

Recent Size and Subcontracting Regulatory Changes



SMALL BUSINESS SIZE AND STATUS INTEGRITY

*FINAL RULE, EFFECTIVE AUG 27 2013
(FED REG VOL 78, NO. 125, JUNE 28, 2013)*

SMALL BUSINESS SUBCONTRACTING

*FINAL RULE, EFFECTIVE AUG 15 2013
(FED REG VOL 78, NO. 136, JULY 16, 2013)*

ORIGINATOR: SMALL BUSINESS JOBS ACT



Presumption of Loss



- Presumption of Loss equal to value of contract
 - Contracts, subcontracts, cooperative agreements, grants
- Contractor willfully seeks and receives award by misrepresentation
- Includes:
 - Submission of an offer intended for SBs (i.e., SBSA)
 - Submission of an offer that encourages agency to classify as an award to a SB
 - Registration on any Federal electronic database for the purpose of being considered for an award
 - 13 CFR 121.108(a) and (b)

Signature Requirement



- Each offer, proposal, bid, subcontract must contain a size self-certification
- Signed by authorized official on the same page as the size status claimed



13 CFR 121.108(c)

Limitation of Liability



- A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors
- Factors considered:
 - Internal management procedures governing size certifications
 - Clarity or ambiguity of the certification requirement
 - Effort made to correct an invalid certification in timely manner

○ 13 CFR 121.108(d)

Penalties for False Misrepresentation



- Suspension or debarment
 - By SBA or the agency
- Civil penalties
 - False Claims Act
 - Program Fraud Civil Remedies Act
- Criminal penalties
 - Small Business Act, Section 16(a)

- Does not apply when govt. personnel have erroneously identified a concern to be small without any representation or certification from the concern, or the concern had no knowledge of it



13 CFR 121.108(e)

SAM



- Must be updated annually
- If not, the firm will not be listed as small until it recertifies its size.



- 13 CFR 121.109 (new)

Reliance upon SAM



- Prime contractors may rely upon SAM
 - For Size and Ownership characteristics
 - If the subcontract contains a clause stating that by submission of the offer, the subcontractor certifications in SAM are correct and complete as of the date of the offer for the subcontract.
- May not require subcontractors use of SAM
- Can still use written self-certifications, in whole or in part

13 CFR 121.411

Defines “subcontract”



- Agreement for supplies or services for performance of a contract or subcontract
- Primes can count only immediate next tier, except:
 - ANCs or Indian Tribes may designate tier
 - Purchases from an affiliate are not included in the subcontracting base (treated as subcontracts of the prime)
 - Only include subcontracts performed inside the U.S. or its outlining areas (except for Dept of State or other agencies with statutory or regulatory authority to include subcontracts outside U.S. and subcontracts for foreign military sales)
 - 13 CFR 125.3

Not “subcontracts”

(Utility prime contractors may have add'l items)

- Internally generated costs (salaries/wages)
- Employee insurance
- Employee benefits
- Petty cash payments
- Depreciation
- Interest
- Income taxes
- Property taxes
- Lease payments
- Bank fees
- Fines, claims and dues
- Warranty period from OEM (when negotiated up front with the product)
- Utilities (water, electricity, sewer, other services purchased from a municipality)
- Philanthropic contributions



Goals



- Subcontracting plan goals are established as a percent of total subcontracting dollars.
- Agency may also require goals based on total contract dollars.
- If a prime does not meet its subcontracting plan goals at conclusion of contract, it shall provide the CO with a written explanation as to why so CO can evaluate whether a good faith effort was made

Utilization of Small Businesses



- Prime contractors (even SBs) that
 - received a contract > \$150,000
 - that will be performed inside the U.S.
 - is not for services that are personal in nature
- are responsible for ensuring that SBs have the maximum practicable opportunity to participate in performance of the contract, including subcontracts for subsystems, assemblies, components, and related services for major systems
- Equivalent to FAR 52.219-8
 - 13 CFR 125.3(b)

Prime Contractor Outreach



- Conduct outreach and marketing efforts through all reasonable means, such as:
 - Online searches of SAM
 - Posting Notices of Sources Sought and/or RFPs on SUB-Net
 - Participating in Business Matchmaking events
 - Attending pre-bid conferences



Subcontracting Plan Indirect Costs



- **Individual Subcontracting Plans**
 - Must include statement addressing whether indirect costs are included
 - Must mirror this choice in ISR in eSRS (or paper SF294 in limited, authorized cases)
 - **Indirect Costs always included in SSRs**
 - Even when chose to exclude in individual subcontracting plan
 - Commercial Plans: include ALL indirect costs
- 13 CFR 125.3(c)

NAICS codes assigned to subcontracts



- Prime contractor must assign a NAICS code (and size standard) to a subcontract that best describes principal purpose of subcontract
- Prime contractors may rely upon self-certifications made in SAM provided subcontract contains clause (see slide 7)
 - Cannot require subcontractors to register in SAM



Timely eSRS Entry



- Submit timely and accurate ISR and SSRs
- For rejected reports, make corrections and resubmit within 30 days after receipt of rejection



Cooperation



- Prime contractors must cooperate in reviews of subcontracting plans
 - Including documentation of good faith efforts
- Compliance Reviews: on-site and follow ups
 - On Site: Achievement of goals on open contracts, contracts completed in last 12 months, and other plan elements
 - Validate ISR/SSRs, whether proper NAICS was assigned to subcontract, whether subcontractor qualified as size status claimed, methodology for completing reports, whether prime contractor is monitoring flow-down plans (monitor ISRs)
 - Follow-Up: 6-8 months after compliance review to see if contractor implemented SBA's recommendations

Award Notice



- Provide pre-award written notification to unsuccessful SB offerors on subcontracts > \$150,000 if a SB received a preference
 - Name & Address of apparent successful offeror
 - Socio-economic Status
- (Best practice: notify for < \$150,000 as well)

Bait & Switch



- Prime contractors must use the subcontractors that were used in preparing & submitting bid/proposal, in the same scope, amount and quality, if:
 - Offeror referenced the SB in the bid/proposal/ SB plan;
 - Offeror has an Agreement in Principal to subcontract with the SB to perform a portion of the contract;
 - SB drafted any portion of the proposal;
 - Offeror used the SB's pricing or cost information, or technical expertise in preparing the proposal; or
 - There is written evidence of an intent or understanding that the SB would be awarded a subcontract if the offeror is awarded the contract.

Bait & Switch



- If prime contractors does not use subcontractor, it must:
 - Provide COs with written explanation
 - Prior to submission of the invoice for final payment and contract close-out



Reduced or late payments



- Provide written notice to CO upon completion of subcontract if prime contractor is paying a reduced price or paying more than 90 days past due under terms of subcontract
 - Include reason for reduction or failure
 - Applies when prime contractor has been paid by the agency

Evaluation Factor



- CO may include an evaluation factor for:
 - Prime contractor's approach to SB subcontracting
 - Meeting past goals
 - Past timely payment of subcontractors
 - Commitment to pay subcontractors within certain number of days after receipt of payment from govt.
- CO may comparatively evaluate the proposed timelines of offerors
- Commitment will become material part of contract
- COs will consider compliance with commitment when evaluating performance
- A small business offeror will receive a maximum score

Multiple Award Contracts



- A subcontracting plan is required for each multiple award IDIQ contract (including Multiple Award Schedule) where the contract value > \$650,000 (\$1.5 M construction) and there are subcontracting opportunities
 - Prime contractor will submit subcontracting reports for individual orders to agency on an annual basis
 - Agency funding order will get the SB credit
 - Agency funding order may establish SB goals for the individual order, BPA, or BOA, at its discretion

Contracting Officer (ACO) Responsibilities



- **Subcontracting Plan evaluation:**
 - (1) Ensure contractors submit eSRS reports within 30 days after report ending date

 - (2) Review all ISR, and when applicable, SSRs within 60 days after report ending date
 - ✦ SSR reports for commercial plans are reviewed by CO that approved the plan
 - Accept or reject ISR and SSR reports in accordance with FAR 19.7, 52.219-9, and the eSRS instructions
 - Provide explanations for rejected reports

Contracting Officer (ACO) Responsibilities (pt2)



(3) COs must evaluate a contractor's good faith efforts to comply with its subcontracting plan. 'Good Faith Efforts' includes documentation:

- Conducts one or more outreach as shown on slide 7
- If failed to reach a goal, overachieved another by same or greater amount
- Fulfilled all plan requirements

(4) Evaluate written explanations for contractor's failure to use a small business in the scope, amount or quality (slides 18 & 19), and considered this in rating the contractor for past performance purposes

Contracting Officer (ACO) Responsibilities (pt3)



(5) Evaluate written explanations for contractor's late or reduced payments to subcontractors (slides 20), and considered this in rating the contractor for past performance purposes

(6) Evaluate whether prime contractor has a history of late or reduced payments, and if so, record in FAPIIS

- a “history” is three occasions in a 12-month period.

(7) At CO's discretion, require a prime contractor to update its plan when option is exercised

Contracting Officer (ACO) Responsibilities (pt4)



(8) Require prime contractor to submit a plan if the value of a modification causes the contract to exceed subcontracting plan threshold, to the extent that subcontracting opportunities exist

- n/a for commercial plans

(9) At discretion, require a plan if the contractor's size changes from SB to LB at time of recertification

(10) If plan is amended because of 7, 8, or 9 above, the changes are for prospective subcontracting opportunities and do not apply retroactively

- Since ISR captures from inception of contract, achievements prior to modification or option will be factored into its overall achievement on the contract from inception