# Subpart 970.44—Management and Operating Contractor Purchasing

**Parent topic:** PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

## 970.4400 Scope.

This subpart prescribes policies and procedures concerning the purchasing systems and activities of management and operating contractors.

## 970.4401 Responsibilities.

## 970.4401-1 General.

(a) In the Department of Energy (DOE), overall responsibility for the oversight of the performance of management and operating contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of the Contracting Activity (HCA). Contracting officers are responsible for the management and operating contractors' conformance with this subpart and the applicable terms and conditions of their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs.

(b) In carrying out their overall responsibilities, HCAs shall—

(1) Require management and operating contractors to maintain written descriptions of their individual purchasing systems and methods and further require that, upon award or extension of the contract, the entire written description be submitted to the contracting officer for review and acceptance;

(2) Require that any changes to the management and operating contractor's written description having any substantive impact upon the contractor's purchasing system and methods be submitted to the contracting officer for review and acceptance prior to issuance;

(3) Ensure the review of individual purchasing actions of certain types, or above stated dollar levels, by the contracting officer pursuant to 48 CFR subpart 44.2 or as set forth in the contractor's approved system and methods; and

(4) Ensure that periodic appraisals of the contractor's management of all facets of the purchasing function, including compliance with the contractor's approved system and methods, are performed by the contracting officer.

(c) In performing the reviews required by paragraphs (b)

(1) and (2), and the appraisals required by paragraph (b)(4) of this subsection, HCAs shall assure that contracting officers determine that the contractors' written systems and methods are consistent with this subpart and the applicable terms and conditions of their contracts.

# 970.4401-2 Review and approval.

(a) The Heads of the Contracting Activities shall establish thresholds, by subcontract type and dollar level, for the review and approval of proposed subcontracting actions by each management and operating contractor under their cognizance. Such thresholds may not exceed the authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive. In establishing these thresholds, the Heads of the Contracting Activities should consider such factors as the following—

(1) The nature of work to be performed under the management and operating contract;

(2) The size, experience, ability, reliability, and organization of the management and operating contractor's purchasing function;

(3) The internal controls, procedures, and organizational stature of the management and operating contractor's purchasing function; and

(4) Policies with respect to such reviews and approvals established by the Senior Procurement Executive.

(b) Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41, entitled Production of Special Nuclear Material, of the Atomic Energy Act of 1954, as amended.

(c) The Heads of the Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchasing from contractor-affiliated sources or the purchase of specific items, or classes of items, which by the terms of the contract may require DOE approval.

(d) The Heads of the Contracting Activities may raise or lower the review and approval thresholds established pursuant to paragraph (a) of this subsection at any time. Such action may be considered upon the periodic review of the contractor's purchasing system, but in any case those adjusted thresholds may not exceed the approval authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive.

(e) DOE approvals of specific proposed purchases pursuant to this subpart shall communicate that such approval does not relieve the management and operating contractor of any obligation under its prime contract with DOE; is given without prejudice to any rights or claims of the Government thereunder; creates no obligation on the part of the Government to the subcontractor, and is not a predetermination of the allowability of costs to be incurred under the subcontract.

(f) Contracting officers shall assure that management and operating contractors establish and maintain subcontract files which contain those documents essential to present an accurate and adequate record of all purchasing transactions.

(g) Contracting officers shall assure that management and operating contractors document purchases in writing, setting forth the information and data used in determining that the purchases are in the best interest of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the purchase.

(h) The Heads of the Contracting Activities shall assure that the contracting activity establishes and maintains files of the documents associated with the review and approval of subcontract actions

subject to DOE review and approval. Those files shall include, among other necessary documentation, an appraisal of the proposed action by the contracting activity and a copy of the approving or disapproving document forwarded to the management and operating contractor, including a listing of any deficiencies, a listing of any required corrective actions, any suggestions, or other relevant comments.

## 970.4401-3 Advance notification.

(a) Contracting officers shall assure that the written description of the management and operating contractor's purchasing system and methods provides for advance notice to the DOE contracting officer of the proposed award of the following specified types of subcontracts, except as stated in paragraph (b) of this subsection—

(1) Pursuant to section 304(b) of the Federal Property and Administrative Service Act of 1949, as amended (41 U.S.C. 254(b)):

(i) Cost reimbursement-type subcontracts of any award value; and

(ii) Fixed price-type subcontracts which exceed the simplified acquisition threshold, or 5 percent of the total estimated cost of the prime contract.

(2) Purchases from contractor-affiliated sources over a value established by the HCA.

(b) Pursuant to section 602(d)13 of the Act (40 U.S.C. 474(13)) referred to in paragraph (a) of this section, the advance notification requirement for the types of purchases listed in paragraphs (a)

(1) and (2) of this subsection shall not apply to subcontracts relating to functions derived from the Atomic Energy Commission.

(c) The advance notice shall contain, at a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of competition, or justification for a noncompetitive purchase procurement. The contracting officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

## 970.4402 Contractor purchasing system.

## 970.4402-1 Policy.

(a) DOE contracts for the management and operation of its facilities, the design and production of nuclear weapons, energy research and development, and the performance of other services. These management and operating (M&O) contractors have been selected for their technical and managerial expertise and are expected to bring to bear these technical and managerial skills to accomplish the significant Federal mission(s) described in their contracts with, and work plans approved by, DOE.

(b) Purchasing done by management and operating contractors is one area in which the particular skills of the contractors will be brought to bear in order to more readily accomplish the contractors'

assigned missions. The contracting procedures of the contractor's organization, therefore, form the basis for the development of a purchasing system and methods that will comply with its contract with DOE and this subpart.

(c) The M&O contractor's purchasing performance, including compliance with the contractor's approved system and methods, will be evaluated against the performance criteria and measures set forth in FAR subpart 44.3, using the procedures articulated in DOE policies including DOE guidance on oversight of M&O Contractors' Purchasing Systems.

## 970.4402-2 General requirements.

The following shall apply to the purchasing systems of management and operating contractors:

(a) The objective of a management and operating contractor's purchasing system is to deliver to its customers on a timely basis those best value products and services necessary to accomplish the purposes of the Government's contract. To achieve this objective, contractors are expected to use their experience, expertise and initiative consistent with this subpart.

(b) The purchasing systems and methods used by management and operating contractors shall be well-defined, consistently applied, and shall follow purchasing practices appropriate for the requirement and dollar value of the purchase. It is anticipated that purchasing practices and procedures will vary among contractors and according to the type and kinds of purchases to be made.

(c) Contractor purchases are not Federal procurements, and are not directly subject to the Federal Acquisition Regulations in 48 CFR. Nonetheless, certain Federal laws, Executive Orders, and regulations may affect contractor purchasing, as required by statute, regulation, or contract terms and conditions.

(d) Contractor purchasing systems shall identify and apply the best in commercial purchasing practices and procedures (although nothing precludes the adoption of Federal procurement practices and procedures) to achieve system objectives. Where specific requirements do not otherwise apply, the contractor purchasing system shall provide for appropriate measures to ensure the—

(1) Acquisition of quality products and services at fair and reasonable prices;

(2) Use of capable and reliable subcontractors who either—

(i) Have track records of successful past performance, or

(ii) Can demonstrate a current superior ability to perform;

(3) Minimization of acquisition lead-time and administrative costs of purchasing;

(4) Use of effective competitive techniques;

(5) Reduction of performance risks associated with subcontractors, and facilitation of quality relationships which can include techniques such as partnering agreements, ombudsmen, and alternative disputes procedures;

(6) Use of self-assessment and benchmarking techniques to support continuous improvement in purchasing;

(7) Maintenance of the highest professional and ethical standards;

(8) Maintenance of file documentation appropriate to the value of the purchase and which is adequate to establish the propriety of the transaction and the price paid; and

(9) Maximization of opportunities for small business, HUBZone small business, small disadvantaged business, and woman-owned small business concerns to participate in contract performance.

## 970.4402-3 Purchasing from contractor-affiliated sources.

(a) A management and operating contractor may purchase from sources affiliated with the contractor (any division, subsidiary, or affiliate of the contractor or its parent company) in the same manner as from other sources, provided—

(1) The management and operating contractor's purchasing function is independent of the proposed contractor-affiliated source;

(2) The same terms and conditions would apply if the purchase were from a third party;

(3) Award is made in accordance with policies and procedures designed to permit effective competition which have been approved by the contracting officer. (This requirement for competition shall not preclude acquisition of technical services from contractor-affiliated entities where those entities have a special expertise, and the basis therefore is documented.); and

(4) The award is legally enforceable where the entities are separately incorporated.

(b) Subcontracts for performance of contract work itself (as distinguished from the purchase of supplies and services needed in connection with the performance of work) require DOE authorization and may involve an adjustment of the contractor's fee, if any. If the management and operating contractor seeks authorization to have some part of the contract work performed by a contractor-affiliated source, and that contractor's performance of that work was a factor in the negotiated fee, DOE approval would normally require—

(1) That the contractor-affiliated source perform such work without fee or profit; or

(2) An equitable downward adjustment to the management and operating contractor's fee, if any.

(c) Determination on cost of money allowance as prescribed at 48 CFR 31.225-10 shall be treated as follows:

(1) When a purchase from a contractor-affiliated source results from competition and is in accord with provisions and conditions of paragraphs (a)(1) through (a)(4) of this subsection, the contractor-affiliated source may include cost of money as an allowable element of the costs of its goods or services supplied to the contractor; provided—

(i) The purchase is based on cost as set forth in 48 CFR 31.205-26(e); and

(ii) The cost of money amount is computed in accordance with 48 CFR 31.205-10 and related

procedures (see 970.30).

(2) When a purchase from a contractor-affiliated source is made non-competitively, cost of money shall not be considered an allowable element of the cost of the contractor-affiliated source purchase.

## 970.4402-4 Nuclear material transfers.

(a) Management and operating contractors, in preparing subcontracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall be required to assure that each such subcontract or agreement contains a—

(1) Description of the material to be transferred;

(2) Provision specifying the method by which the quantities are to be measured and reported;

(3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) Provision for the use of an independent third party as an umpire to settle unresolved differences in the analytical samples; and

(5) Provision specifying in detail which party shall bear the costs of resolving a difference and what constitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

## 970.4403 Contract clause.

The contracting officer shall insert the clause at 970.5244-1, Contractor Purchasing System, in all management and operating contracts.