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VIA ELECTRONIC MAIL

Ms. Brenda Fernandez
U.S. Small Business Administration
Office of Policy, Planning and Liaison
409 Third Street SW, 8th Floor
Washington, DC 20416

Re: Comments on Proposed Rule Regarding Limits on Subcontracting
RIN: 3245-AG58
Docket No. SBA-2014-0006

Dear Ms. Fernandez:

We are writing to submit comments regarding the U.S. Small Business Administration's ("SBA") proposed rule of December 29, 2014, regarding the implementation of provisions of the National Defense Authorization Act of 2013 which pertain to performance requirements applicable to small business and socioeconomic program set aside contracts and small business subcontracting. In addition, the proposed rule would make changes to affiliation rules, joint ventures (small business) and NAICS code appeals.

Our company represents small and medium-sized businesses that operate in the federal marketplace. In general, the proposed rule is positive for small businesses, and we recognize that putting this proposed rule together was no easy task for the SBA. Nonetheless, we do have some specific suggestions and comments, set forth in this letter, as to how the proposed rule can be improved and clarified.

Affiliation – Identity of Interest

Section 121.103(f)(1): We agree with this proposed change, as it provides: (1) clarity regarding the familial relationships that will give rise to the presumption; and (2) it clarifies that the presumption applies only if the two firms conduct business with each other.

Section 121.103(f)(2): We commend the SBA for formalizing the standard the SBA OHA has generally been utilizing in recent affiliation cases and we agree generally with the 70% standard for determining economic dependence. However, we do not agree with this section of the proposed

rule which would presume affiliation where one firm has derived 70% or more of its revenues from another concern in the previously completed fiscal year.

Looking at the previously completed fiscal year to make this determination does not take into account: (1) the fact the firm's financial situation may have changed during the current fiscal year, particularly if the determination is being made toward the end of the current fiscal year; and (2) the fact that there may be legitimate business reasons or unusual circumstances which account for the concern at issue deriving 70% or more of its revenues from another concern, such as the concern at issue being a start-up firm. We therefore recommend that SBA base the determination on the prior three (3) year period from the date of the determination rather than on the previously completed fiscal year. Utilization of the prior three (3) year period is consistent with the current practice for both size and affiliation determinations.

While there is language stating that the presumption is rebuttable, we recommend that the SBA add specific language recognizing the general circumstances under which the presumption could be successfully rebutted such as the fact that the firm is a start-up firm. In addition, we believe SBA should make a reference in this section confirming applicability of the exceptions to affiliation specific to entity-owned firms contained in 13 CFR Parts 121 and 124.

Calculation of Receipts

We support the proposed rule change because it clarifies that only those specifically enumerated items may be excluded from the calculation of a firm's receipts. We believe this will resolve many inconsistencies that may have occurred on the part of firms in calculating their receipts.

Limitations on Subcontracting

1. Cost of Materials

As currently written, the Proposed Rule is confusing as to whether the cost of supplies is included or excluded as to the various contract types. There are inconsistencies between the regulation text and the examples provided therein. We believe the SBA should provide, in a manner consistent with the directives contained in the 2013 NDAA, more clarity regarding how contractors should treat the cost of materials in their limitation on subcontracting calculations. In addition, we believe the SBA should provide a more detailed and explicit definition of "cost of materials" in order to aid contractors with respect to their calculations.

2. Similarly Situated Entities

We believe the portion of the Proposed Rule that provides for small businesses to satisfy the limits on subcontracting through their own work on the prime contract as well as through work performed by similarly-situated entities is a positive change for small businesses. With that said, and while we recognize the need for enforcement and to have procedures in place which will protect small

businesses, the proposed rule imposes many compliance requirements on small business prime contractors that are impractical and may, in reality, end up hurting small businesses in the long run (for example, these requirements impose additional burden(s) on contracting officers that are already overworked and overburdened; as a result, the proposed rule may have the unintended impact of resulting in fewer small business set-aside contracts).

For example, the proposed rule as written would require small business prime contractors who wish to make use of the similarly-situated rule, to provide copies with their proposal, of Teaming Agreements detailing the percentage of work forecasted to be performed by each entity. As is often the case, the final exact work share between a prime contractor and its subcontractor(s) may not be determined until after contract award. While there likely wouldn't be any issues with the prime contractor seeking to increase the subcontracted work to a similarly-situated entity, any attempt on the part of the prime to decrease the subcontracted work will likely be met with opposition by the subcontractor.

Requiring small business prime contractors to submit Teaming Agreements with their proposals could subject prime contractors to situations where the teaming partner can now enforce the percentage of work identified in the Teaming Agreement despite any changes in circumstances that may occur between the time the proposal is submitted and contract award. In addition, such a requirement is inconsistent with and contradictory to the portion of the rule that states “[w]hether particular specific entities perform the forecasted amount of work is not material, as long as the similarly situated entities collectively meet the performance of work requirement.” Requiring a prime contractor to submit executed Teaming Agreements will in essence compel the prime contractor to utilize the specific entities identified in the proposal at the percentages identified, as there will be executed Teaming Agreements which subcontractors will in all likelihood be able to enforce in its entirety against the prime contractor. We would therefore recommend that this portion of the rule requiring submission of teaming agreements be removed from the proposed rule.

In addition, the proposed rule requires only that the prime contractor certify that it will meet the applicable limitation on subcontracting. Given that the similarly-situated entity must also ultimately comply with the limit on subcontracting (i.e., the limit applies at any tier), there should be some similar certification requirement on the part of similarly-situated entities. Failure to impose a similar requirement would impose an undue burden on the small business prime contractor and subject the prime contractor to unfair liability for its subcontractor's noncompliance.

Exception to Affiliation for Certain Joint Ventures

Section 121.103(h) provides exceptions to affiliation in the case of joint ventures. First, the section permits small businesses to joint venture for any procurement, regardless of size. Second, the section provides an exception to ostensible subcontractor affiliation with respect to similarly



situated entities. We support both of these changes and recommend implementation as provided in the proposed rule.

Small Business Subcontracting Plans

We support the changes the proposed rule seeks to make with respect to holding large businesses accountable for good-faith efforts to comply with their small business subcontracting plans. We also support the requirement that prime contractors notify those small business subcontractors in writing that they have been identified by name as such in a proposal, offer, bid or subcontracting plan. However, the rule lacks any substantive mechanisms to monitor compliance with this requirement. We recommend that the SBA include additional requirements outlining how prime contractors will comply with the notification requirement.

In addition, given that the proposed rule does provide significant penalties for failure to comply with the requirements of a subcontracting plan (including the notification to subcontractor requirement), we recommend that the SBA provide a procedure(s) as to how the prime contractor can address and/or respond to a charge/accusation/assertion of noncompliance, including an allegation of failure to provide the requisite notification provided above.

Conclusion

Again, we commend the SBA for the thought and effort that went into drafting the proposed rule, as we are sure it was no easy task. As previously mentioned, we support many of the changes contemplated by the proposed rule, as we feel that the spirit and intent of the changes are favorable for small businesses. However, as outlined above, we do have concerns regarding the administrative burden(s) that the changes impose on small businesses, contracting officers and the SBA. With respect to the increased burdens on contracting officers and SBA, this comes at a time when a corresponding increase in resources to handle increased administration is not anticipated. Thus, we would urge the SBA to consider this very significant practical limitation as well as the other issues identified in these comments in developing the final rule. Thank you for your time and consideration.

Very Respectfully,

/s/

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