

August 30, 2000

General Services Administration  
FAR SECRETARIAT (MVR)  
1800 F Street, N.W.  
Room 4035  
ATTN: Laurie Duarte

RE: FAR CASE: 1999-010

Washington, D.C. 204505

Dear Ms. Laurie Duarte:

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in federal policy making activities.<sup>1</sup> The Chief Counsel participates in rulemakings and other federal agency activities when he deems it necessary to ensure proper representation of small business interests. In addition, the Chief Counsel has a particular interest in ensuring that laws and regulations do not have an adverse impact on competition among businesses of differing sizes. Finally, the Chief Counsel monitors agencies' compliance with the Regulatory Flexibility Act (RFA)<sup>2</sup> and works with federal agencies to ensure that their rulemakings are supported by analyses of the impact that their decisions will have on small businesses and that the analyses are published for public comment.

Regarding FAR case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, I am requesting a more detailed statistical Initial Regulatory Flexibility Analysis (IRFA) and that the revised analysis be published for comment in the Federal Register.

### **Background**

The referenced FAR case was published on June 30, 2000 as a proposed rule with a 60-day comment period. This new case is the result of comments received on FAR case 99-010 published in the Federal Register on July 9, 1999. In response to the proposed regulation of July 9, 1999, this office submitted a formal Comment Letter on November 8, 1999 regarding, among other things, the failure to provide an Initial Regulatory Flexibility Analysis, as required by the RFA. This office is pleased that the current FAR case, 1999-010, does include an IRFA. However, the IRFA does not go far enough and implicitly raises additional questions about the level of impact the proposed regulation rule is expected to have on a substantial number of small entities. It is for this reason that a new IRFA needs to be prepared and published for comment.

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<sup>1</sup> Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§634a-g, 637.)

<sup>2</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§601-612.)

## **Synopsis of the Rule**

The proposed rule is an amendment to the FAR. It is designed to clarify what is relevant credible information on a prospective contractor's record, namely, compliance with federal laws including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection, that is to be used to determine the integrity and business ethics of a potential contractor. This determination is necessary before a prospective contractor can be awarded a contract. This amendment is an attempt to give clarification to the language in 41U.S.C. 253b and 10 U.S.C. 2305(b), which requires the government to award contracts to "responsible sources".

## **Small Entity Impacts**

*Number of Entities Affected.* There are approximately 23 million small businesses in the United States. Of these, the IRFA estimates that approximately 171,000 small entities will be effected by the proposed rule. What is the source of the number 171,000 small businesses? Are all of the 171,000 businesses in the same industry and have the same business profile? Is the impact of this proposed regulation the same for all small businesses? Is the impact positive or negative or a combination of both? To make this IRFA a more useful evaluation tool for the small business community, these baseline questions are in need of sound analytical answers.

*Large and Small Entities Will Be Treated Alike.* Another weakness of the current IFRA is its underlying assumption that the playing field is and will be level for all businesses and that small and large businesses will be treated as equals. This office contends that this assumption is hard to believe. Is the Secretariat really saying that a major R&D company with millions of dollars in defense contracts which is found in violation of EEOC rules, regulations and statutes will be barred from receiving future contracts? Such businesses generally have more financial and human capital resources than small businesses and can not only defend against government enforcement actions but can also ensure that they qualify for the exemptions under the law. Small businesses do not have this flexibility.

Is it unrealistic for the public to suspect that the rule will be applied more often to small firms where enforcement of the rule is likely to be simpler for the government, less costly and less disruptive to the government's procurement process and have less impact on the government's contracting options? The FAR Secretariat has to know that this suspicion is widespread. Thus, this potential should at least be realistically addressed in the IRFA and not hidden from public examination. In addition, it would be helpful to know what safeguards the government will put in place to deter abuses.

To do a credible analysis, the following questions need to be answered.

For FY98 and FY99 how many small businesses were formally charged with an infraction by the regulatory agencies affected by this propose regulation? What was the final disposition of these cases? How many small businesses were suspended from doing business with the federal government pending the outcome of the administrative/judicial review? How many small businesses were debarred from during business with

the Federal Government in FY98 and FY99? How many small businesses were found to be non-responsible in FY98 and FY99? Of this number how many were referred to the United States Small Business Administration for a Certificate of Competency? More importantly, with the exception of the latter, these same questions must be answered for large business. The comparison of the data would be useful to public discussion of this rule.

Beyond these questions, anecdotal evidence raises another issue that needs to be addressed openly and honestly in an IRFA. How many small businesses appearing before adjudicatory/ regulatory bodies cited in the proposed regulation simply pay the fine rather than litigate, even in those instances where litigation might result in victory for the small business? The legal expense and human capital costs of litigation are normally so high that the costs far exceed the benefit. Under the proposed regulation, in order to avoid debarment, a small business owner will be required to challenge any and all allegations and thus expend enormous resources that could otherwise be directed to the growth of the business. The cost of doing so would be disproportionate to the cost incurred by a large business. (And it needs to be stated to see if there is evidence to the contrary, that the costs to the government would be reversed, namely, less for enforcing the rule against a small firm than for enforcing the rule against a large firm. *True?*)

#### **Certificate of Competency.**

This office is pleased that the proposed regulation preserves the Certificate of Competency (CoC). A specific discussion of the CoC should, however, be discussed in the body of the proposed regulation. Currently, the process is only discussed in the narrative on the IRFA, when in fact it should be part of the regulation itself so that it can be part of the enforcement design for the rule. In view of the broad reaching scope of this proposed regulation, it is more important than ever that the COC process achieve maximal visibility and utilization.

#### **Conclusion.**

In conclusion, this office requests that the FAR case 1999-010 not be finalized until such time that a more substantive IFRA is developed and published in the Federal Register for comment. The amended IFRA must at a minimum address the concerns expressed in the preceding paragraphs. Major Clark, Assistant Chief Counsel for Procurement in this office is available to assist you in this process. His telephone number is 202-205-7150 and his e-mail address is [major.clark@sba.gov](mailto:major.clark@sba.gov). We look forward to assisting you.

Sincerely,

Jere W. Glover  
Chief Counsel for Advocacy