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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Victoria Prussen Spears

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Who Is a Subcontractor Under a Federal Government Contract?

*Merle M. DeLancey Jr.**

The author of this article discusses why subcontractor status under a federal government contract is important and explains a two-part test for determining whether a vendor is a subcontractor.

Recently, clients have asked if they or a vendor or supplier are a “subcontractor” under a federal government contract. Sometimes the answer is easy—*e.g.*, you are a subcontractor when a prime contractor contracts directly with a vendor or supplier (hereinafter “vendor”) to perform a federal contract. But the lines become less clear when a prime contractor does not inform the vendor that the subcontract is being entered into in furtherance of a federal government contract or where the vendor supplies goods that the prime contractor uses to perform commercial and government contracts.

WHY IS SUBCONTRACTOR STATUS IMPORTANT?

Subcontractor status is important to prime and subcontractors. A federal prime contractor is required to flow-down multiple Federal Acquisition Regulation (“FAR”) clauses to its subcontractors.¹ The required flowdown clauses that receive the most attention implement three antidiscrimination laws: Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, as amended;² and Section 402 of the Vietnam Era Veterans’ Readjustment Assistance Act.³

A prime contractor’s failure to flow down these clauses to its subcontractors could result in the prime contractor being held responsible and/or liable for its subcontractor’s noncompliance.

It also is important to know if you are a subcontractor under a federal prime contract because, if you are, the required FAR flowdown clauses apply. Significantly, these clauses apply regardless of whether they appear in the applicable subcontract or vendor agreement.⁴

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¹ See FAR 52.212-5(e).

² 29 U.S.C. § 793.

³ 38 U.S.C. § 4212.

⁴ *OFCCP v. Monongahela Railroad Co.*, 1985-OF-2, ALJ Recommended Decision and

THE TWO-PART TEST

With one exception, the applicable regulations contain broad definitions of the terms “government contract,” “prime contractor,” and “subcontractor.” As a result, most are not helpful in determining whether a vendor is a subcontractor. The one exception is in the Department of Labor’s regulations implementing EO 11246 which define “subcontract” as follows:

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of the employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts;

(2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.⁵

Interpreting the above definition of “subcontract,” courts have created a two-part test.

First, to be considered a “subcontract” under any federal statute or regulation, there must be some reasonably close nexus between the efficiency and economy criteria of the Federal Property and Administrative Services Act, the key procurement statute underlying EO 11246 and any expectation imposed upon federal contractors.⁶

Second, to be considered a “subcontract” under any federal government contract there also must be a showing that the products or services being acquired by the prime contractor ultimately will be used in performance of a government contract.⁷ And, so long as the products or services being procured are “necessary” to the performance of a federal government contract, the vendor

Order (April 2, 1986). (The regulations state that the EEO clause is “incorporated by reference in all Government contracts and subcontracts,” and “by operation of the [Executive] Order” is “considered to be a part of every contract and subcontract required by the Order and the regulations . . . whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.”).

⁵ 41 C.F.R. § 60-1.3.

⁶ *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164, 170-71 (4th Cir. 1981) (finding that there was no “reasonably close nexus” between the purpose of the Federal Property and Administrative Services Act, of ensuring efficiency and economy in government procurement and the imposition of the Executive Order’s requirements on the insurance companies).

⁷ *OFCCP v. Monongahela Railroad Company*, 1985-OFC-2, ALJ Recommended Decision and Order (April 2, 1986).

is a subcontractor regardless of the number of products or amount of services being supplied.⁸

REVIEW YOUR CONTRACTS

Prime and subcontractors should review their contracts to determine a vendor's status. Prime contractors should determine if an applicable vendor is a subcontractor and, if so, make sure the required FAR and antidiscrimination laws are included in the subcontract.

Subcontractors should perform a similar review of their agreements. Specifically, you should review the following:

- *Prime and subcontractors:*
 - Does the applicable agreement have a value of at least \$10,000 triggering the applicability of EO 11246?
 - Does the applicable agreement have a value exceeding \$15,000 for applicability of Section 503 of the Rehabilitation Act of 1973, as amended?⁹
 - Does the applicable agreement have a value of \$150,000 or more for applicability of Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act?¹⁰
 - Does your company have at least 50 employees and a contract valued at \$50,000 or more triggering the requirement for written affirmative action plan?
 - Are the goods or services the vendor is selling is "necessary" to the government contract? In other words, are the goods or services incidental to or to facilitate performance of a government contract or are they a deliverable under the contract?
- *Subcontractors:*
 - Are there any FAR or Agency FAR Supplement clauses or references in your agreement or purchase order?
 - Are there any references in your agreement or purchase order to Executive Order 11246, the Rehabilitation Act of 1973, the

⁸ *Id.* (railroad was a subcontractor where it delivered coal to one of many power plants owned by a utility that contracted with the federal government to supply electric and steam to government facilities even when the federal government used approximately 0.4 percent of the electricity generated by the utility on a yearly basis).

⁹ 29 U.S.C. § 793.

¹⁰ 38 U.S.C. § 4212.

WHO IS A SUBCONTRACTOR?

Vietnam Era Veterans' Readjustment Assistance Act or any of their implementing regulations?¹¹ Prime contractors are required to send annual written notification of the company's policy on equal employment opportunity and affirmative action obligations to all subcontractors, including vendors and suppliers.

- Are there any references in your agreement or purchase order to a federal government prime contract?
- Has your company filed or is it filing EEO-1 Reports and is it representing itself as a contractor?
- Has your company received any notices from customers informing the company that they are a federal contractor or requesting a copy of your affirmative action plan?

¹¹ 41 C.F.R. Part 60.1.