



August 13, 2021

CAAC Letter 2021-02

MEMORANDUM FOR CIVILIAN AGENCIES

FROM: WILLIAM CLARK
CHAIR
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Class Deviation From the Federal Acquisition Regulation Regarding Exceptions to the Limitations on Subcontracting (LOS) requirements for Small Business Concerns Under FAR part 19

This CAAC letter is being issued to serve as consultation in accordance with FAR 1.404, authorizing agencies to issue a class deviation to apply the exceptions to the limitations on subcontracting (LOS) requirements for small business concerns at 13 CFR 125.6 which was implemented in the Small Business Administration's (SBA) final rule published in the Federal Register at 84 FR 65647 on November 29, 2019. The SBA rule provided exclusions to the LOS requirements for service contracts, except construction (herein referred to as service contracts).

FAR Case 2016-011, Revision of Limitations on Subcontracting, was published as a final rule at 86 FR 44233, effective 30 days after publication. This rule revised the LOS requirements for service contracts at FAR clause 52.219-14; under revised paragraph (e)(1), contractors cannot pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. At this time for service contracts, there are no exceptions provided in the FAR clause.

SBA's rule amended regulations at 13 CFR 125.6 to include exclusions to the 50 percent limitation on subcontracting for service contracts. The following exclusions may apply:

- Other direct costs, to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service. Examples include airline travel, work performed by transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases.
- Work performed outside the United States on awards made pursuant to the Foreign Assistance Act of 1961, or work performed outside the United States required to be performed by a local contractor.

Adjustments have been made in the FAR language to clarify the SBA intent, as shown in the SBA rule preamble on page 84 FR 65653. The second bullet above shows the reworded

FAR text, changing “overseas” to “outside the United States”, and changing “or required” to “or work performed outside the United States required”.

Attachment 1 provides recommended deviated language for FAR clause 52.219-14, Limitations of Subcontracting, which includes the exceptions from SBA’s rule to be used in set-aside service contracts. Contracting officers should use the deviated clause in lieu of the FAR clause 52.219-14 in accordance with their agencies’ guidance.

This CAAC letter constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1). Agencies are advised to review any relevant clauses in their supplement and take any action that is appropriate. Once processed, agencies are requested to share the deviation widely among their workforces to ensure full awareness of and compliance with the revisions to the limitations on subcontracting. It is recommended that the deviation be made effective until the FAR is amended.

Agencies are reminded that FAR 1.404 requires agencies to furnish a copy of each approved class deviation to the FAR Secretariat, General Services Administration, by emailing the deviation to GSARegSec@gsa.gov.

If you have any questions or require additional information about this Letter, please contact Malissa Jones at (703) 605-2815 or at malissa.jones@gsa.gov.

Attachments 1

Attachment 1 –

Limitations on Subcontracting Deviation Clause

Use deviated clause 52.219-14 instead of the current FAR clause equivalent.

Baseline is FAC 2021-07, effective September 10, 2021.

Changes to baseline shown as **[bolded, bracketed additions]**

FAR text unchanged shown as asterisks *** or *****

52.219-14 Limitations on Subcontracting.

As prescribed in 19.507(e), insert the following clause:

LIMITATIONS ON SUBCONTRACTING (SEP 2021)

[(DEVIATION SEP 2021)]

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) *Definition. Similarly situated entity*, as used in this clause, means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(c) *Applicability*. This clause applies only to—

(1) Contracts that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(2) Part or parts of a multiple-award contract that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(3) Contracts that have been awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, and 19.15;

(4) Orders expected to exceed the simplified acquisition threshold and that are—

(i) Set aside for small business concerns under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii);

(5) Orders, regardless of dollar value, that are—

(i) Set aside in accordance with subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 19.504(c)(1)(ii); and

(6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

(d) *Independent contractors.* An independent contractor shall be considered a subcontractor.

(e) *Limitations on subcontracting.* By submission of an offer and execution of a contract, the Contractor agrees **[to the following requirements]** ~~that~~ in **[the]** performance of a contract assigned a North American Industry Classification System (NAICS) code **[applicable to this contract:]** ~~for~~

(1) *Services (except construction)* ~~[.]~~ ~~±[I]~~t will not pay more than 50 percent of the amount paid by the Government for contract performance **[, excluding certain other direct costs and certain work performed outside the United States (see paragraph (e) (1) (i)),]** to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract ~~[.]~~ ~~±~~

[(i) The following services may be excluded from the 50 percent limitation:

(A) Other direct costs, to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service. Examples include airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases.

(B) Work performed outside the United States on awards made pursuant to the Foreign Assistance Act of 1961 (22 U.S.C. 2151 *et seq.*), or work performed outside the United States required to be performed by a local contractor.]

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies)* [.] ~~it~~ [I]t will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract [.] ~~it~~

(3) *General construction* ~~[.]~~ ~~-~~ ~~[I]~~t will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 85 percent subcontract amount that cannot be exceeded ~~[.]~~ ~~-~~ ~~or~~

(4) *Construction by special trade contractors* ~~[.]~~ ~~-~~ ~~[I]~~t will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 75 percent subcontract amount that cannot be exceeded.

(f) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (c) (1), (2), (3) and (6) of this clause -

[Contracting Officer check as appropriate.]

___ By the end of the base term of the contract and then by the end of each subsequent option period; or

___ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (c) (4) and (5) of this clause, by the end of the performance period for the order.

(g) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.

(End of clause)