

# Doing Business with the Federal Government - An Overview

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## Background

- Contracting with the Federal Government involves competing in a regulated marketplace and creates obligations and potential liabilities that generally do not exist in the commercial marketplace, including:
  - Limits on customer communication/interaction;
  - Socioeconomic requirements;
  - Price justification and audits;
  - Longer term unpredictability; and
  - Potential criminalization of business disputes.
- The existence of these Government-unique risks requires the establishment of compliance mechanisms within the company.
- In today's climate of "procurement reform," however, many of these risks have been reduced, particularly for vendors that provide "commercial items." "Commercial items" are broadly defined to include *products and services* of a type customarily available in the commercial marketplace.

## Customer Communication/Interaction

- Competition for Federal contracts is a regulated process driven generally by the concepts of equal access to information, publicly announced (and applied) contract award criteria, and the enforcement of the competition rules through "bid protests."
- Many marketing/selling techniques that are normal in the commercial marketplace, e.g., special relationships and

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## Practice Areas

Government Contracts

customer entertainment, may create problems if applied in the Federal marketplace.

- Consequently, training of the sales force is necessary to alert them to the nuances of the Federal competition rules and the "Gratuities" and "Procurement Integrity" laws, which restrict communication and interaction with government customers.
- Training is especially critical in today's environment, where most "commercial item" vendors can easily obtain a "multiple award schedule contract" with the General Services Administration, which amounts to little more than a vehicle for marketing to Government buyers under "streamlined" rules of competition.

### **Socioeconomic Requirements**

- Special requirements for Federal contractors (and, in many instances, subcontractors) exist in areas such as:
  - Equal Opportunity/Affirmative Action;
  - Labor standards—e.g., Service Contract Act;
  - Buy American Act;
  - Environmental Protection; and
  - Drug-Free Workplace.
- These requirements may require certifications of compliance and certain reporting obligations, although many of these requirements have been relaxed in recent years by "procurement reform" laws and eliminated altogether for "commercial item" contractors.

### **Price Justification and Audits**

- Federal contracting officers (COs) must determine that the price of every contract the Government enters is "fair and reasonable."
- In many cases, this determination will be based on the CO's analysis of a contractor's "cost or pricing data." This data includes all cost data (e.g., labor/material costs and indirect/profit rates) in the contractor's possession related to the price proposed.
- If submitted, these data must be certified as being "accurate, current and complete."
- Submitted data are subject to post-award audit for verification and may create contractor liability for a retroactive "price reduction."
- Recent "procurement reform" initiatives, however, have reduced—through the expansion of contractor exemptions—the risk in this area, particularly for "commercial item" contractors.
- If no exemption applies, however, a contractor may be required to alter its accounting system to protect itself.

### Longer Term Unpredictability

- Federal appropriations laws generally limit the terms of contracts to one year.
- Contractors must diligently protect their intellectual property rights in technical data and computer software via mandatory markings or risk losing some of those rights to the Government.
- The "Changes" clause contained in all contracts affords the Government the unilateral right to make changes within the "general scope" of the contract, which may increase or decrease the cost of, or time required for, contract performance.
- The "Termination for Convenience" (T/C) clause present in all contracts permits the Government to terminate contracts unilaterally for virtually any reason.
- Although a contractor is to receive an "equitable adjustment" to the contract price and/or schedule for Changes and to be "made whole" financially in the event of a T/C, a contractor may first be required to submit cost justifications and be subjected the contractor to a Government audit of the contractor's accounting records.
- Again, recent reforms have mitigated this risk for "commercial item" contractors.

### Potential "Criminalization" of Business Disputes

- In view of laws such as the False Claims Act and False Statements Act, there is always the risk that business disputes arising from differing interpretations of contract requirements or contract negotiation tactics may generate a criminal investigation.
  - Even if the outcome is ultimately favorable, investigations are inherently negative and unpleasant and are often very costly to defend.
  - They also may raise the risk of debarment or suspension from Government contracting.
- Recent rule on "Contractor Business Ethics Compliance Program and Disclosure Requirements," which goes into effect on December 12, 2008, requires mandatory disclosure whenever contractor has "credible evidence" of
  - "Significant overpayments,"
  - Violations of the civil False Claims Act, or
  - Violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity statutes.

### Conclusion

Contracting with the Government can have many benefits. These include special socio-economic preferences that afford opportunities to new and small business contractors that do not exist in the commercial marketplace and the comfort of dealing with a generally reliable customer. There also exist many potential pitfalls that do not generally exist in the commercial realm, including the Government's right to terminate the contract at its convenience and the possible criminalization of business disputes. In short, while there are

many promising opportunities in contracting with the Government, a company must do its homework to ensure that it knows, and complies with, the myriad unique rules that apply in this environment.