

U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

July 16, 2001

FAR Secretariat  
General Services Administration  
1800 F Street, NW Room 4035  
Attn: Laurie Duarte  
Washington, DC 20405

RE: FAR Case 1997-304

Dear FAR Secretariat:

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.<sup>1</sup> The Chief Counsel participates in rulemakings and other Federal agency activities when he or she 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. Finally, the Chief Counsel monitors agencies' compliance with the Regulatory Flexibility Act (RFA)<sup>2</sup> and works with Federal agencies to ensure that their rulemakings are supported by analyses, and that those analyses reflect the impact that their decisions will have on small businesses.

This letter is in response to FAR case 1997-304; Federal Acquisition Regulation; Electronic Commerce in Federal Procurement. The interim regulation would designate "FedBizOpps" as the "Governmentwide Point of Entry" (GPE) for electronic commerce in the conduct and administration of Federal procurement systems. The concept of e-commerce and e-procurement is fully supported by this office. However, this office is concerned about the adequacy of the Initial Regulatory Flexibility Analysis (IRFA) prepared in connection with this proposed interim regulation pursuant to the RFA.

First, the interim regulation specifically seeks comments on the implementation of Section 810 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. Section 810 is part of the legislative structure for promoting electronic commerce and FedBizOpps. Section 810 is important for small businesses because it allows agencies "to provide access to their notices of solicitation either by transmitting them to the Government-wide Point of Entry (GPE) designated in the FAR or by publishing them in the *Commerce Business Daily (CBD)*." However, the regulatory language of the interim regulation "establishes FedBizOpps as the principal venue for procurement

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

<sup>2</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§601-612.)

notices.” Further, the interim regulation states that, “on and after January 1, 2002, agencies will no longer be required to provide duplicate notice in the *CBD* and instead may rely exclusively on the mandatory notice in FedBizOpps to provide the required access.” It would appear that this proposed regulatory language forecloses the possibility that small businesses will have two sources from which to identify notices and solicitations. Section 810 clearly allows two options, and is not dismissive of either option. The FAR’s interpretation is too restrictive and arbitrarily limits small business access to such notices and solicitations.

In addition, the proposed regulatory language seems to conflict with the language in item “4” of the IRFA that states, “to accommodate small and large businesses that may not wish to access the GPE directly, FedBizOpps will make notices available for paper publication in the *CBD*.” What exactly is being proposed? On one hand, the regulation seems to limit availability to the GPE, but then seems to expand the availability to include publication in the *CBD*. Further, if one were to provide comments based entirely on the language in the IRFA, the FAR Council may stand a very good chance of not receiving comments on Section 810 because the IRFA omits any discussion of this provision of law. Thus, Advocacy is recommending a *Federal Register* announcement to clarify the apparent conflict in language between Section 810 and the proposed interim regulation. This new *Federal Register* notice should also, at a minimum, publish a revised IRFA that consists of a reference and discussion of Section 810. Interested parties should be allowed an additional 30 days to submit comments pursuant to 5 U.S.C. §601 et seq.

Second, the IRFA as presented, does not provide small businesses and small entities with any degree of analytical sufficiency to reach a reasonable conclusion as to the negative or positive impact of the interim regulation. The IRFA indicates that 47,340 small businesses may be affected. It does not, however, provide the number of small entities other than small businesses that may be affected. Further, in identifying the number of small businesses, the IRFA fails to examine any of the particular attributes of this supposedly monolithic group. For example, will the impact of this regulation be the same for information technology companies as for construction companies? Will this interim regulation have the same impact on small businesses located in rural areas and urban areas? What will the impact be on such groups as Native Americans?

It would appear that some data are available on the characteristics of small businesses in e-commerce/e-government. For example, according to a report published in 2000 by the United States Office of Management and Budget, a survey was conducted of the users of FedBizOpps. This report states, “results from a survey of users of FedBizOpps indicate that small businesses generally are finding that it provides use-friendly, easy, and consistent access to business opportunities.” Unfortunately, the report only provides this conclusionary statement without much in the way of analysis. Nevertheless, the raw data could have been used in the preparation of this interim regulation. Several other sources are also available. The Minority Development Agency of the U.S. Department of Commerce and the Small Business Administration Office of Advocacy have also

published reports on selected aspects of the impact of e-commerce on small and minority businesses. These documents are available on the Web sites of each agency. More recently, Access Markets International published a survey on the profile of small business Internet use. This survey reported that 33 percent of small firms are not connected to the Internet. Most reports seem to suggest that small businesses are not yet fully integrated into the emerging e-commerce technological revolution. This conclusion is in line with the July, 2001 published study by the National Association of Purchasing Management and Forrester Research. According to this study, “buyers realize that e-procurement takes more than surfing on supplier Web sites.”

Third, this interim regulation states that there are no alternatives and thus there is no discussion of alternatives. In view of the above studies, this conclusion needs to be evaluated further. One alternative could be to extend the time for agencies to become fully compliant with the regulation. Section 810 provides yet another alternative of allowing availability of notices and solicitations from two sources. The implementation of this regulation without further consideration to the unique characteristics of the small business community is not consistent with the goals and objectives of the RFA.

Fourth, in previous interim regulations regarding this subject matter, the Procurement Marketing and Access Network (PRO-Net) was discussed as being a major part of FedBizOpps for small business. In fact, in the previously cited report by OMB, PRO-Net was cited as being linked to FedBizOpps. However, this interim regulation does not mention this linkage. In fact, an examination of the FedBizOpps Web site shows no easily accessible link to PRO-Net. Further, while the first page of FedBizOpps provides a link to the Minority Business Development Agency, it does not reference SBA nor PRO-Net.

This office stands ready to assist you in any way it can to bring your interim regulation into compliance with spirit and the intent the Regulatory Flexibility Act. Should you have further questions regarding these comments, please feel free to contact Major Clark, Assistant Advocate for Procurement Policy at 202-205 7150.

Sincerely,

signed

Susan M. Walthall  
Acting Chief Counsel for Advocacy