

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 4, 22, 35, 36, 44, and 52

[FAR Case 95-011]

RIN 9000-AH57

Federal Acquisition Regulation;
Subcontract Consent

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to reduce the consent to subcontract requirements. The rule eliminates the requirement for consent to subcontract when there is an approved purchasing system, unless specifically required by the contracting officer. The rule also eliminates the consent requirement for fixed-price incentive contracts, and increases the threshold for the requirement on time-and-material contracts to the same level as other covered subcontracts. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before June 20, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: 95-011@www.arnet.gov.

Please cite FAR case 95-011 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 for information about content or clarification. For information pertaining to status or publication schedules, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 95-011.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends the FAR as a result of recommendations of the Contract Administration Services Reform Process Action Team.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the consent to subcontract requirement has a very small administrative cost that is passed along to the Government as part of the contract price. This rule will reduce the requirement for contractors to seek Government consent to subcontract. Also, this rule should have no effect upon small entities in terms of potential subcontracting opportunities since this rule does not change subcontracting requirements but only reduces the Government review and consent requirement. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 95-011), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies because the proposed changes impose reporting or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* Necessary requests for approval of the information collection requirements have been submitted to the Office of Management and Budget under Section 3507(d) of the Act.

DATES: Comments may be submitted on information collection requirements on or before June 20, 1997.

ADDRESSES: Send written comments on information collection requirements of this proposed rule to the Office of Information and Regulatory Affairs of OMB, Attn.: Mr. Peter N. Weiss, FAR Desk Officer, Room 10236, New Executive Office Building, Washington, DC 20503, and a copy to the FAR Secretariat at the address listed for comments on the proposed rule.

List of Subjects in 48 CFR Parts 4, 22, 35, 36, 44, and 52

Government procurement.

Dated: April 2, 1997.

Ralph Destefano,

Acting Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Parts 4, 22, 35, 6, 44, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 4, 22, 35, 6, 44, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. 2301 to 2331; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

4.705-3 [Amended]

2. Section 4.705-3 is amended in the parenthetical of paragraph (f) by removing “52.244-1 and”.

PART 22—APPLICATION OF LABOR
LAWS TO GOVERNMENT
ACQUISITIONS

3. Section 22.810 is amended by revising paragraph (g) to read as follows:

22.810 Solicitation provisions and
contract clauses.

* * * * *

(g) The contracting officer shall insert the clause at 52.222-28, Equal Opportunity Preaward Clearance of Subcontracts, in solicitations and contracts, except for construction, when the amount of the contract is expected to be for \$1 million or more and includes the clause prescribed in 44.204(a).

* * * * *

PART 35—RESEARCH AND
DEVELOPMENT CONTRACTING

4. Section 35.009 is amended by revising the last sentence of the paragraph to read as follows:

35.009 Subcontracting research and
development effort.

* * * The clause at 52.244-2, Subcontracts, prescribed for certain types of contracts at 44.204(a), requires the contracting officer's prior approval for the placement of certain subcontracts.

PART 36—CONSTRUCTION AND
ARCHITECT-ENGINEER CONTRACTS

5. Section 36.606 is amended by revising paragraph (e) to read as follows:

36.606 Negotiations.

* * * * *

(e) Because selection of firms is based upon qualifications, the extent of any subcontracting is an important negotiation topic. The clause prescribed

at 44.204(b), "Subcontractors and Outside Associates and Consultants (Architect-Engineer Services)" (see 52.244-4), limits a firm's subcontracting to firms agreed upon during negotiations.

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

6. Section 44.000 is revised to read as follows:

44.000 Scope of part.

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.

44.102 [Removed]

7. Section 44.102 is removed.

8. Sections 44.201 and 44.201-1 are revised to read as follows:

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 airframes).

(b) If the contractor does not have an approved purchasing system, consent to subcontract is required under cost-reimbursement contracts, letter contracts, other unpriced contract actions (including unpriced modifications and unpriced delivery orders), time-and-materials contracts, or labor-hour contracts for—

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

(2) Fixed-price subcontracts that exceed the greater of—

(i) The simplified acquisition threshold, or

(ii) 5 percent of the total estimated cost of the prime 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.

9. Section 44.201-2 is revised to read as follows:

44.201-2 Advance notification requirements.

Under cost-reimbursement contracts, even if the contractor has an approved purchasing system and consent to subcontract is not required under 44.201-1, the contractor is required by statute (10 U.S.C. 2306(e) or 41 U.S.C. 254(b)) to notify the agency before the award of—

(a) Any cost-plus-fixed-fee subcontract; or

(b) Any fixed-price subcontract that exceeds—

(1) 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 estimated cost of the prime contract; or

(2) 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 estimated cost of the prime contract.

44.201-3 and 44.201-4 [Removed]

10. Sections 44.201-3 and 44.201-4 are removed.

11. Sections 44.202 and 44.202-1 are revised to read as follows:

44.202 Contracting officer's evaluation.

44.202-1 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) is responsible for consent to subcontract, 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 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 specify in the contract that those requirements have been satisfied (see 44.204(a)(3)).

12. Section 44.202-2 is amended by revising paragraph (a) introductory text to read as follows:

44.202-2 Considerations.

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

* * * * *

13. Section 44.204 is revised to read as follows:

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

(i) For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, the contracting officer shall use the clause with its Alternate I; or

(ii) 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 II.

(3) 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 use the clause with its Alternate III.

(4) Use of this clause is not required in:

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

(ii) 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.

(b) The contracting officer may insert the clause at 52.244-4, Subcontractors and Outside Associates and

Consultants (Architect-Engineer Services), in fixed-price 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.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.244-1 [Removed and Reserved]

14. Section 52.244-1 is removed and reserved.

15. Section 52.244-2 is revised to read as follows:

52.244-2 Subcontracts.

As prescribed in 44.204(a)(1), insert the following clause:

Subcontracts (DATE)

(a) Definitions. As used in this clause—

Approved purchasing system means a Contractor's purchasing system that has been reviewed and approved in accordance with part 44 of the Federal Acquisition Regulation (FAR).

Consent to subcontract means the Contracting Officer's written consent for the prime Contractor to enter into a particular subcontract.

Subcontract means any contract as defined in FAR 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.

(b) This clause does not apply to subcontracts for special test equipment.

(c) When this clause is included in a fixed-price type contract, consent to subcontract is required only on unpriced contract actions (including unpriced modifications or unpriced delivery orders) under such contracts.

(d) If the Contractor does not have an approved purchasing system, consent to subcontract is required for any subcontract if—

(1) The proposed subcontract is of the cost-reimbursement, time-and-materials, or labor-hour type;

(2) The proposed subcontract is fixed-price and exceeds the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of this contract.

(e) If the Contractor has an approved purchasing system, the Contractor nevertheless shall obtain the Contracting Officer's written consent before placing the following subcontracts:

(f)(1) The Contractor shall notify the Contracting Officer reasonably in advance of placing any subcontract or modification thereof for which consent is required under paragraph (c), (d), or (e) of this clause, including the following information:

(i) A description of the supplies or services to be subcontracted.

(ii) Identification of the type of subcontract to be used.

(iii) Identification of the proposed subcontractor.

(iv) The proposed subcontract price.

(v) The subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost or Pricing Data, if required by other contract provisions.

(vi) The subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract.

(vii) A negotiation memorandum reflecting:

(A) The principal elements of the subcontract price negotiations;

(B) The most significant considerations controlling establishment of initial or revised prices;

(C) The reason cost or pricing data were or were not required;

(D) The extent, if any to which the Contractor did not rely on the subcontractor's cost or pricing data in determining the price objective and in negotiating the final price;

(E) The extent to which it was recognized in the negotiation that the subcontractor's cost or pricing data were not accurate, complete, or current; the action taken by the Contractor and the subcontractor; and the effect of any such defective data on the total price negotiated;

(F) The reasons for any significant difference between the Contractor's price objective and the price negotiated; and

(G) A complete explanation of the incentive fee or profit plan when incentives are used. The explanation shall identify each critical performance element, management decisions used to quantify each incentive element, reasons for the incentives, and a summary of all trade-off possibilities considered.

(2) The Contractor is not required to notify the Contracting Officer in advance of entering into any subcontract for which consent to subcontract is not required under paragraph (c), (d) or (e) of this clause.

(g) Unless the consent or approval specifically provides otherwise, neither consent by the Contracting Officer to any subcontract nor approval of the Contractor's purchasing system shall constitute a determination;

(1) Of the acceptability of any subcontract terms or conditions,

(2) Of the allowability of any cost under this contract, or

(3) To relieve the Contractor of any responsibility for performing this contract.

(h) No subcontract or modification thereof placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement type subcontracts shall not exceed the fee limitations in paragraph 15.903(d) of the FAR.

(i) The Contractor shall give the Contracting Officer immediate written notice of any action or suit filed and prompt notice of any claim made against the Contractor by any subcontractor or vendor that, in the opinion of the Contractor, may result in litigation related in any way to this contract, with respect to which the Contractor may be entitled to reimbursement from the Government.

(j) The Government reserves the right to review the Contractor's purchasing system as set forth in FAR Subpart 44.3.

(End of clause)

Alternate I (DATE). As prescribed in 44.204(a)(2)(i), substitute the following subparagraph (f)(2) for subparagraph (f)(2) of the basic clause:

(f)(2) If the Contractor has an approved purchasing system and consent is not required under paragraph (c), (d), or (e) of this clause, the Contractor nevertheless shall notify the Contracting Officer reasonably in advance of entering into any—

(i) Cost-plus-fixed-fee subcontract; or

(ii) Fixed-price subcontract that exceeds the greater of—

(A) The simplified acquisition threshold;

or

(B) 5 percent of the total estimated cost of this contract. The notification shall include the information required in subparagraphs (f)(1)(i) through (f)(1)(iv) of this clause.

Alternate II (DATE). As prescribed in 44.204(a)(2)(ii), substitute the following subparagraph (f)(2) for subparagraph (f)(2) of the basic clause:

(f)(2) If the Contractor has an approved purchasing system and consent is not required under paragraph (c), (d), or (e) of this clause, the Contractor nevertheless shall notify the Contracting Officer reasonably in advance of entering into any (i) cost-plus-fixed-fee subcontract, or (ii) fixed-price subcontract that exceeds either (A) the simplified acquisition threshold or (B) 5 percent of the total estimated cost of this contract. The notification shall include the information required in subparagraphs (f)(1)(i) through (f)(1)(iv) of this clause.

Alternate III (DATE). As prescribed in 44.204(a)(3), add the following paragraph (k) to the basic clause:

(k) Paragraph (d) of this clause does not apply to the following subcontracts, which were evaluated during negotiations:

52.244-3 [Removed and Reserved]

16. Section 52.244-3 is removed and reserved.

17. Section 52.244-4 is amended by revising the section heading, the introductory paragraph, and the clause heading to read as follows:

52.244-4 Subcontractors and Outside Associates and Consultants (Architect-Engineer Services).

As prescribed in 44.204(b), insert the following clause: Subcontractors and

Outside Associates and Consultants
(Architect-Engineer Services) (Date)

* * * * *

18. Section 52.244-5 is amended by
revising the introductory paragraph to
read as follows:

52.244-5 Competition in Subcontracting.

As prescribed in 44.204(c), insert the
following clause:

* * * * *

[FR Doc. 97-10246 Filed 4-18-97; 8:45 am]

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