We have been meaning to write a serious article for publication on this topic, but the time has never seemed right. So you get this blog article intead. The topic really deserves more; it matters because how you define your subcontracts impacts many things, from content to how they are reviewed by government auditors. For example, you will include the mandatory flow-down clauses from your higher-tier contract in your subcontracts, but you won't do that in your general supplier agreements if you don't consider them to be subcontracts. When the DCMA Contractor Purchasing System Review (CPSR) team finally comes to visit, they will have different expectations for your subcontracts than they will for your general supplier agreements (though likely they will look at both). So the definition of subcontract matters.

The problem is, there's no definition of subcontract in the FAR. Or, rather, there's far too many and they vary significantly, depending on where you're looking.

Let's start here: Go to FAR 2.101 (Definitions) and look for "subcontract." You won't find it. Sure, you'll find a definition for "contract" and for "delivery order" and for "task order"—but you won't find a definition for subcontractor. And that's the problem.

Vern Edwards, a demi-god in the pantheon of government contracting experts, tackled this topic in the April 2012 edition of the Nash & Cibinic Report, in his article entitled, "What is a Subcontract? Who is a Subcontractor?" He compared the FAR 44.101 definition of "subcontract" to the definition of subcontractor found in that same Subpart. Here's what the definitions say—

"Subcontract" means any contract as defined in Subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

"Subcontractor" means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

So according to the definitions above, a subcontract is a contract entered into "for performance of a prime contract or subcontract," but a subcontractor is an entity that furnishes *any* supplies or services "to or for a prime contractor or to another subcontractor." That's confusing, at least to us. And apparently to others as well, since comments submitted to the DAR Council in relation to the promulgation of the DFARS Business Systems administration regime pointed out that same confusion.

What did the DAR Council say in response to the public comments regarding the confusing definitions? It said, “Because the Government reimburses contractors for its applicable share of indirect expenses, it would be inappropriate to revise the definitions of subcontracts and purchase orders to exclude agreements with vendors that would normally be applied to a contractor’s G&A expenses or indirect costs.”

So according to the DAR Council, every prime contractor should be flowing-down its prime contract clauses into every single purchase order and contract it enters into with every single one of its suppliers. They don’t address what happens if any of those prime contract mandatory flow-down clauses contradicts the mandatory flow-down clauses of another prime contract. They don’t mention how to handle different DPAS ratings. It doesn’t address the implication that, by its definition, every single supplier agreement valued in excess of $100,000 should be submitted to a Contracting Officer for consent.

In other words, they got it wrong.

Mr. Edwards was much more diplomatic when he wrote –

It is reasonable to interpret the definition of ‘subcontract’ in FAR 44.101 to encompass purchases charged to contractor indirect cost accounts? Such purchases include materials, parts, equipment, and services that are to be used in operations but that will not be incorporated into any deliverable item. We think the answer is no, but to the best of our knowledge that question has never been answered authoritatively by any policy body, board, or court. We have been told and believe that different COs and contractors interpret the definition of ‘subcontract’ in FAR 44.101 differently in that regard, some to include purchases charged to indirect cost pools and some not.

Mr. Edwards’ article notes that the term “subcontract” is officially defined 15 different times throughout the FAR. Suffice to say, while some of the definitions overlap, many others are contradictory. This situation naturally leads to problems when trying to define exactly what a subcontract is and what it is not. The best that can be said is that the official definition of a subcontract is the one that applies, based on the part of the FAR that one is working with.

We have lightly touched on this issue before, notably **here** , when we wrote—

So now we have the FAR Councils asserting that the term “contract” definitely encompasses a task or delivery order—but only with respect to evaluating whether a TINA exemption is applicable. We have the DAR Council clearly stating that the term ‘contract’ definitely encompasses a task or delivery order with respect to mandatory arbitration. But so far nobody has taken the next logical step—which would be to find that the term ‘contract’ encompasses a task or delivery order for purposes of applying CAS.

We also addressed, more directly, the disparate definitions of “subcontract” in **this article**. We noted that the Office of Management and Budget (OMB) expressly defined “subcontractor” as encompassing both agreements under prime or higher-tier subcontracts, and agreements for provision of “general supplies” unrelated to any particular contract. (We **later noted** that the DOD policy-makers undercut the problematic OMB definition, by making the clause in question a mandatory flow-down provision. In other words, according to the DOD, if you don’t have a prime contract or higher-tier subcontract that includes the clause, you don’t need to comply with it—which is not at all what we thought OMB was directing.)

Another related area of contention is whether a Teaming Agreement is an enforceable contract. Courts have been divided on the issue, from what we (non-lawyers) can tell. A current lawsuit against a Top 10 defense contractor may create another opportunity for the Courts to offer an opinion on the matter.

Right now, a small business, L’Garde, is suing The Raytheon Company in a California Court. Though we are not privy to the details, from the late July decision by the California District Court (Central Region) we gather that Raytheon issued to L’Garde a Letter Subcontract, which (allegedly) included a promise to negotiate, in good faith, “a future definitive subcontract.” Thus, apparently a Letter Subcontract is analogous to a Undefinitized Contract Action (UCA)—which has also proved to be **problematic** for the Department of Defense when used. L’Garde sued Raytheon, claiming that Raytheon issued the Letter Subcontract solely in order to win a subcontract from Lockheed Martin and, once the LockMart award was received, failed to definitize the Letter Subcontract. Raytheon, quite naturally, disagreed with L’Garde’s characterization of the situation.

Raytheon advanced a number of arguments in its defense, including trying to persuade the Court that Federal common law should replace state law in the case. The Court was not persuaded, and wrote—

This Case is factually analogous to *Northrop Corp. v. AIL Systems, Inc., 959 F.2d 1424 (7th*

Cir. 1992) , in which the plaintiff sued the defendant for an alleged breach of a 'teaming agreement.' There, the parties successfully 'teamed' up to win a bid for an Air Force contract and while they initially worked together, defendant eventually refused to subcontract out the work to plaintiff in order to realize a cost-reduction.
…
The Seventh Circuit held the teaming agreement did not rise to the level of a unique federal interest sufficient to warrant the imposition of federal law because '[t]he federal government is not liable for any damages [Defendant] may owe [Plaintiff] for the alleged breaches of the teaming agreement. Nor is there any indication that the government will pay a higher price for the [contract] if [Defendant] is found liable to [Plaintiff].'

Thereafter, the Ninth Circuit held the New SD and Northrop decisions to be in harmony because the source of the Northrop dispute arose from the 'teaming agreement,' not the actual 'subcontracts which govern actual work being performed on federal projects that implicate federal interests much more directly.' *New SD, 79 F.3d at 955* (quoting *Northrop, 959 F.2d at 1428*).

Accordingly, we see in the case above that the Courts have been readily able to distinguish between Teaming Agreements and subcontracts. We wonder if they would have the same perspicacity when asked to distinguish between a subcontract and a general supplier agreement?

Isn't it time for the FAR Councils to address this issue in Part 2.101?