LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Current Trends in Federal Procurement

By Peter Ford and Michelle Litteken

For government contractors, staying ahead of the curve is critical for success. Knowing about a new law, policy, or program can provide you with a competitive advantage. There are three current trends in federal procurement that are significantly affecting the means agencies use to purchase goods and services as well as the ways contractors compete for those opportunities: category management, the 809 Panel, and other transaction authority ("OTA"). Staying abreast of these trends and determining how you can effectively maneuver in the new marketplace should be a priority for all contractors.

Category Management

Category management has three primary goals: increasing savings, reducing the number of new contracts, and increasing the amount of spending that is subject to government-wide management. Category management applies to the types of goods and services that are common across federal agencies, referred to as "common goods and services." In FY 2017, these common goods and services constituted $303 billion in federal spending.

Category management was included as one of the goals in the President's Management Agenda, which was released in March 2018. The President's Management Agenda set a goal of achieving $18 billion in savings by the end of 2020 by applying category management principals. To achieve this goal, the government will increase the number of common goods and services bought through best-in-class contract ("BIC") solutions and reduce the number of duplicative contracts by 50,000. BICs are contracts designated by the Office of Management and Budget as meeting various criteria. There are currently approximately 30 BICs, including Alliant, OASIS, and VETS 2.

While the goals of category management are laudable, there are serious concerns about adverse impacts on small businesses. BICs are a pillar of category management, and using BICs restricts competition and reduces the number of opportunities for small businesses. The procurements for BICs are incredibly competitive, and the outcomes are significant. Winning a BIC can make a company, while losing such a valuable opportunity can adversely impact a contractor's ability to get new work. Importantly, although the Government has exceeded its goal for BIC spending to small businesses, the data show that the majority of purchases went to the largest small businesses. And, in 2017, 80% of BIC spending was concentrated among the largest 138 BIC vendors (out of 3,257). This data indicates a real

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concern about the impact of category management on the industrial base, given that the increasing use of BICs is creating a wide disparity between the "haves" and the "have nots."

There is no question that category management is reshaping the way agencies purchase goods and services. And, with bipartisan support, there is reason to believe that it will continue. Given the number of procurements and the proportion of federal spending affected, this is an issue to which contractors should be attuned.

809 Panel

The 809 Panel, which was created by Congress to develop recommendations to streamline and improve the defense acquisition process, also has the potential to materially affect government procurement. Indeed, the impact will likely be seen beyond the Department of Defense ("DOD"), as civilian agencies often adopt regulations and policies similar to those of the DOD.

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The Panel issued its first report in January, which largely centered around the idea of adopting a new acquisition model focused on using streamlined procedures. Two aspects of this new model are particularly noteworthy.

The first proposal concerns changes to small business contracting. In this area, the Panel recommended that instead of focusing on meeting socioeconomic goals and primarily acquiring basic services and commodities, the DOD should focus on purchasing innovative goods and services from small businesses. The second notable aspect of the report pertains to bid protests. The Panel initially recommended creating a DOD-specific forum for protests, limiting the potential protest grounds a disappointed offeror could raise, shortening the time to resolve a protest, and limiting the relief available to a protester. These measures are aimed at reducing the number of protests.

After the Panel's report was issued, the Panel received strong feedback from industry and other stakeholders. Some observers believed that it intended to eliminate the socioeconomic goals entirely and offered fierce opposition. Others objected to the proposed changes to the bid protest system as anticompetitive and unnecessary. Recent statements from the Panel indicate that it is reconsidering its approach to these two important issues.

Because the Panel's final report is not expected until later this year, contractors have the opportunity to continue to give feedback and try to shape the Panel's recommendations. This is significant, as the recommendations in the final report will likely impact multiple aspects of the procurement system.

OTA

OTA is a non-traditional acquisition method designed to give authorized agencies maximum flexibility in obtaining innovation without the red tape of traditional procurements. Eleven federal agencies are authorized to use OTA for different purposes. For example, DOD may use OTA for "prototype projects" that are directly relevant to enhancing the mission of military personnel. This statutory authority is intentionally broad and reflects an expansion from the original purpose of developing weapons and weapons systems. Although OTA has been around for decades, Congress recently made the DOD's authority permanent and doubled the dollar thresholds for required approvals of OTA. A contracting office may approve the use of OTA for up to $100 million, and additional approval is needed to use OTA for projects between $100 million and $500 million and for projects in excess of $500 million. These changes have increased the significance of DOD OTA.

Using OTA, authorized agencies can issue what are called "other transaction agreements," or "OTAs." Importantly, OTAs are not contracts, grants, or cooperative agreements, and they are not subject to the FAR or DFARS. They also are not subject to procurement

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statutes like the Competition in Contracting Act and the Procurement Integrity Act. Nevertheless, these transactions are not entirely immune from protest at the Government Accountability Office ("GAO"). Although GAO will not review an agency's award decision once it properly elects to utilize an OTA, GAO will examine the transaction to assess whether the agency properly chose to use the OTA instead of a procurement contract.

While there are a variety of entity types that can enter into OTAs, forming or joining a consortium appears to be the common approach. Consortia are formed by contractors, non-traditional contractors, and academia based on industry/specialty. Commercial entities and academic institutions may apply to join a consortium as a member. These applications are relatively simple and widely available online. Thus, small businesses interested in pursuing an OTA should consider researching existing consortia and identifying one with a mission that overlaps with their services or products.

On September 12, 2018, PilieroMazza PLLC and NCMA's Denver Chapter will be co-hosting a full-day workshop, "Staying Relevant in a Changing Federal Marketplace," in Denver, Colorado, where we will be talking about these and other current trends affecting government contractors.

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How to Walk in the Valley of the Shadow of Death: Strategies for Mid-Tier Federal Contractors

By Cy Alba

It is a well-known fear of many small business federal contractors that, if you are too successful, it may be the death knell for the business. Every small business set aside is restricted to only those companies whose revenues or employees fall below the applicable size standard, some of which are quite small (only a few million dollars a year in some cases). As a result, small businesses that continue to win work soon find themselves classified as a large business and ineligible to bid on new set asides. These companies are then forced to compete with companies two, five, ten, or even a hundred times their size.

The immediate step up from small to large makes it very difficult for mid-sized firms, those generally with sizes of $25 million to $500 million in annual revenues, to succeed when competing with multi-billion dollar companies. Frequently in such scenarios, the mid-tier companies fail and close. If they are lucky and can survive a few years, they may fall back below the applicable size standards and rise like a small business phoenix from the ashes, or perhaps more accurately, they begin the Sisyphean labor of growing, exceeding the size standard, shrinking, and starting again—doomed to repeat the cycle like the cursed king of Ephyra.

While that all seems rather depressing, there are options to avoid this fate. A common strategy is to partner with a smaller firm that still falls below the applicable size standards in a mentor-protégé relationship, which allows the protégé to retain small business contracts. In such an arrangement, the large firm can continue to perform up to 60% of the work on set-aside contracts (through a joint venture with the protégé). The mentor-protégé regime allows mid-sized firms not only to work on small business contracts with their protégé but to acquire up to a 40% equity interest in that protégé without risk of affiliation. This means that the mid-sized firm not only has the ability to keep most of its incumbent work through the protégé, it also can keep up to 40% of the protégé's profits (as the mentor is treated like any owner and thus entitled to its share of the distributions). This incentivizes mentors to truly seek to have the small business succeed, as that then increases the value of the mentor's investment. This must be structured correctly of course, but it is a great option.

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Another option that can work if the goal is to secure the first few full-and-open contracts is to form a joint venture with multiple other mid-sized firms. Unlike for set-aside contracts, on full-and-open contracts you can create a populated joint venture, where the employees who perform the work are employed by the joint venture itself without concern about affiliation. This not only means that, in most cases, you can use the experience and past performance of each joint venture member, but you also can take advantage of lower G&A costs that the joint venture itself may have, which closes the competitive price gap that may exist between a mid-sized firm and truly large federal contractors. Given that affiliation is not a concern for mid-sized firms, it may even be a viable strategy to form a permanent joint venture with a set of companies that all have complementary skills and experience to compete in the full-and-open arena.

If you are seeking a longer-term solution, an acquisition may help, but it must be done carefully. This is especially the case if you still have legacy small business contracts due to the risk of recertification. Indeed, under SBA's rules, if a company with small business contracts acquires, is acquired, or merges with another firm, all the entities in the transaction must recertify on their respective contracts. If you are large (calculated after the acquisition), then the agency can no longer take small business credit for the work under the contract and, in rare cases, may terminate the work altogether. Thus, if you or the target firm have small business contracts, it is critical to investigate ways to structure the transaction to avoid recertification. While those strategies are not yet tested through case law—so there is some risk involved—for many mid-sized companies, that risk may well be worth it if it means they can continue to have the

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cushion of legacy contracts while leveraging the newly acquired work and experience.

Lastly, focused acquisitions in the commercial space, where the acquired target has all or most of its clients outside of the federal marketplace, can catapult a mid-sized firm into new industries. Such an acquisition can also allow a mid-sized firm to leverage its enlarged asset base, when compared to many of its small business competitors, to secure a competitive advantage in niche areas or unique or new marketplaces. PilieroMazza has helped a number of our mid-sized clients acquire new companies or assets in areas such as specialized camping gear, green energy, modular construction, and more. All of those acquisitions were made by government contractors who had grown out of their size standards, but had strategized and planned for the future prior to losing their small business legacy work. The companies used the revenues from the small business contracts to start investing in commercial technologies and marketplaces. Then, when the time was right, they moved to acquire the companies with which they had partnered in those same spaces. These transactions (1) can take the form of the acquisition of an entire company via stock purchase or merger, (2) can be structured as a strategic investment where the mid-sized firm takes a non-controlling interest in the other party, or (3) may involve the formation of a holding company, which allows the federal and commercial sides of the businesses to remain separate. The sky is the limit when size standards and affiliation are no longer of any concern.

As noted above, while it is certainly a legitimate fear of those in the small business federal market that runaway success can ultimately lead to failure due to the strict small business rules and size standards, there are options that can be deployed to prolong life, grow, and even thrive in what may appear to be a valley littered with the remains of once-great mid-tier companies.

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For any questions or concerns about this issue, or to submit a guest article, please contact our editor, Jon Williams, at jwilliams@pilieromazza.com or 202-857-1000.

It's Time to Tell Your Subcontract to Say "Aaah": Before You Ink That Upcoming Subcontract, You Would Be Wise to Undergo a Check-up

By Paul Mengel

Most of us undergo annual physicals, periodically tune up our vehicles, and perform routine maintenance on items in our personal lives. In a similar vein, as the busy subcontracting season approaches, to help preserve the figurative health of your business as a prudent prime or subcontractor, you would be well-advised to perform a "checkup" on documents upon which you rely, in particular, your "form" subcontract. While it is impossible to draft a document that will completely insulate your company from disputes, you should consider a thorough review of your subcontracts in order to help minimize the risk, and the attendant expense, of resolving a potential dispute through costly litigation.

1 Avoid the use of "Subcontracts R Us."

You might be surprised by the number of matters in which we have been engaged wherein the client has provided a copy of the subject subcontract, which it had downloaded from the internet and executed largely unchanged, aside from plugging in names, dates, and subject matter. In many such cases, the client's penny-wise, but pound-foolish, failure to tailor the document to the needs of, and to the advantage, of the company comes back to haunt it in the form of an adverse outcome in the dispute.

2 Review your dispute resolution provision.

Oftentimes subcontracts contain a rote dispute resolution statement, which may be as simple as: "All claims and disputes arising under or relating to this Agreement are to be settled by binding arbitration in the State of __." While each party may be equally ill-served by this language, your subcontract should work to your advantage wherever possible. So consider: does it provide for litigation of disputes in a forum friendly to

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one party, in terms of venue? Does it contain a waiver of jury trial, which can add significantly to the expense of litigation? If litigation is the chosen dispute resolution mechanism, is there a "loser pays" clause as to legal fees? Has the availability of equitable/injunctive relief been addressed? If arbitration is chosen, are specifics provided as to the conduct of the arbitration, e.g., the number of arbitrators and scope of discovery, or does it defer to the rules of an arbitration provider, such as the AAA? And has the company been advised as to the relative advantages and disadvantages of arbitration vs. litigation? The foregoing is merely representative of the considerations that go into the drafting of the critical dispute resolution provision, each of which can have a substantial impact on the relative rights of the parties and the cost of resolving the issue.

3 Ensure that the subcontract indemnification provision provides sufficient protections.

Your subcontract should contain a comprehensive indemnification provision that sufficiently indemnifies the company from claims, both direct and third-party, arising from the acts and omissions of your counterpart. The covered claims should include, at a minimum, those arising from: negligence (simple and gross); fraud; bad faith conduct; breaches of the reps and warranties in the subcontract; violations of the law and/or relevant FAR clauses and submission of false claims; infringement of intellectual property rights; injury, death, or property loss; and claims made by the other's employees. Anything less could needlessly expose your company to risks that should be borne by the other.

4 Check for robust confidential information protection.

Your company's confidential information ("CI") must be guarded zealously, and the subcontract provisions related to CI are vital to protecting these critical assets. Subcontract language must, at a minimum: classify CI with clarity; provide detailed direction as to its dissemination, including identifying to whom it may be revealed; clearly state the scope and duration of the restrictions; provide for the return/destruction of the CI upon concluding the relationship; and provide strict and legally enforceable penalties for its unauthorized use.

5 Confirm clarity with regard to termination.

Litigation often arises as to whether termination of a subcontract was proper under the circumstances. Your termination provision should state with specificity the events resulting in termination, including default, acts of which must be clearly defined. The effect of termination for convenience by the government should be

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addressed, if appropriate. And there should be no doubt as to the parties' relative rights and obligations upon termination.

> **"In many such cases, the client's penny-wise, but pound-foolish, failure to tailor the document to the needs of, and to the advantage, of the company comes back to haunt it in the form of an adverse outcome in the dispute."**

Every provision of your subcontract is important, and you should approach your review of the document as if there is no such thing as "boilerplate." While clearly some provisions are more critical than others, each is there for a reason, and each has the potential to affect in some manner the likelihood, length, cost, and/or outcome of disputes. While the foregoing five suggested areas of scrutiny are representative of the subject matter of much of the subcontract litigation we encounter, as you conduct your periodic review and tailor your subcontract to the best interests of your company, do not leave any provision behind, as that may be the one that tips the scale in favor of your adversary in a dispute.

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GUEST COLUMN

End of Fiscal Year Buying Season—Cash in with Your GSA Schedule

By Courtney Fairchild, CEO of Global Services

With summer here, we are reminded that the federal fourth quarter (Q4) buying season is upon us. September 30 marks the end of the federal government's 2018 fiscal year (FY), and federal contractors should take steps to obtain as much year-end money as possible. For those companies whose commercial sales may lag in the summer months, this can be the perfect time to focus on sales, especially through the GSA Schedule Program, as federal agencies strive to spend the rest of their budgets to avoid the risk of losing existing funds or the downsizing of their future budgets.

The government will be spending more this time around. In fact, Washington Business Journal noted that the FY 2018 federal budget increased by $143 billion, with 56% increased spending at civilian agencies compared to Q4 spending during the same two months last year.

One of the greatest challenges for agencies associated with spending Q4 funds is that the procurement process must be simple and fast. During this time agencies are looking to existing contracts, GWACs and BPAs, to facilitate a quick purchase. For this reason, the GSA Multiple Award Schedules are always a likely candidate. The GSA Schedule contract vehicle can cut down the procurement process considerably, and it is fairly easy for agencies to use.

Top eight things you need to do to increase your GSA Schedule Q4 sales:

1 Start Early

Many agencies start their planning prior to September, so start gearing up your marketing campaign now to avoid the end-of-the-year rush and panic. Use the summer months to work closely with staff to create proactive marketing plans to ensure that you have

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appropriately marketed your services/products in such a way that the government will seriously consider your company when determining final spending decisions.

2 Make Sure You Comply with New SAM.gov Requirements

To do business with the government, first and foremost contractors must be registered in SAM, and they must have a login.gov user account to access their SAM profile. Due to suspected fraudulent activity, all SAM users are required to submit a notarized letter appointing an entity administrator. While the GSA recently announced that activation of SAM registrations is no longer dependent upon receipt and approval of the entity administrator letter, it is important to note that the letter must be submitted to the Federal Service Desk within 30 days of submission of the SAM registration for the registration to remain active. All contractors are advised to learn more about these recent changes and how they affect both the registration process and access to SAM.gov.

3 Keep Your GSA Contract Current and Compliant

It is imperative that your GSA Schedule be up-to-date with all of the services/products that you offer. Make sure that new services/products are added, that old ones are deleted, and that you have applied for your appropriate annual price escalations. Out-of-date products and pricing will make it difficult for both you and your customers.

4 Make Sure You Are Registered on GSA Advantage! and eBuy

For government agencies to find contractors that have the services/products they wish to purchase in Q4, they may look to the online ordering systems set up by GSA. It is crucial to have your current pricelist loaded on GSA Advantage! for viewing and searches. This will also register you with eBuy so that you can see all the available RFQs released to the GSA Schedule(s) that you hold.

5 Contact Current and Past Clients

A primary part of your proactive marketing plan should be getting in contact with current and past clients to find out if they have year-end money and requirements for which you are qualified. Repeat clients account for much of Q4 money spent. It is more efficient to sell to a customer who is familiar with your products/work, than it is to find and convince new customers of your value.

6 Offer Promotions to GSA Schedule Users

Although the purchases off a GSA Schedule can be made using "best value" justification rather than a best price, government purchasers are always going to be concerned with the bottom line. For GSA Schedule product holders, Q4 is a great time of year to run year-end promotions or discounts to encourage agencies to spend their money with you.

7 Be Mindful of the Micro-Purchase Threshold Sales

Purchases under the micro-purchase threshold are the easiest for federal buyers to make. Be sure you have the ability to accept the government purchase card to close orders that are below the micro-purchase threshold and even the $250,000 Simplified Acquisition Threshold. Credit card purchases under these thresholds can be accomplished with far less paperwork and administration.

8 Don't Be Afraid to Start Small

Some agencies during Q4 may only have a minimal amount of cash left to spend on projects smaller than you may be used to. Don't walk away from business because it seems too small. This can be a great way to gain entrance for your company to a particular agency or office with which you have not previously worked. In this way, you position yourself for larger contracts in the future.

"It is more efficient to sell to a customer who is familiar with your products/ work, than it is to find and convince new customers of your value."

As is always the case with your GSA contract, you should be vigilant, making sure your contract and marketing efforts are up-to-date. But now, more than ever, you and your team should take steps to be sure you are fully prepared for the coming fall harvest in Q4 of FY 2018.

About the Author: Courtney Fairchild is President and CEO of Global Services. In more than 20 years in the arena of federal proposals and GSA Schedules, Global Services has empowered companies with over 2,500 contract awards in excess of $20 billion in value.