



# Set-Aside Alert™

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## Tips for negotiating subcontract and noncompete agreements

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Over the past several years, our firm has seen a significant increase in the number of lawsuits we have filed or defended on behalf of clients. The disputes include claimed breaches of subcontracts and noncompete agreements, owners' disputes, wrongful terminations and intellectual property disputes.

This article provides some basic tips when negotiating key provisions of subcontracts and some thoughts on enforcing noncompete agreements, determining which employees should have them and deciding what those agreements may include.

### Subcontract agreements

Written agreements are essential not only for enforcement but to be certain that you have a meeting of the minds. Reducing deal points to writing is the best way to avoid misunderstandings at the outset and to mitigate the risk that those implementing the agreement will misunderstand the intent.

Potential subcontractors should always ask the three following questions;

1. Does the subcontract clearly define scope of work for the subcontractor? With multiple award, indefinite quantity contracts, the scope may not be clear at the outset. In that case, subcontractors should try to incorporate as much specificity as possible as to the type of work, labor categories or CLINS to be performed by the subcontractor.

2. Does the subcontract provide fair payment terms? If the prime contractor is a large business, then payment should be expected soon after the subcontractor submits a correct and complete invoice. If the prime contractor is a small business, payment terms vary from payment within 30 days to payment within days of receipt of the prime contractor's payment from the government.

Subcontractors should engage in due diligence on prime contractors and if concerns exist as to the financial wherewithal of the prime contractor, subcontractors should consider insisting on an escrow

agent to receive payment from the government. Escrow agents are responsible to pay prime and subcontractors at the same time. Escrow accounts are valuable tools to prevent a prime contractor with cash flow issues from using your funds to pay other obligations.

3. Does the subcontract provide the proper period of performance and termination clauses? Generally, subcontracts are negotiated to coincide with the prime contractor's period of performance including exercise of any options, modifications or extensions. Be cautious if a prime contractor does not agree to this term. Subcontracts should only be terminable for cause or for convenience of the prime contractor if the government terminates the prime contract or work including your portion of that prime contract.

While there are many other important subcontract provisions, disputes most often seem to revolve around the provisions discussed above so pay particular attention to these provisions.

### Noncompete agreements

Noncompete agreements are generally against public policy as these agreements restrict an employee's options for future employment. They should be narrowly tailored to prevent certain key employees from taking a company's trade secrets, employees or customers to a new employer who is a competitor.

In determining whether to enforce such agreements courts generally ask three basic questions: (1) from the employer's perspective - is the agreement no more restrictive than necessary to protect some legitimate business interest of the employer; (2) from the employee's perspective - are the terms unduly harsh or oppressive in curtailing the employee's legitimate efforts to earn a living; and (3) does the agreement comport with sound public policy including free trade and a competitive marketplace.

In considering whether a noncompete agreement will meet these tests you should ask: Is the

agreement designed to meet a legitimate interest of the employer or to prevent an increase in ordinary competition? Protectable interests include: statutorily defined trade secrets; confidential or proprietary information; "unique services"; customer relationships; client or contact lists; and goodwill developed by the employee for the employer's unique services.

You also need to ask: Is the employee a "key" employee? Factors to consider include: the employee's position and duties; the extent to which the employee possesses company confidential information; and the extent of the employee's contact with the company's customers.

When noncompete agreements are in place, employees must consistently and promptly enforce violations in order to avoid a finding that the company has waived its right to enforcement.

On the other hand, potential employers should ask candidates whether they have a noncompete agreement with their former employer and if so, obtain a copy, to determine whether it might apply if you hire the candidate. Lawsuits to enforce covenants not to compete are often filed against the former employee and his or her new employer so be prepared to litigate if you hire someone who is violating such an agreement.

There are many more tips regarding subcontracts, noncompete agreements, employment contracts, owners disputes and intellectual property. Our attorneys are preparing a webinar series that will address these tips in more depth. Email us at [pmpllc@pilieromazza.com](mailto:pmpllc@pilieromazza.com) for more information.

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