

Decision

Matter of: InfoPoint LLC

File: B-419856

Date: August 27, 2021

Scott R. Williamson, Esq., and Daniel R. Williamson, Esq., Williamson Law Group, LLC, for the protester.

Colonel Patricia S. Wiegman-Lenz, Michael J. Farr, Esq., Siobhan K. Donahue, Esq., and Kevin P. Stiens, Esq., Department of the Air Force; and John W. Klein, Esq., and Mark R. Hagedorn, Esq., Small Business Administration, for the agencies.

Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging a solicitation requirement that a joint venture competing for the award, as opposed to the individual members of the joint venture, hold a top secret facility clearance is sustained where the requirement is prohibited by the National Defense Authorization Act for fiscal year 2020 as well as by regulations issued by the Small Business Administration.

DECISION

InfoPoint LLC, a small business of Livonia, Michigan, protests the terms of fair opportunity proposal request (FOPR) No. FA4890-21-R-0008, which was issued by the Department of the Air Force for command and control, intelligence, surveillance, and reconnaissance (C2ISR) support services. The protester argues that the solicitation's requirement that a joint venture competing for the award, as opposed to the members of the joint venture, must have a top secret facility clearance is inconsistent with statutory and regulatory provisions concerning the evaluation of the capabilities of the members of small business joint ventures.

We sustain the protest.

BACKGROUND

The Air Force issued the FOPR on April 22, 2021, seeking proposals to provide C2ISR support services for the Air Force Air Combat Command. FOPR at 1; Performance

Work Statement (PWS) at 2.¹ The solicitation was limited to firms² that hold one of the One Acquisition Solution for Integrated Services (OASIS)--small business pool of governmentwide multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts, which were awarded by the General Services Administration. FOPR at 1. The FOPR anticipates the issuance of a task order with fixed-price and cost-reimbursement contract line items, with a base period of 10 months and four 1-year options. *Id.* The solicitation advised that proposals will be evaluated based on three factors: (1) technical capability, (2) past performance, and (3) price. *Id.* at 2. For purposes of award, the technical capability factor will be evaluated on a pass/fail basis, and the past performance factor is “significantly more important” than price. *Id.*

As relevant here, the solicitation required that an offeror possess a top secret facility clearance at the time of proposal submission, as follows:

2.2 A Top Secret Facility Clearance is required. An Offeror without the requisite clearance will not be permitted as the prime contractor due to the required security classification. Offerors shall possess or acquire a facility clearance equal to the requirement on the DD254 (Attachment 2) without additional authorization (*i.e.* National Interest Determination (NID)) by the proposal due date. If an Offeror does not have the required clearance at the time of proposal submission, the proposal will not be evaluated and is not eligible for award. The Sensitive Compartmentalized Information (SCI) work will take place at a Government facility.

Id.

In response to questions from prospective offerors, the Air Force advised that an offeror comprised of two or more companies aligned to submit a proposal for this effort as a joint venture must itself satisfy the facility clearance requirement. The solicitation further advised that “[t]he individual partners to the [joint venture] having the [facility clearance] is not sufficient.” Agency Request for Dismissal, attach. 3, Questions and Answers at 2. The agency stated that the requirement for a joint venture, as opposed to the partners comprising the joint venture, to have a facility clearance is based on guidance found in Department of Defense Manual (DoDM) 5220.22v2, Air Force Manual (AFMAN) 16-1406v2.³ *Id.*

¹ Citations to the FOPR are to attachment 2 to the agency’s request for dismissal; citations to the PWS are to attachment 1 to the agency’s request for dismissal.

² Although firms that compete for task orders under IDIQ contracts are generally referred to as “vendors,” the record and the parties’ briefings use this term as well as “offerors” interchangeably. Our decision uses the term offerors for the sake of consistency.

³ This guidance is a single document referenced as DoDM 5220.22v2_AFMAN 16-1406v2. National Industrial Security Program: Industrial Security Procedures for

The agency also responded to a question concerning a regulation issued by the Small Business Administration (SBA), 13 C.F.R. § 121.103(h)(4), which, as discussed below, addresses the evaluation of facility clearances for small business joint ventures. *Id.* at 1. The agency advised that, notwithstanding the regulation, the FOPR provision was consistent with DoDM 5220.22v2_AFMAN 16-1406v2, and would therefore not be removed or modified. *Id.*

InfoPoint filed this protest on May 21, prior to the solicitation's closing date of May 24.⁴ The protester argues that the FOPR provision requiring that a joint venture, as opposed to its members, hold a facility clearance at the time of proposal submission violates the Small Business Act and the SBA regulation at section 121.103. On June 1, the Air Force requested that we dismiss the protest, arguing that it failed to state a valid basis of protest because the statutory and regulatory provisions cited by the protester did not prohibit the solicitation's facility clearance provision. We denied the request on June 9, concluding that the protester's arguments concerning the reasonable interpretation of the relevant statutory and regulatory provisions set forth valid bases of protest. See 4 C.F.R. § 21.1(f). Because this protest raises questions concerning the interpretation of regulations promulgated by SBA, our Office invited SBA to provide its views on the merits of the protest, which the agency filed on June 22. InfoPoint and the Air Force filed comments on SBA's response on July 2.

DISCUSSION

InfoPoint argues that the FOPR improperly requires a small business joint venture offeror to hold a facility clearance, even where the individual joint venture members hold the required facility clearances. Protest at 7-8. The protester argues that the solicitation provision is inconsistent with the Small Business Act and the SBA regulation at section 121.103, and that the solicitation should be amended to permit small business joint ventures whose members each hold the required facility clearance to compete for the award. SBA joins the protester's argument, and further argues that the SBA regulation cited by the protester is consistent with a provision in the National Defense Authorization Act (NDAA) for fiscal year 2020, which it contends specifically prohibits the challenged facility clearance requirement in the FOPR. SBA Comments at 3-4.

Government Activities, static.e-publishing.af.mil/production/1/saf_aa/publication/dodm5220.22v2_afman16-1406v2/dodm5220.22v2_afman16-1406v2.pdf (last visited Aug. 13, 2021).

⁴ The Air Force represents that the anticipated value of the protested OASIS IDIQ contract task order exceeds \$10 million. Agency Notice, Aug. 6, 2021, at 1. Accordingly, this protest is within our jurisdiction to hear protests of task orders placed under civilian agency IDIQ contracts. 41 U.S.C. § 4106(f)(1)(B).

The Air Force argues that none of the statutory or regulatory provisions cited by the protester or SBA prohibit the solicitation's facility clearance requirement, and that regulations issued by the Department of Defense (DOD) concerning security clearances should, in any event, take precedence over any regulations issued by SBA. Air Force Comments at 2-3. For the reasons discussed below, we agree with InfoPoint and SBA and sustain the protest.

There are two relevant statutory provisions, as well as implementing regulations, at issue here. For the first, section 644 of the Small Business Act provides:

JOINT VENTURES.—When evaluating an offer of a joint venture of small business concerns, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

15 U.S.C. § 644(e)(4)(B)(ii).

With regard to the second statutory provision, the 2020 NDAA, which was enacted on December 20, 2019, contained a provision that directly addresses the requirement that a joint venture have a facility clearance:

TERMINATION OF REQUIREMENT FOR DEPARTMENT OF DEFENSE FACILITY ACCESS CLEARANCES FOR JOINT VENTURES COMPOSED OF PREVIOUSLY-CLEARED ENTITIES. A clearance for access to a Department of Defense installation or facility may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility.

Pub. L. No. 116-92 § 1629; 133 Stat. 1198, 1741 (2019).

SBA issued a final rule on October 16, 2020, implementing the agency's interpretation of the Small Business Act and the 2020 NDAA. SBA Comments at 4; see 85 Fed. Reg. 66146, 66180 (Oct. 16, 2020). That regulation states as follows:

Facility security clearances. A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.

(i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.

(ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

13 C.F.R. § 121.103(h)(4).

As this protest concerns interpretation of statutory and regulatory provisions, our analysis begins with the text of those provisions. See *Curtin Mar. Corp.*, B-417175.2, Mar. 29, 2019, 2019 CPD ¶ 117 at 9 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). In construing a statute or regulation, “[t]he first step ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.’” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). In this regard, we “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). If the statutory or regulatory language is clear and unambiguous, the inquiry ends with the plain meaning of the language. *ASRC Fed. Data Net. Techs., LLC*, B-418028, B-418028.2, Dec. 26, 2019, 2019 CPD ¶ 432 at 8 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

Here, section 1629 of the NDAA specifically states, and the plain meaning of the statute leads us to conclude, that it unambiguously prohibits DOD from requiring that a joint venture hold a facility clearance if the members of the joint venture hold the required facility clearances. We do not find, and the Air Force has not demonstrated, that there is any other reasonable meaning to this statutory language. Section 644 of the Small Business Act is similarly clear in providing that where a small business joint venture does not itself demonstrate capabilities or past performance, the procuring agency must consider the capabilities and experience of the joint venture members.

Moreover, the relevant regulations also are consistent with the requirements of the 2020 NDAA and the Small Business Act. The SBA regulation at section 121.103 is consistent with the 2020 NDAA, where the regulation states that joint ventures may be awarded contracts requiring facility clearances where either the joint venture itself or the individual partners to the joint venture hold a facility clearance. The SBA regulation therefore provides how procuring agencies should evaluate whether small business joint ventures are eligible for the award of contracts that require facility security clearances. Under the regulations, the relevant inquiry is whether the joint venture itself, or the individual partners that make up the joint venture, hold a facility security clearance.

InfoPoint and SBA argue that section 644 of the Small Business Act requires that the capabilities of the individual members of the joint venture be considered as the capabilities of the joint venture itself. Protest at 7-8. InfoPoint and SBA both also argue that the FOPR requirement is unreasonable and inconsistent with the SBA regulation at section 121.103. SBA Comments at 2-3. SBA notes that section 644 requires agencies to evaluate each joint venture member’s capabilities where the joint venture itself does

not demonstrate capabilities necessary to be considered for award, and contends that this general requirement extends to facility clearances. *Id.* at 3. SBA acknowledges that the Small Business Act “does not explicitly lay out facility clearance requirements for small business joint ventures,” but nonetheless argues that the “regulations [at section 121.103] are a reasonable administrative implementation of § 644(e)(4)(B)(ii).” SBA Comments at 5.

In addition to the general authority of the Small Business Act, SBA argues that the 2020 NDAA specifically addressed this matter, and expressly provides that DOD “may not” require a joint venture itself to hold a facility clearance “if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility.” SBA Comments at 3. SBA argues that the regulation at section 121.103 is consistent with the prohibition set forth in the 2020 NDAA.⁵ *Id.* at 4.

Here, InfoPoint states that it is an unpopulated⁶ mentor-protégé joint venture, organized under the provisions of 13 C.F.R. §§ 125.8 and 121.103(h)(3).⁷ Protest at 4, 7-8. The protester further states that both members of the joint venture hold the top secret facility clearances required under the solicitation. Protester’s Comments at 2. For these reasons, the protester contends that the FOPR requirement that the joint venture itself have a facility clearance is prohibited by the Small Business Act and SBA regulation.

⁵ SBA also notes that the regulations applicable to the small business mentor-protégé joint venture program require that joint ventures be unpopulated, that is, the firms that are members of the joint venture, rather than the joint venture itself, must employ the individuals who will perform the contract. 13 C.F.R. § 121.103(h). SBA contends that because a joint venture is intended to be limited in duration and scope, it is not appropriate to require the joint venture itself to have a facility clearance. SBA Comments at 3. In this regard, SBA argues that requiring a joint venture to have a facility clearance would prohibit newly formed joint ventures from being eligible for security-related contracts even though the joint venture itself will not perform any work and the individual partners that will perform the work have the required clearances. *Id.*

⁶ As relevant here, a joint venture is “populated” where personnel who will perform work under a contract are employed by the joint venture itself; a joint venture is “unpopulated” where personnel who will perform work under a contract are employed by the firms that comprise the joint venture. See 13 C.F.R. § 121.103(h).

⁷ SBA’s small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms in order to provide “business development assistance” to the protégé firms and to “improve the protégé firms’ ability to successfully compete for federal contracts.” 13 C.F.R. § 125.9(a), (b). One benefit of the mentor-protégé program is that a protégé and mentor may form a joint venture. *Id.* § 125.9(d). If SBA approves a mentor-protégé joint venture, the joint venture is permitted to compete as a small business for “any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement[.]” *Id.* § 125.9(d)(1); see also 13 C.F.R. §§ 121.103(b)(6), (h)(1)(ii).

The protester contends that the solicitation should be amended to permit joint ventures to be eligible for award where they are comprised of members that each hold the required facility clearance. As explained above, based on our review of the applicable statutes and regulations, we agree that InfoPoint meets the requirements for holding a facility clearance because both members of the joint venture hold the top secret facility clearances required under the solicitation.

The Air Force makes four primary arguments in response to InfoPoint's protest and SBA's comments: (1) the 2020 NDAA does not apply to the solicitation because DOD has not yet issued regulations implementing that statute; (2) the provisions of the SBA regulation at section 121.103 are permissive, rather than mandatory; (3) our Office should give deference to the statutory delegation of authority to DOD concerning security clearances; and (4) implementation of the plain language of the 2020 NDAA would create challenges arising from conflicts with existing regulations and policies. We conclude that none of these arguments have merit and that none provides a basis to find the solicitation's facility clearance requirement is consistent with the statutes and regulations cited by InfoPoint and SBA.

The Air Force first argues that the 2020 NDAA does not prohibit the facility clearance provision in the solicitation because the agency has not yet issued regulations implementing this statute. Air Force Comments at 2-3; Air Force Response to GAO Questions at 4-5.

Where a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment. *Johnson v. U.S.*, 529 U.S. 694, 702 (2000) (quoting *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991)). In certain situations, such as those where a statute directs an agency to issue regulations to effectuate a statutory provision, our Office has concluded we have no basis to sustain a protest where the agency has not yet promulgated the required regulations. See *Trailboss Enters., Inc.*, B-415970 *et al.*, May 7, 2018, 2018 CPD ¶ 171 at 6. Here, however, the 2020 NDAA provision does not direct DOD to issue regulations or otherwise take any action to implement the provision. See Pub. L. No. 116-92 § 1629; 133 Stat. 1198, 1741 (2019).

The Air Force does not reasonably explain why the 2020 NDAA provision was not effective upon enactment on December 20, 2019, nor why it is ineffective pending regulatory implementation by DOD. Although the agency generally cites the requirement that an agency's "procurement policy, regulation, procedure, or form" must be published for public comment in the Federal Register prior to taking effect, the statutory command in the 2020 NDAA is not a policy, regulation, procedure, or form issued by an agency. See Air Force Response to GAO Questions at 3 (citing 41 U.S.C. § 1707). Rather, it is an unambiguous command by Congress through a statute that DOD not require joint ventures to hold a facility clearance where the members of the joint venture hold the required facility clearances. We therefore find no basis to conclude that the 2020 NDAA provision is ineffective until DOD decides how, or whether, to issue a regulation implementing it.

Next, the Air Force argues that the SBA regulation at section 121.103 contains permissive, rather than mandatory language, because it states that a joint venture “may” be awarded a contract where either the joint venture itself or the individual partners that comprise the joint venture have a facility security clearance. Air Force Comments at 4; 13 C.F.R. § 121.103(h)(4). The Air Force contends that the term “may” grants procuring agencies discretion to choose whether to require the joint venture, or the individual joint venture members, to hold the required facility clearances. Air Force Comments at 4.

SBA responds that the “may” language in section 121.103 is reasonably understood to refer to the eligibility of a joint venture to receive award when the joint venture partner that will perform the classified work holds the appropriate facility clearance. SBA Comments at 5. SBA argues that, as a necessary corollary, procuring agencies are not permitted to exclude small business joint ventures from award when this condition is met. *Id.* Therefore, SBA contends, the regulation’s use of the term “may” does not confer onto an agency the discretion to ignore the regulation’s definition of eligibility. *Id.*

Our Office gives deference to SBA in the interpretation of the regulations it promulgates pursuant to its statutory authority under the Small Business Act. *TechAnax, LLC; Rigil Corp.*, B-408685.22, B-408685.25, Aug. 16, 2019, 2019 CPD ¶ 294 at 4. We think that SBA reasonably interprets section 121.103 as defining the eligibility of joint ventures to receive awards where the joint venture members hold the required facility clearances, rather than stating that procuring agencies have the discretion to withhold awards from joint ventures where the members of the joint venture hold the required facility clearances. We also agree, that as applied, section 121.103 establishes that the solicitation provision at issue here unreasonably requires that the joint venture itself hold the required facility clearance, regardless of whether the members of the joint venture offeror hold the required facility clearances.⁸

Next, the Air Force Argues that even if the 2020 NDAA has immediate effect and the SBA regulation is not permissive, our Office should grant deference to DOD’s view that

⁸ The Air Force also argues that the SBA regulation at section 121.103 is inconsistent with the 2020 NDAA in that the NDAA states that a facility clearance “may not be required for a joint venture if that joint venture is composed entirely of entities that are currently cleared for access to such installation or facility.” The SBA regulation states more broadly that a contract may be awarded where “*either* the joint venture itself *or* the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.” Air Force Response to GAO Questions at 4-5 (emphasis added). As discussed above, InfoPoint states that it is a mentor-protégé joint venture comprised of two members that each hold the required facility clearance. Protester’s Comments at 2. As a result, since InfoPoint satisfies both the 2020 NDAA statutory and SBA regulatory provisions, we need not address at this time whether the SBA regulation at section 121.103 is inconsistent with the 2020 NDAA with regard to whether all members of the joint venture must have facility clearances.

other statutory authorities concerning national security and security clearances render the solicitation's facility clearance provision reasonable. Air Force Comments at 4-14. The Air Force notes that Congress delegated to the Executive Branch the authority to establish procedures and standards regarding security clearances through the National Industrial Security Program (NISP). *Id.* at 5-7 (citing 50 U.S.C. §§ 3161, 3341). As relevant here, DOD formalized the National Industrial Security Program Operating Manual (NISPOM) into the Code of Federal Regulations (CFR), effective February 24 2021.⁹ 85 Fed. Reg. 83300 (Dec. 21, 2020); 32 C.F.R. part 117. This incorporation included the agency guidance that was cited by the Air Force in the solicitation questions and answers as the basis for requiring that a joint venture hold a facility clearance. *Id.* at 83312; 32 C.F.R. § 117.1(a). For these reasons, the Air Force contends that Congress's delegation of authority in the area of security clearances, and the formalization of the NISPOM in the CFR, means that deference should be given to DOD, rather than SBA, in interpreting the 2020 NDAA provision.

When a statute is silent or ambiguous with respect to the specific issue, courts may under certain circumstances grant deference to an agency's interpretation of a regulation it has promulgated. See *Chevron U.S.A. Inc., supra*, at 843-45; see also *United States v. Mead Corp.*, 533 U.S. 218, 227-38 (2001). Our Office similarly accords deference to agencies in the interpretation of regulations it has issued concerning matters where a statute is silent or ambiguous. See *Caddell Constr. Co., Inc.*, B-298949.2, June 15, 2007, 2007 CPD ¶ 119 at 10; *ASRC Fed. Data Net. Techs., LLC, supra*.

However, as the Air Force acknowledges, DOD has not issued regulations or otherwise interpreted the 2020 NDAA provision through the issuance of regulations. Air Force Comments at 2-3; Air Force Response to GAO Questions at 4-5. In this regard, while the agency contends that the CFR provisions that now encompass the NISPOM state that a joint venture, as distinct from its members, must hold a facility clearance, the agency does not contend that this incorporation of the NISPOM into the CFR constitutes DOD's promulgation of regulations implementing the 2020 NDAA. See *id.*

Moreover, as discussed above, we find that the plain language of the 2020 NDAA states that DOD "may not" require that a joint venture hold a facility clearance where the members of the joint venture hold the required facility clearances. Thus, even if the regulation at 32 C.F.R. § 117.1(a) was DOD's regulatory implementation of the 2020 NDAA, the regulation would clearly be contrary to the plain language of the 2020 NDAA. Under such circumstances, our agency will recommend that the procuring agency follow the unambiguous language of the applicable statute, rather than a regulation that on its face conflicts with the statutory language. See *Small Business Administration--Recon.*, B-401057.2, July 6, 2009, 2009 CPD ¶ 148 at 5.

⁹ The NISPOM "establishes requirements for the protection of classified information disclosed to or developed by contractors, licensees, grantees, or certificate holders (hereinafter referred to as contractors) to prevent unauthorized disclosure." 85 Fed. Reg. 83300.

On this record, we find no basis to conclude that DOD has issued regulations interpreting the 2020 NDAA that must be given deference; we therefore need not resolve whether to grant deference to an SBA regulation instead of a DOD regulation in connection with the 2020 NDAA. Further, we find that none of the existing regulations cited by the Air Force provide a basis to conclude that the plain language of the 2020 NDAA should not apply to this solicitation.

Finally, the Air Force identifies two areas where it contends that application of the plain language of the 2020 NDAA provision would create conflicts with existing regulations or policies. First, the Air Force argues that non-DOD agencies are not affected by the 2020 NDAA and therefore can still require a joint venture to hold a facility clearance. Air Force Response to GAO Questions at 5. While our Office acknowledges that the scenario described by the Air Force could give rise to practical difficulties, we see no basis to conclude that these concerns require us to ignore the plain language of the 2020 NDAA in interpreting a solicitation issued by the Air Force.

Second, the Air Force contends that the NISPOM requires that the “entity” that receives the contract have certain security positions filled by employees who are eligible for clearance to fill certain roles. Air Force Comments at 11 n.4, 14-15 (*citing* 32 C.F.R. §§ 117.9(a)(5), (c)(5)). The agency states that because the entity that holds the facility clearance must have the employees that satisfy requirements of the NISPOM, this in turn demonstrates that the joint venture itself must have a facility clearance. *See id.* at 15.

The agency’s argument, however, ignores the clear and unambiguous command by Congress that DOD may not require a joint venture to hold a facility clearance where the joint venture members hold the required facility clearances. The fact that the statute conflicts with what the agency contends are existing regulations does not provide a basis to avoid the requirement to follow the plain language of the statute.

CONCLUSION AND RECOMMENDATION

We conclude that the 2020 NDAA clearly and unambiguously prohibits DOD agencies, like the Air Force here, from issuing solicitations that require a joint venture, rather than the members of the joint venture, hold the required facility clearance. We also agree with InfoPoint and SBA that the SBA regulation at section 121.103 is consistent with the 2020 NDAA with regard to the protester’s argument that the FOPR here unreasonably requires that a small business joint venture hold the required facility clearance at the time of proposal submission, regardless of whether the individual joint venture members hold the required facility clearances.¹⁰ We therefore recommend that the Air Force

¹⁰ We note that InfoPoint’s initial protest did not cite the 2020 NDAA and instead based its argument on SBA regulation at section 121.103. As discussed above, however, we agree with SBA that the regulation at section 121.103 is consistent with the 2020 NDAA

remove from the solicitation the requirement that a joint venture itself hold a top secret facility clearance.¹¹

We also recommend that the agency reimburse the protester's costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claim for costs directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel

with regard to the issue raised by the protester--whether DOD may require a joint venture to hold a facility clearance even where the members of the joint venture individually hold the required facility clearances. We therefore conclude that the protester's arguments concerning the regulation at section 121.103 are sufficient to merit sustaining the protest.

¹¹ Although this protest challenges a solicitation set aside for small business, we note that the 2020 NDAA does not, on its face, limit its application to small business joint ventures.