

# Worst Mistakes in Government Contracting

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# Worst Mistakes in Government Contracting

- DEFAULT
  - Impossibility of Performance/Force Majeure
- Importance of *planning*
  - Contingency planning

# Worst Mistakes in Government Contracting

- DEFAULT FP-R&D (FAR 52.249-9) (Apr. 1984)
- (a)(1) The Government may, subject to paragraphs(c) and (d) of this clause, by written Notice of Default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-
  - (i) Perform the work under the contract within the time specified in this contract or any extension;
  - (ii) Prosecute the work so as to endanger performance of this contract (but see paragraph (a)(2) of this clause); or
  - (iii) Perform any of the other provisions of this contract (but see paragraph (a)(2) of this clause).
- c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1)acts of God or of the public enemy, (2)acts of the Government in either its sovereign or contractual capacity, (3)fires, (4)floods, (5)epidemics, (6)quarantine restrictions, (7)strikes, (8)freight embargoes, and (9)unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

# Worst Mistakes in Government Contracting

- Lessons Learned
  - Can another location provide the second lot of batteries?
  - Obtain from competitor and provide to Govt./JPL
    - Maintain reputation
  - Insist on cost-type effort at inception if risk too great

# Worst Mistakes in Government Contracting

- **Read** the solicitation (and read it again, and again, and again...)
  - Determine **Contract Type(s)**;
  - Section B: Supplies or Services and Prices/Cost;
  - Section C: Statement of Work;
  - Section I: **Clauses Incorporated by Reference**;
  - Section L: Instructions, Conditions, and Notices to Offerors;
  - Section M: Evaluation Factors for Award.

# Worst Mistakes in Government Contracting

## General Proposal Mistakes

- Don't make assumptions-ASK if unclear
- Don't be late
- Not reading clauses incorporated by reference
  - Not noting the DATE of such clauses
- Failing to acknowledge all RFP amendments
- Assuming we know your capabilities
- Failure to adhere to pricing aids (tables, etc.)

# Worst Mistakes in Government Contracting

- Failing to:
  - Conform to RFP specifications
  - Conform to delivery schedule
  - State a specific price or qualifying price
- Imposing conditions that modify the solicitation
- Limiting Govt./JPL's rights under any clause
- Failing to acknowledge a material amendment
- Proposals that don't conform to material terms of the solicitation technically unacceptable
  - "Material terms"-Price, quantity, quality, or delivery

# Worst Mistakes in Government Contracting

- Patent vs. Latent Ambiguities
  - Patent Ambiguities
    - Glaring and ***obvious*** on their face
    - Contractor assumes risk for unanticipated cost for not obtaining clarification
  - Latent Ambiguities
    - ***Not obvious*** on their face
    - Courts will adopt a contractor's reasonable interpretation of a latent ambiguity
      - *Contra Proferentem* (i.e., construed ambiguity against the drafter)



# Worst Mistakes in Government Contracting

- Submit questions and requests for clarifications to CO/SCM prior to due date
  - Ensures remaining latent ambiguities interpreted against Govt./JPL
  - Use read receipts and delivery receipts when using e-mail
  - Obtain a receipt or use certified mail when mailing
- If ambiguity is acknowledged by CO/SCM, an amendment to the solicitation should be issued

# Worst Mistakes in Government Contracting

- Comply with everything in the solicitation
  - Page limits
    - Anything beyond page limit will not be read
  - Format
    - Margins, font., fold-outs (two pgs.)
  - Submission of separate volumes for cost and technical
  - Early submission of Past Performance volume

# Worst Mistakes in Government Contracting

- Past performance must be considered in every solicitation over simplified acquisition threshold
  - Includes relevant contractor's actions under previously awarded contracts, such as:
    - Record of conforming to contract requirements,
    - Record of forecasting and cost controls,
    - Schedule adherence
    - History of reasonable and cooperative behavior and commitment to customer satisfaction, and
    - Contractor's businesslike concern for the interests of the customer

# Worst Mistakes in Government Contracting

- ***Past Performance steps for proposers***
  - Maintain database of previously awarded government contracts;
  - Retain contact information of government officials to serve as references;
  - Regularly check and update agency past performance databases;
  - Fully provide past performance references for all RFP and
    - Follow up to ensure contracting office contacted reference

# Worst Mistakes in Government Contracting

- ***“Best-value” Evaluation Criteria***
- All factors and sub-factors, along with relative importance, must be stated clearly in RFP
  - Section M of the solicitation (Govt.)
  - Source Eval. and Selection Process section (JPL)
  - Proposal Eval. Instructions (Criteria/Factors)(JPL)
- Prepare Compliance Matrix showing relative value of evaluation factors

# Worst Mistakes in Government Contracting

- ***Flowdown Provisions***
- Certain *FAR* clauses must flow down to protect Govt.
  - Some explicitly mandated
    - Equal Opportunity clause
  - Some implicitly flowed down.
    - E.g., Davis-Bacon, Service Contract Act
- Some not required, but should flow down as best business practices:
  - Changes clause
  - Termination for convenience clause

# Worst Mistakes in Government Contracting

- Disputes Clause in lower-tier subcontracts
  - Include tailored Disputes clause in *your* subcontract
  - Require lower-tier subcontractor to continue performance pending dispute:
    - Establish procedure for resolving disputes between parties
    - Require subcontractor to perform pending resolution
    - Include forum for appeal.

# Worst Mistakes in Government Contracting

- Only CO/SCM has authority to enter into, administer, or terminate contracts
- Only CO can give direction, interpret specifications, demand changes, or revise a written contract affecting cost, schedule or technical direction
  - Exception: Technical Direction Memo
- Ask for written Delegation of Authority.
  - If not in writing, not valid
- IF you took direction from other than CO/SCM, courts/GAO will generally deny claim relating to such direction



# Worst Mistakes in Government Contracting

- If a contractor elects to perform work not required by the contract without a written mod, contractor is considered a “volunteer” who will not be paid for the services
- If Govt. requests services or performance not in SOW, to be paid for such a constructive change, the contractor must:
  - Identify the work,
  - Notify the CO, and
  - Request change order and equitable adjustment

# Worst Mistakes in Government Contracting

- Only proper written direction binding
- Ignore verbal instructions from other than CO/SCM
  - Reliance on verbal advice from unauthorized government officials is at contractor's risk
  - Govt. not bound by risk

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# Worst Mistakes in Government Contracting

- FUNDING
- The Limitation of Funds Clause requires:
  - The contractor must notify the CO in writing when:
    - it anticipates that within the next 60 days it will exceed 75 percent of the estimated cost and provide a revised estimate,
    - that total contract cost will be significantly greater than estimated, and
  - The CO must notify contractor in writing that estimated cost has been increased by a specific amount.
- Until such CO notice, contractor not required to:
  - Continue performance or
  - Incur costs that exceed contract estimated cost
- LoF used to help control contractor's spending rate

# Worst Mistakes in Government Contracting

- Design Specifications:
  - Describe in precise detail the materials to be used and how work is performed
  - Contractor has no discretion to deviate from specifications
- Performance Specifications:
  - Set forth an objective or standard to be achieved
  - The successful proposer is expected to exercise creativity in achieving that objective or standard of performance, and selecting the means

# Worst Mistakes in Government Contracting

- Debriefs allow contractor to make future proposals better
  - Evaluation of significant weaknesses/deficiencies
  - Overall evaluated cost and technical rating
  - Past performance information on the offeror
  - Overall ranking of all offerors
  - Rationale for award
  - Make and model of the item delivered (commercial items).
  - Reasonable responses to relevant questions