



CONFLICTS BETWEEN THE FAR & SBA REGULATIONS

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Presented by Don Mansfield
Professor of Contracting





OUTLINE

- **Present conflict—Overseas exception**
- **Resolution of conflicts—FAR Councils**
- **Resolution of conflicts—GAO & COFC**
- **Causes of conflicts**
- **Proposed solutions**
- **Questions?**

WHICH IS IT?

FAR 19.000(b)

“This part...applies **only in the United States or its outlying areas.**”

13 CFR § 125.2(c)(1)

The Small Business Act requires each Federal agency to foster the participation of small business concerns...**regardless of the place of performance** of the contract.

OVERSEAS EXCEPTION?

Latvian Connection, B-408633 (Sep 2013)

“The SBA’s view of the statute—which is not reflected in its own implementing regulation despite the existence of the government-wide FAR rule for decades—does not overcome the deference accorded to the FAR.”

OVERSEAS EXCEPTION?

Latvian Connection, B-410081.1 (Jul 2014)

“Heeding this advice, SBA recently promulgated regulations to address this issue [overseas application of Small Business Act]. Specifically, SBA made wholesale changes to 13 CFR § 125.2 on October 2, 2013.”

– SBA letter to GAO dtd. 8/25/14

OVERSEAS EXCEPTION?

Latvian Connection, B-410081.1 (Jul 2014)

- State Department cancels solicitation
- Protest dismissed

Latvian Connection Protests Army RFQ

- Procurement in Kuwait not set-aside
- Army reissues as set-aside

OVERSEAS EXCEPTION?

FAR Case 2016-002: Applicability of Small Business Regulations Outside the United States

- 07/03/2017 FAR staff notified DAR staff of CAAC differences from DARC suggested changes. DAR and FAR staff resolving draft proposed FAR rule open issues.

FAR COUNCILS' POSITION

“Contracting officers under the Executive Branch are required to follow the FAR. In cases where there are inconsistencies between Title 13 (SBA regulations) and Title 48 (FAR) of the CFR, contracting officers follow the FAR.”

-FAR Case 2006-032, Small Business Size Representation, 74 FR 11821 (Mar.19, 2009)

GAO

Discount Machinery & Equipment, B-240525

- CoC applies worldwide, despite FAR language limiting applicability

Adams Industrial Services, Inc., B-280186

Diagnostic Imaging Tech. Educ. Ctr., B-257590

- SBA regs control applicability of protest decisions rec'd after award—not FAR

COURT OF FEDERAL CLAIMS

C&G Excavating v. US, 32 Fed.Cl. 231 (1994)

- Scope of SBA review for CoC determination not limited by FAR language

Hawpe Construction, 46 Fed.Cl. 571 (2000)

- “Conflicts between FAR and SBA regulations should be resolved by looking to the SBA's latest intent on the issue and by relying on the SBA to determine which provision best implements the policies of the agency itself”



CAUSES OF CONFLICTS

- Lag time between promulgation of SBA rule & FAR rule
- Misinterpretation by FAR Council
- Lack of coordination between SBA & FAR Council

POSSIBLE SOLUTIONS

- **Pursue authority to deviate from the FAR to comply SBA regulations**
- **“Streamline” FAR part 19**
 - Delete duplicate coverage of material already contained in SBA regulations
 - Refer the reader to SBA regulations
 - Insert hyperlinks in Web-based FAR



FURTHER READING

SMALL BUSINESS PROGRAMS: Do They Apply Outside the United States?

Nash & Cibinic Report, September 2015

Postscript: Small Business Programs

Nash & Cibinic Report, May 2007

QUESTIONS?

