

# **FEDERAL CONTRACTS PERSPECTIVE**

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## **SBA PROPOSES RULES IMPLEMENTING SMALL BUSINESS JOBS ACT**

The Small Business Administration (SBA) has published two proposed rules to implement provisions of the Small Business Jobs Act of 2010 (Public Law 111-240). The two proposed rules would amend SBA’s regulations in Title 13 of the Code of Federal Regulations (CFR) to address (1) small business subcontracting, and (2) the integrity of small business size and status representations.

■ **Small Business Subcontracting:** This proposed rule would amend 13 CFR 125.3, Subcontracting Assistance, to implement provisions of Public Law 111-240 that pertain to small business subcontracting.

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SBA is proposing to amend its regulations that pertain to “covered contracts” (contracts for which a small business subcontracting plan is required, currently valued above \$1,500,000 for construction and \$650,000 for all other contracts; small businesses are exempt from this requirement). The following are the primary changes SBA is proposing:

- Paragraph (a)(1) of 13 CFR 125.3 would clarify which subcontracts must be included in subcontracting data reporting, which subcontracts should be excluded, and the way subcontracting data is reported: “Purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor are not included. Subcontract award data reported by prime contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made beyond the immediate next-tier, unless the contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC [Alaska Native Corporation] or Indian Tribe. Only subcontracts involving performance in the United States or its outlying areas should be included...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); electricity; utilities such as water, sewer, and other services purchased from a municipality; and philanthropic contributions.”

- Paragraphs (c)(3) and (c)(4) would require a prime contractor with a covered contract to notify the contracting officer in writing whenever it does not “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 amount and quality used in preparing and submitting the bid or proposal.” An offeror is considered to have used a small business concern in preparing its bid or proposal if:
  - (i) The offeror references the small business concern as a subcontractor in the bid or proposal;
  - (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 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.
- Paragraph (c)(5) would require a prime contractor to notify the contracting officer whenever the prime contractor reduces payments to a subcontractor or when payments to a subcontractor are 90 days or more past due.
- Paragraph (d) would clarify that the contracting officer is responsible for monitoring and evaluating small business subcontracting plan performance.
- Paragraph (d)(8) would require a prime contractor to update its subcontracting plan whenever an option is exercised.
- Paragraph (d)(9) would require a prime contractor to submit a subcontracting plan whenever a modification causes a contract to exceed the subcontracting plan threshold.
- Paragraph (d)(10) would permit the contracting officer to request a subcontracting plan when a firm’s status changes from small to other than small as a result of a size recertification.
- Paragraph (h) would require subcontracting plans for multi-agency contracts (MACs), Federal Supply Schedule contracts, Multiple Award Schedule contracts, and Government-wide Acquisition indefinite-delivery, indefinite-quantity (IDIQ) contracts (GWACs) with estimated values above the subcontracting plan thresholds and that have subcontracting possibilities unless the prime contractor has a commercial plan. “(1) Contractors shall submit small business subcontracting reports for individual orders to the contracting agency on an annual basis. (2) The agency funding the order shall receive credit towards its small business

Vivina McVay, Editor-in Chief

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subcontracting goals. (3) The agency funding the order may in its discretion establish small business subcontracting goals for individual orders.”

Comments on this proposed rule must be submitted no later than December 5, 2011, identified as “RIN: 3245-AG23,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail/hand-delivery/courier to: Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW, 8th Floor, Washington, DC 20416.

■ **Small Business Size and Status Integrity:** This proposed rule would amend 13 CFR Part 121, Small Business Size Regulations; 13 CFR Part 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations; 13 CFR Part 125, Government Contracting Programs; 13 CFR Part 126, HUBZone Program; and 13 CFR Part 127, Women-Owned Small Business Federal Contract Program, to implement statutory provisions pertaining to small business size and status integrity.

The following are the primary changes SBA is proposing:

- Paragraph (a) of 13 CFR 121.108, What are the requirements for representing small business size status, and what are the penalties for misrepresentation?; paragraph (d) of 13 CFR 121.411, What are the size procedures for SBA’s section 8(d) Subcontracting Program?; paragraph (a) of 13 CFR 124.521, What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?; paragraph (a) of 13 CFR 124.1015, What are the requirements for representing small disadvantaged business status, and what are the penalties for misrepresentation?; paragraph (a) of 13 CFR 125.29, What are the requirements for representing service-disabled veteran-owned small business status, and what are the penalties for misrepresentation?; paragraph (a) of 13 CFR 126.900, What are the requirements for representing HUBZone status, and what are the penalties for misrepresentation?; and paragraph (a) of 13 CFR 127.700, What are the requirements for representing women-owned small business or economically disadvantaged women-owned small business status, and what are the penalties for misrepresentation?, would establish that there is a presumption of loss equal to the value of the contract or other instrument when a concern willfully seeks and receives an award under any of these programs by misrepresenting its small business size or socioeconomic status.
- 13 CFR 121.108(b), 13 CFR 121.411(e), 13 CFR 124.521(b), 13 CFR 124.1015(b), 13 CFR 125.29(b), 13 CFR 126.900(b), and 13 CFR 127.700(b), would provide that the submission of a bid or proposal intended for a small business concern, or representation in a federal electronic database that a firm is eligible to be considered for award under a small business program, will be deemed a size or status certification or representation.
- 13 CFR 121.108(c), 13 CFR 121.411(f), 13 CFR 124.521(c), 13 CFR 124.1015(c), 13 CFR 125.29(c), 13 CFR 126.900(c), and 13 CFR 127.700(c), would require an authorized official to sign a certification or representation regarding the size or status of the firm.

- 13 CFR 121.108(e), 13 CFR 121.411(h), 13 CFR 124.1015(e), 13 CFR 125.29(e), 13 CFR 126.900(e), and 13 CFR 127.700(e), would state that the penalties for misrepresentation include suspension or debarment, civil penalties, and criminal penalties.
- 13 CFR 121.109, What Must a Concern do in order to be Identified as a Small Business Concern in any Federal procurement databases?; 13 CFR 124.1016, What must a concern do in order to be Identified as a Small Disadvantaged Business Concern in any Federal procurement databases?; 13 CFR 125.30, What must a concern do in order to be identified as a Service-Disabled Veteran-Owned Small Business concern in any Federal procurement databases?; and 13 CFR 127.701, What must a concern do in order to be identified as a Women-Owned Small Business concern in any Federal procurement databases?, would require a concern to certify its eligibility for a particular small business at least annually in the Online Representations and Certifications Application (ORCA) database (<https://orca.bpn.gov/>). Firms that do not update their size or status in ORCA at least annually will not be identified in the database as small or some other socioeconomic status until the representation is updated.

Comments on this proposed rule must be submitted no later than November 7, 2011, identified as “RIN: 3245-AG23,” by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail/hand-delivery/courier to: Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW, 8th Floor, Washington, DC 20416.

## **FTR AMENDED TO ADDRESS TDY LODGING EXPENSES**

The General Services Administration (GSA) is amending the Federal Travel Regulation (FTR) regarding reimbursement of lodging per diem expenses while on temporary duty travel (TDY). The final rule specifically states GSA’s policy in regards to reimbursement for personally-owned residence and personally-owned recreational vehicle expenses while on TDY.

GSA is amending FTR 301-11.12, How does the type of lodging I select affect my reimbursement?, which contains language regarding reimbursement to travelers based upon the type of lodging they select while on TDY. This amendment expressly states that agencies are not authorized to reimburse the lodging portion of per diem to travelers who purchase property, including recreational vehicles and campers, for lodging purposes in conjunction with TDY, and that agencies are not authorized to reimburse the lodging portion of per diem to those who lodge at their personal residences while on TDY (paragraphs (b)(1) and (b)(2)):

- (b) Your agency will not reimburse you for:
  - (1) Personally-owned residence. You will not be reimbursed for any lodging expenses for staying at your personally-owned residence or for any real estate expenses associated with the purchase or sale of a personal residence at the TDY location...
  - (2) Personally-owned recreational vehicle (trailer/camper). You will not be reimbursed any expenses associated with the purchase, sale or payment of a recreational vehicle or camper at the TDY location.

## SBA PROPOSES INCREASING SMALL BUSINESS SIZE STANDARDS

The Small Business Administration (SBA) is proposing to increase the small business size standards for 15 industries in North American Industry Classification System (NAICS) Sector 51, Information, and 37 industries in NAICS Sector 56, Administrative and Support, Waste Management and Remediation Services.

The following are the industries, their current small business size standards, and their proposed small business size standards:

<b>NAICS Code</b>	<b>Industry Title</b>	<b>Current Size Standard (\$ million)</b>	<b>Proposed Size Standard (\$ million)</b>
<b><i>Sector 51</i></b>			
511210	Software Publishers	\$25.0	\$35.5
512110	Motion Picture and Video Production	\$29.5	\$30.0
512131	Motion Picture Theaters (except Drive-Ins)	\$7.0	\$35.5
512199	Other Motion Picture and Video Industries	\$7.0	\$19.0
512290	Other Sound Recording Industries	\$7.0	\$10.0
515111	Radio Networks	\$7.0	\$30.0
515112	Radio Stations	\$7.0	\$35.5
515120	Television Broadcasting	\$14.0	\$35.5
515210	Cable and Other Subscription Programming	\$15.0	\$35.5
517410	Satellite Telecommunications	\$15.0	\$30.0
517919	All Other Telecommunications	\$25.0	\$30.0
518210	Data Processing, Hosting, and Related Services	\$25.0	\$30.0
519110	News Syndicates	\$7.0	\$25.5
519120	Libraries and Archives	\$7.0	\$14.0
519190	All Other Information Services	\$7.0	\$25.5
<b><i>Sector 56</i></b>			
561311	Employment Placement Agencies	\$7.0	\$25.5
561312	Executive Search Services	\$7.0	\$25.5
561320	Temporary Help Services	\$13.5	\$25.5
561330	Professional Employer Organizations	\$13.5	\$25.5
561410	Document Preparation Services	\$7.0	\$14.0
561421	Telephone Answering Services	\$7.0	\$14.0
561422	Telemarketing Bureaus and Other Contact Centers	\$7.0	\$14.0
561431	Private Mail Centers	\$7.0	\$14.0
561439	Other Business Service Centers (including Copy Shops)	\$7.0	\$14.0
561440	Collection Agencies	\$7.0	\$14.0
561450	Credit Bureaus	\$7.0	\$14.0
561491	Repossession Services	\$7.0	\$14.0
561492	Court Reporting and Stenotype Services	\$7.0	\$14.0

561499	All Other Business Support Services	\$7.0	\$14.0
561510	Travel Agencies	\$3.5	\$19.0
561520	Tour Operators	\$7.0	\$19.0
561591	Convention and Visitors Bureaus	\$7.0	\$19.0
561599	All Other Travel Arrangement and Reservation Services	\$7.0	\$19.0
561611	Investigation Services	\$12.5	\$19.0
561612	Security Guards and Patrol Services	\$18.5	\$19.0
561613	Armored Car Services	\$12.5	\$19.0
561621	Security Systems Services (except Locksmiths)	\$12.5	\$19.0
561622	Locksmiths	\$7.0	\$19.0
561710	Exterminating and Pest Control Services	\$7.0	\$10.0
561740	Carpet and Upholstery Cleaning Services	\$4.5	\$5.0
561910	Packaging and Labeling Services	\$7.0	\$10.0
561920	Convention and Trade Show Organizers	\$7.0	\$10.0
561990	All Other Support Services	\$7.0	\$10.0
562111	Solid Waste Collection	\$12.5	\$35.5
562112	Hazardous Waste Collection	\$12.5	\$35.5
562119	Other Waste Collection	\$12.5	\$35.5
562211	Hazardous Waste Treatment and Disposal	\$12.5	\$35.5
562212	Solid Waste Landfill	\$12.5	\$35.5
562213	Solid Waste Combustors and Incinerators	\$12.5	\$35.5
562219	Other Nonhazardous Waste Treatment and Disposal	\$12.5	\$35.5
562910	Remediation Services	\$14.0	\$19.0
562920	Materials Recovery Facilities	\$12.5	\$19.0

Comments on the proposed changes to Sector 51 are to be submitted no later than December 12, 2011, identified as “RIN: 3245-AF26,” by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail/hand-delivery/courier to: Khem R. Sharma, PhD, Chief, Size Standards Division, 409 Third Street, SW, Mail Code 6530, Washington, DC 20416.

Comments on the proposed changes to Sector 56 are to be submitted no later than December 12, 2011, identified as “RIN 3245-AF27,” by either of the methods for submitting comments on the proposed changes comments on Sector 51.

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## PROPOSED FAR RULE WOULD REQUIRE PRIVACY TRAINING

A new FAR Subpart 24.3, Privacy Training, is being proposed, which would require that contractors: (1) identify employees who require access to a government system of records, handle personally identifiable information, or design, develop, maintain, or operate a system of records on behalf of the federal government; and (2) provide privacy training to those employees upon contract award and at least annually thereafter (paragraph (a) of proposed FAR 24.301, Privacy Training).

FAR 24.301(b) would require agencies to “provide contractors with the privacy training materials (in a format deemed appropriate) necessary to satisfy the requirement described in paragraph (a) of this section unless, on an exception basis, the contracting officer authorizes a contractor to provide its own privacy training materials.”

FAR 24.301(c) would require that such privacy training address, at a minimum:

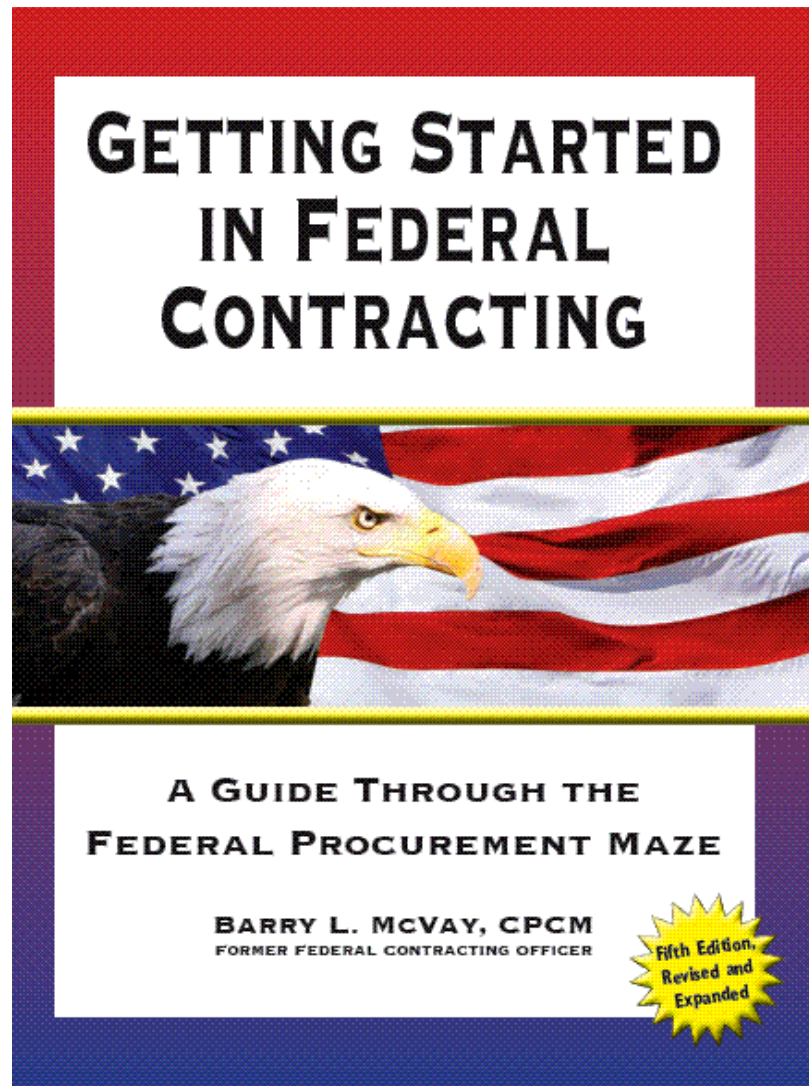
- (1) The protection of privacy, in accordance with the Privacy Act (5 U.S.C. 552a);
- (2) The handling and safeguarding of personally identifiable information;
- (3) The authorized and official use of a government system of records;
- (4) Restrictions on the use of personally-owned equipment to process, access, or store personally identifiable information;
- (5) The prohibition against access by unauthorized users, and unauthorized use by authorized users, of personally identifiable information or systems of records on behalf of the federal government;
- (6) Breach notification procedures (*i.e.*, procedures for notifying appropriate individuals when privacy information is lost, stolen, or compromised) to minimize risk and to ensure prompt and appropriate actions are taken should a breach occur; and
- (7) Any agency-specific privacy training requirements.

An accompanying clause, FAR 52.224-XX, Privacy Training, would be required in solicitations and contracts where contractor employees will have access to a government system of records, handle personally identifiable information, or design, develop, maintain, or operate a system of records. The clause would be required to be included in all subcontracts when subcontractor employees will have access to a government system of records, handle personally identifiable information, or design, develop, maintain, or operate a system of records on behalf of the government.

Finally, there would be two alternative clauses:

- Alternate I would be used when the contracting officer elects to have the contractor provide its own privacy training materials; and
- Alternate II would be used when an agency elects to provide privacy training to contractor employees.

Comments on this proposed rule must be submitted no later than December 13, 2011, identified as “FAR Case 2010-013,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) fax: 202-501-4067; or (3) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE, 7th Floor, Washington, DC 20417.



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