



February 6, 2017

(Submitted electronically at <http://regulations.gov>)

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

Re: Comments on Federal Acquisition Regulation: Set-Asides Under Multiple Award Contracts, FAR case 2014-002

Dear Ms. Flowers,

Women Impacting Public Policy (WIPP) is submitting comments on the proposed rule Federal Acquisition Regulation: Set-Asides Under Multiple Award Contracts, FAR case 2014-002, issued on December 6, 2016.

As a leading advocate for women entrepreneurs engaged in, or considering entering the federal marketplace, WIPP is encouraged by the FAR Council's interest in providing clarity on the use of small businesses on multiple award contracts. That said, we do have concerns with the proposed rule.

Women entrepreneurs continue to struggle to access federal contracts at both the prime and subcontracting levels. While the federal government recently reached its 5% goal of prime contracts awarded to women, there is still progress to be made. This proposed rule could impede the progress women business owners have made through implementation of the WOSB procurement program, by making it harder to compete in the federal market.

The proposed rule seeks to clarify procedures for contracting officers by reserving one or more contract awards for small business under full and open multiple-award procurements and setting aside orders placed against multiple-award contracts. The rule also clarifies both agency and small contractor responsibilities with respect to performance of work requirements (also known as the limitations on subcontracting and the nonmanufacturer rule). Lastly, the proposed rule reorganizes portions of the FAR related to small business, making it easier for contracting officers to reference. This proposed rule follows an interim FAR rule issued in November 2011, and a final SBA rule issued in October 2013.

The proposed rule makes one element in the use of small businesses on multiple award contracts to be clear- the discretion of the contracting officer either pursue a partial set-aside or to reserve one or more spots for a small business leaves too much to chance. WIPP has concerns over this discretionary approach.

### Partial Set Asides

The proposed rule clarifies that partial set-asides should be used when market research indicates a total set-aside of a multiple-award contract is not feasible, and when the acquisition can be divided into small discrete categories. The rule also clarifies that small businesses will no longer be required to submit an offer on the non-set-aside portion of the solicitation, to be considered for the set-aside portion.

WIPP is supportive of providing greater clarity to women-owned firms by requiring a firm submit to bid on the portion of the contract that will go to a small business.

WIPP also supports greater flexibility for contracting officers to divide too-large multiple award contracts into discrete contracts that enable women-owned firms to have more opportunities. WIPP is concerned, however, that this discretionary authority harms women-owned firms. In October 2016, WIPP released a report titled [Do Not Enter: Women Shut Out of U.S. Government's Biggest Contracts](#) which analyzed 19 of the largest multiple-award contracts and found that 12 contracts contain requirements that ensure only certain socio-economic groups have access to the contract. Only a quarter of the contracts examined included a partial set-aside for women-owned firms. WIPP is concerned that agencies are inappropriately structuring large contracts that restrict competition. When agencies elect to utilize large contracts with pools of awardees and specifically set-aside awards for certain socio-economic programs, WIPP believes all programs should be represented. Effectively, WIPP asks for parity among "tracks" on multiple-award contracts.

### Reserve

The proposed rule introduces a new concept called a "reserve" for multiple-award contracts. A reserve is to be utilized where a partial set-aside is not feasible, but an agency seeks to have one or more small business participate at the prime contract level.

WIPP supports the new concept of a reserve, which provides even greater flexibility than partial set-asides for small business participation on multiple-award contracts. However WIPP is concerned about the inclusion of women-owned firms in the reserve, given the concerns outlined in the above-mentioned report, [Do Not Enter: Women Shut Out of U.S. Government's Biggest Contracts](#).

### Set-aside of Orders Below the Simplified Acquisition Threshold

The Small Business Act (15 U.S.C. 644) requires contracts between the micro-purchase threshold (currently \$3,500) and the simplified acquisition threshold (currently \$150,000) to be automatically reserved for small business. This small business reserve was created because small dollar contracts are often well suited for small business.

This proposed rule was not been written with that law in mind; while it recognizes that small businesses are capable of performing contracts and task orders well above the \$150,000 simplified acquisition threshold, it merely states that partial set-aside and reserve authorities are discretionary. If whole contracts within a certain dollar value are automatically reserved for small businesses, to the maximum extent practicable, task orders within that same dollar value should also be reserved for small businesses.

#### Orders on Multiple-award Contracts

WIPP supports the flexibility the proposed rule provides contracting officers to establish in the terms of a solicitation, that all subsequent task orders be set-aside. WIPP also supports utilizing individual NAICS code assignments that describe the principal purpose of the partial set-aside, rather than the NAICS code used for the larger multiple-award contract. More specific NAICS codes will help women-owned firms gain better access to opportunities in their industry.

#### Limitations on Subcontracting

The proposed rule clarifies the responsibilities of both federal agencies and small contractors with respect to the performance of work requirements. Also known as limitations on subcontracting, these requirements ensure that set-aside contracts are being performed by the small business that was awarded the contract. Simply put, that a WOSB is performing the work on a WOSB set-aside contract.

The proposed rule includes an out-of-date policy regarding the limitations on subcontracting. In May 2016, SBA finalized a rule change that substantially revised the limitations on subcontracting by making it easier for women-owned firms to comply. The new rule focuses on the percentage of the award amount that has been subcontracted, not the percentage of work. The rule also provides an exemption for similarly-situated entities, so WOSBs subcontracting to other WOSBs does not count against the percentage of the award subcontracted. This new policy is a win-win for small businesses, but the FAR Council does not acknowledge that new policy in his rulemaking. If one of the purposes of this rule is to clarify small business authorities for contracting officers, the FAR should use the most up-to-date performance of work requirements.

WIPP appreciates the interest of the FAR Council in providing greater flexibility and clarity for the role of small businesses in multiple award contracts. But this

proposed rule does not do enough. The FAR Council should not need over three years to propose a rule based on a final SBA rule. Without additional small business protections, this rule could hurt our nation's biggest job creators- small businesses.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Jane Campbell". The signature is written in a cursive style with a horizontal line underlining the name.

Jane Campbell  
Director of the Washington office of the National Development Council  
President, Women Impacting Public Policy