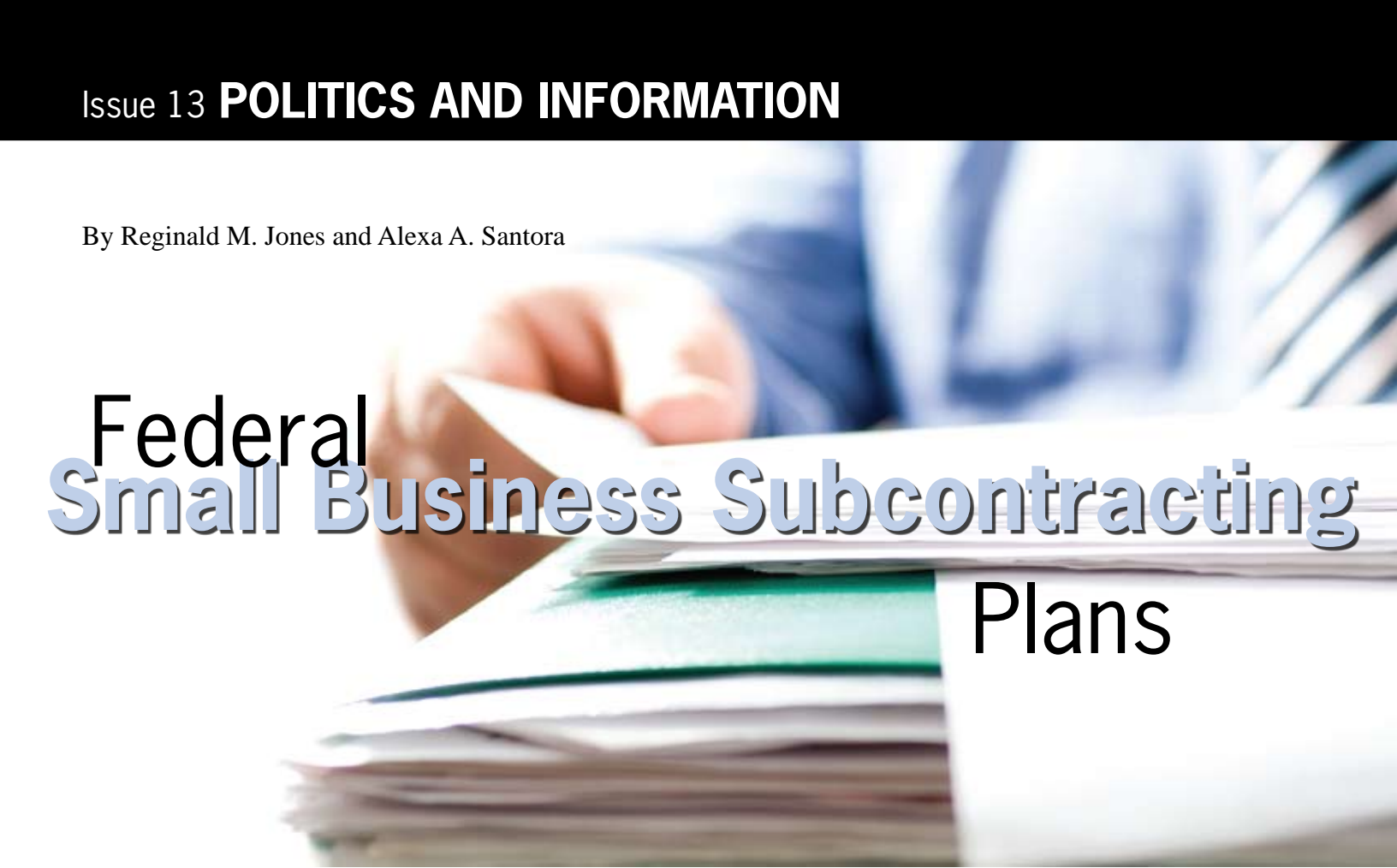



By Reginald M. Jones and Alexa A. Santora



Federal Small Business Subcontracting Plans



All federal construction contracts over \$1 million include Federal Acquisition Regulation (FAR) clauses 52.219-8 (Utilization of Small Business Concerns) and 52.219-9 (Small Business Subcontracting Plan), which require general contractors and their first tier subcontractors to make a “good faith effort” to meet or to exceed the procuring agency’s small business subcontracting goals. Failure to make this effort could result in liquidated damages, default termination and negative performance reviews.

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

What is a Small Business Subcontracting Plan?

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

In order to achieve those goals, FAR 19.702 requires prime contractors that are “other than small” submit detailed small business subcontracting plans when competing for contracts exceeding \$1 million for the construction of public facilities, and \$550,000 for other contracts. The subcontracting plan must describe how much subcontracting will be awarded to each of the specified small business categories. Solicitations typically identify the specific goal of the agency for a particular project. If the solicitation is silent, the prime and its subcontractors must determine the agency’s current goals, which may be listed online.

Under FAR part 19.704, a “flow-down provision,” large subcontractors must also formulate subcontracting plans if they receive a subcontract in excess of the monetary threshold (\$1 million for construction contracts). The higher-tiered contractor is responsible for obtaining, approving and monitoring the subcontracting plans of lower-tiered contractors.

Required Elements and Reporting

The subcontracting plan must contain the following elements:

- Percentage goals for the use of small business and disadvantaged firms
- Total value to be subcontracted
- Description of principal types of supplies or services to be subcontracted
- The method(s) used to develop these goals
- Method(s) used to identify potential small business sources
- Explanation of whether indirect costs are included
- The name of an individual in the offeror's firm who will administer the program
- A description of the efforts the offeror will take to assure an equitable opportunity for competition by small businesses for subcontracts
- Assurances that the same requirements will be included in subcontracts
- Agreement to cooperate with studies and surveys and to submit reports
- Agreement to maintain records to demonstrate procedures adopted to comply with requirements and goals

The contractor is required to submit an Individual Subcontract Report (ISR) and Summary Subcontracting Report (SSR). The ISR is submitted semi-annually with the procuring agency during contract performance and upon contract completion. The SSR is submitted annually with civilian procuring agencies, or semi-annually with the DoD. Both forms are submitted through the Electronic Subcontracting Reporting System (eSRS).

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

Satisfying the Requirements

Small Business Concerns (SBCs), HUBZone businesses, women-owned businesses, Small Disadvantaged Businesses (SDBs), Veteran-Owned Small Businesses (VOSB) and Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) count toward achieving subcontracting goals. In addition, Alaska Native Corporations (ANCs) and Indian tribes satisfy subcontracting goals and, unlike other SBCs, they do not need to qualify as small to count toward subcontracting goals.

A common issue is how far down a contractor may go in order to satisfy its subcontracting goals. The FAR limits contractors to counting only next tier subcontractors toward achieving goals. For example, general contractors are permitted to count only their first tier subcontractors towards the goals identified in subcontracting plans. A general contractor may not count a second tier subcontractor towards its goals, even when the second tier subcontractor is a qualified SBC. Similarly, first tier subcontractors can count only next (second) tier subcontractors to satisfy subcontracting goals. Because of this limitation, a contractor may still achieve its goals even if a SBC subcontracts a large portion of its work to a non-SBC. The higher tier contractor receives its subcontracting credits, even if the SBC does not perform the equivalent amount of work.

These discrepancies were likely caused by the difficulty of tracking this information. Forms that were once submitted in hardcopy are now submitted electronically. Contractors and subcontractors are now required to submit information concerning the percentage and dollar amount of work completed by each SBC firm through eSRS. Contractors may view submissions of subcontractors through eSRS. Under an interim rule, a contractor must provide its prime contract number and DUNS number to its subcontractors with subcontracting plans and require that they provide the prime contract number to their subcontractors. Therefore, the technol-

ogy is in place for the government to keep track of small business subcontracting at all tiers below the general. As a result, it makes little sense to forbid general contractors from receiving credit for work completed by lower-tier small business subcontractors. With the utilization of eSRS, the FAR should be amended to allow all small business concerns to designate which higher-tiered contractor is credited.

The Government's Evaluation

Plans are reviewed by the contracting officer for adequacy to ensure that the required information, goals and assurances are included. The FAR instructs the contracting officer to focus on the circumstances of the particular acquisition in deciding if a plan is acceptable. Previous involvement of small businesses in similar procurements may be considered in determining if the offeror's goals are realistic and proper. The contracting officer must also determine whether goals are artificially low and reject those plans as nonconforming. If a plan, otherwise responsive, evidences the bidder's intention not to comply with its obligations, the contracting officer may find the bidder non-responsive.

In addition, the Small Business Administration (SBA) procurement center representative has the right to review the proposed contract including the subcontracting plan. The SBA can also conduct compliance reviews on behalf of civilian agencies; however, the SBA cannot prescribe the amount of subcontracting, or require the offeror to use a particular small business.

Penalties for Failing to Meet Subcontracting Goals

If the subcontracting plan is approved and the contract is awarded, the general contractor must make a good faith effort to achieve the goals listed in the plan. Because the contractor may be required to prove good faith effort if goals are not met, all actions taken to involve small businesses should be documented. This

includes steps taken to find small businesses, recording when these efforts were made (the earlier in the process the better), providing written justification for why large concerns were selected over small businesses and recording other steps taken to ensure that small businesses were provided with resources to make them competitive.

There are severe penalties if a general contractor does not comply with the subcontracting goals. A contractor who does not make a good faith effort to achieve his goals may be in default of the contract. Liquidated damages may be assessed in proportion to the amount of subcontracting that was promised but not achieved. Failure to achieve subcontracting goals may be assessed as part of the contractor's past performance record for future contracts.

However, failure to achieve planned subcontracting goals does not automatically mean the contractor has failed to make a good

faith effort. If the contractor does not meet its goals, the contracting officer reviews all available information to determine if the contractor made a good faith effort.

The SBA has established steps that a general contractor can take to show a good faith effort. Those steps include:

- Breaking out contracting work items into units that are economically feasible for small firms
- Conducting market research to identify small business subcontractors and suppliers through all reasonable means, including online searches on SBA's PRO-Net, posting Notices of Sources Sought and/or Requests for Proposal on SBA's SUB-Net, and attending pre-bid conferences
- Seeking out small business subcontractors as early in the acquisition process as practicable to give them time to submit an offer for the subcontract

- Providing interested small businesses with adequate and timely information about the plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract
- Negotiating in good faith
- Directing small businesses to the SBA for extra help
- Helping small firms to obtain bonding, lines of credit, required insurance, necessary equipment, materials or services,
- Utilizing other organizations that help small businesses
- Participating in a mentor-protégé program

In addition, a prime contractor may be considered to have made a good faith effort even if it failed to achieve its subcontracting goal in one socioeconomic category, but exceeded its goal by an equal or greater amount in one or more of the other categories.



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The contractor need not award contracts to small businesses if small businesses do not make the best offers or are less qualified to perform; however, the contractor must carry out SBA policy in the awarding of subcontracts to the “fullest extent consistent with efficient performance of the contract.” If awarding the contract to a small business would stand in the way

of effective or efficient performance, then the contractor need not award the contract to a small business. The reasoning behind such decisions must be recorded by the contractor with an explanation for why it believed that awarding the contract to the small business would result in inefficient performance, higher costs or less value to the government.

Compliance Reviews

In addition to ISR and SSR submissions, the contractor’s subcontracting programs are assessed through reviews conducted at the contractors’ facilities. SBA small business specialists and the agencies may conduct annual compliance reviews of subcontracting programs at contractors’ facilities on behalf of civilian agencies.

After a compliance review, the contractor is assigned one of the following ratings for compliance: outstanding, highly successful, acceptable, marginal, or unsatisfactory. A contractor that receives a marginal or unsatisfactory rating must provide a written corrective action plan to the SBA within 30 days of receiving the rating report. Liquidated damages may be assessed if the contractor does not provide a corrective action plan.

Conclusion

Contractors interested in pursuing federal work must understand what a federal subcontracting plan requires and the consequences for failing to make a good faith effort to achieve subcontracting goals. That is the only way contractors will be able to protect against unnecessary risk. It is important to know what counts towards subcontracting goals and what does not. It is unfortunate that the federal government looks only at a prime contractor’s first tier subcontractors because it would benefit the government and small businesses to evaluate down two tiers. With electronic reporting through eSRS, there is sufficient transparency to make this possible, but change in the government contracting world can sometimes be painfully slow.

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