

Current Financial and Legal Trends in Government Contracting

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Presented by:



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Young and Inexperienced Government Procurement and Investigatory Officials: How to Deal with Them

- In 2005, 40% of workforce eligible to retire in 5 years, OR NOW
- No substitute for experience
 - Interns/New Employees
 - Lack of mentors
- Increase in compliance requirements, audits and investigators at the same time

LPTA: Emphasis on Price

- LPTA is a type of Best Value
 - Offerors receive pass/no pass scores for non-price factors
 - Past performance may or may not be considered
- Methodologies may differ by agency
 - Using LPTA allows an agency to start/stop evaluation with the lowest price
 - Some agencies may use a hybrid LPTA that adds weight to past performance

LPTA: Protests, Uphill Battles?

- Pre-award protests
 - Difficult to win given discretion afforded to procurement officials to determine agency needs
 - One potential protest basis is where the solicitation language is inconsistent in how the agency will perform the evaluation, *e.g.*, where LPTA solicitation includes best value language
- Post-award protests
 - Could challenge cost analyses and/or technical evaluations
 - Best case would be protest by offeror with lowest price and technically unacceptable rating



2013 National Defense Authorization Act ("NDAA")

- Introduced significant changes to limitations on subcontracting ("LOS") and mentor-protégé ("MP") relationships
- LOS changes reflect Congress' concern that contract benefits intended for small businesses are claimed by large firms
- MP provisions will extend availability of "approved" MP agreements to all small businesses

NDAAs Revisions to LOS

- Services: small businesses (“SB”) cannot subcontract more than 50% of the amount paid under a contract
- Supplies: SBs cannot subcontract more than 50% of the amount (minus materials) paid under a contract
- Mixed Contracts: SB decides what accounts for the majority of the work under a contract (services or supplies), and then cannot subcontract more than 50% of the amount paid for that work

NDAAs Revisions to LOS

- Changes for construction contracts left to SBA rulemaking
- SBs may comply by subcontracting to “similarly situated entities”
- Changes unlikely to take effect until SBA issues rules, and FAR council revises contract clauses, that implement them

NDAAs Impact on MP Agreements

- SBA does not recognize MP Programs of other agencies, apart from MP Programs established through DoD. MP participation through programs of other agencies creates affiliation risks
- Now, NDAAs has authorized SBA to create MP Program for all SBs
- New rules instituting such a program may be released this summer

Reporting Executive Compensation— The Requirements

- FAR Subpart 4.14 and FAR 52.204-10
- Contractors must report the names and total compensation of the five most highly compensated executives of the contractor and first-tier subcontractor for prior fiscal year
- Reported as part of annual registration requirement in SAM for contractor and after contract award for first-tier subcontractors

Reporting Executive Compensation— When Does It Apply?

- All contracts with a value of \$25,000 or more
- Does not apply to contractors and subcontractors who had gross income in the previous tax year under \$300,000
- Only report if all the following apply:
 - 80% or more of annual gross revenues in prior fiscal year from federal contracts and subcontracts
 - Received \$25 million or more in annual gross revenues from federal contracts and subcontracts
 - Public does not have access to information about the compensation of the executives through periodic reports public companies must file

Reporting Executive Compensation— Definitions?

- Who is an “executive”?
 - Officers
 - Managing partners
 - Any other employees in management positions
 - (Basically, anyone who performs management functions)

Reporting Executive Compensation— Definitions?

- What is included in “total compensation” to be reported?
 - Cash and non cash dollar value
 - Salary and bonus
 - Awards of stock, stock options, and stock appreciation rights
 - Earnings for services under non-equity incentive plans
 - Change in pension value
 - Above-market earnings on deferred compensation which is not tax-qualified
 - Other compensation, if the aggregate value of all such other compensation for the executive exceeds \$10,000
 - E.g., severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property

Executive Compensation- New Developments

- JF Taylor, Inc.
 - FY 2002 through 2005
 - JF Taylor asserted 9 separate statistical flaws in DCAA methodology; also challenged disallowance on other, non-statistical grounds
 - Board sustained the appeals, finding DCAA’s methodology “statistically fatally flawed and therefore unreasonable”
 - Agreed that the use of a static 10% ROR was arbitrary and not statistically valid
 - Static ROAR typically accounts for the majority of questioned costs



Executive Compensation - New Developments

- Metron, Inc.
 - Fiscal years 2004 and 2005
 - Board sustained Metron’s appeals, finding that DCAA’s analysis was “deficient” and “unpersuasive” due to misleading comparisons of the contractor with much larger companies and the use of “unproven, highly questionable assumptions” in making adjustments to compensation survey data

SCA Developments

- Key Issues
 - Inexperienced contract personnel – failure to incorporate correctly
 - Contracting Agency's Responsibility
 - FAR clause
 - CORRECT WD (look out for Unions?)
 - GS equivalents
 - Christian Doctrine not applicable
 - If it is not there, SCA does not apply

SCA Developments

- Contractor's Responsibility
 - Pick the correct labor classification from the WD in the contract
 - If none, request conformance
 - Pay the required benefits
 - If Union, Negotiate! Be mindful of deadlines
 - Benefit Payment: *i.e.*, Accounting

SCA Developments

- Why Do We Care?
 - Customer Tension
 - Service Contracts are Low Hanging Fruit
 - But it's the contracting agency's fault!
 - There is no Statute of Limitations
 - Contract Management
 - Affects Eligibility for EA

Non-Displacement of Qualified Workers

- Right of First Refusal to Predecessor Contractor's E/ee Required where Successor Contracts:
 - Same or similar services
 - Same location
 - Does it apply to me?
 - Does the SCA apply? If yes, then yes
 - Solicitation on or after January 18, 2013
 - FAR Clause-Christian Doctrine applies

Non-Displacement of Qualified Workers

- Obligations
 - Predecessor = List of Employees
 - Right of first refusal
 - GOOD FAITH
 - 90 days after contract performance begins
 - 10 days = response time

Non-Displacement of Qualified Workers

- Exclusions
 - Non-service employees
 - Not qualified
 - Retained by predecessor
 - Successor employees that have worked for successor for at least 3 months
 - Reduced number of positions
 - Not the same job
 - Not the same terms of employment
 - WATCH OUT – for SCA requirements and Unions
 - Employee has refused offer

Non-Displacement of Qualified Workers

- Records
 - Paper or electronic
 - Copies of written offers
 - Retain for 3 years
- Avoidance Strategies that Won't Work
 - Making an offer and then firing the employee after commencement ...
 - I ♥ DOL

Consultants and Contingent Fees

- Consultants frequently perform a variety of legitimate services for government contractors
- However, in an increasingly competitive marketplace, temptation may exist to turn to consultants for help with obtaining contracts
- While not all assistance is prohibited, payment of a fee contingent on the receipt of a federal contract is expressly forbidden (with limited exceptions)

Covenant Against Contingent Fees

- Covenant to be included in every contract awarded using procedures other than sealed bidding
- With exception of bona fide employees or bona fide commercial entities hired to secure business, contractors may not pay contingent fees
- A violation may result in:
 - Proposal rejection (pre-award)
 - Contract cancellation (post-award)
 - Suspension and/or debarment
 - Referral to the Department of Justice for further investigation

Affordable Care Act

- Healthcare Costs and Tax Implications
 - Healthcare Planning – You’ve Waited Long Enough
 - Chances Are It’s Here to Stay
 - Applies to
 - ERs with 50 + FTEs & Dependents
 - Essential Health Benefits to E/ees & Dependents

Affordable Care Act

- Put on the Calendar and Plan!
 - January 1, 2013
 - January 1, 2014
 - January 1, 2017
 - January 1, 2018

Affordable Care Act

- TO DO: Qualitative Analysis of Benefits
 - Plan offered to F/T employees and children up to 26th birthday (who is excluded?)
 - 60% actuarial value
 - Premium co-share of employee-only coverage not greater than 9.5% of household income (huh?) (w-2 (box1) income, rate of pay, FPL for single individual, safe harbors)
 - Non-Discrimination

Affordable Care Act

- Penalties:
 - No Coverage-\$2,000 per year per number of F/T employee (less first 30 F/T employees)
 - Coverage, but does not meet standards – lesser of
 - \$3,000 per year per F/T employee receiving subsidiary from Exchange; or
 - \$2,000 per year per number of F/T employee (less first 30 F/T employees)



Affordable Care Act

- Impact on Service Contract Act Service Employees and Contractors
 - Good News: You're Already Providing Fringe
 - But: Assess Qualitative Factors – Are you meeting them?
 - Non-Discrimination
 - Classify employees
 - Beware of Choices

Affordable Care Act

- Avoidance Strategies That Won't Work
 - Change plan year to December 1st (oops)
 - Organization = Units less than 50 (Nope)
 - And then take the 30 “free” FTEs (yikes!)
 - Only offer coverage to employees, (wrong again...)
 - Cut employees (Not so FAST)

Affordable Care Act

- Long Term Strategic Planning
 - Recruiting Impact
 - Retention Impact
 - If not health benefits, then what?
 - Does it matter? Today v. Tomorrow
 - Costs

QUESTIONS?



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