

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE U.S. DEPARTMENT OF ENERGY

AND

THE U.S. SMALL BUSINESS ADMINISTRATION

I. Preamble

This Memorandum of Understanding (MOU) between the U.S. Department of Energy (DOE or Department) and the U.S. Small Business Administration (SBA) sets forth the methodology for measuring the achievement of the DOE with respect to awarding contracts to small businesses.

II. Purpose

- (a) This MOU implements section 6022(a) of Title VI of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. No. 109-13.
- (b) Section 6022(a) provides that DOE and SBA shall, not later than September 30, 2005, enter into a Memorandum of Understanding setting forth an appropriate methodology for measuring the achievement of DOE with respect to contract awards to small businesses.
- (c) Section 6022(b) provides that such methodology shall, at a minimum include a method of counting DOE's achievements in awards of prime contracts and subcontracts to small businesses awarded by DOE management and operating, management and integration, and other facility management prime contractors, as well as uniform criteria that could be used by prime contractors when measuring the value and number of subcontracts awarded to small businesses.

III. Background

- (a) The Small Business Act, 15 USC §631, as amended, provides as a matter of law that the Government should ensure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government be placed with small business enterprises.
- (b) In 1988, the Business Development Reform Act, Pub.L. No. 100-656, amended the Small Business Act to require the President to annually establish Government-wide procurement goals for small businesses and small disadvantaged businesses. The President's small business goal could not be less

than 20% of the value of all prime contracts, while the small and disadvantaged goal could not be less than 5%. Additionally, each Federal agency was charged with establishing jointly with the SBA specific goals consistent with each agency's mission. The goals were required to realistically reflect the potential of small business concerns to perform the agency's contracts. In the event that an agency and SBA were unable to agree on such goals, the Administrator, Office of Federal Procurement Policy (OFPP), was required to make a final determination of the goal to be established.

- (c) On November 2, 1990, the SBA Administrator referred to the OFPP Administrator disagreements on goaling with three Federal agencies: the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and DOE.
- (d) On March 5, 1991, the OFPP Administrator issued a final determination resolving each of the disagreements. His determination provided specific goals for each of the agencies. DOD and NASA's goals were determined based on their historical small business contracting achievement. With respect to DOE, the OFPP Administrator established the agency's small business goal at 20.1%, a significantly higher level than that originally proposed by SBA (3.7%), and far in excess of DOE's historical achievement. However, the OFPP Administrator further provided that the prime contract goals for DOE should also include the subcontracts awarded by its management and operating (M&O) contractors, in addition to its direct Federal contract obligations.
- (e) On October 7, 1999, the SBA Administrator wrote to the OFPP Administrator expressing the opinion that the M&O's subcontract awards should not be counted towards DOE's prime contract goal achievements, so that all agencies would be measured on the same basis.
- (f) On November 3, 1999, the OFPP Administrator issued a determination stating that effective in FY 2000 and thereafter, OFPP's previous direction of March 9, 1990, was rescinded.
- (g) DOE and SBA complied with the OFPP Administrator's November 1999 determination and revised both the prime contract goaling as well as the prime contract achievement methodologies of the Department. As a result, DOE's achievement changed from the 18%-20% range achieved in prior years under the 1990 OFPP policy direction, to 2.85% in FY 2000.
- (h) As a consequence of the policy change, its impact on goaling and achievements and the potential for misperception as to what these changes meant in terms of DOE's support to small business, DOE re-emphasized the importance of direct DOE prime contracting with small business and adopted a number of high-profile initiatives to increase those awards.

- (i) From FY 2000 to FY 2004, DOE increased prime contract dollar obligations to small business by \$400 million or by approximately 82%. In terms of contracts awarded, the number of contract awards (including contract awards against GSA multiple award schedules) to small business increased from 42% of the total number of prime contracts in FY 2000 to 61% in FY 2004. With respect to achieving the small business goals established with SBA, DOE obligations on small business contracts as a percentage of total prime contract obligations increased from 2.8% in FY 2000 to just over 4% in FY 2004.
- (j) The Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, incorporated, among other things, the Energy and Water Development Appropriations Act, 2005, which contained two provisions affecting DOE's initiatives to increase small business participation at the prime contract level. In Section 312, the Act provides that funds otherwise available to DOE to achieve small business contracting goals could not be used for procurement actions resulting from the break-out of requirements from current M&O contracts unless the Secretary of Energy formally requests, considers, and renders an appropriate decision on the views of the SBA Breakout Procurement Center Representative (or designee) concerning the cost effectiveness, mission performance, security, safety, small business participations, and other legitimate acquisition objectives of the procurement. Section 313 of the Act prohibits the use of funds appropriated by the Act to be used by DOE to require a M&O contractor to perform contract management oversight or other contract administration functions that are inherently governmental as defined and prohibited by the Federal Acquisition Regulation.
- (k) On May 11, 2005, Congress enacted the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. No.109-13, section 6022 of which directs this MOU.

IV. Methodologies for Measuring Achievement

- (a) The methodologies described herein for measuring the achievement of DOE with respect to the award of contracts and subcontracts to small business are consistent with:
 - (i) Section 644(g) of the Small Business Act, which requires that each agency of the Executive branch establish jointly with the SBA an annual goal for that agency that realistically reflects the potential of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts and subcontracts under such contracts let by each agency;

- (ii) Section 637(d) of the Small Business Act, which requires that each agency shall ensure that the goals offered by an apparently successful contractor are attainable in relation to the subcontracting opportunities available to the contract, commensurate with the efficient and economical performance of the contract, the pool of eligible Subcontractors available, and the actual performance of such contractors in fulfilling the subcontracting goals specified in prior subcontracting plans;
- (iii) The most recent determination of the OFPP Administrator as contained in his letter dated November 3, 1999, and issued pursuant to the authorization provided by section 644(g) of the Small Business Act to determine goals where an agency and SBA are unable to agree; and
- (iv) OFPP Policy Letter 99-1 and SBA's "Goaling Guidelines for the Small Business Preference Programs," dated July 3, 2003.
- (b) The method of counting the achievement of DOE in the award of prime contracts to small businesses shall be as follows:
- (i) The total dollar amount obligated during a given fiscal year against all eligible prime contracts awarded by the Department or any Federal component organization thereof, regardless of the year in which the contract was awarded, shall be determined. Eligible contracts include contract awards for supplies and services (including construction) to business concerns, non-profit organizations, educational institutions and state and local governments, except that the following are not eligible:
- Non-appropriated Funds. Procurements with funds generated from sources such as user fees, gifts, etc. rather than appropriated funds. Examples include the U.S. Postal Service and Comptroller of the Currency.
 - Internal Transactions. Some transactions are internal to an agency and are not actually contracts such as when a military base orders supplies from the Defense Department's Supply Depot. The acquisitions of the supply depot are also not included in the goaling program because they are funded with proceeds from resales within the Department.
 - Mandatory Sources. By law, agencies must award certain contracts to "mandatory sources." Examples include commodities produced by the Federal Prison Industries (known as UNICOR) or the JWOD Participating Nonprofit Agency (formerly Sheltered Workshop).
 - Contracts for Foreign Governments or International Organizations. Example includes Foreign Military Sales that

are Government to Government transactions often funded by foreign country funds.

- Contracts Not Under FAR. As a matter of policy, goals only extend to procurements subject to the Federal Acquisition Regulation (FAR).
- Subcontracts awarded by any prime contractor.
- Other transactions as may be specified in the current or future SBA "Goaling" guideline.

(ii) The total dollar amount obligated during a given fiscal year against all eligible prime contractors awarded by the Department or any Federal component organization thereof, to small businesses concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUB-Zone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, regardless of the year in which the contract was awarded, shall be determined.

(iii) The Department's small business achievements shall be expressed as the percentage that IV(b)(ii) represents of IV(b)(i).

(c) The method of counting the achievement of the DOE in the awards by DOE prime contractors including management and operating, management and integration, and other facility management contractors of subcontracts to small businesses shall be as follows:

(i) The amount of dollars obligated by a prime contractor or other-than-small subcontractor (at any tier) with a subcontracting plan under the flow-down requirement against all eligible subcontracts during a given fiscal year, regardless of the year in which the subcontract was awarded. Eligible subcontracts are those agreements entered by a Government prime contractor or subcontractor calling for supplies or services required for the performance of the contract or subcontract, except that the following are not eligible:

- a) Purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or other-than-small subcontractor filing the report;
- b) Subcontracts that do not involve performance in the U.S. or its outlying areas;

(ii) The amount of dollars obligated by a prime contractor or other-than-small subcontractor (at any tier) with a subcontracting plan under the flow-down requirement against all eligible subcontracts with small business concerns, small disadvantaged business concerns, veteran-

owned small businesses, service-disabled veteran owned small businesses, women-owned small business, and HUBZone small businesses concern.

- (iii) The Department's contractors' achievements shall be expressed as the percentage that IV(c)(ii) represents of IV(c)(i).
- (d) In addition to the foregoing, and in order to demonstrate the total impact of DOE's small business achievement, the method of counting the achievement of DOE in the award of total contract obligations to small business may also be as follows: the percentage that the sum of IV(b)(ii) and IV(c)(ii) represents of IV(b)(i).

V. Cooperation

- (a) DOE and SBA agree to meet periodically to consider, explore, and resolve issues regarding this MOU and its methodologies, including consideration and adoption of necessary updates and other modifications to the MOU, and any necessary regulatory or contractual directions, instructions, or clarifications necessary to effect these methodologies. DOE and SBA further agree to explore potential changes to both the Federal Acquisition Regulation, SBA regulations, SBA guidelines, and reporting forms to improve the clarity and consistency of directional and instructional material, and to consider alternatives not otherwise precluded by law.
- (b) DOE and SBA agree to continue their cooperative efforts to advance the objectives of the Small Business Act and to identify and facilitate the achievement of additional small business opportunities in the performance of DOE contracts. These cooperative measures shall include, but shall not be limited to: coordination of subcontract plans through SBA's Procurement Center Representative (or designee); coordination of any procurement not otherwise set-aside for small business with SBA's Procurement Center Representative (or designee); participation of an SBA representative on DOE's small business acquisition review board; coordination with SBA's Breakout Procurement Center Representative (or designee) concerning the cost effectiveness, mission performance, security, safety, small business participants, and other legitimate acquisition objectives of the Department of any proposal break-out of requirements from an existing M&O contract.
- (c) DOE and SBA agree to cooperate in establishing realistic, challenging, but achievable goals for DOE prime and subcontracts consistent with the realistic potential for small business participation in DOE contracting in light of the Department's statutorily authorized business model.

VI. Term

This MOU shall remain in effect for two years from the date of the last signature unless terminated by either agency. Either agency may terminate the MOU with 60 days written notice to the other agency. This MOU may only be modified by written mutual consent.

VII. Responsible Officials

The responsible officials and points of contact for administrative matters pertaining to this MOU are:

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U.S. Small Business Administration

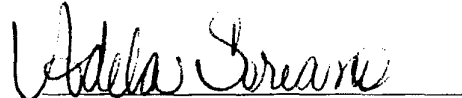
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VIII. Signatures

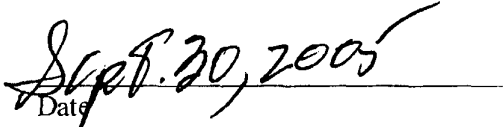
The signatories of this MOU represent they have the authority to make such commitments on behalf of their respective agencies.



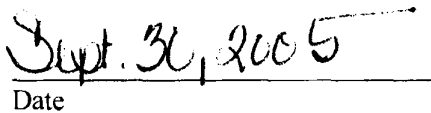
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Date



Date