

• *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

**FOR FURTHER INFORMATION CONTACT:** Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, *telephone:* 301-492-3667.

**SUPPLEMENTARY INFORMATION:**

**Submitting Comments and Accessing Information**

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document using the following methods:

• *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov).

• *Federal Rulemaking Web site:* Public comments and supporting materials related to this petition for rulemaking can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2011-0220.

**Background**

Cheri Swensson, on behalf of the Academy, submitted a petition for rulemaking dated May 5, 2011, and supplemented on August 3, 2011. The petitioner requested that the NRC amend Title 10 of the *Code of Federal Regulations* (10 CFR), Section 26.187, "Substance abuse expert," by including the Academy at Section 26.187(b)(5). The petitioner is the Executive Director for the Academy, which is an international credentialing body composed of psychologists, medical doctors, nurses, social workers, and counselors that provides care in areas such as alcohol and gambling addiction. In 2010, the Academy received its accreditation from the National Commission for Certifying Agencies (NCCA). The NRC has determined that the petition meets the threshold sufficiency requirements for a petition for rulemaking under 10 CFR 2.802, "Petition for rulemaking," and the petition has been docketed as PRM-26-7. The NRC is requesting public comment on the petition for rulemaking.

**Discussion of the Petition**

The petitioner states that the Academy "is very interested in working alongside the NRC to ensure its substance abuse experts are qualified and adhere to the NRC's code of professionalism and ethical conduct through [the Academy's] Certified Addiction Specialist [CAS] certification." The petitioner states that the Academy's CAS certification was accredited by the NCCA in 2010 and is a comprehensive credential offered by the Academy which includes competencies in alcohol addiction, drug addiction, sex addiction, eating disorders and gambling addiction. The petitioner claims that its certification requirements meet or exceed the NRC's requirements. The petitioner requests that the NRC amend § 26.187(b)(5) to include the Academy as one of the organizations authorized to certify a substance abuse expert.

Dated at Rockville, Maryland, this 30th day of September 2011.

For the Nuclear Regulatory Commission.

**Annette Vietti-Cook,**

*Secretary of the Commission.*

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**SMALL BUSINESS ADMINISTRATION**

**13 CFR Parts 121 and 125**

**RIN 3245-AG22**

**Small Business Subcontracting**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Small Business Administration (SBA or Agency) is proposing to amend its regulations to implement provisions of the Small Business Jobs Act of 2010, which pertain to small business subcontracting. SBA is proposing to amend its regulations to provide for a "covered contract" (a contract for which a small business subcontracting plan is required, currently valued above \$1.5 million for construction and \$650,000 for all other contracts), a prime contractor must notify the contracting officer in writing whenever the prime contractor does not utilize a subcontractor used in preparing its bid or proposal during contract performance. SBA is also proposing to amend its regulations to require a prime contractor to notify a contracting officer in writing whenever the prime contractor reduces payments to a subcontractor or when payments to a subcontractor are 90 days or more past due. In addition, SBA is proposing to clarify that the contracting officer is responsible for monitoring and evaluating small business subcontracting plan performance. SBA is also proposing to clarify which subcontracts must be included in subcontracting data reporting, which subcontracts should be excluded, and the way subcontracting data is reported.

SBA is also proposing to make other changes to update its subcontracting regulations, including changing subcontracting plan thresholds and referencing the electronic subcontracting reporting system (eSRS). Some of the SBA's proposed changes would require the contracting officer to review subcontracting plan reports within 60 days of the report ending date.

Finally, SBA is also proposing to address how subcontracting plan requirements and credit towards subcontracting goals can be implemented in connection with Multi-agency, Federal Supply Schedule, Multiple Award Schedule and Government-wide Acquisition indefinite delivery, indefinite quantity (IDIQ) contracts.

**DATES:** Comments must be received on or before December 5, 2011.

**ADDRESSES:** You may submit comments, identified by RIN: 3245-AG23, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail, for paper, disk, or CD-ROM submissions:* Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., 8th Floor, Washington, DC 20416.

- *Hand Delivery/Courier:* Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., 8th Floor, Washington, DC 20416.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.Regulations.gov>, please submit the information to Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., 8th Floor, Washington, DC 20416, or send an e-mail to [Dean.Koppel@sba.gov](mailto:Dean.Koppel@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information or not.

**FOR FURTHER INFORMATION CONTACT:**

Dean Koppel, Office of Government Contracting, 409 Third Street, SW., Washington, DC 20416; (202) 205-9751; [Dean.Koppel@sba.gov](mailto:Dean.Koppel@sba.gov).

**SUPPLEMENTARY INFORMATION:** Section 1321 of the Jobs Act requires the SBA Administrator, in consultation with the Administrator of the Office of Federal Procurement Policy, to publish regulations establishing policies for subcontracting compliance, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices. A 2010 Senate Report to a bill (S. 2989) that contained many of the same or similar provisions to the subcontracting provisions in the Jobs Act cites a 2005 Government Accountability Office (GAO) report concerning the Department of Energy, where GAO found that large business prime contractors had overstated their small business subcontracting achievements by excluding certain subcontracts from the base, such as electricity and utilities, thereby making it appear that the prime contractor awarded a much higher percentage of its subcontracts to small business concerns than the prime contractors actually awarded. S. Rep. No. 111-343, "Small

Business Contracting Revitalization Act of 2010," September 29, 2010; "Department of Energy, Improved Oversight Could Better Ensure Opportunities for Small Business Subcontracting," GAO Report No. 05-459 (May 2005).

While SBA recognizes the valuable insight provided by GAO in the above-referenced report, it does not concur with all of GAO's findings. For example, SBA does not believe that electricity and utilities (e.g., water, sewer, and refuse collection purchased from a municipality) belong in the subcontracting base. Including electricity and other utilities in the base creates the illusion that there are more subcontracting opportunities for small business than are actually available. SBA is proposing to define subcontract so that prime contractors and contracting officers will no longer be confused about which subcontracts must be included when reporting on small business subcontracting performance. For example, when preparing its individual subcontracting plan, a prime contractor must decide whether or not to include indirect costs in the subcontracting base, for both goaling and reporting purposes. Indirect costs must be included in a commercial plan to ensure comparability between goals and achievements because companies with commercial plans file only a summary report, not an individual report. All contractors must include indirect costs in their summary subcontracting reports.

In addition, GAO recommended that prime contractors report subcontracting to small businesses as a percentage of total contract dollars. Under current reporting requirements, prime contractors report subcontracting achievement in whole dollars and as a percentage of eligible subcontracts. SBA believes that subcontracting should be reported as a percentage of total subcontracting dollars rather than as a percentage of total contract dollars. The Small Business Act establishes government goals for socioeconomic groups based on a percentage of total subcontracted dollars, not total contract dollars. 15 U.S.C. 644(g)(1). However, SBA is proposing to explicitly authorize contracting officers to establish additional goals in terms of total contract dollars. Contracting officers are already doing this, and when a prime contractor enters its subcontracting achievements (i.e., dollars) into eSRS, the system automatically calculates the percentage by both methods—i.e., as a percentage of total subcontracting and as a percentage of total contract dollars. Thus, the contracting officer has the

ability to compare achievements against the total contract dollars if desired.

GAO also found that there was confusion within the procuring agency about who was responsible for monitoring small business subcontracting plan performance. SBA is proposing to amend its regulations to make it clear that contracting officers (or administrative contracting officers if applicable) are responsible for monitoring and evaluating the prime contractor's small business subcontracting plan compliance and reporting. SBA is proposing to require the cognizant contracting officer to review every prime contractor's Individual Subcontract Report (ISR) or Subcontracting Report for Individual Contracts, SF 294, if authorized, or when applicable, the Summary Subcontract Report (SSR) for a commercial plan, within 60 days of the report ending date (e.g., by November 30th for a report submitted for the fiscal year ended September 30th) and accept or reject the report in accordance with the Federal Acquisition Regulation (FAR) provisions set forth in subpart 19.7 and the eSRS instructions (<http://www.esrs.gov>).

All contractors whose reports are rejected, including those with individual contract plans and commercial plans as defined in FAR 19.701, will be required to make the necessary corrections and resubmit their reports within 30 days of receiving the notice of rejection.

SBA is also proposing to address subcontracting plans in connection with Multi-Agency, Federal Supply Schedule, Multiple Award Schedule and Government-wide Acquisition IDIQ contracts. Funding agencies have expressed interest in receiving credit towards their subcontracting goals for orders placed against another agency's task or delivery order contract. SBA is proposing that the contracting officer for the IDIQ contract will establish subcontracting plans for contractors without commercial plans. The contractor will report small business subcontracting achievement on an order-by-order basis to the contracting officer for the contracting agency. Contractors are currently reporting information on all orders collectively on a semi-annual or annual basis. Reporting on an order-by-order basis will allow the funding agency to receive credit towards its small business subcontracting goals. SBA is requesting comments on whether the reporting requirement should apply to all orders, or only apply to orders above a certain threshold. SBA is also proposing to allow the funding agency contracting

officer the discretion to establish goals in connection with individual orders.

SBA is proposing that contracting officers require prime contractors to update subcontracting plans whenever an option is exercised, as currently required by FAR 19.705-2(e). SBA is also proposing to require subcontracting plans whenever a modification causes a contract to exceed the subcontracting plan threshold. As currently written the FAR only requires a subcontracting plan if the value of the modification exceeds the subcontracting threshold. SBA is also proposing to allow the contracting officer to request a subcontracting plan when a firm's status changes from small to other than small as a result of a size recertification.

Section 1322 of the Jobs Act established a requirement that a prime contractor on a covered contract must notify the contracting officer in writing if the prime contractor fails to utilize a small business concern used in preparing and submitting the prime contractor's bid or proposal. Defining when a prime used a subcontractor in preparing a bid or proposal is very difficult. For example, providing a quote, or discussing availability, does not rise to the level of collaboration that would require notice to the Government. Consequently, we are proposing that the notice required by the statute will be triggered when: (1) The offeror specifically references a small business concern in a bid or proposal, (2) the offeror has entered into a written agreement with the small business concern for purposes of performing the specific contract as a subcontractor, or (3) the small business concern drafted portions of the proposal or submitted pricing or technical information that appears in the bid or proposal, with the intent or understanding that the small business concern will perform that related work if the offeror is awarded a contract.

Section 1334 of the Jobs Act established a requirement that a prime contractor notify the contracting officer in writing whenever a payment to a subcontractor is reduced or is 90 days or more past due for goods and services provided for the contract and for which the Federal agency has paid the contractor. The prime contractor shall include the reason for the reduction in payment to or failure to pay a subcontractor in the written notice. The contracting officer must consider the prime contractor's unjustified untimely or reduced price payments to subcontractors when evaluating the prime contractor's performance.

In addition, we are proposing that the contracting officer should consider

whether to require a prime contractor to enter into a funds control agreement with a neutral third party if the prime contractor fails to pay subcontractors in a timely manner or fails to pay the agreed upon contractual price without justification. S. Rep. No. 111-343, p. 15. SBA is specifically requesting comments on how these arrangements work in the commercial sector, and specific language which can be used to guide contracting officers on the use of such an arrangement.

As required by the statute, SBA is also proposing that the contracting officer must record the identity of a prime contractor with a history of unjustified, untimely payments to subcontractors in the Federal Awardee Performance and Integrity System or any successor system. SBA is proposing to define a history of unjustified untimely or reduced payments as three incidents within a 12 month period. SBA invites comments on the proposed definition or alternatives with supporting rationales, or comments on whether such judgments should be left to the discretion of the contracting officer.

SBA is proposing to update its regulations to increase the subcontracting plan thresholds which were increased pursuant to the government-wide procurement program inflationary adjustments required by Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, see also 75 FR 53129 (Aug. 30, 2010). SBA proposes to reference eSRS instead of SF-294 and SF-295 (where appropriate). SBA proposes to clarify that compliance reviews include reviews to determine whether the prime has assigned the subcontract the correct NAICS code and corresponding size standard, and whether the subcontractor qualifies under the size or socioeconomic status claimed. In addition, SBA is proposing to update its regulations to specify that a compliance review includes analysis of whether the prime contractor is monitoring its subcontractors with respect to their subcontracting plans, achievement of their subcontracting goals and reviewing their ISRs or other reports.

**Compliance With Executive Orders 12866, 13563, 12988, 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5. U.S.C. 601-612)**

*Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for purposes of Executive Order

12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 801, *et. seq.*

**Regulatory Impact Analysis**

1. *Is there a need for the regulatory action?* The proposed regulations implement Sections 1321, 1322 and 1334 of the Small Business Jobs Act of 2010, Public Law 111-240, 124 Stat. 2504, September 27, 2010 (Jobs Act); 15 U.S.C. 637(d)(6)(G), (d)(12). Section 1321 of the Jobs Act requires the Administrator to establish a policy on subcontracting compliance within one year of enactment.

2. *What are the potential benefits and costs of this regulatory action?*

The proposed regulations will benefit small business subcontractors by encouraging large business prime contractors to pay small business subcontractors in a timely manner and the agreed upon contractual price. The proposed regulations will benefit small business subcontractors by encouraging large business contractors to utilize small business concerns in contract performance where the prime contractor used the small business concern to prepare the bid or proposal. The proposed regulations will benefit small business subcontractors by clarifying the responsibilities of the contracting officer in monitoring small business subcontracting plan compliance. The proposed regulations will benefit small business subcontractors by specifically authorizing procuring agencies to consider proposed small business subcontracting when evaluating offers.

The proposed regulations will benefit small business subcontractors by requiring large business concerns to report subcontracting results on an order-by-order basis, thereby enabling the funding agency to more closely monitor small business subcontracting in connection with the order and enabling the funding agency to receive credit towards its small business subcontracting goals. The proposed rule benefits funding agencies by allowing them to receive credit towards their subcontracting goals. The proposed rule benefits small business subcontractors by providing transparency with respect to small subcontracting on an order-by-order basis, thereby allowing the funding agency to monitor performance, and in its discretion, establish subcontracting goals for particular orders.

eSRS will have to be altered to allow large business prime contractors to report subcontracting results on an order-by-order basis. Other systems may

have to be altered to allow funding agencies to receive credit towards their small business subcontracting goals. Large business prime contractors will have to submit subcontracting reports more frequently.

Large businesses will have to report to the contracting officer in writing when they fail to utilize a small business concern in contract performance when the prime contractor utilized the small business concern in preparing the bid or proposal. Large businesses will have to report to the contracting officer in writing when they fail to pay a subcontractor within 90 days or when they pay a subcontractor a reduced price. The contracting officer will have to consider these written explanations when evaluating contract performance. The Federal Awardee Performance and Integrity System will have to be modified to allow contracting officers to identify large business prime contractors with a history of unjustified untimely payments.

### 3. *What are the alternatives to this final rule?*

Many of the proposed regulations are required to implement statutory provisions, and the Jobs Act requires promulgation of a policy on subcontracting compliance with within one year of enactment. The alternative to the proposed regulation concerning orders would be to maintain the current environment, where subcontracting results are not reported on an order-by-order basis, and agencies funding orders do not receive credit towards their small business subcontracting goals.

#### **Executive Order 13563**

As part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA has solicited comments and suggestions from procuring agencies on how to best implement the Jobs Act. SBA held public forums around the country to discuss implementation of the Jobs Act. SBA has incorporated, where feasible, public input into the proposed rule. The proposed regulations concerning evaluation factors provide contracting officers with the discretion to utilize various methods to improve small business subcontracting, without requiring their use in all cases. The proposed rule concerning orders will provide contracting agencies with transparency by providing data concerning small business subcontracting for particular orders. Overall, these regulations would minimize the burden resulting from these proposed amendments. SBA is proposing to amend its regulations to remove outmoded thresholds that have

increased and remove references to paper based forms that have been replaced by electronic reporting through eSRs.

As part of its implementation of this executive order and consistent with its commitment to public participation in the rulemaking process, SBA held public meetings in 13 locations around the country to discuss implementation of the Jobs Act, and received public input from thousands of small business owners, contracting officials and large business representatives. Although most of these amendments are new, SBA expects that public participation will help to form the Agency's retrospective analysis of related contracting regulations that are not being amended at this time.

#### **Executive Order 12988**

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

#### **Executive Order 13132**

This rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government, as specified in the order. As such it does not warrant the preparation of a Federalism Assessment.

#### **Paperwork Reduction Act, 44 U.S.C. Ch. 35**

For the purpose of the Paperwork Reduction Act, SBA has determined that this rule, if adopted in final form, would impose new government-wide reporting requirements on large prime contractors. The Jobs Act requires such contractors to notify contracting officers, at the applicable procuring agency, in writing whenever a prime contractor fails to utilize a small business subcontractor used in preparing and submitting a bid or proposal; when the prime contractor pays a subcontractor a reduced price without justification; or when payments to a subcontractor are 90 days or more past due. These requirements will also be incorporated in the Federal Acquisition Regulations.

#### **Regulatory Flexibility Act, 5 U.S.C. 601–612**

SBA has determined that this proposed rule, if adopted in final form,

may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. Therefore, SBA has prepared an Initial Regulatory Flexibility Act (IRFA) analysis addressing the proposed regulation.

#### **IRFA**

When preparing a Regulatory Flexibility Analysis, an agency shall address all of the following: a description of why the action by the agency is being considered; the objectives and legal basis of the rule; the estimated number of small entities to which the rule may apply; a description of the projected reporting, recordkeeping and other compliance requirements; identification of all Federal rules which may duplicate, overlap or conflict with the proposed rule; and a description of significant alternatives which minimize any significant economic impact on small entities. This IRFA considers these points and the impact the proposed regulation concerning subcontracting may have on small entities.

#### *(a) Need for, Objectives, and Legal Basis of the Rule*

The majority of the proposed regulatory amendments are required to implement Sections 1321, 1322 and 1334 of the Small Business Jobs Act of 2010, Public Law 111–240, 124 Stat. 2504, September 27, 2010 (Jobs Act); 15 U.S.C. 637(d)(6)(G), (d)(12). The proposed regulations that are not required by the Jobs Act are intended to help small business subcontractors by explicitly authorizing procuring agencies to consider proposed small business participation when evaluating offers from other than small business concerns, and to require other than small prime contractors to report data on small business subcontracting in connection with certain orders.

#### *(b) Estimate of the Number of Small Entities to Which the Rule May Apply*

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of entities that may be affected by the proposed rules, if adopted. The RFA defines “small entity” to include “small businesses,” “small organizations,” and “small governmental jurisdictions.” SBA's programs generally do not apply to “small organizations” or “small governmental jurisdictions” because they are non-profit or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA's regulations. SBA's

programs generally apply only to for-profit business concerns. However, to the extent this rule will impact small organizations or small governmental jurisdictions that receive prime contracts from the Federal government with values that exceed the threshold, the numbers would be minimal, and the major provisions would only apply if the entity fails to pay or utilize small business subcontractors.

The proposed rule will not directly negatively affect any small business concern, because it applies to other than small concerns and contracting officers. The proposed rule will indirectly benefit small business concerns, by requiring other than small prime contractors to report to the contracting officer when the prime contractor has failed to utilize a small business subcontractor used in preparing the bid or proposal. The proposed rule will also indirectly benefit small business concerns, by requiring large business prime contractors to report to the contracting officer when the prime contractor has failed to pay a small business subcontractor in a timely manner or pays a subcontractor a reduced rate without justification.

There are in approximately 348,000 concerns listed as small business concerns in the Dynamic Small Business Search (DSBS) database. We do not know how many of these concerns participate in small business subcontracting. Firms do not need to register in the DSBS database to participate in subcontracting. The DSBS database is primarily used for prime contracting purposes. Thus, the number of firms participating in subcontracting may be greater than or lower than the number of firms registered in the DSBS database.

*(c) Projected Reporting, Recordkeeping and Other Compliance Requirements*

To the extent the proposed rule imposes new information collection, recordkeeping or compliance requirements, they are imposed on other than small business concerns, not on small business concerns.

*(d) Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule*

SBA is not aware of any rules which duplicate, overlap or conflict with the proposed rule. The proposed rule primarily implements statutory provisions.

*(e) Significant Alternatives to the Rule Which Could Minimize Impact on Small Entities*

Section 1321 of the Jobs Act requires SBA to promulgate regulations implementing it. Section 1321 of the Jobs Act and its proposed implementing regulations primarily apply to contracting officers. Sections 1322 and 1334 of the Jobs Act amend portions of the Small Business Act, which SBA is responsible for administering and implementing through its regulations. The proposed rules implementing Sections 1322 and 1334 of the Jobs Act primarily apply to other than small concerns. As discussed above, the proposed rule indirectly benefits small business concerns, without requiring small business concerns to report, keep records or take other compliance actions.

**List of Subjects**

*13 CFR Part 121*

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

*13 CFR Part 125*

Government contracting programs; Small business subcontracting program.

For the reasons stated in the preamble, SBA proposes to amend parts 121 and 125 of title 13 of the Code of Federal Regulations as follows:

**PART 121—SMALL BUSINESS SIZE REGULATIONS**

1. The authority citation for 13 CFR part 121 continues to read as follows:

**Authority:** 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, and 662(5); and Public Law 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

2. Amend § 121.404(g)(3)(ii) by adding the following sentence at the end of the paragraph:

**§ 121.404 When does SBA determine the size status of a business concern?**

\* \* \* \* \*

(g) \* \* \*

(3) \* \* \*

(ii) \* \* \* However, a contracting officer may require a subcontracting plan if a firm's size status changes from small to other than small as a result of a size recertification.

\* \* \* \* \*

**PART 125—GOVERNMENT CONTRACTING PROGRAMS**

3. The authority citation for part 125 is revised to read as follows:

**Authority:** 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644 and 657(f); Pub. L. 111–240, § 1321.

- 4. Amend § 125.3 as follows:
  - a. Revise paragraph (a);
  - b. Revise paragraph (b)(1);
  - c. Revise paragraph (c)(1) introductory text;
  - d. Revise paragraph (c)(1)(iii);
  - e. Redesignate paragraphs (c)(1)(iv), (v), and (vi) as (c)(1)(vii), (viii) and (ix) and add new paragraphs (c)(1)(iv), (v), and (vi);
  - f. Revise newly redesignated paragraphs (c)(1)(viii) and (ix);
  - g. Redesignate paragraph (c)(3) as (c)(6) and add new paragraphs (c)(3), (c)(4) and (c)(5);
  - h. Revise paragraph (d);
  - i. Revise paragraph (f)(2);
  - j. Revise paragraph (g); and
  - k. Add paragraph (h).

The additions and revisions read as follows:

**§ 125.3 Subcontracting assistance.**

(a) *General.* The purpose of the subcontracting assistance program is to provide the maximum practicable subcontracting opportunities for small business concerns, including small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns, certified small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The subcontracting assistance program implements section 8(d) of the Small Business Act, which includes the requirement that, unless otherwise exempt, other-than-small business concerns awarded contracts that offer subcontracting possibilities by the Federal Government in excess of \$650,000, or in excess of \$1,500,000 for construction of a public facility, must submit a subcontracting plan to the appropriate contracting agency. The Federal Acquisition Regulation sets forth the requirements for subcontracting plans in 48 CFR 19.7, and the clause at 48 CFR 52.219–9.

(1) Subcontract under this section means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract or subcontract (including modifications). Purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor are not included. Subcontract award data

reported by prime contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made beyond the immediate next-tier, unless the contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian Tribe. Only subcontracts involving performance in the United States or its outlying areas should be included, with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas and subcontracts for foreign military sales unless waived in accordance with agency regulations. The following should not be included in the subcontracting base: Internally generated costs such as salaries and wages, employee insurance; other employee benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; Original Equipment Manufacturer relationships during warranty periods (negotiated up front with product); electricity; utilities such as water, sewer, and other services purchased from a municipality; and philanthropic contributions. Utility companies may be eligible for additional exclusions unique to their industry, which may be approved by the contracting officer on a case-by-case basis.

(2) Subcontracting goals required under paragraph (c) must be established in terms of the total dollars subcontracted and as a percentage of total subcontract dollars. However, a contracting officer may establish additional goals as a percentage of total contract dollars.

(3) A prime contractor has a history of unjustified untimely or reduced payments to subcontractors if the prime contractor has reported itself to a contracting officer in accordance with paragraph (c)(5) on three occasions within a 12 month period.

(b) *Responsibilities of prime contractors.* (1) Prime contractors (including small business prime contractors) selected to receive a Federal contract that exceeds the simplified acquisition threshold, that will not be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, and that is not for services which are personal in nature, are responsible for ensuring that small business concerns have the

maximum practicable opportunity to participate in the performance of the contract, including subcontracts for subsystems, assemblies, components, and related services for major systems, consistent with the efficient performance of the contract.

\* \* \* \* \*

(c) *Additional responsibilities of large prime contractors.* (1) In addition to the responsibilities provided in paragraph (b) of this section, a prime contractor selected for award of a contract or contract modification that exceeds \$650,000, or \$1,500,000 in the case of construction of a public facility, is responsible for:

\* \* \* \* \*

(iii) A prime contractor may not prohibit a subcontractor from discussing any material matter pertaining to payment or utilization as set forth in paragraph (c) with the contracting officer;

(iv) When developing an individual subcontracting plan (also called individual contract plan), the contractor must decide whether to include indirect costs in its subcontracting goals. If indirect costs are included in the goals, these costs must be included in the Individual Subcontract Report (ISR) in <http://www.esrs.gov> (eSRS) or Subcontract Reports for Individual Contracts (the paper SF-294 (if authorized)). If indirect costs are excluded from the goals, these costs must be excluded from the ISRs (or SF-294 if authorized); however, these costs must be included on a prorated basis in the Summary Subcontracting Report (SSR) in the eSRS system. A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its SSR;

(v) Assigning each subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see 121.410);

(vi) Submitting timely and accurate ISRs and SSRs in eSRS, or if information for a particular procurement cannot be entered into eSRS, submit a timely SF-294, Subcontracting Report for Individual Contract. When a report is rejected by the contracting officer, the contractor must make the necessary corrections and resubmit the report within 30 days of receiving the notice of rejection;

\* \* \* \* \*

(viii) Providing pre-award written notification to unsuccessful small business offerors on all subcontracts over \$150,000 for which a small business concern received a preference. The written notification must include

the name and location of the apparent successful offeror and if the successful offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business; and

(ix) As a best practice, providing the pre-award written notification cited in paragraph (c)(1)(viii) of this section to unsuccessful and small business offerors on subcontracts at or below \$150,000 whenever it is practical to do so.

\* \* \* \* \*

(3) An offeror must represent to the contracting officer that it will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the bid or proposal, in the same amount and quality used in preparing and submitting the bid or proposal. An offeror used a small business concern in preparing the bid or proposal if:

(i) The offeror references the small business concern as a subcontractor in the bid or proposal;

(ii) The offeror has a subcontract or agreement in principle to subcontract with the small business concern to perform a portion of the specific contract; or

(iii) The small business concern drafted any portion of the bid or proposal or the offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract.

(4) If an offeror fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in paragraph (c)(3) of this section, the offeror must provide the contracting officer with a written explanation.

(5) A prime contractor shall notify the contracting officer in writing if the prime contractor pays a reduced price to a subcontractor for goods and services upon completion of the responsibilities of the subcontractor or the payment to a subcontractor is more than 90 days past due for goods and services provided for the contract and for which the Federal agency has paid the prime contractor. The prime contractor shall include the reason for the reduction in payment to or failure to pay a subcontractor in any written notice.

(d) *Contracting officer responsibilities.* The contracting officer (or administrative contracting officer if specifically delegated in writing to accomplish this task) is responsible for evaluating the prime contractor's compliance with its subcontracting plan, including:

(1) Ensuring that all contractors submit their subcontracting reports into the eSRS or, if applicable, the SF-294, Subcontracting Report for Individual Contracts, within 30 days after the report ending date (e.g., by October 30th for the fiscal year ended September 30th);

(2) Reviewing all reports in eSRS within 60 days of the report ending date (e.g., by November 30th for a report submitted for the fiscal year ended September 30th);

(3) Evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. Evidence that a large business prime contractor has made a good faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

(i) The contractor performed one or more of the actions described in paragraph (b) of this section, as appropriate for the procurement;

(ii) Although the contractor may have failed to achieve its goal in one socioeconomic category, it overachieved its goal by an equal or greater amount in one or more of the other categories; or

(iii) The contractor fulfilled all of the requirements of its subcontracting plan.

(4) Evaluating the prime contractor's written explanation concerning the prime contractor's failure to use a small business concern in performance when the prime contractor used the small business concern to prepare the bid or proposal.

(5) Evaluating the prime contractor's written explanation concerning its payment of a reduced price to a subcontractor for goods and services upon completion of the responsibilities of the subcontractor or its payment to a subcontractor more than 90 days late for goods and services provided for the contract and for which the Federal agency has paid the prime contractor.

(6) Evaluating whether a prime contractor that has failed to pay subcontractors in a timely manner or failed to pay subcontractors an agreed upon contractual price without justification should be required to enter into a funds control agreement with a neutral third party for the purpose of paying subcontractors the contractual amount in a timely manner.

(7) Evaluating whether the prime contractor has a history of unjustified untimely or reduced payments to subcontractors, and if so, recording the identity of the prime contractor in the Federal Awardee Performance and Integrity Information System (FAPIS), or any successor database.

(8) A contracting officer must require the prime contractor (other than a prime contractor with a commercial plan) to update its subcontracting plan when an option is exercised.

(9) A contracting officer must require the prime contractor (other than a contractor with a commercial plan) to submit a subcontracting plan if the value of a modification causes the value of the contract to exceed the subcontracting plan threshold.

(10) A contracting officer may require a subcontracting plan if a firm's size status changes from small to other than small as a result of a size recertification.

\* \* \* \* \*

(f) \* \* \*

(2) All compliance reviews begin with a validation of the contractor's most recent ISR (or SF-294, if applicable) or SSR.

(i) A compliance review includes an evaluation of whether the prime contractor assigned the proper NAICS code and corresponding size standard to a subcontract, and a review of whether small business subcontractors qualify for the size or socioeconomic status claimed.

(ii) A compliance review includes validation of the contractor's methodology for completing its subcontracting reports.

(iii) A compliance review includes consideration of whether the contractor is monitoring its subcontractors with regard to their subcontracting plans, achievement of their proposed subcontracting goals, and reviewing their subcontractors' ISRs (or SF-294s, if applicable).

\* \* \* \* \*

(g) *Subcontracting consideration in source selection.* (1) A solicitation requiring a subcontracting plan may contain an evaluation factor or subfactor for small business subcontracting participation in the subject procurement. A small business concern submitting an offer must receive the maximum score or credit under the evaluation factor or subfactor, without having to submit any information in connection with this factor or subfactor.

(2) When an ordering agency anticipates placing an order against a Federal Supply Schedule, government-wide acquisition contract (GWAC), or multi-agency contract (MAC), the

ordering agency may evaluate subcontracting as a significant factor in its source selection process. In addition, the ordering agency may also evaluate subcontracting as a significant factor in source selection when entering into a blanket purchase agreement. At the time of contract award, the contracting officer must disclose to all competitors which one (or more) of these three elements will be evaluated as an important source selection evaluation factor in any subsequent procurement action. A small business offeror automatically receives the maximum possible score or credit on this evaluation factor without having to submit a subcontracting plan and without having to demonstrate subcontracting past performance. The factors that may be evaluated, individually or in combination, are:

(i) The subcontracting to be performed on the specific requirement;

(ii) The goals negotiated in previous subcontracting plans; and

(iii) The contractor's past performance in meeting the subcontracting goals contained in previous subcontracting plans.

(h) *Multi-agency, Federal Supply Schedule, Multiple Award Schedule and Government-wide Acquisition Contracts.* Except where a prime contractor has a commercial plan, the contracting officer shall require subcontracting plans for Multi-agency, Federal Supply Schedule, Multiple Award Schedule and Government-wide Acquisition indefinite delivery, indefinite quantity (IDIQ) contracts with estimated values above the subcontracting plan thresholds and that have subcontracting possibilities.

(1) Contractors shall submit small business subcontracting reports for individual orders to the contracting agency on an annual basis.

(2) The agency funding the order shall receive credit towards its small business subcontracting goals.

(3) The agency funding the order may in its discretion establish small business subcontracting goals for individual orders.

Dated: September 26, 2011.

**Karen G. Mills,**  
*Administrator.*

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