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How To Do Business With the Government

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Know Your Customer— Especially When it's the Government

How to do business with the government successfully. By Colonel Ralph J. Capio

Doing business with the government is a prospect that can create some angst, especially for those not routinely engaged in what has become a very specialized practice. The all-too-often reaction of most people when hearing this phrase, unfortunately, are thoughts of bureaucratic red tape, excessive costs, and risky exposure to complex rules and regulations. However, it can, and should, equally suggest unique and potentially profitable business opportunities with a "customer" that has diverse, and frequently large, requirements, one that scrupulously complies with open procurement policies, honors its contractual commitments, and pays its bills on time!

As with other things in business, government contracting presents something of a dilemma for companies. It is quite clear that government contract business can present insurmountable obstacles to the unwary, as well as excellent business opportunities to the initiated. And, also as with other things, the more one knows about government contracts, the more likely it is that one can resolve this dilemma in his or her business favor.

Identified below are some of the most important aspects of government contracting, if one is to successfully engage as a government contractor. There is no reasonable way to cover such a broad topic, of course, without necessarily being selective in choosing such topics for consideration. But, with all due respect to David Letterman, I would like to offer up these items as my "Top Ten Things To Consider" if one is to be a successful federal government contractor.



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Number Ten: Government procurement represents "big bucks." Billions of dollars are spent every fiscal year—at all levels of government, both domestically and internationally—buying goods and services necessary to satisfy some public need. This equates to unquestionable business opportunities. If businesses routinely "disqualify" themselves from participating in what can be a stable and large business base merely because they are unfamiliar with the unique rules and regulations of doing business with the government, they place themselves at a great business disadvantage. With business comes risk, certainly, but with knowledge comes the opportunity to both measure and limit that risk.

Number Nine: It is quite true that the government procurement process is driven by rules and regulations that differ from the ordinary commercial market place. The procurement of goods and services by the government is a unique activity, directed at the public well being. It is in the nature of a trust, not merely the doing of business. As such, it is dominated by specialized rules and regulations designed to protect that trust, as well as giving potential contractors fair and equal access to the system. A government contractor must be aware of a host of specialized statutes, rules and regulations designed to accomplish not only the task at hand, but to do so with a wide variety of socio-economic objectives also in mind.

Number Eight: For some of the reasons identified in Number Nine, the government procurement process brings with it very well defined and enforced ethics rules. Again, this is a situation that differs from the ordinary course of commercial business. In the commercial marketplace, one hopes and perhaps even expects, to deal with people who comply with standards of ethical conduct. But, in the government contracting arena, this is an absolute requirement. It is an ever-present consideration when dealing with the government procurement process. Government contractors, then, must be well aware of the set of ethics rules against which they and their government counterpart will be measured. By knowing what is expected, contractors and their employees can steer a

course through this ethics minefield with impunity.

Number Seven: The substantive legal rules in the government procurement process can be very different from those encountered in the commercial marketplace. For example, the government is generally entitled to enforce "strict compliance" with contract requirements, rather than having to accept "substantial performance." This is so, again, because the government is operating in the public

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trust, it is fundamentally important that the taxpayers' funds be well spent on defined requirements, and that the integrity of the procurement process be maintained throughout. Thus, contractors seeking to do business with the government must be well aware of the substantive differences in the law they are likely to encounter, so that they can act accordingly.

Number Six: Not all government personnel are vested with the authority it takes to enter into or modify an existing government contract. Unlike the law applicable to commercial contracts, the government is not bound by what is called "apparent authority." Only warranted contracting officers are authorized to commit public funds in the awarding of a government contract, or can modify an executory contract. Government contractors must know with whom they are dealing in the course of contract performance, and the limits of their authority.

Number Five: There are a number of ways government contracts terminate. The most desirable way, of course, from both the government and contractors' perspectives, is for the contract to be completed according to its agreed upon terms and conditions, on time and within cost. However, if changed circumstances require it, the government has the undisputed right to terminate a contract for its

convenience. This "T for C" provision is unique in government contracting, and legally justifiable only because the public's interest in having a remedy available to address changed circumstances outweighs its interest in having "fixed" contracts, not subject to unilateral termination. The very uniqueness of this unilateral governmental prerogative carries with it business risk not ordinarily present in the commercial marketplace. Government contractors must be aware of this as a potential in every government contract, and assess the likelihood of its occurrence as they would assess any potential business risk associated with any project. Their bid/offered price should reflect this assessment accordingly, and then they should keep records that are complete and accurate enough to support an impact claim, if their project is terminated in this way.

Number Four: In offering to perform government contracts, a government contractor must know that the government has information needs that greatly exceed those of his or her commercial trading partners. The government often requires wide-reaching access to a business' proprietary data, and its books and records. This generally has no parallel in the commercial arena. In certain procurements, the government can command the production of cost and pricing data as preconditions to doing business, and these access rights survive years after contract close-out. This is viewed by some potential contractors as so onerous and intrusive that they would choose rather not to do business with the government altogether. Contractors wanting to do business with the government should expect the government to ask for information and data not generally released in the ordinary course of business. They should also understand that the government is under very stringent requirements to protect the data gathered in this way. Again, as in other business transactions, this is an element that requires risk assessment.

Number Three: Government contracts very often involve change. It has been frequently said that the one constant in government contracting is change. As projects mature, as requirements are

refined, as resources—financial and otherwise—are made more or less available, as new needs are identified, the government must have the flexibility to proceed in the direction most appropriate to satisfying its public service obligations. This requires contractors to be prepared to match the government's flexibility. Successful government contractors will understand the changes process, and the government contract clauses addressing change. This is incredibly important if one is to minimize the business risk associated with change, and the degree of project uncertainty inherent in most, if not all, government contracts.

Number Two: While it is true that the consequences of succeeding at a government contract can be very great for an individual contractor, it is equally true that the consequences of failing can be equally great, or even greater. In the unhappy circumstance where a contract is terminated by the government for default, the consequences can be severe. Not only does such an event impact instant contracts, but "past performance" is almost always an evaluation factor in the award of future government business. It is very difficult, if not impossible, to simply walk away from a government contract without incurring long-lasting consequences.

And, the **Number One** item for government contractors to consider: It is very important that actual or potential government contractors have access—in some form or fashion—to professionals who have complete knowledge of the government procurement process, the statutes and regulations

governing it, and who have the ability to maneuver successfully within the government bureaucracy. If "to be forewarned is to be forearmed," then the more one knows about the process and its unique set of rules, the more likely problems can be either avoided altogether or resolved in the most satisfactory way possible. This is clearly one area of business opportunity where risk is inextricably linked with one's ability to penetrate seemingly opaque rules, where the greatest dividends are paid to those who know the process, and to those who systematically plan and act according to those rules.

Doing business with the government can be extremely rewarding. It carries with it the potential for a solid business base. It also offers the sense of satisfaction that comes from doing something for the public will being. It can also be very challenging. The process is often complex, the sums involved are often large, and the consequences for the firm can be both immediate and long-lasting. But, with proper planning and the competent advice of contracting and legal professionals, the risks of doing business with the government can be well managed. ■

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