
CONTRACT ACQUISITION STAFF RESOURCES
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CONTRACT ACQUISITION STAFF RESOURCES
General

1. GENERAL

1.1 Introduction. This supplement provides general information relative to the principles of Federal acquisition; the involvement of Bureau personnel in the preparation, negotiation, award, and administration of a contract; and the specific roles and duties of the Contracting Officer and the Contracting Officer Representative (COR) in the Bureau acquisition system.

1.2 Policy.

A. It is the policy of the Bureau to provide for efficient and effective acquisition in order to advance the Bureau's mission. The information and direction provided in this Supplement shall apply to all Bureau contracts, regardless of the award authority or amount cited for the contract.

B. All Bureau personnel directly or indirectly involved in the contract acquisition process shall be subject to the provisions of this directive.

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2. FEDERAL ACQUISITION

2.1 Principles. To create our present government, the thirteen original States delegated certain powers for the Constitution, the supreme law of the land. In turn, the Constitution delegated certain powers to the three branches of Government. From this delegation comes the Executive Branch's legal right to perform acquisition functions.

A. In the acquisition process, the Legislative Branch authorizes and appropriates money through laws; the Executive Branch implements these laws; and the Judicial Branch interprets these laws to determine whether or not they are in conformance with the Constitution. Thus, the initial authority is vested in Congress to enter into contracts.

B. There are six sources of Government contract law that govern acquisition functions:

(1) The Constitution, the supreme law of the land, gives the Federal Government inherent power based on sovereignty to enter into contracts; the Government has implied powers necessary to the proper performance of its duties.

(2) Statutes passed by Congress, such as public laws.

(3) Executive Orders that implement or supplement the laws passed by Congress.

(4) Administrative Rules and Regulations issued by bodies such as the Board of Contract Appeals and the General Accounting Office (GAO).

(5) Court decisions.

(6) Common law based upon practice and custom in a given trade that has served as precedent in later cases.

C. There are limitations on the Government's legal power to contract, as follows:

(1) The Anti-Deficiency Act (41 U.S.C. 11), enacted in 1906, requires that "no contract or purchase ... shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment." The Contracting Officer may not contract for more money than is appropriated, and, unless Congress has authorized the activity and appropriated the money, the statutory dollar limitations put by Congress on the activity may not be exceeded. A Contracting Officer exceeding the statutory dollar limitations is guilty of an offense which carries criminal and civil penalties. (An

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exception to 41 U.S.C. 11 is possible for the Bureau under 25 U.S.C. 99, subject to the Congressional appropriations for the succeeding fiscal year.)

(2) The doctrine of apparent authority does not apply to Government contracts. Therefore, the Bureau is not bound by a person who only appears to the contractor to have authority to make contracts. No Bureau employee may establish a contract on behalf of the Government (either expressed or implied) unless actually authorized to do so. (Refer to 19 BIAM Supp. 28). Such authority has been delegated in 10 BIAM 4.2C(7) to Contracting Officer positions, the incumbent of which must hold a current Warrant as Contracting Officer. (Refer to 19 BIAM Supp. 1, Contracting Officers' Warrant System).

(3) Statutory restrictions on the amount of certain fees that can be paid. For example, a limit percentage of the total project cost is set on architect and engineer fees.

(4) Certain types of contracts are prohibited by law. For example, Cost Plus a Percentage-of-Cost contracts. (See 48 CFR Part 16)

(5) Kickbacks to Government officials are prohibited in the awarding of contracts.

(6) Competitive procedures for contracts are required to ensure adequate competition unless the acquisition is exempt under one of the exceptions to competitive procedures contained in the Competition in Contracting Act of 1984 (Pub. L. 98-369).

(7) The Government must use fair play in dealing with contractors.

(8) There must be consideration in all Government contracts. That is, the Government must receive a benefit from the bargain.

(9) All essential elements of a contract must exist. There must be:

(a) An offer and an acceptance.

(b) Competency of parties. (Each party to the contract has authority to sign the contract.)

(c) Legality of purpose. (The object of the contract must be legal.)

(d) Clarity of terms. (Each side knows what it is to do under the contract.)

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(e) Consideration (anything of value that changes hands) that is beneficial to the parties. The rule in Government contracting differs from a contract between private parties in that, in addition to a detriment to the promisor, there must be a benefit to the Government.

D. The "law of agency" is a device that brings together at least three parties into a contract: a principal, its agent, and a third party (contractor).

E. The relationship between principal and agent is based on trust, or a fiduciary relationship.

(1) The agent must always work in behalf of and for the benefit of the principal.

(2) The duties of an agent to the principal are:

(a) Loyalty and good faith.

(b) Obedience. All express instructions must be carried out to the letter. If instructions are discretionary, the agent must make decisions to fit the need based on experience and good judgment.

(c) Skill required to perform the duties.

(d) Diligence to perform duties in a timely fashion.

(e) Proper accounting to keep records of all monies paid out or of monies paid in connection with performance.

F. Agents have four main kinds of authority to enter into contracts.

(1) "Expressed authority" is that authority which is spelled out in writing (preferred) or is expressed in an oral form. This authority is central to, and paramount in, Government procurement activities.

(2) "Implied authority" is whatever power and authority is reasonably required to get the job done.

(3) "Customary authority" is that which belongs by custom to a particular profession or trade.

(4) "Apparent authority" is never vested in Government Contracting Officers as all powers are delegated in writing (expressed authority) to the individual from a higher level of authority. (Apparent authority is the type based on the perception of others in dealing with an authority figure.)

2.2 Authority and Responsibility of Bureau Agents. The Bureau Contracting Officer is the agent for the Government (principal).

A. Contracting Officers are designated and warranted in accordance with the procedures set forth by the Department of the Interior and the Bureau. They are authorized to enter into contracts in the name of the United States for supplies or services. (Refer to 19 BIAM Supp. 1, Contracting Officers' Warrant System).

B. Contracting Officers are classified as "special agents" based on the limited degree of authority and powers they possess. A Contracting Officer is the only Bureau person authorized to enter into contracts and is delegated two types of authority to do so:

(1) "Contracting or legal authority" stems from the designation and certification as a Contracting Officer. This type of legal authority is vested in the agent by custom, or by expressed or implied authority.

(2) "Administrative authority" is provided when a requestor issues a purchase request citing appropriation authority to buy particular supplies or services.

C. The duties of a Contracting Officer are to plan, organize, monitor, and manage acquisition activities from start to finish. Responsibility starts from the receipt of the Acquisition Request (AR) and proceeds through the administering of the contract to its close-out.

(1) A Contracting Officer must be fair and impartial and must use individual judgment. A Contracting Officer may consult outsiders for technical help. A Contracting Officer must act within the authorities established and cannot bind the Government if she or he acts without that authority, or outside the scope of that authority.

(2) Illegal acts (fraud, undue influence, conflict of interest) committed by a Contracting Officer cannot bind the Government.

D. A Contracting Officer can assign certain authority to other persons to perform certain duties.

(1) Internally, authority can be assigned to an immediate subordinate to perform certain functions such as management of branches within the office unit, purchasing functions, evaluating and advising, and bid opening.

(2) Externally, authority can be assigned outside the contracting activity to persons who would act as technical representatives of the

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Contracting Officer. This designation may be by letter or may be contained in bid or proposal documents.

(3) The Contracting Officer can never assign his or her responsibilities. The Contracting Officer is the Government's agent and is ultimately responsible for the acts of subordinates while they are acting within their authority. Any act that requires the Contracting Officer's personal judgment cannot be delegated, for example, the rendering of a final decision under the Disputes Clause of a contract.

E. The duration of authority for Contracting Officers is specified in their Warrants. The term may be stated as a calendar date, transfer, change of duties, reaching retirement age, etc. Just as a principal and agent can mutually agree to create a relationship or to specify a term, so they can mutually agree to dissolve it or to end it. (See 19 BIAM Supp. 1, Contracting Officers' Warrant System).

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3. PRINCIPAL BUREAU STAFF

3.1 Contracting Officer (CO). Once a contract is awarded, its administration in all phases is the major responsibility of the Bureau Contracting Officer.

A. Bureau program specialists play an important contributory role in the acquisition process by:

(1) Developing an Acquisition Request (with a Statement of Work) that is used by the Contracting Officer to prepare, solicit, negotiate, award and administer a contract.

(2) Assisting' the Contracting Officer in the evaluation of bids or proposals, upon request.

(3) Participating in negotiation sessions to assist the Contracting Officer, upon request.

B. Only the Contracting Officer has the authority to commit the Bureau or to direct action by the contractor. All persons who may have an interest in the contract shall work through the Contracting Officer.

C. The Bureau is represented by, and acts exclusively through, a Contracting Officer (the Government's agent) for the execution, performance, and administration of a contract.

(1) No other Bureau employee shall take any contractual action with a prospective or current contractor concerning a proposed or active acquisition.

(2) When a contractor is delinquent in performance, the Contracting Officer is the Bureau official responsible for taking remedial action necessary to protect the Government's interests and needs.

(3) The Contracting Officer designates the Contracting Officer Representative (COR) in writing and assigns certain authority to the COR to serve as cognizant technical representative during the contract term. The Contracting Officer is responsible for the thorough orientation and briefing of the COR as well as for monitoring the performance of the duties of the COR. Illustration 1 shall be the standard Memorandum of Designation (Form

) to be used by Bureau Contracting Officers in notifying and outlining the authorities and duties of Bureau employees who will serve as COR's.

3.2 Contracting Officer Representative (COR). Any Bureau person occupying a position that can be used to assist the Contracting Officer in the administration of the contract, and needed for that purpose, can be designated as a

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Contracting Officer Representative (COR) by the Contracting Officer. The latter is assisted by the COR(s) and other support personnel in dealing with a contractor on contract matters.

A. The COR shall take action on contract matters in strict compliance with the conditions written in the COR designation.

B. The COR's responsibility shall be kept within the limits dictated by the particular professional qualifications and technical competency required.

C. Although the COR can be designated to perform a variety of contract administrative actions by the Contracting Officer, certain actions are not authorized, as follows:

(1) Enter into supplemental agreements that would modify the contract.

(2) Make a final decision that is subject to appeal under the Disputes Clause of the contract.

(3) Terminate, in whole or in part, the contractor's right to proceed, with any part of the work covered by the contract.

(4) Issue Change Orders.

(5) Grant extensions of time for any reason.

(6) Issue suspension of work orders.

(7) Commit the Bureau of Indian Affairs in any manner that might affect the price, time, requirements, or conditions of the contract.

(8) Modify the terms and provisions of the contract.

D. The Contracting Officer has full authority to designate any Bureau employee as a COR who is considered best qualified to assist in contract administration.

(1) No person shall be designated a COR if she or he will not or cannot perform the duties required.

(2) A COR has no redesignation authority. This designation is reserved for the exclusive exercise of the Contracting Officer.

(3) The Contracting Officer shall consult first with the Bureau supervisor of the prospective COR to permit a proper adjustment in the normal work assignment of the person to be the COR.

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(4) When the COR is designated, the Memorandum of Designation from the Contracting Officer (a copy is required to be provided the contractor) shall specify and define the COR's authority and duties. The designation and corresponding assignment is in addition to the COR's normal position and duties. The Contracting Officer shall discuss the duties with the designated COR to ensure that appropriate authorities and duties are clearly understood.

(5) The Contracting Officer is legally responsible for the actions of the COR relating to the Memorandum of Designation. For purposes of contract administration, the COR receives technical direction from the Contracting Officer but continues to receive administrative supervision from the Bureau supervisor on matters not related to COR duties.

(6) The COR deals directly with the Contracting Officer on all matters pertaining to the contract in order not to preclude the exercise of the Contracting Officer's independent judgment.

E. The Contracting Officer is responsible for promptly notifying the contractor as early as possible of the COR designation. A copy of the Memorandum of Designation of the COR shall be furnished the contractor and shall outline the COR's authority, duties, and responsibilities as a matter of record. A copy shall also be placed in the contract file.

F. All Bureau COR's shall make periodic written reports to the cognizant Contracting Officer during the term of contract administration. Illustration 2 provides the format for this report.

memorandum

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 Illustration 1
 Page 1 of 3 pages

DATE:

REPLY TO: (Name of Designator)
 ATTN OF: Contracting Officer

SUBJECT: Scope of Authority, Duties, and Responsibilities of Contracting Officer
 Representative on Contract Number _____.

TO: (Name of Designee)
(Position Title)
(Organizational Unit)

This Memorandum of Designation is to formally appoint you as Contracting Officer Representative (COR) for the term of the cited contract (sections attached). I shall contact you to discuss your duties and responsibilities as COR and to answer any questions you may have after reading the attached material.

(Insert where appropriate). Since this contract is awarded to a tribal organization pursuant to the authority of Pub. L. 93-638, as Agency Office Superintendent you will serve as primary COR pursuant to Bureau policy. Staff persons designated by you (who are knowledgeable in the technical areas covered by this contract) shall serve as sub-COR's and are responsible directly to you for administration of this contract. A copy of this Memorandum of Designation should be provided to those persons as well.

I have discussed your appointment with your immediate supervisor who understands that your COR duties will be in addition to your regular Bureau responsibilities.

In order for you to properly perform your COR duties and responsibilities under this designation, you shall:

(1) Provide me with technical expertise to ensure acceptable contractor performance during the life of this contract in meeting Bureau acquisition needs.

(2) Notify me immediately when any problems arise related to the quantity or quality of work required under the contract.

(3) Provide technical program interpretation for any portion of the Statement of Work (copy attached) when requested by the contractor. If the contractor is a Tribal organization, you shall provide all possible technical assistance within your area of expertise and also refer all such requests for assistance in writing to me.

(4) Maintain a written record on all matters pertaining to the contract. A diary is considered desirable.

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(5) Monitor and assess the scope and level of contractor effort in performing the terms and conditions of the contract. Periodic meetings and site-visits for evaluation reviews are encouraged. You will review contractor invoices for payment by the Bureau, Periodic Progress reports, and the Final Report. You will use the format of the COR Report (see 19 BIAM, Supp. 5, Illustration 2) to provide (monthly) (quarterly) reports to me. These Reports will provide a commentary record on contractor work performance, recommendations for payment, technical assistance rendered, and onsite activities.

(Insert where appropriate). This contract is covered by the Prompt Payment Act (Pub. L. 97-177), which subjects the Bureau to penalties for failure to pay its invoices in a timely fashion. Specifically, penalties are assessed if payment is not made within thirty (30) days after receipt of a proper invoice or final acceptance of the goods or services, whichever is later. To avoid the payment of penalties by Bureau program funds (not by new or special Congressional appropriations), it is important that you promptly carry out your role in (1) accepting or rejecting delivered goods or services, and (2) certifying invoices for payment by the Bureau. Consequently, you shall notify me of acceptance or rejection of goods or services within _____ days after delivery. Similarly, all invoices shall be certified within _____ days after receipt. If you are unable to meet these deadlines for any reason (e.g., approved leave, official travel, etc.), please notify me immediately by telephone.

Your duties and responsibilities as COR cannot be delegated to a third person. You shall notify me if you are absent and unable to exercise your COR responsibilities. Further, you are not authorized to:

- (1) Enter into supplemental agreements.
- (2) Make a final decision that is subject to appeal under the Disputes Clause of the contract.
- (3) Terminate, in whole or in part, the contractor's right to proceed with any part of the work covered by the contract.
- (4) Issue Change Orders.
- (5) Grant extensions of time for any reason.
- (6) Issue suspension of work orders.
- (7) Commit the Bureau of Indian Affairs in any manner that might affect the price, time, requirements, or conditions of the contract.
- (8) Modify the terms and provisions of the contract.

As the COR with responsibility delegated as an agent of the Federal Government, you are to have timely, direct, and free communications with my office on any item pertaining to this contract. Please do not hesitate to contact me by telephone at _____.

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Illustration 1
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A copy of this Memorandum of Designation is being forwarded to your immediate supervisor, to the contractor, and to your official personnel folder.

I look forward to working with you on administering this contract.

Attachments: (1) Contract (Cover Sheet, Statement of Work, and Special Provisions)
(2) COR Report Form

cc: (Supervisor name).
cc: (Contractor name).
cc: (Personnel Office).

memorandum

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Illustration 2

Page 1 of 2 pages

DATE:

REPLY TO
ATTN OF: (Name of Designee), COR

SUBJECT: Contracting Officer Representative Report

to: Contracting Officer

- A. 1. Contract No. _____.
2. Name of Contractor: _____
- B. (Quarterly) (Monthly) Report No. _____ from calendar dates
_____ to _____. Attached pages respond to entries below.
1. Report of contractor performance accomplishments for this reporting period.
 2. Report of contractor performance deficiencies for this reporting period.
 3. Request from Tribal contractor for technical assistance (what kind, how much, when needed, duration needed?).
 4. Report of related contract awards from BIA.
 5. Request for contract revisions and my recommendations for improving contractor performance and/or Bureau services.
 6. Number of COR site-visits to assist contractor, monitor performance, provide technical assistance for this reporting period. Explain in detail. Number of COR staff hours involved in site-visits.
 7. Number of contacts between the COR and the contractor for this reporting period. Telephone contacts? Written contacts?
 8. Report on contractor's compliance with the following statutory requirements for subcontracting under: Section 7(b) of Pub. L. 93-638; Small Business concerns; 8(a) firms; female enterprises; non-Indian minority business enterprises; and Labor Surplus Area firms. For each designation, provide data and information in sufficient detail, as follows:

- (a) Number and dollar value of prime contracts that you administer that have the cited subcontracts;
- (b) Number and dollar value of subcontracts;
- (c) Number of minority group member firms and their minority group identification.

9. Additional comments.

(Name and Signature of COR)

Attachments