

SMALL BUSINESS ADMINISTRATION**13 CFR Part 125****RIN 3245-AF12****Small Business Government Contracting Programs****AGENCY:** U.S. Small Business Administration.**ACTION:** Proposed rule.

SUMMARY: This proposed rule amends the U.S. Small Business Administration (SBA) regulations governing small business subcontracting to address several comments received in response to SBA's proposed rule on contract bundling. Specifically, this proposed rule provides a list of factors to consider in evaluating prime contractor's performance and good-faith efforts to achieve the requirements in its subcontracting plan. The proposed rule also authorizes the use of goals in subcontracting plans, and/or past performance in meeting such goals, as a factor in source selection when placing orders against Federal Supply Schedules, government-wide acquisition contracts, and multi-agency contracts.

In addition, this proposed rule implements statutory provisions and other administrative procedures relating to subcontracting goals and assistance. In particular, the proposed rule lists the various categories of small businesses that must be afforded maximum practicable subcontracting opportunities, and clarifies the responsibilities of prime contractors and SBA's Commercial Market Representatives (CMRs) under the subcontracting assistance program. The proposed rule also supplies guidance on Subcontracting Orientation and Assistance Reviews (SOAR), which CMRs perform to assist prime contractors to understand and comply with the requirements governing the small business subcontracting assistance program.

DATES: Comments must be received on or before December 19, 2003.

ADDRESSES: Send comments to Dean Koppel, Assistant Administrator, Office of Policy and Research, 409 Third St., SW., Mail Code: 6500, Washington, DC 20416, by e-mail to dean.koppel@sba.gov, or to www.regulations.gov, or by facsimile to (202) 205-6390.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, Office of Policy and Research, (202) 401-8150 or dean.koppel@sba.gov.

SUPPLEMENTARY INFORMATION:

A. Background

On January 31, 2003, SBA published a proposed rule in the **Federal Register**, 67 FR 47244, to solicit comments on its proposal to implement several recommendations included in the Office of Management and Budget's October 2002 report, entitled "Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Business." Several of the responding commenters identified the need for more guidance on evaluating large prime contractor performance and efforts to achieve subcontracting plans, including examples of what types of conduct constitute "good-faith" efforts to comply with subcontracting plans.

Under section 8(d)(4) of the Small Business Act (15 U.S.C. 637(d)(4)), large businesses awarded a Federal prime contract in excess of \$500,000, or \$1,000,000 for construction of a public facility, must submit a subcontracting plan to the contracting agency. The subcontracting plan must include dollar and percentage goals that reflect the maximum practicable utilization of small businesses in the performance of the contract as subcontractors or suppliers. A prime contractor that fails to make a good-faith effort to achieve the goals in its subcontracting plan can be found in material breach of contract and terminated for default or assessed liquidated damages. SBA and the Defense Contract Management Agency (DCMA) also evaluate good-faith efforts when they perform joint post-award compliance reviews of Department of Defense contractors. Contracting officers also consider a contractor's good-faith efforts to achieve its subcontracting goals as an important factor in determining whether the contractor deserves an acceptable past performance rating.

This proposed rule would provide more detailed guidance on assessing good-faith efforts in performance of subcontracting plans. In particular, the proposed rule provides specific examples of conduct demonstrating that a prime contractor has made a good-faith effort to comply with its subcontracting plan.

This proposed rule would also increase the dollar threshold above which prime contractors must notify unsuccessful offerors from \$10,000 to \$100,000. The proposed dollar threshold will conform to the Simplified Acquisition Threshold and will be in keeping with the Administration's efforts to make Government regulations more practical and less burdensome.

SBA is also proposing amendments to clarify the subcontracting assistance

program and incorporate existing statutory requirements and administrative procedures currently used in administering the program. Further, this proposed rule reorganizes § 125.3 into identifiable substantive areas with new subsection headings for ease of use and clarity. None of these changes impose additional requirements or responsibilities on small or large businesses. The proposed amendments are simply intended to clarify existing responsibilities in carrying out the statutory mandate for small businesses to have the maximum practicable opportunity to participate in Federal contracting.

SBA invites comments on the proposed rule, particularly on the provisions concerning the determination of good-faith efforts.

B. Section-by-Section Analysis

SBA proposes to amend § 125.3(a) to clarify that the purpose of the subcontracting assistance program is to provide maximum practicable subcontracting opportunities to small business concerns. The proposed § 125.3(a) specifies the various categories of small businesses that must be afforded the maximum practicable subcontracting opportunities under section 8(d) of the Small Business Act (15 U.S.C. 637(d)), including small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The proposed § 125.3(a) also makes clear that the subcontracting assistance program implements the requirement that large prime contractors provide subcontracting plans.

SBA proposes to amend § 125.3(b) to clarify the responsibilities of all prime contractors, as provided under section 8(d)(3) of the Small Business Act (15 U.S.C. 637(d)(3)). Section 8(d)(3) applies to "all contracts let by any Federal agency" that exceed the simplified acquisition threshold, that do not include work that will be performed entirely outside of the United States, and that are for services that are personal in nature. It requires all awardees of such prime contracts to carry out "the policy of the United States that small business concerns" have the "maximum practicable opportunity to participate" in the performance of contracts, including subcontracts for subsystems, assemblies,

components, and related services for major systems.

In implementing that existing statutory requirement, the proposed § 125.3(b)(1) expressly requires that all prime contractors, including small business prime contractors, that receive the covered Federal contracts ensure that small business concerns have the maximum practicable opportunity to participate in the performance of the contract as subcontractors and suppliers, consistent with the efficient performance of the contract. SBA believes that the responsibility to maximize subcontracting opportunities for small businesses applies equally to all prime contractors that receive contracts above the simplified acquisition threshold. This provision does not, however, extend the requirement for subcontracting plans to small business concerns. As indicated in the proposed § 125.3(c), discussed below, the requirement for subcontracting plans applies only to large businesses that receive a contract or contract modification exceeding \$500,000, or \$1,000,000 in the case of construction of a public facility.

The proposed § 125.3(b)(2) lists examples of actions prime contractors may take to increase small business subcontracting opportunities. Two comments submitted in response to SBA's proposed bundling rule published in the **Federal Register** on January 31, 2003 (67 FR 47244), requested strategies for maximizing small business subcontracting opportunities. In response to those comments, the proposed § 125.3(b)(2) provides specific guidance to prime contractors on providing the maximum practicable subcontracting opportunities to small businesses.

The proposed guidance in § 125.3(b)(2) is not intended to impose additional burdens or responsibilities on small businesses or to operate as a basis for denying a small business a contract award. Instead, SBA intends that the proposed guidance provide suggested measures for ensuring small business subcontracting opportunities in procurements. As discussed below in connection with the proposed § 125.3(d), documentation that a large business performed the actions and strategies outlined in the proposed § 125.3(b)(2), may serve as evidence that the large business prime contractor made a good-faith effort to comply with its subcontracting plan.

SBA proposes to amend § 125.3(c) to address the additional responsibilities of large prime contractors selected for award of a contract or contract modification that exceeds \$500,000, or

\$1,000,000 in the case of construction of a public facility. These responsibilities include the existing requirements for submitting subcontracting plans, providing timely subcontracting reports and for cooperating in compliance reviews. The proposed § 125.3(c)(1)(v), sets forth the pre-award written notification currently included in the existing § 125.3(a) of SBA's regulations. The current provision requires large prime contractors to provide pre-award written notification to unsuccessful small business offerors on all subcontracts over \$10,000 for which a small business concern received a preference. Unlike that provision, the proposed § 125.3(c)(1)(v) requires such pre-award notification on all subcontracts over \$100,000. This proposed increase in the dollar threshold from \$10,000 to \$100,000 conforms to the simplified acquisition threshold. It also is in keeping with the Administration's efforts to make Government regulations more practical and less burdensome on businesses.

The proposed § 125.3(c)(2) addresses commercial plans. This section makes clear that large prime contractors may use commercial plans for services as well as for products, as long as the product or service being procured meets the definition of a commercial item in 48 CFR 2.101.

SBA proposes to amend § 125.3(d) to address good-faith effort with respect to a large prime contractor's compliance with its subcontracting plan. Under section 8(d)(4)(f) of the Small Business Act (15 U.S.C. 637(d)(4)(f)), a contracting officer may assess liquidated damages against a large business that failed to make a good-faith effort to achieve the small business goals in its subcontracting plan. Several commenters on the SBA's January 31, 2003, proposed bundling rule requested guidance on evaluating a large prime contractor's good-faith efforts to achieve its small business goals. The proposed § 125.3(d) indicates that evidence of good-faith efforts includes supporting documentation that the contractor performed the actions described in the proposed § 125.3(b). The proposed § 125.3(d) further provides that evidence of good faith may also include supporting documentation that other contractors awarded contracts of similar scope, size or dollar value did not achieve or exceed the goals stated in their subcontracting plan, despite their good-faith efforts to do so.

SBA proposes to add a new § 125.3(e) to explain the role of SBA's CMRs, who perform a number of different activities to further the objectives of SBA's subcontracting assistance program. In

2002, the General Accounting Office conducted a study (GAO-03-54) on the role of the CMR. The Study, entitled "The Commercial Marketing Representatives Role Needs To Be Strategically Planned and Assessed" concluded that SBA should seek ways to strengthen the position of CMRs. One of the most important functions of CMRs is to assist prime contractors to understand and comply with the requirements of the subcontracting assistance program. Over time, SBA has found that it is preferable to familiarize a prime contractor with the requirements at the time it receives its first contract requiring a subcontracting plan, than to wait until the time of the compliance review. This avoids misunderstandings and other problems that may result in marginal and Unsatisfactory ratings.

SBA has developed the Subcontracting Orientation and Assistance Review (SOAR) to implement this concept. This proposal incorporates the SOAR into SBA's regulations. Section 125.3(e) describes the CMRs responsibilities in conducting SOARS to assist prime contractors in understanding and complying with the requirements under the subcontracting assistance program.

SBA also proposes to add a new § 125.3(f) to address SBA's approach to conducting compliance reviews of prime contractors with subcontracting plans. This section provides the procedures for conducting on-site compliance reviews and follow-up reviews and validation of the SF-295, Summary Subcontract Report, and SF-294, Subcontracting Report for Individual Contracts. The proposed § 125.3(f) further describes the existing rating process and the different procedures for conducting compliance reviews of prime contractors under a commercial plan. This section also indicates that SBA is authorized to enter into agreements with other Federal agencies and entities to conduct compliance reviews and otherwise further the objectives of the subcontracting program. SBA has entered into one such agreement with the Defense Contracts Management Agency under a Memorandum of Understanding dated May 9, 2003.

Finally, in response to comments to SBA's proposed bundling rule published on January 31, 2003 (68 FR 5134), SBA proposes to add a new § 125.3(g) to address the use of subcontracting plans as an evaluation factor. Several commenters urged that SBA explore incentives that would reward large prime contractors for their subcontracting opportunities and

achievements. In response to those comments, the proposed § 125.3(g) authorizes contracting officials to use subcontracting plans as an evaluation factor in the award of task orders and delivery orders under Federal Supply Schedules, Government-wide acquisition contracts, and multi-agency contracts. Specifically, the section allows contracting officers to consider the proposed subcontracting goals for the specific requirement and the contractor's past performance in meeting its subcontracting goals in previous contracts.

C. Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act

OMB has determined that this rule is a significant regulatory action under Executive Order 12866. The proposed rule revises the SBA regulation governing small business subcontracting assistance to define good-faith effort. For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3 of that Order. For purposes of Executive Order 13132, SBA has determined that this proposed rule has no federalism implications warranting the preparation of a Federalism Assessment. For purposes of the Paperwork Reduction Act, 44 U.S.C. ch. 35, SBA determines that this proposed rule imposes no new reporting or recordkeeping requirements.

SBA certifies that this proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. The proposed rule does not impose any new substantive responsibilities, nor does it require any new reporting or recordkeeping requirements. Instead, this proposed rule clarifies the existing statutory responsibilities under the subcontracting assistance program, including the responsibilities of prime contractors to maximize small business subcontracting opportunities. It also provides guidance to government officials in monitoring and determining the achievements of subcontracting goals. Accordingly, the proposed rule is primarily procedural in nature and therefore would not have a significant economic impact on small entities. As a result, no initial regulatory flexibility analysis is required under 5 U.S.C. 605(b).

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, and Technical assistance.

For the reasons set forth in the preamble, SBA proposes to amend 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for 13 CFR part 125 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 637 and 644; 31 U.S.C. 9701 and 9702.

2. Revise § 125.3 to read as follows:

§ 125.3 Subcontracting assistance.

(a) *General.* The purpose of the subcontracting assistance program is to provide the maximum practicable subcontracting opportunities for small business concerns, including small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The subcontracting assistance program implements section 8(d) of the Small Business Act, which includes the requirement that other-than-small firms awarded contracts that offer subcontracting possibilities by the Federal Government in excess of \$500,000, or in excess of \$1,000,000 for construction of a public facility, must submit a subcontracting plan to the contracting agency. The Federal Acquisition Regulation sets forth the requirements for subcontracting plans in 48 CFR 19.7, and the clause at 48 CFR 52.219–9.

(b) *Responsibilities of prime contractors.* (1) Prime contractors (including small business prime contractors) selected to receive a Federal contract that exceeds the simplified acquisition threshold, that will not be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, and that is not for services which are personal in nature, are responsible for ensuring that small business concerns have the maximum practicable opportunity to participate in the performance of the contract, including subcontracts for subsystems, assemblies, components, and related services for major systems,

consistent with the efficient performance of the contract;

(2) Efforts to provide the maximum practicable subcontracting opportunities for small business concerns include:

(i) Breaking out contract work items into economically feasible units, as appropriate, to facilitate small business participation;

(ii) Conducting market research to identify small business subcontractors and suppliers through all reasonable means, such as performing on-line searches on SBA's PRO-Net, posting Notices of Sources Sought and/or Requests for Proposal on SBA's SUB-Net, and attending pre-bid 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 the 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; and

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

(c) *Additional responsibilities of large prime contractors.* (1) In addition to the responsibilities provided in paragraph (b) of this section, a prime contractor selected for award of a contract or contract modification that exceeds \$500,000, or \$1,000,000 in the case of construction of a public facility, is responsible for:

(i) Submitting and negotiating before award an acceptable subcontracting plan that reflects maximum practicable utilization of small businesses in the performance of the contract as subcontractors or suppliers. A prime contractor may submit a commercial plan, described in paragraph (c)(2) of this section, instead of an individual subcontracting plan, when the product or service being furnished to the Government meets the definition of a commercial item under 48 CFR 2.101;

(ii) Making a good-faith effort to achieve the dollar and percentage goals and other elements in its subcontracting plan;

(iii) Submitting a timely, accurate, and complete SF-294, Subcontracting Report for Individual Contract, and SF-295, Summary Subcontract Report; or entering the same information into an electronic database approved by SBA;

(iv) Cooperating in the reviews of subcontracting plan compliance, including providing requested information and supporting documentation reflecting actual achievements and good-faith efforts to meet the goals and other elements in the subcontracting plan; and

(v) Providing pre-award written notification to unsuccessful small business offerors on all subcontracts over \$100,000 for which a small business concern received a preference. The written notification must include the name and location of the apparent successful offeror and if the successful offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business.

(2) A commercial plan, also referred to as an annual plan or company-wide plan, is the preferred type of subcontracting plan for contractors furnishing commercial items. A commercial plan covers the offeror's fiscal year and applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line). Once approved, the plan remains in effect during the contractor's fiscal year for all Government contracts in effect during that period. The contracting officer of the agency that originally approved the commercial plan will exercise the functions of the contracting officer on behalf of all agencies that award contracts covered by the plan.

(3) The additional prime contractor responsibilities described in paragraph (c)(1) of this section do not apply if:

(i) The prime contractor is a small business concern;

(ii) The prime contract or contract modification is a personal services contract;

(iii) The prime contract or contract modification will be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(iv) The modification is to a contract that did not originally contain the clause at 48 CFR 52.219-8, Utilization of Small Business Concerns (or equivalent prior clauses).

(d) *Determination of good-faith efforts.* Evidence that a large business

prime contractor has made a good-faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

(1) The contractor performed the actions described in paragraph (b) of this section; or

(2) Other contractors awarded contracts of similar scope, size or dollar value have not achieved or exceeded the goals stated in their subcontracting plans, despite other evidence of their good-faith efforts to comply. The determination of the subcontracting plan compliance of other contractors may be based on available subcontracting past performance records and other information.

(e) *CMR Responsibilities.* Commercial Market Representatives (CMRs) are SBA's subcontracting specialists. CMRs are responsible for:

(1) Facilitating the matching of large prime contractors with small business concerns;

(2) Counseling large prime contractors on their responsibilities to maximize subcontracting opportunities for small business concerns;

(3) Instructing large prime contractors on identifying small business concerns by means of SBA's PRO-Net, SUB-Net, and other resources and tools;

(4) Counseling small business concerns on how to market themselves to large prime contractors;

(5) Maintaining a portfolio of large prime contractors and conducting Subcontracting Orientation and Assistance Reviews (SOAR). SOARs are conducted for the purpose of assisting prime contractors in understanding and complying with their small business subcontracting responsibilities, including developing subcontracting goals that reflect maximum practicable opportunity for small business; maintaining acceptable books and records; and periodically submitting reports to the Government; and

(6) Conducting periodic reviews, including compliance reviews in accordance with paragraph (f) of this section.

(f) *Compliance reviews.* (1) A prime contractor's performance under its subcontracting plan is evaluated by means of on-site compliance reviews and follow-up reviews. A compliance review is a surveillance review that determines a contractor's achievements in meeting the goals and other elements in its subcontracting plan for both open contracts and contracts completed during the previous twelve months. A follow-up review is done after a compliance review, generally within six to eight months, to determine if the

contractor has implemented SBA's recommendations.

(2) All compliance reviews begin with a validation of the contractor's most recent SF-295, Summary Subcontract Report, and SF-294, Subcontracting Report for Individual Contracts, if applicable. The validation includes a review of the contractor's methodology for completing these reports and a sampling of specific documentation to substantiate small business status.

(3) Upon completion of the review and evaluation of a contractor's performance and efforts to achieve the requirements in its subcontracting plans, the contractor's performance will be assigned one of the following ratings: Outstanding, Highly Successful, Acceptable, Marginal, or Unsatisfactory. The factors listed in paragraph (c) of this section will be taken into consideration, where applicable, in determining the contractor's rating. However, a contractor may be found Unsatisfactory, regardless of other factors, if it cannot substantiate the claimed achievements under its subcontracting plan.

(4) Reviews and evaluations of contractors with commercial plans are identical to reviews and evaluations of other contractors, except that contractors with commercial subcontracting plans do not submit the SF-294, Subcontracting Report for Individual Contracts. Instead, goal achievement is determined by comparing the goals in the approved commercial subcontracting plan against the cumulative achievements on the SF-295, Summary Subcontract Report, for the same period. The same ratings criteria set forth in paragraph (f)(3) of this section apply to contractors with commercial plans.

(5) SBA is authorized to enter into agreements with other Federal agencies or entities to conduct compliance reviews and otherwise further the objectives of the subcontracting program. Copies of these agreements will be published on www.sba.gov/GC. SBA is the lead agency on all joint compliance reviews with other agencies.

(g) *Subcontracting consideration in source selection.* When an ordering agency anticipates placing an order or entering into a blanket purchase agreement against a Federal Supply Schedule, government-wide acquisition contract (GWAC), or multi-agency contract (MAC), the ordering agency may evaluate subcontracting as an important factor in its source selection process. This evaluation may include any of the following:

(1) The subcontracting to be performed on the specific requirement;

(2) The goals negotiated in the commercial plan, if applicable; and

(3) The contractor's past performance in meeting subcontracting goals in previous contracts.

Dated: October 8, 2003.

Hector V. Barreto,
Administrator.

[FR Doc. 03-26515 Filed 10-17-03; 8:45 am]

BILLING CODE 8025-01-P