

USER'S GUIDE

I. INTRODUCTION

When the ABA Section of Public Contract Law's Subcontracting, Teaming and Strategic Alliances Committee first published the Guide to Service Subcontract Terms and Conditions, the Committee noted that the federal government had been spending more of its funds on service contracts than on supply contracts. That trend continues. So too, does the need for this Guide.

The purpose of this new Second Edition of the Guide is to assist both prime contractors and subcontractors in drafting and negotiating service subcontracts under prime contracts with the federal government of the United States. The Guide is part of the Committee's continuing initiative to address the myriad terms and conditions in federal prime contracts that may be — and, in many cases, must be — flowed down to subcontracts. A range of authors contributed to the Guide, including government attorneys, in-house counsel, private sector attorneys, accountants and other professionals, all of whom brought a multi-faceted perspective to the provisions and clauses analyzed herein.

This Guide is based on the published Federal Acquisition Regulation ("FAR") and Department of Defense FAR Supplement ("DFARS") texts as of November 30, 2018, and provides a framework for prime contractors and subcontractors to negotiate the terms and conditions of service subcontracts in support of federal government customers. The Guide identifies all mandatory "flow-down" clauses (*i.e.*, clauses in the prime contractor's contract which by their terms or pursuant to statute or regulatory requirements, must be included in all first tier, and sometimes lower tier, subcontracts).

The Guide also identifies recommended clauses, which are to be considered for inclusion not because they are mandatory, but because they will help protect the rights and obligations of the prime contractor, the subcontractor and/or the federal government. Although the perspectives of prime contractors, subcontractors, and the Government have all been considered in the recommendation to flow down certain clauses to subcontracts, parties negotiating a subcontract will need to review the Guide and make their own independent decisions regarding how to proceed.

The Guide includes explanatory notes with each clause. The notes detail why flow-down clauses are mandatory or recommended. They cite appropriate support in statute,

regulation, or the language of the clause itself that set forth the basis of why a clause must be flowed down (and to what tier in the subcontracting chain). The notes provide information concerning the Clause's use in the prime contract, factors impacting its inclusion in the subcontract, and other considerations relating to the operation and use of the clause. Similar guidance is provided for the relevant Alternate versions of clauses. While in most cases the use of Alternates in subcontracts tracks their inclusion in the prime contract, in several cases the Alternate applicable to the subcontract differs from that contained in the prime contract due to the application of specific factors set forth in the notes.

This edition of the Guide also includes “redlined” versions of FAR and DFARS clauses that suggest the substitution of certain terms and conditions to accurately reflect the relationships between the prime contractor, its subcontractors, and in some cases, the Government. The redlines help prime contractors and subcontractors quickly identify how the language of the flow-down clauses differs from the text of the clauses in the FAR or DFARS and assess whether to retain the suggested changes and include the clauses in the relevant subcontract.

In fashioning the flowed-down versions of the clauses, the Committee has adopted certain conventions of terminology to refer to the Government, the prime contractor and the subcontractor within the wording of each adapted clause. Only where it is clear that the terms “Government” or “Contracting Officer” in a prime contract clause refer to specific U.S. Government interests or powers that are distinct from those of the prime contractor will those terms be maintained intact in the flowed-down clause. In all other cases the term “Government” is changed to “Buyer” (meaning the prime contractor); the term “Contracting Officer” is changed to “Buyer’s Purchasing Representative;” and the term “Contractor” is changed to “Seller.” Similarly, what is consistently called an “Order” in the flow down clauses in this publication means the particular subcontract containing the clauses. Where the word “subcontract” appears in a prime contract clause in a generic sense, that term is retained in the flow down clause.

These language choices are to some extent arbitrary and need not necessarily be adopted by parties to the subcontracts. The key is to be clear and avoid the oft-used, but not wisely chosen, convention of a blanket statement that directs the reader to equate “Government” with “Prime Contractor” or “Prime Contractor” with “Subcontractor.” The best practice is to consider what title best fits the context of a clause on a clause-by-clause basis. The Committee hopes that this publication lifts much of the burden of this task off the shoulders of the parties.

Although most of the Guide addresses flow-down clauses, it also includes different provisions that warrant the attention of prime contractors and subcontractors alike. The Guide includes “General Provisions,” which are customary commercial subcontract provisions that are not necessarily derived from the FAR or DFARS. The General Provisions include common

subcontract clauses such as those addressing Acceptance, Payment, and Disputes. The General Provisions are presented with alternative language, and are intended to highlight certain performance-related issues that prime contractors and subcontractors may be able to avoid by considering and negotiating the General Provisions (or language similar to the General Provisions) into their subcontracts.

The Guide also includes “Representations and Certifications.” These are provisions that are generally included only in subcontract solicitations and mandate that subcontractors make representations or certifications in order to be eligible for award of subcontracts. The provisions themselves, however, are not included in the contracts as clauses. Instead, they identify and address issues that parties should consider when negotiating fixed price subcontracts. As with the flow-down clauses, the Representations and Certifications include explanatory notes and redlines that help explain the applicability of certain provisions to subcontractors.

The Committee has chosen to include most types of service contracts within the ambit of this publication, including contracts using all pricing methods. The scope of this Guide excludes, however, the following:

1. Representations, certifications and clauses unique to sealed-bid contracting procedures.
2. Clauses for construction and architect/engineer procurements; for demolition, dismantling and removal of improvements; and for facilities management services.
3. Clauses for highly specialized or industry-specific usages not commonly encountered by prime contractors and their subcontractors in typical services contracts.

The Committee intends to update this Second Edition periodically. Users of this Guide, however, should always review the FAR and DFARS to incorporate any changes, particularly the addition or deletion of mandatory flow-down clauses that have been issued since November 30, 2018. The version of the clauses reprinted in the Guide may not necessarily be the same clauses contained in either the prime contract or the most current FAR revision that users are reviewing. However, in cases where the clauses do differ from the version of the clause included in the Guide, the version in this Guide may be used for guidance in adapting the applicable clause to properly reflect the subcontract relationship.

This brings up a point that may sound obvious: always read your contract. To ensure that the Government, the Prime Contractor, and the Subcontractor have a consistent set of contractual expectations, make sure that the FAR clauses that are being flowed down are the same clauses that are in the prime contract. It is not unheard of for prime contracts to include a FAR clause that predates the version that was current at the time that the contract was

awarded. Therefore, it is important first to identify the applicable FAR or DFARS clauses by both title and date. Then, it is equally important that the applicable FAR clauses likewise be identified in the subcontract agreement by both title and date.

II. SUBCONTRACTING FOR COMMERCIAL SERVICES

While most of this Guide focuses on subcontracting for the procurement of non-commercial services, issues relating to commercial services subcontracts are addressed separately in the Commercial Item Contracting Section below.

III. OTHER PROVISIONS NOT INCLUDED IN THIS GUIDE

Disclaimer of Implied Warranties. In addition to the express warranty provided in the General Provisions section below, the Seller may wish to consider a Disclaimer of Implied Warranties clause that disclaims all warranties except for those expressly provided. In the absence of such a disclaimer, implied warranties, including the warranties of merchantability and non-infringement of third party rights, could be read into the agreement.

Waiver of Consequential Damages. Consequential damages are used to compensate the aggrieved party for all damages that, in the ordinary course of business, would likely result from the other party's breach. Consequential damages may exceed a buyer's other remedies, such as repair or replacement of the goods. Parties to the agreement may wish to negotiate a provision that limits or excludes the recovery of consequential damages.

Procurement Integrity. Under FAR 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity (May 2014), the Government may reduce a prime contractor's price or fee for violations of the Procurement Integrity Act, 41 U.S.C. § 2102 or § 2103 (the "Act"), by the prime contractor's subcontractors. Accordingly, the Buyer may wish to include a clause that requires the Seller to comply with the Procurement Integrity provisions of the Act and its implementing regulations found at FAR 3.104 et seq. Buyer may also wish to include a clause that provides that the Seller shall reimburse the Buyer any and all amounts by which the Buyer's price or fee is reduced under FAR 52.203-10(c) for violation of the Act or its implementing regulations by the Seller.

Statement of Work. Every service subcontract should include a "scope of work" or "statement of work" that identifies the tasks to be performed. It further should set forth specifications or standards that identify shared expectations that can be followed and enforced. Parties ideally should resist the temptation to simply incorporate prime contract specifications by reference. Similarly, disputes can arise where an allocation of anticipated prime contract requirements is carried forward from a Teaming Agreement to a Subcontract without ensuring that the Prime Contract, as finalized, matches the parties' earlier expectations.

IV. OTHER NOTES

Matrix of Mandatory and Recommended Clauses. The Guide includes a clause matrix, which is a comprehensive index of the clauses and provisions found in the Guide. The clause matrix lists the clauses and categorizes them as “mandatory,” or “recommended.” The clause matrix also summarizes each explanatory note so practitioners, at a glance, can begin to assess the potential applicability of a clause to a fixed-price supply subcontract. Although the Committee believes that the recommended clauses should be considered for inclusion in service subcontracts, it may be inappropriate or unnecessary to include them under the circumstances of a particular subcontract.

Users of the clause matrix should note that in most cases it provides only an abbreviated version of the notes appearing throughout the Guide. We recommend reading the full version of the note in the Guide after referencing a clause in the clause matrix.

Esoteric Clauses. As noted, the Committee has in this Guide addressed FAR and DFARS clauses that are either mandatory flowdowns or that would reasonably be expected to be flowed down in most fixed-price supply subcontract scenarios. The Guide however does not address whether flowdown of what might be termed some of the more “esoteric” FAR and DFARS clauses would be mandatory or recommended. If the circumstances of a particular subcontract require or implicate the incorporation of such clauses, the users should consult the FAR or DFARS.

Examples of esoteric FAR clauses include, but are not limited to:

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| 52.208-8 | Required Sources for Helium and Helium Usage Data (Aug 2018) |
| 52.215-23 | Limitations on Pass-Through Charges (Oct 2009) |
| 52.223-7 | Notice of Radioactive Materials (Jan 2007) |
| 52.247-64 | Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) |

Examples of esoteric DFARS clauses include, but are not limited to:

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| 252.204-7000 | Disclosure of Information (Oct 2016) |
| 252.222-7002 | Compliance with local Labor Laws (Overseas) (Jun 1997) |
| 252.223-7007 | Safeguarding Sensitive Conventional Arms, Ammunition and Explosives (Sep 1999) |
| 252.225-7025 | Restriction on Acquisition of Forgings (Dec 2009) |
| 252.227-7018 | Rights in Noncommercial Technical Data and Computer Software – Small Business Innovation Research (SBIR) Program (Feb 2014) |
| 252.229-7004 | Status of Contractor as a Direct Contractor (Spain) (Jun 1997) |
| 252.235-7002 | Animal Welfare (Dec 2014) |
| 252.235-7003 | Frequency Authorization (Mar 2014) |

252.239-7016 Telecommunications Security Equipment, Devices, Techniques,
and Services (Dec 1991)

Civilian Agency Contracts. The Committee limited the scope of the Guide to the FAR (applicable to all federal contracts) and the DFARS (applicable to defense contracts, the volume of which comprises roughly half of federal procurement spending). Like DoD, many, if not all, of the civilian agencies have issued contract clauses that are uniquely specific to their requirements. For example, the Department of Health and Human Services requires prime contractors to obtain certifications in contracts involving the participation of human subjects in research. NASA requires contractors to agree to a cross waiver of liability for contracts involving space exploration.

These clauses are not addressed in the Guide. Some expressly require that their terms be flowed down. For others, a prime contractor would be well advised to flow the clauses down. Whether flowdown is mandatory or not, it is particularly important that the subject clauses be identified and included in subcontracts as the parties deem necessary. Accordingly, it is highly recommended that the parties review agency-specific clauses with the same (or even greater) vigilance as the provisions that are set forth in this Guide.

Supply Chain Assurance. Contractors are always required to ensure the integrity of their supply chains and the responsibility of their subcontractors. Increasingly, in solicitation statements of work, evaluation criteria, and clauses, agencies are requiring that prime contractors and their subcontractors agree to police their supply chains. Some requirements (for example the McNamara-O'Hara Service Contract Act of 1965) are longstanding fixtures in federal service contracting. Other facets of supply chain vigilance are new or strengthened in new and revised FAR and DFARS clauses. This is reflected in the significant amount of additional regulatory activity addressing issues such as supply chain risk, nonconforming and counterfeit parts, and cybersecurity.

A number of these affirmative supply chain requirements are touched upon throughout the Guide in terms of flowdown requirements. However, it is the Committee's view that it is not enough for contractors to simply ensure that the applicable clauses are incorporated into their subcontracts. Rather, the parties are well-advised to perform some amount of due diligence to establish what is required by these clauses under the particular contract, and the present responsibility and compliance of their contractual partners, including whether they have: (i) sufficiently robust compliance regimes to monitor and reduce supply chain risk; and (ii) the necessary systems and information security to satisfy the requirements of the particular procurement. The Committee also considers these clauses to impart affirmative compliance and reporting obligations relating to subcontractors and their supply chains, as well as prime contractors. The parties should consider what provisions are needed to ensure appropriate "flow up" of compliance and reporting obligations by subcontractors. Certain clauses imposing such requirements are indicated by an asterisk in the Matrix of Mandatory and Recommended

Clauses. The parties may consider establishing the protocols and processes to be used for investigation and reporting of any actual or suspected reportable incidents.

The policy concerns addressed by many of the supply chain provisions are most commonly associated with supply contracts. These are identified and addressed more fully in the Committee's Guide to Fixed-Price Supply Subcontract Terms and Conditions, 5th ed. The Committee recognizes that there are many contracts that blend services and supplies, particularly in the IT arena where the acquisition of hardware is combined with the provision of consulting and support services. For that reason, the Committee recommends that contractors and subcontractors be mindful of supply chain obligations whether they are unique to, or shared by, service and supply procurements. Consulting both Guides is advisable.

Time Periods Specified for Fulfilling Obligations. Many clauses found in the Guide include language specifying the number of days within which the prime contractor must satisfy certain obligations. Some clauses contain blanks, leaving it to the parties to negotiate the appropriate number of days based on their performance needs. Users of the Guide should be aware that they must exercise discretion in calculating the time necessary to comply with flowed down subcontract requirements. The subcontract should provide sufficient time for the subcontractor to satisfy its obligations so that the prime contractor in turn has sufficient time to satisfy its obligations under the prime contract. To highlight this issue, footnotes containing the following language appear periodically throughout the Guide: "Buyer and Seller should consider the extent to which this number should be modified to allow the Buyer sufficient time to fulfill its prime contract requirements."

Patents, Data and Copyrights. FAR Part 27, Patents, Data, and Copyrights, is unusual in a number of respects that prime contractors and subcontractors should be aware of in drafting and negotiating flowdown clauses. The associated FAR and DFARS clauses encompass both rights in patents (FAR 27.3), and also rights in copyrights and trade secrets (FAR 27.4) addressed through hybrid licenses under the rubric of "rights in data and computer software."

Patent Rights Clauses

Different patent rights clauses may apply to small businesses and non-profit organizations, and other than small businesses. FAR 52.227-11 Patent Rights—Ownership by the Contractor is the primary clause for contracts for experimental, developmental, or research work, and applies to nearly all contracts with small businesses and non-profits, implementing the requirements of the Bayh-Dole Act. Defense contracts with small businesses and non-profits also require the companion clause DFARS 252.227-7039 Patents—Reporting of Subject Inventions any time FAR 52.227-11 is used.

For contracts with other than small business concerns that are for-profit entities, the DFARS provides for the use of DFARS 252.227-7038 Patent Rights—Ownership by the Contractor (Large Business) instead, which is similar to the FAR clause, but with timeframes

that are shorter because they are not dictated by the statute. The Department of Energy (DOE) and the National Aeronautics and Space Administration (NASA) agency supplements have alternate patent rights clauses for other than small businesses as well. Other civilian agency contracts with other than small businesses generally still use 52.227-11. In exceptional circumstances the Contracting Officer (CO) may opt to use FAR 52.227-13 Patent Rights—Ownership by the Government instead.

FAR 52.227-11 and DFARS 252.227-7038 are very unusual clauses in two respects. First, by their terms they create actual privity of contract between the Government and subcontractors at any tier that have the clause in their subcontract, with the notable limitation that the contractual relationship does not confer jurisdiction under the Contract Disputes Act. Second, because some requirements of the Bayh-Dole Act are driven by a contractor's business size and whether it is non-profit or for-profit, the clauses actually require the prime to flow down the clause that applies to the subcontractor based on those criteria, even if that is not the clause in the prime contract.

Rights in Data and Computer Software (Copyright and Trade Secret)

Per FAR 27.400, other than the policy statement in FAR 27.402, the rest of FAR Subpart 27.4 does not apply to DoD contracts at all. There are therefore different data rights clauses that apply to civilian and DoD contracts. Defense contracts typically include DFARS 252.227-7013 Rights in Technical Data – Noncommercial Items and/or DFARS 252.227-7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, and should not include any of the FAR data rights clauses. If the CO does err and include both FAR and DFARS clauses in a DoD prime contract, only applicable DFARS clauses should be used in subcontracts.

In accordance with FAR 27.409, civilian agency contracts should generally only have one FAR data rights clause – i.e., FAR 52.227-14 Rights in Data–General, or one of the other clauses provided for in specific circumstances. However, if the prime contract must include more than one data rights clause (e.g., because the prime contract is an indefinite-delivery, indefinite quantity contract), then the contract needs to “distinguish the portion of contract performance to which each pertains.” FAR 27.409. In turn, if the prime contract includes more than one data rights clause, the prime contractor must determine which clause or clauses apply to each subcontract, include only the clause or clauses that apply to that subcontract, and clearly explain the circumstances when each clause applies (if more than one is included).

It is also important to note that the primary FAR and DFARS data rights clauses do not apply to commercial computer software. Commercial computer software (and associated computer software documentation) is generally purchased under the license customarily provided to the public, provided such license is consistent with Federal law and satisfies the Government's needs. FAR 12.212; FAR 27.405-3; DFARS 227.7202-1. Subcontracts that

include commercial computer software would likewise generally use the seller's standard commercial license, though if the seller's computer software is being delivered under the contract, the prime contractor has the obligation to obtain the Contracting Officer's permission if the license does not grant the same rights that the prime is obligated to provide the Government. FAR 52.227-14(h); DFARS 252.227-7014(d). The FAR does give the Contracting Officer the option of using FAR 52.227-19 Commercial Computer Software and preempting the Contractor's standard commercial license in favor of the equivalent of "restricted rights" for noncommercial software, which the prime in turn would want to flow down to subcontractors providing commercial computer software.

As a final note, as discussed in FAR 27.403, the data rights clauses do not address data delivery requirements at all. Thus, in addition to securing rights in data per the applicable clauses, the Government must separately require delivery of data under the prime contract. The prime contractor must likewise be sure to flow down data delivery requirements to subcontractors where appropriate to be able to fully satisfy its obligations to the Government.