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Government Contracting and the War on Terrorism
New Opportunities, New Perils

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It is now almost a cliché that the world has changed since September 11th. For government contractors, the aftermath of September 11, 2001, the Anthrax scare which followed, and the United States' war on terrorism present both new opportunities and new perils. This article will examine some of the effects that recent events have had or may have on Government contractors.

The Pentagon Seeks New Ideas

In the months since September 11, the Department of Defense ("DOD") has issued a series of Broad Agency Announcements ("BAA") seeking help in the war against terrorism. For example, BAA 02-Q-4665, which closes on January 11, 2002, asks offerors to submit a White Paper, not to exceed 12 pages in length, describing a perceived threat and a proposed solution. The White Paper must identify proposed deliverables, describe the work to be performed, describe the offeror's expertise to effect the proposed solution, and present the estimated costs and schedule for the project. (More information may be obtained at www.bids.tswg.gov.) In a similar development, the Washington Post reported on December 16, 2001 that U.S. military officials had queried defense laboratories and private firms about the existence of any experimental devices capable of detecting human beings beneath tons of granite. Bradley Graham, "Bin Laden May Have Been on Radio," The Washington Post, December 16, 2001, at A18. According to the article, the Pentagon had hoped that technologies used by oil companies to find fuel deposits in rock could be adapted for this military purpose.

Contractors who believe their products or services may be useful in the war on terrorism or in "Operation Enduring Freedom," but who have not been solicited by the Government, should familiarize themselves with Federal Acquisition Regulation ("FAR") Subpart 15.6, which governs unsolicited proposals by contractors. FAR § 15.602 states:

> It is the policy of the Government to encourage the submission of new and innovative ideas in response to Broad Agency Announcements, Small Business Innovation Research topics, Small Business Technology Transfer Research topics, Program Research and Development Announcements, or any other Government-initiated solicitation or program. When the new and innovative ideas do not fall under topic areas publicized under those programs or techniques, the ideas may be submitted as unsolicited proposals.

FAR § 15.603(c) sets out the requirements for submitting an unsolicited proposal. Specifically, a valid unsolicited proposal must be innovative and unique, independently originated and developed by the offeror, and prepared without Government supervision, endorsement, direction, or direct Government involvement. The proposal must include sufficient detail to permit a determination that Government support could be worthwhile and that the proposed work could benefit the agency's research and development or other mission responsibilities. Finally, the unsolicited proposal must not be an advance proposal for a known agency requirement that can be acquired by competitive methods.

Beware the Defense Priorities and Allocation System

The Defense Priorities and Allocation System ("DPAS") is a system for controlling the usage of critical materials and supplies to ensure that they are available for the national defense in times of emergency. Certain contracts and orders are given preferential treatment by being designated as "Rated Orders" under the DPAS, meaning that those orders may be accelerated or given priority for supply in the event of a war or national emergency. *See* 50 U.S.C. App. § 2061.

Contractors should be aware that the Government's right to take certain actions under DPAS does not absolve it from paying the extra costs that contractors incur as a result. For the contractors whose contracts are accelerated, such costs may include costs such as overtime labor. For the contractors whose work is delayed as a result of the diversion of supplies to other contracts, such costs may include delay costs and unabsorbed overhead.

A case in point is *BEI Defense Systems Co.*, ASBCA No. 46399, 95-1 BCA ¶ 27328, where the contractor experienced delays on one product line and acceleration on another product line as a result of the 1991 Gulf War. (In part, the delays were caused by an unavailability of Government-Furnished Material specified in the contract.) The contractor in that case was able to recover substantial damages as a result of the Government's actions.

Can You Get a Sole-Source Contract?

When urgent requirements exist, the Competition-in-Contracting Act ("CICA") permits the Government to use less than full-and-open competition to fill those requirements. However, the Government does not get a "blank check." There are limits to when the Government may use this exception to CICA, and the General Accounting Office ("GAO") will look behind the Government's justification to determine whether it is legitimate. For example, in a case unrelated to the events of September 11th, GAO recently decided that the Army had improperly attempted to justify a sole-source acquisition of helicopter engine overhauls. *See Sabreliner Corporation,* B-288030 (September 13, 2001).

Contractors that intend to challenge a sole-source award should be certain that they can prove their own ability to perform within the time constraints imposed by the Government (unless the contractor can prove that those time constraints are unreasonable). Otherwise, the contractor will achieve the same result as the protestor in *Litton Computer Services,* B-256225, 94-2 CPD ¶ 36, where GAO determined that a proposed sole-source award for enhancement and implementation of an automated aircraft maintenance management system was unobjectionable where the protester's responses to Commerce Business Daily notices consisted of minimal information and its experience was with a system different from the required system. Thus, GAO concluded, the protestor failed to establish that it could meet the agency's requirements, and the agency reasonably determined that only the developer of the original system had the necessary knowledge and experience to accomplish the required tasks for the technically complex system within the stringent 9-month time frame imposed by statute.

Are Your Patents at Risk?

Contractors who followed developments relating to the Anthrax scare in October and November may have heard speculation that the Government would purchase generic versions of patented antibiotics if the manufacturers of the patented versions did not lower their prices. The authority under which the Government might have made such purchases is a statute that indemnifies a contractor that has been authorized by the Government to violate a patent. Specifically, 28 U.S.C.

§ 1498 and FAR § 27.201-1 provide that in those cases where the Government has authorized or consented to the manufacture or use of an invention described in and covered by a U.S. patent, any suit for infringement of the patent may be maintained only against the Government in the U.S. Court of Federal Claims, and not against the contractor or subcontractor.

Patent-holders hoping to prevent patent infringement by the Government are not powerless. First, they may have the opportunity to negotiate a selling price for their product that will be acceptable to the Government. Secondly, there are policy arguments against such infringement that may find a receptive audience. Indeed, the U.S. Government has argued loudly against the same kind of patent infringement by developing countries seeking cheaper anti-retroviral drugs to combat HIV/AIDS.

Getting Paid for Security-Related Suspensions of Work

Many contractors working at Government facilities experienced work-stoppages on September 11th when the Government closed its doors because of security concerns. And, many contractors continue to incur additional costs to comply with newly imposed security requirements. Can contractors recover these costs under their contracts?

At first glance, the "sovereign act" doctrine would appear to insulate the Government from liability for such costs. This well-established doctrine states that when the Government acts as a sovereign for the general welfare of the population, it will not be held liable to specific contractors for the incidental impact that its actions have on those contractors. Nevertheless, contractors have successfully argued that such costs are recoverable under cost reimbursement contracts, since such contracts obligate the Government to pay all costs that are reasonable, allowable and allocable to the contract. Thus, for example, if the Government closes a work-site temporarily for security reasons but expects the contractor to maintain its workforce ready to resume work, the costs of maintaining the workforce during the shutdown have been held to be allocable to the contract.

Conclusion

It is too early to identify all the ways that the tragic events of the last few months will affect Government contractors. It is almost certain, however, that there will be new opportunities for the alert contractor. And, it is equally certain that there will be pitfalls for the unprepared contractor.

If you have questions regarding these or other Government contract issues, you may reach Constance A. Wilkinson at (202) 861-1378, Shlomo D. Katz at (202) 861-1809, Dan Abrahams at (202) 861-1854 or Ken Weckstein at (202) 861-1860.