

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

May 24, 2010

The Honorable Daniel Gordon
Administrator
Office of Federal Procurement Policy
Eisenhower Executive Office Building, Room 263
1650 Pennsylvania Avenue, N.W.
Washington, DC 20503

Re: Work Reserved for Performance by Federal Government Employees, 75 Fed.
Reg. 16,188 (March 31, 2010).

Dear Administrator Gordon:

On March 31, 2010, the Office of Federal Procurement Policy (OFFP or Office) published a proposed policy letter concerning "inherently governmental functions." As Ranking Member of the Committee on Small Business of the House of Representatives, I am writing to ensure that the Office takes into account the impact on small businesses as it crafts a single government-wide definition of those functions that should be performed by federal government employees.

With the commencement of World War II, the federal government recognized that it was necessary to mobilize the private sector, including small businesses in order to provide the country with the goods and services needed to successfully prosecute that conflict. The benefits of contracting with small businesses, higher quality goods and services at fair prices, outlasted the needs of the nation during wartime. Congress recognized the benefits to the federal government of a robust small business industrial and contracting base when it passed the Small Business Act in 1953, after the end of the conflict in Korea. The Small Business Act requires "that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small business concerns."
15 U.S.C. § 644(a).

Since the enactment of the Small Business Act, the size of the federal procurement marketplace has grown dramatically. Today, the federal government purchases nearly \$500 billion in goods and services across the entire gamut of the American economy. Services and goods once provided by federal employees are now routinely offered to the American public by the private sector, including thousands of small businesses, typically at a higher level of performance and often at a lower cost. Despite the substantial benefits

associated with the provision of goods and services by the private sector, there clearly are functions that must be performed by federal employees. Nevertheless, the policies and procedures used to determine which functions necessarily need be performed by federal employees and those that may be provided through contracts with the private sector were, to be kind, never clear or consistent across the federal government. That brew of conflicting policies and agency determinations created difficulties for the private sector in determining what capabilities they should develop in order to best serve the federal government and American people.

Congress waded into this maelstrom in 2008 with the passage of section 321 of the National Defense Authorization Act. Pub. L. No. 110-417, 122 Stat. 4411, codified at 31 U.S.C. § 501 note. That section required OFPP to: a) create a government-wide definition of an inherently governmental function; b) identify criteria to be used in determining what positions are critical and can only be filled by government employees; and c) issue guidance improving the ability of agency heads to manage these determinations.

The issue then in this proceeding for OFPP is how to balance two specific Congressional mandates – craft a consistent government policy concerning what function and positions should be filled by federal employees while ensuring that the federal government utilizes small businesses to obtain the best value in goods and services. These comments are not intended to fill in the criteria needed to establish what constitutes an “inherently governmental functions” or a “critical government position.” Instead, the comments should provide the Office with the necessary framework to consider the consequences of its decision on small business and use those factors in crafting an appropriate policy that ensures maximum opportunity for small business. Those considerations are framed by the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA).

The RFA requires federal agencies to examine the impact of their proposed and final rules on small entities, including small businesses. If those impacts are significant and affect a substantial number of small businesses, the agency is required to prepare regulatory flexibility analyses at the proposed and final rule stages detailing alternatives that would achieve the regulatory objectives of the agency without unnecessarily burdening small businesses. While it remains unclear whether this policy notice constitutes a rule that requires OFPP to comply with the RFA, I would strongly urge that voluntary utilization of its analytical framework because that will enable the Office to craft a more rational unified policy on what constitutes “inherently governmental.”

The first step in complying with the analytical framework of the RFA is to ascertain the number of small businesses affected. Without making this threshold determination, it is impossible to assess correctly the impact that the policy changes will have on small businesses.

However, simply providing an estimate of the number of small businesses that provide goods or services to the federal government, while a crucial first step, is insufficient in determining the impact of the proposed policy on small businesses. OFPP also must review the scope and range of services provided by small businesses. It is entirely

possible that the proposed policy change may have little impact on small business because the services provided by small businesses are not inherently governmental functions. An equally plausible result is that many small businesses may lose government contracts or options on federal procurements because the services they are providing will be considered inherently governmental.

Any losses of federal government contracts will exacerbate an already difficult economic environment for small businesses. Removing a key or, in some circumstances, sole source of revenue would not be beneficial to the business or their ability to help create jobs needed by Americans. Added to the loss of revenue is the continuing inability for small businesses to obtain critical capital; establishing policies that have the possibility of reducing future revenue only would exacerbate the problem. I fear that small businesses, the ones that create the majority of new jobs in the country, will lose out to unfair competition from the federal government and that a reduction in competition for government contracts will add more burdens onto the taxpayer.

After determining the impact on both the revenue and scope of small businesses affected by the proposed policy, OFPP should consider the economic impact of various alternative definitions of inherently governmental. One should be a definition sufficiently narrow that small businesses are able to maintain their existing federal procurement work and even expand their potential procurement opportunities. If this definition adequately protects the integrity of those functions that must be performed by federal employees, then I would urge OFPP to adopt this alternative.

Maintaining a robust small business concern procurement base will ensure that the federal government obtains the best value for its money while being able to take advantage of the innovative ideas emanating from America's small business. In addition to placing this letter in the record of this proceeding, please provide to me the procedures that the Office will use in assessing the impact on small federal government contractors. The information you provide will enable me to determine whether there are gaps that need to be filled in the federal procurement system to ensure maximum utilization of America's entrepreneurs.

Sincerely,



Sam Graves
Ranking Member