

Subcontractors: Be Careful About Accepting the FAR Clause Requiring a Contractor Code of Business Ethics and Conduct

Legal Alert
October 1, 2009

Garvey Schubert Barer Legal Update, October 1, 2009.

By now, most companies working on U.S. Government procurements are aware of the 2009 federal regulations (set forth in FAR § 52.203-13) requiring contractors to adopt a "Contractor Code of Business Ethics and Conduct." This requirement is mandatory in any solicitation or contract if the value of the contract is expected (by the federal contracting officer) to exceed \$5 million and the performance period is 120 days or more. Many companies have found that adopting the government-mandated ethics code is complicated, creates administrative burdens, and can be expensive. Many companies working as subcontractors have avoided this requirement by relying on exceptions, such as the "Commercial Items" exception.

These exemptions for subcontractors no longer apply. Recent amendments to the FAR require a contractor to include (i.e., "flow down") the ethics code requirement, in substance, in any subcontract that has a value in excess of \$5 million and a performance period of more than 120 days. These recent amendments eliminate the exemptions for contracts for commercial items and for contracts performed entirely outside the U.S.

This revised clause raises a serious issue for subcontractors in subcontracts under the commonly-used Indefinite Delivery/ Indefinite Quantity (IDIQ) procurement. Under an IDIQ procurement, the U.S. Government and the prime contractor execute a prime contract giving the prime no specific tasks to perform. Tasks are performed in accordance with Task Orders (T.O.s) issued by the Government to the prime. In turn, the prime and sub typically execute a subcontract that contains no specific

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tasks, but provides that the prime will issue a T.O. to the subcontractor when the prime needs the sub to perform a particular task. The subcontract does not proscribe a fixed number of T.O.s or any expected dollar value of the T.O.s.

What happens if the prime offers the sub a subcontract that includes a clause requiring the sub to adopt a Code of Business Ethics? By including the clause, the prime is, expressly or implicitly, making a determination that the subcontract has a value in excess of \$5 million and a performance period of more than 120 days. But what happens if the prime never issues a T.O. to the sub or issues one or more T.O.s with an aggregate value of less than \$5 million? The sub is still bound by the contract clause. The sub is obligated to adopt a Code of Business Ethics or risk breaching the subcontract.

How to avoid this terrible result if you are a sub with a limited administrative budget and staff, and have not yet adopted a Code of Business Ethics? First, in negotiations with the prime in an IDIQ procurement, seek to avoid a flow down of the FAR clause requiring adoption of the ethics code, unless the prime and sub are sure that the T.O.s to be issued under the subcontract will have an aggregate value in excess of \$5 million. Second, if the prime insists on including the clause, then the sub should push to make it conditional.

Properly worded conditions should meet the prime's concerns that the prime satisfy its obligation under the FAR, while satisfying the sub's concern about prematurely and unnecessarily falling under a burdensome obligation. As the parties' relationship develops and as T.O.s are issued and performed, the sub will then have time to adopt a Business Code of Ethics in an orderly, cost effective means. Perhaps the sub can even use the prime's ethics code as a base document for the sub's code, which should save the sub some money and satisfy the prime that the sub's code meets the prime's standards.