

Policy Flash 2020-40 Attachment 1

This Attachment summarizes and reiterates existing regulations, policy and procedures that require DOE Contracting Officers (COs) to perform independent analyses when reviewing subcontract consent packages, contractor purchasing systems, and potential organizational conflicts of interest. Additionally, this attachment reminds COs these actions and other actions are subject to the Headquarters Business Clearance Review (BCR) Process and are areas of interest in Procurement Management Reviews (PMRs) as well as are set forth in the DOE Acquisition Guide Chapters (AGC) 71.1 and 71.4, respectively.

COs are reminded of the following requirements that they must follow:

Subcontract Review and Consent

Federal Acquisition Regulation (FAR) Subpart 44.2, Consent to Subcontracts, sets forth the requirements for COs to review and approve subcontracts. FAR 44.202-2 requires COs who are responsible for subcontract consent to review the contractor's request and all supporting data. Particularly careful and thorough consideration by the CO 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.

Additionally, FAR Subpart 44.303 addresses contractor purchasing system reviews (see below). Specifically, FAR 44.303(e) requires special attention be given to any treatment accorded affiliates and other concerns having close working arrangements with the contractor.

Contractors' Purchasing Systems Reviews (CPSRs)

FAR Subpart 44.3, requires a CPSR to ensure the contractor: spends Government funds efficiently and effectively; and complies with Government policy when subcontracting.

Specifically,

- FAR 44.302 requires COs to 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.

- FAR 44.303 requires a CPSR evaluation of the contractor's purchasing system. 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.
- FAR 44.304 sets forth CO requirements to maintain a sufficient level of surveillance to ensure that the contractor is effectively managing its purchasing program.

DOE AGC 70.44.3, provides guidance on DOE's Oversight of its M&O Contractors' Purchasing Systems. COs should take advantage of all of the resources DOE provides to ensure their M&O contractors meet FAR's requirements for their purchasing systems. This AGC guidance addresses the construct for how DOE ensures its M&O contractors meet the FAR's requirements for their management of their purchasing systems. The construct for ensuring its M&O contractors (and other contractors if appropriate) effectively manage their purchasing systems comprises the development and execution of the FAR surveillance plan (surveillance) supported by:

(1) The DOE Procurement Evaluation and Reengineering Team (PERT) Handbook for CPSRs - identifies Contractor Purchasing System Evaluation Criteria and CO Risk Assessment and Oversight Tools - Risk Assessment Approach (surveillance).

The CO Risk Assessment Tool is required to be used by all COs in capturing activities used in assessing and documenting the COs purchasing system determination, as set forth in FAR 44.3 and conducting contractor oversight. COs must review contractor auditing of DOE's Subcontracts and Consent Thresholds as part of their CPSR when conducting their Risk Assessment Tool determination.

(2) Utilization of M&O contractors' purchasing expertise.

(3) BCR and PMR reviews and Cooperative Audit Strategy.

Organizational Conflicts of Interest (OCI)

FAR coverage of OCIs is set forth in Subpart 9.5. This coverage provides the foundational principles and processes for identifying and addressing OCI issues. The FAR prescribes responsibilities, general rules, and procedures for COs to identify, evaluate, and resolve OCIs.

DOE-specific OCI guidance is included in the Department of Energy Acquisition Regulation (DEAR) at 909.5 and DEAR 970.0905. Additionally, the DOE AGC 9.505 addresses Organizational and Consultant Conflicts of Interest, stating that COs are responsible for performing a thorough analysis of potential offeror conflicts of interest, to ensure impartiality and objectivity in the performance of the Government's contractual objectives. This guidance emphasizes the importance of the COs role and responsibilities in identifying, analyzing, and resolving OCI issues. The DOE AGC includes descriptions of the various types of OCIs, and examples of how COs can adequately address and resolve OCI issues.