



# Federal Infrastructure Contracting 2023 - Formation

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# Our Agenda

- Types of Contracts
- Pros and Cons of Fixed-Price vs. Cost-Type for Infrastructure/Construction Contracting
- Contracting by Negotiation (FAR Part 15)
- Commercial Products/Services Contracting (FAR Part 12)
- Sole Source Contracting
- Negotiating and Entering Into Subcontracts

# TYPES OF CONTRACTS/ PROS AND CONS

# FAR Part 15 – Contract Types

## Fixed Price Contracts

- Firm-Fixed Price (FFP)
- Fixed-Price with economic price adjustment (FP/EPA) or Level of Effort (FP-LOE)

## Cost Reimbursement Contracts

- Contractor paid reasonable, allocable and allowable costs, IAW FAR Parts 30-31 and Generally Accepted Accounting Principles (GAAP), plus reasonable profit
- Limitations on use: adequate contractor accounting system, contractor ability to administer, etc.
- Statutory limitations on profit/fee; experimental, R&D cap is 15%, A&E or utilities capped at 6%, other cost-plus fixed-fee capped at 10%

# FAR Part 15 – Contract Types (cont.)

Incentive Contracts (*e.g.*, Cost Plus Fixed Fee; Cost Plus Incentive Fee)

- In addition to being paid reasonable, allocable, and allowable costs, contractor can earn additional fee based on meeting specific targets established in contract (*e.g.*, under cost, meeting performance goals)

ID/IQ

Time & Materials (T&M)

- Contractor paid direct labor hours at fixed rates and materials at cost, plus reasonable profit

Labor Hour (LH)

- Similar to T&M, but no materials provided

# FAR Part 12 –Contract Types

## Authorized Contract Types For Commercial Products and Services (FAR 12.207)

- Firm-fixed-price (FFP)
- Fixed price contracts with economic price adjustment (FP/EPA) (or Level of Effort (FP-LOE))
- Indefinite Delivery/Indefinite Quantity (ID/IQ)
- Time and Materials (T&M) or Labor-Hour (LH)

The use of other contract types (*e.g.*, cost-type contracts) for the acquisition of commercial products and services under FAR Part 12 is prohibited (FAR 12.207(e))

Note these restrictions are generally directed toward USG acquisition teams; in contrast, a contractor has greater flexibility to enter into contracts with suppliers for commercial products or services unless specific contract requirements dictate otherwise

# Pros/Cons – Fixed-Price Contracts

## PRO

Lower administrative burden for contractors  
Cost predictability for government  
Specificity in requirements

## CON

Cost risk on contractor  
Limited ability to pursue price adjustments (look for EPA clause)  
Less transparency

# Pros/Cons – Cost-Reimbursable Contracts

## PRO

Shifts cost risk to Government  
More flexibility in scope and cost recovery  
Government has increased insight into contractor costs

## CON

Increased administrative requirements for contractors  
Less predictability  
Risk of hitting ceiling



# CONTRACTING BY NEGOTIATION (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 – 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

# COMMERCIAL PRODUCTS/SERVICES CONTRACTING

# Commercial Product Definitions

## **Paragraph (1) “Of a Type”**

(1) A product, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and—

- (i) Has been sold, leased, or licensed to the general public; or
- (ii) Has been offered for sale, lease, or license to the general public

## **Paragraph (2) “Evolved From”**

(2) A product that evolved from a product described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation

# Commercial Product Definitions

## **Paragraph (3)(i) “Modifications of a type”**

(3) A product that would satisfy a criterion expressed in paragraph (1) or (2) of this definition, except for-

(i) Modifications of a type customarily available in the commercial marketplace

## **Paragraph (3)(ii) “Minor Modifications”**

(3) A product that would satisfy a criterion expressed in paragraph (1) or (2) of this definition, except for-

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. “Minor modifications” means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor



# Commercial Product Definitions

## **Paragraph (4) “Combination”**

(4) Any combination of products meeting the requirements of paragraph (1), (2), or (3) of this definition that are of a type customarily combined and sold in combination to the general public;

## **Paragraph (5) “IOT” → Inter-Organizational Transfer**

(5) A product, or combination of products, referred to in paragraphs (1) through (4) of this definition, even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor

## **Paragraph (6) “Nondevelopmental”**

(6) A *nondevelopmental item*, if the procuring agency determines the product was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.

# Commercial Service Definitions

## Paragraph (1)

(1) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of a commercial product as defined in this section, regardless of whether such services are provided by the same source or at the same time as the commercial product; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government

# Commercial Service Definitions

## **Paragraph (2) “of a type”**

(2) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors; or

## **Paragraph (3) “IOT” → Inter Organizational Transfer**

(3) A service referred to in paragraph (1) or (2) of this definition, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

# Commercial-Off-The-Shelf (“COTS”) Items

COTS Items are defined as:

- a commercial product (as defined in FAR 2.101);
- sold in substantial quantities in the commercial marketplace; and
- offered to the Government under a contract or subcontract at any tier, without modification and in the same form as sold in the commercial marketplace
  - See, *e.g.*, Chant Engineering Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 (“[n]ew equipment like Chant’s proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment.”)

In effect, COTS are a subset of commercial products; as such, all policies applicable to commercial products also apply to COTS items (FAR 12.103)

# Primary Procurement Methods for Commercial Products and Services

Commercial Product and Service Procurement (FAR Part 12)

Micro-purchases (FAR Subpart 13.2)

Simplified Acquisition (FAR Part 13)

Indefinite Delivery Contracts (FAR Part 16)

GSA Schedule Contracts (FAR Subpart 8.4)

# FAR Part 12

In 1995, the FAR Council implemented the statutory preference for the acquisition of commercial items by revising FAR Part 12 to:

- Include policies and procedures solely for commercial items
- Formulate acquisition policies more conducive to the commercial marketplace
- Create exemptions and carve-outs from many federal contracting regulations for commercial item contracts

FAR Part 12 requires federal agencies to:

- Conduct market research to determine whether commercial products and services are available to satisfy the agency's requirements
- Purchase commercial products and services when such items are available to meet the agency's needs
- Requires prime and subcontractors to incorporate, to the maximum extent practicable, commercial products as components of items supplied to agencies
  - Occurs via inclusion of FAR 52.244-6 and DFARS 252.244-7000; both clauses required by the FAR and DFARS, respectively, to be included in all applicable solicitations and contracts

# FAR Part 12 Applicability

FAR Part 12 shall be used to acquire supplies or services that meet the FAR 2.101 definition of commercial products and services (FAR 12.102(a))

COs shall use this part in conjunction with policies and procedures for solicitation, evaluation and award prescribed by FAR Part 13 (Simplified Acquisition Procedures), FAR Part 14 (Sealed Bidding), or FAR Part 15 (Contracting by Negotiation), as appropriate for the particular acquisition (FAR 12.102(b))

Acquisitions of commercial products and services are subject to other policies in the FAR, but when policies from another part conflict with this part 12, this part shall take precedence for the acquisition of commercial products and services (FAR 12.102(c))

# FAR Part 12 Applicability (cont.)

FAR Part 12 shall not apply to the acquisition of commercial products and services:

- At or below the micro-purchase threshold (\$10k);
- Using the Standard Form 44 (see FAR 13.306)
- Using the imprest fund (see FAR 13.305);
- Using the Government-wide commercial purchase card, or
- Directly from another federal agency



# Micro-purchases (FAR Subpart 13.2)

Subset of Simplified Acquisition Procedures (FAR Part 13)

Thresholds for Use

- Products:  $\leq$  \$10,000
- Services:  $\leq$  \$2,500

No competition necessary if agency considers price fair and reasonable

- Similar procedures:
  - GSA Schedule orders: select any contractor that meets agency's needs
  - FAR 16.5 task order competitions: "fair opportunity" procedures not required

FAR clauses not required, but permitted

# Simplified Acquisition Procedures (FAR Part 13)

Provides flexibility and reduced procedural requirements for small purchases to (1) reduce admin costs, and (2) increase efficiency

Typically applies to acquisitions not exceeding \$250,000 (*i.e.*, the Simplified Acquisition Threshold), but Simplified Procedures can be used for:

- Acquisitions not exceeding \$7.5 million if the CO reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial products and services (FAR 13.500(a))
- Acquisitions that do not exceed \$15 million when the acquisition is for commercial products and services that, as determined by the head of the agency, are to be used in support of, *inter alia*, the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack or to support response to an emergency or major disaster

# What Are The Simplified Acquisition Procedures?

Choice of “appropriate” procedures from parts 12, 13, 14, and 15

Competition “to the maximum extent practicable”

May solicit from one source if “circumstances ... deem only one source reasonably available”

For commercial products and services above \$250,000 (up to \$7.5M):

Increased J&A requirements for sole-source

Oral solicitation permitted if low-dollar acquisition

Solicitations must identify basis of award (price only or price & other factors), but need not define relative weights of factors or identify subfactors

# FAR Part 12 – Standard Form 1449

The CO shall use Standard Form 1449 (SF 1449) as the solicitation format for the acquisition of commercial products and services under FAR Part 12, if:

- The acquisition is expected to exceed the SAT;
- A paper solicitation or contract is being issued; and
- The “streamlined” procedures in FAR Subpart 12.6 are not being used

Use of SF 1449 in commercial acquisitions under the SAT is not mandatory, but encouraged (FAR 12.204(a))

# FAR Part 12 – Standard Form 1449 (cont.)

## Solicitation Format

- In addition to SF 1449, the solicitation package under a FAR Part 12 acquisition shall include:
  - CLINs, a schedule for the supplies/services, accounting data
  - Mandated provisions
    - FAR 52.212-1, Instructions to Offerors-Commercial Products and Commercial Services, by reference;
    - Any addendum to FAR 52.212-1;
    - FAR 52.212-2, Evaluation-Commercial Products and Commercial Services (or other description of evaluation factors for award, if used); and
    - FAR 52.212-3, Offeror Representations and Certifications-Commercial Products and Commercial Services
  - Mandated clauses
    - FAR 52.212-4, Contract Terms and Conditions-Commercial Products and Commercial Services;
    - Any addendum to FAR 52.212-4;
    - FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders; and
    - All other required clauses (see FAR 12.301(c))
  - Any contract documents, exhibits or attachments

# FAR Part 12 – Standard Form 1449 (cont.)

Contracts for commercial buys shall include when practicable only clauses that (1) implement law, regulation, or Executive Order; or (2) are consistent with customary commercial practices (FAR 12.301(a))

Terms and conditions are tailored to reflect the scope and complexity of the acquisition

Clauses not customary within the industry for the commercial product/service being acquired require a FAR waiver (FAR 12.302(c))

CO authorized to develop other provisions as long as the provisions are customary for the commercial product/service being acquired

# FAR Part 12 – Standard Form 1449 (cont.)

Because of the broad range of commercial products and services acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, a CO may tailor FAR 52.212-1 and/or FAR 52.212-4 to adapt to the market conditions for each acquisition

- Tailoring may be done if consistent with commercial practice for the item/service being acquired and not inconsistent with applicable laws, regulations, or Executive Orders
- Market research indicates scope of the tailoring
- Tailoring shall be documented in addenda to the solicitation and contract

# FAR Part 12 – Streamlined Solicitation (FAR 12.603)

Subpart 12.6 provides optional procedures for (a) streamlined evaluation of offers for commercial products and services; and (b) streamlined solicitation of offers for commercial products and services for use where appropriate

- These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial products and services consistent with customary commercial practices
- When the procedures under Subpart 12.6 are employed for a commercial product and service acquisition, the use of SF 1449 is not permitted

This procedure combines the notice of contract action synopsis required by FAR 5.203 and the issuance of the solicitation into a single document

- The combined synopsis/solicitation must include, among other information:
  - The type of solicitation (*e.g.*, RFP, IFB, RFQ)
  - Description of items/services and requirements
  - Clauses FAR 52.212-1 through FAR 52.212-5
  - A statement regarding any additional contract requirement(s) or terms and conditions determined by the CO to be necessary for this acquisition and consistent with customary commercial practices



# FAR Part 12 – Publicizing the Solicitation

Under FAR 5.203, agencies generally must publish notice (through the Government Point of Entry (“GPE”)) of upcoming solicitations at least 15 days before issuance

- But for commercial products and services a CO may issue a solicitation (1) less than 15 days after publishing notice, or (2) use the combined synopsis/solicitation procedure under FAR Subpart 12.6

The CO shall establish a solicitation response time—considering the circumstances of the individual acquisition, such as its complexity, commerciality, availability, and urgency—when establishing the solicitation response time that affords potential offerors a reasonable opportunity to respond to commercial products and services acquisitions

- A solicitation response time of less than 30 days can be appropriate for commercial product and service acquisition, even in excess of the SAT
  - See, *e.g.*, *American Artisan Productions, Inc.*, B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding 15 day response period reasonable); GIBBCO LLC, B-401890, Dec. 14, 2009, 2009 CPD ¶255 (finding 22 day response period reasonable)

# FAR Part 12 - Proposal Evaluation and Award

FAR Part 12 proposals are evaluated IAW evaluation criteria in the solicitation (included in FAR 52.212-2)

- At a minimum, proposals evaluated on technical capability, price, and past performance
- Best Value (criteria stated in the Solicitation)
  - Tradeoff between non-price factors and price; or
  - Lowest-Price, Technically Acceptable (LPTA)

# FAR Part 12 – Proposal Evaluation and Award (cont.)

## Past Performance

- Past performance should be an important element of every evaluation and contract award for commercial products and services (FAR 12.206)
- Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Government in accordance with the policies and procedures contained in FAR Subpart 15.3

# FAR Part 12 – Proposal Evaluation and Award (cont.)

## Pricing

- At a minimum, the CO must use price analysis to determine whether the price is fair and reasonable (FAR 15.403-3(c))
- A price in a catalog is not, necessarily, fair and reasonable.
- The CO must establish price reasonableness IAW with FAR 13.106-3 (SAP) or FAR 15.4 (Contract Pricing), as applicable (FAR 12.209)
  - Consider customary commercial T&C's when pricing commercial products and services
  - Ensure that T&C's, and prices, are commensurate with Government needs
  - Consider speed of delivery, length and extent of warranty, seller's liability, quantities ordered, length of the performance period, and specific performance requirements when evaluating pricing

# FAR Part 12 – Proposal Evaluation and Award under FAR Subpart 12.6

When evaluation factors are used, the contracting officer may tailor the evaluation factors and relative importance of those factors to the acquisition

- When using Part 13 procedures in conjunction with Part 12, COs are not required to describe the relative importance of evaluation factors
- For many commercial products and services, proper evaluation will only require consideration of an item's technical capability (the ability of the item to meet the agency's need), price, and past performance
- Past performance shall be evaluated in accordance with the procedures in FAR 13.106 or FAR Subpart 15.3, as applicable

# FAR Part 12 – Proposal Evaluation and Award under FAR Subpart 12.6 (cont.)

The CO must (1) select the offer that is most advantageous to the Government based on the factors contained in the solicitation, and (2) fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered (FAR 12.602(c))

# SOLE SOURCE CONTRACTING

# FAR Part 15 - Sole Source Procurement

The Government **strongly** prefers full and open competition for acquisitions

However, in certain situations, an agency may conduct a sole-source acquisition under FAR Part 15, based on one of the limited bases in FAR Subpart 6.3, through a written justification and approval (J&A)

Sole source bases:

- Only one responsible source
- Unusual and compelling urgency
- National Security
- Industrial mobilization
- Engineering developmental, or research capability
- Expert services
- International agreement/treaty
- Authorized or required by statute
- Public interest



# Sole Source – Commercial Products and Services

## Requirements for Sole-Source Acquisition of Commercial Products and Services (FAR 13.501(a))

- Although acquisitions conducted under SAP are exempt from the competition requirements of FAR Part 6, COs shall not conduct sole-source acquisitions, unless the need to do so is justified in writing with the appropriate level of approval indicated in FAR 13.501(a)(2)
- A written Justification & Approval (J&A) is required for brand name acquisitions of commercial products and services
  - The J&A must be based on one of the limited FAR Subpart 6.3 justifications (*e.g.*, only one responsible source, unusual and compelling urgency, national security, industrial mobilization)
  - See, *e.g.*, Core Sys., B-411060, Apr. 30, 2015, 2015 CPD ¶ 148 (denying protest and finding that the Navy properly restricted a FAR Part 12 competition to a specific brand and model of commercial computer system by reasonably determining that no other product could undergo required testing and approval in sufficient time to meet the Navy's needs)

# NEGOTIATING AND ENTERING INTO SUBCONTRACTS

# 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

# 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

# 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!

# Commercial Product and Service Subcontracting

Opportunity for Commercial Product and Service Contractors:

- Many commercial products are components, sub-systems, equipment, or supplies *used by prime contractors* in the performance of Federal contracts
- For some Commercial Products and Services contractors, the key business development opportunities are at the *prime contract level*
- In the Federal marketplace, it can be just as important to understand the subcontracting process

# Commercial Product and Service Subcontracting (cont.)

The objective of a commercial item determination is to ensure that the product and/or service meets the definition at FAR 2.101

- **Prime contractors are responsible** for determining the commerciality of subcontracted products and services
  - See, e.g., DFARS 244.402(a) (“Contractors are required to determine whether a particular subcontract item meets the definition of a commercial item . . . . **[and] are expected to exercise reasonable business judgment in making such determinations**, consistent with . . . FAR Part 10.”)
  - Defense Procurement & Acquisition Policy Memorandum, Guidance on Commercial Item Determinations and Determination of Price Reasonableness for Commercial Items (Sept. 2, 2016) (“[P]er the Department’s policy (DFARS 244.402), **it is the prime contractor’s responsibility** to determine whether a particular subcontracted supply or service meets the [FAR 2.101] definition of a commercial item.”)
  - Defense Acquisition University, Commercial Item Determination and Pricing - Govt/Industry Perspectives; Hot Topic Training Forum (July 19, 2017) (Defense Procurement & Acquisition Policy representative states that (1) the USG should rely on prime contractor CIDs, and (2) it is the prime contractor’s responsibility to determine whether a subcontract item meets the FAR 2.101 commercial item definition)
- In addition, periodic purchasing system reviews are required to determine the adequacy of a contractor’s commercial item determination process

# Commercial Product and Service Subcontracting (cont.)

Commercial Product and Service subcontracting is a contract between two private parties with mandatory Federal requirements flowed down from the prime contract (*see, e.g.*, FAR 52.244-6)

The prime contractor may also include a “minimal” number of other clauses to satisfy its contractual obligations to the Government customer



# Questions?



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