



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**

Brian Greenberg

VP, Operations,
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- Finance
- Project Control
- Contract Administration
- Accounting
- Human Resources

- **Legal Issues**

Jack Friery

Attorney, SDSU Instructor

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



Operational Issues

Brian Greenberg

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 ???