

APTAC Body of Knowledge Competency Guide

D. Specialized Knowledge

D.4 Construction Contracting

Description

Typified by family-owned small businesses, Construction is an extremely competitive and open industry. Because of easy entry, contractors need to maintain unusually high standards of performance, reliability, quality, and integrity. Subcontracting can introduce entrepreneurs to the culture of public works; it also allows general contractors to enter new markets by utilizing subcontractor expertise, and they can increase their capacity through subcontracting.

Construction is specifically excluded from the GSA Federal Supply Schedules program, but some maintenance and repairs below the Davis-Bacon threshold are included in the Facilities Management Schedule. Other IDIQ Multiple Award Schedules for construction are common, not only in GSA's Public Building Service, but with Army Corps of Engineers and other agencies. Small businesses have difficulty breaking into this market except as subcontractors, but some IDIQ construction contracts are set aside to small business.

Nature of the Work.

Some areas that exist in most government contracts are particularly important in construction contracting. They are such areas as site condition, project management capabilities, use of Contracting Officer Technical Reps (COTRs), Change orders, Contract Close Out, Liquidated Damages, Limits on subcontracting, and principles of effective subcontracting. Also, sometimes performance criteria is not clearly measurable causing re-works that can be costly to the contractor.

In almost all jobsite locations except Tribal Lands, states require contractors to be licensed in their specialty – a general contractor's license is different from each of the trades, so some companies need more than one license. The Federal government does not require contractors to be licensed but does require that the awardee be fully qualified to perform the work, so the result is the same. A newly licensed company with little or no past performance record is highly unlikely to receive an award, even with a low bid.

Other aspects of work in this industry include a higher than usual level of attention to safety, the need to allow for weather delays and natural disasters, and some differences in terminology. For example, the term "contractor" means the "general contractor", not necessarily the prime contractor if a construction management company is the prime contractor. Suppliers are never referred to as contractors, as they are in the FAR.

Risk Management. The work is always performed on the customer's premises, so increased insurance coverages are required, and all work is bonded in three ways. The bid bond assures the owner that the contractor will accept award based on the bid as submitted. The performance

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bond assures the owner that the contractor will perform the work as contracted. The payment bond assures the owner that the contractor will pay all the suppliers and subcontractors so they will not attempt to file a lien on the property or a claim against the owner. This last one is different from private sector construction because Government property cannot be liened, and there is no privity for the government to intercede in subcontractor payments. The “force majeure” clause allows some relief for the contractor in natural disasters, but the procedures for implementing it may seem burdensome than in private-sector construction.

Labor relations are another risk factor. The contractor is responsible for resolving any craft jurisdictional issues, administering collective bargaining agreements if any, and ensuring that federal regulations related to labor are meticulously followed. Regulated wages and weekly payroll reports with Anti-Kickback Certification are examples of unusual requirements.

Payment and cash flow. Unlike private sector, where advance payment is the norm, public agencies never release taxpayer money until the government can take title to the completed portion. Because of the Termination for Convenience (T4C) clause, federal construction contracts usually cannot be financed as other accounts receivable can.

Government regulations and procedures. Small business set-asides are common at the subcontract level as well as prime contract level. State and local government regulations and procedures are usually quite different from federal, and state or local projects with federal funding are a peculiar hybrid of mingled regulations that often trip up the unsuspecting client. In federal Public Works, FAR governs, especially Parts 14 and 36, instead of the familiar state civil codes. Clients should select appropriate specialized legal counsel with FAR expertise and experience with the Boards of Contract Claims and Appeals. However, subcontracts are considered business-to-business cases and are heard in state courts.

Post-award pointers. Federal contracts require heavy administrative duties during post-award and close-out, especially with regard to documenting changes and potential changes promptly enough or adequately enough to be paid for them. Maintaining current as-built drawings is another sticking point, as are proper waste disposal, the requirement for large business contractors to secure customer consent before entering into any subcontract even if specified in the bid, and cash flow at lower tiers.

References:

FAR Parts 14, 36, 43, 44, and 45, and related agency supplements

Courses, seminars, webinars, and publications offered by reputable training companies