



United States
General Accounting Office
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Office of the General Counsel

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July 16, 1998

The Honorable Christopher S. Bond
Chairman
The Honorable John F. Kerry
Ranking Minority Member
Committee on Small Business
United States Senate

The Honorable Dan Burton
Chairman
The Honorable Henry A. Waxman
Ranking Minority Member
Committee on Government Reform and Oversight
House of Representatives

Subject: Department of Defense, General Services Administration, and National Aeronautics and Space Administration: Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on two major rules filed with us by the General Services Administration (GSA); both are entitled "Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement" (RIN: 9000-AH59). We received the rules on June 26, 1998. They were published in the Federal Register as interim rules on June 30, 1998, and July 1, 1998. 63 Fed. Reg. 35719 and 63 Fed. Reg. 36120.

These rules were developed by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration. They have agreed to issue these two rules, Federal Acquisition Circulars 97-06 and 97-07, as interim rules to amend the Federal Acquisition Regulation concerning programs for small disadvantaged business concerns. These amendments conform to a Department of Justice proposal to reform affirmative action in federal procurement to ensure compliance with the constitutional standards established by the Supreme Court in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995).

Federal Acquisition Circular 97-06 implements the evaluation factor or subfactor for small disadvantaged business participation, incentive subcontracting with small disadvantaged business concerns, and other coverage that is not directly related to the price evaluation adjustments for small disadvantaged business concerns. Federal Acquisition Circular 97-07 implements the price evaluation adjustment for small disadvantaged businesses.

The proposed rule was split into these two interim rules for phased implementation to minimize any negative impact on small disadvantaged businesses caused by the large number of firms applying for certification when the program first becomes effective.

Enclosed is our assessment of the agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rules. Our review indicates that the agencies complied with the applicable requirements.

If you have any questions about this report, please contact Kathleen E. Wannisky, Associate General Counsel for Operations, at (202) 512-5207. The official responsible for GAO evaluation work relating to the General Services Administration is Bernard L. Ungar, Director of Government Business Operations Issues. Mr. Ungar can be reached at (202) 512-8387.

Robert P. Murphy
General Counsel

Enclosure

cc: Ms. Ida M. Ustad
Deputy Associate Administrator
for Acquisition Policy
General Services Administration

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF DEFENSE,
THE GENERAL SERVICES ADMINISTRATION, AND
THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
ENTITLED
"FEDERAL ACQUISITION REGULATION; REFORM OF
AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT"
(RIN: 9000-AH59)

(i) Cost-benefit analysis

These rules establish three procurement mechanisms benefitting small disadvantaged businesses (SDBs). The first is a price evaluation adjustment of up to 10 percent in certain two-digit Standard Industrial Classification (SIC) Major Groups authorized by the Administrator of the Office of Federal Procurement Policy (OFPP). This price adjustment is mandatory for those competitive procurements to which it applies. The second mechanism is a source selection evaluation factor or subfactor for planned SDB participation, primarily at the subcontract level, in the performance of a contract in the SIC Major Groups authorized by the Administrator of OFPP.

According to the material submitted to us, these first two mechanisms could potentially apply to up to \$14 billion worth of federal contracts. The General Services Administration assumes that these mechanisms could result in SDBs being awarded \$140 million (or 1 percent) of these contracts. If this occurs, these mechanisms could channel up to \$14 million in differentials into the development of these currently underutilized businesses.

The third mechanism provides for a monetary incentive for subcontracting with SDBs. Although the General Services Administration could not determine the precise cost of this incentive program, it expects it to be minimal.

According to the General Services Administration, the benefit of these mechanisms will be to channel business and employment opportunities to disadvantaged businesses and, ultimately, to increase the number of viable firms capable of competing to provide supplies and services to the federal government.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

An initial regulatory flexibility analysis was incorporated in the notice of proposed rulemaking on May 9, 1997 (62 Fed. Reg. 25786). Comments were sought on the proposed rulemaking, including comments on the initial regulatory flexibility analysis. One hundred and forty-three letters containing over 200 comments were received in response to the proposed rule. According to the information submitted to our Office, all the comments received were considered in the formulation of the interim rule and several significant changes were made to the rule based on the comments received.

(i) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

These interim rules do not impose a federal intergovernmental or private sector mandate of \$100 million or more, as defined in the Unfunded Mandates Act of 1995.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

Since the interim rules involve public contracts, they are exempt from the notice and comment procedures contained in 5 U.S.C. § 553. Instead, 41 U.S.C. § 418b controls the publication of proposed procurement regulations. On May 9, 1997, in compliance with those requirements, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration published the proposed amendments to the Federal Acquisition Regulation as a proposed rule in the Federal Register (62 Fed. Reg. 25786). As a result of public comments received, substantive changes have been made to the proposed rule. The Secretary of Defense, the Administrator of the General Services Administration, and the Administrator of the National Aeronautics and Space Administration determined that urgent and compelling circumstances existed to promulgate these interim rules without opportunity for prior public comment, i.e., to allow adequate time for potential SDB subcontractors to understand the requirements of the rule and to be certified as SDBs by the Small Business Administration. However, the agencies have asked for comments on the interim rules and have stated that comments received in response to the interim rules will be considered in the formulation of the final rules.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

Since these interim rules contain reporting and recordkeeping requirements, they were submitted to the Office of Management and Budget for review. A Federal

Register notice published on May 9, 1997, invited comments on these collections. No comments were received. The information collections required by Federal Acquisition Circular 97-06 were approved under clearance 9000-0150 through June 30, 2000. The information collections required by Federal Acquisition Circular 97-07 were approved under clearance 9000-0007 and clearance 9000-0150 through June 30, 2000.

Statutory authorization for the rules

The interim rules were issued pursuant to the authority of 41 U.S.C. § 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. § 2473(c).

Executive Order No. 12866

These interim rules were determined to be "economically significant" regulatory actions and were reviewed and approved by the Office of Management and Budget.