

SUBCONTRACTING PLAN COMPLIANCE

What Large and Small Contractors Need To Know



A PilieroMazza Webinar

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PRESENTED BY

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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decision, legislative and regulatory rule-making as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the minute recap of legislative and regulatory issues affecting small businesses.

Webinars on YouTube – all of our past webinars can be found on the PilieroMazza YouTube channel.

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OVERVIEW

- ❖ **Subcontracting plan requirements**
- ❖ **Relevant provisions for small businesses**
- ❖ **Understanding the SBA review process**
- ❖ **Best practices for a successful subcontracting program**
- ❖ **Q&A**



SUBCONTRACTING PLAN REQUIREMENTS



WHERE?

- ❖ **FAR Subpart 19.7**
- ❖ **FAR 52.219-8, Utilization of Small Business Concerns**
- ❖ **FAR 52.219-9, Small Business Subcontracting Plan**
- ❖ **Also found in SBA's rules at 13 C.F.R. § 125.3**



WHO AND WHEN?

- ❖ **Providing maximum practicable opportunities for SBs**
 - Applies to most prime contracts
 - Must be flowed down to subcontractors when subcontract offers lower-tier subcontracting opportunities

- ❖ **Subcontracting plan**
 - Applies to prime contracts that offer subcontracting possibilities greater than \$650,000 (Or \$1.5 million for construction)
 - Only applies to large businesses; not applicable to set-aside contracts
 - Must be flowed down to subcontracts meeting the same dollar thresholds
 - Except subcontracts to small businesses and subcontracts for commercial items



WHAT?

- ❖ **Plan entered into between prime contractor and government establishing the contractor's subcontract spending goals for the different types of SBs**
- ❖ **Required elements of a subcontracting plan:**
 - **Subcontract spending goals based on total planned subcontracting dollars expressed as a percentage of total planned subcontracting and as total dollars to be subcontracted**
 - **Separate goals for each type of SB**
 - **Types of supplies/services to be subcontracted**
 - **Methods used to develop goals**
 - **Methods used to identify potential SB subcontractors**
 - **Explanation of whether/how indirect costs are included**



WHAT? (CONT'D)

- ❖ **More required elements of a subcontracting plan**
 - Name of responsible officer administering the plan – i.e., the Small Business Liaison Officer (“SBLO”)
 - Description of efforts company will take to ensure SBs have equitable opportunity to compete
 - Assurances that required provisions will flow down through all subcontracts
 - Assurances that reporting will be completed
 - Assurances offeror will cooperate in any studies or surveys
 - Description of recordkeeping procedures
 - Steps to make good faith effort to comply with plan



TYPES OF SUBCONTRACTING PLANS

❖ **Individual**

- Applies to specific government contract
- Covers entire contract period, including options
- Goals based on offeror's planned subcontracting in support of contract and are negotiable

❖ **Master**

- Boilerplate plan, can apply to corporation, plant, or division
- Effective 3 years after approved
- Goals are negotiated for each contract that incorporates master plan
- Will cover entire life of the contract when adopted for that contract



TYPES OF PLANS (CONT'D)

❖ Commercial

- Preferred plan for companies selling commercial items
- Contractor adopts an annual plan for the entire federal government, not contract specific
- Tied to the contractor's fiscal year
- Plan may be limited to specific company division or business unit
- All of contractor's subcontracting, not just that in support of government contracts, counted towards total subcontracting



REPORTING OBLIGATIONS

- ❖ Reporting submitted through the electronic Subcontracting Reporting System (eSRS), available at <http://www.esrs.gov/>
- ❖ Individual Subcontracting Plans
 - Reports on plan results due twice annually (Apr. 1 and Oct. 30)
 - SF 294
- ❖ Commercial Subcontracting Plans
 - Reports on plan results due once annually (Oct. 30)
 - SF 295



WHY?

- ❖ Congress has determined that the SB subcontracting plan requirements are an important tool to promote the government's objective to maximize small business participation in federal procurements
- ❖ Stakes are high for noncompliance
 - Breach of contract
 - Adverse past performance
 - Evaluation factor
 - Liquidated damages
 - Possible (though rare) when contractor fails to make a good faith effort (i.e., willful or intentional failure) to comply with its plan
 - Amount equal to the dollar amount by which the contractor failed to achieve each subcontracting goal



SUBK PLANS IN BID PROTESTS

- ❖ Graybar, B-410886 (Mar. 4, 2015): protester was properly excluded from competitive range based in part on its consistent failure to meet its small business subcontracting goals on previous contracts
- ❖ Kellogg Brown & Root Services, Inc., B-298694.7 (June 22, 2007): protester's score lower than awardee's due in part to less small business utilization in prior contracts
- ❖ Coastal Maritime Stevedoring, LLC, B-296627 (Sept. 22, 2005): agency improperly rated offeror's incomplete plan as satisfactory
- ❖ SEEMA, Inc., B-277988 (Dec. 16, 1997): awardee's aggressive subcontracting goals one of the decisive factors in award



PROVISIONS TO HELP SMALL BUSINESSES

- ❖ For contracts that require a subcontracting plan, the prime contractor must notify the CO in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing the proposal
 - Subcontractors can inform COs of violations of this requirement
 - “Used in a proposal” means mentioned by name, the existence of a subcontract for the project, or the small business drafted a portion of the proposal and written expectation of receiving a subcontract
- ❖ Prime contractor must also notify a CO in writing whenever the prime reduces payments to a small business subcontractor or when payments to a small business subcontractor are 90 days or more past due



OTHER NOTABLE PROVISIONS FOR SBs

- ❖ **COs may require small businesses whose size status changes during performance of the contract to adopt a subcontracting plan for the remaining portion of the contract**
- ❖ **Prime contractor, CO, SBA, other potential subcontractors, and other interested parties may protest a subcontractor's size status**
- ❖ **SBA's "Presumed Loss Rule" applies to subcontract representations**



RECENT SBA PROPOSED RULE

- ❖ Issued December 2014 to address the limitations on subcontracting, also contained several proposed rule changes related to subcontracting plans:
 - Head of contracting agency must ensure agency collects, reports, and reviews data on the extent to which prime contractors meet the goals and objectives of their subcontracting plans
 - Penalties for not providing a written corrective action plan or demonstrating good-faith effort to comply with such a plan:
 - May be considered for liquidated damages under FAR § 52.219-16
 - Material breach of contract
 - Must be considered in any past performance evaluation
 - Referral to SBA IG if contractor makes a false statement about plan
 - Before prime identifies SB by name as a subcontractor in its proposal or subcontracting plan, prime must notify SB in writing



UNDERSTANDING THE SBA REVIEW PROCESS



OVERVIEW

- ❖ Occurring with greater frequency recently
- ❖ Performed by regional SBA offices, through Procurement Center Representatives (PCR) and Commercial Market Representatives (CMR)
 - Individual agencies may also participate in reviewing subcontracting plan compliance
 - DCMA may be involved



TYPES OF SBA REVIEWS

- ❖ **Subcontracting Program Compliance Review:** a comprehensive review of contractor's total Subcontracting Program
- ❖ **Performance Review:** focuses on subcontracting achievement on a contract-by-contract basis via reporting systems
- ❖ **Subcontracting Orientation and Assistance Review:** includes physical visit to contractor's facility with purpose of providing advice or tools so the contractor can evaluate its small business program
- ❖ **Follow-Up Reviews:** focuses on contractor's implementation of previous SBA recommendations and its utilization of referred resources



A TYPICAL COMPLIANCE REVIEW

- ❖ **Process begins with a letter from SBA specifying date of SBA's planned visit to your office**
- ❖ **SBA's letter will request that you submit the following lists approximately one week before their visit:**
 - **All subcontracts to SBs within the last year**
 - **All subcontracts to LBs over \$150,000 within the last year**
 - **All blanket purchase agreements entered into within the last year**
- ❖ **SBA will then select samples from each list (typically 20-30 from the list of SB subcontracts)**
 - **SBA will drill down on the samples during their visit to determine if you have the necessary supporting documentation**



COMPLIANCE REVIEW CHECKLIST

- ❖ **SBA will also ask you to complete a Compliance Review Checklist**
 - You must answer numerous questions about your subcontracting program, goal performance, historical trends, outreach efforts, etc.
 - Requests several supporting documents, including:
 - Letter of support from CEO
 - Policy and procedures for your subcontracting program
 - Sample subcontractor self-certification form
 - Contract terms and conditions containing flow-down language
 - Organizational chart depicting where SBLO sits in the organization



COMPLIANCE REVIEW SITE VISITS

- ❖ Usually lasts 1-2 days
- ❖ SBA will want to meet with key stakeholders, SBLO, managers, and buyers
- ❖ Looking for good faith efforts to comply with plan through assessments of:
 - Methodology used in developing and reporting goals and performance
 - Recordkeeping, in particular whether you have written representations from your SB vendors that are tied to and timely for your subcontracts
 - How you flow-down requirements to and monitor subcontractors
 - Overall commitment to the program, including management support



POSSIBLE OUTCOMES

- ❖ SBA may conduct exit briefing during onsite
- ❖ Written report provided after visit with rating for your plan
 - Outstanding – exceed all negotiated goals or exceed at least one goal and met all other; exemplary program
 - Highly Successful – met all goals for SB, SDB, and WOSB, and met at least one goal for HUBZone, VOSB and SDVOSB; effort to go above and beyond required elements of program
 - Acceptable – demonstrated good faith effort to meet all of its goals; fulfills requirements of subcontracting plan and regs
 - Marginal – deficient in meeting key subcontracting plan requirements and reporting is not correct; corrective action plan required
 - Unsatisfactory – noncompliant with contractual requirements and management shows little interest in bringing program to acceptable level or is uncooperative; corrective action plan required and Administrative CO must be notified



WHAT HAPPENS NEXT?

- ❖ **If you received a “Marginal” or “Unacceptable” rating, SBA will require you to submit a corrective action plan**
 - **Contractor submits plan to SBA or both the SBA and agency that conducted the compliance review**
 - **Failure to submit or adhere to a corrective action plan may be grounds for penalties and other adverse actions**
- ❖ **SBA will conduct follow-up visit to check on your progress with the corrective action plan**
- ❖ **SBA’s report will go to Administrative CO**



BEST PRACTICES FOR A SUCCESSFUL SUBCONTRACTING PROGRAM



DEVELOP A REALISTIC SUBK PLAN

- ❖ **Establish % goals that are reasonable and realistic for your company**
 - The model plan utilizing government-wide goals (i.e., 3% for HUBZone, 5% for SDB, etc.) may not make sense based on what you buy and availability of SB suppliers
 - Goals must be based on total subk dollars; be wary of goals based on total contract value
- ❖ **Limit responsibility for flow-down and oversight of subk plans by your subcontractors**
 - Ex.: No flow-down for commercial items
- ❖ **Offer narrowly-tailored and objective steps to measure your good faith efforts to comply with the plan**



NARROW YOUR SUBCONTRACTING BASE

- ❖ **Exclude subcontracting that is only available from LBs**
- ❖ **Exclude subcontracting performed overseas, inter-company transactions, and lower-tier subcontracts**
- ❖ **Other authorized exclusions:**
 - Salaries and wages
 - Employee insurance
 - Other employee benefits
 - Payments for petty cash
 - Depreciation
 - Interest
 - Income taxes
 - Property taxes
 - Lease payments
 - Bank fees
 - Fines, claims, and dues
 - OEM relationships during warranty periods (negotiated up front with product)
 - Utilities purchased from a municipality or solely authorized by municipality
 - Charitable contributions



POLICY & PROCEDURES MANUAL

- ❖ **Essential to maintain your program and to pass an audit**
- ❖ **Your manual should address:**
 - Covered supplies/services
 - Program administration and SBLO responsibilities
 - Periodic evaluation of program performance
 - Recordkeeping procedures
 - Maintenance of vendor list
 - Vendor self-certifications
 - Independent verification of vendor self-certifications
 - Flow-down
 - Preparation of subk plans
 - Reporting (internal/external)
 - CEO/senior leadership buy-in and involvement
 - Outreach (internal/external)
 - Employee training



OTHER DOCUMENTS FOR YOUR PROGRAM

- ❖ **Vendor Self-Certification Form**
 - Follow SBA format
 - Ask vendors to represent small business status for primary and any secondary NAICS codes
 - Require vendors to update form at least annually, and more often if vendor undergoes change in status
- ❖ **Subcontract justification sheet**
- ❖ **CEO letter in support of program**
- ❖ **T's & C's should address flow-down obligations and require vendor to represent its size/socio-economic status**



VETTING YOUR SB VENDORS

- ❖ **Critical to obtain written representation from your SB vendors, and keep them current**
- ❖ **Independent verification required for HUBZone vendors; good idea for all SB vendors**
 - **Third parties like CVM Solutions can help, but do not rely on them exclusively**
- ❖ **NAICS code**
 - **SBA rule states prime must assign a NAICS code and size standard to each subcontract; prime has discretion in selecting most appropriate code**
 - **Not in FAR 19.703 or FAR 52.219-9**
 - **Doable for individual subk plans; often not feasible for commercial plans**



TRAINING AND OUTREACH

- ❖ **Make sure your management, sales, and purchasing personnel are on the same page for goal development and attainment**
 - **SBLO needs to be positioned and supported in organization to make this happen**
- ❖ **Hold regular internal meetings and monitor plan performance to catch shortcomings as early as possible**
- ❖ **Get involved in conferences, trade associations, PTACs**
- ❖ **Understand/utilize SAM.gov, Dynamic Small Business Search, and PRO-Net Database**
- ❖ **Document mentoring and success stories with SBs**



BE PREPARED FOR AN AUDIT

- ❖ **Get out in front of acknowledged shortcomings**
 - Tell your story
 - Implement voluntary corrective actions when appropriate
- ❖ **Gather and organize all requested documentation**
- ❖ **Put yourself through a mock audit**
- ❖ **Don't be afraid to ask SBA for help – that's what they are there for**
- ❖ **Approach should be cordial and cooperative, demonstrating willingness to take auditor's suggestions**
 - At the same time, offer alternatives and push back on suggestions that are not feasible, would be too expensive, etc.



Any Questions?

Thank you for joining us today.

If you would like to speak with Jon or Katie about subcontracting plan compliance, please contact them at:

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