




**LIABILITY...
PRIME and
SUBCONTRACTOR
LIABILITY – One
Last Time!**

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ASSET MANAGEMENT STRATEGIES IN A CHANGING WORLD






ASSET MANAGEMENT STRATEGIES IN A CHANGING WORLD

Okay, so what is this all about?

- Topics Covered:
 - Government's Policy on LOSS of Government Property/Contract Property in the possession of Contractors
 - Two Forms of Liability
 - Application at the Prime to Subcontractor Level(s)
 - Natural Consequences

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MY OPENING THOUGHT...

"I HAVE NEVER BEEN MORE FRUSTRATED BY A TOPIC AND ITS APPLICATION!"

O.K., I FEEL BETTER NOW!

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Policy on Loss of GP

And Remember, this is only dealing with GP in the possession of Contractors under the FAR


45.104 -- Responsibility and Liability for Government Property.

(a) Generally, contractors are **NOT** held liable for loss of Government property under the following types of contracts:

- (1) **Cost-reimbursement contracts.**
- (2) **Time-and-material contracts.**
- (3) **Labor-hour contracts.**
- (4) **Fixed-price contracts awarded on the basis of submission of certified cost or pricing data.**

(b) The contracting officer may revoke the Government's assumption of risk when the property administrator determines that the contractor's property management practices are noncompliant with contract requirements.

(c) A prime contractor that provides Government property to a subcontractor shall not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract.

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Limited Risk of Loss


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Policy on Loss of GP

Notice there is no discussion of when the Government DOES hold a contractor liable – as a matter of policy. You need to look FURTHER!

45.107 -- Contract Clauses.


(a)(2) The **contracting officer shall use the clause with its Alternate I in contracts other than those identified in FAR 45.104(a), Responsibility and Liability for Government Property.**

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Policy on Loss of GP

- Wait a minute Doug... That doesn't say ANYTHING about Loss???
- Right – because it is a "LOGIC" statement... "If this... then that."
- So, under any contract **NOT** listed in FAR 45.104 you apply the Alt. I paragraph which is the FULL Risk of Loss Provision
 - That leaves us with **PLAIN VANILLA FP** Contracts, i.e., Non-Negotiated FP Contracts

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Full Risk of Loss

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TWO LEVELS OF LIABILITY


- Simple Process:
 - There are two levels of Liability:
 - FULL RISK OF LOSS
 - Responsible for ANY Loss
 - Except for Reasonable Wear and Tear and Reasonable Consumption
 - LIMITED RISK OF LOSS
 - NOT liable except for:
 - » Insurance – Required or “In Fact”
 - » Willful Misconduct, Lack of Good Faith on the part of Contractor Managerial Personnel
 - » Disapproved Property Management System

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HOPEFULLY,
Everyone understands
these concepts.
There is extensive literature on the
Web Regarding this topic.


Now, on to the
SUBCONTRACTOR ISSUE!

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HISTORY OF LIABILITY FLOWDOWN


- The “OLD” days – Prior to the 2007 Iteration of the FAR GP Clause.
 - (e) **Subcontractors are liable for loss of or damage to Government property furnished through a prime contractor.**
 - However, if the prime contract is of a type listed in subparagraph (b)(1) or (2) of this section, the prime contractor **may**, after **obtaining the contracting officer's** consent, reduce the subcontractor's liability by including in the subcontract a clause similar to paragraph (g), Limited risk of loss, as provided in Alternate I of the clause at [52.245-2](#), Government Property (Fixed-Price Contracts), (for fixed-price contracts) or similar to the same paragraph of the clause at [52.245-5](#), Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts) (for cost-reimbursement contracts).
 - **Before consenting to a clause that reduces the subcontractor's liability, the contracting officer should ensure that the Government's interests are sufficiently protected.**

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NOTES REGARDING THE OLD FAR POLICY

- Notice that the **NORMAL** flow down was the **FULL** Risk of Loss!!!
- That if the Contractor wanted to flow down the Limited Risk of Loss the **Contractor had to come into the CO and ask**, "Mother, May I?"
- And then it was the **CO's decision** as to whether to allow the flowdown with the added EXTENSIVE guidance to the CO to *"ensure that the Government's interests are sufficiently protected."*
 - What the heck does THAT mean – let alone be consistent in application!?!?

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So, what's the big deal?
I have **limited Risk** in my contract, I flow that down to the Sub.
I have **full Risk** in my contract, I flow that down to the sub!
It's simple!

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Really?
Let's
Extrapolate!

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YOU MUST ANSWER THIS QUESTION!

- Scenario – YOUR life.
 - You want to have an entity work on your car... Say, a BRAND NEW 2014 Mercedes E-Class.
 - You bring the car to the entity.
 - You leave the car there for the work that needs to be done.
 - When you come back to pick up the car – it turns out they “accidentally” set the car on fire – and it is burned beyond recognition
 - The entity says they are sorry – and that they are not liable because you gave them the “limited risk of loss.”


DISCUSS!

Yes or No! Do you think that this is Right? What Variables are missing that you in your COMMERCIAL Lives would consider in this “contract?”

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**Lots of VARIABLES..
Huh?**


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**Clausal Language for
SUB-CONTRACTOR LIABILITY**

- (b) Property management.
 - (3) The Contractor shall include the requirements of this clause in all subcontracts under which Government property is acquired or furnished for subcontract performance.

Seems Pretty Simple!

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Clausal Language for SUB-CONTRACTOR LIABILITY

- Include the Requirements of FAR 52.245-1 in Subcontracts where there is or will be Government Property (GFP or CAP)
 - Note: Any alternates must also be considered, i.e.,
 - 52.245-1(Alt I) **[FULL RISK OF LOSS]** and
 - 52.245-1 (Alt II) **[TITLE VESTING for Non-Profits]**


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Clausal Language for SUB-CONTRACTOR LIABILITY




- (f) (v) Subcontractor control.
 - (A) The Contractor shall award subcontracts that clearly identify items to be provided and the extent of any restrictions or limitations on their use. The Contractor shall ensure appropriate flow down of contract terms and conditions (e.g., extent of liability for loss of Government property).


Let's Break this down!

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Breakdown of sentence


- The Contractor shall ensure  **MANDATORY** the Contractor do something - "SHALL" is imperative in FAR2.101
- appropriate flow down of contract terms and conditions  **APPROPRIATE** - based upon the situations and circumstances and variables determine the **APPROPRIATE** flow down! Doesn't mean the same - requires you to THINK!
- (e.g., extent of liability for loss of Government property)  And "FOR EXAMPLE"... It is not a "de facto" setting of what we have they have - what the prime has the sub has!
 - It MAY be the same - but that **MUST** be based upon careful **ANALYSIS** of the Variables!

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EXPECTATIONS

- There was the **EXPECTATION** that the contractors would **APPLY** the same **LOGIC** in determining the **PROPER** ... uh, wait, the **APPROPRIATE** flow down.
- It appears from conversations, conferences and conundrums that this is **NOT** happening the way it was intended.
- Rather, the belief is, "I flow down what I got in my contract."

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So, let's play this out!!!
And...
I am going to make this a
"Forced Choice"
Exercise!


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FP – FULL RISK OF LOSS

- Prime Contractor/Contract
 - FP – **Full Risk of Loss**
 - 52.245-1(Alt. I)
- Regardless of Subcontract Type, What do you flow down to your Subs?
 - In this case what you got in the Prime you would flow down to your sub!
 - I believe ALL of us would flow down the **FULL Risk of Loss***

* Save for one or two of my friend who are Property Deviants


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WHY?

- GIVE ME SOME REASONS???


— _____
— _____
— _____
— _____
— _____

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CR – Limited Risk of Loss

- Prime Contractor/Contract
 - CR – Limited Risk of Loss
 - 52.245-1
- CR Subcontractor/Contract
- What do you flow down to your Sub?
 - _____


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WHY?

- GIVE ME SOME REASONS???


— _____
— _____
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— _____
— _____

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Lemme help you out here...


- Subcontract is CR Therefore:
 - Logical Course of Action from a **Cost/Pricing** Perspective
 - **Requires Certificate of Current Cost and Pricing Data from Subcontractor**
 - FAR 52.215-12
 - Why a Cert of Cost and Pricing Data?
 - Ensure allowability of Costs charged, or in this case unallowability, e.g.,
 - Insurance on Government Property
 - Cost Principle of 31.205-19
 - Follows Government Application of Risk of Loss
 - Good Purchasing Practice
 - Customary Commercial Practice (CCP) as supported by Literature in Purchasing Texts
 - Handbook for Buying and Purchasing Management
 - Harry E. Hough and James M. Ashley (Author)
 - Prentice Hall

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FP
(awarded on the basis of submission of certified cost or pricing data.)


- Prime Contractor/Contract
 - FP (awarded on the basis of submission of certified cost or pricing data)
 - Limited Risk of Loss
 - 52.245-1
- FP (awarded on the basis of submission of certified cost or pricing data)
 - Exceeding \$700,000
- What do you flow down to your Sub?
 - _____

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WHY?


- GIVE ME SOME REASONS???
- _____
- _____
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- _____
- _____

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One more time – Lemme’ help you out here...

- Subcontract is FP over \$700,000 Therefore:
 - Logical Course of Action from a Cost/Pricing Perspective
 - **Requires Certificate of Current Cost and Pricing Data from Subcontractor**
 - FAR 52.215-12
 - Why a Cert of Cost and Pricing Data
 - Ensure allowability of Costs charged, e.g.,
 - Insurance on Government Property???
 - Cost Principle of 31.205-19
 - Follows Government Application of Risk of Loss

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- So, we have THREE SIMPLE APPLICATIONS
 - **FP, FULL** Risk of Loss yields the **FULL** Risk of Loss to the **FP Sub**
 - **CR, LIMITED** Risk of Loss yields the **LIMITED** Risk of Loss to the **CR Sub**
 - **FP, LIMITED** Risk of Loss (**With Cert of C&P Data**) yields the **LIMITED** Risk of Loss to the **FP Sub (With Cert of C&P Data)**
 - And the same as above could play out for CR Prime to FP(Neg with Cert Requirement) Subcontract, i.e., Limited Risk of Loss

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**So,
Are there OTHER
Permutations?**


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Subcontracts where you should go Hmmmm?*

- Prime has a CR or FP(Neg) Contract exceeding \$700,000 with requirement for Cert of Current Cost and Pricing Data
 - LIMITED Risk of Loss under 52.245-1(h)
- FP Non-Negotiated Subcontract with NO requirement for Cert of Current Cost and Pricing Data, i.e., 52.215-12.
- What do you flow down to your Sub?
 - _____


* "Hmmm" attribution given to Lyle Hesterman

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WHY?


- GIVE ME SOME REASONS???
- _____
- _____
- _____
- _____
- _____

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Lemme help you out here...


- FULL RISK OF LOSS – WHY?
- Subcontract is **FP-NON NEGOTIATED** therefore:
 - Logical Course of Action from a **Cost/Pricing** Perspective
 - This type of Contract **DOES NOT** Requires Certificate of Current Cost and Pricing Data from Subcontractor
 - Follows Government Application of Risk of Loss
 - Good COMMERCIAL Purchasing Practice
 - Customary Commercial Practice (CCP) as supported by our INDIVIDUAL buying practices with our own personal property – think back to your Mercedes!

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SIMPLE THOUGHT PROCESS


- The Government is looking for you to apply the same thought process in YOUR awarding of Contracts based upon their pricing arrangement
 - Remember... the term in the GP Clause flowdown discussion is "APPROPRIATE"
- Read the DCMA Policy Letter, dated Sep 12, 2012, in regard to this concept
 - See NPMA "Property Professional," Volume 25, Issue 2.
 - <http://www.npma.org/Archives/Goetz%20Digital%2025-2.pdf>

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Some Natural Consequences


- This action, i.e., flowdown of the "APPROPRIATE" Risk of Loss construct is subject to audit/review:
 - Contractor Purchasing System Reviews (CPSR) DFARS 252.244-7001
 - DCAA – Accounting System Review including Allowable costs (Insurance for GP Costs)
 - DCMA – Property Management System Analysis – 52.245-1(f)(1) Processes and outcomes including (v) Subcontractor Control

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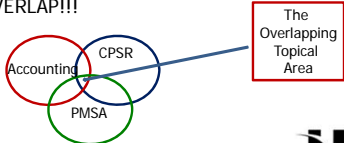
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Some Natural Consequences

- Notice something interesting...
 - All three of the aforementioned reviews are in and of themselves "Business Systems" (With the appropriate implementing clauses) subject to the Business System Rules (DFARS 242.70 & 252.242-7005)
 - And they all OVERLAP!!!



No, this is not an ad for Beer – it is a use of the Three Interlocking Rings – Technically called in Mathematics "Vennian rings."




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On a Personal Note


- I have been chastised and criticized and been told, "Goetz is wrong!"
 - Cool, I understand that.
- "If the Government had wanted us to do this, they should have told us **HOW** to do it!"
 - Really? So you want the Government to go back to the "old" way of doing things – being PRESCRIPTIVE versus Contractor's acting APPROPRIATELY?
 - Maybe the Government should do the same with Ethics?
- My Challenge – If you do not LIKE my analysis -- Put it in Writing!
 - Wait... let me rephrase that... ☺
 - One problem we have in Property (And Asset Management) is, and I have said this before, We FAIL, We REFUSE, we DO NOT ENGAGE in any **INTELLECTUAL DISPUTATION!**
 - Therefore, WRITE AN ARTICLE for the "*Property Professional*" which can then be analyzed and scrutinized and evaluated as to its logic, substance and veracity.
 - Thomas Jefferson "The price of criticism is a constructive alternative."
 - Albert Einstein, "The price of criticism is a constructive alternative."
 - Saul Alinsky, "The price of criticism is a constructive alternative."

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So, what does all of this mean?


- Contract Property Professionals need to be extremely well versed in subject matter related to:
 - Prime Contracts (Beyond just GP)
 - Subcontracts (Beyond just GP)
 - Pricing Arrangements
 - Allowability/Unallowability of Insurance for GP
 - Flowdown Constructs
- NOTE – if you do not believe me READ Bob McFarland's article in the most recent issue of the NPMA Journal of Asset and Property Management.
 - Property ain't just Property! It is that – AND MORE!!!

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So, what does all of this mean?


- Contractors:
 - You will need to speak with, at a MINIMUM, your Purchasing Folks and Subcontracting folks to get this right.
 - And even then, they may fight with you!
- Government:
 - Talk with your contractors, your Government peers, your team leads, Cindy and Tom from DCMA – other Agency leaders (Army, Navy and AF), your COs to get this right
 - And even then, you may get into fights!

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QUESTIONS?




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And I leave you with a quote...

**"I AM STILL
LEARNING!"**


MICHELANGELO

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THANK YOU!!!

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