
Avoiding the Perils of Subcontracting



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James Southerland — Contracts

Advisory Services, Inc.

Maurice Caskey — Private Consultant



Subcontracting Perils

- Prior to the submitting a proposal
 - Entering into agreements
 - Developing the RFP

15-minute break

- When writing the subcontract
- During source selection



Prior to Submitting the Proposal

- Non-disclosure agreements
 - When are NDAs needed?
 - What should be in an NDA?
- Teaming agreements
 - When is a teaming agreement needed?
 - Does teaming agreement protect the parties?
- Requests for proposal
 - What should be included in a RFP?
 - Is the basis for bid complete?



What is the Purpose of an NDA?

- NDAs can be known as:
 - Confidential disclosure agreements
 - Confidentiality agreements
 - Secrecy agreements
- The NDA is a contract document through which 2 or more parties agree to:
 - Exchange protected information (e.g., company confidential, trade secret, proprietary, business or competition sensitive)
 - Hold such information in confidence



Why Execute an NDA?

- It is a legally enforceable agreement
 - Needed when buyer and offeror (future supplier) will exchange company confidential, trade secret, proprietary or competition sensitive information
 - Defines the parties' duties to protect data
- Describes protected information as:
 - Not available in the public domain
 - Restricted from general use
 - Declared by disclosing party to be protected



Making a Successful NDA

- Bilateral or multilateral, not 1-way, agreement to protect all parties
- States the purpose for executing NDA
- Identifies:
 - Any specific restrictions
 - Sender and recipient parties & personnel
 - Termination rights of each party
 - Disposal of information after termination



An NDA's Contents

- Statement of intent to exchange proprietary data (*e.g.*, trade secrets)
- The permitted use(s) of those data
- The ownership of exchanged data
- Residual data rights after expiration
- Duties to protect exchanged data — typically same as recipient's own proprietary data



Restrictions Included in NDAs

- There is a “no implied license” clause
- Release from the NDA or its terms
- Conditions for disclosure to 3rd party:
 - Information publically available
 - Recipient previously, legally held information
 - Information legally obtained from 3rd party
 - Recipient independently developed data
 - Disclosure required by law
- Joint partnership or venture not inferred



NDA Legal Considerations

- Identification of protected information:
 - Media used to transmit
 - Need for markings
 - Nature of the material
- Applicable export control regulations
- Applicable state law
- What happens in case of breach

See NCMA *Contract Management*, November 2006, “Forty-five Nondisclosure Agreement Review Tips”



What is the Purpose of a Teaming Agreement?

- Provides a **mutually beneficial** joining of forces (a buyer + 1 or more suppliers) to offer the customer a unique capability as a team
- Offers the **strongest approach** to meeting the customer's requirements, thus **winning** a contract



Describing the Proposed Program in Teaming Agreement

- Scope of team's efforts in program
 - Goods and services to be delivered
 - Schedule for performance
 - Data requirements
- Customer interface



Agreements Describe the Proposed Team

- Identification of Team's role in overall program
- Identification of prime contractor's role
- Identification of each subcontractor and its role
 - Work share (labor and material)
 - Site(s) of performance



Structure of Teaming Agreements

- Recitals (the “Whereas” clauses)
 - Parties
 - Purpose (portion of program for team)
 - Time frames
 - Statement of agreement to team
- Exclusivity provisions
- Limitations



What is the Purpose of RFPs?

- Solicit information needed by a prime contractor to select suppliers
 - Proposal instructions
 - Evaluation criteria
- Provide suppliers with the entire envisioned contract as basis for valid proposals
 - Ts&Cs
 - SOW
 - Contract attachments
 - Data requirements



Who Issues RFPs?

■ Customers

- First step in process
- Must be thoroughly analyzed to prepare complete prime contractor RFP

■ Prime contractors

- Reflect all customer RFP performance requirements that impact supplier
- Solicit proposal inputs needed for prime contract proposal



Content of Prime Contractor's RFP

- Proposal solicitation
 - Proposal preparation instructions
 - Evaluation criteria
- Envisioned subcontract
- Post-award work requirements
 - SOW
 - Data requirements
- Attachments



Proposal Solicitation

- General instructions
- Submittal instructions
- Proposal content requirements
 - Technical & management volume
 - Cost or pricing volume
- Source selection [evaluation] criteria



General Instructions for Offerors

- Key dates for solicitation
- Conferences
 - Bidders conference
 - Pre-award survey
 - Negotiations
- Need for NDA
- Need for teaming agreement(s)



Key Dates for Solicitation

- Offer due date
- Prime contract key dates
 - End-item delivery
 - Guaranty period
- Proposal evaluation events
 - Pre-award survey
 - Negotiations
- Offer expiration date (anticipated subcontract award)



Proposal Structure & Format

- Organization of proposal
 - Outline
 - Special instructions
- Format for proposal
 - Page & font size
 - Page limitation
- Organizational conflict of interest
- Representations & certifications



Proposal Instructions

- Media to be used & number of copies
 - Hard copy & binding
 - Electronic medium (type & software)
- Address to which proposals delivered
- Points of contact
 - Buyer
 - Government (for possible audit or survey)



Typical Buyer RFP Attachments

- SOW
- Supplier data requirements list
- Certifications and representations
- Labor category descriptions
- Pricing template
- For parties to teaming agreement,
Government RFP



Technical & Management Volume

- How the offeror will perform SOW
- How offeror will process TOs or DOs
- Offeror's proposed schedule
- Offeror's staffing
 - Company & program organization
 - Key people & commitment to program
- Offeror's facility clearance
- Offeror's reservation of rights in data
- Small business plan



Cost or Pricing Volume

- Prime contractor's target rates
- Required cost or pricing data
 - Labor, material, travel & other direct cost
 - Indirect rates (Government approved?)
 - Labor categories & fully-burdened rates
 - Off-site & on-site work rates & burdens
 - Economic price adjustment(s)
- Offeror demonstrate financial stability
- Data presentation format (e.g., Excel)



Source Selection Criteria

- Clear explanation of criteria to ensure offerors submit necessary information
 - Identification of evaluation factors
 - Relative importance of factors
- Role of past performance in selection
- Award for other than lowest proposed price (e.g., best value)



BREAK TIME



Envisioned Subcontract

- Structuring the S/C or PO
- CLINs & period of performance for each
 - Executed at award
 - Options for follow-work
- Work required under the S/C or PO
- Items to be provided by buyer
 - Hardware and/or software
 - Documentation



Structuring the Subcontract

- Selecting the contract form and type
 - What forms and types are available?
 - Do they have to match the prime?
- Prime contract flow-down provisions
 - How can prime be protected?
 - Can buyer avoid unnecessary clauses?
- Buyer's clauses
 - What kinds are needed?



Considerations for Contract Type

- All S/Cs and POs are commercial contracts
 - The commercial S/C or PO is a procurement using Government funds
 - The S/C or PO does not have to be same type as the prime contract
- Subcontracts for commercial items have unique requirements
- Letter contracts should be avoided



Considering Commercial Items

Prime contractors are encouraged to use commercial items in end product

- ❑ “Commercial item” defined in FAR Part 2
- ❑ FAR Part 12 and DFARS Part 212 limit flow-downs for commercial items
- ❑ Commercial item S/Cs & POs are exempt from audit, cost or pricing data and cost accounting standards



Requirements for Commercial Item S/Cs and POs

- FAR Subpart 44.4 & DFARS Subpart 244.4 address commercial items
- FAR 52.212-5 & 52.244-6 and DFARS 252.244-7000 identify required flow-down clauses



Possible Subcontract Forms

- Traditional subcontract
 - Used for complex procurements (e.g., design and build) or to implement teaming agreement
 - Includes same elements as prime contract
 - Options for follow-on, multi-year orders
- Purchase order
 - POs are ideal for less complex purchases
 - Can be structured with separate CLINs for multi-year procurements
- Letter contract



Possible Subcontract Types

- Fixed-price
 - Variants available per FAR Subpart 16.2
 - Prime should not include flexible pricing if not available in prime contract
- Cost-reimbursement
 - Variants available per FAR Subpart 16.3
 - Requires significant financial oversight
- Time-and-materials, labor-hour
 - Variants per FAR Subpart 16.6
 - May use same type as prime contract



Other Subcontract Types

- BOA or other form of agreement
 - Envisions future S/C or PO
 - Establishes supplier prices and buyer delivery expectations, contract clauses
 - Must include termination provisions
- IDIQ or other indefinite delivery S/Cs
 - Requires DOs or TOs
 - Should establish minimum and maximum ordering quantities
 - Must have specified duration



Considering S/C or PO Terms

- Ts&Cs should be appropriate to contract type
- Buyers should avoid Ts&Cs that cause:
 - Extensive administrative requirements
 - Uncertainty
- Seller and buyer should avoid Ts&Cs that unnecessarily shift program risk
- FAR & DFARS include mandatory flow-down provisions



Subcontract Flow-down Clauses

- Prime must read all contract sections
 - FAR Part 52 and DFARS Part 252 clauses identify mandatory flow-downs
 - Some FAR or DFARS clauses may be in other than Contract Section I
 - Some flow-down clauses are necessary
- Buyer clauses needed in lieu of FAR & DFARS flow-downs:
 - For commercial purposes (e.g., payments)
 - For production (e.g., inspection & delivery)



Common Mandatory Flow-downs

- Government socioeconomic clauses
 - Small, small-disadvantaged business
 - Equal employment
 - Domestic procurement for various items
- Contracting integrity
 - TINA, including defective pricing and audit rights
 - FCA, including records retention
- Rights in data



Common Necessary Flow-downs

- Stop-work order
- Termination for convenience to invoke:
 - FAR Part 49; or
 - Commercial items FAR 12.403
- Payment provisions
- Government source inspection
- Price adjustments for multi-year S/Cs
 - Economic price adjustment
 - Commodity price fluctuations
 - Currency fluctuation



Commercial Item FAR Flow-down

FAR 52.244-6(c)(1) requires:

- 52.219-8, Utilization of Small Business Concerns, in all subcontracts that offer further subcontracting opportunities
- 52.222-26, Equal Opportunity
- 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans
- 52.222-36, Affirmative Action for Workers with Disabilities
- 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees
- 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels



Coml. Item DFARS Flow-downs

- DFARS 252.244-7000 requires:
 - 252.225-7014 Preference for Domestic Specialty Metals, Alternate I
 - (b) 252.246-7003 Notification of Potential Safety Issues
 - (c) 252.247-7023 Transportation of Supplies by Sea
 - (d) 252.247-7024 Notification of Transportation of Supplies by Sea
- FAR 52.244-6(c)(2), Prime may flow-down other FAR [& DFARS] clauses to satisfy its contractual obligations



Delivery Clauses

- Inspection and acceptance
 - Times and place of acceptance
 - Inspection at supplier's facility
 - Is notice required before delivery?
- Guaranty (and possibly warranty)
 - Is guaranty period duration based on delivery to buyer or customer?
 - Limitation of liability



Work Related Clauses

- Order of precedence
- Option exercise dates
- [sub]Contract delivery dates
- Classified data requirements (including a form DD254)
- Buyer (or Govt.) furnished material
- Acceptance criteria
- Reporting requirements



Other Subcontract Clauses

- Subcontractor on-site support at buyer's facility(ies)
- Minimum and/or maximum amounts
- Fee adjustment clauses
- Data rights
- Changes clause
 - Certified cost or pricing data
 - Unilateral & bilateral changes



Business-related Clauses

- Payment provisions
 - Where to submit invoices
 - Form and frequency of invoices
 - Payment within “n” days
 - Withholdings and retentions
- Publicity
 - Rights to use subcontract in publicity
 - Approval for using other parties’ names
- Assignments and sub-tier suppliers



Clauses to Resolve Problems

- Damages
 - Liquidated damages (& incentives)
 - Consequential damages
- Choice of law
- Dispute resolution
 - Process between parties
 - Follow-on ADR or litigation, and where
 - Supplier access to Government



Handy Ts&Cs References

- *Guide to Fixed-Price Supply Subcontract Terms and Conditions, Fourth Edition, published by ABA*

[http://www.abanet.org/abastore/index.cfm?section=Best Sellers&fm=Product.AddToCart&pid=5390233](http://www.abanet.org/abastore/index.cfm?section=BestSellers&fm=Product.AddToCart&pid=5390233)

- *Guide to Service Subcontract Terms and Conditions, published by ABA*

[http://www.abanet.org/abastore/index.cfm?section=main &fm=Product.AddToCart&pid=5390259](http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5390259)



The Subcontract SOW

- The SOW should identify:
 - Work that is required
 - Goods & services to be delivered
- The SOW format should be appropriate to the subject matter
 - Design & build equipment and systems
 - Design specification
 - Performance specification
 - Technical services



SOW Basic Requirements

- Tasks to be performed and deliverables, priority & timeframe
- Functional or performance-based work description
- Technical requirements
- Meetings & data requirements
- Description of known risks
- Place of performance



SOW Tasks and Deliverables

- Typical subcontract tasks
 - Design tasks
 - Production tasks
 - Services & customer support tasks
- Typical deliverables (include quantity)
 - Design drawings and other data
 - Hardware & software
 - On-site personnel for support tasks



SOW Technical Requirements

- Typical types of requirements
 - Interface control
 - Design specifications
 - Performance specifications
 - System integration
 - Validation (testing & verification)
- Two basic ways to write requirements:
 - Write buyer-specific specification
 - Tailor customer specification



SOW Meeting Requirements

- Typical reviews
 - Design reviews
 - Special purpose technical reviews
 - Project reviews

- Typical conferences
 - Logistics support
 - System integration
 - Customer testing



Data Requirements

- Data requirements list should include:
 - Technical analyses
 - Logistic support documentation
 - Business reports
- The list should:
 - Identify required deliverable documents
 - Be tailored to meet the real requirement
 - Minimize hard-copy data submittals
 - Avoid flow-down of customer requirements without careful modification
 - Accept subcontractor format



SOW Quality Assurance

- Quality standards and level of quality
- Non-destructive testing requirements
- Inspection and/or performance review
- Acceptance process and criteria
- Customer involvement in quality assurance processes
- Special features (*e.g.*, first article testing, surveillance and oversight)



During Source Selection

- Technical evaluation
 - Can each offeror meet all SOW requirements?
 - Were the proposed schedules reasonable?
- Cost or price evaluation
 - What are the evaluation methods?
 - What is “fair and reasonable” pricing?
- Documentation of award
 - What documentation is needed?
 - Who prepares & signs the documentation?



Some Reminders

- FAR procurement principles apply to S/Cs & POs under government prime contracts
- Subcontractor consent may be required by the prime contract
- Many prime contractors are large businesses with an approved purchasing system
- All procurements must conform to the documented purchasing processes



Single/sole Source Procurements

- Use single-source S/Cs or POs when:
 - The prime contract includes a directed, single or sole source for a subcontract
 - A teaming agreement requires a single-source supplier (approval required?)
 - Only one qualified supplier can be identified for labor or material
- Maximize competitive procurement



The Proposal Evaluation Team

- Purchasing Department
 - SCA or buyer
 - Coordinates (leads) evaluation
 - Negotiates with supplier
 - Cost analysis (overall cost to buyer)
- Other departments
 - Engineering
 - Production
 - Finance (cost estimators)



Evaluating T&M Proposals

Each offer should be evaluated independently for:

- ❑ Including all data required by RFP
- ❑ Demonstrating a capability to perform all work required by SOW
 - Financial strength
 - Resources
- ❑ Demonstrating a reasonable schedule for performance



Other Considerations for T&M Proposal Evaluations

- Data required under the S/C or PO
 - For supplier performance
 - To be submitted to buyer
- Past performance by individual seller or seller teams
- Exceptions to Ts&Cs, if any
- All evaluation criteria factors



The FAR 15.404-1 on Cost or Price Analyses

- “**Price analysis** shall be used when cost or pricing data are not required”
- “**Cost analysis** shall be used to evaluate the reasonableness of individual cost elements when cost or pricing data are required. **Price analysis should be used to verify that the overall price offered is fair and reasonable.**”



“Fair and Reasonable”

- The FAR 15.404-1(a):
 - “The objective of proposal analysis is to ensure that the final agreed-to price is fair and reasonable.”
 - The FAR does not define the term
- **Selling price that is fair to both parties** considering quality, performance, supply situation, delivery time, and payment provisions [See NCMA’s *Contract Management*, October 2007, “Determining a Fair and Reasonable Price Gets More Complicated”]



Price & Cost Analyses Defined

- FAR 15.404-1(b)(1), “**Price analysis** is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.”
- FAR 15.404-1(c)(1), “**Cost analysis** is the review and evaluation of the separate cost elements and profit in an offeror’s or contractor’s proposal (including cost or pricing data or information other than cost or pricing data), and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.”



Evaluating Price Proposals — Preferred Methods

- Adequate price competition; based on:
 - Best value
 - Past performance
 - Lowest overall cost to buyer
- Comparison to previously proposed prices
 - Same or similar items
 - Valid comparison
 - Reasonable previous pricing established



Evaluating Cost or Price Proposals — Other Methods

- Parametric estimating
- Published prices in competitive markets
- Independent buyer estimates
- Market research for same or similar items
- Information provided by seller



Using Price Analysis

- Used when cost or pricing data are not required
- When conducting a price analysis:
 - Use same method for all offers
 - Adjust the evaluated cost to buyer — offered price plus other procurement costs
- Price must be fair and reasonable to both buyer and seller



Using Cost Analysis

- Required for single-source or negotiated procurement
- Proposed costs must be consistent with disclosed cost accounting practices
- Examines each element of cost:
 - Labor
 - Material
 - Indirect burdens (e.g., overhead, G&A)
 - Profit



Documenting the Award

The SCA (or buyer) file should include:

- Copy of RFP and all responses
- S/C (or PO) award summary with attached:
 - Price (or cost) analysis memorandum
 - Technical analysis memorandum
 - Negotiation memorandum



Subcontract Award Summary

- Rationale for selection based on RFP
- Bid summary for each purchase
 - List all potential suppliers solicited
 - Identify price proposed in each response
 - Provide evaluation details for those responses in the competitive price range
- Supporting documentation, *e.g.*,:
 - Dunn & Bradstreet reports
 - Past performance evaluations



Price Analysis Memorandum

- Required for procurements over \$30K
- Explains complex procurement details
 - Defines “fair and reasonable” for this buy
 - Amount of detail depends on complexity
- Includes back-up details — Supporting cost or price analysis for each RFP response
- Printed, signed and dated by buyer or subcontract administrator



Technical Analysis Memorandum

- Required when RFP includes technical or mgmt. evaluation factors
- Identifies for each response to RFP:
 - Evaluation of each proposal element
 - Relative scores of all responses by element and overall
- Printed, signed and dated by evaluator(s)



Negotiation Memorandum

- SCA (or buyer) prepares memo:
 - Should for contract actions over \$100K
 - Must for contract actions over \$650K
- Memo should identify:
 - Who, when, where negotiations occurred
 - What changes were made and why
- Written approval within signature authority required prior to settlement



QUESTIONS AND ANSWERS

Now it's your turn...



Acronyms & Abbreviations

ABA — American Bar Association

ADR — Alternate dispute resolution

BOA — Basic ordering agreement

CLIN — Contract line item number

DD254 — Contract Security Classification Specification

DFARS — Defense Federal Acquisition Regulation
Supplement

DO — Delivery order

FAR — Federal Acquisition Regulation

FCA — False Claims Act

G&A — General and administrative [sometimes selling, general
and administrative (SG&A)]



Acronyms & Abbreviations (cont.)

IDIQ — Indefinite delivery/indefinite quantity

NCMA — National Contract Management Association

NDA — Non-disclosure agreement

PO — Purchase order

RFP — Request for proposal

S/C — Subcontract

SCA — Subcontract administrator

SOW — Statement of work

TINA — Truth in Negotiations Act

TO — Task order

Ts&Cs — Terms and conditions

T&M — Technical and management

