



Intro to Contracting

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3.2.1 Intro to Contracting

TIME: 1.0 HR

TOPIC LEARNING OBJECTIVES

Upon successful completion of this topic, the student will be able to:

1. Recognize why contracts are needed by DoD.
2. Recognize the legal nature of a contract.
3. Recognize the Federal Acquisition Regulation (FAR) and its Supplements as governing the contracting and procurement processes.
4. Recognize the three types of contracting officers.
5. Identify the complementary roles and responsibilities of the contracting officers and the program manager in their partnership throughout the acquisition process.
6. Recognize the differences in background, rules, and responsibilities between the Program Manager (PM) and the Contracting Officer (KO).
7. Identify the requirements associated with pursuing competition.
8. Identify descriptions of contracting terms (e.g., responsiveness and responsibility, Justification and Approval (J&A), sole source).

STUDENT PREPARATION

Student Support Material

1. N/A

Primary References

1. Federal Acquisition Regulations (FAR)
2. SUPSHIP Operations Manual (SOM), Ch 3
3. DoD 5000 Series

Additional References

1. DAU course material; ACQ 1010, ACQ 2020, ACQ 2030, and CLM 005
2. Navy-Marine Corps Acquisition Regulation Supplement (NMCARS) (<https://www.acquisition.gov/nmcars>)
3. DOD Source Selection Guide, AUG 2022
4. NAVSEA Contracts Handbook



Overview

- Need for and nature of contracts
- Governing documents
- Types of Contracting Officers (KOs)
- Relationship and differences between the Program Manager (PM) and KO
- Competition in contracting
- Contracting terms



Why Are Contracts Needed?

- Establish a legal relationship between two parties
 - (e.g., Government and Contractor)
- Define the rights and responsibilities of each party
- Allow for changes within the terms and conditions of the legal relationship

Protect the Contractor and the Government during the acquisition process



Elements of a Contract

- A contract requires these essential elements to be binding:

1. Mutual assent
2. Consideration
3. Capacity
4. Lawful purpose



A mutually binding legal instrument that defines the relationship between the Government and Contractor



1. Mutual Assent

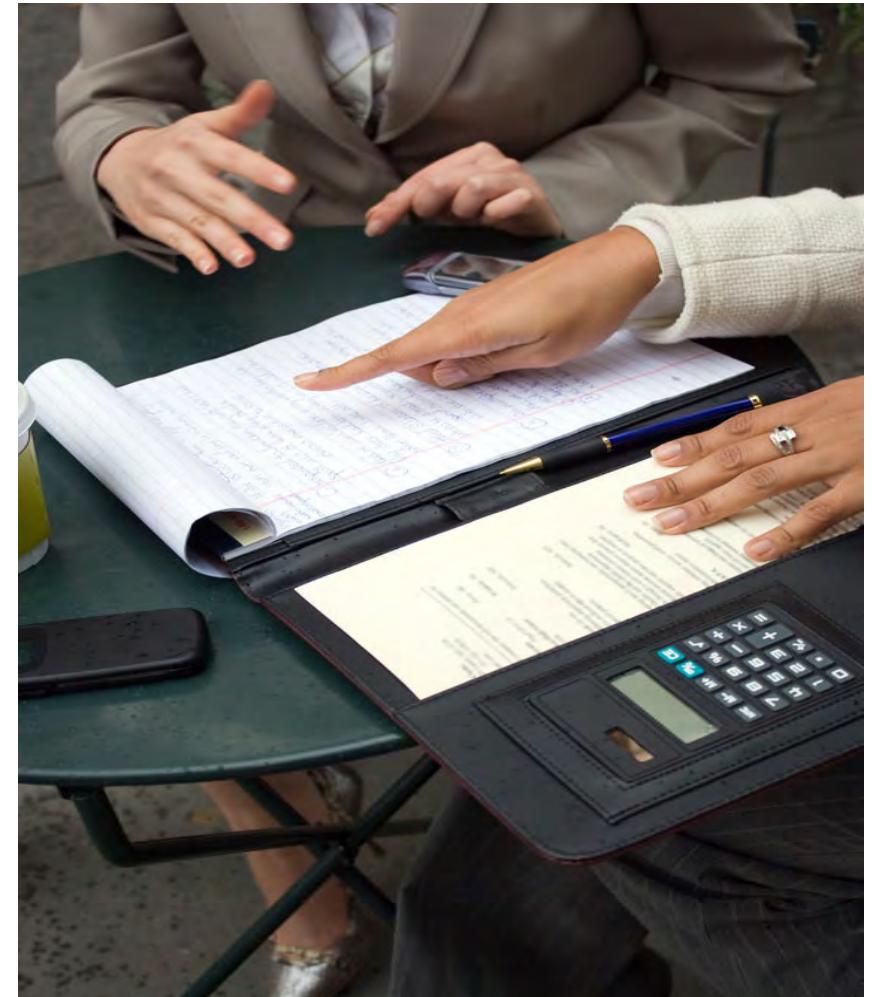
- A contract is formed through the acceptance of an offer:
 - Typically, an offer is a proposal by a person (the "offeror") to enter into a contract
 - The person receiving the offer is called the "offeree"
 - Offeree communicates intent to accept the offer





1. Mutual Assent (cont.)

- Requires a **Meeting of the Minds** and **Certainty of Terms**
 - All requirements and stipulations must be known to both parties before the contract is signed
 - Communications should be timely, clear, and unequivocal
 - The following should be included in the agreement:
 - Price, quantity, and delivery requirements





2. Consideration

- Consideration in the law of contracts is something of value given by one party in return for the promises of the other party to the contract
- Types of consideration include:
 - Promise to perform
 - Act (provide supplies or services)
 - Forbear (not act)
 - Promise in return for performance
 - Payment
 - Time (schedule modification)
 - Relief from some/all technical requirements



In Government contracting, the courts do consider the sufficiency and adequacy of the consideration



3. Capacity

- Both parties must have the capacity to understand and appreciate the terms of the contract
- A contractual relationship cannot be legally established if at least one party to a contract is
 - Mentally incompetent
 - A minor
 - Intoxicated
 - Unauthorized to legally bind their party





4. Lawful Purpose

- A contract, such as an official agreement by two or more entities, establishes lawful **accountability**
- To be binding, a contract must be for legal and possible objectives only
 - The objective or purpose of the contract needs to be **legally enforceable** by a court (e.g., a contract to purchase illegal drugs is not binding)
- The right to contract must yield if it conflicts with the public welfare
 - e.g., minimum wage laws restrict a person's freedom to contract for a lower wage. The courts have the power to declare certain types of contracts void on the grounds that they are contrary to the public policy and violate a state or federal statute





A Binding Contract

Without all elements properly done, your contract may not be valid in the eyes of the court





Government's Relationship to the Contractor

- Transactional
 - The Contractor has a profit motive
 - The Government has a vested interest in cost, schedule, and performance
- Professional
 - Contractors and Government personnel should understand the contract requirements and work together cohesively to satisfy them
- Collaborative
 - Mutually supportive in achieving the desired outcomes
 - Contractors will typically bring unique technical expertise to the table
 - Programmatic decision-making is **inherently governmental**
- Constrained (by ethics rules and contractual obligations)
 - Unauthorized commitments should be avoided
 - Recognize and avoid situations that may translate to conflicts of interest

A good working relationship benefits both sides



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Federal Acquisition Regulations System

- Establishes the policies and procedures for contracting and procurement by all executive agencies
- Consists of:
 - The Federal Acquisition Regulation (FAR)
 - The DoD FAR Supplement (DFARS)
 - DoD Source Selection Procedures
 - Agency supplements and acquisition regulations
 - Navy-Marine Corps Acquisition Regulation Supplement (NMCARS)
 - SUPSHIP Operations Manual (SOM)
 - NAVSEA Source Selection Guide
 - NAVSEA Contracts Handbook



Contracting Officers (KOs) use the FAR and its supplements to carry out the contracting process



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3 Types of Contracting Officers (KOs)

- Procuring Contracting Officer (PCO)
 - Handles procurement from the pre-solicitation phase through contract award to include contract signing on behalf of the Government
- Administrative Contracting Officer (ACO)
 - Performs contract administration functions as assigned by the PCO
 - FAR 42.302(a) lists the functions normally performed by the ACO
- Termination Contracting Officer (TCO)
 - After notice of termination is issued, the TCO is responsible for negotiating an equitable settlement with the Contractor

A single KO can serve in all three roles depending on the needs of the organization or the nature of the contract



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KO and PM Roles & Responsibilities

- KO responsibilities:
 - Ensure contract performance & compliance
 - Serve as the contract advisor for the program
- KO major functions are to:
 - Prepare solicitations and contracts
 - Communicate with potential offers and negotiate contracts
 - Ensure consistency with the FAR and DFARS
 - Award contracts and any modifications, administer contracts, and terminate contracts
 - Legally bind the Government through warranted contracting authority
- PM responsibilities:
 - Responsible for managing the program (overall program responsibility)
 - Accountable to the Milestone Decision Authority (MDA) for cost, schedule, and performance in accordance with the DoD 5000 series



The KO, the PM, and their teams must be familiar with each other's responsibilities and governing regulations



Differences between the PM & the KO

	PM Cost, Schedule, and Performance	KO Contract Advisor
Authority	Tenure Agreement*	Warrant**
Responsibility	Entire program	Contract
Background/Training	Technical	Business
Guiding Directives	DoD 5000 Series	FAR System Contract management
Organization	Program Office (IPT)	Matrix (IPT)

* PM's are provided their authority via designation by the appropriate CAE IAW DoD 5000 and DoD Instruction 5000.66 (additional documentation may include a Charter or ADM, as evidence of approval from MDA)

** Heads of Contracting Activities provide KO's their authority via a Certificate of Appointment, SF 1402, commonly known as a Warrant

IPT – Integrated Product Team

PMs & KOs have complementary roles & responsibilities and maintain a partnership throughout the acquisition process



Who's Responsible?

- Deciding which vendor will be awarded the contract
- Perform contract negotiations with selected vendor
- Setting the desired award date for the contract
- Setting maximum dollar amount to be awarded
- Monitoring Contractor performance
- Making changes to the contract



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Advantages of Competition

- Provides an incentive for contractors to provide goods and services at a lower price
- Encourages innovation of transformational technologies
- Encourages high quality of products delivered and services performed
- Affords the opportunity to acquire performance improvements by using “best value” source selection criteria
- Provides opportunities for capable small businesses to enter new markets
- Enhances a strong defense industrial base



Competition in Contracting Act (CICA)

- Ensures adherence to requirements for competition:
 - Requirement for Full and Open (F&O) competition
 - Allowance for F&O competition after exclusion of sources
 - Allowance for seven exceptions to F&O competition (e.g., sole source)
 - Requirement for approval of other than F&O competition





CICA Requirements

- Full and Open Competition
 - All responsible sources are permitted to compete for the effort (FAR 6.003)
- Exclusion of Sources (FAR 6.2)
 - Excluding sources may be done to facilitate:
 - Establishing or maintaining alternate sources
 - Setting aside work for small business concerns
 - Fulfilling the Small Business Administration (SBA) objectives for its Section 8(a) Program



CICA Requirements

- Seven exceptions to F&O competition (FAR 6.302)
 1. Only one responsible source will satisfy agency requirements
 2. Unusual and compelling urgency
 3. Industrial mobilization
 4. International agreement
 5. Authorized or required by statute
 6. National security
 7. Public interest
- Approval
 - Certification of an exception to F&O competition is accomplished by the approval of a **Justification and Approval (J&A)** or a **Determination and Finding (D&F)** as required by FAR Subpart 6.3
 - The justification, with written approval, shall be made publicly available
 - posted to www.sam.gov after award



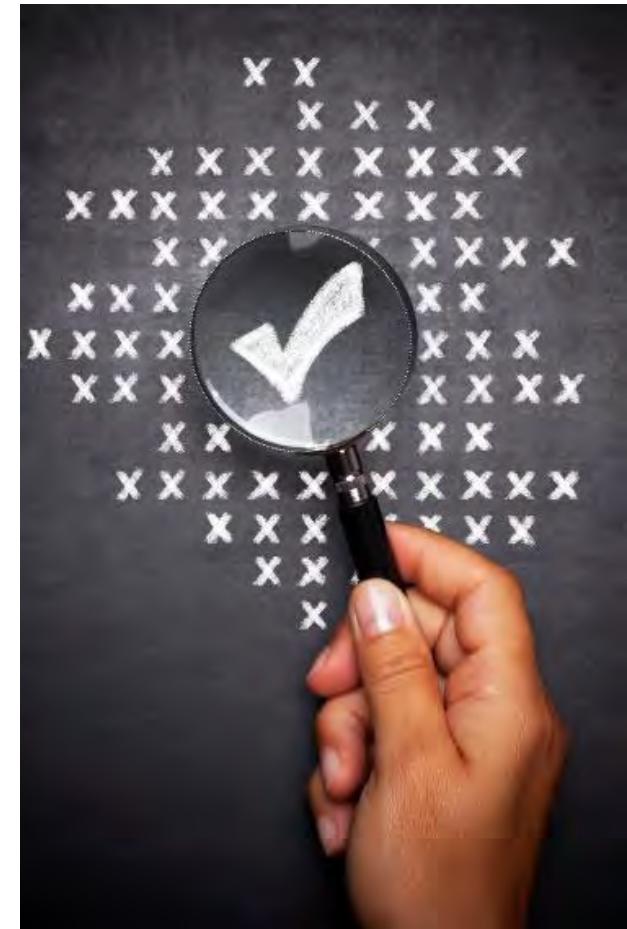
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Sole Source

- A contract that is negotiated with only one source
 - i.e., not competed
- Sole source justifications are required
 - Typically use the J&A format prescribed by NMCARS (<https://www.acquisition.gov/nmcars>)
 - Approved by _____
 - Do you think a sole source KTR influences price more than a competitive selection?



One example of other than F&O competition



Responsiveness and Responsibility

■ Responsiveness

- Award under an Invitation For Bid (IFB) is made without discussion (sealed bidding)
- The bid must conform to or respond to all aspects of the IFB
- This term is not used for contracting by negotiation, where Request for Proposal (RFP) is the method of solicitation

■ Responsibility (*financial health*)

- A prospective contractor must be determined responsible to receive a government contract (per FAR 9.104)
- Applicable to IFB and RFP

Tip to remember:
You are **responsible** for
your own financial
health!





Determining Responsibility

The prospective Contractor (i.e., offeror) must:

- Have **adequate financial resources** or the ability to obtain them
- Be able to comply with the required or proposed delivery schedule
- Have a **satisfactory performance** record
- Have a satisfactory record of integrity and business ethics
- Have the necessary **organization, experience, accounting and operational controls**, and **technical skills**, or the ability to obtain them
- Have the necessary equipment or or the ability to obtain them
- Be otherwise qualified and eligible to receive an award under applicable laws and regulations





Determining Responsiveness

The prospective Contractor's ***bid*** (offer) must ***meet the terms of the solicitation***

- FAR 14.301(a): To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system
 - Example (from FAR 11.403):
“If the offered delivery date computed with mailing or transmittal time is later than the delivery date required by the invitation for bids, the bid shall be considered nonresponsive and rejected”
 - Example (from DAU)
“If the solicitation calls for a component made of copper, but the bidder offers one made of tin, then the bid is considered nonresponsive”





Summary

- Why do we need contracts?
- What are the essential elements of a contract?
- What documents govern contracting?
- What are the “types” of KOs?
- What are the responsibilities of the PM?
- What are the responsibilities of the KO?



Summary

- The requirements associated with pursuing competition are implemented by:
- What do the following terms mean?

Responsiveness:

Responsibility:

Justification and Approval (J&A):

Sole Source: