

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6315

September 13, 2018

Lesley A. Field
Acting Administrator
Office of Federal Procurement Policy
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Dear Acting Administrator Field:

As Chairman and Ranking Member of the House Committee on Small Business and a concerned Member of the House Committee on Armed Services, we write to inquire about the status of Federal Acquisition Regulation (FAR) Case Number 2016-011, titled "(S) Revision of Limitations on Subcontracting."

Section 1651 of Public Law 112-239, the National Defense Authorization Act for Fiscal Year 2013¹ (2013 NDAA), made significant changes to the limitations on federal subcontracting, which were reflected in corresponding regulations made by the Small Business Administration (SBA) on May 31, 2016.² Section 1651 of the 2013 NDAA and SBA regulations require that the limitations on subcontracting for full or partial small business set-aside contracts, HUBZone contracts, 8(a) contracts, service-disabled veteran-owned small business (SDVOSB) contracts, women-owned small business (WOSB), and economically disadvantaged women-owned small business (EDWOSB) contracts be evaluated based on the amount paid by the federal government, rather than the previously used cost of labor, or cost of manufacturing calculation. Significantly, the 2013 NDAA and SBA regulations exclude from the limitations on subcontracting the work performed by first-tier subcontractors that are considered "similarly situated entities."³

Section 1651 of the 2013 NDAA was intended to ensure that a certain amount of work is performed by a small business concern that qualifies for a small business set-aside or sole source procurement due to its socioeconomic program status. However, the FAR has not yet been amended to correspond with the changes made in SBA regulations or in Section 1651 of the 2013 NDAA. Many federal contracting officers operate under the assumption that current FAR clauses govern until they are amended, while the Small Business Administration takes the position that

¹ Pub. L. 112-239, § 1651.

² 81 Fed. Reg. 34243.

³ *Id.*

their regulations take precedence, even if the FAR clauses have not been updated. This has led to significant confusion within the government contracting community; contractors are unsure whether they should comply with the SBA regulation which follows Section 1651 of the 2013 NDAA, the current FAR clause which does not, or try their best to comply with a hybrid of both.

Until recently, the FAR Council intended to publish this rule (Case Number 2016-011) modifying the limitations on subcontracting as an "interim final rule," which becomes effective upon publication throughout the public comment period. However, in the FAR Council's most recent Open Cases Report,⁴ as of August 31, 2018, the FAR Council downgraded this rule to a "proposed rule," which is currently under review by the Office of Information and Regulatory Affairs. Unlike an interim final rule, a proposed rule does not take effect when issued. This proposed rule status means that the changes implemented through Section 1651 of the 2013 NDAA and the SBA's final rule will take significantly longer than anticipated to take effect and be reflected in the FAR, extending and exacerbating this period of confusion for small contractors and contracting officers.

Given that nearly six years have lapsed since the 2013 NDAA was signed into law and two years since SBA's final rule was issued, we respectfully request a status update on FAR Case Number 2016-011, an estimated timeline of completion, and an explanation as to why this case was changed from an "interim final rule" to a "proposed rule." The confusion caused by this long delay undermines the intent of Section 1651 of the 2013 NDAA and swift resolution of Case Number 2016-011 is imperative.

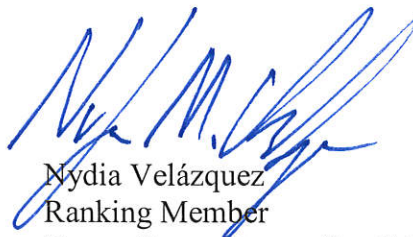
Please respond by September 28, 2018 with this update. If you have any questions, please contact Vivian Ling, counsel to the majority staff at (202) 225-5821, Halimah Locke, counsel to the minority staff at (202) 225-4038, or David Allen, military legislative assistant to Congressman Mo Brooks at (202) 225-4801.

Sincerely,



Steve Chabot
Chairman

House Committee on Small Business



Nydia Velázquez
Ranking Member

House Committee on Small Business

⁴ DEPT. OF DEFENSE, DEFENSE ACQUISITION REGULATIONS SYSTEM, OPEN FAR CASES AS OF 8/31/2018, available at <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>.



Mo Brooks
Member of Congress
House Committee on Armed Services



Trent Kelly
Member of Congress
House Committee on Small Business
House Committee on Armed Services



Steve Knight
Chairman
House Committee on Small Business
House Committee on Armed Services



Stephanie Murphy
Ranking Member
House Committee on Small Business
House Committee on Armed Services



William Shuster
Member of Congress
House Committee on Armed Services



Scott DesJarlais
Member of Congress
House Committee on Armed Services



Walter Jones
Member of Congress
House Committee on Armed Services



Bradley Byrne
Member of Congress
House Committee on Armed Services

cc: Matthew C. Blum, Associate Administrator, Office of the Deputy Administrator, Office of Federal Procurement Policy, Office of Management and Budget
Shay D. Assad, Director, Defense Pricing/Defense Procurement and Acquisition Policy
Monica Y. Manning, Assistant Administrator for Procurement, NASA Headquarters
Jeffery A. Koses, Senior Procurement Executive, General Services Administration
Jonathan Slemrod, Associate Director for Legislative Affairs, Office of Management and Budget
Michael Hershey, Associate Administrator for Congressional and Legislative Affairs, Small Business Administration