

Bid Strategies

Presented By:



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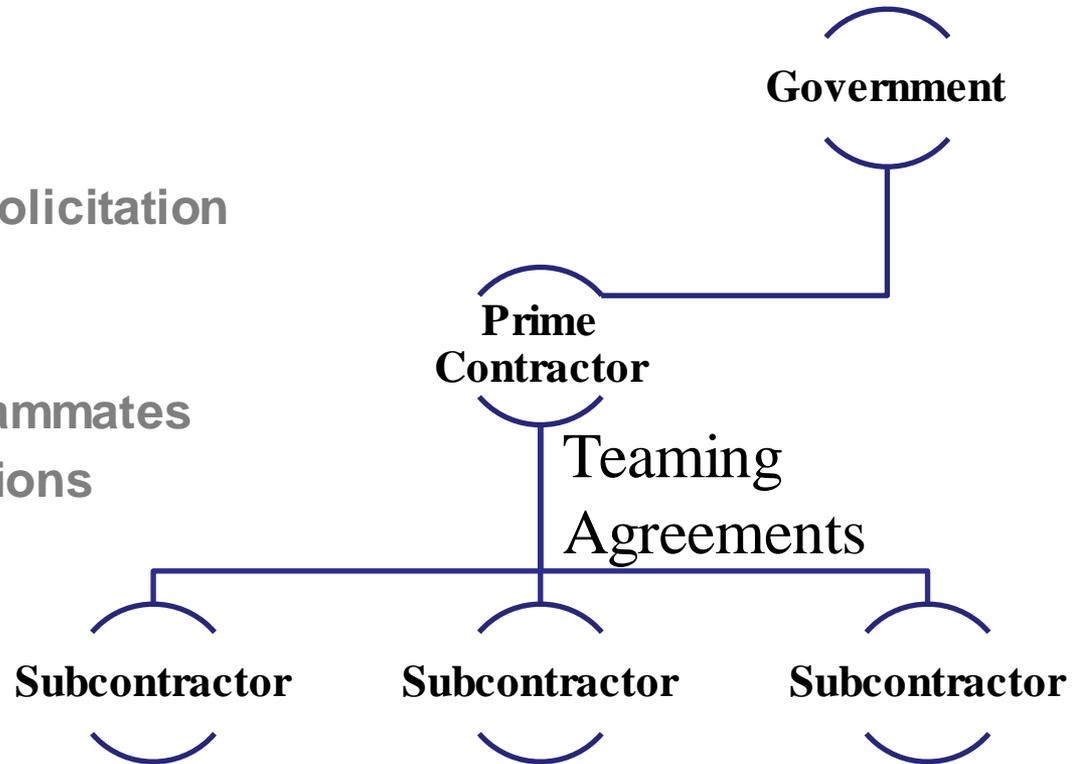
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Roadmap

- ▼ Understanding the Solicitation
- ▼ Bid Strategy
- ▼ Selecting Your Team
- ▼ Agreements with Teammates
- ▼ Post-Bid Considerations



Understanding the Acquisition Type

▼ What type of Acquisition?

▼ Negotiated Procurement (FAR 15)

- ▼ Best Value – cost and non-cost factors float in relative importance
- ▼ LPTA – cost significantly more important than non-cost factors

▼ IDIQ Task Order (FAR 16.505)

▼ BPA (FAR 8)

▼ Others (FAR 13, 14, 36)

- ▼ Each of these has special requirements

Initial Bid Strategy

- ▼ Look at JV structures as possibilities to satisfy past performance or special designations
- ▼ Know the price points, know the customer, do front side intel to understand the RFP.
- ▼ Can we be competitive?
- ▼ If we need to do a forward pricing with the possible new win in place, does this change our pricing strategy?
- ▼ We need to make a bid or no bid decision early in the process
- ▼ Do we need to change our indirect rate structure?
- ▼ Do we need to add cost pools?
 - ▼ SCA, CBA, other types of fringe pool game changers
 - ▼ Does this contract require a M&H pool?

Bid Strategy (continued)

- ▼ We need to understand our past wins and losses in our current strategy and game planning.
- ▼ Need to ensure the NAICS is not exceeded
- ▼ Look to competitors
 - ▼ Is the solicitation written to favor a particular company?
 - ▼ Does the solicitation unduly narrow the competitive field?
 - ▼ Consider a protest of the solicitation

Bid Strategy (continued)

- ▼ When changing your indirect rate structure understand the fall out to other contracts. Ex M&H.
- ▼ Understand that when you bid on contracts that change your price you could create issues with your GSA contacts.
- ▼ Is there any OCONUS work, does this need to be separated in a cost center
- ▼ Is this your first Contractor site work, do we need to add a Facility service center?
- ▼ If we are in a high cost area that is going to require a contractor site, do we need to add a Facility service center for that are
- ▼ Fee is become a major issue in all solicitations, need to understand the market.

Understanding the Solicitation Risk Profile

▼ There are several contract types

- ▼ Firm Fixed-Price, Fixed-Rate, Cost-Plus

▼ Critical to understand your risks

- ▼ Fixed Price: Business takes on virtually all risk
- ▼ Cost Plus: Government takes on virtually all risk
- ▼ Government audit rights?

▼ Review the Solicitation for potential “gotchas:”

- ▼ If the contract will be covered under the SCA, will you have to negotiate a CBA?
- ▼ Where will the contract be performed? High cost area? Local tax profile? Local employment laws?
- ▼ What is the payment schedule? If the contract has a deliverable, will you receive milestone payments?
- ▼ Will this work keep you from performing other work?

Understanding the Cost Volume

- ▼ **Understanding the Cost Volume:**
 - ▼ **Do you understand the costing spreadsheets?**
 - ▼ **If you are the prime:**
 - ▼ **Do your subs have a clear understanding of due dates and submittals?**
 - ▼ **Are your subs allowed to accept cost type contracts?**
- ▼ **Important to create a checklist for the team so that all requirements are understood for each team member**

Understanding the Set-Aside

- ▼ **Is the contract set aside for small businesses or disadvantaged businesses?**
 - ▼ Rule of Two – 2+ offerors at “fair market price”
 - ▼ As a general rule, the procuring agency can decide how to set the procurement aside
 - ▼ SDB status before SB status; contracts already accepted into 8(a) program
- ▼ **Set aside under the NAICS Code: A critical piece of information**
 - ▼ NAICS Codes tell you whether you are small for purposes of a particular acquisition
 - ▼ 13 CFR 121.201 to see if you meet the requirements
 - ▼ Two bases – revenue and employees.
 - ▼ Revenues – three-year average
 - ▼ Employees – average number of employees per pay period for preceding completed 12 calendar months
 - ▼ Is the NAICS code wrong? Can be challenged at SBA

Understanding the Set-Aside (continued)

- ▼ **Subcontracting Limitations play a big role in the work you can get and give away**
 - ▼ **Services: 50% of the cost of contract performance incurred for personnel**
 - ▼ **Supplies: 50% of the cost of manufacturing the supplies, not including the cost of materials**
 - ▼ **General Construction: 15% of the cost of the contract, not including the cost of materials**
 - ▼ **Special Trade Construction: 25% of the cost of the contract, not including the cost of materials**
- ▼ **Non-Manufacturer Rule: small business provides its own produce or that of another domestic small business manufacturing or processing concern**
- ▼ **Special rules for certain SDBs, e.g., 8(a) M-Ps**

Teaming Agreements

Overview

- ▼ A Teaming Agreement is essentially an agreement to work together for the purpose of obtaining a Prime Contract.
- ▼ Subcontract is not necessarily guaranteed.
- ▼ The terms of the Subcontract should be negotiated before the award of the Prime Contract to ensure Teaming Agreement is enforceable.

Teaming Agreements

General Considerations

- ▼ Confirm good standing of the other party by checking SAM; also examine past performance and potential OCIs
 - ▼ Critical to include reps and warranties regarding these issues
 - ▼ But do your own research
- ▼ Clearly define:
 - ▼ Roles of each party
 - ▼ Purpose of the agreement
 - ▼ Term and termination
 - ▼ How disputes will be handled (including choice of law)
 - ▼ Extent of liability and indemnification obligations
 - ▼ Confidentiality obligations

Teaming Agreements

Enforceability

- ▼ Enforceability – to the extent it is “an agreement to agree”, a Teaming Agreement may be unenforceable (see *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, which required inclusion of: (a) nature and scope of work; (b) compensation; (c) place of performance; and (d) duration).
- ▼ Solution – Use definitive language (e.g., “shall be” awarded a subcontract) in lieu of open-ended language (e.g., “agrees to negotiate a subcontract in good faith”). In light of recent court decisions, avoid the use of Virginia or New York law as the Teaming Agreement’s choice of law.

Teaming Agreements

Considerations for Prime Contractors

- ▼ Subcontract – either agree to favorable Subcontract terms or leave open to later negotiation when Subcontractor’s leverage will be reduced.
- ▼ Enforceability – if unenforceable, and Subcontract is not effected, risk that Prime Contractor may not be able to perform.
- ▼ Exclusivity – consider including an exclusivity clause to prevent the Subcontractor from participating in a proposal with another Prime Contractor.

Teaming Agreements

Considerations for Subcontractors

- ▼ Goal – establish Subcontract terms upfront and do not leave for later negotiation.
- ▼ Enforceability – if unenforceable, Prime Contractor could exclude Subcontractor once Prime Contract awarded. Ideally, definitive language will be used and a draft Subcontract will be attached to the Teaming Agreement as an exhibit.

Teaming Agreements

Considerations for Subcontractors

- ▼ Subcontract Terms – attempt to include favorable terms up front, because leverage diminishes once Prime Contract is awarded.
- ▼ Exclusivity – consider including an exclusivity clause to prevent the Prime Contractor from participating in a proposal with another Subcontractor for the work allocated.
- ▼ Alternate Work – in case proposed Subcontract work is not included in the Prime Contract, include alternate work for Subcontractor.

Subcontracts

General Concerns

- ▼ To ensure performance under a Prime Contract, the Prime Contractor should establish Subcontract terms in advance of any award.
- ▼ Prime Contractor should understand:
 - ▼ How work will be allocated to each Subcontractor; and
 - ▼ All of the elements of the fee and how it will be allocated.
- ▼ All first-tier Subcontractors must understand that they will have possible reporting requirements for executive compensation.

Subcontracts

Key Provisions

- ▼ FAR and supplemental (e.g., DFARS) clauses:
 - ▼ Some *must* flow down to the Subcontractor
 - ▼ Some should be included for the benefit of the Prime Contractor to protect against business risks, although Subcontract may oppose
 - ▼ Some will not be applicable to the Subcontractor
 - ▼ The “Christian Doctrine” likely applies to Subcontracts. See *UPMC Braddock v. Harris*, 2013 U.S. Dist. LEXIS 45953 (D.D.C. March 30, 2013).
- ▼ If involves the sale of goods, ensure compliance with UCC

Subcontracts

Key Provisions

▼ Allocation of IP:

- ▼ Prime Contractor may NOT require that all patentable matter be assigned by the Subcontractor as condition to the Subcontract.
- ▼ A more equitable arrangement is for IP developed by one party to belong exclusively to that party and for jointly-developed IP to be jointly-owned (or owned by one party and non-exclusively licensed to the other party).

▼ Government Rights:

- ▼ Government's rights to IP will depend on clauses included in the Prime Contract.
- ▼ Document IP pre-existing the Prime Contract and clearly indicate what IP will be used during performance
- ▼ Ensure appropriate marking of all data provided to the Government and timely report all inventions to protect IP

Subcontracts

Key Provisions

▼ Warranties:

- ▼ Prime Contractor should push for express warranties. At a minimum, subcontractors' warranties should match those of Prime Contractor to the Government.
- ▼ For goods:
 - ▼ Implied warranty of merchantability (UCC 2-314(1))
 - ▼ Implied warranty of fitness for a particular purpose (UCC 2-315)
- ▼ FAR warranty clauses for goods by default, but may be modified for services
- ▼ But... implied warranties may be waived, and the “use of warranties is not mandatory” (FAR 46.703)

Subcontracts

Key Provisions

▼ Changes:

- ▼ Subcontract should clearly provide for how changes may be made (e.g., for adjustment of payments).
- ▼ Although a mutual written consent requirement is typical, conduct of the parties may act as evidence of modification
- ▼ Prime Contractor needs to retain ability to unilaterally modify Subcontract in the event the Government unilaterally changes the Prime Contract (for non-commercial items)

Subcontracts

Key Provisions

▼ Termination for Default:

- ▼ Prime Contractor will want unrestricted ability, whereas Subcontractor will want limitations
- ▼ Events of Default should be clearly specified
- ▼ Prime Contract should push for a short period to cure
- ▼ Subcontractor should push for inclusion of only material breaches and exclude Force Majeure events

▼ Termination for Convenience – Prime Contractor should flow down

Subcontracts

Key Provisions

- ▼ Dispute resolution
- ▼ Indemnification:
 - ▼ e.g., for breach of warranty, IP infringement, and other third party claims
 - ▼ Ensure personnel and affiliates are covered parties
- ▼ Limitation of Liability

Post-Bid

- ▼ **Has another company challenged your size or disadvantaged status to SBA?**
 - ▼ What is the basis?
 - ▼ Affiliation – SF 355
 - ▼ These move quickly – generally, response due three business days from receipt of the challenge

- ▼ **Has another company challenged the award?**
 - ▼ What is the venue – Agency, GAO, Court of Federal Claims
 - ▼ Ask for the public version of the protest –
 - ▼ You have a right to it so be PUSHY if you don't get it immediately
 - ▼ Do you need to “intervene?”
 - ▼ Awardee has a right to intervene
 - ▼ Whether or not you do so depends on the circumstances. We generally recommend that you intervene to ensure that you are aware of the issues
 - ▼ The protest will almost always eventually get to evaluation of the awardee

Post-Bid

- ▼ All quotes and documentation of cost buildup need to be maintained.
- ▼ If a cost type contract will be awarded to any Subcontractor and they have never been through an accounting system review, they need to prepare for this process:
 - ▼ Are all costs allocated to jobs?
 - ▼ Are all direct and indirect cost segregated?
 - ▼ Are all unallowable costs segregated?
 - ▼ Are all costs properly allocated to their proper cost centers?
 - ▼ Is Subcontractor ready for a time sheet floor check?