

# Avoiding Pitfalls Through Contracting Compliance

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# Goal: Embrace the Organizational Tension / Change Traditional Perceptions

- Project Team
  - We need to move fast
    - Time is Money
    - Slowing down means lost opportunity
  - We know what we are doing / We've done this before / Approvals are unnecessary
  - Compliance is great but, if we don't get the work, it doesn't matter
  - There is not much of a value add with compliance
- Compliance Team
  - We need to be careful
  - We need to be consistent
  - You need the necessary approvals
  - Try to read the contract/subcontract/mod before you signing something
  - Don't subject the company to liability

# Government Contracting Subcontracting Policy

- Collaboration of Construction and Government Services Contracting
- Reviewed subcontract language from all groups to come up with best and final language
- Issued to government contracting subsidiary group August 2017
- Intended to be guideline for contracting to ensure consistency in contracting and mitigate risks to subsidiary and ultimately BBNC

# Responsibility of CCR

- Contract Compliance Representative (CCR)
- Services Companies – person designated within Bristol Bay Shared Services
- Construction Services Companies – person within the company, designated by company president and CEO

# Required CCR Review

The designated CCR **must** review all binding contractual agreements prior to Company signature, including:

- Prime contracts and related task/delivery orders and modifications
- Subcontracts
- Purchase orders
- Consulting agreements/independent contractors agreements
- Nondisclosure agreements
- Teaming agreements
- Services agreements
- Leases and subleases
- Partial and final releases relating to prime contracts and subcontracts

# Special Review

Some documents and agreement require heightened review:

- Mentor Protégé and Joint Venture Agreements
  - BBNC SBA Program Manager
  - VP and Associate General Counsel
  - Final Approval by BBNC Chief Operating Officer
- Foreign Work Approval
  - BBNC Tax
  - BBNC Legal
  - BBNC Risk
  - BBNC Chief Operating Officer
- Leases
  - BBNC Chief Operating Officer

# Why is Consistency Important?

- We won't repeat mistakes
- Reviews / Approvals: this is the best and most efficient process to avoid learning the hard way
- Mistakes
  - Expensive
  - Avoidable
  - Consequences may be serious (aside from financial)
  - Far reaching – may affect other subsidiaries, e.g., responsibility determinations

# Case Studies



# No. 1: PM Redlines Insurance Language in Subcontract Design E&O Coverage

- Standardized Government Services Contract Language, General Terms and Conditions, provide:
  - Without prejudice to Subcontractor's liability to indemnify Contractor as stated in this Subcontract, Subcontractor, and any lower-tier subcontractor, shall each maintain in full force and effect at its own expense during the term of this Subcontract, the following required insurance policies with policy limits not less than indicated herein and any other insurance and at such amounts as required by Exhibit B, Prime Contract **Flow Down Provisions**.
  - **Professional Liability: coverage, if Subcontractor performs any professional services under this Subcontract, for damages (including financial loss) caused by any acts, errors, and omissions arising out of Subcontractor's performance of professional services with limits of not less than \$1,000,000 per claim and \$2,000,000 in the aggregate.**

# No. 1: PM Redlines Insurance Language in Subcontract Design E&O Coverage

- Company PM redlines designer E&O liability on subcontract, on a DB construction project in which company is prime
- Claim by Government against the prime arising out of design errors and omissions
- Positive
  - Subcontract without CCR input was executed more quickly
  - Perhaps concession permits engaging a better designer
- Negative
  - Company exposed to liability without coverage
  - Potentially violating prime contract flow down requirements
  - Lack of insurance coverage alters significantly avenues for resolution with design subcontractor

## No. 2: PM Withholds Payment from Subcontractor Without Prior Notice

- Standardized Construction Services Contracting Language
- Payment to Sub of an acceptable invoice is due within 7 working days of receipt of payment by Client
- Enumerated reasons for withholding payment (among others)
  - Delays in the work
  - Claims or liens filed against Sub
  - Evidence that lower tier subs are not being paid
  - Failure to provide proof of insurance
  - Failure to turn in badges
  - Failure to submit certified payrolls
  - Failure to properly invoice
  - Failure to sign final lien release and waiver
  - Failure to submit required Subcontract Documents

## No. 2: PM Withholds Payment from Subcontractor Without Prior Notice

FAR 52.232-7 permits withholding if:

- Proper notice previously has been furnished to the Sub, and
- the Contractor furnishes to the CO a copy of any notice

Clause also specifies contents of notice:

(g) *Written notice of subcontractor withholding.* The Contractor shall issue a written notice of any withholding to a subcontractor (with a copy furnished to the Contracting Officer), specifying—

- (1) The **amount** to be withheld;
- (2) The specific **causes** for the withholding under the terms of the subcontract; and
- (3) The **remedial actions** to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) *Subcontractor payment entitlement.* The Contractor **may not request payment from the Government** of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

## No. 2: PM Withholds Payment from Subcontractor Without Prior Notice

- PM withholds payment from Sub without prior notice
- Positive
  - Sends message to Sub without formally “documenting” reason
  - Perhaps better route to motivate while preserving relationship
  - Less paperwork, easier
- Negative
  - Not documenting noncompliance/breach, may be difficult to support formal action against sub, e.g., termination
  - Sub may not know reasons for withholding without express reasons why / can argue not given a chance to cure
  - Violating Prime Contract – this may have consequences, especially if small business sub

## No. 3: Sub failing, PM pushes sub to correct/improve, but without a cure notice

- Standardized Government Services Contract Language, General Terms and Conditions, provide:

Contractor may terminate this Subcontract, in whole or in part with written notice if:

(a) Subcontractor fails to comply with any of the terms and conditions of this Subcontract, fails to make progress so as to endanger performance, or fails to provide **adequate assurances** to Contractor of Subcontractor's future performance and does not cure the default within **ten (10) days of notice** (or such longer period as Contractor may authorize in writing); provided, however, any default that results in a delivery delay shall not be subject to cure, and Contractor may terminate this Subcontract immediately in such event;

## No. 3: Sub failing, PM pushes sub to correct/improve, but without a cure notice

Standardized Construction Services Contracting Language,  
Termination Clause provides in part:

If Subcontractor is in default and **does not cure** such failure within the time specified from receipt of notification, or fails to provide satisfactory evidence that such default will be corrected within a reasonable time, Contractor may acquire, under the terms and in the manner Contractor deems appropriate, supplies and/or Services similar to those terminated and the Subcontractor will be liable for excess costs for those supplies and/or Services.

## No. 3: Sub failing, PM pushes sub to correct/improve, but without a cure notice

- Sub breaches contract, PM pushes sub without providing a cure notice
- Positive
  - Not formally documenting performance issue within your control – no record to be exploited by Government\*
  - Perhaps better route to motivate while preserving relationship
  - Less paperwork, easier
- Negative
  - You cannot terminate if and when you need to
  - You do not have an accurate contemporaneous record if a performance issue arises with the Government



## No. 4: PM executes a general release without consulting CCR

- Policy provide that CCR shall review:
- all other agreements, including confidentiality agreements, NDA's, consulting agreements, service agreements, leases, subleases, **and releases** to ensure these documents accurately reflect the understanding of the parties and limit the company's risk
- CCRs, BBSS has form releases including for Subcontract closeout

## No. 4: PM executes a general release without consulting CCR

- PM executes general release in Prime Contract without consulting CCR, and related to this,
- PM removes release requirements from subcontract
  
- Positive
  - None
- Negative
  - No recourse against Government in event you have a claim
  - Government attorneys (including DOJ) will take advantage of any ambiguity in release language as to scope / breadth
  - Law is not favorable
  - Need sub release for Miller Act protection
  - Need sub release to ensure claims not withheld

## No. 5: PM executes Prime Contract (or mod) Without Conferring with CCR

- Recent Issues / Clauses to consider:
  - Buy American Act Compliance
  - Cybersecurity Compliance
  - Tariffs / Taxes Clause
  - Indemnity / Bonding
  - Dispute Resolution
  - Maintaining Confidentiality in response to FOIA
  - LDs in Subcontracts
  - Tracking Self Performance Requirements
  - More often prime contracts contain conflicting clauses
  - Modifications may contain compliance requirements



Thank You.

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