

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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CODSIA Case 2018-007
February 4, 2019

Office of Policy, Planning and Liaison
ATTN: Ms. Brenda Fernandez
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

REF: RIN 3245-AG86; SBA Proposed Rule, “National Defense Authorization Acts of 2016 and 2017, Recovery Improvements for Small Entities After Disaster Act of 2015, and Other Small Business Government Contracting”

Dear Ms. Fernandez:

The Council of Defense and Space Industry Associations (CODSIA)¹ is pleased to offer our comments in response to the Small Business Administration’s request for comments on the subject proposed rule, focusing on that portion of the rule relating to a material breach of a subcontracting plan.

Applicability of this Rule and Relationship to the Federal Acquisition Regulation (FAR)

This rule, like many SBA contracting rules, requires implementation through changes to the FAR. SBA should recognize this in its rulemaking and explicitly state that the obligations contained in any final SBA rule do not apply to contractors until a FAR rule adopting any new requirements has been promulgated and inserted into applicable contracts. This would avoid significant uncertainty by both the Government and industry as to what SBA requirements apply and when they come into effect. It should be made clear that contracting officers cannot make determinations that a contractor has breached contractual obligations based on the requirements of this SBA rule until subsequent changes to the FAR take effect.

Preamble to the Rule

The language in the preamble of this portion of the proposed rule needs to be made part of any final addition to Section 125.3 and revised to make clear the following:

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), Information Technology Alliance for Public Sector (ITAPS), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

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- Determinations of bad faith require documentation of specific facts that show a substantial failure on the part of the contractor in meeting its obligations in small business subcontracting plans. Contracting officers should not make determinations without first notifying contractors of the facts as the contracting officer believes them to exist. The contracting officer should cite specific facts and citations of authority to explain the basis for the determination. Prior to issuing a final determination, the contracting officer must consider and address any information provided by the contractor before making a determination.
- Contracting officers should consult legal and other advisors as needed prior to making determinations of bad faith.
- Contractors should have a meaningful opportunity to rebut allegations of bad faith and be able to appeal determinations by the contracting officer that bad faith has occurred.

The Importance of Goals

The SBA final regulations, and the eventual implementing FAR rule, should contain explicit direction to contracting officers to ensure that goals negotiated with contractors are realistic and achievable under the circumstances of a given proposal or contract. Contractors sometime receive pressure to meet arbitrary goals and accepting a goal that the contractor does not believe it can realistically achieve would potentially constitute 'bad faith.'

Specific Comments to Section 125.3

Paragraph (d)(3)(i)(B). Simply meeting, failing to meet or exceeding goals is not evidence, or is at best only partial evidence, of 'good' or 'bad' faith. There are many reasons why a contractor, despite its good faith effort, may fall short in one or more of its goals. Among these reasons can be things entirely outside of the contractor's control, such as delayed awards by the government, contract terminations, or changes to contract requirements. Goals, after all, are just that, and cannot be measured as absolute contract requirements.

Paragraph (d)(3)(i)(C). We recommend that this section be changed to read as follows: "The contractor substantially fulfilled all of the requirements of its subcontracting plan." The addition of the word "substantially" will avoid the implication that a small error could be the basis for concluding a contractor did not achieve every element of a plan.

Paragraph (d)(3)(ii)(E). We recommend this paragraph be deleted. We do not believe there is evidence that contractors enter into subcontracting plans and then implement procedures to frustrate those objectives. In addition, the paragraph introduces a highly subjective test for determining the contractor's ultimate intent.

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Paragraph (d)(3)(ii)(F). We recommend that further guidance be added to make clear that substantiated findings require more than just the opinion of an auditor. For a finding to be substantiated, there should be documented facts and a written determination of the validity of the finding, along with an opportunity for the contractor to rebut the findings and provide reasons why the finding is not correct.

Paragraph (d)(3)(ii)(H). The reference to contracting officer approval is misplaced. Approval is not required of the contractor. Only notice by the Contractor is required. Also, the notice required to be provided is only required to be provided prior to final payment under the affected contract.

Paragraph (d)(11). This provision should be changed to add appropriate due process controls to ensure that a contractor has an opportunity to rebut, and appeal determinations of breach or bad faith (see comments above under the paragraph entitled "Preamble to the Rule").

Thank you for your attention to these comments. Please contact Ryan Ouimette of the Aerospace Industries Association (AIA) at (703) 358-1086 or ryan.ouimette@aia-aerospace.org with any questions regarding the comments herein.

Sincerely,



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Vice President National Security
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