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August 19, 2016

**VIA FEDERAL E-RULEMAKING PORTAL**

Ms. Flowers  
General Services Administration  
Regulatory Secretariat Division  
1800 F Street NW, 2<sup>nd</sup> Floor  
Washington, DC 20405

Re: FAR Case 2015-015

Dear Ms. Flowers:

We are writing to submit comments on the above-referenced notice of proposed rulemaking, issued on June 20, 2016, 81 Fed. Reg. 39,883. Our firm represents small business federal contractors. We submit these comments to assist the Federal Acquisition Regulation (“FAR”) Council in drafting and implementing a rule that is fair and workable for small businesses.

***The Proposed Rule Should Not Be Applied in Small Business Set Asides***

The proposed rule encourages agencies to purchase goods and services under the Federal Strategic Sourcing Initiative (“FSSI”) by requiring procurement personnel to prepare a brief analysis if the FSSI is not used when the procured item is available under the FSSI. The proposed rule provides:

When purchasing supplies or services that are offered under the FSSI, but the FSSI is not used, the contract file shall be documented to include a brief analysis of the comparative value, including price and nonprice factors, between the supplies and services offered under the FSSI and those offered under the source(s) to be used for the purchase

81 Fed. Reg. 39,885. The proposed rule will amend FAR 8.004, which governs the use of non-mandatory sources. Mandatory sources are those listed in FAR 8.002 and 8.003 and those “otherwise provided by law.” FAR 8.002 (a).

Importantly, small businesses are often a mandatory source “otherwise provided by law.” Under the Small Business Act, 15 U.S.C. § 631 *et seq.*, a federal agency shall set-aside a procurement for small businesses if the Rule of Two is satisfied or if the anticipated value of the

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goods or services is less than \$150,000. And, as the Supreme Court recently stated, “‘shall’ imposes a mandatory duty.” Kingdomware Technologies, Inc. v. United States, 579 U.S. \_\_\_\_, slip op. at 9 (2016) (citing United States ex rel. Siegel v. Thoman, 156 U. S. 353, 359-60 (1895)). Indeed, it is U.S. policy to promote small businesses. The Small Business Act states:

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

15 U.S.C. 631(a). The Act also provides that “a fair proportion of the total purchases and contracts for property and services for the Government in each industry category” and “a fair proportion of the total sales of Government property” should be placed with small business concerns. 15 U.S.C. 644(a). The proposed rule does not take this important policy mandate into account.

As discussed above, small businesses are often mandatory sources. In such situations, an agency would not reach FAR 8.004 and the analysis required by the proposed rule. And, federal policy requires that a fair proportion of federal contracts be awarded to small businesses. The FAR Council should revise the proposed rule to clarify that the FSSI analysis is not required in small business set asides.

### ***The Brief Analysis Should Allow for Flexibility***

The proposed rule provides little specificity with respect to the components of the required brief analysis. Rather, the proposed rule only advises the agency to consider “price and nonprice factors” pertaining to the offered supplies and services. This language does not envision a holistic analysis. The proposed rule does not address consideration of the supplier; it does not speak to supplier quality or past performance. And, the proposed rule does not contemplate consideration of the statutory goals for small business procurements. These are just a few examples of factors that are relevant in a selection decision and that should be considered in an analysis. The proposed rule should be revised to ensure that agencies have flexibility to consider these types of issues when conducting the brief analysis, analyzing and deciding not to use the FSSI for a service or supply award through the FSSI.

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***The Notice of Proposed Rulemaking Understates the Impact on Small Businesses***

The notice of proposed rulemaking fails to recognize the potential impact on small businesses. It states: “[t]he rule could indirectly affect small businesses that offer supplies or services under the FSSI as the rule will require contracting officers to consider FSSI vendors when they may not have done so in the past, and this could lead to more sales for those small businesses.” 81 Fed. Reg. 39,885. This statement fails to appreciate that there are thousands of small businesses that are not FSSI vendors. Indeed, the notice reports that there are 78 small businesses under the FSSI, and 43,545 unique small business entities were awarded federal contracts in Fiscal Year 2014. This means that less than one percent of small federal contractors are on the FSSI. By focusing on the contractors that are on the FSSI, the notice of proposed rulemaking ignores the potential adverse impact on more than 43,000 small business contractors.

Under the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., the government is required to analyze and describe the impact of a proposed rule on small entities. The statute requires agencies to make a reasonable, good faith effort to inform the public about potential adverse effects of a proposed rule. Southern Offshore Fishing Assoc. v. Daley, 995 F. Suppl. 1411, 1437 (M.D. Fla. 1998). An agency must address small entities that are affected – even if the entities are not immediately addressed in the proposed rule. Aeronautical Repair Station Assoc., Inc. v. FAA, 494 F. 3d 161, 177 (D.C. Cir. 2007). And, in the final rule, the agency must describe the steps taken to minimize the impact on small entities. 5 U.S.C. § 604(a)(5).

Here, the proposed rule encourages agencies to procure goods and services from companies with FSSI contracts. Procuring items from non-FSSI sources will require additional effort – the analysis required by the proposed rule. Accordingly, agencies will be less likely to purchase goods and services from the thousands of small businesses that do not hold FSSI contracts. Critically, it is often difficult for a company to obtain an FSSI contract or other government-wide contract vehicle. The procurements are highly competitive, there are relatively few awardees, and the contracts have long periods of performance. If a company is not selected for award, it loses out on countless opportunities. For some companies, a large contract like an FSSI contract could make or break the business.

As acknowledged in the notice of proposed rulemaking, less than one percent of small business contractors have an FSSI contract. If agencies are encouraged to use the FSSI whenever possible, notwithstanding the primacy of small business set-asides required under the Small Business Act when certain conditions are met – the small businesses that do not hold FSSI contracts will be adversely impacted by the proposed rule. Yet, the notice of proposed rulemaking – including the Regulatory Flexibility Act analysis – makes no mention of this fact. The FAR Council should reconsider the Regulatory Flexibility Analysis and consider the impact on small businesses that do not hold FSSI. Then, the rule should be revised so that it minimized the negative impact on small businesses.

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Please do not hesitate to contact Pamela Mazza, Tony Franco, Jon Williams, or Michelle Litteken at (202) 857-1000 if you have any questions about these comments.

Very truly yours,



Pamela Mazza  
Tony Franco  
Jon Williams  
Michelle Litteken