

Civilian Agency Acquisition Council authorizes agencies to issue class deviations to make limitations on subcontracting compliance more uniform

By Samuel S. Finnerty, Esq., PilieroMazza PLLC*

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The Federal Acquisition Regulatory Council (FAR Council) recently issued a final rule on August 11, 2021, updating the Federal Acquisition Regulation (FAR) limitations on subcontracting (LOS) rule to more closely mirror the U.S. Small Business Administration's LOS regulation.

This CAAC memorandum promotes further conformity between the FAR and SBA's LOS rules.

However, inconsistencies between the two sets of regulations remain. To bridge the divide, on August 13, 2021, the Civilian Agency Acquisition Council (CAAC) released a memorandum¹ authorizing civilian agencies to issue FAR class deviations adopting certain exceptions to the LOS requirements for small businesses that are specifically outlined in SBA's regulations but have not yet been added to the FAR. **This CAAC memorandum promotes further conformity between the FAR and SBA's LOS rules.**

SBA's LOS rule provides that, for service contracts (except construction), prime contractors "will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated." As it relates here, the rule further provides that "[o]ther direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as 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. In addition, work performed overseas on awards made pursuant to the Foreign Assistance Act of 1961 or work required to be performed by a local contractor, is excluded."

Notably, these exclusions were not added to the FAR Council's August 11th final rule. On the contrary, the FAR Council explained that a "new FAR case would have to be opened to implement the additional changes."

Because it took the FAR Council roughly five years to adopt its recent changes to the LOS rule (after those changes were added to SBA's regulations), we suspect it will be some time before these exceptions are formally incorporated into the FAR.

In the intervening time, the CAAC memorandum specifically authorizes civilian agencies to issue class deviations to ensure that the foregoing exceptions for other direct costs and work performed outside the U.S. are recognized when applying the LOS.

If the Department of Defense takes similar action, LOS compliance could become uniform across the federal government.

The memorandum includes recommended deviated language for FAR clause 52.219-14, Limitations of Subcontracting, and advises contracting officers to use the deviated clause in lieu of FAR 52.219-14 in accordance with their agencies' guidance.

Hopefully, civilian agencies follow suit and issue such deviations, as doing so will make LOS compliance less burdensome and will promote regulatory conformity. If the Department of Defense takes similar action, LOS compliance could become uniform across the federal government.

Notes

¹ <https://bit.ly/3sUBNhO>

About the author



Samuel S. Finnerty, an associate in **PilieroMazza PLLC**'s Washington, D.C., office, represents commercial businesses regarding a wide range of government contracting matters, including bid protests and regulatory compliance. He can be reached at sfinnerty@pilieromazza.com. The author would like to thank summer associate Daniel Figuenick for his assistance with this article, which was originally published Aug. 21, 2021, on the firm's website. Republished with permission.

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