

---

# Subcontracting Under USG Contracts

## The Differing Viewpoints Prime Contractor Abuses

**Steve Purcell**  
**Senior Contracts Manager**  
**ViaSat Inc.**

[Steve.Purcell@viasat.com](mailto:Steve.Purcell@viasat.com)

---

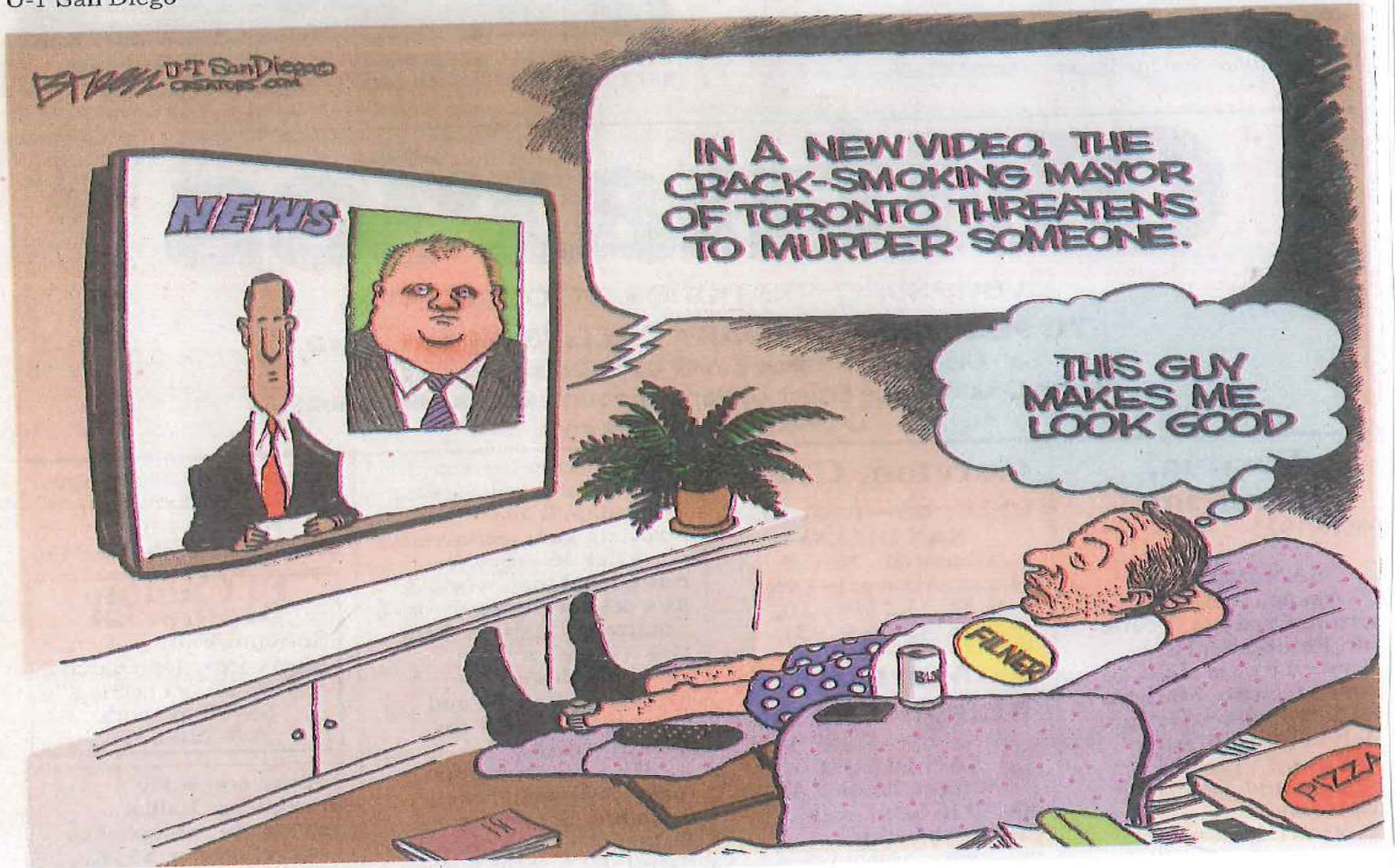
# SUBCONTRACTING UNDER USG CONTRACTS-WHY ALL THE FUSS?

*“The brain is a wonderful organ; it starts working the moment you get up in the morning and does not stop until you get into the office.”*

-Robert Frost

**STEVE BREEN**

U-T San Diego



# DIFFERING VIEWS OF PRIME CONTRACTOR AND SUBCONTRACTOR ON FLOW DOWNS

- ❑ USG generally dictates terms (little negotiation) in the Prime Contract
- ❑ What is negotiable? (We are the USG!)
- ❑ Hence Prime seeks to “shotgun” or “kitchen sink” all provisions from their prime contract
- ❑ Reinforce compliance as well
- ❑ Push risk down the Supply Chain
- ❑ But this can add “Red Tape” and unnecessary costs and arguments if not done right

---

# THE SUBCONTRACTOR'S VIEW?

- ❑ Why are they flowing down all this BOILERPLATE
- ❑ Everything is negotiable? (Isn't it?!)
- ❑ What leverage do we have or can we create?
- ❑ How can we *transactionalize* this? Let's use my standard product, standard service, subject to our Standard T&Cs...
- ❑ Battle of the Forms (UCC)? Or Structured negotiations?
- ❑ Can be very inefficient in terms of time (Contracts, Procurement, Program Staff, Legal)
- ❑ Pre-agreed terms between Prime and Sub?

---

# TEAMING AGREEMENTS

- Could a TA help stop the arguments?
- Prime Contractor and Subcontractor may agree in advance on terms
  - Risk Sharing Provisions
  - “Back-to-Back” Subcontracting
  - Terms and Conditions of the Subcontract to be substantially similar (identical) to the Prime Contract terms, otherwise as mutually agreed between the parties

# TYPICAL STRUCTURE OF Ts & Cs

## USG Prime Contractor

- Subcontract Structure:
- General Ts & Cs (company standard)
- Supplement with FAR/DFARS/Agency Flow downs-Sect. I clauses
- Other Contract Flow downs-Sect. H clauses
  - special reqts. like key personnel clause, Fixed Fee, Manpower Reports, Personnel Quals
- Company Special Provisions
  - QA Clauses, Insurance reqts. for on-site work
- Statement of Work (SOW) and/or Specification, SDRL

# USG PRIME FLOWDOWN CLAUSES

## Do's and Don'ts

- Supplement the company's Standard T's and C's
- Include if direct charge under USG prime or subcontract - not needed on overhead charges.
- Appropriate/required clauses only
- No omnibus/self deleting clauses— avoid contradictions and conflicts
- Christian Doctrine – only applies to prime contracts
  - Don't rely on it for subcontracts and supplier POs
- If incorporating by reference
  - use Contracting Officer = Buyer paraphrase
  - example in Backup Slides



# REVISED \$ THRESHOLDS IMPACTING SUBCONTRACTS and POs (Oct 2010)

- Commercial Items Test Program:  
\$6,500,000
- Simplified Acquisition Threshold: \$150,000
- Cost or Pricing Data Threshold (TINA): \$700,000
- Cost Accounting Standards (CAS) Individual Contracts: \$700,000
- Small Business Subcontracting Plan: \$650,000
  - Required on Commercial Item Contracts/Subcontracts also

# CERTIFICATIONS AND REPRESENTATIONS

- Use to address Compliance for Subcontractors
  - Responsibility Matters (Debarments, Suspensions, Terminations, Taxes Paid)
  - No Payments to Officials (Lobbying)
  - FFATA (Transparency Act)
  - Export Compliance (Foreign Ownership, Export Registration)
  - Commercial Item Certs becoming common
- SAM (formerly ORCA) have made this process much easier on USG contracts (too bad Primes can't use it!)
- Suggest Annual Supplier Reps/Certs

---

# CONTRACT/SUBCONTRACT SUBJECT MATTER-WHAT ARE WE BUYING?

- Research and Development
- Design and Development/Production
- Production Equipment
- Information Technology
- Services Contract
- Construction/A&E
- Commercial Item/Non Development Item
- Each of the above will influence which clauses you need to **FLOW DOWN** and manage risks

---

# SPECIAL PROVISIONS

## WHAT DO WE NEED TO CONSIDER?

- USG Prime Contract- Section H
- Program Requirements
- Company peculiar reqts.
- Performance outside US
- Peculiar to Subcontract Work
- You may need to tailor these based upon your Contract/Subcontract subject matter

# Commercial Item Contracts/Subcontracts (FAR Part 12)

- ❑ Prime should always seek to include FAR 52.244-6
- ❑ Often primes seek to “shotgun” or kitchen sink all Flow downs from their prime contract in spite of this (FAR 15?)
- ❑ FAR 52.212-4 and 52.212-5 specify required clauses for Commercial Contracts
- ❑ Be mindful of FAR 44.402
- ❑ Policy to prime and subcontractors, should NOT Flow down any clause not req’d to implement laws or executive orders, or not consistent w/ commercial practice for the item being ordered
- ❑ Don’t add **Red Tape**

# THE VIEWS CONVERGE WHEN?

- When the Prime and Subcontractor representatives:
  - Communicate
  - Negotiate
  - What does SUCCESS look like to you?
- Final Objective should be to support your organization's business objectives with a fair (balanced?) Subcontract Agreement

# FLOW DOWN ABUSES BY PRIMES

## Some Common Ones

- Just attach copy of prime contract **Section I**— without filtering clauses that are n/a
- Modifies clause to Prime Contractor's advantage
- Un-modified clause, but used inappropriately
- Substitutes Prime clause for FAR clause
- Uses wrong, inappropriate flow down
- Uses company “standard” flow downs without tailoring to the Prime Contract reqts.

---

# ATTACH PRIME Section I

- Some correct clauses
- Some unneeded clauses
- Prime K gets authority of contracting officer
- Prime K type same as subcontract type?
- Disputes clause
- Self deleting? Who decides?



---

# MODIFY CLAUSE TO PRIME'S ADVANTAGE

- Rights in Technical Data
  - Prime asserts rights in Subcontractor's IP while paying sub with USG funds

---

# SUBSTITUTE PRIME CLAUSE FOR FAR FLOW DOWN CLAUSE

- Changes clause goes beyond 52.243-1
  - Can Change quantity (partial termination?)
  - Change schedule (acceleration?)
  - Commercial Item
  - Anything else we decide
- Acceptance
  - When we decide
  - Acceptance Revoked at any time

---

# SUBSTITUTE PRIME CLAUSE FOR FAR FLOW DOWN CLAUSE

- Payments
  - Pay when paid
  - Withholds
- Offsets
  - Contract A against Contract B
  - Division A against Division B
- Onerous IP provisions
  - “Work for Hire”
- Indemnities/insurance
- Warranties

# INSERT WRONG FLOW DOWN

- FP payment clause in CPFF contract
- T for C in commercial item contract
  - 52.249-1 instead of 52.212-4(I)
- Ignore \$ thresholds
  - TINA
  - CAS
- Ignore competitive award

---

# USE COMPANY STANDARD FLOW DOWNS

- Take it or leave it—no modifications
- Obsolete FAR or Supplement clauses
- Wrong thresholds
- Does not reflect Prime Contract clauses
- Wrong certifications

# ADDITIONAL (BAD) EXAMPLES

- Insisting upon IP infringement indemnities beyond the US
  - Sub will want to limit to US patents
- Asserting unlimited rights in all IP and related tech data “conceived, developed, generated or delivered” under the Contract
  - Sub will want to protect its background IP and ensure “Unlimited Rights” if appropriate flow to the USG (not Prime Contractor)
- Expanding Warranties beyond normal Workmanship and Material to Design Warranties
  - Sub should consider carefully (who developed the specification?) also seek UCC disclaimers

# DO IT RIGHT!

- Check the USG Prime Contract clauses
- How was prime Contract awarded?
  - Competitive (exempt from CAS, TINA)
  - Commercial Item
- How was Subcontract awarded?
- Don't duplicate General Ts&Cs in your Flow Down Provisions
  - Creates conflict and overlap
- Customize and tailor as applicable
- If it isn't needed, don't use it!

---

# SUBCONTRACTS PRIME CONTRACT FLOW DOWNS

- Q & A
- DISCUSSION



---

# SUBCONTRACTS

## PRIME CONTRACT FLOW DOWNS

### RESOURCES

- [Www.Farsite.Hill.Af.Mil](http://www.Farsite.Hill.Af.Mil)
  - Approximately 30 Agency Supplements
  
- [www.ndia.org](http://www.ndia.org)
  - Guide to Service Subcontract Terms and Conditions, American Bar Association, © 2008
  - Guide to Fixed-Price Supply Subcontract Terms and Conditions (Fourth Edition), © 2005

---

# Subcontracting Under USG Contracts-Backup Slides

---

# COMMERCIAL ITEM

## Contracts/Subcontracts

- Start with your GENERAL Ts&Cs
- FAR 52.244-6 Clause in Prime Contract?
- Agency Part 44 Clause (if suppl. to FAR)
- Termination for Convenience 52.212-5(j)
- Stop Work Order 52.242-15
- Changes Clause (bilateral)?
- Supplement with Supplier Warranty Provisions and other applicable agreements
  - SW License Agreements, SLAs

---

# COMMERCIAL ITEMS

## FAR Part 12

- Definition of Commercial Item in FAR 2.201
- Can Use SAT, Sealed Bidding, or Negotiated Procurement
- Preference in FASA for Commercial Items
- Market Research
- Use Existing QA Systems
- Includes only Necessary Clauses – Commercial

# USG FLOWDOWN CLAUSES

## FAR Provision

- Buyer may terminate all or part of this contract, effective as of the date specified by buyer, in accordance with the provisions of Federal Acquisition Regulation (FAR) 52.249-2, “Termination for Convenience of the Government (Fixed Price)”, which provisions, except for ... *are incorporated herein by reference.* The terms “Government” and “Contracting Officer” shall mean “Buyer”, and “Contractor” shall mean “Seller.”

# CHOICE OF CONTRACT TYPE

- **Two Ways To Look At contract Types**
- **Contract Type**
  - Cost/Performance Approach
  - Amount Of Oversight
  - Payment Mechanisms
- **Contract Incentives**
  - Balance/Share Risk
  - Motivate Contractor
  - Exercise Cost Control
  - Result: Financial Rewards
- **Prime Contractors are not required to award the same types of subcontracts as their prime contract.**

---

# REVISED \$ THRESHOLDS COST ACCOUNTING STANDARDS

- FAR Part 30, Appendix B Part 9903
- Individual Contracts
  - From \$650,000 To \$700,000
- Separate Business Unit Applicability
  - \$7,500,000 (trigger)
- Modified CAS Coverage – See Trigger Contract
  - Standards 9904-401, 402, 405, 406
  - Clauses 52.230-3; 52.230-6