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GSA/DoD Transportation Law Primer

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Many government agencies accomplish their critical missions by using private transportation and logistics services. The General Services Administration (GSA) is often the key federal agency for managing private procurement of these services. Its Freight Management Branch serves the broader federal agency community's procurement needs including the U.S. Department of Defense (DoD). As one would expect the DoD regularly awards a considerable number of contracts to transportation providers. Unlike contracting with another business for transportation-related services, however, contracting with DoD requires the understanding and acceptance of the federal government's contractual terms and conditions along with other nuances and rules of the road.

This simple primer provides a playbook for the regulations applicable to contracting with the DoD and background on how many transportation providers establish their ability to bid on contracts offered by the DoD and its subagencies.

Why do I keep hearing reference to the "FARs"?

The Federal Acquisition Regulations (FARs) and the Defense Federal Acquisition Regulations (DFARs) are the primary regulations used by all executive agencies, including the DoD, in their acquisition of supplies and services with appropriated funds. Generally, FARs and DFARs apply to vendors and contractors who are seeking awards of government contracts with the DoD. These regulations outline the bid solicitation process and certain performance requirements. The FARs are found in Title 48 of the Code of Federal Regulations.

While the FARs are extensive and cover the requirements of both contractors and government agencies alike, FAR Part 52 is the most impactful for purposes of government contracting. FAR Part 52 contains the standard solicitation provisions and mandatory contract clauses directed at contractors interested in competing for specific contracts.

Are there FARs that pertain specifically to transportation and logistics providers?

The breadth of the FARs generally allows for regulations covering specific areas of contracting. FAR Part 247 contains various requirements and recommendations for government agencies pertaining to contracts for transportation or for transportation-related services. For example, this Part 247 recommends to government procurement officers that in addition to the general evaluation factors and subfactors expressed in the FARs, generally procurement officers should also consider records of claims involving loss or damage and the commitment of transportation assets to readiness support when reviewing bids. In other words, the government, as a sophisticated shipper in this case, is instructed to conduct its due diligence on potential transportation providers during the bid process. FAR Part 247 also expressly acknowledges that there are certain additional required contract clauses for solicitations and contracts for motor carriage in which a motor carrier, broker, or freight forwarder will provide or arrange truck transportation services.

Will I need to obtain a new or different type of operating authority to comply with the FAR?

Generally, there is no additional operating authority (i.e., motor carrier authority or a broker permit) required to perform services for the government beyond what is required in private business. While the FARs do not contain a requirement of certain operating authority, the GSA tends to be particular regarding a contractor's capabilities, such as potentially requiring a prospective contractor to obtain additional authority as part of the solicitation process. Further, government contractors should remain keenly aware of the purview of the False Claims Act (FCA), found at 31 USC §§ 3729-3777, when representing the capabilities of their services to government agencies. In short, the FCA was expressly enacted to punish defense contractors for fraudulent representations, and the FCA's generous establishment of rights for private citizens broadens its scope.

What are some key considerations for compliance with government contracts?

Prospective government contractors should understand that contracting with the federal government brings additional employment legal requirements. For example, both the FARs and applicable Executive Orders prohibit federal contractors and subcontractors who exceed a monetary threshold of business in a given year from discriminating in employment decisions on the basis of race, color, religion, sexual orientation, gender identity, or national origin. Certain Executive Orders also require government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment, including upgrading, demotion, transfer, termination, rates of pay, etc.

Another particularly important consideration in complying with government contracts, particularly for prime government contractors, is the manner in which the contractors "flow down" mandatory or discretionary contractual provisions to their subcontractors performing services pursuant to a government contractor. In short, the FARs require that contracts with government subcontractors contain mandatory flow-down clauses-that is, clauses that must appear or be expressly incorporated into the contractor's agreements with subcontractors. In our experience, "subcontractor" is broadly defined and so, for brokers, flow-down is a necessary part of performance of services for the government. Approaches vary in the marketplace, but we see a range of flow-down provisions to subcontractors from only the required clauses, on one hand, to a full range of optional flow-down provisions on the other. Our team is ready to assist in determining the proper strategy for best practices in compliance with FAR flow-down requirements.

How do transportation providers contract with the Department of Defense?

The DoD and its subagencies award contracts to transportation providers who bid on the services requested. Identifying and, if necessary, establishing the business entity to submit bids to the DoD's subagencies is the first step in soliciting and receiving a contract. Since government agencies are required to award a percentage of their contracts to small, veteran-owned, and minority-owned businesses, many transportation providers launch businesses that satisfy these categories to increase the chance of winning a bid. Determining the range of services to be offered is another early step. For example, transportation providers often produce Capability Statements to advertise the transportation services they wish to offer the DoD. These Capability Statements are typically displayed on the transportation provider's website and can be a required submission when the transportation provider bids.

Once the business entity and capability is determined, the transportation provider must register in the System for Award Management (SAM), located at SAM.gov. Registration in SAM will include several questions about the FARs and DFARs, as discussed above, to ensure the transportation provider is knowledgeable regarding the regulations applicable to government contracting. Following registration, the federal government will activate the transportation provider's SAM.gov account in seven (7) to ten (10) days, and allow the transportation provider to bid on contracts.

Bidding on a DoD transportation or logistics contract takes place in four stages:

Sources Sought. During the first stage, Sources Sought, the applicable agency will publish the details of a potential contract to solicit information from and the capabilities of interested transportation providers.

Pre-Solicitation. The second stage, Pre-Solicitation, involves the agency alerting transportation providers that a contract will be coming for bid and affords the transportation providers the ability to begin preparation of a bid.

Solicitation. Solicitation is the third stage and involves the agency officially requesting bids from transportation providers through the forms requested by the agency.

Award. The fourth stage, Award, involves the agency's contracting officer contacting the transportation provider with the winning bid.

Submitting a winning bid involves a detailed review and response to the agency's instructions and requirements. Close attention to the solicitations and agency instructions on SAM.gov is required, as the agency may fail to consider bids for even the minimal discrepancies (i.e., font and page limit).

What other federal compliance activities may apply when performing as a prime or subcontractor for the Department of Defense?

One of the most frequent topics of conversation when looking to perform DoD-related work is the possible need for registration to handle arms. The federal agency with jurisdiction over the export and temporary import of arms is the Department of State's Defense Directorate of Trade Controls (DDTC), which enforces the International Traffic in Arms Regulations (ITAR) found at 22 CFR Parts 120 to 130.

The ITAR applies to any items designated on the United States Munitions List (USML) found at 22 CFR § 121.1, including firearms, ammunition, missiles, explosives, training equipment, military electronics, optics, and spacecraft systems. The DDTC requires registration and licensing of certain actors and actions involved in the trade of arms.

Transportation and logistics providers involved in the international movement of USML items must in some circumstances maintain registrations as either an "exporter" or a "broker" with the DDTC. The exporter capacity arises for service providers most frequently in the case of participation in the Foreign Military Sales (FMS) Program. On the other hand, the broker capacity arises where a transportation or logistics provider performs certain other services amounting to the facilitation of international arms sales. Determining whether broker registration is required involves close review since it is entirely different than the "property broker" permit that many transportation intermediaries already hold from the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) or from certain state agencies for intrastate brokerage. Unlawful brokering and participation and transactions with knowledge of violations can be a serious area of exposure that in some cases may trigger voluntary disclosure.

Does Department of Defense contracting make sense for my transportation or logistics service portfolio?

There are shared functions across most aspects of the transportation and logistics business, and from that perspective DoD work is no different. Certain of our clients have successfully delivered DoD work, and other GSA work for federal agencies, for many years. For some this is a fundamental part of the business legacy that brings a great source of pride to the organization. Doing so involves recognition that the federal government is not a customer similar to other private enterprise shipper accounts. There will be less flexibility in many ways, including around pricing and the terms of the relationship as a Transportation Service Provider. It also requires a heightened care to process and regulatory compliance that can necessitate launching new divisions, or even new entities, so that core competencies in government contracting and compliance are developed and maintained. As a result, early-stage planning and a robust commitment to day-to-day performance is just as important as strong regulatory compliance. This may not be for all providers, but for some it can develop into a long and fulfilling business segment.

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