



February 23, 2015

Key Legal Requirements for Executive Agencies in Entering Procurement Contracts

Executive agencies that seek to obtain supplies or services for their own direct benefit or use from nongovernmental sources are subject to various legal requirements. Certain requirements of generally government-wide applicability can be found in the provisions of the Armed Services Procurement Act codified in Title 10 of the United States Code; the parallel (if not always identical) provisions of the Federal Property and Administrative Services Act codified in Title 41; and the Federal Acquisition Regulation (FAR). However, numerous agency-specific requirements are also provided for in statutes, regulations, or policy guidance. This “In Focus” briefly notes key requirements, and provides citations to CRS reports that discuss these requirements in more detail.

See generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by Kate M. Manuel et al.

Limitations on Contracting Out Particular Supplies or Services

Agencies must ensure that they may acquire the supplies or services in question from the private sector. Various provisions of federal law bar agencies from contracting out “inherently governmental functions,” or functions that are “so intimately related to the public interest” as to require performance by government employees. There are also restrictions, although generally not outright prohibitions, on contracting out other functions, such as “functions closely associated with inherently governmental functions” and “critical functions.” In addition, in recent years, agencies have been barred from conducting the “public-private competitions” under Office of Management and Budget (OMB) Circular A-76 that are generally required for agencies to arrange for contractor performance of commercial functions performed by federal employees.

See CRS Report R42325, *Definitions of “Inherently Governmental Function” in Federal Procurement Law and Guidance*, by Kate M. Manuel; CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration’s Final Policy Letter*, by Kate M. Manuel, Elaine Halchin, and Erika K. Lunder; CRS Report R40854, *Circular A-76 and the Moratorium on DOD Competitions: Background and Issues for Congress*, by Valerie Bailey Grasso.

Describing and Soliciting Requirements

While agencies generally have broad discretion to determine their “requirements” (i.e., the supplies and services they seek to procure) based on their needs, they

must develop their specifications “in such a manner as is necessary to obtain full and open competition,” and may include restrictive provisions or conditions only to the extent necessary to satisfy agency needs or as authorized by law. See 10 U.S.C. §2305(a); 41 U.S.C. §3306(a). Notices of proposed contracts must generally be made publicly available for set periods of time. See 48 C.F.R. Subpart 5.2. Agencies must evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation, which generally must include contractors’ “past performance” in the case of negotiated procurements.

See CRS Report R40516, *Competition in Federal Contracting: Legal Overview*, by Kate M. Manuel; CRS Report R41562, *Evaluating the “Past Performance” of Federal Contractors: Legal Requirements and Issues*, by Kate M. Manuel.

Competition in Selecting Awardee

When selecting vendors, agencies are generally required to obtain “full and open competition through the use of competitive procedures” unless other procedures are expressly authorized by statute or special circumstances permit “other than full and open competition” (e.g., the necessary supplies and services are only available from one responsible source, the agency head determines it is “necessary in the public interest” to use other than competitive procedures). However, various provisions of law expressly authorize agencies to use other than full and open competition in order to promote contracting with small businesses in particular (e.g., 15 U.S.C. §637(a)).

The issuance of orders under “multiple award contracts” (i.e., contracts held by more than one vendor) is not subject to “full and open competition,” as described above. Instead, all vendors holding the contract must generally be given a “fair opportunity to be considered” for orders valued in excess of \$3,000 (e.g., 48 C.F.R. §16.505).

See CRS Report R40516, *Competition in Federal Contracting: Legal Overview*, by Kate M. Manuel; CRS Report R42981, *Set-Asides for Small Businesses: Legal Requirements and Issues*, by Kate M. Manuel and Erika K. Lunder.

Selection of Contract Type

The FAR recognizes seven broad types of contracts and other agreements, including fixed-price, cost-reimbursement, and incentive contracts. In a few cases, federal law expressly restricts the use of particular types of contracts. Namely:

- the use of cost-plus-a-percentage-of-cost contracts—which provide for the government to reimburse contractors’ costs and pay them a percentage of these costs as an allowance for profit—is prohibited;
- the use of any type of cost-reimbursement contract to acquire “commercial items” is prohibited; and
- contracts resulting from “sealed bidding” must be firm-fixed-price or fixed price with an economic adjustment.

In other cases, agencies may select which type of contract to use in particular procurements, subject to the FAR’s guidance (e.g., time-and-materials contracts may be used only when, among other things, the parties cannot accurately estimate the extent or duration of the work).

See CRS Report R41168, *Contract Types: Legal Overview*, by Kate M. Manuel.

Preferences for Domestic Content or on Other Grounds

In structuring their procurements, agencies are required to give “preference” to certain supplies, services, or vendors. For example, where applicable, the Buy American Act bars agencies from acquiring or using end products or construction materials that are not mined, produced, or manufactured in the United States “substantially all” from components that are similarly mined, produced or manufactured in the United States, unless specified circumstances exist (e.g., the cost of domestic materials is “unreasonable”). Various provisions of law similarly require or encourage the acquisition of supplies with specific environmental attributes, including biobased products (7 U.S.C. §8102); Energy Star® and energy-efficient products (48 C.F.R. §23.203), and recovered-content products (42 U.S.C. §6962), among others.

Federal law also establishes various preferences for small business vendors (48 C.F.R. Part 19); Federal Prison Industries (48 C.F.R. Subpart 8.6); the AbilityOne program for persons who are “blind or severely disabled” (48 C.F.R. Subpart 8.7); and “local contractors” residing or doing business primarily in disaster zones (42 U.S.C. §5150).

See CRS Report R43140, *The Buy American Act—Preferences for “Domestic” Supplies: In Brief*, by Kate M. Manuel; CRS Report R43354, *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, by Kate M. Manuel et al.; CRS Report R43633, *The Federal Prison Industries: An Analysis of Sales, FY1993-FY2013*, by Nathan James.

Avoiding Nonresponsible or Excluded Contractors

Agencies are required to take various steps to ensure that they do not enter contracts with vendors who have failed, or are deemed likely to fail, to meet their obligations under federal law or government contracts. For example, agencies must check the System for Award Management (SAM) prior to awarding a contract to ensure that the vendor is not

debarred or suspended (collectively known as excluded) from government contracts. 48 C.F.R. §404. Debarment lasts for a prescribed period of time, generally reflecting the perceived seriousness of the vendor’s conduct, while suspension generally lasts for the duration of any investigation or litigation involving the contractor.

The agency must also determine that the vendor is affirmatively “responsible” prior to awarding the contract. To be deemed to be responsible, the contractor must have “adequate financial resources” and a “satisfactory performance record,” among other things.

CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel; CRS Report RL34753, *Debarment and Suspension of Government Contractors: Legal Overview*, by Kate M. Manuel

Inclusion of Specific Contract Terms

Certain terms must be included in any contract that the government enters, and agencies are, in some cases, prohibited from entering the contract unless the vendor agrees to specific terms (e.g., terms obligating the vendor to subcontract certain amounts and percentages of the work to small businesses, 15 U.S.C. §637(d)(4)(D)). Such required terms address a range of topics, including payment of locally prevailing wages and fringe benefits (e.g. 48 C.F.R. Subparts 22.4 & 22.10); antidiscrimination and affirmative action obligations (e.g., 48 C.F.R. Subpart 22.8); and notification of employee rights under the National Labor Relations Act (e.g., 48 C.F.R. Subpart 22.16).

Protests of Solicitations and Awards

Agencies could face challenges to the terms of their solicitations, or proposed contract awards, in the form of “bid protests.” Such protests can be heard by the procuring agency, the Government Accountability Office (GAO), and the U.S. Court of Federal Claims. The protester must show that the challenged agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law to prevail on the merits. However, even if the protester does not prevail on the merits, the filing of a protest could delay contract award or performance, particularly in the case of protests timely filed with GAO—which often results in an automatic stay of contract award or performance. The agency could also opt to take corrective action on its own, without a judgment on the merits.

See CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz; CRS Report R40227, *GAO Bid Protests: Trends and Analysis*, by Moshe Schwartz, Kate M. Manuel, and Lucy P. Martinez.

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