

Recommendation 62: Update the FAR and DFARS to reduce burdens on DoD's commercial supply chain to decrease cost, prevent delays, remove barriers, and encourage innovation available to the Military Services.

Problem

FAR and DFARS contract clauses that are required to be flowed down from prime contractors to subcontractors, especially commercial subcontractors, are excessive and create additional burdens on DoD's supply chain, the effects of which increase cost, create delays, create barriers and limit innovation available to the Military Services

Background

FAR and DFARS clauses applicable to DoD contracts incorporate terms and conditions into agreements between DoD and prime contractors that are intended to protect a broad set of government interests. Similarly, transactions in the commercial marketplace are governed by terms and conditions established between buyers and sellers to protect the parties' interests. Depending on the industry, the goods or services exchanged, and the prime contractor's leverage over potential subcontractors, terms and conditions may be driven by either the buyer or the seller and are often subject to negotiation between the parties. The terms and conditions of sale are established to mitigate risk between the interested parties and to govern disputes.

The FAR and DFARS flow down clauses create contract requirements, many of which are unique to doing business with the government, that often erect barriers for businesses unfamiliar with the government's unique terms and requirements. In a 2017 report, GAO found that 11 out of 12 selected nontraditional companies in its review cited "Government-specific contract terms and conditions" as a challenge to doing business with DoD.¹ The report also cited certain nontraditional company officials who indicated the number of unique clauses and the cost of compliance with the associated requirements is a substantial part of the challenge to doing business with the government.²

Discussion

Because most of the innovative, nontraditional firms DoD says it needs to attract are operating in the commercial marketplace, it is appropriate to look at government-unique flow-down clauses that might differ from commercial practice. A substantial number of FAR and DFARS clauses either explicitly *flow down* to subcontracts for commercial items or *are not explicitly exempt* from being flowed down to subcontracts for commercial items.

Currently, there are two primary contract clauses intended to limit the number of additional terms and conditions that flow down from prime contract to subcontract. DFARS 252.244-7000, Subcontracts for Commercial Items, advises the contractor that it is not required to flow down any DFARS contract clause to its subcontracts for commercial items unless so specified in the particular clause. FAR 52.244-6, Subcontracts for Commercial Items, instructs prime contractors to limit flowdown to

¹ GAO, *Military Acquisitions: DoD is Taking Steps to Address Challenges Faced by Certain Companies*, GAO-17-644, 9, accessed November 9, 2018, <https://www.gao.gov/assets/690/686012.pdf>.

² *Ibid*, 15–16.

19 specified clauses, as applicable, in subcontracts for commercial items. FAR 52.244-6 is prescribed for inclusion in solicitations and prime contracts other than those for commercial items.

Recommendation 2, found in the *Volume 1 Report*, effectively removes all government commercial buying clauses from FAR 52.212-4(r), 52.212-5, and DFARS 212.301 because the statutes from which those clauses derived did not explicitly state that the statute applied to commercial buying. Based on this same analysis, the clauses removed from 52.212-4(r), 52.212-5, and DFARS 212.301 should also be removed from FAR 52.244-6 as appropriate and necessary to achieve the intended outcome of unencumbering DoD's access to commercial innovation. In addition to the clauses identified in 52.244-6 as flowing down to commercial subcontracts, a number of other FAR clauses have been identified as flowing down to commercial subcontractors.³

DFARS 252.244-7000 does not specifically identify the DoD clauses that are required to be flowed down to subcontracts for commercial items. The clause instead relies on the prime contractors or higher-tier subcontractor to determine flow down applicability on a clause-by-clause basis. As mentioned above, the government contracting environment (e.g., fear of negative CPSR findings, high transaction volumes, primes' desire for consistency) leads to prime contractors either taking a very conservative approach to tailoring flow downs, or not tailoring at all. These approaches may result in improper compliance requirement burdens on the supply chain. Updating DFARS 252.244-7000 to include all of the required commercial item flow down provisions, similar to FAR 52.244-6, would provide a single point of reference for contractors to determine which clauses flow down. These changes only make a positive effect where the prime contractor is entering into subcontracts for commercial products or services.

The Section 809 Panel also addresses these concerns in Recommendation 92 found in this report, and the recent actions Congress has taken in Section 849 of the FY 2018 NDAA and Section 839 of the FY 2019 NDAA. Those sections of law require a review and report by the FAR and DAR Councils of the efficacy of the defense-unique clauses applied to commercial contracts and subcontracts regardless of the limitations in 41 U.S.C. § 1906 and 10 U.S.C. § 2375. Relying on the FAR and DAR councils to provide that review, without providing additional direction, will not resolve the problems associated with the proliferation of government and defense-unique clauses applicable to commercial buying and flowed down to commercial subcontracts.

Conclusions

For DoD and DoD prime contractors to be able to access innovative commercial solutions, the Section 809 Panel's Recommendations 2 and 92 must be implemented in addition to this recommendation. Congress must establish stricter standards that the FAR and DAR Councils must follow in determining what government and defense-unique clauses flow down to commercial subcontracts associated with noncommercial prime contracts. In addition, the FAR and DAR Councils should revise FAR Clause 52.244-6, Subcontracts for Commercial Items, to include only those clauses that have been determined necessary for flow down to subcontracts for commercial items based on Congress's direction. Based on the analysis in the *Volume 1 Report*, no FAR clauses should flow down to

³ See Robert V. Lieg, *A Study on the Applicability for Federal Acquisition Regulation (FAR) Clauses to Subcontracts Under Prime Defense and NASA Contracts*, (Arlington, VA: National Defense Industrial Association, 2017).

subcontracts for commercial items, and 52.244-6 should be updated to reflect the removal of all applicable flow downs unless Congress explicitly directs that they flow down. Similarly, for DFARS 252.244-7000, Subcontracts for Commercial Items, language and flow down requirements should be updated and aligned with the structure and content of FAR 52.244-6 to provide a single point of reference for defense-unique clauses intended to flow down to subcontracts for commercial items. Any clauses added to 52.244-6 or 252.244-7000 should be the only additional terms and conditions necessary to protect the government's interest relative to the relationship between prime contractors and subcontractors for the majority of commercial item subcontracts. This recommendation does not change prime contractors' responsibility to evaluate contract risks and include or flow down terms that the prime determines are appropriate to allocate or mitigate those risks.

Implementation

Legislative Branch

- Amend 41 U.S.C. § 1906(c) to require the limited number of FAR clauses that flow down to commercial subcontracts to be consolidated into one clause and prohibit federal agencies from requiring any other FAR clauses be flowed down to commercial subcontracts.
- Amend 10 U.S.C. § 2375(c) to require the limited number of DFARS clauses that flow down to commercial subcontracts to be consolidated into one clause and prohibit DoD from requiring any other DFARS clauses be flowed down to commercial subcontracts.

Executive Branch

- Strike all mandatory flow-down clauses from FAR 52.244-6 and DFARS 252.244-7000 consistent with the Section 809 Panel's Recommendations 2 and 92, and consolidate all clauses required to be flowed down to commercial subcontractors into these two clauses.

Implications for Other Agencies

- Changes to FAR clauses will improve commercial buying across all federal government agencies.

RECOMMENDED REPORT LANGUAGE

SEC. ____. LIMITATION ON REQUIRED FLOW DOWN OF CONTRACT CLAUSES TO SUBCONTRACTORS PROVIDING COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES.

This provision would amend section 2375 of title 10, United States Code, and section 1906 of title 41, United States Code, to require the consolidation of Federal Acquisition Regulation (FAR) mandatory subcontracting flow-down clauses into a single clause. The committee notes that currently the increasingly large number of flow-down clauses often leads to confusion for many contractors, especially for small or non-traditional companies.

The provision would also prohibit federal agencies from requiring any other FAR clauses to be flowed down to commercial subcontracts. The committee notes that the Defense Federal Acquisition Regulation Supplement (DFARS) 252.244-7000 does not specifically identify the Defense Department's prime contract clauses required to be flowed down to subcontracts for commercial items. The regulation instead relies on prime contractors or higher-tier subcontractors to determine flow-down applicability on a clause-by-clause basis. The committee further notes the current government contracting environment leads to prime contractors either taking a very conservative approach to tailoring flowdowns or not tailoring them at all. These approaches may result in improper compliance requirement burdens which impede the efficiency of the defense acquisition system, and serve as a barrier to entry for non-traditional businesses.

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1 **SEC. ____ . LIMITATION ON REQUIRED FLOWDOWN OF CONTRACT CLAUSES**
2 **TO SUBCONTRACTORS PROVIDING COMMERCIAL PRODUCTS OR**
3 **COMMERCIAL SERVICES.**

4 (a) CONTRACT CLAUSES REQUIRED IN THE FEDERAL ACQUISITION REGULATION.—Section
5 1906(c) of title 41, United States Code, is amended by adding at the end the following new
6 paragraph:

7 “(5) LIMITATION ON CLAUSES.—

8 “(A) An executive agency may not require that a clause be included in a
9 subcontract for commercial products and services other than a clause required by a
10 provision of law that is not on the list included in the Federal Acquisition Regulation
11 under paragraph (2).

12 “(B) The Federal Acquisition Regulation shall provide for implementation of all
13 provisions of law applicable to subcontracts for commercial products and services
14 through—

15 “(i) a single clause applicable to contracts for commercial products and
16 services; and

17 “(ii) a single clause applicable to contracts for noncommercial products
18 and services.”.

19 (b) CONTRACT CLAUSES REQUIRED IN THE DEFENSE FEDERAL ACQUISITION REGULATION
20 SUPPLEMENT.—Section 2375(c) of title 10, United States Code, is amended—

21 (1) by redesignating paragraph (4) as paragraph (5); and

22 (2) by inserting after paragraph (3) the following new paragraph (4):

1 “(4)(A) The Secretary of Defense may not require that a defense-unique clause be
2 included in a subcontract for commercial products and services other than a clause required by a
3 provision of law, or a contract clause requirement, that is not on the list included in the Defense
4 Federal Acquisition Regulation Supplement under paragraph (2).

5 “(B) The Defense Federal Acquisition Regulation Supplement shall provide for
6 implementation of all defense-unique provisions of law and contract clause requirements that are
7 applicable to subcontracts for commercial products and services through—

8 “(i) a single clause applicable to contracts for commercial products and services;
9 and

10 “(ii) a single clause applicable to contracts for noncommercial products and
11 services.”.

12 (c EFFECTIVE DATES.—(1) Paragraph (5)(A) of section 1906(c) of title 41, United States
13 Code, as added by subsection (a), and paragraph (4)(A) of section 2375(c) of title 10, United
14 States Code, as added by subsection (b), shall apply with respect to solicitations issued by the
15 Government after the end of the 120-day period beginning on the date of the enactment of this
16 Act.

17 (2) The Federal Acquisition Regulation shall be updated to implement paragraph (5)(B)
18 of section 1906(c) of title 41, United States Code, as added by subsection (a), and the Defense
19 Federal Acquisition Regulation Supplement shall be updated to implement paragraph (4)(B) of
20 section 2375(c) of title 10, United States Code, as added by subsection (b), not later than the end
21 of the 180-day period beginning on the date of the enactment of this Act.

Title 41, United States Code

§1906. List of laws inapplicable to procurements of commercial items

(a) DEFINITION.—In this section, the term "Council" has the meaning given that term in section 1301 of this title.

(b) CONTRACTS.—

(1) INCLUSION IN FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercial items. A provision of law properly included on the list pursuant to paragraph (2) does not apply to purchases of commercial items by an executive agency. This section does not render a provision of law not included on the list inapplicable to contracts for the procurement of commercial items.

(2) LAWS ENACTED AFTER OCTOBER 13, 1994.—A provision of law described in subsection (d) that is enacted after October 13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the applicability of the provision.

(c) SUBCONTRACTS.—

(1) Definition.—In this subsection, the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Federal Government and other parties and are not identifiable to any particular contract.

(2) INCLUSION IN FEDERAL ACQUISITION REGULATION.—The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to subcontracts under a contract or subcontract for the procurement of commercial items. A provision of law properly included on the list pursuant to paragraph (3) does not apply to those subcontracts. This section does not render a provision of law not included on the list inapplicable to subcontracts under a contract for the procurement of commercial items.

(3) PROVISIONS TO BE EXCLUDED FROM LIST.—A provision of law described in subsection (d) shall be included on the list of inapplicable provisions of law required by paragraph (2) unless the Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision.

(4) WAIVER NOT AUTHORIZED.—This subsection does not authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(5) LIMITATION ON CLAUSES.—

(A) An executive agency may not require that a clause be included in a subcontract for commercial products and services other than a clause required by a provision of law that is not on the list included in the Federal Acquisition Regulation under paragraph (2).

(B) The Federal Acquisition Regulation shall provide for implementation of all provisions of law applicable to subcontracts for commercial products and services through—

(i) a single clause applicable to contracts for commercial products and services; and

(ii) a single clause applicable to contracts for noncommercial products and services.

(d) COVERED LAW.—A provision of law referred to in subsections (b)(2) and (c) is a provision of law that the Council determines sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

(1) provides for criminal or civil penalties; or

(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

(e) PETITION.—A person may petition the Administrator to take appropriate action when a provision of law described in subsection (d) is not included on the list of inapplicable provisions of law as required by subsection (b) or (c) and the Council has not made a written determination pursuant to subsection (b)(2) or (c)(3). The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Council makes a determination pursuant to subsection (b)(2) or (c)(3) within 60 days after the petition is received.

Title 10, United States Code

§2375. Relationship of commercial item provisions to other provisions of law

(a) Applicability of Government-wide Statutes.—(1) No contract for the procurement of a commercial item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1906(b) of title 41.

(2) No subcontract under a contract for the procurement of a commercial item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1906(c) of title 41.

(3) No contract for the procurement of a commercially available off-the-shelf item entered into by the head of an agency shall be subject to any law properly listed in the Federal Acquisition Regulation pursuant to section 1907 of title 41.

(b) Applicability of Defense-unique Statutes to Contracts for Commercial Items.—(1) The Defense Federal Acquisition Regulation Supplement shall include a list of defense-unique provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercial items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to purchases of commercial items by the Department of Defense. This section does not render a provision of law or contract clause requirement not included on the list inapplicable to contracts for the procurement of commercial items.

(2) A provision of law or contract clause requirement described in subsection (e) that is enacted after January 1, 2015, shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the

best interest of the Department of Defense to exempt contracts for the procurement of commercial items from the applicability of the provision or contract clause requirement.

(c) **Applicability of Defense-unique Statutes to Subcontracts for Commercial Items.**-(1) The Defense Federal Acquisition Regulation Supplement shall include a list of provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to subcontracts under a Department of Defense contract or subcontract for the procurement of commercial items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to those subcontracts. This section does not render a provision of law or contract clause requirement not included on the list inapplicable to subcontracts under a contract for the procurement of commercial items.

(2) A provision of law or contract clause requirement described in subsection (c) shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the best interest of the Department of Defense to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision or contract clause requirement.

(3) In this subsection, the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The term does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract.

(4)(A) The Secretary of Defense may not require that a defense-unique clause be included in a subcontract for commercial products and services other than a clause required by a provision of law, or a contract clause requirement, that is not on the list included in the Defense Federal Acquisition Regulation Supplement under paragraph (2).

(B) The Defense Federal Acquisition Regulation Supplement shall provide for implementation of all defense-unique provisions of law and contract clause requirements that are applicable to subcontracts for commercial products and services through—

(i) a single clause applicable to contracts for commercial products and services; and

(ii) a single clause applicable to contracts for noncommercial products and services.

~~(4)~~ **(5)** This subsection does not authorize the waiver of the applicability of any provision of law or contract clause requirement with respect to any first-tier subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

(d) **Applicability of Defense-unique Statutes to Contracts for Commercially Available, Off-the-shelf Items.**-(1) The Defense Federal Acquisition Regulation Supplement shall include a list of provisions of law and of contract clause requirements based on government-wide acquisition regulations, policies, or executive orders not expressly authorized in law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items. A provision of law or contract clause requirement properly included on the list pursuant to paragraph (2) does not apply to Department of Defense contracts for the procurement of commercially available off-the-shelf items. This section does not render a provision of law or

contract clause requirement not included on the list inapplicable to contracts for the procurement of commercially available off-the-shelf items.

(2) A provision of law or contract clause requirement described in subsection (e) shall be included on the list of inapplicable provisions of law and contract clause requirements required by paragraph (1) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that it would not be in the best interest of the Department of Defense to exempt contracts for the procurement of commercially available off-the-shelf items from the applicability of the provision or contract clause requirement.

(e) Covered Provision of Law or Contract Clause Requirement.-A provision of law or contract clause requirement referred to in subsections (b)(2), (c)(2), and (d)(2) is a provision of law or contract clause requirement that the Under Secretary of Defense for Acquisition, Technology, and Logistics determines sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law or contract clause requirement that-

- (1) provides for criminal or civil penalties;
- (2) requires that certain articles be bought from American sources pursuant to section 2533a of this title, or requires that strategic materials critical to national security be bought from American sources pursuant to section 2533b of this title; or
- (3) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.