

# NEGOTIATING FEDERAL SUBCONTRACTS

Presented by:

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# **WORKING DEFINITION OF “SUBCONTRACTOR”**

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FAR 44.01

“... any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.”

# WHAT SUB CAN EXPECT FROM PRIME

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## PRIME WILL:

- 1) Pass along to the Sub as many as possible of the Prime's obligations owed to the Government;
- 2) Insist on dictating the subcontract terms and conditions, including a mixture of commercial and government terms;
- 3) Be paid before paying the Sub;
- 4) Benefit from the opportunities presented by direct interface with the Government

# **WHAT SUB CAN EXPECT FROM PRIME (CONTINUED)**

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- 5) Try to hold on to some of the special rights of the Government such as Termination For Convenience;
- 6) Have the sole right to present and prosecute claims against the Government;
- 7) Enjoy the explicit and implicit advantages of being in charge of the Government contract

# BUT ...

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It can still be a good life, if you, as the Sub, can

- Execute a Subcontract which
  - Reduces your risks during contract performance
  - Ensure you'll be paid for work properly performed
  - Discourages abuse from Prime
  - Limits exposure of your proprietary data
  - Provides a process for resolving potential and actual conflict
- Perform contract in an exemplary manner
- Leverage success to get more work

# TWO IMPORTANT FACTORS UP FRONT

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1. GET THE SUBCONTRACT IN WRITING
2. GET IN ESSENTIAL TERMS
  - Is there a Teaming Agreement?
  - Does it contain a provision to “negotiate in good faith?”

# ESSENTIAL TERMS

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1. An explicit identification of the work to be performed
2. The price to be paid for the work
3. The estimated quantity of the goods or services involved
4. The anticipated time of performance
5. The date of delivery of the work
6. The time of payment
7. Procedure for handling disputes

# NEGOTIATION LEVERAGE

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- Your ability to negotiate provisions in or out of the contract will depend upon:
- Provisions in your Teaming Agreement (if there is one)
- Understanding why the Prime chose **YOU** as a sub
  - Familiarity (Past Experience)
  - Technical Need
  - Quid Pro Quo
  - Subcontracting Goal
  - Market Base Expansion
  - Best submitted proposal
  - Other

Your use of relevant knowledge

# FLOWDOWN CLAUSES

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- Definition: Clauses taken from a prime's contract and incorporated substantially or exactly into its subcontracts
- Mandatory Flowdowns: Those that are *required* to be included in particular subcontracts by statute, executive order, FAR, or the terms of a clause in the applicable prime contract

Examples:

- Examination of Records
- Kickbacks

## FLOWDOWN CLAUSES (CONTINUED)

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PART 52, "SOLICITATION PROVISIONS AND CONTRACT CLAUSES" OF THE FAR AND OF THE AGENCY FAR SUPPLEMENTS PROVIDE THE REGULATIONS AND THE CLAUSES FOR FLOW-DOWNS, THE CONDITIONS THEY MAY, BE INCORPORATED BY REFERENCE, AND WHETHER THEY MUST BE IDENTICAL OR JUST SIMILAR.

<<http://www.pitt.edu/~offres/externalpubs/far.html>>

## **FLOWDOWN CLAUSES (CONTINUED)**

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Non-Mandatory Clauses That Prime May Demand Be Flowed Down to Subs:

- Changes Clause
- Technical Data Rights
- Warranties
- Property
- Defective Pricing

# **SUGGESTIONS FOR REDUCING RISK**

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## 1. FLOWDOWN CLAUSES

- Identify which clauses are mandatory and what conditions must be fulfilled to trigger the mandatory requirement
- Also, determine which clauses are not mandatory and can be negotiated with the prime

## 2. SUBCONTRACT BOILERPLATE

# SUGGESTIONS FOR RISK ABATMENT (CONT'D)

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## 3. PROTECTING AUDIT DATA DISCLOSURE TO THE PRIME

- Avoiding disclosure of proprietary data
- Utilizing Defense Contract Audit Agency

## 4. COST OR PRICING DATA

- Truth in Negotiations Act (TINA)
- Exemptions

## **SUGGESTIONS FOR REDUCING RISK (CONT'D)**

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### ■ 5. CONTRACT "CHANGES" CLAUSE

- Typical Fixed Price Changes Clause Authorizes Written Changes Within the General Scope of the Contract to:

"...drawings, designs, or specifications when the supplies to be furnished are specially made for the Government in accordance with the drawings, designs, or specifications."

- Resist Attempts by Prime to Modify Such Clause to Give Prime Broader Authority Over Sub than Government Has Over Prime
- Insist that Protections Afforded Prime in Changes Clause, Such as Contract Price and Schedule Adjustment Provisions, Are Flowed Down to Sub As Well

## **SUGGESTIONS FOR REDUCING RISK (CONT'D)**

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- 6. TERMINATION FOR CONVENIENCE CLAUSE
  - Avoid verbatim flowdown of clause, e.g, substitution of “contractor interest” for “Government interest”
  - Insist that T for C apply *only* if prime itself is terminated for convenience and *only* for the exact deliverable work the Government itself has terminated for convenience

## SUGGESTIONS FOR REDUCING RISK (CONT'D)

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### ■ 7. INSPECTION

- Clause provides that: “The Government shall perform inspections and tests in a manner that will not unduly delay the work.” FAR 52.246-2
- Insist on the following supplement: “The buyer shall perform inspections and tests in a manner that will not unduly delay the work.”

## **SUGGESTIONS FOR REDUCING RISK (CONT'D)**

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### **8. TECHNICAL DATA RIGHTS**

- “[Subcontractor] grants [Prime or Customer] a perpetual [or time limited], non-exclusive license to use the products [define] developed by [subcontractor] for [Prime or Customer] under this agreement, only for the purpose of [list]. All copyrights, patent rights, and other intellectual property rights are retained by [subcontractor].”
- A clause calling for return of all confidential information sub supplied to prime when the contract is over
- A clause restricting the use of subcontractor’s confidential information received under the agreement for a period of years after dissolution of the agreement

# **SUGGESTIONS FOR REDUCING RISK (CONT'D)**

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## ■ 9. CONTRACT REMEDIES

- Litigation vs. Alternative Dispute Resolution
- Disputes Clause Options

- \* Mediation
- \* Binding Arbitration
- \* [www.adr.org](http://www.adr.org)

## 10. THE SUBCONTRACTORS OWN SUBCONTRACTORS

- The Golden Rule vs. An Eye for an Eye
- Your Call

## SUMMARY

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- Get it in writing
- Include Essential Terms
- Identify Mandatory Flowdowns & Triggering Conditions
- Negotiate or Eliminate Other Flowdowns
- Protect Proprietary & Data Rights
- Reduce Risks
- Perform in an Exemplary Manner

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