

**COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS**  
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General Services Administration  
Regulatory Secretariat Division (MVCB)  
Attn: Ms. Flowers  
1800 F Street, N.W., 2<sup>nd</sup> Floor  
Washington, D.C. 20405

Re: Comments on FAR Case 2014-003, Small Business Subcontracting Improvements, 80  
Fed. Reg. 32909 (June 10, 2015)

Dear Ms. Flowers:

On behalf of the Council of Defense and Space Industry Associations (CODSIA)<sup>1</sup>, we appreciate the opportunity to submit comments on the proposed FAR Case entitled “Small Business Subcontracting Improvements” published as a proposed rule in the *Federal Register* on June 10, 2015.<sup>2</sup> The rulemaking is the result of a lengthy process beginning with the passage of the Small Business Jobs Act of 2010 (Jobs Act) signed into law on September 27, 2010,<sup>3</sup> whose enactment required the Small Business Administration (SBA) and the FAR Council to coordinate on regulations on many of the contracting provisions in Parts I – IV of Subtitle C of the law.

Specifically, this proposed rule pertains to the implementation of sections 1321, Subcontracting Misrepresentations, and 1322, Small Business Subcontracting Improvements, of the Jobs Act, but also makes regulatory changes designed to increase small business contracting opportunities that have ancillary impacts on other areas of FAR Part 19 not entirely or solely related to the relevant Jobs Act sections. Several of the provisions related to this FAR proposed rule have already undergone the implementation process at the SBA through a final rule issued in July 2013.<sup>4</sup>

Section 1321 requires regulations on subcontracting compliance including compliance that impacts government contracting and oversight functions. Section 1322 requires prime contractors, as part of the subcontracting plan, to provide an assurance that they will make a good faith effort to use a small business subcontractor to the same degree that the prime relied on the small business in the preparation and submission of its bid or proposal. If the same

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<sup>1</sup> The Council of Defense and Space Industry Associations (CODSIA) was formed in 1964 at the suggestion of the Department of Defense by industry associations with common interests in federal procurement policy issues. CODSIA consists of six associations – the Aerospace Industries Association, the American Council of Engineering Companies, the Chamber of Commerce of the United States, the Information Technology Alliance for Public Sector, the National Defense Industrial Association, and the Professional Services Council. CODSIA acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

<sup>2</sup> 80 Fed. Reg. 32909 et seq. (June 10, 2015) available at <http://www.gpo.gov/fdsys/pkg/FR-2015-06-10/pdf/2015-14055.pdf>

<sup>3</sup> P.L. 111-240

<sup>4</sup> 78 Fed. Reg. 42391 et seq. (July 16, 2013) available at <http://www.gpo.gov/fdsys/pkg/FR-2013-07-16/pdf/2013-16967.pdf>

subcontractor is not used as described in the proposal, the prime is required to explain the reasons to the CO in writing.

The implementation of these two Jobs Act sections in this FAR proposed rule represents a thoughtful approach by the SBA and the FAR Council to the relevant contracting issues, but we offer the following comments and recommendations that we feel improve on a good product for consideration during the development of a FAR final rule.

1. Small Business Size Representation by Subcontractors: SBA's previous rulemaking, in 2013, addressed whether prime or higher-tier subcontractors could rely on representations that a subcontractor makes in the System for Award Management (SAM) as follows:

*“[p]rime contractors may rely on the information contained in the System for Award Management (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.” (13 CFR § 121.411)*

To some extent, the FAR proposed rule aligns with the flexible approach to size representation expressed in the SBA rules and permits prime contractors to utilize the business size and status information in the SAM database or, have prospective subcontractors “self-certify” their business size with the contractor, for purposes of classifying their subcontractors for small business reporting and other purposes (52.219-9(c)(2)). While we support the proposed language, we recommend revising 52.219-9 (c)(2)(i)(B) as follows:

*(B) The subcontractor represents that the **NAICS code**, 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.*

We also recommend that it would be efficient and beneficial to the prime and subcontractor if prime contractors could remain free to require subcontractors to provide representations directly to the prime irrespective of whether the subcontractor is registered in SAM and that reliance by primes upon those representations were afforded the safe harbor described in the underlying SBA rules.

2. Small Business Goals Based on Total Contract Award Value: The proposed rule would permit Contracting Officers to require prime contractors to express small business goals as a percentage of total contract dollars as well as a percentage of total subcontract dollars. This could lead to confusion about a contractor's performance against their subcontracting plan and, thus, a consistent standard for measuring contractor performance is needed to avoid unwarranted challenges of prime contractor performance, given that a contractor's performance against its small business subcontracting plan is used in past performance evaluations, small business program audits and other evaluations to determine if the contractor has made a good faith effort in meeting its subcontracting plan requirements. We request that the FAR Council provide clear guidance on how the dollar and percentage goals will be used and recommend that 52.219-9 be revised to state that evaluation of the contractor achievement of its small business

subcontracting goals will be based on performance against goals established as a percentage of total subcontract dollars.

### 3. Identifying NAICS Codes in Small Business Subcontracting Plans

The proposed rule includes several subcontract management requirements for the prime contractor to identify the NAICS code and corresponding size standard of each subcontract it plans with small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns.

In many cases, the products and services to be subcontracted cannot be fully or accurately identified by the prime contractor prior to the award or performance of the prime contract. There is a high probability that the NAICS codes that will be identified in the contractor's subcontracting plan will reflect a sampling of potential NAICS codes, rather than the actual NAICS codes that will apply to any resulting subcontract. We recommend that the requirement to identify NAICS codes in the prime contractor's subcontracting plan be deleted. Instead, we recommend that an assurance statement be added to FAR 19.704 and 52.219-9 as follows:

**“The contractor will ensure that the appropriate NAICS code is identified for all subcontracts covered by its subcontracting plan for purposes of obtaining business size representation for the subcontract from its subcontractors, and to satisfy reporting requirements under this clause”.**

### 4. Applicability of Proposed rule changes to Commercial Items and COTS Items

The rule proposes to amend FAR clauses 52.219–8, Utilization of Small Business Concerns, and 52.219–9, Small Business Subcontracting Plan, and failed to exempt commercial or COTS items suppliers from the proposed rule. The Jobs Act made no mention of applying these changes to commercial or COTS supplies or services. 41 USC 1906 and 1907 require a burden analysis be conducted before applying unique government requirements to commercial suppliers. We recommend that this proposed rule provide a clear exemption from commercial items and COTS. If the FAR Council determines that coverage of commercial items and COTS is necessary, we alternatively recommend that prior to issuance of any final rule the FAR Council address the omission of a burden analysis and/or produce some evidence to support the claim that applying the proposed rule to commercial/COTS suppliers “is in the best interests of the federal government.”

### 5. Good Faith Use Requirements

FAR 19.704 (a)(12) and the clause at 52.219-9(d)(12) defines “used in preparing the bid or proposal” by conditioning that term to actions or writings by the prime designed to indicate to the small business subcontractor a firm intention to subcontract by using their technical or business proposal or data as part of the prime's proposal to the government. Only where such an intention clearly states the direct use of such data by a prime to obtain a contract award would the good faith assurance be triggered requiring a prime to submit an explanation to the CO.

Although we support the way the FAR defines the term “used...”, we recommend that the rule clarify that, where allegations of the breach of the assurance of good faith effort are directly submitted to the CO by a small business subcontractor, the CO provide a copy of any communications to the prime contractor so that they have notice of any such allegations. We further suggest that the written explanation requirements for prime contractors to COs pursuant to the rules not be expanded to multiple tiers in the supply chain where the 219-9 clause is required to be flowed down and that the operative clause and policy language be changed so it is limited to “prime” contractors.

6. Subcontract Awards by Affiliates treated as subcontract awards by the Contractor

Current FAR 52.219-9(j) states that “***Subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, or when the subcontractor provides a commercial item subject to the clause at 52.244-6, Subcontracts for Commercial Items, under a prime contract.***” That language remains in the proposed rule. Paragraph (j) ensures that the administrative burdens and cost impacts associated with flow down of government-unique requirements are not imposed on affiliates and subcontractors providing commercial items. Likewise, current FAR 52.219-9(l), which excludes from ISRs and SSRs all purchases from a corporation, company, or subdivision that is an affiliate of the contractor or subcontractor, was retained in the proposed rule.

However, the proposed rule amends FAR 52.219-9(l) by adding a statement that “*Subcontract awards by affiliates shall be treated as subcontract awards by the Contractor.*” This new requirement is readily susceptible to misinterpretation and could be read to mean that subcontract awards by affiliates or “subcontractors” providing commercial items are now subject to this clause and the related plan reporting requirements. Such a misapplication would create a direct conflict with paragraph (j), as well as void the intent of FAR 2.101 definition of “Commercial item”, subparagraph (7), which addresses items “transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.” To avoid that potential conflict or misinterpretation, we recommend clarifying FAR 52.219-9(l) as follows:

(l) The Contractor shall submit ISRs and SSRs using the web-based eSRS at <http://www.esrs.gov>. Purchases from a corporation, company, or subdivision that is an affiliate of the Contractor or subcontractor are not included in these reports. Subcontract awards by affiliates shall be treated as subcontract awards by the Contractor, **with the exception of subcontracts exempted under paragraph (j) of this clause.** Subcontract award data reported by the Contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower tier subcontractors, unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian tribe. Only subcontracts involving performance in the United States or its outlying areas should be included in these reports with the exception of subcontracts under a contract awarded by the State Department or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas.

## 7. Subcontracting Plans and Reports for ID/IQs

The rule proposes to amend FAR 52.219-9(d)(10) and 19.705-1 to require prime contractors to include subcontracting data for each order when reporting subcontracting achievements for multiple-award contracts and permit COs to require subcontracting plans for each ID/IQ.

We recommend that the final rule clarify (a) whether each task order under the prime ID/IQ contract requires a subcontracting plan, in addition to a subcontracting plan at the ID/IQ (prime) contract level; (b) whether a subcontracting plan would be required only for task orders over the subcontracting plan thresholds at 19.702 and small business subcontracting opportunities exist; and (c) whether the new reporting requirement would apply retroactively to existing ID/IQ contracts.

We also note that eSRS currently lacks the functionality to allow ISRs for task and delivery orders. Unless eSRS is updated to allow reporting at the task and delivery order level, the proposed rules will create significant administrative burdens and increased costs for contractors since they will need to submit paper reports to comply with the new reporting requirement for thousands of additional ID/IQ task orders.

We appreciate the opportunity to submit comments about this proposed rule. Should you require any additional information from us on this topic, please contact Erica McCann at [emccann@itic.org](mailto:emccann@itic.org) or Roger Jordan at [jordan@pscouncil.org](mailto:jordan@pscouncil.org). You may also contact CODSIA's Administrative Officer Bettie McCarthy at [codsia@pscouncil.org](mailto:codsia@pscouncil.org).

Sincerely,



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