

March 24, 2003

Via EPA E Docket and First-Class Mail

OEI Docket

Title: Background Checks for EPA Contractors

Performing Service On-Site

Docket ID No. OARM-2002-0001

EPA Docket Center (28221T)

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, N.W.

Washington, DC 20460

Re: Acquisition Regulation: Background Checks for Environmental Protection Agency (EPA) Contractors Performing Services On-Site (68 FR 2988).

Dear Docket Clerk:

The Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in Federal policy making activities.¹ The Chief Counsel participates in rulemakings and other Federal agency activities when he deems it necessary to ensure proper representation of small business interests. In addition, the Chief Counsel has a particular interest in ensuring that laws and regulations do not have an adverse impact on competition among businesses of differing sizes. Because the Office of Advocacy is an independent entity within the U.S. Small Business Administration (SBA), the views expressed by the Chief Counsel do not necessarily reflect the views of the SBA or the Administration.

The Office of Advocacy is writing regarding EPA's proposed rule, Acquisition Regulation: Background Checks for Environmental Protection Agency(EPA) Contractors Performing Services On-Site, published in the *Federal Register* on January 22, 2003. The EPA is seeking comments on a proposal to require contractors and subcontractors to perform background checks and make suitability determinations on their employees before the employees can perform on-site contract services for the EPA. This proposed regulation does not comply with at least two statutory provisions of the RFA. A discussion of these deficiencies follows:

Regulatory Flexibility Act (RFA) Requirements

(1) Certification Deficiency

¹ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§634a -g, 637).

As stated in section 605(b) of the RFA, the head of an agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The certification must include a statement providing the factual basis for this determination. The EPA did not provide a factual statement in support of its certification that the rule would not have a significant economic impact on a substantial number of small entities. The lack of a factual basis raises several questions on the potential impact on small entities that may result in a higher burden on small entities than on large businesses.

First, the proposed regulation will require the background check requirement to flow down to the subcontractor. The proposed regulation seems to imply that the prime contractor may require the subcontractor to adhere to a different level of compliance. The flow down language of the proposed regulation states, “the contractor agrees to insert terms that conform *substantially* to the language of this clause.” To insure that small entities are not overly burdened with costs imposed by the prime contractor, the regulation should require that the subcontractor comply with the identical requirements of the prime contractor.

Second, another concern raised by this inadequate certification is the “flow down of cost to the small business subcontractor.” The proposed regulation provides for the cost of compliance to be incorporated as part of the contractor’s bid price. If a cost dispute should materialize between the prime contractor and the small business subcontractor on this mandatory requirement, and since the government does not recognize a legal relationship with the subcontractor, how is the dispute to be resolved?

For further clarification on providing a factual basis in support of a certification, EPA may wish to refer to Chapter 1 in Advocacy’s recently revised RFA guide, *The Regulatory Flexibility Act: An Implementation Guide for Federal*. This guide can be found on Advocacy’s website, <http://www.sba.gov/advo/laws/rfaguide.pdf>.

(2) RFA Definition of Small Entity

EPA’s certification does not discuss the impact of the proposed rule on two of the three small entities as recognized by the RFA. The applicable sections of the RFA are: section 601(4) defines a small organization and section 601(5) defines small governmental jurisdictions. As an example, would a non-profit organization that is providing contractual services to EPA at an EPA site have to perform background checks on its employees in the same manner as a contractor under the proposed regulation? If so, then the analysis of impacts needs to go beyond small businesses.

Steps to Cure Inadequate Certification

Without a statement explaining the factual basis, it is nearly impossible for small entities to evaluate the economic impact of the proposed rule. Thus, the Office of Advocacy recommends the following actions to cure this inadequate certification:

First, if EPA has factual data supporting its certification, then it should be published as a supplemental notice in the *Federal Register* with a period for public comment. Second, the Office of Advocacy encourages EPA to review carefully the comments submitted regarding the impact of its proposed rule on small entities. Based on the comments, EPA should take appropriate steps to bring this rulemaking into compliance with the RFA by either publishing the factual basis for the certification or by publishing an IRFA for public comment.

If you have any questions regarding this, 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 Graham, Administrator, Office of Information and Regulatory Affairs