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Incorrect Government Advice – Whom Should You Heed?

By Richard D. Lieberman

Many large and small contractors have made the mistake of taking direction and/or advice from officials who were not authorized to give it to them or of accepting verbal promises or direction from officials even though they contradicted or were inconsistent with what was in the written solicitation or the signed contract. This article considers whom a government contractor should heed and take direction from, both before and during the performance of a government contract. It is also important to consider situations where government personnel give contractors *wrong or incorrect advice.* Are those personnel untrained, overzealous, mean, or just plain not knowledgeable? And, are government personnel trying to encourage contractors to make the mistakes? This article also explores how agency officials have misled contractors in good faith and bad. It also discusses possible actions that contractors can take to avoid these problems in pre-award, post-award and bad faith default situations.

Pre-Award. With respect to sealed bidding, Federal Acquisition Regulation (''FAR'') 14.201-6(c)(2) requires that FAR 52.214-6 be included in all Invitations for Bids (''IFB''). This clause, titled ''Explanation to Prospective Bidders,'' states as follows:

> Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. Any information given a prospective bidder concerning a solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders.

Oral explanations concerning solicitations are not binding on the government, and any information necessary for the prospective bidders must be disseminated in writing through a written amendment to the solicitation. Such an amendment can only be issued by a contracting officer. FAR 14.208(a) and FAR 14.201-1(a) (''Contracting officers shall prepare invitations for bids. . .'')

With respect to negotiated procurements, FAR 15.206(a) states that ''[w]hen, either before or after receipt of proposals, the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation.'' Oral notices of such amendments may be used only when time is of the essence, FAR 15.206(f). FAR 15.206(g) describes the minimum information that must be included in each written amendment. Therefore, the situation in a negotiated procurement using a Request for Proposals (''RFP'') is essentially the same as in an IFB—only a proper, written amendment can be used to modify or correct a solicitation, and the contracting officer is required to issue that amendment.

In its decisions on bid protests, the Government Accountability Office (''GAO'') has repeatedly held that oral advice that would have the effect of altering the written terms of a solicitation, *even from a contracting officer,* does not operate to amend a solicitation or otherwise legally bind the agency, and that any offeror relies on such oral advice at its own risk. *Noble Supply & Logistics* , B-404731, 2011 CPD ¶ 67, March 4, 2011, cit-

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ing *ESCO Marine, Inc.,* B-401438, Sept 4, 2009, 2009 CPD ¶ 234; *TRS Research,* B-274845, Jan. 7, 1997, 97-2 CPD ¶ 6.

Oral advice from contracting officer leads contractor astray. Noble Supply & Logistics, B-404731, 2011 CPD ¶ 67, March 4, 2011, involved a solicitation issued by Minot Air Force Base in North Dakota, where a contractor called the contracting officer one day before the closing date and explained there was a severe weather situation at the base. The contracting officer orally advised the contractor that ''if the proposal was delivered on [the date after the closing date], it would still be evaluated.'' Based on this advice, the protester arranged for delivery of its proposal one day late. Ten days later, the contracting officer notified the contractor that its proposal had been received after the specified closing time and would not be considered. Noble's protest was denied. The GAO held that ''oral advice that would have the effect of altering the written terms of a solicitation, even from a contracting officer, does not operate to amend a solicitation or otherwise legally bind the agency.''

Oral advice from officials other than the contracting officer. ESCO Marine, Inc., B-401438, Sept 4, 2009, 2009 CPD ¶ 234 considered oral advice from officials other than a contracting officer. In *ESCO,* the Navy sought proposals for towing and dismantling of three decommissioned Navy ships. The Navy provided offerors with an opportunity to conduct site visits to inspect all three ships. The Navy also identified a specific government point of contact for each site, one of which was the Director of the Navy Inactive Ship Maintenance Office (''NISMO'') in Philadelphia. The RFP listed specific materials that were not part of the dismantling effort and that the contractor was to remove and set aside for government pick up (such as propellers and steam control valves) but the RFP did not include a landing craft. ESCO did not ask the contracting officer, the point of contract, or the Navy's overall NISMO director whether the landing craft was part of the required dismantling effort. Instead, ESCO asked various NISMO contractor employees, who advised ESCO that the landing craft on board *would be removed,* and therefore would not be part of the required dismantling effort. ESCO priced its offer with that understanding. However, the Navy indicated that the RFP stated it would be left onboard the ship for dismantling and/or salvage purposes. GAO noted simply that ''if ESCO was unsure whether a landing craft was part of the . . .dismantling requirement, it should have raised the matter prior to the closing date with the contracting officer. . .'' The protest was denied.

Oral explanations at pre-proposal conferences are not binding. Not only are oral explanations or changes not binding, but information that is disseminated at formal pre-proposal conferences cannot change a solicitation. In *Digital Imaging Acquisition Networking Associates, Inc*., B-285396.3, 2000 CPD ¶ 191, Nov. 8, 2000, a contractor alleged that evaluation of proposals for mobile x-ray services by the agency had been improper. It asserted that the evaluation should have been weighted more toward ''law enforcement issues'' rather than technical and medical issues, in accordance with the statement of work and oral instructions allegedly given by the contracting officer's representative at the pre-proposal conference. GAO disagreed that there were any specific law enforcement issues in the statement of work, and stated that ''[t]o the extent the protester believes that something the agency personnel said at the pre-proposal conference misled the firm, oral advice, even if given, does not operate to amend the solicitation or otherwise legally bind the agency.'' *Id* at note 6. GAO denied the protest.

Clearly incorrect information given to a contractor about facsimile submissions of bids. There are even more egregious examples of incorrect information given to a contractor, whether in good faith or bad faith. In *Heath Const., Inc.,* B-403417, 2010 CPD ¶ 202, Sept 1, 2010, a contractor contacted the contract specialist person designated on the face of the solicitation to receive questions, and asked if the bid could be submitted by email or facsimile transmission. The specialist informed Heath that it could transmit its bid by facsimile and identified the telephone number of the facsimile machine. The contracting officer rejected Heath's bid because facsimile bids were not authorized by the solicitation (a bid sent by facsimile must be rejected unless permitted by the solicitation, FAR 14.301(c), and there was no such permission contained in the solicitation.) The GAO denied Heath's protest (consistent with its prior decisions) but included the following gratuitous comment: ''we think that procuring agencies should ensure that the personnel designated on the face of the solicitation documents to respond to prospective bidders' questions provide accurate information concerning a solicitation.'' All readers would agree with GAO's comment, but it certainly didn't help the protester!

Clearly incorrect information given to a contractor about facsimile submissions of bid amendments. In *Michelin Aircraft Tire Corp.,* B-248500 et al., 92-2 CPD ¶ 142, Aug. 31, 1992, the solicitation stated that bid modifications could be submitted by facsimile only ''if authorized,'' and such modifications were not explicitly authorized by the solicitation. Michelin contacted the contract specialist who, Michelin asserted, ''orally authorized the use of facsimile transmissions'' and provided the agency's facsimile number, even though the solicitation included FAR 52.214-6, which provides that oral explanations are not binding. The agency refused to consider Michelin's facsimile bid modifications, Michelin lost the contract, and the GAO denied Michelin's protest, stating that the agency had properly refused to consider Michelin's facsimile bid modifications.

In both *Heath* and *Michelin*, the contractor relied on the incorrect oral advice of a contract specialist to its detriment. Perhaps contract specialists should know better and understand the requirements of the FAR more clearly, but frequently they do not.

Identity of the contracting officer and his/her contact information. When preparing a solicitation, most agencies include the name, address, phone and email address of the contracting officer in Block 10 of the Standard Form 33, ''Solicitation, Offer and Award,'' a block titled ''For information call. . .'' The Department of Defense's (''DOD''), on the other hand, refuses to place the name and other information of the actual contracting officer on the solicitation. Instead, DOD components identify only contract specialists or CORs in that block. This ensures that any answer given from the person identified on a DOD solicitation will not bear the imprimatur of the contracting officer, and the issue raised by the contractor may never be brought to the contracting officer's attention. It can result in the type of problems described in *Heath* and *Michelin* above.

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Contractors should be careful never to speak to a contracting specialist about a substantive issue in a solicitation. Contracting specialists are only allowed to write things they cannot sign and as shown previously, frequently give oral advice that comes without any authority whatsoever. The only purpose a contractor should have in speaking to a contract specialist would be to ask where, in a solicitation, a specific item is located (i.e., where in this solicitation are ''facsimile proposals'' or amendments to bids discussed). If the contractor cannot find it himself, the contractor can be directed by the specialist to the actual words which control.

The RFQ Trap. This is another preaward situation where the actions of the government are confusing to the contractor, and are apparently meant to be so. In the ''RFQ Trap,'' a contractor responds to a request for quotations (''RFQ''), and often thinks it has submitted an offer. But FAR 13.004 does not recognize a response by a contractor to an RFQ as an offer, but as a *quotation* or *quote* that cannot be accepted by the Government to form a binding contract. The government must issue a Purchase Order in response to a quote, and this purchase order is an *offer* by the Government. A contract is established only when the supplier accepts the offer either by writing back to the agency, or by furnishing the supplies or services, in which case the formation of the contract and acceptance will occur at a later time.

The problem is that agencies frequently mark the Purchase Order with the statement that ''the Contractor is not required to sign the purchase order in order to indicate acceptance.'' If the contractor does not sign and accept the order, then before delivery, the Government may amend, or cancel its offer. FAR 13.004(c). Because of this confusing language the government has placed on the purchase order, most contractors do not sign it, and do not accept it in writing. Instead, they just proceed with performance. If the contractor had signed it, there would have been an actual contract at the outset. However, by not signing, there is no contract in place, and if the contractor doesn't perform, there will still be no contract. The PO will lapse by its own terms (the non-delivery of the goods), or the agency can simply withdraw or cancel the purchase order, and the contractor will got no contract and no relief at all. A good example is *TTF, LLC,* ASBCA Nos. 58495, 58516, 2013 BCA ¶ 35403.

Cut-off dates for questions on solicitation. If a contractor has a problem with a solicitation, such as an ambiguity (i.e., there are two reasonable interpretations), don't try to solve it with a phone call, regardless of whether you call the contracting officer, a contract specialist, or any other government official. Write to the contracting officer, and if he or she refuses to answer your question or gives an unsatisfactory answer, submit an email or letter-protest on the solicitation to the contracting officer. Many solicitations have cutoff dates for questions, but the GAO has clearly indicated that any protest of a solicitation (including an ambiguity) is proper and timely if submitted before the closing (or opening) date of the solicitation. See 4 CFR 21.1(a)(1). A simple email to the CO submitted prior to the due date for proposals or bids will be construed by the GAO as an informal agency level protest, and will be timely. GAO takes the position that ''even if a letter to an agency does not explicitly state that it is intended to be a protest, [GAO] nevertheless will consider it as such where . . . it conveys an expression of dissatisfaction and a request for corrective action.'' *American Material Handling, Inc.* , B-250936, 93-1 CPD ¶ 183, March 1, 1993, citing *Mackay Communications*, B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426. So this is the way to get any crucial questions answered, even where a ''cutoff date for questions'' that was included in the solicitation has long passed.

Why do government officials give out the wrong advice? It may be out of ignorance, lack of training or a desire to harm a contractor, but it really doesn't matter what their motives are. Contractors should ignore anything that isn't in the actual solicitation or amendments, regardless of who tells you about it, even if the advice comes from the contracting officer. Although the contracting officer has authority to amend the solicitation, an amendment must be in writing, and cannot be provided orally unless time is of the essence, which is rare.

II. Contract Performance. One of the biggest problems in contract performance results from contracting officials asking contractors to perform work that is not in their contract, or directing contractors to perform extra-contractual actions. In addition to specific direction, there are also ''constructive changes,'' which occur when the ''contract work is actually changed but the procedures of the Changes clause (such as FAR 52.243-1, Changes, Fixed Price, requiring a written order from the Contracting officer) have not been followed.'' Cibinic, Nash & Nagle, ''Administration of Government Contracts'' at 427, 4th Ed (2006). These changes give rise to a contractor's proper request for an equitable adjustment in price, delivery schedule or both.

FAR 1.602-1(a) says that ''[c]ontracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings.'' But only duly designated contracting officers may do so. A contracting officer may designate and authorize in writing a contracting officer's representative (''COR'') to oversee contract performance. The COR is normally located where the products or services are delivered, and is empowered to act on behalf of the contracting officer. However, the COR ''[h]as no authority to make any commitments or changes that affect price, quality, quantity, delivery or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions.'' FAR 1.602-2(d)(5). The COR therefore has no authority to direct any changes, whether by order or a constructive change.

In addition, FAR 43.201(a) says ''[g]enerally, government contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract.'' This is implemented in the changes, clause, FAR 52.243-1, which states that the Contracting Officer (meaning no one other than the CO) may make changes. Every reference in the changes clause is to the ''Contracting Officer''.

The FAR defines ''contracting officer'' to mean ''a person with the authority to enter into, administer, and /or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.'' FAR 2.101. The second sentence generally refers to delegations to inspectors for inspec-

tions or to other similar technical personnel, and rarely, if at all, includes a delegation permitting anyone other than a contracting officer to make a change to a contract.

The FAR defines ''contracting officer's representative (COR) as ''an individual, including a contracting officer's technical representative (COTR), designated and authorized in writing by the contracting officer to perform specific technical or administrative functions. *Id*.

The definitions and provisions cited above demonstrate that whenever changes are required in a contract, it is crucial that a contractor receive direction on these from the contracting officer, and no other official. Preferably, all changes should be in writing. When changes are made by someone without authority, the cost of these changes is likely to be rejected by the government. Government contractors must be wary of any change that is directed by someone who lacks authority to make the change under the FAR. The following cases are some typical examples of changes ordered by government officials who were not authorized to order them, and the contractor failed to receive an equitable adjustment for the change.

Improper change at pre-performance conference. *Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007). In a contract for renovation of a dental research facility, the Navy's Resident Officer in Charge of Contracts (''ROICC'') was formally designated to administer the contract, then the designation was changed to the Engineer in Charge (''EIC''). The contractor was directed at the preconstruction conference to submit Requests for Information (''RFI'') to the ROICC or the EIC, if modifications were needed. The contractor provided numerous RFI's during performance and sought equitable adjustments (some of which were approved by the Navy), but on appeal, the Navy took the position that the contracting officer did not direct the work in the claims for equitable adjustment, and only the contracting officer, not the ROICC or EIC had authority to change the scope of work or authorize compensable changes. The court held that neither the ROICC nor the EIC had authority to authorize contract changes, and the Navy's directions for day to day contract administration presented in the preconstruction conference contradicted the clear language of the contract—and it is the contract which governs. All of the contractor's claims except one (for other reasons) were denied.

Improper oral contract made by a person who lacked sufficient delegated authority. In *General Construction Servs., Inc.*, ASBCA No. 57187, 11-2 BCA ¶ 34816, the contractor alleged that it had entered into a verbal contract with the Chief of the Logistics Division and Facility Manager for the Munson Army Health Center in Ft. Leavenworth Kansas, to perform certain work on that facility. The Chief had been appointed as a COR, and could only issue service orders up to $2,500. The contractor submitted a claim of $142,922 for about six months of work of unpacking, assembling and distributing equipment at the facility. The Board held that the Chief no authority to bind the government for purchases of more than $2,500 and therefore, there was no contract with the government on which it could recover.

Improper verbal instructions by a COR. In *Keuffel & Esser Co*, 1975 Westlaw 41664 (GPOBCA), Dec. 11, 1975, a contractor for the Government Printing Office asserted that it was owed additional money for services performed in preparing the transfer of certain government furnished materials, pursuant to ''specific verbal instructions of the government personnel present'' at a meeting with the contractor. The Board noted that there was no contracting officer at the meeting, and even if the oral statement had been made, it was not made by anyone clothed with authority. (Apparently the specific verbal instructions had been given by a COR). The entire claim was denied.

Improper oral statements of a warehouse custodian. In *M.W. Zimmerman Co*, ASBCA No. 20745, 76-1 BCA ¶ 11832, the Board considered a government claim for storage charges because of the contractor's delay in removal of surplus property the contractor had purchased under a government surplus sales contract. The contractor asserted that the Government had waived its rights because the Government warehouse custodian had assured the contractor that no such charges would be assessed. The Board held that the claim of waiver, based on statements of a government warehouse custodian, was without merit. The contract provisions prohibited the contractor from relying on any oral statement or representation that purported to modify any of the terms of the contract. The contractor failed to establish that any authorized contracting officer had modified the contract.

Improper direction and approval by a Program Manager (or COR). In *Norair Eng'g Corp, GSBCA No. 668, 1963 Westlaw 863 (July 5, 1963)*, the contractor requested that work under two separate contracts for performance on a Department of Agriculture building be combined into a single operation to accelerate the work. The contractor asserted that responsible officials of the Public Buildings Service had orally assented to the combination. However, the government demonstrated that the proposal to combine the work had never been approved by the contracting officer. Further, even if it were true that certain personnel had orally agreed to the combination, the Public Building Service was not the contracting officer and had no authority to alter or order changes in the work or alter or change terms and conditions of the contract. The claim was denied.

Improper ''substitutions, trades and changed items'' by a COR/Project Manager. In *Sinil Co, Ltd,* ASBCA No. 55819, 09-2 BCA ¶ 34213, the Board considered indefinite delivery, indefinite quantity contracts for repair and replacement of fences, walls and concrete pavement at the US Army Contracting Command Korea. The contracts were managed by the Department of Public Works (''DPW''), which nominated CORs to support the contracting officer. COR authority was limited as in the FAR. After the contract was completed, the Army Auditing Agency recommended the recovery of $1.22 million dollars for items never received, but billed and paid to the contractor. DPW's Director responded to the audit by saying that Sinil was overpaid because the auditors ''did not take into consideration those items which were not part of the original delivery order or substituted items.'' DPW's Director also acknowledged that DPW was responsible for the substitutions and changes since modifications were not processed ''to reflect the additional work, changed scope of work and substituted line items.'' The contractor acknowledged that it knew that DPW personnel had no authority to modify the contract, but argued that DPW itself was at fault, had admitted it, and should pay for the claim. The government was awarded the $1.22 million recommended for repayment in the audit.

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In all of these contract performance situations, when confronted by changes demanded by someone other than the contracting officer, the contractor could have written to the contracting officer, and asked for clarification and if necessary, correction of the government's position and direction. Such clarification and direction issued by a CO could be a constructive amendment to a contract, but when issue by someone without authority, such changes generally have no status whatsoever and should be ignored by the contractor.

III. Post-Contract Performance. The final aspect of ''government advice'' involves post-contract performance issues, primarily terminations of contracts. In this context, there are a small number of cases where the Government has breached the covenant of good faith and fair dealing by the actions it has taken in speaking to and treating a government contractor.

An implied term (covenant) of every government contract is that each party will act in good faith toward the other, and that a party may be found to have breached the contract by acting in bad faith. See e.g., *Centex Corp. v. United States,* 395 F.3d 1283, 1304 (Fed-.Cir.2005).

The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.'' *Id*. ''A breach of the covenant of good faith occurs when there has been 'sharp dealing' such as taking 'deliberate advantage of an oversight by your contract partner concerning his rights under the contract.'' *Moreland Corp. v. United States,* 76 Fed. Cl. 268 (2007)

Because the government is presumed to act in good faith, *Am-Pro Protective Agency Inc, v. United States, 281 F 3d 1234 (Fed. Cir. 2002); Kalvar Corp. v. United States,* 543 F. 2d 1298 (1976), government bad faith is rarely found. However, in several cases, the government was found in violation of the covenant, all of which involved default terminations. The important aspect of all these cases were the improper actions as well as improper comments made to the contractor.

Although the bad faith situation is slightly different from ''Government advice'' or ''oral advice'' it is similar in that contracting officials take actions and actively advise contractors about certain things that are inconsistent with the contract, the FAR or the cases, and may have given that advice in bad faith. Indeed, it is the bad faith element of these actions that converts a government contract action from one that may be incorrect or correct, into a breach of contract because the government acts to ''destroy the reasonable expectations of the contractor regarding the fruits of the contract.'' *Centex Corp. v. United States,* 395 F.3d 1283 (Fed.Cir. 2005).

Bait and switch by the government. In *Teresa A Mcvicker*, P.C., ASBCA No. 57487, 2012 Westlaw 3645366, Aug. 16, 2012, within two days of award of a contract, the COR of the contract for physician assistants and technicians at Walter Reed Hospital hired away the two Physician Assistants of the contractor, in order that those two individuals would perform the services as federal employees, in-house. The government never advised the contractor of its intentions when it negotiated the contract, and although this was a *de facto* partial termination, it was implemented by the COR without an authorized contract modification or partial termination. Only after the contractor filed a claim for breach of contract did the government issue partial termination, ratifying the COR's actions. The Board called this a ''bait and switch type of government behavior'' that demonstrated a breach of the duty of good faith and fair dealing.

''Think of the CO as God and the COR as Jesus Christ.'' In *Libertatia Assoc., Inc. v. United States,* 46 Fed. Cl. 702 (2000) the COR demonstrated personal animosity and greed toward the contractor. The COR told many of the contractor's employees that they should think of him as ''Jesus Christ'' and the CO as ''God''. The COR used intimidation and coercion in administering the contract. The COR expressed to other contractors that Libertatia would not be able to complete the job, and the COR often expressed personal animosity for the officers of the contractor. The COR told the president of the Contractor that he would ''break them.'' The COR expressed to numerous personnel his desire to cause the contractor's employees to work overtime because it benefitted him financially (more overtime). The COR threatened to run the contractor off the Army base, repeatedly expressed contempt for the contractor and its personnel and expressed pleasure in terminating the contractor for default. The court found the termination to be improper, and based on bad faith.

A prolonged campaign designed to harm the contractor and conduct far below the standard expected. In *North Star Alaska Housing Corp. v. United States, 76 Fed. Cl 158 (2007),* the record was replete with statements made by key government officials exhibiting animus toward North Star. The Chief of Housing for Alaska (a COR) repeatedly made such statements. The government repeatedly forced North Star to pay for items which should have been at the Government's expense. (''The record provides a virtual rancid cornucopia of electronic messages and other communications evidencing a specific intent by key government officials to injure North Star.'') Breaches of the lease were found when the government took steps designed to unduly complicate and increase the cost of North Star's performance, stockpiling units specifically to cause North Star difficulty, failure to provides required and adequate notice, improper use of extra-contractual inspections, and numerous actions designed to otherwise increase North Star's costs. The actions that government officials took far exceeded strict insistence on contract compliance and ''took the form of a prolonged campaign designed to harm North Star. . .'' The court concluded that the conduct of ''governmental actors who dealt with North Star fell far below the standard of good faith that is integral to the federal procurement system.'' The court awarded damages.

Denying meritorious claims so the agency would have greater leverage in other claims; deplorable conduct. In *Moreland Corporation v. United States,* 76 Fed. Cl. 268 (2007), the Government breached the covenant of good faith and fair dealing in a building lease where the CO denied meritorious claims of the lessor on advice of agency counsel so that the agency would have greater leverage in negotiating other claims. The agency also attempted to impose upon lessor the obligation to perform a structural loading study to determine whether agency could safely install an auxiliary heating, ventilating and air conditioning system on roof of the facility. The Inspector general had specifically

recommended that the agency be responsible for this study. The court called the conduct of certain agency officials ''deplorable by any measure''

Cardinal change in direct violation of the contract, and depriving a contractor of its contractual rights. In *Keeter Trading Co., Inc.,,* 85 Fed. Cl. 613 (2009) (damages) as well as *Keeter Trading Co. Inc.,,* 79 Fed. Cl. 243 (2007) (entitlement) the Postal Service violated the government's duty of good faith and fair dealing. The government breached the contract by making a cardinal change to mailboxes to the contractor's route, in direct violation of the specific terms of the contract. The cardinal change was orchestrated by the Administrative Officer (a Postmaster), and this set in motion the actions that deprived the contractor of its contractual rights and resulted in a wrongful default termination. Two Contract specialists as well as the contracting officer disregarded clear language of the contract and relied on the same Postmaster (the Administrative Official) to deprive the contractor of his rights. The Postal Service ignored the contractor's complaints and engaged in a concerted effort to force the contractor to acquiesce in its improper demands. The actions of the postal officials ''far exceeded strict insistence on contract compliance and instead evolved into a plan designed to get rid of plaintiff when plaintiff refused to comply with the Postal Service's wishes.''

In these five cases, the government's actions and statements to the contractor, for whatever reason, did not comply with the FAR, and did not comport with the covenant of good faith and fair dealing. Many times the motives of the government officials were unclear, just as in most of the pre-award and contract administration situations that were discussed above. The only recourse a contractor has in situations such as this is to refuse to perform, submit a claim explaining why, and then litigate that claim. Alternatively, if the contract has been defaulted, to contest the default termination.

Guidelines for Contractors.

Pre-award

(1) Always read the entire solicitation, including all clauses incorporated by reference.

(2) Always ask the contracting officers any questions in writing about any ambiguities or unclear parts of the solicitation.

(3) If the contracting officer won't answer your question, or provides a non-answer, submit a letter or email to him or her outlining the problem and requesting a correction (an ''informal agency protest'').

(4) Only ask a contract specialist where something can be found in a solicitation; do not ask about anything that involves a material aspect of a solicitation.

(5) Always accept or acknowledge in writing a government purchase order issued in response to your company's quote (if you want the business!)

(6) Should you need to speak to a contracting officer about a DOD solicitation, contact the person listed on the face of the solicitation and request the contracting officer's name, address, email address and phone number. Do not conduct business or ask questions of the contact person listed in the solicitation, since he or she is most likely a contract specialist.

During Performance

(7) If any government official other than a contracting officer asks you to perform something that is not in your contract, or that is contrary to your contract, immediately notify your contracting officer and request a written modification from him or her. Perform these extra-contractual actions only under written protest to the contracting officer, and advise that they are a potential breach of contract that may cause you to stop performance.

(8) If any official (including a contracting officer) seeks to ''trade'' or ''swap'' different items or different actions with those in your contract, write to the contracting officer and insist that this be accomplished through a written modification. State that without such a modification, the contractor will not perform these swaps.

(9) Always ask any government official who directs you to do something about their actual authority as a contracting officer. FAR 1.602-1(a) states that information on the contracting officer's authority ''shall be readily available to the public and agency personnel.'' If the person is unwilling to provide you with his or her authority, they probably have no authority, and should be ignored by the contractor.

Government Bad Faith or Violation of the Covenant of Fair Dealing

(10) If any government official acts improperly, engages in ''sharp practices'' or exhibits an animus towards you or your company, immediately notify in writing the contracting officer or his superior, if the offender is the contracting officer.

(11) If the government does not cease the improper acts which violate the covenant of good faith and fair dealing, advise the contracting officer in writing that the government has breached the contract, and that the contractor will stop performance in 10 days if the government does not cure the breach.

IV. Conclusion. It's not clear why certain government officials who lack authority give advice or direction to contractors when they know or should know that they have no authority to give that advice or direction. An examination of the evidence in the cases after the fact often shows that contractors rely on such information, primarily because they believe the government is giving them a straightforward and honest answer, even if that answer is not correct according to the FAR or the terms of the solicitation or contract.

During performance, contractors and contracting officials frequently engage in ''working disputes'' about day to day issues involving the contract, its requirements and the interpretation thereof. The only way for contractors to protect themselves is to insist that the government fully comply with the FAR, and that it turn square corners. (''Men must turn square corners when they deal with the Government.'' *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141, 143 (1920). All matters relating to a contract, particularly those involving interpretation or change orders, must be discussed with the contracting officer, and conclusions placed in writing. If a contractor is given direction by someone like a contract specialist, contracting officer's representative or a Program Manager, and such direction is inconsistent with the contract, the contractor should immediately email (or fax) the CO, and request a definite interpretation before the contractor proceeds as directed.

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