Sometimes the best advice we can give our clients is “get a lawyer.” We can offer suggestions and assistance in many areas of government contract cost accounting, compliance, and administration; but we cannot offer legal advice. In fact, we are prohibited from doing so!

Thus, sometimes we have to tell clients that they need legal advice from a real, honest-to-God attorney. If the matter is a complex government contracting issue, we suggest they find an attorney with strong credentials in that area. If the matter may lead to litigation if not resolved, we suggest they think about a firm with litigation experience in the government contracting area.

Obviously, one engages an attorney only with some reluctance, because we all know that attorneys are expensive—but when there is sufficient money at stake, that is definitely the way to go. Sometimes, however, the matter isn’t about money: it’s about risk. Risk associated with submitting a cost in an invoice, or risk associated with making a certain statement in a proposal. Oftentimes those are legal risks where an attorney’s input can be valuable; but other times the risks are simply business risks. It might be a matter of cash flow or a matter of profit, or a matter of a customer relationship.

And the point of this little article is that attorneys don’t always offer the best advice on business risk matters.

Why? Because in our experience too many attorneys bias towards risk aversion. They want to eliminate risk instead of managing it.

We have thought about this for some time. We have pondered why that might be the case. (And of course we are not talking about all attorneys; there are obviously exceptions to any generalization.) Our speculation is that this general bias against risk is a product of law school. Attorneys are trained to think about risks and possible consequences and what-ifs and what-abouts—and that kind of thinking leads to good attorneys and good advice. We speculate, though, that drafting contract language to militate against risk and thinking about how to avoid consequences naturally leads to an inherent risk aversion. It’s all just guesswork, but that’s where our thoughts have led us.

Not to make too much of a joke of this topic, but *you might be a risk-averse attorney if*—

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You require all internal documents to be marked “Attorney-Client Privileged” even though the documents don’t touch on legal matters and no attorney was involved in their creation

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You require the Program Manager to refer all customer questions to you for consideration of their legal ramifications

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You insist on personally resolving all customer disputes, even those of a routine administrative nature

Et cetera.

As business people, we learn to manage risk, not to avoid it. We understand that risk cannot be eliminated. We learn to identify risks, to monitor risks, and to implement mitigation plans when risks start to transform into events.

Every government contract is, in essence, a series of risks to be managed. (In fact, I co-instructed a NCMA National Education Seminar on Risk Management of Complex U.S. Government Contracts and Projects a few years ago. The seminar tag line, which you can still find on Google today, was “*Risk management*, the ability to efficiently and cost effectively mitigate potential problems, is fundamental to good business in both the public and private sectors.”) Obviously, each contract carries with it the risk associated with performance. As we’ve often opined, that risk includes the risk associated with subcontractor performance. But there are far more risks associated with a government contract and, as we’ve

noted before, contractors are not very good at assessing their risks. Each clause referenced in Section I of your contract carries with it a specific non-compliance risk; some of those risks are relatively small but others are quite large. Section H clauses have their own risks. There are cost accounting risks (e.g., non-compliance with the FAR Part 31 cost principles or with applicable Cost Accounting Standards) and there are Business System risks (e.g., failure to properly manage government property, including contractor-acquired government property, or failure to have an adequate purchasing system). The point is: when you accept a government contract you accept a whole package of risks that all need to be managed.

If you were risk averse you would never be in government contracting in the first place.

That doesn't mean you should ignore the advice of your attorney. After all, you're paying for that advice and we don't want you to waste your money. No, what we are saying is that your attorney's advice is but one piece of information in your risk management regime. On legal matters, that advice ought to weigh very heavily but, on business matters, perhaps that advice shouldn't carry the same weight.

In fact, our (limited) understanding of the situation is that jurisprudence makes a distinction between an attorney giving legal advice and an attorney giving business advice. In the former case, that communication is protected by privilege; but in the latter case, privilege may not apply.

For example, see **this article** we found at the San Diego County Bar Association website. We like it because not only does is discuss distinctions between legal advice and business advice, it does so in the context of risk.

It states—

Anytime you give advice, you are naturally exposing yourself to some level of risk. There is always the chance that things could go sour, the client blames you, and you find yourself defending your decision. However, that's a risk in every business and every law firm, and one that you will need to assess based on your own comfort level.

The other (less obvious) risk is that giving business advice could potentially blur the lines between advice that is subject to the attorney-client privilege and advice that isn't. For the most part, if you are acting as external (as opposed to in-house) counsel, your communications with your client will be privileged. However, as a general rule, the attorney-client privilege only applies where the relevant communications between a lawyer and a client are for the purpose of giving or receiving *legal* advice and are expressed in confidence. Application of this rule can become a bit slippery when an in-house counsel is acting in a commercial capacity (for instance, as Company Secretary) and providing business or strategic advice. While the lawyer will still be subject to professional rules of conduct that prohibit him or her from disclosing these discussions to a third party, the communications themselves may not be privileged.

(Emphasis in original.)

This is a complex, nuanced, area and we have probably pushed the envelope about as far as we should on this topic. Government contractors can—and **have** —fought protracted battles about which documents are privileged and which are not. Courts and Congress have admonished contractors' counsels for going
too far
in making documents confidential. There are a number of attorneys who are perhaps over-zealous in trying to shield their clients from risk; and those efforts have created additional risks of their own.

As business people, we have to learn to make decisions given the information we have at hand. Some of that information is from our attorney(s) and other bits of information can come from other areas, such as program management, accounting, or finance. All the input must be considered and weighed, and used to inform our decision-making.

We cannot be risk-averse because avoiding risk is not an option, not if we want to have a thriving business. We also need to understand when our attorney is giving us legal advice, which should weigh heavily, and to understand when our attorney is giving us business advice. We think that's the approach that will help optimize decisions.

Importantly, we also have to learn to find attorneys whose appetite for risk is more in line with our own. Risk aversion is great in some contexts, but we don't think it works very well in a

business context.