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National Association of Surety Bond Producers
Regional Meeting – Regions 8, 9, 10, and 11
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INFORMATION PAPER

Since our presentation time for **Federal Contracting Opportunities** is brief, please accept this additional summary of information. Federal acquisition is a very broad subject with many layers and textures. Our panel presentation today and this paper are only a summary and cannot be relied upon for detailed guidance. Every case is different, with distinct facts and law applicable to those facts. I strongly recommend knowledgeable legal representation by an attorney experienced in Federal construction contracts. Such representation should begin well before submitting a proposal in response to a solicitation issued by a Federal agency.

Our firm has represented Federal construction contractors and related businesses since the late 1960s. I have been involved with the legal aspects of Federal contracting, almost exclusively construction and engineering contracts, since 1981. For more information, please visit our website at www.smithcurrie.com. The opinions presented here are my own and do not represent our firm's policy.

Contracting Agencies

The U.S. Army Corps of Engineers has the largest acquisition program, including military projects and so-called "civil works" projects (locks, dams, dredging, flood prevention, hydropower, beach replenishment, and more). The Corps operates in a decentralized organization from its HQ in Washington, DC, through Division offices, down to District offices that are regional based on military bases and/or river basins. For example, work along the Eastern Seaboard is administered through the North Atlantic and South Atlantic Engineer Divisions, with contracts awarded by Engineer District offices along the coast from the Mobile Engineer District to the New England Engineer District near Boston.

Corps projects of any size are monitored more closely than the typical comparable private project. The Corps has a strong technical presence. This agency has a tradition of resolving

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issues at the lowest level. However, the acquisition workforce is young, less experienced, and has little or no private business experience. This last point applies across the board to all Federal agencies at the level where contractors interface with the government.

The Naval Facilities Engineering Command is the U.S. Navy's version of the Army Corps of Engineers. NAVFAC has no "civil works" function. Obviously, the Navy is more focused on coastal Navy and Marine installations. In general terms, the Navy tends to contract out more and push issues higher in the organization. It is less decentralized.

The U.S. Air Force has a tiny self-administered construction program compared to the Corps or NAVFAC. For the most part, the Air Force must rely on the Corps or NAVFAC for administration of its major construction projects. In some ways, this lack of control causes the Air Force to be less flexible and more defensive of its actions.

The Department of Veterans Affairs strongly supports award of contracts to Service-Disabled Veteran-Owned Small Businesses and Veteran-Owned Small Businesses. The VA has some unusual and very specific acquisition regulations as they relate to costs, delay, and participation by small businesses.

The General Services Administration is the Federal government's landlord, except for military installations. The major focus is building operation and maintenance (Federal courthouses, office buildings, border stations, and more. In some respects, such as contract administration and advanced construction and engineering techniques (for example, use of building information modeling and incorporation of LEED "green" certification requirements), the GSA operates more like a business than the military or the VA.

Contracting Methods

The days of sealed bidding, hard dollar contracts have passed. The Federal government's preferred contracting method is so-called "best value" competitively negotiated acquisitions. By this method, the government effectively engages prospective awardees in a proposal writing contest. Contractors wishing to participate must pay very close attention to the evaluation factors and sub-factors called in the solicitation. Every specific evaluation factor and criterion must be addressed with particularity and in detail. Obvious defects in a solicitation must be brought to the government's attention prior to submission of proposals.

Many contracts are solicited and awarded as indefinite delivery, indefinite quantity (ID/IQ) contracts. The actual contract is the delivery order by which the specific work is directed. The ID/IQ "contract" is unenforceable unless it includes a minimum payment in the event a minimum amount of work, usually set by price, is not ordered. Such contracts often have a "base year" and

up to 4 “option years” that are awarded at the government’s option. If an option year is not awarded, the contract ends.

Multiple award, task order contracts (MATOCs), often ID/IQ, are used for a particular type of work or for work within a specified geographical area. Such contracts are competitively negotiated. Typically, 2 to 6 awardees are announced. Each delivery order is then issued to all awardees for submittal of competitive proposals tailored to a proposed delivery order.

More and more work is solicited as design-build rather than the traditional method of a government contract for design services from an architect-engineer firm followed by solicitation of construction bids based on that design. Coupled with the government’s preference for fixed-price or fixed-unit-price, estimated-quantity contracts, much more risk is pushed onto the design-build contractor.

Even though the GSA considers itself more “cutting edge” in terms of project delivery methods, it continues to solicit 50-60% of its projects as traditional design-bid-build, with only 5-10% as design-build, and 30-40% using a Construction Manager at Risk (“CMc”). Note that Federal agencies sometimes use terms such as CMc but assign meanings to those terms that can vary from standard usage within the engineering-construction industry. By way of contrast, the Corps has peaked in its usage of design-build for military projects and is settling back to an adapt-build model based on site adaptation of standardized designs.

Small Business

Small business is big business in the Federal government. The one exception is race-based minority small businesses. Programs under that banner have been declared unconstitutional and are no longer in effect.

A basic small business set-aside rule is the so-called “Rule of Two.” If the Federal government can identify at least 2 small businesses that are capable of performing certain work, then the work must be set aside for small businesses.

Recently, the Government Accountability Office (GAO) determined that HUBZone “Rule of Two” set-asides trumped other types of small businesses. The White House, Office of Management and Budget, has directed executive agencies to disregard that determination. The intent of the set-aside rules, based on U.S. Small Business Administration (“SBA”) regulations, is to provide parity among the various types of small businesses. The GAO’s determination contradicted the SBA’s regulations but followed acquisition regulations.

Large businesses often enter into teaming agreements with a small business to pursue contracts. Many small businesses lack the bonding capacity to provide a “bid” bond and Miller Act performance and payments bonds. A large business can offer bonding assistance. The SBA also operates a bond guarantee program; however, the dollar limitations are too low for projects of a substantial size. Bonding assistance, standing alone, is not an indication of an affiliation. A joint venture agreement with a large business will be considered a disqualifying affiliation (two or more small businesses can form a JV without disqualifying themselves). Other indicia of affiliation, based on the “totality of the circumstances,” can be viewed by the SBA or the contracting agency as a disqualifying affiliation. Repetitive contracts with the same large-small business team can be viewed as a disqualifying affiliation.

Under a section of the Small Business Act, contractors can be admitted to the 8(a) program. Work can be set aside for 8(a) contractors either as a sole-source or competitively awarded contract. Mentor-Protégé programs and agreements are also available to 8(a) contractors. Under such agreements, a large business (mentor) can perform in tandem, even under a joint venture agreement, with a small business (protégé) and not run afoul of the affiliation rules. The Department of Defense and subsidiary organizations are favorably inclined to Mentor-Protégé programs and agreements. The VA is less favorably inclined. Mentor-Protégé agreements must be approved by the SBA. Some agencies, such as the Corps, are beginning to develop separate Mentor-Protégé type arrangements.

Women-owned small businesses continue to be a recognized type of favored small business enterprise. There are fewer set-asides for women-owned small businesses; however, being a woman-owned business can be helpful as contracting agencies attempt to comply with percentage goals.

HUBZone small businesses are intensely-managed in that more rules that are more specific apply. Unlike other small businesses that must self-perform 15% under a general construction contract (or 25% if a special trade contractor), HUBZone contractors must self-perform 50%.

Service-Disabled Veteran-Owned Small Businesses and Veteran-Owned Small Businesses are favored by the VA for obvious reasons. Such businesses must satisfy two sets of rules: Department of Veterans Affairs rules for matters related to veteran status and Small Business Administration rules for matters related to small business status.

Alaska Native Corporations (“ANCs”) and Native Hawaiian Organizations are specialized categories of small businesses. ANCs have come under fire recently based on assertions that ANCs are passing work through to large, non-ANC subcontractors. ANCs are exempt from limits on sole source contracts that apply to 8(a) firms.

The percentage requirements on self-performance, actually limitations on subcontracting, mentioned above, are defined as follows. When performing a general construction contract, the small business must incur at least 15% of the cost of contract performance for small business employees or the employees of other small business subcontractors. Cost of the contract means all allowable direct and indirect costs allocable to the contract, excluding profit or fees. Other percentage limitations or requirements are similarly administered.

Disclosures

A key to a good relationship with the Federal government is disclosure, disclosure, disclosure. There are a number of specific disclosure requirements. Those requirements are a floor, not a ceiling. Included are pre-qualification letters, teaming agreements, mentor-protégé agreements, bonding assistance agreements, *etc.*

There are at least 15 different certifications that can apply to Federal solicitations and contracts. No certification is routine. Due diligence and attention to detail prior to signing a certificate are key.

American Reinvestment and Recovery Act

The term “stimulus” has fallen out of favor in Washington, DC. People now speak of “ARRA” or “Recovery” projects. Contractors receiving ARRA payments must report certain information not typically required. They can use the tool available at *FederalReporting.gov*.

Contractors must track ARRA funds separately for each project or portion of a project financed by the Act. This is generally accomplished by way of the normal payment request process and forms.

Recipients of ARRA funds must comply with “Buy American” requirements specific to the Act. These requirements differ from and are in addition to requirements under the more traditional Buy American Act. For example, all iron, steel, and manufactured goods used in an ARRA-funded project must be produced in the United States.

Contractors are required to report to the agency inspector general any credible evidence of the submission of a false claim (as defined by the False Claims Act) or any other violation of laws related to fraud, conflict of interest, bribery, gratuity, or similar misconduct.

Jobs saved and jobs created must be reported. Even now, the specific requirements for such reports have not been set.

Under rules that set up and then eliminate this requirement for almost all contractors, the compensation for the top 5 earners in a firm must be reported if the contract is ARRA-funded.

Other Emerging Issues

“Bid” protests are much more prevalent today than in the past. Prospective offerors must submit a protest for any obvious defect in a solicitation prior to date when proposals are due. Best value acquisitions allow the government much more latitude on source selection. The evaluation criteria are applied in a subjective manner that is difficult to attack successfully.

Fraud self-reporting will continue to be required. False Claims Act coverage will continue to be expanded. Recently, the “intent” requirement was eliminated from the Act. It is no longer necessary for the government to prove that a payment request, statement, or claim was designed to get a false claim paid or approved. The fact of its submittal will be sufficient.

Many contractors will be required to have a written and functioning fraud prevention and ethics compliance program. The details of such plans are far beyond the scope of this paper.

Construction contractors are issued a performance evaluation by the contracting agency at or after the conclusion of the project. Such evaluations form a crucial component of best-value determinations under future solicitations, which always include past performance as a subjective evaluation factor.

KEY POINTS

1. Knowledgeable legal representation by an attorney experienced in Federal construction contracts should begin well before submitting a proposal in response to a solicitation issued by a Federal agency.
2. Federal contracting agencies differ in approach and style in connection with contract administration and technical (construction and engineering) matters.
3. By administering so-called “best value” competitively negotiated acquisitions, the government effectively engages prospective offerors in a proposal writing contest.
4. Obvious defects in a solicitation must be brought to the government’s attention prior to submission of proposals.
5. Federal construction work is increasingly solicited as design-build or variations on that theme rather than the traditional design-bid-build method.

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6. Small business is big business in the Federal government. Numerous small business and acquisition rules are applicable and, sometimes, in conflict.
7. Teaming agreements and Mentor-Protégé agreements are the means by which large businesses can access the market for construction projects that are set-aside for small businesses.
8. A key to a good relationship with the Federal government is disclosure, disclosure, disclosure.
9. Contractors receiving ARRA payments must report certain information not typically required.

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A handwritten signature in dark ink, appearing to read 'S. Reed', is written over a horizontal line.

Steven L. Reed