

SBA'S FINAL RULES ON LIMITATIONS ON SUBCONTRACTING

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Overview

- Background
- Limitations on Subcontracting
- Identity of Interest
- Joint Ventures
- Size Recertification
- Size Protests
- Nonmanufacturer Rule



Background

- 2013 NDAA
- Proposed Rule – December 29, 2014
- Final Rule – effective June 30, 2016



Limitations on Subcontracting



Similarly Situated Entities

- Work performed by Similarly Situated Entities may count towards the applicable limitations on subcontracting
- What is a “Similarly Situated Entity”?
 - Subcontractor that has same small business program status as the prime contractor
 - Small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform
- In order to count, work must be performed by subcontractor’s own employees



Changes to Calculation

- Services (except construction): the prime contractor will not pay more than 50% of the amount paid by the government to the prime to firms that are not similarly situated
- Supplies/products (other than from a nonmanufacturer of such supplies): the prime contractor will not pay more than 50% of the amount paid by the government to the prime to firms that are not similarly situated
 - Cost of materials are excluded and not considered to be subcontracted



Changes to Calculation (Cont'd)

- Supplies from a nonmanufacturer: the prime contractor will supply the product of a domestic small business manufacturer or processor, unless a waiver is granted
 - For a multiple item procurement where a **waiver has not been granted** for one or more items, more than 50% of the value of the products to be supplied by the nonmanufacturer must be the products of one or more domestic small business manufacturers or processors
 - For a multiple item procurement where a **waiver is granted** for one or more items, compliance with the limitation on subcontracting requirement will not consider the value of items subject to a waiver. As such, more than 50% of the value of the products to be supplied by the nonmanufacturer that are not subject to a waiver must be the products of one or more domestic small business manufacturers or processors
 - For a multiple item procurement, the same small business concern may act as both a manufacturer and a nonmanufacturer



Changes to Calculation (Cont'd)

- General construction: the prime contractor will not pay more than 85% of the amount paid by the government to the prime to firms that are not similarly situated
 - Any work that a similarly situated subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded
 - Cost of materials are excluded and not considered to be subcontracted
- Special trade contractors: no more than 75% of the amount paid by the government to the prime may be paid to firms that are not similarly situated
 - Any work that a similarly situated subcontractor further subcontracts will count towards the 75% subcontract amount that cannot be exceeded
 - Cost of materials are excluded and not considered to be subcontracted



Mixed Contracts

- When services and supplies are combined, the CO will select the appropriate NAICS code best describing the principal purpose of the product or services being acquired, and that NAICS code is determinative as to which limitation on subcontracting and performance requirement will apply to the prime contract
 - In no case will both a services and supplies/products calculation apply to the same procurement
 - The relevant limitation on subcontracting shall apply only to that portion of the contract award amount



Example 1 of Mixed Contracts

A procuring agency is acquiring both services and supplies through a small business set-aside. The total value of the requirement is \$3,000,000, with the supply portion comprising \$2,500,000, and the services portion comprising \$500,000.

The contracting officer appropriately assigns a manufacturing NAICS code to the requirement.

The cost of material is \$500,000. Thus, because the services portion of the contract and the cost of materials are excluded from consideration, the relevant amount for purposes of calculating the performance of work requirement is \$2,000,000 and the prime and/or similarly situated entities must perform at least \$1,000,000 and the prime contractor may not subcontract more than \$1,000,000 to non-similarly situated entities.



Example 1 Diagram

Total Contract Value = \$3,000,000

- Supply = \$2,500,000*
- Services = \$500,000

*CO assigns manufacturing NAICS code

\$2,500,000	Supply Portion
<u>- \$500,000</u>	Cost of Materials
\$2,000,000	For calculation of LOS

50% of \$2,000,000 = At least **\$1,000,000** Performed by
Prime or SSE Subcontractors



Example 2 of Mixed Contracts

A procuring agency is acquiring both services and supplies through a small business set-aside. The total value of the requirement is \$3,000,000, with the services portion comprising \$2,500,000, and the supply portion comprising \$500,000.

The contracting officer appropriately assigns a services NAICS code to the requirement.

Thus, because the supply portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the performance of work requirement is \$2,500,000 and the prime and/or similarly situated entities must perform at least \$1,250,000 and the prime contractor may not subcontract more than \$1,250,000 to non-similarly situated entities.



Example 2 Diagram

Total Contract Value = \$3,000,000

- Services = \$2,500,000*
- Supply = \$500,000

*CO assigns services NAICS code

Services Portion = \$2,500,000 for calculation of LOS

50% of \$2,500,000 = At least **\$1,250,000** Performed by
Prime or SSE Subcontractors



Determining Compliance

- Total or partial set-aside contracts: Base term and then each subsequent option period
- Order set-aside under full and open contract with reserve: period of performance for each order (unless order is competed among other-than-small businesses, and subcontracting limitations do not apply)
- CO may require compliance on an order-by-order basis at his or her discretion
- Element of responsibility and not component of size eligibility
- Independent Contractors: considered subcontractors and may count towards meeting limitation on subcontracting when Independent Contractor qualifies as a similarly situated entity



Limitations on Subcontracting Do Not Apply

- Small business set-aside contracts with value greater than \$3,500 but not \$150,000, or
- To subcontractors entering into lower-tier subcontracts (except where prime relying on subcontractor's similarly situated status)



Identity of Interest



Familial Relationships

- New rule defines the types of familial relationships that may give rise to affiliation
- Married couples, parties to a civil union, parents, children, and siblings are presumed to be affiliated with each other if they conduct business with each other
- Business = subcontracts, joint ventures, or sharing or providing loans, resources, equipment, locations or employees with one another
- Rebuttable presumption remains – clear line of fracture



Economic Dependence

- SBA has added the “70% rule” developed by OHA
- If a firm derives 70% or more of its revenue from another firm over the previous three fiscal years, SBA will presume that the one firm is economically dependent on the other and, therefore, that the two firms are affiliated
- Rebuttal presumption – must show that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern
 - Example: where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts



Joint Ventures



Exclusion from Affiliation

- A JV of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract
 - For a JV between two or more SBs, the size of the procurement or type of contract no longer matters for exception to affiliation
- “Similarly situated subcontractors” are excluded from affiliation under the ostensible subcontractor rule



Size Recertification & Protests



Recertification Triggered by Merger or Acquisition



- SBA is now requiring recertification of size following the merger or acquisition of a firm that submitted an offer as a small business concern
- If the merger or acquisition occurs after submittal of offer as a SB, but prior to award, the offeror must recertify its size to the contracting officer prior to award



Size Protests

- Who can file a size protest?
 - Any offeror that the contracting officer has not eliminated from consideration for any procurement related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range
- SBA also clarified that, in connection with eligibility for the SDVO SBC and the WOSB/EDWOSB programs, the Director, SBA Office of Government Contracting, may initiate a formal size determination



Nonmanufacturer Rule



When does NMR apply?

- SBA clarified that LOS and the NMR do not apply to small business set-aside contracts valued between \$3,500 and \$150,000



Waivers of the NMR

- SBA has added 13 C.F.R. § 121.1206 to require COs to notify potential offerors of any waivers, whether class waivers or contract specific waivers, that will be applied to the procurement during the procurement process
- This notification of the application of a waiver must be contained in the solicitation
- Final rule authorizes SBA to grant a waiver to the NMR for an individual contract after a solicitation has been issued, provided the CO agrees to provide all potential offerors additional time to respond



Questions?

Thank you for joining us today.



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