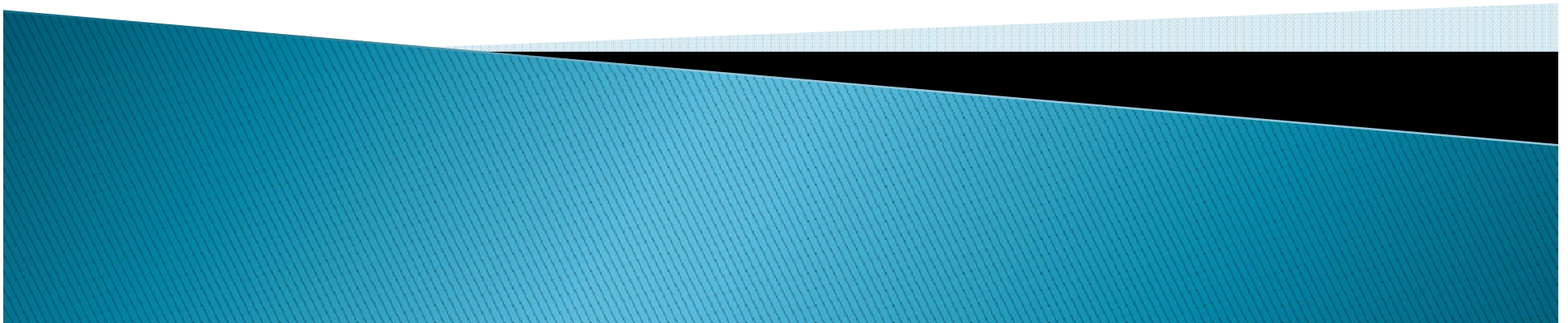


# SBA

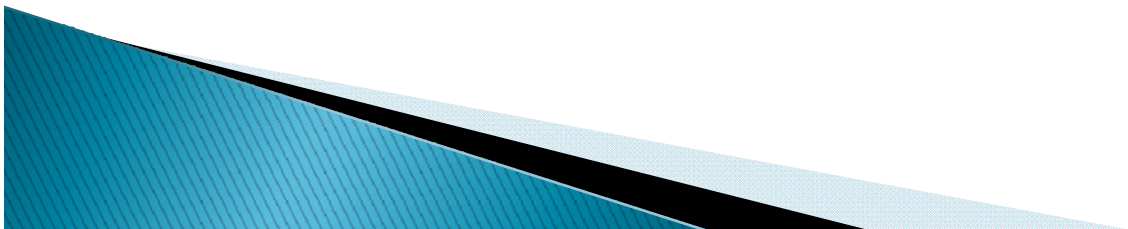
# Subcontracting Final Rule

Kenneth Dodds  
Director of Policy, Planning and Liaison  
SBA  
March, 2014



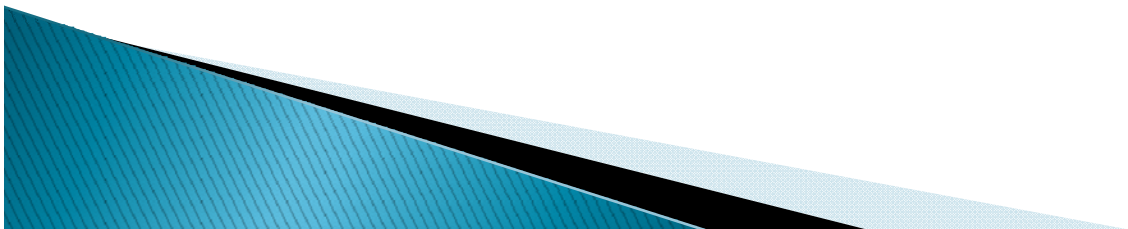
# Subcontracting Final Rule

- ▶ Small Business Jobs Act of 2010
- ▶ 15 USC 637(d)(6)
- ▶ 15 USC 637(d)(12)
- ▶ 78 Fed. Reg. 42391 (Final)
  - July 16, 2013
  - Effective August 15, 2013
  - 13 CFR 125.3
- ▶ 76 Fed. Reg. 61626 (Proposed)
  - October 5, 2011



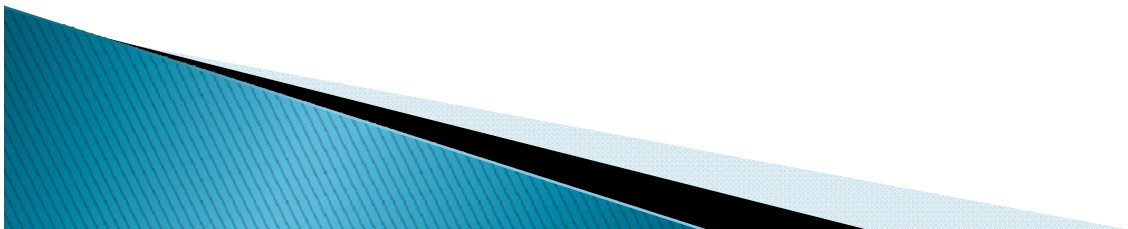
# Subcontracting Final Rule

- ▶ Prime must notify CO when it fails to pay sub within 90 days, where sub has completed performance and prime has been paid
- ▶ Prime must notify CO when prime used sub to prepare offer, but not in performance
- ▶ CO consider both as part of past performance
- ▶ Firm with history of late payment may be reported in FAPIIS



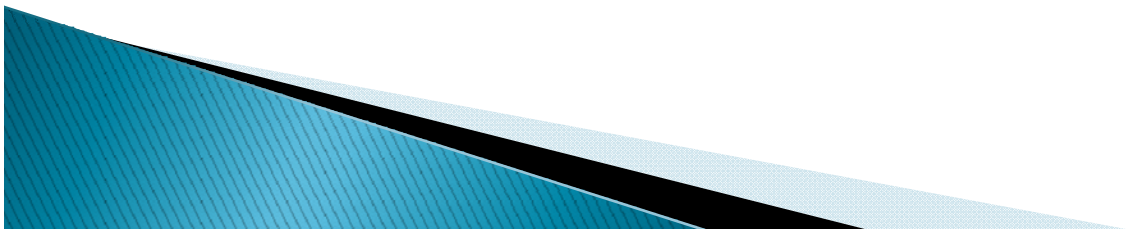
# Subcontracting Final Rule

- ▶ The following should not be included in the subcontracting base: internally generated costs such as salaries and wages; employee insurance; other employee benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; Original Equipment Manufacturer relationships during warranty periods (negotiated up front with product); utilities such as electricity, water, sewer, and other services purchased from a municipality or solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Utility companies may be eligible for additional exclusions unique to their industry, which may be approved by the contracting officer on a case-by-case basis. Exclusions from the subcontracting base include but are not limited to those listed above.
- ▶ 13 CFR 125.3(a)(1)(iii)



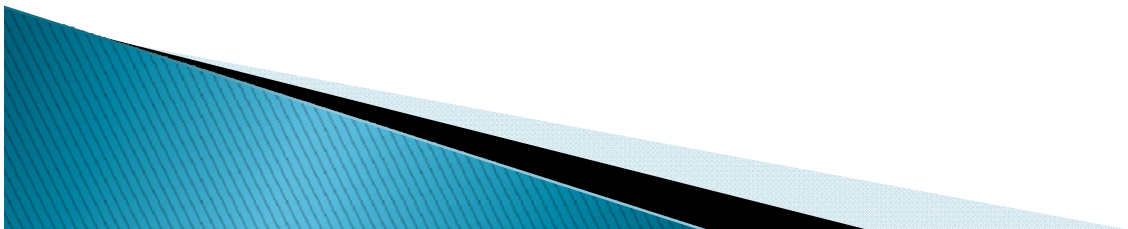
# Subcontracting Final Rule

- ▶ Subcontracting goals required under paragraph (c) of this section must be established in terms of the total dollars subcontracted and as a percentage of total subcontract dollars. However, a contracting officer may establish additional goals as a percentage of total contract dollars.
- ▶ 13 CFR 125.3(a)(2)



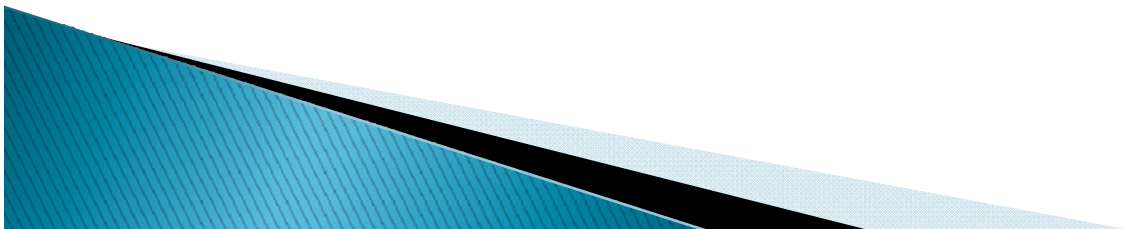
# Subcontracting Final Rule

- ▶ A prime contractor has a history of unjustified untimely or reduced payments to subcontractors if the prime contractor has reported itself to a contracting officer in accordance with paragraph (c)(5) of this section on three occasions within a 12 month period
- ▶ 13 CFR 125.3(a)(3)



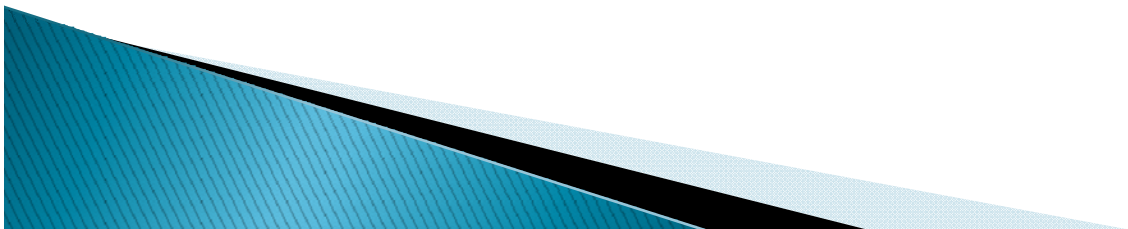
# Subcontracting Final Rule

- ▶ The contractor may not prohibit a subcontractor from discussing any material matter pertaining to payment or utilization with the contracting officer
- ▶ 13 CFR 125.3(c)(1)(iii)



# Subcontracting Final Rule

- ▶ The contractor must assign each subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (See § 121.410).
- ▶ The prime contractor may rely on subcontractor self-certifications made in SAM (or any successor system), if the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications in SAM (or any successor system) are current, accurate and complete as of the date of the offer for the subcontract.
- ▶ A prime contractor or subcontractor may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract
- ▶ 13 CFR 125.3(c)(1)(v)

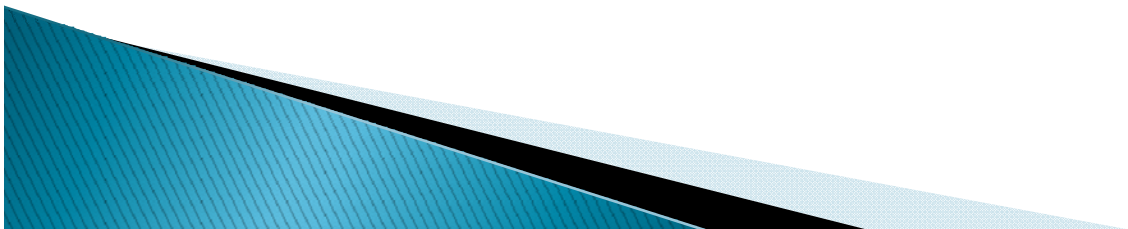




# Subcontracting Final Rule

- The contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over \$ 150,000 for which a small business concern received a preference. The written notification must include the name and location of the apparent successful offeror and if the successful offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business
- As a best practice, the contractor may provide the pre-award written notification to unsuccessful and small business offerors on subcontracts at or below \$ 150,000 and should do so whenever practical.

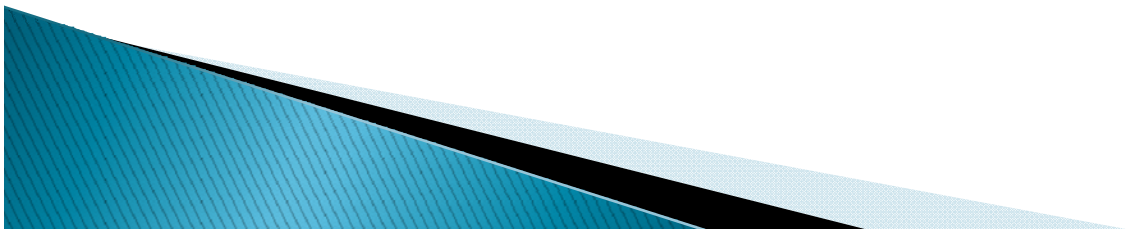
13 CFR 125.3(c)(1)



# Subcontracting Final Rule

An offeror must represent to the contracting officer that it will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the bid or proposal, in the same scope, amount, and quality used in preparing and submitting the bid or proposal. Merely responding to a request for a quote does not constitute use in preparing a bid or offer.

13 CFR 125.3(c)(3)



# Subcontracting Final Rule

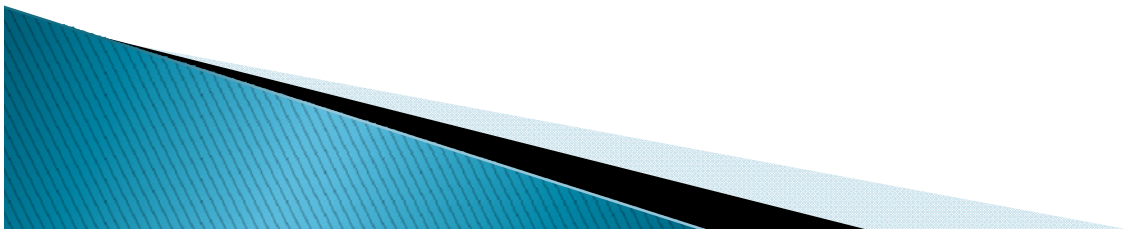
An offeror used a small business concern in preparing the bid or proposal if:

- (i) The offeror references the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan;
- (ii) The offeror has a subcontract or agreement in principle to subcontract with the small business concern to perform a portion of the specific contract; or
- (iii) The small business concern drafted any portion of the bid or proposal or the offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including email) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract.



# Subcontracting Final Rule

- ▶ A prime contractor shall notify the contracting officer in writing if upon completion of the responsibilities of the small business subcontractor (i.e., the subcontractor is entitled to payment under the terms of the subcontract), the prime contractor pays a reduced price to a small business subcontractor for goods and services provided for the contract or the payment to a small business subcontractor is more than 90 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor. "Reduced price" means a price that is less than the price agreed upon in a written, binding contractual document. The prime contractor shall include the reason for the reduction in payment to or failure to pay a small business subcontractor in any written notice.
- ▶ 13 CFR 125.3(c)(5)



# Subcontracting Final Rule

CO, in his or her discretion, may require the prime contractor (other than a prime contractor with a commercial plan) to update its subcontracting plan when an option is exercised.

CO shall require the prime contractor (other than a contractor with a commercial plan) to submit a subcontracting plan if the value of a modification causes the value of the contract to exceed the subcontracting plan threshold and to the extent that subcontracting opportunities exist.

13 CFR 125.3(c)



# Subcontracting Final Rule

CO, in his or her discretion, may require a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.

Where a subcontracting plan is amended in connection with an option, or added as a result of a recertification or modification, the changes to any existing plan are for prospective subcontracting opportunities and do not apply retroactively. However, since achievements must be reported on the ISR (or the SF-294, if applicable) on a cumulative basis from the inception of the contract, the contractor's achievements prior to the modification or option will be factored into its overall achievement on the contract from inception.

- ▶ 13 CFR 125.3(c)



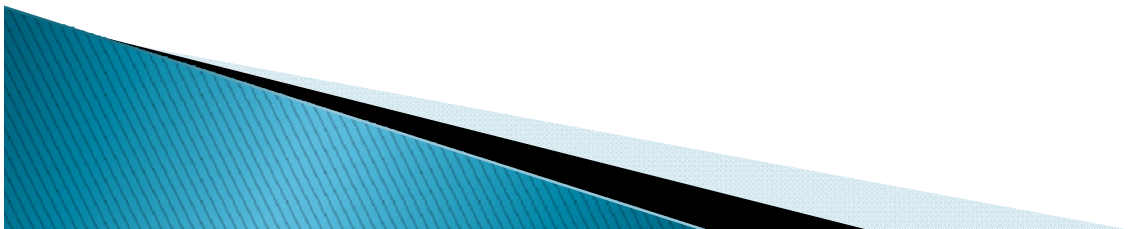
# Subcontracting Final Rule

- ▶ Subcontracting in Source Selection
- ▶ CO may include evaluation factor that considers and compares:
  - Prime's proposed approach to subcontracting
  - The extent to which Prime met subcontracting goals under prior contracts
  - The extent to which Prime timely paid subcontractors under prior contracts
  - Prime's commitment to pay subcontractors within a specified number of days



# NDAA 2014

- ▶ (14) An offeror for a covered contract that intends to identify a small business concern as a potential subcontractor in a bid or proposal for the contract, or in a plan submitted pursuant to this subsection in connection with the contract, shall notify the small business concern prior to making such identification.
- ▶ 15 USC 637(d)





# Contact Information

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- ▶ Thank you for Inviting Me!
- ▶ Questions?

