



Column: The importance of a carefully-drafted work-share provision

by Peter B. Ford, partner, PilieroMazza PLLC

Subcontracts contain a number of important provisions that shape the relationship between a prime contractor and its subcontractor.

However, there is one provision that overshadows the rest in terms of its significance to the parties' agreement: work share. The work-share provision dictates the amount and types of work the subcontractor will perform. In addition, it is through the work-share provision that the parties decide how best to divide the work between themselves to achieve the agency's objective.

Given its importance to the subcontract, it should come as no surprise that the work-share provision is often subject to dispute.

While you cannot eliminate a potential dispute over work share altogether, a carefully-drafted provision will help mitigate your exposure.

Avoid vague language

For starters, avoid using non-committal language about the work split (e.g., the prime "will strive" to provide up to a certain amount of work), or language that is vague. For purposes of measuring work share, consider the nature of the work at hand. If the subcontractor is providing personnel, it may make sense to measure work share in terms of Full-Time Equivalents, as opposed to percentages.

The division of work between the prime and subcontractor should be clearly defined. Do not simply state that the subcontractor will perform 49% of the work because that implies the subcontractor is going to perform 49% of all contract tasks.

In addition to sparking a dispute, an unclear definition of work share can create an ostensible subcontractor problem. In this regard, if the subcontract does not specify discrete tasks to be performed by the parties, the Small Business Administration could find the prime to be affiliated with its large busi-

ness subcontractor and other than small for the contract award. Consider using an "Exhibit A" to the subcontract to define the scope of work and the discrete functions assigned to the subcontractor.

Subcontractor goals

For subcontractors, you want the work share to be as definitive as possible, and you want your prime to be committed to honoring the agreed-upon division of work.

Ideally, the work-share provision would indicate that the subcontractor "shall" perform XX% of the total contract or "no less than" XX% of the total contract.

You also do not want your share of the pie being cut further, so consider using language that precludes the prime from adding other subcontractors to perform the same or similar contract tasks assigned to you.

If you are dealing with a large prime, this may be tough to negotiate. While the prime may be reluctant to agree to a clear statement of your work share, do not be afraid to push back and insist on one.

Prime contractor goals

For prime contractors, you want some flexibility to adjust the subcontractor's work share, especially if the procurement is an indefinite delivery/indefinite quantity (IDIQ) contract, where you may not know the specific contract functions until the task orders are issued.

If the contract is a set-aside, you need to balance that flexibility with how clearly you are defining the scope of a subcontractor's work to limit the risk of affiliation.

For a non-IDIQ contract, a flexible work-share provision could stipulate that the amount of the subcontractor's work will be "approximately" or "no more than" XX% of the total contract.

Addressing flexibility becomes more difficult with an IDIQ contract but, at the very least, you should

be able to specify a target percentage and the categories of work tasks that the subcontractor is "anticipated" to fulfill.

Reviews and adjustments

A well-drafted work share provision should also address how the parties will ensure the agreed-upon work share is achieved.

To that end, the parties could agree to meet periodically to review performance of the contract and work in good faith to make adjustments to work share if the targets are not being met.

This is particularly important with set-aside contracts where the prime is required to self-perform a certain amount of the contract work. A subcontract for a set-aside contract should include a clear expression of the applicable limitation on subcontracting and the parties' commitment to it.

Small business set-aside rules

Finally, a work-share provision that is inconsistent with small business set-aside rules may be legally unenforceable, so use the SBA's rules to your advantage when negotiating with subcontractors.

Also, if you are a subcontractor and the prime is not living up to its work-share obligations, consider involving the agency's contracting officer (CO), if necessary. The Federal Acquisition Regulation allows a subcontractor to communicate directly with the CO if the prime has not provided the promised work share, or is not utilizing the subcontractor to the same extent as indicated in the proposal.

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