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Government Contracting Doesn't Have to be Rocket Science

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In the first three quarters of fiscal year 2009, the United States government awarded more than $146 billion in contracts to more than 91,000 contractors.[1] A review of the top 100 awardees reveals that five defense contractors claimed more than 27 percent of contract dollars awarded. This correlates to a substantial sum going to very few contractors, but how's this for perspective: the construction company claiming the 99th spot on the list of the top 100 contractors won only 14 percent of contract dollars awarded, and that correlated to contracts worth more than $206 million combined. Not a bad first three quarters for a company that came in 99th. The lesson here is that government contracting does not have to be rocket science to be profitable. Nondefense contractors can also do very, very well.

When you contract with a client as powerful as the United States of America, you're expected to conform to a number of processes and regulations that you wouldn't otherwise have to deal with.[2] What's more, if there is a project dispute, you will have to seek an administrative remedy from the agency on the other side of the dispute, and if your issue is not satisfactorily resolved by the agency you may have to seek relief from courts and boards that you are not familiar with. But that's not the worst of it. If you do something wrong like submit a bill for an amount not due (whether accidentally or not), you can be hit with treble damages and you might go to jail.[3]

For an example of how not to deal with the federal government, see the case of *Daewoo Engineering and Const. Co., Ltd. v. U.S.*, 73 Fed.Cl. 547 (2006), *aff'd 557* F.3d 1332. There, a contractor who may have had a legitimate claim in the amount of $13.4 million decided to claim $64 million as a negotiating ploy instead, thereby submitting a false claim in the amount of $50.6 million. The penalty for doing so was (1) a fine in the amount of the false claim, and (2) forfeiture of the potentially legitimate claim. What the company viewed as a (perhaps routine) tactic of beginning negotiations with a high number was actually a $64 million lapse in judgment.

So, forget about this federal contracting business, right? Wrong. Here's the deal: The federal government is spending huge amounts of money to have work done by companies like yours. So it behooves you to compete for and win some of these lucrative projects. Federal contracting doesn't have to be rocket science (either literally or figuratively speaking), but care must be taken to handle business details precisely [4] and to understand the differences between federal and commercial contracting.

Take, for example, the *Christian* Doctrine.[5] In a commercial setting, parties are generally free to agree that unwanted contractual clauses will be omitted. Likewise, parties to a commercial contract are free to include any mutually agreeable contractual clause. With limited exceptions, courts will simply look to the language of the contract (as agreed to) and the intent of the parties to decide whether the included or omitted clause will be enforced. This is not necessarily true, however, when the project owner is the United States. Contracts with the government are subject to a number of statutes and regulations, including the Federal Acquisition Regulation (FAR). The FAR includes certain mandatory clauses for various types of contracts entered into on behalf of the government. Under the Christian Doctrine, if a clause stricken by the parties is (a) required by law and (b) based on fundamental procurement policy, that clause will be read back into the contract as if it had not been stricken. Certain clauses will always be included in government construction contracts.

Conversely, there are other clauses that may not be written into a government construction contract. For example, in a commercial setting, if a contemplated project results in more potential liability than the contractor is comfortable with, the contractor might negotiate an indemnity provision shifting a portion of that potential liability to the project owner. When the project owner is the federal government, however, this isn't allowed. Contracting officers do not have authority to bind the government beyond funds actually allocated for the project. In other words, an agency contracting officer may not usurp the role of Congress by allocating funds not assigned to the project, even though expenditure of those funds is uncertain (as in the case of potential indemnity). A contracting officer who agrees (without Congressional allocation of sufficient funds) to such an indemnity provision may be in violation of statutes collectively known as the Anti-Deficiency Act6and may be subject to harsh penalties. A contractor reviewing a federal request for proposal must become comfortable with the level of potential risk, knowing that the contracting officer doesn't have the authority to negotiate indemnity from the government.

While federal contracting is, at times, unlike commercial contracting, the rules generally make sense when viewed in perspective. Rules described above, for example, simply stand for the propositions that (1) the FAR generally controls the content of a government contract and (2) federal agencies may not agree to expend funds not allocated by Congress. These simple propositions apply to government contractors whether they build spacecraft or storage sheds. It really doesn't have to be rocket science.

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1. fedspending.org
2. This is true of all federal contracts, but even more so where American Reinvestment and Recovery Act (ARRA) funds comprise any portion of the contract. For an understanding of ARRA opportunities and additional obligations for contractors who win these contracts, visit www.recovery.gov.
3. Statutes at issue include: 18 U.S.C. § 286 (conspiracy to defraud); 18 U.S.C. § 287 (False Claims); 18 U.S.C. § 1001 (False Statements); 18 U.S.C. § 1341-1343 (Mail and Wire Fraud); 18 U.S.C. § 1031 (Major Fraud Act); and 31 U.S.C. § 3729-3733 (Civil False Claims Act).
4. Practical Tip: Take your billing practices off of auto pilot. For example, some companies routinely bill the project owner for the cost of project bonds in the initial billing cycle (sometimes during mobilization or during a design phase of the project). Be sure that the department responsible for procuring the bonds has done so before billing the federal project owner for them. The fact that the company has received a quote, made application and received word that bonds are forthcoming may not suffice, and an invoice charging the government owner for a bond promised but not yet procured may be a false claim.
5. Named for a case in the United States Court of Federal Claims called Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963).
6. 31 U.S.C. §§ 1341-1344, 1511-1517.