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October 25, 2021

VIA FEDERAL RULEMAKING PORTAL

Victoria Mundt
Associate Director
DoD Office of the Small Business Programs

Re: DOD-2021-OS-0077, Notice
Request for Comments on Barriers Facing Small Businesses in
Contracting With the Department of Defense

Dear Ms. Mundt:

We are writing to submit comments on the Department of Defense's ("DoD") above-referenced notice of request for comments on barriers facing small businesses in contracting with the DoD. See 86 Fed. Reg. 50333 (Sept. 8, 2021). Our firm represents small businesses operating across the government contracting arena that do business with the DoD. Our suggestions for proposed changes are below.

Facility Clearances for Joint Ventures

The topic of facility clearance ("FCL") requirements for joint ventures ("JVs") is a source of constant confusion and frustration for the small business community. Under the U.S. Small Business Administration's ("SBA") regulations, a JV can pursue set aside opportunity provided all members of the JV are small under the applicable NAICS code or, in the case of a JV between a small business and an other than small business, the members of the JV are in an SBA-approved mentor-protégé relationship. Unfortunately, while SBA's regulations are intended to promote small business participation in government contracting through JVs, such entities face significant barriers to entry when pursuing classified work. That is because the Defense Counterintelligence and Security Agency ("DCSA")—which manages the FCL process—has indicated that a JV, itself, must obtain an FCL when awarded a classified contract.

Obtaining an FCL is a lengthy process and requires that an applicant demonstrate, among other things, a need for a clearance. This construct poses a challenge for JVs formed under SBA's regulations, because such JVs are limited-purpose, unpopulated entities that rely on the capabilities, past performance, experience, certifications, and business systems of their members. Often, such JVs are formed for the sole purpose of pursuing a specific government contract. Consequently, when a solicitation requires an offeror to hold an FCL, many small businesses are left scrambling to obtain an FCL for a JV that has no employees and no contracting history—

something which is not always easy to do. To make matters worse, when a solicitation requires that an offeror hold an FCL at the time of bid submission, JVs are often precluded from competing because the time constraints make it impossible for them to obtain an FCL prior to submitting a proposal. These factors have the effect of stifling small business participation and we believe DoD action is needed.

For one thing, we believe that DCSA's requirement that a JV have its own FCL is contrary to law. Indeed, Section 1629 of the National Defense Authorization Act ("NDAA") of 2020 states that "[a] clearance for access to a Department of Defense installation or facility may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility." (emphasis added). This provision was recently the subject of a bid protest, wherein the Government Accountability Office concluded that the 2020 NDAA prohibited the DoD from requiring that a JV hold an FCL if the members of the JV each hold the required FCL. See InfoPoint LLC, B-419856 (Aug. 27, 2021). Implementing and expanding upon this notion, SBA regulations provide that a JV may be awarded a contract requiring an FCL where either the JV or its partners that will perform the necessary security work has (have) an FCL. 13 C.F.R. § 121.103(h)(4). Those regulations further provide that where an FCL is required to perform primary and vital requirements of a contract, the lead small business partner to the JV must possess the required FCL, but where the security portion of the contract is ancillary to the principal purpose of the procurement, only the partner to the JV that will perform that work must possess an FCL. Id.

We believe the DoD should enact regulations that implement the provisions of the 2020 NDAA, outlined above. Specifically, we believe that the most equitable construct would be for the DoD to enact a regulation (1) precluding an agency from requiring that a JV have an FCL when both of its members have FCLs and (2) permitting a JV to rely on (i) the FCL of its lead small business member when an FCL is required to perform primary and vital requirements of a contract or (ii) the clearance of whichever partner will perform the cleared portion of the contract, when the cleared portion of the contract is ancillary to the contract's principal purpose. In the meantime, we believe DoD should revise DCSA's current policy statement regarding JV FCLs to be consistent with the foregoing principles.

Expanding the Use of Past Performance and Other Qualifications of Joint Venture Members and Teammates

We believe that DoD can also remove small business barriers to entry by enacting regulations that permit JVs to rely upon the past performance, capability, and other qualifications of their members when pursuing small business work. The SBA has already done this, and we believe the DoD should as well.

The Small Business Act provides that "[w]hen evaluating an offer of a joint venture of small business concerns, if the joint venture does not demonstrate sufficient capabilities or past

performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.” 15 U.S.C. § 644(e)(4)(B)(ii) (emphasis added). In turn, SBA’s regulations state that “[w]hen evaluating the **capabilities**, past performance, experience, **business systems and certifications** of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture . . . a procuring activity must consider work done **and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously**. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, **business systems and certifications** necessary to perform the contract.” 13 C.F.R. § 125.8(e) (emphasis added). Given that SBA JVs are usually contract-specific entities, it makes sense that such entities should be able to broadly rely on the capabilities, past performance, and business systems and certifications of their members. Indeed, those are the entities that will actually be performing the work. By enacting similar regulations, DoD could create more opportunities for small businesses and help reduce barriers to entry.

DoD could further promote small business participation by adopting regulations that require DoD agencies to consider the capabilities, past performance, and experience of each first tier subcontractor that is part of a small business team as the capabilities, past performance, and experience of the small business prime contractor if the prime contractor cannot independently demonstrate the capabilities, past performance, and experience necessary for award. Consistent with its goal of assisting and protecting the interests of small business, SBA recently enacted a regulation that does just that. See 13 C.F.R. § 125.2(g). By taking similar action, DoD would be removing barriers to entry for small business.

Category Management

Government agencies, including various DoD agencies, have been moving towards implementing category management and best-in-class contracting vehicles. Many of these vehicles are multiple award, long-term contracts that can prove very costly for small businesses to pursue. While we recognize that category management is a government-wide initiative, the shift to these vehicles creates significant barriers for small businesses, as a significant amount of work that is currently being performed by small businesses is frequently moved to Multiple Award Contracts (“MAC”) or other Indefinite-Delivery/Indefinite-Quantity (“IDIQ”) contracts that the incumbent small business does not hold. Further, given the long-term nature of the contracts (often times approximately 10 years), if a small business was not awarded an underlying contract, it can hinder the small business for years to come given the lack of on-ramping opportunities.

In order to help alleviate this impact, we suggest that where work is currently being performed as a small business (or other socioeconomic designation) set-aside and the DoD agency is considering procuring this work through a MAC or IDIQ that the incumbent does not hold, that the applicable SBA Procurement Center Representative be required to approve the use of the vehicle. If the incumbent contractor would still otherwise be eligible to compete, notwithstanding the decision to move the work to a MAC or IDIQ, then the requirement should remain a small business or other socioeconomic set-aside, as applicable, and not be moved to the vehicle in order to enable the incumbent to compete for the work against other small businesses.

We also recommend that there be more on-ramping periods for MACs and other long-term IDIQ contracts to permit more small businesses access to compete for the work sought thereunder. Generally speaking, the current on-ramp options are limited at best and can delay a small business' growth by years. Allowing small businesses who may have missed the initial award of the contract the ability to pursue a vehicle will increase opportunities for small businesses and can also provide different options and capabilities for the ordering agencies as the competition pool adjusts. The Government should also consider an increase to the number of small business awards under MACs and IDIQ contracts as award of a contract does not guarantee a small business any work, but simply provides it an opportunity to compete. Additional awards will increase competition amongst small businesses and give the Government more opportunities to obtain the best value.

Creating more on-ramp and award opportunities for small businesses will help to reduce the barrier to entry.

Procurement Technical Assistance Program

The Procurement Technical Assistance Program is administered by the Defense Logistics Agency's Office of Small Business. Under this program, Procurement Technical Assistance Centers ("PTACs") help businesses pursue and perform contract with federal agencies, including the DoD. A major benefit of PTACs to small business government contractors is that much of the assistance provided by PTACs is free. However, many PTACs often refer companies to our firm and other paid-services companies due to a lack of knowledge over certain topic areas. In order to help small businesses have access free services in order to be best poised to do business with federal agencies, we recommend that the PTAC counselors receive more frequent and comprehensive trainings.



We thank the DoD for its efforts, and we appreciate the opportunity to submit these comments. Please do not hesitate to contact the undersigned at (202) 857-1000 if you have any questions about these comments.

Very truly yours,



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