



**PUBLIC  
CONTRACTING  
INSTITUTE**

# **Becoming A Prime Contractor**

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# Our Agenda

- Bidding on Negotiated Procurements (FAR Part 15)
- Contract Administration As a Prime
- Closeouts
- Hiring and Managing Subcontractors
- How to Avoid Common Hazards and Pitfalls

# BIDDING ON NEGOTIATED PROCUREMENTS (FAR PART 15)

# FAR Part 15 – The Request for Proposals (RFP)

An RFP is used in negotiated acquisitions to communicate Government requirements to prospective contractors and to solicit proposals

Under FAR 15.203, the RFP must, at a minimum, describe:

- The requirements
- The anticipated terms and conditions in the contract
- Information required to be in the offeror's proposal
- Factors and significant subfactors that will be used to evaluate proposals, along with their relative importance

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

Absent limited exceptions, an RFP will follow the uniform contract format (UCF)

Pursuant to FAR 15.204-1(b), Table 15-1, the UCF is divided into four main parts:

- Part I – The Schedule (Sections A-H)
- Part II – Contract Clauses (Section I)
- Part III – List of Documents, Exhibits, and Other Attachments (Section J)
- Part IV – Representations and Instructions (Sections K-M)

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part I – The Schedule (FAR 15.204-2)

- Section A – Solicitation/contract form
  - The cover page of the RFP
  - Typically Standard Form (“SF”) 33 or Optional Form (“OF”) 308
  - Contains identifying characteristics of the acquisition, including:
    - Contact information for issuing activity
    - Specific location for proposal submission
    - Solicitation number and date of issuance
    - Closing date and time
    - Number of pages
    - Requisition/purchase authority
    - Brief description of the product(s)/service(s)
    - Offer expiration date

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part I – The Schedule (cont.)

- Section B – Supplies or services and/price costs
  - Sets forth brief description of products and/or services
  - Provides the contract type
  - Communicates the pricing structure for the products and/or services
    - Mapped to the Contract Line Item Number (“CLIN”) level
    - Sometimes also tailored to the Subcontract Line Item Number (“SLIN”) level
  - Use as template when preparing pricing proposal

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part I – The Schedule (cont.)

- Section C – Description, specifications, statement of work
  - Describes the Agency’s specific needs
  - Includes a Statement of Work (“SOW”) or Performance Work Statement (“PWS”)
  - Also may set forth a Statement of Objections (“SOO”) and/or a Quality Assurance Surveillance Plan (“QASP”)
  - Review the SOW/PWS carefully to determine whether you can meet the Agency’s requirements



# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part I – The Schedule (cont.)

- Section D
  - Packaging/Packing
  - Marking
  - Presentation
- Section E
  - Inspection and acceptance
  - Part 46 QA requirements
    - Warranties
    - Liability for loss or damage to Government property
- Section F
  - Delivery and performance
    - Time, place, method
- Section G
  - Contract administration
    - Accounting and appropriations data

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part II – Contract Clauses (FAR 15.204-3)

- Section H – Special contract requirements
  - Lists any special contract provisions that are not included elsewhere in the solicitation
- Section I – Contract clauses
  - Sets forth clauses required by law or regulation
  - Lists additional clauses expected to be included in the resulting contract, as long as those clauses aren't required by any other section of the UCF
  - Most clauses are incorporated by reference
  - Some are set forth in full
    - Practically, there is no difference, as you will be obligated to the same extent
  - Read each clause carefully, ensuring that you are reviewing the correct version of the clause, as dates change frequently, and note deviations

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part III – Documents, Exhibits, Attachments (FAR 15.204-4)

- Section J – List of attachments
  - Sets forth the title, date, and number of pages for each attached document, exhibit, and other attachments
  - Cross-references to material in other sections may also be included, as appropriate
  - Examples of common attachments include:
    - Award/Incentive Fee Plan
    - Drawings
    - Contract Data Requirements List (“CDRL”)
    - SOWs and/or PWS’s (if not presented in Section C)
    - QASP
  - Check to see if proposal will be incorporated into contract

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part IV – Representations and Instructions (FAR 15.204-5)

- Section K – Representations, certifications and other statements of offerors
  - Includes provisions that require representations, certifications, or the submission of other information
  - Purpose is to confirm that the offeror is an eligible business entity and that it complies with all applicable laws and regulations
  - Common reps and certs include those relating to:
    - Responsibility matters
    - Small business issues
    - Compliance with socioeconomic clauses
    - Supply chain/domestic sourcing restrictions (*e.g.*, Buy American, Trade Agreements Act)
    - Procurement procedures, process, and policies
  - Review Section K carefully, as noncompliance could lead to significant liability

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Part IV – Representations and Instructions (FAR 15.204-5) (cont.)

- Section L – Instructions, conditions, and notices to offerors or respondents
  - Sets forth solicitation provisions and other information and instructions to guide offerors or respondents
  - Instructions may specify further organization of proposal or response parts (such as administrative, management, technical, past performance, certified cost or pricing data)
- Section M – Evaluation factors for award
  - Sets forth the evaluation methodology
  - Agency will always have to evaluate cost or price, technical and management, and past performance.
    - There is an exception to this rule: DoD is required to evaluate past performance in contracts for systems and operation support of greater than \$5 million, in contracts for services, information technology, or science and technology of greater than \$1 million, and in all other contracts that exceed the simplified acquisition threshold. For other contracts, DoD is not required to evaluate past performance.
  - Lists significant evaluation factors and subfactors, along with their relative importance

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Amendments to the RFP (FAR 15.206)

- If the Agency changes its requirements and/or terms and conditions, it must amend the RFP
- Amendments may be issued before or after receipt of proposals
  - If issued before receipt of proposals, amendments must be sent to all offerors
  - If issued after receipt of proposals, amendments must be sent to all offerors in the competitive range
- Upon receipt of the amendment, carefully check the modified requirements/terms/conditions
  - Often, the due date for proposals will be modified
  - SOW/PWS and/or pricing provisions may also be changed

# FAR Part 15 – The Request for Proposals (RFP) (cont.)

## Oral Presentations (FAR 15.102)

- Oral presentations may be evaluated as a part of an offeror’s proposal
  - These presentations matter as much as the written proposal; their content is part of the contemporaneous evaluation record
  - Information pertaining to areas such as an offeror’s capability, past performance, work plans or approaches, staffing resources, transition plans, or sample tasks may be suitable for oral presentations
- Review the solicitation carefully for the following information:
  - The types of information to be presented and the evaluation factors to be utilized
  - The individuals required to attend the presentation
  - Notifications regarding written material that might supplement the presentations
  - The duration of the presentation
  - The depth and breadth of exchanges that may occur as part of the presentations
- Oral presentations may rise to the level of discussions if questions are raised and if offerors are allowed to make proposal changes

# FAR Part 15 – Analyzing the RFP

Read the entire RFP in an objective manner

As you review, ask yourself:

- Are there any ambiguities?
  - Undefined terms/conditions
  - Unclear terms/conditions that are facially susceptible to more than one interpretation
  - Conflict between terms/conditions
- Are there any defects?
  - Inclusion of improper clause or provision
  - Unreasonable evaluation methodology
  - Unduly restrictive terms/conditions

**Focus in particular on sections L and M**



# FAR Part 15 – Analyzing the RFP (cont.)

If you identify potential ambiguities or defects, you must seek and receive written clarification before the closing date for receipt of proposals

- Ask the CO your question(s) in writing
- Explain, at a granular level, why you think the RFP is ambiguous and/or defective
- Make sure the CO responds in writing, as oral advice is insufficient

If the CO does not address your concern(s), or does so unsatisfactorily, **consider filing a protest before time for receipt of proposal**

- Act quickly in coordination with legal and business functions

# FAR Part 15 – Note of Caution

General information about agency mission needs and future requirements may be disclosed at any time

After RFP is released, the CO must be the focal point for all exchanges

Any specific information about a proposed acquisition that would be necessary for the preparation of proposals and which was disclosed to one or more potential offerors must be made public as soon as practicable, but no later than the next release of general information

Focus is on avoiding an unfair advantage and complying with procurement integrity rules

# FAR Part 15 – Proposal Evaluation and Award

## Evaluation Factors & Subfactors (FAR 15.304)

- Evaluation factors and significant subfactors must:
  - Represent the key areas of importance and emphasis to be considered in the source selection decision
  - Support meaningful comparison and discrimination between and among competing proposals

# FAR Part 15 – Proposal Evaluation and Award (cont.)

## Evaluation Factors & Subfactors (FAR 15.304) (cont.)

- The factors and their relative importance are generally within the Government’s discretion, subject to the following requirements:
  - Price or cost to the Government shall be evaluated in every source selection
  - The quality of the product/service shall be addressed through consideration of one or more non-cost evaluation factors
  - Past performance shall be evaluated unless the CO documents the reason past performance is not an appropriate evaluation factor
- All factors and significant subfactors shall be stated clearly in the solicitation
- The solicitation shall also state, at a minimum, whether all evaluation factors other than cost/price, when combined are:
  - Significantly more important than cost or price;
  - Approximately equal to cost or price; or
  - Significantly less important than cost or price

# FAR Part 15 – Proposal Evaluation and Award (cont.)

## Proposal Evaluation (FAR 15.305)

- Price/Cost evaluation
  - Evaluates what the proposed contract will cost
  - Price/cost and reasonableness must be evaluated in all source selections
    - Past Performance
      - Subjective assessment of the quality of previous, relevant projects
      - Past performance evaluations are required for:
        - Negotiated competitive acquisitions exceeding the simplified acquisition threshold unless the CO determines otherwise in writing; and
        - Bundled acquisitions that offer a significant opportunity for subcontracting
- Offerors with no past performance receive a neutral evaluation

# FAR Part 15 – Proposal Evaluation and Award (cont.)

## Technical Factor Evaluations

- Assesses the merit of the proposed approach and the work to be performed or item/service to be provided
  - Examples of flawed technical evaluations:
    - Relaxation of a material solicitation requirement
    - Elimination of a proposal for minor deficiencies capable of easy correction
    - Excluding a proposal for criteria not in solicitation
    - Failing to make reasonable distinctions between competing offerors' approaches

# FAR Part 15 – Proposal Evaluation and Award (cont.)

## Establishing the Competitive Range

- The competitive range is a group of offerors with whom the CO will conduct discussions, and from whom the agency will seek revised proposals
- The CO must consider all evaluation factors in making the competitive range determination
- The competitive range cannot be limited to only one proposal, and the agency cannot compile the competitive range based on predetermined cutoff scores
- An offeror cannot be omitted from the competitive range for omissions that can be corrected during discussions

# FAR Part 15 – Proposal Evaluation and Award (cont.)

## Exchanges With the Agency Prior to Establishing the Competitive Range

- Clarifications (FAR 15.306(a))
  - “Limited exchanges between the Government and offerors” that do not lead to revisions, such as the opportunity to resolve minor irregularities, informalities, or clerical errors
    - *See, e.g., MG Indus., B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17* (finding the “opportunity to revise” as the key element distinguishing discussions from clarifications)
- Communications (FAR 15.306(b))
  - Exchanges with offerors who are not in the competitive range for the purpose of addressing issues that “must be explored to determine whether a proposal should be placed in the competitive range”



# FAR Part 15 – Proposal Evaluation and Award (cont.)

## Exchanges With the Agency Following the Establishment of the Competitive Range

- Discussions (FAR 15.306(d))
  - Discussions are negotiations that occur after establishment of the competitive range that result in the offeror being allowed to revise its proposal
    - The RFP must indicate whether an award will be made with or without discussions
  - If an agency conducts discussions with an offeror, it may not make award on the initial proposal; discussions cannot be held with only one offeror
  - Discussions must be meaningful, equitable, and not misleading
    - At minimum, the CO must notify the offeror of deficiencies, significant weaknesses, and adverse past performance. But, the CO does not have to identify each deficiency, and does not have to point out a deficiency if discussions cannot improve it (*e.g.*, a CO does not have to inform an offeror its price is too high if it does not consider the price unreasonable or a significant weakness or deficiency)

# FAR Part 15 – Proposal Evaluation and Award (cont.)

## Final Proposal Revisions

- After discussions, the agency must notify offerors of the deadline to submit final proposal revisions that clarify and document any understandings reached during discussions
- Agencies are not required to reopen discussions to address additional deficiencies introduced in the final revision

# Notices

## FAR Part 15 (FAR 15.503)

- **Preaward notices of exclusion from competitive range**

- The CO shall notify offerors **promptly** in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition, and shall state the basis for the determination and that a proposal revision will not be considered

- **Postaward notices**

- Within **3 days after the date of contract award**, the CO shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award

- The notice shall include-

- The number of offerors solicited;

- The number of proposals received

- The name and address of each offeror receiving an award;

- The items, quantities, and any stated unit prices of each award; and

- In general terms, the reason(s) the offeror's proposal was not accepted (excluding an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information)

# Debriefings (cont.)

Debriefings are required for FAR Part 15 procurements in excess of the SAT

- **Pre-award debriefings (FAR 15.505)**
  - Offerors excluded from the competitive range may request a debriefing by submitting a written request to the CO within 3 days after notice of exclusion from the competition
  - Offerors **must** request the debriefing within the requisite time period (failure to do so could affect protest timeliness)
  - Preaward debriefings are required to include:
    - The agency's evaluation of significant elements in the offeror's proposal
    - A summary of the rationale for eliminating the offeror from the competition; and
    - Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition

# Debriefings (cont.)

## FAR Part 15

- **Post-award debriefings (FAR 15.506)**
  - Offeror has 3 days to provide written request for debriefing after it receives notification of contract award (failure to do so could affect timeliness of any downstream protest)
  - Debriefings should, “[t]o the maximum extent practicable,” occur within 5 days after receipt of the written request
  - Debriefing must include:
    - The Government’s evaluation of significant weaknesses or deficiencies in the offeror’s proposal
    - Overall evaluated cost or price (including unit prices) and the technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror
    - Overall ranking of offerors (if developed during the source selection)
    - A summary of the rationale for award
    - For commercial product and service acquisitions, the make and model of the item to be delivered by the successful offeror
    - Reasonable responses to relevant questions

# Debriefings (cont.)

- **DoD Post-Award Enhanced Debriefing**

- Established in Section 818 of FY 2018 NDAA and applicable to DoD procurements; implemented by DFARS Class Deviation (March 22, 2018) and finalized March 18, 2022
- Only applicable to DoD procurements at this time
- Disappointed offerors have **2 business days** to submit written questions **after receiving a post-award debriefing IAW FAR 15.506(d)**
- The DoD agency must submit a written response to the offeror's questions **within 5 business days**
  - Once the offeror receives the agency's written responses, the debriefing is considered concluded
- March 2022 Final Rule increased the scope of the DoD enhanced debriefing program to require
  - Small businesses and nontraditional defense contractors have the option to request a redacted agency source selection document (if contract award between \$10 million and \$100 million)
  - Disclosure of a redacted agency source selection decision document (if contract award in excess of \$100 million)

# CONTRACT ADMINISTRATION AS A PRIME

# The Federal Contracting Environment

## Highly Regulated

- **Ethics in Government Act** (18 U.S.C. § 201, et seq.)
- **Procurement Integrity Act** (41 U.S.C. § 2101, et seq.)
- **False Claims Act** (31 U.S.C. § 3729, et seq.)
- **Foreign Corrupt Practices Act** (15 U.S.C. § 78dd-1, et seq.)
- **Truth in Negotiations Act** (10 U.S.C. § 2306a, 41 U.S.C. § 3501, et seq.)
- **Anti-Kickback Act** (41 U.S.C. § 8701, et seq.)
- **FAR Part 3** – Improper Business Practices and Personal Conflicts of Interest
- **FAR Subpart 9.5** – Organizational Conflicts of Interest
- **Office of Government Ethics Regulations** (5 CFR Subch. B)
- **Department of Defense Joint Ethics Regulation (“JER”)** (DoD 5500.7-R)



# The Federal Contracting Environment (cont.)

## Major Consequences for Being Too Cavalier

- **Default Termination**
- **Contract Damages**
- **Administrative Remedies**
- **Civil Penalties**
- **False Claims Act – Treble Damages**
- **Suspension & Debarment**
- **Criminal Prosecution**

# The Contractor-Government Relationship

## Bribes (18 U.S.C. § 201)

- In short, a gratuity ***with intent***
  - Gift, offer, or promise of “***anything of value;***”
  - To a “public official;”
  - With intent to influence any “official act” (§ 201(b)); or
  - Because of any “official act” performed or to be performed (§ 201(c))

## Gifts and Gratuities (5 C.F.R. § 2635.201, et seq.)

- In short, a gratuity ***without intent***
- Applies to **Federal employees** (but contractors should avoid getting their customers in trouble)
- “Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a **gift** (1) from a **prohibited source** . . .”

# The False Claims Act (FCA)

## Key Risk: Existential Threat to Unwary Contractors

- **Treble damages** and **per-claim penalties** for inaccurate certifications and claims for payment submitted to the Government
- Legal action can be filed **by anyone with original knowledge**, including your own employees
- **Substantial legal costs** to fight even a questionable FCA action
- **FCA risk looms over all phases of Federal contracting** – from proposal submission through contract performance

# The False Claims Act

## “Knowingly” Means the Contractor:

Had actual knowledge of the false information

Acted in deliberate ignorance of the truth or falsity of the information

Acted in reckless disregard of the truth or falsity of the information

Knowledge of Employees is Imputed to the Contractor

Failure to Maintain an Effective Compliance Program =  
“Reckless Disregard”

# Elements of an Effective Contractor Compliance Program

## **FAR 52.203-13 – Elements of Internal Control System**

1. Assign responsibility at a sufficiently high level
2. Screen for prior unethical conduct
3. Establish relevant internal controls, policies, and procedures
4. Train relevant employees and communicate with workforce
5. Monitor and audit
6. Internal reporting mechanism – anonymous “hotline”
7. Consistent disciplinary action
8. Periodic review of the program (at least annually)
9. Timely mandatory disclosure
10. Full cooperation with Government audits and investigations

# Additional Compliance Issues Implicating FAR Part 15

- Supply Chain Security
- Domestic Sourcing (*e.g.*, Buy American, Trade Agreements Act)
- Cybersecurity (*e.g.*, CMMC, DFARS 252.204-7012 compliance, “ransomware” attacks)
- Antitrust (*e.g.*, Procurement Collusion Strike Force, teaming and “no-poach” agreements)
- Bid protests

# CLOSEOUTS

# Closeouts – FAR 4.804 generally

Regulations generally govern responsibilities of contracting officer to close out contract files.

However, contractors should be aware of and cooperate with Government process to close out contract files (contract-type dependent)



# Closeouts – When are Contracts “Closed Out”?

Depends on the office performing the closeout!

When closeout performed by the office administering the contract:

- Firm-fixed-price contracts should be closed within 6 months after the date on which the contracting officer receives evidence of physical completion. FAR 4.804-1(a)(2).
- Cost reimbursement contracts requiring settlement of indirect cost rates should be closed within 36 months of the month in which the contracting officer receives evidence of physical completion. FAR 4.804-1(a)(3).
- All other contracts should be closed within 20 months of the month in which the contracting officer receives evidence of physical completion. FAR 4.804-1(a)(4).

# Closeouts (Cont.) – When are Contracts Closed Out?

What if an office other than the office administering the contract performs contract closeout?

- Contract files shall be closed “as soon as practicable” after the contracting officer receives a contract completion statement from the contract administration office. The contracting officer shall ensure that all contractual actions required have been completed and shall prepare a statement to that effect. FAR 4.804-2(b).

# Closeouts (Cont.) – When is a Contract “Physically Complete”?

When is a contract considered “physically complete” for closeout?

1. (i) The contractor has completed the required deliveries and the Government has inspected and accepted the supplies; (ii) The contractor has performed all services and the Government has accepted these services; and (iii) All option provisions, if any, have expired; or
2. The Government has given the contractor a notice of complete contract termination.

FAR 4.804-4(a)

# Closeouts (Cont.) – A Contract Will Not Be Closed If...

Agency will not close a contract file if:

1. Contract is in litigation or under appeal; or
2. In the case of a termination, all termination actions have not been completed.

FAR 4.804-1(c).

# Contactoer Considerations During Closeout

- Ensure all required reports are submitted (e.g., final patent reports, etc.)
- Verify that all cost issues are settled (e.g., all interim or disallowed costs are settled, prior year indirect cost rates settled)
- Settle all subcontracts
- Submit final invoice

# HIRING AND MANAGING SUBCONTRACTORS

# What is a Subcontract in the U.S. Supply Chain? Things to Think About

- It is Not a Government Contract
- There is No Privity With the Government
- It is a Product of Negotiation Between the Parties
- It is Constrained Only by Mandatory Flow-Downs
- Think of It in Two Parts: Negotiated Terms and FAR and FAR Supp Flow-Downs
- Commercial Item Suppliers Have Very Limited Mandatory Flow-Downs
- Flow-Downs Can Have Extended Reach
- It Can Take Many Forms

# A Must – a Negotiated Agreement

## Alternatives Are All Bad

- Starting Work Before Definitive Agreement
- Competing Forms
- Email Exchanges
- Attaching the Prime Contract



# Contract Terms To Consider

- **Limitation of Liability**
- **Price/Charge/ Price Changes**
- **Indemnification**
- **Scope and Goals/Specification [Deliverables]**
- **Termination**
- **Payment/Payment Options**
- **Responsibility of the Parties**
- **Warranty**
- **Liquidated Damages**
- **Delivery**
- **Intellectual Property**
- **Order of Precedence**
- **Term**
- **Invoices/Late Payment**
- **Data Privacy**
- **Data Security/Cybersecurity**
- **Acceptance**
- **Regulatory Compliance [Flow-Downs]**
- **Change Management**
- **Force Majeure**
- **Dispute Resolution**

# Indemnification - Common Embedded Indemnity Provisions

- EVERYTHING
- Property Damage, Personal Injury, and Wrongful Death
- Infringement
- Compliance with the Law
- Export Control
- Defective Cost or Pricing Data
- Contract Disputes Act Appeals Made on Sub's Behalf

“Seller shall indemnify and hold Buyer and its customers harmless from any and all expenses, liability, and loss of any kind (including all costs and expenses including attorneys’ fees) arising out of claims, suits, or actions . . . .”

# Delivery to Warranty Pressure Points

- Who can inspect and when and where?
- Time period for acceptance once delivered/inspected
- Remedies other than rejection – repair and replace, cost adjustment, cost or third party repair or replace
- Time limits for acceptance
- Is Customer acceptance an issue?
- Latent defects and fraud
- Seller notice of defects and seller assurances
- Watch out for creeping warranties

# Warranties – Common Pressure Points

- Excluding implied warranties
- Limiting warranty period
- When does warranty period commence
- Limitations on remedy
- Subject matter of warranty
  - Defects in workmanship and materials
  - Defects in design
  - Conform to specifications
  - High professional standards

# Payment Pressure Points

- Pay when paid
- Trigger point for payment
- Days to payment
- When is payment before delivery justified

# Protection for Payments to Subcontractors in FAR

**FAR 32.112-1.** Subcontractor may make assertion of non-payment directly to Contracting Officer (giving flexibility of CO to withhold payment to prime)

**FAR 52.242-5 and 15 U.S.C. 637.** The prime must self-disclose to the CO when a small business subcontractor receives a reduced or untimely payment and the reasons for such. A history of unjustified untimely payments may result in negative performance history.

**FAR 52.232-27.** For construction contracts, the prime must pay the subcontractor within 7 days after payment from the Government. Withholding payments from a sub is allowed if permitted under the agreement. However, withholding must be reported to the CO.

**FAR 52.232-40.** If the prime gets accelerated payments from the Government, it must make accelerated payments to its small business subcontractors to the maximum extent practicable and prior to when it is required under the subcontractor (upon receipt of a proper invoice and any other required documentation)

# Termination Pressure Points

- Convenience – Tied to Government T/C or Not
- Notice for T/D and Ability to Cure
- Grounds for T/D
- Conversion of T/D into T/C if Wrongful
- Remedies
- Availability of IP

# Disputes Pressure Points

- Cooling Off Period
- Does Management Get First Crack?
- Mediation before Litigation
- Arbitration vs. Litigation
- Forum Selection
- Choice of Law
- Obligation to Continue Working While Dispute is Pending
- Right to Injunctive/Equitable Relief
- Piggybacking on the Prime to Dispute Gov't



# Flow-Down Clauses

- Required Flow-Downs vs. Discretionary Flow-Downs
- Some cannot be flowed down –  
e.g., Disputes Clause
- Some are to protect the prime's interests  
e.g., termination, stop work, suspension, changes, warranty, DPAS, and IP rights clauses
- Often conditioned on contract type, type of work to be performed and total anticipated contract value

# How to Flow Down Clauses

FAR 52.102 recommends incorporation by reference versus full text and that they be tailored on a contract-by-contract basis.

Primes must flow down version of the clause in the Prime contract. Earlier versions of clauses available at “Archives” tab of [www.acquisition.gov](http://www.acquisition.gov) website.

Primes should alter terms to fit the subcontract but watch for global alterations.

- Watch for Order of Precedence!

# COMMON HAZARDS AND PITFALLS

# Top 10 Tips to Avoid Hazards and Pitfalls

1. Read and follow all instructions in RFP/Solicitation
2. Consider whether a protest may be appropriate
3. ***Read (and re-read) the FAR/DFARS/Agency clauses in the contract!***
4. Know your Contracting Officer
5. Have a robust compliance program in place (and ensure employees are aware of and trained on their ethical obligations)

# Top 10 Tips to Avoid Hazards and Pitfalls

6. Document, document, document
7. Beware (and understand the implications of) broad release language
8. Understand the prime-sub relationship (commercial, but...)
9. Ensure all required clauses flow down to subcontractors (mandatory vs. necessary flowdowns)
10. Make sure all teams are integrated (sales, legal, compliance, etc.)

# Questions?



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