

Ellin & Tucker, Chartered



Contractors' Perspective

SPRING 2011



Prevailing at procurement

Tips for succeeding in federal government contracting

Are you mishandling your independent contractors?

The IRS is watching more closely than ever

Get your employees involved in accident prevention

PLUS!

Construction Success Story

Competitive contractor looks to labor burden costs

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Prevailing at procurement

Tips for succeeding in federal government contracting

It's no secret that federal procurement is increasing. The passage of the American Recovery and Reinvestment Act of 2009 allocated \$787 billion for infrastructure (and other) projects, according to the government's Recovery.gov website.

Winning bidders of federal jobs typically enjoy substantive contracts, steady work and assured compensation, making the arduous procurement process worthwhile. So how do you get in on the action? Read on.

Get a feel for it

First, review what contracts have been awarded in your region and the specifics of the winning bids. Sites such as FedSpending.org and USAspending.gov will help you determine whether federal construction opportunities would be attractive — especially considering the time and effort it takes to prepare a bid.

Different federal agencies buy different services, so the next step is determining which

agency is most likely to need your construction company's work. An SBA Procurement Center representative can be a big help in this regard. Resources are available at your local SBA office or by visiting SBA.gov.

Although websites provide valuable information about how to work within the system, face-to-face networking is also a good idea. And this is particularly true for contractors who are new to federal work. Attending networking and federal contracting events can generate valuable insights on winning a bid and carrying out a job smoothly.

(For some ideas of where to find networking opportunities, as well as other pertinent information, see "3 networking resources for federal contracting" on page 3.)

Register early, update often

To formally submit a bid for a federal contract, you'll first need to register with the Central Contractor Registration (CCR). This is the federal government's primary registrant database, which you must be in to do business with — and get paid by — the federal government.

The registration process requires a nine-digit Dun & Bradstreet (D-U-N-S) number, which you can obtain at <http://fedgov.dnb.com/webform/index.jsp>. You'll also need a five-digit Commercial and Government Entity (CAGE) Code, which is available at <https://www.bpn.gov/ccr/default.aspx>.

Federal procurement laws mandate that contractors renew and update their CCR profiles at least once annually. You also must complete an Online Representations and Certifications Application (ORCA) at <https://orca.bpn.gov>.

The ORCA system centralizes the storage and collection of contractors' representations and certifications in an online system, eliminating the need for the paper copies that were once submitted with each bid. You're also required to update your ORCA every year.



3 networking resources for federal contracting

Do you want to log some valuable networking time with other contractors who have experienced the joys and travails of government contracting? A variety of organizations can hook you up with contacts and other information to make it more likely that you'll succeed in the public sector. Three examples are:

1. Business Matchmaking Online Network (BMM; *businessmatchmaking.com*). From procurement workshops to online training, BMM has generated more than 75,000 seller-buyer meetings, which have resulted in billions of dollars' worth of contracts. And many of these jobs have fallen within the government realm.

2. The Association of Procurement Technical Assistance Centers (*aptac-us.org*). This nonprofit can provide technical assistance in submitting your Invitation for Bid. (See main article.) It can also put you in touch with other construction business owners who are working through the process. You might develop relationships that can help you win future bids.

3. Give Me 5 (*giveme5.com*). Sponsored by Women Impacting Public Policy and American Express OPEN, this partnership program serves women business owners. Its intent is to teach participants how to apply for and secure federal procurement opportunities.

Once you've completed the required registrations, you can start looking for projects to bid on. Discover what Invitations for Bids (IFBs) are available through sources such as <https://www.fbo.gov>. The U.S. General Services Administration ([gsa.gov](https://www.gsa.gov)) publishes notifications of the largest federal contracts as well. Keep in mind that, when a federal agency issues an IFB, it's seeking a clearly defined service at the best possible price.

Be responsible

Federal contracts can be awarded only to "responsible" bidders. To be considered responsible, you must meet various criteria, such as having:

- Adequate financial resources to perform the contract,
- A satisfactory performance record (though a lack of relevant experience won't automatically disqualify you),
- An acceptable record of business ethics,
- Appropriate operational controls in place, and
- The necessary equipment to complete the job (or the capacity to access it).

Be sure you have proper bonding lines in place as well. Some agencies even require audited financial statements, which typically allow more

contract work to be awarded than if you provide only reviewed financial statements.

When a contract is awarded, the lowest bidder typically wins. But be careful: If your company comes in as the low bidder and is then found "nonresponsible," it could harm your reputation — both in the public *and* private sectors.

Be sure you have proper bonding lines in place.

Construction businesses with special certifications may have a better chance, because a certain percentage of federal contracts must go to such companies. Examples include businesses owned by women or veterans, located in Historically Underutilized Business (HUB) zones or certified in the SBA's 8(a) program. Of course, simply qualifying under one of these categories doesn't automatically mean you'll win a bid.

Take a look

Make no mistake, bidding and executing a federal contract will call for some hard work. But with the construction environment remaining ultracompetitive in many regions, few contractors can afford *not* to take a look at the opportunities Uncle Sam is offering up. ■

Are you mishandling your independent contractors?

The IRS is watching more closely than ever

For many years now, the IRS has been monitoring, in some cases challenging, employers' handling of independent contractors. At issue: the agency's contention that some companies are misclassifying employees as independent contractors.

The IRS has gone as far as to undertake a formal national research project to study independent contractor use as well as fringe benefits and various payroll issues. And construction companies — with their various subcontractor and project-specific, specialist relationships — are particularly in danger of running into classification troubles.



Paying the taxes

One of the major differences between a conventional employee and an independent contractor comes down to taxes.

Payments you remit to independent contractors aren't subject to withholding of payroll or income taxes, and you don't have to pay the employer share of FICA or Medicare taxes either. You also aren't subject to unemployment or workers' compensation insurance requirements.

What is prompting all of the IRS attention to businesses' use of independent contractors? Worker misclassification diminishes federal income revenue by billions of dollars annually, according to the IRS. This is likely because, even though workers classified as independent contractors are subject to self-employment taxes, they tend to underreport their income and often don't pay into unemployment and workers' compensation programs. Naturally, states also lose tax dollars — and many are taking action.

Making the distinction

When scrutinizing a company's independent contractor arrangements, the IRS typically looks at three general categories.

The first one is behavioral control: When, where and how a job gets done. If you direct the work — meaning you require the individual to perform the work on your job site or at your office, at a set time *and* according to your processes or on your equipment — that person is more likely to be classified as an employee by the IRS. If you define only the outcome of the work and the worker is free to achieve that outcome as he or she sees fit, the individual probably is an independent contractor.

The second category is financial control. Here the IRS examines how much an individual controls financial aspects of his or her work. For example, if a worker has ongoing expenses that aren't reimbursable (such as investments in facilities, tools or equipment), can market his or her services to others, and is in a position to experience a profit or loss on a particular project, the person likely is an independent contractor.

Worker misclassification diminishes federal income revenue by billions of dollars annually, according to the IRS.

The third and final category covers the relationship between the parties. This category considers how the business relationship is structured. Independent contractor arrangements typically include a contract for a particular timeframe and a specific outcome for a set fee. Conversely, employees generally handle a broader array of duties and may be paid benefits in addition to wages or salary.

Correcting the mistake

If you fear you've misclassified an employee as an independent contractor, don't panic. Internal Revenue Code Section 3509 may allow you to reduce or escape liability by correcting the mistake and submitting proper documentation to the IRS.

You might also look to Sec. 530 of the Revenue Act of 1978 for relief of employment tax liability for worker misclassification. Under it, you may escape penalties if you can show you had a reasonable basis for classifying the worker as you did, treated the worker and all similar workers as independent contractors and filed Form 1099-MISC for the worker.

Remaining vigilant

You may have grown comfortable with your handling of subcontractors or other short-term specialists who work on your job sites or in your office. But you've got to remain vigilant: A long-term project or a key technicality in the arrangement could draw IRS attention.

If you're concerned some of your independent contractors could be reclassified as employees — or you're not sure whether a new worker qualifies as an independent contractor or should be treated as an employee — your tax advisor can help you assess the situation. ■

Get your employees involved in accident prevention

Accidents and injuries lead not only to detrimental medical and morale consequences, but also to financial and, often, legal ones. Naturally, there are a variety of ways to encourage safety. But few of them are likely to be effective without one key ingredient: the participation of your employees.

Train and supervise

Preventing accidents begins with knowledge. So, first and foremost, you need to provide safety training to your workers. One way to incentivize participants to view these sessions as more than just time off from the job site is to award bonuses to those who reach measurable safety goals.

For example, designated teams could receive a free lunch or small amount of cash for going a specified number of days accident-free. You may be able to further engage them by inviting suggestions about how to make job sites safer.

Instruct your foremen or project managers to perform routine walkthroughs to see whether workers are following safety guidelines.

When a project gets underway, hold an initial safety meeting to address the specific dangers of that location. Thereafter, schedule additional “safety update” meetings or, at minimum, do so if an accident occurs — or almost occurs.

As the job goes on, instruct your foremen or project managers to perform routine walkthroughs to see whether workers are following safety guidelines. (If financially feasible, you may even hire a dedicated safety manager to conduct walkthroughs and otherwise oversee your program.)

Is the job site relatively clean and orderly in terms of construction waste and equipment/materials storage? Is everyone wearing protective gear? Require supervisors to shut down work if workers don't comply with the safety program.

If an accident does occur, require employees to report it immediately. A failure or hesitation to report mishaps can be one downside to offering safety-related bonuses, so levy stiff consequences on anyone who doesn't follow the immediate-notification rule.

Don't forget subs

If you're a general contractor, subcontractors play key roles in your projects and can do just as much as your own workers in preventing accidents. Be sure subcontractors are well aware, on arrival, of your safety policies and procedures.

In addition, insert clauses into your subcontracts requiring subs to comply with your safety program. Along with safeguarding your construction business against financial loss, such clauses give you enforcement leverage — especially if subs know they'll be fined for violations.

Maximize your efforts

Few, if any, construction companies are able to avoid accidents entirely. But you can maximize your efforts to prevent them and, when they do occur, manage their outcomes for the best possible results. A big part of winning this battle is making sure your employees are just as passionate and committed to safety as you are. ■



Construction Success Story

Competitive contractor looks to labor burden costs

In a slowly recovering but still challenging local economy, a midsize excavation specialist wanted to bid on every job that came along. But he knew the dangers of overcommitting his company.

When a request for proposal (RFP) for a potentially lucrative job came along, he wanted some input on where he should focus his attention to stay within his means but still be competitive. So he turned to his financial advisor for guidance.

Beyond compensation

The first thing the advisor suggested was to look at the labor burden cost per production hour. Putting a hard number to this concept could help the contractor determine his true costs and prepare a feasible bid.



Calculating the labor burden cost per production hour would entail applying the following formula:

$$\frac{\text{The total cost of the employee}}{\text{number of actual production hours}} = \text{Employee labor burden cost per production hour}$$

So, the advisor continued, say you have an employee who earns \$18 per hour for \$37,440 annually. And say indirect costs include \$3,200 in payroll taxes, \$3,700 in workers' compensation, \$4,500 in health insurance, \$1,100 in retirement benefits, \$3,500 for company vehicle use, \$1,000 for cell phone costs and \$500 in training fees. These indirect expenses total \$17,500, making the annual cost of this \$18-an-hour employee \$54,940.

Next, the advisor said, it's necessary to determine the actual number of production hours. To do this, you first multiply 52 weeks per year by 40, the number of hours in his workweek, resulting in 2,080 annual hours. Then you subtract any unproductive time. After factoring holidays, vacation days, sick time and training, say the worker's estimated average labor time is cut by 300 hours annually, leaving him available for approximately 1,780 hours of production work.

The advisor went on to explain how dividing the total cost of the employee (\$54,940) by actual production hours (1,780) shows that the employee actually costs the contractor \$30.87 per production hour — nearly 72% more than his \$18 per hour gross hourly labor rate.

Closer attention

After calculating the labor burden cost per production hour for all of his employees, the contractor found that his workers were typically costing him 50% to 150% above their gross hourly labor rates. Clearly, he agreed, this issue warranted closer attention. His advisor suggested the contractor review his labor burden cost per production hour every six months or whenever other pertinent changes occur (such as insurance cost fluctuations).

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For additional information regarding the services listed above, or the ideas presented in this newsletter, please contact Frank Brodnax, Todd Feuerman, Kristin King, or Mike Strauss. We would welcome the opportunity to help you build your success.

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