

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

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44.000 Scope of part.

This part prescribes policies and procedures for consent to subcontracts and for review, evaluation, and approval of contractors' purchasing systems.

Subpart 44.1—General

44.101 Definitions.

"Approved purchasing system" means a contractor's purchasing system that has been reviewed and approved in accordance with this part.

"Consent to subcontract" means the contracting officer's written consent for the prime contractor to enter into a particular subcontract.

"Contractor," as used in this part, means the total contractor organization or a separate entity of it, such as an affiliate, division, or plant, that performs its own purchasing.

"Contractor purchasing system review (CPSR)" means the complete evaluation of a contractor's purchasing of material and services, subcontracting, and subcontract management from development of the requirement through completion of subcontract performance.

"Facilities" (see 45.301).

"Subcontract," as used in this part, means any contract as defined in Subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

"Subcontractor," as used in this part, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

44.102 Policy.

(a) Consent to subcontracts is required under 44.201 when the subcontract work is complex, the dollar value is substantial, or the Government's interest is not adequately protected by competition and the type of prime contract or subcontract.

(b) Consent requirements may be waived when the contractor's purchasing system has been reviewed and approved in accordance with Subpart 44.3.

Subpart 44.2—Consent to Subcontracts

44.201 Consent requirements.

44.201-1 Fixed-price prime contracts.

(a) Consent to subcontracts is not required under prime contracts that are firm-fixed-price or fixed-price with economic price adjustment provisions. (See paragraph (c) of this section for unpriced modifications.)

(b) If the contractor has an approved purchasing system—

(1) Consent to subcontracts is not required under other fixed-price prime contracts (but see subparagraph (b)(2) of this subsection); and

(2) Consent is required for subcontracts identified in the subcontracts clause of the contract. These can be subcontracts for critical systems, subsystems, or components, or other subcontracts selected by the contracting officer as needing special surveillance. Subcontracts may be identified by subcontract number or by class of items (*e.g.*, subcontracts for engines on a prime contract for airframes).

(c) If the contractor does not have an approved purchasing system, consent to the subcontracts specified in paragraph (d) of this section is required—

(1) Under fixed-price incentive and fixed-price re-terminable prime contracts; and

(2) Under prime contracts that are firm-fixed-price or fixed-price with economic price adjustment provisions, only when a new subcontract results from an unpriced modification to the prime contract.

(d) Under prime contracts required to include the clause at 52.244-1, Subcontracts (Fixed-Price Contracts), consent is required under paragraph (c) of this subsection for any subcontract that is—

(1) Estimated to be over \$100,000 (or less if the contract clause has been modified as permitted by its preface); or

(2) One of a number of subcontracts, under the prime contract, with a single subcontractor for the same or related supplies or services, which in the aggregate are estimated to be over \$100,000 (or less, if the contract clause has been modified as permitted by its preface).

44.201-2 Cost-reimbursement and letter prime contracts.

(a) Consent is required under cost-reimbursement and letter prime contracts (except facilities contracts) for subcontracts—

(1) For fabrication, purchase, rental, installation, or other acquisition of special test equipment valued at more than \$25,000 or of any items of facilities, or

(2) That have experimental, developmental, or research work as one of their purposes

(b) If the contractor does not have an approved purchasing system, consent is also required, under cost-reimbursement and letter prime contracts for—

(1) Cost-reimbursement, time-and-materials, or labor-hour subcontracts and

(2) Fixed-price subcontracts that exceed either \$25,000 or 5 percent of the total estimated cost of the prime contract; except that for DoD, Coast Guard, and NASA, the amount shall be the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the prime contract.

(c) If the contractor has an approved purchasing system—

(1) Consent is not required for the subcontracts identified in paragraph (b) of this subsection (but see subparagraph (c)(2) of this subsection). However, advance notification is still required by 10 U.S.C. 2306(e) or 41 U.S.C. 254(b); and

(2) Consent is required for subcontracts identified in the subcontracts clause of the contract. These can be subcontracts for critical systems, subsystems, or components, or other subcontracts selected by the contracting officer as

needing special surveillance. Subcontracts may be identified by subcontract number or by class of items (*e.g.*, subcontracts for engines on a prime contract for airframes).

44.201-3 Other prime contracts.

Except for purchase of raw material or commercial stock items, consent is required for all subcontracts under time-and-material contracts. Consent is required for subcontracts under prime contracts for—

(a) Architect-engineer services; and

(b) Mortuary services, refuse service, or shipment and storage of personal property, when an agency requires prior approval of subcontractors' facilities.

44.201-4 Contractor use of Government sources.

The contracting officer's written authorization for the contractor to purchase from Government sources (see Part 51) constitutes consent.

44.202 Contracting officer's evaluation.

44.202-1 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) is responsible for consent to subcontracts, except when the contracting officer retains the contract for administration or withholds the consent responsibility from delegation to the ACO. In such cases, the contract administration office should assist the contracting office in its evaluation as requested.

(b) The responsible contracting officer shall—

(1) Promptly evaluate the contractor's requests for consent to subcontract;

(2) Obtain assistance in the evaluation from subcontracting, audit, pricing, technical, or other specialists as necessary; and

(3) Notify the contractor in writing of consent or the withholding of consent, including any changes or corrections required.

(c) Designation of a specific subcontractor by the Government or evaluation of subcontracts during contract negotiations does not in itself satisfy the requirements for advance notification or consent pursuant to the clauses at 52.244-1, 52.244-2, and 52.244-3. However, if, in the opinion of the contracting officer, the advance notification or consent requirements were satisfied for certain subcontracts evaluated during negotiations, the contracting officer shall include a statement in the contract that those requirements have been satisfied. The statement shall identify the specific subcontracts and contain appropriate information concerning the extent to which such requirements are satisfied and/or limited with respect to future changes or revisions in work statement, specifications, or

other applicable aspects of the contract that may be subject to change. For fixed-price contracts see 44.204(a)(3).

44.202-2 Considerations.

(a) The contracting officer responsible for consent shall review the request and supporting data and consider the following:

(1) Is the decision to subcontract consistent with the contractor's approved make-or-buy program, if any (see 15.407-2)?

(2) Is the subcontract for special test equipment or facilities that are available from Government sources (see Subpart 45.3)?

(3) Is the selection of the particular supplies, equipment, or services technically justified?

(4) Has the contractor complied with the prime contract requirements regarding small business subcontracting, including, if applicable, its plan for subcontracting with small, small disadvantaged and women-owned small business concerns (see Part 19)?

(5) Was adequate price competition obtained or its absence properly justified?

(6) Did the contractor adequately assess and dispose of subcontractors' alternate proposals, if offered?

(7) Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?

(8) Has the contractor performed adequate cost or price analysis or price comparisons and obtained accurate, complete, and current cost or pricing data, including any required certifications?

(9) Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?

(10) Has adequate consideration been obtained for any proposed subcontract that will involve the use of Government-furnished facilities?

(11) Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?

(12) Does the prime contractor comply with applicable cost accounting standards for awarding the subcontract?

(13) Is the proposed subcontractor on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (see Subpart 9.4)?

(b) Particularly careful and thorough consideration under paragraph (a) of this section is necessary when—

(1) The prime contractor's purchasing system or performance is inadequate;

(2) Close working relationships or ownership affiliations between the prime and subcontractor may preclude free competition or result in higher prices;

(3) Subcontracts are proposed for award on a non-competitive basis, at prices that appear unreasonable, or at

prices higher than those offered to the Government in comparable circumstances; or

(4) Subcontracts are proposed on a cost-reimbursement, time-and-materials, or labor-hour basis.

44.203 Consent limitations.

(a) The contracting officer's consent to a subcontract or approval of the contractor's purchasing system does not constitute a determination of the acceptability of the subcontract terms or price, or of the allowability of costs, unless the consent or approval specifies otherwise.

(b) Contracting officers shall not consent to—

(1) Cost-reimbursement subcontracts if the fee exceeds the fee limitations of 16.301-3;

(2) Subcontracts providing for payment on a cost-plus-a-percentage-of-cost basis;

(3) Subcontracts obligating the contracting officer to deal directly with the subcontractor;

(4) Subcontracts that make the results of arbitration, judicial determination, or voluntary settlement between the prime contractor and subcontractor binding on the Government; or

(5) Repetitive or unduly protracted use of cost-reimbursement, time-and-materials, or labor-hour subcontracts (contracting officers should follow the principles of 16.103(c)).

(c) Contracting officers should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor the right of indirect appeal to an agency board of contract appeals if the subcontractor is affected by a dispute between the Government and the prime contractor. Indirect appeal means assertion by the subcontractor of the prime contractor's right to appeal or the prosecution of an appeal by the prime contractor on the subcontractor's behalf. The clause may also provide that the prime contractor and subcontractor shall be equally bound by the contracting officer's or board's decision. The clause may not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the clause at 52.233-1, Disputes.

44.204 Contract clauses.

(a) *Fixed-price contracts.* (1) Except as specified in (a)(2) of this section, the contracting officer—

(i) Shall insert the clause at 52.244-1, Subcontracts (Fixed-Price Contracts), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed \$500,000; and

(ii) May insert the clause in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is not expected to exceed \$500,000, if the

contracting officer determines that its use will be in the Government's interest.

(2) The clause shall not be used—

(i) In solicitations and contracts for mortuary services, refuse services, or shipment and storage of personal property, when an agency prescribed clause on approval of subcontractors' facilities is required; or

(ii) In architect-engineer contracts.

(3) If the contracting officer elects to delete the requirement for advance notification of, or consent to, any subcontracts that were evaluated during negotiations, the contracting officer shall use the clause with its Alternate I.

(b) *Cost-reimbursement and letter contracts.* The contracting officer shall insert the clause at 52.244-2, Subcontracts (Cost-Reimbursement and Letter Contracts), in solicitations and contracts when a cost-reimbursement or letter contract is contemplated. If the contracting office is in DOD, the Coast Guard, or NASA, the contracting officer shall use the clause with its Alternate I. See also 44.205.

(c) *Time-and-materials and labor-hour contracts.* The contracting officer shall insert the clause at 52.244-3, Subcontracts (Time-and-Materials and Labor-Hour Contracts), in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated.

(d) *Architect-engineer contracts.* The contracting officer shall insert the clause at 52.244-4, Subcontractors and Outside Associates and Consultants, in fixed-price architect-engineer contracts.

(e) *Competition in subcontracting.* The contracting officer shall, when contracting by negotiation, insert the clause at 52.244-5, Competition in Subcontracting, in solicitations and contracts when the contract amount is expected to exceed the simplified acquisition threshold, unless—

(1) A firm-fixed-price contract, awarded on the basis of adequate price competition or whose prices are set by law or regulation, is contemplated; or

(2) A contract of the type and/or purpose identified in paragraphs (c) and (d) of this section is contemplated.

Subpart 44.3—Contractors' Purchasing Systems Reviews

44.301 Objective.

The objective of a contractor purchasing system review (CPSR) is to evaluate the efficiency and effectiveness with which the contractor spends Government funds and complies with Government policy when subcontracting. The review provides the administrative contracting officer (ACO) a basis for granting, withholding, or withdrawing approval of the contractor's purchasing system.

44.302 Requirements.

(a) Determine the need for a CPSR based on, but not limited to, the past performance of the contractor, and volume, complexity and dollar value of the subcontracting activity. If a contractor's sales to the Government (excluding sales under sealed bid procedures and sales of commercial items pursuant to Part 12) are expected to exceed \$25 million during the next year, perform a review to determine if a CPSR is needed. Such sales include those represented by prime contracts, subcontracts under Government prime contracts, and modifications. Generally, a CPSR is not performed for a specific contract. The head of the agency responsible for contract administration may raise or lower the \$25 million review level if such action is considered to be in the Government's best interest.

(b) Once an initial determination has been made under paragraph (a) of this section, at least every 3 years the cognizant contract administration activity will determine whether a purchasing system review is necessary. If necessary, the cognizant contract administration activity will conduct a purchasing system review.

44.303 Extent of review.

A CPSR requires an evaluation of the contractor's purchasing system. This evaluation shall not include subcontracts awarded by the contractor exclusively in support of Government contracts awarded to the contractor that used sealed bid procedures or that are for commercial items pursuant to Part 12. The considerations listed in 44.202-2 for consent evaluation of particular subcontracts also shall be used to evaluate the contractor's purchasing system, including the contractor's policies, procedures, and performance under that system. Special attention shall be given to—

(a) The degree of price competition obtained;

(b) Pricing policies and techniques, including methods of obtaining accurate, complete, and current cost or pricing data and certification as required;

(c) Methods of evaluating subcontractor responsibility, including the contractor's use of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (see 9.404) and, if the contractor has subcontracts with parties on the list, the documentation, systems, and procedures the contractor has established to protect the Government's interests (see 9.405-2);

(d) Treatment accorded affiliates and other concerns having close working arrangements with the contractor;

(e) Policies and procedures pertaining to small business concerns, including small disadvantaged and women-owned small business concerns;

(f) Planning, award, and postaward management of major subcontract programs;

(g) Compliance with Cost Accounting Standards in awarding subcontracts;

(h) Appropriateness of types of contracts used (see 16.103); and

(i) Management control systems, including internal audit procedures, to administer progress payments to subcontractors.

44.304 Surveillance.

(a) The ACO shall maintain a sufficient level of surveillance to ensure that the contractor is effectively managing its purchasing program.

(b) Surveillance shall be accomplished in accordance with a plan developed by the ACO with the assistance of subcontracting, audit, pricing, technical, or other specialists as necessary. The plan should cover pertinent phases of a contractor's purchasing system (preaward, postaward, performance, and contract completion) and pertinent operations that affect the contractor's purchasing and subcontracting. The plan should also provide for reviewing the effectiveness of the contractor's corrective actions taken as a result of previous Government recommendations. Duplicative reviews of the same areas by CPSR and other surveillance monitors should be avoided.

44.305 Granting, withholding, or withdrawing approval.

44.305-1 Responsibilities.

The cognizant ACO is responsible for granting, withholding, or withdrawing approval of a contractor's purchasing system. The ACO shall—

(a) Approve a purchasing system only after determining that the contractor's purchasing policies and practices are efficient and provide adequate protection of the Government's interests; and

(b) Promptly notify the contractor in writing of the granting, withholding, or withdrawal of approval.

44.305-2 Notification.

(a) The notification granting system approval shall include—

(1) Identification of the plant or plants covered by the approval;

(2) The effective date of approval; and

(3) A statement that system approval—

(i) Applies to all Federal Government contracts at that plant to the extent that cross-servicing arrangements exist;

(ii) Waives the contractual requirement for advance notification in fixed-price contracts, but not for cost-reimbursement contracts;

(iii) Waives the contractual requirement for consent to subcontracts in fixed-price contracts and for specified subcontracts in cost-reimbursement contracts but

not for those subcontracts, if any, selected for special surveillance and identified in the contract Schedule; and

(iv) May be withdrawn at any time at the ACO's discretion.

(b) In exceptional circumstances, consent to certain subcontracts or classes of subcontracts may be required even though the contractor's purchasing system has been approved. The system approval notification shall identify the class or classes of subcontracts requiring consent. Reasons for selecting the subcontracts include the fact that a CPSR or continuing surveillance has revealed sufficient weaknesses in a particular area of subcontracting to warrant special attention by the ACO.

(c) When recommendations are made for improvement of an approved system, the contractor shall be requested to reply within 15 days with a position regarding the recommendations.

44.305-3 Withholding or withdrawing approval.

(a) The ACO shall withhold or withdraw approval of a contractor's purchasing system when there are major weaknesses or when the contractor is unable to provide sufficient information upon which to make an affirmative determination. The ACO may withdraw approval at any time on the basis of a determination that there has been a deterioration of the contractor's purchasing system or to protect the Government's interest. Approval shall be withheld or withdrawn when there is a recurring noncompliance with requirements, including but not limited to—

(1) Cost or pricing data (see 15.403);

(2) Implementation of cost accounting standards (see 48 CFR Chapter 99 (FAR Appendix, loose-leaf edition));

(3) Advance notification as required by the clauses prescribed in 44.204; or

(4) Small business subcontracting (see Subpart 19.7).

(b) When approval of the contractor's purchasing system is withheld or withdrawn, the ACO shall within 10 days after completing the in-plant review (1) inform the contractor in writing, (2) specify the deficiencies that must be corrected to qualify the system for approval, and (3) request the contractor to furnish within 15 days a plan for accomplishing the necessary actions. If the plan is accepted, the ACO shall make a follow-up review as soon as the contractor notifies the ACO that the deficiencies have been corrected.

44.306 Disclosure of approval status.

Upon request, the ACO may inform a contractor that the purchasing system of a proposed subcontractor has been approved or disapproved, but shall caution that the Government will not keep the contractor advised of any changes in the approval status. If the proposed subcontractor

tor's purchasing system has not been reviewed, the contractor shall be so advised.

44.307 Reports.

The ACO shall distribute copies of CPSR reports; notifications granting, withholding, or withdrawing system approval; and Government recommendations for improvement of an approved system, including the contractor's response, to at least—

- (a) The cognizant contract audit office;
- (b) Activities prescribed by the cognizant agency; and
- (c) The contractor (except that furnishing copies of the contractor's response is optional).

Subpart 44.4—Subcontracts for Commercial Items and Commercial Components

44.400 Scope of subpart.

This subpart prescribes the policies limiting the contract clauses a prime contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with Section 8002(b)(2) (Public Law 103-355).

44.401 Applicability.

This subpart applies to all contracts and subcontracts. For the purpose of this subpart, the term "subcontract" has the same meaning as defined in Part 12.

44.402 Policy requirements.

(a) Contractors and subcontractors at all tiers shall, to the maximum extent practicable:

- (1) Be required to incorporate commercial items or nondevelopmental items as components of items delivered to the Government; and
- (2) Not be required to apply to any of its divisions, subsidiaries, affiliates, subcontractors or suppliers that are furnishing commercial items or commercial components any clause, except those—

- (i) Required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components; or
- (ii) Determined to be consistent with customary commercial practice for the item being acquired.

(b) The clause at 52.244-6, Subcontracts for Commercial Items and Commercial Components, implements the policy in paragraph (a) of this section. Notwithstanding any other clause in the prime contract, only those clauses identified in the clause at 52.244-6 are required to be in subcontracts for commercial items or commercial components.

(c) Agencies may supplement the clause at 52.244-6 only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items.

44.403 Contract clause.

The contracting officer shall insert the clause at 52.244-6, Subcontracts for Commercial Items and Commercial Components, in solicitations and contracts for supplies or services other than commercial items.

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