



FEDERAL SPENDING DATA MADE EASY

Immensely Powerful
Intelligently connects
key data points
Win more business, and
go beyond the ordinary

Fedmine Webinar Series with Obermayer

Success in Federal Subcontracting
July 14th, 2020

Agenda

- Introductions
- Presentation by Maria Panichelli
- Q&A – Please use the chat or Q&A feature to ask questions. There will also be time at the end for Q&A

Fedmine's mission is to bring accurate information, unmatched transparency and clear accountability to the world of government contracts.

Founded in 2004, we provide agencies, prime contractors and support firms convenient, simplified access to the best federal contract data sets available anywhere.

What We Do

Our online platform analyzes and **simplifies** the increasingly complex federal business landscape in real time, providing you the visibility you need into your addressable market of business opportunities. With Fedmine, you're able to:

- Monitor federal spending by industry, geography or socioeconomic status
- Receive daily alerts based on awarded contracts within your addressable market
- Identify teaming partners and joint ventures, then confidently reach out armed with information from the most coveted Company Profiles in the market
- Dissect competition, quickly comprehend agency markets, drill down to key contacts, and download information or share it with peers
- Conduct fast Super Searches, create custom keyword alerts, discover subcontractors at the task order level, with complete comprehension of what matters most
- Build a pipeline with addressable re-compete and newly forecasted solicitations

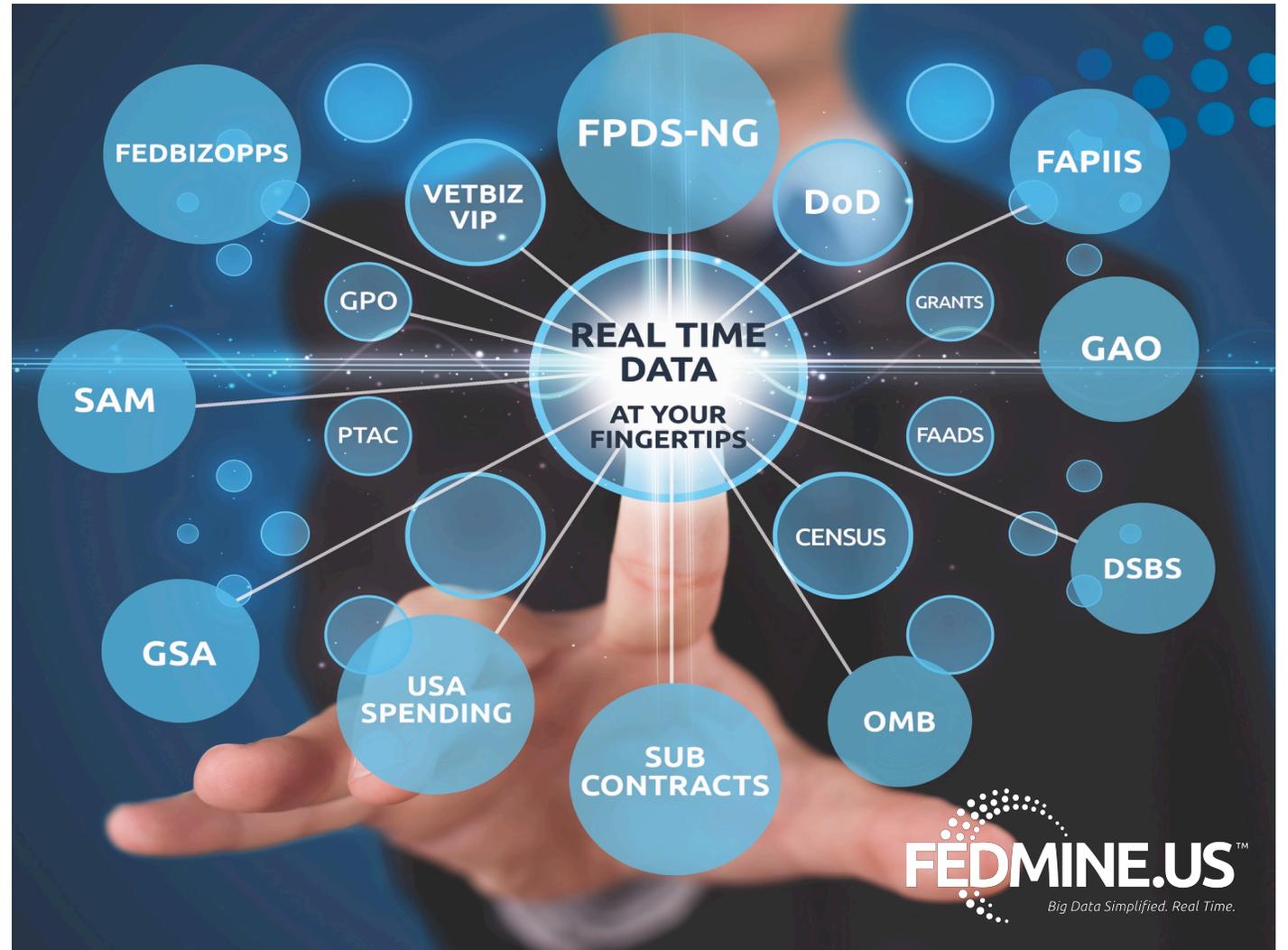
How It Works

Data is populated directly from federal government sources. Unlike error-prone manual methods, our fully automated technology architecture leverages the power of the internet to curate real-time information from integrated data sets in an easy-to-use platform.

Using Fedmine, you get:

- Customized keyword searches to understand who's winning federal contracts
- Email alerts to keep you up-to-the-minute on re-compete contracts, new opportunities, and awards made to your competitors with task order detail
- Agency and company profiles by socioeconomic status, place of performance, industry, company size
- and more
- Competition mix analysis by agency, bureau, military base and contracting office
- Links to comprehensive federal spending information

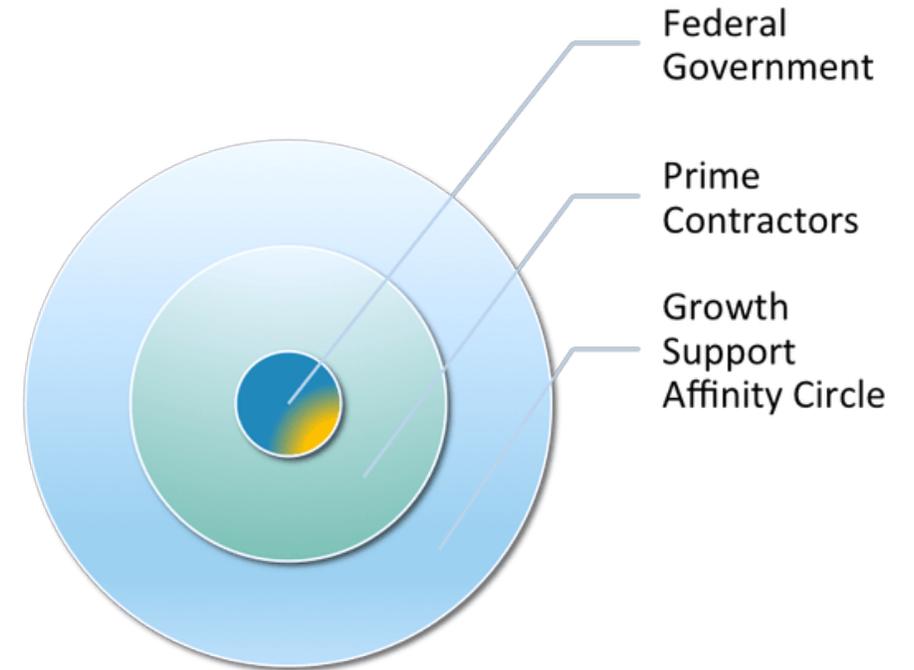
Data Sources



Who We Serve

Fedmine is a SaaS (Software as a Subscription) product for commercial and government clients

Our clients include Prime Contractors, Growth Support organizations and the Federal Government itself – we call this the “Fed Circle”

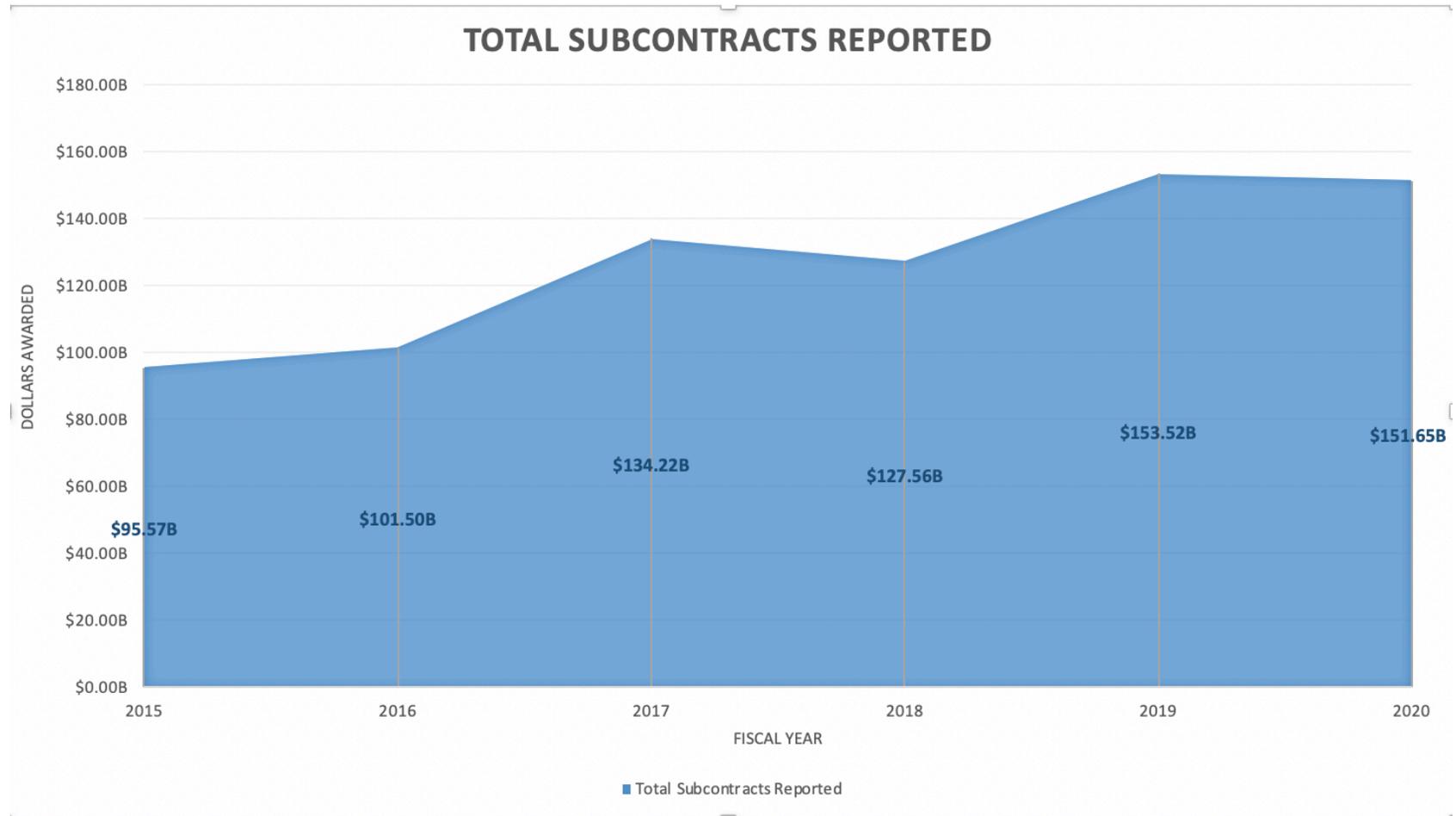


Federal Subcontracting data

Within all federal contract awards that are reported to FPDS-NG there is a field for “subcontract plan requirement” which include plan required, type of plan required and an option for plan not required. This is a searchable field with Fedmine.

Prime Contractors, typically will report the subcontracts within the eSRS system. Fedmine will integrate the subcontract data, with the prime contract at the task order level.

Total Subcontracts Reported Since FY 15



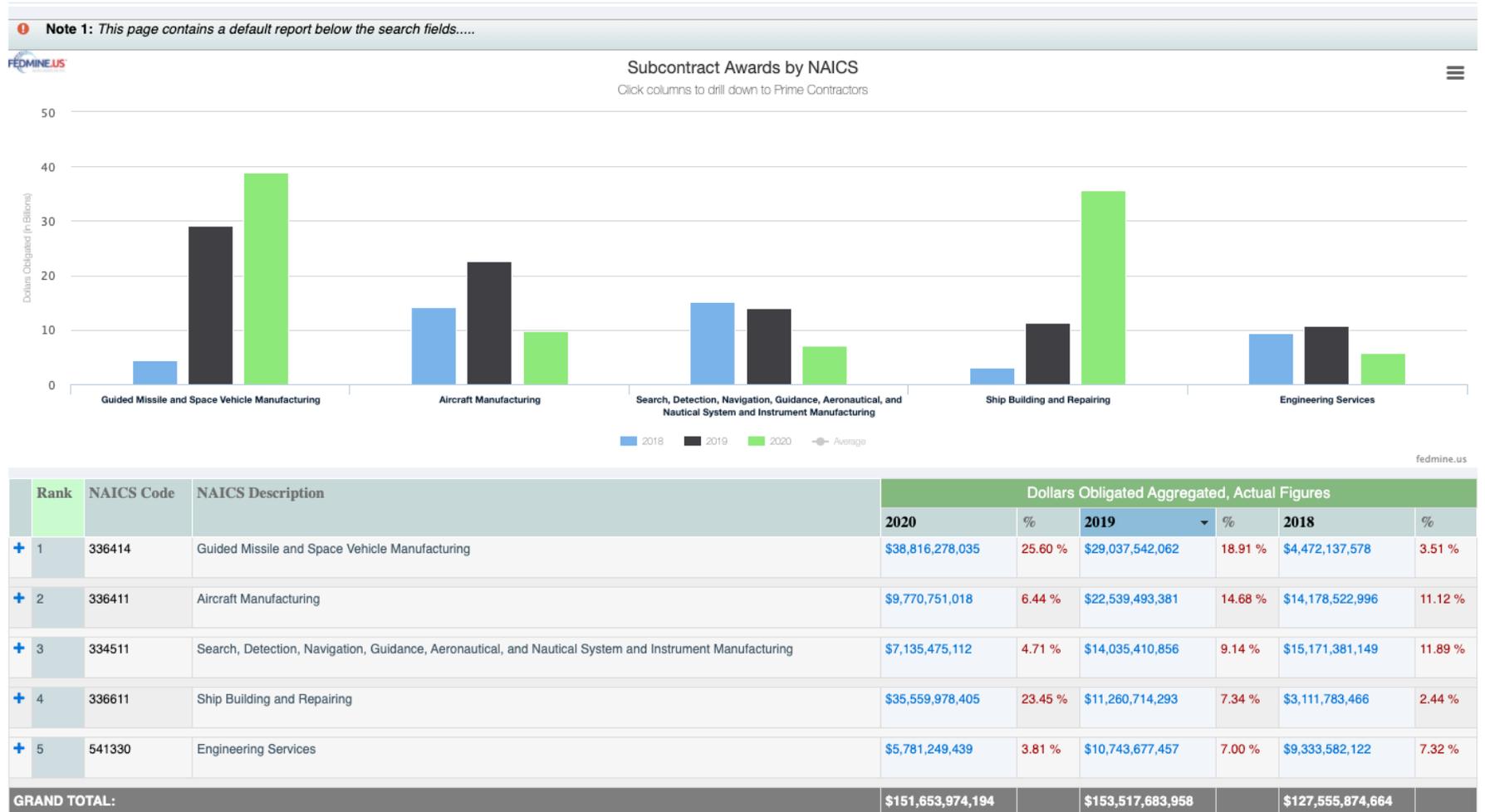
Fedmine Analysis of Subcontracts Reported in eSRS - top 10 agencies (based on FY 19 awards)

Agency	2015	2016	2017	2018	2019	2020
NAVY, DEPARTMENT OF	\$ 23,009,191,497	\$ 26,055,109,754	\$ 23,406,269,055	\$ 41,675,666,883	\$ 54,630,433,145	\$ 60,717,586,810
ARMY	\$ 32,316,970,888	\$ 21,990,539,599	\$ 21,101,124,005	\$ 33,950,729,911	\$ 31,317,475,969	\$ 25,814,188,998
AIR FORCE	\$ 8,187,542,527	\$ 18,591,182,896	\$ 15,187,349,370	\$ 21,711,981,980	\$ 28,959,331,854	\$ 32,883,480,784
DEFENSE, DEPARTMENT OF	\$ 9,844,388,394	\$ 5,879,551,197	\$ 6,137,175,608	\$ 9,006,913,002	\$ 15,606,748,859	\$ 17,954,842,537
DEFENSE LOGISTICS AGENCY (DLA)	\$ 5,132,055,657	\$ 4,570,430,573	\$ 49,456,004,638	\$ 5,342,226,752	\$ 4,767,092,314	\$ 1,313,133,698
GENERAL SERVICES ADMINISTRATION	\$ 1,968,612,470	\$ 4,821,430,820	\$ 2,014,786,350	\$ 2,197,366,418	\$ 3,565,845,347	\$ 1,102,803,999
NASA	\$ 5,201,772,181	\$ 5,182,268,927	\$ 3,036,235,611	\$ 1,548,438,279	\$ 2,281,297,462	\$ 4,710,276,653
HOMELAND SECURITY	\$ 664,992,990	\$ 867,728,004	\$ 2,201,177,603	\$ 1,362,812,144	\$ 2,258,692,009	\$ 432,177,547
ENERGY, DEPARTMENT OF	\$ 545,565,908	\$ 208,138,129	\$ 273,383,519	\$ 459,566,553	\$ 1,984,439,774	\$ 998,499,895
US AID	\$ 763,913,695	\$ 3,103,762,510	\$ 1,755,978,026	\$ 4,087,831,869	\$ 1,653,977,930	\$ 2,062,036,040

Top 10 Agencies include DoD, GSA, NASA

Top Five NAICS Codes

includes aircraft manufacturing, ship building and engineering services



Future Webinars with Obermayer

Asserting and Defending Bid Protests

September 15th, 2020



Success in Federal Subcontracting

Presented By:

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Meet the Presenter



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TODAY'S AGENDA



- Primer: It's All About the Approach...
- Flow Down Clauses
- “Pass Through” Claims
- Claims Between Primes and Subs

HOW TO APPROACH YOUR SUBCONTRACT



An Overall, Continuing Theme...

- Integrity and Willingness to Work (and Work Together)
- Honesty
- Transparency
- Open Communication
- Empathy and Understanding



Flow Down Clauses and Risk-Shifting Provisions

FLOW-DOWN CLAUSES



What are “**Flow-Down**” (aka “Flow-Through” or “Pass-Down”) Clauses?

- Flow-down clauses are FAR clauses included in a contractor’s prime contract with the Government, which the prime contractor is required to (or sometimes chooses to) flow-down to their subcontractors

FLOW-DOWN CLAUSES



Sometimes Refers to Other Risk-Shifting Provisions

- Protections for Prime

FLOW-DOWN CLAUSES



The **Unique World** of Federal Government Contracting

- Federal Government Contracts differ in many respects from a commercial contract
- Federal Government Contracts are governed by federal law (FAR, Agency Supplemental Regs, Small Biz Regs)
- Subject to a completely different set of dispute resolution procedures / different adjudicatory forums (FAR and CDA / COFC and Boards of Contract Appeals), different theories of recovery and different legal bases for claims

FLOW-DOWN CLAUSES



Accordingly, “Flow Downs” May Be a Little Different, and Potentially More Important, in the **Federal** Work Space

- Government does not bend or negotiate
- Prime Contractor has very little wiggle room
- Therefore, Prime Contractors are reluctant to negotiate with subs
 - **UNLESS...**

FLOW-DOWN CLAUSES



Understanding Each Other

- **Prime might be thinking:** I cannot afford to be stuck in the middle, fighting the government and my sub at the same time; I cannot have my subcontractor put me in a position that endangers my contract/relationship with the client
- **Sub might be thinking:** I am less familiar with the FAR and this complicated Federal space; I need to protect myself, I need access to remedies

FLOW-DOWN CLAUSES



What Do I Flow Down?

- Mandatory Flow-Downs, No Brainer
- Suggested Clauses
- Suggested Considerations

FLOW-DOWN CLAUSES



How Can You Tell Which Are the “Mandatory” Flow Downs

- Often, the FAR itself will state whether a clause must be flowed-down to a prime’s subcontractors
- Mandatory v. Automatic – Vital Distinction

FLOW DOWN CLAUSES



What other clauses *should* be flowed down?

FLOW-DOWN CLAUSES



Answering This Question Starts with Understanding **Why** You Flow Down, Or Include, Clauses in Your Subcontract

What is The Purpose?

- Prime Contractor is ultimately responsible for the completion of the contract and project, meaning they are ultimately responsible for the performance of their subcontractor(s)
- Federal Government does not mess around, and is not going to accept finger-pointing. It is on the prime to get the work done. Period. A subcontractor issue can force a default, can cause notice failures, can cause delays, etc. Prime needs to be vigilant.

FLOW-DOWNS MATTER: EXAMPLE 1 *A PRIME GETS STUCK!*



Terminations for Convenience:

- FAR 52.249-1: The Contracting Officer, by written notice, may terminate this contract, in whole or in part, **when it is in the Government's interest**

FLOW-DOWNS MATTER: EXAMPLE 1 *A PRIME GETS STUCK!*



In Example Case:

- Prime Contractor was terminated for convenience
- Nothing in the subcontract addressed Termination for Convenience, only for Default
- Termination of sub's contract was breach; Sub argued Prime Still had to pay sub
- \$\$ going out, while no more \$\$ coming in – It's a bad place to be!

FLOW-DOWNS MATTER: EXAMPLE 1

A PRIME GETS STUCK!



Take-Away Lessons for Primes:

- Always want to avoid battling on two fronts, or being stuck in the middle
- Carefully study your Prime contract and know all the possible scenarios. Prime contractors can find that their rights and obligations under the prime contract with the government are dramatically different from the rights and obligations of their subcontractors under standard subcontract boiler plate clauses
- Protect yourself! If you have an obligation that implicates the sub, flow it down! If the sub could impact your ability to fulfill a responsibility or perform, account for that!
- Make sure the subcontractor is accountable to at least the same extent you are; make sure that your rights vis a vis the sub mirror the Government's rights *vis a vis* you

FLOW-DOWN CLAUSES



The Primary Objective of Prime Contractors

- To make sure the obligations of the subcontractor to the Prime Contractor mirror the obligations of the Prime Contractor to the Government and to make sure the Subcontractor is bound by same procedures as the Prime Contractor

FLOW-DOWN CLAUSES



What about Subcontractors?

- Subs need to be thinking, too...

FLOW-DOWN CLAUSES



Biggest Subcontractor Mistake: Agreeing to a Non-Specific “Catch All” Type Flow Down Clause

Why Is This a Mistake?

- Seems consistent with the advice given to Primes, right? WRONG.
- Subcontractors need to understand their **SPECIFIC** obligations and responsibilities, scope of work, compliance requirements. Otherwise you risk default, notice failures, and all the things you are hoping to avoid in the first place
- Vague catch all clauses do not put Subs on notice of their obligations!

FLOW-DOWNS MATTER: EXAMPLE 2 *A SUB'S IGNORANCE IS NOT BLISS*



NOTICE CAN BE CRITICAL!

In Example Case,

- Prime Contractor used vague catch all flow down clause
- Inexperienced sub had no idea about FAR notice requirements
- Subcontractor failed to give proper notice to Prime; Prime was unable to give requisite notice to Government
- Both subcontractor's ability to recover and Prime's ability to recover were hampered
- Poor drafting therefore hurt both Prime and Sub

FLOW-DOWNS MATTER: EXAMPLE 2 *A SUB'S IGNORANCE IS NOT BLISS*



Take-Away Lessons for Subs:

- Make sure you understand your obligations and responsibilities in specific terms
- If there is a reference to the Prime Contract Documents, get them! If you can't, don't sign – rework the language!
- NEVER AGREE TO A CATCH-ALL FLOW DOWN CLAUSE IF YOU CAN HELP IT
- Prime's obligations to you should mirror Government obligations to Prime

(Bonus Lesson for Primes:

- Make sure your Subs understand their obligations and responsibilities in specific terms – It won't necessarily be only the sub that is harmed by the sub's ignorance or misunderstandings)

FLOW-DOWN CLAUSES



Subcontractor's Primary Objectives

- Subcontractors need to know what their obligations are, and what contractual procedures they must comply with
- Subcontractors also want to avoid assuming liability for compliance with clauses that are not mandatory and/or are not applicable to their subcontract work

FLOW-DOWN CLAUSES



Critical Considerations:

- Mandatory Clauses
- Notice (Changes, Differing Site Conditions, etc.)
- Terminations/Default
- Delays/LDs
- Suspensions
- Changes (Prosecution of Work)
- Dispute/Dispute Resolution
- Costs and Pricing
- Option Exercise
- L&E Issues?
- Ethics Requirements?
- Other Compliance Concerns?
- IP Issues?



Subcontractor's “Pass Through” Claims

SUBCONTRACTOR'S “PASS THROUGH” CLAIMS



Subcontractors Cannot File Claims Directly Against the Federal Government

- Sovereign Immunity is general bar
- Tucker Act exception only covers prime contractors, who have “privity of contract” with the US
- So, to file a claim, a sub must rely on its Prime to “sponsor” or “pass through” its claim

SUBCONTRACTOR'S “PASS THROUGH” CLAIMS



- Claims ruled by Contract Disputes Act (“CDA”)
 - Exhaustion of administrative remedies
 - Long and complicated legal process
- Prime litigates, Sub supports
- Unsurprisingly, can be a **HUGE** source of Prime/Sub conflict, and one of the most important things to account for in a subcontract

SUBCONTRACTOR'S “PASS THROUGH” CLAIMS



Why A Huge Source of Conflict?

Remember the Approach: Understanding Each Other

- What is Prime scared of?
 - Two-fronted Battle
 - Being Stuck in the Middle
 - Certification Issues → Forfeit/Fraud/FCA etc.

- What is Subcontractor Scared of?
 - Lack of Remedies, Recourse, Recovery

SUBCONTRACTOR'S “PASS THROUGH” CLAIMS



Draft Your Subcontract to Address These Concerns

- Disputes clause that outlines cooperative requirements, addresses concerns
 - If sub does X, Prime will sponsor; sub will help in preparation, litigation, etc.
 - Addresses FCA/fraud issues
- Disputes clause that differentiates between sub disputes against owners and sub disputes against primes
- Disputes clause that explicitly refers to CDA remedies and process, and demands patience
- Disputes clause that provides for penalties for fraudulent certification
- Arbitration?

SUBCONTRACTOR'S “PASS THROUGH” CLAIMS



Sample clause:

14.1 Any dispute resolution procedure in the Prime Contract shall be deemed incorporated in this Agreement and shall apply to any disputes arising hereunder.

14.2 Any claims or disputes not covered by the dispute resolution procedure in the Prime Contract shall be submitted to arbitration in accordance with the Construction Industry Rules of the American Arbitration Association. In either case, the demand for arbitration shall be made within a reasonable time after written notice of the claim, but in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim would be barred by the applicable statute of limitations. All proceedings in any such arbitration shall take place in [REDACTED]

SUBCONTRACTOR'S “PASS THROUGH” CLAIMS



Best practices for subcontract disputes clauses:

- The Disputes clause from the prime contract, FAR 52.233-1, should be flowed down *in full text*, verbatim, from the prime contract.
- An additional clause should be included requiring the subcontractor to proceed with the work during the pendency of the dispute, for example:
 - “CONTINUATION OF WORK. No claim, dispute or controversy shall interfere with the progress and performance of work required to be performed under this Subcontract and Subcontractor shall proceed as directed by Contractor in all instances with its work under this Subcontract.”

SUBCONTRACTOR'S "PASS THROUGH" CLAIMS



Liquidating Agreements

- Agreements specifically governing the litigation of pass through claims
- Areas to discuss:
 - Relationship
 - Scope of litigation support responsibilities
 - Attorneys fees
 - Settlement/veto
 - Apportionment
 - Appeal decisions

SUBCONTRACTOR'S "PASS THROUGH" CLAIMS



Best practices for subcontract disputes clauses (continued):

- The subcontract should set forth a method to determine if the subcontractor's claim is a claim against the government, or against the prime contractor, or some combination thereof.
- The subcontract should set forth explicitly what dispute resolution procedures must be exhausted before the subcontractor can demand arbitration.

SUBCONTRACTOR'S "PASS THROUGH" CLAIMS



Best practices for subcontract disputes clauses (continued):

- Every claim in excess of \$100,000 on a federal construction project must be certified -- A prime contractor passing through a subcontractor's claim to the Government must include the certification language
- So the subcontract should impose an obligation on the subcontractor to certify its claim and provide all necessary documentation and supporting data so that the prime contractor can certify it to the government.



Subcontractor v. Prime Contractor Claims

SUB'S LAWSUITS AGAINST PRIME



What if a prime breaches the subcontract?

- If prime refuses to honor subcontract, the subcontractor can:
 - Bring suit against the prime in the appropriate U.S. District Court
 - Proceed to arbitration if authorized in the subcontract
 - Submit a claim to the prime's surety (a Miller Act claim)

SUB'S LAWSUITS AGAINST PRIME



ADR Issues

- Mandatory mediation
- Arbitrability
- Location
- Attorneys fees

SUB'S LAWSUITS AGAINST PRIME



Other Issues in Sub v. Prime Litigation

- Damages for delay
- Pay if Paid v. Pay When Paid?
- Exhaustion of Administrative Remedies
- Jurisdiction

SUB'S LAWSUITS AGAINST PRIME



Other Potential Remedies

- No Liens
- Miller Act Claims



Questions?



OBERMAYER

Looking forward. Thinking ahead.



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