

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