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EXISTING STATUTORY AND REGULATORY PROVISIONS SUPPORT APPLICATION OF THE HUBZONE PRICE EVALUATION PREFERENCE TO TASK ORDERS
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HUBZone Program spending has been in decline for the last 10 years, and most federal agencies and prime contractors fall well short of meeting the 3% spending goal for HUBZone firms. Recently, the U.S. Small Business Administration ("SBA") and Congress have taken several positive steps to improve the HUBZone program and help federal agencies and prime contractors increase their HUBZone spending. The HUBZone Program is needed now more than ever, as the number of HUBZone locations around the country have roughly doubled since Congress first created the program more than 20 years ago. The HUBZone contractor community is optimistic that the recent SBA and Congressional actions to provide more certainty, flexibility, and fair requirements for the program will help it fulfill its promise for more federal agencies, prime contractors, and HUBZone communities across the country.

There is one critical tool to help increase HUBZone spending that deserves more attention: the HUBZone price evaluation preference. The HUBZone price evaluation preference helps to level the playing field for HUBZone firms in full-and-open competitions, and allows federal agencies greater opportunity to devote federal spending to HUBZone firms. Currently, the HUBZone price evaluation preference is not used as widely as it could be because of the interpretation that the HUBZone price evaluation preference does not apply to task orders. With the federal government increasingly driving its spending through IDIQ contracts, such as the "Best in Class" GWACs, a significant opportunity for HUBZone spending is being lost because the HUBZone price evaluation is not being applied in the award of task orders.

This white paper explains why the governing statutory and regulatory provisions support the application of the HUBZone price evaluation preference to task orders. As explained below, we believe SBA's current statutory and regulatory provisions support application of the HUBZone price evaluation preference to task orders. However, given the confusion regarding the applicability of the HUBZone price evaluation preference to task orders, the best way to ensure that agencies apply the preference correctly is for Congress to amend the Small Business Act. Through legislative action, Congress can clarify that the HUBZone price evaluation preference explicitly applies to task orders and direct the SBA to revise its regulations to provide that same clarity. This will allow the HUBZone contractor community to work with agencies to ensure that the price evaluation preference is applied in the award of task orders while the FAR Council updates the HUBZone regulations in the FAR, a process that can take years. With Congressional action and clarification that the HUBZone price evaluation preference applies to task orders, this will surely help to arrest the decline in HUBZone spending and get the program headed toward meeting the 3% goal.

I. Overview of Arguments for Why the HUBZone Price Evaluation Preference Applies to Task Orders

The price evaluation preference language in the Small Business Act is very broad and does not exclude orders. It states that "**in any case** in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror . . . ." 15 U.S.C. § 657a(c)(3)(A). The only statutory exception for the application of the HUBZone price evaluation preference is for procurements of commodities.

The fact that Congress expressly provided for one exception, but did not provide an exception for task orders, indicates Congress did not intend there to be an exception for task orders. Moreover, the statute says that the price evaluation preference applies "in any case." Given this very broad phrase, and the fact that there is only one explicit exception (for commodities), the HUBZone price evaluation preference should be applied as broadly as possible and the implementing rules should not be interpreted as restricting application of the preference, except in procurements for commodities.

The Small Business Act states that the price evaluation preference applies when "a contract" is awarded. SBA has previously taken the position that, when the Small Business Act uses the term "contract," this includes task orders. This is also consistent with the Supreme Court's ruling in Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1978, 195 L. Ed. 2d 334 (2016), and FAR 2.101, which defines "contract" broadly and explicitly includes orders.

Next, we believe the placement of orders under indefinite-delivery contracts falls under the statutory language "awarded on the basis of full and open competition" because the placement of the order (which is a contract) qualifies as a procurement where all responsible sources are able to submit bids, which fully satisfies the definition of full and open competition under the statute; or, in the alternative, task orders are a part of contract performance, and if the master contract was awarded under full and open competition, then this flows down to the ordering stage. Either way, the HUBZone price evaluation preference applies. Regarding orders placed under the Federal Supply Schedules, the FAR explicitly provides that "orders placed against a [Multiple Award Schedule], using the procedures in this subpart, are considered to be issued using full and open competition . . . ." 48 C.F.R. § 8.404(a).

The counter-argument to these interpretations is in FAR 19.1304, which states that "this subpart" does not apply to orders under indefinite-delivery contracts and orders under FSS contracts. Insofar as FAR 19.1304 is interpreted to create an exception from the HUBZone price evaluation for task orders, we believe this exception is contrary to the Small Business Act, for the reasons stated above.

Furthermore, we do not think the intent of FAR 19.1304 was to exempt application of the HUBZone price evaluation preference to task orders, and nothing in FAR 19.1304 explicitly creates such an exception. FAR 19.1304(b) and (c) essentially say that the HUBZone provisions in FAR Subpart 19.13 do not apply to orders under indefinite-delivery contracts or FSS contracts

– unless those orders are set aside. If the task orders are set aside, FAR Subpart 19.13 would apply. Therefore, we believe the appropriate exception in FAR 19.1304 is from the HUBZone set-aside/eligibility components of FAR Subpart 19.13, but not the entirety of Subpart 19.13. In other words, FAR 19.1304 means that the HUBZone set-aside/eligibility requirements in FAR Subpart 19.13 do or do not apply depending on whether the task order is set aside, which makes sense. We do not believe this has anything to do with the HUBZone price evaluation preference, which is not an element of HUBZone eligibility. We believe the proper and appropriate intent of FAR 19.1304, in light of the broad language in the Small Business Act discussed above, is that the exception in FAR 19.1304(b) and (c) is narrow and only excludes the HUBZone set-aside/eligibility requirements when task orders are not set aside.

In further support of this interpretation, we note that the price evaluation preference rule in 13 C.F.R. § 126.613 says nothing about an exception for task orders. Thus, neither the Small Business Act nor SBA's regulations provide for, or permit, an exception against the application of the HUBZone price evaluation preference to task orders.

Therefore, in summary, the HUBZone price evaluation preference applies to task orders because:

- The Small Business Act and SBA regulations creating and implementing the HUBZone price evaluation preference contain very broad language, indicating the price evaluation preference applies "in any case," and there is no statutory exception for task orders.

- Task orders are contracts and are awarded on the basis of full and open competition.

- FAR 19.1304 creates only a limited exception for task orders that are not set aside, excepting such orders from the HUBZone eligibility requirements in FAR Subpart 19.13. The interpretation that FAR 19.1304 creates a broader exception to the application of the HUBZone price evaluation preference to task orders is incorrect because it is contrary to the Small Business Act and SBA rules.

II. Analysis of the Statutory and Regulatory Authority for the HUBZone Price Evaluation Preference

Through conversations with HUBZone clients and other stakeholders, we have learned that government procurement officials construe the exclusions listed in FAR 19.1304 to mean that the HUBZone price evaluation preference does not apply to task orders, including those issued under indefinite-delivery contracts and orders placed against Federal Supply Schedules. See 48 C.F.R. § 19.1304(b)–(c). On its face, and when read in isolation, § 19.1304 does appear to exclude task orders from the HUBZone program's overall applicability. However, we contend that § 19.1304's exclusion of task orders was meant to apply solely to HUBZone set-asides. Indeed, immediately following the listed exclusions concerning orders, the regulations include explicit exceptions regarding discretionary set-asides of orders awarded under FAR Part 16.5 and FAR Part 8.4. Id. Notably, while referencing set-asides, § 19.1304 makes no mention of the HUBZone price evaluation preference. This makes sense because the HUBZone Price

Evaluation Preference does not apply to set-aside procurements. Thus, FAR 19.1304 should not be interpreted to exclude the HUBZone price evaluation preference from applying to orders placed under indefinite-delivery contracts or the Federal Supply Schedules.

Furthermore, we note the broad language contained in FAR 19.1307. FAR 19.1307 provides that "[t]he price evaluation preference for HUBZone small business concerns shall be used in **acquisitions** conducted using full and open competition." Id. § 19.1307(a) (emphasis added).

The broad regulatory language in FAR 19.1307 corresponds with the statutory provision in the Small Business Act that created the HUBZone price evaluation preference. Importantly, the statute provides that "**in any case** in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror . . . ." 15 U.S.C. § 657a(c)(3)(A). This language obviously does not exclude task orders from the price preference, and neither does the implementing provision at FAR 19.1307 or in SBA's regulations. In fact, the only noted statutory limitations on the use of the HUBZone price evaluation preference concern the procurement of commodities and services and products procured from prisons and for purchases from people who are blind or severely disabled. See id. § 657a(c)(3)(B)–(D), (c)(4). This exception should be strictly construed – if Congress intended there to be more exceptions beyond commodities procurements, it would have explicitly written the additional exceptions into the law.

The statutory language also applies to task orders because task orders are contracts. The Small Business Act provides definitions for "Prime Contract[1]" and "Multiple Award Contract" – terms not used in the HUBZone price evaluation preference statutory provision – but the Small Business Act does not define the word "contract" in isolation. See 15 U.S.C. § 632. The FAR, however, does. Under FAR 2.101, a contract is defined – expansively – as follows:

> Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and

[1] Notably, even if the term "prime contract" appeared in 15 U.S.C. § 657a instead of merely "contract," the price evaluation preference would still apply to orders because under the Small Business Act, a prime contract is defined as "a contract or contractual action entered into by the Federal Government to obtain supplies, materials, equipment, or services of any kind." See 15 U.S.C. § 632(m)(1) (providing for the definition of prime contract as provided for in 41 U.S.C. § 8701(4)).

> cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see part 16.

48 C.F.R. § 2.101 (emphases added). Under this definition, task orders placed under indefinite-delivery contracts and the Federal Supply Schedules would certainly qualify as contracts because they are in writing, are mutually binding, concern services or supplies that require payment by the government, and concern appropriated funds. More to the point, this definition explicitly includes task orders. Id. It follows that under either 15 U.S.C. § 657a(c)(3) or FAR 19.1307(a), acquisitions awarded on the basis of full and open competition encompass task orders placed under indefinite-delivery contracts and the Federal Supply Schedules and, therefore, the HUBZone price evaluation preference should apply.

Construing orders as contracts also aligns with SBA's own interpretation, which has been that the use of the word contract in the Act includes, or at least applies to, orders. See, e.g., Aldevra, B-411752 (Oct. 16, 2015) (noting that SBA argued that 15 U.S.C. § 644(j), which concerns the award of contracts above the mirco-purchase threshold, should be harmonized with § 644(r) and that 644(j) requires "that all FSS orders with values in the specified range be set aside . . . ."). This is even more the case following the U.S. Supreme Court's ruling in Kingdomware, 136 S. Ct. at 1978, in which the Supreme Court rejected arguments that Federal Supply Schedules orders do not constitute contracts.

Additionally, task orders fall within the statutory requirement to apply the HUBZone price evaluation preference for contracts awarded using full and open competition. Under the HUBZone program, the definition of "full and open competition" is found at 41 U.S.C. § 107. See 15 U.S.C. § 657a(c)(1). Pursuant to 41 U.S.C. § 107, "the term 'full and open competition', when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." Under Title 41 of the United States Code, "the term 'procurement' includes all stages of the process of acquiring property or services . . . ." 41 U.S.C. § 111 (emphasis added). And, amongst other factors, a "responsible source" must be "otherwise qualified and eligible to receive an award under applicable laws and regulations." 41 U.S.C. § 113. Based on these statutory definitions, and depending on the terms of each acquisition, a great many orders acquired under indefinite delivery contracts and the Federal Supply Schedules fall under the broad definition of full and open competition and, therefore, the HUBZone price evaluation preference should apply.

While the applicable FAR regulations concerning orders under indefinite-delivery contracts provide an exemption from the competitive requirements outlined in FAR Part 6 (Competition Requirements), this exemption does not bring all orders issued under indefinite-delivery contracts outside the purview of the statutory definition of full and open competition outlined above. See 48 C.F.R. § 16.505(b)(1)(ii). To the contrary, the placement of orders under an indefinite-delivery contract requires the Government to "describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed." Id. § 16.505(a)(2). In other words, the actual ordering is one stage of the process for the acquisition of property or services, which undeniably falls under the statutory definition of a procurement. See 41 U.S.C. § 111. And, as responsibility is

established at the indefinite-delivery contract level, and is not required for each order placed against the indefinite-delivery contract, responsibility flows through to each order. See Esco Marine, Inc., B-401438 (Sept. 4, 2009) ("once an offeror is determined to be responsible and is awarded a contract, there is no requirement that an agency make additional responsibility determinations during contract performance.") (citation omitted). Thus, at least some orders issued under an indefinite-delivery contract constitute full and open competition because they are procurements where all responsible offerors – i.e., the indefinite-delivery contract holders that are qualified and eligible – may submit sealed bids or competitive proposals and, therefore, the HUBZone price evaluation preference should apply. See 48 C.F.R. § 19.1307(a) ("[t]he price evaluation preference for HUBZone small business concerns shall be used in acquisitions conducted using full and open competition."). Quite simply, while orders under indefinite-delivery contracts may be exempt from the competitive requirements of FAR Part 6, if the base contract was awarded on the basis of full and open competition and competitive procedures are used at the ordering level, then the award of the order should be interpreted to qualify as a contract award using full and open competition, which means the HUBZone price evaluation preference should apply.

The placement of task orders under the Federal Supply Schedules also constitutes full and open competition. The FAR Part 8 regulations explicitly provide that "orders placed against a [Multiple Award Schedule], using the procedures in this subpart, are considered to be issued using full and open competition . . . ." FAR 8.404(a); see also FAR 6.102(d)(3) ("Use of multiple award schedules issued under the procedures established by the Administrator of General Services consistent with the requirement of 41 U.S.C. 152(3)(A) for the multiple award schedule program of the General Services Administration is a competitive procedure."). Responsibility in this context is also established at the Multiple Award Schedule portion of the procurement and flows down to individual orders. See Advanced Tech. Sys., Inc., B-296493.6 (Oct. 6, 2006) ("we conclude that the initial responsibility determination made by GSA in connection with the award of the underlying FSS contract satisfies the requirement for a responsibility determination regarding that vendor and that there is no requirement that an ordering agency perform separate responsibility determinations when placing orders under that contract."). It follows that orders issued under the Federal Supply Schedules constitute full and open competition and, therefore, the HUBZone Price Evaluation Preference should apply. See FAR 19.1307(a).

III. Proposed Congressional Action

Despite the current government statutory and regulatory provisions in support of the application of the HUBZone price evaluation preference to task orders, agencies are not applying the preference in the award of task orders given the conflicting interpretation of FAR 19.1304. As such, the surest way to resolve this confusion is for Congress to amend the Small Business Act, specifically 15 U.S.C. § 657a(c)(3)(A), to remove any doubt that the HUBZone price evaluation preference explicitly applies to task orders issued under contracts that were awarded on the basis of full and open competition. We believe that Congress could make a simple addition to § 657a(c)(3)(A) to make clear that "in any case in which a contract is to be awarded on the basis of full and open competition," includes task orders issued under unrestricted

multiple award IDIQ contracts and the unrestricted portion of a partial set-aside contract. With such an amendment, there would be no doubt that the HUBZone price evaluation preference applies to task orders.

In addition to amending § 657a(c)(3)(A) and to ensure agencies begin to apply the HUBZone price evaluation preference in the award of task orders, it would be beneficial for Congress to direct the SBA to amend its HUBZone regulations, particularly 13 C.F.R. § 126.613, within ninety days to provide quick regulatory effect to the amendment. This will allow HUBZone concerns to show agencies, definitively, that the HUBZone price evaluation preference applies to task orders, regardless of FAR 19.1304. Indeed, it is critical that SBA amend its regulations because the FAR Council will also need to amend the FAR, which can take years, further delaying application of the HUBZone price evaluation preference to task orders. In sum, with these statutory and regulatory fixes, HUBZone concerns will be in a much stronger position to show agencies that the HUBZone price evaluation preference applies to task orders, allowing full use of the price evaluation preference.

IV. Conclusion

This paper demonstrates that the HUBZone price evaluation preference, under the existing law and regulations, should be applied broadly, including to task orders issued under IDIQ and Federal Supply Schedule contracts awarded on the basis of full and open competition. While we do not believe a legislative change is needed because the law is clear, procuring agencies are not following this interpretation due to a conflicting interpretation of FAR 19.1304. Therefore, we believe an amendment to the Small Business Act and a directive to amend SBA's regulations is the best way to confirm that the HUBZone price evaluation preference applies to task orders. Given the significant benefit that application of the HUBZone price evaluation preference would have for SBA, agencies, and HUBZone firms to increase HUBZone spending, Congress should pass legislation to ensure that federal agencies apply the HUBZone price evaluation preference to task orders.