

## 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.<sup>1</sup> 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.<sup>2</sup>

### 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

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<sup>1</sup> 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>.

<sup>2</sup> *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.<sup>3</sup>

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

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<sup>3</sup> 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.