



Billing Code: 8025-01

## SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 125

RIN 3245-AG71

Credit for Lower Tier Small Business Subcontracting

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to implement section 1614 of the National Defense Authorization Act for Fiscal Year 2014 (NDAA 2014). Section 1614 amended the Small Business Act to provide that where a prime contractor has an individual subcontracting plan for a specific prime contract with an executive agency, the prime contractor shall receive credit towards its subcontracting plan goals for awards made to small business concerns at any tier under the contract. The changes authorized by this statute will allow an other than small prime contractor that has an individual subcontracting plan for a contract to receive credit towards its small business subcontracting goals for subcontract awards made to small business concerns at any tier, to the extent reported on the subcontracting plans of its lower tier subcontractors. The final rule also implements the statutory requirements related to the subcontracting plans of all subcontractors that are required to maintain such plans, including the requirement to monitor subcontractors' performance and compliance toward reaching the goals set out in those plans as well as their compliance with subcontracting reporting requirements. SBA is also clarifying that the size standard for a particular subcontract must appear in the solicitation for the subcontract.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Introduction

The final rule implements Section 1614 of the National Defense Authorization Act for Fiscal Year 2014, Public Law 113-66, December 26, 2013 (hereinafter NDAA 2014). Section 1614 amended section 8(d)(6)(D) of the Small Business Act, 15 U.S.C. 637(d)(6)(d), to provide that where a prime contractor has a subcontracting plan for a specific prime contract with an executive agency, as required by Section 8(d) of the Small Business Act, the prime contractor will receive credit towards its subcontracting plan goals for awards made to small business concerns at any tier under the contract, to the extent reported under the subcontracting plan of a lower tier other than small subcontractor. When a prime contractor awards a subcontract to a firm, it is generally considered a first tier subcontract. That subcontractor may award a subcontract, which would be considered a second tier subcontract, and so on. Currently, with few exceptions, a prime contractor cannot receive credit towards its small business subcontracting plan goals for awards made below the first tier.

SBA is amending its regulations to require other than small business prime contractors to count lower tier small business subcontract awards towards their federal small business subcontracting goals on unrestricted federal contracts, to the extent the

lower tier subcontractor are required to report the information. With limited exceptions, unrestricted federal procurements and subcontracts over \$700,000 (\$1.5 million for construction of any public facility) include Federal Acquisition Regulation (FAR) clause 52.219-9 (Small Business Subcontracting Plan), which requires other than small contractors and their lower tier subcontractors to make a good faith effort to meet or to exceed the small business subcontracting goals established in their respective subcontracting plans. Failure to make this effort could result in liquidated damages, default termination, and negative performance reviews. For a subcontracting plan for a specific prime contract, the contractor or subcontractor is required to submit an Individual Subcontract Report (ISR) and Summary Subcontracting Report (SSR). The ISR is submitted semiannually during contract performance and upon contract completion. The SSR is submitted annually to procuring agencies. Both forms are submitted through the Electronic Subcontracting Reporting System (eSRS). Until this final rule, a large prime contractor could not take credit for a subcontract award to a second-tier small business subcontractor. Lastly, large prime contractors are already required to identify the size standard that applies to a subcontract. 13 CFR §§ 121.410, 121.411, 125.3(c)(1)(v). Subcontractor size representation is reviewed during compliance reviews (See 13 CFR § 125.3(f)(2)(i)) and size representations at the subcontract level may be protested (See 13 CFR 121.411). In addition, Section 868 of the National Defense Authorization Act of 2016, P.L. 114-92 (November 25, 2015), requires SBA, as part of the its scorecard on agency small business prime contracting and subcontracting performance, to compare “The number of small business concerns, 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 awarded subcontracts in each North American Industry Classification System code during the fiscal year and a comparison to the number of awarded subcontracts during the prior fiscal year, if available.”

SBA published a proposed rule regarding these changes in the Federal Register on October 6, 2015. 80 FR 60300 (October 6, 2015). SBA received a total of 13 comments. Two of these comments were generally positive without offering any comments on specific provisions. SBA received three comments that were generally opposed to the rule without offering comment on specific provisions. These three commenters generally felt that the statute and the regulations were likely to hurt small business subcontractors rather than help them, and would likely result in large prime contractors attempting to exert more control over their subcontractors. SBA received one comment that was not relevant; this comment made no mention of the proposed regulation.

Two commenters did not think that SBA’s regulatory impact analysis took into consideration the extra burden that large businesses would have under these changes. The commenters claimed that the costs and challenges of collecting the data are more than minimal, and that large businesses will incur more than minimal costs. Neither commenter provided data or analysis on what those costs would be, just a general statement that they would be more than minimal. SBA addressed this issue in its proposed rule. Any costs associated with the regulatory implementation of these provisions of the NDAA 2014 will be included in the proposed Federal Acquisition Regulation (FAR) changes. Thus, any Paperwork Reduction Act (PRA) costs associated

with proposed rulemaking and implementation will occur during the FAR rulemaking process.

SBA received one comment seeking clarification that this rule and credit for lower tier subcontracting does not affect Agencies' prime contract goaling numbers. This rule only applies to subcontracting plans, not to agency prime contract goaling requirements. Generally, agencies do not count subcontracting dollars awarded to small business concerns towards their prime contract goaling requirements, except for the Department of Energy. This rule does not change reporting under the SSR, which is how agencies receive credit for subcontracting. Firms will continue to report only their first-tier subcontracts on the SSR.

SBA received one comment regarding enforcement of these regulations prior to FAR regulatory implementation and updates to eSRS. As noted in the proposed rule, it is SBA's position that this regulation will require changes to FAR prior to full implementation in eSRS.

## Summary of Proposed Rule, Comments, and SBA's Responses

### Part 121

SBA proposed amending § 121.411(b) allowing prime contractors to accept a subcontractor's size certification electronically. The list of enumerated methods is illustrative only, and is not exhaustive. SBA received several comments on this issue, and all believed the proposed change was positive, but that more clarity was needed about who may accept the certifications, and whether this applied to socioeconomic certifications. Thus, SBA is adopting the language as proposed, with minor additions for clarity. The final rule now makes clear that prime and subcontractors may rely on any

form of electronic certification that they deem appropriate provided it is given in connection with an offer for specific subcontract and it includes the language in SBA's regulation which provides that in order to accept an electronic representation, the representation must be in connection with an offer for a subcontract and the solicitation and subcontract provides that the subcontractor verifies by submission of the offer that the size and socioeconomic representations and certifications are current accurate and complete as of the date of offer for the subcontract. See 13 CFR §§ 121.411(b), 125.3(c)(1)(v).

#### Part 125

In proposed § 125.3(a)(1), SBA included the new statutory definition for a subcontract that was enacted by NDAA 2014. SBA received one comment that requested more specificity with regard to what will be considered a subcontract. Specifically, this commenter wanted lists of what would and would not be considered a subcontract, based in part on FAR definitions. The proposed definition is taken from the statute, which was added by NDAA 2014, and SBA is adopting the statutory definition in the final rule. See 15 U.S.C. 632(dd)(1).

In proposed § 125.3(a)(1)(i)(C), SBA provided guidance on when a prime contractor may receive credit for lower tier subcontracting. Specifically, the proposed rule stated that only individual subcontracting plans were entitled to receive the credit. SBA has revised this section based on the comments. Specifically, the final rule clearly states how commercial and individual plans differ, and what the prime contractor's and subcontractor's responsibilities and requirements are for individual subcontracting plans as required by the Small Business Act. SBA received several comments asking for

clarification, and several comments asking SBA to also apply the new guidelines to commercial subcontracting plans. SBA addressed this issue in its proposed rule, “Section 1614 applies only when determining whether or not a prime contractor has met its individual subcontracting plan goals. Thus, Section 1614 does not apply where the prime contractor has a commercial plan or comprehensive subcontracting plan.” 80 FR 60300, 60301 (October 6, 2015). The Small Business Act specifically states that the prime contractor shall receive lower tier credit “if the subcontracting goals pertain to a single contract with the executive agency.” 15 U.S.C. 637(d)(16)(A)(i). A commercial plan, like a comprehensive subcontracting plan, applies to more than one government contract, and thus the lower tier credit provisions do not apply to those types of plans.

SBA received two comments on the issue of double counting and the incorporation of subcontracting plans from lower tier, other than small subcontractors. One commenter suggested that SBA amend the language of the regulation and add examples to provide clarity. One commenter requested that SBA remove the requirement that other than small subcontractors are required to have their own subcontracting plan, if their plan is incorporated into the prime contractor’s plan. The requirement that subcontractors have their own plan is an independent statutory requirement that must be met. SBA has crafted the final rule to make it clear that incorporation of lower tier goals does not change the requirements of the lower tier subcontractors to have its own subcontracting plans, meet their goals, and report on its first tier performance. Further, the prime contractor will continue to report on performance at the first tier level. The prime contractor’s performance towards its lower tier small business subcontracting goals will be based on the reports of its other than small lower tier subcontractors with

subcontracting plans to the extent that the lower tier subcontractor are required to report. The prime contractor remains responsible for ensuring accurate reporting to the government.

SBA received two comments on proposed § 125.3(c)(1)(i), which proposed to require that in order for a prime contractor to receive credit for awards made at lower tiers, the prime contractor would be required to have a complete subcontracting plan, including incorporation of its subcontractor's goals, prior to award. The Small Business Act requires that subcontracting plans be submitted, negotiated, and approved before contract award. 15 U.S.C. 637(d)(4)(B) and (C). The commenters contend that having all of the necessary steps done and completed prior to award, including the incorporation of lower tier subcontractor's plans, is not practicable on all contracts. The commenters state that often the prime will not be aware of which companies their subcontractors may be utilizing. The Small Business Act provides that prime contractors "shall" receive credit for subcontractors at any tier pursuant to a subcontracting plan required by section 15 U.S.C. 637(d)(6)(D), which is the statutory requirement to require other than small subcontractors to have subcontracting plans if the subcontract exceeds certain threshold amounts. 15 U.S.C. 637(d)(16)(A)(i). Thus, the prime contractor with an individual subcontracting plan will be obligated to consider and establish goals based on the subcontracting plans of its other than small subcontractors prior to award of the contract.

SBA proposed to amend § 125.3(c)(1)(v) to clarify which NAICS should apply to a subcontract and how primes should inform potential subcontractors which NAICS and corresponding size standard will be applied. SBA's regulations currently require that the prime contractor (or subcontractor that is subcontracting to another concern) must assign



a NAICS code to the subcontract that best describes the work being performed or the product being purchased by that subcontract. The contractor may not simply pass down the NAICS assigned to the prime contract to all subcontracts. SBA received five negative comments on this requirement, and one comment that believed it would be in conflict with the FAR. However, this is not a new requirement. SBA's current regulations require that each subcontract have a NAICS assigned that describes the work being performed under the subcontract, with the corresponding size standard. While not a new requirement, SBA believes it is important to reiterate why this requirement is necessary to accurately reflect small business participation in subcontracting. Utilizing the prime contract's NAICS for subcontracts may not always accurately describe the work being done under that subcontract. SBA does not have a one-size-fits-all definition of what a small business is, because whether a firm is small depends largely on what type of work it performs, or what type of product it supplies. Utilizing one NAICS code for all subcontracts would distort the calculation of small business subcontracting performance.

Several comments requested clarification on whether, based on the wording of this rule, all subcontracts would require a solicitation. That was not the intention of the regulation, and SBA has added a sentence to the regulation to make this clear. However, it should also be clear that the prime contractor (or lower tier subcontractor that is subcontracting) assigning the NAICS to the subcontract is responsible for providing notice of the size standard to prospective subcontractors prior to acceptance and formation of a subcontract. This is necessary to ensure that small businesses can

accurately certify to their size status. SBA also added parentheticals to make clear that this applies to prime contractors and subcontractors.

SBA proposed to add § 125.3(c)(1)(x) to implement 15 U.S.C. 637(d)(6)(D) of the Small Business Act, requiring prime contractors and subcontractors with subcontracting plans to do various tasks in connection with their subcontractors with subcontracting plans. SBA received one negative comment stating the requirements were too burdensome and one comment requesting clarification concerning whether these requirements pertain to commercial subcontracting plans. SBA also received a comment requesting that the requirements of this paragraph and paragraph (xi) be required only if the prime contractor incorporates its subcontractors' subcontracting plans. The requirements articulated in the proposed rule are required by statute for all subcontracting plans, and thus we are adopting the language as proposed in the final rule. Subcontractors of primes with commercial plans do not have to have subcontracting plans if the subcontract is for a commercial item. Consequently, the requirements of § 125.3(c)(1)(x) apply to a prime with a commercial plan to the extent its subcontractors have their own individual subcontracting plans, not commercial plans

SBA received one comment stating that the dollar value thresholds in SBA's rule are different than the recently updated FAR thresholds. The revised inflation adjusted subcontracting plan thresholds became effective after SBA issued the proposed rule, and SBA has updated the thresholds in this final rule.

SBA proposed to add § 125.3(c)(1)(xi) in order to incorporate new requirements from the statute concerning the records the prime contractor must maintain to demonstrate subcontractors at all tiers comply with the subcontracting plan requirements.

Two commenters noted confusion as to what was meant by the phrase “recite the types of records the prime will maintain.” SBA is changing language to make clear that a written statement is required.

Finally, with respect to liquidated damages, the Small Business Act provides that each contract subject to the requirements for a subcontracting plan shall contain a clause for the payment of liquidated damages upon a finding that a prime contractor has failed to make a good faith effort to comply with the requirements imposed on such subcontractor by section 8(d)(4)(F) of the Small Business Act, 15 U.S.C. 637(d)(4)(F). Thus, a prime contractor could be subject to liquidated damages if it fails to make a good faith effort to review and approve subcontracting plans submitted by its subcontractors; monitor subcontractor compliance with its approved subcontracting plans; ensure that subcontracting reports are submitted by its subcontractors when required; acknowledge receipt of its subcontractors' reports; compare the performance of its subcontractors to subcontracting plans and goals; and discuss performance with subcontractors when necessary to ensure its subcontractors make a good faith effort to comply with their subcontracting plans.

Compliance with Executive Orders 12866, 13563, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).

#### Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action for the purposes of Executive Order 12866.

Accordingly, the next section contains SBA’s Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

Regulatory Impact Analysis:

1. Is there a need for the regulatory action?

The final regulations implement section 1614 of the National Defense Authorization Act for Fiscal Year 2014. Section 1614(c)(3) requires the Administrator to promulgate regulations necessary to implement the Act.

2. What are the potential benefits and costs of this regulatory action?

The benefits of the final regulations are minimal and the final costs cannot be determined until the FAR rules are proposed. Other than small business prime contractors and subcontractors already establish individual subcontracting plan goals and report on their achievements if the subcontracting plan thresholds are met. Under section 1614 of the NDAA 2014, a prime contractor with an individual subcontracting plan will receive credit towards its goals for small business performance at lower tiers. Thus, there will be some costs to the prime contractor to propose subcontracting plan goals that incorporate small business performance at lower tiers and to ensure that their subcontractors have plans and submit required reports, and there will also be costs to the Government to evaluate whether the prime contractor's goals adequately address maximum practicable small business subcontracting opportunity at all tiers. SBA estimates that there were approximately 34,000 individual subcontracting plans in fiscal year 2015, and that approximately 24,000 were at the prime contract level. Other than small firms may have multiple individual subcontracting plans at the prime and sub level, so the number of other than small firms affected by this rule will be less than the number of individual subcontracting plans, but we cannot say with any precision how many will be impacted. There may also be costs to the Government as eSRS may have to be

modified to allow other than small prime contractors to receive small business credit at any tier towards their subcontracting plan goals. However, SBA is not able to estimate these costs because the system will be modified when this rule is implemented into the FAR and the process for capturing the lower tier reports is further defined. There should not be any costs imposed on small business concerns as this rule does not change any reporting or recordkeeping requirements for small business concerns.

3. What are the alternatives to this final rule?

Many of the final regulations are required to implement specific statutory provisions which require promulgation of implementing regulations. There are no other alternatives that would meet the statutory requirements.

Executive Order 13563

As part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA has solicited comments and suggestions from the public and the procuring agencies on how to best implement section 1614 of NDAA 2014. For example, SBA received comments from the American Bar Association Section of Public Contract Law, the Associated General Contractors of America, the Council of Defense and Space Industry Associations, the U.S. Women's Chamber of Commerce, and Women Impacting Public Policy (WIPP).

SBA has incorporated those comments and suggestions to the extent feasible. SBA has considered the comments received in response to the proposed rule and incorporated public input into the final rule to the extent feasible.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this final rule, to the

extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

#### Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this final rule has no federalism implications warranting preparation of a federalism assessment.

#### Paperwork Reduction Act, 44 U.S.C. Ch. 35

For purposes of the Paperwork Reduction Act (PRA), SBA has determined that this final rule, if adopted in final form, would not impose new government-wide reporting and recordkeeping requirements on other than small prime contractors and subcontractors. If any information collection procedures change or are amended during the subsequent FAR rulemaking of this SBA rule, they will be addressed in the FAR rulemaking process.

#### Regulatory Flexibility Act, 5 U.S.C. 601-612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines “small entity” to include “small businesses,” “small organizations,” and “small

governmental jurisdictions.” This final rule concerns various aspects of SBA’s contracting programs. As such, the rule relates to small business concerns, but would not affect “small organizations” or “small governmental jurisdictions” because those programs generally apply only to “business concerns” as defined by SBA regulations, in other words, to small businesses organized for profit. “Small organizations” or “small governmental jurisdictions” are non-profits or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA’s regulations.

This rule will impact other than small business concerns, as small business concerns are not required to have subcontracting plans. Other portions of the rule simply clarify existing regulations, and do not impose new requirements on small business concerns. As discussed previously, SBA’s rules currently require firms to certify their size and socioeconomic status in connection with subcontracts. This rule simply clarifies that the requirement to certify applies to the solicitation for the subcontract. In sum, the final rule will not have a disparate impact on small businesses or impose any additional costs on small business concerns. For the reasons discussed, SBA certifies that this final rule will not have a significant economic impact on a substantial number of small business concerns.

#### List of Subjects

##### 13 CFR Part 121

Government contracts, Government procurement, Small businesses, Size standards.

##### 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA amends 13 CFR parts 121 and 125 as follows:

**PART 121--SMALL BUSINESS SIZE REGULATIONS**

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

2. Amend § 121.411 by removing the second sentence in paragraph (b) and adding two sentences in its place to read as follows:

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

\* \* \* \* \*

(b) \* \* \* Prime contractors (or subcontractors) may accept paper self-certifications as to size and socioeconomic status or a subcontractor's electronic self-certification as to size or socioeconomic status, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are accurate and complete. Electronic submission may include any method acceptable to the prime contractor (or subcontractor) including, but not limited to, size representations and certifications made in SAM (or any successor system) and electronic conveyance of subcontractor certifications in prime contractor systems in connection with an offer for a subcontract. \* \* \*

\* \* \* \* \*

**PART 125--GOVERNMENT CONTRACTING PROGRAMS**



3. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6), 637, 644, 657f, and 657q.

4. Amend § 125.3 as follows:

a. Revise paragraph (a)(1) introductory text;

b. Add paragraph (a)(1)(i)(C);

c. Add paragraph (a)(1)(i)(D);

d. Revise the heading for paragraph (c);

e. Amend paragraph (c)(1) by removing “\$650,000” and adding in its place “\$700,000”;

f. Revise the first sentence of paragraph (c)(1)(i);

g. Revise paragraph (c)(1)(v);

h. Remove the word “and” at the end of paragraph (c)(1)(viii);

i. Remove the period at the end of paragraph (c)(1)(ix) and add in its place a semi-colon and the word “and”; and

j. Add new paragraphs (c)(1)(x) and (xi).

The additions and revisions read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

(a) \* \* \*

(1) Subcontract under this section means a legally binding agreement between a contractor that is already under contract to another party to perform work and a third party (other than one involving an employer-employee relationship), hereinafter referred to as the subcontractor, for the subcontractor to perform a part or all of the work that the contractor has undertaken.

(i) \* \* \*

(C) Where the prime contractor has an individual subcontracting plan, the prime contractor shall establish two sets of small business subcontracting goals, one goal for the first tier and one goal for lower tier subcontracts awarded by other than small subcontractors with individual subcontracting plans. Under individual subcontracting plans the prime contractor shall receive credit for small business concerns performing as first tier subcontractors (first tier goal) and subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns (lower tier goal). Other-than-small, lower tier subcontractors must have their own individual subcontracting plans if the subcontract is at or above the subcontracting plan threshold, and are required to make a good faith effort to meet their subcontracting plan goals. The prime contractor and any subcontractor with a subcontracting plan are responsible for reporting on subcontracting performance under their contracts or subcontracts at their first tier. The prime contractor's performance under its individual subcontracting plan will be calculated using its own reporting at the first tier for its first tier goal and its subcontractors' first tier reports under their plans for the lower tier subcontracting goals. The prime contractor's performance under the individual subcontracting plan must be evaluated based on its combined performance under the first tier and lower tier goal.

(D) Other-than-small prime contractors and subcontractors with subcontracting plans shall report on their subcontracting performance on the Summary Subcontracting report (SSR) at their first tier only.

\* \* \* \* \*

(c) Additional responsibilities of other than small contractors. \* \* \*

(1) \* \* \*

(i) Submitting and negotiating before award an acceptable subcontracting plan that reflects maximum practicable opportunities for small businesses in the performance of the contract as subcontractors or suppliers at all tiers of performance. \* \* \*

\* \* \* \* \*

(v) The contractor must assign to each subcontract, and to each solicitation, if a solicitation is utilized, the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see § 121.410 of this chapter). A formal solicitation is not required for each subcontract, but the contractor must provide some form of written notice of the NAICS code and size standard assigned to potential offerors prior to acceptance and award of the subcontract. The prime contractor (or subcontractor) may rely on a subcontractor's electronic representations and certifications, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are current, accurate and complete as of the date of the offer for the subcontract. Electronic submission may include any method acceptable to the prime contractor (or subcontractor) including, but not limited to, size or socioeconomic representations and certifications made in SAM (or any successor system). A prime contractor (or subcontractor) may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract;

\* \* \* \* \*

(x) Except when subcontracting for commercial items, the prime contractor must require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,500,000 in the case of a subcontract for the construction of any public facility, or in excess of \$700,000 in the case of all other subcontracts, and which offer further subcontracting possibilities, to adopt a subcontracting plan of their own consistent with this section, and must ensure at a minimum that all subcontractors required to maintain subcontracting plans pursuant to this paragraph will review and approve subcontracting plans submitted by their subcontractors; monitor their subcontractors' compliance with their approved subcontracting plans; ensure that subcontracting reports are submitted by their subcontractors when required; acknowledge receipt of their subcontractors' reports; compare the performance of their subcontractors to their subcontracting plans and goals; and discuss performance with their subcontractors when necessary to ensure their subcontractors make a good-faith effort to comply with their subcontracting plans; and

(xi) The prime contractor must provide a written statement of the types of records it will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan established in accordance with paragraph (c)(1)(x) of this section, including the establishment of source lists of small business concerns, 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 efforts to identify and award subcontracts to such small business concerns; and size or socioeconomic certifications or representations received in connection with each subcontract.

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Dated: December 14, 2016.

Maria Contreras-Sweet,  
Administrator.

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