



December 20, 2024

Ms. Donna Fudge
Small Business Administration
Washington, D.C.

Subject: Comments on Small Business Contracting: Increasing Small Business Participation on Multiple Award Contracts Proposed Rule

Dear Ms. Fudge,

The Coalition for Government Procurement (Coalition) appreciates the opportunity to comment on the Small Business Administration's (SBA) proposed rule issued on October 25, 2024, concerning application of the small business rule of two to multiple award contracts (MACs).¹

By way of background, the Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Its members collectively account for a significant percentage of the sales generated through General Services Administration (GSA) contracts, including the Multiple Award Schedule (MAS) program. Coalition members also are responsible for many of the commercial item solutions purchased annually by the Federal Government. These members include small, medium, and large business concerns. The Coalition is proud to have collaborated with Government officials for 45 years in promoting the mutual goal of common-sense acquisition.

As noted above, the Coalition has members that are small, medium, and large and the views of members on the proposed rule depend on where the member sits in the procurement ecosystem. Generally small businesses support the proposed rule, while medium and large businesses do not, for obvious reasons. However, we question whether the proposed rule is consistent with statutory language and Congressional intent, whether the proposed rule will add complexity and litigation risk to the procurement process, whether the proposed rule provides adequate guidance or considers unintended consequences, and whether the premise of the need for the rule is supported by data. Finally, we suggest that the real issue in small business contracting, the shrinking industrial base and precipitous drop in small business participation, can be better addressed in other ways.

The Proposed Rule Conflicts with Statute and Congressional Intent

¹ 89 FR 85072.

The 2007 Service Acquisition Reform Act (SARA) panel report to Congress provided the impetus and proposed statutory language for small business order set-asides under MACs.² The SARA panel report discussed the need for legislation because agencies believed the rule of two applied prior to contract formation, and, as such, agencies believed they could not set aside orders for small business because of the fair opportunity requirements applicable to MACs. In addition, separate legislation required the Department of Defense to provide all MAC holders with order solicitations and consider all responses. Further, a 2010 Presidential Interagency Task Force report provided that set aside decisions were made prior to contract award, and that procurement policy officials were reluctant to make the rule of two mandatory with respect to orders.³ Thus, in 2010 Congress, via the Small Business Jobs Act, directed that the Administrator of the Office of Federal Procurement Policy and the SBA Administrator, in consultation with the GSA Administrator, “shall, by regulation, establish guidance under which Federal agencies *may, at their discretion*” set aside orders for small business under MACs.⁴ In the same 2010 Small Business Jobs Act where Congress used the word “may” with respect to order set-asides, Congress also changed “shall” to “may” with respect to HUBZone set-asides, eliminating the possibility of a protest with respect to a contracting officer’s decision not to proceed with a HUBZone set-aside.⁵ Thus, the Government Accountability Office (GAO) has interpreted 15 USC 644(r) to provide that the small business rule of two with respect to orders is discretionary, and not subject to protest.⁶

Nevertheless, SBA’s proposed rule provides, “a contracting officer *shall* set aside orders valued over the micro-purchase threshold (MPT) for small business contract holders when the contracting officer determines there is a reasonable expectation of obtaining offers from two or more small business contract holders under the multiple-award contract that are competitive in terms of fair market price, quality, and delivery.”⁷ SBA’s use of the word “shall” instead of “may” in the proposed rule is inconsistent with the statutory language and Congressional intent, and would not be entitled to any deference from a Court, especially in this post-*Chevron/Looper Bright* era.

The Proposed Rule will Increase Burden and Litigation Risk

The proposed rule provides, “[w]hen placing an order valued over the MPT under a multiple award contract, and the contracting officer does not set-aside the order for small business, the

² REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS (Jan. 2007).

³ REPORT ON SMALL BUSINESS FEDERAL CONTRACTING OPPORTUNITIES, <https://www.sba.gov/document/support--interagency-task-force-federal-contracting-opportunities-small-businesses>.

⁴ Section 1331 of Pub. L. 111-240 (2010), codified at 15 USC 644(r) (emphasis added).

⁵ Section 1347(b)(1) of Pub. L. 111-240 (2010), codified at 15 USC 657a(c)(2)(B); 76 FR 14566; 77 FR 12930; 75 FR 62258, 62275.

⁶ *Itility, LLC*, B-419167, Dec. 23, 2020, 2020 CPD P412.

⁷ 89 FR 85072, 85076-7 (emphasis added).

contracting officer must document and provide to its small business specialist the basis for not setting aside the order.” Thus, the proposed rule imposes review, documentation, and coordination requirements on contracting officers, thereby slowing down the procurement process while increasing the risk of litigation, as the contracting officer’s set aside documentation can be protested. The proposed rule could also have the unintended consequence of contracting officers setting aside orders when they otherwise would not to avoid litigation, increasing risks for the agency, the taxpayer, and ultimately any small business that is unable to perform. Although the proposed rule states that it does not require agencies to apply the rule of two before selecting a contract vehicle, an agency’s decision to utilize an existing MAC with one or no small businesses could be protested, given the requirement to document the decision, including market research considering small businesses that are not contract holders. This burden would significantly impact the utility of MAC vehicles, acquisition methods that today are heavily relied upon to deliver needed solutions, especially at fiscal year-end. Upending this efficient acquisition method would very likely result in agencies’ needs going unmet and, as a result, operating with diminished mission capabilities.

The Proposed Rule Fundamentally Alters Multiple Award Contracting

A contracting officer can only award a contract, including a MAC, to a responsible contractor capable of performing the contract.⁸ Thus, if there are two or more small businesses on a MAC, it is unclear when a task or delivery order would not have to be set aside for small business. If the proposed rule is applied to existing MACs, it would severely alter the terms and conditions upon which those contracts were competed and bid on by other than small contract holders. Those firms, many of which rely on MACs for a significant amount of their government business, would face irreparable harm. Such firms would undoubtedly be entitled to economic price adjustments and/or reimbursement to account for the changes in ordering procedures and the competitive environment. Going forward, other than small businesses may decline to bid on MACs where the fair opportunity provisions that form the backbone of MAC contracting will be preempted by the rule of two mandate, potentially depriving the government of robust competition and needed goods or services.

The proposed rule will disadvantage medium and emerging small businesses by depriving them of the ability to compete for follow-on opportunities where they are the incumbent on a small business set-aside, opportunities needed to survive and compete after graduation from the small business market. Finally, there are numerous small businesses that choose to participate in the Federal market as subcontractors. Many MACs have robust small business subcontracting plan requirements that do not apply to small business set-asides. Thus, the proposed rule may not increase, and could in fact decrease, overall small business participation under these MACs.

The Data does not Support the Need for the Proposed Rule

The Federal government has met or exceeded the statutory 23 percent small business prime contract goal every year since Fiscal Year (FY) 2013. In FY 2023, the Federal government awarded small businesses 28.3% of prime contract dollars, for a record amount of \$178.6

⁸ Federal Acquisition Regulation (FAR) 9.104-1.

billion.⁹ In FY 2022, the Federal government awarded small businesses \$162 billion, or 26.5%, of all prime contract dollars.¹⁰ According to the Office of Management and Budget (OMB), small businesses are doing even better under best-in-class MACs, receiving approximately 38% of the total dollars awarded.¹¹ Small businesses received 40% of the dollars awarded under the professional services OASIS MAC¹² and over 31% of the total dollars awarded on the information technology services CIO-SP3 MAC.¹³ Small businesses represented over \$7.8 billion, or more than 27% of total spending for GSA's governmentwide programs, including OASIS, Alliant 2, 8(a) STARS III, and VETS II. This figure is expected to increase in the future with the implementation of Polaris, a small business program replacing Alliant 2 SB. Additionally, small businesses accounted for more than \$8 billion of NASA SEWP V obligations, over 80% of the program's total. According to SBA, in FY 2023 small business set-asides accounted for the highest percentage of overall small business awards (65%) since the data became available.¹⁴ These results, along with small business performance under the GSA MAS where the rule of two is discretionary (34% in FY22, 36% in FY23), aptly demonstrate that small businesses can flourish when contracting officers are provided with discretion, not mandates.

There are Better Ways to Increase Small Business Participation

The real issue in small business contracting is the precipitous drop in participation in the Federal market.¹⁵ Depending on the methodology and the fiscal years involved, contract awards to small businesses have fallen between 33% to 50% over the past ten to twelve years.¹⁶ The number of new entrants, firms receiving an award for the first time, has fallen by an even greater percentage, 80%.¹⁷ At the same time, the number of new business applications in the overall United States economy is booming.¹⁸ A mandate that applies to existing contracts is not an effective way to reverse the trend. Instead, businesses of all kinds, especially small businesses,

⁹ [Scorecard 2023 details | U.S. Small Business Administration.](#)

¹⁰ [Scorecard 2022 details | U.S. Small Business Administration.](#)

¹¹ [REV_Increasing-Opportunities-to-Small-Businesses-under-MACs-CATS-Final-Copy-1-25-24.pdf](#), page 5.

¹² <https://www.gsa.gov/system/files/OASIS%20BIC%20Value%20Prop%20%20Jan%202022.pdf>.

¹³ <https://about.bgov.com/news/preliminary-list-for-50-billion-it-contract-is-425-companies/>.

¹⁴ 89 FR 85072.

¹⁵ <https://www.gao.gov/products/gao-22-104621>

¹⁶ <https://www.nextgov.com/acquisition/2023/02/small-business-participation-federal-marketplace-continues-decline-despite-159-billion-awards/382881/#:~:text=In%20total%2C%20just%20under%2060%2C000.government%20in%202010%2C%20roughly%2012%2C270;> <https://www.gao.gov/assets/gao-21-40.pdf>, page 45.

¹⁷ <https://federalnewsnetwork.com/contracting/2023/05/agencies-spending-record-amounts-on-small-business-contracts-amid-shrinking-pool-of-firms/>

¹⁸ [Small Business Data Center | U.S. Chamber of Commerce \(uschamber.com\)](#)

face an immense and complicated regulatory compliance burden, which is a clear barrier to entry and an incentive to exit the Federal procurement market.

A good place to start would be to adhere to Congressional intent and exempt commercial providers from new laws and regulations unless statutorily required.¹⁹ The Federal Acquisition Regulatory (FAR) Council should also review prior decisions not to exempt commercial providers on the grounds that it would not be in the “best interests” of the government to do so. Next, there are countless FAR clauses that bear no relation to contract performance and should be repealed: Reporting Executive Compensation and First-Tier Subcontract Awards (52.204-10), Public Disclosure of Greenhouse Gas Emissions and Reduction Goals - Representation (52.223-22), Encouraging Contractor Policies to Ban Text Messaging While Driving (52.223-18), Drug-Free Workplace (52.223-6), Certification Regarding Trafficking in Persons Plan (52.222.56), Printed or Copied on Doubled-Sided Postconsumer Fiber Content Paper (52.204-4), *etc.* Enacting GSA’s legislative proposal to focus the MAS on achieving best value instead of only the lowest cost alternative will help entice small businesses and new entrants to enter the Federal market through the MAS. Other ways to encourage small business participation in the Federal market include increasing the simplified acquisition threshold and providing sole source authority for awards to small business, examining the potential for an exemption from affiliation for venture capital investing, eliminating agency category management utilization goals, and reducing the number of virtually identical large, long-term governmentwide acquisition contracts for professional and information technology services that may be difficult for new entrants to compete for and obtain, and that are costly to maintain.

The Coalition hopes you find these comments useful and thanks you for your time and consideration. If you have any questions, I may be reached at (202) 899-2986 ext. 129 or kdodds@thecgp.org.

Regards,



Kenneth Dodds
Executive Vice President & General Counsel

¹⁹ 41 USC 1906(b)(2).