

Part I: Litigation Impact Issues to Consider in a Subcontract Originating from the Federal Government

A Practical Guidance® Article by Kristi Morgan Aronica, Weitz Morgan PLLC



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This is Part one of a two-part series of articles on litigation impact issues in subcontracting with a federal government contractor. For Part 2, see [Part II: Litigation Impact Issues to Consider in a Subcontract Originating from the Federal Government](#).

Best practices dictate that government contracting partners should approach all of the terms of their subcontract agreement from the perspective that each is affected by the requirements of and regulations governing the prime contract. Undertaking this activity assists with negotiations, but also in vetting – and importantly mitigating – risk and liability. This piece begins a series of articles highlighting issues related to government contracts that have considerable impact on prime-sub litigation and offering take-aways for how to effectively address them.

Pass Through Claims

A fundamental tenant of public contract law is that subcontractors do not have privity of contract with the government. Thus, absent a willingness or contractual obligation for the prime to sponsor a claim by a sub against the government, the sub cannot seek recovery of any damages against the entity that directly caused the harm (there are some judicially created exceptions to the privity rule, but they are difficult to use successfully).

A significant amount of jurisprudence exists on pass-through claims. In federal courts, it is well-settled that a contractor can present a subcontractor's claim on a pass-through basis. The majority of state courts, including Texas, acknowledge pass-through claims as well. However, in order to be recognized in a federal or Texas state court, the pass-through arrangement between the parties must be set up in a manner that will survive a jurisdiction attack by the government defendant.

What is critically important about these types of clauses is that the prime must remain liable to the subcontractor for the damages. Complete discharge of the prime contractor's liability will defeat its ability to bring a claim against the government for the damages sustained by its subcontractor. However, contingent liability, where the sub releases the prime from liability if the prime agrees to bring the action against the government and remit any recovery to the subcontractor, satisfies the legal requirements for a valid pass-through arrangement.

The Take-Away

First, the parties should ensure that a pass-through clause is included in the subcontract. Second, the agreement should be carefully drafted to not fully exculpate the prime from liability. Additionally, the parties will want to consider and specifically outline allocation of fees and expenses related to any pass-through action.

Incorporation of Flow-Down Clauses

A hallmark of subcontracting in government contracts is the requirement to flow down certain provisions of the

prime contract to subcontractors. The Federal Acquisition Regulation (FAR) outlines mandatory flow-down clauses, but the prime contractor will also want to evaluate which additional prime contract requirements to include, or “flow-down,” in subcontracts. These are known as discretionary flow-downs.

Importantly, any type of flow-down is not automatic. The clauses must be included in the subcontract to be enforceable against the subcontractor. From a litigation perspective, how these clauses are outlined in the subcontract agreement is critical to their enforceability. For example, courts across jurisdictions have delineated between “incorporation by reference” language and any prescriptive language in the FAR clause. Some courts have held that a subcontracting party has sufficient notice of the requirement by simply incorporating by reference flow-down clauses or even the entirety of the prime contract. However, others have held that if the language of the FAR clause necessitates mandatory inclusion in full, meaning has language like the prime contractor “shall include” this clause in a subcontract agreement, the provision is only enforceable if it is fully set-forth in the agreement.

The Take-Away

When drafting or negotiating subcontract agreements, primes and subs will want to take care to look at the law of the governing jurisdiction regarding how courts determine the enforceability of prime contract flow-downs. And in doing so, they will want to determine issues like is an incorporation by reference provision alone sufficient, can the clauses be simply listed on an attachment, must “shall include” mandatory flow-downs be directly incorporated, is it enough to just reference the prime contract, and how to treat a mandatory clause that has “shall include language” like “shall include the substance of the clause” instead of simply “shall include this clause.”

Equitable Remedies

Sometimes a party is harmed but unable to identify its monetary damages. In such cases, injunctive relief is how that party seeks redress. Injunctive relief clauses typically cover situations like non-compliance with a non-disclosure or non-compete agreement. Certainly, government subcontracts should have standard equitable relief clauses given they are commercial agreements, but it is also important that the parties consider whether any other uniquely government matters should be included as well. One item to specifically outline as subject to injunctive relief is noncompliance with the subcontract’s communication with the government clause.

When a subcontractor is in breach of a no-contact with government provision, the prime contractor will likely not be able to easily identify its financial damages as a result of this conduct, at least at the outset. Allowing the activity to continue and suing the subcontractor for breach is not as preferable as stopping the prohibited conduct and doing so as quickly as possible. If the no-contact clause is not outlined specifically in the equitable remedies clause, obtaining an injunction to stop the subcontractor’s conduct is of course not foreclosed and including it is not proof of the elements for injunctive relief. However, identifying a specific type of conduct to be subject to equitable relief demonstrates the parties’ understanding that the harm resulting from that behavior is unique and would be difficult to quantify monetarily, which is critical to obtaining injunction.

The Take-Away

In some cases, stopping conduct is more important than recovering damages as a consequence of it. The result that could come from a subcontractor communicating inappropriate or misinformation to the government may cause financial harm that is difficult to quantify, such as loss of goodwill. Accordingly, and in an effort to help obtain a preliminary injunction should one be needed, prime contractors (and subs with lower-tiers) will want to one, ensure they have a no-contact provision and two, specifically indicate that it is subject to equitable relief.

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An experienced attorney with comprehensive capabilities in commercial litigation and government contracts, Ms. Aronica has an extensive track record of excellence in work product and client satisfaction. A graduate of the University of Miami School of Law, she is licensed to practice in Texas and in various federal jurisdictions.

Ms. Aronica represents government contractors and subcontractors in federal procurements, including advising on applicable laws and solicitation terms, bid protests, contract negotiations, conducting post-award training and compliance, REAs and claims, litigating disputes, drafting/reviewing teaming agreements and subcontracts, and providing counsel or assistance with mergers and acquisitions, organizational conflicts of interests, GSA Schedules, small business programs, suspension and debarment proceedings, grants, and cooperative agreements.

Providing reliable legal representation founded on strength of conviction, strategic decision making, and substantive knowledge, Ms. Aronica is driven in her commitment to clients and their matters. As a result, she has also had successful outcomes in both state and federal courts as counsel for prime contractors and subcontractors in commercial disputes arising from federal procurement contracts. Experienced on both sides of the docket, she serves as plaintiff's or defendant's counsel and has a unique skill set of combined proficiency in federal public contract law and the civil procedure and substantive law of state and federal jurisdictions in Texas.

Ms. Aronica represents a diverse set of clients working on government contracts and has particularly strong knowledge in the unique aspects of entities operating in the government marketplace in the industries of construction, parts supply, and tech.

In addition to practicing law, Ms. Aronica has published on subcontract terms and conditions and in the fields of American literature and U.S./Mexican immigration and has been quoted by Bloomberg Law on federal procurement cases. She also spent numerous years in a leadership position on the board of directors of The Arc of the Capital Area, a Texas non-profit focused on enhancing the lives of those with intellectual and developmental disabilities.

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