Limitations on Subcontracting: Regulatory Disconnect Leaves Small Businesses in an Untenable Situation

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Small businesses competing for or performing set-aside contracts are caught in a difficult position because of delays in statutory implementation by the FAR Council, which follow delays in statutory implementation by the Small Business Administration (SBA). The Federal Acquisition Regulation (FAR) provides a specific formula, included in a mandatory clause for all small business set-aside solicitations and contracts, to be used in evaluating whether a small business complies with subcontracting limitations.[1] The Court of Federal Claims has held that this clause is a material portion of the contract, which may mean that contractors that violate the clause can be terminated for default.[2] Further, without weighing in on the validity of the charge, the Department of Justice has pursued contractors under the False Claims Act for violating this clause.[3] The statute imposes hefty penalties for violations,[4] and the SBA considers violation of the subcontracting limitations to be potential grounds for debarment.[5]

The difficulty for contractors is that Congress changed the limitations on subcontracting in early 2013 as part of the 2013 National Defense Authorization Act (NDAA). The SBA modified its regulations to sync with the statute, as well as to clarify a few questions left unaddressed by the new law. However, more than four years later, the FAR still does not implement the statute. While the FAR Council apparently approved a draft interim rule in late March 2017, no such rule has been published in the *Federal Register*.[6] Even a conforming change will not remedy the problem for contracts that contain the old provision, and it might not address the problem for solicitations that contain the old provision.

In the meantime, as general guidance subject to qualification depending on the circumstances, contractors should comply with both the FAR and the statute or potentially risk significant penalties. In this article, we explore (1) the previous regulatory framework, (2) issues that arose under the earlier framework, (3) the statutory change, (4) issues that arise as a result of the current discrepancy between the statute and the regulations, and (5) suggested guidance for contractors in light of the regulatory confusion.

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The Small Business Act and Set-Aside Procurements in General

The Small Business Act, 15 U.S.C. §§ 631–657s, codifies long-standing U.S. policy to promote the growth of small and disadvantaged businesses through preferential award of procurement contracts.[7] The Act permits contracting officers to restrict competition to particular classes of small business concerns in certain situations.[8] To implement the statutory directive, the FAR establishes the "rule of two," requiring all acquisitions under the simplified acquisition threshold to be set aside for small business concerns unless the contracting officer determines that there is no reasonable possibility of obtaining two competitive offers.[9] Acquisitions above the simplified acquisition threshold should also be set aside if the contracting officer determines that offers will be obtained from at least two responsible small business concerns and award will be made at fair market price.[10]

Limitations on Subcontracting: A Belated but Flawed Solution to a Clear Problem

The government is alert to guard against large businesses using small businesses as fronts. As the SBA recently explained, "The Government's policy of promoting contracting opportunities for small businesses, HUBZone SBCs, SDVO SBCs, WOSBs/EDWOSBs, and 8(a) SBCs is seriously undermined when firms pass on work in excess of applicable limitations to firms that are other than small or that are not otherwise eligible for specific types of small business contracts."[11] However, the Small Business Act imposed no such limitation until 1987, when Congress addressed its concern with "SBA's failure to require that the prime contractor, under a set-aside contract, perform a specific proportion of the work in-house, with its own personnel."[12] Certain limitations on subcontracting requirements were accordingly included as part of the NDAA for fiscal year 1987,[13] and the requirements were modified slightly in early 1987.[14]

The limitations on subcontracting provisions of the Small Business Act added as part of the 1987 NDAA, including the modification, provided as follows:

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LIMITATIONS ON SUBCONTRACTING

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> (o) Requirements for performance of contracts by employees of small business concerns
>
> (1) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that—
>
> (A) in the case of a contract for services (except construction), at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern;
>
> (B) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

The FAR Council promulgated regulations implementing the statute that same year.[15]

The statute's emphasis on "cost of contract performance" has been the subject of much criticism. In 1987, for example, Congress held hearings to address the implementation of the rule.[16] At those hearings, the SBA's Associate Administrator for Procurement Assistance, Monika Edwards Harrison, stated that the standard should be "based on total contract value, rather than on the concept of costs."[17] At the same hearing, the SBA presented a feasibility study that mirrored Harrison's statement.[18]

By concentrating on costs of performance, Congress established a rule that posed difficulty for small businesses and left many questions unanswered. Contractors performing fixed-price contracts did not necessarily account for costs in sufficient detail to determine whether they complied with the rule, and many small businesses lacked the sophisticated accounting tools needed to track costs with specificity. Additionally, the statute did not define "cost of performance," or clarify whether "cost of performance" included, for example, general and administrative expenses (G&A) and profit.

Over time, the U.S. Court of Federal Claims (USCFC) and Government Accountability Office (GAO) resolved these definitional issues. GAO developed a formula for evaluating compliance: "[T]he total contract cost (including profit) less materials and subcontracting costs is to be compared with all subcontracting costs less the subcontractor's materials costs."[19] GAO further explained that the total contract costs should include overhead and G&A.[20] This formula was adopted by the USCFC as well.[21] However, the formula for compliance still did not rectify the underlying issue of measuring compliance by cost.

The revised limitations also failed to address practical business implications for small business contractors, including whether the subcontracting prohibitions applied only to subcontracts to large businesses or included small business subcontractors as well. On October 6, 2011, Jennifer Bisceglie, president of a woman-owned small business (WOSB), testified on behalf of Women Impacting Public Policy (WIPP) before the House Small Business Committee's Subcommittee on Contracting and Workforce.[22] Bisceglie testified that agencies often do not understand subcontracting limitations. Only when she prepared her testimony did she realize agencies incorrectly informed prime contractors they were required to perform *at least* 51 percent of the work, even though the statute required them to perform *only* 50 percent of the work. More importantly, Bisceglie noted that the statute required prime contractors to know their subcontractors' personnel costs when performing service contracts, but "[n]o business we know is going to share that information in either the commercial or government market."[23] Further, Bisceglie testified that the cost-based system was onerous because it "basically requires a cost based accounting system that many small businesses are not required to use—and therefore do not use—due to cost."[24] Accordingly, Bisceglie suggested

> that the Subcommittee take a look at amending the law to achieve the intention of the law, which we believe is to ensure that the prime performs at least 50% of the work. A suggested change that would be helpful in making this rule effective is to require 50% of the *price* of the contract, not the cost of the contract. In addition, it is our view that in the case of small business set aside contracts, the 50% should be calculated by including all small businesses on the contract, both prime and subcontractors. This will ensure a uniform allocation of small business work as more women owned businesses bid for prime contracts.[25]

Bisceglie's testimony thus touched on another significant issue with the limitations on subcontracting: the original statute was overly broad; it prohibited subcontracting to both large and small business entities. As Bisceglie explained, many small businesses are not large enough to compete as prime contractors and instead choose to perform work exclusively as subcontractors. As a result, this rule hurt small businesses because it limited the percentage of work that could be subcontracted to small businesses.

Some agencies attempted to resolve issues regarding the subcontracting limitations by issuing internal interpretive memoranda. For example, an air force policy memorandum provided that subcontracts to other small businesses would not count against the 50 percent subcontracting limit.[26] This memorandum led to a lengthy series of protests before GAO and the USCFC, culminating in a landmark Federal Circuit decision concerning a single procurement where an offeror detrimentally relied on the air force policy memorandum.[27] The Federal Circuit in *Centech* explained that the air force memorandum "could not override the LOS [limitations on subcontracting] clause."[28]

Significantly, the Federal Circuit explained that while

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compliance with the limitations on subcontracting is ordinarily a matter of responsibility to be evaluated by the SBA, "a proposal that, on its face, leads 'an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation' is technically unacceptable and 'may not form the basis for an award.'"[29]

Centech highlighted the need for Congress to act.

Congress Amends the Statute and the SBA Reacts—Slowly

Congress modified the limitations on subcontracting imposed by the Small Business Act by passing the NDAA for 2013.[30] The new statute provides as follows:

> (a) In general: If awarded a contract under section 637(a), 637(m), 644(a), 657a, or 657f of this title, a covered small business concern—
>
> (1) in the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount paid to the concern under the contract;
>
> (2) in the case of a contract for supplies (other than from a regular dealer in such supplies), may not expend on subcontractors more than 50 percent of the amount, less the cost of materials, paid to the concern under the contract;
>
> (3) in the case of a contract described in paragraphs (1) and (2)—
>
> (A) shall determine for which category, services (as described in paragraph (1)) or supplies (as described in paragraph (2)), the greatest percentage of the contract is awarded;
>
> (B) shall determine the amount awarded under the contract for that category of services or supplies; and
>
> (C) may not expend on subcontractors, with respect to the amount determined under subparagraph (B), more than 50 percent of that amount; and
>
> (4) in the case of a contract which is principally for supplies from a regular dealer in such supplies, and which is not a contract principally for services or construction, shall supply the product of a domestic small business manufacturer or processor, unless a waiver of such requirement is granted—
>
> (A) by the Administrator, after reviewing a determination by the applicable contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including period for performance) required by the contract; or
>
> (B) by the Administrator for a product (or class of products), after determining that no small business manufacturer or processor is available to participate in the Federal procurement market.
>
> (b) Similarly situated entities: Contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted for purposes of determining whether the covered small business concern has violated a requirement established under subsection (a) or (d).[31]

> ***Though the final SBA rule is a helpful step away from the "cost of performance," the current language still creates uncertainty***

The new statute measures compliance by reference to the amount paid to the concern under the contract, rather than "cost," and permits subcontracting to "similarly situated entities," i.e., subcontractors that are the same type of small business concern as the prime contractor.[32] However, the SBA took more than three years to promulgate regulations implementing the statute, and the FAR Council still has not published a draft rule as of the date this article was written. In 2014, GAO noted "it could take years to incorporate these changes into the FAR," explaining that GAO "recently reported on a small business regulation change that took 3 years to complete, a time frame that agency officials told [GAO] is typical."[33]

Congress noted the delayed implementation in 2014, but to little effect. On July 15, 2014, Angela B. Styles, a partner at Crowell & Moring LLP and former Administrator for Federal Procurement Policy at the Office of Management and Budget, testified before the House Small Business Committee's Subcommittee on Contracting and Workforce regarding the problems with the old regime, delayed implementation, and resulting confusion. Styles testified that private government contract practitioners began seeing "a dramatic increase in compliance questions related [to] these unimplemented provisions."[34] Styles explained:

> [T]he limitation on subcontracting regulations for many years . . . require[d] small business prime contractors awarded a prime contract on a set-aside basis to agree that "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the small business prime contractor." In practice, what constitutes the "cost of contract performance" for personnel has been impossible to understand or implement. . . . Fortunately, the NDAA changed this vague requirement into a simple calculation. . . . The problem, however, is the SBA's failure to implement new regulations consistent with the new NDAA limitations on subcontracting statutory provision. . . . Compliant and diligent small business[es] are left in the position

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of implementing two inconsistent provisions, a statute that allows them to subcontract 50% of the amount they are paid and a contract clause which requires them to perform 50% of the cost of performance with their own employees. . . . Second, the new statute allows a small business prime contractor winning a set-aside contract to subcontract any amount of work to similarly situated small business. Under the existing regulation, with minor exceptions, the limitation on subcontracting applies to subcontracts with both large and small businesses. So a small business prime contractor winning a "set-aside" award has significant limitations on the amount of work that could be subcontracted to another small business—treating subcontracts with large business the same as subcontracts with small businesses.[35]

Styles concluded:

SBA needs to immediately begin this rulemaking process to resolve the uncertainty and improve the business climate. First, the SBA needs to change its regulations to reflect the laws Congress explicitly changed. That action will spur the Federal Acquisition Regulation Council to change the FAR's limitation on subcontracting clause. Neither of these entities has taken action, and that failure is increasing the cost of doing business with the government.[36]

Similarly, Charlotte Baker, CEO of a WOSB, testified to the subcommittee on behalf of WIPP that implementing the new statute was vital because it would increase opportunities for small businesses to win government work by permitting subcontracting to similarly situated entities. Baker stated:

[T]he "Similarly Situated Entities" provision will reduce barriers to contracting. . . . For businesses new to procurement, subcontracting is often the first step toward entering the federal marketplace. . . . Once it is implemented, an EDWOSB may subcontract any amount to another EDWOSB. This is a change we strongly support because: 1) dollars awarded remain with companies who have the same set-aside designation and 2) access to contract competition for small businesses is increased. As we continue to respond to federal opportunities, these elements are critical.[37]

Notwithstanding industry concern, regulatory action was not immediately forthcoming.

SBA Regulations Answer Questions, but the FAR Remains Unchanged

The SBA published a proposed rule on December 29, 2014,[38] requesting public comments be submitted by February 27, 2015, and then extending the comment period through April 6, 2015.[39] In the final rule, published a year and a half later, the SBA explained that it received 17 comments that strongly advocated speedy implementation, and several of those comments suggested that the proposed rule be issued as an interim final rule.[40] Indeed, the SBA should have published an interim rule reflecting the current statutory regime, rather than leaving contractors subject to conflicting requirements for an additional year and a half. Nevertheless, the SBA asserted an interim rule would not have expedited the rulemaking process. This explanation left contractors in the untenable position of complying with both regimes during the rulemaking process.

Despite the delays, the SBA final rule does provide guidance for implementation. First, the agency's comments prefacing the rule suggest that the measurement of "amount paid to the concern under the contract," as used in the statute, means "the overall award amount."[41] This interpretation could help resolve the lingering question of how to measure compliance when faced with a significant deductive change mid-performance. Nonetheless, the final rule does mirror the statute by referencing "50% of the amount paid by the government" without reference to "award amount."[42] What are the prime contractor's limitations on subcontracting? Though the final SBA rule is a helpful step away from the "cost of performance," the current language still creates uncertainty.

Second, the regulation establishes specific subcontracting limits for categories of work not provided for by the statute, such as construction.[43] The SBA's recognition that subcontracting practices vary by industry addresses practical market realities and mirrors the limitations in the prior regulatory regime.

Third, the regulation clarifies that where a contract requires both services and supplies, the NAICS code selected by the contracting officer determines which subcontracting limitations apply.[44] Additionally, the limitations on subcontracting will apply *only* to the portion of the amount paid to the contractor that corresponds to that predominant portion of the contract.[45] This could suggest that the contractor can subcontract the full amount of the non-predominant portion of the contract without the subcontract counting against the limit. However, the examples provided in the regulation suggest the opposite: that the contractor may not subcontract more than half the predominant amount, including subcontracts for the non-predominant portion of the contract.[46] The SBA's comments shed light on this potential discrepancy:

[W]here a procurement combines supplies and services, the limitations on subcontracting apply only to subcontracts that correspond to the principal purpose of the prime contract. For a contract principally for services, but which also requires supplies, this means that the prime contractor or its similarly situated subcontractors cannot subcontract more than 50 percent of the services to other than small concerns. *However, the prime contractor can subcontract all of the supply components to any size business*.[47]

Fourth, the SBA went beyond the statute in clarifying the bounds of the "similarly situated entity" exception

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by looking past the first-tier subcontract. The SBA explained in the final rule:

> [I]f all that was looked at was the first tier subcontract, that first tier subcontractor could in turn pass all of its performance on to a large or otherwise not similarly situated entity through a second subcontract. . . . To address these concerns, SBA will apply the limitations on subcontracting collectively to the prime and any similarly situated first tier subcontractor, and any work performed by a similarly situated first tier subcontractor will count toward compliance with the applicable limitation on subcontracting. Any work that a similarly situated first tier subcontractor subcontracts, to any entity, will count as subcontracted to a non-similarly situated entity for purposes of determining whether the prime/sub team performed the required amount of work.[48]

Fifth, the SBA added penalties for subcontracting violations, adopting the statutory penalties without significant modification. Entities that violate the rule are subject to a fine equal to $500,000 or the dollar amount spent on subcontracts in excess of the statutory limit, whichever is greater.[49] Further, the SBA provided for the possibility of suspension or debarment stemming from violations, explaining that while the SBA does not take suspensions or debarments lightly, "a contractor's violation of the spirit and intent of a subcontract with a similarly situated entity is something SBA may consider as a basis for debarment, but is not required to consider for debarment."[50]

Sixth, the SBA explained that the base contract period is used to determine compliance, and each subsequent performance period will be examined separately.[51] In other words, contractors must comply with the limitation both during the base period and separately during each option period, rather than simply playing "catch up" at the end of performance. Additionally, the regulations provide that, for orders issued under indefinite delivery/indefinite quantity contracts (IDIQs), the compliance period is the entire period of performance for each order.

Seventh, the SBA provided that the limitations do not apply to contracts under $150,000 except for "all 8(a), HUBZone, SDVO, and WOSB/EDWOSB" procurements.[52]

Finally, the SBA explained that, despite the statutory mandate, it need not implement a new monitoring program to ensure compliance because there is already sufficient monitoring. However, the SBA indicated that it is ready to revisit the issue in the future.[53]

In short, after three years and five months, the SBA promulgated a rule that implemented the 2013 NDAA and provided clarification. However, the SBA regulations are not part of any solicitation or contract. Rather, the relevant requirements are provided by the FAR and agency FAR supplements, which as of today remain unmodified.

What Should Contractors Do?

Congress passed the 2013 NDAA in January 2013. Today, more than four years later, FAR 52.219-14 remains unchanged, and thus contractors are subject to two conflicting rules: (1) the "cost" based assessment of the FAR, established by the old statute, which does not include an exception for subcontracting to similarly situated entities; and (2) the "amount paid" assessment established by the new statute. Although a draft interim rule is being reviewed,[54] even if an interim rule is put in place, the old FAR provision still governs contracts entered into before the change, and may still appear in solicitations.

How should contractors address the discrepancy between regulation and statute? As a general matter, if the old FAR 52.219-14 appears in the solicitation or contract, contractors should ordinarily comply with *both* regimes, regardless of whether their dispute arises during formation or performance. Bearing in mind that each situation must be evaluated independently, the following general guidance may be helpful.

Bidding: When the Old Regulation Appears in the Solicitation. In the bid context, potential offerors should review the solicitation to determine what requirements are imposed. Even if FAR 52.219-14 is absent from the solicitation, the clause may nonetheless be read into the solicitation.[55] Indeed, even if the *wrong* limitation is imposed, the Armed Services Board of Contract Appeals (ASBCA) has nonetheless imposed the correct limitation on the contractor and denied entitlement to a change.[56] Regardless of whether FAR 52.219-14 is in the solicitation, the contractor has several options to address concerns about how an agency will approach the discrepancy between the statute and regulations.

First, the contractor could ask the agency for guidance regarding how the agency intends to interpret the subcontracting requirement. But this may not be enough. If the agency varies the express terms of FAR 52.219-14 in its answer and incorporates the answer into the solicitation by amendment, that *could* be a sufficient basis upon which an offeror can rely.[57] However, the agency may not have authority to vary a clear regulatory mandate, even if the regulation is no longer empowered by the underlying statute. GAO or the USCFC may look to *Centech* as instructive, as the Federal Circuit in *Centech* ruled that the agency could not change the requirements of the limitations on subcontracting clause.[58] Although *Centech* may not apply in this context due to the changed statute, an offeror relies on the agency's directive to ignore the FAR at its own risk.

Second, the contractor could file a pre-award protest challenging the inclusion of FAR 52.219-14 in the solicitation in light of the changed statutory regime.[59] Here, contractors could invoke *Centech* to argue that the regulation has no applicability because it is an "administrative action[] taken in violation of statutory

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authorization" and thus is "of no effect," and the only limitations should be those imposed by the statute and SBA regulations.[60] The difficulty with this approach is that in the years since the statute was changed, both GAO and the USCFC have applied FAR 52.219-14 notwithstanding the new statute.[61] While this does not mean that a challenge to the inclusion of the regulation would fail, it demonstrates that the USCFC and GAO judge protests based on what is in the solicitation, and might not consider the statutory change.

Third, an offeror could remain silent and submit a bid that facially complies with both regimes. GAO has repeatedly explained that "compliance is presumed unless specifically negated by other language in the proposal. The plain language of the subcontracting limitation clause provides that the act of proposal submission itself is sufficient to demonstrate agreement to be bound by the limitation."[62] However, if the agency has any doubt whether the offeror *can* comply with the limitation, it will refer the matter to the SBA.[63] That process may reveal that the offeror intends to comply with only one of the limitations, which could provide grounds for the SBA or the procuring agency to disqualify the offeror for submitting a nonresponsive bid. If it is clear that the proposal does not comply with one regime or the other, the agency arguably *cannot* award the contract to that offeror. As the Federal Circuit explained, "a proposal that, on its face, leads 'an agency to the conclusion that an offeror could not and would not comply with the subcontracting limitation' is technically unacceptable and 'may not form the basis for an award.'"[64]

Until the FAR is updated to reflect the current statutory requirements, offerors should avoid any suggestion in their proposals that they will not comply with either FAR 52.219-14 or the current SBA regulations. Even after the FAR is amended, offerors should remain cautious and determine whether the old regulation is included in the solicitation. Offerors should ensure that their cost or price proposal does not contain language suggesting the offeror is noncompliant.

The converse is true as well: from the standpoint of a disappointed offeror, there may be grounds to protest if the successful offeror takes exception to either regime.

Performance: When the Old Regulation Appears in the Contract. In the performance context, the analysis is different. FAR 52.219-14 is both a regulation and a contract clause. When it is included in the contract, FAR 52.219-14 is not susceptible to attack simply because the statutory regime may have changed. There is a general rule against retroactivity in government contracts.[65] Accordingly, contractors should be careful to abide by the requirement in their contracts, even after the FAR is modified.

At the same time, contractors should also comply with the new statutory regime. As mentioned above, contractors are presumed to know which limitations apply to their contracts.[66] Although the contractor may be entitled to additional compensation if the new regime imposes requirements that make performance more expensive,[67] contractors should still comply with the express statutory limitation on subcontracting.

There may be adverse consequences for failing to comply with both regimes. The limitations on subcontracting have been referred to as "material" provisions on multiple occasions; violation of the requirement is potentially ground for an assertion of material breach of contract.[68] Indeed, GAO has continued to refer to compliance with FAR 52.219-14 as "material" notwithstanding the change in law.[69] Further, the USCFC has intimated that violating FAR 52.219-14 constitutes a material breach and may be ground for default termination.[70] Accordingly, there is a basis for the government to argue that if FAR 52.219-14 appears in a contract, violating it is a material breach, regardless of the statutory change.

Finally, contractors should be aware that the new statute imposes significant financial penalties for violating the subcontracting limitations.[71] Again, this reinforces that contractors should comply with both regimes, barring a contractual amendment replacing FAR 52.219-14 with a subsequently promulgated version that reflects the current statute. Even if the old FAR 52.219-14 is in the contract, the statutory penalties apply if the contractor violates the current limitations.

Conclusion

Congress took a big step in making changes to the limitations on subcontracting in the 2013 NDAA. The new rules are easier to follow. By permitting subcontracting to "similarly situated entities," Congress made it simpler for small businesses to enter into government contracts. Nevertheless, contractors are stuck between two regimes that arguably both apply. Even after the FAR Council acts, contractors will continue to face difficulties with inconsistent rules for years to come. Here is a summary of guidelines based on our discussion:

- Carefully review the solicitation to identify the applicable subcontracting limitations. Even if FAR 52.219-14 is not part of the solicitation, it might nonetheless be read into the solicitation and contract;
- Consider the possibility of a pre-award protest to challenge the validity of FAR 52.219-14 in light of the regulatory change;
- When submitting a bid for a set-aside procurement, ensure that there is no indication on the face of the bid that the contractor will not comply with either the old or new subcontracting limitations (and conversely, disappointed bidders should be aware that this may be a protest ground); and
- When performing a contract that includes FAR 52.219-14, ensure compliance with both the new

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and the old limitations, if applicable, or risk being accused of material breach, having statutory penalties imposed, or facing other civil penalties. PL

Endnotes

1. FAR 52.219-14.
2. Chapman Law Firm v. United States, 63 Fed. Cl. 519, 527 (2005) (noting that "a proposal that fails to conform to a material term and condition of the solicitation, such as the subcontracting limitation, is unacceptable and may not form the basis for an award").
3. Press Release, Dep't of Justice, Washington Gas Energy Systems Agrees to Pay $2.5 Million in Fines and Penalties for Conspiring to Obtain Federal Contracts (Nov. 19, 2014), http://tinyurl.com/lz3y3ju; Press Release, Dep't of Justice, California-Based Masonry Companies Pay Nearly $1.9 Million to Settle Claims of Misrepresenting Disadvantaged Small Business Status in Connection with Military Contracts (Apr. 9, 2014), http://tinyurl.com/mcp5skf; Press Release, Dep't of Justice, Utah Construction Company to Pay Government to Settle Alleged False Claims in Connection with Program for Small and Disadvantaged Businesses (Mar. 21, 2014), http://tinyurl.com/mq654bl.
4. 15 U.S.C. § 645(g).
5. Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 80 Fed. Reg. 12,353 (proposed Mar. 9, 2015).
6. *Open FAR Cases*, Dep't of Def., http://tinyurl.com/l767doh (last updated Apr. 28, 2017) (Case No. 2016-011).
7. John Cibinic Jr. et al., Formation of Government Contracts 1573–1614 (4th ed. 2011).
8. *See, e.g.*, 15 U.S.C. §§ 637, 644, 657a, 657f.
9. FAR 19.502-2(a).
10. FAR 19.502-2(b).
11. Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 81 Fed. Reg. 34,243, 34, 244 (May 31, 2016). HUBZone SBCs are small business concerns that qualify under the Historically Underutilized Business Zones (HUBZone) program. SDVO SBCs are service-disabled veteran-owned small business concerns. WOSBs are women-owned small businesses, and EDWOSBs are economically disadvantaged women-owned small businesses. 8(a) SBCs are socially and economically disadvantaged small business concerns.
12. H.R. Rep. No. 99-718, at 257 (1986).
13. Pub. L. No. 99-661, § 921(c), 100 Stat. 3816, 3927–28 (1986).
14. Pub. L. No. 100-26, § 10(b), 101 Stat. 273, 288 (1987).
15. Small Business Set-Asides, Federal Acquisition Regulation, 52 Fed. Reg. 38,188 (Oct. 14, 1987) (to be codified at FAR 52.219-14).
16. *The Impact of Amendments to Small Business Procurement Programs in the Fiscal Year 1987 DOD Authorization Act: Hearing Before the Subcomm. on Gov't Contracting & Paperwork Reduction of the S. Comm. on Small Bus.*, 100th Cong. 1 (1987).
17. *Id.* at 4.
18. *Id.* at 13–14; *see also* Sonicraft, Inc. v. Def. Info. Sys. Agency, GSBCA No. 11750-P, 93-1 BCA ¶ 25,282, at 125,914–16 (discussing legislative history).
19. Mech. Equip. Co., B-292789.2 et al., 2004 CPD ¶ 192, at 23–24 (Comp. Gen. Dec. 15, 2003) (citing Marwais Steel Co., SBA No. 3884 (Feb. 10, 1994); Phoenix Sys. & Techs., Inc., SBA No. 3220 (Nov. 29, 1989)).
20. *Id.*
21. *See* Excel Mfg., Ltd. v. United States, 111 Fed. Cl. 800, 808–09 (2013) (reciting GAO formula and deferring to GAO's expertise on the matter).
22. *Subpar Subcontracting: Challenges for Small Business Contractors: Hearing Before the Subcomm. on Contracting & Workforce of the H. Comm. on Small Bus.*, 112th Cong. 44 (2011) (statement of Jennifer Bisceglie, President, Interos).
23. *Id.* at 47.
24. *Id.*
25. *Id.* at 47–48.
26. U.S. Dep't of the Air Force Material Command, Policy Memo 2004-PK-007, Limitations on Subcontracting, FAR Clause 52.219-14 (1996) (2004).
27. *See* Centech Grp., Inc. v. United States, 554 F.3d 1029 (Fed. Cir. 2009).
28. *Id.* at 1039 ("The Air Force Material Command could not, through the Policy Memorandum, alter the requirements of the LOS clause, which was mandated by statute and regulation. In short, the Policy Memorandum could not override the LOS clause. We thus reject Centech's argument that the presence of the Policy Memorandum (prior to its retraction) meant that Centech submitted a proposal which reflected agreement to comply with the LOS clause." (citations omitted) (citing United States v. Amdahl Corp., 786 F.2d 387, 392–93 (Fed. Cir. 1986) ("Administrative actions taken in violation of statutory authorization or requirement are of no effect."); Lyng v. Payne, 476 U.S. 926, 937 (1986) (noting that "not all agency publications are of binding force" and "an agency's power is no greater than that delegated to it by Congress").
29. *Id.* (citing Chapman Law Firm v. United States, 63 Fed. Cl. 519, 527 (2005)).
30. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1651, 126 Stat. 1632 (2013). The NDAA also added penalties for violating the provision, which had historically been absent from the subcontracting limitations, and set up a vague monitoring obligation. *Id.* § 1652.
31. 15 U.S.C. § 657s.
32. *Id.* § 657s(e)(2).
33. U.S. Gov't Accountability Office, GAO-14-706, 8(a) Subcontracting Limitations: Continued Noncompliance with Monitoring Requirements Signals Need for Regulatory Change 16 (2014).
34. *Action Delayed, Small Business Opportunities Denied: Implementation of Contracting Reforms in the FY 2013 NDAA: Hearing Before the Subcomm. on Contracting & Workforce of the H. Comm. on Small Bus.*, 113th Cong. (2014) (statement of Angela B. Styles, Partner, Crowell & Moring LLP).
35. *Id.* (footnotes omitted).
36. *Id.* (footnotes omitted).
37. *Id.* (statement of Charlotte Baker, CEO, Digital Hands).
38. Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 79 Fed. Reg. 77,955 (proposed Dec. 29, 2014).
39. Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 80 Fed. Reg. 12,353 (proposed Mar. 9, 2015).
40. Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 81 Fed. Reg. 34,243 (May 31, 2016).
41. *Id.* at 34,244.
42. 13 C.F.R. § 125.6(a)(1).
43. *Id.* § 125.6(a)(3).
44. *Id.* § 125.6(b).
45. *Id.*
46. *Id.* at exs. 1 & 2.
47. Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 81 Fed. Reg. 34,243, 34,245 (May 31, 2016) (emphasis added).
48. *Id.* at 34,246.
49. 13 C.F.R. § 125.6(h).
50. 81 Fed. Reg. at 34,247.
51. 13 C.F.R. § 125.6(e).
52. 81 Fed. Reg. at 34,249.
53. *Id.* at 34,247.
54. *Open FAR Cases*, *supra* note 6 (Case No. 2016-011).

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55. *Compare* Transatl. Lines LLC v. United States, 68 Fed. Cl. 48, 53–54 (2005) (applying the doctrine), *with* NCS/EML JV, LLC, B-412277 et al., 2016 CPD ¶ 21, at 9–10 (Comp. Gen. Jan. 14, 2016) (declining to read the clause into the solicitation).
56. Sarang-Nat'l Joint Venture, ASBCA No. 54992, 06-2 BCA ¶ 33,347, at 165,357 ("We believe exercise of due care would require Sarang and National to understand the limitations in FAR 52.219-14 before they bid. Upon reading FAR 52.219-14, it would have been clear that NAICS 235940—Construction by special trade contractors—required at least 25 percent self-performance.").
57. *See, e.g.*, Sarang-Nat'l Joint Venture, ASBCA No. 54992, 07-1 BCA ¶ 33,512 (finding terms of solicitation varied by amendment).
58. *See* Centech Grp., Inc. v. United States, 554 F.3d 1029, 1039 (Fed. Cir. 2009).
59. *See, e.g.*, BINL, Inc. v. United States, 106 Fed. Cl. 26, 42 (2012) (holding that agency's regulatory definitions should not be included in solicitation in light of revised regulatory framework); Rotech Healthcare Inc. v. United States, 71 Fed. Cl. 393, 424 (2006) (examining which statutory and regulatory framework applies to mixed solicitation for supplies and services).
60. *Centech*, 554 F.3d at 1039 (citing United States v. Amdahl Corp., 786 F.2d 387, 392–93 (Fed. Cir. 1986) ("Administrative actions taken in violation of statutory authorization or requirement are of no effect."); Lyng v. Payne, 476 U.S. 926, 937 (1986) (noting that "not all agency publications are of binding force" and that "an agency's power is no greater than that delegated to it by Congress").
61. *See, e.g.*, Excelsior Ambulance Serv., Inc. v. United States, 124 Fed. Cl. 581, 593 (2015); Lynxnet, LLC v. United States, 119 Fed. Cl. 226, 232 n.9 (2014) (denying protest where no reason to conclude from face of proposal that awardee would not comply); Hyperion, Inc. v. United States, 115 Fed. Cl. 541, 554 (2014); Cyber Sols. & Servs., Inc., B-413563 et al., 2016 CPD ¶ 352, at 4 (Comp. Gen. Nov. 18, 2016); Mare Sols., Inc., B-413238 et al., 2016 CPD ¶ 259, at 10–11 (Comp. Gen. Sept. 14, 2016).
62. Express Med. Transporters, Inc., B-412692, 2016 CPD ¶ 108, at 6 (Comp. Gen. Apr. 20, 2016).
63. FAR 19.601(d); *see also Centech*, 554 F.3d at 1040.
64. *Centech*, 554 F.3d at 1038 (citing Chapman Law Firm v. United States, 63 Fed. Cl. 519, 527 (2005)).
65. *See, e.g.*, Gen. Dynamics Corp. v. United States, 47 Fed. Cl. 514 (2000) (determining that retroactive application of new executive compensation limits was a breach); Gould, Inc., ASBCA No. 46759, 97-2 BCA ¶ 29,254, at 145,547 ("hearken[ing] to the language and administrative history of the original standard as in effect at the relevant time" rather than permitting the newly promulgated cost accounting standard to inform the interpretation of the prior standard); Cotton & Co., EBCA No. 426-6-89, 90-2 BCA ¶ 22,828, at 114,625 (prohibiting newly promulgated cost principles from being used to disallow costs in contracts entered into prior to the promulgation of those regulations).
66. Sarang-Nat'l Joint Venture, ASBCA No. 54992, 06-2 BCA ¶ 33,347, at 165,357.
67. *Gen. Dynamics*, 47 Fed. Cl. 514.
68. *See, e.g.*, *Centech*, 554 F.3d at 1038 (referring to the provision as material); *Chapman*, 63 Fed. Cl. at 527 (same); Cyber Sols. & Servs., Inc., B-413563 et al., 2016 CPD ¶ 352, at 4 (Comp. Gen. Nov. 18, 2016) (same).
69. *Cyber Sols.*, 2016 CPD ¶ 352, at 4.
70. *See* RCS Enters. v. United States, 60 Fed. Cl. 800, 809 (2004).
71. 15 U.S.C. § 645(h).

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