

U.S. GOVERNMENT CONTRACTING: NAVIGATING THE REGULATORY ENVIRONMENT

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USG Contracting Is a Unique Opportunity

- USG is the largest buyer of goods and services in the world
- In an unstable business environment, USG is a stable customer with approved funding

Doing Business With the USG

- Is An Opportunity
- But Involves Risk
- Therefore Presents Challenges

USG Procurement Principles

- Competition
- Fair Access
- Integrity
- Responsibility

No “Waste, Fraud, and Abuse”

The USG Contract

- The standard form, fixed price contract is strict but reasonably fair with understandable rules of risk allocation
- You can rely on government specifications, but you must perform in accordance with them
- USG must pay for its changes, but you must perform them
- Schedules are subject to excusable delays
- There may be special clauses allocating risk

The USG Contract

- Contractors have the right to claim equitable adjustments but must certify, document and prove claims
- The contract is covered by reliable laws with established appeal rights and impartial disputes forums
- The Federal Acquisition Regulation (FAR) requires clauses imposing certain duties and restrictions

The USG Contract Presents Business Risks

- Compliant timely performance is required
- USG has the right to reject or make claims when work is not in accordance with the contract
- USG has the unilateral right to change specified requirements
- USG has the right to terminate for default or convenience
- USG has the power to withhold payment

Subcontract Issues for Primes

- Proper Procurement Process
- Subcontractor Failure No Excuse
- Flow Down Prime Contract Obligations
- Choice of Law/Disputes Procedures
- Right to Pass-Through Subcontractor Claims

Subcontract Issues for Subs

- No Direct Relationship with USG
- Flow-Down Prime Contract Rights
- Provisions for Timely Payment
- Choice of Law/Disputes Procedures

USG Contract (or Subcontract) Also Poses Special Risks

- To protect the U.S. taxpayer from contract “fraud,” the USG has contractual and statutory power to audit and investigate; and extraordinary contractual and statutory remedies

USG Special Remedies

- Criminal False Claims, False Statements, Conspiracy to Defraud, etc – prison and fines
- Civil False Claims – treble damages, penalties, and forfeitures
- “Suspension and Debarment” Power
- Withholding Payments and Reclaiming Overpayments

How Do U.S. Contractors Protect Themselves?

- Compliance Policies, Reviews, and Training
- Disclosure Procedures
- Defense Industry Initiative
- Construction Industry Initiative
- Crowell & Moring's Role
- The risks remain but obviously are manageable because contractors are doing profitable business with the USG

The Lessons and the Challenge

- To continue doing business with the USG
- Be prepared to deal with an unusual contract and an unusual customer
- Avoid the common mistakes that contractors are making in Iraq and the Middle East

Most Common Mistakes by Non-U.S. Contractors

- Not Understanding U.S. Legal Restrictions and Requirements
- Not Having an Adequate Compliance System
- Not Understanding and Enforcing Your Rights

Legal Restrictions and Requirements

- False Statements and False Claims
- Fraud
- Bribery and Kickbacks
- Inaccurate Cost Information During Non-Competitive Price Negotiations
- Product Substitution and Overcharging for Labor and Material
- Creating False Records and Destroying Evidence
- Obstructing Audits and Investigations

Bribery and Gratuities

- 18 U.S.C. § 201
- Prohibits giving or offering anything of value to a public official with the intent of influencing official acts or inducing the public official to collude in or allow fraud on the United States

Anti-Kickback

- 41 U.S.C. § 51-58
- Prohibits providing, attempting to provide, or offering to provide any kickback (i.e., anything of value or compensation of any kind) to a prime contractor for improperly obtaining or rewarding favorable treatment in connection with a subcontract
- Prohibits soliciting, accepting or attempting to accept any kickback
- Obligates contractor to report any attempted kickback

Fraud and False Statements

- 18 U.S.C. § 1001
- Prohibits knowing and willful making of any materially false, fictitious or fraudulent representation, statements or writings to the USG
- Prohibits knowing and willful falsification, concealment or cover up of a material fact to the USG

False Claims

- 31 U.S.C. § 3729, et. seq.
- Prohibits knowingly presenting, or causing to be presented, to the USG any false or fraudulent claim for payment or approval
- Prohibits knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the USG
- *Qui Tam* Provisions: 15-30% bounties for whistleblowers

Potential Consequences of a Legal Violation

- Criminal and Civil Penalties
 - Fines up to \$10,000 for each violation
 - Forfeiture of contract proceeds
 - Penalty up to three times the contract proceeds or other damages the government sustains
 - Imprisonment of up to ten years for each violation
- Not Getting Paid
 - Offset to current contract payments
 - Offset to claims
- Suspension and Debarment

Mandatory Disclosure

- Contractors are obliged to timely disclose to the Government, in connection with a contract or subcontract, credible evidence of:
 - Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations;
 - Violation of the civil False Claims Act – including retaliation provisions; or
 - Significant overpayment(s) on the contract.
- “Full cooperation” must be given to all USG agencies involved with audits, investigations, or corrective actions

How Do U.S. Contractors Protect Themselves?

- Be ready to withstand the scrutiny that comes with the USG contract and to make these contracts work for you
- Establish a Compliance Program
 - Written policies/procedures and Code
 - Compliance officer and other compliance resources – *proactive not reactive*
 - Monitoring based upon a “risk assessment” – internal/external audits
 - Hotline and corrective action for discovered shortcomings
 - Educate yourself and key employees
- Disclosure Procedures
- Deal with Audits and Investigations and Defend Yourself

Understanding and Working Within the System – As a Business Asset

- Adopt the Proper Mindset
- Learn How To and How Not To
- Create and Spread the Culture of Compliance and Ethics

Your Rights as a Contracto

- Fair Competition
- Fair Payment for Work Performed

Fair Competition

- Bid Protests – Contractor's right to challenge the conduct of a procurement to ensure a fair and objective opportunity to compete for and win government business
- Pre-Award Protests – Challenge to the terms of the Solicitation or elimination from the competitive range where USG acted unfairly
- Post-Award Protests – Challenge to Agency's evaluation and award decision where Agency deviated from stated evaluation criteria or otherwise acted unfairly

Fair Payment for Work Performed

- Contracting Officers taking advantage of local contractors who do not know the rules
- Formal claims process exists
- Bringing a claim is common in U.S. system
- Takes time, effort, and understanding of the process – but can be very valuable (including interest)

Fair Payment for Work Performed

- Common Mistakes
 - Failing to give notice of claims
 - Executing contract modifications without reserving rights
 - Lack of an adequate cost accounting system necessary for accurate pricing any non-competitive contract award or modification (including cost allowability and CAS)
 - Lack of proof and supporting documentation
 - Certifying the claim before the facts are known
 - Taking extreme or offensive positions during negotiations

Conclusion

- You don't have to love the USG to make business work
- If you break the rules, or cut corners, you will get into trouble
- If you follow the rules and enforce your rights, you will do well
- Get good counsel