Doing business with the government?

Put it all in writing

Although doing business with the government can produce lucrative results, disputes do occur; it is best to put everything; in writing

by Hal Callaway

The U.S. government is probably the largest single buyer of roofing construction services in the world. Are you getting your fair share of government jobs? And, more importantly, do you know how to stay out of trouble after you get the job?

Getting the contract

Getting a government contract is like getting most any other type of contract—you must be the lowest bidder. The list of government agencies is impressive when you think about the many areas to market your services—the U.S. Navy, the U.S. Army, the U.S. Air Force, NASA and even the U.S. Postal Service. These agencies all contract pursuant to the requirements of the Federal Acquisition Regulations (FAR), which is available from the U.S. Superintendent of Documents in Washington D.C.

In addition, all national and some international government contracts are advertised in the Commerce Business Daily, published by the U.S. Commerce Department. If you learn how to do business with one government agency, you are over 90 percent on the way to doing business with all of them.

Many clauses in a government contract are mandatory for agencies to include in their contracts. Four clauses in contracts cause more problems (or opportunities, if you are prepared) than all of the others combined. These are: changes, differing site conditions, suspension of work and termination.

The changes clause:

The changes clause allows the government to make alterations to its contract at any time. If any change under this clause causes an increase (or decrease) in your costs, you can probably expect reimbursement from the government.

Examples of changes under this clause include increases or decreases in quantities; material changes; scheduled changes, such as changing from the dry season to the rainy season to install a roof; delays with your men; and equipment and home office operation inactivity.

If the government does not direct the change, you should be aware of the subtleties leading to a constructive change. A constructive change occurs when the government directs the contractor to provide work in a way that is contrary to what the specifications require. This could mean a difference in the interpretation of application requirements, site access, material quantities or even work hours.

It is under the changes clause that the contractor receives payment for any compensable conditions encountered in the other clauses. Therefore, a discussion of the types of items that may be compensable should be considered to ensure that

as a result of the change, you are properly remunerated. Some of the types of compensable items include—material costs, labor,
labor burden, home office overhead, labor inefficiency and equipment costs.

The more details about the roofing project you can provide to the government, the more likely you are to be fully compensated for additional efforts. For example, when providing details about labor, be sure to include your labor burden, the employer's portion of the Federal Insurance Contribution Act, state unemployment, workers compensation, federal unemployment and any special benefits paid by your company.

Contractors should also keep a daily inventory of equipment on the site. Equipment costs are described in NRCA's Roofing Contractors Equipment Cost Schedule. This is probably the most comprehensive listing of equipment in the industry and is almost always acceptable to the government.

Overhead is the most complex area of change, and the area where contractors most often get hurt (see "Estimating and Calculating Overhead: Don't Let Expenses Weigh you Down," on Page 26). If your real home office overhead is 25 percent, and you are doing changes for 10 percent overhead and 10 percent profit, you can quickly go broke.

In addition, if you are delayed for any extended period beyond what you anticipated in the original contract, but home office expenses are continuing to add up, the results can be devastating. Consider the impact if you have moved your equipment to the site for a built up roofing (BUR) job, and the government takes an extra month to approve material submittals. This ties up your bonding (not to mention your manpower and equipment) and can have a devastating impact on your yearend financial statement.

A roofing contractor should also know how to calculate his actual overhead rate from the financial statement. First, look at your financial statement for general and administrative expenses. From this total, delete items that are not allowable, such as interest, advertising and entertainment. Then, find the number showing the total cost of doing business, excluding profit, general and administrative expenses, and divide this number into the general and administrative expenses. The resulting fraction should be the rate of overhead you add as a minimum to the cost of all changes before profit.

One word of caution: Some Veterans Administration and General Service Administration contracts drastically limit the total amount of overhead and profit to a number that may be less than your total overhead; enter these contracts very cautiously and build in a healthy profit at bid time.

Proof of labor inefficiency requires good recordkeeping. Daily records of production, along with total man-hours, is essential. If you are working on a reroofing job, keep a daily log of demolition rates, as well as replacement rates.

You should also keep accurate records on the effect of weather on the job each day. For example, if a job is rescheduled to a season that is normally wetter, time required on the site with equipment and production may be dramatically affected. With these detailed records readily available, you can prove the difference in production rates, and with good negotiation skills, collect from the government if a discrepancy occurs.

As a final note on the changes clause, you should understand that with very few exceptions, if the contracting officer directs you to carry out a change, you must do so; to refuse is to risk termination.

The following is an example of what could be written to the government as a notice of a constructive change.

"This is to advise that we were directed by [name of contracting officer/prime contractor] to [describe what you were directed to do]. We do not consider this to be in our original contract, and will expect additional compensation. A change proposal will be submitted when the total impact of this direction has been determined."

The following is a sample of what could be written when there is a difference in interpretations in the contract, and when the end result is an increase in the cost or your time.

"Please be advised that [name of person] has informed us that the government interpretation of our contract is [describe government's point of view]. We, however, interpret the contract to say [describe your point of view].

"We are proceeding as directed, but hereby advise that we will expect additional compensation as this is considered to be a change to our original contract."

Differing site conditions:

According to FAR, the differing site conditions clause states that a contractor should promptly give the government written notice of subsurface physical conditions at the site if they differ from those indicated on the contract, or notify it of any unknown physical conditions at the site. This clause was originally put into government contracts so that contractors would not have to include contingencies in their contracts.

When fully understood, this clause can help keep you from "losing the farm" on a roofing contract, especially with a reroofing contract. For example, a contractor bid to remove and replace 900 squares on a NASA project in Florida; the contract price was $600,000. The documents indicated that the roof was a three- to four-ply BUR that had been resaturated. What the contractor actually found was a roof 1 1/2 to 3 inches thick, composed of embedded asphalt and gravel. The contractor gave timely notice to the government of a differing site condition, and the contract increased to approximately $1,300,000, albeit after a drawn-out court battle (see "Contractor battles NASA, wins federal case: David versus Goliath?" October 1991 issue, Page
34).

Another contractor bid to tearoff and replace BUR on approximately 1,300 squares on Navy warehouses in Mississippi; the contract was for $203,000. The contractor found a vapor barrier when he began to remove the existing roof, though one had not been indicated on the original job specification. The contractor gave notice to the government and was directed to remove the vapor barrier. The end result was a contract modification in the amount of $215,000.

There are two types of differing site conditions—Type I and Type II.

A Type I differing condition is one in which the job is materially different from what is shown in the original plans. Although a Type I differing condition is the more common of the two, it still must be approached with care.

First, a contractor should visit the site and make a reasonable site inspection. This does not mean redesigning the project and checking all of its dimensions. However, if the drawings show the job to be a one-story building and you actually encounter a two-story building, you are responsible for reporting this discrepancy to the government.

Many Type I claims arise as a result of the quality of the pre-bid jobsite visit. You are always better off when you don't encounter any changed conditions.

The government has the responsibility of preparing accurate specifications from which you should be able to prepare an estimate of the work required for the project.

In the examples cited above, both contractors encountered Type I differing site conditions, because the contract showed something different than what was actually encountered. If this happens to you, it should be reported to the government promptly and before the conditions are disturbed.

The following could be written if a Type I differing site condition is encountered:

"This is to advise you in accordance with the differing site conditions clause that such a condition has been encountered. The plans and/or specifications show/require that we [state type of work that was originally specified]. However, the actual conditions require that we [state type of work that must actually be done]. Promptly advise us as to how we are to proceed, as this is affecting the progress of the project."

A Type II condition exists when a circumstance (that you can prove you did not have prior knowledge of) is encountered and is considered "unusual." For example, a contractor was removing a roof from a U.S. Navy housing project that had a plywood deck. Approximately 200 houses had felt underlayment that was mechanically attached, allowing the roofs to be readily
removed. On 30 of the houses, however, the felt underlayment had been hot-mopped directly to the plywood decking, thus causing them to be considerably more expensive to remove.

Because it was "unusual" for the contractor to expect that the felt underlayment would be mopped directly to the plywood deck on a residential project, he was duly compensated by the government.

The following letter is one way to address the government after encountering a Type II condition:

"We are encountering conditions that were unknown to us at the time of bidding this project. These conditions are not what one would expect with this type of work and were not mentioned in the contract. These conditions are as follows: [give a detailed description of conditions encountered].

"Please advise us as to how we should proceed. Also, please be advised that we consider this to be a change in the contract for which we expect to be compensated"

Suspension of work:

The suspension of work clause permits the government to suspend the contract for indefinite periods of time with the responsibility of compensating the contractor for costs incurred. The same costs are compensable under this clause as they are under the changes clause, with the exception of profit.

In addition, under the terms of this clause, the contractor is given extra time for disruptive weather that is not normally

encountered in a specific locale at a specific time of year. However, you are not financially compensated for weather delays under this clause. Before you ask for weather delays, check to make sure the postponements are not the result of other conditions that may be compensable.

Termination clause:

For contractors who have had experience with the termination clause, the word instantly evokes an emotion: either wrath or joy. Under this clause, the government has the right to either terminate the contract for convenience or default.

A termination for default is very serious, and, depending on your company's size and the conditions surrounding the termination for default, it could mean the end of your business. If the government alerts you that it is considering terminating your contract for default, every effort should be made to convert the case to a termination for convenience, instead. In a termination for default, the government may either require your bonding company to complete, readvertise or renegotiate the project. In any case, the difference in price is chargeable to you.

In the less-serious case of a termination for convenience, this is the only instance where the contract and the FAR specifically require the government to pay for your lawyer, accountant, cost consultant and related settlement expenses, in addition to your total cost, plus reasonable profit. This is another reason why detailed records are important. All of your direct costs subsequent to termination must be itemized for the government in significant detail.