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Silicon Valley Leveraging Government Resources

From Chaos, Unprecedented Opportunity

Doing Business With The U.S. Government

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Regulatory Environment

- Government vs. Commercial Contracts: Principal Differences
 - UCC vs. Federal Acquisition Regulation (FAR) vs. Other Agreements
 - Competition and Pricing
 - Intellectual Property
 - Termination
 - Disputes
 - Enforcement

Types of Contracting Instruments

- FAR-Based Commercial Item Contracts
- FAR-Based Noncommercial Item Contracts
- Grants and Cooperative Agreements
- Other Transactions
- Technology Investment Agreements

Contracting Process

- Generally, full and open competition required (e.g., FAR Part 6)
 - May set aside contracts for small businesses
 - Sole source contracts very limited
- Solicitation (e.g., FAR Subpart 15.2)
 - Must strictly comply with instructions and law
 - Procurement integrity
- Proposals/Source Selection/Award
- Protest

Subcontracting

- Subcontract must include some terms from the prime contract
 - All mandatory flowdowns
 - Discretionary flowdowns required to ensure compliance with prime contract obligations
- Prime contractor may have to comply in good faith with subcontracting plan that sets goals for subcontracting to various small business entities

Intellectual Property - Inventions

- Contract/agreement should include a clause setting forth the parties' respective rights in "subject inventions"
- Subject invention is normally defined as any invention conceived or first reduced to practice in the performance of the work under the contract/agreement
- Standard patent rights will depend on type of contract/agreement
 - Generally, title is retained by contractor, subject to compliance with disclosure, election, and patent filing requirements. Compliance with such requirements is critical...can lose right to elect title.
 - Disclosure, election, filing and reporting obligations are different under various agreements/clauses

Intellectual Property - Data

- Data is recorded information, regardless of form, and includes technical data and computer software
- For FAR-based commercial item contracts government generally receives the same rights as commercial customers
- For FAR-based non-commercial contracts government generally gets either:
 - Unlimited rights → use without restriction
 - Government purpose rights (this right generally used only in Defense contracts) → use for government purposes only (including for government procurement) for five years, then unlimited rights thereafter
 - Limited rights → generally may not be disclosed outside the government (restricted rights for computer software)

Enforcement Risk

- Civil False Claims Act prohibits the submission of false or fraudulent claims to the government. 31 U.S.C. § 3729
 - E.g., knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval
- Laws and Regulations
 - Bribery - 18 U.S.C. § 201(b)
 - Gratuities - 18 U.S.C. § 201(c); FAR 3.2, FAR 52.203-3
 - Kickbacks - 41 U.S.C. §§ 8701 - 8707; FAR 52.203-7
 - Standards of Conduct for Executive Branch – 5 CFR § 2635 (OGE Guidance applies to government employees only, but wise for company to follow)

Disclosure Rules

- Mandatory Disclosure Rule -- FAR 52.203-13 (also covered in FAR 9.4)
 - Disclosure to government of “credible evidence” of:
 - Certain violations of criminal law relating to government contracts/subcontracts (fraud, conflicts of interest, bribery, gratuities) in Title 18 of US Code
 - Violations of the Civil False Claims Act
 - Significant overpayments on a contract

Guidance/Tips

- Get help in advance
- Clear and strong policies
 - Distribution to all relevant employees
 - Audit
 - Open door and hotline
- Closely follow the patent and data rights clauses
- Disclosure program