DEPARTMENT OF THE AIR FORCE

HEADQUARTERS AIR FORCE MATERIEL COMMAND
WRIGHT-PATTERSON AIR FORCE BASE OHIO

Policy Memo 2004-PK-007

MEMORANDUM FOR SEE DISTRIBUTION

19 Aug 04

FROM: HQ AFMC/PK
4375 Chidlaw Road, Room S208
Wright-Patterson AFB OH 45433-5006

SUBJECT: Limitation of Subcontracting, FAR Clause 52.219-14 (Dec 1996)

1. FAR Clause 52.219-14, Limitations on Subcontracting (Dec 1996), which applies to 8(a)[1] and small business set-aside[2] contracts, states the small business prime contractor must perform specified minimum amounts of work, when the contract has been set aside for 8(a) or small business. The 13 CFR 125.6(g) offers a valid interpretation and allows the minimum amounts of work to be performed by formal and informal joint ventures. The context and history of the entire 13 CFR 125 and 103 coverage of this matter provide for a reasonable interpretation of "informal joint venture" to mean a prime contractor and its subcontractors when the contract is reserved for 8(a) or small business. Requirements are different and separately detailed for HUBZone set-asides[3] and service-disabled veteran-owned (SDVOSB) set-asides[4] where the minimum amount of work must be performed by the prime and other HUBZone or SDVOSB concerns. SAF/AQC and SAF/SB joint memo, "Small Business Set-asides Under 'Joint Ventures and Teaming Relationships'" dated 11 Jan 99 (Atch 2) previously provided notice regarding revisions to the applicable SBA regulations which support the position expressed herein. Details regarding this interpretation of existing policy are presented in attachment 1.

2. Accordingly, within AFMC, we interpret the clause at 52.219-14 to mean that the minimum amounts of work can be performed by the collective efforts of either small business members of a formal joint venture or a small business prime contractor together with the first tier small business subcontractor(s), when the circumstances outlined in attachment 1 are present.

3. Questions may be directed to HQ AFMC's Director of Small Business, Anthony Lander, HQ AFMC/CDB, DSN 787-6102, Anthony.Lander@wpafb.af.mil or Elaine Smith, HQ AFMC/PKPA, DSN 986-0364, Elaine.Smith@wpafb.af.mil.

Thomas S. Wells

THOMAS S. WELLS, SES
Director of Contracting

2 Attachments
1. Limitation of Subcontracting Paper
2. SAF/AQC/SB Memo, 11 Jan 99

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[1] See FAR 19.811.3
[2] See FAR 19.508(e)
[3] See FAR 19.1308 and 52.219-3
[4] See FAR 19.1407 and 52.219-27

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SAF/SB

Policy Coverage and Rationale for Interpretation
to Allow Small Business Prime Contractors and First Tier Small Business Subcontractors
to Perform the Minimum Work in the "Limitation of Subcontracting" Rule
17 Aug 04

Introduction and References.

FAR Clause 52.219-14, Limitations on Subcontracting (Dec 1996), which applies to 8(a) and small business set-aside contracts[5] states that the small business prime contractor must perform specified minimum amounts of work, when the contract has been set aside for small business or 8a—8a sole source or 8a competitive. (Minimum amounts of work for HUBZone and service-disabled veteran-owned (SDVOSB) procurements are separately specified,[6] and allows for the collective efforts of other HUBZone firms or other SDVOSB firms in addition to the prime contractor.)

The percentage limitations are established by SBA in 13 CFR 125.6 (2004), which states:

> Sec. 125.6 Prime contractor performance requirements (limitations on subcontracting).
>
> (a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, or an unrestricted procurement where a concern has claimed a 10 percent small disadvantaged business (SDB) price evaluation preference, a small business concern must agree that:
> (1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.
> (2) In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).
> (3) In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).
> (4) In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).

The regulation goes on to state at 13 CFR 125.6(g)[7]:

> 125.6(g) Where an offeror is exempt from affiliation under Sec. 121.103(h)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the joint venture, not its individual members.

Reading 13 CFR 121.103(h)[8] and subparagraph (3), to see when exemptions to affiliation rules apply, and therefore the exception to the performance of work requirements apply:

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[5] See FAR 19.811.3 for 8(a) and FAR 19.508 for small business set-aside.
[6] 52.219-3 (HUBZone); 52.219-27 (SDVOSB).
[7] Text as amended by SBA in a Final Rule published in the Federal Register, Vol 69, No. 99, 21May04 pp. 21192-29209. However, this amendment merely changed the reference to 121.103(h)(3) and deleted a reference to "team"—the exemption has been in existence since SBA changed the Limitation of Subcontracting rules in 1998.

121.103(h) Affiliation based on joint ventures. A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer. **A joint venture may or may not be in the form of a separate legal entity.** [Emphasis added.] The joint venture is viewed as a business entity in determining power to control its management. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(4) of this section.

(1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Except as provided in paragraph (h)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.

(3) Exception to affiliation for certain joint ventures.

(i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (h) of this section so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(A) The procurement qualifies as a "bundled" requirement, at any dollar value, within the meaning of Sec. 125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a "bundled" requirement within the meaning of Sec. 125.2(d)(1)(i) of this chapter, and:

(1) For a procurement having a receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds $10 million.

(ii) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (h) of this section so long as the requirements of Sec. 124.513(b)(1) of this chapter are met.

(iii) Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

(4) A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of

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[8] Text as amended by SBA in a Final Rule published in the Federal Register, Vol 69, No. 99, 21May04 pp. 21192-29209. Original text, published by SBA in 1998, exempted "joint ventures or teaming arrangements."

subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

Conclusion.

The requirements in the FAR Clause 52.219-14, Limitations on Subcontracting were written in December 1996. The "relaxed" limitations on subcontracting in the CFR above were written in 1998 and amended in 2004, clearly after the FAR clause was written.

The CFR refers to joint ventures but also states that the term "joint venture" is not limited to legally formed joint venture entities but also refers to informally formed joint ventures. We interpret this to include what is commonly referred to as "team" which is most frequently manifested in teams formed by a lead prime contractor with one or more first-tier subcontractors[9].

In the absence of a formal change to the FAR coverage in this matter, the situation begs an interpretation.

Analyzing the totality of the regulatory coverage we conclude that the intent of the CFR regulations is to apply the minimum work percentages (limitation of subcontracting) to the collective efforts of formal and informal joint ventures. We interpret that teams formed with prime contractor and subcontractor relationships are included in the CFR's use of the sentence, "A joint venture may or may not be in the form of a separate legal entity" i.e., an informal joint venture.

Prime-subcontractor teams may be a mix of large business and small business subcontractors but the performance of work requirements must be met by the cooperative efforts of the small prime contractor and the small business members of the subcontractor group.

Therefore, the performance of work requirements (i.e., limitation of subcontracting) apply to the cooperative efforts of either a formal joint venture which is classified as a small business or a small business prime contractor and its small first tier subcontractors, when

Each concern considered to comply with the limitation of subcontracting is small under the size standard corresponding to the NAICS code assigned to the contract, and

a. for a procurement having a receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

b. for a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds $10 million.

This interpretation only applies to FAR 52.219-14 in 8(a) and small business set-aside contracts.

HQ AFMC/CDB
Small Business Office
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[9] Reference 13 CFR 121.103(h) sentence, "SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture..."

DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

11 JAN 1999

Office of the Under Secretary

MEMORANDUM FOR ALMAJCOM-FOA-DRU (DIRECTORS OF CONTRACTING)

FROM: SAF/AQC
1060 Air Force Pentagon
Washington, DC 20330-1060

SAF/SB (Rm 5E271)
1060 Air Force Pentagon
Washington, DC 20330-1060

SUBJECT: Small Business Set-asides Under "Joint Ventures and Teaming Relationships"

Recently, the Small Business Administration (SBA) revised their regulations on size standards (13 CFR 121) to exclude certain joint venture and teaming arrangements from SBA's affiliation rules. This change should increase the potential pool of small businesses available to compete for particular procurements and encourage contracting officers to consider small business contractors more closely before establishing an acquisition strategy.

Further, where a joint venture or teaming arrangement qualifies as a small business concern under the revised regulation, the Limitations on Subcontracting clause (FAR 52.219-14) shall apply to the cooperative effort of the team and not its individual members.

In view of negative trends in small business awards over the past several years, it is crucial to recognize that this final rule (see extracts attached) increases the potential for small business set-asides as well as contract awards under the 8(a) program. Air Force activities must take full advantage of this increased pool of firms to achieve our small business goals, endorsed by the Chief of Staff and Secretary of the Air Force.

Frank J. Anderson Jr.
FRANK J. ANDERSON, JR., Brig Gen, USAF
Deputy Assistant Secretary (Contracting)
Assistant Secretary (Acquisition)

ANTHONY J. DELUCA
Director
Office of Small and Disadvantaged Business Utilization

Attachment:
Final Rule (Extracts)

cc:
MAJCOM Directors of Small Business

FINAL RULE EXTRACTS

[Federal Register: June 30, 1998 (Volume 63, Number 125)]
[Rules and Regulations]
[Page 35726-35767]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr30jn98-23]

SMALL BUSINESS ADMINISTRATION
13 CFR Parts 121, 124, and 134
Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals
AGENCY: Small Business Administration.
ACTION: Final rule.

Page 35726--"Underlining" emphasis added

The revisions to 13 CFR part 121 apply with respect to all solicitations issued on or after June 30, 1998.

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In addition to the changes to 13 CFR part 124, the final rule also makes changes to SBA's size regulations (part 121) to permit size protests and appeals of Standard Industrial Classification (SIC) code designations in connection with 8(a) competitive procurements, and to exclude certain joint venture arrangements from SBA's affiliation rules. These changes should increase the potential pool of small businesses available to compete for particular procurements and should encourage contracting officers to consider small business contractors more closely before determining a procurement strategy.

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The changes that exclude certain joint venture and teaming arrangements from SBA's affiliation rules and the 8(a) mentor/protege program are designed to enable small businesses to effectively compete for contracts that were previously too large for a single small business to perform as a prime contractor. By allowing small businesses to form joint venture and teaming relationships without regard to affiliation, they can be considered responsible contractors for "bundled" and other large contracts which exceed the capability of any of the individual small businesses to perform as prime contractors.

Likewise, 8(a) Participants will be able to submit offers for and be considered responsible businesses for larger contracts than they would be able to obtain individually without the newly established mentor/ protege program. Expanding the number and dollar amount of contracts available for award through the 8(a) BD program may result in a shift of dollars to small business.

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Sec. 121.103 What is affiliation?

* * * * *

(f) * * *

(2) Except as provided in paragraph (f)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.

(3) Exclusion from affiliation. (i) A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business for a non-8(a) Federal procurement without regard to affiliation under paragraph (f) of this section so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; or

[[Page 35739]]

(B) For a procurement having an employee-based size standard, the procurement exceeds $10 million.

(ii) A joint venture or teaming arrangement of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (f) of this section so long as the requirements of 13 CFR 124.513(b)(1) are met.

(iii) Two firms approved by SBA to be a mentor and protege under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protege qualifies as small for the size standard corresponding to the SIC code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

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