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February 7, 2024

VIA EMAIL ONLY

Ms. Joanne Woytek
Program Director
NASA SEWP Program

Re: NAICS Codes and Nonmanufacturer Rule Waiver for SEWP VI

Dear Ms. Woytek:

Our firm represents numerous small businesses that perform on the SEWP V contract as information technology value-added resellers (“ITVARs”). As you may recall, I have met and heard you speak at several industry events over the years. We know you appreciate how important the SEWP V contract has been for many small business ITVARs, and, in turn, how important these small business ITVARs have been to the great success of the SEWP V vehicle.

As NASA is working on the final RFP for SEWP VI (“Final RFP”), we are writing to express concerns from the many small business ITVARs we represent regarding the use of NAICS code 541512 for all three categories in the draft SEWP VI RFP (“Draft RFP”). We understand others have expressed similar concerns to NASA, most notably the House Small Business Committee in a letter it sent last month to NASA Administrator Bill Nelson. To best address these concerns, we have two recommendations for the Final RFP: (1) designate NAICS code 541519, ITVAR exception to Category A; and (2) include all applicable class waivers of the nonmanufacturer rule (“NMR”) and pursue an individual waiver of the NMR for common product categories in which there are no small business manufacturers.

1. Designate NAICS code 541519, ITVAR Exception, for Category A

In our view, NAICS code 541512 is not the best fit for each category in the Draft RFP and, therefore, the assignment of NAICS code 541512 to all three categories would not be consistent with applicable U.S. Small Business Administration (“SBA”) regulations and case law. Furthermore, assignment of NAICS code 541512 to all three categories for SEWP VI would prevent most small business ITVARs on SEWP V from participating as prime contractors on SEWP VI because such firms have higher annual revenue from reselling IT products and qualify as small businesses under the so-called “ITVAR exception” to NAICS code 541519, which has a size standard of 150 employees. SEWP V utilized the ITVAR exception to NAICS code 541519 and SEWP VI should as well.

According to SBA regulations, the procuring agency contracting officer is supposed to designate the NAICS code “which best describes the principal purpose of the product or service being acquired.”¹ For multiple award contracts like SEWP VI, the contracting officer may only assign a single NAICS code if that code “best describes the principal purpose of the acquisition” and “will also best describe the principal purpose of each order to be placed under the Multiple Award Contract.”² However, when a single NAICS code is not the best fit for the entire acquisition and each order to be placed under the multiple award contract, the contracting officer is required to “[d]ivide the solicitation into discrete categories . . . and assign each discrete category the single NAICS code and corresponding size standard that best describes the principal purpose of the goods or services to be acquired under that category”³

While we believe NASA appropriately divided the Draft RFP into three categories, it was wrong to assign NAICS code 541512 to all three. Specifically, NAICS code 541512 is not the best fit for Category A because the predominance of work in this category will be for IT products, not services. In the Draft RFP, NASA described Category A as covering “a broad suite of IT solutions, i.e., technology in which there is an intertwining of products, such as a laptop, and services, such as maintenance and installation, requirements.” The Draft RFP noted the following six technical areas in Category A: IT Computer Systems/Storage Devices/Computer Facilities; Networking Technology/Mobility & Communications; Software and Cloud Technology; Supporting Technology/Security Technology; A/V Equipment and Accessories; and Product-Based Services. The mandatory and additional sub-areas under each Technical Area further support that, while Category A involves a mixture of supplies and services, products will account for most of the anticipated work. Several of our clients told us that NASA officials confirmed this during the October 2023 industry day. This is also echoed in NASA’s response to Question 157, in which NASA noted that SEWP V is approximately 70% hardware and 30% services.⁴

Under SBA Office of Hearings and Appeals (“OHA”) case law, NAICS code 541512 is not the appropriate NAICS code unless more than 50% of the work on each order under Category A will be for services. OHA has found that NAICS code 541512 is the appropriate code when the contract predominantly involves services related to installation of computer systems, which could include further development, management and maintenance of an existing computer system.⁵ As OHA has explained, “the central task of any procurement under [NAICS code 541512] must be computer systems planning and design.”⁶ However, when less than 50% of the contract’s value is for services, and the government is acquiring substantial quantities of

¹ 13 C.F.R. § 121.402(b).

² Id. at § 121.402(c)(1)(i).

³ Id. at § 121.402(c)(1)(ii) (emphasis added).

⁴ Of note, Category B for SEWP V used NAICS code 541519.

⁵ See NAICS Appeal of Rsch. Innovations Inc., SBA No. NAICS-6196 (2023).

⁶ See NAICS Appeal of Engineering Services Network, Inc., SBA No. NAICS-5064 (2009).

IT products that account for more than 50% of the contract's value, NAICS code 541519 with the ITVAR exception is the appropriate NAICS code.⁷

Since the start of SEWP V, small business ITVARs have supplied significant volumes of IT products to many customer agencies. The small business ITVARs have developed and honed specialized expertise, authorized distributor relationships with the manufacturers, infrastructure, financial wherewithal, and other resources to supply the large quantities of IT products that agencies have routinely ordered under SEWP V. Conversely, companies that qualify as small businesses under NAICS code 541512 focus on computer design services and generally lack the capabilities, relationships, and resources to supply large volumes of IT products. Additionally, small businesses under NAICS code 541512 would quickly graduate to large business status under this code due to the substantial revenue attributable to reselling large quantities of IT products. Customer agencies will no doubt prefer to continue ordering from the experienced small business ITVARs that have the capabilities and expertise to continue fulfilling their needs for IT products and value-added services. These agencies may be forced to use other contract vehicles if they cannot directly access the small business ITVARs on SEWP VI.

2. Include all applicable class waivers of the NMR and pursue an individual waiver of the NMR for common product categories in which there are no small business manufacturers

Assuming NASA appropriately assigns NAICS code 541519 with the ITVAR exception to Category A for SEWP VI, NASA will also need to address the NMR in the Final RFP. As stated in the ITVAR exception, small business ITVARs must comply with the NMR in supplying IT products. Compliance with the NMR requires small business ITVARs to supply products made by another small business unless SBA has granted a waiver that permits the small business ITVARs to supply products made by large businesses.

There are several class waivers of the NMR that already exist and apply to certain classes of products that have been supplied under SEWP V and will be supplied under SEWP VI. For example, a class waiver exists for commercially available off-the-shelf laptop and tablet computers. There is also a class waiver for peripheral equipment when purchasing a mainframe computer. The full list of existing class waivers is available from SBA.⁸ Pursuant to SBA regulations, NASA must include all available and applicable class waivers in the Final RFP.⁹

⁷ See NAICS Appeal of Microtechnologies, LLC, SBA No. NAICS-5489 (2013); see also Consolidated Safety Servs., Inc. v. United States, 167 Fed. Cl. 543, 555-56 (2023) (discussing that the NAICS code a contracting officer selects may not be a perfect fit for all aspects of the work in a procurement but must be the code that constitutes the “best” overall description of the work).

⁸ See 13 C.F.R. § 121.1205.

⁹ See 13 C.F.R. § 121.1206(a).

In addition to incorporating the existing and applicable class waivers in the Final RFP, NASA can and should pursue an individual waiver of the NMR rule for the SEWP VI contract. The most efficient and effective approach would be to pursue an individual waiver for the largest and most important categories of products obtained through SEWP V, such as: (1) computer desktops/workstations; (2) servers (stand-alone and rack servers); (3) all hand-held devices; (4) printers (large format printers down to deskside); and (5) networking gear. In these categories, customer agencies typically purchase products that are commercially available off-the-shelf and sold in substantial quantities that also must be Trade Agreements Act (“TAA”) compliant. There are no small business manufacturers of the products in these categories that are commercially available off-the-shelf, sold in substantial quantities, and TAA compliant. Therefore, NASA could readily support its request to SBA for an individual waiver of these product categories by posting a sources sought to determine to confirm there are no small business manufacturers that make products in these categories that are commercially available off-the-shelf, sold in substantial quantities, and TAA compliant.

Pursuing the individual waiver for SEWP VI would not significantly delay the timeline for the Final RFP. We researched sources sought for individual waiver requests from other agencies and found the closing date for responses was typically between one to two weeks after the agency posted the sources sought. If, as expected, no small business manufacturers respond, NASA could then submit the individual waiver request to SBA pursuant to 13 C.F.R. § 121.1204(b). A few years ago, DHS obtained an individual waiver from SBA for its FirstSource III procurement that involves similar product categories. The process DHS followed for FirstSource III is an exemplar for NASA’s pursuit of an individual waiver for SEWP VI.

Industry is prepared to help NASA with the individual waiver request. We could assist in drafting the product category specifications for the sources sought, in preparing the individual waiver request to SBA, and in communicating with SBA to facilitate its prompt review of the individual waiver request. This is a critical issue for the small business ITVAR community and for the future of the SEWP vehicle. As such, our firm and the many small business ITVARs we represent stand ready to facilitate NASA’s pursuit of an individual waiver for SEWP VI.

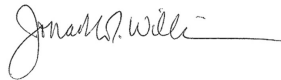
In closing, we want to thank you for your consideration of this correspondence and for your efforts along with others in the SEWP Program Management Office who are working hard on SEWP VI. To summarize our points above, we believe SEWP VI will be best positioned to continue and build on the success of SEWP V if:

- NASA assigns NAICS code 541519, ITVAR exception to Category A;
- The Final RFP includes all existing and applicable class waivers of the NMR like the class waiver for commercially available off-the-shelf laptops and tablets and the class waiver for peripheral equipment when purchasing a mainframe computer; and

- NASA pursues an individual waiver of the NMR for the SEWP VI contract for products that are commercially available off-the-shelf, sold in substantial quantities, and TAA compliant in the following product categories: (1) computer desktops/workstations; (2) servers (stand-alone and rack servers); (3) all hand-held devices; (4) printers (large format printers down to desksize); and (5) networking gear.

If you have any questions or if you would like to discuss this correspondence, please do not hesitate to contact us.

Sincerely,



Jonathan T. Williams

Meghan F. Leemon

cc: Andrea M.T. Ross, SEWP Procurement Team Lead (sewp6@sewp.nasa.gov)
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