

May 10, 2018

**Legal Alert: Subcontracting Government Contracts:  
Key Legal Concerns and Best Practices**

Nonprofit organizations often collaborate to provide services to their communities, and subcontracting relationships can be an effective means to both organizations to leverage their resources and expertise to accomplish a goal. However, when the source of funds is a government entity, nonprofit organizations should take extra care to ensure both organizations understand and agree to the many compliance obligations such funds bring with them. An organization that receives such funding as a lead (or prime) contractor must ensure that those obligations flow down to all subgrantees or subcontractors. In addition, a subcontract should allow a lead contractor to monitor the subcontractor's work, resolve disputes, allocate risk, and more.

In addition to a clear understanding of the obligations and deliverables that form the heart of the contract, below are terms that should be considered for inclusion in every government funding subcontract:

- **Flow down** – Subcontracts should be clear regarding which of the lead contractor's obligations "flow down" to the subcontractor. For example, if the government contract for home delivered meals specified certain quality standards, those standards should be required under the subcontract as well.
- **Required terms** -- What provisions does the government agency require in all subcontracts? Because government funding often requires submission and/or approval from the relevant government agency, adding required provisions from the beginning can streamline contracting and payment process.
- **Resolving disputes** between the lead and subcontractor – Will arbitration be required? Which state's laws will be applied?
- **Allocating risks** – Who will indemnify whom, and for what? For example, must either party obtain particular insurance and/or add the other as an additional insured?
- **Sharing information, premises, employees** – Operational concerns such as what information must be kept confidential, or whether one organization should grant the other a license to use its premises for the government-funded program, and who is responsible for supervising and compensating staff working on the program should be addressed.

- **Verifying work** – How will the lead contractor monitor and audit the subcontractor’s work? Is it clear that the subcontractor agrees to allow the government funder to monitor and audit the subcontractor’s records?
- **Payment** – What will the parties do if the government fails to pay the lead contractor on time or unilaterally reduces the size of the grant? If failure to meet performance standards have implications for the amount of payment from the government, is the corresponding reduction in payment amount reflected in the subcontract?

A common strategy for subcontracting is to incorporate by reference the entire government contract. While this is appealing from an efficiency standpoint, it does not always accomplish what is intended. In New York, clauses incorporating prime contract clauses by reference into a subcontract bind a subcontractor only as to the prime contract provisions relating to the scope, quality, character, and manner of the work to be performed by the subcontractor.”<sup>1</sup> Thus, despite a general incorporation clause, the provisions in a prime agreement related to contractual indemnification for an employee’s injuries and insurance procurement are not incorporated by reference into the subcontract between a subcontractor and a sub-subcontractor.

**Lawyers Alliance staff are available to help qualified nonprofits draft and negotiate contracts and subcontracts. Please contact Legal Director Elizabeth Perez at [eperez@lawyersalliance.org](mailto:eperez@lawyersalliance.org), (212) 219-1800 ext. 232, or visit [www.lawyersalliance.org](http://www.lawyersalliance.org) for further information. This alert is meant to provide general information only, not legal advice.**

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<sup>1</sup> *Persaud v. Bovis Lend Lease, Inc.*, 93 A.D.3d 831 (2d Dept. 2012)