PANEL E:

Costly Mistakes!

How to avoid the most common pitfalls that face a growing company. Lessons learned from an operational and legal perspective that may help you make money and stay out of jail!
Agenda

• Operational Issues
  – Finance
  – Project Control
  – Contract Administration
  – Accounting
  – Human Resources

• Legal Issues
  – Legal Issues
  – Risks and Rewards in Government Market
  – Prime or Sub?
  – Teaming Agreements
  – Subcontract Terms and Conditions
  – Performance Traps
  – Disputes and Claims
  – Internet Resources

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Operational Issues

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Finance

• Financial Operating Plan
• Income statement
  – Cash vs. accrual
  – Pro Forma statements – Your bank will want them
• Cash flow
  – What happens on 30 Sept if task is incrementally funded?
  – Can you handle winning the contract and adding 10 employees?
• Business Plan updates
  – Cost of new business marketing vs. B&P vs. IR&D
• Company valuations
  – ESOP?
Finance (cont’d)

• Direct labor
  – Technical-PM-Financial-QC?

• Indirect labor
  – Government site vs. contractor site vs. manufacturing
  – How do I assign employees to each indirect pool?

• Expenses
  – Allowable vs. unallowable

• Allocation methodology
  – Reasonable and consistent

• Fringe benefits
  – Competitive? Timing effects on cash flow

• Overhead vs. G&A
  – Causal / beneficial relationship - you don’t have to have both!
  – Understand the variance between actual vs. accrued
Finance (cont’d)

• **B&P vs. IR&D**
  – Understand the rules – high visibility for DCAA
  – Good option if you have someone idle and you want to keep them

• **Subcontract and material handling**
  – Pass-thru rate? Don’t forget G&A on burden and profit!
  – You may not make profit but this can cover a lot of indirect expense
  – Too much subcontracting may push you over the NAICS Small Business code threshold

• **Incurred Cost Claims - DCAA**
  – Contract Closeouts = + CASH!
  – 15% of profit can add up (don’t forget it’s the last 15% on CR contracts)

• **Forward Pricing/Billing Rates - DCAA**
  – Review and modify as necessary – effects cash flow
Project Control

• Plan vs. actual
  – Don’t surprise your customer - 75% letter

• Customer reporting
  – What you say can and will be held against you

• LOE monitoring
  – Don’t exceed contractual limitations
  – Make sure the employees meet the labor category qualifications
  – An employee can qualify for more than labor category

• Travel authorization
  – Does the contract require advance approval? Are there budget limitations?

• Purchasing authorization
  – Does the contract require advance approval?
  – Are there budget limitations?
  – Did you get 3 quotes if > $2500?
Project Control (cont’d)

• Backlog reporting
  – Don't wait to plan the follow-on!
  – Don't assume your task manager is watching this

• Labor categories
  – Compliance with contract?

• Charge numbers
  – How do employees know what to charge?
  – Can you charge before the contract is signed?
    • Precontract Cost Authorization
  – DCAA will audit you!
Contract Administration

- Pricing
- Labor rates
  - How do I justify new labor categories?
- Indirect rates
  - For a small company, every proposal causes us to re-do the business plan
- Total wrap rate
  - Assess need and contract ramifications if you want to be aggressively competitive
- GSA schedules
  - Labor categories
  - Growth / costing changes over time
Contract Administration (cont’d)

- Professional Contracts Administrator
  - You don’t need an expensive attorney
  - You do need someone qualified and experienced
  - A good C.A. will earn their salary
    - Higher negotiated billing rates
    - Increased cash flow
    - Effectively negotiate contract changes
    - Eliminate unnecessary and costly terms and conditions
    - Effective relations with the Contracting Officer and DCAA
    - Pays attention to the all the details that you won’t!
    - Keeps you and your technical staff compliant
    - Insures you don’t get burned with a bad effective date on modifications
Contract Administration (cont’d)

• **Teaming Agreements**
  – Be specific about what you will do. %'s mean nothing in reality
  – Be sure you get the right to review what is proposed regarding your company
  – Remember, once the subcontract is awarded, the Teaming Agreement usually goes away

• **Non-Disclosure Agreements**
  – Be sure they are written fairly to both parties
Contract Administration (cont’d)

- Contract compliance
  - You will be audited. Don’t kid yourself.
    - Time cards
    - Purchasing
    - GFP
    - EEO
    - Service Contract Act
    - Contract labor qualifications
    - Travel reimbursement
    - QA systems
    - Inventory management
Contract Administration (cont’d)

- File maintenance
  - Must maintain for 3 years after final payment date!
    - Correspondence
    - Proposals
    - Agreements
    - Budgets
    - Deliverables
    - Invoices

- Closeouts
  - Must submit within 6 months after fiscal year-end
  - Realistically plan on 2 years to settle
  - Ask for quick closeout before Incurred Cost claim is settled
    - 2 year history of satisfactory incurred cost settlements
Contract Administration (cont’d)

- GFP administration
- If you bought and it’s not consumed, you have to track it!
- Subcontract administration
  - Price justification - either you do it or have the CO ask DCAA
  - Terms and Conditions – only include 3 mandatory flow downs
  - Type contract - easier to make subs T&M vs. CR - no closeout issues
  - Watch out for termination clauses
  - Payment terms - pay sub after prime gets paid, or net 30?
- Disputes resolution
  - Keep the lawyers out of it. What are the obligations for prime to appeal to the customer?
  - Commercial vs. non-commercial
  - Sometimes a purchase order is good enough
Accounting

• **Time cards**
  – Train your employees, then train them again
  – Perform periodic internal audits
  – Overtime
    • Straight vs. premium
    • Compensated vs. uncompensated
  – Watch out for CR vs. FFP contracts

• **Accounts payable**
  – Authorization
  – Contract approval needed?
  – Recording
    • Commitment = Invoicing
    • If Subs are slow with invoices, at least get their monthly report in and use that!
Accounting (cont’d)

- Accounts receivable
  - Billing preparation
  - On-line invoicing vs. DCAA approval
  - Tracking - cash is king!
  - Recording payments
    - Year end… watch out… plan ahead

- General accounting
  - Chart of Accounts - the more the better; impacts indirect cost calculations
  - Fixed assets - don’t confuse direct vs. indirect
  - Not everything you buy on a FFP contract becomes deliverable to the Government
  - Lease vs. buy effects cash flow
Accounting (cont’d)

• Audit support
  – Just because you are the President does not mean you do not have to complete expense reports!

• 401K administration
  – Profit sharing and matching are included in the indirect costs

• Travel
  – Audit every expense report
  – Limited to per diem rates
    • Receipts vs. no receipts
Human Resources

• Offer letters
  – Contingent vs. non-contingent - be specific as possible
• Government compliance
  – Train them and train them again
• Benefits coordination
  – Costs have significant impact on indirect rates
• Policies and procedures
  – Train them and train them again
• Worker's Compensation
• EEO compliance
  – >60 employees..must do!
• Employee qualifications on Labor Service Contracts
  – Update annually
Legal Issues

Jack Friery
Legal Issues

- Risks and rewards in Government market
- Prime or sub?
- Team agreements
- Ts & Cs
- Performance traps
- Disputes & claims
- Resources
Risks & Rewards in Government Market

• **Rewards:**
  - Government pays on time
  - Patriotism
  - National interest

• **Risks:** if you mischarge costs, falsify reports or invoices, or skip required testing, this will bring
  - FBI visits
  - Debarment
  - Past performance problems

• **Defective pricing issues**
Prime or Sub?

- **Prime:**
  - Responsible for end-product
  - Many more Government-unique clauses and requirements
  - Paying your subs no matter what?

- **Sub**
  - Concept of privity
  - No recourse to Government customer
  - Little leverage if sub

- **Does your corporate form make a difference?**
  - Corporations vs. LLCs vs. partnerships

- **Can you improve your leverage?**
Team Agreements

• Advice re team agreements—prime or sub
• Is it enforceable?
• Should it be exclusive?
  – Playing on several teams: pitfalls
• Pricing data
  – To your partner, or direct to the USG?
• Termination
  – At-will, either side
  – Government direction
  – Can you play with another after?
Team Agreements (con’t)

• Negotiating the follow-on subcontract
  – Does the team agreement continue?
  – How long to negotiate?
  – When do you agree on major Ts & Cs?
Subcontract Terms & Conditions

• Prime selling commercial items or services to the US Government —most of the US Government Ts & Cs are now negotiable
  – See FAR Part 12

• Sub selling commercial components to US Government prime—use FAR clauses in 52.212-4 as your start

• What contract type do you get if you’re a sub?
  – Advantages & disadvantages: fixed-price, cost-plus, T&M
Terms & Conditions (con’t)

• **Pay-when-paid clauses**
  – Letting yourself become part of the problem

• **Intellectual property clauses**
  – How to protect pre-existing technology

• **Changes**
  – Using as bargaining chips

• **Termination for convenience**
  – Only when your prime is terminated?

• **Warranties**
  – Are you giving or getting?
Terms & Conditions (con’t)

• **Indemnity**
  – Must have a cap on liability

• **Audit**
  – Your prime or DCAA?

• **Disputes**
  – Litigation
  – Alternate dispute resolution
Performance Traps

• Changes
  – Disciplining your system

• Termination for convenience
  – Proving up your costs

• Prime contract termination for default

• Allowability & allocability of costs (cost-type contracts)
  – Effect of unintentionally false certificates

• Labor categories & qualifications (T&M contracts)
  – Matching them up
Disputes & Claims

- Choice of law (to interpret contract)
- Choice of forum/state (to litigate about contract)
- How-to:
  - Litigation
  - Mediation
  - Arbitration (binding or non-binding?)
- Remedies for Government acts that cause you harm—if you’re the sub
Internet Resources

• Federal Acquisition Jumpstation: http://prod.nais.nasa.gov/pub/fedproc/home.html
• Where in Federal Contracting? http://www.wifcon.com/
• Manuals, training, policies: Defense Acquisition University: http://deskbook.dau.mil/jsp/default.jsp
Summary
Top 10 Issues

• Be clear when the contract says you are done!
  • Various types of contracts define “done” differently
• Don’t surprise your customer
  • They can’t help you if you have not followed the rules
• Get help with contract administration
  • The return on expenses far outweighs the costs
• Time cards: the silent enemy
  • Train your employees, then train them again!
• Protect your company from the whistleblowers
  • Sound policies and procedures work every time
Top 10 Issues (cont’d)

• Meet all contract requirements
  • Avoid FBI visits, debarment, past performance problems

• Make informed decisions regarding prime / sub status
  • Total responsibility = you can be sued

• Know the advantages / disadvantages of contract types
  • Fixed price tasks can be beneficial

• Don’t skip the terms and conditions section
  • Many T&Cs are negotiable; some are gifts that keep giving

• Avoid disputes, claims, litigation
  • All have cost implications; know your options for remedies
Questions ???