

January 5, 2004

Via E-mail to acquisition@dhs.gov

Ms. Kathy Strouss
Department of Homeland Security
Office of the Chief Procurement Officer
Acquisition Policy and Oversight
245 Murray Drive, Bldg. 410 (RDS)
Washington, DC 20528

Re: Homeland Security Acquisition Regulation (HSAR); Interim Rule; 68 Fed. Reg. 67867, December 4, 2003.

Dear Ms. Strouss:

The Office of Advocacy of the U.S. Small Business Administration submits this comment letter in response to the above-referenced interim rule. Advocacy's comments represent the views of small entities shared with our office pursuant to the Office of Advocacy's procurement roundtable held on December 4, 2003.

The Office of Advocacy urges the Department of Homeland Security (DHS) to give careful consideration to the comments filed by small entities and to clarify aspects of the rule that impose unnecessary burdens on small entities affected by the rule.

I. Advocacy Background.

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.¹

On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement policies protecting small entities when writing new rules and regulations.² The DHS is developing its policy on consideration of small entities, which should help ensure more consistent compliance with the RFA by DHS and its numerous agencies. In addition, Executive Order 13272 instructs Advocacy to provide comment on draft rules to the agency that has proposed the rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

Budget.³ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

II. Advocacy urges DHS to further examine the economic impacts of the rule on small entities.

The DHS issued this interim rule under the good cause exception of the Administrative Procedure Act (APA), citing the existence of urgent and compelling reasons to publish an interim rule prior to the opportunity for public comment. Publishing a proposed rule under APA notice and comment rulemaking triggers the need to comply with the RFA. Advocacy commends DHS for soliciting comments on the interim rule in recognition of the valuable input agencies receive from affected entities. Advocacy notes that DHS took the additional step of certifying under section 605(b) of the RFA that the rule would not have a significant economic impact on a substantial number of small entities; however, as a matter of good policy, DHS should have provided a factual basis to support its decision to certify the rule under the RFA. Advocacy regularly advises agencies that a factual basis should at a minimum identify the small entities affected by the rule, describe the impact on those entities, and explain the agency's reasoning in support of the certification.⁵ Advocacy encourages the DHS to review comments from small entities to determine whether the final rule can be certified or if analysis of the rule's impact is required. Advocacy is available to assist the DHS in its analysis of the rule's impacts on small entities.

III. Advocacy recommends that the DHS clarify sections of the rule that may complicate small entity compliance due to uncertainty or unnecessary confusion.

Small entities have advised Advocacy that certain aspects of the rule may lead to confusion. For example, Subpart 3001.104 of the HSAR establishes an order of precedence to resolve any acquisition regulation or procedural inconsistency found within the HSAR or the Homeland Security Acquisition Manual (HSAM). The order of precedence in the regulation does not acknowledge court and administrative decisions interpreting the law or pursuant to a bid protest. This may be an implied oversight, but it requires further clarification or explanation because the implications for the small entity could be significant. The discussion of this section in the interim rule does not provide small entities with clear guidance on how to comply.

Advocacy was also advised that HSAR Subchapter D, Part 3019, is unclear as to whether the Director of the Small Business Office has responsibility for small and small disadvantaged business programs as stated in the regulation or whether this authority includes the women-owned and service-disabled veterans programs as well. Advocacy recommends that the DHS clarify this language and explain its intentions in the preamble to the final rule.

³ E.O. 13272, at § 2(c).

⁴ *Id.* at § 3(c).

⁵ *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, Chapter 1, available on Advocacy's website, <http://www.sba.gov/advo/laws/rfaguide.pdf>.

IV. Advocacy is concerned that the incentives provided large business prime contractors to participate in the mentor-protégé program artificially inflate the mentor’s small business subcontracting performance.

Advocacy was advised of small business concerns regarding Subpart 3052.219-71 of the HSAR, which establishes the mentor-protégé program. The certification by DHS states that this program will be a benefit to protégé firms, but does not provide a factual basis or analysis of the impact of the program on other small entities. Advocacy is concerned that the incentives provided a large contractor that participates as a mentor may actually penalize small business subcontractors that do not desire to participate in the program as protégés. Large business prime contractors’ good faith efforts to provide subcontracting opportunities to small businesses and to fulfill their subcontracting plan should be based on actual subcontract awards and not credits or incentives earned through their participation in the mentor-protégé program. Advocacy recommends that DHS revise subsection (d) of Subpart 3052.219-71 to clarify whether the mentor can satisfy its entire subcontracting plan by awarding a contract and development assistance to a protégé. If the interpretation to subsection (d) is correct, Advocacy recommends that DHS analyze the impact on other small entities and describe the impact as part of the final rule, assuming the impact does not trigger the need for a final regulatory flexibility analysis.

V. Conclusion

The Office of Advocacy welcomes the opportunity to work with the Department of Homeland Security to clarify the regulations and assess the potential economic impact on small entities. Advocacy stands ready to assist the DHS is developing its written procedures on consideration of small entity impacts pursuant to E.O. 13272.

The Office of Advocacy appreciates the opportunity to comment on this rulemaking. For additional or the assistance of the Office of Advocacy, please contact Major L. Clark, III at (202) 205-7150.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Major L. Clark, III
Assistant Chief Counsel for Procurement

Cc: Dr. John D. Graham, Administrator
Office of Information and Regulatory Affairs