

# CONTRACTOR RISKS

## in Transitioning From Private to Public Work

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# FOR DECADES, AMERICAN INFRASTRUCTURE

has been DETERIORATING without  
substantial governmental investment.

In fact, the U.S. infrastructure ranking sunk from  
9th to 13th from 2018<sup>1</sup> to 2019.<sup>2</sup> However,  
Congress may soon attempt to address these  
issues through infrastructure initiatives like  
the proposed *American Jobs Plan*.<sup>3</sup>





With that in mind, contractors eager to take on new federal government, state, and municipal work should be aware of the many often-conflicting statutes, rules, regulations, ordinances, and guidance. Awareness of the requirements and risks involved will help translate into a successful bid and, hopefully, a successful project.

## Labor Burden

Performing work on public construction projects triggers the application of laws regarding employment compensation that may be unfamiliar to contractors that primarily work in the private project space. Most of these laws impose requirements that are in addition to the general laws applicable to private construction, which can present significant risk to an unaware contractor.

### WAGE & BENEFIT RATE REQUIREMENTS

When it comes to wage and benefit rates that must be paid to a contractor's employees, those applicable to public construction contracting can differ from private projects — for both field labor and office employees.

Compensation of employees engaged in providing labor in the field on public projects largely depends on whether the project requires payment of prevailing wages. Projects that are procured or financed by the federal government are ruled by the *Davis-Bacon and Related Acts* (DBRA)<sup>4</sup> and, in some cases, state prevailing wage laws similar to the DBRA. These laws generally establish the minimum wages and benefits that must be paid for labor deployed on a public construction project. This means that an employer must pay the wage and benefit rates established by these laws even if they are higher than the wage and benefit rates agreed upon by the contractor and its laborers.

The rates at which employees are paid is also controlled by the laws setting the minimum wage rates. It is important to note that federal contractors have the additional requirement of complying with an executive order issued on April 27, 2021, which set the minimum wage rate for federal contractors at \$15.<sup>5</sup> This rate applies to employees who provide field labor, as well as office personnel not engaged at the project site. Be aware, however, that if DBRA wage rates apply, those wages and benefits must be paid even if they exceed the applicable minimum wage rates.

### RISKS RELATED TO EMPLOYEE COMPENSATION ON PUBLIC PROJECTS

The myriad of risks relating to the compensation of employees in the public contracting space include possible debarment, termination of a contract, liabilities for underpayment

of wages, damages for overtime violations, and erosion or elimination of profit on a contract. Perhaps more important, contractors should be aware that they will be responsible for their subcontractors' (i.e., all subcontractors, not just first-tier) violations of these requirements, which creates a major compliance obligation. Most of these risks arise from the misclassification of employees and the failure to maintain records substantiating compliance.

This can occur for a variety of reasons, and a common misstep occurs when an applicable wage determination does not include a classification for laborers that will be employed on the project. This often leads to contractors applying wage and benefit rates based on their estimation of what prevailing wages will be. Many contractors in these situations found that they underpaid their laborers when the Department of Labor (DOL) audited the project and concluded that the wages and benefits paid were too low.

## Bidding

### QUALIFYING TO BID ON GOVERNMENT CONTRACTS

State and federal agencies have established various procedures for contractors to bid on construction projects. In order to bid on a federal construction project, a company must first register with the System for Award Management (SAM) and *sam.gov* (previously known as Federal Business Opportunities). Information regarding both *sam.gov* and the SAM are available on the U.S. General Services Administration (GSA) website.<sup>6</sup>

In order to register to do business with the federal government and to bid on projects, a contractor must know its North American Industry Classification System (NAICS) code, tax identification number, and have a registered Data Universal Numbering System (DUNS) code from Dun & Bradstreet. Note that the federal government plans to cease use of the DUNS system in April 2022 in favor of a federally created "Unique Entity Identifier" for its SAM.<sup>7</sup>

### BIDDING OPPORTUNITIES

Bidding opportunities are posted on government websites, third-party websites, and even in the newspaper — especially municipalities. They are typically posted with submittal dates and the scope of work clearly defined.

It is imperative for a contractor to follow the rules precisely, which are generally well outlined in the government agency's request for proposal (RFP) or request for quotation (RFQ). Many amazing bid packages have been rejected simply because the contractor missed the pre-bid meeting that required attendance.





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It is easy to identify potential construction contracting opportunities via [sam.gov](http://sam.gov). The phase of the procurement process for construction work is typically listed as Sources Sought, Presolicitation, or Solicitation.

### Sources Sought

A Sources Sought opportunity is essentially market research that allows the government to gauge interest in its projects and to determine how best to package the actual solicitation for the project<sup>8</sup> with a focus on garnering interest and input from small businesses, veteran-owned businesses, women-owned small businesses, and similar entities.

### Presolicitation

Presolicitation is as simple as it sounds; it is notice of a pending solicitation of bids for a given project and is a requirement of the government to provide notice of upcoming opportunities.<sup>9</sup> Typically Presolicitation outlines the project, which includes terms of whether it will be design-build or design-bid-build, the name of the government department that is authorizing the work, and if they may or may not provide various plans or specifications. It also may provide information to potential bidders as to how each bid will be evaluated for the purpose of award.

### Solicitations

Solicitations typically include plans, specifications, wage determinations, evaluation factors for contract award, as well as all other relevant information necessary for a bidder to prepare a complete proposal.

### AWARDING GOVERNMENT CONSTRUCTION CONTRACTS

Projects are typically awarded to the lowest responsive bidder, sometimes referred to as the *lowest responsible and eligible bidder* or the *lowest responsive and responsible bidder*. A responsive bid means that it has met all the legal requirements and substantially complies with all of the bid specifications. A responsible bidder is one that has the skills, ability, and financial resources to perform the work and complete the project.

Federal construction projects below the prospectus level are procured either through utilizing sealed bidding procedures, low-price technically acceptable competitive proposals, or competitive orders against existing multiple award “indefinite delivery, indefinite quantity” construction contracts. The award will go to the lowest responsive, responsible bidder as defined by the Federal Acquisition Regulations (FAR). Major construction contracts are selected through FAR’s “source selection” method. Although there are many variations of this method, it typically works like this:

- The basic method requests both technical or management proposals and a price proposal.
- Upon receipt, the proposals are evaluated technically and then in terms of prices. The federal agency may make a trade-off in terms of whether a more technically high-grade element is desired vs. saving costs on one aspect of a project.
- With this in mind, the agency selects what it considers to be the “best value” proposal. Federal solicitations must

## CHECKLIST for Bidding on Public Works

- ❑ **GET A BOND PROGRAM** in place in order to qualify to bid on public works.
- ❑ **IN ESTIMATING**, make sure to account for the requirements of public work contracts (prevailing wage, minority business enterprise requirements, etc.).
- ❑ **WHEN SUBMITTING THE BID**, make sure all requirements in RFPs are met (i.e., bid proposal is signed, bid bond conforms to RFP, licensing requirements are met and proof provided, insurance certificates provided, all certifications are provided (noncollusion, etc.)), that you have Davis-Bacon Wage Act compliance, any material requirements (i.e., Buy America) are met, and list of subcontractors provided.
- ❑ **IF AWARDED THE CONTRACT**, understand and follow the billing procedures and requirements.
- ❑ **REVIEW THE CHANGE ORDER PROCEDURES** that are unique to federal and state contracts and laws.
- ❑ **PLAN ON FINANCING PART** of the contract to address the slower payment of progress payments.



state the relationship between the technical and price proposals; e.g., technical more important than price, technical equal to price, or lowest price technically acceptable. Negotiations can be held between the bidders and the agency to correct or clarify any technical proposals and the pricing.

There is also a two-step advisory process that allows for technical proposals to be evaluated. This is also where bidding contractors are advised of whether they are technically viable to compete in a particular procurement. Then the final evaluations of the contractors' bids follow the one-step process and with the objective of selecting the best value for the government.<sup>10</sup>

#### CLARIFICATION OF THE BIDDING PROCESS

There are several resources available that clarify and explain the bidding process. The GSA is likely the most comprehensive source of information, but other resources include the U.S. Small Business Association (SBA) as well as a variety of blogs, websites, and paid subscription services that compile all public project RFPs and provide information and tips regarding the bidding process. A simple internet search should reveal an abundance of resources to assist in the process.

### Payment Risks

#### SLOW PAYMENT

Federal agencies are notorious for being slow to pay for work that has been completed for months or even years. While waiting for payment, contractors are forced to bear the costs, which can result in severe financial distress for the business. In order to combat slow pay, the *Prompt Payment Act* mandates that an agency that pays a vendor late must pay interest on that payment.<sup>11</sup> A federal contractor may pursue remedies under the *Prompt Payment Act* if an agency does not pay interest as required.<sup>12</sup>

#### CHANGE ORDER RISKS

A contractor should be aware that a federal agency can unilaterally issue a change order, and often does so in bundles in order to save on costs. While some informal changes are foreseeable due to the nature of construction work, they lead to delays associated with recognizing them as official and receiving compensation for them.

Further, when federal agencies group small modification actions together in a change, they reduce the negotiating power of the original contract and kneecap the contractor. A contractor should also be aware when bundled change orders have the likelihood of increasing the original contract price, thereby requiring a larger bond.

Contractors can protect themselves from these risks by maintaining an open line of credit, good cash flow, and ensuring that their surety knows of any finished projects to retain bonding capacity.

#### UNEXPECTED CHANGES

FAR §52-236-2 guides the contractor on how to proceed when faced with an unexpected condition or a change in condition. If this occurs, the contractor must generally notify the government entity and ask for guidance.<sup>13</sup> If the contracting officer responds with a directive that the contractor believes goes beyond what it is required to do according to the contract, then the contractor must tell the contracting officer that its directive will have a cost and time consequence, if that is the case.<sup>14</sup>

FAR §43.103(a)(1) states that once a change is made or occurs, the contracting officer shall make an equitable adjustment and modify the contract in writing. FAR §43.204(b) also states that, as to contract modifications, the contracting officer shall negotiate equitable adjustments resulting from change orders in the shortest, practicable time.

So, when there are changes, the contracting officer is supposed to recognize them and negotiate an appropriate adjustment.<sup>15</sup> However, the government often does not recognize the change in a timely fashion, or at all. To protect from costs associated with this conflict, the contractor should keep complete records and an open line of communication with the contracting officer.

#### COMPENSATION UNDER THE PPP

Your compensation may be impacted if your company took advantage of the Paycheck Protection Program (PPP), especially depending on whether you have previously worked on a federal government contract. Congress created the PPP during the COVID-19 pandemic to aid businesses in meeting payroll costs and expenses during the worst of the crisis. PPP loans were designed to be fully forgivable if the proceeds were spent for these purposes.

However, the FAR — the main rules governing all executive agencies in their acquisition of goods and services — contains a “credits clause,” whereby federal contractors will possibly owe the government a credit if the PPP loan was forgiven and was used to pay for the costs covered under a government contract. The government’s rationale behind this is that a credit is due to avoid duplicative payments; however, according to recently released guidance, only the amount of the forgiveness allocable to a government contract will result in a credit.<sup>16</sup>



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Contractors affected by the interplay of the PPP and FAR argue that being forced to repay portions of their PPP loans through credits runs opposite of the PPP program's intent to help keep businesses afloat during the crisis.<sup>17</sup> This conflict between the statutes is typical of federal government contracting, and contractors should take care when navigating the web of federal statutes, regulations, and guidance.

#### DELAYS

Most federal government contracts address the issue of delay by incorporating provisions of the FAR. The FAR addresses excusable delays in §49.505(b), and if a delay is deemed excusable, a contractor is entitled to time, but not costs.<sup>18</sup> Unlike with private contracts, FAR is subject to extensive statutory interpretation, and conflicts arise as to whether a delay is excusable. Both epidemics and quarantine restrictions are grounds to assert a delay is excusable.<sup>19</sup>

#### GOVERNMENT PROJECT BONDS

If the construction project is over \$100,000, performance and payment bonds are required by the *Miller Act* for federal projects<sup>20</sup> and are governed by "Little Miller Acts" by individual states. According to 41 USC §1908, the *Miller Act* has a dollar threshold that is adjusted for inflation. The bonding requirements under each "Little Miller Act" vary from state to state. Surety bonds under the *Miller Act* are meant to protect subcontractors and taxpayers against a GC's nonperformance or failure to pay subcontractors and material suppliers.

Other types of bonds that are sometimes required on construction projects include contractor license bonds, supply bonds, and maintenance bonds. Most surety companies offer two different bonding capacity amounts — a single project contract amount and the total aggregate for all open projects. Obtaining bonding is akin to obtaining financing from a bank. Contractors should reach out to their surety agent to ensure that their company's resources, expertise, and capability to perform the project are considered in the calculation of bonding capacity.

### Technical Requirements for Public Work

The good news is that construction is construction, regardless of the work being public or private. However, there are certainly specifics to public work that stand out.

#### CONTRACTING OFFICER

The contracting officer fundamentally serves as the owner's representative, similar to some private projects, but with heightened authority and responsibility. Fully understanding

the role of the contracting officer, or the contracting officer's representatives, is paramount to properly managing and executing the work.

#### CHANGE ORDERS

While it can be challenging and difficult to get change orders on private projects, the process can be increasingly more difficult on public work. Regarding the process for change orders, this is due to onerous contract provisions that can be less than clear to contractors new to the public market.

Additionally, as budgets for projects diminish, the ability of the contracting officer to obtain certification of fund availability is more difficult, which is a requirement prior to modification of a contract, such as an execution of an additive change order. In short, there may not be funding for necessary change order work without the contracting officer raising the issue up the chain of command.

#### SCHEDULE ANALYSIS

Performing schedule analysis to support extensions of time can also vary greatly from private to public. Performing a critical path method analysis is not typically an acceptable method in justifying a delay. For example, the Unified Facilities Guide Specifications require time impact analysis as necessary for prospective schedule changes/extensions of time.<sup>21</sup> Whereas for a retrospective analysis, any acceptable schedule analysis as identified by the Association for the Advancement of Cost Engineering (AACE) identified in AACE29R-03 is acceptable.<sup>22</sup>

### Conclusion

With a thorough understanding of the risks and requirements of entering the public contracting world, contractors may have a better chance of not only winning work but also successful and profitable project completion. In short, contractors should remember to budget and plan for the additional requirements associated with a federal construction project in the bid.

Contractors should be aware of risks related to wage determinations and be sure to review their compensation structure for federal compliance. They should also review the FAR requirements and bidding procedures so that they know what to expect when bidding on a particular construction project. Finally, contractors should know the risks associated with payment, including the risk of a delayed payment, change order risks, or other unexpected changes and delays. Due to the intricacies and risks involved, contractors should consult their advisors before and along the way. ■





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