Guide to Service Subcontract Terms and Conditions

A. INTRODUCTION

The purpose of this Guide to Service Subcontract Terms and Conditions is to assist prime contractors to the U.S. Government and their subcontractors in drafting and negotiating subcontracts under the most commonly encountered types of federal procurement contracts for services. The text reprints the relevant representations, certifications and clauses from the Federal Acquisition Regulation (“FAR”) and the Department of Defense FAR Supplement (“DFARS”). This Guide was prepared by the ABA Section of Public Contract Law’s Strategic Alliances, Teaming and Subcontracting Committee.

The Committee has for many years published the Guide to Fixed-Price Supply Subcontract Terms and Conditions. Because, in recent years, the federal government has been spending more of its procurement dollars on service contracts than on supply contracts, the Committee believed it would be useful to also publish this Guide to Service Subcontract Terms and Conditions. The Committee hopes that the FAR and DFARS materials in this guide, together with the Committee’s commentaries and characterizations, will be helpful to both prime contractors and subcontractors in attempting to understand and protect their rights and business interests, to include considering the flow down of appropriate clauses and provisions in service subcontracts and subcontract solicitations. However, this Guide is not intended as a substitute for expert business or professional guidance and counseling with respect to particular transactions, and should not be considered legal advice.

Importantly, flow down obligations for commercial item service subcontracts are substantively different than flow down obligations for non-commercial service subcontracts. For the user’s convenience, this Guide contains a separate section specifically addressing terms and conditions applicable to commercial item service subcontracts.

These materials are taken from the published FAR and DFARS as of July 15, 2007 (except that the Commercial Item Clauses are current through Federal Acquisition Circular 2005-19, effective August 17, 2007). The statutes and regulations governing the federal procurement system are subject to periodic change at irregular intervals, and changes to the standard published clauses for solicitations and contracts will occur from time to time. The Committee recommends checking the most current versions against the materials printed in this Guide. Prime contracts that have been awarded, however, typically require the prime contractor to include in its subcontracts the version of any required flow down clause that is contained in the prime contract, not the newest version. When a FAR or DFARS clause is placed into a subcontract verbatim or with modifications, its official date should be included to facilitate identification and comparison of clauses.
The Committee has chosen to include most types of service contracts within the ambit of this publication, including contracts using all pricing methods. The scope of this Guide excludes, however, the following:

1. Representations, certifications and clauses pertaining to sealed-bid contracting procedures.

2. Clauses for construction and architect/engineer procurements; for demolition, dismantling and removal of improvements; and for facilities management services.

3. Clauses for highly specialized or industry-specific usages not commonly encountered by prime contractors and their subcontractors in typical services contracts.

Section B of the Guide ("Mandatory and Advisable FAR Clauses for Non-Commercial Subcontracts") sets forth the full text of the most common prime contract clauses that must be flowed down to subcontractors and the clauses that the Committee believes should be flowed down to protect the rights and obligations of the prime contractor, the subcontractor or the federal government. In selecting the "advisable" clauses, the Committee has taken into consideration the interests of both prime contractors and subcontractors. That the Committee has included these additional clauses does not mean that the parties cannot or should not delete or modify them in the course of bargaining and in recognition of special circumstances.

The full-text clauses, both mandatory and advisable, are printed as commonly adapted for insertion into subcontracts or purchase orders to reflect properly the relationship of the parties and, in some instances, time limits for subcontractor actions. In addition, the commentary immediately preceding each clause identifies the textual portion of the FAR that requires and/or provides guidance on use of the clause.

In fashioning the flowed-down versions of the clauses, the Committee has adopted certain conventions of terminology to refer to the Government, the prime contractor and the subcontractor within the wording of each adapted clause. Only where it is clear that the terms "Government" or "Contracting Officer" in a prime contract clause refer to specific U.S. Government interests or powers that are distinct from those of the prime contractor will those terms be maintained intact in the flowed-down clause. In all other cases the term "Government" is changed to "Buyer" (meaning the prime contractor); the term "Contracting Officer" is changed to "Buyer’s Purchasing Representative"; and the term "Contractor" is changed to "Seller". Similarly, what is consistently called an "Order" in the flow down clauses in this publication means the particular subcontract containing the clauses. Where the word "subcontract" appears in a prime contract clause in a generic sense, that term is retained in the flow down clause. These language choices, although consistent internally and also with the earlier Guide to Fixed-Price Supply Subcontract Terms and Conditions, are necessarily arbitrary and need not be adopted by parties to the subcontracts. The Committee recognizes that contractor companies employ varying terminology in their contracts and subcontracts and
that the labels applied to contractual or legal instruments do not necessarily confine their content or legal effect. What is important is that the relationships and duties of the parties are made clear.

Other segments of the Guide set forth Mandatory and Advisory Representations and Certifications; Commercial Item Clauses (including those from the DFARS); the DFARS Intellectual Property Clauses for Non-Commercial Subcontracts, a short section on Suggested Dispute Resolution Mechanisms and a Matrix of clauses, provisions and certifications that may be useful as a checklist.

As with the Guide to Fixed-Price Supply Subcontract Terms and Conditions, the Committee intends to publish periodic updates to this Guide. Updates will be available at the Committee’s website, at http://www.abanet.org/dch/committee.cfm?com=PC404500. Comments on this publication will be received via the Committee’s website as well.