

December 18, 2003

Via Facsimile and E-mail

Mr. Dean Koppel, Assistant Administrator
Office of Policy and Research
U.S. Small Business Administration
409 Third Street, SW, Mail Code 6500
Washington, DC 20416

RE: Small Business Government Contracting Programs; 68 Fed. Reg. 60015, October 20, 2003.

Dear Mr. Koppel:

The Office of Advocacy of the U.S. Small Business Administration submits this comment letter in response to the above-referenced notice of proposed rulemaking. 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 commends the Small Business Administration (SBA) for proposing specific responsibilities for large prime contractors to demonstrate good-faith efforts to ensure maximum practicable subcontracting opportunities for small businesses and to fulfill their subcontracting plans. Advocacy urges the SBA to amend proposed section 125.3(b) to exclude small business prime contractors, consistent with the current regulations and authorizing statute underlying the SBA's small business subcontracting assistance program. Small businesses have advised Advocacy that expressly including small business prime contractors under proposed section 125.3(b) will create confusion, will impose new responsibilities and paperwork burdens on small businesses receiving prime contracts, will place additional demands on the shrinking pool of contracting officers, and may have the unintended consequence of penalizing small businesses fortunate enough to receive prime contracts.

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 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 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 these 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. The RFA Requires SBA to Analyze the Proposed Rule's Economic Impacts on Small Entities

The RFA requires regulatory agencies to estimate the impacts of proposed rules on small entities. Agencies must complete an Initial Regulatory Flexibility Analysis (IRFA) for a proposed rule⁵ unless the head of the agency can certify that the rule would not have "a significant economic impact on a substantial number of small entities," and publishes the factual basis for the decision to certify in the *Federal Register*.⁶ The SBA certified this rule under Section 605(b) of the RFA; however, Advocacy believes the factual basis provided does not meet the requirements of the RFA or provide sufficient information on the potential impacts to afford affected entities a meaningful opportunity to comment on the appropriateness of the certification. 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.⁷

In support of its certification, SBA states that the rule does not impose any new substantive responsibilities, nor does it require any new reporting or recordkeeping requirements, and it is procedural in nature.⁸ These assumptions appear to overlook the implications of proposed section 125.3(b) for small businesses that receive or seek to receive prime contracts from the Federal government.

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).

³ E.O. 13272, at § 2(c).

⁴ *Id.* at § 3(c).

⁵ 5 U.S.C. § 603.

⁶ 5 U.S.C. § 605(b).

⁷ *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>.

⁸ 68 Fed. Reg. 60015 and 60017.

A. SBA's Proposed Rule Imposes Costs on Small Business Prime Contractors

The proposed rule amends the regulations that implement the statutorily mandated subcontracting assistance program which is intended to provide maximum practicable subcontracting opportunities for small business concerns.⁹ The current regulations state that the “purpose of the subcontracting assistance program is to achieve maximum utilization of small business by major prime contractors.”¹⁰ This language has been consistent in the Code of Federal Regulations since at least 1998. In its proposed rule, the SBA is proposing changes to section 125.3 that not only clarify the responsibilities of prime contractors to achieve maximum practicable subcontracting opportunities for small businesses, but for the first time impose those responsibilities on small business prime contractors. Advocacy and representatives of affected small entities that contacted Advocacy regarding this proposed change are concerned about the burden this will place on small contractors fortunate enough to be awarded a prime contract.

Proposed section 125.3(b) sets forth certain responsibilities of prime contractors and expressly includes small business prime contractors. By including small business prime contractors under section 125.3(b), the SBA is proposing that the small business prime contractor perform the eight responsibilities listed in section 125(b)(2) to demonstrate their good-faith efforts to facilitate small business subcontracting. Contrary to the statement in the preamble of the proposed rule that the eight items are for guidance purposes, the text of proposed section 125.3 (b) does not include language stating the eight items are for guidance purposes. The eight items are identified as responsibilities of the prime contractor, with additional responsibilities for large prime contractors set forth in proposed section 125.3(c). Advocacy believes these eight items of responsibility will require the small business prime contractor to incur new costs in doing business with the Federal government.

Moreover, experience shows that SBA should not assume these impacts are insignificant. Pursuant to section 8(d) of the Small Business Act, Federal Acquisition Regulation (FAR) Part 19, and the implementing regulations in current section 125.3, large prime contractors have established sophisticated systems to provide subcontracting assistance to small businesses, and these large prime contractors can more evenly distribute the cost of those compliance systems throughout the company. Under the SBA proposed rule, the eight items of responsibility could impose a tremendous cost burden on a small business that has not had this requirement but is fortunate enough to win a prime contract. The small prime contractor cannot absorb these costs as easily as the large business. Furthermore, if the small business prime contractor is to “ensure” that it is providing maximum practicable contracting opportunities for other small businesses, it is reasonable to expect that a contracting officer will want to see evidence of these efforts and consequently such efforts need to be documented. This would suggest that the proposed rule imposes a recordkeeping or paperwork obligation despite the statement in the *Federal Register* notice to the contrary.

⁹ Small business concerns also include small business concerns owned and controlled by veterans, small business concerns owned and controlled by service disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals and small business concerns owned and controlled by women.

¹⁰ 13 CFR 125.3(a).

Advocacy acknowledges that the following language from Federal Acquisition Regulation Part 52.219-9 is to appear in all prime contracts above the simplified acquisition threshold:

It is the policy of the United States that small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems to provide maximum practicable contracting opportunities.

However, as a practical matter, generally small business prime contractors have not had to take action pursuant to this language to further small businesses subcontracting opportunities because the award of the prime contract to the small business has already met the objective of providing maximum practicable contracting opportunities as a 100% small business contract award. The FAR is consistent with the authorizing statute and does not expressly include small business prime contractors. What the proposed rule makes unclear is whether a small business prime contractor must now do more and whether a contracting officer could take action against a small business prime contractor for failing to demonstrate good-faith efforts, including implications for the contractor's record of past performance. The proposed regulation creates inconsistency with the FAR and thus increases the potential for small businesses to be in noncompliance with Federal rules and regulations. Advocacy encourages the SBA to carefully consider the implications of proposed section 125.3(b) for small business prime contractors and to perform a preliminary economic analysis of the costs associated with compliance to determine if an Initial Regulatory Flexibility Analysis should have been performed or if the economic analysis provides a factual basis for its certification. Depending on the results of this analysis, the SBA may want to consider issuing a supplemental notice for comment on the impacts on small business prime contractors with consideration of less burdensome alternatives.

B. The SBA Should Clarify the Statutory Authority for Including Small Business Prime Contractors under Section 125.3(b)

The RFA also requires a statement of the factual, policy, and legal reasons for selecting a regulation. The SBA's small business assistance program, section 8(d) of the Small Business Act, was created by Public Law 87-305, which was signed into law in September 1961. The law was intended to address the declining percentage of prime contracts being awarded to small business. In 1979, Congress amended the Small Business Act when it passed Public Law 95-507. The Federal Acquisition Regulation implementing Public Law 95-507 did not use the language *including small business prime contractors*. Throughout the history of the Small Business Act, Congress has been consistent to require that small businesses have the maximum opportunity to participate in the Federal procurement system. Congress has also been very careful not to overburden small businesses with paperwork. Congress never intended for small

business prime contractors to comply with the small business subcontracting assistance program requirements as is being proposed by SBA.

III. Conclusion

The Office of Advocacy commends the SBA for initiating this rulemaking in response to comments filed in the prior rulemaking on contract bundling. Improving small business participation in the procurement arena is a goal we share. Advocacy's comments seek to ensure that through the best of intentions SBA does not unintentionally overburden small contractors that are successful in obtaining prime contracts. While improving small business subcontracting on Federal contracts is also an important objective, it should not be accomplished to the detriment of small businesses increasing their share of prime contracts, which is their ultimate objective and which provides records of past performance and direct access to the Federal procurement process.

Advocacy is available to assist the SBA in its efforts to bring this rulemaking into compliance with the RFA. Advocacy recommends that SBA perform a preliminary analysis of the proposed rule's impact on small entities to determine if an Initial Regulatory Flexibility Analysis (IRFA) should be performed. Unless the analysis reveals that the rule will not have a significant economic impact on a substantial number of small entities and can be certified, the SBA should publish a supplemental notice in the Federal Register with an IRFA and solicit public comments. If certification is appropriate, then the SBA can proceed to a final rule with a certification and factual basis that identifies the affected small entities with a description of the economic impact and why it is not significant.

The Office of Advocacy appreciates the opportunity to comment on this rulemaking. If you have any questions regarding this letter, 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