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May 29, 1981

POLICY LETTER 80-2, Supplement No. 1

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT:Regulatory Guidance on Section 211 of Public Law 95-507

Government procurement policy should be uniform and consistent in application. The purpose of this supplementary Policy Letter is to provide a uniform resolution to certain problems and questions which have arisen in the administration of OFPP Policy Letter 80-2, April 29, 1980 (45 *Federal Register* 31028, May 9, 1980).

1. The question has been raised whether it is necessary to obtain a new subcontract plan if a modification over \$500,000 (\$1 million for construction) is made to a contract already containing a plan. Policy Letter 80-2 indicates that subcontracting plans must be included, pursuant to Public Law 95-507, in contracts **and contract modifications** over the statutory thresholds. It also requires that the "contracting officer promptly negotiate appropriate revisions to "agreed subcontracting percentage and dollar goals if any subsequent amendments to the contract will have a major impact on the original planned volume or type of contracting effort." It is not necessary for the contracting officer to obtain a new subcontract plan if a modification over \$500,000 (\$1 million for construction) is made to a contract already containing a plan. The modification may incorporate the existing plan by reference. However, the modification must either contain separate goals for the new effort or revise the original goals.
2. Another question has been raised as to whether the terms of an overall or "master" company subcontracting plan may be incorporated by reference into a specific plan submitted for a given contract over the statutory thresholds. This is acceptable provided: (1) the master plan contains all the elements required by the statute; (2) subcontract goals for small and small disadvantaged firms are specifically set forth in each contract or modification over the statutory thresholds; (3) any changes to the plan deemed necessary and required by the contracting officer in areas other than goals are specifically set forth in the contract or modification; (4) the contracting officer has copies of the entire plan; and (5) the resident Procurement Center Representative (PCR) of the Small Business Administration has had an opportunity to comment on the master plan.
3. A third question relates to the applicability of an approved commercial products plan beyond the fiscal year in which it is approved. Policy Letter 80-2 states that:

"If a commercial product is offered the required subcontracting plan may relate to the company's production generally (both for commercial and non-commercial products) rather than solely to the item being procured under the government contract. In such

cases, the contractor shall be required to submit one company-wide annual plan to be reviewed for approval by the first agency with which it enters into a prime contract (which requires a subcontracting plan) during the fiscal year, or by another agency satisfactory to the contracting officer."

The approved plan shall apply to all deliveries made under contracts entered into during the contractor's fiscal year, even though those deliveries are made in a succeeding fiscal year. The contractor shall submit a new plan to the first agency with which it enters into a contract (over the statutory threshold) during a succeeding fiscal year. The new plan shall apply to all deliveries made under contracts entered into during the succeeding fiscal year, no matter when those deliveries are made.

4. Also with respect to commercial products plans, there is a question whether the contractor is required to keep "contract-by-contract" records pursuant to paragraphs 3f(3) and (6) of the Small Business and Small Disadvantaged Business Subcontracting Plan (Negotiated) and (Advertised) clauses. Such contract-by-contract records would be incompatible with the concept and purpose of an annual company-wide plan, and are not required. Accordingly, OFPP Policy Letter 80-2 is amended by adding the following sentence at the end of paragraphs 3f(3) and 3(f)(6) of both the Negotiated and Advertised clauses: "This requirement does not apply to a plan submitted pursuant to par. 6, hereof."
5. Paragraph 3d of the clause entitled "Small Business and Small Disadvantaged Business Subcontracting Plan (Negotiated)", as set forth in Policy Letter 80-2, provides for flowdown of the subcontracting plan requirements to all non-small business subcontractors which receive subcontracts over the applicable thresholds. Further, the prime contractor is required to describe its "procedures for the review, approval, and monitoring for compliance with such plans."

This requirement has raised questions of what is meant by monitoring and whether, in some cases, the prime contractor should be relieved of this responsibility.

If interpreted literally to require each prime contractor to monitor its subcontractors' compliance, by plant visits and examinations of records, this could result in situations such as: (1) several contractors monitoring the same subcontractor, to review essentially the same information, which would at a minimum be disruptive and redundant; (2) the prime contractor being monitored by one or more of the subcontractors which it is monitoring, where the prime/sub relationships are reversed; and (3) problems concerning access to records, particularly when the prime contractor and the subcontractor are competitors. This disruption, duplication and additional unnecessary cost do not appear to be justified or necessary. In many instances, particularly where a subcontractor is also performing Government prime contracts, the Government already has a representative either on the scene or available who is monitoring the firm's performance as a prime contractor. The Government representative, in such case, should be familiar with the firm's overall plan for subcontracting with small and small disadvantaged businesses, and therefore in the best position to determine whether the firm is meeting its goals either as a

prime contractor or as a subcontractor. Accordingly, departments and agencies may, in their regulations, notwithstanding the last sentence of the aforesaid paragraph 3d, relieve the prime contractor from this obligation when they deem it appropriate. An agency's decision to relieve a contractor from its obligation to monitor for compliance should take into consideration an existing Government presence at the subcontractor's plant and whether the monitoring can be accomplished most economically and efficiently through Government or prime contractor activity.

Whether monitoring is done by the prime contractor or by the Government, the degree of monitoring will vary depending on the circumstances. Such factors as access to records, subcontract dollar amount, the subcontractor's past performance in meeting goals, and many others must be considered in reviewing the procedures for monitoring compliance.

While there is some flexibility, as indicated by the foregoing discussion, with respect to monitoring for compliance, prime contractors are **not** relieved of their obligation to review and approve their subcontractor's plans.

EFFECTIVE DATE: This supplementary Policy Letter is effective June 30, 1981.

CONCURRENCE: This supplementary Policy Letter has been concurred in by the Director of the Office of Management and Budget.

William E. Mathis
Acting Administrator