



July 16, 2012

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Subject: Proposed Rule
Implementation of the Small Business Jobs Act
RIN: 3245-AG20

The Coalition for Government Procurement (Coalition) submits comments on the above referenced rule. The Coalition is a non-profit association of approximately 275 firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium and large business concerns; approximately one third of the membership consists of small business concerns. The Coalition is proud to have worked with Government officials over the past 30 years towards the mutual goal of common sense acquisition.

The Small Business Jobs Act offers the potential of increasing opportunities for small business concerns under the GSA Schedules program. We are concerned, however, that as written the proposed rule will negatively impact the achievements of small business concerns on the GSA Schedule. Further, it does not appear that detailed operations of the GSA Schedule ordering and award process have been fully considered in adopting definitions and processes under the proposed Small Business Administration (SBA) rule. The result could be overly complex and confusing provisions set forth in two separate sources, the Federal Acquisition Regulations (FAR) and the SBA Regulations. Consequently, we urge SBA to delete references to the GSA Schedule program contained in this proposed rule. Rather, GSA should be charged with incorporating the principles of SBA's final rule into GSA Schedule ordering procedures, to the maximum extent practicable. This method would allow a well-considered implementation of the Jobs Act into the GSA Schedules Program, with all instructions applicable to using the program in one source. This recommendation is consistent with Executive Order 13563, Improving Regulations and Regulatory Review (January 18, 2011) which articulates the need for regulations to be accessible, written in plain language and easy to understand. More specific comments follow.

Small business eligibility

The GSA schedule has been a valuable acquisition tool for small business concerns. Small business accomplishments consistently exceed goals of other government-wide programs. Historically more than 30% of sales go to small business concerns. The Small Business Jobs Act offered the possibility to further increase opportunities for small business under the GSA Schedules program. We are concerned, however, that the opposite may occur given the proposed implementation of the Act. The number of small concerns receiving orders could decrease. Companies that are now small under a GSA Schedules buy may not qualify as small because the non-manufacturer rule and the limitation on subcontracting will apply. The affected companies operate in the commercial market as small and agencies have long considered them small for purposes of the GSA Schedule. The impact could be immediate because SBA encourages the use of on and off ramp techniques. According to SBA, agencies use “off ramp” provisions to remove or terminate a contractor that has recertified its status as other-than-small and therefore is no longer eligible to receive new task orders as a small business. The proposed rule allows a contracting officer to require recertification of size status in response to a solicitation for an order

An interim FAR rule issued in November 2011 applied the non-manufacturer rule and limitation on subcontracting to the GSA Schedule, apparently in anticipation of the SBA rule. The proposed SBA rule exacerbates the impact with respect to limitation on subcontracting in that the requirement to perform 50% of the cost of performance is evaluated at the order level. Consequently, in a GSA Schedule Blanket Purchase Agreement (BPA) where multiple orders are expected, there might be no consideration for the fact that a small business could perform a small percentage of the first order and a large percentage of remaining orders that account for a high percentage of the revenue. This aspect of the rule could particularly impact the ability of small service contractors to capture business under the Schedule. We note that the proposed rule does not require SBA to evaluate the limitation on subcontracting at the order stage in its 8a program. Rather, SBA has an option to evaluate based on the total value of orders performed over a period of time. At a minimum, we suggest that that option be available to acquisitions on all multiple award contracts.

Prior to issuing a final rule for either the FAR or the SBA regulations we suggest that GSA analyze results under the November interim FAR rule to determine the impact of the non-manufacturer rule and the limitation on subcontracting on current GSA schedule small business contractors. Considering the results of the interim rule is a logical step prior to issuing another regulation addressing the same subject matter. The analysis of the impact of the interim rule would provide valuable information to develop final regulation to support small business concerns and address the needs of federal customers of multiple award contracts. This step is consistent with Executive Order 13610, Identifying and Reducing Regulatory Burdens (May 10, 2012). The Executive Order underscores the importance of conducting retrospective analyses of existing rules to determine if they should remain or be modified in light of current circumstances.

Reconciliation with 8.4

SBA expresses the opinion that the proposed rule and FAR 8.4 are not in conflict and can be reconciled. In describing how the two regulations will work together SBA states

“The agency would first apply the “rule of two” to determine whether a set-aside is appropriate; however, the agency can request quotes from more than two small businesses. The same is true for acquisitions above the simplified acquisition threshold, where the FAR requires the ordering activity contracting officer to post a request for quotes (RFQ) on e-Buy or provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances. Agencies would not be required to document the circumstances for restricting consideration to less than three small business schedule contractors based on one of the reasons at FAR Sec. 8.405.”

We do not believe that FAR 8.4 and the proposed rule are easily reconcilable. FAR Part 19 generally does not apply to orders placed against the GSA Schedule. The “rule of two” does not apply to agencies placing orders against the schedule. FAR Part 8 implements the discretionary authority to set aside orders under the GSA Schedules program. To the contrary SBA’s interpretation reconciling the regulations suggests that ordering agencies have an obligation to set aside order in accordance with the “rule of two”. SBA’s statement seems to be outside the scope of the Jobs Act and inconsistent with the proposed rule. The rule states in several places that the rule of two does not compel any agency to use the tools set forth therein; the authority is discretionary.

The proposed rule purports to cover GSA Schedules. However there are a number of definitions and processes that have no relevance to the program. For example, the definition of subcontractor teaming arrangements and the exception from affiliation are not applicable to GSA Schedule teaming arrangements. In another case, the requirement to assign a single NAIC code by category seems infeasible where SIN descriptions are broad and may cover a number of different service/product categories. The individual “disconnects” may appear small, but the sum total of the differences results in a confused regulatory land scape. The GSA Schedule provides a streamlined, comparatively simple vehicle for buying commercial items. Simplicity benefits both government and small business. Regulatory changes that introduce confusion negate that simplicity and lessen the value of the program for customer agencies and small business. The ultimate result is a disincentive to use the program.

Documentation

They proposed rule requires contracting officers to document decisions not to use the authority to set-aside multiple award contracts and orders. SBA invites comments on the requirement. The requirement to document may serve a purpose in promoting compliance. However, the act of documentation also acts as a limitation on what is supposed to be a discretionary tool. SBA states in several places that the document requirements are not new but rather already required by other regulations including FAR provisions on acquisition planning. If that is the case we suggest that SBA rely on existing regulatory provisions. It should not duplicate or increase requirements to document in regulations implementing the Jobs Act. Executive Order 13563,

Improving the Regulatory Process suggests that agencies consider alternatives to direct regulation. The Order also suggests that to the extent feasible, agencies specify performance objectives rather than specifying the specific behavior or compliance that a regulated entity must adopt. In this case, well developed small business contracting goal and a clear statement of acquisition rules could be a more powerful incentive to contract with small business concerns than documentation requirements.

The Coalition appreciates an opportunity to submit comments on this rule. We look forward to working with SBA and GSA to develop common sense programs to enhance the ability of small business concerns to participate in government contracts.

Sincerely,

A handwritten signature in black ink, appearing to read 'Roger Waldron', with a long horizontal flourish extending to the right.

Roger Waldron
President