

SubCon

TRAINING WORKSHOPS
MARCH 30-31, 2017 • DULLES, VA



Things I Have Learned As An Arbitrator On How Not to Draft Agreements

Barbara Kinosky
Centre Law & Consulting

Agenda and Sources

Agenda

1. Advantages and Risks
2. Key Questions & Considerations
3. Related Documents & Examples
4. Applicable Laws

Sources

- Federal Acquisition Regulation
- Agency Regulations

Key Subcontracting Agreement Advantages

- Grow Your Business (Size, Revenue, Experience)
- Past Performance Record
- Lower Costs
- More Opportunities
- Prime Contracts



Key Subcontracting Agreement Advantages

- Qui Tam Lawsuits
- Affiliation
- No Priv



Key Questions

- Why subcontracting agreements are important?
- What is in my teaming agreement?
- What is my relative bargaining strength?
- What type of an agreement should I get (cost reimbursable or not?)
- What is my dispute resolution process?
 - Prime – sub
 - Sub-government



Key Considerations

1. Specific Commitment (% of Work)
2. FAR Flow Down Provisions
3. Exclusivity
4. Proposal Preparation
5. Payment Options

Key Considerations

6. Warranty and Indemnity
7. Termination for Convenience
8. Confidential / Proprietary Information
9. Statement of Work
10. Non-Compete

Key Considerations

11. Error Correction
12. Rights in Data & Return of Materials
13. Responsibility for Delays & Government Shut-Downs
14. Invoicing and Payment
15. Stop-Work

Key Considerations

16. Delivery Orders
17. Interference with Employees
18. Duty of Avoid Conflict of Interest
19. Restrictions on Competition
20. Ownership of Employee Developments
21. Post Subcontracting Agreement Outlook

Subcontract & Related Documents

- Modifications
- Schedules
- Attachments
- Drawings
- Special Conditions
- General Conditions
- Teaming Agreements
- Non-Disclosure Agreements

Other Applicable Laws

- The False Claims Act & Qui Tam
- Truthful Cost or Pricing Data
- The Buy American Statute
- The Trade Agreements Act
- The Prompt Payment Act
- Anti-Bribery / Anti-Kickbacks
- State / Local Laws



Caution

- Each subcontracting arrangement calls for a customized subcontracting agreement
- Do not use the same template for all situations
- A quick legal review is always recommended



Examples of BAD Subcontracting Agreement Clauses

Payment Terms and Conditions – Review it carefully (arguably the most important clause of any contract)

Payment Terms: Subcontractor will invoice Prime Contractor for services performed as specified. Each invoice will provide a level of detail to reflect the amount applicable to each individual site location and be accompanied by time keeping records to substantiate the invoice amount. Invoices will be mailed to:

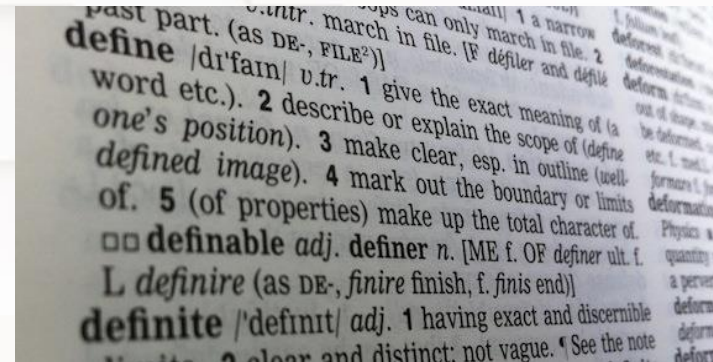
Termination: This Subcontracting agreement shall commence...



Examples of BAD Subcontracting Agreement Habits

Definitions – Define key contractual terms and use consistent definitions

This Agreement between Parties This Subcontracting agreement is effective on... This DOCUMENT will be terminated This Contract states that... The venue for this Subcontracting Contract will be...



Examples of BAD Subcontracting Agreement Habits

Consideration – Always include language of consideration

Whereas, Prime Contractor was awarded a task order issued under contract #, to provide services to the U.S. Government

Whereas, in accordance with this Subcontract, the Parties desire to set forth the work to be performed by the Subcontractor,

...

Now, the Parties agree as follows:



Examples of BAD Subcontracting Agreement Habits

List all key documents – Create an index of all attachments

The Subcontracting Agreement consists of this Agreement and all attachments, schedules, and relevant documents on the table right next to the water fountain.



Examples of BAD Subcontracting Agreement Habits

Contractual Obligations – Control your contractual obligations

Subcontractor agrees and shall be bound to Prime Contractor by all of the terms of the Agreement between Prime Contract and the Government.

- Consider whether you should exclude insurance, indemnity, certain warranties, etc.
- Know all your obligations

Conclusion

- Subcontracting Agreements Are Important
- Start with the Teaming Agreement
- Customize it to Fit Your Particular Situation
- A Quick Legal Review is Highly Recommended

Contact Information

Barbara Kinosky
Centre Law & Consulting LLC
bkinosky@centrelawgroup.com

*Disclaimer: This presentation is for educational and information purposes only.
For specific questions, contact an experienced government procurement attorney.*