

# U.S. Government Services Contracts and Subcontracts

Alan Dickson, Esq.

Holland + Knight LLP

CPCM, Fellow, Board Of Advisors

# SELECTED TOPICS IN U.S. GOVERNMENT SERVICES CONTRACTING

- -- Growth of services and contracts for services
- -- Legal and Contractual Structure
- -- Implications for Proposals and Performance
- -- Enforcement / Disputes
- -- Typical / Recurrent Drafting and Negotiation Issues at prime contract and subcontract levels

# Popularity of Services Contracts

- U.S. has increasingly had a services-dominated economy
- Performance of Government functions has become more complex and reliant on services contractors
- One advantage: Svcs contracts can be turned off or downscoped when needed, unlike Govt employees and their benefits and retirement guarantees
- Expansion of “commercial items” to include services
- Authorization to use GSA FSS, etc. vehicles for services

# Legislation

- Supply and construction contracts have long had labor standards laws
- Nothing for US Govt service contract employees until McNamara-O' Hara Service Contract Act of 1965; codification at 41 U.S. Code 351-358
- Provides minimum wage
- DOL primarily administers, interprets, enforces
- Wage determinations or union agreements; in absence of either, FLSA (general min. wage law)

# Wage Escalation

- Multiple-year contracts and options and extensions common in services contracting; new wage determinations and changes in laws may hike wage levels
- Price adjustments for resulting increased wage and fringe levels provided by FAR 52.222-43 and 44
- Contractors, obedient to warranty in those clauses, should not price bids to include annual escalation into wage and fringe rates and resulting workers comp and employment taxes; overhead and G&A OK.

# “Performance Based Contracting”

- Govt provides intended result and/or quality, rather than prescribing “how”
- OFPP Policy Letter 91-2 (1991) – use PBC to max. extent for services
- NDAA for FY 2001 (P.L. 106-398) provided statutory preference for PBC
- See FAR Subpart 37.6
- Agency usage: (a) genuine or otherwise?  
(b) slogans or substance?

# Services Subcontracting

- A few recurrent or typical problems in the services contract context

# Recurrent Team Agreement Drafting Problems

- Promises to sub to guarantee “X” percent of entire project
- TA to expire on execution of subcontract
- [Subcontract “entire agreement” clause that may extinguish valuable TA rights.]
- TA that implies it is a joint venture

# Subcontract Duration

- Equivalent to prime contract duration?
- Effect of options/extensions at prime level
- Subcontract options/extensions
- Sub request for coterminous periods
- Similar issue: T for C
- Protection of sub's human capital

# Option Exercise Timing

- Faulty FAR language – Watch Out !! [At both prime and sub levels]

FAR 52.217-8 Option to Extend  
Services (Nov 99)

The Government may require  
continued performance . . . .

The Contracting Officer may  
exercise the option by written notice to  
the Contractor within \_\_\_\_\_ ***[insert the***  
***period of time within which the***  
***Contracting Officer may exercise the***  
***option]***.

# Better Text

## [ subcontract version]

52.217-8: ... Buyer may exercise the option by written notice delivered to Seller *at least 45 days* prior to expiration of the current term of the Subcontract.

[Similar issue under 52.217-6, -7 and -9]

# Commercial Item Subcontracting

- Prime may need to adapt to Sub's standard commercial terms and conditions and "flow them up" to Govt
  - E.g., warranties, repairs, terminations, changes
  - Sometimes Subs are not informed about prime contract's data rights clause, which is not a mandatory flowdown; confusion / loss of sub's rights may occur
  - Both Primes and Subs should heed Alt II to FAR 52.227-14 [allowing identification of limited rights data under contract initially not requiring submission of data]

# FAR 52.227-14, Alt. II

- (g)(3) Notwithstanding paragraph (g)(1) of this clause ....  
If delivery of ... data is required, the Contractor shall affix the following “Limited Rights Notice” to the data and the Government will treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with the notice:

## Limited Rights Notice (Dec 2007)

- (a) These data are submitted with limited rights under Government Contract No. \_\_\_\_\_ (and subcontract \_\_\_\_\_, if appropriate)....
- (b) This Notice shall be marked on any reproduction of these data, in whole or in part.

# Commercial Item Subcontracting

- FAR 52.212-4 (commercial items Ts and Cs) is not a mandatory flowdown
- Sometimes ignored by Prime in drafting subcontract
  - Sub may or should insist on similar Ts and Cs
  - Prime and Sub should watch for inconsistent clauses as between commercial and standard FAR clauses
  - Blanket flowdowns and name substitutions can cause problems
  - Note that reference to FAR standard Disputes clause is inappropriate, without modification, for use in a subcontract as dispute resolution system

# Thank You, South Bay !!

Alan Dickson

Holland + Knight LLP

Los Angeles

213-896-2415