



COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

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Operations Memorandum No. 21

Subject: Guidance on Nonprofit Agency Establishment of Subcontract Relationships for
Current or Potential Procurement List Projects

Effective Date: May 1, 2006

1. PURPOSE

During a Central Nonprofit Agency's (CNA) or nonprofit agency's (NPA) assessment of its ability to furnish a product, service or collection of the same to a Federal customer under the Javits-Wagner-O'Day (JWOD) Program, it often identifies a need to engage one or more subcontractors to provide raw materials or supplies, or to contribute technical, professional or specialized skills that may be lacking in the current JWOD-participating organization(s). The CNA or NPA may find that it requires such subcontractor(s) to assist in demonstrating full capability when developing a new business opportunity, and/or it may require such subcontractor(s) to maintain a current Procurement List (PL) project.

This memorandum provides guidance on the procedures to be followed by CNAs and NPAs when seeking and establishing subcontracts with commercial firms or nonprofit agencies to assist them in fulfilling JWOD contract requirements.

This memorandum includes clarification of and guidance for:

- Regulatory parameters for subcontracting;
- Definitions and scope;
- Requesting Committee approval of subcontract relationships;
- The timing for entering into subcontracts;
- Appropriate levels of competition and re-competition; and
- Structure of the resulting subcontract relationship.

2. REGULATORY PARAMETERS

a. In addition to the guidelines herein, subcontracts to fulfill requirements that have been placed on the PL must comply with the Committee's Subcontracting regulations at 41 CFR 51-4.4 (Attachment 1).



b. Unless otherwise specified by the Committee's regulations, the subcontract relationship and product(s) or service(s) delivered to the Federal Government must comply with all applicable requirements of the Federal Acquisition Regulations (FAR).

3. DEFINITION AND SCOPE

a. **Subcontracting.** Subcontracting is defined by the Committee as any acquisition from another source of materials or services required by the nonprofit agency(ies) to provide a Procurement List product or service allocated under the JWOD Program. The JWOD Act requires all procurements to be between the Government and the Committee-designated nonprofit agency, establishing the nonprofit agency in prime contractor status.

- i. Although the term "partnering" is often used colloquially to refer to any cooperative relationship between two or more parties, the Committee's regulations do not recognize partnerships or joint ventures as valid relationships for the performance of contracts under the JWOD Program.
- ii. Likewise, "sourcing" or similar terminology may be used to refer to seeking competitive quotes routinely and making a best value determination on a per case basis, versus establishing a longer-term supplier relationship. This type of business relationship also meets the subcontracting definition used in the FAR and adopted by the Committee.

b. **Scope.** The Committee understands that virtually every product or service furnished under the JWOD Program requires some purchase of raw materials, supplies and/or technical services from other sources. The Committee's subcontracting guidance applies to all JWOD contracts where a subcontract as defined above exists.

- i. The Committee's primary concerns are to ensure fair, transparent and appropriate selection of subcontractors, and to ensure that work intended to be performed by people who are blind or severely disabled is not later assigned to nondisabled business entities.
- ii. The Committee's reporting and advance approval requirements apply only to multiyear agreements and to changes (other than de minimis changes, not to exceed five percent of direct labor or dollar value) to the extent of subcontracting on existing Procurement List projects. See Attachment 2 for a summary as to when a new or modified subcontract agreement must be submitted to the Committee staff for approval prior to signature, and/or when a change in subcontractor status must be reported to the Committee staff.

4. COMMITTEE APPROVAL OF SUBCONTRACT RELATIONSHIPS

a. All subcontract relationships on JWOD Program contracts are subject to Committee oversight, in accordance with the Committee's regulations at 41 CFR 51-4.4.

- b. In accordance with 41 CFR 51-4.4(a), multiyear contracts for materials or components used in the provision of Procurement List items must be reviewed and approved by Committee staff prior to the nonprofit agency's signature on a subcontracting agreement.
- i. This requirement applies to raw materials used in manufacturing projects, semi-finished materials that are used in assembly or packaging projects, supplies used in the provision of service projects that comprise a significant share of the contract value, and/or labor purchased to fulfill service requirements.
 - ii. Such proposed multi-year agreements should be transmitted to the Committee's Information Management department, who will forward to appropriate staff members for review and requested approval.
- c. Routine subcontracting of part of the production or performance process must be identified to the Committee when the item is proposed for addition to the Procurement List. Any departure from the extent of subcontracting described in the addition package and Vote Letter must be approved in advance by the Committee staff in accordance with 41 CFR 51-4.4(c).
- i. If the subcontract is initiated, or if an existing subcontract undergoes more than de minimis changes (i.e., changes in excess of five percent of direct labor or dollar value) after the Procurement List addition is approved -- particularly if there is a resulting change in the suitability factors such as direct labor, ratio and/or pricing -- the staff may seek the Committee members' review and reconsideration of the suitability criteria.
 - ii. Changes in the socioeconomic status of the subcontractor must be reported to the Committee staff within 30 days.
- d. Under no circumstances may a CNA or NPA subcontract an entire requirement, contract or order, without prior written Committee staff approval, in accordance with 41 CFR 51-4.4(d).

5. TIMING

- a. A CNA or NPA may compete and select a subcontractor at an early stage in the development process. It is not necessary for the CNA or NPA to have a specific requirement already on the Procurement List before competing and selecting the subcontractor. However, there must be enough information about the subcontract opportunity to allow for clear definition of the supplies and/or services sought, and to allow for an open, fair and transparent selection process.
- b. As noted above in Section 4(b), whether negotiated in advance of a Procurement List addition, or for an existing Procurement List project, any multiyear agreements

with subcontractors must be approved by the Committee prior to the nonprofit agency's signature on a subcontracting agreement.

- c. As noted above in Section 4(c), before a nonprofit agency changes the extent of subcontracting for any requirement that has been added to the Procurement List, it must seek approval from the Committee staff prior to signing and finalizing the modified subcontract arrangement, in accordance with 41 CFR 51-4.4(c).
 - i. In particular, if the change involves subcontracting of materials or labor that was not identified in the Vote Letter upon which the Committee members based their suitability decision, the new information and its impact on direct labor, pricing, etc. must be evaluated and approved by Committee staff, before signature.
 - ii. If the data supporting the suitability criteria are significantly different from the status at the time of addition as a result of the new or modified subcontract, the Committee members' reconsideration may be sought at the staff's discretion.

6. COMPETITION

- a. Consistent with the Committee's regulations at 41 CFR 51-4.4(b), CNAs and/or NPAs shall first seek to maximize subcontracts with other nonprofit agencies employing people who are blind or severely disabled, to the extent practicable. In subcontracting to other JWOD-participating nonprofit agencies, the responsible CNA(s) will allocate the work in accordance with the Committee's regulations and the CNAs' internal procedures. It is not necessary for the CNA or NPA to seek competition when using their standard allocation process. However, if allocation or re-allocation affects the fair market price, the Committee staff must review and approve the change.
- b. If subcontracting with other nonprofit agency(ies) is not feasible, CNAs and/or NPAs shall seek small business subcontractors, to the maximum extent practicable. Such businesses are defined by the Small Business Administration at www.sba.gov/size. If subcontracting with other CNAs/NPAs or small businesses is not feasible, subcontracts with large businesses may be sought.
- c. The Committee's regulations at 51-4.4(a) and (b) require broad competition to the maximum extent practicable. It is assumed, unless otherwise demonstrated, that competitive sources exist in the marketplace and will be sought to ensure the best possible subcontract arrangement for the ultimate Federal customer.
 - i. If no competition is held because there is only one subcontractor that can provide the item or service, the CNA/NPA must support this conclusion. The CNA/NPA shall not enter into an agreement with the subcontractor until it obtains the Committee's approval.
 - ii. If more than one potential subcontractor exists, the CNA/NPA must hold a competition for the opportunity through a fair and transparent process.

It is recommended, but not required, that such a process include a debriefing at the end for unsuccessful offerors, particularly if the contract exceeds the Simplified Acquisition Threshold.

- iii. The broad practical standard of competition can be met by soliciting at least three offers from within the local trading area, provided that the approach to competition is practical and that there are sufficient local firms to meet the requirement. Any such procurement must be as transparent as possible, with disclosed evaluation factors. NPAs will make available, upon request, an appropriate written document detailing the rationale for the selection.
- iv. When a subcontractor must have nationwide capability, a full and open competition is encouraged. The CNA or NPA may solicit through on-line business exchange sites and/or in appropriate national business or news publications, or in trade/industry journals. If all members of a particular industry are known to the CNA/NPA, they may be contacted directly. The NPA shall provide a solicitation, with an appropriate Statement of Work (SOW)/Performance Work Statement (PWS), with evaluation instructions and criteria to potential offerors.
- v. A technical and cost evaluation will be used to select the subcontractor. If factors such as technology, geography, capacity, etc. require the selection of more than one subcontractor, a pool of subcontractors may be established. At the discretion of the CNA/NPA, this pool may be maintained for up to five years before a re-compete is required, or it may be dissolved after award.
- vi. The source selection criteria shall include an appropriate weighted factor that gives credit to any offeror that makes a good faith effort to hire people who are blind or severely disabled. To earn such credit, the offeror must submit a written plan to the nonprofit agency, including a proposed measurement system, and the plan must be acceptable to the CNA/NPA. The offeror may be asked to orally brief this plan.

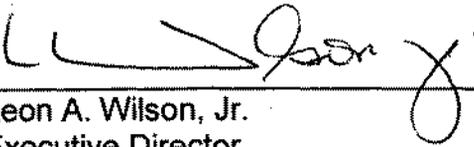
7. RE-COMPETITION

Generally, the CNA or NPA must be able to show competition for the subcontractor at least every five (5) years. The CNA/NPA should conduct an annual assessment of the subcontractor's performance to ensure value is maintained. The nature of the re-competition, as well as justification for any sole source selections, is identical to the guidelines above for first-time competitions.

8. STRUCTURE OF RELATIONSHIP

Upon selection, the contract would assume a traditional prime/subcontractor form, with the NPA as prime and the commercial firm as subcontractor. All subcontracting will comply with 41 CFR 51-4.4.

- a. Any sizable subcontract or subcontract for work that could eventually be performed by people with disabilities should include a written transition plan to provide more of the direct labor hours to people with disabilities in the future.
- b. It is recommended that subcontract relationships encourage second tier subcontracts or purchasing from small businesses.



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Executive Director

02/15/06

Date

Attachment 1: 41 CFR 51-4.4

Attachment 2: Subcontracting Reporting and Approval Checklist

Attachment 1

CODE OF FEDERAL REGULATIONS
TITLE 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT
Revised as of October 14, 2003
CHAPTER 51—COMMITTEE FOR PURCHASE FROM
PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

51-4.4 Subcontracting

- (a) Nonprofit agencies shall seek broad competition in the purchase of materials and components used in the commodities and services furnished to the Government under the JWOD Act. Nonprofit agencies shall inform the Committee, through their central nonprofit agency, before entering into multiyear contracts for materials or components used in the commodities and services furnished to the Government under the JWOD Act.
- (b) Each nonprofit agency shall accomplish the maximum amount of subcontracting with other nonprofit agencies and small business concerns that the nonprofit agency finds to be consistent both with efficient performance in furnishing commodities or services under the JWOD Act and maximizing employment for persons who are blind or have other severe disabilities.
- (c) Nonprofit agencies may subcontract a portion of the process for producing a commodity or providing a service on the Procurement List provided that the portion of the process retained by the prime nonprofit agency generates employment for persons who are blind or have other severe disabilities. Subcontracting intended to be a routine part of the production of a commodity or provision of a service shall be identified to the Committee at the time the commodity or service is proposed for addition to the Procurement List and any significant changes in the extent of subcontracting must be approved in advance by the Committee.
- (d) A nonprofit agency may not subcontract the entire production process for all or a portion of an order without the Committee's prior approval.

Attachment 2

SUBCONTRACTING REPORTING AND APPROVAL SUMMARY

Note:

The Committee staff will accept reporting and requests for approval from Central Nonprofit Agencies (CNAs) and/or Nonprofit Agencies (NPAs) as required below in either electronic format (via email or eventually, via electronic submission to the Committee's Enterprise Architecture system) or in print form via U.S. mail, express delivery or facsimile.

CNAs and NPAs must obtain the Committee's prior approval before signing subcontract agreements when:

- The subcontract is a multiyear agreement
- The subcontract represents more than a de minimus change to an existing Procurement List project (e.g., there is a change in the nature of the goods purchased, or there is a change in the labor performed by a subcontractor.)
- The subcontract is for an entire order, contract or requirement that is on the Procurement List.

CNAs and/or NPAs must report to the Committee but not seek prior approval when:

- There is a change in the socioeconomic status of the subcontractor as identified at the time of Procurement List addition.

CNAs and/or NPAs are not required to report to the Committee or obtain approval when:

- The subcontract is for one year or less, after which it will be recompeted.
- The subcontract is awarded to a new vendor, but the extent of the goods purchased or labor performed remains consistent with that identified at the time of Procurement List addition, and the vendor is of the same socioeconomic status as that identified at the time of addition.