

*Contract Administration**

** Made Easier*

Who is Out There?

- ▶ Years in transit procurement
- ▶ Experience in non-transit procurement
- ▶ Role in your organization
- ▶ Familiarity with FTA Circular 4220.1F

Some Basics

Who is Part of the Agency Team?

- ▶ Contract Administrator – Lots of different names in different agencies
 - ▶ Administers the contracting office functions
 - ▶ Change orders, dispute resolution, contract interpretation, terminations, contract closeout
- ▶ Project Manager – or Contracting Officer's Technical Representative
 - ▶ Administers the performance functions
 - ▶ Technical performance, inspections, approvals, product and deliverable acceptance

Who is Part of the Agency Team?

- ▶ DBE representative
 - ▶ May be assigned to the Contract Administrator or Project Manager
 - ▶ DBE compliance, commercially useful functions, replacement of DBE subcontractors,
- ▶ Who else?
 - ▶ Accounting/Finance
 - ▶ Risk Management
 - ▶ Grant Management
 - ▶ Law

The Common Denominator

- ▶ Everyone on the Agency team needs:
 - ▶ Clear roles and responsibilities
 - ▶ Adequate training
 - ▶ A basic understanding of the larger picture – know who does what
 - ▶ Information sharing
 - ▶ Unity of purpose

Record Keeping

- ▶ Four questions in the FY19 Triennial Review guide examined grantee contract administration practices
- ▶ Question P1 - “Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?”
- ▶ Procurement history: “The recipient must maintain records sufficient to detail the history of the procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.”

More Triennial Targets

- ▶ P1 - includes “oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts” and dispute resolution processes
- ▶ P5 - Recipients must maintain records sufficient to detail the significant history of a procurement
 - ▶ Again mentions rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price

More Triennial Targets

- ▶ P6 - ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts
 - ▶ See the pattern? This question looks to timely delivery of conforming goods, milestones, and analysis of slippage
- ▶ P14 - Management, evaluation, and approval levels for change orders

A Word on Micro and Small Purchases

- ▶ FTA C. 42201.1F, Chapter VI, paragraph 3.a(2)(c)
- ▶ “FTA’s only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection.”
- ▶ Still must be equitably distributed
- ▶ Still cannot split requirements

Now We're Ready!

Preparing for Success

- ▶ Contract administration can only be successful if the pre-award processes prepare for success
 - ▶ We will look at pre-award preparation throughout
- ▶ Always keep track of the records!
 - ▶ Have and enforce a standard operating procedure so everyone knows where things must be filed and how to find things when needed

Internal Kick-Off

- ▶ Review roles and responsibilities
- ▶ Review individual authority
 - ▶ Delegation of authority letter for PM?
 - ▶ Address filed changes
- ▶ Review the contract
 - ▶ SOW, schedule, deliverables, DBE, Buy America, contractor reporting requirements
- ▶ Establish intra-team communication

Kick-Off Meeting with Contractor

- ▶ Contractor without significant agency experience
- ▶ New contract type for the agency
- ▶ Complex project
 - ▶ Large dollar, coordinated contracts, tight schedule, complex deliverables, incentives or liquidated damages
- ▶ Attendees include both project managers, both contract administrators, wage compliance, DBE
- ▶ Tell them this meeting will or may be required in the RFP itself!

Kick-Off Meeting with Contractor

- ▶ Review the scope of the contract and the project goal
- ▶ Schedule requirements
- ▶ Measures of progress and success
- ▶ Required reporting
- ▶ Deliverables
- ▶ Communications protocols – who, how, when
 - ▶ Numbered communications
 - ▶ Record keeping is imperative!

Submissions

► Insurance – ACORD 25



The image shows a standard ACORD 25 Certificate of Liability Insurance form. The form is titled "CERTIFICATE OF LIABILITY INSURANCE" and includes the ACORD logo. It contains several sections for providing policy details, including:

- INSURED:** A section for the name and address of the insured party.
- INSURANCE:** A section for listing the types of insurance coverage, such as Commercial General Liability, Automobile Liability, and others.
- COVERAGE:** A section for providing details about the coverage, including limits, deductibles, and conditions.
- INSURER'S POLICY:** A section for the insurer's name and address.
- ENDORSEMENTS:** A section for listing any additional coverages or conditions.

The form is designed to be filled out by the insurer and provided to the insured party. It includes a date stamp in the top right corner and a signature line at the bottom.

Submissions

- ▶ Bonds
 - ▶ <https://fiscal.treasury.gov/surety-bonds/list-certified-companies.html>
- ▶ Who checks and confirms insurance and bonds are sufficient?
- ▶ Safety and Quality Assurance plans
- ▶ Permits and licenses
- ▶ Approval of subcontractors
- ▶ Be sure potential contractors understand pre-NTP submissions – spell them out in your RFP

Notice to Proceed

- ▶ Starts the clock on performance
- ▶ Acknowledges receipt of pre-performance submissions
- ▶ May be a *limited* NTP
 - ▶ Dollar cap
 - ▶ Portion of the work

Communications

- ▶ Built on the RFP and kick-off meeting
- ▶ Progress reports
 - ▶ Retrospective progress
 - ▶ Prospective short-term plans
 - ▶ Burn rate, in relation to schedule, with triggers
- ▶ Insist on established POCs
- ▶ Formal, numbered recorded responses
- ▶ Submittal of deliverables

Schedule Monitoring

- ▶ Who does it?
 - ▶ Contracting?
 - ▶ Project office?
- ▶ Identify issues early
- ▶ Tracking the critical path

Schedule Monitoring

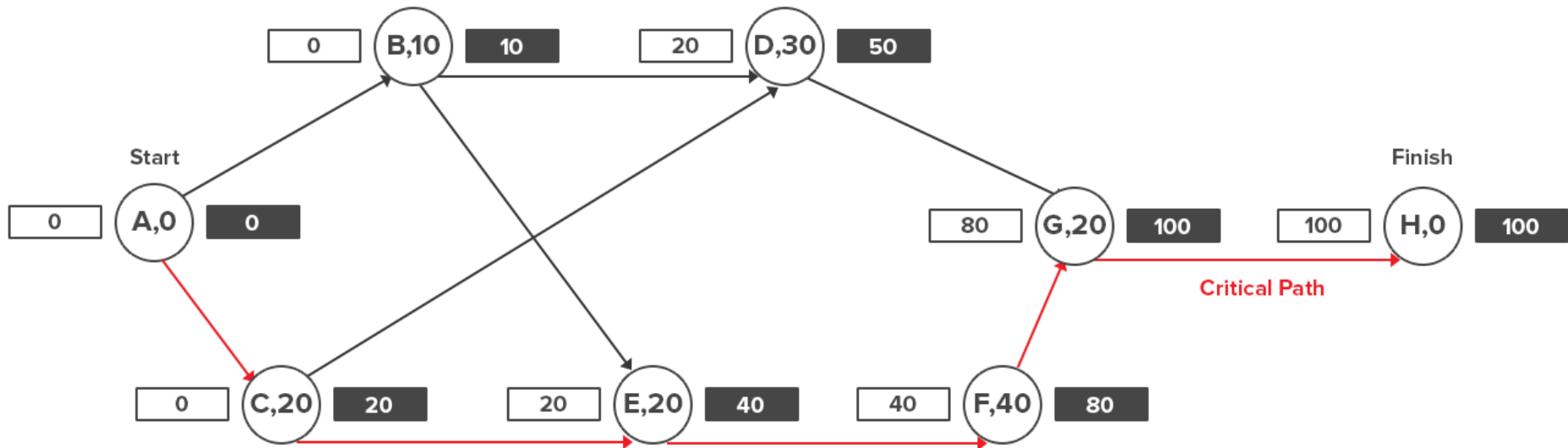


Illustration by Workamajig, at www.workamajig.com

Schedule Monitoring

- ▶ Identify issues early – if it is on the critical path, even a very early mis-step can cause delay
- ▶ Recovery plans
 - ▶ How late is late enough for a recovery plan?
 - ▶ Another place where the ground rules are established in the RFP and reinforced at the kick-off meeting

Inspections

- ▶ On site inspectors for rolling stock – QA and BA
 - ▶ BA session scheduled for June 23
- ▶ Hold points to ensure quality before moving on
- ▶ First Article Inspections
 - ▶ Testing
 - ▶ Manufacturer, agency inspectors
 - ▶ Rules laid out in the RFP!
- ▶ Draft reviews for written deliverables

Product Acceptance

- ▶ Why is this important? – “Acceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements” – FAR 46.501
- ▶ Agency’s responsibility to identify patent defects
- ▶ Once accepted, patent defects are the agency’s responsibility

Conditional Acceptance

- ▶ Testing incomplete
- ▶ Minor defects or deficiencies that must be repaired, replaced, or compensated for
 - ▶ “Punch list” in construction
 - ▶ Condition of final payment!

Non-Conforming Goods

- ▶ Something that does not comply with the specifications
- ▶ In-process – vendor's factory
 - ▶ Piece, part, assembly
 - ▶ Segregation from the line and stores to avoid inadvertent use

Non-Conforming Goods

- ▶ At delivery – a final product
 - ▶ Rejection – unacceptable
 - ▶ Conditional acceptance – minor flaws
- ▶ Toughest case – too extreme for conditional acceptance, not bad enough to reject outright
 - ▶ In your RFP and contract, establish a process for
 - ▶ Inspection before shipment to avoid this
 - ▶ Necessary repairs on sight for issues identified in final acceptance testing

Payments

- ▶ Advance payments – payments before costs incurred
 - ▶ FTA C. 4220.1F, chapter IV, section 2.b(5)(b)
 - ▶ May use local share
 - ▶ FTA dollars only with sound business reason
 - ▶ Customary
 - ▶ Adequate security

Payments

- ▶ Progress payments – payments during performance
 - ▶ FTA C. 4220.1F, chapter IV, section 2.b(5)(c)
 - ▶ Again requires adequate security
 - ▶ Document work completed to deserve the payment
- ▶ Percentage of completion for construction only
- ▶ Milestone payments
- ▶ Retention

Payments

- ▶ Whether advance, progress, or on delivery/acceptance, you need a payment process
- ▶ Checks and balances a must!
- ▶ Typical
 - ▶ PM checks off on work or product
 - ▶ Contracting confirms payment is proper under the agreement
 - ▶ Finance reviews as within authorized project budget and issues payment

Payments

- ▶ Must be timely!
- ▶ California Prompt Payment Act (public projects)
 - ▶ Progress payments within 30 days after undisputed request
 - ▶ Retainage within 60 days after completion
- ▶ FTA does not establish a payment period from agency to prime
- ▶ Agencies will be known in the industry for slow payments

Payments

- ▶ From prime to subs
 - ▶ FTA – 49 CFR 26.29 – applies to ALL subs
 - ▶ Within 30 days of payment to prime
 - ▶ Prime to release retainage within 30 days of completion of the sub's work – NOT the project
 - ▶ California requires more
 - ▶ Seven days to pay subs/seven days after release of retention
 - ▶ Allows for holding 150% of disputed amounts

Auditing

- ▶ Buy America audits in a later installment
- ▶ Cost reimbursement contracts
 - ▶ Contractor must have annual audits conforming to FAR Part 31/2 CFR 200, Subpart E
- ▶ Overhead rate caps?

Agency Property

- ▶ Vehicles, equipment, office space
- ▶ Monitor condition and maintenance regularly
- ▶ Contract provisions on condition standards, reporting, minimum maintenance requirements, permissible uses, responsibility for insuring, replacement of damaged or worn out equipment
- ▶ Periodic reports, documentation, and review or inspection

Contract Interpretation

- ▶ Question from either the contractor or agency team
- ▶ Contracting officer and PM should collaborate
 - ▶ Few questions involve pure contractual or technical matters
 - ▶ Coordination is paramount in ensuring an answer is consistent with both the contract terms and technical requirements
- ▶ Always remember, ambiguity counts against the drafter!

Monitoring DBE Compliance

- ▶ Uniform Report of DBE Awards or Commitments
 - ▶ June 1 and December 1
 - ▶ Prime and sub contract awards (obtain from primes)
 - ▶ Value
 - ▶ Broken down by ethnicity and gender
 - ▶ Payments – prime and subs
- ▶ Always a triennial finding
- ▶ Requires contractor information so all must report

Monitoring DBE Compliance

- ▶ 49 CFR 26.37 – “a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (...) is actually performed by the DBEs to which the work was committed. This mechanism must include a written certification that you have reviewed contracting records and monitored work sites in your state for this purpose.”

Monitoring DBE Compliance

- ▶ What are we looking for?
- ▶ Commercially useful function – 26.55(c)
- ▶ Inappropriate terminations of DBE subs – 26.53(f)
- ▶ Prompt payments – 26.29(d)
- ▶ On site observation – identify the DBE firms and workers, know the contracted portions

Monitoring Wage Rules

- ▶ Davis-Bacon and Fair Labor Standards Act
- ▶ California Dep't of Industrial Relations – Director's General Prevailing Wage Determinations
- ▶ Certified payrolls required – in RFP and contract
- ▶ Spot checks – count heads and compare

Changes

- ▶ Understand and avoid constructive changes
 - ▶ Informal direction
 - ▶ Extra effort to fix defective plans
 - ▶ Unreasonable interpretation of the contract requirements - ambiguity
 - ▶ Unreasonably denied request for delay

Changes

- ▶ Guard against 'apparent authority'
- ▶ Akin to informal direction
- ▶ Typically a person outside of the contract team

Differing Site Conditions

- ▶ Something not reasonably anticipated
- ▶ A construction issue
- ▶ Plan for the unexpected- this is very much like that situation where a contractor claims it took extra effort because our plans – or information – were defective
- ▶ No extra effort/claims authorized without notice

Value Engineering

- ▶ Strongly encouraged by FTA
- ▶ Contractor devises a better way to approach a problem, that would require some alteration of the anticipated work
- ▶ Share in the savings

Contract Modification

- ▶ Issue formal change orders
 - ▶ Time, money, or requirements
- ▶ Maintain lines of authority within the agency
- ▶ Ensure it is within the contract scope!
- ▶ Ask for a proposal, or receive contractor's request
- ▶ Require contractor's proposal in writing
- ▶ Additive and deductive changes
- ▶ Equitable adjustment – agency fault or Act of God

Contract Modification

- ▶ Treat every change order like a sole source procurement
- ▶ Independent cost estimate
 - ▶ 4220.1F, Chapter VI, paragraph 6 – “in connection with every procurement action, including contract modifications”
 - ▶ 2 CFR 200.323(a) – “in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications”
 - ▶ \$250,000!

Contract Modification

- ▶ Treat every change order like a sole source procurement
- ▶ Cost or price analysis
 - ▶ 4220.1F, Chapter VI, paragraph 6(a) – cost analysis “in the event of a change order”
 - ▶ 2 CFR 200.323(a) – does not specify whether cost analysis is required or if price analysis is sufficient – simply when “in excess of the Simplified Acquisition Threshold”
 - ▶ \$250,000!

Contract Modification

- ▶ Treat every change order like a sole source procurement
- ▶ Negotiate profit separately
 - ▶ 4220.1F, Chapter VI, paragraph 6(a)(2) – “FTA expects the recipient to negotiate profit as a separate element of the cost for each contract in which there has been no price competition”
 - ▶ 2 CFR 200.323(b) – “must negotiate profit as a separate element of the price for each contract in which there is no price competition”

Contract Modification

- ▶ What is a fair profit?
- ▶ WMATA guidelines at <https://www.wmata.com/business/procurement/upload/WMATA-Procurement-Procedures-Manual-2017-Version-7-9.pdf>

Profit Calculation

Factor	Rate	Weight	Value
Risk	20	.03 to .12	
Difficulty	15	.03 to .12	
Magnitude	15	.03 to .12	
Performance period	15	.03 to .12	
Investment	5	.03 to .12	
Agency assistance	5	.03 to .12	
Subcontracting	25	.03 to .12	

Profit Calculation

- ▶ Risk
 - ▶ Time and materials = low
 - ▶ Level of effort = moderate
 - ▶ Lump sum = high
- ▶ Difficulty – harder is higher
- ▶ Magnitude – smaller jobs = higher profit

Profit Calculation

- ▶ Performance period – longer jobs = higher profit
- ▶ Investment – more capital investment = higher profit
- ▶ Agency assistance – less agency help = higher profit
- ▶ Subcontracting – less subcontracting = higher profit
- ▶ Telling the contractor how you will price changes in advance – in the RFP, policies like WMATA's, and in the kick off meeting – will save lots of haggling later

A Final Word on Pricing Changes

- ▶ Pricing in advance of the work
- ▶ Pricing at the end of the work
 - ▶ Essentially – time and materials
- ▶ Pricing where there is uncertainty
 - ▶ Representative sample on T&M
 - ▶ Negotiate the rest of the work

Liquidated Damages

- ▶ Must be in the RFP and contract if you want to consider using them
 - ▶ Construction contracts – late delivery
 - ▶ Service contracts – performance measures
 - ▶ Vehicle contracts – late, weight, RAMS
- ▶ Must be thought through carefully to ensure the right behavior is incentivized

Liquidated Damages

- ▶ The value of the LDs must match likely damages
- ▶ Cannot be a penalty
- ▶ Make a record of the basis
 - ▶ It costs more to maintain and operate old equipment and old buildings
 - ▶ Untimely performance may impact future ridership
 - ▶ Some failures may put the agency in violation of FTA or other requirements
 - ▶ Value both the objective and subjective measures

Liquidated Damages

- ▶ For liquidated damages to be effective, the schedule or other measures must be reasonable
 - ▶ Contractors will price in likely LDs
- ▶ If you don't use them when available, you may have paid too much or favored the incumbent in the next round of contracts

Liquidated Damages

- ▶ Assessing damages
- ▶ Notice to contractor
 - ▶ An opportunity to be heard is desirable but not required
 - ▶ Don't sandbag! – evaluate and notify promptly to improve performance
 - ▶ Review defenses – did unusually dense traffic stop on-time routes?

Incentives

- ▶ Just the flip side of liquidated damages
- ▶ The carrot!
- ▶ Just like LDs, must be objectively measured to be effective
- ▶ Just like LDs, careful what you incentivize

Exercising Options

- ▶ Before you exercise
 - ▶ Ensure the options were evaluated as part of the offer
 - ▶ Ensure the pricing is still fair and reasonable
 - ▶ Ensure the options are still valid
- ▶ Give proper and timely notice to the contractor
- ▶ FTA forbids negotiating a further discount – 4220.1F, Chapter V, section 7.a.(1)(c)2

Issuing Purchase Orders

- ▶ ID/IQ contracts
- ▶ Within minimum/maximum
- ▶ Ordering quantity satisfied
- ▶ Ensure ordering period is still open
- ▶ Ensure pricing is still fair and reasonable

Issuing Task Orders

- ▶ Single contractor
 - ▶ Agency prepares scope, ICE
 - ▶ Provide scope to contractor for proposal
 - ▶ Negotiate the task order

Issuing Task Orders

- ▶ Multiple contractors
 - ▶ Agency prepares scope, ICE
 - ▶ Provide scope to ALL contractors for proposal
 - ▶ Selection on price or price and other factors
 - ▶ Be clear in the TO solicitation
 - ▶ Treat as a mini-competition

Issuing Task Orders

- ▶ Multiple A&E contractors
 - ▶ Agency prepares scope, ICE
 - ▶ Provide scope to ALL contractors for proposal
 - ▶ Must follow Brooks Act procedures
 - ▶ Rank firms and select most qualified
 - ▶ Negotiate pricing
 - ▶ Serial negotiation

When Things Start to Slip

- ▶ Slippage on schedule, quality
- ▶ Evaluate reasons
 - ▶ Change order justified?
 - ▶ Just poor performance?
- ▶ Adequate assurances
- ▶ Cure notice
 - ▶ Reasonable amount of time
 - ▶ Standard for recovery
 - ▶ Recovery plan?

Suspending Work

- ▶ Prepare for this in your RFP and contract
- ▶ Example – FAR 52.242-14
 - ▶ Agency convenience
 - ▶ No price adjustment unless time “unreasonable”
 - ▶ Be sure you specify pricing adjustment will be for actual costs only!
- ▶ ‘Stop work order’

Warranty Enforcement

- ▶ A warranty generally applies upon acceptance
- ▶ Implied warranty of merchantability
- ▶ Implied warranty of fitness for a particular purpose
- ▶ Express warranties – e.g., miles or hours – in contract

Warranty Enforcement

- ▶ Preserve the warranty
 - ▶ Minimum maintenance requirements
 - ▶ Quality of parts, fluids
 - ▶ Alterations, additions
- ▶ Use the warranty
 - ▶ Can agency personnel do warranty work?
 - ▶ Does my contract allow reimbursement for labor, parts?

Warranty Enforcement

- ▶ Track the warranty
 - ▶ Mean time between failure
 - ▶ Other aspects of RAMS
- ▶ Track for fleet defects
 - ▶ Percentage of components with same defect
 - ▶ Allows replacement of ALL similar components, regardless of failure

Document Performance

- ▶ A record of the contractor's work
- ▶ Good or bad
- ▶ If bad, or sort of bad, notice and opportunity to be heard
 - ▶ *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (1980)
 - ▶ “when the Government effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity, due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken.”

Contract Close Out

- ▶ Grants must be closed out in 90 days after activities in the grant are complete
- ▶ What does it mean?
 - ▶ Services complete, materials accepted
 - ▶ Final payment made
 - ▶ Contractor has released all claims

Contract Close Out

- ▶ Administrative checklists – draft and use them!
 - ▶ Disputes, claims, protests, and litigation settled
 - ▶ Final overhead rates approved
 - ▶ Funding released (final payment, retainage paid)
 - ▶ Property accounted for (return, disposal)
 - ▶ The files are consolidated
- ▶ Document retention requirements based on project, not just the contract

Questions?