

Common FAR Clauses and How They Impact the Program Manager

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Purpose

This training will review common Federal Acquisition Regulation (FAR) clauses that Program Managers (PMs) need to be aware of when supporting Federal contracts and customers. This includes:

- FAR clauses 52.232-20, Limitation of Cost and 52.232-22, Limitation of Funds and their relation to the Anti-deficiency Act (ADA)
- FAR clause 52.215-22, Limitation on Pass-Through Charges, and how it potentially impacts the amount of work that can be assigned to subcontractors and vendors
- FAR clause 52.244-2, Subcontracts, and Consent to Subcontract requirements
- FAR clause 52.232-25, Prompt Payment, and its impact on invoicing and payment

Note: This training highlights important clause requirements, but does not quote each clause in its entirety. Always coordinate with your Contract Administrator (CA) to ensure a comprehensive understanding of how these clauses may impact your programs/projects.

FAR 52.232-20 – Limitation of Cost

- **Application:** Applies to the Cost ceilings established in Section B [“the Schedule”] of the contract or task order. Applies to cost ceilings at the IDIQ-level as well.
- **Notification Requirements:** The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that:
 - The costs the Contractor expects to incur under this contract **in the next 60 days**, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or
 - The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.
 - The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent.
 - Updated notifications can be sent as needed to transmit urgency of cost ceiling requirement or to revise previous estimates.
- **Notification Content:** As part of the notification, the Contractor shall provide the Contracting Officer a **revised estimate** of the total cost of performing this contract.
- **CA Role:** As the Limitation of Cost notification is submitted to the Contracting Officer, it should be submitted by the CA; however, the tracking and identification of notification requirements is the responsibility of the PM and supporting Project Controller.

FAR 52.232-20 – Limitation of Cost (Cont)

- **Government's Obligations (or lack thereof):** The Government is not obligated to reimburse the Contractor for costs incurred in excess of:
 - the estimated cost specified in the Schedule [Section B]; or
 - if this is a cost-sharing contract, the estimated cost to the Government specified in the Schedule.
- **Contractor's Obligations (or lack thereof):** The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer:
 - notifies the Contractor in writing that the estimated cost has been increased and
 - provides a revised estimated total cost of performing this contract. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.
- **Allowability of Costs:** If the estimated cost specified in the Schedule is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost **shall be allowable to the same extent as if incurred afterward**, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

FAR 52.232-22 – Limitation of Funds

- **Application:** Current funded amount established in Section B of the contract or task order for incrementally funded efforts.
- **Notification Requirements:** The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of:
 - the total amount so far allotted to the contract by the Government or,
 - if this is a cost-sharing contract, the amount then allotted to the contract by the Government plus the Contractor's corresponding share.
 - The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent.
 - Updated notifications can be sent as needed to transmit urgency of the funding requirement or to provide updated estimates.
- **Notification Content:** The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.
- **CA Role:** As the Limitation of Funds notification is submitted to the Contracting Officer, it should be submitted by the CA; however, the tracking and identification of notification requirements is the responsibility of the PM and supporting Project Controller.

FAR 52.232-22 – Limitation of Funds (Cont)

- **Government's Obligations (or lack thereof):** The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to the contract.
- **Contractor's Obligations (or lack thereof):** The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of:
 - The amount then allotted to the contract by the Government or;
 - If this is a cost-sharing contract, the amount then allotted by the Government to the contract plus the Contractor's corresponding share, until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.
- **Allowability of Costs:** When and to the extent that the amount allotted by the Government to the contract is increased, any costs the Contractor incurs before the increase that are in excess of:
 - The amount previously allotted by the Government or;
 - If this is a cost-sharing contract, the amount previously allotted by the Government to the contract plus the Contractor's corresponding share, shall be allowable to the same extent as if incurred afterward...

Limitation of Cost/Funds and the Anti-Deficiency Act (ADA)

- **Contracting Officer's Actions:** FAR 32.704, Limitation of Costs or Funds, dictates the Contracting Officer's actions once a Limitation of Costs or Funds Notification is received. Based on the availability of additional funding and programming information, the Contracting Officer shall notify the contractor in writing that:
 - Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;
 - The contract is not to be further funded and that the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;
 - The contract is to be terminated; or
 - (A) The Government is considering whether to allot additional funds or increase the estimated cost,
 - (B) The contractor is entitled by the contract terms to stop work when the funding or cost limit is reached; and
 - (C) Any work beyond the funding or cost limit will be at the contractor's risk.
- **Timeliness of Notification:** Upon learning that a partially funded contract will receive no further funds, the contracting officer shall promptly give the contractor written notice of the decision not to provide funds.
- **ADA Implications:** Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes section 3679 (31 U.S.C. 1341) [the ADA] that may subject the violator to civil or criminal penalties.

FAR 52.215-22 Limitations on Pass-Through Charges - Identification of Subcontract Effort

- **Application:** Used in solicitations to require offerors to identify in their proposals the total cost of the work to be performed by the offeror, and the total cost of the work to be performed by each subcontractor, under the resulting contract, task order, or delivery order.
- **Purpose:** Preclude offerors or their proposed subcontractors from proposing excessive pass-through charges (where the Contractor or subcontractor that adds no or negligible value to a contract or subcontract).
- **Additional Requirements:** If the offeror intends to subcontract more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the offeror shall identify in its proposal:
 - The amount of the offeror's indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and
 - A description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s).
 - Same requirement applies if a proposed subcontractors intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract.
- **Added Value Defined:** Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).

FAR 52.215-23 Limitations on Pass-Through Charges

- **Application:** Used in contracts, task order and delivery orders.
- **Purpose:** Preclude the Government from having to pay excessive pass-through charges (where the Contractor or subcontractor that adds no or negligible value to a contract or subcontract) based on changes after award.
- **Notification Requirements:** The Contractor shall notify the Contracting Officer in writing if:
 - The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or
 - Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).
- **No or Negligible Value Defined:** “No or negligible value” means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

FAR 52.215-23 Limitations on Pass-Through Charges (Cont)

- **Importance of Clause:** Failure to notify the Contracting Officer or obtain Contracting Officer determination of the “value added” subjects the contractor to the recovery of excess pass-through charges as follows:
 - For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in FAR subpart 31.2; and
 - For applicable DoD fixed-price contracts, as identified in 15.408(n)(2)(i)(B), the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price. [FAR 15.408(n)(2)(i)(B)(2) excepts firm-fixed-price contracts awarded on the basis of adequate price competition.]
 - Recovery typically covers indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).
- **Clause Flowdown Requirements:** The Contractor shall insert the substance of this clause, including this paragraph (f), in all cost-reimbursement subcontracts under this contract that exceed the simplified acquisition threshold, except if the contract is with DoD, then insert in all cost-reimbursement subcontracts and fixed-price subcontracts, except those identified in 15.408(n)(2)(i)(B)(2) [FFP with adequate price competition], that exceed the threshold for obtaining cost or pricing data in accordance with FAR 15.403-4 [\$2M].

FAR 52.244-2 Subcontracts

- **Importance of Clause:** FAR 52.244-2 identifies Consent to Subcontract requirements applicable to a contract, task order or delivery order.
- **“Consent to Subcontract” Defined:** “Consent to subcontract” means the Contracting Officer’s written consent for the Contractor to enter into a particular subcontract.
- **Consent Requirements:** Consent to Subcontract requirements are primarily driven by whether or not the contractor has an “approved purchasing system.”
- **“Approved Purchasing System” Defined:** “Approved purchasing system” means a Contractor’s purchasing system that has been reviewed and approved in accordance with Part 44 of the Federal Acquisition Regulation (FAR)

FAR 52.244-2 Subcontracts

- **Contractors with Approved Purchasing Systems:** Section (d) of the clause is tailored by the Contracting Officer to identify specific circumstances (usually based on subcontract type or value) when the Contracting Officer's written consent is required prior to executing the subcontract (or potentially subcontract modification).
- **Beware of Alternate 1:** Contractors with Approved Purchasing Systems may still be required to provide "notification" to the Contracting Officer if Alternate 1 of FAR 52.244-2 is included in the contract, task order or delivery order:

"If the Contractor has an approved purchasing system and consent is not required under paragraph (c) or (d) of this clause, the Contractor nevertheless shall notify the Contracting Officer reasonably in advance of entering into any (i) cost-plus-fixed-fee subcontract, or (ii) fixed-price subcontract that exceeds either the simplified acquisition threshold or 5 percent of the total estimated cost of this contract. The notification shall include the information required by paragraphs (e)(1)(i) through (e)(1)(iv) of this clause."

FAR 52.244-2 Subcontracts (Cont)

- **Contractors without Approved Purchasing Systems:** Section (c) of the clause requires the Contracting Officer's written consent for any subcontract that:
 - Is of the cost-reimbursement, time-and-materials, or labor-hour type; or
 - Is fixed-price and exceeds—
 - For a contract awarded by the Department of Defense, the Coast Guard, or the National Aeronautics and Space Administration, the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract; or
 - For a contract awarded by a civilian agency other than the Coast Guard and the National Aeronautics and Space Administration, either the simplified acquisition threshold or 5 percent of the total estimated cost of the contract

FAR 52.244-2 Subcontracts (Cont)

- **Notification Requirements:** Section (e)(1) of the clause requires the contractor to notify the Contracting Officer reasonably in advance of placing any subcontract or modification thereof for which consent is required, to include providing the following information:
 - A description of the supplies or services to be subcontracted.
 - Identification of the type of subcontract to be used.
 - Identification of the proposed subcontractor.
 - The proposed subcontract price.
 - The subcontractor's current, complete, and accurate certified cost or pricing data and Certificate of Current Cost or Pricing Data, if required by other contract provisions.
 - The subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract.
 - A negotiation memorandum reflecting various elements regarding the subcontract price negotiations and associated compliance requirements.

These notification requirements also apply to contractors with approved purchasing systems for which subcontract notification is required by inclusion of Alternate 1 of FAR 52.244-2.

FAR 52.244-2 Subcontracts (Cont)

- **Important of Subcontracts Clause to PMs:** Subcontractors included in the original proposal are approved as part of the resulting award. [(j.) Paragraphs (c) and (e) of this clause do not apply to the following subcontracts, which were evaluated during negotiations.] The Subcontracts clause drives the Contracting Officer notification and consent requirements for bringing on new subcontractors post award.
- **Coordination requirements:** Consent to Subcontract notifications/requests require close coordination between the PM, CA and Subcontract Administrator (SCA).
- **PM:** Responsible for identifying son contracting requirements and potential subcontract teammates and coordinating associated requirements with both the supporting CA and SCA.
- **CA:** Assists the PM in interpreting clause requirements. Directly interfaces with the Contracting Officer with regards to providing timely notification, requesting consent and receiving the Contracting Officer's response.
- **SCA:** Plays the lead role in assembling the Consent to Subcontract package, to include the required negotiation memorandum documentation.

FAR 52.232-25 Prompt Payment

- **Application:** Used in contracts, task order and delivery orders.
- **Purpose:** Identifies contractor invoice requirements and Government prompt payment requirements, as well as interest penalties applicable to the Government when prompt payment is not made. The clause also procedures for the remittance of contractor overpayments.
- **Contractor Invoice Requirements:** Section (a)(3) of the clause identifies the content requirements for a contractor's invoice to be considered a "proper invoice." The designated Government billing office is required to return non-compliant invoices within 7 days (less for perishables) with the reasons why the invoice is not a "proper invoice."
- **Payment Due Date:** (Excepting perishables) the due date for making invoice payments by the designated payment office shall be the later of the following two events:
 - The 30th day after the designated billing office receives a proper invoice from the Contractor...
 - The 30th day after Government acceptance of supplies delivered or services performed. For a final invoice, when the payment amount is subject to contract settlement actions, acceptance is deemed to occur on the effective date of the contract settlement.

If the designated billing office fails to annotate the invoice with the actual date of receipt at the time of receipt, the invoice payment due date is the 30th day after the date of the Contractor's invoice; provided the designated billing office receives a proper invoice and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements

FAR 52.232-25 Prompt Payment (Cont)

- **Interest Penalty:** Section (a)(3) of the clause requires the designated payment office to pay an interest penalty automatically, without request from the Contractor, if payment is not made by the due date, provided that:
 - The designated billing office received a proper invoice.
 - The Government processed a receiving report or other Government documentation authorizing payment, and there was no disagreement over quantity, quality, or Contractor compliance with any contract term or condition.
 - In the case of a final invoice for any balance of funds due the Contractor for supplies delivered or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor
- **Additional Interest Penalties:** Section (a)(6) of the clause requires the designated payment office to pay an interest penalty automatically, without request from the Contractor, if the Government takes a discount for prompt payment improperly. Additional Interest Penalties are identified in Section (a)(7) of the clause.

FAR 52.232-25 Prompt Payment (Cont)

- **Overpayments to the Contractor:** If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall:
 - Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the:
 - Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);
 - Affected contract number and delivery order number if applicable;
 - Affected line item or subline item, if applicable; and
 - Contractor point of contact.

When remitting overpayments to the designated payment office, contractors are required to provide copies of the remittance and supporting documentation to the Contract Officer.

CONCLUSION

Be aware of the requirements of each of the following FAR clauses, and your role as the PM in ensuring compliance for your programs/projects.

- FAR clauses 52.232-20, Limitation of Cost and 52.232-22, Limitation of Funds
- FAR clause 52.215-22, Limitation on Pass-Through Charges
- FAR clause 52.244-2, Subcontracts
- FAR clause 52.232-25, Prompt Payment

Coordinate further with your supporting CA(s) with questions regarding the interpretation and application of clause requirements.