



Homeland
Security

MEMORANDUM FOR: Heads of Contracting Activities
PAUL R
FROM: Paul Courtney COURTNEY
Chief Procurement Officer
SUBJECT: Federal Acquisition Regulation Class Deviation (Number 22-02) –
Limitations on Subcontracting for Small Business Concerns

Digitally signed by PAUL
R COURTNEY
Date: 2021.10.05
12:38:46 -04'00'

Purpose: This class deviation is issued in accordance with Federal Acquisition Regulation (FAR) 1.404 and rescinds and supersedes DHS FAR Class Deviation 19-01, Revision 1, issued on August 18, 2020. Effective immediately, contracting officers shall use the clause at Attachment 1, 52.219-14, Limitations on Subcontracting (OCT 2021) (DEVIATION OCT 2021), in lieu of the clause at FAR 52.219-14.

Effective Date: This deviation is effective on the date of signature.

Background: On August 13, 2021, Civilian Agency Acquisition Council (CAAC) Letter 2021-02, Class Deviation from the FAR Regarding Exceptions to the Limitations on Subcontracting (LOS) for Small Business Concerns Under FAR Part 19, was issued and served as consultation to agencies in accordance with FAR 1.404. CAAC Letter 2021-02 authorized agencies to issue a class deviation to apply the exceptions to the LOS requirements for small business concerns at 13 CFR 125.6 which was implemented in the Small Business Administration's (SBA) final rule published in the Federal Register at 84 FR 65647 on November 29, 2019.

The final rule for FAR Case 2016-011 was published in the Federal Register on August 11, 2021 (86 FR 44233). This final rule incorporated into the FAR the revisions to the LOS and the nonmanufacturer rule in the SBA final rule issued on May 31, 2016 (81 FR 34243). However, SBA issued a subsequent final rule on November 29, 2019 (84 FR 65647) which further amended its regulations to include certain exclusions to the LOS for services contracts. These exclusions are addressed in paragraph (e)(1) of the attached deviation clause.

Requirement: Effective immediately, contracting officers shall use the clause at Attachment 1, 52.219-14, Limitations on Subcontracting (OCT 2021) (DEVIATION OCT 2021), in lieu of the clause at Federal Acquisition Regulation (FAR) 52.219-14.

Applicability: This class deviation applies to all solicitations and contracts (see definition of contract at FAR 2.101).

Expiration: This class deviation will remain in effect until incorporated in the FAR or is otherwise rescinded.

Attachments:

- Attachment 1 - 52.219-14 Limitations on Subcontracting (OCT 2021) (DEVIATION OCT 2021)
- Attachment 2 - CAAC Letter 2021-02: Class Deviation from the Federal Acquisition Regulation Regarding Exceptions to the Limitations on Subcontracting (LOS) requirements for Small Business Concerns Under FAR Part 19

Additional Information: DHS Component contracting activities should update their contract writing systems to include the clause in Attachment 1. In addition, the clauses from FAR Class Deviation 19-01, Revision 1 should be removed from contract writing systems.

Questions or comments about this class deviation may be directed to Candace Lightfoot at Candace.Lightfoot@hq.dhs.gov.

Attachment 1 - 52.219-14 Limitations on Subcontracting (DEVIATION OCT 2021)

Use deviated clause 52.219-14 instead of the current FAR clause equivalent.

52.219-14 Limitations on Subcontracting.

As prescribed in 19.507(e), insert the following clause:

LIMITATIONS ON SUBCONTRACTING (OCT 2021) (DEVIATION OCT 2021)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) *Definition. Similarly situated entity*, as used in this clause, means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(c) *Applicability*. This clause applies only to—

(1) Contracts that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(2) Part or parts of a multiple-award contract that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(3) Contracts that have been awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, and 19.15;

(4) Orders expected to exceed the simplified acquisition threshold and that are—

(i) Set aside for small business concerns under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii);

(5) Orders, regardless of dollar value, that are—

(i) Set aside in accordance with subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 19.504(c)(1)(ii); and

(6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

(d) *Independent contractors.* An independent contractor shall be considered a subcontractor.

(e) *Limitations on subcontracting.* By submission of an offer and execution of a contract, the Contractor agrees to the following requirements in the performance of a contract assigned a North American Industry Classification System (NAICS) code applicable to this contract:

(1) *Services (except construction).* It will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding certain other direct costs and certain work performed outside the United States (see paragraph (e)(1)(i)), to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract.

(i) The following services may be excluded from the 50 percent limitation:

(A) Other direct costs, to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service. Examples include airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases.

(B) Work performed outside the United States on awards made pursuant to the Foreign Assistance Act of 1961, or work performed outside the United States required to be performed by a local contractor.

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies)*. It will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract.

(3) *General construction*. It will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 85 percent subcontract amount that cannot be exceeded.

(4) *Construction by special trade contractors*. It will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity

further subcontracts will count towards the prime contractor's 75 percent subcontract amount that cannot be exceeded.

(f) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (c)(1), (2), (3) and (6) of this clause –

[Contracting Officer check as appropriate.]

__ By the end of the base term of the contract and then by the end of each subsequent option period; or

__ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (c)(4) and (5) of this clause, by the end of the performance period for the order.

(g) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.

(End of clause)