

DOES THE *FAR* APPLY TO FEDERAL CONTRACTORS? **No!**

Dispelling Myths in *FAR* Applicability and Clause Selection
in the Contracting Profession



BY CHRISTOPH MLINARCHIK

As contracting professionals, our mandate is to educate, inform, advance, and improve the contracting profession.¹ Fundamental concepts lay the foundation for achievement, mastery, and professionalism, but minor misunderstandings can morph into major misconceptions.

For these reasons, this article hammers home a critical concept that affects all federal contracts—the applicability of the *Federal Acquisition Regulation (FAR)* and its clauses. In short, all contracting professionals must understand the scope and applicability of the *FAR*.

No Contracting Professionals Can Accept or Spread Myths about the *FAR*

There is no place for misconceptions, misunderstandings, rumors, legends, or outright falsehoods in the contracting profession. Our mission is to educate our colleagues—especially the less-experienced members of the workforce—on sound contracting principles. With this in mind, it's time to dispel a couple of deeply rooted government contracting myths.

I provide professional instruction in government contracts through my consulting firm,² and to date, the firm has taught more than 1,000 contracting professionals on a wide variety of government contracts topics, including fundamentals of government contract law. A favorite icebreaker question—the answer to which never fails to shock the overwhelming majority of students—is:

DOES THE *FAR* APPLY TO FEDERAL CONTRACTORS?

This question seems innocent, simple, and straightforward. But contracting professionals, including attorneys and executives from both the public and private sector, consistently fail to provide the correct answer, which is an emphatic “No!” Only a tiny minority—less than 20 students over the years—have hit the mark. Ignorance of this key concept of the contracting profession is not an option.

As a participating member of the contracting profession, you have accepted a duty.³ After reading this article, that duty is to share this knowledge—which is paramount to several critical contracting skills, including contract formation, clause selection, contract negotiation, and contract administration—with your federal contracting office or your federal contractor organization. Everyone in your sphere of influence should understand the following concept (before reading further, for your own safety, please sit down in a comfortable chair, put away any distractions, and take a deep breath): *The FAR does not apply to federal contractors!*

After the initial shock subsides and you come to your senses, allow your myriad questions to bubble to the surface: *What does this mean? How can this be possible? What is the authority for such a bold statement?*⁴ *If the FAR does not apply to federal contractors, why should federal contractors be familiar with the FAR?* Before explain-

ing the connection between the *FAR* and federal contractors, it is necessary to start with the authority and applicability of the *FAR*.

The *FAR* Clearly Describes Its Own Applicability

The *FAR* provides an unambiguous answer concerning its applicability—you just have to know where to start, then wade through the *FAR*'s complexities to find it. Lucky for you, your first lead is at the very beginning. You cannot miss this vital information if you start from the top! If you begin with *FAR* 1.000, you will read:

This part sets forth basic policies and general information about the Federal Acquisition Regulations System, including purpose, authority, *applicability*, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation....⁵

Great! Now you know that *FAR* Part 1 provides information about the *applicability* of the Federal Acquisition Regulations System. This is a good start. Perhaps there is a subpart, section, or subsection⁶ within *FAR* Part 1 devoted to applicability?

Reading further, you will stumble upon *FAR* 1.104, titled, “Applicability.” Your eyes may light up, and you may think the answer cannot be too far away. *Au contraire*. If you are unfamiliar with the *FAR*, congratula-

tions—you've just discovered that it can be quite a tease. The text of FAR 1.104 *does not* directly answer the question of the FAR's applicability; instead, it directs you to a different citation:

The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded.⁷

No problem—now you have a road map to track down the answer. Traveling over to FAR Part 2, you will find that you need to search the set of definitions found at FAR 2.101. However, your search should end rather quickly, since the *very first definition* of FAR 2.101 is the term *acquisition*,⁸ which FAR 2.101 defines as follows:

"Acquisition" means the acquiring by contract with appropriated funds of supplies or services (including construction) *by and for the use of the federal government* through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.⁹

After carefully reading this lengthy, somewhat poorly constructed definition two or three times (as you have been properly trained to do), you may notice a problem. Hopefully, you will know that it's poor form to use the defined word in the definition itself; unfortunately, that's exactly what you see in the FAR definition of *acquisition*. However, what you should have latched on to was the word *by*, noticing that it's connected to the words *federal government*:

...acquiring by contract...*by and for the use of the federal government*.¹⁰

There it is. Case closed. The FAR applies to "acquisitions," and acquisitions are

conducted by the "federal government." Therefore, the FAR only applies to federal employees conducting acquisitions, *not* to federal contractors.

This may sound like too simple of an answer, and a few nagging questions may still remain. You know that federal contractors care a great deal about the FAR. Federal contractors submit public comments to the *Federal Register* when there are proposed changes to the FAR.¹¹ Federal contractors spend time and money training their contracts staff on the contents of the FAR.¹² You also know that nobody gets hired for a position in the contracts department at a federal contractor without demonstrating at least a modicum of understanding of the FAR.

How is the FAR Relevant to Federal Contractors?

So, where do you go from here? If the FAR does not apply to federal contractors, why should federal contractors be familiar with the FAR? If the FAR does not apply to federal contractors, how can the federal government get federal contractors to agree with and to the policies, procedures, or processes found in the FAR? The answer is by "contract formation."

The FAR Does Not Apply to Federal Contractors, but the Terms and Conditions of Federal Contracts Do!

Another common misconception is that the entire FAR is incorporated into every federal contract. The immediate challenge to such a ridiculous assertion is: "Where in the federal contract does it say that?" Theoretically, a federal contractor can sign a contract that incorporates, by reference or full text, the entire contents of Title 48, Chapter 1 of the *Code of Federal Regulations*—also known as the FAR.¹³ But how would that be interpreted during contract performance?

Furthermore, *why* would the federal government need or want to incorporate the entire FAR into a contract? For example, if the contract is procured under the authority of FAR Part 13, "Simplified Acquisitions,"

why should you incorporate the entire contents of FAR 8.405, "Ordering Procedures for Federal Supply Schedules"?

These questions may lead you to a revelation: Certain sections of the FAR will be incorporated into individual contracts, as appropriate, but there is no logical reason to dump the entire contents of the FAR into any contract.

Only Certain Sections of the FAR Apply to Federal Contractors by Incorporation of Specific FAR Clauses into Individual Contracts

The FAR prescribes standard contract clauses to insert into contracts (and provisions to insert into solicitations).¹⁴ For instance, FAR Subpart 12.3 "establishes provisions and clauses to be used when acquiring commercial items," FAR 16.506 provides provisions and clauses for various types of indefinite-delivery contracts, and FAR 19.508 provides provisions and clauses to insert when setting aside acquisitions for small businesses under FAR Subpart 19.5.

These contract clauses (and solicitation provisions) are the relevant connection between the FAR and federal contractors. As simple as this sounds, the contracting profession needs a refresher course in this basic concept, for both prime contract and subcontract clause selection and negotiation.

All too often, a novice contract manager will be fooled into accepting an irrelevant argument during contract performance: "The FAR says the following; therefore, you must do the following." The novice will search for whatever FAR citation is provided, read the text carefully, and mistakenly conclude that the argument is sound and compliance is mandatory. This is completely incorrect and demonstrates a fundamental lack of understanding of contracting principles.

The expert contract manager—the *contracting professional*—will know that the first

place to look is in the contract itself, *not* in the FAR. Putting aside the *Christian Doctrine*,¹⁵ if the FAR clause is not in the contract, it is not relevant! (Remember, the FAR applies to federal employees conducting acquisitions, *not* to federal contractors.) Always start by reading the contract and its clauses.

Before Consulting the FAR, Read Your Contract and Its Clauses

The starting place for federal contract interpretation is not the FAR, as some misguided practitioners will tell you. The first place to look is the contract itself. Read your contracts, and read your contracts carefully! Each clause is presumed to be included for a reason, and by signing the contract, you have agreed to abide by its terms and conditions.

Prescription Clauses Provide Clear Guidance to Federal Contracting Officers for FAR Clause Insertion

Every contracting professional must be familiar with the concept of the "prescription clause." At the beginning of FAR contract clauses, you will find a reference to FAR guidance (applicable to the federal contracting officer) for when to insert or not insert the clause into federal contracts. This FAR reference, containing guidance for contracting officers, is known as the "prescription clause."

As an example, consider the clause at FAR 52.219-9, titled "Small Business Subcontracting Plan." The first text you see below the title is the reference to the prescription clause:

As prescribed in 19.708(b), insert the following clause....¹⁶

The prescription clause itself is FAR 19.708(b), which reads, in part:

Insert the clause at 52.219-9, Small Business Subcontracting Plan, in solicitations and contracts that offer subcontracting possibilities, are expected to exceed

The *Christian Doctrine*

G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl., 1963)

The *Christian Doctrine* is an important exception to the rule that clauses not found in the contract are irrelevant. The *Christian Doctrine* holds that if a clause is mandatorily prescribed by the FAR and is considered to express deeply ingrained procurement policy, that clause will be automatically "read into" the contract by the courts.

There are two important concepts about the *Christian Doctrine*

1. First, it is called a "doctrine" because it is a creation of the court system, also known as common-law precedent. This means that the clause will only be "read into" or considered to be part of the contract by the court during contractual litigation. As such, by invoking the *Christian Doctrine* during negotiations, a contracting professional is actually implying the following: If this disagreement devolves into litigation, the court will interpret the clause to be "read into" the contract.

Meanwhile, both parties in the disagreement are still negotiating over a contract that does not actually include the clause in question. In short, the party invoking the *Christian Doctrine* is in a relatively weak position because only expensive and time-consuming litigation will validate that position.
2. The second point to remember about the *Christian Doctrine* is that it requires a two-prong test of applicability
 - a. Most seem to grasp the first prong, which is that the clause must be "mandatory," or required by the FAR. The first prong is easily investigated by examining the prescription clause, which is found at the beginning of each FAR clause. Of course, the first prong is relatively simple, but not sufficient.
 - b. The second prong is the more difficult hurdle to clear: The clause must express some deeply ingrained aspect of public procurement policy. That is vague and subjective, which makes it much more difficult for the layman to evaluate or predict.

Considering these two points about the *Christian Doctrine*, the obvious question is: "Where can I find the list of clauses subject to the *Christian Doctrine*?"

Unfortunately, there is no such list.

Remembering the first point, the *Christian Doctrine* is a legal doctrine created by the court, which means it is subject to future court decisions and holdings. Therefore, the list of *Christian Doctrine* clauses is always subject to expansion via future litigation.

The only way to truly know that a specific clause falls under the *Christian Doctrine* is to identify a specific court case that holds that the *Christian Doctrine* applies to that clause.

Anything other than similar legal research is speculative at best.

\$700,000 (\$1.5 million for construction of any public facility), and are required to include the clause at 52.219-8, Utilization of Small Business Concerns, unless the acquisition is set aside or is to be accomplished under the 8(a) program.¹⁷

The prescription clause states, generally, that FAR 52.219-9 is inserted into solicitations and contracts expecting to exceed \$700,000 and that offer subcontracting possibilities. As a reminder: This guidance applies to the contracting officer, *not* to the prime contractor's contract manager. The failure to properly include this clause in an applicable federal contract is the government's failure, not the prime contractor's. The prime contractor merely negotiated and signed the contract, and was not subject to the guidance in FAR 19.708(b).

Flow-down Prescription Clauses Provide Clear Guidance to Prime (and Lower-Tier) Contractors for Flow-down Clause Insertion

The federal government has *privity* of contract, or a direct contractual relationship, only with the first-tier, prime contractor. Therefore, the only way the federal government can enforce its desire to include contract clauses in lower-tier subcontracts is by requiring the prime contractor to flow down such clauses, and the only way to require the prime contractor to flow down contract clauses is to insert mandatory language in the prime contractor's contract to do so.

Some FAR clauses are not required to be flowed down to subcontractors. However, others state that they *must* be included in some or all lower-tier subcontracts. The guidance for flowing down contract clauses into subcontracts is different from the guidance for inserting FAR clauses into prime contracts. The guidance must be

different because of the fact that the FAR applies to federal employees conducting acquisitions, but does not apply to federal contractors. The main difference is where the guidance is found.

Prescription clause guidance is found in the FAR, as the FAR applies to federal employees conducting acquisitions. Flow-down prescription clauses must be found in the clauses themselves—because, as previously stated, the FAR does not apply to federal contractors.

There is No Such Thing as a “Self-Deleting” Clause!

There is one more widely discredited and dangerous myth that the contracting profession needs to debunk and jettison. This is the infamous myth of “self-deleting” clauses. The theory behind this canard is that if the clause is somehow inappropriate for or inapplicable to the contract, it is somehow “self-deleting,” and will not be considered enforceable in a court of law. As a universal principle, this is an absurd



idea and must not be spread by contracting professionals.

Clauses do not “self-delete.” Some clauses *might* be found to be unenforceable, illegal, or otherwise rendered inoperative. But to rely on the nonexistent legal principle of “self-deleting” clauses during negotiations is the mark of a rank amateur.

If there is a flow-down clause in the sub-contract that should not be there, for any reason, be a professional and negotiate to get the clause either deleted or amended in a way that makes sense. During negotiations, do not accept a clause that seems wrong on the basis of that clause being “self-deleting.”

Think about it this way: If the clause is allegedly “self-deleting” anyway, why should your negotiation counterpart object to deleting it immediately? The contracting profession is long overdue to eradicate the pernicious myth of “self-deleting” clauses.

Once more, for emphasis: No, the FAR does not apply to contractors, and “self-deleting” clauses do not exist! **CM**

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ENDNOTES

1. For more guidance and suggestions on improving the contracting profession and developing as a contracting professional, see Christoph Mlinarchik, “Secrets of Superstar Contracting Professionals,” *Contract Management Magazine* (May 2014).
2. Christoph LLC. See www.christophllc.com for more information.
3. Mlinarchik (May 2014), *op. cit.*
4. For more information on the proper sources of authority in federal contracting, see Christoph Mlinarchik, “Sticks and Stones: How Words and Terms of Art Can Hurt the Contracting Profession,” *Contract Management Magazine* (January 2016).
5. FAR 1.000, “Scope of Part” (emphasis added).
6. The FAR is divided into subchapters, parts, subparts, sections, and subsections. (See FAR 1.105-2(a).)
7. FAR 1.104, “Applicability.”
8. In this context, *acquisition* is considered a *term of art*, or “a term that has a specialized meaning in a particular field or profession.” (www.merriam-webster.com/dictionary/term%20of%20art; see also Mlinarchik (January 2016), note 4.)
9. FAR 2.101, “Definitions” (emphasis added).
10. *Ibid.* (emphasis added).
11. Proposed and final changes to the FAR and other federal regulations are available online at www.federalregister.gov.
12. As an example, NCMA offers a number of in-person and virtual education opportunities on the FAR and numerous other contracting subjects. For more information, see www.ncmahq.org/learn-and-advance/events-education.
13. The FAR is a set of regulations that can be found at Title 48, Chapter 1 of the *Code of Federal Regulations (CFR)*. The CFR is the centrally organized repository for all final regulations promulgated by executive agencies through public notice and comment procedures outlined in the Administrative Procedures Act or other legislation.
14. There are also regulatory supplements to the FAR, like the *Defense FAR Supplement (DFARS)*, found in Title 48, Chapter 2 of the CFR.
15. The *Christian Doctrine* is a legal rule that allows for clauses that are both mandatory and express deeply ingrained procurement policy to be “read into” a contract by operation of law. The *Christian Doctrine* is named for *G.L. Christian & Assoc. v. United States*, 312 F.2d 418 (Ct. Cl., 1963).
16. FAR 52.219-9.
17. FAR 19.708(b)(1).

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