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Flow-Down Clauses: Best Practices

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Federal government contractors and subcontractors often struggle with flow-down clauses. Fundamentally, prime and subcontractors squabble over flow-down clauses because they involve assumption of risk. A prime contractor has committed to comply with all of the clauses in its prime contract. To the extent a prime contractor does not flow down a clause to its subcontractor, the prime contractor assumes the risk of any subcontractor non-compliance. This is because, if a contracting officer identifies regulatory non-compliance, the government only looks to the party with which it has privity to enforce compliance: the prime contractor. If the prime contractor has not flowed down the applicable clause to its subcontractor, the prime contractor is responsible for its subcontractor's non-compliance. If the clause has been flowed down, the prime contractor can enforce compliance upon its subcontractor. From a subcontractor perspective, the more flow-down clauses it accepts from its prime contractor, the more compliance risk it assumes.

As a result, prime contractors seek to flow down as many FAR clauses as possible—well beyond the mandatory flow-downs discussed below. Subcontractors, meanwhile, seek to keep flow-down clauses to a minimum. Subcontractors must analyze when it is appropriate and productive to resist non-mandatory flow-down clauses, and sometimes the answers to these questions may not be straightforward. Below we address the mandatory flow-down clauses for commercial subcontracts with commercial and non-commercial prime contractors, how subcontractors can handle irrelevant clauses, and the best flow-down practices for prime contractors and subcontractors.

Commercial Prime Contracts with Commercial Subcontracts

FAR 52.212-5(e) addresses situations where both the prime contract and subcontract are for commercial products or services. In such cases, the subcontract for commercial products or services must include the 22 FAR clauses listed in FAR 52.212-5(e)(1). As to these clauses, there should be no dispute that a prime must flow down the clauses and a subcontractor must accept them when both contracts are for commercial products or services. In addition to these non-negotiable clauses, FAR 52.212-5(e)(2) also allows a prime contractor to flow down "a minimal number of additional clauses necessary to satisfy its contractual obligations." These additional clauses are where there is an inherent struggle: prime contractors are permitted to flow down further clauses, but they are not mandatory.

Non-Commercial Prime Contdractor Awards a Subcontract for Commercial Products or Commercial Services

In the context of commercial subcontracts performed under *non-commercial* prime contracts, the flow-down world becomes murky. FAR 52.244-6 addresses this situation, stating that the subcontract must include the 20 FAR clauses listed in FAR 52.244-6(c)(1) as well as FAR 52.244-6 itself. Similar to FAR 52.212-5(e)(2), while these clauses are mandatory flow downs and non-negotiable, FAR 52.244-6(c)(2) allows a prime contractor to flow down "a minimal number of additional clauses necessary to satisfy its contractual obligations."

There is often confusion in this situation because the prime contractor's non-commercial contract includes clauses that must be flowed down but which are beyond the mandatory clauses in FAR 52.244-6. Often, the prime contractor flows down all clauses from its contract with the government customer. There is nothing *per se* improper with this practice because FAR 52.244-6(c)(2) allows a prime contractor to flow down "a minimal number of additional clauses necessary to satisfy its contractual obligations." However, this practice puts subcontractors in a difficult position. In such situations, the subcontractor first should attempt to disabuse the prime contractor of its understanding that FAR clauses in, for example, a cost-reimbursement contract, are required to be flowed down to a subcontractor providing commercial products or services.

This can be done by pointing to FAR 44.403, which provides that for non-commercial prime contracts "The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Products and Commercial Services, in solicitations and contracts other than those for commercial products or commercial services." This clause demonstrates that prime contractors performing non-commercial contracts with subcontracts for commercial products and services are not obligated to flow down all clauses in their contracts, but rather only the clauses within FAR 52.244-6. Any other interpretation of FAR 52.244-6 would render the clause meaningless.

If a prime contractor will not agree to eliminate all FAR clauses beyond the mandatory clauses, the subcontractor must then weigh several factors. First, the subcontractor must assess whether it can comply with the additional clauses (obviously, you do not want to agree to clauses with which you cannot comply). Second, the subcontractor needs to determine which party has the leverage in the negotiations—in other words, which party needs the other more. If the products or services being sought by the prime contractor are available from other subcontractors, the subcontractor would have less of an ability to say "no" to the additional clauses then if the subcontractor is the so-called "only game in town."

Handling Irrelevant Flow-Down Clauses

We are often asked by subcontractors how to handle irrelevant or clearly inapplicable FAR clauses that a prime contractor seeks to flow down. Such clauses can be mandatory clauses or additional clauses. For example, a mandatory albeit often irrelevant clause might be FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States. Because the FAR mandates that a prime contractor flow down the inapplicable clause, there is little to no chance that the prime will agree to omit this clause even if it is

inapplicable to the subcontract's services. Most primes take compliance with their flow-down requirements seriously because they can face penalties, including termination for default, for not including these mandated FAR provisions. Further, even if the prime does not flow down these clauses, the prime will still be required to comply with them.

In the case of non-mandatory clauses, the subcontractor must evaluate any risks and costs associated with accepting the inapplicable clause(s) to determine whether these outweigh the value of accepting the subcontract. There is always an inherent risk in accepting clauses that are arguably irrelevant to a subcontractor's performance, as a dispute could arise during contract performance about whether the clause actually applies.

Best Practices

Subcontractors

Subcontractors should be clear on what clauses are and are not mandatory flow downs, and should resist agreeing to flow-down clauses beyond those mandated by the FAR. If a subcontractor has no practical choice but to accept additional clauses, it must confirm that it can comply with the additional clauses.

Prime Contractors

In addition to the clauses in FAR 52.244-6 or FAR 52.212-5(e), prime contractors should consider flowing down certain clauses beyond the mandatory flow-down clauses. For example, FAR 52.209-6 "Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment" prohibits subcontracting with entities that have been debarred, suspended, or proposed for debarment. Even though this is not a mandatory flow-down clause for subcontracts for commercial products or services, it involves an easily enforced compliance area. Similarly, prime contractors should consider flowing down applicable cybersecurity clauses as the government has indicated this is, and will be, a targeted area for compliance enforcement.