



January 3, 2012

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Hada Flowers
1275 1st NE., 7th Floor
Washington, DC 20417

Re: FAC 2005-54, FAR Case 2011-024

Ms. Flowers:

On behalf of The Coalition for Government Procurement, the following comments are provided on the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 13331 of the Small Business Jobs Act of 2010. The interim rule was published in the Federal Register on November 2, 2011.

The Coalition for Government Procurement is a non-profit association of approximately 300 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. Many of our members are also information technology contractors on most, if not all, of the Governmentwide Acquisition Contracts ("GWACs"). In addition, our members are contractors on many agency wide multiple award contracts as well as multi-agency contracts ("MACs"). Coalition members include small, medium and large business concerns.

Small businesses play a vital role in the U.S. economy as an engine for growth and jobs. The Coalition supports flexible, commercial item contracting programs like the Federal Supply Schedule (FSS) program as the key to providing market-based opportunities for small business concerns. At a time when government contracting generally struggles to meet the governmentwide small business contracting goal of 23 percent, year after year the FSS program far exceeds the goal with over one third of total dollars going to small business concerns on an annual basis. The FSS program does this by providing agencies with ordering flexibility and market based solutions mirroring commercial practice. Given the FSS program's unique success in this area as compared to government contracting generally, the Coalition is

concerned that adopting regulatory guidance that limits agency flexibility when using the FSS program or otherwise applies rigid, mandatory set-aside rules would lead to reduction in opportunities for small businesses by dividing the market and adding unnecessary complexity.

Section 1331's Applicability to the FSS Program

Section 1331 of the Small Business Jobs Act of 2010 directs the Office of Federal Procurement Policy and the Small Business Administration, in consultation with the General Services Administration (GSA), to develop regulatory guidance under which agencies may at their discretion: (1) set-aside parts of multiple award contracts for small businesses; (2) set aside task or delivery orders for small businesses under multiple-award contracts; and (3) reserve one or more multiple award contracts for small business in a procurement where the contracts are awarded using full and open competition.

However, with regard to setting aside task or deliver orders, Section 1331 only waives the fair opportunity requirements of 10 U.S.C. 2304c(b) and 41 U.S.C. 253j(b) which deal with the ordering procedures for multiple award task and delivery order contracts authorized by the Federal Acquisition Streamlining Act of 1994. Section 1331 states the following:

“(2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)), set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);”

The FSS program is authorized and governed by separate and distinct statutory authorities apart from 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)). See 41 U.S.C. 259(b)(3) regarding the FSS program and the definition of competitive procedure. Therefore, the modification of the FAR 8.4 FSS ordering procedures is outside the scope of Section 1331.

FSS Contract Model: Enhancing Small Business Opportunities

Prior to the publication of FAR Case 2011-024, FAR subpart 8.4 already included key guidance enhancing small business opportunities. First, FSS orders placed with small business concerns could be credited towards an agency's small business goals. See FAR 8.405(a). Second, agencies could also consider socio-economic status when identifying contractors for consideration or competition for award of an order or Blanket Purchase Agreement (“BPA”). See FAR 8.405(b). Third, the regulation provided that agencies should consider at least one

small business concern, if available, when placing an FSS order. *Id.* In addition, GSA's electronic tools, GSA eLibrary and eBuy, allowed agencies to efficiently and effectively conduct market research and contact small business contractors for orders. As demonstrated by the large dollar volume of orders going to small business concerns, the FAR guidance and electronic tools created a powerful combination benefiting small businesses across the FSS program.

The Coalition also believes that a key feature of the FSS program that benefits small business concerns is the ability to participate in a procurement program along with medium and large business concerns. This provides small businesses teaming opportunities with medium and large businesses. It also enhances visibility of small business concerns. Much like a shopping mall, large businesses serve as "anchor stores" attracting agency ordering activities. These ordering activities invariably learn about and place orders with small and medium-sized FSS contractors. The Coalition believes that this dynamic feature mirrors the commercial marketplace and increases small business opportunities.

In contrast, the restrictions inherent in the small business set-aside rules, if applied to the FSS program, will likely negatively impact small business long term ability to compete under the program and increase their compliance risk. For example, applying the small business set-aside requirements such as the limitation on subcontracting to FSS small business concerns will increase contract complexity and compliance costs while reducing agency flexibility in accessing small business concerns via the ordering process. The likely result will be a divided marketplace with fewer opportunities for small business FSS contractors and higher prices for commercial items for the government.

Concerns Regarding Application of the "Rule of Two"

To the extent that the government considers applying "the rule of two" or otherwise establishes new criteria addressing when orders are to be set-aside, such approach is inconsistent with the discretionary language of the Section 1331 and is not in the best interests of government and industry, including small business concerns. The "rule of two" is prescriptive, limiting a contracting officer's discretion. FAR 19.502-2(b) directs that the contracting officer *shall set-aside* any acquisition over \$150,000 for small businesses when there is a reasonable expectation that (1) offers will be received from at least two responsible business concerns offering the products of different small business concerns; and (2) award will be made at fair market prices. Applying the "rule of two" to orders would fundamentally alter the FSS program. It could radically alter the ordering procedures of the FSS program. For example, the Information Technology Schedule 70 includes more than a thousand small business concerns. Therefore, applying the "rule of two" at the order level would likely result in tremendous confusion. Although there may be over a thousand small business FSS IT contractors, many

may not be capable of fulfilling an agency's specific requirement. At a minimum, the process of identifying whether there are two capable small business contractors would increase the complexity of the FSS program and likely result in reduced agency use of the program. Moreover, there is a significant possibility that application of the "rule of two" in its current prescriptive form would convert Schedule 70 into an exclusive small business contracting vehicle rather than a program open to all sources consistent with 41 U.S.C. 259(b)(3). Such a result would lead to the creation of separate schedules for large and small businesses dividing the market and likely reducing overall opportunities for small businesses.

The Coalition is very concerned that application of the "rule of two" or similar rule to orders against GSA FSS contracts would, in the long run, undermine the strengths of the FSS program and negatively impact all contractors regardless of size. It would require implementation of two regulatory frameworks (small business versus other than small) under the FSS program. This would increase the complexity and reduce the streamlined commercial practices within the FSS program. Increased complexity at the order level would likely drive agencies to other contract vehicles that have less success in providing opportunities to small business concerns. In addition, any approach that mandates set-asides at will likely have a significant impact on medium size businesses which rely heavily on the FSS program.

In conclusion, applying the "rule of two" and/or establishing similar criteria mandating set-asides for certain orders, while well intended, will likely hurt small businesses in the long run by undermining the current structure of the FSS program. In essence, such an approach would make the FSS program operate more like general open market government contracting which has not been nearly as successful as the FSS program in meeting or exceeding the small business governmentwide goal of 23 percent. The government would be modifying a successful small business contracting program (the FSS program) to make it operate more like less successful small business contracting programs.

Future Guidance on Small Business Set-asides & Exercising Discretion

Section 1331 of the Small Business Jobs Act directs that agencies may, at their discretion, set aside parts of, orders, or contract awards for multiple award contracts to small business concerns. The key to the statutory language is that agencies may issue set-asides *at their discretion*. Any further guidance drafted must provide agencies with discretion consistent with the statute. Limiting discretion through third party review of set-aside decisions or the establishment of criteria as to when agency must use set-asides would be inconsistent with Section 1331.

Further, any additional guidance must balance the need for efficiency and effective competition with the need to provide meaningful opportunities for small businesses. Guidance

that undercuts the flexibility and efficiency of multiple award contracting will increase costs for agencies, contractors and taxpayers. As the FSS program has demonstrated over the last decade, given the appropriate discretion, incentives, and procurement flexibilities, agencies can effectively target and award to small business concerns.

Finally, while Coalition supports efforts to develop guidance that allows agencies to exercise their discretion consistent with Section 1331, the Coalition strongly recommends that the OMB, the SBA and GSA review and consider all comments in response to the FAR Case 2011-024 prior to issuing any further guidance. Issuing guidance prior to review consideration of the public comments received in response to this FAR case would be premature. It would also be inconsistent with the Administration's goals of transparency and effective and efficient rule making. Moreover, at the time any additional guidance is issued for public comment, it should be included in the FAR to ensure consistency and reduce confusion.

The Coalition appreciates the opportunity to submit comments on this interim rule. If you have any questions, please contact me at (202) 331-0975 or rwaldron@thecgp.org.

Regards,

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

Roger Waldron
President