

Federal Contracting For Small Business: An Introductory "How-To" Guide to Mitigate Becoming a Government Contractor Statistic



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17 Must Have Items to Include in Subcontracts

- The following slides will provide some items to include in your subcontracts to pass down some of the risk to your subcontractors.
- **Because of the level of risk involved in these types of ventures, you must consider venture partners who can absorb part of the risk. This does a couple things:**
 - **Mitigates the risk off of you**
 - **Allows your surety and bank to breathe a little easier**



17 Must Have Items to Include in Subcontracts

- Ensure your subcontract fully describes the work to be performed:
 - The subcontractor can adequately insure his risk
 - There are no disputes during performance which endanger the work
 - The work can be performed properly without change orders or claims

17 Must Have Items to Include in Subcontracts

- **Payment Terms**

- **Fees**

- **What kind of contract are we dealing with – understand it**

- T&M, Cost Reimbursable or fixed fee

- **Invoicing**

- **At Completion, progress payments, retention**

- **Payment terms**

- **Net 7 days, 30, pay when paid (FAR Rules)**



17 Must Have Items to Include in Subcontracts

- **Access to the site**
 - **This may sound silly but it can lead to a change order modification that can drive up costs and lower your profit.**
 - **Discuss what the working hours, holidays and weekend hour schedules might be.**
 - **Many states have laws regarding overtime that differ**
 - **E.g. California requires overtime if you exceed 8 hours/day, Georgia only if you exceed 40 hours/week.**



17 Must Have Items to Include in Subcontracts

- **Confidentiality**

- **If this is a DOD or DOE site are there clearance requirements**

- Is a Q or TS clearance requirement involved?
- Is the subcontractor to be privy to your firm's confidential business or bid information?

- **What about the client's site layout?**

- DOE has strict records management requirements
- Check with the RFP and determine if you need to cover this requirement



17 Must Have Items to Include in Subcontracts

- Ownership of work materials
 - When do materials transfer
 - This may seem silly but what happens in the event there is a fire at the site
 - Vandalism
 - Check your insurance
 - What is covered on Government property
 - Who is securing the site, may be excluded if you did not secure it
 - Do the materials transfer when delivered, affixed or at acceptance?

17 Must Have Items to Include in Subcontracts

- **Delays and Changes**
 - **How will you manage delays**
 - Delays can be caused by many reasons
 - Are they the fault of the sub
 - Material delivery delay
 - Weather or other acts of God
 - Compensable by money or time
 - Whose fault
 - Government, prime or sub
 - Procedures for claiming
 - **Changes**
 - Do we simply give the sub our clause from the FAR Clauses or draft our own



17 Must Have Items to Include in Subcontracts

- **Insurance**
 - **Besides general and professional liability**
 - Will the subcontractor have employees
 - Make sure they have employment compensation insurance and automobile insurance
 - **Make sure the subcontractor has adequate bonding to cover the proportionate share of the risk of their part of the job.**



17 Must Have Items to Include in Subcontracts

- **Risk Allocation of the Job**
 - How are you allocating the risk of the job?
 - This affects the price
- **What about the procedure for filing a claim?**
 - Do you agree to support a claim against the Government under any circumstances, forward it to the KO, or want to review it first. Will you assist with drafting it?
- **Be sure to address Quality of Workmanship issues?**
 - What do expect so far as quality of workmanship



17 Must Have Items to Include in Subcontracts

- Warranty

- What is the warranty in the prime contract
 - Do we want to pass down the same warranty requirement
 - Do we want the subcontractor to warranty longer
- Who will carry the manufactures warranties
 - Who will be responsible for installation on manufacturers warranties
 - Most only cover replacement of defective parts
- When does the warranty begin to run
 - Does it begin when the subcontractor finishes or when the entire job is accepted
 - This could create an issue for the prime if the sub is released too soon



17 Must Have Items to Include in Subcontracts

- Indemnity Clause
 - To what extent will the subcontractor be required to indemnify the prime
 - Is it only for the sole acts of the subcontractors employees or for any acts of the sub's employees
 - What about the standard of care – simple negligence, gross negligence, reckless acts, or any acts
 - What about cross indemnification
 - The subcontractor may expect the prime to indemnify them
 - This is common; especially if the prime is small and the sub is large and has bargaining position.



17 Must Have Items to Include in Subcontracts

- General Limitations of Remedies
 - Try and limit the Rights of redress for the Subcontractor
 - Quite often there will be a provision in a contract that allows a subcontractors rights to be dragged out – this creates uncertainties for extended periods of time: Define the avenue of redress
 - Pick the pathway
 - President of Subcontractor and the Vice President of Prime, if that fails then binding arbitration under AAA rules in Memphis, TN.
 - Do not let in, “if this fails sub may use any other avenues available under law.”



17 Must Have Items to Include in Subcontracts

- Governing Laws
 - We always want the Home Court Advantage if we can get it
 - This is generally covered in two places
 - The forum selection clause
 - Disputes shall be resolved in Atlanta Georgia in the Superior Court of Fulton County
 - And the Choice of Law Provision
 - This contract shall be governed under the laws of the Great State of Georgia



17 Must Have Items to Include in Subcontracts

- Termination
 - Termination generally appears in two forms
 - Termination for Convenience or Default
 - We want to draft our own – if possible
 - The Government T4C Clause is good for us. We want to be able to terminate our sub for any reason whatsoever – in contract to the Government T4C – the sub will want to put in that we can only T4C if the we receive a T4C
 - The Termination for Default should cover our costs to cover in the event the sub fails to perform to avoid a walk-off of the job



17 Must Have Items to Include in Subcontracts

- Assignment
 - An odd topic but be sure to cover this
 - There are several types of assignments
 - Assignment of the actual work to someone else
 - The Government typically requires consent to subcontract so you need to approve further assignment to third tier subs
 - Assignment of Claims
 - This is often a FAR Clause included in Prime Contracts
 - It is a type of contract financing whereby the right to payment may be assigned to a trust or other financing institution.
 - Do you allow the sub to do this – adverse sign of responsibility???



17 Must Have Items to Include in Subcontracts

- Dispute Resolution
 - A very important topic often ignored
 - This is when “The Honeymoon is Over”
 - Oh My Gosh – We are not Gonna Make Money on This Job!!!”
 - Be sure to have this ready, up front, in the contract.
 - If you are big and he is small, take advantage of it throughout the contract. Control the location, forum selection choice of law, choice of manner – AAA Arbitration or to the court, jury or judge alone – all these things can be decided before you even begin work.
 - I always add that if my side makes an offer before trial or arbitration and you win and receive less than I offered, you have to pay my attorney’s fees! These are often up to half the costs!



17 Must Have Items to Include in Subcontracts

- How do we serve notices on each Party?
 - This sounds onerous but first let's define a notice.
 - It is every change, modification or request you make on the sub that might be important later
 - This always becomes important in a dispute later. Keep good records – critical in this process.
 - Always follow up with an email.
 - If it is anything that effects the work, follow the notification process in the contract


17 Must Have Items to Include in Subcontracts

- FAR Flow-Downs
 - Every Prime Contract with the Federal Government has pages of FAR provisions attached to it
 - Inevitably one of two things are done with them
 - They are left out of the subcontract
 - They are cut and pasted in total to the contract
 - Do Not Do This!
 - Some are mandatory but most are not!
 - The FAR Provisions should be analyzed to decide which provisions favor us to flow down and which ones we will tailor a bit to more favor us, or leave them out completely if we want.



Free Download

Proposal Preparation Checklist



PROPOSAL PREPARATION CHECKLIST

1. RFP/DOCUMENTS

- Request or download a copy of the bid documents - IFB or RFP.
- Assemble your internal review team to review the request/invitation.
- Review the entire package for missing pages or sections.
- Determine if additional information is required and prepare questions for submission to Contracting Officer (CO).
- Set up a tracking date to receive the CO's responses
- If satisfied with the responses, have team review and begin preparing a plan for responding to the solicitation.

2. TEAMING PARTNERS

- Identify potential teaming partners.
- Determine type of teaming arrangement.
- Prepare teaming agreements and negotiate.
- Receive signed agreements from partners. Do you have a subcontracting plan requirement?
- Have you clearly defined each Team-member's level of participation on the project?
- Have you determined the level of effort needed to prepare the bid in terms of staff?
- ...In terms of consultants?

Download at:

<http://www.roseconsultinglawfirm.com>

Resources

Proposal Preparation Checklist



We Build Our Relationships
One Client at a Time

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This list can be downloaded from our resources page along with a lot of other useful contracting material. We do not use bots or other tracking material and it is free for your use. Please log on to:

<http://www.roseconsultingllc.org/resources.html>

