

1230.1820 REQUIRED SUBCONTRACTING FOR CONSTRUCTION OR PROFESSIONAL OR TECHNICAL SERVICES.

Subpart 1. **Goal setting.** The division may set goals that require prime contractors to subcontract a portion of any contract for construction or professional or technical services to targeted group small businesses.

A. Goals for subcontracting will depend on the type of work involved, location of project, size of project, and the availability of certified, willing, and able targeted group small businesses open to subcontracts from the prime contractor.

B. Credit toward the goal established for the contract shall be at 100 percent for subcontractors who provide labor, materials, and supplies and at 60 percent for subcontractors who provide supplies and materials only.

Subp. 2. **Subcontracting.** No contractor receiving a subcontract under this program shall in turn subcontract more than 25 percent of the contract dollar amount. A targeted group small business may exceed the 25 percent limitation if the awarded subcontract is to another targeted group small business.

Subp. 3. **Waivers.** Prime contractors may obtain waivers from the normal subcontracting goals according to the following procedure:

A. The prime contractor may request a waiver for some or all specialties based on a documented unsuccessful effort to obtain certified targeted group subcontractors. The request for waiver with documentation showing the effort and steps taken to secure certified targeted group subcontractors and the results thereof must accompany the bid response, unless the invitation to bid specified a period after bid opening, not to exceed 72 hours, where documentation of efforts and steps taken to secure certified targeted group subcontractors will be permitted.

B. After the award and the commencement of a project, a prime contractor may request a waiver for a specific specialty if the certified targeted group subcontractor cannot or will not fulfill the subcontract and no suitable alternative subcontractor is available so as to prevent significant project delay. Failure to use the certified targeted group subcontractors specified at the time of award without a grant of waiver will invoke a penalty as outlined in subpart 4.

Subp. 4. **Incentives and penalties.** Solicitation documents must state whether or not the incentive rule applies for the project being solicited. If so,

A. Prime contractors who exceed the established goal on a given project for use of certified targeted group subcontractors by more than three percent may be awarded a

financial incentive over and above the awarded project price, the incentive to be determined in the following manner:

(1) Contracts qualifying for incentive clauses may be prime contracts at \$50,000 or higher in which the goal for subcontractor use has been set at one percent or higher. The maximum goal qualifying for incentives may not exceed 25 percent. Contracts between \$2,000 and \$50,000 may qualify for incentive clauses if the approved goal percentage applied to the estimated project cost will provide a minimum of \$500 in potential subcontracting awards.

(2) A monetary incentive over and above the awarded contract price shall be paid to the prime contractor upon documented proof of actual use of certified targeted group subcontractors on the project in excess of three percent of the goal set for that project. The monetary incentive in any case shall not exceed six percent of the awarded project price, or \$60,000 at the maximum. The form of documented proof shall be specified in the award agreement.

(3) The actual amount of incentive to be paid shall be calculated by the following formula:

- (a) subtract the established goal plus three percent from 25 percent;
- (b) divide six percent of the project or \$60,000, as appropriate, by the number of percentage points in unit (a); and
- (c) multiply the result of unit (b) by the number of percentage points exceeding goal plus three percent.

(4) The provisions of subitems (1), (2), and (3), shall be applicable to all prime contractors and shall also apply to certified targeted group contractors acting as prime contractors if the awarded contract was not gained through preference or set-aside bidding procedures.

B. Prime contractors who have been awarded a contract and fail to meet the project goal for certified targeted group subcontractor use without approved waiver shall be penalized up to six percent of the total project value, not to exceed \$60,000. The penalty to be assessed will be proportionate to the actual underuse of certified targeted group subcontractors as compared to the project goal. The contractor involved shall be notified in writing of the proposed penalty and the reasons for the penalty. Within 15 calendar days of receipt of the notice the contractor may request a hearing before the director or the director's designee. The director may uphold, modify, or reject the penalty. The decision of the director may be appealed within 30 calendar days to the commissioner. If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, or, if feasible, may affirm or reject the director's decision.

C. Prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low responder shall have a penalty of up to six percent, not to exceed \$60,000, added to their total price when other prime contractors have submitted responses that meet the specified targeted goal. The penalty to be added must be proportionate to the underuse determined in the response as compared to the announced project goal. The formula to be utilized in the application of this subpart is: Penalty (to be added to the response) = maximum penalty x (underuse ÷ project goal).

D. The division may cancel solicitations and resolicit the project when no responses meet the announced goal and the evidence available to the division indicated sufficient responsible certified targeted group subcontractors are willing and able to do the work.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

History: *16 SR 194; 28 SR 499*

Published Electronically: *January 14, 2005*