

ALERT

FAR Updated to Include Useful Guidance on “Good Faith” Compliance with Small Business Subcontracting Plans

August 13, 2021

WHAT: The Federal Acquisition Regulatory (FAR) Council issued its final rule to implement Small Business Administration (SBA) rules that provide examples to guide contracting officers in assessing whether large business prime contractors have made “good faith” efforts to comply with their small business subcontracting plans. For example, the FAR now states that exceeding subcontracting goals in one quarter despite failing in another or participating in the mentor-protégé program are indicators of a good faith effort. Indicators of a failure to make a good faith effort include failing to pay small business contractors in accordance with subcontract terms. Like the SBA rules, the FAR now requires that indirect costs be included in commercial subcontracting plans and reported on summary subcontract reports (SSRs).

WHEN: The final rule was issued August 10, 2021, and is effective September 10, 2021.

WHAT DOES IT MEAN FOR INDUSTRY: Although these examples have been in SBA’s regulations for several years, contracting officers are likely to give them greater attention now that they are explicitly listed in FAR 19.705-7. It remains the case that failure to make “good faith” efforts can result in liquidated damages under FAR 52.219-16. Although this clause has been seldom invoked by the government, including these specific examples in the FAR could prompt contracting officers to consider exercising this authority more frequently if they believe a contractor is not making a “good faith” effort. At the same time, however, contractors can now point contracting officers to these examples in the FAR when attempting to demonstrate that they have

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indeed made “good faith” efforts to comply with their plans even if they fell short of reaching their subcontracting goals during a particular period.