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THIRD-PARTY PROVISIONS IN AGENCY/SUBCONTRACTOR CONTRACTS

Igor Vesler

Diken Research, New York, NY

Disclaimer

All similarities and/or analogies between the contractual provisions expounded below and any and all actual contracts and agreements are purely coincidental. Neither this article as a whole nor any part thereof may be considered, interpreted, and/or used as legal advice.

1 Basic Definitions and Assumptions

Subcontractor means a physical person who acts in a business capacity and who, according to the Department of Labor's definition of a self-employed person, is not subject to control, direct supervision, or any other oversight of his/her relevant activities in this capacity under a contract with the agency, bureau, translation company, or similar legal entity.

Agency means a business entity rendering services to direct clients by using subcontractors for actual performance of jobs ordered by such clients. (Here I intentionally do not make a distinction between agencies and bureaus, while acknowledging that differences do exist between the two (added value, quality control, etc.).)

Client means any legal entity or physical person in need of services that agencies and subcontractors normally provide.

Contract means a written statement of the rights and obligations of both agency and subcontractor within the scope of the services provided by subcontractor to agency. In any particular case, agency and subcontractor are the principal parties to the contract.

Third party means, for the purpose of any contract between agency and subcontractor, any legal entity or physical person other than agency or subcontractor. (Although the contract may explicitly or implicitly contemplate involvement of third parties of several types (e.g., government agencies and/or officials with the legitimate right to know), we will discuss only bureau/agency clients as a third party, unless otherwise specified.)

2 Third-Party Provisions

2.1 General

The following aspects of each of the provisions presented below are discussed:

Controllability is the extent to which one party can control the other party's compliance with the specific provision;

Enforceability is the extent to which one party can enforce or ensure the other party's compliance with the specific provision;

Balance of rights is the extent to which the interests of both parties are equally represented in the specific provision.

2.2 Noncompete Provision

The "noncompete provision" quite often is a component of these contracts. In some cases it is a part of, or linked to, the confidentiality/nondisclosure and nonexclusivity provisions. The general idea of the noncompete provision is to prevent a subcontractor from competing with the agency in the same market segment, while a nonexclusivity clause establishes that nothing contained in the contract may prevent the subcontractor from rendering the same services to other entities. As a rule, it is presumed in the contract (whether explicitly or implicitly) that such competition stems

from subcontractor's awareness of agency's clients he/she may have learned about during his/her performance of work ordered by such clients through agency. The language of this kind of provision varies from contract to contract, ranging from highly restrictive (e.g., absolutely no contacts with any persons or entities mentioned in the documents translated by subcontractor or during his/her interpreting assignments) to very liberal (e.g., subcontractor retains the right to contract with and/or perform similar services for other entities, including competitors of the agency), as does the period during which this provision is legally in force (from one to five years from the moment of contract termination.) A more specific form of the noncompete provision is the nonsolicitation clause, which expressly prohibits subcontractor's soliciting or even accepting assignments from agency's clients. Such a clause also ranges from extremely tight (encompassing all business services, including translation and interpreting, and all of agency's clients) to more relaxed (limited to only services similar to or the same as those rendered by subcontractor to agency and to only those clients made known to subcontractor through agency).

Within this legal framework, agency's position is quite clear and natural. However, as drafted in many contracts, the noncompete provision is a one-way street. It protects the agency from unfair competition, but does not provide any protection of or remedies to a subcontractor in a case where an agency happens to offer its services to current subcontractor's direct client. The agency may argue that such an offer or solicitation was a part of its regular marketing activity and was not based on information gleaned from a subcontractor. However, subcontractor's résumé and professional references normally contain information on his/her direct clients, as do some other sources. Therefore, at least from the contractual point of view, nothing may prevent an agency from using such information to its benefit. This and some other considerations lead to the simple idea that the noncompete/nonsolicitation provision must be bilateral, and that the fair-competition requirement should apply to both parties, i.e., agency and subcontractor.

Controllability. Is any agency (having, say, 30 active accounts and 100 subcontractors) capable of controlling its subcontractors' contacts? How (other than through close personal contacts with client's employee in charge of procurement of translation services) can the agency learn one of its clients has been approached by subcontractor? These questions are rhetorical, since even a decreasing work flow from a specific client does not necessarily mean that the client switched to some other provider of the same services. Actually, the agency may not learn until long after the fact that a subcontractor has taken over its client. In addition, there might be no documents showing that subcontractor violated the nonsolicitation clause the client may have contacted the subcontractor simply while shopping around for better rates, or the subcontractor may even have contacted this client during a regular marketing campaign. On the other hand, no less likely is the situation where agency approaches subcontractor's direct client and offers its services, having no contractual obligation to apply the noncompete provision to the subcontractor's interests.

Some agencies use a better (though harder-to-implement) approach. They include a provision in their contracts with clients to the effect that the client may not hire agency's subcontractor who has performed any work for that client through or with the intercession of that agency. Still, client's compliance with such a provision (even if client's lawyer would agree to such a restriction) is very difficult, if not impossible, to control. However, in this case subcontractor is not subject to noncompete provision requirements (although some agencies provide for a 25% commission fee in their agreements with subcontractors who 'take over' agency's client).

To summarize, in most cases neither agency nor subcontractor can effectively control each other's marketing activities and contacts with actual or potential clients.

Enforceability. Taking into consideration the above conclusion, one can hardly imagine a mechanism whereby the agency can possibly enforce the noncompete provision. (Although there are certain exceptions: once an agency sent me a text for translation where all proper names were diligently blacked out so that I would never learn who the client was.) Ideally, to avoid any conflicts agency and subcontractor should keep each other's mailing lists and notify each other every time either one establishes a new account. (If such a "market paradise" ever existed, I have never heard of it.) Some agencies try to enforce this provision by imposing severe liability on subcontractor for his/her noncompliance, which, agencies claim, causes irreparable harm to them and therefore entitles them to injunctive relief and any other remedies permitted by law. But unless documents evidencing noncompliance are available (which is very seldom the case), it is virtually impossible to win such a civil suit in court.

To summarize, in practice no agency is able to effectively enforce a noncompete/ non-solicitation provision.

Balance of rights. The commercial essence of the noncompete provision is obvious. Along with subcontractors, agency's clients and goodwill constitute extremely valuable intangible assets. It takes years of marketing and a lot of money for any agency to establish and maintain its customer base, and it therefore is agency's legitimate right to protect this asset by all legal means. BUT it also is subcontractor's right! One may argue that the very nature of agency/subcontractor business relations is such that subcontractor receives valuable information on agency's clients with every translation or interpreting assignment. If one accepts this position, then it is agency's responsibility to prevent any misuse of the information it provides to subcontractor, especially where such information is transmitted over information networks.

2.3 Pay-as-Approved/Pay-as-Paid Provision

Another even more explicit example of third-party involvement is the payment clause. One precondition many agencies establish in their contracts is that agency's payment to subcontractor is subject to client's approval (the pay-as-approved principle) or to client's payment to the agency (the pay-as-paid principle). As opposed to a noncompete/nonsolicitation provision whereby agency tries to keep subcontractor as far as possible from its clients, here agency makes subcontractor involved in its business relations with its clients by forcing him/her to share both responsibility for client's acceptance of work and the financial burden arising out of any delayed payment.

Controllability. It is obvious that subcontractor has no control over client's relations with agency in general and over client's acceptance of his/her work in particular. Furthermore, as soon as subcontractor submits a translation file to the agency, he/she has no control over further editing, changes, modifications, and so forth that agency may do. The above applies to client's payment to an even greater extent.

Enforceability. Theoretically, when agency fails to pay subcontractor on time, pleading the excuse that client has not paid, the only option left to subcontractor is to contact agency's client (which is a violation of the noncompete provision) and to persuade it to pay the agency (which is hard to imagine).

Balance of rights. Even without thorough legal analysis it is clear that a pay-as-approved/pay-as-paid provision unevenly allocates financial risk and thereby unreasonably restricts subcontractor's right to be paid for his/her work within the agreed period. There is no reason why subcontractor should share with the agency the burden of agency's problems related to its clients, which are contractually isolated from subcontractor.

To summarize, any payment provisions related to agency's clients are irrelevant and should be replaced with a single payment clause providing for a regular 30-day payment term (which is standard practice in the translation industry).

3 Conclusion

There are a number of other third-party provisions such as a liability clause, which unilaterally imposes liability obligations on subcontractor to an extent all out of proportion to his/her ability to control agency's and/or client's actions and in amounts out of line with his/her revenues. Sometimes subcontractor is forced to become contractually liable for all direct, indirect, and even consequential damages arising from errors and omissions in his/her translation. While this obligation may be acceptable where subcontractor deals with a direct client and willingly accepts it, such reallocation of risk by agency is both unfair and unjustified.

In presenting this material for discussion, I would like to assure any potential reader and/or listener that the impartiality and objectiveness of my views is largely guaranteed by the fact that I act in a twofold capacity. On one hand, for many years I have been an actively practicing translator and interpreter engaged in numerous contacts with both agencies/bureaus and direct clients. On the other hand, I am owner of a translation and information services company that uses subcontractors' services, and therefore have gained considerable experience in dealing with various contracts and agreements, with both my subcontractors and my clients. It is my strong belief that the rights of all parties to any contractual document are to be equally protected, well balanced, and enforceable over a wide range of possible circumstances. Specifically, any agreement or contract between translator/interpreter and agency/bureau should be bilateral, i.e., the subcontractor and subcontracting agency should be the only parties to it. Moreover, any reference whatsoever to any third party and/or its promises and obligations is both irrelevant and invalid within the context of such an agreement or contract.