

Managing Federal Contracts and Subcontracts

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Agenda

- Some basic advice.
- Compliance issues.
- Liability for pricing information.
- Subcontracting and other arrangements.
- Some realities of life.



**Only one in five
government projects finish
within budget and on time.**

According to survey of 151
Federal government managers

August 2007, PM-Network, August 2007



Causes of Project Failure

- From 2007 poll by PM-Network (1007 respondents):
 - 28% Poor communication.
 - 18% Insufficient resource planning.
 - 13.2% Unrealistic schedules.
 - 9.8% Poor project requirements.
 - 6.7% Lack of stakeholder buy in.
 - 5.2% Undefined project success criteria.
 - 4.8% Unrealistic budgets.
 - 4.4% Insufficient or no risk planning.
 - 4.3% Lack of control and inadequate change process.



Basic Advice

- Use management process that guarantees 100% compliance.
- Meet all milestones.
- Submit all deliverables on or before date due.
- Keep both contracting officer (CO) and contracting officer's technical representative (COTR) informed.
- Document: Create electronic and paper trails.
- Keep both systems spic and span.



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**Prime responsible for
compliance by sub.**



Types of Flowdown Clauses

1. Mandatory clauses.
2. Protective clauses: Prime inserts these to meet requirements of its contract with government.
3. Clauses requiring that “substance” prime’s contract be incorporated in subcontracts.
4. Automatically applicable clauses (created by federal law).

Mandatory Flowdown Clauses

1. 52.203-13: Contractor Code of Business Ethics and Conduct.
2. 52.219-8: Utilization of Small Business Concerns.
3. 52.222-26: Equal Opportunity.
4. 52.222-35: Equal Opportunity for Veterans.
5. 52.222-36: Affirmative Action for Workers With Disabilities.

Mandatory Flowdown Clauses (cont)

6. 52.222-40: Notification of Employee Rights Under the National Labor Relations Act.
7. 52.222-41: Service Contract Act of 1965.
8. 52.222-50: Combating Trafficking in Persons.
9. 52.222-51: Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment.
10. 52.222-53: Exemption from Application of the Service Contract Act to Contracts for Certain Services.

Mandatory Flowdown Clauses (cont)

11. 52.222-54: Employment Eligibility Verification.
12. 52.226-6: Promoting Excess Food Donation to Nonprofit Organizations.
13. 52.247-64: Preference for Privately Owned U.S.-Flag Commercial Vessels
14. 44.402(c): Provisions required by agency-specific statutes.

Non-Mandatory Flowdown Clauses

- Termination for convenience.
 - Should always be included in some form.
 - Primes often overreach.
- Changes.
 - Sub should insist on functional equivalent of “notice of changes” with appropriate REA language
- Suspension of work.



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Virtual Absolute Liability for Defective Data of Prospective or Actual Subs

- Prime responsible for—
 - Ensuring that subcontractor data is current, accurate, and complete as of the date of prime's price agreement with government.
 - Requirement to certify data accuracy.

Liability for Increases In Price, Costs, or Fee

- Liable even if—
 - You did not know about the subcontractor's price data.
 - Subcontractor's data became available just before the end of the closing or cutoff date on price agreement.
- Indemnification clause.

Hence: Surveillance Plan Needed

- Proven performance support tool.
- Prime's plan to monitor subcontractor compliance with contract provisions.
- Identifies—
 - Critical work processes.
 - Delivery schedule.
 - Deliverables.
 - Costs for the effort.
- Helps to identify **risks** inherent in performance.

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**Subcontractors receive
60 to 80 percent
of U.S. procurement dollars.**



Three Ways to Get Work Done

- “Ordinary” subcontracting.
- Joint ventures.
- Teaming agreements.



What is a joint venture (JV)?

- Business entity separate from its members: corporation, LLC, or partnership.
- JV is the offeror (bidder) to government.
- Contractual privity will be between JV and government.
- Can be populated or unpopulated (pass-through entity).
- JV members can be subcontractors.
- JV is **not** a quick way to assemble a team without addressing scope-of-work issues.

What is a teaming agreement (TA)?

- Agreement between prospective prime contractor and subcontractor to work cooperatively on proposal.
- Usually includes outline of terms of a subcontract to be issued if government awards prime contract to prime.
- Designed to lock in parties, set out pricing, and scope of work.
- Binding contract? Depends on terms and jurisdiction.

Advantages of JVs

- JV can be cover multiple requests for proposals (RFQs) and contracts.
- The management, control, and profit-loss distribution issues usually get addressed up front.
- Tax savings may result.
- Can avoid the high cost structure of the parent corporations. Important if price is a major source-selection criterion.
- Bid and proposal costs are allowable.

Disadvantages of JVs

- If partnership, partner in JV has liability for the obligations of the whole JV.
- Management issues or partner disagreements may be difficult to resolve.
- JV may lock contractor into relationship with other company for longer period than contractor desires.
- Contractors use it (wrongly) to avoid scope-of-work issues until prime contract awarded.
- More accounting expenses and more potential disclosure of financial information.

Advantages of TAs

- Less expensive to set up.
- No corporate filings.
- No tax implications.
- Less of commitment by the prime to the sub (if you are the prime).

Disadvantages of TAs

- Requires well-drafted agreement to be legally binding.
- Usually not enforceable until performance starts.
- Potential conflicts between teaming agreement and subcontract.
- Structure less useful to management of project and resolution of disputes.
- Less commitment by prime to the sub (if you are the sub).
- Subcontractor's bid and proposal costs not allowable.
- More accounting headaches and potentially more disclosure of financial information, but fewer than with JV.

Warning!

- JVs and TAs can both run afoul of SBA affiliation rules.
- **Watch out for SBA size rules!**



Important Provisions of TA

1. Designates which team member is prime contractor and which is subcontractor.
2. Purpose and scope of agreement.
3. Incorporation by reference of non-disclosure agreement.
4. Intellectual property concerns.
5. Division of responsibilities between prime contractor and subcontractor.
6. Definition of relationship of parties: Neither party has right to bind other.

Important Considerations for TA (con't)

6. Duration of agreement and termination provisions.
7. Limitations of liability.
8. No assignment without consent.
9. Exclusivity and noncompetition.
10. If commercial-item subcontractor, requirement that the resulting subcontract will be commercial-item subcontract as provided by FAR part 12.

Subcontractor Disputes

- Generally, subcontractor has no direct rights against the government (lack of privity).
- Prime sponsorship:
 - Prime may bring claim on behalf of sub.
 - Sub may bring claim in prime's name with prime's consent.
 - Does not require prime's active participation.
 - Prime does have to consent to any settlement.
 - Sub should negotiate sponsorship terms in subcontract.



Choice of Law

- Parties generally negotiate choice-of-law provisions.
- Courts have held that federal common law applies where—
 - Dispute implicates uniquely federal interest.
 - Significant conflict exists between federal policy and applicable state law.
- Disputes clause cannot be flowed down in its entirety. No power to confer jurisdiction.



Christian Doctrine

- Christian Doctrine does not apply to subcontracts.
- Exceptions for social policy:
 - Notice of requirement for affirmative action to ensure equal employment opportunity for construction. FAR 52.222-23.
 - Affirmative action compliance requirements for construction. FAR 52.222-27.
 - Equal opportunity for special disabled veterans, veterans of the Vietnam era, and other eligible veterans. FAR 52.222-35.
 - Affirmative action for workers with disabilities. FAR 52.249-36.

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Realities of Life

1. Prime contractor rules.
2. Prime contract is a federal procurement contract.
3. The subcontract is a commercial contract.
4. There are very few mandatory flowdown clauses.
5. Primes tend to flow down all federal procurement clauses.
6. Subcontractor has no legal standing with government.

Realities of Life

7. Government is very concerned about how primes manage subcontracts.
8. Government can partially terminate a contract.
9. No one reads the contract.
10. Most contractors (prime and sub) fail because they do not properly plan. In particular, they fail to baseline the contract from the outset.
11. Primes and subs must perform as partners, with the sub totally integrated into the effort.
12. Prime and subcontractor must be a high-performance team.

Questions?

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