

Subcontract Management From A to Z:

Session 6: Selecting Subcontractors

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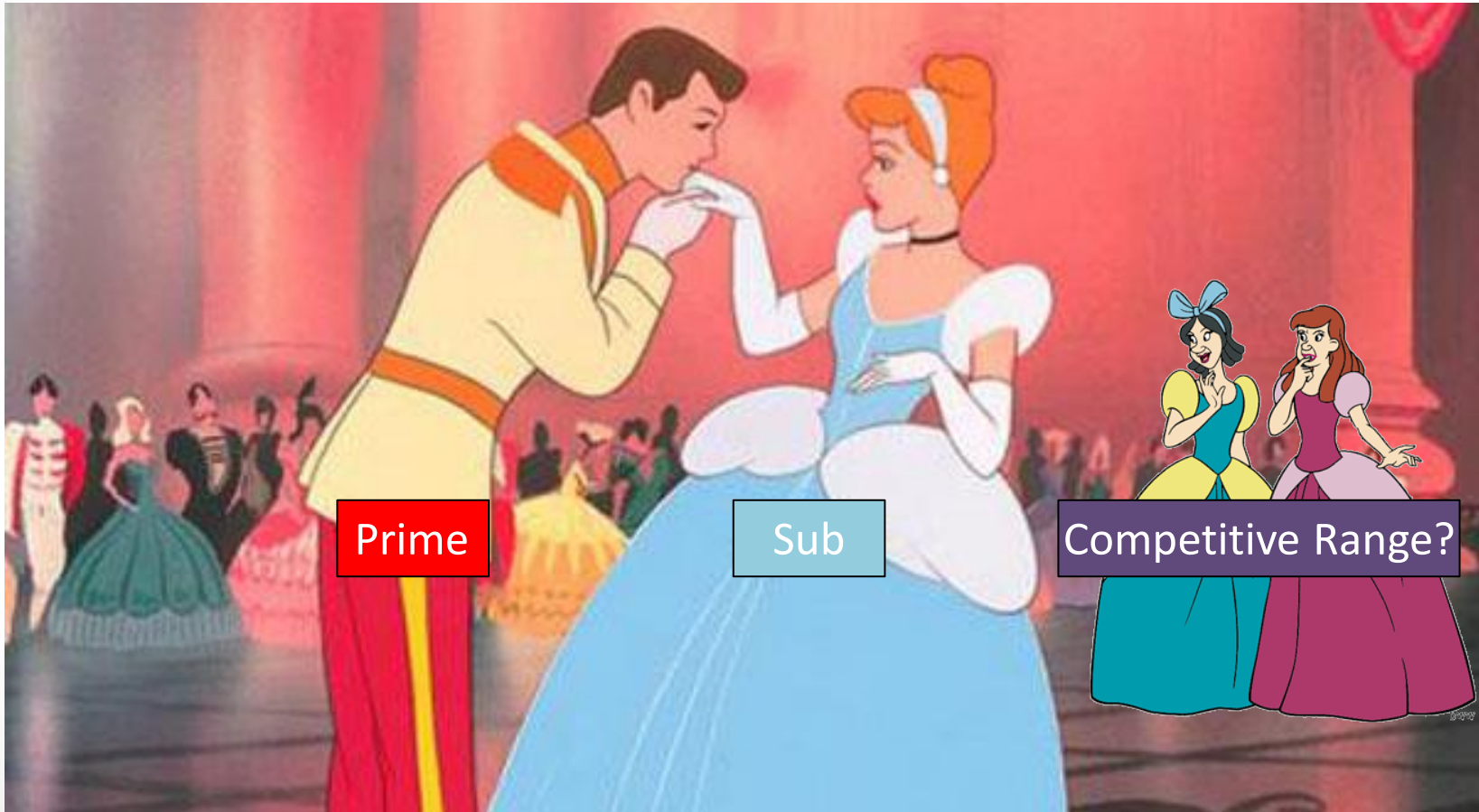
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Overview of the Series

- January 12: Federal Subcontracting 101 (An Overview)
- February 9: Joint Ventures and Teaming Agreements
- March 9: Small Business Programs
- April 13: Small Business Subcontracting
- May 11: Contractor Purchasing Systems
- June 15: Selecting Subcontractors
- September 14: Flow Downs and Terms & Conditions
- October 12: Subcontract Pricing
- November 9: Subcontract Management and Administration

Selecting Subcontractors



Selecting Subcontractors A-Z



REQUEST



OR



QUOTES



PROPOSALS

3 Phases of Subcontract Management



Agenda

- 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.
- “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



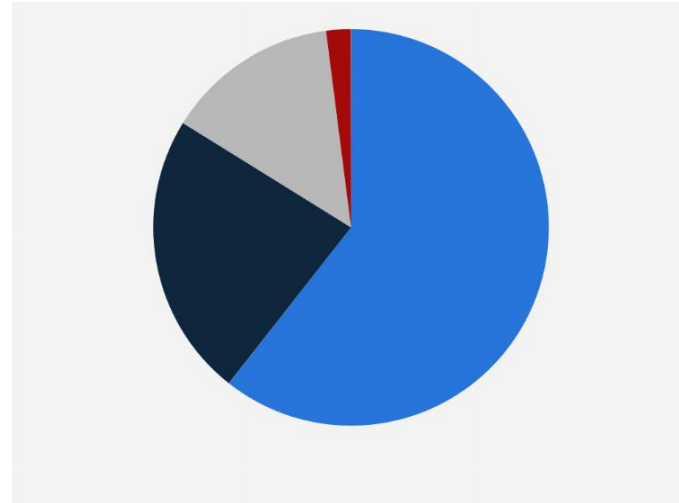
Market Research

- 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

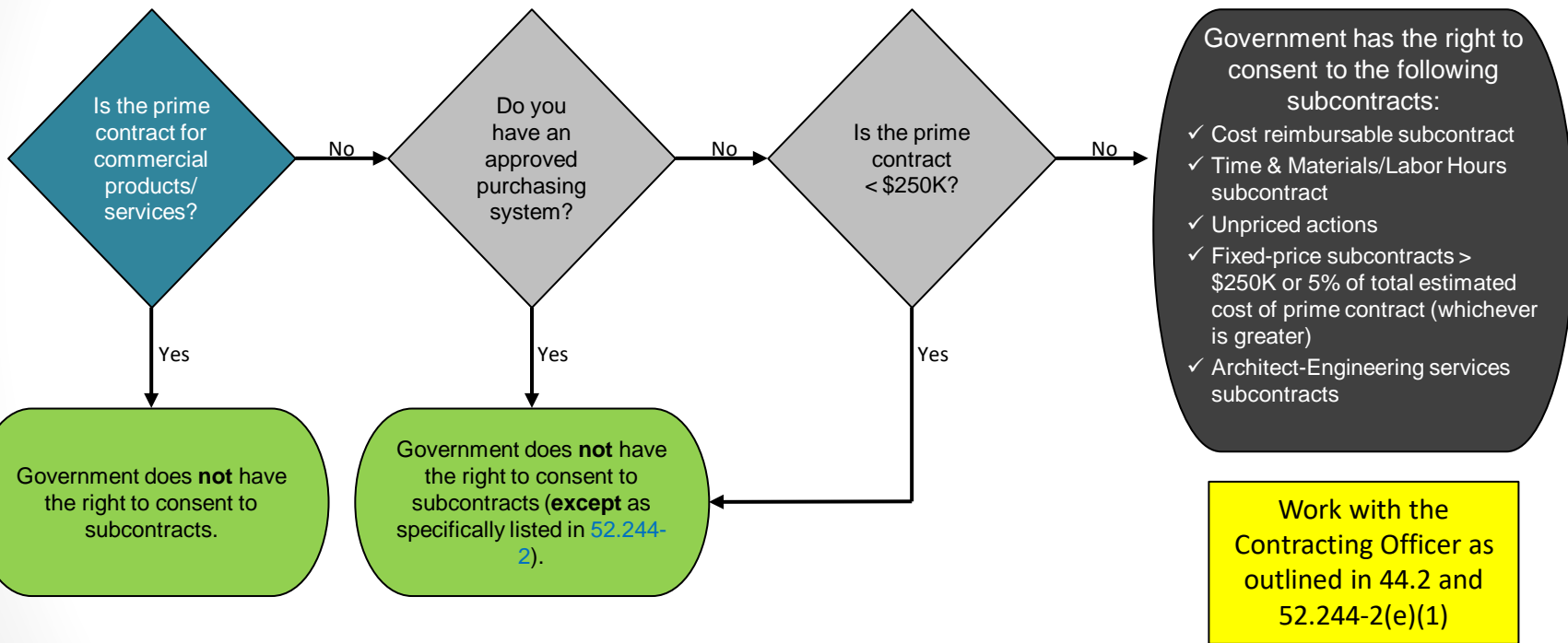


Consent to Subcontracting

- 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-quantity ("IQ")** 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

Subcontract Types (cont'd)

- Required quality of estimated quantities?
 - UCC Requirements vs. federal law
 - UCC requires good faith estimates
 - Federal law requires firm min/max ordering; no warranty of estimates
 - **UCC § 2-306, Output, Requirements and Exclusive Dealings**
 - (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means **such actual output or requirements as may occur in good faith**, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
 - (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use **best efforts to supply the goods and by the buyer to use best efforts to promote their sale**.
- Note that UCC § 2-306 may impose different obligations than federal law

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
 - UCC
 - Warranty probably exists

Subcontract Types (cont'd)

4. **Basic Ordering Agreements (“BOAs”)** (FAR 16.703)
5. **Multiple Award (“IDIQ”)** 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
- Automatic Data Processing (ADPE)
- Federal Supply Schedule items
- 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
- ✓ Run potential subcontractors through SAM.gov and other databases
- ✓ 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



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Next Session on September 14, 2023

- Session 7: Flow Downs and Terms & Conditions



(Enjoy your summer!)

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