

Subcontracting-Pre and Post Award

Fred Lagunas

Procurement Center Representative(PCR)/
Commercial Market Representative(CMR)

alfredo.lagunas.1@us.af.mil

210-395-8924

Importance of the Subcontracting Program

- In FY14, SBs received \$91.7 billion in prime contracts (roughly 25% of \$366.8 billion) and \$75.0 billion in subcontracts (33.0% of \$227.0 billion).
- Maximizes small business participation at all performance tiers
- Increasing importance on agency SCORECARD

Regulatory Requirements

- **When is FAR Clause 52.219-8, Utilization of Small Business Concerns, required?**
 - Contracts > Simplified Acquisition Threshold
AND subcontracting opportunities exist
 - Required for all business concerns, including small businesses
 - **Not** required for personal services contracts or when performance is entirely outside the US and outlying areas

Regulatory Requirements

- **When is FAR Clause 52.219-9, Small Business Subcontracting Plan, required?**
 - Contracts > \$700K (\$1.5M construction) **AND** subcontracting opportunities exist
 - Modifications > \$700K with new work **AND** subcontracting opportunities exist
 - From large businesses, state/local govt., NIB/NISH/Ability One, educational institutions, foreign owned firms.

Basically, all except small business concerns

Definition

“Other Than Small” – Refers to any entity that is not classified as a small business. This includes large businesses, state and local governments, non-profit organizations, NIB/NISH/Ability One, public utilities, educational institutions and foreign owned firms that receive Federal contracts (if any portion of the contract is to be performed in the United States.)

Regulatory Requirements

- SB Subcontracting Plan **Not** required for:
 - Small businesses
 - Personal services contracts
 - When performance is entirely outside the U.S. and outlying areas
 - Modifications within scope that do not contain 52.219-8

Subcontracting Plan Performance

- How will your performance affect your company?
 - Liquidated Damages FAR 19.705-7
 - Amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.
 - Past Performance used in proposal evaluation

Types of Plans

- Individual Plan
 - Plan for a specific contract
 - 1 contract = 1 plan
 - Covers entire contract period, including separate goals for each option period
 - Contains required plan elements
 - Choose whether or not to include indirect costs incurred for common or joint purposes (allocated on a prorated basis)
 - ISR is used to determine whether goals are met

Types of Plans

- Master Plan
 - Plant or division wide basis
 - Boiler plate plan
 - Effective for 3 years after approved
 - Goals negotiated for each contract (and rationale)
 - Master plan + goals are married and become an individual plan effective for the life of the contract
 - ISR is used to determine whether goals are met

Types of Plans

- Commercial Subcontracting Plans
 - Preferred type for “commercial items” (FAR 2.101)
 - Annual plan based on Contractor’s fiscal year
 - Applies to the entire production of commercial items on a corporate, plant, division, or product line basis
 - Covers all subcontracting (govt. and commercial)
 - Contains required elements (FAR 19.704)
 - Plan and SSR include indirect costs
 - SSR used to determine whether goals are met
 - Remains in effect during the contractor's fiscal year for all Federal government contracts in effect during that period

Types of Plans

- Commercial Plans
 - Once a contractor's commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect
 - As long as providing a commercial item.

Types of Plans

- Comprehensive Subcontracting Plan (DoD contracts only)
 - DoD Test Program, DFARS 219.702
 - Annual plan for all DOD subcontracting
 - Government fiscal year
 - Corporate, plant, or division basis
 - DCMA administers program
 - Contains required elements (FAR 19.704)
 - Has additional elements
 - Submit SSR annually (used to determine whether goals are met)

Who to count?

- Primes must collect written size certifications
- Goal Categories
 - **Small Business – self-certifying***
 - **SDB – self-certifying***
 - **WOSB – self-certifying**
 - **HUBZone – SBA certified**
 - **VOSB – self-certifying**
 - **SDVOSB – self-certifying**



*ANCs and Indian Tribes are counted as SB and SDB in subcontracting plans/reports

*For DOD contracts, NIB/NISH & HBCU/MI counted toward SB

Size



- Contractors must be small for the NAICS code of the subcontract
- Subcontractors include suppliers, vendors, and subcontractors (anyone you spend money with).
- Subcontractors could be small for one subcontract, and large for another
- Size at time of size self-certification with subcontract is size for LIFE of subcontract

SBA Compliance Reviews

- SBA performs compliance reviews
 - Subcontracting Orientation and Assistance Review (SOAR)
 - Reviews of ISR/SSR data in eSRS
 - Full On-Site Compliance Reviews
 - issue rating
 - Follow Up Reviews
 - Issue rating
- The agency may join SBA during the review

Compliance

- Policy statement from CEO/President
- Training of buyers/ Buyer Awareness
- Outreach/success stories
- Goal attainment/eSRS reporting
- Correct classification of subcontractors
- Justification for Subcontracts < \$150,000
- Subcontracting Plan Flow Down Subcontract > \$700,000 to a large business
 - FAR 52.212-5(e) or FAR 52.244-6(c)

Good Faith Efforts

Taking specific steps to maximize small business participation in subcontracts

13 CFR 125.3:

- (i) Breaking apart work
- (ii) Conducting market research to identify small business subcontractors and suppliers (Dynamic Small Business Search, posting notices in SBA's SUB-Net, participating in Business Matchmaking events)
- (iii) Soliciting small business concerns early in the acquisition process
- (v) Negotiating in good faith with interested small businesses;
- (vi) Directing small businesses that need additional assistance to SBA;
- (vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services;
- (viii) Utilizing the available services of small business associations and organizations
- (ix) Participating in a formal mentor-protégé program

Proposed Rule (Oct. 5, 2011)

76 Federal Register 61626

Required by the Small Business Jobs Act

Long-standing concerns that primes use SBs to win contracts but do not follow through when contract is awarded

Key Requirements:

- If offeror fails to use the SBs that it referenced or relied upon in its proposal, the offeror must provide the contracting officer with a written explanation.
- A prime contractor also must notify the contracting officer if it pays a reduced price to a subcontractor or payment to a subcontractor is more than 90 days past due.

Proposed Rule (Oct. 5, 2011)

76 Federal Register 61626

- COs must report prime in FAPIS, when it has a history of unjustified, untimely, or reduced payments
- NAICS codes must be assigned to subcontracts
- For contracts > 5 years, the CO may now require a subcontracting plan if the firm's size status changes to Large following its recertification.
- Primes must update their subcontracting plans upon the award of an option or if a modification causes the value of the contract to exceed the subcontracting plan threshold (\$700,000).
- Primes cannot prohibit a subcontractor from discussing payment or utilization of small business concerns directly with the Government.

Final Rule (May 31, 2016) 81 Federal Register 34243 (eff: June 30, 2016)

- Previous statutory language: In order to be awarded a contract as a SB, a concern must agree to perform a certain % of a contract with its own labor force.
- NDAA 2013: In order to be awarded a contract as a SB, a concern must agree that the amount expended on subcontractors does not exceed a certain % of the total value of the contract.
 - Subcontracting does not include any work done by similarly situated entities.

Final Rule (May 31, 2016) 81 Federal Register 34243 (eff: June 30, 2016)

- Mixed contracts (one requiring both services and supplies)
 - CO's selection of the applicable NAICS code will determine which limitation of subcontracting (LOS) requirement applies.
- LOS applies only to that portion of the requirement identified as the primary purpose of the contract. (i.e., for services NAICS code, only to the services portion of the contract; not to ancillary supply items that may also be procured)

Final Rule (May 31, 2016) 81 Federal Register 34243 (eff: June 30, 2016)

- Cost of materials excluded from LOS requirement for construction and supply contracts.
- Prime and similarly situated subcontractors at first tier subcontracting level must perform required % of work. So, first tier subs counted only to the extent that work is performed by employees of the first tier subcontractor. First tier subs cannot subcontract to a non-similarly situated entity and satisfy the requirement Cost of materials.
- Proposed rule required prime to enter a written agreement with each similarly situated entity it intended to use, identifying and amount of work to be performed. Final rule: eliminated requirement to have such written agreements.

Final Rule (May 31, 2016) 81 Federal Register 34243 (eff: June 30, 2016)

- Proposed rule required a SB that was using similarly situated entities to meet the limitations on subcontracting requirements to report to the C.O. on their compliance with those LOSs. Final rule eliminates that requirement.
 - SBs who do not use similarly situated entities to meet the LOS requirements are not required to report on their compliance; wanted to make the rules similar.
- Similarly situated entity is one that is small for the NAICS code that the prime assigns to the subcontract.

Final Rule (May 31, 2016) 81 Federal Register 34243 (eff: June 30, 2016)

- LOSs do not apply to small business set-aside contracts valued between \$3,000 and \$150,000.
 - Would continue to apply to all 8(a), Hubzone, SDVOSB and WOSB/EDWOSB set-aside contract awards regardless of value.
- Amends ostensible subcontractor rule to exclude subcontractors that are similarly situated entities.

Electronic Subcontract Reporting System (eSRS)

- eSRS is a web-based government-wide subcontracting system that allows electronic submission, management (acceptance, revision, rejection), creation of reports and analyses of subcontracting data in a real-time paperless environment. In turn, there is a reduction in errors and processing time and no lost paper work which leaves more time for increasing subcontracting.

Assistance

- eSRS Functionality Questions
 - Federal Service Desk www.fsd.gov
 - Within the U.S. toll free at 1-866-606-8220 or outside the U.S. at 334-206-7828
- Subcontracting Questions
 - SBA Commercial Marketing Representative for your area:
<http://www.sba.gov/content/government-contracting-field-staff-directory>
 - Lead Subcontracting Program Analyst
Angela Terry - 202-205-9455

SUB-Net

web.sba.gov/subnet/

- SUB-**Net** -- Electronic Bulletin Board for Subcontracting Opportunities
 - Free
 - Quick Registration
 - Start Posting
- For more information contact Marsha Daigle at marsha.daigle@sba.gov

QUESTIONS