

# CHANGE REQUEST COVER SHEET

**Change Request Number:** 11-20

**Date Received:** 1/11/2011

**Title:** Buy American Act Exemption

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**Name:** Tim Eckert

**Phone:** (202) 267-7527

**Policy OR Guidance:** Guidance

**Section/Text Location Affected:** T3.6.4A.6

**Summary of Change:** Changes to Trade Agreements Act thresholds in T3.6.4A.6

**Reason for Change:** Updates to Trade Agreements Act thresholds consistent with T3.6.4A.2

**Development, Review, and/or Concurrence:** Acquisition Policy Division; Legal; and Contracting organizations at FAA HQ, Centers, and Regions

**Target Audience:** Contracting workforce and program offices

**Potential Links within FAST for the Change:** None

**Briefing Planned:** No

**ASAG Responsibilities:** None

**Potential Links within FAST for the Change:** None

**Links for New/Modified Forms (or) Documents (LINK 1)**

**Links for New/Modified Forms (or) Documents (LINK 2)**

**Links for New/Modified Forms (or) Documents (LINK 3)**

## SECTIONS EDITED:

### Procurement Guidance:

*T3.6.4 Foreign Acquisition*

*Foreign Acquisition*

### **Section 6 : Trade Agreements** [\[Old Content\]](#)[\[New Content\]](#) [\[RedLine Content\]](#)

### Procurement Guidance:

*T3.10.2 Subcontracting Policies*

*Subcontracting*

### **Section 1 : Consent for Subcontract** [\[Old Content\]](#)[\[New Content\]](#) [\[RedLine Content\]](#)

### Procurement Guidance:

*T3.10.2 Subcontracting Policies*

*Subcontracting*

### **Section 2 : Contractors Purchasing Systems Reviews** [\[Old Content\]](#)[\[New Content\]](#) [\[RedLine Content\]](#)

### Procurement Guidance:

*T3.10.2 Subcontracting Policies*

*Subcontracting*

### **Section 3 : Definitions** [\[Old Content\]](#)[\[New Content\]](#) [\[RedLine Content\]](#)

## SECTIONS EDITED:

### **Section 6 : Trade Agreements**

#### **Old Content:** Procurement Guidance:

*T3.6.4 Foreign Acquisition*

*Foreign Acquisition*

#### **Section 6 : Trade Agreements**

a. FAA acquisitions are subject to the following trade-related acts:

(1) The NAFTA Implementation Act (Pub. L. 103-182, 107 Stat. 2057) which involves offers of Canadian or Mexican end products; and

(2) The Agreement on Civil Aircraft (19 U.S.C. 2513) which involves aircraft and related supplies from countries participating in the Agreement.

b. FAA acquisitions are *not* subject to the following trade-related acts:

TITLE	REFERENCE
United States-Bahrain Free Trade Agreement	H.R. 4340
The Caribbean Basin Trade Initiative (CBTI) under the Caribbean Basin Economic Recovery Act (Note: Except for Panama)	19 U.S.C. 2701
The Dominican Republic-Central America-United States Free Trade Agreement Implementation Act	P.L. 109-53
The least developed country designation made	19 U.S.C. 2511(b)(4)

by the U.S. Trade Representative, pursuant to the Trade Agreements Act	
United States- Australia Free Trade Agreement Implementation Act	P.L. 108-286
United States-Chile Free Trade Agreement Implementation Act	P.L. 108-77
United States-Israel Free Trade Implementation Act	19 U.S.C. 2112
United States-Morocco Free Trade Agreement Implementation Act	P.L. 108-302
United States-Singapore Free Trade Agreement Implementation Act	P.L. 108-78

*c. North American Free Trade Agreement.*

(1) As required by the NAFTA Implementation Act, the CO will evaluate offers of the following NAFTA country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program as follows:

- (a) NAFTA country construction materials under construction contracts with an estimated acquisition value of \$8,422,165 or more.
- (b) Canadian end products under supply contracts with an estimated value equal to or exceeding \$25,000 and Mexican end products under supply contracts with an estimated value equal to or exceeding \$64,786 or more.
- (c) Canadian and Mexican end products under service contracts with an estimated value equal to or exceeding \$64,786.

(2) To determine whether NAFTA applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), the CO should calculate the estimated acquisition value as follows:

- (a) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.
- (b) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.
- (c) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48.

(d) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(e) If a contemplated acquisition includes an option clause, when calculating the threshold for application of NAFTA provisions include the value of all options.

d. *Civil Aircraft and Related Articles.* The Buy American Act does not apply to acquiring civil aircraft and related articles of countries or instrumentalities that are parties to the Agreement on Civil Aircraft pursuant to a waiver from the U.S. Trade Representative, on February 19, 1980 (45 FR 12349, February 25, 1980). Countries and Instrumentalities that are parties to the agreement (as of January 1, 1996) are Austria, Belgium, Bulgaria, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom. The Office of the U.S. Trade Representative, Washington, DC 20506 can provide information on the current list of parties to the agreement; or the current list may be located at: <http://usinfo.state.gov/products/pubs/trade/glossac.htm>. For the purpose of this waiver, an article is a product of a country or instrumentality when:

(1) It is wholly the growth, product, or manufacture of that country or instrumentality; or

(2) In the case of an article that consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

e. This section "Trade Agreements" does not apply to:

(1) Purchases below an applicable dollar threshold cited in a trade agreement;

(2) Purchases under small or small disadvantaged business programs;

(3) Purchases indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative.

(4) Research and development contracts;

(5) Purchases of items for resale;

(6) Purchases from Federal Prison Industries, Inc. and nonprofit agencies employing people who are blind or severely disabled.

**New Content:** Procurement Guidance:

*T3.6.4 Foreign Acquisition*

## *Foreign Acquisition*

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c. *North American Free Trade Agreement.*

(1) As required by the NAFTA Implementation Act, the CO will evaluate offers of the following NAFTA country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program as follows:

- (a) NAFTA country construction materials under construction contracts with an estimated acquisition value equal to or exceeding \$9,110,318.
- (b) Canadian end products under supply contracts with an estimated value equal to or exceeding \$25,000 and Mexican end products under supply contracts with an estimated value equal to or exceeding \$70,079.

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(c) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48.

(d) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(e) If a contemplated acquisition includes an option clause, when calculating the threshold for application of NAFTA provisions include the value of all options.

d. *Civil Aircraft and Related Articles.* The Buy American Act does not apply to acquiring civil aircraft and related articles of countries or instrumentalities that are parties to the Agreement on Civil Aircraft pursuant to a waiver from the U.S. Trade Representative, on February 19, 1980 (45 FR 12349, February 25, 1980). The current list of countries and instrumentalities that are parties to the agreement are on the U.S. Trade Representative website. For the purpose of this waiver, an article is a product of a country or instrumentality when:

(1) It is wholly the growth, product, or manufacture of that country or instrumentality; or

(2) In the case of an article that consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

e. This section "Trade Agreements" does not apply to:

(1) Purchases below an applicable dollar threshold cited in a trade agreement;

(2) Purchases under small or small disadvantaged business programs;

(3) Purchases indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative.

(4) Research and development contracts;

(5) Purchases of items for resale;

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**Red Line Content: Procurement Guidance:**

*T3.6.4 Foreign Acquisition*

*Foreign Acquisition*

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(a) NAFTA country construction materials under construction contracts with an estimated acquisition value equal to or exceeding ~~\$89,422,110,465 or more~~ \$318.

(b) Canadian end products under supply contracts with an estimated value equal to or exceeding \$25,000 and Mexican end products under supply contracts with an estimated value equal to or exceeding ~~\$6470,786 or more~~ \$79.

(c) Canadian and Mexican end products under service contracts with an estimated value equal to or exceeding ~~\$6470,786~~ \$79.

(2) To determine whether NAFTA applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), the CO should calculate the estimated acquisition value as follows:

(a) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(b) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

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~~information on the instrumentalities current list that of are~~ parties to the agreement; ~~or the current list may be located found~~ at: ~~<http://usinfo.state.gov/products/trade-topics/pubs/industry-manufacturing/tradeindustry-initiatives/glossac.htm>~~ ~~aircraft~~. -For the purpose of this waiver, an article is a product of a country or instrumentality when:

- (1) It is wholly the growth, product, or manufacture of that country or instrumentality; or
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### **Section 1 : Consent for Subcontract**

**Old Content:** Procurement Guidance:

*T3.10.2 Subcontracting Policies*

*Subcontracting*

### **Section 1 : Consent for Subcontract**

a. The Contracting Officer (CO) may include requirements for subcontract consent in contracts that could include subcontracts when the CO determines that it is in the best interest of the FAA to review subcontracts in advance.

b. *Considerations.* The CO and integrated product team (IPT)/procurement team should consider the specific situation in determining if consent to subcontract is necessary. If subcontract consent will not be required, the CO may still specify that contractors provide the CO a subcontract notice prior to entering subcontracts. Some of the elements that could affect the decision to include the requirement for subcontract consent are:

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(1) *Approved purchasing system.* Contractors or offerors that have approved purchasing systems should not require subcontractor consent because their purchasing systems have already been reviewed and determined acceptable under a contractor's procurement system review (CPSR). In exceptional circumstances, consent to certain subcontracts or classes of subcontracts may be required even though the contractor's purchasing system has been approved. Reasons for doing so include the fact that a CPSR or continuing surveillance has revealed sufficient weaknesses in a particular area of subcontracting to warrant special attention by the contracting officer.

(2) *Type of contract.* The type of contract is also relevant to the consideration of subcontractor consent.

(a) *Cost type/Labor Hour/Time and Material or Other Best Effort Type Contracts.* The need for subcontractor consent is greater in contracts that reimburse the contractor for effort performed where the contractor's obligation is to deliver its best effort. The FAA bears more risk in these kinds of contracts because the FAA pays for the effort delivered. Contracts predicated upon best effort require the FAA to assure to the extent possible that the contractor has exercised good judgment and minimized the FAA's risk by engaging subcontractors that have higher probability for success.

(b) *Fixed price contracts .* The contractor's obligation in a fixed price contract to successfully complete the work increases contractor risk which behooves contractors to enlist reliable subcontractors. There should not be any need for subcontractor consent in fixed price contracts unless extraordinary circumstances are present. Such circumstances could include subcontracts for critical systems, subsystems, or components, or other subcontracts selected by the contracting officer as needing special surveillance. The contract should address these requirements.

*c. Reviewing the Subcontractor.*

(1) The CO, jointly with the IPT/procurement team, should determine the information needed to review a subcontractor and request the contractor to submit that. The following elements may be considered:

(a) Is the decision to subcontract consistent with the contractor's approved make-or-buy program?

(b) Is the subcontract for special test equipment or facilities that are available from Government sources?

(c) Is the selection of the particular supplies, equipment, or services technically justified?

(d) Has the contractor complied with the prime contract requirements regarding small business subcontracting, including, if applicable, its plan for subcontracting with small, small disadvantaged and women-owned small business concerns?

(e) Was adequate price competition obtained or its absence properly justified?

- (f) Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?
- (g) Has the contractor performed price analysis or price comparisons?
- (h) Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?
- (i) Has adequate consideration been obtained for any proposed subcontract that will involve the use of Government-furnished facilities?
- (j) Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?
- (k) Does the prime contractor comply with applicable cost accounting standards for awarding the subcontract?
- (l) Is the proposed subcontractor on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs?
- (2) The CO should review the contractor's submission with the IPT/procurement team to determine consent. The CO should make the final determination with the input of the team.
- (3) The CO should notify the contractor in writing of consent or the withholding of consent, including any changes or corrections required. The consent should disclaim any implication that the FAA's consent constitutes a determination of the acceptability of the subcontract terms or price, or of the allowability of costs.
- (4) Subcontracts should be consistent with the FAA's procurement policy. Contracting officers should be aware of subcontract conditions that could be deemed the basis for denial such as:
  - (a) Subcontracts providing for payment on a cost-plus-a-percentage-of-cost basis;
  - (b) Subcontracts creating a relationship between the FAA and the subcontractor;
  - (c) Subcontracts that make the results of arbitration, judicial determination, or voluntary settlement between the prime contractor and subcontractor binding on the Government.

**New Content: Procurement Guidance:**

***T3.10.2 Subcontracting Policies***

***Subcontracting***

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(1) *Approved Purchasing System.* Contractors or offerors that have approved purchasing systems should not require subcontractor consent because their purchasing systems have already been reviewed and determined acceptable under a contractor's procurement system review (CPSR). In exceptional circumstances, consent to certain subcontracts or classes of subcontracts may be required even though the contractor's purchasing system has been approved. Reasons for doing so include the fact that a CPSR or continuing surveillance has revealed sufficient weaknesses in a particular area of subcontracting to warrant special attention by the contracting officer.

(2) *Type of Contract.* The type of contract is also relevant to the consideration of subcontractor consent.

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(d) Has the contractor complied with the prime contract requirements regarding small business subcontracting, including, if applicable, its plan for subcontracting with small, small disadvantaged and women-owned small business concerns?

(e) Was adequate price competition obtained or its absence properly justified?

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(g) Has the contractor performed price analysis or price comparisons?

(h) Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?

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(1) *Approved ~~purchasing system~~ **Purchasing System**.* Contractors or offerors that have approved purchasing systems should not require subcontractor consent because their purchasing systems have already been reviewed and determined acceptable under a contractor's procurement system review (CPSR). In exceptional circumstances, consent to certain subcontracts or classes of subcontracts may be required even though the contractor's purchasing system has been approved. Reasons for doing so include the fact that a CPSR or continuing surveillance has revealed sufficient weaknesses in a particular area of subcontracting to warrant special attention by the contracting officer.

(2) *Type of ~~contract~~ **Contract**.* The type of contract is also relevant to the consideration of subcontractor consent.

(a) *Cost ~~type~~ **Type**/Labor Hour/Time and Material or ~~Other~~ **other** Best Effort Type Contracts.* The need for subcontractor consent is greater in contracts that reimburse the contractor for effort performed where the contractor's obligation is to deliver its best effort. The FAA bears more risk in these kinds of contracts because the FAA pays for the effort delivered. Contracts predicated upon best effort require the FAA to assure to the extent possible that the contractor has exercised good judgment and minimized the FAA's risk by engaging subcontractors that have higher probability for success.

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## **Section 2 : Contractors Purchasing Systems Reviews**

**Old Content:** Procurement Guidance:

*T3.10.2 Subcontracting Policies*

*Subcontracting*

### **Section 2 : Contractors Purchasing Systems Reviews**

a. *General.* The objective of a contractor purchasing system review (CPSR) is to determine if the contractor's purchasing system will use FAA funding efficiently and effectively consistent with the best interests of the FAA and is compliant with the FAA's policy on subcontracting. The review provides the contracting officer a basis for granting, withholding, or withdrawing approval of the contractor's purchasing system. The CO may conduct a CPSR when there are probable benefits to the FAA such as relieving the FAA of providing subcontractor consent on a case by case basis. CPSR's are generally beneficial to the FAA when there will be a continuous relationship with the FAA involving large contract values and multiple contract relationships. CPSR's should not be considered under \$10 million unless there is substantial benefit to be derived by the FAA in the CO's opinion.

b. *CPSR Process.* The CO may determine the information needed to conduct the CPSR. The CO (or delegates) should obtain the kind of information or conduct reviews that would validate the contractor's capability to be efficient and protect the FAA's interest.

c. *Review Cycle.* Once a CPS has been approved, the CO may establish a regular review schedule of about every 3 years, unless circumstances warrant greater or less frequency. The CO should



maintain sufficient surveillance to be aware of the contractor's effective management of the system and to identify significant deviations. Evidence of deficiencies may require spontaneous review and withdrawing approval.

d. *Extent of review.* The CO should conduct a complete evaluation of the contractor's purchasing system. Things to consider include:

- (1) Whether competition is relied on as the preferred method;
- (2) Pricing policies and techniques that support fair and reasonable prices;
- (3) Methods of evaluating subcontractor responsibility, including the contractor's use of the "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and, if the contractor has subcontracts with parties on the list, the documentation, systems, and procedures the contractor has established to protect the FAA's interests.
- (4) Treatment accorded affiliates and other concerns having close working arrangements with the contractor;
- (5) Policies and procedures pertaining to small business concerns;
- (6) Planning, award, and postaward management of major subcontract programs;
- (7) Compliance with Cost Accounting Standards in awarding subcontracts;
- (8) Appropriateness of types of contracts used;
- (9) Management control systems, including internal audit procedures, to administer payments to subcontractors.

e. *System approval.* The CO should notify the contractor of a system approval specifically addressing the following:

- (1) Identification of the plant or plants covered
- (2) The effective date of approval and period for which approval is valid;
- (3) Applicability - the approval may apply to all Federal Government contracts at that plant to the extent that cross-servicing arrangements exist ;
- (4) Any special waiver to contract requirements such as those for advance notification in fixed-price contracts but not generally for cost-reimbursement contracts);
- (5) Automatic termination:
  - (a) at the end of the approval period; or

(b) when any significant change occurs in the system unless approved by the contracting officer;

(6) FAA's right to withdraw at any time at the contracting officer's discretion.

(7) Identification of any class or classes of subcontracts that will still require advance consent. (Reasons for selecting the subcontracts include the fact that a CPSR or continuing surveillance has revealed sufficient weaknesses in a particular area of subcontracting to warrant special attention by the contracting officer.)

**New Content: Procurement Guidance:**

***T3.10.2 Subcontracting Policies***

***Subcontracting***

**Section 2 : Contractors Purchasing Systems Reviews**

a. *General.* The objective of a contractor purchasing system review (CPSR) is to determine if the contractor's purchasing system will use FAA funding efficiently and effectively consistent with the best interests of the FAA and is compliant with the FAA's policy on subcontracting. The review provides the contracting officer a basis for granting, withholding, or withdrawing approval of the contractor's purchasing system. The CO may conduct a CPSR when there are probable benefits to the FAA such as relieving the FAA of providing subcontractor consent on a case by case basis. CPSR's are generally beneficial to the FAA when there will be a continuous relationship with the FAA involving large contract values and multiple contract relationships. CPSR's should not be considered under \$10 million unless there is substantial benefit to be derived by the FAA in the CO's opinion.

b. *CPSR Process.* The CO may determine the information needed to conduct the CPSR. The CO (or delegates) should obtain the kind of information or conduct reviews that would validate the contractor's capability to be efficient and protect the FAA's interest.

c. *Review Cycle.* Once a CPS has been approved, the CO may establish a regular review schedule of about every 3 years, unless circumstances warrant greater or less frequency. The CO should maintain sufficient surveillance to be aware of the contractor's effective management of the system and to identify significant deviations. Evidence of deficiencies may require spontaneous review and withdrawing approval.

d. *Extent of review.* The CO should conduct a complete evaluation of the contractor's purchasing system. Things to consider include:

(1) Whether competition is relied on as the preferred method;

(2) Pricing policies and techniques that support fair and reasonable prices;

(3) Methods of evaluating subcontractor responsibility, including the contractor's use of the "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and, if the contractor has subcontracts with parties on the list, the documentation, systems, and procedures the contractor has established to protect the FAA's interests.

- (4) Treatment accorded affiliates and other concerns having close working arrangements with the contractor;
- (5) Policies and procedures pertaining to small business concerns;
- (6) Planning, award, and postaward management of major subcontract programs;
- (7) Compliance with Cost Accounting Standards in awarding subcontracts;
- (8) Appropriateness of types of contracts used;
- (9) Management control systems, including internal audit procedures, to administer payments to subcontractors.

e. *System approval.* The CO should notify the contractor of a system approval specifically addressing the following:

- (1) Identification of the plant or plants covered;
- (2) The effective date of approval and period for which approval is valid;
- (3) Applicability - the approval may apply to all Federal Government contracts at that plant to the extent that cross-servicing arrangements exist;
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**Red Line Content:** Procurement Guidance:

*T3.10.2 Subcontracting Policies*

*Subcontracting*

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### **Section 3 : 3. Definitions**

**Old Content:** Procurement Guidance:

*T3.10.2 Subcontracting Policies*

*Subcontracting*

### **Section 3 : 3. Definitions**

- a. *"Approved purchasing system"* means a contractor's purchasing system that has been reviewed and approved in accordance with this part.
- b. *"Consent to subcontract"* means the contracting officer's written consent for the prime contractor to enter into a particular subcontract.
- c. *"Contractor,"* as used in this section, means the total contractor organization or a separate entity of it, such as an affiliate, division, or plant, that performs its own purchasing.

d. "*Contractor purchasing system review (CPSR)*" means the complete evaluation of a contractor's purchasing of material and services, subcontracting, and subcontract management from development of the requirement through completion of subcontract performance.

e. "*Facilities*" means property used for production, maintenance, research, development or testing. It includes plant equipment and real property. It does not include material, special test equipment, special tooling, or agency-peculiar property

f. "*Subcontract*" means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

g. "*Subcontractor*" means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

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*T3.10.2 Subcontracting Policies*

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*T3.10.2 Subcontracting Policies*

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*Subcontracting*

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