

October 8, 2012

General Services Administration, Regulatory
Secretariat (MVCB)
ATTN: Hada Flowers
1275 First Street, NE.,
7th Floor,
Washington, DC 20417.

RE: FAR Case 2012-015: "Small Business Set Asides for Research and Development Contracts."

Dear Regulatory Secretariat:

The Office of Advocacy (Advocacy) submits these comments on the Federal Acquisition Councils (FAR) proposed rule "Small Business Set Asides for Research and Development Contracts."¹ The Office of Advocacy would like to commend the FAR Council for agreeing to publish this proposed rule.

Recommendation

Small business stakeholders have for several years expressed to the Small Business Administration (SBA), the Office of Advocacy and to the Senate Small Business Committee their concerns regarding the restrictive nature of FAR Part 19.502(b)(2). Specifically, these stakeholders are of the belief that they have been denied contracting opportunities because of this restrictive clause. Indeed an examination of the FY 2011 and FY 2012 contracting data from the Federal Procurement Data System indicates that small businesses have been awarded less than eight percent of R&D set aside contracts in R&D NAIC Codes 541710, 541711, and 541720. In part, one may attribute the low percentage of awards to small businesses to the restrictive nature of FAR Part 19.502(b)(2). The Office of Advocacy would urge the FAR Council to remove this restrictive clause. In the alternative, Advocacy supports the revision as proposed.

Advocacy

Advocacy was established pursuant to P.L. 94-305 to represent the views of small business before Federal agencies and Congress.² Advocacy is an independent office

¹ FAR Case 2012-015 "Small Business Set Asides for Research and Development Contracts. "Federal Register vol 77, number 155, pp. 47797-47799, August 10, 2012.

² 15 U.S.C. § 634a (1976). http://www.sba.gov/advo/laws/law_sta.html#634a.

within the Small Business Administration (SBA), so the views expressed in this letter do not necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory Flexibility Act (RFA) also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.³ Advocacy takes its direction from small businesses and regularly hosts roundtables to receive input on what issues are of greatest importance to small business.

Background

On Friday, August 10, 2012, the Federal Acquisition Council published in the Federal Register a proposed regulation: "Small Business Set Asides for Research and Development Contracts." Federal Register Volume 77, Number 155, Pages 47797-47799.

This proposed rule responds to a request from the SBA to review the last sentence in FAR Part 19.502-2 (b) (2) which reads: "In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules." FAR Part 19.502-2(b) establishes the general requirements for a total small business set-asides above the simplified acquisition threshold: (1) That offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns; and (2) That the award from the set-aside will be made at fair market prices.

Proposed Regulatory Amendment

The proposal would amend the Federal Acquisition Regulation (FAR) to clarify that contracting officers shall set aside acquisitions for research and development when there is also a reasonable expectation, as a result of market research, that there are small businesses capable of providing the best scientific and technological approaches.

Additional Justifications/Recommendations for Removing the Regulatory Clause

A. The SBA advises that the additional language in FAR Part 19.502(b)(2) requiring the best scientific and technological sources has been interpreted as an additional and unique condition that must be met before a contracting officer can proceed with a small business set-aside for research and development. This interpretation conflicts with the general requirements for a total small business set aside above the simplified acquisition threshold.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1981) (Codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat.857 (1996). 5 U.S.C. §612(a).

B. In 1982, Congress enacted the Small Business Innovation Development Act of 1982 (SBIDA), Public Law 97-219 (codified at 15 U.S.C. 638), which established the Small Business Innovation Research Program (SBIR Program). The statutory purpose of the SBIR Program is to stimulate technological innovation by strengthening the role of innovative small business concerns (SBCs) in Federally-funded research and research and development (R/R&D). The essence of this stimulation is the development of research and development products that can be commercialized for the government or for the consumer marketplace.

On December 31, 2011, the President signed into law the National Defense Authorization Act for Fiscal Year 2012 (Defense Reauthorization Act), Public Law 112-81, 125-Stat. 1298, Section 5001, Division E of the Defense Authorization Act contains the SBIR/STTR Reauthorization Act of 2011 (Reauthorization Act), which amends the Small Business Act and makes several amendments to the SBIR Program. Title LI sections 5121-5127 of the reauthorization of 2011 strengthens the requirements for SBIR projects to be commercialized. FAR 19.502(b)(2), pre dates the FAR. This regulation is in conflict with the above statute and thus a regulatory clause cannot take precedence over a statute; the clause should be removed.

C. FAR 19.502(b)(2) should also be removed because research has revealed that no apparent legislative nor regulatory history of how this clause, that pre-dates the FAR, came into existence and the reasons for its creation. Lacking any justifiable evidence of its original purpose, the clause fits squarely within the framework of the Administration's Retrospective Review and elimination of regulations that have a negative impact on small businesses.

Conclusion

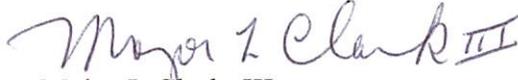
The Office of Advocacy urges the FAR Council to give full consideration to the removal of FAR 19.502(b) (2). The FAR Council must give full consideration of the negative impact FAR 19.502(b) (2) may have on the technological economic viability of this nation. In a global marketplace competing with other nations for technology advancements and our small business community can be a key player. Small innovative businesses, that represent the economic engine of this nation, continue to produce, according to research data provided by the U.S. Department of Commerce to the Office of Advocacy, 16.5 times more patents per employee than large patenting firms. This is an opportunity to remove one of the roadblocks that prevent small businesses from being even more innovative than they are today, by issuing a final regulation that removes FAR 19.502(b)(2).

Thank you for your consideration and if you have further questions please feel free to contact me directly or Major L. Clark, Assistant Chief Counsel for Procurement Policy in my office. His email is major.clark@sba.gov and his direct telephone number is 202-205-7150.

Sincerely,



Winslow L. Sargeant, Ph.D
Chief Counsel for Advocacy



Major L Clark, III
Assistant Chief Counsel for Advocacy