February 4, 2019

Via Regulatory Portal

Ms. Lois Mandell  
1800 F Street NW  
2nd floor  
Washington, DC 20405

Re: Comments on Proposed Rule, Revision of Limitations on Subcontracting, 83 Fed. Reg. 62540 (December 4, 2018); RIN 9000-AN35; FAR Case 2016-011

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. 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.

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch, Marian Blank Horn, and Kristine Kassekert, 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 https://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/ under the topic “Small Business and Socioeconomic Issues.”
I. BRIEF SUMMARY OF PURPOSE FOR PROPOSED REVISION OF LIMITATIONS ON SUBCONTRACTING

The Department of Defense ("DoD"), General Services Administration ("GSA"), and National Aeronautics and Space Administration ("NASA") (collectively the "FAR Council") proposes to amend the FAR to implement regulatory changes made by the Small Business Administration ("SBA") in 2016 to its regulations that revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements. The amendments further incorporate the definition of "similarly situated entity" and the exclusion of subcontracting to similarly situated entities from the calculation of the limitations on subcontracting. Finally, the proposed rule reorganizes the limitations on subcontracting and nonmanufacturer rules through revising existing clauses and creates new clauses.

The proposed rule was published in 83 Fed Reg. 62540 on December 4, 2018, and would impact 48 CFR Parts 19 and 52.

II. COMMENTS

The Section is pleased to offer comments on the FAR Council’s proposed amendments to the FAR to implement regulatory changes to the limitations on subcontracting (the "Proposed Rule"). The Section believes that the Proposed Rule implements important changes stemming from the 2013 National Defense Authorization Act that were implemented by the SBA on May 31, 2016. See 81 Fed. Reg. 34243 (May 31, 2016). These amendments would create a consistent set of rules between the FAR and the current Title 13 of the CFR.

The SBA, however, issued its own proposed rule on December 4, 2018 that would change its regulations regarding limitations on subcontracting again to implement provisions of the National Defense Authorization Acts of 2016 and 2017 and the Recovery Improvements for Small Entities After Disaster Act of 2015. See 83 Fed. Reg. 62516 (Dec. 4, 2018). As a result, if the FAR Council proceeds with its pending Proposed Rule, the FAR and Title 13 will, once again, be inconsistent and create new confusion.

The Section therefore recommends that the FAR Council issue an interim final rule, effective immediately, consistent with the SBA’s rules implemented on May 31, 2016. This interim rule would permit the FAR and SBA regulations to be immediately consistent and resolve current confusion.

Looking forward, the Section also recommends that the FAR Council coordinate with the SBA on SBA’s pending rulemaking and proceed to issue its own final rule that matches the final rule as published by the SBA.

III. 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/

Kara M. Sacilotto
Chair, Section of Public Contract Law

cc:
Linda Maramba
Susan Warshaw Ebner
Jennifer L. Dauer
Annejanette Heckman Pickens
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Small Business & Other Socioeconomic Programs Committee
Craig Smith
Samantha S. Lee