

## 5 Tips for Drafting A Low-Risk, High-Yield Subcontract

By **Ben James**

Law360, New York (October 06, 2010) -- Disputes with subcontractors can be costly and may endanger a prime government contractor's relationship with Uncle Sam. A detailed subcontract with a good dispute resolution clause can lessen the risk of such fights and mitigate the damage they might cause, government contracts lawyers say.

Here are some steps primes can take when crafting their subcontracts to stave off potentially costly spats:

### 1. Include a Well-Crafted Dispute Resolution Clause

Human nature, as well as time constraints, can cause primes and subcontractors to put off making hard choices and tough decisions about what should happen if and when something goes wrong. But that's an invitation for litigation down the road, lawyers said.

"No one wants to spend a ton of time and money in the formation stages. You want to do what you can to get the work going," noted George Ash, chair of Foley & Lardner LLP's government procurement practice.

The key concern for primes who deal with subcontractors is ensuring that the prime does not find itself saddled with an obligation to the government that should have been passed down to the subcontractor, lawyers said.

When drawing up a subcontract, primes should lay out specific details about the scope, quality and deadlines for the work the subcontractor is supposed to perform. And they should be sure to include a fair and efficient dispute resolution mechanism.

The dispute resolution mechanism should anticipate, as far as possible, problems that may arise if the subcontractor does work that's unauthorized, not up to the prime's expected standards, or more costly than anticipated — as well as problems between the government and the prime contractor that may have an impact on the a subcontractor.

And a subcontract should have clear rules about the process for resolving any disputes that do arise, Ash said. Prime contractors often have more bargaining power than subcontractors and can set up dispute-resolution mechanisms that tilt the playing field in the prime's favor, according to Ash.

Ash cited a contract provision that called for any disputes between a prime and subcontractor to be litigated in Paris, applying French law, as an example.

"If you have a fair and efficient system of resolving disputes, and put together a good contract that clearly outlines what the expectations and risks are, the parties greatly minimize the potential for disputes," Ash said.

Ash also pointed out that order of precedence clauses — which specify which contract provisions govern in the event of a perceived conflict between provisions — are an important and often under-appreciated piece of the puzzle.

## **2. Protect Yourself Against Termination for Convenience and Other Changes**

Primes should not forget to include a provision in their subcontracts stating that if the government changes what it is seeking, the prime may, in turn change the requirements that are incumbent on the subcontractor, according to Belkin.

Without that provision, the prime could find itself "in a world of hurt," Belkin said, simultaneously on the hook for delivering what the government wants and unable to compel the subcontractor to perform.

Some clauses in a prime contractor's agreement with the government are required to flow down to the subcontractor, but many — including the termination for convenience clause — are not. This standard clause allows the government unfettered authority to unilaterally terminate a contract with or without providing a reason.

A subcontract should protect the the prime contractor in the the event that the government exercises its right to terminate for convenience, said Wiley Rein LLP government contracts lawyer Rand Allen. .

While subcontractors typically won't agree to give a prime contractor the same broad latitude that the government has with respect to terminating a contract, a subcontract should provide that the prime contractor can terminate its deal with the subcontractor in the event that the prime finds itself terminated for convenience, Allen said.

## **3. Don't Focus on Boilerplate at the Expense of Other Clauses**

Making sure all the required "flow-down" clauses are included in a subcontract is important, but a prime contractor may need to go further to protect itself, said Jeffrey Belkin, head of the Alston & Bird LLP's government contract group.

For example, if a prime contractor wants to be able to audit the subcontractor's records to ensure compliance with wage requirements, simply flowing down an audit requirement clause from the government's contract with the prime wouldn't be sufficient, because that would only give the government (not the prime contractor) the right to audit the subcontractor's records, Belkin said.

Large prime contractors sometimes invest a great deal of time and effort on boilerplate flow-down provisions, but fail to apply the same rigor to the actual statement of work and the specifics of what, when and how the subcontractor should perform, Allen noted.

"The government holds the prime accountable for the performance of the subcontractors, which is why the prime needs to make sure that it has the ability to hold a subcontractor to the same standards being applied by the government," Allen said.

#### **4. Use Your Bargaining Power Wisely**

Prime contractors should be careful not to abuse any bargaining power they might have with respect to the subcontractor, lawyers said.

A "take-it-or-leave-it posture" with a subcontractor may push that subcontractor to bite off more than they can chew — either in terms on the difficulty of the work at issue, the cost of the work, or the time they have to do it — which can lead to litigation, Allen said.

Subcontractors will become leery of doing business with a prime contractor that makes life too difficult for its business partner, according to Ash.

#### **5. Create a Strong Teaming Agreement**

One way to avoid a whole range of issues that can arise between a prime and subcontractor is to execute a strong teaming agreement, said Crowell & Moring LLP government contracts partner Amy O'Sullivan.

Teaming agreements — submitted jointly by a prime and subcontractor in response to a sponsor's request for proposal — typically expire when a contract is or is not awarded.

Even so, the agreement puts the prime contractor and subcontractor on the same page with respect to their expectations, and the scope of the work the subcontractor is supposed to perform, O'Sullivan said.

Any potential subcontractor should be thoroughly vetted, and any subcontract that ends up being signed should lay out the provisions covering when the subcontractor ought to be paid, and what will happen if the government disputes an invoice from the prime, O'Sullivan added.

"The bottom line is that this isn't a last-minute question," O'Sullivan said. "There's a lot of advance planning that needs to be done to avoid problems."