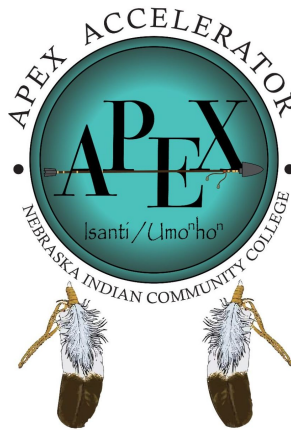


NEWSLETTER

February 2024



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TIP OF THE MONTH

Subcontractor Communications with Federal Government Officials

In federal government contracting, it's commonplace for prime contractors to insert provisions in their subcontract agreements restricting their subcontractors from communicating directly with the government. For the most part, these provisions are reasonable: to avoid potential confusion and information gaps, the prime has an interest in ensuring that communications with the customer flow through the prime. For its part, the government also generally prefers to communicate only with the prime – the entity in “privity of contract” with the government.

While provisions restricting the ability of a subcontractor to communicate with the government aren't unusual, they sometimes go too far by restricting all communications regarding the prime contract and subcontract. Prime contractors and subcontractors alike should be aware that such blanket restrictions on communications may run afoul of the Federal Acquisition Regulation, in two key respects.

First, whenever a large business is required to provide a subcontracting plan under [FAR 19.7](#) and its implementing clauses, the large prime cannot prohibit the subcontractor from communicating with the government regarding certain matters.

[FAR 19.704\(a\)\(10\)\(14\)](#) states that the large prime's subcontracting plan must contain “[a]ssurances that the contractor will not prohibit a subcontractor from discussing with the contracting officer any material matter pertaining to payment to or utilization of a subcontractor.” This requirement is repeated in the implementing clause, [FAR 52.219-9](#), as well as an applicable U.S. Small Business Administration (SBA) Regulation, [13 C.F.R. 125.3\(c\)](#). The SBA regulation, in fact, goes beyond seeking “assurances” and flatly states that “[t]he [large prime] contractor may not prohibit a subcontractor from discussing any

material matter pertaining to payment or utilization with the contracting officer.”

Second, almost all prime contracts now include the clause at FAR 52.203-19, entitled “Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.” This clause provides, in relevant part:

“The Contractor shall not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).”

In sum, a blanket “no communications with the government” provision could violate either or both of these FAR restrictions. Prime contractors and subcontractors alike should understand that these provisions may require “carve outs” to communication restrictions imposed by subcontracts, and should seek legal advice from a qualified attorney to ensure compliance.

NICC APEX ACCELERATOR NEWS YOU CAN USE

Congress Increases SDVOSB Prime Contracting Goal to Five Percent

The recently-adopted National Defense Authorization Act contains a big win for service-disabled veteran-owned small businesses: it increases the government-wide SDVOSB prime contracting goal from three percent to five percent of total contracting dollars. The new goal could result in billions of dollars in additional contracting revenue for SBA-certified SDVOSBs. [Read more about the NDAA’s SDVOSB goaling increase and its potential impact here](#) (log into LinkedIn before accessing the article).

If you want to learn more about the SBA’s SDVOSB certification and how it could benefit your business, or are seeking assistance with an SDVOSB certification application, your APEX Accelerator can help! Contact your APEX counselor today to schedule an appointment.

GOVOLOGY WEBINARS

Please use the new code **24NICC20** when registering for Govology webinars.



Developing a Compelling Capability Statement (2024 Update)

Date: February 6, 2024

Time: 1:00 p.m. EST

Presenter: Ashley Duwel, Duwel Dev

[Click Here to Learn More](#)



Intro to Teaming (2024 Update)

Date: February 8, 2024

Time: 1:00 p.m. EST

Presenter: Carroll Bernard, Govology

[Click Here to Learn More](#)



How to Build a Strong Government Sales Strategy – 8 Core Activities (2024 Update)

Date: February 13, 2024

Time: 1:00 p.m. EST

Presenter: Joshua Frank, RSM Federal

[Click Here to Learn More](#)



Evolving DoD Contractor Cybersecurity Requirements (2024 Update)

Date: February 14, 2024

Time: 1:00 p.m. EST

Presenter: Adam Austin, Totem Technologies

[Click Here to Learn More](#)



Understanding Simplified Acquisitions in Government Contracting

Date: February 20, 2024

Time: 1:00 p.m. EST

Presenter: Amanda Swanson Goff, The Pulse of Govcon

[Click Here to Learn More](#)

RECOMMENDED READINGS

Note: One of the most important recent developments in federal contracting was the Department of Defense (DoD)'s release of a long-awaited proposed rule to implement the Cybersecurity Maturity Model Certification, or CMMC. Recommended readings regarding the proposed CMMC rule are found below in the "CMMC & FOCI News of Note" section.

SBA's 2023 Update: Demonstrating 8(a) Social Disadvantage

In the wake of a federal court decision in mid-2023, all individually-owned 8(a) applicants must now demonstrate their social disadvantage. The SBA recently released new guidance about how to accomplish this task. [Read more about the SBA's updated guidance here.](#)

New Year, (Potentially) New Definition of "Subcontract"

One might assume that the FAR and the DoD's FAR Supplement (DFARS) have a standardized definition of the term "subcontract." Think again! One study found that the FAR and DFARS have 27 unique definitions of "subcontract" and related terms like "subcontractor." A solution to this confusion may be on the horizon, however. [Read more about a potential single definition of subcontract, aligning the FAR and DFARS, here.](#)

Successor Government Contractor Hiring Obligations Change

The Department of Labor has issued a rule to re-impose a rule regarding non-displacement of qualified workers under service contracts. This rule will require service contractors to extend bona fide offers of employment to incumbent personnel under certain conditions and will take effect in February. [Read more about this rule here.](#)

SPECIAL INTEREST

This section highlights items of special interest and importance to the Department of Defense Office of Small Business Programs (DOD OSBP). Please take a moment to visit the sites listed below for additional information. We also suggest that you read the latest edition of the [DOD's Small Business Digest](#) if you want to do business with the DOD.

Cybersecurity Maturity Model Certification (CMMC)/Cybersecurity Compliance Resources

[DOD CMMC Resource Page](#) – Resources to assist government contractors with understanding and complying with CMMC/cybersecurity requirements.

[Project Spectrum](#) – Project Spectrum is working with APEX Accelerators to assist small businesses in achieving compliance with CMMC/cybersecurity requirements.

Foreign Ownership, Control, and Influence (FOCI) Resources

[FOCI Frequently Asked Questions](#) -- FOCI is a status or situation in which a contractor with access to classified information has some foreign investment or association with foreign interest. Learn more about the federal government's requirements relating to FOCI.

<https://business.defense.gov/> – The official website of DOD OSBP. It contains additional information, news, events, and other items for those interested in doing business (or currently engaged) with the DOD.

CMMC & FOCI News of Note

Proposed Rule: Cybersecurity Maturity Model Certification Program

The long-awaited proposed rule to implement CMMC has arrived. [Read the full proposal](#), along with supporting documents and instructions for submitting comments.

DoD's New Year Resolution: A Cybersecurity Maturity Model Certification Program (CMMC) Proposed Rule

This [overview of the proposed rule](#), written by attorneys, summarizes the proposed rule's applicability to contractors, the proposed implementation timeline, assessments, and more key takeaways.

DoD Rings in New Year with Proposed CMMC Rule

Another [legal analysis of the proposed rule](#), this article includes a comparison to the previous "CMMC 2.0" framework and much more, including other key items that the authors believe contractors should consider.

What Contractors Should Do Now About DoD's New Cybersecurity Rule

In this [interview transcript](#), an expert offers some suggestions about what contractors should do now that the CMMC proposal has been released.

The FY 2024 National Defense Authorization Act: What Government Contractors Should Know

In addition to increasing the SDVOSB goal from three percent to five percent, the 2024 NDAA included several provisions aimed at ensuring defense supply chain security, particularly with respect to foreign adversaries. For example, the 2024 NDAA will require DoD contractors providing consulting services to certify that they do not provide services to the governments of China or Russia. [Read more about the NDAA's provisions here](#).

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