From:	John A. Safyurtlu
Date:	October 6, 2004
To:	Client
Subject:	General File

Following are my comments on the proposed Marketing Services Agreement with GGG. In brief, the agreement seems to me to be a bit thin. I don't see you exposing yourself to any liability (over and above the $10K you're paying to GGG), but it seems to me that the agreement could be improved. My comments fall into three categories: (1) the text of the agreement as presented, (2) the addendum, and (3) additional suggested text.

1. <u>The text of the agreement as presented</u>

The second paragraph of the preamble provides that this is a non-exclusive engagement, meaning that GGG is free to hire itself out to other businesses seeking to become government contractors. What if there is another company out there, the Acme Company, who does exactly what you do? What if GGG became a consultant to that company as well? What of there was a government contract that would be perfect for either you or Acme, but only one of them could have it? Wouldn't that put GGG into a conflict-of-interest position with regard to its clients? What will GGG do in the case of a conflict of interest?

1.1 "... and hereby agrees to provide the initial setup task ..." I'm confused by this. What is the initial setup task and who is providing it? It seems at first that you are providing it, but it also seems that you are the beneficiary of it.

2.1 - Fees. This is a nonrefundable fee of $10K, with half up front and the balance due, at the latest, on 1 December 2004. As a business issue, rather than a legal one, wouldn't you like to make at least this second payment contingent on some form of delivery of consulting services, preferably which have matured into results vis-à-vis obtaining government contracts? As it now stands, GGG could do nothing for you, and you'd still have to pay them. Along those same lines, instead of splitting the payment 50/50, why not backload it so you only pay $2500 up front, and $7500 later (or some other back-end-heavy proportion)?

5.0 - Limitation of Liability. Again as a business issue, rather than a legal one, you may want to challenge this by asking "don't you stand behind your work?" If you are paying GGG $10K for consulting, and then, as a result of a flaw in the advice given to you by GGG in the course of that consulting, you are damaged, shouldn't GGG be on the hook for that? If GGG wants you to pay this money for this advice, then shouldn't GGG have to "put its money where it's mouth is?"

6.5 - Mandatory Arbitration. Good idea, but they're forcing you, the client, to go to San Diego. Insist instead that the arbitration be held in Los Angeles. Also, they want to use the American Arbitration Association. I'd reject that for three reasons. First, the AAA has a horrible reputation for charging administrative fees so high as to make the procedure worthless unless you're fighting over something that has a payout of more than $50K at stake. Not the case here given a $10K contract. Second, with the AAA, you're more likely than not to be stuck with a former attorney or case worker. I prefer to be in front of a former Judge as a matter of policy and practice. Third, I'd always say no to the other side's "default" ADR provider, because more often than not, that party already has a pre-existing relationship with that ADR company, so the ADR company has something of a vested interest in keeping that party happy, to keep the work flowing. That means you walk into an arbitration already in the hole. I'd push for either JAMS or ADR Services, both of whom have many highly-regarded former Judges in LA.

2. <u>The Addendum</u>

My basic issue here is that the terms are vague. For instance, what does it mean to "Assist in the setup ..." or "Telephone assist in the solicitation and bidding tasks ..." or "Provide logistical support ..." or "Assist in identifying government packaging houses ..."? I'd remove this vague language and replace it with concrete statements that will allow you to say either the task has or has not been performed. So, I'd suggest the following:

- Replace fourth bullet point with: "Review and process the Automated Best Value Score in order to monitor and track delivery scores"
- Replace the sixth bullet point with: "Provide direct feedback and advice on all solicitation and bidding tasks for one month after your first Government bid."
- Replace the seventh bullet point with: "Identify government solicitations, procurement histories and award history data for [_____ months from the date of this agreement] [or] [_____ bids] for the purpose of you bidding on federal government solicitations."
- Replace the eighth bullet point with "Identify _____ government packaging houses for the purpose of packaging material, shipping material, and the processing of Material Inspection reports (DD 250 Forms) to military installations."

3. <u>Suggested additions</u>

Here I just have some questions:

- What about your trade secrets, intellectual property and other confidential information? Won't GGG necessarily have access to this in order to perform its consulting services? Shouldn't this be defined and agreed to that GGG will not distribute it?
- If GGG breaches this and does begin to (or threaten to) divulge these secrets, do you have to go through the arbitration process to get GGG to stop (by which time, it may be too late?) Conversely, shouldn't you have the right to go to court immediately for an injunction to prevent the disclosure and keep the genie in the bottle, at least until such time as a Judge can rule on the issue? If that is the case, then shouldn't GGG agree to this right up front to avoid issues of proof later?
- Would you like to have a strong liquidated damages provision to hang over GGG's head to prevent exactly this type of issue from ever arising?
- Would you like to have the ability to perform at least some minimal discovery into GGG's position if a situation should arise that requires arbitration. As the agreement is now worded, this is not addressed, which means that the discovery rights are subject to the whim of the arbitrator. This uncertainty can be removed by setting forth what those rights are in the contract.
- You invest time and money training your employees. Some of these employees may (and probably will) come into contact with GGG. If GGG were to "cherry-pick" some of these employees by hiring them away from you, you would be damaged by that loss and the consequent need to re-hire and re-train. A clause can be inserted forbidding this hiring.
- There are also about a dozen or so additional points that could be included, which mostly fall under the category of "boilerplate language." Things like confidentiality, sufficiency and receipt of consideration acknowledged, jurisdiction and venue, assumption of risk, due diligence, cooperation in drafting, etc.

Please let me know what your thoughts are on these questions; I have language that I can craft to add to the contract to address these points.