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**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 19, 42, and 52**

**[FAC 2021-07; FAR Case 2019-004; Item IV; Docket No. FAR-2019-0030, Sequence No. 1]**

**RIN 9000-AN87**

**Federal Acquisition Regulation: Good Faith in Small Business Subcontracting**

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation to implement a section of the National Defense Authorization Act for Fiscal Year 2017, which requires examples of failure to make good faith efforts to comply with a small business subcontracting plan.

**DATES:** Effective **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dana Bowman, Procurement Analyst, at 202-803-3188, or by email at [dana.bowman@gsa.gov](mailto:dana.bowman@gsa.gov), for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755 or

GSARegSec@gsa.gov. Please cite FAC 2021-07, FAR Case 2019-004.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published a proposed rule on June 3, 2020, at 85 FR 34155, to implement section 1821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (section 1821(c) of Pub. L. 114-328; 15 U.S.C. 637 note). Section 1821 requires the Small Business Administration (SBA) to amend its regulations to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA issued a final rule at 84 FR 65647, dated November 29, 2019, to implement section 1821 of the NDAA for FY 2017. In its final rule, SBA amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA revised 13 CFR 125.3(c)(1)(iv) to require that prime contractors with commercial subcontracting plans include indirect costs in their subcontracting goals. Other than small business concerns that have a commercial subcontracting plan report on performance through a summary subcontract report (SSR).

Prior to the publication of its final rule, SBA's regulations required that contractors using a commercial subcontracting plan must include all indirect costs in their SSRs, but did not require these contractors to include indirect costs in their subcontracting goals, which led to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

Small business subcontracting plans are required from large prime contractors when a contract is expected to exceed \$750,000 (\$1.5 million for construction) and has subcontracting possibilities. FAR 19.704 lists the elements of the plan, which include the contractor's goals for subcontracting to small business concerns and a description of the efforts the contractor 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. Failure to make a good faith effort to comply with the plan may result in the assessment of liquidated damages per FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

This final FAR rule requires that all indirect costs, with certain exceptions, are included in commercial plans and SSRs.

FAR 19.705-7 contains examples of a good faith effort, and examples of a failure to make a good faith effort.

Four respondents submitted public comments in response to the proposed rule.

## **II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule as a result of the public comments are provided as follows:

### **A. Summary of Significant Changes from the Proposed Rule**

There are no changes made to the final rule.

### **B. Analysis of Public Comments**

#### **1. Clarify applicability to subcontracts for commercial items and commercially available off-the-shelf (COTS) items**

*Comment:* One respondent commented that the rule should clarify that the "good faith" requirement is not applicable to subcontracts for commercial and COTS items under prime contracts. The respondent commented that the proposed rule does not address FAR 52.219-9(j), which states that subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212-5, Contract Terms and Conditions Required to

Implement Statutes or Executive Orders-Commercial Items, or when the subcontractor provides a commercial item subject to the clause at 52.244-6, Subcontracts for Commercial Items, under a prime contract.

*Response:* This rule does not revise the conditions for when a subcontracting plan is required. If a subcontracting plan is not required, then the examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan are not applicable. No changes were made to the final rule as a result of this comment.

## **2. Material Breach**

### **a. FAR language broader than SBA language**

*Comment:* One respondent stated that the proposed FAR language at 19.705-7(d) is much broader than the SBA final rule and is unclear on whether "material breach" refers to the subcontracting plan or a breach of the contract itself.

*Response:* FAR 19.705-5(a)(5) requires that the subcontracting plan become a "material part of the contract upon award." The final rule text at FAR 19.705-7(d), similar to the SBA final rule, cites FAR 52.219-16, Liquidated Damages-Subcontracting Plan, which provides the corrective actions available to all Federal Government contracting officers when a contractor fails to make a good faith effort to comply with the subcontracting plan, while also giving consideration to other Federal contracting

regulations. In this context, a failure to make a good faith effort to comply with a subcontracting plan is a material breach, sufficient for the assessment of liquidated damages, and also for other remedies the Government may have. No changes were made to the final rule as a result of this comment.

**b. Recommended language to be added to final rule**

*Comment:* One respondent requested the proposed FAR language at 19.705-7(d) include language to indicate that the contractor has an opportunity to rebut and appeal before a determination of noncompliance is rendered and provided recommended text.

*Response:* The clause at FAR 52.219-16, Liquidated Damages-Subcontracting Plan, which is cited in proposed FAR text 19.705-7(d), specifically 52.219-16(c), allows the contractor an opportunity to demonstrate what good faith efforts have been made and to discuss the matter, before the contracting officer's final decision. No changes were made to the final rule as a result of this comment.

**3. Clarifications**

**a. Ensure consistency between FAR 52.219-16 and proposed FAR 19.705-7(b) (2)**

*Comment:* One respondent recommended that to remain consistent, the proposed language at FAR 19.705-7(b) (2) should either include the language contained in 52.219-16 or include references to the intent of 52.219-16, as the

examples provided at FAR 19.705-7(b) (2) may occur without willful or intentional behavior. The respondent also recommended that intent and examples should be read together providing that an occurrence of the examples without intent would not constitute a violation. Specifically, failure to make a good faith effort must meet the "willful or intentional" standard. The respondent also provided various reasons why the FAR should make it clear that an occurrence of the examples without intent would not constitute a violation.

*Response:* This final rule is implementing current SBA regulation. SBA's language at 13 CFR 125.3(d) (3) provides guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. This language parallels the language in SBA's rule providing contracting officers with examples to consider, in the context of the contractor's total effort, as possible indicators of a failure to make a good faith effort. SBA's rule does not reference the "willful and intentional" language. The FAR text will not be revised to incorporate the requested language as the "willful and intentional" language already appears in the definition of "failure to make a good faith effort to comply with the subcontracting plan" at both FAR 19.701 and in the clause at FAR 52.219-16. No changes were made to the final rule as a result of this comment.

**b. Clarify the intent of the proposed language at FAR 19.705-7(b) (2) (vi)**

*Comment:* One respondent stated FAR 19.705-7(b) (2) (vi), as written, could be misinterpreted to hold a lower-tier contractor to the terms of a prime contractor's contract with the Government and recommended a revision to provide the intent of the text is to ensure a contractor pays its small business subcontractors in accordance with the terms of their contract with the small business.

*Response:* The current text states, "Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor;" and provides that the intent pertains to the subcontractor's contract with the prime contractor. The final rule FAR text will not be revised to include the recommended text.

**c. Clarify intent of FAR 19.705-7(b) (2) (vii)**

*Comment:* One respondent stated that the language at FAR 19.705-7(b) (2) (vii) should be revised to expressly require prime contractors to attend training as a remedy to any performance review findings. The respondent further stated that this is necessary given that a failure to attend the training offered by the Government could be perceived as a failure to make a good faith effort. The respondent provided recommended revisions to 19.705-7(b) (2) (vii).



*Response:* The respondent's interpretation of the language at FAR 19.705-7(b)(2)(vii) is correct. If a contractor does not either correct substantiated findings or participate in subcontracting plan management training offered by the Government, it could be perceived by the contracting officer as a failure to make a good faith effort. This is not all inclusive of failure to make a good faith effort, but is one of many instances and examples used to show a lack of good faith effort on behalf of the prime contractor. Additionally, the contracting officer has the choice of requiring or recommending other corrective remedies as deemed necessary. The respondent's recommended language is more restrictive by suggesting "and" instead of "or" as written in the SBA rule. The final rule FAR text will not be revised to include the recommended text.

**d. Clarify applicability to contracts at or below the simplified acquisition threshold**

*Comment:* One respondent stated that the preamble to the proposed rule indicates that the FAR Council is considering expanding the scope of the rule to include contracts at or below the simplified acquisition threshold (SAT) and recommended that the final FAR rule under this case should specify that it does not apply to contracts at or below the SAT. The respondent further stated that contracts at or below the SAT must be exempt from any

policy or regulatory requirements pertaining to Small Business Plans.

*Response:* Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires subcontracting plans only for acquisitions valued above \$750,000 (\$1.5 million for construction contracts). As stated in section III of this preamble, the requirements of section 1821 of the NDAA for FY 2017 (Pub. L. 114-328; 15 U.S.C 637 note) do not apply to contracts at or below the SAT.

**e. Clarify intent of FAR 19.705-7(b) (1) (v)**

*Comment:* One respondent stated that the language at FAR 19.705-7(b) (1) (v) does not make clear how a contracting officer would make a determination that a contractor has “negotiated in good faith with interested small business.” The respondent also states that it is not clear how a contractor would negotiate with a small business that is merely interested in participating as a subcontractor.

*Response:* The language at FAR 19.705-7(b) (1) (v) is broadly written, as the intent is not to restrict or limit the contracting officer’s authority or ability to determine the prime contractor’s effort to negotiate in good faith. No changes were made to the FAR final rule as a result of this comment.

**4. Outside the scope of this rule**

*Comment:* One respondent had no issue with the proposed changes and clarifications in the language (FAR

text) and agreed that the requirements should be consistent. However, the respondent disagreed with commercial subcontracting plans allowing large businesses to "capture and be credited for small dollars spent" that have nothing to do with the specific awarded Federal contract. The respondent recommended a maximum cap proposed at 0.5 percent to the large business and that any remaining credit or subcontracting expenditure allowed be with the small business directly involved and subcontracted to the specific awarded Federal contract. The respondent further reiterated the original intent of the subcontracting law was to encourage large business primes to work and subcontract with small businesses in support of the Federal contract awarded and not to receive credit for unrelated work. Another respondent acknowledged the importance of prime contractors making a good faith effort to comply with SBA's small business subcontracting plan. The respondent further stated that the country is in the midst of a deadly pandemic and offered additional political commentary irrelevant to the subject FAR case.

*Response:* The comments are outside the scope of this rule. The intent of this rule is to provide guidance on evaluating whether a prime contractor made a good faith effort to comply with its small business subcontracting plan and to provide a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, this rule is amending the FAR to require that all indirect costs, minus certain exceptions, are included in both commercial plans and summary subcontract reports.

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items**

This rule implements a statutory requirement to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. The Federal Acquisition Regulatory Council (FAR Council) does not intend to apply the requirements of section 1821 of the NDAA for FY 2017 (Pub. L. 114-328; 15 U.S.C 637 note) to contracts at or below the SAT, but intends to apply those requirements to contracts for the acquisition of commercial items, including COTS items. The clauses at FAR 52.219-9 and 52.219-16 are revised by this rule.

**A. *Applicability to Contracts at or below the SAT.***

Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to acquisitions at or below the SAT; or (iii) 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. If

none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan.

The FAR Council does not intend to apply this rule to acquisitions at or below the SAT.

***B. Applicability to Contracts for the Acquisition of Commercial Items.***

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list

of provisions of law that are inapplicable to the acquisition of commercial items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans—including commercial plans—to make a good faith effort to comply with the plans. SBA's final rule did not exempt the acquisition of commercial items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of commercial items.

***C. Applicability to Contracts for the Acquisition of COTS Items.***

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically

refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 et seq., 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of COTS items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans—including commercial plans—to make a good faith effort to comply with the plans. SBA's final rule did not exempt the acquisition of COTS items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of

small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of COTS items.

#### **IV. Expected Impact of the Rule**

This rule provides examples of activities that contracting officers may consider when evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. The contracting officers also have consistent and uniform examples to identify and hold large prime contractors accountable for failing to make a good faith effort to comply with their subcontracting plans. Encouraging large prime contractors to meet their subcontracting goals may have a positive economic impact on any small business entity that wishes to participate in Federal procurement as a subcontractor.

The final rule also requires prime contractors with commercial subcontracting plans to include indirect costs, with certain exceptions, in their subcontracting goals. This will ensure that the data reported in the summary subcontract report is consistent with the goals in the commercial subcontracting plan.



## **V. 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.

## **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

## **VII. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601-612. The FRFA is summarized as follows:

The objective of this final rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations, which provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA amended 13 CFR 125.3(c)(1)(iv) to require that large prime contractors with commercial subcontracting plans include indirect costs in the commercial subcontracting plan goals. Large prime contractors that have a commercial subcontracting plan report on performance through a Summary Subcontract Report (SSR) in the Electronic Subcontracting Reporting System (eSRS). The FAR currently requires - as SBA's regulations required prior to publication of SBA's final rule - that a contractor using a commercial subcontracting plan include all indirect costs in its SSR. However, these regulations did not require contractors to include indirect costs in their commercial subcontracting plan goals, which leads to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

This rule may have a positive economic impact on any small entity that wishes to participate in Federal procurement as a subcontractor.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities. This rule provides guidance to the contracting officer on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

By providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, the FAR will enable contracting officers to determine more easily whether large prime contractors have made a good faith effort to comply with their subcontracting plans and to hold large prime contractors accountable for failing to make a good faith effort to comply with their subcontracting plans. More diligence in developing and meeting subcontracting goals on the part of

large prime contractors could have a positive impact of giving small business concerns more opportunities to subcontract on Federal contracts.

Data from the Federal Procurement Data System for fiscal years 2018 through 2020 indicate that there were 7,656 entities with 30,414 new awards that required subcontracting plans. Of the 30,414 new awards, 18 percent or 5,399 required commercial subcontracting plans. Additionally, 31 percent or 2,318 of the 7,656 unique awardees required commercial subcontracting plans. According to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), there are 19,596 unique entities who are subcontractors. Approximately 80 percent of the entities registered in the System for Award Management are small entities. Therefore, we estimate that 80 percent (15,677) of the subcontractors in FSRS are small entities. These small entities may benefit from this rule.

This final rule requires a large prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals. The benefit of requiring that indirect costs be included in subcontracting goals in commercial subcontracting plans is that it will increase the small business subcontracting goal and thus, increase the amount of funds the prime contractor will subcontract to small business concerns, providing more opportunities for subcontract awards to small business concerns.

This final rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

### **VIII. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. 3501-3521) applies to this rule; however, these changes to the FAR do not impose additional information collection requirements

to the paperwork burden previously approved under OMB  
Control Number 9000-0007, Subcontracting Plans.

**List of Subjects in 48 CFR Parts 19, 42, and 52**

Government procurement.

William F. Clark,  
Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 19,  
42, and 52 as set forth below:

1. The authority citation for 48 CFR parts 19, 42,  
and 52 continues to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and  
51 U.S.C. 20113.

**PART 19—SMALL BUSINESS PROGRAMS**

2. Amend section 19.704 by—

a. In paragraph (a)(6) removing the phrase  
“subcontracting goals” and adding the phrase  
“subcontracting goals (for commercial plans, see paragraph  
(d) of this section)” in its place;

b. Revising paragraph (d) introductory text; and

c. In paragraph (d)(4) removing the phrase “one SSR”  
and adding the phrase “one SSR that includes all indirect  
costs, except as described in paragraph (d) of this section,”  
in its place.

The revision reads as follows:

**19.704 Subcontracting plan requirements.**

\* \* \* \* \*

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. 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 item. The contractor shall-

\* \* \* \* \*

**19.705-4 [Amended]**

3. In section 19.705-4 amend paragraph (c), in the fourth sentence, by removing the phrase "faith effort" and adding the phrase "faith effort (see 19.705-7)" in its place.

4. Amend section 19.705-6 by revising paragraphs (g) (1), (h), and (i) to read as follows:

**19.705-6 Postaward responsibilities of the contracting officer.**

\* \* \* \* \*

(g) \* \* \*

(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.

\* \* \* \* \*

(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).

\* \* \* \* \*

5. Amend section 19.705-7 by--

a. Revising the section heading;

b. In paragraph (a)--

- i. Adding a paragraph heading;
- ii. Removing the phrase "small disadvantaged business" and adding the phrase "small disadvantaged business," in its place;
- c. Revising paragraphs (b), (c), (d), and (e);
- d. Adding a paragraph heading to the introductory text of paragraph (f);
- e. Removing paragraph (g); and
- f. Redesignating paragraph (h) as paragraph (f) (5).

The revisions and additions read as follows:

**19.705-7 Compliance with the subcontracting plan.**

(a) *General.* \* \* \*

(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.* \* \* \*

**19.706 [Amended]**

6. In section 19.706 amend paragraph (f) by removing the phrase "subcontracting plan" and adding the phrase "subcontracting plan (see 19.705-7(b) for more information on the determination of good faith effort)" in its place.

**PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

7. Amend section 42.1501 by redesignating paragraphs (a) (5) thru (a) (7) as paragraphs (a) (6) thru (a) (8) and adding a new paragraph (a) (5) to read as follows:

**42.1501 General.**

(a) \* \* \*

(5) Complying with the requirements of the small business subcontracting plan (see 19.705-7(b));

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

8. Amend section 52.212-5 by revising the date of the clause and paragraphs (b) (17) (i), (b) (17) (v), and (b) (20) to read as follows:

**52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.**

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE

ORDERS—COMMERCIAL ITEMS (SEP 2021)

\* \* \* \* \*

(b) \* \* \*

\_\_\_ (17) (i) 52.219-9, Small Business

Subcontracting Plan (SEP 2021) (15 U.S.C. 637(d)(4)).

\* \* \* \* \*

\_\_\_ (v) Alternate IV (SEP 2021) of 52.219-9.

\* \* \* \* \*

\_\_\_ (20) 52.219-16, Liquidated Damages—

Subcontracting Plan (SEP 2021) (15 U.S.C. 637(d)(4)(F)(i)).

\* \* \* \* \*

9. Amend section 52.219-9 by—

a. Revising the date of the clause;

b. In paragraph (d)(2)(i) removing the word “subcontracts” and adding the phrase “subcontracts, including all indirect costs except as described in paragraph (g) of this clause,” in its place;

c. Adding a new fifth sentence to paragraph (g);

d. Revising the date of Alternate IV, and paragraph (d)(2)(i) of Alternate IV.

The revised and added text reads as follows:

**52.219-9 Small Business Subcontracting Plan.**

\* \* \* \* \*

SMALL BUSINESS SUBCONTRACTING PLAN (SEP 2021)

\* \* \* \* \*

(g) \* \* \* A Contractor authorized to use a commercial subcontracting plan shall include in its subcontracting goals and in its SSR 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. \* \* \*

\* \* \* \* \*

*Alternate IV (SEP 2021).* \* \* \*

(d) \* \* \*

(2) \* \* \*

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Contractor's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan, including 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;

\* \* \* \* \*

10. Amend 52.219-16 by—

a. Revising the date of the clause; and

b. In paragraph (b) in the second sentence removing the phrase “plan, established” and adding “plan (see 19.705-7), established” in its place.

The revision reads as follows:

**52.219-16 Liquidated Damages—Subcontracting Plan.**

\* \* \* \* \*

LIQUIDATED DAMAGES—SUBCONTRACTING PLAN (SEP 2021)

\* \* \* \* \*

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