SUBCONTRACT MANAGEMENT TRAINING FORUM

SUPPLY CHAIN MANAGEMENT AND THE COMPETITIVE ADVANTAGE
Keys to a Successful Subcontracting Program

Breakout Session # C03
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Date: March 17, 2016
Time: 3:45pm – 5:00pm
Overview

- Understanding the subcontracting requirements
- Common subcontracting plan compliance issues
- Vetting small business subcontractors
- How to survive an SBA subcontracting plan review
- A few things to consider when structuring the relationship with small business subcontractors in your plan
Subcontracting Requirements

• Congress has determined that the small business (SB) subcontracting plan requirements are an important tool to promote the government’s objective to maximize SB participation in federal procurements.

• Requirements are found in:
  - FAR Subpart 19.7
  - FAR 52.219-8, Utilization of Small Business Concerns
  - FAR 52.219-9, Small Business Subcontracting Plan
  - Also found in SBA’s rules at 13 C.F.R. § 125.3
Applicability

• Provide maximum practicable opportunities for SBs
  • Applies to most prime contracts
  • Must be flowed down to subcontractors when subcontract offers lower-tier subcontracting opportunities

• Implement a subcontracting plan
  • Applies to prime contracts that offer subcontracting possibilities greater than $700,000 (or $1.5 million for construction)
  • Only applies to large businesses; not applicable to set-aside contracts
  • Must be flowed down to subcontracts meeting the same dollar thresholds, except subcontracts to small businesses and subcontracts for commercial items
What Is a Subcontracting Plan?

• Plan establishing the contractor’s goals to spend a certain portion of its subcontracting dollars on SBs

• Required elements of a subcontracting plan:
  • Subcontract spending goals based on total planned subcontracting dollars
  • Separate goals for each type of SB
  • Types of supplies/services to be subcontracted
  • Methods used to develop goals and identify potential SB subs
  • Explanation of whether/how indirect costs are included
  • Steps to be taken to make a good faith effort to comply with the plan
Types of Subcontracting Plans

• Individual
  • Applies to a specific government contract
  • Covers entire contract period, including options
  • Goals are based on offeror’s planned subcontracting in support of contract and are negotiable

• Master
  • Boilerplate plan, can apply to corporation, plant, or division
  • Effective for 3 years after approved
  • Goals are negotiated for each contract that incorporates plan
  • When adopted, covers entire life of a contract
Types of Subcontracting Plans

• Commercial
  • Preferred plan for companies selling commercial items
  • Contractor adopts an annual plan for the entire federal government, not contract specific
  • Tied to the contractor’s fiscal year
  • Plan may be limited to specific company division or business unit
  • All of contractor’s subcontracting, not just that in support of government contracts, counted towards total subcontracting
Reporting Obligations

• Reporting submitted through the electronic Subcontracting Reporting System (eSRS), available at http://www.esrs.gov/

• Individual Subcontracting Plans
  • Reports on plan results due twice annually (Apr. 1 and Oct. 30)
  • SF 294

• Commercial Subcontracting Plans
  • Reports on plan results due once annually (Oct. 30)
  • SF 295
Rule Changes on the Horizon

• SBA’s limitations on subcontracting rule
  • Before prime identifies SB by name in its proposal or subcontracting plan, prime must notify SB in writing

• SBA’s lower-tier subcontracting rule
  • Would allow primes with individual subcontracting plans to receive credit for SBs at any subcontracting tier
  • Adds more obligations for primes to monitor subs

• FAR 19.7 and 52.219-9
  • NAICS code in each subcontract
  • Permits reliance on SAM.gov
  • Order-level reporting for multiple-award contracts
  • Breach of contract and past performance exposure
Importance of Compliance

• Focus on subcontracting compliance on Capitol Hill

• SBA audits are up, and trend is expected to continue

• Stakes are high for noncompliance
  • Breach of contract
  • Adverse past performance
  • Evaluation factor
  • Liquidated damages
Compliance Impacts in Bid Protests

- Graybar, B-410886 (Mar. 4, 2015): protester was properly excluded from competitive range based in part on its consistent failure to meet its small business subcontracting goals on previous contracts.

- Kellogg Brown & Root Services, Inc., B-298694.7 (June 22, 2007): protester’s score lower than awardee’s due in part to less small business utilization in prior contracts.

- Coastal Maritime Stevedoring, LLC, B-296627 (Sept. 22, 2005): agency improperly rated offeror’s incomplete plan as satisfactory.

- SEEMA, Inc., B-277988 (Dec. 16, 1997): awardee’s aggressive subcontracting goals one of the decisive factors in award.
Make Sure Your Plan Is Realistic

• Establish % goals that are reasonable and realistic for your company

• Limit responsibility for flow-down and oversight of subcontracting plans by your subcontractors
  
  • Ex.: No flow-down for commercial items

• Offer narrowly-tailored and objective steps to measure your good faith efforts to comply with the plan
Exclude Certain Spending

- Exclude subcontracting that is only available from LBs
- Exclude subcontracting performed overseas, inter-company transactions, and lower-tier subs (for now)

- Other authorized exclusions:
  - Salaries and wages
  - Employee insurance
  - Other employee benefits
  - Payments for petty cash
  - Depreciation
  - Interest
  - Income taxes
  - Property taxes
  - Lease payments
  - Bank fees
  - Fines, claims, and dues
  - OEM relationships during warranty periods (negotiated up front with product)
  - Utilities purchased from a municipality or solely authorized by municipality
  - Charitable contributions
Write Up Your Procedures

• Written subcontracting program manual is essential to maintain your program and to pass an audit

• Your manual should address:
  ▪ Covered supplies/services
  ▪ Program administration and SBLO responsibilities
  ▪ Periodic evaluation of program performance
  ▪ Recordkeeping procedures
  ▪ Maintenance of vendor list
  ▪ Vendor self-certifications
  ▪ Independent verification of vendor self-certifications
  ▪ Flow-down
  ▪ Preparation of subcontracting plans
  ▪ Reporting (internal/external)
  ▪ CEO/senior leadership buy-in and involvement
  ▪ Outreach (internal/external)
  ▪ Employee training
Go with the Flow

• Flow down should be addressed in subcontract or your standard terms and conditions

• Requirement to provide maximum practicable opportunities for SBs
  • Must be flowed down to subcontractors when subcontract offers lower-tier subcontracting opportunities

• Requirement to implement a subcontracting plan
  • Must be flowed down to subcontracts that offer further subcontracting possibilities greater than $700,000 (or $1.5 million for construction)
  • No flow down to subcontracts to SBs
  • No flow down to subcontracts for commercial items (when prime contract contains FAR 52.212-5 or 52.244-6)
Make Your Deadlines

• Make sure to submit your ISR/SSR on time via eSRS
  • Define reporting procedures, timelines, and responsibilities in your compliance manual
  • Discrepancies or negative trends in reported data more likely to trigger SBA audit
Training and Outreach

• Make sure your management, sales, and purchasing personnel are on the same page for goal development and attainment

• Hold regular internal meetings and monitor plan performance to catch shortcomings as early as possible

• Get involved in conferences, trade associations, PTACs

• Be sure to document mentoring and success stories with SBs
Vet Subcontractors

- Critical to obtain written representations of size/status from your SB vendors, and keep them current
  - Use SBA’s preferred format for vendor “Self-Certification Form”
  - If SB is relying on SAM, the SB must represent to you in writing that its SAM is current, accurate, and complete for the subcontract
  - For commercial plans, ask vendors to represent small business status for primary and any secondary NAICS codes
- Independent verification required for HUBZone vendors; good idea for all SB vendors
- Third party verification good, but not foolproof
Ensure Businesses are Small

• NAICS code – assign to each subcontract?

• NAICS codes are the prime’s responsibility
  
  • Ensure that the NAICS code is appropriate based on the work that accounts for the majority of the contract value
    
    • If highest value is supplies/materials, use a manufacturing code
    
    • If highest value is services, use a service code
    
    • NEVER use wholesale codes
    
    • Be aware of nonmanufacturer rule
Verify Size and Status - HUBZone

- Must be small under applicable NAICS code
- Must be certified by SBA and reviewed every 3 years
- 51% owned and controlled by a U.S. citizen
  - Unconditional and direct ownership
- 35% of all employees reside in a HUBZone
  - Need proof (e.g., driver’s license or voter registration card)
- Principle office must be in a HUBZone
  - Where majority of employees perform their work
Verify Size and Status - SDVOSB

• Must be small under applicable NAICS code
• 51% owned and controlled by service-disabled veteran (as judged by VA)
  • Must control both day-to-day and long term decision making
  • Veteran is the highest officer, regularly present and devoted to business
  • Ownership must be unconditional and direct
• Self-certification suffices, except for VA procurements
  • VA has formal certification process for SDVOSBs and VOSBs
Verify Size and Status - 8(a)/SDB

• Must be small under applicable NAICS code
• 8(a) must be certified by SBA
• SDB can self-certify
• 51% owned and controlled by socially and economically disadvantaged individual – U.S. citizen
  • Income of owner averages less than $350K when in program
  • No more than $750K net worth when in program
  • No more than $6M in total assets
  • Unconditional and direct ownership
Verify Size and Status - WOSB/EDWOSB

• Must be small under applicable NAICS code
• Self-certification or third-party certification (for now)
• 51% owned and controlled by a woman or an economically disadvantaged woman – U.S. Citizen
  • Economic disadvantage thresholds similar to 8(a)
• Prime contract set-asides only allowed for certain NAICS codes where women are deemed to be underrepresented or significantly underrepresented
  • SBA recently expanded NAICS codes
  • Do NAICS code limitations apply at the subcontract level?
Overview of SBA Reviews

- Recently occurring with greater frequency
- Performed by SBA area offices, through Procurement Center Representatives (PCRs) and Commercial Market Representatives (CMRs)
  - Individual agencies may also participate in reviewing subcontracting plan compliance
  - DCMA may be involved
Types of SBA Reviews

- **Subcontracting Program Compliance Review**: a comprehensive review of contractor’s total subcontracting program
- **Performance Review**: focuses on subcontracting achievement on a contract-by-contract basis via reporting systems
- **Subcontracting Orientation and Assistance Review**: includes physical visit to contractor’s facility with purpose of providing advice or tools so the contractor can evaluate its small business program
- **Follow-Up Reviews**: focuses on contractor’s implementation of previous SBA recommendations and its utilization of referred resources
A Typical SBA Review

• Process begins with a letter from SBA specifying date of SBA’s planned visit to your office

• SBA’s letter will request that you submit the following data approximately one week before their visit:
  • All subcontracts to SBs within the last year
  • All subcontracts to LBs over $150,000 within the last year
  • All blanket purchase agreements entered into within the last year

• SBA will then select samples from each list (typically 20-30 from the list of SB subcontracts)
Compliance Review Checklist

• SBA’s compliance review checklists requires you to answer numerous questions about your subcontracting program, goal performance, historical trends, outreach efforts, etc.

• Requests several supporting documents, including:
  • Letter of support from CEO
  • Policy and procedures for your subcontracting program
  • Sample subcontractor self-certification form
  • Contract terms and conditions containing flow-down language
  • Organizational chart depicting where SBLO sits in your organization

• Be thorough in your responses
Compliance Review Site Visits

• Usually lasts 1-2 days
• SBA will want to meet with key stakeholders, SBLO, managers, and buyers
• Looking for good faith efforts to comply with plan through assessments of:
  • Methodology used in developing and reporting goals and performance
  • Recordkeeping, in particular whether you have written representations from your SB vendors that are tied to and timely for your subcontracts
  • How you flow-down requirements to and monitor subcontractors
  • Overall commitment to the program, including management support
• Prepare in advance
What Happens Next?

• If you receive a “Marginal” or “Unacceptable” rating, SBA will require you to submit a corrective action plan
  • Contractor submits plan to SBA or both the SBA and agency that conducted the compliance review
  • Failure to submit or adhere to a corrective action plan may be grounds for penalties and other adverse actions
• SBA will conduct follow-up visit to check on your progress with the corrective action plan
• SBA’s report will go to Administrative CO
Using Who You Bid and Bidding Who You Will Use

• For contracts that require a subcontracting plan, the prime contractor must notify the CO in writing whenever the prime contractor does not utilize a SB subcontractor used in preparing the proposal

• Subcontractors can inform COs of violations of this requirement

• “Used in a proposal” means mentioned by name, the existence of a subcontract for the project, or the small business drafted a portion of the proposal, and written expectation of receiving a subcontract
Late or Reduced Payments

- Prime contractor must notify the CO in writing whenever:
  - The prime reduces payments to a small business subcontractor; or
  - When payments to a small business subcontractor are 90 days or more past due

- Subcontractors have the right to contact the CO directly
Avoid the Risk and Impact of Inaccurate Certifications

• COs may require small businesses, whose size status changes during performance of the contract, to adopt a subcontracting plan for the remaining portion of the contract – flow that down!

• Prime contractor, CO, SBA, other potential subcontractors, and other interested parties may protest a subcontractor’s size status – ensure small subcontractors understand the rules and certify their size/status!

• SBA’s “Presumed Loss Rule” applies to subcontract representations – can cost the large prime and small subcontractors more than just the profits on contracts!
Any Questions?
Thank you for joining us today

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