



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211, 215, 219, 242, and 252

[Docket DARS-2016-0027]

RIN 0750-AJ00

Defense Federal Acquisition Regulation Supplement: Temporary Extension of Test Program for Comprehensive Small Business Subcontracting Plans (DFARS Case 2015-D013)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2015 and a section of the National Defense Authorization Act for Fiscal Year 2016, both of which provide revisions to the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015-D013, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>. Search for "DFARS Case 2015-D013." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2015-D013" on any attached documents.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2015-D013 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Jennifer Johnson, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Johnson, telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year

(FY) 2015 and section 872 of the NDAA for FY 2016, both of which revise the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans. Section 821 of the NDAA for FY 2015 provides for contractors participating in the Test Program to report, on a semiannual basis, the amount of first-tier subcontract dollars awarded; the total number of subcontracts active under the Test Program that would have otherwise required a subcontracting plan under 15 U.S.C. 637(d); costs incurred in negotiating, complying with, and reporting on comprehensive subcontracting plans; and costs avoided by adoption of a comprehensive subcontracting plan. This information is expected to assist in determining if Test Program participants have achieved cost savings while enhancing opportunities for small businesses.

In addition, section 821—

- Repeals section 402 of Public Law 101-574, which suspended liquidated damages under comprehensive small business subcontracting plans;
- Requires consideration, as part of the past performance evaluation of an offeror, of any failure to make a good faith effort to comply with its comprehensive subcontracting plan;
- Extends the Test Program through December 31, 2017;

- Increases the threshold for participation in the Test Program from \$5,000,000 to \$100,000,000; and
- Prohibits negotiation of comprehensive subcontracting plans with contractors who failed to meet the subcontracting goals of their comprehensive subcontracting plan for the prior fiscal year.

Section 872 of the NDAA for FY 2016 removes the prohibition on negotiation of comprehensive subcontracting plans with contractors who failed to meet the subcontracting goals of their comprehensive subcontracting plan for the prior fiscal year.

II. Discussion and Analysis

This rule proposes to amend DFARS subparts 211.5, 215.3, 219.7, 242.15, and 252.2 as summarized in the following paragraphs:

A. Subpart 211.5, Liquidated Damages. Section 211.500 is added to clarify that subpart 211.5 and Federal Acquisition Regulation (FAR) subpart 11.5 do not apply to liquidated damages for comprehensive subcontracting plans under the Test Program, and to include a reference to DFARS 219.702-70.

B. Subpart 215.3, Source Selection. Section 215.305 is amended to require contracting officers to consider an offeror's failure to make a good faith effort to comply with its comprehensive subcontracting plan as part of the past performance evaluation.

C. Subpart 219.7, The Small Business Subcontracting Program.

- Section 219.702-70, Statutory requirements for the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans, renumbers section 219.702 and incorporates new requirements stemming from section 821 of the NDAA for FY 2015.

- o Paragraph (1) is renumbered as paragraph (a) and amended to include the title of the Test Program.

- o Paragraph (2), which addressed the nonapplicability of liquidated damages, is deleted in its entirety.

- o Paragraph (b) is added to provide the current requirements for participation in the Test Program. These requirements are expressly stated in 15 U.S.C. 637 note, as amended by section 821 of the NDAA for FY 2015 and section 872 of the NDAA for FY 2016. To participate in the Test Program, the contractor must have furnished to DoD, during the immediately preceding fiscal year under at least three contracts, supplies, services, or construction in the aggregate amount of at least \$100 million.

- o Paragraph (c) is added to describe the establishment and use of comprehensive subcontracting plans.

- o Paragraph (d) is added to provide the process to determine the need to assess liquidated damages for failure to make a good faith effort to comply with the comprehensive

subcontracting plan. Paragraph (e) is added to describe the calculation and application of liquidated damages. This rule sets forth the following methodology for assessing liquidated damages:

- The participant contractor shall be subject to the payment of liquidated damages if, after allowing the contractor an opportunity to demonstrate that it has made a good faith effort to comply with its comprehensive subcontracting plan, the contracting officer makes a final decision that the contractor failed to make a good faith effort to comply with its plan.

- The amount of liquidated damages owed to the Government shall be the amount of anticipated damages sustained by the Government, including but not limited to additional expenses of administration, reporting, and contract monitoring.

- o Paragraph (3) is renumbered as paragraph (f) and amended to revise the expiration date for the Test Program from December 31, 2014, to December 31, 2017.

- Section 219.708, Contract Clauses, is amended as follows:

- o Paragraph (b)(1)(B) guidance on use of clause 252.219-7004 is updated and aligned with the revised flowdown instructions in paragraph (g) of the clause. A correction is made to the Code of Federal Regulations to remove the phrase "and FAR 52.219-9, Small Business Subcontracting Plan(DoD

Contracts),". Paragraph (b) (1) (B) (2) (ii) is removed as the information is now contained at FAR 19.708(b) (1) (iii).

o Paragraph (b) (2), is amended to instruct contracting officers to use the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), in lieu of FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

D. Subpart 242.15, Contractor Performance Information.

Section 242.1502 is added to require that past performance evaluations include an assessment of the contractor's performance against, and efforts to achieve, the goals in its comprehensive subcontracting plan.

E. Subpart 252.2, Text of Provisions and Clauses.

• Clause 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), basic clause and its Alternate I, are amended to advise that contractors must insert (i.e., "flow down") the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), to subcontractors who participate in the Test Program.

• Clause 252.219-7004, Small Business Subcontracting Plan (Test Program), is amended to incorporate new requirements stemming from section 821 of the NDAA for FY 2015.

o Paragraph (a) provides definitions for additional terms used in connection with the Test Program.

- o Paragraph (c) is amended to advise participant contractors of the requirements for participation in the Test Program.

- o Paragraph (d) is amended to include the reporting requirements for contractors with comprehensive subcontracting plans. The reports must present the data by North American Industry Classification System code, by major defense acquisition program, by contract (for certain contracts with a value exceeding \$100,000,000), and by military department.

- o Paragraph (f) is added to address liquidated damages under a comprehensive subcontracting plan.

- o Paragraph (g) flowdown instructions are clarified and updated.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-The-Shelf Items.

This rule proposes to amend the clauses at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), and 252.219-7004, Small Business Subcontracting Plan (Test Program), in order to implement section 821 of the NDAA for FY 2015. The requirements of section 821 were enacted to promote utilization of small businesses and to determine the success of the Test Program at reducing administrative burdens while enhancing subcontracting opportunities for small businesses. Section 821

advances the interests of small business subcontractors by encouraging test program participants to comply with their comprehensive subcontracting plans.

A. Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold (SAT). It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Contracts for the Acquisition of Commercial Items, Including Commercially Available Off the Shelf Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the

FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to commercially available off-the-shelf (COTS) items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

C. Applicability Determination

This proposed rule does not apply the requirements of section 821 of the NDAA for FY 2015 to contracts at or below the SAT, but does apply the requirements of section 821 to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101.

The prescriptions for these clauses currently require their use in solicitations and contracts for commercial items, including COTS items. This rule merely revises these clauses to implement the new requirements of section 821; consequently, exclusion of acquisitions of commercial and COTS items from these requirements would create confusion among contractors and

the contracting workforce and would result in fewer subcontracting opportunities for small businesses. By applying the requirements of section 821 to acquisitions of commercial items, the burden on contractors is no greater than the burden on contractors who have other types of subcontracting plans. DoD will make the final determination with regard to application to commercial items after receipt and analysis of public comments.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because small entities do not participate in the Test Program. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291) and section 872 of the NDAA for FY 2016 (Pub. L. 114-92). Section 821 of the NDAA for FY 2015 provides several changes to the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans (Test Program), including new reporting and eligibility requirements, an extension of the Test Program, and authority to assess liquidated damages. Section 872 of the NDAA for FY 2016 removes one of the eligibility requirements.

The objectives of this proposed rule are to collect data to assist in assessing the successes or shortcomings of the Test Program and to provide the means to hold Test Program participants accountable for failure to make a good faith effort to comply with their comprehensive subcontracting plans. The authorizing legislation is section 821 of the NDAA for FY 2015 and section 872 of the NDAA for FY 2016.

The rule will not apply to small entities. The rule, however, may have an indirect positive economic impact on small entities, because the rule encourages Test Program participants to make a good faith effort to comply with their comprehensive subcontracting plans.

The rule does not impose any reporting or recordkeeping requirements on small entities. There are new semiannual reporting requirements for Test Program participants who are, as a matter of eligibility for the program, other than small businesses.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known, significant, alternative approaches to the rule that would meet the requirements of the applicable statutes.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2015-D013), in correspondence.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35), because the rule does not impose a collection of information on ten or more members of the public.

List of Subjects in 48 CFR Parts 211, 215, 219, 242, and 252.

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 211, 215, 219, 242, and 252 are proposed to be amended as follows:

1. The authority citation for parts 211, 215, 219, 242, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

2. Add section 211.500 to read as follows:

211.500 Scope.

This subpart and FAR subpart 11.5 do not apply to liquidated damages for comprehensive subcontracting plans under the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans. See 219.702-70 for coverage of liquidated damages for comprehensive subcontracting plans.

PART 215—CONTRACTING BY NEGOTIATION

3. Amend section 215.305(a)(2) by—
 - a. Designating the text as paragraph (a)(2)(A); and
 - b. Adding paragraph (a)(2)(B).

The addition reads as follows:

215.305 Proposal evaluation.

(a)(2) * * *

(B) Contracting officers shall consider an offeror's failure to make a good faith effort to comply with its comprehensive subcontracting plan under the Test Program described at 219.702-70 as part of the evaluation of the past performance.

PART 219—SMALL BUSINESS PROGRAMS

219.702 [Redesignated as 219.702-70]

4. Redesignate section 219.702 as 219.702-70; and revise it to read as follows:

219.702-70 Statutory requirements for the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans.

(a) In accordance with 15 U.S.C. 637 note, DoD has established a test program to determine whether comprehensive subcontracting plans on a corporate, division, or plant-wide basis will reduce administrative burdens while enhancing subcontracting opportunities for small and small disadvantaged business concerns. This program is referred to as the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans (Test Program).

(b) Eligibility requirements. To become and remain eligible to participate in the Test Program, a business concern is required to have furnished supplies or services (including construction) under at least three DoD contracts during the preceding fiscal year, having an aggregate value of at least \$100 million.

(c) Comprehensive subcontracting plans. (1) The Defense Contract Management Agency will designate the contracting officer who shall negotiate and approve comprehensive subcontracting plans with eligible participants on an annual basis.

(2) Test Program participants use their comprehensive subcontracting plans, in lieu of individual subcontracting plans, when performing any DoD contract or subcontract that requires a subcontracting plan.

(d) Assessment. The contracting officer designated to manage the comprehensive subcontracting plan shall conduct a compliance review during the fiscal year after the close of the fiscal year for which the plan is applicable. The contracting officer shall compare the approved percentage or dollar goals to the total, actual subcontracting dollars covered by the comprehensive subcontracting plan.

(1) If the contractor has failed to meet its approved subcontracting goal(s), the contracting officer shall give the contractor written notice specifying the failure, advising of the potential for assessment of liquidated damages, permitting the

contractor to demonstrate what good faith efforts have been made, and providing a period of 15 working days (or longer period at the contracting officer's discretion) within which to respond. The contracting officer may take the contractor's failure to respond to the notice as an admission that no valid explanation exists.

(2) The contracting officer shall review all available information to determine whether the contractor has failed to make a good faith effort to comply with the plan.

(3) If, after consideration of all relevant information, the contracting officer determines that the contractor failed to make a good faith effort to comply with the comprehensive subcontracting plan, the contracting officer shall issue a final decision. The contracting officer's final decision shall include the right of the contractor to appeal under the Disputes clause. The contracting officer shall distribute a copy of the final decision to all cognizant contracting officers for the contracts covered under the plan.

(e) Liquidated damages. The amount of liquidated damages shall be the amount of anticipated damages sustained by the Government, including but not limited to additional expenses of administration, reporting, and contract monitoring, and shall be identified in the comprehensive subcontracting plan. Liquidated damages shall be in addition to any other remedies the Government may have.

(f) Expiration date. The Test Program expires on December 31, 2017.

5. Amend section 219.708 by—

- a. Revising paragraph (b) (1) (B);
- b. Revising paragraph (b) (2); and
- c. Removing from paragraph (c) (1) “test program described in 219.702” and adding “Test Program described in 219.702-70” in its place.

The revisions read as follows:

219.708 Contract clauses.

(b) (1) * * *

(B) In contracts with contractors that have comprehensive subcontracting plans approved under the Test Program described in 219.702-70, including contracts using FAR part 12 procedures for the acquisition of commercial items, use the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), instead of the clauses at 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), FAR 52.219-9, Small Business Subcontracting Plan, and FAR 52.219-16, Liquidated Damages—Subcontracting Plan.

(2) In contracts with contractors that have comprehensive subcontracting plans approved under the Test Program described in 219.702-70, do not use the clause at FAR 52.219-16, Liquidated Damages—Subcontracting Plan.

* * * * *

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

6. Add subpart 242.15, consisting of 242.1502, to read as follows:

Subpart 242.15—Contractor Performance Information

242.1502 Policy.

(g) Past performance evaluations in the Contractor Performance Assessment Reporting System shall include an assessment of the contractor's performance against, and efforts to achieve, the goals identified in its comprehensive small business subcontracting plan when the contract contains the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 252.219-7003 by—

a. In the basic clause—

i. Removing the clause date of "(MAR 2016)" and adding "(DATE)" in its place;

ii. Adding paragraph (g); and

b. In Alternate I—

i. Removing the clause date of "(MAR 2016)" and adding "(DATE)" in its place; and

ii. Adding paragraph (g).

The additions read as follows.

252.219-7003 Small Business Subcontracting Plan (DoD Contracts).

* * * * *

(g) Include the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70, where the subcontract is expected to exceed \$700,000 (\$1.5 million for construction of any public facility) and to have further subcontracting opportunities.

* * * * *

Alternate I. * * *

* * * * *

(g) Include the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70, where the subcontract is expected to exceed \$700,000 (\$1.5 million for construction of any public facility) and to have further subcontracting opportunities.

* * * * *

8. Revise section 252.219-7004 to read as follows:

252.219-7004 Small business subcontracting plan (Test Program).

As prescribed in 219.708(b)(1)(B), use the following clause:

SMALL BUSINESS SUBCONTRACTING PLAN (TEST PROGRAM) (DATE)

(a) Definitions. As used in this clause—

Covered small business concern means a small business concern, veteran-owned small business concern, service-disabled veteran-

owned small business concern, HUBZone small business concern, women-owned small business concern, or small disadvantaged business concern as these terms are defined in FAR 2.101.

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

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

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

(b) The Contractor's comprehensive small business subcontracting plan and its successors, which are authorized by and approved under the Test Program of 15 U.S.C. 637 note, as amended, shall be included in and made a part of this contract. Upon expulsion from the Test Program or expiration of the Test Program, the Contractor shall negotiate an individual subcontracting plan

for all future contracts that meet the requirements of 15 U.S.C. 637(d).

(c) Eligibility requirements. To become and remain eligible to participate in the Test Program, a business concern is required to have furnished supplies or services (including construction) under at least three DoD contracts during the preceding fiscal year, having an aggregate value of at least \$100 million.

(d) Reports. (1) The Contractor shall report semiannually for the six-month periods ending March 31 and September 30, the information in paragraphs (d)(1)(i) through (v) of this section within 30 days after the end of the reporting period. Submit the report at <https://www.esrs.gov>.

(i) A list of contracts covered under its comprehensive small business subcontracting plan, to include the Commercial and Government Entity (CAGE) code and Data Universal Numbering System (DUNS) number.

(ii) The amount of first-tier subcontract dollars awarded during the six-month period covered by the report to covered small business concerns, with the information set forth separately by—

(A) North American Industrial Classification System (NAICS) code;

(B) Major defense acquisition program, as defined in 10 U.S.C. 2430(a);

(C) Contract number, if the contract is for maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment, and the total value of the contract, including options, exceeds \$100 million; and

(D) Military department.

(iii) Total number of subcontracts active under the Test Program that would have otherwise required a subcontracting plan.

(iv) Costs incurred in negotiating, complying with, and reporting on its comprehensive subcontracting plan.

(v) Costs avoided through the use of a comprehensive subcontracting plan.

(2) The Contractor shall—

(i) Ensure that subcontractors with subcontracting plans agree to submit an Individual Subcontract Report (ISR) and/or Summary Subcontract Report (SSR) using the Electronic Subcontracting Reporting System (eSRS).

(ii) Provide its contract number, its DUNS number, and the e-mail address of the Contractor's official responsible for acknowledging or rejecting the ISR to all first-tier subcontractors, who will be required to submit ISRs, so they can enter this information into the eSRS when submitting their reports.

(iii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS

number, and the e-mail address of the subcontractor's official responsible for acknowledging or rejecting the ISRs to its subcontractors with subcontracting plans who will be required to submit ISRs.

(iv) Acknowledge receipt or reject all ISRs submitted by its subcontractors using eSRS.

(3) The Contractor shall submit SSRs using eSRS at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns. Purchases from a corporation, company, or subdivision that is an affiliate of the prime Contractor or subcontractor are not included in these reports. Subcontract award data reported by prime contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower-tier subcontractors unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from a member firm of the Alaska Native Corporations or an Indian tribe. Only subcontracts involving performance in the U.S. or its outlying areas should be included in these reports.

(i) This report may be submitted on a corporate, company, or subdivision (e.g., plant or division operating as a separate profit center) basis, as negotiated in the comprehensive subcontracting plan with the Defense Contract Management Agency.

(ii) This report encompasses all subcontracting under prime contracts and subcontracts with the Department of Defense, regardless of the dollar value of the subcontracts, and is based on the negotiated comprehensive subcontracting plan.

(iii) The report shall be submitted semi-annually for the six months ending March 31 and the twelve months ending September 30. Reports are due 30 days after the close of each reporting period.

(iv) The authority to acknowledge receipt or reject the SSR resides with the Defense Contract Management Agency.

(e) The failure of the Contractor or subcontractor to comply in good faith with the clause of this contract entitled "Utilization of Small Business Concerns," or an approved plan required by this clause, shall be a material breach of the contract.

(f) Liquidated damages. The Contracting Officer designated to manage the comprehensive subcontracting plan will exercise the functions of the Contracting Officer, as identified in paragraphs (f) (1) through (4), on behalf of all DoD departments and agencies that awarded contracts covered by the Contractor's comprehensive subcontracting plan.

(1) To determine the need for liquidated damages, the Contracting Officer will conduct a compliance review during the fiscal year after the close of the fiscal year for which the plan is applicable. The Contracting Officer will compare the approved percentage or dollar goals to the total, actual subcontracting dollars covered by the plan.

(2) If the Contractor has failed to meet its approved subcontracting goal(s), the Contracting Officer will provide the Contractor written notice specifying the failure, advising of the potential for assessment of liquidated damages, and permitting the Contractor to demonstrate what good faith efforts have been made. The Contracting Officer may take the Contractor's failure to respond to the notice within 15 working days (or longer period at the Contracting Officer's discretion) as an admission that no valid explanation exists.

(3) If, after consideration of all relevant information, the Contracting Officer determines that the Contractor failed to make a good faith effort to comply with the comprehensive subcontracting plan, the Contracting Officer will issue a final decision to the Contractor to that effect and require the Contractor to pay liquidated damages to the Government in the amount identified in the comprehensive subcontracting plan.

(4) The Contractor shall have the right of appeal under the clause in this contract entitled "Disputes" from any final decision of the Contracting Officer.

(g) The Contractor shall include in subcontracts that offer subcontracting opportunities, are expected to exceed \$700,000 (\$1.5 million for construction of any public facility), and are required to include the clause at 52.219-8, Utilization of Small Business Concerns-

(1) FAR 52.219-9, Small Business Subcontracting Plan, and 252.219-7003 Small Business Subcontracting Plan (DoD Contracts)-Basic;

(2) 52.219-9, Small Business Subcontracting Plan, with its Alternate III, and 252.219-7003, Small Business Subcontracting Plan (DoD Contracts)-Alternate I, to allow for submission of SF 294s in lieu of ISRs; or

(3) 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70.

(End of clause)

[FR Doc. 2016-22573 Filed: 9/22/2016 8:45 am; Publication Date: 9/23/2016]