

Association of Corporate Counsel Government Contractors Forum

July 21, 2022

**Prime-Subcontractor relationships:
Does it have to be this hard?
Strategies for mitigating risk and preserving an
effective partnership for Prime Contractors and
Subcontractors**

VENABLE LLP

Overview

- Background
- Common issues that arise in a Prime-Subcontractor relationship
- The importance of a well-drafted subcontract
- Case studies
- Best practices

The Contractual Relationship Between a Prime Contractor and Its Subcontractor

- Generally considered to be a private contract.
- No privity of contract with the government.
- May require government consent to enter into a subcontract.
- False claims and other fraud may subject the subcontractor to the same penalties that a Prime contractor would face.

Setting the Table:

Common Issues That Arise in the Prime-Subcontractor Relationship

Common Issues That Arise in the Prime-Subcontractor Relationship

- Poorly defined workshare (scope and duration)
- Payment terms (pay when paid without limit)
- Subcontract not in alignment with Prime contract
- Employee is accepting a larger risk profile than desired by the company
- Violation of anti-poaching provisions
- Indemnity
- Misappropriation of trade secrets
- Employee's lack of familiarity with the contract's terms and conditions

Common Issues That Arise in the Prime-Subcontractor Relationship

- Ambiguous terms and conditions
- Flow-downs
- Certifications (failure to obtain or verify)
- Data rights
- Warranties
- Anti-assignment provisions
- Disputes (work stoppages and slowdowns)
- Supply chain
- Force majeure

A well-drafted subcontract is the key to managing risk and avoiding litigation.

Choosing the “Law of the Case”

- **Parties will be given great latitude to create “the law of the case.”**
- “[A] term of the parties’ contract becomes the law of the case unless such term is repugnant to public policy or to some rule of law.”
 - *Gordonsville Energy, L.P. v. Va. Elec. & Power Co.*, 257 Va. 344 (Va. 1999)
- Flow-downs

Mitigation of Risk

The Subcontract as a Risk Management Tool

Address:

- Prerequisites to litigation
 - Including informal or formal mediation
- Where any litigation will take place
- The manner of dispute resolution
- Scope of dispute
- The location/forum
- Available relief

The Subcontract as a Risk Management Tool

Managing and Avoiding Litigation

Consider incorporating the following as prerequisites to filing suit:

- Notice of Claim provisions
 - Tie notice and waiver together
- Statute of limitations
- Informal resolution efforts, such as management-level negotiation
- Formal resolution efforts, such as mediation

The Subcontract as a Risk Management Tool

- Forum/Requirements for claims involving the government versus sub-prime disputes
 - Arbitration
 - Litigation

The Subcontract as a Risk Mitigation Tool

Forum Selection Clauses

- Careful drafting is critical
 - Decide on a forum and make it exclusive
- “Courts of Virginia” versus “Courts in Virginia”
 - The 4th Circuit follows the “widely-accepted rule that forum selection clauses that use the term ‘in [a state]’ express the parties’ intent as a matter of geography, permitting jurisdiction in both the state and federal courts of the named state, whereas forum selection clauses that use the term ‘of [a state]’ connote sovereignty, limiting jurisdiction over the parties’ dispute to the state courts of the named state.”
 - *FindWhere Holdings, Inc. v. Sys. Env’t Optimization, LLC*, 626 F.3d 752 (4th Cir. 2010)

The Subcontract as a Risk Mitigation Tool

Remedies

- Can be done by negative/limiting remedies
- Affirmatively as addressing available remedies
- Lost profits
- Attorneys' fees
- Interest

The Subcontract as a Risk Mitigation Tool

Intellectual Property

- Applicability of government license rights to contracting parties
 - Government-Prime/Subcontractor relationship vs. Prime-Subcontractor relationship
- In conveying a Prime Contractor's rights to Subcontractor intellectual property, careful, measured drafting is critical.
 - Require confirmation from the Subcontractor that there is no valuable IP at issue; and if there is, specifically identify as such in a schedule.

The Subcontract as a Risk Mitigation Tool

Intellectual Property

- Trade secrets vs. confidential information
 - If you are the owner of the trade secrets at issue, you will want to protect the information in a contractual form.
 - On the other hand, the opposite party will want to protect itself from accusations of misappropriation.

Key Subcontract Terms and Conditions:

What are the 10 most important contract provisions for Primes and Subcontractors?

Top 10 most significant subcontract provisions

1. Workshare / FTE provisions
2. Confidentiality (can also be separate NDA)
3. Non-solicitation / non-competition / firewall provisions / removal of personnel
4. Limit of liability
5. Dispute resolution provision; choice of law; jurisdiction, venue, and attorneys' fees

Top 10 most significant subcontract provisions

6. Invoicing and payment provisions
7. Indemnification
8. Structure of flow-downs
9. Domestic preference requirements
10. Security / cybersecurity compliance

Real-World Examples of Subcontract Terms and Conditions – Let’s Make a Deal

“May I have what is behind door number?”

Real-World Examples of Subcontract Terms and Conditions – *Force Majeure*

Door No. 1:

- A. Neither party shall be responsible for any failure to comply with, or for any delay in performance of the terms of this Subcontract, where such failure or delay arises from: (i) acts of God, (ii) acts of the Government in its sovereign (and not contractual) capacity, (iii) fires, (iv) floods, (v) epidemics, (vi) quarantine restrictions, (vii) strikes, (viii) freight embargoes, (ix) unusually severe weather, or (x) shortages of supplies or materials where such supplies or materials were unobtainable from an alternate source. In all such events where performance is delayed or prevented, the affected Party shall nonetheless exert reasonable and diligent efforts to remove said causes and resume performance hereunder.
- B. If failure or delay of performance resulting from a condition of force majeure continues for more than 30 days, or if the affected Party is unable to provide, upon request, immediate written assurances that performance will be tendered within 30 days following initial occurrence of the force majeure condition, the other Party may terminate this Subcontract, in whole or in part, for convenience in accordance with the provisions of the Subcontract's Termination provision.

Real-World Examples of Subcontract Terms and Conditions – *Force Majeure*

Door No. 2:

Subcontractor shall not be liable for any delays in delivery caused by circumstances beyond its reasonable control including acts of God or of the public enemy, fire, floods, epidemics, quarantine restrictions, strikes or freight embargoes, provided that:

- a) Subcontractor immediately gives written notice to Prime of any difficulty or anticipated difficulty in meeting the delivery schedule set forth in this Agreement;
- b) Subcontractor immediately gives written notice to Prime of any actual or potential situation that is delaying, or threatens to delay the timely performance of this Agreement, including an actual or potential labor dispute; and
- c) the delay does not materially affect Prime's scheduling on any system or process.

When any delays in delivery occur, Subcontractor shall immediately give notice thereof to Prime. If requested by Prime, Subcontractor shall use additional effort, including premium effort, to avoid or minimize delay to the maximum extent possible. All the costs of the additional effort shall be negotiated by Subcontractor and Prime and shall not be borne by Subcontractor solely.

Notwithstanding the above, if such delays extend for more than thirty (30) calendar days from the delivery or performance date or threatens Prime's delivery commitments under the Prime Contract, Prime may terminate such part of this Agreement remaining to be performed without liability to Prime except for the fair value of work already completed and accepted.

Real-World Examples of Subcontract Terms and Conditions – *Force Majeure*

Door No. 3:

The Subcontractor shall be excused from performance of the Services, either in its entirety, or as delayed in the event performance is delayed due to one of the following causes: (1) acts of God or of the public enemy, or of terrorists (2) acts of the U.S. Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Subcontractor. The Subcontractor shall notify Prime in writing within ten (10) days after the beginning of any such cause.

Real-World Examples of Subcontract Terms and Conditions – *Force Majeure*

Door No. 4:

FORCE MAJEURE. ABC Company shall not be liable for delays in or non-performance of the Services as a result of strikes, lockouts, fires, acts of terrorism or war conditions, accidents, pandemics, foreign or domestic government controls or other actions (including controls or actions related to heightened terrorism alert status or infectious disease), embargoes or other causes beyond ABC Company's control.

Real-World Examples of Subcontract Terms and Conditions – *Supply Chain*

Door No. 1:

COUNTERFEIT WORK

a) The following definitions apply to this clause:

“Counterfeit Work” means Work that is or contains unlawful or unauthorized reproductions, substitutions, or alterations that have been knowingly mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified part from the original manufacturer, or a source with the express written authority of the original manufacturer or current design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitution includes used Work represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

“Suspect Counterfeit Work” means Work for which credible evidence (including, but not limited to, visual inspection or testing) provides reasonable doubt that the Work part is authentic.

b) SELLER shall not deliver Counterfeit Work or Suspect Counterfeit Work to Prime under this Contract.

c) SELLER shall only purchase products to be delivered or incorporated as Work to Prime directly from the Original Component Manufacturer (OCM)/Original Equipment Manufacturer (OEM), or through an OCM/OEM authorized distributor chain. SELLER may use another source only if (i) the foregoing sources are unavailable, (ii) SELLER’s inspection and other counterfeit risk mitigation processes will be employed to ensure the authenticity of the Work, and (iii) SELLER obtains the advance written approval of Prime.

Real-World Examples of Subcontract Terms and Conditions – *Supply Chain*

- (d) SELLER shall maintain counterfeit risk mitigation processes in accordance with industry recognized standards and with any other specific requirements identified in this Contract.
- (e) SELLER shall immediately notify Prime with the pertinent facts if SELLER becomes aware that it has delivered Counterfeit Work or Suspect Counterfeit Work. When requested by Prime, SELLER shall provide OCM/OEM documentation that authenticates traceability of the affected items to the applicable OCM/OEM. SELLER, at its expense, shall provide reasonable cooperation to Prime in conducting any investigation regarding the delivery of Counterfeit Work or Suspect Counterfeit Work under this Contract.
- (f) This clause applies in addition to and is not altered, changed, or superseded by any quality provision, specification, statement of work, regulatory flowdown, or other provision included in this Contract addressing the authenticity of Work.
- (g) In the event that Work delivered under this Contract constitutes or includes Counterfeit Work, SELLER shall, at its expense, promptly replace such Counterfeit Work with genuine Work conforming to the requirements of this Contract. Notwithstanding any other provision in this Contract, SELLER shall be liable for all costs relating to the removal and replacement of Counterfeit Work including, without limitation, Prime's costs of removing Counterfeit Work, of installing replacement Work and of any testing necessitated by the reinstallation of Work after Counterfeit Work has been exchanged. The remedies contained in this paragraph are in addition to any remedies Prime may have at law, equity or under other provisions of this Contract.
- (h) SELLER shall include paragraphs (a) through (f) and this paragraph (h) of this clause or equivalent provisions in lower tier subcontracts for the delivery of items that will be included in or furnished as Work to Prime.

Real-World Examples of Subcontract Terms and Conditions – *Supply Chain*

Door No. 2:

COUNTERFEIT WORK

Procurement of Electronic Components.

- All Electrical, Electronic, and Electromechanical (EEE) components and those included in assemblies and subassemblies being delivered per this Subcontract must be purchased from either the original equipment manufacturer of the Products or an authorized distributor of the component. Seller shall maintain the manufacturer's certificate of conformance for each EEE component included in the assemblies and subassemblies being delivered per the Subcontract. At a minimum, the certificate of conformance shall include: (a) manufacturer's name and address; (b) manufacturer's and/or Buyer's part number; and (c) batch identification for the Products, including the date code, lot code, and serialization.
- Seller shall maintain a method of traceability that enables tracking of the supply chain back to the original equipment manufacturer of all EEE components included in assemblies and subassemblies being delivered under this Subcontract. This traceability method shall clearly identify the name and location of all supply chain intermediaries from the manufacturer to the direct source of the product for Seller.
- In the event that any EEE components required to be delivered under this Subcontract cannot be procured by Seller in accordance with this requirement, Seller shall submit written justification and request a deviation from this requirement prior to making delivery. If the request for deviation is accepted by Buyer, Buyer shall modify this Subcontract accordingly. Additional verification of the EEE component may be required prior to allowing the deviation from this requirement; such additional verification will include inspections and/or test activities, including but not limited to, visual inspection, X-ray inspection, destructive physical analysis, thermal cycle testing, and records of this activity prior to granting the deviation.
- Seller shall flow the substance of this clause, including this sentence, in all sub-tier subcontracts for Work performed under this Order

Real-World Examples of Subcontract Terms and Conditions – *Supply Chain*

Door No. 3:

COUNTERFEIT WORK

Only new and authentic materials are to be used in products delivered to Buyer. No counterfeit or suspect counterfeit parts are to be contained within the delivered product. Parts shall be purchased directly from the OCMs/OEMs, or through the OCM/OEMs Franchised Distributor.

Documentation must be available that authenticates traceability to the applicable OCM/OEM. Independent Distributors (Brokers) shall not be used without written consent from Buyer.

Real-World Examples of Subcontract Terms and Conditions – *Supply Chain*

Door No. 3 (con't).:

COUNTERFEIT WORK

Definitions:

- **Counterfeit** – a part that is an illegal or unauthorized copy or substitute of an OEM item; an item that does not contain the proper external or internal materials or components required by the OEM or that is not constructed in accordance with OEM specification; an item or component thereof that is used, refurbished or reclaimed but the Seller represents as being a new item; an item that has not successfully passed all OEM required testing, verification, screening and quality control but that Seller represents as having met or passed such requirements; or an item with a label or other marking intended, or reasonably likely, to mislead a reasonable person into believing a non-OEM item is a genuine OEM item when it is not. Parts that have been modified pursuant to a specific Buyer's Order requirement, such as refinished, up-screened, or up-rated parts that are properly identified as such are not considered suspect or counterfeit.

Real-World Examples of Subcontract Terms and Conditions – *Supply Chain*

Door No. 3 (con't).:

COUNTERFEIT WORK

Definitions:

- **Suspect Counterfeit** – A part in which there is an indication by visual inspection, testing, or other information that it may have been misrepresented by the supplier or manufacturer and may meet the definition of a counterfeit part.
- **OCM** – Original component manufacturer
- **OEM** – Original equipment manufacturer
- **Franchise Distributor** – A distributor with whom the OCM has a contractual agreement to buy, stock, re-package, sell and distribute its product lines. Franchised distributors normally offer the product for sale with full manufacturer's warranty. Franchising contracts may include clauses that provide for the OCM's marketing and technical support, failure analysis and corrective action, and exclusivity of inventory.
- **Independent Distributor (Broker)** – A distributor that purchases parts with the intention to resell them. Independent Distributors may be franchised for selected, but not all, product lines. For purposes of counterfeit risk mitigation, a distributor is considered independent when not franchised for the item to be procured.

Real-World Examples of Subcontract Terms and Conditions – *Supply Chain*

Door No. 4:

COUNTERFEIT WORK

- “Material,” as used in this clause, includes, but is not limited to, raw material, parts, items, components and end Items. “New,” as used in this clause, means previously unused or composed of previously unused materials allowing for typical in-factory or site use including, but not limited to, integration, installation, assembly, test, burn-in, training, troubleshooting, and rework as required.
- Unless Buyer specifies in writing otherwise, Seller shall deliver New Material under this contract that is fully warranted and does not contain any counterfeit material. Material verification includes documentation that Seller is purchasing product directly from the original equipment manufacturer or authorized franchised distributor. In addition, the New Material is not of such age or so deteriorated, due to storage factors, as to impair its usefulness or safety.

Real-World Examples of Subcontract Terms and Conditions – *Suspension of Work*

Door No. 1:

- Prime shall have the right to direct Subcontractor in writing to suspend all or any part of the work for a period of time not to exceed ninety (90) days, and for any further period as the parties may agree, unless extended by the Government. Upon receipt of the written notice, Subcontractor shall immediately comply with the terms of the notice and shall take all reasonable measures to mitigate the costs allocable to the suspended portion of the work.
- If work is suspended, an adjustment may be made in accordance with the provisions of Subcontract for any increase in the time and the cost (exclusive of profit) of performing this Agreement necessarily caused by such suspension prior to incurrence of costs in excess of the funded value, and this Agreement and/or the applicable Task Order may be modified in writing accordingly. In no event, however, is Prime obliged to increase the funded value; therefore, Subcontractor shall ensure costs never exceed the funded value.
- A claim shall not be allowed under this Section unless the claim, in an amount stated, is asserted in writing within thirty (30) days after Prime's issuance of the notice of termination of the suspension. Suspension may only be terminated by written notice from Prime, regardless of the expiration of the original or extended suspension period. When the suspension has been terminated, Subcontractor shall immediately commence performance, notwithstanding the fact that there is no agreement as to a revised schedule or the cost of completing this Agreement and/or the applicable Task Order.

Real-World Examples of Subcontract Terms and Conditions – *Suspension of Work*

Door No. 2:

- The Prime Contractor, at any time and in its sole discretion, may issue a written stop work notice at any time and for any or all portions of the Work. If work is stopped, the Subcontractor may seek an equitable adjustment pursuant to the Changes clause of this Agreement. In the event the Prime Contractor's customer rejects, disallows, or otherwise chooses not to pay the equitable adjustment, the Subcontractor shall be bound by such decision, and any claim or right to funds, or funds actually provided to Subcontractor shall be extinguished and/or promptly returned to the Prime Contractor.

Real-World Examples of Subcontract Terms and Conditions – *Suspension of Work*

Door No. 3:

H-33 Government Down Time

- From time to time, the Government (Installation Commander or designee) may decide to close all or part of the Government installation in response to an unforeseen emergency or other occurrence. Sample emergencies include, but are not limited to, adverse weather such as snow or flood, an act of God such as a tornado or earthquake, real world force protection measures, or a base disaster such as a natural gas leak or fire. Subcontractor personnel are "non-essential personnel" (except as otherwise determined in accordance with F-3 Place of Performance for purposes of any instructions regarding the emergency).
- The Subcontractor shall be officially dismissed upon notification of closure in accordance with paragraph d below. The Subcontractor shall promptly secure all government furnished property appropriately and evacuate in an expedient but safe manner.

Real-World Examples of Subcontract Terms and Conditions – *Suspension of Work*

Door No. 3 (con't.):

- With regard to work under the Subcontract, XYZ Company shall retain the following options:
 - XYZ Company may grant a time extension in each task order delayed by the closure equal to the time of the closure, subject to the availability of funds and the PoP limitations.
 - XYZ Company may forgo the work. The Subcontractor will not be paid for work not performed (for a Fixed Price effort a contract modification will be required).
 - XYZ Company may reschedule the work on any day mutually agreed to by both Parties.
 - XYZ Company may permit the Subcontractor to perform at the Subcontractor's facility or remote during the period of installation closure if work within the scope of the task order can be accomplished. This work must be authorized by XYZ Company and such authorization shall not be unreasonably withheld. Notify the XYZ Company Subcontract Administrator within 5 business days of return to work regarding the nature and scope of the work completed at the Subcontractor's facility. If approved, the Subcontractor shall be permitted to bill XYZ Company at the labor rates established for the task order, such approval shall not be unreasonably withheld.

Real-World Examples of Subcontract Terms and Conditions – *Suspension of Work*

Door No. 3 (con't.):

- Government Installation Closure Notification Procedures:
 - After an official decision to close the installation has been made by the responsible Government representative, the local radio and television stations shall be notified of the closure.
 - The contractor is directed to listen to or watch one of the local radio or television stations for notification of installation closures and delays. Unless otherwise notified by the XYZ Company Subcontract Administrator, the Subcontractor should follow instructions intended for non-essential personnel.
 - The Subcontractor may not receive any other form of notification of installation closure from the Government. The Subcontractor is responsible for notification of his or her employees and arrangement for any work off-Government site as described in c. (iv) above.
- If the decision to close all or part of the installation is made during the duty day, and the installation Commanders' decision is transmitted through official notification channels, the Subcontractor shall follow the instructions as given. Subcontractor personnel shall notify their Program Manager and act in accordance with the Program Manager's instruction.

Real-World Examples of Subcontract Terms and Conditions – *Suspension of Work*

Door No. 3 (con't.):

- Government Installation Closure Due to Non-Emergencies: The Government (Installation Commander or designee) may elect to close all or part of the installation for non-emergency reasons such as a time-off award, base open house, etc. In the event of a non-emergency installation closure, the Directorate/division/branch Functional Area Evaluator (“FAE”) and the Prime Contractor Program Manager shall choose a course of action within the following options.
 - If there is a need for the service during installation closure and a Government employee will be present, the Subcontractor may continue on-site work. Subcontractor shall bill XYZ Company at the labor rates identified in the task order contract.
 - If there is a need for work during installation closure but either a Government employee will not be present or access will not be available, the Subcontractor may work at the Prime Contractor/Subcontractor's facility provided meaningful work may be accomplished. The Subcontractor shall certify to XYZ Company by letter within 5 business days of returning on-site the nature and scope of the work completed. The Subcontract shall bill XYZ Company at the labor rates specified in the task order contract.
 - If there is no need for the service during the scheduled installation closure, the Subcontractor shall not work on or off-site. XYZ Company may grant a time extension in each task order delayed by the closure equal to the amount of time of the closure, subject to the availability of funds and the PoP limitations.
 - Subcontractor Personnel are authorized to attend training (e.g., mandatory training, safety, Anti-Terrorism, etc.) and charge their time as allowable hours under their task order.
- Any equitable adjustment in the form of additional costs or schedule extensions will be handled utilizing the appropriate Changes clause.

Real-World Examples of Subcontract Terms and Conditions – *Suspension of Work*

Door No. 4

H-9 STOP WORK ORDER

- In accordance with FAR 52.242-15 and ALT I, ABC Company may at any time, by written notice to Subcontractor's contractual and technical representatives named in the Agreement, instruct Subcontractor to stop all or any part of the work called for by this Agreement. ABC Company shall send the stop work notice by e-mail. The work stoppage shall become effective immediately after issuance of said notice or as otherwise stated in the notice.
- Upon receipt of such notice, Subcontractor shall take all reasonable steps to mitigate costs during the period of work stoppage.

Real-World Examples of Subcontract Terms and Conditions – *Removal of Personnel*

Door No. 1:

- Prime retains the right to request removal of any personnel with or without cause.
 - For those personnel removed for cause, removal may be immediate. For the purposes of this provision, “cause” shall be defined as a violation of military or civilian law, or willful misconduct, or whom Prime deems, in its reasonable discretion, to be unsatisfactory or unprofessional, or when expressly requested by the Government to remove such personnel, and replace them with personnel of Subcontractor, Prime or another subcontractor.
 - Upon such request, Subcontractor shall use all reasonable efforts to replace within five (5) business days such removed individual with a substitute employee of Subcontractor acceptable to Prime, having skills and training suitable to perform the Services.
- For those personnel whose removal is requested without cause, Prime shall submit to the Subcontractor, a written removal request, which shall contain an explanation of the reason(s) for the removal request. After discussion and mutual agreement between Prime and Subcontractor, the Subcontractor personnel may be removed.

For any Subcontractor personnel who are removed for cause, or who are removed without cause, Subcontractor shall retain the right to staff those positions as part of the work share agreement with Prime, as defined in the SOW, for a reasonable period of time, and subject to the above “Substitution of Personnel” and “Key Personnel” Sections. Positions for any of Subcontractor’s removed personnel shall be re-staffed under provisions above.

Real-World Examples of Subcontract Terms and Conditions – *Removal of Personnel*

Door No. 2:

Prime Contractor has the right to disapprove or remove any Subcontractor personnel for good cause shown including, but not limited to, the Government requesting such action, misuse of Prime or Government property, unethical actions, violation of any law or regulation, any behavior that is a security risk, any behavior that is disruptive or inconsistent with successfully performing the Prime Contract (in the sole discretion of the Prime). Subcontractor shall, within five (5) calendar days, provide alternative qualified personnel to perform of the Subcontract. Prime Contractor may, at its discretion, staff any positions or provide the services required of the removed or disapproved Subcontractor personnel in the event Subcontractor fails to timely provide qualified personnel to perform in accordance with this provision.

Real-World Examples of Subcontract Terms and Conditions – *Removal of Personnel*

Door No. 3:

XYZ Company, in its sole discretion, may require Subcontractor to remove any employee whose performance or conduct is deemed unacceptable. Subcontractor shall bear all costs associated with such removal, including any cost for replacement of any personnel. Subcontractor shall immediately remove such personnel (unless otherwise ordered by the PM in writing) and take any other action requested by XYZ Company. Subcontractor shall, within five (5) business days, replace such personnel with substitute qualified personnel.

Real-World Examples of Subcontract Terms and Conditions – *Anti-poaching*

Door No. 1:

ARTICLE 2.15 PERSONNEL AND NONSOLICITATION

- **No Solicitation.** With the exception of Prime, who was hired by ABC Company prior to Subcontract negotiation and execution, it is expressly agreed that PRIME will not, directly or indirectly, solicit for hire (by enticing, encouraging, offering special inducements, or otherwise) any employee(s) of Subcontractor who is/are associated with efforts under this Agreement during the term of this Agreement and for a period of two (2) years from the termination or expiration thereof. Likewise, it is expressly agreed that Subcontractor will not, directly or indirectly, solicit for hire (by enticing, encouraging, offering special inducements, or otherwise) any employee(s) of ABC Company who is/are associated with efforts under this Agreement during the term of this Agreement and for a period of two (2) years from the termination or expiration thereof. However, both parties recognize that success of the program will, in part, be dependent upon the continuity of the employees currently supporting the program. ABC Company and Subcontractor will work together to identify those current Subcontractor employees associated with the program that are critical for success of the contract that may be transitioned to ABC Company for continued performance under the program. The transition of any Subcontractor employee(s) to ABC Company will be mutually agreed to in writing by the Subcontractor, ABC Company and the employee(s).
- Notwithstanding the foregoing, any rights of either Party granted by law shall not be limited, restricted or encumbered nor shall either Party be restricted from advertising in the media not specifically directed at employees of the other party or from hiring individuals who respond to general advertisements or make independent inquiries for employment. Publication of open positions in any media of general circulation and requisitions to recruiting firms for open positions will not constitute solicitation or inducement.
- Subcontractor may use independent contractors to perform the Services hereunder contingent on written approval by ABC Company. Subcontractor retains responsibility to PRIME for any Services performed by such contractors under this Agreement to the same extent as if such Services were performed directly by Subcontractor's employees.

Real-World Examples of Subcontract Terms and Conditions – *Anti-poaching*

Door No. 2:

NON-SOLICITATION.

ABC Company provides services to government clients throughout the world. ABC Company's most valued asset is its intellectual capital. ABC Company will provide the Subcontractor with access to its trade secrets, Proprietary Information and business strategies. As a result, the Subcontractor will obtain invaluable expertise and intimate knowledge of ABC Company's operations. Therefore, any competition by the Subcontractor with ABC Company would cause Company to suffer irreparable harm.

During the Term of this Subcontract, and for one year thereafter, Subcontractor shall not, directly or indirectly, (i) employ, engage or seek to employ or engage any employee or contractor of ABC Company unless such ABC Company employee or contractor (A) resigns voluntarily (without any solicitation or involvement from Subcontractor or any of its affiliates), in which case Subcontractor hereby agrees to refrain from employing, engaging or seeking to employ or engage any such ABC Company employee or contractor for a period of one (1) year following such person's resignation, or (B) is terminated by ABC Company after the date hereof, and (ii) causing or attempting to cause any such ABC Company employee or contractor to resign or sever his, her or its relationship with ABC Company.

During the Term of this Subcontract, and for one year thereafter, Subcontractor shall not, directly or indirectly, sell, license or otherwise provide any services or products related to any follow-on contract to the Prime Contract and/or that are competitive with the services and products that can be provided by Company or its subcontractors under the Prime Contract.

Real-World Examples of Subcontract Terms and Conditions – *Anti-poaching*

Door No. 2 (con't.):

Notwithstanding the above, Subcontractor agrees that any non-compete or non-solicitation language in Subcontractor's agreement(s) with its employees or subcontractors shall not prohibit ABC Company or any of its affiliates from soliciting and hiring its employees or subcontractors nor prohibit any of Subcontractor's employees or subcontractors from soliciting and/or accepting employment with ABC Company or its affiliates, provided the employees or subcontractors are no longer employed with or engaged to perform services for Subcontractor. Subcontractor agrees that should there be any conflict in the terms or conditions in this Section of the Subcontract Agreements, Subcontractor agrees that the language in this Section of the Subcontract shall govern and that Subcontractor agrees to not to enforce such agreements against its employees or subcontractors. Subcontractor waives its right to file any claims, whether tort or contractual in nature, against ABC Company or its affiliates related to ABC Company's employment of its employees or subcontractors.

Subcontractor acknowledges that if Subcontractor breaches this Section, ABC Company will suffer irreparable injury not compensable by money damages alone and therefore will not have an adequate remedy at law. Accordingly, ABC Company shall be entitled to injunctive relief to prevent or curtail any such breach, threatened or actual. This Section shall survive expiration or termination of this Agreement.

Real-World Examples of Subcontract Terms and Conditions – *Anti-poaching*

Door No. 3:

NON-SOLICITATION.

During the period of this Agreement and for two (2) years following termination of this Agreement, neither Party will solicit for employment or hire the personnel of the other Party about whom such Party learns or otherwise becomes aware as a result of this proposal process for the purposes of inducing them to join such Party's employ during the course of this Agreement and any resultant subcontract, and for one year thereafter, without the prior written agreement of such other Party. Either Party, however, may approach or have employment discussions with employees of the other Party who respond to or apply for positions offered through the normal process of general public advertisement (including, without limitation, advertisement over the Internet) or who makes a direct inquiry as to employment with the other Party without having been personally solicited or recruited.

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 1:

ARTICLE 2.2 NONDISCLOSURE

- A. In performing this Subcontract, the parties may be required to make available to the other party certain information which they may consider confidential and/or proprietary. Additionally, the parties may gain access to certain information which may be considered confidential and/or proprietary to Client. Confidential and/or Proprietary Information is defined as any information disclosed in a written or tangible form clearly marked as such or bearing any other appropriate notice indicating the sensitive nature of such information, or if disclosed orally or visually, identified as confidential and/or proprietary at the time of disclosure. Confidential and/or Proprietary information includes without limitation, information related to patents, research, development, computer software, software source code, specifications, designs or processes, pricing, trade secrets, customer lists and technical and business information and know-how of ABC Corporation, Subcontractor, and/or of Client. The party who discloses such information is considered the “Disclosing Party” for purposes of this Article. The party who receives such information is considered the “Receiving Party” for the purposes of this Article. In addition, the preparation and specifications in the Statement of Work shall in all instances be treated as proprietary, unless and until disclosed publicly with Subcontractor’s permission. The parties agree to safeguard and hold in strictest confidence all Confidential and/or Proprietary Information.

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 1 (con't.):

- B. If during the performance of this Subcontract, the Subcontractor is provided access to ABC Company's computers, computer systems, and information systems (including, but not limited to, e-mail, internet, intranet), (collectively "computer business systems"), then Subcontractor agrees to treat information received from these computer business systems as Confidential and/or Proprietary. Access to these computer business systems may be withdrawn at any time, with or without reason, with or without notice. ABC Company reserves the right to monitor usage of its computer business systems. Subcontractor agrees that it will use ABC Company's computer business systems in an appropriate manner, will not violate the security of Confidential and/or Proprietary information of ABC Company and its Client, and will not use these computer business systems in a manner inconsistent with this Subcontract. Subcontractor shall inform its employees who are given access to these computer business systems of the restrictions contained in this Paragraph and shall obtain such employees' written agreement that they will be bound by the restrictions contained in this paragraph. If requested by ABC Company, Subcontractor shall provide ABC Company copies of its employees' written agreements. Subcontractor shall indemnify and hold ABC Company harmless for any breaches of this Article 2.2 by Subcontractor's employees or by Subcontractor.
- C. All information disclosed under this Subcontract shall remain the property of the Disclosing Party, and, at the Disclosing Party's request, shall promptly be returned or destroyed by the Receiving Party.
- D. Each party agrees that it shall make Confidential and/or Proprietary Information available to its officers, employees, agents, representatives, and affiliates only on a need-to-know basis, and that all such persons to whom Confidential and/or Proprietary information is made available will be made aware of the confidential and sensitive nature of such Confidential and/or Proprietary Information, and will be required to agree to hold such Confidential and/or Proprietary information in confidence under terms substantially identical to the terms hereof.

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 1 (con't.):

- E. The Receiving Party shall use the same degree of care and secrecy to protect the confidentiality of information disclosed under this Subcontract as it uses to protect its own Confidential and/or Proprietary Information, and, in any event, shall not use less than a reasonable degree of care and secrecy to protect the confidentiality of such information. Each party shall instruct its officers, employees, agents, representatives, and affiliates of their obligations to maintain the confidentiality of Confidential and/or Proprietary Information obtained from the other party under this Subcontract. In addition, each party shall be responsible for any actions on the part of its respective officers, employees, agents, representatives, and affiliates for any improper disclosure of Confidential and/or Proprietary Information, which is disclosed to such individual.
- F. Information disclosed under this Subcontract that the Disclosing Party, in good faith, regards as confidential and/or proprietary shall be clearly marked or orally designated as such or bear any other appropriate notice indicating the sensitive nature of such information.
- G. Both parties recognize that violation of this Article may give rise to irreparable injury to the other party, inadequately compensable in damages, and that, accordingly, the other party may immediately terminate this Subcontract, in whole or in part, and seek and obtain reasonable, injunctive relief from the breach of the other party's obligations under this Article, in addition to any other legal remedies which may be available.
- H. The parties agree not to make use of nor disclose to third parties any Confidential and/or Proprietary Information except in performance hereunder or as expressly authorized in writing by ABC Company, Subcontractor, or, where Client's Proprietary Information is being used or disclosed, by Client. The parties' obligations under the terms of this provision shall survive termination of this Subcontract for a period of three (3) years, except for trade secrets, software source code, and specifications for which there shall be no time limit.

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 1 (con't.):

- I. Notwithstanding anything contained in paragraphs A and H above, Confidential and/or Proprietary Information shall exclude and the obligations imposed within this Article shall not extend to information that
- 1) at the time of disclosure, is in the public domain; or
 - 2) after disclosure hereunder, enters the public domain, other than information that entered the public domain by breach of this Subcontract; or
 - 3) was obtained by a party from a third party without knowledge by such party of any restriction on such third party's right to disclose this information; or
 - 4) was obtained by a party through independent research without use of or reliance upon Confidential and/or Proprietary Information; or
 - 5) was independently known to the Receiving Party at the time of receipt without restriction; or
 - 6) is disclosed with the written approval of the Disclosing Party; or
 - 7) was or is independently developed by the Receiving Party; or
 - 8) becomes known to the Receiving Party from a source other than the Disclosing Party who is legally entitled to such information without breach of this Subcontract or any other contract; or
 - 9) is disclosed more than three (3) years after it was first received under this Subcontract, except for trade secrets, software source code, and specifications for which there shall be no time limit.
- J. Subcontractor shall require its lower tier subcontractors to execute a subcontract or a nondisclosure agreement which contains language substantially similar, as applicable, to that set forth in Article.

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 2:

From time to time either party may provide its own confidential business and technical information to the other party in connection with the work to be performed by such party under Work Statements issued hereunder. Such information shall be designated as confidential upon or prior to disclosure. In addition, the preparation and specifications of the Deliverables shall in all instances be treated as confidential, unless and until disclosed publicly by mutual agreement of the parties. All confidential written materials shall be marked with the legend "[NAME OF DISCLOSING PARTY]–Confidential." Each party shall use its best efforts to prohibit any use or disclosure of the disclosing party's confidential information, except as necessary to perform work under the Work Statements issued hereunder.

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 3:

6.1 Confidential Information. For purposes of this Agreement “*Confidential Information*” means (a) any non-public data or information disclosed by one party (the “*Discloser*”) to the other party (the “*Recipient*”) that is marked “confidential” or “proprietary” at the time of disclosure or which the Recipient should reasonably know to be confidential given the nature of the data or information and the circumstance of disclosure; (b) the specific terms and conditions of this Agreement; and (c) the Super Software and any documentation related thereto.

6.2 Exceptions. The obligations set forth in Section 6.3 will not apply to any information that: (a) is or becomes generally known to the public through no fault of or breach of this Agreement by the Recipient; (b) is rightfully known by the Recipient at the time of disclosure without an obligation of confidentiality; (c) is independently developed by the Recipient without use of the Discloser’s Confidential Information; or (d) is rightfully obtained by the Recipient from a third party without restriction on use or disclosure.

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 3 (con't.):

6.3 Obligations. Except as expressly permitted by this Agreement, during the term of this Agreement:

- a) For a period of five (5) years after receipt of Confidential Information under this Agreement, except for trade secrets, software source code, and specifications for which there shall be no time limit, a Recipient shall hold Confidential Information in confidence. Upon expiration of this protection period, all limitations this Agreement imposes on use or disclosure of Confidential Information will cease, except that for trade secrets, software source code, and specifications the limitations shall continue in perpetuity. A Recipient shall not disclose Confidential Information to any nonparty during the protection period and shall never disclose trade secrets, software source code, and specifications, despite any earlier termination of this Agreement. A Recipient shall not use Confidential Information that it receives under this Agreement for design or manufacture without first obtaining the written permission of the originating party.
- b) The Recipient shall not disclose the Discloser's Confidential Information except (i) to the employees or contractors of the Recipient to the extent that they need to know that Confidential Information for the purpose of performing the Recipient's obligations under this Agreement, and who are bound by confidentiality terms with respect to that Confidential Information no less restrictive than those contained in this Section 6.3; or (ii) as required to be disclosed by law, to the extent required to comply with that legal obligation, provided that the Recipient will promptly notify the Discloser of such obligation;
- c) The Recipient shall use the Discloser's Confidential Information only for the purpose of performing Recipient's obligations under this Agreement; and

Real-World Examples of Subcontract Terms and Conditions – *Confidentiality of Proprietary Information*

Door No. 3 (con't.):

- d) The Recipient shall use all reasonable care in handling and securing the Discloser's Confidential Information, and employ all reasonable data security measures that the Recipient ordinarily uses with respect to its own confidential information of similar nature and importance. In addition, each party shall be responsible for any actions on the part of its respective employees for any improper disclosure of confidential and/or proprietary information, which is disclosed to such employee. The parties agree that the unauthorized disclosure of information protected under this Agreement shall cause material and irreparable harm to the party who owns or has the right to disclose the Proprietary Information, who shall have recourse to all available remedies, at law or in equity, to compensate for any and all damages suffered as a result of the disclosure.
- e) Disclaimer of License. Proprietary Information is and remains the property of the originating party. The receiving party does not receive any right or license under any patents, copyrights, trade secrets, or the like of the originating party.

Real-World Examples of Subcontract Terms and Conditions – *Dispute Resolution*

- A. In the event of any disagreement regarding performance under or interpretation of this Subcontract, the parties shall attempt to reach a negotiated resolution. Notwithstanding the parties' desire to resolve disputes through negotiation, in the event that immediate action is required to protect a party's rights under the Subcontract, the aggrieved party may take whatever immediate action is appropriate to protect its rights, to include, but not limited to, injunctive relief. Nothing contained in this Subcontract or in any other document related hereto shall have the effect of requiring either party hereto to consider, resort to, participate in, or abide by any arbitration process or mechanism, or any device or arrangement of a nature or intent similar to arbitration.
- B. Any dispute that arises under or is related to this Subcontract and which relates to a matter that gives the ABC Company recourse against the Agency under the Prime Contract or applicable law may be resolved, by agreement of the parties, in accordance with the Disputes clause of the Prime Contract as follows:
 - 1. Subcontractor shall give ABC Company a fully supported claim concerning any such dispute within ninety (90) days after the claim accrues, but in no event later than final payment under this Subcontract, or Subcontractor shall be barred from any remedy for such claim.
 - 2. Subcontractor shall cooperate fully with ABC Company in prosecuting any such dispute, and ABC Company agrees to diligently pursue such claim and Subcontractor shall be bound by the outcome unless: (i) ABC Company does not afford Subcontractor a reasonable opportunity to participate in the resolution of the dispute, (ii) ABC Company settles or takes other action to prejudice Subcontractor's rights concerning the dispute, without Subcontractor's written consent, or (iii) ABC Company determines to discontinue its own prosecution of the dispute, it must afford Subcontractor an opportunity to continue to prosecute the dispute in ABC Company's name.
 - 3. ABC Company and Subcontractor shall each bear their own costs of prosecuting any such dispute.
 - 4. Nothing in this Subcontract grants Subcontractor a direct right of action under the Disputes clause of the Prime Contract.
- C. Unless otherwise pre-empted by State law, this Subcontract will be governed in all respects by the substantive laws of the Commonwealth of Virginia without regard to its conflict of laws or choice of law provisions.

Real-World Examples of Subcontract Terms and Conditions – *Dispute Resolution*

- Any dispute arising under this subcontract that is not settled by agreement of the parties, or pursuant to the administrative relief provided for in the following paragraphs, may be settled by recourse to appropriate legal remedies in accordance with the laws of the State of Maryland. Notwithstanding other provisions in this subcontract, any decision of the Contracting Officer under the prime contract, which binds ABC Company shall bind both ABC Company and Subcontractor to the extent that it relates to this subcontract, provided (1) ABC Company promptly notifies Subcontractor of this decision, and (2) if requested by Subcontractor, ABC Company appeals the decision in accordance with the disputes clause of the prime contract.
- Any decision on the appeal, or any other decision of the Government under the prime contract that is binding on ABC Company and cannot be appealed under the disputes clause of the prime contract, shall also bind ABC Company and Subcontractor to the extent that it relates to this subcontract, provided ABC Company promptly notifies Subcontractor of the decision and, if Subcontractor requests, brings suit or files a claim, as appropriate, against the Government. A final judgment in the suit shall be conclusive upon ABC Company and Subcontractor.
- If ABC Company prosecutes any appeal, suit or claim under this clause, Subcontractor shall be permitted to participate fully in the prosecution for the purpose of protecting its interest. If requested by ABC Company, Subcontractor shall assume the burden of prosecuting for ABC Company any appeal, suit, or claim initiated by ABC Company at Subcontractor's request. Each party shall cooperate fully in assisting the other party in the proceedings. ABC Company agrees that unless Subcontractor consents it will not enter into a settlement agreement with the Government or take any other action that would prejudice Subcontractor's right under this clause.
- Pending any decision, appeal, suit, or claim pursuant to this clause, Subcontractor shall proceed diligently with performance of this subcontract. All costs and expenses incurred by Subcontractor and ABC Company in prosecuting any appeal or suit, the Subcontractor shall pay claim initiated by ABC Company at Subcontractor's request. The rights and obligations of ABC Company and Subcontractor under this subcontract shall survive completion of, and final payment under, this subcontract.
- No determination by ABC Company of a question affecting Subcontractor's rights shall be considered final or conclusive, or prejudice any legal rights of Subcontractor, without Subcontractor's consent. Any provision in this subcontract requiring determinations or approvals of the Contracting Officer are intended to implement the requirement of the prime contract and ABC Company agrees that any question requiring this determination or approval will be referred to the Contracting Officer as a matter arising under the prime contract.

Real-World Examples of Subcontract Terms and Conditions – *Dispute Resolution*

Either Party may litigate any dispute arising under or relating to this Subcontract Agreement. Such litigation shall be brought and jurisdiction and venue shall be proper only in a state or U.S. District Court in Arlington, VA. Pending resolution of any such dispute by settlement or by final judgment, the parties shall proceed diligently with performance.

- Good-Faith Negotiations. If any dispute arises under this agreement that is not settled promptly in the ordinary course of business, the parties shall seek to resolve any such dispute between them, first, by negotiating promptly with each other in good faith in face-to-face negotiations. If the parties are unable to resolve the dispute within twenty (20) business days (or such period as the parties shall otherwise agree) through these face-to-face negotiations, then any such dispute shall be resolved in the following manner.
- Excluded Causes. If the only dispute relates to unpaid fees, costs or other charges, the party owed the money may commence legal action in court for outstanding monies due under this Subcontract.
- Binding Alternative Dispute Resolution. Any remaining dispute arising under this Subcontract shall be resolved by using Alternative Dispute Resolution (ADR) procedures, which can hopefully avoid or reduce the acrimony resulting from adversarial litigation. If the efforts through face-to-face negotiations in paragraph 1., above, are not successful, the parties will initiate a mini-trial (ADR) process with selection of a neutral advisor, who will schedule a mini-trial to occur approximately thirty (30) business days after the selection of the neutral advisor. The neutral advisor will introduce an impartial opinion approximately 15 business days after completion of the mini-trial. Throughout the ADR process, the neutral will provide an element of mediation with the goal of having the Parties resolve the dispute without issuance of the impartial opinion. However, if the Parties do not reach agreement, the impartial opinion rendered by the neutral advisor will be binding and judgment upon that opinion may be entered in any court having jurisdiction thereof. The Parties may elect to use an arbitration/mediation service, which specializes in timely ADR, such as Endispute or the Judicial Arbitration and Mediation Services, Inc. All expenses such as the cost of the neutral advisor or the hearing facility will be shared equally.

DISPUTES

Both Parties shall attempt in good faith to resolve disputes arising hereunder. Pending resolution of any dispute, Subcontractor agrees to proceed diligently with the performance of this Subcontract. This Subcontract shall be governed by the laws of the State of Maryland. Each party hereby waives any objections or right as to lack of jurisdiction or venue, or inconvenient forum.

Real-World Examples of Subcontract Terms and Conditions – *Security*

VI. SECURITY REQUIREMENTS.

Performance under this Subcontract may involve access to classified material, work in a security area, or both. Subcontractor will ensure that its contract personnel comply with the requirement to obtain the minimum personnel security investigations as prescribed by the Contract(s). The subcontractor will work with PRIME to ensure that the pre-employment screening process for contract personnel includes the appropriate investigations and that each contract employee has the appropriate questionnaires and forms to be completed. All completed forms will be reviewed by the Subcontractor and forwarded directly to the Military Treatment Facility for processing. The Subcontractor understands that, while contract personnel may be allowed to temporarily occupy non-critical sensitive positions pending National Agency Check (NAC), personnel will be immediately removed from the position if at any time the NAC receives unfavorable adjudication, or, if other unfavorable information that would affect the NAC becomes known.

Real-World Examples of Subcontract Terms and Conditions – *Security*

43.3 SECURITY REQUIREMENTS FOR GOVERNMENT INFORMATION SYSTEMS DATA

- The contractor/SELLER is strictly prohibited from disclosing any information derived from Government Information Systems. This prohibition applies to extracts or summaries of such information, and includes oral, written, or electronic media disclosures. The subject databases include, but are not limited to, financial databases, program budget information databases, and procurement information databases. In limited circumstances, the Government Contracting Officer, through the PRIME, may authorize the contractor's/subcontractor's disclosure of such information when disclosure is necessary to the successful completion of the contract. The contractor's unauthorized disclosure of Government database information could result in the disqualification, debarment or suspension of the contractor. Such an unauthorized disclosure may also constitute a criminal violation of the fraud or information disclosure provisions of Title 18 of the United States Code. In addition, the unauthorized disclosure of information related to the national defense may constitute a violation of the "espionage" provisions of Title 18 of the U.S. Code, Section s 793, 794, and/or 798, or Title 50 of the U.S. Code, Section 783.
- The contractor shall provide the PRIME Technical Representative a list of applicable employees prior to personnel gaining access to any Information Systems.
- Information Systems is defined as any telecommunications and/or computer-related equipment or interconnected system or subsystems of equipment that is used in the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmitting, or receiving of voice and/or data, and includes software, firmware, and hardware.

Flow-downs

Real-World Examples of Subcontract Terms and Conditions – *Flow-Down Provisions*

Flow-down provisions: Contract provisions from a government Prime contract that have been inserted into a subcontract to be executed during the Prime contract's performance period.

- May assign responsibility to the Subcontractor that are similar to the responsibilities the Prime owes to the government.
 - Notably, certain clauses in the subcontract give the government control, despite the lack of privity between the Subcontractor and the government.

Real-World Examples of Subcontract Terms and Conditions – *Flow-Down Provisions*

- Either Mandatory or Necessary/Essential Clauses
 - Mandatory clauses must be flowed down
 - Necessary/Essential clauses flowed down in the Prime's interest
- Prime contractors are tasked with ensuring the appropriate flow-down provisions are included in the subcontract.

Real-World Examples of Subcontract Terms and Conditions – *Mandatory Flow-Down Provisions*

Determining Mandatory Flow-Down Provisions

- Status-based: Small business
- Value-based: Greater than the simplified acquisition threshold
- Type-based: A cost-reimbursement-type contract
- Territory-based: Contracts performed CONUS, OCONUS

How Mandatory Flow-Down Provisions Are Prescribed

- Prescribed by clause

Real-World Examples of Subcontract Terms and Conditions – *Mandatory Flow-Down Provisions*

Examples of Flow-Down Provisions

Door No. 1:

Incorporation by Reference. This Subcontract incorporates, to the fullest extent possible, all Federal Acquisition Regulation (“FAR”) or other clauses required by the Prime Contract and/or applicable law to be included in this Subcontract, as well as all provisions of the Prime Contract applicable to Subcontractor. Prime and Subcontractor will comply with all such clauses with the same force and effect as if they were given in full text herein. Subcontractor assumes toward Prime all of the obligations and responsibilities that Contractor, by those instruments, assumes toward the Agency. Where the words “Contracting Officer” and “Government” appear in the Prime Contract or any clauses incorporated by reference into the Prime Contract, such terms shall be deemed to refer to Prime’s Project Manager and Prime, respectively, as applicable. Where the word “Contractor” appears in the Prime Contract, or in any clauses incorporated by reference into the Prime Contract, such word shall be deemed to refer to Subcontractor. Where the word “subcontractor” appears in the Prime Contract, or in any clauses incorporated by reference into the Prime Contract, such word shall be deemed to refer to Subcontractor’s subcontractors, if any.

Real-World Examples of Subcontract Terms and Conditions – *Mandatory Flow-Down Provisions*

Examples of Flow-Down Provisions

Door No. 2:

Federal Government Flow-down Clauses. The Subcontractor shall be subject to and bound by those FAR, FAR Supplement, or Agency Acquisition Regulations and the Procurement Integrity Act clauses and provisions which are binding by law upon all federal subcontractors and their subcontractors, including but not limited to all mandatory flow-down clauses. Such clauses and provisions are made a part of this Agreement and the Subcontractor agrees to notify ABC Company in writing of any known, potential, or actual conflicts of interest or violations of law or regulations, which may arise hereunder. For the convenience of the Subcontractor, the applicable federal government flow-down clauses are provided as Attachment [___], and are incorporated by reference, with the same force and effect as if they were given in full text.

Real-World Examples of Subcontract Terms and Conditions – *Mandatory Flow-Down Provisions*

Door No. 3:

ANNEX TO NEGOTIATION MATRIX MANDATORY FLOW-DOWN CLAUSES

STANDARD COMMERCIAL FIXED PRICE TERMS AND CONDITIONS AND FAR FLOW-DOWN PROVISIONS

ITEM 2 – FAR, DFARS AND/OR NFS CLAUSES APPLICABLE IF THIS ORDER IS PLACED UNDER BUYER CONTRACT CONTAINING SUCH CLAUSES

In addition to the provisions of Item-1, the following provisions shall apply as required by the terms of Buyer's Government Contract or by operation of law or regulation. Buyer is flowing down to Seller certain provisions and clauses from the Federal Acquisition Regulation (FAR), Department of Defense FAR Supplement (DFARS), NASA FAR Supplement (NFS) and FAA Acquisition Management System (AMS) (all herein "USG Clauses"). These USG Clauses are hereby incorporated by reference, as applicable, and in the manner set forth below (including any parenthetical information and Numbered Notes). USG Clauses inapplicable to the performance of this Order under Buyer's Government Contract are self-deleting. If the date and/or substance of a USG Clause is different than the date or substance of the clause incorporated in Buyer's Government Contract, then the date and/or substance of the clause incorporated in Buyer's Government Contract shall apply instead. The Parties hereby agree to amend this ITEM 2 to include any additional or revised USG Clauses incorporated in Buyer's Government Contract that are applicable to the performance of this Order. The Parties shall handle any such amendments of this ITEM 2 under Article 11 "Changes and Equitable Adjustments" of this Order. Seller shall flow down to its lower-tier subcontractors all applicable USG Clauses and any other requirements of this Order and applicable law so as to enable and ensure that Buyer and Seller comply with all applicable requirements of Buyer's Government Contract.

Real-World Examples of Subcontract Terms and Conditions – *Mandatory Flow-Down Provisions*

Door No. 3 (con't.):

It is intended by the Parties that these USG Clauses shall apply to Seller in such manner as is necessary to reflect the position of Seller as a subcontractor to Buyer, and to insure Seller's obligations to Buyer and to the Government, and to enable Buyer to meet its contract obligations to the Federal Government. Consequently, in interpreting and applying USG Clauses flowed down to Seller, and as context requires, the terms "Contractor" and "Offeror" shall mean Seller, the term "Contract" shall mean this Order, and the term "Government", "Contracting Officer" and equivalent phrases shall mean Buyer and/or Buyer Representative. However, as an exception to the foregoing, the terms "Government" and "Contracting Officer" do not change in the following circumstances:

- a) in the phrases "Government Property," "Government-Furnished Property," and "Government-Owned Property;"
- b) in the Patent Rights clauses incorporated therein, if any;
- c) when a right, act, authorization or obligation can be granted or performed only by the Government or a Contracting Officer or his/her duly-authorized representative;
- d) when title to property is to be transferred directly to the Government;

Real-World Examples of Subcontract Terms and Conditions – *Mandatory Flow-Down Provisions*

Door No. 3 (con't.):

- e) when access to proprietary financial information or other proprietary data is required, except as otherwise provided in this Order; and
 - f) where specifically modified in this Order.
- USG Clauses flowed down by Buyer to Seller pursuant to this provision may require submission of certificates. All such required representations and certifications made by Seller in connection with flow down of USG Clauses, including all such certifications submitted by Seller with its offer, are hereby incorporated in this Order by reference. Seller shall, with respect to applicable USG Clauses flowed down pursuant to this provision, furnish to Buyer (or directly to the Government upon request of Buyer) any certificate required to be furnished by any USG Clause and any certificate required by any further U.S. law, ordinance, or regulation with respect to Seller's compliance with the terms and provisions of U.S. laws, ordinances, or regulations. As used in this paragraph, the word "certificate" shall include any plan or course of action or record keeping function, as, for example, a small business subcontracting plan for which flow-down is required.
 - Seller shall indemnify and hold Buyer harmless from and against any price reduction in Buyer's Government Contract, as well as Buyer's reasonable attorney fees and other direct costs to defend Government Contract claims when said reduction is attributable to the failure of Seller or Seller's subcontractors to properly discharge applicable duties under the Truth in Negotiation Act and Cost Accounting Standards clauses incorporated by reference in accordance with this provision.
 - The notation [M] after a FAR Clause name (or Alternate) indicates that the FAR *requires* the clause to be flowed down to subcontracts, or requires the contractor to certify the subcontractor's compliance.

Subcontracting Issues in the Real World:

Case Studies

Case Study: Case 1

Trade secrets:

- *Navar, Inc. v. Fed. Bus. Council*, 291 Va. 338, 345 (2016) – Case is regularly cited in government contractor disputes.
 - A jury awarded FBC \$1.25 million for breaching an NDA and teaming agreement and misappropriating trade secrets.
 - The trial court set aside the verdict for breach of the teaming agreement because it was unenforceable but upheld the remaining verdict.
 - Navar appealed.

Case Study: Case 2

Trade secrets:

- *Appian v. Pegasystems*:
 - Very recent – May 2022, jury verdict for over \$2 billion out of the Fairfax Circuit Court stemming from trade secret misappropriation. Jury found Pegasystems's misappropriation was willful and malicious.
 - Appian (Virginia based) alleged that Pegasystems (Mass. based) hired an employee of a government contractor from 2012 to 2014 to access Appian's software to improve its own software and compete. Appian alleged that Pegasystems internally referred to this employee as a “spy.”
 - Pegasystems has stated that it plans to appeal
 - Trade secret verdict amounts are on the upswing.

Case Study: Case 3

- *Ala. Aircraft Indus. v. Boeing Co.*, 319 F.R.D. 730 (N.D. Ala. 2017); *Ala. Aircraft Indus. v. Boeing Co.*, No. No. 20-11141, 2022 U.S. App. LEXIS 4039, 2022 WL 433457 (11th Cir. Feb. 14, 2022)
 - Boeing and AAI have been in litigation since 2011, when AAI claimed it provided Boeing with proprietary information under a 2005 teaming agreement to jointly bid on a contract, only to have Boeing pull out of the deal and win the nearly \$1.2 billion contract on a solo bid—causing AAI to go out of business.
 - AAI alleged multiple breach of contract theories, including breach of the teaming agreement, breach of the nondisclosure agreement, and misappropriation of trade secrets.
 - The district court dismissed the trade secret misappropriation claim in 2012.
 - On the NDA claim, AAI alleged that Boeing breached the parties' nondisclosure agreement by using AAI's proprietary pricing information in preparing its solo bid.
 - AAI asserted evidence including an apples-to-apples comparison of the offerors' pricing, which was consistent with Boeing's misuse of AAI proprietary information, to gain a competitive advantage over AAI in framing Boeing's solo bid pricing. AAI also showed that Boeing allowed personnel who were "contaminated" with knowledge of AAI's proprietary pricing information to prepare their bid.
 - In March 2020, the jury awarded AAI \$1.3 million on the breach of the NDA claim, and another \$788,510 for breach of the teaming arrangement.
 - This year, the Eleventh Circuit held that the district court had wrongly dismissed AAI's trade secret misappropriation claim based on an improper conclusion regarding the statute of limitations. This means AAI can now pursue its \$100 million claim against Boeing a decade later.

Case Study: Case 4

Subcontract negotiations –

- *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, No. 1:12CV396, 2012 WL 3841416 (E.D. Va. Sept. 4, 2012) – This case is ALWAYS cited in any litigation related to teaming agreement into subcontract negotiations gone wrong.
 - **Complaint:** IE (subcontractor) sued Cyberlock (prime) for fraudulent inducement to enter the teaming agreement, unjust enrichment, and breach of the teaming agreement based on Cyberlock's refusal to execute a subcontract.
 - **Facts:**
 - Cyberlock, a prime and subcontractor entered into a teaming agreement that stated if the prime (IE) won the contract, it would "execute a subcontracting agreement to provide [Cyberlock] 49% of the Prime Contract."
 - In reliance on that, Cyberlock asserted that it provided IE with its breakdowns of labor categories, rates and hours. Cyberlock alleged that IE did not intend to execute a subcontract and that IE "intended to push out Cyberlock at the time of the award of the prime contract or soon after." IE emailed a draft subcontract to Cyberlock containing terms different than those in the teaming agreement (including workshare).
 - Cyberlock proposed revisions, and IE refused all but two minor revisions. Cyberlock alleged that IE falsely represented that certain provisions of the subcontract were required by the USG.

Case Study: Case 5

- *CGI Fed. Inc. v. FCI Fed., Inc.*, 295 Va. 506 (2018)
 - CGI, a large business, and FCI, a small business, entered a teaming agreement to compete for a Department of State (“DOS”) small business set aside. The first teaming agreement indicated CGI would receive approximately 45% of the work. FCI submitted a proposal to DOS with only 38% of workshare to CGI – but CGI never saw the proposal. DOS told FCI that it would need to propose less work to CGI. FCI then misled CGI to believe that its revised proposal included 41% workshare for CGI – and the parties executed an amended teaming agreement for 41%. However, FCI’s first amended proposal actually included only 35%. Its second amended proposal further reduced the workshare to 18%.
 - DOS awarded FCI the contract, and the final offer to CGI was for 22% workshare. CGI worked the contract at that percentage for approximately 6 months, then terminated due to a staffing dispute. CGI claimed breach of contract for FCI’s failure to offer CGI 41% workshare.
 - CGI brought claims for fraudulent inducement (teaming agreement), breach of contract (teaming agreement), and unjust enrichment.

Case Study: Case 6

- **Poaching**

- *Beacon Assocs., Inc. v. Apprio, Inc.*, 308 F. Supp. 3d 277 (D.D.C. 2018).
 - Plaintiff-Subcontractor sought preliminary injunction to ensure it could remain competitive.
 - Apprio had a prime contract with the Federal Emergency Management Agency (FEMA). Apprio subcontracted with Beacon. Beacon provided 40 employees for FEMA's Center for Domestic Preparedness in Alabama. The subcontract prohibited solicitation of each other's employees for the term of the agreement and for a period after of 1 year.
 - On February 27, 2018, Apprio terminated its subcontract with Beacon and required Beacon employees to stop work immediately. On February 28, 2018, the 40 FEMA Center Employees from Beacon began working for Apprio. Apprio claims that all the employees applied to the job posting on the afternoon of February 27.
 - The court found that Beacon was likely to succeed on the merits because Apprio deliberately induced or attempted to induce Beacon's employees to leave their employment with Beacon to join Apprio in violation of the subcontract's anti-poaching provisions. Apprio did so by offering retention bonuses that some Beacon employees immediately signed. The court granted the preliminary injunction.

Case Study: Case 7

- **Poaching (con't.)**

- *Advantor Sys. Corp. v. DRS Tech. Servs., Inc.*, 678 F. App'x. 839 (11th Cir. 2017).
 - Appeal from Summary Judgment. Summary Judgment was improper because there was a question of whether the subcontract would have been awarded if employees had not been poached.
 - Advantor designed and manufactured intrusion detection systems (IDS) and provided on-site maintenance and training for the security systems it had installed. Advantor had previously sold its IDS to United States Air Force Bases. The Space and Naval Warfare Systems Command (SPAWAR) decided to consolidate the maintenance of security systems through one contract. Advantor was not eligible to bid for the consolidated contract.
 - DRS solicited bids from manufacturers and entered negotiations with Advantor to subcontract with DRS. During these negotiations, DRS and Advantor entered an NDA that had a no direct hire clause. The clause says that “during the term of the agreement and for a one-year period thereafter” the parties cannot “knowingly or actively seek to hire any employee of the other Party” except through indirect or general solicitation.
 - After receiving a quote from Advantor, DRS decided its bid would be priced more competitively without including Advantor as a subcontractor. DRS decides to eliminate Advantor from the bid. In its communications with SPAWAR it continued to call Advantor a partner.
 - After winning the contract and beginning work, DRS hired 3 Advantor employees from an online posting. DRS received 1,357 applications, from which DRS hired 50 employees. The three employees contacted DRS on their own. The three employees had agreements with Advantor that contained confidentiality and non-compete provisions. Advantor claims that DRS knew of the provisions and intentionally induced the employees to breach them. Advantor claims this is tortious interference with contract.
 - Emails exchanged between DRA and SPAWAR showed that to meet its obligations under the contract, DRS either had to hire Advantor as a subcontractor or hire Advantor-trained techs. The court says Summary Judgment was improper. There was a question that Advantor would have been hired if their employees had not been poached – and this needed to be reviewed for the tortious interference claim.

Best Practices:

There Will Be Peace in the Valley Today.

Best Practices

- Develop company-approved templates for common types of contracting relationships
- Develop and implement a negotiation matrix
- Seek to have a balanced approach to the Prime-Subcontractor relationship
- Ensure clear and continual communication with your partners

ABC COMPANY SUPPLY NEGOTIATION MATRIX

OVERVIEW

- We created this Negotiation Matrix to assist ABC Company (“ABC”) in negotiating some of the standard articles contained in its Defense Supply Agreements. We chose the articles set forth in this Negotiation Matrix based upon: 1) a detailed review of the content of ABC’s standard articles; 2) our own experience concerning likely exceptions, negotiations, and/or possible revisions to certain standard clauses; and 3) proposed revisions to certain ABC articles provided by two representative suppliers.
- The Negotiation Matrix comprises four columns: 1) the ABC current standard article that is likely to require negotiation and/or revision; 2) potentially relevant government (FAR/DFARS/NFS) clauses, if any, that may be implicated by the article; 3) and some recommended alternatives to ABC’s standard article or “fallback” positions in descending order of preference.
- This Negotiation Matrix is intended merely as a guide to identify potential issues and assist in formulating a reasonable strategy for negotiations and possible revisions to ABC’s standard Articles. It is not a substitute for obtaining legal advice and assistance concerning a specific agreement. Questions or concerns regarding any revisions to ABC standard Articles in a specific agreement should be directed to appropriate ABC in-house counsel.

ABC ARTICLES LIKELY SUBJECT TO REVISION	CONTRACT TYPE	POTENTIALLY RELEVANT GOVERNMENT CLAUSES	ALTERNATIVE POSITIONS AND/OR POTENTIAL REVISIONS
13. COMPLIANCE WITH THE U.S. FOREIGN CORRUPT PRATICES ACT	Same across all contracts.		Non-Negotiable. ABC risks substantial liability by removing this provision.
14.GRATUITIES/ KICKBACKS	Same across all contracts.	FAR 52.203-3 Gratuities	Non-Negotiable. ABC risks substantial liability by removing this provision.

ABC ARTICLES LIKELY SUBJECT TO REVISION	CONTRACT TYPE	POTENTIALLY RELEVANT GOVERNMENT CLAUSES	ALTERNATIVE POSITIONS AND/OR POTENTIAL REVISIONS
16. TERMINATION	Similar across contracts.	FAR 52.249-8 Default (Fixed-Price Supply and Service); 52.249-2 Termination for Convenience of the Government; DFARS 252- 259-7002 Notification of Anticipated Termination or Reduction	<p>Seller's Concerns: Seller may seek to limit terminations for default and/or available remedies in the event of default.</p> <p>1) Revise 16(a)(4) by adding the word “material” between the words “other” and “obligations,” and deleting the words “or fails to make progress, so as to endanger performance.”</p> <p>2) Revise 16(c)(2) by adding the word reasonable between “Seller” and “moneys.”</p> <p>Seller Concerns: Seller may seek to limit situations where Buyer can terminate the contract for convenience as well as the limits on recovery.</p> <p>1) Consider tailoring the provision to provide that ABC is liable for payment of designated Non-Cancelable/Non-returnable work up to and including the date of termination for convenience, but that for other than such specially performed work, ABC's only obligation is payment of a mutually agreed-upon <u>restocking or service charge</u>.</p>
17. DELAYS AND NOTICE OF LABOR DISPUTES	Same across all contracts.	FAR 52.249-8 Default; 52.222-1 Notice to the Government of Labor Disputes	<p>Seller's Concerns: Seller may be concerned that there are no apparent limits to liability with respect to government acts.</p> <p>1) Tailor the Article to include acts of the government, whether in its sovereign or contractual capacity.</p> <p>2) Increase time period to 90 days.</p>

Provision or Clause	Latest Version	Prescribed In	Provision or Clause	Incorporation by Reference Authorized?	Subcontract Flowdown: Mandatory? (M = Mandatory; R = Recommend; N = No)	Subcontract Flowdown: Threshold? (Either ">" or dollar value, or No mention)	Subcontract Flowdown: Apply to Commercial Item Subcontracts? (Y = Yes; N = No)	Subcontract Flowdown Commentary	Fixed-Price Supply	Cost-Reimbursement Supply	Fixed-Price Service	Cost-Reimbursement Service	Time & Material/Labor Hours	Indefinite Delivery	Key
52.202-1 Definitions.		2.201	C	Yes	R		Y	Recommended: It ensures similar understandings of defined terms.	R	R	R	R	R	R	R = Required A = Required when applicable O = Optional I = Revision
52.203-2 Certificate of Independent Price Determination.		3.103-1	P	No	R			Recommend flowdown if included in prime contract.	A		A			A	
52.203-3 Gratuities.		3.202	C	Yes	N			Recommend flowdown if included in prime contract.	A	A	A	A	A	A	
52.203-5 Covenant Against Contingent Fees.		3.404	C	Yes	N			Recommend flowdown if included in prime contract.	R	R	R	R	R	R	
52.203-6 Restrictions on Subcontractor Sales to the Government.		3.503-2	C	Yes	M	>\$150,000		Mandated by Subsection (c) of the clause.	R	R	R	R		R	
Alternate I	(OCT 1995)	3.503-2	C	Yes	M	>\$150,000	Y	Applies to commercial item acquisitions.							

Panelists



Paul A. Debolt

Partner | Venable
padebolt@Venable.com
202.344.8384



Kendall Lucas

Counsel | Deloitte
kelucas@deloitte.com



Christian Scott

Counsel | Vectrus
Christian.Scott@Vectrus.com



Taylor S. Chapman

Partner | Venable
tschapman@Venable.com
+1 703.905.1409



Dismas Locaria

Partner | Venable
dlocaria@Venable.com
+1 202.344.8013

© 2022 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

