

The Federal Acquisition Regulation and US Government Contracting: An Introduction

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Any company that wants to do business with the US government must understand the federal acquisition regulation (“FAR”) and agency-specific regulations that supplement the FAR. Together these regulations which are published in Title 48 of the Code of Federal Regulations, cover all aspects of the contracting process: planning, soliciting, awarding, performing and closing-out. Understanding the FAR and its supplements is a fundamental requirement for:

- Marketing;
- Preparing bids and offers responding to solicitations;
- Receiving awards,
- Properly administering a contract;
- Successfully avoiding contract litigation; and
- Complying with related federal laws.

The FAR is over 1900 pages, and it is impossible in an article this size to describe it at more than a general level. The purpose of this article is to highlight some general concepts about the FAR’s applicability, the basic procurement methods, and some provisions that may impact non-U.S. companies seeking to enter the federal market place.

1. FAR Applicability

The FAR applies to any procurement by any federal agency using funds appropriated by Congress. Because appropriated funds are the source of nearly all acquisitions conducted by the U.S. government, the FAR has broad applicability. Virtually all procurements by the U.S. Department of Defence and Department of Homeland security are subject to the FAR. Thus, if a non-U.S. company desires to sell supplies and services to the US Government, it needs to understand the FAR.

2. Basic Procurement Methods Under the Far

The FAR provides many ways for the U.S. agencies to procure suppliers and services. Agencies choose from several methods to solicit offers leading to contract, including the following types of acquisition and contracting methods.

- Micropurchases;
- Simplified Acquisitions;
- Sealed Bidding;
- Negotiated Procurement
- Two-Step Sealed Bidding;
- Commercial Item Procurement;
- Non-development Items; and
- Indefinite Delivery Contracts and GSA Schedule Contracts

Each of these methods has specific requirements for the following stages of a procurement:

- Developing the agency's requirement;
- Developing the acquisition plan, including selecting the contract type;
- Drafting a request for proposals, which includes all terms and conditions of the resulting contract;
- Publicizing the agency's requirement to the market place in order to soliciting competitive proposals;
- Evaluating proposals and award contracts;
- Administering the contract; and
- Evaluating contractor performance

As a general matter, the types of contract federal agencies uses to procure suppliers and services include fixed-price contracts, cost-reimbursement contracts, incentive contracts, indefinite delivery contracts, and time-and-material contracts. Cost-reimbursement contracts are subject to the cost principles of FAR Part 31 and, for larger contracts, require the contractor to implement an accounting system that meets the requirements of the Cost Accounting Standards. (Fixed-price contracts are not subject to these requirements.)

3. General requirements to Sell to the U.S. Government

Subject to laws discussed below, the FAR permits non-US companies to compete for US Government contracts. It is common for non US companies to establish a US subsidiary for this purpose. The general requirements to sell to the U.S Government include:

- Obtaining a D-U-N-S®Number, which is a unique nine-digit identification number provided by Dun and Bradstreet for each physical location of a business;
- Registering in the Central Contractor Registration (CCR) database; (You can register by going to the CCR website (www.ccr.gov) and following the instructions.)
- Completing the Online Representations and Certifications Application (ORCA) (<http://orca.bpn.gov/>), which includes the required representations and certifications (often called "Reps and Certs") in an electronic format that contractors must make to be eligible for a government contract;
- For Department of Defense contractors, obtain a NATO Contractor and Government Entity (NCAGE) code (A list of country representatives can be found at http://www.dlis.dla.mil/nato_poc.asp); (This requirement applies equally to vendors in the U.S., NATO, and non-NATO countries.)

4. Special Requirements Applicable to NON-U.S. Companies

There are some special requirements that apply to non-U.S companies. U.S. laws regarding foreign ownership control and influence ("FOCI") generally prohibit a foreign-owned or – controlled U.S company from obtaining the facility security clearance necessary to bid on or perform classified U.S Government contracts.

The requirements setting forth FOCI restrictions and means of negating FOCI are found in the National Industrial Security Program Manual, DoD 5220.22M (NISPOM). The U.S Defense

Security Service (DSS) is responsible for handling FOCI issues and coordinating with relevant U.S. Government agencies. The NISPOM addresses foreign acquisitions of U.S. companies with existing facilities clearances, as well as U.S. company applications for internal facility clearance.

Except where foreign ownership is minimal, the only two forms of FOCI negotiation used are a Special Security agreement (SSA) and a Proxy Agreement, with the later being favoured by the U.S. Government.

The SSA is designed to allow the foreign stockholder(s) to retain the right to be represented on the board of directors and to have a direct voice in the business management of the U.S. entity, while denying unauthorized access to classified information. The SSA consists of a set of institutional corporate practices and procedures actively administered by senior management and certain board members (who must be cleared U.S. citizens). The SSA will exclude foreign directors and shareholders from participating in decisions affecting security or classified information. In addition, the company must set up a Government Security Committee to oversee classified and export control matters.

A Proxy Agreement is the more restrictive FOCI negotiation method. Under a Proxy Agreement the voting rights of the foreign owner are conveyed by irrevocable proxy agreement to proxy holders. There must be at least three proxy holders, who must become members of the board of directors of the U.S. entity, The Proxy Agreement gives the proxy holders all the prerogatives of ownership with complete freedom to act without consultation with, or influence from, the foreign stockholders.

5. Barriers to the U.S. Government Market

The FAR also includes certain preferences that may limit the ability of a non-U.S. company to compete for certain contracts.

○ Domestic Preference Requirements

One type of limitation in the FAR that may impact non-U.S. companies are domestic preference provisions that require federal agencies to procure supplies produced inside the United States in certain circumstances. The primary domestic preference laws include the Buy American Act, the Trade Agreement Act, and the Buy America Act. These laws apply mainly to suppliers (not services) and include numerous exceptions.

The primary exception to domestic preference laws are found in the World Trade Organization's Government Procurement Agreement ("WTO GPA") and other trade agreements. Under the WTO GPA, the United States does not restrict the federal government from purchasing end products from other WTO GPA countries in procurements above certain monetary thresholds. Members of the European Union are among the WTO GPA countries entitled to this treatment.

○ Requirements that Promote Socio-economic Goals

In addition to domestic preference requirements, the FAR also contains provisions that require U.S. Government procurement dollars to be spent in ways that foster social and economic goals.

Each U.S. Government solicitation and contract, depending on the type and scope of the contract effort, has provisions and clauses pertaining to all manner of social and economic issues. Socio-economic provisions and clauses deal with, among many other issues:

- Equal employment opportunity;
- Drug free work place;
- Use of U.S. ships or airplanes for transport;
- Worker wage and work hour requirements;
- Workplace safety;
- Small business growth; and
- Environmental protection.

The socio-economic provisions that have the most significant impact on non-U.S. companies result from “set aside” requirements that limit competition to the U.S. small businesses. When procurements are set aside for small businesses, the non-discriminatory provisions of the WTO GPA do not apply, and non-U.S. firms cannot participate as prime contractors. However, non-U.S. firms still have an opportunity to participate as a subcontractor.

Whether or not a business qualifies a small business is defined by either the number of employees it has (generally used for suppliers) or its annual receipts in U.S. dollars (generally used for services), or both. These determinants may vary from one business segment to another. Contracting Officers and contractors refer to appropriate codes in the North American Industry Classification System (NAICS) to determine if a particular U.S. business qualifies as small business.

When procurement is expected to exceed the simplified acquisition threshold, U.S. Contracting Officers must follow the “Rule of Two”. Simply put, if the Contracting Officer expects at least two responsible small businesses to submit offers at fair market prices, the procurement is set aside for small businesses. This is called “total set aside”. If a small business is not capable of performing the entire contract, consideration may be given to setting aside part of the requirement. This is called “partial set aside”. If the Contracting Officer does not expect two or more small business offers, the procurement is not set aside, and the non-discriminatory provisions of the WTO GPA could apply.

6. Conclusion

Individual U.S. Government agencies have little discretion when awarding contracts. The wide applicability of the FAR to procurements conducted across the U.S. Government provides uniformity and predictability in the procedures agencies will follow when buying goods and services. Although the FAR voluminous, this uniformity and predictability makes entering the U.S. Government market for non-U.S. companies easier and more manageable.

Non-U.S. companies must understand the FAR’s procedures as well as special provisions that may limit participating (domestic preference and socio-economic requirements) or increase administrative burdens (cost accounting or FOCI mitigation requirements).

Non-U.S. companies should not try to navigate the FAR by themselves. The FAR contains numerous rules and requirements that are easy to violate and may expose a contractor to sustainable liability. If a non-U.S. company is making a significant investment in becoming a U.S. Government

contractor, it should hire employees and independent consultants who are knowledgeable and experienced in U.S. Government contracting to assist with its business. Key areas that a company should seek professional assistance include marketing, finance and accounting, contract management, and legal.

Mr. Black is a partner in the Government Contracts Practice Group of Holland & Knight. His practice includes counselling federal contractors and subcontractors on a variety of procurement, contract performance and compliance issues as well as representing companies in bid protests, claims, and government investigations and audits. Mr. Black can be reached at 703.720.8680 or at david.black@hoklaw.com.