October 11, 2019

Via Regulatory Portal

Ms. Lois Mandell
General Services Administration
Regulatory Secretariat Division (MVCB)
1800 F Street NW, 2nd Floor
Washington, DC 20405


Dear Ms. Mandell,

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service.1 The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch and Douglas Mickle, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.
2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Small Business and Socioeconomic Issues.”
I. COMMENTS

The Section is pleased to offer comments on the FAR Council’s proposed rule concerning application of small business regulations to contracts performed outside the United States and its outlying areas (hereinafter “Overseas”). The proposed rule would amend FAR 19.000(b) to give contracting officers discretion as to whether to apply FAR Part 19 to contracts performed Overseas. In particular, the FAR Council proposes to change FAR 19.000(b)(1) to read:

Unless otherwise specified in this part (see subparts 19.6 and 19.7) –
(i) Contracting officers shall apply this part in the United States and its outlying areas; and
(ii) Contracting officers may apply this part outside the United States and its outlying areas.

See 84 Fed. Reg. 39793, 39795 (emphasis added).

The FAR Council states that this change is being done to be consistent with SBA’s own rules on the subject, specifically 13 C.F.R. § 125.2. The FAR Council states that SBA’s own regulatory comments make clear that it intended 13 C.F.R. § 125.2 to make application of the Small Business Act (the “Act”) discretionary for contracts performed Overseas:

While SBA’s regulations do not explicitly state that use of small business programs is discretionary overseas, SBA clarified and confirmed their position in the preamble of their notice on Small Business Mentor-Protégé Programs published July 25, 2016, at 81 FR 48557. The preamble stated that SBA had issued a final rule previously on October 2, 2013, to amend 13 CFR 125.2 ‘‘recognizing that small business contracting could be used ‘regardless of the place of performance.’ ’’ The preamble went on to explain that SBA merely sought to clarify that the authority to use small business programs overseas already existed and to highlight contracting officers’ discretionary authority to use these programs where appropriate regardless of the place of performance. This proposed rule is consistent with these rules.


However, it appears that the FAR Council may have misconstrued SBA’s intentions in revising 13 C.F.R. § 125.2 to add the “regardless of the place of performance” language.

To the extent the phrase “regardless of the place of performance” in 13 C.F.R. § 125.2 is unclear, SBA has stated that it added the “regardless of the place of performance” language to 13 C.F.R. § 125.2 to make clear that the Act and its implementing regulations apply to contracts performed Overseas. As a result, the proposed change to FAR 19.000 would appear to continue (rather than resolve) the conflict between the FAR and SBA regulations on this issue.
Therefore, the Section recommends that the FAR Council consult with the SBA to ensure the proposed rule with respect to FAR 19.000(b) comports with SBA regulations on this issue.

A. The FAR Council’s Conclusion Regarding SBA’s Intent Appears to Conflict with SBA’s Own Actions and Statements on the Issue

In support of the proposed rule change, the FAR Council takes the position that making the change—to make application of small business regulations discretionary in Overseas contracts—is necessary to harmonize the FAR with SBA regulations on this issue. The FAR Council relies on statements made by SBA in connection with a subsequent (and different) regulatory change to discern SBA’s intent. However, the FAR Council’s conclusions in this regard appear to be inconsistent with SBA’s actions and stated intentions for the inclusion of the “regardless of the place of performance” language in 13 C.F.R. § 125.2. Contrary to the FAR Council’s conclusion, SBA’s interpretation of the Act appears to make application of the small business regulations mandatory in Overseas contracts rather than discretionary.

1. After GAO Concluded That the Act and SBA Regulations were Silent on Whether the Act Applies to Overseas Contracts, SBA Amended Its Implementing Regulations to State that the Act Applied to Contracts “Regardless of the Place of Performance.”

In 2013, GAO issued a decision, Latvian Gen. Trading & Constr. LLC, concerning whether the Small Business Act applied to procurements for contracts performed Overseas. See B-408633, 2013 CPD ¶ 224, 2013 WL 5230262 (Sept. 18, 2013) (“Latvian Connection”). The protest involved a procurement to be conducted outside the United States and its outlying areas. The protestor argued that pursuant to the Act and SBA regulations, 15 U.S.C. § 644(j)(1) (2006) and 13 C.F.R. § 125.2(f)(1) (2013), the Air Force was required to issue the RFQ as a set-aside for small businesses. The Air Force cited FAR 19.000(b), which stated that FAR Part 19 (with one exception that was not applicable) “applies only in the United States or its outlying areas.”

The SBA acknowledged that the Act and its own implementing regulations were silent on the issue, but nonetheless disagreed with the Air Force and asserted that the Act required the procurement to be set-aside for small businesses. The SBA argued that “the silence of § 644(j)(1) with respect to its application outside the United States indicates that Congress intended that this section of the Act would apply outside the United States.” Latvian Connection, 2013 WL 5230262, at *2.

GAO agreed that the Act and SBA regulations were “silent with respect to the application of § 644(j)(1) and 13 C.F.R. § 125.2(f)(1) outside the United States and its outlying areas.” GAO found that “FAR § 19.000(b) specifically addresses the applicability of § 644(j)(1) outside the United States and its outlying areas.” As a result, GAO concluded that the SBA regulations and FAR did not conflict, and that because SBA regulations (and the Act) were silent on the
issue (SBA’s legal interpretation that the Act applied overseas had not been incorporated into its
department), the FAR prevailed:

Given the silence of the Small Business Act with respect to the application of
§ 644(j)(1) outside the United States and its outlying areas, we cannot say that the
validly-promulgated, long-standing regulation found at FAR § 19.000(b) is
inconsistent with, or contrary to, the Small Business Act. This FAR provision is
also not inconsistent with the SBA's own regulation implementing § 644(j)(1).
Although the SBA disagrees with how the Federal Acquisition Regulatory
Council has interpreted the Small Business Act in this regard, and states that our
Office is required to give deference to the SBA's interpretation of the Act, the
SBA's interpretation reflects its informal legal opinion. The SBA's view of the
statute—which is not reflected in its own implementing regulation despite the
existence of the government-wide FAR rule for decades—does not overcome the
deference accorded to the FAR.

We conclude that the Air Force acted reasonably in relying upon FAR § 19.000(b)
to determine that it was not required to set aside the RFQ for small business
concerns.


After the GAO decision in *Latvian Connection*, SBA issued a Final Rule to amend 13
C.F.R. § 125.2 in two places:

Small business concerns must receive any award (including orders, and orders
placed against Multiple Award Contracts) or contract, part of any such award or
contract, and any contract for the sale of Government property, **regardless of the
place of performance**, which SBA and the procuring or disposal agency
determine to be in the interest of . . . .

13 C.F.R. § 125.2(a) (emphasis added); 78 Fed. Reg. 61137 (October 2, 2013) (effective Dec. 31,
2013).³

The Small Business Act requires each Federal agency to foster the participation of
small business concerns as prime contractors and subcontractors in the contracting
opportunities of the Government **regardless of the place of performance** of the
contract.

13 C.F.R. § 125.2(c)(1) (emphasis added).⁴

³ Before the change, this sentence had read: “Small business concerns must receive any award or contract, or any
contract for the sale of Government property, that SBA and the procuring or disposal agency determine to be in the
⁴ Before the change, this sentence had read: “The Small Business Act requires each Federal agency to foster the
participation of small business concerns as prime contractors, subcontractors, and suppliers in the contracting
By adding “regardless of the place of performance,” it appears that SBA attempted to make clear that there was no distinction between contracts performed in the United States and those performed Overseas when it came to application of the Act.

To the extent SBA’s intent was not clear from the face of its amended regulations, in 2014, in connection with another GAO protest related to this issue, SBA appears to confirm that it added the “regardless of the place of performance” language to 13 C.F.R. § 125.2 to address this very issue:

State [Department] argues that the GAO decision of Latvian Connection General Trading and Construction LLC, B-408633, Sept. 18, 2013, 2013 CPD ¶ 224, applies here. In that case, GAO ruled that FAR 19.000(b) limits the application of FAR part 19 (dealing with the SBA’s small business programs) to acquisitions conducted in the United States (and its outlying areas). We believe the basis for GAO’s ruling was that SBA’s regulations were silent on this issue and therefore, the more specific FAR regulation controlled.

Heeding this advice, SBA recently promulgated regulations to address this issue. Specifically, SBA made wholesale changes to 13 CFR § 125.2 on October 2, 2013. As a result, SBA issued a final rule … [adding the “regardless of the place of performance” language to 13 C.F.R. § 125.2] ....

Therefore, SBA’s policy and legal interpretation of the Small Business [Act] has been incorporated into regulations. In sum, according to statute and regulations, small business set asides, regardless of place of performance, are mandatory for acquisitions valued from $3,000 to $150,000.


2. SBA’s 2016 Commentary in the Federal Register Does Not Appear to Indicate a Different Intent

In support of its view that SBA intended the “regardless of the place of performance” language (added in October 2013 to 13 C.F.R. § 125.2) to make application of the Act discretionary Overseas, the FAR Council cites the preamble of SBA’s notice on Small Business Mentor-Protégé Programs. 81 Fed. Reg. 48557 (July 25, 2016). The FAR Council asserts that the preamble confirms SBA intended “regardless of the place of performance” to make application of the Act discretionary Overseas. See 84 Fed. Reg. 39793, 39794. However,

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5 Subsequently, the agency took corrective action by canceling the solicitation, and as a result the protest was dismissed. See Donald E. Mansfield, Small Business Programs: Do They Apply Outside the United States?, 29 Nash & Cibinic Rep. NL ¶ 52 (Sept. 2015).
reading the cited preamble section in context, it does not appear that the FAR Council has correctly interpreted SBA’s intent.

The preamble section reads as follows:

Place of Performance

In the case of Latvian Connection General Trading and Construction LLC, B–408633, Sept. 18, 2013, 2013 CPD ¶ 224, GAO ruled that § 19.000(b) of the Federal Acquisition Regulation (FAR) limits the application of FAR part 19 (dealing with SBA’s small business programs) to acquisitions conducted in the United States (and its outlying areas). The basis for GAO’s ruling was that SBA’s regulations were silent on this issue and therefore, the more specific FAR regulation controlled. Heeding this advice, SBA promulgated regulations to address this issue. Specifically, SBA made wholesale changes to 13 CFR 125.2 on October 2, 2013. As a result, SBA issued a final rule recognizing that small business contracting could be used “regardless of the place of performance.” 13 CFR 125.2(a) and (c).

The February 5, 2015 proposed rule proposed to add similar language to §§ 124.501, 125.22(b), 126.600, and 127.500, thus specifically authorizing contracting in the 8(a) BD, SDVO, HUBZone and WOSB programs regardless of the place of performance, where appropriate. Although SBA believes that the authority to use those programs in appropriate circumstances overseas already exists, the proposed rule merely sought to make that authority clear. Nothing in the Small Business Act would prohibit the use of those programs in appropriate circumstances overseas. SBA received a few comments on this issue. The commenters supported clarification of the current authority. The regulatory text merely highlights contracting officers’ discretionary authority to use these programs where appropriate regardless of the place of performance.

81 Fed. Reg. 48557, 48561.

As indicated in the preamble, these changes all concerned the use of 8(a) BD, SDVO, HUBZone and WOSB programs specifically, versus the application of the Act in general.

In suggesting this language reflects that SBA intended for the Act and SBA regulations to be entirely discretionary for contracts performed Overseas, the FAR Council appears to focus on the preamble statement that the “regulatory text merely highlights contracting officers’ discretionary authority to use these programs where appropriate regardless of the place of performance.” However, read in context with the 2013 regulatory changes, the preamble section as a whole, and SBA’s Letter, it appears what SBA is pointing out is that where the Act and SBA’s implementing regulations give contracting officers discretion to use these specific programs, that discretion applies “regardless” of whether the contract is performed in the United States or Overseas. The FAR Council’s reading of the preamble statement takes the language a
step too far in applying it to the Act as a whole and all set-asides, rather than SBA’s more limited intent to clarify contracting officers’ discretion to choose among these specific programs.

B. **The Proposed Change to FAR 19.000(b) Appears to Continue (Rather than Resolve) the Conflict between SBA Regulations and the FAR on this Issue.**

Making the application of FAR part 19 discretionary in Overseas contracts would further the conflict between FAR 19.000(b) and SBA’s stated interpretation of 13 C.F.R. § 125.2 (and the Act as implemented by SBA).

In the 2013 *Latvian Connection* protest, GAO decided in favor of the Air Force because, unlike FAR 19.000, SBA’s regulations were silent as to whether the Act (and SBA’s implementing regulations) applied Overseas. Since that time, SBA has changed its implementing regulations to incorporate its legal interpretation into those regulations, such that they now say the Act applies *regardless of place of performance*. In other words, whether the contract is to be performed Overseas is not a factor in determining whether the Act applies to the procurement. For example, SBA has specifically stated that, per the Act and SBA’s revised regulations, “small business set asides, regardless of place of performance, are mandatory for acquisitions valued from $3,000 to $150,000.” *See* SBA Letter at 4 (emphasis added).

By revising FAR 19.000(b) to explicitly make application of FAR part 19 “discretionary” for Overseas contracts, the FAR Council is amending the FAR to conflict with SBA regulations directly, or at the very least conflict with SBA’s stated interpretation of its regulations. Such a change will only further the conflict between the FAR and SBA regulations on this important issue, creating confusion for contractors and contracting officers, which could result in further protest litigation that could otherwise be avoided.\(^6\)

C. **The Section Recommends the FAR Council Consult with the SBA to Ensure the Proposed Rule Comports with SBA Regulations on this Issue.**

In order to harmonize the FAR and SBA regulations concerning application of the Act (and implementing regulations) to Overseas contracts, the Section recommends that the FAR

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\(^6\) “The Small Business Act, as amended, created the SBA, which was given broad authority for promoting the Act's policies and taking actions to assure that small businesses obtain their fair share of contracts awarded by the U.S. government. Pursuant to this authority, the SBA has promulgated regulations implementing the Small Business Act, including 13 C.F.R. § 125.2(f)(1), which implements section 644(j)(1).” *Latvian Connection Gen. Trading & Constr. LLC*, B-408633, 2013 CPD ¶ 224, 2013 WL 5230262, at *3 (Sept. 18, 2013). When the FAR and SBA regulations conflict on issues concerning implementation of the Act, the U.S. Court of Federal Claims, GAO, and the SBA Office of Hearings and Administrative Appeals have generally found the SBA regulations to control. *See C & G Excavating, Inc. v. United States*, 32 Fed. Cl. 231, 239 (1994); *Hawpe Const., Inc. v. United States*, 46 Fed. Cl. 571, 581 (2000), aff'd, 10 F. App'x 957 (Fed. Cir. 2001) (“Conflicts between FAR and SBA regulations should be resolved by looking to the SBA’s latest intent on the issue and by relying on the SBA to determine which provision best implements the policies of the agency itself.”); *Adams Indus. Servs., Inc*, B-280186, 98-2 CPD ¶ 56, 1998 WL 546000, at *3 (Aug. 28, 1998) (deferring to SBA regulations over conflicting regulation in FAR part 19 concerning impact of a post-award size protest on the contract in question); *Size Appeal of Cox Constr. Co.*, SBA No. SIZ-5070, 2009 WL 3198517, at *5 (Sept. 25, 2009) (“SBA’s regulations regarding size determinations are controlling in the event of a conflict with the FAR.”).
Council consult with the SBA to ensure the proposed rule with respect to FAR 19.000(b) comports with SBA regulations on this issue.

II. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

/s Linda Maramba
Chair, Section of Public Contract Law

cc:
Susan Warshaw Ebner
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