



Five Risk Management Tips to Prepare for the Road Ahead

by Justin A. Chiarodo and James S. Carter¹

We are nine months into a new administration marked by continued uncertainty regarding the legal, regulatory, and budgetary environments for government contractors. Although contractors have benefitted from a precipitous drop in new regulations, and from the repeal of others (remember Fair Pay and Safe Workplaces?), the procurement community is still grappling with important questions. These include the prospects for the Budget Control Act, the FY 2018 Budget, and the FY 2018 National Defense Authorization Act (“NDAA”). Not to mention stated administration priorities ranging from “Buy American, Hire American” to strengthening federal cybersecurity networks. And what about the prospect of a government shutdown in October? Regardless of how these issues play out, contractors operate today in an environment of heightened uncertainty and risk.

What can contractors do to manage this uncertainty? We offer below five risk management actions contractors can take to mitigate the risks presented in this new operating environment.

Tip 1: Assess Your Compliance Program

In today’s heightened enforcement environment, even routine contract administration issues may turn into major government investigations, or worse. Last year, the Department of Justice reported over \$4.7 billion in settlements and judgments under the False Claims Act (the third-highest year on record). The Interagency Suspension and Debarment Committee, comprised of representatives from executive agency suspension and debarment programs, reported a staggering 4,200 suspensions,

debarments, and proposed debarments in FY 2016. The costs and disruption of a government investigation can be considerable, and—in the case of suspension and debarment—existential.

All contractors should maintain compliance programs as a front line of defense against these risks. Not only can an effective compliance program head off issues before they become major problems, but an effective program can be a mitigating factor in the event of an enforcement action or government investigation. What makes for an effective program? This will vary with the size, business focus, legal and regulatory burdens, and risk profile of the organization.

Comprehensive programs for government contractors will generally address major areas including: 1) interactions with government officials (e.g., gifts and gratuities, the Anti-Kickback Act, post-government employment, etc.); 2) fair competition rules (e.g., the Procurement Integrity Act, antitrust laws, conflicts of interest, etc.); 3) integrity in contract performance and administration (e.g., time and labor charging, Mandatory Disclosures under FAR Part 9 and FAR 52.203-13, cost accounting, etc.); and 4) public policy and national security matters (e.g., domestic preferences, industrial security, export controls, cybersecurity, labor law compliance, etc.).

An effective program will feature buy-in from ownership and senior management, foster a “speak-up” culture that provides for effective reporting, provide a strong system for evaluating and addressing issues, and be adequately supported with the human and financial capital necessary to carry out the objectives of the program.

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Tip 2: Revisit Subcontracts

Government contracting has long been a team sport. To successfully compete for and perform government contracts, contractors enter into arrangements ranging from multi-member joint ventures to traditional prime-sub relationships. Well-drafted agreements are a key foundation for these relationships.

Effective agreements address general business terms in plain, understandable language and ensure important regulatory and prime contract obligations are flowed down the supply chain. Common business risk issues worth special attention include statements of work and payment terms, intellectual property and data rights protection, pricing disclosures, and indemnity and liability limitations.

Despite a slowdown of rule making under the Trump administration, contractor flow-down obligations have grown considerably in recent years. Recent noteworthy changes include executive orders imposing minimum wages and paid sick leave, new cybersecurity requirements, human trafficking compliance programs, and changes to the small business subcontracting limitations for set-aside contracts.

When was the last time your organization reviewed the terms and conditions in your teaming agreements and subcontracts? Are you comfortable they adequately protect your business from a risk and compliance perspective? In our experience, contractors are well-served to review these key documents at least annually to ensure they reflect the current legal and regulatory landscape and adequately apportion rights and responsibilities between the parties.

Tip 3: Maximize Your Insurance Assets

Facing considerable compliance, cyber, and other risks, many government contractors are understandably focused on prevention. But contractors must also anticipate—and be prepared to manage—the costs and liabilities that can arise in the event a risk becomes reality. These costs can be considerable. For example, the Ponemon Institute's most recent Cost of Data Breach Study reported that the average cost of a data breach at an organization stood at a staggering \$3.6 million per incident (with the average cost per stolen record containing sensitive information at \$141).

Insurance can help contractors manage and mitigate such costs. Far too often, however, organizations neglect to read their insurance policies until after disaster strikes or when the government comes knocking in an investigation, only to discover avoidable coverage gaps. To maximize insurance coverage, your organization should take a forward-thinking, proactive approach to purchasing, reviewing, and renewing insurance policies. A contractor should regularly evaluate its insurance program to determine whether its coverage aligns with the specific risks it faces (which change), and features the most favorable terms it can obtain.

Insurance can be an incredibly valuable corporate asset. It should not be relegated to an isolated corner of your organization's risk management strategy. Rather, it should play

a central and integrated role in that strategy. Companies should both understand their insurance coverage and be prepared to use it if necessary (including, among other things, through advance familiarity with notice and other key insurance conditions that may be overlooked in the event of crises).

Tip 4: Plan for Possible Government Shutdowns

The prospects of government shutdowns have come into sharp focus in recent years given the political climate and use of potential shutdowns as political leverage. Although these have often been avoided (in many cases through eleventh-hour congressional deal making), just a few short years ago we witnessed a 16-day government shutdown that resulted in nearly 850,000 furloughed federal workers and a profound disruption in the government services industry. It was the second-longest shutdown since the enactment of the Budget Act of 1974.

Given the stakes involved, contractors should have a shutdown contingency plan that, among other things, addresses contract management, financial, and human resources issues. As a shutdown is almost certain to lead to additional expenses and delays, contractors should focus on thoroughly documenting costs associated with these events, as well as maintaining strong lines of communication with contracting officers about contract performance (including seeking written stop-work orders where appropriate).

Tip 5: Advocate

Government contracting is particularly exposed to the political process. The bad news is that this can lead to significant uncertainty and changes in the regulatory and budgetary climate in which contractors operate. The good news is that contractors have an opportunity to have their voice heard in the process. This advocacy is especially important today.

There are many ways to advocate for your interests. Strengthening relationships with your congressional delegations and their staff, participating in trade and industry associations (like the Professional Services Council), and working with government relations professionals can all be effective channels for making your voice heard. As one ongoing illustration, the American Bar Association's Section of Public Contract Law Section is working to provide comments to the Section 809 Panel (established by Congress in Section 809 of the 2016 NDAA), which is tasked with making recommendations to streamline and simplify defense procurements. Staying on the sidelines means your organization's perspectives may not be heard.

In closing, today's uncertain environment warrants a heightened level of awareness and risk management. In our experience, investment in the five areas above will enhance your organization's ability to manage and avoid predictable risks, while minimizing the costs and business disruption of unexpected events. To paraphrase Louis Pasteur, chance favors the prepared mind (and business). ■