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Doing Business with the Federal Government— *Is It Really That Different and is it Worth It?*

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Roadmap

- Introductions
- Benefits of Government Contracting
- Overview of Government Marketplace
- Key Differences Between Commercial And Government Contracts
- Strategies For Entering The Government Market
- Questions



What level of involvement (if any) does your company currently have in government contracting?

- ☐ Government contracting is all we do.
- ☐ Most, but not all, of our business is with the government.
- ☐ Most of our business is in the commercial space, but we do some government contracting.
- ☐ We're not currently involved in government contracting, but we've seriously considered it.
- ☐ We've never seriously considered government contracting, but it might eventually become an option for us.
- ☐ None of the above.



Benefits of Government Contracting

- Federal government is the world's largest single consumer, spends roughly \$600 billion on a wide range of goods and services
- Government market is often considered more “recession proof” (and “pandemic proof”)
 - Many commercial companies sought to enter government market following financial crisis and “Great Recession”
 - Billions in government contracts awarded for COVID-19 response
 - American Rescue Plan expected to increase government contracting opportunities through 2021 and beyond



Benefits of Government Contracting (cont'd)

- Government customers may offer greater stability and certainty compared to commercial customers
 - Requires less due diligence/investigation of client than deals in commercial sector
 - Federal government required to make timely payments (Prompt Payment Act)
 - Subject to standard terms and conditions, generally non-negotiable
 - Benefits of stability and certainty may offset downsides (e.g., increased compliance costs, lower profit margins)
- Many sophisticated, complex, large scale projects
 - Significant revenue
 - Potential to attract skilled employees



Benefits of Government Contracting (cont'd)

- “Commercial Item” contracting rules designed to attract commercial companies to do business with the U.S. Government
 - Streamlined procurement procedures
 - Terms and conditions mirror commercial terms (e.g., IP)
 - Limited “flowdowns” to subcontractors
 - Not subject to government cost accounting standards
 - Limited Government audit rights
 - Covers both products and services
- GSA Schedules, other “GWACs” can be used to market to multiple agencies
- Expanded use of “Other Transaction Agreements” (OTAs) in recent years to attract more “nontraditional” contractors



Benefits of Government Contracting (cont'd)

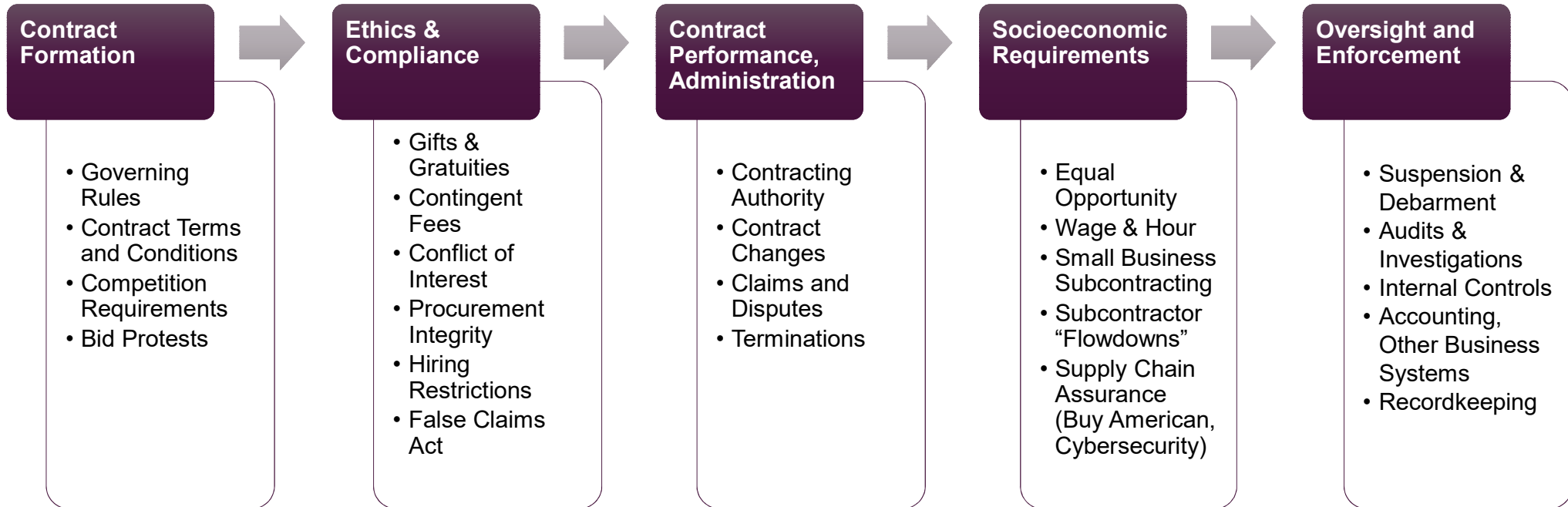
- Small Business programs may create business opportunities to enter the government market:
 - Certain procurements may be “set aside” for small business
 - Prime contractors may be required to subcontract certain percentages of work to different categories of small business (e.g., women-owned, service-disabled-veteran-owned, 8(a), HUBZone)
 - Small businesses may be able to enter into “Mentor-Protégé” agreement with large business, for JVs to pursue government work as a small business
- Specialized requirements may present additional business opportunities (e.g., Cybersecurity)



Poll Results

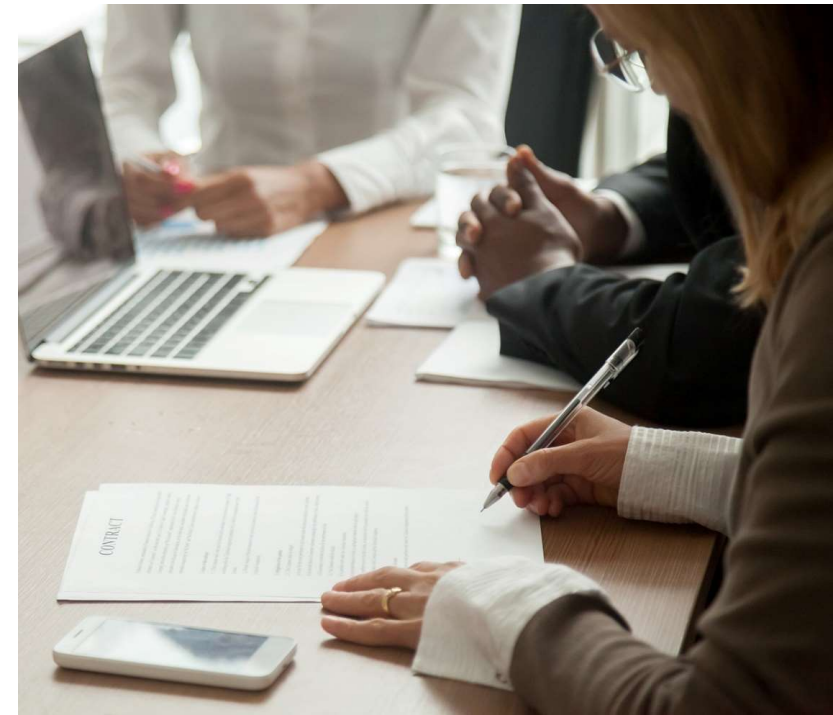
Overview of The Government Marketplace

Highly Regulated Marketplace, Governed by Complex Web of Rules and Regulations Through All Phases of Contracting



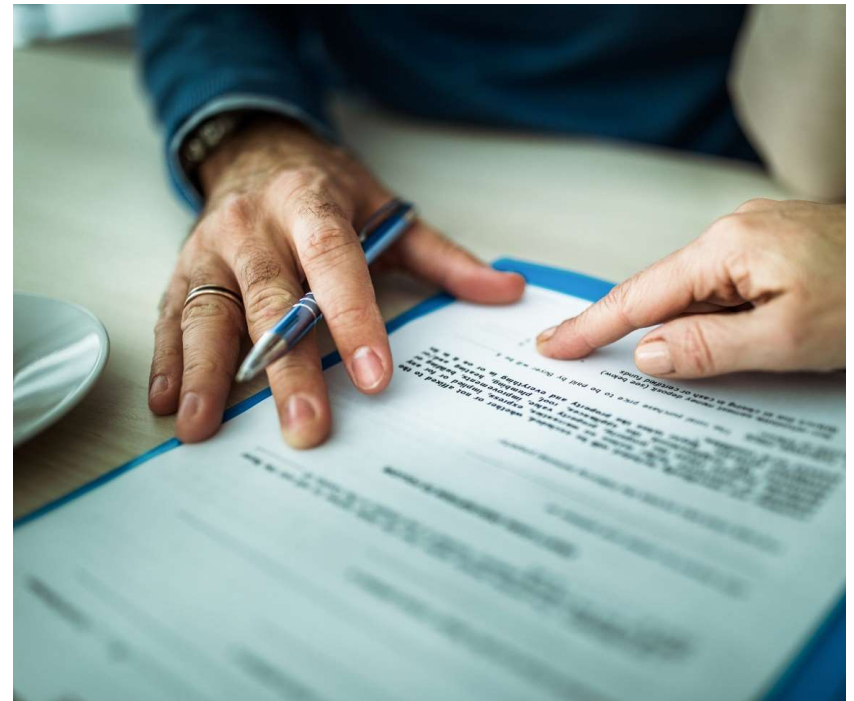
Differences Between Government and Commercial Contracts: **Governing Rules**

- Government contracts governed by complex set of rules
 - Statutes
 - Executive Orders
 - Regulations (FAR, DFARS, Agency Supplements)
 - No UCC, no state laws
- Rules reflect Government's two unique roles: "customer" and "sovereign"
 - Accountability for public funds
 - Sovereign immunity issues
- Creates unique compliance obligations, risks for contractors that don't exist in commercial contracts



Differences Between Government and Commercial Contracts: **Terms and Conditions**

- Government contracts include potentially hundreds of standard contract clauses
- Specific clauses applicable to a particular contract influenced by various factors, including:
 - Procuring agency
 - Product or service
 - Dollar value
 - Contract type (e.g., fixed price, cost-plus, T&M)
 - Commercial Item or Non-Commercial Item
- Even “negotiated” procurements are generally on the government’s terms (i.e., “take it or leave it”)
 - Exception -- “Commercial Item” contracts, OTAs



Differences Between Government and Commercial Contracts: **Competition**

- Competitions for government contracts highly regulated, no “backroom” deals allowed
 - US Government policy generally requires “full and open competition” to the greatest extent possible
 - Requires publicizing contract opportunities and holding competitions
 - Rules of competition are strictly enforced to ensure level playing field
 - Limits on the ability to communicate with the government about your offer/proposal



Differences Between Government and Commercial Contracts: **Bid Protests**



- Unlike commercial marketplace, if you don't win a government contract, you may be able to "sue" your government customer
 - "Bid protest" process allows losing bidder(s) to challenge Government procurement decisions
 - Terms of solicitation
 - Failure to follow applicable procurement rules
 - Act as a "check" on the system
 - A number of different fora for pursuing a protest—
 - Agency, "Ombudsman"
 - Government Accountability Office (GAO)
 - Court of Federal Claims (COFC)

Which entity or individual has the authority to initiate investigations or enforcement actions against government contractors for suspected wrongdoing?

- A. U.S. Congress
- B. U.S. Department of Justice
- C. U.S. Department of Labor
- D. Office of the Inspector General (OIG)
- E. Suspension and Debarment Official (SDO)
- F. None of the Above
- G. All of the Above



Differences Between Government and Commercial Contracts: **Gifts and Gratuities**

- Criminal statutes prohibit bribes, kickbacks, gifts and gratuities in connection with government contracts and subcontracts
- As a result, normal commercial “business courtesies” may be prohibited
 - Gratuities include many courtesies that are common in the commercial marketplace, such as:
 - Meals and beverages
 - Tickets to sporting or entertainment events
 - Travel and lodging



Differences Between Government and Commercial Contracts: **Contingent Fees**

- Federal law limits a company's ability to enter into "*contingent fee*" arrangements to secure award of a government contract
 - Prohibits payment of commissions, percentages, brokerages or other fees that are contingent upon securing a government contract
 - Designed to prevent "influence peddling"
 - Exception for commissions paid to a contractor's own sales employees or to a "bona fide selling agency" (*i.e.*, a third party hired to perform substantive marketing activities, such as proposal preparation)



Differences Between Government and Commercial Contracts: **Conflict of Interest**

- Organizational conflicts of interest (OCI) rules prohibit contractors and subcontractors from performing conflicting roles
 - “Impaired Objectivity” – Can’t evaluate own products or services
 - “Biased Groundrules” – Can’t bid if contractor developed specifications
 - “Unequal Access” – Can’t bid where access to non-public information provides unfair advantage
- OCI restrictions may limit the types of government contracts a company can pursue



Differences Between Government and Commercial Contracts: **Procurement Integrity**

- The Procurement Integrity Act prohibits disclosure or receipt of certain types of non-public information:
 - Government “source selection” information (e.g., Government evaluation plans or results)
 - Contractor “bid or proposal” information (e.g., competitors’ proposals)
- Designed to protect the integrity of the procurement process
- Violations can result in significant liability including disqualification, criminal penalties



Differences Between Government and Commercial Contracts: **Hiring Restrictions**

- Federal law restricts hiring or even contacting certain government personnel (e.g., procurement officials) about employment
- Conflict of interest rules may also limit activities that former government employees can engage in after leaving government
 - One-year, two-year and permanent restrictions depending on nature of the particular matter(s) the employee was responsible for while in government
 - Designed to address concerns about “revolving door” between government and industry
 - Ethics opinion from former employee’s agency can help define scope of restrictions



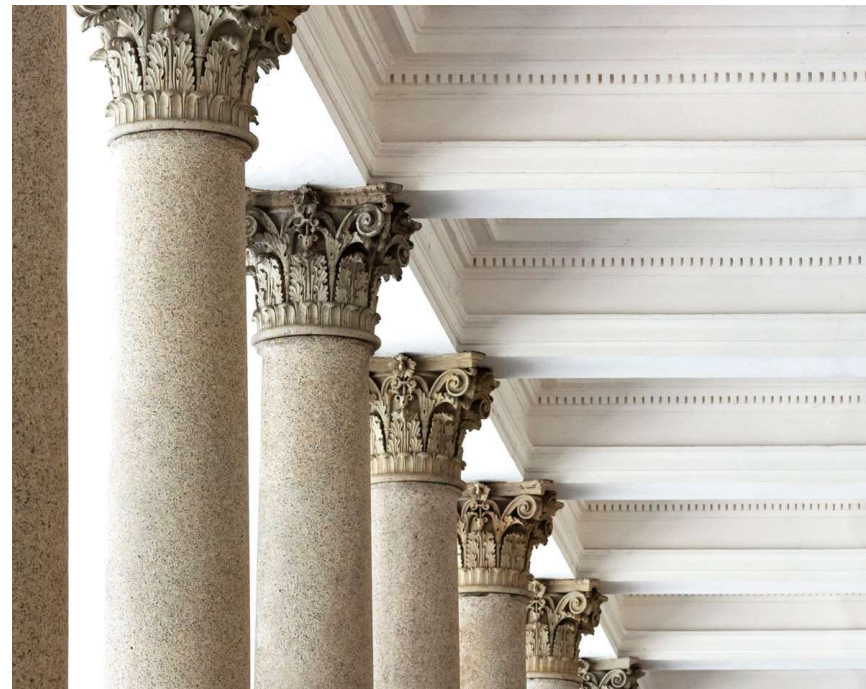
Differences Between Government and Commercial Contracts: **False Claims**

- Unethical or improper contracting practices can lead to civil criminal fraud investigations and/or actions
 - False Claims Act (FCA) can result in civil and criminal penalties for submission of “false claims” to the Government
 - False certifications
 - Product substitution
 - Overcharging, mischarging
 - FCA can result in “treble damages,” plus other penalties
 - In addition to obvious types of fraud, FCA covers broad range of what might otherwise be considered business disputes in the commercial market



Differences Between Government and Commercial Contracts: **Suspension and Debarment**

- Contractors must be deemed “responsible” in order to do business with the U.S. Government
 - Among other factors requires a satisfactory record of “integrity and business ethics”
- If Government determines a contractor is no longer “responsible,” that determination applies government-wide
 - Suspension/debarment process
 - Forecloses any new government contracts (or subcontracts) while excluded



Poll Results & Answer

H. All of the Above

Differences Between Government and Commercial Contracts: **Audits and Investigations**

- Government contractors are subject to oversight (e.g., audits and investigations) by various authorities:
 - U.S. Congress
 - U.S. Department of Justice
 - U.S. Department of Labor
 - Agency Offices of the Inspector General (OIG)
 - Suspension and Debarment Official (SDO)
 - Contracting Officer
 - Other audit agencies (e.g., DCAA, DCMA)
- May require contractor to maintain and provide access to certain types of records (e.g., accounting records, timesheets, etc.)



Differences Between Government and Commercial Contracts: **Contracting Authority**

- There is no such thing as “apparent authority” in government contracting
 - Only one person has authority to contract/modify/terminate a government contract:
the Contracting Officer (“CO”)
 - No one else has authority (even if they claim otherwise)
 - CO can ratify unauthorized actions, but not required to do so
 - Any agreement reached without the CO’s approval is not binding on the government (and could be to your peril)



Differences Between Government and Commercial Contracts: **Unilateral Changes**

- The Government can unilaterally change the contract terms during performance
 - Government obligated to make an “equitable adjustment” to price or schedule (or both) to compensate for the change
 - Under Changes clause, change must be within scope of contract
 - Exception for commercial item contracts – changes only by *mutual agreement*
- Even if you don’t like the change, you must continue to perform
 - Disputes clause requires contractor to continue performing despite pending dispute (with limited exceptions)



Differences Between Government and Commercial Contracts: **Claims and Disputes**

- If you have a dispute with the Government about contract interpretation or performance issues, you can't just sue
 - Contract Disputes Act (CDA) establishes process for resolving disputes in exchange for a limited waiver of sovereign immunity
 - Before litigating a dispute, a contractor must first submit a "certified claim" to the CO and get a final decision from the CO
 - Time limits for appealing a CO's final decision
 - Limits on where you can file an appeal
 - Armed Services Board of Contract Appeals (ASBCA)
 - Civilian Board of Contract Appeals (CBCA)
 - COFC



Differences Between Government and Commercial Contracts: **Terminations**

- The Government can terminate a contract “for convenience” (i.e., without cause) at any time
 - One-way street -- only the Government has this right, not the contractor
 - Contractor entitled to compensation if the Government terminates for its convenience
 - Compensation for work performed, costs incurred prior to termination
 - Does not include lost profits
 - Limited grounds to challenge a termination for convenience



Can a company rely on its existing infrastructure and resources (or those of its affiliates) to pursue government contracts, and then make any additional investments that may be required for contract performance once it has secured the work?

A. Yes

B. No

C. It Depends



Differences Between Government and Commercial Contracts: **Socioeconomic Obligations**

- Government contracts can include clauses that require contractors (and subcontractors) to comply with various socioeconomic obligations, including for example:
 - Equal Opportunity/Affirmative Action;
 - Minimum wage obligations (e.g., Service Contract Act, Davis-Bacon Act, Minimum Wage Executive Order);
 - Small Business Subcontracting requirements;
 - Employment Eligibility Verification (i.e., e-Verify);
 - Anti-Human Trafficking policies.
- Government can require contractors to “flow down” these obligations to their subcontractors



Differences Between Government and Commercial Contracts: **Supply Chain**

- Government procurement rules have increasingly focused on securing the Government supply chain
 - Buy American Act (BAA) and “Trade Agreements Act”
 - Multiple EOs have called for strengthening “Buy American” requirements
 - May limit contractor’s ability to deliver products or services from certain countries (e.g., China, India)
 - Cybersecurity
 - “Section 889” restricts use of telecommunications and surveillance products and services from certain companies from China
 - Recent Cybersecurity EO aims to strengthen cybersecurity information sharing, other protections in response to Solar Winds, Colonial Pipeline and other incidents



Poll Results & Answer

C. It Depends

Differences Between Government and Commercial Contracts: **Internal Controls**

- Government can require certain contractors to implement certain internal controls
 - Ethics and Compliance Program
 - “Code of Business Ethics”
 - Training and awareness program
 - Mandatory disclosure of “credible evidence” of certain criminal and civil violations
 - Failure to disclose is a ground for suspension/debarment
 - Several laws (e.g., False Claims Act) and regulations encourage and protect whistleblowers
 - Depending on type of contract, contractor may be required to implement other business systems
 - Accounting system, policies relating to “allowable” costs
 - Purchasing, Estimating, Timekeeping systems



Strategic Considerations for Entering Government Market: **Commercial Item or Non-Commercial Item?**

“Commercial Item” Contracting

- **Advantages:**
 - Streamlined acquisition procedures
 - Terms and conditions mirror commercial terms (e.g., commercial software license)
 - Limited “flowdown” obligations
 - Not subject to government accounting standards, cost principles
- **Disadvantages**
 - Certain opportunities may not be considered “commercial items”
 - Not truly “commercial,” still impose government-unique obligations

“Noncommercial Item” Contracting

- **Advantages:**
 - Broader universe of potential contract opportunities
- **Disadvantages:**
 - Additional compliance obligations
 - Broader universe of standard clauses
 - Government cost accounting standards, cost principles
 - Other business systems
 - Government audit rights



Strategic Considerations for Entering Government Market: **Direct or Indirect?**

“Indirect” Approach (Subcontracting, Teaming)

- **Advantages:**
 - Potentially limits compliance obligations (e.g., limited “flowdowns”)
 - Access existing contract vehicles that might be closed to new entrants
 - Opportunity to build up experience/past performance
- **Disadvantages:**
 - Less control
 - Less visibility
 - Less revenue
 - Risk not completely eliminated

“Direct” Approach (Prime Contracting)

- **Advantages:**
 - More control
 - Higher profile
 - More “top line” revenue
- **Disadvantages:**
 - Increased compliance obligations
 - More risk



Strategic Considerations for Entering Government Market: **Create Separate Subsidiary?**

Separate Subsidiary

- **Advantages:**
 - Potentially limits liability, compliance obligations, audit exposure to subsidiary
- **Disadvantages:**
 - Parent may remain liable for subsidiary in certain cases
 - Establishing separation may require duplicate compliance infrastructure
 - Other potential impacts (e.g., tax and accounting impacts)
 - Subsidiary may not be able to claim “credit” for experience of affiliates

Single Entity

- **Advantages:**
 - Avoids duplication of compliance infrastructure
 - Gives parent greater control
 - Ability to leverage corporate experience
- **Disadvantages:**
 - Greater investment in compliance infrastructure
 - Potentially exposes parent to liability



Strategic Considerations for Entering Government Market: “Make” or “Buy”?

Acquire Existing Government Contractor

- **Advantages:**
 - Less time and expense than creating or adapting compliance infrastructure
 - May also provide means to access existing contract vehicles that might be closed to new entrants
- **Disadvantages:**
 - Potential integration issues
 - Risk of acquiring past liabilities (e.g., False Claims Act)
 - Contracts must be “novated” at Government discretion, no guarantee

Build Out Government Contracts Compliance Infrastructure

- **Advantages:**
 - May be able to avoid integration issues by adapting existing compliance infrastructure to meet government-unique compliance obligations
- **Disadvantages:**
 - Requires investment of time, resources to update current compliance infrastructure to meet government-unique compliance obligations



Key Takeaways

- *There are significant benefits to doing business with the U.S. Government, including access to a significant, stable market.*
- *At the same time, doing business with the Government involves unique compliance obligations and risks that don't exist in the commercial world.*
- *Companies looking to enter the Government market for the first time may be able to take steps to reduce that risk, including teaming and subcontracting, contracting for “commercial items” or acquiring an existing contractor.*
- *However, no strategy can completely eliminate the risk. Therefore, companies entering the government market should make sure that they are prepared to comply with the unique obligations that come with being a government contractor.*





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