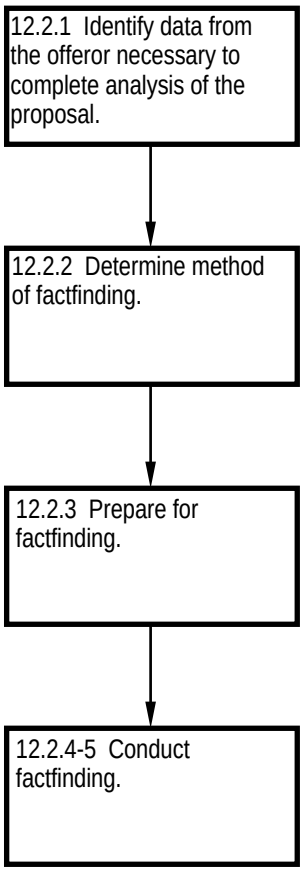
- Obtaining answers to questions raised during cost or price analysis.
- Testing realism of negotiation objectives.
- Checking inconsistencies in cost information.
- Clarifying such elements as
  - labor hours, rates
  - material lists, prices
  - overhead
- Probing for rationale behind the offeror's basis for estimating the various elements of the proposal.
- Determining the range of the negotiation positions of each side.

Steps in Performance

The steps in factfinding are charted on the next page. Following the flowcharts, each step is discussed in turn in subchapter 12.2.

The flowchart and discussion for planning negotiation strategy are found in subchapter 12.3.

STEPS IN FACTFINDING



STEPS IN FACTFINDING

12.2 FACTFINDING

12.2.1 Identify Data Needed to Complete Analysis

FAR 15.807(a)

Proposal analysis cannot be completed until you have a clear understanding of the information from the contractor. Identify all areas of the proposal that are unclear and warrant additional facts to prepare for negotiations. Questions and the need for clarification are typically generated from:

- technical proposals, and
- business terms and conditions (e.g., price-related factors, proposed contract type, requests for financing, etc.)

12.2.2 Determine Method of Factfinding

Factfinding can be conducted in a variety of ways --

- Phone call
- Letter
- Conference
- Visit to offeror's site

Choose the method of factfinding based on the type and amount of information you need. If complex and voluminous information is required, a conference or a visit to the offeror's site may be necessary. Questions of less magnitude usually involve correspondence or a telephone call.

12.2.3 Prepare for Factfinding

If the complexity of information you require warrants a conference or a visit to the offeror's site, you may find it necessary to assemble a team of specialists to participate in the factfinding session. Prepare team members by:

- Defining roles,
- Developing specific questions on the technical proposal, and
- Developing specific questions on business terms and conditions.

Make sure all team members know their roles and are able to discriminate between:

- negotiations, which is bargaining, and
- factfinding, which is information gathering.

B-237009

Planned questions should cover all information needed and should not

reveal information that could impair the Government's negotiation strategy.

12.2.4 Conduct Fact-finding Session

When final preparations for factfinding are complete, you are ready to conduct the session. The communication skills required are questioning, probing, listening, and understanding.

Questioning

In some cases it is advisable to plan questions in detail, as in the case of an interview. In other instances, the non-directed interview approach can be used to your advantage. These questions are broad and are designed to stimulate broad responses. This technique often produces more information in the form of unsolicited answers than the detailed questioning method.

The method chosen will depend on the subject matter involved and on the person to whom the questions are directed. It can not be emphasized enough that the factfinding session is strictly exploratory. In the process of questioning, there may be a strong temptation to counter and slip into negotiations. However, to do so would destroy the purpose of the factfinding session.

Probing

When answers given are vague or guarded, it may be necessary to use the probing technique:

> This calls for a series of questions concerning the same subject matter with each successive question "digging in" deeper to elicit an adequate answer.

Probing also involves using different approaches or ways of asking the question:

> If the answer is not satisfactory, ask the question in another way, postpone it for awhile and continue to rephrase it until adequate answers come forth.

If these efforts fail, attempt to determine why an adequate answer is not given.

Listening

Listening is as vital to communication as talking. Inadequate communication is often caused by inadequate listening--perhaps more often than insufficient talking. In the factfinding session, the art of listening is significant. This time your primary task is to listen and absorb answers.

Understanding

Unintentional disputes frequently occur because of a lack of understanding. One technique for assuring the understanding of a point is to rephrase it and ask whether everyone's understanding is the same.

Do not end the session until you have:

- tested the realism of the issues and positions as planned prior to the factfinding session,
- determined, by the many questions asked, the basis for the contractor's position, and
- determined the contractor's probable stand to be taken on issues and the relative importance they have placed on each.

When these tasks have been accomplished, you should close the session and document the contract file with any new information and resulting changes. As a result of information received from factfinding, you may need to complete one or more of the following actions:

- Issue an amendment to the RFP.
- Revise negotiation objectives.
- Redetermine the competitive range.

DIALOGUE DIVIDENDS

Whether conducted by phone call or conference, factfinding should not only provide data to complete analysis of proposals but also reveal information that will help in planning and conducting negotiations when the proper communication skills are used.

WHAT'S THE PLAN?

During factfinding with WeSell, it becomes apparent that

- *labor hours,*
- *overhead charges, and*
- *profit*

will be major issues. While

- *tooling,*
- *delivery, and*
- *inspection requirements*

will be minor issues. The negotiators at WeSell have a reputation for being tough and, therefore, seem to be firm on their objectives.

What should be included in your preparation for this negotiation?

What strategies and tactics are available to help you plan for agreement?

INTRODUCTION TO NEGOTIATION STRATEGY

All questions of fact about cost or pricing data should have been resolved during factfinding. The differences that exist now should be those concerning

FAR 15.610(c)

- value,
- business terms and conditions, and
- deficiencies in technical proposal.

It is through the use of discussions, hard bargaining, and compromise that final agreement is reached. Preparing for negotiation discussions is crucial to a successful outcome. You and your team must have a strategy before the discussions begin.

Definition

The negotiation strategy is the overall plan, including appropriate tactics, for conducting negotiations at the bargaining table to achieve your overall objectives.

Purpose

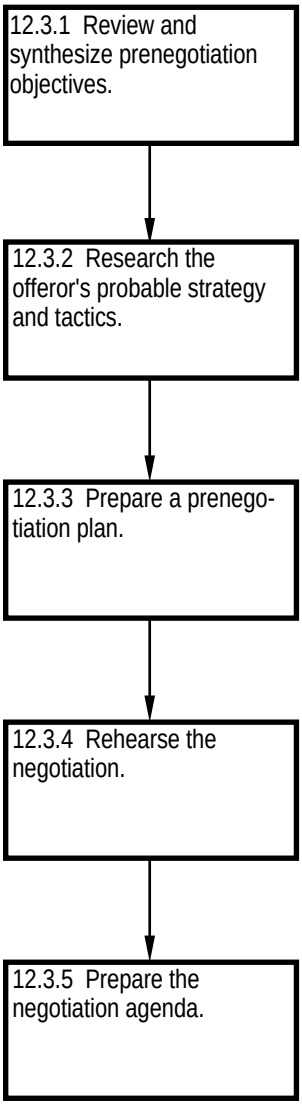
The goal of negotiations is win/win, not win/lose, accomplished by conducting negotiations as a cooperative search for solutions that are optimal from the standpoint of both parties' goals.

Negotiations should not be based on overcoming resistance but on diminishing the possibilities of resistance and increasing gains for both parties.

Steps in Performance

The steps in planning negotiation strategy are charted on the next page. Following the flowchart, each step is discussed in turn in subchapter 12.3.

STEPS IN PLANNING NEGOTIATION STRATEGY



STEPS IN PLANNING NEGOTIATION STRATEGY

12.3 NEGOTIATION STRATEGY

12.3.1 Review Prenegotiation Objectives

After completing your cost or price analysis, you may not be firmly committed to one set of ideas about costs, profits, and price.

For example, you may have defined the possibilities and developed different prices for different situations:

1. One price objective would be based on the assumption that all processes worked out as planned. This would be the minimum price position.
2. Another price objective would be based on the assumption that all predicted events took place but not as soon as hoped for. Call this the target position.
3. A third, maximum price position, might be developed assuming a "worst case" situation.

Identify each of these positions for each objective. All objectives should be fully supportable based on facts and market knowledge.

Assemble Team

You are now ready to assemble your negotiation team and brief them on:

1. The results of your various analyses, and
2. How the team members must conduct themselves during the actual discussions.

A negotiation team is assembled for significant procurements to provide technical expertise and specialized help. The size and composition of the negotiation team varies depending on:

- size and complexity of the contract,
- circumstances surrounding the upcoming negotiation, and
- personnel resources available to the Government.

The negotiation team generally consists of a chief negotiator (you), a price analyst, and a technical representative. Larger teams include:

- auditors,
- attorneys,
- several price analysts,
- manufacturing and other technical specialists, and
- representatives from the user community.

Agency regulations may require fewer or additional Government officials.

Exhibit 12-1 identifies the information that should be gathered and presented to the team as necessary.

ISSUES FOR NEGOTIATION TEAM

- Issues from initial reading of the proposal.
- Issues and recommended prenegotiation objectives from technical analyses.
- Issues and recommended prenegotiation objectives from field pricing or audit report.
- Issues and recommended prenegotiation objectives from the cost or price analysis and evaluation of other proposed business terms.
- Issues that arose during the competitive range determination.
- Issues that arose during the factfinding session.
- Offeror's probable negotiation goals and positions.

Exhibit 12-1

The team, after reviewing the collected information will consolidate, reorganize, and reformulate issues and prenegotiation objectives.

Since some team members may not be familiar with their responsibilities as team members, you should brief them on the regulations listed in Exhibit 12-2.

TEAM MEMBERS RESPONSIBILITIES

• Procurement integrity.	FAR 3.104
• Disclosure of proposal information before award.	FAR 15.413
• Contracting officer controls all discussions.	FAR 15.610(c)(1)
• Technical leveling, technical transfusion, auctioning.	FAR 15.610(d & e)
• Disclosure of Government reports and analyses.	FAR 15.803

Exhibit 12-2

12.3.2 Research Offeror's Probable Strategy

You should, whenever possible, try to determine the negotiation style and probable strategies of the offeror's negotiator(s) and use this information in developing your strategy and tactics. Contact all of the most likely sources of significant data, such as:

- Post negotiation memoranda from previous procurements.
- Government representatives
- Proposal
- Government analyses of the proposal
- Factfinding reports

12.3.3 Prepare Prenegotiation Plan

STEP 1: IDENTIFY FACTORS AFFECTING NEGOTIATIONS

Each negotiation session has its own character because of the many variables at work in a procurement. Some of the more common ones are:

- Aspects of the requirement at issue.
- Business terms and conditions at issue.
- Number of issues to be discussed.
- Number of offerors.
- Time available for conducting discussions.
- Skill of Government team members.

You need to make an assessment of these factors when developing your pre-negotiation plan.

For example, your assessment of the team members' skills will determine who attends negotiation sessions, the extent of participation by the team members, and the kind of tactics you or they may employ.

STEP 2: IDENTIFY NEGOTIATION PRIORITIES

The negotiation issues (See Exhibit 12-1) or different points of view are what the negotiation is all about. Each objective will be composed of issues and facts. Issues are those elements upon which both sides disagree because of opposing interests and objectives. You need to analyze the issues as follows:

- Distinguish major from minor issues.
- Distinguish "firm" from "give" positions.
- Compare your priorities with the offeror's anticipated positions.

- Identify potential tradeoffs and concessions.
- Determine how each issue should be addressed.
- Determine who should lead the discussion of each issue.

Slant any concessions and tradeoffs during negotiations toward the Government's most important objectives and away from the least important.

STEP 3: DEVELOP OVERALL STRATEGY

It is through resolution of the issues that an agreement can be reached. Since they are vehicles for both clashing and resolution, the proper handling of issues is the key to successful negotiation. Exhibit 12-3 shows various strategies for approaching the issues.

ISSUES STRATEGY

1. **Offensive**
   a. Arrange issues in order of importance.
   b. Arrange issues and present them so that when a concession is made by offeror on one issue, it is necessary to make a concession on another to be consistent.
   c. Arrange issues in order of ease of agreement.
   d. Arrange issues in terms of the offeror's stated interests.
2. **Defensive**
   a. Arrange issues in order of least importance.
   b. Arrange issues in order of difficulty of agreement.
3. **Defensive-Offensive**
   a. Use an initial strategy to move offeror from position beyond maximum objective to one which is within the objective range, then use a separate strategy.
   b. Present options to offeror on each issue and ask the offeror to choose between them.
4. **Problem Solving**
   a. Determine offeror's interests beyond the stated positions.
   b. Arrange issues in terms of amenability to a joint problem solving basis.
   c. Focus decision making on known interests rather than on fixed position on trivial issues.
   d. Where possible, establish qualitative rather than quantitative objectives.

Exhibit 12-3

Obtain input and opinions from all team members and decide the strategy and tactics that you will use. Select an approach that best incorporates your negotiation planning and knowledge of the offeror's probable objectives and strategy. Planning strategy includes the development of negotiation points which consist of:

Must points:	Issues so important to your position that they cannot be conceded.
Give points:	Issues relatively low in importance that can be used as concessions.
Discussion points:	Issues which have some flexibility for either winning a concession or conceding the issue.
Avoidance points:	Issues not to be discussed because of weakness or inflexibility.

Prior to the start of the bargaining session, your negotiation team should determine all the issue points, and their order of presentation. Make sure you consider:

- Opening positions
- Game plan for exchanging counter offers and concessions
- Tactics (which to employ and when)

There are three basic approaches to the game plan for exchanging counter offers and making concessions:

1. Reveal No Position
   - Make offeror justify position; counter justification.
   - Move offeror from one position to another until objective is reached.
   - Useful when offeror in weak position.
2. Reveal Minimum Position
   - Initial counterproposal.
   - Useful to test strength of offeror's position.
   - Should not be offered and immediately withdrawn: must be vigorously negotiated.
   - Useful as a point from which concessions can be made.
3. Reveal the Target Objective
   - Saves negotiation time but has little bargaining room.
   - Negotiator must be willing to sell hard.
   - May be considered as a sign of weakness.

Exhibit 12-4 shows tactics that have been used from time to time by negotiators. Some of them border on the unethical and are presented to help you recognize and successfully counter them.

STEP 4: PREPARE PRENEGOTIATION PLAN

Solidify your approach to negotiations by preparing a prenegotiation plan. The plan should be sufficient in detail to obtain program and procurement management support for your positions in the negotiation. A thorough plan will include:

- Procurement background
- Target objectives
- Major negotiation issues
- Negotiation strategy
- Team members and roles
- Schedule

It is very important that you do not disclose any information on proposed acquisitions outside the Government and restrict disclosure within the Government to persons with a legitimate interest in the acquisition.

STEP 5: BRIEF MANAGEMENT ON THE PLAN

Most procurement organizations require some supervisory review of the plan prior to starting negotiations. The review is conducted so that management can be assured you have

- "done your homework" and
- are ready for negotiations with a well-conceived, realistic plan.

You on the other hand have the opportunity to get policy guidance and management support in the handling of particular problems.

The review can be a five-minute briefing of the facts and the objectives if it is a small dollar or routine contract.

It can also be a formal presentation by the team using a flip chart or slide show to the agency's top procurement managers.

Many times it will take the form of a written justification and request for clearance to proceed for the upcoming negotiation.

The larger or more visible the procurement, the higher the review will go in the chain of command of the organization and the more formal will be its requirements and procedures.

TACTICS

A. Use of Language

- Verbal: Speaking, writing, listening, and reading.
- Nonverbal: Posture, facial expression, voice tone, gestures, and dress.
- Physical: Charts, pictures, movies, television, and handouts.

B. Use of Questions

- Direct to an individual.
- Require explanation.
- Provocative.
- 'Yes' or 'No.'
- On overhead to a group.
- Ambiguous.
- Redirected or reversed.
- Leading.
- Factual.
- Controversial.
- Relay.

C. Miscellaneous

- Physical distractions.
- Selection of negotiation sites.
- Use of deadlines.
- "David vs. Goliath."
- Unscheduled meetings.
- Straw issues.
- Use of walkouts.
- Pro and con analysis.
- Use of recesses.
- Place the other side on the defensive.
- Hospitality.
- Show of detachment.
- Silence.
    - Allow issue to drag out.
- Use of the word 'No'.
- Good guy - bad guy technique.
- Present alterative proposals.
- Agreement and rebuttal (yes but).
- Use of summaries.
- Issue a unilateral decision.
- Make the other party appear unreasonable.
- Throw blame for inability to compromise on a third party
- Get offeror to justify position on the basis that the negotiator will then use the information to justify the offeror's position to higher authority.
- Appeal to ego or emotions (e.g., flattery, appeal to patriotism).
- Change members of the negotiation team
- Deliberate misinterpretation or pretended misunderstanding (borders on the unethical).
- Express any genuine misunderstandings
- Prepare a detailed memorandum showing the offeror's position to be unreasonable
- Use of negative or indirect concessions
- "Walk in the woods"--separate meeting between the two principal negotiators.
- Bait and switch (questions on one aspect of the negotiations actually designed to elicit data on another aspect).
- Bribes and inducements (from the subtle to the not so subtle).

Exhibit 12-4

Management concurrence of your negotiation plan is imperative. Make sure you obtain agreement on:

- issues.
- objectives.
- team members.
- roles.
- schedule.
- concessions or commitments.

You must know how much room you have to negotiate and the amount of freedom you have to move up or down from the objective as the information and circumstances change during the negotiation.

12.3.4 Rehearse Negotiation Plan

Your negotiation team is not a formal, identifiable organizational entity. Instead, it is an ad hoc group that lasts until the contract has been negotiated and awarded, and then it is disbanded. For this reason, it is important for the team to review, rehearse, and finalize the plan and strategy prior to the start of negotiations.

Prepare the team for the negotiation session by:

- Reviewing the plan and strategy.
- Obtaining agreement on each member's role.
- Conducting a simulated negotiation session.
- Designating a "devil's advocate" to challenge the strategy.

This rehearsal should also review the team members responsibilities with regard to:

- disclosure of proposal information,
- ethics and standards of conduct,
- rules for oral and written discussions, and
- guidance on negotiating against cost and price objectives.

Being completely prepared for the negotiation session is oftentimes your best strategy.

12.3.5 Prepare Negotiation Agenda

An agenda is one of the most useful tools available to get the negotiations started on a favorable path.

1 Establish an agenda of issues that you want to consider with the offeror during negotiations.

2. Write in fairly general terms since specifics may divulge your position.

3. Propose the agenda at the start of the conference

The agenda will help you to confine the discussions to important matters.

In preparing the negotiation agenda, include:

- Schedule
- Topics
- Location(s)
- All participants including titles or positions

A copy of the agenda should be provided to all team members prior to the start of the negotiation.

CHAPTER 13

CONDUCTING NEGOTIATIONS & MISTAKES

FACE TO FACE

You have been put in charge of the negotiation with the WeSell company. The fact-finding session indicated that the negotiation session would be difficult, and you planned your strategy accordingly.

What can you do to set up the session to promote a positive atmosphere for negotitions?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Conduct negotiation sessions.
Prepare price negotiation memoranda.
Identify and correct mistakes in offers.

Individual:

CONDUCTING NEGOTIATIONS

13.1.1 Schedule discussions and brief team.

13.1.2 Conduct discussions.

13.1.3 Identify and apply special tactics for sole source discussions.

13.1.4 Conclude discussions.

13.1.5 Request Best and Final Offers (BAFOs).

13.1.6 Identify the highest ranking BAFO.

13.1.7 Determine the need to reopen discussions.

13.1.8 Prepare the Price Negotiation Memorandum certificate.

PREAWARD MISTAKES IN PROPOSALS

13.2.1 Identify and correct minor informalities and irregularities.

13.2.2 Identify and correct other suspected mistakes in the course of discussions.

13.2.3 Process mistakes when awarding without discussions.

INTRODUCTION TO CONDUCTING NEGOTIATIONS

FAR 15.102

"Negotiation is a procedure that ... permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract."

Bargaining is used in the sense of:

- Discussion
- Persuasion
- Alteration of initial assumptions and positions
- Give and take.

Bargaining may apply to:

- Price
- Schedule
- Technical requirements
- Type of contract
- Other terms of a proposed contract.

Successful negotiation -- the achievement of a mutual agreement that is in the best interests of both parties -- is a product of many factors. These factors include:

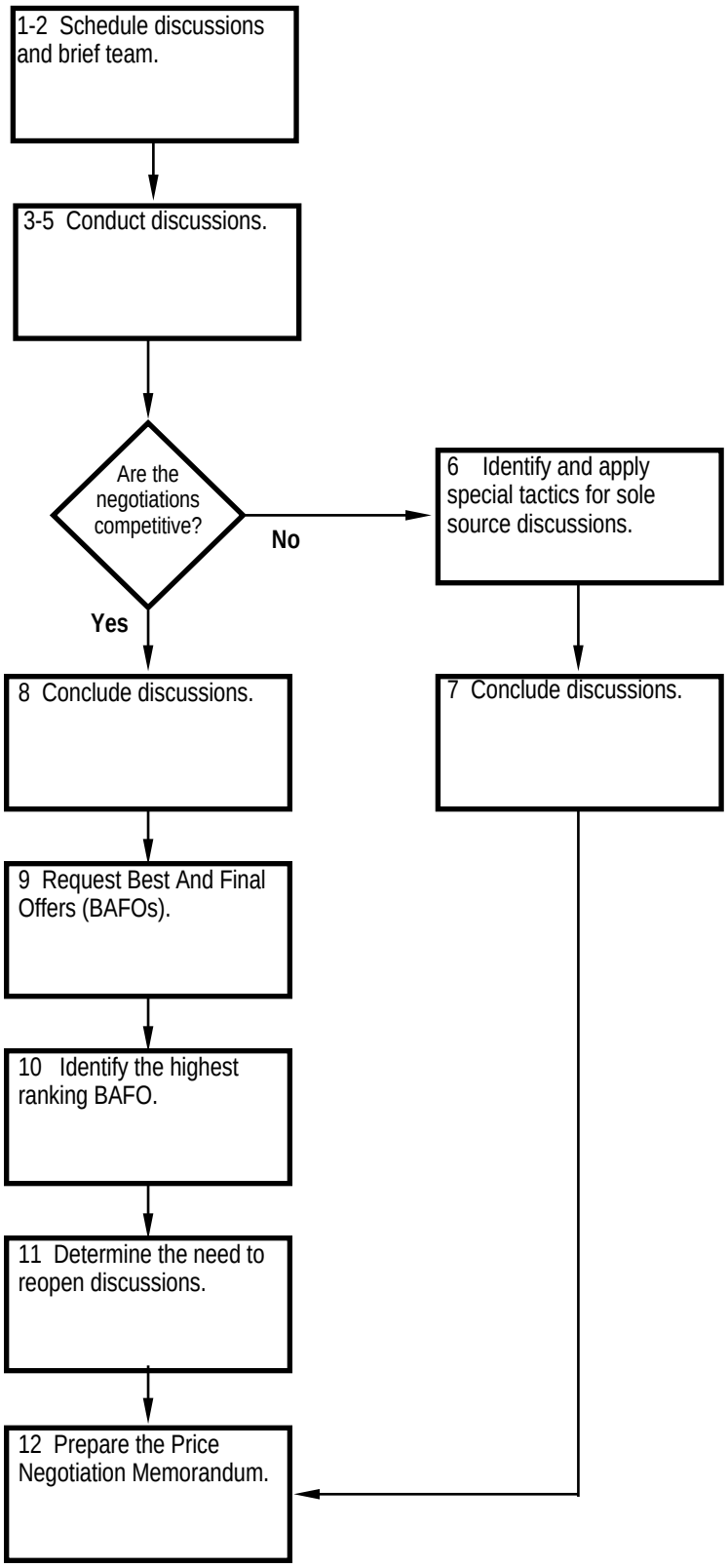
- Equity of the aims and positions of each party.
- Peculiar circumstances surrounding the bargaining session.
- Negotiating skills, motivation, and open-mindedness of the involved parties.
- Willingness of both sides to make concessions along with the resolve of each side not to yield on certain issues.

Steps in Performance

The steps in conducting negotiations are charted on the next page. Following the flowchart, each step is discussed in turn in subchapter 13.1.

The discussion for processing mistakes is found in subchapter 13.2.

CONDUCTING NEGOTIATIONS



STEPS IN CONDUCTING NEGOTIATIONS

13.1 CONDUCTING NEGOTIATIONS

13.1.1 Schedule Discussions

The Government is normally the host in a negotiation, therefore, it is your responsibility to:

1. Schedule the session and
2. Provide adequate facilities.

It is best to schedule negotiation sessions with offerors **in writing.** (Whenever possible hold discussions in a Federal facility.) Allow time for normal delays such as traffic, weather, lunch hour, etc. so that all parties are prompt. Arrange schedule so that you avoid overlapping sessions with other offerors.

Choose a location where the negotiation can be conducted without interruption or disturbance. Physical surroundings should also be considered as they may influence the course and final outcome of the negotiations as much as the Government's position and agreements.

Minimize personal discomforts, which tend to promote friction and disagreement, by ensuring that, the <u>conference room has certain basic requirements</u>:

- space to accommodate all participants,
- proper lighting,
- adequate acoustics,
- climate control capability,
- comfortable chairs,
- sufficient table space,
- available chalkboard, pencils, and paper.

A separate room, if available, should be provided to the contractor for private discussions.

Brief Team Members

Even though you have rehearsed the negotiations with your team, you should give them <u>one last briefing right before the session begins</u>, as delays may have extended the time since your rehearsal. When conducting negotiations with assistance from a team, make sure that all team members fully understand their functions and roles.

1. Team members who are accustomed to leading in their operating capabilities may find it quite difficult to play a secondary or supporting role at the negotiating table.
2. Inform the members that they should participate in the discus-

sions only as planned and that they should be extremely careful before giving a direct reply to any question.

3. A safe procedure to establish would be for everyone to seek your consent in some way before answering. If this is not done, your communications control may break down and jeopardize the team's position.

You will also need to remind team members of some of the basic ground rules of negotiations as listed in Exhibit 13-1.

NEGOTIATION GROUND RULES

- Never indicate to offerors they will win the award.
- Never give one offeror an advantage by disclosing information about other offerors' prices or technical proposals.
- Never cite non-existent regulations or make false statements.
- Never disclose the Government cost estimate.
- Never allow team members to disagree (unless planned) during negotiations.
- Never allow deadlines to affect the course of negotiations.
- Do not use the same strategies/tactics all the time.
- Do not engage in technical leveling or transfusion.
- Do not use auction techniques.

Exhibit 13-1

Technical Leveling means "helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses..."

FAR 15.610(e)

Technical Transfusion means disclosing technical information supplied by one offeror to other offerors.

Auction techniques include

B-246604.3

1. Indicating to an offeror a cost or price that must be offered to receive further consideration.
2. Advising an offeror of its price standing relative to another offeror.
3. Otherwise furnishing information about other offerors' prices.

13.1.2 Conduct Discussions

STEP 1: MAKE OPENING STATEMENT

The opening of the session is critical. The manner of the opening can influence attitudes which will prevail throughout the negotiation and can either aid or prevent reaching agreement. It is your responsibility to open the meeting with a statement that not only

- outlines the areas for discussion, but also
- sets forth the meeting format.

This opening statement should be clear, complete, and carefully planned since it helps determine whether the negotiation session will be orderly and productive or confused and misguided. Consider the following when preparing for the opening statement:

Be prompt - Government team members should be on time, and preferably arrive before the team members of the offeror.

Make a well-groomed appearance - Business attire or military uniforms represent appropriate dress.

Extend a pleasant greeting - Express appreciation for the attendance of the participants.

Introduce team - Full names and titles of members should be presented. Providing nameplates to everyone is recommended.

FAR 52.215-11

Establish authority - Determine if the other side has the authority to make a final decision.

Eliminate negotiation tension - Humorous anecdotes often help all negotiators feel at ease.

Synopsize procurement - Present background information which defines the problem or the nature of the acquisition action.

Results of factfinding - Identify additional factual information (data about which there is no disagreement.)

Purpose of negotiations - Express the need to resolve the issues by a willingness to evaluate the arguments and positions of both parties.

Emphasize fairness - Stress the Government's intention of fairness in all points.

The creation and maintenance of a positive atmosphere is critical. Successful negotiations are most often conducted in an atmosphere of cordiality and mutual trust.

STEP 2: SETTLE ON AGENDA AND PROCEDURES

If the offeror has not already received a copy of the agenda that you prepared while developing your negotiation strategy, you should present it at the start of the session. The agenda not only

- outlines the areas for discussion, but should also
- provide a formal negotiation structure which is consistent with your prenegotiation plan.

A key to maintaining control of the negotiations is to adhere to the established format.

STEP 3: HOLD DISCUSSIONS

B-242289

You will want to proceed with the negotiations as initially planned in the negotiation strategy. To be meaningful discussions, you must address all areas of concern, uncertainty, and deficiency with respect to:

B-244528.2

- Technical matters
  - Terms and conditions
  - Clarifications
  - Deficiencies
- Price and other business terms and conditions

Your team members are available to provide assistance as you request or as previously planned. Solicit their expertise when needed but <u>continue to maintain control of the negotiations</u>.

As agreements are made, they should be summarized and documented:

- Charts the negotiation's progress;
- Prevents future misunderstandings;
- Allows you to move on to the next issue when negotiations get bogged down; and return to that issue at a later time.

FAR 15.803(c)

Price negotiation does not, however, require that agreement be reached on every element of cost. Balance contract type, cost, and profit or fee negotiated to achieve a total fair and reasonable result. Do not agree on

FAR 15.807(c)

profit or fee without concurrent agreement on cost and type of agreement. Observe the session carefully to be able to recognize the offeror's strategy and tactics and effectively apply your own.

STEP 4: OBTAIN REVISIONS TO PROPOSAL

Provide the offeror with a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.

13.1.3 Sole Source Discussions

In the absence of competition, negotiating can be difficult. Many times the offeror resists bargaining because of this exclusive status.

When you encounter an unreasonable sole source offeror, you must identify and apply special tactics to improve your bargaining position so as to be able to negotiate from a position of perceived strength and not perceived weakness:

- Identify alternative ways to meet the Government's needs and lessen the dependence on the contractor.
  - Investigate in-house Government performance capability
  - Research other technical solutions
  - Bring another offeror on line
  - Postpone the requirement
  - "Break out" and compete subcomponents
  - Purchase data rights
- Act as an equal because cost/pricing data puts you on a level with the contractor.
- Consider changing the contract type. Reduced risk or increased profit incentives may facilitate agreements.

You should conduct negotiations with the offeror until a favorable agreement (best case) or an acceptable agreement (not necessarily favorable) on price and other terms is reached. However, you are not obliged to reach agreement if an acceptable agreement is not possible. In this event, you might want to consider referring the contract action to a higher authority for resolution or settlement.

13.1.4 Conclude Discussions

You should remember that the objective of the negotiation is to reach agreement on all contract terms. When this appears to have been accomplished, you should ensure that a common understanding has been reached before you close the negotiation session.

Important considerations are often attached to agreements on the various issues and these must be understood by both parties.

B-236896

1. If there is not common understanding, the contractor may refuse to execute the contract and another negotiation session may be necessary.
2. Therefore, commit the various agreements to writing before the negotiation ends and the contractor representatives depart.
   - make it a mutual effort: each party doing some writing.
   - reflect all the exceptions to the standard terms and conditions, the delivery schedule, special clauses, the price and profit agreements, and the contract type to be used.
3. Both you and the offeror retain a copy after signing.

Although the agreement may be subject to final approval at a higher level, the preparation and signing of the memorandum of understanding prior to adjournment of the negotiations will ensure a complete understanding by both parties of the accomplishments of the negotiation.

13.1.5 Request BAFOs

Discussions are conducted with each offeror in the competitive range. Once you have reviewed the results of the discussions, you will need to determine whether to eliminate any additional offeror(s) from the competitive range. Immediately notify **in writing** any newly eliminated offerors that their proposals will receive no further consideration for award.

At the conclusion of discussions, you must request offerors remaining in the competitive range to submit a "best and final offer" (BAFO). The written request shall include:

FAR 15.611

1. Notice that discussions are concluded;
2. Notice that this is the opportunity to submit a best and final offer;
3. Common cutoff date and time that allows a reasonable opportunity for submissions of written best and final offers; and
4. Notice that if any modification is submitted, it must be received by the date and time specified and is subject to the Late Submis-

B-242529

sions, Modifications, and Withdrawals of Proposals provision of the solicitation.

10

Offerors are not required to submit changes to their proposals, however, many do take advantage of the opportunity for revision.

- Modifications to proposals which are received after the cutoff date and time must be considered late and then rejected.*
- Promptly notify the offeror that the BAFO will not be considered when making award decision. (However, the original offer will still be considered.)
- Timely BAFOs should be reviewed to identify any mistakes.
- These mistakes should then be promptly resolved.

13.1.6 Identify Highest Ranking BAFO

13

If the discussions have been successful, one or more of the offerors will submit a BAFO that meets the highest expectations of the Government (e.g., a superior technical proposal at a competitive price). To determine the highest ranking BAFO, you must evaluate the new offers by:

1. Obtaining rankings on technical factors;
2. Applying price-related factors; and
3. Determining the overall ranking of each offer.

You must only apply evaluation factors which are specified in the solicitation and rank offers against those factors and not each other.

13.1.7 Determine Need to Reopen Negotiations

B-237486

After receipt of best and final offers, you should not reopen discussions unless it is clearly in the Government's interest to do so. If negotiations are reopened, you must issue an additional request for best and final offers to all offerors still within the competitive range.

13.1.8 Prepare PNM

At the conclusion of each negotiation, a price negotiation memorandum (PNM) is to be prepared for inclusion in the file and for the use of any reviewing authorities. The purpose of a PNM is twofold:

First, it helps establishe the reasonableness of the price agreement reached with the offeror.

Second, some agencies use the PNM as documental support for the award decision requiring that the PNM or a summary PNM be in sufficient detail to allow an accurate reconstruction of the procurement for immediate review and future reference.

* A later modification of an otherwise successful proposal that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted. FAR 52.215-10(g).

This memorandum should explain the principal elements of the negotiation in sufficient detail to reflect the most significant considerations involved in reaching the final price.

The PNM explains how all the data collected from the proposal and its supporting documents and the Government advisory reports were used. The content in each PNM will vary but must report the actual events of the analysis and negotiation. The availability of data will dictate the kind and amounts of information to include in the PNM. The information shown in Exhibit 13-2, however, should be included:

CONTENTS OF PRICE NEGOTIATION MEMORANDUM

FAR 15.808

- Purpose of the negotiation.
- Description of the acquisition, including appropriate identifying numbers (e.g., RFP No.)
- Name, position, and organization of each person representing the offeror and the Government in the negotiation.
- Current status of offeror's: purchasing system, when material is a significant cost element, and other systems (e.g., estimating, accounting, and compensation).
- If certified cost and pricing data were required, the extent to which the contracting officer:
  - Relied on the data submitted and used them in negotiating the price
  - Recognized as inaccurate, incomplete, or noncurrent; resulting actions by the contracting officer and offeror; effect of the defective data on the price negotiated.
- For price negotiations over $100,000, any exemption or waiver to requiring cost or pricing data and the basis for claiming or granting it.
- For price negotiations under $100,000, the rationale for requiring cost or pricing data, if such had been required.
- Summary of offeror's proposal, recommendations from field pricing report, and reasons for any pertinent variances from such recommendations. Where the determination of price reasonableness was based on cost analysis, include for each major cost element:
  - Contractor's proposal
  - Field report's recommendation (if any).
  - Government's negotiation objective.
  - Amount considered negotiated as part of the price.
- The most significant facts or considerations controlling the establishment of the prenegotiation price objective and the negotiated price, including the rationale for any differences between the two.
- If significant, the impact of direction from Congress, other agencies, and higher officials.
- Basis for determining profit or fee prenegotiation objective; and profit or fee negotiated.

Exhibit 13-2

MARKET FORCES OR MIX-UP?

A novice contract specialist in your office examined the many offers he received from his first solicitation. Since he received good competition, he immediately started award preparations for this urgent requirement. He noticed that the low offeror's price is far below the Government estimate and the next low offeror. He showed the range of prices to you and exclaimed, "Gee, competition really works!"

Is an extremely low price always a bargain?

Why is it important to point out possible mistakes to offerors?

INTRODUCTION TO MISTAKES IN OFFERS

Offerors often err in estimating costs and calculating a proposed price. In contracting by negotiation, the identification of mistakes in proposals that surface before award tends to have **little impact** because:

1. Discussions are permitted, and
2. The offeror can correct mistakes or withdraw the proposal at any time before award.

However, ignoring genuine mistakes might:

1. Force the awardee to work at a significant risk of losing money (with a correspondingly high risk of default or unacceptable performance), while
2. Denying award to offerors who prepared (often at great expense) legitimate offers--which, in the long run, would tend to discourage them from pursuing Government contracts.

Steps in Performance

Each step in processing mistakes is discussed in turn in subchapter 13.2.

STEPS IN PROCESSING PREAWARD MISTAKES

13.2 PROCESSING MISTAKES

13.2.1 Identify and Correct Minor Informalities and Irregularities

When reviewing proposals, you must look for any minor informalities or irregularities, such as the omission of

- certifications,
- signatures,
- acknowledgments, or
- required number of document copies.

These can be resolved by clarifying them with the offeror. This type of communication is not generally considered "discussions." However, if the resulting clarification prejudices the interest of other offerors, award may not be made without discussions with all offerors within the competitive range.

13.2.2 Identify and Correct Other Suspected Mistakes

In your proposal examination, you may also discover clerical mistakes or suspect other types of errors such as:

- transposition of numbers,
- mistake in calculation,
- misunderstanding of the required work, or
- unusually low offer.

If you have reason to believe that a mistake may have been made, you must bring the suspected mistake to the offeror's attention and request a verification of the offer. Mistakes can be verified and resolved in the conduct of written or oral discussions. Exhibit 13-3 highlights the steps to take in requesting verification of offers with suspected mistakes.

VERIFICATION OF OFFERS

1. If you suspect a clerical or nonclerical error, identify it to the offeror.
2. If you cannot point out a specific error, give the offeror an indication of why you are asking to verify the offer.
3. NEVER suggest a specific rewrite or correction to the mistake.

Exhibit 13-3

If you can do so, you should give the offeror an indication of why you suspect that the offer contains a mistake. Advise the offeror, as appropriate:

- That his/her offer is so much lower than the other offers or the Government's estimate as to indicate a possibility of an error.
- Of important or unusual characteristics of the specifications (that might have been overlooked).
- Of changes in requirements from previous purchases of a similar item.
- Of other data proper for disclosure that will put the offeror on notice of the suspected mistake.

TO ERR IS HUMAN

After he received verification from the offeror that the proposal contains a mistake, your co-worker asks if he can make the correction and then award on the initial proposals he received.

Can he award without holding discussions?

13.2.3 Process Mistakes when Awarding Without Discussions

If you intend to award without discussions, then the following procedures for mistakes should be followed:

STEP 1: REQUEST VERIFICATION

FAR 15.607

Advise the offeror (pointing out the suspected mistake or otherwise identifying the area of the proposal where the suspected mistake is) and request verification. If the offeror verifies its proposal, award may be made.

STEP 2: ADVISE OFFEROR OF OPTIONS

If an offeror alleges a mistake in its proposal, advise the offeror that the proposal may be

- withdrawn or
- that correction may be sought.

STEP 3: DETERMINE WHETHER TO PERMIT CORRECTION

If the offeror requests permission to correct a mistake in its proposal, a determination permitting the correction may be made, provided both

- existence of the mistake and
- proposal actually intended

are established by clear and convincing evidence ascertainable from the solicitation and the proposal, and such correction shall not be considered a "discussion." If, however, establishing the mistake and intended proposal requires reference to

- documents,
- worksheets, or
- other data

outside the solicitation and the proposal, then the correction of such a mistake may be accomplished only through the conduct of discussions.

STEP 4: IF YES, OBTAIN WRITTEN APPROVAL TO CORRECT

The above determination to correct must be made, in writing, by the agency head or his designee, not below the level of chief of the contracting office. Each determination should include a review by legal counsel.

STEP 5: IF NO, ADVISE OFFEROR OF FINAL OPTIONS

If the determination cannot be made and award without discussions is still contemplated, give the offeror a final opportunity to

- withdraw or
- verify proposal.

CHAPTER 14

RESPONSIBILITY

THE CASE OF THE COMPLEX RADIOS

Five offers were received. You have already determined that adequate price competition has been obtained and that the low offer is fair and reasonable. The low offeror, Ace Electronics, is a small business that has never manufactured a complex electronic unit like the one specified in the RFP. While determining who should be awarded the contract, you become concerned that Ace Electronics will not be able to manufacture the item on time and in accordance with the specifications.

What should you do?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Determine and document the responsibility or nonresponsibility of a prospective contractor.

Individual:

14.1 Review the Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

14.2 Identify data that bear on the issue of responsibility.

14.3 Obtain and analyze the survey report.

14.4 Apply General and Special Standards for responsibility.

14.5 Obtain, and where necessary, appeal SBA's determination of responsibility.

14.6 Obtain preaward EEO clearance from the Department of Labor.

INTRODUCTION TO RESPONSIBILITY

Government Policy On Responsibility

FAR 9.103 & 105-2

It is the policy of the Government that purchases shall be made from, and contracts awarded to, responsible prospective contractors only. Therefore, no purchase or award shall be made unless the CO makes an affirmative determination of the responsibility of the prospective contractor. If the determination is that the prospective contractor is responsible, the CO's signature on the contract constitutes the determination. If, however, an award is not made because the prospective contractor was found to be nonresponsible, the CO shall document the file with the reasons for the determination of nonresponsibility.

Responsibility Defined

FAR 9.104

To be considered responsible, a prospective contractor must:

- Be eligible to receive the award, **and**
- Have a satisfactory performance record, **and**
- Be able to perform work/services required by the contract, **and**
- Be available to perform, **and**
- Have integrity, **and**
- Have adequate financial resources, **and**
- Meet any special standards.

Why Determine Responsibility?

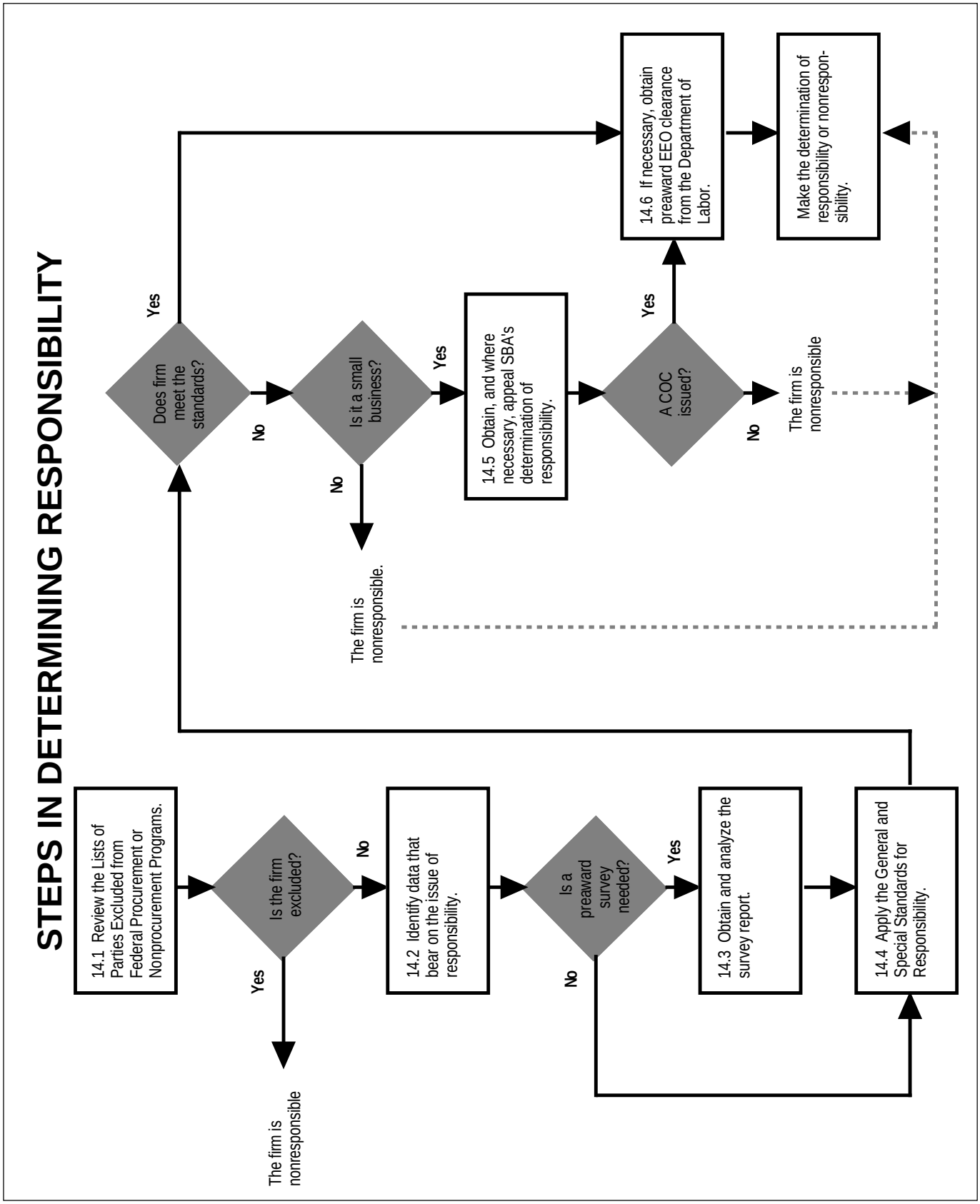
FAR 9.103(c)

"The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors."

NOTE: The tasks for determining responsibility in negotiations are the same as those used in the sealed bidding method of procurement, and the text itself is taken for the most part from the Sealed Bidding Text/Reference.

Steps In Performance

The steps in determining responsibility are charted on the next page. After the flowchart, each step is discussed in turn.


STEPS IN DETERMINING RESPONSIBILITY
14.1 Review the Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.
Is the firm excluded?
Yes
The firm is nonresponsible
No
14.2 Identify data that bear on the issue of responsibility.
Is a preaward survey needed?
Yes
14.3 Obtain and analyze the survey report.
No
14.4 Apply the General and Special Standards for Responsibility.
Does firm meet the standards?
Yes
No
Is it a small business?
Yes
14.5 Obtain, and where necessary, appeal SBA's determination of responsibility.
A COC issued?
Yes
14.6 If necessary, obtain preaward EEO clearance from the Department of Labor.
Make the determination of responsibility or nonrespon-sibility.
No
The firm is nonresponsible
No
The firm is nonresponsible.

STEPS IN DETERMINING RESPONSIBILITY

14.1 Review List of Excluded Parties

As a part of your responsibility determination, you must refer to the "list." The "list" is the Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

These lists are compiled, maintained, and distributed by the GSA. Agencies shall not, unless the acquiring agency's head or a designee determines that there is a compelling reason to do so:

- Solicit offers from,
- Award contracts to, or
- Consent to subcontracts with

prospective contractors on these lists.

Excluded parties are also precluded from conducting business with the Government as agents or representatives of other contractors. Exhibit 14-1 lists several causes for exclusion.

Review the Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs

- to ensure that any prospective contractors have not been excluded from competing for your RFP and
- just prior to award, to ensure proposed awardee hasn't been added.

FAR 9.405(d)

However, an excluded party may submit an offer under a new corporate title. You can detect and exclude these parties through such means as comparing the names of the corporate officers of the offeror against names of the corporate officers of parties on the Excluded Lists. GSA has automated the Excluded List and included the facility to search on such things as the names of corporate officers (see GSA's User's Manual to the Lists of Parties Excluded From Federal Procurement Or Nonprocurement Programs).

FAR 9.404(d)

In addition, review List to ensure that no proposed subcontractor, for any subcontract subject to Government consent, has been excluded. If a subcontractor is on List, notify the offeror in writing and obtain a different, more acceptable subcontractor to be eligible for award.

FAR 52.209-6

"Notwithstanding that a prospective contractor may be on these lists, agencies may continue contracts or subcontracts in existence at the time the prospective contractor was found to be on these lists, unless the acquiring agency's head or a designee directs otherwise."

FAR 9.405-1

If there are compelling reasons for renewing or extending current contracts with an excluded contractor, state such reasons in a justification proposed for signature by the agency head or a designee.

CAUSES FOR EXCLUSION

FAR 9.406-2 for debarment & FAR 9.407-2 for suspension

- Conviction of, or civil judgment for:
  - Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract.
  - Violation of Federal or State antitrust statutes relating to the submission of bids.
  - Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
  - Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.
- Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as:
  - Willful failure to perform in accordance with the terms of one or more contracts.
  - A history of failure to perform or of unsatisfactory performance of, one or more contracts.
- Violation of the Drug-Free Work Place Act of 1988.
- Commission of an Unfair Trade Practice; using "Made in America" label when not made in America.
- Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

Exhibit 14-1

14.2 Identify Data that Bear on Responsibility

FAR 9.103(b)

"In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility."

Therefore, you must seek data that bears on responsibility, starting with that which is readily available in your agency. Also, if the firm you wish to award to has other agency contracts, check to see whether they are having delivery problems on their current contracts.

Several sources of information are available to support determinations of responsibility or nonresponsibility as listed in Exhibit 14-2.

SOURCES OF INFORMATION TO DETERMINE RESPONSIBILITY

- The prospective contractor — including offer information, questionnaire replies, certifications and representations, financial data, information on production equipment, and personnel information.
- Records and experience data — from contracting office, audit offices, contract administration offices, and other contracting offices.
- Other sources such as:
  - Publications
  - Suppliers
  - Subcontractors
  - Customers of the prospective contractor
  - Financial institutions
  - Government agencies
  - Business and trade associations

Exhibit 14-2

Qualified and Eligible Offerors

The process for determining responsibility may vary depending on, for example, procedures in your office or the number of offers received. However, generally, the more efficient process is to first determine whether or not the offeror is "otherwise qualified and eligible" to receive further consideration. If the offeror is qualified and eligible, then you may proceed with the other standards of responsibility (outlined in Section 14.4). The reason for considering this standard first is that, normally, this standard can be determined by referring to the offeror's certification or representation.

There are several matters to consider when determining whether or not the offeror is "otherwise qualified and eligible to receive an award under applicable laws and regulations." There will be several items that relate to qualifications and eligibility in any given proposed contract action.

One way for you to identify those that apply to your action is to review Section K of the RFP (Representations, Certifications, and Other Statements of Offerors). The ones that you will most often deal with are shown in Exhibit 14-3.

MOST COMMON CERTIFICATIONS AND REPRESENTATIONS

Walsh-Healey Public Contracts Act

All contracts for furnishing materials, supplies, articles, and equipment and with a value of greater than $10,000 are subject to the Walsh-Healey Public Contracts Act of 1936. This Act states that all such contracts shall:

Be with manufacturers or regular dealers in the supplies manufactured or used in performing the contract; and

Include or incorporate by reference the representation that the contractor is a manufacturer or a regular dealer of the supplies offered, and the stipulations required by the Act pertaining to such matter as minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions. (FAR 22.602)

A properly prepared RFP will contain a representation to be completed by the offeror to state whether it is or is not a manufacturer or regular dealer. An offeror who is not a manufacturer or regular dealer is ineligible for award.

Set-Aside or Partial Set-Aside for Small Business

If this action is a set-aside or partial set-aside for small business, did the offeror certify that it is a small business? You are authorized to rely on the offer's certification, however, if you believe the certification is erroneous or if the size status is protested by another offeror, you must take the matter to SBA. (FAR 19.302)

Exhibit 14-3

Other examples of certifications and representations related to eligibility under Section K of the RFP include:

- Certification of Nonsegregated Facilities (FAR 52.222-21)
- Previous Contracts and Compliance Reports (FAR 52.222-22)
- Affirmative Action Compliance (FAR 52.222-25)
- Clean Air and Water Certification (FAR 52.223-1)
- Certification Regarding a Drug-Free Workplace (FAR 52.223-5)
- Requirement for Certificate of Procurement Integrity (FAR 52.203-8)

WALSH-HEALEY???

In the vignette at the beginning of this chapter, there is no Walsh-Healey Act problem. Ace Electronics has manufactured radios for the commercial market. However the radios are less complex in design than the RFP's specifications. The question you, as a contract specialist, are concerned with, is whether the manufacturer can produce the more complex radio specified in the RFP. Additional information will continue to be provided on this case later in this chapter.

14.3 Request a Preaward Survey

A preaward survey is defined as an evaluation by a surveying activity of a prospective contractor's capability to perform a proposed contract. The conditions under which a preaward survey is generally appropriate are:

When needed:

- The information on hand or readily available to the CO is not sufficient to determine the prospective contractor's responsibility.
- Poor past performance experience with contractor.
- Reference to SBA for Certificate of Competency (COC) as small business is likely.

Dollar value: Unless circumstances justify its cost, the CO should not request a preaward survey if the contract will be for:

- $25,000 or less, or
- A fixed price of less than $100,000 involving commercial products only.

Level of detail required: Commensurate with dollar value and complexity of the acquisition.

Should it include subcontractors? Normally this is the prime contractor's responsibility. However, for an important contract involving extensive subcontracts, subcontractors may be included.

You should use the SF 1403, Preaward Survey of Prospective Contractor (General), to request the surveying activity to perform the preaward survey. Generally, the surveying activity is the cognizant contract administration office.

PREAWARD SURVEY REQUEST

FAR 9.106-2

The preaward survey request shall:

- Identify factors, in addition to those on the SF 1403, about which additional information is needed (see Exhibit 14-6).
- Include the complete solicitation package (unless it has previously been furnished).
- Indicate any known prior unsatisfactory performance by the prospective contractor.
- State whether the contracting office will participate in the survey.
- Specify a due date for the report. This date should be consistent with the scope of the survey requested. Normally allow at least 7 working days to conduct the survey.
- Limit the scope of the survey, when appropriate.

Exhibit 14-4

SF 1403 Preaward Survey

The CO initiates the SF 1403 by completing applicable parts of the form as shown in Exhibits 14-5 and 14-6. The surveying activity, after accomplishing the survey, will complete the SF 1403.

The surveying activity may need to complete additional forms as part of the survey. Those forms are:

- SF 1404, Preaward Survey of Prospective Contractor — Technical
- SF 1405, Preaward Survey of Prospective Contractor — Production
- SF 1406, Preaward Survey of Prospective Contractor — Quality Assurance

- SF 1407, Preaward Survey of Prospective Contractor — Financial Capability
- SF 1408, Preaward Survey of Prospective Contractor — Accounting System

FAR 19.601

When the prospective contractor surveyed is a small business that has received preferential treatment on an ongoing contract under Section 8(a) of the Small Business Act, or has received a Certificate of Competency (COC) during the last 12 months, the surveying activity shall consult the appropriate SBA field office before making a recommendation of responsibility or nonresponsibility.

Upon completion of the survey, the surveying activity will check one of the boxes in Item 24, SF 1403, to indicate whether it recommends:

- Complete award
- Partial award (and quantity)
- No award

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The surveying activity will then return the SF 1403 to the contracting activity together with any supplementing forms and remarks.

Review Survey Report

After receiving the preaward survey report, you will
- review the data thereon,
- evaluate it, and
- compare it with the data received from other sources.

Where necessary, the CO should contact the survey office to discuss any omissions or deficiencies with the survey report and obtain further information to clarify or buttress a finding.

The preaward survey report should be given great weight! The surveying activity has made an on-site, in-depth review of the prospective contractor's plant, capabilities, and financial ability.

However, the recommendation as to award is strictly a recommendation. The final decision to award or not to award is made by the CO.

PREAWARD SURVEY OF PROSPECTIVE CONTRACTOR (GENERAL)	1. Serial No. (For surveying activity use)	FORM APPROVED OMB NO: **9000-0011**

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (VRS), Office of Federal Acquisition and Regulatory Policy, GSA, Washington, D.C. 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0011), Washington, D.C. 20503.

SECTION I -- REQUEST (For Completion by Contracting Office)

2. NAME AND ADDRESS OF SURVEYING ACTIVITY	3. SOLICITATION NO.	4. TOTAL OFFERED PRICE **$**
	5. TYPE OF CONTRACT	
6A. NAME AND ADDRESS OF SECONDARY SURVEYING ACT. (For surveying activity only)	7A. NAME AND ADDRESS PROSPECTIVE CONTRACTOR	
6B. TELEPHONE NO. (Include autovon, WATS or FTS if available)	7B. FIRM'S CONTACT	7C. TELEPHONE NO. (with area code)
8. Will Contracting Office Particpate in Survey? ☐ YES ☐ NO	13. NAME AND ADDRESS OF PARENT COMPANY (If applicable)	
9. DATE OF THIS REQUEST / 10. DATE REPORT REQUIRED		
11. PROSPECTIVE CONTRACTOR REPRESENTS THAT IT ☐ IS ☐ IS NOT A SMALL BUSINESS CONCERN.		
12. WALSH-HEALEY CONTRACTS ACT (Check applicable box(es)) ☐ A. IS NOT APPLICABLE ☐ B. Is applicable & prospective contractor represents his classification as: ☐ MANUFACTURER ☐ REGULAR DEALER ☐ OTHER (specify)	14A. PLANT AND LOCATION (If different from Item 7, above)	
15A. NAME OF REQUESTING ACT. CONTRACTING OFFICER	14B. POINT OF CONTACT	14C. TELEPHONE NO. (& area code)
15B. SIGNATURE	16A. NAME OF CONTACT POINT AT REQUESTING ACTIVITY (If different from item 15A)	
15C. TELEPHONE NO. (Include autovon, WATS, FTS, if available)		
17. RETURN PREAWARD SURVEY TO THIS ADDRESS: ATTN:	16B. TELEPHONE NO. (Include autovon, WATS or FTS, if available)	

SECTION II -- DATA (For Completion by Contracting Office)

18A ITEM NO.	18B. NATIONAL STOCK NO. (NEW) & NOMENCLATURE		18C. TOTAL QUANTITY	18D. UNIT PRICE	18E. DELIVERY SCHEDULE (a)	(b)	(c)	(d)	(e)
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					
		SOLICITED							
		OFFERED		$					

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1403-103

STANDARD FORM 1403 (9-88)
Prescribed by GSA
FAR (48 CFR) 53-209-1(a)

Exhibit 14-5 SF 1403 (Front Side)

STEPS FOR FILLING OUT STANDARD FORM 1403 (FRONT SIDE)

1. Survey group will fill in this number.

2. Name and address of surveying activity. The CO will designate who this will be. This might be a contract administration group.

3. CO places the RFP number here.

4. Place the total prospective contract price here.

5. Place a “fixed price” or “fixed price with EPA” here.

7. Place name and address of prospective contractor here.

9. Date of request.

10. Date survey report required (give a reasonable amount of time to do an adequate job).

14B. Name and title of person at firm that the surveying group should contact.

14C. The telephone number of person described in Item 17A.

18. Data on descriptions of items, quantities, deliveries, and prices that are going to be on the contract.

SECTION III -- FACTORS TO BE INVESTIGATED

19. MAJOR FACTORS	CHK. (a)	SAT. (b)	UNSAT (c)	20. OTHER FACTORS Provide specific requirement in Remarks	CHK. (a)	SAT. (b)	UNSAT (c)
A. TECHNICAL CAPABILITY				A. GOVT. PROPERTY CONTROL			
B. PRODUCTION CAPABILITY				B. TRANSPORTATION			
C. QUALITY ASSURANCE CAPABIL.				C. PACKAGING			
D. FINANCIAL CAPABILITY				D. SECURITY			
E. ACCOUNTING SYSTEM				E. SAFETY			
21. IS THIS A SHORT FORM PREAWARD REPORT? (For completion by surveying activity)				F. ENVIRONMENTAL/ENERGY CONS.			
				G. FLIGHT OPS. / FLIGHT SAFETY			
☐ YES ☐ NO				H. OTHER (Specify)			
22. IS A FINANCIAL ASSISTANCE PAYMENT PROVISION IN THE SOLICITATION? (For completion by the contracting activity)							
☐ YES ☐ N0							

23. REMARKS (For Contracting Activity Use)

SECTION IV -- SURVEYING ACTIVITY RECOMMENDATIONS

24. RECOMMEND	25A. NAME AND TITLE OF SURVEY APPROVING OFFICIAL	25B. TELEPHONE NO.
☐ A. COMPLETE AWARD ☐ B. PARTIAL AWARD (Quantity _____) ☐ C. NO AWARD	25C. SIGNATURE	25D. DATE

STANDARD FORM 1403 (REV. 9-88) BACK

Exhibit 14-6 SF 1403 (Back Side).

STEPS FOR FILLING OUT STANDARD FORM 1403 (BACK SIDE)

19. Major factors to be investigated. CO should check those items that should be investigated.

20. Other factors. In this section and in "Remarks," the CO should indicate the problem. For example, if it is "security" and the CO knows of a security problem, then the surveyor should be told of the specific problem.

21. Check, if appropriate.

22. Completed by the CO.

23. Remarks. Tell the surveyor all that he/she needs to know so that he/she can provide you with the data to approve or disapprove the award.

24. The surveyor fills out this section and makes recommendations.

25A. Surveyor will fill out when form is completed.

25B. Surveyor will fill out when form is completed.

25C. Surveyor will fill out when form is completed.

25D. Surveyor will fill out when form is completed.

ILLUSTRATION OF THE USE OF THE PREAWARD SURVEY

In the vignette discussed earlier in this chapter, you are concerned about whether Ace Electronics is responsible. Can it manufacture a complex radio? After you have reviewed all data in-house and other informational sources, such as audit and contract administration, you may still be uncertain as to what your determination of responsibility should be. In this case, the Government estimate for the price of the 100 radios is $500,000. Hence, you have justification to ask for a preaward survey if you feel it is necessary. In your preaward survey request, state which factors require additional information. You might therefore list the following questions on the preaward request form and ask the surveying activity to furnish the answers:

- *Has Ace Electronics ever manufactured radios of similar complexity? (Check and annotate Block 19A on the SF 1403).*

- *Does Ace have an adequate quality assurance program to produce electronics equipment of high reliability so that the specifications will be met? (Check and annotate Block 19C on the SF 1403).*

- *Does Ace have qualified engineers on board, or consultants available to deal with reliability problems? (Check and annotate Block 19C on the SF 1403).*

- *Does Ace have adequate financing? If it incurs a loss on this contract, will it be able to continue performance? (Check and annotate Block 19D on the SF 1403).*

- *Is Ace capable of completing this radio contract (performing on time to the desired specifications without compromising its other committments)? (Check and annotate Block 19G on the SF 1403).*

- *Has Ace had problems in the past with quality, delivery, or production? (Check and annotate Block 19G on the SF 1403).*

14.4 Apply General and Specicial Standards of Resposibility

After determining that the low offeror is qualified and eligible to receive the award, consider the remaining

- General Standards and then if applicable,
- Special Standards of responsibility.

This is the point at which you and the CO collect information and make what might be called value judgments as to whether or not the offeror is responsible. Exhibit 14-7 lists all the General Standards; a more detailed discussion follows.

GENERAL STANDARDS FOR RESPONSIBILITY

FAR 9.104-1

A prospective contractor is responsible if it:

- Is otherwise qualified and eligible to receive an award under applicable laws and regulations (e.g., is not debarred, suspended, or ineligible and is a regular dealer or manufacturer.)
- Has a satisfactory record of performance.
- Has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them:
  - production control
  - property control
  - quality assurance
  - safety programs
- Has the necessary production, construction, and technical equipment and facilities, or the ability to obtain them.
- Has adequate financial resources to perform the contract, or the ability to obtain them.
- Is able to comply with the required delivery schedule.
- Has a satisfactory record of integrity and business ethics.

Exhibit 14-7

Past Performance

FAR 9.104-3(c)

A prospective contractor that is or recently has been seriously deficient in contract performance through, for example, failure to

- apply sufficient tenacity and perseverance to perform acceptably,
- meet the quality requirements of the contract,
- meet the goals contained in a subcontracting plan, or
- meet delivery schedules

shall be presumed to be nonresponsible, unless the CO determines that the

- circumstances were beyond the contractor's control or
- contractor has taken appropriate corrective action.

The CO shall consider the number of contracts involved and the extent of the deficiency of each in making this evaluation.

The fact that a firm has just satisfactorily completed a contract, is not sufficient evidence for you to determine that the firm is responsible. The overall record of prior performance for that firm is what must indicate whether the firm is responsible or nonresponsible. However, poor prior performance on earlier, smaller contracts should not be used to judge whether a firm is nonresponsible when that firm has performed satisfactorily on much larger contracts for the same work.

Performance of Parent or Predecessor Companies

Sometimes it may be necessary to look into the performance record of parent or predecessor companies.

Where there is a reasonable connection, the poor performance of a parent company or an affiliate may be taken into account in determining the responsibility of a wholly owned offeror-subsidiary. This is true even in the absence of a close working relationship between the two companies and even though the two firms share only a few managerial positions in common. Similarly, the record of a bankrupt predecessor firm may be considered in determining the responsibility of the current offeror where the management and control of both firms are the same and the poor record continued after the current firm took over operations.

Capability to Perform

The prospective contractor must possess the necessary organization, experience, accounting and operational controls (e.g., quality assurance measures, property control systems, and safety programs), and technical skills; and the necessary production, construction, and technical equipment and facilities, or the ability to obtain them.

If the prospective contractor has to obtain any of them or has not made acceptable subcontracting arrangements, then you shall require acceptable evidence of the prospective contractor's ability to obtain the resources. Acceptable evidence normally consists of a commitment or explicit arrangement - that will be in existence at the time of contract award - to rent, purchase, or otherwise acquire the needed facilities, equipment, or other resources.

Financial Ability

FAR 32.107

The prospective contractor must have adequate financial resources to perform the contract, or the ability to obtain them. The following paragraph on "Buy-In" offers is an example of how a prospective contractor's financial ability may be assessed.

"Buy-In" Offers

FAR 3.501

An offer may not be automatically rejected simply because it is unprofitable or may even result in a loss. The submission of such an offer (sometimes referred to as a "buy-in") may reflect on the offeror's understanding of the Government's requirement and its responsibility. The key is whether or not the CO has reason to believe that the offeror has the requisite financial ability to perform the contract at a loss. If an offeror is found to have this ability, it will be deemed responsible (if it meets the other standards). A preaward protest will not be successful when filed with the GAO solely on the basis that the apparently successful offeror will suffer a loss in performing the contract. If found not to have the financial ability, however, the offeror will be declared nonresponsible.

Availability to Perform

The prospective contractor must be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.

The key question the CO must ask is, "Does the prospective contractor possess the adequate resources to bear on the Government's requirements given other commitments?"

An example of where the Comptroller General upheld a CO's determination of nonresponsibility based on an inability to comply with required delivery schedules, is in a case involving the X-Tyal International Corporation. This firm had recently moved to a new facility, had undergone a labor strike, and had delivery problems with a majority of its other Government contracts. Given that amount of evidence the CO was correct in the nonresponsibility determination.

Contractor Integrity

The prospective contractor must have a satisfactory record of integrity and business ethics.

B-236893.2

This is probably the most difficult standard to apply when determining responsibility because the definition for integrity is very vague. Generally, however, integrity is defined as honesty, decency, and uprightness. Most cases involving a nonresponsibility determination based on a lack of integrity involve a criminal violation by the company or its employees.

Applying Special Standards

For some acquisitions, it may be appropriate to use special standards, in addition to the general standards to determine a prospective contractor's responsibility. When special standards are used, they must be stated in the RFP. Special standards of responsibility may be appropriate when:

- Experience has proven it necessary for a particular acquisition or a class of acquisitions.
- Unusual expertise or specialized facilities are needed for adequate contract performance.

Specialized experience requirements shall not be used unless:

- The CO is willing to abide by them after offers have been seen; and
- The requirements reasonably relate to the offeror's responsibility and are not unduly restrictive.

For example, an RFP may require (as a prerequisite to award) that the offeror have certain specialized experience. For example, an offeror may be required to show that:

- It has had a minimum number of years of experience in manufacturing a particular type of item; or
- It has previously performed similar work.

This illustration pertains to experience and expertise. Similarly, special standards may be appropriate relative to facilities. The acquisition of food stuffs provides a good example. Prospective contractors' facilities must be adequate to meet approval under the agency's standards for

sanitation. Meeting sanitation standards is a FAR requirement for offerors supplying food stuffs.

New firms are not necessarily barred from competing on this type of RFP, since the experience of the firm's principal officers may be considered. Also, unless prohibited by the terms of the RFP, a specialized experience requirement may be met through a subcontractor.

14.5 Determine Responsibility of Small Business Concern

In general, the standards and procedures used to determine the responsibility of small business concerns are the same as those used to determine the responsibility of large businesses. However, if the CO determines that a small business concern is not responsible relative to a particular procurement, the matter must be referred to the Small Business Administration (SBA) for a final decision. The SBA will then notify the concern and offer it the opportunity to apply for a Certificate of Competency (COC). If the concern applies for a COC, the SBA (local Regional Office) investigates the matter. A COC is a certificate issued by the SBA stating that the holder is responsible (see standards in Exhibit 14-7 and any special standards) for the purpose of receiving and performing **a specific Government contract.**

FAR 19.601(a)

Upon deciding and documenting that a responsive small business lacks certain elements of responsibility, the CO shall proceed with the following steps:

B-242397

WHEN THE CO DETERMINES THAT A SMALL BUSINESS IS NONRESPONSIBLE

FAR 19.602-1

The CO shall proceed as follows:

- Withhold contract award; and
- Refer the matter to the cognizant SBA Regional Office in accordance with agency procedures, except that referral is not necessary if the small business concern is:
  - Determined to be unqualified and ineligible to receive an award under applicable laws and regulations, provided that the determination is approved by the chief of the contracting office; or
  - Is on the Lists of Parties Excluded from Federal Procurement or Non-procurement Programs.

Exhibit 14-8

The referral to SBA by the CO shall consist of a notice that a small business concern:

- Has been determined to be non-responsible, specifying the elements of responsibility the CO found lacking; and
- If applicable:
  - Copy of the RFP,
  - Drawings,
  - Specifications,
  - Preaward survey findings,
  - Pertinent technical and financial information,
  - Abstract of offers, and
  - Any other pertinent information that supports the CO's determination.

Within 15 business days (or a longer period agreed to by the SBA and the contracting agency) after receiving a notice that a small business concern lacks certain elements of responsibility, the SBA will take the actions outlined in Exhibit 14-9.

SBA ACTIONS CONCERNING A CASE OF NONRESPONSIBILITY

FAR 19.602-2

- Inform the small business concern of the CO's determination and offer it an opportunity to apply to the SBA for a COC.
- Upon timely receipt from the concern of the application and required documentation, send an SBA team to visit the concern. Investigate it only for the specific elements of responsibility that the agency notice specified as lacking. Make recommendations to the SBA Regional Administrator.
- If the Regional Administrator plans to issue or recommend issuance of a COC, provide advance notice of the proposed action to the CO together with a brief statement of the reasons for it.

Exhibit 14-9

The SBA Regional Administrator will then make a decision as follows:

SBA REGIONAL ADMINISTRATOR DECISION	
IF THE REGIONAL ADMINISTRATOR:	**THEN THE REGIONAL ADMINISTRATOR:**
Confirms the Contracting Officer's finding of nonresponsibility,	Notifies the concern and the CO that the COC is denied.
Determines that the firm is able to perform the contract in question and the contract is $500,000 or less,	Issues the COC. (If the CO decides to appeal, then the RA forwards the recommendation to the SBA Central Office.)
Determines that the firm is able to perform the contract in question and the contract is over $500,000,	Forwards a recommendation to the SBA Central Office that a COC be issued.

Exhibit 14-10

FAR 19.602-3

If the CO disagrees with the Regional SBA proposal, she or he may decide to appeal to SBA Central Office for a final decision. In this case, the CO shall request that the SBA Regional Office suspend action and refer the case to the SBA Central Office for review.

Upon receipt of a recommendation from the Regional Administrator to issue a COC, the SBA Central Office shall take the following actions:

- Notify the concern and the CO that the COC is denied; or
- Inform the CO that it concurs with its Regional Office and allow the CO to file a formal appeal.

Make a final determination pursuant to a formal appeal and advise the CO and the concern of its action.

There are three situations that might arise after the COC process has begun. They are:

- The CO might obtain new information that supports a determination that the concern is responsible. If so the CO shall:
  - Reverse the determination of nonresponsibility,
  - Notify the SBA of the action,
  - Withdraw the referral, and
  - Proceed to award the contract.
- If the SBA issues a COC after receiving the referral, the CO shall award the contract to the small business concern (if it is still otherwise eligible for award). An SBA-certified concern shall not be required to meet any other (i.e., new) requirements of responsibility. SBA COCs are conclusive with respect to all elements of responsibility.

FAR 19.602-4

- If SBA has not issued a COC within 15 business days (or a longer period of time agreed to with the SBA) after receiving the referral, the CO shall proceed with the acquisition and award the contract to another appropriately selected and responsible offeror.

14.6 Obtaining EEO Clearance from DOL

FAR 22.805(a)

A preaward equal employment opportunity (EEO) clearance is required from the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), if the estimated amount of the proposed contract is expected to total $1 million or more. The rules relative to EEO clearances also apply to subcontracts, basic ordering agreements, or when increasing the aggregate value of an existing contract to $1 million or more.

The CO shall request in writing, directly from the OFCCP regional office(s) the preaward clearance for each proposed contract and for each proposed first-tier subcontract of $1 million or more. Verbal requests shall be confirmed in writing.

The CO shall allow as much time as feasible before award for the conduct of the necessary reviews by OFCCP. As soon as the apparently successful contractor is determined, the CO shall process a preaward review request in accordance with agency procedures. The CO should submit the preaward review request to the OFCCP regional office at least 30 calendar days before the proposed award date.

DECISION TABLE—EEO CLEARANCES

FAR 22.805(a)(6-7)

IF:	THEN:
The Director of OFCCP has not made a final preaward clearance determination within 30 calender days from submission of the clearance request.	The CO shall withhold award of the contract for an additional 15 calender days, or until clearance is received, whichever occurs first.
The additional 15 calendar days expires **and** The Director has neither found the contractor to be in compliance nor made a final written determination declaring the contractor ineligible for reasons of noncompliance.	Award can be made to offeror in question **and** The CO shall notify the OFCCP regional office of the award.
The above procedures would delay award of an urgent and critical contract beyond the time necessary to make award or beyond the time specified in the bid or extension thereof.	The CO shall immediately inform the OFCCP regional office of the expiration date of the bid or the required date of award and request clearance be provided before that date.
The OFCCP regional office advises that a preaward review cannot be completed by the required date.	The CO shall submit written justification to the head of the contracting activity, who, after informing the OFCCP regional office, may then approve the award without the preaward clearance.

Exhibit 14-11

SUMMARY DECISION TABLE-DETERMINING RESPONSIBILITY		
When the contracting officer determines that:	**And the firm is a small business:**	**And the firm is other than a small business:**
The firm is on the "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs."	Do not award.	Do not award.
The procurement is subject to the Walsh-Healey Public Contracts Act and the firm is not a regular dealer or manufacturer.	Do not award, notify the firm, and notify SBA of the finding.	Do not award and notify the firm of the finding and its appeal rights.
The firm is otherwise ineligible under a Federal law or regulation for award of the contract.	Do not award.	Do not award.
The firm's performance record is not satisfactory.	Withhold award and refer the matter to SBA.	Do not award.
The firm is not capable of performing or of obtaining the resources necessary to perform (i.e., lacks the necessary financial resources, organization, experience, accounting, and operational controls, technical skills, or production, construction, and technical equipment and facilities).	Withhold award and refer the matter to SBA.	Do not award.
The firm is not available to perform in terms of meeting the delivery or performance schedule.	Withhold award and refer the matter to SBA.	Do not award.
The firm lacks integrity.	Withhold award and refer the matter to SBA.	Do not award.
The firm does not meet a special standard for the procurement.	Withhold award and refer the matter to SBA.	Do not award.
A COC will not be issued by SBA.	Do not award.	Not applicable.
Additional evidence now supports an affirmative determination of responsibility on a small business after a referral to SBA.	Notify SBA and award.	Not applicable.
Upon receiving notice from the SBA Regional Administator of intent to issue an COC, that the firm is nonetheless nonresponsible.	Appeal to the SBA Central Office.	Not applicable.
Based on an OFCCP finding, the firm has not complied with EEO requirements.	Do not award.	Do not award.

Exhibit 14-12

A LAST WORD ON RESPONSIBILITY

At the beginning of this chapter, we discussed an RFP in which, Ace Electronics, a small business, was the low offeror, and you were considering whether to award the contract. You had to determine whether Ace was a responsible offeror before you could make an award. You now know, after having read this chapter, that you need to review all readily available sources of information that may help you in this decision. If, after reviewing all data that may be readily available to you; obtaining data from other COs, audit agencies, contract administration units, and others; you still are not sure that Ace is responsible, you may request a preaward survey if the costs can be justified. When data is received from the preaward survey, you should review it carefully and make a decision.

The CO makes the final decision, except in the case of small businesses. If the CO judges the low offeror as not responsible, he/she may overrule the recommendations of the preaward survey. Ace is a small business. If the CO determines that it is not responsible, he/she has to refer the case to SBA for a possible issuance of a COC. If SBA makes a review and decides to issue a COC, the CO will have to award the contract even though the CO was of the opinion that Ace was nonresponsible.

This contract is for less than $1 million. Therefore, a OFCCP preaward clearance is not required. Also, you have determined that Ace is a manufacturer (Walsh-Healey). Having jumped all the hurdles and obtained all the necessary clearances, the CO can now award the contract.

RESPONSIBILITY

CHAPTER 15

PREPARING AWARDS

WHEN AWARD IS GREATER THAN PURCHASE REQUEST

You prepared and issued a solicitation for your purchase request. The lowest offer received, which is fair and reasonable, is $485,000. The requiring activity had only committed $450,000 on the purchase request.

What options are available to the agency?

If sufficient funds can be made available, what are the steps in awarding this contract?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Make or recommend the final source selection decision or reject all offers. Prepare and review contracts.

Individual:

15.1 Compare prices to the amount of funding provided.

15.2 Determine whether to withdraw or modify any set-aside.

15.3 Make final award decisions.

15.4 Prepare the contract.

15.5 Document the award

INTRODUCTION TO PREPARING AWARDS

Award Document Objectives

B-245448.3

In finalizing your selection of a contractor, you have completed and properly documented the following actions:

- Evaluation factors have been properly considered.
- Scores or ratings of the competing proposals have been arrived at according to the selection plan.
- Competitive range was fairly established.
- All procedures, approvals, and clearances have been met.
- Offeror selected for award represents the best value for the Government, in terms of the RFP's evaluation factors.

The objective in documenting your selection is to allow accurate reconstruction of the procurement for immediate review and for future reference.

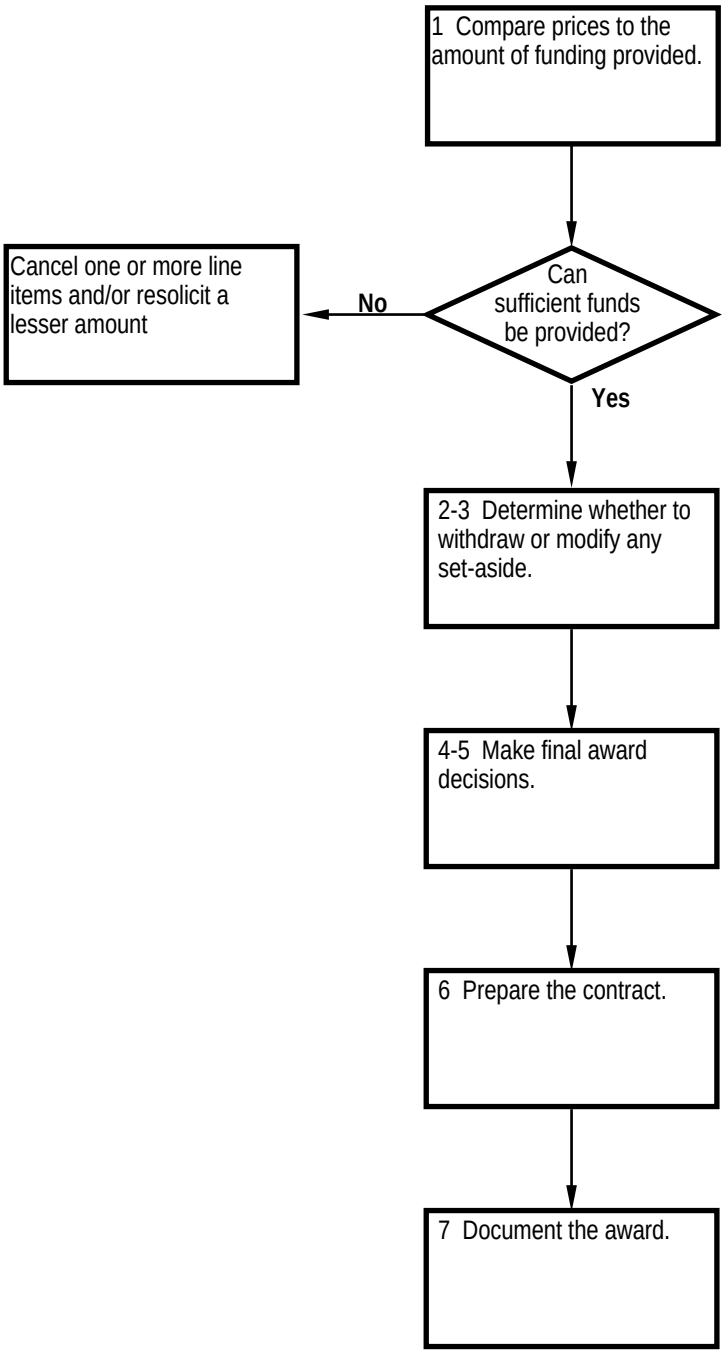
Drawing on your documentation you must prepare a contract for execution that establishes a legal and binding agreement. The contract must accurately and sufficiently convey what was agreed upon by the Government and the offeror as reflected in the

- Solicitation (including any amendments) and
- Best and final offer.

Steps in Performance

The steps in preparing awards are charted on the next page. Following the flowchart, each step is discussed in turn.

STEPS IN PREPARING AWARDS



STEPS IN PREPARING AWARDS

15.1 Compare Prices to the Amount of Funding Provided

One of the most important actions taken by a contracting officer before signing a contract is reconfirming that adequate funds are available. You determined that funds were available before the RFP was issued; now you must reconfirm it. The typical steps pertaining to funding are:

STEP #1: Technical or requirements organization includes an "Independent Government Cost Estimate" in the purchase request (e.g. $75,000).

STEP #2: Purchase request is routed through a finance and accounting office. This office "commits" $75,000 from the correct appropriation fund for the proposed contract.

STEP #3: Contracting officer, upon receipt of the purchase request, confirms that the funds are available. It is not acceptable to solicit offers unless

FAR 32.702

- Adequate funds are available to make the purchase, or
- In the event funds will become available (as when waiting for Congress to appropriate money), the solicitation will state that award of a contract is subject to the availability of funds.

STEP #4: After offers are received and the award decision is made, the "commitment" must be converted to an "obligation."

- Contracting officer must now ensure that funds are available for obligation before signing the contract.
- Also, because it is unlikely that the award will be exactly $75,000, the finance office may have to make an upward or downward adjustment.
- If the award is for more than $75,000, it is essential to confirm the availability of the additional funds as soon as possible to prevent undue delays in contract award.

Generally, sufficient funds will be available to accommodate small increases over the amount committed on the purchase request. However, if substantial additional funds are needed, the agency must examine its options, as mapped in Exhibit 15-1.

FUNDING DECISIONS	
IF THE ADDITIONAL FUNDING:	THEN YOU SHOULD:
Is available and the activity wishes to complete the purchase,	Request the requiring activity to process an amendment to the purchase request to add more funds.
Is not available or the requiring activity does not want to authorize additional funds,	Consider buying a lesser quantity if this is agreeable to the requiring activity.
Is not available and the requiring activity cannot use a lesser quantity,	Cancel the RFP.

Exhibit 15-1

15.2 Determine Whether to Withdraw or Modify any Set-aside

After reviewing offers received as a result of a set-aside, you may determine that award to a small business concern would be detrimental to the public interest (e.g., payment of more than fair market prices).

You may choose one of the following actions to remedy the situation:

FAR 19.506

1. Withdraw the set-aside and reissue the solicitation without business size restrictions if you determine that supplies or services can be provided by a large business at a more reasonable price.

2. Modify the set-aside by changing the requirement or reissuing a partial set-aside for those competitively priced items offered by small businesses.

If you intend to withdraw or modify a set-aside, notify your agency's small and disadvantaged business utilization specialist or the SBA procurement center representative in writing. A statement supporting the withdrawal or modification should also be included in the contract file.

FAR 20.205

Similar procedures apply for a labor surplus area set-aside.

15.3 Make Final Award Decisions

After completion of technical and cost evaluations, you must decide how to finalize the award. Exhibit 15-2 summarizes the possibilities.

FINAL AWARD DECISION TABLE

IF YOU DETERMINE THAT:	THEN YOU SHOULD:
No discussion is needed with any offeror,	Proceed directly to award without holding discussions after verifying that the RFP properly alerted offerors and ensuring discussions were not held with any offeror. {FAR 15.610(a)}
Questions need resolving or negotiation is required,	Hold discussions with all offerors in the competitive range, evaluate BAFO's, and award according to price and other factors in the solicitation. {FAR 15.611(d)}
All offers are unacceptable with no possibility of being made acceptable,	Reject all offers after obtaining approval from the agency head. {FAR 15.608(b)}

Exhibit 15-2

Your award recommendation will generally be reviewed by :

- Contracting officer,
- Higher level in accordance with the policy of your agency, or
- Source Selection Authority in formal source selections.

Recommendation Rejected

Ordinarily, the contracting officer should have little cause to reject your recommendation. However, you might be questioned relative to a judgment call, such as reasonableness of price or responsibility of offeror. If you cannot successfully defend your judgment, the contracting officer could reject your recommendation resulting in:

- Awarding the contract to the next low offeror.
- Reopening negotiations.
- Cancelling the solicitation.

Recommendation Accepted

If the contracting officer accepts your recommendation and all approvals and clearances have been obtained, the award decision is final, and you

should then:

- Assemble all of the required documentation,
- Complete the contract file, and
- Prepare the award document so that it is ready for the contracting officer's signature.

15.4 Prepare Contract

FAR 15.406-1(b)

All elements of the RFP except Part IV, any amendments to the RFP, and the offer, as negotiated, should be clearly and accurately set forth in the award document (See Exhibit 15-3) . An award is the acceptance of an offer, and together they constitute the contract.

AWARD DOCUMENT SELECTION

General procedure:	The contracting officer awards the contract by signing the award section of the SF33 - Solicitation, Offer and Award.
If the offer has been amended through negotiation:	The bilateral form, the SF26 - Award/Contract - must be completed because a new signature is required of the offeror. Incorporate any written amendments by reference in the award.

Exhibit 15-3

Use of the award portion of SF 33 or SF 26 does not preclude the additional use of informational documents, such as telegrams, for notices of award. Exhibits 15-4 and 15-5 show the correct procedure for completing these forms.

15.5 Prepare Documentation of Award

Throughout this text, you have been alerted to document in the contract file certain actions pertaining to the procurement process.

See Exhibit 8-1-3 for a listing of contract file contents that are proprietary or source selection information and shall be protected from disclosure to unauthorized persons.

FAR 4.803

The following contracting office contract file list of 43 items serves both as a reminder and a checklist for documentation requirements. Your agency regulations may have augmented this list.

CONTRACTING OFFICE CONTRACT FILE CHECKLIST

1. Purchase request & acquisition plan
2. Justifications & Approvals, and Determinations & Findings
3. Evidence of availability of funds
4. Synopsis in CBD
5. List of sources solicited and those denied solicitation
6. Set-aside decision
7. Government estimate of contract price.
8. RFP and any amendments thereto
9. Security requirements and clearances
10. Each offer or quotation, the related abstract, and record of determinations concerning late offers.
11. Contractor's contingent fee representation and other certifications and representations.
12. Preaward survey reports
13. Source selection documentation.
14. Contracting officer's determination of the contractor's responsibility
15. Small Business Administration Certificate of Competency.
16. Records of contractor's compliance with labor policies including EEO policies.
17. Cost or pricing data and Certificates of Current Cost or Pricing Data or a required waiver.
18. Packaging and transportation data.
19. Cost or price analysis.
20. Audit reports or reasons for waiver.
21. Record of negotiation.
22. Justification for type of contract.
23. Authority for deviations from regulations, statutory requirements, or other restrictions.
24. Required approvals of award and evidence of legal review.
25. Notice of award.
26. Original signed contract or award; all contract modifications; and documents supporting modifications executed by the contracting office.
27. Synopsis of award or reference thereto.
28. Notice to unsuccessful quoters or offerors and record of any debriefing.
29. Acquisition management reports.
30. Bid, performance, payment, or other bond documents, or a reference thereto; notices to sureties.
31. Report of postaward conference.
32. Notice to proceed, stop orders, and any overtime premium approvals granted at the time of award.
33. Documents modifying normal assignment of contract administration duties and responsibility.
34. Approvals or disapprovals of requests for waivers or deviations from contract requirements.
35. Rejected engineering change proposals. These may be filed separately for early disposal.
36. Royalty, invention, and copyright reports (including invention disclosures) or reference thereto.
37. Contract completion documents.
38. Documentation regarding termination actions for which the contracting office is responsible.
39. Cross-references to pertinent documents that are filed elsewhere.
40. Additional documents on which action was taken or that reflect actions pertinent to the contract.
41. Chronological list of awarding and successor contracting officers including dates.
42. All procurement integrity certifications.
43. Record of all persons authorized to have access to proprietary or sources selection information.

SOLICITATION, OFFER AND AWARD	1. This contract is a rated order under DPAS (15 CFR 360) ▶	Rating	Page 1 of

2. Contract No.	3. Solicitation No.	4. Type of Solicitation	5. Date Issued	6. Requisition/Purchase No.
	DABT59-8X-B-0001	☐ Sealed Bid (IFB) ☐ Negotiated (RFP)		

7. Issued By Code	8. Address Offer To (If other than Item 7)

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder"

SOLICITATION

9. Sealed offers in original and 0 copies for furnishing the supplies or services in the Schedule will be received at the place specified in Item 8, or if hand-carried, in the depository located in Bldg 1, Room 6 until _____ time _____date.

CAUTION--LATE Submissions, Modifications, and Withdrawals: See Section L. Provision No. 52.214-7 or 52.215-10. All offers are subject to all terms and conditions contained in this solicitation.

10. For Information Call: ▶	A. Name	B. Telephone No.(Area code) (NO COLLECT CALLS)
	Robert E. Jones	202-922-7771

11. Table of Contents

X	SEC.	DESCRIPTION	PAGE(S)	X	SEC.	DESCRIPTION	PAGE(S)
		PART I - The Schedule				**PART II - Contract Clauses**	
	A	Solicitation/Contract Form			I	Contract Clauses	
	B	Supplies or Services and Prices/Costs				**PART III - List of Documents, Exhibits and other Attachments**	
	C	Desc./Specs/Work Statement			J	List of Attachments	
	D	Packaging and Marking				**PART IV - Representations and Instructions**	
	E	Inspection and Acceptance			K	Representations, Certifications and Other Statements of Offerors	
	F	Deliveries or Performance					
	G	Contract Administration Data			L	Instructions., Conditions., and Notices	
	H	Special Contract Requirements			M	Evaluation Factors for Award	

OFFER (Must be fully completed by offeror)

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16

12. In compliance with the above, the undersigned agrees, if this offer is accepted within ____calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

13. Discount for Prompt Payment (See Section I, Clause No. 52.232-8 ▶	10 CalendarDays %	20 CalendarDays %	30 CalendarDays %	Calendar Days %
14. Acknowledgment of Amendments (The offeror acknowledges receipt of amendments to the Solicitation for offerors and related documents numbered and dated)	Amendment No.	Date	Amendment No.	Date
	Amendment No.	Date	Amendment No.	Date

15A. Name and Address of Offeror	Code ☐ Facility ☐	16. Name & Title of Person Authorized to sign Offer (Type or Print)
15B. Telephone No. (Include area code)	☐ 15C. Check if Remittance address is different from above. Enter such address in schedule.	17. Signature / 18. Offer Date

AWARD (To be completed by Government)

19. Accepted as to items numbered	20. Amount	21. Accounting and Appropriation

22. Authority for using other than FAOC ☐ 10 USC 2340(c) ☐ 41 USC 253(c)	23. Submit invoices to address shown in (4 copies unless otherwise specified) ▶	Item

24. Administered by (If other than Item 7) Code	25. Payment will be made by Code

26. Name of Contracting Officer	27. United States of America (Signature of Contracting Officer)	28. Award Date

IMPORTANT -- Award will be made on this form, or on SF 26, or by other authorized official written notice.

COMPLETING THE AWARD PORTION OF THE SF 33

You completed the **solicitation portion** when you prepared the RFP.

The offeror completed the **offer portion**.

A warranted contracting officer that has the appropriate authority will make award by completing and signing the **award portion** of the SF 33.

Block 19: Indicate what items in the RFP are being awarded in this contract.

Block 20: Indicate the dollar amount of the contract.

Block 21: Insert accounting data. Supplied by fiscal officer.

Block 22: Insert "1 to 7" if appropriate.

Block 23: Insert "7, 8, or 25."

Block 24: Indicate the contract administration office if it is not your office.

Block 25: Insert name and address of disbursing office.

Block 28: Insert award date, generally the date the contracting officer signs the form.

AWARD/CONTRACT	1. This contract is a rated order under DPAS (15 CFR 350)	Rating	Page of Pages
2. Contract *(Proc. Inst. Ident.)* No.	3. Effective Date	4. Requisition/Purchase Request Project No.	

5. Issued By	Code	6. Administered By *(If other than Item 5)*	Code

7. Name and Address of Contractor *(No., street, city, county, State and ZIP Code)*	8. Delivery ☐ FOB Origin ☐ Other *(See below)*
	9. Discount for Prompt Payment
	10. Submit Invoices *(4 copies unless other - wise specified)* To the Address Shown in: Item
Code / Facility Code	

11. Ship to / Mark for	Code	12. Payment Will Be Made By	Code

13. Authority for Using Other Than Full and Open Competition:	14. Accounting and Appropriation Data
☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253(c)( )	

15A. ITEM NO.	15B. SUPPLIES / SERVICES	15C. QUANTITY	15D. UNIT	15E. UNIT PRICE	15F. AMOUNT
				15G. TOTAL AMOUNT OF CONTRACT	$

16. TABLE OF CONTENTS

SEC.	DESCRIPTION	PAGE(S)	SEC.	DESCRIPTION	PAGE(S)
	PART I - THE SCHEDULE			PART II - CONTRACT CLAUSES	
A	Solicitation/Contract Form		I	Contract Clauses	
B	Supplies or Services & Prices/Costs			PART III - LIST OF DOCUMENTS, EXHIBITS & OTHER ATTACH.	
C	Description/Specs./Work Statement		J	List of Attachments	
D	Packaging and Marking			PART IV - REPRESENTATIONS AND INSTRUCTIONS	
E	Inspection and Acceptance		K	Representations, Certifications and Other Statements of Offerors	
F	Deliveries or Performance				
G	Contract Administration Data		L	Instrs., Conds., & Notices to Offerors	
H	Special Contract Requirements		M	Evaluation Factors for Award	

CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE

17. ☐ Contractor's Negotiated Agreement (*Contractor is required to sign this document and return _____ copies to issuing office.)* Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, represent - ations, certifications, and specifications, as are attached or incorporated by reference herein. (*Attachments are listed herein.)*

18. ☐ Award *(Contractor is not required to sign this document.)* Your offer on Solicitation Number _____., including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.

19A. Name and Title of Signer (Type or print)		20A. Name of Contracting Officer	
19B. Name of Contractor By _____ *(Signature of person authorized to sign)*	19C. Date Signed	20B. United States of America By _____ *(Signature of person authorized to sign)*	20C. Date Signed

COMPLETING THE SF 26

This document may become a contract when

- issued with the contracting officer's signature, or
- it may require a bilateral action.

In the latter case, the contractor signs the form first, then the contracting officer signs. The document becomes a contract with the contracting officer's signature.

Block 3: Enter the date you want the contractor to begin working. This is generally, the same date as in Item 20, the date the contracting officer signs the contract.

Block 5: Insert name and address of purchasing office

Block 6: Insert name and address of contract administration office

Block 11: Insert address where items under contract are to be delivered.

Block 12: Insert name and address of disbursing office.

Block 15: Insert here:

- Item numbers from RFP
- Description of supplies or services
- Quantity
- Unit
- Unit price
- Amount (show total amount of contract)

Block 16: Check all items, except Part IV which will not be sent with the contract package. It will be incorporated by reference.

Block 17: If applicable, check block, and indicate number of copies you want returned. This is a bilateral action. Contractor signs first, then the contracting officer signs and sends copies to contractor.

Block 18: If applicable, check block, and insert RFP number in space. This is a unilateral action. When the contracting officer signs, a contract is in effect.

CHAPTER 16

SUBCONTRACTING PLANS AWARD DEBRIEFING

ADEQUATE SMALL BUSINESS OBJECTIVES

Before awarding an $800,000 contract, your contracting officer hands you a recently submitted small business subcontracting plan. Your assignment is to review the plan's objectives and goals to determine whether it is adequate.

What do you look for in determining the adequacy of a subcontracting plan?

What can happen if the plan is not adequate?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Review and approve subcontracting plans for inclusion in the contract.
Apply procedures for awarding contracts and provide notice of awards.
Debrief unsuccessful offerors.

Individual:

SUBCONTRACTING PLANS

16.1.1 Obtain subcontracting plans from offerors.
16.1.2 Research subcontracting potential.
16.1.3 Determine adequacy of the proposed subcontracting plan.
16.1.4 Negotiate or request a corrected plan.
16.1.5 Determine the offeror's responsibility based on submitted plan.
16.1.6 Determine the amount of monetary incentive for exceeding goals (if any).
16.1.7 Notify SBA of the award.

AWARD

16.2.1 Obtain approvals for awarding contract.
16.2.2 Make preaward notifications.
16.2.3 Execute contract(s) and transmit notice to successful offeror(s).
16.2.4 Make postaward notifications.

DEBRIEFING

16.3.1 Prepare for debriefing.
16.3.2 Conduct debriefings.
16.3.3 Document debriefings.

INTRODUCTION TO SUBCONTRACTING PLANS

Statutory Requirements

FAR 19.702

Any offeror

> "receiving a contract for more than the small purchase limitation ... shall agree in the contract that small business concerns and small disadvantaged business concerns shall have the maximum practicable opportunity to participate in contract performance."

Compliance and Violation

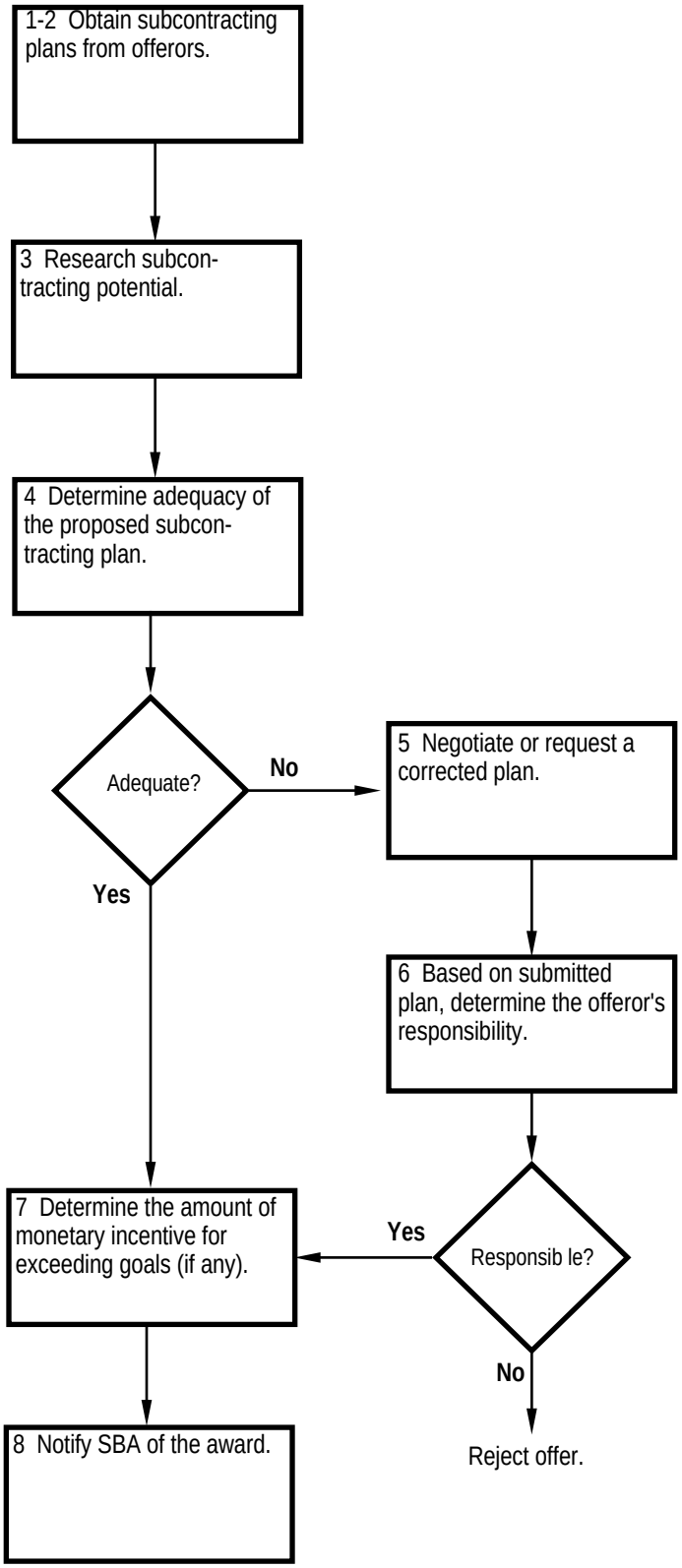
To ensure maximum small business contract participation:

- Certain contracts offering subcontracting possibilities must contain a clause which requires any offeror who is selected for award to submit a detailed subcontracting plan to the procurement agency.
- Subcontracting plan will outline subcontract opportunities which will be made available to small businesses.
- If the offeror fails to comply with this requirement, you must determine the offeror nonresponsible.

Steps in Performance

The steps in evaluating subcontracting plans are charted on the next page. The steps in executing awards and debriefing are found in subchapters 16.2 and 16.3 respectively. Following each flowchart, each step is discussed in turn.

STEPS IN EVALUATING SUBCONTRACTING PLANS



STEPS IN EVALUATING SUBCONTRACTING PLANS

16.1 SUBCONTRACTING PLANS

16.1.1 Obtain Subcontracting Plans from Offerors

Because prime contractors award substantial numbers of subcontracts, they are required by certain clauses (See Exhibit 16-1) that are included in contracts and subcontracts to provide subcontracting opportunities to small and small/disadvantaged business concerns.

SMALL BUSINESS SUBCONTRACTING CLAUSES

RFPs Contain This Clause	Unless:
Utilization of Small Business Concerns and Small Disadvantaged Business Concerns. [FAR 52.219-8]	Contract is: - under small purchase limitation. - performed outside of the U.S. - for personal services.
Utilization of Women-Owned Small Businesses. [FAR 52.219-13]	Contract is: - under small purchase limitation. - performed outside of the U.S. - for personal services.
Utilization of Labor Surplus Area Concerns. [FAR 52.220-3]	Contract is: - under small purchase limitation. - performed outside the U.S. and contractor is foreign. - for personal services.
Utilization of Indian Organizations and Indian-Owned Economic Enterprises [FAR 52.226-1]	- Contract does not contain Subcontracting Plan clause at (FAR 52.219-9). (Civilian agency use is optional based on subcontracting opportunities and funding for any increased costs.)

Exhibit 16-1

In addition to the above, the apparently successful offeror is required to comply with the

FAR 52.219-9

1. Small Business and Small Disadvantaged Business Subcontracting Plan (SB/SDBS) clause and submit a plan, provided the contract:
   - Is being awarded to other than a small business,

FAR 19.704(c)

- Offers subcontracting possibilities,
- Is expected to exceed $500,000 (including options),
- Includes the Utilization of Small Business Concerns and Small Disadvantaged Business Concerns clause, and
- Is not being accomplished through the 8(a) program;

and/or

FAR 52.220-4

2. Labor Surplus Area Subcontracting Program clause and conduct such a program, provided the contract:

- Offers substantial subcontracting possibilities,
- Is expected to exceed $500,000, and
- Includes the Utilization of Labor Surplus Area (LSA) Concerns clause.

The LSA program targets labor surplus areas for subcontracts.

The SB/SDBS plan:

- describes how the offeror will provide subcontract opportunities to small, small/disadvantaged, and women-owned small businesses, and
- must be obtained within an established time frame but before award.

FAR 19.702(a)(1)

If the offeror does not negotiate and/or submit a plan within the prescribed time period, the offeror will be ineligible for award.

Types of Plans

The SB/SDBS clause provides for three types of plans:

1. Individual Procurement

This subcontracting plan relates only to a specific contract.

2. Master

FAR 19.704(b)

Offeror may satisfy the subcontracting plan requirement by referencing an approved master subcontracting plan, with individual goals for a specific contract:

- May be established on a plant or division-wide basis;
- Are effective for one year after approval, or for the life of the individual contract in which it is incorporated.

3. Commercial Product

If a commercial product is offered, the subcontracting plan may relate to the offeror's production generally for both commercial and non-commercial products rather than solely to the government contract. Generally the offeror will submit a company-wide or division-wide annual plan for approval by the govern-

ment. Make sure the Commercial Product Plan applies to this particular contract (e.g., right time period.)

Contents of Plans

FAR 19.704 (a)

Each subcontracting plan must include:

1. Separate percentage goals for small business concerns and small disadvantaged business concerns; subcontract plans for contracts containing options must separately address goals for both the basic contract and each option.
2. Name of an individual employed by the offeror to administer the program;
3. Description of how the firm will provide subcontracting opportunities;
4. Assurance the offeror will include the:
   - Utilization of Small Business Concerns and Small Disadvantaged Business Concerns clause in all subcontracts having subcontracting opportunities, and
   - Small Business and Small Disadvantaged Business Subcontracting Plan clause in all subcontracts (except small business concerns) over $500,000.
5. Assurances the offeror will fulfill reporting requirements, and cooperate in any required studies of surveys;
6. A list of the types of records the contractor will maintain to demonstrate compliance with the subcontract plan.

16.1.2 Research Subcontracting Potential

To review and evaluate the plan, you must explore the subcontracting potential. Conduct factfinding on the subcontracting plan with help from the SBA resident procurement center representative and/or the Director of Small and Disadvantaged Business Utilization (SADBU), to obtain information on such matters as:

- Offeror's past performance in awarding subcontracts for the same or similar products or services to small and small disadvantaged businesses.
- Offeror's overall past performance in awarding subcontracts to small and small disadvantaged businesses.
- Offeror's make or buy program, in terms of identifying potential conflicts with the proposed subcontracting plan.
- Subcontracting potential, given the offeror's make or buy policies and programs, the nature of the products or services to be subcontracted, the known availability of small and small disad-

vantaged business concerns in the area where the work is to be performed, and the offeror's longstanding contractual relationships with suppliers.

FAR 5.206

Prime contractors may use the CBD to publicize subcontracting opportunities.

16.1.3 Determine Adequacy of Proposed Plan

With assistance from the SBA resident procurement center representative and/or the SADBU, you must determine whether the plan is adequate. A plan is adequate when:

1. Plan is complete per Section 16.1.1 above.
2. Specified goals match what the small business community is capable of providing. Evaluate goals by taking into account:
   - Past participation by small business concerns in similar acquisitions.
   - Proven methods of involving small business concerns as subcontractors in similar acquisitions.
   - The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by the contractor.

FAR 19.705-4(d)

16.1.4 Negotiate or Request a Corrected Plan

Adequate plans do not have zero goals. The subcontracting goals should be set at a level for which there is a reasonable expectation that the offeror can achieve by expending good faith efforts.

If you find the plan to be unacceptable in that it does not incorporate the required elements, you may request the offeror to submit a revised plan or you may negotiate.

> Take care not to negotiate a goal upwards if it is apparent that a higher goal will significantly increase the Government cost.

You may assist the offeror by providing information on established small and small disadvantaged business subcontractors as well any firms known to be potential subcontractors.

16.1.5 Determine Offeror's Responsibility Based on Plan

The subcontracting plan, if required, may determine a contractor's eligibility for award. The offeror is nonresponsible if:

- The plan submitted or revised does not incorporate the required elements or is not submitted within the time specified, or
- If the offeror's past record of compliance with subcontracting plans tips the scales against the offeror.

16.1.6 Determine Amount of Monetary Incentive for Exceeding Goals

FAR 19.708(c)

Monetary incentives may be used in support of the subcontracting programs. The incentives usually include payments based on actual subcontracting achievement or award fee contracting.

1. If a contractor exceeds its subcontract goals, it will usually receive a percentage of the difference between the dollar amount of its subcontract awards and the subcontract dollar goal amount.
2. The percentage ranges from 1 to 10% and is determined by the contracting officer prior to the initiation of contract performance.
3. This determination will be based on the type and extent of effort which would be required for the contractor to exceed the subcontract goal.
4. If properly implemented, monetary incentives encourage a contractor to provide a unique outreach program, use small and small disadvantaged subcontractors in non-traditional areas, and furnish major technical assistance to these firms.

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Incentive provisions should normally be negotiated after reaching final agreement with the contractor on the subcontracting plan. In establishing these rewards, realistic goals should be set to provide the proper motivation.

16.1.7 Notify SBA of Award

The SBA has the responsibility to evaluate contractors' compliance with subcontracting plans on a contract-by-contract basis or on an aggregate basis. Therefore, you must inform the SBA of the award of your contract by providing the documents as shown in Exhibit 16-2.

SBA NOTIFICATION

FAR 19.706-6

Copies of:	Must be provided to:
Award document	Assistant Regional Administrator for Procurment Assistance in the SBA region where the contract will be performed.
Subcontracting plan and associated approvals	Assistant Regional Administrator for Procurement Assistance in the SBA region where the company's headquarters is located if company-wide plans were received from offerors of commercial products. SBA resident procurement center representative.

Exhibit 16-2

LOOK OUT FOR THE LITTLE GUY

As a final measure of responsibility, you must determine the adequacy of a submitted small business subcontracting plan. The plan must contain all the information goals and assurances required, and the established goals should reflect the capabilities of the small business community. If the plan that you received is not acceptable you can request a more acceptable plan from the offeror or you may negotiate the objectives. If an acceptable plan is not received. You should determine the offeror nonresponsible and proceed to award the next offeror.

AND THE WINNER IS.....

Your contracting officer has approved your recommendation for award of a $3.5 million small business set-aside contract but she informs you that you must complete your pre-award notices and get clearance to proceed before the contract can be executed and the award can be announced.

What is contract clearance and who may provide it?

Who must be informed of an impending award?

What action(s) constitute executing a contract?

INTRODUCTION TO AWARDS

Definition of Award

The Government formally accepts the terms and conditions of an offer and formulates a contract to which both the Government and contractor are legally bound.

Award Responsibility

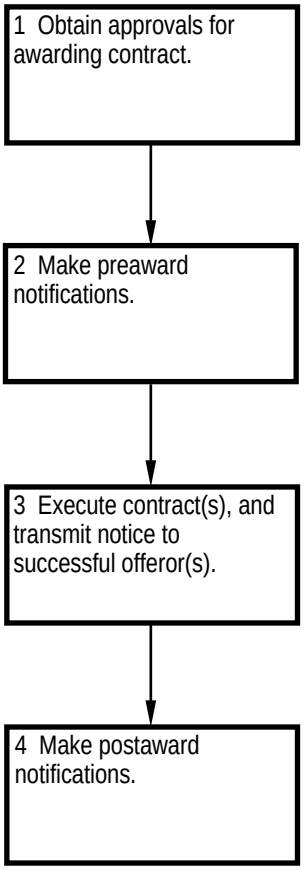
Only a duly appointed contracting officer acting within the scope of his or her authority, may award a contract with a signature. However, there are many tasks that a contract specialist must complete before and after the signature to finalize the award process. These tasks include:

- Obtaining approvals for awarding the contract,
- Notifying successful offeror,
- Notifying unsuccessful offerors,
- Issuing notices of award,
- Synopsizing award, and
- Documenting reasons for not synopsizing awards.

Steps in Performance

The steps in awarding the contract are charted on the next page. After the flowchart, each step is discussed in turn.

STEPS IN AWARDING THE CONTRACT



STEPS IN AWARDING THE CONTRACT

16.2 AWARDING THE CONTRACT

16.2.1 Obtain Approvals for Awarding Contract

Award decisions are generally subject to several clearance or approval procedures when negotiation is the method of procurement. These approvals

- provide safeguards for a process which does not mandate award decisions be made strictly on an objective basis (i.e., always awarding to the low offeror),
- depend on your agency's review requirements, and
- are usually based on the dollar value of the contract.

Clearance and approval may involve the critical examination of:

- Actions leading to the negotiation of terms for which authority to contract is requested,
- Adequacy of the proposed terms, and
- Information submitted in support of them.

Although attention is focused primarily on the business aspects, the whole acquisition may be reviewed for compatibility with the legal, technical, and business interest of the Government:

- Necessity for acquisition,
- Selection of sources,
- Method of acquisition selection,
- Manner in which solicitations were made, and
- Nature and scope of the negotiations.

In addition, clearance may entail analysis of prior acquisitions and future plans to determine the consistency and validity of the terms involved in the acquisition being cleared. In short, clearance encompasses the acquisition actions and responsibilities of the negotiator, buyer, or contracting officer, and of technical and/or engineering personnel.

Approving officials are usually personnel from:

Legal Staff. A legal review is almost always required. Legal approval ensures that the

> proposed contract is legally "sufficient"--that all the requirements of laws and regulation have been met and that the contract will be enforceable.

Typically, the legal review and approval process does not include a review of your decisions unless any premises upon which you based

your judgment appear faulty.

The attorney who performs the legal review may be in the Office of Counsel, Office of the General Counsel, the Judge Advocate General's Office, or other such organization within your contracting activity or agency.

Level Above Contracting Officer. Many activities require preaward authorization and approval by persons at a level higher than the contracting officer on contracts with significant dollar values. The signatures of these individuals indicate agreement with procedures followed, judgment used and decisions made in finalizing the award.

Some of the persons at this level include

- Head of the Contracting Agency or designee,
- Head of the Department,
- Head of the Contracting Activity, or

any other such person in a position which is above that of the contracting officer.

Requiring Activity. It is always a good idea to secure the approval of the requiring activity before executing the contract. This is not always feasible however, especially if you are making a consolidated buy.

AN OUNCE OF PREVENTION

The approvals and authorizations that provide contract clearance are required to ensure compliance with all laws and regulations. These reviews should also help prevent errors that cause protests.

16.2.2 Make Pre-award Notifications

FAR 15.1001(b)(1)

Evaluation Period Exceeds 30 Days

When the proposal evaluation period is expected to exceed 30 days, the contracting officer, upon determining that a proposal is unacceptable, shall promptly notify the offeror and state ① in general terms, the basis for the determination and ② that a revision of the proposal will not be considered.

FAR 15.1001(b)(2)

Small Business Offerors

B-243805

In a small business set-aside, each unsuccessful offeror must be notified, in writing, of the name and location of the apparent successful offeror. This "loser letter" should also state that the ① Government will not consider subsequent revisions of the unsuccessful proposal and ② that no response is required unless a basis exists to challenge the small business size status of the apparently successful offeror (does the contractor meet the criteria established by the SBA?)

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Agency Public Liaison Office

For contracts with high public and political interest, it may be necessary to inform your agency public liaison office of an impending award. This pre-award notice will provide sufficient time to allow the appropriate agency or Congressional official to prepare for announcing the award.

FAR 5.303 (a)

Public Announcement

You must make information available on awards over $3 million (unless another dollar amount is specified in agency acquisition regulations) in sufficient time to announce it by the public release time of 5:00 p.m. Washington DC time on the day of the award. You may also release information on contract awards to local press or other media.

16.2.3 Execute Contract(s)

FAR 4.101

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Award is made by:

- Contracting officer signing the award portion of the Standard Form 33, "Solicitation, Offer and Award."
- If however, an offer is changed so that it results in the need for a new, bilateral award document, the SF 26 "Award/Contract" is normally used, and both the offeror and the contracting officer sign it.
- In some circumstances, such as contracting for construction, other forms may be required.
- Contracts may also be made by issuing a Notice of Award.

FAR 15.1002

The award is completed by mailing or otherwise providing a properly executed award document to the successful offeror. If a partial award is made and additional items are being withheld for subsequent award, the offeror must be advised that additional awards may be made within the offer acceptance period.

16.2.4 Make Post-award Notifications

When the contracting officer signs the award document, your contract action is substantially complete; however, you must ① make post-award notifications and ② distribute the contract.

Any release of information prior to official announcement is improper. Even if award is to be made to the apparent low offeror, the release of such information should occur only in accordance with agency regulations. Proper notification should be given to:

Requiring Activity

Inform the requisitioner of the award by making a phone call to the point of contact.

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Unsuccessful Offerors

FAR 15.1001(c)

You should notify each offeror whose offer is not selected for award, unless disclosure might prejudice the Government's interest. Notification to unsuccessful offerors must be prompt* and in writing. (Many agencies use form postal cards to notify unsuccessful offerors.) The post-award notice should include the following:

- Number of offerors solicited and proposals received,
- Name and address of each offeror receiving an award,
- Items, quantities, and unit prices of each award, and
- Reason(s) proposal was not accepted (if price alone is insufficient).

Keep in mind that specific information pertaining to a competitor's proposal must not be disclosed to any offeror.

FAR 5.301(a)

Commerce Business Daily

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The Government encourages open competition among subcontractors who support prime contractors on large contracts. Accordingly, you must synopsize in the CBD any awards greater than $25,000 that are likely to result in subcontracts (also, contracts subject to the Trade Agreements Act).

Transmit the synopsis of a contract award to the Commerce Business Daily (See Subchapter 6.1). Exceptions to the synopsis requirement are shown in Exhibit 16-3.

Government Agencies

Your agency may require that Government agencies who have interest

* For Trade Agreement or NAFTA acquisitions, notification must be within 7 working days of award.

in a contract should also be sent a notice of award. Such agencies include:

- Small Business Administration
- Department of Labor
- GSA for ADP

EXCEPTIONS TO CBD AWARD SYNOPSIS

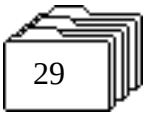
FAR 5.301(b)

- Notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;
- Award results from acceptance of an unsolicited research proposal that demonstrates a unique and innovative research concept and publication of any notice would disclose the originality;
- Award results from a proposal submitted under the Small Business Innovative Development Act of 1982;
- Contract action is an order placed under a requirements contract;
- Award is made for perishable subsistence supplies; or
- Award is for utility services, other than telecommunications services, and only one source is available.

Exhibit 16 -3

FPDS Input

FAR Subpart 4.6



Upon award, you must

- complete Standard Form 279, Federal Procurement Data System - Individual Contract Action Report, and
- submit report data, usually via a central collection point in your agency, to the Federal Procurement Data Center.

Most agencies have some level of automation for collecting and reporting data.

Distribution

FAR 4.201

You must have copies of a contract distributed within 10 working days after execution by all parties. Be sure to retain your initial contract distribution list so that future modifications to the contract, if any, can be sent to the same locations. The individuals and agencies shown in Exhibit 16-4 should receive a copy of the contract.

CONTRACT DISTRIBUTION

- Contractor (awardee)
- Finance and accounting or paying office, if different
- Contract administration office, if appropriate
- Official contract file
- Audit agency, if appropriate
- Requiring activity
- Other offices as prescribed by agency policy

Exhibit 16-4

FAR 4.203(b)

For the copy of the contract sent to the paying office, you must include the contractor's Tax Identification Number (TIN) by either

- annotating the last page with the TIN or
- attaching a copy of the contractor completed Tax Identification provision.

FAR 52.204-3

SIGNED, SEALED, AND DELIVERED

The contracting officer's signature on an award document after making pre-award notifications completes the execution of a contract. The post-award notifications and the distribution of copies of the contract to all parties finalizes the award process.

HOW CAN I EXPLAIN?

After receiving post-award notification that his company did not receive an award, the offeror phones you and says, "My offer was much lower than that of the contract awardee. Why was my offer not selected for the award? Do you:

Refer the call to the contracting officer who is authorized to disclose information?

Give the offeror a brief explanation of his non selection at that time? or

Require him to submit a letter requesting a formal debriefing?

INTRODUCTION TO DEBRIEFING

Policy

FAR 15.1003(a)

When a contract is awarded on a basis other than price alone, unsuccessful offerors, upon their written request, shall be debriefed as soon as possible and furnished the basis for the selection decision and contract award.

Definition

Debriefing is the act of telling unsuccessful offerors why their offers were deficient.

Purpose

The basic purpose of the debriefing is to assist offerors in upgrading the quality of their future proposals by identifying areas where they can improve their proposal techniques.

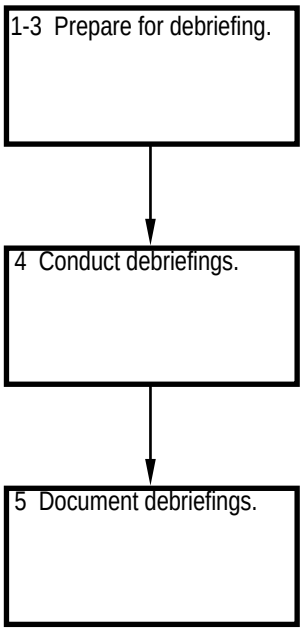
Objective

The debriefing should be conducted in a manner that will assure unsuccessful offerors that the proposal evaluation and source selection process was thorough and conducted impartially and equitably.

Steps in Performance

The steps in conducting debriefings are charted on the next page. Following the flowchart, each step is discussed in turn.

STEPS IN DEBRIEFING



STEPS IN DEBRIEFING

16.3 DEBRIEFING

16.3.1 Prepare for Debriefing

Unsuccessful offerors will frequently solicit information from you as to why their offers were rejected. The practice of debriefing, if properly performed, will

- help to satisfy the contractor's natural interest in why the offer was unsuccessful,
- help the Government develop and maintain as broad a base of suppliers as possible, and
- aid in submitting more acceptable offers on future acquisitions.

Full disclosure of a proposal's major strengths and weaknesses must be made in order to benefit the contractor's future proposal efforts.

STEP #1: Compile and review all of the technical evaluation memoranda.

Include deficiency reports and narrative assessments, and determine which reports are sufficient or where more narrative is needed to support a thorough debriefing. Take care to ensure that the deficiencies previously noted in the letters to each unsuccessful offeror are fully covered in the respective debriefings.

STEP #2: Determine if technical personnel are needed.

In many cases, especially on complex acquisitions where offers were rejected for technical reasons, cognizant technical personnel should be asked to assist in debriefing unsuccessful offerors. These personnel may be present at the meeting or nearby for consultation.

STEP #3: Prepare technical personnel.

Brief them on the purpose and objectives of debriefing and define their roles. Control participation of technical personnel in the debriefing conference by advising that they should:

- Restrict their conversations to the rejected contractor's proposal;
- Concentrate on the areas that were considered deficient or inferior; and
- Refrain from comparing the rejected proposal with the successful offer or with any other offer received.

STEP #4: Identify information that cannot be disclosed.

The offeror must be informed of the basic elements of his proposal which were deficient and weak in relation to the evaluation criteria, the standards for the criteria, and other requirements of the solicitation. At

the same time, you must also avoid making any reference or comparison to other offerors' proposals (See Exhibit 16-5).

DISCLOSURE OF INFORMATION AT DEBRIEFING

FAR 15.1003(b)

- Only discuss deficiencies in business and technical terms and conditions specific to the offeror's proposal.
- Do not disclose the relative merits or technical standing of offers from other competitors or how other competitors scored.
- No information that is not releasable under the Freedom of Information Act should be disclosed, such as:
  - trade secrets,
  - confidential manufacturing processes and techniques, or
  - confidential financial information (including profit, indirect cost rates, and cost breakdowns)

Exhibit 16-5

16.3.2 Conduct Debriefings

The debriefing should be done individually, and you can:

discuss only those deficiencies in business terms and conditions specific to the proposal (no disclosure of other proposals or comparison to them.)

You must keep the objective of debriefing in mind and conduct the meetings in a forthright, factual, and courteous manner.

Avoid source-selection sensitive areas, or areas which are not germane to the objectivity or purpose of the debriefing.

Opening the Conference

You should prepare a short opening for the debriefing conference. It should reflect your willingness and intention to assist the offeror through constructive criticism. You may encounter varying degrees of negative attitudes on the part of the offeror, therefore, be aware that your manner and technique have a significant effect on the atmosphere of the conference.

There is a delicate balance required to provide information adequate enough to satisfy the offeror that his/her proposal received a fair and impartial evaluation, yet avoid divulging sensitive or proprietary source selection data.

16.3.3 Document the Debriefing

FAR 15.1003(c)

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Document the debriefing by preparing a written summary of the session so that an accurate and complete record is kept on file.

An offeror may suggest taping the briefing for company records. However, the taping may inhibit remarks by Government and industry personnel thereby limiting the benefits of the debriefing to both. Therefore, any offeror's request to allow taping or recording should be politely declined.

PROFIT FROM MISTAKES

After receiving the written request for debriefing, you should hold a meeting to communicate what happened during the source selection process, identify the deficiencies of the offeror's proposal, and most of all, show the offeror how to turn the defeat of today into the "winning proposal" of tomorrow.

CHAPTER 17

PROTESTS

PROTESTING THE PROCUREMENT

After completing all the other steps in the negotiation process, you finally award a contract and go on to other solicitations. A week later, an unsuccessful offeror calls to complain about the award. This offeror alleges that there was apparent favoritism toward the awardee and the specifications were poorly drafted. The unsuccessful offeror claims that his company should have received the award and also indicates that if something is not done to correct the problem, he plans to protest to GAO, and maybe go to court.

What should you do now?

COURSE LEARNING OBJECTIVES

At the completion of this course, you will be able to:

Overall: Develop and forward the Government's position on the protest, and document the resolution of the protest.

Individual:

PROTESTS FILED WITH THE AGENCY

17.1.1 Respond to verbal or written complaints.
17.1.2 Prepare Findings of Fact.
17.1.3 Recommend whether to continue contract action or performance.
17.1.4 Recommend resolution of protest.
17.1.5 Select course of action.
17.1.6 Respond to protest.

PROTESTING A SMALL BUSINESS REPRESENTATION

17.2.1 Notify parties of proposed awardee.
17.2.2 Forward protests or CO concers about eligibility to SBA.
17.2.3 Determine whether to award immediately.
17.2.4 Implement SBA's determination.

PROTESTS CONCERNING THE WALSH-HEALEY ACT

17.3.1 Notify offeror that its eligibility has been questioned.
17.3.2 Determine the offeror's eligibility.
17.3.3 Forward the determination to SBA for small businesses.
17.3.4 Forward the protest to DOL.
17.3.5 Determine whether to award immediately.
17.3.6 Implement SBA's or DOL's determination.

PROTESTS TO GAO

17.4.1 Notify offerors.
17.4.2 Prepare Findings of Fact.
17.4.3 Respond to requests for written documents.
17.4.4 Recommend whether to continue contract action or performance.
17.4.5 Prepare and forward report to GAO.
17.4.6 Participate in hearing scheduled by GAO.
17.4.7 Determine whether to accept or appeal the GAO recommendation.

PROTESTS TO THE GSBCA AND TO THE COURTS

17.5.1 Protests to the GSBCA.
17.5.2 Legal remedies.

INTRODUCTION TO RESOLVING PROTESTS

Definitions

FAR 33.101

Protest is defined as a written objection by an interested party to a solicitation for offers for a proposed contract for the acquisition of supplies or services. Or a protest could be a written objection by an interested party to a proposed award or the award of such a contract.

Interested party for the purpose of filing a protest means an actual or prospective offeror whose direct economic interest could be affected by the award of a contract or by the failure to award a contract.

Purpose of Protest Procedures

FAR 52.233-2

Protests are filed when one offeror feels that another offeror won a contract unfairly. There are specific procedures for filing protests. The action that you take will be affected by whether the protest is submitted:

- Before award or
- After award, and

whether filed directly with:

- The agency
- General Accounting Office (GAO), or
- General Services Board of Contract Appeals (GSBCA) for automatic data processing (ADP), and

whether the protest is sustained or denied.

FAR 15.1004

"Protests against award in negotiated acquisition shall be treated substantially the same as in sealed bidding." (Text in this chapter is virtually the same as in the Sealed Bidding course Text/Reference.)

Regulations Concerning Protests

FAR Subpart 33.1

In addition to the FAR, the following regulations from the Code of Federal Regulations (CFR) are applicable to protests:

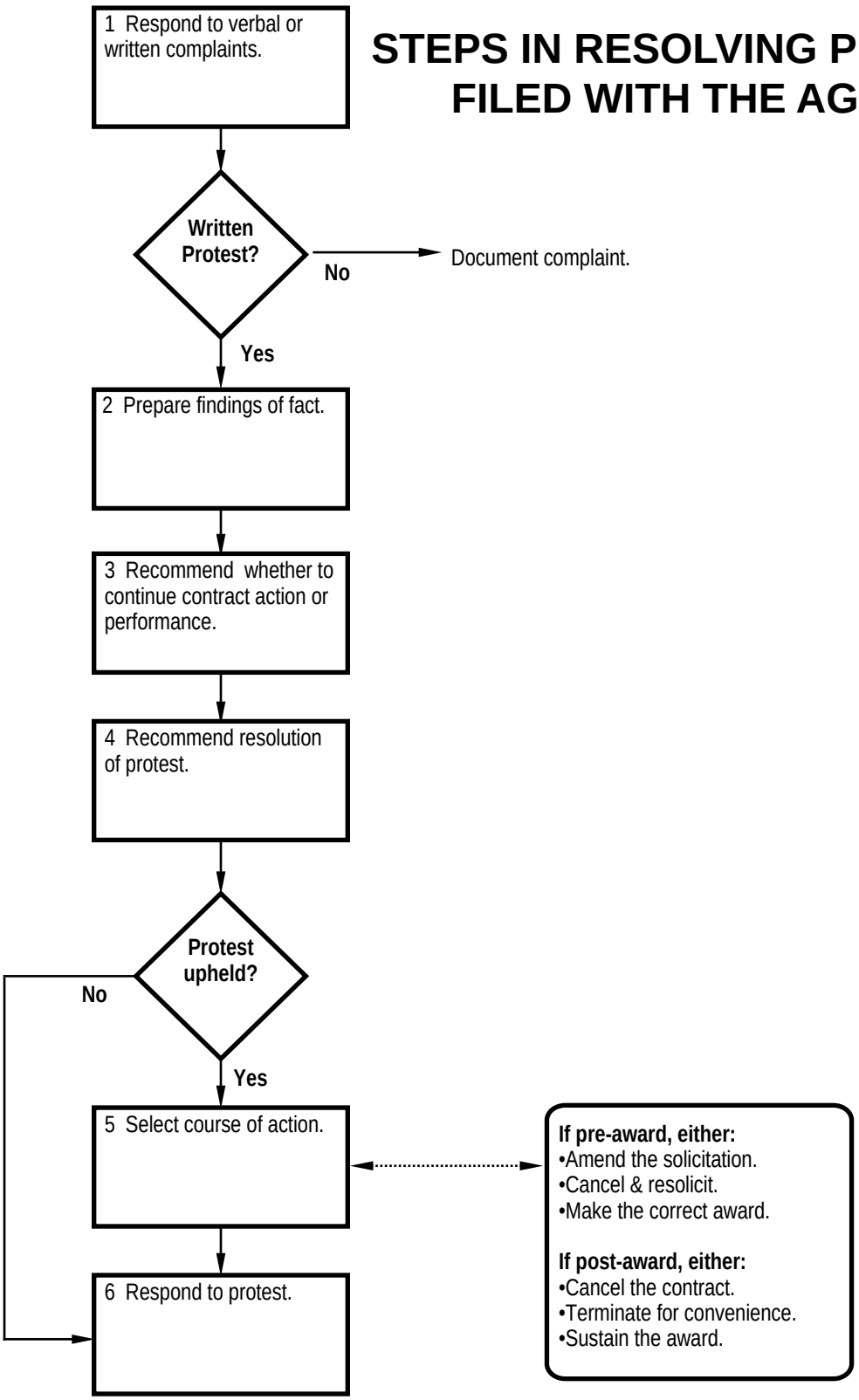
1.	Protest filed with the GAO:	4 CFR 21
2.	Protest on ADP filed with GSBCA:	48 CFR 61
3.	Protests filed with SBA:	13 CFR 121
4.	Protest filed with Labor:	41 CFR 50

Steps in Performance

The steps in resolving protests filed with the agency are charted on the next page. Following the flowchart, each step is discussed in turn in Subchapter 17.1.

Protesting a small business representation is found in subchapter 17.2.
Protests concerning the Walsh-Healey Act is found in subchapter 17.3.
Protests to GAO is found in subchapter 17.4.
Protests to the GSBCA and to the Courts is found in subchapter 17.5.

STEPS IN RESOLVING PROTESTS FILED WITH THE AGENCY



STEPS IN RESOLVING PROTESTS

17.1 PROTESTS FILED WITH THE AGENCY

17.1.1 Respond to Verbal or Written Complaints

Many protests begin with a phone call from an offeror, in which the offeror voices a complaint about the procurement and the way the procurement has been handled to that point. How you answer that first phone call may trigger a full blown, time consuming written protest at both the agency and other protest forums. Or, with a little tact and a few facts, the protest might begin and end with that call. Hence, consider the do's and don'ts in Exhibit 17-1.

RESPONDING TO VERBAL COMPLAINT	
DO:	**DON'T:**
Ask questions to define the issue, rephrase the issue to the protestor, and ask the protestor if you have correctly stated it.	Debate the offeror. Limit your phone conservations to (a) questions that define the issue and (b) statements of fact.
Disclose facts about the procurement that address the issue, provided disclosure is in accordance with Chapters 6.2, 8.1.2, or 16.3.	Criticize the offeror or offeror's firm.
Break for factfinding, if you need to research the case to identify the pertinent facts.	Release facts about the responsibility of other bidders, other proprietary data, or any other facts that may not be disclosed to competing contractors at that point in the procurement.
Tell the offeror about sources of information on the different protest forums.	Agree, on the spot, to sustain or deny the protest.
Instruct offeror to put protest in writing by a specific date when the offeror is not satisfied by your verbal response.	Withhold protest and appeal procedures when asked.
Document the call.	Ignore the complaint.

Exhibit 17-1

If you receive the protest in writing, you may be the one to initiate a phone call to the protestor, to ① ask questions that define the issue and ② otherwise clarify the protestor's written statement. Observe the same do's and don't's in making such a call.

Protestors must meet the following timeframes in submitting protests:

FAR 33.103(b)

1. Protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals shall be filed prior to the closing date for receipt of proposals.

2. In all other cases, protests shall be filed not later than 10 working days after the basis of protest is known, whichever is earlier.

When submitted, the protest shall include the following:

- Name, address, and telephone number of protester.
- Solicitation or contract number.
- Detailed statement of grounds for protest.
- Request for ruling by the agency.
- Statement as to the form of relief requested.

17.1.2 Prepare Findings of Fact

In order to make a decision as to whether to sustain or deny the protest, the CO must assemble, review, and evaluate all pertinent information relating to the procurement and to the protest. This process involves a great deal of factfinding and may involve you, the CO, legal counsel, and requirements or technical personnel. The information gathered may be put into a statement called a Findings of Fact. Typically, this statement includes a chronological detailing of events, from receipt of the purchase request to award of the contract — or to whatever point in the process was reached when the protest was filed.

Procurement events in the statement will include, as appropriate, those items shown in Exhibit 17-2.

If the protest pertains to the substance of the RFP (e.g., an allegation that the statement of work or specifications are unduly restrictive), the factfinding would be expanded to include, as appropriate:

- The procurement history of the item.
- Reasons for restrictions (if, in fact, there are restrictions).
- Quantity requirements.
- Time constraints.
- Special factors for responsibility.
- Other pertinent aspects of the procurement.

INFORMATION THAT MAY BE INCLUDED IN THE FINDINGS OF FACT

- All dates involved
- CBD dates
- Number of RFPs released
- Number of offers received
- Evaluation factors
- Handling of late offers and modifications of offers
- Amendments to RFPs
- Resolution of mistakes in offers
- Factors affecting award

Exhibit 17-2

At the same time factfinding is conducted to determine what the agency did, similar consideration must be given to determine whether the protest accurately states the pertinent facts. An early recognition of an incorrect statement or assumption in the protest could negate the need for exhaustive factfinding.

Because the decision to be rendered must be based on fact, factfinding must be thorough, accurate, honest — and results must be documented. Once factfinding is completed, the CO (or other authority) will evaluate the findings and then make the appropriate decision.

17.1.3 Recommend Whether to Continue Contract

When a protest is filed with the agency, an award shall not be made until the matter is resolved, unless the CO or other designated official first determines that one of the conditions in Exhibit 17-3 applies.

AWARDING A CONTRACT WITH PROTEST PENDING

FAR 33.103(a)(2)

An award can be made even though a protest is pending if the CO determines that:

- Supplies or services to be contracted for are urgently required.
- Delivery or performance will be unduly delayed by failure to make award promptly.
- Prompt award will otherwise be advantageous to the Government.

Exhibit 17-3

When you receive a protest against making an award and the award will be withheld pending disposition of the protest, complete the steps shown in Exhibit 17-4.

WITHHOLDING AWARD PENDING RESOLUTION OF A PROTEST

FAR 33.103(a)(3)

- Inform the offerors whose offers might be eligible for award if the protest is upheld.
- If appropriate, request those offerors to extend the time for acceptance in order to avoid the need for resolicitation.
- Investigate the basis for the protest.
- If you fail to obtain time extensions for the offers, consider proceeding with award as set forth in Exhibit 17-3.

Exhibit 17-4

Exhibit 17-5 describes how to handle protests received after award.

PROTESTS FILED WITH THE AGENCY AFTER AWARD

FAR 33.103(a)(4)

- Handle protests that are filed only with the agency and that are filed after award in accordance with agency procedures.

- You need not suspend contract performance or terminate the awarded contract unless it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

- You should consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis or, if appropriate, issue a "stop-work" order as provided in the "Protest After Award" clause in the contract (see FAR 52.233-3).

Exhibit 17-5

A review of Exhibits 17-3 and 17-5 makes it clear that only after careful review and analysis of the facts should a decision be made to continue a procurement action or continue contract performance pending the resolution of a dispute.

Contracting is a team effort. Use your team now! Obtain firm, well-founded, and documented information from the technical or requirements organizations involved. Have them tell you the pros and cons pertaining to a decision to "continue" as opposed to a decision to "wait."

Legal Counsel

Concurrently, get legal counsel involved. Counsel will be able to give you some sound advice, but more than anything else, counsel can research previous decisions of the Comptroller General (Comp. Gen.) or the General Services Board of Contract Appeals (GSBCA) for information on decisions made on similar protests. Knowledge of previous Comp. Gen. and GSBCA decisions is one of the most valuable sources of guidance for even the most experienced COs.

Sometimes you believe that you cannot support a "continue" decision, even though it might appear that a protest is based on weak assumptions or is without great merit and has little chance of being sustained. Or, sometimes the protest might have merit and you believe it has a reasonable chance or better of being sustained. In either of these

situations, you should recommend that the contract action be delayed or, if award has been made, seek a suspension of performance.

You should not, however, think that recommending a resolution of the protest is an expediency to avoid dealing with a "wrong" (as it might turn out) decision to "continue." As in the case of a decision to "continue," you must weigh the operational impact of a decision to put (or not to put) a hold on any aspect of the acquisitions.

If the facts appear to be sufficient to "continue," then by all means continue. But, also understand that a decision to continue, in either situation, is a momentous one and should be based on

- thorough investigation,
- sound, reliable advice, and
- plenty of documentation.

17.1.4 Recommend Resolution of Protest

After you complete factfinding, you are now ready to recommend either sustaining or denying the protest. This decision is a function of:

- Facts.
- Your agency's FAR Supplement.
- Case law (e.g., Comptroller General decisions)

The basic issue in any protest is whether, given the facts, the agency complied with the applicable policies as interpreted by the GAO.

Even though the agency may not necessarily believe itself to be bound by a given Comptroller General decision, it is important to know how the GAO might rule—given the fact that protest may next go to GAO. It is even possible to request an advisory opinion from GAO on the agency protest. Generally, CO's turn the task of researching case law over to the legal staff. In the final analysis, however, the CO generally makes the decision to sustain or uphold an agency protest.

When you recommend a resolution of the protest, support that recommendation with a findings of fact and appropriate documentation.

17.1.5 Select Course of Action

If the agency sustains the protest, one of the actions shown in Exhibit 17-6 is generally appropriate, depending on the circumstances.

SUSTAINED PROTEST ACTIONS	
If the protest was sustained:	Then:
Prior to award	Either amend or cancel the RFP.
After award	Cancel the award as being improperly awarded; or Terminate for convenience; or Allow the award to stand considering: - Degree of performance already completed - Need to prevent performance delays, and - Incumbent contractor's good faith in entering into the contract.

Exhibit 17-6

17.1.6 Respond to Protest

If the agency denies the protest,

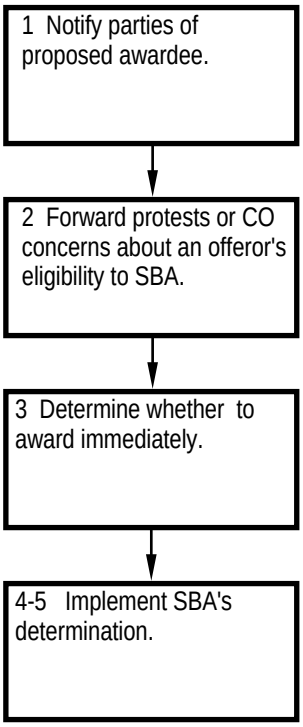
1. CO (or other authority as provided in agency regulations) notifies the protester and any other parties affected by the decision (e.g., awarding the contract to the originally intended successful offeror).
2. Offeror (or interested party that filed the protest) may file a "subsequent" protest with the General Accounting Office (GAO).
3. Filing must be done within 10 days after the offeror has been notified of, or has knowledge of, the adverse agency action.

Details on the subsequent protest procedures are set forth in Part 21.2(a)(3) of the GAO Bid Protest Regulations (4 CFR 21).

If the agency sustains the protest,

1. Promptly notify all affected parties.
2. Take the indicated action, being sure to conform to agency regulations.
3. Include all factfinding documentation and a copy of the decision in the appropriate file.

STEPS IN PROTESTING A SMALL BUSINESS REPRESENTATION



SIZE DOES COUNT IN SET-ASIDE AWARDS

After issuing pre-award notices for your small business set-aside procurement, you receive a letter from one of the unsuccessful offerors which challenges the size status of the apparent awardee. Your contracting officer advises that you should immediately suspend award proceedings.

Who decides whether the successful offeror is indeed a small business?

When can you finalize the award?

17.2 PROTESTING A SMALL BUSINESS REPRESENTATION

FAR 52.219-1

Sometimes all or part of a procurement is reserved for (or set-aside for) small business concerns only. Therefore, to be eligible for award, the offeror must represent that it is a small business in accordance with the size standard that applies to that procurement. With respect to a specific offer, the CO, any offeror, or any other interested party may protest that an offeror is not a small business.

FAR 19.301(d)

If there is actual misrepresentation of size status by a business concern for the purpose of obtaining an award, the SBA, or the contracting officer if SBA declines, may initiate penalty action.

17.2.1 Notify Parties of Proposed Awardee

FAR 19.302(d)

Protests must be filed on a timely basis. Protests must be received by the CO by the close of business of the fifth business day after offers are due. Note, however, that when contracting is by negotiation, the identity of the apparent successful offeror is not known by the interested parties. To overcome this situation, the CO is required to send a preaward notice to each unsuccessful offeror, on a small business set-aside, giving the name and location of the apparent successful offeror. Under this procedure, the five day time period is tabulated beginning the date of the receipt by the interested party of the notification.

17.2.2 Forward Protests or CO Concerns About an Offeror's Eligibility to SBA

Nature of Protest: Any interested party may protest the small business representation of a offeror on a specific RFP. The protest shall contain detailed evidence to support the allegation that the offeror is not a small business. (Note: The CO may also question the representation.)

CO Actions: Promptly send the protest to the SBA Regional Office and withhold award until:

- SBA has made a size determination, or
- The expiration of 10 business days after SBA receipt of the protest. However, award shall not be withheld if the CO determines in writing that an award must be made to protect the public's interest.

SBA Actions: SBA will make the determination as to the small business status of the questioned offeror and will so notify the CO and the offeror. After SBA notifies the CO of the decision concerning the protest, the CO will notify the protestor of SBA's decision.

Timeliness of Protest; Small Business Representation

At any time after offers are due, the CO may question the small business representation of any offeror relative to a specific offer. Also, the CO must forward a protest, (whether received timely or not) that is submitted by an interested party to the SBA Regional Office for the geographical area where the principal office of the concern in question is located.

If, however, the protest is to affect a specific RFP, the protest must be submitted and processed in a timely manner:

Protests by an interested party must be received by the CO by close of business on the fifth business day after offers are due:

- If made in writing, it must be delivered to the CO by hand, telegram, or letter postmarked within the five-day period.
- If made orally, it must be confirmed in writing either within the five-day period or by letter postmarked no later than one day after the oral protest.
- A CO's protest is always considered timely whether it is filed before or after award.

FAR 19.302(i)

The SBA will communicate with the challenged offeror to obtain additional information and, within 10 business days after receiving the protest, make a size determination and so inform the CO and the offeror. There is an appeal procedure, also.

17.2.3 Determine Whether to Award Immediately

The decision table in Exhibit 17-7 shows when the CO may make an award immediately. The CO must notify SBA when award has been made under these circumstances.

DECISION TABLE FOR CO TO AWARD IMMEDIATELY	
IF:	**THEN CO:**
Awarding is in the public's interest,	Will award immediately.
No SBA decision is rendered within 10 days,	May award.

Exhibit 17-7

17.2.4 Implement SBA's Determination

The decision table in Exhibit 17-8 describes the CO's actions based on SBA's determinations.

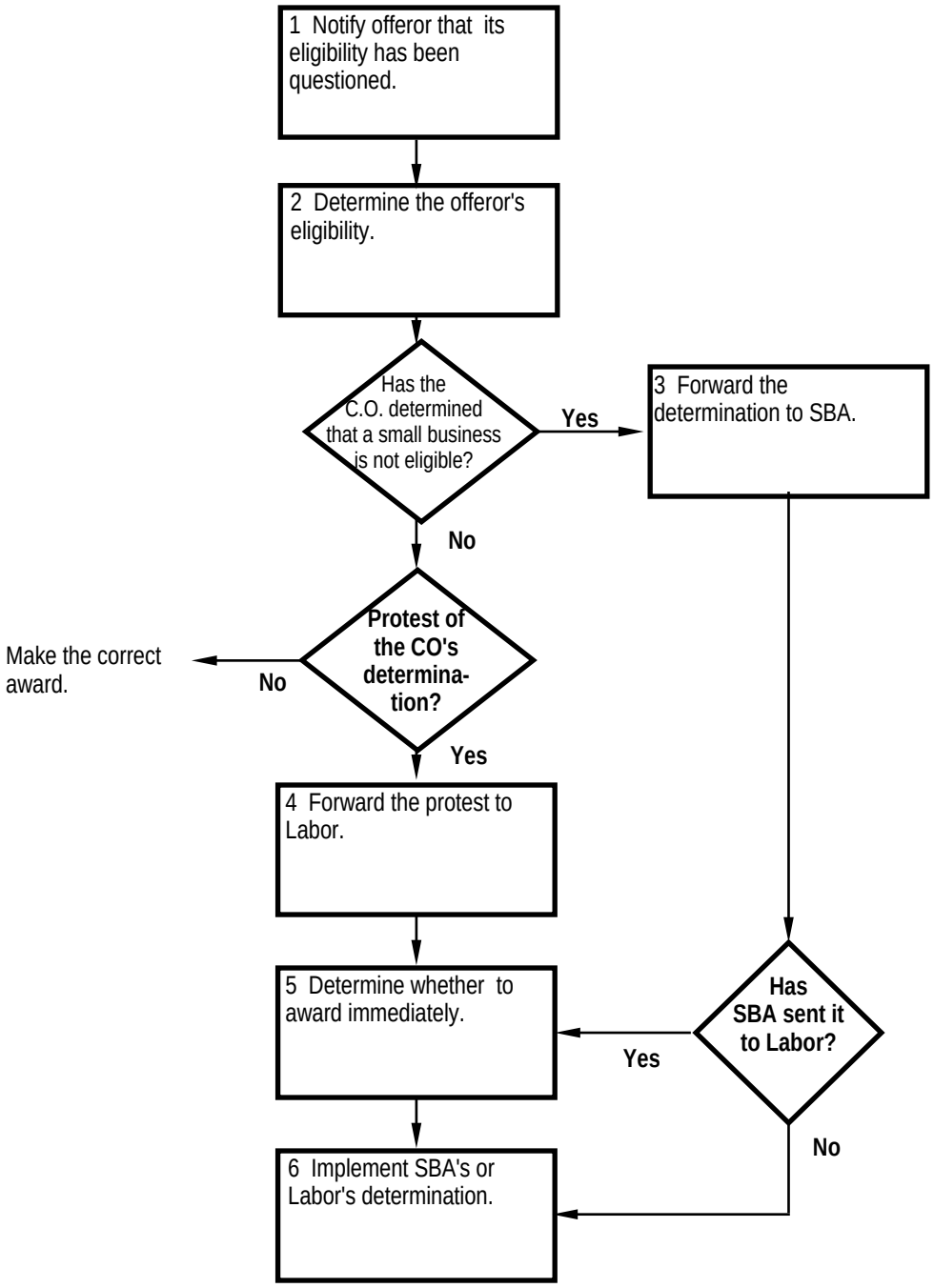
DECISION TABLE FOR CO TO IMPLEMENT SBA's DETERMINATION	
IF SBA:	**THEN CO:**
Determines that the offeror is a small business,	Awards contract to that offeror.
Determines that offeror is not a small business,	Awards contract to the next eligible offeror who is a small business concern.

Exhibit 17-8

THE BUCK STOPS AT SBA

Even though the letter challenging the size of the awardee was sent to the contracting officer, it is the Small Business Administration that makes the final determination. Protests for a specific contract which are received in a timely manner may delay final award proceedings until SBA renders its decision.

STEPS IN RESOLVING PROTESTS CONCERNING WALSH-HEALEY



17.3 PROTESTS CONCERNING WALSH-HEALEY ACT

FAR 22.608-3

Briefly stated, the Walsh-Healey Public Contracts Act pertains to minimum wages, hours, child labor, etc., and it applies to contracts over $10,000 for the manufacture or furnishing of materials, supplies, articles, and equipment. To be eligible for award of such a contract, the offeror must represent that it is in fact a manufacturer or regular dealer in the materials, supplies, articles, and equipment (unless an exemption applies). The representation may be challenged by the CO or, it may be challenged by another offeror by the filing of a protest.

17.3.1 Notify Offeror That Its Eligibility Has Been Questioned

FAR 52.222-19

You should rely on the offeror's representation that it is a manufacturer or regular dealer except in the following circumstances:

- He/she has knowledge that raises the question of the validity of the representation.
- A protest has been lodged by another offeror.
- The apparently successful offeror has not previously been awarded a contract subject to the Walsh-Healey Act by the particular acquisition office (contracting activity).
- A preaward survey of the offeror's operations is otherwise being made to determine the technical and production capability, plant facilities and equipment, and subcontracting and labor resources of the offeror.

If a offeror is not a manufacturer or regular dealer (if the Walsh-Healey Act is applicable), or if the offeror in any way qualifies its full compliance with the Act, the CO shall reject offer.

If you have reason to question or challenge the offeror's representation that it is a manufacturer or regular dealer, request additional information from the offeror to make a determination of eligibility. If the eligibility of the offeror is challenged by a protest from another offeror, promptly notify the apparently successful offeror of the protest.

In either of the above cases, it might be appropriate to notify offeror whose offers might become eligible for award to extend their dates for offer acceptance.

17.3.2 Determine the Offeror's Eligibility

FAR 22.608-2

After a review of all factual evidence, if the CO determines that the offeror in question is not eligible, and the offeror is a small business, the case should be referred to the SBA.

If the CO determines, after a review of all factual evidence, that the offeror in question is not eligible, and the offeror is not a small business, the case should be referred to the Department of Labor (DOL).

If another offeror challenges the eligibility of the apparently successful offeror, the procedures to follow are essentially the same.

17.3.3 Forward the Determination to SBA for Small Businesses

The CO may want you to send the determination on a small business to SBA even if the offeror does not protest the determination. The SBA may:

- Reverse the determination and forward a certification of the offeror's eligibility to the CO, or
- Forward the case to the DOL for a final determination, if it agrees with the CO.

17.3.4 Forward the Protest to DOL

After making a determination, the CO shall first notify the offeror in writing:

- That he/she is not eligible,
- The reasons for the ineligibility determination, and
- That he/she may protest the determination by submitting supporting evidence to the CO within 10 working days.

If the CO's position has not changed as a result of reviewing the evidence, the offeror 's protest and all pertinent material shall be sent to the DOL for a final decision, in accordance with agency procedures.

17.3.5 Determine Whether to Award Immediately

Generally, award should not be made while waiting a final determination by the DOL or SBA. However, award may be made if the CO certifies, and the certification is approved as required by agency regulations, that:

- The items are urgently required, or
- Delay in making the award will result in a substantial hardship for the Government.

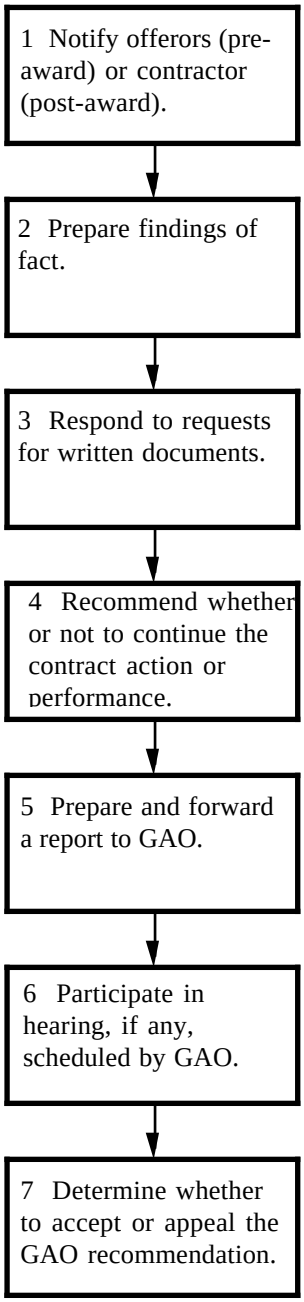
If a decision is made to award before a final determination by the DOL or SBA, fully document the reasons for making the award and so notify the DOL or SBA and the protestor.

17.3.6 Implement SBA's or DOL's Determination

You should make the appropriate award(s), depending on the decisions that have been made, unless award has already been made as noted above.

Any offerors previously notified of the protest should be notified of the final award decision. All actions should be fully documented in the appropriate contracting office files.

STEPS IN RESOLVING PROTESTS TO GAO



17.4 PROTESTS TO GAO

The GAO is authorized, by statute, to render decisions on protests filed with it by any interested party. The decisions are made by or for the head of the GAO (the Comptroller General of the United States), and they are referred to as Comptroller General decisions.

Comptroller General decisions are final and, essentially, binding on the agency involved:

- If the decision goes against the party that filed the protest, it is referred to as "**denied**."
- If the decision is in favor of the party that filed the protest, it is referred to as "**sustained**."

B-220425.4

The Comptroller General is also authorized to recommend that an appropriate interested party shall be entitled to the costs of:

FAR 33.104(h)

- Filing and pursuing the protest, including reasonable attorney's fees, and
- Proposal preparation.

The Comptroller General usually declares such entitlement when the decision corrects an inappropriate award or, in some cases, when the decision recognizes that the interested party was harmed by the agency's action or inaction during the procurement.

Many protests are rejected because they are not filed in time. Government agencies that neglect to follow GAO requirements (e.g., timely submission of reports) are apt to have difficulty getting their actions sustained.

Many of the procedures to be followed in GAO protests are similar for both preaward and postaward protests.

FAR 33.104(a)(1)

1. Protestor shall furnish a copy of a complete protest to the official at the location designated in the RFP (or, in the absence of such a designation, to the CO) no later than one day after the protest is filed with the GAO. Failure to file a complete copy of the protest within one day may result in dismissal of the protest by GAO.

B-244380

2. Protests based on alleged improprieties in an RFP that are apparent prior to the due date for offers must be filed prior to the due date.

B-242601

3. In other cases, protests must be filed no later than 10 days after the basis for the protest is known, or should have been known.

B-236932

4. If a offeror initially submits a protest to the CO, any subsequent protest to the Comptroller General must be filed within 10 days after initial adverse action taken by the agency, no matter how they heard, e.g., receipt of formal notification or actual or constructive knowledge.
5. To ensure that an interested party's protest to GAO is not considered "late," the protester may file the protest with the CO and GAO at the same time. Note, however, that GAO has reserved the right to consider "untimely protests" if it so wishes.

17.4.1 Notify Offerors (Preaward) or Contractor (Post-award)

You should give notice of the protest and its basis (i.e., "protest submissions") to offerors and other interested parties involved in or affected by the protest. They should be notified immediately after receipt of the protest by the agency.

FAR 33.104(a)(2)

- <u>If the award has been made</u>, notify the contractor of the protest.
- <u>If no award has been made</u>, notify all parties who appear to have a reasonable prospect of receiving an award should the protest be denied.

FAR 33.104(b)(3)

When a protest against making an award is received and <u>award is withheld pending disposition of the protest</u>, the offerors whose offers might become eligible for award should, if appropriate, be requested, before expiration of their offer, to extend the time for acceptance. If such extensions cannot be obtained, consider proceeding using the procedure shown in Exhibit 17-9.

17.4.2 Prepare Findings of Fact

The most important step in responding to a protest is factfinding. Follow the instructions in Section 17.1.2 to perform this step.

17.4.3 Respond to Requests for Written Documents

When a protest, before or after an award, is lodged with the GAO, the procuring agency shall prepare a report. (See section 17.4.5 for contents of report.) At the same time, this report must be furnished to the protestor and other interested parties responding to the notification above.

FAR 33.104(a)(4i)

A party shall receive all relevant documents except:

1. Those that the agency has decided to withhold from that party for any reason (including those covered by a protective order from GAO*), such as documents that:
   - are classified;
   - would give the party a competitive advantage; or
   - have previously been provided to the party.
2. Protestor's documents which the agency determines to withhold from an interested party.

If, within 2 work days after receipt of the report, the protestor requests additional documents, the agency shall provide the additional documents to GAO within 5 work days unless withheld per above.

17.4.4 Recommend Whether to Continue Contract

When an agency receives notice that a protest was filed directly with GAO, award cannot be made unless authorization is received from the head of the contracting activity.

FAR 33.104(b)

Contract award shall not be made until the agency has notified GAO of the above finding.

* See FAR 33.104(a)(5) for procedures covering protective orders.

AWARDING CONTRACTS WITH PROTESTS PENDING

A contract may be awarded pending a protest if the head of the contracting activity makes a written finding that:

- There are urgent and compelling circumstances that significantly affect the interest of the United States; and
- Award is likely to occur within 30 calendar days of the written finding.

Exhibit 17-9

FAR 33.104(c)

If the agency, within 10 calendar days after award, receives notice that a protest was filed directly with GAO, the CO shall immediately suspend performance or terminate the awarded contract, unless:

- In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that:
  - Contract performance will be in the best interests of the United States; or
  - Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for GAO's decision, and
- The agency has notified GAO of the above finding.

If the decision to suspend performance or terminate the awarded contract, you should attempt to negotiate an agreement with the contractor that such action will be on a no-cost basis to the Government.

If the agency receives notice that a protest was filed directly with GAO more than 10 calendar days after award, you need not suspend contract performance or terminate the awarded contract. However, if the you that the award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest, he/she should suspend contract performance or terminate the contract.

17.4.5 Prepare and Forward a Report to GAO

The agency shall submit a complete report on the protest to GAO within

- 25 work days after receipt from GAO of the telephonic notice of such protest, or within
- 10 calender days after receipt from the GAO of a determination to use the express option.

The express option is an accelerated procedure that may be used to settle a protest if there is a bona fide need for an expeditious decision. Either the protester, the agency, or an interested party may request GAO to use the express option. Use of the option is at the sole discretion of the GAO. If the express option is used, certain times, otherwise prescribed, do not prevail.

FAR 33.104(f)

For example, under normal procedures GAO will make a decision within 90 days. Under the express option, the decision will be made in 45 days.

A report is not required during these time frames if:

- GAO advises the agency that the protest has been dismissed; or
- Agency advises the GAO in writing that the specific circumstances of the protest require a longer period and the GAO establishes a new date.

FAR 33.104(a)(3)

The report shall include a copy of:

- protest,
- offer submitted by the protesting offeror,
- offer that is being considered for award or that is being protested,
- all evaluation documents,
- solicitation, including the specifications or portions relevant to the protest,
- abstract of offers or relevant portions,
- other relevant documents,
- CO's signed statement setting forth findings, actions, recommendations, and other evidence that bears on the validity of the protest.
- If a determination has been made to continue the procurement action or contract performance, a copy of the determination will be included in the report.
- list, identifying other parties who are being provided copies of the report,
- list of documents withheld and reasons for withholding.

In addition, you must also make available to GAO any documents specifically requested by the protestor.

You will most likely be called on to prepare or assist in preparing the report.

When a protest, either before or after award, has been filed with the GAO, the agency shall prepare a report to be submitted to the GAO. You, the CO, legal counsel, and others may be involved in preparing the report.

The purpose of the report is to provide the GAO with the agency's description of events (including appropriate documentation) pertaining to the particular procurement. The report must be accurate and complete because it is the major source of information used by the GAO in evaluating the agency's handling of the procurement.

Of course, if GAO dismisses the protest, the report will not be necessary. Also, the agency may request additional time to submit the report.

17.4.6 Participate in GAO Hearing

FAR 33.104(e)

GAO may hold a hearing on the merits of the protest to resolve specific factual disputes essential to the resolution of the protest. As a part of this conference, you, the CO and/or other agency officials might be questioned by the hearing official or other attending party:

- Transcripts of the hearing are made a part of the proceeding.
- All parties will have 7 work days after receipt of the transcript to submit written comments on it.
- If you are questioned, be sure to thoroughly review the particulars of the case and have relevant documents available for reference.

17.4.7 Determine Whether to Accept or Appeal the GAO Recommendation

FAR 33.104(g)

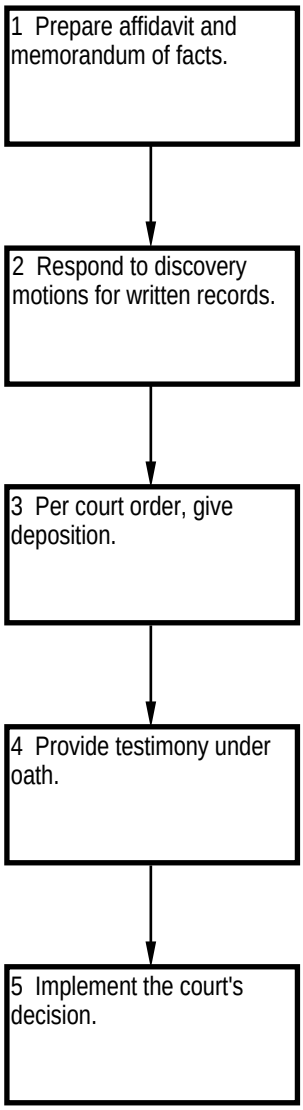
As stated before, GAO will issue its recommendation on a protest within 90 calendar days, or within 45 calendar days under the express option, unless GAO establishes a longer period of time.

- If GAO denies the protest, the CO's position is upheld. Any delayed award can be made or any suspended contract can proceed.

- If GAO sustains the protest, GAO may recommend a course of action or may order the agency to refrain from acting in a similar manner in the future. GAO may also recommend the awarding of protest costs.

The head of the agency or a designee responsible for the proposed award or award of the contract shall report to the Comptroller General within 60 days of receipt of the GAO's recommendation if the agency has decided not to comply with the recommendation. The report shall explain the reasons why GAO's recommendation will not be followed by the agency.

STEPS IN RESOLVING PROTESTS TO THE COURTS



17.5 PROTESTS TO THE GSBCA AND TO THE COURTS

17.5.1 Protests to the General Services Board of Contract Appeals (GSBCA)

An interested party may protest certain types of ADP acquisitions to GSBCA as provided in Section III of the Federal Property and Administrative Services Act. A protest that is filed with the GAO, however, cannot later be filed with the GSBCA. ADP acquisition protests that are not covered under this statute cannot be heard by the GSBCA. They may be heard by the agency, the courts, or GAO.

FAR 33.105

There are detailed procedures pertaining to protests filed with the GSBCA. The GSBCA has published its Rules of Procedure at 4 CFR Part 21. In general, the procedures for filing protests with the GSBCA are similar to those applicable to a civil suit in a U.S. District Court.

When a GSBCA protest is filed, you should promptly bring it to the attention of the CO, who will then work closely with legal counsel to provide GSBCA with a "protest file." This is similar to the agency report that is required to be filed with GAO on a GAO protest case.

You may be asked to furnish a detailed Statement of Facts in the case of either a GAO or a GSBCA protest. This is a simple outline of the procurement events that occurred in the negotiation process. The statement is usually organized chronologically from the receipt of the procurement request to the award of the contract. The statement will show dates, how many offers were received, and all the essential "facts," so that the reviewing authority can make a determination to deny or sustain the protest.

17.5.2 Legal Remedies

Nothing in the protest procedures discussed in this chapter prevents an interested party from pursuing its rights through the U.S. District Courts or the U.S. Claims Court. For example, before or after award, the protesting offeror can ask the court to enjoin the award of the contract or to set-aside a contract already awarded.

If any such action, including injunctive action, arises under a procurement with which you are involved, you, the CO, counsel, and other agency officials will be required to review appropriate case documentation, prepare reports, provide testimony, and take other direct or indirect action to support the Government's case.

THE LAST WORD ON PROTESTS
A REVIEW OF THE VIGNETTE

Going back to the protest that was discussed at the beginning of this chapter, you have learned how to handle a protest. First, you try to respond effectively to the complaint. Seek advice from the CO and review the facts. If errors were made, divulge hem now.

Suppose that after a thorough review, and with counsel concurring, you did not make any significant errors. You and the CO might meet with the unsuccessful offeror to discuss the complaint. You should be as sensitive to the offeror's feelings as you can. The company may have spent a great deal of money preparing the proposal and may need the contract badly. In addition, he company may feel that it has a legitimate complaint.

The CO will tell the unsuccessful offeror the "facts" as concisely as possible and give him a chance to talk—it may be all he wants to do. Do everything to assure him that there was no favoritism, that the specifications were carefully prepared, and that he got the same treatment as anyone else. If, however, the offeror is not satisfied and does file a protest, immediately take the appropriate action depending on who received the protest.

CHAPTER 18

FRAUD

SPREADING THE WEALTH

In reviewing the history of a procurement, you notice that two companies consistently submit offers. On closer inspection, you realize that there has been a pattern of success between these firms. Each company seems to win the award in alternating years.

Should you be concerned about your findings?

To whom should you report this information?

COURSE LEARNING OBJECTIVES

At the completion of this course, you should be able to:

Overall: Refer evidence of fraud and other civil or criminal offenses to the Inspector General and other responsible parties.

Individual:

18.1 Brief contractors and Government officials on fraud and other civil and criminal offenses.

18.2 Identify and report evidence of fraud or other misconduct.

INTRODUCTION TO FRAUD

Definition

FAR Part 3

Fraud is a felonious act of corruption, or an attempt to cheat the Government or corrupt its agents to gain some unfair or dishonest advantage.

Motives

The objective of fraud may be to:

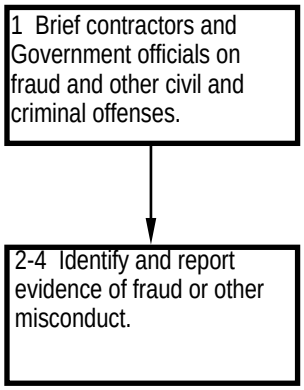
- Obtain money, property, or services;
- Avoid the payment or loss of money, property, or services; or
- Secure business or personal advantage.

Steps in performance

The two major steps in reporting fraud are charted on the next page. Following the flowchart each step is discussed in turn.

STEPS IN REPORTING FRAUD

Fraud and other civil or criminal offenses



STEPS IN REPORTING FRAUD

18.1 Brief Contractors and Government Officials on Fraud

One of the most important requirements of the contracting process is that contractors and subcontractors be honest in their dealings with the Government. This requirement is supported by a number of criminal and civil statutes imposing a variety of penalties on contractors and others who do not comply with them (See Exhibit 18-1).

PENALTIES FOR FRAUD	
OFFENSE	PUNISHMENT
Criminal	Fines, imprisonment.
Administrative	Contract termination, price reductions, debarment or suspension, withholding of funds.
Civil	Voiding of contract, forfeiture of claims.

Exhibit 18-1

Contractors must be made aware of the statutes and regulations regarding fraud, improper conduct and other civil or criminal offenses so that violations will not be committed out of ignorance. Brief them on this matter as a part of your post-award orientations. An emphasis on adherence is imperative.

18.2 Identify and Report Evidence of Fraud or other Misconduct

B-239252

Government personnel, such as contracting officer representatives, are usually the ones to find evidence of civil or criminal offenses (See Exhibit 18-2) as they are responsible for monitoring contractor actions. Therefore, they should also be apprised of the statutes and regulations regarding fraud as well as be able to detect indicators of fraud.

INDICATORS OF FRAUD ON THE PART OF CONTRACTORS

- Suppressing or limiting offers, complementary bidding, offer rotation, or market division.
- Bribes and gratuities.
- False invoices and cost mischarging.
- Falsification of Government furnished property records.
- Failure to update cost or pricing data upon receiving information that prices have decreased.

Exhibit 18-2

Another factor to be considered is that fraud is sometimes committed by or with the help of Government employees (See Exhibit 18-3). There have even been instances of Government employees creating or participating in the ownership of outside businesses for the purpose of committing fraud through their ability to impact on or control the award process.

IINDICATORS OF FRAUD ON THE PART OF GOVERNMENT PERSONNEL

- Improper disclosure of information on pending or ongoing procurements.
- Slanting specifications to the products or capabilities of a single contractor without adequate justification for such slanting.
- Splitting requirements to get under the small purchase threshold.
- Falsified statements in sole source recommendations.

Exhibit 18-3

Any indication of fraud or other improper conduct on the part of an offeror, contractor, or Government personnel, should be immediately reported. Communicate your suspicions to your agency's Inspector General and to other relevant Government officials. Exhibit 18-4 lists some specific references to fraud and penalties in the Federal Acquisition Regulation.

Many agencies have established hotlines to make reporting officials accessible. Your full cooperation is necessary for a thorough investigation; therefore, make all data available to these responsible officials upon request.

REFERENCES TO FRAUD/PENALTIES IN THE FAR

FAR	Subject	FAR Clause/Provision
3.102-1	Officials not to benefit	52.203-1
3.103-2(b)	Reporting suspected collusion	52.203-2
3.104-3	Procurement integrity	52.203-8,9,10,13
3.203	Gratuities	52.203-3
3.303	Reporting suspected antitrust violations	
3.409	Contingency fees	52.203-4,5
3.502-2;3	Subcontractor kickbacks/restrictions	52.203-7,6
3.601	Contracts with Government employees	
3.705	Voiding or rescinding a contract	
3.802	Anti-Lobbying	52.203-11,12
9.406-2	Debarment, suspension, and ineligibility	52.209-5
22.809	EO 11246, Equal Opportunity	52.222-26
49.106	Settlement of terminated contract.	

Exhibit 18-4

INDICATIONS OF FRAUD NEED REPORTING

The indication of bid rotation (alternating company awards) mentioned at the start of this subchapter does not conclusively establish the existence of fraud. However, the presence of any fraud indicators should alert you to the possibility of impropriety. The appropriate action to take to ensure the integrity of the procurement process involves notifying the proper officials of all suspicions.

INTRODUCTION TO COMPETITION

Competition in Contracting Act

In 1984, Congress passed the Competition In Contracting Act (CICA) which provides for Executive Agencies to use "competitive procedures" in acquiring property and services. Competitive procedures are the procedures under which an agency enters into a contract pursuant to "full and open competition." CICA also excepted certain categories of procurements from its competitive requirements. Among these exceptions were seven categories of circumstances which require written justifications by the contracting officer, management approvals at certain dollar levels, and public notice as appropriate to the particular circumstances.

Definitions

FAR 6.003

Full and open competition means that all responsible sources are permitted to compete for Government contracts. In other words, competition allows all qualified contractors an equal opportunity to win a contract.

Other than full and open competition (restricting or limiting competition) means contracting without providing for full and open competition.

Sole source acquisition means a contract action that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.

Justification and approval means a document that contains the circumstances, rationale, and authority for using other than full and open competition and approval is made by an appropriate official.

Policy

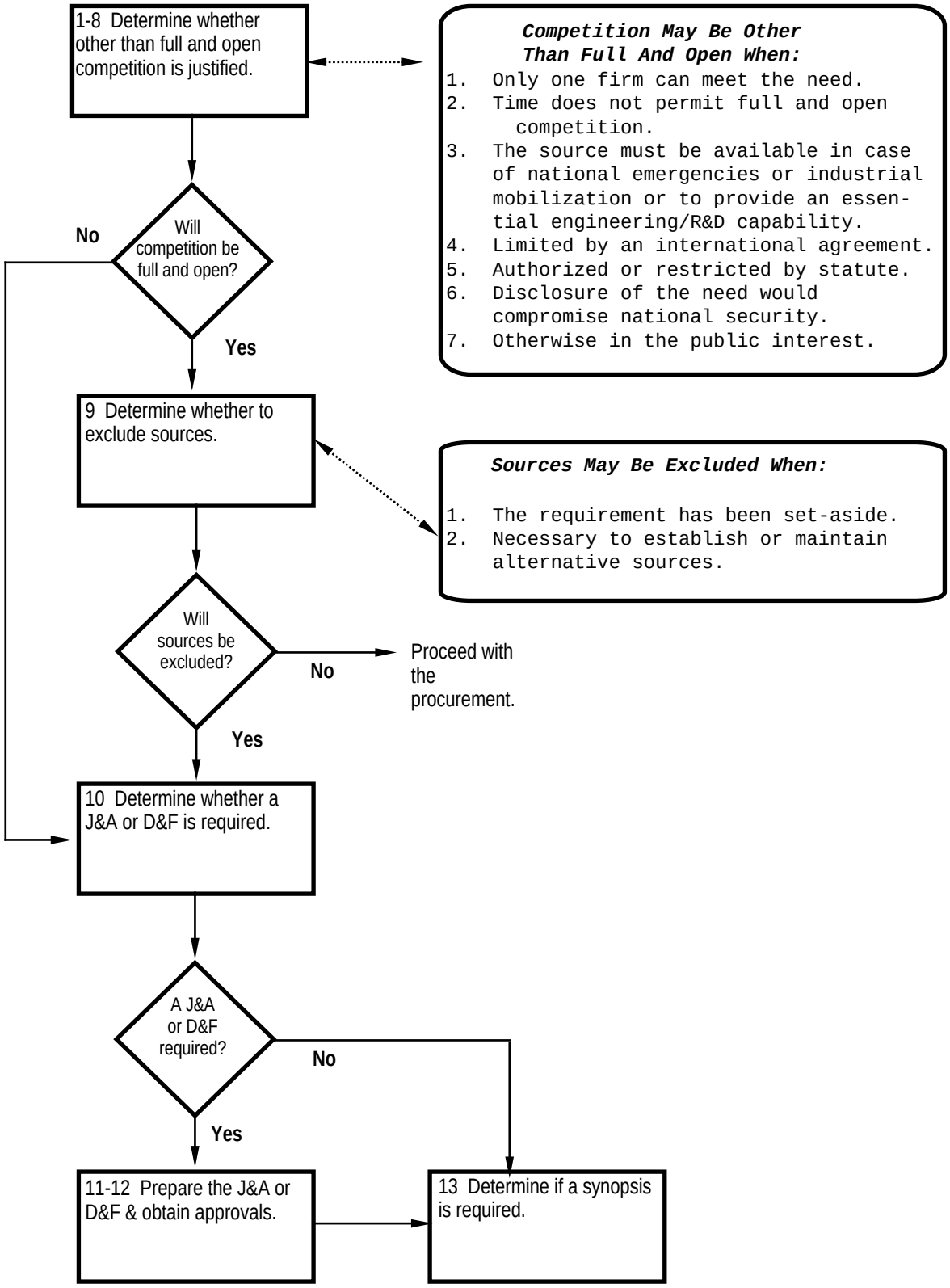
FAR 6.101

Contracting officers are responsible for promoting full and open competition in all solicitations and contracts through the use of the competitive procedures that best meets the needs of the Government.

Steps in Performance

The steps in determining the extent of competition are charted on the next page. Following the flowchart, each step is discussed in turn.

STEPS IN DETERMINING THE EXTENT OF COMPETITION



STEPS IN DETERMINING THE EXTENT OF COMPETITION

A.1 Determine if Other than FAOC is Justified

You are required to promote competition to the fullest extent practicable using full and open competition unless otherwise justified. Understanding what constitutes full and open competition is necessary in determining if other than full and open competition procedures should be justified. Full and open competition is determined to have happened when:

1. The Government's intent to procure is known to the public:
   - published in the CBD or authorized alternative,
   - announced to all sources on mailing lists and
   - to those concerned identified through market research
   - sources sought synopsis or equivalent are not used as the only announcement to the public

2. The public is given sufficient information as to what the Government's needs are; and

3. The Government invites all interested parties to compete and indicates a solicitation will be provided to them.

The issuance of a complete solicitation to more than one potential offeror, in and of itself, does not necessarily make a procurement full and open competition. The critical issue in this case is whether:

All potential offerors were <u>made known of the requirement</u> and given an opportunity to submit offers.

In fact, multiple parties may not necessarily need a complete solicitation document to make a procurement full and open competition. The critical issue in this case is whether:

All potential offers were <u>given sufficient information</u> and an opportunity compete for what the Government's needs are.

A complete solicitation would have to be provided when more than one firm responds to your attempts to publicize the requirement.

Even if only one firm is received (or if only one firm was even expected to be received), the requirement for full and open competition has been met as long as all potential sources are provided an opportunity to submit offer. The law does not require the contracting officer to justify the

actual response of the market place; however, attainment and maximization of competition is imposed in other ways. The concept of full and open competition relates to the process by which the contracting officer requests the private sector to respond to the Government's requirement.

Although the contracting officer may have evidence of limited competition to justify the application of an exception to the use of competitive procedures (item is available from only one responsible source and no other type of property or service will satisfy the agency's need), nothing prohibits the contracting officer from using full and open competitive procedures. The contracting officer has an affirmative duty to question using competitive procedures that results in less than three offers. The contracting officer is required to take appropriate action to facilitate future competition.

FAR 14.407-1

Will the procurement be known to the public and will solicitations be made available to all interested offerors; or

Will only a select few be made aware of the procurement or provided a copy of the solicitation?

Which question results in an affirmative answer will go along way in determining if the procurement will be full and open competition.

At times, the requiring activity may

- only identify one source for the procurement,
- request a specific firm(s) not be considered for award, or
- have legitimate reasons for restricting the competition.

Certification of Technical Restrictions

The technical or requirements personnel are required to provide certification when technical or requirements data form a basis for noncompetitive procedures. With or without the certification, it is up to you to determine the intent of the requester. Is their request legitimate?

FAR 6.303-2(b)

If you determine that the requiring activity has not adequately justified its recommendation or if your actions have identified additional responsible sources, you will need to advise the requiring activity that you will utilize full and open competition (FAOC) procedures.

However, if you agree that competition should be restricted or limited, the use of procedures permitting "other than full and open competition" can be authorized. Exhibit A-1 provides policy guidance on the use of other than full and open procedures.

OTHER THAN FULL AND OPEN COMPETITION

FAR 6.301

- One of seven statutory exceptions must be cited:
  1. Only one responsible source.
  2. Unusual and compelling urgency.
  3. Industrial mobilization; or engineering or R & D capability.
  4. International Agreement.
  5. Authorized or required by statute.
  6. National security.
  7. Public interest.

- Cannot be justified on basis of lack of advanced planning or the availability of funds.

- Offers shall be solicited from as many potential sources as practicable.

Exhibit A-1

FAR 6.302

Each of the seven authorities which permit contracting without providing for full and open competition is described below. While the requiring activity is generally required to support any determination, it is up to you to identify the authorizations and process the necessary paperwork.

Only One Responsible Source

If the purchase request identifies only one source, other than full and open competition may be authorized when:

> "the supplies or services required by the agency are available from only one responsible source, or for DOD, NASA, and the Coast Guard from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements."

Some situations that may apply to this authorization are:

- Unsolicited research proposal
- Follow-on contracts for specialized major system
- Unique supplies/services and/or supplier(s)
- Limited data rights, patents, etc.
- Utilities
- Supplies are established as standard
- Brand name descriptions (brand name only) even when dealers and manufacturer can submit offers.

FOR EXAMPLE:

The requiring activity has stated only one manufacturer's vehicles are acceptable for delivery to a remote location in Alaska. Their justification is based upon the severely limited access to repair and maintenance services available in that location. The nearest "town" is over 1,000 miles away. The requisitioning agency has standardized their fleet in that location for only those manufacturer's vehicles. Using full and open competition could result in the requisitioner receiving vehicles that cannot be serviced.

It is much better to justify the "one responsible source" than to cause the activity insurmountable problems after delivery. In this case, only the one responsible source should be considered.

Unusual and Compelling Urgency

If the purchase request or subsequent documentation specifies that the requirement is urgently needed, this authority may be used when it can be demonstrated that:

"the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals."

Some situations that may apply to this authorization are:

- Earthquake or Flood
- Other natural disasters
- National or world events

FOR EXAMPLE:

The President has issued a state of emergency due to flooding in several states. Your agency has been authorized to purchase mobile homes for use by the emergency workers in those states. Since the need for the mobile homes would be immediate, lead times necessary for permitting full and open competition would unduly delay delivery .

In this case, the need for the requirement is so compelling that it is best to forego the competitive procedures in order to act timely.

FAR 7.103(a)

☞ **NOTE:** You will need to be able to determine that neither the pending expiration of funds nor lack of advance planning is the real reason for this urgency. If either is the case, this authorization cannot be cited.

(For instance, an agency's supply of items has run out or a machine needs repair and the warranty period has expired; or the end of the fiscal year is approaching and the requiring activity has money to "burn.")

This is generally considered the most abused of the seven authorities.

Industrial Mobilization

Industrial mobilization decisions are made at management levels beyond the contracting officer or requiring activity. This authorization may be used when it is necessary to:

"(i) Establish or maintain an essential capability for theoretical analyses, exploratory studies, or experiments in any field of science or technology;

(ii) Establish or maintain an essential capability for engineering or developmental work calling for the practical application of investigative findings and theories of a scientific nature; or

(iii) Contract for supplies or services as are necessary incident to paragraphs above"

Situations that may apply to this authorization are:

- Strategic Defense Initiative
- Solar energy
- Agency specific procurements

FOR EXAMPLE:

The requiring activity limited competition to four sources for night vision image intensifier tubes. The four sources were selected because of their proven ability to manufacture the tubes in large quantities. Using full and open competition would limit the agency's control over the quantity of tubes manufactured by any one firm--and would therefore have less assurance of a sustained manufacturing base.

The goal of this authority is to assure a continuous and secure stream of production for mobilization purposes--not to maximize competition.

International Agreement

The purchase request will indicate when a procurement is subject to an international agreement and will provide pertinent information about the agreement. This authorization may be cited when:

> "(1) A contemplated acquisition is to be reimbursed by a foreign country that requires that the product be obtained from a particular firm as specified in official written direction such as a Letter of Offer and Acceptance; or
>
> (2) When a contemplated acquisition is for services to be performed, or supplies to be used, in the sovereign territory of another country and the terms of a treaty or agreement specify or limit the sources to be solicited."

Situations that may be applicable to this authority include:

- Foreign Military Sales
- Agency specific procurements

FOR EXAMPLE:

> Under the terms of an international agreement between the U.S. and Turkey, the foreign government has specified in writing that competition on the acquisition of equipment, parts, and services associated with PEACE III program be restricted to Howard Industries to ensure single vendor integrity.

The written direction alone takes precedence over full and open competition and is therefore sufficient justification for restricting competition under this authority.

☞ **NOTE:** Just stating this authority on the purchase request may not be sufficient for your agency. Generally, these circumstances are well documented by the requiring activity; however, when in doubt investigate! Requests from foreign countries that do not direct you to procure from a particular source should be accomplished through full and open competitive procedures.

Authorized or Required by Statute

If the purchase request identifies the source(s) as required by statute (or law), this authorization may be cited when:

> "1. Statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, or
> 2. Agency's need is for a brand name commercial item for authorized resale."

It is common practice to acquire certain supplies and/or services off "Schedules" from agencies such as

- General Services Administration,
- Defense Logistics Agency,
- Veterans Administration,
- Office of Personnel Management.

In addition, you may be required to acquire specific products or services from "specified sources" such as

- Federal Prison Industries Inc.,
- Qualified Nonprofit Agencies for the Blind or other Severely Handicapped, and
- Government Printing Office.
- Sole source awards under the 8(a) Program.

The DOD and civilian agencies generally buy brand name commercial products that are preferred by customers of the selling activity for resale at their respective commissaries and/or base exchanges.

FOR EXAMPLE:

A requirement for data entry must be procured from Federal Prison Industries, Inc.

☞ **NOTE:** Although these sources have been identified by a statute, you may obtain a waiver if the source cannot meet the agency's need (e.g., timely delivery, economically priced, minimum specifications).

National Security

If national security applies to a procurement, the purchase request or subsequent documentation should indicate this designation. This authority can be used when it can be clearly demonstrated that:

> "Disclosure of the agency's need would compromise the national security unless the agency is permitted to limit the number of sources."

Some situations that may apply to this authorization are:

- Covert operations
- Research and development
- Weapon systems

FOR EXAMPLE:

The requirement is for the "black box system" to enhance missile

> control. There are only three sources known from which to solicit who possess top secret clearances and who have experience in this line of work.

If full and open competition procedures were used, the Government may compromise security requirements that could have an adverse effect on the nation.

☞ **NOTE:** Do not use this authority merely because access to classified data will be necessary or the acquisition is classified.

Public Interest

If the purchase request or supporting documentation attempts to limit competition and none of the other six authorities apply, this authority may be appropriate when:

> "The agency head determines that it is necessary in the public interest to use other than full and open competition in the procurement concerned."

☞ **NOTE:** This authority is very general and requires high level visibility; therefore, it is important not to use it unless evidence from the requiring activity fully supports this determination. If you determine this authority is appropriate, an individual D&F must be approved by the agency head with substantial supporting data supplied by the requiring activity. A Justification and Approval may also be required by the head of the agency. In addition, you must prepare written notification for submission to Congress at least 30 days before award.

Although the requiring activity has recommended that competition be restricted, other than FAOC procedures cannot be used

- until you have attempted to locate additional sources, and
- your market research (to locate these sources) fully supports the recommendation.

It is also inappropriate to have a bona fide sole source requirement and select competitive procedures. <u>You are responsible for determining the degree of competition for the procurement</u>.

A.2 Determine Whether to Exclude Sources

FAR SubPart 6.2

There are three groups of procurements which are categorized as "Full and Open Competition after the Exclusion of Sources":

1. Alternative sources,
2. Set-asides for small business and labor surplus area concerns, and
3. 8(a) competition.

For (1) and (2), procedures requiring the use of full and open competition must be followed after the exclusion of source(s).

Alternative Sources

The Competition in Contracting Act provides that agencies are permitted to exclude particular sources when it is necessary to establish or maintain alternate source(s) if the agency head determines that to do so would:

1. Increase or maintain competition and likely result in reduced overall costs;
2. Be in the interest of national defense for emergency or industrial mobilization; or
3. Be in the interest of national defense to maintain educational/ nonprofit research & development capability.

Small Business and Labor Surplus

To fulfill the statutory requirements relating to small business and/or labor surplus area concerns, contracting officers may set aside solicitations to allow only such business concerns to participate.

8(a) Competition

To fulfill the statutory requirements relating to section 8(a) of the Small Business Act, as amended, contracting officers may limit competition to eligible 8(a) contractors.

A.3 Determine Whether J&A or D&F is Required

When full and open competition is used, no documentation is necessary to support that decision. However, if your market research and other analysis indicate that you will not use FAOC, then you must prepare either a

- Determination and Findings (D&F), or a
- Justification for Other than Full and Open Competition (J&A)

Determination and Findings means a

FAR 1.701

> "special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contracting actions. The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation."

☞ NOTE: Only D&Fs pertaining to competition will be discussed in this chapter.

Justification and Approval means essentially the same as D&F with the exception of the format. The justification must contain sufficient facts and rationale to justify the use of the specific authority cited.

FAR 6.303-1(c)

Documentation is generally for an individual contract action. However, class D&Fs and J&As may be authorized for a class of contracting actions:

- A class may consist of contracting actions for the same or related supplies or services or other contracting actions that require essentially identical justification.
- When a class J&A or D&F already exists for a class of contracting actions, you do not need to prepare any other document.
- You are required to determine if the procurement is within the scope of the class justification and shall document the file accordingly.

The circumstances in Exhibit A-2 identify when a D&F or J&A apply.

DETERMINING WHEN TO USE J&A's AND D&F's

If This Circumstance:	Then Use This Documentation
Full and Open Competition (includes Brand Name or Equal descriptions)	None
FAOC after Exclusion of Sources	
• Set-asides	None
• Establishing alternative sources	D&F
Other than Full & Open Competition	
• 6.302-1 (Only One Source, -includes Brand Name Only	J&A
• 6.302-2 (Urgent & Compelling)	J&A
• 6.302-3 (Industrial Mobilization)	J&A
• 6.302-4 (International Agreement)	J&A***
• 6.302-5 (Authorized or Required by Statute)	
- Brand name authorized for resale	None
- Qualified Nonprofit Agencies for the Blind or Severely Handicapped	None
- 8(a)	None
- Federal Prison Industries, Inc.	J&A*
- Government Printing and Binding	J&A*
- Any other required source (including other agencies)	J&A*
• 6.302-6 (National Security)	J&A
• 6.302-7 (Public Interest)	D&F**

*J&A is required unless agency statutes waive this requirement.
**J&A must also be prepared if required by agency head.
***DoD, NASA, and Coast Guard - as required by the FY 1990 Defense Acq. Act

Exhibit A-2

A.4 Prepare J&A for Other than FAOC

You are responsible for ensuring that justifications contain all the required information even if the J&A has been prepared by another office. An important factor to remember is to use the authority that best applies to the situation. Justifications should be:

- In writing,
- Certified as accurate and complete, and
- Approved before award with the exception of the Unusual and Compelling Urgency authority when preparation and approval would unreasonably delay the procurement. Approval must be made after award.

At a minimum, all justifications and D&Fs must include the elements in Exhibit A-3. Following the exhibit is a sample format.

ELEMENTS OF JUSTIFICATIONS AND D&Fs	
JUSTIFICATIONS {FAR 6.303-2}	D&Fs {FAR 1.704}
1. Identification of agency	1. Identification of agency
2. Nature and/or description of action	2. Nature and/or description of action
3. Description of supplies or services	3. Citation of statute or regulation
4. Identification of statutory authority	4. Findings
5. Contractor's unique qualifications	5. Determination
6. Efforts to obtain competition	6. Expiration of date of D&F, if required
7. CO's fair and reasonable determination	7. Signature of authorized official
8. Market survey and results	
9. Other supporting factors	
10. Interested sources	
11. Actions to increase competition	
12. CO's certification of accuracy and completeness	

Exhibit A-3

FORMAT FOR J & A FOR OTHER THAN FAOC

1. **AGENCY AND CONTRACTING ACTIVITY** - Specify the agency and contracting activity responsible for this action.

2. **DESCRIPTION OF ACTION** - Describe the nature of the contractual action for which approval is requested (i.e., new contract, modification). Include type of contract, share and ceiling arrangements, when applicable.

3. **DESCRIPTION OF SUPPLIES/SERVICES** - Describe the supplies or services to be acquired. Include the estimated total value (including options, if any).

4. **AUTHORITY CITED** - Identify the statutory authority, including title and citation permitting other than full and open competition.

5. **REASON FOR AUTHORITY CITED** - Describe how this action requires the use of the authority cited. If applicable, identify the proposed or potential contractor and include a discussion of the proposed contractor's unique qualifications for fulfilling the contract requirements.

6. **EFFORTS TO OBTAIN COMPETITION** - Describe efforts made to ensure that offers are solicited from as many potential sources as is practicable. Also describe the extent of competition anticipated for this acquisition.

7. **FAIR AND REASONABLE DETERMINATION** - Describe techniques (i.e., cost analysis, price analysis, audit, should cost, Government estimate, etc.) which will be the basis used to determine anticipated costs are fair and reasonable.

8. **MARKET SURVEY** - Describe the market survey conducted to identify all qualified sources. If a survey was not conducted, explain why it was not.

9. **OTHER FACTORS** - Discuss any other factors supporting the use of other than full and open competition such as:
   a. **Acquisition data availability** - Explain why technical data packages, specifications, engineering descriptions, statements of work or purchase descriptions suitable for full and open competition have not been developed or are not available. Describe actions taken or planned to remedy this situation
   b. **Follow-on contracts** - Include an estimate of the cost that would be duplicated and the basis and derivation of the estimate.
   c. **Unusual and Compelling Urgency** - Provide data, estimated cost or other rationale as to the nature and extent of the harm to the Government.

10. **INTERESTED SOURCES** - Include a listing of the sources that expressed written interest in the acquisition. If Only One Responsible Source is the intended authority, explain why such other sources responding to the synopsis were rejected. If the justification is submitted and approved prior to synopsis, notify the approving authority in writing if any responding sources are rejected.

11. **ACTIONS TO INCREASE COMPETITION** - Include a statement of the action taken (or to be taken to increase competition before any subsequent acquisition of the supplies or services is required. There may be instances where it is not possible to compete the current acquisition; explain how competition will be increased or enhanced for the required supplies or services (include breakout or other considerations)).

12. **CONTRACTING OFFICER CERTIFICATION** - Include the following statement: "I certify that the facts and representations under my cognizance which are included in this justifications are accurate and complete to the best of my knowledge and belief."

NAME_____ DATE_____

TITLE_____ SIGNATURE_____

13. **TECHNICAL CERTIFICATION** - Include the following statement: "I certify that the supporting data under my cognizance which are included in the justification are accurate and complete to the best of my knowledge and belief."

NAME_____ DATE_____

TITLE_____SIGNATURE_____

14. **REQUIREMENTS CERTIFICATION** - Include the statement in paragraph 13 above.

NAME_____DATE_____

TITLE_____SIGNATURE_____

15. **REVIEW/COORDINATION** - Your agency may require other reviews such as lower level competition advocates, director of contracting, small and disadvantaged utilization specialist, and legal.

16. **APPROVAL**

NAME_____DATE_____

TITLE_____SIGNATURE_____

Technical experts are the officials responsible for providing and certifying that the data, supporting their recommendations for other than full and open competition, are accurate and complete.

- Critique the recommendation based on acquisition histories, market research, and your general knowledge about the commodity before you accept the justification.
- If there is any doubt, challenge the recommendation.
- When the requiring activity certifies their recommendation and your market research confirms it, chances are you have a legitimate procurement for other than FAOC.
- Your CO can now certify the justification is accurate and complete.

Remember, you make the decision and will be required to defend it. Many procurements the requiring activity had deemed to be sole source are changed to permit full and open competition once certification is requested by the contracting office.

The circumstance for restricting competition will determine the extent of documentation. The justification must show your efforts to remove any barriers to competition and any further procurements of the same supplies or services. For example:

> Substantial data must support a decision for only One Responsible Source unlike the documentation needed for International Agreements.

The justification in its entirety will be released to the public upon request; therefore, the data must sufficiently support the decision made.

Approval Levels

FAR 6.304(a)

Now that the circumstance has been documented to support other than full and open competition, you must get approval from one of the following officials:

1. **Contracting Officer:** The individual with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. (Note: The contracting officer's certification will serve as approval unless a higher approving level is established in agency procedures.)

2. **Competition Advocate:** Agency heads are required to designate competition advocates for the agency and for each procuring activity of the agency.

3. **Head of Procuring Activity:** General, flag officer, or GS-16 or above; or in a comparable or higher position in another schedule. Individual who has overall responsibility for managing the contracting activity.

4. **Senior Procurement Executive:** All agencies except DoD, NASA, Coast Guard: individual appointed pursuant to OFPP Act. This authority may not be delegated. DOD, NASA, and Coast Guard as required by the FY 1990 Defense Authorization Act.

5. **Agency Head:** Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency unless otherwise indicated.

APPROVAL LEVELS (Class and Individual)

Official	Dollar Value	Circumstance
Contracting Officer	Up to $100,000	All except 6.302-7
Competition Advocate	$100,000 - $1 million	All except 6.302-7
Head of Procuring Activity	$1 million - $10 million	All except 6.302-7
Senior Procurement Executive	Over 10 Million	All except 6.302-7
Agency Head	Any amount	6.302-7

Exhibit A-4

The appropriate approving official is determined by the particular circumstance and the dollar value (including the cost of any options) of the procurement as shown in Exhibit A-4.

Competition Advocates

FAR 6.502

Agency competition advocates are responsible for:

1. Challenging barriers to and promoting FAOC.
2. Reviewing contracting operations to identify opportunities to achieve FAOC.
3. Preparing annual report to agency procurement executive.
4. Recommending annual goals and plans for increasing competition.
5. Recommending system of accountability for competition.

Competition advocates are also appointed for each procuring activity of an agency.

8.5 Determine if Synopsis is Required

Just because you have been authorized to use one of the seven circumstances for other than FAOC, you have not been authorized to waive the synopsis requirements even if a sources sought synopsis was previously published**.** Exhibit A-5 is a decision table on whether to synopsize other than FAOC actions.

SYNOPSIS REQUIREMENTS	
If This Authority {FAR 6.302}	**Then** {FAR 5.202(a)}
Only One Responsible Source	Synopsize; except maybe utility and unsolicited research proposal.
Unusual and Compelling Urgency	Exempt
Industrial Mobilization	Exempt
Authorized or Required by Statute	Exempt
Public Interest	Exempt
International Agreement	Exempt
National Security	Synopsize, if appropriate; except if disclosure is compromising.

Exhibit A-5

FAR 15.402(h)

☞ **NOTE:** The results of a synopsis may overturn the justification for other than FAOC. Even though a synopsis may not be required, an informal market survey can be conducted within the prescribed deadlines.

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