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Ms. Brenda Fernandez
U.S. Small Business Administration
Office of Policy, Planning and Liaison
409 Third Street SW
Washington, DC 20416

Re: Comments on Proposed Rule—Credit for Lower Tier Small Business Subcontracting, 80 Fed. Reg. 60300 (October 6, 2015); RIN 3245-AG71

Dear Ms. Fernandez:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.

The National Defense Authorization Act of 2014 (“NDAA”), Section 1614 contains provisions impacting small businesses, including amending Section 8(d) of the Small Business Act (15 U.S.C. § 637(d)) as it relates to small business subcontracting plans. The Section appreciates SBA’s efforts in implementing the

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Heather Weiner, member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Small Business and Other Socioeconomic Programs.”
Small Business Act amendments into the small-business regulations, as well as proposing regulations related to Section 1614 of the NDAA. As set forth below, the Section encourages the SBA to consider whether the benefits of the Proposed Rule are outweighed by the potential burdens and whether the Proposed Rule could lead to increased costs beyond those considered by the SBA. We also offer suggestions that we believe would improve the Proposed Rule.

COMMENTS

The Section’s comments suggest improvements in six areas of the Proposed Rule: (1) proposed changes to the requirement that a prime contractor incorporate the subcontracting plan goals of their lower tier subcontractors in their individual subcontracting plan; (2) enforcement before the eSRS and FAR are amended; (3) credit for non-individual small business subcontracting plans; (4) mechanisms for monitoring subcontractor performance; (5) assignment of NAICS codes to solicitations; and (6) electronic certifications.

A. The Section Recommends that the SBA Consider Revisions to the Proposed Credit for Small Businesses Performing as Subcontractors Regulations.

Section 1614 of the NDAA mandated that when a prime contractor has a subcontracting plan for a specific prime contract with an executive agency, as required by Section 8(d) of the Small Business Act, the prime contractor will receive credit towards its subcontracting plan goals for awards made to small business concerns at any tier under the contract. In interpreting this mandate, the SBA has added a requirement in 13 C.F.R. 125.3(a)(1)(i)(C) that “[p]rime contractors must incorporate the subcontracting plan goals of their lower tier subcontractors in their individual subcontracting plan.” At the same time, the SBA has recognized that “[t]hus, there will be some costs to the prime contractor to propose subcontracting plan goals that incorporate small business performance at lower tiers, and there will also be costs to the Government to evaluate whether the prime contractor’s goals adequately address maximum practicable small business subcontracting opportunity at all tiers.” The SBA estimates that these costs will be minimal.

The Section respectfully requests that SBA carefully consider the costs of including the goals of subcontractors in a prime contractor’s small business subcontracting plan and the practical implications of this requirement. Prime contractors usually negotiate their small business subcontracting plans with contracting officers prior to the execution of the prime contract. Subcontracts, however, are typically negotiated after the award of the prime contract. As a result, at the time of the submission of the prime contractor’s subcontracting plan, the identity of many of the prime’s subcontractors may not be known. The same situation may occur at every tier of the supply chain until there are no subcontracts with large business concerns that exceed the dollar threshold for adopting of small business subcontracting plans. This continually changing situation may require a prime contractor’s small business subcontracting plans to be amended multiple times during the life of a contract, at a significant cost and time commitment for both the prime contract and the Government.

As an alternative, the Section suggests that it may not be necessary for the prime contractor’s plan to include the goals of all subcontractors to receive credit for its lower-tier
small business subcontracting. If a prime contractor misses its goals, but can show that there was significant small business subcontracting within its supply chain by its other than small business subcontractors, that fact should be taken into consideration in evaluating the prime’s performance. Likewise, if a prime contractor meets its goals but its subcontractors fare poorly on meeting their goals, that factor can also be taken into consideration.

B. The Section Recommends that the SBA Clarify the Need for FAR and eSRS Changes before the Proposed Rule is Enforced.

The Section believes that the SBA should provide guidance as to the need for FAR and eSRS changes before the Proposed Rule is enforced. The Proposed Rule recognizes that “[t]here may also be costs to the Government as eSRS may have to be modified to allow large business prime contractors to receive small business credit at any tier towards their subcontracting plan goals.” The exact nature of this modification to eSRS system is unclear, so the Section recommends that the SBA continue its dialogue with industry on how to best modify the system to in a way that ensures that prime contractors can meet the new requirements. As compliance would not be practical, prime contractors should not be required to comply with these requirements until the modified eSRS system is functional.

Similarly, the Section recommends that before the SBA holds contractors responsible for complying with these proposed rules, it await appropriate changes to the FAR to implement NDAA Section 1614. Without a corresponding FAR rule and clause, prime contractors may be confused as to how the new requirements are to be implemented or may be unaware of them as they have not yet been included in the FAR or in a contractual clause.

C. The Section Recommends that the SBA Clarify When a Credit Determination Will Be Made for Certain Forms of Combined Subcontracts.

The Section recommends the SBA consider how the requirements of this rule will work in cases where prime contractors combine the requirements of multiple prime contracts on a single subcontract. It is common for prime contractors to purchase the same item from a single subcontractor for use on multiple prime contracts. Combining requirements can serve the interests of all parties and result in more favorable pricing to the Government, such as when a subcontractor builds items in a single lot for multiple prime contracts. Combining requirements can benefit the Government through increased application of such requirements as the Truth in Negotiations Act and other requirements that have dollar thresholds for applicability. Unfortunately, combining requirements creates issues with reporting under small business subcontracting plans. eSRS, for example, can only accept a report on a single prime contract. SBA’s regulations (and the FAR) cannot process this situation, which leaves contractors uncertain as to how to address the issue in subcontracting plans for subcontracts that include requirements for multiple prime contractors. The Section recognizes that the issue affects more than just the instant Proposed Rule, but recommends SBA explore ways to address the issue.
D. The Section Recommends that the SBA Provide Guidelines for Mechanisms for Monitoring Subcontractor Performance.

The Section seeks clarification on what mechanisms should be utilized for monitoring subcontractor performance. Under the Proposed Rule, 13 C.F.R. 125.3 would be modified to add a requirement in a new paragraph (c)(xi) that would, among other things, require a prime contractor to “recite the types of records the prime will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the plan.” (Emphasis added) As currently written, the Proposed Rule provides prime contractors with little guidance as to how to meet this requirement. Possible mechanisms for monitoring subcontractor performance include revised flowdown requirements requiring subcontractors to provide information to their primes and revisions to the eSRS system as described above. Guidelines as to acceptable mechanism will help to facilitate compliance with this requirement.

In addition, the Section recommends that the Proposed Rule more fully recognize the nature of the relationships between the prime contractor and its subcontractors at lower tiers. In the same way the Government holds a prime contractor responsible for the performance of a prime contract, including effort performed by the prime contractor’s subcontractors, in practice, the prime contractor, and each successive tier of subcontractor, hold the next tier responsible for the performance of their subcontract. This flow of communication and responsibility is relevant to the requirements in 15 U.S.C. § 637(d)(6)(D), that requires contractors to “discuss performance with subcontractors when necessary to ensure their subcontractors make a good faith effort to comply with their subcontracting plans.” The Section recommends that the Proposed Rule reflect this aspect of subcontracting relationships in the flowdown of requirements in subcontracting plans, such that each tier contractor has the responsibility to discuss performance and otherwise monitor performance of their direct subcontractors.

E. The Section Recommends that the SBA Clarify Whether Solicitations are Required for Subcontracts.

In 13 C.F.R. 125.3, the SBA has proposed requiring that “[t]he contractor must assign to the solicitation and the resulting subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract.” The Proposed Rule appears to imply that every resulting subcontract must have a preceding solicitation that contains the appropriate NAICS code and corresponding size standard. As a practical matter, many subcontracts are not awarded as a result of competitive solicitation. Contractors may solicit many low value items orally, and such solicitations may account for the majority of transactions for a contractor. We believe that adding a requirement that all subcontracts must be preceded by a solicitation, and that the solicitation must also contain a NAICS code, calls for significant effort that is inconsistent with subcontracting processes. As the contractor is already required to assign a NAICS code to any resulting subcontract, the Section recommends that the SBA clarify that the Proposed Rule does not create a new requirement that a solicitation is required for each subcontract.
F. The Section Applauds the Use of Electronic Certifications in the Proposed Rule.

The Proposed Rule would modify 13 C.F.R. 121.411(b) to include the following:

Prime contractors may accept a subcontractor’s electronic self-certification as to size, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size representations and certifications are accurate and complete. Electronic submission may include any method acceptable to the prime contractor including, but not limited to, size representations and certifications made in SAM (or any successor system).

The Section applauds SBA for this proposed change. Because prime contractors have for many years used electronic self-certifications from their subcontractors, and many subcontractors are not registered in the System for Award Management (SAM), this change will permit contractors to use an efficient and effective means for verifying the small business status of their small business subcontractors.

CONCLUSION

The Section appreciates the SBA’s efforts to implement Section 1614 of the NDAA. These comments are meant to suggest improvements to the SBA’s implementation effort and to encourage the SBA to continue seeking assistance from other agencies and the public while refining its regulations. The Section respectfully requests that the SBA consider the issues identified in these comments in developing any final rule. The Section is available and willing to provide any additional information and assistance as the SBA may require.

Sincerely,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
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Council Members, Section of Public Contract Law
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