



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

May 6, 2002

Ms. Susan L. Schneider  
Defense Acquisition Regulation Council  
OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon  
Washington, DC 20301-3062

RE: DFARS Case 2001-D017; Multiple Award Contracts

Dear Ms Schneider:

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 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.

This letter is in response to a proposed regulation published on April 1, 2002, in the *Federal Register* entitled, "Defense Acquisition Regulation Supplement; Competition Requirements for Purchase of Service Under Multiple Award Contracts, DFARS Case 2001-D017." The proposed rule is designed to implement section 803 of the National Defense Authorization Act for Fiscal Year 2002, which requires the Department of Defense (DOD) to issue Defense Acquisition Regulations policy requiring competition in the purchase of services under multiple award contracts.

DOD should be commended for seeking additional comments on certain aspects of this regulation through a public meeting. However, Advocacy would like to bring to the attention of DOD the fact that the regulation, as proposed, does not meet the requirements of the RFA. The RFA requires an agency either to certify that the proposed regulation will not have a significant economic impact on a substantial number of small entities, or if there is an impact, the agency must prepare an Initial Regulatory Flexibility Analysis (IRFA). If an agency opts to certify the regulation, then there must be a factual basis for such a conclusion. The proposed DOD regulation provides a certification, but does not provide an adequate factual basis.

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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.)

The Office of Advocacy concurs with DOD's position that the proposed regulation does not change the preferences afforded to small business concerns under FAR 8.404(b)(6). However, there are a large number of small businesses that participate in multiple award contracts at dollar values above the micro threshold level of \$2,500. The proposed regulation will impact these small businesses.

Currently, if an agency solicits a multiple award requirement and the solicitation provides for clear and defined work for small businesses and large businesses, only small businesses can bid for task orders under the small business requirements while large businesses are limited to task orders restricted for large businesses. The proposed regulatory change would seem to suggest that "all contractors offering such services under the multiple award schedule" must be allowed to compete for the work. Will small and large businesses be required to compete for the same work? If this interpretation is correct, then what will the impact on small businesses be?

Thus, it is the recommendation of the Office of Advocacy that an interim IRFA be prepared and published in the *Federal Register* for public comment prior to publication of a final rule. This IRFA should provide additional clarity to section 208.404-70(c)(1)(i) of the proposed regulation and analyze more carefully the impact to small business concerns. If Advocacy's interpretation of the relevant section is not correct, then, at a minimum, additional clarity should be provided in the final rule along with a certification.

In conclusion, while the proposed regulation implements section 803 of the Fiscal Year 2002 National Defense Authorization Act, the regulation must still meet the requirements of the RFA. The Office of Advocacy urges DOD to consider the options discussed above before proceeding to a final rule. Please contact Mr. Major Clark, III, of my staff if you have any questions relating to this issue, 202-205-7150.

Sincerely,

Thomas M. Sullivan  
Chief Counsel Office for Advocacy