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Daniel Gordon
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Gordon,

Thank you for inviting the Coalition for Government Procurement ("the Coalition") to join the session on the use of small business set-asides and related tools under multiple award task-and-delivery-order contracts and Multiple Award Schedule ("MAS") contracts. I enjoyed the meeting and the thoughtful discussion on how to support efficient and effective federal contracting for small business.

The Coalition is a non-profit association of approximately 300 companies offering commercial services and products to Federal agencies through the General Services Administration's ("GSA's") MAS program and other governmentwide contract vehicles. Our members account for approximately 70 percent of the business conducted through MAS contracts and about half of the commercial solutions purchased annually by the Federal Government. Many of our members also are 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. The Coalition is proud to have worked with government officials for over 30 years to promote common sense acquisition solutions.

The Coalition appreciates the opportunity to provide initial written comments regarding the development of new guidance addressing small business opportunities under multiple award contracts. The following outlines some initial thoughts and considerations regarding the development of any new policies and procedures

addressing small business contracting opportunities under the MAS program and other multiple award contracts.

I. MAS Contracts

GSA's MAS program is a vibrant federal marketplace for small business concerns. Over the last decade the dollar value of orders placed with small business concerns has consistently exceeded the governmentwide goal of 23 percent, accounting for approximately 30-35 percent of the total dollar value of all MAS purchases. The success of the MAS program in promoting small business opportunities hinges on the program's flexible, streamlined ordering process as well as its reliance on commercial practices. The streamlined ordering procedures save the government and industry time, resources and money, which is especially vital to small business concerns competing in the federal marketplace. The flexible MAS ordering procedures also provide agencies with the ability to quickly and effectively consider small businesses when conducting market research and placing orders.

Federal Acquisition Regulation ("FAR") subpart 8.4 includes key guidance that enhances small business opportunities. First, MAS orders placed with small business concerns can be credited towards an agency's small business goals. *See* FAR 8.405(a). Second, agencies also may 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 provides that agencies should consider at least one small business concern, if available, when placing an MAS order. *Id.* In addition, GSA's electronic tools, GSA eLibrary and eBuy, allow 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 create a powerful combination that benefits small businesses across the MAS program.

The Coalition also believes that a key feature of the MAS program that benefits small business concerns is the ability to participate in a major procurement program alongside medium and large business concerns. This creates opportunities for small businesses to team 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 MAS contractors. The Coalition believes that this dynamic feature mirrors the commercial marketplace and increases small business opportunities.

As explained during the meeting, the Coalition does not believe mandating set-asides or otherwise applying the "rule of two" is either required by law or in the best

interest of the government or industry, including small business concerns.¹ The “rule of two” is prescriptive. 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 MAS program. It could radically alter the ordering procedures of the MAS program. For example, the Information Technology Schedule 70 includes at least a thousand small business concerns. Therefore, applying the “rule of two” at the order level would likely result in tremendous confusion. There may be a thousand small business MAS IT contractors but 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 MAS 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).

The Coalition believes that nothing in the Small Business Jobs Act of 2010 (“the Act”) compels application of the “rule of two” to orders against MAS contracts. Section 1331(c) allows agencies at their discretion to reserve one or more contract awards for small business concerns under full and open multiple award procurements. The section seems to validate the procedures of FAR Part 8 allowing a preference for small business and, in fact, authorizes similar procedures in other multiple award procurements. (See the discussion of the Act later in this letter).

The Coalition is very concerned that application of the “rule of two” to orders against GSA MAS contracts would, in the long run, undermine the strengths of the MAS 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 MAS program. This would increase the complexity and reduce the streamlined commercial practices within the MAS 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. Applying the “rule of two” and/or 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 MAS program.

The Coalition believes that more can and should be done to assist MAS small business contractors. First, GSA should update its guidance regarding teaming

¹ As noted in our meeting, the Government Accountability Office has held that the set-aside provisions of FAR part 19 do not apply to competitions among MAS contracts using FAR part 8 procedures. See *Edmund Computer Company*, B-402863, B-402864, August 25, 2010, 2010 CPD 200.

arrangements for MAS contractors. Special attention should be placed on providing guidance to small business concerns on effective teaming across MAS contracts as well as how agencies can get credit towards their socio economic goals when placing an order that involves a teaming agreement that includes at least one small business MAS contractor. For example, it is not commercial practice to require a prime contractor to perform at least 51 percent of the service work. Second, GSA should specifically tailor its mentor-protégé program to address the MAS program. A MAS mentor-protégé program would have tremendous potential in promoting small business concerns across the MAS program.

Third, agencies should be provided additional, non-regulatory training and guidance on effective tools for considering socio-economic status when identifying MAS contractors for consideration or competition for orders consistent with FAR 8.405-5(b). Any such guidance should ensure that agencies can continue to give “preference” to small businesses as they do under the current system while clarifying what rules are applicable when an agency gives preference, as opposed to formally setting aside at the order level. The size, complexity and duration of an agency’s requirement as well as the corresponding capability of the eligible pool of small businesses may be appropriate discretionary considerations in such circumstances. The guidance should also address the use of discretionary evaluation criteria for award that takes into account socio-economic status.

II. Multiple Award Task and Delivery Order Contracts

In the wake of *Delex Systems Inc*, B-400043, October 8, 2008, 2008 CPD 181, there has been a great deal of confusion regarding the applicability of the “rule of two” to task and delivery order contracts at the order level. The Coalition believes that Section 1331 of the Act addresses the applicability of the “rule of two” to multiple award contracts generally and to task or delivery orders issued under multiple award contracts authorized under 10 U.S.C. 2304a and 41 U.S.C. 253h. Unfortunately the Act does not provide clear guidance as to when and how agencies should give preference to small business concerns. Currently, the “rule of two” as implemented at FAR 19.505-2 is prescriptive. As discussed above, the “rule of two” limits a contracting officer’s discretion by requiring the set-aside of contracts when certain criteria are met. By contrast, Section 1331 of the Act directs that:

not later than 1 year after enactment the Administrator for Federal Procurement Policy, the Administrator [of the Small Business Administration], in consultation with the Administrator of General Services, shall, by regulation, establish guidance under which Federal agencies may, *at their discretion-- . . .*

- (1) set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);

- (2) set aside orders placed against multiple award contracts for small business concerns, including subcategories of small business concerns identified in (g)(2); and
- (3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in subsection (g)(2).

[Emphasis added.]

The Coalition strongly supports OFPP's efforts to develop guidance that instructs agencies regarding how to use the new discretionary authority. Any new guidance regarding multiple award task and delivery contracts 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. Moreover, in our view, to the extent any new guidance limits agency discretion through third party review of set aside decisions regarding multiple award contracts or orders under such contracts, the guidance will likely result in the defacto mandatory set asides. As the MAS 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.

Thank you again for the opportunity to participate in the discussion on this important issue. The Coalition looks forward to working with OFPP, GSA, and the Small Business Administration on this issue.

Sincerely,



Roger Waldron
President