PRIME AND SUBCONTRACTOR RELATIONSHIP
Outline

• Why should a Prime Subcontract?
• Subcontracting Risks
• Government’s Need for Subcontracting Oversight
• “Flow-down” Provisions
• Subcontract management “The Realities”
**GENERAL DEFINITION OF A SUBCONTRACT**

**Broadly Defined...** Any Contract or Agreement To Perform Work or Provide Material in Support of A Prime Contract. • **Far Part 44.101**

- **Federal Procurement Contract**
  - **PRIVITY** YES
  - **PRIVITY NO**

- **Commercial Contract**
  - **PRIVITY** YES

**Subs**

**Privity (Contractual Relationship)** exists only between the Buyer & Seller

Privity does not exist between Buyer and the Seller’s Subcontractors
Why should a Prime Subcontract?

- Strategic Advantage/Alliance
- Enhances capabilities of prime contractor
- Facilitate entry into otherwise closed markets
- Spread financial risk
- More cost effective than performing in-house
- Greater value to customer (Government)
- Government places requirements on the prime to sub out contracts to small disadvantage business (socio-economics)
Subcontracting Risks

• **Prime contractor perspective**
  - Complex Government oversight
  - Prime responsible for final accountability *(must make the tough decisions)*
  - Subs lack of timely reporting of costs on cost reimbursement contracts
  - Prime’s performance assessment dependent on subcontractor performance
Subcontracting Risks

- Subcontractor perspective
  - Price, cost and delivery pressures by Prime
  - Doing things the prime way (especially if sub has more experience)
  - Sub’s past performance not usually reported in Gov’t reporting system
Subcontracting Risks

• **Government perspective**
  
  • No privity with subcontractors
    - Lack of Gov’t oversight
  
  • The need for added oversight responsibilities
    - Prime oversight is not necessary in Government best interest
  
• Added risk of breaching constraints
  - Cost overruns
  - Not meeting scheduled deliveries
  - Technical quality is subpar
Government’s Need for Subcontracting Oversight

- Provide the customer (Gov’t) with timely best value solution to requirement
- Maintain public trust in government acquisition system
- Implement public policy
- Protect government’s interests
- Assure contract performance
- Ensure public funds are prudently spent

• Provisions in a subcontract are known as “flow-down” provisions
  o That is if they impose the same duties on the subcontractor that the government imposed on the prime contractor in the prime contract

• Prime contractor responsible to "flow-down" subcontract clauses to the subcontractor.

• Methods of incorporation: FAR 52.102
  o Clauses requiring verbatim incorporation
  o Clauses that must be incorporated in substance
  o Clauses that are silent on incorporation

  ▶ Included either by reference or in-text

FAR Part 52.2 - categorized as:

- Mandatory (required)
  - The Christian Doctrine

- Required when applicable
  - Dollar threshold and the nature of procurement activity dictates when these provisions apply

- Optional
  - Subject to negotiation

Note: each FAR clause specifies when it must be flowed-down from Prime to subcontractor (must know the clauses)
The Christian Doctrine


The court held that the Government contracting regulations have the force and effect of law and that the CO does not have the latitude to remove or alter the clause.

What does this mean? – regardless of whether the clauses is inserted or altered a court may interpret the contract as if the cause was actually presented.
The Christian Doctrine: Examples of Mandatory Provisions for Prime Contractors

- Truth in Negotiations Act
- The Buy-American Act – FAR 52.225(1)(4)
- Termination for Convenience – FAR 52.249(1)-(7)
- Termination for Default – FAR 49.401
- The Payment Clause – FAR 52.232(1)-(7)
- Equal Opportunity and Affirmative Action Clauses
The Christian Doctrine and Subcontracts

• Don’t assume that a mandatory provision will flow-down automatically

The Christian Doctrine does not apply to subcontracts

Exceptions for Government’s social policies:

- 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
Subcontractors Pay Close Attention

- To language stating the term buyer implies government – i.e. Prime attempting to transfer government’s rights to itself;

- Flow-down language that does not cite applicable FAR dates;

- Language stating that all provisions applicable to Prime apply to Subcontractor without listing those provisions;

- Changes to the FAR that the Prime may with to impose on Subcontractor at no additional cost to Prime;

- FAR provisions that Subcontractor simply can’t comply with
Primes Pay Close Attention

• Don’t flow-down all the prime’s clauses:
  
  o It runs the risk of creating significant internal conflicts and/or rendering the subcontract incoherent.
  
  o It could give the subcontractor rights that they should not have or you don’t want them to have (e.g., limitation on subcontracting, unaltered disputes clause, payments clause, and others).
  
  o No reasonable subcontractor would/should accept it all clause flow-down – this could cause relationship issues between prime and sub.

Payment Provision

The subcontract should specify exactly when the subcontractor gets paid

- Types of payment clauses:
  - Net 30 or net 45 (not common on federal government contracts, except with the very largest primes)
  - Pay-when-paid (most common)
    - Pay-when-paid clause should include specific time for payment,
      - such as “within 10 days of the prime’s receiving payment from the Government for the subcontractor’s work”

Dispute Resolution Provisions **

• A special tailored dispute clause to govern how any dispute arising under the contract will be resolved by the parties

• Should also include subcontractor to perform during pendency of dispute

** Top 100 contracting mistakes
Prime and Subcontractor Relationship

1. The Prime Contractor Controls Relationship

2. In actuality, there are very few mandatory “flow-down” clauses

3. Primes tend to flow down all Federal Procurement Clauses (not advised) or without dates

4. The government is very concerned about how primes manage subcontracts

5. The government can partially terminate a contract
Prime and Subcontractor Relationship

6. Few read the entire contract

7. Most contracts (prime and sub) fail because they do not properly plan

8. Primes and subs must perform cohesively

9. Prime and subcontractor need to work as high-performance team!

Key Fact - 60-80% Of U.S. Procurement Dollars are Spent On Subs
Thank you.