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Should We Get Involved In the Government Marketplace?

The Federal government spends trillions of dollars annually for a wide range of goods and services to meet mission needs. Current events indicate that one potential factor in the recovering economy will include stable or increasing government procurement budgets. Along with the current depletion of the spare parts inventory for the military, technology advancements require up to date development programs and a consistent focus on maintaining our lead in state of the art equipment. Finally, the Government has become increasingly reliant on industry and the commercial markets to provide the technical expertise to advance the required solutions for mission success.

While many of the largest defense companies and government contractors have an operational presents in Colorado, the majority of existing defense/government contracting and research and development opportunities remain untapped by Colorado businesses. The doors are opening, particularly in the area of defense contract work. High technology practice areas in Colorado include, but are not limited to: nanotechnology; space; software development; energy and construction. Colorado businesses, as well as the state legislature, are realizing the vast potential in the government marketplace and the unique position Colorado has in becoming a primary state to provide the government marketplace with the supplies and services needed to successfully accomplish its mission.

Doing business in the Federal or State marketplace has changed over the years. Past difficulties have been eliminated with the new focus on the commercial

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contractor and smaller businesses. Please consider the following FAQs to better understand the current opportunities:

Q: If a business entity was considering entering the government marketplace and you could give them just one piece of advice, what would it be?

A: Do it right! The concept is simple, but the execution can be more complex if a company attempts to perform in the government marketplace without the experience or advice necessary to succeed. Unique skills are needed because the government marketplace is a different forum than the commercial market. A company must recognize, understand and prepare for the differences. In order to take advantage of the many opportunities when dealing with the government, the company must be prepared to understand there are differences, those differences can be “handled”, and the potential is worth the focus. In that regard, it is crucial to have experienced, qualified professionals advising you about those unique requirements when dealing with the government—contract administrators, accountants, quality and marketing experts, and legal professionals. It’s not necessary to hire people experienced in these areas, but a company should have such advisors available as needed. In addition, it is important to look to organizations like the Small Business Administration and the Department of Defense’s Procurement Technical Assistance Centers for help and guidance on the proper proactive approach to government contracting.

Q: Once a company wins a government contract or is awarded an order, what focus should they have in completing their obligation?

A: It’s important to remember that a company’s “past performance” is not just a concept, but rather an important element of success. While there is no such thing as a perfect contract, careful administration, timely performance, quality work and accurate accounting are essential to securing an outstanding performance evaluation. The manner in which a company performs and how its contracts are administered is a primary factor the government considers when awarding new opportunities. Exercising sound business judgment, even on those occasions when the company must seek an equitable adjustment or relief from the contracting officer, is important in avoiding and/or resolving disputes over the performance of

the contract. Remember, the government has responsibilities under the contract as well and must be held accountable. If approached in a business like manner and supported by the guiding principles in the regulations, executive orders and statutes, the Government generally appreciates an attempt to resolve issues at the lowest level and in the quickest amount of time.

Q: Is it important to understand the commercial-item procurement initiative when dealing with the government?

A: Federal Acquisition Regulation Part 12 provides guidelines for the purchase of “commercial” supplies and services. Briefly, the regulation states a preference for the acquisition of commercial items and that commercial items shall be acquired to meet the needs of the agency whenever they are available. In addition, the regulation requires prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items as components of items supplied to the government agency. This initiative is very important for any business participating in or considering entering the government marketplace. Having a product or service designated as “commercial” affects intellectual property rights, accounting audits, quality programs, socioeconomic requirements and the imposition of most of the normally required terms and conditions.

Q: Is the government interested in research and development projects?

A: Yes. The government recognizes the enormous amount of technical talent that currently exists in the commercial sector. In fact, a seminar on the topic of the urgent need for technical expertise on the battlefield was focused that exact initiative. According to the speakers, Dr. Alok Das (Chief Scientist – Space, Air Force Research Laboratories) and William Brower (Deputy Project Manager, PEO Soldier Program), there are urgent needs for small and medium contractors to provide advanced, unique technologies to the government in record time. The government has adopted new programs and regulations that make it advantageous for commercial companies to commit to the research and development in technologies that are specifically important to the government.

Q: Obviously contract terms and conditions are important, but how closely should contracts be reviewed?

A: As with all legal documents, it is important to understand the terms you are committing to and your responsibilities under the contract. In addition, over-incorporation of clauses only creates opportunity for increased spending and a forum for failure. In one situation our client, a small subcontractor on a major program, was given flow-down terms and conditions from the large prime contractor. We were requested to review these flow-down clauses and comment on the applicability of the requirements. Although the subcontractor was on the prime's proposal team, the prime flowed down more than 115 contract provisions. Upon review, we found only a limited number of clauses that were mandatory due to the unique status of dealing with the Government and 14 clauses that would be acceptable if appropriately modified to support the prime contractor's responsibilities to the government. The rest of the clauses did not apply or were just not appropriate. Always review the clauses and negotiate the final contract as much as possible. Balance your review by recognizing acceptable risks, managing those risks, and keeping in mind your goals in acquiring and performing the contract.

Q: What are some important considerations when establishing the Prime-Subcontractor relationships?

A: A company's approach to entering the realm of government contracts should include various relationships with prime contractors. Those contractual relationships could include not only the traditional subcontract, but also teaming arrangements, joint ventures and mentor-protégé programs. Be thorough and proactive in the development of such relationships. Ensure that there is an understanding in terms of the focus and goals to be achieved and the responsibilities assigned to each party. Understand billing, risk allocation, intellectual property issues, marketing, and quality issues between the contract parties. Most important, clearly identify the roles and goals of the parties. Finally, understand and limit the terms and conditions necessary to successfully perform the contract.

Q: How should the contractor handle a dispute with the government or prime over contract award or performance?

A: There are different approaches to resolving disputes with the government or prime over a contract award or performance. In my opinion, it is most important not to be arbitrary and to understand that there is a certain cost to performing any business obligation. Management must balance the rights supplied under the contract with the importance of the company's relationship with its customer. Generally, my experience has been that the government understands that parties to a contract may have a dispute—there is no perfect contract. While there are no guarantees, most government officials understand that it is “just business” as long as the issues are presented in a business-like approach. A professional approach goes a long way toward resolving issues and maintaining a high past performance rating.

Whatever the level of the dispute, the contractor must ensure that the claim is drafted well and fully supported. While there are times that demand a more formal resolution technique, I am a firm believer in trying to resolve issues through unassisted negotiation or formal mediation. There are a number of government directives that encourage alternative dispute resolutions between parties; take advantage of those directives as much as possible (it's just good customer relations)

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