



March 18, 2020

Limitations on Subcontracting-Upcoming Changes-Building to Full Change in the FAR? Sources to Use with Contracting Officers and Internally.

In contracts awarded through the U.S. Small Business Administration (SBA), there is a mandatory performance level required by the small business firm on each contract. The type of contract, whether service, construction, specialty construction, or supplies, dictates the amount required for the prime to perform and the amount that may be subcontracted. A key factor in determining performance is who is defined as subcontractor. A similarly situated entity, for SBA regulations, is not counted as a subcontractor and its performance may be counted as part of the prime's mandatory performance level on the contract. For instance, if the prime contract is an 8(a) contract, and the prime 8(a) contractor/firm then contracts with another 8(a) firm to perform a portion of the contract, both contractors' performance count towards the mandatory performance requirement for that 8(a) contract and do not count against the firm as a subcontracted amount.

While SBA has passed regulations recognizing the statutory changes, the FAR has not. This has oftentimes leading contracting officers and contractors scratching their heads as to which regulations follow.

Two primary deviation letters were issued on from both the Civilian Agencies' Council and the Defense Agencies Regulation Council *that seem to marry the FAR regulations (without changing the FAR) with the SBA regulations*. (Please note there are several out for there that are agency specific.) We reported these earlier but are publishing again. Those letters can be found here:

Or by links to both here:

https://www.acquisition.gov/sites/default/files/page_file_uploads/CAAC%20Letter%202019-01.pdf <https://www.acq.osd.mil/dpap/policy/policyvault/USA001048-19-DPC.pdf>

The Federal Register also published proposed regulations on December 4, **2018**, to marry the regulations. Those proposed regulations can be found here:

Or the link here: <https://www.govinfo.gov/content/pkg/FR-2018-12-04/pdf/2018-25506.pdf>

There is also a FAR open case (2016-11). Here is the update from the FAR council on the proposed regulations mentioned above:

2016-011 19, 52 (S) Revision of Limitations on Subcontracting Implements SBA's final rule (81 FR 34243) for section 1651 of the NDAA for FY 2013 (Pub. L. 112-239), which revised the limitations on subcontracting and the nonmanufacturer rule. Also implements SBA's regulatory clarifications concerning application of the limitations on subcontracting, nonmanufacturer rule, and size determination of joint ventures. 01/28/2020 CAAC Legal concurrence with draft final FAR rule. FAR staff preparing to send to OFPP, pending GSA Administrator approval.

Finally, the FAR Council Subcommittee is supposed to meet tomorrow and SBA is sending someone to attend (and likely push) to see when the FAR rules meet SBA rules and the law.