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## Intelligence Contracts

### The Challenges of Getting and Keeping Intelligence Contracts

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**N**obel Prize-winning economist Gary S. Becker, who coined the term “human capital,” noted that “[t]he most successful companies and the most successful countries will be those that manage human capital in the most effective and efficient manner.”<sup>1</sup> This observation is particularly applicable to managing an intelligence agency service contract. If your employee leaves, the work may leave as well.

Over the past decade, the intelligence field has expanded dramatically and shifted from being an inherently governmental field to an area dominated by outside contractors. As a result, the intelligence services field has become both lucrative and competitive. But in an industry where budgets and contract awards are mostly classified, how does a company obtain and keep a contract for intelligence services? How does a company even know an agency is looking for a contractor on a new project, given the classified nature of this work?

As discussed in greater detail below, the answer to these and related questions is that you must have the right people working for you. Entering this field, retaining contracts, and succeeding in getting new contracts

largely depends upon how a government contractor manages its human capital.

Providing services for an intelligence agency is quite different than providing services for an operations agency. Due to the high-stakes of each assignment and the clandestine nature of the work, each intelligence service contract has numerous inimitable qualities. The same qualities that make intelligence service contracts unique also make them attractive to government contractors.

While the intelligence budget has not yet reached the size and scope of the national defense budget, the amount of money at issue in intelligence agency service contracting is still quite large. The National Intelligence Program (NIP) funds intelligence activities in several Federal departments and the Central Intelligence Agency (CIA). NIP’s budget is classified, so the 2011 Budget does not publicly disclose funding requests for intelligence activities.<sup>2</sup> However, as recently as May 2007, during a presentation at the Defense Intelligence Agency, Terri Everett, a procurement executive from the Office of the Director of National Intelligence, estimated that seventy percent of the \$60 billion U.S. intelligence budget is spent on private contractors.<sup>3</sup> Assuming that the budget continues to be funded at levels at least equal to that of 2007, contractors are competing for approximately \$42 billion a year in intelligence agency service contracts. As Ms. Everett in her presentation discussing the importance of contractors to the

<sup>1</sup> Joyce Brocaglia; *The Importance of Human Capital*; available at: <http://www.altaassociates.com/pdf/06-AUG-CC.pdf>, retrieved on October 1, 2011, quoting; Gary S. Becker (1964, 1993, 3rd ed.). *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* Chicago, University of Chicago Press. ISBN 978-0-226-04120-9.

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<sup>2</sup> 2011 US Budget, National Intelligence Program; available at: <http://www.gpoaccess.gov/usbudget/fy11/pdf/budget/intelligence.pdf>. Retrieved October 1, 2011.

<sup>3</sup> Everett, ‘Procuring the Future: 21st Century IC Acquisition (PowerPoint Presentation)’ (Defense Intelligence Agency, Keystone, Colorado, 14 May 2007), available at: [www.fas.org/irp/dni/everett.ppt](http://www.fas.org/irp/dni/everett.ppt); Shorrock, ‘The Corporate Takeover of U.S. Intelligence’ (Salon.com, 1 June 2007), available at: [www.salon.com/news/feature/2007/06/01/intel\\_contractors](http://www.salon.com/news/feature/2007/06/01/intel_contractors); Simon Chesterman ‘We Can’t Spy . . . If We Can’t Buy!’ The Privatization of Intelligence and the Limits of Outsourcing ‘Inherently Governmental Functions’ *Eur J Int Law* (2008) 19(5): 1055-1074 doi:10.1093/ejil/chn055.

country's intelligence industry proclaiming, '[w]e can't spy . . . if we can't buy!'<sup>4</sup>

**In-House Talent Crucial.** Who is getting this work? Some are major corporations with household names. Many are small companies most people have never heard about. The one common element these successful contractors share is that they have the necessary talent in-house to provide the contracting agency with the necessary comfort that the contractor has the skills and institutional knowledge to get the job done.

Intelligence agencies often require proficiency in esoteric skills, including difficult languages, sciences and technologies, and require that individuals pass demanding suitability and security clearance requirements. Once the right individuals are identified, the agency often develops long-term and team-critical relationships with the individual. That individual, over time, may have as much or more institutional knowledge specific to the project's subject area as anyone inside the agency.

The result is that only a select number of individuals will meet the needs of a specific government requirement. Aspiring government contractors must vie with existing government contractors for this talent pool. Because the number of individuals that can meet the needs of the contracting agency is so limited, a significant barrier is created for companies who want to break into this market. The existing contractors control the talent, know the contracting officers, and have a better sense of the needs and preferences of the agency. As a result, the agency will have a certain amount of comfort with the incumbent that is performing the service.<sup>5</sup> The advantage of incumbency, combined with a limited pool of qualified individuals, makes controlling the key employees not only valuable but critical.

A closer look at the procurement process and the government's contract rights will show just how vital these key employees can be to obtaining or retaining intelligence contracts.

**Two Ways to Land Prime Intelligence Contracts.** Effectively, there are two ways that a company can become a prime contractor on an intelligence agency contract. First, the company can receive an award from an agency, either through a competition or through an authorized other-than-full-and-open competition procedure (sole source or a limited competition).<sup>6</sup> The second way is to purchase an existing contractor who works in the desired space. Unless the company can control the key talent and have them as part of the company's program team, neither of the approaches above is likely to work.

It is unrealistic to believe that a company will win a contract through an open or limited competition if others have the experts with whom the agency has a history of working. On rare occasion, a truly new and different area of service is put out for bid. In that case, while the agency may know one or another company better, it will consider all who have recognized experts to lead the project. More often, however, the proposed scope of work is a continuation of existing projects or an offshoot or derivation of earlier projects. In those

situations, the company whose team is led by the known quantity with institutional knowledge is likely to prevail. Typically, this is the incumbent. Periodically, however, a competitor can lure away the key person(s) and give itself the edge for the new contract award, provided any non-competition issues (discussed below) can be satisfactorily addressed. Winning one of these awards can be a very difficult task for a company that does not already have a foot in the door of the contracting agency and have access to talent critical to the project.

If a company elects to enter into this field through the acquisition of an existing government contractor with ties to one or more intelligence agencies, the analysis, while more complicated, is not much different in the end. Whoever controls the key talent the agency feels it needs to have on the project will get the work.

Often, an acquiring company assumes that all existing government contracts in place will continue. In many instances, however, a government contract requires that the acquiring company go through an assignment (novation) process, affording the government the opportunity to approve the transfer of the work to the new owner.<sup>7</sup> One of the areas the government looks at in deciding whether to approve the transfer is whether the acquiring company, once the transaction has closed, will have the necessary capability to perform the work. If the key program people are no longer with the company following the acquisition, the government may decide not to approve the transfer of the contract.

If no government approval is needed, or even if the government approves the transfer, this does not mean that the work will stay with the acquired company for the long term. Setting aside more sweeping factors that could prevent a company from maintaining an acquired government contract (such as foreign ownership, other security clearance concerns or the impact of the acquisition on a company's small business status), intelligence agencies are most concerned with one thing: whether or not the purchasing company plans to (and can) keep the critical individuals who are performing the agency's work. If the project team remains in place after the transaction, there is an excellent chance that the work will stay with the acquired company.

**Two Ways to Obtain or Retain Key People.** What can a company do to ensure that it can obtain or retain the key people necessary for securing and performing the intelligence contract work? There is a legal option and a practical option.

The legal response is to make sure that all key employees are subject to appropriate non-competition and confidentiality ("non-compete") agreements.

The majority of U.S. states recognize and enforce non-compete agreements. Some states, such as Califor-

<sup>4</sup> *Id.*

<sup>5</sup> *Bara-King Photographics, Inc.*, B-253,631 (15 Sept. 1993).

<sup>6</sup> FAR 6.302.

<sup>7</sup> Depending on the type of acquisition, the government may be required to authorize the transfer of the contract to the acquiring company. This is called a novation. If a contractor wishes the government to recognize a successor in interest to its contracts the contractor must submit a written request to the responsible contracting officer. A novation is unnecessary when there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract. FAR 42.1204.

nia, prohibit non-compete agreements except in limited circumstances.<sup>8</sup> Some states base the determination on how restrictive the agreement is, and how much it limits someone from working in their field or location.<sup>9</sup> In those states that recognize non-compete agreements, the general rule is that they must be reasonable in: (i) the scope of the activity prohibited, (ii) the geographic area involved, and (iii) the length of time the restriction remains in effect. What is reasonable depends upon the particular facts involved and the applicable state's law, balancing the employer's need for protection with the employee's right to earn a living.<sup>10</sup>

In the discussion above, non-compete agreements are involved in two different scenarios.

If a company wants to enter into the intelligence contracting world by acquiring talent, the company needs to determine whether the talent is subject to an existing non-compete agreement. If so, the hiring company must make various business decisions. If an internal determination is made that the non-compete agreement is not valid, the hiring company could proceed with the hire and hope that the current employer does not file (and prevail in) an action seeking both: (i) an injunction preventing the hire, and (ii) damages for the hiring company tortiously interfering with the current employer's contract with the employee. As an alternative, the hiring company could explore whether there is non-restricted work the targeted employee could do for the hiring company until the non-compete agreement expires. If so, the employee could do that work until (s)he is free of the non-compete obligations. Note that, under those circumstances, the employee could not indirectly solicit or work on intelligence contracts behind the scenes if doing so directly would violate the non-compete agreement.

If a company elects to enter this field by acquiring an existing government contractor, the buyer, as part of its due diligence, needs to be sure that the key personnel are subject to a valid, enforceable and appropriate non-compete agreement (where allowed) and that these agreements will continue to be effective after the transaction closes. If such non-compete agreements are not in place, they must be executed and delivered as a condition of closing. In other words, if you are acquiring talent, non-compete agreements are a problem; if you are acquiring a company, they are essential.

Having a non-compete agreement in place gives the buyer a fair amount of ammunition to keep the key employees in place. Buyer can prevent the employee from doing the type of work (s)he was doing for buyer and its predecessor for the period of time specified in the agreement. This means that the employee cannot walk out the door to a competitor and take the existing contracts, or any new or follow-on contracts, to that com-

petitor. It does not guaranty that the employee will never leave. Importantly, it also does not ensure that the government will allow the buyer to keep doing the work.

**Contract Terminations.** If the key employee leaves and remains subject to the non-compete agreement, the government may well decide to take the work to its back-up expert at another company rather than leave it with the incumbent. If that is the government's decision, there are a number of ways the agency can move an existing contract from one contractor to another. Terminations are the clearest example.<sup>11</sup> Once terminated, the government can award a new contract to another company for work similar to that which was to have been performed under the terminated contract.

The government may terminate a contract at any time either for the government's own convenience or due to the contractor's default.<sup>12</sup> When the government terminates a contract for convenience, the contractor must stop working on the terminated portion of the contract, it must terminate any subcontracts, and it must submit and negotiate a termination settlement claim with the government. While the acquisition regulations do not permit the government to terminate a contract arbitrarily, the standard for terminating a contract for the government's convenience is relatively low.<sup>13</sup>

If the contractor fails to perform the contract or is unable to perform and complete its obligations, the government may choose to terminate the contract for default.<sup>14</sup> This might occur if one or more critical employ-

<sup>11</sup> If an agency acts improperly and takes work away from a contractor or awards contracts to a company's competitors without allowing the contractor to compete, the contractor may have legal options. In the event of improper termination, the contractor can appeal the termination to the appropriate board of contract appeals or the Court of Federal Claims. In the event of a termination for convenience, the contracting officer has a lot of discretion and must only act reasonably and in the best interests of the government, but the termination can still be challenged in certain circumstances. FAR 2.101; *Operational Serv. Corp.*, ASBCA No. 37059, 93-3 BCA ¶ 26,190; *Salsbury Indus. v. United States*, 905 F.2d 1518 (Fed. Cir. 1990); *Kalvar Corp., Inc., v. United States*, 543 F.2d 1298 (Ct. Cl. 1976). If the contractor believes that the contracting officer is improperly restricting competition by not allowing the contractor to compete for new awards or task orders, the contractor may be able to file a bid protest at the Government Accountability Office or Court of Federal Claims challenging the improper restriction on competition. The protester must allege a violation of a procurement statute or regulation. 31 U.S.C. § 3552. The GAO will also review allegations of unreasonable agency actions. *S.D.M. Supply, Inc.*, B-271492, June 26, 1996, 96-1 CPD ¶ 288. While these options exist for a contractor to challenge the agency's actions, they are not always the most effective way for the contractor to accomplish its original goal of keeping the contracts or gaining additional intelligence agency work.

<sup>12</sup> FAR Part 49; Contracts for commercial items/services should follow the regulations on terminations as set out in FAR 12.403 and FAR Clause 52.212-4.

<sup>13</sup> FAR 52.249-2, provides for termination for convenience of the government. Under this regulation, the government "may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the government's interest." 48 C.F.R. § 52.249-2(a) (1996).

<sup>14</sup> FAR 49.4.

<sup>8</sup> "Calif. Supreme Court finds noncompete clauses invalid". CNET. November 8, 2008, [http://news.cnet.com/8301-1001\\_3-10010724-92.html](http://news.cnet.com/8301-1001_3-10010724-92.html). Retrieved October 1, 2011.

<sup>9</sup> See *Advanced Marine Enters., Inc. v. PRC Inc.*, 501 S.E.2d 148, 155 (Va. 1998); *Simmons v. Miller*, 544 S.E.2d 666, 678 (Va. 2001) (stating that the function, geographic scope and duration of the non-compete must be considered together to determine the reasonableness of the restriction).

<sup>10</sup> See *Blackwell v. E.M. Helides, Jr., Inc.*, 368 Mass. 225, 229 (1975) (three-year restriction reasonable); *All Stainless, Inc. v. Colby*, 364 Mass. 773, 778 (1974); *Edwards v. Athena Capital Advisors, Inc.*, 23 Mass. L. Rep. 155, 2007 Mass. Super. LEXIS 378 (Super. Ct., Aug. 7, 2007).

ees on the project team are no longer at the company and the government, in its discretion, determines that the company no longer possesses the requisite expertise. If the government terminates the contract for default, the contractor is not likely to be able to recover any termination expenses and will be required to report the termination as part of its past performance and certification of responsible contracting.<sup>15</sup> In the case of termination for default, the contractor is entitled to compensation only for services or goods already accepted by the government and may even need to pay the government procurement costs.<sup>16</sup>

However, the agency does not need to terminate a contract in order to change contractors. One option is to simply allow the contract to expire. Most service contracts are five-year contracts, made up of a base year award and four one-year option years.<sup>17</sup> At the end of the base year or the current option year, the agency can decide not to exercise the option and instead procure the services through a different contract vehicle.<sup>18</sup>

The agency may not even need to wait until the end of a particular option year. Some contracts are awarded as task orders under variable contract vehicles (normally either indefinite delivery, indefinite quantity (“IDIQ”) contracts or blanket purchase agreements (“BPA”). BPAs and IDIQ contracts typically have multiple awardees and the government can go to any of the awardees for all or any part of the work. Under these contract vehicles, any task order to a company could be terminated and the agency could decide to issue all future task orders to a different company.

**Reasons to Have Non-Compete Agreements.** Given all of the government’s options, why have the non-compete agreement? The company loses the work anyway and now has a bad relationship with the agency because the company will not let the agency use its favored expert.

However, there are several reasons to make sure the company still has non-compete agreements in place for all its key employees. First, it helps discourage key employees from leaving. Their options are more limited and the government contract that provides their livelihood might be lost to them for at least some period of time (and possibly permanently). Second, it gives competitors pause about hiring the company’s employees, as the competitor risks litigation and liability for damages (including punitive damages where tortious interference with contract is recognized) if they hire someone subject to a non-compete agreement. Finally, the non-compete agreement allows the company to have a constructive conversation with the government. It affords the company the opportunity to explain why your company still has the talent to complete the work. If the government is not convinced, and still wants to move the work, it allows you the chance, if appropriate, to cooperate with the government by lifting some or all of the restrictions on the departed employee. This may re-

sult in salvaging the working relationship with the agency and result in other government work the agency feels might be better suited to the company’s remaining personnel.

**How to Retain Key Personnel.** What remains to be discussed is a practical, commonsense approach to the retention of key personnel: Give them reasons to stay.

In 1997, McKinsey and Company researched 77 large U.S. companies from various industries. They talked to 400 corporate officers and 6,000 executives from the top 200 executives in each company to appreciate why these executives worked where they did and how they had become the professionals they were.<sup>19</sup> Organizations with successful human capital plans had a persuasive answer to the question, “Why would a talented person want to work here?”<sup>20</sup> Employees critical to intelligence contracts are assets on which an entire government contract may rest. Companies should identify these employees and regard them as the assets that they are. Many U.S. companies, particularly in the intelligence gathering field, are already suffering a shortage of executive talent.<sup>21</sup> Recruiting superior talent and retaining the employees who meet these hard to fulfill roles at agencies is key to winning and keeping intelligence agency contracts.

What motivates a given employee to stay can vary, but often includes some or all of the following: (i) appropriate compensation, (ii) recognition for their contributions outside of compensation, (iii) real or phantom ownership interests in the company so they get additional benefit from building the company, (iv) in an acquisition scenario, a phased “stay bonus,” where they get bonuses if they remain as full time employees on certain trigger dates, (v) solicit their opinions on significant issues and, if appropriate, bring them into management and (v) develop a team culture and collegial workplace.

If a company can motivate its key employees to stay, it is a win-win situation for all concerned. The company will continue to grow and thrive. The employee will have lucrative and satisfying work. And the government will be able to work with its chosen team. The alternative, relying upon the uncertainties of non-compete agreements, the cost in time and money to enforce them, and the potential backlash from the government should be avoided if at all possible.

**Conclusion.** The intelligence agency marketplace can be a lucrative area. To be successful, a company must take into account, and make a significant investment in, the human capital element that permeates the intelligence agency’s requirements. The agency is hiring the company to provide them with Michelangelo to complete a work of art; if Michelangelo decides to pack up his easel and leave the company, the work may follow because the agency is not interested in one of the company’s other ceiling painters. Effective use of proper due diligence prior to the acquisition of a company, guarding of human capital jealously, and the creative

<sup>15</sup> FAR 9.104-5; 52.209-5 - Certification Regarding Responsibility Matters.

<sup>16</sup> FAR Clause 52.249-8.

<sup>17</sup> Generally, a contract, including all options, may not exceed five years. See FAR 17.204(e). See also 10 U.S.C. 2306b and FAR Subpart 17.1 (limiting multi-year contracts); 10 U.S.C. 2306(c) and FAR 17.204(e); 41 U.S.C. 353(d) and FAR 22.1002-1 (limiting contracts falling under the Service Contract Act to five years in length).

<sup>18</sup> FAR 17.207

<sup>19</sup> Elizabeth G. Chambers, Mark Foulon, Helen Handfield-Jones, Steven M. Hankin, And Edward G. Michaels Iii; The war for talent; [http://www.executivesondemand.net/managementsourcing/images/stories/artigos\\_pdf/gestao/The\\_war\\_for\\_talent.pdf](http://www.executivesondemand.net/managementsourcing/images/stories/artigos_pdf/gestao/The_war_for_talent.pdf). Retrieved October 1, 2011.

<sup>20</sup> Id.

<sup>21</sup> Id.

use of non-competition agreements, can help ensure a company's success and growth in the intelligence contracts area.