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August 10, 2015

VIA FEDERAL ERULEMAKING PORTAL

U.S. General Services Administration
Regulatory Secretariat Division (MVCB)
Attn: Ms. Hada Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405

Re: FAR Case 2014-0003, Comments on Proposed Rule – Small Business Subcontracting Improvements

Dear Ms. Flowers:

We are writing to submit comments on the above-referenced Proposed Rule to amend the Federal Acquisition Regulation ("FAR"), issued June 10, 2015, 80 Fed. Reg. 32,909. Our firm represents a wide variety of firms operating across the government contracting spectrum. After the recent small business subcontracting plan changes were implemented by the U.S. Small Business Administration ("SBA") in its final rule at 78 Fed. Reg. 42,391, dated July 16, 2013, many of our clients have asked us how the SBA's new rules should be interpreted in light of the existing FAR small business subcontracting requirements. We believe that the FAR Councils are taking the right steps to harmonize the SBA's requirements with the obligations the FAR imposes. However, we believe that there are several aspects of the proposed rule that could be amended to provide greater clarity and less burdensome outcomes for contractors administering subcontracting plans, particularly contractors that maintain commercial plans.

We understand that these proposed amendments to the FAR correspond with the new SBA regulations found at 13 C.F.R. § 125.3. Therefore, we have organized our comments as centered around the changes the FAR Councils identified in the Proposed Rule (see 78 Fed. Reg. at 32,910):

- **Authorizing contracting officers to establish subcontracting goals in terms of total contract dollars in addition to the required goals in terms of total subcontracted dollars, for individual plans.**

While we recognize that this particular goal implements a change made by the SBA in its rules (see 13 C.F.R. § 125.3(a)(2)), we believe that this proposal could be problematic in its implementation. Allowing contracting officers to establish additional goals tied to the total

contract dollar value as opposed to the total subcontracted dollars may result in agencies insisting that contractors assign the same percentage for a particular subcontracting goal tied to the entire contract value as the agency's own small business contracting goals for that particular socioeconomic program. This would not be a fair result in instances where adequate subcontracting opportunities do not exist. The Proposed Rule should provide guidance to contracting officers regarding what types of situations setting an additional goal tied to total contract value would be appropriate.

For example, it would not be a fair result to require a contractor to utilize subcontractors for a certain percentage of total contract value if the contractor is otherwise capable of completing the substantial majority of contract performance with its own resources. We have heard from businesses we represent that contracting officers often will tie the subcontracting goals to the entire contract value and blindly assign the agency's own small business goals to these individual contract targets, requiring the contractor to comply with unrealistic expectations from the outset of contract performance. We believe that this provision needs to be revised to provide more guidance regarding when these alternate goals are appropriate.

- **Providing contracting officers discretion to require a subcontracting plan in instances where a prime contractor's size status changes from small to other than small business as a result of re-representation.**

We agree with this proposed change in the context of its application to multiple award or indefinite-delivery, indefinite-quantity contracts. For larger contracting vehicles, it makes sense to require contractors to comply with subcontracting plan obligations after they have recertified as other than small, since there is presumably a greater amount of small business subcontracting opportunity for larger or long-term contracting vehicles. However, it would be impractical to apply such subcontracting plan goals to smaller contracts, where subcontracting opportunities may be limited. In other instances, the adoption of subcontracting plans in these circumstances would serve little purpose, especially if contract performance is mostly complete. Prime contractors performing on such contracts will also have preexisting obligations to their current subcontractors, and it would be unduly burdensome to require them to breach their current subcontracts in order to accommodate newly-implemented subcontracting plan goals.

The adoption of subcontracting plans in such instances would create unnecessary administrative burdens for the contractor and contracting officer alike, with no appreciable benefit. Therefore, we suggest adding additional language to the end of FAR 19.301-2(e) to indicate that subcontracting plans should be required where a prime contractor's size status changes from small to other than small as a result of a re-representation, but only "to the extent significant new subcontracting opportunities exist."

- **Requiring subcontracting plans, to the extent that subcontracting opportunities exist, when a modification causes the overall contract value to exceed the subcontracting plan threshold, even if the modification's value is less than the threshold.**

Similar to our comment above regarding the adoption of subcontracting plans after a prime contractor's re-representation of its small business size status to other than small, we believe that the proposed rule should reflect that the subcontracting plan requirement should only be implemented "to the extent significant new subcontracting opportunities exist." Inclusion of this additional language at the end of FAR 19.702(a)(3) is important, as the contract modification may not have a corresponding increase in subcontracting opportunities. It would also caution contracting officers from automatically requiring subcontracting plans when such modifications are implemented without assessing the ultimate practicality of enforcing such a requirement.

- **Requiring prime contractors to list North American Industry Classification System (NAICS) codes for each subcontract.**

We disagree with the proposed change to FAR 52.219-9(a)(3) that would require contractors to list the NAICS code and size standard for each subcontract in the subcontracting plan. This will be very burdensome for many contractors, particularly those with commercial plans, as it could result in subcontracting plans that are thousands of pages in length. Furthermore, the collection of this information is not necessary for the proper performance of the FAR. The proposed change to FAR 2.101 would define a small business subcontractor according to the prime contractor's determination of the NAICS code that best fits the subcontract. This proposed definition gives prime contractors flexibility in when and how to determine the small business criteria for their subcontractors; prime contractors are not required by this definition to assign the NAICS code in the subcontract or subcontracting plan, rather they simply must make the determination of what NAICS code best fits the subcontract. That is a better way to balance the proper functioning of the subcontracting plan requirements with the burdens placed on contractors.

The proposed requirement at FAR 52.219-9(a)(3) is particularly troublesome for firms with commercial subcontracting plans. Most firms that have commercial plans have thousands of vendors, and many times that number of invoices and purchase orders issued each year. For this reason, we believe the FAR properly includes critical exemptions for commercial plans. For example, no change was proposed to the language in FAR 52.219-9(d)(11)(vi). FAR 52.219-9(d)(11)(vi) exempts contractors with commercial plans from maintaining supporting records on a contract-by-contract basis regarding the business size of each subcontractor. The FAR Councils should confirm that the proposed changes do not alter the broad recordkeeping exemption for commercial plans found in FAR 52.219-9(d)(11)(vi). The recordkeeping exemption for commercial plans exists for good reason, given the nature of commercial plans

and the practical difficulties commercial contractors would face in maintain such records for tens of thousands of vendors and purchase orders.

There are other examples in the rules indicating the new reporting and recordkeeping requirements should apply only to individual subcontracting plans. For example, the preamble to the proposed rule explains at page 32,910 that "prime contractors with individual subcontracting plans [would be required] to report order level subcontracting information." (Emphasis added.) Similarly, FAR 19.704(c) states that the requirements of FAR 19.704(a) —which, as proposed, would include the requirement to assign a NAICS code to each subcontract—apply "[i]f a subcontracting plan is necessary and if the offeror is submitting an individual subcontracting plan . . . ." Proposed Rule at page 32,914 (emphasis added).

One reasonable and practical approach for commercial plans is found in the Annotated Desk Reference for FAR 52.219-9, attached to these comments as Exhibit A. Regarding the annual Summary Subcontract Report requirement at FAR 52.219-9(l)(2)(iii), the Annotated Desk Reference states that, for a commercial plan, "the Contractor may obtain from each of its subcontractors a predominant NAICS Industry Subsector and report all awards to that subcontractor under its predominant NAICS Industry Subsector." The FAR Councils should consider an approach like this that avoids the unduly cumbersome requirement to assign or list a NAICS code to every invoice and purchase order when a contractor has a commercial plan. The contract-by-contract requirements such as assigning a NAICS code may be appropriate for contractors with individual subcontracting plans, but we believe they are not workable for commercial plans, especially for large companies operating mainly in the commercial sector.

- **Amend FAR 52.219-9(j) to make clear that prime contractors with commercial plans do not need to flow down the subcontracting plan requirements to subcontractors, regardless of the nature of the subcontract**

FAR 52.219-9(j) provides two potential exceptions to the requirement to flow down the subcontracting plan requirements to subcontractors: (1) when the prime contract contains FAR 52.212-5 or (2) when a subcontractor provides a commercial item subject to FAR 52.244-6 under a prime contract. The first exception is based on the nature of the prime contract and the second exception is based on the nature of the subcontract, and these are either/or exceptions.

FAR 52.212-5(e)(1) lists the few FAR clauses that should be flowed down in a subcontract for commercial items. FAR 52.219-9 is not one of the required flow-down clauses listed in FAR 52.212-5(e)(1). There is nothing in FAR 52.212-5 to indicate FAR 52.219-9 must be flowed down to subcontractors in any circumstance. FAR 52.219-9(j) is the only clause to address flow down of the subcontracting plan requirement, and that clause explicitly states that the subcontracting plan requirement is not flowed down to subcontractors when the prime contract contains FAR 52.212-5.

The FAR Councils have previously addressed this and found that FAR 52.212-5(e) and FAR 52.219-9(j) are not in conflict. In FAR Case 2005-040, a commenter questioned the need to add the language now found in FAR 52.219-9(j), which states that subcontracting plans are not required from subcontractors when the prime contract contains FAR 52.212-5. The commenter objected to the proposed language because the commenter believed that FAR 52.219-9 should be included in contracts for commercial items. In response, the FAR Councils rejected the comment and kept the flow-down exception in FAR 52.219-9(j) because, according to the FAR Councils, the language in FAR 52.219-9(j) "is consistent with FAR 52.212-5(e)(1)." 75 Fed. Reg. 34,260, 34,261 (June 16, 2010) (emphasis added).

The consistency the FAR Councils noted in FAR 52.212-5(e)(1) and FAR 52.219-9(j) is that when an acquisition is for commercial items, whether at the prime contract or subcontract level, subcontractors are exempted from the subcontracting plan requirements in FAR 52.219-9. Similarly, for both of the flow-down exceptions in FAR 52.219-9(j), the common thread is the commercial nature of the acquisition.[1] As long as either the prime contract (FAR 52.212-5) or the subcontract (FAR 52.244-6) is for commercial items, FAR 52.219-9(j) indicates that subcontractors are not required to have subcontracting plans.

It makes sense not to flow down the subcontracting plan requirement in commercial item acquisitions because of the Congressional policy, embodied in 41 U.S.C. § 3307 and FAR Part 12, that such acquisitions should be simplified and contain as few FAR clauses as possible. See FAR 12.301(a) (citing 41 U.S.C. § 3307 and stating that, to the maximum extent practicable, contracts for commercial items should contain only those FAR clauses required by law or that are consistent with customary commercial practice); see also FAR 12.102(c) (stating that when a policy in another part of the FAR is inconsistent with a policy in FAR Part 12, Part 12 takes precedence for the acquisition of commercial items).

The exclusion of the flow-down requirement from commercial item acquisitions is also consistent with the Small Business Act. The Small Business Act requires a subcontracting plan to contain:

> [A]ssurances . . . that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in

[1] The inclusion of FAR 52.212-5 in a prime contract signals the acquisition is for commercial items. See FAR 12.301(b)(4) (instructing that FAR 52.212-5 should be inserted in acquisitions for commercial items). Conversely, FAR 52.244-6 applies when the prime contract is not for commercial items, but the subcontract is. See FAR 44.403 (instructing that FAR 52.244-6 should be included in solicitations and contracts "other than those for commercial items.").

> the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5) . . .

15 U.S.C. § 637(d)(6)(D) (emphasis added). Based on the statute's separate uses of the terms "subcontract" and "contract," and the way the statute ties the receipt of a subcontract to a contract, we believe Congress envisioned that a prime contractor would be required to flow down the subcontracting plan requirement to subcontractors that work directly under a particular federal prime contract, such as in the case of a subcontract issued in connection with a federal prime contract for construction of a public facility.

When a prime contractor has an individual subcontracting plan related to a specific federal prime contract, it is reasonable that large subcontractors working underneath that federal project would also need to implement their own subcontracting plan to ensure the small business participation goals for that project are met. However, when a contractor has a commercial plan, the prime contractor does not have subcontracting goals or subcontracts tied to a particular federal project. See FAR 52.219-9(g) (indicating a commercial plan relates to all of the prime contractor's purchasing, both commercial and government). Indeed, many contractors with commercial plans have thousands of suppliers that, by and large, do no commercial work. It is for reasons like these that we believe Congress envisioned a prime contractor would need to require a subcontractor to have its own subcontracting plan in connection with a specific federal prime contract, but not, as noted in FAR 52.219-9(j), when the prime contract or subcontract is an acquisition for commercial items.

We bring this up because, despite what we believe is clear in the FAR and in the FAR Councils' previous comments on the flow-down issue, we have seen some agencies interpret the FAR as requiring prime contractors with commercial plans to flow down the subcontracting plan requirements if the subcontractor is not providing a commercial item. We believe the correct interpretation of FAR 52.219-9(j) is that flow-down is not required if the prime contract is for commercial items, regardless of the nature of the subcontracts. To avoid confusion, the FAR Councils should add language to FAR 52.219-9(j) so it reads: "Subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, regardless of whether the subcontractor is providing a commercial item, or when . . . ."

- **Permitting reliance on SAM representations**

We also note that it is a positive development to allow prime contractors to accept a subcontractor's size and representations in the System for Award Management ("SAM) if they represent that its size and status representations in SAM are current, accurate and complete as of the date of the offer for the subcontract. This will allow subcontractors to maintain their size and status representation in one location and reduce paperwork and administrative burden placed on

prime contractors. However, we question whether the proposed changes should go as far as to require prime contractors to only accept a subcontractor's written representation of its small business size and status if the subcontractor has not previously registered in SAM. The Proposed Rule creates an inconsistency with the SBA's guidance regarding the matter and eliminates the most direct certification process available—a written certification from the subcontractor. Cf. 13 C.F.R. § 121.411 ("Prime contractors may rely on the information contained in [SAM] . . . as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list."). Requiring prime contractors to rely on SAM before accepting written certifications creates an extra administrative burden that is ultimately unnecessary. This extra step is particularly onerous for large prime contractors administering commercial plans, where they deal with thousands of vendors that do no work in the government contracting sector, and are, therefore, not registered in SAM.

- **Providing that prime contractors cannot prohibit a subcontractor from discussing payment or utilization matters with the contracting officer.**

We agree with this proposed change, as we believe that it will encourage transparency between prime contractors and subcontractors, and will better allow contracting officers to track subcontractor utilization.

- **Requiring prime contractors to resubmit a corrected subcontracting report within 30 days of receiving the contracting officer's notice of report rejection.**

We agree with this proposed change, as 30 days is a reasonable time period to review a contracting officer's notice of subcontracting report rejection.

- **Clarifying a requirement that prime contractors notify unsuccessful offerors for subcontracts in writing.**

We agree with this proposed change, as it will encourage prime contractors to officially inform subcontractor offerors when their subcontract proposals have not been accepted. This will also serve to clarify when a subcontractor's information has been utilized for purposes of proposal submission. We commend the FAR Councils' inclusion of its proposed clarification in FAR 52.219-9(d)(12) of what it means to "use" a small business concern during the preparation of bids and proposals. This clarification will help protect small business subcontractors.

- **Requiring prime contractors with individual subcontracting plans to report order-level subcontracting information.**

We agree with the proposed changes which would include subcontracting data for each order when reporting subcontracting achievements for multiple award contracts intended for use

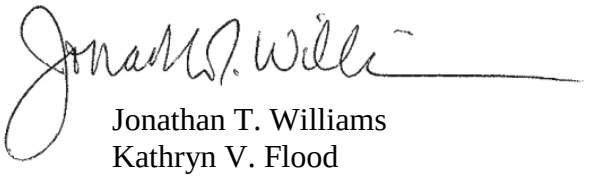
by multiple agencies. We commend the FAR Councils' emphasis that this requirement does not apply to prime contractors administering commercial plans.

- **Clarifying that failure to comply in good faith with the subcontracting plan shall be a material breach of the contract and may be considered in any past performance evaluation of the prime contractor.**

While we agree that a prime contractor's failure to comply in good faith with its subcontracting plan should be a material breach of contract and considered in past performance evaluations, we also believe that the Proposed Rule should include language regarding the processes prime contractors may take to contest or respond to such a finding.

Please do not hesitate to contact Jon Williams or Kathryn Flood at (202) 857-1000 if you have any questions about these comments.

Sincerely,



Jonathan T. Williams
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