

Researching DFARS

Written by Nick Sanders

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Most of us would agree that the FAR is hard enough. But sometimes you have to go into the DFARS; and it turns out that is harder than it needs to be.

Recently I team-taught a class in England that was, essentially, an introduction to the FAR and the DFARS. A company had received multiple subcontracts from various US prime contractors, each of which contained a lengthy list of FAR and DFARS clauses—most of which had been incorporated by reference. Meaning that there was a clause number and a clause title and a date. And that was it.

An important exercise was looking up the clauses and their prescriptions. (For those who don't know, the prescription tells the contracting officer when the clause is to be incorporated into a contract.) We also looked at the clauses themselves in order to identify whether the clause was a mandatory flow-down and, if so, then under what circumstances.

We taught the class that some DFARS clauses *implemented* a FAR clause while other DFARS clauses *supplemented* a FAR clause. (For your information, an implementation augments the FAR rule while a supplementation adds additional stuff not found in the FAR.) There are specific conventions that identify implementing clauses versus supplementing clauses, but you're already bored so we're moving on now.

In short, there was a lot of moving back and forth between the FAR and the DFARS, so as to see whether the FAR clause controlled, or if it had been modified somehow by the DFARS.

How did we do that? We did it electronically, using various websites.

Now, you might think that only one website would be necessary. Effective 30 September 2019, "Acquisition professionals and vendors will ... have a single website to access and search the Federal Acquisition Regulation (FAR) and supplemental regulations." And that website is www.acquisition.gov.

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If you go to that site, on the very top of the page is a button marked “Regulations,” and clicking that button brings up all the various government acquisition regulations, from the FAR to the DFARS and even the military service supplements. The list of acronyms is amazing! Do you know what the DOLARS is? What about the LIFAR? Or the NRCAR? You get the picture.

Thus, if the site is to be believed, it’s a one-stop shop and one need go nowhere else. Yet we hardly used it.

Sure, as far as FAR research went, it was fine. But when navigating the DFARS, the site was lacking. It just didn’t work. The links between the DFARS clauses and their prescriptions didn’t. Or at least, they didn’t (link) consistently. The lack of effectiveness of the DFARS section of www.acquisition.com made me long for the days of farsite at hill.afb.org.

That website worked and it was easy to navigate. But sadly, it’s no longer in existence.

So what did we do instead? We used the electronic Code of Federal Regulations website at www.ecfr.gov

. Once you know that the FAR is Title 48 of the CFR and that the DFARS is Chapter 2 of Title 48, then you’re good to go. And the eCFR has really cool search features that turned out to be really useful.

We needed strong search features because of this little ditty buried in the DFARS clause 252.244-7000 (“Subcontracts for Commercial Items,” June 2013). That clause states:

1.

The Contractor is not required to flow down the terms of any Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial items at any tier under this contract, unless so specified in the particular clause.

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What does that mean? It means that the only DFARS clauses that are mandatory flow-downs for subcontracts for commercial items are those clauses that expressly require flow-downs to subcontracts for commercial items. Let me give you an example. Suppose a clause states “Contractor must flow this clause down to all subcontracts.” That clause would not be a mandatory flow-down to a subcontract for commercial items because it does not expressly say “... all subcontracts, including those for commercial items.”

That’s right. *“All” does not mean “all.”*

Right. That blew my mind as well. But there you go.

I know, you’re thinking I’m crazy. Here’s an example of what I’m talking about. If you look at the DFARS clause 252.229-7014 “(Taxes-Foreign Contracts in Afghanistan,” December 2015) you see this clear direction to contractors that have received contracts that incorporate that particular clause: “(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts, *including subcontracts for commercial items.*” (Emphasis added.) If you see that direction, then you know the clause is a mandatory flow-down for subcontracts for commercial items. If you don’t see that, then the clause is not a mandatory flow-down.

If you think this is crazy hard (and you should), you should have seen the faces of the British folks we were training. (It took a couple of days, but they all got it in the end.)

Fortunately, we had the eCFR site so we could search for the clauses that needed to be flowed-down. Because if we had relied on the www.acquisition.gov site for the training, it would have been impossible.