



GC Newsletter

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This is the June 2007 issue of the GCNewsletter from Gaffey & Associates Government Contracting Services Group. It is the last issue until we startup again in September. We hope that you will find the contents of this GCNewsletter and those in the future interesting, valuable and if nothing else thought provoking. As things develop of immediate importance between now and September we will issue GCAAlerts to keep you informed.

We continue to ask you to visit our website at www.GaffeyCPA.com to learn more about the government contracting services that we provide and to gain access to previous issues of the GCNewsletter, the GCAAlert and to review White Papers and presentations on various subjects of government contracting interest. We also urge you to contact our alliance members FedLinx and O'Riordan-Bethel Law.

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TOP 10 TIPS TO CONSIDER WHEN LOSING OUT ON A GOVERNMENT CONTRACT

The competition for obtaining government contracts work today is lucrative and fierce. Companies work hard putting together materials to submit to the government to get work. They want to make sure they get a "fair shake" in the process and be treated fairly. However, a company pursuing government contracts work cannot fully protect its rights and business interests without knowing some of the basic rules governing federal government bid protests. Knowing the basics is all the more critical in view of the tight timeframes and deadlines associated with steps to be taken when losing out on a procurement opportunity. To assist in the process, we offer the following "Top Ten Tips" to help government contractors navigate through this lucrative yet tricky terrain.

Tip #1 – Find out why you lost.

Nobody wants to hear bad news, but it's important to learn how to do it better the next time. You also need to reach out and get information establishing why you didn't get the contract, that may lead you to learn critical information establishing whether it should have been awarded to your company. The best way of doing this is to get a debriefing. That's the government's after-action description of why the company lost.

Debriefings come in several varieties.

1. RFP's and procurements under FAR "Part 15."

For a vendor who lost a negotiated procurement carried out under FAR Part 15, the most useful debriefing to a vendor is called a "required briefing." It's useful because the government MUST tell the vendor a lot of helpful information. FAR 15.506(d) says: "At a

minimum, the debriefing information shall include – (1) The Government’s evaluation of the significant weaknesses or deficiencies in the offeror’s proposal, if applicable; (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror; (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection; (4) A summary of the rationale for award; ...

To get this helpful “required debriefing”; a vendor, according to FAR 15.506(a)(1) has to meet a rigid 3 day deadline:

An offeror, upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award in accordance with 15.503(b), shall be debriefed...

Therefore, you have to get into the government’s hands a written request for a debriefing 3 days after the company learns its lost. If this tight deadline is not met, the company’s rights are jeopardized.

The second kind of debriefing is a voluntary one. If a vendor misses this 3 day deadline, the government can still give the vendor a debriefing (FAR 15.506(a)(4)(i)) but it’s the government’s choice whether to do one under the rules. You cannot assume that the government will automatically cooperate and accommodate the request. Check with government contract counsel to confirm whether a debriefing is required or not – that will have an impact on subsequent steps.

2. Federal Supply Schedule (FSS) buys.

On a related point, it is worth keeping in mind that vendors who lose out on schedule buys can get a debriefing of sorts. According to FAR 8.40-2(d):

If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis of award decision shall be provided.

Any questions on how these provisions apply should be discussed with counsel sooner rather than later.

Tip #2: Be careful how you handle the debriefings.

The company should attend the meeting with its senior personnel and take copious notes on the grounds of the agency’s action. The company should then update their attorney on the results of the meeting, but should NOT bring the attorney to the debriefing session. Anytime the vendor’s lawyer shows up at a debriefing, it raises the contracting officer’s blood pressure because the contracting officer is afraid that the vendor’s lawyer is looking for information to use in a protest challenging the validity of the contract award. A vendor can end up getting LESS information if a lawyer is present.

Tip #3: Stay focused and don’t complain to your Member of Congress.

Complaining about a lost contract to a Member of Congress is a waste of precious time. If a vendor was treated unfairly and wants to protest to the Government Accountability Office (GAO), typically the vendor has (only) 10 days to do so. Getting to the Member can eat up some/all of these 10 days. Don’t waste your time – each calendar day that goes by wastes another day that your counsel can use to consider and prepare a bid protest that can change how the government handled the situation. The attorney will need some time to do this, since the FAR has specific requirements that must be met to ensure that the filing is proper and will be accepted.

Tip #4: File a GAO protest rather than an agency-level protest.

A vendor who wants to formally complain about the way it was treated in losing the contract has three choices. One choice for the vendors is a protest directly to the agency. However, that’s often a waste of time. The vendor is going to the agency that just “stole” the contract from them in such instances and basically ask the Contracting Officer “Don’t you think you stole that contract from me?” That’s often not productive.

Protests that are often more effective

are protests filed at the Government Accountability Office (GAO), which is set up to administer such protests that are filed in compliance with the FAR. Such cases can be appealed to the U.S. Court of Federal Claims (CFC). Also, filing the protest to GAO can be easy – the GAO accepts protests by email!


Tip #5: Consider whether a CFC appeal is a smart decision.

A protest is really a lawsuit against your customer trying to get the order. If the protest fails at GAO, you can appeal to the Court of Federal Claims, which is located in Washington, D.C. However before doing so reflect on a basic economic analysis of whether it will be cost effective for you to take that path, which could be very effective but has an additional layer of expense.


Tip #6: Don’t assume winning is a long shot – it’s not.

According to GAO reports, the protestor effectiveness rating is over 40%. That is, protestors get SOME help as a result of protesting to the GAO over 40% of the time. That does not mean that 40% of the protesting vendors get the protested contract. All it means is that the protesting vendors get some sort of favorable settlement of the protest without getting a formal GAO decision: it could be getting put back into the competitive range; having its proposal re-evaluated; or sometimes actually winning the underlying contract.

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Reading formal GAO decisions gives a false impression of a protester's effectiveness since these settlement "victories" do not get reported in a GAO decision. In any event, statistics show that if you aggressively fight a bid protest with counsel, you have roughly a one-in-two shot at getting some form of relief – not bad!

Tip #7: Follow protest deadlines meticulously.

If a vendor wants to file a protest to GAO, it must follow strict deadlines: there is essentially no flexibility in the deadlines for protesting to GAO. If a vendor thinks there is something wrong with the solicitation, perhaps for example the solicitation should be a small business set-aside, it must file the protest PRIOR to the deadline for receipt of proposals or bids. If a protester wants to protest anything else, like the government did not fairly evaluate its proposal, it must protest to GAO within 10 days of when it knew, or should have known, of the reason it thinks it was not fairly treated. Bottom line – don't wait!

Tip #8: Protest early enough to grab the automatic stay.

As mentioned in Mistake 7, the time to protest a solicitation not being a small business set-aside is NOT after the vendor loses the contract to a large business. The time to protest is by the deadline for the submission of offers – usually months earlier. Too often, unfair treatment stemming from the solicitation does not get protested until it is too late – after the vendor has lost under the unfair solicitation.

ALSO, companies often fail to take advantage of the automatic stay that applies to protests that are filed **within 5 days** of a debriefing. Simply put, you are wasting a huge opportunity to freeze the entire procurement and gain leverage on the government and awardee if you don't file a bid protest within this five day timeframe. Sometimes cases reach a favorable settlement since the awardee and/or government wants to simply resolve the situation so that they can get on with performing the work. Carefully keep this tight deadline in mind.

Tip #9: Stick to strong arguments under the FAR.

When a vendor finds out it lost, often they blame the contracting officer and the government evaluation team and argue that the government dealt with it in "bad faith." That is an absolutely losing argument. GAO has never sustained a protest based on government bad faith.

Arguments that could be more successful are that the government paperwork on why the winner won is not adequate or that the government did not have "meaningful discussions" with the vendor over the vendor's proposal. In sum, the FAR and related law provides specific grounds on how the government should behave in maintaining fair and open competition. Make sure you talk to your lawyer on how the FAR can be best used to your advantage.

Tip #10: Use an attorney.

A protestor does not need a lawyer to win a protest at GAO, but using a lawyer can be invaluable. For example, when an agency responds to a protest with an "Agency Report" it usually contains confidential agency and winning contractor material. If a protester has a lawyer, the lawyer can be admitted to a "Protective Order," a GAO order that protects this confidential information from disclosure to all except those who promise not to disclose – even to their own client – any of the confidential material. That's where the lawyer comes in. He or she can then use such information to help you even if you can't immediately look at it. The lawyer can be admitted to the Protective Order and use the confidential information to win the protest, even though the lawyer can not tell the client any of the confidential material. The attorney can also help you understand how to meet the filing deadlines and take the best steps available to win the protest or appeal.

A company should keep these ten tips in mind, act quickly and not take itself out of serious competition for lucrative government contracts work.

This article was provided by Terry O'Connor, Special Counsel, Government Contracts, at Albo & Oblon, LLP (www.

albo-oblon.com). Terry, with over thirty years experience, has published four books on government contract law and is a frequent government contracts instructor. He can be reached via phone at 703-562-3382 or via email at to@albo-oblon.com.

FACTS ABOUT EMPLOYEE BENEFITS

The following information on employee benefits was obtained from Payroll Network, 4040 Nicholson Court, Kensington, MD 20895-1003 (www.payrollnetwork.com).

Employee benefit costs, on average, were more than 44 percent of payroll in 2005, according to the U.S. Chamber of Commerce.

Included in the total benefit costs are the cost of the traditional benefits and the legally-required benefits such as: paid vacation, paid holidays, paid sick leave, health insurance, dental insurance, life insurance, retirement plans, Social Security taxes, workers compensation insurance, and unemployment insurance payments.

Career Builder.com Survey

This survey of 1,650 employees found that 64 percent prefer a shorter workweek over a shorter commute. And 79 percent prefer more income over more vacation time.



And 60 percent prefer a flexible schedule compared with 40 percent who prefer being able to work at home.

MetLife Study

This new study reports that 55 percent of employers rank retention as their top goal for their benefits investment. Also, the study reports that just 33 percent of employees feel strongly that their employer does an effective job of educating them about their benefit options.

National Business Group on Health Research

This newly released research finds a majority of U.S. employees are very satisfied with their health care benefit plan...with 75 percent of surveyed employees saying their health benefits are most important. Most impressive, 83 percent of surveyed employees would prefer a cut in pay or retirement benefits rather than a cut in health benefits.

Contradicting the U.S. Chamber of Commerce survey referenced above, a Grant Thornton Government Contractor Industry Survey published in November 2005 indicated that fringe benefits (excluding bonuses) were 32 percent of total labor. Fringe benefits including bonuses were 37% of total labor. With a preponderance of contractors excluding bonuses from the fringe benefit pool the consolidated rate was 33% percent of total labor. Reflecting the impact of retired employees with fringe benefits covered by a previous employer or covered by an employed spouse, 27 percent of the respondents to this Grant Thornton survey reported offering reduced statutory fringe benefits to certain employees.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

Whether someone who works for you is an employee of an independent contractor is a very important question. The answer determines your liability to pay and withhold Federal income tax, social security and Medicare taxes and Federal unemployment tax.

The IRS has established a 20-point checklist that can be used in determining the answer to this question. The checklist is designed to determine who has the "right of control." The greater the control exercised over the terms and conditions of employment, the greater the chance that the controlling entity will be the employer. This checklist is only a guideline; it does not guarantee that a person is correctly classified. Most government agencies and courts look to the "totality of the circumstances" and balance the factors to determine whether a worker is an employee or an independent contractor.

Following are the 20-points that have been established by the IRS:

1. Must the individual take instructions from your management staff regarding when, where, and how work is to be done?
2. Does the individual receive training from your company?
3. Is the success or continuation of your business somewhat dependent on the type of service provided by the individual?
4. Must the individual personally perform the contracted services?
5. Have you hired, supervised, or paid individuals to assist the worker in completing the project stated in the contract?
6. Is there a continuing relationship between your company and the individual?
7. Must the individual work set hours?
8. Is the individual required to work full time at your company?
9. Is the work performed on company premises?
10. Is the individual required to follow a set sequence or routine in the performance of his work?
11. Must the individual give you reports regarding his/her work?
12. Is the individual paid by the hour, week, or month?

13. Do you reimburse the individual for business/travel expenses?
14. Do you supply the individual with needed tools or materials?
15. Have you made a significant investment in facilities used by the individual to perform services?
16. Is the individual free from suffering a loss or realizing a profit based on his/her work?
17. Does the individual only perform services for your company?
18. Does the individual limit the availability of his services to the general public?
19. Do you have the right to discharge the individual?
20. May the individual terminate his services at any time?

In general "no" answers to questions 1-16 and "yes" answers to questions 17-20 indicate an independent contractor. However, a simple majority of "no" or "yes" answers does not guarantee independent contractor status. Some questions are either irrelevant or of less importance because the answers may apply equally to employees and independent contractors.

If this is all confusing and you would like the IRS to determine whether or not a worker is considered an employee, you can submit Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. Go to www.irs.gov/pubs/irs-pdf/fss8.pdf for a copy of this form and its instructions.

DoD Requests for Public Input

The Department of Defense is giving contractors a chance to comment on contract financing and the process for the development of pre-negotiation profit or fee objectives.

Contract Financing

DoD policies on contract financing (FAR Part 32 / DFARS Part 232) cover a variety of contract financing issues, including non-commercial item purchase financing; commercial item purchase financing; loan guarantees for defense production; advance payments for noncommercial items; progress payments based on costs; contract debts; contract funding; assignment of claims; prompt payment; performance-based payments; electronic funds transfer; electronic submission and processing of payment requests; and levies on contract payments.

DoD is interested in receiving contractor input on these contract-financing policies including those that are effective and those that are ineffective, along with supporting rationale.

Profit/Fee Policies

DoD profit/fee policies are described in DFARS Part 215. One of the key DoD profit policies is based on the Weighted Guidelines. Since being developed in the mid-1980's there have been a number of changes, including (1) the evolution of DoD's acquisition programs, (2) extensive industry consolidation, and (3) a significant increase in the number of DoD contracts for services.

DoD is interested in receiving contractor comments on the many risk factors utilized in the weighted guidelines process, those that are working effectively and those that should be revised or eliminated along with supporting rationale.

These requests can be found in the Federal Register, May 22, 2007 (Volume 72, Number 98) Proposed Rules, Pages 28663-28664. Comments, with supporting rationale, are to be submitted on both issues by July 23, 2007 to the Director, Defense Procurement and Acquisition Policy, ATTN: OUSD (AT&L) DPAP (CPF), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062 or by fax at (703) 602-7887 or via email at Bill.Sain@osd.mil.

Don't miss this chance to make your comments heard on these two important subjects.

SUBCHAPTER "S" CORPORATION STATE TAX ALLOWABILITY

A Federal Circuit Court appeal case decided February 6, 2006 (Information Systems & Networks Corporation/ICN v. United States) holds that under the FAR Cost Principle at FAR 31.205-41, Taxes, Subchapter S corporations are "exempt" from paying state income taxes on their earnings and therefore such state taxes are not allowable costs whether paid directly by the corporation or reimbursed by the corporation to the owner/ shareholders.

On March 31, 2006, DCAA issued audit guidance instructing auditors to question claimed cost for individual shareholder income taxes assessed on contractor pass-through income no matter who pays the tax liability. It is their finding that since S corporations are not subject to or are exempt from state income taxes their recovery is unallowable.

CAREERS AT G&A

Our goal is to build a firm of entrepreneurial minded individuals who "partner" with clients to provide creative solutions to achieve the desired goal. Our associates need to be good listeners, responsive, caring, knowledgeable, and committed to our client's success.

Gaffey & Associate's connections and opportunistic outlook enables continued firm growth at twice the industry average. We provide a friendly, collegial, family oriented environment that fosters individual and professional growth.

The Government Contracting Services Group of Gaffey & Associates is looking for individuals interested in becoming a part of our exciting and rapidly growing consulting practice. We need people who are detail-oriented, eager to learn and advance and would be good with clients. A college degree in accounting is required. Experience in government contract cost accounting, the Federal Acquisition Regulation (FAR) and Cost Accounting Standards (CAS) is a positive. Defense Contract Audit Agency (DCAA) experience a definite plus but

not required. Contact Sam Davidson at samuel.davidson@gaffeycpa.com.

G&A – YOUR TICKET TO SUCCESS

The Government Contracting Services Group provides hands-on assistance and business advisory services in most areas of government contracting and government procurement regulation compliance. Areas where our experience, knowledge and innovative thinking puts us ahead of our competition include:

- Design and preparation of indirect cost rate proposals and cost allocation plans that:
- Facilitate the management decision making process
- Maximize cost recovery and improve profitability
- Improve your competitive position
- Meet regulatory compliance requirements
- Preparation, submission and negotiation of Requests for Equitable Adjustment to your contract pricing, schedule or both.
- Establishment and maintenance of compliant business systems and effective internal controls.
- Performance of business process analysis and operations improvement reviews to identify and prioritize key business risks.

We also provide specialized assistance in the areas of:

- Accounting system design and assessment

Thought for the Day

"Victory goes to the player who makes the next-to-last mistake."

- Chessmaster Savielly Grigorievitch
Tartakower (1887-1956)

- Business system assessment (Labor Recording, Billing, Cost Estimating and etc.)
- Compliance with the FAR, CAS and the OMB Circular requirements
- Proposal pricing and “red team” reviews
- Preparation, submission and negotiation of termination for convenience proposals
- Subcontract management
- Training seminars on an open-enrollment or in-house basis

Whatever your government contracting needs contact us and tap into a resource that can help you succeed in a very competitive marketplace.

We can be reached by contacting Sam Davidson at 703-748-5816 or via email at samuel.davidson@gaffeycpa.com.

COMING EVENTS

PTAP Seminar at George Mason University

On Tuesday, June 19, 2007, Sam Davidson will be presenting the “Business Tool for Success – Costing and Pricing Basics” seminar at George Mason University in Fairfax City. This Procurement Technical Assistance Program (PTAP) seminar is sponsored by DoD/DLA, George Mason Universities School of Public Policy and the Center for Innovative Technology.

The seminar is an introduction to the establishment of an indirect cost structure that meets the need to: (1) accurately determine the actual cost of your products and services, (2) establish competitive pricing and (3) provide management with accurate and timely information to facilitate their day-to-day decision making process. The seminar costs \$150.00 and runs from 9:00AM to 3:00PM including extensive course materials and lunch. To register please call PTAP at (703) 277-7700 or go on-line at www.VAPTAP.org and look under VA PTAP Events Calendar or contact Sam Davidson at 703-748-5816 or at Samuel.Davidson@GaffeyCPA.com

G*CON Small Business Contracting Symposium

On Wednesday, June 13, 2007 Gaffey & Associates Government Contracting Services Group in conjunction with their alliance partners FedLinX and O’Riordan-Bethel will be an exhibitor at the G*CON Small Business Contracting Symposium being held at the McLean Hilton in Tysons Corner. This one-day educational and networking event is sponsored by the Tysons Corner Chapter of the National Contract Management Association and the Northern Virginia Government Contractors Council of the Fairfax Chamber of Commerce. For more information or to register go to www.gconseries.com/symposium or the Fairfax County Chamber site at www.fccc.org.