

Clean Energy Contracting with the Government: A New Era for Government Funding

Kenneth B. Weckstein, Esq., and Michael D. Maloney, Esq., Brown Rudnick LLP

The ramifications of the Gulf oil spill on the Gulf of Mexico and surrounding ecosystems will be profound. Already, the economic impact on the Gulf Coast region has been severe. And images of oil-soaked pelicans and water fowl are stark reminders of the tragic consequences that can result when things go wrong in our modern world. The oil spill has had other impacts at the policy level—the administration's moratorium on deep water drilling, for example—that will be felt across the U.S.

For the sustainable energy community, this tragedy has created a new focus on freeing up funding to support green alternatives—particularly from federal government sources. Federal government spending on clean energy research and development (R&D) was at the forefront recently when Microsoft founder Bill Gates and General Electric's Jeff Immelt met with President Obama to discuss the need to significantly increase federal investment in clean energy R&D. Gates and Immelt pointed out that the U.S. spends more on potato chips annually than it does on clean energy R&D. If Gates and Immelt have their way, federal investment in clean energy R&D will triple to \$16 billion per year.¹

Where will the money come from and how will it be accessed? The avenues already exist. These sources include federal government contracts and grants. But companies dealing with the federal government and competing for these funding opportunities confront unique issues and challenges that do not exist in the private funding context.

The first challenge is finding the opportunity. A good starting point is the federal government's contracting web portal FedBizOpps at www.fbo.gov. Other potential online sources include: the U.S. Department of Energy's Office of Science, Grants and Contracts site, www.er.doe.gov/grants; the Department of Energy's ARPA-E (Advanced Research Projects Agency - Energy) site, www.arpa-e.energy.gov; the federal government's Recovery Act site, www.recovery.gov; and the federal government's grants web portal, www.grant.gov. These sites and others include

© 2010 Brown Rudnick LLP. Originally published by Bloomberg Finance L.P. in the Vol. 3, No. 8 edition of the Bloomberg Law Reports—Sustainable Energy. Bloomberg Law Reports[®] is a registered trademark and service mark of Bloomberg Finance L.P.

The discussions set forth in this report are for informational purposes only. They do not take into account the qualifications, exceptions and other considerations that may be relevant to particular situations. These discussions should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Any tax information contained in this report is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. The opinions expressed are those of the author. Bloomberg Finance L.P. and its affiliated entities do not take responsibility for the content contained in this report and do not make any representation or warranty as to its completeness or accuracy.

announcements for federal government contract and grant opportunities, including many specifically pertaining to sustainable energy programs.

After you've found the money, you need to know some things about dealing with the government.

You're a Government Contractor: The Ten Things You Need to Know

1. All statements you make to the Government must be true.

The False Statements Act subjects to a fine or imprisonment anyone who "makes any materially false, fictitious, or fraudulent statement or representation" to the government.² The lesson is simple—tell the truth in your proposals, responses, and all your dealings with the government.

2. You can't take your customer to lunch.

The Federal Acquisition Regulation (FAR) prohibits giving any gift or gratuity to your government customers. It says:

The right of the Contractor to proceed may be terminated by written notice if . . . the agency head or a designee determines that the Contractor, its agent, or another representative —

(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.³

Penalties for violations can be severe. Not only could you lose your contract, the government also could collect as damages ten times the cost of the gratuity and the person responsible for the gratuity could go to jail.⁴

Your proposal will stand and be judged on its merits; the rules ensure that your competitors' will as well.

3. When you submit cost and pricing data, it must be accurate, complete and current.

The Truth in Negotiations Act contains requirements pertaining to contractors' and offerors' prices. The statute requires you to "certify that . . . the cost or pricing data submitted are accurate, complete, and current,"⁵ and require that the contract price be adjusted "to exclude any significant amount by which it may be determined by the head of the executive agency that such price was increased because the contractor . . . submitted defective cost or pricing data."⁶

Extra care must be taken when preparing and submitting proposals to the federal government. Cost and pricing data is one area where mistakes have been made. It

also is an area where the government has caught some criminals. When a contractor submits defective cost or pricing data, other provisions with other implications are triggered. One is the False Claims Act.

4. Claims and invoices must be accurate and fully supported.

The False Claims Act subjects contractors to treble damage liability and additional civil monetary penalties for presenting to government officials "a false or fraudulent claim for payment or approval."⁷ When federal government contractors submit claims for payments to the government that are false or fraudulent, contractors find themselves in lots of trouble. That includes claims based on defective contract pricing. Good business practices—and diligent invoicing and accounting practices and policies—can keep government contractors out of trouble.

5. The Federal Acquisition Regulation and mandatory contract clauses apply to your contract/grant.

Under the "Christian Doctrine," if the government omits a clause for your contract that implements an important government policy, the clause may apply anyway.⁸

The government may terminate your contract at any time for any reason, except in bad faith, under a "Termination for Convenience" clause. If that happens, you will have the right to be paid certain costs.⁹

The government usually has the unilateral right to make changes in your work under the contract and can add or delete work from—and even change the schedule in—your contract. Under those circumstances, you can submit claims for additional compensation from the government.¹⁰

6. When you hire former government employees, their work for you may be limited.

The U.S. Code restricts what work certain former officers, employees, and elected officials of the executive and legislative branch can do in the private sector.¹¹ There is a "lifetime restriction" on former officials for matters in which the official "participated personally."¹² Certain officials are restricted for two years from working on matters "actually pending under his or her official responsibility" while with the government,¹³ and for one year officials may not appear before his or her former agency.¹⁴

7. The government may get rights in your data and inventions, but you can negotiate limits and protections.

Federal government contracts and grants often provide that the government will obtain rights to inventions and other intellectual property created using government funds.¹⁵ After all, the government paid for it, right? Of course, if the government gets rights in your data and inventions, the government may let others use or access that intellectual property, thus depleting its value to you. The government recognizes this concern and may be willing to negotiate less onerous terms. Often contractors

can negotiate limits on what the government gets and what the government can do with the data.

8. When you lose a competition for a contract, you have the legal right to challenge the award decision.

The FAR contains provisions that allow an interested party (one who loses a contract competition) to file a protest against the award or proposed award of the contract.¹⁶ If you lose a federal Government contract competition, you have rights. You have the right to a "debriefing," where the Government will tell you why your proposal was not selected.¹⁷ This "debriefing" helps you submit better proposals in the future, but it also helps you make decisions about whether you want to challenge the award to your competition. The FAR calls such challenges "protests." If you act quickly and protest in a timely fashion, you can stop the award until the protest has been fully and finally decided.¹⁸ Of course, when you win, the competition has the same right to challenge the award to you.

9. The government can audit you.

Under certain types of contracts, the government retains the right to audit you and to inspect your books and records and your operations and facilities.¹⁹ You also may be required to maintain your books and records for a designated period of time after your contract is terminated, and the government may retain the right to audit your books and records after termination.

10. Your employees have certain rights that they did not have when you were just a private commercial enterprise.

Many federal government contracts require payment of wages and fringe benefits at prevailing rates. Violations of those provisions could subject you to liability for damages and could cause your contract to be terminated. You also could be "debarred" and prevented from competing for and winning other government contracts.²⁰ In addition, federal whistleblower protections may be implicated when you become a federal government contractor. Many federal laws protect whistleblowers who report false claims, product defects, and violations of environmental laws and labor laws, to name a few.²¹

Conclusion

Although these (and other) characteristics of federal government contracting may seem unduly intrusive or restrictive, the risks are manageable and there is much upside potential. And, if Bill Gates and Jeff Immelt have their way and we start paying more annually for clean energy R&D than we do for potato chips, the rewards for alternative energy companies ready to partner with the government could be even more attractive.

Kenneth B. Weckstein is a Partner in Brown Rudnick's Government Contracts & Litigation Group. He represents clients on matters related to government contracts, complex civil litigation and trade secrets law. Mr. Weckstein has substantial

experience in a wide range of complex civil litigations (jury and bench trials). He has successfully litigated bid protests before the Government Accountability Office and courts and contract disputes before BCAs and courts. He has represented contractors in IG and criminal investigations and handled litigation involving the protection of trade secrets. He can be reached at +1.202.536.1750 or kweckstein@brownrudnick.com.

Michael D. Maloney is a member of Brown Rudnick's Government Contracts & Litigation Group. He represents clients in all aspects of litigation in federal and state courts as well as administrative agencies and various arbitration tribunals. Mr. Maloney has significant experience with general trial, commercial and complex litigation matters and has successfully litigated bid protests and contract disputes before the Government Accountability Office and courts. He has represented clients in litigation involving the protection of trade secrets and intellectual property rights, construction, FOIA, landlord/tenant disputes, wage and hour and federal employee health care law. He can be reached at +1.202.536.1754 or mmaloney@brownrudnick.com.

¹ See Mark Drajem and Jim Snyder, *Immelt, Gates Push to Boost Clean Energy Spending*, Bloomberg News (June 10, 2010).

² 18 U.S.C. § 1001(a)(1).

³ 48 C.F.R. § 52.203-3 (hereinafter Title 48 of the C.F.R. will be referred to as FAR).

⁴ See *id.* See also 41 U.S.C. § 423.

⁵ 10 U.S.C. § 2306a(a)(2).

⁶ 41 U.S.C. § 254b(e)(1)(A).

⁷ 31 U.S.C. § 3729(a)(1)(A).

⁸ See *G.L. Christian and Associates v. U.S.*, 312 F.2d 418 (Ct.Cl. 1963).

⁹ See FAR § 49.201 *et seq.*

¹⁰ See FAR § 52.243-1(b).

¹¹ See 18 U.S.C. § 207.

¹² *Id.* § 207(a)(1)(B).

¹³ *Id.* § 207(a)(2)(B).

¹⁴ See *id.* § 207(b).

¹⁵ See FAR Part 27.

¹⁶ See generally FAR § 33.101 *et seq.*

¹⁷ See FAR § 15.506.

¹⁸ See FAR § 33.104(c)(1).

¹⁹ See FAR § 52.215-2.

²⁰ See 41 U.S.C. § 351.

²¹ See *e.g.*, 31 U.S.C. 3729 *et seq.*; 15 U.S.C. § 2087; 42 U.S.C. § 7622; 15 U.S.C. § 2622; 29 U.S.C. § 660.