

March 27, 1999. This notice provides information on the second public hearing and seeks written requests from individuals and organizations to provide testimony at the hearing. The public hearings are intended to aid the Commission compile a factual record and prepare findings to be transmitted to the Corporation's Board of Directors, along with recommendations, to inform the Corporation's interpretation of the presence requirement and to provide the basis for any necessary and appropriate remedial action, such as a rulemaking or a request for legislative action by the Congress.

DATES: The second public hearing will be held by the Commission on April 10, 1999, at Stanford University, in Palo Alto, California. Requests to provide oral testimony at the second public hearing are due on or before April 5, 1999.

ADDRESSES: Requests to provide oral testimony may be submitted to the Office of the General Counsel, Legal Services Corporation, 750 First St. NE., 11th Floor, Washington, DC 20002-4250. Requests may be faxed at 202-336-8952 or e-mailed to adawayn@smtplsc.gov.

FOR FURTHER INFORMATION CONTACT: Suzanne B. Glasow, 202-336-8817.

SUPPLEMENTARY INFORMATION: On February 18, 1999, the Corporation published a notice in the **Federal Register** of the formation of a Commission to study the issue of when aliens must be present in the United States to be eligible for legal assistance from Corporation-funded programs. See 64 FR 8140 (Feb. 18, 1999). The February notice requested written comments on the alien eligibility matter and gave notice that comments were due at the Corporation on or before March 22, 1999. *Id.* The Corporation published a second notice on March 15, 1999, which provided information on the first hearing that was held by the Commission on March 27, 1999. See 64 FR 12822 (March 15, 1999). This notice provides information on the second hearing and solicits requests to provide oral testimony. Oral testimony at the hearing will be at the invitation of the Commission.

The second hearing has been scheduled for Saturday, April 10, 1999, and will be held in Building 60, Room 61H at Stanford University, located at 450 Serra Mall, Stanford, California.

Requests to provide oral testimony at the second hearing must be submitted in writing and are due at the Corporation on or before April 5, 1999.

Dated: March 30, 1999.

Suzanne B. Glasow,

Senior Assistant General Counsel.

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OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Policy Letter 99-X on Promoting Subcontracting Opportunities and Administering Subcontracting Plans

AGENCY: Executive Office of the President, Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP).

ACTION: OFPP is requesting comments on a policy letter supplementing the Federal Acquisition Regulation (FAR) to further promote subcontracting opportunities for small, small disadvantaged, and women-owned small business concerns.

SUMMARY: This policy letter supersedes and cancels OFPP Policy Letters 80-1, 80-2, and 80-4. It supplements FAR coverage of subcontracting opportunities for small, small disadvantaged, and women-owned small business concerns. The current trend toward contract consolidation may impact these small business concerns' ability to compete as prime contractors. We are issuing this policy letter to enhance subcontracting opportunities for such concerns.

COMMENT DATE: Comments must be received on or before June 1, 1999.

ADDRESSES: Please submit comments to Deidre A. Lee, Administrator, Office of Federal Procurement Policy, Old Executive Office Building, Room 352, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Linda Williams at 202-395-3302.

Deidre A. Lee,
Administrator.

Policy Letter 99-X to the Heads of Executive Departments and Establishments

Subject: Policy on Promoting Subcontracting Opportunities and Administering Subcontracting Plans

1. *Purpose.* This directive supplements Federal Acquisition Regulation (FAR) coverage of subcontracting plans required by section 8(d) of the Small Business Act (15 U.S.C. 637(d)) as amended by the Federal Acquisition Streamlining Act of 1994 (FASA).

2. *Supersession Information.* This Policy Letter supersedes and cancels OFPP Policy Letter 80-1, "P.L. 95-507, Section 211, Subcontracting: Agency Coordination with the Small Business Administration Resident

Procurement Center Representatives," dated January 24, 1980; OFPP Policy Letter 80-2, "Regulatory Guidance on Section 211 of Public Law 95-507," dated April 29, 1980; Supplement No. 1 to Policy Letter 80-2, dated May 29, 1981; and OFPP Policy Letter 80-4, "Women's Business Enterprise Program," dated April 29, 1980.

3. *Authority.* This Policy Letter is issued pursuant to section 6 of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. 405.

4. Definitions.

a. The definitions of commercial plan, failure to make a good faith effort to comply with the subcontracting plan, individual contract plan, master plan, small business concern, small business subcontractor, small disadvantaged business concern, and women-owned small business concern have the same meaning as that provided by FAR Part 19.

b. The term commercial item has the same meaning as that provided by FAR section 2.101.

c. The term subcontract has the same meaning as that provided by FAR section 19.701. However, purchases from a corporation, company or division of a prime contractor that are affiliates as defined in 13 C.F.R. 121.103 are not considered "subcontracts."

5. *Policy.* This document establishes policies for promoting subcontracting opportunities and administering subcontracting plans for small business, small disadvantaged business, and women-owned small business concerns. Nothing in this Policy Letter precludes an agency from establishing additional requirements regarding subcontracting plans.

6. Solicitation and Subcontracting Plan Requirements.

a. Determining the Need for a Subcontracting Plan. In addition to the requirements contained at FAR section 19.705-2, the solicitation shall inform prospective offerors that the estimated value of indefinite delivery contracts/task order and delivery order contracts will be used to determine if a subcontracting plan is required.

b. Reviewing the Subcontracting Plan. In addition to the procedures contained at FAR section 19.705-4, contracting officers shall take the following actions:

(1) Require an offeror that proposes lower goals than the target goals stated in the solicitation to explain why it cannot achieve the stated goals.

(2) Advise offerors of the availability of the following sources of information on potential small, small disadvantaged, and women-owned small business concern subcontractors:

(a) The U.S. Small Business Administration (SBA) Procurement Marketing and Access Network (PRONet) (<http://pro-net.sba.gov/>), a free on-line internet-based search engine that provides access to the profiles of more than 170,000 small businesses.

(b) The Department of Commerce, Minority Business Development Agency's (MBDA) Phoenix Data Base or the Opportunity Data Base at www.mbda.gov.

(c) State, county, and city government minority business offices.

(d) Small, minority, and women business associations.

(e) Local chambers of commerce.

(f) DOD's Centralized Contractor Registration Data Base.

(3) Encourage offerors to synopsise in the Commerce Business Daily (CBD) or advertise in trade newspapers, journals, or other communication media.

(4) Require offerors to identify other contracts that had subcontracting plans. Contact the contracting officers who administered those earlier plans to determine whether the objectives were realized and required reports were submitted on time. Overall compliance should be considered, not merely whether the goals were met.

(5) Ensure that subcontracting master plans meet the following conditions:

(a) The SBA procurement center representative has been given an opportunity to comment on the master plan and,

(b) The subcontract goals for small, small disadvantaged, and women-owned small business concerns are specifically set forth in each contract or modification.

(6) Follow the requirements of FAR clause 52.219.9 entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan" if the award is expected to exceed \$500,000 (\$1 million for construction of a public facility), unless the acquisition is reserved for small business concerns, no subcontracting opportunities exist, the contract will be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, or the contract is with Federal Prison Industries or the blind or severely disabled and is awarded under the provisions of the Javits-Wagner-O'Day Act. The clause shall apply to all other entities including large businesses; state and local governments; non-profit organizations; public utilities; educational institutions, including Historically Black Colleges and Universities (HBCUs), Minority Institutions (MIs), and foreign-owned firms that receive federal contracts if the portion of the contract to be performed in the United States exceeds the above thresholds. However, subcontracting plans are not required from HBCUs and MIs that receive contract awards above the thresholds from the Department of Defense (DOD), the Coast Guard, and the National Aeronautics and Space Administration (NASA).

(7) Ensure that small disadvantaged and women-owned small business concern dollars are included in the small business category. This means, for example, that a small disadvantaged business concern owned by a woman is counted as a small business concern, a small disadvantaged business concern, and a women-owned small business concern.

(8) Ensure that the actual achievements on the SF 294, Subcontracting Report for Individual Contracts, are reported on the same basis as the goals set forth in the contract.

(9) When subcontractors are required to adopt subcontracting plans (see FAR section 19.704(a)(9)), require offerors to review,

approve, and monitor their subcontractors' compliance with such plans. Copies of subcontractors' plans must be retained by the prime contractor until subcontract completion. A "certificate of compliance" or statement from the subcontractor that it has a subcontracting plan does not satisfy this requirement.

c. Award of Contracts or Contract Modifications.

(1) The Small Business Act treats contracts and modifications separately. The following policies apply to contract modifications other than options. If a subcontracting plan is not required at the time of award because the contract value is below the threshold, a subcontracting plan will not be required even if a subsequent modification increases the contract value to an amount exceeding the threshold. The only exception to this rule is when the contract modification itself exceeds the threshold. Moreover, it is not necessary to obtain another subcontracting plan for a modification exceeding the applicable threshold if the contract already includes a subcontracting plan. However, the original plan must be modified to adjust the goals to account for the new effort.

(2) The following policies apply to contractors and subcontractors that no longer meet the size or ownership criteria for a small, small disadvantaged, or women-owned small business concern as a result of growth, a buy-out, or a merger during the period of contract performance:

(a) A subcontracting plan is not required of any former small business prime contractor that, during contract performance, no longer meets the definition of a small business concern. Similarly, the requirement to submit periodic reports does not apply. However, a subcontracting plan is required if a prime contractor erroneously considered itself small at the time of contract award. Under this circumstance, the contracting officer should request a subcontracting plan from the contractor and the responsibility to submit periodic reports applies.

(b) A prime contractor may continue to report subcontract dollars as a small, small disadvantaged, or women-owned small business concern award for the duration of the subcontract, including all option years.

d. Contract Awards Involving Commercial Plans.

(1) Commercial plans, as described in FAR section 19.704(d), are useful for companies that normally rely on their existing network of suppliers for all of their business and do not enter into specific subcontracts to fill Government contracts. Commercial plans may apply to the production of the offeror's entire company, or may be limited to a corporation, company, division, plant or product line.

(2) Commercial plans are recognized as one way to reduce the burden of government-unique requirements for companies that provide commercial items under Government contracts and subcontracts.

(3) Agencies shall inform prospective offerors in solicitations expected to trigger the requirements for a subcontracting plan of the opportunity for them and/or their subcontractors to develop commercial plans if they are supplying commercial items.

(4) Offerors shall state if there is a pre-approved plan and for which item(s) and/or service(s) the plan has been approved.

(5) The contracting officer shall obtain a copy of the plan and approval document from a contractor who has a commercial plan previously approved by another agency's contracting activity or another federal agency.

e. Contract Administration of Subcontracting Plans. In addition to the requirements at FAR section 19.706, administrative contracting officers shall:

(1) Monitor a contractor's compliance with the SF 294 report requirements. The SF 294 is used to evaluate the contractor's progress toward meeting the subcontracting goals established in an individual contract plan. The contracting officer shall pay particular attention to reviewing the SF 294 required at contract completion. The SF 294 is not required for contracts with an approved commercial plan.

(2) Ensure receipt of and review the SF 295 (Summary Subcontracting Report). The SF 295 is used to evaluate the contractor's progress toward meeting the subcontracting goals in commercial plans. The SF 295 also is used for both commercial plans and individual plans to summarize all subcontract awards under contracts with a particular federal agency.

7. *Best Practices.* For purposes of this Policy Letter, best practices are practical techniques gained from experience that agencies may use to improve subcontracting plans. The best practices are not mandatory and should not form the basis for Inspector General or other audit reviews.

a. Subcontract Plan Evaluation.

(1) DOD, Coast Guard, and NASA regulations require that the subcontracting plan be a factor in evaluating bids or competitive proposals (10 U.S.C. 2323(h)(2)) under solicitations that require a plan. Other agencies may use this approach as appropriate. For example, the offeror's subcontracting plan may be a separate factor/subfactor in complex, large dollar negotiated acquisitions, or consolidated procurements, where substantial subcontracting opportunities exist. As a separate evaluation factor/subfactor (apart from the offeror's technical, management, and cost proposal), the subcontracting plan should account for a meaningful percentage or weight of the total evaluation. In cases where small businesses are bidding against large contractors and small businesses are not required to have a plan, contracting officers shall give small businesses a rating equal to the maximum points available for those evaluation factors/subfactors.

(2) Agencies should define the parameters by which a subcontracting plan will be evaluated. The parameters may include the following:

(a) The extent to which the plan expresses definitive commitments to subcontracting with small, small disadvantaged, and women-owned small business concerns. Greater credit may be given to an offeror who identifies the names of the intended small, small disadvantaged, and women-owned small business concerns with the initial submission of its plan, and/or provides

"letters of commitment" to subcontract with such firms.

(b) The extent to which the plan provides a significant share of subcontracting dollars to small, small disadvantaged, and women-owned small business concerns.

(c) The quality of the offeror's overall plan, including its goals and methods for achieving those goals.

(d) For individual contract plans, the offeror's procedures for reviewing, approving, and monitoring its subcontractors' compliance with subcontracting plans.

(e) The extent to which the offeror utilizes small business incumbents with proven performance records as subcontractors under consolidated contracts for services. Utilizing incumbents allows the government to retain institutional knowledge, and small businesses to continue providing quality services at advantageous prices.

(f) For mission-specific contracts such as high technology and research, the extent to which the offeror plans to award subcontracts for other than routine support services.

(g) The extent to which prime contractors have excelled in achieving subcontracting goals or participated in a Mentor Protégé Program.

b. Use of Past Performance in Source Selection.

(1) The contracting officer may obtain information from the cognizant contract administration office concerning an offeror's past performance with respect to subcontracting with small, small disadvantaged, and women-owned small business concerns. In addition, the contracting officer may seek the advice of the agency's small business representative and/or check with the SBA Area Director for Government Contracting or the Defense Contract Management Command to determine the offeror's current subcontracting performance rating.

(2) In evaluating past performance, the contracting officer may consider the following:

(a) The extent to which goals were achieved on contracts completed during the current fiscal year and the two previous fiscal years, with greater weight assigned to those contracts completed most recently.

(b) The extent to which the offeror's subcontracting efforts were consistent with its subcontracting plan or the extent to which the offeror made a good faith effort to comply with its plan.

(c) The extent to which the offeror required its large business subcontractors to adopt similar plans under the contract flow-down requirement.

(d) The extent to which an offeror complied with the timely and accurate submission of the required SF 294 and SF 295.

(e) The extent to which the offeror participates in a Mentor Protégé Program.

c. Awards and Incentives.

(1) Contracting activities, in conjunction with Heads of Offices of Small and Disadvantaged Business Utilization, may establish an awards program for contracting officials and prime contractors who do an outstanding job of promoting small, small

disadvantaged, and women-owned small business concerns as subcontractors. Recognition may be in the form of plaques, certificates, monetary awards, etc. The awards program may, among other things, recognize:

(a) Prime contractors that exceed all of their subcontracting goals;

(b) Contracting officials who are exemplary in administering and enforcing compliance with subcontracting plans, and

(c) Small business and contracting specialists who demonstrate outstanding outreach efforts to promote the use of small, small disadvantaged, and women-owned small business concerns as subcontractors.

(2) In addition to an awards program, contracting activities may consider incentives such as:

(a) In contracts containing the Liquidated Damages clause at FAR section 52.219-16, requiring that a certain percentage of the contract value be subcontracted to small business concerns. If the percentage is not met, the contracting activity may assess liquidated damages.

(b) Making the administration and enforcement of subcontracting plans a critical factor in the contracting officer's performance appraisal.

(c) Negotiating alternative payment schedules with prime contractors that offer to provide substantial subcontracting opportunities to small, small disadvantaged, and women-owned small business concerns. This incentive also could be applied to prime contractors that agree to mentor small business concerns under a Mentor Protégé Program.

(d) Reducing inspection, monitoring, and auditing of subcontracting compliance for prime contractors that have an outstanding past performance record. For example, a contractor that receives an outstanding rating on a subcontracting compliance review could receive a follow-up review the next year that consists of a statistical desk audit only. The SBA has authorized its field office staff to exempt outstanding contractors from a formal compliance review for three years as long as the SF 295 shows no deterioration in the dollars awarded to small, small disadvantaged, and women-owned small business concerns during that period.

d. Goals.

(1) The contracting officer may use target goals in solicitations to inform potential offerors of what the Government expects in an acceptable subcontracting plan.

(2) The contracting officer may specify subcontracting percentage goals to increase small, small disadvantaged, and women-owned business concern participation in newly consolidated contracts for non-commercial items/services. The percentages may be determined on a contract-by-contract basis based on market research and requests for information from potential offerors and potential small business subcontractors.

(3) In addition to the statutory goals for small, small disadvantaged, and women-owned small business concerns, which are based on the projected value of the prime and subcontract awards proposed by the offeror, the contracting officer may also establish subcontracting goals based on the overall value of the procurement.

(Note: In some cases, this may not be a realistic approach. The dollar value of the contract may have no effect on the potential for subcontracting.)

(4) The contracting officer may consider increasing the small, small disadvantaged, and women-owned small business concern participation goals commensurate with the size of the contract. For example, the larger the degree of contract aggregation, the higher the goals for small, small disadvantaged and women-owned small business concern participation may be set.

8. **Responsibilities.** The Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this Policy Letter is published in final form in the **Federal Register**. Promulgation of final regulations within that 210-day period shall be considered issuance in a "timely manner" as prescribed in 41 U.S.C. 405(b).

9. **Information Contact.** Questions regarding this Policy Letter should be directed to Linda Williams, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, NW, Washington, DC 20503, telephone 202-395-3302, facsimile 202-395-5105.

10. **Judicial Review.** This Policy Letter only provides policy guidance to agencies in the exercise of their discretion concerning Federal contracting. It does not interpret the Constitution or any law. It is not intended to create any legal right or any basis on which to sue the United States or its representatives.

11. **Effective Date.** The Policy Letter is effective 30 days after the date of issuance.

[FR Doc. 99-8122 Filed 4-1-99; 8:45 am]

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OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

OFPP Policy Letter 99-1 on Government-Wide Small Business, HUBZone Small Business, Small Disadvantaged Business, and Women-Owned Small Business Goals for Procurement Contracts

AGENCY: Executive Office of the President, Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP).

ACTION: Notice of proposed policy letter.

SUMMARY: OFPP is requesting comments on proposed OFPP Policy Letter 99-1. This letter contains guidance on implementing government-wide goals for procurement contracts awarded to small businesses, HUBZone small businesses, small disadvantaged businesses, and women-owned small businesses. The Policy Letter also provides guidance on reporting requirements that will help the Small Business Administration (SBA)