

Best Practices for Managing Flowdowns



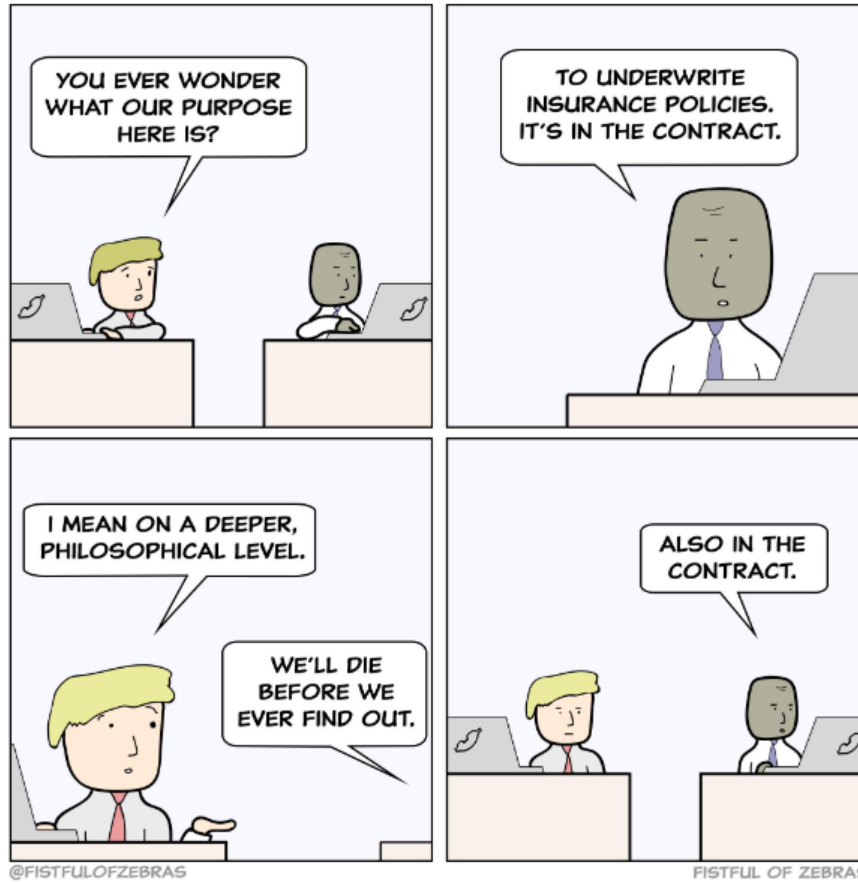
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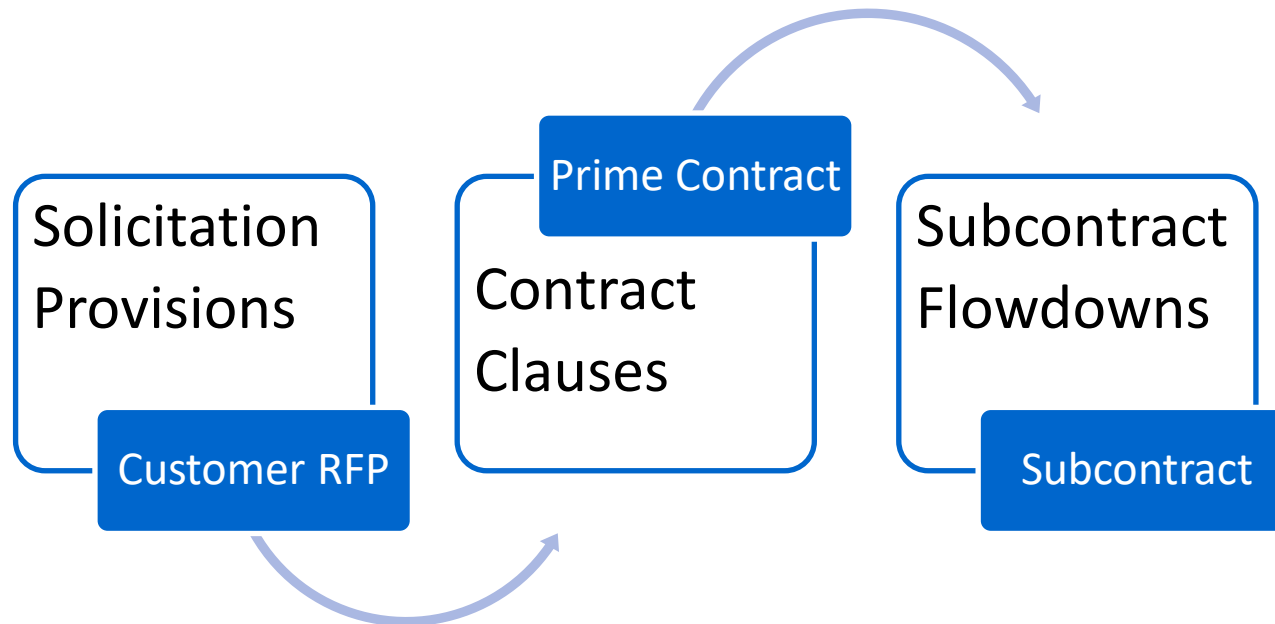
Flowdowns Defined



A *flowdown* can be described as the transfer and translation of requirements from a prime contract (or upper tier subcontract) into a subcontract (or lower tier subcontract) in support of the prime contract.



The Flowdown Concept



Mandatory Flowdowns: Christian Doctrine



- A mandatory contract clause that expresses a significant tenant of public procurement policy is considered to be included in the contract by operation of law. *G.L. Christian & Assoc. v. United States*, 312 F.2d 418 (Ct. Cl. 1963).
- Only clauses that are both mandatory and speak to public procurement policy are covered by the doctrine.



Mandatory Flowdowns: Christian Doctrine



- Can the *Christian Doctrine* be used to incorporate such clauses into subcontracts?
 - The fact that the government is not a party to the subcontract would suggest the answer is “no.”
 - However, this is an evolving area.
 - The “four corners” of the subcontract may not contain all the clauses.
 - Legal advice should be sought.



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Impact of Dollar Thresholds Changes



FAR 1.109 Statutory acquisition–related dollar thresholds-adjustment for inflation.

(a) 41 U.S.C. 1908 requires that the [FAR Council periodically adjust all statutory acquisition-related dollar thresholds in the FAR for inflation](#), except as provided in paragraph (c) of this section. This adjustment is calculated [every 5 years](#), starting in October 2005, using the Consumer Price Index for All Urban Consumers (CPI-U), and supersedes the applicability of any other provision of law that provides for the adjustment of such acquisition-related dollar thresholds.

(b) The statute defines an acquisition-related dollar threshold as a dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of supplies or services by an executive agency, as determined by the FAR Council.

(c) The statute does not permit escalation of acquisition-related dollar thresholds established by:

(1) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction);

(2) 41 U.S.C. chapter 67, Service Contract Labor Standards; or

(3) The United States Trade Representative pursuant to the authority of the Trade Agreements Act of 1979 (19 U.S.C. 2511 et seq.



Impact of Dollar Thresholds Changes



(d) The statute, as amended by section 821 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), requires the adjustment described in paragraph (a) of this section be applied to contracts and subcontracts without regard to the date of award of the contract or subcontract. Therefore, if a threshold is adjusted for inflation as set forth in paragraph (a) of this section, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment.

(e) A matrix showing calculation of the most recent escalation adjustments of statutory acquisition-related dollar thresholds is available via the Internet at <http://www.regulations.gov> (search FAR Case 2019-013, open the docket folder, and go to the supporting documents file).



Impact of Dollar Thresholds Changes



Impact on Provisions and Clauses:

1. FAR Council is removing specific dollar values from provisions and clauses and replacing them with terms that appear in the FAR prescriptions:

“\$250,000” has been changed to “Simplified Acquisition Threshold”

2. FAR Prescriptions then provide guidance as to what the value of the term is based on specific dates and/or public laws.

Subcontract Compliance Actions:

Review Policies, Procedures, Terms, Conditions, Flowdowns, proforma documents to ensure that your firm’s documents have embraced these changes.

REGULATIONS



Mandatory vs Non-Mandatory Flowdowns



Mandatory flowdowns are clauses that are **required** to be either:

- Incorporated by the government into the prime contract and/or
- By the contractor in the subcontract

They typically reflect the implementation of public law or express significant tenants of public procurement policy.



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Mandatory vs Non-Mandatory Flowdowns



How does one determine if a clause is considered a mandatory flowdown?

- By reading the clause
- By reviewing the FAR Matrix

READ

Many clauses are mandatory flowdowns when required under certain conditions.

Clauses that are **Non-Mandatory** can be flowdown optionally, or not at all.



Example: Mandatory Flowdown Clause



Prescription:

3.909-3 Solicitation provision and contract clause.

When using funding subject to the prohibitions in [3.909-1\(a\)](#), the contracting officer shall-

- (a) (1) Include the provision at [52.203-18](#), Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation, in all solicitations, except as provided in paragraph (a)(2) of this section; and
 - (2) Do not insert the provision in solicitations for a personal services contract with an individual if the services are to be performed entirely by the individual, rather than by an employee of the contractor or a subcontractor.
- (b) (1) Include the clause at [52.203-19](#), Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, in all solicitations and resultant contracts, other than personal services contracts with individuals.
 - (2) Modify existing contracts, other than personal services contracts with individuals, to include the clause before obligating FY 2015 or subsequent FY funds that are subject to the same prohibition on internal confidentiality agreements or statements.

Parent topic: [3.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.](#)



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Example: Mandatory Flowdown Clause



Clause:

52.203-19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.

As prescribed in [3.909-3\(b\)](#), insert the following clause:

PROHIBITION ON REQUIRING CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS OR STATEMENTS (JAN 2017)

(a) *Definitions.* As used in this clause-

Internal confidentiality agreement or statement means a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

Subcontract means any contract as defined in [subpart 2.1](#) entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

(b) The Contractor shall not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

(c) The Contractor shall notify current employees and subcontractors that prohibitions and restrictions of any preexisting internal confidentiality agreements or statements covered by this clause, to the extent that such prohibitions and restrictions are inconsistent with the prohibitions of this clause, are no longer in effect.

(d) The prohibition in paragraph (b) of this clause does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(e) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235), and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) use of funds appropriated (or otherwise made available) is prohibited, if the Government determines that the Contractor is not in compliance with the provisions of this clause.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts under such contracts.

(End of clause)

Parent topic: [52.203 \[Reserved\]](#)



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Flowing Down Non-Mandatory Clauses



There are numerous clauses that are not required to be flowdown but may be flowed down for various reasons.

Examples are:

- Changes
- Stop work
- Termination Clauses



Flowing Down Non-Mandatory Clauses Cont.



Pros: While certain clauses are not required to be flowed down, the prime should include the proper clauses in the subcontract to ensure it complies with the requirements of the prime contract.

- For example, when the prime receives a stop work order, it must, in turn, stop the work of its subcontractors.

Cons: These clause are normally contentious and will mostly be part of a negotiations with subcontractors.

- Subcontractors may only want to accept a version of the Stop Work clause that is modified to allow the Prime Contractor to ONLY issue a Stop Work Order to the Subcontractor as a direct result of the Prime Contractor receiving the same from the Government.



Best Practice Tip



Don't Wait Until You Receive A Contract!

- Vet the Government's Request for Information (RFI), Draft Request for Proposal (RFP) and
- RFP, and Coordinate with:
 - Business Development
 - Finance
 - QA
 - Program Management
 - Technical Personnel/Operations
 - Legal
 - Cyber/IT
 - Security
- Incorporate subcontract flowdown requirements into the teaming agreement
- Communicate expectation with potential subcontractors



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Negotiating Flowdowns



Negotiations with the government:

- Starts at the draft RFP stage
- Continues during the Q&A stage
- Finishes prior to contract execution



At each stage, negotiations take different forms and involves different strategies.

- **Contractors** need to appreciate the government's role as it relates to protecting the taxpayer's interests.
- **The Government** needs to appreciate the impact of flowdowns on both the contractor and its subcontractor(s).
- **Both parties** need to be knowledgeable on mandatory vs. non-mandatory clauses.



Prime Contractor's Perspective on Flowdowns to Subs



- The prime's tendency is to flow down as much as possible as a risk management strategy.
- This is out of concern for being compliant to the prime contract's requirements. In many cases, the prime does not see much latitude for negotiation.
- However, if overdone, this strategy can be costly in terms of time to negotiate and to add unnecessary requirements. Instead of forcing subcontractors to take exceptions, a better strategy is for the prime to ask the subcontractor to identify the terms and conditions that are increasing the proposed price.



Subcontractor's Perspective on Flowdowns



- The subcontractor's first concern is to understand what the prime wants to flow down.
- This requires the subcontractor to understand enough about the prime contract to determine if a flowdown applies.
- The subcontractor should review the proposed clauses in the request for proposal and identify and relay any concerns or exceptions to the prime as early as possible.
- It is best to offer a rationale and alternatives so that the prime will understand the impact of the proposed flowdown and ways to possibly accomplish the same result at less cost.



Establishing a Flowdown Matrix



- Consider using [FAR Smart Matrix Tool](#) as a starting point, however:
 - It was written by the government, for the government
 - It does not address all supplements
 - **Department of Defense (DOD) and Department of Energy (DOE)** have developed flowdown matrix for use by the government and industry
 - Leading companies develop their own based on:

Type of subcontract	Domestic vs International
Type of project	Product vs. Services
Business Size	Commercial vs. Non-Commercial
Industry	
- Note: Seek legal advice when developing your own!**



JA White's Law of Subcontract Flowdown Compliance



“For every clause that is levied (flowed down) upon a subcontractor, there is a direct compliance requirement that can be measured (reviewed/audited) by the contractor and the government customer.”



Proactive Subcontract Compliance Management



Develop a Subcontract Compliance Management Plan That Addresses:

- Deliverables
- Reporting Requirements
- Key Performance Indicators (KPI's)/Metrics
- Program Reviews
- Monitoring/Surveillance
- Subcontract Reviews
- Audits
- Documentation



Subcontract Compliance Management Plan



Subcontract Compliance Management Plans can be:

- Specific to each subcontract
- Specific to subcontracts supporting specific programs
- Overarchingly applied to the subcontracting function
- Flexible based on its application
 - Type of subcontract
 - Visibility/Strategic Importance/Customer
 - Dollar Value



Flowdown Training and Tools



Training on Managing Flowdowns should be:

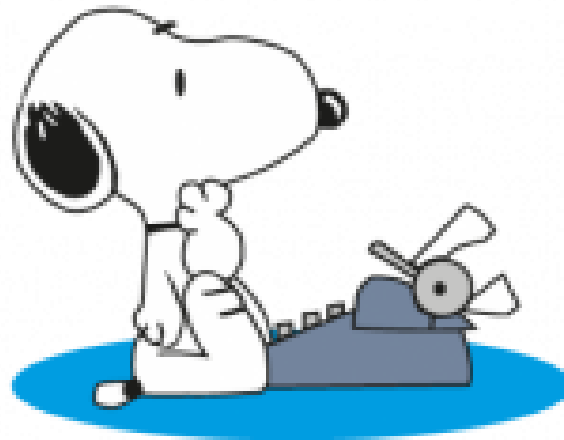
- On-going and current
- Part of an annual training plan
- Made available to stakeholders outside of the contracts and subcontracts

Consider the implementation of tools:

- Government Tools
 - [DAU Provision and Clause Matrix](#)
 - [Smart Matrix | Acquisition.GOV](#)
 - [NDIA FAR Flowdown Book](#)
- 3rd Party Apps
- In-House Developed Tools



Questions



About Us



Jeffery A. White

Founder & CEO

JA White & Associates, Inc.



As a leading Government Contracting, Compliance and Supply Chain Consulting firm for the last 27 years, J.A. White & Associates, Inc. combine deep functional industry experience with flexible engagement models. Our Subject Matter Experts seek to understand our client's requirements against the current legal and regulatory environment, marketplace best practices and business trends.

With countless successful Business System Reviews and implementations and an unprecedented track record, our tailored advisory services assist the GovCon Community in terms of Supply Chain compliance and risk mitigation, managing financial risks, leveraging technology, and optimize policy and procedures for effective expenditures of Government funds.

Through corporate offices in Columbia, SC, we support domestic and international clients, as well as Federal, State, and local Governments.

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Procurement Compliance Automation Powered by JA White



Company Benefits may include:

- Company Savings
- Improved Accuracy
- Process Time Reduction
- Compliant File Documentation



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