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August 9, 2010

Mr. Jeremy Olsen
Department of Homeland Security
Office of the Chief Procurement Officer
Acquisition Policy and Legislation Branch
245 Murray Drive, Bldg. 410 (RDS)
Washington, D.C. 20528

Via email: <http://www.regulations.gov> [Docket DHS 2010-0045]

Ref: HSAR Case 2009-005: Revision of Department of Homeland Security Acquisition Regulation; Limitation on Subcontracting in Emergency Acquisitions

CODSIA Case 11-10

Dear Mr. Olsen:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ appreciate the opportunity to comment on the referenced proposed rule published by the department in the Federal Register on June 9, 2010. The rule would amend the Homeland Security Acquisition Regulation (HSAR) to implement Section 692 of the Post-Katrina Emergency Management Reform Act of 2006, as included in the fiscal year 2007 Department of Homeland Security Appropriations Act (Public Law 109-295; October 4, 2006). Section 692 limits the use of subcontractors on cost-reimbursement contracts entered into by the department to facilitate the response to or recovery from a natural disaster, act of terrorism or other man-made disaster.

Introduction

The Department's Regulatory Flexibility Act analysis published along with the proposed rule indicates that, in fiscal year 2008, the department awarded only 73 cost-type actions to 31 contractors, to

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues, at the suggestion of the Department of Defense. CODSIA consists of eight associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the Associated General Contractors of America (AGC), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica, and the U.S. Chamber of Commerce. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

respond to 141 declared disasters. No information was published about subsequent fiscal year actions but the DHS/FEMA website indicate that there were only 59 disasters declared in fiscal year 2009 and 61 declared disasters in this fiscal year through August 2, 2010. As such, absent a repeat of a Katrina-magnitude disaster, we would not expect a significant increase in the number of cost-type contracts to be covered by this rule in the future and therefore the department's implementation of the statute should be as simple as possible.

Yet it is ironic that Congress imposed significant limitations on the department's ability to respond to or recover from a disaster at the very time that the department should have the greatest flexibility to respond expeditiously to save lives, minimize property damage and provide critical resources to speed the response and recovery. It is also interesting that Congress imposed these arbitrary restrictions on only cost-type contracts when the department should have the full range of contract types available to appropriately meet the wide range of circumstances that may arise in a disaster response.

In our view, this limitation on subcontracting will adversely affect small businesses, and particularly those local firms best suited to provide debris clearance, distribution of supplies, reconstruction, and other activities who are doing business primarily in the area affected by the disaster or emergency. In fact, Section 694 of this same Act modified the Stafford Act to impose a preference for firms located in the disaster area. Section 697 of this Act also directs the FEMA Administrator to establish and maintain a registry of contractors willing to perform debris removal, distribution of supplies, reconstruction and other disaster or emergency relief activities.

In the Discussion Section of the Federal Register notice, the department notes that it determined not to establish separate disaster declaration standards applicable only to Section 692. We concur with that determination.

Existing FAR Coverage on Limitations on Pass-through Charges

In addition, the Discussion Section of the Federal Register notice reiterates that the limitations proposed in this HSAR amendment are in addition to, and do not replace, the Federal Acquisition Regulation (FAR) "limitations on pass-through charges" already provided for in FAR 15.408(n). That FAR regulation implements Section 866 of the National Defense Authorization Act for fiscal year 2009 (Public Law 110-417), enacted on October 14, 2008, which applies to all executive branch agencies other than the Department of Defense (DoD). DoD is already covered by a similar but separate statute and DFARS regulation. Both statutes and regulations seek to minimize certain pass-through charges by contractors from all tiers of subcontractors that add no or negligible value to meeting the contract objectives. While we recognize that these two statutory provisions establish different standards from the DHS statute, we strongly recommend that when DHS finalizes this HSAR regulation, it also seek a deviation from having to include the FAR requirement in contracts covered by this rule. While the FAR and this proposed HSAR rule address the same general limitation, they employ different processes, standards of review, threshold levels, and other significant operational differences. At the very time when DHS – and even the President when he makes a major disaster declaration – is expecting prompt responses to save lives and provide critical resources, contractors should only be forced to follow one of these unnecessarily

restrictive regulatory requirements. Since the DHS statute is more specific and more targeted than the general FAR provision, we recommend that it take precedence over the more general FAR provision. At the appropriate time, we would support a DHS request to OFPP and the FAR Council for such FAR deviation.

Section 3015.404-3: Subcontracting pricing considerations

Section 3015.404-3 directs the contracting officer to require offerors to submit sufficient evidence that the offeror “will or will not award subcontracts that exceed 65 percent of the cost (excluding indirect costs and fee) of the contract.” In this section, and in other provisions in the proposed regulation, we believe there should be greater clarity of the key term “cost of the contract.” For example, in 3052.216-75(d), the contractor is required to annually notify the contracting officer of the “total costs (less indirect costs and fee) for the prior 12 months (emphasis added) compared to costs incurred by its subcontractors.” No other section of the rule carries this 12 month comparison but we believe it is an appropriate measure for calculating the percentage of subcontracting.

In addition, the formulation of the percentage calculation varies slightly but significantly in the various provisions for no apparent reason and must be uniformly and consistently defined and applied. For example, 3015.404-3 uses the phrase “will not award subcontracts that exceed 65 percent of the cost of the contract or the cost or any individual task order or delivery order but uses the phrase “total cost” as well. Section 3016.370(a) addresses the “cost of the action” while 3016.370(c) directs contracting officers and offerors “for purposes of establishing the percent of cost of work of the contract or task or delivery order” to 3052.216-75.” Section 3052.216-75(c) addresses “all costs ... incurred by the contractor” (presumably incurred by the prime contractor in performing the covered contract or a specifically identified task or delivery order) compared to the “total dollar value the Contractor allocates to subcontractors.” Beyond the inconsistent language on percentage calculations, for this latter provision, what does the term “allocated to subcontractors” mean in this section and why are the terms different here from every other provision?

Section 3016.370: Limitation on subcontracting in emergency acquisitions

As noted above in 3015.404-3, the formulation of the cost limitation calculation in 3016.370(a) is inconsistently described here when compared to other provisions in the rule yet, as the key operative provision, it must be consistently defined and applied.

Paragraph 3016.370(b) provides for a determination that the “prohibition on subcontracting” in (a) does not apply. Subsection (a) acts as a limitation, not a prohibition, on subcontracting. In addition, we believe this paragraph would be clearer if the phrase “by the contracting officer” was added after the phrase “if a determination is made.”

Paragraph 3052.216-75(e) provides that if the contractor expects “at any time” that compliance with these limits is not practicable or feasible,” it shall submit a written request for a “waiver” to the contracting officer. We recommend that 3016.370(b) be modified to take into account that a contracting officer’s determination can be made and applied at any time.

Paragraph 3016.370(b) also provides for a determination not to apply the limitation to “a contract or class of contract actions.” This rule does not otherwise mention the potential scope of this determination. We recommend adding the phrase “unless a determination is made pursuant to 3016.370(b)” before the period in the first sentence of 3052.216-75(b) and again before the period in the first sentence of 3052.216-76(a). Clarifications should also be made to the provisions in 3052.216-75(e) and (f). We urge the department to consider acting in advance in identifying those “classes of contracts” that could be subject to such determination. The pre-negotiated and prepositioned federal contracts entered into pursuant to Section 691 of this same Act are exactly of the type that should not be subject to this arbitrary subcontracting restriction. Another perfect candidate for such class determination would be the GSA Schedules contracts because of the congressional authority provided to DHS to permit state and local governments to use those Schedules contracts (called “cooperative purchasing”) for response to or recovery from a disaster. When the department issues a class deviation, it should prominently note that fact on the department’s “Open for Business” website.

Section 3052.216-75: Limitations on subcontracting in emergency acquisitions

The lead-in to this clause identifies the types of actions covered by 3016.307(a) but does not address the coverage fully. We recommend either adding the full text of the scope of coverage from 3016.307(a) or deleting the list of covered actions provided for in the lead-in text to 3052.216-75.

Paragraph 3052.216-75(h) notes that nothing in this clause shall be construed to supersede or nullify other terms and conditions of the contract, including socioeconomic goals. While we concur that this provision does not override those provisions, DHS must recognize the impact compliance with this statutory limitation on subcontracting will have on the opportunities available for subcontracting that would be included in the goals a prime contractor includes in its small business subcontracting plan. If DHS determines that achieving the small business goal under a contract or class of contracts has a higher priority than complying with this percentage limitation on subcontracting, the contracting officer should make the determination of inapplicability pursuant to 3016.370(b) as early in the acquisition process as possible.

Section 3052.216-76: Proposal Information on limitations on subcontracting in emergency acquisitions

In the proposed clause at 3052.216-76(a), the description of the scope of coverage is incomplete. We recommend deleting the phrase “contract or order is expected to be awarded based on this solicitation” in both places and inserting “an award based on this solicitation.” In addition, since the restriction in 3016.370 is limited to prime contractors, we recommend adding the word “Prime” before the word “Contractor” in subparagraph (a).

Paragraph (b) requires that the offeror’s proposal include “acceptable evidence” of the offeror’s ability to satisfy this requirement. However, proposed 3015.404-3 requires “sufficient evidence” that the offeror “will or will not awards subcontracts that exceed 65 percent.” The two standards should be harmonized.

Paragraph (c) provides authority for the offeror to make a written request for a waiver of the application of the limitation, presumably to the contracting officer, along with supporting rationale. Neither the term “waiver” (as used in this paragraph (c) or in 3052.216-75(e)) nor the phrase “excused” (as used in 3052.216-75(e)) are used in section 3016.370(b). Again, there must be a consistent use of terms throughout the rule when they are intended to have the same meaning.

Conclusion

We appreciate the challenges with implementing a statutory provision that runs contrary to the primary mission of DHS to respond to and recover from disasters. Nevertheless, the rule is replete with inconsistent definitions and uses of key terms and provisions. Other provisions are referenced only once in the rule and not identified in other key provisions. We strongly urge the department to make the corrections we recommend in these comments and publish a revised proposed rule for public comment.

We would welcome the opportunity to discuss these comments with you or others in the Office of the Chief Procurement Officer. In the interim, if you have any questions or need any additional information, please contact the CODSIA project officer, Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council, at chvotkin@pscouncil.org or (703) 875-8059 or Bettie McCarthy, the CODSIA Administrative Officer, at 703-875-8059.

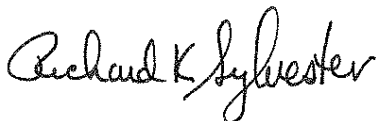
Sincerely,



Alan Chvotkin
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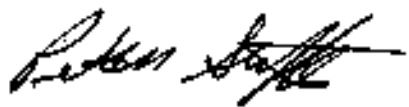
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