



January 6, 2012

U.S. Small Business Administration
Office of Government Contracting
Attn: Mr. Dean Koppel
409 Third Street, SW, Suite 8th Floor
Washington, DC 20416

Re: RIN 3245-AG22 Small Business Subcontracting

Dear Mr. Koppel,

On behalf of The Coalition for Government Procurement, the following comments are provided on the proposed rule implementing the small business subcontracting plan provisions of the Small Business Act of 2010. The proposed rule was published in the Federal Register on October 5, 2011.

The Coalition for Government Procurement is a non-profit association of approximately 300 firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium and large business concerns. The Coalition is proud to have worked with Government officials over the past 30 years towards the mutual goal of common sense acquisition.

The Small Business Administration (SBA) issued the proposed rule to amend its regulations with regards to "covered contracts," defined as contracts for which a small business subcontracting plan is required, currently valued above \$1.5 million for construction and \$650,000 for all other contracts. The rule proposes the following:

- A prime contractor must notify the contracting officer in writing whenever the prime contractor does not utilize a subcontractor used in preparing its bid or proposal during contract performance.
- A prime contractor must also notify the contracting officer whenever the prime contractor reduces payments to a subcontractor or when payments to a subcontractor are 90 days or more past due.

- A prime contractor must update its subcontracting plans upon the award of an option or if a modification causes the value of the contract to exceed the subcontracting plan threshold.
- A contracting officer is tasked with monitoring and evaluating the prime contractor's small business subcontracting plan performance. Responsibilities include: reviewing subcontracting plan reports within 60 days of the report ending date, and determining whether the prime contractor has not complied with their subcontracting plan. If so, the contracting officer must report the prime contractor in the Federal Awardee Performance and Integrity Information System (FAPIS).
- Prime contractors cannot prohibit a subcontractor from discussing matters pertaining to payment or utilization of small business concerns directly with the Government.

Although we support the SBA's efforts to eliminate "bait and switch" tactics and ensure good faith efforts are being made to utilize small business, the Coalition believes that this new regulation will instead reduce opportunities for small businesses and overwhelm contracting officers with additional workload. The following are a few of the Coalition's specific concerns.

Definition of Subcontractor

An important issue that is not clarified in the proposed rule is the definition of who qualifies as a "subcontractor" and for what purposes when the contractor sells commercial items. This is important in the context of developing goals, reporting plan results, and applying flow-down clauses. Clarification on the following questions is needed. Which vendors in the commercial plan should be considered a "subcontractor" for the purpose of applying flow down clauses in the prime contract? Is it possible for a vendor to be considered a "subcontractor" for the purposes of completing a commercial plan and not a "subcontractor" for purposes of flow-down clauses?

Balancing Opportunities and Costs Associated with the Rule

Under the new proposed rule, a prime contractor is now required to update its subcontracting plans upon the award of an option or if a modification causes the value of the contract to exceed the subcontracting plan threshold (\$650,000). This change will force contractors to retroactively modify a contract that is already ongoing and will result in additional costs, and delay in performance time. A more effective approach would be to maintain the current requirement where only modifications that have a value of \$650,000 and above would require a subcontracting plan. This would significantly reduce costs for contractors as well as workload for contracting officers.

In crafting the rule, the Coalition also recommends that the SBA examine the rule to ensure that it does not increase transactional costs for prime contractors and subcontractors. We believe that as proposed, the rule would not incentivize the use of subcontractors and would increase contract administration costs for government and industry. SBA should

reexamine the rule so that is more effective and efficient in its approach to increasing small business subcontracting.

The new regulation will have unequal impact amongst large businesses. Large businesses that maintain a master subcontracting plan in accordance with FAR clause 52.219-9 will be more heavily impacted than those that have a plan under a different requirement such as the DoD Comprehensive Subcontracting Plan Test Program. Large businesses that maintain and are in full compliance with small business programs prescribed under FAR clause 52.219.9 must identify subcontractors for each individual bid, including those that may be IDIQ and multi-million dollar ceiling values. In contrast, large businesses that maintain a comprehensive test subcontracting plan do not as they maintain a general list for source purposes and do not submit subcontracting plans on a proposal-by-proposal basis. Consequently, the proposed rule will create competitive disadvantages in industry.

The proposed rule focuses on the prime contractor's responsibility when there is an unsuccessful attempt to include small business teammates on a contract. However, there are many business-based justifications for which accountability may be with a small business' unsuccessful attempts to contribute to contract execution. For example, many contracts have rapid turn-around for task or delivery order bids for which a service is not being adequately generated by a small business. Other examples include a change to the contract requirements where the subcontractor can no longer provide the requested service, and the inability to produce cleared staff or staff in geographies. The regulation should include guidance on how to handle circumstances when there is a reasonable basis for not using the proposed subcontractor.

As required by the statute, a prime contractor with a history of unjustified, untimely payments to subcontractors will be reported to the Federal Awardee Performance and Integrity Information System (FAPIIS), negatively affecting the contractor's past performance rating. SBA is proposing to define a history of unjustified untimely or reduced payments as three incidents within a 12 month period. The Coalition believes this to be an unreasonably low threshold. Prime contractors are involved with thousands of transactions each year, and three instances represent a very small number of cases to be penalized for. In addition, the proposed rule does not recognize cases in which reduced or late payments to subcontractors may be justified. §125.3 Subcontracting assistance (a)(3) appears to imply that any reduced or untimely payments to subcontractors should automatically be considered unjustified. §125.3(a)(3) does not acknowledge the underlying requirement that the contracting officer must review the reason for the reduced or untimely payment and determine whether it was unjustified.

Further, the heightened scrutiny over subcontracting plans incentivizes large businesses to avoid engaging in teaming arrangements with small business. Not only will prime contractors experience substantial burdens from increased reporting costs, but given the new statutory representation requirement there is an increased possibility for Civil False Claims Act liability. Large businesses will likely seek alternative ways to meet the requirements and avoid

the risks and costs associated with subcontracting plan compliance. The proposed rule limits the flexibility for large and small business to come together in teaming arrangements resulting in a reduction of opportunities for small businesses, the opposite effect of what the Small Business Jobs Act of 2010 seeks to accomplish.

Subcontracting Consideration in Source Selection

The Coalition supports source selection as a means of incentivizing increased small business opportunities through subcontracting. Assessing a contractor's subcontracting plan as an evaluation criteria in the source selection encourages teaming between large, medium, and small businesses in order to provide comprehensive solutions for federal agencies. This practice is not only an opportunity to offer best value to government and the American taxpayer, but also reflects common practices in the commercial market. The Coalition believes that subcontracting consideration in source selection should be included in the FAR.

Multi-Agency Contracts and Increased Government Administrative Burdens

The proposed rule also requires additional subcontracting compliance reporting under Multi-Agency, Federal Supply Schedule, Multiple Award Schedule and Government-wide Acquisition IDIQ contracts. The SBA is proposing that prime contractors report small business subcontracting achievement on an order-by-order basis. Not only will prime contractors bear the burden of updating their plans so that they apply to FSS and other multiple-award contracts and face increased reporting costs for small business subcontracting compliance at the task order level, but contracting officers will bear the burden of monitoring and evaluating the overwhelming number of new reports.

Implementation of this new regulation would overwhelm contracting officers with hundreds of thousands of evaluation of reports. In this tight economic environment, many contracting offices lack the resources to effectively handle the additional workload. In addition, contracting officers will be forced to take part in a private transaction, as prime contractors cannot prohibit their small business subcontractors from discussing material matters pertaining to payment or utilization of the subcontractor with contracting officers. This negatively impacts the relationship between prime contractors and subcontractors and it pushes the government to become a mediator between large and small businesses. Dealing with potential disputes between prime and subcontractors will take them away from their mission of achieving the best value on behalf of the taxpayer.

Finally, the rule is unclear regarding §125.3 (h) Multi-agency, Federal Supply Schedule, Multiple Award Schedule and Government-wide Acquisition Contracts. Further clarification is needed as to how items 1- 3 apply including the submission of small business subcontracting reports by contractors, credit agencies receive towards subcontracting goals, and subcontracting goals for individual orders. As written, the Coalition does not believe that contractors with commercial plans would be required to file reports for individual orders.

Recommendations

- The proposed rule should provide clarification on the definition of “subcontractor.”
- The proposed rule should reconcile requirements for contracts that have a subcontracting plan in accordance with FAR clause 52.219-9 and those that have a plan under a different requirement such as the DoD Comprehensive Subcontracting Plan Test Program.
- The regulation should include guidance on how to handle circumstances when there is a reasonable basis for not using the proposed subcontractor.
- The SBA should reconsider its criteria for determining a “history of unjustified untimely or reduced payments”. Due to the complexities involved in subcontracting, the government should be more flexible in how this rule is structured. Otherwise, contractors may be less likely to engage in subcontracting with small business.
- The SBA should review the rule with federal agencies and industry to determine what revisions may be made to increase small business opportunities within the context of the statute. As proposed, the rule is likely to increase costs for government and industry, which serve as a disincentive for both parties.
- To minimize the increase on transactional workload, the proposed rule should adopt a reasonable threshold for which subcontracting opportunities and reporting would apply. Many task or delivery orders on Federal Supply Schedules or multiple agency contracts may be as small as two full time employees or may be for a single product purchase. It is also possible that small business subcontracting may not be the best value for the government purchaser. As such, a more effective and efficient option would be to require subcontract reporting only to task or delivery orders above \$10 million for which subcontracting plans are part of the evaluation criteria. For example, a \$10 million task or delivery order on average may result in 20 full time employees. This size of task or delivery order may present meaningful subcontracting opportunities for all socioeconomic categories.

The Coalition appreciates the opportunity to submit comments on this proposed rule. If you have any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Regards,



Roger Waldron
President