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VIA HAND DELIVERY

Brenda Fernandez
Office of Policy, Planning and Liaison
U.S. Small Business Administration
409 3rd Street, S.W., 8th Floor
Washington, D.C. 20416

Re: RIN: 3245-AG58, Comments on Proposed Rule
Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments

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 a statutory mandate for the performance requirements applicable to small business and socioeconomic program set aside contracts and small business subcontracting. See Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 79 Fed. Reg. 77955 (Dec. 29, 2014) ("Proposed Rule"). The Proposed Rule is designed to implement section 1651 of the National Defense Authorization Act ("NDAA") of 2013, which changes the limitations on subcontracting for full or partial small business and socio-economic program set-aside contracts and small business subcontracting. Additionally, the Proposed Rule also contemplates changes to the SBA's regulations governing the nonmanufacturer rule, affiliation rules, joint venture qualifications, and North American Industry Classification System ("NAICS") code appeals.

Our firm represents small businesses operating across the government contracting spectrum. Since Congress proposed to change the limitations on subcontracting calculations in the 2013 NDAA and through SBA's release of the Proposed Rule, we have received numerous comments from our clients and industry partners regarding the potential ramifications these proposed changes will have on small business government contractors. These comments convey these concerns and suggestions regarding the limitations on subcontracting, as well other changes proposed to SBA's regulations.

First, we commend SBA for its thoughtful development of this rule. Obviously the task of achieving transparency while accommodating the unique circumstances of very different industries is extremely challenging. We also commend SBA for reorganizing its regulations regarding compliance with the rule for establishing identical methods for calculating compliance

regardless of the type of small business set-aside being utilized. We also support the clarification of the role of SBA's Procurement Center Representatives. Our comments on the specific portions of the new rules follow.

Limitations on Subcontracting

While the Proposed Rule brings many welcome changes to the calculations for the limitations on subcontracting, we have a few serious concerns with how the new calculations will be implemented under the proposed regulations as currently drafted. We understand that a shift towards calculations based on the total contract value is meant to simplify compliance for both contractors and the government. However, the new Proposed Rule poses many questions regarding how such calculations are derived. Moreover, without further modification, the Proposed Rule will severely impact small business contractors operating in the environmental remediation and general and specialty trade construction industries. It may also severely impact other service industries that require significant materials and supplies in order to perform those service contracts. Without key revisions and clarifications to the Proposed Rule, we believe that small business contractors in these industries may be unable to meet the new requirements. In addition, the small business contracting community will struggle in their interpretation of how the new calculations are to be applied, as well as in the practical implications the new rules will affect.

As a general matter, we have received queries from our clients regarding how SBA plans to define the "total contract value" upon which the calculation is based. Is the total contract value the total amount funded by the agency issuing the procurement? We believe that SBA should define "total contract value," so that small business contractors understand the underlying assumption for these calculations.

- **Cost of Materials**

We believe that the draft regulation's proposed language does not provide the requisite clarity concerning how contractors are supposed to treat the cost of materials in their limitations on subcontracting calculations. Currently, the regulations allow contractors to exclude the cost of materials in calculations for contracts dealing with supplies and products, general construction, and specialty trade construction. 13 C.F.R. § 125.6(a). Similarly, the mandate found in section 1651 of the 2013 NDAA clearly excludes the cost of such materials from the calculation for supplies contracts:

> [I]n the case of a contract for supplies (other than from a regular dealer in such supplies), [a covered small business concern] may not expend on subcontractors more than 50 percent of the amount, <u>less the cost of materials</u>, paid to the concern under the contract.

(Emphasis added.)

However, as drafted, the Proposed Rule does not explicitly exclude the cost of materials in determining the limitation on subcontracting for supplies or products. See Proposed Rule at 77967, § 125.6(a)(2). Additionally, no exclusion for the cost of materials is provided in the Proposed Rule's calculation for the general construction and specialty trade construction industries. Id. at 77968, § 125.6(a)(4), (5).

We are not sure if SBA intended to leave out the cost of materials in describing these calculations. The "Example to paragraph (a)(3)" provided in the Proposed Rule, which illustrates a contract providing mixed services and supplies, does seem to indicate that the cost of materials will be excluded from the calculation for supplies: "Because the services portion of the contract is excluded from consideration, a small business manufacturer, together with one or more similarly situated small business manufacturers, must perform at least 50% of the cost of manufacturing the supplies or products, or at least 50% of the $2,500,000 supply portion of the requirement (not including the cost of materials)." Id. at 77967-68, at § 125.6(a)(3) (emphasis added). But there is no direction in the actual proposed language which would require an exclusion of those costs.

Based on the directive in the 2013 NDAA, as well as the language in the Example, we believe that the Proposed Rule should explicitly exclude the cost of materials from the limitation on subcontracting calculation for supplies contracts.

We also believe the Proposed Rule would benefit from an explanation regarding how SBA defines "supplies" and "materials," so small business contractors know exactly to which portions of their contracts the new regulations apply. We are aware that "cost of materials" is defined in 13 C.F.R. § 125.1(i); we believe that the Proposed Rule should specifically reference this definition, or should delineate the types of items it believes should be included as either supplies or materials.

Additionally, the provided Example demonstrates how the limitations on subcontracting calculation would apply to a "mixed" services and supplies contract where the majority of the contract value is for supplies. We believe that SBA should include another example in the Proposed Rule demonstrating how the calculation will be applied if the majority of the contract value is for services. For example, if the majority of the contract value is for services, it would seemingly follow from the language of the new regulation that contractors are now allowed to exclude from consideration that portion of the contract value that is for supplies or products. Does this mean that contracts for the majority of services allow for the exclusion of those portions of the contract that are not for services? Does this exclusion include items such as the costs of materials and supplies that are included in the total contract value? More clarity is

needed so that contractors and contracting officers will know exactly how to perform these calculations, and what is excluded.

We believe that the cost of materials and supplies should be excluded in calculating compliance with the limitation on subcontracting for all service contracts. For example, in the janitorial services industry, contractors are often required to purchase cleaning supplies and other equipment necessary to perform the contract. These costs can be significant and should be excluded prior to determining compliance with the limitation. Likewise, contractors in the information technologies industry are often required to purchase hardware or software in order to perform the contract. The same holds true for logistics support contracts which are typically categorized under the 51 or 54 NAICS code series. Often these types of contracts require managing repairs and purchasing supplies to make the repairs. These purchases should be excluded prior to determining compliance with the limitation on subcontracting.

- **Construction and Specialty Trade Construction**

We strongly encourage SBA to modify the Proposed Rule to explicitly exclude the cost of materials from the calculations applicable to construction and specialty trade construction contracts. This exclusion makes sense for a variety of reasons. Importantly, Congress in the 2013 NDAA left it to SBA to determine the applicable calculations for these industries. The statute states:

> CONSTRUCTION PROJECTS.—The Administrator shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. <u>The percentage applicable to any such requirement shall be determined in accordance with paragraph (1)</u>.

2013 NDAA § 1651(d)(3) (emphasis added). "Paragraph (1)" states that the Administrator is authorized to establish "a requirement that a covered small business concern may not expend on subcontractors more than a specified percentage of the amount paid to the concern under a contract in that category." 2013 NDAA § 1651(d)(1). Nothing in the language of the 2013 NDAA prevents SBA from providing for an exclusion of the cost of materials for small businesses performing construction and specialty trade construction contracts. Indeed, Congress left the "establishment," i.e., the formulation, of these percentages directly to the discretion of SBA.

The current rules allow for the exclusion of the cost of materials for construction and specialty trade construction, and contractors are accustomed to approaching projects with these

exclusions in mind. And, as discussed above, the 2013 NDAA also provided an exclusion for the cost of materials on supply contracts; it would make sense to apply this exclusion to construction contracts as well. More importantly, we believe that without including an exclusion for the cost of materials, contractors in the general construction and specialty trade construction industries will not be able to meet the proposed limitations on subcontracting percentage values of 15% and 25%, respectively. We have heard from a variety of our clients and industry partners on this topic, and they are adamant that achieving compliance with these percentages will not be realistic without an accompanying exclusion for the cost of materials.

We asked several clients to calculate compliance with the limitation on subcontracting as proposed, assuming no exclusion for the cost of materials and using the 15% general construction requirement. On average, using this calculation, the small business general contractor would only be performing between 3% and 5% of the cost of the contract. In addition, we spoke with several large and mid-sized construction contractors who agreed that the general contractor generally only performs between 3% and 5% of the cost of the contract. Excluding the cost of materials when calculating compliance with the limitation on subcontracting for the general and specialty trade construction industries is critical. Without this exclusion, general and specialty contractors may not be able to comply and, eventually, set-asides in these industries may not be feasible.

- **The Environmental Remediation Industry**

Under NAICS code 562910, procurements requiring services in three or more disciplines are categorized as environmental remediation contracts. If no one service dominates, NAICS code 562910 is assigned. Contracts under this code include environmental clean up of federal facilities. Excluding the cost of materials and supplies prior to determining compliance is critical. In addition, these contracts often include components that no small businesses are capable of performing. For example, many environmental remediation contracts require the contractor to identify the extent of hazardous waste at the subject site, remove the waste from the facility, and transport the waste to a storage facility. Transportation by rail is often required. It is simply not feasible that a "similarly situated small business" (as discussed further below) could be used for rail transportation. Truck transportation of waste also poses significant threats to the environment. States and the federal government have strict requirements for such transportation, often eliminating the possibility that qualified similarly situated small businesses could perform these services.

Moreover, because of the nature of environmental remediation contracts, often large businesses are required to perform critical portions of the contract. These large business subcontractors may be disinclined to participate in small business set-asides, if the amount of work available to them to perform is further restricted. The proposed rule may have this unintended impact. The Department of Defense, the Department of Energy, and the

Environmental Protection Agency, to name a few agencies, have historically viewed small business set asides very favorably in the environmental remediation industry. Without revisions to the proposed rule, we could experience a set-back in the size and number of awards to our environmental remediation small business contractors.

We believe that a change to the SBA's definition of cost of materials may solve this problem. Currently, the definition for "cost of materials" is found at 13 C.F.R. § 125.1(i), and reads as follows:

> Cost of materials means costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), commercial off-the-shelf items (and similar common supply items or commercial items that require additional manufacturing, modification or integration to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, cost of materials includes the acquisition of services or products from outside sources following normal commercial practices within the industry.

We recommend that within the definition of "cost of materials," SBA should also include the costs associated with a particular service required for contract performance that is unavailable from similarly situated small businesses, as reasonably determined by the contracting officer. As requested above, the cost of materials would be excluded prior to calculating compliance with the limitations on subcontracting. For example, we recommend that, at a minimum, the environmental remediation sector be addressed by adding an additional sentence to the definition of "cost of materials": "In the case of services including environmental remediation services, costs of materials includes transportation costs paid to a common carrier and disposal costs paid to a regulated disposal facility."

This concept is similar to SBA's rule on directed subcontractors. SBA currently treats these directed subcontractors as "Other Direct Costs" and therefore excludes them from the current calculation of performance of work by the small business prime contractor. 13 C.F.R. § 125.1(v). However, in the case of the environmental remediation industry and the other service industries cited in the above examples, multiple non-similarly situated businesses may be capable subcontractors, so the current directed subcontractor rule would be overly restrictive. While it would not be appropriate for contracting officers to select and direct a particular subcontractor, it would be appropriate for them to reasonably conclude that no similarly situated small business is available to perform the services, and therefore those services should be included in the cost of materials.

It was not the intent of Congress to harm small businesses through the passage of these provisions. Rather, its intent was to make the applicable limitation on subcontracting

percentages easier to calculate and audit. Our recommended changes providing exclusions for specialty large business subcontractors allows for compliance with Congress' intent while at the same time not adversely affecting small businesses performing in industries that are heavily dependent upon large businesses to perform required specialty services. Left unchecked, the language of the Proposed Rule will have a disparate impact upon small business set-asides in these industries.

❖ **Similarly Situated Entities**

We welcome the changes which allow small businesses to satisfy their limitations on subcontracting targets through the combination of the small business' work on the prime contract and any subcontracts awarded to "similarly situated entities." We believe that the current regulations which already provide for a similar concept in the HUBZone and Service-Disabled Veteran-Owned Small Business ("SDVOSB") programs have positively impacted contractors participating in those programs. It makes sense to extend this concept to all small business and socioeconomic set-asides. In fact, we believe that a regulatory change bringing parity to the other small business programs could be issued as an interim rule while SBA considers the comments and concerns regarding the other aspects of the rule.

The Proposed Rule, however, includes many compliance criteria that contractors utilizing similarly situated entities would be required to follow. Some of these proposed compliance criteria do not appear to be workable or practical for certain types of contracts. For example, the Proposed Rule will require small business prime contractors to identify in their proposals those similarly situated subcontractors that they intend to rely upon in order to comply with the limitations on subcontracting, and also identify the percentage of the prime contract award amount that will be spent on each similarly situated entity. Proposed Rule at 77968, § 125.6(d). Additionally, small business prime contractors will be required to enter into written agreements with each similarly situated subcontractor, detailing the percentage of work forecasted to be performed by each entity. Id. at § 125.6(b).

SBA should consider eliminating these requirements and simply mirror existing regulations which allow for such subcontracting in the SDVOSB and HUBZone programs. We are unaware of abuses in this area, and rather than complicating the calculations and putting the burden of compliance on the small business prime contractor, particularly at the time of proposal submission, we recommend that SBA adopt a different approach that would allow a bit more flexibility, such as the approach used for large businesses making good faith efforts to achieve their small business subcontracting plans. See, e.g., 13 C.F.R. § 125.3(c)(1)(ii) and (c)(3) regarding good faith efforts. It seems unfair for small business prime contractors to bear an administrative burden that is greater than the burden placed on large businesses.

Small business prime contractors and contracting officers can still track compliance over the applicable performance periods. Contracting officers can use the CPARS system to note noncompliance and this could be an evaluation factor for future awards. SBA and the FAR Council regulations governing large business subcontracting could be mirrored. Moreover, if it is determined that a material misrepresentation occurred, the small business prime contractor could be prosecuted under the False Claims Act or suspended or disbarred under the current regulatory structure.

Should SBA not adopt this approach, we recommend that the Proposed Rule be amended so that forecasting compliance is required at the task order level for certain types of contracting vehicles. For example, for large multiple award contracts such as those for Indefinite Delivery, Indefinite Quantity ("IDIQ"), the small business prime contractor will necessarily not have an adequate sense of how it intends to utilize its various proposed subcontractors until the specifications for the specific task orders are released by the agency. It seems counterproductive to require a prime contractor to essentially "pledge" in both the teaming agreement and the proposal that it will utilize a specific subcontractor for a specified percentage of the contract's value, when it is impossible to predict the agency's future requirements, or even a timeline of those requirements. The Proposed Rule does not provide contractors with the necessary flexibility they require in order to properly address future agency needs, such as task orders on an IDIQ vehicle.

We recognize that the Proposed Rule states that SBA will not consider "material" whether or not the "particular specific entities perform the forecasted amount of work," so long as "the similarly situated entities collectively meet the performance of work requirement." Id. at § 125.6(b)(2). However, this caveat does not do enough to alleviate the force of the pledges that SBA requires the prime contractor to enter into with their proposed subcontractors. For example, the teaming agreements which the small business prime contractor will be required to enter into with its proposed subcontractors will presumably be enforceable under law. Additionally, the Proposed Rule states that SBA "may consider any party's failure to comply with the spirit and intent of such a subcontract as a basis for debarment . . ." Id. at § 125.6(b)(3). Such a severe penalty seems harsh for those contracting vehicles where the prime contractor will have no hope of predicting the future requirements of the agency. Perhaps SBA should include an exception or alternative set of requirements for prime contractors intending to utilize similarly situated entities for multiple award and IDIQ contracting vehicles. Otherwise, the language of the Proposed Rule provides too onerous of a burden on these small business prime contractors.

In addition, we have heard from the small business community that many small businesses currently participating as suppliers or subcontractors on federal small business set-asides are not federal contractors and are only accustomed to providing a quote, perhaps on the back of an envelope. Many may simply walk away from the work or agree to perform and then fail the test. These small subcontractors may actually be harmed if they are required to enter into

Small Business Teaming Arrangements ("SBTA") and guarantee the small business prime contractor that they will perform the required percentage of work. For example, if a small business performing an environmental remediation contract is required to identify the contaminated area to be remediated, that prime contractor often hires a local small business to survey the area. It also hires a small fencing company to install the orange fencing around the contaminated site. Under SBA's proposed rule, both these small, commercial contractors would be required to enter into an SBTA and possibly certify self-performance. In addition, it is unclear from the proposed rule whether the proposed fencing contractor can obtain the fencing from a local hardware store or whether the cost of the fencing can be excluded in determining compliance.

As you can see, an overly restrictive rule will have unintended consequences that may harm not only small business prime contractors, but their small business subcontractors as well.

❖ **Certifications**

As noted above, we request that SBA eliminate many of the complexities in its proposed rule and simply adopt current regulations for HUBZone and SDVOSB teaming arrangements. However, if SBA does not agree with this recommendation, then we believe more clarification regarding certifications would be helpful.

The Proposed Rule requires prime contractors to certify in their proposals that they will meet the applicable limitations on subcontracting. Proposed Rule at 77968, § 125.6(c). We believe that more information is required regarding the nature of this certification. For example, the proposed rule says that the contracting officer "must be satisfied that the small business concern prime contractor will satisfy the applicable limitation on subcontracting at the time of award." (Emphasis added.) However, as described above, it will be difficult for prime contractors to accurately predict future government needs in multiple award and IDIQ contract vehicles. For prime contractors that plan on utilizing similarly situated entities in order to meet the applicable limitations on subcontracting percentage, will those prime contractors be required to certify that they will utilize the identified subcontractors precisely as proposed? What form will the certification take? Will this new certification be included in the standard representations and certifications prime contractors already include in their proposals (such as those found on the System for Award Management), or will it be a separate certification? Before small business prime contractors are required to make yet again another representation, it necessarily follows that they should know exactly to what they are certifying. This is especially true in light of the severe penalties they will be subject to if such certifications turn out to be false.

Identity of interest affiliation

We are in favor of the proposal to clarify the types of family relationships that give rise to a rebuttable presumption of affiliation. This will make it easier for small businesses to understand when it may (or may not) be necessary to take steps to rebut the presumption.

However, we do not agree with the proposal at section 121.103(f)(2) that would presume affiliation when one firm has derived 70% or more of its receipts from another concern in the previously completed fiscal year. Currently, the analysis of size and affiliation (including economic dependence) is based on the three most recently completed fiscal years. A three-year average of 70% would be more indicative of a dependent relationship, compared to just one year that could be just a blip based on a one-time large purchase or other unusual circumstance in that year. Also, we believe the SBA should account for trends in the current, incomplete fiscal year when determining whether the presumption of affiliation is rebutted. As an example, a size determination may occur in November of a given year. A firm may have had over 70% of its revenue from another firm in the last completed fiscal year, but the 11 months of the current fiscal year may show a significant downward trend. Finally, SBA should clarify in the rule that economic dependence arises when the concern in question serves as a subcontractor to another firm and derives 70% or more of its revenue from those subcontracts. Such dependence would not arise, however, when the concern in question is the prime contractor or otherwise is the one in control of issuing and maintaining the contractual relationship with the other concern. This distinction is consistent with SBA's Office of Hearings and Appeals case law.

The Proposed Rule also states that the presumption of economic dependence is rebuttable when the firm is "new or a start-up and has only received a few contracts or subcontracts." We believe that SBA should provide more clarity regarding what constitutes a new or "start-up" firm.

SBA should also provide for the ability for firms to rebut the presumption of economic dependence affiliation. For example, a firm established in a small community may only have one or two contracts with a larger company located in the same community simply due to the geographic restrictions. It would be unfair to penalize a small business seeking to expand its client base with an automatic presumption that it is affiliated with the only business it has happened to work with. SBA should also allow companies to rebut the presumption of economic dependency through an explanation of the nature of the business relationship between the two firms as of the date of determining size, in order to determine whether the same business relationship has continued and whether the subject concern has developed contracts with firms other than the challenged affiliate.

SBA should also clarify that the economic dependence determination is not meant to apply to situations where 70% of revenues are from one government customer or from a major

prime contractor responsible for running a government facility. For example, many Department of Energy facilities are run by major prime contractors who then issue subcontracts to carry out the mission of the facility. These prime contractors are essentially standing in the shoes of DOE and small businesses with a majority of their work at one facility should not be penalized for that fact.

Joint Ventures

We are strongly in favor of the proposal to permit small businesses to joint venture for any procurement, regardless of the size of the procurement, as long as each joint venture partner meets the applicable size standard. We also support the changes made to eliminate the requirement that an 8(a) program participant cannot joint venture unless its revenues are less than half the revenues of the NAICS code assigned to the procurement. This will eliminate what has been an often-confusing rule to explain and understand, and it will make a very valuable tool available and useful to more small businesses. Moreover, if the proposed rule regarding similarly situated teaming partners is adopted, joint venture partnerships would still be permitted so long as each partner is small. In other words, the similarly situated small business proposal applies only to teaming partners as subcontractors and small businesses under the various socio-economic programs would still be able to joint venture with other non-similar small businesses so long as they meet the regulatory requirements governing ownership and control of the joint venture.

Size Recertification

We strongly oppose the proposed change to section 121.404(g)(2)(ii)(D) requiring a firm to recertify its size if a merger or acquisition occurs after offer but prior to award. While we appreciate SBA's concern, we believe the recertification requirement has already gone too far in depressing the value of small businesses and restricting their ability to freely operate their businesses and maximize their opportunities. Currently, the recertification requirement arises as part of a contract that was already awarded and the firm's inability to recertify as small does not require termination of the contract. The firm in most cases would be able to continue performing the contract, but the agency could not continue counting the contract toward its small business goals. The proposal to require recertification on pending proposals is very likely to have a much more negative effect on the contract. The great risk with this proposal is that many contracting officers, thinking the recertification indicates the firm is no longer eligible for the contract, would decline to award the contract to the recertifying firm. So small businesses will lose contracts for which they were eligible based on their size as of the date they submitted their proposal.

If SBA's goal is to improve the accuracy of small business contracting data, rather than to prevent firms from receiving contracts they were eligible to pursue on the date they submitted

their proposal, SBA should instead push the recertification until after contract award. The rule could require the firm to recertify within 30 days of the merger or acquisition, or within 30 days of contract award, whichever occurs later. And SBA should go further in the rule to make clear that the inability to recertify as small does not affect the firm's eligibility for the contract, which is based on the firm's size status as of the date it submitted its proposal. Also, we note that SBA already has the "present effect rule" to address the circumstance when a merger or acquisition is consummated after proposal submission, but the deal was effectively finalized via an agreement in principal reached before the proposal was submitted.

If SBA decides to include such a recertification requirement in the final rule, we believe that it should consider establishing a size parameter on the requirement. For example, firms that have been acquired while a proposal is pending would not need to recertify their size to the contracting officer if they have been acquired by another firm that is small under the size standard attached to the procurement.

As noted above, we recommend that the proposal be removed from the final rule. It creates a chilling effect on commerce, which is already severely frustrated by the current recertification rules for mergers and acquisitions. Many small businesses struggle when they grow to be other than small – not large enough to successfully compete against the truly large businesses and no longer welcome on teams looking for small business subcontracting credit. A viable option for these firms is to grow through acquisitions or to merge. However, SBA currently requires that both the acquired and the acquiring firms recertify on all contracts, which severely handicaps this type of growth as a viable option, particularly for firms with large IDIQ contract vehicles. Those firms may be off-ramped from the contract if unable to recertify, or they may simply not be allowed to bid on future task orders. Given the current contracting environment, with protracted procurement cycles, large IDIQ contracts, Governmentwide Acquisition Contracts, and use of Federal Supply Schedules, SBA should consider loosening rather than tightening these rules. SBA now has fines and penalties in place for firms who fail to update data bases such as SAM. We submit that these are sufficient enforcement mechanisms. While firms that are no longer small after a merger or acquisition should not and are not able to certify as small for new work, given the current environment, the recertification rules actually may have the unintended consequence of not allowing the firms to keep what they were awarded as legitimate small businesses.

NAICS Code Appeals

We believe the current 10-day period for NAICS code appeals is the right amount of time and should not change. The fact that many procurements close in 30 days is a good example of why the 10-day period is necessary. The procurement cycle is already so compressed that shortening the appeal period may reduce the number of appeals because firms, with all of the

other demands of a rapid procurement cycle, will not have enough time to review the solicitation and identify the bases to appeal.

We are strongly in favor of making clear in SBA's rules that the filing of a NAICS code appeal requires the contracting officer to suspend the proposal deadline until the conclusion of the appeal. We understand that OHA used to direct contracting officers to suspend the proposal deadline in their notice and order at the outset of NAICS code appeals, but they stopped that practice a few years ago. We had a case where the contracting officer initially refused to suspend the proposal deadline. As a result, our client, which had filed the NAICS code appeal, had to consider filing a lawsuit in the U.S. Court of Federal Claims to enjoin the proposal deadline pending the outcome of the NAICS code appeal. Currently, section 121.1103(c)(1)(i) provides that the contracting officer must "stay the solicitation" after receiving an NAICS code appeal. We believe the rules should make clear that the proposal deadline must be suspended until conclusion of the appeal, so there is no confusion as to whether firms have to go through the time and expense of preparing a proposal for a solicitation for which they may not be eligible depending on the outcome of the appeal.

Size Protests

We agree with the proposal in section 121.1001(a)(1)(i) to make clear that firms eliminated from a procurement due to technical unacceptability or non-responsiveness do not have standing to protest size. However, we have some concern with the proposal to not allow protests from firms eliminated from the competitive range. An agency is permitted to establish a competitive range of only one firm, which would effectively insulate that one firm from any size challenge except by the contracting officer or SBA. Also, when a firm is eliminated from the competitive range, this is not the same as a firm found to be non-responsive or technically unacceptable. A firm may be eliminated from the competitive range, even if well-regarded, because the agency determined that other proposals were more highly rated. If one of the firms in the competitive range was eliminated due to size issues, that might lead the agency to make a new competitive range determination including another firm.

Nonmanufacturer Rule

We agree with continuing the exemption from the limitations on subcontracting for small business set-asides between $3,000 and $150,000. However, such an exemption does favor small businesses over other socio-economic groups. It would be appropriate for the exemption to be extended to all set-asides. We think that SBA should clarify whether or not the exceptions to the nonmanufacturer rule apply to individual orders issued multiple award contracts, or if they apply only to total contract values between the micropurchase and simplified acquisition thresholds. We believe that it would be beneficial to small businesses if the exceptions extended to orders as well as individual contracts.

We also agree with the concept that solicitations should identify whether a class waiver of the nonmanufacturer rule exists and that SBA should allow for waivers after contract award when the contract requirements have changed. However, if an individual waiver is pending on the due date for proposal submission, small businesses will be faced with the uncertainty of knowing that a waiver is pending when they put their team together. From this perspective, requiring that the contracting officer state in the solicitation that a waiver request is pending without further guidance will not be helpful. Perhaps a clause could be placed in the solicitation stating that when a waiver request is pending and subject to SBA approval, small businesses may submit proposals assuming that the waiver will be granted.

We appreciate your attention to this matter and trust that you will carefully consider these comments. Please do not hesitate to contact us if you have any questions.

Very truly yours,

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