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# GovCon 101: A Guide to Navigating FAR Part 52

David S. Gallacher, Kutak Rock LLP, Washington, DC

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# Nice to Meet You!



**David Gallacher**

+1 202.828.2437 | Washington, D.C.

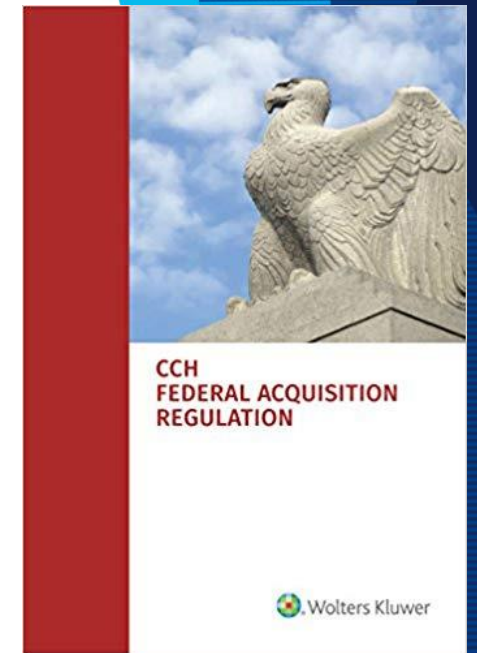
[David.Gallacher@KutakRock.com](mailto:David.Gallacher@KutakRock.com)

# Agenda

- Overview of the FAR
- Overview of FAR Part 52
- The *Christian* Doctrine
- Flowdowns
- Q&A

# Overview of the FAR

- Title 48, Code of Federal Regulations (48 C.F.R), Chapter 1
  - <https://www.acquisition.gov/browse/index/far>
  - <https://www.ecfr.gov/current/title-48/chapter-1>
- FAR typically applies government-wide
  - Individual agencies may have an agency “supplement” (e.g., DFARS)
  - Supplements implement agency-unique requirements
- FAR only applies to **direct procurements**; spending through government grant programs is administered through grant regulations (2 C.F.R. Part 200)



## Overview of the FAR (cont'd)

- New rules/regulations are subject to notice & comment (published in the Federal Register/Federal Acquisition Circular)
  - Proposed Rule
  - Interim Rule
  - Final Rule
- Class Deviations may modify the “official” regulations
- Additional policies and memoranda may also implement Agency priorities (e.g., DOD Procedures Guidance and Information (PGI)).

# Overview of the FAR (cont'd)

## 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 and Information 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 Products and Commercial Services

## 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 23-Environment, Sustainable Acquisition, and Material Safety
- 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 31-Contract Cost Principles and Procedures
- 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-Information Security and Supply Chain Security
- Part 41-Acquisition of Utility Services

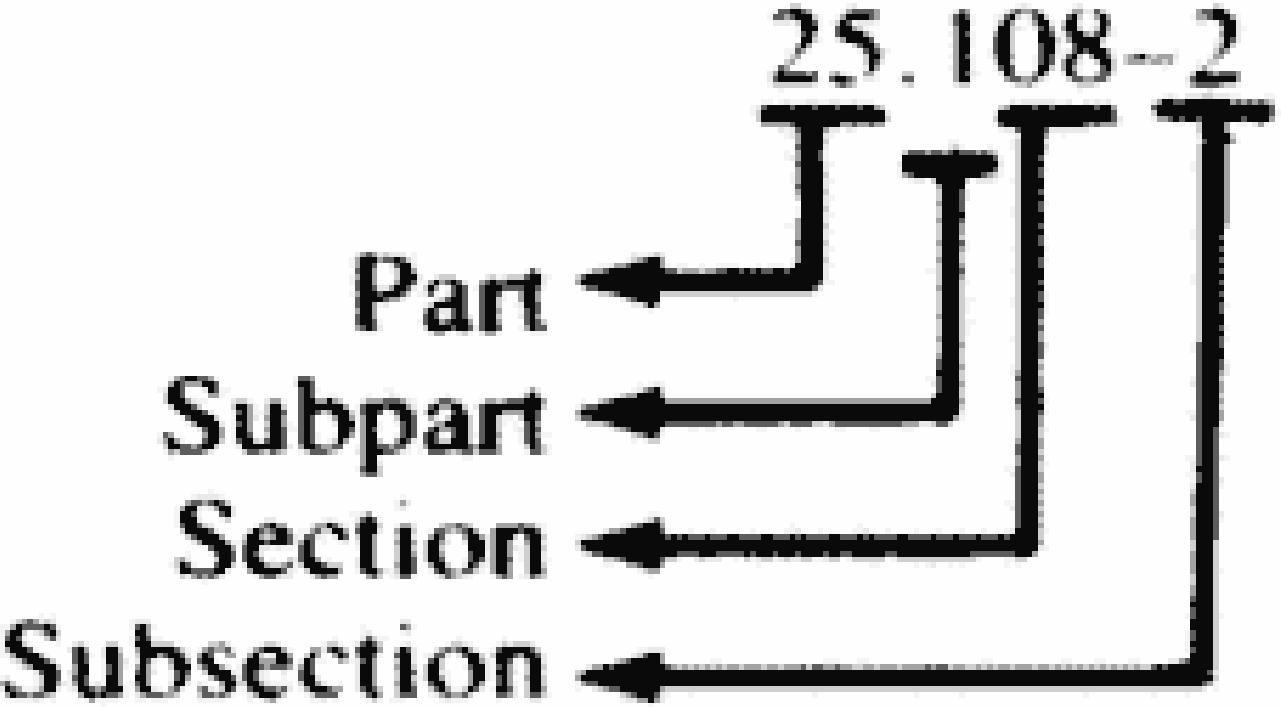
## Subchapter G-Contract Management

- 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

## Subchapter H-Clauses and Forms

- Part 52-Solicitation Provisions and Contract Clauses
- Part 53-Forms

# Overview of the FAR (cont'd)



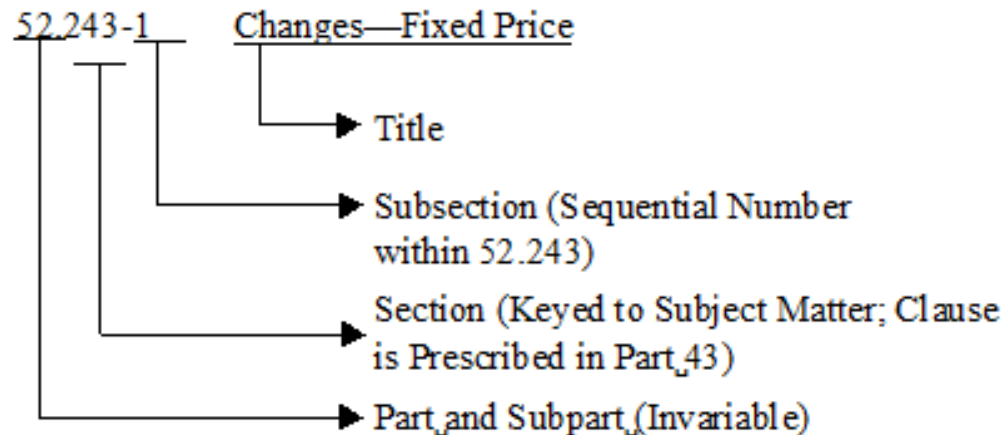
# Overview of the FAR (cont'd)

- Parts 1-51 = Procurement Regulations
- Part 52 = **Solicitation Provisions** and **Contract Clauses**
  - Instructions (e.g., 52.202-1, Definitions)
  - Certifications (e.g., 52.212-3, Offeror Representations and Certifications – Commercial Products and Commercial Services)
  - Prohibitions (e.g., 52.204-30, Federal Acquisition Supply Chain Security Act Orders – Prohibition)
  - Requirements (e.g., 52.225-1, Buy American – Supplies)



# Overview of FAR Part 52

- All FAR provisions and clause numbers begin with “52.2” because the text of all FAR provisions and clauses appear in **FAR Subpart 52.2**
  - Agency supplements will follow a similar format (e.g., DFARS = 252.2)



- 600+ provisions and clauses in FAR Subpart 52.2

# Overview of FAR Part 52 – Incorporating References

- Provisions and clauses may be spelled out **by full text**
- Provisions and clauses may also be **incorporated by reference**
  - ?With date?
- Customer-unique provisions and clauses should be spelled out in whole
- Clauses are commonly called out in solicitations/contracts:
  - Section H, Special Contract Requirements
  - Section I, Contract Clauses
  - Section K, Representations, Certifications, and Other Statements of Offerors

# Overview of FAR Part 52 – Clause Dates

- Each provision or clause may be **updated** from time to time
- Month/Year reference to clarify which version will apply

52.243-1, Changes – Fixed-Price (APR 1984)	v.	52.243-1, Changes – Fixed-Price (AUG 1987)
52.225-1, Buy American – Supplies (FEB 2009)	v.	52.225-1, Buy American – Supplies (OCT 2022)

- **But what if there is no date listed...?**

# Overview of FAR Part 52 – Prescriptions

- The FAR describes when the provision or clause will apply
- These “prescriptions” are referenced in the [introductory text](#) of each provision or clause

52.243-1, Changes – Fixed-Price	52.225-1, Buy American – Supplies
“As <b>prescribed</b> in 43.205(a)(1), insert the following clause....”	“As <b>prescribed</b> in 25.1101(a)(1), insert the following clause....”

# Overview of FAR Part 52 – Alternates

- Prescriptive language also describes when *alternate clauses* are appropriate
- Alternate versions address slightly different circumstances requiring slightly different requirements
- Example: 52.225-1, Buy American – Supplies (ALTERNATE I) (OCT 2022)
- Use of *multiple* alternates in the same contract is rare

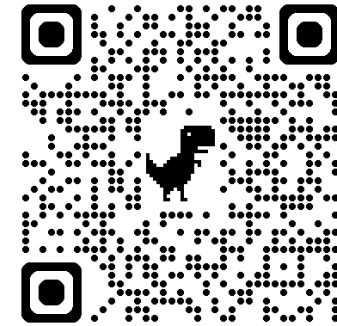
52.243-1, Changes – Fixed-Price	52.225-1, Buy American – Supplies
<p>“As <b>prescribed</b> in 43.205(a)(1), insert the following clause....”</p>	<p>“As <b>prescribed</b> in 25.1101(a)(1), insert the following clause....”</p>
<p>(1) The contracting officer shall insert the clause at <b>52.243-1, Changes – Fixed-Price</b>, in solicitations and contracts when a <b>fixed-price contract for supplies</b> is contemplated.</p> <p>(2) If the requirement is for <b>services</b>, other than architect-engineer or other professional services, and <b>no supplies are to be furnished</b>, the contracting officer shall use the clause with its <b>Alternate I</b>.</p> <p>(3) If the requirement is for <b>services</b> (other than architect-engineer services, transportation, or research and development) and <b>supplies are to be furnished</b>, the contracting officer shall use the clause with its <b>Alternate II</b>.</p> <p>(4) If the requirement is for <b>architect-engineer or other professional services</b>, the contracting officer shall use the clause with its <b>Alternate III</b>.</p> <p>(5) If the requirement is for <b>transportation services</b>, the contracting officer shall use the clause with its <b>Alternate IV</b>.</p> <p>(6) If it is desired to include the clause in solicitations and contracts when a <b>research and development contract</b> is contemplated, the contracting officer shall use the clause with its <b>Alternate V</b>.</p>	<p>(i) Insert the clause at <b>52.225-1, Buy American—Supplies</b>, in solicitations and contracts with a value <b>exceeding the micro-purchase threshold but not exceeding \$50,000</b>; and in solicitations and contracts with a value exceeding \$50,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section [relating to application of the Trade Agreements Act, which would displace the Buy American Act], except if—</p> <p>(A) The solicitation is restricted to domestic end products in accordance with subpart 6.3;</p> <p>(B) The acquisition is for supplies for use within the United States and an exception to the Buy American statute applies (e.g., nonavailability, public interest, or information technology that is a commercial product); or</p> <p>(C) The acquisition is for supplies for use outside the United States.</p> <p>(ii) The contracting officer shall use the clause with its <b>Alternate I</b> to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.101(d)....</p>

# Overview of FAR Part 52 – Modifications

- Most FAR provisions and clauses are “as-is”/non-negotiable
- But some provisions or clauses require modifications
  - “Fill-in-the-blank”
  - “Substantially the same as...”
  - [To be completed by offeror]
- Any modification should be included in the solicitation or contract at award – **not after the fact**

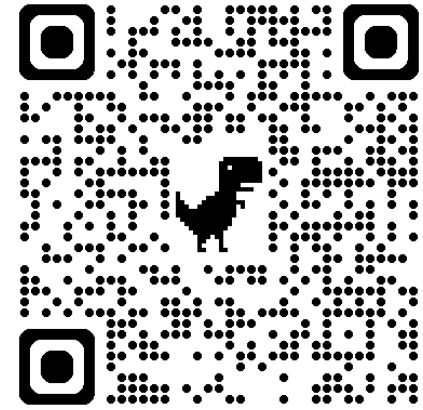
# Overview of FAR Part 52 – Deviations

- Deviations may be necessary to meet the specific needs and requirements of each agency
  - Deviations are issued by agency heads
  - Deviations are usually agency-specific
  - FAR-wide deviations are rare
- Two types of deviations
  - **Class Deviation** – similar in effect to an interim rule; immediate effect
  - **Individual Deviation** – contract specific; often negotiated
- Example: 252.225-7972, Prohibition on the Procurement of Foreign-Made Unmanned Aircraft Systems (AUG 2024) (DEVIATION 2024-O0014)



DOD Class Deviations

# Overview of FAR Part 52 – Subpart 52.3 Matrix



- This is a quaint relic of an earlier time, and the matrix is rarely used today

PROVISION OR CLAUSE	PRESCRIBED IN	PRINCIPLE TYPE AND/OR PURPOSE OF CONTRACT																					
		P OR C	IBR	UCF	FP SUP	CR SUP	FP R&D	CR R&D	FP SVC	CR SVC	FP CON	CR CON	T&M LH	LMV	COM SVC	DDR	A&E	FAC	IND DEL	TRN	SAP	UTL SVC	CI
<a href="#">52.202-1</a> Definitions.	<a href="#">2.201</a>	C	Yes	I	R	R	A	R	R	R		R	R	R	R		R	R	R	R		R	
<a href="#">52.203-2</a> Certificate of Independent Price Determination.	<a href="#">3.103-1</a>	P	No	K	A		A		A		A			A	A	A	A	A	A	A		A	
<a href="#">52.203-3</a> Gratuities.	<a href="#">3.202</a>	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A		A	
<a href="#">52.203-5</a> Covenant Against Contingent Fees.	<a href="#">3.404</a>	C	Yes	I	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R		R	
<a href="#">52.203-6</a> Restrictions on Subcontractor Sales to the Government.	<a href="#">3.503-2</a>	C	Yes	I	R	R			R	R									R			R	
Alternate I	<a href="#">3.503-2</a>	C	Yes																				R

P=Provision; C=Clause

R=Required; A=Required when Applicable; O=Optional



# The *Christian Doctrine*

- *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 160 Ct. Cl. 1 (1963)
- Certain rules and contract clauses have the force and effect of law even though not expressly incorporated in a prime contract
  - “Deeply ingrained strand of public procurement policy”
  - Such as, for example, 52.249-2, Termination for Convenience of the Government (Fixed-Price)
- **Legal risk** for all prime contractors: Even if your contract does not include a specific clause, it could be **deemed to include** that clause by operation of law

# Flowdowns

- Some clauses require the clause to be flowed down to subcontractors

52.203-7, Anti-Kickback Procedures (JUN 2020)	52.204-21, Basic Safeguarding of Covered Contractor Information Systems (NOV 2021)	52.222-50, Combatting Trafficking in Persons (NOV 2021)
<p>(c)(5): “The Contractor agrees to incorporate the substance of this clause, including this paragraph (c)(5) but excepting paragraph (c)(1) of this clause [relating to having an internal compliance program], in all subcontracts under this contract that exceed [\$150,000].”</p>	<p>(c): The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts under this contract (including subcontracts for the acquisition of commercial products or commercial services, other than commercially available off-the-shelf items), in which the subcontractor may have Federal contract information residing in or transiting through its information system.</p>	<p>(i)(1): “The Contractor shall include the substance of this clause, including this paragraph (i), in all subcontracts and in all contracts with agents. The requirements in paragraph (h) of this clause [relating to a formal compliance plan] apply only to any portion of the subcontract that” will be performed outside the United States and is valued above \$550K.</p>

## Flowdowns (cont'd)

- But the FAR also distinguishes between flowdowns for commercial (FAR Part 12) (vs. non-commercial) subcontracts
- If you have a **commercial subcontract**, the flowdowns may be limited
- If you have a **non-commercial subcontract**...
  - You may end up taking just about everything that the prime chooses to flow down
  - You may have limited leverage...



# Flowdowns (cont'd)

- “Mandatory” flowdowns vs. “Necessary” flowdowns
  - Certain clauses mandated by law
    - 52.244-6, Subcontracts for Commercial Products and Commercial Services (see also 52.212-5(e) for commercial prime contracts)
  - Other clauses must be included as a practical matter to ensure prime contract compliance
- Prime contractors are directed to try to limit flowdowns
  - 52.244-6(c)(2): “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 obligations**.”
  - 252.244-7000: “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.....:
    - Specified in a particular clause; or
    - Listed in 52.244-6 and 52.212-5(e)

# Flowdowns – “Self-Deleting”



- Companies will often argue that certain clauses do not apply as a practical matter, making the clause “self-deleting”

52.203-7, Anti-Kickback Procedures (JUN 2020)	52.204-21, Basic Safeguarding of Covered Contractor Information Systems (NOV 2021)	52.222-50, Combatting Trafficking in Persons (NOV 2021)
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- Legally, there is **no such thing** as “self-deleting”
  - But the concept might help the subcontractor assess the relative risk of a clause...

# Flowdowns – The *Christian* Doctrine

- The *Christian* doctrine does **not** apply at the subcontractor level
  - See, e.g., *Energy Labs, Inc. v. Edwards Engineering, Inc.*, No. 14-C-7444, 2015 WL 3504974, at \*5 (N.D. Ill. June 2, 2015)
- Clauses **must** be referenced/incorporated in a subcontract to apply



# Quiz/Recap

# Quiz/Recap

1. True or False: The FAR solicitation provisions and contract clauses apply any time a government entity spends money?
  - a. True
  - b. False

**ANSWER: B, False.** The FAR (48 C.F.R., Chapter 1) applies only when the federal government is buying supplies or services through a direct *procurement contract*. The FAR does not normally apply to cooperative agreements or “other transaction” agreements, although government agencies may choose to use FAR provisions and clauses in those types of agreements. Most importantly, the FAR does not apply when a state or local government is spending federally-appropriated dollars that were disbursed under a federal grant. Grant dollars are typically subject to the regulations at 2 C.F.R. Part 200, as well as any agency-specific supplements.



# Quiz/Recap

2. Based on the numbering convention set forth in FAR Part 52, which of the following would reference a FAR solicitation provision or contract clause?
- a. 25.1101(c)
  - b. 52.225-5
  - c. 225.502
  - d. a and b
  - e. a and c
  - f. All of the above

**ANSWER: B, 52.225-5.** Remember that because all the solicitation provisions and contract clauses are contained in FAR Subpart 52.2, each of these provisions or clauses will begin with “52.2.” In the case of **52.225-5**, Trade Agreements, “**52.2**” reflects the fact that this is a standard FAR provision or clause, “**25**” reflects that the clause is required under FAR Part 25, and “**-5**” reflects that this is the 5<sup>th</sup> sequential clause required under FAR Part 25. The other answers are incorrect. FAR 25.1101(c) is the regulatory provision that prescribes when 52.225-5 should be used in a solicitation or contract. And 225.502 is a section from the DOD’s agency-specific FAR supplement (the DFARS), but 225.502 is not a separate contract clause. Standard solicitation provisions and contract clauses under the DFARS will typically begin with “**252.2**” because the DFARS is located at 48 C.F.R. Chapter **2**.

# Quiz/Recap

3. True or False: An undated contract clause will automatically refresh when a clause is updated.
- a. True
  - b. False
  - c. “I don’t know what to believe; I’ve been told both answers.”

**ANSWER: B, False.** Each clause has a specific date so that the government and contractors alike can know the *exact* contract requirement. The contract’s specific terms are typically set on the date the parties sign the agreement, absent a later modification. Unless the contract states that provisions will automatically refresh, the terms do not change unless the parties separately agree (usually in writing). Leaving a clause undated does **not** help manage risk; it introduces ambiguity and confusion into the contract, because it could be unclear as to what, specifically, the parties agreed. As a practical matter, especially when flowing down contract requirements, many prime contractors will leave clauses undated; but that does not mean that the clause will automatically refresh. More likely, it means that the version of the clause that was in effect on the day the contract was signed will control.

# Quiz/Recap

4. True or False: Alternates and Deviations will automatically apply to a contract if a Contracting Officer makes and mistake and includes the wrong version of a provision or clause.
- a. True
  - b. False
  - c. It depends

**ANSWER: B, False.** Generally speaking, the version of the clause that is listed in the contract will govern the relationship between the parties. If there is mistake, the parties will usually just have to live with it. This is one of the reasons that it is important to carefully review draft solicitations and to provide inputs to the government during the solicitation's Q&A period. While the government tries very hard to make sure that the proper provisions and clauses are listed, everyone makes mistakes.

Answer C *could* be correct here, because it is *possible* that the *Christian* doctrine could operate to apply a particular version of a clause if the Contracting Officer made a mistake. But this is unlikely. In order for the *Christian* doctrine to apply, the clause must reflect a “deeply ingrained strand of public procurement policy.” An “alternate” version of a clause or a “deviation” (by their very nature) do not usually reflect policies that are “deeply ingrained.” The courts that have considered this issue have been slow to expand the *Christian* doctrine under these unique circumstances.

# Quiz/Recap

5. Where can I find complete copies of the specific FAR solicitation provisions and contract clauses listed in a solicitation or contract?
- a. Online at [acquisition.gov](http://acquisition.gov) or [ecfr.gov](http://ecfr.gov)
  - b. The solicitation or contract
  - c. The Contracting Officer
  - d. Loose-leaf or hard-copy versions printed by publishers
  - e. All of the above

**ANSWER: E, All of the above.** Solicitations and contracts do not normally list every single FAR provision or clause, although many may be set forth in full. Contracting Officers will typically direct vendors to online resources for complete copies of the clauses (which is the most common way that people access the procurement regulations), but the FAR directs the Contracting Officer to make available complete copies of the various provisions and clauses upon request. Other companies publish hard-copy versions of the FAR (including NDIA, Wolters Kluwer, and even the Government Printing Office), which may prove useful. But these hard-copy versions quickly become out of date as the regulations are updated.

# Questions?



**David Gallacher**

+1 202.828.2437 | Washington, D.C.  
[David.Gallacher@KutakRock.com](mailto:David.Gallacher@KutakRock.com)