

Subcontract Management From A to Z:

Session 4: Small Business Subcontracting

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Overview of the Series

- January 12: Federal Subcontracting 101 (An Overview)
- February 9: Joint Ventures and Teaming Agreements
- March 9: Small Business Programs
- April 13: Small Business Subcontracting
- May 11: Contractor Purchasing Systems
- June 8: Awarding Subcontracts
- September 14: Flow Downs and Terms & Conditions
- October 12: Subcontract Pricing
- November 9: Subcontract Management and Administration

Agenda

- Small Business Subcontracting
 - Goals
 - Plans
 - Post-Award Reporting + Compliance Reviews
- Limits on Small Businesses Subcontracting Work
 - Limitations on Subcontracting
 - Ostensible Subcontractor Rule
 - Non-Manufacturer Rule

Small Business Subcontracting



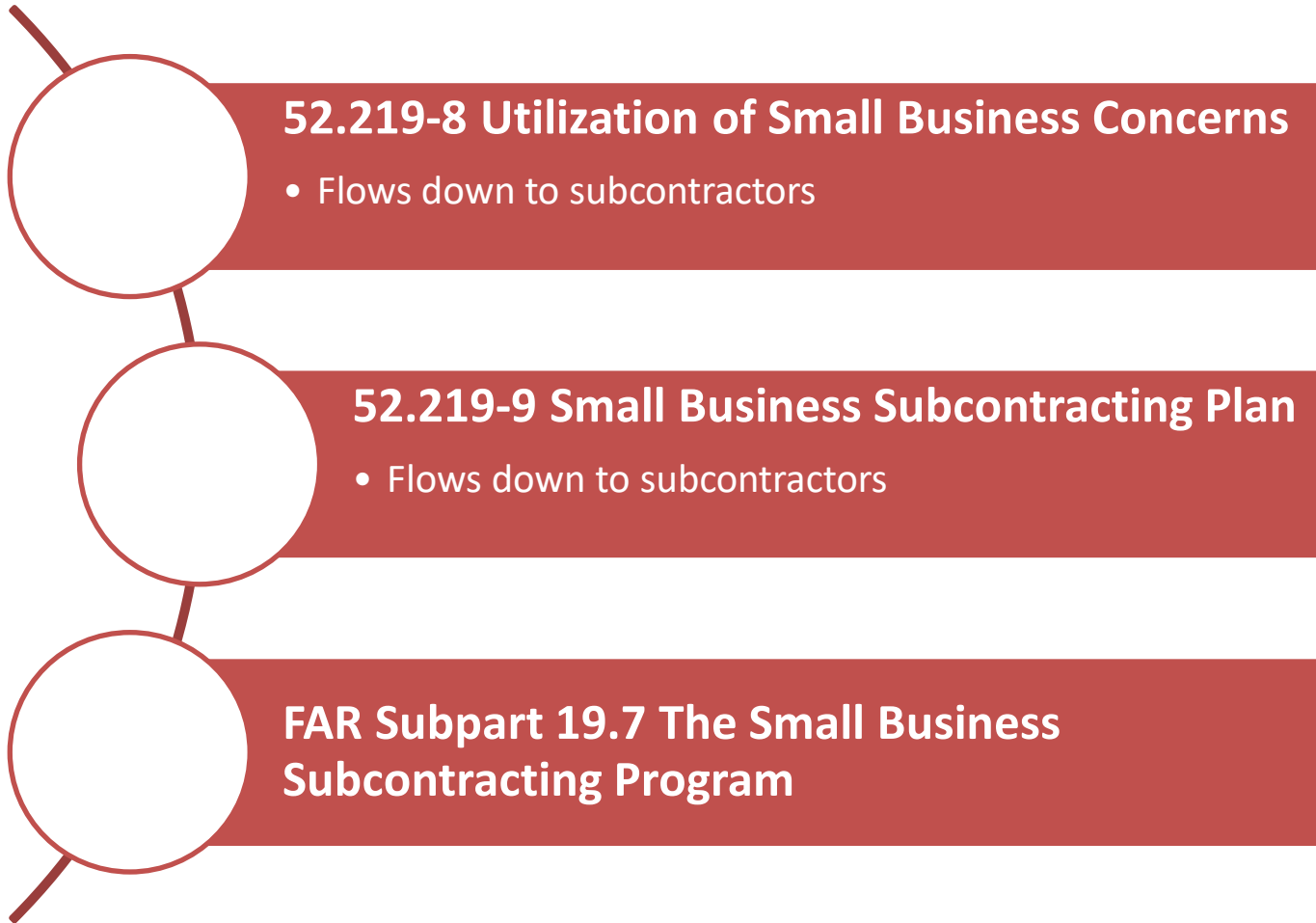
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1. Small Business Subcontracting

Small Business Subcontracting: Regulations



Small Business Subcontracting: FAR 52.219-8

“It is the policy of the United States that **small business concerns**, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns **shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency**, including **contracts** and **subcontracts** for subsystems, assemblies, components, and related services for major systems.”

“The Contractor hereby agrees to carry out this policy in the **awarding of subcontracts** to the fullest extent consistent with efficient contract performance. The Contractor further **agrees to cooperate** in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the Contractor's compliance with this clause.”

Small Business Goals

Type of Firm		Goal	Measure of Contract Awards
Small Businesses		27%	23%
Small Disadvantaged Businesses (criteria for social and economic disadvantage apply)	15%	11%	5%
Women-Owned Small Businesses		4.6%	5%
Service-Disabled Veteran-Owned Small Businesses	4.4%	4.4%	3%
HUB (Historically Underutilized Business) Zone Small Business		2.5%	3%



President Biden has issued several Executive Orders that aim to promote small disadvantaged businesses, in particular.

Small Business Goals (cont'd)

- Every year the U.S. Small Business Administration issues a Government-Wide Small Business Procurement Scorecard
 - The annual “grade” is based on:
 - 50%: Prime contracting
 - 20% Subcontracting
 - 10%: Comparison of the Number of Small Business Prime Contractors
 - 20%: OSDBU Peer Review on Agency Compliance with Section 15(k) of the Small Business Act (21 requirements)
 - FY 2023 National Defense Authorization Act expands reporting requirements for the Scorecard to include percentage of sole-source awards and set-aside contracts for the various socioeconomic small business programs (SDVOSB, WOSB, HUBZone, 8(a))



U.S. Small Business
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Small Business Goals (cont'd)

FY 2021* Scorecard Subcontracting Overview

	FY 2021 Subcontracts Goal	FY 2021 Subcontracts	Increase/Decrease from FY 2020 (in total percentage point change)
Small Business	29.36%	30.87%	-1.59%
SDVOSB	3%	2.25%	+0.11%
Small Disadvantaged Business	5%	5.24%	+0.04%
WOSB	5%	5.25%	+0.38%
HUBZone	3%	1.6%	-0.05%

*FY 2022 will likely be released in Fall 2023

Small Business Goals (cont'd)

- But the Scorecard doesn't tell the full story...
 - Subcontracting data is generally drawn from eSRS.gov, the government's Electronic Subcontracting Reporting System
 - eSRS.gov only captures *some* (not all) subcontract spending
 - So, in reality, subcontracting figures are likely higher, but there's no way to know by how much



Small Business Subcontracting Plans

- If contract (base year + options) is expected to exceed **\$750,000** (\$1.5M for construction), large business prime **must** have a small business subcontracting plan
 - Does not apply to prime contracts without subcontracting possibilities or contracts performed entirely outside the United States
- Each agency has unique subcontracting goals
- The contracting officer may provide subcontracting “goals” for the prime contractor that the agency is hoping to meet



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Small Business Subcontracting Plans (cont'd)

There are two types of small business subcontracting plans (52.219-9):

Commercial Plan

- One subcontracting plan covering **all of contractor's contracts** for that fiscal year
- Offeror's total projected sales (in dollars) and the total value of projected subcontracts, including all allowed indirect costs (see next slide for exceptions)

Individual Plan

- Contract-specific plan
- **Total dollars planned to be subcontracted** on that **specific** contract
- **Indirect costs** on common/joint purposes may be allocated on a prorated basis

Small Business Subcontracting Plans (cont'd)

- **Individual Plan**

- Covers the entire contract period (including options)
- Goals are based on the planned subcontracting opportunities for the specific contract
- May be tailored to implement or reference a Master Subcontracting Plan
 - 3-year periods
 - Reviewed/approved by Contracting Officer
 - No changes without CO approval
 - Master Subcontracting Plans do not have goals; goals are typically implemented via individual subcontracting plans
- Individual/Master plans are less practical if a company has more than a few prime contracts covered by FAR 19.7

Small Business Subcontracting Plans (cont'd)

- **Commercial Plan**

- Preferred plan for commercial products and commercial services
- Applies to commercial *and* government business
- Contractor includes in subcontracting goals and reports all indirect costs, except for:
 - ✓ Employee salaries and benefits
 - ✓ Petty cash payments
 - ✓ Depreciation
 - ✓ Interest
 - ✓ Income taxes
 - ✓ Property taxes
 - ✓ Lease payments
 - ✓ Bank fees
 - ✓ Fines, claims, and dues
 - ✓ Philanthropic contributions
 - ✓ Original equipment manufacturer relationships during warranty periods (negotiated up front with the product)
 - ✓ Utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region

Small Business Subcontracting Plans (cont'd)

- **Note:** a small business subcontracting plan is **NOT** required **from subcontractors** if:
 - X Prime contract contains FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Products and Commercial Services
 - X Subcontractor provides a commercial product or commercial service subject to FAR 52.244-6, Subcontracts for Commercial Products and Commercial Services, under a prime contract

Subcontracting Plan Requirements

- What does the subcontracting plan include? FAR 19.704; 52.219-9(d)

Model Small Business Subcontracting Plan

SMALL BUSINESS SUBCONTRACTING PLAN OUTLINE (MODEL)

(For information purposes only. The following outline meets the minimum requirements of Section 8(d) and the Federal Acquisition Regulation (FAR) Subpart 19.7. It is intended to be used as a guideline. It is not intended to replace any existing corporate plan, which may be more extensive. If assistance is needed to locate small business sources, contact the Office of Enterprise Development at 18th and F Streets, NW, Washington, DC 20405 (Phone (202) 501-1021 or Fax (202) 208-5938.)

I. IDENTIFICATION DATA:

Company Name: _____
Address: _____
Date Prepared: _____ Solicitation Number: _____
Item/Service: _____
Estimated Contract Dollar Value: _____
Individual Contract Period: _____
Base: _____ Option: _____
Commercial Plan Period: _____

II. TYPE OF PLAN: (Check only one).

- ___ INDIVIDUAL CONTRACT PLAN: *Covers the entire contract period (including option periods), applies to a specific contract, and has goals which are based on the company's planned subcontracting and purchasing in support of the performance of a specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.*
- ___ INDIVIDUAL CONTRACT PLAN INCORPORATING MASTER PLAN: *Master plans containing all the required elements of an individual contract plan, except goals, may be incorporated into individual contract plans providing the master plan has been approved. A master plan must be approved once every three years. Once incorporated into a contract with specific goals, it is valid for the life of the contract.*
- ___ COMMERCIAL PRODUCTS PLAN: *Used when the company sells large quantities of commercial off-the-shelf commodities to many Government agencies. Goals are negotiated on a company-wide basis. Plan is done annually, effective during the company's fiscal year, approved by the first Federal agency awarding a contract for commercial products during the contractor's fiscal year, and is applicable to every additional Federal contract for commercial products awarded to that contractor during the contractor's same fiscal year. A new plan must be obtained and approved 30 days prior to the expiration of the current plan.*

III. GOALS:

(For information purposes only. FAR 19.704(a)(1) requires separate percentage goals for using small, HUBZone small, small disadvantaged, women-owned small, veteran-owned small, and service-disabled veteran-owned small business concerns as subcontractors; and a statement of the total dollars planned to be subcontracted to small, HUBZone small, small disadvantaged, women-owned small, veteran-owned small, and service-disabled veteran-owned small business concerns. NOTE: The dollar amounts planned for subcontracting to SB, to HZSB, to SDB, to WOSB, to SDVOSB must be expressed as percentages of total subcontracting dollars as shown below.)

Subcontracting Plan Requirements (cont'd)

1. Separate **goals** (total dollars subcontracted and as a percentage of total planned subcontracting dollars) for the use of:

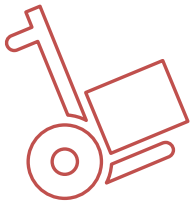


- Small Business
 - VOSBs/SDVOSBs
 - HUBZone
 - 8(a)/SDBs
 - WOSBs
- Includes all subcontracts that contribute to contract performance, and may include proportionate share of products/services that are normally allocated as indirect costs
 - ANC and Indian tribes: counted as small business and small disadvantaged businesses, regardless of size or SBA certification status

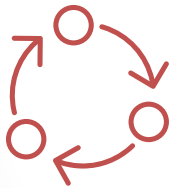
Subcontracting Plan Requirements (cont'd)



2. **Total dollars planned to be subcontracted** (individual plan) or the contractor's total projected sales (commercial + government) in dollars, and the total value of projected subcontracts to support the sales (commercial plan), with breakdown of total dollars planned to be subcontracted to each type of small business



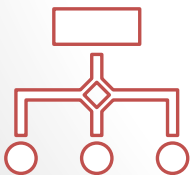
3. Principle **types of supplies and services** to be subcontracted, and an identification of the types planned for subcontracting to each type of small business



4. **Method** used to develop subcontracting goals

5. Method used to identify **potential sources** (e.g., existing company source lists, SAM, trade associations, etc.)

- May rely SAM as accurate representation of a business's size and status
- But using SAM as a source list isn't enough; still must pursue outreach, assistance, counseling, or publicizing subcontracting opportunities



Subcontracting Plan Requirements (cont'd)



6. Description of how **indirect costs** will be used in establishing subcontracting goals,



7. **Name of contractor employee** who will administer the subcontracting program and a description of his/her duties



8. **Efforts** the contractor will take to assure each type of small business will have an **equitable opportunity** to compete for subcontracts



9. Assurances the contractor will **flow-down** 52.219-8, “Utilization of Small Business Concerns,” in all subcontracts that offer further subcontracting opportunities, and that contractor will **require all non-small subcontractors** receiving awards above \$750,000 with subcontracting possibilities to adopt a subcontracting plan

Subcontracting Plan Requirements (cont'd)

10. Assurances the contractor will:

Cooperate in any required **studies/surveys**

Submit periodic **reports**

Include **order-level subcontracting data** for IDIQ contracts with individual subcontracting plans where contract is for **multiple agencies**

Submit required reports and **ensure subcontractors submit required reports** using eSRS

Provide required information to subcontractors with subcontracting plans

Require **subcontractors with subcontracting plans** to provide required information

Subcontracting Plan Requirements (cont'd)

11. Description of the **types of records** the contractor will maintain to document/implement procedures



- Checklists
- Source lists
- Description of the offeror's efforts to locate each type of small business
- Description of award incentives
- And more...

Subcontracting Plan Requirements (cont'd)

.... You must have **records** of:

Source lists, guides, and other data to identify each type of small business

Organizations contacted in an attempt to locate each type of small business

Each subcontract solicitation for award above simplified acquisition threshold:

- Whether each type of small business was solicited (if not, why not)
- If applicable, the reason award was not made to a small business

Outreach efforts to contact trade ass'ns, business dev't orgs, conference and trade fairs, and veterans service orgs

Internal guidance & encouragement to buyers through workshops, seminars, trainings, etc.; & monitoring performance to evaluate compliance

Individual plans only:
Records to support award data submitted to the gov't, including the name/address/business size of each subcontractor

Subcontracting Plan Requirements (cont'd)

The government is **NOT**
a matchmaking agency
– you're expected to
find small businesses on
your own and
DOCUMENT,
DOCUMENT,
DOCUMENT your
outreach efforts



Subcontracting Plan Requirements (cont'd)

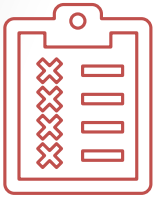
12. Assurances the contractor will make a **good faith effort** to subcontract to the small businesses it used in preparing the bid or proposal in the same or greater scope, amount, and quality



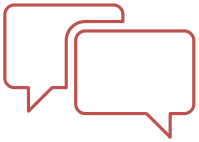
- “Used” in preparing the bid or proposal means:
 - **Contractor identified the small business as a subcontractor in the bid or proposal** or subcontracting plan to furnish certain supplies or perform part of the subcontract; or
 - **Contractor used the small business’s pricing, cost information, or technical expertise** in preparing the bid or proposal and there is written evidence of an intent/understanding the small business will be awarded a subcontract for the related work upon Contract award
- Not merely responding to a request for a quote

Subcontracting Plan Requirements (cont'd)

Assurances the contractor will:



13. Provide the CO with a **written explanation** if offeror fails to acquire the goods/services used in preparing the bid or proposal



14. **Not prohibit a subcontractor** from discussing any material matter pertaining to payment or utilization of a subcontractor with the CO

- See also FAR 52.203-6, Restrictions on Subcontractor Sales to the Government



15. **Pay its small business subcontractors** on time and in accordance with the subcontract's terms and conditions, and notify the CO when the prime makes either a reduced or untimely payment

Subcontracting Plan Requirements (cont'd)

- Contractor's obligations to effectively **implement the plan** (to the extent **consistent with efficient contract performance**)
 1. Provide assistance to small businesses:
 - Arrange solicitations
 - Allow time for the preparation of bids, quantities, specifications, and delivery schedules to facilitate the participation of small businesses
 - If a contractor's lists of potential small businesses are excessively long, contractor must make reasonable effort to give all such small businesses an opportunity to compete over a period of time
 2. Provide adequate and timely consideration of the potentialities of each type of small business in all "make-or-buy" decisions
 3. Counsel and discuss subcontracting opportunities with each type of small business

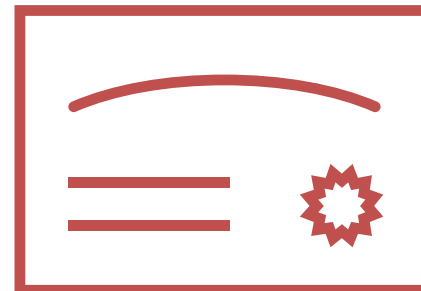


Subcontracting Plan Requirements (cont'd)

4. Confirm a subcontractor representing itself as a HUBZone small business is SBA-certified by accessing SAM or the Dynamic Small Business Search (DSBS)
5. Provide notice to subcontractors regarding penalties and remedies for misrepresenting small business size or status to obtain a subcontract
6. For competitive subcontracts above the simplified acquisition threshold (\$250,000) in which a small business received a small business preference, prior to award but after selection of awardee, the contractor must notify each unsuccessful small business offeror of the apparent awardee and whether it is a small business
7. Assign the appropriate NAICS code to each subcontract

Small Business Certifications

- **Company must be small on the date it certifies its size for the subcontract**
 - If a company qualifies as “small” for a procurement, it is generally considered small for the life of the contract
- A prime contractor may generally accept a subcontractor’s written representations or SAM representations of its size and socioeconomic status with its offer if they are presented as current, accurate, and complete as of the date of the subcontract offer
 - Independent certifications of WOSB or SDVOSB *may* not be required
- A prime acting in good faith is not liable for a subcontractor’s misrepresentations regarding its size or socioeconomic status



Post-Award Reporting Requirements

- Contractor must submit Individual Subcontract Report (ISR) for individual plans and/or Summary Subcontract Report (SSR) for individual or commercial plan via eSRS.gov
- Contractor will report information on subcontracts to small businesses, including VOSB/SDVOSBs, HUBZone, 8(a)/SDBs, and WOSBs
 - NASA only: also report Historically Black Colleges and Universities and Minority Institutions



Post-Award Reporting Requirements (cont'd)

- **Individual Subcontracting Report**
 - Submitted semi-annually during performance for periods ending March 31 and September 30 as well as within 30 days of contract completion
 - If CO rejects report, the contractor has 30 days to correct it
 - CO acknowledges/rejects prime's ISR
 - Prime acknowledges/rejects subcontractor's ISR



Post-Award Reporting Requirements (cont'd)

- **Summary Subcontract Report**
 - Submitted annually for previous fiscal year
 - For individual plans:
 - If CO rejects report, the contractor has 30 days to correct it
 - Agency awarding the prime contracts can acknowledge/reject SSR
 - For commercial plan:
 - Where contractor is performing work for multiple agencies, the contractor must specify the percentage of dollars attributable to each agency
 - CO who approved commercial plan can acknowledge/reject SSR

Post-Award Reporting Requirements (cont'd)

- Subcontractors that are required to have subcontracting plans must also submit information using eSRS
- CO will acknowledge or reject reports
- There is a **pending proposed rule** on how primes will receive credit for subcontracts lower than the first-tier that is a decade in the making but it has been criticized as lacking clarity on what subs are covered and who is required to submit the data...



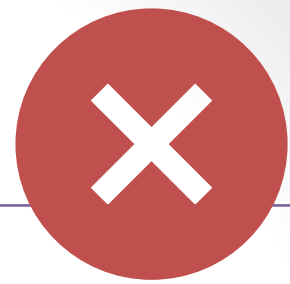
Compliance Reviews

- SBA or DCMA evaluate whether contractors comply with their subcontracting plans (as well as to any Corrective Action Plan in place, if applicable) as well as subcontracting rules, processes, and procedures
 - Compliance reviews are random, not on a set schedule
 - Contractor receives at least 90-days notice before a compliance review
 - Contractor receives a rating regarding level of compliance (or non-compliance)
 - Exceptional, Very Good, Satisfactory, Marginal or Unsatisfactory
 - Contractor must provide a written corrective action plan for a Marginal or Unsatisfactory rating
 - Follow-up review is conducted within 6-8 months to see if the contractor implemented SBA's recommendations
- 13 C.F.R. 125.3(f)



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Compliance: Consequences



- May affect future awards; contracting officer will consider the contractor's compliance with its subcontracting plans as part of determining the responsibility of the offeror
- Failure to make a “good faith effort” to comply with a small business subcontracting plan is a material breach of the contract and may:
 - Be considered in any past performance evaluation of the contractor and/or
 - Result in the government assessing liquidated damages. FAR 52.219-16, Liquidated Damages – Subcontracting Plan.
- FAR 19.705-7, Compliance with the Subcontracting Plan, explains “good faith effort”:
 - Totality of the circumstances assessment
 - Failure to meet goals is not, alone, a failure to make a good faith effort
 - Takes into account unavailability of anticipated sources or unreasonable prices

Compliance: Good Faith Indicators

✓ Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation	✓ Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract
✓ Conducting market research to identify potential small business subcontractors through all reasonable means, such as searching SAM, posting notices or solicitations on SBA's SUBNet, participating in business matchmaking events, and attending preproposal conferences	✓ Providing interested small businesses with adequate and timely information about plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract
✓ Negotiating in good faith with interested small businesses	✓ Directing small businesses that need additional assistance to SBA
✓ Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services	✓ Utilizing the available services of small business associations ; local, state, and Federal small business assistance offices; and other organizations
✓ Participating in a formal mentor-protégé program with one or more small business protégés that results in developmental assistance to the protégés	✓ Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories

Compliance: Failure to Show Good Faith

<p>X Failure to attempt through market research to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns, through all reasonable means including outreach, industry days, or the use of Federal systems such as SBA's Dynamic Small Business Search or SUBNet systems</p>	<p>X Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in 19.704(a)(12)</p>
<p>X Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan</p>	<p>X Failure to submit an acceptable ISR, or the SSR, using the eSRS, or as provided in agency regulations, by the report due dates specified in 52.219-9, Small Business Subcontracting Plan</p>
<p>X Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements</p>	<p>X Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan</p>
<p>X Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor</p>	<p>X Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government</p>
<p>X Falsifying records of subcontract awards to small business concerns</p>	

2. Limits on Small Businesses Subcontracting Work

Limitations on Subcontracting



- Generally, small business prime contractors awarded set-aside contracts **must perform the majority of the work**
For set-aside supplies and/or services contracts:
 - (1) above the simplified acquisition threshold (currently \$250,000) or
 - (2) specifically set-aside for a socioeconomic category of small business (regardless of value)
- **The small business must not pay more than 50% of the amount paid by the government to companies that are not “similarly situated”**: the small business must retain at least 50% of the amount paid by the government
 - Similarly situated = same small business status as the prime (i.e., another WOSB, SDVOSB, small business, etc.) that is small under the NAICS code the prime assigns to the subcontract
- 52.219-14, Limitations on Subcontracting

Limitations on Subcontracting (cont'd)

- Contract for supplies
 - 50% does not include material costs in calculation
- Services
 - 50% of services performed
- Contract for services *and* supplies:
 - 50% limitation applies to dominant portion (per applicable NAICS code)
 - Services NAICS code = 50% limitation on services portion, no limitation on supply portion
 - Supply NAICS code = 50% limitation on supplies portion, no limitation on services portion
- Construction: small business will not pay more than 85% of amount paid by the government, excluding material costs, to non-similarly situated subcontractors
- Construction by special trade contractors: small business will not pay more than 75% of amount paid by the government, excluding material costs, to non-similarly situated subcontractors

Ostensible Subcontractor Rule

- On **services contracts**, a small business can't be merely a "front" or "pass-through" for a large business subcontractor
- **Ostensible Subcontractor Rule:** a subcontractor is "ostensible" when:
 - (1) it is the entity that is actually performing the "**primary and vital**" contract requirements and/or
 - (2) the prime is **unusually reliant** upon the subcontractor
- In that case, the prime and sub are deemed **affiliated**
 - Ostensible Subcontractor Rule impacts size eligibility...



Ostensible Subcontractor Rule (cont'd)

- SBA looks at the entire relationship between prime and sub, including:
 - ✓ Proposal terms (contract management, technical responsibilities, and the percentage of subcontracted work)
 - ✓ Agreements between the parties (bonding assistance, teaming agreement, etc.)
 - ✓ If subcontractor is the incumbent but ineligible because of its size
- 13 C.F.R. § 121.103(h)(2)



Non-Manufacturer Rule

- FAR 52.219-33, Nonmanufacturer Rule
- Small contractors must supply their own products
 - But the NMR offers an exception...
- Small business may supply product of another U.S. **small business manufacturer** unless there's a waiver allowing small to provide products of a large
 - SBA may waive requirement if there are no small business manufacturers
 - Two types of **waivers**
 - **Class waivers** (specific NAICS and product code)
 - Any individual or organization may request
 - Request should be in writing
 - **Individual waivers** (solicitation-specific)
 - Only contracting officer may request waiver



Conclusion

Best Practices

- ✓ Ensure that your plan is **known and managed**
 - Who's in charge of your plan?
 - Who's in charge of submitting reports?
- ✓ **Written policies/procedures** can help demonstrate good faith compliance
 - Market research is critical
 - Refresh the market research on a regular basis
- ✓ Ensure that small business subcontracting requirements are **flowed down**
 - 52.219-8, Utilization of Small Business Concerns (mandatory flowdown)
 - 52.219-9, Small Business Subcontracting Plan (**not** a mandatory flowdown)
- ✓ **Support** your small business subcontractors, but **do not control** them
 - Control = Affiliation
 - Affiliation = (Potential) False Certification
 - False Certification = \$\$\$
- ✓ Ensure that proposals do not describe an **Ostensible Subcontractor** situation
- ✓ Carefully monitor **workshare allocations** on small business set-asides

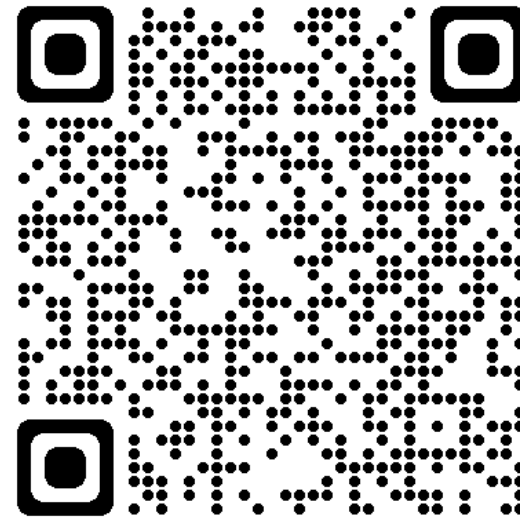


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Next Session on May 11, 2023

Session 5: Contractor Purchasing Systems



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