

June 1, 2010

Via Facsimile and E-mail

Mr. Mathew Blum
Associate Administrator
Office of Federal Procurement Policy
New Executive Office Building, Room 9013
724 17th Street, NW
Washington, DC 20503

RE: Proposed Policy Letter to Provide Guidance to Executive Departments and Agencies on Circumstances When Work Must Be Reserved for Performance by Federal Government Employees, 75 Federal Register 16188

Dear Associate Administrator Blum:

The Office of Advocacy (Advocacy) submits this comment letter to the Office of Federal Procurement Policy (OFPP) in response to the above-referenced notice.

On March 31st, 2010, OFPP published a policy letter providing guidance to Executive Departments and Agencies on circumstances when work must be reserved for performance by federal government employees. Advocacy supports the Administration's goal of trying to balance work that is inherently governmental, and should be performed by government employees, with work that can be outsourced to the private sector. This policy will help provide a more level playing field for small businesses. While the draft policy document is not by definition a regulation, Advocacy is concerned that the outcome of the policy directive may have similar effects as a regulation. Therefore the Office of Advocacy encourages OFPP to consider the cost of compliance on small entities.

I. Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) ¹ requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act. ² The RFA requires agencies to analyze the economic impact of proposed regulations on small entities, and where there is likely to be a significant

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

² Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

economic impact on a substantial number of small entities, to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on these small entities.³

In addition, under Executive Order 13272 agencies are required to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

II. Potential Impact on Small Business

The following small business concerns have been brought to Advocacy's attention:

A. Loss of contracts

Small business trade organizations have in general expressed support for the effort of the government to develop policy guidance on when work must be reserved for performance by Federal employees. However, small businesses want to make sure that they will not lose contracts as a direct result of the government revisiting the issue of "inherently governmental" and insourcing. The Office of Advocacy has received several calls from small businesses who have expressed a concern that as the government attempts to develop a more coherent policy on the definition of what is inherently governmental, the application of this policy by Federal agencies may make their contracts more vulnerable to cancellation unless there is a uniform and clear process of applying the policy guidance. To support this concern, these owners have discussed an Air Force insourcing policy statement that set a percent goal of bringing contract work back for Federal employees. Recently, Congressman Langevin successfully introduced an amendment to the Fiscal Year 2011 Defense Authorization Bill in the House Armed Services Committee that would prevent the Pentagon from establishing arbitrary goals or targets to implement DOD's insourcing initiative. Small business groups supported this effort as yet another step in leveling the playing for small businesses.

Many small federal contractors have developed a single business model based on the business needs of the Federal government. A 1989 research study performed for the Small Business Administration's Office of Advocacy showed that from 1985 to 1987 small businesses received 553, or 70 percent, of the 793 Circular A-76 activities contracted out by the U.S. Department of Defense and Federal civilian agencies.⁶ More

³ See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003).

⁴ Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

⁵ *Id.* at § 3(c).

⁶ Ann Parker Maust, *A-76 Privatization Initiatives: An Examination of Small Business participation and Competitiveness*, SBA Office of Advocacy, August 1989.

recently, from 1995 to 2002 an internal report from the Department of Defense showed that 68 percent of the contracts outsourced under Circular A-76 were awarded to small businesses.⁷

Small businesses represent 99.7 percent of all employer firms, and they generate 60 to 80 percent of net new jobs annually.⁸ When small businesses win Circular A-76 contracts, they create a win-win for the government and the American public. It would be unfortunate if small business contracts are cancelled, even though the government's findings indicate that they are being performed at fair and competitive prices, and the government has to hire the small businesses' employees to continue the work. OFPP's final policy letter should encourage agencies, when reviewing prime contracts for small businesses, to give full consideration to the critical economic role played by small businesses in this nation's economy. If in this consideration an agency should make a determination that a small business contract must be cancelled, then the agency should be encouraged to institute a phase out process of the contract. This phase out would provide the small business owner with an opportunity to retool the company's business model.

B. Reduction in the percentage of contracts

The net result of this policy should not be a reduction in the percentage of contracts awarded to small businesses. The Federal government has a statutory goal of awarding 23 percent of its contract dollars to small businesses. The Administration has endorsed fully this requirement and has recognized the vital role that small businesses play in job creation. This policy letter should reinforce the 23 percent goal and the role that small businesses play as the economic backbone of this nation.

C. Reduction of subcontracts

The OFPP draft policy letter has not addressed the issue of small business subcontracting. Small businesses are concerned that large prime contractors may reduce or eliminate their contracts under the guise of redefining inherently governmental contracting. In this regard, small businesses are concerned that prime contractors may use this new policy letter as an opportunity not to subcontract with them as the law encourages. OFPP should issue a statement to the contracting community that subcontracting with small businesses is and continues to be the law of the land.⁹

⁷ Department of Defense Report: FY 2003 Competitive Sourcing Efforts, May 11, 2004.

⁸ Office of Advocacy, Small Business Administration, Frequently Asked Questions, <http://web.sba.gov/faqs/faqindex.cfm?areaID=24>.

⁹ See Public Law 95-507, October 24, 1978.

Advocacy appreciates OFPP's recognition of the need to balance inherently governmental activities with those that can be outsourced to the private sector and requests that full consideration be given to the concerns of small business when finalizing its policy letter on this subject.

If you have any questions regarding this letter, please contact Major L. Clark, III in my office at (202) 205-7150.

Sincerely,

Susan Walthall
Acting Chief Counsel for Advocacy

Major L. Clark, III
Assistant Chief Counsel for Procurement

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs