

Supporting Authorities

There are two supporting authorities that allow contracting officers to request information to determine whether a small business concern is in compliance with the applicable limitations on subcontracting. The first authority is Federal Acquisition Regulation (FAR) section 1.602-2, which provides a contracting officer with the authority to “ensure compliance with the terms of the contract . . .” The second authority is from section 1651 of the 2013 National Defense Authorization Act (NDAA), Public Law 112-239 (January 2, 2013), which amended the limitations on subcontracting and permits the use of similarly situated entities in the determination of whether a small business concern complies with the limitations on subcontracting. Section 1651 added section 46 (15 U.S.C. § 657s) of the Small Business Act, which reflects the statutory changes described in section 1651. FAR 1.602-2 is copied below and section 1651 of the 2013 NDAA can be found on page 3 of this document.

FAR 1.602-2 -- Responsibilities.

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall --

(a) Ensure that the requirements of [1.602-1\(b\)](#) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment;

(c) Request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate;

(d) Designate and authorize, in writing and in accordance with agency procedures, a contracting officer’s representative (COR) on all contracts and orders other than those that are firm-fixed price, and for firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties. See [7.104\(e\)](#). A COR—

(1) Shall be a Government employee, unless otherwise authorized in agency regulations;

(2) Shall be certified and maintain certification in accordance with the current Office of Management and Budget memorandum on the Federal Acquisition Certification for Contracting Officer Representatives (FAC-COR) guidance, or for DoD, in accordance with the current applicable DoD policy guidance;

- (3) Shall be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with agency procedures;
- (4) May not be delegated responsibility to perform functions that have been delegated under [42.202](#) to a contract administration office, but may be assigned some duties at [42.302](#) by the contracting officer;
- (5) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions;
- (6) Shall be nominated either by the requiring activity or in accordance with agency procedures; and
- (7) Shall be designated in writing, with copies furnished to the contractor and the contract administration office—
 - (i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;
 - (ii) Identifying the limitations on the COR's authority;
 - (iii) Specifying the period covered by the designation;
 - (iv) Stating the authority is not redelegable; and
 - (v) Stating that the COR may be personally liable for unauthorized acts.

SEC. 1651. LIMITATIONS ON SUBCONTRACTING.

The Small Business Act (15 U.S.C. 631 et seq.) is amended by inserting before section 47 (as redesignated by section 1641 of this subtitle) the following:

``SEC. 46. <<NOTE: 15 USC 657s.>> LIMITATIONS ON SUBCONTRACTING.

``(a) In General.--If awarded a contract under section 8(a), 8(m), 15(a), 31, or 36, a covered small business concern--

``(1) 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;

``(2) 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;

``(3) <<NOTE: Determinations.>> in the case of a contract described in paragraphs (1) and (2)--

``(A) shall determine for which category, services (as described in paragraph (1)) or supplies (as described in paragraph (2)), the greatest percentage of the contract is awarded;

``(B) shall determine the amount awarded under the contract for that category of services or supplies; and

``(C) may not expend on subcontractors, with respect

to the amount determined under subparagraph (B), more than 50 percent of that amount; and

“(4) in the case of a contract for supplies from a regular dealer in such supplies, shall supply the product of a domestic small business manufacturer or processor, unless a waiver of such requirement is granted--

“(A) by the Administrator, after reviewing a determination by the applicable contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including period for performance) required by the contract; or

“(B) by the Administrator for a product (or class of products), after determining that no small business manufacturer or processor is available to participate in the Federal procurement market.

“(b) 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 for purposes of determining whether the covered small business concern has violated a requirement established under subsection (a) or (d).

“(c) <<NOTE: Regulations. Notice. Public information. Determination.>> Modifications of Percentages.--The Administrator may change, by rule (after providing notice and an opportunity for public comment), a percentage specified in paragraphs

(1) through (4) of subsection (a) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

“(d) Other Contracts.--

“(1) <<NOTE: Regulation. Notice. Public information.>> In general.--With respect to a category of contracts to which a requirement under subsection (a) does not apply, the Administrator is authorized to establish, by rule (after providing notice and an opportunity for public comment), a requirement that a covered small business concern may not expend on subcontractors more than a specified percentage of the amount paid to the concern under a contract in that category.

“(2) <<NOTE: Applicability.>> Uniformity.--A requirement established under paragraph (1) shall apply to all covered small business concerns.

“(3) <<NOTE: Regulations. Requirements. Applicability.>> Construction projects.--The Administrator shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. <<NOTE: Determination.>> The percentage applicable to any such requirement shall be determined in accordance with paragraph (1).

“(e) Definitions.--In this section, the following definitions apply:

“(1) Covered small business concern.--The term ‘covered small business concern’ means a business concern that--

“(A) with respect to a contract awarded under section 8(a), is a small business concern eligible to receive contracts under that section;

“(B) with respect to a contract awarded under section 8(m)--

“(i) is a small business concern owned and controlled by women (as defined in that section);

or

“(ii) is a small business concern owned and controlled by women (as defined in that section) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

“(C) with respect to a contract awarded under section 15(a), is a small business concern;

“(D) with respect to a contract awarded under section 31, is a qualified HUBZone small business concern; or

“(E) with respect to a contract awarded under section 36, is a small business concern owned and

controlled by service-disabled veterans.

“(2) Similarly situated entity.--The term ‘similarly situated entity’ means a subcontractor that--

“(A) if a subcontractor for a small business concern, is a small business concern;

“(B) if a subcontractor for a small business concern eligible to receive contracts under section 8(a), is such a concern;

“(C) if a subcontractor for a small business concern owned and controlled by women (as defined in section 8(m)), is such a concern;

“(D) if a subcontractor for a small business concern owned and controlled by women (as defined in section 8(m)) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law), is such a concern;

“(E) if a subcontractor for a qualified HUBZone small business concern, is such a concern; or

“(F) if a subcontractor for a small business concern owned and controlled by service-disabled veterans, is such a concern.”.