



Bean Kinney & Korman, P.C.

Getting it Done

2300 Wilson Boulevard, 7th Floor

Arlington, Va. 22201

703 525-4000

www.beankinney.com

www.valanduseconstructionlaw.com



Legal Issues in Government Contracting

Methods of Contracting
Bids and Negotiations
Contracts Generally and FAR
Bid Protests and Process

Similarities and Differences

- Similarities to common law contracts
 - Offer, acceptance, meeting of minds
 - Generally plain meaning rule
- Differences
 - Actual authority generally required
 - More limited theories of apparent authority
 - Terminations for convenience

Authority

- Heads of Agencies
- Heads of Contracting Activities (HCAs)
- Contracting Officers
- Contracting Officer Representatives
 - (CORs or COTR)

Fixed Price Contracting

- Fixed Price Contracting: FAR 16.2
- FFP: Firm fixed price (16.202)
- FFP w/EPA: FFP w/Economic Price Adjustment (16.204)
- FPI: Fixed Price w/ Incentive (16.204, 16.403)
- Fixed Price with Award Fees (16.404)

Cost Reimbursement

- Cost based contracts – FAR 16.3
- Cost Plus Fixed Fee (16.306)
- Cost Plus Incentive Fee (16.304)
- Cost Plus Award Fee (16.305, 16.405-2)

Other Methods

- T&M and Labor Hour (FAR 16.6)
 - Gen. incl. agreed rates with cap, material costs with possible handling charges
- Level of Effort (16.207)
 - Fixed price on rates, level of effort for period
 - Example – min/max specific hours over period

Indefinite Delivery

- **Definite Quantity (16.502)**
 - Price and quantity spec, delivery orders for dates and locations
- **Indefinite Quantity (16.504)**
 - Requirements (16.503): – gov't. purchases requirements from contractor
 - ID/IQ: obligated to purchase agreed min.

Type of Contract Matters

- Termination for convenience:
 - CPIF no entitlement to incentive; CPAF may be able to demonstrate partial incentive earned
- Requirements Contracts: can get lost profits for diversion
- Compare: blown gov't. estimates on req. K can be grounds for GAO protest, but no lost profits claim

Process

- Sealed Bidding
- Negotiated Contracts
- Simplified Acquisition Procedures

Sealed Bids - IFB

- Uniform Contract Format
- Solicitation, Offer and Award – Form 33
- Amendment – Form 30
- Specs and materials
- Publicizing
- Only FFP and FFP w/EPA contracts

Sealed Bids - Problems

- LATE IS LATE.
 - Examples
 - No time specified – generally deemed 4:30
 - Exceptions for government control, government frustration
- CO has some ability to delay bid openings under limited express circumstances

Sealed Bid Problems

- Follow IFB – method of submission must match, place of submission must match
- Lack of Responsiveness
- Uncertainty of bid
- Variations in acceptance periods, contract terms, bid guarantees
- Failure to sign
- Failure to acknowledge amendments

Firm Bid Rule

- Bidder must keep bid open bids for specified time
- Another departure from common law

Responsibility

- Financial
- Schedule
- Performance Record
- Management/Technical Capacity
- Equipment/Facilities/Production Capacity
- Ethics

Negotiated Contracts

- Far more discretion
- Non-price factors in award
- Comparative use of past performance, not a pass/fail like sealed bidding
- No communications in sealed bidding v. potential for “discussions” with parties

Evaluation Criteria

- Listing of factors & sub-factors
- Relative weighting
- Mandatory
 - Price/Cost
 - Quality Factors
 - Past Performance
 - Small business participation

“Discussions”

- RFP should disclose intent to hold or not hold discussions
- Initial proposals: late is still late!
- Limited ability to award from initial proposals where discussions intended
- Award with no discussions means **NO DISCUSSIONS**

Discussion Problems

- Minor clarifications are not discussions
- Changes in personnel, clarifications of significant terms are “discussions”

Process of Negotiation

- Establishing competitive range
- Inclusion of most highly rated proposals
- Fair and balanced discussions
- Final Proposal Revisions
- Selection for award and stated rationale

Debriefings

- Pre-award – excluded from competitive range or otherwise eliminated
 - MUST REQUEST IN WRITING: 3 DAYS OF NOTICE OF EXCLUSION (15.505)
- Post-Award
 - MUST REQUEST IN WRITING: 3 DAYS OF NOTICE OF AWARD (15.506)
- In both cases, dig dig dig

Simplified Acquisitions

- Under \$100,000 (FAR Part 13)
 - Purchase Orders
 - Blanket Purchase Agreements
- Micro-Purchases Under \$2,500, \$2,000 for construction (FAR 2.101, 13.201)
- CICA exempts simplified acquisitions, only competition to maximum extent practicable

Commercial Acquisitions

- FAR Part 12 – process for commercially available items
- FFP or FFP w/EPA (FAR 12.207)
- Commercial items, services or off the shelf
- Federal Supply Schedules (FSS)
- Multiple Award Schedule (MAS)

Contract Terms

- FAR provisions incorporated through IFB terms
- Section 52 terms
- Flow down provisions
- Parallel programs
 - Examples – Buy America Act; E-verify; equal opportunity; et c.

Bid Protests - Fora

- Agency
- Government Accounting Office
- US Court of Claims

Agency Protests

- Filed with CO, FAR 33.103
- Pre-award - filed prior to opening or date for proposal receipt
- Others – within 10 days of knowledge of grounds
- Pre-award - stay
- Post-award - suspend performance if agency receives within 10 days of award, 5 days of debriefing

Agency Process

- Best efforts to resolve within 35 days
- May involve discovery
- Decision to be “well-reasoned”
- Remedies – parallel to GAO, award costs
- Follow-on protest to GAO or COFC
 - GAO – within 10 days of any initial adv action

GAO Appeals

- Must be “interested party”
 - Viewed conservatively – 8th or 9th in line ex.
 - High priced can show everyone fails
- Violation of statute or regulation
- NOT
 - Administration
 - Small biz class or COC, Industrial class

GAO Protest Timing

- Solicitation: prior to bid opening or closing of proposals
- Prior to next due date if based on amendment
- Within 10 days of debriefing if required
- If filed within 5 days of debrief, entitled to stay
- Within 10 days of knowledge of basis

CICA Stays

- Pre-award protests: Agency may not award contract after receipt of timely protest
- Post-award: CO suspends performance if agency receives GAO notice of protest w/i 10 days of date of contract award or 5 days after the date offered for required post-award briefing

GAO Standards

- Gen – must show agency clearly unreasonable
- Protestor must show prejudice – “substantial chance” would have been awarded the contract but for error

GAO Process

- Must be in writing – e-mail accepted
- Basic Information
- Copies to agency within 1 day of GAO filing
- Agency admin report within 30 days
- Protestor comment – 10 days
- Potential Hearings and ADR
- GAO decision within 100 days

GAO Actions

- “Recommendations” – agency must notify if not following, GAO reports to Congress
- Recommendations: refrain from options; termination; recompetete; issue new solicitation; award consistent with statute/regs
- Impact consideration

US Court of Claims

- No specific time, but do it quickly (irreparable harm needed)
- Need to seek injunctive relief – rapid scheduling
- Solicitation – pre-award
- TRO/injunction standards – parallel typical federal standards

COFC – Review

- Review – arbitrary and capricious standard
- Extensive rules and process, notice to DOJ, COFC, procuring agency
- Agency response 60 days
- Potential limited discovery
- Gen injunctive relief, costs, not profits
- EAJA – attorneys fees