

Incorporating Prime Contract “Flow-Down” FAR Clauses in Government Subcontracts: *Guidance for Primes and Subs*

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- Represented all types and all sizes of government contractors in over 100 protests before federal agencies. SBA, GAO and the Court of Federal Claims
- Editor, ABA Guide to Service Contracts Flow-Down Terms and Conditions
- Routinely draft and negotiate teaming agreements, subcontracts, joint venture agreements, M&A agreements, and non-disclosure/non-compete/non-solicitation agreements

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Understanding the FAR Flow-Down Process

- Need to understand:
 - The Federal Acquisition Regulation (“FAR”) and its applicability to government prime contracts
 - Prime government contractor’s responsibility to “flow down” a prime contract clause
 - What qualifies as a subcontract
 - The difference between mandatory and discretionary “flow-down” clauses
 - How to “flow-down” FAR clauses
 - Risks associated with “flowing-down” prime contract clauses to subcontractors
 - Interplay between standard subcontract terms and conditions and prime contract clauses “flowed-down” to a subcontractor

The Federal Acquisition Regulation (“FAR”)

- Set of regulations that govern federal procurements and the management and administration of government contracts
 - Some agencies have agency-specific “supplements” to the FAR regulations; i.e., the Department of Defense (known by “252” reference)
- The regulations primarily address responsibilities of government representatives but some provisions apply to contractors directly
- With respect to government contracts, the FAR instructs government representatives to include certain contract clauses in government prime contracts which also need to be included in subcontracts

The Federal Acquisition Regulation (“FAR”) *cont.*

- FAR clauses are included in Part 52 of the FAR
 - FAR 52.000- 52.214-35
- Each FAR clause refers back to the FAR provision that requires the FAR clause to be included in a government prime contract
- Each FAR clause contains a date reflecting a version of the language of that clause
 - FAR 52.203-13 – Contractor Code of Business Ethics and Conduct (Oct 2015)

FAR Clauses Incorporated Into Prime Contracts

- Nearly all FAR clauses included in a prime contract are non-negotiable
- Many FAR clauses implement general policies associated with government's role in distributing tax payer dollars
 - Clauses address equal opportunity and affirmative action, labor, bribery/ethics, drug control, and clean air/water issues etc.
- Many factors determine which FAR clauses will be included in a prime contract
 - Type of prime contract, value of prime contract, purpose/nature of prime contract

FAR Clauses Incorporated Into Prime Contracts *cont.*

- Failure of a prime to comply with FAR clause “flow-down” obligations may lead to contractor being terminated for default
 - If prime contractor subcontracts work under the prime contract, must consider obligations that should be included in subcontract to ensure that prime contractor complies with prime contract obligations
- Many FAR clauses include language *requiring* a prime contractor to “flow-down” the FAR clause to its subcontractors (mandatory “flow-down” clauses)
 - Other FAR clauses discretionary and “flow-down” left to prime contractor’s judgment

Issues Prime Should Consider Before “Flowing-Down” a FAR clause

- What does the FAR consider a “subcontract”?
- Is the FAR clause mandatory or discretionary or applicable to the subcontract work?
- How does the prime “flow-down” the FAR clauses in its prime contract to the subcontractor?
- What risks are created with respect to “flowing-down” a FAR clause to a subcontractor?

What does the FAR consider a “subcontract” or “subcontractor”?

- Many FAR clauses include language requiring the prime contractor to flow-down the clause to its subcontractors
 - E.g. “The Contractor shall include the substance of this clause, including this paragraph, in subcontracts that...”
- But FAR doesn't include a standard definition of “subcontract” or “subcontractor”
 - The Section 809 panel stated that the FAR and DFARs have 27 “separate, sometimes overlapping, definitions’ of “subcontractor”

What does the FAR consider a “subcontract” or “subcontractor”? *cont.*

- Common approach is to consider any contractor that is providing goods and services identified in the prime contract's scope of work a subcontractor
- Contractors that provide goods and services that benefit the *company as a whole* or enable a company to perform the contract work generally are not considered a subcontractor for the purpose of the “flow-down” process

Is the FAR clause Mandatory and Applicable to the Subcontract Work?

- Mandatory clauses are those that include language requiring prime contractor to include a “substantially similar” clause in its subcontracts
- FAR includes a “matrix” that shows mandatory/discretionary nature of each FAR clause (48 C.F.R. Subpart 52.301)
- Not all mandatory flow-down FAR clauses are applicable to the subcontract work
 - FAR clauses in prime contract may apply only to contracts above or below certain dollar thresholds
 - FAR clauses may apply to only certain types of contracts (i.e., fixed price, cost reimbursement)
 - FAR clauses may apply only to certain types of work (i.e., supplies vs. services, international vs. domestic etc.)
 - FAR clauses may apply to contracts for “commercial items”

If discretionary, is it still necessary to “flow-down” the FAR clause to a subcontractor?

- Prime contractor should assess its risk exposure and the subcontractor's role in prime contract performance
 - Buy American Act clauses
 - Trade Agreements clauses
 - Changes
 - Termination for Convenience
 - Stop Work Order
 - Intellectual Property Clauses

How does a prime contractor “flow-down” a FAR clause to a subcontractor?

- Most common method is to include an appendix or attachment to a subcontract identifying FAR “flow-down” clauses
 - Appendix or attachment typically “flows down” *all* prime contract FAR clauses
 - Prime contractor typically includes “substitution paragraph” in the subcontract indicating that the term “prime contractor” shall be substituted any time the term “agency” or “Contracting Officer” is referenced in a FAR “flow-down” clause etc.
- Some primes use broad statement that all obligations of the prime flow-down to the subcontractor

Risks Associated with FAR Flow-down Process

- *Christian Doctrine*
 - Based on case called *G.L. Christian & Assoc. v. United States*, 312 F.2d 418 (Ct. Cl. 1963)
 - FAR clause not physically in prime contract may be incorporated by reference if mandated by law or regulation
 - But certain public policy FAR clauses are incorporated as a matter of law in subcontracts such as clauses relating to affirmative action, labor issues, equal opportunity
- General Substitution and Dates
 - Ensure that subcontract flow-down clauses have due dates in advance of due dates included in prime contract FAR clauses
 - Version control

Risks Associated with FAR Flow-down Process

- Inconsistencies between subcontract terms and conditions and FAR clauses in an attachment/appendix
 - Subcontract is a mix of commercial terms and FAR clauses
- *Order of Precedence clause*
 - Order of Precedence clause in body of contract will effect outcome if the provisions of a FAR “flow-down” clause in an attachment conflicts with a provision in body of subcontract
 - FAR Order of Precedence clause

Risks Associated with FAR Flow-down Process

➤ *Disputes*

– Commercial

- Choice between courts/ arbitration
- Can make losing party pay dispute fees

– FAR

- Requirement that performance must continue notwithstanding a dispute
- Subcontractor has no privity with the Government, needs “sponsorship” language
- Separate disputes provisions into two categories:
 - disputes with the government and disputes with the prime contractor
 - Prime contractor should ensure that its liability for government based disputes is not greater than subcontractor's recovery from the Government

Risks Associated with FAR Flow-down Process

- *Changes clause*
 - Commercial
 - Modification to subcontract terms only with mutual consent
 - FAR
 - Government can make unilateral changes to drawings, designs or specifications
 - Method of shipping or packing
 - Place of delivery
 - Must submit claim within 30 days

Risks Associated with FAR Flow-down Process

- *IP Clauses*
 - Commercial
 - Work for hire
 - License
 - Patent
 - FAR
 - Government license rights vs. prime contractor rights
 - Legending requirements
 - Patent filing protocol

Risks Associated with FAR Flow-down Process

- *Termination*
 - Commercial
 - Termination for default
 - Either party can terminate upon reasonable notice
 - FAR
 - Prime contractor must stop work immediately
 - Prime contractor must deliver works in progress
 - Prime contractor must file termination claim within 1 year
 - Prime contractor should adjust claim due date
 - Subcontractor should only accept unilateral termination if government terminates prime contract unilaterally

Prime Contractor Best Practices

- Prime wants to transfer all risk to subcontractor
 - Most large contractors have generic documents that list FAR flow-down clauses in different columns that vary according to type of subcontract (FFP v. CPFF, domestic vs. international, supplies vs. services etc.)
- Include provision in subcontract that allows prime to “flow-down” clauses added during contract performance (new versions, *Christian doctrine*)
- Ensure that timeframes in “flow-down” clauses allow prime sufficient time to comply with FAR clauses in prime contract
- Be careful to ensure that “flow-downs” are consistent with subcontract terms and conditions

Subcontractor Best Practices

- Reject blanket statements
- Ask for list of prime contract “flow-down” clauses; don’t accept vague references in subcontract
- Ensure that general substitution paragraph includes “as applicable” language
- Include IP/audit/government property exceptions to general substitution paragraph
- Strike those clauses clearly inapplicable to the work
- Negotiate language of discretionary FAR clauses “flowed-down”
- Identify potentially inconsistent subcontract provisions

Resources

- American Bar Association, Section on Public Contract Law
 - Guide to Supply Flow-Down Clauses
 - Guide to Services Flow-Down Clauses
- National Defense Industrial Association
 - *Study of the Applicability of FAR Clauses to Subcontracts Under Prime Defense and NASA Contracts*
- Large Contractors
 - Lockheed Martin and other contractors publish subcontract terms and conditions on their websites

Questions?



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