



EMERGING CONTRACTING ISSUES AND HOT TOPICS

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AGENDA

Environment

New Source Selection Guide

*New Incentive and Contract Types Direction
Services (DoD 5000.74)*

Emerging Issues

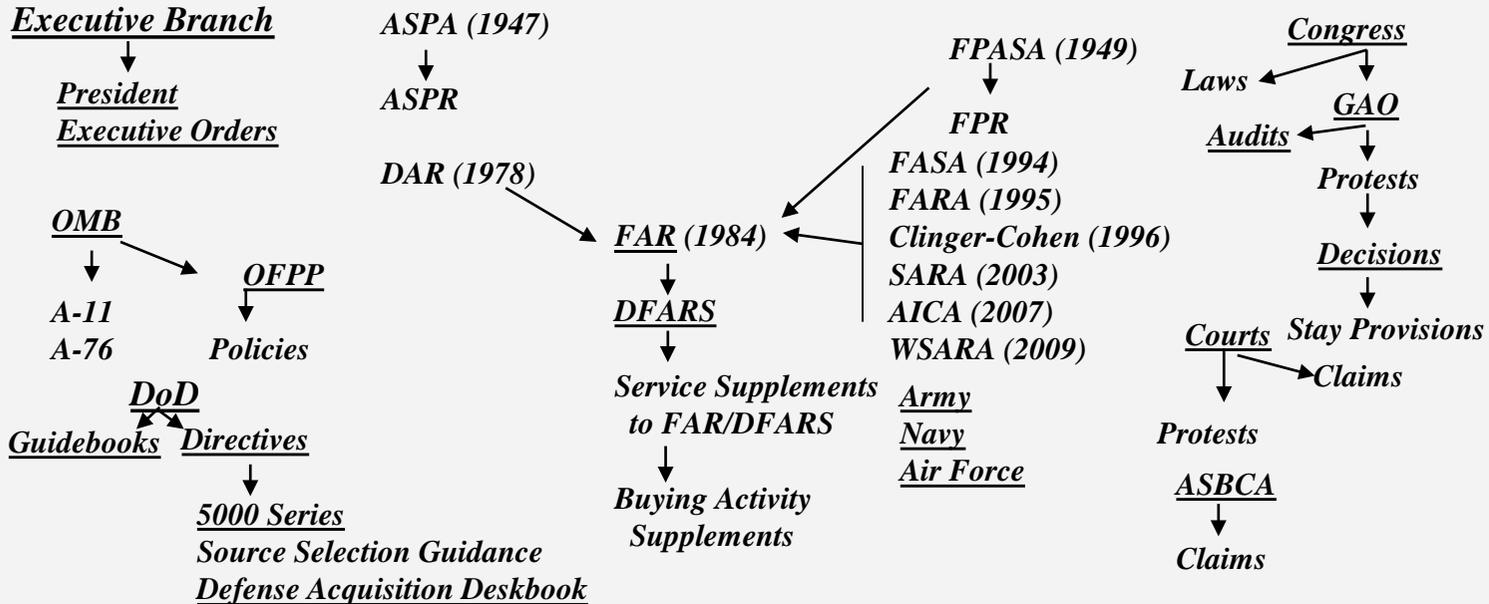
- *Executive Orders*
- *NDAA*

AT&L/DPAP Direction & Hot Topics

Other Issues

Questions

CONTRACTING ENVIRONMENT OVERSIGHT AND GUIDANCE



OMB-Office of Mg & Budget, OFPP-Office of Federal Procurement Policy, ASBCA- Armed Services Board of Contract Appeals, ASPA- Armed Services Procurement Act, ASPR- Armed Services Procurement Regulation, DAR-Defense Acquisition Regulation FAR- Federal Acquisition Regulation, DFARS- Defense Federal Acquisition Regulation Supplement, FPASA- Federal Property & Administrative Services Act, FPR- Federal Procurement Regulation, FASA- Federal Acquisition Streamlining Act, FARA- Federal Acquisition Reform Act, SARA – Service Acquisition Reform Act, GAO- General Accounting Office – WSARA Weapons Systems Acquisition Reform Act

LAWS AFFECTING GOV CONTRACTING

<u>Public Law Name</u>	<u>Result</u>
Purveyor of Public Affairs Act of 1795	Allowed the government to buy needed supplies and materials to perform government functions.
Civil Sundry Appropriations Act of 1861	Continued the principle of advertised procurements for the next 86 years.
Sherman Antitrust Act of 1890	Protected small companies and their labor force from large business.
Eight-Hour Work Law of 1892	Set the eight-hour workday.
The Davis-Bacon Act of 1931	Set the minimum wage on the construction site at the local prevailing wage.
Walsh-Healey Public Contracts Act of 1936 (law drastically changed in 1994)	Required a supplier to certify that it was the manufacturer or a regular dealer. This was an attempt to do away with the "broker."
Armed Services Procurement Act of 1947	Continued the sealed bid as the preferred method of procurement, placed procurement rules in one location and gave us the Armed Services Procurement Regulation (ASPR), which was the beginnings of today's rulebook, the FAR.
Small Business Act of 1953	Established the Small Business Administration.
Buy American Act	Required the government to buy only American products.

LAWS AFFECTING GOV CONTRACTING

<u>Public Law Name</u>	<u>Result</u>
Berry Amendment of 1941, (later modified in 1994, 2002 and 2006)	Mandated that the Department of Defense buys certain items from U.S. or qualifying countries.
Truth in Negotiation Act of 1962	Required both prime and subcontractors on contracts over \$500,000 to certify the cost data submitted under the solicitation.
Public Law 95-507, Amendment to the Small Business Act (1978)	Formalized the Small Business Subcontracting Plan requirement in contracts over \$500,000 to large businesses. Set goals for large primes.
Federal Acquisition Streamlining Act of 1994 (FASA)	Repealed or substantially modified more than 225 statutes to simplify the federal procurement process, reduce paperwork, & and transform the SAP process to electronic commerce.
Federal Acquisition Reform Act of 1996 (FARA) or (Clinger-Cohen Act)	Before FASA could be fully implemented, this Act became law and corrected some deficiencies in the earlier legislation and made more changes.
Services Acquisition Reform Act of 2003	Codifies the guidance and flexibility on how we acquire services.
Weapon Systems Acquisition Reform Act of 2009 (WSARA)	Measures to address problematic issues facing the defense acquisition process. Key goals include limiting cost overruns, strengthen oversight and accountability, enhance competition and end conflicts of interest in the weapons acquisition process.

FAR AND DFARS/PGI CHANGES

86 Federal Acquisition Circulars (FACs) issued since March 2005 [Through FAC 2005-86]

- + 4 Amendments
- + 1 Technical Amendment
- + 4 Revisions
- + 1 Addendum [20 pages]
- + 1 Thresholds Matrix [34 pages]
- + 10 Corrections

198 Defense FAR Supplement Publication Notices¹ issued since January 2008 [Through DPN 20160216]

58 Open FAR Cases

44 Open DFARS Cases

[¹ Previously Designated Defense FAR Supplement Change Notices]

These changes do not even take into account the myriad of USD(AT&L) and DPAP policy memoranda.

Last Change — 16 February 2016

MEASURING ACQUISITION REFORM

01 October 2014	Golf Ball	Band-aids	Delta	Index
Radius	0.84	2.30	1.4582	2.7359
Diameter	1.68	4.60	2.9164	2.7359
Circumference	5.28	14.44	9.1648	2.7373
Volume	2.48	50.85	48.3626	20.4797
Measurements in inches				

Measuring Acquisition Reform



FY 2008

FY 2009

FY 2010

FY 2011

FY 2012

FY 2013

FY 2014

FY 2015

EMERGING CONTRACTING ISSUES



They're Helping Me Again



REVISED DEPARTMENT OF DEFENSE SOURCE SELECTION GUIDANCE



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REVISED DOD SOURCE SELECTION PROCEDURES

- Published 1 April 5 Jan 2016
- It Now Identifies Three Different Approaches to Source Selection:
 - Full Tradeoff
 - **Value Adjusted Total Evaluated Price (VATEP) Tradeoff**
 - Low Price Technically Acceptable

Value Adjusted Total Evaluated Price (VATEP) Tradeoff

- **Total Evaluated Price Determine For Each Offeror**
- **SSA Must Then Determine If The Higher Rated Technical Offeror Is Worth The Additional Cost**
 - VATEP Value is identified in the RFP
 - Offer should be able to calculate if the additional cost of offering better performance will make them more competitive
 - Provides the Source Selection Team the ability to assign a monetary value, or “monetize” the higher rated technical attributes (thus taking some subjectivity out of the best value evaluation).

FIGURE B-1: SUBJECTIVE TRADEOFF SCENARIO

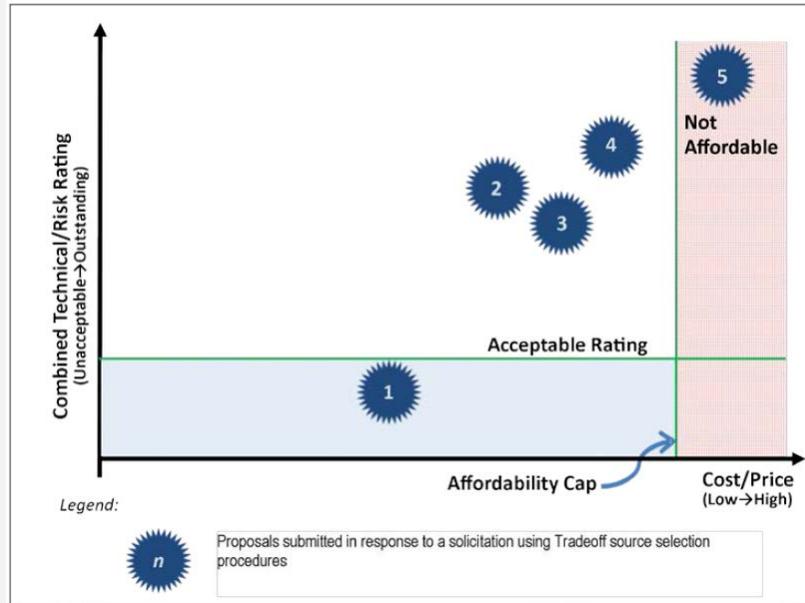


FIGURE B-2: VATEP TRADEOFF SCENARIO

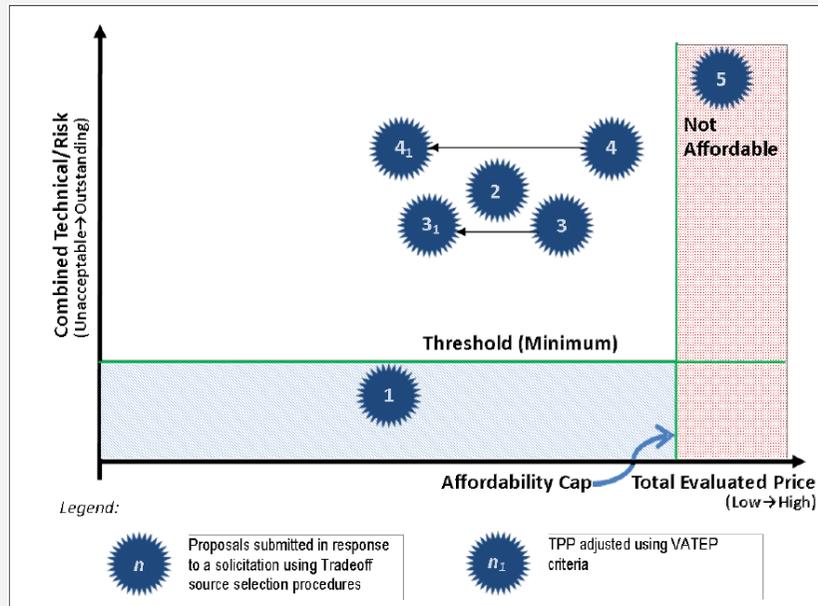
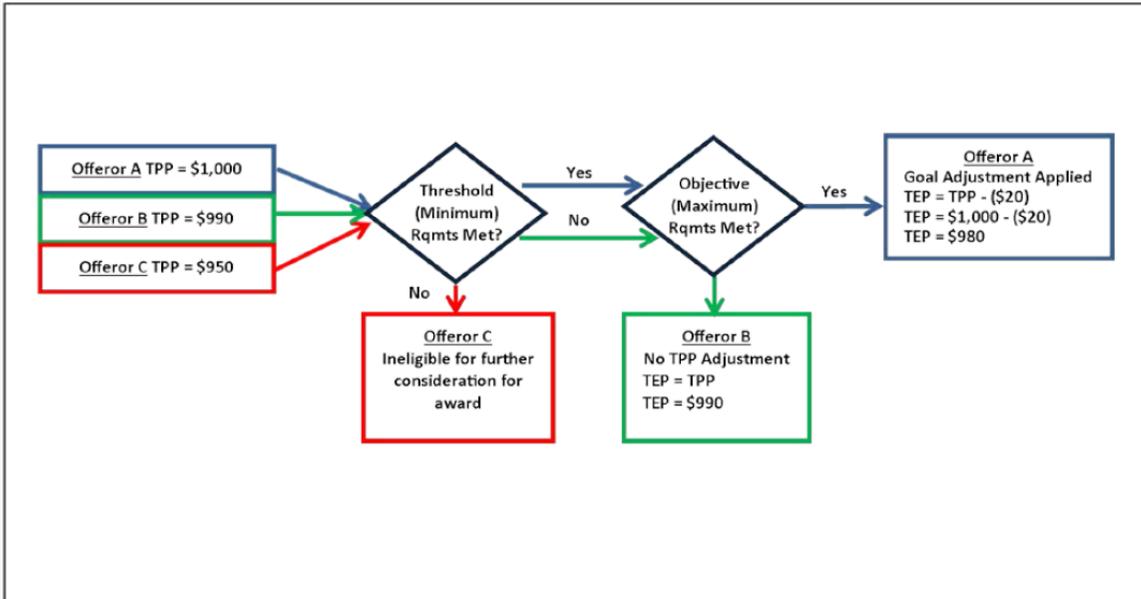
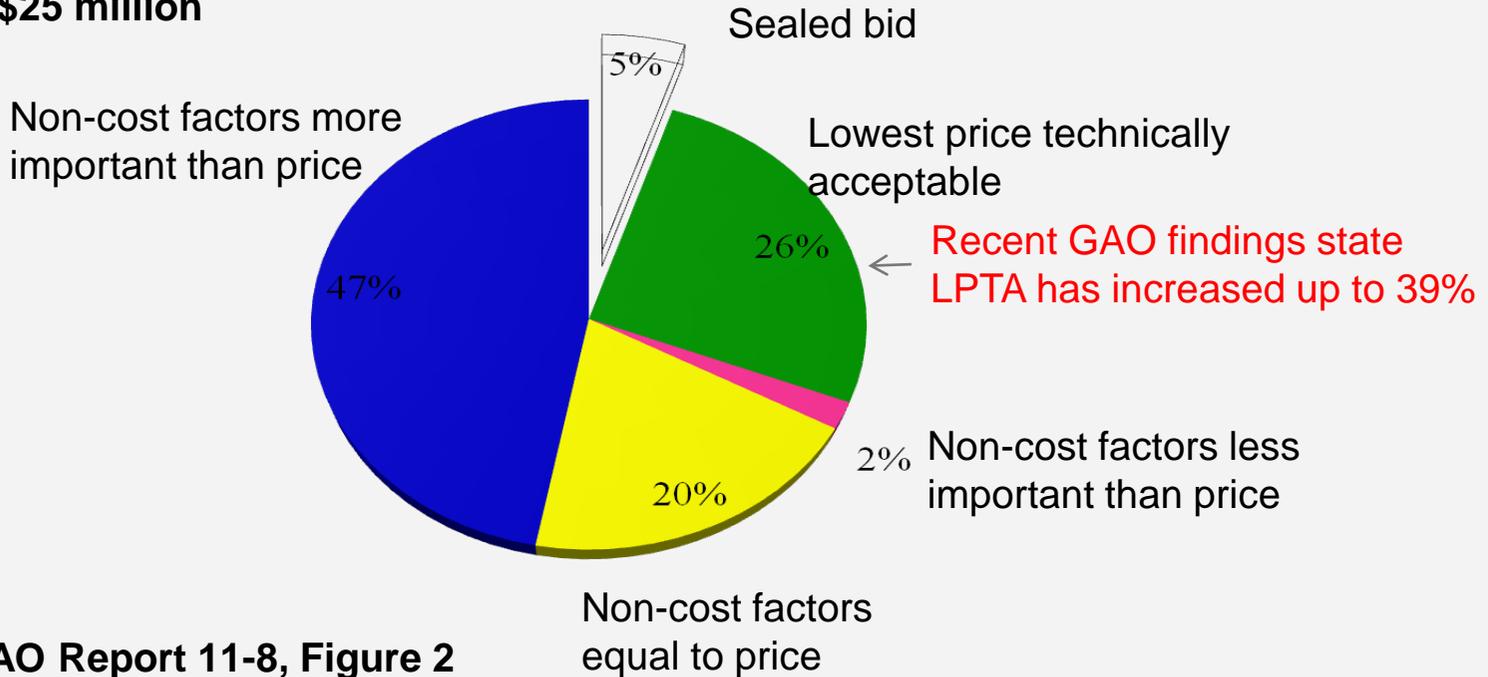


FIGURE B-3: VATEP ADJUSTMENT EXAMPLE



SOURCE SELECTION APPROACHES

Estimated Frequencies of Source Selection Approaches Used in Fiscal Year 2009 for New, Competitively Awarded DOD Contracts Obligating over \$25 million



GAO Report 11-8, Figure 2

BBP 2.0 GUIDANCE ON SOURCE SELECTION

When Lowest Price Technically Acceptable is used, define Technically Acceptable to ensure needed quality

When LPTA is used as a source selection technique, Section M of the RFP and the Source Selection Plan must clearly describe the minimum requirements that will be used to determine the acceptability of the proposal.

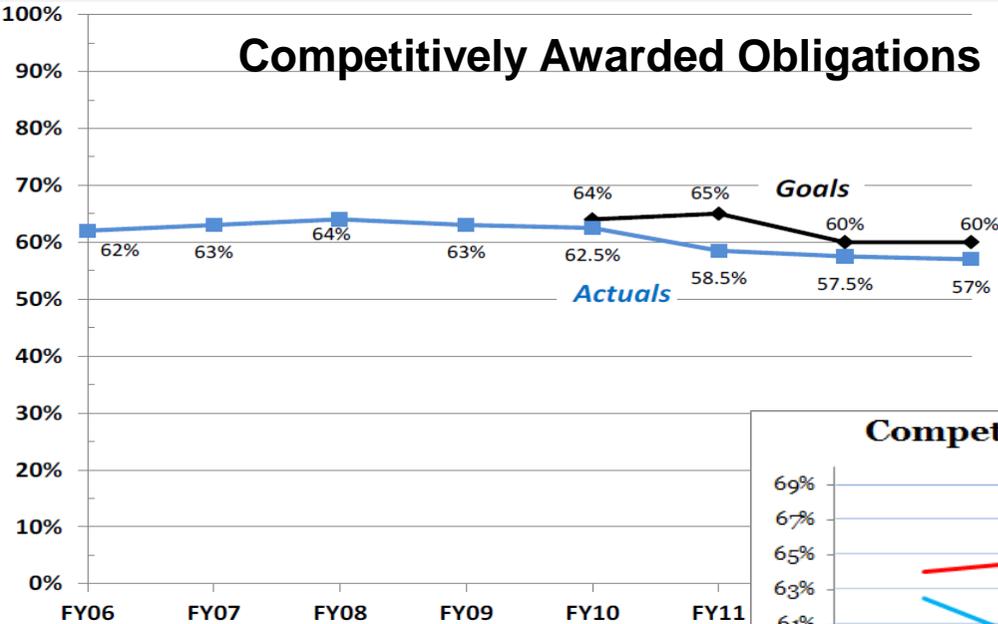
Better define value in “best value” competitions

[Tradeoff Process]

The Department routinely sets “threshold” and “objective” level requirements for the products it acquires and also routinely defaults to threshold performance as the basis for selecting a product. This initiative directs the Components, where possible, to quantify the value, in terms of an increased premium they will pay, for proposals above the threshold level of performance and to include this information in solicitations to industry.

COMPETITION TRENDS: GOALS AND ACTUALS

Competitively Awarded Obligations



Competitively-Awarded Contracts

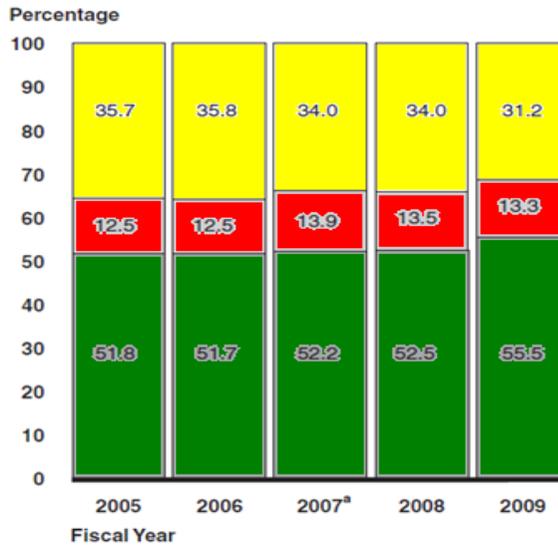


Source: DoD

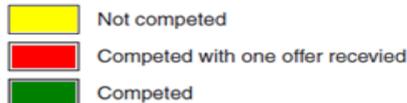
Performance of the Defense Acquisition System
2014 Annual Report

PROMOTE ~~REAL~~ EFFECTIVE COMPETITION

Figure 1: Percentage of Federal Obligations to Competitive, Noncompetitive, and Competed Contracts with One Offer Received for Fiscal Years 2005 through 2009 (Constant Dollars)



Total obligation (in billions)	2005	2006	2007 ^a	2008	2009
	\$430	456	477	514	543



GAO-10-833

**Competition in
Federal
Contracting**



GUIDANCE ON USING INCENTIVE AND OTHER CONTRACT TYPES

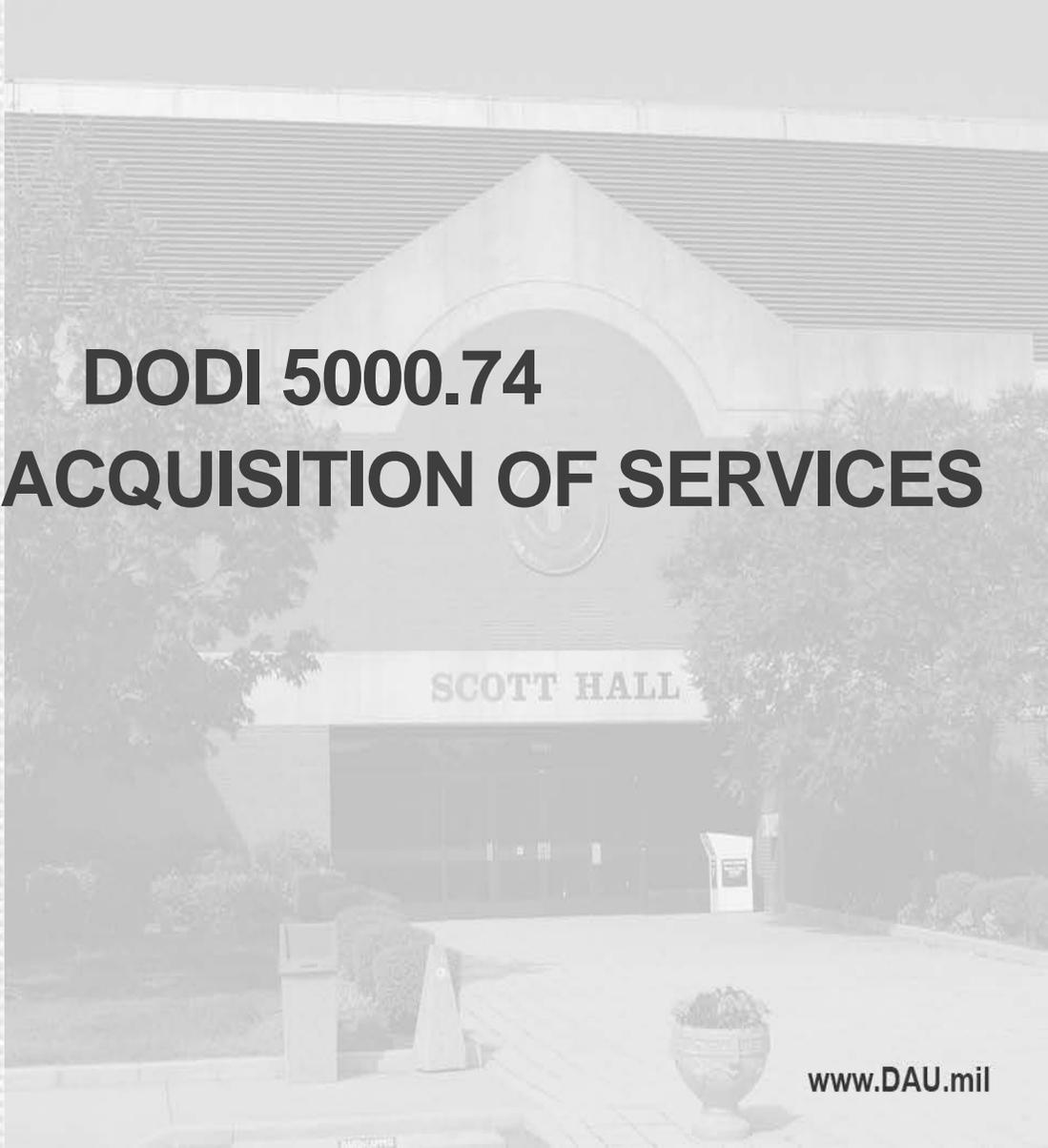
Guidance on using incentive and other contract types

- Published 1 April 5 Jan 2016
- **Addresses considerations that should be taken into account when selecting and negotiating the most appropriate contract type for the requirement**
 - No preconceived ideas on which contract type is best – determine the best business solution
 - No additional contract types identified
 - Identifies when you might use different incentives
 - Elaborates on the use of incentives and the negotiation of incentives



DODI 5000.74

DEFENSE ACQUISITION OF SERVICES



DODI 5000.74 OVERVIEW

- Published 5 Jan 2016
- Incorporates and cancels Enclosure 9 of DoDI 5000.02 (8 Dec, 2008)
- General instructions plus 7 enclosures that:
 - Establishes policy, assigns responsibilities, provides direction
 - Implements management structure for acquisition of services
 - Authorizes decision authorities to tailor procedures
 - Mandates data collection to provide management information

DODI 5000.74 ENCLOSURES

Encl. 1: References

Encl. 2: Responsibilities

Encl. 3: Oversight of Contracted Services Portfolios

Encl. 4: Key Services Acquisition Management Roles, Responsibilities

Encl. 5: Requirements Development, Validation and Oversight

Encl. 6: Data Collection, Reporting, and Inventory of Contracted Services

Encl. 7: Considerations for IT Services (including IT as-a-service)

DODI 5000.74 APPLIES TO:

- **DoD acquisition of services from private sector entities (estimated value greater than SAT)**
- **Acquisition of all advisory and assistance services in support of research and development or construction activities categorized within the knowledge-based services portfolio group**

DODI 5000.74 DOESN'T APPLY TO SERVICES...

- Managed and reviewed as part of defense acquisition programs and IT programs
- Meeting Major Automated Information Systems thresholds (including software as a service)
- Included in non-major programs whose primary purpose is to provide capabilities, goods, or systems in accordance with DODI 5000.02
- Listed in FAR 37.502 (personal service, below SAT, etc.)

DODI 5000.74 DOESN'T APPLY TO SERVICES...

- Included in classified, cryptologic, and intelligence projects (except to the extent practical at discretion of senior officials)
- From DoD Federally Funded Research and Development Centers
- In direct support of declared overseas contingency, humanitarian or peacekeeping operations as defined in FAR 2.101
- Required to respond/recover from an emergency or disaster (Presidential declaration)

SERVICE ACQUISITION CATEGORIES (S-CATS)

Category	Threshold	Decision Authority
Services Category I	Estimated total value \geq \$1B or $>$ \$300M in any one year	USD(AT&L) or designee, or Military Department Service Acquisition Executive (SAE) or designee
Special Interest	As designated by USD (AT&L)	USD(AT&L) or designee
Services Category II	Estimated total value \geq \$250M but $<$ \$1B	USD(AT&L) or designee, or Military Department SAE or designee
Services Category III	Estimated total value \geq \$100M but $<$ \$250M	Senior Services Manager (SSM) or designee
Services Category IV	Estimated total value \geq \$10M but $<$ \$100M	SSM or designee
Services Category V	Estimated total value \geq Simplified Acquisition Threshold but $<$ \$10M	SSM or designee



**“CARL LEVIN AND HOWARD
P. ‘BUCK’ MCKEON
NATIONAL DEFENSE
AUTHORIZATION ACT ”
(2015 NDAA)**

SEC 816 RESTATEMENT & REVISION OF REQUIREMENTS APPLICABLE TO MULTI-YEAR DEFENSE ACQS. TO BE SPECIFICALLY AUTHORIZED BY LAW

When > \$500M, DoD can't enter into a Multi-Year unless the contract is specifically authorized by law in an Act [other than the appropriations Act](#)

The SECDEF's request of a specific authorization shall include:

- Preliminary Findings
- Confirmation that the Preliminary Findings were made after the completion of Cost Analysis performed by the Director of Cost Assessment and Program Evaluation

SECDEF must also certify that:

1. Use of Multi-Year will result in substantial savings . . .
2. Minimum need is expected to remain substantially unchanged . . .
3. Reasonable expectations . . . Agency will request funding. . .
4. Stable design . . . technical risks are not excessive
5. Estimates for contract costs and cost avoidance via multi-year are realistic
6. Contract will promote the national security

SEC 817 SOURCING REQUIREMENTS RELATED TO AVOIDING COUNTERFEIT ELECTRONIC PARTS

Authorizes obtaining electronic parts from alternate supplies if such parts are not available from the original manufactures, authorized dealers, or supplies identified as “**trusted suppliers**” in accordance with regulations pursuant to subparagraphs.

Procedures must put in place a mechanism for identifying trusted suppliers

Sec 833 (2013 NDAA) and Sec 818 (2014 NDAA) also addressed counterfeit parts:

- The cost of counterfeit electronic parts and suspected counterfeit electronic parts and cost of rework/corrective action for the use of inclusion of these parts are not allowable und DoD contracts unless:
 - Contractor as an operational system to detect and avoid counterfeit parts and suspected parts that has been reviewed and approved by DoD
 - The Counterfeit parts were provided to the contractor as Government Property IAW FAR Part 45
 - The contractor provides timely notice to the Government



NATIONAL DEFENSE AUTHORIZATION ACT ' (2016 NDAA)



Section 805 Amendment Relating to Multiyear Contract Authority for Acquisition of Property

This section would amend section 2306b(a) of title 10, United States Code, to **allow the head of an agency to enter into multiyear contracts for the acquisition of property if there is a reasonable expectation that the use of a multiyear contract would result in lower total anticipated costs** of carrying out the program than if the program were carried out through annual contracts.

- This **section would strike the existing requirement that the head of an agency must determine that substantial savings would be achieved before entering into a multiyear contract.**

TITLE VIII-ACQ POLICY, MANAGEMENT & RELATED MATTERS

SUBTITLE C - PROVISIONS RELATED TO MDAPS

Sec 828. **Penalty for Cost Overruns:** The Secretary of each military department shall pay a penalty for cost overruns on covered MDAPs of the military department.

- **Calculation of Penalty:** 3% of the cumulative amount of cost overruns of the military department in a FY.
 - Cumulative overrun is a military department is the sum of overruns and underruns for covered MDAPs in the FY.
 - Joint programs penalties to be allocated among the military departments as determined by USD(AT&L).
- **Transfer of Funds:** Secretary of military department shall reduce RDT&E account by percentage to equal cost overrun penalty.
 - Reduction shall occur within after the end of each FY
 - Amount shall be credited to the Rapid Prototyping Fund (Sec 804 of NDAA)
- **Applicability:** MDAP impacted if original Baseline Estimate was established on/after WSARA (22 May 09)

TITLE VIII-ACQ POLICY, MANAGEMENT & RELATED MATTERS

SUBTITLE C - PROVISIONS RELATED TO MDAPS

OTHER SECTIONS OF INTEREST

- Sec 821. Acquisition Strategy Required for Major Programs, MDAP & MAIS
 - No major change in status quo. [Codifies that each program shall have an approved acquisition strategy by the MDA.](#)
 - Discusses the content of the Acquisition Strategy.
- Sec 822. Revision to Requirements Related to **Risk Management** in Development of MDAP and Major Systems. [Initial Acq Strategy shall have a comprehensive approach to managing and mitigating risk.](#)
- Sec 823. Revisions of [MS A Decision Authority Responsibilities for MDAPs. Before granting MS A approval MDA shall ensure:](#)
 - Information is sufficient to warrant entry into risk reduction phase
 - Concurrence on cost, schedule, technical feasibility, and performance tradeoffs
 - Sound plans for progression to the development phase
- Sec 824. Revisions of [MS B Decision Authority Responsibilities for MDAPs. Before granting MS B approval MDA shall ensure:](#)
 - PDR and formal post PDR assessment complete; certify high likelihood of accomplishing intended mission
 - Certify technology demonstration in relevant environment
 - Codify due diligence with regard to affordability, tradeoffs, reasonable cost and schedule estimates, funding available, market research, complete AOA, JROC analysis, life-cycle planning, etc.

SECTION 835 REVIEW OF GOVERNMENT ACCESS TO INTELLECTUAL PROPERTY RIGHTS OF PRIVATE SECTOR FIRMS

- Requires the Secretary of Defense to enter into a contract with an independent entity with appropriate expertise to conduct a review of Department of Defense regulations and practices related to Government access to and use of **intellectual property rights of private sector firms**.
 - Independent entity shall consult with the National Defense Technology and Industrial Base Council
 - Secretary must submit a report on the findings of the independent entity, along with a description of any actions that the Secretary proposes to revise and clarify laws or that the Secretary may take to revise or clarify regulations related to intellectual property rights to the congressional defense committees not later than March 1, 2016



Other Issues

PROPER USE OF INTERAGENCY AGREEMENTS



A Violation of the Antideficiency Act?



PROPER USE OF INTERAGENCY AGREEMENTS

GAO Reports, “Interagency Contracting: Franchise Funds Provide Convenience, but Value to DoD is Not Demonstrated.”

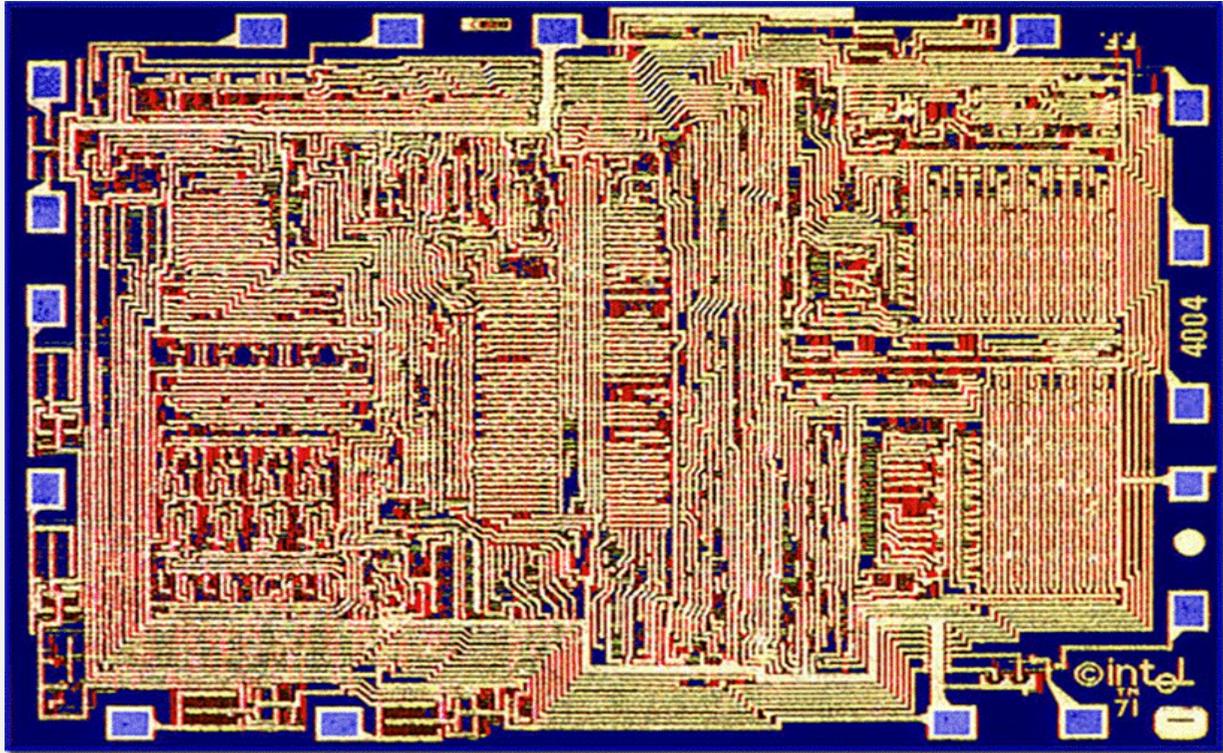
Importance of understanding shared responsibilities

Teamwork and communication are critical

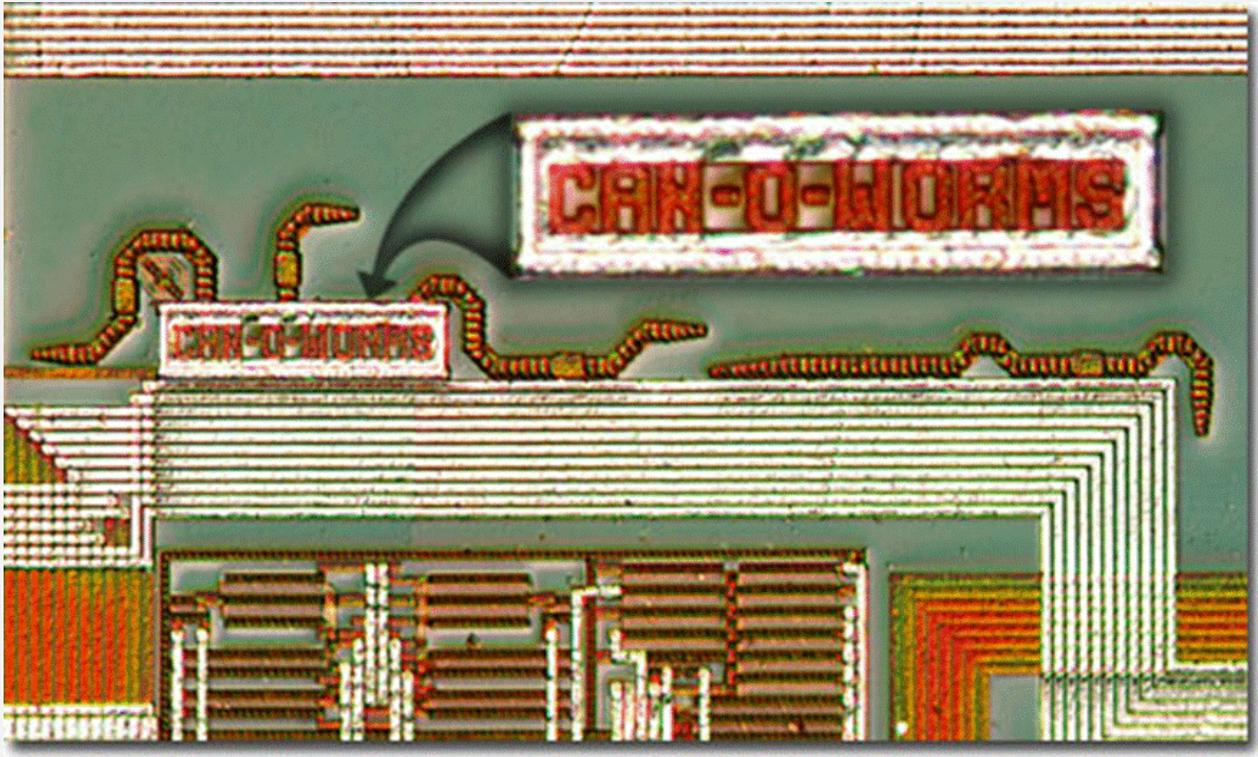
Customer must provide sufficiently detailed requirement

Decision to use Interagency Acquisition is a business decision with shared responsibilities

DATA VULNERABILITY



SUPPLY CHAIN MANAGEMENT





“DATA VULNERABILITY” PROVISIONS AND CLAUSES

- DFARS 252.204-7012 Safeguarding of Unclassified Controlled Technical Information. [Clause]
- DFARS 252.209-7001 Disclosure of Ownership or Control by the Government of a Terrorist Country. [Provision]
- DFARS 252.209-7002 Disclosure of Ownership or Control by a Foreign Government. [Provision]
- DFARS 252.239-7001 Information Assurance Contractor Training and Certification. [Clause]
- DFARS 252.239-7000 Protection Against Compromising Emanations. [Clause]
- DFARS 252.239-7017 Notice of Supply Chain Risk. [Provision]
- DFARS 252.239-7018 Supply Chain Risk. [Clause]

GOVERNMENT PROPERTY

- **DoD needs to strengthen the accountability and management of personal property owned by DoD when the property is provided to contractors for contract performance**
- **FAR and DFARS clauses are not being included in solicitations and contracts as required**
- **Accountability and auditability of Government-Furnished Property (GFP) cannot be achieved if contracts do not contain the appropriate contract clauses**

GOVERNMENT PROPERTY

MANDATORY

FAR 52.245-1 **Government Property**, in all cost type and T&M solicitations and contracts, and in labor hour and fixed-price solicitations and contracts when the Government will provide property.

FAR 52.245-9 **Use and Charges**, in solicitations and contracts when the clause at 52.245-1 is included.

DFARS 252.245-7001 **Tagging, Labeling, and Marking of Government-Furnished Property**, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

DFARS 252.245-7002 **Reporting Loss of Government Property**, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

DFARS 252.245-7003 **Contractor Property Management System Administration**, in solicitations and contracts containing the clause at FAR 52.245-1, Government Property.

DFARS 252.245-7004 **Reporting, Reutilization, and Disposal**, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

DFARS 252.211-7007 **Reporting of Government-Furnished Property**, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

OPTIONAL

DFARS 252.245-7000 **Government-Furnished Mapping, Charting, and Geodesy Property**, in solicitations and contracts when mapping, charting, and geodesy property is to be furnished.

Defense Statutory Acquisition Workforce

Career Field	Army	Navy	Air Force	4th Estate	Totals
Auditing	0	0	0	4,560	4,560
Business - Cost Estimating	250	548	438	73	1,309
Business - Financial Mgmt	1,766	1,879	1,850	647	6,142
Contracting	8,211	5,725	8,413	7,477	29,826
Engineering	8,981	19,797	8,473	1,991	39,242
Facilities Engineering	1,530	5,039	4	44	6,617
Industrial/Contract Property Mgmt	49	57	22	261	389
Information Technology	1,704	2,185	1,098	789	5,776
Life Cycle Logistics	7,554	5,715	2,907	1,548	17,724
Production, Quality and Manufacturing	1,432	2,675	330	5,234	9,671
Program Management	3,263	5,949	5,242	1,549	16,003
Purchasing	265	501	80	359	1,205
S&T Manager	290	434	2,559	118	3,401
Test and Evaluation	2,037	3,179	2,975	378	8,569
Unknown	10	2	4	15	31
Totals	37,342	53,685	34,395	25,043	150,465

Source: AT&L Workforce DataMart; FY14 Final Data

CONTRACTING CERTIFICATION

Level I Certification

CON 090

Federal Acquisition Regulation
(FAR) Fundamentals

4 weeks classroom

CON 100

Shaping Smart Business
Arrangements

20 hrs, online

CON 115

Contracting Fundamentals

45 hrs, online

CLC 058

Introduction to Contract Pricing

2 hrs, online

CON 170

Fundamentals of Cost and
Price Analysis

10 days classroom

CLC 033

Contract Format and Structure

Knowledge based

Level II Certification

ACQ 101

Fundamentals of Systems
Acquisition Management

25 hrs, online

CON 200

Business Decisions for
Contracting

19 hrs, online

CON 216

Legal Considerations in
Contracting

23 hrs, online

CON 270

Intermediate Cost & Price
Analysis

10 days classroom

CON 280

Source Selection and
Administration of Service
Contracts

10 days classroom

CON 290

Contract Administration and Negotiation
Techniques in a Supply Environment

10 days classroom

CLC 051

Industrial Property

CLC 056

Analyzing Contract Costs

CLC 057

Performance Based Payments &
Value of Cash Flow

HBS 428

Negotiations

Application/case based

Level III Certification

ACQ 201A

Intermediate Systems
Acquisition, Part A

25 hrs, online

CON 360

Contracting for Decision Makers

Online

9.5 days classroom

Choice of:

- ACQ 265 - Mission Focused Svs
- ACQ 370 - Acquisition Law
- CON 232 - Overheads
- CON 334 - Adv Contingency Con
- CON 235 - Adv Contract Pricing
- CON 244 - Construction
- CON 250 - Modified CAS

**1 CLM: Harvard
Business Series**

Case/scenario based

QUESTIONS?

