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B2G CONNECT 2010 CONFERENCE

NEGOTIATIONS, FOIA, AND SUBCONTRACTOR ISSUES

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Negotiations

- Sealed Bid shall be used if:
 - Time permits
 - Award based on price
 - No need exists for discussions
 - Expectation of at least two bids
- Competitive Proposals may be used if:
 - Sealed bids are not appropriate
 - Contracts outside the U.S.



Negotiations

“NOT” NEGOTIATIONS

- Award without discussions
- Clarifications and award without discussions
 - Limited exchanges
 - Resolve minor or clerical errors



Negotiations

“NOT NEGOTIATIONS” (cont.)

- Communications before competitive range determination
 - Enhance Government understanding of proposal
 - Allow reasonable interpretation of proposal
 - Address ambiguities, perceived weaknesses, errors, omissions or mistakes
 - Address adverse past performance information
 - Not used to cure defects or revise the proposal



Negotiations

- Negotiations = exchanges after competitive range determination with intent of allowing proposal revisions
- Negotiations = Discussions



Negotiations

- Discussion requirements
 - Must be conducted with all offerors in the competitive range
 - Must identify significant weaknesses, adverse past performance information
 - May discuss areas that would enhance potential for award



Negotiations

- Discussion limitations
 - Cannot favor one offeror
 - Cannot reveal an offeror's technical solution or intellectual property
 - Cannot reveal an offeror's price
 - May indicate price is too high or too low
 - Cannot reveal names of references
 - Cannot reveal source selection information



Freedom of Information Act

- Provides for broad disclosure of public records by executive agencies
- Exceptions include confidential business information, national security information, agency deliberations, etc.
- Provides procedures, time lines and appeal rights
- Permits use of FOIA by Competitors
 - Obtain successful offerors proposal
 - Obtain post-award contract modifications
 - Obtain post-award ordering or performance information



FOIA

- Contents of the request
 - “Pursuant to the Freedom of Information Act, I request a copy of”
 - Description of documents being requested
 - Purpose of intended use
 - Statement of willingness to pay fees up to \$?
- Processing the request
- Appeal of denials



FOIA

- Fees
 - Depends on projected use (commercial, education, scientific, media)
 - Types of fees: search, review and duplication
 - Generally
 - Search costs > 2 hours
 - Duplication costs for > 100 pages
 - Search/Review \$8 to \$45/hour
 - Copying \$.10 to \$.35/page
 - No advance unless > \$250 or previous failure to pay



Subcontractor Issues

COMMON QUESTIONS

- What's required?
 - Specifications/Statement of Work
- When is it required?
 - Delivery schedule
- When do I get paid?
 - Payment provisions
- How can I get out?
 - Termination



Subcontractor Issues

COMMON QUESTIONS (cont.)

- What risks are there?
 - Nonperformance
 - Warranty
 - Nonpayment
 - Termination
 - Indemnification



Subcontractor Issues

- Flow down of clauses
- Subcontract payment terms
 - Amount and timing
 - Price reductions/discounts
 - Set-offs
- Changes
- Terminations
 - Convenience
 - Default



Subcontractor Issues

- Warranties
- Disputes
- Claims



Subcontractor Issues

PAYMENT

- Privity of Contract
- Government role
 - No responsibility for payment to subs
 - No liability for nonpayment of subs
- Prompt Payment Act
- Miller Act
- CO may (FAR 32.112-1)
 - Determine whether contractor has made payment to sub
 - Determine whether contractor's certification of payment is accurate



SUBCONTRACTOR ISSUES

PAYMENT (cont.)

- Possible Government action (FAR 32.112-1)
 - “Encourage” contractor to pay subs
 - Reduce or suspend progress payments
 - If contractor falsely certified regarding payment to subs, CO may initiate action against contractor



Contractor Issues

PAYMENT (cont.)

- Subcontractor may request information regarding:
 - Whether contractor has submitted requests for payments to Government
 - Whether final payment has been made to the contractor



QUESTIONS



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