

# Contract Terms & Conditions, Subcontract and PO Flow-downs

Presented by  
National Contract Management  
Association

22 SEPTEMBER 2010

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# Agenda

- 8:30 – NCMA introduction
- 8:35 – Speakers introduction
- 8:45 – Regulatory Framework, Policy
- 9:25 – Prime Contract Flow Downs
- 10:15 –break (NCMA Chapter business)
- 10:30 –Special Topics, Prime T&Cs  
Abuses
- 11:20 –Q&A, Discussion

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# PRESENTED BY:

- Jim Southerland - Chapter Advisor
- Steven Hill –Supply Chain Manager,  
Cobham Composites
- Steve Purcell – SD Chapter President  
(way back-1996!)

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**INSTRUCTOR**

**Regulatory Framework /  
Policy**

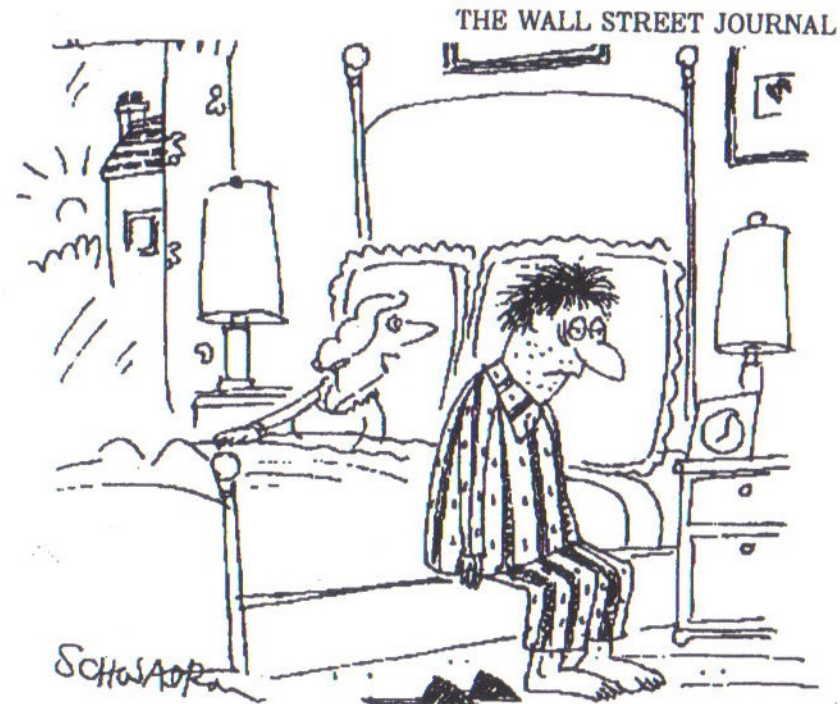
**James Southerland**

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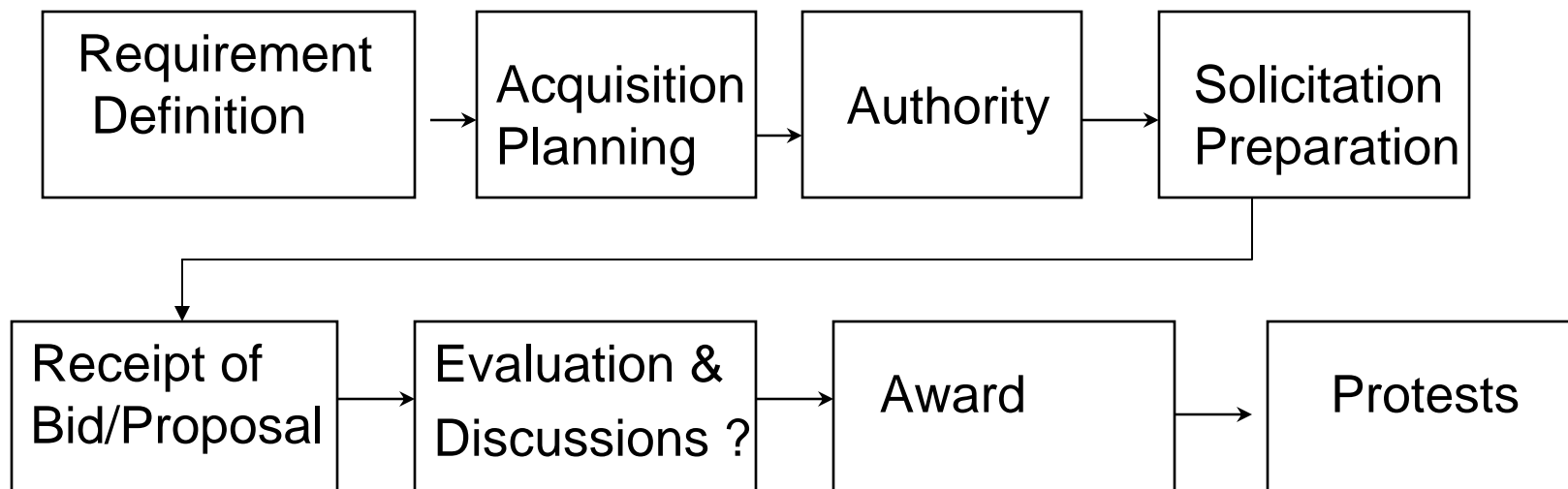
**PART 1**



**"It's hard to believe in only one hour  
you'll give a motivational talk."**

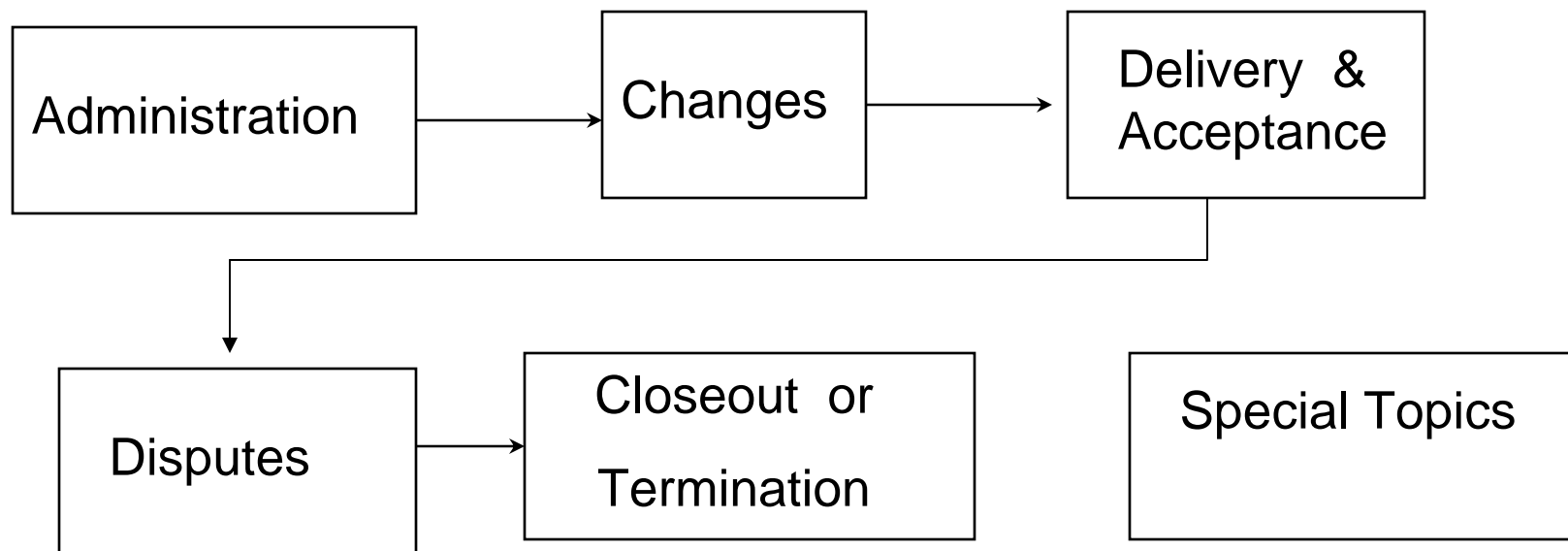
# THE PROCUREMENT PROCESS

## *Formation*



# THE PROCUREMENT PROCESS - cont'd

## *Administration*



# GOVERNMENT VS. COMMERCIAL CONTRACTING

<b>Aspect</b>	<b>Commercial Contracting</b>	<b>Government Contracting</b>
<b>1. Statutory &amp; Regulatory Framework</b>	UCC, common law	USC Titles 10, 40, 41, FAR DFARS, others, UCC
<b>2. Type of Contract</b>	Mostly FFP, oral	FFP, Cost-reimbursement, no oral
<b>3. Competition Req'ts</b>	No such requirement	Full & open
<b>4. Authority of Agents</b>	Apparent authority	Only actual, written authority
<b>5. Audits</b>	Rare	Fact of life
<b>6. Socioeconomic programs</b>	Not required	Mandatory
<b>7. Protests, claims &amp; disputes</b>	None	Normal & routine
<b>8. Changes Clause*</b>	Mutual agreement	Gov't change order
<b>9. T/C**</b>	No such clause	Required

\*Unique

\*\*Most unique



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# STATUTES, RULES AND REGULATIONS

- I. Competition in Contracting Act of 1984 ("CICA")
  - A. "Full and Open Competition" v.
  - B. "As Much Competition As Practicable"
- II. Armed Services Procurement Act of 1947  
(Codified in Title 10 U.S. Code)
- III. Federal Property and Administrative Services Act of 1949 (Codified in Titles 40 & 41 U.S. Code)

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# STATUTES, RULES AND REGULATIONS

- IV. Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355
  - I. Clinger-Cohen Act of 1996 (Federal Acquisition Reform Act of 1996) ("FARA"), Pub. L. No. 104-106
  - II. Services Acquisition Reform Act of 2003 ("SARA"), Pub. L. No. 108-136, Title XIV
  - III. Duncan Hunter Nat'l Defense Authorization Act, FY 2009 ("Clean Contracting Act") Pub. L. No. 110-417

# KEY PURPOSE OF FEDERAL ACQUISITION STREAMLINING ACT ("FASA") & FEDERAL ACQUISITION REFORM ACT ("FARA")

- Reduce unique gov't purchasing requirements
  - Minimize need for certified cost or pricing data
  - Purchase COMMERCIAL items
- Increase use of Simplified Acquisition Procedures
  - New threshold of \$100,000 (**\$150,000** effective 1 Oct 2010)
  - Use of purchase (IMPAC) credit cards
- Buy goods faster & reduce gov't cost
  - Reduce bid protests
  - Reduce procurement lead-time
  - Make in-house procedures simpler

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# SERVICES ACQUISITION REFORM ACT ("SARA") of 2003 (Title XIV, Pub. L. No. 108-136)

- Chief Acquisition Officers
- Additional authorization for Time & Materials and Labor Hour contracts for commercial services (requires Determination & Finding & ceiling price)
- Expanded "commercial items" definition (not just specific tasks but where "specific outcomes [are] to be achieved")
- Treat Performance-Based contracts as commercial items if under \$25 mil; has specific end products or outputs with firm prices; & contractor delivers similar services to the general public

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# DUNCAN HUNTER NATIONAL DEFENSE AUTHORIZATION ACT FY2009

- Contractor Performance/Integrity Database
- Restricts “unusual and compelling urgency” exception to CICA, 1 yr period
- Competitive procedures (3 offers) on multiple award contracts-Governmentwide
- Requires new FAR guidance on use of cost-reimbursement contracts
- Permits CO’s to request labor, material & overhead for services that are “of a type” offered & sold in comm’l marketplace
- Expands GAO authority to interview employees

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# STATUTES, RULES AND REGULATIONS

Federal Acquisition Regulation ("FAR")

General (FAR Parts 1-4)

Competition and Acquisition Planning (5-12)

Contracting Methods & Contract Types (13-18)

Socioeconomic Programs (19-26)

General Contracting Requirements (27-33)

Special Categories of Contracting (34-41)

Contract Management (42-51)

Clauses and Forms (52-53)

Agency Supplements to the FAR

Sub-Agency Supplements to the FAR

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# NUMBERING IN THE FAR

- FAR (Part).\_\_ \_\_ & -1, -2, etc.
- FAR 16.203-1 (Fixed Price description)
- Forms: 53.301-SF (or other)
- Clauses: Part 52
- All are: 52.2 + \_\_ \_\_ (Part prescribing)
- Example: FAR 52.243-1 & Part 43
- DFARS: 252.243-7000
- NASA: 1852.243-xxxx
- NAVY: 5252.243-xxxx

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# SIMPLIFIED ACQUISITION THRESHOLD

- Purchases between \$3,000 and \$150,000 (the “SAT”) reserved for small business  
Certain laws and many clauses inapplicable to prime; some not applicable to subcontractor
- Simplified procedures/written quotes not required
- Promote “maximum practicable” competition
- Best value encouraged; award to best bidder, not necessarily low bidder. LPTA or trade off



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# COMMERCIAL ITEMS

## FAR Part 12

- Definition of Commercial Item in FAR 2.201
- Can Use SAT, Sealed Bidding, or Negotiated Procurement
- Preference in FASA for Commercial Items
- Market Research
- Use Existing QA Systems
- Includes only Necessary Clauses – Commercial

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# COMMERCIAL ITEMS

- Practices
  - Limited Reps and Certs
  - Limited compliance requirements
- No Changes clause
- Test Program for commercial (\$5.5 mil)
- Commercial Procedures for non-comm'l performance-based contracts <\$27mil

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# CONTRACT TYPES

## Fixed-Price Contracts (all types of contracts)

- Firm-Fixed-Price ("FFP")

- Fixed Price with Economic Price Adjustment ("EPA")

- Fixed-Price-Incentive ("FPI") (Fixed-Price with price redetermination)

## Cost-Reimbursement Contracts (for non-commercial)

- Cost-Plus-Fixed-Fee ("CPFF")

- Cost-Plus-Incentive-Fee ("CPIF")

- Cost-Plus-Award-Fee ("CPAF")

  - No "cost plus % of cost"

## Time & Materials and Labor Hour Contracts

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# CHOICE OF CONTRACT TYPE

- **Two Ways To Look At contract Types**
- **Contract Type**
  - Cost/Performance Approach
  - Amount Of Oversight
  - Payment Mechanisms
- **Contract Incentives**
  - Balance/Share Risk
  - Motivate Contractor
  - Exercise Cost Control
  - Result: Financial Rewards
- **Prime Contractors are not required to award the same types of subcontracts as their prime contract.**

# CONTRACT FAMILY CHARACTERISTICS

	<u><b>COST</b></u>	<u><b>FIXED PRICE</b></u>
<b>PERFORMANCE DUTY</b>	Best Effort	Must Deliver
<b>RISK TO CONTRACTORS</b>	Low	High
<b>RISK TO GOVERNMENT</b>	High	Low
<b>PERFORMANCE PYMTS</b>	As incurred	Upon Delivery
<b>PROGRESS PAYMENTS</b>	None	% of Actual Costs
<b>ADMINISTRATION</b>	Max Surveillance	Min Surveillance
<b>FEE/PROFIT</b>	Max: 10/15%	No Limit

# ELEMENTS OF BASIC CONTRACT TYPES

<u>CPFF</u>	<u>CPIF</u>	<u>FPI</u>	<u>FFP</u>
1. Estimated Cost (EC)	1. Target Cost (TC)	1. Target Cost (TC)	1. Price
2. Fixed Fee (FF)	2. Target Fee (TF)	2. Target Profit (TP)	
	3. Maximum Fee (MxF)	3. Ceiling Price (CP)	
	4. Minimum Fee (MnF)	4. Share Ratio	
	5. Share Ratio		

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# CONTRACT TYPES - OTHER

- Letter Contracts
- Indefinite Delivery/Indefinite Quantity
  - Requirements
  - Task Order
- Basic Ordering Agreement/BPA
- Award Fee/Award Term

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# KEY POINTS TO REMEMBER - TYPES OF CONTRACTS

- Cost reimbursement contracts leave responsibility of performance with the Buyer
- Fixed price contracts place responsibility for performance with the contractor
- Cost reimbursement contracts have extensive audit/administration requirements
- FAR flow downs will vary with type of contract
- Payment provisions will vary with type of contract
- Inter company transfers may be treated as a subcontract or as a budget transfer



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# CONTRACT TYPES & RFQ ISSUES

RFP: Proposal is Offer  
+ Government Accepts = Contract formed

IFB: Bid is Offer  
+ Government Accepts = Contract formed

RFQ: Quote is NOT an Offer  
Government-issued Order is Offer  
+ Contractor accepts or delivers = Contract

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# PURCHASE ORDERS

## M Purchase Order--FAR Part 13

- Order issued on DD 1155 or similar form--See block 16 for acceptance
- If contractor never accepts in writing, but fails to deliver on time, Gov't may cancel without consequence
- If costs incurred, cancellation must be done under Part 49 Termination for Convenience
- If acceptance is by “performance”, and if not acknowledged, how do you know they accepted?

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# SUBTLE TRAPS FOR THE UNWARY

- Special Delegations
- ACO's authority
- Unfunded contracts
- Limitation of Cost
- Unilateral Government Options
- Unilateral Government Extensions
- Minimum Wages
- Delivery Schedules
- Liquidated Damages

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# SUBTLE TRAPS FOR THE UNWARY - cont'd

- Variation in Estimated Quantity
- Limitation of Gov't Liability
- IDIQ & Requirements Contracts
- Rights in Data
- Special Invoicing Requirements
- Asserting Right to Claims
- Special Inspection or Acceptance Requirements
- Formulas for fee evaluation (CPAF)
- Terminations
- Excess Cost of Reprocurement

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**INSTRUCTOR**

# **Prime Contract Flow Down Provisions**

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Cobham Composites**

## **PART 2**

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# PRIME CONTRACT FLOW DOWNS

## FLOW DOWN PROVISIONS:

- Inserting a clause from a U.S. Government prime contract into a subcontract or P.O. (Commercial contract) issued for goods or services required in the performance of the prime USG contract
- Includes far and agency (e.g. DFARS) supplement clauses
- Approximately 30 agency supplements. Clause numbers identify the FAR supplement.
- [www.farsite.hill.af.mil](http://www.farsite.hill.af.mil)

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# PRIME CONTRACT FLOW DOWNS

- Include by reference: FAR 52.215-10  
Defective Pricing
- Include substance: FAR 52.232-16  
Progress Payments
- Include in full text: FAR 52.232-32  
Performance Based Payments

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# PRIME CONTRACT FLOW DOWNS—Commercial Items

- FAR – 52.244-6 Subcontracts for Commercial Items.
- DFARS –252.244-7000 Subcontracts for Commercial Items and Commercial Components
- AFFARS—5352.244-700X. USAF. No coverage.
- DEARS—952.244-700X. DOE. No coverage.
- HSAR—3052.244-700X. DHS. No coverage.



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# PRIME CONTRACT FLOW DOWNS

- MOST ORDERS

- Labor & Socioeconomic

- \$ THRESHOLDS

- Micro Purchase—under \$3,000--none
- Typically SAT--\$100,000 (\$150,000 1 Oct 10)

- THRESHOLDS WITH EXCEPTIONS

- Competition
- Commercial item or component
- Small business

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# PRIME CONTRACT FLOW DOWNS

- ABSOLUTELY NOT REQUIRED
  - Bid Protest — FAR Part 33
  - Disputes — FAR Part 33
- NOT REQUIRED BUT MUST INCLUDE
  - Termination For Convenience — FAR 49
  - Stop Work — FAR Part 42
  - Changes — FAR Part 43

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# PRIME CONTRACT FLOW DOWNS

- SOME REALLY COMPLICATED ISSUES:
  - Data Rights
  - Buy America
  - DPAS Rating (Required)
  - Ethics And Conflicts Of Interest
  - Specialty Metals
  - 30 Separate Agency Supplements
  - DOD has 7 supplements!

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# PRIME CONTRACT FLOW DOWNS

- How do I tell which clause is needed?
- Read the clause—it will specify.
- Read the text reference that prescribes use of the clause in prime contract.
- Buy matrix from [www.ndia.org](http://www.ndia.org). For FAR, DFARS and NASA.
- Ask [jimso-cas@att.net](mailto:jimso-cas@att.net).

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# USG FLOWDOWN CLAUSES

- Supplement your organization's Standard T's and C's
- Include if direct charge under USG prime or subcontract - **not needed on overhead charges.**
- Appropriate/required only
- No omnibus/self deleting – **avoid contradictions**
- Not by reference if use CO = Buyer ;  
paraphrase - **example on next slide.**

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# USG FLOWDOWN CLAUSES

- Buyer may terminate all or part of this contract, effective as of the date specified by buyer, in accordance with the provisions of Federal Acquisition Regulation (FAR) 52.249-2, “Termination for Convenience of the Government (Fixed Price)”, which provisions, except for ... *are incorporated herein by reference*. The terms “Government” and “Contracting Officer” shall mean “Buyer”, “Contractor” shall mean “Seller.”

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# USG FLOWDOWN CLAUSES

- Required By Some Prime Contract Clauses
- Dollar Levels
- Not Required By Prime Clause But Protects Prime (I.E. Risk Management)
  - Termination
  - Stop Work
  - Changes
- Christian Doctrine – **only applies to primes**
  - Don't Rely On It!

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# USG FLOWDOWN CLAUSES

- Not Needed At All
  - Bid Protests
  - Some Certifications
  - Dollar Level
  - Each Prime Contract Determines
  - Each Subcontract Determines



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# HIERARCHY OF T's AND C's

- General (Standard) T's and C's
- FAR Flowdowns
- Agency Supplement Flowdowns
- Contract Flowdowns-special e.g. **Sec H key personnel clause**
- Company Special Provisions – **special status reports required from specific supplier**
- Subcontract Peculiar Clauses – **e.g. source inspection required**

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# GENERAL TERMS AND CONDITIONS

- Non FAR Clauses
- Commercial Contract Needs
- No FAR Flowdowns (Except)
- Statement that if under USG prime contract, incorporates attached FAR, agency supplement clauses

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# GET LEAN

- Work with Prime Contract Manager and Program Manager
- Determine
  - Method of Placement
  - Dollar Value
  - Type of Contract
  - Subject Matter-technical, QA and SOW Provisions – R&D may require one set of clauses while Product may require another.
  - Special Provisions – Earned Value Mgmt Sys (EVMS)

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# LEAN AND MEAN

- For subcontracts, determine
  - Method of placement
  - Dollar value
  - Type of contract (same as prime?)
  - Subject matter
  - Special provisions-prime
  - Special provisions-company
  - Commercial item?

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# METHOD OF PLACEMENT

- Prime Contract
  - sole source follow-on
  - competitive
- Subcontract
  - sole source follow-on
  - competitive
- Intercompany

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# DOLLAR VALUE

- Under \$2,000 DBA, \$2,500 SCA
- Under \$3,000 Micro purchase
- Under \$100,000, \$150,000 SAT
- Under \$650,000/\$700,000 TINA/CAS
- Under \$6,500,000 Commercial Item SAT
- Under \$7,500,000 CAS Trigger
- Over \$10,000,000 EEO Pre Award

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# REVISED \$ THRESHOLDS IMPACTING SUBCONTRACTS

**Final rule implemented by FAR Circular  
2005-45 effective 1 October 2010**

- **Micro Purchase Threshold:**  
Remains at \$3,000
- **Simplified Acquisition Threshold\*:**  
From \$100,000 to \$150,000
- \*The \$150,000 SAT often refers to the “simplified acquisition threshold” when specifying the flow down of clauses to subcontractors

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# REVISED \$ THRESHOLDS IMPACTING SUBCONTRACTS

- Commercial Items Test Program:  
From \$5,500,000 To \$6,500,000
- Cost or Pricing Data Threshold:  
From \$650,000 To \$700,000
- Small Business Subcontracting Plan:  
From \$550,000 To \$650,000



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# REVISED \$ THRESHOLDS COST ACCOUNTING STANDARDS

- FAR Part 30, Appendix B Part 9903
- Individual Contracts
  - From \$650,000 To \$700,000
- Separate Business Unit Applicability
  - \$7,500,000 (trigger)
- Modified CAS Coverage – See Trigger Contract
  - Standards 9904-401, 402, 405, 406
  - Clauses 52.230-3; 52.230-6

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**INSTRUCTOR**

**Special Topics**  
**Prime Contractor Abuses**

**Steve Purcell**

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**Senior Contracts Manager**  
**ViaSat**

**PART 3**

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# CONTRACT SUBJECT MATTER

- Research and Development
- Design and Development/Production
- Information Technology
- Services Contract
- Construction/A&E
- Commercial Item/Non Development Item
- Advisory and Assistance
- Each of the above will influence which clauses you need to FLOW DOWN and manage risks

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# SPECIAL PROVISIONS

- Prime Contract- Section H
- Program Requirements
- Company peculiar
- Performance outside US
- Peculiar to Subcontract Work
- You'll need to tailor these based upon your Contract subject matter

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# COMMERCIAL ITEM CLAUSES

- Start with your GENERAL TERMS AND CONDITIONS
- FAR 52.244-6 Clause in Prime Contract?
- Agency Part 44 Clause (if suppl to FAR)
- Termination for Convenience 52.212-5(j)
- Stop Work Order 52.242-15
- Changes Clause (bilateral)

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# Commercial Item Contracts/Subcontracts (FAR Part 12)

- ❑ Prime should always seek to include FAR 52.244-6
- ❑ Often primes seek to “shotgun” or kitchen sink all Flow downs from their prime contract in spite of this (FAR 15?)
- ❑ FAR 52.212-4 and 52.212-5 specify required clauses for Commercial Contracts
- ❑ Be mindful of FAR 44.402
- ❑ Policy to prime and subcontractors, should NOT Flow down any clause not req'd to implement laws or executive orders, or consistent w/ commercial practice for the item being ordered
- ❑ Don't add RED TAPE

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# STATE/LOCAL GOVERNMENT USG FUNDING

- General Terms and Conditions
- State Peculiar/Required Clauses
- FAR Clauses as Specified in the Procurement or Contract Documents
- Example: FAR Part 31 (Allowable Costs), Access to Records, Buy America, Lobbying Certs
- Program Peculiar Requirements
- Company Peculiar Requirements
- subject to that State's law and jurisdiction

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# STATE/LOCAL GOVERNMENT NO USG FUNDING

- General Terms and Conditions
- State Peculiar/Required Clauses
- Program Peculiar Requirements
- Company Peculiar Requirements
- Will be subject to that State's law and jurisdiction



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# COMMERCIAL CONTRACTS

- General Terms and Conditions
- Terms as Specified by Prime Order
- Program Requirements-Subject Matter of the Contract?
- Company Requirements
- Foreign Direct Sale Contracts

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# TEAMING AGREEMENTS

- Prime Contractor and Subcontractor may agree in advance on terms
  - Risk Sharing Provisions
  - “Back-to-Back” Subcontracting
  - Terms and Conditions of the Subcontract to be substantially similar (identical) to the Prime Contract terms, otherwise as mutually agreed between the parties

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## DIFFERING VIEWS OF PRIME CONTRACTOR AND SUBCONTRACTOR ON FLOW DOWNS

- ❑ USG generally dictates terms (little negotiation) in the Prime Contract
- ❑ What is negotiable? (We are the USG!)
- ❑ Hence Prime seeks to “shotgun” or “kitchen sink” all provisions from their prime contract
- ❑ Reinforce compliance as well
- ❑ Push risk down the Supply Chain
- ❑ But as already shown, this can add RED TAPE and unnecessary costs and arguments if not done right

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# THE SUBCONTRACTOR'S VIEW?

- ❑ Why are they flowing down all this BOILERPLATE
- ❑ Everything is negotiable? (Isn't it?!)
- ❑ What leverage do we have or can we create?
- ❑ How can we transactionalize this? Let's use my standard product, standard service, subject to Standard T&Cs...
- ❑ Battle of the Forms ? Or Structured negotiations
- ❑ Can be very inefficient in terms of time (Contracts, Procurement, Program Staff, Legal)
- ❑ Pre-agreed terms between Prime and Sub?

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# THE VIEWS CONVERGE WHEN?

- ❑ Communicate
- ❑ Negotiate
- ❑ What does SUCCESS look like to you?
- ❑ Final Objective should be to support your organization's business objectives with a fair (balanced?) agreement

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# FLOW DOWN ABUSES BY PRIMES

## Some Common Ones

- Just attach copy of prime contract Section I— without filtering clauses that are n/a
- Modifies clause to Prime Contractor's advantage
- Un-modified clause, but used inappropriately
- Substitutes Prime clause for FAR clause
- Uses wrong, inappropriate flow down
- Uses company "standard" flow downs without tailoring to the Prime Contract reqts

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# ATTACH PRIME Section I

- Some correct clauses
- Some unneeded clauses
- Prime K gets authority of contracting officer
- Prime K type same as subcontract type?
- Disputes clause
- Subcontracting plan?
- Self deleting? Who decides?

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# MODIFY CLAUSE TO PRIME'S ADVANTAGE

- Rights in Technical Data
  - Prime asserts rights in Subcontractor's IP while paying sub with USG funds
- Acceptance
  - Revoke acceptance of goods or services within some "reasonable" time
  - Really at prime's unilateral discretion after delivery/receipt
  - What is reasonable? Specify if not earlier rejected, after [20] days deemed accepted
  - May be critical for sales revenue recognition



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# DOES NOT MODIFY CLAUSE, USES TO ADVANTAGE

- Termination for Convenience
  - Terminates sub even when prime not terminated
    - For Change of ownership, or loss of other business
    - T-for-C should be operative when Prime is under T-for-C (full or partial) and require copy of Prime Contract termination notice
- Options Clause
  - Does not exercise option with sub even though USG exercises option w/ prime
- Teaming Agreement
  - Supersedes teaming agreement w/ different terms in subcontract e.g. work content %

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# SUBSTITUTE PRIME CLAUSE FOR FAR FLOW DOWN CLAUSE

- Changes clause goes beyond 52.243-1
  - Can Change quantity (partial termination?)
  - Change schedule (acceleration?)
  - Commercial Item
  - Anything else we decide
- Acceptance
  - When we decide
  - Acceptance Revoked at any time

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# SUBSTITUTE PRIME CLAUSE FOR FAR FLOW DOWN CLAUSE

- Payments
  - Pay when paid
  - Withholds
- Offsets
  - Contract A against Contract B
  - Division A against Division B
- Indemnities/insurance
- Warranties

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# INSERT WRONG FLOW DOWN

- FP payment clause in CPFF contract
- T for C in commercial item contract
  - 52.249-1 instead of 52.212-4(I)
- Ignore \$ thresholds
  - TINA
  - CAS
- Ignore competitive award

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# USE COMPANY STANDARD FLOW DOWNS

- Take it or leave it—no modifications
- Obsolete FAR or Supplement clauses
- Wrong thresholds
- Does not reflect Prime Contract clauses
- Wrong certifications

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# ADDITIONAL (BAD) EXAMPLES

- Insisting upon IP infringement indemnities beyond the US
    - Sub will want to limit to US patents
  - Asserting unlimited rights in all IP and related tech data “conceived, developed, generated or delivered” under the Contract
    - Sub will want to protect its background IP and ensure “Unlimited Rights” if appropriate flow to the USG (not Prime Contractor)
  - Expanding Warranties beyond normal Workmanship and Material to Design Warranties
    - Sub should consider carefully (who owns the specification?) also seek UCC disclaimers
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# DO IT RIGHT!

- Check the prime Contract clauses
- How was prime Contract awarded?
  - Competitive (exempt from CAS, TINA)
  - Commercial Item
- How was Subcontract awarded?
- Don't duplicate General Ts&Cs in your Flow Down Provisions
  - Creates conflict and overlap
- Customize and tailor as applicable
- If it isn't needed, don't use it!

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# SUBCONTRACTS PRIME CONTRACT FLOW DOWNS

- Q & A
- DISCUSSION



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# SUBCONTRACTS

## PRIME CONTRACT FLOW DOWNS

### ■ RESOURCES

- ❑ [www.ndia.org](http://www.ndia.org)
- ❑ Guide to Service Subcontract Terms and Conditions, American Bar Association, © 2008
- ❑ Guide to Fixed-Price Supply Subcontract Terms and Conditions (Fourth Edition), © 2005

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# Q & A

- **Q: How does one distinguish between FAR/DFARS clauses to be flowed down by reference vs. in full text? Does it really make any difference?**
- **A: (sp) Jim S answered this one pretty well “Read the Clause” then noted very few are required in full text (e.g. the Progress Payments Clause 52.232-16 and PB Payments 52.232-32 must be flowed down “in substance”.) Don’t forget, you may need both under some circumstances as DFARS supplement the FAR.**

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## Q & A (cont'd)

- **Q: (Chart 17) What if you don't sell to Govt as commercial item or service, however, you sell to public as commercial service, is that a problem?**
- **A: I am not sure how this would be a problem. The question is a bit vague.**

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## Q & A (cont'd)

- **Q: (Chart 21) Did the statutory limitation change for Cost Reimbursable contracts for fee on R&D contracts? My understanding is for R&D contracts, fee limitation could go up to 15%?**
- **A: That is correct (see FAR 15.404-4(C)(4)). It has been correct for at least thirty years. It now applies only to CPFF contracts and subcontracts, not to CPAF or CPIF (changed about 10 years ago)**

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# Q & A (cont'd)

- **Q: Is there a list of clauses that are deemed to be in your prime contract even if they are not included?**
- A: the Christian Doctrine (sp: note it only covers certain Clauses req'd by law and only applies to Prime Contractors/Prime Contracts—see slide 39). From the DAU “Ask a Professor” site.
- There is no “universal list” of clauses covered under the Christian Doctrine which would apply under all circumstances. Here’s why: Under Christian, the standard established is that clauses that impact a “**significant or deeply ingrained strand of public procurement policy**” are incorporated by operation of law into a Government contract – even when omitted from the contract. It is very difficult to prove (or predict) that standard.
- That said, various courts and boards of contract appeals have none-the-less, consistently held that the disputes clause, terminations, changes and payment clauses, and clauses implementing provisions of the Buy America Act and Truth in Negotiations Act each meet the “significant or deeply ingrained strand of public procurement policy” standard.
- The other aspect of Christian is that the clause at issue must be a **mandatory** contract clause. Just because a clause is “mandatory” does NOT alone mean that is covered under Christian. It has to be mandatory and significantly impact public procurement policy. Thus, there is still some subjectivity.

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## Q & A (cont'd)

- **Q: Are advance payments acceptable by the FAR?**
- **A: Yes. See FAR 32.102. However, if requested, there must be very unusual circumstances ; otherwise, the financial stability of the contractor is brought into question and the risk elements of the award may be re thought. Also see FAR 32.4, Advance Payments for Non-commercial items for details.**

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## Q & A (cont'd)

- **Q: Termination for convenience of the prime, rather than the Government, how do you negotiate this out of a subcontract? (sP: believe Jim answered this also, I mentioned the right to T-for-C should be restricted to when the prime contractor is T-for-C'd, and request a copy of the Termination notice. Then the rights under FAR 49 need to flow down , and remedies need to flow up.)**
- **A: Equitable Adjustment. Keep good record. Strike out, subcontractors don't have to accept, take exception.**

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## Q & A (cont'd)

- **Q: How many months in advance or how often should you submit a small business plan?**
- **A: Small business administration process in place, cost point collects this info at time of quote. Depending on the solicitation, could be part of the proposal submission or prior to contract award.**



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## Q & A (cont'd)

- **Q: The Prime contract has a 12- month guaranty provision, however, the commercial component has a standard 90-day workmanship and material warranty. How do you reconcile this as a prime? (applies to both commercial and government contracts)**
- **A: (sp: I would certainly “flow through” as a prime the commercial warranties rec'd from suppliers of Commercial items or COTS items and Commercial Software, so that my obligation to provide a 12-month guaranty is on the other items to be delivered)**

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## Q & A (cont'd)

- **Q: Why are “minimum wage” & “IDIQ” in the subtle traps for the unwary? For what reasons?**
- **A:** The minimum wage must be kept current as the area wage determinations are released. If the CO does not provide it as the contract requires, the contractor is still liable for paying the increases and should request an equitable adjustment.
- ID/IQ contracts do not guarantee any specific \$ of business to be awarded to the contractor. The quantity assumptions used in pricing the items must be weighed in the proposal. If the quantity is lower, the contractor may lose money. Also the method of stair step discounts can be problematic.

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## Q & A (cont'd)

- **Q: You discuss requirements for commercial items & cost or pricing – not required, but on the Duncan Hunter slide, it appears you contradict this? Can you clarify?**
- **A: Certification of cost or pricing data is not required for commercial items, however, the government could request for information other than cost or pricing data, which essential is the same information as cost or pricing data without the certification part.**
- (sp: we also noted that this is not really a big change, the Govt. is simply reinforcing the ability to ask for and get “other than cost or pricing data.” )

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## Q & A (cont'd)

- **Q: My understanding is that the contractor isn't required to necessarily accept agency supplements if they are duplicative or similar to a FAR or DFARS clause or a FAR/DFARS clause can be substituted in its place. Is that correct?**
- **A: I have never heard of this concept. That is why the Congress authorized the supplements and they are updated using the normal process of Federal Register and acquisition circulars. Rejection of agency clauses may result in award to another contractor. Subcontractors can try to reject, if not a required flow down.**

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## Q & A (cont'd)

- **Q: When you have a key personnel clause in Section H of the Prime Contract, which includes a subcontractor's Program Manager, do you need to flow down that H Clause in the prime or create a separate succinct H clause in the subcontractor's sub contract?**
- **A: You should flow down the H clause since most likely the subcontractor's personnel was listed in the proposal as the key personnel. (sP: we also noted key employee provisos can be "red tape" so limit them to the suppliers/subs who really have named key personnel).**

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## Q & A (cont'd)

- **Q: UCC covers product only?**
- A: yes, it does not apply to services nor to the government.
- **Q: SAT \$150,000 new threshold as of 1 Oct 2010, are there any other new thresholds?**
- A: see slides 46 – 48

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## Q & A (cont'd)

- **Q: Does a generic statement such as “all applicable clauses of the prime agreement are hereby incorporated into this sub agreement” cover me – as far as my flow down responsibilities go?**
- **A: (sP: might work, but also can be a dangerous tactic, could create the conflict and overlap and “red tape” discussed—see slide 71—also sub may be a different contract type meaning wholesale omissions may result)**

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# Q & A (cont'd)

- **Q: What is up with this “pay when paid” clause? I don’t want to wait for my payment. How do I negotiate it out?**
- **A:** (sp: discussed with the author of question in side-bar; pay when paid is a creature of the construction industry, lots of problems with it leading to dispute and litigation there. On USG primes be careful Prime cannot include subcontractor /supplier payments in its invoices unless it is paying subs (e.g. subcontractor progress billings) and suppliers in accordance with established practice (e.g. terms of net 30, 2% 10, etc.). Is Prime certifying that subs/suppliers have been paid? Read the prime’s contract payment provisions...
- Also common for support contracts from the Navy here in SD. Many small/medium size primes with limited resources use this clause for payment to their small/medium size subcontractors.