



CAVEAT VENDOR

Weighing Opportunities and Risks in the Federal Marketplace

Charles "Rod" Marvin, Jr., Esquire
Paul A. Debolt, Esquire
Venable LLP

Charles L. Wilkins, CPA
Tim A. Di Guiseppe, CPA
FTI Consulting, Inc.

Introduction

4

Federal Contracting
Opportunities

6

Some Unique Aspects
of the Federal Contracting
Environment

10

Assessing and Managing
the Risks in a Specific
Procurement

18

Conclusion

31

Practice Tips

32

CAVEAT VENDOR

Weighing Opportunities and Risks in the Federal Marketplace

Charles "Rod" Marvin, Jr., Esquire
Paul A. Debolt, Esquire
Venable LLP

Charles L. Wilkins, CPA
Tim A. Di Guiseppe, CPA
FTI Consulting, Inc.

This publication is not intended to provide legal advice or opinion. Such advice can only be provided in response to specific fact situations.
© 2005 Venable LLP and FTI Consulting, Inc.
All Rights Reserved.

Introduction

The federal government's multilevel and multifaceted response to the recent marked rise in the nature, scope, and number of terrorist attacks worldwide has generated a significant demand for products and services in areas related to the national defense and homeland security.

As a result, one can expect the number of contracting opportunities with the federal government to continue to be substantial in the near to mid-term, especially contracting opportunities for products and services supporting domestic programs to implement direct protective measures for the public, national resources and infrastructure, and for support of US forces and operations against terrorist organizations

and regimes overseas. In response to this rising, and likely continuing demand, many US firms can offer technology and services that may significantly increase and upgrade the nation's ability to protect itself from terrorist threats in the coming years. Under these circumstances, it is both commercially sensible and socially responsible for firms with such capabilities to consider entering the federal government marketplace, even if those firms have not traditionally sought business with the federal government.

This booklet highlights some of the opportunities and risks associated with participation in the federal government marketplace. The booklet first addresses areas of federal

contracting opportunities that may appeal to the new entrant, identifies some of the unique features of the federal market, and warns of potential pitfalls that might be encountered as a new business works its way through the maze of unique rules applicable to this marketplace. Next, the booklet presents some strategies for the effective, proactive management of government contracts and offers some tips to help contractors protect themselves and their business investment during contract performance. Finally, the booklet concludes with some top-level recommendations concerning methods to maximize revenue and minimize risk for firms considering federal contracting opportunities.

Federal Contracting Opportunities

Increased federal contracting opportunities directly related to the recent surge in demand for security-related goods and services include, among others, worldwide opportunities with the Department of Defense (“DOD”) and domestic opportunities with the recently formed Department of Homeland Security (“DHS”). These federal agencies have specific responsibilities for defense of the public and the national infrastructure against terrorism.

Simply stated, the mission of the Department of Defense is to protect and defend the United States against its enemies wherever they are found.

To accomplish its mission, DOD requires not only the equipment, goods, and services to manage its day-to-day operations, but also specialized equipment and services, including research and development, in a host of mission-related areas. Indeed, contracting opportunities with the Department of Defense cover almost the entire spectrum of the federal marketplace.

The primary mission of the Department of Homeland Security, created by the Homeland Security Act of 2002, is to prevent terrorist attacks within the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States. To accomplish that mission, DHS must procure a vast array of equipment, supplies, and services to support not only its daily operations, but

also its mission-specific tasks, including its responsibilities for the designation and certification of Qualified Anti-Terrorism Technologies (“QATT”).

Federal agencies obtain the resources to accomplish their missions through various types of contractual instruments. To obtain the goods and services they require, most federal agencies rely primarily upon “standard” procurement contracts solicited, awarded, and administered under the Federal Acquisition Regulation (“FAR”) and the agencies’ supplemental regulations, e.g., the Defense Federal Acquisition Regulation Supplement (“DFARS”).

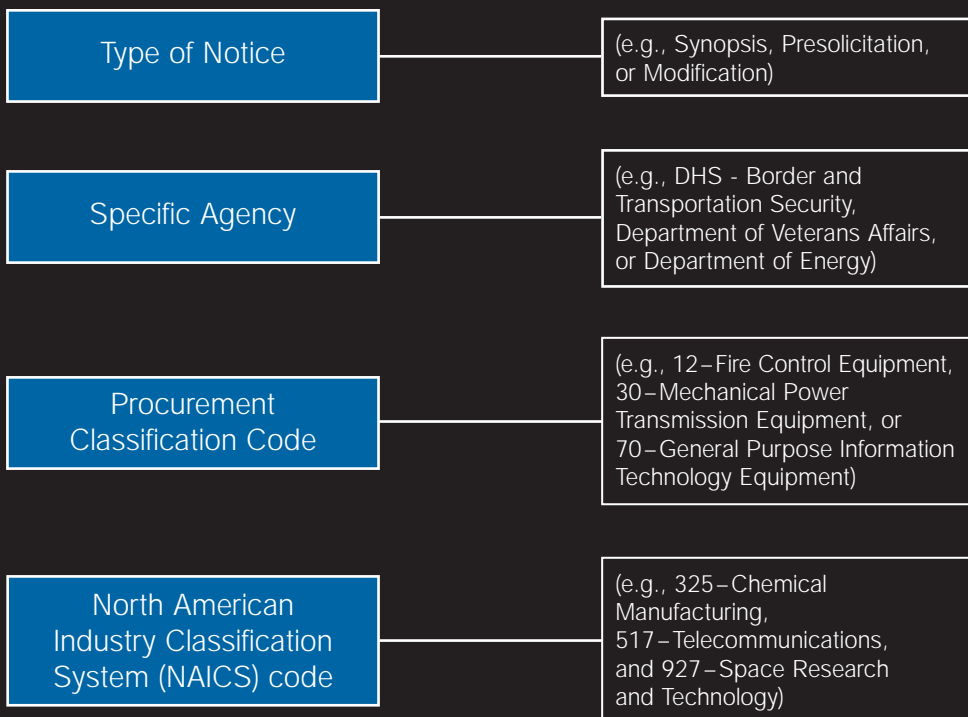
In addition to their authority under the FAR, some federal agencies also have statutory authority to conduct programs and procurements using procedures that depart, sometimes significantly, from the requirements of the FAR. For example, federal agencies may use Cooperative Agreements to foster basic and applied research in a wide range of pursuits. Federal laboratories may also participate in Cooperative Research and

Development Agreements, which are instruments designed to facilitate the transfer of technology from the government into the commercial sector.

To support research and the development of mission-critical goods and services, DOD and DHS also have broad and flexible authority to utilize instruments called "Other Transactions." These instruments allow DOD and DHS to tailor the contractual provisions governing the contractor's effort in a manner that can preserve a contractor's control over the dissemination and use of not only the intellectual property the contractor brings to the effort, but also the intellectual property that is developed under the effort. For contractors who have been reluctant to enter the federal marketplace due to the risks associated with the use or refinement of their intellectual property in the performance of a government contract under the FAR, the use

of these specialized instruments, where appropriate, can mitigate, or even eliminate those risks.

Under laws governing the procurement of goods and services by the federal government, all non-classified government business opportunities of an amount greater than \$25,000 are listed at a single location on the Internet called the Government-wide Point of Entry ("GPE") (www.fedbizopps.gov). Commonly called the FedBizOpps website, the GPE includes synopses of solicitations, proposed contract actions, and other information relating to government contracting opportunities. A click on the "Go" box for "Find Business Opportunities" leads to the search page. Using buttons, check boxes, and dropdown menus, one can search for government business opportunities by:



8 The FedBizOpps home page also allows a prospective offeror to access a list of subcontracting opportunities. On the right side of the page, click on "SUB – Net (Subcontracting Opportunities)" for a link to the U.S. Small Business Administration Subcontracting Network (web.sba.gov/subnet). From that site, a prospective offeror can research solicitations for subcontracting opportunities, or explore links to the SBA's Subcontracting Opportunities Directory (www.sba.gov/GC/indexcontacts-sbsd.html) – a listing derived from small business subcontracting plans submitted by federal government prime contractors.

In addition to the FedBizOpps site, some agencies, such as the Defense Advanced Research Projects Agency ("DARPA") have their own websites. DARPA's website, for example, gives potential offerors specific guidance with respect to DARPA solicitation and award procedures, describes its Small Business Innovative Research and Small Business Technology Transfer programs, and provides agency contact information. Simply go to www.darpa.mil, then click on "Doing Business with DARPA" or "Solicitations."

Finding a good business opportunity is only the beginning of an analytical process that should support a decision concerning whether a foray into the federal marketplace is advisable. The characteristics of the federal marketplace can differ substantially from those of the commercial market. A number of factors and risks associated with the solicitation and award process, the type of contract, accounting and administration requirements, and termination provisions must be considered.

" Finding a good business opportunity is only the beginning of an analytical process that should support a decision concerning whether a foray into the federal marketplace is advisable. The characteristics of the federal marketplace can differ substantially from those of the commercial market."

Some Unique Aspects of the Federal Contracting Environment

TYPES OF SOLICITATIONS

The federal government awards contracts for billions of dollars worth of goods and services every year, seeking everything from pencils to building maintenance to research and development to jet fighters. To obtain information from offerors concerning the characteristics and prices of the goods and services it needs, the federal government uses two primary solicitation approaches: sealed bidding and competitive proposals.

Sealed Bid Acquisitions

Sealed bidding must be used in a federal procurement when 1) there is sufficient time for the solicitation, submission, and evaluation of sealed bids; 2) the government expects to award the contract on the basis of price and other price-related factors; 3) discussions with the responding offerors about their bids will not be necessary; and 4) the government reasonably expects to receive more than one sealed bid.¹ If the government decides that the use of sealed bidding is appropriate, it will issue an Invitation for Bids ("IFB"). For most sealed bidding procurements, the IFB is prepared in a standard format.² Among other things, the IFB provides instructions to bidders, specifies the work being solicited and the schedule of performance, identifies the time and place for the submission of bids, identifies any representations or certifications required from bidders, and states the evaluation factors that will be used to select the awardee. Additional requirements can

be identified through express provisions included in the IFB, or through the incorporation by reference of specific regulatory provisions.

Unless extended by prior public notice, the bids will be opened publicly at the time and place identified for submission. With very few exceptions, bids arriving at the designated place after the time designated for the receipt of bids will not be opened, but will be deemed ineligible for award and returned to the bidder. In unclassified procurements, at the time specified for bid opening, the bid opening officer will open publicly all bids received before that time, read the bids aloud to persons present (if practicable), and record the bids on an Abstract of Offers prepared in accordance with the applicable regulations.³ Persons present at the bid opening may examine the bids to the extent that such review does not unduly interfere with the conduct of government business.⁴ In classified procurements,

¹ FAR 6.401(a). The Federal Acquisition Regulation is found at Title 48 of the Code of Federal Regulations ("CFR"), Chapter 1.

² See FAR §14.201-1.

³ See FAR §14.403.

⁴ See FAR §14.402-1.

bidders with the appropriate security clearance may attend bid opening.

An offeror must exercise great care in the preparation of its response to an IFB. Often, in addition to technical performance requirements, the IFB will identify a host of specific requirements, including requirements relating to delivery, packaging, and modifications or withdrawals of bids. These provisions should be addressed in the solicitation and should be carefully considered by the contractor. Any deviation from the material aspects of the solicitation can render a bid nonresponsive, and thus, ineligible for award.⁵

After reviewing the bids for conformance to the requirements of the IFB, the contracting officer will award the contract “to that responsible bidder whose bid, conforming to the invitation, will be the most advantageous to the Government, considering only price and the price-related factors ... included in the invitation.”⁶

Competitive Negotiated Acquisitions

Competitive negotiation procedures may be used when the conditions for using sealed bidding are not present.⁷ An agency commences a competitive negotiated acquisition by issuing a Request for Proposals (“RFP”). Like an IFB, an RFP is normally issued using a standard format.⁸ At a minimum, the RFP must contain a description of the government’s requirements, the proposed terms and conditions that will apply to the contract, the information that the offeror is required to provide in its proposal, and

the factors and subfactors (and their relative importance) that will be used to evaluate the proposal.⁹ The RFP will also state the time and place for receipt of proposals. With few exceptions, a proposal received after the time specified in the RFP ordinarily will not be considered for award.¹⁰

To determine whether to submit a proposal in response to the RFP, a prospective offeror should read the RFP carefully to ensure that it understands not only the requirements the RFP identifies, but also the risks it assigns to the contractor. Not all of the provisions affecting the contractor’s requirements and risks, however, may be readily apparent simply by reviewing the RFP. For example, both Sections H and I contain contract requirements. While Section H will usually describe those requirements in clauses presented in full text within the RFP, Section I of the RFP will include a series of contract clauses — some of which will be included in full text, while other clauses will be incorporated by reference. A prospective offeror must find and read the complete text of all of these clauses to assess fully the responsibilities and risks (i.e., the potential business exposure) that will be borne by the awardee in the performance of the contract.

An offeror may seek to modify objectionable RFP provisions in its proposal if the solicitation authorizes offerors to propose alternate terms and conditions,¹¹ or during discussions with the contracting officer. If, however, the RFP announces the government’s intention to award without

⁵ See FAR §§ 14.301(a); 14.404-2.

⁶ FAR §14.408-1(a)(3).

⁷ FAR §6.401(b).

⁸ See FAR §15.204-1.

⁹ FAR §15.203(a).

¹⁰ FAR §15.208.

¹¹ See FAR §15.203(a)(2)(i).

discussions, the offeror will only have a limited opportunity to clarify aspects of its proposal and will not be permitted to revise it.¹²

After proposals are received, the government will evaluate and score the proposals using the evaluation criteria stated in the RFP to assess the technical merit of the proposal, the past performance of the offeror, and the reasonableness of the price or cost proposed.¹³ Depending upon the procedure specified in the RFP, the government may award the contract on the basis of initial proposals, or establish a competitive range and conduct discussions with the offerors whose proposals are within that range.

If the government chooses to award a contract without discussions, it is restricted to seeking minor clarifications of an offeror's proposal.¹⁴ Offerors cannot make revisions to their proposals as a result of any such clarifications. Consequently, under these circumstances, offerors should ensure that their proposals include the most competitive terms and prices possible. If, after reviewing proposals submitted in response to an RFP, the government determines that discussions are advisable, notwithstanding its prior statement in the RFP that it would award a contract without discussions, it can do so, but must document the contract file with its rationale, establish a competitive range, and proceed accordingly.¹⁵

If the government establishes a competitive range, it must contain all of the most highly rated proposals, unless the RFP stated that the government might limit the number of proposals in the competitive range for efficiency.¹⁶ The government will conduct discussions, i.e., negotiations, with each offeror whose proposal is placed in the competitive range. The purpose of these discussions is "to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation."¹⁷ To do so, the government will engage in bargaining with the offeror that can vary widely in scope across procurements, but in any particular procurement might include negotiations over technical requirements, terms and conditions, price, schedule, and even the type of contract to be awarded.¹⁸ When establishing its goals for these discussions, an offeror should consider not only its desired maximum outcome, but also the likely positions of its competitors who are engaging in discussions in the same procurement. Otherwise, an offeror might very well "win the battle" on terms and conditions, but "lose the war" by not being selected for award.

When the government has concluded its discussions, it will issue a request for final proposal revisions (formerly known as a "call for Best and Final Offers" ("BAFO") and set a time for receipt of any such revisions.¹⁹ An offeror's final proposal

¹² See FAR §15.306(a)(2). As a practice note, rather than taking exception to the terms of an RFP in one's proposal, a more prudent, and possibly more effective strategy would include the provision of comments on the draft RFP, submission of questions concerning the terms of the RFP, and attendance at any proposal conferences. Indeed, FAR §15.201 encourages the exchange of information among all parties at the earliest possible date.

¹³ FAR §15.305.

¹⁴ FAR §15.306(a).

¹⁵ FAR §15.306(a)(3).

¹⁶ See FAR §15.306(c).

¹⁷ FAR §15.306(d)(2).

¹⁸ FAR §15.306(d).

¹⁹ FAR §15.307.

revision (or BAFO) is its chance to make whatever revisions it deems advisable, after due consideration of its discussions with the government, in an effort to maximize the competitiveness of its proposal, perhaps by refining its performance approach (technical, schedule) and/or its price (if a fixed price contract is contemplated) or its proposed cost (for a cost reimbursement contract).

After reviewing the offerors' final proposal revisions, the government's Source Selection Authority ("SSA"), will choose as the awardee, that offeror whose proposal, in the SSA's independent judgment, provides the best value to the government, i.e., the greatest overall benefit in response to the requirement, "based on a comparative assessment of proposals against all source selection criteria in the solicitation."²⁰

Sole Source Acquisitions

In very limited circumstances, the government may use its authority under the procurement statutes²¹ to award a contract in fulfillment of its needs without using full and open competition. Those circumstances include situations in which there is only one responsible source and no other supplies or services will satisfy agency requirements; situations presenting unusual and compelling urgency; maintenance or expansion of the industrial base to facilitate mobilization; when required to implement an international agreement (e.g., foreign military sales); when authorized or required by statute (e.g., government printing and binding); and situations involving national security.

Sole source acquisitions are conducted using an RFP that has been modified to remove portions and requirements that are inapplicable to an acquisition involving only one offeror.²²

UNSOLICITED PROPOSALS

FAR Procedures

The federal government encourages the submission of new and innovative ideas in response to its advertised needs and ongoing programs.²³

Offerors who believe that there is a governmental need for research and development or some other product or service they can offer in support of an agency's mission need not await the issuance of a solicitation by the government.

Instead, such offerors may provide a proposal to the government for its consideration. Such proposals are called "Unsolicited Proposals" and are received, evaluated, accepted or rejected, and, to the extent appropriate, protected from disclosure outside the government in accordance with specific regulations.

Under the FAR,²⁴ to be considered valid, an unsolicited proposal must be innovative and unique, independently originated and developed by the offeror, prepared without government supervision, endorsement, direction, or direct involvement, and include

²⁰ FAR §§2.101; 15.002(b); 15.308.

²¹ See 41 U.S.C. §253(c); 10 U.S.C. §2304(c).

²² FAR 15.002(a).

²³ FAR 15.602.

²⁴ See FAR Subpart 15.6.

Fixed-price contracts are used when the risk of performance is minimal or can be predicted with an acceptable degree of certainty.

Cost-reimbursable contracts are used when the uncertainties of contract performance do not permit the estimation of costs with the accuracy necessary to support a firm-fixed-price contract.

Analysis of the advantages and disadvantages of the contract type specified in the solicitation, and the likelihood of influencing the contract type to the advantage of the offeror, should be an important part of the overall business case supporting a prospective offeror's bid/no bid decision.

enough detail to permit the government to determine whether government support would further the agency's research and development or other mission responsibilities.²⁵

An offeror submitting an unsolicited proposal must ensure that it contains the information required by the FAR:²⁶ address and type of organization (profit, nonprofit, educational, small business) of the offeror; contact information for technical and business personnel; identification of proprietary data; names of other agencies (federal, state, and local) receiving the proposal; date of submission; signature of the offeror's authorized representative; technical information describing the proposed effort (short title and abstract, and detailed description of the scope and method of work and the manner in which the work will benefit the agency); support required from the agency; type of contract desired; duration of the effort; and a brief description of the organization (its past experience and performance, and the facilities it will use to accomplish the effort).

Upon receipt of an unsolicited proposal, the agency will review it to determine if it is complete and meets the regulatory requirements. If submitted with the required information, the proposal will be evaluated further. If the proposal is deficient, the offeror will be notified promptly of its rejection and the proposed disposition of the proposal.

When an agency evaluates an unsolicited proposal, it will consider the following factors: whether the concepts, methods, or approaches demonstrated by the proposal are unique, innovative and meritorious; the overall scientific, technical or socioeconomic merits of the proposal; whether the proposal would contribute to the agency's mission; the match between the offeror's capabilities and the requirements of the proposal; and the realism of the proposed cost.²⁷ If a proposal receives a favorable evaluation, the agency will then determine whether the proposed effort is available to the government from another source, whether the proposal closely resembles a pending competitive acquisition requirement, and whether the proposal relates sufficiently to the agency's mission. Based upon these conditions, the proposal may be rejected, notwithstanding a favorable technical evaluation.²⁸

Information contained in an unsolicited proposal is protected from misuse by the government. Unless the information is available from an unrestricted source, government employees may not use any data, concept, idea, or other part of an unsolicited proposal as the basis of all or part of a solicitation or negotiation with any other firm without the permission of the offeror.²⁹ If the proposal contains information that the offeror considers to be proprietary, the offeror must clearly identify that information using the legends and other methods described in the FAR³⁰ to ensure that the protections provided by federal statutes and the FAR against improper disclosure of the proprietary information are applied.³¹

²⁵ FAR §15.603(c).

²⁶ FAR §15.605.

²⁷ FAR 15.606-2(a).

²⁸ FAR 15.607.

²⁹ FAR §15.608(a).

³⁰ See FAR §15.609.

³¹ See FAR §15.608(b).

Department of Homeland Security Supplementary Provisions

The Department of Homeland Security has supplemented the FAR provisions pertaining to unsolicited proposals. Under the DHS Acquisition Regulation (“HSAR”),³² DHS delegated the agency’s authority to receive, review, evaluate, and dispose of unsolicited proposals to the Heads of Contracting Activities within DHS.³³ The DHS website (www.dhs.gov/dhspublic) lists the points of contact for each such activity. Upon entering the site, click on “Business” to access a host of resource materials for doing business with DHS, including an instruction sheet for submission of unsolicited proposals.

The HSAR also establishes specific timeframes for the initial review and subsequent evaluation of an unsolicited proposal. Under the HSAR, DHS will make an initial review determination within seven calendar days after receiving the unsolicited proposal.³⁴ Within three days after the initial review determination, the agency will contact the offeror and either inform the offeror in writing of the reasons for the rejection of its proposal, or, if the proposal meets the initial requirements of the FAR,³⁵ advise the offeror of the timeframe for subsequent evaluation.³⁶

Evaluations of unsolicited proposals should be completed within 60 calendar days after making the initial review determination. Should additional time be necessary for the evaluation, “the agency

contact point shall advise the offeror accordingly and provide a new evaluation completion date.”³⁷

TYPES OF CONTRACTS

Depending upon the nature of the goods or services being procured, the contract types and terms under which the items are procured can vary widely. Most federal procurement contracts fall into the general categories of fixed price or cost reimbursable contracts. Within each of these categories, several variants exist which, when analyzed, blur the boundaries between the general categories of fixed price and cost-reimbursement contracts.

Fixed-price contracts are used when the risk of performance is minimal or can be predicted with an acceptable degree of certainty.³⁸ Within the general category of fixed-price contracts, one finds firm-fixed-price contracts, fixed-price contracts with economic price adjustment, fixed-price incentive contracts, fixed-price contracts with either prospective or retroactive price re-determination, and firm-fixed-price, level-of-effort term contracts. Essentially, fixed-price contracts other than firm-fixed-price contracts are designed to allow some sort of adjustment of the price based upon the occurrence of specific conditions and bounded within a specific range of variation. Otherwise, under a fixed-price contract, the contractor ordinarily bears the full risk of fluctuations in the cost of performance.

³² See 48 CFR Chapter 30, Subpart 3015.6.

³³ HSAR §3015.606(a).

³⁴ HSAR 3015.606-1(a).

³⁵ FAR §15.606-1(a).

³⁶ HSAR §3015.606-1(b) & 1(c).

³⁷ HSAR 3015.606-2(a).

³⁸ FAR §16.103(b).

Cost-reimbursable contracts are used when the uncertainties of contract performance do not permit the estimation of costs with the accuracy necessary to support a firm-fixed-price contract.³⁹ Under a cost-reimbursable contract, the government ordinarily bears the risk of fluctuations in the cost of performance. Within the general category of cost-reimbursable contracts, one finds cost contracts, cost-sharing contracts, cost-plus-incentive-fee contracts, cost-plus-award-fee contracts, and cost-plus-fixed-fee contracts. Essentially, contracts other than “pure” cost contracts are designed to mitigate the government’s cost risks by providing different levels and types of incentives for the contractor to control the costs incurred in the performance of the contract.

In addition to the variations in contract types derived from pricing differences, indefinite delivery contracts are used when uncertainties exist with respect to the magnitude and timing of the agency’s needs. The category of indefinite delivery contracts includes definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. These contracts may be used when the exact times or exact quantities of future deliveries are not known at the time of award.⁴⁰

Each of these contract types differs, sometimes substantially, in the administrative requirements and burdens, allocations of risk, and profit potential. Analysis of the advantages and disadvantages of the contract type specified in the solicitation, and the likelihood of influencing the contract type to the advantage of the offeror, should be an important part of the overall business case supporting a prospective offeror’s bid/no bid decision. The next section of this booklet addresses other areas presenting risk to the prospective offeror and the methods used to identify, assess, and manage those risks.

³⁹ FAR §16.301-2.

⁴⁰ FAR §16.501-2(a).

Assessing and Managing the Risks in a Specific Procurement

In addition to identifying the work to be accomplished and the roles of the respective parties, one of the core functions of any contract is the allocation of the risks of performance between the parties. As described above, some of the risks of performance are allocated through the use of a particular contract type. Unlike most commercial contracts, a government contract routinely contains provisions that must be “flowed down” into any subcontracts awarded by the prime contractor for the work. Consequently, a government contract allocates the risks of performance not only between the government and the prime contractor, but also between the prime contractor and its subcontractors, and sometimes even its suppliers.

Obviously, how well the contractor identifies, allocates, and manages the risks of a project can mean the difference between successful performance and financial success or failure. In federal procurements, project risks can arise in much the same manner as they do in the commercial context: ambiguities in the interpretation of the technical requirements, inaccurate or incomplete assessment of the contractor's own technical capabilities, erroneous assumptions concerning the availability of needed resources, inadequate assessment of possible inefficiencies during performance, and failure to identify or track the effects of changes in the requirements during the course of contract performance.

In addition to these risks, the federal marketplace has a few risks that are somewhat unique. For example, in the commercial context, directions to the

contractor changing the work that are issued by persons whom the contractor reasonably believes are authorized by the owner to order such changes can usually be enforced against the owner. Under these circumstances, the contractor will be able to recover its added costs and time required for performance caused by that directive. In the federal government contract environment, however, such directives may only be enforced against the government when they are issued by a person with actual authority to issue the order, and the risk of error in the determination of either the existence or scope of that person's authority is on the contractor. Should the contractor proceed to change the work on the direction of a person later determined to lack the authority to issue the order, the contractor might not be able to recover its added costs of performance or to obtain an

extension to the performance schedule for the added time required to perform the changed work. Consequently, a contractor must ensure who in the government's project management office has the authority to issue change orders or other directives, and should always insist that any such orders or directives are issued in writing. Frequently, the government will identify those individuals with authority to issue direction to the contractor in the contract document itself. Contractors should be careful to note any limitations on the authority of any such individuals, including individuals identified as contracting officers.

INITIAL ACTIONS

Understand the Technical Requirements

A contractor's effort to identify, allocate, and manage contract performance risk begins with its initial review of the solicitation. To identify potential risks, contractors should evaluate very carefully every element of the government's description, usually called the Scope of Work or Statement of Work ("SOW"), of the equipment, supplies, or services it desires. It is essential at this stage of analysis that the contractor assess whether any of the terms or requirements of the SOW can be interpreted reasonably in more than one way. If there is an obvious ambiguity, the contractor is under a duty to identify that ambiguity to the government and seek a clarification before award. Failure to do so can result in the enforcement of the government's interpretation of the provision to the detriment of the contractor. A contractor should address such issues proactively by attending bidders' conferences, providing comments on a draft RFP when possible, submitting questions for response by the procurement office to clarify provisions of the RFP, and,

if these issues persist into the competition, by raising such issues in discussions and obtaining written resolutions that are incorporated into the contract itself.

The contractor should also ensure that it understands the standards and regulations that are incorporated into the SOW and how those standards and regulations will be applied to the work. Although some of these requirements may be stated in full in the SOW, others might be incorporated only by reference. These standards and regulations can affect not only the method by which the contractor may perform the contract, but also the acceptance by the government of the contractor's product or service at the INTRODUCTION of the effort. Ideally, these requirements should be clearly identified and understood by both parties prior to award.

For example, some SOWs issued initially by the government have simply required the contractor to evaluate and comply with all applicable requirements addressed in the agency's internal regulations, the Code of Federal Regulations (CFR), and all applicable state regulations. Faced with such a provision, the contractor should request that the government identify with specificity the applicable requirements and the person or entity responsible for their interpretation during the project. Once identified, each of the referenced requirements must be reviewed in detail for ambiguities and the incorporation of additional requirements in the same manner as the contractor's review of the SOW. In addition, all sources of requirements identified by the SOW should be reviewed by the contractor's technical personnel to assess their effect upon the contractor's capability to perform,

as well as its estimates of the cost and time required for performance. Any questions concerning the technical requirements should be addressed fully and in writing with an authorized representative of the government before submitting a proposal.

Match the Requirements to Your Capabilities

Other areas that contractors should cover in their assessment of the SOW requirements include: performance areas where the contractor lacks experience; whether the technology required for performance is sufficiently developed for that application; whether entities other than the contracting office will have some role in determining whether the contractor has met the terms of the contract; and, if so, whether the roles of those entities are well defined. Although a contractor might be able to obtain the necessary experience, complete the development of existing technology to perform the work, or negotiate with outside entities to obtain the requisite approvals to proceed with performance, the cost and time required for such adjustments may be substantial. Moreover, the additional time required to overcome these obstacles could place successful completion of the contract in jeopardy.

Once the technical risks have been identified, the contractor should consider whether it can bound and mitigate its risks to an acceptable level as part of its bid/no bid decision process. A number of techniques are available to assist in the evaluation of risk mitigation. These techniques can be as simple as calculating a bid contingency, increasing the price offered, or obtaining warranties from potential subcontractors. On the other

hand, risk bounding and mitigation techniques might require a much more complicated approach, involving the utilization of statistical testing and estimation techniques. Finally, in appropriate circumstances, a contractor should determine whether some of that risk might be transferable to the government, i.e., through use of government facilities, technology, or resources to support the contract effort.

When attempting to ensure that subcontractors share in the contract's performance and financial risks, the contractor should analyze carefully the financial solvency of any potential subcontractor.

Simply transferring risks of performance to a subcontractor will not usually protect the contractor from liability to the government under the prime contract should the subcontractor's performance be deficient due to circumstances within its control, including its financial condition.

Consequently, as a routine matter, a contractor should check credit reports and other financial disclosures by its intended subcontractors, especially if the contractor has not worked with that entity in the past.

Understand Required Representations and Certifications

In its proposal response to Section K of the solicitation, an offeror might be

required to make a series of representations and certifications. These representations and certifications can relate to a number of governmental interests, including:

- 1) the status of the offeror (8a, HUBZone, SDB⁴¹);
- 2) whether the offeror has had a government contract terminated for default within the previous three years;
- 3) whether the offeror is in compliance with Equal Employment Opportunity requirements;
- 4) whether the offeror has communicated with any other offeror in relation to its intention to submit an offer, the pricing of that offer, or the methods or factors used to calculate the prices offered; and
- 5) whether the offeror has been debarred or suspended from participation in federal procurements.

These representations and certifications must be completed carefully. Erroneous representations or certifications can render an offer ineligible for award and, in some cases, can result in the assessment of other penalties.

PROTECTING YOUR INTERESTS DURING PERFORMANCE

So, you have successfully navigated the federal procurement process and have been awarded a federal government contract. Now what? Winning a government contract opens the door not only to the opportunity to prosper, but also to the risk of incurring liabilities that can outlive the contract itself. Consequently, once a contractor receives an award of a government contract, the contractor must remain vigilant of the unique aspects of government procurement and manage the contract proactively, or its first foray into the federal marketplace might be its last.

Document All Significant Contract Events

During the performance of the contract, the contractor should ensure that a company employee or employees are tasked with the responsibility to create, maintain, and store business records pertaining to the contract. To maximize the likelihood that contract records can be used in the resolution of any disputes that might arise under the contract, it is essential that the employee creating the record of a contractually significant event have personal knowledge of the event, creates the record (document) at or near the time of the event, and complies with the rules of the business concerning the filing of that document. Documents that should be created and maintained include minutes of meetings with other participants in the contract effort (e.g., government contracting officials, technical representatives, subcontractors, permitting officials), all contract-related correspondence, progress reports, schedules, technical reports, change orders and notices, reports of incidents causing delays on the project, and any other event that might be material to the resolution of a dispute with the government or a subcontractor over the quality, quantity, or timeliness of performance.

Identify and Manage Contract Changes

Unlike most commercial contracts, a government contract will contain a clause that allows the government to order changes in the contract requirements after award without committing a breach of contract. The types of changes that the government may order under the "Changes" clause varies according to the type of contract (e.g., fixed-price, cost-reimbursable, or time and material contracts).

⁴¹ 8(a), HUBZone, and Small Disadvantaged Business ("SDB") programs are administered by the Small Business Administration. Procurement preferences involving these entities are found in FAR Part 19.

In exchange for providing this flexibility to the government, the Changes clause provides protection to the contractor. For example, the Changes clause used in fixed-price contracts⁴² provides generally that where the change ordered by the government causes an increase in the cost of, or time required for performance, the contractor is entitled to an equitable adjustment, i.e., the contractor may recover those additional costs, plus profit, and, in appropriate circumstances, will receive an extension to the contract performance schedule. On the other hand, should the change ordered by the government decrease the effort required, the government may also adjust the contract price and schedule to reflect that deduction.⁴³

The Changes clause not only provides flexibility to the government to modify the contract after award to address changes in requirements, but also provides a vehicle for the government to incorporate into the contract changes in performance that are proposed by the contractor during performance. For example, a contractor might propose that minor changes be made to the specifications or delivery schedule to meet production requirements. Should the government determine that the changes proposed by the contractor do not decrease the value of the performance to the government, or if the contractor offers consideration to the government for the changed requirements, the government could accept the proposal and modify the requirements under the Changes clause to allow the variation.

A contractor's ability to recover the cost of changed work can depend on the effort expended by the contractor, as part of its proposal effort, to understand, plan, and document the contract requirements. The more the contractor understands about the relationship between the scope of performance in the solicitation and its costs, schedule, and other performance metrics, the more likely the contractor will be able to recognize changes to the scope of the contract and to obtain appropriate adjustments to the price and schedule for performance.

On occasion, despite the contractor's efforts to review and understand fully the contract requirements in the proposal phase, a disagreement arises between the government and the contractor over the interpretation of the contract requirements during performance. Under these circumstances, the government may order the contractor to proceed with performance in a manner that the contractor, but not the government, believes is a change to the contract requirements. In this case, the Changes clause still offers some protection to the contractor, as long as the contractor complies with its provisions. Specifically, the contractor should notify the government contracting officer that it believes that the direction constitutes a change to the contract and that the contractor reserves its right to submit a claim for an equitable adjustment under the Changes clause. By notifying the government contracting officer promptly of the contractor's interpretation, the contractor provides the government with a fair opportunity to assess the situation and confirm or retract its direction prior to expending costs or time in response to the direction.

⁴² See FAR 52.243-1.

⁴³ FAR 52.243-1(b).

“To minimize losses and maximize the potential for recovery under the Changes clause, contractors should educate their management personnel to ensure that they understand the contract requirements and the requirements of the Changes clause, identify a change, and promptly notify the government contracting officer ...”

Should the government persist in its interpretation notwithstanding the contractor's notification, the contractor has 30 days from the date it received the government's written directive to submit its claim for an equitable adjustment. Some leeway is usually allowed in the timing of a contractor's claim submission, especially for "constructive" changes, i.e., those that are not supported from the outset by a written modification to the contract by the government (e.g., differences in the interpretation of contract requirements arising after performance relating to that requirement has begun or concluded). In these circumstances, prompt identification of possible claims and the effects of those changes upon the contractor's performance should assist the contractor in its effort to substantiate its increased costs or time requirements caused by the change.

Managed incorrectly, changes can be very expensive for a contractor. To minimize losses and maximize the potential for recovery under the Changes clause, contractors should educate their management personnel to ensure that they understand the contract requirements and the requirements of the Changes clause, identify a change, and promptly notify the government contracting officer in writing when they believe that an order of the government requires performance in excess of the contract requirements.

The actual process of issuing and implementing a change can be time-consuming, and the contractor frequently will find itself having to incorporate the changed requirements into its contract performance effort before the parties have agreed upon a price for the change. Under most

circumstances, the terms of the "Disputes" clause⁴⁴ incorporated into government contracts require the contractor to proceed with performance of the contract, as directed by the government, pending resolution of the dispute. Moreover, the contractor bears the burden of proof to establish both the fact that the change caused an increase in the costs and time required for performance and the amount of those increases. Consequently, the contractor should establish an accounting system that can track the change-related costs accurately, e.g., by establishing separate Work Breakdown Structure accounts for the changed work, by documenting the necessary work schedule adjustments, and by demonstrating the effect, if any, of the change in requirements upon the contractor's ability to meet schedule milestones or delivery dates. Indeed, if the contract contains the Change Order Accounting clause,⁴⁵ the contractor must establish a system to segregate such costs.

Despite these provisions, in many circumstances, especially those in which constructive changes have occurred, contractors have not identified or segregated the cost of the changed work. This may occur when management first determines that specific work is an increase in contract requirements only after that work has either commenced or has been completed. In these cases, the contractor's options are: 1) identify the rationale for the determination that the work constituted a change in the contract requirements; 2) determine the cost of that changed work through functional or product-specific analysis; 3) use fact-based engineering estimates or standards to validate the

⁴⁴ See FAR 52.233-1.

⁴⁵ See FAR 52.243-6.

impact of changed work; 4) determine what, if any, schedule time was lost due to changed work or other issues; 5) identify the cost related to the schedule change; and 6) identify other changed conditions and the cost impacts associated with the primary change.

Given the difficulties with this approach, the contractor should undertake a strategy designed to minimize the likelihood that it will incur unrecoverable costs during performance. That strategy should include elements that ensure that its program management has procedures in place to assess changes in its periodic cost or schedule performance metrics for the contract work to determine if they are the result of a constructive change; to refrain from proceeding with the implementation of any changes unless those changes have been issued by written order of the government contracting officer; and to ensure that contract modifications implementing any changes are reviewed by technical, management, and accounting personnel, and its legal counsel prior to execution of the modification by the contractor's representative.

Monitor Contract Modifications

Every contract modification, even routine modifications issued to add funding to an incrementally funded contract, should be reviewed carefully before being executed to ensure that it does not contain a provision that purports to waive the contractor's rights to pursue claims.

Although releases appended to modifications issued during performance (as opposed to final payment releases) are narrowly construed by courts and administrative tribunals, the presence of such releases in a modification that has been executed by the contractor almost guarantees a dispute if related claims are submitted later.

Consequently, a contractor should ensure that its contract administration and legal counsel review carefully even the most routine contract documents presented by the government for its signature.

Monitor Costs Incurred Against the Contract Amount

In a firm-fixed-price contract, to protect its profit, a contractor monitors carefully its incurred costs against the schedule of values and its basis of estimate to assist it in the management (and minimization) of its costs of performance. In a cost-reimbursement contract, or a fixed-price contract that is incrementally funded (i.e., where the government has not obligated all of the money to pay for the work in the year the contract is signed), the contractor will also be required to monitor the amount of costs incurred, but for a different reason. A cost-reimbursement contract, or a fixed-price contract that has been incrementally funded, will have a contract provision warning the contractor that the government will not be liable for the reimbursement of costs incurred by the

contractor that exceed the funds “obligated” to the contract, i.e., the amount of funds the government has available to pay the contractor for the work.

For cost-reimbursement contracts, the “Limitation of Cost” or “Limitation of Funds” clause will be included in the contract. These clauses require the contractor to report to the contracting officer when it has incurred costs reaching a designated percentage of the funds then obligated to the contract. For contracts where effort is expected to begin prior to full funding, the “Availability of Funds” or the “Availability of Funds for the Next Fiscal Year” clause will be used. These clauses warn the contractor that appropriated funds are not yet available for the contract effort, or are not available beyond a certain date, and inform the contractor that the government’s liability for payment will not arise until the funds have been appropriated and the contractor is informed of that fact in writing by the government contracting officer. Consequently, contractors performing under contracts with any of these clauses must monitor their costs carefully as the contract progresses not only to maximize their performance efficiency, but also to limit their exposure to uncompensated costs due to unexpected changes in government funding.

Protect Your Investment in Intellectual Property

The rules relating to the ownership and assignment of rights in intellectual property created in the performance of a government contract can differ substantially from the commercial contracting environment. For example, under most government

contracts, when an invention is conceived or first reduced to practice using government funds (which includes payments received by the contractor under a government procurement contract), the government will obtain an irrevocable, non-exclusive, fully paid-up license to practice that invention or have it practiced on its behalf worldwide.⁴⁶ An invention falling within this statutory rule is called a “subject invention” under that government contract.⁴⁷

Federal regulations also require the contractor to disclose to the government any such subject invention within a specific time period.⁴⁸ Should the contractor fail to disclose a subject invention, the contractor can lose title to the invention upon challenge by the government.⁴⁹ Consequently, contractors with intellectual property assets under development, especially those efforts undertaken and supported using company funds, must keep meticulous records relating to that intellectual property.

Where the inventions are being developed using company funds, reliable, detailed records can help avoid (and even resolve) disputes over when a novel, patentable concept was first conceived or put into practice, and thus, whether the government will have any rights to the invention.

⁴⁶ FAR 27.302(c).

⁴⁷ FAR 27.301.

⁴⁸ FAR 252.227-11(c); 52.227-12(c).

⁴⁹ FAR 27.302(d)(1)(i); 52.227-11(d)(1).

For subject inventions, the contractor must have a system in place to ensure that any such inventions are disclosed to the government within the timeframe required by the contract to avoid the risk of forfeiture.

In addition to taking measures to protect their patent rights, contractors must also be aware of the government contract requirements associated with technical data. In many cases, the technical data associated with a contractor's product or service can be as important as an invention.

A contractor's technical data may be protected under copyright laws or as a trade secret. While copyright laws help protect data that is published, publication is anathema to the protection of data as a trade secret. Consequently, a contractor must be aware of the rights that it will be required to relinquish to the government with respect to data that is produced under or used in the performance of a government contract.

The federal regulations establish a hierarchy of rights in data that can arise under government contracts, e.g., Unlimited Rights, Limited Rights, Restricted Rights, and Rights in Special Works.⁵⁰ With some exceptions, the government will seek, and usually obtain unlimited rights in data that is first produced in the performance of a government contract. Moreover, the government will usually obtain unlimited

rights in form, fit and function data, in data that constitute instructional manuals or training materials related to items or processes delivered or furnished for use under the contract, and in all other data delivered under the contract, unless the government's rights in such data are limited by another regulatory provision.⁵¹ When the government receives unlimited rights in such data, it has rights to "use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display [the data] publicly, in any manner and for any purpose, and to have or permit others to do so."⁵²

In specific circumstances, contractors may be able to retain some or most of their rights in data, usually in situations in which the data or software to be delivered under the contract was developed at private expense and constitutes a trade secret.⁵³ In these circumstances, a contractor might be able to withhold such data from delivery, substituting therefore form, fit and function data.⁵⁴ If the contractor must deliver the data, it must identify such data with specific protective markings or risk loss of its protection.⁵⁵

Given the wide range of such circumstances, and the complexity of the regulations and clauses pertaining to such situations,⁵⁶ to ensure that they understand fully the legal environment in which they propose to function, prospective government contractors should be especially careful to seek competent legal

⁵⁰ See, e.g., FAR 27.401; 27.405(a); 52.227-14; 52.227-17.

⁵¹ FAR 27.404(a).

⁵² FAR 27.401; 27.404(a).

⁵³ See FAR 27.401; 27.404(b).

⁵⁴ FAR 27.404(b); 52.227-14(g)(1).

⁵⁵ FAR 27.409(c) & (d); 52.227-14(g)(2) & (3).

⁵⁶ For example, the Department of Defense has supplemented the FAR with provisions relating to technical data and software that vary, in some cases substantially, from the basic FAR provisions referenced here. See generally Defense FAR Supplement, 48 CFR Chapter 2, Part 227.

counsel with respect to these issues in advance of submission of an offer to the government that could result in the award of a procurement contract.

Terminations

Another unique feature of federal government contracts is the manner in which they can end. Under the terms of a government contract, one party, the government, has the right to terminate the contract at any time during performance for its convenience.⁵⁷ The government may exercise this right for a number of reasons, including a substantial change in requirements occurring after award, lack of funds to continue performance, or a determination that the equipment, supplies, or services to be provided under the contract are no longer needed.

In exchange for this flexibility, when a government contract is terminated for convenience, the contractor is usually entitled to receive its costs of performance, plus profit, as well as the costs it incurs as a result of the termination (i.e., its settlement expenses).

There are specific rules governing the actions a contractor must take upon receipt of a termination notice from the government contracting officer, including rules relating to the preparation and submission of the contractor's termination settlement proposal.

Failure to adhere to these rules and time limits can substantially affect, if not extinguish, a contractor's ability to recover some or all of its costs. In addition, if it is determined that the contractor would have experienced a loss if the contract had been completed, the contractor's recovery can be decreased proportionately.

Unlike a termination for convenience, a termination for default is similar to a breach of contract action, except that the government is, as one might expect, in a preferential position compared to the contractor. The government's preferential position is established by inclusion in the contract of the Termination for Default clause appropriate for the type of contract.⁵⁸

While the circumstances under which a contractor can stop performing a government contract are very limited, the circumstances under which the government can terminate the contract for default are basically co-extensive with the circumstances that would support a breach of contract action in the commercial context. For example, with very limited exceptions, a contractor must continue performance of a government contract pending the resolution of a dispute with the government concerning that contract, even if that dispute involves a substantial amount of additional contractor effort and cost. On the other hand, the government can terminate a supply contract for default should the contractor miss a single delivery date.⁵⁹

⁵⁷ See, e.g., FAR 52.249-2, Termination for Convenience of the Government (Fixed Price).

⁵⁸ See, e.g., FAR 52.249-8, Default (Fixed-price Supply and Service); FAR 52.249-9, Default (Fixed-price Research and Development); FAR 52.249-10, Default (Fixed-price Construction).

⁵⁹ FAR 52.249-8(a)(1)(i).

Notwithstanding the unbalanced nature of the parties' rights relative to termination, a contractor may have recourse to a number of defenses to mitigate, or even defeat the government's assertion of termination rights under the default clause. Some of these defenses require that the contractor take specific actions during the course of performance to preserve the contractor's rights. A successful defense against a termination for default will usually convert the termination into one for the convenience of the government. If so, the contractor is usually in a much better position to attempt to recover its costs of performance. In many, if not most cases, however, awaiting receipt of a termination notice to react to technical or schedule problems arising during a contractor's performance or with the interpretation of contract requirements risks disaster. Consequently, proactive management of contract performance is especially important in government contracts.

Contract closure

("It ain't over 'til it's over.")

Contractors must not only approach the solicitation and performance of their government contracts cognizant of the risks associated with such work, but they must also proceed with caution in the completion and closeout of their contracts. Generally, the contract clauses that provide a contractor with price and schedule adjustments in the event of changes caused by the government in the scope of work do not survive final payment. Moreover, the government usually requires a contractor to execute a release from future claims at the time the contractor receives final payment. Consequently, prior to submitting its

voucher to the contracting officer seeking final payment under a contract, and before the execution of any releases, a contractor should review carefully its contract records to ensure that it has asserted all possible claims under the terms of the contract.

In cost reimbursable contracts, contract closeout may occur some time after the completion of work on the contract as the result of delay in the finalization of negotiated overhead rates and the completion of an audit of the contractor's costs. Under normal closeout procedures, typically following the calculation of the final overhead rates and the development and submission of a final prior year overhead rate proposal, the contractor's books and records are subject to audit by the appropriate audit agency.

At contract closure, a contractor can expect that an audit of its incurred costs will be performed. During this audit, the Defense Contract Audit Agency ("DCAA") or other audit agency reviews the allowability of costs. Generally, a cost is allowable under a cost reimbursable contract if it is determined to be reasonable, allocable, and otherwise meets the requirements of accounting standards, the terms of the contract, and special rules contained in the FAR.⁶⁰ A cost is reasonable if it does not exceed what would have been paid by a reasonably prudent person in the conduct of competitive business.⁶¹ A cost is allocable if it is incurred specifically for the contract, or if it benefits both the contract and other work and can be distributed on a reasonable basis, or if it is necessary for the overall operation of the business even though a direct relationship

⁶⁰ See FAR 31.201-2(a).

⁶¹ See FAR 31.201-3.

30 to a particular cost objective cannot be shown.⁶²

Final reviews of cost-reimbursable contracts are performed after the contractor submits a contract completion invoice or voucher as required by the FAR.⁶³ In these final reviews, a contractor's incurred costs may be audited from contract inception and may include a review of the disposition of ending inventory, the negotiation of final or quick closeout rates and the calculation of the fee, including the award or incentive fee in appropriate circumstances. Some of the costs typically reviewed by DCAA include the following categories: material and subcontract costs; direct labor and labor rates; scrap and spoilage; travel and other direct costs; and various overhead rates. The results of these reviews can affect the final indirect rates that the government will reimburse under the contract, and thus, the overall profitability of the work.

⁶² See FAR 31.201-4.

⁶³ See FAR 52.216-7(h)(1).

Conclusion

Contracting with the federal government can be a rewarding experience as long as the contractor is aware of, and accounts for, the unique aspects of the federal marketplace throughout its involvement in the federal procurement process. Obtaining professional assistance in the identification, evaluation, and management of the risks of performance in the federal marketplace is crucial not only to winning and performing the contract itself, but, most importantly, to protecting the “bottom line” throughout performance of the contract.

Practice Tips

- 1 Mine the Internet for federal business opportunities within your firm's capabilities.
- 2 Review every portion of a solicitation carefully to identify ambiguities and assess risks before submitting a proposal.
- 3 During the procurement process, use all available opportunities to clarify your understanding of the contract requirements, resolve ambiguities with the government, and mitigate risks.
- 4 Use great care in the completion of Section K representations and certifications.
- 5 Document your understanding of the contract requirements in your proposal.
- 6 Document any "side agreements" reached with your government counterparts during negotiations and ensure that these agreements are contained in the final integrated contract.
- 7 Monitor instructions and directives from the program office during performance carefully to identify possible changes in requirements.
- 8 Provide appropriate written notification to the program office of any perceived change and segregate the costs associated with incorporation of any such change into performance.
- 9 If proprietary information is to be provided to the government under the contract, ensure that the appropriate markings and legends have been affixed to deliverables.
- 10 Document research and development efforts at all times to maintain a defensible record of the events relevant to the determination of ownership and assignment of patent rights.
- 11 Report all "subject inventions" within the required time limits to protect against forfeiture of title.
- 12 Review every bilateral contract modification carefully before signing it to ensure that it does not contain provisions that affect your rights to assert claims or the strength of your positions on other contract issues not directly related to the modification under review.
- 13 If the contract is terminated for convenience, ensure that your termination settlement activities and proposal are completely and accurately prepared and timely submitted. If the contract is terminated for default, ensure that all possible defenses are considered that might be used to convert the termination into one for the convenience of the government through an appeal.



CHARLES WILKINS
(202) 312 9100
charles.wilkins@fticonsulting.com

Charles Wilkins has more than 35 years of experience involving public contracts from inside the aerospace and defense industry and as a professional advisor. Mr. Wilkins has extensive experience in damage claims and calculations, forensic accounting, wrongful termination, federal compliance regulations, FAMP, NFAMP and AWP calculations, auditing, cost and schedule analysis, lost profits, lost wages, and financial cost analysis. Mr. Wilkins has assisted clients with a wide array of services, including litigation and dispute resolution, industry advice, compliance matters and profit maximization. Mr. Wilkins holds an MBA from University of California, a B.A. from California State University, and a B.A. from LaSalle University. He is a certified public accountant in California, Virginia, and the District of Columbia. Mr. Wilkins's full biography is available on FTI Consulting, Inc.'s Web site (www.fticonsulting.com).



TIM DI GUISEPPE
(202) 312 9100
tim.diguiseppe@fticonsulting.com

Tim Di Guiseppe has approximately 30 years of experience in government contracting as an accountant, auditor and consultant. Mr. Di Guiseppe provides consulting and litigation support services on issues relating to contract claims and disputes resolution, contract compliance, cost accounting, operational and contract management, requests for equitable adjustments, defective pricing, and fraud investigations. His experience includes forensic accounting and litigation support, strategic planning and analysis, process and controls evaluation, contract cost analysis, management, financial accounting and reporting, and evaluation of compliance programs. Mr. Di Guiseppe holds a B.S. from University of Maryland, University College. He is a certified public accountant in Virginia and a certified government financial manager. Mr. Di Guiseppe's full biography is available on FTI Consulting's Web site (www.fticonsulting.com).



ROD MARVIN
(202) 344 4963
crmarvin@venable.com

Rod Marvin assists clients with government contracts-related matters across a wide range of substantive activities, including space-related systems, defense weapons and weapons simulation systems, information systems and technology, nuclear waste cleanup technology, health care services, and geotechnical construction. Mr. Marvin advises and represents clients over the entire breadth of the government procurement process, including contractor teaming and joint ventures; prime/subcontractor issues and disputes; the solicitation and award process; protection of intellectual property rights in the government contract context; general contract administration, changes, and claims; termination settlement proposals, termination avoidance, and termination challenges. Mr. Marvin received his B.A., with honors, from Michigan State University, his J.D. from Boston University Law School, his LL.M. in Military Law from The Judge Advocate General's School (Army), and his LL.M. in Government Procurement Law, with highest honors, from The George Washington University. Mr. Marvin's full biography is available on Venable's Web site (www.venable.com).



PAUL DEBOLT
(202) 344 8384
padebolt@venable.com

Paul Debolt assists corporations and individuals on all issues that arise out of doing business with the federal government, including civil fraud issues. He works on the competitive bid process, defending or prosecuting bid protests, issues advice concerning compliance with government regulations and laws during the performance of a contract, and helps to resolve disputes and claims during contract performance or as a result of contract termination. In addition, Mr. Debolt advises and represents clients on numerous other issues including: contractor teaming and joint ventures; prime/subcontractor disputes, litigation of intellectual property rights, and contract changes. Mr. Debolt has extensive litigation experience including the prosecution of an action to overturn a termination for default as well as a \$300 million counterclaim. Mr. Debolt received his B.A. from John Carroll University, where he was a Distinguished Military Graduate, and his J.D. from Ohio State University College of Law. Mr. Debolt's full biography is available on Venable's Web site (www.venable.com).

VENABLE[®]_{LLP}

