

SubCon

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Subcontract Concerns of a General Counsel

Breakout Session C03

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8:30-10:00 AM

Cirrus Ballroom A

Our Session

- This is a different type of presentation
- A few (yes, just a few) substantive observations that came up in the experiences of a general counsel of a large small business IT defense contractor, that was often sub, but when it was the prime, it was usually very reliant on a large business subcontractor.
- We will then discuss what things we should consider in a prime-sub relationship, and what topics we think should be addressed in a prime-sub contract.

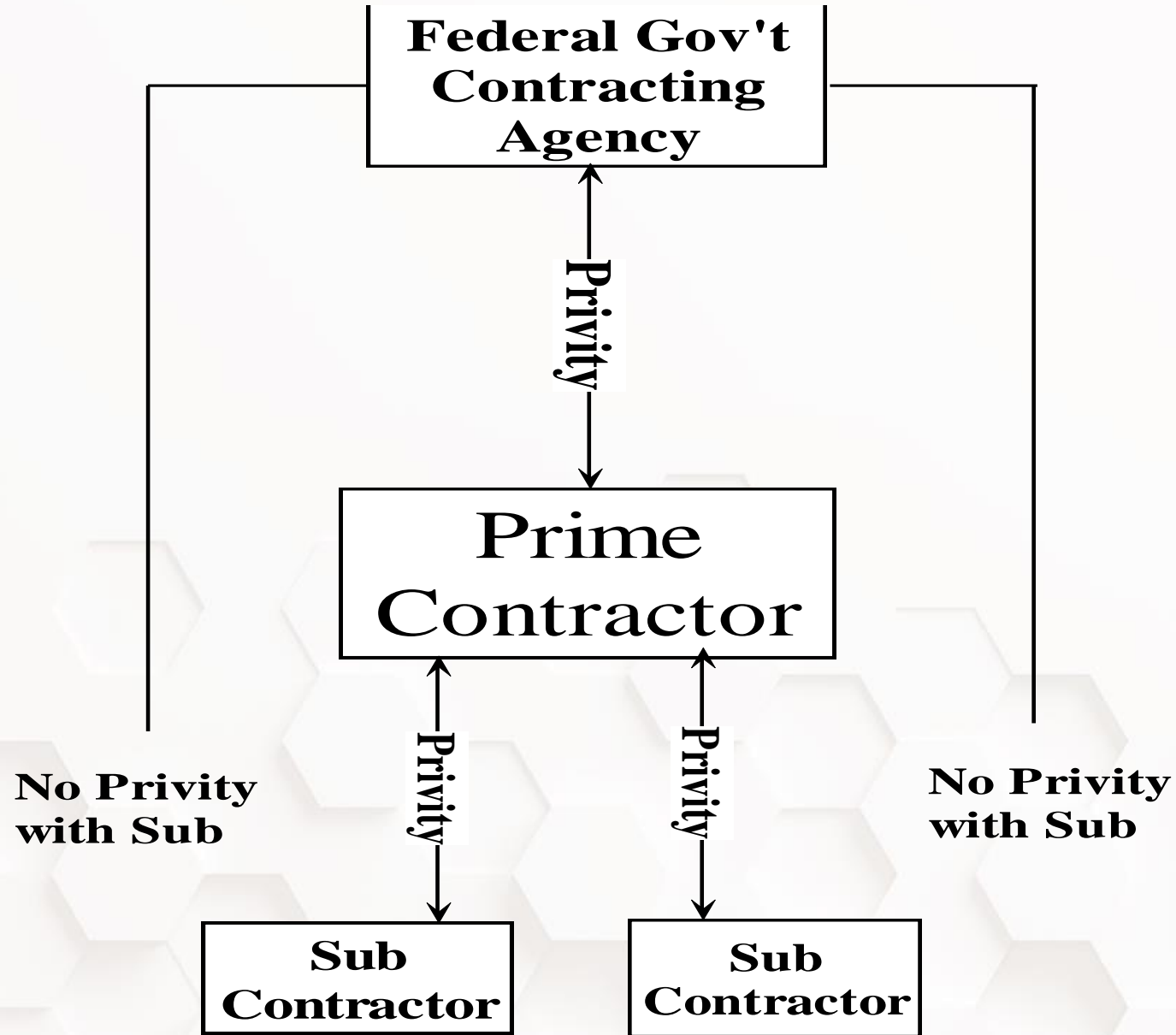
- I. Subcontracts
- Some General Counsel Concerns
 - a. Ethics
 - b. Organizational Conflicts of Interest
 - c. Legal Considerations
 - Contract Formation and Content
 - Contract Interpretation
 - Contract Management
- III. Topics We'd Like Addressed by Prime and Sub, and Topics We'd Like Covered in the Subcontract

I. Subcontracts



A subcontract is a private commercial transaction

- A “Subcontractor” is a firm that supplies goods and services to a prime or high tier subcontractor (FAR §44.101)
- A Subcontractor has no privity of contract with the USG. The Sub’s only contractual obligations are to the Prime



- A Prime – Sub contract is a type of Teaming Agreement (FAR §9.601) with elements of commercial and government – imposed duties.
- In the USG contracting environment, many subs are often primes, but life as a federal sub may involve as many compliance requirements, and corresponding contract management skills and resources, as a large contractor.

- The USG disclaims responsibility over subcontractors, but wants to maintain some control of the subcontract environment (same as EU procurement directives)
- USG affects subcontracting: 1) Contractor Purchasing System (CSPR); 2) Consent to SubKs; 3) Flow – Downs; 4) Socio Economic Policies; 5) Sub Payment Protection

Contractors to a Federal Grantee

- Contractors (NOT “SUBCONTRACTORS”) vs. Subawardees, to a Federal Grantee
- Contractors to a grantee are NOT subject to the grant terms and conditions, or to the federal terms that would apply if the prime relationship with the federal government was a procurement contract.
- The grantee’s contract is not quite entirely immune from federal terms, because the grantee has to put some compliances in their contracts (e.g., Davis Bacon compliance)

Subawardees to a Federal Grantee

- A subaward is a private contract, but it is to accomplish some or all of the grant
- The Grantee is 100% and sole responsible to the federal grantor agency, but is required to “flow down” all the requirements of its grant to the subawardee.
- Subaward management may be more challenging than contract management

Part II

Selected Concerns of a Subcontractor's General Counsel

FRAUD, ETHICS, COMPLAINTS, CONFIDENTIALITY, AND ATTORNEY CLIENT PRIVILEGE

Fraud and Ethics

- A common impression is that the general counsel is supposed to be the sheriff of ethics.
- Fraud at the subcontract level – Do not assume large primes and subs do not cheat each other
 - The “competitive” subcontract purchasing of a large prime
 - The fraud of a sub on a subcontract

Organizational Conflicts of Interest



- An OCI “means that because of other activities or relationships with another person, a person is unable, or potentially unable, to render impartial assistance or advice to the Government, or a person’s objectivity in performing the contract work is, or might be, otherwise impaired, or a person has an unfair competitive advantage.” FAR 2.101
- This FAR definition captures the three species of OCIs.

The Three Types of OCIs

- Unequal Access to Non Public Information
- Impaired Objectivity
- Biased Ground Rules

Unequal Access to Information OCI

- Access to proprietary information, source selection information, or other non-public information.
- Actual use does not have to be shown.
- Information must be real and substantial.
- “Natural advantage of incumbency,” by itself, will not create OCI.
 - Protestor must show that awardee was “so embedded in the agency as to provide it with insight into the agency’s operations beyond that of a typical government contractor.” (ARINC)
- Access by team member OR SUBCONTRACTOR can create OCI.
- Information from ex-Govt employee can create OCI.

Impaired Objectivity OCI

- OCI is based on contractor's other government contracts or commercial business interests.
- Test is not whether biased advice was actually given, but whether reasonable to believe that a contractor's objectivity might have been impaired.
- Some relationships are too "remote" to create OCI risk.
- Not an OCI if activities are "ministerial," and do not give the contractor opportunity to exercise judgment or discretion to act in its own interest.

Biased Ground Rules OCI

- OCI arises where offeror seeks to provide a system (or components) for which it previously provided SETA services, or contributed to specifications or statement of work.
- Test is whether the information supplied led “directly, predictably, and without delay” to statement of work.
- Test is not whether company actually drafted specifications that benefited itself, but rather whether company was in position to affect competition, intentionally or not, in its own favor.
- OCI can result from biased ground rules that are established “unintentionally,” since contractor will frequently view solutions in a way that fits its technological capability or method of doing business.

Why OCIs Matter

- OCIs may preclude contract award.
- OCIs may cause loss of an awarded contract.
- Contractors want to avoid wasting bid and proposal resources.
- Contractors want to implement sound business strategies involving potential mergers and acquisitions.
- Violations (of certifications) can lead to civil and criminal sanctions.

- An OCI can occur in any type of acquisition, but they are more likely to occur in the following types of contracts -
- Management support services (9.502(1))
- Consultant and professional services (9.502(2))
- Contractor participation in technical evaluations (9.502(3))
- Systems engineering and technical direction contracts - unless the contractor already has overall program responsibility (9.502(4))
- Support and technical evaluation contracts
- Multi-customer task order contracts
- Government-Wide Acquisition Contracts (GWAC's)
- Acquisitions of companies with related contracts

Subcontractors should:

- Insist upon seeing Prime's OCI Plan in timely manner.
- Insist that Prime disclose any relevant potential OCIs.
- Try to learn about potential OCIs involving Prime or other team members.
- Make necessary changes to Prime's Mitigation Plan that relate to their work scope.

Primes should provide their proposed Mitigation Plan to Subs with the RFP package; encourage Subs to identify potential OCIs that apply to their scope of work; and require Subs to follow the Plan and document their implementation.

Why Are OCIs Arising More Frequently?

- Consolidation in industries (e.g. defense)
- Proliferation of “umbrella” contracts
- Broad statements of work
- Attrition of government’s acquisition workforce and outsourcing of procurement support functions
- More procurement of services that involve the exercise of judgment

Legal Considerations

- **Contract Formation**
- **Contract Content**
- **Contract Interpretation**
- **Contract Management**



Applicable Law

- What law governs contract formation and interpretation? Unless agreed, state “choice of law” rules
- If for supplies (goods) the state’s version of the Uniform Commercial Code on Sales (Article 2) applies
- If for services, the state common law – or commercial law – applies

Contract Concerns

- Formation: Offer and Acceptance (UCC 2-206)
- Additional terms in acceptance (UCC 2-207)
- Content: Parol Evidence Rule (UCC 2-202)
- Course of Performance (UCC 2-208)

- Unlike the law between the Prime and the USG, the Plain Meaning Rule might not apply in a Prime-Sub dispute, nor does the “patent ambiguity exception to contra proferentem.”
- Also, it is common for the party with more bargaining power to require the other party to contract away contra proferentem altogether. This has become so commonplace that California recognizes the practice in its contract law. (Cal. Civil Code §1654 cmt.)

III. Things to be Considered and Covered



Things to be Considered

- Parties' POCs and Authority
- Handling of Sub Cost and Pricing Data
- Sub Interface with Government

Some Things That Might Be Covered

- The content of the contract (with both parties understanding the parole evidence rule)
- Contract creation and choice of law (state law)
- Continuing during a dispute
- Notice of a Change (incl. change accounting procedures and proof of Adjust or EAs)
- Sub retaining its bid worksheets
- Intellectual Property
- Applicability of non-mandatory flow downs

OUR THOUGHTS

