**Federal Construction Project Acquisition and Procurement Reforms**

**Quality Construction Alliance (QCA) Position:**

***Congress should implement Federal construction project acquisition and procurement reforms that promote the best interest of prime contractors and subcontractors alike. Procurement policies that favor prime contractors at the expense of all other performing subcontractors, who perform the bulk of work on most Defense and Civilian agency projects, is one-sided, unfair, and out of date relative rulemaking perspective that is contrary to modern integrated project delivery/performance models that include all substantial project participants – prime contractors and subcontractors alike – in the project procurement and project execution planning and performance responsibility procedures in the interest of overall success of the project. QCA’s ultimate goal is to improve overall successful construction project performance and Federal agency client mission and project goals while saving the taxpayers’ dollars.***

Following is a list of measures in Congress or under regulatory development that the QCA supports in 2015.

**Issue:Support H.R. 838 – Security in Bonding Act of 2015**

1. ***The measure would require agency Contracting Officers that would accept individual surety prime contractor payment and performance bonds issued by individual sureties, rather than corporate surety bond providers, to post and deposit bonds backed by Government securities for the full amounts of those Miller Act Federal construction project payment and performance bonds***.

The legislation is designed to make sure the agency and subcontractors and suppliers are protected by bonds backed with readily accessible and tangible assets and deposited in the event of prime contractor defaults. The problem is that in some cases, Contracting Officers have relied upon their permissible discretion to accept individual surety bonds in lieu of Treasury Department approved corporate surety bonds, which then regrettably were not backed by sufficient assets, to cover the loss in the event of prime contractor defaults. The problem arises frequently enough to warrant remedial action.

**Status:**

The measure was introduced in the House Small Business Committee Contracting Subcommittee Chairman Richard Hanna (R-NY-22) and co-sponsored by full Committee Chairman Steve Chabot (R-OH-1), and by Subcommittee Ranking Member Grace Meng (D-NY-6). H.R 838 is pending before the House Small Business Committee and the house Judiciary Committee.

***When meeting with members of those committees, press for support of H.R 838 as a measure that provides solid surety bond asset backing in the event of prime contractor default for the benefit of the Agency, the taxpayers, and subcontractors and suppliers, while sacrificing none of the benefits of small business development by the ability to use bona fide individual, non-corporate sureties whose bonds are back by real and readily accessible assets to answer bond claims.***

**H.R. 838 Co-Sponsors:**

Hanna, Richard (R-NY) Chabot, Steve (R-OH) Meng, Grace (D-NY)

**Committees of Jurisdiction:**

House Small Business, House Judiciary Subcommittee on Regulatory Reform, Commercial, and Antitrust Law.

*As of April 22, 2015*

**Issue:**

1. ***Support H.R. 1481 – Small Contractors Improve Competition Act of 2015 - The measure makes a number of technical and administrative changes to the Small Business Administration’s enforcement and administration of Federal contracting goals and procedures pertaining to agency programs to promote small business contracting, in all industries, with all small businesses covered by the SBA program, such as small businesses defined by annual dollar volume or employment levels, and small businesses owned by women, socially and economically disadvantaged individuals, service-disabled veterans, and historically underutilized businesses zone (HUB Zone) businesses.***

It also includes controls and notices where Federal agencies have the need to bundle procurements in the interest of government efficiency rather than to avoid small business contracting provisions. There are other technical revisions to the administration of the small business rule relating to evaluating prime contractors and subcontractor joint venture team performance for small business award evaluation, and a measure that would exempt small business subcontracting award requirements in the performance of small business supply or service prime contracts.

**Status:**

***The most salient feature of H.R. 1481 for QCA purposes is the Common Sense Contracting Act of 2015 provisions included in the measure that would prohibit internet reverse auctions for award of small business construction contracts***. This measure pertains to small business awards only, for now, but can serve as a precedent to expand the ban on reverse auctions for construction project prime contract awards of all types – small business and otherwise in the future. It has long been the QCA position, and that of virtually all other construction employer groups, that the use of internet reverse auctions for prime contract awards is a highly counterproductive abuse of the sealed low-bid procurement process. So, H.R. 1481 is a step in the right direction. But further steps should be taken. This measure was introduced by Representative Richard Hanna (R-NY-22) and Representative Grace Meng (D-NY-6) Chairman and Ranking Member respectively of the House Small Business Contracting Subcommittee. The measure has been reported out of the House Small Business Committee, and may be taken up as a small business/procurement amendment to the 2015 National Defense Authorization measure pending in the House now.

***So, when meeting with House members on the Small Business or Armed Services Committees, urge favorable consideration of H.R. 1481 generally, and the anti-reverse auction measures in particular. The same approach should be taken with members of the Senate Small Business and Entrepreneurship and Armed Services Committees***.

Moreover, urge those same members to consider broadening that small business scope to ban internet reverse auctions for all direct Federal low-price award procedures – small business or otherwise, and to expand that to include price-only selection procedures on sealed low-bid awards, and low-price/technically acceptable award procedures as well. Furthermore, ask the lawmakers to consider adding on a similar protection for all subcontractors that requires the prime contractors to list the major sub bids used in the prime low-price proposal and to award to the listed firms in the absence of justified cause for post-award substitutions of subcontractors to prevent post-award bid shopping and bid peddling. These sub bid listing approaches are proven to promote successful project completion that avoids all the project problems caused by post-award bid shopping and bid peddling by unethical prime contractors and subcontractors. Those measures are fully consistent with the purposes of a ban of reverse auctions for prime contract awards. (QCA expects an anti-bid shopping measure, similar to H.R 1942 introduced by Representative Carolyn Maloney (D-NY-12) in the last Congress, to be introduced again in 2015.)

**H.R. 1481 Co-Sponsors:**

Chabot, Steve (R-OH)

**Committees of Jurisdiction:**

House Small Business

*As of April 22, 2015*

**Issue:**

1. ***Support rapid and full regulatory implementation of Executive Order 13673, requiring prospective prime contractors and subcontractors to certify to satisfactory legal compliance as a condition of direct Federal prime or subcontract award***.

EO13673, was put forward by the Obama Administration last year, and would require that prospective prime contractors certify to satisfactory legal compliance to the agency Contracting Officer (CO) and a Legal Compliance Advisor (LCA) across a broad spectrum of Federal labor and employment and related state laws as a precondition to contract award in the responsibility determination process after bid but before final award of the prime contract. The EO then requires that the prime contractor require and assess a similar certification from prospective subcontractors before the award of each subcontract under a covered prime contract.

**Status:**

The QCA has supported the aims of the EO in general, just as QCA supported the Federal Contractors Legal Compliance Database almost 8 years ago that would now be used in the EO legal compliance review process. Back then, as now, opponents of higher legal compliance standards as a condition of the responsibility determination process – for both primes and subs - have charged that the EO and the use of the database will lead to blacklisting of firms in a politically motivated assessment that will lead to abusive non-responsibility determinations. These opponents refuse to recognize that the possibility for such abuses exist under current regulations, and that if anything, the EO provides procedures to guard against such claimed abuses.

QCA has said that high standards will raise the competitive bar in the marketplace, attracting in more qualified firms that would otherwise not compete in a low-standards market, and that the EO just provides tools and guidance for Contracting Officers who currently have the authority and discretion to make these proprietary judgments of non-responsibility under the current regulations. The responsibility standard hasn’t changed, the access to information and procedures to make that judgment have been made more specific, and the right of a firm that is ruled ineligible to complain has been broadened, not diminished.

However, QCA has advised the Government regulatory agencies that changes in regulation need to be made to avoid the consequences of faulty or unscrupulous responsibility evaluations by prime contractor of subcontractors who may suffer post-award price negotiations in the guise of the pre-subcontract legal compliance/responsibility evaluation process. QCA has called for pre-award legal compliance certification of the prime contractor and all major subcontractors by the Contracting Officer and the LCA in the post-competition pre-award responsibility determination process. In effect, the EO would require sub bid listing and review all at once, in the pre-award review process post competition (bidding or negotiations) but before final contract award, by the government agency (CO and LCA), rather than leaving the reviews to the prime contractors at the time of the subcontract award, with all the opportunity for abuse and price renegotiations, and project detriments from late ineligibility determinations that could cause projects delays, claims and disputes as the project proceeds.

Also, the QCA position protects the prime contracting from False Claims Act problems and other charges of mistake or abuse from subcontractors in its own legal compliance reviews of subcontractors. Better to have the government agents (CO and LCA) make those complex judgments at all contracting tiers on a project-wide, pre-award basis, when ineligibility problems have less effect on project performance going forward.

EO 13673 has been the subject of a hearing in the House Education and Workforce Committee, and is the subject of interest in the House Oversight and Government Reform Committee as well. In fact, the Democratic minority members of both committees recently wrote a letter to the Administration urging rapid regulatory implementation of the EO this year. The EO has not gone into effect yet, pending adoption of final regulation.

When meeting with members of either party in the House or Senate labor or government operations committees (House Education and Workforce or Oversight and Government Reform, or Senate Health, Education, Labor, and Pensions (HELP) or Homeland Security and Governmental Affairs), note the QCA support for EO13673, and point out how legal compliance provides value for the taxpayers in better project performance promoted with regulations that promote market participation from quality firms competing on the basis of contract performance in full legal compliance.