



New Year's Resolution: Comply with Small Business Subcontracting Plan

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About Aronson LLC

Aronson LLC provides a comprehensive platform of assurance, tax, and consulting solutions to today's most active industry sectors and successful individuals. For more than 50 years, we have purposefully expanded our service offerings and deepened our industry specialties to better serve the needs of our clients, people, and community. From startup to exit, we help our clients maximize opportunity, minimize risk, and unlock their full potential.

Aronson Awards / Accolades / Affiliations



INSIDE Public Accounting Top 100

Once again, Aronson has earned a spot in the top 100 of this prestigious list, released by *INSIDE Public Accounting*. This is the longest running, most comprehensive and accurate independent analysis focusing on management and operations of America's large local, regional and national firms.

Accounting Today Top Firm

In 2013, Aronson was once again named to *Accounting Today's* list of the top 100 firms in the country. *Accounting Today* is a leading provider of online business news for the tax and accounting community.

Washington Business Journal Best Places to Work

Aronson has been recognized five times as one of the Metro area's "Best Places to Work." The award recognizes a company's achievements in creating a positive work environment that attracts and retains employees through a combination of employee satisfaction, working conditions and company culture.

Washington Business Journal Top 25

Aronson is ranked #12 on the *Washington Business Journal's* Top 25 Accounting Firms in the DC Metropolitan area.

Montgomery County Chamber Corporate Social Responsibility Award

In 2010, Aronson was honored to receive the MCCC's Corporate Social Responsibility Award based on the depth and breadth of the company's energetic commitment to support young people, in the areas of education, housing and health.

The Gazette of Politics & Business Exceptional 53 Business Award

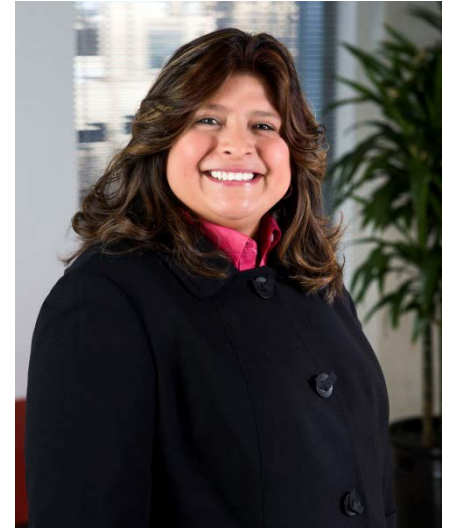
In 2012, Aronson received the PB53 award for the third year in a row. The program acknowledges the top businesses and organizations in Maryland based on criteria that includes the company's annual revenue, employee growth, noteworthy product or service innovations, community service efforts and more.



Sonia Pesantes, Aronson LLC

Managing Consultant, Government Contract Services Group

Sonia Pesantes is a managing consultant in Aronson's Government Contract Services Group, where she leads clients successfully through the GSA Multiple Award Schedules (MAS) lifecycle. From obtaining a new GSA Schedule contract acquisition to administering ongoing GSA schedule contracts, she works closely with clients to tailor solutions that meet current and future organizational needs. She has more than 10 years of experience in GSA Schedule support, including development of scope and pricing strategies, contract compliance, audit support, and contract profitability strategies. Sonia earned her bachelor's degree from George Mason University.



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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Sign up for our newsletters and blog at
www.pilieromazza.com

PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decision, legislative and regulatory rule-making as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the minute recap of legislative and regulatory issues affecting small businesses.

Webinars on YouTube – all of our past webinars can be found on the PilieroMazza YouTube channel.

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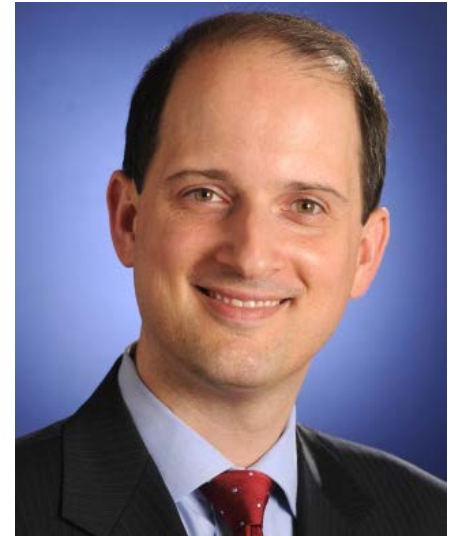
Jon Williams, PilieroMazza PLLC

Partner, Government Contracts Group

Jon Williams is a Partner with PilieroMazza and a member of the Government Contracts Group

He advises contractors on a wide range of government contracting matters and Federal Acquisition Regulation compliance, including the federal procurement programs for small business (such as the 8(a) and SDVOSB programs).

Mr. Williams represents contractors in bid protests, size protests and appeals, and related administrative and court proceedings. He also assists large and small contractors in navigating SBA audits and investigations, including subcontracting plan compliance reviews and suspension and debarment proceedings. He regularly helps contractors to establish and navigate teaming, subcontract, joint venture, and mentor-protégé relationships. He also counsels clients regarding claims and disputes with the government, growth and exit strategies, data rights and trademark issues, Service Contract Act compliance and negotiations with labor unions, among many other matters.



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Agenda

- Contractor Responsibilities
- Compliance with Subcontracting Requirements
- Common Compliance Issues
- Helpful Tips to Handle SBA Reviews
- Upcoming Developments



Contractor Responsibilities

Contractor's Responsibilities

- Promote the government's objective to maximize small business participation in federal procurements
 - FAR Subpart 19.7
 - FAR 52.219-8, Utilization of Small Business Concerns
 - FAR 52.219-9, Small Business Subcontracting Plan
 - SBA's rules at 13 C.F.R. § 125.3
- Types of Plans
 - Individual
 - Master
 - Commercial
 - Department of Defense Test Program for Comprehensive Small Business Subcontracting Plan (Comp Plan)



Compliance with Subcontracting Requirements

Compliance with Subcontracting Requirements

- Reporting Obligations (FAR 52.219-9)
- Notification Requirement for Non-Use of SBs
- Vendor Identification
- Diversity
- Good Faith Efforts
- Implementation of Policies and Procedures

Reporting Obligations (FAR 52.219-9)

- Reporting submitted through the electronic Subcontracting Reporting System (eSRS), available at <http://www.esrs.gov/>
- Individual Subcontracting Plans
 - Reports on plan results due twice annually (Apr. 1 and Oct. 30)
 - SF 294
- Commercial Subcontracting Plans Reports on plan results due once annually (Oct. 30)
 - SF 295
- Exceptional Cases – Paper Reports Submitted to Contracting Officer

Reporting Obligations (Continued)

- Count a SB that meets subset definitions in all categories that apply
- What Subcontracts not to include
- What Subcontracts to include
- Do not see a contract on ESRS
- Revise goal dollars and goal percentages during options
- Report although no subcontracting with SB has been done
- No task order reporting
- Final ISR needs to be submitted within 30 days of contract completion.
- CPARS - Provide explanation for goal shortfalls in the "Remarks" section
- CPARS - Hold PMs responsible for providing remarks

Notification Requirement for Non-Use of SBs

- When the prime contractor does not utilize a small business subcontractor used in preparing the proposal
- When the prime reduces payments to a small business subcontractor
- When payments to a small business subcontractor are 90 days or more past due
- Prime or other subcontractors may file a size protest challenging a subcontractor's small business status

Vendor Identification

- Written self-certifications (13 CFR 121.411(a))
- Required content and SB misrepresentation disclosure. 15 U.S.C. § 645
- Non-profit organizations should not be classified as a Small Business.
- No certification- cannot be accounted as small

Diversity

- Utilization of Available Services
- Mentor-Protégé program
- Interested Small Business
- Negotiate in Good Faith
- Assistance to SBA

Good Faith Efforts

- Compartmentalize
- Market research
- Post notices
- Network Events
- Solicit
- Management Support

Implementation of Policies and Procedures

- Who is Responsible?
- Develop Standard Operating Procedures
- Vendor/Subcontractor Agreements, Pricing and Proposals
- Documentation and Tracking
- Training



Common Compliance Issues

Importance of Compliance

- Increasing focus on subcontracting compliance on Capitol Hill
- SBA audits are up, and trend is expected to continue
- Stakes are high for noncompliance
 - Breach of contract
 - Adverse past performance
 - Evaluation factor
 - Liquidated damages
 - Possible (though rare) when contractor fails to make a good faith effort (i.e., willful or intentional failure) to comply with its plan
 - Amount equal to the dollar amount by which the contractor failed to achieve each subcontracting goal

Compliance Impacts in Bid Protests

- Graybar, B-410886 (Mar. 4, 2015): protester was properly excluded from competitive range based in part on its consistent failure to meet its small business subcontracting goals on previous contracts
- Kellogg Brown & Root Services, Inc., B-298694.7 (June 22, 2007): protester's score lower than awardee's due in part to less small business utilization in prior contracts
- Coastal Maritime Stevedoring, LLC, B-296627 (Sept. 22, 2005): agency improperly rated offeror's incomplete plan as satisfactory
- SEEMA, Inc., B-277988 (Dec. 16, 1997): awardee's aggressive subcontracting goals one of the decisive factors in award

Subcontracting Goals are Unrealistic

- Establish % goals that are reasonable and realistic for your company
 - The model plan utilizing government-wide goals (i.e., 3% for HUBZone, 5% for SDB, etc.) may not make sense based on what you buy and availability of SB suppliers
 - Goals must be based on total subcontracting dollars; be wary of goals based on total contract value (see proposed rules)
- Limit responsibility for flow-down and oversight of subcontracting plans by your subcontractors
 - Ex.: No flow-down for commercial items
- Offer narrowly-tailored and objective steps to measure your good faith efforts to comply with the plan

Subcontracting Goals are Unrealistic

- Exclude subcontracting that is only available from LBs
- Exclude subcontracting performed overseas, inter-company transactions, and lower-tier subcontracts (see proposed rule)
- Other authorized exclusions:
 - Salaries and wages
 - Employee insurance
 - Other employee benefits
 - Payments for petty cash
 - Depreciation
 - Interest
 - Income taxes
 - Property taxes
 - Lease payments
 - Bank fees
 - Fines, claims, and dues
 - OEM relationships during warranty periods (negotiated up front with product)
 - Utilities purchased from a municipality or solely authorized by municipality
 - Charitable contributions

Inadequate Vetting of SB Vendors

- Critical to obtain written representation from your SB vendors, and keep them current
- Independent verification required for HUBZone vendors; good idea for all SB vendors
 - Third parties like CVM Solutions can help, but do not rely on them exclusively
- NAICS code
 - SBA rule states prime must assign a NAICS code and size standard to each subcontract; prime has discretion in selecting most appropriate code
 - Not in FAR 19.703 or FAR 52.219-9 . . . yet
 - Doable for individual subcontracting plans; often not feasible for commercial plans

Missing or Outdated Self-Certifications

- You must have a size and status self-certification on file for every subcontractor you are treating as small on your ISR/SSR
 - Use SBA's preferred format for vendor "Self-Certification Form"
 - If SB is relying on SAM, the SB must represent to you in writing that its SAM is current, accurate, and complete for the subcontract
 - For commercial plans, ask vendors to represent small business status for primary and any secondary NAICS codes
- Size and socio-economic status determined at initial offer that includes price
 - Representation is good for contract duration
 - For vendors utilized for repetitive purchases under commercial plans, require updating of self-certification at least annually, and more often if vendor undergoes a change in status
 - Foreign businesses must meet the definition of SB to count as small (13 C.F.R. 121.105)

Missing Other Key Documents

- In addition to SBA's preferred Self-Certification Form, your subcontracting plan compliance program should also include:
 - Subcontract justification sheet
 - Used to demonstrate compliance with FAR 52.219-9(d)(11)(iii) by describing efforts to solicit SBs for subcontracts over \$150,000
 - CEO letter in support of your subcontracting program
 - Your company's standard terms and conditions should address subcontracting plan flow-down obligations and require vendors to represent their size/socio-economic status

Lack of Adequate Written Procedures

- A written subcontracting program manual is essential to maintain your program and to pass an audit
- Your manual should address:
 - Covered supplies/services
 - Program administration and SBLO responsibilities
 - Periodic evaluation of program performance
 - Recordkeeping procedures
 - Maintenance of vendor list
 - Vendor self-certifications
 - Independent verification of vendor self-certifications
 - Flow-down
 - Preparation of subcontracting plans
 - Reporting (internal/external)
 - CEO/senior leadership buy-in and involvement
 - Outreach (internal/external)
 - Employee training

Failure to Flow Down

- Flow down should be addressed in subcontract and/or your standard terms and conditions
- Requirement to provide maximum practicable opportunities for SBs
 - Must be flowed down to subcontractors when subcontract offers lower-tier subcontracting opportunities
- Requirement to implement a subcontracting plan
 - Must be flowed down to subcontracts that offer further subcontracting possibilities greater than \$700,000 (or \$1.5 million for construction)
 - No flow down to subcontracts with SBs
 - No flow down to subcontracts for commercial items (when prime contract contains FAR 52.212-5 or 52.244-6)

Late or Missing Reports

- Make sure to submit your ISR/SSR on time via eSRS (see slide 12)
 - Define reporting procedures, timelines, and responsibilities in your compliance manual
- Discrepancies or negative trends in reported data more likely to trigger SBA audit

Insufficient Training and Outreach

- Make sure your management, sales, and purchasing personnel are on the same page for goal development and attainment
 - Your SBLO needs to be positioned and supported in your organization to make this happen
- Hold regular internal meetings and monitor plan performance to catch shortcomings as early as possible
- Get involved in conferences, trade associations, PTACs
- Understand/utilize SAM.gov, Dynamic Small Business Search, and PRO-Net Database
- Be sure to document mentoring and success stories with SBs



Helpful Tips to Handle an SBA Review

Overview of SBA Reviews

- Occurring with greater frequency recently
- Performed by regional SBA offices, through Procurement Center Representatives (PCRs) and Commercial Market Representatives (CMRs)
 - Individual agencies may also participate in reviewing subcontracting plan compliance
 - DCMA may be involved

Types of SBA Reviews

- **Subcontracting Program Compliance Review:** a comprehensive review of contractor's total subcontracting program
- **Performance Review:** focuses on subcontracting achievement on a contract-by-contract basis via reporting systems
- **Subcontracting Orientation and Assistance Review:** includes physical visit to contractor's facility with purpose of providing advice or tools so the contractor can evaluate its small business program
- **Follow-Up Reviews:** focuses on contractor's implementation of previous SBA recommendations and its utilization of referred resources

A Typical SBA Review

- Process begins with a letter from SBA specifying date of SBA's planned visit to your office
- SBA's letter will request that you submit the following data approximately one week before their visit:
 - All subcontracts to SBs within the last year
 - All subcontracts to LBs over \$150,000 within the last year
 - All blanket purchase agreements entered into within the last year
- SBA will then select samples from each list (typically 20-30 from the list of SB subcontracts)
 - SBA will drill down on the samples during their visit to determine if you have the necessary supporting documentation

Compliance Review Checklist

- SBA's compliance review checklists requires you to answer numerous questions about your subcontracting program, goal performance, historical trends, outreach efforts, etc.
- Requests several supporting documents, including:
 - Letter of support from CEO
 - Policy and procedures for your subcontracting program
 - Sample subcontractor self-certification form
 - Contract terms and conditions containing flow-down language
 - Organizational chart depicting where SBLO sits in your organization
- Be thorough in your responses

Compliance Review Site Visits

- Usually lasts 1-2 days
- SBA will want to meet with key stakeholders, SBLO, managers, and buyers
- Looking for good faith efforts to comply with plan through assessments of:
 - Methodology used in developing and reporting goals and performance
 - Recordkeeping, in particular whether you have written representations from your SB vendors that are tied to and timely for your subcontracts
 - How you flow-down requirements to and monitor subcontractors
 - Overall commitment to the program, including management support
- Prepare in advance

What Happens Next?

- If you receive a “Marginal” or “Unacceptable” rating, SBA will require you to submit a corrective action plan
 - Contractor submits plan to SBA or both the SBA and agency that conducted the compliance review
 - Failure to submit or adhere to a corrective action plan may be grounds for penalties and other adverse actions
- SBA will conduct follow-up visit to check on your progress with the corrective action plan
- SBA’s report will go to Administrative CO



Upcoming Developments

SBA Rulemakings

Limitations on subcontracting rule

- Proposed rule issued in December 2014; final rule expected in 2016
- Proposals for subcontracting plans include:
 - Before prime identifies SB by name in its proposal or subcontracting plan, prime must notify SB in writing
 - Penalties for primes that do not provide a written corrective action plan or demonstrate good-faith effort to comply:
 - May be considered for liquidated damages under FAR § 52.219-16
 - Material breach of contract
 - Must be considered in any past performance evaluation
 - Referral to SBA IG if contractor makes a false statement about plan

SBA Rulemakings

Lower-tier subcontracting rule

- Implements 2014 NDAA
- Proposed rule issued in 2015; final rule toward end of 2016?
- Would allow primes with individual subcontracting plan to receive credit for SBs at any subcontracting tier
- SBA wants primes to avoid double-counting at lower tiers, but does not address how
- Adds more obligations for primes to monitor subcontractors and enforce subcontracting plan requirements

FAR Changes

FAR 19.7 and 52.219-9

- Proposed rule issued in 2015; final rule in 2016?
- Highlights:
 - Requires subcontracting plan to list NAICS code for each subcontract
 - Permits primes to rely on subcontractor representations in SAM
 - Allows goals based on total contract dollars
 - Primes cannot prohibit subcontractor from discussing payment or utilization matters directly with CO
 - Primes must notify unsuccessful subcontract offerors in writing
 - Primes with individual subcontracting plans must report order-level subcontracting info for multiple-award contracts
 - Failure to comply in good faith with subcontracting plan shall be a material breach of the contract and may be considered in past performance evaluation

Developments on The Hill

- Current climate: more oversight and enforcement of subcontracting plans
- 2016 NDAA included several provisions to improve monitoring of existing requirements, including agency scorecard program, and GAO reporting
- November 2015 House Small Business Committee hearing addressed whether SB subcontracting opportunities are “real,” with panelists advocating for stricter accountability for subcontracting plan goals
- SB Subcontracting Transparency Act (S. 2138)
 - Would give SBA PCRs and CMRs the ability to delay acceptance of an apparently successful offeror’s subcontracting plan
- SB Entrepreneur Subcontracting Opportunities Act (H.R. 4284)
 - Would require SBA to issue rules giving examples of a failure to comply in good faith with subcontracting plan requirements

Any Questions?

Thank you for joining us today

If you would like to speak to Sonia or Jon about subcontracting plan compliance, please contact them at:



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