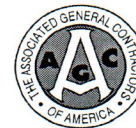


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**AGC of America**  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
**Quality People. Quality Projects.**



March 12, 2015

Ms. Brenda Fernandez  
Office of Policy Planning & Liaison  
U.S. Small Business Administration  
409 Third Street SW  
Washington, D.C. 20416

**RE: Small Business Government Contracting & National Defense Authorization Act of 2013  
Amendments Proposed Rule Concerning Small Business Limits on Subcontracting**

Dear Ms. Fernandez,

On behalf of the Associated General Contractors of America (AGC), I would like to thank you and the U.S. Small Business Administration (SBA) for soliciting comments on limiting a percentage of small business set-aside award amounts to be spent on subcontractors. AGC applauds the SBA's more uniform approach on calculating such a figure than currently exists under the performance of work requirements for small business prime contractors. However, AGC has a number concerns about a few of the proposed requirements to implement this new approach.

AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

**AGC Supports SBA's Proposed Standardized Calculation of the Limitation on Subcontracting Percentage**

Under the performance of work requirements that currently exist, small business prime construction contractors must calculate the cost of contract performance based on their labor costs. That figure excludes profits or fees, but includes overhead which has only direct labor as its base, plus the contractor's general and administrative rate multiplied by the labor cost. This calculation method can vary based on whether the construction contractor is a HUBZone, 8(a), Service Disabled Veteran Owned, or any other type or non-designated type of small business. In short, it is a difficult and confusing matrix for contractors to follow and contracting officers to evaluate.

SBA proposes to standardize this calculation for all set-asides to small business concerns, as well as SDVO SBC contracts, HUBZone contracts and WOSB/EDWOSB contracts in excess of \$150,000. The proposed rule sets forth a change in concept that maintains a nexus with the previous rules. As SBA notes, the proposal shifts from the concept of a required percentage of work to be performed by a prime contractor to the concept of limiting a percentage of the award amount to be spent on subcontracting. Ultimately, this change in concept maintains the same goal as the current performance of work requirement: to ensure that a small business prime contractor self-performs a certain amount of work on a

project. AGC fully supports this standardization of the calculation across small business set-aside categories, as it will help eliminate a wide degree of confusion.

SBA also proposes to keep the percentages of self-performed work the same for general construction contractors and specialty construction contractors. Under the current performance of work rules general construction contractors must self-perform at least 15 percent of the work and specialty and trade contractors must perform at least 25 percent. In the proposed rule, SBA sets the limitation on subcontracting in line with these current figures: an 85 percent limitation on subcontracting for general contractors and a 75 percent limitation on subcontracting for specialty and trade contractors. AGC, again, fully supports this proposal. It will truly assist contractors adjust to the implementation of this rule.

Lastly, and perhaps most significantly, SBA proposes to simplify the calculation of work performed by subcontractors. Rather than a complex calculation noted above for the performance of work percentage, the limitation on subcontracting percentage would be determined by the amount paid by the prime to subcontractors compared to the overall amount paid by the government for the contract. For example, if a small business general contractor receives \$100,000 from the government for a contract and pays subcontractors \$75,000 to perform work on that project, the \$75,000 paid to subcontractors is the figure used to calculate the limitation on subcontracting percentage. Thus, here, that percentage would be 75 percent and the general contractor would have operated within the rules. Again, this is a truly significant step forward and simplify this determination for contractors.

#### **SBA Should Work with the FAR Council to Improve Compliance of this Requirement by Agencies**

If the proposed uniform standards are adopted, it is essential that the SBA work with the Federal Acquisition Regulation (FAR) Council to implement FAR provisions that can be clearly understood by the agencies, as well as affected contractors. Currently, the FAR contains a standard Performance of Work clause, FAR 52.236-1, which is attached as Exhibit A. In accordance with FAR 36.501(b) (Exhibit B) that clause is not authorized for use in contracts awarded pursuant to FAR Subparts 19.5, 19.8, 19.11, 19.13, 19.14 or 19.15. (These are the current designations in the FAR for the various small business set-aside programs.) It is believed that FAR 36.501(b) was adopted to ensure that conflicting performance of work standards were not set forth in a small business concern (SBC) set-aside contract.

In reality, many agencies do not follow the direction in FAR 36.501(b) and leave in solicitations and SBC set-aside contracts awarded to small business contractors both the clauses at FAR 52.236-1 and the separate FAR clause which currently implements the performance of work requirement applicable to a particular SBC set-aside contract.

Attached as Exhibit C are several pages from a Naval Facilities Engineering Command solicitation number N40085-13-R-7702, a 100 percent small business set-aside. (See pages 1 and 5 of 64.) While this solicitation incorporates by reference FAR 52.219-14, Limitations on Subcontracting (see page 28 of 54), it also sets forth a FAR 52.236-1 clause in the full text (page 41 of 5) even though that FAR clause is not authorized for use in a small business set-aside contract. This creates conflicting standards. In addition, as FAR 52.236-1 in the full text while the correctly applicable provision at FAR 52.219-14 is incorporated by reference, there is a very clear probability that contractors will be confused by the conflicting standards. This is a recurrent problem in current federal government construction SBC set-aside awards and could be addressed, at least in part, through this rulemaking process.

## **SBA Must Take into Account Issues Stemming from Modifications to the Contract during Project Delivery, Especially Government Initiated Modifications and Delays**

AGC appreciates the simplification and standardization of the limitation on subcontracting calculation. However, the association is seriously concerned about how that calculation will work in the practical federal construction sector. As many AGC members note, if you have built one project, you built one project. Each construction services contract is subject to the unique demands of the project, including: the geography—including but not limited to site conditions, the seasonality of certain construction activities, project proximity to major suppliers, and site ingress and egress in conjunction with other landowners—the needs, requirements, personnel and budgetary criteria of the owner, specific and unique design features, construction requirements and parameters, and the composition of the project team. As such, federal construction agencies understand modifications to the contract may be and usually are required during project delivery as differing site conditions, delays, design flaws or other unexpected issues occur.

The federal government, not construction contractors, will require the vast majority of modifications to the contract to address unexpected issues. Such modifications can cause a general contractor to require a subcontractor to perform more work than initially anticipated. For example, take a small business general contractor working on a \$20 million Department of Veterans Affairs (VA) hospital wing project. When building the wing to the VA's specifications in the contract, it is determined that the heating and cooling systems installed do not adequately function to meet the demands of the facility 30 days prior to the scheduled and contractually required project completion date. As such, the VA initiates a contract modification for \$5 million to remove and replace the installed heating and cooling system and complete the work within 30 days or the general contractor will be subject to liquidated damages per day the project is late. For the last 3 years of the project the general contractor has met the 85 percent subcontracting limitation, subcontracting \$17 million. The heating and cooling subcontractor is a large business and will receive \$5 million for its work on the project, as the general contractor cannot find another similarly situated small business subcontractor to complete the job within 30 days nor can it self-perform this specialty trade subcontractor work. As a result, the VA now pays the general contractor \$25 million on the project and the general contractor has subcontracted \$23 million or 92 percent. Under SBA's proposal the small business general contractor would be subject to a \$1.75 million fine.<sup>1</sup> When we are talking about a small business contractor operating on thin margins and in a slower federal construction market that fine could bankrupt the small business, amounting to a death sentence.

Again, SBA's proposed rule does not take into account government initiated modifications for which a small business contractor would have no recourse. Instead the small business—as the one in our example—could be placed in a situation where it either: (1) violates the limitation on subcontracting; or (2) denies a federal government owner's modification, inviting liquidated damages and negatively impacting project delivery and contractors future work with that agency and any others based on a negative past performance evaluation.

The limitation on subcontracting proposal applies to the amount paid by the government to the construction contractor. The proposed regulation does not explicitly state that this calculation is to be

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<sup>1</sup> The penalty for exceeding the subcontracting limitation is the greater of \$500,000 or the dollar amount spent, in excess of permitted levels, by the entity on subcontractors. In this case, the general contractor exceeded the 85 percent limitation by 7 percent or \$1.75 million. Thus, that would be the fine under the proposed rule.

based on the original contract amount or in the final contract amount. In addressing construction awards, Congress did not mandate either approach in the 2013 NDAA. (See Exhibit D at page 449.)

As such, AGC would recommend that SBA exclude the value of post-award changes issued by the government from the calculation for purposes of the limitations on subcontracting (amount paid) requirement. SBA should adopt a construction standard based upon the initial contract amount awarded, not the final contract amount for the following reasons shortly stated:

- a. Subsequent to award, the scope of the work in construction contracts is often changed by the agency. This is beyond the prime contractor's control.
- b. These changes can be due to differing site conditions, revised scope requirements, or something as specific as additional fixtures, furniture or equipment.
- c. The nature of the work affected by the change, added or deleted, is often limited to a few subcontractors, which may be small businesses of non-small business contractors. At the time the change is implemented, a prime contractor is already under contract with the affected subcontractor(s) and cannot be reasonably expected to add a similarly situated small business subcontractor or deduct work from firms that are other than small in order to maintain the performance of work requirement. Any effort to make those scope changes would be very difficult to administer and could create disputes.

By excluding these post award modification amounts, the prime contractor is not tasked with addressing agency issued changes after the subcontractor team members are selected but it is not free to alter the extent of the subcontracting of the original contract's scope of work to similarly situated small business subcontractors or large business subcontractors based on its own discretion.

The adoption of a standard of measurement that excludes the value of the agency issued changes from the "amount paid" calculation also avoids the need to adopt some type of safe harbor or waiver provision, which might be invoked if and when the agency post-award changes upset the initial calculations of the amount of work which a prime contractor could subcontract to non-similarly situated subcontractors and still comply with the applicable limitation on subcontracting proposed.

At a minimum, AGC alternatively recommends that a "good faith best efforts" determination—whereby a general contractor's good faith best efforts to meet the requirement given the change—safe harbor, or waiver process be considered for a contractor that tries but ultimately cannot adjust to the modifications mandated by the federal agency during project delivery. The vast majority of modifications are the result of federal agency initiated modifications. It would be patently unfair to penalize, in some cases to the point of bankruptcy, a small business for changes mandated by the government for which that business could have little to no room to comply with these limitation on subcontracting requirements.

Furthermore, the reality is that federal agencies also do not have robust acquisition staff to quickly make some decisions, often delaying projects for months and years. This adds cost to the initial contract price. In construction, again, the unknown can happen and federal agencies must make modifications to adapt to those changes to deliver a successful project. There may not be a similarly situated business that can do the particular change order work for a particular project. If a general contractor makes its good faith best efforts to do so, SBA should allow the contracting officer to accept that effort to satisfy the requirement and spirit of the law.

## **SBA Should not Mandate Subcontractor Bid Listing**

Under the proposed rule, SBA would require small business prime contractors to enter a “written agreement” with every similarly situated entity to detail the percentage of work forecasted to be performed by each entity. The agreement must identify the solicitation number at issue, be signed by each entity, and be attached to the prime contractor’s offer. In the construction context, this requirement will lead to a host of bid protests, causing significant procurement delays and adding to project delivery costs.

Firstly, this “written agreement” submitted with the bid and prior to contract award is bid listing and arguably an enforceable contract between prime contractor and subcontractor that the prime contractor will use the subcontractor on the job. In construction, the bidding and proposal process is swift and intense. As the GAO recently reported:

[T]he process the prime contractor goes through to submit a proposal can be chaotic. According to both prime and subcontractors we interviewed, subcontractors, to remain competitive, often wait to submit their bids to the prime contractor until *just minutes* before the prime contractor is required to submit its proposal to the agency, which allows minimal time for the prime contractor to ensure that the bids are reasonable and cover the required scope of work. For a large project, the subcontractors’ bids can number in the hundreds. In fact, one prime contractor estimated that for one large project it may review approximately 500 bids to prepare its proposal. Further, according to prime contractors, it can be uncertain at the time their proposals are submitted to the government that subcontractors bids include the full scope of work, so they must do their best to quickly assess the accuracy and completeness of the various bids they review for one trade.<sup>2</sup> (emphasis added)

Under SBA’s current proposal a prime contractor would be placed in a shotgun contractual marriage to a similarly situated contractor. The prime contractor would not have time to fully determine if the subcontractor’s proposal is reasonable or matches the scope of work. This could be detrimental to the small business prime contractor, its similarly situated subcontractor and the government agency where there are disagreements that have not been fully resolved prior to bid. A potential subcontractor may have misread or misunderstood the scope of work for which the prime contractor sought the subcontractor’s services. As such, prime contractor, and potentially the government, would be liable for change orders stemming from such misunderstandings. Such misunderstandings can lead to bid protests, project delays and increased costs even before ground has been broken. As the GAO report notes, it is customary for construction prime and subcontractors to negotiate specific tasks and prices after it is awarded the project. “After a prime contractor is awarded a construction contract, it negotiates with subcontractors on the scope of work and price before awarding subcontracts.

In addition, the award evaluation process by the agencies may take weeks or months, a potential subcontractor at the time of a proposal may be unavailable or no longer interested at the time of award. A letter agreement which accompanied the bid/proposal may be stale or generate disputes that it is unenforceable.

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<sup>2</sup> <http://www.gao.gov/products/GAO-15-230>

Additionally, this form of bid listing has failed the government in the past. The GAO report explains how the Department of the Interior and GSA previously required subcontractor bid listing but stopped the practice in 1975 and 1983, respectively. GSA testified in 2000 that bid listing would create more harm than benefit and strongly opposed bid-listing requirements for a number of reasons, such as adverse effect on the timeliness and cost of contract performance and increase in the government's administrative expenses. GAO also found that officials from one state that requires bid listing are reconsidering the requirement because of the administrative burden it is causing for state contracting officials, specifically an increase in bid protests. According to these officials, unsuccessful contractors are using this requirement to protest contract awards because of administrative mistakes in contractors listing their subcontractors. This is similar to the issue that GSA raised in the early 1980s when it stopped the requirement to list subcontractors.

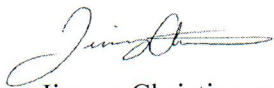
Instead of putting forth a shotgun approach that will encourage bid protests and significant administrative burden, AGC recommends SBA require the prime contractor submit a list of its similarly situated subcontractors to contracting officers not later than 14 working days after receipt of the notice of award. This would allow the prime contractor and subcontractors to more carefully review their proposals. Furthermore, project construction usually takes several weeks, if not months, to begin after award. Such an approach would meet the requirements and spirit of this proposal.

## **Conclusion**

In sum, AGC is generally supportive of SBA's proposed standardization and simplification of the limitation on subcontracting calculation. However, practical realities in the construction industry and federal construction contracting in particular should be reflected in SBA's final rule, as explained above.

Thank you for your consideration of AGC's concerns.

Sincerely,



Jimmy Christianson  
Director of Government Affairs  
Federal & Heavy Construction Division  
Associated General Contractors of America

# **EXHIBIT A**

**ELECTRONIC CODE OF FEDERAL REGULATIONS**

e-CFR Data is current as of January 1, 2015

Title 48 → Chapter 1 → Subchapter H → Part 52 → Subpart 52.2 → §52.236-1

Title 48: Federal Acquisition Regulations System  
PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES  
Subpart 52.2—Text of Provisions and Clauses

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**52.236-1 Performance of Work by the Contractor.**

As prescribed in 36.501(b), insert the following clause: *[Complete the clause by inserting the appropriate percentage consistent with the complexity and magnitude of the work and customary or necessary specialty subcontracting (see 36.501(a)).]*

PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984)

The Contractor shall perform on the site, and with its own organization, work equivalent to at least \_\_\_\_ *[insert the appropriate number in words followed by numerals in parentheses]* percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government.

(End of clause)

[48 FR 42478, Sept. 19, 1983, as amended at 71 FR 57369, Sept. 28, 2006]

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# **EXHIBIT B**

**ELECTRONIC CODE OF FEDERAL REGULATIONS**

e-CFR Data is current as of February 2, 2015


Title 48 → Chapter 1 → Subchapter F → Part 36 → Subpart 36.5 → §36.501

Title 48: Federal Acquisition Regulations System  
PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS  
Subpart 36.5—Contract Clauses

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**36.501 Performance of work by the contractor.**

(a) To assure adequate interest in and supervision of all work involved in larger projects, the contractor shall be required to perform a significant part of the contract work with its own forces. The contract shall express this requirement in terms of a percentage that reflects the minimum amount of work the contractor must perform with its own forces. This percentage is (1) as high as the contracting officer considers appropriate for the project, consistent with customary or necessary specialty subcontracting and the complexity and magnitude of the work, and (2) ordinarily not less than 12 percent unless a greater percentage is required by law or agency regulation. Specialties such as plumbing, heating, and electrical work are usually subcontracted, and should not normally be considered in establishing the amount of work required to be performed by the contractor.

 (b) The contracting officer shall insert the clause at 52.236-1, Performance of Work by the Contractor, in solicitations and contracts, except those awarded pursuant to subparts 19.5, 19.8, 19.13, 19.14, or 19.15 when a fixed-price construction contract is contemplated and the contract amount is expected to exceed \$1.5 million. The contracting officer may insert the clause on solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to be \$1.5 million or less.

[48 FR 42356, Sept. 19, 1983, as amended at 53 FR 43392, Oct. 26, 1988; 69 FR 25279, May 5, 2004; 75 FR 53134, Aug. 30, 2010; 76 FR 18313, Apr. 1, 2011; 79 FR 61751, Oct. 14, 2014]

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# **EXHIBIT C**

<b>SOLICITATION, OFFER, AND AWARD</b> <i>(Construction, Alteration, or Repair)</i>	1. SOLICITATION NO. N40085-13-R-7702	2. TYPE OF SOLICITATION <input type="checkbox"/> SEALED BID (IFB) <input checked="" type="checkbox"/> NEGOTIATED (RFP)	3. DATE ISSUED 30-Jan-2013	PAGE OF PAGES 1 OF 54
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IMPORTANT - The "offer" section on the reverse must be fully completed by offeror.

4. CONTRACT NO.	5. REQUISITION/PURCHASE REQUEST NO.	6. PROJECT NO.
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7. ISSUED BY NAVFAC MID ATLANTIC HAMPTON ROADS IPT 9742 MARYLAND AVENUE NORFOLK VA 23511-3095  TEL: _____ FAX: _____	CODE N40085	8. ADDRESS OFFER TO (If Other Than Item 7) CODE  See Item 7  TEL: _____ FAX: _____
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9. FOR INFORMATION CALL:	A. NAME JENNIFER ROESNER	B. TELEPHONE NO. (include area code) (NO COLLECT CALLS) (757) 341-2074
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**SOLICITATION**

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

10. THE GOVERNMENT REQUIRES PERFORMANCE OF THE WORK DESCRIBED IN THESE DOCUMENTS (Title, identifying no., date):

Small Business Design-Build, Design-Bid-Build Multiple Award Contract for new construction, renovation, alteration, and repairs for projects in the Hampton Roads Area, Virginia.

Seed Project: Design-Build P-8146 Veterinary Facility Replacement at Naval Station Norfolk, Norfolk, Virginia.

Competition Requirements: 100 Percent Small Business Set-Aside

Procurement Method: Contracting by Negotiation

Source Selection Process: Best Value, Tradeoff; Two-Phase Design-Build Selection Procedures

Type of Contract: Firm Fixed Price

The drawings and specifications for the seed project are not available at this time and will be posted via amendment. The drawings and specifications will not be available until Phase II.

ALL INQUIRIES MUST BE SUBMITTED NO LATER THAN 14 DAYS PRIOR TO THE PROPOSAL DUE DATE. All inquiries must be submitted in writing and emailed to Jennifer Roesner at jennifer.roesner@navy.mil with inquiries attached as a word document.

All drawings, specifications, and amendments will be posted to the Navy Electronic Commerce Online (NECO) website at www.neco.navy.mil. Potential offerors will not be contacted regarding any changes posted.

11. The Contractor shall begin performance within <u>15</u> calendar days and complete it within <u>425</u> calendar days after receiving <input type="checkbox"/> award, <input checked="" type="checkbox"/> notice to proceed. This performance period is <input checked="" type="checkbox"/> mandatory, <input type="checkbox"/> negotiable. (See FAR 52.211-10 )
--

12 A. THE CONTRACTOR MUST FURNISH ANY REQUIRED PERFORMANCE AND PAYMENT BONDS? (If "YES," indicate within how many calendar days after award in item 12B.) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	12B. CALENDAR DAYS 10
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13. ADDITIONAL SOLICITATION REQUIREMENTS:

A. Sealed offers in original and 5 copies to perform the work required are due at the place specified in item 8 by 02:00 PM (hour) local time 01 Mar 2013 (date). If this is a sealed bid solicitation, offers must be publicly opened at that time. Sealed envelopes containing offers shall be marked to show the offeror's name and address, the solicitation number, and the date and time offers are due.

B. An offer guarantee  is,  is not required.

C. All offers are subject to the (1) work requirements, and (2) other provisions and clauses incorporated in the solicitation in full text or by reference.

D. Offers providing less than 120 calendar days for Government acceptance after the date offers are due will not be considered and will be rejected.

## Section 00100 - Bidding Schedule/Instructions to Bidders

PROPOSAL REQUIREMENTS

## PURPOSE:



100% Small Business set-aside Design Build/Design Bid Build (DB/DBB) Multiple Award Contract (MAC) for New Construction, Renovations, Alterations, and Repair Projects for Facilities in the Hampton Roads Area, Virginia. This acquisition will use the two-phase design-build selection procedures, consisting of one solicitation covering both phases, and will result in a Firm-Fixed Price (FFP), Indefinite-Delivery/Indefinite Quantity (IDIQ) contract for DB/DBB MAC for New Construction, Renovations, Alteration, and Repair Projects for Facilities in the Hampton Roads Area, Virginia.

## DESCRIPTION:

This procurement is a 100% Small Business set-aside DB/DBB IDIQ MAC for the New Construction, Renovations, Alterations, and Repair Projects for Facilities in the Hampton Roads Area, Virginia. The work includes, but is not limited to, warehouses, training facilities, personnel support and service facilities, and housing facilities. The Contractor shall provide all labor, supervision, engineering, design, materials, equipment, tools, parts, supplies, and transportation, to perform all of the services described in the plans and specifications for each task order. No more than five (5) contracts will be awarded as a result of this solicitation. The duration of the contract(s) is for one (1) year from the date of contract award with four (4) one-year option periods. The total five-year (base and four one-year options) estimated construction cost for all contracts is not to exceed \$95,000,000.00 for the life of the contract. The limit is the maximum for the life of the contract of \$95,000,000.00. Projects for the Small Business MAC have an estimated construction cost between \$5,000,000.00 and \$30,000,000.00; however, smaller and larger dollar value projects may be considered, at the discretion of the Acquisition Director. The government guarantees an award amount of \$5,000.00 to each successful offeror over the full term of the contract, including option years.

## SEED PROJECT INFORMATION:

P8146 Veterinary Facility Replacement at Naval Station Norfolk, Norfolk, VA will construct a new veterinary service facility, food safety office, and branch headquarters. The project will provide veterinary medical, ancillary, food safety, and facility support functions. Supporting facilities include all site work and improvements, utilities, access roads, and parking. Existing veterinary facilities are scheduled for demolition or for reuse by the installation. Asbestos removal may be required during demolition. Project will be designed in accordance with DoD Unified Facilities Criteria (UFC) 4-5 10-0 1, American Animal Hospital Association Guidelines, DoD Minimum Antiterrorism Standards for Buildings UFC 4-010-01, barrier-free design in accordance with DoD, "A BA (Architectural Barriers Act) Accessibility Standard" and DEPSECDEF Memorandum "Access for People with Disabilities" dated 10/31/2008, Evidence Based Design principles, MRS World Class Checklist Requirements (version 2.0, 201 1), Executive Order J35 14, DoD Strategic Sustainability Performance Plan (SSPP), and the Energy Policy Act of 2005 (EPact05), and other applicable codes and regulations. The project will be designed to LEED 3.0 Silver Certified rating standard. Operation and Maintenance Manuals, Commissioning, and Comprehensive Interior Design will be provided.

## ACQUISITION STRATEGY:

The two-phase design-build selection procedure will be utilized for this procurement and will consist of one solicitation covering both phases. Phase One of the solicitation is in accordance with FAR Part 36.3. The Phase One written technical proposal will address Technical Approach, Corporate Experience, Performance Confidence Assessment (Past Performance), and Safety. The Phase One evaluation will result in a determination of the most highly qualified Offerors. Only the most highly competitive proposals will be selected to submit proposals for Phase Two.


Phase Two of the solicitation shall be comprised of a written technical and price proposal, which will be evaluated separately in accordance with Part 15. The Phase Two written technical proposal will address the Offeror's Design-Build Technical and Energy and Sustainable Design Solutions for the Seed Project, and the Phase Two written price proposal shall set forth the Offeror's price for the Seed Project.

## Section 00700 - Contract Clauses

## CLAUSES INCORPORATED BY REFERENCE

52.202-1	Definitions	JAN 2012
52.203-3	Gratuities	APR 1984
52.203-5	Covenant Against Contingent Fees	APR 1984
52.203-7	Anti-Kickback Procedures	OCT 2010
52.203-8	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity	JAN 1997
52.203-10	Price Or Fee Adjustment For Illegal Or Improper Activity	JAN 1997
52.203-12	Limitation On Payments To Influence Certain Federal Transactions	OCT 2010
52.204-4	Printed or Copied Double-Sided on Postconsumer Fiber Content Paper	MAY 2011
52.204-7	Central Contractor Registration	AUG 2012
52.204-9	Personal Identity Verification of Contractor Personnel	JAN 2011
52.204-10	Reporting Executive Compensation and First-Tier Subcontract Awards	AUG 2012
52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment	DEC 2010
52.209-9	Updates of Publicly Available Information Regarding Responsibility Matters	FEB 2012
52.209-10	Prohibition on Contracting With Inverted Domestic Corporations	MAY 2012
52.211-18	Variation in Estimated Quantity	APR 1984
52.215-2	Audit and Records--Negotiation	OCT 2010
52.215-11	Price Reduction for Defective Certified Cost or Pricing Data-- Modifications	AUG 2011
52.215-21	Requirements for Certified Cost or Pricing Data or Information Other Than Certified Cost or Pricing Data-- Modifications	OCT 2010
52.219-6	Notice Of Total Small Business Set-Aside	NOV 2011
52.219-8	Utilization of Small Business Concerns	JAN 2011
52.219-14	<u>Limitations On Subcontracting</u>	NOV 2011
52.222-3	Convict Labor	JUN 2003
52.222-4	Contract Work Hours and Safety Standards Act - Overtime Compensation	JUL 2005
52.222-6	Davis Bacon Act	JUL 2005
52.222-7	Withholding of Funds	FEB 1988
52.222-8	Payrolls and Basic Records	JUN 2010
52.222-9	Apprentices and Trainees	JUL 2005
52.222-10	Compliance with Copeland Act Requirements	FEB 1988
52.222-11	Subcontracts (Labor Standards)	JUL 2005
52.222-12	Contract Termination-Debarment	FEB 1988
52.222-13	Compliance with Davis-Bacon and Related Act Regulations.	FEB 1988
52.222-14	Disputes Concerning Labor Standards	FEB 1988
52.222-15	Certification of Eligibility	FEB 1988
52.222-21	Prohibition Of Segregated Facilities	FEB 1999
52.222-26	Equal Opportunity	MAR 2007
52.222-27	Affirmative Action Compliance Requirements for Construction	FEB 1999

52.236-1 PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984)

 The Contractor shall perform on the site, and with its own organization, work equivalent to at least 20 percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government.

(End of clause)

52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

<https://www.acquisition.gov/>

(End of clause)

52.252-6 AUTHORIZED DEVIATIONS IN CLAUSES (APR 1984)

(a) The use in this solicitation or contract of any Federal Acquisition Regulation (48 CFR Chapter 1) clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the date of the clause.

(b) The use in this solicitation or contract of any FAR or DFAR clause with an authorized deviation is indicated by the addition of "(DEVIATION)" after the name of the regulation.

(End of clause)

252.203-7005 REPRESENTATION RELATING TO COMPENSATION OF FORMER DOD OFFICIALS (NOV 2011)

(a) Definition. Covered DoD official is defined in the clause at 252.203-7000, Requirements Relating to Compensation of Former DoD Officials.

(b) By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror, and who are expected to undertake activities on behalf of the offeror for any resulting contract, are presently in compliance with all post-employment restrictions covered by 18 U.S.C. 207, 41 U.S.C. 2101-2107, and 5 CFR parts 2637 and 2641, including Federal Acquisition Regulation 3.104-2.

(End of provision)

252.216-7006 ORDERING (MAY 2011)

# **EXHIBIT D**



"(2) MENTOR-PROTEGE PROGRAM.—The term 'mentor-protege program' means a program that pairs a mentor with a protege for the purpose of assisting the protege to compete for Federal prime contracts and subcontracts.

"(3) PROTEGE.—The term 'protege' means a small business concern that—

"(A) is eligible to enter into Federal prime contracts and subcontracts; and

"(B) satisfies any other requirements imposed by the Administrator.

"(c) CURRENT MENTOR PROTEGE AGREEMENTS.—Mentors and proteges with approved agreement in a program operating pursuant to subsection (b)(4)(C) shall be permitted to continue their relationship according to the terms specified in their agreement until the expiration date specified in the agreement.

"(f) SUBMISSION OF AGENCY PLANS.—Agencies operating mentor protege programs pursuant to subsection (b)(4)(C) shall submit the plans specified in subsection (b)(1)(A) to the Administrator within 6 months of the promulgation of rules required by subsection (b)(3). The Administrator shall provide initial comments on each plan within 60 days of receipt, and final approval or denial of each plan within 180 days after receipt."

#### PART IV—TRANSPARENCY IN SUBCONTRACTING

##### 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. 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) 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—

extended in some states even further by the "discovery rule." This rule provides that a cause of action does not accrue, and that the statute of limitations clock does not even begin to "tick" until the defect is, or should have been, discovered.<sup>121</sup>

Section 12.2.2.1 of the AIA A201 also requires the contractor to correct any defective work within one year of substantial completion. Warranties that expressly state a specific duration, such as 12 months from substantial completion, generally do not limit other avenues of recovery and do not reduce applicable statutes of limitation.<sup>122</sup> So long as the defect occurred within the warranty period, an action to enforce the warranty can be brought any time within the applicable statute of limitation, although the equitable doctrine of "laches" may limit that time. Laches provides that when a claimant delays asserting its claim for so long that the defendant is materially prejudiced (such as defense witnesses have died or can no longer be located), it would be inequitable to allow the claimant to proceed.

Where an express warranty covers the same subject of an implied warranty, some courts will enforce only the express warranty and not the implied warranty.<sup>123</sup> Additional express warranties may be included in a contract in connection with equipment supplied by the contractor. Such specific warranties usually are spelled out under the provisions of the specifications to which they apply rather than in the general conditions. They often appear as performance guarantees or an agreement to repair defects for a specified period of time.

A warranty generally is not waived by final payment or completion.<sup>124</sup> The express warranties required by the contract documents generally begin to run from the date of substantial completion.<sup>125</sup> Other special warranties may commence at delivery of the machinery or commencement of operations.

Contractors performing projects with phased completion requirements must ensure that the warranties from equipment suppliers are consistent with the contractor's warranty to owner. It is not unusual for a contract with phased completion dates to provide that the contractor's warranty to the owner for all systems begins at the date of substantial completion or acceptance of the final phase, even though systems in the earlier phases have been previously put in operation. Equipment suppliers' warranties often are triggered by either delivery or first operation. In this situation, the contractor may face a gap in the warranty coverage. Although a supplier may be willing to agree to an extended warranty during the bid or proposal phase at no extra cost, an effort to extend the supplier's warranty at project completion may be very costly.

“(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) 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) 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) UNIFORMITY.—A requirement established under paragraph (1) shall apply to all covered small business concerns.

“(3) 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. 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

## B. Implied Warranties

Both private and government contracts have been held to contain warranties that are implied by law for the benefit of one of the contracting parties. These implied warranties typically can be excluded (or disclaimed) by express contract language and may not exist unless there is privity of contract between the parties.<sup>126</sup> In construction, one common implied warranty arises when there are no express contractual warranties. This is the warranty of good and workmanlike construction in accordance with customary trade standards.<sup>127</sup> This implied warranty differs from state to state. Courts have stated that contractors impliedly warrant that they will perform in a "workmanlike manner and without negligence"<sup>128</sup> or that the work will be done in a "fit and workmanlike manner."<sup>129</sup>

Another implied warranty arises in home or condominium construction. This is the implied warranty of habitability, which imposes a duty on the homebuilder to construct the home so that it is fit for habitation.<sup>130</sup> For example, in *Roland v. Heritage Litchfield, Inc.*,<sup>131</sup> the plaintiff condominium owners sued the developer and builder after discovering mold in the firewall area of the condominium buildings. The plaintiffs claimed damages based on, among other things, breach of the implied warranty of habitability.<sup>132</sup> The trial court found, as a matter of law, that the developer/builder was liable to the condo owners for its breach of this implied warranty where the condo owners had presented undisputed facts that the toxic mold rendered the condo units unsafe.<sup>133</sup>

This implied warranty may exist even where the homebuilder attempts to exclude it in the contract documents. For example, in *McGuire v. Ryland Group, Inc.*,<sup>134</sup> the federal district court held that, under Florida law, a homebuilder's general exclusion of implied warranties is insufficient to preclude as a matter of law a claim for breach of the implied warranty of habitability. On reconsideration, the court held, however, that where the contract contained express performance specifications, such specific standards sufficiently disclaimed the implied warranty.<sup>135</sup>

Probably the best-known implied warranty in construction is the warranty of design information furnished by one of the parties to the contract. This is commonly referred to as the *Spearin* doctrine, which provides that "where a contractor must build according to plans and specifications of an owner, the contractor will not be responsible for the consequences of defects in the plans and specifications, even though the contractor is required to check the plans and inform itself of the requirements."<sup>136</sup> In *AAB Joint Venture v. United States*,<sup>137</sup> the plaintiff contractor claimed increased costs due to defective specifications for the

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.”.

**SEC. 1652. PENALTIES.**

Section 16 of the Small Business Act (15 U.S.C. 645) is amended by adding at the end the following:

“(g) SUBCONTRACTING LIMITATIONS.—

“(1) IN GENERAL.—Whoever violates a requirement established under section 46 shall be subject to the penalties prescribed in subsection (d), except that, for an entity that exceeded a limitation on subcontracting under such section, the fine described in subsection (d)(2)(A) shall be treated as the greater of—

“(A) \$500,000; or

“(B) the dollar amount expended, in excess of permitted levels, by the entity on subcontractors.

“(2) MONITORING.—Not later than 1 year after the date of enactment of this subsection, the Administrator shall take such actions as are necessary to ensure that an existing Federal subcontracting reporting system is modified to notify the Administrator, the appropriate Director of the Office of Small and Disadvantaged Business Utilization, and the appropriate contracting officer if a requirement established under section 46 is violated.”.

**SEC. 1653. SUBCONTRACTING PLANS.**

(a) AMENDMENTS TO SMALL BUSINESS ACT REQUIREMENTS.—Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) is amended by—

construction of a military storage base in Israel. The court held under the *Spearin* doctrine, the implied warranty that is imposed on the government owner is "that the specifications will result in a satisfactory, acceptable or adequate result; [and,] short of that, the specifications are defective and the contractor is entitled to an equitable adjustment."<sup>138</sup> This implied warranty is not, however, absolute.

For example, the owner will likely not be held to have breached the implied warranty of adequate design plans and specifications where the alleged defect is only minor and not a fundamental flaw or series of flaws requiring the contractor to make major revisions.<sup>139</sup> Likewise, if the alleged defect is a patent (or obvious) ambiguity about which the contractor failed to inquire, it should not give rise to a claim for breach of the implied warranty of design plans and specifications.<sup>140</sup> For a more detailed discussion on the *Spearin* doctrine, see **Chapter 5** and **Chapter 9**.

### C. Statutory Warranties

Many states have enacted statutes providing warranties for the benefit of purchasers of new homes or condominium units. The items covered by the warranty, the length of time the warranty lasts, and the ability to waive the warranty vary from state to state. These statutory warranties protect purchasers who failed to protect themselves through contract.

Several of these statutory warranties allow purchasers of new homes or condominium units to seek relief for defective construction against the parties that sold the homes or condominium units as well as the contractor responsible for the defective construction. For example, in Florida, the developer of a condominium, the contractor, and all subcontractors and suppliers grant to the purchaser of each condominium unit a three-year warranty as to certain key elements of the condominium, such as the ~~roofline~~ roof, structural components, mechanical elements, and plumbing elements. Additionally, the developer and various contractors grant the purchaser one-year warranties as to all other improvements and materials.<sup>141</sup> These warranties assure that the purchaser can seek relief against all potentially responsible parties.

As an added level of protection for home purchasers, several statutory warranties cannot be waived by the owner or reduced by the builder.<sup>142</sup> In Mississippi, for example, a builder cannot waive its warranty to new home purchasers that the home will be free from defects due to noncompliance with the building standards.<sup>143</sup>

(1) redesignating paragraphs (7), (8), (9), (10), (11), and (12) as paragraphs (8), (9), (10), (11), (12), and (13) respectively;

(2) inserting after paragraph (6) the following:

“(7) The head of the contracting agency shall ensure that—

“(A) the agency collects and reports data on the extent to which contractors of the agency meet the goals and objectives set forth in subcontracting plans submitted pursuant to this subsection; and

“(B) the agency periodically reviews data collected and reported pursuant to subparagraph (A) for the purpose of ensuring that such contractors comply in good faith with the requirements of this subsection and subcontracting plans submitted by the contractors pursuant to this subsection.”;

(3) in paragraph (9), as redesignated by paragraph (1) of this subsection, striking “shall be a material breach of such contract or subcontract” and inserting “shall be a material breach of such contract or subcontract and may be considered in any past performance evaluation of the contractor”;

(4) in subparagraph (C) of paragraph (11), as redesignated by paragraph (1) of this subsection, by striking “, either on a contract-by-contract basis, or in the case contractors” and inserting “as a supplement to evaluations performed by the contracting agency, either on a contract-by-contract basis or, in the case of contractors”;

(5) by adding at the end the following:

“(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) The Administrator shall establish a reporting mechanism that allows a subcontractor or potential subcontractor to report fraudulent activity or bad faith by a contractor with respect to a subcontracting plan submitted pursuant to this subsection.”.

(b) ADDITIONAL REQUIREMENTS.—

(1) REPORTING REQUIREMENTS.—Not later than 1 year after the date of the enactment of this part, the Administrator of the Small Business Administration shall take such actions as are necessary to ensure that the electronic subcontracting reporting system established by the Administration to carry out the requirement of section 8(d)(6)(E) of the Small Business Act is modified to ensure that it can identify entities that fail to submit required reports.

(2) ANNUAL REPORT.—Not later than March 31 of each year, the Administrator of the Small Business Administration shall provide the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report, based on data available through existing systems, that sets forth, by agency (and to the extent practicable, by type of goal or plan), the following information:

(A) the percentage of entities required to submit reports pursuant to section 8(d)(6) of the Small Business