

West  Nutshell Series

STEVEN W. FELDMAN
W. NOEL KEYES

Government Contracts

in a
nut
shell

5th Edition

WEST®

GOVERNMENT CONTRACTS IN A NUTSHELL

Fifth Edition



U.S. Army Engineering and Support Center,
Huntsville, Alabama

W. NOEL KEYES

Emeritus, Pepperdine University
School of Law

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610 Opperman Drive
St. Paul, MN 55123
1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-26851-8

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I would like to thank two special persons for their support. First and foremost, to my dear wife, Gayla, for her continuing love and encouragement. She was with me every night (and many days) as I worked on this text. I also express my appreciation to my late wife of 25 years, Ann Feldman, who was a wonderful helpmate during our marriage, even in the final stages of her cancer.

PREFACE

Contracting with the federal government is an important part of American economic life. The United States spends billions of dollars every year on the procurement of supplies, services, and construction. But government contracting also has unique problems and pitfalls. So, while many companies have become successful by concentrating most of their efforts on doing business with the federal government, either as a prime contractor or subcontractor, others have not fared as well.

The Government Contracts Nutshell, Fifth Edition, is intended to highlight the essential elements and principles of government contracting regarding both contract formation and contract administration. It provides the reader with a foundation for understanding how government procurement works in formal and informal ways. Ideally, this treatment will enable students to become familiar with the fundamentals of government contracting in a relatively short time.

As its title indicates, this text is a "Nutshell," and not a full analysis of all contracting doctrines and procedures. Thomson Reuters has several multi-volume treatises devoted to this subject. Government contracting is a field filled with laws and regulations and countless significant legal decisions

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and is rife with protests, disputes and litigation. It is also a field in constant flux and has changed in major ways since the publication of the Fourth Edition of this book in 2004. Indeed, almost every chapter has been largely rewritten since the prior edition. Chapter numbering follows the coverage in the applicable part of the Federal Acquisition Regulation, the guidepost of federal executive branch contracting.

Although the Nutshell's primary audience is the student of federal government procurement, those with contracting experience should also find it of value. The text has been organized to parallel the events that someone would probably experience as a government contractor or as a government contracting official or other procurement professional. For them, the book will serve as a guide to specific areas with which they may be unfamiliar and as a useful reference in those areas where they are already knowledgeable.*

* This text was written by Mr. Feldman in his personal capacity and the views expressed do not represent those of any federal agency.

GLOSSARY

This Glossary is designed to serve two purposes. First, it is an abbreviations key—a tool for translating the numerous specialized abbreviations and acronyms used throughout the text and footnotes in each chapter of the book. The list focuses on “specialized” abbreviations used in writing about and citing government contract authorities; it excludes many of the common abbreviations used in citing standard legal authorities. Second, the Glossary defines many of the specialized terms used in the field of government contracts.

A-E—Architect-engineer

A-76 procurements—Acquisitions implementing OMB Circular A-76, as modified, which implements the Executive Branch’s general policy to rely upon private enterprise for commercially available goods and services.

Accelerated procedure—Procedure under the Contract Disputes Act whereby an appellant before an agency board of contract appeals can elect, for certain small claims, to have a decision issued on a claim within six months after making the election.

ACO—Administrative Contracting Officer (responsible for contract administration).

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Acquisition Plan—A plan for managing the overall strategy for a proposed acquisition.

ADR—Alternative dispute resolution

Administrative change—A contract alteration that does not affect the substantive rights of the parties.

Administrative Contracting Officer—The contracting officer that administers a particular contract.

Advance payment—Monetary advance made by the government to a contractor prior to, but in anticipation of, contract performance.

Allocable cost—A cost that is assignable or chargeable to one or more cost objectives in accordance with the relative benefits received or other equitable relationship.

Allowable cost—Any cost that can be included in prices, cost reimbursements, or settlements under the contract to which it is allocable (To be allowable, a cost must meet five basic requirements: (1) the cost is “reasonable,” (2) the cost is allocable to the contract, (3) the treatment of the cost is in accordance with the Cost Accounting Standards, if applicable (or otherwise conforms to generally accepted accounting principles), (4) the cost is in accordance with the terms of the contract, and (5) the allowability of the cost is subject to any specific limitations or exclusions set forth in the cost principles.)

Alternative dispute resolution—A procedure used instead of litigation to resolve a dispute,

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including mini-trial, settlement judge, mediation, or arbitration, or combinations thereof.

Appeal notice—A notice to a board of contract appeals that a Contracting Officer's final decision is being appealed.

Armed Services Procurement Act—General federal statute that governs contracting by the Department of Defense and its military services.

ASBCA—Armed Services Board of Contract Appeals.

Audit—The systematic examination of records and documents and the securing of other evidence by confirmation, physical inspection, or otherwise, for one or more of the following purposes: determining the propriety or legality of transactions; ascertaining whether all transactions have been recorded and are reflected accurately in accounts; determining the existence of recorded assets and inclusiveness of recorded liabilities; determining the accuracy of financial or statistical statements or reports and the fairness of the facts they present; determining the degree of compliance with established policies and procedures relative to financial transactions and business management; and appraising an accounting system and making recommendations concerning it.

BAA—Buy American Act

BCA—*Board of Contract Appeals Decisions* (published by Commerce Clearing House, Inc.)

Bid bond—A surety bond that indemnifies the government against a winning bidder's failure to

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execute the contract documents and proceed with performance (also called a bid guarantee).

Bid protest—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; or (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.

Blanket purchase agreement—A simplified purchasing method used by agencies to fill anticipated repetitive needs for supplies or services by establishing charge accounts with qualified sources.

Boards of contract appeals—Judicial-type administrative boards established by the various government procuring agencies to hear and decide government contract disputes.

BPA—Blanket purchase agreement

“Brand name or equal”—Type of purchase description that identifies one or more commercial products by brand name or other appropriate nomenclature and sets forth the physical, functional, or other characteristics of the named product that are essential to the government’s needs.

Buy American Act—Federal law that carries out the government’s preference for the use of American-made materials and the purchase of do-

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mestically-manufactured goods by requiring that acquisitions for public use be for materials, supplies, or articles substantially composed of domestic products.

Buy-in—Attempt to win a contract by submitting a price so low that a loss will result, with the hope of recouping the loss through change orders or follow-on contracts.

CAA Council—Civilian Agency Acquisition Council.

CAFC—U.S. Court of Appeals for the Federal Circuit.

Cardinal change—Contract change having the effect of making the work as performed not essentially the same work as the parties bargained for when the contract was awarded, and thus constituting a breach of contract by the government.

CAS—Cost Accounting Standard

CBCA—Civilian Board of Contract Appeals

CCR—Central Contractor Registration (database serving as the repository for contractor information required for the conduct of business with the government).

CBD—*Commerce Business Daily* (see “GPE”)

CDA—Contract Disputes Act of 1978

Certificate of Competency—Certification by the Small Business Administration that a small business has the capacity and credit to perform a particular government contract.

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Certificate of Current Cost or Pricing Data—Prescribed certificate required to be executed by contractors that must submit cost or pricing data under the Truth in Negotiations Act.

Certification of claim—The requirement under the Contract Disputes Act that contract claims over \$100,000 be accompanied by a statement asserting that the claim is made in good faith, that supporting data are accurate and complete, and that the amount requested reflects the contract adjustment believed due.

Change order—A written order signed by the Contracting Officer directing the contractor to make changes that the “Changes” clause of the contract authorizes the Contracting Officer to make without the consent of the contractor.

Civilian Agency Acquisition Council—A group composed of members from federal civilian agencies which has joint responsibility with the Defense Acquisition Regulations Council for revision of the Federal Acquisition Regulation.

Civilian Board of Contract Appeals—A single appeals board that has consolidated the boards of contract appeals other than the Armed Services Board, the Postal Services Board, and the Tennessee Valley Board.

Claim—Under the Contract Disputes Act, a written demand or written assertion by one of the contracting parties, seeking (as a matter of right) the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other

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relief arising under or relating to a government contract.

CO—Contracting Officer of a government procuring agency

COC—Certificate of Competency

COFC—U.S. Court of Federal Claims

Commerce Business Daily—A Department of Commerce publication which was issued every business day to provide information on government contract opportunities and awards (superseded) (see “GPE”).

Commercial item—An item of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes and defined by the Office of Federal Procurement Policy Act; a statutory preference for the acquisition of commercial items by both civilian and defense agencies was established by the Federal Acquisition Streamlining Act of 1994.

Comp. Gen.—The Comptroller General of the United States or the official reports of his decisions, *Decisions of the Comptroller General of the United States* (published by the Government Printing Office) (now discontinued).

Comp. Gen. Dec.—A specific decision of the Comptroller General.

Competition in Contracting Act—Federal law (effective in 1985) designed to promote full and open competition, which brought about numerous significant changes in procurement practices.

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Competitive negotiation—One of the two basic procurement methods, this means of contracting is used when sealed bidding cannot feasibly be employed and (1) is initiated by a Request for Proposals which sets out the government's requirements and the criteria for evaluation of offers, (2) contemplates the submission of timely proposals by the maximum number of possible offerors, (3) usually provides discussions with those offerors found to be within the competitive range, and (4) concludes with the award of a contract to the offeror(s) whose offer (price and other announced factors considered) is most advantageous to the government.

Comptroller General of the United States—Government official who controls and directs the Government Accountability Office.

Constructive acceleration—A requirement (based on the reasonable interpretation of the words, acts, or inaction of authorized government employees) that a contractor complete its work by a date earlier than one that would reflect the time extensions to which it is entitled because of excusable delays.

Constructive contract change—An alteration to a contract resulting from conduct by the government (for example, defective specifications) or its authorized employees that has the effect of requiring the contractor to perform additional work.

Cont. Cas. Fed.—*Contract Cases Federal* (published by Commerce Clearing House, Inc.)

GLOSSARY

Contract auditor—Person representing the government who is responsible for examining the books and records of contractors.

Contract change—An alteration to a contract made by the government, within the general scope of the contract, which calls for an adjustment in the terms, such as the contract price or delivery schedule.

Contract Disputes Act—Comprehensive federal statute, effective since 1979, which establishes procedures for the adjudication of described government contract disputes.

Contract modification—Any unilateral or bilateral written alteration in the specifications, delivery point, rate of delivery, contract period, price, quantity, or other provision of an existing contract, accomplished in accordance with a contract clause or statutory authority.

Contract Work Hours and Safety Standards Act—Federal law governing government construction contracts which forbids allowing any laborer or mechanic to work more than 40 hours in any week unless overtime wages of at least 11/2 times the basic pay rate are paid, and which also forbids working conditions that are unsanitary, hazardous, or dangerous to employee health or safety.

Contracting Officer—Employee of a government procuring agency with authority to legally bind the government in matters under a particular contract.

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Contractor purchasing system review—Review of a contractor's procurement system conducted on a periodic basis to allow the government to monitor its contractors' activities and protect government interests.

COFC—Court of Federal Claims

Cost Accounting Standards—The set of 19 rules on cost accounting for government contracts promulgated by the Cost Accounting Standards Board.

Cost Accounting Standards Board—Agency established by Congress in 1970 which developed the Cost Accounting Standards and implementing regulations—the Board was dissolved in 1980 but reestablished in 1988 within the Office of Federal Procurement Policy.

Cost principles—The regulations that establish rules and policies relating to the general treatment of costs in government contracts, particularly the allowability of costs.

Cost-reimbursement contract—Basic category of government contract in which the pricing arrangement involves the government's payment of "allowable" costs incurred by the contractor during performance.

CPAF contract—Cost-plus-award-fee contract.

CPD—COMPTROLLER GENERAL'S PROCUREMENT DECISIONS (published by Thomson Reuters).

CPFF contract—Cost-plus-fixed-fee contract.