

# Subcontracting Smart:

## *Labor Relations and Subcontracting Plan Obligations Between Prime Contractors and Subcontractors*

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# About PilieroMazza

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for more than 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on business, corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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**Legal Advisor Newsletter** – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

**Weekly Update** – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

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# Labor Relations



# Labor & Employment

## General Obligations

- Prime is on the hook
- Flow down all obligations to the subcontractor
- Comply with all applicable labor laws
  - FLSA, SCA, DBA, OFCCP
- Subcontracts usually have a general warranty
- But what else?



# Non-Solicitation Provisions

- Protect your assets
- The risk of employee poaching
- How important are specific people to your workshare?
- Subcontract or employment contract?



# Beyond the Flow Down: OFCCP, Service Contract Act, Davis Bacon Act

- Clauses must be flowed down in full
- Attach any wage determination
- Labor classification selections – proceed with caution
- Investigations and withholding
- Compliance challenges





# Investigations

- Employee complaints of discrimination, harassment, whistleblower
  - Prime - subcontractor
  - Subcontract - government
- What information do you share?
- Risks



# Fair Pay Safe Workplaces

- Executive Order 13673
- Proposed Rule, 80 Fed. Reg. 30.547
- Applies to government contractors and subcontractors with contracts over \$500,000
- Requires disclosure of violations of 14 different federal employment laws and state equivalents
- New contracts beginning in 2016
- 3-year look back requirement
- Contractors disclose corrective actions related to violations
- Prime contractors responsible for subcontractors



# 14 Federal Labor Laws:

- Fair Labor Standards Act
- Occupational Safety and Health Act
- Migrant and Seasonal Agricultural Worker Protection Act
- National Labor Relations Act
- Davis-Bacon Act
- Service Contract Act
- Executive Order 11246 of Sept. 24, 1965 (EEO)
- Family and Medical Leave Act
- Title VII of the Civil Rights Act
- Section 503 of the Rehabilitation Act of 1973 (prohibits disability discrimination)
- Vietnam Era Veteran's Readjustment Assistance Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Executive Order 13658 of Feb. 12, 2014 (contractor minimum wage)
- State law equivalents



# Fair Pay Safe Workplaces

- Prime must evaluate responsibility of subcontractor
- Willful, serious or pervasive violations
- Practical implications
- Impact of information sharing on competition
- Alternatives



# Indemnification Provisions

- Consider costs outside of direct damages
  - Investigation costs
  - Attorneys' fees
- Evaluate the language of the clause
- Limitations: responsibility goes beyond this clause



# Small Business Subcontracting Plans



# Subcontracting Plan Obligations

- Contractor's responsibilities
  - Promote the government's objective to maximize small business participation in federal procurements  
FAR Subpart 19.7
    - FAR 52.219-8, Utilization of Small Business Concerns
    - FAR 52.219-9, Small Business Subcontracting Plan
    - SBA's rules at 13 C.F.R. § 125.3



# Subcontracting Plan Obligations

- Types of Plans
  - Individual
  - Master
  - Commercial
  - Department of Defense Test Program for Comprehensive Small Business Subcontracting Plan (Comp Plan)





# Compliance with Subcontracting Requirements

- Reporting obligations (FAR 52.219-9)
- Notification requirement for non-use of SBs
- Vendor identification
- Diversity
- Good faith efforts
- Implementation of policies and procedures



# Why You Should Focus on Compliance

- Increased activity on Capitol Hill focusing on subcontracting plan compliance
- Number of SBA audits are up
- Contractual requirement for prime contractors
  - Potential breach issues
  - Adverse past performance implications
  - Evaluation factor for future procurements
  - Potential of liquidated damages assessment



# Best Practices

- Establish realistic goals upfront
- Limit your responsibility for flow down and oversight of subcontracting plans by subcontractors
- Know your exclusions from the subcontracting base
- Thoroughly vet your SB vendors
  - Current, written self-certifications of SB and socio-economic status
  - Independent verification
- Written subcontracting plan manual



# SBA Audits

- Occurring with greater frequency
- Performed by SBA regional offices
  - Procurement Center Representatives (PCR)
  - Commercial Market Representatives (CMR)
- Contracting agencies and DCMA may also be involved
- Reviews may be fulsome or targeted



# What to Expect During the Audit Process

- SBA will send a letter disclosing the date they will visit your office
  - Usually lasts 1-2 days
  - Coordinate with Small Business Liaison Officer (SBLO)
- You must submit information to CMR/PCR prior to visit:
  - All subcontracts to SBs within the last year
  - All subcontracts to LBs over \$150,000 within the last year
  - All blanket purchase agreements entered into within last year



# What to Expect During the Audit Process

- SBA will select samples from each list, and will want to see the necessary supporting documentation
- Must complete SBA compliance review checklist
- SBA wants to see good faith efforts to comply with plan



# Audit Follow Up

- Given a rating at end of the audit process
  - If rating is “Marginal” or “Unacceptable,” SBA requires submission of corrective action plan
  - Must submit it to both SBA and agency
  - Failure to follow up with CA plan may result in penalties/liquidated damages assessment
- SBA will follow up with visits to ensure that you are implementing CA plan measures



# Upcoming Subcontracting Developments





# Limitations on Subcontracting Rule

- Proposed rule issued in December 2014; final rule expected in 2016
- Proposals for subcontracting plans include:
  - Before prime identifies SB by name in its proposal or subcontracting plan, prime must notify SB in writing
  - Penalties for primes that do not provide a written corrective action plan or demonstrate good-faith effort to comply:
    - May be considered for liquidated damages under FAR § 52.219-16
    - Material breach of contract
    - Must be considered in any past performance evaluation
    - Referral to SBA IG if contractor makes a false statement about plan



# Lower-Tier Subcontracting Rule

- Implements 2014 NDAA
- Proposed rule issued in 2015; final rule by end of 2016?
- Would allow prime contractors with individual subcontracting plan to receive credit for awards to SBs at any subcontracting tier
- Unresolved question of how to avoid “double-counting” at lower tiers
- Increased obligations to monitor subcontractors and enforce subcontracting plan requirements



# Changes to FAR 19.7 and 52.219-9

- Proposed rule issued in 2015; finalized in 2016?
- Highlights:
  - Requires subcontracting plan to list NAICS code for each subcontract
  - Permits primes to rely on subcontractor representations in SAM
  - Allows goals based on total contract dollars



# Changes to FAR 19.7 and 52.219-9

- Highlights:
  - Primes cannot prohibit subcontractor from discussing payment or utilization matters directly with CO
  - Primes must notify unsuccessful subcontract offerors in writing
  - Primes with individual subcontracting plans must report order-level subcontracting info for multiple award contracts
  - Failure to comply in good faith with subcontracting plan shall be a material breach of contract and may be considered in past performance evaluation



# *Questions?*

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