

APTAC Body of Knowledge Competency Guide

C. Basics of Contracting with Government Entities

C.14.1 Subcontracting Laws and Regulations

Description

Because a subcontract is a legal agreement between two businesses, or a business and a non-profit corporation, to which the government is not a party, the agreement is governed by the version of the Uniform Commercial Code adopted in the subcontractor's state, and not by federal laws and regulations. However, the prime contract usually contains clauses that incorporate federal requirements into the contract which may be imposed onto the subcontractor, and certain federal laws (such as equal opportunity, for example) apply more broadly.

In the Federal marketplace, applicable laws resulting from legislation and court judgments are found in the United States Code, and applicable regulations are found in the Code of Federal Regulations and its Agency Supplements. Additional requirements are issued in Office of Management & Budget Circulars and in Executive Orders. Updates are published in the Federal Register.

In the State and Local marketplace, applicable laws, regulations, policies and procedures vary by state, but those relating to doing business with the state or its subdivisions can usually be found linked from the state website. Often, the state procurement office publishes a manual or guide to its relevant laws and regulations.

Hybrid markets, such as federally-funded state projects, involve a combination of federal laws and regulations and state laws and practices. Examples are highway construction, public housing projects, and Community Development Block Grants, to name only a few. Another example of a hybrid market is military housing, in which the military service leases its land to a developer who designs, builds, operates and maintains housing units on federal land, often using specialty subcontractors.

Applicable Law. When the customer is a unit of federal government, the Federal Acquisition Regulation governs the contracting relationship between the government and the prime contractor, but it does not govern the relationships between the prime contractor and the subcontractors, and it does not apply at all to state and local government contracts.

FAR and its agency supplements are the policies and procedures and instructions for federal employees to perform their jobs relating to contracting activities. FAR contains a library of provisions, clauses, and forms in Parts 51, 52, and 53, from which the government employee is instructed to select for incorporation into each contract. The contractor signs the contract, agreeing to those FAR-based contract clauses, not to the FAR itself. UCC does not apply to federal contracts, but it does apply to the subcontracts under federal contracts. FAR does not apply at all to State and Local government but federally funded state or local contracts usually contain federal requirements. PTAC counselors should ascertain what State and Local law applies in their state. Native American PTAC counselors should also be familiar with Tribal laws and regulations that apply to contracts. Note that being familiar with applicable laws and

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regulations and explaining them to clients does not include providing legal advice, which PTACs do not do. A few specific unusual laws are described briefly below.

Christian Doctrine. The Christian Doctrine, which flows from the decision in *G.L. Christian & Assoc. v. United States*, provides that if the government makes a mistake and fails to incorporate a contract clause that is required specifically by law, or that reflects such an ingrained principle of federal contracting law that its omission could not be tolerated, that clause is construed to be in the contract even if it is not stated. If an issue arises over such a requirement, competent counsel with expertise in government contract law should be consulted.

Flow-down clauses. The prime contract often requires that certain terms be imposed on subcontractors, at the first or second tier or at all tiers. These clauses are referred to as “flow-down clauses” because they “flow” downstream as a function of the contracting relationships. Because of the limitations of privity. See more detailed discussions in BOK Section 14.2

PL 95.507 et seq.: Small Business Subcontracting Plan. A large federal prime contractor (according to SBA size determinations) with a federal contract valued over \$500,000 \$700,000 or \$1-million in construction is required to have a formal, approved, plan for utilizing socially and economically disadvantaged small business subcontractors. The law contains various requirements for managing the contractor's subcontracting program, including collecting and reporting detailed statistics, having an individual in a management position who is responsible for administering the plan, and setting and meeting goals for utilizing various socio-economic categories of subcontractors. Under this law and its amendments the company does not guarantee the right of any small business to be accepted by a prime contractor simply because of its socio-economic status. Both companies must use prudent business practices and document their decisions.

The Small Business Jobs Act of 2010 holds large prime contractors more accountable to their own subcontracting plans by requiring written justification when plans aren't met and when small business subcontractors aren't paid on time. This helps eliminate “bait-and-switch” tactics that occur when large primes – after winning the prime contract – don't follow through with their own plans to give subcontracts to small businesses. (As explained on SBA website) The North American Defense Authorization Act of 2013 and 2014 has several changes that affect small businesses. PTACs should be knowledgeable of those changes and council clients accordingly.

References

An article from California Polytechnical Institute, posted at <http://www.certifiedksolutions.com/blog/?p=102>, explains the Christian case. See also *G.L.*

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Christian & Associates v. US, 312 F.2d 418 (Ct. Cl. 1963); rehearing denied, 320 F. 2d 345 (Ct. Cl. 1963); cert denied, 375 U.S. 954 (1964).

Official copy of the original Public Law 95-507 (before its many amendments) is posted at <http://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1757.pdf>

Small Business Jobs Act of 2010 is online at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ240/pdf/PLAW-111publ240.pdf> (especially, see Sections 1311 through 1335). Also see summary discussion at <http://www.bakertilly.com/insights/important-policy-updates-related-to-small-business-subcontracting-that-all/>

Uniform Commercial Code: Since it is not uniform, each state posts its version, often on its Secretary Of State website, or on the state's "laws and regulations" website. Cornell University has posted the full text at <http://www.law.cornell.edu/ucc> along with links to some state versions and reference materials.

North American Defense Authorization Act of 2013 and 2014.