Subpart 19.7 - The Small Business Subcontracting Program

Parent topic: Part 19 - Small Business Programs

19.701 Definitions.

As used in this subpart-

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 plan means a subcontracting plan (including goals) that covers the *offeror*'s fiscal year and that applies to the entire production of *commercial products* and performance of *commercial services* 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.

Failure to make a good faith effort to comply with the subcontracting plan means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

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

Reduced Payment means a payment that is for less than the amount agreed upon in a *subcontract* in accordance with its terms and conditions, for *supplies* and services for which the Government has paid the prime contractor.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for *supplies* and/or services

required for performance of the contract, *contract modification*, or *subcontract*.

Total contract dollars means the final anticipated dollar value, including the dollar value of all *options*.

Untimely Payment means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a *subcontract* for *supplies* and services for which the Government has paid the prime contractor.

19.702 Statutory requirements.

Any contractor receiving a contract with a value greater than the *simplified acquisition threshold must* agree in the contract that small business, veteran-owned small business (VOSB), service-disabled veteran-owned small business (SDVOSB), *HUBZone* small business, small disadvantaged business (SDB), and women-owned small business (WOSB) *concerns* will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their *subcontracts* with small business, VOSB *concerns*, SDVOSB *concerns*, *HUBZone* small business *concerns*, SDB *concerns*, and WOSB *concerns*.

(a)

(1) Except as stated in paragraph (b) of this section, section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans:

(i) In negotiated *acquisitions*, each *solicitation* of *offers* to perform a contract that is expected to exceed $900,000 ($2 million for *construction*) and that has subcontracting possibilities, *shall* require the apparently successful *offeror* to submit an acceptable subcontracting plan. If the apparently successful *offeror* fails to negotiate a subcontracting plan acceptable to the *contracting officer* within the time limit prescribed by the *contracting officer*, the *offeror* will be *ineligible* for award. For a *multiple-award contract* with more than one North American *Industry* Classification System (NAICS) code, see paragraph (a)(2)(i) of this section.

(ii) In sealed bidding *acquisitions*, each invitation for bids to perform a contract that is expected to exceed $900,000 ($2 million for *construction*) and that has subcontracting possibilities, *shall* require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the *contracting officer*, the bidder will be *ineligible* for award. For a *multiple-award contract* with more than one NAICS code, see paragraph (a)(2)(i) of this section.

(iii) Each *contract modification* that causes the value of a contract without a subcontracting plan to exceed $900,000 ($2 million for *construction*), *shall* require the contractor to submit a subcontracting plan for the contract, if the *contracting officer* determines that subcontracting opportunities exist. For a *multiple-award contract* with more than one NAICS code, see paragraph (a)(2)(ii) of this section.

(2)

(i) For a *multiple-award contract* with more than one NAICS code, the *solicitation* referenced in paragraphs (a)(1)(i) and (ii) of this section *shall* require the apparently successful *offeror* to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of their proposal for which the *offeror* is other than small or for the entirety of their proposal, at the *offeror*'s discretion. When determining the need for a subcontracting plan, the *contracting officer shall* consider the cumulative dollar value of the portion(s) or category(ies) of the *offeror*'s proposal for which the *offeror* is other than small.

(ii) For a *multiple-award contract* with more than one NAICS code, the modification referenced in paragraph (a)(1)(iii) of this section *shall* require the contractor to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of the contract for which the contractor is other than small or for the entirety of their contract, at the contractor's discretion. When determining the need for a subcontracting plan, the *contracting officer shall* consider the cumulative dollar value of the portion(s) or category(ies) of the contract for which the contractor is other than small.

(b) Subcontracting plans (see paragraphs (a)(1) and (2) of this section) are not required–

(1) From small business *concerns*;

(2) For *personal services contracts*;

(3) For contracts or *contract modifications* that will be performed entirely outside of the *United States* and its *outlying areas*; or

(4) For modifications that are within the scope of the contract and the contract does not contain the clause at 52.219-8, Utilization of Small Business *Concerns*.

(c) As stated in 15 U.S.C. 637(d)(9), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor’s failure to make a good faith effort to comply with the requirements of the subcontracting plan *shall* result in the imposition of liquidated damages.

(d) As authorized by 15 U.S.C. 637(d)(12), certain costs incurred by a mentor firm in providing developmental assistance to a protégé firm under the Department of Defense Mentor-Protégé Program, *may* be credited as if they were *subcontract* awards to a protégé firm for the purpose of determining whether the mentor firm attains the applicable goals under any subcontracting plan entered into with any *executive agency*. However, the mentor-protégé agreement *must* have been approved by the Director, Small Business Programs of the cognizant DoD military department or defense agency, before developmental assistance costs *may* be credited against *subcontract* goals. A list of approved agreements *may* be obtained at https://business.defense.gov/Programs/Mentor-Protege-Program/.

(e) In accordance with 15 U.S.C. 657r(a), a mentor with an SBA-approved mentor-protégé agreement (see 13 CFR 125.9) that provides a *subcontract* to its protégé *may* apply the costs incurred for training it provides to its protégé toward its subcontracting plan goals, provided that protégé is a covered territory business or that protégé has its principal office located in the Commonwealth of Puerto Rico.

19.703 Eligibility requirements for participating in the program.

(a) Except as provided in paragraph (c) of this section, to be eligible as a subcontractor under the program, a *concern must* represent itself as a small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, or *women-owned small business concern*.

(1) To represent itself as a small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, or *women-owned small business concern*, a *concern must* meet the appropriate definition (see 2.101 and 19.001). For subcontracting purposes, a *concern* is small if it does not exceed the size standard for the NAICS code that the prime contractor determines best describes the product or service being acquired by the *subcontract*.

(2)

(i) Unless the prime contractor has reason to question the representation, it *may* accept a subcontractor's written representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, or a women-owned small business, if the subcontractor represents that the size and socioeconomic status representation with its *offer* are current, accurate, and complete as of the date of the *offer* for the *subcontracts;* or

(ii) Unless the prime contractor has reason to question the representation, it *may* accept a subcontractor's representation of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, or a women-owned small business in the *System for Award Management (SAM*) if–

(A) The subcontractor is registered in SAM; and

(B) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the *offer* for the *subcontract*.

(iii) The prime contractor *may* not require the use of SAM for the purposes of representing size or socioeconomic status in connection with a *subcontract*.

(iv) In accordance with 13 CFR 121.411, 126.900, 127.700, and 128.600, a prime contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(b) The contractor, the *contracting officer*, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1001 through 121.1008.

(c)

(1) In accordance with 43 U.S.C. 1626, the following procedures apply:

(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 contractor acting in good faith *may* rely on the written representation of an ANC or an Indian tribe as to the status of the ANC or Indian tribe unless an interested party challenges its status or the *contracting officer* has independent reason to question its status. In the event of a challenge of a representation of an ANC or Indian tribe, the interested parties *shall* follow the procedures at 26.103(b) through (e).

(d) Protests challenging the socioeconomic status of a *HUBZone* small business *concern must* be filed in accordance with 13 CFR 126.801.

19.704 Subcontracting plan requirements.

(a) Each subcontracting plan required under 19.301-2(e) and 19.702(a)(1)(i), (ii), and (iii) *shall* include-

(1) Separate percentage goals for using small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business (including ANCs and Indian tribes) and *women-owned small business concerns* as subcontractors;

(2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business (including ANCs and Indian tribes) and *women-owned small business concerns*, as a percentage of total *subcontract* dollars. For *individual subcontracting plans* only, a *contracting officer may* require the goals referenced in paragraph (a)(1) of this section to be

calculated as a percentage of *total contract dollars*, in addition to the goals established as a percentage of total *subcontract* dollars;

(3) A description of the principal types of *supplies* and services to be subcontracted and an identification of types of *supplies* or services planned for subcontracting to small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business (including ANCs and Indian tribes), and *women-owned small business concerns*;

(4) A description of the method used to develop the subcontracting goals;

(5) A description of the method used to identify potential sources for *solicitation* purposes;

(6) A statement as to whether or not the *offeror* included *indirect costs* in establishing subcontracting goals (for commercial plans, see paragraph (d) of this section), and a description of the method used to determine the proportionate share of *indirect costs* to be incurred with small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business (including ANCs and Indian tribes), and *women-owned small business concerns*;

(7) The name of an 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 ensure 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 at 52.219-8, Utilization of Small Business *Concerns* (see 19.708(a)), in all *subcontracts* that *offer* further subcontracting opportunities, and that the *offeror* will require all subcontractors (except small business *concerns*, including entities that are treated as small business *concerns* by statute for certain purposes (*e.g.,* ANCs, see 13 CFR 125.3(b)(2)) that receive *subcontracts* in excess of $900,000 ($2 million for *construction*) to adopt a plan that complies with the requirements of the clause at 52.219-9, Small Business Subcontracting Plan (see 19.708(b));

(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) After November 30, 2017, include subcontracting data for each order when reporting subcontracting achievements for indefinite-delivery, indefinite-quantity contracts with *individual subcontracting plans* where the contract is intended for use by multiple agencies;

(iv) Submit the Individual *Subcontract* Report (ISR), and the Summary *Subcontract* Report (SSR) using the *Electronic Subcontracting Reporting System (eSRS*) (http://www.esrs.gov), following the instructions in the eSRS.

(A) The ISR *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. When a *contracting officer* rejects an ISR, the contractor is required to submit a revised ISR within 30 days of receiving the notice of the ISR rejection.

(B) The SSR *shall* be submitted annually by October 30 for the twelve-month period ending September 30. When an SSR is rejected, the contractor is required to submit a revised SSR within 30 days of receiving the notice of SSR rejection;

(v) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using the eSRS;

(vi) Provide its prime contract number, its *unique entity identifier*, 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

(vii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own *unique entity identifier*, 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 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 to award *subcontracts* to them;

(12) Assurances that the *offeror* will make a good faith effort to acquire articles, equipment, *supplies*, services, or materials, or obtain the performance of *construction* work from the small business *concerns* that the *offeror* used in preparing the bid or proposal, in the same or greater scope, amount, and quality used in preparing and submitting the bid or proposal. Responding to a request for a quote does not constitute use in preparing a bid or proposal. An *offeror* used a small business *concern* in preparing the bid or proposal if–

(i) The *offeror* identifies the small business *concern* as a subcontractor in the bid or proposal or associated small business subcontracting plan, to furnish certain *supplies* or perform a portion of the contract; or

(ii) The *offeror* used the small business *concern*'s *pricing* or cost information or technical expertise in preparing the bid or proposal, where there is written evidence of an intent or understanding that the small business *concern* will be awarded a *subcontract* for the related work if the *offeror* is awarded the contract;

(13) Assurances that the contractor will provide the *contracting officer* with a written explanation if the contractor fails to acquire articles, equipment, *supplies*, services or materials or obtain the performance of *construction* work as described in (a)(12) of this section. This written explanation will be submitted to the *contracting officer* within 30 days of contract completion;

(14) Assurances that the contractor will not prohibit a subcontractor from discussing with the *contracting officer* any material matter pertaining to payment to or utilization of a subcontractor; and

(15) Assurances that the *offeror* will pay its *small business subcontractors* on time and in accordance with the terms and conditions of the *subcontract*, and notify the *contracting officer* if the *offeror* pays a reduced or an *untimely payment* to a *small business subcontractor* (see 52.242-5).

(b) Contractors *may* establish, on a plant or division-wide basis, a master plan (see 19.701) that contains all the elements required by the clause at 52.219-9, Small Business Subcontracting Plan, except goals. Master plans *shall* be effective for a 3-year period after approval by the *contracting officer*; however, it is incumbent upon contractors to maintain and update master plans. Changes required to update master plans are not effective until approved by the *contracting officer*. A master plan, when incorporated in an individual plan, *shall* apply to that contract throughout the life of the contract.

(c) For multiyear contracts or contracts containing *options*, the cumulative value of the basic contract and all *options* is considered in determining whether a subcontracting plan is necessary. If a subcontracting plan is necessary and the *offeror* is submitting an *individual subcontracting plan*, the *individual subcontracting plan shall* contain all the elements required by paragraph (a) of this section and *shall* contain separate statements and goals based on total *subcontract* dollars for the basic contract and for each *option*.

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing *commercial products* and *commercial services*. The subcontracting goals established for a commercial plan *shall* include all *indirect costs* with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; *depreciation*; interest; income taxes; property taxes; lease payments; bank fees; fines, *claims*, and dues; original equipment manufacturer relationships during *warranty* periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Once a contractor's commercial plan has been approved, the Government *shall* 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 product* or *commercial service*. The contractor *shall*—

(1) Submit the commercial plan to either the first *contracting officer* awarding a contract subject to the plan during the contractor’s fiscal year, or, if the contractor has ongoing contracts with commercial plans, to the *contracting officer* responsible for the contract with the latest completion date. The *contracting officer shall* negotiate the commercial plan for the Government. The approved commercial plan *shall* remain in effect during the contractor’s fiscal year for all Government contracts in effect during that period;

(2) Submit a new commercial plan, 30 working days before the end of the Contractor’s fiscal year, to the *contracting officer* responsible for the uncompleted Government contract with the latest completion date. The contractor *must* provide to each *contracting officer* responsible for an ongoing contract subject to the plan, the identity of the *contracting officer* that will be negotiating the new plan;

(3) When the new commercial plan is approved, provide a copy of the approved plan to each *contracting officer* responsible for an ongoing contract that is subject to the plan; and

(4) Comply with the reporting requirements stated in paragraph (a)(10) of this section by submitting one SSR that includes all *indirect costs*, except as described in paragraph (d) of this section, in eSRS, for all contracts covered by its commercial plan. This report will be acknowledged or rejected in eSRS by the *contracting officer* who approved the plan. The report *shall* be submitted within 30

days after the end of the Government’s fiscal year.

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

19.705-1 General.

(a) The *contracting officer may* encourage the development of increased subcontracting opportunities in negotiated *acquisition* by providing monetary incentives such as payments based on actual subcontracting achievement or award-fee *contracting* (see the clause at 52.219-10, Incentive Subcontracting Program, and 19.708(c)). When using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the subcontracting plan, the *contracting officer must* ensure that (a) the goals are realistic and (b) any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended. Incentive provisions *should* normally be negotiated after reaching final agreement with the contractor on the subcontracting plan.

(b)

(1) Except where a contractor has a commercial plan, the *contracting officer shall* require a subcontracting plan for each indefinite-delivery, indefinite-quantity contract (including task or *delivery order* contracts, FSS, GWACs, and MACs), when the estimated value of the contract meets the subcontracting plan thresholds at 19.702(a) and small business subcontracting opportunities exist.

(2) *Contracting officers* placing orders *may* establish small business subcontracting goals for each order. Establishing goals *shall* not be in the form of a new subcontracting plan as a contract *may* not have more than one plan (19.705-2(e)).

19.705-2 Determining the need for a subcontracting plan.

The *contracting officer shall* take the following actions to determine whether a proposed contractual action requires a subcontracting plan:

(a)

(1) Determine whether the proposed *total contract dollars* will exceed the subcontracting plan threshold in 19.702(a).

(2) Determine whether a proposed modification will cause the *total contract dollars* to exceed the subcontracting plan threshold (see 19.702(a)).

(b) Determine whether subcontracting possibilities exist by considering relevant factors such as-

(1) Whether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance of part of the work or maintain sufficient in-house capability to

perform the work; and

(2) Whether there are likely to be product prequalification requirements.

(3) Whether the firm can acquire any portion of the work with minimal or no disruption to performance (with consideration given to the time remaining until contract completion), and at fair market value, when a determination is made in accordance with paragraph (a)(2).

(c) If it is determined that there are no subcontracting possibilities, the determination *shall* include a detailed rationale, be approved at a level above the *contracting officer*, and placed in the contract file.

(d) In *solicitations* for negotiated *acquisitions*, the *contracting officer may* require the submission of subcontracting plans with initial *offers*, or at any other time prior to award. In determining when subcontracting plans *should* be required, as well as when and with whom plans *should* be negotiated, the *contracting officer must* consider the integrity of the competitive process, the goal of affording maximum practicable opportunity for small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, and *women-owned small business concerns* to participate, and the burden placed on *offerors*.

(e) A contract *may* not have more than one subcontracting plan. However, a *contracting officer may* establish separate subcontracting goals for each order under an indefinite-delivery, indefinite-quantity contract (19.705-1(b)(2)). When a *contract modification* exceeds the subcontracting plan threshold (see 19.702(a)) or an *option* is exercised, the goals of an existing subcontracting plan *shall* be amended to reflect any new subcontracting opportunities not envisioned at the time of contract award. These goal changes do not apply retroactively.

(f) If a subcontracting plan has been added to the contract due to a modification (see 19.702(a)(1)(iii)) or a size re-representation (see 19.301-2(e)), the subcontracting goals apply from the date of incorporation of the subcontracting plan into the contract and the contractor's achievements *must* be reported on the ISR (or the SF-294, if applicable) on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

19.705-3 Preparing the solicitation.

The *contracting officer shall* provide the Small Business Administration's (SBA’s) *procurement* center representative (or, if a *procurement* center representative is not assigned, see 19.402(a)) a reasonable period of time to review any *solicitation* requiring submission of a subcontracting plan and to submit advisory findings before the *solicitation* is issued.

19.705-4 Reviewing the subcontracting plan.

The *contracting officer shall* review the subcontracting plan for adequacy, ensuring that the required information, goals, and assurances are included (see 19.704).

(a) No detailed standards apply to every subcontracting plan. Instead, the *contracting officer shall* consider each plan in terms of the circumstances of the particular *acquisition*, including-

(1) Previous involvement of small business *concerns* as prime contractors or subcontractors in

similar *acquisitions*;

(2) Proven methods of involving small business *concerns* as subcontractors in similar *acquisitions*; and

(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by contractors.

(b) If, under a sealed bid *solicitation*, a bidder submits a plan that does not cover each of the 15 required elements (see 19.704), the *contracting officer shall* advise the bidder of the deficiency and request submission of a revised plan by a specific date. If the bidder does not submit a plan that incorporates the required elements within the time allotted, the bidder *shall* be *ineligible* for award. If the plan, although responsive, evidences the bidder's intention not to comply with its obligations under the clause at 52.219-8, Utilization of Small Business *Concerns*, the *contracting officer may* find the bidder nonresponsible.

(c) In negotiated *acquisitions*, the *contracting officer shall* determine whether the plan is acceptable based on the negotiation of each of the 15 elements of the plan (see 19.704). Subcontracting goals *should* be set at a level that the parties reasonably expect can result from the *offeror* expending good faith efforts to use small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, and women-owned *small business subcontractors* to the maximum practicable extent. The *contracting officer shall* take particular care to ensure that the *offeror* has not submitted unreasonably low goals to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts. Additionally, particular attention *should* be paid to the identification of steps that, if taken, would be considered a good faith effort (see 19.705-7). No goal *should* be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of *acquisition* objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program), *may* be used when additional and unique contract effort, such as providing technical assistance, could significantly increase *subcontract* awards to small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, or *women-owned small business concerns*.

(d) In determining the acceptability of a proposed subcontracting plan, the *contracting officer should* take the following actions:

(1) Obtain information available from the cognizant *contract administration office*, as provided for in 19.706(a), and evaluate the *offeror*'s *past performance* in awarding *subcontracts* for the same or similar *products* or services to 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 information is not available on a specific type of product or service, evaluate the *offeror*'s overall *past performance* and consider the performance of other contractors on similar efforts.

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that the goals offered are attainable in relation to-

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in

prior plans.

(3) Ensure that the subcontracting goals are consistent with the *offeror*'s *certified cost or pricing data* or *data other than certified cost or pricing data*.

(4) Evaluate the *offeror*'s make-or-buy policy or program to ensure that it does not conflict with the *offeror*'s proposed subcontracting plan and is in the Government's interest. If the contract involves *products* or services that are particularly specialized or not generally available in the commercial market, consider the *offeror*'s current capacity to perform the work and the possibility of reduced subcontracting opportunities.

(5) Evaluate subcontracting potential, considering the *offeror*'s make-or-buy policies or programs, the nature of the *supplies* or services to be subcontracted, the known availability 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 the geographical area where the work will be performed, and the potential contractor's long-standing contractual relationship with its suppliers.

(6) Advise the *offeror* of available sources of information on 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*, as well as any specific *concerns* known to be potential subcontractors. If the *offeror*'s proposed goals are questionable, the *contracting officer must* emphasize that the information *should* be used to develop realistic and acceptable goals.

(7) Obtain advice and recommendations from the SBA *procurement* center representative (or, if a *procurement* center representative is not assigned, see 19.402(a)) and the agency small business specialist.

19.705-5 Awards involving subcontracting plans.

(a) In making an award that requires a subcontracting plan, the *contracting officer shall* be responsible for the following:

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility.

(2) Assure that a subcontracting plan was submitted when required.

(3) Notify the SBA *procurement* center representative (or, if a *procurement* center representative is not assigned, see 19.402(a)) of the opportunity to review the proposed contract (including the plan and supporting documentation). The notice *shall* be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the *contracting officer*. Failure of the representative to respond in a reasonable period of time *shall* not delay contract award.

(4) Determine any fee that *may* be payable if an incentive is used in conjunction with the subcontracting plan.

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

(b) Letter contracts and similar undefinitized instruments, which would otherwise meet the requirements of 19.702(a)(1)(i) and (ii), *shall* contain at least a preliminary basic plan addressing the requirements of 19.704 and in such cases require the negotiation of the final plan within 90 days after award or before definitization, whichever occurs first.

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or *contract modification* containing a subcontracting plan is awarded or an existing subcontracting plan is amended, the *contracting officer shall* do the following:

(a) Notify the SBA of the award by sending a copy of the award document to the Area Director, Office of Government *Contracting*, in the SBA area office where the contract will be performed.

(b) Forward a copy of each commercial plan and any associated approvals to the Area Director, Office of Government *Contracting*, in the SBA area office where the contractor's headquarters is located.

(c) Give to the SBA *procurement* center representative (or, if a *procurement* center representative is not assigned, see 19.402(a)) a copy of-

(1) Any subcontracting plan submitted in response to a sealed bid *solicitation*; and

(2) The final negotiated subcontracting plan that was incorporated into a negotiated contract or *contract modification*.

(d) Notify the SBA *procurement* center representative (or, if a *procurement* center representative is not assigned, see 19.402(a)) of the opportunity to review subcontracting plans in connection with *contract modifications*.

(e) Forward a copy of each plan, or a determination that there is no requirement for a subcontracting plan, to the cognizant *contract administration office*.

(f) Monitor the prime contractor's compliance with its subcontracting plan, to include the following:

(1) Ensure that subcontracting reports are submitted into the eSRS within 30 days after the report ending date (*e.g.*, by October 30 th for the fiscal year ended September 30 th).

(2) Review ISRs, and where applicable, SSRs, in eSRS within 60 days of the report ending date (*e.g.*, by November 30 th for a report submitted for the fiscal year ended September 30 th).

(3) Either acknowledge receipt of or reject the reports in accordance with subpart 19.7, 52.219-9, Small Business Subcontracting Plan, and the eSRS instructions (www.esrs.gov).

(i) The authority to acknowledge or reject SSRs for commercial plans resides with the *contracting officer* who approved the commercial plan.

(ii) If a report is rejected, the *contracting officer must* provide an explanation for the rejection to allow the prime contractor the opportunity to respond specifically to identified deficiencies.

(g) Evaluate the prime contractor's compliance with its subcontracting plan, to include the following:

(1) Assess whether the prime contractor made a good faith effort to comply with its small business

subcontracting plan. See 19.705-7(b) for more information on the determination of good faith effort.

(2) Assess the prime contractor's written explanation concerning the prime contractor's failure to use a small business *concern* in the performance of the contract in the same scope, amount, and quality used in preparing and submitting the bid or proposal, if applicable.

(h) Initiate action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the administrative *contracting officer*, if one is assigned, or receipt of other reliable evidence to indicate that assessing liquidated damages is warranted.

(i) Take action to enforce the terms of the contract upon receipt of a notice from the *contract administration office* under 19.706(f).

(j) Acknowledge receipt of or reject the ISR and the SSR in the eSRS. Acknowledging receipt does not mean acceptance or approval of the report. The report *shall* be rejected if it is not adequately completed, for instance, if there are errors, omissions, or incomplete data. Failure to meet the goals of the subcontracting plan is not a valid reason for rejecting the report.

19.705-7 Compliance with the subcontracting plan.

(a) *General.* Maximum practicable utilization 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 in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages *shall* be paid by the contractor.

(b) *Determination of good faith effort.*

(1) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a *contracting officer must* look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort (see 19.701). For example, notwithstanding a contractor's diligent effort to identify and solicit *offers* from any of the small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, and *women-owned small business concerns*, factors such as unavailability of anticipated sources or unreasonable prices *may* frustrate achievement of the contractor's subcontracting goals. The *contracting officer may* consider any of the following, though not all inclusive, to be indicators of a good faith effort:

(i)Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation.

(ii)Conducting *market research* to identify potential *small business subcontractors* through all reasonable means, such as searching SAM, posting notices or *solicitations* on SBA's SUBNet, participating in business matchmaking events, and attending preproposal conferences.

(iii)Soliciting small business *concerns* as early in the *acquisition* process as practicable to allow them sufficient time to submit a timely *offer* for the *subcontract*.

(iv)Providing interested small businesses with adequate and timely information about plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely *offer* for the *subcontract*.

(v)Negotiating in good faith with interested small businesses.

(vi)Directing small businesses that need additional assistance to SBA.

(vii)Assisting interested small businesses in obtaining bonding, lines of credit, required *insurance*, necessary equipment, *supplies*, materials, or services.

(viii)Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations.

(ix)Participating in a formal mentor-protégé program with one or more small business protégés that results in developmental assistance to the protégés.

(x)Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories.

(xi)Fulfilling all of the requirements of the subcontracting plan.

(2)When considered in the context of the contractor's total effort in accordance with its plan, the *contracting officer may* consider any of the following, though not all inclusive, to be indicators of a failure to make a good faith effort:

(i)Failure to attempt through *market research* to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, or *women-owned small business concerns*, through all reasonable means including outreach, *industry* days, or the use of Federal systems such as SBA's Dynamic Small Business Search or SUBNet systems.

(ii)Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan.

(iii)Failure to submit an acceptable ISR, or the SSR, using the eSRS, or as provided in agency regulations, by the report due dates specified in 52.219-9, Small Business Subcontracting Plan.

(iv)Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements.

(v)Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan.

(vi)Failure to pay *small business subcontractors* in accordance with the terms of the contract with the prime contractor.

(vii)Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government.

(viii)Failure to provide the *contracting officer* with a written explanation if the contractor fails to acquire articles, equipment, *supplies*, services, or materials or obtain the performance of *construction* work as described in 19.704(a)(12).

(ix)Falsifying records of *subcontract* awards to small business *concerns*.

(c) *Documentation of good faith effort.* If, at completion of the basic contract or any *option*, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to comply with the requirements of its subcontracting plan, which includes meeting its subcontracting goals, the *contracting officer shall* review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the *contracting officer shall* document the file accordingly.

(d) *Notice of failure to make a good faith effort.* If the *contracting officer* decides in accordance with paragraph (b) of this section that the contractor failed to make a good faith effort to comply with its subcontracting plan, the *contracting officer shall* give the contractor written notice in accordance with 52.219-16, Liquidated Damages—Subcontracting Plan, specifying the material breach, which *may* be included in the contractor's *past performance* information, advising the contractor of the possibility that the contractor *may* have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice *shall* give the contractor an opportunity to demonstrate what good faith efforts have been made before the *contracting officer* issues the final decision and *shall* further state that failure of the contractor to respond *may* be taken as an admission that no valid explanation exists.

(e) *Payment of liquidated damages.*

(1) If, after consideration of all the pertinent data, the *contracting officer* finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the *contracting officer shall* issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The *contracting officer*'s final decision *shall* state that the contractor has the right to appeal under the clause in the contract entitled Disputes. Calculations and procedures *shall* be in accordance with 52.219-16, Liquidated Damages—Subcontracting Plan.

(2)The amount of damages attributable to the contractor's failure to comply *shall* be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal. For calculations for commercial plans see paragraph (f) of this section.

(3)Liquidated damages *shall* be in addition to any other remedies that the Government *may* have.

(f) *Commercial plans.* With respect to commercial plans approved under the clause at 52.219-9, Small Business Subcontracting Plan, the *contracting officer* that approved the plan *shall*-

(1) Perform the functions of the *contracting officer* under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, and document the results of the review;

(3) If a determination is made to assess liquidated damages, in order to calculate and assess the amount of damages, the *contracting officer shall* ask the contractor to provide-

(i) Contract numbers for the Government contracts subject to the plan;

(ii) The total Government sales during the contractor’s fiscal year; and

(iii) The amount of payments made under the Government contracts subject to that plan that contributed to the contractor's total sales during the contractor's fiscal year; and

(4) When appropriate, assess liquidated damages on the Government's behalf, based on the pro rata share of subcontracting attributable to the Government contracts. For example: The contractor's total actual sales were $50 million and its actual subcontracting was $20 million. The Government's total payments under contracts subject to the plan contributing to the contractor's total sales were $5 million, which accounted for 10 percent of the contractor's total sales. Therefore, the pro rata share of subcontracting attributable to the Government contracts would be 10 percent of $20 million, or $2 million. To continue the example, if the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of $2 million, or $20,000. The *contracting officer shall* make similar calculations for each category of small business where the contractor failed to achieve its goal and the sum of the dollars for all of the categories equals the amount of the liquidated damages to be assessed. A copy of the *contracting officer*'s final decision assessing liquidated damages *shall* be provided to other *contracting officers* with contracts subject to the commercial plan.

(5) Every *contracting officer* with a contract that is subject to a commercial plan *shall* include in the contract file a copy of the approved plan and a copy of the final decision assessing liquidating damages, if applicable.

19.706 Responsibilities of the cognizant administrative contracting officer.

The administrative *contracting officer* is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract. The *contract administration office shall* provide the necessary information and advice to support the *contracting officer*, as appropriate, by furnishing-

(a) Documentation on the contractor's performance and compliance with subcontracting plans under previous contracts;

(b) Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, and *women-owned small business concerns*;

(c) Information on whether the contractor's efforts to ensure the participation 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* are in accordance with its subcontracting plan;

(d) Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans;

(e) Immediate notice if, during performance, the contractor is failing to meet its commitments under the clause prescribed in 19.708(b) or the subcontracting plan;

(f) Immediate notice and rationale if, during performance, the contractor is failing to comply in good

faith with the subcontracting plan (see 19.705-7(b) for more information on the determination of good faith effort); and

(g) Immediate notice that performance under a contract is complete, that the goals were or were not met, and, if not met, whether there is any indication of a lack of a good faith effort to comply with the subcontracting plan.

19.707 The Small Business Administration’s role in carrying out the program.

(a) Under the program, the SBA *may*-

(1) Assist both Government agencies and contractors in carrying out their responsibilities with regard to subcontracting plans;

(2) Review (within 5 working days) any *solicitation* that meets the dollar threshold in 19.702(a)(1)(i) or (ii) before the *solicitation* is issued;

(3) Review (within 5 working days) before execution any negotiated contractual document requiring a subcontracting plan, including the plan itself, and submit recommendations to the *contracting officer*, which *shall* be advisory in nature; and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to-

(1) Prescribe the extent to which any contractor or subcontractor *shall subcontract*,

(2) Specify *concerns* to which *subcontracts* will be awarded, or

(3) Exercise any authority regarding the administration of individual prime contracts or *subcontracts*.

19.708 Contract clauses.

(a) Insert the clause at 52.219-8, Utilization of Small Business *Concerns*, in *solicitations* and contracts when the contract amount is expected to exceed the *simplified acquisition threshold* unless-

(1) A *personal services contract* is contemplated (see 37.104); or

(2) The contract, together with all of its *subcontracts*, will be performed entirely outside of the *United States* and its *outlying areas*.

(b)

(1) Insert the clause at 52.219-9, Small Business Subcontracting Plan, in *solicitations* and contracts

that *offer* subcontracting possibilities, are expected to exceed $900,000 ($2 million for *construction* of any public facility), and are required to include the clause at 52.219-8, Utilization of Small Business *Concerns*, unless the *acquisition* is set aside or is to be accomplished under the 8(a) program. When-

(i) *Contracting* by sealed bidding rather than by negotiation, the *contracting officer shall* use the clause with its *Alternate* I;

(ii) *Contracting* by negotiation, and subcontracting plans are required with initial proposals as provided for in 19.705-2(d), the *contracting officer shall* use the clause with its *Alternate* II;

(iii) The contract action will not be reported in the Federal *Procurement* Data System pursuant to 4.606(c)(5), or (c)(6), the *contracting officer shall* use the clause with its *Alternate* III; or

(iv) Incorporating a subcontracting plan due to a modification as provided for in 19.702(a)(1)(iii), the *contracting officer shall* use the clause with its *Alternate* IV.

(2) Insert the clause at 52.219-16, Liquidated Damages-Subcontracting Plan, in all *solicitations* and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan, or the clause with its *Alternate* I, II, III, or IV.

(c)

(1) The *contracting officer may*, when *contracting* by negotiation, insert in *solicitations* and contracts a clause substantially the same as the clause at 52.219-10, Incentive Subcontracting Program, when a subcontracting plan is required (see 19.702), and inclusion of a monetary incentive is, in the judgment of the *contracting officer*, necessary to increase subcontracting opportunities for 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 is commensurate with the efficient and economical performance of the contract; unless the conditions in paragraph (c)(3) of this section are applicable. The *contracting officer may* vary the terms of the clause as specified in paragraph (c)(2) of this section.

(2) Various approaches *may* be used in the development 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*' subcontracting incentives. They can take many forms, from a fully quantified schedule of payments based on actual *subcontract* achievement to an award-fee approach employing subjective evaluation criteria (see paragraph (c)(3) of this section). The incentive *should* not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program.

(3) As specified in paragraph (c)(2) of this section, the *contracting officer may* include small business, veteran-owned small business, service-disabled veteran-owned small business, *HUBZone* small business, small disadvantaged business, and women-owned small business subcontracting as one of the factors to be considered in determining the award fee in a cost-plus-award-fee contract; in such cases, however, the *contracting officer shall* not use the clause at 52.219-10, Incentive Subcontracting Program.