



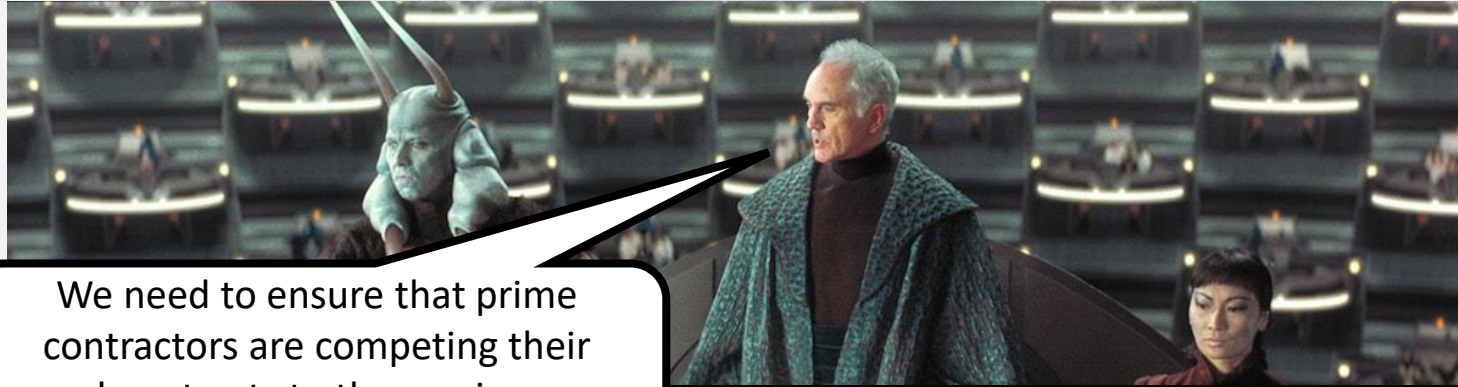
MAY THE CLAUSE BE WITH YOUSM

52.244-5, Competition in Subcontracting

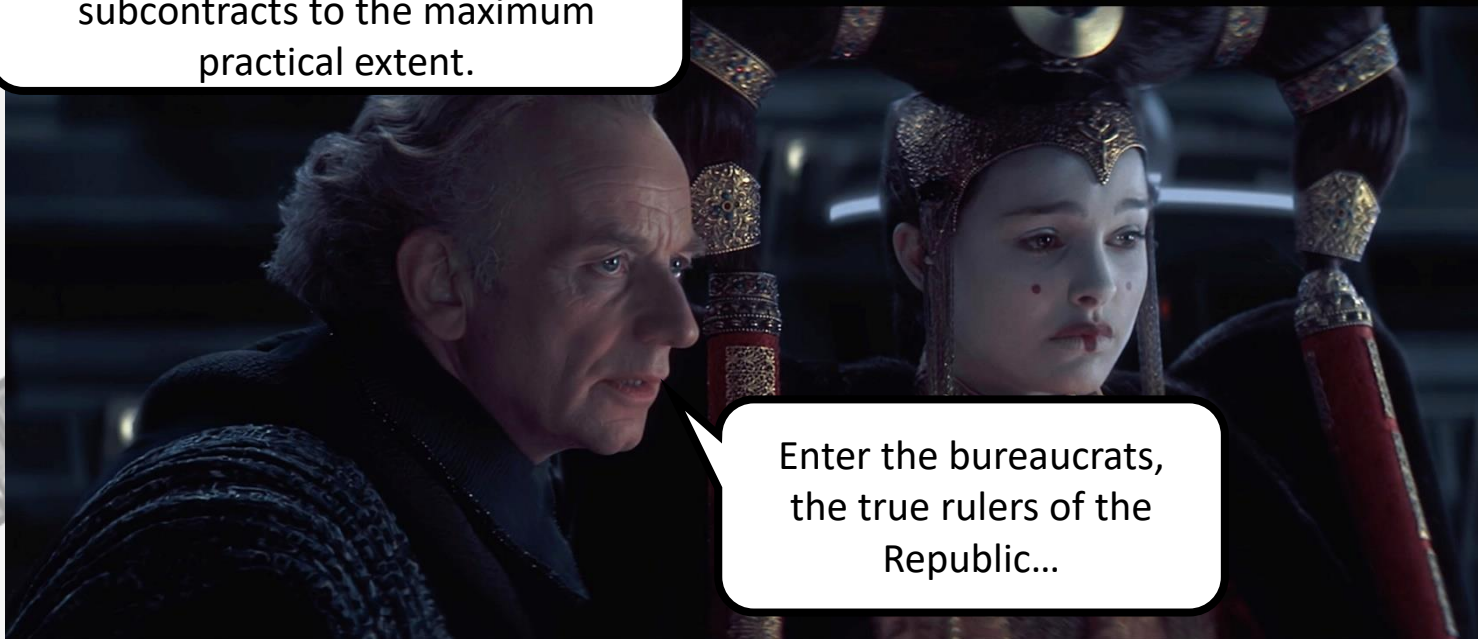
David Gallacher, Kutak Rock

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The Problem We Are Trying To Solve...



We need to ensure that prime contractors are competing their subcontracts to the maximum practical extent.



Enter the bureaucrats, the true rulers of the Republic...

Agenda

- Background
- FAR 52.244-5, Competition in Subcontracting
 - Competition
 - Practicality
 - Objectives and Requirements
- Applicability

Background

- 52.244-5 has remained unchanged since December 1996
- 52.244-5 implements the Competition in Contracting Act (41 U.S.C. § 3301) at the subcontract level
- Federal policy favors competition for better price
- But please note:
 - 52.244-5 is **NOT** a statutory requirement
 - 52.244-5 implements policy, not a strict legal requirement
 - Approved Purchasing System (FAR Subpart 44.3) requires some level of competition

FAR 52.244-5, Competition in Subcontracting

- (a) The Contractor shall select subcontractors (including suppliers)
 - on a competitive basis
 - to the maximum practical extent
 - consistent with the objectives and requirements of the contract.
- (b) If the Contractor is an approved mentor under the Department of Defense Pilot Mentor-Protégé Program (Pub. L. 101-510, section 831 as amended), the Contractor may award subcontracts under this contract on a noncompetitive basis to its protégés.

“On a Competitive Basis”

- “Competition” focuses on the contractor’s **process**, not necessarily the price
 - *U.S. ex rel. Garzione v. PAE Government Services*, 164 F. Supp.3d 806 (E.D. Va. 2016) (dismissing whistleblower complaint because prime contractor competed a requirement, despite the fact that award was made to the highest-priced offeror).
- “The regulations applicable to what is required by way of a ‘competitive process’ and what constitutes a ‘reasonable’ price are general and by their terms confer a great deal of discretion and judgment on the selecting contractor.” *Id.* at 813.

“On a Competitive Basis” (cont’d)

- “FAR 52.244-5 requires the contractor to select subcontracts/purchase orders on a competitive basis to the maximum practical extent. To know if this has been achieved the analyst needs to know the following”:
 - Number of bids requested
 - Number of bids received
 - Number of bids responsive.

DCMA’s Contractor Purchasing System Review (CPSR) Guidebook (Sep. 10, 2021)
(https://www.dcmamilitary.com/Portals/31/Documents/CPSR/CPSR_Guidebook_091021.pdf)



“To the Maximum Practical Extent”

- Competition priorities for the government when consenting to subcontracts:

- ✓ 44.202-2(a)(5): adequate price competition
- ✓ 44.202-2(b)(2): treatment of affiliates
- ✓ 44.202-2(b)(3): noncompetitive procurements

- Hallmarks of a contractor’s Purchasing System:

- ✓ 44.303(a): market research
- ✓ 44.303(b): price competition
- ✓ 44.303(e): treatment of affiliates
- ✓ 252.244-7001(c)(7): competitive sourcing
- ✓ 252.244-7001(c)(8): determination of fair and reasonable prices

“To the Maximum Practical Extent” (cont’d)

- What about purchases from affiliated companies?
 - FAR 44.2-202(b): “Particularly careful and thorough consideration ... is necessary when...Close working relationships or ownership affiliations between the prime and subcontractor may preclude free competition or result in higher prices.”
 - *U.S. ex rel. Howard v. Lockheed Martin Corp.*, 14 F. Supp.3d 982, 1006 n.15 (S. D. Oh. 2014) (rejecting argument that a prime contractor violated the False Claims Act by improperly awarding subcontracts to vendors with preexisting relationships absent a specific, additional contract requirement that would prohibit any such potential conflicts of interest that might arise from the preexisting relationship).
- What about “strategic” relationships?
 - Teaming Agreements
 - Mentor-Protégé Agreements
- What about long term agreements (LTAs)?
 - Difficult to maintain adequate price competition
 - Did the prime contractor have sufficient data/background with the subcontractor to justify the LTA?

“To the Maximum Practical Extent” (cont’d)

- Competition involving related and non-related entities

When developing acquisition strategies, program managers and contracting officers shall consider increasing government insight into the subcontractor selection process when another division of a potential offeror might be a competitor for a particular subsystem. In that situation, the solicitation should ask offerors to submit a plan explaining how they will ensure that the subcontractor competition will be conducted fairly and result in the best value for DoD.

— Principal Deputy Under Secretary Of Defense Memo, May 5, 1999

“To the Maximum Practical Extent” (cont’d)

- A competition plan could include:
 - How source selection decisions will provide best value to Government
 - How intellectual property will be protected
 - Whether independent advisors will assess the competition
 - Whether firewalls will be implemented
 - Whether there are benefits to dual-sourcing that outweigh the costs
 - Perhaps also OCIs...

“Consistent with the Objectives and Requirements of the Contract”

- Technical requirements?
- Quality requirements?
- Policy objectives?
 - Small businesses?
 - Reduced price?
- Directed sources?

- What does your contract specifically require?
- What does your customer require?

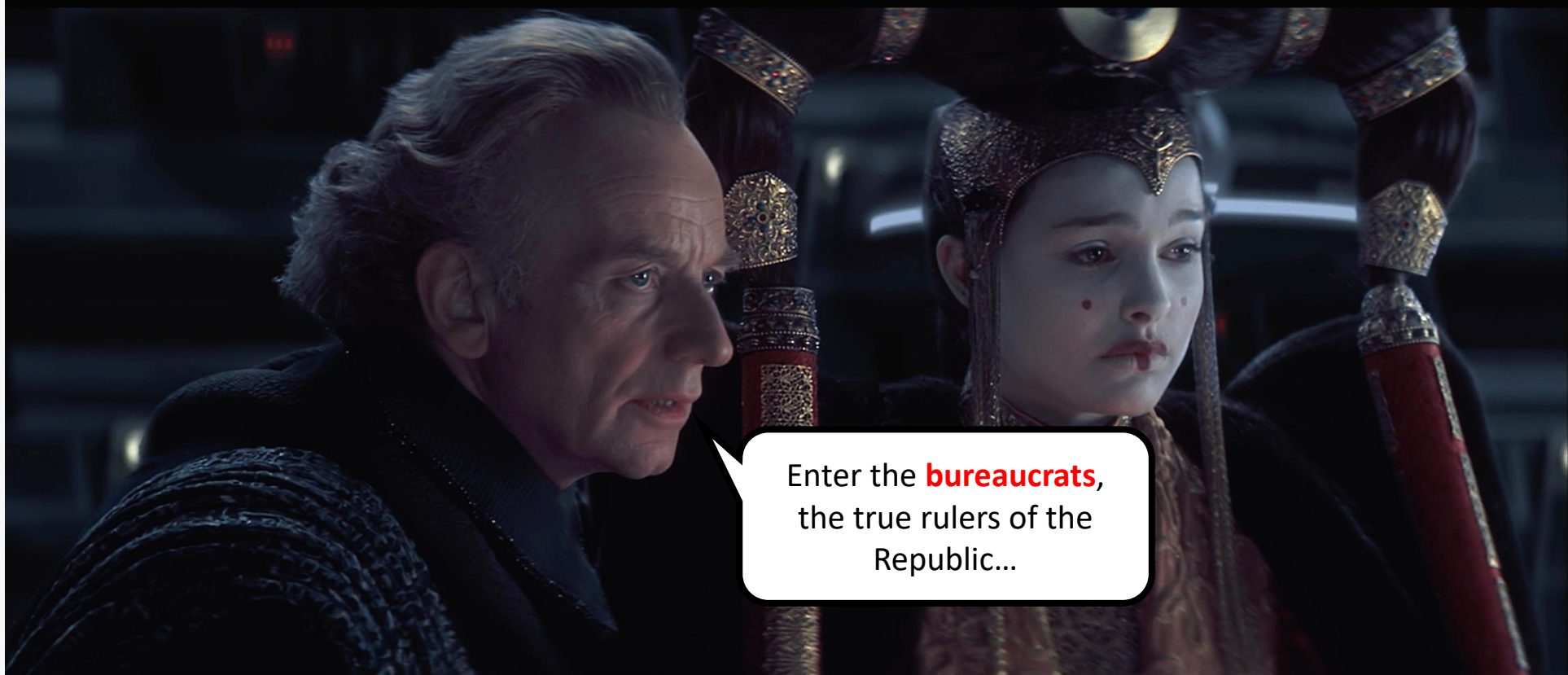
When Does FAR 52.244-5 Apply?

- Per FAR 44.204(c), this clause should be included in prime contracts:
 - When the Contracting Officer is contracting by negotiation;
 - When the prime contract amount is expected to exceed \$250,000 (simplified acquisition threshold);
 - (Only?) when the Government has “consent to subcontract” rights under FAR Subpart 44.2?
 - FAR Subpart 44.2 does not apply to commercial prime contracts (FAR 44.000(b))
 - But the clause does not appear to be expressly limited to non-commercial contracts

When Does FAR 52.244-5 Apply? (cont'd)

- Per FAR 44.204(c)(1) and (2), the clause does **not** apply when:
 - Firm-fixed-price prime contract is awarded based on adequate price competition;
 - Firm-fixed-price prime contract is awarded based on prices set by law or regulation;
 - T&M /LH prime contract;
 - A&E prime contract.
- 52.244-5 is **not** a mandatory flowdown clause (per FAR 52.244-6 and 52.212-5(e)), although it is commonly flowed down in any event

Conclusion



Questions?



David Gallacher

+1 202.828.2437 | Washington, D.C.

david.gallacher@kutakrock.com