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# WORKING WITH GOVERNMENT CONTRACTS SUBCONTRACTS ( & VENDORS )

Best practices for primes and higher-tier subs from teaming agreements through contract close-out.

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This presentation is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

# TEAMING AGREEMENTS AND SUBCONTRACTS

The Who, What, How, and Why.

# Teaming Agreements

- Teaming Agreements are used during proposal phase – when a subcontract would be detrimental to the partners.
- What is a Teaming Agreement?
  - Only one party is the prime (must be identified in the proposal/bid)
  - Teaming agreement lasts up until a contract is received, then parties enter into a subcontract
    - Enforceability issues?
    - Agreement to agree
    - For one specific contract/project or a for a type of project over a period of time
  - Teaming agreement often contains recommended provisions for the resulting subcontract
  - Subcontracting limitations rule applies to prime
  - Consider ostensible subcontractor affiliation
- Why Team?
  - Leverage capabilities and enhance competitive posture
  - Reduce risk
  - Facilitate market entry
  - Address experience or past performance
  - Opportunities to bid on set aside contracts (large businesses)

# Teaming Agreements

## PROS

- Less expensive and cumbersome to set up
- May be exclusive for one party

## CONS

- Need to craft a teaming agreement that is **concise** otherwise it will have issues
- Potential for conflict between terms of the teaming agreement and the subcontract
- Hard to resolve disputes
- Difficulty in enforcement (VA, NY)
- Must comply with *Limitations on Subcontracting Rule*

# Teaming Agreements

- With whom should you consider teaming?
- Factors to consider:
  - **TRUST**
  - Data confidentiality/security
  - Company capabilities
  - Financial compatibility
  - Proposal development capabilities
  - Competition from potential teammate
  - Compatibility of corporate management
  - Prior experience and reputation
  - Actual or potential organizational conflicts of interest
  - Conflicts and/or competition on other bids
  - Affiliation/size status



# Teaming Agreements

- Consider if your business personalities are *compatible*.
  - This is the “dating phase” – make sure you work well together.
  - Considerations:
    - Does your business’ approach and culture fit with the partner you are considering?
      - Are management and leadership styles compatible?
      - Is the leadership on the other side trustworthy, or are there concerns?
      - If you feel bullied, tricked, or trapped – RUN!
      - Are you seeing any red flags?
- Due Diligence
  - At a minimum, check the SAM registration: [www.sam.gov](http://www.sam.gov)
    - Review it carefully, even if you do not know what it means. Look diligently for red flags.
  - Ask to attend meetings with the other business.
    - See how they interact with government customers.
  - Check the suspended and debarred list.
    - If you are thinking about non-federal state or local work, check with those states.
  - Do a “Google” search to find public information
  - If you suspect this is a partner that has litigation in court – look up public dockets.
  - **ASK THEM.**

# Proposal Development

- Under the TA, usually a prime is identified and serves as lead proposal writer
  - USG will only talk to/work with bidding entity
- Non-disclosure, non-use agreement ("NDA")
- Teams collaborate to build best proposal
- Determine work share
  - Critical that parties not only agree, but stick to this agreement.



# Subcontracts

- Used when the proposal was successful and the parties can enter a binding agreement.
- Are the “commitment phase.”
  - Most Teaming Agreements contemplate that if successful a subcontract will follow.
    - Prime is usually the driver of negotiations. Provides original forms, etc.
  - Most parties expect that certain terms will carry-over from TA and/or proposal
    - There is often a requirement in the TA to move the subcontracting process along quickly.
- Subcontracts are not government contracts but are commercial agreements written under the law of a state jurisdiction
  - Binding once executed.
  - Will contain Flow-Down clauses. Prime wants to flow-down every clause, and subcontractor only wants the applicable clauses.
- USG does not have privity.
- Closeout documents can be provided as attachments to subcontract

# Subcontractor/Vendor/Supplier

- Federal acquisition regulations do not distinguish between subcontractors, vendors, or suppliers.
  - Meaning any reference in the FAR to subcontractors includes vendors and suppliers.
  - In practice, vendors and suppliers tend to provide goods and services that qualify as commercial products, commercial services, or COTS, and that's the necessary distinction to understand why vendors and suppliers seem to have a lighter requirement.
  - In FAR 52.212-4 Contract Terms and Conditions – Commercial Products and Commercial Services, subcontract includes purchase orders
- Note: Grants, cooperative agreements, and Other Transaction Authority agreements are not subject to the FAR and do distinguish.

# Commercial Products/Services

- Some purchases are considered “commercial” items/services.
  - Required to comply with a limited number of FAR clauses.
  - If providing Commercial-Off-The-Shelf (COTS) items/services, compliance with even fewer FAR clauses is required.
- FAR 52.212-5, Contract Terms and Conditions Applicable to Commercial Products and Commercial Services Contracts
  - Lists all FAR clauses that apply to Commercial Contracts.
    - For Commercial Products, there are 7 mandatory clauses (Prohibition on certain confidentiality clauses, Kaspersky Labs, Huawei, inverted domestic corporations, accelerated payments to small businesses, protests after award, and breach of contract claims)
    - For Commercial Services, there are 9 mandatory clauses (mostly HR/wage related)
    - Additional 65 that are at the discretion of the KO based on project
  - Approximately 20 of those FAR clauses have a compliance requirement.

# Contract Performance

- Prime is responsible for the oversight and performance of all subcontractors
  - May use some limitations of liability, but the USG will hold Prime accountable
- Prime generally wants to limit communications with USG, and can to a certain extent.
  - Cannot limit discussions regarding failure to pay invoices or late payments
- Prime generally does not have access to accounting data or CPARS/past performance.
- If a dispute with USG arises, Prime must sponsor Sub's claim
- If a small business is involved, must meet limitations on subcontracting and the non-manufacturer rule.

# Limitations on Subcontracting (FAR 52.219-14; 13 CFR 125.6)

- Every **set-aside** contract contains some kind of subcontracting limit
  - Depends on type of contract
  - Small business set-asides are *exempt* if value between \$10,000 and \$250,000
- Small Business Must Satisfy the Following Percentages By Own Efforts and Those of “Similarly Situated” Subcontractors When Subcontracting:
  - Services (non-construction – Prime will not pay more than 50% of the amount paid by the government to subcontractors that are not similarly situated.
  - Supplies or products – Prime will not pay more than 50%, excluding the cost of materials of the amount paid by the government to subcontractors that are not similarly situated.
  - General construction – Prime will not pay more than 85%, excluding the cost of materials of the amount paid by the government to subcontractors that are not similarly situated.
  - Construction by special trade contractors – Prime will not pay more than 75%, excluding the cost of materials of the amount paid by the government to subcontractors that are not similarly situated.
- Look at NAICS code!
- On IDIQs, the KO has the discretion to calculate on a per base period/option period basis or an order basis.

# Similarly Situated Entities

- Effective September 10, 2021, the FAR will now reflect similarly situated. (FAR 19.001 and FAR 52.219-14)
- In 2016, the SBA issued a final rule flowing from 2013 NDAA
  - Provision of 2013 NDAA allows contractors to count “similarly situated” contractors in determining compliance with the limitation on subcontracting rule.
  - Meaning first tier-subcontractors who are similarly situated may count toward the 50% of the cost of contract performance calculation.
- Note: limitations on subcontracting should not be confused with the rules for Small Business Subcontracting Plans under FAR 19.702, which effective Jan. 23, 2017 allow primes to receive credit for subcontractors in various preference programs at any tier.

# Similarly Situated Entities

- Who is similarly situated?
  - “a subcontractor that has the same small business program status as the prime contractor”
  - In other words, similarly situated subcontractors must be (1) small under the NAICS code assigned to the procurement and (2) in the same program status (i.e., HUBZone, WOSB, SDVOSB, 8(a)) as the prime contractor
  - The “similarly situated” subcontractor need only be small under the NAICS code assigned by the prime – NOT the primary NAICS code for the contract.
- Only the first-tier subcontractors may be counted as “similarly situated” – ANY work subcontracted beyond the first-tier does not count, even if it would otherwise qualify as “similarly situated”

# Misrepresentation

- SAM.gov requires a contractor to **certify** as to size
- Misrepresentations are affirmative, intentional, willful, or actionable under the False Claims Act, 31 U.S.C. Section 3729, et. seq.
  - Does not include unintentional error, technical malfunction, or similar situations.
- Be careful – penalties for misrepresenting size could be harsh
  - 13 C.F.R. 121.108, 124.501 (8(a)), 128.600 (VOSB, SDVOSB), 126.900 (HUBZone), 127.700 (WOSB, EDWOSB)
  - Suspension, debarment, administrative remedies, fines, and even imprisonment
  - Civil and criminal
  - The 2013 NDAA mandated that fines must be the greater of either \$500,000 or the dollar amount spent in excess of the permitted levels for subcontracting



# Small Business Affiliation

- Effect of a finding of affiliation: add the sizes of the prime and subcontractor together for size eligibility purposes
- Numerous ways entities can be found affiliated (e.g., ownership, identity of interest, common management, etc...)
  - “totality of the circumstances”
- Ostensible Subcontractor Rule:
  - SBA may find a small prime affiliated with its subcontractor if:
    - The subcontractor performs the “primary and vital” parts of the contract and/or;
    - The prime contractor is unusually reliant upon the subcontractor



# Subcontractor Invoicing and Overhead

- If a small business, must make payment within 15 days – or an alternate, negotiated timeframe
- The USG does not pay profit on profit.
  - Unless expressly forbidden by the contract, primes and higher-tier subs are permitted to charge a mark-up for managing subcontracts.
  - These are usually the additional labor, materials, supervision hours, as well as mark-ups for normal overhead.
  - Prime may not add mark-up for Subcontractor's OH or profit – i.e. cannot stack profit on profit or OH on OH and then apply a percentage.
- FAR 52.215-23 – Limitation on Pass-Through Charges – limits 70%

# Subcontract Closeout

- All of the Prime's subcontracts and purchase orders must be paid and closed before the Prime can be eligible for contract closeout.
  - If appropriate (such as for construction contracts) confirm receipt of final release and/or lien waivers from every subcontractor/vendor is received.
- Confirm physical completion/delivery, e.g., make sure each delivery is checked for damages and any discrepancies in quantity or damages are resolved beforehand, make sure that delivery documents, shipping documents and inspection records are all in sync;
- Confirm all administrative actions have been completed, e.g., any subcontract terminations have been fully completed, any claims settled and any disputes resolved via whatever disputes process was required – arbitration, mediation, litigation;
- Confirm all payments of amounts due under the subcontract or P.O., as amended via changes, claims and disputes, have been paid and any required releases or waivers have been signed and submitted. There should be no open liabilities between the Prime contractor and its subcontractors;
- Confirm that all documentation is properly preserved and all required documentation has been provided, e.g., warranties by third parties, etc.
- Try not to enter into subcontracts that must be closed out.

# GRANTS

# Uniform Guidance (2 CFR Part 200)

- Applicable to all non-federal entities receiving federal grant awards
- Includes pass through entities and sub-recipients

## Definitions

- **Pass-through entity** | non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.
- **Sub recipients** | a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program.
  - **Mission partner**
- **Contractor** | (replaces term “vendor” (used in A-133)) – means an entity that receives a contract.
  - **Supplier of goods or services; commercial**

# Internal Controls (2 CFR 200.1)

- Process designed to provide reasonable assurance regarding the achievement of objectives in the following categories:
  - Effectiveness and efficiency of operations;
  - Reliability of reporting for internal and external use; and
  - Compliance with applicable laws and regulations.
- The non-federal entity must comply with Internal Control Requirements in 200.303.
- These internal controls should follow guidance in:
  - “Standards for Internal Control in the Federal Government”, issued by the Comptroller General of the United States, or
  - The “Internal Control Integrated Framework”, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).
- Consider the Compliance Supplement annually published by OMB
  - Provides auditors with an auditing guide for major federal programs and Part 6 summarizes requirements for Internal Control and discusses important concepts with illustrations of entity-wide internal control

# Subrecipient Monitoring and Management (200.331)

- A Pass-through entity must make a case-by-case determination whether each agreement casts the party as a subrecipient or contractor.
- Look at the nature of the relationship.
- It does not matter what the agreement is called.

<u>Subaward</u>	<u>Contract</u>
<ul style="list-style-type: none"><li>■ Allowable activities based on applicable statute, local plan, State rules</li><li>■ Management rules<ul style="list-style-type: none"><li>■ UGG; and</li><li>■ State law/policies and procedures</li></ul></li></ul>	<ul style="list-style-type: none"><li>■ Allowable activities based on terms and conditions of contract</li><li>■ Management rules<ul style="list-style-type: none"><li>■ Terms of the contract; and</li><li>■ State contract law</li></ul></li></ul>

# Subaward v. Contract (200.331)

## SUB-RECIPIENT

- Determines who is eligible to participate in a federal program
- Has its performance measured against whether the objectives of the federal program are met
- Is responsible for programmatic decision making
- Is responsible for complying with federal program requirements
- Uses the federal funds to carry out a program as compared to providing goods or services for a program

## CONTRACTOR

- Provides the goods and services within normal business operations
- Provides similar goods or services to many different purchasers
- Operates in a competitive environment
- Provides goods or services that are ancillary to the operation of the federal program
- Is not subject to compliance requirements of the federal program



# Pass-Through Entity Responsibilities (200.332)

- PTE – this is the grantee, the first entity that receives the grant
- Responsibility for Subawards (200.332) (new citation)
  - Subaward Information
  - Evaluate Subrecipient Risk
  - Specific Conditions (200.208)
  - Monitoring
  - Verify Subrecipient Has Single Audit; Management decisions
  - Enforcement (200.339) (new citation)

# Subaward Information (200.332(a))

- Information
  - Subrecipient name (must match name associated with unique entity identifier)
  - Subrecipient unique entity identifier
  - Federal Award Identification Number (FAIN)
  - Federal Award Date
  - Period of performance state and end date
  - “Amount of federal funds ‘obligated by this action’
  - Total amount of federal funds ‘obligated to the subrecipient’
  - Total amount of the federal award
  - Federal award project description for FFATA purposes
  - Name of federal awarding agency, pass-through entity, and contact official
  - CFDA Number and Name; the pass-through entity must identify the dollar amount made available under each Federal award and the CFDA number at time of disbursement;
  - Is the award for “research and development”
  - The indirect cost rate
  - Require an assurance from subgrantees that access will be provided to records and financial statements.
- Additional Information
  - The pass-through must reference the requirements of the federal grant and any additional requirements imposed by the pass-through (e.g., identification of any required financial and performance reports).
  - An approved federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government.
    - Or negotiate a rate with subrecipient
    - Accept a rate negotiated with another pass-through
    - Use de minimis rate
  - Appropriate terms and conditions concerning closeout of the subaward.

# Other Responsibilities under 200.322

- Subrecipient Risk (200.332(b))
  - The pass-through must evaluate each subrecipient's risk of noncompliance with federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring.
    - subrecipient's prior experience with the grant program
    - results of previous audits
    - new personnel or substantially changed systems
    - results of federal monitoring
- Specific Conditions (200.322(b) and 200.208)
  - Pass-through must consider imposing additional federal award conditions, if appropriate.
    - Require reimbursement;
    - Withhold funds until evidence of acceptable performance;
    - More detailed reporting;
    - Additional monitoring;
    - Require grantee to obtain technical or management assistance; or
    - Establish additional prior approvals.

# Other Responsibilities under 200.322

- Specific Monitoring (200.322(d))
  - Pass-through must monitor its subrecipients to assure compliance and performance goals are achieved.
  - Monitoring must include:
    - Review financial and programmatic reports
    - Ensure corrective action
    - Issue a “management decision” on applicable audit findings
  - 200.332(e) outlines monitoring tools, based on risk
    - Training and technical assistance on program related matters
    - On site reviews
    - Arranging for “agreed upon procedures” engagements (described in 200.425 Audit Services)
- Pass-through Enforcement (200.322(h))
  - Pass-throughs must consider taking enforcement action based on noncompliance
    - Temporarily withhold cash payments pending correction
    - Disallow all or part of the cost
    - Wholly or partly suspend the award
    - Recommend to federal awarding agency suspension/debarment
    - Withhold further federal awards
    - Other remedies that may be legally available

# PROCUREMENT UNDER A FEDERAL AWARD

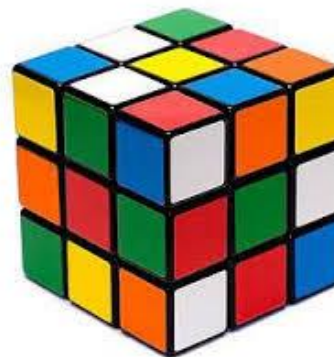
2 CFR 200.317 – 200.327

# Procurement Under a Federal Award

- Procurement Standards (200.318)
  - All non-federal entities must have documented procurement procedures which reflect applicable Federal, State, and local laws and regulations.
    - Open and Full Competition (Maximum Extent Possible)
    - Specific Thresholds for Purchasing
    - Prohibited In-State and Local Preferences
    - Contract Administration System
    - Conflict of Interest Rules
    - Mandatory Disclosures
- Contract Administration (200.318(b))
  - Non-federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of the contract

# Methods of Procurement (200.320)

- Grantee must have and use documented procurement procedures for the following methods:
  - (a) Informal procurement methods
    - Micro-purchase
    - Small purchase procedures
  - (b) Formal procurement methods
    - Competitive sealed bids
    - Competitive proposals
  - (c) Noncompetitive proposals



# Informal Procurement (200.320(a))

- Use when value does not exceed \$250,000 (simplified acquisition threshold), or a lower threshold established by a non-federal entity
- Procurement of property or services required under federal award
- Purpose: to expedite completion and minimize administrative burden and cost

## Micro-Purchases (200.320(a)(1))

- Distribution. “To the maximum extent practicable, the non-federal entity should distribute ... among qualified suppliers.”
- Awards. May be awarded without price or rate quotes if non-federal entity “considers the price to be reasonable **based on research, experience, purchase history or other information and documents its files accordingly.**”
- Thresholds. Determined and documented by grantee, based on internal controls, risk, and procedures. Authorized by state, local laws. May be higher than threshold in FAR (\$10,000).
  - Nonfederal entity may self-certify threshold up to \$50,000, if:
    - Low-risk auditee for most recent audit (200.520)
    - Annual internal institutional risk assessment to identify, mitigate and manage financial risks; or
    - For public institutions, a higher threshold consistent with state law
  - Over \$50,000, must have approval of cognizant agency indirect costs

## Small-Purchases (200.320(a)(b))

- Used when for purchases greater than micro-purchase threshold, but less than simplified acquisition threshold (\$250,000).
- Price or rate quotations from “adequate number of qualified sources” **as determined appropriate by non-federal entity**
- Thresholds. Established based on internal controls, risk and procedures, and documented. Cannot exceed the threshold in FAR (\$250,000), but may be lowered.



# Formal Procurement (200.320(b))

- Used for purchases that exceed small purchase threshold (\$250,000, or lower, if set by the non-federal entity)
  - Require documented procedures
  - Require public advertising
- Two options:
  - (1) Sealed bids
  - (2) Proposals

# Noncompetitive Proposals (200.320(c))

- Appropriate only when:
  - **Micro-purchases**
  - The item is only available from a single source;
  - **There is a public emergency for the requirement that will not permit delay resulting from publicizing a competitive solicitation;**
  - The Federal awarding agency or pass-through expressly authorizes noncompetitive procurement in response to a written request from non-Federal entity; or
  - After soliciting a number of sources, competition is determined inadequate.



# Mandatory Flow-down (Appendix II)

- CONTRACT (not subaward):
  - Must have legal remedies for breach of contract
  - Termination for cause or convenience
  - EEO
  - Davis-Bacon – pay prevailing wages
  - Copeland Anti-Kickback provisions
  - Contract Work Hours and Safety Standards (40 hours, or 1.5 times)
  - Rights to inventions
  - Clean Air / Federal Water Pollution Control Act
  - Debarment and Suspension
  - Byrd Anti-Lobbying Amendment
  - Huawei Prohibition
  - Use of recovered (recycled) materials
  - Domestic preferences

# Domestic Preferences (200.322)

- “To the greatest extent practicable” must provide a preference for the purchase of goods and materials produced in the U.S.
- Must include this section in all subawards, contracts and purchase orders



# Questions or Comments?

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# BACK-UP MATERIALS

# GRANTS: FINANCIAL MANAGEMENT

Budgeting and Reporting



# Reporting

- Financial Reporting (200.328)
  - Unless otherwise approved by OMB, the federal awarding agency must solicit only the OMB-approved government-wide data elements for collection of financial information (SF-425, FFRs FSR, etc...)
- Performance Reporting (200.329)
  - The federal awarding agency must use OMB-approved common information collections, as applicable, when providing financial and performance reporting information.
  - Reporting requirements must be clearly articulated (award notice)
  - Reporting intervals must be no less frequent than annually nor more frequent than quarterly except in unusual circumstances, for example where more frequent reporting is necessary
    - Reports submitted annually must be due no later than 90 calendar days after the reporting period.
    - Reports submitted quarterly or semiannually must be due no later than 30 calendar days after the reporting period.
  - Final performance report submitted by the non-federal entity and/or pass-through entity must be due no later than 120 calendar days after the period of performance end date.
  - Subrecipients must submit final reports to the pass-through entity, no later than 90 calendar days after the period of performance end date.
- Final Reporting (closeout)
  - For final reports, reporting end date is the period of performance end date.

# Budget Controls

## (200.302(b)(5) and 200.308)

- The approved budget for the federal award summarizes the financial aspects of the project or program as approved during the federal award process.
- Recipients/subrecipients **MUST** periodically compare actual expenditures with budget amounts for each federal award.
- Must report deviations from budget or project scope or objective, and request prior approvals from Federal awarding agencies for budget and program plan revisions.

# Prior Approval for Budget Changes (200.308(c))

- Change in the scope or the objective of the project or program.
- Change in a key person specified in the application or award.
- The disengagement from the project for more than three months, or a 25% reduction in time devoted to the project, by the approved project director or principal investigator.
- The inclusion, unless waived, of costs that require prior approval in accordance with Subpart E of Part 200.
- The transfer of funds budgeted for participant support costs to other categories of expense.
- Unless described in the application and funded in the approved Federal awards, the subawarding, transferring or contracting out of any work under a Federal award.
  - This provision does not apply to the acquisition of supplies, material, equipment or general support services.
- Changes in the approved cost-sharing or matching provided by the non-federal entity.
- The need arises for additional federal funds to complete the project.

# Other Prior Approvals (200.407 and 200.421-476)

- In order to avoid subsequent disallowance or dispute of costs, the non-federal entity may seek the prior **written** approval of the cognizant agency for indirect costs or the federal awarding agency in advance of the incurrence of special or unusual costs.
- Prior **written** approval should include the timeframe or scope of the agreement.
- The absence of prior written approval on any element of cost will not, in itself, affect the reasonableness or allocability of that element, unless prior approval is specifically required for allowability as described under 200.407.
- 200.407 requires prior approval for many different categories of costs, such as equipment, fringe benefits, entertainment costs, participant support costs, pre-award costs