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SBA Publishes Plan to Assess Economic Benefits of HUBZone Program

The Small Business Administration recently outlined the method it plans to use to measure the economic impact of the Historically Underutilized Business Zone (HUBZone) program.

Development of a way to assess the economic benefits of the HUBZone program was one of a number of recommendations in a recent Government Accountability Office report questioning whether assistance under the program is reaching targeted locations and businesses. SBA agreed with the recommendation and published a notice in the Aug. 11 *Federal Register* seeking public input on its proposal for assessing the program's impact in economic terms.

SBA in its notice attributed the "complexity" of such an assessment to a number of factors, such as using three government agencies to reach five categories of HUBZones. "In addition, the required data for this assessment will be derived from four different databases," SBA said, which "increases the difficulty of correctly identifying the assessment's relevant data elements." The four different databases are the HUBZone Certification Tracking System, the Central Contractor Registration, the Federal Procurement Data System, and Census 2000 data.

SBA's notice referred to reports, including the one by GAO, that the various databases provide inconsistent data on HUBZone firms and HUBZone areas, which it said "can lead to misidentification of the contract dollar-flows to HUBZone areas." SBA said its planned methodology "assumes that data inconsistencies will be addressed."

SBA said the methodology is based on an economic model that will provide estimates of:

- the economic impact directly attributable to the HUBZone program;
- the economic impact of the Non-HUBZone SBA programs on HUBZone areas; and
- the economic impact of other related federal procurement programs affecting HUBZone areas.

Economic impact will be measured by the estimated growth in median household income and employment or a reduction in unemployment in a specific HUBZone area, according to the notice.

The HUBZone program is designed to assist small firms in economically distressed areas by providing contracting preferences to such firms. There is a 3 percent governmentwide contracting goal for the program, but, according to GAO, awards under the program in fiscal year 2006 fell short of that goal by about one-third.

GAO also said in its report on the HUBZone program, which was released last June, that federal agencies awarded contracts valued at about \$8 billion to HUBZone firms in FY 2007, that there are more than 14,000 HUBZone areas, and that almost 13,000 firms were participating in the program as of last February.

Comments on SBA's methodology are due Sept. 10, 2008 (73 Fed. Reg. 46,698, 8/11/08).

Industry Critical of Proposed FAR Rule To Require Use of DHS E-Verify System

Industry groups expressed strong reservations over a proposed rule issued by the Federal Acquisition Regulation councils in June that would require contractors to participate in the Department of Homeland Security's electronic employment verification (E-Verify) system to ensure contractor personnel are eligible to work in the United States.

The rule would amend the FAR by adding a new clause requiring agencies to award certain contracts to firms that utilize E-Verify to prevent illegal immigrants from working on contracts in the United States, thereby carrying out Executive Order No. 12,989, as amended and signed by the president June 6. The new clause would be included in prime contracts in excess of the micropurchase threshold (generally \$3,000) and in subcontracts for commercial or noncommercial services valued at more than \$3,000, including construction awards.

Industry groups, while supportive of the intent of the E-Verify system, contend that the rule in its current form should not be made final and should be substantially revised.

In comments submitted to the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council, industry groups said the rule:

- does not clearly define the type of contractor personnel that are required to be covered;
- does not address to what extent the E-Verify requirement should flow down to subcontractors;
- is unclear about its applicability to commercial items;
- provides an unreasonably short time frame for contractors to enroll in E-Verify; and
- does not fully recognize the burden, including the added costs, contractors will incur in order to comply with the E-Verify requirement.

Several industry groups, including the Council of Defense and Space Industry Associations (CODSIA), representing six large trade associations, warned that the rule would prove difficult to implement and present the contracting community with a variety of challenges. CODSIA said in Aug. 11 comments that it does not oppose the current voluntary use of E-Verify and urged improvements to the system that would result in increased company participation.

"We do, however, oppose [E-Verify] as a mandatory requirement for performance of federal contracts and subcontracts," CODSIA said. The group added that the rule should undergo further government review "in order to limit the unintended consequences to the federal procurement process." "While significant improvements have been made since its inception," CODSIA said, "the existing E-Verify System as currently designed, configured, and staffed will not be adequate to handle the rapid and sizable increase in utilization that will result from implementation of the proposed rule in its current form."

Industry previously has raised concerns about the accuracy and reliability of the E-Verify system and database. In addition to information fed into the system by DHS, the Social Security Administration also provides worker eligibility verification system data. CODSIA's comments were submitted on behalf of the U.S. Chamber of Commerce, Professional Services Council, Information Technology Association of America, American Council of Engineering Companies, Aerospace Industries Association, and National Defense Industrial Association.

CODSIA said the rule would apply to contractors' new hires and all existing employees who are involved in performing contracts in the United States, but this description "is so broad as to potentially encompass even personnel in functional or corporate organizations who provide minimal or indirect" contract support, such as legal, finance, and government relations personnel. The rule also creates numerous definitions for groups and types of contractor personnel whose legal work status must be run through E-Verify, CODSIA said, adding that the rule does not define the phrase "directly performing work" under contract in the United States.

"Is the intent that only employees who charge directly to the contract be impacted by the requirement, or do management and administrative functional support personnel 'directly' perform work under this definition?" CODSIA said. Additionally, the rule is too broad in defining "all new employees of the contractor" that would be subject to E-Verify processing, CODSIA said. This part of the rule should at least be modified to read "newly hired assigned employees" or "each employee who becomes an assigned employee by virtue of a change in assignment," the group said.

"Without this improvement, the requirement unduly and disproportionately burdens contractors that engage in significant commercial business relative to their government business," according to CODSIA. PSC, in separate comments on the rule submitted Aug. 11, said the proposed rule should be consistent with the federal government's own employee verification requirements and limit the use of E-Verify to new employees. The rule also should clarify that E-Verify can process contractor personnel employment status queries for existing employees, PSC said.

Although the rule states that subcontractors would be required to utilize E-Verify, CODSIA said the rule is not clear as to how subcontractor compliance is expected to be executed. As a result, CODSIA the rule should specify to which subcontracting tier the requirement extends and who is responsible for subcontractor compliance. "It is reasonable to conclude that the administrative and cost burden of managing an unlimited chain of subcontractor compliance with E-Verify requirements could be enormous in any given contract," CODSIA asked. PSC said it is opposed to a subcontractor flow-down requirement "unless it provides guidance regarding a prime contractor's obligations if a subcontractor violates the terms of the E-Verify program." The group recommended that contractors only be held responsible for including the E-Verify contract clause in their subcontracts and that subcontractors be held responsible for compliance.

CODSIA also said it is unclear why the rule contains an exemption for commercially available off-the-shelf (COTS) items but does not extend to commercial items. "It appears that the E-Verify program is not targeted at any specific contract type (supply or service), so commercial services should be exempt as well," CODSIA said. It added that the lack of a commercial item exemption could confuse suppliers. ITAA said in Aug. 11 comments that the FAR councils "should exempt all commercial item contracts and subcontracts from the E-Verify requirements."

COTS contracts "are merely a subset" of contracts for commercial items sold in substantial quantities in the commercial marketplace, ITAA said. "Exempting COTS item contracts but not other commercial item contracts is inconsistent with the Federal Acquisition Streamlining Act of 1993," the group commented. "Moreover, by only exempting COTS item contracts, the proposed rule unreasonably prejudices commercial service contractors" by applying E-Verify requirements "to a commercial item service contract for repairs to those same COTS items" that are exempt from the requirements.

New Rule Implements Statutory Changes In Competition Mandates for FPI Purchases

An interim rule issued Aug. 12 revises the Defense Federal Acquisition Regulation Supplement to implement new competition requirements that apply to procurements of products in which the Federal Prison Industries has a significant market share.

The competition mandates, set out in Section 827 of the fiscal year 2008 defense authorization act (Pub. L. No. 110-181), require competitive bidding for products in which FPI has a significant share of the DOD market. They relieve DOD from having to conduct market research beforehand to determine whether products available from the private sector are comparable to those offered by FPI and can be obtained at a better value.

Section 827 defines a significant market share as more than 5 percent. DOD has determined that there are eight product categories, also referred to as Federal Supply Codes (FSCs), in which the FPI meets this threshold. These FSCs are:

- laundry and dry cleaning equipment;
- miscellaneous hardware;
- electrical connectors;
- electrical hardware and supplies;
- cable, cord, wire assemblies--communications equipment;
- electrical wire and cable;
- office furniture; and
- household furnishings.

These FSCs will be updated as necessary in subsequent policy memos, according to a March 28 advisory from Shay Assad, director of defense procurement, acquisition policy, and strategic sourcing. Because FPI's share of the DOD market for these product categories exceeds 5 percent, competitive or fair opportunity procedures must be applied to solicitations and the contracts or orders that follow, Assad said in his memo. In conducting such competitive procedures, contracting officers must consider timely offers from FPI in accordance with Federal Acquisition Regulation 8.602(a)(4).

The interim rule took effect Aug. 12. Concerns that the changes could result in a significant reduction in inmate jobs under the FPI program were raised at a May 6 hearing of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security.

When FPI does not have a significant market share for a particular product, DOD contracting officers are required to follow the process outlined in FAR Subpart 8.602 and conduct market research to determine whether the product is comparable to private sector products in terms of price, quality, and time of delivery. Comparability determinations "are made at the discretion of the contracting officer," Assad said.

If the FPI product is not comparable to private sector products, DOD must use competitive procedures for the procurement or make a purchase under a multiple award contract in accordance with the competition requirements of those contracts. Under Section 827, contracting officers conducting such a competition "shall include FPI in the solicitation process and consider a timely offer from FPI," Assad said in his memo.

"Likewise, if the procurement is made using a multiple award schedule, then FAR 8.602(a)(4)(iii) requires contracting officers to communicate the item description or specifications and evaluation criteria directly to FPI, 'so that an offer from FPI can be evaluated on the same basis as the contract or schedule holder.' A timely offer from FPI must then be considered," Assad said.

Comments on the interim rule are due Oct. 14, 2008 (73 Fed. Reg. 46,816, 8/12/08).

Homeland Security IG Report Urges Fewer Restrictions on Multitier FEMA Contracts

The Federal Emergency Management Agency should work with the Department of Homeland Security, the Office of Federal Procurement Policy, and Congress to promulgate less restrictive regulations on multitier contracting to avoid hampering FEMA's ability to respond to disasters, the DHS Office of Inspector General said in an Aug. 4 report.

The report responded to congressional concerns that, in the wake of hurricanes Katrina and Rita, multitier subcontracting increased costs to the government, limited opportunities for small and local businesses to participate in response and recovery efforts, and resulted in subcontractors receiving payment for little or no added value. However, the report said that while "unnecessary" tiers of subcontracting may have existed after Hurricane Katrina, "It does not appear the multitier subcontracting, as an isolated factor, caused significant increases in costs to the government, nor did it reduce subcontracting opportunities for small and local businesses."

This was because large prime contractors paid subcontractors based on fixed rates for the majority of their work, and fixed-rate contracts do not allow subcontractors to pass overhead and other operating costs above the agreed-upon rate to prime contractors, the report said. "Once the federal government and the prime contractor agree on a price for a particular service, and the prime contractor issues a fixed-price subcontract, the number of tiers of subcontractors has no effect on the cost to the government."

The report did cite several "legitimate concerns" about multitier contracts, including: (1) the agreed-upon price between the government and the prime contractor could be too high due to excessive subcontract rates; (2) a subcontractor performing certain work could be paid significantly less than what the prime contractor charged the government for that work; and (3) a "perception of

unfairness" could arise from the belief that some tiers simply charge overhead and profit without performing any "real work." But because subcontractor invoices generally do not include specific information on lower-tier subcontractors, the IG's office said it could not determine whether any of these fears were justified for specific contracts.

The report said that although FEMA relied heavily on large national prime contractors following Hurricanes Katrina and Rita, which initially prevented small and local businesses from participating as prime contractors themselves, the large prime contractors subcontracted a significant portion of the value of their contracts to small and local businesses. Prime contractors reported that, of the \$2.4 billion paid to subcontractors, \$1.45 billion (71 percent) went to small businesses, exceeding FEMA's 40 percent small business subcontracting goal. Although the agency did not set specific goals for hiring local businesses, the report added, \$1.26 billion (62 percent) went to local businesses after the storms.

The report said that section 692 of the Post-Katrina Emergency Management Reform Act of 2006 (Pub. L. No. 109-295) would limit subcontracting to 65 percent of total contract costs, which could restrict funding for small and local businesses while "potentially impairing FEMA's ability to respond quickly to future catastrophic disasters." Furthermore, the IG said that although the legislation would limit first-tier subcontracting on certain contracts and task or delivery orders, it would not directly limit the number of tiers allowable. As a result, the act does not specifically prevent multitiering, the report said.

"Had the Post-Katrina Act been in effect immediately following Hurricane Katrina and been applied to the four large [prime] contracts and their related task orders, it could have had the effect of requiring some of the work that was subcontracted to be done in-house by the prime contractors," the report said. "This could have decreased the amount of dollars available to subcontractors, and possibly could have affected the ability of the prime contractors to fulfill their disaster response assignments in an effective and timely manner."

The IG has not been critical of the entire act. For example, the FEMA administrator and the DHS IG said at a hearing April 3 that the legislation has prompted significant post-Katrina reforms within the agency.

The report, Hurricane Katrina Multitier Contracts, is available at:
http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_08-81_Jul08.pdf.

REGULATORY ACTION

Agency	Action	Description	Comment Due Date/ Effective Date; Federal Register Cite
DOD	Final rule	To amend the DFARS to reflect the redesignation of the "Office of Small and Disadvantaged Business Utilization" to the "Office of Small Business Programs" within DOD	Effective 8/12/08 (73 Fed. Reg. 46,813, 8/12/08)
DOD	Interim rule, with request for comments	To amend the DFARS to supplement Section 827 of the FY 2008 defense authorization act	Effective 8/12/08; Comments due 10/14/08 (73 Fed. Reg. 46,816, 8/12/08)
DOD	Final rule	To amend the DFARS to implement Section 130 of the FY 2007 defense authorization act requiring establishment of a quality control policy for the procurement, modification, repair, and overhaul of ship critical safety items	Effective 8/12/08 (73 Fed. Reg. 46,817, 8/12/08)
DOD	Final rule	To amend the DFARS to incorporate increased dollar thresholds for application of the World Trade Organization Procurement Agreement and the Free Trade Agreements, as determined by the U.S. Trade Representative	Effective 8/12/08 (73 Fed. Reg. 46,818, 8/12/08)
DOD	Final rule	To amend the DFARS to update and clarify requirements for unique identification and valuation of items delivered under DOD contracts	Effective 8/12/08 (73 Fed. Reg. 46,819, 8/12/08)
DOD	Final rule	To amend the DFARS to update text addressing contractor standards of conduct and the handling of extraordinary contractual actions; changes are	Effective 8/12/08 (73 Fed. Reg. 46,814, 8/12/08)

		consistent with changes made to the FAR	
DOD	Proposed rule, with request for comments	To amend the DFARS to add a contract clause requiring a contractor to notify DOD if the contractor is required to report its activities under the U.S.— International Atomic Energy Agency Additional Protocol	Comments due 10/17/08 (73 Fed. Reg. 48,185, 8/18/08)
GSA	Proposed rule	To revise GSAR language that provides requirements for termination of contracts; the revisions are part of the GSAR rewrite effort and are intended to implement streamlined and innovative acquisition procedures for entering into and administering contractual relationships	Comments due 10/14/08 (73 Fed. Reg. 47,123, 8/13/08)
SBA	Notice	To develop a methodology for assessing HUBZone's economic impact	Comments due 9/10/08 (73 Fed. Reg. 46,698, 8/11/08)
GSA	Proposed Rule	To revise GSAR language regarding requirements for improper business practices and personal conflicts of interest	Comments due 10/3/08 (73 Fed. Reg. 45,194, 8/4/08)
DOD, GSA, NASA	Notice	To review and approve an extension of a currently approved information collection requirement concerning past performance information	Comments due 10/6/08 (73 Fed. Reg. 45,427, 8/5/08)
GSA	Proposed Rule with request for comments	To revise GSAR language that provides requirements for bonds and insurance	Comments due 10/6/08 (73 Fed. Reg. 45,378, 8/5/08)
GSA	Proposed Rule	To revise GSAR language that provides requirements for quality assurance	Comments due 10/6/08 (73 Fed. Reg. 45,379, 8/5/08)
GSA	Notice	To review and approve an extension of a currently approved information collection requirement regarding the GSAR Price Reductions Clause	Comments due 10/6/08 (73 Fed. Reg. 45,772, 8/6/08)
GSA	Final Rule	To revise GSAR language	Effective Date 8/8/08 (73 Fed.

		pertaining to application of labor laws to government acquisitions; the revisions are part of GSAR rewrite effort	Reg. 46,202, 8/8/08)
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