Current Regulatory Issues Potentially Impacting Contractors and their Subs

USGIF Geospatial Law Working Group
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Topics for Discussion

- Issues from Early Planning Phase to Consider
- Issues that Putting Together a Team Can Introduce
- Performance Considerations
- Discussion/Q&A
Acquisition Planning Phase Issues

USG Contracting Officers have an obligation to do Market Research per FAR Part 10

- To see if Commercial Items exist that meet needs
  - Preferences noted in 41 USC §3307 and 10 USC §2377

- To consider appropriate contract structure to use—is Consolidation/Bundling necessary and justified?

- To consider whether Small Businesses can perform SOO/SOW
  - FAR 19.502-2 “Rule of Two”= a total small business set-aside for contracts > $150,000 when there is a reasonable expectation that two or more small businesses will submit offers, and award can be made at fair market prices. Veterans Admin case See Kingdomware Techs. v. United States, 136 S. Ct. 1969 (2016)
  - GAO expects that CO decisions to set aside (or not) acquisitions will be based on objective data (more than just the contracting officer’s judgment) that there are (not) at least two responsible small businesses capable of performing the work at a fair market price See Safety Storage, Inc., B-280851, October 29, 1998
Putting Together a Team

• Supply Chain can make or break your Team (Supply Chain and Teammates are critical in a global economy and need early consideration)
  – Is Supplier qualified to perform in today’s compliance environment?
    • Cyber Security
    • Counterfeit parts prevention system and plans
    • Avoidance of Human Trafficking
    • BAA/TAA compliance
    • Specialty Metals
    • Conflict minerals
    • Labor and Employment Laws
    • Environmental concerns/standards

• Consider long lead items, possible studies, trades, and advance developments (IRAD) to provide competitive discriminators etc.
Putting Together a Team (cont’d)

• Be aware of your Teammates’ current status and risks they bring

  – Prime could be excluded/not awardable due to a subcontractor’s status
    » Suspension/debarment
    » Small business status
    » Missing required qualification or certifications
    » Conflicts of Interest that the subcontractor will bring to the team
  – Contracting officers have authority under FAR 9.104-4 to assess and directly determine a prospective subcontractor’s responsibility
  – See GAO case *Leidos Innovations Corp.*, B-414289.2, June 6, 2017
  – Subcontractor will not have standing to protest such non-responsibility determination by the CO or the exclusion of the team
  – As Prime you may not have sufficient insight even if you want to

[* If you do end up in a protest, may now get enhanced debriefing*]
Performance Considerations

• Contractors should already be seeing an uptick of incurred cost audits
  – NDAA FY18 §803 directed DoD to work off the audit backlog by end of FY 2019
  – Generally if audit findings not issued w/i one year then audit will be deemed done

• EO 13788 “Buy American and Hire American”

• Enhanced supply chain scrutiny
  – NDAA FY18 §807 & DFARS subpart 239.73 [Req. for Info rel to supply chain risk]

• Trafficking in Persons
  – FAR 52.222-50 immediate disclosure of credible information from any source

• Anti-Counterfeiting regulations
  – DFARS 252.246-7007 and -7008
Performance Considerations (cont’d)

• Cybersecurity
  – EO 13800 “Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure”--requires use of NIST framework
    • Safeguarding federal IT networks and systems
    • Identifying and supporting critical infrastructure of greatest risk
    • Cybersecurity beyond those to protect internet for future generations
  – DFARS 252.204-7012
    • NIST standards SP 800-71 by end of 2017 (DoD approach allows planning)
    • Disclosure requirements (rapidly report/72 hours)
THE VALUE OF PERFORMANCE.

NORTHROP GRUMMAN