

FAR Flowdowns – The Basics that You Need to Know

Presented by:



New Hampshire

**PROCUREMENT TECHNICAL
ASSISTANCE CENTER**



Introduction and Participant Guide

- ▶ NH PTAC –
- ▶ Stuff to know before we start
 - ▶ Muting
 - ▶ Chat function
 - ▶ Slides will be posted at www.NHEconomy.com/ptac under Training Presentations
 - ▶ Session is being recorded
 - ▶ We will post the recording as soon as we're able



What to Expect from Today's Webinar

- ▶ What do we mean by “flowdowns”?
- ▶ What is privity of contract, and how does it play in to flowdowns?
- ▶ Three perspectives:
 - ▶ The “flow-er”
 - ▶ The recipient of the flowdown
 - ▶ Being stuck in the middle – recipient and flow-er.
- ▶ Timing and contractual requirements – what's in the contract stays in the contract
- ▶ Flow-er strategies and best practices
- ▶ Recipient best practices
- ▶ The clauses – practical flowdown knowledge



So what's a Flowdown?

- ▶ It's a contract term or condition that is "flowed down" from a prime (direct) contract to a subcontract
- ▶ Usually, we are concerned with flowdowns that are required by the federal government
- ▶ That said, any party in the contracting chain can initiate a flowdown
- ▶ Some flowdowns "keep on flowin"; others stop with the first tier subcontractor
- ▶ Some are conditional, often based on the size of the contract/or subcontract(?)
- ▶ Others have limited applicability



Privity of Contract

- ▶ This legal term means that contracts inherently can only apply to the parties that sign the contract.
- ▶ This creates a problem for the government: because of its many rules, it needs to assure that some of those rules flow down throughout the supply chain.
- ▶ Otherwise, the purpose of the contract condition might be diluted or even completely undermined
- ▶ So, a flowdown is a contract term that says: “as a part of this contract, you agree to insert a similar term in any subcontracts that you may establish under this contract.
- ▶ Flowdowns are the solution to the problems created by privity of contract

A Few Words about Contract Clauses

- ▶ The vast majority of federal contracting rules are contained in the federal acquisition regulations (FAR) and its subparts (DFARS, AFARS, VAAR, GSAM)

Regulations

 <u>FAR</u>	 <u>SOFARS</u>	 <u>DOSARS</u>	 <u>HUDAR</u>
 Chapter 99 (CAS)	 <u>TRANSFARS</u>	 <u>DTAR</u>	 <u>IAAR</u>
 <u>DFARS</u>	 <u>AGAR</u>	 <u>EDAR</u>	 <u>JAR</u>
 <u>DFARSPGI</u>	 <u>AIDAR</u>	 <u>EPAAR</u>	 <u>LIFAR</u>
 <u>AFARS</u>	 <u>CAR</u>	 <u>FEHBAR</u>	 <u>NFS</u>
 <u>AFFARS</u>	 <u>DEARS</u>	 <u>GSAM/R</u>	 <u>NRCAR</u>
 <u>DARS</u>	 <u>DIARS</u>	 <u>HHSAR</u>	 <u>TAR</u>
 <u>DLAD</u>	 <u>DOLARS</u>	 <u>HSAR</u>	 <u>VAAR</u>
 <u>NMCARS</u>			



More Words about Contract Clauses

- ▶ The FAR rules are included in Parts 3-51. There are almost 2000 rules.
- ▶ Many of these rules have explicit contract text that needs to be included in contracts. These segments of text are referred to as clauses. FAR clauses are found in FAR Part 52.
- ▶ So, we go from a FAR rule to a FAR clause, which is referred & linked to in the rule.
- ▶ The rule and the clause usually contain flowdown instructions, if any. There are currently 896 FAR clauses.
- ▶ I found **about 100 FAR and over 70 DFARS clauses that contain flowdown requirements**



The FAR Matrix – Order out of Chaos

- ▶ The FAR Council has provided a matrix table of all of the clauses ([FAR 52.301-1](#)), and the types of contracts that should include them. Not all clauses go into every contract.
- ▶ Defense Acquisition University has developed a [new & improved version](#) of this table.
- ▶ NH PTAC has a further improved version that highlights which clauses have flowdown requirements.
- ▶ We break the flowdown requirements into two main types:
 - ▶ Terminal – flow down from the Prime to the 1st tier subcontractor, then stop
 - ▶ Sequential – flow all the way down the chain of subs and suppliers at all tiers

A Very Special Case - Terminations

- ▶ The Government always* has the right to terminate contracts
 - ▶ Termination for cause or default
 - ▶ **Termination for convenience**
- ▶ **The termination clauses don't have flowdown requirements – but you should flow them down anyway, in some shape or form.**
- ▶ **The termination clauses (FAR 52.249) convey rights and obligations on both parties, with the objective being fairness to both**
- ▶ **Don't create ambiguity by failing to provide for this.**

Lawyers love ambiguity!

* *The Christian Doctrine*



Three Different Perspectives

- ▶ If I'm a prime contractor, I need to know two things:
 - ▶ What clauses do I have to flow down?
 - ▶ How do I accomplish this?
- ▶ If I'm a subcontractor, I need to determine:
 - ▶ What flowdowns actually apply to me?
 - ▶ Thresholds
 - ▶ Applicability
- ▶ If I'm not the end of the line...
 - ▶ Which clauses do I need to flow further down?
 - ▶ How do I do that?



The Prime Contractor Case

- 1. Read your contract!**
2. Look for clauses that may require you to flow them down.
3. Now determine whether flowdown is really required. Consider whether:
 1. Below the dollar threshold for the clause
 2. Applicability criteria aren't met – e.g. COTS items
4. Evaluate the rewrite needs of each flowdown
 1. Some clauses must be flowed down essentially verbatim – change the names only.
 2. Others need significant rewrites for them to make sense



For the Subcontractor

- 1. Read your contract!**
2. Identify the clauses that are there because of a flowdown requirement
3. Evaluate the language – does it make sense in your context? If not:
 1. Consider addressing the issue with your customer
 2. At a minimum, document your interpretation in your contract files
4. Are you exempt? Why? Documentation in your files!
5. Identify any clauses that you are required to flow further down
6. Modify the clause language as needed, and flow it down



Specific Flowdown Language

1. Terminal – 52.204-14

As prescribed in [4.1705\(a\)](#), insert the following clause:

SERVICE CONTRACT REPORTING REQUIREMENTS (OCT 2016)

(a) *Definition.*

First-tier subcontract means a subcontract awarded directly by the Contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs.

(b) The Contractor shall report, in accordance with paragraphs (c) and (d) of this clause, annually by October 31, for services performed under this contract during the preceding Government fiscal year (October 1-September 30).

.....

(1) The Contractor shall require each first-tier subcontractor providing services under this contract, with subcontract(s) each valued at or above the thresholds set forth in [4.1703\(a\)\(2\)](#), to provide the following detailed information to the Contractor in sufficient time to submit the report:

Specific Flowdown Language

1. Terminal? – 52.226-6

52.226-6 Promoting Excess Food Donation to Nonprofit Organizations.

As prescribed in [26.404](#) , insert the following clause:

PROMOTING EXCESS FOOD DONATION TO NONPROFIT ORGANIZATIONS (JUN 2020)

(e) *Subcontracts.* The Contractor **shall insert this clause in all contracts, task orders, delivery orders, purchase orders, and other similar instruments that exceed the threshold specified in Federal Acquisition Regulation [26.404*](#)** on the date of subcontract award with its subcontractors or suppliers, **at any tier**, who will perform, under this contract, the provision, service, or sale of food in the United States.

(End of clause)

*\$25,000



Specific Flowdown Language

1. Sequential – 52.223-18

52.223-18 Encouraging Contractor Policies to Ban Text Messaging While Driving.

As prescribed in [23.1105](#) , insert the following clause:

ENCOURAGING CONTRACTOR POLICIES TO BAN TEXT MESSAGING WHILE DRIVING (JUN 2020)

(d) *Subcontracts*. The Contractor **shall insert the substance of this clause, including this paragraph (d), in all subcontracts that exceed the micro-purchase threshold**, as defined in Federal Acquisition Regulation [2.101](#) on the date of subcontract award.

(End of clause)



No Specific Flowdown Language

3. Special Circumstances

52.222-8 Payrolls and Basic Records.

As prescribed in [22.407\(a\)](#), insert the following clause:

PAYROLLS AND BASIC RECORDS (AUG 2018)

(c) The **Contractor or subcontractor** shall make the records required under paragraph (a) of this clause available for inspection, copying, or transcription by the Contracting Officer or authorized representatives of the Contracting Officer or the Department of Labor. The Contractor or subcontractor shall permit the Contracting Officer or representatives of the Contracting Officer or the Department of Labor to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit required records or to make them available, the Contracting Officer may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.



Flowdown Needed, but not Required

52.222-24

52.222-24 Preaward On-Site Equal Opportunity Compliance Evaluation.

As prescribed in [22.810](#)(c), insert the following provision:

PREAWARD ON-SITE EQUAL OPPORTUNITY COMPLIANCE EVALUATION (FEB 1999)

If a contract in the amount of \$10 million or more will result from this solicitation, the prospective Contractor **and its known first-tier subcontractors with anticipated subcontracts of \$10 million or more shall be subject to a preaward compliance evaluation by the Office of Federal Contract Compliance Programs (OFCCP)**, unless, within the preceding 24 months, OFCCP has conducted an evaluation and found the prospective Contractor and subcontractors to be in compliance with Executive Order 11246.

(End of provision)



Specific Examples – Let's look at the FAR Matrix – NH PTAC Annotated

Disclaimer – the NH PTAC Annotated version of the DAU FAR Matrix is not a product of the U.S. government. While we believe it to be complete and accurate at this time, we cannot guarantee that there are no errors and omissions. Use it at your own risk.

Furthermore, even if it was perfect today, changes to the FAR over time assure that it will develop errors and omission over time. It is intended as an aid, not a complete solution.



Words Matter!

52.222-34 Project Labor Agreement.

As prescribed in [22.505](#)(b)(1), insert the following clause:

(c) *Subcontracts*. The Contractor shall include the substance of this clause, **including this paragraph (c)**, in all subcontracts with subcontractors engaged in construction on the construction project.

Words Matter!

52.227-13 Patent Rights-Ownership by the Government.

As prescribed at [27.303](#)(e), insert the following clause:

(i) Subcontracts.

(1) **The Contractor shall include the substance of the patent rights clause** required by FAR [subpart 27.3](#) in all subcontracts for experimental, developmental, or research work. The prescribed patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. **The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.**

(2) In the event of a refusal by a prospective subcontractor to accept the clause, the Contractor-

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Contracting Officer.

(3) **In subcontracts at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by the patent rights clause constitute a contract between the subcontractor and the agency with respect to those matters covered by this clause.**

(4) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of such subcontract, and, no more frequently than annually, a listing of the subcontracts that have been awarded.



Flowdown Summary

- ▶ **Read you contract!**
- ▶ **Don't accept a subcontract that's impossible or doesn't make sense**
- ▶ **Understand the flowdowns that apply to you, and comply with them**
- ▶ **Know which flowdowns must be further flowed down**
- ▶ **Write your flowdowns competently- usually not simply by reference to FAR**
- ▶ **Have a Termination or Cancellation clause that reflects the realities of government contracts, protects you, and is fair to your subs & suppliers**



Shameless Commercial:

- ▶ NH PTAC offers free assistance with all this & more.
- ▶ You must have a physical presence in New Hampshire.
- ▶ You have to sign up online.
- ▶ To continue “active client” status, you have to use us as a resource.

How do I get started with NH PTAC?

- Go to the website and answer our questionnaire (www.nheconomy.com/ptac)
- email us at: govcontracting@livefree.nh.gov
- Meet with us in Concord (currently via Zoom)
- Request a site visit – we'll come to you.

