

July 6, 2009

**BY ELECTRONIC MAIL**

**FAR Secretariat  
General Services Administration  
Regulatory Secretariat  
Room 4035  
Attn: Hada Flowers  
Washington, DC 20405**

**Re: Payments Under Fixed-Price Architecture and Engineering Contracts, FAR Case 2008-015, (74 Fed. Reg. 20666)**

Dear FAR Secretariat:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the Federal Acquisition Regulation (FAR) Council Payments Under Fixed-Price Architecture and Engineering Contracts (A&E) proposed rule. [\(1\)](#) Advocacy is appreciative of the FAR Council's efforts to address small businesses' concerns in the proposed rule and encourages the Council to adopt further modifications.

**I. The Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), [\(2\)](#) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), [\(3\)](#) gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

Section 610 of the Regulatory Flexibility Act (RFA) [\(4\)](#) requires federal agencies to review regulations that have a significant economic impact on a substantial number of small entities within 10 years of their adoption as final rules. These periodic rule reviews are a mechanism for agencies to assess the impact of existing rules on small entities and to determine whether the rules should be continued without change, or should be amended or rescinded, consistent with the objectives of applicable statutes.

Executive Order 13277(5) requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

## **II. Proposed Regulation**

On May 5, 2009, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) proposed to amend the FAR to provide the contracting officer with greater flexibility regarding retainage on Fixed-Price A&E Contracts. Under the proposed rule, the contracting officer may retain less than the maximum of ten percent of the contract price on each voucher of the A&E firm. The government retains the amount until the contracting officer determines that the work has been satisfactorily completed.

## **III. Advocacy's r3 Initiative**

Advocacy commends the FAR Council for considering this proposed regulation in response to the Office of Advocacy's Regulatory Review and Reform (r3) initiative. The r3 initiative was launched in 2008 and is designed to identify and address existing federal regulations that should be revised because they are ineffective, duplicative, or out of date. r3 is a tool for small business stakeholders to suggest needed reforms. r3 includes the process under Section 610 of the RFA for agencies to consider whether their current regulations are still needed, and the degree to which technology, economic conditions, or other factors have changed since their rules were first promulgated. The A&E small business community recommended this proposed regulatory change to Advocacy under the r3 program.

## **IV. Additional Recommendations of Small A&E Firms**

Small A&E firms are pleased that the FAR Council accepted their recommendation to revisit the rule for payments under firm fixed price A&E contracts. In a May 28, 2009 meeting with members of the Council on Federal Procurement of Architectural and Engineering Services, several aspects of the proposed rule were highlighted. It is the belief of small A&E firms that there are several refinements to the rule that will, if incorporated in the final rule, provide them with a level contracting playing field. In the referenced May meeting, small business owners pointed out that the current fixed price provision was implemented prior to the acquisition reforms of the 1990s. Since the acquisition reforms of the 1990s, contracting agencies have been provided with more flexible acquisition tools such as ID/IQ contracting. Some agencies are now using ID/IQ contracting for the purchase of A&E services, and some small A&E firms believe that the current regulation may not be consistent with ID/IQ contracting practices. Small A&E firms strongly support applying this proposed rule to other types of A&E contracts such

as mapping. Finally, small firms expressed a desire to have the regulation establish a standard acceptance for the contracted deliverable. A standard of acceptance would establish a degree of consistency and uniformity through out the federal contracting community. Small A&E firms assert that this change would reduce the guess work associated with deliverables and provide the agency with a better product.

## **Conclusion**

Advocacy would like to thank the FAR Council for providing small business with an opportunity to recommend changes to the Payments Under fixed-Priced Architecture and Engineering rule under the r3 initiative. Small businesses are pleased that the FAR Council has accepted some of the recommendations regarding the rule and has proposed a formal regulatory change. Advocacy would urge the FAR Council to give further consideration to the above additional recommendations expressed at the May 28, 2009 meeting.

Please feel free to contact me or Major Clark at (202) 205-7150 (major.clark@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Shawne Carter McGibbon  
Acting Chief Counsel for Advocacy

/s/

Major L. Clark, III  
Assistant Chief Counsel for Advocacy

cc: Mr. Kevin Neyland, Acting Administrator, Office of Information and Regulatory Affairs

## **ENDNOTES**

1. 74 *Fed. Reg.* 20666 (May 05, 2009).
2. Regulatory Flexibility Act, Pub. L. 96-354.
3. Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).
4. 5 U.S.C. § 610 (2000).
5. Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).