August 10, 2015

VIA REGULATORY PORTAL AND U.S. MAIL

General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Hada Flowers
1800 F Street, NW, 2nd Floor
Washington, D.C. 20405


Dear Ms. Flowers:

On behalf of the American Bar Association ("ABA") Section of Public Contract Law ("Section"), I am submitting comments on the Proposed Rule cited above.1 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 Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein 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 policy of the ABA.2

I. INTRODUCTION

The Section recognizes the vitally important role that small businesses play in federal contracting, and the Section accordingly supports revising the Federal Acquisition Regulation ("FAR") to enhance small businesses’ ability to participate in contracting. The Proposed Rule includes several worthwhile enhancements to the FAR

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1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Heather K. Weiner, member 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.”
that will achieve this objective. Nonetheless, as noted in the comments that follow, the Section believes that several provisions should be revised before the Proposed Rule’s implementation. The Section believes these proposed revisions will not diminish the objective of enhancing opportunities for small businesses, but instead will result in improved regulations that will benefit the Government and the contracting community alike.

II. COMMENTS

The Section recommends that the FAR Council revise the Proposed Rule in the following areas.

A. Small Business Size Representations from Subcontractors

1. Subcontractors Registered in the System for Award Management

The Proposed Rule would add new burdens on prime and higher-tier contractors when obtaining small-business size representations from potential subcontractors. Historically, contractors have obtained written business-size representations from their subcontractors to classify those subcontractors for small-business reporting and other purposes. The Small Business Act contemplates this process and provides a safe harbor for contractors to rely in good faith on such representations. Specifically, Section 637(d) of the Small Business Act provides:

Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern, small business concern owned and controlled by veterans, small business concern owned and controlled by service-disabled veterans, a small business concern owned and controlled by socially and economically disadvantaged individuals, or a small business concern owned and controlled by women.


In the small-business subcontracting final rule published by the Small Business Administration (“SBA”), 78 Fed. Reg. 42391 (June 28, 2013) (“SBA Subcontracting Rule”), SBA addressed whether prime or higher-tier contractors could rely on representations that a subcontractor makes in the System for Award Management (“SAM”) (in an anticipated role as a prime contractor). The SBA Subcontracting Rule modified 13 C.F.R. § 121.411 to state that “[p]rime contractors may rely on the information contained in [SAM] (or any successor system or equivalent database maintained or sanctioned by SBA) as an accurate representation of a concern’s size and ownership characteristics for purposes of maintaining a small business source list.” The SBA Subcontracting Rule thus allows, but does not require, the prime contractor to use SAM to determine a subcontractor’s size status.
The Proposed Rule takes a more restrictive approach and requires prime contractors to use SAM if the subcontractor is registered in that system. FAR 52.219-8(d), as modified by the Proposed Rule, states:

(1) The prime Contractor may accept a subcontractor’s representations of its small business size and status as a small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a woman-owned small business in the System for Award Management (SAM) if: (i) The subcontractor is registered in SAM; and (ii) The subcontractor represents that the size and status representations made in SAM (or any successor system) are current, accurate and complete as of the date of the offer for the subcontract.

(2) The prime Contractor may accept a subcontractor’s written representations of its small business size and status as a small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a woman-owned small business if: (i) The subcontractor is not registered in SAM; and (ii) The subcontractor represents that the size and status representations provided with its offer are current, accurate and complete as of the date of the offer for the subcontract.


The Section believes the Proposed Rule creates an inconsistency with SBA’s guidance and eliminates one of the most accurate certification processes available—a direct, written certification from a subcontractor. We believe that a contractor should be permitted to require its subcontractor to provide current representations about its size directly to the contractor irrespective of whether the subcontractor is registered in SAM. Contractors often have hundreds of subcontractors or, in the case of larger contractors, thousands of subcontractors. For several reasons, set forth below, we believe that requiring a prime contractor or a higher-tier contractor to check SAM to determine whether it can allow a subcontractor to represent its status directly to the contractor adds an extra step, for no apparent benefit, when current information can be obtained directly from the subcontractor.

The Section has identified four ambiguities or conflicts caused by the proposed language. First, the Proposed Rule is inconsistent with the SBA rules, which state that contractors “may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract.” 13 C.F.R. § 121.411(b). Second, it is not clear whether the safe harbor provision in 15 U.S.C. § 637(d), which states that contractors may rely on “written representations by their subcontractors” regarding their size status, would apply to electronic representations made to the Government and then relied upon by a contractor. Third, the items a subcontractor sells to the Government may be different from what it sells to a prime or higher-tier contractor, and thus it is possible for a concern to be a small business in SAM under a particular North American Industry Classification System (“NAICS”)
code, but an other-than-small business in a representation to a contractor, or vice versa. Fourth, in the SBA’s Subcontracting Rule, the SBA referred to relying on subcontractor representations in SAM for the purpose of “maintaining a small business source list.” Although SBA’s intent is not entirely clear, this language seems to foreclose reliance on SAM representation for uses other than maintaining source lists and would support deleting the proposed revisions at FAR 52.219-8(d)(2) to allow contractors the flexibility to rely on SAM if they so choose.

The Section is aware that Congress and the SBA have expressed concern regarding fraudulent misrepresentations of small-business status by contractors and subcontractors. The Section does not believe that permitting contractors to obtain small-business representations directly from their subcontractors limits the Government’s ability to pursue remedies against subcontractors that misrepresent their status. The Department of Justice has successfully prosecuted subcontractors who have committed fraud in connection with subcontracts involving small-business size status as well as other fraud such as sale of counterfeit parts and defective cost or pricing data. Accordingly, the Section believes that paragraph (d)(2) of the revised provision at FAR 52.219-8, and similar language elsewhere in the Proposed Rule, should be deleted.

B. Method of Obtaining Subcontractor Small Business Size Representations

As noted above, prime and higher-tier subcontractors often have hundreds or thousands of subcontractors in their immediate supply chain. Each subcontractor may receive many subcontracts and purchase orders. Historically, and to date, many contractors obtain small-business representations from their suppliers on a periodic basis and classify their subcontractors based on these representations. Most companies utilize electronic systems to collect these direct certifications from subcontractors and to renew these representations periodically. Yet, following publication of the SBA Subcontracting Rule as well as SBA’s Small Business Size and Status Integrity Rule, 78 Fed. Reg. 38811 (June 28, 2013) (the “SBA Size Rule”), questions and confusion have arisen concerning the use of electronic systems versus paper representations with pen-on-paper signatures, obtaining representations on an annual or other periodic basis, and other issues.

The Section believes that it would serve the interests of both the Government and industry to clearly provide that contractors may use electronic systems to collect subcontractor small-business representations and that the signature in such systems may be an electronic signature identifying the individual authorized to submit the representation. In promulgating the SBA Size Rule, SBA stated that it did not have authority to allow electronic signatures, but indicated that the FAR had such a provision for government contracts, citing FAR 4.502(d). See 78 Fed. Reg. at 38813. That FAR provision, however, states only that agencies may accept electronic signatures; it does not mention contractors. The Section recommends modifying FAR 4.502(d) to allow contractors to accept electronically signed size representations, or adding a new FAR provision to that effect.
Lastly, as with the annual updates in SAM, it should be acceptable for contractors to obtain small-business size representations on an annual basis, with the subcontractor obligated to update the information promptly in the event of any change. The Section recommends that the FAR Council revise the Proposed Rule accordingly.

C. Modifications Triggering the Threshold for Subcontracting Plans

The Proposed Rule would modify FAR 19.702 to address the need for a subcontracting plan under a contract that is initially below the dollar threshold for requiring a subcontracting plan, but that later exceeds the threshold as a result of a modification to the contract. The Proposed Rule would add a new paragraph (a)(3) to FAR 19.702:

Each contract modification that causes the value of a contract without a subcontracting plan to exceed $650,000 ($1.5 million for construction), shall require the contractor to submit an acceptable subcontracting plan for the contract, if the contracting officer determines that subcontracting opportunities exist.


The Section believes that additional guidance should be added to the new language to avoid situations in which obtaining subcontracting plans in these circumstances would serve little purpose. Although the requirement that the contracting officer determine “that subcontracting opportunities exist” is helpful, the scope of such “subcontracting opportunities” is undefined and may be problematic. For example, there may be many modifications that add to the value of a contract but involve very little subcontracting. Further, as a result of workshare agreements in previously negotiated subcontracts, many of which guarantee a certain percentage of work or work in a particular area to a key subcontractor based on the original solicitation’s scope of work, many prime contractors will be contractually obligated to award work resulting from a modification to their existing subcontractors. Moreover, when the majority of subcontracting has already been accomplished, negotiating a plan that has goals that will mostly be based on subcontracts that have already been awarded would create administrative burdens for both the contractor and contracting officer without benefit. All of these situations require additional flexibility for contractors and contracting officers to implement the Proposed Rule in a manner that is efficient and does not create a breach of existing agreements.

The Section believes that the acknowledgment that the contracting officer needs to determine “that subcontracting opportunities exist” should go further because there is often a tendency to read such language as meaning “any subcontracting opportunities,” an interpretation supported by proposed FAR 19.705-2(c)(2) of the Proposed Rule (“If it is determined that there are no subcontracting possibilities” a rationale and higher level approval is required). 80 Fed. Reg. at 32915. Thus, under the Proposed Rule, a contractor with a $641,000 contract who receives a $9,000 contract modification near the end of contract performance would have to prepare and negotiate with the
Government a subcontracting plan unless no subcontracting opportunities exist. Any such subcontracting opportunities would not be significant enough to warrant the time and expense of preparing and negotiating a small-business subcontracting plan. In contrast, when addressing the effect of modifications on contracts that already have small-business subcontracting plans, contractors are instructed to update their subcontracting plan only where the modification itself exceeds $650,000 (See FAR 19.702(a)(1)).

To avoid unnecessary effort, the Section recommends revising the phrase “if the contracting officer determines that subcontracting opportunities exist” to “if the contracting officer determines that significant new subcontracting opportunities exist as a result of the modification to the contract” and modifying FAR 19.705-(2)(c)(2) accordingly. Further, the Section recommends that guidance be included in the final rule explaining that implementation of a small-business subcontracting plan during contract performance must accommodate existing contractual agreements, such as those that guarantee a given subcontractor a percentage of work or work in a particular area.

D. Goals Based on Award Value of Subcontracts

FAR 19.704(a)(2) and 52.219-9, as modified by the Proposed Rule, would permit, but not mandate, that contracting officers require contractors to express goals in terms of percentage of total contract dollars, in addition to the goals expressed as a percentage of total subcontract dollars. While we recognize that this FAR change is implementing a requirement that the SBA implemented in the SBA Subcontracting Rule (see 13 C.F.R. § 125.3(a)(2)), the Section recommends that contracting officers be discouraged from using this authority unless goals based on expected subcontracting are inadequate given the nature of a specific contract. Subcontracting performance is frequently an evaluation factor in source selections, and because contractors’ performance against their goals can be used as the basis for a material-breach claim, in past-performance evaluations, in small-business program audits and in other evaluations of contractors, the Government should strive for a consistent standard for establishing goals against which to measure contractors.

The Section believes that goals should be based on total expected subcontracting dollars and not total contract award value. Many factors influence what a contractor can, or should, subcontract. Such considerations as program and performance risk, pricing, make-or-buy, teaming relationships, and excessive pass-through requirements all influence what a contractor subcontracts. Adding a requirement to establish goals on the basis of total contract value could interfere with a contractor’s ability to address these other, legitimate considerations.

If the Government intends to provide contracting officers with unfettered discretion to require goals on the basis of a contract’s award value, then the Section believes additional guidance needs to be added to assist contracting officers in setting realistic goals. First, goals based on total contract-award value necessarily must be lower than goals based on subcontracting. Second, goals based on total contract-award...
value must be realistic and achievable based on the needs requirements of the affected program, and should take into consideration the internal capabilities of a contractor, make-or-buy decisions, program risk, cost, and other factors.

E. Treatment of the NAICS Codes

NAICS codes are essential to determine the small-business size status of contractors and subcontractors. Contractors, when classifying subcontractors with respect to size status for small-business reporting and other purposes, need to ensure that subcontractors are “small” based on the NAICS Code applicable to the principal purpose of the subcontract. Currently, FAR 52.219-9 requires subcontracting plans to include among other things:

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) Small business concerns; (ii) Veteran-owned small business concerns; (iii) Service-disabled veteran-owned small business concerns; (iv) HUBZone small business concerns; (v) Small disadvantaged business concerns; and (vi) Women-owned small business concerns.

FAR 52.219-9(d)(3).

The Proposed Rule retains this language while adding an entirely new requirement to the clause. In addition to the summary-type information already required to be included in plans, plans would have to identify:

(3) The NAICS code and corresponding size standard of each subcontract that best describes the principal purpose, including the types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) Small business concerns; (ii) Veteran-owned small business concerns; (iii) Service-disabled veteran-owned small business concerns; (iv) HUBZone small business concerns; (v) Small disadvantaged business concerns; and (vi) Women-owned small business concerns.

80 Fed. Reg. at 32917 (emphasis added).

Identifying in every subcontract plan the NAICS Code and corresponding size standard for every subcontract would be extremely burdensome. Collecting this information will significantly increase the time required for negotiating subcontracting plans. Further, if the information is going to actually be part of a plan, then contractors effectively will be required to update the information before the plan is finalized, which is certain to add delay and significant administrative cost.

In addition, because subcontract sources typically are selected after prime-contract award (and thus after a subcontracting plan is submitted and negotiated), the information would likely prove to be inaccurate. Moreover, NAICS Codes are assigned
based on the “principal purpose” of the subcontract, and a contractor may choose to
combine or divide subcontract work after award, changing the principal purpose of a
particular subcontract after the plan is negotiated.

The Section recommends that the requirement to identify NAICS Codes in
subcontracting plans be deleted. Instead, the Section recommends that NAICS Codes be
addressed in subcontracting plans by inserting the following requirement: “Assurances
that the contractor uses appropriate NAICS Codes for classifying small business
subcontracts, providing reports, and satisfying other requirements in the subcontracting
plan.” This simpler language would protect the government by ensuring that NAICS
Codes are properly used to classify small businesses, but would not unnecessarily
require identification of particular subcontracts by NAICS Codes in small-business
plans.

F. **Use of Small Business Concerns Participating in Proposals**

The Section commends the proposed clarification in FAR 52.219-9(d)(12) of
what it means to “use” a small business concern in preparing bids and proposals. As
written the proposed rule would require:

> Assurances that the offeror will make a good faith effort to acquire
> articles, equipment, supplies, services, or materials, or obtain the
> performance of construction work from the small business concerns that
> the offeror used in preparing the bid or proposal, in the same or greater
> scope, amount, and quality used in preparing and submitting the bid or
> proposal. Responding to a request for a quote does not constitute use in
> preparing a bid or proposal. An offeror used a small business concern in
> preparing the bid or proposal if (i) The offeror identifies the small
> business concern as a subcontractor in the bid or proposal or associated
> small business subcontracting plan, to furnish certain supplies or
> perform a portion of the contract; or (ii) The offeror used the small
> business concern’s pricing or cost information or technical expertise in
> preparing the bid or proposal, where there is written evidence of an
> intent or understanding that the small business concern will be awarded
> a subcontract for the related work if the offeror is awarded the contract.


Clarifying that “use” is limited to subcontractors identified in a small-business
plan, when cost information or technical expertise is used in preparing the bid or
proposal, or when there is written evidence of an intent or understanding that the small
business will be awarded a subcontract for the related work if the offeror is awarded the
contract, ensures contractors can reasonably identify when this requirement applies,
which will help ensure proper notification is given should it be required. This
clarification also will protect small businesses whose participation in a contractor’s
proposal involves written commitments regarding the award of subcontracts such as
when the prime contractor and subcontractor have executed a teaming agreement.
G. **Representation by a Contractor that Represented Itself as a Small Business Concern**

The Section also commends the proposed clarification in FAR 19.301-2 that a change in size status does not change the terms and conditions of the contract. To provide otherwise would create significant cost and performance problems if, for example, a small-business supplier became subject to Cost Accounting Standards in the middle of performing a contract. The Proposed Rule wisely avoids this problem.

H. **Clarification of Requirements Applicable to Prime Contractors**

In referring to various provisions of the Jobs Act of 2010 and the SBA’s Size and Subcontracting Rules, the Proposed Rule’s “background” section makes it clear that the FAR Council intends that most of the changes implemented through the Proposed Rule apply to prime contractors. The Section endorses that approach, because extending many of these provisions further down a contractor’s supply chain would raise several concerns not addressed by the Proposed Rule.

Unfortunately, the Proposed Rule as drafted does not always make clear which provisions apply to prime contractors alone and which may apply to a subcontractor at the first or lower tier, including subcontractors who are required to adopt subcontracting plans. Because FAR 52.219-9 sets forth the requirements for a small-business subcontracting plan, and the clause requires that large-business subcontractors who are required to adopt plans must adopt plans that conform to the requirements of the clause, anything added to FAR 52.219-9 effectively applies to sub-tier subcontracting plans. Accordingly, the Section recommends that the FAR Council revise references to “the Contractor” to expressly refer to “the prime contractor” for those requirements intended to only apply to a prime contractor.

An example of this needed clarification is in paragraph (d)(13) of the revised FAR 52.219-9, which adds a new requirement for small-business subcontracting plans:

A requirement for the Contractor to provide the Contracting Officer with a written explanation if the Contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in (d)(12) of this clause. This written explanation must be submitted to the Contracting Officer within 30 days of contract completion.


Although imposing this notice requirement on prime contractors satisfies the Jobs Act of 2010, the notice requirement is not mandated for lower-tier subcontracts as well, and the Proposed Rule’s background section indicates that the requirement is intended to apply only to prime contractors. See 80 Fed. Reg. at 32911. As FAR 52.219-9(d)(3) is proposed for revision, however, any small-business subcontracting plan at any tier would be subject to this requirement because all subcontracting plans must meet the requirements of FAR 52.219-9. Clarifying that paragraph (d)(13) imposes a
“requirement for the prime contractor” to provide the explanation would resolve this issue.

I. Treatment of Options

The Proposed Rule modifies FAR 19.704(c) to specify that “[i]f a subcontracting plan is necessary and the offeror is submitting an individual subcontracting plan, the individual subcontracting plan shall contain all the elements required by paragraph (a) of this section and shall contain separate statements and goals for the basic contract and for each option.” Options thus are to be addressed in the initial subcontracting plan.

Paragraph (e) of FAR 19.705-2, as modified by the Proposed Rule, states:

A contract may have no more than one subcontracting plan. When a contract modification exceeds the subcontracting plan threshold (see 19.702(a)), or an option is exercised, the goals of an existing subcontracting plan shall be amended to reflect any new subcontracting opportunities. These goal changes do not apply retroactively.

80 Fed. Reg. at 32915 (emphasis added).

The Section believes the words “or an option is exercised” should be deleted from paragraph (e) above. Options are addressed in the initial subcontracting plan and whatever subcontracting possibilities that exist are defined in the initial plan. Requiring amendment of a plan whenever an option is exercised is redundant and adds cost and administrative burden, with little benefit.

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,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
James A. Hughes
Aaron P. Silberman
Kara M. Sacilotto
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Small Business and Other Socioeconomic Programs Committee
Chairs and Vice Chairs, Subcontracting, Teaming and Strategic Alliances Committee