

# Part II 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 the second of two articles highlighting how issues related to government contracting impact subcontract terms. Along with some key take-aways, the topics include choice of law and forum, indemnification, and damages. For Part I, see [Part I: Litigation Impact Issues to Consider in a Subcontract Originating from the Federal Government](#).

## Choice of Law & Forum

Choice of law is an important term from a litigation perspective in subcontracting arrangements when the parties are geographically diverse, which is often the case in government contracting alliances. For instance, consider a matter where counsel is advising a subcontractor-client who had not been paid on whether to pursue litigation. The prime is domiciled in Oklahoma and the project work was undertaken in Oklahoma, but the subcontractor is located in Texas. In the analysis of the claim, one of counsel's first tasks is to review the choice of law provision. In this scenario, the parties had agreed that Texas law governed, which after reviewing the law in that jurisdiction on the issues was a pivotal factor in counsel's advice regarding decisions on what were its client's options, the likelihood of prevailing, strategy, under what theories would it make its claims, and ultimately whether to proceed with litigation.

It follows that in a situation like the one described above the choice of forum is also of importance. In that example, the parties had elected a Texas forum as well, which

again was a positive for the Texas-based subcontractor in making decisions about litigating. Being in an unfamiliar jurisdiction and having to expend additional resources for local counsel can be a limiting factor in deciding whether to move forward with a lawsuit and leverage for the party in the forum jurisdiction. Additionally, when drafting and negotiating a forum clause, the parties will want to review the law of the jurisdiction for which they are considering to ensure the clause is properly crafted and reflects their intent. For example, Texas, notably, distinguishes between forum, the state in which the case is to be tried, and venue, the place within the state it is to be tried.

## The Take-Away

For primes and subs (and possibly projects) that are located in different jurisdictions choice of law and forum is important. They significantly impact litigation decisions from whether to proceed to what claims are available, the applicable legal standards, probability of success, and fees. Additionally, when the parties are already in a dispute over the merits, spending time and money on litigating what law should apply or in what place the case should be tried only further prolongs the proceeding and thus resolution; and of course, it increases costs significantly. With a thoughtful approach and careful drafting, choice of law and forum clauses can put, at least one of the parties, in an advantageous position, as in the example above, and also help alleviate some of the already significant burdens of litigation and contract administration.

## Indemnification

The all-important indemnification clause. It is one of the most negotiated provisions in a contract given its primary

purpose is to impact litigation by shifting liability. It is also a topic that cannot be sufficiently covered in a series, so look for more in-depth articles on this clause in future posts.

For subcontracting parties, indemnification is particularly relevant because often primes and subs are working together on government sites. If a subcontractor were to negligently injure a prime contractor's employee or government personnel and the prime contractor incurred liability to that injured person, then the prime contractor would want to be indemnified by subcontractor.

Also of significance for government contract primes and subs is liability to the government for regulatory non-compliance. The False Claims Act ("FCA") is the best example of this scenario. A prime contractor should always include in its indemnification provision the ability to recover against the subcontractor should the subcontractor's non-conformance cause the prime to incur losses under an FCA claim.

The Take-Away – Prime contractors face significant liability in the government contracts marketplace; yet, much of their ability to perform requires subcontracting partners, who, even inadvertently, can cause primes to run afoul of the extensive and stringent compliance requirements of procurement contracting. To help mitigate this risk, primes will want to consider including language in their indemnification clauses to cover losses related to failure to comply with prime contract terms and conditions when such losses are caused by their subcontractors.

## Damages

Whether and to what extent damages are defined in commercial agreements is always an important consideration. However, these types of clauses in subcontract agreements take on even more importance due to the unique aspects of government contracting, particularly liquidated and consequential damages.

A liquidated damages clause may be useful for the parties in a prime/sub relationship to cover situations when the government terminates the prime contract for convenience. A subcontractor may not be willing to bear the risk and burden of termination for convenience and potential loss of all or part of the subcontract. Thus, in order to counter the inability to recover or at least mitigate the loss of any prospective profits or damages due to the cancellation (and having to extensively litigate the issue), a subcontractor should consider negotiating a set amount to be paid to it in such an event. Prime contractors, in an effort to avoid a repudiation or anticipatory breach claim, on the other hand may want to include its own termination for convenience provision in the subcontract and ensure the language is clear that the subcontractor bears the full risk of any such event.

Another type of liquidated damages clause in subcontract agreements is what is in effect a pass-down of liability. An example is in the case of a delay in performance or completion of the project. Often, the government will assess liquidated damages against a prime for delay beyond the project completion date. Similar to an indemnification provision, in this instance, the prime contractor would require the subcontractor to assume liability for any liquidated damages the prime may suffer as a result of a liquidated damages clause in the prime contract being triggered by the actions of the subcontractor. Here, a subcontractor will want to take care to review the liquidated damages provision in the prime contract during subcontract negotiations to note the parameters and extent of potential for liquidated damages.

As for consequential damages, excluding such is particularly important for the subcontractor. A prime contractor will likely want the subcontractor to have to pay for its consequential damages, given, for example, the subcontractor's actions could cause the prime to lose the government contract or a portion thereof. Additionally, prime contractors tend to be larger entities, so consequential damages could be exponentially greater than what a smaller subcontractor could cover. Facing damages claims that include consequential damages puts the subcontractor in a poor leverage position throughout the litigation. Given that the damages number will be significantly higher than if consequential damages were excluded, a defendant is more likely to settle and do so for a much larger amount. Because consequential damages can greatly increase the potential liability, it often makes more sense to settle than to take the chance of the plaintiff prevailing on its damages claims.

## The Take-Away

Damages are a cornerstone of litigation. Even when liability is relatively clear, the amount of damages at issue and the costs associated with attempting to obtain them are critical factors in determining the outcome of recovery. They drive decisions of risk and whether to institute formal legal proceedings, the timing of settlement, if any, whether attorneys' fees are going to outweigh any recovery, and impact on profits or even worse survivability in the event of a pay-out. Subcontracting parties will therefore want to take care in ensuring whether these clauses are appropriate for their circumstances and to what extent, that their liquidated damages clauses are not a penalty and can withstand scrutiny by a court, and that consequential damages provisions are carefully drafted to specifically enumerate what damages are included (i.e. "arising out of" versus "due to"), if any.

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# Related Content

## Prior Legal Developments & Analysis

- [Part I: Litigation Impact Issues to Consider in a Subcontract Originating from the Federal Government](#)

## Practice Notes

- [Interpretation of Government Contracts \(Part 1\): Federal Government Contracting](#)
- [Interpretation of Government Contracts \(Part 2\): Federal Government Contracting](#)
- [Interpretation of Government Contracts \(Part 3\): Federal Government Contracting](#)
- [Teaming Agreements and Other Teaming Arrangements](#)

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### Kristi Morgan Aronica, Partner, Weitz Morgan PLLC

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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