# Federal Small Business Subcontracting Plans

With limited exceptions, unrestricted federal procurements over $650,000 ($1.5 million for construction of any public facility) include Federal Acquisition Regulation (FAR) clauses 52.219-8 (Utilization of Small Business Concerns) and 52.219-9 (Small Business Subcontracting Plan), which require contractors and their first tier subcontractors to make a "good faith effort" to meet or to exceed the procuring agency's small business subcontracting goals. Failure to make this effort could result in liquidated damages, default termination and negative performance reviews.

This requirement for small business contracting plans raises many questions. Can a contractor count a second tier 8(a) subcontractor even if the first tier is not a small business concern? Does it still count if a first tier service-disabled veteran-owned small business (SDVOSB) subcontractor subcontracts a large portion of its work to a non-SDVOSB?

## What is a Small Business Subcontracting Plan?

The federal government encourages small businesses to participate in government contracts. Each year, the head of each federal agency establishes goals for the award of subcontracts to small business concerns. The president also establishes annual government-wide subcontracting goals that help the agencies formulate their own specific goals. Government-wide goals are 23 percent for small businesses, three percent for service-disabled veteran-owned businesses, five percent for small disadvantaged businesses and five percent for women-owned businesses.

In order to achieve those goals, FAR 19.702 requires prime contractors that are "other than small" to submit detailed small business subcontracting plans when competing for contracts exceeding $1.5 million for the construction of public facilities, and $650,000 for other contracts.

The subcontracting plan must describe how much subcontracting will be awarded to each of the specified small business categories. Solicitations typically identify the specific goal of the agency for a particular project. If the solicitation is silent, the prime and its subcontractors must determine the agency's current goals, which may be listed online.

Under FAR part 19.704, a "flow-down provision," large subcontractors must also formulate subcontracting plans if they receive a subcontract in excess of the monetary threshold. The higher-tiered contractor is responsible for obtaining, approving and monitoring the subcontracting plans of lower-tiered contractors.

The contractor is required to submit an Individual Subcontract Report (ISR) and Summary

Subcontracting Report (SSR). The ISR is submitted semiannually with the procuring agency during contract performance and upon contract completion. The SSR is submitted annually with civilian procuring agencies, or semiannually with the DoD. Both forms are submitted through the Electronic Subcontracting Reporting System (eSRS).

Under the flow-down provision, other-than-small business subcontractors with subcontracting plans must also submit ISR and SSR. The higher-tier contractor is responsible for acknowledging receipt of the subcontractor's ISR and ensuring the ISR is accurate. Lower-tier contractor SSRs are reported directly to the agency that awarded the prime contract.

## Satisfying the Requirements

Small business concerns (SBCs), HUBZone businesses, women-owned businesses, small disadvantaged businesses (SDBs), veteran-owned small businesses (VOSB) and service-disabled veteran-owned small businesses (SDVOSBs) count toward achieving subcontracting goals. In addition, Alaska Native Corporations (ANCs) and Indian tribes satisfy subcontracting goals and, unlike other SBCs, they do not need to qualify as small to count toward subcontracting goals.

A common issue is how far down a contractor may go in order to satisfy its subcontracting goals. The FAR limits contractors to counting only next tier subcontractors toward achieving goals.

For example, general contractors are permitted to count only their first tier subcontractors towards the goals identified in subcontracting plans. A general contractor may not count a second tier subcontractor towards its goals, even when the second tier subcontractor is a qualified SBC.

Similarly, first tier subcontractors can count only next (second) tier subcontractors to satisfy subcontracting goals. Because of this limitation, a contractor may still achieve its goals even if a SBC subcontracts a large portion of its work to a non-SBC. The higher tier contractor receives its subcontracting credits, even if the SBC does not perform the equivalent amount of work.

## Failing to Meet Subcontracting Goals Could Affect Your Performance Evaluation

The SBA issued a proposed new regulation (76 Fed. Reg. 193 at 61626) on October 5, 2011, requiring a large prime contractor on an unrestricted procurement to provide a written explanation if the large prime does not use a small business subcontractor, as identified in the federal small business subcontracting plan included in the bid or proposal. If the large prime does not submit a written explanation, or the contracting officer is dissatisfied with the explanation, it could adversely affect the large prime's performance evaluation.

However, even failure to meet planned goals is acceptable if the contracting officer, who reviews all information, sees that the subcontractor made a good faith effort. For example, a prime contractor that failed to achieve its subcontracting goals in one socioeconomic category, but exceeded them by an equal or greater amount in one or more of the other areas may still be considered to have made a good faith effort.

In addition, while the contractor need not award contracts to small businesses if they do not make the best offers or are less qualified to perform, it must carry out SBA policy in the awarding of subcontracts to the "fullest extent consistent with efficient performance of the contract."

## Conclusion

Contractors interested in pursuing federal work must understand federal subcontracting plan requirements. This includes knowing what information and actions do – and do not – count toward meeting subcontracting goals, as well as the consequences for failing to make a good faith effort to achieve them. Only then will contractors be able to avoid unnecessary risk.

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Filed Under: Compliance, Governance