



# Small Business Legislative Updates

**Taragh Mulvihill**

**Orbital ATK Flight Systems Group Supply Chain Compliance**

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- Late 2014 saw the finalization of several small business proposed rules from 2013.
- 2015 has seen few new finalized rules but MANY new proposed rules- some which have garnered significant comments from industry.
- A brief recap- that is not inclusive of all potential legislative changes.



- **DoD Issues Final Rule Revising Regulations Concerning Contracts and Subcontracts with Small Disadvantaged Businesses (“SDBs”)**

On October 14, 2014, the FAR Council and DoD issued new interim rules concerning contracting and subcontracting with SDBs. Based on case law and the expiration of the underlying statutory authority, the FAR Council removed and reserved FAR Subpart 19.11, Price Evaluation Adjustment for Small Disadvantaged Business Concerns, and FAR Subpart 19.12, Small Disadvantaged Business Participation Program and DoD removed DFARS coverage pertaining to these programs. However, the other federal policies that encourage SDB participation in the federal marketplace, including the government-wide goal of awarding five percent of prime and subcontract awards to SDBs, remain in place. As a result of these changes, several FAR and DFARS clauses have changed. On March 26, 2015, DoD adopted as final the interim rule changes. (80 Fed. Reg. 15912)

# Proposed FAR Changes To Implement SBA Small Business Subcontracting Rules



DOD, GSA, and NASA have proposed a number of changes to the FAR to implement changes made by the Small Business Administration in 2013 regarding small business subcontracting goals and plans. While the proposed FAR changes include a number of technical and definitional updates, a few of the substantive changes could be significant and are worthy of some discussion.

- First, a proposed change to FAR 19.301-2 would allow a contracting officer to require a subcontracting plan from a prime contractor whose size status changes from small to not small as a result of a size re-representation during contract performance. Obviously the criteria by which contracting officers might exercise this discretionary authority will be important, but even more important will be the implications to primes of having a subcontracting plan obligation imposed on a contract that could be entering its sixth year of performance (one point at which a size re-representation would be required). Presumably the prime by this point would have established contractual relationships with subs for performance on the contract, making it difficult- if not impossible- to add new subcontractors to the existing team in order to satisfy a newly imposed subcontracting plan obligation.

# Proposed FAR Changes To Implement SBA Small Business Subcontracting Rules cont'd



- A second potentially significant change to FAR 19.702 would require the addition of a subcontracting plan to an existing contract without a plan if the contract is modified after award to exceed the dollar threshold for subcontracting plans. Though the proposed FAR change requires the addition of a subcontracting plan, the language does include the caveat “if the contracting officer determines that subcontracting opportunities exist,” creating at least some amount of discretion for the CO. Like in the case of a re-representation, though, this proposed change will be problematic for prime contractors with existing teaming or subcontract obligations already in place on an existing program.
- Finally, a proposed change to the little-noticed FAR 2.101 (and also to FAR 19.703) would modify the definition of “Small Business Subcontractor.” Currently, the definition states that a small business subcontractor is one that does not exceed the size standard applicable to the work that it will be performing. Perfectly logical – but the definition does not provide any guidance as to who determines the appropriate NAICS code classification for the work that the subcontractor will be performing. The proposed change specifies that the prime contractor must determine which NAICS code best describes the product or service to be provided by the subcontractor. Though the proposed rule has the advantage of assigning responsibility for the determination, one need only review a few SBA Office of Hearings and Appeals NAICS code challenge decisions to understand how subjective and potentially controversial these decisions can be, particularly when the prime and the subcontractor are motivated to ensure that the work performed by the subcontractor counts toward the satisfaction of a subcontracting plan category.

# More Proposed Rules For Small Businesses



- New changes to performance requirements under the U.S. Small Business Association (“SBA”) could be applicable to your company in the near future. Proposed changes were made pursuant to Section 1651 of the National Defense Authorization Act of 2013 (NDAA), which pertains to performance requirements applicable to small businesses and socioeconomic program set aside contracts and small business contracting. The limitations on subcontracting rule provides that an awardee of a small business set-aside can only subcontract a certain percentage of work to other contractors. The calculation of this percentage depends on the type of work primarily being performed, with different rules applying for service contracts, supply contracts, general construction contracts, and special trade construction contracts.
- On Feb. 5, 2015, the U.S. Small Business Administration released its long-awaited proposed rule to establish a mentor-protége program for all small businesses. See 80 Fed. Reg. 6618 (Feb. 5, 2015). Federal contractors have been eagerly anticipating this rulemaking since Congress directed the SBA, first in the Small Business Jobs Act of 2010 and then in the 2013 National Defense Authorization Act, to expand its mentor-protége program. Currently available only to participants in the SBA’s 8(a) program, the SBA is now proposing to create a second mentor-protége program open to all small businesses- a “universal mentor-protégé plan”.

- Proposed Changes To Small Business Joint Ventures. The proposed regulations not only significantly expand the mentor/protégé program, they also change what form of joint venture the mentor and protégé can form to pursue contracts. First, the proposed regulations specify that “any joint venture must be in writing.” Second, the SBA sought comments on whether “informal” joint ventures should be permitted at all. An “informal” joint venture is one in which the joint venture is reduced to writing, but there is no separate legal entity formed and filed with a state. From the proposed regulations, it appears that the SBA is inclined to eliminate the informal joint venture option. Third, the SBA’s proposed rule would eliminate “populated” joint ventures.
- The Small Business Administration ("SBA") recently issued a proposed rule to address statutory changes that would permit agency contracting officers to award sole-source contracts to women-owned small businesses ("WOSBs") and economically disadvantaged women-owned small businesses ("EDWOSBs"). The proposed SBA rule would allow a contracting officer to make a sole-source award to WOSBs or EDWOSBs of a manufacturing contract not exceeding \$6.5 million in value and other contracts not exceeding \$4 million in value. The proposed rule also addresses the statutory change that eliminates the ability of a WOSB to self-certify its status and submit supporting documentation. The SBA's proposed rule highlights significant opportunities as well as new challenges for WOSBs.