



## **USAID PROCUREMENT EXECUTIVE**

### **PROCUREMENT EXECUTIVE'S BULLETIN NO. 2018- 01**

#### **SUBJECT: RESPONSIBILITIES REGARDING SUBCONTRACTING PLAN COMPLIANCE**

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#### **1. Scope**

This Bulletin applies to all USAID Contracting Officers (COs) and A&A staff worldwide.

#### **2. Purpose**

The purpose of this PEB is to provide reference information and best practice to support a Contracting Officer (CO) in facilitating prime contractor compliance with its own small business subcontracting plan as represented in its contract with the Federal government.

This document highlights current policies and procedures which COs may use to address situations when a prime contractor fails to make a good faith effort to comply with its own small business subcontracting plan.

#### **3. Responsibilities and Requirements**

FAR Subpart 19.7 states the responsibilities of the CO under the Subcontracting Assistance Program. The responsibilities include identifying the need for a subcontracting plan, evaluating the proposed plan and monitoring the prime contractor's compliance with its own plan after award.

FAR 42.15 requires the CO to evaluate the prime contractor's performance on meeting its own subcontracting plan goals as a part of the annual past performance evaluations. See the most recent FAR provisions and clauses to ensure current small business program requirements are followed.

#### **4. Pre-Award – Subcontracting Plan Requirement**

FAR Subpart 19.7 and specific FAR contract clauses address the Small Business Program requirements and prime contractors' obligation to use best efforts to meet small business subcontracting plan goals. In negotiated acquisitions where a resulting contract is expected to exceed \$700,000 (\$1.5 million for construction)<sup>1</sup> the apparent successful offeror must submit an acceptable small business subcontracting plan to the CO. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the CO within the time limit prescribed by the CO, the offeror will be ineligible for award.

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<sup>1</sup> Dollar thresholds are subject to change. See FAR Part 19 for current figures.

The CO may evaluate the subcontracting plan as a matter of responsibility or as a weighted technical evaluation factor. (See USAID Procurement Executive Bulletin No. 2017-01). Once the evaluation is completed, and if the CO finds the subcontracting plan acceptable, the plan becomes a part of the awarded contract or the CO modifies the contract to include the plan.

Contract modifications that are in scope and cause the contract value to exceed \$700,000 (\$1.5 million for construction) also require the prime contractor to submit a plan if the CO determines that subcontracting opportunities exist, and the clause at FAR 52.219-8 was included in the contract. Table 1. below summarizes the Small Business Program Subcontracting Requirements.

Subcontracting plans are not required from small business concerns, personal service contracts, contracts or contract modifications that will be performed entirely outside of the United States and its outlying areas, or for modifications that are within the scope of the contract that do not contain the clause at 52.219-8, Utilization of Small Business Concerns.

**Table 1. Small Business Program - Subcontracting Requirements**

<b>Required to Submit a Subcontracting Plan</b>	<b>Regulations &amp; Clauses</b>	<b>Application</b>	<b>Eligible to be Subcontractors under the Small Business Program</b>
<b>Other Than Small Business Concerns</b>	FAR 19.702 -- Statutory Requirements	*Contracts that are expected to exceed \$700,000 (\$1.5 million for construction)	Small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns
	FAR 52.219-8 -- Utilization of Small Business Concerns		
	FAR 52.219-9 – Small Business Subcontracting Plan		
	FAR 52.219-16, Liquidated damages – Subcontracting Plan		

\*Dollar thresholds are subject to change. See FAR Part 19 for current figures.

### **5. Best Practices for Pre-Award – Subcontracting Plan**

COs must determine if subcontracting opportunities exist and ensure that prime contractors make a good faith effort to achieve the goals established in the small business plan. The following best practices will provide a solid contractual foundation:

- Read and understand regulations, and procedures in FAR Part 19 Small Business Programs and FAR Subpart 44.2 Consent to Subcontracts. Specifically, be familiar with the following:
  - When a subcontracting plan is required (See FAR 19.702);
  - The 15 required elements a subcontracting plan must contain, (See FAR 19.704);

- If the CO determines that there are no subcontracting possibilities, the determination must be approved at a level above the CO and placed in the contract file. (See FAR 19.705-2); and
  - Before providing consent to subcontract, the CO must consider whether the contractor has complied with the prime contract requirements regarding small business subcontracting (See FAR 44.202-2).
- Include the necessary contract clauses in the solicitation to help facilitate compliance of the prime contractor with meeting the subcontract plan goals.(See FAR 19.708)
  - Clearly identify the method of evaluating small business subcontracting plans in the solicitation, i.e., as a matter of responsibility in accordance with 19.705-4 or as a weighted technical factor which also includes reviewing the plan for compliance with 19.705-4.
  - Engage the Agency Small Business Specialist(s) or the Office of Small Disadvantaged Business Utilization (OSDBU) to assist with identifying various market research tools to educate and assist prime contractors.

## **6. Post-Award – Subcontracting Plan Requirement**

After a contract or contract modification containing a subcontracting plan is awarded or an existing subcontracting plan is modified, the CO must monitor the prime contractor's compliance with its subcontracting plan. The CO must also evaluate, at least annually and at the time the work under a contract or order is completed, the contractor's performance against, and efforts to achieve, the goals identified in the small business subcontracting plan. In accordance with FAR 19.705 and FAR 42.1502, the CO is responsible for the following:

- Ensuring that the contractor submits subcontracting reports into the electronic Subcontracting Reporting System (eSRS);
- Reviewing Individual Subcontracting Report (ISRs), and where applicable, Summary Subcontract Reports (SSRs);
- Acknowledging receipt of or rejecting the reports in accordance with FAR Subpart 19.7, FAR clause 52.219-9, Small Business Subcontracting Plan, and the eSRS instructions found at [www.esrs.gov](http://www.esrs.gov).
  - The authority to acknowledge or reject SSRs for commercial plans resides with the CO who approved the plan.
  - If a report is rejected, the CO must provide an explanation for the rejection to allow the prime contractor the opportunity to respond specifically to the identified deficiencies.

If the CO rejects the prime contractor's subcontracting plan, the CO must:

- Assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan as required in FAR 19.705-6 (see also 13 CFR 125.3(d)(3)).

- 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 proposal.

Table 2 below illustrates the role and responsibility of the CO and prime contractor.

**Table 2. Subcontracting Plan Monitoring Requirements**

<b>Responsibility</b>	<b>Regulation/Clause</b>	<b>Action Required</b>	<b>Time Frame</b>
Prime Contractor	52.219-9 Small Business Subcontracting Plan	Submit subcontracting reports	Within 30 days after the report ending date
Contracting Officer	19.705-6 -- Postaward Responsibilities of the Contracting Officer	Review ISRs, and where applicable, SSRs, in eSRS and either acknowledge receipt of or reject the reports in accordance with subpart <u>19.7</u> , <u>52.219-9</u>	Within 60 days of the report ending date
		Assess whether the prime contractor made a good faith effort to comply with the subcontracting plan	Annually and at the time the work under a contract or order is completed
Prime Contractor	52.219-9 -- Small Business Subcontracting Plan	Provide the CO with a written explanation if the Contractor fails to acquire goods or from small business subcontractors.	Within 30 days of contract completion
Contracting Officer	19.705-6 -- Postaward Responsibilities of the Contracting Officer	Basis for accepting or rejecting report - Assess the prime contractor's written explanation concerning its failure to use a small business concern as planned	Annually and at the time the work under a contract or order is completed
Contracting Officer	Subpart 42.15. Contractor Performance Information	Include in past performance evaluation contractor's performance against, and effort to achieve, goals in the subcontracting plan	Annually and at the time the work under a contract or order is completed

## **7. Best Practices for Post-Award – Subcontracting Plan**

While the Federal government has privity of contract with the prime contractor and not the subcontractor, the government can influence the prime contractor to make a good faith effort to meet its small business subcontracting goals by keeping a past performance record. The FAR requires Federal agencies to use past performance information in the source selection process. The CO cannot award a contract unless it is determined that the contractor is “responsible” for having a positive past performance record; such a rating is arguably essential for the contractor

to compete for and receive future government contracts. Best practices for managing the compliance of a prime contractor as it relates to the small business subcontracting goals:

- As a part of the initial orientation or kick-off meeting the CO should review the contract’s small business contracting plan and highlight that efforts to meet goals in the contract will become part of the past performance record stored in the Contractor Performance Assessment Reporting System (CPARS). The CO should also remind the prime contractor that a subcontracting plan is more than goals.
- If the contractor has a previous federal contract where the terms and conditions related to the subcontracting plan were not enforced, the CO should communicate to the prime contractor that the terms and conditions related to its subcontracting plan goals will be adhered to in the future.
- The CO must conduct an annual evaluation in accordance FAR 19.705 and 42.15, when the contract includes FAR clause 52.219-9 Small Business Subcontracting Plan.
- When assessing whether the prime contractor made a good faith effort or failed to comply with its small business subcontracting plan, the CO should:
  - Compare the percentage of funds invoiced for the subcontractor work completed with the subcontract plan for the specified period of performance.
  - Ask the prime contractor to provide information to assist with the process, i.e., identify invoices where subcontractor(s) contributed to the contract efforts or submit an explanation as to why the subcontracting goals were not met, etc.

The CO must collect and submit performance information including information relating to the prime contractor efforts to meet its subcontracting plan to CPARS.

## 8. Point of Contact

The point of contact for questions regarding this PEB is the Ombudsman at [ombudsman@usaid.gov](mailto:ombudsman@usaid.gov).

## 9. Effective Date

This Bulletin is effective immediately and will remain in effect until cancelled by the Procurement Executive or otherwise rescinded.

\_\_\_\_\_ 1/30/18 \_\_\_\_\_  
Date

\_\_\_\_\_/s/\_\_\_\_\_  
Mark A. Walther  
Acting Procurement Executive