

**CLASS DEVIATION
FINDINGS AND DETERMINATION
USE OF CLAUSES TO IMPLEMENT REGULATORY CHANGES TO
LIMITATIONS ON SUBCONTRACTING**

Findings

1. Section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013 (15 U.S.C. 657s) revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under Federal Acquisition Regulation (FAR) part 19 procurements.
2. Section 1651 changed the focus of the limitations on subcontracting rules. Instead of requiring a percentage of work to be performed by a prime contractor (which was inconsistently applied across small business programs), the limitations on subcontracting rules now limit subcontracting to a percentage of the overall award amount to be spent by the prime on subcontractors. As a result, the prime contractor no longer has to track the percentage of costs incurred that it spends performing work itself; it only has to track the percentage of the overall award amount (i.e., contract price) that it spends on subcontractors. For small businesses, this change will reduce a substantial burden associated with tracking and demonstrating compliance with the limitations on subcontracting. Section 1651 also allows work performed by similarly situated entities¹ to be counted as if it were performed by the prime contractor in determining compliance with the limitations on subcontracting, thereby giving small businesses greater flexibility on how they choose to comply with the limitations on subcontracting.
3. The Small Business Administration (SBA), in its final rule published in the Federal Register at 81 FR 34243 on May 31, 2016 and made effective June 30, 2016, implemented the statutory requirements of section 1651. SBA's final rule specified that similarly situated entities must also comply with the limitations on subcontracting. Requiring prime contractors and their similarly situated entity subcontractors to comply with the limitations on subcontracting will ensure that the benefits from small business and socioeconomic set-aside and sole-source contracts flow to the intended parties. SBA's final rule also provided updated guidance on the nonmanufacturer rule, including the process for obtaining waivers to the nonmanufacturer rule and the proper application of these waivers to procurements. Lastly, the SBA rule clarified that the limitations on subcontracting and the nonmanufacturer rule do not apply to small business set-aside contracts valued at or below \$150,000, but do apply to set-aside and sole-source awards under the other small business programs regardless of dollar value.
4. The Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2019-01 on April 3, 2019 providing agencies a model class deviation to implement regulatory changes made by


¹ The statute and SBA's implementing regulations define "similarly situated entity" as a subcontractor that has the same small business program status as that which qualified the prime contractor for the award and that is considered small for the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract the subcontractor will perform.

SBA to limitations on subcontracting in its final rule, pending publication of the formal amendment to the FAR via FAR case 2016-011. The class deviation updates the limitations on subcontracting and the nonmanufacturer rule for all small businesses in the clauses relating to set-asides and sole source awards under FAR part 19 for: (1) Small business concerns; (2) 8(a) Program participants; (3) Historically Underutilized Business Zone (HUBZone) small business concerns; (4) Service-disabled veteran-owned small business (SDVOSB) concerns; (5) Economically disadvantaged women-owned small business (EDWOSB) concerns; and (6) Women-owned small business (WOSB) concerns eligible under the WOSB Program.

5. CAAC Letter 2019-01 constitutes required consultation in accordance with FAR 1.404 with the Chair of the CAAC.

Determination

It is hereby determined that a class deviation (using the FAR Deviation clauses included in CAAC Letter 2019-01, Attachments 1-6) is appropriate to implement section 1651 of the National Defense Authorization Act for Fiscal Year 2013. Once processed, the Department of Energy will share the deviation widely among its workforces to ensure full awareness of and compliance with the revisions to the limitations on subcontracting. This class deviation is effective upon the date of signature and will remain effective until cancelled or until the FAR is amended by the FAR case.



John R. Bashista,
Director
Office of Acquisition Management,
Department of Energy



S. Keith Hamilton, P.E.,
Deputy Associate Administrator
Acquisition and Project Management
and Senior Procurement Executive
National Nuclear Security Administration

Effective Date: 7/25/2019

Attachment: CAAC Letter 2019-01 with FAR Deviation clauses (Attachments 1-6)