



CONTRACTING GONE WILD

THE EVER-INCREASING BUREAUCRACY OF DOING BUSINESS WITH UNCLE SAM

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Ever since the American colonies won their independence from Britain, U.S. companies have made fortunes, large and small, selling their goods and services to our government. While there have always been rules to government contracting, for at least the last few decades, the hardest part was the competitive bidding process.

You often worked days, nights and weekends preparing proposals and even subjecting yourself to interviews and requests for additional information. Then – if you won – you had to do a good job for your customer. The government often kept you on the short leash of a one-year contract, subject to extension at the pleasure of the feds. Fair enough. The rules were pretty clear, the playing field was fairly level and the rewards for success were often good. Just drive around the Beltway, and the names on those big buildings will tell you that plenty of businesses prospered working for the government. Increasingly, though, doing business with the government has become a bureaucratic and burdensome nightmare.

Congress and its minions are now churning out crazy new requirements that make the latest SAW movie tortures seem like the family sing-a-longs in the Sound of Music.

NO MORE SECRETS

Just this past summer, federal regulators rushed into effect new rules requiring government contractors to disclose the compensation of their most highly paid executives and also vastly expanded the required disclosure of the terms upon which contractors hire subcontractors. The new regulation, fancifully titled “Reporting Executive Compensation and First-Tier Subcontract Awards,” requires government contractors to report the names and total compensation of their five most highly compensated executives.

Generally, the rule applies to those contractors that, in their preceding fiscal year, received \$25 million or more in annual gross revenues from federal contracts and other agreements and derived 80 percent or more of their annual gross revenues from the federal government. Similarly, contractors must report the same information for any of their subcontractors that received annual gross revenues above the same thresholds. Ironically, this regulation was rushed along without the normal opportunity for the business community to comment on the new rules before they went into effect. Apparently, the regulators themselves were well over a year late in complying with the Congressional mandate to issue

this regulation. To paraphrase Orwell, when it comes to obeying the rules, some of us are more equal than others.

This missed opportunity for advance comment is unfortunate. These new regulations will add a burden to every business that must establish new systems to gather the data and make the appropriate reports. Worse, disclosure of executive compensation forces companies to reveal data that is normally considered extremely proprietary in the “real world.” Government contractors undoubtedly will be exposed to an increased threat that their senior executives will be lured away by recruiters who now fully understand the executive compensation packages sufficient to cherry-pick their best and brightest executives. Perhaps this rule, issued on an interim basis but still subject to comment and revision (even though compliance is required in the meantime), will be softened to mitigate its burdens and threats.

Unfortunately, this regulation is just the tip of one of the few icebergs that are still growing.

E-VERIFY

In September 2009, the final rule went into effect, requiring government contractors to verify the employment eligibility of their new employees. In addition to the standard employment eligibility compliance that all employers must perform, virtually all government contractors now must use the federal E-Verify program to confirm that all new hires of the contractor who are working in the United States are eligible to work in this country. This process must be initiated within three business days after the date of hiring. Additional requirements include posting notices, performing tutorials and complying with employment non-discrimination laws. Generally, E-Verify participation is required of all federal government contractors and their subcontractors, but not of providers of commercial-off-the-shelf (COTS) goods.

INTO THE CONFSSIONAL

This next one sounds like something my mom helped dream up. In December 2008, every government contractor became bound to self-report – that is, turn themselves in – if they received credible evidence that their company violated federal criminal laws involving fraud, conflict of interest, bribery or similar crimes. Prior laws imposed similar, more limited requirements. But the final 2008 “Contractor Code of Business and Ethics and Conduct” broadened disclosure requirements and limited existing exemptions. Notable self-reporting requirements include the mandate to adopt a business and ethics code, implement training programs, develop internal controls to support the ethics program and display a “hotline” poster for reporting violations.

At its core, this new regulation requires disclosure to the government of acts like fraud or bribery on a timely basis once a contractor has credible evidence of the crime. The contractor must also fully cooperate with any resulting government investigation, including providing requested documents and access to employees although constitutional rights, like the Fifth Amendment bar on self-incrimination, are preserved. Still, if a significant member of your contractor team, such as an officer or director, fails to disclose a relevant crime known to that person, the contractor can be suspended or banned from government business which can be the death of any government contractor.

MORE ICEBERGS

There's more. Lots. Government requirements now regulate dozens of aspects of the federal contracting process. The list is long, but notable laws include the following:

- **Davis Bacon and Service Contract Acts** require that you and your subcontractors pay certain minimum wages and keep detailed payroll records.
- **Buy American Act and Statute** requires that you buy particular U.S. made products in performing certain contracts.
- **The Fraud Enforcement and Recovery Act of 2009** expanded government contractor exposure under the Civil War era False Claims Act and, notably, entices more parties to scrutinize your billing of the government.

Make sure that you have the right advisors and compliance program in place to ensure that winning a contract actually turns out to be a victory.

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