We've written before that prime contractors are responsible for program execution and that risk cannot be transferred to the program subcontractors. We stand by that position.

The challenge of program management is to execute the program while complying with a host of contract requirements, many of which have no obvious connection to the program's objectives, and some of which may actually impede efficient program execution. As a rule, program managers don't get paid to ensure that all clause requirements are met; they get paid to execute the program. In general, that means they get paid to deliver on time, on budget, and in accordance with quality requirements and technical specifications. This is sometimes called "The Iron Triangle" or "The Triple Constraint" of program management, and it generally defines the expected contractual and programmatic outcomes.

You will note that "compliance with Section I clause requirements" is not generally considered to be a significant program constraint, even though we would argue that a compliance failure might be more catastrophic than a breach of of any of the more traditional constraints.

A contract that is behind schedule or over budget is a problem contract, and a contract whose deliverables don't pass inspection or don't meet technical specifications is similarly a problem contract (and possibly a candidate for a default termination). Those are not desirable situations and they might affect the ability to win future awards, but those situations are essentially limited to the instant contract and do not tend to have significant implications for the enterprise as a whole. They are, if you will, small problems that are (relatively) easily managed.

In contrast, contracts where clause requirements are not met are not really perceived as being problem contracts. Clause breaches are not typically viewed as being small problems, limited to the instant contract and easily managed. Thus, it is typically not the program manager who is blamed for noncompliance with the requirements of one of the many Section I clauses. Instead, the contractor's business systems are blamed, or the human resource management policies, or something similar. The enterprise itself has breached the clause requirements, not just the instant contract.

Thus, a noncompliant contract is not a problem contract; it is a symptom of a problem contractor.

Consequently, program managers (perhaps correctly) focus on the risks for which blame will attach to them personally, while other risks (such as contract clause compliance) are handled by matrixed enterprise functions such as "contract management" or "contract compliance" or "government accounting". Program managers tend to focus on their Triple Constraint model and they let the back-office folks worry about the administrivia. So long as cost, schedule, and quality/technical results are within tolerances, the program managers are generally happy.

They may not care to look too closely at how those results were obtained. That's not evil: that's just human nature.

Human nature being what it is, and program managers being who they are, can lead to situations such as the one described in **this article** published by the New York Times in 2011. It described how one prime contractor in Afghanistan paid one "Mr. Arafat" $1 million "to keep them safe" from attacks by insurgents on its construction crews. The NY Times wrote –

The vast expenses and unsavory alliances surrounding the highway have become a parable of the corruption and mismanagement that turns so many well-intended development efforts in Afghanistan into sinkholes for the money of American taxpayers … At their worst, the failures have financed the very insurgents that NATO and Afghan forces are struggling to defeat. Some American officials and contractors involved in the project suspect that at least some of the money funneled through Mr. Arafat made its way to the Haqqani group, a particularly brutal offshoot of the Taliban.

Critics say that payoffs to insurgent groups, either directly or indirectly, by contractors working on highways and other large projects in Afghanistan are routine. Some officials say they are widely accepted in the field as a cost of doing business, especially in areas not fully under the control of the United States military or the Afghan government. As a result, contracting companies and the American officials who supervise them often look the other way.

The NY Times article discussed how the many levels of subcontracting contributed to difficulty in determining how the USAID's funds were ultimately spent, and whether or not some of those funds ended-up in the hands of the Taliban. Indeed, that has long been a concern of DoD policy-makers, who have complained that they lack visibility into subcontractor costs because those contracts are between the prime contractor and the subcontractor (or between two lower-tier subcontractors). The United States is not considered to be a party to those subcontracts and thus it has very limited rights. (One important reason for mandatory flow-down clauses is to ensure that the US government has some rights being asserted in the otherwise B2B subcontracts.)

Indeed, the US government's remedy for defective pricing by a subcontractor is to adjust the prime contract. Similarly, the US government's remedy for a subcontractor's CAS noncompliance is to adjust the prime contract. That approach makes the government customer whole, and then leaves it up to the prime contractor to be reimbursed by the subcontractor—if it can collect.

The notion that the US government is not a party to the subcontracts beneath the prime contract level is called "privity of contract." The doctrine limits the rights of the US government in those B2B subcontracts, and it limits the government customer's visibility into lower-tier subcontract actions. The lack of privity and the associated limited contractual rights has long been an issue that Federal policy-makers have looked to address.

And perhaps now they have.

In Bob Antonio's Fifteenth annual **analysis** of the National Defense Authorization Act, we noticed a section called "Never Contract with the Enemy". Without researching too much, we believe that the new law is driven by the situation described in the 2011 NY Times article we quoted above. The explanatory statement for the new law states that it will --

… provide the authority to terminate or void a contract, grant, or cooperative agreement when it is found that funds received under that contract, grant, or cooperative agreement are being provided directly or indirectly to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

Section 842, promulgated under the "Never Contract with the Enemy" section of the 2015 NDAA, is entitled "Additional Access to Records." It requires the DoD to promulgate a new contract clause in "each covered contract, grant, and cooperative agreement of an executive agency." That new clause would address the following requirements –

(2) CLAUSE- The clause described in this paragraph is a clause authorizing the head of the executive agency concerned, upon a written determination pursuant to paragraph (3), to examine any records of the contractor, the recipient of a grant or cooperative agreement, or any subcontractor or subgrantee under such contract, grant, or cooperative agreement to the extent necessary to ensure that funds, including goods and services, available under the contract, grant, or cooperative agreement are not provided directly or indirectly to a covered person or entity.

(3) WRITTEN DETERMINATION- The authority to examine records pursuant to the contract clause described in paragraph (2) may be exercised only upon a written determination by the contracting officer, or comparable official responsible for a grant or cooperative agreement, upon a finding by the commander of a covered combatant command (or the specified deputies of the commander) or the head of an executive agency (or the designee of such head) that there is reason to believe that funds, including goods and services, available under the contract, grant, or cooperative agreement concerned may have been provided directly or indirectly to a covered person or entity.

(4) FLOWDOWN- A clause described in paragraph (2) may also be included in any subcontract or subgrant under a covered contract, grant, or cooperative agreement if the subcontract or subgrant has an estimated value in excess of $50,000.

As we see it, a signed public law has just directed DoD rule-makers to promulgate a new contract clause that will, upon written determination by a contracting officer, overcome the legal doctrine of privity of contract. It will give the government customer audit rights and visibility into how funds are being used by lower-tier subcontractors and subgrantees. While the clause will be limited to contracts performed overseas in warzones, it establishes new rights not previously provided to the US Government.

It will be interesting to see what the US Government and its auditors do with the new rights given to them by Congress.