

Key Issues in Federal Small Business Contracting

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May 18, 2011

Agenda

- 8:30 – NCMA Introduction
- 8:35 – Speakers Introduction
- 8:45 – Tim Warren
- 9:25 – Richard Blum
- 10:15 –Break (NCMA Chapter Business)
- 10:35 –Rochelle Lowe
- 11:20 –Q&A, Discussion

PRESENTED BY:

- Tim Warren – Acquisition Process for SB
- Richard Blum– NAICS/Size Standards
- Rochelle Lowe – Small Business Program (FAR Part 19)

How The Acquisition Process Works For Small Businesses

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PART 1

The Acquisition Process For Small Businesses

Federal Acquisition Regulations (FAR) Guiding Principles for Federal Contracting and Subcontracting (FAR 1.102) ---

- Cost, quality and timeliness
- Commercialization
- Past performance
- Competition

Acquisition Process

Guiding Principles Continued

- Minimal admin operating costs
- Integrity, fairness and openness
- Public policy objectives

Acquisition Process

Guiding Principles Continued

- Team consists of technical, supply, procurement, internal customer and contractor personnel
- Personal initiative and sound business judgment
- Best value to the customer

Acquisition Process

Guiding Principles Continued

Public Policy Objectives –

(FAR 19.201(a)): One of these objectives is to provide maximum practicable opportunities at the prime and subcontract levels to:

- Small Business (SB)
- Veteran-Owned (VOSB)
- Service Disabled Veteran Owned (SDVOSB)
- Historically Underutilized Business Zone (HUBZone)
- Small Disadvantaged Business (SDB – includes 8(a))
- Women Owned (WOSB - includes Economically Disadvantaged Women Owned – EDWOSB)

Acquisition Process

Guiding Principles Continued

(FAR 5.002) Opportunities are publicized to-

- Increase competition
- Broaden industry participation
- Assist small businesses in obtaining prime and subcontracts

Acquisition Process

Guiding Principles Continued

(FAR 7.103) When planning for acquisitions-

- The government must consider the facilitation of competition by and among small businesses

- Unnecessary bundling of contracts must be avoided

Acquisition Process

Guiding Principles Continued

(FAR 19.202-1) Equitable opportunities for SB. Examples include—

- Divide acquisitions into reasonably small lots
- Encourage large business prime contractors to subcontract with Small Businesses
- Keep SBA in the loop on opportunities for Small Businesses

The Acquisition Process Itself

Full and Open Competition (FAR 6.1)

- Sealed bids
- Competitive negotiations
- Multiple award contracts such as GSA and Navy Seaport E

The Acquisition Process Cont.

Full and Open Competition After Exclusion of Sources (FAR 6.2) -

- Maintain industrial base (FAR 6.202)
- Small business set asides (FAR 6.203 and 19.5)
- 8(a) set asides (FAR 6.204 and 19.8)
- HUBZone set asides (FAR 6.205 and 19.13)
- SDVOSB set asides (FAR 6.206 and 19.14)
- WOSB set asides (FAR 6.207 and 19.15)
- Set asides for local firms during disasters/emergencies (FAR 6.208 and 26.2)

The Acquisition Process Cont.

Other Than Full and Open Competition (FAR 6.3) --

- Only one responsible source
(FAR 6.302-1)

- Authorized by statute – includes
8(a)/HUBZone/SDVOSB sole source
(FAR 6.302-5)

Set Aside Order of Priority

References: FAR 19.203 and 19.502

- No order of precedence among 8(a), HUBZone, SDVOSB, WOSB

Set Aside Order of Priority (continued)

Micro-Purchases (\$3,000 and below) –

No priority for Small Business

Set Aside Order of Priority Continued

*Between Micro-Purchase Threshold (\$3,000) and
Simplified Purchase Threshold (\$150,000) –*

- Reserved exclusively for Small Businesses
- May award to 8(a)/HUBZone/SDVOSB/WOSB, but no priority over Small Business
- If instead unrestricted full and open competition, the contracting officer shall document the reason why

Set Aside Order of Priority Continued

Above Simplified Purchase Threshold \$150K

- 8(a)/HUBZone/SDVOSB/WOSB set-asides have priority over Small Business set-asides
- Once a requirement is placed under 8(a) program, it must remain under 8(a) program unless SBA allows otherwise

Set Aside Order of Priority Continued

Above Simplified Purchase Threshold \$150K

- HUBZone/SDVOSB Sole Sources MAY be awarded before considering Small Business set asides
- Small Business set-asides have priority over full and open competition

More Set Aside Rules

(Some of the) **Good** Reasons To Not Set Aside
For Small Business (FAR 19.502) –

- Government's interest to maintain or mobilize the Nation's full productive capacity, war or national defense programs
- One or less responsible Small Business firms are competitive in terms of market prices, quality and delivery

More Set Aside Rules

(Some of the) *Bad* Reasons To Not Set Aside
For Small Business (FAR 19.502-5) –

- A large % of previous contracts for same item or service has been placed with Small Businesses
- The government agency is already awarding a fair portion of contracts to Small Businesses for the year
- The item is on a Qualified Products List

More Set Aside Rules

(Some of the) *Bad* Reasons To Not Set Aside
For Small Business (FAR 19.502-5) –

- A period of less than 30 days is available for bidders to respond
- The acquisition is classified for national security reasons
- A brand name or equal product description will be used in the solicitation

The 50% Rule

When an acquisition is set aside (or sole sourced) to SB/8(a)/SDVOSB/WOSB, there can be rules governing how much of the contract cost or performance needs to be done by the Prime

- Small Business and 8(a) Set Asides/8(a) Sole Source: 52.219-14
- HUBZone Set Aside and Sole Source: 52.219-3

The 50% Rule - Continued

- Small Business and 8(a) Set Asides/8(a) Sole Source: 52.219-14
- HUBZone Set Aside and Sole Source: 52.219-3
- SDVOSB Set Aside and Sole Source: 52.219-27
- WOSB/EDWOSB Set Aside: 52.219-29 or 52.219-30

The 50% Rule - Continued

The required percentages for prime contractor cost or performance for Small Business/8(a)/SDVOSB/WOSB/EDWOSB Set Asides and Sole Sources are --

(NOTE: HUBZone Set Asides are more complicated in this area)

- Non-Construction Services: 50% of Labor Cost (not including cost of materials)

The 50% Rule - Continued

- Supplies (If Prime Contractor Is Non Manufacturer, i.e. Wholesaler/Distributor/Reseller/Retailer): No Minimum % needs to be done by Prime Contractor (*)

() However, there's the complicated "Non Manufacturer Rule (see later slide)*

The 50% Rule - Continued

- General Construction Services: 15% of Labor Cost (not including cost of materials)
- Special Trade Construction Services (Electrical, Plumbing, etc): 25% of Labor Cost (not including cost of Materials)

The 50% Rule - Continued

(FAR 19.102(f)) Complicated Non Manufacturer Rule –

- For obvious business reasons, the government is not requiring that a wholesaler/distributor/reseller/retailer prime contractor incur a certain minimum percentage of cost in-house under a Set Aside.

The 50% Rule - Continued

(FAR 19.102(f)) Complicated Non Manufacturer Rule –

- At the same time, under such a Set Aside, the wholesaler/ distributor/ reseller/retailer prime contractor must provide either own product or that of a small business manufacturer or processor

The 50% Rule - Continued

(FAR 19.102(f)) Complicated Non Manufacturer Rule –

- Basically, the government is trying to prevent large business and foreign manufacturers from taking advantage of Set Asides

The Rule of Two (and One)

Rule of 2 for SB/8(a)/HUBZone/SDVOSB/WOSB Set Asides

FAR References for Rule of 2:

- SB – FAR 19.502-2
- 8(a) – FAR 19.805-1
- HUBZone – FAR 19.1305
- SDVOSB – FAR 19.1405
- WOSB – FAR 19.1505

The Rule of Two (and One) Continued

Rule of 2 for SB/8(a)/HUBZone/SDVOSB/WOSB Set Asides

Government SHALL set aside for SB unless documented otherwise between \$3,000 and \$150,000 and MAY set aside for SB if over \$150,000

Determination is based on:

- Reasonable expectation of receiving offers from two or more responsible SB, and

Determination is based on:

- Their expected offers would be competitive in terms of market prices, quality and delivery

The Rule of Two (and One) Continued

Rule of 2 for SB/8(a)/HUBZone/SDVOSB/WOSB Set Asides -Continued

For 8(a), HUBZone, SDVOSB and WOSB Set Asides —

Government MAY set aside over \$3,000 if

- Reasonable expectation of receiving offers from two or more responsible small businesses, and
- Their expected offers would be competitive in terms of market prices

The Rule of Two (and One) Continued

Rule of 1 for 8(a)/HUBZone/SDVOSB Sole Source

FAR References for 8(a)/HUBZone/SDVOSB Sole Source

- 8(a) – FAR 19.805-1
- HUBZone – FAR 19.1306
- SDVOSB – FAR 19.1406

The Rule of Two (and One) Continued

Rule of 1 for 8(a)/HUBZone/SDVOSB Sole Source Continued

For HUBZone and SDVOSB:

- Set aside has priority over Sole Source
- To allow for HUBZone/SDVOSB sole source, only one eligible firm can do the job

The Rule of Two (and One)

Rule of 1 for 8(a)/HUBZone/SDVOSB Sole Source Continued

For 8(a) Firms:

- 8(a) competitive is customary if over \$6.5M for manufacturing and \$4M for all other
- Sole source is allowed if under these amounts – there is no requirement that only one 8(a) firm can do the job

So How Do You Find Qualified Small Businesses?

Meaning “Two Ships Passing In The Night”

Meaning “Be There!”

Finding Qualified Small Businesses

*The FAR suggests Market Research techniques
such as:*

- Contact knowledgeable individuals in
Government and industry

(Get Referrals!)

Finding Qualified Small Businesses Cont.

- Review results of prior market research efforts
(respond to market research inquiries/sources sought/requests for information(RFIs), whether contacted or listed in FedBizOpps!)

- Publish RFIs in relevant technical/scientific journals or business/trade publications

(Read journals and publications that are relevant to your industry!)

Finding Qualified Small Businesses Cont.

- Query lists of available Multiple Award contractors, such as GSA and Navy Seaport E
(Consider getting these contracts!)
- Participate in online interactive communications among Government, industry and user personnel
(Start chatting!)

Finding Qualified Small Businesses Cont.

- Review company catalogs and product literature

(Send these to your targeted clients and make them available online!)

- Conduct technical forums and pre-bid/pre-solicitation meetings

(If contacted or in FedBizOpps, attend these events!)

End Part 1

NAICS Codes/Size Standards/Affiliation Rules

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PART 2

Role of NAICS

- NAICS codes replaced SIC codes
- CO designates applicable NAICS
- NAICS determines SB size standard
 - Annual Receipts
 - Maximum Employee Count
- SBA adjust NAICS codes/size standard on five-year basis

Size Standard Calculation

■ Annual Receipts

- Used for construction/services NAICS codes
- Receipts=total income + cost of goods sold
- Average over last three complete taxable years
- Includes:
 - All Revenues, not just NAICS work
 - Affiliates
- Proof: Income Tax Returns
- Construction – ranges from \$6.5 to \$31 million
- Services – most common = \$6.5 million

Size Standard Calculation – Cont.

■ Employee Count

- ❑ Used for manufacturing/mining NAICS codes
- ❑ Avg. # of employees each pay period
- ❑ Preceding completed 12 calendar months
- ❑ Proof: Payroll Records
- ❑ Full-time, part-time, temps *et al* = *head count*
- ❑ Predominant size standard=500 employees, none lower

Size Standard Issues – Cont.

■ Self-Certification Process

- ❑ Size status (receipts/head count) represented in Online Reps & Certs Application (ORCA) or Offer
- ❑ Accepted as true absent size protest
- ❑ Other CO/SBA info on size

■ SBA Certification Required

- ❑ HUB Zone SB
- ❑ Small Disadvantaged Business (SDB)
- ❑ 8a DBE

Size Standard Issues-Cont.

- Size as of date of offer controls
- Penalties for misrepresentation
- Recertification requirements
- 50% Rule

Recertification Rules

- **Issue:** Can firms grow large (“other than small”) during long-term Ks?
- **General Rule:** If small at date of initial offer, considered small for life of contract, including options
 - Exceptions:
 - Follow-on contracts
 - Novations

Recertification Rules – Cont.

- New rule since 2007:
 - Recertification required before 6th year and each Option thereafter for FSS, MAS, GWACs (LT- K)
- When CO/Agency Requests, or
- Acquisition/merger/novation

Affiliation Rules – Cont.

■ Affiliation

- When one concern controls/has power to control the other, or
- Third-party control has power to control two firms
- Then, the firms are combined for size determination

Affiliation Rules – Cont.

- Common Ownership/Voting Control
 - 50% plus
 - Less than 50% but controlling
 - Present effective rule
- Common Management
- Substantially Identical Interests
- Newly Organized Concerns
- Negative Control Devices

Affiliation Exceptions

- Mentor-protégé programs
 - SBA
 - DoD
- Alaskan Native Corporations
- American Indian Tribes
- Certain JVs

Ostensible Subcontractor Rule

- Affiliation rule treats prime and sub as affiliated for receipts/employee count
- “Ostensible” sub is really dominant firm, controlling contract performance
- **Focus:** Determine which party will perform the “primary and vital” tasks for contract
- **Focus:** Is prime “unusually reliant on sub”?

Size Status Protests

- **Protest.** Challenge to SB self-certification

- How to Protest:
 - In writing to CO, or call to CO, followed by letter
 - Allege specific facts
 - Lawyer not required, but usually advisable

- Who may Protest:
 - Offerors
 - CO
 - SBA

Size Status Protests – Cont.

- When to Protest:
 - Five business days of notice of tentative/actual award
 - CO/SBA protests always timely
 - Timely protest suspends award until 10 business days after SBA gets protest from CO
 - Untimely protests don't usually get considered

SBA Protest Process – Cont.

- Protest triggers Areas Officer (AO) investigation
- Challenged firm required to file SBA 355
- Protest allegations frame issues, but SBA not limited to them
- 355 can require major effort
- Failure to file = “other than small” result
- Failure to provide info = adverse inference
- AO issues size determination

SBA Appeals

- May ask AO to reconsider
- May appeal to SBA's Office of Hearings and Appeal (OHA)
- Who may appeal: Any interested party
- Time to appeal: 15/30 days of AO decision
- Must show errors of law/fact
- Limited to facts/arguments presented to AO
- Best Advice: Use an attorney for OHA appeal

Impact of Adverse Formal Size Determination

- Firm ineligible for award of contract
- Precludes firm from later self-certifying under same or lower size standard
- Potential for misrepresentation penalties

In Summary -

When Teaming and Subcontracting:

- When a SB prime, remember:
 - Affiliation rules
 - Ostensible subcontractor
 - 50% Subcontracting limitation
 - Federal flow-down requirements

- When a sub, remember:
 - Prime is the awardee, not the sub
 - Prime's commitment to teaming/subcontracting is not ordinarily binding

End Part 2

Federal Small Business Program - FAR Part 19.7

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PART 3

Small Business Plans

- When is a SB Plan Required?
- Can a Plan be Renegotiated Once Complete?
- Example of SB Plan (See Handout)
 - GSA Model Outline
 - DLA Checklist

Small Business Reporting Requirements

- ISR and SSR replaced 294/295
- ISR semi-annual (April & October)
- SSR yearly (October)
 - DCMA and NASA semi-annual (April & October)

Individual and Summary Reports

- Reports required for Individual Plan, Commercial Plan, Comprehensive Plan
 - ISR – Individual Plan
 - SSR – Individual Plan, Commercial, Comprehensive
 - What about Master Subcontracting Plan?

Electronic Subcontracting Reporting System - eSRS

- Used to complete/submit ISR and SSR reports
- Reports due by April 30 and October 30

IAE: eSRS (Electronic Subcontracting Reporting System) - Microsoft Internet Explorer

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eSRS

Integrated Acquisition Environment
Electronic Subcontracting Reporting System



Log-In or Register Now:



[GOVERNMENT](#)



[CONTRACTORS](#)

Please use Internet Explorer 6.0+, Mozilla Firefox 2.0+, or Apple Safari 3.0+ to access eSRS.

Department of Defense organizations that handle unclassified contracts will use eSRS in October 2008. Classified contract reporting should still be done through your government contracting official.

Training

About eSRS

FAQs

Introduction to eSRS

This guide focuses on the system functionality, registration process, Federal Government Agency and Contractor responsibilities and a high level overview of SBA's Subcontracting Program.

[eSRS Quick Reference for Federal Government Prime Contractors filing an Individual Subcontracting Report](#)

The Individual Subcontracting Report (ISR) is the former SF-294. This guide

Documents

User Guides

- » [eSRS Contractor Guide](#)
- » [eSRS Agency Coordinator Guide](#)
- » [eSRS CO Guide](#)
- » [eSRS POC Guide](#)
- » [eSRS DGU Guide](#)

Training Materials

- » [Quick Reference for Federal Government Contractors Filing SSR for Commercial Plan](#)
- » [Quick Reference for Federal Government Contractors Filing SSR for Individual Plan](#)
- » [Quick Reference for Federal Government Contractors Submitting SDB Participation Report](#)
- » [Quick Reference for Federal Government Contractors Submitting SDB Year-End Report](#)
- » [Quick Reference for Federal Government Prime Contractors Filing ISR](#)
- » [Quick Reference for Federal Government Subcontractors Filing ISR](#)

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DEPARTMENT OF DEFENSE
OSBP
OFFICE OF SMALL BUSINESS PROGRAMS

FAQS | CONTACT | EXTRANET | SITE MAP

Home | About | *for Small Businesses* | *for Small Business Specialists* | *for Government* | DoD Small Business Offices

Welcome! We're
Business Program

We advise the Secretary of Defense and are committed to maximizing small business acquisitions. We provide leadership and Defense Agencies to meet the needs and opportunities for small businesses while ensuring each tax dollar is spent responsibly.

- Regulations
- e-SRS
- Executive Orders
- Legislation
- Policy Directives
- Resources
- Conferences & Events

PLANS & PERFORMANCE

In order to fulfill our strategic goals and mission, we seek out opportunities and strategic activities to increase small business dollars competitively awarded by DoD military departments and agencies. These statistical tables and reports demonstrate how well we are performing.

LEGISLATION, REGULATIONS, POLICY

Small business' contributions to the Warfighter are maximized through legislation, regulations, Executive Orders and policy directives. These laws, rules, policies, orders and related guidelines defining the small business community's support of the DoD are accessible here.

RESOURCES

There are a number of reference materials, guides, training resources as well as professional counseling available to DoD Small Business Specialists. This includes a link to the Procurement Technical Assistance Centers, which provide training and counseling assistance at no cost.

<http://www.acq.osd.mil/osbp/sbs/esrs.shtml> Internet

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Small Business Specialists

Regulations

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Policy Directives

Resources

Electronic Subcontracting Reporting System (e-SRS) Information

As part of the President's Management Agenda for Electronic Government (E-Gov), the Electronic Subcontracting Reporting System (eSRS) was developed to collect subcontracting accomplishments. This system replaces the paper Standard Form 294, Subcontract Reporting for Individual Contracts, and the Standard Form 295, Summary Subcontract Report. Government prime contractors and subcontractors submit subcontracting reports, Individual Subcontracting Reports (ISR) and Summary Subcontracting Reports (SSR) via the eSRS website, <http://esrs.gov>

The Department of Defense (DoD) began implementation of eSRS In April 2008. Prime contractors and subcontractors (with Subcontracting Plans) were required to submit subcontracting reports using the eSRS for the FY 2008 reporting period and all subsequent reporting periods.

Training Videos

[DAU Training Video on DoD Deployment of eSRS \(10/22/08\)](#)

Memorandums

Done Internet

Program 2008, introduction to the electronic subcontracting reporting system (eSRS) (Archived 22 Oct 2008, 12:53 PM EDT)

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Introduction to the Electronic Subcontracting Reporting System(eSRS) (Archived 22 Oct 2008, 12:53 PM EDT)

Part of "Small Business Contracting" Channel



Introduction to the Electronic Subcontracting Reporting System(eSRS) (Archived 22 Oct 2008, 12:53 PM EDT)

Ms. Wendy Despres and Ms. Kristine Preece will be presenting a WebCast on 22 October 2008 at 1300 EST on the subject of the Electronic Subcontracting Reporting System (eSRS), an online source for subcontracting data for the Federal government. The system replaces the paper Standard Form 294, Subcontract Report for Individual Contracts, and the Standard Form 295, Summary Subcontract Report. This session will provide participants with an introduction on how this system works and how it is being deployed across the Department of Defense. The session will also cover eSRS policy and related policy issues.

Available Formats:
 Windows - 96-256-384k, Video
 Windows - 300K, Video

Available Date: 22 Oct 2008, 2:37 PM EDT
Expiration Date: Does not expire

Duration: 65 minutes

View Program:

[Introduction to the eSRS](#)
 (Windows - 96-256-384k, Video)

[ESRS How To](#)
 (Windows - 300K, Video)

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What Happens if Small Business Goals are not Met?

- Possible penalties
 - **52.219-16 Liquidated Damages—Subcontracting Plan.**
As prescribed in [19.708\(b\)\(2\)](#), insert the following clause:
 - (a) “Failure to make a good faith effort to comply with the subcontracting plan,” as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled “Small Business Subcontracting Plan,” or willful or intentional action to frustrate the plan.
 - (b) Performance shall be measured by applying the percentage goals to the total actual subcontracting dollars or, if a commercial plan is involved, to the pro rata share of actual subcontracting dollars attributable to Government contracts covered by the commercial plan. If, at contract completion or, in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled “Small Business Subcontracting Plan,” the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor’s failure to comply shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal.

What Happens if Small Business Goals are not Met?

- Possible penalties
 - **52.219-1652.219-16 Liquidated Damages—Subcontracting Plan.**
 - (c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made and to discuss the matter. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.
 - (d) With respect to commercial plans, the Contracting Officer who approved the plan will perform the functions of the Contracting Officer under this clause on behalf of all agencies with contracts covered by the commercial plan.
 - (e) The Contractor shall have the right of appeal, under the clause in this contract entitled, Disputes, from any final decision of the Contracting Officer.
 - (f) Liquidated damages shall be in addition to any other remedies that the Government may have.

What Happens if Small Business Goals are not Met?

- Past performance might be affected
 - **15.304(c)(3)(ii) Evaluation factors and significant subfactors.**
 - (ii) For solicitations involving bundling that offer a significant opportunity for subcontracting, the contracting officer must include a factor to evaluate past performance indicating the extent to which the offeror attained applicable goals for small business participation under contracts that required subcontracting plans ([15 U.S.C. 637\(d\)\(4\)\(G\)\(ii\)](#)).
 - **15.305(a)(2)(i)(v) Proposal evaluation.**
 - (i) Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination required under [Subpart 9.1](#).
 - (v) The evaluation should include the past performance of offerors in complying with subcontracting plan goals for small disadvantaged business (SDB) concerns (see [Subpart 19.7](#)), monetary targets for SDB participation (see [19.1202](#)), and notifications submitted under [19.1202-4\(b\)](#).
- Justification
 - "Good Faith" (see handout)

End Part 3

Questions?

RESOURCES

- ❑ <https://www.sba.org>
- ❑ <https://www.acquisition.gov/FAR/>
- ❑ <https://www.fedbizopps.gov/>
- ❑ <https://www.esrs.gov/>