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Dear Members of the Federal Acquisition Regulation Councils:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), we are submitting proposed amendments and comments to the Federal Acquisition Regulation (hereinafter "FAR"), agency supplements to the FAR, and OMB policy statements to address specific requirements for the counting of lower-tier subcontractors towards a prime contractor's subcontracting goals. For the reasons set forth below, an amendment to the FAR to delineate such requirements is of immediate and paramount interest to the federal government and to the construction industry.

AGC is the leading association for the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly perform construction services for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration and other federal departments and agencies. Most are small and closely-held businesses. Unlike many associations in the industry, AGC proudly represents both union and open-shop construction contractors.

The Challenge

The construction industry routinely operates at tiers. This is because so much of construction work is performed by small companies that specialize in specific trades and facets of construction work. Lower tier small business subcontracting occurs naturally in the construction industry based on the specialty

trade competencies that are required to complete a complex construction project. It is this breakdown of work and creation of logical tiers that enables the industry to perform at such a high level of competency and efficiency. This structure should be acknowledged and supported in the small business participation programs so that the contribution which small business makes to a project can be recognized and the businesses can operate at the tier that matches their scope of work and proper risk allocation.

However, current rules require goals be established and approved for a number of small business socio-economic subcategories within a subcontracting plan, but prohibit prime contractors from truly accounting for the total amount of dollars flowing to small businesses. Under the current system, if a business concern other than a small business is included in first tier subcontractors, a prime contractor cannot report dollars going to small businesses further down in the subcontracting chain. For the small business program to fail to recognize the complexity and efficiency of the tiers is to fail the nation in accounting for the true value, benefit, and contribution of small businesses within the construction industry.

A Path Forward

Allowing prime contractors to report small business subcontracting at all tiers would demonstrate true small business participation on a federal contract. Also, accurately accounting for small business participation helps federal agencies better understand and present their contribution toward meeting the overall goals intended by the Small Business Act.

The shift away from paper SF-294 and SF-295 forms and towards the Electronic Subcontracting Reporting System (eSRS) by the federal government provides an opportunity to correct this problem. The eSRS provides the capability to accurately track and report small business subcontractors on multiple tiers. Unfortunately, even the recent final rule for FAR Case 2005-040, Electronic Subcontracting Reporting System, specifically – and inexplicably – prohibits receiving credit for contractors at all tiers.

We also note that because of the new language inserted by the eSRS final rule at FAR 19.704(a)(10)(v), there is now a requirement for the prime contractor to provide the prime contract number and the prime contractor's DUNS number to all subcontractors with subcontracting plans. Section (vi) further requires any subcontractors to provide the prime contract number and their own DUNS numbers to each of their subcontractors. This change allows subcontractors to enter the prime contract number when they enter their reports for individual contracts. Use of the prime contract number could enable the government to capture subcontracts at lower tiers on a contract-by-contract basis. Moreover, by including the prime contract number, along with the name and DUNS number of the agency or contractor awarding the contract or subcontract, the system will be able to tie everything together; thus we will know how much small businesses receive at any given tier. Also, we will know how much small business receives in the aggregate by rolling up all the tiers. This will be helpful to agencies defending a program before Congress and trying to demonstrate the economic benefit to the Nation. It will also be useful for agencies such as SBA and the Defense Contract Management Agency (DCMA) that perform compliance reviews.

The need for specific FAR guidance on the lower-tier issue and the proof that there are marked differences is underscored by the tracking system applied to the American Recovery and Reinvestment Act of 2009 (ARRA). By and large, contracts procured under ARRA have met subcontracting goals consistently. AGC argues that this is because the greater reporting requirements under ARRA have necessitated tracking all the dollars that flow to subcontractors at all levels. We believe there will be similar results if prime contractors were allowed to receive credit for all the dollars at all the subcontracting tiers.

We respectfully suggest the following regulatory language as a fix:

FAR 52.219-9(1)

The Contractor shall submit ISRs and SSRs using the web-based eSRS at <http://www.esrs.gov>. Purchases from a corporation, company, or subdivision that is an affiliate of the prime Contractor or subcontractor are not included in these reports. Subcontract award data reported by prime Contractors and subcontractors shall be credited for limited to awards made to their immediate next-tier subcontractors. ~~Credit cannot be taken for awards made to lower tier subcontractors unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian tribe.~~

We believe this regulatory fix would provide a necessary and workable regulatory solution. It would bring clarity to bidders and contracting officers charged with the responsibility to evaluate subcontracting goals.

If there is any additional information that AGC can provide, please do not hesitate to let me know. We would appreciate your prompt consideration in opening a FAR case and look forward to your response.

Sincerely,



Stephen E. Sandherr
Chief Executive Officer
Associated General Contractors of America

cc:

Leslie Field, Deputy Administrator, Office of Federal Procurement Policy
Mathew Blum, Associate Administrator, Office of Federal Procurement Policy
Paul Parsonault, U.S. Army Corps of Engineers
Joseph Gott, U.S. Naval Facilities Engineering Command
Ann Marie Sweet-Abshire, U.S. General Services Administration
Joseph Jordan, Small Business Administration