

What an EU Practitioner Needs to Know about U.S. Government Contracting

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Question comes to the fore if EU company (1) seeks to establish a presence in US to bid on government contracts; (2) acquires a US company; or (3) divests a business unit through sale to US entity.

Public contracts are awarded by federal government and by states and municipalities.

- Federal government contracts are highly regulated by statutes, Executive Orders, and the Federal Acquisition Regulation (FAR), and agency supplements to the FAR.
- State and local contracts are governed by state law.
- In 1979, the House of Delegates of the American Bar Association adopted recommendations of the Section of Public Contract Law, Section of State and Local Government Law, and other organizations, and approved the ABA Model Procurement Code for State and Local Governments. The Code has been enacted in full by sixteen states; in part, by several more; and by thousands of local jurisdictions across the United States.

Commercial contracting

- The Uniform Commercial Code, first published in 1952, is designed to harmonize the laws of sales and other commercial transactions among the states.
- Construction and Design: American Institute of Architects. AIS Contract Documents consist of nearly 200 forms and contracts that define the relationships and terms involved in design and construction projects.
- International Construction: Fédération Internationale Des Ingénieurs-Conseils ("FIDIC") is an international federation of consulting engineers, formed in 1913 by France, Belgium and Switzerland, and joined by the United Kingdom in 1949. Headquartered in Switzerland with membership among more than 60 countries. FIDIC produces standard form contracts for the construction and engineering industry.

Risks of Contracting with the United States Government

I. Gateway Risks

Domestic Preferences

With some exceptions, the Buy American Act requires the U.S. government to acquire certain materials from U.S. sources. The Trade Agreements Act makes an exception for procurements from "designated countries."

Committee on Foreign Investment in the United States ("CFIUS")

Inter-agency committee consisting of nine cabinet-level Executive Branch agencies and offices, and other non-voting offices with national security responsibilities. Reviews certain foreign investment transactions ("covered transactions") and advises the President on matters of national security arising from foreign investments.

"Covered transaction": proposed or pending "transaction" with any "foreign person" that could result in "control" of a "US Business" by a foreign person.

In a merger, acquisition, or other investment involving a foreign interest, parties determine whether CFIUS review is warranted or likely.

As advised by CFIUS, the President may "suspend or prohibit any covered transaction when, in the President's judgment, there is credible evidence to believe that the foreign person exercising control over a US business might take action that threatens to impair the national security[.]"

Failure to file and receive CFIUS approval can subject a transaction to risk if national security issues are involved. Once CFIUS approves a transaction, it will not be subject to further government review unless false, incomplete, or misleading information is provided to the Committee.

Areas of CFIUS interest include: US companies (a) with contracts implicating national security concerns; (b) that are performing or have performed classified contracts; (c) that deal in critical technologies; (d) whose transactions could result in foreign control over critical infrastructure; or (e) with offices or facilities in locations near sensitive government facilities (e.g., military bases, national laboratories, etc.).

Foreign Ownership, Control or Influence ("FOCI")

Policy of U.S. Government to allow foreign investment consistent with national security interest of United States. Program is administered by Defense Counterintelligence and Security Agency.

National Industrial Security Program Operating Manual ("NISPOM") covers government-industrial security related matters.

FOCI exists when foreign interest has power, direct or indirect, whether or not exercised, and whether or not exercisable, to direct or decide matters affecting the management or operations of a company in a manner that may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.

Factors in determining whether a company is under FOCI:

- Record of economic and government espionage against U.S. targets.
- Record of enforcement or engagement in unauthorized technology transfer.
- The type and sensitivity of the information that shall be accessed.
- The source, nature, and extent of FOCI.
- Record of compliance with pertinent U.S. laws, regulations and contracts.
- The nature of any bilateral and multilateral security and information exchange agreements that may pertain.
- Ownership or control, in whole or in part, by a foreign government.

These factors determine whether a company may receive a Facility Security Clearance ("FCL"), making the company eligible for access to classified information.

Key Management Personnel must be processed for a personnel security clearance. Non-US citizens are ineligible for a personnel security clearance.

Officers and directors of foreign parent organization or its affiliates cannot serve as officer or director of cleared company.

2. Legal Risks

Contract Award Challenges

The United States has a robust procedure for bid protests, based on alleged violations of statute, regulation, the terms of the solicitation, or that the agency's decision was unreasonable or irrational.

Authority of Government Officials

The government may act only through duly appointed contracting officers within the scope of their authority and the limits of available funding. The contractor is at risk if these requirements are not met. The concepts of "implied authority" or "apparent authority" do not apply to the government.

Presumption of Good Faith

Government contracting officials enjoy a presumption of good faith. Contractors have an exceedingly high burden of proving the absence of good faith.

The Sovereign Act Doctrine

Contractors cannot recover for breach of contract when the government's action is "public and general" and not targeted toward a particular contract.

False Claims Act

The False Claims Act permits "whistleblower" suits that give the claimant a percentage of potential recovery. Contractor certifications, submittals, and invoices are favored targets for these lawsuits, many of which are filed by former employees.

3. Contractual Risks

Strict Compliance

The government is entitled to "strict compliance" with technical requirements. The contractor cannot expect to rely on "substantial compliance." Failure can subject contractor to charge of product substitution.

Self-Governance and Self-Reporting

FAR contract clause requires contractors to have a Code of Business Ethics and Conduct, a business ethics awareness and compliance program and an internal control system, to train employees, and to disclose certain violations of law. FAR 52.203-13.

Suspension and Debarment

Contractors can lose the ability to bid on government contracts for violation of statutes, contract requirements, or for "[c]ommission of any offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor." FAR 9-406-2(a)(5); FAR 9.407-2(a)(9).

Third Party Risk Management

Contractors are responsible to police their supply chain vendors for risks that include bribery, kickbacks, data breaches, and other violations of law.

Reimbursable Costs

FAR Part 31 "Cost Principles" consists of regulations that govern whether incurred costs are reimbursable based on (a) reasonableness; (b) allocability; (c) application of generally accepted accounting principles; (d) contract terms; and (e) statutory and regulatory limitations.

Cost Accounting Standards

Contractors awarded certain contracts above a specified dollar threshold must ensure their cost accounting system meets standards for uniformity and consistency in measuring, assigning, and allocating costs.

Cost or Pricing Data

Unless an exemption applies, such as "commercial item" or "adequate price competition", the Truth in Negotiations Act requires contractors to submit cost or pricing data and certify that it is accurate, current and complete, before the award of a covered prime contract or contract modification. Violations can lead to price reductions, penalties, and fraud investigations.

Counterfeit Parts

Contractors must maintain a risk-based detection and avoidance system to uncover counterfeit parts in the supply chain. Failure may result in disapproval of purchasing system, withholding of payments, and disallowance of costs related to counterfeit parts, including cost of re-work or corrective actions.

Trafficking in Persons

Contract clauses require implementation of trafficking compliance plans and annual certifications of the absence of trafficking activities.

Service Contract Act

Imposes requirements for payment of determined wages and fringe benefits to service employees. Noncompliance can result in penalties including debarment by the Department of Labor.

Davis Bacon Act

Counterpart of Service Contract Act applicable to construction contracts.

Government Audit Rights

The government has broad rights to audit contractor books and records, most typically: (a) pre-award audits of proposed price or estimated costs; (b) pre-award surveys of the contractor's capability to perform the contract and the contractor's "present responsibility"; (c) reviews of internal controls including purchasing and subcontracting systems; (d) incurred cost audits before final payment and closeout; and (e) defective pricing audits.

Cybersecurity

Clauses impose security controls in the form of basic safeguarding requirements, procedures to protect covered contractor information systems, and reporting requirements in the event of a cyber incident.

Contract Changes

The government has the unilateral right to direct changes within the general scope of the contract. The contractor must proceed with the work as changed, but is entitled to an "equitable adjustment" for increased costs and additional time occasioned by the change.

Termination for Convenience

The government has a broad right to terminate contracts for its own convenience. The contractor is generally entitled to recover costs plus profit for work performed, but cannot recover anticipated profit on the terminated portion of the contract.

Termination for Default

The government may terminate a contractor for default for failure to make progress or to deliver in strict compliance with contract terms.

Socio-Economic Policies

Federal government contracts contain clauses that implement social, economic, and environmental policy. Contractors can be subject to sanctions, including termination for default and debarment, for failure to comply. The contractor's failure to "flow down" required clauses to subcontractors also exposes the contractor to sanctions.

Rights in Technical Data and Computer Software

The government often seeks to obtain the contractor's technical data and rights in the data. Contractors must understand the limits of government rights and how to protect their data.

Warranties

Contractors are required to provide warranties of services and warranties of systems and equipment. Contractors must in turn obtain warranties for subcontracted items or services. After the warranty period, the government may assert a claim for "latent defects."

Conflicts of Interest

There are two categories of conflicts of interest: (a) personal or individual conflicts of interest that involve improper conduct with government officials, and (b) organizational conflicts of interest that can restrict the contractor's ability to enter into certain types of contracts.

Arms Export Control Act/International Traffic in Arms Regulation

Controls the export and import of defense related articles and services on the United States Munitions List. Violations cover products as well as associated technical data.

Subcontracting Procedures

Includes, in certain circumstances, advance consent to subcontracts and review of contractor's purchasing system.