February _, 2015

Brenda Fernandez
Office of Policy, Planning and Liaison
409 Third Street, SW
Washington, DC 20416

Re: Comments regarding RIN: 3245-AG58

Dear Ms. Fernandez:

The Native Hawaiian Organization Association (NHOA) is an advocacy organization whose mission is to protect, promote, and advance the legislative intent of the SBA 8(a) Business Development program for Native Hawaiian Organizations. In response to the proposed rule published in the Federal Register on December 29, 2014 [79 Federal Register, No. 248, Docket No. SBA-2014-0006, RIN: 3245-AG58], we respectfully submit the following comments.

1. **Regarding Section 1621: Procurement Center Representatives (PCRs)**

NHOA supports the proposed changes to give PCRs more authority to act on behalf of small business.

2. **Regarding Section 1651: Limitations on Subcontracting**

NHOA generally supports the proposed changes that would make changes to the limitations on subcontracting. However, we have concerns about the penalties imposed. Penalties for violating the subcontracting rules are provided in 15 USC 645(d), which include a fine of not more than $500,000 or imprisonment for not more than 10 years, suspension and debarment, as well as civil penalties under the False Claims Act and other laws. The proposed rule provides that the amount of the fine shall be the greater of $500,000 or the dollar amount spent in excess of permitted levels for subcontracting. NHOA's position is that the penalty is too high and, therefore, burdensome on small business. Furthermore, it is NHOA's position that the penalty should be imposed upon the subcontractor that made misrepresentations about its size or small business status and that good faith reliance on representations made by a subcontractor should be a defense at each tier in the contracting process.

3. **Regarding section 1653**

NHOA supports the proposed changes that govern the collection, reporting and review of data and the extent to which contractors meet the goals and objectives in their subcontracting plans.

4. **Regarding Affiliation**

The proposed changes clarifies the basis for a finding of affiliation, specifically if a firm derives 70% or more of its revenue from another firm over the previous fiscal year, SBA will presume that one firm is economically dependent on another and thus they are affiliated. Although this

provision is largely expresses in case law, there currently is no specific percentage identified in the regulation. This presumption is rebuttable. SBA will take into account firms that are new and may have only received a few contracts.

NHOA has concerns with this proposed rule due to its potential impact on start-up firms, particularly in the case of NHOs. We encourage SBA to consider the totality of the circumstances when determining if affiliation in fact exists, especially in the case of new firms, rather than merely looking at the percentage of revenue it generates from one source.

5. **Regarding Joint Ventures**

NHOA supports the proposed change that would provide that two or more small businesses that joint venture for any procurement are not considered affiliated.

6. **Regarding Calculation of Annual Receipts**

NHOA is neutral regarding the proposed change, which clarifies that annual receipts include all income, including passive income. Nonetheless, NHOA encourages SBA to more clearly define passive income.

7. **Regarding Recertification**

NHOA is neutral regarding this proposed change that would provide that a firm must recertify its size to a contracting officer if it is acquired or merged with another firm and that merger or acquisition occurs after offer but prior to award.

8. **Regarding Small Business Innovation Research and Small Business Technology Transfer Program**

NHOA is neutral regarding the proposed change that would clarify eligibility for the SBIR and STTR programs.

9. **Regarding Size Protests**

NHOA is neutral regarding the proposed change that addresses who may initiate a size protest. However, NHOA is concerned that the proposed change has the potential to limit valid protests.

10. **Regarding NAICS Code Appeals**

In response to SBA's request for comment regarding the appropriate timeline for filing a NAICS code appeal, NHOA recommends that the timeline for such appeals be 10 business days rather than 10 calendar days.

11. Regarding Nonmanufacturer Rule

NHOA is neutral regarding the proposed changes regarding the notification of any waivers related to the nonmanufacturer rule.

12. Regarding Adverse Impact and Construction Requirements

The proposed rule would modify §124.504 to clarify when a procurement for construction services is considered a new requirement for purposes of conducting an adverse impact analysis. Currently all construction is considered "New" and an analysis is not always conducted. Under the proposed rule, the use of indefinite delivery or indefinite quantity (IDIQ) contracts will not be considered new.

NHOA opposes the proposed change because of the potential impact it could have on the timeline for the contract award. In the case of an IDIQ contract, the proposed rule requires that an adverse impact analysis be conducted. This could hinder the award process and the timeline for performing the work on the contract.

13. Regarding Certificate of Competency

Although the NHOA is neutral regarding the proposed change to the Certificate of Competency program, we encourage SBA to clearly define how it would determine the amount for financial capacity. Currently, there doesn't seem to be a uniform process for determining financial capacity. This new rule could work against a firm found nonresponsible, even though the firm may have access to other resources which would enable them to perform the task. Additionally, it may limit the amount of the award or work, even though the contracting officer cannot deny a firm the award on the basis of financial incapacity.

14. Other Issues of Concern

While looking at the proposed rule changes published on December 29, 2015, NHOA also noticed that several other issues of concern should be brought to the attention of SBA. These additional issues are identified below.

a. Regarding Economic Disadvantage

NHOA proposes that NHOs be deemed economically disadvantaged as are the ANCs. In the alternative, NHOA proposes that economic disadvantage of NHOs be based upon the U.S. Census data for the state of Hawaii, or upon statistics compiled by the State of Hawaii or the Office of Hawaiian Affairs demonstrating that Native Hawaiians are economically disadvantaged. A second alternative would be that NHOs be required to prove economic disadvantage once at the time they certify their first 8(a) subsidiary. Thereafter, as long as the qualifying Board members remain as the majority of the Board, further qualification would be unnecessary.

b. **Regarding passing of direct award contracts between related entities**

As a result of changes made to regulations in May 2012 [77 FR 28237, May 14, 2012], a NHO, Tribe and ANC-owned 8(a) BD participant may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another 8(a) BD participant that is owned by the same NHO as well as other Native entities. While we recognize that this change was made to ensure consistency for all entity-owned 8(a) BD participants, it has resulted in undue hardship for NHO-owned firms. Specifically, the lack of a clear definition of "follow-on" has led to inconsistencies in interpretation and, thus, difficulties in receiving directed awards for contracts that are clearly not follow-on. We encourage SBA to more clearly define "follow-on" to ensure there is a consistent interpretation by all SBA offices.

NHOA further notes that SBA's position of not allowing NHOs, Tribes and ANCs to use this provision has an adverse impact on the competitiveness of their Native 8a subsidiaries. They are required to give up their staff when another entity takes over the follow-on contract. Specifically, this transfer of employment has a negative impact on their employees. They transition to the entity taking over the follow-on contract, and are required to relinquish and start benefit balances with a new employer.

In addition, NHOA suggests an NHO, Tribe and ANC may receive a 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately and previously by another Participant (or former Participant) owned by the same Native entity no more than 2 times.

c. **Regarding the Size Standard Change for Environmental Remediation Services NAICS code 562910 From 500 to 1250 Employees**

NHOA opposes this proposed change and concurs with the comments opposed to the change submitted by Engineering/Remediation Resources Group dated September 23, 2014 and Cabrera Services dated October 24, 2014. An increase to 1250 employees would put existing small businesses at a competitive disadvantage to the larger firms. Instead of a 250% increase in the size standard, we propose an increase from 500 to 600 employees.

d. **Regarding HUBZone**

HUBZone legislation requires that firms are owned by an individual to be eligible, not another firm, unless there is an exemption. At the time the exemption was passed for ANC and Tribal-Owned firms, the NHO program had not yet been passed and thus did not receive such an

exemption. As a result, NHOs cannot be certified as HUBZone even if they otherwise would qualify. NHOA urges SBA to support the expansion of this program to include NHOs.

e. **Regarding Holding Companies**

The NHO regulations require that the non-profit has direct ownership of the 8(a) subsidiary firm(s). This means that funds that flow to the NHO are considered unrelated business income for federally recognized non-profits and limit the amount of dollars that can flow in and allow non-profits to maintain their tax exempt status.

NHOA is urging that NHOs who are 501c (3) Non-Profits be allowed a waiver from the direct ownership rule, to have a Holding Company that is 100% owned by the NHO, which is then the majority owner of the For-Profit 8(a) company. This will alleviate the Unrelated Business Income rule required by the IRS for continued 501c (3) status.

f. **Regarding Limiting the Use of Lowest Price/Technically Acceptable Contracts to the Procurement of Standard Commercial Products and Services**

In Lowest Price/Technically Acceptable (LPTA) contracts, the award goes to the lowest priced contractor who submits a technically acceptable proposal. LPTA contracts make sense when procurement officials are purchasing standard commercial products like vehicles, fuel, or office supplies, or even in routine construction projects. They are not a good option for procurements involving complex requirements or where quality, safety and/or innovation are important, such as in contracts for sophisticated analytical services, munitions response and removal, environmental remediation and logistics management. Products and services with more complex requirements are better procured using Best Value contracts as they allow agencies to balance the tradeoff between quality and cost. Under this type of contract the federal government can award a contract to a company who does not offer the lowest price if the higher-priced proposal provides a greater benefit and that benefit is worth paying the extra price differential. When LPTA is used for complex procurements, the lowest price proposal may appear at the evaluation stage to be technically acceptable. However, the LPTA awardee may be unable to perform at the contracted price due to complexities that were not foreseen. Then change orders and claims can drive up the total contract price. NHOA asks SBA to urge the Contracting Commands to limit the use of Lowest Price/Technically Acceptable contracts to the procurement of standard commercial products and services and to use Best Value contracting for the procurement of complex commercial products and services.

g. **Regarding Alternatives to Geographical Limitations in Services Contracts: Where Appropriate, Explore the Use of Contract Requirements for Cultural Expertise and Quick Response to Changing Circumstances**

In 8(a) competed services contracts, it is generally not permissible for contracting officers to limit the competitors to those within a specified geographical area unless necessary to meet logistical requirements such as the need for quick response time in the event of changing circumstances. Where contracts are to be performed in areas with sensitive indigenous cultural

sites. NHOA supports the addition of a requirement that the contractor must have applicable cultural expertise.

Thank you for your time and consideration of NHOA's comments.

Respectfully,

Ron Jarrett, President

cc: U.S. Senator Brian Schatz
U.S. Senator Mazie Hirono
U.S. Representative Tulsi Gabbard
U.S. Representative Mark Takai
John Klein, Associate General Counsel for Procurement Law, SBA
John Shoraka, Assoc. Administrator, Government Contracting and Business Development, SBA
Chris James, Assistant Administrator, Office of Native American Affairs, SBA
Kevin Allis, Executive Director, Native American Contractors Association