Getting Closer to FARs: Managing and Streamlining Government Contracting for the Small Contractor for Goods and Services
Session No. 1002 – Friday (Oct 31, 2014)

Presented by ACC Small Law Department Committee

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SHOW OF HANDS

• There are ______ FAR Clauses:
  – About 125
  – About 340
  – Roughly 470
  – Roughly 590

• There are “mandatory” flowdowns:
  – 11
  – 15
  – 85
  – 103
TODAY’S AGENDA

1. FAR Basics – (Review)
2. Before Your First Contract
3. Teaming Agreements
4. Numbers for Small Businesses
5. Issues in Subcontracting
6. Mandatory Flowdowns
7. Necessary Flowdowns
8. Optional Flowdowns
9. Insertions
10. Recommended Flowdown Techniques
11. Small Business Subcontracting Issues
12. Ostensible Subcontractor Trap
13. FAR Reaching Impact
14. The Christian Doctrine
15. Prime v. Subcontractor
16. Practice Notes
FAR BASICS

• FAR System governs the "acquisition process" by which the government purchases (acquires) goods and services.

• The process consists of three phases:
  (1) need recognition and acquisition planning,
  (2) contract formation, and
  (3) contract administration. The FAR System regulates the activities of government personnel in carrying out that process.
FAR FUNCTION FOR CONTRACTORS

• FAR (Federal Acquisition Regulations)
  – Implement Federal Statutes and Regulations
  – Function as the contract boilerplate or terms and conditions for working with the Federal Government.
  – Acts as gap filler similar to the UCC in commercial contracting.

• Codified at Title 48, Chapter 1 of the United States Code of Federal Regulations.
  • Various website references:
    – http://www.ecfr.gov
    – http://farsite.hill.af.mil/
http://farsite.hill.af.mil/
FAR Supplements

• Additional terms supplied by each agency to enhance or supersede the FAR clauses such as:
  – DFARs (Defense Supplement to the FARs)
    • AFFARS (Air Force Supplement to the DFARs)
  – NASA FAR Supplement (NFS)
  – Supplements located at 48 CFR 2 et seq.
FAR DIVIDED INTO TOPIC AREAS

In Volume 1:

Subchapter A: General
Part 1. Federal Acquisition Regulations System
Part 2. Definitions of Words and Terms
Part 3. Improper Business Practices and Personal Conflicts of Interest
Part 4. Administrative Matters

Subchapter B: Acquisition Planning
Part 5. Publicizing Contract Actions
Part 6. Competition Requirements
Part 7. Acquisition Planning
Part 8. Required Sources of Supplies and Services
Part 9. Contractor Qualifications
Part 10. Market Research
Part 11. Describing Agency Needs
Part 12. Acquisition of Commercial Items

Subchapter C: Contracting Methods and Contract Types
Part 13. Simplified Acquisition Procedures
Part 14. Sealed Bidding
Part 15. Contracting by Negotiation
Part 16. Types of Contracts
Part 17. Special Contracting Methods
Part 18. Emergency Acquisitions

Subchapter D: Socioeconomic Programs
Part 19. Small business programs
Parts 20-21. Reserved
Part 22. Application of Labor Laws to Government Acquisitions
Part 24. Protection of Privacy and Freedom of Information
Part 25. Foreign Acquisition
Part 26. Other Socioeconomic Programs

Subchapter E: General Contracting Requirements
Part 27. Patents, Data, and Copyrights
Part 28. Bonds and Insurance
Part 29. Taxes
Part 30. Cost Accounting Standards Administration
Part 32. Contract Financing
Part 33. Protests, Disputes, and Appeals

Subchapter F: Special Categories of Contracting
Part 34. Major System Acquisition
Part 35. Research and Development Contracting
Part 36. Construction and Architect-Engineer Contracts
Part 37. Service Contracting
Part 38. Federal Supply Schedule Contracting

Part 39. Acquisition of Information Technology
Part 40. Reserved
Part 41. Acquisition of Utility Services

Subchapter G: Contract Management
Part 42. Contract Administration and Audit Services
Part 43. Contract Modifications
Part 44. Subcontracting Policies and Procedures
Part 45. Government Property
Part 46. Quality Assurance
Part 47. Transportation
Part 48. Value Engineering
Part 49. Termination of Contracts
Part 50. Extraordinary Contractual Actions and the Safety Act
Part 51. Use of Government Sources by Contractors

In Volume 2:

Subchapter H: Clauses and Forms
Part 52. Solicitation Provisions and Contract Clauses
Part 53. Forms
FAR PART 52 (48 CFR 52)

- Contains Terms & Conditions
  - For Solicitations and Contracts
  - Inclusion of these clauses is driven by multiple factors:
    - Language of the FAR “enabling” clause
    - Language of the FAR “contract” clause itself
      - Type of Contract (Firm Fixed Price, Cost Plus Fixed Fee)
      - Duration of Contract (less than or more than 6 months)
      - Contract Value (FAR 52.215-2 Audit)
      - Total government contracting revenue (FAR 52.222-44 – Report of Executive Compensation)
**Enabling* Clause**

52.222-26 -- Equal Opportunity.

As prescribed in 22.810(e), insert the following clause:

Equal Opportunity (Mar 2007)

(a) **Definition.** “United States,” as used in this clause, means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

(b) (1) If, during any 12-month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of $10,000, the Contractor shall comply with this clause, except for work performed outside the United States by employees who were not recruited within the United States. Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.

**FAR Part 22.810(e)**

The contracting officer shall insert the clause at 52.222-26, Equal Opportunity, in solicitations and contracts (see 22.802) unless the contract is exempt from the requirements of E.O. 11246 (see 22.807(a)). If the contract is exempt from one or more, but not all, of the requirements of E.O. 11246, the contracting officer shall use the clause with its Alternate I.

*Also referred to as the “implementing” clause.*
52.222-26 -- Equal Opportunity.
As prescribed in 22.81(e), insert the following clause:

Equal Opportunity (Mar 2007)
(a) Definition. “United States,” as used in this clause, means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.
(b) (1) If, during any 12-month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of $10,000, the Contractor shall comply with this clause, except for work performed outside the United States by employees who were not recruited within the United States. Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.
GOVERNMENT CONTRACTING IS LIKE ...

A) Boxing

B) Soccer

C) Fishing

D) Baseball
BEFORE YOUR FIRST CONTRACT

• GOVERNMENT AGENCIES

• PRIME CONTRACTORS

• STATE AND LOCAL AGENCIES
FAR Part 4.1202 – “REPS & CERTS”

- Certificate of Independent Price Determination
- Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions
- Taxpayer Identification
- Previous Contracts and Compliance Reports
- Affirmative Action Compliance
- Certification Regarding Responsibility Matters

There are at least 28 representations and certifications that you answer before your first contract.
AND TOMORROW, ONE MORE

• (e) 52.204-17, Ownership or Control of Offeror (effective November 1, 2014)
CLEARING THE AIR – TEAMING AGREEMENTS

- FAR Part 9.6 provides guidance.
- State law governs.
IMPORTANT NUMBERS FOR SMALL BUSINESSES

- Micro Purchase: $15,000 (US)
- Simplified Acquisition Threshold: $150,000 (US)
- Some laws (and their clauses) do not apply to Micro Purchases. See 48 CFR 13.005-006
- Prime contracts between $3,000 and $150,000 are “set-aside” for small businesses. 48 CFR 19.502
ISSUES IN SUBCONTRACTING

• FAR FLOWDOWN CLAUSES
  – Clauses that prime contractor must or ought to incorporate into its subcontracts or supplier agreements
  – Flowdown clauses may also designate rights and responsibilities between prime contractors and subcontractors
  – Three types of flowdown clauses:
    • Mandatory (Required)
    • Necessary flowdown clauses, which are clauses that the government does not require you to flow down, but that you had better flow down in order to protect yourself, such as the Changes clause and the Termination for Convenience clause.
    • Optional
HOW DO YOU KNOW IF THE FAR APPLIES?

• Ask
• Funding
• Location for delivery or provision of services
  – “Ft. Sam Houston”
  – “Walter Reed”
• The Subcontract
  – Documents incorporated by reference
  – Requests that you agree to “abide by the terms and accept responsibility to perform certain obligations under the Client’s prime contract as identified to Company by the Client.”
• Other documents you are asked to sign or submit
  – Certificate of Cost or Pricing Data
  – Subcontracting Plans
MANDATORY FLOWDOWN CLAUSES

• Clauses that Primes are required to flowdown (include) in the Subs contract.
  – By Law
  – By Regulation
  – By Contract

• “Mandatory” Defined – If the clause appears in the prime contract, the Prime is obligated to flow it down to the subcontractor as per the clause.

• “Mandatory” is usually conditional.
SAMPLE MANDATORY LANGUAGE

• 52.203-7 Anti-Kickback Procedures
  – 5) The Contractor agrees to incorporate the substance of this clause, including this subparagraph (c)(5) but excepting subparagraph (c)(1), in all subcontracts under this contract which exceed $150,000.

• 52.215-12 Subcontractor Certified Cost or Pricing Data
  – (c) In each subcontract that exceeds the threshold for submission of certified cost or pricing data at FAR 15.403-4, when entered into, the Contractor shall insert either—
    – (1) The substance of this clause, including this paragraph (c), if paragraph (a) of this clause requires submission of certified cost or pricing data for the subcontract; or
    – (2) The substance of the clause at FAR 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications.
MINIMUM MANDATORY STANDARDS

• FAR requirements are least intrusive when the Government buys COTS (Commercial Off The Shelf), i.e. Commercial Items

• BUT there are still minimum flowdown requirements

• FAR 52.244-6 specifies that 11 clauses are required to be included in all subcontracts for commercial-of-the-shelf items.
THE 11 MANDATORY CLAUSES . . .

• 52.203-13, Contractor Code of Business Ethics and Conduct
• 52-219-8, Utilization of Small Business Concerns
• 52.222.26, Equal Opportunity
• 52.222-35, Equal Opportunity for Veterans
• 52-222-36, Affirmative Action for Workers with Disabilities
• 52-222-40, Notification of Employee Rights Under the National Labor Relations Act
• 52-222-50, Combating Trafficking in Persons
• 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
THE OTHER MINIMUM STANDARD

- 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items (JAN 2014)
  - The 11
  - Minus 2
  - Plus 6
THE 15 MANDATORY CLAUSES

- 52.203-13, Contractor Code of Business Ethics and Conduct
- 52-219-8, Utilization of Small Business Concerns
- 52.222-17, Nondisplacement of Qualified Workers
- 52.222.26, Equal Opportunity
- 52.222-35, Equal Opportunity for Veterans
- 52-222-36, Affirmative Action for Workers with Disabilities
- 52-222-40, Notification of Employee Rights Under the National Labor Relations Act
- 52.222-41, Services Contract Act of 1965
- 52-222-50, Combating Trafficking in Persons
- 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment
- 52.222-54, Employment Eligibility Verification
- 52-225-26, Contractors Performing Private Security Functions Outside the United States
- 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations
- 52-247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels
NECESSARY FLOWDOWN CLAUSES

• Necessary flowdown clauses, which are clauses that the government does not require you to flow down, but good practice to flow down in order to protect yourself, such as the Changes clause and the Termination for Convenience clause.
  – Changes (FAR)
  – Termination for Convenience

• A necessary flowdown clause may also be “encouraged” by a FAR clause to satisfy contractual obligations. E.g. FAR 52.244-6.
OPTIONAL FLOWDOWN CLAUSES

• Many primes insert optional flowdown clauses for convenience – easier than drafting new language.

• Optional means optional – subcontractors should try to negotiate.
FLOWDOWN VERSUS INSERTION

• Flowdown based on clauses already in the prime contract.

• “Insertion” deals with clauses not in the prime contract but must be inserted based on guidance external to the FAR.

• Example: Clauses dealing with Small Businesses
SMALL BUSINESSES SUBCONTRACTS

• Contracts under the Minimum Threshold
• Small Business Act
• SBIR Program
• SBIR Policy Directive
  – SBIR Data Rights
Section 4 (c)(1) of the Policy Directive specifically states the following (underlined for emphasis):

(c) **Phase III.** SBIR Phase III refers to work that derives from, extends, or completes an effort made under prior SBIR funding agreements, but is funded by sources other than the SBIR Program. Phase III work is typically oriented towards commercialization of SBIR research or technology.

(1) **Each of the following types of activity constitutes SBIR Phase III work:**

(i) Commercial application (including testing and evaluation of products, services or technologies for use in technical or weapons systems) of SBIR-funded R/R&D financed by non-Federal sources of capital **(Note: The guidance in this Policy Directive regarding SBIR Phase III pertains to the non-SBIR federally-funded work described in (ii) and (iii) below. It does not address private agreements an SBIR firm may make in the commercialization of its technology, except for a subcontract to a Federal contract that may be a Phase III.);**

(ii) SBIR-derived products or services intended for use by the Federal Government, funded by non-SBIR sources of Federal funding;

(iii) Continuation of R/R&D that has been competitively selected using peer review or merit-based selection procedures, funded by non-SBIR Federal funding sources.
FEDERALLY FUNDED PRIMES

Section 4(c)(4) states that “Phase III work may be for products, production, services, R/R&D, or any combination thereof.”

• Section 4(c)(5) states: There is no limit on the number, duration, type, or dollar value of Phase III awards made to a business concern. There is no limit on the time that may elapse between a Phase I or Phase II award and Phase III award, or between a Phase III award and any subsequent Phase III award. A Federal agency may enter into a Phase III SBIR agreement at any time with a Phase II awardee. Similarly, a Federal agency may enter into a Phase III SBIR agreement at any time with a Phase I awardee. A subcontract to a Federally-funded prime contract may be a Phase III award.
SBIR PHASE III DATA RIGHTS

With this in mind, Section 4(c)(2) further states that the SBIR Data Rights apply under a Phase III as shown by the following language:

(2) A Phase III award is, by its nature, an SBIR award, has SBIR status, and must be accorded SBIR data rights. If an SBIR awardee receives a funding agreement (whether competed, sole sourced or a subcontract) for work that derives from, extends, or completes efforts made under prior SBIR funding agreements, then the funding agreement for the new work must have all SBIR Phase III status and data rights.

Finally, according to Section 8(b) of the Policy Directive dealing with Rights in Data Developed Under SBIR Funding Agreement, application of SBIR Data Rights (FAR Clause 52.227-20) for work that qualifies as an SBIR Phase III award is required. Section 8(b)(3) of the Directive states as follows (relevant portions underlined):

(3) SBIR technical data rights apply to all SBIR awards, including subcontracts to such awards, that fall within the statutory definition of Phase I, II, or III of the SBIR Program, as described in section 4 of this Policy Directive. The scope and extent of the SBIR technical data rights applicable to Federally-funded Phase III awards is identical to the SBIR data rights applicable to Phases I and II SBIR awards. The data rights protection period lapses only: (i) Upon expiration of the protection period applicable to the SBIR award; or (ii) By agreement between the awardee and the agency.
(4) Agencies must insert the provisions of (b)(1), (2), and (3) immediately above as SBIR data rights clauses into all SBIR Phase I, Phase II, and Phase III awards. These data rights clauses are non-negotiable and must not be the subject of negotiations pertaining to an SBIR Phase III award, or diminished or removed during award administration. An agency must not, in any way, make issuance of an SBIR Phase III award conditional on data rights. If the SBIR awardee wishes to transfer its SBIR data rights to the awarding agency or to a third party, it must do so in writing under a separate agreement. A decision by the awardee to relinquish, transfer, or modify in any way its SBIR data rights must be made without pressure or coercion by the agency or any other party. Following issuance of an SBIR Phase III award, the awardee may enter into an agreement with the awarding agency to transfer or modify the data rights contained in that SBIR Phase III award. Such a bilateral data rights agreement must be entered into only after the SBIR Phase III award, which includes the appropriate SBIR data rights clause, has been signed. SBA will report to the Congress any attempt or action by an agency to condition an SBIR award on data rights, to exclude the appropriate data rights clause from the award, or to diminish such rights.
FLOWDOWN TECHNIQUES

• Generic flowdowns
  – “Subcontractor agrees to abide by all of the clauses in the prime contract replacing “Government” or “Contracting Officer” with “Contractor” and replacing “Contractor” with “Subcontractor.”

• “Self-Deleting” - Does that really happen?

• How does “self-deleting” work such clauses as:
  – 52.203-13 Contractor Code of Business Ethics and Conduct
  – 52.215-10 Price Reduction for Defective Certified Cost or Pricing Data

• What happens to the “Disputes” Clause?
BEST PRACTICE

• SPECIFIC IS BEST, BUT YOU HAVE TO KNOW WHAT IS IN THE PRIME CONTRACT!

• If your contract value exceeds $10,000, the following clauses apply . . .

• If your contract value exceeds $50,000, the following clauses apply . . .

• If you are providing commercial-of-the-shelf goods, the following clauses apply . . .
SMALL BUSINESS CONTRACTING ISSUES

• SBA Rules
  – New SBA Rules/Penalties for “misrepresentation of size status.”
  – “Willful” includes responding to a solicitation, registering in SAMS
  – Ties violation to debarment
  – FCA and FSA penalties apply
OSTENSIBLE SUBCONTRACTOR TRAP

• Who identified the procurement?
• Pre-existing relationship?
• Who wrote the proposal?
• Is the Prime doing “primary and vital” work?
• What percentage of the work will the prime perform?
• Prime have necessary experience?
• Who controls the payments?
• Does the Sub provide financing, support, services, space, or other vital assistance?
FAR REACHING IMPACT ON BUSINESS

• Marketing
• Treat your employees
• Price your supplies or services
• Account for your costs
• Hire subcontractors
• Contract with certain clients (or not)
• Manage your risk
• Reporting requirements
• Arrange your bulletin board
FOR EXAMPLE . . .

• If your company has a federal government contract in excess of $50,000; or
• If you do business with a federal government contract for at least $50,000; then

• You are a subcontractor!
THE CHRISTIAN DOCTRINE

- Permits the incorporation by operation of law of mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy. *G.L. Christian & Assoc. v. United States, 312 F.2d at 424, 427.*

- APPLIES IF (and only if) there exists a required clause that reflects an important public policy, its omission will be corrected by reading the clause into the contract.
  - Two essential elements for invoking this doctrine:
    1. First the clause in question must be required by the regulation or statute.
    2. It must reflect an important public policy.

DOES THE CHRISTIAN DOCTRINE APPLY TO SUBCONTRACTS?

• If a mandatory clause is not in the subcontract, will it be read in as a matter of law? The key phrase is "a matter of law."

• Since subcontracts are commercial contracts (the government is not a party), state law would apply.

WHAT THE CHRISTIAN DOCTRINE DOESN’T DO

Christian doctrine does not permit the "automatic incorporation of every required contract clause." General Engineering & Mach. Works v. O'Keefe, 991 F.2d at 779.
BUT HOW FAR CAN IT REACH?

  – “All government contractors and subcontractors are subject to the [Rehabilitation] Act”
  – “[I]t should not make any difference whether the defendant’s contribution to the government contract is large or small, significant or insignificant.”
KEY FACTORS TO CONSIDER UNDER THE CHRISTIAN DOCTRINE

• CONGRESSIONAL ENACTMENT

• “MANDATORY” CLAUSE LANGUAGE

• CONTRACTING OFFICER DISCRETION
PRIME V. SUBCONTRACTOR ISSUES

• BID PROTESTS
  – Subcontractors can generally not protest an award

• DISPUTES
  – Contract Disputes Act applies to the Prime
  – State law applies to a subcontractor

• COMPLIANCE PROGRAMS
  – FAR Part 3.10

• WHISTLEBLOWER PROTECTIONS
  – See FAR 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights
MAY THE “FOURTH” BE WITH YOU!

• Q: What is the fourth clause listed in both “mandatory” lists?

• A: 52.222.26, Equal Opportunity
OFCCP – VEVRAA MANDATORY POSTING

• Required to make Mandatory Job Listings with state agencies

• May use third-party to satisfy requirement, but responsible for compliance

• Disclosures must be made simultaneously to first job listing and when any information changes

• Must provide specific information:
  – Status as a federal contractor ("VEVRAA Federal Contractor")
  – Desire priority referrals of protected veterans
  – Names and locations of each hiring location in state
  – Contact information for official responsible for hiring at each location
  – If external job search organization assists with hiring, the contact information for the job search organization
OFCCP – 503 REQUIREMENTS

• If current AAP “in place” on effective date (3/24/14)
  – Do not have to update AAP until next cycle
  – Do not have to comply with subpart C (including applicant self-id requirements) until next AAP date

• “Utilization Goals”

• “IWD”

• If no AAP “in place” on effective date
  – Must develop AAP with new regulations

• Must comply with other requirements (postings, etc.)
OFCCP(?) – MINIMUM WAGE REQUIREMENTS

• Proposed Regulations
  – Scheduled for release October 14, 2014

• Effective Date:
  – January 1, 2015
OFCCP – EQUAL PAY REPORTING

- NPRM – August 6, 2014
- ANPRM – August 10, 2014 (Data Collection Tool)
- Correction to NPRM - August 20, 2014
- ANPRM Comment Period Closes – October 11, 2014
- NPRM Comment Period Closes – November 6, 2014

- Amending the regulation at 41 CFR 60–1.7 by adding a requirement that employers who file EEO–1 Reports, have more than 100 employees, and a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, submit two columns of additional information to the EEO–1 Report in a new Equal Pay Report to OFCCP.

- The report requires the submission of summary data on employee compensation by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees.
PRACTICE NOTES

- FAR & FAR Supplements updated on an ongoing basis – current version online.
- Changes are identified and made available for public opinion in the Federal Register (www.regulations.gov)
- Because government contracts can be issued for multiple years, the governing version of a particular clause will be that version in effect when the contract was issued.
MORE PRACTICE NOTES

• There is NO master magic list of flow down clauses.

• In order to know which clauses you must flow down, you must read (or know) each and every clause in your prime contract.
  – This applies to BOTH primes and subs.

• The language used to flow the clauses down bears careful consideration.
STILL MORE PRACTICE NOTES

• Understand the reporting requirements that are incorporated into FAR clauses.

• Understand the administrative burden that comes with accepting FAR flowdowns.

• The FAR and its supplements change regularly. You must keep current.
BOTTOM LINE

“In Business As in Life, You Don't Get What You Deserve, You Get What You Negotiate.”

Chester L. Karrass

• The list of mandatory flow down clauses is not that long, relatively speaking, and if your bargaining position permits, you should test what the prime is saying about the clause being mandatory.