

Update – Advanced Flow-Downs, Mandatory DFARS Clauses and Best Practices

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Goals

- Review the mechanisms by which flow-downs are commonly incorporated
- Understand the differences in flow-down requirements for commercial product v. noncommercial product contracts
- Review the new rule concerning flow-down clauses and commercial product/service contracts
- Distinguish between mandatory DFARS and recommended flow-downs applicable to various types of defense-related subcontracts

FAR v. DFARS

- Federal Acquisition Regulation (“FAR”): 48 C.F.R. 1.101 et seq.
 - The FAR System “is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.”
 - Actual clauses appear in FAR Part 52
- Defense Federal Acquisition Regulation Supplement (“DFARS”)
 - 48 C.F.R. 201.104 et seq., with clauses in DFARS Part 252
 - DFARS both supplements and deviates from FAR, per 48 C.F.R. 201.301
 - FAR and DFARS “also apply to purchases and contracts by DoD contracting activities made in support of foreign military sales or North Atlantic Treaty Organization cooperative projects without regard to the nature or sources of funds obligated, unless otherwise specified in this regulation.” DFARS 201.104

Overview of Flow Down Basics

What Are Flow-down Provisions?

- United States Government (“USG”) prime contract clauses inserted into a subcontract
- Includes clauses from the FAR and agency supplements (*e.g.*, DFARS)
- These “flow-down” the responsibilities of the prime to the subcontractor
- Can significantly impact the obligations, price and risk for performing a subcontract

What Is A Subcontract?

- A contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or subcontract. It includes, but is not limited to, purchase orders and changes and modifications to purchase orders. FAR 44.101
- “Subcontractor” means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor. FAR 44.101 (Emphasis added)
- Does “subcontractor” include your landlord? Delivery or IT service provider? Insurance broker or carrier? Lawyer?
- Note that the FAR definition does not require existence of written agreement

Mandatory vs. Non-Mandatory Flow-downs

Mandatory Flow-downs

- Specifically require the prime to include them in subcontracts
- Not negotiable
- *E.g.*, whistleblower rights, export controls

Non-Mandatory Flow-downs

- Prime contract does not explicitly require they be included in subcontracts
- Yet, Prime must ensure subcontractor compliance with Prime contract requirements
- Certain clauses should also be flowed-down even if not required*
- *E.g.*, changes, termination for default, requests for equitable adjustment

Why Do Flow-downs Matter?

Prime Contractor

- Meet contract requirements
- USG consent to subcontract (FAR Subpart 44.2) & purchasing system approval (FAR Subpart 44.3)
- Manage/allocate performance uncertainties and risk



Subcontractor

- Ability to participate in huge federal marketplace
- Develop past performance history
- Minimize exposure to prime contractor risks
- Ensure company can meet compliance obligations

What If A Mandatory Clause Is Not Flowed Down?

Prime Contractor

- In breach of USG Prime contract
- Can be subject to numerous remedies, such as:
- Withholding of payments,
- Termination of contract, and
- Suspension or debarment



Subcontractor

- Under current trend to extend the “Christian Doctrine,” subs becoming subject to USG requirements even if they are not in subcontract
- *UPMC Braddock, et al. v. Harris*, 934 F. Supp. 2d 238, 259 (D.D.C. 2013), vacated as moot on other grounds, appeal dismissed *sub nom. UPMC Braddock v. Perez*, 584 F. Appx. 1 (D.C. Cir. 2014)
- Incorporated mandatory socio-economic requirements into subcontract even though not in subcontract
- Based on *G.L. Christian & Associates v. United States*, 312 F.2d 418, 426 (Ct. Cl. 1963) finding contract requirements reflecting a “significant or deeply ingrained strand of public procurement policy” apply to government contracts even if requirements not in contract
- Before *UPMC Braddock*, Christian Doctrine only applied to Prime contracts

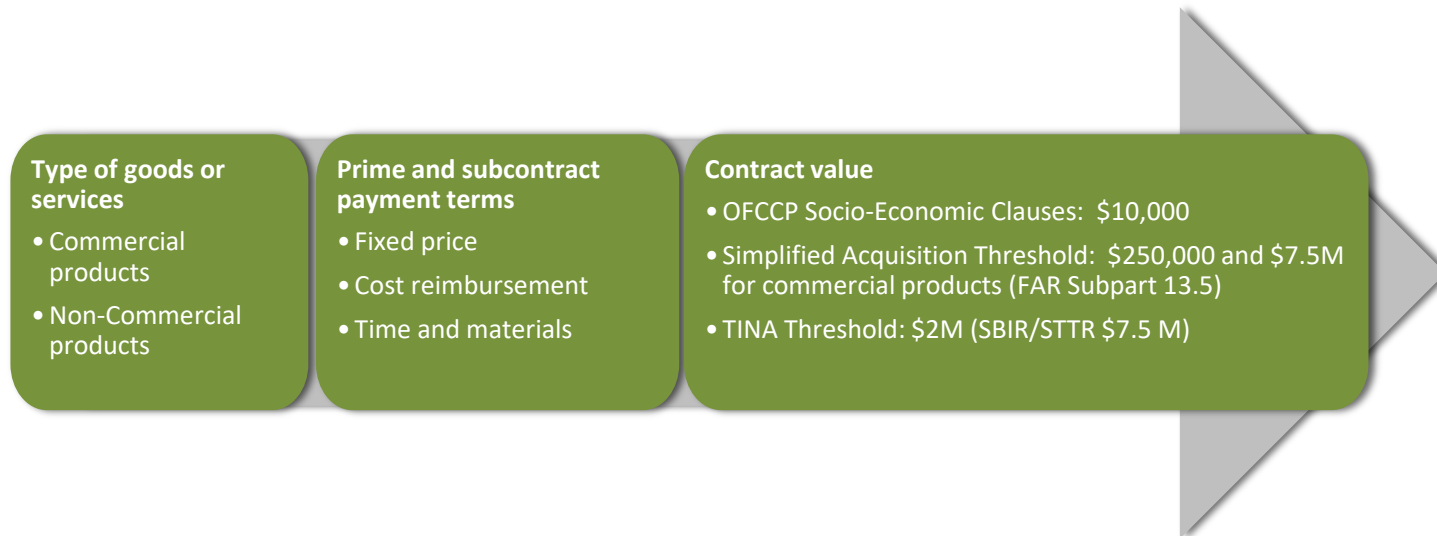
How Can I Tell When A Clause Is Required To Be Flowed Down To A Subcontract?

1. Read the clause—it will specify

- Some clauses must be flowed-down verbatim
 - “Contractor shall include this clause in subcontracts”
- Other clauses can be modified
 - “Contractor shall include the substance of this clause in subcontracts”

2. Read the text reference that prescribes use of the clause (e.g., conditions or threshold)

Which Clauses Are Required To Be Flowed Down Depend On The Type And Value Of The Contract:



Incorporation Strategies

- List out only clauses specifically applicable to each subcontract
 - Greatest accuracy, largest administrative burden
- Incorporate entirety of prime contract FAR / DFARS provisions by reference
 - Easy to accomplish, but over-inclusive and may create logical inconsistencies
 - Final rule on DoD commercial product/service contracts*
- Create and use templates specific to various types of subcontracts
 - Achieves balance of burden and tailoring with acceptable accuracy but some risk

Incorporation Strategies: Traps for the Unwary

- The Purchase Order Problem
 - POs unconnected to a larger prime contract or subcontract must incorporate required flow-down clauses
 - Clauses that are always mandatory for purchases of a specific type should be incorporated into the PO template
 - Many large contractors have a standard template document stored online
 - Beware Battle of Forms issues

Incorporation Strategies: Traps for the Unwary

- Failure to Include Appropriate Preface Language
 - “Government” shall mean “Contractor”. . . “Contractor” shall mean “Subcontractor”
 - Without such language, subcontractor requirements with respect to flow-downs are unclear
 - Need to make sure all necessary terms are translated
 - *e.g.*, Contracting Officer, Contracting Officer’s Representative, etc.

Commercial Product/Service v. Noncommercial Product/Service Subcontracts

What Is A Commercial Product/Service? FAR 2.101

- Now includes both product and service– but still commonly referred to as a “commercial item contract”
- Product “of a type” customarily used by the general public, and has been sold, leased, or licensed to the general public, or
- Any product that would satisfy a criterion above, but for-
 - i. Modifications of a type customarily available in the commercial marketplace; or
 - ii. Minor modifications of a type not customarily available in the commercial marketplace made to meet USG requirements

What Is A Commercial Product?

FAR 2.101

- Services since 2020
- Installation services, maintenance services, repair services, training services, and other if:
 - Such services are procured for support of a commercial product; and
 - The source of such services provides similar services contemporaneously to the general public
- Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices



Laws Not Applicable To Commercial Products/Services Subcontracts – DFARS 212.504

10 U.S.C. 3321(b)	Prohibition on Contingent Fees
10 U.S.C. 3841(d)	Examination of Records of a Contractor
10 U.S.C. 3741-3750	Allowable Costs Under Defense Contracts
10 U.S.C. 4871	Reporting Requirement Regarding Dealings with Terrorist Countries
10 U.S.C. 4753(b)	Requirement to Identify Suppliers
10 U.S.C. 2391	Notification of Substantial Impact on Employment
10 U.S.C. 4654	Prohibition Against Doing Business with Certain Offerors or Contractors
10 U.S.C. 4651	Employment Transparency Individuals Who Perform Work in the People’s Republic of China
10 U.S.C. 4656(a)	Prohibition on Persons Convicted of Defense Related Felonies
10 U.S.C. 3845	Contractor Inventory Accounting System Standards
10 U.S.C. 4801	Notification of Proposed Program Termination
10 U.S.C. 4864	Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods
10 U.S.C. 2631	Transportation of Supplies by Sea (with exceptions, see DFARS 252.247-7023)
Others:	E.g., various provisions of authorization acts, including domestic content restrictions

Exemption To Domestic Preference For COTS Products

- DFARS 212.570 - Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf product.
- “Paragraph (a)(1) of 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American sources, is not applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf products, except as provided at 225.7003-3(b)(2)(i).” (Emphasis supplied).

Old Rule: Minimal Number of DFARS Clauses Must be Flowed Down in Commercial Product/Service Subcontracts

252.244-7000 – SUBCONTRACTS FOR COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES (JAN. 2023)

- 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.***

Paragraph (b) has been eliminated in the New Rule

Old Rule: Minimal Number of DFARS Clauses Must be Flowed Down in Commercial Item Subcontracts

252.244-7000 – SUBCONTRACTS FOR COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES (JAN. 2023)

- c. (1) In accordance with 10 U.S.C. 3457(c), the Contractor ***shall treat as commercial products any items valued at less than \$10,000 per item that were purchased*** by the Contractor for use in the performance of multiple contracts with the Department of Defense and other parties and ***are not identifiable to any particular contract when purchased***.

(2) The ***Contractor shall ensure that any items*** to be used in performance of this contract, that are treated as commercial products pursuant to paragraph (c)(1) of this clause, ***meet all terms and conditions*** of this contract that are applicable to commercial ***products in accordance with the clause at Federal Acquisition Regulation 52.244-6*** and paragraph (a) of this clause.
- d. The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract, including subcontracts for the acquisition of commercial products or commercial services.

No substantive change to these paragraphs in the New Rule

NEW RULE: ONLY REQUIRED DFARS Clauses Must be Flowed Down in Commercial Product/Service Subcontracts

252.244-7000 – SUBCONTRACTS FOR COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES (NOV. 2023)

(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.
 - FAR 12.301(d): Includes certifications and administrative clauses such as FAR 52.204-7 (System for Award Management) and FAR 52.209-12 (Certification Regarding Tax Matters)
 - FAR 52.212-5(e)(1): Clauses required to implement statutes or executive orders in commercial products/services contracts
 - FAR 52.244-6(b)(1): Mandatory FAR clauses for commercial products/services contracts

NEW RULE: What do I do?

- Applicability: The new rule does not affect pre-existing DoD contracts/subcontracts (entered into before Nov. 17, 2023)
- Prime Contractors: Be prepared to limit flowdowns on commercial products/services subcontracts once the latest version of DFARS 252.244-7000 is incorporated into the prime contract
- Subcontractors: Notify your prime contractor or high-tiered subcontractor about the change and ask whether the new clause has been incorporated into the prime contract

NEW RULE: What do I do?

- Contracting Officers: The new rule applies, in part, to you!
 - The DFARS previously did not expressly prohibit COs from incorporating additional, non-mandatory terms
 - DFARS 212.301(f) now states that COs “shall not use other FAR or DFARS provisions and clauses unless required by the FAR or DFARS or consistent with customary commercial practices.”
 - The underlined language still gives COs some discretion that is not afforded to prime contractors under the new rule

Mandatory DFARS Flow-Down Clauses For All Commercial-Items Subcontracts

- Mandatory to flow down when clause is in Prime Contract
- Additional mandatory flow-down clauses depend on contract specifics
- Required flow-down clauses for commercial product subcontracts set the minimum requirements for contracts of a particular type or character

252.203-7002	Requirement to Inform Employees of Whistleblower Rights
252.204-7015	Notice of Authorized Disclosure of Information for Litigation Support
252.204-7018	Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services
252.204-7020	NIST SP 800-171 DoD Assessment Requirements
252.204-7021	Cybersecurity Maturity Model Certification Requirements
252.225-7048	Export-Controlled Items
252.225-7052	Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten
252.227-7015	Technical Data – Commercial Items
252.227-7037	Validation of Restrictive Markings on Technical Data
252.244-7000	Subcontracts for Commercial Items
252.225-7056	Prohibition Regarding Business Operations with the Maduro Regime

Breakdown Of Mandatory DFARS Flow-Downs For All Commercial-Products Subcontracts

- **Whistleblower Protections**

- 252.203-7002 – Requirement to Inform Employees of Whistleblower Rights (DEC. 2022)
 - The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of contractor employee whistleblower rights and protections
- 252.204-7015 – Notice of Authorized Disclosure of Information for Litigation Support (JAN. 2023)
 - Government may disclose to a litigation support contractor sensitive information received in a quote, offer, or during performance of the contract

Breakdown Of Mandatory DFARS Flow-Downs For All Commercial-Items Subcontracts

- **Covered Telecommunications Equipment and Services**
 - 252.204-7018 – Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services (**JAN. 2023**)
 - General prohibition on supplying equipment and services from one of the covered entities
- **Export Controls**
 - 252.225-7048 – Export-Controlled Items (JUN 2013)
 - Contractor must follow ITAR, EAR, and other export controls laws



Breakdown Of Mandatory DFARS Flow-Downs For All Commercial-Items Subcontracts

- **Covered Materials**

- 252.225–7052 Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten (JAN. 2023)
 - Prohibition on the acquisition of any covered material melted or produced in any covered country (North Korea, China, Russia, or Iran), or any end item, manufactured in any covered country, that contains a covered material

Breakdown Of Mandatory DFARS Flow-Downs For All Commercial-Items Subcontracts

- **Cybersecurity**

- 252.204-7020 – NIST SP 800-171 DoD Assessment Requirements (**NOV. 2023**)
 - Registration and reporting of assessment scores in accordance with the DoD Assessment Methodology in the Supplier Performance Risk System are now required of all DoD contractors and subcontractors that handle controlled unclassified information
 - Nov. 2023 update included new URL for accessing NIST SP 800-171
- 252.204-7021 – Cybersecurity Maturity Model Certification Requirement (JAN. 2023)
 - Required only if the prime contract statement of work requires CMMC compliance at a particular level, and such inclusion must be approved by the Office of Under Secretary of Defense for Acquisition and Sustainment

Breakdown Of Mandatory DFARS Flow-Downs For All Commercial-Items Subcontracts

- **Intellectual Property**

- 252.227-7015 – Technical Data – Commercial Products and Commercial Services **(MAR 2023)**
 - Must be flowed down whenever technical data related to commercial product/service developed at private expense will be obtained from a subcontractor
 - Contractor generally allowed to place restrictions on Government use of data, subject to certain restrictions
 - Contrasts sharply with rights afforded under contracts for noncommercial products
 - March 2023 updated revised definition of “technical data” to exclude “financial, administrative, cost or pricing, or management information, or information incidental to contract administration”
- 252.227-7037 – Validation of Restrictive Markings on Technical Data (JAN 2023)
- Subcontractor must justify restrictive markings and Contracting Officer has a method to challenge the markings

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Monetary threshold triggers (examples):**

- > \$250K (simplified acquisition threshold)
 - 252.215-7010 – Requirements for Certified Cost or Pricing Data and Data Other than Certified Cost or Pricing Data (**JAN 2023**). *(If included in Prime Contract)*
- > \$500K
 - 252.226-7001 – Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (JAN 2023)

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- > \$750K
 - 252.219-7003 – Small Business Subcontracting Plan (DoD Contracts) (DEC 2019)
 - Required for contracts that include FAR 52.219-9, Small Business Subcontracting Plan (> \$1.5M for construction). See FAR 19.708(b)(1). (*Does not apply to Small Businesses*)
 - 252.219-7004 – Small Business Subcontracting Plan (Test Program) (DEC 2022)
 - Required for contracts that include FAR 52.219-8, Utilization of Small Business Concerns (> \$1.5M for construction). See FAR 19.708(b)(1). (*Does not apply to Small Businesses*)
- >\$50M
 - 252.234-7004 – Cost and Software Data Reporting System (NOV 2014)
 - “Contractor shall require CSDR reporting from subcontractors at any tier with a subcontract that exceeds \$50 million.”

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- Sensitive Information

- 252.204-7000 – Disclosure of Information (OCT 2016)
 - Required where contractor will have access to or generate unclassified information that may be sensitive

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- Items critical to safety or integral to a system
 - 252.246-7003 – Notification of Potential Safety Issues (JAN 2023)
 - Requires notification of nonconformances or deficiencies that may have an impact on critical safety items or integral systems
 - 252.237-7023 – Continuation of Essential Contractor Services (OCT 2010)
 - Requires plan to provide mission-essential contractor services and must notify if unable to perform such services

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- Electronic parts and components

- 252.246-7007 – Contractor Counterfeit Electronic Part Detection and Avoidance System (JAN 2023)
 - Requires the establishment and maintenance of counterfeit electronic part detection and avoidance system.
 - Required in prime and subcontracts involving delivery of electronic parts, excluding small business set-asides. See DFARS 246.870-3(a)
 - Applies only to CAS-covered contractors

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- 252.246-7008 Sources of Electronic Parts (JAN 2023)
 - Generally requires: (1) tracking of electronic parts from original manufacturer; or (2) if cannot track, inspection, testing and authentication of parts.
 - May 2018 update clarified that Government review, audit and approval of contractor-approved untraceable parts are discretionary.
 - Required in prime and subcontracts involving delivery of electronic parts, including contracts for commercial products and small business set-asides, See DFARS 246.870-3(b)

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- Toxic or Hazardous Materials

- 252.204-7010 – Requirement to Notify DoD if the Contractor’s Activities are Subject to Reporting Under the U.S.-International Atomic Energy Agency Additional Protocol
- 252.223-7006 – Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials
- 252.223-7002 – Safety Precautions for Ammunition and Explosives
- 252.223-7007 – Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives
- 252.223-7008 – Prohibition of Hexavalent Chromium

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- Contracts requiring transport by sea

- 252.247-7023 – Transportation of Supplies by Sea (JAN 2023)
 - Requires subcontractors to use U.S. Flag vessels under certain circumstances
- 252.247-7022 – Representation of Extent of Transportation by Sea (JUN 2019)
 - Prime offeror required to represent whether it anticipates supplies will be transported by sea in performance of the contract or any subcontract

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- Research and development contracts

- 252.235-7002 – Animal Welfare (DEC 2014)
 - Must comply with laws and regulations pertinent to treatment of research animals
- 252.235-7003 – Frequency Authorization (MAR 2014)
 - Requires approval for use of unallocated radio frequencies
- 252.235-7004 – Protection of Human Subjects (JUL 2009)
 - Mandates certain approvals required when using human subjects

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **SOW Dependent:**

- Contracts Involving Covered Defense Information

- 252.204-7012 – Safeguarding Covered Defense Information and Cyber Incident Reporting (JAN 2023)
 - Requires “adequate security” for information systems that have CDI resident on or transitioning through it
 - Must comply with NIST SP 800-171 security controls by 12/31/2017
 - Cyber incident and compromise reporting within 72 hours of discovery
 - Requires cooperation with any post-report investigations,
 - Includes preserving images of all affected systems for 90 days

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Particular types of contracts:**

- Aviation related contracts

- 252.228-7001 – Ground and Flight Risk (**MAR 2023**)
 - Outlines conditions of Government’s self-insurance of loss of aircraft
 - Clause revamped in March 2023 and included revised definitions for “covered aircraft,” “flight,” and “workmanship error”
 - Revisions were prompted by the emergence of contracts for small, unmanned aircraft
- 252.228-7005 – Mishap Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles (NOV 2019)
 - Requires contractor to report all pertinent facts relating to each mishap involving an aircraft, missile, or space launch vehicle in connection with contract
- Litigation support contracts
 - 252.204-7014 – Limitations on the Use or Disclosure of Information by Litigation Support Contractors (JAN 2023)

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Particular types of contracts:**

- Foreign Acquisitions

- 252.225-7007 – Prohibition on Acquisition of U.S. Munitions List Items from Communist Chinese Military Companies (DEC 2018)
 - Required in all subcontracts for items covered by the U.S. Munitions List or the 600 series of the Commerce Control List
- 252.225-7009 – Restriction on Acquisition of Certain Articles Containing Specialty Metals (JAN 2023)
 - Generally requires that articles containing specialty metals (steel, nickel, cobalt, titanium, zirconium) be purchased in the U.S. or TAA qualifying country

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Particular types of contracts:**
 - Foreign Acquisitions (*cont.*)
 - Flow-downs related to certain duties and levies
 - 252.225-7013 – Duty Free Entry (**NOV 2023**)
 - Contract price does not include duty
 - Contractor may claim duty-free entry for supplies
 - Contractor must pay duty on supplies diverted to nongovernmental use
 - Nov. 2023 update included non-substantive, administrative changes

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Particular types of contracts:**
 - Foreign Acquisitions (*cont.*)
 - Flow-downs related to certain duties and levies
 - 252.229-7011 – Reporting of Foreign Taxes – U.S. Assistance Programs (SEP 2005)
 - Commodities acquired under contracts for U.S. Assistance Programs are exempt from all value added taxes and customs duties imposed by the recipient country
 - Contractor must report taxes that are nonetheless imposed

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Particular types of contracts:**

- Foreign Acquisitions (cont.)

- Performance of work overseas

- 252.225-7039 – Defense Contractors Performing Private Security Functions Outside the United States (JAN 2023)

- Must register weapons and armored vehicles

- Must comply with federal requirements

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Particular types of contracts:**

- Foreign Acquisitions (cont.)

- Performance of work overseas

- 252.225-7040 – Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States (OCT 2015)

- Contractor accepts risk of performing in dangerous or austere conditions
- Contractor may only use arms in self defense
- Contractor must comply with regulations regarding government provided security, reporting, investigations, etc.

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Particular types of contracts:**

- IT Contracts

- 252.239-7016 – Telecommunications Security Equipment, Devices, Techniques, and Services (DEC 1991)
 - Prime and sub contractor must secure telecommunications systems and use government approved systems

- Contracts Requiring Physical Access to Federally-Controlled Facility

- 252.204-7004 – Antiterrorism Awareness Training for Contractors (JAN 2023)
 - Requires federal contractors who routinely access federally-controlled facilities and military installations to complete Level I anti-terrorism awareness training

Other Mandatory DFARS Clauses To Flow-Down Depend On Contract Specifics (non-exhaustive examples)

- **Notification of Contracting Officer:**
 - 252.215–7008 – Only One Offer (DEC 2022)
 - Requires additional cost or pricing data after the contracting officer notifies the contractor that only one offer is received in response to a competitive solicitation
 - Flow-down required unless offeror is the Canadian Commercial Corporation

Recommended Non-Mandatory DFARS Clauses Prime
Contractors Should Consider Flowing Down
in Non-Commercial Product/Services Contracts

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- 252.211-7007 – Reporting of Government-Furnished Property
 - Contractor remains responsible for reporting when Government-Furnished Property is in subcontractor’s possession
- 252.215-7009 – Proposal Adequacy Checklist
 - Matches proposal requirements with specific pages to ensure coverage
 - “offerors may elect to have their prospective subcontractors use the same or similar checklist as appropriate.”

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- 252.217-7003 – Changes
 - CO can unilaterally dictate changes, subject to equitable adjustment
- 252.243-7002 – Requests for Equitable Adjustment
 - Incorporation allows Prime to pass on Sub REAs

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- 252.217-7001 – Surge Option
 - Allows increase in the quantity of supplies/services of delivery schedule
- 252.217-7009 – Default
 - Allows termination for default
- 252.249-7002 – Notification of Anticipated Contract Termination or Reduction
 - Prime must require subs to provide notice to lower tier subs
- 252.243-7001 – Pricing of Contract Modifications
 - Cost principles apply to price adjustments

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- 252.222-7006 – Restrictions on the Use of Mandatory Arbitration Agreements
 - Requires Prime to certify that it requires subs not to agree to or enforce a mandatory arbitration agreement with respect to certain tort and civil rights claims

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- **Additional Warranties**

- 252.246-7001 – Warranty of Data
 - Contractor must warranty accuracy of technical data, to the extent a sub is providing such data, Prime will want a warranty from the sub as well
- 252.239-7000 – Protection Against Compromising Emanations
 - Provided IT must be accredited to meet appropriate information assurance requirements, and Prime must correct or replace deficient IT found deficient within 1 year after proper installations

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- **Indemnification**

- 252.235-7000 – Indemnification Under 10 U.S.C. 2354–Fixed Price
- 252.235-7001 – Indemnification Under 10 U.S.C. 2354–Cost Reimbursement
- Indemnification flow-down only allowed if Sub has same obligations to Prime as Prime has to the Government

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- **Foreign Acquisition**

- 252.225-7028 – Exclusionary Policies and Practices of Foreign Governments
 - “Contractor and its subcontractors shall not ...”
- 252.225-7043 – Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States
 - “Contractor and its subcontractors. . . shall”

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

- **Specialty IP Provisions**

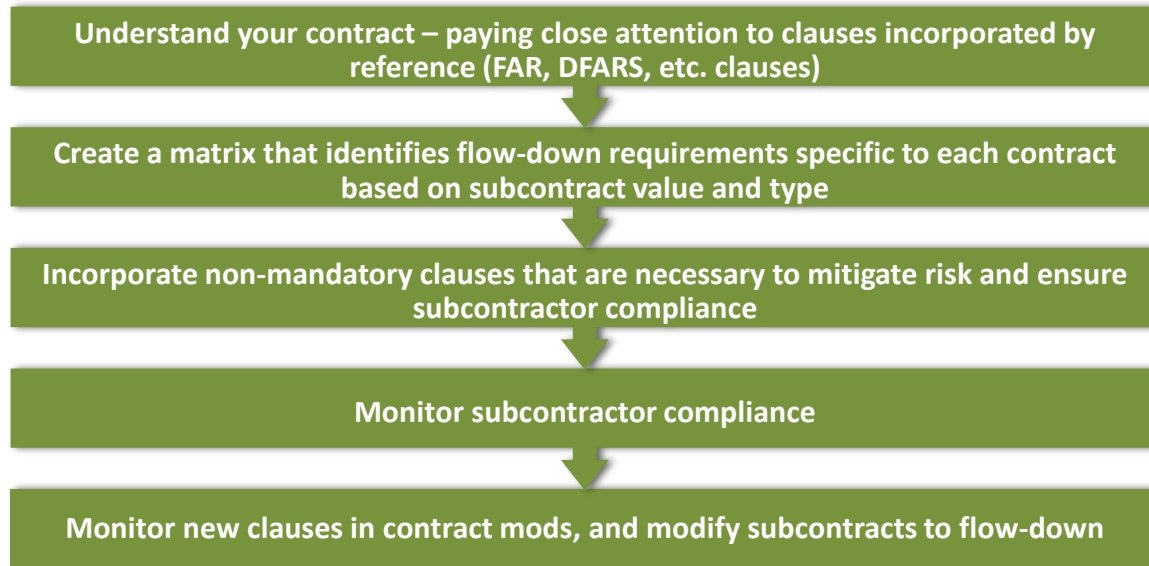
- Flow down data rights clauses that satisfy prime contract requirements
- 252.227-7020 – Rights in Special Works
 - USG gets:
 - Unlimited rights in works first produced and required to be delivered under the contract
 - A royalty-free, world-wide, nonexclusive, irrevocable license to use copyrighted works not first produced under the contract but incorporated into a deliverable
 - Contractor indemnifies USG against unauthorized use of third party copyrighted data
 - If Prime owes indemnity, will want Sub to owe indemnity to Prime

Non-Mandatory DFARS Clauses Prime Contractors Should Consider Flowing Down

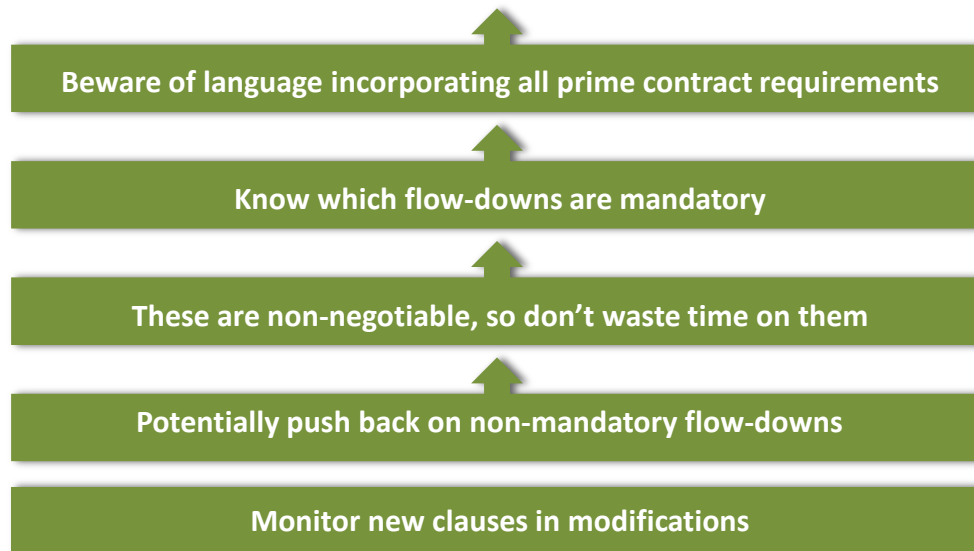
- **Specialty IP Provisions**

- 252.227-7021 – Rights in Data—Existing Works
 - USG gets nonexclusive, paid-up, world-wide license to distribute works called for under the contract
 - USG may authorize others to use works
 - Contractor must indemnify USG for unauthorized use of third party copyrighted data
 - If Prime owes indemnity, will want Sub to owe indemnity to Prime
- 252.227-7025 – Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends
 - Contractor's use of marked data limited in accordance with markings
 - Contractor must indemnify USG for unauthorized use

Flow-Down Best Practices – Prime Contractor



Flow-Down Best Practices – Subcontractor



Presenters



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