
Presented by:
David A. Rose
Principal Attorney
Rose Consulting Law Firm

http://www.roseconsultinglawfirm.com
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
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• 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.
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- 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.”
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• 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 f 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
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- **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!
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• 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 contact
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

Download at:
http://www.roseconsultinglawfirm.com

Resources

Proposal Preparation Checklist
17 Must Have Items to Include in Subcontracts

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