

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

The Honorable Isabel Guzman
Administrator
Small Business Administration
409 3rd Street, SW
Washington, DC 20024

May 19, 2021

Dear Administrator Guzman:

As Ranking Member of the House Committee on Small Business and its Subcommittee on Contracting and Infrastructure, we write to urge the Small Business Administration's (SBA) swift implementation of Section 1614 of Public Law No. 113-66, the National Defense Authorization Act of Fiscal Year 2014 (FY14 NDAA) passed on December 19, 2013, which was reiterated in Section 870 of Public Law No. 116-92, the National Defense Authorization Act of Fiscal Year 2020 (FY20 NDAA).

Under these provisions, Congress permits prime contractors with individual subcontracting plans to take credit towards their subcontracting goals for small business subcontractors operating at *any* tier; this marks a distinct change from the previous rule, permitting prime contractors to take credit towards their subcontracting goals for only *first-tier* subcontractors. Three years after the passage of the FY14 NDAA, the Small Business Administration (SBA) issued a final rule on January 23, 2017,¹ amending its regulations pursuant to Sec. 1614 of the FY14 NDAA. However, this final rule instituted a dual-goal system requiring prime contractors to meet two sets of goals in its individual subcontracting plan; one set consisting of its direct subcontract awards (first-tier subcontracting goals), and another set which includes subcontractors at any other tier by other than small business subcontractors with individual subcontracting plans (lower-tier goals). The rule also required adoption by the Federal Acquisition Regulation (FAR) Council before taking effect.

The FAR Council, two years after the SBA's final rule, issued a proposed rule via FAR Case 2018-003² implementing the SBA's new regulations on June 26, 2019. However, no final FAR rule was adopted prior to the enactment of Sec. 870 of the FY20 NDAA on December 11,

¹ Credit for Lower Tier Small Business Subcontracting, 81 FR 94246 (Dec 23, 2016).

² Federal Acquisition Regulation: Credit for Lower-Tier Small Business Subcontracting, 84 FR 30071 (June 26, 2019).

2019. Sec. 870 of the FY20 NDAA reiterated Congress's intention, as passed in Sec. 1614 of the FY14 NDAA, permitting prime contractors to obtain subcontracting credit towards their subcontracting goals at all tiers, including a new Rule of Construction explicitly prohibiting the establishment of a secondary subcontracting goal as the SBA had done in its 2017 final rule. Due to this new Rule of Construction as passed in the FY20 NDAA, FAR Case 2018-003 was suspended. As of the most recent FAR Open Cases Report issued on February 17, 2021, the status of FAR Case 2018-003 is "01/08/2020 Case on hold pending publication of a proposed rule by SBA."³ Committee staff inquired with SBA regarding the status of this proposed rule on February 9, 2021 and the answer received on February 19, 2021 was that the rule was still being drafted with no discernable timeline as to the expected publication of the proposed rule.⁴

This accounting of the timeline between the passage of the FY14 NDAA and today is necessary to fully comprehend the long wait time federal contractors have had to endure. When originally passed, the provision was hailed by small subcontractors as an incentive for injecting more small businesses into the supply chain at lower tiers, given the potential for increased subcontracting opportunities that add value to prime contractors. For prime contractors, the provision was a welcome way to provide much-needed flexibility in preparing their subcontracting plans and meeting their subcontracting goals. Since this provision does not take effect until the FAR Council issues final rules promulgating the SBA's regulations, prime and subcontractors have been unable to realize the benefits of this law for the past seven years and counting.

We understand and greatly appreciate the heroic efforts of the SBA over the past year prioritizing regulations and guidance relating to COVID relief. Despite the significant challenges faced by the agency, your efforts have led directly to the preservation of millions of American jobs. While providing COVID relief is of the utmost importance, the day-to-day work of the Congress and the SBA must continue as well – small businesses across the nation depend on it. Specifically, regarding the issue presented in this letter, we understand the SBA's 2017 final rule requires only a simple modification complying with the Rule of Construction present in Sec. 870 of the FY20 NDAA, eliminating the dual subcontracting goal system so that only one subcontracting goal for primes need exist. All other important aspects of this provision, and Sec. 1614 of the FY14 NDAA, have already been successfully met by the SBA in its 2017 regulations.

To this end, we respectfully request answers to the following inquiries regarding Sec. 870 of the FY20 NDAA:

1. What is the current status of the SBA's proposed rule, specifically in complying with the Rule of Construction?
2. What is the SBA's timeline in issuing its proposed rule?
3. Are there any other issues which could further delay or prevent implementation?
4. What is the SBA's timeline in issuing its final rule?
5. Any additional comments volunteered by the SBA in relation to this topic.

³ DEPARTMENT OF DEFENSE, *Open FAR Cases as of 2/17/2021* 11 (Feb 17, 2021).

⁴ E-mail from Small Business Administration Congressional & Legislative Affairs to Committee staff (Feb. 19, 2021, 12:14 EST) (on file with Committee staff).

We respectfully request a response from the SBA by March 31, 2021. If you have questions regarding this request, please contact Vivian Ling, Counsel to the Committee for the minority, at (202) 225-5821.

Sincerely,



Maria Salazar
Ranking Member
Subcommittee on Contracting
and Infrastructure
Committee on Small Business



Jim Hagedorn
Member
Subcommittee on Contracting
and Infrastructure
Committee on Small Business



Pete Stauber
Member
Subcommittee on Contracting and
Infrastructure
Committee on Small Business



Dan Meuser
Member
Subcommittee on Contracting
and Infrastructure
Committee on Small Business



Scott Fitzgerald
Member
Subcommittee on Contracting
and Infrastructure
Committee on Small Business