

# Subcontract Management From A to Z:

## Session 6: Selecting Subcontractors

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# Introduction

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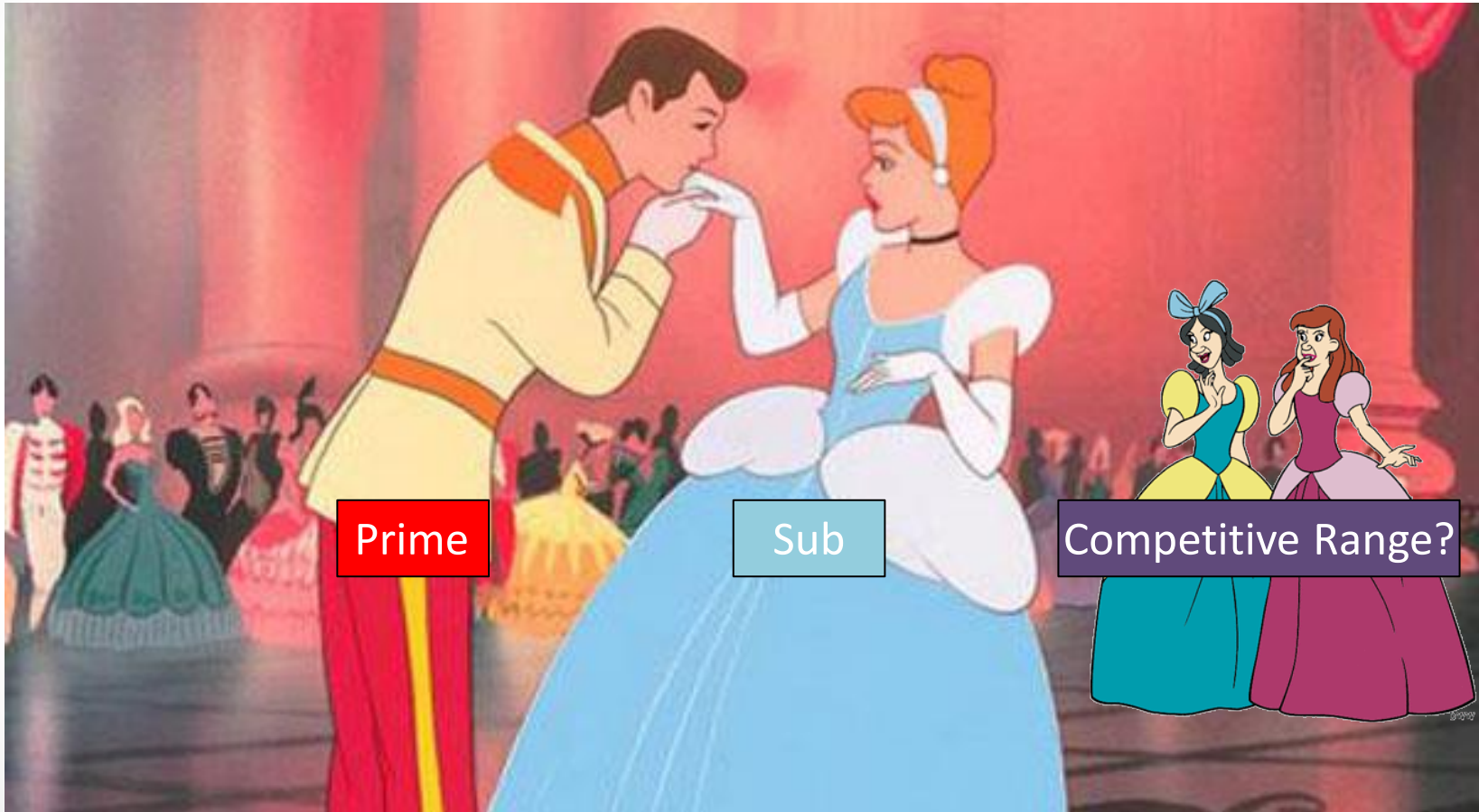
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# Overview of the Series

- January 16: Federal Subcontracting 101 (An Overview)
- February 20: Joint Ventures and Teaming Agreements
- March 19: Small Business Programs
- April 16: Small Business Subcontracting
- May 21: Contractor Purchasing Systems
- June 18: Selecting Subcontractors
- September 17: Subcontract Negotiations and Flowdowns
- October 15: Subcontract Pricing
- November 19: Subcontract Management and Administration

# Selecting Subcontractors



# Selecting Subcontractors A-Z



**REQUEST**



**OR**



**QUOTES**



**PROPOSALS**

# 3 Phases of Subcontract Management



# Agenda

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- Acquisition Planning
  - Competition in Subcontracting
  - Market research
  - Developing an RFP/RFQ
  - Confidentiality Agreements
  - Teaming Agreements (Redux)
  - Consent to Subcontracting
  - Responsibility
  - Affiliates/Partners
  - Justification & Approval
  - Subcontractor Certifications
- Choosing Subcontract Type

# 1. Acquisition Planning



# Competition In Subcontracting

Competition

**VS.**

Value

# Competition In Subcontracting (cont'd)

- Need for competition in subcontracting
  - Federal policy favors competition for better price
  - FAR 52.244-5, Competition in Subcontracting
  - Approved Purchasing System requirement also requires competition
- FAR 52.244-5 is not included in:
  - Prime contracts < \$250,000
  - FFP prime contract, awarded based on adequate competition
  - Mentor-Protégé
  - Commercial subcontracts
    - *Maybe* – this clause is not a mandatory flowdown
- Subcontract competition requirements can probably be less rigorous for these types of subcontracts

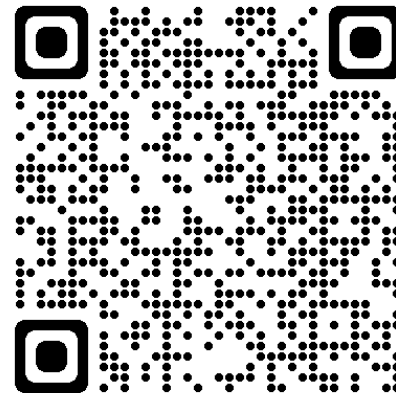
# Competition In Subcontracting (cont'd)

- 52.244-5 requires prime contractors to award subcontract “on a competitive basis to the **maximum practical extent...**”
- “Competition” focuses on the contractor’s **process**, not necessarily the **price obtained**
  - *U.S. ex rel. Garzione v. PAE Government Services*, 164 F. Supp.3d 806 (E.D. Va. 2016) (dismissing whistleblower complaint because prime contractor competed a requirement, despite the fact that award was made to the highest-priced offeror).
  - “The regulations applicable to what is required by way of a ‘competitive process’ and what constitutes a ‘reasonable’ price are general and by their terms confer a great deal of discretion and judgment on the selecting contractor.” *Id.* at 813.

# Competition In Subcontracting (cont'd)

- “FAR 52.244-5 requires the contractor to select subcontracts/purchase orders on a competitive basis to the maximum practical extent. To know if this has been achieved the analyst needs to know the following”:
  - Number of bids requested
  - Number of bids received
  - Number of bids responsive.

*DCMA Contractor Purchasing System Review (CPSR) Guidebook (September 10, 2021)*



# Competition In Subcontracting (cont'd)

- Competition priorities for the government when consenting to subcontracts:
  - 44.202-2(a)(5): adequate price competition
  - 44.202-2(b)(2): treatment of affiliates
  - 44.202-2(b)(3): noncompetitive procurements
- Hallmarks of a contractor's Purchasing System:
  - 44.303(a): market research
  - 44.303(b): price competition
  - 44.303(e): treatment of affiliates
  - 252.244-7001(c)(7): competitive sourcing
  - 252.244-7001(c)(8): determination of fair and reasonable prices



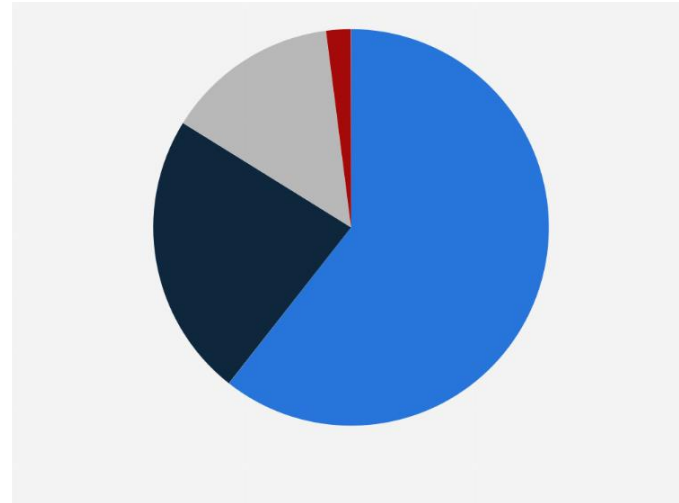
# Market Research

- For **commercial contracts**, the assumption is that normal commercial practices are driving some level of market research
- For **non-commercial contracts**, FAR 52.210-1, Market Research, is required in prime contracts > \$6M
  - Requires market research for non-commercial subcontracts > \$250K
  - Preference is for commercial products or services at all levels



# Market Research (cont'd)

- How do you do your market research...?
- Where do you turn?
  - SAM.gov
  - USASpending.gov
  - Small business databases
  - Trade associations
  - Other?
- Do you use your Small Business Subcontracting Plan as a resource?
- Are you conducting periodic industry surveys to see how the landscape has changed?
- Are you leveraging Requests for Information (RFIs)?



# Developing the RFP/RFQ

- Determining the subcontract type (more on this later...)
- Statement of Work
  - Are you accurately translating prime contract requirements for your sub?
- Delivery schedule
- Unique conditions
  - Shipping
  - Facility access
  - H-clauses
- Flowdowns
- Standard terms and conditions?
  - Commercial terms?
  - Non-commercial terms?
- Evaluation procedures?



**Anything that might relate to pricing and scope should be included!**



# Confidentiality Agreements

- Make sure you have confidentiality agreements in place to protect proprietary data
- When should confidentiality agreements be addressed?
  - Early and often
- What is the scope of use?
  - Define the intellectual property under the agreement
  - Define the program/contract to be covered
- Should your confidentiality agreement address:
  - Employment restrictions?
    - To whom does this apply?
    - For how long?
  - Participation with other offerors?
  - Surviving obligations



# Teaming Agreements (Redux)

- Previously discussed in detail in Session 2 of this series...
- FAR Subpart 9.6
- TAs are allowed to (1) complement each other's unique capabilities and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.
- Teaming partners may differ from your “normal” subcontractors

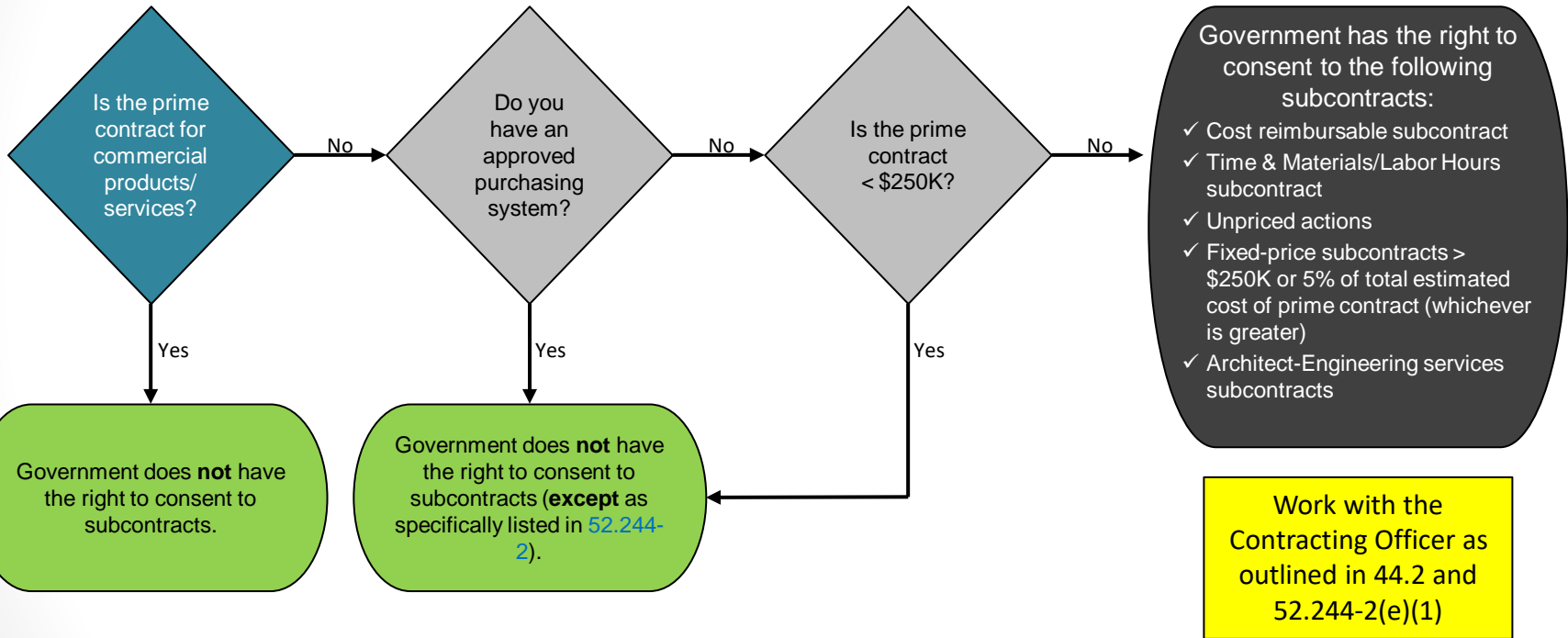


# Consent to Subcontracting

- Government's rights to consent to subcontracts are spelled out in FAR subpart 44.2
- Government right to consent typically occurs where subcontract type is complex, high value, or needs special surveillance
  - Whether prime contractor has an **approved purchasing system** in place
  - Cost reimbursable subcontracts
  - Time & Materials/Labor Hour subcontracts
  - Unpriced actions
  - Certain dollar thresholds
- Government consent may be required when the subcontract type puts government at risk



# Consent to Subcontracting (FAR 44.2)



# Consent to Subcontracting (cont'd)

- **Factors to be considered under FAR 44.202-2**
  - (a) The contracting officer responsible for consent must, **at a minimum**, review the request and **supporting data** and **consider the following**:
    - (1) Is the decision to subcontract consistent with the contractor's approved **make-or-buy program**, if any (see 15.407–2)?
    - (2) Is the subcontract for special test equipment, equipment or real property that are **available from Government sources**?
    - (3) Is the selection of the particular supplies, equipment, or services **technically justified**?
    - (4) Has the contractor complied with the **prime contract requirements** regarding—
      - (i) **Small business subcontracting**, including, if applicable, its plan for subcontracting with small, veteran-owned, service-disabled veteran-owned, HUBZone, small disadvantaged and women-owned small business concerns (see part 19); and
      - (ii) **Purchase from nonprofit agencies** designated by the Committee for Purchase From People Who Are Blind or Severely Disabled (41 U.S.C. 8504) (see part 8).
    - (5) Was **adequate price competition** obtained or its absence properly justified?

# Consent to Subcontracting (cont'd)

- **Factors to be considered under FAR 44.202-2 (cont'd)**
  - (6) Did the contractor adequately assess and dispose of subcontractors' **alternate proposals**, if offered?
  - (7) Does the contractor have a sound basis for selecting and determining the **responsibility** of the particular subcontractor?
  - (8) Has the contractor performed **adequate cost or price analysis** or price comparisons and obtained certified cost or pricing data and data other than certified cost or pricing data?
  - (9) Is the proposed **subcontract type appropriate for the risks involved** and consistent with current policy?
  - (10) Has **adequate consideration** been obtained for any proposed subcontract that will involve the use of Government-provided equipment and real property?
  - (11) Has the contractor adequately and reasonably **translated prime contract technical requirements into subcontract requirements**?
  - (12) Does the prime contractor comply with applicable **cost accounting standards** for awarding the subcontract?
  - (13) Is the proposed subcontractor listed as excluded in the **System for Award Management** (see subpart 9.4)?

# Consent to Subcontracting (cont'd)

- **Specific areas of emphasis under FAR 44.202-2**
  - (b) **Particularly careful and thorough consideration** under paragraph (a) . . . is **necessary** when –
    - (1) The prime **contractor's purchasing system** or performance is inadequate;
    - (2) Close working relationships or **ownership affiliations** between the prime and subcontractor may preclude free competition or result in higher prices;
    - (3) Subcontracts are proposed for award on a **non-competitive basis, at prices that appear unreasonable**, or at prices higher than those offered to the Government in comparable circumstances; or
    - (4) Subcontracts are proposed on a **cost-reimbursement, time-and-materials, or labor-hour basis**.

# Consent to Subcontracting (cont'd)

- Key Takeaways
  - Work with your Contracting Officer
  - What are the Government's concerns?
  - Tailor your actions to mitigate these issues
  - Work consistent with your established plan





# Subcontractor Responsibility

- Responsibility Criteria
  - ✓ Adequate financial resources to perform the contract
  - ✓ Meet delivery and performance schedule
  - ✓ Satisfactory performance record
  - ✓ Satisfactory record of integrity and business ethics
  - ✓ Necessary experience, skills, and operational controls
  - ✓ Necessary production equipment facilities
- Prime contractors can usually accept subcontractor certifications regarding responsibility criteria
- The SBA issues Certificates of Competency for small businesses (FAR Subpart 19.6)
- Government may make responsibility determination directly for a subcontractor (FAR 9.104-4(b))
- Make sure that you document the record

# Subcontractor Responsibility (cont'd)

- Other responsibility issues
  - Debarred/Suspended Subcontractors
    - Government reserves the right to make a responsibility determination under FAR part 9
    - Also FAR 52.209-6, Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment (subcontracts > \$35K)
  - Subcontractor Past Performance?
    - Government may also exert influence over approving a poorly performing subcontractor
  - Analysis may include affiliates, if it will adversely affect the contractor's responsibility



# Treatment of Affiliates/Partners

- Policies should set forth arm's-length policies for affiliates/partners
- Competition involving related and non-related entities

When developing acquisition strategies, program managers and contracting officers shall consider **increasing government insight** into the subcontractor selection process when another division of a potential offeror might be a competitor for a particular subsystem. In that situation, the solicitation should ask offerors to **submit a plan explaining how they will ensure that the subcontractor competition will be conducted fairly and result in the best value for DoD.**

Principal Deputy Under Secretary Of Defense Memo, May 5, 1999

# Treatment of Affiliates/Partners (cont'd)

- Competition plans should address:
  - How source selection decisions will provide **best value** to Government;
  - How **intellectual property** will be protected;
  - Whether **independent advisors** will assess the competition;
  - Whether **firewalls** will be implemented;
  - Whether there are **benefits** to dual-sourcing that outweigh the costs;
  - Potential **Organizational Conflicts of Interest?**
    - Not included in DOD memo, but could have been

# Justification & Approval (J&A)

- Second-level sign-off
- Requirements are dictated by internal policies
- Documented justification as to why you are deviating from standard policies
- Common reasons given for J&As:

Customer Directed	Engineering Directed
Proprietary Items	Only Supplier Qualified
Economically Justified	Other Justifiable Reasons
No Justification Given	

# Subcontractor Certifications

- What should you make your subcontractor certify?
- Custom forms?
- Standard forms?
- Should you accept their standard SAM certifications?
- Maintain copies in your files
- Refresh at least annually

## 2. Subcontract Types

# Subcontract Types

## Method of Payment

- Risk continuum
  - Firm-fixed price
  - Cost-Plus
- Incentive Fees

## Method of Ordering

- IDIQ
- Requirements
- BOA
- T&M

## Product or Service Being Procured

- Commercial vs. non-commercial
- O&M
- Construction



# Subcontract Types (cont'd)

- Subcontract types based on the **method of payment**
  1. **Fixed price** contracts (FAR subpart 16.2)
    - Scope of work should be clearly defined
      - Preferred pricing type of the Government
      - Forces **companies to shoulder the risk**
    - But are fixed price contracts in fact “fixed price?”
      - Not with a “Changes” clause in the contract...
      - Not with an Economic Price Adjustment Clause in the contract...

# Subcontract Types (cont'd)

## 2. **Cost reimbursement** contracts (FAR subpart 16.3)

- **Applicability**
  - When scope is not clearly defined
  - Involving immature technology
  - Risk is shared by the Government
  - Disfavored due to public misperceptions about what constitutes a “cost plus” contract
- **Allowability and allocability rules**
  - FAR part 31 for types of allowable costs
  - Cost Accounting Standards (“CAS”)
    - CAS requires consistency and disclosure of accounting practices
    - \$50M requires full CAS coverage
- **Funding/cost limitation clauses**
  - Standard FAR clauses require notice to the Government when funding ceilings are being approached (75-85%)
  - Requires CO approval – **not** COTR

# Subcontract Types (cont'd)

## 3. **Alternatives** to Fixed Price & Cost Plus contracts

- Fixed Price with "cap" on loss
- Cost with "cap" on costs
- Partially Fixed and partially Cost (phases or separately identified CLINs)
  - This is becoming increasingly common

## 4. **Incentive contracts:** Fixed-price incentive (firm target) contracts (FAR 16.204); Cost-plus-incentive-fee contracts (FAR 16.304)

- Designed as a middle step between cost-reimbursement development and firm-fixed-price production contracts
- Schedule/performance incentives
- Cost incentives
  - Decreasing/increasing profit based on shared cost of overruns/underruns
- Liquidated damages for schedule/performance
  - Reasonable estimate; not penalty

# Subcontract Types (cont'd)

- Subcontract types based on **method of ordering supplies or services**
  1. **Definite-Quantity** contracts (FAR 16.502)
  2. **Indefinite-Delivery/Indefinite-Quantity ("IDIQ")** contracts (FAR 16.504)
    - The need for "consideration"
      - Must have some guaranteed minimum
      - State court judges tend to take this more seriously than federal contracting bodies
    - Required quality of estimates?
      - Most states require good faith estimates
      - Federal law requires firm min/max ordering; no warranty of estimates

# Subcontract Types (cont'd)

## 3. **Requirements** contracts (FAR 16.503)

- The need for "consideration" is inherent in this type of contract
- Quality of estimates?
  - Federal
    - Warranty of estimates
    - But is the law changing?
    - Government increasingly has more flexibility
  - State law
    - Warranty probably exists

# Subcontract Types (cont'd)

4. **Basic Ordering Agreements (“BOAs”) and Blanket Purchase Agreements (“BPAs”)** (FAR 16.703)
5. **Multiple Award** contracts (FAR 16.504 & 16.505)
  - Boosted by acquisition reforms in mid-1990s
  - Increased competition requirement for task orders under IDIQ in 2008
6. **Time & Materials (“T&M”)** contracts (FAR 16.601)

# Subcontract Types (cont'd)

- Subcontract types based upon the **nature of product or service being procured**
  - Specially designed products (non-commercial products or services)
  - Commercial products or services (FAR part 12)
    - COTS procurements are a subset of “commercial products”
    - COTS = supplies only; *not* services

# Subcontract Types (cont'd)

- Commercial product is defined at FAR 2.101:
  - (1) A product, other than real property, that is **of a type customarily used by the general public or by non-governmental 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;**
  - (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;
  - (3) A product that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, except for —
    - (i) **Modifications of a type customarily available in the commercial marketplace;** or
    - (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements . . . .



# Subcontract Types (cont'd)

- Services
  - Note that commercial services "**of a type**" customarily used by the general public may still require additional cost or pricing justification under amendments to the FAR
- Construction
- Federal Supply Schedule items (FAR Subpart 8.4)
- O&M
  - Special rules apply, especially for DOE

# Subcontract Types (cont'd)

- Subcontractor claims based on inappropriate contract vehicle ?
  - Not a valid basis for challenge
  - *Am. Tel. & Tel. Co. v. United States*, 177 F.3d 1368 (Fed. Cir. 1999)

# Conclusion

# Best Practices

- ✓ Determine if you are required to obtain government **consent to subcontract** and seek consent as soon as practicable.
- ✓ When possible, select subcontractors on a **competitive** basis
  - Make sure that your **internal policies** set forth how that competition will be obtained and documented
- ✓ Run potential subcontractors through SAM.gov and other databases to verify **suspension/debarment**
- ✓ **Market research** is a never-ending process...

## Best Practices (cont'd)

- ✓ Be wary of antitrust/anti-competition risks (especially for **affiliates**)
- ✓ Ensure RFQs/RFPs capture all necessary terms needed for **pricing**
- ✓ Carefully select appropriate **subcontract type**
- ✓ Timely implement **confidentiality agreements** during negotiations
- ✓ Rely on **certifications** from subcontractors



**uestions?**

# Next Session on September 17, 2024

- Session 7: Subcontract Negotiations and Flowdowns



(Enjoy your summer!)