

**PART 8
PREFERENCE AWARDS**

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8.1 BPA PREFERENCE AWARDS.

8.1.1 BPA Preference Award Program.

POLICY:

(a) It is BPA's preference award program policy to place a fair proportion of its purchases with small businesses, small socially or economically-disadvantaged business, and woman-owned business through its normal course of business. This may include Small Business Administration (SBA) 8(a) program purchases, as well. (Detailed definitions are provided in Appendix 8-A).

(b) The HCA is responsible for overseeing BPA's performance regarding preference awards.

(c) CO's shall take into account BPA's preference policy, 8.1.1(a) above, when carrying out their responsibilities for purchasing strategy and making awards.

(d) The BPA preference award program shall be managed as follows:

(1) The HCA shall assess the degree of participation of preference businesses. No specially focused programs shall be implemented so long as participation meets satisfactory norms.

(2) In the event BPA fails to meet standards established under the process described in 8.1.1(d)(1) above, BPA shall intensify its outreach efforts.

(3) If participation is still lagging, BPA shall activate narrowly tailored affirmative action purchasing programs, as appropriate. Purchasing and technical personnel shall take all reasonable action to place a fair proportion of purchases with such businesses.

8.1.2 Small and Disadvantaged Business Representative.

INFORMATION: BPA has established a Small Business Specialist position. This person's duties include the facilitation of the preference award policies as set forth in the BPI, and interactions with the SBA representatives. The Specialist has a direct line of communication with the HCA to ensure that top-level BPA management is actively involved in the preference program implementation.

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8.1.3 Clause Usage Prescriptions.

POLICY: The CO shall obtain and document the information required by clause 8-1, Preference Award Representation, prior to awarding any contract.

8.2 CONTRACTING WITH THE SBA 8(a) PROGRAM.

8.2.1 Selecting Purchases for the 8(a) Program.

PROCEDURE: In determining whether a requirement should be offered to the 8(a) Program, the CO should evaluate--

- (a) Current and future plans to acquire the specific items or work that 8(a) contractors are seeking to provide,
- (b) Problems encountered in previous purchases of the items or work;
- (c) The impact of any delay in delivery; and
- (d) Any other pertinent information, including the proposed firm's capabilities and price reasonability.

8.2.2 Clause Usage Prescriptions.

PROCEDURE: The CO shall include clause 8-2, Section 8(a) Award (Three-Party Agreement), in 8(a) contracts, unless the contract is for construction and the conditions of Alternate I apply. Use the clause with its Alternate I if the contract is for construction and the SBA has exempted it from the performance and payment bond requirements of the Miller Act. When using Alternate I, add paragraphs (6) through (8) of Alternate I to paragraph (c) of the basic clause.

8.3 SUBCONTRACT PLAN.

8.3.1 Subcontracting Requirements.

POLICY:

(a) Any contractor (except, for BPA purposes, small businesses, or contracts with individuals) receiving a contract for more than \$50,000 shall agree to use best efforts to afford small business concerns and small disadvantaged business concerns the opportunity to participate as subcontractors in contract performance, consistent with its efficient performance.

(b) It is BPA policy, except as per 8.3.1(c) and (d) below, to fully implement subcontracting plans. Each solicitation or contract expected to exceed \$650,000 (\$1.5 million for construction) for the total contract including optional extensions, and which has subcontracting possibilities, shall require offerors who are not small businesses to submit an estimate of the amounts they will subcontract to small and small disadvantaged business. The successful offeror shall also submit an appropriate subcontracting plan prior to award.

(c) If the contract does not provide subcontracting opportunities, but does meet the criteria, the CO will document the lack of subcontracting opportunities in the official file.

- (d) A subcontracting plan is neither required nor apply to:
- (1) Small business concerns;
 - (2) Personal services contracts;
 - (3) Utility contracts; or
 - (4) Intergovernmental Contracts awarded per BPI Part 25.

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(5) Contracts or contract modifications that will be performed entirely outside any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(e) A subcontracting plan shall meet the criteria set forth by statute and according to the procedures published in BPI Appendix 8B.

(f) The CO shall be responsible for determining the adequacy of a subcontracting plan and that the subcontracting plan is performed by the contractor.

8.3.2 Liquidated Damages.

INFORMATION:

(a) When a contractor fails to make a good faith effort to comply with a subcontracting plan, 15 U.S.C. § 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) If, after consideration of all the pertinent data, the CO finds that the contractor failed to make a good-faith effort to comply with its subcontracting plan, the CO shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The CO's final decision shall state that the contractor has the right to appeal under the Disputes clause.

8.3.3 SBA's Role in Carrying Out the Program.

INFORMATION:(a) Under the program, the SBA may --

- (1) Assist both BPA and contractors in carrying out their responsibilities with regard to subcontracting plans,
- (2) Review any solicitation that meets the dollar threshold in 8.3.1,
- (3) Review any negotiated contractual document requiring a subcontracting plan, including the plan itself, and
- (4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to prescribe the extent to which any contractor or subcontractor shall subcontract, specify concerns to which subcontracts will be awarded, or exercise any authority regarding the administration of individual prime contracts or subcontracts.

8.3.4 Clause Usage Prescriptions.

PROCEDURES:

(a) The CO shall include Clause 8-3, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns, in solicitations and contracts when the contract amount is expected to be over \$50,000. Clause 8-3 shall not be included in contracts awarded to a small business or to an individual.

(b) The CO shall include Clause 8-4, Subcontracting Plan Requirement, in solicitations, and Clause 8-5, Liquidated Damages-Small Business Subcontracting Plan, in solicitations and contracts that (1) offer subcontracting possibilities and (2) are expected to exceed \$650,000 (\$1.5 million for construction of any public facility) for the total contract including optional extensions. Clause 8-4 and Clause 8-5 shall not be included in contracts awarded to a small business or an individual.

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8.50 TEXT OF CLAUSES.

The following clauses are referred to in BPI Part 8:

- 8-1 Preference Award Representation.
- 8-2 Section 8(a) Award (Three Party Agreement).
- 8-3 Utilization of Small Business Concerns and Small Disadvantaged Business Concerns.
- 8-4 Subcontracting Plan Requirement.
- 8-5 Liquidated Damages - Small Business Subcontracting Plan.

Clause 8-1 PREFERENCE AWARD REPRESENTATION (Sep 98)(BPI 8.1.3)

(a) The offeror represents that:

- (1) it is / , is not / a small business concern and that, if supplies/equipment are offered, all / , not all / end items to be furnished will be manufactured or produced by a small business concern in the United States, its territories or possessions, or Puerto Rico, or the Trust Territory of the Pacific Islands.
- (2) it is / , is not / a small disadvantaged business concern.
- (3) it is / , is not / a women-owned small business concern.

(b) Definitions.

- (1) Small Business Concern. The North American Industry Classification System (NAICS) code for this solicitation is _____ (CO fill in). "Small Business Concern" means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is competing for Government contracts, and its average annual receipts for its preceding three fiscal years do not exceed \$_____ (CO insert) million. (OR, if the size standard for the specific industry is specified in terms of numbers of employees) and if the average number of persons employed during the past year does not exceed _____ employees.
- (2) Small Disadvantaged Business Concern: See BPI Appendix 8-A for a detailed definition.

(End of clause)

Clause 8-2 SECTION 8(a) AWARD (Three Party Agreement) (Sep 98)(BPI 8.2.2)

(a) The Small Business Administration (SBA) has entered into a contract with the Bonneville Power Administration for the performance described. SBA has also entered into a subcontract with the contractor named in this contract for the contractor (hereinafter referred to as "subcontractor") to perform the work.

(b) SBA Responsibilities. By execution of this contract, the Small Business Administration (SBA) agrees to the following:

- (1) To furnish the supplies or services set forth in the contract by subcontracting with the subcontractor who has been determined an eligible concern pursuant to the provisions of section 8(a) of the Small Business Act, as amended (15 U.S.C. § 637(a)).
- (2) Except for novation agreements and advance payments, delegates to the Bonneville Power Administration (BPA) the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract; provided, however that BPA shall give advance notice to the SBA before it issues a final notice terminating the right of the subcontractor to proceed with further performance, either in whole or in part, under the contract.
- (3) To notify the BPA Contracting Officer immediately upon notification by the subcontractor that the owner or owners upon whom 8(a) eligibility was based plan to relinquish ownership or control of the concern.

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- (c) 8(a) Subcontractor Responsibilities. The subcontractor agrees and acknowledges as follows:
- (1) That it will, for and on behalf of the SBA, fulfill and perform all of the requirements of the SBA prime contract for the consideration stated therein and that it has read and is familiar with each and every part of this contract.
 - (2) That the SBA has delegated responsibility, except for novation agreements and advance payments, for the administration of this subcontract to BPA with complete authority to take any action on behalf of the Government under the terms and conditions of this subcontract.
 - (3) That it will not subcontract the performance of any of the requirements of this subcontract to any lower tier subcontractor without the prior written approval of the SBA and the designated Contracting Officer of BPA.
 - (4) That it will notify the BPA Contracting Officer in writing immediately upon entering an agreement, (either oral or written) to transfer all or part of its stock or other ownership interest to any other party.
 - (5) That it shall have the right of direct appeal from decisions of the Contracting Officer cognizable under the "disputes" clause of this contract.
- (d) Payments, including progress payments under the subcontract, will be made directly to the subcontractor by BPA.

(End of clause)

Alternate I (Feb 94)

- (6) That, in accordance with section 301(b) of Pub. L. 100-656, it will establish a special account, at a bank insured by the Federal Deposit Insurance Corporation, under which (i) all payments under this subcontract will be deposited directly by the BPA and (ii) all disbursements will be subject to approval and counter signature by the SBA or a third party approved by SBA.
- (7) That it will make timely payment to all suppliers of material or labor.
- (8) That it will notify all suppliers of material or labor and will obtain written acknowledgment from such suppliers, that the contract is exempt from the Miller Act's bonding requirement and that neither the SBA or BPA are liable for payment to suppliers for materials or labor. Such acknowledgments must be provided to the SBA prior to SBA approval of disbursements to the contractor from the special bank account.

(End of Alternate I)

Clause 8-3 UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL DISADVANTAGED BUSINESS CONCERNS (Sep 98)(BPI 8.3.4)

- (a) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts.
- (b) Prime contractors shall establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.
- (c) The Contractor hereby agrees to carry out the policies in (a) and (b) in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the Department of Energy as may be necessary to determine the extent of the Contractor's compliance with this clause.

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(d) As used in this contract, the terms "small business concern" and "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

(End of clause)

Clause 8-4 SUBCONTRACTING PLAN REQUIREMENT (Dec 12)(BPI 8.3.4)

Offerors who are not small businesses as defined in Clause 8-1, Preference Award Representation, shall:

- (a) Submit with their offer, either
 - (1) an estimate of the dollar amounts they plan to award to subcontractors who are either small businesses or small disadvantaged businesses, or
 - (2) a statement, with supporting reasons, that the nature of the contract does not offer subcontracting possibilities.

(b) Negotiate a detailed subcontracting plan as described in BPI 8.3.3 prior to award if the nature of the contract offers subcontracting possibilities. The plan shall provide maximum practicable opportunity for small businesses and small disadvantaged businesses to participate in performance of the contract. The plan will be incorporated into the contract.

(End of clause)

Clause 8-5 LIQUIDATED DAMAGES -- SMALL BUSINESS SUBCONTRACTING PLAN (May 11)(BPI 8.3.4)

(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 subcontracting plan approved under this contract, or willful or intentional action to frustrate the plan.

(b) If the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides that the Contractor failed to make a good faith effort to comply with its subcontracting plan, the Contractor shall pay BPA liquidated damages in an amount stated. The amount of 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, or in the case of a commercial products plan, that portion of the dollar amount allocable to the BPA contract by which the Contractor failed to achieve each subcontract goal.

(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. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If 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 approved commercial products plans, i.e., company-wide or division-wide subcontracting plans, the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial products 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.

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(f) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of clause)