

(Almost) Everything You've Ever Wanted to Know About Subcontracting

Presented by

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- **OBJECTIVES** - After completion of this training class, you will be able to:
 - ▶ Have basic understanding of Subcontracting
 - ▶ Have a basic understanding of the Limitations on Subcontracting requirements found in federal contracts
 - ▶ Be aware of other socio-economic programs conflicts with the basic clause
 - ▶ Know how to apply that knowledge to bid/proposal preparation
 - ▶ *Keep yourself out of trouble!*





■ REFERENCES

- ▶ Small Business Jobs Act of 2010
- ▶ FAR Part 15.304 & DFAR 215.304
- ▶ FAR Part 19.7 Subcontracting Program
- ▶ FAR Part 19.13 HUBzone Program
- ▶ FAR Part 19.14 Service-Disabled Veteran-Owned Small Business Procurement Program
- ▶ FAR 52.219-14 Limitations on Subcontracting





Segment 1 The Basics

- What is meant by “Subcontracting?”
 - ▶ Defined by the SBA as the process of putting in place a “Subcontract” for supplies and other performance under a Federal prime contract.
 - ▶ Things that the prime contractor either can’t do or doesn’t want to do under his contract.
 - ▶ Prime is always responsible for his subs.
 - ▶ May include, but not limited to –
 - Purchase orders
 - Changes and modifications to purchase orders





■ History of Subcontracting

- ▶ 1958 – P.L. 85-536 instituted a *voluntary* subcontracting plan requirement for prime contractors.
- ▶ 20 Years later, P.L. 95-507 instituted a *mandatory* subcontracting plan...
- ▶ Subsequent changes to the laws added various requirements for content and added goals for accountability
- ▶ 2010 Congress put more teeth into the program thru the Jobs Act.





- **Small Business Jobs Act of 2010**
 - ▶ Became law Sept 27, 2010
 - ▶ Most significant piece of legislation for small business in over a decade
 - ▶ Requires higher accountability in Small Business Subcontracting from **large** prime contractors.

- **Thresholds changed for submission of a Small Business Subcontracting Plan**
 - ▶ \$650,000; or,
 - ▶ \$1.5M for construction





Other Jobs Act changes (Section 1321)-

- Subcontracting Misrepresentations
 - ▶ Required the government to establish policy on small business subcontracting compliance
 - ▶ Assignment of compliance responsibilities between the contracting/program offices and the SBA
 - ▶ Established periodic oversight and review activities.





Other Jobs Act changes (Section 1321)-

- Compliance

- ▶ **Large** prime contractors are accountable to written goals in subcontracting plans. No Bait & Switch!
- ▶ Must explain in writing if it is unable to make a good faith effort to meet small business subcontracting goals.
- ▶ Failure to make a good faith effort can result in assessment of Liquidated Damages up to the amount specified in the subcontracting plan.





Other Jobs Act changes (Section 1321)-

- Payment to Subcontractors --
 - ▶ Prime must notify the contracting officer in writing when subcontractor payments are less than the agreed price (reduction to invoice) and/or payment is not made within 90 days.
 - ▶ Non- or late payment is a factor in rating performance along with subcontracting plan compliance.





What is a Subcontracting Plan, Anyway?

- Formal plan negotiated by an apparently successful **LARGE** prime offeror with the contracting officer prior to award. Becomes part of the contract. (FAR Part 19.7)
- Done after evaluation and just prior to award.
- Based on **total dollars** available for subcontracting.
- Distinct goals for all small business categories (SB, SDB, WOB, HUBZone, VOSB, and SDVOSB).





Elements of a Subcontracting Plan

- Goal percentages for all small business categories and dollar amounts for each group.
 - ▶ Must be realistic and achievable
 - ▶ Must be meaningful
- Description of future purchases.
 - ▶ Must list all the business lines to be subcontracted (e.g. trucking & hauling, special trades, materials & supplies)
 - ▶ Includes letters of commitment





Elements of a Subcontracting Plan, cont'd

- How they developed their goals and potential sources.
- Efforts on behalf of small business (outreach, networking, etc.)
- Flow down assurances
- Name and position of the Plan Administrator
- Assurances regarding future reporting and studies, records retention, and so on...





Compliance

■ Government:



- ▶ Review semi-annual subcontracting reports submitted through eSRS system.
- ▶ Advises prime contractor of acceptability of efforts; formulates corrective action plan to comply with subcontracting plan

■ Prime Contractor:

- ▶ Reviews lower-tier individual subcontracting reports (if 2nd tier subcontractor is also large business) and enforces flow down clauses.





Final Performance Evaluation



- **Government:**

- ▶ End of Contract period, final evaluation of achievement against contract goals is performed.
- ▶ Liquidated Damages are assessed if failure to meet goals is attributed to no good faith effort made.
- ▶ Performance is documented in Past Performance Information Retrieval System (PPIRS) for all Federal agencies to view.





- In this segment we talked about:
 - ▶ What is “Subcontracting” and the laws that have evolved.
 - ▶ Changes resulting from the “Jobs Act.”
 - ▶ What is a “Subcontracting Plan,” what it contains, to whom it applies, and how it’s enforced.





Segment 2 Small Business Participation Plans

- What is a Small Business Participation Plan?



- ▶ **RE: FAR 15.304 & DFARS 215.304** – An evaluation provision in an unrestricted NEGOTIATED solicitation for Best Value (Trade offs) requiring ALL offerors to address how they will get work into the hands of small business.





- What is a Small Business Participation Plan, cont'd?
 - ▶ Applies to both **small** and **large** business offerors. All offerors submit with their offer for evaluation.
 - ▶ Is *NOT* the same thing as a “subcontracting plan.”
 - ▶ Does not apply to Invitations for Bid or Negotiated procurements evaluated on a Lowest Price Technically Acceptable (LPTA) basis.





- What is a Small Business Participation Plan, cont'd?
 - ▶ A submittal attachment to an Offer which outlines how much work will go to small business.
 - Based on **total amount of offer** – NOT the total expected to be subcontracted.
 - Is evaluated and scored based on the criteria for the solicitation. i.e. Highest \$ amount gets rated highest.
 - Offers showing written commitments to specific small businesses get higher scores.
 - **The small business gets “credit” for self-performance in the percentage of participation.**





- After Evaluation...what happens now?
- If the successful Offeror is a **LARGE** business,
 - Must submit an acceptable Subcontracting Plan prior to award.
 - Must MIRROR the percentages, dollars, and commitments to small businesses found in their Small Business Participation Plan submitted with their offer.
 - Subcontracting Plan is a material part of the awarded contract.





- After Evaluation...what happens now?, cont'd
 - ▶ If the successful Offeror is a **SMALL** business –
 - the Small Business Participation Plan becomes part of their offer and is filed in the contract file.
 - No subcontracting plan is submitted (not required for small business).
 - BUT! The Small Business better follow the participation plan they submitted – a slippery slope! No bait & switch!





- In this segment we talked about:
 - ▶ What is the Small Business Participation Evaluation Factor
 - ▶ What is the Small Business Participation Plan submitted as part of an offer, what it is, who does it and what it is for.
 - ▶ What happens to the plan after evaluations are finished.
- *REMEMBER* – if the solicitation was set aside for **small business at any tier**, inclusion of a small business participation evaluation factor is NOT required – only applies to unrestricted full and open solicitations.





Segment 3: “Limitations on Subcontracting”

Did you know there are limitations on how much of a contract can be subcontracted out by a small business?

- ▶ After covering this segment, you will have the basic knowledge about the Limitations of Subcontracting
- ▶ The “What,” “When,” and “How”
- ▶ Other socioeconomic programs that associate with it.





- **WHAT IS “Limitations on Subcontracting”?**
 - ▶ Contract Clause (FAR 52.219-14) restricting the subcontracting of large portions of the work.
 - ▶ Helps to ensure that pass-through contracts aren't issued.
 - ▶ Helps to ensure that work stays in the hands of small business.
 - ▶ Does NOT apply to large businesses – they have a subcontracting plan they must follow.





■ WHEN is it required?



- ▶ Contracts/Solicitations over \$150K (Simplified Acquisition Threshold).
- ▶ In all contracts and solicitations for supplies, services and construction **if any portion is set aside for small business.**
- ▶ Includes multiple award contracts (MATOCs) when orders under the contract may be set aside for small business
 - E.g. if the terms of the MATOC require work under certain \$\$ amounts to be set aside for SB





- HOW is “it” applied?
 - ▶ By submitting an offer or bid and the execution (signing) of the contract “it” (the Limitations on Subcontracting”) becomes binding and the contractor “agrees” to comply.



- *By submitting the offer, the contractor agrees to:*
 - **SERVICE CONTRACTS:** Perform at least **50%** of the cost of labor with his own employees



▷ Definition of “Service” - directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply

- **MANUFACTURING:** Perform at least **50%** of the cost of manufacturing **SUPPLIES** (excluding cost of materials)



Illustration by Chris Gash

▷ But see the *Non-manufacturer Rule* for exception...





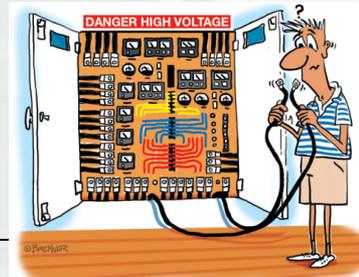
- *By submitting the offer, the contractor agrees to:*

- ▶ **CONSTRUCTION** - Perform at least **15%** of the cost of the contract for a **GENERAL Construction contractor** (excluding cost of materials/equipment) **NAICS 236 & 237**
 - ▷ General contractor has no specific specialty, but has experience in a myriad of construction areas.
 - Can include management, oversight, quality control activities, safety and other “non-trade”- type work
 - Doesn't necessarily have to perform specific on-site actual construction trades.





- ***By submitting the offer, the contractor agrees to:***
 - **SPECIALTY CONSTRUCTION** - Perform at least **25%** of the cost of the contract for a SPECIAL TRADES construction contractor (excluding cost of materials)
NAICS 238
 - ▷ Is higher because it's assumed there's at least one trade the contractor can do, like electrical or plumbing
 - ▷ Expects that the contractor will also be working in his trade on the site
 - ▷ Can include management, oversight, quality control activities, safety and other "non-trade"- type work





- WHEN does “it” **NOT** apply?
- ❑ DOES **NOT** APPLY TO AN *UNRESTRICTED PROCUREMENT* - Full and Open Competition (aka, *everyone* can bid)
 - By virtue of the clause requirement, (SBSA over \$150K), would not apply to a small business that is the successful offeror or bidder against an *unrestricted* procurement.
 - Does not apply to a large business at all – they can subcontract with no limitations, BUT they must have a subcontracting plan to meet small business goals. (See Segment 1)





- In this segment we talked about:
 - ▶ What is the “Limitations on Subcontracting”.
 - ▶ To whom does it apply.
 - ▶ When is it applicable.
 - ▶ What the percentages are for each type of contract.





Segment 4: Special Limitations on Subcontracting

Did you know there are other limitations on how much of a contract can be subcontracted out?

- ▶ After covering this segment, you will have the basic knowledge about limitations on subcontracting in conjunction with unrestricted procurements and the HUBZone Program.
- ▶ The “What,” “When,” and “How”





SEGMENT 4: MORE LIMITATIONS ON SUBCONTRACTING...

Limitations On Subcontracting Under The Price Evaluation Preference For HUBzone Concerns (FAR 52.219-4)

- Clause applies to ALL **UNRESTRICTED** procurements.
- Carries its own “Limitations on Subcontracting” rules.
- It’s a price preference of 10% that is added to ALL OTHER offers/bids received (with exceptions) if any bid received is from a HUBZone company.
- Can be waived by a HUBZone bidder for his bid only





Limitations On Subcontracting Under The Price Evaluation Preference For HUBZone Concerns, cont'd

➤ What does the 10% price preference do?

- RECAP: What is a HUBZone (Historically Underutilized Business Zone)? – areas of high unemployment, low economic growth and opportunities.
- HUBZone companies get a leg up on receiving contract awards on the premise that they will be putting people to work from depressed areas.
 - They have to have 35% of their employee base living in a HUBZone and their principle office must be within the HUBZone.

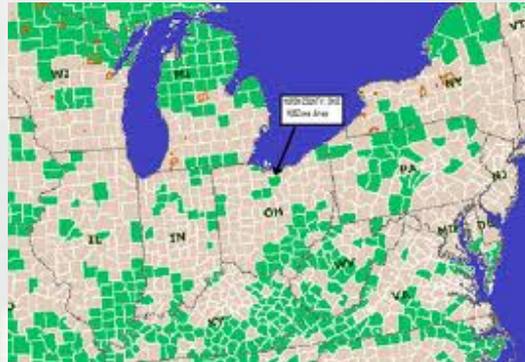




Limitations On Subcontracting Under The Price Evaluation Preference For HUBzone Concerns, cont'd

➤ What else does the 10% price preference do?

- Is intended to show an investment in the economy and job growth of the depressed area, teaching skills to workers, “raising them up.”



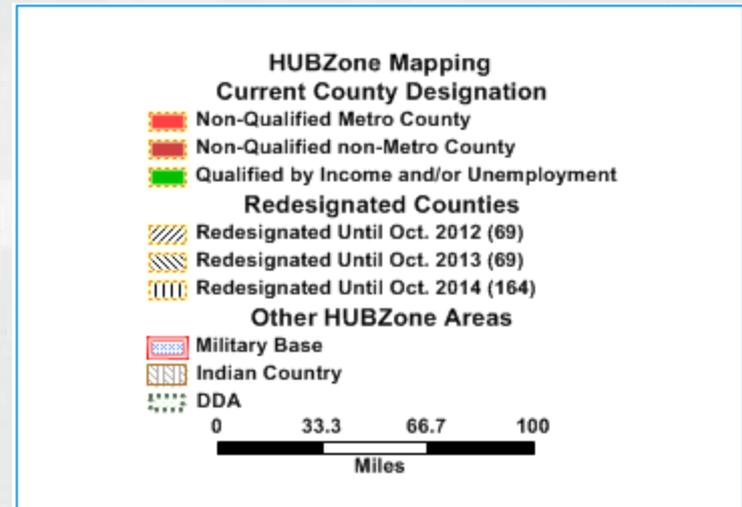
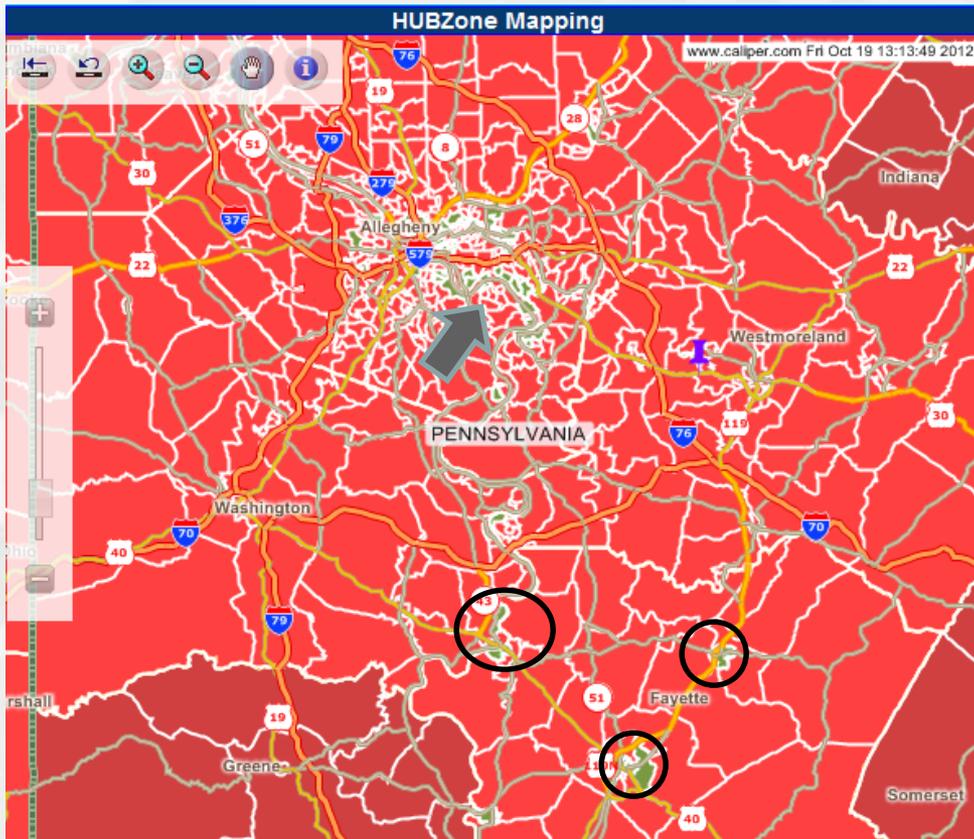
- Price preference factor of 10% on unrestricted procurements allows the HUBZone firm's price to be higher and still get the award.





Limitations On Subcontracting Under The Price Evaluation Preference For HUBzone Concerns, cont'd

➤ HUBZone Map





Limitations On Subcontracting Under The Price Evaluation Preference For HUBzone Concerns, cont'd

How does the price preference work?

- If a firm bidding in response to an unrestricted procurement is also a HUBZONE small business and they have not waived the preference -
 - Price preference of 10% is automatically added to ALL OTHER offers/bids received **EXCEPT** –
 - ✓ Otherwise SUCCESSFUL small business bid (*i.e. the apparent low bidder if they are Small*)
 - ✓ Other HUBZone firm bids that have **not** waived the preference





How does the price preference work, cont'd?

- At the time of bidding, the HUBZone firm can choose if they want the preference or if they want to waive it.
 - Waiving the preference = “I don’t want the leg up.”
 - Not waiving the preference = “I DO want the leg up”
- **WAIVING THE PREFERENCE** – Why would you do that?
 - ✓ HUBZone companies waive the preference because they know they cannot meet the Limitations on Subcontracting requirement in the clause. *Paragraphs (d) & (e) of the clause (52.219-4) become “not applicable.”*

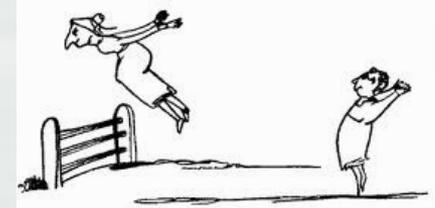




Limitations On Subcontracting Under The Price Evaluation Preference For HUBzone Concerns, cont'd

HOW DOES THE PRICE PREFERENCE WORK?

- Adding the price preference to all other offers can change the bidding order – a HUBZone company can “jump” over the apparent low bidder (if it is not another business) and get the award.
- The bidding order can also change.
- The analysis is done by the contracting officer after adding the price preference in accordance with the clause. If, by adding the preference, a Hubzone contractor's bid does not become the lowest, the original successful contractor remains as the apparent low bidder.





■ Limitations On Subcontracting Under The Price Evaluation Preference For HUBzone Concerns, cont'd

➤ What happens if they waive the preference?

➤ HUBZone companies that “waive” the preference are treated like a regular company.

➤ Depends on how many HUBZone bids are received:

○ 1 HZ BID REC'D + WAIVE PREF = NO PREFERENCE ADDED

○ >1 HZ BID REC'D + >/=1 NOT WAIVE PREF = PREFERENCE ADDED



10% factor is added the bid price of those HUBZone companies that waived the preference. They are treated like another small business bidder.

➤ If a HUBZone firm is the apparent low bidder, the 10% preference isn't added to his price whether they waived or not. It's already the successful small business bid.





SPECIAL LIMITATIONS ON SUBCONTRACTING

➤ APPLICATION OF PRICE EVALUATION PREFERENCE EXAMPLE

Bidder	Biz size	Bid price	Initial Bid Order	After 10% Pref	New bid order
A	Large	100,000	1	110,000	2
B	Large	105,000	2	110,500	3
C	HUBZone	107,000*	3	107,000*	1 *HZ gets to move up – award made at their bid price
		110,500**		110,500**	** Does not get to move up
D	Small	108,000	4	108,000	4 – no pref added can't jump over anyone



***If, after applying the price evaluation preference, the HZ does not become the least expensive, bid order does not change - Bidder A would get award at \$100,000. If it's equal, then HUBZone gets award at their bid price.*





Special Limitations on Subcontracting Under HUBZone Price Evaluation Factor, cont'd

- HUBZone bidders must be aware of the special limitations on subcontracting if not waiving the price evaluation preference. *WHY???*
 - Must be aware of this requirement in order to decide whether they can actually perform and comply with the clause.
 - Adding the price preference to other bids can make them become the low bidder – *it's automatic.*
 - If the company accepts the contract, the special limitations on subcontracting must be complied with or they will be in default of the clause/contract.
 - Not complying could be detrimental to Past Performance rating, cause Liquidated Damages to be assessed and other woes.





Special Limitations on Subcontracting Under HUBZone Price Evaluation Factor, cont'd

- ❑ OK – So what are the special limitations on subcontracting under the HZ price evaluation factor (52.219-4(d))??
 - **Services** – Perform at least **50%** of the cost of labor with his own employees OR a mix of self- and other HUBZone service contractors* as first tier subs.
 - **Supplies** – Perform at least **50%** of the cost of manufacturing SUPPLIES (excluding cost of materials) , OR a mix of self- and other HUBZone manufacturers*.





□ 52.219-4(d) cont'd

▪ Construction

- **General Contractors** – must do at least **15%** self; IN ADDITION,
 - At least **50%** of cost of performance for personnel (labor) will be performed by self- or combo of self and employees of other HZ firms* as first tier subcontractors.
 - **NO MORE THAN 50%** of cost of performance for personnel may be subcontracted out to concerns not HUBZone.
- ***If you can't comply, waive the factor!!***





□ 52.219-4(d) cont'd

▪ Construction

- **Special Trade Contractors** – must do at least **25%** self; IN ADDITION,
 - At least **50%** of cost of performance for personnel (labor) will be performed by self or by combo of self and employees of other HZ firms* as first tier subcontractors
 - **NO MORE THAN 50%** of cost of performance for personnel may be subcontracted out to concerns not HUBZone.

IF YOU CAN'T COMPLY, WAIVE THE FACTOR!!

* IN ALL CASES, verification of subcontractor HUBZone status is done through System for Award Management.





- In this segment we talked about:
 - ▶ Special Limitations on Subcontracting Under HUBZone Price Evaluation Factor.
 - ▶ When it applies.
 - ▶ How the preference is applied and to whom.
 - ▶ Why you need to know this!





- ❑ In these 4 segments, you have (almost) everything you ever wanted to know about subcontracting -
 - What is Subcontracting and what large primes have to comply with.
 - What is a Subcontracting Plan.
 - Small Business Participation Factor as an evaluation factor.
 - The Clause (52.219-14) Limitations on Subcontracting
 - Special subcontracting limitations when the procurement is unrestricted and HUBZone firms are bidding (Clause 52.219-4)
- When deciding to bid, 1st Question should always be “Can I do this work?”
 - ❖ 2nd Question should then be “Can I comply with limitations on subcontracting?”
 - How can the job be split up – is there a logical division between labor to meet the limitations if I have to subcontract? Is there enough left for me to do to meet the percentage of self-performance required? If I am a HUBZone, can I meet the special subcontracting limitations or should I waive it?





ANY QUESTIONS?

