



## June 2023 Newsletter



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### Tip of the Month:

#### Flow-Downs in Federal Government Subcontracts

If you've ever listened to a discussion of federal government subcontracts, chances are you've heard the term "flow-down." But what exactly is a flow-down, and what should prime contractors and subcontractors know about flow-downs? In this article, we'll take a brief look at what flow-downs are and provide some high-level tips for prime contractors and subcontractors alike.

##### ***What Is a Flow-Down?***

A flow-down is simply a provision of a federal government prime contract that must, by its terms, be included in a subcontract. Flow-downs can appear anywhere in the contract's terms and conditions but most often appear in Federal Acquisition Regulation (FAR) or agency FAR supplement (such as Defense Federal Acquisition Regulation Supplement) clauses.

For example, FAR 52.203-6 (Restrictions on Subcontractor Sales to the Government) includes the following paragraph:

*(c) The Contractor agrees to incorporate the substance of this clause, including this paragraph (c), in all subcontracts under this contract which exceed the simplified*

*acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award.*

When a prime contract requires flow-downs, the prime contractor must include the required provisions in its subcontracts. Failure to do so may result in a breach of contract!

### ***What Should Prime Contractors Know About Flow-Downs?***

Prime contractors should understand a few key considerations about flow-downs:

- *Not Subject to Negotiation.* If a subcontractor isn't familiar with flow-downs, the subcontractor may object to one or more of the flowed-down clauses. Be prepared to educate your subcontractors: flow-downs aren't subject to negotiation.
- *Update Commercial Subcontracts.* You may already have a commercial subcontract that you use regularly. Remember, commercial subcontracts can't be used "as-is" for federal prime contracting. They'll need to be amended to comply with the flow-down requirements of your new government prime contracts.
- *Consider Incorporation by Reference.* Identifying all the required flow-downs can sometimes be time-consuming and challenging. Many prime contractors satisfy their legal obligations by including an "incorporation by reference" provision in their subcontracts. At their most basic, these provisions simply tell the subcontractor that the subcontract includes all mandatory prime contract flow-downs.
- *Consider Highlighting Key Flow-Downs.* Even when using an incorporation by reference clause in a subcontract, consider a "belt and suspenders" approach highlighting key compliance provisions, like prevailing wage clauses. This makes it less likely that the subcontractor will overlook these important obligations.

### ***What Should Subcontractors Know About Flow-Downs?***

- *Obtain the Prime Contract.* If a subcontractor agrees to an incorporation by reference clause, the subcontractor should obtain a copy of the prime contract or at least a copy of all clauses contained in the prime contract. Otherwise, the subcontractor has no way of knowing what flow-downs the subcontract contains.
- *Understand the Extent of Flow-Downs.* When a subcontract is for a commercial product or service, as those terms are defined in [FAR 2.101](#), and the prime contract contains the clause at [FAR 52.244-6](#), the mandatory flow-downs are limited to those identified in the clause, plus any other flow-downs the contract specifically requires to be included in commercial subcontracts. As a commercial subcontractor, it is wise to ask that the subcontract state that it is for commercial products or services just so there is no doubt as to which flow-downs apply.

### ***Final Thoughts***

This article has provided a high-level overview of flow-downs in federal government subcontracts. As with any matter of contractual compliance and negotiation, prime contractors and subcontractors alike should consider obtaining advice and assistance from a qualified attorney.

## NICC APEX Accelerator News You Can Use:

### New Defenses to the Ostensible Subcontractor Rule Are Coming

Small businesses will have more clarity on applying the so-called “ostensible subcontractor” affiliation rule, as well as new defenses to potential findings of affiliation under that rule, under new SBA changes effective May 30, 2023. Among other changes, the new rule will clarify that construction contractors are expected to perform management and supervision but may rely on subcontractors for the actual construction work. [Read more about the new SBA rule here.](#)

### Govology Webinars:



#### Understanding the Domestic Preference Statutes: The Buy American Act and Trade Agreements Act (2023 Update)

**Date:** June 8, 2023

**Time:** 1:00 pm EDT

**Presenter:** John Mattox, Schoonover & Moriarty LLC

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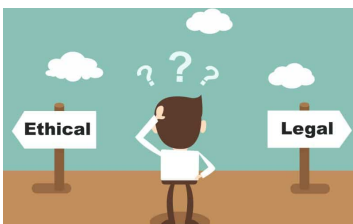
#### Methods for Communicating Your Past Performance to Accelerate Government Sales (2023 Update)

**Date:** June 13, 2023

**Time:** 1:00 pm EDT

**Presenter:** Joshua Frank, RSM Federal

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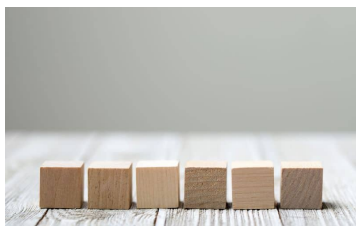
#### Ethics in Federal Government Contracting (2023 Update)

**Date:** June 15, 2023

**Time:** 1:00 pm EDT

**Presenter:** Nicole Pottroff, Koprince McCall Pottroff LLC

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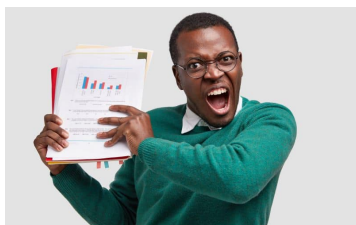
## **NAICS Codes: Six Impactful Digits for Federal Contractors (2023 Update)**

**Date:** June 20, 2023

**Time:** 1:00 pm EDT

**Presenter:** Tim Laughlin, Schoonover & Moriarty LLC

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## **Using Proposal Graphics for Readability and Impact (2023 Update)**

**Date:** June 22, 2023

**Time:** 1:00 pm EDT

**Presenter:** Carrie Ann Williams, Andana Consulting

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## **Diversifying Your Government Contracting: Strategies for State and Local Opportunities**

**Date:** June 27, 2023

**Time:** 1:00 pm EDT

**Presenter:** Dr. Shana Nicholson, Rescue Me LLC

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*Please use the new code **20NICC23** when registering for Govology webinars.*

## **Recommended Readings:**

### **Court of Federal Claims Decision Results in ‘Sea Change’ for Federal Acquisition**

A recent decision by the U.S. Court of Federal Claims will not only force the General Services Administration to pause and reassess its strategy for awarding contracts under the Polaris Governmentwide Acquisition Contract vehicle but will also affect GSA’s strategy for the OASIS+ vehicle. [Read more about the decision here.](#)

### **U.S. to Lift Most COVID-19 Vaccine Mandates**

Effective May 11, 2023, most COVID-19 vaccine requirements will end, including vaccine requirements for contractors. [Read more here.](#)

## ***About Nebraska Indian Community College APEX Accelerator:***

### **Address (Macy Campus):**

1111 Hwy. 75/P.O. Box 428

Macy, NE 68039

(Coverage Area: Omaha Indian Reservation)

### **Address (Santee Campus):**

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Niobrara, NE 68760

(Coverage Area: Santee Sioux Indian Reservation)

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