



SESSION GUIDE  
SEASON 2023, EPISODE TWENTY-THREE  
FAR PART 44: SUBCONTRACTING

## I. Introduction

We've mentioned subcontracting in passing quite a few times in past chapters. However, we haven't yet discussed the ins and outs of subcontracting generally. We've discussed subcontracting-related accounting issues and small business issues, but not the overarching policies and procedures that govern subcontract management.

Before we go further, there are a few important things to note. First is the definition of "subcontractor." We've briefly looked at this definition in the past, but since we're going to learn about the specifics of subcontracting today it behooves us to look at it again. Per **FAR 44.101**, the definition of "subcontractor" is "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor." Under that definition a "subcontractor" could be anyone who assists a prime contractor to perform any of its operations. However, to understand the scope and limitations of **FAR Part 44** it is important to examine how "subcontract" is defined in **FAR 44.101** as well. More specifically, that any reference to "subcontracts" is limited to contracts (including purchase orders and modifications or changes to purchase orders) entered into solely for the **performance of a prime contract**. See **FAR 44.101** (emphasis added) We sometimes refer to subcontractors by "tiers"—a firm that furnishes supplies or services to the prime contractor directly under a subcontract is a tier one subcontractor. Firms that a first-tier subcontractor may contract with to support their efforts under that subcontract are called "second-tier" subcontractors, and so forth.

Also recall that subcontractors do not have "privity" with the Government. There is no direct contractual relationship between the subcontractor and the Government, so as a general rule the subcontractor may only approach the Government through the prime contractor.

## II. Subcontracting Policies and Procedures

While the Government doesn't have privity with the subcontractor, in some cases the prime contractor is required to seek and obtain the Government's consent prior to contracting work out to third parties. Such consent is most often required under "flexibly priced" contracts, but may be required in a variety of circumstances. The Government wants to make sure that the prime contractor is working only with responsible qualified contractors and spending its (i.e., our!) money efficiently, effectively, and in compliance with applicable regulations. Said another way, the Government doesn't want the prime contractor to subcontract with just anybody! Consent requirements are discussed in this Part. Other

issues discussed in this Part include contractor purchasing system reviews (CPSR) and special issues related to commercial items and components.

CPSRs have an important relationship to the rules requiring consent to subcontract; if the prime contractor in question has an approved purchasing system in place, there are fewer subcontracting consent hoops to jump through, because the Government has already approved of the way in which the prime contractor “subcontracts” in its purchasing of goods or services. Commercial items are important because of the emphasis in the FAR on commercial items. We will examine each of these three topics—consent to subcontract, CPSRs, and commercial item subcontracting—in depth in the following sections.

### **A. Consent to Subcontracts**

Consent requirements are mainly found in cost-reimbursement contracts, time-and-materials and labor hour contracts, and letter contracts. Why? Because in those contracts, the choice of subcontractor and the terms of the subcontract directly affect the price to the Government. In contrast, subcontracting under firm-fixed-price contracts will not generally require the Government’s consent, because it is the prime contractor, not the Government, that will bear the cost (and risk) of a non-competitive or non-performing subcontractor. Note, however, that there is an exception for unpriced modifications under fixed-price contracts above the Simplified Acquisition Threshold. See **FAR 52.244-2(b)**.

The FAR identifies four general situations in which consent is necessary. But before we get too far into that, we have to ask: who is it who must consent to the subcontract? Usually, the ACO is responsible for the actual consent to subcontracts. **44.202-1(a)**. However, the CO is responsible for the other issues surrounding consent to subcontract, and is also the one who typically decides whether consent to subcontract is necessary. **44.202-1(b) and (c)**.

Let’s look at the four circumstances in which consent is necessary. The first circumstance involves prime contractors who possess an approved purchasing system. In that situation, the contractor needs consent to subcontract only for subcontracts the CO has specifically identified in the Subcontracts clause of the prime contract. The contractor can form other subcontracts without consent. **44.201-1(a)**. There may still be notification requirements, as laid out in **44.201-2**, but those are far less burdensome than consent requirements.

The second situation involves prime contractors who do not possess an approved purchasing system. In that situation, the contractor needs consent to subcontract for nearly everything (except fixed price contracts) that falls above the simplified acquisition threshold. A full list of contract types falling into that bucket can be found at **44.201-1(b)**. This is the category that imposes the most burden on prime contractors.

The third situation involves architect-engineer services. For this situation, the FAR merely says that the CO *may* require the contractor to obtain consent to subcontract. **44.201-1(c)**. The fourth and final situation involves prime contractors who wish to purchase goods or services from Government sources in accordance with the guidance set forth at **FAR Part 51**. In that situation, if the CO has issued a written consent to purchase from Government sources to the contractor, that’s considered consent to subcontract—but only as far as the written consent authorizes! **44.201-1(d)**.

So what does the CO (or ACO) responsible for consent have to consider when deciding whether to consent to a subcontract? As it turns out, there's a whole list of factors the CO has to consider. This list of thirteen considerations can be found at **44.202-2(a)**, and includes issues like whether the prime obtained adequate price competition and whether the proposed subcontract type is appropriate for the risks involved. Sometimes, the CO is also directed to pay special attention to all thirteen considerations. **44.202-2(b)**. Of course, the CO should always make careful decisions, but some circumstances—four, to be precise—require even more care than usual.

*Question 1* – What are the four situations in which the CO is directed to be especially careful and thorough in his consideration of the factors in **44.202-2(a)**?

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There are some limitations on what the CO's consent to a subcontract means. Consent to subcontract isn't a blank check for the prime. It isn't a determination of whether the subcontract's terms or price are acceptable, or whether subcontract costs are allowable (unless the consent clearly states that it is making this determination). **44.203(a)**. There are also a number of subcontracts the CO *cannot* consent to under any circumstances. These include cost-reimbursement subcontracts that contain a fee that exceeds the limits found at **15.404-4(c)(4)(i)** and subcontracts providing for payment on a cost-plus-a-percentage-of-cost basis (which, as you'll recall, is outright illegal in government contracting). **44.203(b)**. On the other hand, there are also limitations on the CO's ability to withhold consent. COs can't withhold consent simply because the subcontract contains a clause giving the subcontractor the right to indirectly appeal to an agency board of contract appeals if something happens in the prime contract that affects the subcontract. **44.203(c)**.

*Question 2* – What type of provisions in a subcontract's dispute resolution clause might a contracting officer determine are not permitted under **FAR 44.203(c)** and thus cause a subcontract to not be approved during the subcontract consent process?

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## B. Contractor Purchasing System Reviews

Consent requirements can be extremely burdensome to prime contractors, who often need to bring subcontractors onto the contract in an expeditious manner. The CO may be unwilling (or unable) to give requests for consent the same priority. This is why it can be extremely helpful—even necessary—for a prime contractor that does extensive subcontracting (such as a major systems integrator) to have an approved purchasing system.

We mentioned “approved purchasing system” a few times in the previous section, but what does that mean? How does a purchasing system become approved, and what’s the point of approval? **44.301** tells us that the point of a contractor purchasing system review (CPSR) is to evaluate the efficiency and effectiveness of the contractor’s spending of Government funds, and whether the contractor complies with Government policies regarding subcontracting. The CPSR is an important part of the approval process, since it gives ACOs a basis for granting, withholding, or withdrawing approval of the purchasing system. Not every purchasing system needs approval or review, though. The ACO decides whether to perform a review based on past performance, complexity of the contract, and the dollar value of the subcontracts under the contract. **44.302(a)**.

*Question 3* – True or false? Once an ACO has approved a contractor’s purchasing system, she is required to revisit that determination every five years thereafter. [Hint: check out **44.302(b)**]

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So what does the ACO actually review during a CPSR? Viewed from a high level, a CPSR will first examine the contractor’s purchasing policies to make sure they are complete and consistent with Government policies and applicable regulations. Then the CPSR auditor will look at a selected number of subcontracts to determine whether those purchasing policies have actually been followed. CPSRs can be very detailed, and very burdensome.

Since the purpose of performing a CPSR is to determine whether the prime contractor is being responsible when using Government funds to pay subcontractors, the ACO mainly reviews issues relevant to that question. This means that the ACO should give particular attention to certain problem areas, including price competition, pricing policies and techniques, and methods of evaluating subcontractor responsibility. **44.303**. It also means that the ACO won’t necessarily evaluate every single subcontract that falls under the contractor’s purchasing system. In fact, unless it’s impracticable to segregate the contractor’s subcontracts, the ACO *shall not* review any subcontracts that are exclusively in support of certain types of fixed-price contracts, or are for commercial items (since subcontracts under those types of contracts do not affect what the Government will pay). **44.303**. Once the ACO has finished the review and considered all the issues in **44.303**, she must continue to keep track of whether the contractor is effectively managing its purchasing program. **44.304(a)**. This surveillance dovetails with the review. The ACO develops a surveillance plan with the help of various specialists, and tailors the plan

to the individual contractor and any issues that arose during the CPSR. **44.304(b)**. The surveillance plan helps both the contractor and the Government combat inefficient and ineffective spending.

In addition to approval responsibilities, the ACO also has notification responsibility. He must notify the prime contractor *promptly* upon making his decision to grant, withhold, or withdraw approval of the contractor's purchasing system. **44.305-1(b)**. The contents of the notification depend on whether the ACO has approved the purchasing system, as you might expect. If the ACO has approved the contractor's purchasing system, the notification of approval must contain all relevant information in **44.305-2**, including identification of which consent and notification requirements have been waived. If the ACO has withheld or withdrawn approval, the notification must specify why the ACO has made that decision and which deficiencies the contractor must correct to qualify for approval. **44.305-3(b)**. Generally, these notifications only go to the contractor and to certain Government officials and bodies. However, the ACO can also inform a contractor of a proposed subcontractors' purchasing system status if the contractor asks. **44.306**.

*Question 4* – To what three core parties must the ACO distribute CPSR reports, notifications, and recommendations? [Hint: check out **44.307**]

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### C. A Quick Note on Commercial Items in Subcontracting

As you probably remember from our discussion of **Part 12** earlier in this Workbook, commercial items are treated differently from non-commercial items at the prime contracting level. (If you need a refresher on commercial items, go back to Chapter 7 of this Workbook.) For example, you might recall that the Government is required to use commercial items "to the maximum extent practicable," and that contracts for commercial items can use more streamlined contracting procedures with fewer contract clauses and less cost analysis. The same holds true in subcontracting. Contractors and subcontractors at all tiers—prime, sub, sub of the sub, and so on—are directed to incorporate commercial items as much as possible. **44.402(a)(1)**. This is true even where the prime contract is not a commercial item contract; any prime contract can benefit from using commercial items. To facilitate this requirement, contractors are only required to put two varieties of clauses in their subcontracts for commercial items: clauses required by law or executive order, and clauses that are part of customary commercial practice for acquiring the items in question. **33.403(a)(2)**.

*Question 5* – What contract clause should a CO insert into a contract or solicitation to implement the policy we’ve just discussed? Are there any situations where this clause is unnecessary? [Hint: check out **44.403**]

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### Discussion Questions

1. What's the difference between consent to subcontract and advance notification of subcontracting? Why do you think the FAR draws this distinction? [Hint: check out **44.201**]

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2. FARFun LLC , a large government contractor, is seeking to subcontract with F&S Technical, an IT subcontractor on a cost reimbursement contract for the development of an artificial intelligence driven contract management system . Because of its contract value, FARFun is required to notify its contracting officer reasonably in advance of placing this subcontract. What information must be included on this notification? [Hint: check out **52.244-2(e)**]

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3. What information must a contractor provide to a contracting officer so that she may perform a "Risk Assessment" and determine if a contractor "qualifies" for a CPSR. What is the responsibility of the DCMA CPSR Group? [Hint: See Resources (DCMA CPSR Guidebook)]

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4. **FAR 52.244-5** provides that a prime contractor under certain contracts is required to obtain subcontractor competition to the maximum extent practicable. Under what circumstance may subcontractor competition not be practicable? What types of contracts are explicitly exempt from subcontract competition requirements? [Hint: check out **44.204(c)**]

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5. FARFun is back, and wants to give it's wholly owned subsidiary, FunFAR, a subcontract for commercial IT services. Does FARFun need consent to subcontract to FunFAR? Why or why not? [Hint: check out **44.402**]

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6. **FAR Question:** In this section, we spoke a lot about consent to subcontract. However, **FAR Part 44** never defines *Consent to Subcontract*. Provide the definition of *Consent to Subcontract* and identify where this definition can be found.

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### **Answer Key**

*Answer 1* – The four situations wherein a contracting officer must be especially careful and thorough when consenting to subcontracts are: (i) The prime contractor's purchasing system or performance is inadequate; (ii) Close working relationships or ownership affiliations between the prime and subcontractor may preclude free competition or result in higher prices; (iii) 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; and (iv) Subcontracts are proposed on a cost-reimbursement, time-and-materials, or labor-hour basis.

*Answer 2* – The subcontract should not contain a provision which attempts to obligate the contracting officer or appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the Disputes clause set forth at FAR 52.233-1.

*Answer 3* – False, a contracting officer is required to review a contractor's purchasing system every 3 years once it has been approved.

*Answer 4* – The ACO must distribute CPSR reports, notifications, and recommendations to the following parties: (i) the cognizant contract audit office; (ii) activities prescribed by the cognizant agency; and (iii) the contractor (except that furnishing copies of the contractor's response is optional).

*Answer 5* – The CO shall insert clause FAR 52.244-6 (Subcontracts for Commercial Items) in solicitations and contracts other than those for commercial items. The required clause FAR 52.244-6 is not necessary if the prime contractor is performing under a prime contract for commercial items awarded under a FAR Part 12 or FAR Part 8 Federal Supply Schedule contract procurement.

### Discussion Questions Answer Key

1. Consent to subcontract is getting government to consent to the prime entering into the subcontract. Advance notification of subcontracting is providing notice to the Government in advance of placing certain subcontracts. Depending on the agency advance notification may be required even if consent is not.
2. Under that circumstance FARFun LLC must provide the contracting officer with 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; (vii) A price negotiation memorandum.
3. The contractor must complete a Risk Assessment form, containing, at a minimum: Contractor POC name and phone number; contractor's name, address, and all applicable CAGE codes; CO name and number; and a summary of purchasing actions during the past 12 months. The preparations for the CPSR are conducted by the DCMA CPSR Group. Assistance with obtaining information will be requested from the CO and contractor.
4. Subcontractor competition might not be practicable in a FFP contract awarded on the basis of adequate price competition or whose prices are set by law or regulation; or a T&M, labor-hour, or architect-engineer contract. If the contractor is an approved mentor under the DoD Pilot Mentor-Protege Program, the contractor may award subcontracts under this contract on a noncompetitive basis to its proteges.
5. Unless FARFun was awarded a commercial item prime contract awarded under a FAR Part 12 procurement, FARFun would need to obtain consent from the contracting officer prior to awarding a subcontract to its subsidiary.
6. Per the definition found at FAR 2.101 or FAR 52.244-2, "consent to subcontract" means the contracting officer's written consent for the prime contractor to enter into a particular subcontract.

## APPENDIX

All of the following materials are linked and can be found via the Links Document or online.

### [DCMA CPSR Guidebook – June 2019](#)

DCMA's Contractor Purchasing System Review Guidebook published June 2019. The guidebook provides guidance and procedures to Government personnel for evaluating contractor purchasing systems and preparing the CPSR reports.

### [DoD Subcontracting The Basics 2019](#)

The basics of subcontracting charts by the DoD Subcontracting Program published in 2019. It includes information as to regulatory requirements (authority and applicable regulations), subcontracting requirements (when and who), and additional resources for reference.

### [NIH Subcontractor Consent Template](#)

Office of Acquisitions Consent to Subcontract Review Checklist from February 2015. This checklist is a template for the steps and questions that must be completed prior to completing a subcontracting agreement.

**FUN WITH THE FAR**  
**Episode 23**  
**FAR Part 44**  
**Summary Outline**

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**D. Commercial Items in Subcontracting**

**III. Closing Remarks**