

New Small Business Subcontracting Requirements Added to the FAR

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On July 14, 2015, the FAR Council issued a final rule consistent with the Small Business Administration's final rule discussed previously, which implemented regulations designed to prevent the purported use of "bait and switch" tactics with small business subcontractors. The final FAR rule requires large business prime contractors to notify the contracting officer in writing if they fail to utilize a small business included in their bid or proposal or make late or reduced payments to a small business subcontractor. The final rule is effective November 1, 2016.

The primary impact of the final rule is the change to FAR 52.219-9, Small Business Subcontracting Plans. Contractors' subcontracting plans will have to provide additional assurances, which are designed to protect small business subcontractors from prime contractors including them in proposals solely for small business subcontracting participation evaluation purposes, but not actually providing the subcontractors any work post-award. In addition to requiring a written justification for the failure to utilize proposed subcontractors, contractors must also allow their subcontractors access to the contracting officer to complain about the lack of utilization, or late/reduced payments from the prime contractor. Specifically, prime contractors must provide assurances that their subcontractors will not be prohibited from discussing payment or utilization issues with the contracting officer. Although the FAR Council stressed that this would not alter the lack of privity between the subcontractor and the government, some commenters on the final rule expressed concern that this requirement will allow subcontractors to form relationships with contracting officers with no input or monitoring by the prime contractor.

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The final rule also clarifies the requirement that prime contractors assign NAICS codes to their subcontracts. Many prime contractors have mistakenly believed that they can simply flow-down the NAICS code selected by the contracting officer for the prime contract. Now, contractors must provide assurances in their subcontracting plan that they will “[a]ssign each subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract.” In practice, this means that a prime contractor may have to assign a different NAICS code to one or more subcontracts than the code assigned to the prime contract, if the “principal purpose” of the work performed by the subcontractor is different from the principal purpose of the prime contract.

Lastly, the final rule includes provisions to enhance competition among small business subcontractors. Prior to award of a competitive subcontract, prime contractors are required to inform each unsuccessful small business subcontract offeror, in writing, of the name and location of the apparent successful offeror and the successful offeror’s small business status (SB, VOSB, WOSB, HUBZone, etc.). Although not widely known or used, SBA’s regulations permit size protests of small business subcontract awards. This provision could spark an increase in such protests.

Contractors should review their subcontracting plans and update them as necessary to incorporate these new requirements. Contractors should also ensure that they have the capacity to utilize their proposed small business subcontractors at the level proposed. If not, contractors risk potentially being in breach of their prime contracts, and receiving negative past performance ratings for noncompliance with their subcontracting plans.