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New DFARS Rule Prohibits Many Flow-Downs in Commercial Subcontracts

Heads up, DoD prime contractors: under the revised DFARS clause resulting from a new final rule, flowing down many FAR or DFARS clauses to commercial items subcontractors is prohibited. The new DFARS rule marks a significant change from prior policy, which discouraged—but did not prohibit—the flow-down of non-mandatory clauses.

Commercial item flow-downs have long been governed primarily by FAR 52.212-5 (where the prime contract is for commercial items) and FAR 52.244-6 (where the prime contract is not for commercial items). Both clauses provide a specific list of other FAR clauses that must be flowed down to commercial subcontractors.

But what happens with the remaining clauses in the prime contract? Can or should the prime contractor flow them down?

FAR 52.212-5(e)(2) and FAR 52.244-6(c)(2) both state:

> While not required, the Contractor may include in its subcontracts for commercial products and commercial services a minimal number of additional clauses necessary to satisfy its contractual obligations.

DoD commercial items subcontracts are also subject to the DFARS supplement at DFARS 252.244-7000. Before November 17, 2023, that clause stated, in relevant part:

> (a) The Contractor is not required to flow down the terms of any Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial products or commercial services at any tier under this contract, unless so specified in the particular clause. (b) While not required, the Contractor may flow down to subcontracts for commercial products or commercial services a minimal number of additional clauses necessary to satisfy its contractual obligation.

Despite the three clauses' use of the term "minimal number," prime contractors often flow down all or almost all the prime contract's clauses to their commercial subcontractors. In my experience, this happens for three main reasons:

1. The prime contractor doesn't differentiate between its commercial and non-commercial subcontracts, and its subcontract template includes an overbroad, everything-plus-the-kitchen-sink "incorporation by reference" flow-down. (In my experience, this is *very* common).
2. The prime contractor hopes to gain advantages by flowing down certain non-mandatory clauses—for example, the prime may flow down a termination for convenience clause, so it later has the option to remove the subcontractor without cause.
3. The prime contractor has been advised to flow down certain non-mandatory clauses to better protect itself from liability. For example, this article, written by two government contracts attorneys, suggests that contractors consider flowing down non-mandatory clauses dealing with suspension, debarment, and cybersecurity. (When I practiced law, I sometimes gave similar advice!)

Given the subjective, wishy-washy "minimal number" language of FAR 52.212-5, FAR 52.244-6, and the prior version of DFARS 252.244-7000, there's no bright-line test for when a prime's flow-downs go too far. The reality is that under these clauses, the question of which mandatory flow-downs appear in a subcontract essentially has been a matter for negotiation between the prime contractor and subcontractor—an area in which the prime often (though not always) has more leverage.

Under the revised DFARS clause, though, the "minimal number" rule has been replaced with an outright flow-down *prohibition*—and in my opinion, it means that many prime contractors' standard subcontracts are about to become non-compliant. It's a major shift: the DoD is no longer playing around with simply discouraging these flow-downs but has enacted a bright-line, enforceable ban. As Eminem once said, "I was playin' in the beginning, the mood all changed." (Fun fact: you—if you visit Detroit, you can eat at Eminem's restaurant—named, of course, "Mom's Spaghetti.")

The new DFARS rule amends DFARS 252.244-7000, the DFARS supplement addressing commercial subcontracts. The revised clause does away with the text I quoted above and replaces it with the following relevant language:

> (a) The Contractor shall not include the terms of any Federal Acquisition Regulation (FAR) clause or Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial products or commercial services at any tier under this contract, unless—(1) For DFARS clauses, it is so specified in the particular clause; or (2) For FAR clauses, the clause is listed at FAR 12.301(d) or it is so specified in paragraph (e)(1) of the clause at FAR 52.212–5 or paragraph (b)(1) of the clause at FAR 52.244–6, as applicable.

In case "shall not" is in any way confusing, the DoD also provided the following commentary in the final rule accompanying the change:

> This final rule prohibits flowing down FAR or DFARS clauses by the prime contractor, under certain conditions, under DFARS clause 252.244–7000, Subcontracts for Commercial Products or Commercial Services.

When will this important change to DFARS 252.244-7000 occur, you ask? The DoD published the new DFARS rule on November 17, 2023, and it took effect *immediately*. In other words, it's on the books *now*!

Because the rule amends a contractual clause, it doesn't affect preexisting DoD contracts, which will remain subject to the previous version of the clause unless the contract is modified to incorporate the revision. It does mean, though, that DoD Contracting Officers will start including the flow-down prohibition in new solicitations and contracts moving forward.

Once a DoD prime contractor becomes party to a contract containing the new version of DFARS 252.244-7000, the contractor will be prohibited from flowing down that contract's FAR and DFARS clauses, other than those specifically exempted. In my opinion, because so many primes flow down non-mandatory clauses to their commercial subcontractors as a matter of course, a whole boatload of DoD primes will soon be out of compliance unless they revise their standard subcontracts.

For DoD primes, then, the takeaway is clear: be on the lookout for the new version of DFARS 252.244-7000 in upcoming solicitations and contracts and be prepared to strictly limit flow-downs under commercial subcontracts covered by the revised clause. If I were a DoD prime, I'd be proactive and get my "contracts people," started on revising my standard subcontract agreements now so that I'm ready when the revised clause starts popping up.

For their part, DoD subcontractors should not assume that their primes are aware of the revised DFARS rule, because I strongly suspect many primes simply won't realize that the clause has changed. (Which, sadly, means these poor lost souls aren't subscribing to this *GovCon Roundup* newsletter!)

Chances are, DoD subcontractors are going to be handed lots of draft subcontracts with newly impermissible flow-downs. Subcontractors should be prepared to check DoD solicitations and prime contracts for the revised clause. When it's included, subcontractors will suddenly find themselves in a very different bargaining position than they're used to when it comes to avoiding unnecessary flow-downs.

Oh, one final piece of advice for primes and subcontractors alike: if you find yourself in the Motor City, remember that "[a]ccording to Eminem, the best way to eat your spaghetti is as a sandwich with garlic bread."

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