The Federal government enters into contracts with various parties and often those parties then enter into contracts with other parties to procure goods and/or services necessary to meet the obligations arising under their contract with the Federal government. We call the Federal government's contract the prime contract, and the parties that contract directly with the Federal government are called prime contractors. The parties that contract with the prime contractor are called subcontractors. If those subcontractors then enter into their own contracts with other parties in order to fulfill *their* obligations, those are called lower-tier subcontracts.

We thus have prime contractors and prime contracts, first-tier subcontractors and their subcontracts, and the lower-tier subcontractors and their subcontracts. It can get confusing because the term "subcontract" is not consistently defined in applicable regulations; therefore, it helps to use appropriate modifiers such as "first-tier," "second-tier," and *et cetera*. It's even more confusing when you realize that a prime contractor on Contract A can also be a first-tier subcontractor on Contacts B and C, and perhaps a second-tier subcontractor on Contract D. When you get deep into the defense supply chain you find out that many first and second-tier subcontractors are working for multiple prime contractors. It's a tangled web and nobody really understands how it maps out.

Once upon a time, the Department of Defense promised Congress it would map its contracting space in something called the "S2T2" initiative, but like so many Pentagon back-office initiatives it sounded great but never seemed to go anywhere. Our quick check revealed that the STT2 initiative is now being handled by the Dept. of Commerce (Bureau of Industrial Security) and it has a survey that it requires selected contractors to complete, under the auspices of 50 U.S.C. App Sec 2155. Now we're not lawyers here, but our layperson's reading of that section of the United States Code tells us that use of that authority if inapposite unless it has been implemented in a regulation (
e.g.
, FAR or DFARS). (Note: It's probably easier and cheaper to fill out the Excel file rather than argue about the authority to require it to be completed in court.) We're also not sure what BIS does with the data it receives. It would not surprise us in the least to learn that the various Excel spreadsheets received lie in somebody desk drawer (metaphorically speaking). The BIS website says the results of its "Space Deep Dive" survey are available, but that survey was published in 2015. There is nothing available since that date.

Back to the topic at hand: privity. Privity is the concept that only the contracting parties can enforce the duties of the contract. With some exceptions, the Federal government's ability to enforce its contract begins and ends with the prime contractor. What happens below the prime contract level is the responsibility of the prime contractor (or lower-tier subcontractor, as

appropriate).What this means for most of us is that a non-compliance at a lower level in the supply chain is enforced at the prime contract level, even if the non-compliance occurs in the lower-levels of the supply chain.

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Second-tier CAS non-compliance? Impact enforced on the prime contractor.

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Third-tier defective pricing? Impact enforced on the prime contractor.

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First-tier unallowable costs billed to the prime? Impact enforced on the prime contractor.

The door swings both ways, though. The government (with limited exceptions) cannot enforce contractual duties on a lower-tier subcontractor. We discussed this concept about 18 months ago, in **this article** about New Century Consulting (NCC) a lower-tier subcontractor under the Legacy Program. DCAA alleged that NCC had significant unallowable costs in its indirect rates that it had used to bill the Legacy Program prime contractor. Unfortunately, that prime contractor went bankrupt and the government couldn't enforce the audit findings. The situation frustrated many, including then-SECDEF Mattis, who testified before Congress that it was "probable" that criminal charges would be filed against NCC. The terms "suspension" and "debarment" were also used. Eighteen months later, we cannot find any new stories that mention what happened to NCC, if anything. NCC appears to still be in business accepting contracts with the Federal government.

Certainly, these things take time. So maybe the wheels of compliance enforcement are grinding slowly and we haven't heard about it. Or maybe the whole thing was dropped because it was difficult to show criminal intent, or because the Contract Disputes Act's Statute of Limitations had run its course. We don't know.

Another issue about privity that bothered many was the allegation that funds going to Afghanistan contractors ended-up in the hands of Afghan insurgents. The Special Inspector

General for Afghanistan Reconstruction (SIGAR) reported that its efforts to track the funds were impeded by the use of subcontractors. For example, in its report to Congress dated July 30, 2013, SIGAR wrote “the vetting challenges inherent in the use of multiple tiers of subcontractors.” Congress heard the complaints, and included in the FY2015 National Defense Authorization Act (NDAA) Subtitle E (“Never Contract with the Enemy”) that included Section 842 (“Additional Access to Records”).

Section 842 provided that, upon a written determination by a contracting officer that “upon a finding by the commander of a covered combatant command (or the specified deputies of the commander) or the head of an executive agency (or the designee of such head) that there is reason to believe that funds, including goods and services, available under the contract, grant, or cooperative agreement concerned may have been provided directly or indirectly to a covered person or entity,” the Federal government may “examine any records of the contractor, the recipient of a grant or cooperative agreement, or any subcontractor or subgrantee under such contract, grant, or cooperative agreement to the extent necessary to ensure that funds, including goods and services, available under the contract, grant, or cooperative agreement are not provided directly or indirectly to a covered person or entity.” Section 842 required DOD to implement a clause enforcing the public law with 270 days, and further provided that the clause was to be a mandatory flowdown clause—i.e., that the substance of the clause, granting the access to subcontractor records—was to be included in “any subcontract or subgrant under a covered contract, grant, or cooperative agreement if the subcontract or subgrant has an estimated value in excess of $50,000.”

So that never happened. The DAR Council never issued the required clause.

In what has become the familiar routine, a **Class Deviation** has been issued to implement the requirements of the public law. The Class Deviation includes two clauses. One of the two clauses is 252.225-7975 (“Additional Access to Contractor and Subcontractor Records (DEVIATION 2020-O0001)”). The new clause states:

In addition to any other existing examination-of-records authority, the Government is authorized to examine any records of the Contractor and its subcontractors to the extent necessary to ensure that funds, including supplies and services, available under this contract are not provided, directly or indirectly, to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

And it is a mandatory flowdown clause.

We note the clause does not require a contracting officer's written determination (as per the FY2015 NDAA authority). Perhaps that will be covered in the PGI when the DAR Council finally issues the clause.

In the meantime, if you are a contingency contractor, you should start working with your subcontractors regarding organizing their books and records. You know, just in case.