



MAY THE CLAUSE BE WITH YOUSM

52.244-2, Subcontracts

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Master, may I have your consent to take on young Anakin as a subcontractor?

My consent is not required, unless he poses an undue risk to the Force.

But if he does, then R2-D2 should begin preparing the paperwork for review by the Jedi Council.

Agenda

- When does the Clause apply?
- 52.244-2, Subcontracts
- Approved Purchasing Systems
- Consent to Subcontracts
- Substance of Government Review
- Tips/Suggestions
- Conclusion

When Does This Clause Apply?

- Does not apply to prime contracts for commercial products or commercial services (FAR 44.000(b))
 - *But we regularly see this in commercial contracts, nonetheless...*
- **Included** in the following types of prime contracts:
 - Cost-reimbursement
 - Letter contracts > \$250,000
 - Fixed-price contracts > \$250,000 for which unpriced contract actions/modifications are expected
 - T&M/LH > \$250,000

When Does This Clause Apply? (cont'd)

- **Not included** in the following types of prime contracts:
 - Fixed price A&E
 - Mortuary services?
 - Refuse services?
 - Shipment and storage of personal property?



When Does This Clause Apply? (cont'd)

- **Arguably**... you should only see this clause in the following types of contracts:
 - Non-commercial contracts that are...
 - Cost-Reimbursable **or** FFP/T&M/LH > \$250,000
- *But, as I said, you see this clause much more commonly than this...*

FAR 52.244-2, Subcontracts (Jun 2020)

(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 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 the prime contract or a subcontract. It includes, but is not limited to, *purchase orders*, and changes and modifications to purchase orders.

(b) 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), and only if required in accordance with paragraph (c) or (d) of this clause.

FAR 52.244-2, Subcontracts

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

- (1) Is of the cost-reimbursement, time-and-materials, or labor-hour type; or
- (2) Is fixed-price and exceeds—
 - (i) For a contract awarded by the Department of Defense, the Coast Guard, or the National Aeronautics and Space Administration, the greater of the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of the contract; or
 - (ii) For a contract awarded by a civilian agency other than the Coast Guard and the National Aeronautics and Space Administration, either the simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award, or 5 percent of the total estimated cost of the contract.

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

Approved Purchasing Systems

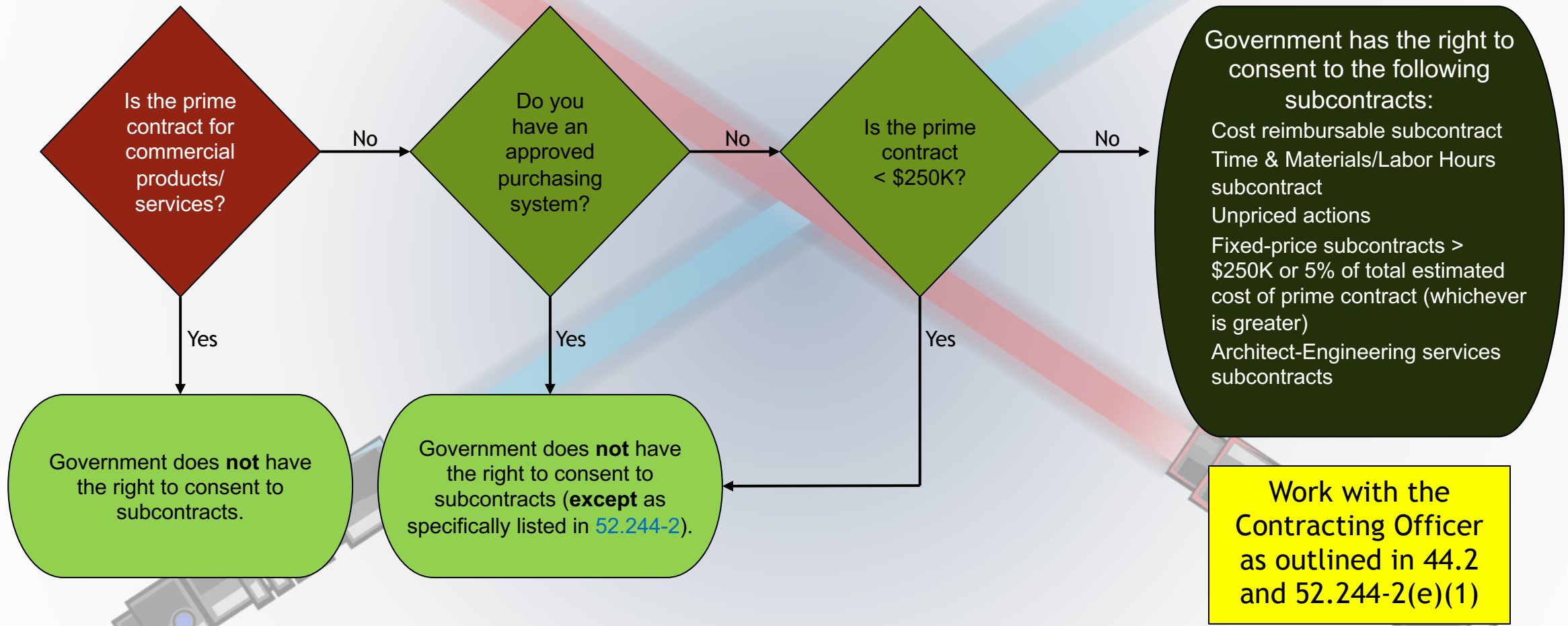
- Purchasing System reviews
 - Formal Contractor Purchasing System Review (CPSR) required for contractors with prime contracts expected to >\$25M
 - DOD: > \$50M (???)
 - Every 3 years(?)
- No definitive Purchasing System requirements in the FAR
 - And DFARS 252.244-7001 provides specific requirements for DOD-approved purchasing systems
- Key Features (per FAR Subpart 44.3):
 - Written policies/manuals?
 - Subcontract Management Plan?
 - Small Business Subcontracting Plan?
 - Training?

FAR 44.3, Contractor Purchasing System Review

• Your purchasing system should consider the following issues (as applicable):

- Industry surveys
- Market research
- Competition requirements
- Pricing analysis
- Commercial Item determinations
- J&A protocols
- Creating and distributing RFPs
- Drafting SOWs
- Reporting
- Responsibility determinations
- T&Cs
- Flowdowns
- Evaluation procedures
- Administration of Awards
- Make/Buy protocols
- Monitoring/Q&A from subs
- Production
- Payments

FAR 44.2: Government Consent to Subcontracts



FAR 52.244-2, Subcontracts



(e)(1) The Contractor shall **notify the [Administrative] Contracting Officer reasonably in advance of placing any subcontract** or modification thereof for which consent is required under paragraph (b), (c), or (d) 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 certified **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.

FAR 52.244-2, Subcontracts



(e)(1) The Contractor shall **notify the [Administrative] Contracting Officer reasonably in advance of placing any subcontract or modification thereof for which consent is required ...**, including the following information:

* * *

(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 certified 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 certified 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 certified 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 is not required under paragraph (b), (c), or (d) of this clause.

Substance of Government Review

- Factors to be considered under FAR 44.202-2
 - (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?

Substance of Government Review (cont'd)

- Factors to be considered under FAR 44.202-2:
 - (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)?

Substance of Government Review (cont'd)

- Factors to be considered under FAR 44.202-2:
 - (b) **Particularly careful and thorough consideration** under paragraph (a) . . . 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**.



FAR 52.244-2, Subcontracts

(f) 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.

(g) 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 FAR 15.404-4(c)(4)(i).



FAR 52.244-2, Subcontracts

(h) 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.

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

(j) Paragraphs (c) and (e) of this clause do not apply to the following subcontracts, which were evaluated during negotiations:

Tips/Suggestions

- Avoiding problems under FAR Subpart 44.2
 - Act early
 - Get SBA involved (if applicable)
 - Guarantee work/finances
 - Is there "float" in the delivery schedule?
 - Put technical/administrative people on-site at subcontractor
- Key Mitigation Strategies
 - Work with your CO/ACO
 - Get timelines/review periods that work for the schedule
 - What are the Government's concerns?
 - Tailor your actions to mitigate these issues
 - Work consistent with your established plan
 - Get it in writing!

Conclusion

- Remember that 52.244-2 applies much more **narrowly** than most people think
 - Overreaching invites “conversations” with your customer...
 - Does not apply to commercial prime contracts
- Be aware of the types of subcontracts that do (and do not) require government consent
 - **Higher-risk subcontracts** under non-commercial primes will typically require consent
- Approved purchasing systems are helpful, but not mandatory
 - If you have an approved system, only listed subcontracts require approval
- Contractors have the responsibility to prepare materials for the Contracting Officer to issue consent
 - The rule is **process based** and the government’s rights are non-negotiable
 - Remember, **consent ≠ approval**

Questions?



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