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| TO: Director, Preliminary Plan Review Bureau SUPERSEDED BY EI 76-063 EFFECTIVE 10/13/1976 | ENGINEERING INSTRUCTION NEW YORK STATE DEPARTMENT OF TRANSPORTATION |
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| APPROVED:  Deputy Chief Engineer (Construction) | Date: <u>11/18/74</u> Supersedes: |

The purpose of this instruction is to clarify the requirements and criteria relative to subcontracting in view of numerous audit citations on this general subject.

1. General

- a. On both federal-aid or 100% State contracts, the maximum amount which may be sublet is 50% of the original total contract price less the amount of any "specialty items" delineated in the Proposal.
- b. No work may be started on any item by other than the contractor's forces until such other firm is approved in writing as a subcontractor by the Regional Director per standard procedure for work on that item. There have been violations of this requirement in that approvals have been dated after the subcontractor started work or a subcontractor worked on an item which was not included on the listing of work for which he was approved. These are in violation of Section 138 of the State Finance Law.
- c. The contractor retains the primary responsibility for the adequate performance of all work in accordance with the contract requirements and specifications regardless of whether the work is performed by his forces or those of his subcontractors.
- d. Prior to approving a subcontract, the Region should insure that the subcontract directly contains all pertinent provisions and requirements of the prime contract including the federal and EEO provisions. A written certification by the contractor, with attachments of such pertinent provisions, to the effect that such attached provisions will be directly incorporated in all subcontracts should be satisfactory for this purpose. It is not satisfactory to incorporate such provisions in the subcontract solely by reference.
- e. Requests for approval of subcontractors are to be initiated by the prime contractor only. Second tier subcontractors will not be approved.

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2. Computing the Amount of Subcontract Work

- a. The value of the work subcontracted is to be based on the contract unit bid prices for the items sublet; not on the amount agreed upon to be paid by the contractor to the subcontractor. Thus, any profit which the contractor retains on work performed wholly by a subcontractor is to be included in computing the percentage of subcontract work.
- b. Where a firm, to whom work is to be sublet, both produces material and incorporates it in the contract work, the total value of such work including the material is to be included as subcontract work. For example, if a firm manufactures and supplies guide rail or structural steel and is requested as a subcontractor to install same, it is not permissible to regard that firm separately as a supplier and subcontractor for the guide rail or structural steel item. The value of such subcontract should equal the value of the pertinent item based on its contract unit bid price.
- c. On the other hand, where the contractor purchases material from one firm and sublets to another separate firm only the work required to incorporate it into the contract work, the value of the subcontract may be computed excluding the cost of the material. In this instance, the material firm is a supplier and the firm performing the contract work is a subcontractor. In no instance may a firm be both a supplier and subcontractor concurrently for any single contract item. The amount of the subcontract in such instances must include, for the purpose of computing the percentage subcontracted, a prorated share of the contractor's profit on the item.

3. Definition of Subcontractor vs. Supplier

- a. FHWA PPM 21-6.3 defines a subcontractor, for the purpose of computing the percentage of contract work assigned, as a firm who assumes obligations for performing part of the contract work under the following general conditions:
 - 1) Compensation is related to the amount of work accomplished rather than on an hourly basis.
 - 2) Choice and control of work methods, labor and equipment, in accordance with contract requirements, are exercised by the subcontractor under only general supervision by the prime contractor.
 - 3) The personnel involved in the operation are under the direct supervision of the subcontractor and are included on his payroll.

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- b. The above definition of a subcontractor may not necessarily agree in all instances with the criteria in the FHWA Labor Compliance Manual. For example, where a subcontractor both furnishes material and incorporates it in the contract work, he is a subcontractor for the total value of the contract item involved for the purpose of computing the percent of work sublet. However, his personnel engaged in the off-site production of such material are not subject to the prevailing wage rate provisions in the contract.
- c. Examples for the purpose of clarification are as follows:
1. An owner-operator of a truck employed to haul material at the contractor's direction on the project site is neither a supplier or subcontractor and must be included on the contractor's payroll.
 2. Similarly, operators furnished in conjunction with arrangements for rented construction equipment must be carried on the contractor's payroll.
 3. It is not permissible to engage municipal police forces on a fee or ad-hoc basis to perform certain duties under maintenance and protection of traffic. Off-duty police personnel may be utilized if included on the contractor's payroll and paid at least the prevailing wage rate.

Unusual instances should be referred to this office for decision.

- d. Project supervisors should be trained in the requirements of the FHWA Labor Compliance Manual with particular reference to Appendix E-2, which contains numerous examples of the distinction between subcontractors and suppliers for the purpose of administering the contract labor conditions.

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