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August 10, 2015

VIA FEDERAL ERULEMAKING PORTAL

U.S. General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Hada Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405

Re: FAR Case 2014-0003, Comments on Proposed Rule – Small Business
Subcontracting Improvements

Dear Ms. Flowers:

We are writing to submit comments on the above-referenced Proposed Rule to amend the Federal Acquisition Regulation (“FAR”), issued June 10, 2015, 80 Fed. Reg. 32,909. Our firm represents a wide variety of firms operating across the government contracting spectrum. After the recent small business subcontracting plan changes were implemented by the U.S. Small Business Administration (“SBA”) in its final rule at 78 Fed. Reg. 42,391, dated July 16, 2013, many of our clients have asked us how the SBA’s new rules should be interpreted in light of the existing FAR small business subcontracting requirements. We believe that the FAR Councils are taking the right steps to harmonize the SBA’s requirements with the obligations the FAR imposes. However, we believe that there are several aspects of the proposed rule that could be amended to provide greater clarity and less burdensome outcomes for contractors administering subcontracting plans, particularly contractors that maintain commercial plans.

We understand that these proposed amendments to the FAR correspond with the new SBA regulations found at 13 C.F.R. § 125.3. Therefore, we have organized our comments as centered around the changes the FAR Councils identified in the Proposed Rule (see 78 Fed. Reg. at 32,910):

- **Authorizing contracting officers to establish subcontracting goals in terms of total contract dollars in addition to the required goals in terms of total subcontracted dollars, for individual plans.**

While we recognize that this particular goal implements a change made by the SBA in its rules (see 13 C.F.R. § 125.3(a)(2)), we believe that this proposal could be problematic in its implementation. Allowing contracting officers to establish additional goals tied to the total

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contract dollar value as opposed to the total subcontracted dollars may result in agencies insisting that contractors assign the same percentage for a particular subcontracting goal tied to the entire contract value as the agency's own small business contracting goals for that particular socioeconomic program. This would not be a fair result in instances where adequate subcontracting opportunities do not exist. The Proposed Rule should provide guidance to contracting officers regarding what types of situations setting an additional goal tied to total contract value would be appropriate.

For example, it would not be a fair result to require a contractor to utilize subcontractors for a certain percentage of total contract value if the contractor is otherwise capable of completing the substantial majority of contract performance with its own resources. We have heard from businesses we represent that contracting officers often will tie the subcontracting goals to the entire contract value and blindly assign the agency's own small business goals to these individual contract targets, requiring the contractor to comply with unrealistic expectations from the outset of contract performance. We believe that this provision needs to be revised to provide more guidance regarding when these alternate goals are appropriate.

- **Providing contracting officers discretion to require a subcontracting plan in instances where a prime contractor's size status changes from small to other than small business as a result of re-representation.**

We agree with this proposed change in the context of its application to multiple award or indefinite-delivery, indefinite-quantity contracts. For larger contracting vehicles, it makes sense to require contractors to comply with subcontracting plan obligations after they have recertified as other than small, since there is presumably a greater amount of small business subcontracting opportunity for larger or long-term contracting vehicles. However, it would be impractical to apply such subcontracting plan goals to smaller contracts, where subcontracting opportunities may be limited. In other instances, the adoption of subcontracting plans in these circumstances would serve little purpose, especially if contract performance is mostly complete. Prime contractors performing on such contracts will also have preexisting obligations to their current subcontractors, and it would be unduly burdensome to require them to breach their current subcontracts in order to accommodate newly-implemented subcontracting plan goals.

The adoption of subcontracting plans in such instances would create unnecessary administrative burdens for the contractor and contracting officer alike, with no appreciable benefit. Therefore, we suggest adding additional language to the end of FAR 19.301-2(e) to indicate that subcontracting plans should be required where a prime contractor's size status changes from small to other than small as a result of a re-representation, but only "to the extent significant new subcontracting opportunities exist."

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- **Requiring subcontracting plans, to the extent that subcontracting opportunities exist, when a modification causes the overall contract value to exceed the subcontracting plan threshold, even if the modification's value is less than the threshold.**

Similar to our comment above regarding the adoption of subcontracting plans after a prime contractor's re-representation of its small business size status to other than small, we believe that the proposed rule should reflect that the subcontracting plan requirement should only be implemented "to the extent significant new subcontracting opportunities exist." Inclusion of this additional language at the end of FAR 19.702(a)(3) is important, as the contract modification may not have a corresponding increase in subcontracting opportunities. It would also caution contracting officers from automatically requiring subcontracting plans when such modifications are implemented without assessing the ultimate practicality of enforcing such a requirement.

- **Requiring prime contractors to list North American Industry Classification System (NAICS) codes for each subcontract.**

We disagree with the proposed change to FAR 52.219-9(a)(3) that would require contractors to list the NAICS code and size standard for each subcontract in the subcontracting plan. This will be very burdensome for many contractors, particularly those with commercial plans, as it could result in subcontracting plans that are thousands of pages in length. Furthermore, the collection of this information is not necessary for the proper performance of the FAR. The proposed change to FAR 2.101 would define a small business subcontractor according to the prime contractor's determination of the NAICS code that best fits the subcontract. This proposed definition gives prime contractors flexibility in when and how to determine the small business criteria for their subcontractors; prime contractors are not required by this definition to assign the NAICS code in the subcontract or subcontracting plan, rather they simply must make the determination of what NAICS code best fits the subcontract. That is a better way to balance the proper functioning of the subcontracting plan requirements with the burdens placed on contractors.

The proposed requirement at FAR 52.219-9(a)(3) is particularly troublesome for firms with commercial subcontracting plans. Most firms that have commercial plans have thousands of vendors, and many times that number of invoices and purchase orders issued each year. For this reason, we believe the FAR properly includes critical exemptions for commercial plans. For example, no change was proposed to the language in FAR 52.219-9(d)(11)(vi). FAR 52.219-9(d)(11)(vi) exempts contractors with commercial plans from maintaining supporting records on a contract-by-contract basis regarding the business size of each subcontractor. The FAR Councils should confirm that the proposed changes do not alter the broad recordkeeping exemption for commercial plans found in FAR 52.219-9(d)(11)(vi). The recordkeeping exemption for commercial plans exists for good reason, given the nature of commercial plans

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and the practical difficulties commercial contractors would face in maintain such records for tens of thousands of vendors and purchase orders.

There are other examples in the rules indicating the new reporting and recordkeeping requirements should apply only to individual subcontracting plans. For example, the preamble to the proposed rule explains at page 32,910 that “prime contractors with individual subcontracting plans [would be required] to report order level subcontracting information.” (Emphasis added.) Similarly, FAR 19.704(c) states that the requirements of FAR 19.704(a) —which, as proposed, would include the requirement to assign a NAICS code to each subcontract—apply “[i]f a subcontracting plan is necessary and if the offeror is submitting an individual subcontracting plan” Proposed Rule at page 32,914 (emphasis added).

One reasonable and practical approach for commercial plans is found in the Annotated Desk Reference for FAR 52.219-9, attached to these comments as Exhibit A. Regarding the annual Summary Subcontract Report requirement at FAR 52.219-9(1)(2)(iii), the Annotated Desk Reference states that, for a commercial plan, “the Contractor may obtain from each of its subcontractors a predominant NAICS Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector.” The FAR Councils should consider an approach like this that avoids the unduly cumbersome requirement to assign or list a NAICS code to every invoice and purchase order when a contractor has a commercial plan. The contract-by-contract requirements such as assigning a NAICS code may be appropriate for contractors with individual subcontracting plans, but we believe they are not workable for commercial plans, especially for large companies operating mainly in the commercial sector.

- **Amend FAR 52.219-9(j) to make clear that prime contractors with commercial plans do not need to flow down the subcontracting plan requirements to subcontractors, regardless of the nature of the subcontract**

FAR 52.219-9(j) provides two potential exceptions to the requirement to flow down the subcontracting plan requirements to subcontractors: (1) when the prime contract contains FAR 52.212-5 or (2) when a subcontractor provides a commercial item subject to FAR 52.244-6 under a prime contract. The first exception is based on the nature of the prime contract and the second exception is based on the nature of the subcontract, and these are either/or exceptions.

FAR 52.212-5(e)(1) lists the few FAR clauses that should be flowed down in a subcontract for commercial items. FAR 52.219-9 is not one of the required flow-down clauses listed in FAR 52.212-5(e)(1). There is nothing in FAR 52.212-5 to indicate FAR 52.219-9 must be flowed down to subcontractors in any circumstance. FAR 52.219-9(j) is the only clause to address flow down of the subcontracting plan requirement, and that clause explicitly states that the subcontracting plan requirement is not flowed down to subcontractors when the prime contract contains FAR 52.212-5.

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The FAR Councils have previously addressed this and found that FAR 52.212-5(e) and FAR 52.219-9(j) are not in conflict. In FAR Case 2005-040, a commenter questioned the need to add the language now found in FAR 52.219-9(j), which states that subcontracting plans are not required from subcontractors when the prime contract contains FAR 52.212-5. The commenter objected to the proposed language because the commenter believed that FAR 52.219-9 should be included in contracts for commercial items. In response, the FAR Councils rejected the comment and kept the flow-down exception in FAR 52.219-9(j) because, according to the FAR Councils, the language in FAR 52.219-9(j) “is consistent with FAR 52.212-5(e)(1).” 75 Fed. Reg. 34,260, 34,261 (June 16, 2010) (emphasis added).

The consistency the FAR Councils noted in FAR 52.212-5(e)(1) and FAR 52.219-9(j) is that when an acquisition is for commercial items, whether at the prime contract or subcontract level, subcontractors are exempted from the subcontracting plan requirements in FAR 52.219-9. Similarly, for both of the flow-down exceptions in FAR 52.219-9(j), the common thread is the commercial nature of the acquisition.¹ As long as either the prime contract (FAR 52.212-5) or the subcontract (FAR 52.244-6) is for commercial items, FAR 52.219-9(j) indicates that subcontractors are not required to have subcontracting plans.

It makes sense not to flow down the subcontracting plan requirement in commercial item acquisitions because of the Congressional policy, embodied in 41 U.S.C. § 3307 and FAR Part 12, that such acquisitions should be simplified and contain as few FAR clauses as possible. See FAR 12.301(a) (citing 41 U.S.C. § 3307 and stating that, to the maximum extent practicable, contracts for commercial items should contain only those FAR clauses required by law or that are consistent with customary commercial practice); see also FAR 12.102(c) (stating that when a policy in another part of the FAR is inconsistent with a policy in FAR Part 12, Part 12 takes precedence for the acquisition of commercial items).

The exclusion of the flow-down requirement from commercial item acquisitions is also consistent with the Small Business Act. The Small Business Act requires a subcontracting plan to contain:

[A]ssurances . . . that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,000,000 in the case of a contract for the construction of any public facility, or in excess of \$500,000 in

¹ The inclusion of FAR 52.212-5 in a prime contract signals the acquisition is for commercial items. See FAR 12.301(b)(4) (instructing that FAR 52.212-5 should be inserted in acquisitions for commercial items). Conversely, FAR 52.244-6 applies when the prime contract is not for commercial items, but the subcontract is. See FAR 44.403 (instructing that FAR 52.244-6 should be included in solicitations and contracts “other than those for commercial items.”).

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the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5) . . .

15 U.S.C. § 637(d)(6)(D) (emphasis added). Based on the statute’s separate uses of the terms “subcontract” and “contract,” and the way the statute ties the receipt of a subcontract to a contract, we believe Congress envisioned that a prime contractor would be required to flow down the subcontracting plan requirement to subcontractors that work directly under a particular federal prime contract, such as in the case of a subcontract issued in connection with a federal prime contract for construction of a public facility.

When a prime contractor has an individual subcontracting plan related to a specific federal prime contract, it is reasonable that large subcontractors working underneath that federal project would also need to implement their own subcontracting plan to ensure the small business participation goals for that project are met. However, when a contractor has a commercial plan, the prime contractor does not have subcontracting goals or subcontracts tied to a particular federal project. See FAR 52.219-9(g) (indicating a commercial plan relates to all of the prime contractor’s purchasing, both commercial and government). Indeed, many contractors with commercial plans have thousands of suppliers that, by and large, do no commercial work. It is for reasons like these that we believe Congress envisioned a prime contractor would need to require a subcontractor to have its own subcontracting plan in connection with a specific federal prime contract, but not, as noted in FAR 52.219-9(j), when the prime contract or subcontract is an acquisition for commercial items.

We bring this up because, despite what we believe is clear in the FAR and in the FAR Councils’ previous comments on the flow-down issue, we have seen some agencies interpret the FAR as requiring prime contractors with commercial plans to flow down the subcontracting plan requirements if the subcontractor is not providing a commercial item. We believe the correct interpretation of FAR 52.219-9(j) is that flow-down is not required if the prime contract is for commercial items, regardless of the nature of the subcontracts. To avoid confusion, the FAR Councils should add language to FAR 52.219-9(j) so it reads: “Subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, regardless of whether the subcontractor is providing a commercial item, or when”

➤ **Permitting reliance on SAM representations**

We also note that it is a positive development to allow prime contractors to accept a subcontractor’s size and representations in the System for Award Management (“SAM”) if they represent that its size and status representations in SAM are current, accurate and complete as of the date of the offer for the subcontract. This will allow subcontractors to maintain their size and status representation in one location and reduce paperwork and administrative burden placed on

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prime contractors. However, we question whether the proposed changes should go as far as to require prime contractors to only accept a subcontractor's written representation of its small business size and status if the subcontractor has not previously registered in SAM. The Proposed Rule creates an inconsistency with the SBA's guidance regarding the matter and eliminates the most direct certification process available—a written certification from the subcontractor. Cf. 13 C.F.R. § 121.411 ("Prime contractors may rely on the information contained in [SAM] . . . as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list."). Requiring prime contractors to rely on SAM before accepting written certifications creates an extra administrative burden that is ultimately unnecessary. This extra step is particularly onerous for large prime contractors administering commercial plans, where they deal with thousands of vendors that do no work in the government contracting sector, and are, therefore, not registered in SAM.

- **Providing that prime contractors cannot prohibit a subcontractor from discussing payment or utilization matters with the contracting officer.**

We agree with this proposed change, as we believe that it will encourage transparency between prime contractors and subcontractors, and will better allow contracting officers to track subcontractor utilization.

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

We agree with this proposed change, as 30 days is a reasonable time period to review a contracting officer's notice of subcontracting report rejection.

- **Clarifying a requirement that prime contractors notify unsuccessful offerors for subcontracts in writing.**

We agree with this proposed change, as it will encourage prime contractors to officially inform subcontractor offerors when their subcontract proposals have not been accepted. This will also serve to clarify when a subcontractor's information has been utilized for purposes of proposal submission. We commend the FAR Councils' inclusion of its proposed clarification in FAR 52.219-9(d)(12) of what it means to "use" a small business concern during the preparation of bids and proposals. This clarification will help protect small business subcontractors.

- **Requiring prime contractors with individual subcontracting plans to report order-level subcontracting information.**

We agree with the proposed changes which would include subcontracting data for each order when reporting subcontracting achievements for multiple award contracts intended for use

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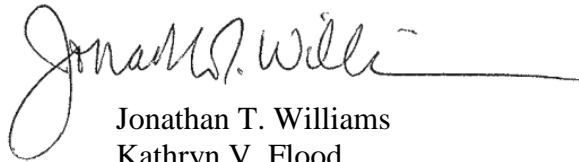
by multiple agencies. We commend the FAR Councils' emphasis that this requirement does not apply to prime contractors administering commercial plans.

- **Clarifying that failure to comply in good faith with the subcontracting plan shall be a material breach of the contract and may be considered in any past performance evaluation of the prime contractor.**

While we agree that a prime contractor's failure to comply in good faith with its subcontracting plan should be a material breach of contract and considered in past performance evaluations, we also believe that the Proposed Rule should include language regarding the processes prime contractors may take to contest or respond to such a finding.

Please do not hesitate to contact Jon Williams or Kathryn Flood at (202) 857-1000 if you have any questions about these comments.

Sincerely,



Jonathan T. Williams
Kathryn V. Flood

EXHIBIT A

2 Ann. Fed. Acquisition Reg. Desk Ref. § 52.219-9

Annotated Federal Acquisition Regulation Desk Reference
Database updated June 2015

Steven N. Tomanelli ^{a0}

Annotated Federal Acquisition Regulation Desk Reference
Title 48. Federal Acquisition Regulations System
Chapter 1. Federal Acquisition Regulation
Subchapter H. Clauses and Forms
Part 52. Solicitation Provisions and Contract Clauses
Subpart 52.2. Text of Provisions and Clauses

§ 52.219-9. Small Business Subcontracting Plan.

As prescribed in 19.708(b), insert the following clause:

SMALL BUSINESS SUBCONTRACTING PLAN (JUL 2013)

(a) This clause does not apply to small business concerns.

(b) *Definitions.* As used in this clause—

“Alaska Native Corporation (ANC)” means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended ([43 U.S.C. 1601, et seq.](#)) and which is considered a minority and economically disadvantaged concern under the criteria at [43 U.S.C. 1626\(e\)\(1\)](#). This definition also includes ANC direct and indirect subsidiary corporations, joint ventures, and partnerships that meet the requirements of [43 U.S.C. 1626\(e\)\(2\)](#).

“Commercial item” means a product or service that satisfies the definition of commercial item in [section 2.101 of the Federal Acquisition Regulation](#).

“Commercial plan” means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (*e.g.*, division, plant, or product line).

“Electronic Subcontracting Reporting System (eSRS)” means the Governmentwide, electronic, web-based system for small business subcontracting program reporting. The eSRS is located at <http://www.esrs.gov>.

“Indian tribe” means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act ([43 U.S.C.A. 1601 et seq.](#)), that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs in accordance with [25 U.S.C. 1452\(c\)](#). This definition also includes Indian-owned economic enterprises that meet the requirements of [25 U.S.C. 1452\(e\)](#).

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

“Subcontract” means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(c) 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 concerns, small disadvantaged business, and women-owned small business concerns. If the offeror is submitting an individual contract 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 the subcontracting plan shall make the offeror ineligible for award of a contract.

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

(1) Goals, expressed in terms of percentages 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. The offeror shall include all sub-contracts 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 (SDB) concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe.

(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 prime 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 contract 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;

(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, the System for Award Management (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—

- (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 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 \$650,000 (\$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) 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 the Small Business Administration as small disadvantaged businesses), women-owned small business concerns, and Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with this clause, or as provided in agency regulations;
- (iv) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using eSRS;
- (v) Provide its prime contract number, its DUNS number, and the e-mail 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
- (vi) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS number, and the e-mail 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 offeror'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, 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.; and
 - (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 offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.
- (e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:
- (1) Assist small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Contractor's lists of potential small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.
 - (2) Provide adequate and timely consideration of the potentialities 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 in all “make-or-buy” decisions.
 - (3) Counsel and discuss subcontracting opportunities with representatives of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business firms.
 - (4) Confirm that a subcontractor representing itself as a HUBZone small business concern is identified as a certified HUBZone small business concern by accessing the SAM database or by contacting SBA.
 - (5) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, veteran-owned small business, HUBZone small, small disadvantaged, or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.
 - (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, the Contractor must inform each

unsuccessful small business subcontract offeror in writing of the name and location of the apparent successful offeror prior to award of the contract.

(f) A master 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 plan has been approved;
- (2) The offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan, including evidence of its approval, to the Contracting Officer; and
- (3) Goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items. The commercial plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract. Once the Contractor's commercial plan has been approved, the Government will not require another subcontracting plan from the same Contractor while the plan remains in effect, as long as the product or service being provided by the Contractor continues to meet the definition of a commercial item. A Contractor with a commercial plan shall comply with the reporting requirements stated in paragraph (d)(10) of this clause by submitting one SSR in eSRS for all contracts covered by its commercial plan. This report shall be acknowledged or rejected in eSRS by the Contracting Officer who approved the plan. This report shall be submitted within 30 days after the end of the Government's fiscal year.

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) A contract may have no more than one plan. When a modification meets the criteria in 19.702 for a plan, or an option is exercised, the goals associated with the modification or option shall be added to those in the existing subcontract plan.

(j) Subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, or when the subcontractor provides a commercial item subject to the clause at 52.244-6, Subcontracts for Commercial Items, under a prime contract.

(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.

(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 prime Contractor or subcontractor are not included in these reports. Subcontract award data reported by prime Contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made 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 subcontract 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.

(ii) 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.

(iii) 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 contract plans—

(A) This report encompasses all subcontracting under prime contracts and subcontracts with the awarding agency, regardless of the dollar value of the subcontracts.

(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 a prime Contractor and/or 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 \$650,000 (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. However, for construction and related maintenance and repair, a separate report shall be submitted for each DoD component.

(D) For DoD and NASA, the report shall be submitted semi-annually for the six months ending March 31 and the twelve months ending September 30. For civilian agencies, except NASA, it shall be submitted annually for the twelve month period ending September 30. Reports are due 30 days after the close of each reporting period.

(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.

(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 from which contracts for commercial items were received.

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

(iii) All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a Year-End Supplementary Report for Small Disadvantaged Businesses. The report shall include subcontract awards, in whole dollars, to small disadvantaged business concerns by North American Industry Classification System (NAICS) Industry Subsector. If the data are not available when the year-end SSR is submitted, the prime Contractor and/or subcontractor shall submit the Year-End Supplementary Report for Small Disadvantaged Businesses within 90 days of submitting the year-end SSR. For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant NAICS Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector.

(End of clause)

Alternate I (Oct 2001). As prescribed in 19.708(b)(1)(i), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) 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 contract 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 (Oct 2001). As prescribed in 19.708(b)(1)(ii), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) 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 contract 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 (July 2010). 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 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 prime Contractor or subcontractor are not included in these reports. Subcontract award data reported by prime Contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made 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 subcontract plan. For prime 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.

(ii) 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.

(2) *SSR*.

(i) Reports submitted under individual contract plans—

(A) This report encompasses all subcontracting under prime contracts and subcontracts with the awarding agency, regardless of the dollar value of the subcontracts.

(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 a prime Contractor and/or 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 \$550,000 (over \$1,000,000 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. However, for construction and related maintenance and repair, a separate report shall be submitted for each DoD component.

(D) For DoD and NASA, the report shall be submitted semi-annually for the six months ending March 31 and the twelve months ending September 30. For civilian agencies, except NASA, it shall be submitted annually for the twelve-month period ending September 30. Reports are due 30 days after the close of each reporting period.

(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.

(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 from which contracts for commercial items were received.

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

(iii) All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a Year-End Supplementary Report for Small Disadvantaged Businesses. The report shall include subcontract awards, in whole dollars, to small disadvantaged business concerns by North American Industry Classification System (NAICS) Industry Subsector. If the data are not available when the year-end SSR is submitted, the prime Contractor and/or subcontractor shall submit the Year-End Supplementary Report for Small Disadvantaged Businesses within 90 days of submitting the year-end SSR. For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant NAICS Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector.

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Footnotes

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