



World Bank's 11th Public Procurement Knowledge Exchange Platform

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Contract Oversight in the U. S.

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U.S. Government Accountability Office

Overview

- The U. S. Government Accountability Office
- U.S. Procurement System
- Procurement Oversight
- Bid Protests

Branches of Federal Government

Legislative Branch (Congress):

*Government
Accountability Office is
investigative arm of
Congress*

Judicial Branch:

*All U.S. Courts,
including the
Court of Federal
Claims*

Executive Branch:

*Examples of Agencies:
Department of Defense
Department of State
USAID*

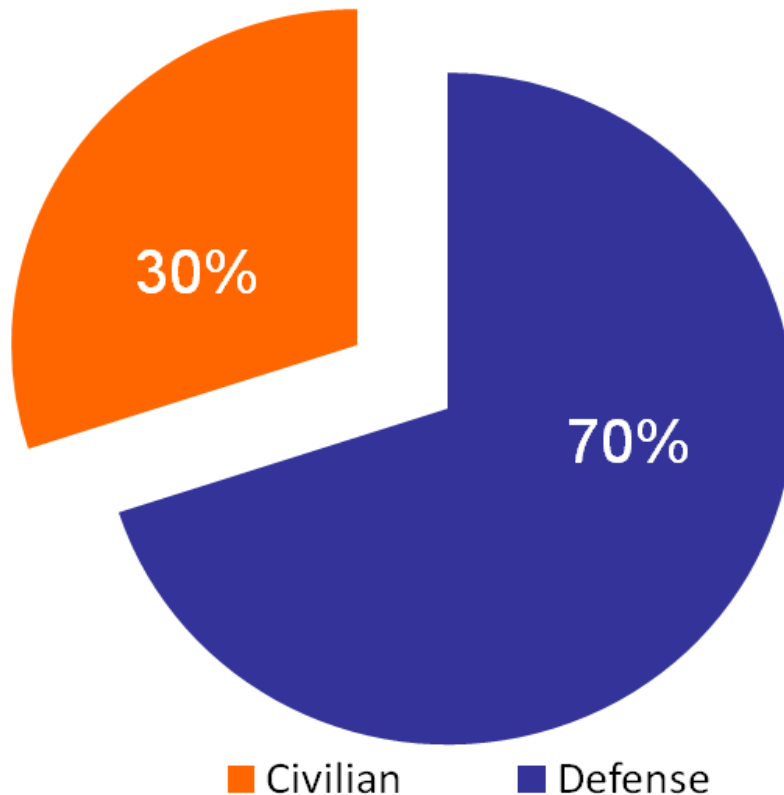
Office of Management &
Budget, Office of Federal
Procurement Policy

Who is GAO?

- GAO is an independent, nonpartisan agency in the legislative branch of the US Government
- Founded in 1921, GAO has a broad mandate to investigate how federal dollars are spent
- GAO is independent from the executive branch
- Workforce of 3,000 is organized by subject area into 14 different mission teams ranging from acquisition to defense capabilities to homeland security to physical infrastructure

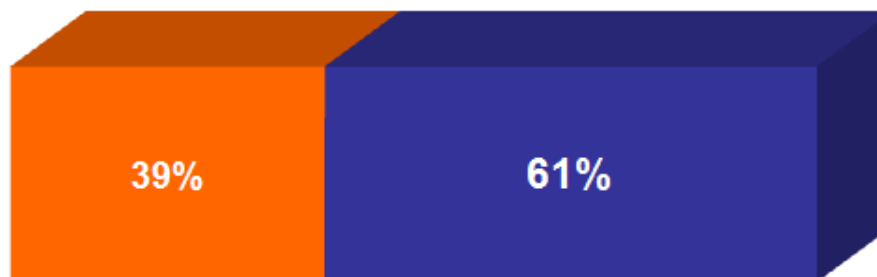
Federal Government: Civilian and Defense Contracts

Annual Contract Obligations

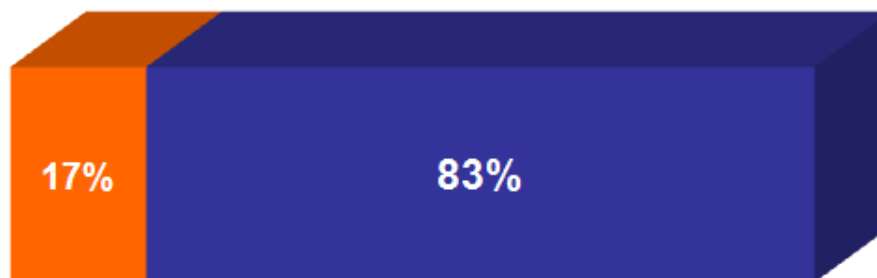


Federal Government: Products and Services

Comparison of Annual Contract Obligations



Services



Products

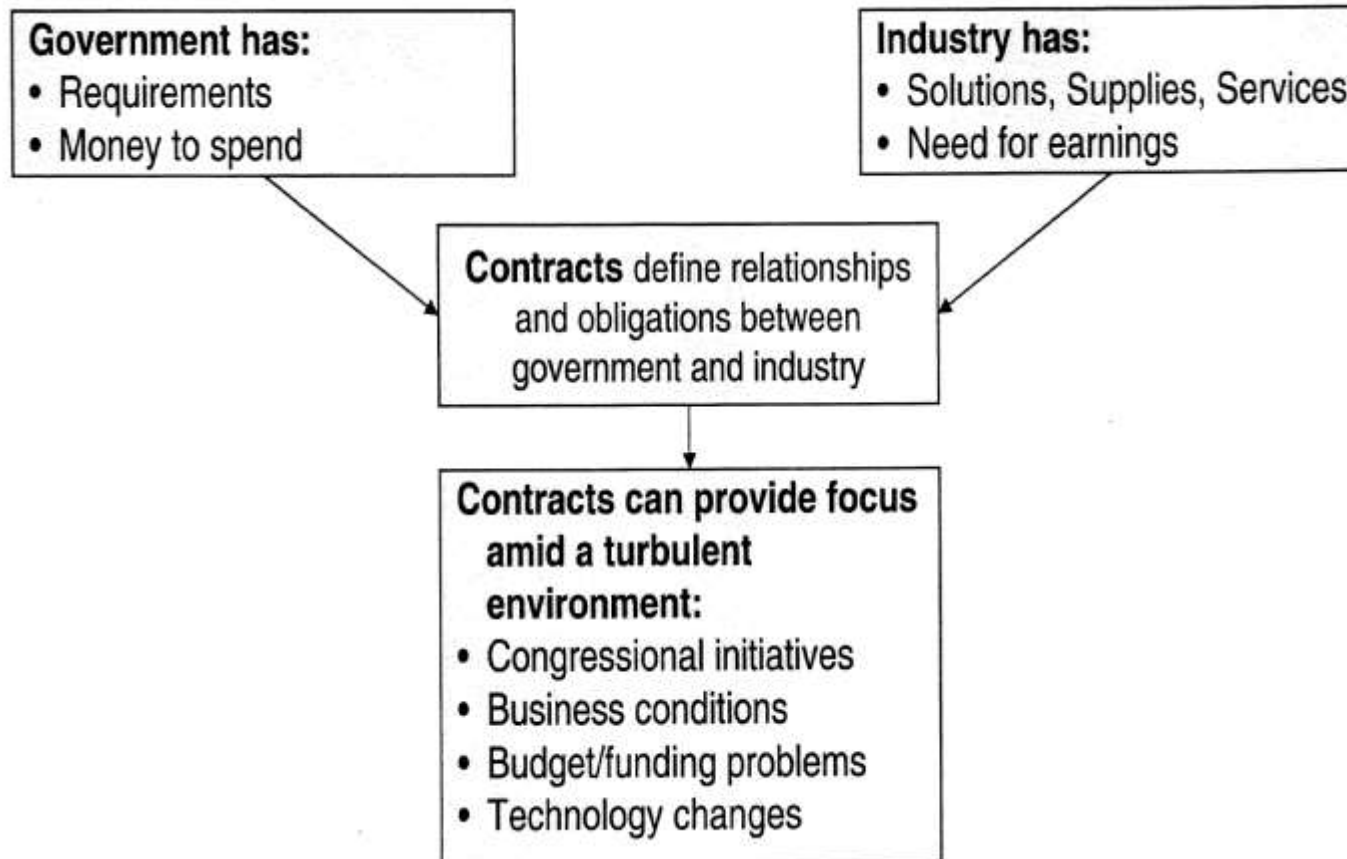
■ Civilian ■ Defense

What is a contract?

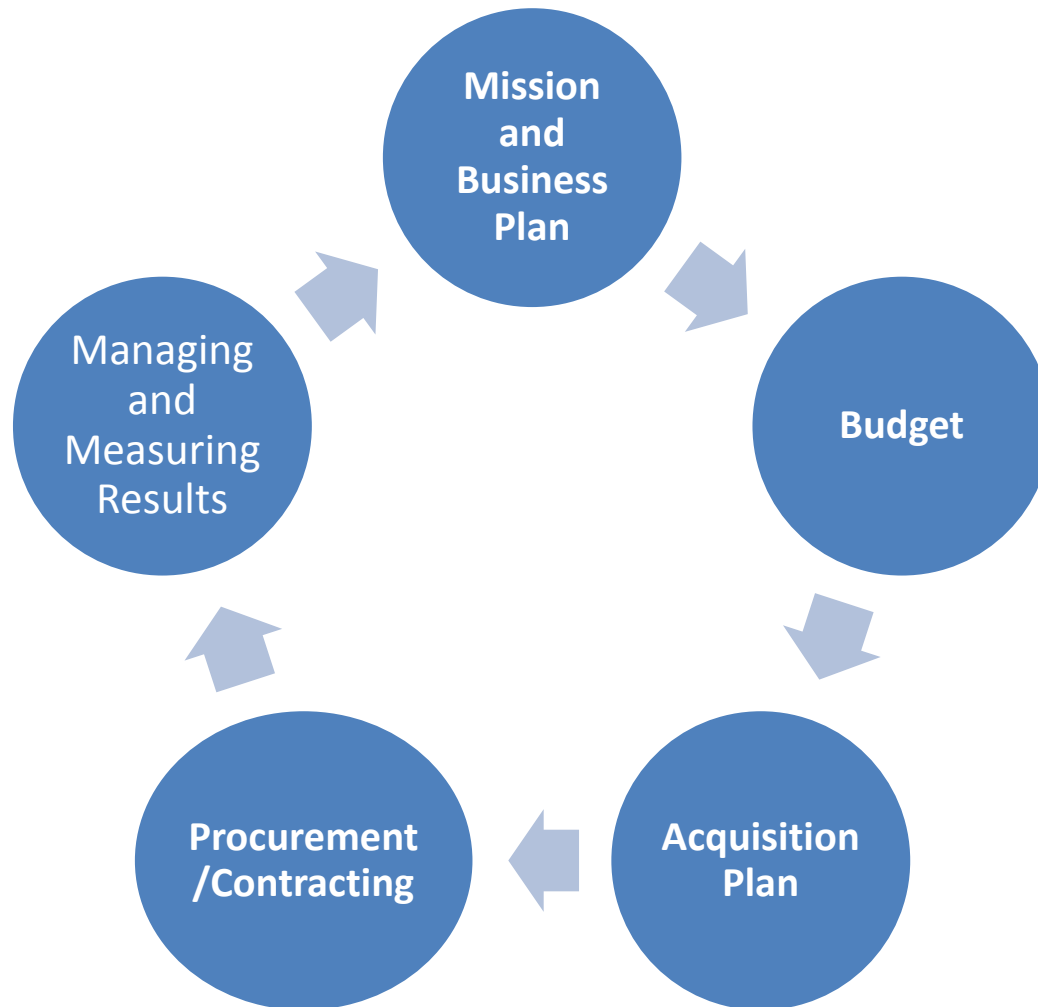
Contract - a mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them and obligates the Government to an expenditure of appropriated funds --

- usually in writing,
- entered into by a designated, warranted Contracting Officers or Government Purchase Card Holders with limited threshold amount
- no one else has the legal authority to obligate the Government
- program personnel cannot negotiate with vendors without the Contracting Officer's Involvement/Presence

Contracts Overview: Why Do We Need Them?



Acquisition Lifecycle



How We Buy: Contracting Process



- Requirements analysis
- Procurement planning
- Solicitation preparation
- Evaluation of offers
- Negotiation and discussion
- Selection of awardees
- Contract administration
- Performance monitoring
- Termination and closeout

Criteria:

- Federal Acquisition Regulation (FAR)
- Agency supplements to the FAR, policies, and directives
- Internal controls standards

Scope of US Procurement System

Government Coverage

112 Departments & agencies around the world

3,400 Contracting Offices

The People

30,000 Contracting Officers (FAR 1.602)

Contracting Officer's Representatives (FAR 1.604)

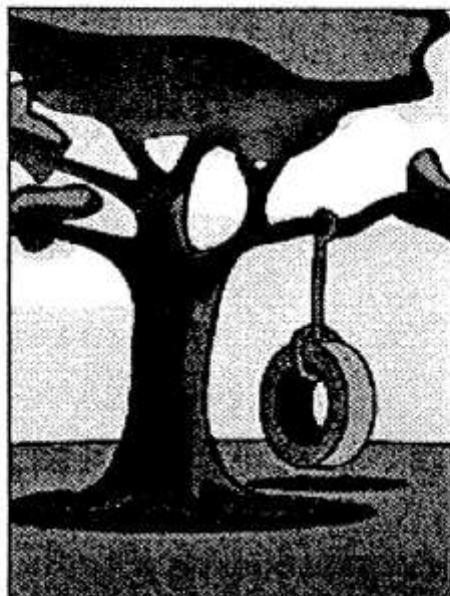
Program Managers

300,000 purchase card holders

Key Players



Contracts Overview



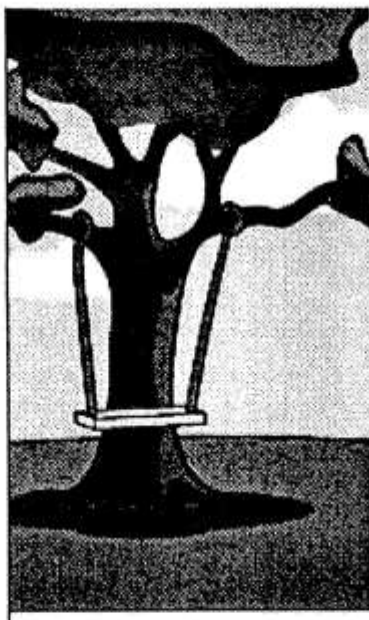
What the User wanted.

Contracts Overview



As Management requested it...

Contracts Overview



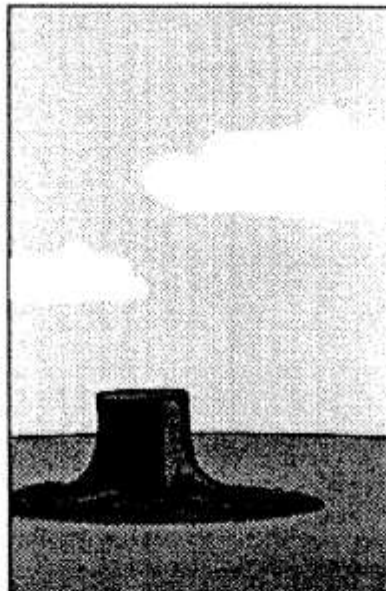
As the Project Leader defined it...

Contracts Overview



As Systems designed it...

Contracts Overview



As Programming developed it...

Contracts Overview



As Operations installed it...

Contract Fundamentals

Base Contract Types

Fixed Price

Government pays contractor a fixed (set) price for the delivery of a product or service.

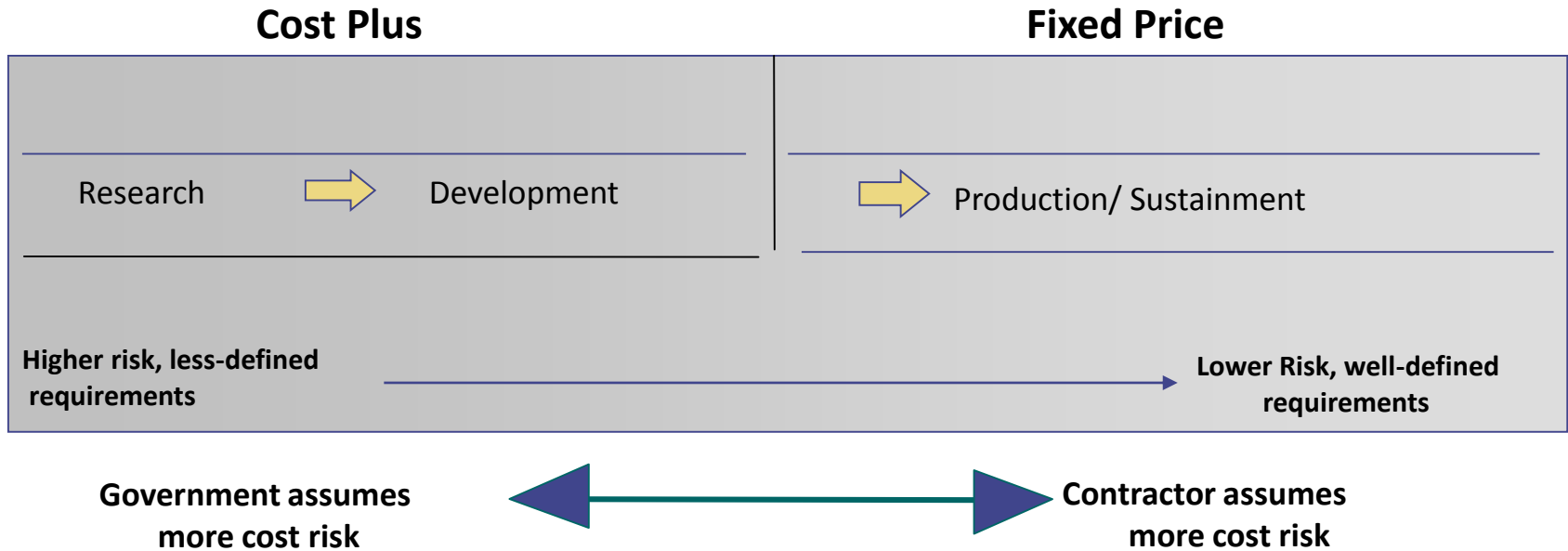
Time and Materials

Government pays contractor fixed per-hour labor rates - include wages, overhead, administrative costs, and profit

Cost Plus

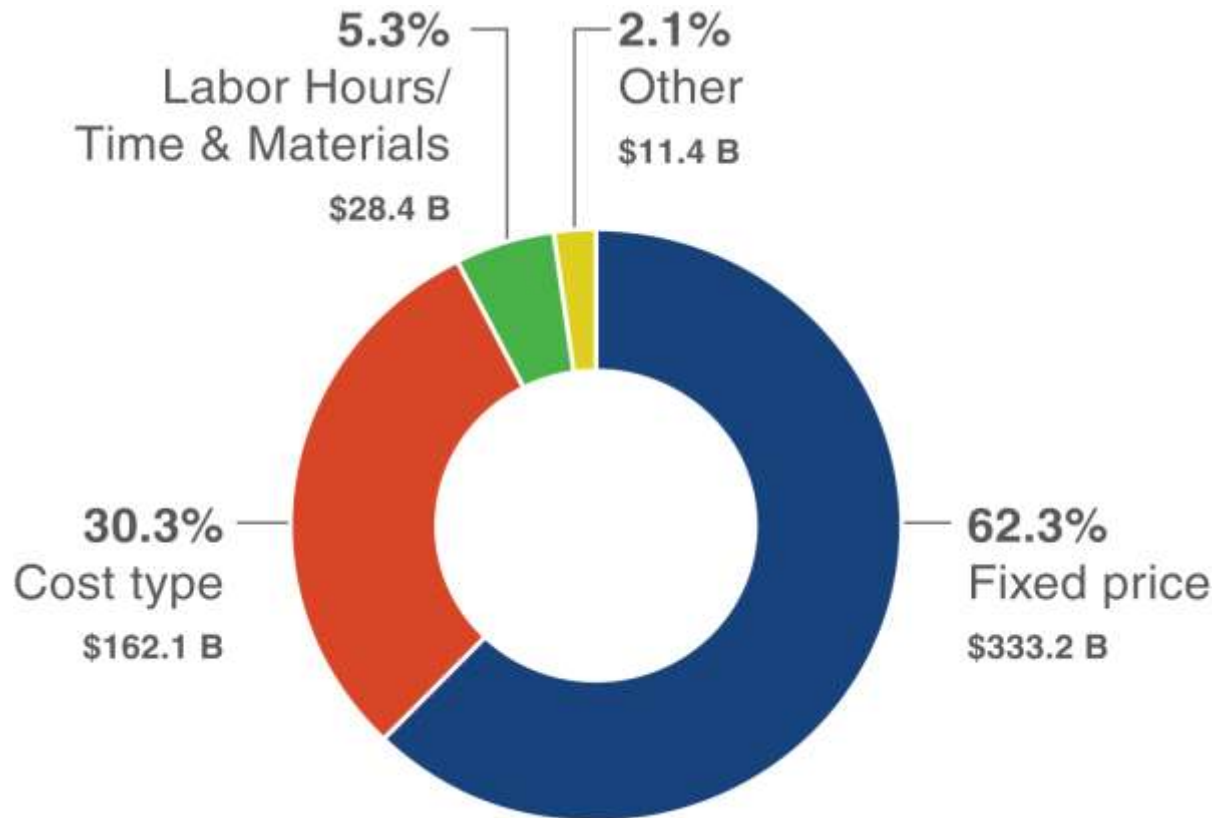
Government pays contractor for all appropriate costs in delivering a product or service.

Contract Type Risks



Total Contract Obligations

\$535 Billion



Reducing Risk with Contract Type

Type of Contract	Who Assumes Risk of Cost-over-runs?	Best Used When...
Fixed Price	Contractor	Requirements are very well defined and pricing can be determined
Cost Reimbursement	US Government	Requirements are less defined and costs become more known as project progresses (R&D contracting)
Time-and-Materials (<i>least preferred</i>)	US Government	Only when it is not possible to accurately estimate the extent or duration of the work or costs with any reasonable degree of confidence
Indefinite Delivery Contract	Depends	When need exists but quantity needed may or may not be known, delivery dates may vary

Types of Audits

- Financial Audit
- Performance Audit: an assessment of program effectiveness and efficiency

Federal Auditing Agencies

Legislative Branch (All gov.)

- GAO
 - Financial Audits
 - Performance audits
 - Bid Protests

Inspectors General
All Agencies

Executive Branch (Defense)

- Defense Contract Audit Agency
- Army Audit Agency
- Naval Audit Service
- Air Force Audit Agency

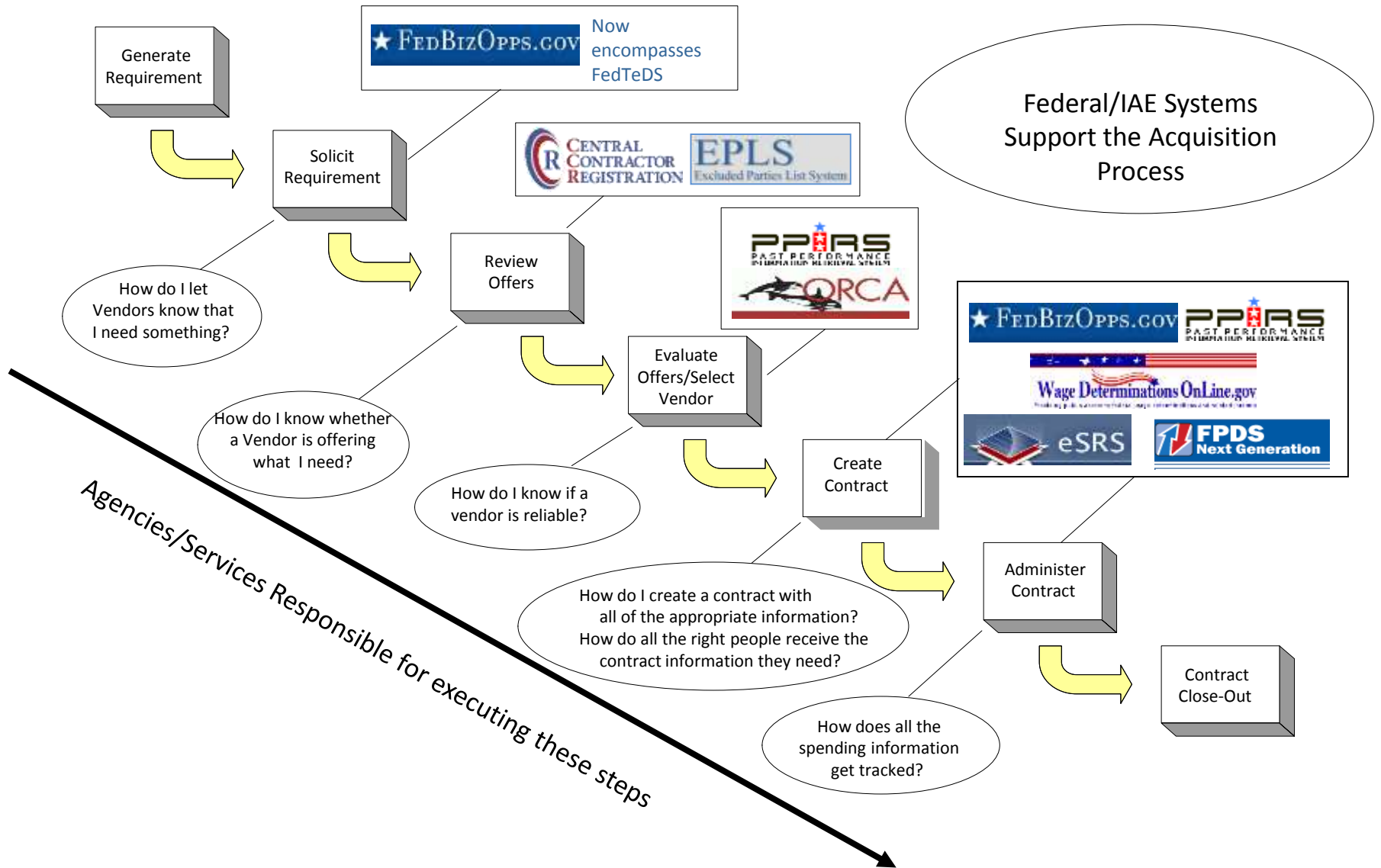
Types of Auditors

- [External auditor](#) is an independent firm engaged by the client subject to the audit, to express an opinion on whether the company's [financial statements](#) are free of material misstatements,
- [Internal auditors](#) are employed by the organizations they audit.

Auditing Standards

- Yellow Book
- Cost Accounting Standards
- Cost Principles
- Contract Terms and Conditions
- Legislative Requirements
- The most commonly used external audit standards are the US [GAAS](#) of the [American Institute of Certified Public Accountants](#); and the ISA [International Standards on Auditing](#) developed by the [International Auditing and Assurance Standards Board](#) of the [International Federation of Accountants](#).

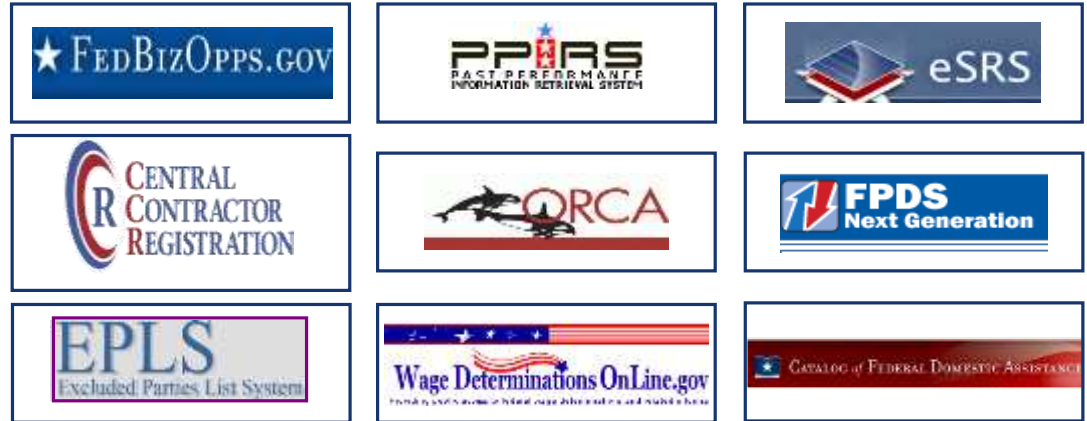
Central IT Systems in US procurement process



Future – System for Award Management (SAM)

Today

- Siloed – Separate systems each with a separate login
- Redundant – Overlapping data
- Separate – Various hosting locations, managed separately



Future

- 1 Login! – Functionality accessible at one online location to streamline the process
- 1 Data Source! – Centralized, normalized data to eliminate potential for conflicting values
- 1 Host! – Consolidated hosting to reduce O&M costs



Existing capabilities, streamlined for efficiency.

Bid Protests at GAO

- GAO's bid protest function began in 1920s and was codified in the Competition in Contracting Act of 1984
- GAO is to provide for the *independent, expeditious, and inexpensive* resolution of protests
- GAO's bid protest decisions establish a uniform body of law relied on by Congress, the courts, contracting agencies, and the public

Protests vs. Audits/ Internal Oversight

- Protests use suppliers' complaints as the trigger for oversight
- Suppliers decide *which* procurements deserve review (if no one complains, don't open a protest file)
- Protest forum can let protester & agency argue back and forth, with the forum acting as judge
- Result: potentially greater efficiency in oversight

Challenges Every Protest System Faces

- Political and cultural challenges
- Ensuring that contracting agencies provide information needed by the protest forum
- Compliance with the forum's decisions
- Suppliers' fear to protest
- Sometimes: Suppliers' willingness to protest too much, so they abuse the system (for example, by filing frivolous protests, just to cause trouble)

Key Elements in the Architecture of the System

- What is a protest?
- Who is allowed to protest?
- Which body of government decides protests?
- Scope of the protest forum's jurisdiction?
- When must the protest be filed?
- What happens to procurement while protest is pending?
 - Interim relief: whether the procurement is put “on hold” while the protest is pending
- Too many incentives or disincentives to protest?
- Forum's power provide meaningful relief?

Definition of Protest

“Protest” means a written objection by an interested party to any of the following:

1. A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
2. The cancellation of the solicitation or other request.
3. An award or proposed award of the contract.
4. A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Time of Protests

- Contractors can protest during all three phases of contracting

Phase 1: Pre-award	Phase 2: Award	Phase 3: Post-Award
<ul style="list-style-type: none"> Solicitations Cancellations of solicitations <p><i>Example: improperly restricts competition</i></p>	<p>Award or proposed contract award</p> <p><i>Example: selection was unreasonable or inconsistent with the solicitation award criteria</i></p>	<p>Termination or cancellation of contract award</p>

- Issues with Contract Administration are called Disputes – not Protests

Who hears Protests?

- Protests, related to the formation of a contract, can be submitted to different government organizations:
 - Contracting Agencies
 - Government Accountability Office (GAO) - Independent administrative forum, most common
 - U.S. Court of Federal Claims

- Disputes related to contract performance may be taken to:
 - Administrative Board of Contract Appeals
 - US Court of Federal Claims
 - Appeals from either of the above venues, may be taken to the Court of Appeals for Federal Circuit

Bid Protest to Agency

- Policy established by *E.O. 12979 – Agency Procurement Protests*
- Interested parties may request independent review a level above the contracting officer
 - Solicitations should advise potential bidders and offerors that this review is available
- Agency appellate review of CO's decision on protest will not extend GAO's timeliness requirements
- Less common than GAO
- *Example: General Services Administration (GSA) designates Suspension and Debarment Official as agency appellate reviewer*
 - *About 50 protests per year received in GSA*

Bid Protests at GAO

- GAO's bid protest function began in 1920s and was codified in the Competition in Contracting Act of 1984 (CICA)
- CICA directs GAO to provide for the *independent, expeditious, and inexpensive* resolution of protests
- GAO's bid protest decisions establish a uniform body of law relied on by Congress, the courts, contracting agencies, and the public

Bid Protests at GAO

- GAO, the investigative arm of Congress, was established in 1921
- GAO is the U.S.'s national audit office, and protests are a very small part of its work
- GAO's bid protest function began in 1920s and was codified in the Competition in Contracting Act (CICA) of 1984
- CICA directs GAO to provide for the *independent, expeditious, and inexpensive* resolution of protests
- GAO's bid protest decisions are published & establish a uniform body of law relied on by Congress, the courts, contracting agencies, and the public

Bid Protest to COFC

- Part of the Judicial Branch of US Government
- COFC's protest process is provided for in section 1491(b) of Title 28 of the United States Code, 28 U.S.C. § 1491(b)
- COFC's rules, additional information, and COFC's decisions are posted on its website at <http://www.uscfc.uscourts.gov/rulesuscfc>

GAO's role in the 3 phases of government procurement

- **Pre-award:** GAO considers protests to ensure that agencies have not improperly restricted competition
- **Award:** GAO considers protests challenging awards primarily to ensure that the selection was reasonable and consistent with the solicitation criteria
- **Post-award:** GAO generally does not consider challenges to contract administration

Some numbers...

- Of the hundreds of thousands of solicitations & awards each year...
- GAO received approximately **2,500** protest filings in fiscal year 2013
- The Court of Federal Claims received approximately **80** protests in fiscal year 2013
- Many protests are filed with contracting agencies directly--no statistics available

GAO strives for balance...

...between the need to hold agencies accountable and protect aggrieved offerors' due process rights

...and...

...the need to ensure that the government procurement process can proceed without undue disruption

Holding agencies accountable and protecting aggrieved offerors' due process rights

- Broad jurisdiction:
 - Protest can challenge any federal agency's procurement
 - Anyone who submitted an offer can protest
- Process is (fairly) inexpensive & informal
- “Automatic stay” usually stops agency from proceeding

Holding agencies accountable and protecting aggrieved offerors' due process rights (cont.)

- Agency must provide full report to GAO
- Protester has chance to respond to report
- GAO may hold hearing or otherwise seek further information

Holding agencies accountable and protecting aggrieved offerors' due process rights (cont.)

- GAO will sustain protest if agency violated procurement law to detriment of protester
- 106 protests sustained in fiscal year 2012 (19% of merit decisions)
- GAO will recommend remedy appropriate to problem, & reimbursement of costs
- GAO's recommendations almost always followed

Ensuing that the government procurement proceeds without undue disruption

- Strict time limits on filing protests
- GAO has only 100 days to issue decision
- GAO resolves most protests well before 100-day deadline

Ensuing that the government procurement proceeds without undue disruption (cont.)

High standard to be met before GAO will sustain protest:

- GAO must find agency violated procurement statute or regulation
- Mere disagreement with agency's judgment not enough
- GAO must find violation hurt protester

Ensuing that the government procurement proceeds without undue disruption (cont.)

GAO strictly respects limits on its jurisdiction:

- No contract administration issues
- No issues reserved for other agencies

Scope of Protest Jurisdiction

- In U.S., the COFC and GAO have broad jurisdiction, over essentially the entire federal government
- However, they do not have jurisdiction over state and local procurement protests
 - State and local governments have their own review procedures, often including the courts.

Possibilities Regarding Parties

- In U.S., both foreign and U.S. suppliers may protest to either GAO or the COFC
- At both GAO and the COFC, before award of a contract, any supplier that wants to win the contract may protest – but others may not
- At both GAO and the COFC, protests challenging an award of a contract may only be made by a supplier that competed for the contract

Impact of Protest on Procurements

Issue: What happens to solicitation or contract during protest?

GAO

- filing of a protest automatically stops the procurement while the protest is pending:
 - If protest is filed before award, no contract can be awarded until the protest is decided
 - If protest is filed after award, contract performance stops until the protest is decided
 - But agencies have the right to move forward, if they establish a need to do so, and have the appropriate document signed by a high-level official

Court of Federal Claims

- government may voluntarily stop the procurement while the Court decides the protest, or the Court may decide whether to issue an order telling them to stop

Issues GAO and the COFC consider in deciding protests

- GAO and the COFC will be strict in insisting that agency follow ground rules laid out in solicitation & treat competing firms fairly/equally
- Neither GAO nor the COFC will substitute its judgment in place of agency technical assessments or judgments about cost/technical tradeoffs

Final Relief

GAO

- decision on relief is a recommendation, but is followed 95+% of time

Court of Federal Claims

- can order agency to provide relief, and its order is binding

GAO & Court of Federal Claims

- Relief is tailored to the specific impropriety. Examples:
 - Revisions to solicitation
 - Re-evaluation of proposals
 - Further negotiations with offerors
 - Termination of contract & award to protester (rare)
 - If no other relief possible: reimbursement of cost of competing
 - Reimbursement of costs of protesting

Further steps at GAO & the COFC

Issue: What if protestor disagrees with decision and wants to appeal?

GAO

- Unsuccessful party may ask GAO to reconsider
- GAO decisions cannot be appealed

Court of Federal Claims

- Unsuccessful protester may protest in COFC
- COFC decisions may be appealed to Court of Appeals for the Federal Circuit

Helpful Web sites

Acquisition Central

<http://www.acquisition.gov>

Office of Federal Procurement (OFPP)

<http://www.whitehouse.gov/omb/procurement/index.html>

Director, Defense Procurement and Acquisition Policy (DPAP)

<http://www.acq.osd.mil/dpap>

Defense Acquisition University (DAU)

<http://www.dau.mil>

General Services Administration (GSA)

<http://www.gsa.gov>