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¶ 19 THE NEW LIMITATIONS ON SUBCONTRACTING: New Rules, New Uncertainties

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When Congress creates a program granting special privileges and benefits to a particular class of persons or organizations it will eventually have to take measures to ensure that the unworthy do not benefit through surreptitious means. In the 1980s, Congress enacted statutory limitations on subcontracting under contracts awarded through set-asides for small business to ensure that small businesses do not serve as "fronts" or "pass-throughs" for large businesses posing as "subcontractors." But the limitations proved complicated and difficult to comply with and enforce. So, Congress decided to simplify them.

Sections 1651 and 1652 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, changed the statutory limitations on subcontracting under small business program awards (codified at 15 USCA § 657s) and prescribed a $500,000 minimum penalty for exceeding them (codified at 15 USCA § 645(g)). The old limitations had been stated in terms of percentages of the cost of contract performance; the new limitations are stated in terms of percentages of amounts paid to the contractor by the Government. This article is a preliminary analysis of the new limitations and the challenges that may arise in their implementation.

Chronology—The Rulemaking Process

To orient the reader, we begin with a chronology of main events, beginning with the enactment of the FY 2013 NDAA.

- January 2, 2013—enactment of FY 2013 NDAA §§ 1651 and 1652, which amended the Small Business Act by (1) changing the limitations on subcontracting and (2) imposing a stiff penalty for violation.
- January 7, 2014—the Small Business Administration adds implementation of FY 2013 NDAA small business amendments to its semiannual regulatory agenda. 79 Fed. Reg. 1228, Regulatory Identifier Number (RIN) 3245-AG58.

- July 15, 2014—a subcommittee of the House Committee on Small Business conducts hearings to inquire about the delay by the SBA in implementing the changes.
- December 29, 2014—the SBA publishes a 16-page proposed rule to implement the changes, 79 Fed. Reg. 77955.
- March 9, 2015—the SBA extends the proposed rule comment period to April 6, 2015, 80 Fed. Reg. 12353.
- May 31, 2016—the SBA publishes a 23-page final rule implementing Pub. L. 112-239 §§ 1651 and 1652 by amending 13 CFR § 125.1 and 13 CFR § 125.6, 81 Fed. Reg. 34243.
- September 30, 2016—the SBA issues a correction to its final rule of May 31, 2016, 81 Fed. Reg. 67093.
- August 24, 2017—the SBA announces its intention to make additional changes to 13 CFR § 125.6 based on requests from industry. 82 Fed. Reg. 40362, RIN 3245-AG86.
- December 4, 2018—the SBA publishes a 17-page proposed rule, which includes proposed changes to 13 CFR § 125.6, 83 Fed. Reg. 62516.
- December 4, 2018—the Federal Acquisition Regulation councils publish an 11-page proposed rule to implement the SBA's final rule of May 31, 2016, in the FAR, 83 Fed. Reg. 62540.
- November 29, 2019—the SBA publishes a 20-page final rule that includes changes to 13 CFR § 125.6, 84 Fed. Reg. 65647.
- October 16, 2020—the SBA publishes a final rule amending 13 CFR § 125.6(b) to provide guidance about limitations applicable to mixed contracts, 85 Fed. Reg. 66146, 66192–93.
- August 11, 2021—the FAR councils publish a 20-page final rule to implement the SBA's final rule of May 31, 2016, Federal Acquisition Circular 2021-07, 86 Fed. Reg. 44233. It does not include the changes made by the SBA's final rule of November 29, 2019.
- August 13, 2021—the Civilian Agency Acquisition Council issues Class Deviation 2021-02 in order to conform the FAR to the SBA's final rule of November 29, 2019.
- September 13, 2021—the Department of Defense issues Class Deviation 2021-O0008 to conform the FAR to the SBA's final rule of November 29, 2019.
- February 18, 2022—a DOD team is drafting a proposed rule to amend the FAR to implement the SBA's final rules of November 29, 2019, and October 16, 2020. See https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf.

Background To The New Limitations

The changes to the subcontracting limitations made by §§ 1651 and 1652 of the FY 2013 NDAA were proposed in H.R. 3893, 112th Cong. (2012) ("Subcontracting Transparency and Reliability Act of 2012"). In the accompanying report, H.R. Rep. No. 112-731, pt. 1, 7–8 (Dec. 27, 2012), Congress explained its principal objective as follows:

> Small businesses face two issues in making a good faith effort to comply with the restrictions on pass-through contracting....

> First, there are the inherent challenges with cost-based accounting. Take, for example, the case of a service contract. Pursuant to section 15(o)(1)(A) of the [Small Business] Act, at least 50 percent of the cost of contract performance incurred for personnel must be spent on employees of the prime contractor. However, that requires that the prime contractor have a cost-based accounting system, something that few small businesses and almost no commercial companies use. The Federal Acquisition Regulation (FAR) specifically exempts most small businesses from employing cost accounting systems, because they are considered a barrier to entry for small firms. Even if a prime contractor has a cost accounting system, the firm must have access to each subcontractor's personnel costs if the firm is to correctly calculate 50 percent of the cost of contract performance incurred for personnel. [Footnote omitted.]
>
> Unfortunately, even for cost accounting standards compliant contracts, the subcontractor is not required to give its cost information to the prime contractor, because the information is considered too sensitive. Instead, subcontractors are permitted to provide cost and pricing data in a sealed envelope that is transmitted to the contracting officer (CO). However, this data pass-through will not work when examining limitation on subcontracting, as the prime contractor needs access to the cost data to track its own compliance. The small business firm that wants to comply is therefore left making guesses and estimates regarding its subcontractors['] costs.
>
> The second challenge faced by small businesses is that the current statutory scheme assumes that contracts are either for goods or services. While this is sometimes the case, an increasing number of small businesses are receiving contracts as valued added resellers, or for contracts that encompass the provision of goods and services. Neither the Act nor the implementing regulations give small firms guidance on how to comply in those scenarios.

The need for change was emphasized by Angela Styles, former Administrator for Federal Procurement Policy, in testimony at a congressional hearing conducted on July 15, 2014, after the changes were enacted into law but before the SBA had gotten around to implementing them.

> The 2013 NDAA modified the Small Business Act to change the limitations on subcontracting for Federal prime contracts awarded to small businesses under set-aside programs. So, for example, when a Federal procurement is set aside for competition among small businesses, the winning small business prime contractor is restricted from subcontracting more than a certain percentage of the amount paid by the Federal Government to another business.
>
> For service contracts, the NDAA provision provides that the small business prime contractor may not expend on subcontractors more than 50 percent of the amount paid to the small business prime contractor by the Federal Government. So, for example, if you receive a contractor award for $100 as a small business, you can't subcontract more than $50 of the award to a large business. It is simple. It is easy to apply. And it really is easy for everyone, whether you are a prime contractor or you are a subcontractor or you are the government.
>
> The NDAA statutory provision was a meaningful change, because for many years, and guess what, still existing in the current unmodified SBA regulations in the FAR, the limitation on the subcontracting regulations require small business prime contractors awarded a prime contract on a set-aside basis to agree to something completely different; that at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the small business prime contractor.
>
> In practice, what constitutes the cost of contract performance for personnel has been absolutely impossible to understand or implement.

See *Action Delayed, Small Business Opportunities Denied: Implementation of Contract Reforms in the FY 2013 NDAA, Hearing Before the Subcomm. on Contracting and Workforce of the H. Comm. on Small Business*, 113th Cong. 4–5. (July 15, 2014). To date, it has taken the SBA and the FAR councils more than nine years to implement the statutory changes, with more work yet to be done.

Applicability Of The Limitations On Subcontracting

The policy that limits subcontracting under contracts awarded to small businesses is stated at 13

CFR § 125.6, "What are the prime contractor's limitations on subcontracting?" That rule is now implemented by FAR 19.505, "Limitations on subcontracting and the nonmanufacturer rule." FAR 19.505 applies above the simplified acquisition threshold to (a) small business set-asides and (b) task and delivery orders issued directly to a small business in accordance with FAR 19.504(c)(1)(ii). It applies regardless of dollar value to awards under FAR Subparts 19.8, 19.13, 19.14, and 19.15 that are set-aside contracts; sole-source contracts; orders set aside under FAR 8.405-5 or FAR 16.505(b)(2)(i)(F); orders issued directly under FAR 19.504(c)(1)(ii); and contracts awarded to a HUBZone small business under the HUBZone price evaluation preference, unless the small business waived the evaluation preference

Contract Clause—FAR 52.219-14, "Limitations On Subcontracting (SEP 2021)"

The ultimate product of eight long years of rulemaking was a FAR contract clause. As of this writing there are three versions: (1) the official FAR version, 52.219-14, "Limitations on Subcontracting (SEP 2021)"; (2) a Civilian Agency Acquisition Council class deviation (DEVIATION SEP 2021); and (3) a DOD class deviation (DEVIATION 2021-O00008). The class deviations vary from the official FAR version only with respect to paragraph (e), the paragraph that specifies the limitations. The two class deviations vary from one another only in format.

The analysis that follows is based on DOD Class Deviation 2021-O0008, available at https://www.acq.osd.mil/dpap/dars/class_deviations.html. All references to FAR 52.219-14 in this article will refer to that version, which consists of seven paragraphs, (a) through (g):

- Paragraph (a) is one simple sentence, which states that the clause does not apply to the unrestricted portion of a partial set-aside.
- Paragraph (b) is one long and complex sentence, subdivided into two subordinate clauses that define the term *similarly situated entity*.
- Paragraph (c) is one long and very complex sentence, subdivided into six subordinate clauses that specify the six categories of contracts to which the clause applies.
- Paragraph (d) is one short and simple sentence, which states that independent contractors are subcontractors for the purposes of the clause.
- Paragraph (e), which is subdivided into four subparagraphs, specifies the limitations that apply to (1) service contracts, (2) supply contracts, (3) general construction contracts, and (4) contracts for construction by special trade contractors.
- Paragraph (f) consists of two sentences. The first sentence provides a choice between two alternative points in time by which the contractor must be in compliance with limitations that apply to a contract. The second sentence states the point in time by which the contractor must be in compliance with limitations that apply to task or delivery orders.
- Paragraph (g) is one sentence, which states how the limitations will be applied to contracts performed by a joint venture.

In this article we are going to focus on paragraph (e), which specifies the limitations, especially subparagraph (e)(1), which specifies the limitation on service contracts. We focus on paragraph (e)(1) because it is the most complicated of the four limitations. We start with definitions.

Definition: What Is A Subcontract?

FAR 52.219-14 does not define *subcontract*, s*ubcontracting*, or *subcontractor*, nor does it refer to any official definition of any of those terms. None of the definitions of *subcontract* in the FAR applies to the limitations on subcontracting. FAR Part 2 does not include a definition. The definition of subcontract in FAR 19.701, which provides the "Definitions" for FAR Subpart 19.7, "The Small Business Subcontracting Program," does not apply to the limitations on subcontracting in FAR Subpart 19.5 because of the rule in FAR 1.108(a) and FAR 2.000(b), which restricts the application of definitions in places other than FAR Part 2 to the part, subpart, or section in which the term is defined.

The definitions of *subcontract* and *subcontracting* that apply to the limitations on subcontracting are in 13 CFR § 125.1, "Definitions," and are as follows:

> Subcontract or subcontracting means, except for purposes of [13 CFR] § 125.3, that portion of the contract performed by a business concern, other than the business concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available commercial off-the-shelf items, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the Government as part of the contract to use any specific source for parts, supplies, or components subassemblies [sic] the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

That definition makes prospective determinations of what is a subcontract and who is a subcontractor potentially complicated, since it entails a determination of whether a purchase is for a commercial off-the-shelf item. Moreover, the plain language of that definition covers purchases of "parts, supplies, components, or subassemblies," which are *supplies* as defined in FAR 2.101. The definition makes no mention of services.

Do purchases of services constitute subcontracts? We do not believe that the SBA intended to exclude subcontracts for services from the limitations on subcontracts, but if the definition in 13 CFR § 125.1 applies to the limitations, as we think it does, then that is what they seem to have done.

Definition: What Is A Similarly Situated Entity (Subcontractor)

13 CFR § 125.6(c) provides as follows:

> (c) *Subcontracts to similarly situated entities.* A small business concern prime contractor that receives a contract [subject to the limitations on subcontracting] and spends contract amounts on a subcontractor that is a similarly situated entity shall not consider those subcontracted amounts as subcontracted for the purposes of determining whether the small business concern prime contractor has violated [the limitations], to the extent the subcontractor performs the work with its own employees. Any work that the similarly situated subcontractor does not perform with its own employees shall be considered subcontracted[.] SBA will also exclude a subcontract to a similarly situated entity from consideration under the ostensible subcontractor rule ([13 CCR] § 121.103(h)(4)).

The definition of *similarly situated entity* that appears in 13 CFR § 125.1 is as follows:

> Similarly situated entity is a subcontractor that has the same small business program status as the prime contractor. This means that: For a HUBZone requirement, a subcontractor that is a certified HUBZone small business concern; for a small business set-aside, partial set-aside, or reserve a

subcontractor that is a small business concern; for a [service-disabled veteran-owned (SDVO)] small business requirement, a subcontractor that is a self-certified SDVO SBC; for an 8(a) requirement, a subcontractor that is an 8(a) certified Program Participant; for a [women-owned small business (WOSB)] or [economically disadvantaged women-owned small business (EDWOSB)] contract, a subcontractor that has complied with the requirements of [13 CFR] part 127. In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the [North American Industry Classification System codes (NAICS)] code that the prime contractor assigned to the subcontract the subcontractor will perform.

FAR 52.219-14(b) defines *similarly situated entity* as follows:

"Similarly situated entity," as used in this clause, means a first-tier subcontractor, including an independent contractor, 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 its socioeconomic status); and (2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

Understanding The Limitations

Here is the limitation on subcontracting under service contracts as now stated in FAR 52.219-14, DOD class deviation 2021-O0008, paragraph (e)(1):

(e) *Limitations on subcontracting*. By submission of an offer and execution of a contract, the Contractor agrees that in performance of a contract assigned a North American Industry Classification System (NAICS) code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding other direct costs and certain work performed outside the United States (see paragraph (e)(1)(i)), to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract. The following services may be excluded *from the 50 percent limitation* [emphasis added]:

(i) Other direct costs, to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service. Examples include airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS codes 562910) [sic], cloud computing services, or mass media services.

(ii) Work performed outside the United States on awards made pursuant to the Foreign Assistance Act of 1961 or work performed outside the United States required to be performed by a local contractor.

The exclusions permitted by subparagraphs (i) and (ii) were added by the SBA's final rule of November 29, 2019.

Note that payments by similarly situated subcontractors to their second-tier subcontractors do count against the limitations, regardless of the size and program status of those subcontractors. This means that prime contractors must obtain information about similarly situated subcontractors' second-tier subcontractors and provide it to Contracting Officers.

Note the "exclusions" in paragraphs (e)(1)(i) and (ii). They were added to the service contract limitation on subcontracting by the SBA's final rule of November 29, 2019, in response to industry requests. See 84 Fed. Reg. 65647, 65653–54. We think the SBA's intention was to "exclude", i.e., deduct, certain "other direct costs" from the amounts paid to subcontractors for the purpose of

determining contractor compliance with the limitations. But the language of the clause says to exclude those costs "from the 50 percent limitation," which, if taken literally, would lower the amount of the limitation. The procedure would be as follows:

Step	Determining Whether a Prime Contractor Complied With the Limitations on Subcontracting
1.	Determine the total amount paid by the Government to the prime contractor for contract performance.
2.	Determine what is 50 percent of that amount. That is the limitation on subcontracting.
3.	Deduct excluded costs "from the 50 percent limitation." The remainder is now the limitation.
4.	Identify the prime contractor's subcontractors.
5.	Determine which subcontractors are *similarly situated entities* and which are not.
6.	Determine how much the prime paid to each *not similarly situated entity subcontractor*.
7.	Determine how much each *similarly situated entity subcontractor* paid to each of their second-tier subcontractors.
8.	Determine the sum of Steps 6 and 7.
9.	Determine whether the sum of Steps 6 and 7 exceed the limitation determined in Step 3.

Suppose that an agency paid a contractor $5,000,000 for performance and that the 50 percent limitation on subcontracting was thus $2,500,000. Suppose further that the contractor had paid not similarly situated subcontractors $2,400,000, of which $200,000 was for other direct costs. If you deducted the other direct costs "from the 50 percent limitation," as directed by the plain language of the clause, the limitation would be reduced to $2,300,000, and the contractor would be in violation and might have to pay a penalty.

However, based on the SBA's comments accompanying its final rule of November 29, 2019, see 84 Fed. Reg. 65653–54, we think what is intended is to deduct the other direct costs from the amounts paid to the subcontractors, not from the amount of the 50 percent limitation, as follows:

Step	Determining Whether a Prime Contractor Complied With the Limitations on Subcontracting
1.	Determine the total amount paid by the Government to the prime contractor for contract performance.
2.	Determine what is 50 percent of that amount. That is the limitation on subcontracting.
3.	Identify the prime contractor's subcontractors.
4.	Determine which subcontractors are *similarly situated entities* and which are not.
5.	Determine how much the prime paid to each *not similarly situated subcontractor*.
6.	Determine how much each *similarly situated subcontractor* paid to each second-tier subcontractor.
7.	Determine the sum of Steps 5 and 6.
8.	Deduct excluded costs from the sum of Steps 5 and 6.
9.	Determine whether the remainder calculated in Step 8 exceeds the limitation.

Taking the latter approach, the $200,000 in other directs costs would be deducted from the $2,400,000 paid to the subcontractors, which would reduce that amount to $2,200,000. The contractor would be compliant and would not have to pay a penalty. We think that is the intended approach.

It is interesting that the definition of subcontract in 13 CFR § 125.1 and the exclusions in clause paragraph (e)(1) will still entail the kinds of cost accounting that prompted Congress to change the limitations from measures of cost to measures of payments.

"Monitoring" Contractor Compliance

The Government Accountability Office has reported, and Congress has complained, that agencies do not "monitor" contractor compliance with the limitations on contracting. The SBA, in its November 29, 2019, final rule amending its May 31, 2016, final rule, said this about CO responsibility to monitor compliance:

> As with all contract administration, it is the responsibility of the contracting officer to monitor compliance with the terms and conditions of a contract. (FAR 1.602–2, including the limitations on subcontracting clause). SBA proposed language to clarify that contracting officers have the discretion to request information from contractors to demonstrate compliance with limitations on subcontracting clauses. The Government Accountability Office (GAO) has noted in reports that contracting officers have not been monitoring compliance with the limitations on subcontracting. "Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight," GAO–06–399, April 2006; "8(a) Subcontracting Limitations: Continued Noncompliance with Monitoring Requirements Signals Need for Regulatory Change," GAO–14–706, September 2014; and "Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention," GAO–12–84, January 2012.
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> * * *
>
> On balance, SBA agrees that contracting officers are best positioned to assess if, how, and when additional scrutiny of contractors' limitations on subcontracting compliance would be helpful. As such, the final rule does not require limitations on subcontracting compliance reporting but, rather, indicates that contracting officers have the discretion to request demonstration of compliance at any point during performance or upon completion of a contract. The rule includes examples of what documentation could adequately demonstrate compliance but is not intended to be an exhaustive list.

84 Fed. Reg. 65647, 65652–53.

13 CFR § 125.6(e)(4) provides as follows:

> (4) Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

Neither the SBA regulations nor the FAR prescribe specific actions to be taken with respect to the administration of the limitations on subcontracting, except for a mere mention at FAR 42.1503(b)(2)(vi).

When Must Contractors Be In Compliance With The Limitations?

Contractors need not be in compliance with the limitations at all times during performance. The SBA regulation at 13 CFR § 125.6(d) provides as follows:

> (d) Determining compliance with applicable limitation on subcontracting. The period of time used to determine compliance for a total or partial set-aside contract will be the base term and then each subsequent option period. For an order set aside under a full and open contract or a full and open contract with reserve, the agency will use the period of performance for each order to determine compliance unless the order is competed among small and other-than-small businesses (in which case the subcontracting limitations will not apply).

And FAR 52.219-14 states:

> (f) The Contractor shall comply with the limitations on subcontracting as follows:
>
> (1) For contracts, in accordance with paragraphs (c)(1), (2), (3) and (6) of this clause—
>
> [Contracting Officer *check as appropriate.*]
>
> □ By the end of the base term of the contract and then by the end of each subsequent option period; or
>
> □ By the end of the performance period for each order issued under the contract.
>
> (2) For orders, in accordance with paragraphs (c)(4) and (5) of this clause, by the end of the performance period for the order.

So why "monitor"? As we shall see, below, the law provides for a stiff minimum "fine" of $500,000 for violating the limitations. One would think that the penalty should be a sufficient incentive to comply.

13 CFR § 125.6(d)(2) states that compliance with the limitations is a matter of contractor responsibility. See also FAR 9.104-3(a) and FAR 19.601(d). Neither the SBA regulations nor the FAR requires agencies to solicit and evaluate proposed subcontracting work breakdowns, schedules, or cost breakdowns from small business offerors participating in a set-aside or a sole-source procurement. While such plans might be of assistance to agencies in monitoring compliance with the limitations, agencies conducting set-asides might do well to wait until after contractor selection to assess prospective compliance, instead of asking for the information to be submitted for proposal evaluation beforehand. That would enable them to avoid proposal evaluation issues and the byzantine rules in FAR 15.306 about clarifications, communications, discussions, and final proposal revisions.

If, after tentative selection, an offeror appears unable to comply with the limitations, i.e., appears to be nonresponsible, COs could try to resolve the issue before award. See *Second Street Holdings, LLC*, Comp. Gen. Dec. B-417006.4, 2022 CPD ¶ 33, 2022 WL 194396 ("Communicating with an offeror concerning its responsibility does not constitute discussions, so long as the offeror does not change its proposed cost or otherwise materially modify its proposal."). If the matter cannot be resolved, the CO could refer the matter to the SBA for a certificate of competency decision. If an agency wants a subcontracting work, cost, or schedule breakdown for compliance monitoring purposes, it could require submission after contract award, rather than requiring them as proposal components.

The Impact Of Unexpected Developments And Changes

Subcontracting can be affected by postaward developments. Unanticipated events during performance might make subcontracting plans impractical or require a contractor to subcontract work that it had planned to do itself. Subcontract work, schedule, price, and payments to subcontractors might be affected by changed conditions, change orders, and constructive changes. What had been intended to be a small subcontract might turn out to be a much larger one or vice versa.

It might take weeks, months, or even years to settle issues, negotiate requests for equitable adjustment and claims, and determine the final dollar value of a subcontract and the amount of total payment owed. It may be years before the amounts paid to a prime contractor by the Government and amounts paid by a similarly situated subcontractor to a lower-tier subcontractor are known. In short, "monitoring" and determining contractor compliance may be complicated and time

consuming, and a determination of ultimate compliance a distant prospect. In complex acquisitions, point-in-time observations, data, and assessments pertaining to the status of a contractor's compliance may not be valid bases for predictions of final states of affairs. Contractors might postpone settling with subcontractors until they see how much they can recover from the Government. Contractors inclined to cheat might even conspire to delay payments to subcontractors in order to avoid a finding of noncompliance.

During a 2014 GAO investigation into compliance with the limitations on subcontracting in the 8(a) program, COs and their representatives did not seem to be shy about admitting to the GAO that they were not proactive about monitoring compliance. Moreover, they said that they would need "additional guidance" on the administration of the new limitations. See GAO-14-706, *8(a) Subcontracting Limitations: Continued Noncompliance With Monitoring Requirements Signals Need for Regulatory Change* 7–17 (Sept. 16, 2014).

Congress and the Executive Branch want and expect compliance when they enact or announce new socioeconomic policies and rules, but they rarely if ever have provided agencies with more resources. Contracting office resources in particular are stretched thin, yet in the last year new policies have been announced on an almost monthly basis. More than eight years have passed since the enactment of the FY 2013 NDAA, and little if any training or "guidance" has been made available to COs about how to monitor and enforce compliance with the new limitations. We doubt that monitoring and enforcing the limitations on subcontracting will be a priority or be effective in coming years.

Applying The Penalty For Noncompliance

15 USCA § 645(g) prescribes a penalty for violating the limitations on subcontracting. See 13 CFR § 125.6(g):

> (g) *Penalties.* Whoever violates the requirements set forth in paragraph (a) of this section shall be subject to the penalties prescribed in 15 U.S.C. 645(d), except that the fine shall be treated as the greater of $500,000 or the dollar amount spent, in excess of permitted levels, by the entity on subcontractors. A party's failure to comply with the spirit and intent of a subcontract with a similarly situated entity may be considered a basis for debarment on the grounds, including but not limited to, that the parties have violated the terms of a Government contract or subcontract pursuant to FAR 9.406-2(b)(1)(i) (48 CFR 9.406-2(b)(1)(i)).

The SBA regulation does not say who is to make the determination to assess the penalty, under what circumstances, and pursuant to what procedures and rights of appeal. The clause at FAR 52.219-14 makes no mention of the penalty, and since the SBA calls it a fine, it may be that COs have no authority to assess it. Since there is no mention of the penalty in the clause, it does not seem to be a contractual remedy that a CO could pursue.

Summary And Conclusion

This has been just a preliminary analysis of the new limitations on subcontracting. We will undoubtedly have more to say in the course of time.

The new limitations may be simpler and easier to apply and enforce than the old ones, but that remains to be seen. They certainly are not simple, and we have yet to learn about the challenges of implementation. We think it unlikely that the new limitations, and the possibility of being levied a minimum $500,000 fine for violation, will make Government business more attractive to small, innovative companies or improve opportunities for small businesses.

There is no point in complaining about the piling of socioeconomic programs onto the shoulders of the acquisition system. It seems very likely that there will be more to come in the months leading up to November. There is also no point in complaining that Congress gives COs ever more rules and things to do without giving them more resources with which to do it, better training, and better guidance. Congress has never cared about that. Not really. *VJE*