Facing the Dangers in the Contracting World

Contracting officer representatives, quality assurance evaluators, and other technical representatives must walk a fine line between being a partner and protecting the rights of the government.

BY DEBRA PARRA

In the past several years, there has been a significant trend toward contracting-out government functions. Contractors are now performing many jobs previously performed by government employees. The workplace has changed considerably, and government employees are working closely with contractors to accomplish their mission.

This trend has especially impacted those government technical people who are responsible for performing market research, source selection and/or quality assurance, and evaluation of contractor performance. There is an increased emphasis on government/contractor partnerships, yet contracting officer representatives (CORs), quality assurance evaluators (QAEs), and other technical representatives must walk a fine line between being a partner and protecting the rights of the government.

This fine line is fraught with peril and can be a landmine of contracting and legal headaches if not cautiously approached and considered. Contracting officers are responsible for ensuring that their technical representatives understand the risks inherent in their technical contracting roles and the implications of those risks. These include:

- making an unauthorized commitment;
- jeopardizing the government's contractual rights;
- managing unauthorized actions, causing a contract dispute;
- violating the Bona Fide Need Rule or the Anti-deficiency Act;
- violating the law by administering a non-personal service contract as a personal services contract; and
- managing conflict of interest.

Unauthorized Commitments

Unauthorized commitments[1] are defined as agreements that are not binding solely because the government representative who made the agreement lacked the authority to enter into that agreement on behalf of the government. An individual who makes an unauthorized commitment may be held personally liable and subject to administrative and other penalties.

An unauthorized commitment can occur when CORs/QAEs act outside the scope of their appointment letters, or when technical personnel take actions that only contracting officers have the authority to perform. This can happen unintentionally in what appears to be an innocuous situation. For example, technical people who perform market research may be treading dangerous ground if they ask for a "bid" as opposed to "market research information" when talking to vendors. Vendors may misconstrue the bid request as an actual solicitation,

resulting in an unintentional commitment and ratification action.

During market research, technical people should specifically state that they are conducting market research, and should focus primarily on the technical aspects of the market, as opposed to the pricing aspects. In fact, it may be wise for technical personnel to focus *only* on the technical aspects, leaving the business and pricing aspects of the research to their contracting counterparts.

Technical representatives, who ask contractors to start work on a project prior to contract inception, also run the risk of an unauthorized commitment. Wise technical people keep their contracting officer informed of their needs and understand that there are authorized contractual procedures for dealing with short-fuse requirements.

The Government's Rights

Another minefield in the world of government contracting is the possibility that a technical representative will take an action to jeopardize the government's rights or result in a claim against the government. Again, this can happen in innocuous situations.

Non-contracting personnel may jeopardize the government's rights by:

- telling the contractor that you will accept a product of lesser quality or value than that required by the contract;
- telling a contractor that you will allow delivery of a product or service on a date different than the contractual delivery date;
- waiving a contractual reporting requirement;
- not informing the contracting officer promptly when problems occur;
- changing contract delivery terms;
- asking the contractor to provide data, materials, or reports in addition to what is required by the contract;
- agreeing to changes in personnel staffing, contrary to that in the contract; and
- authorizing overtime for a task.

A general rule of thumb for technical people to follow is to avoid authorizing any changes that impact contract price, quantity, quality, delivery, or staff. These are cases where direct contracting officer involvement is very important.

There may be situations where the COR believes a report should be waived or a delivery schedule should be lengthened. If so, the government may be entitled to consideration for those changes. If the technical representative authorizes such changes directly, the government may lose out on that consideration, thereby jeopardizing the government's right to the consideration.

The contracting officer has latitude and flexibility in determining what comprises adequate consideration for a change. Examples of consideration include monetary adjustments to the contract, extended warranties, additional reports, or quantities at no cost or at a reduced cost. The possibilities are virtually endless, but cannot be explored if the contracting officer is not aware of the change.

Bona Fide Need Rule

Another way the government's rights can be jeopardized is if the contracting officer is not promptly informed of delivery or performance problems under a contract. Failure to act and timely address such problems can be interpreted as waiving the requirement in dispute situations. Therefore, it is critical for technical representatives to inform the contracting officer immediately when such problems arise.

Spending funds outside of fiscal time constraints (e.g., violating the Bona Fide Need Rule) is another danger for technical personnel. The Bona Fide Need Rule[2] requires that funds be obligated to satisfy only the bona fide needs of the year in which the funds are obligated. This rule requires the contractor to start work promptly and proceed without unnecessary delay. In the construction arena, the failure to ensure that a contractor begins work within 90 days[3] of the obligation of funds is an indicator of a bona fide need violation. In one case, a delivery order for road repairs was issued at fiscal year end with an intent for the COR to schedule the specific projects under the order within a generic time frame. The order lost visibility, and the contractor started work on the first project under the order over a year later. When the contracting officer became aware of the situation, she immediately issued a "stop work" order. This violation of the Bona Fide Need Rule resulted in the loss of the funding obligated under the order, and the need to replace the funding with current year dollars.

This type of situation can be avoided if contracting officers and their technical representatives are diligent in ensuring prompt commencement of work following obligation of funds.

Anti-Deficiency Act

Technical personnel also need to be aware of the intent of the Anti-deficiency Act[4] and ensure that their actions do not result in a violation of this act. An officer or employee may not make or authorize an obligation or expenditure in excess of the appropriated or funded amount, outside the appropriate subdivision of funds, or in advance of the appropriation (unless specifically authorized by law). Doing so could violate this act. Technical personnel must not direct the contractor to do work that is not funded under the contract, or should be funded by a different

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"color" of money (i.e., military construction funding versus operations and maintenance funding), at the risk of violating this law. The proper funding must be obligated *prior* to commencement of work.

Source Selection Information

Partnerships between government and contractor employees are very valuable. However, these types of close relationships can also result in a false sense of security and a higher likelihood of discussing topics that may not be appropriate for discussion. Technical personnel should be wary of discussing any information that may be considered "source selection information" with contractor employees or anyone else who does not have a specific and valid need to know. Contracting officers need to be proactive in educating their technical representatives about this danger, when entering a source selection situation. The following events should not be undertaken outside the source selection structure without the express permission and involvement of the contracting officer and legal advisor:

- discussion/release of contractor-proposed pricing,
- discussion of technical or cost evaluation of proposals,
- discussion of rankings of proposals or competitors,
- discussion of government requirements (or asking a specific contractor to assist in defining requirements) in advance of a solicitation, and
- release of any documents marked "source selection sensitive" (see FAR 3.104).

Personal Services

When government employees and contractor employees work closely together on projects, it is very easy to slip into personal services behavior without realizing the impact. The government is prohibited from obtaining personal services[5] under contract unless specifically authorized by statute. FAR 37.104 states that personal services exist when the inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, government direction or supervision of contractor employees. Certain actions taken by technical representatives may have the effect of changing a non-personal service contract into personal services contract. Examples of such behaviors include:

- taking any action that could be construed as "supervision" of contractor employees,
- specifying contractor employees by name for contract tasks,
- telling a contractor to fire somebody, and
- telling the contractor to give somebody a raise.

Government technical personnel should be extremely cautious when making suggestions regarding *how* a task should be performed because such "how to" guidance could be construed as directing an employee.

Conflicts of Interest

Lastly, technical representatives should be thoroughly familiar with the DOD Joint Ethics Regulation (DODD 5500-7R) and the related standards of conduct for government employees. Individuals should not only avoid conflict of interest situations, but should be able to identify them when they occur. Conflicts of interest occur when, because of other activities or relationships with others, a person is unable or potentially unable to render impartial assistance or advice to the government.

A conflict of interest also can exist when the person's objectivity in performing the contract work is or might otherwise be impaired or could provide an unfair competitive advantage to a company. In this age of contracting out, technical people need to be especially astute regarding the conflict of interest rules, especially in small communities where ties and relationships between government and contractor personnel are prevalent.

In one case, an employee was hired for a civil service quality assurance evaluator (QAE) position, with primary duties of the position were to monitor a particular contract. After the individual was hired, the contracting officer found that the individual's spouse was an employee of the contractor under the contract he was hired to evaluate. In order to alleviate the conflict of interest, the employee had to be assigned different job responsibilities and was ultimately placed in a different position. This type of conflict of interest situation is not uncommon, and technical personnel should be able to identify such situations when they happen.

Government contracting is an interesting and vital field and is rapidly becoming a cornerstone to mission accomplishment within the government. However, it also can be dangerous ground for our technical representatives, who are out in the field working side-by-side with contractors every day. Contracting officers are called to be proactive in educating the technical community on the dangers involved in technical contracting rules and how they can be avoided. *CM*

Endnotes

1. Federal Acquisition Regulation 1.602-3.
2. Defense Finance & Accounting Services (DFAS) – Indianapolis Regulation 37-1, paragraph 8.
3. DOD Financial Management Regulation, Volume 3, Chapter 8, paragraph 080303c.
4. 31 USC 1341 or 31 USC 1517.
5. FAR 37.104.