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General Services Administration
Regulatory Secretariat Division (MVCB)
ATTN: Lois Mandell
1800 F Street NW, 2nd Floor
Washington, DC 20405

RE: FAR Case: 2018-003; RIN: 9000-AN61

Dear Ms. Mandell,

On behalf of the Associated General Contractors of America (“AGC”), I would like to thank the Federal Acquisition Regulation (FAR) Council for the opportunity to comment on this important rulemaking that implements Section 1614 of the National Defense Authorization Act for Fiscal Year 2014¹ (“Sec. 1614 of 2014 NDAA”). Under that provision, Congress directed federal agencies to allow non-small prime contractors with individual prime contracts to take credit for small business subcontracts at *all tiers*—a change from only *first-tier* small business subcontracts—towards small business subcontracting goals. While AGC applauded the effort by Congress to make this critical change to provide further growth and transparency in small business contracting, the association has significant concerns with the FAR Council’s proposed approach to implementing that statutory provision.

For background, AGC is the leading association for the construction industry, representing both union and open shop prime and subcontractor/specialty construction companies—more than 80 percent of which are small businesses of 20 or fewer employees. AGC represents more than 27,500 firms including over 6,500 of America’s leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 89 chapters in all fifty states, the District of Columbia and Puerto Rico. AGC contractors are engaged in the construction of the nation’s commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water

¹ Public Law No: 113-66

conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

As alluded to above, AGC has a number of concerns about the proposed requirements to implement this new approach and recommends that the FAR Council revise the proposed rule to align with Sec. 1614 of 2014 NDAA. AGC fears the FAR Council's proposed rule could force construction contractors to leave the federal market, thus reducing competition and driving up the cost of doing business with all federal construction agencies. These concerns arise from two provisions in the proposal:

- The establishment of a second set of small business goals for lower-tier subcontractors; and
- The degree to which prime contractors—and subcontractors through flow-down requirements—must monitor or be responsible for subcontractor compliance with subcontracting plans, among other things.

As such, AGC urges the FAR Council—in conjunction with the U.S. Small Business Administration (“SBA”) as appropriate—to significantly revise the proposed rule to align with Sec. 1614 of 2014 NDAA and not create a second additional small business goal for lower-tier subcontractors.

I. FAR COUNCIL’S PROPOSAL TO ESTABLISH TWO SETS OF SMALL BUSINESS SUBCONTRACTING GOALS EXCEEDS ITS STATUTORY AUTHORITY; DEPARTS FROM SBA’S STATED GOALS; AND THREATENS TO UPEND THE ENTIRE FEDERAL CONSTRUCTION MARKETPLACE

For the reasons articulated below, AGC holds that the FAR Council must revise its proposal to include only one small business subcontracting goal in the final rule: one that applies to all small business subcontracts at all tiers. If the FAR Council fails to do that, it should—at a minimum—consider making contractor compliance with the lower-tier small subcontracting goal optional and without agency preference, while devising a fair and coherent reporting system and identifying clear “good faith efforts” for which contractors could realistically comply. It is important that there remains flexibility in prime contractors’ ability to develop plans for small business participation.

a. The FAR Council’s Proposal to Establish Two Sets of Small Business Subcontracting Goals Exceeds the Authority Granted to it Under Section 1614 of the 2014 NDAA

Sec. 1614 of 2014 NDAA enacted a major reform: allowing prime contractors to “receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (6)(D).” However, the statute neither explicitly nor implicitly requires the SBA to establish two separate small business subcontracting goals: (1) one for the first-tier subcontracts; and (2) another for subcontracts below the first subcontracting tier. Instead, the FAR Council—as the SBA before it—has exceeded the statutory authority for granted to it in establishing two separate small business subcontracting goals.

As it stands, contractors are required to negotiate with the procurement authority on a subcontracting plan which incorporates the information prescribed in 15 U.S.C § 637(d)(6). Paragraph (d)(6) explicitly details what must be included in a subcontracting plan, including the inclusion of percentage goals for the utilization small business subcontractors at (d)(6)(A). Section 1614 of the NDAA states that “[n]othing . . . shall abrogate the responsibility of a prime contractor to make a good-faith effort to achieve the first tier small business goals under [15 U.S.C § 637(d)](6)(A).”

Sec. 1614 of 2014 NDAA, therefore, retains the currently existing regulatory method of establishing small business subcontractor goals based on subcontracts awarded at the first-tier of subcontracting, but now allows for credit towards those goals to be received through subcontracts at all tiers of subcontracting. Paragraph (d)(6)(A), remember, establishes the inclusion of percentage goals for the utilization of small business subcontractors. It does not express how those goals are established—either at the first tier or lower-tiers.

Sec. 1614 of 2014 NDAA, however, made it clear that those goals are established at the first-tier in its language stating that the small business goals under Paragraph (d)(6)(A) are “first tier small business goals.” Prior to Sec. 1614 of 2014 NDAA, 15 U.S.C. § 637 made no reference as to how to establish those small business subcontracting goals or how to credit small business subcontracts towards that goal. Rather, the decision to count first-tier small business subcontracts towards these goals was a regulatory agency decision.² Through Sec. 1614 of 2014 NDAA, Congress explicitly states that these small business subcontracting goals: (1) are established for and based on the first-tier subcontracting opportunities—in an effort to ensure good faith prime contractor efforts; and (2) small business subcontracts at the first or any tier count towards achieving those goals.

² See Federal Acquisition Regulation (FAR) clauses 52.219-8 (Utilization of Small Business Concerns) and 52.2199 (Small Business Subcontracting Plan).

Consequently, the FAR Council—as the SBA in its preceding rulemaking—has incorrectly interpreted Sec. 1614 of 2014 NDAA and the existing provisions within the Small Business Act by effectively establishing two small business subcontracting goals—one at the first tier and one at lower-tiers. This FAR Council proposed rule furthers that misinterpretation and, thus, oversteps its statutory authority under Sec. 1614 of 2014 NDAA. As such, the FAR Council must put forth a final rule with one goal for all subcontracting tiers.

Further, the FAR Council’s proposal changes contract performance evaluation criteria so that the new lower-tier goals will now be included in the performance evaluations. The proposed section 42.1503 requires “...an individual subcontracting plan that includes lower-tier goals, the contractor’s combined performance under the first-tier and lower-tier goals...” If the FAR Council makes such a change, it will effectively raise the small business subcontracting goals established by Congress in clear contradiction of Sec. 1614 of 2014 NDAA.

b. The FAR Council’s Proposal to Establish Two Sets of Small Business Subcontracting Goals Departs from SBA’s Stated Goals

The FAR Council’s proposed rule establishes two tiers of small business goals for the prime contractor to comply. Prime contractors will be responsible for two sets of goals, first-tier and all lower-tier, in the subcontracting plan. This approach goes against the SBA’s own stated goal to demonstrate agency contract dollars to small business in the aggregate, not in specific tiers. SBA’s website³ confirms that the agency in charge of protecting small business does not separate the small business goals by a tier system. The goals should be based on the maximum practicable opportunities for small businesses in the performance of the contract as subcontractors or suppliers regardless of the subcontractor’s tier. The maximum practicable opportunities for small business subcontracts at all tiers will—generally speaking—always be greater than the maximum practicable opportunities at the first-tier.

II. The FAR Council’s Proposal to Establish Two Sets of Small Business Subcontracting Goals Threatens to Upend the Federal Construction Market Resulting from its Compliance Impracticalities

3 The government works to make sure small businesses get at least 23 percent of all federal contracting dollars.” Retrieved on August 22, 2019 from: <https://www.sba.gov/federal-contracting/contracting-assistance-programs>

Again, AGC holds that the FAR Council must revise its proposal to include only one small business subcontracting goal in the final rule: one that applies to all small business subcontracts at all tiers. While the discussion above related to the FAR Council and SBA exceeding their statutory authority and even—in the case of the SBA—departing from its stated agency objectives in establishing two goals, here AGC will bring to light the significant compliance impracticalities that such a move would bear on the federal construction industry and resulting marketplace. These arguments further underscore AGC’s case against having a separate lower-tier small business subcontracting goal.

That stated, if the FAR Council fails to remove that lower tier goal, it should—at a minimum—consider making contractor compliance with the lower-tier small subcontracting goal optional and without agency bid preferences for doing such, while devising a fair and coherent reporting system and identifying clear “good faith efforts” for which contractors could realistically comply. It is important that the final rule does not create a second set of small business goals for lower-tier subcontractors, including any additional separate socioeconomic contracting goals.

As such, AGC would propose that the FAR Council consider a phased and contingent implementation of a lower-tier goal through first a small pilot program across several industries. Contractor participation would be optional, and the pilot’s purpose would be to determine if the establishment of such a lower-tier goal—and the various requirements associated therewith—would not counter economy and efficiency in federal contracting. If the results of the pilot reflect that such a goal did not further economy and efficiency in federal contracting, the FAR Council would then establish one goal for all tiers of small business subcontracting. Such an approach would allow for data-driven decisions that are in the interests of effective and efficient procurement.

a. Monitoring Subcontractors Compliance

The FAR Council must ensure that any prime contractor requirements to police subcontractors’ individual subcontracting plans must not overly burden contractors. The FAR proposed rule needs further clarity as how prime contractors are expected to comply. The proposed section 19.704 closely mirrors the language in Sec. 1614 of 2014 NDAA. In that paragraph, however, the FAR Council’s proposed rule neither defines, nor provides more clarity on a host of new requirements for prime contractors. Under the proposed rule, prime contractors must do all of the following:

1. Review and approve subcontractors' subcontracting plans;
2. Monitor subcontract compliance with subcontractors' approved subcontracting plans;
3. Ensure that subcontracting reports are submitted by their subcontractors when required;
4. Acknowledge receipt of their subcontractor reports;
5. Compare the performance of their subcontractors to subcontracting plans and goals; and
6. Discuss performance with subcontractors, when necessary, to ensure their subcontractors make a good faith effort to comply with their subcontracting plans.

The FAR Council's proposed rule will place these new burdens directly on prime contractors. As such, AGC urges the FAR Council to further clarify actions that are enough to meet each requirement. For example, what prime contractor actions sufficiently meet the "monitoring" of subcontract compliance with approved subcontracting plans? Would a simple email or letter suffice for acknowledgment of receipt of subcontractor reports? When would it be "necessary" for a prime contractor to discuss performance with subcontractors concerning their subcontracting plans? Does a discussion require in-person meetings or would electronic or written correspondence suffice?

Additionally, the term "subcontracting reports" used throughout paragraph 19.704 is undefined. Are these reports from a subcontractor to a prime contractor about their subcontracting plan performance? Should prime contractors assume that they will have to establish subcontracting plan reporting systems or forms through which their subcontractors must respond on a routine basis? If so, what timely basis—i.e., annually, quarterly or monthly—would satisfy the monitoring component of these requirements? AGC seeks further clarity on these reports.

Following along the lines of the questions above that must be clarified, AGC recommends that the FAR Council clearly articulate how prime contractors should review, approve and monitor their subcontractors' individual subcontracting plans. Such an explanation may include, but may not be limited to, a prime contractor's establishment and exercise of a monitoring program whereby the prime contractor receives reports from subcontractors concerning their subcontracting plans. Such reports may include information exhibiting statistics or narrative of how the subcontractor is or is not meeting its small business subcontractor goal. The SBA publication entitled "A Handbook for Small Business Liaison Officers – June 2010" that provides a good source for information and examples of how contractors may meet

good faith requirements.⁴ AGC suggests that the FAR Council reference that handbook—and the examples used for good faith—as a way to illuminate the requirements within 19.704.

b. Two Sets of Small Business Goals Are Impractical and Will Create Further Barriers to Entry in the Federal Construction Marketplace

AGC is concerned that the new requirements could negatively change the way prime construction contractors and subcontractors engage in business. If prime contractors are required to approve or acknowledge the lower-tier goals in addition to submitting its own Individual Subcontracting Report (ISR) with combined effort, the subcontractor would have to provide all required data—contract values, certification forms, etc.—to the prime prior to the reporting due date.

AGC suggests that the FAR Council reference the GAO report⁵—and the bidding process—as a way to understand the limitations on prime construction contractors’ ability to submit subcontracting plans. As the report explains, the process the prime contractor goes through to submit a proposal can be chaotic. According to the report, subcontractors, in order to remain competitive, often wait to submit their bids to the prime contractor until just minutes before the prime contractor is required to submit its proposal to the agency, which allows minimal time for the prime contractor to ensure that the bids are reasonable and cover the required scope of work.

For a large project, the subcontractors’ bids can number in the hundreds. In fact, one prime contractor estimated that for one large project it may review approximately 500 bids to prepare its proposal, which will include the prime’s subcontracting plans. After a prime contractor is awarded a construction contract, it negotiates with first-tier subcontractors on the scope of work and price before awarding. The solicitation process that GAO describes underscores the risks that prime contractors undertake when bidding on federal work. It is important that the government allows for robust

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[https://www.sba.gov/sites/default/files/Small_Business_Liaison_Officer_\(SBLO\)_Handbook_6_2010.pdf](https://www.sba.gov/sites/default/files/Small_Business_Liaison_Officer_(SBLO)_Handbook_6_2010.pdf)

⁵ FEDERAL CONSTRUCTION SUBCONTRACTING: Insight into Subcontractor Selection Is Limited, but Agencies Use Oversight Tools to Monitor Performance

GAO-15-230: Published: Jan 29, 2015. Publicly Released: Jan 29, 2015.

flexibility in the prime’s subcontracting plans. Adding a second set of goals for lower-tier subcontracting while threatening impact to the prime contractors’ performance rating, and potentially subject to liquidated damages⁶, would remove the flexibilities prime contractors—and even their first-tier subcontractors—have in assembling the most qualified team for the construction project.

AGC fails to see the logic behind creating a new, lower-tier small business subcontracting goal, when simply allowing the prime contractor to count the aggregate small business subcontracting dollars at all tiers will: (1) generate a more accurate account of small business participation on a federal construction project; (2) reduce the temptation and/or occurrence(s) of illegal “pass through” first-tier subcontractors; (3) promote partnerships by first-tier subcontractors with technically competent small business, lower-tier subcontractors; (4) enhance partnering efforts between prime and sub-tier contractor outreach and networking; and (5) retain the current eSRS reporting platform and procedures.

c. Two Sets of Goals Could Lead to Further Goals for Other Socio-Economic Programs at Lower Tiers, Further Complicating Compliance

AGC is concerned that the Government will eventually use the counting of lower-tier goals to expand separate goals at different tiers and/or further expand existing socio-economic goals into the lower-tier arena (e.g., HUBZone, 8(a), so forth). Nothing in the FAR proposed rule prevents federal agencies from adding additional goals to the lower-tier subcontractors. It is possible that lower-tier small business goals could also lead to goals within the lower-tier arena to goals of existing socio-economic set-aside programs among the different federal agencies. This could even further restrict the flexibility prime contractors—and their subcontractors—have in choosing the most qualified firms for the federal construction project.

It is critical that the final rule does not create a second set of small business goals for lower-tier subcontractors, including any additional separate socioeconomic contracting goals as prime contractors will face a nearly impossible task of identifying lower-tier subcontractors that meet all the various set-aside goals come bid-time (as elucidated in the GAO report discussed above). The Government’s costs will increase because prime contractors will have even less flexibility in forming their team of contractors for the project, as it would force contractors to select from limited options for key roles. Any new requirement along those lines may create a significant barrier in the federal construction market.

⁶ FAR 19.19.705-7(b)

d. Establishing Percentage-Based Lower-Tier Goals on Construction Contracts May be Arbitrary at Worst or Uninformed at Best

As previously stated, AGC urges the FAR Council to significantly revise the proposed rule. However, if the proposed rule is unchanged it is important that the lower-tier goal be based on hard data in any given market. For example, many localities have widely different construction markets and subcontractor availability. The number of small business subcontractors available in Fargo, North Dakota, can differ from those available in Philadelphia, Pennsylvania. What system will be used to gather information on lower-tier subcontractors are available in a given area to establish such goals on construction projects? Will sources sought notices be sent to lower-tier subcontractors? How long would gathering this information delay existing procurements?

While some information may exist in contracting platforms, like in eSRS, the Government may not have existing, relevant data on the availability of lower-tier subcontractors among the different markets where the federal government utilizes construction services across the country. Absent such hard data—or the generation there of—any goals for lower-tier small business subcontractors may be arbitrary at worst and uninformed at best.

If the FAR Council fails to revise the rule or make contractor compliance with the lower-tier small subcontracting goal optional and without agency bid preferences for trying to achieve it, then it should proceed to consider a pilot program prior to implementing the rule across industries. A pilot program would serve two benefits in this scenario: (1) It would allow the government to see whether or not this rule actually benefits small businesses and reflects true small business participation in federal procurement; and 2) Would help determine if there is economy and efficiency in the compliance processes set forth under this proposal.

e. Electronic Subcontracting Reporting System (eSRS)

AGC agrees with FAR Council that the federal government use the Electronic Subcontracting Reporting System (ESRS) to allow for the submission and retrieval of this data and include that in a final rule. AGC does not recommend the creation of a completely new electronic system—or prime contractors creating individual, in-house data systems—for gathering non-small subcontractor plan data, but rather suggests improving the ESRS to minimize costs to the government and contractors. As it stands, non-small subcontractors already use ESRS to report their small business

plan information; and federal agencies— not prime contractors—may currently take credit for that information.

The prime contractor should be able to receive credit for the goals that were established in their approved subcontracting plan. The prime contractor could be able to flow down those initial goals to small business subcontractors which in turn would have to provide their lower-tier data (contract amounts and size classifications) to the prime. For example, subcontractors could have the option to report the actual performance in eSRS under the prime contractor's contract number and all the dollars would roll up into one master reporting. Upon receipt of that information from the other than small subcontractor, the prime contractor can record the data in the first-tier ISR. The tracking methodology could be tracked monthly but will require a significant increase in the amount of monitoring by the other than small contractor. They will have to be responsible for retrieving the lower-tiers size classifications as well. There is currently no government form for certifying a business's classification. AGC recommends that there should be a standardized government "self-certification" form that subcontractors at all levels are required to complete and return to the prime contractors.

CONCLUSION

AGC appreciates the opportunity to share our insights with you and to help advance our common goals of increasing economy and efficiency in federal procurement. Again, AGC strongly urges the FAR council to significantly revise the proposed rule in order to align with the current statute and the goals of SBA. If the FAR Council fails to do that, it should—at a minimum—consider making contractor compliance with the lower-tier small subcontracting goal optional and without agency preference, while devising a fair and coherent reporting system and identifying clear "good faith efforts" for which contractors could realistically comply. If the FAR Council moves forward ignores the AGC's recommendations, the FAR Council should allow a pilot program prior to mandating compliance industry-wide. If you would like to discuss this matter with us further, please do not hesitate to contact AGC of America.

Submitted by:

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