

CONSIDERATIONS WHEN CONTRACTING ON FEDERAL PROJECTS

By Anthony D. Whitley (as seen in *Texas Construction* April 2010)

Even in today's difficult economic climate, the federal government is still planning, funding and building construction projects in Texas and around the country. This will likely appeal to otherwise private commercial contractors and subcontractors seeking to fill the void left by the recent recession. Contracting with the federal government can be profitable, but it can also be dangerous for those who are new to the process. The following brief summaries contain just a few examples of complex federal contracting laws that should be considered and fully understood by both prime and subcontractors before entering the world of federal contracting.

Authority Structure

The authority structure of the federal government is rigid and must be respected. Different government personnel have different roles and authorities, and contractors should make sure the person with whom they are dealing has the authority to bind the government. That person is usually the contracting officer. For example, FAR Subpart 43.102 states that only the contracting officer acting within the scope of the contract has the authority to bind the government with regard to contract modifications. But that authority is not unlimited. For example, FAR Subpart 43.105 prohibits the contracting officer from executing a contract modification without first obtaining a certificate of funds availability. A contractor may find itself with a negotiated price for the additional or changed work only to discover that the full amount was not approved due to funding limitations. Contractors must be patient with this process and not incur costs until the government signs the contract modification.

Compliance with the Davis Bacon Act

Contractors and subcontractors on federal projects must abide by the Davis Bacon Act governing wage rates for employees. This Act is incorporated into prime and subcontracts through FAR Subpart 22.4 and FAR Clause 52.222-6, and it requires companies to pay prevailing wage rates to its employees as determined by the Secretary of Labor. Companies must pay their employees not less often than once per week and provide weekly certification of those performing the work, hours worked and wages paid, among other information. The government has the authority to audit records and withhold funds on any current contract for non-compliance, or make payment to the effected employees.

Federal Prompt Payment Act

The federal prompt payment requirement found at FAR Subpart 32.9 and FAR Clause

52.232-27 requires contractors to pay their subcontractors and suppliers within seven days of receipt of payment from the government. Subcontractors must similarly make prompt payment to their subcontractors and suppliers. If cause exists to withhold payment, the contractor must give notice to the subcontractor (with copy to owner) of the amount withheld, reasons for the withholding and remedial actions the subcontractor must take to get paid. If payment is not made and is otherwise due, the subcontractor can recover interest on the unpaid amount. The current rate for amounts accruing between January 1, 2010 and June 30, 2010 is 3.25% per annum. The current rate can be found at http://www.treasurydirect.gov/govt/rates/tcir/tcir_opdprmt2.htm.

The American Recovery and Reinvestment Act

Contractors must be aware of the funding source for their contracts which may result in requirements to report how the contract funds are used and the jobs created or sustained. If the contract is funded under the American Recovery and Reinvestment Act, contractors receiving the funds must report the following on a quarterly basis: (1) the dollar amount of the contractor invoices; (2) the supplies delivered and services performed; (3) an assessment of the status of the work; (4) an estimate of the number of jobs created or retained as a result of the recovery act funds; (5) names and total compensation of the five most highly compensated officers for the calendar year in which the contract was awarded; and (6) similar information about subcontractors, including, names and compensation of their five most highly compensated officers. These requirements are found at FAR Subpart 4.15 and FAR Clause 52.204-11. The reporting requirement is subject to the government's right to audit the prime contract and subcontracts and interview the contractor (and its employees) and the subcontractor in the course of the audit. Contracting officers must use "appropriate contractual remedies" for a contractor's failure to comply with this law and include the failure in its performance evaluation.

E-Verification

Department of Homeland Security Secretary Janet Napolitano stated last year that the new "E-Verify" law will be the "centerpiece" of the government's efforts to "maintain a legal workforce" and will be the "long-term reality" for doing business in the United States. Though very complex, the new law essentially requires all federal contractors and subcontractors of any tier to verify and report employment eligibility of their employees. The law is found at FAR Subpart 22.18 and FAR Clause 52.222-54. Verification is made via an internet based system which checks information from I-9 forms against records of the Social Security Administration, Department of Homeland Security and Department of State. Contractors and subcontractors are subject to audits for compliance. The law applies to contracts awarded after September 8, 2009 unless the contract is below the simplified acquisition threshold of \$100,000 or for a period of less than 120 days, among other exceptions. Failure to comply with this law can result in the contractor's suspension or debarment from federal contracting.

Knowing how these and other federal laws work, and how to fulfill their requirements, will help contractors perform their obligations and avoid pitfalls on federal projects.