

Introduction to Federal Government Contracting

By: Anita Ponder and Cynthia Park

Overview of Federal Government Contracting

Products and Services Procured by the Federal Government

"A government agency is likely to have a need for just about any product or service one can think of, and probably in quantities that stretch the imagination."

- Frank M. Alston & Margaret M. Worthington, et al., *Contracting with the Federal Government*

The government awards contracts for various products and services such as electronics, office supplies and furniture, vehicles, food and beverages, tools and equipment, construction materials and services, architectural and engineering services, maintenance and repair, financial services, risk management and technology consulting services, just to name a few. The Department of Defense (DoD) is the largest government purchasing agency, buying products such as aircraft components and accessories, electronic components, instruments and laboratory equipment, and vehicular equipment. Its 2009 procurement budget was approximately \$104.2 billion. The U.S. General Services Administration (GSA) is another large agency that makes purchases totaling approximately \$66 billion a year.

Countless goods and services are also subcontracted by government contractors to other businesses. On the basis of the solicitations listed on the subcontracting website of the U.S. Small Business Administration (SBA), Sub-Net, services in the construction industry appear to be the most commonly subcontracted good/service.

Your company may sell goods or services that may be procured by the federal government. This alert will provide an overview of federal government contracting issues that your company may face as federal government contractors, subcontractors, prospective contractors or prospective subcontractors. It does not cover all aspects of federal government contracting law, since the law is extensive and comprehensive. Out of necessity, we have generalized certain aspects of the law.

Key Regulations Governing Federal Government Contracting

The Federal Acquisition Regulation (FAR) governs procurement by federal government executive agencies. The FAR authorizes federal government agencies to issue or authorize the issuance of agency-specific regulations that implement or supplement the FAR. These implementing or supplementing regulations are parallel to the FAR in format, arrangement and numbering.

Contracting with the government is very different from contracting with the private sector. One major difference is that the federal contracts process is much more regulated than contracting in the private sector. This difference is driven by public policy and U.S. law. For instance, work on federal government contracts must be regulated for nondiscrimination and sometimes for affirmative action in hiring. Certain contracts must be regulated for wage-hour and drug-free workplace compliance. Examples of laws that govern wage-hour compliance are the Service Contract Act, the Contract Work Hours and Safety Standards Act, the Davis-Bacon Act and the Walsh-Healey Public Contracts Act. Government contractors must comply with environmental regulations, including the National Environmental Policy Act and Clean Air and Water Acts. They must also comply with requirements of socioeconomic laws programs, such as those that promote the participation of small businesses, and minority and women-owned businesses in the contracting process. In addition, ethics are heavily regulated. Lobbying activities and sometimes political contributions and governmental conflicts of interest must be disclosed.

The terms of government contracts tend to heavily favor the government. To illustrate, under the concept of “termination for convenience,” the government can unilaterally completely or partially terminate a contract when termination is deemed in the government’s best interest. No statute or regulation outlines the criteria a contracting officer must use to decide when to terminate a contract for convenience except that it be “in the government’s interest.”

The contractor for a federal contract must generally be selected pursuant to a relatively uniform, open and competitive process, whereas contractors for public sector contracts may be chosen on the basis of each company’s separate preferences and criteria, such as when, for example, a trusted, longtime supplier is awarded a private sector contract without much consideration for other competitors. This difference is driven by the fact that the U.S. government is spending the taxpayers’ money and to promote the efficient use of this money, it must use an open, fair and competitive process.

Award of Federal Government Contracts

Publicizing Contract Opportunities

The federal government is required to award contracts pursuant to full and open competition. With limited exceptions (such as for emergency procurements), information on proposed government contracts valued at more than \$25,000 must be publicized on the Federal Business Opportunities website (<http://www.FedBizOpps.gov>), the Government Point of Entry for such contract opportunities. In addition, some federal government subcontracting opportunities are listed in a directory on the SBA’s website, called Sub-Net (<http://web.sba.gov/subnet/>). The SBA also publishes a directory of federal prime con-

tractors that have received federal contracts valued at more than \$500,000 (or \$1 million for construction). Similarly, the DoD has a directory of DoD prime contractors that prospective subcontractors can review to contact prime contractors and possibly obtain subcontracting opportunities (http://www.acq.osd.mil/osbp/doing_business/index.htm).

Procurement Methods

To fulfill the FAR's requirement that it use competitive procedures to award contracts, the federal government typically uses either the sealed bid process or the competitive proposal process for most acquisitions.

Sealed Bidding

Invitations for bid (IFB) are used when bids are evaluated primarily on price and price-related factors. IFBs must clearly describe the government's requirements, including bid preparation instructions and details concerning payment, technical data and specifications. Sealed bids must be submitted by prospective contractors to the government agency by the deadline stated on the IFB – these deadlines are strict and non-negotiable. A public bid opening is held and the contract is awarded to the lowest "responsive" and "responsible" bidder. Generally, a prospective contractor is responsive when it complies with all material aspects of an IFB, and responsible when it has adequate financial resources, a satisfactory record of performance, integrity and business ethics, as well as the necessary organization, technical skills and facilities.

Competitive Proposals

The government typically uses requests for proposal (RFPs) to evaluate offers when it needs to take into account factors other than price, such as past performance, technical excellence, management capability and personnel qualifications. The federal government is required to select the proposal that represents the "best value" and may make these determinations based on various factors, depending on the type of contract. The FAR provides in section 15.101: "For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection." RFPs must indicate the factors and significant subfactors, and their relevant importance, that the government will use to evaluate proposals.

Other Procurement Methods

The federal government may award contracts without full and open competition if the acquisitions meet certain requirements. In these cases, the federal government must "solicit offers from as many potential sources as is practicable under the circumstances." For instance, certain agencies may award a sole-source contract to a vendor if it is the only responsible source, whereas DoD, National Aeronautics and Space Administration (NASA) and the Coast Guard may do so when "one or a limited number of responsible sources" are available. The federal government is not required to use full and open competition under certain emergency situations.

Full and open competition also need not be utilized when it is necessary to award the contract to a particular source in order to: 1) maintain a facility or supplier available for

providing goods or services in case of a national emergency or to achieve industrial mobilization; 2) maintain an essential engineering, research or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center; or 3) acquire the services of an expert or neutral person for current or anticipated litigation or a dispute. Full and open competition is also not required when the acquisitions involve certain international agreements, it is not authorized or required by statute or lack of such competition will protect national security or the public interest. For acquisitions not using full and open competition, the government must publicize its justification in writing.

For goods and services not exceeding the simplified acquisition threshold (\$100,000), the federal government has broad discretion in utilizing appropriate evaluation procedures. Government agencies can solicit and accept quotes orally and may solicit quotes from a single source. Prospective contracts valued at more than \$3,000 and less than \$100,000 generally must be set aside for competition among small businesses.

The federal government may make purchases valued under the “micro-purchase threshold” without soliciting competitive quotations if the contracting officer considers the price to be reasonable. The micro-purchase threshold is \$3,000, except for: acquisitions of construction subject to the Davis-Bacon Act (\$2,000); acquisitions of services subject to the Service Contract Act (\$2,500); and acquisitions of supplies or services that are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack (\$15,000 in the case of any contract to be awarded and performed inside the U.S. and \$25,000 in the case of any contract to be awarded and performed outside the U.S.).

The federal government may also acquire commercial goods and services in varying quantities for discounts associated with volume buying through the Federal Supply Schedule (FSS) program, also known as the GSA Schedules Program or the Multiple Award Schedule Program. The FSS program is maintained by the GSA. All GSA Schedule contractors must publish an “Authorized Federal Supply Schedule Pricelist” that contains all supplies and services offered by a schedule contractor and the pricing, terms and conditions pertaining to each item that is on the schedule. GSA offers an on-line shopping service called “GSA Advantage!” through which the federal government may place orders from GSA Schedule contractors. When a contractor is placed on a GSA Schedule, it does not mean that the government actually guarantees that it will order from that contractor; it merely arranges the terms between the contractor and government so that the government may order from that contractor in a more streamlined manner. To enroll in a GSA Schedule, the contractor must respond to a solicitation issued pursuant to that GSA Schedule.

Protests

An interested party in the federal government contracting process may file a protest to object to an agency’s solicitation, cancellation of a solicitation, award or proposed award of a contract, or termination or cancellation of an award of a contract. An interested party is an actual or prospective offeror with direct economic interest that would be affected by the award of a contract or by failure to award a contract. Outside of filing suit in court, an interested party may file a protest with the contracting agency and/or the Government Accountability Office (GAO), although the federal government encourages interested parties to seek resolution with the agency before filing a protest with the GAO.

A protest filed with the agency must contain the following information: 1) name, address, and fax and telephone numbers of the protester; 2) solicitation/contract number; 3) detailed statement of the legal and factual grounds for the protest, including a description of resulting prejudice to the protester; 4) copies of relevant documents; 5) request for a ruling by the agency; 6) statement as to the form of relief requested; 7) all information establishing that the protester is an interested party; and 8) all information establishing the timeliness of the protest. Protests to the agency must be addressed to the contracting officer or person designated to receive protests. Consistent with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer. Protests based on alleged improprieties in a solicitation must be filed before the bid opening or closing date for receipt of proposals, and in all other cases, protests must be filed no later than 10 days after the basis of the protest is known or should have been known, whichever is earlier.

After receipt of a protest to the agency before the contract award, a contract may not be awarded until resolution of the protest, unless the contract award is justified in writing for urgent and compelling reasons or it is determined to be in the best interest of the federal government. After receipt of a protest to the agency within 10 days after contract award or within five days after a timely debriefing date in accordance with FAR § 15.505 or § 15.506, the contracting officer must suspend contract performance pending resolution of the protest within the agency, unless continued performance is justified in writing for urgent and compelling reasons or it is determined to be in the best interest of the federal government. Agencies must make their best efforts to resolve agency protests within 35 days after a protest is filed. If, pursuant to the protest regulations, an agency determines that a contract action does not comply with statute or regulation, it may take an action that would have been recommended by the Comptroller General had the protest been filed with the GAO, and it may require the awardee to reimburse the government's costs if a post-award protest is sustained due to an awardee's intentional or negligent misstatement, misrepresentation or miscertification.

Protests to the GAO must be signed by the protester and include: 1) the name, street address, electronic mail address, and telephone and facsimile numbers of the protester; 2) the agency and the solicitation and/or contract number; 3) detailed statement of the legal and factual grounds of protest including copies of relevant documents; 4) all information establishing that the protester is an interested party for the purpose of filing a protest; 5) all information establishing the timeliness of the protest; 6) request for a ruling by the Comptroller General of the U.S.; and 7) statement of the form of relief requested. Within one day after the protest is filed with the GAO, the protester must file a copy of the protest with the individual or location designated by the awarding agency for receipt of protests. Protests based on alleged improprieties in a solicitation must be filed before the bid opening or closing date for receipt of proposals. In all other cases, protests must be filed no later than 10 days after the basis of the protest is known or should have been known, whichever is earlier. If a timely agency-level protest was filed, however, a subsequent protest to the GAO must be filed within 10 days of actual or constructive knowledge of an initial adverse agency action. In matters where an alleged impropriety in a solicitation is timely protested to an agency, a subsequent protest to the GAO will be considered timely if filed within 10 days of actual or constructive knowledge of an initial adverse agency action, even if it is filed after bid opening or closing date for receipt of proposals.

Upon receipt of a protest to the GAO, the agency may be required to withhold award and suspend contract performance, pursuant to the applicable federal statute. The GAO must issue a decision on a protest within 100 days after it is filed, although the federal regulations provide for an express option wherein a decision must be issued within 65 days of filing. If, pursuant to the protest regulations, the GAO determines that a contract action does not comply with statute or regulation, it may recommend that the agency implement any combination of the following remedies: 1) refrain from exercising options under the contract; 2) terminate the contract; 3) recompetete the contract; 4) issue a new solicitation; 5) award a contract consistent with statute or regulation; 6) consider other recommendations as deemed necessary by the GAO to promote compliance; or 7) reimburse the protester for the costs of filing and pursuing the protest and/or bid and proposal preparation.

Types of Government Contracts

The most common form of government contract is the fixed-price contract. Fixed-price contracts provide for a firm price or, in appropriate cases, an adjustable price. Contracts awarded through sealed bidding and those for commercial items are typically fixed-price contracts.

With some contracts, it may be difficult if not impossible for the government to accurately estimate a price. In these cases, the government may use a cost-reimbursement type of contract. Pursuant to such contracts, contractors are paid allowable incurred costs to the extent set in the contract. These contracts may also include a maximum cost amount that the contractor may not exceed without approval of the agency. Some contracts may be administered pursuant to an incentive format; that is, the government may choose to set goals on technical performance or delivery and increase payments to contractors when goals are met and decrease them when they are not.

The government may choose an indefinite-delivery format for a contract. There are three types of indefinite-delivery contracts: definite-quantity contracts, requirement contracts and indefinite-quantity contracts. An indefinite-delivery contract can be used to acquire goods and/or services when the exact times and/or exact quantities of future deliveries are unknown at the time of contract award. These contracts require the appropriate pricing data for an estimated quantity of supplies or services.

The government may also use time-and-materials or labor-hour contracts when it is not possible at the time of placing the contract to accurately estimate the extent or duration of the work or to accurately estimate costs. Under a time-and-materials contract, labor is paid for on the basis of direct labor hours at specified fixed hourly rates, and materials are paid for at cost. Labor-hour contracts are similar to time-and-materials contracts and are utilized when materials are not expected to be supplied by the contractor.

Procurement Preferences for Minority and Women-Owned Businesses

The federal government has certain procurement process policies to ensure that various basic socioeconomic objectives are met and has implemented certain contracting preferences to businesses such as small and disadvantaged businesses, women-owned small businesses (WOSBs), veteran-owned small businesses and small businesses located in Historically Underutilized Business Zones (HUBZones). Under the federal regulations, federal government prime contractors are required to provide such businesses with the “maximum practicable opportunity” to participate in contracts. In addition, prime contractors on contracts valued at more than \$550,000 (\$1 million for construction contracts) must prepare and submit subcontracting plans explaining the contractor’s proposed efforts to ensure that such businesses have an equitable opportunity to compete for subcontracts. The subcontracting plan becomes part of the prime contract, so after the prime contract is awarded, the federal government can take action to enforce the subcontracting plan. In addition, when determining a prospective contractor’s responsibility, the federal government may look to its compliance with its subcontracting plans under prior federal contracts as a factor.

The federal government may provide additional procurement preferences to certain socioeconomically disadvantaged firms, including setting aside contracts, awarding sole-source contracts and granting price preferences to these firms. With respect to minority-owned businesses, the SBA maintains a program called the 8(a) Business Development Program wherein it grants 8(a) certification to small businesses that, generally speaking, are at least 51 percent unconditionally and directly owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the U.S., and which demonstrate potential for success. Persons of certain races are presumed to be socially disadvantaged, but non-minority women are not. A firm seeking to become certified as an 8(a) firm must complete and submit a certification application, which requires an extensive amount of information and documentation, and is available on the SBA’s website. Firms may participate in the 8(a) Business Development Program for nine years. Pursuant to federal regulations, the federal government may set aside certain contracts for competition among 8(a) firms and may award contracts to 8(a) firms on a sole-source basis. The SBA and its resource partners also provide specialized business training, counseling, marketing assistance and high-level executive development to 8(a) firms.

The SBA has a program called the Small Disadvantaged Business Participation Program, through which firms certified as small disadvantaged businesses (SDBs) may receive a 10 percent price evaluation adjustment on bids to the DoD, NASA and the U.S. Coast Guard. Pursuant to Section 801 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, however, DoD may not grant this price evaluation adjustment in any fiscal year in which the Secretary of DoD has determined that DoD awarded 5 percent of its contracts to SDBs in the most recent fiscal year for which data is available. DoD has met this 5 percent SDB goal since 1999 and has not granted this price evaluation adjustment to SDBs. The eligibility criteria for SDBs is similar to that for 8(a) firms, except that SDB firms do not need to prove potential for success and the personal net worth limit for economically disadvantaged owners of SDBs is \$750,000, whereas for initial 8(a) certifi-

cation eligibility, the personal net worth limit for economically disadvantaged owners of 8(a) firms is \$250,000. 8(a) firms are automatically certified as SDBs, although SDBs are not automatically certified as 8(a) firms. In 2008, because the SBA determined that SDBs receive few procurement preferences from SDB certification, SDBs were not required to apply for SDB certification and could self-certify.

In addition, the federal government has a goal of awarding at least 5 percent of all federal prime contracts and subcontracts each fiscal year to WOSBs. The federal government may restrict competition for contracts among WOSBs for contracts in which the SBA has determined that WOSBs are underrepresented or substantially underrepresented in federal procurement and the procuring agency has satisfied through the appropriate analysis, including an analysis of its procurement history, that such a set-aside would meet all applicable legal requirements, including the equal protection requirements of the U.S. Constitution. WOSBs may self-certify as such on the Central Contractor Registration (CCR).

The U.S. Department of Transportation has implemented the disadvantaged business enterprise (DBE) program through which it requires state departments of transportation to calculate and set goals for DBE participation on their federally assisted contracts and to certify DBE firms pursuant to federal eligibility standards. Eligible DBEs are generally small businesses that are at least 51 percent owned and controlled by socially and economically disadvantaged individuals who are U.S. citizens. Unlike the requirements for 8(a) certification, non-minority women are presumed to be socially disadvantaged individuals for purposes of DBE certification. Firms seeking DBE certification must apply for certification through the applicable state Department of Transportation.

Ethics and Compliance

Ethics in federal government contracting is heavily regulated. Certain practices that may be acceptable in the private sector marketplace are not acceptable in the federal government contracting marketplace and may be a cause for penalties including suspension, debarment, contract termination, contract damages and criminal sanctions.

Contractor Responsibility

Federal government contractors and subcontractors must be “responsible.” A contractor or subcontractor is responsible when it has adequate financial resources, a satisfactory record of performance, integrity and business ethics, and the necessary organization, technical skills and facilities. Pursuant to this requirement, failure to comply may result in suspension or debarment from federal contracting. Suspended or debarred contractors are prohibited from receiving prime or subcontract awards, and agencies cannot solicit offers from, award contracts to or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action.

Conflicts of Interest and Revolving Door Prohibitions

Federal government employees and officers are prohibited from participating “personally and substantially” in matters in which they or organizations in which they serve or with which they are negotiating for employment have a financial interest. Doing so may subject these employees and officers to criminal sanctions. In fact, federal statute prohibits

contractors from engaging in employment discussions or making employment offers to agency officials who participated personally and substantially in a federal contract in which the contractor participated. In addition, federal statute imposes various “revolving door” restrictions on federal government employees who have contracting responsibilities.

Federal Crimes

Generally speaking, giving, promising or offering anything of value to a public official because of an official act performed or to be performed by that official is a federal crime. It is also a federal crime to give anything of value to a public official with the intent to influence an official act or induce the public official to commit fraud or violate an official duty.

The Anti-Kickback Act prohibits giving anything of value to federal government prime contractors or subcontractors in order to improperly obtain or reward favorable treatment in connection with a federal government prime contract or subcontract. Prime contractors and subcontractors have an affirmative obligation to disclose if it has reasonable grounds to believe that the company, a subcontractor or an employee has engaged in this activity.

Pursuant to the False Claims Act, it is a federal crime to knowingly submit a false claim to the federal government, directly or indirectly, for payment. This activity covers product substitution, overcharging, time-charging fraud and false progress reports/certifications. The False Statements Act broadly prohibits knowingly and willfully making a false statement or certification regarding a matter within the jurisdiction of any federal government agency.

Procurement Integrity Act

The Procurement Integrity Act prohibits a prospective government contractor that is competing for a contract from knowingly obtaining contractor bid or proposal information or source selection information before award of that contract. Contractor bid or proposal information includes any of the following information submitted to a federal agency as part of or in connection with a bid or proposal, if that information has not been previously disclosed publicly: cost or pricing data; indirect costs and direct labor rates; proprietary information regarding manufacturing processes, operations or techniques marked by the contractor in accordance with applicable law or regulation; and information marked by the contractor as “contractor bid or proposal information.” Source selection information is any of the following information prepared for use by the federal government to evaluate a bid or proposal, if that information has not been previously disclosed publicly: bid prices submitted in response to a solicitation; proposed costs or prices submitted in response to a solicitation; source selection plans; technical evaluation plans; technical evaluations of proposals; cost or price evaluations of proposals; competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract; rankings of bids, proposals or competitors; reports and evaluations of source selection panels, boards or advisory councils; and other information marked as “source selection information” by the federal government pursuant to the applicable laws and regulations.

In addition, pursuant to the Procurement Integrity Act, a former federal government employee who served in certain positions on a procurement action or contract in excess

of \$10 million is barred for one year from receiving compensation as an employee or consultant from the contractor who was awarded that contract.

Contractor Business Code of Ethics

As of December 2007, contractors performing certain federal government contracts must have a written business code of ethics. Federal contracts valued at more than \$5 million must contain a clause requiring the contractors to have ethics policies in place and internal controls to maintain them within 90 days of the contract award. This requirement also applies to subcontracts that are valued at more than \$5 million and have a performance period of 120 days or longer. To promote compliance with their codes of business ethics and conduct, contractors should have employee business ethics and compliance training programs and internal control systems. A contract may also require contractors to post a hotline number where employees can report possible violations of the business code of ethics. Each agency decides whether it will require a hotline poster and the information required to be contained on the poster.

Contract Administration

Committing to Contract Terms

Contractors must commit to certain contract terms of the federal government. Terms regarding price, delivery, deliverables and payment are sometimes open to negotiation, discussed and agreed upon. The matrix found at FAR § 52.301 outlines the contract provisions that are required for each type of contract, depending on the principal type and/or purpose of the contract.

Making Contract Changes

In order to make changes to a federal government contract that are not covered by a contract clause, or to make changes in quantity, bilateral agreements must be utilized. A unilateral modification, signed only by the contracting officer, is used to make changes that are authorized by clauses included in the contract. Before a contract modification is implemented, the government must estimate the costs of the modification, if possible. If the government finds that a contract modification could result in a significant increase in cost but time does not permit negotiation of a price, the government must negotiate a maximum price, unless it is impractical. Furthermore, if a contractor attempts to change a contract, an unsuccessful proposer may protest the acceptance of the change on the grounds that the change was being made without competition and is an attempt to circumvent the competitive procurement requirements. Contracting officers may be hesitant to accept contract changes.

If a contractor seeks a change, it may issue a change order to the contracting officer for government approval. After the need for a change is acknowledged, the contractor and government contracting officer confer to exchange pricing and technical data to define the scope of change and the agreed adjustment, if any, in contract pricing. When a contractor does not seek a change but believes the government has made a change to the contract, it must request that the contracting officer issue a written order regarding the change. The contractor must then address to the contracting officer, within the time limit specified in the contract (usually 30 days after receipt of notification of a change),

a written statement of claim or a written notice that a claim will be submitted at a later date. The procedure outlined in the contract must be followed or a contractor may not be compensated for extra work performed because of the change.

Contract Termination

The federal government can terminate a contract for convenience or default. When the government terminates a contract for convenience, the contractor must stop working on the terminated portion of the project, terminate subcontracts and attempt to settle termination claims, which are negotiated with the government. The settlement negotiation must take into consideration compensation for work already completed and work executed in preparation for the terminated project. A contractor can negotiate compensation for costs such as preparation and presentation of claims, termination and settlement of subcontracts, and costs associated with materials, storage, labor and transportation and the sale of goods/services created for the purpose of the contract.

If the government terminates the contract for default, which means the contractor has not performed according to specifications, expenses may not be easily recoverable, especially if the contractor is unable to cure the defect within 10 days or to show that the contract should not be terminated for default. In the case of termination for default, the contractor is entitled to compensation only for services or goods accepted by the government. If the government must repurchase the contracted items elsewhere, however, then it is entitled to charge any excess repurchase costs to the contractor. Ultimately, certain costs can be negotiated depending on the nature of the terminations and costs associated with job changes can be negotiated as part of the settlement package.

Federal Stimulus Funding Issues

Under the American Recovery and Reinvestment Act of 2009 (ARRA), \$787 billion of stimulus funds have been allocated to jumpstart the economy, and to save or create millions of jobs. The federal government must follow implementing guidance issued by the Office of Management and Budget (OMB) when awarding contracts funded by ARRA. Pursuant to such guidance, OMB has a preference that federal government agencies award fixed-price contracts pursuant to the competitive award process. If other contract types are used, the award notice and rationale for such utilization must be publicized on the FedBizOpps website.

Reporting Requirements

Recipients of ARRA funds, including federal government agencies, must adhere to comprehensive reporting guidelines in connection with the utilization of ARRA funds. Recipients must prepare and submit quarterly reports, beginning in July 2009, containing the following information: government contract and order number; amount of ARRA funds invoiced; significant services performed or supplies delivered; program or project title; description of overall purpose and expected outcomes; assessment of contractor's progress towards completion of contract; narrative description of "employment impact" of work funded by ARRA, including number and types of jobs created and retained; names and total compensation of five most highly compensated officers, if annual gross revenue from federal contracts, subcontracts, loans, grants, subgrants or cooperative agreements is more than \$25 million and 80 percent of the contractor's gross

revenues and the information is not already available through Securities and Exchange Commission or Internal Revenue Service reports; and certain information about first-tier subcontractors.

With respect to reporting regarding first-tier subcontractors, the amount of information about the subcontractor that must be reported depends on several factors. A contractor can provide an aggregate report showing the total number and dollar amount of first-tier subcontractors that are valued at less than \$25,000, awarded to an individual or awarded to a subcontractor with gross income in the previous tax year of less than \$300,000. For other first-tier subcontractors, the contractor must report: the subcontractor's DUNS number, physical address, primary performance location, amount, date of award, NAICS code, funding agency, description of goods or services provided, and names and total compensation of the five highest compensated officers.

Auditing by GAO and Inspector Generals

In order to ensure that contracts funded by ARRA are implemented appropriately, the GAO and/or federal agency Inspector Generals have the right to examine the records of any contractor or subcontractor who was awarded a contract or subcontract funded by ARRA funds, and to interview any officers and employees of the contractor. The GAO may also interview subcontractors' officers or employees.

Lobbying Restrictions

Projects funded by ARRA have lobbying restrictions. Before engaging in oral communications regarding certain ARRA projects, applications or applicants, federal government agencies must inquire as to whether any participant in the communications is a registered lobbyist. Lobbyists are not permitted to attend or participate in these oral communications, but may submit communications in writing, which must be published on the agency's ARRA website within three days.

Buy American Provision

Projects funded by ARRA also have "Buy American" restrictions. ARRA funds may not be used for projects for the construction, alteration, maintenance or repair of public buildings or public works unless all of the iron, steel and manufactured goods used in the projects are produced in the U.S. This restriction may be waived if an agency head determines that: application of the restriction is "inconsistent with the public interest"; the goods are not produced in the country in sufficient and reasonably available quantities and of a satisfactory quality; or use of American goods will increase the cost of the project by more than 25 percent. Interim FAR rules were issued on March 31, 2009, implementing the Buy American restrictions.

Davis-Bacon Act Provision

In addition, § 1606 of ARRA requires that projects funded in whole or in part by ARRA are in compliance with the Davis-Bacon Act. The Davis-Bacon Act requires that contractors performing work on construction, alteration and repair of public buildings and works of the federal government or District of Columbia pay prevailing wages and fringe benefits to their laborers and mechanics. The Davis-Bacon Act is applicable to ARRA-funded contracts, including those awarded by state and local entities that are funded in whole or part by ARRA.

Conclusion

With the downturn in the private sector economy and distribution of federal stimulus funds pursuant to ARRA, more businesses are likely to seek government contracts with federal, state, and local government agencies. Government contracting, particularly at the federal level, is highly regulated and the laws and regulations governing government contracts are comprehensive and complex. Companies seeking government contracts should ensure they familiarize themselves with the applicable laws and regulations, particularly the government contract award process, types of government contracts, procurement preferences for minority and women-owned businesses, ethics and compliance, contract administration and federal stimulus issues.

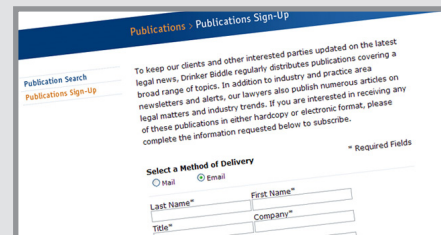
For information on these and other federal government contracting issues, please contact Anita J. Ponder at Anita.Ponder@dbr.com or (312) 569-1153 or Cynthia Y. Park at Cynthia.Park@dbr.com or (312) 569-1052.

Other Publications



www.drinkerbiddle.com/publications

Sign Up



www.drinkerbiddle.com/publications/signup