

Limitations on Subcontracting: Evaluation and Administration

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April, 2017



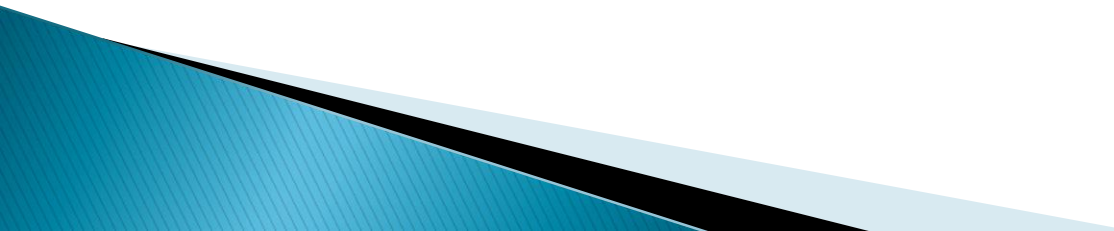
Limitations on Subcontracting

- ▶ Section 1651 National Defense Authorization Act of 2013
- ▶ In the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount **paid** to the concern under the contract
- ▶ In the case of a contract for supplies (other than from a regular dealer in such supplies), may not expend on subcontractors more than 50 percent of the amount, less the cost of materials, **paid** to the concern under the contract
- ▶ **Similarly Situated Entities** – Contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted
- ▶ SBA Final Rule – 81 FR 34243 (May 31, effective June 30, 2016)

NDAA 2013 Final Rule – LOS

- ▶ Similarly situated entity is a subcontractor that has the same small business program status as the prime contractor.
- ▶ This means that: for a HUBZone requirement, a subcontractor that is a qualified HUBZone small business concern; for a small business set-aside, partial set-aside, or reserve a subcontractor that is a small business concern; for a SDVO small business requirement, a subcontractor that is a self-certified SDVO SBC; for an 8(a) requirement, a subcontractor that is an 8(a) certified Program Participant; for a WOSB or EDWOSB contract, a subcontractor that has complied with the requirements of part 127.
- ▶ 13 CFR 125.1

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- ▶ In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.
 - ▶ 13 CFR 125.1
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- ▶ In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded.
 - 13 CFR 125.6(a)(1)

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- ▶ In the case of a contract for supplies or products (other than from a nonmanufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded.
- ▶ Cost of materials are excluded and not considered to be subcontracted.
 - 13 CFR 125.6(a)(2)(i)

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- ▶ In the case of a contract for general construction, it will not pay more than 85% of the amount paid by the government to it to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.
 - 13 CFR 125.6(a)(3)

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- ▶ In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime may be paid to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 75% subcontract amount that cannot be exceeded.
- ▶ Cost of materials are excluded and not considered to be subcontracted.
 - 13 CFR 125.6(a)(4)

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- ▶ Mixed contracts. Where a contract combines services and supplies, the contracting officer shall select the appropriate NAICS code as prescribed in § 121.402(b) of this chapter.
- ▶ The contracting officer's selection of the applicable NAICS code is determinative as to which limitation on subcontracting and performance requirement applies.
- ▶ In no case shall the requirements of paragraph (a)(1) and (a)(2) of this section both apply to the same contract.
- ▶ The relevant limitation on subcontracting in paragraph (a)(1) or (a)(2) of this section shall apply only to that portion of the contract award amount.
 - 13 CFR 125.6(b)

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- ▶ Subcontracts to similarly situated entities. A small business concern prime contractor that receives a contract listed in §125.6(a) and spends contract amounts on a subcontractor that is a similarly situated entity shall not consider those subcontracted amounts as subcontracted for purposes of determining whether the small business concern prime contractor has violated §125.6(a), to the extent the subcontractor performs the work with its own employees.
- ▶ Any work that the similarly situated subcontractor does not perform with its own employees shall be considered subcontracted SBA will also exclude a subcontract to a similarly situated entity from consideration under the ostensible subcontractor rule (§ 121.103(h)(4)).
 - 13 CFR 125.6(c)

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- ▶ Determining compliance with applicable limitation on subcontracting.
The period of time used to determine compliance for a total or partial set-aside contract will be the base term and then each subsequent option period. For an order set aside under a full and open contract or a full and open contract with reserve, the agency will use the period of performance for each order to determine compliance unless the order is competed among small and other-than-small businesses (in which case the subcontracting limitations will not apply).
- ▶ (1) The contracting officer, in his or her discretion, may require the concern to comply with the applicable limitations on subcontracting and the nonmanufacturer rule for each order awarded under a total or partial set-aside contract.
- ▶ (3) Work performed by an independent contractor shall be considered a subcontract, and may count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.
 - 13 CFR 125.6(e)

SAMPLE LOCAL CLAUSE – LIMITATIONS ON SUBCONTRACTING COMPLIANCE AND REPORTING REQUIREMENTS -- SERVICES (XXX 20XX)

(a) Small Business Set-aside Prime Contractor Requirement: This clause is applicable to the small business set-aside prime Contractor required to perform a certain percentage of work with its own employees and/or its similarly situated entities or, in the case of supplies, a percentage of the cost of manufacturing in accordance with the requirements set forth in 13 CFR 125.6 'Prime Contractor Performance Requirements – Limitations on Subcontracting' and FAR 52.219-14 'Limitations on Subcontracting'.

(b) Service Contracts: Where a small business set-aside prime Contractor must meet the applicable percentage of work requirement as identified in FAR 52.219-14(b)(1), the contract type determines which computational method to apply as follows:

(1) Indefinite Delivery/ Indefinite Quantity (IDIQ) contracts: The Contractor shall submit a semi-annual report to the Contracting Officer documenting compliance with FAR 52.219-14(b)(1) and/or 13 CFR 124.510(c) demonstrating that it has performed the required percentage of costs for the total of all combined orders issued to that date. If the Contractor is using Similarly Situated Entities it must be clearly identifiable in the submitted reports. If the required percentage is not being met, the Contractor shall include, with the semiannual report, a plan to meet the required percentage before the contract end date.

(2) Contracts other than IDIQ: The Contractor shall submit a semi-annual report to the Contracting Officer documenting compliance with FAR 52.219-14(b)(1). If the Contractor is using Similarly Situated Entities it must be clearly identifiable in the submitted reports. If the required percentage is not being met, the Contractor shall also include, with the semiannual report, a plan to meet the required percentage before the contract end date.

(c) Instructions for Calculation of the Cost of Contract Performance Incurred for Personnel in Accordance with 'Limitations on Subcontracting': (FAR 52.219-14) – Services: When the work in this contract is identified as 'Services (except construction)' in accordance with FAR 52.219-14(b)(1), the small business prime Contractor shall utilize the following computational steps/instructions to determine whether the small business prime Contractor and its' similarly situated entities meets the applicable percentage of cost incurred for personnel with its own employees.

Cont'd SAMPLE LOCAL CLAUSE — LIMITATIONS ON SUBCONTRACTING COMPLIANCE AND REPORTING REQUIREMENTS -- SERVICES (XXX 20XX)

(1) Identify what parts of the project will be performed by small business prime Contractor employees and or it's similarly situated entities and the related cost for each part. Provide and illustrate the calculation for Cost of Contract Performance Incurred for Prime Personnel, in accordance with the definitions below:

(i) "Cost of Contract Performance Incurred for Prime Personnel" includes fully burdened prime labor cost (direct labor and all indirect costs applied to direct labor – e.g., fringe, labor overhead, and G&A). Also includes all costs associated with the Primes Similarly Situated Entities. All other direct costs (material, travel, ODCs, subcontracts, consultants, etc.) and "below the cost line" mark-ups -- such as profit and gross receipts tax -- are excluded.

(ii) "Cost of Contract Performance Incurred for Subcontractor/Consultant Personnel" includes fully burdened subcontractor labor (direct labor and all indirect costs applied to direct labor – e.g., fringe, labor overhead, and G&A) and consultant labor cost. All other direct costs (material, travel, ODCs, tiered subcontracts, tiered consultants, etc.) and "below the cost line" mark-ups -- such as profit and gross receipts tax -- are excluded. NOTE: Tiered subcontract(s) fully-burdened labor costs and tiered consultant labor costs should be computed in the same manner.

(iii) "Total Cost of Contract Performance Incurred for Personnel" means the total fully burdened labor cost for prime and subcontractor(s)/consultant personnel. (c)(1)(i) + (c)(1)(ii)

(iv) "Percent of Cost of Contract Performance Incurred by Prime Personnel" is calculated by dividing the above defined cost of "Cost of Contract Performance Incurred for Prime Personnel" by the "Total Cost of Contract Performance Incurred for Personnel" and multiplying the result by 100."

(2) Use a format similar to the following to identify and calculate "Cost of Contract Performance Incurred for Prime Personnel". Refer to the definitions above pertaining to "Cost of Contract Performance Incurred by Prime Personnel", "Total Cost of Contract Performance Incurred for Personnel" and "Percent of Cost of Contract Performance Incurred for Prime Personnel."

Clearly describe the Work to be Performed by Prime Personnel and/or Similarly Situated Entities:

Show Calculation of the Cost of Contract Performance Incurred for Personnel:

1. Total cost of contract = \$____
2. Total cost of performance by Prime and its similarly situated entities = \$____
3. Percentage of Contract Performance Incurred by Prime Personnel and/or Similarly Situated Entities: = (line 1 / line 2) * 100 = ____%

(End of clause)

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