

GOVERNMENT CONTRACTS CARRY HIDDEN RISKS AND RESPONSIBILITIES

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In this difficult economy, funding sources can be scarce. The financial climate makes government contracts appear quite lucrative. Every industry should seriously consider the ramifications of their actions on other areas of the business when entering into government contracts. We frequently see situations where the sales force of an organization enters into a contract without coordination with the sections of the business responsible for compliance with the multiple reporting procedures, that often go along with government contracts. In fact, there have been a number of occasions where a company's contracting agents had no idea that the work being secured for the company would result in significant reporting requirements. Two relatively new developments should give companies pause when considering government contracting.

Executive Order 11246 requires that all government contractors undertake affirmative action in the hiring of traditionally disenfranchised groups where the contractor or subcontractor has a government contract of \$10,000 or more. Contractors who have contracts of \$50,000 or more must prepare, maintain and comply with a written affirmative action program. Compliance with affirmative action plans is onerous enough, but the bigger issue is that these plans may be classified as admissible evidence to prove reverse discrimination. See [Stimeling v. Board of Education Peoria Public School Dist.](#) To be sure this issue has been visited in the past by appellate courts, with recent case law successes in the reverse discrimination field. See [Christianson v. Equitable Life Assurance Society](#), 767 F.2d 340, (7th Cir. 1985). At least one court has recently found that a former employee of the Peoria School District in Illinois could use the existence of the District's affirmative action plan as evidence of discriminatory intent, so long as other evidence of intent was also present. This case is evidence of the fact that Office of Federal Contract Compliance Programs' ("OFCCP") mandates for affirmative action plans can create hidden dangers to a company. These factors should be considered prior to entering into any government contract.

The second fairly new issue of concern is the fact that government contractors are now required to disclose the compensation earned by certain company executives. This information will be made publicly available once it has been reported to the government. An amendment to the federal acquisition regulation which became effective March 1, 2011, requires all contractors and

first-tier subcontractors to report the executive compensation (in all forms) of their top five most highly compensated executives for the contractor's previous fiscal year (the amendment has been in place since July 2010, and has been implemented in phases). The reports will be applicable to all contracts where the prime contract is for \$25,000 or more. Contractors and first-tier subcontractors must report the information by the end of the month following the month of the award of the contract and annually thereafter. Many companies will be less than thrilled about such information becoming public.

The wise move is to think long and hard about entering into any government contract. Once the decision is made, companies would do well to recognize the risks of such contracts and take steps to limit those risks. Here are some dos and don'ts when considering entering into government contracts:

- Advise your sales force of the potential attendant requirements of any government contract.
- Require sales executives to get approval of a management official before proceeding with any government contract.
- Carefully examine all requirements of the contract before signing.
- Assign reporting requirements to a specific entity within the company.
- Know the end date for the contract. You are not required to continue any contract-related reporting or other record keeping after the completion of the contract. Doing so may subject the company to discrimination claims and unnecessary scrutiny.

Should you require additional information about any of the information discussed above, please feel free to contact Shaun Henry at (717) 237-5346.

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