

Item III—FPI Blanket Waiver Threshold (FAR Case 2016–008)

This final rule amends the FAR to increase the blanket waiver threshold for small dollar-value purchases from Federal Prison Industries (FPI) by Federal agencies from \$3,000 to \$3,500. No waiver is required to buy from an alternative source below \$3,500. Customers may, however, still purchase from FPI at, or below, this threshold, if they so choose.

Item IV—Revision to Standard Forms for Bonds (FAR Case 2015–025)

This rule amends the FAR to revise five Standard Forms prescribed for contracts involving bonds and other financial protections. The revisions, aimed at clarifying liability limitations and expanding the options for organization types, are made to Standard Forms 24, 25, 25A, 34, and 35. These changes will minimize questions from industry to the contracting officer.

This final rule does not place any new requirements on small entities.

Item V—Technical Amendments

Editorial changes are made at FAR 4.1801, 4.1803, 52.204–16, 52.204–17, 52.204–18, 52.204–20, and 52.212–3.

Dated: June 30, 2016.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2005–89 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–89 is effective July 14, 2016 except for item I which is effective November 1, 2016, and items II, III, and IV, which are effective August 15, 2016.

Dated: July 1, 2016.

Claire M. Grady,

Director, Defense Procurement and Acquisition Policy

Dated: July 1, 2016.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: June 29, 2016.

William G. Roets,

Acting Assistant Administrator, Office of Procurement National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 15, 19, and 52

[FAC 2005–89; FAR Case 2014–003; Item I; Docket No. 2014–0003; Sequence No. 1]

RIN 9000–AM91

Federal Acquisition Regulation; Small Business Subcontracting Improvements

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration, which provide for a Governmentwide policy on small business subcontracting.

DATES: *Effective:* November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruha Uddowla, Procurement Analyst, at 703–605–2868 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–89, FAR Case 2014–003.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 80 FR 32909 on June 10, 2015. The proposed rule discussed regulatory changes made by the Small Business Administration (SBA) in its final rule published at 78 FR 42391, on July 16, 2013, concerning small business subcontracting. SBA's final rule implements the statutory requirements in sections 1321 and 1322 of the Small Business Jobs Act of 2010 (Pub. L. 111–240), as well as other changes aimed at improving subcontracting regulations to increase small business opportunities. The changes being implemented in this final rule include the following:

(1) Requiring prime contractors to make good faith efforts to utilize their proposed small business subcontractors during performance of a contract to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal. To the extent a prime contractor is unable to

make a good faith effort to utilize its small business subcontractors as described above, the prime contractor is required to explain, in writing, within 30 days of contract completion, to the contracting officer the reasons why it is unable to do so.

(2) Authorizing contracting officers to calculate subcontracting goals in terms of total contract dollars in addition to the required goals in terms of total subcontracted dollars.

(3) Providing contracting officers with the discretion to require a subcontracting plan in instances where a small business rerepresents its size as an other than small business.

(4) Requiring subcontracting plans even for modifications under the subcontracting plan threshold if said modifications would cause the contract to exceed the plan threshold.

(5) Requiring prime contractors to assign North American Industry Classification System (NAICS) codes to subcontracts.

(6) Restricting prime contractors from prohibiting a subcontractor from discussing payment or utilization matters with the contracting officer.

(7) Requiring prime contractors to resubmit a corrected subcontracting report within 30 days of receiving the contracting officer's notice of report rejection.

(8) Requiring prime contractors to provide the socioeconomic status of the subcontractor in the notification to unsuccessful offerors for subcontracts.

(9) Requiring prime contracts with subcontracting plans on task and delivery order contracts to report order level subcontracting information after November 2017.

(10) Funding agencies receiving small business subcontracting credit.

(11) On indefinite-delivery, indefinite-quantity contracts, the contracting officer may establish subcontracting goals at the order level (but not a new subcontracting plan).

Twenty-seven respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments received and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- FAR 19.703(a)(2), 52.219–8(d), 52.219–9(c)(2), and 52.219–9 Alternate IV (c)(2)—language has been revised to neither specify an order of precedence nor prescribe how subcontractor representations should be obtained by a prime contractor.

- FAR 19.704(a)(10)(iii), 52.219–9(d)(10)(iii), and 52.219–9 Alternate IV (d)(10)(iii)—language has been revised to require order-level reporting on single-award, indefinite delivery, indefinite quantity contracts intended for use by multiple agencies in addition to multiple-award contracts in use by multiple agencies and to clarify that the order-level reporting would be required after November 2017, which is when Electronic Subcontracting Reporting System (eSRS) will be ready to accommodate the requirement.

- FAR 19.704(a)(10)(iv)(A) and (B)—language has been revised to remove the reasons for the rejection of an Individual Subcontract Report or Summary Subcontract Report, since those reasons are not an exhaustive list.

- FAR 19.704(a)(14), 52.219–9(d)(13), and 52.219–9 Alternate IV (d)(13)—language has been revised to match surrounding paragraphs on contractor providing “assurances”.

- FAR 19.704(c)—language has been added to clarify that the requirement to have separate goals for the base and option years will only apply to goals based on total subcontract value.

- FAR 19.705–1 and 19.705–2—language has been added to clarify that contracting officers may only establish subcontracting goals at the order level, not subcontracting plans at the order level.

- FAR 19.705–2(b)(3)—language has been revised to encompass services, as well as supplies.

- FAR 52.219–9(d)(3) and (e)(7)—language has been revised to clarify that the contractor is to assign NAICS codes and corresponding size standards to all subcontracts, not list NAICS codes in subcontracting plans.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Six respondents supported the overall changes and clarifications contemplated in the proposed rule. Among the positive changes noted by these respondents were the clarification of the subcontract reporting process, clarification of the HUBZone certification requirements, clarification of the requirement for contractors to notify unsuccessful offerors for subcontracts, and convenience afforded by allowing contractors to accept small business size and status certifications

made in the System for Award Management (SAM). Other respondents noted that the clarification of what it means to “use” a small business concern when preparing a bid or proposal ensures that contractors can reasonably identify situations where the requirement applies and ensure proper notification is given.

Response: The Councils acknowledge these areas of agreement.

Comment: One respondent commented that they concurred with the clarification that a change in size status does not change the terms and conditions of a contract.

Response: The Councils acknowledge this comment; however, it is important to note that the contracting officer does have discretionary authority to require a subcontracting plan if the contractor rerepresents that its size status has changed from small to other than small.

2. Requirement for a Subcontracting Plan

a. Subcontracting Opportunities

Comment: Three respondents commented that the rule provides a contracting officer the authority to require a subcontracting plan from a prime contractor in two situations: when a prime contractor that was a small business concern at contract award recertifies as an other than small business concern (FAR 19.301–2(e)); and when a modification increases the total dollar value of a contract above the subcontracting plan threshold (FAR 19.702(a)(3)). The respondents explained that in certain situations under these circumstances, requiring the creation of a subcontracting plan would be administratively burdensome and provide few substantive subcontracting opportunities. As examples of when a subcontracting plan may not be appropriate, the respondents mention the following situations: contract performance is under way and the prime contractor has pre-existing exclusive supplier agreements with subcontractors; there are very few remaining or additional subcontracting opportunities; or the performance of the contract is almost complete. One of the respondents suggested providing the contracting officer additional guidance on when it is appropriate to require the submission of a subcontracting plan during contract performance. All of the respondents recommended the addition in the rule of the word “significant” before “subcontracting opportunities” at 19.702(a)(3) “. . . if the contracting officer determines that subcontracting opportunities exist.”

Response: The rule provides the contracting officer authority to require the submission of a subcontracting plan under the circumstance noted. Specifically, at FAR 19.301–2(e), “the contracting officer may require a subcontracting plan . . . if a prime contractor’s size status changes from small to other than small as a result of a size rerepresentation.” At FAR 19.702, the mandatory requirement for submission of a subcontracting plan only happens “if the contracting officer determines that subcontracting opportunities exist.” The rule contains language at FAR 19.705–2(b) that provides general guidance to contracting officers on how to determine whether subcontracting possibilities exist in the circumstances noted in the comment.

It would not be feasible in the final rule to include every possible factor that a contracting officer will need to consider in determining whether subcontracting opportunities exist, because these conditions will vary from acquisition to acquisition. Factors such as the remaining ceiling amount on the contract, effect on current prime contractor subcontractor agreements, amount of work ultimately going to the prime contractor’s subcontractors that are small business concerns can all weigh heavily in this decision. As such, the language in the rule remains unchanged.

b. Treatment of Options

Comment: One respondent recommended the words “or an option is exercised” be deleted from paragraph (e) of FAR 19.705–2. Options are addressed in the initial subcontracting plan and whatever subcontracting possibilities that exist are defined in the initial plan. Requiring amendment of a plan whenever an option is exercised is redundant and adds cost and administrative burden, with little benefit.

Response: The Councils reviewed the area of the rule identified by the respondent to ensure that the appropriate requirements were being applied to subcontracting. The rule already reflects a revision to the existing FAR text to clarify that the goals shall be adjusted to reflect any new subcontracting opportunities that were not envisioned at the time of contract award, not as a requirement to negotiate a new goal each time an option is exercised. The final rule adds language at FAR 19.705–2(e) that the opportunities were not envisioned at the time of contract award.

c. Clarify When a Subcontracting Plan is not Required

Comment: One respondent recommended clarification to FAR 19.702(b)(4) while this rule is being finalized. The respondent commented that FAR 19.702(b)(4) is poorly worded and that a literal interpretation would be that, in order for the exception to apply, the contract modification would have to be within the general scope of the contract AND the contract modification would have to not include FAR clause 52.219–8. The respondent understands that this is not the intent and recommended restructuring the sentence to read “For contract modifications if (1) the contract modification is within the scope of the contract, and (2) the contract being modified does not contain the clause at 52.219–8, Utilization of Small Business Concerns.”

The respondent also mentioned that by moving the language currently at FAR 19.705–2(c) to FAR 19.705–2(c)(2), it now gives the impression that the approval requirement for not including a subcontracting plan only applies when a modification increases the total contract dollars above the subcontracting plan threshold.

Response: The Councils reviewed the areas of the rule identified by the respondent and have amended the FAR in the final rule at FAR 19.702(b)(4), 19.705–2(c), and 19.705–2(f).

d. When a Small Business Rerepresents as Other Than Small

Comment: One respondent recommends that when a prime contractor’s size changes from small to other than small as a result of rerepresentation, the contracting officer should be required to request a subcontracting plan.

The respondent further stated that Government contractors are consolidating and contract opportunities for small firms are decreasing as large businesses are acquiring small businesses, and as such when small businesses become other than small, a subcontracting plan should be required (particularly for indefinite-delivery, indefinite-quantity contracts with more than two years remaining).

Response: SBA’s final rule grants contracting officers the discretion to require a subcontracting plan if size changes as a result of size rerepresentation.

3. Goals in Terms of Total Contract Dollars

Comment: A number of respondents expressed concern that the new

requirement at FAR 19.704(a)(2) allowing contracting officers to require the contractor to establish subcontracting goals both in terms of the total dollars planned to be subcontracted and now also in terms of the total contract dollars will lead to confusion. Three respondents were strongly opposed to this approach, since the goals based on total contract value would be lower than the goals based on total planned subcontracting dollars, allowing a contracting officer to unfairly penalize a contractor that chose to perform the work using its own internal resources. One respondent remarked that the requirement for contractors to establish small business goals based on total contract dollars would be subject to protest and was contrary to the SBA’s regulations. Two other respondents stated that the requirement for contractors to establish goals based on total subcontract dollars and total contract dollars should be mandatory.

Response: The Councils realize that this new requirement may entail additional effort on the behalf of contractors and the Government; however, many contracting officers have already established subcontracting goals in terms of total contract dollars as a means of obtaining additional insight into the contractor’s subcontracting performance, and it has proven to be an effective management tool. As set forth in the proposed rule, the use of this approach is discretionary, not mandatory, and it is not intended to dissuade contractors from making normal make or buy decisions, or other prudent business choices.

Establishing two sets of subcontracting goals may not work in all situations, nor would it be beneficial for either the Government or the contractor to establish unrealistic goals. This is why contracting officers will need to carefully consider using this approach on a case-by-case basis, factoring in the unique characteristics of the acquisition at hand and the results of market research. In addition, although the Councils cannot predict the outcome of any solicitation in terms of the likelihood that it will be protested, this rule is fully consistent with SBA’s regulations at 13 CFR 125.3(a)(2). Finally, to change the decision to require goals based on total contract dollars from discretionary to mandatory is beyond the scope of this rule.

Comment: One respondent wanted to know if the definition for total contract dollars at FAR 19.701 and clause 52.219–9(b) included the maximum quantity (or ceiling price) of an indefinite quantity contract, and asked that this be clarified in the rule. This

respondent remarked that the definition for total contract dollars. . .

“total contract dollars means the final anticipated dollar value, including the dollar value of all options 19.701”

. . . was inconsistent with the requirement to have separate goals for the base and option years. Further, basing a goal on the total contract value would likely place the contractor at a great disadvantage should the contract options not be exercised.

Response: The definition for total contract dollars includes the maximum or ceiling price for an indefinite delivery contract. The requirement to have overall goals encompassing the entire contract, including options, is consistent with SBA’s regulations, and as noted, this rule amends the FAR to reflect SBA’s regulations. However, the Councils have revised the rule at FAR 19.704(c) to clarify that the requirement to have separate goals for the base and option years will only apply to goals based on total subcontract value.

4. Assigning NAICS Codes to Subcontracts

Comment: Several respondents commented on the requirement in the proposed rule that prime contractors must identify in the subcontracting plan the NAICS code and corresponding size standard of each subcontract with a small business concern. A number of these respondents commented that due to the fact that contractors identify potential subcontracts after the award of the prime contract (particularly in the case of indefinite delivery, indefinite quantity contracts), it is possible that the NAICS codes and size standards projected in the subcontracting plan would be inaccurate and impossible to estimate. Other respondents commented that identifying the NAICS codes for all procurements would be administratively burdensome, and may result in excessively lengthy subcontracting plans. It was also noted that this burden has the potential to harm small business participation rather than enhance it. Numerous alternative approaches to the proposed rule were suggested.

Response: The Councils have revised the rule at FAR clause 52.219–9 to reflect the requirement from SBA’s final rule, which directs the contractor to assign NAICS codes and corresponding size standards to all subcontracts, not to list NAICS codes in subcontracting plans.

Comment: One respondent recommended that at FAR clause 52.219(c)(2)(i)(B), the small business represent that the NAICS code is

current, accurate, and complete as of the date of the offer for the subcontract, in addition to its size and status representation.

Response: The Councils did not adopt this suggestion in the final rule, since it is the responsibility of the contractor to accurately assign the proper NAICS code to the subcontract.

5. Subcontractor Representations

a. General

Comment: One respondent inquired where to find guidance regarding accepted practices for small business self-certification, auditing of small business certifications, and agency enforcement responsibilities.

Response: Subpart 19.3 of the FAR provides guidance for required small business representations in connection with Federal prime contracts. In addition, SBA's regulations at 13 CFR parts 121, 124, 125, 125, and 127 provide detailed information covering the small business certification procedures, audits, and enforcement.

Comment: One respondent commented that contractors should be allowed to accept the written representation from potential subcontractors, regardless of whether or not the offeror was registered in SAM.

Response: The FAR rule allows the prime contractor, under specific conditions, to accept size and socioeconomic status representations either from SAM or by written representation. However, the final rule has been revised to clarify there is no order of precedence for either method of acceptance, and to clarify that prime contractors are prohibited from requiring the use of SAM for the purposes of representing size or socioeconomic status.

Comment: A few respondents commented that the requirement to have a current representation each time an offer is made on a subcontract, including purchase orders between a prime contractor and a vendor, would be burdensome. Two respondents recommended that the rule be revised to make it acceptable for a contractor to obtain small business size representations on an annual basis, since small businesses are required to annually update their small business status, and the subcontractor should be obliged to promptly update any information in the event of a change.

Response: The requirement for a concern to represent its eligibility status when submitting an offer is not new; the proposed rule merely added guidance by giving prime contractors the option to accept either a subcontractor's self-

certification in SAM or a written representation. With regard to obtaining the small business representation on an annual basis, the respondent's recommendation is not in keeping with SBA's regulations and, therefore, was not adopted by the Councils. SBA's regulations at 13 CFR 121.411(b) require that a subcontractor must qualify and self-certify as a small business at the time it submits its offer as a small business subcontractor.

Comment: Two respondents generally remarked and implied, respectively, that the requirement to make a size and socioeconomic representation on every offer was burdensome.

Response: The respondents' comments are noted; however, the representation requirement is in keeping with SBA's regulations. SBA's regulations at 13 CFR 121.411(b) require that a subcontractor must qualify and self-certify as a small business at the time it submits its offer as a small business subcontractor.

b. Written Representation Versus SAM Representation

Comment: A few respondents questioned whether the proposed rule should go so far as to only accept a subcontractor's written representation of its size and socioeconomic status if the contractor ascertained that the small business was not registered in SAM. They pointed out that this requirement was inconsistent with the SBA's regulations and placed unnecessary burdens on the contractor.

Response: There is no order of precedence in choosing whether to accept the small business subcontractor's representation through SAM or by a direct written response; both methodologies are equally acceptable. The rule has been revised to clarify that the contractor may accept either the subcontractor's written representation or its self-certification in SAM with equal assurance.

Comment: One respondent remarked that SBA's final rule referred to relying on subcontractor representations in SAM for the purpose of "maintaining a small business source list," and concluded this would foreclose reliance on SAM for uses other than maintaining a source list. For this reason, the respondent recommended deleting the proposed revision at FAR clause 52.219-8(d)(2) to allow contractors the flexibility to rely on SAM if they so choose.

Response: The SBA rule establishes that SAM may be used for both purposes. However, the final rule is revised to clarify that a contractor has

the flexibility to rely on SAM if they so choose.

c. Maintaining "Safe Harbor"

Comment: Two respondents questioned whether the "safe harbor" afforded to a prime contractor for accepting a firm's written representation of its size or socioeconomic status in connection with a subcontract, extended to electronic representations. One respondent suggested that FAR 4.502(d) be amended to allow contractors to accept electronically signed representations.

Response: The Councils did not adopt the change suggested by the respondent, but have amended the FAR in the final rule at FAR 19.703(a)(2), 52.219-8(d), 52.219-9(c)(2), and Alternate IV of 52.219-9 at paragraph (c)(2), to clarify that a prime contractor acting "in good faith" is not held liable for misrepresentations made by the subcontractor regarding its size or socioeconomic status. SBA regulations at 13 CFR 121.411(b), provide that prime contractors may accept a subcontractor's electronic self-certification as to its size, if the subcontract contains a clause that provides that the subcontractor verifies by its submission of the offer that the size or socioeconomic representations and certifications made in the SAM (or any successor representations system) are current, accurate, and complete as of the date of the offer for the subcontract. SBA's regulations at 13 CFR 121.411(h), 124.1015(d), 125.29(d), 126.900(d), and 127.700(d) afford the "safe harbor" protection to the prime contractor for the subcontractor's misrepresentation of its size or socioeconomic status representation or certification. SBA's regulations serve as the regulatory basis for this FAR rule.

6. Orders

a. Goals

Comment: A number of respondents commented on the rule explicitly authorizing contracting officers to establish small business subcontracting goals for orders. One respondent submitted a number of questions seeking clarification on this authority, which indicated that the respondents believed the authority was tantamount to requiring a subcontracting plan for an order. The other respondent assumed that the authority to establish goals for orders was separate from a requirement for a subcontracting plan for orders and suggested language for the rule that would make this clear. This respondent also commented that unless the goals established on orders were higher than

the goals established on the parent contract, the prime contractor may not meet its goals under the parent contract.

Response: The final rule has been revised at FAR 19.705–1 and 19.705–2 to clarify that contracting officers may only establish subcontracting goals at the order level, not subcontracting plans. The authority remains discretionary for ordering contracting officers, *i.e.*, the contracting officer may choose to establish goals for any order or not. The rule also maintains the discretion of the contracting officer to establish whatever goal they deem appropriate for an order.

b. Reporting Requirements

Comment: Two respondents submitted comments and questions relating to the requirement that prime contractors provide subcontracting data for each order when reporting subcontracting achievements for multiple-award contracts intended for use by multiple agencies.

One respondent commented that due to the volume of orders, a contractor may not be able to comply with this requirement and that the benefits of this requirement are minimal, but may result in driving up contract cost. The respondent suggested that the order-level reporting be an optional requirement, as opposed to a mandatory one, and also recommended that the requirement only apply when goals are established on orders.

Response: This rule is implementing regulatory changes made by SBA, which include the mandatory order-level reporting requirement. In addition to compliance with SBA's regulations, the order-level reporting requirement has the benefit of facilitating the allocation of subcontracting credit to funding agencies; proper allocation of credit ensures that funding agencies are incentivized to promote small business subcontracting on orders. The Councils are working with the Integrated Award Environment (IAE) to ensure that eSRS facilitates order-level reporting in a way that minimizes the additional burden to contractors.

Comment: Both respondents asked whether this reporting requirement would apply to existing multiple-award contracts or only to those contracts awarded after the rule becomes final.

Response: The order-level reporting requirement will apply via the updated FAR clause 52.219–9, Small Business Subcontracting Plan. Unless otherwise specified, FAR changes are applied to solicitations and contracts in accordance with FAR 1.108(d).

Comment: One of the respondents asked whether this reporting

requirement would apply to all orders or only orders of a certain dollar value and whether this requirement is optional for single-award, indefinite delivery, indefinite quantity contracts.

Response: As the rule states at FAR 19.704(a)(10)(iii) and 52.219–9(d)(10)(iii), subcontracting data is required for each order, regardless of dollar value. The rule has been revised to now also require order-level reporting on single-award indefinite delivery, indefinite quantity contracts intended for use by multiple agencies in order to ensure that subcontracting credit is allocated based on funding agencies for all contracts, not just multiple-award contracts in use by multiple agencies.

7. Failure To Make a Good Faith Effort

Comment: One respondent pointed out that depending on how “good faith effort” is defined, the rule could be tantamount to requiring a “guaranteed work share.”

Response: The FAR does not provide a definition for the phrase “good faith effort.” However, “failure to make a good faith effort to comply with the subcontracting plan” is defined in paragraph (a) of the clause at FAR 52.219–16, Liquidated Damages—Subcontracting Plan, which is further explained at FAR 19.705–7(d); the SBA gives further guidance at 13 CFR 125.3. Also, neither SBA's regulations nor the FAR rule establish a requirement for a “guaranteed work share.”

Comment: One respondent objected to characterizing the failure to comply in good faith with the subcontracting plan as a material breach of contract, since material breaches are typically tied to key objectives or contract targets. Therefore, using the “good faith” standard would be an inappropriate and punitive basis for something as drastic as contract termination.

Response: Fulfillment of the small business subcontracting plan is not merely ancillary to the objective of a contract. Failure of a contractor to comply in good faith with its subcontracting plan is a failure to perform an obligation on which the award of the contract was predicated.

The principle that a failure to comply in good faith with the subcontracting plan is a material breach of contract predates this FAR rule. The typical remedy provided in the FAR when the contracting officer decides that the contractor failed to comply in good faith with its subcontracting plan is the assessment of liquidated damages in accordance with FAR clause 52.219–16. However, neither this remedy nor any other remedy the contracting officer decides is appropriate can be

characterized as punitive. Rather, liquidated damages are imposed so as to compensate the Government for the contractor's failure to fulfill a material obligation of the contract.

Comment: Three respondents agreed that failure to fulfill subcontracting goals is a material breach of contract. However, one respondent was unclear as to the process the contractor needs to follow should the contracting officer advise that the contractor has failed to make a good faith effort. One other respondent stated that stricter penalties for negative behavior should be employed.

Response: The procedures the contractor will follow should it receive written notification from the contracting officer of its failure to make a good faith effort are provided at FAR clause 52.219–16. In terms of amending the FAR to provide for stricter penalties, the Councils do not have statutory authority to do so.

8. Flow Down of Subcontracting Plan Requirements to Subcontractors

A few respondents submitted comments related to paragraph (j) of FAR clause 52.219–9, which provides guidance on the flow down of the clause to subcontractors.

Comment: One respondent suggested clarification to FAR clause 52.219–9(j) to emphasize that subcontracting plans are not required from subcontractors when the prime contract contains the clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items. The respondent suggests the clarification because of their experience with agencies' interpreting the FAR as requiring prime contractors with commercial plans to flow down the subcontracting plan requirement if the subcontractor is not providing a commercial item.

Response: The changes suggested to paragraph (j) of FAR clause 52.219–9 are not in keeping with the statutory requirements or SBA's implementing regulations.

Comment: The other respondents suggested clarification of the proposed text at FAR 52.219–9(l) in order to avoid misinterpretation of the new language, which would put it in direct conflict with paragraph (j) of FAR clause 52.219–9. Specifically, the respondents stated that the revised language “subcontract awards by affiliates shall be treated as subcontract awards by the Contractor” will be interpreted as requiring subcontracting plans from subcontractors providing commercial items through flow down of FAR clause 52.219–9.

Response: There is no reason to interpret the proposed language as requiring flow down of the clause to subcontractors. Paragraph (l) of FAR clause 52.219–9 addresses the reporting requirements and what a contractor may or may not take credit for when reporting its subcontracting achievements. The existing language in paragraph (l) states that a contractor cannot take credit for (*i.e.*, report as subcontracting) purchases from an affiliate. The new language, in keeping with SBA's final rule, clarifies that subcontract awards made by affiliates shall be treated as subcontract awards made by the contractor. Therefore, the contractor must take credit for first-tier subcontracts entered into by an affiliate.

9. Notification to Unsuccessful Offerors for Subcontracts

Comment: Three respondents commented on the proposed rule clarifying that prime contractors notify unsuccessful offerors for subcontracts in writing.

One respondent indicated that the requirement should also include a detailed explanation from the prime why the subcontractor was unsuccessful, as well as the granting of a cure period. Another remarked that due to the high volume of procurements, it is not always possible or realistic to notify unsuccessful offerors in writing, regardless of size. The onus should be on the supplier to follow up on the status of award and whether the subcontractor has been selected. The third respondent recommends that primes must offer these unsuccessful subcontractors an in-person or oral debriefing (subcontractor's choice) and offer at least five business days from the notification date to request that debriefing.

Response: The requirement for prime contractors to notify unsuccessful small business offerors parallels SBA's regulations at 13 CFR 125.3(c)(1)(viii), which contemplate a pre-award written notification as to the name and location of the apparent successful offeror and whether the successful offeror is a small business and if so, its socioeconomic categories. The Councils note that FAR clause 52.219–9 already included the requirement for notification; this rule is only adding the requirement that the notification include the socioeconomic status of the successful subcontract offeror and clarifying that the notification occur before award of the subcontract. It is not within the scope of this FAR Case to levy an additional period on prime contractors.

10. Contractors' Written Explanation for Not Using Small Business Subcontractors

A number of respondents commented on the rule requiring a prime contractor's written explanation as to why it did not utilize small business concerns to the same extent that the small business was used in preparing the bid or proposal.

Comment: One respondent recommended the explanation or report should be available to the subcontractor for review after submission and the small business be afforded the opportunity to add any relevant facts.

Response: SBA's regulations at 13 CFR 125.3(c)(4) only provide that the written explanation be provided to the contracting officer prior to the submission of the invoice for final payment and contract close-out. The SBA final rule did not contemplate an adjudicative process for small businesses to provide additional input. Therefore, it is not within the scope of this FAR Case to address this issue.

Comment: One respondent commented that section 1322 of the Small Business Jobs Act, implemented in proposed FAR 19.704(a)(12) and (13), will decrease opportunity for small business because it will drive prime contractors away from identifying potential small businesses in their subcontracting plans. Primes are encouraged to list no small businesses or large businesses to avoid punishment should a potential small business not be utilized based on unforeseen circumstances between proposal and subcontract award.

Response: The intent of incorporating SBA's revised regulations at 13 CFR 125.3(c)(4) into the FAR is to increase the likelihood that the contractor will carefully consider its small business supplier base when developing the small business subcontracting plan, and in doing so will more likely be capable of adhering to the assurances it made in the plan. FAR 19.702 already requires that any contractor receiving a contract for more than the simplified acquisition threshold must agree in the contract that small business concerns will have the maximum practicable opportunity to participate in contract performance.

Comment: One respondent commented that FAR 19.704(a)(13) is left to the offending contractor and is considered timely if "submitted to the contracting officer within 30 days of contract completion." Such timing makes the anticipated statutory relief illusory. The respondent suggests amending FAR 19.704(a)(13) (and corresponding modifications to FAR

clause 52.219–9) to require the contractor to provide the written notice within 5 days of making a decision not to utilize a subcontractor or supplier described in FAR 19.704(a)(12), as well as written explanation supporting the alternative decision.

Response: The FAR rule is predicated on SBA's regulation at 13 CFR 125.3(c)(4), which provides that the written explanation must be submitted to the contracting officer prior to the submission of the invoice for final payment and contract close-out. However, the FAR rule provides a shorter timeframe (*i.e.*, within 30 days of contract completion) than SBA's regulations provide in order to comply with a related requirement in SBA's regulations (see 13 CFR 125.3(d)(4)) that contracting officers use the written explanation in the performance assessment for the prime contractor. The SBA final rule did not contemplate an additional notice period and, therefore, it is not within the scope of this FAR rule.

Comment: One respondent recommended that prime contractors that do not utilize small business in their subcontracting plans have points deducted when other offerors include small businesses in their subcontracting plans.

Response: SBA's regulations at 13 CFR 125.3 do not contemplate such a requirement. However, there is nothing in the FAR that precludes the contracting officer from including evaluation criteria in the solicitation that will allow the contracting officer to evaluate the extent to which offerors identify and commit to small business participation in the contract.

11. Privity

Comment: One respondent stated that permitting a subcontractor to discuss payment or utilization matters with the contracting officer will allow the subcontractor to establish its own relationship with the contracting officer. Another respondent recommended that the FAR be amended to require that contracting officers monitor contractors' compliance in terms of not prohibiting subcontractors from discussing matters of payment or non-utilization with the contracting officer. A third respondent recommended that where a subcontractor has furnished an allegation of lack of good faith effort to the contracting officer, the contracting officer must share the submission with the contractor to make them aware of the allegation.

Response: The recommendations made by these respondents are not in keeping with the principles of privity.

Although limited communication between the contracting officer and the subcontractor may occur in accordance with this clause, it is not the role of the contracting officer to take any action on behalf of the subcontractor; rather, any action the contracting officer may take will be with respect to the contractor. As SBA noted in its final rule, the contracting officer cannot be a party to disputes between the contractor and its subcontractor, although he or she will be involved in evaluating the contractor's subcontracting performance. FAR Case 2014-004, Payment of Subcontractors, provides more specific guidance related to payments to subcontractors.

12. Use of the Term "Contractor" Versus "Prime Contractor"

Comment: Two respondents found that the use of the terms "Contractor" and "prime Contractor" in FAR clause 52.219-9 was somewhat confusing, since it was not clear when a requirement applied to the prime contractor alone, or to the prime and a subcontractor at a first or lower tier. These respondents recommended that the term "prime Contractor" be used for those requirements that apply only to prime contractors.

Response: This recommendation was not adopted by the Councils. The clause is intended to reflect the relationship between the prime contractor and the Federal agency that executed the contract; therefore, the terms "Contractor" and "prime Contractor" as used in the clause, are synonymous and mean the "prime contractor." Within the context of the prime contract, requirements that must be fulfilled by subcontractors will be indicated by use of the term "subcontractor."

13. Prime Contractor—Subcontractor Relationship

Comment: One respondent commented that the liability of a prime contractor to the small business subcontractor for not complying with its subcontracting plan should be unlimited, to include the loss of revenue, loss of profits, and loss of goodwill, which will likely be irreparable, and also indicated the rule would have implications to exclusivity provisions in teaming arrangements and/or subcontracts.

Response: Neither SBA's final rule nor the FAR prescribe elements to be considered in determining the liability of a prime contractor to its subcontractor when the prime contractor has not acted in "good faith." Further, the FAR does not prescribe "exclusivity provisions" in either

teaming agreements or subcontracts; therefore, the rule cannot address implications to these relationships.

14. Funding Agencies Receiving Subcontracting Credit

Comment: One respondent stated their support of the initiative to allocate subcontracting credit based on funding agency and explained that this change, being applied to all contracts, will provide consistent methodology and reliable data, and will prohibit funding agencies from picking and choosing types of contracts based on whether or not they could get subcontracting credit.

Response: The Councils acknowledge receipt of the comment.

Comment: One respondent commented that they are uncertain of the impact of the rule in changing the way subcontracting credit is allocated across Government, *i.e.*, from contracting agency to funding agency, considering the rule ties the new order-level reporting requirement to only those multiple-award contracts with individual subcontracting plans, that require Individual Subcontract Reports (ISRs). The respondent stated that many Governmentwide acquisition contracts (GWACs) and Federal Supply Schedule (FSS) contracts have commercial plans for which there are only Summary Subcontract Reports (SSRs), not ISRs, and the SSRs are how agencies are allocated subcontracting credit.

Response: In addition to the requirement for order-level reporting on contracts like GWACs and FSS with individual subcontracting plans (*i.e.*, contracts that require ISRs), the proposed rule contained minute changes to the requirement for SSRs, which would facilitate funding agencies getting credit for all other contracts.

15. Systems-Related Concerns

Two respondents submitted comments and questions related to implementation of the rule's requirements in Governmentwide systems such as Federal Procurement Data System (FPDS) and eSRS.

Comment: Two respondents pointed out that FPDS and eSRS would need to be modified to allow for order-level reporting of subcontracting achievements. One respondent also pointed out that FPDS and eSRS would need to be modified to allow for funding agencies to receive subcontracting credit for all contracts.

Response: The Councils are aware that eSRS does not currently allow for order-level reporting and are working with IAE to ensure this capability is implemented in eSRS. The rule has been revised to clarify that the order-

level reporting requirement applies after November 30, 2017, which is when eSRS is expected to accommodate the requirement. The Councils are also working with IAE to facilitate reporting of SSRs based on funding agency so as to ensure the appropriate agency gets subcontracting credit but contractors can continue to report SSRs as they do now and still be compliant with the revised FAR clause 52.219-9.

Comment: One respondent asked whether eSRS would be modified to capture NAICS codes on Individual Subcontracting Reports (ISRs).

Response: No changes will be made to eSRS to capture NAICS codes on reports. The rule has been revised to remove the requirement for contractors to list NAICS codes in the subcontracting plan.

Comment: One respondent asked whether FPDS and eSRS would be modified to accommodate the scenarios where a contracting officer established subcontracting goals in terms of total contract dollars.

Response: There will be no need for changes to FPDS or eSRS to accommodate those contracts with individual subcontracting plans where a contracting officer established subcontracting goals in terms of total contract dollars. eSRS already provides for an ability to report subcontracting achievements in terms of total contract dollars in ISRs, by using the "Base and All Options Value" field from FPDS as a basis for the calculations. The rule provides for a definition of "total contract dollars" so when contracting officers complete the "Base and All Options Value" field in FPDS accordingly, the business rules are already in place in FPDS and eSRS to accommodate those subcontracting plans for which goals in terms of total contract dollars have been established.

16. Lack of Burden Analysis

Comment: One respondent recommended that the FAR rule clearly exempt commercial or commercially available off-the-shelf (COTS) item suppliers from the revisions at FAR clause 52.219-9, since the Small Business Jobs Act of 2010 made no mention of applying the changes set forth in the rule to commercial items or COTS items. The alternative suggestion from this respondent was for the FAR Council to address the omission of the burden analysis and/or produce some evidence to support the claim that applying the proposed rule to commercial/COTS suppliers is in the best interests of the Federal Government.

Response: The Councils did not adopt this respondent's recommendation, because neither the law nor SBA's regulations provide an exemption for the application of the requirements in this rule to acquisitions for commercial or COTS items (although in the case of a contract for commercial or COTS items, the contractor is not required to flow down the subcontracting FAR clause at 52.219-9 to subcontractors). The use of a commercial subcontracting plan is preferred for contractors furnishing commercial items, since many of the requirements associated with small business subcontracting plans are either streamlined or are not applicable to commercial plans. Nevertheless, a contractor that has been awarded a contract that meets the statutory requirements for a subcontracting plan must comply with the requirements discussed in this rule. Historically, FAR clause 52.219-9 has been applied to acquisitions for commercial and COTS items, as demonstrated by FAR clause 52.212-5(b).

An analysis of the public burden associated with the implementation of this rule, pursuant to the Paperwork Reduction Act, as amended (44 U.S.C. chapter 35) and an analysis of the impact of the rule on small entities in accordance with the Regulatory Flexibility Act was provided in sections V and VI of the preamble to the proposed rule. Pursuant to 41 U.S.C. 1906, the requirements of this rule will apply to the acquisitions of commercial items because the FAR Council made a written determination that it would not be in the best interest of the Federal Government to exempt acquisitions of commercial items. Pursuant to 41 U.S.C. 1907, the requirements of this rule will apply to the acquisitions of COTS items because the Administrator of Federal Procurement Policy made a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items. A summary of the determinations, the final Paperwork Reduction Act and Regulatory Flexibility Act analyses will be provided in sections III, V, and VI of the preamble to the final rule.

17. Out of Scope

a. Credit for Subcontracts Awarded to AbilityOne

Comment: One respondent inquired as to whether eSRS would be modified to allow contractors to receive credit for making subcontract awards to AbilityOne. The respondent also inquired if this would become more

important than meeting the small business subcontracting goals.

Response: This inquiry relates to matters that are beyond the scope of the rule. Prime contractors may only take credit for subcontract awards made to AbilityOne participating non-profit agencies when the awarding agency has specific statutory authority to do so. Otherwise, subcontracting credit can only be taken for subcontracts made to small business concerns, which by definition are for-profit entities.

b. Matters Related to the HUBZone Program

Comment: One respondent requested several changes to SBA's HUBZone program eligibility requirements.

Response: In the FAR rule, only the definitions for "HUBZone contract" and "HUBZone small business concern" were amended, so as to clarify that the representation of HUBZone status cannot be done through "self-certification." Changes to the eligibility requirements for HUBZone small business concerns can only be made by SBA, which has the statutory authority to administer the HUBZone program. Accordingly, the respondent's recommended changes are beyond the scope of the FAR rule.

c. Inclusion of Insurance Costs in the Subcontracting Base

Comment: Many respondents expressed concern regarding the requirement that prime contractors must exclude insurance costs from the subcontracting base, and claimed that this would be a disincentive for prime contractors to award subcontracts to small businesses in this industry sector. These respondents requested that insurance costs be included in the subcontracting base.

Response: The SBA regulation at 13 CFR 125.3(a)(1)(iii) lists items that should not be included in the subcontracting base. One item is employee insurance. The FAR does not address the subject. Questions concerning whether or not certain insurance expenses should be excluded from the subcontracting base are beyond the scope of this rule and must be directed to SBA.

d. Unilateral Termination of a Subcontract

Comment: One respondent stated that there should be a separate proposed rule prescribing that a prime contractor cannot prevent a subcontractor from unilaterally terminating a subcontract or teaming agreement in the event the subcontractor does not receive its adequate work share.

Response: This comment is beyond the scope of this rule, since it addresses the specific relationship between the prime and its subcontractor.

e. Small Business Participation Plan

Comment: One respondent commented on the scenario where a subcontracting plan would be required once a small business contractor rerepresents as other than small business. This respondent expressed concern that in such a scenario, the contractor would no longer be able to comply with the small business utilization commitments made in its "Small Business Participation Plan," which in turn would reflect negatively on its contract performance.

Response: The proposed rule does not address "Small Business Participation Plans;" rather, the rule addresses the discretionary authority of the contracting officer to require a subcontracting plan should the small business represent a change of size status from small to other than small. Furthermore, although some contracting officers have requested prime contractors to provide a "Small Business Participation Plan," it is not a policy prescribed in the FAR and therefore addressing the administrative procedures associated with this technique is beyond the scope of the rule.

f. Definitions

Comment: One respondent provided revisions to the definition of "small business subcontractor" in FAR 2.101 and to the definition of "master subcontracting plan" in FAR 19.701 and recommended they be incorporated into the FAR rule.

Response: The revisions proposed to the definitions are beyond the scope of this rule, as they are not based on changes or clarifications that SBA has made in their final rule.

18. Miscellaneous Edits and Clarifications

Comment: Two respondents pointed out typos in the proposed rule, specifically at FAR clause 52.219-9(d)(1) and 52.219-9(d)(6).

Response: The rule has been revised at FAR clauses 52.219-9(d)(1) and 52.219-9(d)(6) to correct the typos.

Comment: One respondent suggested edits to the language regarding master subcontracting plans in paragraphs (b) and (f)(1) of FAR clause 52.219-9. The respondent's suggestion was to specify that master subcontracting plans are to be "approved by the Administrative Contracting Office."

Response: The Councils did not adopt the suggested edits. The statutory

requirements and SBA's revised regulations being implemented in this rule do not require that a master subcontracting plan be approved by the "Administrative Contracting Office."

C. Other Changes

This final rule contains the following additional changes:

- A reference to 19.705–2(b)(3) has been added to 19.301–2(e) as a reminder of factors to consider when deciding whether to require a subcontracting plan under 19.301–2(e).
- The term "socioeconomic" has been added throughout the rule to differentiate between size status and socioeconomic status.
- Updates the text at 19.702(a)(3) and throughout the rule to reflect the October 1, 2015, inflationary adjustment to the subcontracting plan threshold.
- A technical edit at FAR 19.703(d)(2) to clarify that protests challenging the socioeconomic status of a HUBZone small business must be filed in accordance with 13 CFR 126.801.
- The introductory text of paragraph 19.704(a) has been revised to remove "required" so as to not imply that 19.301–2(e)(2) requires a subcontracting plan.
- The phrase "or any successor system" is removed from the rule since the FAR would be amended to reflect any successor to a system currently named in the FAR.
- Conforming changes are made to the cross-references at 19.704(c) and 52.219–9(l)(1)(ii)(B).
- Conforming changes are made to additional FAR clauses that reference FAR clause 52.219–8, *i.e.*, 52.212–5 basic and Alternate II, 52.213–4, and 52.244–6.
- Restores paragraph (E) of clause 52.219–9(l)(2)(i), which was mistakenly left out in the published proposed rule.
- Language has been added to 52.219–9 Alternate IV (c)(1) to make the same clarifications made in 19.705–2(e) regarding whether the goals in a subcontracting plan added post-award apply retroactively.
- Minor grammatical edits throughout the rule.

The final rule will not be making a change to the FAR 19.703(b) reference at FAR 19.305(c) as this is the appropriate reference for subcontractor size protests.

III. Applicability to Commercial Items, Including Commercially Available Off-the-Shelf Items

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule's application of Section 1321 and 1322 of the Small Business Jobs Act of 2010, to

contracts for the acquisition of commercial items and contracts for the acquisition of commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of commercial items.

The purpose of this rule is to implement sections 1321 and 1322 of the Small Business Jobs Act of 2010.

Section 1321 requires promulgation of regulations on subcontracting compliance relating to small business concerns, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices and periodic oversight and review activities.

Section 1322 amends the Small Business Act at 15 U.S.C. 637(d), to require a Federal contractor to make a good faith effort to utilize a small business subcontractor during performance of a contract to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal. If a prime contractor does not utilize a small business subcontractor as described above, the prime contractor is required to explain, in writing, to the contracting officer the reasons why it is unable to do so.

These statutory requirements are reflected in the Small Business Administration's (SBA's) final rule published at 78 FR 42391 on July 16, 2013, which did not exempt acquisitions of commercial items.

The law is silent on the applicability of these requirements to acquisitions of commercial items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1906 and its application to acquisitions of commercial items. Therefore, it does not apply to acquisitions of commercial items unless the FAR Council makes a

written determination as provided in 41 U.S.C. 1906.

The law furthers the Administration's goal of supporting small business and advances the interests of small business subcontractors by encouraging prime contractors to comply with their stated subcontracting objectives. Increased compliance with subcontracting objectives will expand opportunities for small business subcontractors. Exclusion of a large segment of Federal contracting, such as acquisitions for commercial items, will limit the full implementation of these subcontracting-related objectives. Further, the primary FAR clauses implementing Federal procurement policies governing subcontracting with small business, 52.219–8, Utilization of Small Business Concerns and 52.219–9, Small Business Subcontracting Plan, are currently prescribed for use in solicitations for commercial items. This rule merely revises FAR clause 52.219–9 to implement the new requirements of sections 1321 and 1322. Exclusion of acquisitions for commercial items from these requirements would create confusion among contractors and the Federal contracting workforce. The burden on contractors would not increase significantly if the new requirements of sections 1321 and 1322 were applied to acquisitions for commercial items. Under the FAR clauses noted above, contractors are already required to commit to objectives for subcontracting with small business concerns under contracts for commercial items above the subcontracting plan threshold. The effort required for contractors to comply with the new requirements will be relatively small.

For these reasons, it is in the best interest of the Federal Government to apply the subcontracting requirements to all contracts above the subcontracting plan threshold.

B. Applicability of Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that

it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of COTS items.

The purpose of this rule is to implement sections 1321 and 1322 of the Small Business Jobs Act of 2010.

Section 1321 requires promulgation of regulations on subcontracting compliance relating to small business concerns, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices and periodic oversight and review activities.

Section 1322 amends the Small Business Act at 15 U.S.C. 637(d), to require a Federal contractor to make a good faith effort to utilize a small business subcontractor during performance of a contract to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal. If a prime contractor does not utilize a small business subcontractor as described above, the prime contractor is required to explain, in writing, to the contracting officer the reasons why it is unable to do so.

These statutory requirements are reflected in the SBA's final rule published at 78 FR 42391 on July 16, 2013, which did not exempt acquisitions of COTS items.

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1907 and its application to acquisitions of COTS items. Therefore, it does not apply to acquisitions of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided in 41 U.S.C. 1907.

The law furthers the Administration's goal of supporting small business and advances the interests of small business subcontractors by encouraging prime contractors to comply with their stated subcontracting objectives. Increased compliance with subcontracting objectives will expand opportunities for small business subcontractors. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, will limit the full implementation of these subcontracting-related objectives. Further, the primary FAR clauses implementing Federal procurement policies governing subcontracting with small business,

52.219–8, Utilization of Small Business Concerns and 52.219–9, Small Business Subcontracting Plan, are currently prescribed for use in solicitations for COTS items. This rule merely revises FAR clause 52.219–9 to implement the new requirements of sections 1321 and 1322. Exclusion of acquisitions for commercial items from these requirements would create confusion among contractors and the Federal contracting workforce. The burden on contractors would not increase significantly if the new requirements of sections 1321 and 1322 were applied to acquisitions for commercial items. Under the FAR clauses noted above, contractors are already required to commit to objectives for subcontracting with small business concerns under contracts for commercial items above the subcontracting plan threshold. The effort required for contractors to comply with the new requirements will be relatively small.

For these reasons, it is in the best interest of the Federal Government to apply the subcontracting requirements to all contracts above the subcontracting plan threshold.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule amends the FAR to provide uniform guidance on small business subcontracting consistent with the Small Business Administration's (SBA's) final rule published at 78 FR 42391, on July 16, 2013, which implements sections 1321 and 1322 of the Small Business Jobs Act of 2010 (Public Law 111–240). SBA's final rule also implements other changes intended to help small business subcontractors by requiring

other than small prime contractors to report data on small business subcontracting in connection with orders.

The objectives of this rule are to implement statutory requirements, as well as make improvements to increase subcontracting opportunities for small businesses.

This rule may have a positive economic impact on any small business entity that wishes to participate in the Federal procurement arena as a subcontractor. Analysis of the System for Award Management (SAM) database indicates there are over 307,846 small business registrants. It is unknown how many of these concerns participate in small business subcontracting. Firms do not need to register in the SAM database to participate in subcontracting. Thus, the number of firms participating in subcontracting may be greater than or lower than the number of firms registered in the SAM database.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small businesses.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of SBA.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains information collection requirements. OMB has cleared these information collection requirements under OMB Control Number 9000–0192, titled: Utilization of Small Business Subcontractors, in the amount of 5,328 burden hours; OMB Control Number 9000–0006, titled: Subcontracting Plans/ Subcontract Report For Individual Contracts, in the amount of 2,403,108 burden hours; and OMB Control Number 9000–0007, titled: Subcontracting Plans/Summary Subcontract Report, in the amount of 534,024 burden hours. No comments were received on the information collection requirements so no revisions were made to the collections. The burden hours for 9000–0006 and 9000–0007 include both existing information collection requirements associated with subcontracting plans, as well as the new information collection requirements in this rule.

List of Subjects in 48 CFR Parts 1, 2, 15, 19, and 52

Government procurement.

Dated: June 30, 2016.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 1, 2, 15, 19, and 52, as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 15, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 by removing from the table, FAR segments “19.7” and “52.219–9” and their corresponding OMB control numbers “9000–0006 and 9000–0007” and adding, in numerical sequence, FAR segments “19.7” and “52.219–9” and their corresponding OMB control numbers “9000–0192, 9000–0006, and 9000–0007” in their places.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 3. Amend section 2.101 in paragraph (b)(2) by revising the introductory text of the definition “HUBZone contract” and the definitions “HUBZone small business concern” and “Small business subcontractor” to read as follows:

2.101 Definitions.

* * * * *

HUBZone contract means a contract awarded to a Small Business Administration certified “HUBZone small business concern” through any of the following procurement methods:

* * * * *

HUBZone small business concern means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).

* * * * *

Small business subcontractor means a concern that does not exceed the size standard for the North American Industry Classification Systems code that the prime contractor determines best describes the product or service being acquired by the subcontract.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.304 by—
 ■ a. Revising paragraph (c)(3)(i); and

■ b. Removing from paragraphs (c)(3)(ii) and (c)(4) “must” and adding “shall” in their places.

The revision reads as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(3)(i) Past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 5. Amend section 19.301–2 by revising paragraph (e) to read as follows:

19.301–2 Rerepresentation by a contractor that represented itself as a small business concern.

* * * * *

(e) A change in size status does not change the terms and conditions of the contract. However, the contracting officer may require a subcontracting plan for a contract containing 52.219–9, Small Business Subcontracting Plan, if a prime contractor’s size status changes from small to other than small as a result of a size rerepresentation (see 19.705–2(b)(3)).

19.305 [Amended]

■ 6. Amend section 19.305 by removing from paragraph (c) “19.703(a)(2)” and adding “19.703(e)” in its place.

■ 7. Amend section 19.701 by—

■ a. Removing the definitions “Individual contract plan” and “Master plan”; and

■ b. Adding in alphabetical order definitions for “Individual subcontracting plan” and “Master subcontracting plan” and “Total contract dollars”.

The additions read as follows:

19.701 Definitions.

* * * * *

Individual subcontracting plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror’s planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master subcontracting plan means a subcontracting plan that contains all the required elements of an individual subcontracting plan, except goals, and

may be incorporated into individual subcontracting plans, provided the master subcontracting plan has been approved.

* * * * *

Total contract dollars means the final anticipated dollar value, including the dollar value of all options.

■ 8. Amend section 19.702 by—

■ a. Removing from the first sentence of the introductory text “for more” and adding “with a value greater” in its place;

■ b. Removing from paragraph (a) introductory text “Section” and adding “section” in its place;

■ c. Removing from paragraphs (a)(1) and (2) “a contract or contract modification, that individually is” and adding “a contract that is” in their places, respectively;

■ d. Adding paragraph (a)(3); and

■ e. Revising paragraph (b)(4).

The addition and revision read as follows:

19.702 Statutory requirements.

* * * * *

(a) * * *

(3) Each contract modification that causes the value of a contract without a subcontracting plan to exceed \$700,000 (\$1.5 million for construction), shall require the contractor to submit a subcontracting plan for the contract, if the contracting officer determines that subcontracting opportunities exist.

(b) * * *

(4) For modifications that are within the scope of the contract and the contract does not contain the clause at 52.219–8, Utilization of Small Business Concerns.

* * * * *

■ 9. Amend section 19.703 by—

■ a. Adding a sentence to the end of paragraph (a)(1);

■ b. Revising paragraphs (a)(2) and (b);

■ c. Removing from paragraph (d)(1) introductory text “System for Award Management” and adding “SAM” in its place;

■ d. Removing from paragraph (d)(1)(i) “or <http://www.sba.gov/hubzone>”;

■ e. Removing from paragraph (d)(1)(ii) “HUB” and adding “HUBZone Program” in its place;

■ f. Revising paragraph (d)(2); and

■ g. Adding paragraph (e).

The additions and revisions read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(a) * * *

(1) * * * For subcontracting purposes, a concern is small if it does not exceed the size standard for the

NAICS code that the prime contractor determines best describes the product or service being acquired by the subcontract.

(2)(i) The prime contractor may accept a subcontractor's written representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business, if the subcontractor represents that the size and socioeconomic status representation with its offer are current, accurate, and complete as of the date of the offer for the subcontracts; or

(ii) The prime contractor may accept a subcontractor's representation of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business in the System for Award Management (SAM) if—

(A) The subcontractor is registered in SAM; and

(B) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(iii) The prime contractor may not require the use of SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(iv) In accordance with 13 CFR 121.411, 124.1015, 125.29, 126.900, and 127.700, a prime contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(b) The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1001 through 121.1008.

* * * * *

(d) * * *

(2) Protests challenging the socioeconomic status of a HUBZone small business concern must be filed in accordance with 13 CFR 126.801.

(e) The contracting officer or the SBA may protest the disadvantaged status of a proposed subcontractor. Protests challenging a subcontractor's small disadvantaged business representation must be filed in accordance with 13 CFR 124.1007 through 124.1014. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate

a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.

■ 10. Amend section 19.704 by—

■ a. Revising paragraph (a) introductory text and paragraphs (a)(2) and (3);

■ b. Redesignating paragraphs (a)(10)(iii) through (vi) as paragraphs (a)(10)(iv) through (vii), respectively;

■ c. Adding new paragraph (a)(10)(iii);

■ d. Removing the semicolon from the end of newly designated paragraph (a)(10)(iv) introductory text and adding a period in its place;

■ e. Adding a sentence to the end of the newly designated paragraph (a)(10)(iv)(A);

■ f. Revising the newly designated paragraph (a)(10)(iv)(B);

■ g. Removing the periods from the ends of newly designated paragraph (a)(10)(vii) and (a)(11) and adding a semicolon in their places, respectively; and

■ h. Adding paragraphs (a)(12) through (14);

■ i. Removing from paragraph (b) "master" and adding "master subcontracting" in its place, three times, and removing "Master" and adding "Master subcontracting" in its place, once; and

■ j. Revising paragraph (c).

The revisions and additions read as follows:

19.704 Subcontracting plan requirements.

(a) Each subcontracting plan under 19.301–2(e) and 19.702(a)(1), (2), and (3) shall include—

* * * * *

(2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes) and women-owned small business concerns, as a percentage of total subcontract dollars. For individual subcontracting plans only, a contracting officer may require the goals referenced in paragraph (a)(1) of this section to be calculated as a percentage of total contract dollars, in addition to the goals established as a percentage of total subcontract dollars;

(3) A description of the principal types of supplies and services to be subcontracted and an identification of types of supplies or services planned for subcontracting to small business (including ANCs and Indian tribes),

veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes), and women-owned small business concerns;

* * * * *

(10) * * *

(iii) After November 30, 2017, include subcontracting data for each order when reporting subcontracting achievements for indefinite-delivery, indefinite-quantity contracts intended for use by multiple agencies;

(iv) * * *

(A) * * * When a contracting officer rejects an ISR, the contractor is required to submit a revised ISR within 30 days of receiving the notice of the ISR rejection.

(B) The SSR shall be submitted annually by October 30 for the twelve-month period ending September 30. When an SSR is rejected, the contractor is required to submit a revised SSR within 30 days of receiving the notice of SSR rejection;

* * * * *

(12) Assurances that the offeror 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 the offeror used in preparing the bid or proposal, in the same or greater scope, amount, and quality used in preparing and submitting the bid or proposal. Responding to a request for a quote does not constitute use in preparing a bid or proposal. An offeror used a small business concern in preparing the bid or proposal if—

(i) The offeror identifies the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the contract; or

(ii) The offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence of 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;

(13) Assurances that the contractor will 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 (a)(12) of this section. This written explanation will be submitted to the contracting officer within 30 days of contract completion; and

(14) Assurances that the contractor will not prohibit a subcontractor from discussing with the contracting officer any material matter pertaining to payment to or utilization of a subcontractor.

* * * * *

(c) For multiyear contracts or contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary. If a subcontracting plan is necessary and the offeror is submitting an individual subcontracting plan, the individual subcontracting plan shall contain all the elements required by paragraph (a) of this section and shall contain separate statements and goals based on total subcontract dollars for the basic contract and for each option.

* * * * *

- 11. Amend section 19.705–1 by—
- a. Revising the section heading;
- b. Redesignating the text as paragraph (a); and
- c. Adding paragraph (b).

The revision and addition read as follows:

19.705–1 General.

* * * * *

(b)(1) Except where a contractor has a commercial plan, the contracting officer shall require a subcontracting plan for each indefinite-delivery, indefinite-quantity contract (including task or delivery order contracts, FSS, GWACs, and MACs), when the estimated value of the contract meets the subcontracting plan thresholds at 19.702(a)(1) and small business subcontracting opportunities exist.

(2) Contracting officers placing orders may establish small business subcontracting goals for each order. Establishing goals shall not be in the form of a new subcontracting plan as a contract may not have more than one plan (19.705–2(e)).

- 12. Amend section 19.705–2 by—
- a. Removing from the introductory text “must” and adding “shall” in its place;
- b. Revising paragraph (a);
- c. Adding paragraph (b)(3);
- d. Revising paragraphs (c) and (e); and
- e. Adding paragraph (f).

The revisions and additions read as follows:

19.705–2 Determining the need for a subcontracting plan.

* * * * *

(a)(1) Determine whether the proposed total contract-dollars will exceed the subcontracting plan threshold in 19.702(a).

(2) Determine whether a proposed modification will cause the total contract dollars to exceed the subcontracting plan threshold (see 19.702(a)).

(b) * * *

(3) Whether the firm can acquire any portion of the work with minimal or no disruption to performance (with consideration given to the time remaining until contract completion), and at fair market value, when a determination is made in accordance with paragraph (a)(2).

(c) If it is determined that there are no subcontracting possibilities, the determination shall include a detailed rationale, be approved at a level above the contracting officer, and placed in the contract file.

* * * * *

(e) A contract may not have more than one subcontracting plan. However, a contracting officer may establish separate subcontracting goals for each order under an indefinite-delivery, indefinite-quantity contract (19.705–1(b)(2)). When a contract modification exceeds the subcontracting plan threshold (see 19.702(a)) or an option is exercised, the goals of an existing subcontracting plan shall be amended to reflect any new subcontracting opportunities not envisioned at the time of contract award. These goal changes do not apply retroactively.

(f) If a subcontracting plan has been added to the contract due to a modification (see 19.702(a)(3)) or a size re-representation (see 19.301–2(e)), the subcontracting goals apply from the date of incorporation of the subcontracting plan into the contract and the contractor’s achievements must be reported on the ISR (or the SF–294, if applicable) on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

19.705–4 [Amended]

- 13. Amend section 19.705–4 by removing from paragraph (b) “11 required” and adding “14 required” in its place; and removing from paragraph (c) “11 elements” and adding “14 elements” in its place.

- 14. Amend section 19.705–6 by—

- a. Revising the introductory text;
- b. Removing from paragraph (a) “Notifying” and adding “Notify” in its place;
- c. Removing from paragraph (b) “Forwarding” and adding “Forward” in its place;
- d. Removing from paragraph (c) introductory text “Giving” and adding “Give” in its place;

- e. Removing from paragraph (d) “Notifying” and adding “Notify” in its place;
- f. Removing from paragraph (e) “Forwarding” and adding “Forward” in its place;
- g. Redesignating paragraphs (f) through (h) as paragraphs (h) through (j), respectively;
- h. Adding new paragraphs (f) and (g).
- i. Removing from the newly designated paragraph (h) “Initiating” and adding “Initiate” in its place;
- j. Removing from the newly designated paragraph (i) “Taking” and adding “Take” in its place; and
- k. Removing from the newly designated paragraph (j) “Acknowledging” and “rejecting” and adding “Acknowledge” and “reject” in their places, respectively.

The revisions and additions read as follows:

19.705–6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded or an existing subcontracting plan is amended, the contracting officer shall do the following:

* * * * *

(f) Monitor the prime contractor’s compliance with its subcontracting plan, to include the following:
 (1) Ensure that subcontracting reports are submitted into the eSRS within 30 days after the report ending date (e.g., by October 30th for the fiscal year ended September 30th).

(2) Review ISRs, and where applicable, SSRs, 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) Either acknowledge receipt of or reject the reports in accordance with subpart 19.7, 52.219–9, Small Business Subcontracting Plan, and the eSRS instructions (www.esrs.gov).

(i) The authority to acknowledge or reject SSRs for commercial plans resides with the contracting officer who approved the commercial plan.

(ii) If a report is rejected, the contracting officer must provide an explanation for the rejection to allow the prime contractor the opportunity to respond specifically to identified deficiencies.

(g) Evaluate the prime contractor’s compliance with its subcontracting plan, to include the following:

(1) Assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan (see 13 CFR 125.3(d)(3)).

(2) Assess the prime contractor's written explanation concerning the prime contractor's failure to use a small business concern in the performance of the contract in the same scope, amount, and quality used in preparing and submitting the bid or proposal, if applicable.

* * * * *

■ 15. Amend section 19.708 by—

- a. Removing the period at the end of paragraphs (b)(1)(i) and (ii) and adding a semicolon in their places;
■ b. Removing from paragraph (b)(1)(iii) "Alternate III." and adding "Alternate III; or" in its place;
■ c. Adding paragraph (b)(1)(iv);
■ d. Removing from paragraph (b)(2) "Alternate I, II, or III." and adding "Alternate I, II, III, or IV." in its place.

The addition reads as follows:

19.708 Contract clauses.

* * * * *

(b)(1) * * *

(iv) Incorporating a subcontracting plan due to a modification as provided for in 19.702(a)(3), the contracting officer shall use the clause with its Alternate IV.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 16. Amend section 52.212-5 by—
■ a. Revising the date of the clause;
■ b. Revising paragraphs (b)(16) and (17) and the first sentence of paragraph (e)(1)(ii); and
■ c. Amending Alternate II by revising the date of the alternate and the first sentence of paragraph (e)(1)(ii)(C).

The revisions read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Nov 2016)

* * * * *

(b) * * *

(16) 52.219-8, Utilization of Small Business Concerns (Nov 2016) (15 U.S.C. 637(d)(2) and (3)).

(17)(i) 52.219-9, Small Business Subcontracting Plan (Nov 2016) (15 U.S.C. 637(d)(4)).

(ii) Alternate I (Nov 2016) of 52.219-9.

(iii) Alternate II (Nov 2016) of 52.219-9.

(iv) Alternate III (Nov 2016) of 52.219-9.

(v) Alternate IV (Nov 2016) of 52.219-9.

* * * * *

(e)(1) * * *

(ii) 52.219-8, Utilization of Small Business Concerns (Nov 2016) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. * * *

* * * * *

Alternate II (Nov 2016). * * *

(e)(1) * * *

(ii) * * *

(C) 52.219-8, Utilization of Small Business Concerns (Nov 2016) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. * * *

* * * * *

■ 17. Amend section 52.213-4 by revising the date of the clause and paragraph (a)(2)(viii) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Nov 2016)

(a) * * *

(2) * * *

(viii) 52.244-6, Subcontracts for Commercial Items (Nov 2016).

* * * * *

■ 18. Amend section 52.219-8 by—

- a. Revising the date of the clause;
■ b. Revising the definition in paragraph (a) of "HUBZone small business concern";
■ c. Revising paragraph (d)(1);
■ d. Redesignating paragraph (d)(2) as (d)(5); and
■ e. Adding new paragraphs (d)(2) through (4).

The revisions and additions read as follows:

52.219-8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (Nov 2016)

(a) * * *

HUBZone small business concern means a small business concern, certified by the Small Business Administration, that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

* * * * *

(d)(1) The Contractor may accept a subcontractor's written representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business if the subcontractor represents that the size and socioeconomic status representations with its offer are current, accurate, and complete as of the date of the offer for the subcontract.

(2) The Contractor may accept a subcontractor's representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business in the System for Award Management (SAM) if—

(i) The subcontractor is registered in SAM; and

(ii) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(3) The Contractor may not require the use of SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(4) In accordance with 13 CFR 121.411, 124.1015, 125.29, 126.900, and 127.700, a contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

* * * * *

■ 19. Amend section 52.219-9 by—

- a. Revising the clause heading and the date of the clause;
■ b. In paragraph (b), removing the definitions "Individual contract plan" and "Master plan"; and adding, in alphabetical order, definitions for "Individual subcontracting plan" and "Master subcontracting plan" and "Total contract dollars".
■ c. Revising paragraph (c);
■ d. Revising paragraphs (d) introductory text, (d)(1) introductory text, paragraph (d)(1)(i), (d)(1)(ii) introductory text, (d)(2)(i), (d)(3) introductory text, (d)(5), (d)(6) introductory text, (d)(7) through (10), and (d)(11)(iv)(C);
■ e. Adding paragraphs (d)(12) through (14);
■ f. Revising paragraphs (e)(4) and (6);
■ g. Adding paragraph (e)(7);
■ h. Revising paragraphs (f), (i), (k), and (l);
■ i. Revising Alternates I, II, and III; and
■ j. Adding Alternate IV.

The revisions and additions read as follows:

52.219-9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (Nov 2016)

* * * * *

(b) * * *

Individual subcontracting plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master subcontracting plan means a subcontracting plan that contains all the required elements of an individual subcontracting plan, except goals, and may be incorporated into individual subcontracting plans, provided the master subcontracting plan has been approved.

* * * * *

Total contract dollars means the final anticipated dollar value, including the dollar value of all options.

(c)(1) The Offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the Offeror is submitting an individual subcontracting plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The subcontracting plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the subcontracting plan shall make the Offeror ineligible for award of a contract.

(2)(i) The Contractor may accept a subcontractor's written representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business if the subcontractor represents that the size and socioeconomic status representations with its offer are current, accurate, and complete as of the date of the offer for the subcontract.

(ii) The Contractor may accept a subcontractor's representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business in the System for Award Management (SAM) if—

(A) The subcontractor is registered in SAM; and

(B) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(iii) The Contractor may not require the use of SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(iv) In accordance with 13 CFR 121.411, 124.1015, 125.29, 126.900, and 127.700, a contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(d) The Offeror's subcontracting plan shall include the following:

(1) Separate goals, expressed in terms of total dollars subcontracted, and as a

percentage of total planned subcontracting dollars, for the use of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. The Offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs. In accordance with 43 U.S.C. 1626—

(i) Subcontracts awarded to an ANC or Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe; and

(ii) Where one or more subcontractors are in the subcontract tier between the prime Contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate Contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

* * * * *

(2) A statement of—

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan;

* * * * *

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to—

* * * * *

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, SAM, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in SAM as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of SAM as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the Offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine

the proportionate share of indirect costs to be incurred with—

* * * * *

(7) The name of the individual employed by the Offeror who will administer the Offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the Offeror will make to assure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the Offeror will include the clause of this contract entitled "Utilization of Small Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the Offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$700,000 (\$1.5 million for construction of any public facility) with further subcontracting possibilities to adopt a subcontracting plan that complies with the requirements of this clause.

(10) Assurances that the Offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the Offeror with the subcontracting plan;

(iii) After November 30, 2017, include subcontracting data for each order when reporting subcontracting achievements for indefinite-delivery, indefinite-quantity contracts intended for use by multiple agencies;

(iv) Submit the Individual Subcontract Report (ISR) and/or the Summary Subcontract Report (SSR), in accordance with paragraph (1) of this clause using the Electronic Subcontracting Reporting System (eSRS) at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by SBA as small disadvantaged businesses), women-owned small business concerns, and for NASA only, Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations;

(v) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using eSRS;

(vi) Provide its prime contract number, its DUNS number, and the email address of the Offeror's official responsible for acknowledging receipt of or rejecting the ISRs, to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their ISRs; and

(vii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS number, and

the email address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

(11) * * *

(iv) * * *

(C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, service-disabled veteran-owned, and women-owned small business sources; and

* * * * *

(12) Assurances that the Offeror 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 or greater scope, amount, and quality used in preparing and submitting the bid or proposal. Responding to a request for a quote does not constitute use in preparing a bid or proposal. The Offeror used a small business concern in preparing the bid or proposal if—

(i) The Offeror identifies the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the subcontract; or

(ii) The Offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence of 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.

(13) Assurances that the Contractor will 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 (d)(12) of this clause. This written explanation must be submitted to the Contracting Officer within 30 days of contract completion.

(14) Assurances that the Contractor will not prohibit a subcontractor from discussing with the Contracting Officer any material matter pertaining to payment to or utilization of a subcontractor.

(e) * * *

(4) Confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern in accordance with 52.219-8(d)(2).

* * * * *

(6) For all competitive subcontracts over the simplified acquisition threshold in which a small business concern received a small business preference, upon determination of the successful subcontract offeror, prior to award of the subcontract the Contractor must inform each unsuccessful small business subcontract offeror in writing of the name and location of the apparent successful offeror and if the successful subcontract 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 concern.

(7) Assign each subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract.

(f) A master subcontracting plan on a plant or division-wide basis that contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the Offeror by this clause; provided—

(1) The master subcontracting plan has been approved;

(2) The Offeror ensures that the master subcontracting plan is updated as necessary and provides copies of the approved master subcontracting plan, including evidence of its approval, to the Contracting Officer; and

(3) Goals and any deviations from the master subcontracting plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

* * * * *

(i) A contract may have no more than one subcontracting plan. When a contract modification exceeds the subcontracting plan threshold in 19.702(a), or an option is exercised, the goals of the existing subcontracting plan shall be amended to reflect any new subcontracting opportunities. When the goals in a subcontracting plan are amended, these goal changes do not apply retroactively.

* * * * *

(k) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization Of Small Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract and may be considered in any past performance evaluation of the Contractor.

(l) The Contractor shall submit ISRs and SSRs using the web-based eSRS at <http://www.esrs.gov>. Purchases from a corporation, company, or subdivision that is an affiliate of the Contractor or subcontractor are not included in these reports. Subcontract awards by affiliates shall be treated as subcontract awards by the Contractor. Subcontract award data reported by the Contractor and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower tier subcontractors, 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 in these reports 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.

(1) *ISR*. This report is not required for commercial plans. The report is required for each contract containing an individual subcontracting plan.

(i) The report shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30.

A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period. When the Contracting Officer rejects an ISR, the Contractor shall submit a corrected report within 30 days of receiving the notice of ISR rejection.

(ii)(A) When a subcontracting plan contains separate goals for the basic contract and each option, as prescribed by FAR 19.704(c), the dollar goal inserted on this report shall be the sum of the base period through the current option; for example, for a report submitted after the second option is exercised, the dollar goal would be the sum of the goals for the basic contract, the first option, and the second option.

(B) If a subcontracting plan has been added to the contract pursuant to 19.702(a)(3) or 19.301-2(e), the Contractor's achievements must be reported in the ISR on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

(iii) When a subcontracting plan includes indirect costs in the goals, these costs must be included in this report.

(iv) The authority to acknowledge receipt or reject the ISR resides—

(A) In the case of the prime Contractor, with the Contracting Officer; and

(B) In the case of a subcontract with a subcontracting plan, with the entity that awarded the subcontract.

(2) *SSR*. (i) *Reports submitted under individual subcontracting plans*.

(A) This report encompasses all subcontracting under prime contracts and subcontracts with an executive agency, regardless of the dollar value of the subcontracts. This report also includes indirect costs on a prorated basis when the indirect costs are excluded from the subcontracting goals.

(B) The report may be submitted on a corporate, company or subdivision (*e.g.* plant or division operating as a separate profit center) basis, unless otherwise directed by the agency.

(C) If the Contractor or a subcontractor is performing work for more than one executive agency, a separate report shall be submitted to each executive agency covering only that agency's contracts, provided at least one of that agency's contracts is over \$700,000 (over \$1.5 million for construction of a public facility) and contains a subcontracting plan. For DoD, a consolidated report shall be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DoD prime contractors.

(D) The report shall be submitted annually by October 30 for the twelve month period ending September 30. When a Contracting Officer rejects an SSR, the Contractor shall submit a revised report within 30 days of receiving the notice of SSR rejection.

(E) Subcontract awards that are related to work for more than one executive agency shall be appropriately allocated.

(F) The authority to acknowledge or reject SSRs in eSRS, including SSRs submitted by subcontractors with subcontracting plans, resides with the Government agency awarding the prime contracts unless stated otherwise in the contract.

(ii) *Reports submitted under a commercial plan.*

(A) The report shall include all subcontract awards under the commercial plan in effect during the Government's fiscal year and all indirect costs.

(B) The report shall be submitted annually, within thirty days after the end of the Government's fiscal year.

(C) If a Contractor has a commercial plan and is performing work for more than one executive agency, the Contractor shall specify the percentage of dollars attributable to each agency.

(D) The authority to acknowledge or reject SSRs for commercial plans resides with the Contracting Officer who approved the commercial plan.

(End of clause)

Alternate I (Nov 2016). As prescribed in 19.708(b)(1)(i), substitute the following paragraph (c)(1) for paragraph (c)(1) of the basic clause:

(c)(1) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the bidder is submitting an individual subcontracting plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

Alternate II (Nov 2016). As prescribed in 19.708(b)(1)(ii), substitute the following paragraph (c)(1) for paragraph (c)(1) of the basic clause:

(c)(1) Proposals submitted in response to this solicitation shall include a subcontracting plan that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the Offeror is submitting an individual subcontracting plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a

separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate a subcontracting plan shall make the Offeror ineligible for award of a contract.

Alternate III (Nov 2016). As prescribed in 19.708(b)(1)(iii), substitute the following paragraphs (d)(10) and (l) for paragraphs (d)(10) and (l) in the basic clause:

(d)(10) Assurances that the Offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the Offeror with the subcontracting plan;

(iii) Submit Standard Form (SF) 294 Subcontracting Report for Individual Contract in accordance with paragraph (l) of this clause. Submit the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the Electronic Subcontracting Reporting System (eSRS) at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by the Small Business Administration as small disadvantaged businesses), women-owned small business concerns, and for NASA only, Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations; and

(iv) Ensure that its subcontractors with subcontracting plans agree to submit the SF 294 in accordance with paragraph (l) of this clause. Ensure that its subcontractors with subcontracting plans agree to submit the SSR in accordance with paragraph (l) of this clause using the eSRS.

(l) The Contractor shall submit a SF 294. The Contractor shall submit SSRs using the web-based eSRS at <http://www.esrs.gov>. Purchases from a corporation, company, or subdivision that is an affiliate of the Contractor or subcontractor are not included in these reports. Subcontract awards by affiliates shall be treated as subcontract awards by the Contractor. Subcontract award data reported by the Contractor and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower tier subcontractors, 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 U.S. or its outlying areas should be included in these reports 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.

(1) *SF 294.* This report is not required for commercial plans. The report is required for each contract containing an individual subcontracting plan. For Contractors the report shall be submitted to the Contracting Officer, or as specified elsewhere in this contract. In the case of a subcontract with a subcontracting plan, the report shall be submitted to the entity that awarded the subcontract.

(i) The report shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period. When a Contracting Officer rejects a report, the Contractor shall submit a revised report within 30 days of receiving the notice of report rejection.

(ii)(A) When a subcontracting plan contains separate goals for the basic contract and each option, as prescribed by FAR 19.704(c), the dollar goal inserted on this report shall be the sum of the base period through the current option; for example, for a report submitted after the second option is exercised, the dollar goal would be the sum of the goals for the basic contract, the first option, and the second option.

(B) If a subcontracting plan has been added to the contract pursuant to 19.702(a)(3) or 19.301-2(e), the Contractor's achievements must be reported in the report on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

(iii) When a subcontracting plan includes indirect costs in the goals, these costs must be included in this report.

(2) *SSR. (i) Reports submitted under individual subcontracting plans.*

(A) This report encompasses all subcontracting under prime contracts and subcontracts with an executive agency, regardless of the dollar value of the subcontracts. This report also includes indirect costs on a prorated basis when the indirect costs are excluded from the subcontracting goals.

(B) The report may be submitted on a corporate, company or subdivision (*e.g.*, plant or division operating as a separate profit center) basis, unless otherwise directed by the agency.

(C) If the Contractor and/or a subcontractor is performing work for more than one executive agency, a separate report shall be submitted to each executive agency covering only that agency's contracts, provided at least one of that agency's contracts is over \$700,000 (over \$1.5 million for construction of a public facility) and contains a subcontracting plan. For DoD, a consolidated report shall be submitted for all contracts awarded by military departments/agencies and/or subcontracts awarded by DoD prime contractors.

(D) The report shall be submitted annually by October 30, for the twelve month period ending September 30. When a Contracting Officer rejects an SSR, the Contractor is required to submit a revised SSR within 30 days of receiving the notice of report rejection.

(E) Subcontract awards that are related to work for more than one executive agency shall be appropriately allocated.

(F) The authority to acknowledge or reject SSRs in the eSRS, including SSRs submitted by subcontractors with subcontracting plans, resides with the Government agency awarding the prime contracts unless stated otherwise in the contract.

(ii) *Reports submitted under a commercial plan.*

(A) The report shall include all subcontract awards under the commercial plan in effect during the Government's fiscal year and all indirect costs.

(B) The report shall be submitted annually, within 30 days after the end of the Government's fiscal year.

(C) If a Contractor has a commercial plan and is performing work for more than one executive agency, the Contractor shall specify the percentage of dollars attributable to each agency.

(D) The authority to acknowledge or reject SSRs for commercial plans resides with the Contracting Officer who approved the commercial plan.

Alternate IV (Nov 2016). As prescribed in 19.708(b)(1)(iv), substitute the following paragraphs (c) and (d) for paragraphs (c) and (d) of the basic clause:

(c)(1) The Contractor, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the Contractor is submitting an individual subcontracting plan, the plan shall separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The subcontracting plan shall be incorporated into the contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. The subcontracting plan does not apply retroactively.

(2)(i) The prime Contractor may accept a subcontractor's written representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business if the subcontractor represents that the size and socioeconomic status representations with its offer are current, accurate, and complete as of the date of the offer for the subcontract.

(ii) The Contractor may accept a subcontractor's representations of its size and

socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business in the System for Award Management (SAM) if—

(A) The subcontractor is registered in SAM; and

(B) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(iii) The Contractor may not require the use of SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(iv) In accordance with 13 CFR 121.411, 124.1015, 125.29, 126.900, and 127.700, a contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(d) The Contractor's subcontracting plan shall include the following:

(1) Separate goals, expressed in terms of total dollars subcontracted and as a percentage of total planned subcontracting dollars, for the use of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. For individual subcontracting plans, and if required by the Contracting Officer, goals shall also be expressed in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. The Contractor shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs. In accordance with 43 U.S.C. 1626—

(i) Subcontracts awarded to an ANC or Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe; and

(ii) Where one or more subcontractors are in the subcontract tier between the prime Contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate Contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

(A) In most cases, the appropriate Contractor is the Contractor that awarded the subcontract to the ANC or Indian tribe.

(B) If the ANC or Indian tribe designates more than one Contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each Contractor. The sum of the amounts designated to various Contractors cannot exceed the total value of the subcontract.

(C) The ANC or Indian tribe shall give a copy of the written designation to the Contracting Officer, the Contractor, and the subcontractors in between the prime Contractor and the ANC or Indian tribe

within 30 days of the date of the subcontract award.

(D) If the Contracting Officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the Contractor that awarded the subcontract to the ANC or Indian tribe will be considered the designated Contractor.

(2) A statement of—

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Contractor's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan;

(ii) Total dollars planned to be subcontracted to small business concerns (including ANC and Indian tribes);

(iii) Total dollars planned to be subcontracted to veteran-owned small business concerns;

(iv) Total dollars planned to be subcontracted to service-disabled veteran-owned small business;

(v) Total dollars planned to be subcontracted to HUBZone small business concerns;

(vi) Total dollars planned to be subcontracted to small disadvantaged business concerns (including ANCs and Indian tribes); and

(vii) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to—

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns; and

(vi) Women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, SAM, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). The Contractor may rely on the information contained in SAM as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of SAM as its source list does not relieve a firm of its responsibilities (e.g., outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the Contractor included indirect costs in

establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with—

- (i) Small business concerns (including ANC and Indian tribes);
- (ii) Veteran-owned small business concerns;
- (iii) Service-disabled veteran-owned small business concerns;
- (iv) HUBZone small business concerns;
- (v) Small disadvantaged business concerns (including ANC and Indian tribes); and
- (vi) Women-owned small business concerns.

(7) The name of the individual employed by the Contractor who will administer the Contractor's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the Contractor will make to assure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the Contractor will include the clause of this contract entitled "Utilization of Small Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the Contractor will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$700,000 (\$1.5 million for construction of any public facility) with further subcontracting possibilities to adopt a subcontracting plan that complies with the requirements of this clause.

(10) Assurances that the Contractor will—

- (i) Cooperate in any studies or surveys as may be required;
- (ii) Submit periodic reports so that the Government can determine the extent of compliance by the Contractor with the subcontracting plan;
- (iii) After November 30, 2017, include subcontracting data for each order when reporting subcontracting achievements for an indefinite-delivery, indefinite-quantity contract intended for use by multiple agencies;
- (iv) Submit the Individual Subcontract Report (ISR) and/or the Summary Subcontract Report (SSR), in accordance with paragraph (l) of this clause using the Electronic Subcontracting Reporting System (eSRS) at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns (including ANCs and Indian tribes that are not small businesses), veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns (including ANCs and Indian tribes that have not been certified by SBA as small disadvantaged businesses), women-owned small business concerns, and for NASA only, Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations;
- (v) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using eSRS;

(vi) Provide its prime contract number, its DUNS number, and the email address of the Contractor's official responsible for acknowledging receipt of or rejecting the ISRs, to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their ISRs; and

(vii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS number, and the email address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the Contractor's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (e.g., SAM), guides, and other data that identify small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than \$150,000, indicating—

- (A) Whether small business concerns were solicited and, if not, why not;
- (B) Whether veteran-owned small business concerns were solicited and, if not, why not;
- (C) Whether service-disabled veteran-owned small business concerns were solicited and, if not, why not;
- (D) Whether HUBZone small business concerns were solicited and, if not, why not;
- (E) Whether small disadvantaged business concerns were solicited and, if not, why not;
- (F) Whether women-owned small business concerns were solicited and, if not, why not; and

(G) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact—

- (A) Trade associations;
- (B) Business development organizations;
- (C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, service-disabled veteran-owned, and women-owned small business sources; and
- (D) Veterans service organizations.
- (v) Records of internal guidance and encouragement provided to buyers through—
 - (A) Workshops, seminars, training, etc.;

(B) Monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the Contractor to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.

(12) Assurances that the Contractor 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 proposal for the modification, in the same or greater scope, amount, and quality used in preparing and submitting the modification proposal.

Responding to a request for a quote does not constitute use in preparing a proposal. The Contractor used a small business concern in preparing the proposal for a modification if—

(i) The Contractor identifies the small business concern as a subcontractor in the proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the subcontract; or

(ii) The Contractor used the small business concern's pricing or cost information or technical expertise in preparing the proposal, where there is written evidence of an intent or understanding that the small business concern will be awarded a subcontract for the related work when the modification is executed.

(13) Assurances that the Contractor will 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 (d)(12) of this clause. This written explanation must be submitted to the Contracting Officer within 30 days of contract completion.

(14) Assurances that the Contractor will not prohibit a subcontractor from discussing with the contracting officer any material matter pertaining to the payment to or utilization of a subcontractor.

■ 20. Amend section 52.244–6 by revising the date of the clause and the first sentence of paragraph (c)(1)(iii) to read as follows:

52.244–6 Subcontracts for Commercial Items.

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Subcontracts for Commercial Items (Nov 2016)

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(c)(1) * * *

(iii) 52.219–8, Utilization of Small Business Concerns (Nov 2016) (15 U.S.C. 637(d)(2) and (3)), if the subcontract offers further subcontracting opportunities.

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