

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,