The Prime Contractor’s Responsibilities Regarding Subcontractors

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# Areas of Responsibility

- Accounting System Adequacy
- Price/Cost Analysis
- Technical Analysis
- Reps & Certs
- Reporting
- Audit
- Closeout
The Beginning
Assembling a Winning Team

• Source selection considerations
  • Capabilities and qualifications
  • Socio-economic subcontracting plan compliance
  • Past Performance
  • Business System Status
• Source Selection Responsibilities
  • All of the above, plus
    • Document
    • Document
    • Document
• Check Suspension/Debarment status
Clear all Sub’s for OCI

• OCI is the number one basis for successful protests
• Know the Types of OCI
  ▫ Unequal Access to Non-Public Information – have any of your subs ever had access to competitor data or source selection information?
  ▫ Biased Ground Rules – Have any of your subs ever participated in writing the SOW for this procurement?
  ▫ Impaired Objectivity – Does any part of your sub’s organization do ANY work that could be interpreted as...
    • Evaluating any part of the work under the solicitation SOW?
    • Advising the Government on any issues of significance that might arise during performance of the contract?
• Mitigate or Eliminate ALL OCI potential among ALL subs
• Require Non-Conflict certifications prior to substantive discussions
Writing the Proposal

• Normally the EXCLUSIVE responsibility of the Prime
• Using a Sub to assist in the Technical Proposal may give them rights the Teaming agreement did not
  ▪ Does not include cost volume
  ▪ Does not include documentation of business considerations
• Sub’s costs to participate in authoring the Technical Proposal not normally allowable as B&P
• Cost can be allowable as B&P for the Prime if the Sub is PAID to write
Subcontract Type Selection

• Does NOT have to follow the Prime contract type and often SHOULD NOT
• Should be driven by the *essential nature* of the Work
• Other considerations
  ▫ Sub’s business system status
  ▫ Sub’s indirect rate structure
  ▫ Sub’s audit status (rates, compliance and history)
• Take subcontract closeout into consideration
Pricing the Contract

• Who will price the subcontract(s)
• How will they be priced?
• Consider competition BEFORE selection
• If negotiated, how will rates be verified?
• Will the subcontractor permit access to books?
Timing Considerations

- Source selection, subcontract type and pricing decisions are all EASIER BEFORE AWARD
  - When thoroughly documented in the proposal, award of a competitive contract can constitute consent to award of the proposed subcontracts
  - Disputes with subs on type and pricing are much more difficult to resolve post award
Price/Cost Analysis
15.401 Definitions

• As used in this subpart—
• “Price” means cost plus any fee or profit applicable to the contract type.
• “Subcontract” (except as used in 15.407-2) also includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor (10 U.S.C. 2306a(h)(2) and 41 U.S.C. 254b(h)(2)).
15.402 Pricing policy

- Contracting officers (read Prime Contractors) must—
  - (a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary.
The contracting officer (read Prime Contractor) must generally use the following order of preference in determining the type of information required:

1. No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).
2. Information other than cost or pricing data: Catalog prices; GSA Schedule pricing, etc.
3. Cost or pricing data
Cost/Price Analysis THE FAR

15.403-4 Requiring cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b)

- (a)(1) The contracting officer (read Prime Contractor) must obtain cost or pricing data only if the contracting officer (read Prime Contractor) concludes that none of the exceptions applies.
- The threshold for obtaining cost or pricing data is $700,000.

- (b) When cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:
  - (1) The cost or pricing data, AND . . . .
Cost/Price Analysis FAR


- (b)(2) A certificate of current cost or pricing data, in the format specified in 15.406-2, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.
Cost/Price Analysis  PRIME CONTRACTOR

- Price/Cost Analysis Memo to the Subcontract File
  - Type of Analysis: Competition/Other Source/Cost or Price Data
  - Recap of Analysis
    - Prices received in Competition
    - Prices from other sources with references
    - Cost/Price data with analysis as to reasonableness
  - Conclusion as to Reasonableness
Technical Analysis
Technical Analysis PRIME CONTRACTOR

• Technical Analysis Memo to the Subcontract File
  ▫ Subcontractor has personnel qualified to perform
  ▫ Subcontractor has adequate/successful past performance in the field of work
  ▫ Subcontractor has adequate facilities/finances/business systems to perform the scope of work

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Reps & Certs
4.1201 Policy

- (a) Prospective contractors shall complete electronic annual representations and certifications at http://orca.bpn.gov in conjunction with required registration in the Central Contractor Registration (CCR) database (see FAR 4.1102).

- This is now SAM.GOV where all Federal Contractor information from old CCR and ORCA are now entered.
4.1201 Policy

• (b)(1) Prospective contractors shall update the representations and certifications submitted to ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The representations and certifications are effective until one year from date of submission or update to ORCA.
4.1201 Policy

(2) When any of the conditions in paragraph (b) of the clause at 52.219-28, Post-Award Small Business Program Re-representation, apply, contractors that represented they were small businesses prior to award of a contract must update the representations and certifications in ORCA as directed by the clause.
52.219-28  Post-Award Small Business Program Re-representation

- (1) Within 30 days after execution of a novation agreement
- (2) Within 30 days after a merger or acquisition that does not require a novation
- (3) For long-term contracts—
  - (i) Within 60 to 120 days prior to the end of the fifth year of the contract; and
  - (ii) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter.
In the Subcontract File:

- Obtain signed print out of Subcontractor’s ORCA from SAM.GOV dated PRIOR to award of Subcontract, but within 30 days of award of Subcontract.

- FOR SMALL BUSINESS SUBCONTRACTORS: Please read and ensure that Subcontractor’s ORCA contains the appropriate Certifications for Size and Status before including Subcontractor in your Small Business Subcontracting Plan.
After the Win
Consent to Subcontract

• FAR Subpart 44.2—Consent to Subcontracts
• 44.201(a) If the contractor has an approved purchasing system, consent is required (only) for subcontracts specifically identified by the contracting officer in the subcontracts clause of the contract. (Comment added)
• 44.201(b) Absent an approved purchasing system, consent is required for...
  □ Cost-reimbursement, time-and-materials, labor-hour, or letter contracts, and un-priced modifications or delivery orders under fixed-price contracts that exceed the simplified acquisition threshold (currently $150k), and
  □ Fixed-price subcontracts that exceed the greater of $150k or 5% of the contract
• Failure to obtain consent can result in ALL sub costs being questioned on audit
The Award(s)

- Should FOLLOW Consent to Subcontract
  Well, that one seemed obvious, didn’t it?
- Must address any OCI mitigation required
- Must include all mandatory clause flow-downs
- Should include other flow-downs as necessary to protect the Prime
  - Since Sequestration, termination clauses have been the #1 “bone of contention” in subcontract negotiations
  - Consider negotiating the terms and conditions PRIOR TO submission of the proposal
  - Consider EXECUTING the subcontract prior to submission of the proposal with a clause that makes it effective only upon a win
- Check Suspension/Debarment status the day of award
Subcontractor Reporting

- FAR 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards
  - Required in all solicitations and contracts of $25,000 or more
  - Exceptions: Classified solicitations and contracts, contracts with individuals.
- Requirements for Subcontracts:
  - Timing - by the end of the month following the month of award
  - Threshold - $25,000 or more
- Requirements for Subcontractor Exec Comp
  - Timing - end of the month following the month of subcontract award, annually thereafter
  - Five most highly compensated executives for the Sub’s prior fiscal year
  - Reporting threshold(s)
    - 80% or more of revenues from Federal contracts, and
    - $25M or more in Federal contract revenues, and
    - No other public access to data
Subcontractor Reporting

• Per the Small Business Jobs Act of 2010, SBA issued a final rule 7/16/13 that under a “covered contract” (where a small business subcontracting plan is required):
  ▫ Primes must notify the contracting officer in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing its bid or proposal during contract performance.
  ▫ Primes must notify a contracting officer in writing whenever the prime contractor reduces payments to a small business subcontractor or when payments to a small business subcontractor are 90 days or more past due.
During Performance
Performance Monitoring

- Technical performance monitoring is critical and can have Rev Rec implications
- Cost performance monitoring can be important for certain subcontract types
- Compliance monitoring is difficult, but Prime responsibility
Invoicing and Payment

• Timely invoicing affects more than financials
  ▫ Failure to align sub invoicing and costs with performance reporting can be a continual source of avoidable reconciliation work
  ▫ Consider writing a requirement for electronic submission of invoices and supporting data (including format requirements) into subcontract

• Subcontract should address payment terms
  ▫ DCAA will consider “normal course of business” to be net thirty unless other terms are written into the contract
  ▫ “Pay when paid” is acceptable, but discouraged for small subs
  ▫ If used, subcontract payment terms should clearly state permissible “lag time” for sub payment
  ▫ FOLLOW THE TERMS
Subcontractor Compliance

• Prime is responsible for subcontractor compliance!
  ▪ Supercritical for OCI
  ▪ Critical for SCA/DBA contracts
    • Back pay for subs employees can be withheld from Prime’s payments
  ▪ Also important for cost accounting, invoicing and other business systems

• Ever heard of “vicarious liability?”
  ▪ Can occur with FCA violations
  ▪ Also with certain other violations of law or regulations
More Subcontractor Reporting

• Remember, Subcontractor Exec Comp reporting is annual for the life of the subcontract
Post Performance
Subcontractor Audit

• Audit status of Sub’s should have been a consideration in source selection
• If the BD team “stuck you” with a sub that has never been audited because...
  ▫ They have never had a prime contract, or
  ▫ They have never submitted an incurred cost submission (even though required)
  ▫ They have made required submissions, but the Government has never “shown up” to do the audit
  ▫ WHAT NOW?
• Who will do that audit?
Subcontract Closeout

- Subcontract closeout is the responsibility of the Prime
- More important, if the subcontract remain open, the Prime contract cannot be closed out
- Engineer subcontracts for quick and easy closeout
  - Consider contract types that DO NOT require audit for closeout
    - Fixed price contracts do not require audit
    - T&M contracts with a “fixed handling charge” in lieu of G&A on ODCs and Subs do not require audit of rates
    - T&M contract with NO “load” on ODCs and Subs do not require audit
- Cost-type subcontracts WILL require audits and final rates for all years prior to closeout
  - Gov’t will not audit absent prime contracts
  - If they don’t, audit is the responsibility of the Prime
Questions?
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