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# FAR Council Finalizes Small Business Subcontracting Rules

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The FAR Council recently published a series of final rules amending several FAR provisions relating to limitations on subcontracting. These amendments “advance[] the interests of small business prime contractors by making it easier to comply with the limitations on subcontracting, potentially allowing those contractors to compete for larger contracts than they could in the past.”

In large part, these amendments align with prior regulations issued by the Small Business Administration (“SBA”) in 2016.

## **Revised Limitation on Subcontracting**

The FAR Council revised the limitation on subcontracting applicable to small businesses. Under the final rule, subcontracting limits set forth in FAR 19.505 and FAR 52.219-14 will be based on the percentage of the overall contract or order amount, rather than the percentage of work to be performed directly by the prime contractor. This change will substantially decrease the burden for small businesses to monitor and document their compliance with the requirements of the subcontracting limitations.

In addition, the final rule applied the concept of “similarly situated entities” to the limitation of subcontracting provisions. Now, to qualify as a similarly situated entity, the subcontractor must have the same small business status as the prime contract and must be small under the applicable North American Industry Classification System (“NAICS”) code the prime contractor assigned to the subcontract. Any amounts paid to a subcontractor who is a similarly situated entity will not count against the prime contractor's compliance with the limitation of subcontracting requirements.

For additional information, the final rule may be found [here](#).

## **“Good Faith” Efforts in Small Business Subcontracting**

In accordance with FAR 52.219-9, small business subcontracting plans are generally required to be completed by a large business prime contractor when a contract is expected to exceed \$750,000, or \$1.5 million for construction contracts. Under FAR 52.219-16, the government may assess liquidated damages against the prime contractor for a “[f]ailure to make a good faith effort to comply with the subcontracting plan.” The final rule provides a non-exhaustive list of examples that may indicate a prime contractor's good faith efforts to comply with the subcontracting plan:

1. Breaking out the work to be subcontracted into economically

- feasible units to facilitate small business participation;
2. Taking reasonable steps to conduct market research to identify potential small business subcontractors;
  3. Soliciting input from small businesses as early in the acquisition process as practicable;
  4. Providing interested small businesses with information regarding the anticipated requirements of the prime contract;
  5. Negotiating in good faith with small businesses;
  6. Directing small businesses to the SBA if additional assistance is necessary, or other available small business services offered by Federal, state, and local organizations;
  7. Assisting small businesses in obtaining bonding, lines of credit, insurance, equipment, supplies, materials, and/or services;
  8. Participating in a mentor/protégé program with one or more small businesses; or
  9. Exceeding the subcontracting goals in one socioeconomic category, notwithstanding shortcomings in other goals.

On the other hand, the final rule provided several additional non-exhaustive examples that may indicate a prime contractor is not making good faith efforts to comply with the subcontracting plan:

1. Failing to designate and maintain a company official to oversee the small business subcontracting plan;
2. Failing to timely submit acceptable Individual Subcontracting Reports or Summary Subcontract Reports by the deadlines specified in the prime contract;
3. Failing to maintain records or otherwise demonstrate procedures designed to comply with the subcontracting plan, including flowdown requirements (as necessary); or
4. Adopting company policies or documented procedures that have as their objective the frustration of a subcontracting plan's objectives.

For additional information, the final rule may be found [here](#).

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