

10 MYTHS of Government Contracting



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Foreword

The world of Government contracting has changed a lot in the 40-plus years that I have been involved in it. In today's fast-paced, electronic environment, we seldom take the time to focus on the big picture, preferring instead to get the answers we need on-line. More often than not, these answers do not address the myriad issues at hand. Perhaps more troublesome, there is a lot of junk on the Internet, and, unfortunately, people find that out the hard way.

A few years ago, I assembled a list of myths that I have encountered countless times over the course of my career and have used it in many presentations. My audiences have found it useful, and I hope that you do, too. The 10 Myths of Government Contracting is a sister publication of the 10 Commandments of Government Contracting, both of which are also available online (www.thompsoncoburn.com/myths and www.thompsoncoburn.com/commandments).

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Myth No. 1:

We should never protest.

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Bid protests are an intimidating aspect of Government contracting, not only because they usually mean hiring a lawyer, but also because most people don't even like the thought of suing their customer.

Protests certainly are not part of the commercial business sector, but they are a daily occurrence in Government contracting, and anyone jumping into this business needs to understand how protests work and the role they play.

Most protests relating to a U.S. Government procurement may be filed in three separate places—with the agency, at the Government Accountability Office (“GAO”), or at the U.S. Court of Federal Claims. (Some agencies, such as the Federal Aviation Administration and the U.S. Postal Service, have their own protest procedures and forum.) Each forum presents different characteristics, and prudent companies select their forum after consulting experienced counsel. While we do not have any statistics on the success rate for agency-level protests, the GAO’s statistics are published annually. For the fiscal year completed on Sept. 30, 2013, for example, the GAO closed 2,538 protests, issuing decisions in 509 of them. The GAO sustained 17 percent of its protests on the merits. But the GAO has another statistic that is perhaps even more important—the “success rate.” In the fiscal year ending Sept. 30, 2013, 43 percent of the protests filed at the GAO resulted in corrective action. These statistics show that there are a lot of companies filing protests, these protests are often effective, and they deserve a second look if you have shied away from them in the past.

There are essentially two kinds of bid protests: those that challenge the terms of a solicitation and those that challenge an agency's award to a competitor. With respect to the first type, it is critical to understand that any challenge to the terms of a solicitation must be filed before offers are due. Many companies spot problems in the solicitation, such as specifications that are tailored to a competitor's product, but decide to hold off on filing a protest until after the results of the competition are announced, hoping they will win and reasoning that they have a solid protest issue in their back pocket if they lose. Their rationale is simple: let's not "rock the boat." Of course, the fact that the solicitation was written around a competitor's product was a pretty clear message that they weren't even in the boat. And if they do file this kind of a protest after award has been announced, it will be dismissed as untimely, an argument every Government lawyer has mastered.



Here is what experienced companies do: First, they review a solicitation thoroughly, and they make notes of any troublesome areas. Second, they try to resolve any ambiguities, discrepancies or contradictions by applying the "Order of Precedence" clause in the solicitation. Third, they prepare a list of questions to submit to the agency contracting officer, and they either submit them by the deadline for questions

set forth in the solicitation or early enough so that the agency will have a reasonable amount of time to answer the questions (in other words, they don't wait until the last day). Fourth, if the agency refuses or fails to answer

the question, or responds in an unsatisfactory way, the company must decide whether to (a) take a pass on the opportunity; (b) submit a proposal in spite of the risk; or (c) file a protest. This is primarily a business decision, but it should be made with the benefit of advice from experienced counsel.

The second type of protest, challenging an agency's award to a competitor, usually focuses on whether the agency's actions were consistent with the terms of the solicitation and whether the agency complied with the applicable regulations. In order for this kind of protest to succeed, a protester must show a material deviation from the solicitation or the regulations and it must also show that it was prejudiced by the agency's actions. As part of that challenge, a protester must realize that agency contracting officials are given wide discretion in the execution of their duties, and the GAO and the courts do not like to substitute their judgment for an agency official's judgment, but they will if the facts demand it.

In most negotiated procurements, a protest cannot be filed until after a disappointed offeror has received its debriefing. This is a critical step in the process, and experienced contractors know that they should file a written request for a debriefing immediately after learning they lost. They also know that they must prepare for a debriefing, understanding what they are entitled to learn and preparing questions they want answered. The completion of the debriefing triggers the short protest time period, and every day counts. While the regulations state that a protest must be filed at the agency or at the GAO within ten calendar days after the basis for the protest was known or should have been known, the fact is that most companies, especially incumbent contractors that just lost on a re-compete, want to file at the GAO within five calendar days in order to maximize the chance that the contract at stake will be "stayed" until the protest is resolved. The U.S. Court of Federal Claims does not have a similar filing deadline, but judges there will not look kindly on a company that drags its feet in getting to the courthouse.



Myth No. 2:

We should always protest.

The decision to file a protest highlights one of the unique features of contracting with the U.S. Government, involving as it does a long list of questions that must be addressed and the pressure of having to decide whether to sue a customer within a very short time frame.

In Myth No. 1, “We should never protest,” I explained why there might be certain situations where a company really should protest. As in other walks of life, however, a company’s reputation is an important part of its success, and its reputation could be harmed if it is known as a business that protests everything. The filing of a protest generally leads to a lot of work for the Government personnel that have to deal with it. The contracting officer and her team have to devote significant time to assembling all relevant documents and preparing an agency report. Agency counsel will be required to work with the contracting team in an effort to understand the procurement, the relevant facts, and the strength of the protester’s arguments. If the agency personnel decide that corrective action is necessary, that should not generate any ill will toward the protester; on the other hand, if a company files one spurious protest after another, that could lead to problems over time.

Don’t ever underestimate the power of a Government employee, regardless of rank. If you have offended or angered someone in a customer agency, they have ways of doing (or not doing) things that can have an impact on your company, and they can do it without leaving any tracks. For example, the exercise of a contract option is unilateral on the part of the Government, and its failure to do so is not something that will lead to a successful protest. Likewise, a miffed contracting officer might simply fail to process a request

for an equitable adjustment, or fail to include your company on an emergency solicitation short list. In other words, your faucet can be turned off without your having a clue. Because of this raw power, smart contractors avoid doing things, like filing a spurious protest, that will anger their customers.

Chasing a Government contract can be an expensive and arduous process, and I have not met many executives who have admitted that they did not submit a very good proposal. Likewise, I have never met a disappointed offeror (Government-speak for “loser”) that believes they had gotten a fair shake in a procurement. The “Dear John” letter that disappointed offerors receive can lead to negative feelings, even anger, but the appropriate course of action has to be decided without letting emotion in the door. Many

people in that position immediately want to file a protest, but in a negotiated procurement, you generally must wait until you have had the debriefing before you can file. So, the very first step is to file a timely request for a debriefing, if one is available, and that should be done within 24 hours of receiving a “Dear John” letter. If you are offered a chance to attend an in-person debriefing, take it. And regardless of the type of debriefing you are offered (the Government gets to dictate whether a debriefing will be held in person, by phone, or in writing), always take the first date offered. Why? Because your protest period starts to run on that date, and your risk of filing an untimely protest will have increased dramatically if you decline that first date.



The “Dear John” letter should be read carefully. Some agencies will use it to provide a written debriefing, which means your protest period starts on the date you receive the letter. Other agencies might provide you with directions relating to a debriefing. For example, the agency might tell you that you must submit written questions in advance of the debriefing and that failure to do so will mean that no questions will be entertained at the actual debriefing. Experienced counsel can assist you in addressing either of these common situations.

The debriefing itself offers an opportunity for the company to make a good impression on the customer. Prepare by reviewing the applicable regulation (either FAR 15.505 or 15.506) and preparing a list of reasonable questions that you want to get answered if possible. At the debriefing itself, avoid hostility or inflammatory remarks; don't mention the word "protest" and maintain a poker face. In other words, be professional. Further, give some thought to who should attend on your behalf. As a general rule, I don't recommend including your lawyer—that sends the wrong message. Your goal in a debriefing is to obtain as much information as possible, and bringing a lawyer will often cause the Government representatives to clam up.

Once the debriefing is over, confer with experienced counsel and discuss the situation. Your counsel should have what he or she needs to advise you whether a protest is advisable, and in many cases you will be told it is not. This is just another example of how a smart businessperson has to pick his battles.

Filing and pursuing protests can be expensive. If your protest is before the GAO or the U.S. Court of Federal Claims, it is very likely that a "protective order" will govern the matter. This means that only lawyers representing the various parties will be able to see the full, unredacted file. This is often frustrating for clients paying the bills, but protective orders are designed to prevent the competing companies from seeing each other's confidential information as well as the Government's source-selection information. While some of the protest costs might be reimbursed if you are successful, that should never be the motivating factor in the decision-making process. Instead, you should focus on the facts and the law, your relationship with the agency, your commitment to your team of subcontractors and the potential expense. All of these factors must be weighed in a very short period of time, which means considerable pressure.

Taking a position at either end of the protest spectrum, without knowing the facts, is simply silly. A smart contractor weighs a variety of factors, including advice from competent counsel, in deciding whether and where to file a protest.



Myth No. 3:

The Contracting Officer really isn't our customer; the Program people are.

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One of the most significant differences between commercial contracting and Government contracting is the presence and importance of a person called the "Contracting Officer." There is really no commercial equivalent of the C.O., and it is critical that a Government contractor understand the role that the C.O. plays. In a nutshell, nothing happens in Government contracting unless the C.O. says it does.

Imagine if every single Government employee, from the president down to a buck private, had the unlimited ability to commit the Government contractually. That's ridiculous, of course. If that were the case, the Government would be even more in debt than it currently is. Well then, how do we go about deciding what Government officials should have the ability to commit Uncle Sam? Perhaps we could authorize every military officer or civilian employee above a certain grade to bind the Government, but even that poses risk. The problem is addressed by delegating contractual authority from the president on down through the agencies by means of a written delegation called a "certificate of appointment," or a "warrant." Most warrants contain a specific monetary ceiling, although unlimited warrants do exist. A contracting officer is then able to bind the Government up to the limits of her warrant.

In the commercial arena, if I conclude after dealing with someone that he has the ability to bind his company contractually, there is a strong possibility

that his company will be bound. That stems from a common law concept called "apparent authority." Unfortunately, that concept does not apply when dealing with U.S. Government officials. Under a doctrine called "actual authority," a contractor bears the risk (and thus the consequences) if the Government official that has requested, demanded, bullied or urged the contractor to do something, and to incur costs in the process, is not an authorized contracting officer. There are legions of cases demonstrating this principle, but many contractors still continue to act as if they don't exist.



"The customer is always right" is a mantra in the commercial sector. Prudent Government contractors share this philosophy, but they have learned that while the maxim may be true, the "customer" really has not authorized a particular course of action until the C.O. has blessed it in writing. This can pose difficulties in the performance of a Government contract because the contractor may be performing its work hundreds or thousands of miles away from a C.O.'s office, and the contractor's only contact is with a Government employee known as the "COTR," *i.e.*, the Contracting

Officer's Technical Representative." COTRs can run the gamut from ones who play everything by the book to others who are control freaks and bullies. Regardless of how a COTR behaves, the fact is that he or she usually has little or no ability to bind the Government, but that will not prevent them from trying to get a contractor to do things that are not called for under the contract. As a result, experienced Government contractors are well versed in documenting anything that might come back to have a cost impact on their performance. In the course of developing that documentation, they are careful to include the C.O. on any material correspondence and they preserve anything that reflects the C.O.'s knowledge and approval of particular events.

One of the reasons that doing business with the Government is different in so many ways from doing business in the commercial sector is that the Government is a sovereign, and sovereigns possess different powers and

characteristics than commercial entities do. U.S. Government contracts are notorious for their burdensome statutory and regulatory framework, and it is impossible for a business to succeed unless its personnel study and understand that framework. One of the key statutes underlying the business is called the Administrative Procedure Act, 5 U.S.C. 552 *et seq.* The APA is the basis for resolving most disputes with the Government, and it is only fair to warn a newcomer that the APA process alone provides the Government with an upper hand.

One of the key concepts flowing from the APA is the “discretion” that a contracting officer is accorded in her day-to-day dealings with contractors. In disputes with the Government, a contractor challenging a C.O.’s decision must not merely prevail by a preponderance of the evidence but must demonstrate that the C.O.’s actions were arbitrary, capricious or unreasonable, a higher standard of proof. As a result, courts, boards and the GAO will frequently issue decisions in which they “defer” to a C.O.’s judgment, or they refuse to substitute their judgment for the C.O.’s where the question is within the C.O.’s discretion. Thus, experienced counsel can assist a contractor in determining whether a particular decision or action can be challenged—some are simply destined for failure. Why waste your money on that kind of fight?

You will meet a lot of different people in the course of working as a Government contractor. Many will outrank the C.O. that has been assigned to you. You must clearly treat everyone professionally, but you must never forget that nothing happens without the C.O.’s approval. While it is not always easy to do, you should try to meet the C.O. personally as soon as you can after a contract has been awarded, and you should work to keep an open line of communication with the C.O. throughout contract performance. This sometimes means having to go to the C.O. with bad news, but that is far better than sitting on that news and having the C.O. find out about it by surprise. They hate surprises.



Myth No. 4:

We will only work as a subcontractor because we don't want to be exposed the way a prime is.

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How many times have you heard this? My response is always the same: Have you actually read any of your subcontracts? I already know the answer to that question, of course, because no one who has read a properly drafted subcontract could ever utter the words above.

If a prime contractor is doing its job, it is going to “flow down” many of the clauses from its prime contract to its subcontractors. Primes go about this in a variety of ways. Some will actually print each and every clause verbatim and include it in your subcontract, and they will tell you that where the clause says “the Government” it means the prime and where it says “contractor” it means the sub. Others will simply list the clauses by title and leave it to you to look them up. Other primes might include clauses that look like they are standard clauses but, upon examination, have been altered in ways that are adverse to the sub. And these are just a few of the things that can happen!

Of course, with the volume of business that goes on, a sub might have several different deals pending at any time, and the common complaint is that there is never enough time to do the review that is necessary before signing a subcontract. In other words, they sign the deal without really knowing what is in it, and they hope for the best. In most situations, contracts can be performed with only minor glitches, so this ostrich approach has

not caused any harm. But in those cases where major problems arise, this approach can cause a lot of heartburn.

While it is true that a subcontractor does not have “privity” with the Government, *i.e.*, it does not have a direct contractual relationship, that merely presents a procedural impediment to the Government’s ability to get to the sub. If the prime contractor has put the appropriate clauses into your agreement, there is almost no shield between your company and the Government. Let’s say, for example, that the Government determines that your cost and pricing data are defective under the Truth in Negotiations Act. Because it has no privity with your company, the Government will lodge the defective pricing claim against the prime, and the prime will turn around and send it to you. You will then have to work with and through your prime to resolve the problem.



The same two-step process would hold true for most standard contract actions, but there are situations in which the Government, acting in its sovereign capacity rather than its contractual capacity, can come directly against a subcontractor. For example, let’s say that your defective pricing matter has been referred to the Department of Justice (“DOJ”) and the DOJ concludes that your actions were criminal. The DOJ can file charges directly

against your company even though it has no contractual relationship with you whatsoever. Likewise, if the Department of Labor (“DOL”) should conclude that your company failed to follow the Service Contract Act, the DOL can move directly against you without going through your prime.

There is one particular area where being a subcontractor actually exposes a company to more risk than being a prime, and that is payment. The prime is the beneficiary of a statute called the "Prompt Payment Act," which puts pressure on the Government to make timely payments. This statute does not apply to subs; instead, the sub's payment is governed by the language in its subcontract. If that subcontract is silent on payment, or if the language is of the "paid when paid" variety, *i.e.*, the prime agrees to pay the sub within a certain number of days after the Government has paid the prime, the subcontractor could be in a bind. What happens, for example, if the agency fails to make its first payment to the prime until 60-90 days after contract performance begins? This is not an unusual occurrence. If the payment terms are "pay when paid," the sub is out of luck. That is why, to the extent possible, a subcontractor should insist on payment within 30 days of submitting an invoice to the prime, regardless of when the Government actually pays the prime. This often comes down to a matter of negotiating leverage. Most subcontractors believe that they have no leverage in such situations, but that is not necessarily true.

A subcontractor's exposure may depend on two other important concepts—choice of law and disputes. A well-drafted subcontract will always contain clauses addressing these two issues. Without such clauses, the prime will be in the driver's seat. The "Choice of Law" clause dictates what forum's law will govern the transaction. It is yet another reminder that a subcontract is between two commercial organizations, and the prime usually will try to ensure that the laws of its home state will govern. This is not necessarily a bad thing, but if a sub is aware that a particular state is inhospitable to manufacturers, for example, it might want to think twice before agreeing to be governed by that state's laws. One way to mitigate this effect would be to agree that the subcontract will be governed by the law of federal Government contracts and that, if a situation should arise where there is no such applicable law, then the law of the prime's home state will apply. This has become a fairly popular approach to the choice-of-law dilemma.

With respect to disputes, it is important to remember that there are two basic kinds of disputes that can arise in connection with a subcontract: disputes between the prime and the sub and disputes that really are between the Government and the sub. Consequently, your subcontract should contain a Disputes clause that addresses both kinds of situations. In devising the language addressing disputes between the prime and the sub, there are many possible approaches, but beware of a provision calling for binding arbitration. Arbitration may sound attractive because it avoids the courts, but in practice it can be an expensive and frustrating experience, with no way out. I recommend using language calling for some sort of alternative dispute resolution technique (there are many) that will minimize the role of lawyers and the risk of uncontrolled litigation expenses. If it is not possible to agree on such an approach, and litigation is the only available option, be careful to avoid language requiring that all such litigation be conducted in the prime contractor's jurisdiction.

With respect to the language addressing disputes that really are between the Government and the sub, it is important to track the Disputes language from the prime contract so that the procedures in the subcontract parallel it.

Every contract presents risk. A smart subcontractor realizes this and takes careful and prudent steps to mitigate that risk. The failure to do so could lead to some serious consequences.



Myth No. 5:

My prime contractor will tell me what clauses should be in our subcontract.

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I have lost count of the number of times I have heard this one, and anyone who believes it is true needs some immediate counseling because this is a recipe for disaster. Let's start by stating the obvious: a prime contractor has its interests to protect and a subcontractor must protect its own interests. The interests of the two parties are going to overlap a great deal, but they are never going to be identical.

As I mentioned in Myth No. 4, there are a lot of landmines in a Government contract and any subcontract issued under it, and a subcontractor has to take the time to ensure that the agreement it signs does not pose any unacceptable risk. You can't do that without reading and understanding the document. You will rarely be able to eliminate all risks up front, but you have to try to identify and minimize them.

I am not suggesting that prime contractors are dishonest. The fact is that many companies serve as primes on some contracts and subs on others, and they are well aware that their strategy will be affected by their role. Having been on both sides of the table might actually be helpful to them in negotiating a deal.

Large primes are famous for sending a set of terms and conditions to potential subs with a note indicating that these are the prime's "standard terms and conditions," and requesting the sub to sign the document and

return it promptly. Incredibly, many subs do just that because they are so desperate for the business. But the fact that this document might contain the prime's standard terms does not mean that they are identical to a sub's standard terms, and a sub would be foolish to simply accept them. Instead, the sub needs to review them carefully to ensure that it can live with what the prime has proposed. For example, primes frequently utilize a "Pay When Paid" clause, meaning that the sub will not be paid by the prime until the prime has been paid by the Government. A sub has to determine when exactly that might be—in some cases it could be over 90 days after work has begun. Can you make it that long? The real problem in such situations is that the party with superior bargaining power will prevail, and subs therefore need to understand how much risk and pain they can absorb—that is a business decision. Lawyers can sympathize, but lawyers cannot resolve this for the parties.



In taking tough positions like this, primes are not acting unethically or immorally. They are simply capitalizing on their leverage and the sub's hunger to get the deal done, and history shows that this is a very successful strategy. One could react to this point by concluding that it really is not worth it to challenge what the prime has handed down because it will be a losing effort, but that is not the case. While some of the provisions will certainly come down to economic leverage, others will not. For example, the "Termination for Convenience" clause is unique to Federal contracts and enjoys such elevated status that courts have held that it will be "read into" a Federal prime contract even if the

Government agency neglected to include it. Most prime contractors will insert this clause into proposed subcontracts because they want an exit ramp if the Government should decide to terminate the prime contract for convenience—a wise strategy. In the commercial world, however, a convenience termination is nothing more than a breach of contract, and since the agreement between a prime and a sub is a commercial transaction, the sub should insist that the Termination for Convenience clause be limited to those situations where the Government has actually terminated the prime's contract for the convenience of the Government; the clause should also state that in the case of a partial termination of the prime contract, the prime will only be able to terminate that portion of the subcontract affected by the termination. Without such protection, a subcontract could be terminated at any time, for almost any reason, depriving the sub of the certainty of contract that is a staple of commercial transactions.

President Ronald Reagan was known for saying, "Trust, but verify," wisdom borrowed from an ancient Russian proverb. Mr. Reagan used this phrase in the context of explaining the rationale for extensive verification procedures that were to be used in our Government's dealings with the Soviet Union, a high-stakes process. While your subcontract negotiations with a large prime contractor might not be of the same importance as diplomatic negotiations, they are important to you and your company, and your failure to protect your interests could lead to some unwanted problems down the road. Experienced prime contractors will not be offended by your attempts to negotiate certain terms and conditions. In fact, they would be surprised if you didn't—they do it every day with their primes.



Myth No. 6:

We don't have to market to the Federal agencies like we do in the commercial sector because the Feds have a regulated process.

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In the on-line world we live in, someone might believe that the only thing necessary to chase Government business is to log on to FedBizOpps. That would be a mistake. Indeed, many a veteran will tell you that by the time an opportunity appears on FedBizOpps it is too late to have a realistic opportunity for award. It may not be impossible, but it is going to be an uphill battle.

It is true that a great deal of business can be conducted by sitting at your computer, but it is also true that e-mail communications alone are inadequate without a personal relationship beneath them. Regardless of all of the rules and regulations that are in play in the context of a Federal procurement, personal relationships matter in Government contracting as much as they do in the commercial world, and you can't build a meaningful relationship on line. That is why it is important to employ men and women who know how to build these relationships or to employ organizations that can provide this essential ingredient.

Since 9/11, the security employed in Federal buildings and on Federal installations has increased to the point where the ability to simply walk in off the street has disappeared. You must have an appointment or you must already know someone you can call who will come down to escort you into

the building. Meanwhile, the incumbent contractor, if there is one, has daily access to the customer's decision makers. This access can often bloom into lasting friendships, mutual feelings of trust, socializing and (believe it or not) carpooling. Over time, this means something.

In addition, the Government contracting world is infamous for its so called "revolving doors," i.e., men and women who go from a Government agency to a contractor and *vice versa*. There are a plethora of laws and regulations designed to combat the coziness and the advantages gained through the revolving-door process, but there are a lot of doors, and they have been



revolving a long time. Experienced contractors are very careful to make sure that these laws and regulations are not violated. As a general rule, the more attractive a potential candidate is because of his or her position in the Government, the more likely they are going to be saddled with strict conflict-of-interest restraints, including a period of time in which they are prohibited from dealing with their former agency on anything in which they were involved. Most "cooling off" periods for Government employees are limited in

their duration to a maximum of two years, so it is usually just a matter of time before someone can take advantage of the persons he or she has met while working in the Government or working for a contractor. When I say "take advantage," I do not mean to suggest anything improper. For example, merely knowing that a colonel or a senior civilian official in a particular agency will take your call because of your relationship puts you in a very good position vis-à-vis your competition.

FAR Part 15.201, "Exchanges With Industry Before Receipt of Proposals," lists some of the many ways that Government agencies can engage in a dialogue with contractors. The list includes industry or small business conferences, draft RFPs, Requests for Information and pre-solicitation conferences, among other things. You can bet that your competitors are

engaging in all of these things, so simply attending these meetings or responding to something the Government has sent out may not be enough for you. That is why you would do well to focus on one-on-one meetings, which are also on the list. If you get those meetings, you want to make the most of them in terms of making the best impression possible on your audience. In order to secure such a meeting, it helps to have a pre-existing relationship.

If you are new to Government contracting or simply too small to employ the type of marketing team I am suggesting you need, there are experienced firms out there that will provide this for you on a commission basis (some may ask for a business development fee or retainer as well). The men and women who work at these firms usually have significant Government experience on their resumes and they have established relationships that can inure to your benefit. They also know the ropes of Government procurement and may be able to provide you with agency insights, useful historical information, and, perhaps most important, help in writing proposals. It might make sense for you to be a smart consumer, talk to several of them to find out how they operate and what they have to offer, and then retain the one you think is the best fit. Nothing guarantees a contract award, but taking this approach increases your chances.

In a nutshell, a Government contractor has to be every bit as aggressive as a commercial concern when it comes to marketing, but they have to be aware of the very different environment in which Government contracting operates. There are strict regulations governing the entertainment of Government employees, and many of the major prime contractors have adopted similar restrictions. To succeed, the wise Government contractor learns those rules and works within them. Staying on top of FedBizOpps is certainly one thing smart contractors do, but it is by no means the only thing.



Myth No. 7:

Our documents, including our proprietary information and intellectual property, are safe with the Government.

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There are a myriad of ways that doing business with the Federal Government differs from the commercial sector, and protection of a company's sensitive business information is one of them. The most important thing for you to understand is that everything that you submit to the Federal Government is subject to a statute called the Freedom of Information Act ("FOIA"). This statute was enacted in 1967 based in part on the philosophy, to paraphrase Justice Brandeis, that "sunlight is the best disinfectant." In other words, the more open and transparent our Government is, the less likelihood that improper conduct can occur. This does not happen in the commercial sector; if someone wrote to General Motors asking for a copy of your recent steel quote, there is no law or regulation that requires GM to respond.

Millions of people and entities submit information to the U.S. Government every day, and much of it is sensitive. If it were released to a third party, severe damage could result. For example, imagine what would happen if the Social Security Administration released your Social Security number to an unscrupulous person. For that very reason, the FOIA has protections built into it that serve to prevent the release of such information. Now consider what a company puts into a proposal it submits to a Government agency. It might include a description of its unique technical approach, its entire cost

structure, a unique technical concept, a list of key personnel—all of those things constitute sensitive and proprietary business information, the release of which would inflict severe competitive harm on that company.

Under the FOIA, and the decisions that courts have issued interpreting and applying it, such information would probably not be releasable if the company could persuade the agency, or perhaps a court, that such release would create the potential for economic injury or competitive harm. That one sentence makes it sound like a fairly easy process, but like almost anything involved with Government contracting, the process presents challenges. Experienced Government contractors are well aware that their competitors are constantly seeking their information through FOIA requests and other means. That is why they take very basic steps in order to protect the sensitive information they submit to the Government.



First, it is important to educate your employees about the rules for protecting information that is submitted to the Government. For instance, your employees must be taught to mark all proposal information, and anything else that is submitted to the Government, appropriately. In order to do this correctly, you must mark your information in accordance with the directive at Federal Acquisition Regulation

52.215-1(e), "Restrictions on Disclosure and Use of Data." Any marking that differs from the legend prescribed in that regulation will increase your risk. This very basic question ("Did they mark it?") will be the starting point for the analysis that either the agency or a court, or both, will conduct if someone files a FOIA request for your information, and your failure to mark your data appropriately could prove fatal to your position.

Second, if a U.S. Government agency ever asks you to comment on a FOIA request that is aimed at your data, as agencies are required to do, you must treat that request seriously and promptly, and in responding to the agency you must make a compelling case, if the facts support you, that the release of the requested data will cause your company competitive harm or economic injury. (In doing so, be realistic—don't try to protect harmless information—that affects your credibility and could hurt your chances of success). Your response should be a clear statement of your position, and it should cite to case law supporting it. Also, as part of this response, I strongly recommend having the letter signed by a very senior company official, underscoring the importance of the matter. If the letter is going to be submitted by your outside counsel, it should be accompanied by a sworn affidavit or declaration, signed by a senior officer, describing the potential harm. Why must you do this? Because you are building a record; if the agency should disagree with you in any material way and decide to release the information at issue, any court challenge will be limited to reviewing the record that was before the agency. In other words, don't save your ammunition for a later stage—you want it on the record now.

Don't expect agencies to roll over simply because your letter has cited some recent legal decisions favorable to contractors. The agencies have experienced personnel handling FOIA requests. They know the law, and it is rare that they will see an argument for the first time. They also know that the FOIA and the courts favor disclosure, so your burden is heavy.

Third, over-marking your data could serve to undercut your position if a competitor files a FOIA request seeking it. In order to make a credible argument to an agency or a court, it will help if you can show that you were judicious in marking your data. That puts you in a much better position to challenge the release of data you did mark. (The same approach holds true for marking your technical data, a separate topic but one that is also critical to a Government contractor's survival. Over-marking such data can cause major problems down the road.)

In addition to protecting information submitted to the Government, and with the major role that social media and electronic filing now play in both our personal and our business lives, we need to be careful about what we put

out there. For example, if two parties are in litigation in a Federal court, their filings are available to the public on line through a service called Pacer. You might be surprised at what you can learn about a competitor from reading these filings. The FOIA is not going to protect you if sensitive information is available on Pacer, so experienced contractors coordinate closely with their outside counsel in determining what information can be included in their court filings.

As for social media, a prudent business will educate its employees about what types of things should not be posted. Technical papers, derogatory e-mails, blog comments about Government officials, rants about a prime contractor's practices, and venting about a recent contract loss might make you feel good in the short run but can have negative long-term consequences. Once again, the FOIA is not there to protect you.



Myth No. 8:

We can treat our Government customers the same way we treat our commercial customers.

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Over the last 20 years or so, the Government contracts sector has seen countless new entrants. Many of these newcomers are experienced commercial-sector concerns that have decided to give the Government a try. Others are just newcomers. Some have succeeded better than others, but all of them have bruises to show for it. That is because they made the mistake of focusing on the potential sales they could make rather than on the procedures and practices that would be involved, and they learned about those the hard way.

About ten years ago I visited a software company in the Washington, D.C. suburbs. The CEO had invited me out to discuss a problem the company had run into with a Federal civilian agency. I sat down with the CEO and several members of his team. They told me a story about how they were about \$800,000 in the hole on their contract, and they asked me if I thought there was a solution to the problem. I said, "There might be, but let me ask a few questions. First, who is the contract administrator"?

"Well," the CEO said, "we don't have anyone here with that title. What does a contract administrator do?" After I explained, the CEO said, "Well, John keeps the correspondence; Sally has all the contract documents; and Ken is our point of contact with the agency's program manager." Although the CEO's answer already answered my next question, I asked, "Where is the contract

file”? And, of course, I learned that there was no central contract file but that John, Sally and Ken each kept what was important to their duties.

Any experienced Government contractor reading this article would be shaking her head because a splintered approach to a Federal Government contract is a recipe for trouble. While that approach may be typical in a commercial setting, it is far too risky for a Government contractor that will be dealing with a contracting officer who maintains the master contract file and through whom all important documents, discussions and decisions must flow.

The importance of centralized and knowledgeable contract administrators is not the only distinction between the Government contracting world and the commercial world, but it is certainly an important one. Sales and marketing

practices also need to be studied. The types of things that are common in the commercial sector—entertainment, golf outings, and meals—are handled in an entirely different way in Government contracting. While Federal employees may be able to accept certain things up to a \$20 limit (actually, the gift must be \$20 or less, as long as it is not cash, and the employee may accept no more than \$50 in gifts, in the aggregate, from the same source in a calendar year), they are flirting with trouble if they go beyond that limit, and both the contractor and the employee could be in hot water. Many of the major prime contractors impose similar, if not more rigid, limitations on their employees.

The rule of thumb here should be that

you never want to embarrass your customer. In order to achieve this goal, you have to familiarize yourself with the rules that govern your customer.



The pricing practices you use in the commercial sector might also be a problem for you in the Government arena. For example, if you are selling goods or services through the GSA's Federal Supply Schedule ("FSS"), you are governed by something called the "Price Reduction" clause. While this clause and its potential problems are a worthy topic of much more discussion, in essence, before the contract is awarded the Government and the contractor review the contractor's customer list and select a customer or class of customer that will serve as the basis for the FSS award. Once the contract is awarded, if there are any improvements in the pricing offered to that customer or customers, the contractor is required to pass the same improvements on to the Government. Failure to do so could lead to both civil and criminal liability. Given these risks, contractors have to train their sales force to avoid any such infractions, and they must implement policies and controls designed to prevent them from occurring.

Similarly, inexperienced contractors rarely have accounting systems that are tailored to the Government sector. As a contractor becomes more reliant on Government business, however, it will discover that simply having a system that conforms to generally accepted accounting principles will not impress a Government auditor. This can be a problem if a contractor is seeking reimbursement for an equitable adjustment ordered under the "Changes" clause or is seeking recovery under a claim. The lack of an adequate accounting system can prove to be fatal to either action.

My list of examples could go on, but it is probably a better idea to say that a company doing business with the U.S. Government for the first time needs to either hire or align itself with people who have experience with and knowledge of this very unusual customer. It also should dedicate a group within the company to the Government sector, centralizing all Government-related activities. The failure to take these two simple steps simply means that the question is not whether your company is going to run into trouble with its Government customer, but when.



Myth No. 9:

Only the big guys succeed.

It is true that the media focuses on the big names in Government contracting, and those big names are very successful; but, for a variety of reasons, it is also true that a small business can thrive in this market as well. In our prior myths we have discussed a number of ways in which Government contracting differs from the commercial sector, and we are about to discuss another one—socioeconomic goals. Put simply, Congress recognized a long time ago that Government contracting could be a very useful tool for enhancing social and economic changes that Congress deemed worthy. That is why the typical Government contract contains numerous clauses and requirements that really have nothing to do with the quality of the product or service that is being provided. For example, a typical contract might contain requirements relating to small business subcontracting, clean air, clean water, a drug-free workplace, a drug-free workforce, hiring veterans and non-discrimination. This is just the Government exerting its leverage—in return for the privilege of performing a Government contract, the contractor agrees to comply with all of these requirements.

Take a look at the table of contents for the Federal Acquisition Regulation (“FAR”). Subchapter D, “Socioeconomic Programs,” contains FAR Parts 19-26. FAR Part 19, “Small Business Programs,” is the starting point for understanding why a competent small business can do so well with this customer. Like so many other things in Government contracting, the term “small business” is a term of art. For manufacturers, a firm is “small” if its average number of employees for the preceding completed twelve months of pay periods is below a number prescribed by the U.S. Small Business Administration (the “SBA”). For service companies or construction

companies, a firm is small if its average annual receipts for the most recently completed three fiscal years are below a number that the SBA also establishes.

Congress ranks small business right up there with motherhood and apple pie, and the laws require the U.S. Government to award a fair proportion of its contracts to small businesses. Following Congress' lead, Federal agencies are required to give special treatment to small businesses, small disadvantaged businesses, small woman-owned businesses, Alaska-Native-owned businesses and small, service-disabled veteran-owned small businesses, to name a few.

The mechanics for carrying out this Congressional mandate are somewhat complicated, but it all starts by an agency determining that there is adequate competition available to justify "setting aside" a particular procurement for a particular class of small business. "Adequate competition" exists when two or more capable firms within the particular class are expected to respond to the solicitation. When the solicitation finally is issued, it will advise interested offerors exactly what class of small businesses may compete and it will contain a North American Industry Classification System ("NAICS") code. A company must then consult the SBA's regulations to determine what the size standard is for that particular code. If they are small in relation to that standard, they are eligible to compete for that contract. For example, if the procurement is for security guard services and is set-aside for small businesses, it will be assigned NAICS 561612 and the size standard will be \$19 million. Therefore, if your company's average annual receipts for the past three fiscal years are below \$19 million on the day your proposal is submitted, your company is eligible to compete under this set-aside. Depending upon the NAICS code in question, one company could be small for some procurements and "other than small" for others.

A business hoping to compete on a set-aside contract must "self-certify" its small business size status. Most contracting officers will accept such a certification on its face, but if they have information to the contrary they may file a protest with the SBA and the SBA will proceed to determine the firm's eligibility. This does not happen very often; what usually happens, and with great frequency, is that an agency will announce the name of the intended

awardee and one or more competitors will file a small business size status protest. The SBA will review the matter and issue a decision. That decision may be appealed to the SBA's Office of Hearings and Appeals ("OHA"). Although OHA's decisions may be challenged in court, it usually has the last say.

An entire body of law has developed relating to small business size status protests, and it makes for interesting reading. If you ever have the chance to review a sampling of the decisions issued by the SBA's Office of Hearings and Appeals, you will be surprised by the extraordinary and sometimes creative



means by which some companies strive to maintain their small business size status. Whenever a program offers the possibility of preferential treatment, many companies will go to great lengths to qualify for the program, and some will cross legitimate lines. Competitors will be watching at every step, and they will be quick to protest if they suspect that a proposed awardee is not eligible.

Many small businesses fail to understand that prime contractors are wonderful targets of opportunity. Why? Because their agency customers must meet annual small business goals, and the primary way they can achieve these goals is on the backs of their prime contractors. Primes that are not small businesses must submit small business subcontracting plans, and they are expected to meet them. Therefore, smart primes are always on the lookout for competent small businesses that can join their team as a subcontractor—a true win-win situation. Whether it is operating as a prime or a sub, a small business must be vigilant about its small business size status.

It is ironic that the price of success for a small business might be that it is no longer small, but that is a fact of life in Government contracting.

Finally, set-aside procurements offer opportunities for small businesses to grow in other ways because the solicitation requirements often necessitate teaming with a large-business subcontractor. As long as the small business does more than 50 percent of the work on the contract, it is permissible to have a large business teammate. Once again, competitors watch these situations very closely, so strong contract administration is required to ensure that the small business prime is doing things by the numbers, thus protecting both its reputation and its customer. If the small business is able to gain the confidence of its large-business teammate in the process, it could bode well for the future.



Myth No. 10:

Solicitations are filled with boilerplate provisions, and we really don't have to read them carefully.

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Webster's Dictionary defines "boilerplate" as "the detailed standard wording of a contract." In the world of Government contracting, "boilerplate" usually refers to those standard provisions that are plucked from the Federal Acquisition Regulation ("FAR") and dropped into the Government's solicitations and contracts. It is true that the solicitations and contracts issued by the Government are filled with boilerplate, but it is also true that countless contractors have been burned by that very boilerplate.

Government contracts are contracts of adhesion, *i.e.*, they aren't deals that are negotiated from the ground up, created from scratch by the parties. If a company wants to do business with the U.S. Government, it must be willing to accept the Government's demanding requirements, many of which are encapsulated in the boilerplate.

Let's start at the top: The FAR is the senior regulation for contracts with Executive Branch agencies, and in its paperback format it is almost two inches thick. Of course, the provisions and clauses that end up in solicitations and contracts are in just one part of the FAR—Part 52—but in order to understand those clauses and the context in which they are supposed to be used, a contractor must consult the other 51 sections of the FAR.

It is difficult to sympathize with a contractor that gets upended by a standard FAR clause. There really is no excuse for not being aware of it or for not understanding it. The same can be said of the agencies' supplements to the FAR. FAR clauses and agency supplemental clauses are all subject to a period of public comment required by the Administrative Procedure Act ("APA"). This rulemaking process is carried out by publication in a document called the Federal Register, which is published every working day the Federal Government is open. The public—meaning you—is charged with knowledge of everything published in the Federal Register, even if you have not actually read it. And yet, contractors get tripped up by the FAR on a daily basis.



It is very likely that, pressed to answer under oath, a company official would admit that he or she had not actually read every clause in his company's contract. This would not be a huge shock to anyone who has been in this business for a while. But most people would also tell you that they are aware of the clause because of their experience in the business. For example, it is difficult to imagine someone with five years or more of Government contracting experience saying she had never

heard of the "Termination for Convenience" clause. In addition, senior executives rely on their staffs to review and negotiate contracts, and they expect their personnel to understand the requirements inside and out. So the fact that the boss has not read a particular clause does not mean that no one else in the company has read it.

The real danger with contract clauses stems from what I will call "local clauses." These are clauses drafted by a particular buying activity (*i.e.*, an agency component) to address problems or concerns its contracting personnel have encountered. These clauses normally are not a product of

the APA process, they have not been subjected to public comment, and they can be troublesome. Oftentimes the buying activity will put the title of such a clause in the solicitation (usually, but not always, in Section H, “Special Contract Requirements”) but leave it to the offeror to do the work necessary to find out what the clause actually says. The buying activity is betting that most offerors will either not notice it or will not do the work to determine what it means—and the buying activity would be right in most cases.

Here is an example. From time to time over the past 40 years, I have seen buying activities use a risk-shifting clause whose very title suggests mischief: “Contract Interpretation: Notice of Ambiguities.” The clause reads as follows:

This written contract and any and all identified writings or documents incorporated by reference herein or physically attached hereto constitute the parties' complete agreement and no other prior or contemporaneous agreements either written or oral shall be considered to change, modify, or contradict it. Any ambiguity in the contract will not be strictly construed against the drafter of the contract language but shall be resolved by applying the most reasonable interpretation under the circumstances, giving full consideration to the intentions of the parties at the time of contracting.

It shall be the obligation of the contractor to exercise due diligence to discover and to bring to the attention of the Contracting Officer at the earliest possible time any ambiguities, discrepancies, inconsistencies, or conflicts in or between the specifications and the applicable drawings or other documents incorporated or referenced herein. Failure to comply with such obligation shall be deemed a waiver and release of any and all claims for extra costs or delays arising out of such ambiguities, discrepancies, inconsistencies and conflicts.

Without going into too much detail, the effect of this clause is to shift the risk of writing a poor specification from the buyer to the seller. Legend has it that this clause was hatched during the Vietnam conflict at the Oakland

Naval Supply Center, a very busy buying activity, and it was so effective that it migrated across the country as contracting personnel were transferred.

There are a number of reasons why this clause is objectionable. Among other things, it eliminates the pesky contract interpretation rule known as *contra proferentem* by shifting the risk of latently ambiguous language from the Government drafter to the contractor. I once heard a judge at the Armed Services Board of Contract Appeals tell an Army lawyer that this clause was unenforceable because it was unconscionable, and I agree with that. But what happens if, for whatever reason, a contractor fails to get this clause knocked out of a solicitation and now faces a contract interpretation battle with its Federal customer? Well, if you draw the right judge, you might be in good shape, but if you get a judge who is not ready to make such a statement you might find yourself on the witness stand being cross-examined by the Government lawyer:

Lawyer: Mr. Johnson, before you prepared the proposal, did you read the entire solicitation, including this clause?

There are two possible answers. Let's try the first one:

Mr. Johnson: "Yes."

There are judges who would then conclude that you were aware of this risk-shifting clause and priced your proposal with those risks in mind. So you will lose. Now let's try the second answer:

Mr. Johnson: "No."

If that is your answer, a judge will have no sympathy for you. If you were reckless enough to submit a proposal without reading the solicitation, you will pay the price. After all, no competent judge is going to issue a decision saying that a clause can't apply to your company because you didn't read it before bidding.

So what is an offeror to do when reviewing a solicitation? First, understand the difference between standard FAR clauses and local clauses. Even with

the standard FAR clauses, of course, you might come across one that is unfamiliar. If that happens, you have to review it to ensure that it is properly in the solicitation and that you understand it. If you don't understand it, you need to do what it takes to fix that. Second, check to see if there are any local clauses in the solicitation, and pay careful attention to them. If you spot a problem, consult your management and your counsel about what to do. Your options are to: (1) price the proposal to address the risk; (2) ask the agency to delete the clause and be prepared to protest if the agency refuses; or (3) pass on the procurement.

If you decide that a protest is necessary, file it before offers are due; otherwise, it will be dismissed as untimely because the problematic clause was clear from the face of the solicitation. Don't wait until the last minute to challenge an offensive provision; do it as early as possible in the procurement cycle, and phrase your challenge in a way that explains your concerns and tries to persuade the agency to see it your way. If you can argue persuasively that the clause is detrimental to competition, that may be your best shot.

Benjamin Franklin once said that "an ounce of prevention is worth a pound of cure." That wisdom applies to the world of Government contracting: what you do up front can make a huge difference—and save a lot of angst and money—down the road. Yes, there is a lot of boilerplate in a Government contract, but not all boilerplate is created equal.

About the Firm

Thompson Coburn's Government Contracts attorneys have substantial experience in every phase of contractual and disputes processes, whether at the federal, state or local level. In fact, many of our attorneys have served in the federal government, including in the Departments of Justice, Defense and Transportation, as well as in the Central Intelligence Agency. This firsthand insight serves our clients well when they face the complexities of the contracting and compliance processes.

In addition to being counselors, our attorneys are seasoned litigators who have advocated our clients' interests before numerous federal courts, including the U.S. Supreme Court, the U.S. Courts of Appeals, the U.S. District Courts and the U.S. Court of Federal Claims. Moreover, we regularly litigate disputes at the Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA), and pursue and defend bid protests before the Government Accountability Office (GAO).

Thompson Coburn LLP is built on a foundation of sophisticated corporate and litigation practices, each with a long track record of success in the boardroom and the courtroom. Since the firm's founding in 1929, we have represented clients from nearly every industrial and corporate sector, including transportation, technology, communications, manufacturing, and energy. With 380 lawyers and 50 practice areas, we serve clients throughout the United States and abroad.

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