



A KCA Construction Industry Article of Interest:

Another Important Heads-Up If You Do Business with the Pennsylvania Department of General Services

By Tom Williams, Esquire

There is an old adage that those who do business with the government do so at their own peril. This would apply to construction contractors doing business with the Pennsylvania Department of General Services. Contractors who have performed work for Pennsylvania taxpayers through the Department of General Services are quite familiar with the concept that DGS designates each and every term contained in the agreement between the contractor and DGS; and that these terms are not negotiable. Not satisfied with this, DGS has recently flexed its powers by inserting itself into the contracts between contractors and their subcontractors by designating several particular terms that contractors must include in all of their subcontracts on DGS projects. To be sure, contracting with DGS is not for dabblers. For in order to get to the end of a DGS project in the black, contractors must not only successfully navigate the ever

increasing morass of statutory, regulatory and other bureaucratic pitfalls; but they must also be vigilant in complying with unilaterally imposed, and sometimes peculiar, contract terms.

One day earlier this year, without prior notice to the contracting community, the folks at DGS decided to add new requirements to their general conditions. While Pennsylvania public construction contractors were busying themselves with such things as providing value to their customers, figuring out how to keep their employees employed, negotiating ever-increasing insurance rates, securing accounts receivable, and fending off cyber-attacks, DGS released a barrage of new contract requirements. For those who have not accessed the Department of General Services website to find that DGS has added to its General Conditions, this article will likely come as a surprise.

The newly published DGS General Conditions contain an entirely new section, section 7.5, entitled “Subcontracts and Purchase Orders.” The section enumerates several new requirements primarily designating specific terms that a contractor must include in its subcontracts. The following is a verbatim recitation of section 7.5 and its requirements:

7.5 **SUBCONTRACTS AND PURCHASE ORDERS**

A. DEFINITIONS:

1. **Manufacturer** – Defined in Article 1 of these General Conditions.
2. **Subcontractor** - Defined in Article 1 of these General Conditions
3. **Supplier** – Defined in Article 1 of these General Conditions.

B. SUBCONTRACTORS:

1. On Small Business Projects, the Small Business Contractor must perform at least 51% of its Work and is encouraged to subcontract with other self-certified Small Business contractors. Small Business subcontractors shall perform 100% of their subcontract.
2. All Work performed for the Contractor by a Subcontractor shall be done pursuant to a written subcontract between the Contractor and the Subcontractor.

3. The form of the written subcontract must be the same for all Subcontractors.
4. All subcontracts between the Contractor and each Subcontractor **must**:
 - a. Be signed by both parties;
 - b. Contain Provisions that:
 - i. Set forth the amount the Subcontractor is to be paid; and
 - ii. Describe the scope of Work to be performed by the Subcontractor; and
 - iii. Preserve and protect the rights of the Department and the Professional under the Contract with respect to the Work to be performed under the Subcontract, so that the subcontracting thereof will not prejudice such rights; and
 - iv. Require that such Work be performed in accordance with the requirements of the Contract Documents; and
 - v. Require submission to the Contractor of applications for payment under each Subcontract to which the Contractor is party, in reasonable time to enable the Contractor to apply for payment in accordance with the provisions of the Prompt Payment Schedule (62 Pa. C. S. §3931-§3939) and the provisions of these General Conditions governing payment by the Department; and
 - vi. Require that all claims for additional costs, extensions of time or otherwise with respect to subcontracted portions of the Work shall be submitted to the Contractor in the manner provided in the Contract Documents for like claims by the Contractor upon the Department; and
 - vii. If applicable to the Project, prior to commencing onsite or offsite work, require each Subcontractor to comply with the provisions of the Public Works Employment Verification Act (43 P.S. §§ 167.1 – 167.11), which requires subcontractors to utilize the Federal E-Verify program to verify the employment eligibility for every new employee hired after January 1, 2013 and to submit to the Department a Commonwealth Public Works Verification Form available on the Department's web site at www.dgs.state.pa.gov.
 - viii. If applicable to the Project, require each Subcontractor to include provisions in each of its subcontracts regarding the applicability of the Public Works Employment Verification Act (43 P.S. §§ 167.1 – 167.11), information regarding the use of the Federal E-Verify program, and reference to the Department's web site to obtain a downloadable copy of the Commonwealth Public Works Employment Verification Form required to be submitted to the Department.
 - ix. Require acknowledgement by the Subcontractor that the Subcontractor is without privity of Contract with the Department and that the Subcontractor agrees by signing the Subcontract that it neither acquires or intends to acquire any rights against the Department on a third party beneficiary theory or any other theory; and
 - x. Require each Subcontractor to notify its Subcontractors, in writing, that their rights of recovery against the bond of the Contractor for failure of payment may not be exercised unless the Contractor is notified of the claim within ninety (90) days from the last performance of labor or provision of materials and/or equipment; and

- xi. Obligate each Subcontractor to specifically consent to all provisions of this Article of the General Conditions of the Contract; and
- xii. Contain the following certification language:
 - 1. **Certification:** I, the undersigned officer of the Prime Contractor, do certify that, to the best of my knowledge, this subcontract complies with the provisions of the Subcontractor Article of the General Conditions of the Contract with the Department of General Services. I understand that by signing this document I certify that this document is subject to the provisions of the Unsworn Falsifications to Authorities (18 P.S. §4904). I acknowledge that if my company does not comply with the terms of the Subcontractor Article my firm may be subject to suspension for a period up to three (3) months and/or debarment from bidding on any Commonwealth of Pennsylvania Public Works Projects for a period of three (3) years.
- xiii. The Contractor agrees that failure to incorporate these terms in its Subcontracts is a material breach of the terms of the Contract Documents. The Contractor will have five (5) days, as required by the Administrative Procedures, to provide proof in writing that such a deficiency in its subcontract documents has been remedied. Failure to provide written proof within five (5) days shall constitute grounds for default of the Contractor by the Department.
- 5. The Contractor shall submit two (2) copies of all subcontracts for Work to be performed on the Project to the DGS Designated Representative for the Project **prior to the commencement of any Work by the Subcontractor.**
- 6. On non-Small Business projects, the Contractor shall also submit a copy of every subcontract with a Small Diverse Business to the Department's Bureau of Small Business Opportunities.
- 7. The Contractor shall identify the work to be subcontracted on a separate line item on the Contract Breakdown Sheet, GSC-30, as described more completely in the Administrative Procedures.

C. MANUFACTURERS AND SUPPLIERS:

- 1. Manufacturers and Suppliers do not have to sign Purchase Orders.
- 2. The Contractor shall submit one (1) certification letter, on the Contractor's letterhead, with language identical to that set forth in the sample letter included as part of the Administrative Procedures governing Material and Subcontractor approvals. This one (1) letter, which shall apply to all purchase orders, shall certify the Contractor's compliance with the terms set forth in the letter. The language required by the Administrative Procedures to be included in the letter shall not be altered in any way.
- 3. The Contractor shall submit this certification letter to the DGS Designated Representative for the Project **prior to the delivery of any material and/or equipment by any Manufacturer or Supplier.**
- 4. On non-Small Business projects, for every purchase order with a Small Diverse Business Supplier and Small Diverse Business Manufacturer, the Contractor shall submit a copy of the purchase order to the Department's Bureau of Small Business Opportunities. The purchase order for a Nonstocking Supplier must include the fee or commission paid to the Nonstocking Supplier.

5. On non-Small Business projects, the Contractor shall identify all material and/or equipment that will be supplied by a Small Diverse Business Supplier or a Small Diverse Business Manufacturer on a separate line item (per Supplier/Manufacturer, not per material and/or equipment) on the Contract Breakdown Sheet, GCS-30.

The consequences of ignoring these new requirements are severe. In the event that DGS finds that the contractor has failed to comply with the requirements of section 7.5, the contractor will have five days to provide proof in writing that the deficiency has been remedied. Any failure to provide proof within the five days will constitute grounds for defaulting the contractor by DGS. In addition, a contractor who fails to comply with these new requirements is subject to suspension for a period of three months and/or debarment from bidding on any Commonwealth Pennsylvania public works projects for a period of three years.

Because the penalties for non-compliance are potentially dire, and because we have confirmation from contractors that DGS is in fact enforcing these new requirements of section 7.5 requirements, contractors doing business with DGS should immediately insert the new provisions into their subcontracts.

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