PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 8 **NUMBER 1** **January 2022**

Editor's Note: Subcontracting Rules
Victoria Prussen Spears 1

Moving the Goalposts for Small Business Contractors: The FAR Codification of the New Limitation on Subcontracting Rules
Michael McGill and Thomas A. Pettit 3

Opportunities Abound After Infrastructure Investment and Jobs Act Becomes Law
Nancy A. Fischer, Aimee P. Ghosh, Benjamin J. Cote, Elizabeth Vella Moeller, Craig J. Saperstein, Moushami P. Joshi and Johnna Purcell 13

Pentagon Scraps Current Cybersecurity CMMC Program in Favor of CMMC 2.0, Which Promises to Ease the Burden of Participating in Government Contracts
Meghan D. Doherty, Michael R. Rizzo and Brian E. Finch 18

Navigating the Federal Contractor COVID-19 Vaccine Mandate and Workplace Safety Protocols
Kristen E. Ittig, Joshua F. Alloy and Thomas A. Pettit 21

Top 10 Takeaways from Federal Contractor and Subcontractor Vaccine Mandate
David T. Hickey and Amba M. Datta 31

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:
Heidi A. Litman at 516-771-2169
Email: .... heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call .... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:
Customer Services Department at .... (800) 833-9844
Outside the United States and Canada, please call .... (518) 487-3385
Fax Number .... (800) 828-8341
Customer Service Website .... http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call
Your account manager or .... (800) 223-1940
Outside the United States and Canada, please call .... (937) 247-0293

Library of Congress Card Number:
ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

(2022–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF
STEVEN A. MEYEROWITZ
President, Meyerowitz Communications Inc.

EDITOR
VICTORIA PRUSSEN SPEARS
Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS
MARY BETH BOSCO
Partner, Holland & Knight LLP

PABLO J. DAVIS
Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.
Partner, Blank Rome LLP

J. ANDREW HOWARD
Partner, Alston & Bird LLP

KYLE R. JEFCOAT
Counsel, Latham & Watkins LLP

JOHN E. JENSEN
Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA
Partner, Venable LLP

MARCIA G. MADSEN
Partner, Mayer Brown LLP

KEVIN P. MULLEN
Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON
Partner, Nixon Peabody LLP

STUART W. TURNER
Counsel, Arnold & Porter

ERIC WHYTSELL
Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON
Partner Of Counsel, Dinsmore & Shohl LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Moving the Goalposts for Small Business Contractors: The FAR Codification of the New Limitation on Subcontracting Rules

By Michael McGill and Thomas A. Pettit*

The Federal Acquisition Regulation Council revised Federal Acquisition Regulation 52.219-14, Limitations on Subcontracting, and related sections to address an inconsistency between that clause and the corresponding Small Business Administration regulation. This article addresses many questions that arise in this context, including for mentor-protégé joint ventures.

The Federal Acquisition Regulation Council revised Federal Acquisition Regulation ("FAR") 52.219-14, Limitations on Subcontracting, and related FAR sections to address an inconsistency between that clause and the corresponding Small Business Administration ("SBA") regulation at 13 C.F.R. § 125.6.[1] Limitations on subcontracting limit the percentage of work small business prime contractors performing covered contracts can subcontract to large businesses. These restrictions apply to contracts or portions of contracts that an agency has reserved or set aside for small-businesses, including orders under certain multiple award contracts, and that are expected to exceed the simplified acquisition threshold (currently $250,000), except contracts set aside based on socioeconomic status, in which case limitations on subcontracting apply regardless of value.[2]

---

* Michael McGill is a partner at Arnold & Porter Kaye Scholer LLP representing clients across virtually all industry sectors that do business with government customers (including aerospace and defense, technology, healthcare, pharmaceuticals, energy and professional consulting) and in nearly all aspects of procurement and contracting law. Thomas A. Pettit is an associate at the firm representing government contractors across industry sectors facing a range of government contracting challenges, including litigation, transactions, cybersecurity compliance and investigations. The authors may be reached at mike.mcgill@arnoldporter.com and thomas.pettit@arnoldporter.com, respectively.

[1] SBA promulgated 13 C.F.R. § 125.6 in 2016 pursuant to Section 1651 of the National Defense Authorization Act ("NDAA") for Fiscal Year 2013 (15 U.S.C. § 657s). The Department of Defense issued a class deviation in 2019 to align its contracting policies with 13 C.F.R. § 125.6, https://www.acq.osd.mil/dpap/policy/policyvault/USA001048-19-DPC.pdf.

[2] FAR 19.507(e); FAR 19.505(a). Although FAR 52.219-14 is the principal clause, other FAR clauses specific to certain socioeconomic status contain similar limitations on subcontracting requirements. FAR 52.219-13(d), *Notice of HUBZone Set-Aside or Sole Source Award*; FAR 52.219-27(d), *Notice of Service-Disabled Veteran-Owned Small Business Set-Aside*; FAR 52.219-29(d), *Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns*; FAR 52.219-30(d), *Notice of Set-Aside for, or Sole Source Award to,*

Historically, limitations on subcontracting clauses specified the percentage of work that the small business prime contractor must perform directly, but SBA loosened this policy to allow the prime contractor to satisfy the limitations through work performed directly by similarly situated entities. The new FAR rule aligns with this approach to the limitations on subcontracting. Understanding these requirements is critical to structuring teams and subcontracting relationships to compete for and win small business set-aside contracts and to successfully perform them. Small businesses that fail to comply with these requirements face protest risks, exposure to civil and criminal liability, and potential suspension or debarment.

This article addresses many questions that arise in this context, including for mentor-protégé joint ventures ("JVs"), which must comply not only with FAR 52.219-14 but also SBA's workshare obligations.

WHAT IS A SIMILARLY SITUATED ENTITY?

SBA defines "similarly situated entity" as "[a] subcontractor that has the same small business program status as the prime contractor."[3] Whether a concern qualifies for a small business set-aside contract depends on whether it meets the SBA's size standards and requirements to participate in the relevant SBA socioeconomic status program, if any. A concern's size (i.e., small or other than small) is determined by whether the concern's average annual receipts or employee headcount are below the SBA's size standard for the relevant National Industry Classification System ("NAICS") code.[4] Solicitations identify the applicable NAICS code(s), and prime contractors in turn assign NAICS codes to subcontracts. SBA's socioeconomic programs for which contracts may be set aside include service-disabled veteran-owned small business ("SDVOSB"), women-owned small business ("WOSB"), Historically Underutilized Business Zones ("HUBZone") and 8(a) Business Development program participants.

A plain reading of SBA's definition of similarly situated entity indicates that the subcontractor must meet the size and socioeconomic program statuses that qualified the prime contractor for award. SBA's definition includes examples confirming this, explaining, for instance, that if the contract imposes "a HUBZone requirement," similarly situated entity means "a subcontractor that is a certified HUBZone small business concern."[5] Similarly, for procurements set aside for SDVOSBs, a subcontractor is similarly situated if it "is a

Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

[3] 13 C.F.R. § 125.1.

[4] *Id.* at § 121.101, *What are SBA size standards?*

[5] *Id.* at § 125.1.

self-certified SDVO[SB]," and so on.[6] SBA also explains in 13 C.F.R. § 125.6(c) that a prime contractor cannot count a first-tier subcontractor as similarly situated entity if the subcontractor no longer qualifies as small, or for the socioeconomic status program.

While the text of the FAR final rule is consistent with this definition,[7] the FAR Council's preamble to the final rule and use of only one example (as opposed to SBA's use of several examples) could create confusion for a relatively straightforward concept. In response to a comment seeking clarification of the definition in the FAR Council's proposed rule, the FAR Council stated:

> SBA's regulation at 13 CFR 125.1 states that "for small business set-aside, partial set-aside, or reserve" a similarly situated entity is "a subcontractor that is a small business concern." Therefore, the definition of "similarly situated entity" in this final FAR rule has been revised to clarify that, *for a small business set-aside, a similarly situated entity is a small business, without regard to socioeconomic status*.[8]

In FAR 19.001, the FAR Council defines a similarly situated entity as a concern that "(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to socioeconomic status); and (2) Is considered small for the size standard under the NAICS code the prime contractor assigned to the subcontract."[9] The FAR Council presumably included this language to clarify that where small business set-aside procurements are not set aside for specific socioeconomic programs, a subcontractor need only qualify as small under the applicable NAICS code. That is the only reading that aligns with SBA's definition, and any other reading would render the first prong of the definition and reference to "same small business program status" superfluous.

CAN THE PRIME CONTRACTOR ACCEPT A SUBCONTRACTOR'S REPRESENTATIONS ABOUT SIZE AND SOCIOECONOMIC STATUS?

Although FAR 52.219-14 is silent on this issue, prime contractors would be wise to follow FAR Subpart 19.7, *The Small Business Subcontracting Program*, which addresses small business subcontracting plans. In many cases, size and socioeconomic statuses are determined based on self-certifications, and prime

---

[6] *Id.*

[7] 86 Fed. Reg. 44233, 44241, 44235 (Sept. 10, 2021).

[8] *Id.* at 44235 (quoting 13 C.F.R. § 125.1).

[9] FAR 19.001.

contractors can often rely upon those self-certifications. However, prime contractors must be careful in this area.

FAR 19.703(a) generally allows prime contractors to rely upon a subcontractor's representations about its size and socioeconomic statuses if the representations are made in SAM or otherwise in writing and the subcontractor certifies that its representations "are current, accurate, and complete as of the date of the offer for the subcontracts." This will not suffice, however, for HUBZone small business status. That is because, unlike other small business statuses (small disadvantaged business, veteran-owned small business and service-disabled veteran-owned small business), a concern must be SBA-certified to qualify as a HUBZone small business.[10] Accordingly, FAR 19.703 provides prime contractors "shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the SAM or by contacting the SBA," including through SBA's Dynamic Small Business Search ("DSBS") system.[11]

Prime contractors should do the same when determining whether a subcontractor or prospective subcontractor qualifies for WOSB or EDWOSB status. As is often the case, the current iteration of FAR 19.703 lags behind SBA regulations, and that now holds true with respect to the FAR's treatment of WOSB and EDWOSB certifications. Historically, small business concerns that participated in the WOSB and EDWOSB programs could self-certify their status.

In May 2020, the SBA issued a final rule,[12] effective July 15, 2020, eliminating self-certification for concerns competing for WOSB and EDWOSB set-aside or sole-source contracts and requiring SBA certification. We would expect the FAR Council to eventually revise FAR 19.703 to require prime contactors to verify WOSB and EDWOSB certifications similar to HUBZone representations. For purposes of limitations on subcontracting, WOSB or EDWOSB prime contractors should confirm that a subcontractor is certified by SBA as a WOSB or EDWOSB before treating the subcontractor as similarly situated.

---

[10] FAR 19.1303(a)–(b) ("Status as a HUBZone small business concern is determined by the Small Business Administration (SBA) in accordance with 13 C.F.R. part 126. If the SBA determines that a concern is a HUBZone small business concern, it will issue a certification to that effect and will add the concern to the List of Qualified HUBZone Small Business Concerns {on the Dynamic Small Business Search ('DSBS') system}. Only firms on the list are HUBZone small business concerns eligible for HUBZone preferences.").

[11] FAR 19.703(d)(1).

[12] https://www.federalregister.gov/documents/2020/05/11/2020-09022/women-owned-small-business-and-economically-disadvantaged-women-owned-small-business-certification.

Prime contractors should take steps to track any changes in subcontractors' size and socioeconomic status. As discussed, SBA's regulations make clear that a subcontractor no longer qualifies as a similarly situated entity if it "ceases to qualify as small or under the relevant socioeconomic status."[13] A prime contractor cannot assume that a subcontractor will retain its size and socioeconomic status for the duration of a contract or program.

To track status changes, prime contractors should consider imposing a contractual requirement on subcontractors claiming size or socioeconomic status to promptly alert the prime contractor of status changes and possibly an accompanying obligation to indemnify the prime contractor for liability resulting from the subcontractor's inaccurate representations or failure to update them. Through these types of subcontract terms, prime contractors can go a long way towards mitigating risks associated with changes in subcontractors' status and exposure to liability for misrepresentations.

HOW DO PRIME CONTRACTORS CALCULATE WORK VALUE PERCENTAGES?

SBA provides detailed regulations on how to calculate percentages for purposes of complying with FAR 52.219-14. Those directives changed the methodology for these calculations. Historically, the calculation focused on the cost of performance, but with these changes, the calculation is now based on the amount paid to the subcontractor. The specific percentage thresholds vary based on the type of contract.

Services Contracts

Historically, FAR 52.219-14 has required small business prime contractors performing set-aside contracts to ensure that its own employees account for at least 50 percent of the cost of contract performance, exclusive of materials costs.[14] Under this final rule, and the FY2013 NDAA, the prime contractor cannot expend more than 50 percent of the amount paid by the government, exclusive of materials costs, on subcontractors that are not similarly situated entities.[15]

Contracts for Supplies or Products

Where a prime contractor holds a small business set-aside contract for supplies or products, the calculation methodology depends on whether the

---

[13] 13 C.F.R. § 125.6(c).

[14] *See, e.g.*, *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1031 (Fed. Cir. 2009) ("The [Limitations on Subcontracting] clause [FAR 52.219-14] requires an offeror to agree that at least 50% of its personnel costs under the contract will be based upon work of its own employees.").

[15] 15 U.S.C. § 657s(a)(1); FAR 52.219-14(e) (SEP 2021).

prime contractor is the manufacturer of the product. If the prime contractor is the manufacturer, the prime contractor cannot pay more than 50 percent of the amount it receives from the government, exclusive of costs of materials, to firms that do not qualify as similarly situated entities.[16]

If the prime contractor is not the manufacturer, the prime contractor must comply with the nonmanufacturer rule absent a waiver under 13 C.F.R. § 121.406(b)(5).[17] This means that the prime contractor must "supply the product of a domestic small business manufacturer or processer."[18] A product is manufactured or processed by a domestic small business where more than 50 percent of the value of the product is manufactured or produced by domestic small business manufacturers or processers. Where the government acquires multiple products, this calculation is done in the aggregate across all products sold.[19] Where the government issues a waiver for one or more products, the value of the waived items plus the value of items supplied by domestic small business manufacturers or processers must account for at least 50 percent of the value of the contract.[20]

Construction Contracts

For general construction contracts, the prime contractor cannot pay firms that do not qualify as similarly situated entities more than 85 percent of the amount paid by the government, exclusive of materials costs.[21]

Special Trade Contracts

For contracts performed by special trade contractors, the prime contractor cannot pay concerns that do not qualify as similarly situated entities more than 75 percent of the amount paid by the government, exclusive of materials costs.

Mixed Contracts

If a contract requires the contractor to perform or provide a combination of services, supplies and construction, the contracting officer must select one NAICS code. The contractor must comply with the calculation methodology

---

[16] 13 C.F.R. § 125.6(a)(2)(i).

[17] *Id.* at § 125.6(a)(2)(ii).

[18] *Id.*

[19] *Id.* at § 125.6(a)(2)(ii)(A).

[20] *Id.* at § 125.6(a)(2)(ii)(B).

[21] *Id.* at § 125.6(a)(3).

that applies to the work performed under that NAICS code, excluding all other services, supplies, or construction from consideration.[22]

HOW DO LIMITATIONS ON SUBCONTRACTING APPLY TO INDEFINITE-DELIVERY, INDEFINITE-QUANTITY CONTRACTS AND ORDERS?

The application of the limitations on subcontracting to indefinite-delivery, indefinite-quantity ("IDIQ") contracts (or similar umbrella contracts) was unclear for some time. Prior to 2016, there was no rule stating whether limitations on subcontracting applied to individual orders, all orders issued over the duration of the IDIQ contract, or orders issued during each period of the IDIQ contract (e.g., the base period and option periods). In bid protest decisions concerning allegations about an offeror's intent to comply with limitations on subcontracting, the U.S. Government Accountability Office ("GAO") has taken the position that "the entire contract period will be reviewed to determine compliance with the subcontractor limitation"[23] and that compliance is based on the contract as a whole, not individual orders.[24] This view, however, is now outdated.

In a 2016 final rule, SBA revised its regulations to clarify that it is inadequate to focus on the contract as a whole. SBA reasoned that it is inappropriate "for compliance to be determined at the end of the contract terms, including all option periods," as that "would eliminate the ability to monitor compliance during performance and request a proposed corrective action."[25] SBA indicated that compliance should be assessed at least as frequently as each period of the umbrella contract, stating "[w]hen compliance is monitored per base period and each option period, or per order in some cases, it helps ensure that the intended benefits are flowing to the intended recipients," whereas "the remedies would be much more limited" if compliance were determined at the end of performance.[26] Accordingly, 13 C.F.R. § 125.6(e) directs the agency to consider compliance for the base period as well as each option period and for each task order or delivery order set aside for small businesses.

---

[22] *Id.* at § 125.6(b).

[23] *Spectrum Sec. Servs.*, B-297320.2, *et al.*, Dec. 29, 2005, 2005 CPD ¶ 227.

[24] *Lockheed Martin Fairchild Sys.*, B-275034, Jan. 17, 1997, 97-1 CPD ¶ 28 ("Contrary to {the protester's} contention, this clause {FAR 52.219-14}, by its terms, only apply to the contract as a whole and does not require that each delivery order placed under the contract satisfy the requirements of that clause").

[25] 81 Fed. Reg. 34243, 34248–49 (May 31, 2016).

[26] *Id.* at 34249.

HOW DOES FAR 52.219-14 APPLY TO MENTOR-PROTÉGÉ JOINT VENTURES?

One of the more complex issues implicated by FAR 52.219-14 relates to application of the clause to joint ventures. Mentor-protégé JVs must comply with two requirements when performing set-aside contracts: limitations on subcontracting and SBA's protégé workshare requirement. The former, as discussed above, requires the prime contractor or similarly situated entities to comply with the requirements discussed above in Section C. The later requires the protégé to perform at least 40 percent of the work performed by the JV members.[27] The interplay between these requirements is not obvious.

SBA ordinarily deems JV partners to be affiliated for purposes of determining size status. However, SBA provides an exception to that general rule. The exception, codified in 13 C.F.R. § 121.103(h), comes with multiple strings attached, including that the JV must be unpopulated—i.e., the JV may employ persons necessary to operate the JV but may not employ persons to perform contracts other than administrative tasks. This means that where a small business set-aside contract is awarded to such a JV, the JV must subcontract the work performed to its members.

With respect to limitations on subcontracting, it would appear at first glance that the concept of a similarly situated entity would be irrelevant in the JV context because the members would qualify as first-tier subcontractors. The FAR Council addressed this issue in FAR 52.219-14(g), explaining that the limitations on subcontracting work percentages refer to work "performed by the aggregate of the joint venture participants." In other words, although the joint venture members are technically subcontractors, they are treated as prime contractors for purposes of complying with FAR 52.219-14 in this narrow scenario.

SBA illustrated this point in October 2020 through a long overdue clarification of how limitations on subcontracting and protégé workshare requirements operate.[28] As SBA explained, if an agency awards a services contract valued at $10 million to a mentor-protégé JV, FAR 52.219-14 requires the JV to perform 50 percent of the services, or $5 million. If a similarly situated subcontractor performs $2 million of the required services, the JV must perform $3 million of the services to satisfy the 50 percent requirement. The JV

---

[27] 13 C.F.R. § 121.103(h).

[28] 85 Fed. Reg. 66146, 66167 (Oct. 16, 2020).

protégé must then perform $1.2 million of the services, or 40 percent of the $3 million performed by the JV.[29]

This hypothetical can create heartburn for protégés in JVs because, under this hypothetical, the mentor and other entities can perform $8.8 million—or 88 percent—of the work, while the protégé may be left with only 12 percent of the work. It is important for proteges to remember that these requirements represent the minimum threshold. JV agreements can require the parties to ensure that the protégé performs a higher percentage of the work.

WHY SHOULD WE CARE ABOUT THESE RULES?

Misrepresentations relating to and noncompliance with small business program requirements, including FAR 52.219-14, carry significant risks, including bid protests, civil and criminal liability, and suspension or debarment. Although these are serious matters, prudent contractors can limit these risks through a variety of measures.

Bid Protests

There are numerous bid protest decisions addressing allegations that an offeror will not comply with limitations on subcontracting. In general, the Court of Federal Claims ("COFC") and GAO have been reticent to sustain protests challenging an offeror's alleged noncompliance with FAR 52.219-14, considering these arguments to raise matters of responsibility or contract administration unless it is evident from the face of the proposal that the offeror does not intend to comply.[30] Offerors competing for small business set-aside contracts can limit bid protest risk—that is, the risk of exposure to a successful protest from a competitor—by carefully developing teams and crafting proposals to demonstrate compliance with FAR 52.219-14. It is especially important to avoid any statement that could be interpreted as reflecting an intent not to comply with the limitations (unless an offeror cannot comply and intends to intentionally take issue with the requirements, which would be an exceedingly rare occurrence given these are mandatory requirements).

Civil and Criminal Liability

The FCA is one of the government's principal and most powerful tools for enforcing contracts and penalizing contractors perceived as engaging in fraud.

---

[29] *Id.*

[30] *See, e.g.*, *Hyperion, Inc. v. United States*, 115 Fed. Cl. 541 (2014); *Express Med. Transporters, Inc.-Reconsideration*, B-412692.2, Mar. 6, 2017 2017 CPD ¶ 86; *CR/ZWS LLC*, B-414766, B-414766.2, Sept. 13, 2017, 2017 CPD ¶ 288; *TYBRIN Corp.*, B-298364.6, *et al.*, Mar. 13, 2007, 2007 CPD ¶ 51.

The FCA can impose severe financial liability, including trebling of the government's damages and a penalty per false claim (e.g., per invoice). SBA's regulations create a presumption that the government's loss stemming from misrepresentations of size and socioeconomic status is the total amount paid under the contract.[31] Contractors that make a knowing false representation of compliance with FAR 52.219-14 may face FCA liability through a qui tam or Department of Justice action.[32] Additionally, contractors could face criminal liability under Title 18 of the U.S. Code, including 18 U.S.C. § 1001, for making false statements.

Suspension or Debarment

SBA's regulations specifically contemplate—but do not require—suspension or debarment as a potential consequence of size and socioeconomic status representations.[33]

Mandatory Penalties

SBA imposes a mandatory penalty for noncompliance with limitations on subcontracting equal to "the greater of $500,000 or the dollar amount spent, in excess of permitted levels, by the entity on subcontractors."[34]

---

[31] 13 C.F.R. §§ 121.108, 124.501, 124.1004, 125.29, 126.900, 127.700.

[32] *See, e.g.*, *Chapman Law Firm. v. United States*, 63 Fed. Cl. 519 (2005).

[33] 13 C.F.R. § 125.6(g); *see also id.* §§ 121.108, 124.501, 124.1004, 125.29, 126.900, 127.700.

[34] *Id.* at § 125.6(g).