



Hazards to Contractors Entering the U.S. Supply Chain by Subcontract

August 1, 2024

Cara A. Wulf
Partner
McCarter & English LLP
cwulf@mccarter.com

Our Agenda

- The Need for a Negotiated Agreement
- Mandatory vs. Permissive Flow-Downs
- Courted as a Small Business – Don't Represent Until You Know the Affiliation Rules
- Update on Section 889 – A Possible Barrier to Entry at All Tiers
- Navigating the “TikTok Ban”
- Managing Supply Chain Security Risk (Implementation of FASCSA Orders)

What is a Subcontract in the U.S. Supply Chain? Things to Think About

- It is Not a Government Contract
- There is No Privity With the Government
- It is a Product of Negotiation Between the Parties
- It is Constrained Only by Mandatory Flow-Downs
- Think of It in Two Parts: Negotiated Terms and FAR and FAR Supp Flow-Downs
- Commercial Product/Service Suppliers Have Very Limited Mandatory Flow-Downs
- Flow-Downs Can Have Extended Reach
- It Can Take Many Forms

A Must – a Negotiated Agreement

Alternatives Are All Bad

- Starting Work Before Definitive Agreement
- Competing Forms
- Email Exchanges
- Attaching the Prime Contract

Contract Terms To Consider

- **Limitation of Liability**
- **Price/Charge/ Price Changes**
- **Indemnification**
- **Scope and Goals/Specification [Deliverables]**
- **Termination**
- **Payment/Payment Options**
- **Responsibility of the Parties**
- **Warranty**
- **Liquidated Damages**
- **Delivery**
- **Intellectual Property**
- **Order of Precedence**
- **Term**
- **Invoices/Late Payment**
- **Data Privacy**
- **Data Security/Cybersecurity**
- **Acceptance**
- **Regulatory Compliance [Flow-Downs]**
- **Change Management**
- **Force Majeure**
- **Dispute Resolution**

Scope and Deliverables

Subcontractor Wish List for Scope & Deliverables

- Clearly defined description of work with assigned responsibilities for subcontractor
- SOW tied to payments and to deliverables – to CLINS and SLINS
- Disclosure/relationship with prime contractor's SOW
- Limit IP deliverables

Limitation of Liability

Subcontractor Wish List for Limitation of Liability

- Expand scope of damages covered
- Expand scope of actions covered
- Extend limitations or cap limitations
- Extend categories of persons/entities protected by limitation
- Include statute of limitations
- Extend to third party actions

Indemnity

Common Embedded Indemnity Provisions

- EVERYTHING
- Property Damage, Personal Injury, and Wrongful Death
- Infringement
- Compliance with the Law
- Export Control
- Defective Cost or Pricing Data
- Contract Disputes Act Appeals Made on Sub's Behalf

“Seller shall indemnify and hold Buyer and its customers harmless from any and all expenses, liability, and loss of any kind (including all costs and expenses including attorneys’ fees) arising out of claims, suits, or actions”

Subcontractor Wish List for Indemnity

- Limitations on types of claims
- Limiting indemnitees
- Adding concept of fault or negligence
- Limitations on who is making the claim
- Notice
- Opportunity to defend and settle
- Duty to cooperate
- Caps (e.g., at insurance)
- Carving out nature of work being performed at prime
- Reasonableness of costs, expenses and fees
- For patent indemnity – right to substitute and relationship with “Authorization and Consent”

Price and Form

Subcontractor Wish List – Price and Form of Contract

- Typically fixed price vs. cost reimbursement
- Now with supply chain issues – the tables have turned! – varieties of fixed price contracts with adjustments
- Avoid most favored customer clauses
- Avoid intrusive cost or pricing data review
- Price should reflect additional risks of being a government contractor

Changes

Subcontractor Wish List – Changes

- Mutuality
- Limiting breadth
- Tied to government action
- Addressing constructive changes and authority
- Claim process – no unreasonable deadlines
- Flexibility with duty to continue performing
- Limiting verification of claim

Delivery/Warranty

Delivery to Warranty Timeline

Delivery

Inspection

Rejection/Repair/Replace/Price Adj.

Acceptance

Warranty

Delivery to Warranty Pressure Points

- Who can inspect and when and where?
- Time period for acceptance once delivered/inspected
- Remedies other than rejection – repair and replace, cost adjustment, cost or third party repair or replace
- Time limits for acceptance
- Is Customer acceptance an issue
- Latent defects and fraud
- Seller notice of defects and seller assurances
- Watch out for creeping warranties

Warranty – Common Pressure Points

- Excluding implied warranties
- Limiting warranty period
- When does warranty period commence
- Limitations on remedy
- Subject matter of warranty
 - Defects in workmanship and materials
 - Defects in design
 - Conform to specifications
 - High professional standards

Payment

Prompt Payment Act – Fundamentals

5 CFR Part 1315; FAR 32.9; 52.232-25.

- Payment period begins on **receipt of a proper invoice** when required
- Payment is due 30 days of start of payment period unless specified in contract or if accelerated payment methods are not used
- An invoice is deemed received on the **later of** (1) actual receipt of an invoice or (2) the 7th day after the date goods are delivered or performance of services is completed or if a longer **acceptance** period is specified in the contract (constructive acceptance period for calculating interest)
- PPA regs require **acceptance to be executed as promptly as possible**. Commercial items not be subject to extensive acceptance period
- Acceptance is defined as an **acknowledgement by the Government that goods received and services rendered conform with the contract requirements**.
- For cost reimbursement contracts, payment is 30 days after date of receipt of a proper invoice.
- Not applicable to subcontracts except for construction contracts (payment within seven days of payment from agency)

Payment Pressure Points

- Pay when paid
- Trigger point for payment
- Days to payment
- When is payment before delivery justified

Intellectual Property

Subcontractor Intellectual Property Rights

- No Rights to Prime Except to Perform
- Flow-down on DFARS Data Rights and FAR/DFARS Patent Clause
- Avoid Deferred Delivery/Deferred Ordering Flow-Down
- If Commercial Item, Use of EULA
- Limitations of Delivery Tied to Prime's Obligations
- Participation in Data Assertions Table
- Ability to Negotiate Directly with the Agency

- **Patent Rights – Ownership by the Contractor 52.227-11**
- **Rights in Technical Data – Noncommercial Items 252.227-7013**
- **Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation 252.227-7014**
- **Technical Data - Commercial Items 252.227-7015**
- **Rights in Bid or Proposal Information 252.227-7016**
- **Validation of Asserted Restriction – Computer Software 252.227-7019**
- **Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends 252.227-7025**
- **Deferred Delivery of Technical Data or Computer Software 252.227-7026**
- **Deferred Ordering of Technical Data or Computer Software 252.227-7027**
- **Technical Data – Withholding of Payment 252.227-7030**
- **Validation of Restrictive Markings on Technical Data 252.227-7037**
- **Patent Rights-Ownership by the Contractor (Large Business) 252.227-7038**
- **Patents – Reporting of Subject Inventions 252.227-7039**

Termination

Termination Pressure Points

- Convenience – Tied to Government T/C or Not
- Notice for T/D and Ability to Cure
- Grounds for T/D
- Conversion of T/D into T/C if Wrongful
- Remedies
- Availability of IP

Force Majeure/Excusable Delay

FAR 52.212-4(f)*

Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, **acts of the Government in either its sovereign or contractual capacity**, fires, floods, **epidemics**, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

*May be tailored to reflect customary commercial practices (FAR 12.302(b))

Disputes

Pressure Points – Disputes

- Cooling Off Period
- Does Management Get First Crack
- Mediation before Litigation
- Arbitration vs. Litigation
- Forum Selection
- Choice of Law
- Obligation to Continue Working While Dispute is Pending
- Right to Injunctive/Equitable Relief
- Piggybacking on the Prime to Dispute Gov't

Flow-Down Clauses

Flow-Down Clauses

- Required Flow-Downs vs. Discretionary Flow-Downs
- Some flow downs don't make sense
e.g., Disputes Clause
- Some are to protect the prime's interests
e.g., termination, stop work, suspension, changes, warranty, DPAS, and IP rights clauses
- Often Conditioned on Contract Type, Type of Work to be Performed and Total Anticipated Contract Value

Flow-Downs and Commercial Products and Services

Flow-downs for Commercial Products and Services – Limited by FAR and DFARS (listed in FAR 52.212-5(e)(1), FAR 52.244-6(c)(1)) and 252.224-7000) plus “a minimal number of additional clauses necessary to satisfy . . . Contractual obligations”

FAR 12.504 and DFARS 212.504 lists laws that are not subject to subcontracts for commercial items at any tier. E.g., validation of proprietary data restrictions and rights in technical data.

Some exemptions listed in clauses themselves:

FAR 52.203-14 – Display of Hotline Posters

FAR 52.219-9 Small Business Subcontracting Plan

How to Flow Down Clauses

FAR 52.102 recommends incorporation by reference versus full text and that they be tailored on a contract-by-contract basis.

Primes must flow down version of the clause in the Prime contract. Earlier versions of clauses available at “Archives” tab of www.acquisition.gov website.

Primes should alter terms to fit the subcontract but watch for global alterations.

Watch for Order of Precedence!

Suggested Categories for Flow-Downs

Prime (Commercial)

Prime (Non-Commercial) – Sub (Non-Commercial)

Prime (Non-Commercial) – Sub (Commercial)

- Regardless of contract value
- Value exceeds certain dollar amounts
- DoD Prime Contract

AFFILIATION RULES USED TO MEASURE SMALL BUSINESS SIZE STATUS; 13 C.F.R. PART 121

Small Business Size Status

- SBA regulations define whether a business entity is “small” and eligible for programs and preferences reserved for “small business concerns”. Size standards are particular to certain industries under the North American Industry Classification System (NAICS)
- Small business status is determined by your:
 - (1) average annual receipts over the five most recently completed fiscal years (13 CFR 121.104); and/or
 - (2) average number of employees for each pay period during the past 24 months (13 CFR 121.106).
- When you have an ***affiliate***, your affiliate’s average annual receipts or number of employees are counted with yours to determine if you are a small business

Small Business Affiliation

- Affiliation is all about **control**
 - SBA's affiliation rules look to whether one firm has the power to control another, or a third firm has the power to control both
 - Control can be affirmative or negative
 - Does not matter if control is exercised, so long as the power to control exists
- Under 13 C.F.R. § 121.103, affiliation can arise based on:
 - Stock ownership: stock options, convertible securities, merger agreements
 - Common management: identity of interest
 - Newly organized concerns: joint ventures
 - Ostensible subcontractor arrangements: franchise and license agreements
 - Totality of the circumstances: SBA may find affiliation even though no single factor is sufficient to constitute affiliation

Small Business Affiliation

- An affiliate can be any business entity, whether for profit or non-profit, domestic or foreign
- Affiliation can be ongoing or specific to one contract
- Affiliation is determined at a specific point in time
 - Generally, the date you submit your initial proposal, with price, or your application for an SBA procurement program
- There are exceptions to the affiliation rules for firms owned and controlled by Indian Tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations
- Affiliation rules for other SBA programs are found in other regulatory sections:
 - SBIR and STTR programs: 13 C.F.R. § 121.702
 - Business Loan, Disaster Loan, and Surety Bond programs: 13 C.F.R. § 121.301(f)

Small Business Affiliation

- Mentor-Protégé Agreements are generally a “shield” to affiliation for joint ventures, so a joint venture between a mentor and a protégé is generally not grounds for affiliation
- Additionally, a mentor-protégé joint venture will be treated as if it has the same size and socioeconomic status as the protégé (and thus will qualify for the same set-asides), BUT:
 - The parties must operate within the confines of the Mentor-Protégé Agreement (i.e., no out of scope activities)
 - The joint venture must comply with the applicable joint venture regulations, including those governing the joint venture’s corporate documents and those governing the partners’ performance of work
- The Department of Justice has been cracking down on improperly-formed joint ventures using the False Claims Act, especially where the mentor has too much control over the joint venture

SECTION 889 OF THE 2019 NDAA CHINESE TELECOM EQUIPMENT & SERVICES

FAR 4.2102 Prohibition on Procuring

(a)(1) On or after August 13, 2019, agencies are prohibited from ***procuring or obtaining***, or extending or renewing a contract to procure or obtain, any ***equipment, system, or service*** that uses ***covered telecommunications equipment or services*** (CTE&S) as a ***substantial or essential component of any system***, or as ***critical technology as part of any system***, unless an exception at paragraph (b) of this section applies or the CTE&S are covered by a waiver described in 4.2104.

FAR 4.2102 Prohibition on Using

(a)(2) On or after August 13, 2020, agencies are ***prohibited from entering into a contract, or extending or renewing a contract***, with an entity that ***uses any equipment, system, or service that uses CTE&S as a substantial or essential component of any system, or as critical technology as part of any system***, unless an exception at paragraph (b) of this section applies or the CTE&S are covered by a waiver described in 4.2104.

This prohibition applies to the use of CTE&S, ***regardless of whether that use is in performance of work under a Federal contract.***

FAR 4.2105 Solicitation Provisions

(a) The contracting officer shall insert the provision at **52.204-24**, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment—

(1) ***In all solicitations for contracts; and***

(2) Under ***indefinite delivery contracts***, in all notices of intent to place an order, or solicitations for an order (e.g., subpart 8.4 and 16.505).

(c) The contracting officer shall insert the provision at **52.204-26**, Covered Telecommunications Equipment or Services-Representation, ***in all solicitations.***

4.2105 Contract Clause

(b) The contracting officer shall insert the clause at **52.204-25**, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, in ***all solicitations and contracts***.

FAR 4.2101 Definition of Covered Telecommunications Equipment

- (1) Telecommunications equipment produced by ***Huawei Technologies Company or ZTE Corporation***, (or any subsidiary or affiliate of such entities);
- (2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, ***video surveillance*** and telecommunications equipment produced by ***Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company*** (or any subsidiary or affiliate of such entities);

FAR 4.2101 Definition of Covered Telecommunications Services & Catch-All

(3) Telecommunications or ***video surveillance services*** provided by such entities or using such equipment; or

(4) Telecommunications or ***video surveillance equipment or services*** produced or provided by an entity that the Secretary of Defense, in consultation with the DNI or the Director of the FBI, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the ***government of a covered foreign country***.

52.204-26 CTE&S -- Representation

(c) (1) Representation. The Offeror represents that it **does**, **does not** provide CTE&S as a part of its offered products or services to the Government in the performance of **any contract, subcontract, or other contractual instrument**.

(2) After conducting **a reasonable inquiry** for purposes of this representation, the offeror represents that it **does**, **does not** use CTE&S, or any equipment, system, or service that uses CTE&S.

NOW A PART OF SAM ANNUAL REGISTRATION REPRESENTATIONS

52.204-24 Representation Regarding CTE&S (Includes Disclosure Obligation)

(d) *Representation*. The Offeror represents that—

(1) It **will**, **will not provide** CTE&S to the Government in the performance of any contract, **subcontract** or other contractual instrument resulting from this solicitation. The Offeror shall provide the additional disclosure information required at paragraph (e)(1) of this section if the Offeror responds “does” in paragraph (d)(1) of this section.

(2) After conducting **a reasonable inquiry**, for purposes of this representation, the Offeror represents that—

It **does**, **does not use** CTE&S, or use any equipment, system, or service that uses CTE&S. The Offeror shall provide the additional disclosure information required at paragraph (e)(2) of this section if the Offeror responds “does” in paragraph (d)(2) of this section.

52.212-3(v) Offeror Representations and Certifications-Commercial Items – CTE&S

(1) The Offeror shall review the list of excluded parties in SAM for entities excluded from receiving federal awards for CTE&S.

(2) The Offeror represents that–

(i) It does, does not **provide** CTE&S as a part of its offered products or services to the Government in the performance of **any contract, subcontract, or other contractual instrument**.

(ii) After conducting a reasonable inquiry for purposes of this representation, that it does, does not **use** CT&S, or any equipment, system, or service that uses CT&S.

What is a “reasonable inquiry”?

Identify the legal entity which is or will be the subject of the clause and all branches, divisions and business units

Collect and review all information which would reasonably lead to discovery of use of CTE&S including equipment inventories, supplier and service agreements, and purchase orders from every office of the entity throughout the world

Train and disseminate information about the clause to all persons within the entity, including supply chain personnel, so they are aware of restrictions and can assist in collection of information to inform representation

Obtain certificates from third party suppliers of TE&S and products and services that include TE&S

52.204-24(e) Disclosures for Equipment

- (A) The entity that produced the covered telecommunications equipment;
- (B) A description of all covered telecommunications equipment offered; and
- (C) Explanation of the proposed use . . . and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

52.204-24(e) Disclosures for Services

(A) If the service is related to item maintenance: A description of all covered telecommunications services offered; or

(B) If not associated with maintenance, the Product Service Code (PSC) of the service being provided; and explanation of the proposed useand any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

52.204-25 The Contract Clause

(b)(1) The Contractor is prohibited from **providing** to the Government any equipment, system, or service that uses CTE&S as a substantial or essential component of any system, or as critical technology as part of any system, unless **an exception** . . . applies or the CTE&S are covered by a **waiver**

(b)(2) Section 889(a)(1)(B) prohibits an agency on from entering into a contract, or extending or renewing a contract, with an entity that **uses** any equipment, system, or service that uses CTE&S as a substantial or essential component of any system, or as critical technology as part of any system unless there is an exception or waiver. ***This prohibition applies to the use of CTE&S, regardless of whether that use is in performance of work under a Federal contract.***

52.204-25(d)(1) The Contract Clause Reporting Requirement

In the event the Contractor identifies CTE&S used as a substantial or essential component of any system, or as critical technology as part of any system, ***during contract performance***, or the Contractor is ***notified of such by a subcontractor at any tier or by any other source***, the Contractor shall report the information in paragraph (d)(2) of this clause to the Contracting Officer, unless elsewhere in this contract are established procedures for reporting the information; in the case of the Department of Defense, the Contractor shall report to the website at <https://dibnet.dod.mil>.

52.204-25(d)(2) What is to Be Reported?

(i) ***Within one business day*** from the date of such identification or notification: the contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier CAGE code (if known); brand; model number; item description; and any readily available information about ***mitigation actions undertaken or recommended***.

52.204-25(d)(2) What is to Be Reported?

(ii) ***Within 10 business days*** of submitting the information in paragraph (d)(2)(i) of this clause: any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of CTE&S, and any additional efforts that will be incorporated to prevent future use or submission of CTE&S.

52.204-25 The Flow-Down Requirement

(e) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (e) and excluding paragraph (b)(2), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items.

NAVIGATING THE “TIKTOK BAN”

Tik-Tok Ban

- No TikTok on Government Devices Act (included as part of the Consolidated Appropriations Act of 2023) and implementing guidance under OMB Memorandum M-23-13 (February 27, 2023), which directed agencies to remove any covered application from Federal devices
- FAR 52.204-27, Prohibition on a ByteDance Covered Application (JUN 2023) must be included in all solicitations and contracts

FAR 4.2202 - Prohibition

(a) Section 102 of Division R of the Consolidated Appropriations Act, 2023 (Pub. L. 117-328), the No TikTok on Government Devices Act, and its implementing guidance under Office of Management and Budget (OMB) Memorandum M-23-13, dated February 27, 2023, “No TikTok on Government Devices” Implementation Guidance, collectively prohibit the presence or use of a covered application on information technology, including certain equipment used by Federal contractors.

(b) This prohibition applies to the presence or use of a covered application on any information technology owned or managed by the Government, or on any information technology used or provided by the contractor under a contract, including equipment provided by the contractor’s employees, unless an exception is granted in accordance with OMB Memorandum M-23-13.

FAR 52.204-27, Prohibition on a ByteDance Covered Application (JUN 2023)

- The Contractor is prohibited from having or using a covered application on any information technology owned or managed by the Government, or on any information technology used or provided by the Contractor under this contract, including equipment provided by the Contractor's employees
 - However, this prohibition does not apply if the Contracting Officer provides written notification to the Contractor that an exception has been granted in accordance with OMB Memorandum M-23-13
 - 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
- Flowdown required in all subcontracts, including subcontracts for the acquisition of commercial products or commercial services

MANAGING SUPPLY CHAIN SECURITY RISK (IMPLEMENTATION OF FASCSA ORDERS)

Managing Supply Chain Security Risk

- Federal Acquisition Supply Chain Security Act (FASCSA) – enacted in 2018 as part of the Strengthening and Enhancing Cyber-Capabilities by Utilizing Risk Exposure Technology Act
- FASCSA established a Federal Acquisition Security Council (FASC) represented by eight different agencies, which is tasked with overseeing the development of supply chain risk management standards, guidelines, and practices by the National Institute of Standards and Technology (NIST)
- FASC also provides guidance to agencies for how best to address supply chain risks using acquisition vehicles
- FASC was given the authority to provide guidance on the issuance of orders requiring the removal of certain “covered articles” from executive agency information systems with which agencies are required to comply

FASCSA and FAR

- New FAR clauses (as of December 2023):
 - 52.204-28, Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Government-wide Acquisition Contracts, and Multi-Agency Contracts
 - 52.204-29, Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures
 - 52.204-30, Federal Acquisition Supply Chain Security Act Orders—Prohibition

FAR 52.204-29 – Federal Acquisition Supply Chain Security Act Orders – Representation and Disclosures (DEC 2023)

- Required to be inserted in all solicitations
- Does not necessarily mean that a FASCSA order applies to the procurement
- Requires contractors to certify:

[T]hat it has conducted a reasonable inquiry, and that the offeror does not propose to provide or use in response to this solicitation any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA order in effect on the date the solicitation was issued, except as waived by the solicitation, or as disclosed in paragraph (e).

FAR 52.204-30 – Federal Acquisition Supply Chain Security Act Orders – Prohibition (DEC 2023)

- Streamlines the process of ensuring certain risky articles are excluded from federal procurements
- Contractors must search the System for Award Management (SAM) to obtain a list of covered articles, and ensure that it is not providing or using as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA order
- Contractor should make a “reasonable inquiry” into covered systems, and should task competent personnel and management with reviewing a list of covered articles every three months

FAR 52.204-30 – Federal Acquisition Supply Chain Security Act Orders – Prohibition (DEC 2023)

- If Contractor identifies covered articles (or products or services produced or provided by a source), where the covered article or source is subject to a FASCSA order, Contractor must disclose that information to the Agency and take efforts to exclude such items from the procurement
- Flowdown required; prime contractors will require subcontractors to conduct a reasonable inquiry of applicable systems

FAR 52.204-30 – Key Terms

Covered article, as defined in 41 U.S.C. 4713(k), means—

- (1) Information technology, as defined in 40 U.S.C. 11101, including cloud computing services of all types;
- (2) Telecommunications equipment or telecommunications service, as those terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);
- (3) The processing of information on a Federal or non-Federal information system, subject to the requirements of the Controlled Unclassified Information program (see 32 CFR part 2002); or
- (4) Hardware, systems, devices, software, or services that include embedded or incidental information technology.

FAR 52.204-30 – Key Terms

FASCSA order means any of the following orders issued under the Federal Acquisition Supply Chain Security Act (FASCSA) requiring the removal of covered articles from executive agency information systems or the exclusion of one or more named sources or named covered articles from executive agency procurement actions, as described in 41 CFR 201–1.303(d) and (e):

(1) The Secretary of Homeland Security may issue FASCSA orders applicable to civilian agencies, to the extent not covered by paragraph (2) or (3) of this definition. This type of FASCSA order may be referred to as a Department of Homeland Security (DHS) FASCSA order.

(2) The Secretary of Defense may issue FASCSA orders applicable to the Department of Defense (DoD) and national security systems other than sensitive compartmented information systems. This type of FASCSA order may be referred to as a DoD FASCSA order.

(3) The Director of National Intelligence (DNI) may issue FASCSA orders applicable to the intelligence community and sensitive compartmented information systems, to the extent not covered by paragraph (2) of this definition. This type of FASCSA order may be referred to as a DNI FASCSA order.

FAR 52.204-30 – Key Terms

Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of any covered articles, or any products or services produced or provided by a source. This applies when the covered article or the source is subject to an applicable FASCSA order. A reasonable inquiry excludes the need to include an internal or third-party audit.

FAR 52.204-30 – Waiver

- A waiver requires disclosure of the following:
 - Name of the product or service provided to the Government
 - Name of the covered article or source subject to a FASCSA order
 - If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied or supplies the covered article or the product or service to the Offeror
 - Brand
 - Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number)
 - Item description
 - Reason why the applicable covered article or the product or service is being provided or used
- Upon submission of that waiver request, the contracting officer reviews the information and makes a determination of whether to waive the requirements

FAR 52.204-30(c) – Notice and Reporting Requirements

- If the inquiry uncovers that an item was provided to the Agency or used by Contractor during contract performance (including through notification by a subcontractor at any tier), Contractor will need to submit a report to the contracting office
- On DoD contracts, the report should be submitted to <https://dibnet.dod.mil>, and on civilian contracts it should go to the contracting officer. The report should be submitted within 3 business days of discovering an item that does not comply with FASCSA and the information in the report should include the following:
 - (A) Contract number;
 - (B) Order number(s), if applicable;
 - (C) Name of the product or service provided to the Government or used during performance of the contract;
 - (D) Name of the covered article or source subject to a FASCSA order;
 - (E) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Contractor;
 - (F) Brand;
 - (G) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);
 - (H) Item description; and
 - (I) Any readily available information about mitigation actions undertaken or recommended.

FAR 52.204-30(c) – Notice and Reporting Requirements (cont'd)

- Additionally, within 10 business days of submitting the information above, Contractor would have to submit the following additional information:
 - (A) Any further available information about mitigation actions undertaken or recommended.
 - (B) In addition, the Contractor shall describe the efforts it undertook to prevent submission or use of the covered article or the product or service produced or provided by a source subject to an applicable FASCSA order, and any additional efforts that will be incorporated to prevent future submission or use of the covered article or the product or service produced or provided by a source that is subject to an applicable FASCSA order

FAR 52.204-30(e) - Subcontracts

(e) Subcontracts. (1) The Contractor shall insert the substance of this clause, including this paragraph (e) and excluding paragraph (c)(1) of this clause, in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial products and commercial services.

(2) The Government may identify in the solicitation additional FASCSA orders that are not in SAM, which are effective and apply to the contract and any subcontracts and other contractual instruments under the contract. The Contractor or higher-tier subcontractor shall notify their subcontractors, and suppliers under other contractual instruments, that the FASCSA orders in the solicitation that are not in SAM apply to the contract and all subcontracts.

Top Takeaways

- Understand the prime-sub relationship (commercial, but...)
- Ensure all required clauses flow down to subcontractors (mandatory vs. necessary flowdowns)
- Make sure all teams are integrated (sales, purchasing, legal, compliance, etc.)
- Pay attention to relationships with other companies to avoid inadvertent affiliation
- Keep informed of developing compliance requirements passed down from prime contractors

Thank You!



Cara A. Wulf
McCarter & English, LLP
cwulf@mccarter.com
202.753.3401