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MEMORANDUM

To: Clients and Friends
From: Pamela J. Mazza
Antonio R. Franco
Devon E. Hewitt
Jonathan T. Williams
Date: March 25, 2011
Re: **FAR Council Issues Series of New Revisions to the Federal Acquisition Regulation**

On March 16, 2011, the Federal Acquisition Regulatory Council (“FAR Council”) published in the Federal Register a number of revisions to the Federal Acquisition Regulation (“FAR”). Notably, the FAR revisions include an interim rule implementing a new law requiring the justification and approval (“J&A”) of sole-source contracts over \$20 million awarded under the 8(a) Business Development Program. See 76 Fed. Reg. 14559 (Mar. 16, 2011). Another significant revision of the FAR is an interim rule reestablishing parity among all socioeconomic programs, including the 8(a) Business Development Program, the HUBZone Program, and the Service-Disabled Veteran-Owned Small Business (“SDVOSB”) Program. Lastly, the FAR Council issued an interim rule mandating enhanced competition requirements for orders placed against multiple-award contracts, including the General Service Administration’s Federal Supply Schedules (“FSS”).

These interim rules are effective as of March 16, 2011. Interested parties may submit written comments by May 16, 2011, for consideration in the final rule.

I. Justification and Approval Requirement for 8(a) Sole-Source Awards Above \$20 Million

Section 811 of the National Defense Authorization Act for FY 2010, Public Law 111-84, established a new requirement for Federal agencies to justify and approve a

sole-source 8(a) contract award to a business, including businesses owned by Indian Tribes and Alaska Native Corporations, if the sole-source award exceeds \$20 million. The new interim rule implements this statutory mandate. Prior to the enactment of Section 811, J&As were not required for 8(a) sole-source awards for any dollar amount.

Section 811 states that the sole-source justification must include the following five elements:

- A description of the needs of the agency concerned for matters covered by the contract;
- A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract;
- A determination that the use of a sole-source contract is in the best interest of the agency concerned;
- A determination that the anticipated cost of the contract will be fair and reasonable; and
- Any other such matters as the head of the agency concerned shall specify.

Accordingly, the new interim rule mandates that the above five elements must be included in a J&A for 8(a) sole-source awards over \$20 million. Moreover, the new rule requires that the J&A be approved by the “appropriate official” provided under FAR § 6.304, and made public within 14 days after award is made.

Other than the new J&A requirement, the new interim rule does not in any way restrict the ability of agencies to award 8(a) contracts with a dollar value over \$20 million.

II. Parity Among Socio-Economic Programs

Section 1347 of the Small Business Jobs Act of 2010, Public Law 111-240, clarified that the contracting officer has discretion when determining whether an acquisition is restricted to small businesses participating in the 8(a), HUBZone or SDVOSB programs. Under a new interim rule, the FAR Council is making a similar change to the FAR, clarifying that there is no order of precedence among the 8(a), HUBZone or SDVOSB programs. This rule is designed to clear up the confusion, based on several Government Accountability Office and Court of Federal Claims cases in the last few years, regarding whether one program has priority over the others. It is now clear that there is parity between the 8(a), HUBZone and SDVOSB programs.

Notwithstanding the reestablishment of parity, the interim rule states that if a requirement has been accepted by the Small Business Administration (“SBA”) under the 8(a) program, it must remain in the 8(a) program until SBA agrees to its release in accordance with SBA regulations. Also, for acquisitions above the Simplified

Acquisition Threshold (“SAT”), the contracting officer must consider a set-aside or sole-source acquisition under these socio-economic programs before proceeding with a small business set-aside.

III. Enhanced Competition Requirements for Multiple Award Schedule Contracts

Section 863 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417, mandated that the FAR be revised to enhance competition on multiple-award schedule contracts, including the FSS. Such enhancements to competition on schedule contracts, including some additional enhancements not specifically mandated by Section 863, have been incorporated into a new interim rule and are summarized below.

A. Enhanced Competition Requirements for Multiple Award Schedule Contracts Mandated by Section 863

Section 863 and its corresponding FAR revisions include a requirement that, in general, an agency using a multiple-award schedule contract must provide fair notice of intent to make a purchase of property or services in excess of the SAT to all contractors offering such property or services under that multiple-award schedule contract. Moreover, the agency is also required to give all contractors responding to the notice a fair opportunity to make an offer and have that offer fairly considered.

By way of exception, the agency may provide this notice of intent to purchase to fewer than all contractors offering such property or services, provided that the notice is given to as many contractors as practicable. However, an agency cannot make a purchase under this exception unless (i) offers were received by three qualified contractors or (ii) the contracting officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts.

These new requirements can be waived on the basis of a justification, including a written determination identifying the statutory basis for the waiver that is prepared and approved at the agency levels specified in the FAR.

B. Enhanced Competition Requirements for Orders Placed Against FSS Blank Purchase Agreements (“BPA”)

Although not mandated by Section 863, the new interim rule also includes enhanced competition requirements for placement of orders against FSS BPAs. For example, the new interim rule establishes a preference for multi-award BPAs instead of single-award BPAs, although single-award procedures will be permitted under certain conditions. In addition, the new interim rule establishes certain procedures under multiple-award BPAs to ensure that all BPA holders offering the supplies or services sought by the agency have notice of, and a fair opportunity to respond to, a request for quotation issued pursuant to the BPA. Further, the new interim rule restricts the ability of agencies to establish BPAs based on limited-source justifications.

The new interim rule also clarifies that agencies are permitted to seek price reductions under FSS contracts at any time and must seek price reductions when placing an order or establishing a BPA that exceeds the SAT.

Finally, the new interim rule clarifies that protest procedures under FAR Subpart 33.1 are applicable to the issuance of an order or the establishment of a BPA against an FSS contract.

The likely result of these significant revisions to the FAR is that it will be somewhat more difficult for agencies to place orders against multiple award schedules on a limited- or sole-source basis than in the past.

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We encourage affected contractors to submit comments to the FAR Council. If you would like our assistance in preparing such comments, or if you have any specific questions pertaining to the FAR revisions discussed above, please do not hesitate to contact us.