

Government Contracts 101

Angela B. Styles
Daniel R. Forman
Peter J. Eyre
Crowell & Moring

Jeffrey S. Brown
ManTech International

November 13, 2012

Today's Speakers



Angela B. Styles is a partner in Crowell & Moring's Washington, D.C. office and chair of the firm's Government Contracts Group.. Prior to joining the firm, Ms. Styles served in the federal government as Administrator for Federal Procurement Policy within the Office of Management and Budget at the White House, a position requiring confirmation by the United States Senate. Ms. Styles' practice concentrates on government contracts counseling and litigation, including procurement ethics and compliance, civil and criminal fraud matters under the False Claims Act, mandatory disclosure, procurement integrity, the Anti-Kickback Act, GSA Schedule contracting with an emphasis on pricing issues, GSA leasing, and Buy American and Trade Agreements Act compliance.



Daniel R. Forman is a partner in Crowell & Moring's Government Contracts Group, resident in the firm's Washington, D.C. office. Mr. Forman's practice focuses on a wide variety of government procurement law, including bid protests, False Claims Act and qui tam litigation, investigations of potential civil and criminal matters, ethics and compliance, contract claims and disputes, GSA schedule contracting, and small disadvantaged business contracting. Dan is also experienced in negotiating and drafting teaming agreements and subcontracts, as well as providing counseling on the interpretation of FAR clauses and solicitations. Dan's practice also focuses on state and local procurement matters, including State False Claims Act issues, lobbying and contingency payment compliance.

Today's Speakers



Peter J. Eyre is a counsel in Crowell & Moring's Government Contracts Group. Peter's practice focuses on a wide range of government procurement law, including compliance counseling, litigation, bid protests, investigations of potential civil and criminal matters, and suspension and debarment proceedings. He has domestic and international litigation and arbitration experience in matters involving foreign sovereigns and multi-national corporations. Peter has appeared and argued before the U.S. District Court for the District of Columbia, the U.S. District Court for the Eastern District of Virginia, the U.S. Court of Federal Claims, D.C. Superior Court, and the Government Accountability Office, and has participated in proceedings before international arbitral tribunals.



Jeffrey S. Brown is executive vice president, general counsel and secretary for ManTech International Corporation, and has been with the company since 1994. He has served as general counsel since 1999 and corporate secretary since 2007. As general counsel, Brown oversees all of the company's legal matters. He is a graduate of Cornell University and the George Mason University School of Law, and is a member of the Virginia State Bar.

Government Contracts Compliance Landscape & Acquisition Basics

The Compliance Landscape

- High stakes and high visibility
- U.S. Government purchases more than \$500 billion/year from the private sector
- Expanded enforcement and oversight
- Unique tools to investigate and enforce

Government Enforcement Tools

- Audits and investigations
 - IGs, DOJ, FBI, DCAA
- Federal & State Statutes
 - False Claims Acts
 - False Statements Acts
- Civil False Claims Act
- Mandatory Disclosure
- Suspension & Debarment
- Contract Termination

Civil False Claims Act

- Government's Principal Anti-Fraud Weapon
 - Suit alleging contractor defrauded the government by submitting false claims for payment
- *Qui Tam* Provisions
 - 15%-30% bounties for whistleblowers
- Severe Sanctions

Mandatory Disclosure

- Requires contractors to timely disclose credible evidence of violations of certain criminal laws (fraud, conflict of interest, bribery, or gratuity violations found in Title 18), violations of the False Claims Act and significant overpayments.
- Amendments to FAR added the following:
 - Basis for suspension and debarment
 - FAR clause for use in government contracts and subcontracts

Suspension and Debarment

- Purpose
 - To protect the public interest – not to punish
 - Key concept of “present responsibility”
 - Details in FAR 9.4
- Who can be suspended/debarred?
 - Individuals
 - Entities (e.g., corporations, partnerships, divisions, or business units within an entity)
 - Parents and affiliates, if warranted
 - Prime contractors, subcontractors, and/or participants at any tier

Suspension and Debarment

- Increased activity due to:
 - Enhanced interagency cooperation
 - Reporting requirements
 - Competitors reporting directly to SDO
 - Media reports of contractor misconduct
 - Agency response to Congressional criticisms
- Three key trends
 - Focus on number of suspensions and debarments
 - Focus on fact-based suspensions
 - Focus on conduct “unrelated” to government contract

Public Sector Contracts Are Unique

- Special regulations and contract terms
 - Convenience terminations
 - Unilateral changes
 - Data Rights Clauses
- Litigation limits (sovereign immunity)
- Limitations on authorized representatives
- Audit/investigations
- Fines/penalties/jail/suspension/debarment
- Compliance programs to meet unique requirements

Federal Contracting Basic Principles

- Implementation of social policies
 - Service Contract Act
 - Davis Bacon
 - Small Business Set-Asides
 - Goals
 - Small Business Subcontracting Plan
 - Office of Federal Contract Compliance
 - Yearly Reports (EEO-1 & VETS-100)
 - Affirmative Action Program
 - Audits/Private Litigation
 - Domestic preferences

Federal Acquisition Regulation - (“FAR”)

- Basic regulations are used by all federal agencies in their acquisition of supplies and services
- “Contracting by regulations” – 90% or more of the clauses in government contracts are prescribed by regulation
- Establishes uniform policies and procedures for acquisition by all federal agencies

Organization of the FAR

- Subchapter A – General
 - Parts 1 – 4
- Subchapter B – Competition and Acquisition Planning
 - Parts 5–12
- Subchapter C – Contracting Methods and Contract Types
 - Parts 13–18
- Subchapter D – Socioeconomic Programs
 - Parts 19–26
- Subchapter E – General Contracting Requirements
 - Parts 27–33
- Subchapter F – Special Categories of Contracting
 - Parts 34–41
- Subchapter G – Contract Management
 - Parts 42–51
- Subchapter H – Clauses and Forms
 - Parts 52, 53, Appendix and Index

Types of Contracts

- Selecting the type of contract is generally a matter for each contracting agency to determine
- Two broad categories of contracts commonly used
 - Fixed price (Subpart 16.2)
 - Cost reimbursable (Subpart 16.3)
- Other types of contracts
 - Incentive contracts
 - Indefinite-delivery contracts
 - Time and materials contracts
 - Labor hour contracts

GSA Schedule Contracting

- FAR Part 8
- Commercial goods and services
- Simplified procedures
 - Commercial Sales Practices Format
 - Price Reduction Clause
 - Trade Agreements Act
 - Negotiable terms

Commercial Sales Practices Format

(3) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), are the discounts and any concessions which you offer the Government equal to or better than your best price (discount and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions? YES ____ NO _____. (See definition of "concession" and "discount" in 552.212-70.)

(4) (a) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), provide information as requested for each SIN (or group of SINs for which the information is the same) in accordance with the instructions at Figure 515.2, which is provided in this solicitation for your convenience. The information should be provided in the chart below or in an equivalent format developed by the offeror. Rows should be added to accommodate as many customers as required.

COLUMN 1 CUSTOMER	COLUMN 2 DISCOUNT	COLUMN 3 QUANTITY/VOLUME	COLUMN 4 FOB TERM	COLUMN 5 CONCESSIONS

(b) Do any deviations from your written policies or standard commercial sales practices disclosed in the above chart ever result in better discounts (lower prices) or concessions than indicated? YES ____ NO _____. If YES, explain deviations in accordance with the instructions at Figure 515.4-2, which is provided in this solicitation for your convenience.

Price Reduction Clause

552.238-75 PRICE REDUCTIONS (MAY 2004) (ALTERNATE I - MAY 2003) 538.273(b)(2)

(a) Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained throughout the contract period. Any change in the Contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.

Trade Agreements Act

- Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, UK
- Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic and Slovenia
- Canada
- Iceland
- Israel
- Japan
- Korea
- Liechtenstein
- Norway
- Singapore
- Switzerland
- Taiwan

Negotiable Terms

- Tailoring Must be Consistent with Industry Practice – FAR 12.302
- Terms Typically Tailored
 - Intellectual Property -- commercial licenses
 - Warranties
- Cannot Tailor
 - Statutory Requirements
 - Assignments, Disputes, Payment, Invoice

Compliance & Ethics Overview

Overview

- Why government contractors must care about compliance and ethics?
- Three basic categories
 - Infrastructure
 - Content
 - Culture of ethics

Compliance Program Background

- Where do “the rules” come from?
 - Statutes
 - Regulations
 - Case law
 - Government investigations, enforcement actions, settlement agreements, and suspensions/debarments
 - Best practices
 - Anecdotes and experiences
 - RFP provisions
 - US Sentencing Guidelines for Organizations
 - Congress
 - Spotting the trends
 - Company policies, vision, and culture

Compliance Program Infrastructure

- Governing body with oversight of the program
- Assignment of internal responsibility for the program
 - People, other resources, organizational placement (audit, legal, compliance)
- Internal controls
 - Written materials
 - Training (new employee, annual, general, specialized, refresher)
 - Separation of duties, etc.
- Internal mechanisms for employees and other stakeholders to raise concerns, anonymously
- Self-monitoring and auditing
- Corrective action
 - Discipline
 - External disclosures
 - Restitution
 - Root cause analysis

Infrastructure Meets Content

- Starts with a risk assessment of business
- Each principal risk area should be:
 - covered in written policies and procedures
 - the subject of employee training
 - the subject of an auditing and monitoring plan
 - associated with internal controls, including enforcement of the rules

Gifts, Gratuities, & Entertainment

- Basic rule
 - Cannot offer or give anything of value to a government employee because of any official act or with intent to influence any official act
 - Anything of value includes food, alcohol, discounts, airplane tickets, lodging, samples, tradeshow entrance fees, transportation, training, tickets to theater and sporting events, flowers
- Criminal bribery and gratuities in 18 U.S.C. § 201
- FAR implementation (52.203-3)
- Office of Government Ethics regulations (5 C.F.R. § 2635)
- Federal Executive Order for political appointees
- State/local laws & regulations

Federal Anti-Kickback Act

- Basic rule
 - Cannot provide, attempt to provide, offer, solicit, accept, or attempt to accept a kickback
 - Kickback is defined as any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract
- Anti-Kickback Act (41 U.S.C. §§ 8701 et seq.)
- FAR implementation (52.203-7)

Federal Anti-Kickback Act

- Improper intent can be inferred from the circumstances
- No bright line dollar value
- Improper benefit to employees or the company
- Anything of value given to improperly obtain or reward favorable treatment
 - Covers some standard commercial transactions
 - Gifts and entertainment offered by vendors
 - Gifts and entertainment offered to prime contractors
 - Rebates and discounts
 - Volume based reductions
 - Commission splitting

Off-Limits Information

- Rules on “off-limits” government or competitor information
- Procurement Integrity Act
 - Prohibitions on disclosing and obtaining procurement sensitive information, particularly source selection information and contractor bid or proposal information
 - Statutory (41 U.S.C. §§ 2101-2107)
 - FAR implementation (3.104)
- Federal and state trade secrets laws

Off-Limits Information

- Scope
 - Financial data, including indirect and direct labor rates and similar information, profit margins, and other sensitive economically valuable data not released to the public
 - “Trade secrets” or “proprietary” information (e.g., technical solutions, innovations, software, supplier base, customer lists)
 - “Inside information” regarding competitors, the procurement, etc.

Off-Limits Information

- Source of the information is typically irrelevant
 - *E.g.*, consultant, competitor’s current or former employees, support contractor personnel, even government personnel
- Oral and written information covered
- Red flags
 - Conversations that “never happened”
 - Proprietary or source selection sensitive legends
 - Hiring government personnel or competitor personnel for their “inside” knowledge

Employment Discussions

- Basic rule
 - Without agency approval, current government employees cannot discuss employment with firms over which they – or their subordinates – have any oversight or regulatory responsibility
- Statutory (18 U.S.C. § 208 and 41 U.S.C. §§ 2101-2107)
- Office of Government Ethics regulations (5 C.F.R. § 2635)
- FAR implementation (3.104-3)

Revolving Door Restrictions

- Restrictions on hiring
 - Some former government employees cannot be hired for one year by contractor
- Representation before a former agency employer
 - Some former government employees cannot contact their former agency on any matter for one to two years or longer
- Specific matters
 - Some former government employees can never communicate with the government on contracts or other matters they worked on in government

Revolving Door Restrictions

- Statutory (18 U.S.C. § 207, 41 U.S.C. §§ 2101-2107, Section 847 of 2008 NDAA)
- Office of Government Ethics regulations (5 C.F.R § 2635)
- FAR implementation (3.104-3)
- DFARS implementation (252.203-7000, 252.203-7005)

Hiring Former Government Officials

- Common Fact Pattern

- Bidder hires former government official to assist in drafting its proposal
- During employment at agency, official attended procurement planning meetings, participated in development of requirements, and had access to early planning documents
- Former government official obtains so-called “clean letter” from the Designated Agency Ethics Official
- No firewall implemented and bidder allows former government official to help craft proposal
- CO disqualifies offeror because of unfair competitive advantage or GAO sustains protest if disappointed offerors challenge award to bidder that used former government official during proposal preparation

Hiring Former Government Officials

- Implications and Best Practices
 - Beware of so-called “clean letters” from Designated Agency Ethics Officials
 - Screening process
 - Incorporate key concepts into HR policies/procedures
 - If mitigation is required or advisable in connection with particular procurement, seek approval from contracting officer
 - When in doubt, establish firewall to separate former government official from business capture effort, including proposal preparation

Contractor Disclosures

- SAM – System for Award Management
 - ORCA – Online Representations and Certifications Application
 - CCR – Central Contractor Registration
- FAPIIS – Federal Awardee Performance and Integrity Information System
- FFATA – Federal Funding Accountability and Transparency Act

Other Hot Topics and Common Pitfalls

Bid Protests

- Legal challenges to the federal government's conduct of procurements
- Statutorily created right to challenge procurement ground rules (Solicitation terms) and evaluation and award decisions
- Provides offerors an opportunity to ensure a fair and objective chance to compete for and win government business
- If you don't know what the procurement rules and your rights are or when to challenge issues, you may lose your ability to protest

Two Main Types of Protests

- Pre-Award Protests
 - Challenge to the terms of the solicitation
- Post-Award Protests
 - Challenge to agency's evaluation and award decision

Government Intellectual Property Rights

- Two general categories of government IP issues:
 - Rights in Technical Data and Computer Software
 - Patent Rights

Rights in Technical Data & Computer Software

- Different Rules for
 - Civilian Agencies (FAR) v. DOD (DFARS)
 - Technical Data v. Computer Software
 - Commercial Items v. Non-Commercial Items
- Unique Federal Scheme
 - Rights allocation unique
- Standard contract clauses
 - Different for DOD and civilian agencies
- Analogous to, but different from, copyright and trade secret protection

Data Rights

- Complex Rules
- Technical data must be actively managed
- Contractor gets title
- Government License Rights
 - Unlimited
 - Limited (Data)/Restricted (Software)
 - Government Purpose

Data Rights

- Watch out for the traps
 - Labeling
 - Record keeping
 - Special clauses
- Commercial items are exempt from government data rights scheme
- When in doubt ask the questions before
 - Executing the contract
 - Delivering the data/software

Patent Rights

- Subject invention
 - Conceived or first actual reduction to practice
 - In performance of government contract
- Contractor may elect to retain title to subject inventions
- Minimum government rights: non-exclusive, irrevocable, worldwide license

Small Business Contracting: Risk to Small Businesses

- False Certifications
 - The Small Business Jobs and Credit Act of 2010 provides that an offeror’s mere submission of a proposal for a small business set-aside contract, or even its registration in a database to be considered for a set-aside, is to be considered an “affirmative, willful and intentional” certification that the offeror meets the small business size and status requirements
- Work Allocation
 - Small businesses can expect to have their subcontracting relationships with large businesses scrutinized to ensure that the small businesses are not being used as “pass-throughs”
 - Added care in negotiating terms of teaming agreements, subcontracts
 - Failure to comply with limitations on subcontracting also grounds for proposal elimination

Small Business Contracting: Risk to Large Businesses

- Work Allocation
 - Large business must be aware of limitation on subcontracting requirements when working with small business subcontractors on set-aside contractors
 - Large businesses cannot rely on their small business prime contractors to be responsible for this issue
 - DOT DBE program crack-down – small business subcontractor must perform “commercially useful function”

Organizational Conflicts of Interest

- FAR Definition (FAR 2.101)
 - “An OCI arises when, because of other relationships or circumstances, a contractor may be unable, or potentially unable, to render impartial advice or assistance to the government, the contractor’s objectivity in performing the contract work is or might be impaired, and/or the contractor would have an unfair competitive advantage”
- Three categories
 - Biased ground rules
 - Impaired objectivity
 - Unequal access to information

Organizational Conflicts of Interest

- Biased ground rules (FAR 9.505-2)
 - “a [contractor], as part of its performance of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications.” *Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397, et al.*, July 27, 1995, 95-2 CPD ¶ 129

Organizational Conflicts of Interest

- Impaired objectivity (FAR 9.505-3)
 - If a contractor is in the position of evaluating its own performance or products, or the performance or products of a competitor
 - Making decisions based on contractor’s commercial or policy interests, rather than best interests of government
 - Contractor’s ability to “render impartial advice to the government will be undermined, or impaired, by its relationship to the product or services being evaluated” *Overlook Sys. Techs., Inc.*, B-298099.4, *et al.*, Nov. 28, 2006, 2006 CPD ¶ 185

Organizational Conflicts of Interest

- Unequal access to information (FAR 9.505-4)
 - Access to nonpublic information that is competitively useful
 - Competitor's proprietary information
 - Government's confidential information

Organizational Conflicts of Interest

- Some OCIs are easier to mitigate than others
- Most effective for unequal access to information
 - Firewalls
 - Release of information to all
- Biased ground rules and impaired objectivity are difficult (or impossible) to mitigate
 - Must avoid or obtain waiver
 - *E.g.*, for impaired objectivity, must hire independent third party subcontractor
- CO must approve and determination is afforded great discretion

Mounting Pressure on Procurement

- Era of austerity and sequestration
- Budgetary pressures may lead to program changes, increased scrutiny, and aggressive contract administration
- Reduced quantities and extended schedules
- Delayed and decreased funding
- Resistance to compensation for changes
- De-scopes
- Terminations

Questions and Discussion

Angela B. Styles
202.624.2901
astyles@crowell.com

Peter J. Eyre
202.624.2807
peyre@crowell.com

Daniel R. Forman
202.624.2504
dforman@crowell.com

Jeffrey S. Brown
703.218.6098
jeff.brown@mantech.com