

incorporated in the FAR within 210 days from the date this Policy Letter is published in the Federal Register. Promulgation of final regulations within that 210 day period shall be considered issuance in a "timely manner" as prescribed in 41 U.S.C. 405(b).

8. *Information Contact.* Questions regarding this Policy Letter should be directed to William Coleman, Deputy Administrator, 202-395-3505 or Linda Mesaros, Deputy Associate Administrator, 202-395-4821, facsimile 202-395-5105. The address is Office of Federal Procurement Policy, 725 17th Street, NW, Washington, DC 20503.

9. *Judicial Review.* This Policy Letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any persons. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this Policy Letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this Policy Letter.

10. *Effective Date.* This Policy Letter is effective 30 days after the date of issuance. Steven Kelman,

Administrator.

[FR Doc. 95-23881 Filed 9-25-95; 8:45 am]

BILLING CODE 3110-01-M

Office of Federal Procurement Policy; Policy Letter on Subcontracting Plans

AGENCY: Executive Office of the President, Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP).

ACTION: OFPP is requesting comments on a proposed Policy Letter on Subcontracting Plans as required by section 8(d) of the Small Business Act and amended by the Federal Acquisition Streamlining Act of 1994 (FASA).

SUMMARY: It is a fundamental policy of the United States Government that a fair proportion of its contracts be placed with small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women and that such businesses be provided the maximum practicable opportunity to participate as subcontractors in the performance of Government prime contracts consistent with their efficient performance.

Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires that before award can be made of a contract that

exceeds \$500,000 (\$1 million in the case of construction of a public facility) to other than a small business concern, the apparent successful offeror must negotiate a subcontracting plan describing how it will provide subcontracting opportunities to small businesses.

This Policy Letter, when issued in final, will supersede and cancel OFPP Policy Letter 80-1, "Pubic Law 95-507, Section 211, SubContracting: Agency Coordination with the Small Business Administration Resident Procurement Center Representatives," dated January 24, 1980; OFPP Policy Letter 80-2, "Regulatory Guidance on Section 211 of Public Law 95-507," dated April 29, 1980; Supplement No. 1 to Policy Letter 80-2, dated May 29, 1981; and OFPP Policy Letter 80-4, "Women's Business Enterprise Program," dated April 29, 1980. The Policy Letter consolidates previously issued guidance contained in the above Policy Letters; adds clarification on issues that have arisen since the issuance of the earlier Policy Letters; addresses the FASA concern about the burden of government-unique requirements for companies supplying commercial items by establishing a preference for commercial plans; and provides additional guidance on the administration and enforcement of subcontracting plans and liquidated damages.

COMMENT DATE: Comments must be received on or before November 27, 1995.

ADDRESSES: Comments should be submitted to Linda Mesaros, Deputy Associate Administrator, Office of Federal Procurement Policy, New Executive Office Building, Room 9001, 725 17th Street, NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Linda Mesaros at 202-395-4821.

Steven Kelman,
Administrator.

Policy Letter 94-X

To the Heads of Executive Departments and Establishments

Subject: Policy Regarding SubContracting Plans

1. *Purpose.* This directive provides Executive Branch policies concerning subcontracting plans required by section 8(d) of the Small Business Act (15 U.S.C. 637(d)) as amended by the Federal Acquisition Streamlining Act of 1994 (FASA).

2. *Supersession Information.* This Policy Letter supersedes and cancels OFPP Policy Letter 80-1, Public Law 95-507, Section 211, "Subcontracting: Agency Coordination with the Small Business Administration Resident Procurement Center Representatives," dated January 24, 1980; OFPP Policy Letter 80-2, "Regulatory Guidance on Section 211 of

Public Law 95-507," dated April 29, 1980; Supplement No. 1 to Policy Letter 80-2, dated May 29, 1981; and OFPP Policy Letter 80-4, "Women's Business Enterprise Program," dated April 29, 1980.

3. *Authority.* This Policy Letter is issued pursuant to section 6 of the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. 405.

4. *Definitions.*

a. *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 bidding on government contracts, and qualified as a small business under the criteria and size standards in 13 CFR Part 121.

b. *Small business subcontractor.* Means a concern, including its affiliates, whose (1) number of employees does not exceed 500 employees, provided the subcontract is \$10,000 or less, or (2) number of employees or average annual receipts does not exceed the size standard under 13 CFR 121.601 when the value of the product or service it is providing on a subcontract exceeds \$10,000.

c. *Small disadvantaged business concern.* Normally means a small business concern that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals, and that has its management and daily business controlled by one or more such individuals. The term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian Organization, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one of these entities, that has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian Organization, and that meets the requirements of 13 CFR Part 124. This definition may not apply to all agencies when a different one is established by statute.

d. *Socially disadvantaged individuals.* Means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals. Individuals who certify that they are members of these named groups, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent-Asian Americans, are considered to be socially disadvantaged.

(1) Subcontinent-Asian Americans means United States citizens whose origins are in India, Pakistan, Bangladesh, Sri Lanka, Bhutan, Nepal, or the Maldive Islands.

(2) Asian-Pacific Americans means United States citizens whose origins are in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Laos, Kampuchea (Cambodia), Taiwan, Burma, Thailand, Malaysia,

Indonesia, Singapore, Brunei, Republic of the Marshall Islands, the Federated States of Micronesia, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru.

(3) Native Americans means American Indians, Eskimos, Aleuts, and Native Hawaiians.

e. Economically disadvantaged individuals. Means a socially disadvantaged individual whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged (see 13 CFR Part 124).

f. Small business concerns owned and controlled by women (women-owned small business concerns). Means a small business concern (1) which is at least 51 percent owned by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women, and (2) whose management and daily business operations are controlled by one or more women.

g. Subcontract. Means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for contract performance, contract modification, or subcontract. However, purchases from a corporation, company or division which are affiliates, as defined in 13 CFR 121.401, of a prime contractor are not considered "subcontracts."

h. Individual contract plan. Means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals which 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.

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

j. Commercial plan. Means a subcontracting plan covering the offeror's fiscal year and which is applicable to the entire production of commercial items sold by either the entire company or portion thereof (e.g., division, plant, or product line). As used in this Policy Letter, the term "commercial item" is a product or service that satisfies the definition of commercial item in section 8001 of FASA (41 U.S.C. 403).

k. Failure to make a good faith effort to comply with the subcontracting plan. Means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

5. Background

a. It is a fundamental policy of the United States Government that a fair proportion of its contracts be placed with small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women and that such businesses be provided the maximum practicable opportunity to

participate as subcontractors in the performance of Government prime contracts consistent with their efficient performance. In furtherance of the policy for providing the maximum practicable opportunity to small business concerns to perform as subcontractors on Government contracts, the laws governing Federal procurement do not require contractors to subcontract specific percentages of the work on Government contracts to small, small disadvantaged, or women-owned small business concerns. The policy does require that to the extent a Government contractor does subcontract a portion of the work on the Government contract, it must provide the maximum practicable opportunity to small, small disadvantaged, and women-owned small business concerns to perform the subcontracted portion of that contract.

b. Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires that before award can be made of a contract that exceeds \$500,000 (\$1 million in the case of construction of a public facility) to other than a small business concern, the apparent successful offeror must negotiate a subcontracting plan describing how it will provide subcontracting opportunities to small businesses. This requirement does not apply if the contract offers no subcontracting opportunities. The subcontracting plan shall become a material part of the contract.

c. Regulations implementing the policies of Section 8(d) of the Small Business Act have been implemented in Part 19 of the Federal Acquisition Regulation (FAR). This Policy Letter consolidates previously issued guidance contained in Policy Letters 80-1, 80-2 and its Supplement No. 1, and 80-4; adds clarification on issues that have arisen since the issuance of the earlier Policy Letters; addresses the Congress' concern about the burden of government-unique requirements for companies supplying commercial items by establishing a preference for commercial plans; and provides additional guidance on the use and administration of commercial plans.

6. Solicitation and Subcontracting Plan Requirements

a. The FAR shall prescribe a clause entitled "Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns" to be inserted in solicitations and contracts when the acquisition is expected to exceed the simplified acquisition threshold, except when (1) A personal services contract is contemplated, or (2) the contract and all of its subcontracts will be performed and awarded entirely outside of the United States, its possessions, Puerto Rico, or the Trust Territory of the Pacific Islands. This clause shall express the policy of the United States for providing maximum practicable opportunity to small, small disadvantaged, and women-owned small business concerns to participate in the performance of prime contracts let by the Federal Government and subcontracts. The clause also shall require prime contractors to establish procedures to ensure timely payment to such small business concerns performing as subcontractors and commit the prime contractor to carrying out these policies and cooperating with the Small Business

Administration (SBA) in studies to determine the extent of the prime contractor's compliance. The requirements of the clause also shall apply to small business concerns.

b. For each subcontract the prime contractor will award to a small business subcontractor, the prime contractor must obtain a written representation from the subcontractor that it qualifies under the size and ownership standards applicable for the subcontract (see 13 CFR 121.911 and the definition at subparagraph 4.b. The contractor may rely on this written representation, unless it has reason to believe otherwise. Before including a firm on its source list, a contractor should obtain written acknowledgment that the potential subcontractor is aware of the adverse consequences for misrepresentation provided for in Section 16(d) of the Small Business Act (15 U.S.C. 645(d)).

(1) Upon receipt of a formal protest, the Office of Government Contracting in the SBA has the final authority to determine the eligibility of a concern to be designated as a small business and to answer inquiries from prime contractors and others regarding such eligibility.

(2) Similar authority to make determinations of the formally protested eligibility of small disadvantaged businesses has been given to the SBA's Office of Minority Enterprise Development.

(3) Women-owned eligibility determinations will be made in accordance with regulations established by the SBA.

c. The FAR shall prescribe a clause entitled "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan" in solicitations and contracts if the award is expected to exceed \$500,000 (\$1 million for construction of a public facility), unless the acquisition is reserved for small business concerns, offers no subcontracting opportunities, or unless the contract will be performed and awarded outside the United States, its possessions, Puerto Rico or the Trust Territory of the Pacific Islands. Other exceptions include contracts with Federal Prison Industries and contracts with workshops for the blind or severely disabled awarded under the provisions of the Javits-Wagner-O'Day Act. The clause shall apply to all other entities including large businesses, state and local governments, non-profit associations, public utilities, Historically Black Colleges and Universities, Minority Institutions, and foreign-owned firms that receive Federal contracts if any portion of that contract will be performed in the United States. There is an exemption to the clause for the Department of Defense (DOD), the Coast Guard, and National Aeronautics and Space Administration (NASA) in regard to Historically Black Colleges and Universities and Minority Institutions. The actual or estimated value of the contract for the entire term of the contract, including any option periods, determines whether the threshold is met. The clause shall require that the subcontracting plan include the following elements:

(1) A statement of total dollars to be subcontracted and statements of total dollars to be subcontracted to small business, to small disadvantaged business, and to

women-owned small business. Small disadvantaged and women-owned small business dollars are included in the small business category. This means, for example, that a small business owned by a minority woman is counted as a small business, a small disadvantaged business, and as a women-owned small business. An individual contract plan for a contract with options shall contain a separate statement for the basic contract and individual statements for each option.

(2) Separate goals expressed as percentages of total planned subcontracting dollars for small, small disadvantaged, and women-owned small business. Unless a commercial plan is involved, goals are stated separately for the basic contract and for any option periods or quantities.

(3) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals and a description of the methods used to determine the proportionate share of indirect costs to be incurred with small, small disadvantaged, and women-owned small business concerns.

(4) A description of the principal types of supplies and services to be subcontracted (to large, small, small disadvantaged, and women-owned small business concerns) and an identification of the specific types to be subcontracted to each small business category.

(5) A description of the methods that were used in developing the subcontracting goals.

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

(7) A description of the methods used to identify potential sources for solicitation purposes. Offerors may rely on information contained in SBA's Procurement Automated Source System (PASS). The information included in PASS will be incorporated into the Federal Acquisition Computer Network (FACNET) Contractor Registration Data Base.

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

(9) Assurances that the offeror will include the Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns clause in all subcontracts over the simplified opportunities.

(10) Assurances that subcontractors (except small business concerns) who receive subcontracts in excess of \$500,000 (\$1 million for construction of a public facility) will adopt a plan similar to the plan agreed to by the offeror. For individual contract plans, offerors are required to describe their procedures for reviewing, approving, and monitoring their subcontractors' compliance with subcontracting plans. Copies of subcontractors' subcontracting plans must be retained by the prime contractor until completion of the subcontract. A "certificate of compliance" or statement from the subcontractor that it has a subcontracting plan does not satisfy this requirement.

(11) Assurances that the offeror will cooperate in any studies or surveys that may be required; submit periodic reports so the

Government can determine the extent of compliance by the offeror with the subcontracting plan; submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, following the instructions on the form or as provided in agency regulations; and ensure that its subcontractors agree to submit SF 294s and 295s.

(12) A description of the type of records that will be maintained concerning procedures that will ensure compliance with the plan and its goals.

(13) A description of the efforts that will be made to locate and award subcontracts to small, small disadvantaged, and women-owned small business concerns.

d. A contractor's failure to make a good faith effort to comply with the subcontracting plan is a material breach of the contract. Section 8(d)(4)(F) of the Small Business Act requires that contracts that include the Utilization and Subcontracting Plan clauses also contain a clause requiring the payment of liquidated damages upon a finding that the contractor failed to make a good faith effort to comply with the requirements of these clauses. The FAR shall prescribe a clause entitled "Liquidated Damages-Subcontracting Plan" that shall describe the procedures for making such a determination.

e. Nothing in this Policy Letter precludes an agency from establishing additional requirements regarding subcontracting plans.

(1) The contracting officer may also use informational goals in solicitations to inform potential offerors of the Government's expectations concerning the goals in an acceptable subcontracting plan. Informational goals shall not be interpreted as minimal acceptable requirements.

7. Instructions to Contracting Officers.

Contracting officers are required to determine the acceptability of the subcontracting plan before awarding the contract. The following policy and procedural guidance is provided to contracting officers to assist them in making their determinations. This guidance is not intended to be all inclusive. Ultimately, there is no substitute for the reasoned and objective judgment of a contracting officer exercised on a case-by-case basis.

a. *Reviewing the Subcontracting Plan.* Many factors warrant consideration in reviewing the adequacy of a subcontracting plan. Consequently, the contracting officer should be flexible and avoid establishing arbitrary criteria. Potential weaknesses in the plan should be identified and brought to the attention of the offeror. For example, by regulation, a zero goal is not acceptable. A positive goal is required to establish a gauge for measuring results and to provide an incentive for continuing efforts to increase the dollar value of subcontracts placed with small, small disadvantaged, and women-owned small business concerns. During the contract period, the contractor is expected to make continuing efforts to locate and identify new small, small disadvantaged, and women-owned small business concerns as potential subcontractors. Subcontracting goals should not be negotiated upward if they would significantly increase the Government's cost

or seriously impede the attainment of the acquisition's objective. The contracting officer shall take the following actions:

(1) Evaluate the anticipated potential for subcontracting to small, small disadvantaged, and women-owned small business concerns taking into consideration the make-or-buy policies or programs of the offeror, the nature of the products or services to be subcontracted and the known availability of small, small disadvantaged, and women-owned small business concerns in the geographical area where the work will be performed.

(2) If informational goals are stated in the solicitation, require an offeror that proposes lower goals to explain why its subcontracting plan cannot achieve the stated goals.

(3) If the proposed goals are questionable, advise the offeror of (a) the names of any known potential small, small disadvantaged, and women-owned small business subcontract sources and (b) the availability of the sources of information on potential small, small disadvantaged, and women-owned small business subcontractors. The contracting officer shall emphasize that one or more of the available sources of information concerning potential small, small disadvantaged, and women-owned small business subcontract sources should be considered in developing realistic and acceptable goals. Sources of information include:

(i) Local SBA offices.
(ii) The Department of Commerce, Minority Business Development Agency (MBDA). An offeror can ask for access to the MBDA's Profile System.

(iii) State, county, and city government minority business offices.

(iv) Small, minority, and women business associations.

(v) Local chambers of commerce.
(vi) The Commerce Business Daily (CBD), the FACNET Contractor Registration Data Base, newspapers, and other communication media. An offeror can synopsise in the CBD or advertise in trade newspapers or journals seeking competition for subcontracts and to increase participation by small, small disadvantaged, and women-owned small business concerns to meet subcontract goals.

(4) Obtain advice and recommendations of the agency Small Business Specialist and the SBA Procurement Center Representative (SBA PCR) concerning the acceptability of the proposed plan. The FAR shall require that the contracting officer provide the SBA PCR a reasonable opportunity to review subcontracting plans and make recommendations, which are advisory in nature.

(5) Consider the offeror's performance on other Government contracts that required subcontracting plans. The contracting officer should encourage the offeror to identify other contracts that had subcontracting plans and contact the contracting officers who administered those earlier plans to ascertain whether the objectives of those plans were realized and whether required reports were submitted in a timely manner. Overall compliance should be considered, not merely whether or not the goals established in the plan were met.

(6) Incorporate by reference the terms of a master plan into an individual contract plan provided:

(a) The master plan contained all the required elements;

(b) The master plan has been approved within the last three years and the SBA PCR had an opportunity to comment on the master plan;

(c) Subcontract goals for small, small disadvantaged, and women-owned small business concerns are specifically set forth in each contract or modification over the threshold;

(d) Any changes to the plan deemed necessary and required by the contracting officer in areas other than goals are specifically set forth in the contract or modification; and

(e) The contracting officer has copies of the complete plan.

(7) A preliminary subcontracting plan may be accepted for letter contracts and similar undefinitized instruments provided negotiation of the final plan is accomplished within 90 days after award or before definitization, whichever occurs first.

b. Award of Contract or Contract Modification

(1) After award of a contract or contract modification containing a subcontracting plan, the contracting officer shall provide a copy of the award document to the SBA Area Director for Government Contracting in the Area where the contract will be performed. A copy of any subcontracting plan submitted pursuant to a sealed bid solicitation or the subcontracting plan incorporated into a negotiated contract or modification shall be provided to the SBA PCR.

(2) The following policies apply to contract modifications other than options. The Small Business Act treats contracts and modifications separately. If a subcontracting plan is not required at the time of award because the value of the contract is below the threshold, a subcontracting plan will not be required even if a subsequent modification increases the value of the contract to an amount exceeding the threshold. The only exception to this rule is when the value of the modification itself exceeds \$500,000 (\$1 million for construction of a public facility). Moreover, it is not necessary to obtain another subcontracting plan for a modification exceeding the applicable threshold if the contract already includes a subcontracting plan. However, the original plan must be modified to adjust goals accordingly for the new effort. If the value of the modification does not exceed the threshold, the original plan does not need to be modified.

(3) The following policies apply to contractors and subcontractors that no longer meet the size or ownership status as a small, small disadvantaged, or women-owned small business concern during the period of contract performance as a result of growth, a buy-out, or a merger:

(a) A subcontracting plan is not required of any former small business prime contractor that, during contract performance, no longer meets the definition of a small business concern. Similarly, the requirement to submit

periodic reports does not apply. However, a subcontracting plan is required if the prime contractor erroneously considered itself small at the time of contract award. Under this circumstance, the contracting officer should request a subcontracting plan from the contractor and the responsibility to submit the periodic reports would apply.

(b) If a prime contractor awards a subcontract to a small business, it may continue to report those subcontract dollars as a small business award for the duration of the subcontract, including all option years.

c. Contract Awards Involving Commercial Plans

(1) A commercial plan is an annual subcontracting plan which is effective during the offeror's fiscal year and applies to all of the offeror's production of both commercial and noncommercial items. This type of plan is useful for companies that normally rely on their existing network of suppliers for all of their business and do not enter into specific subcontracts to fill Government contracts. The plan may apply to the production of the offeror's entire company, or it may be limited to a corporation, company, division, plant or product line. A commercial plan is approved by the first Federal agency awarding a contract for commercial products or services during the contractor's fiscal year, and is applicable to every additional Federal contract for those items awarded to that contractor during the contractor's same fiscal year. The cutoff date for applying a previously approved commercial plan to additional Federal contracts is the end of the company's fiscal year in which the commercial plan was approved. If a contract extends beyond the expiration date of the plan, a new plan must be obtained and approved by the contracting officer monitoring the plan. The new plan should be requested 30 days before the old plan expires.

(2) Commercial plans are recognized as one way the burdens of government-unique requirements can be reduced for companies that provide commercial items on Government contracts and subcontracts.

(a) It is the policy of the United States Government that commercial plans, when authorized under this Policy Letter, shall be the preferred method of compliance with the requirements of section 8(d) of the Small Business Act. Commercial plans are only authorized for products or services that meet the definition of commercial item as provided in subparagraph 4j.

(b) Agencies, in all solicitations expected to trigger the requirements for a subcontracting plan, shall inform prospective offerors of the opportunity for them and/or their subcontractors to develop commercial plans if they are supplying commercial items. Commercial plans are authorized for subcontractors that provide commercial items under a prime contract even when the prime contractor is not supplying a commercial item.

(3) When a contractor has a commercial plan previously approved by another agency's contracting activity or another Federal agency for the company's fiscal year, the contracting officer shall obtain a copy of

the plan and the approval document from the contractor. These documents shall be incorporated into the contract.

(4) Since a commercial plan may be applicable to contracts awarded by more than one contracting activity or Federal agency, contracting officers must ensure that the commercial plan is not allowed to expire prior to the negotiation of a new commercial plan. This eventuality may occur when the contract of the contracting officer monitoring the plan is completed and no new contract is awarded to that contractor during the contractor's fiscal year. To prevent such an occurrence, 30 days prior to contract completion, the contracting officer monitoring the commercial plan shall obtain from the contractor the name of the contracting officer administering the contract with the latest completion date and arrange for the transfer of the monitoring responsibilities to that contracting officer.

d. Contract Administration of Subcontracting Plans

(1) The contracting officer administering a contract with an individual contract plan is responsible for monitoring receipt of the SF 294 reports. The SF 294 is used to evaluate the contractor's progress toward meeting the subcontracting goals established in the individual contract plan. The contracting officer shall pay particular attention to reviewing the SF 294 required at contract completion. The SF 294 is not required for contracts with an approved commercial plan.

(2) The SF 295 is used to evaluate the contractor's progress toward meeting the subcontracting goals in subcontracting plans. The contracting officer monitoring a subcontracting plan is responsible for ensuring receipt and review of the SF 295. The SF 295 report summarizes all subcontract awards under contracts with a particular federal agency and is due on or before October 30th of each year. Since this report measures progress during the Government's fiscal year and the commercial plan applies to the contractor's fiscal year, a second SF 295 will be required from contractors with commercial plans whose fiscal year is different from the Government's. This second SF 295 report shall enable the contracting officer monitoring the commercial plan to evaluate progress in meeting subcontracting goals by comparing the applicable report with the plan.

(3) For contracts containing a commercial plan, the contracting officer monitoring the plan shall review the contractor's performance at the close of the fiscal year for which the plan is applicable in order to determine whether it is appropriate to assess liquidated damages under the FAR clause entitled "Liquidated Damages-Subcontracting Plan." For contracts containing individual contract plans, the contracting officer should evaluate contract performances at the time of contract completion, unless the contract contains options for extending contract performance. In this case, a decision would be made upon completion of the initial period of performance and at the end of each option period.

(4) In making a determination regarding the assessment of liquidated damages, the

contracting officer should consider whether the contractor made a good faith effort to comply with the subcontracting plan. Failure by the contractor to meet the subcontracting goals established in the subcontracting plan does not, in and of itself, constitute a failure to make a good faith effort. The contracting officer shall consider the totality of the contractor's effort. If the contractor failed to make a good faith effort to comply, section 8(d) of the Small Business Act mandates that liquidated damages must be assessed. When considering whether a good faith effort has been made, the contracting officer should examine whether the contractor:

(a) Submitted the periodic reports required by the subcontracting plan in a timely manner.

(b) Failed to meet its subcontracting goals because of a lack of diligence. Factors such as unavailability of anticipated sources or unreasonable prices may impact on the achievement of the contractor's goals.

(c) Made efforts to identify, contact, solicit and consider for award small, small disadvantaged, and women-owned small business concerns. Factors such as the contractor's efforts to request assistance from SBA or to reach out to other organizations, i.e., trade associations, business development associations, etc., in an effort to locate small, small disadvantaged, and women-owned small business concerns should be considered in evaluating the contractor's efforts.

(d) Maintained records and established procedures to comply with the subcontracting plan. The contracting officer should look for documentation of efforts to contact organizations to locate small, small disadvantaged, and women-owned small business concerns, participation in business fairs, information on who was solicited for particular solicitations, and any documentation of reasons for not awarding to small, small disadvantaged, or women-owned business concerns.

(e) Maintained a company official to administer the subcontracting program and monitor and enforce compliance.

(f) Assisted small, small disadvantaged, and women-owned small business concerns in responding to solicitations issued by the contractor.

(5) If the contracting officer's initial assessment is that the contractor did not make a good faith effort to comply with the subcontracting plan, the contracting officer must notify the contractor, in writing, calling the contractor's attention to the suspected failure. As part of the notification, the contractor must be given the opportunity to demonstrate that good faith efforts have been made. The contractor must be advised that failure to respond to the notice may be taken as an admission that no valid explanation exists.

(6) Before making a final decision, the contracting officer shall consider the contractor's response, if any, along with any pertinent information available. The contracting officer's final decision shall be documented in a "final decision" which is appealable by the contractor under the "Disputes" clause of the contract. The contracting officer's final decision should include:

(a) A description of the contractor's failure;

(b) Reference to the appropriate contract terms;

(c) A statement of the factual areas of agreement and disagreement;

(d) A statement of the contracting officer's decision with supporting rationale;

(e) A demand for liquidated damages; and

(f) An explanation of the contractor's appeal rights.

(7) For a contract containing an individual contract plan, the amount of liquidated damages to be assessed is the sum of the amounts by which the contractor failed to meet each subcontracting goal for small, and/or small disadvantaged, and/or women-owned small business concerns. For contracts containing a commercial plan, the amount of liquidated damages to be assessed is calculated based upon the total payments made under contracts subject to the commercial plan as a percentage of the contractor's total sales. For example, if the contractor's total sales are \$50 million and the Government's total payments under contracts subject to the commercial plan are \$5 million, the Government accounts for 10 percent of the contractor's total sales. The commercial plan stated that the subcontracting dollars to support the sales would be \$20 million. Therefore, the pro rata share of subcontracting attributable to the Government contracts would be 10 percent of the \$20 million or \$2 million. If the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of the \$2 million or \$20,000. The contracting officer shall make similar calculations for each category of small business where the contractor failed to achieve its goal and the sum of the dollars for all of the categories equals the amount of the liquidated damages to be assessed. The contracting officer of the agency that originally approved the plan will exercise the functions of the contracting officer on behalf of all agencies that awarded contracts subject to the commercial plan.

(8) Liquidated damages shall be in addition to any other remedies available to the Government by law or under the contract.

8. *Responsibilities.* The Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this Policy Letter is published final in the Federal Register. Promulgation of final regulations within that 210 day period shall be considered issuance in a "timely manner" as prescribed in 41 U.S.C. 405(b).

9. *Information Contact.* Questions regarding this Policy Letter should be directed to Linda Mesaros, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, NW, Washington, DC 20503, telephone 202-395-3501, facsimile 202-395-5105.

10. *Judicial Review.* This Policy Letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any persons. It is intended only to provide policy guidance to agencies in the

exercise of their discretion concerning Federal contracting. Thus, this Policy Letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.

11. *Effective Date.* The Policy Letter is effective 30 days after the date of issuance.

Steven Kelman,

Administrator.

[FR Doc. 95-23880 Filed 9-25-95; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

United Fire Technology, Inc.; Order of Suspension of Trading

September 20, 1995.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of United Fire Technology, Inc. ("United Fire") because of questions regarding the accuracy of assertions by United Fire in documents sent to the National Association of Securities Dealers, Inc., market-makers of the stock of United Fire, other broker-dealers, and to investors, and by others, that, among other things: (1) United Fire's products have been, or are being, tested and/or certified by various independent testing centers, including the U.S. Navy Firefighting School; (2) the company has the capability to manufacture its products; (3) the identity of the individuals in control of United Fire; and (4) information regarding the liabilities of the company and its stock issuances.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EST, September 21, 1995 through 11:59 p.m. EST, on October 4, 1995.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 95-23838 Filed 9-25-95; 8:45 am]

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