

A New Contractual Toolkit For Work on Federal Projects

Contractors must heed new rules that govern ethical behavior and worker eligibility requirements on federal contracting jobs

IF YOU ARE AN AGC MEMBER interested in federal construction work, the American Recovery and Reinvestment Act may be a glimmer of hope in tough times. The interest in federal work has increased. Agencies, which recently had difficulty attracting enough bids, are now overwhelmed with qualified bidders.

When preparing to pursue federal work, all contractors should be aware of the Federal Acquisition Regulation (FAR), with its multifaceted requirements. Even experienced federal contractors need to take note of two new regulations: the Business and Ethics Compliance provisions and the Employment Eligibility and Verification regulation, the latter with an anticipated effective date of this June. These requirements cannot be ignored and may require revisions to any firm's subcontract and purchase order forms.

Any contractor receiving a government contract in excess of \$5 million with a duration of 120 days or more (covered contract) shall:

- Adopt a written code of business ethics and conduct and make it "available" to each employee working on the covered contract;
- Exercise "due diligence" to prevent and detect criminal conduct;
- Promote an organizational culture that encourages ethical conduct and compliance;
- Make a "timely" written disclosure to the agency inspector general with a copy to the contracting officer whenever the contractor has "credible evidence" of a violation of the civil False Claims Act (31 U.S.C. 3729-3722) or of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations.

Except for small businesses, every contractor must establish a business ethics and awareness program and an internal control system within 90 days of contract award. The contractor's program and system shall include:

- Reasonable steps to communicate standards and procedures and provide training.
- An internal control system that includes standards and procedures to facilitate timely

discovery of improper conduct, periodic risk assessments of criminal conduct, reporting mechanisms such as a hotline and disciplinary action for improper conduct or for failing to prevent or detect improper conduct.

➤ Disclosure of improper conduct to the federal government.

Contractors must flow down these requirements to subcontracts and purchase orders in excess of \$5 million and 120 days' duration and verify subcontractor/vendor compliance. AGC's Federal Government Contractor Ethics and Compliance Programs, Toolkit and Guidance publication includes generic ethics and compliance programs and is intended to assist contractors to navigate these complex new regulatory waters.

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In what the FAR councils labeled a "sea change," the FAR now imposes a mandatory disclosure obligation on a contractor when it has "credible evidence" of a violation of the civil False Claims Act or federal criminal laws related to its government contracts. This requirement applies to all existing contracts and retroactively to those on which the contractor has received final payment within three years prior to December 12, 2008. The concepts of credible evidence and timely disclosure are not defined, as the FAR councils viewed them as being fact-dependent. Contractors need to consider consequences of a suspension or debarment as well as the cost of a proceeding for threat of suspension or debarment.

Undocumented workers remain a major political issue. On June 6, 2008, the FAR councils released a new provision requiring the use of the Dept. of Homeland Security's Electronic Employment Eligibility Verification System

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(“E-Verify”). If this survives judicial challenge in its present form, a contractor performing a construction contract in excess of \$100,000, a “covered contract,” must enroll in E-Verify within 30 calendar days of contract award and start using E-Verify within 90 calendar days of enrollment to verify the employment eligibility of any new employee. With limited exceptions, employees, whether new or existing, who are assigned to the covered contract must be verified within 90 calendar days of

enrollment or 30 calendar days of assignment to that contract, whichever is later.

The proposed E-Verify clause contains a flow-down requirement to any subcontract or purchase order exceeding \$3,000. While a contractor is not responsible for the hiring decisions of lower-tier firms, a contractor is expected to ensure that all lower-tier contracts include a provision requiring E-Verify use.

In federal contracting, numerous FAR requirements must be flowed down. There is a

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clear need for a standard federal subcontract.

AGC, as part of the 22 drafting and endorsing organizations involved with ConsensusDOCS, published the ConsensusDOCS 752 Federal Subcontract, or Consensus 752, in May to meet this need. I represented AGC in the process and chaired the task force that drafted Consensus 752. The agreement builds off the balanced-risk allocation in the ConsensusDOCS 750 Subcontract Agreement. However, Consensus 752 is tailored to meet the FAR requirements, including the new provisions discussed above and these other federal practices:

- Dispute resolution and mitigation procedures that do not prejudice the subcontractor but allow the contractor to fulfill its obligations to exhaust all dispute-resolution procedures;

- A sample exhibit of mandatory FAR flow-down provisions, including the Buy America Act, Davis-Bacon, and anti-kickback clauses;

- Provisions conforming to government practices for differing site conditions;

- Consistent remedies if the government suspends the work or terminates the project.

Consensus 752 replaces the AGC 601 Federal Subcontract agreement and adds to the ConsensusDOCS comprehensive document library. It will likely be recognized throughout the industry as the first and only standard document addressing federal subcontracting, even if contractors have not been able to switch to ConsensusDOCS in their private work. ■