

Overcoming Unique, Heightened Record-Keeping and Documentation Challenges for Contingency Contracts

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Topics Covered

- Business as Usual?
- FAR/DFARS Requirements
- Lessons from the Past
- Potential Risks
- What Contractors Can Do to Avoid Pitfalls

“Business As Usual”

According to the *Defense Contingency Contracting Handbook* (June 2010) it’s “business as usual” for contractors:

“All FAR and DFARS administrative recordkeeping and file management will continue under contingency, humanitarian assistance, or peacekeeping conditions unless specifically stated otherwise.” (p. 213)

“Business as Usual, but . . . ”

- However, the Defense Contingency Contracting Handbook cautions that:

“Since normal checks and balances may not exist during contingency situations, contingency contracting officers (CCOs) can be assured auditors will be interested in all paperwork when the unit returns home.”
- For contractors performing in contingency environments, the importance of maintaining adequate records relating to contract performance and administration – an audit trail – cannot be overstated!

Legal Requirements

- FAR Requirements
 - FAR Subpart 4.7, Contractor Records Retention
 - FAR Part 18, Emergency Acquisitions
 - FAR Subpart 25.3, Contracts Performed Outside the United States

Legal Requirements

- DFARS Requirements:
 - DFARS Subpart 218, Emergency Acquisitions
 - DFARS 225.74, Defense Contractors Outside the United States
- Defense Contingency Contracting Handbook (Version 3, June 2010): Guide for contracting officers conducting contingency contracting operations in a Joint environment
 - Useful reference for contractors as well

Critical Documentation Requirements Unique to Contingency Contracting

- Incident-reporting
- Tracking contractor personnel in-theater
- Documentation of individual training covering weapons familiarization and qualification
- Special area, country, and theater personnel clearance documents
- Medical and dental records of the deploying employees
- FCPA record-keeping obligations
- U.S. Export Controls and ITAR compliance

The Players

- Contingency Contracting Officer (CCO):
 - OCONUS CCO will be administering the contract following deployment
 - May be supported by CONUS contracting offices
 - Contracting officer's representative (COR) can assist in contract monitoring and administration
- Defense Contract Management Agency (DCMA):
 - Will provide contract administration support
 - In consultation with auditors, will monitor, review and approve contractor's business systems (such as accounting, purchasing, and estimating)
 - Will also provide property administration and QA support, as required
- Defense Contract Audit Agency (DCAA):
 - Can provide in-theater support
 - Contract audit services, accounting and financial advisory services regarding contracts and subcontracts to all DOD components
 - Contract closeout, evaluation of claims, and equitable adjustments

Lessons from the Past

Lessons learned from Hurricane Katrina Contracts:

- Vague contracts with inadequate cost controls: contracts did not always define roles, responsibilities, deliverables, and performance measures for contractors
- Poor contract oversight/monitoring by Government
- Agencies did not document contract files per regulatory requirements; contract templates not well-defined
- Government failures to require contractors to provide documentation for goods and services prior to payment of invoices
- Inadequate documentation to track Government spending meant that Government relied heavily on contractors to support their own invoices – an example of contractor self-policing

Lessons from the Past – cont'd

Earlier Iraq/Afghanistan Contracts:

- Increased Government reliance on contractors, but difficulties in contract administration and oversight
- Government's contract files poorly maintained
- Government staffing constraints, including insufficient contracting personnel in theater and significant personnel turnover
- Inadequate incurred cost proposals – and lack of support for costs – led to DCAA delays in completion of incurred cost audits
 - June 2011: FAR revised to list minimum information that contractors must include for incurred cost proposals to be adequate
- Challenges associated with contract closeout – frequently related to lack of documentation
- DOD incurred unnecessary costs because improper payments to contractors were discovered late, contract files insufficient

GAO: Challenges Associated With Contract Closeout

GAO Report GAO-11-891 (Sept. 2011), one in a series of reports on Contingency Contracting:

“[E]mphasis on timely contract closeout is especially important in a contingency environment because the longer the time from when the contractor completes its work and when the contract is closed, the more difficult it becomes to determine the status of contracts, resolve documentation and administration issues, obtain a release of claims and negotiate final payments.”

What to Expect?

Government agencies and DCMA/DCAA auditors can be expected to “second guess” contractors after-the-fact, particularly when it comes time to closeout contracts, evaluate claims, REAs

➤ ***EXPECT AFTER-THE-FACT
REVIEWS***

➤ ***CREATE AN AUDITABLE TRAIL***

Potential Risks

- Post-award audits and reviews : DCAA, agency Inspectors General
- Future litigation
- Future investigations
- Congressional inquiries
- Government claims (overpayment, defective pricing); contract disputes/claims

Potential Risks – cont'd

- Without sufficient records of their own to rebut Government positions, contractors are at risk for:
 - Allegations of overpayments
 - Unauthorized commitments
 - Allegations of deficient performance, non-performance
 - Allegations of fraud, waste and abuse
 - Potential legal and monetary liability (e.g., False Claims Act)
 - Administrative sanctions

Avoiding the Pitfalls

- Contracting files should be organized and sufficiently annotated to document actions taken and the supporting rationale for the entire procurement process.
- Support for subcontracts issued, payments made to subcontractors/vendors
- Support for general purchases, including any cash-and-carry purchases from vendors
- Documentation to support contract claims, REAs
- Support for invoices

Avoiding the Pitfalls

- Significant delays being experienced in the closeout process for contingency contracts mean contractors should retain relevant records indefinitely
 - General 3-year record retention requirement in FAR 4.703 (after final payment) may not be sufficient to protect contractors
 - Contractors' may need to create special record retention policies for records relating to contingency contracts

Subcontracting Files

Subcontracting with foreign vendors presents significant risks. Therefore, subcontracting files must be particularly robust.

- Document payments
- Flow-down critical T's & C's, such as restrictions against the use of private security contractors
- Screen against the debarred and restricted-party lists
- Document competitions and source selection decisions

Invoice Support Files

- The Head of Contracting Activity for Afghanistan has the authority to exempt payments made in the theater of operations from Prompt Payment Act interest and interest penalties, where it is impractical for U.S. forces to adequately match receipt of necessary supporting documentation.
- To avoid payment delays in this environment, it is critical to maintain back-up support for all invoices:
 - Receiving reports
 - Complete contract files
 - Quality assurance and property records
 - Bills, invoices, vouchers and supporting documents describing the amounts billed for labor categories and rates, travel, materials, and other direct costs

GFE Files

- The Government has been unable to effectively track GFE in- theater and it relies on contractors to be accountable for and maintain official records of GFE in their possession.
- Accountable property records must include the current status and location of the property. At a minimum, a property system should include:
 - Name, part number, and description;
 - Quantity and status of the property;
 - Unique item identifier;
 - Location of property; and
 - Transaction dates

Examples of Other Key Records

- Representations and Certifications
- Cost and Pricing Data, certificates of current cost of pricing data
- Signed contract, task/delivery orders and all modifications thereto, including documents supporting modifications
- **Contract performance evaluations and records relating to supplies delivered or services performed**
- Packing, packaging, transportation data
- Export-related documentation (e.g., export licenses, if required)
- Quality assurance records
- **Records of GFE/GFP**
- Bills, invoices, vouchers and supporting documents
- Records of payments and/or receipts, especially from cash-and-carry transactions
- Deviations from SOW or PWS (Documentation; notification to CCO)
- Documentation of changes (in-scope, out-of-scope; written/oral; unauthorized commitments)
- Support for REAs and contract claims/appeals
- Contract Closeout Checklist (DDC Form 1597)