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GovCon 101: Flowdowns

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Nice to Meet You!



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Agenda

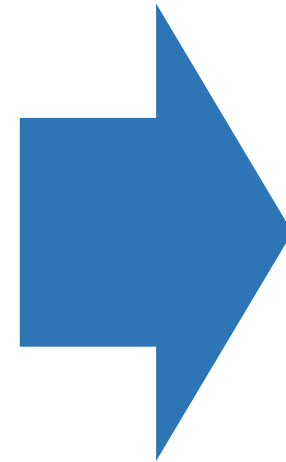
- General Principles
 - Risk Management
 - “Self-Deleting”
 - *Christian* Doctrine
- Flowdowns
 - Mandatory
 - Necessary
 - Other
- Q&A

Risk Management in Government Contracts



- The Government wants **everything** in its contracts, using the “power of the purse” to advance its policies

Risk Management in Government Contracts (cont'd)



SUBCONTRACT

- Some clauses **MUST** be flowed down to subcontractors, per the terms of the specific clause
- Also helps manage prime contractor's risk

Risk Management in Government Contracts (cont'd)

Section I - Contract Clauses	52.215-12 (Dev)	Subcontractor Certified Cost (2022-00001)	252.203-7001	Prohibition On Persons Convicted Of Contract-Related Felonies		
CLAUSES INCORPORATED BY REFERENCE	52.215-13	Subcontractor Certified Cost (2022-00001)	252.203-7002	Requirement to Inform Employer Agency Office of the Inspector General	252.227-7037	Validation of Restrictive Markings on Technical Data
52.202-1	52.215-14	Integrity of Unit Prices	252.203-7003	Agency Office of the Inspector General	252.228-7003	Capture and Detention
52.203-3	52.215-15	Pension Adjustments and Waiver of Facilities Cap	252.204-7000	Disclosure Of Information	252.232-7003	Electronic Submission of Payment Requests and Receiving Reports
52.203-5	52.215-17	Reversion or Adjustment (PRB) Other than Pension	252.204-7002	Payment For Contract Line or Priced		
52.203-6	52.215-18	Notification of Ownership Requirements for Certified Cost		Control Of Government Personnel	252.232-7010	Levies on Contract Payments
52.203-7	52.215-19	Other Than Certified Cost Allowable Cost And Payment	252.204-7003	Antiterrorism Awareness Training	252.233-7001	Choice of Law (Overseas)
52.203-8	52.216-7	Fixed Fee	252.204-7004	Limitations on the Use or Disclosure	252.242-7006	Accounting System Administration
52.203-10	52.216-8	Cost Contract--No Fee	252.204-7009	Contractor Reported Cyber Incidents	252.243-7002	Requests for Equitable Adjustment
52.203-12	52.216-11	Notice of Price Evaluation Business Concerns	252.204-7012	Safeguarding Covered Defense Incident Reporting	252.244-7000	Subcontracts for Commercial Products or Commercial Services
52.203-13	52.219-4	Utilization of Small Business Concerns (20002)	252.204-7015	Notice of Authorized Disclosure Support	252.244-7001	Contractor Purchasing System Administration
52.203-16	52.219-8 (Dev)	Small Business Subcontracting (20002)	252.204-7018	Prohibition on the Acquisition of Telecommunications Equipment	252.245-7001	Tagging, Labeling, and Marking of Government-Furnished Property
52.203-19	52.219-9	Liquidated Damages--Subcontractor	252.205-7000	Provision Of Information To Contractor	252.245-7002	Reporting Loss of Government Property
52.204-2	52.219-14 (Dev)	Nonmanufacturer Rule	252.209-7004	Subcontracting With Firms That Are Not U.S. Citizens	252.245-7003	Contractor Property Management System Administration
52.204-4	52.219-16	Convict Labor		The Government of a Country	252.245-7004 (Dev)	Reporting, Reutilization, and Disposal (DEVIATION 2022-00006)
52.204-10	52.222-3	Contract Work Hours and Compensation	252.211-7003	Terrorism	252.246-7001	Warranty Of Data
52.204-12	52.222-4	Child Labor -- Cooperative Contracts for Materials, Supplies, and Services	252.211-7007	Item Unique Identification and Reporting of Government-Furnished Property	252.246-7003	Notification of Potential Safety Issues
52.204-13	52.222-19	Prohibition Of Segregate Equal Opportunity	252.211-7008	Use of Government-Assigned Funds	252.246-7004	Safety of Facilities, Infrastructure, and Equipment for Military Operations
52.204-14	52.222-20	Notification Of Visa Denial	252.215-7002	Cost Estimating System Requirement	252.246-7007	Contractor Counterfeit Electronic Part Detection and Avoidance System
52.204-15	52.222-21	Equal Opportunity for Women and Minorities	252.215-7002	Cost Estimating System Requirement	252.246-7008	Sources of Electronic Parts
52.204-18	52.222-26	Employment Reports on Employees	252.219-7003	Small Business Subcontracting	252.247-7023	Transportation of Supplies by Sea
52.204-19	52.222-29	Relations Act	252.223-7004	Drug Free Work Force	252.247-7023	Transportation of Supplies by Sea
52.204-21	52.222-35	Service Contract Labor Standards Act	252.223-7006	Prohibition On Storage, Treatment, and Disposal of Hazardous Materials		
52.204-23	52.222-36	Fair Labor Standards Act	252.225-7002	Qualifying Country Sources Act		
52.204-25	52.222-37	Standards - Price Adjustments (Contracts)	252.225-7004	Report of Intended Performance and Canada--Submission after Preference For Certain Domestic Products		
52.208-9	52.222-40	Combating Trafficking in Persons	252.225-7012	Trade Agreements--Basic Buy American--Free Trade Agreements		
52.209-6	52.222-41	Employment Eligibility Requirements	252.225-7021	Buy American--Free Trade Agreements--Basic		
52.209-9	52.222-43	Minimum Wages for Contractors (Order 14026)	252.225-7036	Trade Agreements--Basic Buy American--Free Trade Agreements		
52.209-10	52.222-50	Paid Sick Leave Under Executive Order 14026	252.225-7043	Antiterrorism/Force Protection Contractors Outside the United States		
52.210-1	52.222-54	Drug-Free Workplace	252.225-7048	Export-Controlled Items		
52.211-5	52.222-55	Waste Reduction Programs	252.225-7056	Prohibition Regarding Business Regime		
52.215-2	52.223-10	Ozone-Depleting Substances	252.225-7060	Prohibition on Certain Procurement		
52.215-8	52.223-11	Potential Hydrofluorocarbon Acquisition of EPEAT - 2014)	252.227-7013	Uyghur Autonomous Region Rights in Technical Data--Other Than Commercial Services		
52.215-10	52.223-13	Acquisition of EPEAT - 2014)	252.227-7014	Rights in Technical Data--Other Than Commercial Services		
52.215-11	52.223-14	Acquisition of EPEAT - 2014)	252.227-7016	Rights in Bid or Proposal Information		
	52.223-15	Acquisition of EPEAT - 2014)	252.227-7017	Identification and Assertion of Restrictions		
	52.223-16	Energy Efficiency in End Products	252.227-7019	Validation of Asserted Restrictions		
			252.227-7026	Deferred Delivery Of Technical Data--Withholding (2022-00006)		
			252.227-7027			
			252.227-7030			

CLAUSES INCORPORATED BY FULL TEXT

52.204-27 PROHIBITION ON A BYTEDANCE COVERED APPLICATION (JUN 2023)
 (a) Definitions. As used in this clause--

Covered application means the social networking service TikTok or any successor application or service developed or provided by ByteDance Limited or an entity owned by ByteDance Limited.

Information technology, as defined in 40 U.S.C. 11101(6)--

(1) Means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires the use--

(i) Of that equipment; or

(ii) Of that equipment to a significant extent in the performance of a service or the furnishing of a product;

(2) Includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources; but

(3) Does not include any equipment acquired by a Federal contractor incidental to a Federal contract.



Risk Management in Government Contracts (cont'd)

- Flow down by **reference** (list/attachments)
- Flow down by **full text** incorporation
- Be mindful of the “undated” problem
 - 52.244-6 vs. 52.244-6 (FEB 2023)
 - Should clauses automatically refresh as they are updated in the FAR?

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252.227-7037	Validation of Restrictive Markings on Technical Data	JAN 2023
252.228-7003	Capture and Detention	DEC 1991
252.232-7003	Electronic Submission of Payment Requests and Receiving Reports	DEC 2018
252.232-7010	Levies on Contract Payments	DEC 2006
252.233-7001	Choice of Law (Overseas)	JUN 1997
252.242-7006	Accounting System Administration	FEB 2012
252.243-7002	Requests for Equitable Adjustment	DEC 2022
252.244-7000	Subcontracts for Commercial Products or Commercial Services	JAN 2023
252.244-7001	Contractor Purchasing System Administration	MAY 2014
252.245-7001	Tagging, Labeling, and Marking of Government-Furnished Property	APR 2012
252.245-7002	Reporting Loss of Government Property	JAN 2021
252.245-7003	Contractor Property Management System Administration	APR 2012
252.245-7004 (Dev)	Reporting, Reutilization, and Disposal (DEVIATION 2022-00006)	NOV 2021
252.246-7001	Warranty Of Data	MAR 2014
252.246-7003	Notification of Potential Safety Issues	JAN 2023
252.246-7004	Safety of Facilities, Infrastructure, and Equipment for Military Operations	OCT 2010
252.246-7007	Contractor Counterfeit Electronic Part Detection and Avoidance System	JAN 2023
252.246-7008	Sources of Electronic Parts	JAN 2023
252.247-7023	Transportation of Supplies by Sea	JAN 2023
252.247-7023	Transportation of Supplies by Sea	JAN 2023

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(2) Includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources; but

(3) Does not include any equipment acquired by a Federal contractor incidental to a Federal contract.

Risk Management in Government Contracts (cont'd)

- Flow down **without alteration**
 - For example: Data Rights (DFARS 227.7103-15) & Computer Software (227.7203-15)
 - Limitations on a Subcontractor's right to sell directly to the Government, FAR 3.503-1
- Flow down **with alteration**
 - Incorporating a clause without modification can create confusion (e.g., 52.233-1, Disputes)
 - May also grant a prime contractor more rights than you intend

“Self-Deleting”



- Companies will often argue that certain clauses do not apply, making the clause “self-deleting”
 - FAR 52.222-41, Service Contract Labor Standards
 - FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States
 - FAR 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations
- **There is no such thing as “self-deleting”**
 - But the concept might help the subcontractor assess the relative risk of a clause...

The *Christian* Doctrine

- Be mindful of 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, the Termination for Convenience clause (52.249-2)
- Open debate as to whether the *Christian* doctrine applies at the subcontractor level
 - BUT...

The *Christian* Doctrine (cont'd)

- The Office of Federal Procurement Policy (OFCCP) issued at least two decisions extending *Christian* to subcontractors in the healthcare field
 - Radically expansive view of *Christian* doctrine
 - *OFCCP v. UPMC-Braddock*, ARB Case No. 08-048 (May 29, 2009)
 - Relates to Federal Employee Health Benefits Program (administered by Office of Personnel Management)
 - Equal Employment Opportunity (EEO) clauses under jurisdiction of Department of Labor and OFCCP may be subject to the *Christian* doctrine or incorporated into subcontracts by operation of language of authorizing statute or Executive Order
 - In March 2013, the D.C. District Court affirmed OFCCP's ruling by granting the Government's motion for summary judgment
 - The case was appealed to the D.C. Circuit and was dismissed as moot in November 2014 because the Secretary of Labor issued a five-year moratorium on the enforcement of the socioeconomic requirements for TRICARE subcontractors
 - *OFCCP v. Fla. Hosp.*, DOL OALJ No. 2009-OFC-00002 (Oct. 18, 2010)
 - Relates to TRICARE (administered by the Department of Defense)
 - Complaint **dismissed** on appeal
- **Better, more recent decision:** *Energy Labs, Inc. v. Edwards Engineering, Inc.*, No. 14-C-7444, 2015 WL 3504974, at *5 (N.D. Ill. June 2, 2015) – *Christian* **does not apply to subcontractors**

Flowdowns

- “Mandatory” vs. “Necessary” flowdowns
 - Certain clauses mandated by law (examples)
 - Contractor Code of Business Ethics and Conduct
 - Small Business
 - Socioeconomic/Equal Opportunity
 - Human Trafficking
 - Ban on Huawei/ZTE telecommunications equipment
 - TikTok ban
 - **NEW: Federal Acquisition Supply Chain exclusion orders** (December 2023)
 - Other clauses must be included as a practical matter to ensure prime contract compliance

Flowdowns (cont'd)

- The FAR distinguishes between flowdowns for commercial and non-commercial subcontracts
- 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...



“Mandatory” Flowdowns

- Commercial subcontracts under non-commercial prime contracts
 - FAR 52.244-6(c), Subcontracts for Commercial Products and Commercial Services

1. FAR 52.203–13, Contractor Code of Business Ethics and Conduct
2. FAR 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009
3. FAR 52.203–17, Contractor Employee Whistleblower Rights
4. FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
5. FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems
6. FAR 52.204-23, Prohibition of Contracting for Hardware, Software, and Services Developed by Kaspersky Lab and Other Covered Entities
7. FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
8. FAR 52.204-27, Prohibition on a ByteDance Covered Application
9. FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition
10. FAR 52.219–8, Utilization of Small Business Concerns
11. FAR 52.222–21, Prohibition of Segregated Facilities
12. FAR 52.222–26, Equal Opportunity
13. FAR 52.222–35, Equal Opportunity for Veterans
14. FAR 52.222–36, Equal Opportunity for Workers with Disabilities
15. FAR 52.222-37, Employment Reports on Veterans
16. FAR 52.222-40, Notification of Employee Rights Under the National Labor Relations Act
17. FAR 52.222–50, Combating Trafficking in Persons
18. FAR 52.222–55, Minimum Wages under E.O. 13658
19. FAR 52.222-62, Paid Sick Leave under E.O. 13706
20. FAR 52.224-3, Privacy Training
21. FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States
22. FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors
23. FAR 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels

“Mandatory” Flowdowns (cont’d)

- Commercial subcontracts under commercial prime contracts
 - FAR 52.212-5(e)(1), Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services
 1. FAR 52.203-13, Contractor Code of Business Ethics and Conduct
 2. FAR 52.203-17, Contractor Employee Whistleblower Rights
 3. FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
 4. FAR 52.204-23, Prohibition of Contracting for Hardware, Software, and Services Developed by Kaspersky Lab and Other Covered Entities
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 13. FAR 52.222-37, Employment Reports on Veterans
 14. FAR 52.222-40, Notification of Employee Rights Under the National Labor Relations Act
 15. FAR 52.222-41, Service Contract Labor Standards
 16. FAR 52.222-50, Combating Trafficking in Persons
 17. FAR 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements
 18. FAR 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Requirements
 19. FAR 52.222-54, Employment Eligibility Verification (“E-Verify”)
 20. FAR 52.222-55, Minimum Wages under E.O. 13658
 21. FAR 52.222-62, Paid Sick Leave under E.O. 13706
 22. FAR 52.224-3, Privacy Training
 23. FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States
 24. FAR 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations
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“Mandatory” Flowdowns (cont’d)

- Why two different lists?
 - Most companies simply combine the two lists from 52.244-6 and 52.212-5(e) for commercial subcontracts
 - Approximately 28 clauses
 - Simpler to have a single process in place



“Necessary” Flowdowns

- But “mandatory” does not necessarily mean “only”...
- FAR 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**.

“Necessary” Flowdowns (cont’d)

- Some clauses, as a practical matter, may need to be included in the subcontract to meet prime contract requirements
- Examples:
 - Cybersecurity (especially DFARS 252.204-7012)
 - Buy American/Country of Origin
 - Sourcing restrictions (including DFARS 252.246-7008, Sources of Electronic Parts)
 - Technical data rights/computer software rights
 - Cost or pricing data
 - Audit
 - Background check/facility access
 - Organizational Conflicts of Interest (OCIs)
 - H-Clauses

“Necessary” Flowdowns (cont’d)

- *But see* DFARS 252.244-7000, Subcontracts for Commercial Products or Commercial Services (NOV 2023):
 - “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
 - Listed in 52.244-6 and 52.212-5(e)
-
- Likely impact of new DFARS rule:
 - ✓ Non-Commercial subcontracts = “kitchen sink” approach
 - ✓ Commercial subcontracts = “tailored” approach (if possible)
 - ✓ **No clear consequences** if a prime contractor flows down too many clauses...

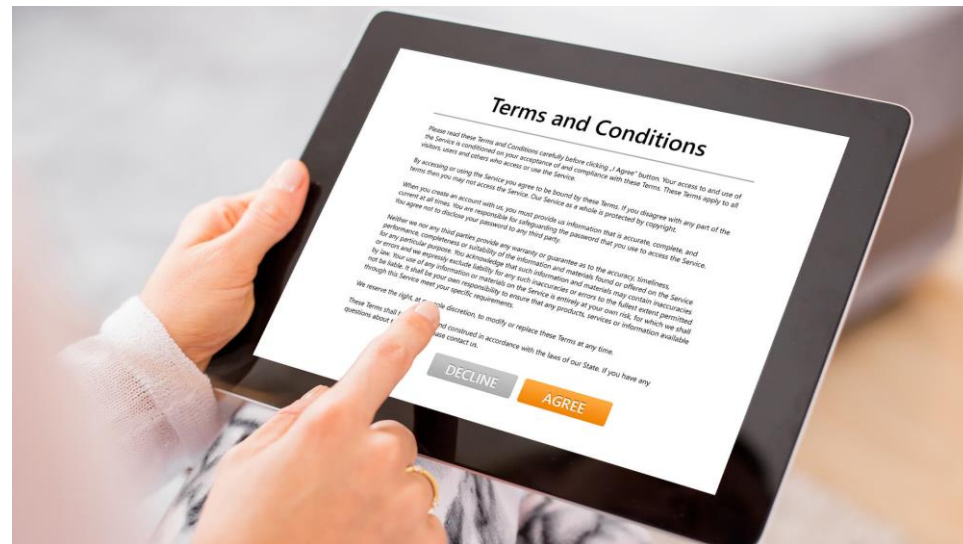
“Necessary” Flowdown Clauses (cont’d)

- What if the clause says that you **must** flow it down, but it is not listed on 52.244-6 or 52.212-5(e)?
 - *E.g.*, 52.203-7(c)(5), Anti-Kickback Procedures
- Which version of the clause applies if it is undated?
 - *E.g.*, 52.222-50, Combatting Trafficking in Persons
- How far down in the supply chain do these flowdowns need to go?
 - “All the way down...”
- What do you do when your supplier/subcontractor won’t agree to a flowdown clause?
 - It depends on who has the leverage...



Other Flowdowns

- “Standard” terms & conditions may substitute for “flowdown” clauses
- Examples:
 - ✓ Termination (incl. Termination for Convenience)
 - ✓ Default
 - ✓ Excusable Delay
 - ✓ Liquidated Damages
 - ✓ Delivery/Shipping
 - ✓ Inspection/Warranty
 - ✓ Limitations on Liability
 - ✓ Payments
 - ✓ Changes
 - ✓ Audit
 - ✓ Disputes
 - ✓ Choice of Law



Quiz/Recap

Quiz/Recap

1. Why do prime contractors typically flow down so many subcontract requirements?
 - a. Because they are lazy
 - b. Because the prime contract with the government requires them to flow down every single clause, even to commercial subcontracts
 - c. Because they are trying to manage their contract risk
 - d. Because they will be suspended or debarred if they do not

ANSWER: C, Manage contract risk. While prime contractor flowdowns often feel abusive and lazy, there is a reason for them. Admittedly, many prime contractors “overflow” their flowdown clauses, but these companies are usually trying to manage the risks under their prime contract – ensuring that the government customer gets exactly what it needs and that *certain* clauses required to be flowed down in the prime contract are included in the subcontract. If a prime contractor does not flow down the necessary clauses, the company will probably not be suspended or disbarred, but it could be deemed to have breached its prime contract and could be forced to update its policies and procedures to meet the government’s requirements.

Quiz/Recap

2. True or False: FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States, is a “self-deleting” clause if you are not performing private security functions outside the United States.
 - a. True
 - b. False
 - c. “I never see this clause, anyway, so it doesn’t really matter...”

ANSWER: B, False. There is no such thing as “self-deleting.” So, if FAR 52.225-26 is included in your subcontract, then you could be required to comply. However, as a practical matter, if you are not performing private security functions outside the United States, then the risk of being impacted by this clause is low. But please remember... “low” is not “zero.”

Quiz/Recap (cont'd)

3. True or False: Based on current authority, the *Christian* doctrine does not pose a substantial risk of FAR and DFARS requirements being implied in your subcontract as a matter of law.
- a. True
 - b. False
 - c. "I believe in separation of church and state..."

ANSWER: A, True. The *Christian* doctrine is a principle that applies at the prime contract level when the government accidentally omits a contract requirement reflecting a deeply ingrained strand of public procurement policy. A subcontract between two commercial companies does **not** raise the same legal concerns, and current authorities reject the idea that the *Christian* doctrine should apply at the subcontract level. While there were some Department of Labor decisions from fifteen years ago holding differently, those decisions were ultimately rejected and are not controlling authority.

Quiz/Recap

4. Which of these is **NOT** a mandatory flowdown under FAR 52.244-6 or 52.212-5(e) for commercial subcontracts?
- a. FAR 52.203-13, Contractor Code of Business Ethics and Conduct
 - b. FAR 52.204-27, Prohibition on a ByteDance Covered Application
 - c. FAR 52.222-54, Employment Eligibility Verification
 - d. FAR 52.249-2, Termination for Convenience
 - e. None of the above

ANSWER: D, Termination for Convenience. 52.249-2 is not listed as a mandatory flowdown in commercial subcontracts, while the other three clauses are. While it is probably a good idea for a prime contractor to include some type of a Termination for Convenience clause in its subcontracts, FAR 52.249-2 is not a mandatory flowdown. Most government contractors typically flow down the clause (with modification) as a “necessary” flowdown or include some kind of tailored termination clause in their standard terms and conditions.

Quiz/Recap

5. Which of the following could represent a “necessary” flowdown requirement that a prime contractor needs to include in its subcontracts to meet the prime contract requirements?
- a. Cybersecurity (e.g., FAR 52.204-21 or DFARS 252.204-7012)
 - b. Country of origin (e.g., Buy American Act or Trade Agreements Act)
 - c. Technical data rights/computer software rights
 - d. Organizational Conflicts of Interest (OCIs)
 - e. All of the above

ANSWER: E, All of the above. All of these requirements are commonly flowed down to subcontractors, despite the fact that they are not listed as a “mandatory” flowdowns under 52.244-6 and 52.212-5(e). If it is important to the government customer and the prime contractor that the subcontractor meet these specific requirements, then the clause may be considered a “necessary” flowdown, whether under a commercial or non-commercial subcontract. While the government encourages companies to limit the number of flowdowns in subcontracts, there is no real consequence if a prime contractor fails to comply. And whether the subcontractor must accept the clause is a matter of negotiation.

Questions?



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