U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

MAR 0 8 2006

MEMORANDUM FOR: All Heads of the Contracting Activities (HCA's)

FROM: Elaine C. Duke
Chief Procurement Officer

SUBJECT: Class Deviation from Federal Acquisition Regulation (FAR) 19.7, Small Business Subcontracting Program and FAR 52.219-9

Purpose: To issue a class deviation from the requirements of FAR 19.7 and 52.219-9.

Effective Date: Immediately

Background: In negotiated acquisitions or modifications over $500,000 ($1 million for construction) that has subcontracting possibilities, FAR 19.702(a) requires the apparently successful offeror to submit an acceptable subcontracting plan. FAR 19.704(a)(10)(iii) and (iv) require that as part of the subcontracting plan, subcontract reporting be submitted using Standard Form (SF) 294, Subcontracting Report for Individual Contracts and the SF 295, Summary Subcontract Report. These requirements are also covered in FAR 52.219-9, Small Business Subcontracting Plan (JUL 2005). The Electronic Subcontracting Reporting System (eSRS, at **http://www.esrs.gov**) provides electronic reporting to substitute for the SF 294 and the SF 295. eSRS also automates the subcontract reporting process. eSRS became operational on October 28, 2005.

Expiration Date: This class deviation will remain in effect until changes are permanently implemented in the FAR.

Class Deviation from the Federal Acquisition Regulation (FAR)
Subpart 19.7 and Part 52 regarding the Small Business Subcontracting Program

Determination and Findings

The Department of Homeland Security has authorized a class deviation from the Federal Acquisition Regulation (FAR) 19.7, and 52.219-9 to accommodate the new Integrated Acquisition Environment (IAE) tool for subcontracting, Electronic Subcontracting Reporting System (eSRS).

Findings

FAR 19.704(a)(10)(iii) and (iv) require that as part of the subcontracting plan, subcontract reporting be submitted using Standard Form (SF) 294, Subcontracting Report for Individual Contracts and the SF 295, Summary Subcontract Report. These requirements are also covered in FAR 52.219-9, Small Business Subcontracting Plan (JUL 2005). The Electronic Subcontracting Reporting System (eSRS, at **http://www.esrs.gov**) provides electronic reporting to substitute for the SF 294 and the SF 295. Since the affected regulations do not reflect the new electronic reporting process of eSRS, the SBA and FAR regulations must be amended. The FAR will be amended following the promulgation of a SBA modification to their regulations. The DHS deviations to the FAR coverage to implement the eSRS are attached to this Determination and Findings.

Determination

In accordance with FAR 1.404, I have issued this class deviation. This class deviation shall remain in effect until the effective date of a pertinent FAR change.

Elaine C. Duke
Chief Procurement Officer
Department of Homeland Security

March 7, 2006
Date

FAR Deviation from Subpart 19.7

Part 19 - Small Business Programs

Subpart 19.7 – The Small Business Subcontracting Program

19.704 Subcontracting plan requirements.

(a) Each subcontracting plan required under 19.702(a)(1) and (2) must include—

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(10) Assurances that the offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan;

(iii) Submit ***the Individual Subcontract Report*** and ***the Summary Subcontract Report using the web-based Electronic Subcontracting Reporting System (eSRS, at*** *http://www.esrs.gov)* following the instructions ***in eSRS*** as ***supplemented by*** agency regulations;

(iv) Ensure that its subcontractors ***with subcontracting plans*** agree to submit ***the Individual Subcontract Report and/or the Summary Subcontract Report using eSRS***;

(v) Provide the prime contract number, the order number, if applicable, and the prime contractor's DUNS number to all first-tier subcontractors with subcontracting plans so they can enter this information into eSRS with their reports; and

(vi) Ensure that all subcontractors with subcontracting plans under the flow-down requirements of subparagraph (a)(9) above, at every tier, provide the prime contract number, the order number, if applicable, and their own DUNS number to all of their subcontractors with subcontracting plans.

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

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19.705-7 Liquidated damages.

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(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business, veteran-owned small business, service-disabled veteran-owned

small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following, though not all inclusive, may be considered as indicators of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns; a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan; a failure to submit ***an Individual Subcontract Report or a Summary Subcontract Report using eSRS*** in accordance with the instructions ***in eSRS or as supplemented by*** agency regulations; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; or the adoption of company policies or procedures that have as their objectives the frustration of the objectives of the plan.

Deviation from FAR 52.219-9

52.219-9 Small Business Subcontracting Plan.

Use the following version of FAR 52.219-9 whenever FAR 19.708(b) prescribes the use of FAR 52.219-9:

Small Business Subcontracting Plan (July 2005) (DEVIATION)

(a) This clause does not apply to small business concerns.

(b) *Definitions.* As used in this clause—

"Commercial item" means a product or service that satisfies the definition of commercial item in section 2.101 of the Federal Acquisition Regulation.

"Commercial plan" means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (*e.g.,* division, plant, or product line).

"Individual contract plan" means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

"Master plan" means a subcontracting plan that contains all the required elements of an individual contract plan, except goals, and may be incorporated into individual contract plans, provided the master plan has been approved.

"Subcontract" means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

"Direct Subcontract Award" means a subcontract award that is identified with the performance of one or more specific Government contracts.

"Indirect Subcontract Award" means a subcontract award which, because of incurrence for common or joint purposes, is not identified with one or more specific Government contracts. Such subcontract awards are related to Government contract performance but remain for allocation after direct subcontract awards have been determined and identified to specific Government contracts.

(c) The offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business concerns, small disadvantaged business, and women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the subcontracting plan shall make the offeror ineligible for award of a contract.

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) A statement of—

(i) Total dollars planned to be subcontracted for an individual contract plan; or the offeror's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan;

(ii) Total dollars planned to be subcontracted to small business concerns;

(iii) Total dollars planned to be subcontracted to veteran-owned small business concerns;

(iv) Total dollars planned to be subcontracted to service-disabled veteran-owned small business;

(v) Total dollars planned to be subcontracted to HUBZone small business concerns;

(vi) Total dollars planned to be subcontracted to small disadvantaged business concerns; and

(vii) Total dollars planned to be subcontracted to women-owned small business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to—

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns; and

(vi) Women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in paragraph (d)(1) of this clause.

(5) A description of the method used to identify potential sources for solicitation purposes (*e.g.,* existing company source lists, the ***Central Contractor Registration database's (CCR's) Dynamic Small Business Search function***, veterans service organizations, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, HUBZone, small disadvantaged, and women-owned small business trade associations). A firm may rely on the information contained in ***CCR's Dynamic Small Business Search function***, as an accurate representation of a concern's size and ownership characteristics for the purposes of maintaining a small, veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, and women-owned small business source list. Use of ***CCR's Dynamic Small Business Search function*** as its source list does not relieve a firm of its responsibilities (*e.g.,* outreach, assistance, counseling, or publicizing subcontracting opportunities) in this clause.

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with—

(i) Small business concerns;

(ii) Veteran-owned small business concerns;

(iii) Service-disabled veteran-owned small business concerns;

(iv) HUBZone small business concerns;

(v) Small disadvantaged business concerns; and

(vi) Women-owned small business concerns.

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to assure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause of this contract entitled "Utilization of Small Business Concerns" in all subcontracts that offer further subcontracting opportunities, and

that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of $500,000 ($1,000,000 for construction of any public facility) to adopt a subcontracting plan that complies with the requirements of this clause.

(10) Assurances that the offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan;

(iii) Submit ***the Individual Subcontract Report, and/or the Summary Subcontract Report***, in accordance with paragraph (j) of this clause, ***using the web-based Electronic Subcontracting Reporting System (eSRS, at http://www.esrs.gov)***. The reports shall provide information on subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, women-owned small business concerns, and Historically Black Colleges and Universities and Minority Institutions. Reporting shall be in accordance with the instructions ***in eSRS*** as ***supplemented by*** agency regulations;

(iv) Ensure that its subcontractors ***with subcontracting plans*** agree to submit ***the Individual Subcontract Report and/or the Summary Subcontract Report using eSRS***;

(v) Provide the <u>prime contract number</u>, the <u>order number</u>, if applicable, and the prime contractor's <u>DUNS number</u> and to all first-tier subcontractors with subcontracting plans so they can enter this information into eSRS with their reports; and

(vi) Ensure that all subcontractors with subcontracting plans under the flow-down requirements of subparagraph (d)(9) above, <u>at every tier</u>, provide the <u>prime contract number</u>, the order number, if applicable, and <u>their own</u> DUNS number to all of their subcontractors with subcontracting plans.

(11) A description of the types of records that will be maintained concerning procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists (*e.g.*, ***CCR's Dynamic Small Business Search function***), guides, and other data that identify small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than $100,000, indicating—

(A) Whether small business concerns were solicited and, if not, why not;

(B) Whether veteran-owned small business concerns were solicited and, if not, why not;

(C) Whether service-disabled veteran-owned small business concerns were solicited and, if not, why not;

(D) Whether HUBZone small business concerns were solicited and, if not, why not;

(E) Whether small disadvantaged business concerns were solicited and, if not, why not;

(F) Whether women-owned small business concerns were solicited and, if not, why not; and

(G) If applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact—

(A) Trade associations;

(B) Business development organizations;

(C) Conferences and trade fairs to locate small, HUBZone small, small disadvantaged, and women-owned small business sources; and

(D) Veterans service organizations.

(v) Records of internal guidance and encouragement provided to buyers through—

(A) Workshops, seminars, training, etc.; and

(B) Monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having commercial plans need not comply with this requirement.

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Contractor's lists of potential small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors are excessively long, reasonable effort shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business firms.

(4) Confirm that a subcontractor representing itself as a HUBZone small business concern is identified as a certified HUBZone small business concern by accessing the Central Contractor Registration (CCR) database or by contacting SBA.

(5) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small, veteran-owned small business, HUBZone small, small disadvantaged, or women-owned small business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.

(f) A master plan on a plant or division-wide basis that contains all the elements required by paragraph (d) of this clause, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided—

(1) The master plan has been approved;

(2) The offeror ensures that the master plan is updated as necessary and provides copies of the approved master plan, including evidence of its approval, to the Contracting Officer; and

(3) Goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

(g) A commercial plan is the preferred type of subcontracting plan for contractors furnishing commercial items. The commercial plan shall relate to the offeror's planned subcontracting generally, for both commercial and Government business, rather than solely to the Government contract. Commercial plans are also preferred for subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item.

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) The failure of the Contractor or subcontractor to comply in good faith with—

(1) The clause of this contract entitled "Utilization Of Small Business Concerns;" or

(2) An approved plan required by this clause, shall be a material breach of the contract.

(j) The Contractor shall submit the Individual Subcontract Report and the Summary Subcontract Report as described below using the web-based eSRS (http:www.esrs.gov). Neither report is required from small businesses. These reports collect subcontract award data from prime contractors/subcontractors that: (a) hold one or more contracts over $500,000 (over $1,000,000 for construction of a public facility); and (b) are required to report subcontracts awarded to Small Business (SB), Small Disadvantaged Business (SDB), Women-Owned Small Business (WOSB), HUBZone Small Business (HUBZone SB), Veteran-Owned Small Business (VOSB) and Service-Disabled Veteran-Owned Small Business concerns under

a subcontracting plan. Purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor are not included in these reports. Subcontract award data reported on these forms by prime contractors/subcontractors shall be limited to awards made to their immediate subcontractors. Credit cannot be taken for awards made to lower tier subcontractors:

(1) **Individual Subcontract Report.** ***This report is not required for commercial subcontracting plans, except as noted below. The report is required for each contract containing a subcontracting plan and must be submitted to the Administrative Contracting Officer (ACO) or Contracting Officer if no ACO is assigned, semi-annually during contract performance for the periods ended March 31 and September 30. A separate report is also required for each contract at contract completion. Reports are due 30 days after the close of each reporting period unless otherwise directed by the Contracting Officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or since the inception of the previous report. The authority to accept or reject the Individual Subcontract Report resides with:***

(A) In the case of the prime contractor, it resides with the Government agency responsible for administering the prime contract; and

(B) In the case of a subcontractor with a subcontracting plan under the flow-down requirements in subparagraph (d)(9) above, it resides with the prime contractor or higher-tier subcontractor that awarded the subcontract.

(2) *Summary Subcontract Report.* This report encompasses all of the contracts with the awarding agency. It must be submitted annually ***using eSRS for the twelve months ending September 30th, except for contracts covered by an approved commercial plan***. If the reporting activity is covered by a commercial plan, the reporting activity must report annually ***using eSRS*** all subcontract awards under that plan. ***Reports for other than commercial plans are due 30 days after the close of each reporting period. Commercial plan reports are due 30 days after the end of the contractor's fiscal year for all Government contracts in effect during that period:***

(A) The report must be submitted on a corporate, company or subdivision (e.g. plant or division operating on a separate profit center basis), unless otherwise directed by the agency awarding the contract. If a prime contractor/subcontractor is performing work for more than one Federal agency, a separate report shall be submitted via eSRS to each agency covering only that agency's contracts, provided at least one of that agency's contracts is over $500,000 (over $1,000,000 for construction of a public facility) and contains a subcontracting plan;

(B) The annual report submitted by organizations having an approved commercial plan shall include all subcontracting activity under commercial plans in effect during the year and shall be submitted in addition to the required reports for other-than-commercial plans, if any;

(C) The authority to accept or reject Summary Subcontract Reports in eSRS, including Summary Subcontract Reports submitted by subcontractors with subcontracting plans under the flow-down requirements in subparagraph (d)(9) above, resides with the Government agency awarding the prime contract; however, the authority to accept or reject Summary Subcontract Reports for commercial plans resides with the Contracting Officer who approved the commercial plan; and

(D) The contractor shall maintain a hard copy of the Summary Subcontract Report signed by its Chief Executive Officer on file for four (4) years from the ending date of the reporting period.

(3) Contractors with approved commercial plans who wish to take advantage of eSRS' lower-tier reporting capability may voluntarily submit the semi-annual Individual Subcontract Report for one or more contracts covered by their commercial plan and may require their other-than-small subcontractors to submit a semi-annual Individual Subcontract Report for the same contract(s). No Contracting Officer or other Government official shall require a contractor with an approved commercial plan to submit the semi-annual Individual Subcontract Report if the contractor does not wish to do so.

(4) All reports submitted at the close of each fiscal year (both individual and commercial plans) shall include a breakout, using eSRS. of subcontract awards, in whole dollars, to small disadvantaged business concerns by North American Industry Classification System (NAICS) Industry Subsector. ***eSRS will prompt contractors to submit this report when they complete their year-end Summary Subcontract Report, but it will allow them to submit it at a later date if the data is not available when the year-end Summary Subcontract Report is submitted.*** For a commercial plan, the Contractor may obtain from each of its subcontractors a predominant NAICS Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector.

(End of clause)

Alternate I (Oct 2001). When contracting by sealed bidding rather than by negotiation, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the bidder is submitting an individual contract plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the

resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

Alternate II (Oct 2001). As prescribed in 19.708(b)(1), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) Proposals submitted in response to this solicitation shall include a subcontracting plan that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If the offeror is submitting an individual contract plan, the plan must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate a subcontracting plan shall make the offeror ineligible for award of a contract.