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44.000 Scope of part.

(a) This part prescribes policies and procedures for *consent to subcontracts* or advance notification of subcontracts, and for review, evaluation, and approval of contractors' purchasing systems.

(b) The consent and advance notification requirements of subpart 44.2 are not applicable to prime contracts for commercial *supplies* or *commercial services* acquired pursuant to part 12.

Subpart 44.1 - General

44.101 Definitions.

As used in this part-

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

Contractor 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.

Subcontract 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 means any supplier, distributor, vendor, or firm that furnishes *supplies* or services to or for a prime *contractor* or another *subcontractor*.

Subpart 44.2 - Consent to Subcontracts

44.201 Consent and advance notification requirements.

44.201-1 Consent requirements.

(a) If the contractor has an approved purchasing system, consent is required for subcontracts specifically identified by the *contracting officer* in the subcontracts clause of the contract. The *contracting officer may* require *consent to subcontract* if the *contracting officer* has determined that an individual consent action is required to protect the Government adequately because of the subcontract type, complexity, or value, or because the subcontract needs special surveillance. These can be subcontracts for critical systems, subsystems, *components*, or services. Subcontracts *may* be identified by subcontract number or by class of items (*e.g.,* subcontracts for engines on a prime contract for air-frames).

(b) If the contractor does not have an approved purchasing system, *consent to subcontract* is required for cost-reimbursement, time-and-materials, labor-hour, or letter contracts, and also for unpriced actions (including unpriced modifications and unpriced *delivery orders*) under fixed-price contracts that exceed the *simplified acquisition threshold*, for-

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

(2) Fixed-price subcontracts that exceed-

(i) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, the greater of the *simplified acquisition threshold* or 5 percent of the total estimated cost of the contract; or

(ii) For civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, either the *simplified acquisition threshold* or 5 percent of the total estimated cost of the contract.

(c) Consent *may* be required for subcontracts under prime contracts for *architect-engineer services*.

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

44.201-2 Advance notification requirements.

Under cost-reimbursement contracts, the contractor is required by statute to notify the *contracting officer* as follows:

(a) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, unless the contractor maintains an approved purchasing system, 10 U.S.C. 3322(c) requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds the greater of the *simplified acquisition threshold* or 5 percent of the total estimated cost of the contract.

(b) For civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, even if the contractor has an approved purchasing system, 41 U.S.C. 3905 requires notification before the award of any cost-plus-fixed-fee subcontract, or any fixed-price subcontract that exceeds either the *simplified acquisition threshold* or 5 percent of the total estimated cost of the contract.

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 *contracting officer* responsible for consent *shall* review the contractor’s notification and supporting data to ensure that the proposed subcontract is appropriate for the risks involved and consistent with current policy and sound business judgment.

(c) Designation of specific subcontractors during contract negotiations does not in itself satisfy the requirements for advance notification or consent pursuant to the clause at 52.244-2. 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* identify those subcontracts in paragraph (j) of the clause at 52.244-2.

44.202-2 Considerations.

(a) The *contracting officer* responsible for consent *must*, at a minimum, 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*, equipment or real property that are available from Government sources?

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

(4) Has the contractor complied with the prime contract requirements regarding-

(i) Small business subcontracting, including, if applicable, its plan for subcontracting with small, veteran-owned, service-disabled veteran-owned, *HUBZone*, small disadvantaged and *women-owned small business concerns* (see part 19); and

(ii) Purchase from nonprofit agencies designated by the Committee for Purchase From People Who Are Blind or Severely Disabled 41 U.S.C.8504 (see part 8)?

(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

certified cost or pricing data and *data other than certified cost or pricing data*?

(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-provided equipment and real property?

(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 listed as excluded in the *System for Award Management* (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 15.404-4(c)(4)(i);

(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)

(1) The *contracting officer shall* insert the clause at 52.244-2, Subcontracts, in *solicitations* and contracts when contemplating-

(i) A cost-reimbursement contract;

(ii) A letter contract that exceeds the *simplified acquisition threshold*;

(iii) A fixed-price contract that exceeds the *simplified acquisition threshold* under which unpriced contract actions (including unpriced modifications or unpriced *delivery orders*) are anticipated;

(iv) A time-and-materials contract that exceeds the *simplified acquisition threshold*; or

(v) A labor-hour contract that exceeds the *simplified acquisition threshold*.

(2) If a cost-reimbursement contract is contemplated, for civilian agencies other than the Coast Guard and the National Aeronautics and Space Administration, the *contracting officer shall* use the clause with its *Alternate* I.

(3) Use of this clause is not required in-

(i) Fixed-price architect-engineer contracts; or

(ii) 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.

(b) The *contracting officer may* insert the clause at 52.244-4, Subcontractors and Outside Associates and Consultants (*Architect-Engineer Services*), in architect-engineer contracts.

(c) 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 time-and-materials, labor-hour, or architect-engineer contract 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) The ACO *shall* determine the need for a CPSR based on, but not limited to, the *past performance* of the contractor, and the volume, complexity and dollar value of subcontracts. If a contractor's sales to the Government (excluding competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts and sales of commercial *supplies* and *commercial services* pursuant to part 12) are expected to exceed $25 million during the next 12 months, perform a review to determine if a CPSR is needed. 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 it 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 three years the ACO *shall* determine whether a purchasing system review is necessary. If necessary, the cognizant *contract administration office* will conduct a purchasing system review.

44.303 Extent of review.

A CPSR requires an evaluation of the contractor's purchasing system. Unless segregation of subcontracts is impracticable, this evaluation *shall* not include subcontracts awarded by the contractor exclusively in support of Government contracts that are competitively awarded firm-fixed-price, competitively awarded fixed-price with economic price adjustment, or awarded for commercial *supplies* and *commercial services* 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 results of *market research* accomplished;

(b) The degree of price competition obtained;

(c) *Pricing* policies and techniques, including methods of obtaining *certified cost or pricing data*, and *data other than certified cost or pricing data*;

(d) Methods of evaluating subcontractor responsibility, including the contractor's use of the *System for Award Management* Exclusions (see 9.404) and, if the contractor has subcontracts with parties on the Exclusions list, the documentation, systems, and procedures the contractor has established to

protect the Government's interests (see 9.405-2);

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

(f) Policies and procedures pertaining to small business concerns, including small disadvantaged, women-owned, veteran-owned, *HUBZone*, and service-disabled veteran-owned small business concerns;

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

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

(i) Appropriateness of types of contracts used (see 16.103);

(j) Management control systems, including internal audit procedures, to administer progress payments to subcontractors; and

(k) Implementation of higher-level quality standards.

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) *Certified cost or pricing data* (see 15.403);

(2) Implementation of cost accounting standards (see 48 CFR chapter 99);

(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'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 Products and Commercial Services

44.400 Scope of subpart.

This subpart prescribes the policies limiting the *contract clauses* a contractor *may* be required to apply to any subcontractors that are furnishing *commercial products*, including *commercial components*, or *commercial services* in accordance with 41 U.S.C. 3307.

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 products*, *commercial services*, 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 products* or *commercial services* any clause, except those-

(i) Required to implement provisions of law or Executive orders applicable to subcontractors

furnishing *commercial products* or *commercial services*; 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 Products* and *Commercial Services*, 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 products* or *commercial services*.

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

44.403 Contract clause.

The *contracting officer shall* insert the clause at 52.244-6, Subcontracts for *Commercial Products* and *Commercial Services*, in *solicitations* and contracts other than those for *commercial products* or *commercial services*.