

## Synopsis

In Section IV.B of the Further Notice of Proposed Rule Making (FNPRM) accompanying the Data Collection Order, adopted on December 11, 2012, the Commission sought comment on possible changes to its rules for the business data services. The Commission set the comment deadlines on this portion of the *Special Access FNPRM*, 78 FR 2600, several months beyond the document's release date to allow interested parties opportunity to review the data and information collected before filing comments. The Bureau has extended these deadlines, upon request and in consideration of oppositions filed in response to the request for extensions of time, to allow interested parties adequate time to access and review the data and information collected. Accordingly, the deadline for filing comments is extended to *January 22, 2016*, and the deadline for reply comments is extended to *February 19, 2016*.

Federal Communications Commission.

**Pamela Arluk,**

Chief, Pricing Policy Division.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 19, 42, and 52

[FAR Case 2014-004; Docket No. 2014-0004; Sequence No. 1]

RIN 9000-AM98

#### Federal Acquisition Regulations: FAR Case 2014-004, Payment of Subcontractors

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the Small Business Jobs Act of 2010. This statute requires contractors to notify the contracting officer in writing if the contractor pays a reduced price to a small business subcontractor, or if the contractor's payment to a small business contractor is more than 90 days past due.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat at one of the addresses shown below on or before March 21, 2016 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAR Case 2014-004 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2014-004". Select the link "Comment Now" that corresponds with FAR Case 2014-004. Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2014-004" in all attached documents.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Second floor, ATTN: Ms. Flowers, Washington, DC 20405.

**Instructions:** Please submit comments only and cite FAR Case 2014-004, Payment of Subcontractors in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202-501-1448 for clarification of content. Please cite FAR case 2014-004. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA are proposing to implement section 1334 of the Small Business Jobs Act of 2010 (Pub. L. 111-240) and the Small Business Administration's (SBA's) implementation of section 1334 with its final rule, Small Business Subcontracting, published in the **Federal Register** at 78 FR 42391, on July 16, 2013, and effective August 15, 2013. This statute requires the prime contractor to self-report to the contracting officer when the prime contractor makes late or reduced payments to small business subcontractors. In addition, the contracting officer is required to record the identity of contractors with a history

of late or reduced payments to small business subcontractors in the Federal Awardee Performance and Integrity Information System (FAPIIS).

The FAR is proposed to be amended as follows to implement the requirements of section 1334:

FAR 19.701 is revised to add definitions for "reduced payment" and "untimely payment."

FAR 19.704(a)(12) and 52.219-9(d)(12) are added to require that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the subcontract, and notify the contracting officer when the prime contractor pays a reduced or an untimely payment to a small business subcontractor.

FAR 42.1502(g) is revised to include in the past performance evaluation reduced or untimely payments reported to the contracting officer by the prime contractor in accordance with the clause at 52.242-XX, Payments to Small Business Subcontractors, that are determined by the contracting officer to be unjustified.

FAR 42.1503(b)(2)(v) is revised by including "reduced or untimely payments to small business subcontractors when a subcontracting plan is required in accordance with 19.702(a)" to the list of "Small business subcontracting" past performance evaluation factors.

FAR 42.1503(h)(1)(vi) is added to the list of "other contractor performance information" that will be reported to FAPIIS and considered by contracting officers in evaluating contractor past performance to include a contracting officer's determination that a contractor has a history of unjustified reduced or untimely payments to small business subcontractors.

FAR table 42-2, "Evaluation Ratings Definitions (for the Small Business Subcontracting Evaluation Factor, When 52.219-9 is Used)" is revised to include the contracting officer's evaluation of a prime contractor's self-reported unjustified reduced or untimely payments (history of three or more) to small business subcontractors.

FAR 42.1504 is added to require contracting officers to insert the clause at 52.242-XX, Payment to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan.

FAR clause 52.219-9, Small Business Subcontracting Plan, is revised to add definitions for "reduced payment" and "untimely payment."

FAR clause 52.242-XX, Payment to Small Business Subcontractors, is added

to FAR part 52 to require the contractor to provide a written notice to the contracting officer if it makes a payment to a small business subcontractor that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions for supplies and services for which the Government has paid the prime contractor, or if payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract for supplies and services for which the Government has paid the prime contractor. In accordance with the SBA final rule, this proposed rule would apply to prime contracts that require small business subcontracting plans. For the reasons explained in section II, below, the proposed rule would cover acquisitions for commercial items, including acquisitions for commercial-off-the-shelf (COTS) items.

## II. Determinations

The FAR Council has made the following preliminary determinations with respect to the rule's application of section 1334 of the Small Business Jobs Act of 2010, entitled "Payment of Subcontractors," to contracts for the acquisition of commercial items:

### A. Applicability to Contracts for the Acquisition of Commercial Items

41 U.S.C. 1906 governs the applicability of laws to the acquisition of commercial items (other than COTS items). This statute limits the applicability of laws to the acquisition of commercial items. However, section 1906 provides that the acquisition of commercial items will not be exempt from a provision of law if—

- The law contains criminal or civil penalties;
- The law specifically refers to 41 U.S.C. 1906 and states that the law applies to the acquisition of commercial items; or
- The FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt the acquisition of commercial items from the provision of law.

Section 1334 of the Small Business Jobs Act of 2010 is silent on the applicability of the requirements set forth above to contracts for commercial items and does not provide for criminal or civil penalties. Therefore, under 41 U.S.C. 1906, section 1334 does not apply to acquisitions for commercial items unless the FAR Council makes a written determination that such application is in the best interest of the Federal Government.

In making its initial determination of whether application of section 1334 to

commercial items is in the best interest of the Federal Government, the FAR Council considered the following factors: (i) The benefits of the policy in furthering Administration goals, (ii) the extent to which the benefits of the policy would be reduced if an exemption is provided for commercial items, and (iii) the burden on contractors if the policy is applied to acquisitions for commercial items.

With respect to the first factor, this Administration has taken a number of steps to ensure that the government promptly and efficiently pays small businesses when they contract to provide goods and services to the government. These steps are part of the Administration's strong commitment to supporting small business growth and prosperity, as an engine to drive economic activity and job creation throughout the country. On September 14, 2011, the Office of Management and Budget (OMB) issued Memorandum M 11–32, titled: "Accelerating Payments to Small Businesses for Goods and Services." That memorandum established "the Executive Branch policy that, to the full extent permitted by law, agencies shall make their payments to small business contractors as soon as practicable, with the goal of making payments within 15 days" of receipt of relevant documents. OMB explained that such acceleration helps to improve cash flow for small businesses, increases liquidity, unlocks capital for the purposes of investment and growth, and increases small business participation in Federal contracting. To further preserve and increase small business participation in all levels of federal contracting through improved cash flow, OMB broadened the policy to reach small business subcontractors. Memorandum M–12–16, "Providing Prompt Payment to Small Business Subcontractors," established the Executive Branch policy that, to the full extent permitted by law, agencies shall take certain steps to accelerate payments to all prime contractors, in order to allow them to provide prompt payments to small business subcontractors. The policy was extended by OMB Memoranda M–13–15 and M–14–10. In 2014, the FAR Council finalized FAR changes to implement this policy and provide a clause (see FAR clause 52.232–40) to support the acceleration of payments to subcontractors.

By instilling accountability for untimely payment to subcontractors, section 1334, SBA's implementing regulation, and this rule further the benefits and policies goals described above. Specifically, the proposed rule

helps to create greater cash flow certainty, which is critical for small business subcontractors and reduces a potential barrier to their participation in federal contracting.

With respect to the second factor (the impact of excluding commercial item acquisitions on the overall benefits of the underlying policy), the FAR Council believes based on an analysis of Fiscal Year 2014 Federal Procurement Data System (FPDS) data that less than one-third of spending on new contracts over \$650,000 (*i.e.*, the threshold for the applicability of this rule) are for commercial item acquisitions, so exclusion could have a material impact on these benefits.

With respect to the third factor, burden on contractors selling commercial items, the initial analysis under the Paperwork Reduction Act (PRA) suggests that the total number of unique entities in Fiscal Year (FY) 2014 that are covered under this requirement (selling either commercial or non-commercial items) is 2,279 and the estimated reporting time per respondent is 2 hours. See the discussion on the PRA at Section VI, below. The FAR Council further estimates that the number of covered entities selling commercial items is not more than 40 percent of this stated total, and some of these entities may only sell COTS items, which as explained below are covered by the rule pursuant to the requirements of 41 U.S.C. 1907.

Based on the above benefit and burden considerations, the FAR Council has made a preliminary determination that it is in the best interest of the government to apply section 1334 to commercial item acquisitions: covering commercial items helps to further an important ongoing Administration initiative to help ensure effective cash flow to small business subcontractors, which in turn helps to strengthen their participation in federal contracting, whereas exclusion of commercial item acquisitions would remove a significant amount of contracting activity from the accountability that this rule imposes on prime contractors to meet their payment commitments to their small business subcontractors. The limited information currently available to the FAR Council on reporting in accordance with the requirements of this rule suggests the burdens are not expected to be significant. Moreover, the relief provided by an exemption would be limited, since COTS are covered for the reason explained below.

The Council welcomes public feedback on its initial analysis and preliminary determination to cover commercial items, including additional

insight on the need for and cost of retrofitting payment systems to meet the requirements in the rule. This feedback will be considered before the FAR Council finalizes its analysis of benefits and burdens and makes a final determination on the scope of the final rule.

#### *B. Applicability to Contracts for the Acquisition of COTS Items*

41 U.S.C. 1907 governs the applicability of laws to the acquisition of COTS items. This statute limits the applicability of laws when agencies are acquiring COTS items. However, section 1907 provides similar requirements for a law to be applied to COTS items where the law contains criminal or civil penalties, refers to section 1907 and states the law applies to COTS, or where the Administrator for Federal Procurement Policy determines it would not be in the best interest of the Federal Government to exempt the acquisition of COTS items from the provision of law. Of particular relevance to the instant rulemaking, section 1907 further provides that the acquisition of COTS items will not be exempt from a provision of law if the law concerns—

- Authorities or responsibilities under section 15 of the Small Business Act (15 U.S.C. 644); or
- Bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*; 10 U.S.C. 2305(e) and (f); or 41 U.S.C. 3706 and 3707.

Section 1334 amends section 8(d) of the Small Business Act (15 U.S.C. 637(d)) to establish the requirement for a prime contractor for a covered contract to provide written notification to the contracting officer if the contractor pays a reduced price to a subcontractor for goods and services upon completion of the responsibilities of the subcontractor or the payment to a subcontractor is more than 90 days past due for goods or services provided for the covered contract for which the Federal agency has paid the prime contractor.

Section 1334 requires a contracting officer of a covered contract to consider unjustified untimely or reduced payments to a small business subcontractor of the covered contract in the prime contractor's past performance evaluation. The statute defines a "covered contract" as a contract under which a prime contractor is required to develop a subcontracting plan. Pursuant to section 8(d) of the Small Business Act (15 U.S.C. 637(d)), as implemented at FAR 19.702(a), a small business subcontracting plan is required in acquisitions expected to exceed \$700,000 that have subcontracting opportunities. Contracts for COTS items

in amounts greater than \$700,000 that have subcontracting opportunities meet the definition of a "covered contract" provided in the statute.

The law furthers the Administration's goal of supporting small business and advances the interests of small business subcontractors by encouraging prime contractors to comply with their stated subcontracting objectives. Increased compliance with subcontracting objectives will expand opportunities for small business subcontractors. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, will limit the full implementation of these subcontracting-related objectives.

Further, one of the primary FAR clauses implementing Federal procurement policies governing subcontracting with small business, 52.219–9, Small Business Subcontracting Plan, are currently prescribed for use in solicitations for COTS items. This rule merely revises FAR clause 52.219–9 to implement the new requirements for a prime contractor for a covered contract to provide written notification to the contracting officer if the contractor pays a reduced price to a subcontractor for goods and services upon completion of the responsibilities of the subcontractor or the payment to a subcontractor is more than 90 days past due for goods or services provided for the covered contract for which the Federal agency has paid the prime contractor. A further example that the rule should apply to COTS items is FAR clause 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, which is required in all solicitations and contracts. Exclusion of acquisitions for COTS items from these requirements would create confusion among contractors and the Federal contracting workforce.

The burden on contractors is not expected to increase significantly if the new requirements of section 1334 were applied to acquisitions for COTS items. Under the FAR clause 52.219–9, which is noted above, contractors are already required to commit to objectives for subcontracting with small business concerns under contracts for COTS items above the subcontracting plan threshold. The effort required for contractors to comply with the new requirements should be relatively small.

The Council welcomes public feedback on its initial analysis and preliminary determination to cover COTS items, including additional insight on the need for and cost of retrofitting payment systems to meet the requirements in the rule. This feedback will be considered before the FAR

Council finalizes its analysis of benefits and burdens and makes a final determination on the scope of the final rule.

### **III. Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This proposed rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

DoD, GSA, and NASA expect that this proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Therefore, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603 and is summarized as follows:

Section 1334 of the Small Business Jobs Act of 2010 (Public Law 111–240) and the Small Business Administration's final rule, Small Business Subcontracting, published in the **Federal Register** at 78 FR 42391, on July 16, 2013, require that the prime contractor self-report when the prime contractor makes reduced or untimely payments to small business subcontractors. Section 1334 also requires the contracting officer to record the identity of contractors with a history of unjustified reduced or untimely payments in FAPIIS.

This proposed rule implements the self-reporting requirements of section 1334 by amending FAR 42.1504 to require contracting officers to include FAR clause 52.242–XX, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219–9, Small Business Subcontracting Plan. The new FAR clause requires prime contractors to notify the contracting officer of reduced or untimely payments to small business subcontractors.

The proposed rule also amends FAR 42.1503(h) to require contracting officers to report to FAPIIS a contractor that has a history of three or more reduced or untimely payments to small business subcontractors within a 12-month period under a single contract that are unjustified. Table 42–2 is also amended to include unjustified reduced or untimely payments to small business

subcontractors as part of the definition of ratings for the “small business subcontracting” past performance evaluation factors.

The proposed rule would apply to payments made to small businesses that are first-tier subcontractors to prime government contractors. There will be no burden on small businesses, as small businesses do not have subcontracting plans. This regulation will benefit small business subcontractors by encouraging large business prime contractors to pay small business subcontractors in a timely manner and the agreed upon contractual price.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The specifics of the statutory requirement and the SBA final rule do not allow for alternative implementation strategies.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2014–004) in correspondence.

## V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The proposed rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000–XXXX, titled: Payments to Small Business Subcontractors. FPDS for Fiscal Year (FY) 2014 lists 794 new commercial item contracts over \$650,000 where the size determination was other than small and a subcontracting plan was required. FPDS for FY 2014 also lists 1,485 new non-commercial item contracts over \$650,000 where the size determination was other than small and a subcontracting plan was required. It is estimated that no more than twenty percent of contractors with new commercial and non-commercial contracts where the size determination was other than small and where a subcontracting plan was required would have to notify the contracting officer that the prime contractor paid a reduced or an untimely payment to a small business subcontractor. It is also estimated that the average time required

for a contractor to prepare the information for this collection is two hours. It is estimated also that the responses per respondent would be one.

The annual reporting burden is estimated as follows:

Respondents: 456.

Responses per respondent: 1.

Total annual responses: 456.

Preparation hours per response: 2.

Total response burden hours: 912.

## List of Subject in 48 CFR Parts 19, 42 and 52

Government procurement.

Dated: January 11, 2016.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

Therefore, the DoD, GSA, and NASA propose amending 48 CFR parts 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 42, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

## PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.701 by adding, in alphabetical order, the definitions “Reduced payment” and “Untimely payment” to read as follows:

### 19.701 Definitions.

\* \* \* \* \*

*Reduced payment* means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

\* \* \* \* \*

*Untimely payment* means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract, for supplies and services for which the Government has paid the prime contractor.

■ 3. Amend section 19.704 by removing the period from the end of paragraph (a)(11) and adding “; and” in its place; and adding paragraph (a)(12) to read as follows:

### 19.704 Subcontracting plan requirements.

(a) \* \* \*

(12) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the subcontract, and notify the contracting officer when the prime contractor pays a reduced or an

untimely payment to a small business subcontractor.

\* \* \* \* \*

## PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 4. Amend section 42.1502 by revising paragraph (g) to read as follows:

### 42.1502 Policy.

\* \* \* \* \*

(g) Past performance evaluations shall include an assessment of the contractor’s—

(1) Performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219–9, Small Business Subcontracting Plan; and

(2) Reduced or untimely payments (see 19.701) determined by the Contracting Officer to be unjustified to small business subcontractors.

(i) The contracting officer shall consider and evaluate a contractor’s written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified.

(ii) The contracting officer determines that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12 month period (see 42.1503(h)(1)(vi) and the evaluation factors in Table 42–2).

\* \* \* \* \*

■ 5. Amend section 42.1503 by—

■ a. Revising paragraph (b)(2)(v);

■ b. Removing from paragraph (b)(2)(vi) the phrase “late or nonpayment to subcontractors,”;

■ c. Revising the introductory text of paragraph (h)(1);

■ d. Removing from paragraph (h)(1)(iv) “; or” and adding a semicolon in its place;

■ e. Removing the period from the end of paragraph (h)(1)(v) and adding “; or” in its place;

■ f. Adding paragraph (h)(1)(vi); and

■ g. Revising table 42–2.

The revisions and additions reads as follows:

### 42.1503 Procedures.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(v) Small business subcontracting, including reduced or untimely payments to small business subcontractors when 19.702(a) requires

a subcontracting plan (as applicable, see Table 42–2).

\* \* \* \* \*

(h) \* \* \*

(1) Agencies shall ensure information is accurately reported in the FAPIIS or

any successor thereto module of CPARS within 3 calendar days after a contracting officer—

\* \* \* \* \*

(vi) Determines that a contractor has a history of three or more unjustified

reduced or untimely payments to small business subcontractors within a 12 month period (see 42.1502(g)(2)).

\* \* \* \* \*

TABLE 42–2—EVALUATION RATINGS DEFINITIONS

[For the Small Business Subcontracting Evaluation Factor, when 52.219–9 is used]

Rating	Definition	Note
(a) Exceptional .....	Exceeded all statutory goals or goals as negotiated. Had exceptional success with initiatives to assist, promote, and utilize small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), HUBZone small business, veteran-owned small business (VOSB), and service disabled veteran owned small business (SDVOSB). Complied with FAR 52.219–8, Utilization of Small Business Concerns. Exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Went above and beyond the required elements of the subcontracting plan and other small business requirements of the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12 month period.	To justify an Exceptional rating, identify multiple significant events and state how they were a benefit to small business utilization. A singular benefit, however, could be of such magnitude that it constitutes an Exceptional rating. Small businesses should be given meaningful and innovative work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, <i>etc.</i> Also, there should have been no significant weaknesses identified.
(b) Very Good .....	Met all of the statutory goals or goals as negotiated. Had significant success with initiatives to assist, promote and utilize SB, SDB, WOSB, HUBZone, VOSB, and SDVOSB. Complied with FAR 52.219–8, Utilization of Small Business Concerns. Met or exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Endeavored to go above and beyond the required elements of the subcontracting plan. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12 month period.	To justify a Very Good rating, identify a significant event and state how it was a benefit to small business utilization. Small businesses should be given meaningful and innovative opportunities to participate as subcontractors for work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, <i>etc.</i> There should be no significant weaknesses identified.
(c) Satisfactory .....	Demonstrated a good faith effort to meet all of the negotiated subcontracting goals in the various socioeconomic categories for the current period. Complied with FAR 52.219–8, Utilization of Small Business Concerns. Met any other small business participation requirements included in the contract/order. Fulfilled the requirements of the subcontracting plan included in the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12 month period.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor has addressed or taken corrective action. There should have been no significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS—Continued  
[For the Small Business Subcontracting Evaluation Factor, when 52.219-9 is used]

Rating	Definition	Note
(d) Marginal .....	Deficient in meeting key subcontracting plan elements. Deficient in complying with FAR 52.219-8, Utilization of Small Business Concerns, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Failed to satisfy one or more requirements of a corrective action plan currently in place; however, does show an interest in bringing performance to a satisfactory level and has demonstrated a commitment to apply the necessary resources to do so. Required a corrective action plan. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12 month period.	To justify Marginal performance, identify a significant event that the contractor had trouble overcoming and how it impacted small business utilization. A Marginal rating should be supported by referencing the actions taken by the Government that notified the contractor of the contractual deficiency.
(e) Unsatisfactory .....	Noncompliant with FAR 52.219-8 and 52.219-9, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Showed little interest in bringing performance to a satisfactory level or is generally uncooperative. Required a corrective action plan. Had a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12 month period.	To justify an Unsatisfactory rating, identify multiple significant events that the contractor had trouble overcoming and state how it impacted small business utilization. A singular problem, however, could be of such serious magnitude that it alone constitutes an Unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the actions taken by the Government to notify the contractor of the deficiencies. When an Unsatisfactory rating is justified, the contracting officer must consider whether the contractor made a good faith effort to comply with the requirements of the subcontracting plan required by FAR 52.219-9 and follow the procedures outlined in FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

Note 1: Plus or minus signs may be used to indicate an improving (+) or worsening (–) trend insufficient to change the evaluation status.  
Note 2: N/A (not applicable) should be used if the ratings are not going to be applied to a particular area for evaluation.

■ 6. Add section 42.1504 to Subpart 42.15—CONTRACTOR PERFORMANCE INFORMATION to read as follows:

**42.1504 Contract clause.**

Insert the clause at 52.242-XX, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 7. Amend section 52.212-5 by revising the date of the clause and paragraph (b)(17)(i) to read as follows:

**52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items.**

\* \* \* \* \*

**Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items (Date)**

\* \* \* \* \*

(b) \* \* \*

(17)(i) 52.219-9, Small Business Subcontracting Plan (DATE) (15 U.S.C. 637(d)(4)).

■ 8. Amend section 52.219-9 by—

■ a. Revising the date of the clause;  
■ b. Adding to paragraph (b), in alphabetical order, the definitions “Reduced payment” and “Untimely payment”; and

■ c. Adding paragraph (d)(12).

The revisions and additions read as follows:

**52.219-9 Small Business Subcontracting Plan.**

\* \* \* \* \*

Small Business Subcontracting Plan (Date)

\* \* \* \* \*

(b) \* \* \*

*Reduced payment* means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

\* \* \* \* \*

*Untimely payment* means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract, for supplies and services for which the Government has paid the prime contractor.

\* \* \* \* \*

(d) \* \* \*

(12) The offeror shall provide assurances that the offeror will pay its small business subcontractors on time, make payments in accordance with the terms and conditions of the underlying subcontract, and notify the contracting officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242-XX).

\* \* \* \* \*

■ 9. Add section 52.242-XX to read as follows:

**52.242-XX Payments to Small Business Subcontractors**

As prescribed in 42.1504, insert the following clause:

Payments to Small Business Subcontractors (Date)

(a) *Definitions.*

*Reduced payment* means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

*Untimely payment* means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract, for supplies

and services for which the Government has paid the prime contractor.

(b) *Notice.* The Contractor shall notify the Contracting Officer in writing if—

(1) A small business subcontractor is entitled to payment under the terms and conditions of the subcontract; and

(2) The Prime contractor makes a payment that is either reduced or untimely to the small business subcontractor, or if the Contractor failed to make a payment which is now untimely.

(c) *Content of Notice.* The Contractor shall include the reason(s) for making the reduced or untimely payment in any notice required under paragraph (b).

(End of clause)

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