Introduction to Federal Procurement and Equipment Leasing Issues

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Summary

1. Is leasing different in federal procurement?
2. The procurement lifecycle
3. Government v. commercial contracting
4. Formation of contracts-sealed bid and negotiated procurement
5. GSA Multiple Award Schedules
6. Contract administration
7. Leasing Cases
8. Conclusions and Recommendations
Is Leasing by the Federal Government Different?

- The Federal Acquisition Regulations (“FAR”) System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. FAR 1.101 Purpose.
- Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease…. FAR 2.101 Definitions
The Government Contracts Lifecycle

FORMATION
- Solicitation (all parts)
- Sealed Bid
- Negotiated
- Commercial Items
- Multiple Award Schedules
- Task & Delivery Orders

COMPLETION
- Contract closeout
- Release

TERMINATIONS
- For default (reprocurement)
- For Government's convenience

OVERSIGHT
- Audits
- Investigations

AWARD
- Responsive offer
- Responsible contractor
- Protests

PERFORMANCE
- Delivery schedule
- Compliance with terms
- Quality Control

ADMINISTRATION
- Orders
- Inspection
- Acceptance
- Invoicing
- Prompt Payment
- Subcontracts

CHANGES
- Change orders/Constructive Changes
- Requests for Equitable Adjustment
- Claims
- Disputes
# Government Contracting v. Commercial Contracting

<table>
<thead>
<tr>
<th>Aspect</th>
<th>Commercial Contracting</th>
<th>Government Contracting</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Statutory &amp; Regulatory Framework</td>
<td>UCC, common law</td>
<td>USC Titles 10, 40, 41, FAR DFARS, others, UCC</td>
</tr>
<tr>
<td>2. Type of Contract</td>
<td>Mostly FFP, oral</td>
<td>FFP, Cost-reimbursement, no oral Full &amp; open</td>
</tr>
<tr>
<td>3. Competition Req’ts</td>
<td>No such requirement</td>
<td></td>
</tr>
<tr>
<td>4. Authority of Agents</td>
<td>Apparent authority</td>
<td>Only actual, written authority</td>
</tr>
<tr>
<td>5. Audits</td>
<td>Rare</td>
<td>Fact of life</td>
</tr>
<tr>
<td>6. Socioeconomic programs</td>
<td>Not required</td>
<td>Mandatory</td>
</tr>
<tr>
<td>7. Protests, claims &amp; disputes</td>
<td>None</td>
<td>Normal &amp; routine</td>
</tr>
<tr>
<td>8. Changes Clause*</td>
<td>Mutual agreement</td>
<td>Gov’t change order</td>
</tr>
<tr>
<td>9. T/C**</td>
<td>No such clause</td>
<td>Required</td>
</tr>
</tbody>
</table>

*Unique
**Most unique
Formation of Federal Equipment Leasing Contracts

• Full and Open Competition
  – Sealed Bidding
  – Negotiated Procurement
  – Federal Supply Schedules
Formation of Federal Equipment Leasing Contracts-SEALED BIDDING

• Invitation for Bids ("IFB")
• On Time Bid
• Responsive Bid (Conforms to IFB)
• Responsible Bidder
• Lowest Price
Formation of Government Contracts – NEGOTIATED PROCUREMENT

- Request for Proposals ("RFP")
- Proposals
- Evaluation by Agency-Competitive Range
- Discussions/Negotiations
- “Best Value” (Cost/Technical Tradeoff)
- Award to a Responsible Contractor that offers best value, even if not lowest price
## Sealed Bidding v. Negotiated procurement

<table>
<thead>
<tr>
<th>CHARACTERISTICS</th>
<th>SEALED BIDDING</th>
<th>NEGOTIATED PROCUREMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Initiating document</td>
<td>Invitation for Bids (IFB)</td>
<td>Request for Proposals (RFP) or Request for Quotations (RFQ)</td>
</tr>
<tr>
<td>2. Response (Offer)</td>
<td>Bid</td>
<td>Proposal</td>
</tr>
<tr>
<td>3. Specifications</td>
<td>Must be precise</td>
<td>Need not be definite</td>
</tr>
<tr>
<td>4. Minimum prospective offers</td>
<td>Two</td>
<td>May be sole source</td>
</tr>
<tr>
<td>5. Late bids or modifications</td>
<td>Considered only if delayed in mails or late primarily because mishandled by Government</td>
<td>Essentially the same</td>
</tr>
<tr>
<td>6. Amendment of solicitation (including specs.) after closing</td>
<td>Not allowed</td>
<td>Allowed</td>
</tr>
<tr>
<td>7. Withdrawal or modifications of offer after closing and before award</td>
<td>Not allowed</td>
<td>Offer may be withdrawn at any time before acceptance and may be modified as permitted</td>
</tr>
<tr>
<td>8. Selection criteria</td>
<td>Award only to low, responsive, and responsible bidder</td>
<td>Award in accordance with stated evaluation criteria (not necessarily low price)</td>
</tr>
<tr>
<td>9. Types of contracts awarded</td>
<td>Only fixed-price (with or without escalation)</td>
<td>May be fixed-price or cost-reimbursement type</td>
</tr>
</tbody>
</table>
Federal Supply Schedules (“FSS”) - General Services Admin. (“GSA”) Multiple Award Schedules (“MAS”) - 1

- Simplified process, pre-established contracts
- Competition in initial award only
- “Considered to be issued using full and open competition”
- $31.8 billion MAS purchases in FY 2004
- Usage fee to end-user agency
- Commercial items
Federal Supply Schedules ("FSS")-General Services Admin. ("GSA")  Multiple Award Schedules ("MAS")-2

• Safeguards in initial award
  – Data disclosure (commercial sales practices)
  – Certifications of accuracy and disclosure
  – Price reduction (most favored customer)
  – Audit rights

• Competition requirements
  – Statement of work – non DOD
  – Statement of work - DOD
Contract Administration – 1
Authority of Government Personnel

• Actual authority required--“apparent authority” is not enough. Authority must be in writing.

• Contractor must always ask about authority

• Contracting Officers with a “warrant”

• Contract Specialists, and Contracting Officer Tech Reps (“COTR”) HAVE NO AUTHORITY

• Administrative Contracting Officers only have such authority as delegated to them by the CO

• Only a CO can change a contract.
Contract Administration 2-Change Orders

- Unilateral right of government to make changes within the “general scope”
- Outside of general scope is a “cardinal change” and may be refused by contractor
- Contractor must continue the contract under the change order—may not stop work
- Only a CO may order a change, NOT an ACO
Contract Administration 3 - Terminations

- Termination for Convenience of the Government ("T/C")
- Termination for Default ("T/D")
  - Excess costs of reprocurement
  - Affect on past performance evaluations
Contract Administration 4 – Billing and Collection Issues

• Invoice in exact accordance with the contract – this must be done for the first and all subsequent invoices
• If not paid within 30 days of invoicing, write to CO
• If CO doesn’t resolve within 30 days, submit a claim under the Contract Disputes Act for an Unpaid, disputed invoice, request decision in 60 days
• If CO denies your claim, or fails to decide claim in 60 days it is “deemed denied” and you may appeal to a Board of Contract Appeal or Court of Fed. Claims
Equipment Leasing Cases in the Courts, Government Accountability Office and the Boards of Contract Appeals

- Sharp Electronics Corp., ASBCA No. 54475, 2004 Westlaw 1,747,419
- Mohammad Darwish Ghabban Est., ASBCA No. 51994, 00-2 BCA ¶ 21114
- Unisys Corp., ASBCA no. 49,083 et al., 02-BCA ¶ 31095
- Cramer Alaska, Inc., ASBCA no. 47725, 96-1 BCA ¶ 27971
- Goodfellow Bros., Inc., AGBCA No. 80-189-3, 1981 Westlaw 6981
- Delta Elec. Control Corp., ASBCA no. 21952, 77-2 BCA ¶ 12706
- Charles E. Cope, AGBCA no. 328, 73-2 BCA ¶ 10090
- Northridge Bank, Req. for Recon., B-184665, Dec. 15, 1976, 76-2 CPD ¶ 487
- Shafco Indus., Inc., IBCA No. 1447-3-81, 82-1 BCA ¶ 15683
- Supreme Equip. & Sys. Corp., ASBCA No. 20079, 76-1 BCA ¶ 11858
Conclusions & Recommendations

• Leasing is a Subset of Federal Procurement; statutes & regulations apply
• Always find out the written, delegated authority of the government official who is directing you
• Ensure that your company is in full compliance with solicitations and contract terms and conditions
• Suggestion: Include in proposal & contract a statement: Gov’t must notify contractor in writing 30 days in advance of lease end, and request removal of equipment
• If you have a problem in formation, administration or collection of invoices, contact government contracts counsel. Dick Lieberman, 202-775-5560, rlieberman@mshpc.com. These problems can be solved.
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