

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracting

SUBCONTRACTING PLANS: HOW IMPLEMENTING BEST PRACTICES NOW CAN SAVE YOU HEADACHES DOWN THE ROAD

By Katie Flood

As a federal contractor, there are already many areas where you must track your compliance with the rules and regulations carefully. One area increasingly receiving greater scrutiny from the government is prime contractors' compliance with their small business subcontracting plan obligations.

Under the Small Business Act as amended in 1978, prime contractors must provide small businesses subcontracting opportunities for all contracts in excess of \$150,000. And, for large businesses, formal subcontracting plans are required elements for most full and open contracts that are in excess of \$650,000 (or \$1,500,000 in the case of construction contracts for public facilities). When a subcontracting plan has been incorporated into a prime contract, the large business prime contractor is required to provide the "maximum practicable opportunity" for small businesses to participate in the contract performance as subcontractors. The formal subcontracting plan must contain separate goals for small business participation, as well as small disadvantaged businesses under the various socioeconomic programs administered by the SBA.

When developing the subcontracting plan, a contractor must first identify which plan type best fits its situation. If the contractor only wants to develop a plan specific to a single contract, it should develop an Individual Subcontracting Plan, to cover the entire contract period including options. The goals incorporated into the Individual Subcontracting Plan should be based on the offeror's planned subcontracting in support of that specific contract.

If a contractor does a lot of business with the Federal government, it might enter into a Master Subcontracting Plan, which contains all of the required elements of an individual plan, except the specific goals for individual

contracting opportunities. If the company receives new contracts requiring subcontracting plans, it will then develop goals specific for each plan.

When a contractor sells commercial products and services to the government, it is encouraged to enter into a Commercial Subcontracting Plan. A Commercial Subcontracting Plan includes goals that are tied to the company's fiscal year and relates to the company's production in general for both commercial and noncommercial products or services, rather than in relation to a particular government contract. It can also apply either to the entire company or a portion of the company, such as a division or product line.

Regardless of the type, the Subcontract plan must contain certain required elements. Next to the specific subcontracting goals expressed in dollars and as a percentage of total planned subcontracting dollars, the most important piece of the subcontracting plan is the contractor's description of how it plans to meet these goals. When developing the plan, it is critical that the company engages in a team effort that involves all affected divisions of the company, as the established goals must be both reasonable and realistic.

Once its plan has been submitted to the agency either as part of the contractor's offer or as a Commercial Subcontracting Plan and has included specific subcontracting goals accepted by the agency, the contractor must make good faith efforts to satisfy the requirements incorporated into the plan. Contractors are also required to report their plan results on the government's Electronic Subcontracting Reporting System (eSRS), on a bi-annual basis for Individual Subcontracting Plans and an annual basis for Commercial

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Subcontracting Plans. At this stage, contractors need to adopt best practices to ensure that they are meeting their subcontracting plan goals. Such best practices include:

- Ensuring that the company maintains organized and complete files, in order to accurately track the total amount of subcontracting dollars being spent by the company
- Receiving up-to-date representations, signed by the subcontractor, of the subcontractor's size and socioeconomic status, obtained at least on an annual basis or when the subcontractor has a change of status
- Maintaining an internal subcontractor database, to cross-reference by NAICS code and socioeconomic status those subcontractors eligible for specific opportunities
- Searching diligently for qualified small businesses to keep the internal database a robust and a meaningful resource
- Conducting training to help company employees identify subcontracting opportunities available for small businesses
- Attending trade fairs, industry meetings, and other events where the contractor can engage in outreach to the small business community and identify potential teaming partners

Such best practices serve not only altruistic ends: A contractor's failure to comply with its subcontracting plan and make a "good faith effort" to maximize small business participation can bring significant penalties. Penalties may include liquidated damages, which subjects vendors to prescribed financial liabilities if the contracting officer determines that the vendor failed to make a good faith effort to meet its subcontracting goals. Liquidated damages may be assessed in an amount equal to the actual dollar amount by which the vendor failed to achieve each subcontracting goal. Penalties can also include the government's claim of

breach of contract; qui tam actions; loss of good will with the agency; and potentially suspension and/or debarment proceedings.

SBA will periodically audit contractors that hold subcontracting plans through its "Subcontracting Assistance Program." SBA's audit program includes a variety of periodic performance reviews, in addition to follow-up reviews after the contractor has submitted its reports. During the auditing process, SBA will not only review the contractor's plan and identify whether or not the contractor has successfully met its targets, but it will also examine the company's trends in its small business utilization, validate the methodologies the company used in preparing its reported figures, and evaluate the company's internal dedication and commitment to the program. If the contractor falls short on any metric, SBA will recommend that the contractor implement corrective action measures, or face penalties.

Plainly, there are many reasons why large business prime contractors must be very familiar with the rules governing subcontracting plans, especially during this current environment that requires heightened compliance. For these reasons, it is critical that contractors set in place best practices from the onset of their subcontracting plan creation, in order to ensure that they are meeting their goals and making the "good faith efforts" the government wants to see.

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