



Understanding Flowdowns

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Flowdown: What is it?

- <http://definitions.uslegal.com/f/flow-down-clause/>
- A flow down clause is a contract provision by which the parties incorporate the terms of the general contract between the owner [Government] and the general contractor [Prime Contractor] into the lower tier agreement. It may also be referred to as a pass-through or conduit clause...Such provisions state that the subcontractor is bound to the contractor in the same manner as the contractor is bound to the owner in the prime contract. Flow-down provisions help to ensure that the subcontractor's obligations to the contractor mirror the contractor's obligations to the owner.

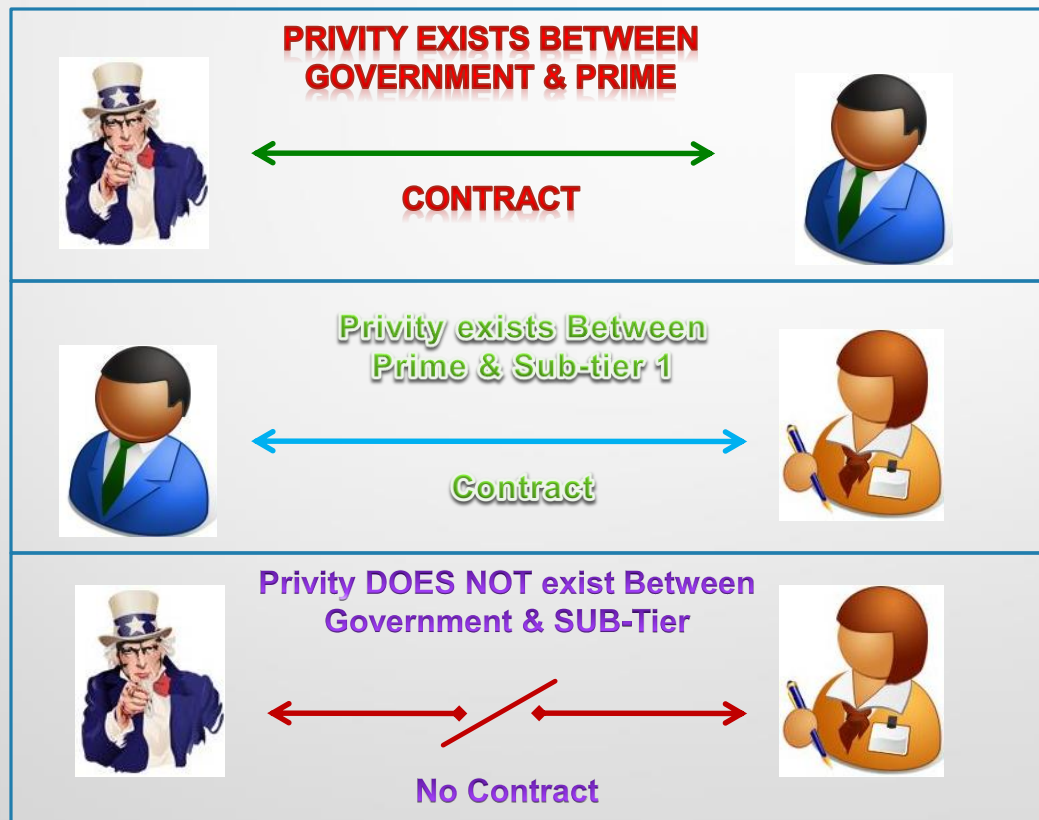
Required Elements of a Contract

- Capacity:
 - The parties must have the capacity/authority to enter into a contract
- Mutual Assent:
 - Parties must mutually assent to be bound to the contract terms by both having an “Offer” and “Acceptance” of offer.
- Consideration:
 - Parties must provide consideration/value to each other (Perform ‘x’ for ‘y’)
- Lawful Purpose:
 - A contract must be for a lawful purpose.
- Terms:
 - *The terms must be certain and clear.*
- Form:
 - The formation of the contract must be of a type permitted by law.

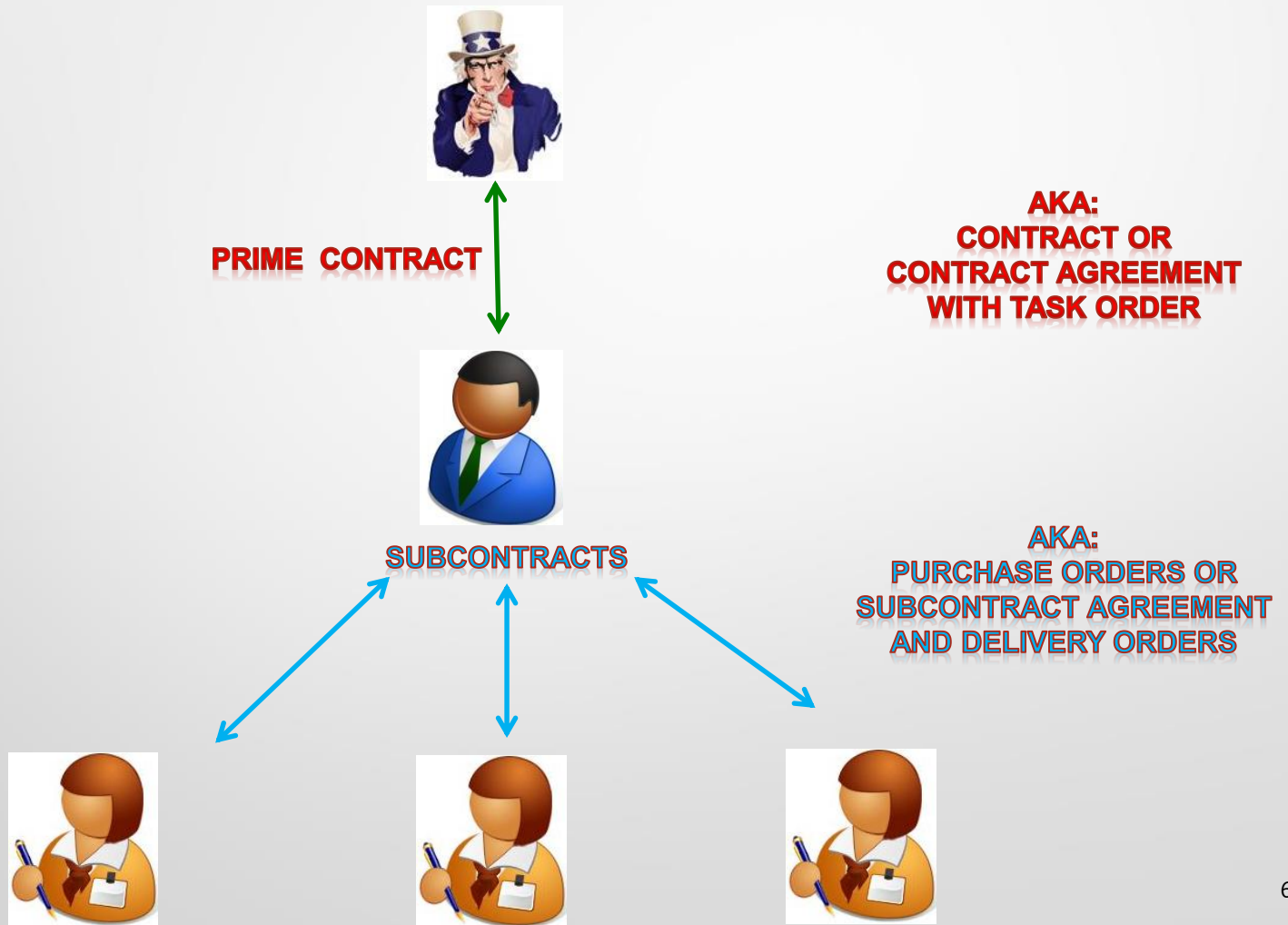
THE **Basic** Tenant of Contracting

- ☞ When you agree to a contract, it is an agreement to **EVERYTHING** in the contract.
 - “Contract Document/Purchase Order
 - Line items, special notes, call outs to other documents
 - Procurement Spec or Statement of Work
 - All call outs to other specs, and the specs in the specs, etc.
- IF a Prime outsources any of the efforts to lower tier contractors, it is still up to the Prime to ensure 100% compliance with the requirements the Prime contracted to. Therefore, the requirements imposed by the Prime to its subcontractors must be sufficient to maintain compliance.

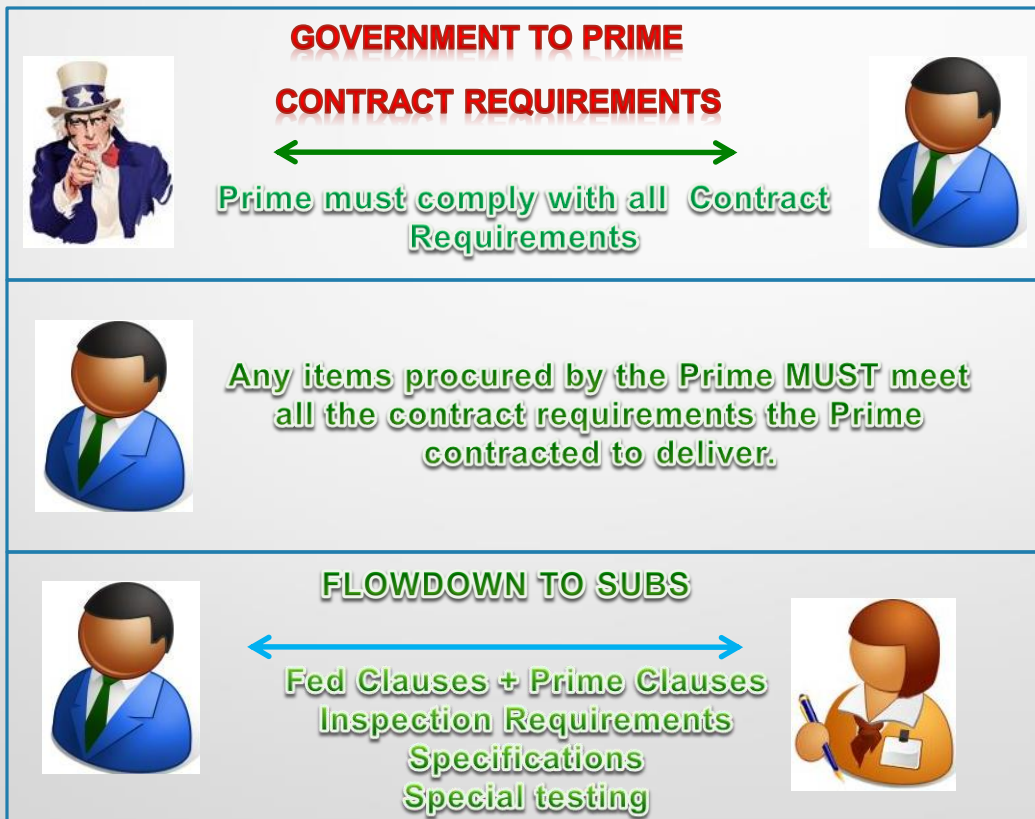
Privity Of Contract



Federal Contracting Terminology



SUBCONTRACTING:



Outsourcing Requirements: Does the Government Care?

- Contractor Purchase System Review
 - The Fed Government expects that the 'supply chain' using the Federal Dollars will function as the Government does
 - Price Justifications
 - **Proper Contract Requirement Flowdown**
 - **Proper clauses for proper vehicle type.**
 - Proper oversight of Sub-vendors
 - Small business program requirements
 - TINA Certifications
 - Etc., etc., etc.

Sub-Contract Documents

- The 'written' contract documentation is the over-riding determination of the agreement and duties between the parties.
- It is the same for Sub-contracting.
 - While it is good to have relationships with the right vendors, the documentation of the requirements of the job need to be clearly documented. "They know what we meant" is not sufficient in the Federal supply chain realm of transparency and audits.
 - Modifications, properly denoted, dated, etc. are important for buyers and subs. Both get audited.

Mandatory Flowdowns

- Only certain FAR / DFARS Clauses **require** flowdown:
 - Sub-Contract Type plays a role in some clauses (FFP, Cost Reimbursable, T&M)
 - Sub-Contract Value Requirements/Thresholds
- Prime/Customer Specific Mandatory flowdowns
- Certification requirements
 - Prime may need to get certifications from subs
 - Small business representations
 - Debarment certifications
 - Lobbying,
 - Etc.

Types of Mandatory Flowdowns

- Mandated by the Clause itself:
 - “Contractor shall include the substance of this clause...in all subcontracts.”
 - Example: 52.222-50 “Combating Trafficking in Persons”
- Required by underlying regulation:
 - 52.211-15 Defense Priority and Allocation Requirements which refers to 5 C.F.R. 700.3(d) - “Persons who receive rated orders must in turn place rated orders with their suppliers”
- Clauses that require interpretation (argue self deleting)
 - Example: 52.219-9 “Small Business Subcontracting Plan” -Insert into “all subcontracts that offer further subcontracting opportunities”
 - Criteria such as Contract Type, Value, Subcontractor status (Small Bus), Territory of work effort.

Methods of providing Flowdowns

- Flowdowns can be done by:
 - Verbatim (or almost)
 - By Substance
 - By Reference

Types of Mandatory Flowdowns

Examples: (From Presentation for the Pacific Northwest Defense Coalition, July 9, 2013, Presented by James C. Bradshaw of Ball and Janick LLP)

- 52.203-7 “Anti-Kickback Procedures”
 - “Contractor agrees to incorporate the substance of this clause...in all subcontracts”
- 52.226-6 “Promoting Excess Food Donation to Nonprofit Organizations”
 - “Contractor shall insert this clause in all contracts”
- 52.222-54 “Employment Eligibility Verification”
 - “Contractor shall include the requirements of this clause...in each subcontract”
- 52.214-26 “Audit and Records—Sealed Bidding”
 - “Contractor shall insert a clause containing all the provisions of this clause...in all subcontracts”

Necessary Flowdowns

- “Necessary” are not Contractual/clause related requirements, but not including them could put the contracting party at huge risk.
 - Items such as:
 - Stop Work & Termination Clauses.
 - Changes Clause
 - Price Reduction for Defective Cost or Pricing Data
- Christian Doctrine: Applies in Contracts between Government to Prime Contractors, NOT between Prime & Subvendors!

Flowdown Methods Found in Industry:

- Cut and Paste Govt Terms & Conditions into subcontract
 - Legal risks of statement: Change “Government” to “Buyer”
 - Intellectual Property
 - Audit allowances
 - Many requirements are not good to have passed down: i.e. High level Packing, or special delivery
- Prime can develop flowdown requirement Case by Case
 - Most precise method
 - Requires some expertise in contracting
 - Time consuming and can be argued as expensive.
- Prime can develop ‘standard’ set and mod as necessary.
 - Still requires review by contracting expertise on case by case basis
- Just referencing that Sub must comply with Prime requirements:
 - ***THIS IS NOT*** a good practice.
 - As a sub, you probably don’t have a copy of the customer’s contract with their customer
 - As a ‘customer’, you probably don’t want your vendor to have the full copy of your contract, and actual requirements, such as packaging, shipping methods, audits, and many other issues can occur.

Potential Consequences for not flowing down requirements

- Non-acceptance of Product
 - Example: Missing proper material certifications
- Failure of Audits
 - Contractor Purchasing System Review (CPSR)
 - Quality audits
- Breach of Contract
 - Termination for Default
 - Debarment or Suspension
- False Claims litigation is possible.

Final Thoughts, Questions and Thank You for your attention

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