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DoD Contracting

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Overall Policies

- The US Government maintains an open and transparent procurement system in which “full and open competition” is one of the principal policy objectives. This conforms to international norms and requirements, such as WTO Agreement on Government Procurement.
- Competition is favored in order to ensure that the prices paid for goods and services are ‘fair and reasonable’. When competition is insufficient to assure fair and reasonable prices, the Government may perform a ‘cost analysis’ which includes a detailed audit of the contractor’s costs in its proposal.
- Competition also is favored to ensure that the Government is offered the best technical solutions and products to meet its stated needs.

The Basic Laws

- The Armed Services Procurement Act of 1947 (10 USC 2302 and following) and the Federal Property and Administrative Services Act of 1949 (40 USC 471 and following, 41 USC 251 and following).
- These statutes are comprehensive in scope and prescribe procurement general policies, procedures, limitations, prohibitions, and requirements.
- The Armed Services Procurement Act applies to the Departments of Defense, the Army, Air Force, and Navy; the Coast Guard; and the National Aeronautics and Space Administration. ASPA addresses procurement of all property (except land) and services for which payment is to be made from appropriated funds (10 USC 2303).
- The Competition in Contracting act mandates ‘full and open competition’.

The Implementing Regulations

- Federal procurement statutes are implemented in the Federal Acquisition Regulations. (“FAR”)
- This is set forth in the Code of Federal Regulations, and is available on the Internet.
<https://www.acquisition.gov/browse/index/far>
- DoD has its own Supplement – the DoD FAR Supplement. (“DFARS”) Also available on the Internet.
<https://www.acquisition.gov/dfars>

Text of all contract clauses also are published here.

DoD is very open to non-US contractors

Annual DoD procurement budget ranges from \$150 to \$200 Billion, depending on how one accounts for R&D.

The percentage of this that is awarded to non-US companies ranges from 3-5%!

Japan – US Reciprocal Defense Procurement MoU

This 2016 Memorandum of Understanding facilitates reciprocal defense procurement. Most important is the removal of non-tariff trade barriers like the Buy American Act.

Japanese companies are treated as if they are American. “Qualifying country”.

See Text on DoD website:

<https://www.acq.osd.mil/asda/dpc/cp/ic/reciprocal-procurement-mou.html>

See also ATLA website:

https://www.mod.go.jp/atla/en/policy/defense_equipment.html

Open Public Sources for Procurement Information

- The Government maintains main open sources for information on procurement, including:
- These are maintained in the Systems for Awards Management “SAM”)
- **Important:** to qualify for contracts, your company must be registered in www.sam.gov. This should also result in your company being assigned an NCAGE code.
- If the SAM does not yield an NCAGE code, use the NCAGE tool at <https://eportal.nspa.nato.int/Codification/CageTool/home>

Types of Solicitations

- For acquisition planning:
 - RFI – Request for Information - very important if you qualify. If you do not respond, Government will not know about you and you may not receive the RFP.
 - RFQ – Request for Quotation.

These are useful to respond to in order to make government aware of source, but they do not result in contracts.
- For acquisition:
 - BAA – Broad Agency Announcement.
This is used largely for R&D – states broad objectives.
 - RFP – Request for Proposals.
This is used for actual procurement, more complex items.
 - IFB – Invitation for Bids.
Used for uncomplicated items where only concern is lowest price. (Sealed bids.)

Contract Types

- Firm Fixed Price and
- Fixed Price Incentive
Most common for significant DoD purchases of defense equipment and systems.
- IDIQ – Indefinite Delivery Indefinite Quantity
Being used more and more by DoD for supplies and services.
- Cost Reimbursement Types, e.g.
 - Cost Plus Fixed Fee (mostly for R&D)
 - Cost Plus Award Fee (“subjective incentives”)

The types and their uses are all set forth in FAR Part 16, “Types of Contracts”

Contract Clauses

- Both the FAR and the DFARS contain many standard clauses that are applied to DoD contracts, usually mandatory.
- Some terms are negotiable, e.g. Intellectual Property Rights.
- Many Clauses are for 'socio-economic' purposes, e.g. nondiscrimination, environmental concerns, and are not applicable to non-U.S. entities.
- Many are required to be 'flowed down' to subcontractors at lower tiers.
- Each Solicitation sets forth the clauses; they must be studied.

Recommendation about the standard clauses

Once you have the Solicitation (RFP), then create a clauses matrix in Excel.

Download the text of the clauses from the FAR or DFARS website.

List the clauses in your matrix, and examine each clause to determine what performance requirements apply, what risks exist and how you plan to comply.

You can also download the Defense Acquisition University clause matrix to start with. [DAU Provision and Clause Matrix | www.dau.edu](http://www.dau.edu)

The “Default” clause is a good example of why you need to understand the clauses.

塵も積もれば山となる (chiri mo tsumoreba yama to naru)

If enough dust accumulates it becomes a mountain.

Default clause example

In some country's procurement systems, if you miss a delivery date, you may receive a "cure notice".

Not in the US procurement system!

If the contractor "fails to make progress" in the Government's view, it may issue a 10-day cure notice.

However, if the contractor misses any delivery date, it is immediately in default. This can have serious consequences for the company's performance rating and affect future contracts.

CPARS – the Contractor Performance Assessment Reporting System

It is very important to achieve an “exceptional” or “very good” rating.

Contract award decisions must be based on past performance, among other things.

A poor performance rating in CPARS may result in not being awarded a new contract.

You are permitted to comment on the proposed rating and seek a change. That is “last resort”.

Cost Issues

- Negotiated contracts are normally 'cost based' and the costs that may be charged to the contract must be reasonable, allowable and allocable.
- Reasonableness is judgmental.
- Allowability is determined by the regulations, FAR Part 31.
- Allocability is also determined by the regulations, FAR Parts 30, 31, and the Cost Accounting Standards.
- Government audit of cost based contracts, for DoD is by the DCAA – Defense Contract Audit Agency.

Unallowable costs

Some costs are explicitly “unallowable” under the FAR Part 31.

Bad Debts (31.205-3)

Contributions or donations (31.205-8)

Entertainment Costs (31.205-14)

Fines, Penalties, and mischarging costs (31.205-15)

Interest and other financial costs (31.205-20)

Lobbying and political activity costs (31.205-22)

Losses on other contracts (31.205-23)

Organizational costs (31.205-27)

Goodwill (31.205-49)

Costs of Alcoholic Beverages (31.205-51)

CONTINGENCIES ARE NEVER PERMITTED.

“Truth in Negotiations”

Under this statutory requirement, contractors must certify in writing that their costs as submitted to the Government are “current, accurate and complete” at the time agreement on price is reached.

Some exceptions apply such as “adequate price competition” but Government can still require very detailed cost breakdowns.

Government can recover increased costs if this certificate is wrong.

Example: you receive two vendor bids, one high and one low, and do not tell Government about the low bid.

Intellectual Property

- Patents:

The Government respects the contractor's background patents. Foreground "subject inventions" – "invention first conceived or first actually reduced to practice" under contract – the Government obtains world wide royalty free non-exclusive license. Must be reported or contractor's ownership rights lost.

- Technical data (includes knowhow/trade secrets) and software:

The "default position" under the clauses is that the Government gets "Unlimited Rights" to all foreground. Also can get "Unlimited Rights" to background IP delivered under the contract without restrictions.

Intellectual Property - 2

- Because this is the “default position” it is **CRITICAL** that contractors propose different terms in the proposal, ensure that the terms and conditions are specially negotiated with the government and included in the contract, and that all deliverables are properly marked with restrictive legends as appropriate.
- Follow the Data Rights Assertion table in the applicable clause (usually DFARS 252.227-7013 Rights in Technical Data—Other Than Commercial Products and Commercial Services”. Submit this with proposal.
- Failure to negotiate properly protective terms and failure properly to mark documents can lead to a loss of rights in the technical data/knowhow/software.

Cybersecurity

This is a vitally important topic, but beyond the scope for today.

DoD is very serious about implementation of cybersecurity requirements by contractors.

Contractors must become fully compliant with NIST 800-171. <https://csrc.nist.gov/pubs/sp/800/171/r2/upd1/final>

They are using the Cybersecurity Maturity Model Certification (CMMC) Program

See <https://dodcio.defense.gov/CMMC/about/>

Your IT Specialists need to study and understand this!

Soon compliance will be a condition to contract award.

Understanding Cultural Differences

It is important to understand business cultural differences between US procurement personnel and Japan.

1. Never offer gifts. This is illegal for them to accept. If you host a luncheon, for example, have a tray or place where they can “pay” for it. Price should be reasonable. They will not be insulted!
2. Before contract award: they are very “Anglo-Saxon”. Strict rules must apply for everyone.
3. After contract award: They are very Japanese. They appreciate team approach, courtesy, respect. Will often use “consensus approach”. Be “on their team”.

Example

I mentioned the different approach to the Default clause.

Important to be proactive and never give customer an unpleasant surprise. If you believe a delivery date might not be met, go immediately to Contracting Officer and let him or her know, give workaround plan and mitigation. Present to them as a problem the team needs to solve.

Work to establish new date and get the contract modified with new delivery date so that “default” doesn’t occur.

Respect human nature.

The Contracting Officer is the only person who can bind the Government.

This is a very important principle.

In dealing with the Government under a contract, one may deal with many people....engineers, inspectors, etc.

Normally they have no authority to bind the Government. Sometimes they ask for things that cost time or money.

If for example there is a question about contract compliance or what work must be done, get a determination from the Contracting Officer.

Questions?

I apologize that time does not allow a very detailed presentation.

I have tried to cover the main points.

You are also always welcome to contact me at:

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