

We're not lawyers but this week we attended a briefing where lawyers spoke. And one of the briefing topics was drafting a subcontract.

It caught our attention because—as you know if you've been reading this blog for a decent amount of time—we think subcontracting is a pretty important topic and one that has been given short shrift in the government acquisition environment. Reason being, of course, is that the Federal government doesn't do subcontracting. Oh sure, contracting officers must review consent packages and CPSR reviewers must review contractor files; but generally the topic of subcontracting is a mystery to most of the Federal acquisition team. As a result, it's kind of a mystery to the contractor side as well—even though that's supposed to be a core competency of contractor acquisition.

As you know if you've been reading this blog for a decent amount of time, we think subcontractor management is the *single most important factor* that determines program outcomes. In today's environment, where often more than half of a program's content is sourced from the supply chain via subcontract, a failure to effectively manage those subcontractors almost inevitably leads to program problems.

Effective subcontractor management starts with subcontract formation.

You could go further back in time, if you'd like. You could say that effective subcontractor management starts with subcontractor source evaluation and selection. Or you could say that effective subcontractor management starts with choosing the right teaming partner and putting the right teaming agreement language into place. Those statements wouldn't be wrong. But we're going to start with subcontract formation because that's what the attorneys focused on.

The attorneys segregated the subcontracts into different categories. They identified commercial item subcontracts and non-DoD subcontracts and DoD subcontracts. Each of those categories were subject to different prime contract flow-down requirements. The attorneys identified mandatory flow-down clauses for each type.

But that's not all. As the attorneys pointed out, there are many non-mandatory clauses that a prime contractor would want to flow down to its subcontracts. Those are clauses that, if something happens at the prime level, the prime would want to have its subcontractors take parallel actions. Without those clauses there is nothing that compels the subcontractors to take such actions—potentially leaving the prime contractor in a world of hurt.

We are reminded of a situation years ago, where the prime contractor failed to include a Termination for Convenience clause in its firm, fixed-price subcontract. And then—*whoops!*—th e prime contract was T4C'd and litigation inevitably followed. One of the (many) problems was that the prime needed to submit a termination settlement proposal within 12 months and the subcontractor was not cooperating about providing actual costs incurred because the parties were in litigation. Suffice to say that the subcontractor had sufficient leverage to obtain a very nice settlement.

The attorneys also discussed additional clauses that would be helpful to the prime. These clauses might not be found in the prime contract at all, but it would be in the prime's best interests to include them in its subcontracts. Some clauses might be found in a prime's "standard set" of terms and conditions, but others might not be obvious. The value added by a skilled and experienced subcontract administrator is that they have learned what clauses need to be added in order to protect the prime. If you are a prime contractor, you will want to make sure you have a cadre of skilled and experienced subcontract administrators. It will be worth your while.

On the other hand, subcontractors also have rights and interests that need to be protected. Their "sell side" administrator needs to be just as skilled and experienced as the prime's "buy side" administrator. While the prime is busy flowing-down mandatory (and non-mandatory) clauses and adding in additional clauses intended to protect it, the subcontractor is similarly busy editing and/or deleting some of those clauses because they impose overly onerous duties that the prime hasn't (yet) paid enough for. One attorney we spoke with called it "the battle of the forms" and he noted that if the parties authorized the subcontractor to begin work before the battle was over, then that created some interesting challenges with respect to post-award

disputes. If the parties hadn't agreed on the final subcontract language then it would be hard for a trier of fact to interpret the contract. Indeed, it might be possible to say that there was no subcontract, because there hadn't been a meeting of the minds regarding rights and duties.

All in all, subcontract administration is its own discipline, one with its own body of knowledge. That's not to say that an individual should specialize only in that body of knowledge and exclude knowledge of prime contract matters or basic procurement matters. As my old boss Bill used to say, he wanted a team of acquisition professionals who were well-rounded and skilled in every aspect of Government contracting, because then he had a versatile team who could solve whatever problem came up.

So you might want to consider whether Bill was right, and whether you should develop your people so that they are knowledgeable about the entire spectrum of government contracting—or whether you want experts in a single discipline. Either way, what you don't want is people who don't know what they're doing or why they're doing it. Unfortunately, that description fits too many people, both in and outside of government.