

Edison Electric Institute
FAR: REFORM OF AFFIRMATIVE ACTION
IN FEDERAL PROCUREMENT

FACT SHEET

THE INFORMATION INCLUDED IN THIS *FACT SHEET* WAS PREPARED IN COLLABORATION WITH GSA/SBA. HOWEVER, IT SHOULD NOT BE CONSIDERED LAW NOR INTENDED TO TAKE THE PLACE OF THE LAW. THIS *FACT SHEET* WILL ASSIST EEI MEMBER COMPANIES TO BETTER UNDERSTAND KEY AREAS OF THE LAW AS IT APPLIES TO ELECTRIC UTILITY COMPANIES.

1. Electric utilities regulated and unregulated that provide electric service to Federal Government facilities are considered prime contractors of the Federal Government.
2. The rule requiring all SDB subcontractors to be certified by SBA became effective on October 1, 1999, and applies only to solicitations issued on or after that date. Accordingly, reports filed in 2003 or in subsequent years for contracts in which the solicitation was issued on or after October 1, 1999, will require that all SDB subcontractors be certified by SBA. Prime contractors (EEI member companies) must verify SDB Certification via Central Contractor Registration (CCR) Dynamic Small Business search www.ccr.gov or http://dsbs.sba.gov/dsbs/dsp_dsbs.cfm
3. Any Contractor entering into a contract with the Federal Government, which exceeds \$500,000 (\$1,000,000 for construction), that has subcontracting possibilities are required to submit an acceptable subcontracting plan that contains goals for the award of subcontracts to Small (SB), HUBZone, Small Disadvantaged (SDB), Women-Owned Small Businesses (WOSB), Veteran-Owned (VOSB) and Service Disabled Veterans-Owned (SD/VOSB). Likewise, any Contractor entering into a contract for more than simplified acquisition threshold (\$100,000) must agree in the contract that such businesses shall have the maximum practicable opportunity to participate in the performance of the contract consistent with its efficient performance.
4. There are three types of subcontracting plans: **(1) Commercial Plans, (2) Individual Plans, and (3) Master Plans.** *Commercial Plans* (formerly called "Commercial Product Plans") are used when the contract is for a commercial item and the company cannot separate out or identify the cost attributable to a specific contract. Utility companies fall within the definition of "commercial products". Utility companies must submit one company-wide or division-wide annual subcontracting plan covering the company or division's entire operations. Commercial plans must be submitted and approved annually.

Individual Plans are generally used in support of a specific Government contract for the purchase of materials and services for the Government and to the Government. The individual plan upon initial approval is valid throughout the life of the contract. With the evolution of deregulation, some utility companies may be bidding on specific Government contract work. In those instances, the utilities will have to file an *individual plan* separate from any existing commercial products plan the utility may have.

Master Plans are plans that contain all the elements of an individual plan, except goals, and may be incorporated into an individual contract plan, provided that the master plan has been approved. A Master Plan is good for 3 years.

5. In the case of commercial plans, the agency that first awards a contract containing an approved subcontracting plan is responsible for monitoring the contractor's annual report on subcontracting and for approving the annual plan.
6. The subcontracting plan is approved by the procuring agency, not by SBA, so GSA would be responsible for advising the contractor that its plan has been approved. A commercial plan as defined in FAR 19.701 remains in effect during the contractor's fiscal year for all Government contracts in effect during that period (FAR 19.704(d)(1)) (as long as the product or service meets the definition of a commercial item. The commercial plan applies to all Government agencies, but a member utility would have to provide the Government with an individual plan if it received a Federal contract for a non-commercial product or service (i.e., a product or service that is unique to the Government)).
7. SBA must certify all suppliers and subcontractors claiming HUBZone and SDB status. Prime Contractors (EEI member companies) must verify that their SDB and HUBZone suppliers are certified by checking CCR's Dynamic Small Business Search (see item #2 on page 1).

REPORTING PARAMETERS FOR COMMERCIAL PLANS FILED BY AN EEI MEMBER UTILITY

8. Electric utilities that have existing area-wide contracts, established prior to changes in the Federal Acquisition Regulations (FAR) regarding the SDB and HUBZone Certification, will follow the old guidelines relative to reporting SDBs. (There was no goal for HUBZone companies prior to January 4, 1999). However all Electric utilities should encourage all of their SDBs to become certified by contacting the U.S. Small Business Administration at (202) 619-1850 or by visiting the SBA SDB website at <http://www.sba.gov/sdb>.
9. Contractors may include flow-down provisions contained in Federal Acquisition Regulation clauses 52.219-8, Utilization of Small Business Concerns, and 52.219-9,

Small Business Subcontracting Plans in their contracts when offering a commercial subcontracting plan. Further, the prime contractor is required to describe its procedures for the review, approval, and monitoring for compliance with such plans.

10. Purchases from a corporation, company, or subdivision regulated or non-regulated which is a subsidiary or an affiliate of the reporting utility company are *not considered "subcontracts"* for the purpose of establishing total subcontracting dollars and percentages under a subcontracting plan, and are not to be included in the reporting utility company's subcontracting goals or accomplishments.
11. Power (electricity for resale or nuclear fuels) purchased for resale to a public utility are not considered subcontracts and should be excluded as such from the utility company's subcontracting plan. Natural gas may be excluded when it is purchased as a long-term contract of 2 years or greater. Other purchased fuels such as coal may also be excluded from the goals in the subcontracting plan, if approved by GSA.
12. Purchases from suppliers who are located outside the United States and performance is to take place entirely outside the United States should be excluded from the contractor's total subcontracting dollars. Otherwise, such purchases should be included (see SF-295, General Instruction #7).
13. In addition to items in number 11, electric utility companies should **exclude** internally generated costs and expenditures, e.g. salaries and wages, depreciation, interest, employee insurance and other benefits, income and property taxes, payments for petty cash, payment of fees, fines, claims, dues, OEM relationships during warranty periods (negotiated up front with product), and philanthropic contributions. Rail service such as coal delivery to power plants should also be excluded, as should expenditures for regulated utilities (telephone, light, gas, water, and sewer).
14. Fees associated with transactions with banks and investments firms such as bond issues, stock repurchases, etc., are to be **included** as subcontracting dollars. However, the total transactions (vs. the fees) may be reported as "Accomplishments" in the "Remarks" section of the SF-295 report.
15. Electric utility companies may elect to set goals on First-tier and Second-tier provided the distinction between 1st and 2nd tier is noted in the narrative section of the subcontract plan. Dollars spent with 2nd-tier SDBs and other small businesses are not reported on Form 295.
16. There is currently no regulation permitting prime contractors to exclude subcontracting dollars from the mathematical base when no small business or SDB exists.
17. **Utilities found in non-compliance with Federal subcontracting regulations may be considered to be lacking a "good-faith effort" to comply with contract requirements.** This in turn could result in a finding of "*material breach of contract*"

and could lead to "*Termination for Default*," in which case the cost of the Government's re-procurement would be charged back to the defaulted contractor. **Alternatively, a contractor that fails to make a good-faith effort and falls short of its subcontracting goals could be assessed liquidated damages at contract completion (defined as the actual dollar amount by which the goals are missed).** If the Government chooses not to act on either of these remedies, it can assess a *poor past performance rating* to the contractor, which may affect the ability of the contractor to win future Federal business.

18. Company's non-regulated subsidiaries cannot bid on Government work using the parent company's subcontracting plan and activity for their proposals

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