



ACQUISITION HOUR WEBINAR

Flow-Down Clauses – Management and Responsibilities for Federal Contractors

February 23, 2016



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assistance to
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What we will Cover Today

- What are Flow Down Clauses
- How to Determine if a Clause Flows Down
- Method to Track Clauses
- Commercial Item Contracts
- Sample Subcontract Language



What are Flow Down Clauses?

FAR clauses included in Government contracts that prime contractors are required to flow down to their subcontractors in their subcontracts.

Flow Down Clauses can significantly impact the obligations and risk of performing a subcontract.



What is a Subcontract?

FAR 44.101

“Subcontract” means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract, including POs, and changes and mods to POs

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

How do you Know What Flows Down

- The FAR clause itself usually states if the clause flows down.
- Flow down can be mandatory, non-mandatory (suggested), or to be consider.
- May need to flow down the entire clause or the substance of the clause.

Why do Flow Downs Matter?



For Prime Contractors:

- Responsible for the actions of their subcontractors. Prime Contractor is responsible for the entire contract.
- Manage/allocate performance uncertainties and risk

Why do Flow Downs Matter?

For Subcontractors:

- Need to know how FAR requirements will impact their costs.
- May need to flow down FAR clauses as well to their subcontractors/suppliers.
- Minimize exposure to prime contractor risks.
- Ensure company can meet compliance obligations.

Flow Down Requirements

- Flow down requirements depend on subcontract type and dollar value.
- The entire prime contract should not be flowed down to the subcontractor.

Drafting Flow Downs

- Some clauses must be flowed down verbatim

“Contractor shall include this clause”

“Contractor shall include the terms of this clause”

- Some clauses may be modified

“Contractor shall include the requirements of this clause”

“Contractor shall include the substance of this clause”

Non-Mandatory Flow Downs to Include

- **Termination for Convenience Clause** (FAR 52.249-x) – Allows prime to terminate subcontract should the Government terminate the prime contract. If prime has no right to terminate subcontract could result in costly breach of contract.
- **Changes Clause** (FAR 52.243-x) – Allows prime to flow Government changes to the subcontractor. Prime must be able to modify subcontract unilaterally to match the scope of the Government change.
- **Disputes Clause** (FAR 52.233-1) – Puts subcontractor on notice of disputes process and requires subcontractor to keep working pending a dispute.

FAR Clause Dates

- The Prime Contractor needs to flow down the version of the clause that is in their contract.
- If the FAR is updated between the award of the prime contract and the signing of subcontracts, the original contract clause is flowed down.

Steps after receipt of contract award

- Generate a file, either paper or electronic of the full text of all clauses listed in the contract.
- Look up each clause to determine if it flows down to the subcontractor. Note if any thresholds apply.
- Prepare contracts with subcontractors including all flow-down clauses.

Steps after receipt of contract award

- Use Excel to set up a list of all clauses, include effective date of the clause and if an alternate was included.
- Indicate if reports are required.
- If you have multiple government contracts, maintain a master list of all clauses.

CLAUSE #	TITLE	THRESHOLD	CLAUSE/ PROVISION	REFERENCE/ FULL TEXT	FLOW DOWN	WHEN TO USE			
52.202-1	Definitions (NOV 2013)	over SAT	C	R	C				
52.203-3	Gratuities (APR 1984)	over SAT	C	R	C				
52.203-5	Covenant Against Contingent Fees (MAY 2014)	over SAT	C	R	C				
52.203-6	Restrictions on Subcontractor Sales to the Government (SEI)	over SAT	C	R	M	commercial items over the SAT			
52.203-7	Anti-Kickback Procedures (MAY 2014)	over SAT	C	R	M	Over SAT			
52.203-8	Cancellation, Rescission and Recovery of Funds for Illegal o	over SAT	C	R	None				
52.203-10	Price or Fee Adjustment for Illegal or Improper Activity (M)	over SAT	C	R	None				
52.203-12	Limitation on Payments to Influence Certain Federal Transac	over \$150K	C	R	M	Over SAT			
52.203-13	Contractor Code of Business Ethics and Conduct (APR 201	over \$5 M	C	R	M	Over \$5M	period of performance 120 day		
52.203-14	Display of Hotline Poster(s) (DEC 2007)	over \$5 M	C	R	M	Over \$5M	CO fill in		
52.203-15	Whistleblower Protections Under the American Recovery and Reinvestmen		C	R	M	All	when funded in whole or in pa		
52.203-16	Preventing Personal Conflicts of Interest (DEC 2011)	over SAT	C	R	M	Over SAT	sol. includ self-employed indivi		
52.203-17	Contractor Employee Whistleblower Rights and Requiremen	all over SAT	C	R	M	Over SAT			
52.204-4	Printed or Copied Double-Sided on Postconsumer Fiber Co	over SAT	C	R	None				
52.204-7	System for Award Management (JUL 2013)	ALL	P	R	M	All			
52.204-8	Annual Representations and Certifications (DEC 2014)	all over SAT	P	F	None				
52.204-9	Personal Identity Verification of Contractor Personnel (JAN	All	C	R	M	Access to	when routine access to a fede		
52.204-10	Reporting Executive Compensation and First-Tier Subcontr	over \$25K	C	R	None				
52.204-13	System for Award Management Maintenance (JUL 2013)	All	C	R	M	All	When 52.204-7 is included		
52.204-14	Service Contract Reporting Requirements (JAN 2014)		C	R	M	All	Over thresholds outlined in FA		
52.204-15	Service Contract Reporting Requirements for Indefinite-Delivery Contract		C	R	M	All	Over thresholds outlined in FA		
52.204-16	Commercial and Government Entity Code Reporting (NOV	All	P	R	None				
52.204-17	Ownership or Control of Offeror (NOV 2014)	All	P	R	None				
52.204-18	Commercial and Government Entity Code Maintenance (NOV 2014)		C	R	None		when 52.204-16 is included		
52.204-19	Incorporation by Reference of Representations and Certifica	All	C	R	None				
52.209-5	Representation by Corporations Regarding an Unpaid Tax I	Over SAT	P	F	None				

Commercial Item Contracts

Even Commercial Item Contracts require contractors to flow down clauses to subcontractors. *FAR 52.244-6 Subcontracts for Commercial Items* requires a subcontract to include a mandatory of 14 clauses



Commercial Item Contracts

- 52.203-13 Contractor Code of Business Ethics and Conduct
- 52.203-15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009
- 52.219-8 Utilization of Small Business Concerns
- 52.222-21 Prohibition of Segregated Facilities
- 52.222-26 Equal Opportunity
- 52.222-35 Equal Opportunity for Veterans

Commercial Item Contracts

- 52.222-36 Equal Opportunity for Workers with Disabilities
- 52.222-37 Employment Reports on Veterans
- 52.222-40 Notification of Employee Rights Under the National Labor Relations Act
- 52.222-50 Combating Trafficking in Persons
- 52.222-55 Establishing a Minimum Wage for Contractors

Commercial Item Contracts

- 52.225-26 Contractors Performing Private Security Functions Outside the United States
- 52.232-40 Providing Accelerated Payments to Small Business Subcontractors
- 52.247-64 Preference for Privately Owned U.S.-Flag Commercial Vessels

FAR 52.203-6 Restrictions on Subcontractor Sales to the Government

(a) Except as provided in (b) of this clause, the Contractor shall not enter into any agreement with an actual or prospective subcontractor, nor otherwise act in any manner, which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (including computer software) made or furnished by the subcontractor under this contract or under any follow-on production contract.

(b) The prohibition in (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation.

(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract which exceed the simplified acquisition threshold.



Sample Subcontract Language

INCORPORATION OF FAR CLAUSES.

The Federal Acquisition Regulation (FAR) clauses referenced below are incorporated herein by reference, with the same force and effect as if they were given in full text, and are applicable, including any notes following the clause citation, during the performance of this Contract. If the date or substance of any of the clauses listed below is different than the date or substance of the clause actually incorporated in the Prime Contract referenced by number herein, the date or substance of the clause incorporated by said Prime Contract shall apply instead.

Sample Subcontract Language

GOVERNMENT SUBCONTRACT.

This Contract is entered into by the Parties in support of a U.S. Government Contract.

Definitions as used in the FAR clauses referenced below and otherwise in this Contract:

1. "CONTRACTOR" means the SELLER, as defined in the definitions of this document, acting as the immediate (first-tier) subcontractor to ABC COMPANY.
2. "Prime Contract" means the contract between ABC COMPANY and the U.S. Government or between ABC COMPANY and its higher-tier contractor who has a contract with the U.S. Government.

Sample Subcontract Language

3. "Contract" means this Contract.
4. "Subcontract" means any contract placed by the CONTRACTOR or lower-tier subcontractors under this Contract.

NOTES.

1. Substitute "ABC COMPANY" for "Government" or "United States" as applicable throughout this clause.
2. Substitute "ABC COMPANY Procurement Representative" for "Contracting Officer", "Administrative Contracting Officer", and "ACO" throughout this clause.

Sample Subcontract Language

3. Insert "and ABC COMPANY" after "Government" or "Contracting Officer", as appropriate, throughout this clause.
4. Insert "or ABC COMPANY" after "Government" throughout this clause.
5. Communication/notification required under this clause from/to the CONTRACTOR to/from the Contracting Officer shall be through ABC COMPANY.
6. "Contracting Officer" shall mean the U.S. Government Contracting Officer for ABC COMPANY's government prime contract under which this Contract is entered.

Sample Subcontract Language

AMENDMENTS REQUIRED BY PRIME CONTRACT.

CONTRACTOR agrees that upon the request of ABC COMPANY it will negotiate in good faith with ABC COMPANY relative to amendments to this Contract to incorporate additional provisions herein or to change provisions hereof, as ABC COMPANY may reasonably deem necessary in order to comply with the provisions of the applicable prime contract or with the provisions of amendments to such prime contract. If any such amendment to this Contract causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the Work under this Contract, an equitable adjustment shall be made pursuant to the “Changes” clause of this Contract.

Sample Subcontract Language

FAR FLOWDOWN CLAUSES.

REFERENCE TITLE

- 1. The following FAR clauses apply to this Contract :**
- 2. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$10,000:**
- 3. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$25,000:**
- 4. The following FAR clauses apply to this Contract if the value of this Contract equals or exceeds \$150,000:**

Sample Subcontract Language

52.225-9 BUY AMERICAN ACT – CONSTRUCTION MATERIALS (MAY 2014)

52.225-13 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (JUNE 2008)
(In paragraph (a), see Notes 5 and 6.)

52.234-1 INDUSTRIAL RESOURCES DEVELOPED UNDER DEFENSE
PRODUCTION ACT TITLE III (DEC 1994). (See Note 2.)

52.242-13 BANKRUPTCY (JUL 1995) (See Note 2.)

52.242-15 STOP-WORK ORDER (AUG 1989) (See Notes 1 and 2.)

Substance of FAR Clause Included

GRATUITIES/KICKBACKS

(a) No gratuities (in the form of entertainment, gifts or otherwise) or kickbacks shall be offered or given by SELLER, to any employee of ABC COMPANY with a view toward securing favorable treatment as a supplier.

(b) By accepting this Contract, SELLER certifies and represents that it has not made or solicited and will not make or solicit kickbacks in violation of FAR 52.203-7 or the Anti-Kickback Act of 1986 (41 USC 51-58), both of which are incorporated herein by this specific reference, except that paragraph (c)(1) of FAR 52.203-7 shall not apply.

Available Reference Book

Guide to FAR Contract Clauses: Detailed Compliance Information for Government Contracts, 2014 Edition

By Wolters Kluwer Law & Business

Current cost \$255.00



Resources:

- FAR: <https://www.acquisition.gov/?q=browsefar>
- Air Force FAR: <http://farsite.hill.af.mil/>
- Acquisition.gov is: <https://www.acquisition.gov/>
- Wisconsin Procurement Institute
Phone: 414-270-3600 www.wispro.org



Upcoming WPI Events

- ***Acquisition Hour Live Webinar Series - Tuesdays and Wednesdays including:***
 - Protest In Federal Procurement – An Overview – March 15, 2016*
 - Intellectual Property and Government Contracts – March 29, 2016*
- ***Virtual FAR Training Webinar Series – Wednesday evenings - Starting February 17, 2016***
- ***USFS Forest Products Laboratory and Northern Research Station Industry Day – February 25, 2016 – Madison, WI***
- ***Increasing Access to Government Opportunities: HUBZone Small Business Program – March 2, 2016 – Milwaukee, WI***

Upcoming WPI Events

- ***SAME Small Business Expo – March 9 – 10, 2016 – Northbrook, IL***
- ***Government Contracting Opportunities for Small Business – March 24, 2016 – Ladysmith, WI***
- ***4th Annual US Department of Veterans Affairs Business Conference – May 12, 2016 – Brown Deer, WI***
- ***10th Annual Volk Field Small Business Conference – June 15-16, 2016 – Camp Douglas, WI***



questions?

Continuing Professional Education



CPE Certificate available, please contact:

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