

**TO: Costello Wilson
Team.gov**

FROM: Wayne J. James

**RE: GSA CONTRACT CONSOLIDATION/
PROCUREMENT PROCESS/IMPACT ON 8(A)**

DATE: October 8, 2021

MEMORANDUM

You have asked for a Brief of the Legislative and Regulatory Authority for General Services Administration's ("GSA") removal of contracts from the Small Business Administration's ("SBA") Minority Small Business Development Program and Capital Ownership Development Program (also commonly referred to as the "8(a) Program"), opening those contracts to open competition, and short-cycling of existing contracts. Additionally, you requested research and analysis of the following:

- 1) Background Legislation, including 15 USC 637(a) and SBA's SOPs;
- 2) Legal Authority or lack thereof for GSA's above-described approach to stifling contract competition;
- 3) Whether GSA's contracting activity is violative of Congressional Intent, bypassing the 25% rule, and bypassing SBA's approval before removing contracts from the 8(a) Program.
- 4) Regulations, including 84 Fed. Reg. 60846-60881, regarding "Bona Fide" Offices

Finally, you asked for research on the existence of any pending or decided regulatory appeals or pending legislation relevant to this matter.

Accordingly, this memorandum will discuss the forgoing issues.

I. ISSUES

Under the Code of Federal Regulations, generally, once SBA has awarded a procurement as an 8(a) Program, any follow-on requirements must remain in the 8(a) program, unless SBA agrees to release it for non-8(a) competition.¹ GSA consolidated two 8(a) contracts² and solicited them as unrestricted, full and open requirements, without SBA's consent. Is GSA's consolidation action an improper conversion of an 8(a) contract into a non-8(a) procurement in violation of federal law?

Under the Code of Federal Regulations, generally, once SBA has awarded a procurement as an 8(a) Program, any follow-on requirements must remain in the 8(a) program, unless SBA agrees to release it for non-8(a) competition.³ GSA consolidated two 8(a) contracts⁴ and solicited them as unrestricted, full and open requirements, without SBA's consent. Does GSA's Use of Consolidation and Bundling Create Unfair Competition for Small Businesses?

II. BACKGROUND LEGISLATION

A. General Services Administration (GSA)

The General Services Administration (GSA) is an independent agency of the United States government established to help manage and support the basic functioning of federal agencies. Formed to streamline the administrative work of the Federal Government,⁵ GSA facilitates the Federal Government's purchase of high-quality, low-cost goods and services from commercial vendors, including small and disadvantaged businesses.

¹ See 13 CFR § 124.504(d).

² See 47PE0520F0001 and 47PE0519Q0016.

³ See 13 CFR § 124.504(d).

⁴ See 47PE0520F0001 and 47PE0519Q0016.

⁵ <https://www.gsa.gov/about-us/mission-and-background/our-missions-evolution>

The GSA is authorized by 40 USC 501⁶ to prescribe policies and methods governing the acquisition and supply of utility services for federal agencies, for periods not exceeding ten years. This authority includes related functions such as managing public utility services and representing federal agencies in proceedings before federal and state regulatory bodies. Additionally, GSA acquisition regulations and internal policies are consolidated into the General Services Acquisition Manual (GSAM). The GSAM is used to assist in GSA's fulfillment of immediate and long-term acquisition goals and priorities. GSA's supplementation of the Federal Acquisition Regulations is also contained within the GSAM.

B. *Small Business Administration (SBA). Section 8(a) Business Development Program*

To help small, disadvantaged businesses compete in the marketplace, the SBA created its 8(a) Program. The 8(a) Program is a business-assistance program intended to help *eligible* small and disadvantaged businesses with training, technical assistance, and government-contracting opportunities. With “leveling the playing field” for small businesses as its primary goal, the federal government aims to award at least five percent (5%) of all federal contracting dollars to small, disadvantaged businesses every year.⁷

The statutory authority for the 8(a) Program is contained within Sections 7(j), 8(a), and 8(d) of the Small Business Act of 1953,⁸ as amended at 15 USC § 637(a). Effective July 15, 2020, to qualify for the 8(a) program, eligible participants must:

⁶ 48 CFR § 41.103 (West 2021).

⁷ <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program>

⁸ Title 15 U.S. Code Section 637, Additional Powers,
[https://uscode.house.gov/view.xhtml?req=\(title:15%20section:637%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:15%20section:637%20edition:prelim))

- a) be a small business;
- b) not have previously participated in the 8(a) program;
- c) be at least fifty-one percent (51%) owned and controlled by U.S. citizens who are socially and economically disadvantaged;
- d) have a personal net worth of \$750,000 or less, adjusted gross income of \$350,000 or less, and \$6,000,000 or less in assets; and,
- e) demonstrate good character and potential to perform on contracts.⁹

Accordingly, a small business's *eligibility* for participation in the 8(a) Program is predicated on it being unconditionally owned and controlled by one or more socially and economically disadvantaged individuals, who are of good character and citizens of and residing in the United States, that demonstrate potential for success.¹⁰

A "socially and economically disadvantaged individual" is defined as:

[A]ny individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group, without regard to his or her individual qualities.¹¹

The circumstances under which a business will or will not be considered "controlled" by a "socially and economically disadvantaged individual" are specified by the regulations, found in the United States Code of Federal Regulations ("CFR"), Title 13, Parts 105, 121, and 124.¹²

⁹ <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program>

¹⁰ See 15 USC § 637 (West 2021).

¹¹ See 49 CFR § 26.5 (West 2021).

¹² Title 13 Code of Federal Regulation Section 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations, https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title13/13cfr124_main_02.tpl

In CFR, Title 13, Part 124, the federal government delineates who qualifies for the 8(a) program and defines who can be considered as being “socially and economically disadvantaged.”

Contracts may be awarded to the SBA for performance by eligible 8(a) participants on either a sole source or competitive basis. Acting under the authority of the program, the SBA certifies to an agency that SBA is competent and responsible to perform a specific contract. The contracting officer has the discretion to award the contract to the SBA based upon mutually agreeable terms and conditions.

1. Procurement Methods

In accordance with 13 CFR § 124.501(g), SBA must determine eligibility of participant before award of either sole source or competitive 8(a) contracts. Eligibility is based on 8(a) program criteria, including whether the Participant:

- Qualifies as a small business under the size standard corresponding to the NAICS code assigned to the requirement;
- Is in compliance with any applicable competitive business mix targets established or remedial measure imposed by 13 CFR § 124.509 that does not include the denial of future sole source 8(a) contracts;
- Complies with the continued eligibility reporting requirements set forth in 13 CFR § 124.112(b);
- Has a bona fide place of business in the applicable geographic area if the procurement is for construction;
- Has not received 8(a) contracts in excess of the dollar limits set forth in 13 CFR § 124.519 for a sole source 8(a) procurement;
- Has complied with the provisions of 13 CFR § 124.513(c) and (d) if it is seeking a sole source 8(a) award through a joint venture; and,
- Can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in 13 CFR § 124.510.

a. Competitive & Sole Source Contracts

13 CFR§ 124.507(a) states procuring activities will conduct competitions among and evaluate offers received from Participants in accordance with 48 CFR, chapter 1.

Competitive 8(a) contract can be awarded if the following applies:

- (a) reasonable expectation that at least two qualified 8(a) small businesses will submit offers;
- (b) the resulting contract can be awarded at a fair market price;
- (c) the government estimate exceeds \$7 million for manufacturing requirements or \$4 million for all other requirements; and,
- (d) the requirement hasn't already been accepted by the SBA as a sole-source 8(a) award on behalf of a tribally-owned or ANC-owned business.¹³

Sole-source 8(a) contracts may be awarded if:

- (a) it is determined that the qualified small business is responsible;
- (b) the resulting contract can be awarded at a fair market price; and,
- (c) the government estimate doesn't exceed \$7 million for manufacturing requirements or \$4 million for all other requirements. Contracts valued less than \$150,000 are automatically set aside for small businesses.¹⁴

b. Consolidation and Bundling of Procurements

Consolidation, is defined in 15 U.S.C. § 657q(a)(2), as:

[T]he use of a solicitation to obtain offers for a single contract or a multiple-award contract to satisfy two (2) or more requirements of the federal agency for goods or services that have been provided to or performed for the federal agency under two (2) or more separate contracts lower in cost than the total cost of the contract for

¹³ <https://www.sba.gov/partners/contracting-officials/contracting-program-administration/8a-program-administration>

¹⁴ *Id.*

which the offers are solicited; or to satisfy requirements of the federal agency for construction projects to be performed at two (2) or more discrete sites.¹⁵

Bundling is the consolidating of two (2) or more requirements for supplies or services, previously provided or performed by a small business under separate small contracts, into a solicitation for a single contract (including Multi-Agency Contracts) that is likely to be unsuitable for award to a small business concern.¹⁶

An acquisition strategy including consolidation of contract requirements with a total value of more than \$2 million may not be carried out unless the following is provided:

- a. Market research;
- b. Identified alternative contracting approaches are identified;
- c. A written determination of necessity and justification;
- d. Identified negative impacts on small business concerns as a result of the acquisition strategy; and,
- e. Ensured steps to include small business concerns into the acquisition strategy.¹⁷

c. Follow-On Contracts (13 CFR §124.3)

As noted above, pursuant to 13 CFR §124.504(d)(1), procurement awarded as 8(a) contract must remain in the 8(a) program unless SBA agrees to release it for non-8(a) competition. For SBA to agree to release, the following requirements must be considered:

- a. whether the scope has changed significantly, requiring meaningful different types of work or different capabilities;

¹⁵ 15 USC 657(q)(a)(2)(West 2021).

¹⁶ 15 U.S.C. § 632(o)(West 2021).

¹⁷ 15 USC § 657q(c)(1)(A-E)(West 2021).

- b. whether the magnitude or value of the requirement has changed by at least twenty-five (25) percent for equivalent periods of performance; and,
- c. whether the end user of the requirement has changed.

However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the twenty-five (25) percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.¹⁸ In addition, SBA's approval must be received prior to releasing any follow-on procurement from the 8(a) program.¹⁹

2. *The SBA Office of Business Development's Standard Operating Procedure ("SOP"). SOP 80 05 5*

The SBA Office of Business Development's SOP 80 05 5,²⁰ provides interpretation of both the statute and regulations for implementing the 8(a) program. It also provides internal policy and procedural guidance for SBA employees to use in performing their official duties. Further, it also delineates the responsibilities of SBA's Headquarters and field offices in implementing the 8(a) program. In cases of programmatic issues, the order of precedence applies as follows:

1. Statute;
2. Regulations;
3. Legal Decisions; and,
4. the SOP.

Participation in the 8(a) Program is divided into two (2) phases, over nine (9) years:

¹⁸ 13 CFR § 124.3 (West 2021).

¹⁹ 13 CFR § 124.504 (West 2021).

²⁰ SBA Office of Business Development Standard Operating Procedure, September 23, 2016, <https://www.sba.gov/document/sop-80-05-office-business-development>

- 1) Phase 1 - a four (4) -year developmental stage; and,
- 2) Phase 2 - a five (5) -year transition stage.

During participation, program eligibility must be maintained. If any changes occur that would adversely affect eligibility, the concern must inform SBA in writing, especially if those changes affect economic disadvantage and ownership and control.²¹

Additionally, a business may be terminated from the program before the nine-year term expires “for good cause.”²²

3. SBA 8(a) Partnership Agreement

In 2012, GSA entered into a partnership agreement (the “Agreement”)²³ with the SBA to streamline the contract-execution process between the SBA, GSA, and 8(a) Program participants.²⁴ The Agreement outlines how authority is delegated amongst the agencies and establishes the basic procedures for expediting the award of 8(a) contract requirements.

GSA’s role under the Agreement:

- (a) receiving and retaining SBA’s delegation of contract execution and review functions;
- (b) adhering to all provisions of contractual assistance identified in 13 CFR §§124.501 – 124.520, as well as provisions of FAR Subpart 19.8;
- (c) determining suitable requirements for offering to the 8(a) program in accordance with FAR Subpart 19.8;

²¹ See 13 CFR § 124.112(a)(West 2021).

²² See 13 CFR § 124.303(a) (West 2021).

²³ Partnership Agreement, U.S. SBA and GSA, Oct. 17, 2012, <https://www.sba.gov/document/support--sba-and-agencies-partnership-agreements>

²⁴ See 13 CFR §124.501 (West 2021).

- (d) retaining responsibility for compliance with the limitations on subcontracting requirements, FAR 52.219-14, and GSA regulations; and,
- (e) performing all contract administrative duties for contract awards, modifications, options, and purchase orders awarded or issued under the 8(a) program.

SBA's role under the Agreement:

- (a) delegate its authority to GSA to re-delegate to all its warranted contracting officers, authority to arrange for performance of procurement contracts by eligible 8(a) Participants;
- (b) implement its responsibilities through uniform procedures for use by all SBA offices;
- (c) provide training for GSA contracting officers and small business specialists;
- (d) review the GSA's offering letters, issue acceptance or rejection letters, and make eligibility determinations for awards of sole-source procurements and competitive acquisitions, and acquisitions valued at or below the Simplified Acquisition Procedures Threshold;
- (e) review and approve all proposed joint-venture agreements involving 8(a) participants;
- (f) hold appeal authority in accordance with FAR §19.810; and,
- (g) select appropriate 8(a) participants when GSA submits an opening offering letter for sole source.

C. Government Accountability Office

The Government Accountability Office (“GAO”) is an independent agency that examines the operations of the federal government and its use of taxpayer dollars.²⁵ GAO engages in audits and investigations that produce objective, fact-based information to help improve efficiency within the Government, as well as save money. Additionally, through the Competition in Contracting Act of 1984 (“CICA”), GAO is authorized to review and decide the outcome of federal contract award-related protests²⁶. Accordingly, GAO is required to provide cost-effective and prompt resolutions to protests²⁷ filed against federal agencies’ contract procurement solicitations and/or awards. GAO must investigate and determine if the solicitations, proposed awards, or awards comply with federal statutes and regulations. Based on the findings, GAO may dismiss such protest or recommend actions for the federal agency under investigation.

III. FACTS AND PROCEDURAL HISTORY

A. Recent Pre-Award Protests Against GSA

On March 24, 2021, Yukon Fire Protection Services, Inc. (“Yukon”), an Alaskan-based SBA 8(a) contractor, issued a pre-award protest of GSA Solicitation No.47PD0321Q0002 (Complete Facilities Maintenance Services Mississippi) to the GAO. The protest challenged the consolidation of two current 8(a) contracts and GSA’s alleged lack of compliance with congressional intent to foster small-business participation as prime contractors, subcontractors, and suppliers. GAO dismissed the claim on April 27, 2021, citing GSA’s corrective actions to

²⁵ <https://www.gao.gov/about/what-gao-does>

²⁶ See 31 USC § 3554 (West 2021).

²⁷ See FAR 33.104 (West 2021).

take place regarding the solicitation because of the protest. Those corrective actions included further coordination with SBA, the re-issuance of the solicitation, and the reopening of the period for submission of quotations.

On August 4, 2021, TeamGov, Inc., a Maryland-based certified SBA 8(a) contractor, filed a pre-award protest (“Protest”) with the GAO regarding GSA Solicitation 47PD0121Q0007 (Suitland Census Headquarters North/South Operations & Maintenance Related Services). The requirements of the solicitation were once performed through an SBA 8(a) set-aside Indefinite Delivery Contract (“IDC”).

The new solicitation issued the requirements as an unrestricted, openly competed Blanket Purchase Agreement (“BPA”). TeamGov’s Protest claimed the solicitation was defective due to the improper removal of 8(a) contract under the SBA 8(a) program, and unlawful conversion of the contract to an unrestricted competition solicitation, without the SBA’s concurrence or consent.

On August 9, 2021, GAO dismissed the protest, finding that GSA is exempt from seeking the SBA’s concurrence in accordance with FAR 8.402(a), discussed below.

B. Recent Procurements Outside of the 8(a) Program

On November 26, 2019, GSA issued a request for quotations (solicitation 47PD0120Q0003) from holders of the GSA FSS facilities maintenance and management contracts for the facilities, engineering, operation, and maintenance of the Orville Wright, Switzer, Cohen, Wilbur Wright, and Lyndon Federal Buildings located in Washington, District of Columbia (also known as the “DC5”). This procurement was solicited as a BPA on a full and open, unrestricted competition basis. The previous operations and maintenance of the DC5 was performed by Trademasters Service, Inc. (“Trademasters”), a Virginia-based 8(a) contractor, under a contract awarded in 2017 as a small business set-aside through the 8(a) program.

On February 8, 2020, Trademasters filed a pre-award protest against GSA challenging the issuance of the solicitation by alleging improper acquisition planning and incomplete specifications. Specifically, Trademasters challenged GSA’s decision to remove the incumbent contract from the 8(a) program. They claimed GSA improperly removed the contract from the program by considering the existing requirements in place. In addition, Trademasters alleged that GSA failed to coordinate with and seek SBA’s approval. Trademasters also advocated that the requirements of the solicitation could have been accomplished through their contract in lieu of issuing solicitation for services. GSA rebutted that the original contract issued to Trademasters was a lowest price, technically acceptable bid which only allowed for minimal service and a new contracting methodology would allow for “*high performance and sustainable operations*” that would better meet the agency’s needs.²⁸ As a result, GSA determined that issuing a BPA was in the organization’s best interest. Furthermore, since GSA decided to move the existing contract to the FSS, coordination with SBA was not required.²⁹

On June 3, 2020, GAO dismissed the claims, citing GSA did what was in its best interest and did not violate any statute and/or regulation. Additionally, GAO determined that since Trademasters recently had graduated from the 8(a) program, the protest regarding GSA’s compliance with the 8(a) program requirements held no bearing, due to Trademasters being unable to compete in a 8(a) set-aside competition, if it existed. Consequently, the solicitation remained unrestricted on the FSS and a BPA was established in February 2021, granting the solicitation to Emcor Government Services, Inc., a Virginia-based company³⁰.

²⁸ *In Re: Trademasters Service, Inc.*, B-418522 (June 30, 2020), <https://www.gao.gov/assets/b-418522.pdf>

²⁹ *See FAR 8.404(a)*(West 2021).

³⁰ Blanket Purchase Agreement 47QSHA19D0044-47PD0121A0002, <https://govtribe.com/award/federal-idv-award/blanket-purchase-agreement-47qsha19d0044-47pd0121a0002>

In 2018, GSA sought sources for market research via 47PM0818R0021 for the operations and maintenance of the Saint Elizabeth's Hospital West Campus in Washington, District of Columbia. Like the DC5 project, the ensuing work was performed under SBA 8(a) set-aside contract; however, its follow-on market research solicitation was extended to woman-owned, small, and economically disadvantaged businesses within the small business set-aside program³¹. The follow-on market research solicitation did not result in a contract award; however, in 2019, a solicitation was issued under the FSS as a BPA with the same base requirements. Due to the requirements being moved to the FSS as a BPA, the solicitation was issued as open, unrestricted competition (Solicitation 47PM0619Q0015). This solicitation and GSA's procurement strategy were not challenged by any interested party and a contract was ultimately awarded – again – to Emcor Government Services, Inc. on September 9, 2019, in the amount of \$88.9 million.³²

IV. DISCUSSION AND ANALYSIS

A. Is GSA's Consolidation Action an Improper Conversion of an 8(A) Contract into A Non-8(A) Procurement in Violation of Federal Law?

Under the Code of Federal Regulations, generally, once SBA has awarded a procurement as an 8(a) Program, any follow-on requirements must remain in the 8(a) program, unless SBA agrees to release it for non-8(a) competition.³³ Here, GSA consolidated two 8(a) contracts and solicited them as unrestricted, full and open requirements, without SBA's consent.

³¹ Source Sought for Saint Elizabeth West Campus Operations and Maintenance <https://govtribe.com/opportunity/federal-contract-opportunity/source-sought-for-saint-elizabeth-west-campus-operations-and-maintenance-47pm0818r0021>

³² Blanket Purchase Agreement 47QSHA19D0044-47PD0319A0007, <https://govtribe.com/award/federal-idv-award/blanket-purchase-agreement-47qsha19d0044-47pd0319a000>

³³ See 13 CFR § 124.504(d).

Some 8(a) Participants, including TeamGov, aver that in some cases, consolidation has negatively impacted small, disadvantaged business, particularly within the SBA 8(a) Business Development Program.³⁴

Recent consolidations of existing Operations and Maintenance procurements have deemed projects as “new requirements,” resulting in the removal of existing 8(a) set-aside contracts from its respective small business development program to open, competitive solicitations. This has resulted in multiple pre-award protest of solicitations challenging GSA’s adherence to federal regulations regarding both contract requirement consolidation and 8(a) contract removal.

GSA’s consolidation of contract requirements is intended to provide a more modernized and simplified procurement process for the agency, but should not create negative impacts to its small, disadvantaged business vendors, particularly within the SBA 8(a) Business Development Program. Thus, generally, conversion of the procurements from the 8(a) Program to open-competition procurements are allowed, with the SBA’S consent, pursuant to 13 CFR §124.504(d)(1), which provides, “where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD program, unless SBA agrees to release it for non-8(a) competition.”³⁵ Moreover, SBA approval also is required for removal, pursuant to FAR 19.815(a):

Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless ... SBA agrees to release the requirement from the 8(a) program in accordance with 13 CFR 124.504(d).

However, recent removals have converted set aside contracts to either Federal Supply Schedules (“FSS”) or BPAs, thus eliminating the requirements of the 8(a) release. *See* for example, *In Re: Coast to Coast Computer Products, Inc* (Hereafter, “CTC”).³⁶

³⁴ See Appendix, Ex. A (Chart of alleged companies affected by GSA’s action, provided by TeamGov).

³⁵ 13 CFR §124.504(d)(1)(West 2021).

³⁶ *In Re: Coast to Coast Computer Products, Inc.*, B-417500 (July 29, 2019)

In *CTC*, a small business protested the terms of GSA’s request for quotations for the establishment of multiple-award blanket purchase agreements (“BPAs”) for IT supplies and services. The protester argued, *inter alia*, that the solicitation “improperly consolidates numerous existing contracts for IT supplies and services, and that the agency failed to comply with a statutory requirement to consider the consolidation’s potential economic effect on small businesses.”³⁷

GSA did not conduct a consolidation analysis of its proposed BPAs before issuing the RFQ,³⁸ arguing that a consolidation analysis was not required because BPAs are not contracts. As such, GSA contended that the Small Business Jobs Act’s (“SBJA”) requirements do not apply to the establishment of BPAs.³⁹ GSA defended the structure of its procurement by arguing that a subtle technicality built into the wording of the consolidation statute exempted this procurement from the consolidation analysis. Specifically, GSA argued that because the consolidation statutes referred to “contracts,” it was not required to conduct a consolidation analysis because, as a legal matter, a BPA is not a “contract.” In support of this position, GSA relied on a final Department of Defense (“DoD”) rule issued, amending the FAR provisions to institute a government-wide policy on consolidation and bundling.⁴⁰ The preamble to this final rule discusses BPAs, and clarifies:

[T]he statutory definition of “bundling of contract requirements” at 15 U.S.C. § 632(o), and of “consolidation of contract requirements” at 15 U.S.C. § 657q, as well as SBA’s implementing regulations at 13 C.F.R. § 125.1(c) refer only to “contracts” when addressing bundling and consolidation, and BPAs are not

³⁷ See *id.*, p. 2.

³⁸ The RFQ was issued under the GSA’s Federal Supply Schedule (“FSS”) utilizing Federal Acquisition Regulation (“FAR”) subpart 8.4 procedures discussed hereinabove.

³⁹ *In Re: Coast to Coast*, *supra*, page 5.

⁴⁰ *Id.*, citing, 81 Fed. Reg. 67763 (Sept. 30, 2016).

contracts.” Accordingly, neither the statute nor the implementing regulations apply the requirement for a consolidation and bundling analysis to BPAs.⁴¹

The SBA disagreed with GSA and argued:

[T]here is a consolidation in this case “because the eventual orders issued off the BPA will be limited to competition among the nine BPA awardees,” and the term “contract” in the consolidation definition “applies here to the IT70 contracts affected by the BPA.”

Notwithstanding SBA’s position, the GAO disagreed and found that SBA’s interpretation was not supported by the applicable authority. Specifically, GAO noted the final DoD rule mentioned above was issued **after** SBA incorporated regulatory changes to the SBJA regarding contract consolidation and bundling.⁴²

GAO found:

SBA’s own regulations at 13 C.F.R. § 125.1, provide that “contract” “has the same definition as set forth in FAR § 2.101” and “includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (e.g., a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).” 13 C.F.R. § 125.1 (emphasis added).

Ironically, GAO’s determination concludes that consolidation analysis for BPAs is to be performed at the task-order level, finding that task orders issued **under** the BPA **are** contracts, but the BPAs themselves are not contracts.^{43 44} Accordingly, GAO upheld GSA’s defense that it did not violate any statutory requirements and denied CTC’s Protest.

⁴¹ *Id.*, page 5 (internal citations omitted).

⁴² *See* 78 Fed. Reg. 61114 (Oct. 2, 2013).

⁴³ *In Re: Coast to Coast, supra*, page 6.

⁴⁴ Notably, pursuant to 13 CFR § 121.404, a BPA likewise is not considered a contract. *See* 13 CFR § 121.404(a)(2) (West 2021).

This contradicts GSA Acquisition Manual “(GSAM”), which states GSA Form 2689, Small Business Analysis Record must be used as record evidence that consideration was given to small and disadvantaged businesses, is not required for acquisitions with mandatory sources; acquisitions, including contracts, orders, and BPAs, that have been set aside for a small business program specified in FAR 19.203 unless consolidated, bundled or substantially bundled; or orders or BPAs under \$6 million, unless consolidated, bundled or substantially bundled.⁴⁵ In the *Coast to Coast Computer Products, Inc.* case, the value of the consolidated BPA was \$5.5 million, less than the \$6 million stipulation, and the requirements were consolidated. These factors, at a minimum, required GSA Form 2689 to be prepared and added to the file. However, the court did not acknowledge the conflicting requirements of the GSAM because the federal statute and court rulings supersede it.

Consequently, such procurement method is exempt from the regulations required for follow-on contracts. As such, these conversions from 8(a) contracts to FSSs and BPAs are becoming more prevalent. This procurement is governed by FAR Subpart 8.4, Section 8.404(a), which states, in pertinent part, that Simplified Acquisition Procedures do not apply to BPAs or orders placed against Federal Supply Schedules contracts....”⁴⁶

This means follow-on contract compliance rules for existing 8(a) contracts are not necessary. This approach can be perceived as a bypass, but recent court decisions⁴⁷ have made the burden of proof harder for small businesses who have been impacted by such decision. However,

⁴⁵ See GSAM 519.502-70(f)(1-3).

⁴⁶ FAR Subpart 8.4, Section 8.404(a)(West 2021).

⁴⁷ See *In Re: Coast to Coast Computer Products, Inc.*, B-417500 (July 29, 2019).

as a means of transparency, GSA is now required to provide public notification of the determination rationale for consolidating or bundling.⁴⁸

B. Does GSA's Use of Consolidation and Bundling Create Unfair Competition for Small Businesses?

Without further substantiation, it cannot be determined that GSA's use of its authority to consolidate and bundle procurements has created unfair competition for small businesses. Yet, because combining two (2) or more contract requirements into a single requirement can exclude certain small businesses as potential prime contractors due to capability limitations, the potential negative effects on small businesses have drawn special attention from current 8(a) Program participants concerned about future contracting opportunities and performance qualifications. Some have filed protests.

However, GAO has denied protests, in cases where, consistent with the relevant statutory requirements, the agency reasonably considered the potential impact on small businesses and concluded that the consolidation would result in substantial governmental benefits.⁴⁹

For example, in *In Re: American Toner & Ink; KPaul Properties, LLC; Dolphin Blue, Inc.; Capital Shredder Corp.* ("American Toner"), the protesters, all small businesses, argued that a procurement for a government-wide provision of office supply items improperly consolidated numerous existing contracts into a smaller pool of multiple-award contracts, and that GSA did not comply with a statutory requirement to consider the consolidation's potential economic effect on small businesses.

⁴⁸ See FAR Subpart 7.107-5.

⁴⁹ See for example, *In Re: American Toner & Ink; KPaul Properties, LLC; Dolphin Blue, Inc.; Capital Shredder Corp.*, B-409528.7; B-409528.11; B-409528.14; B-409528.18 (June 9, 2014).

GAO recognized and discussed in detail, the SBJA,⁵⁰ which requires agencies to consider the effect that consolidation of agency contract requirements (over \$2 million) has on small businesses. Specifically, prior to issuing a solicitation that consolidates contract requirements, the SBJA requires agencies to conduct market research, assess and identify the impact of contract consolidation on small businesses, and make a written determination that the consolidation is “necessary and justified,” and that “the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches” identified by the agency.⁵¹

In *American Toner*, before issuing the solicitation, GSA prepared an eleven (11) -page Consolidation Analysis, conducted market research, identified alternative contract approaches that would involve less consolidation, and outlined its views on the negative impact the consolidation strategy would have on small business. GSA concluded that the benefits to be gained through the consolidated solicitation outweighed the potential negative impact to small business. SBA joined the protesters, arguing that GSA’s Consolidation Analysis did not adequately or meaningfully address the SBJA’s requirements.

GAO reviews challenges to such solicitations to determine whether the approach is reasonably required to satisfy the agency’s needs.⁵² It recognizes that “bundling may serve to meet an agency’s needs where the agency reasonably determines that consolidation will result in significant cost savings or operational efficiencies”⁵³ Specifically, GAO will look at whether GSA

⁵⁰ Small Business Jobs Act of 2010 (SB Jobs Act), Pub. L. No. 111-240, 124 Stat. 2504 (2010) (codified at 15 U.S.C. § 657q).

⁵¹ See 15 U.S.C. § 657q(c)(1), (2).

⁵² See *American Toner*, *supra*, p.7, citing, *2B Brokers et al.*, B-298651, Nov. 27, 2006, 2006 CPD ¶ 178 at 9.

⁵³ See *American Toner*, *supra*, p.7, citing, *2B Brokers et al.*, B-298651, (Nov. 27, 2006), 2006 CPD ¶ 178 at 9, and *Teximara, Inc.*, B-293221.2, (July 9, 2004), 2004 CPD ¶ 151 at 6.

has conducted market research, and has reasonably found that the consolidation is “necessary and justified,” and that the benefits “substantially exceed” those of other contracting approaches.⁵⁴

GAO concluded that GSA’s Consolidation Analysis was reasonable, and that it met the requirement under the SBJA to perform an analysis addressing whether the benefits of the consolidation acquisition strategy “substantially exceed” the benefits of each of the possible alternative contracting approaches, pursuant to 15 U.S.C § 657q(c)(2)(A). Specifically, GSA conducted market research and considered alternatives to the procurement approach set forth in the solicitation. Further, the agency prepared a consolidation analysis which recognized that there was a potential for a reduction in sales for small business contractors who did not receive awards under the solicitation. However, GSA concluded that the benefits to be gained through the solicitation outweighed the potential negative impact to small business concerns.

Accordingly, GAO found that GSA’s analysis addressed the relevant requirements of the SBJA and denied the protests.

Over the past few fiscal years, GSA has determined that consolidation and bundling of numerous contracts was necessary and justified, considering both the quantitative and qualitative benefits. Moreover, the GAO overwhelmingly approved such consolidations, where the benefits realized because of the consolidation outweighs any anticipated or perceived negative impacts to small businesses. For example:

2020 Consolidations

09/02/2020 - FAS Marine Corps Travel Management Company (TMC)

Analyzed the benefits of consolidating four (4) separate contracts into one (1) Task Order for a term of five (5) years, with one (1) year base period plus four (4) one (1) -year option periods. GSA found that consolidation is necessary and justified. Consolidation of the requirements will result in substantial benefits estimated at 29.14%. The benefits exceed the requirement per FAR 7.107-2(d) of 10% of the

⁵⁴ See *American Toner*, *supra*, p.7, citing, 15 U.S.C. § 657(q)(c)(2).

estimated contract value for contracts below \$94 million. In addition to the significant quantified cost savings, the task order will benefit from potential lower contract pricing, an expedited and simplified ordering process, shorter Procurement Acquisition Lead Time (PALT), and streamlined Government requirements and contract administration. The administrative savings and risk mitigation that will be realized because of the consolidated task order outweigh any perceived negative impacts to small business. Additionally, due to size and scope requirements, a set aside exclusively to a small business is not feasible.

06/15/2020 - FAS FEDSIM Military and Family Life Counseling (MFLC) Program

Analyzed the benefits of consolidating three (3) separate Task Orders (TOs) into two (2) contracts. This consolidation is determined necessary and justified based on both qualitative and quantitative benefits. Consolidation of the requirements will result in substantial benefits estimated at 5.06% percent of the total value of the MFLC requirement. The benefits exceed the requirement per Federal Acquisition Regulation (FAR) 7.107-2(d) of five percent (5%) of the estimated contract value, for contracts above \$94 million. In addition to the significant quantified cost savings, the contract will benefit from increased staffing performance and reduction in lost assignment days. The cost savings and other benefits realized because of this consolidated order outweigh any anticipated negative impact on small business.

05/06/2020 - FAS Army CONUS Travel Management Company (TMC)

Analyzed the benefits of consolidating five (5) separate contracts into one (1) Task Order for a term of five (5) years with one (1) -year base period plus four (4) one (1) -year option periods. GSA has found the consolidation necessary and justified, considering both quantitative and qualitative benefits. Consolidation of the requirements will result in substantial benefits estimated at 10.07% percent. The benefits exceed the requirement per Federal Acquisition Regulation (FAR) 7.107-2(d)(1)(ii) of five percent of the estimated contract value when the contract value exceeds \$94 million. In addition to the significant quantified cost savings, the contract will benefit from increased efficiency, reduced acquisition cycle times, enhanced performance, and better terms and conditions, the cost and administrative savings that will be realized because of the consolidated task order outweigh any perceived negative impacts on small businesses.

02/14/2020 - PBS R3 Facilities Engineering, Operations & Management Services

Analyzed the benefits of consolidating three (3) separate contracts into one (1) contract. A BPA will first be procured and an order for a bundled procurement combining three (3) existing contracts will be immediately awarded. GSA has found bundling necessary and justified. Consolidation of the requirements will result in substantial benefits estimated at 12.04% over a period of 10-years. The benefits exceed the requirement per FAR 7.107-3(d)(1) of 10% of the estimated contract value for contracts below \$94 million. The contract will benefit from

reduced administrative costs and contract duplication through increased efficiencies; as well as, expansion of the collection and sharing of government-wide buying data, leading to better informed business decisions and reduction of costs and inefficiencies. The cost savings and other benefits that will be realized because of this consolidated contract outweigh the negative impacts to small business.

2019 Consolidations

09/11/2019 - FAS Multiple Award Schedules (MAS) Program

Analyzed the benefits of consolidating the twenty-four (24) GSA-managed Schedule solicitations into one (1) solicitation for products, services, and solutions. This consolidation is justified as being critical to the agency's mission success (see FAR 7.107-2(e)(1)(i)). Though quantitative benefits of this initiative cannot be reasonably estimated, a number of significant qualitative benefits are anticipated. These benefits include improvements that will save time, promote efficiency, reduce acquisition cycle times, and simplify the terms and conditions of the MAS program. This consolidation will establish a more intuitive structure that streamlines customer access to contract offerings and eliminates duplication of items throughout the program. Additionally, this initiative will make it easier and more efficient for industry to do business with federal, state, and local governments. Overall, the consolidation of the 24 GSA-managed schedule solicitations into one solicitation is critical to the success of GSA's mission. This approach provides the most optimal solution, and the benefits realized because of this consolidated solicitation outweigh any possible negative impacts to small business.

04/09/2019 - FAS R7 Air Force Civil Engineering Center (AFCEC) Environmental Services

Realized the benefits of issuing one (1) single Programmatic Consolidation rather than four (4) single consolidations. GSA has found this consolidation necessary and justified. Consolidation of these requirements will result in an overall substantial benefit estimated at 14.89%. The benefits exceed the requirement per Federal Acquisition Regulation (FAR) 7.107-2(d) of ten percent of the estimated contract value, when the contract value exceeds \$94 million. In addition to the significant quantified cost savings, the contract will benefit from increased efficiency, reduced acquisition cycle times, enhanced performance, and better terms and conditions. The cost savings and other benefits that will be realized because of this consolidated TO outweigh the negative impacts to Small Business (SB).

02/25/2019 - FAS FEDSIM Travel Issuance and Overseas Citizens Assistance (TIOCA)

Analyzed the benefits of consolidating four (4) separate contracts into one (1) task order. GSA has found the consolidation necessary and justified, considering both

quantitative and qualitative benefits. Consolidation of the requirements will result in substantial benefits estimated at 12.9 percent. The benefits exceed the requirement per Federal Acquisition Regulation (FAR) 7.107-2(d)(1)(ii) of five percent of the estimated contract value, when the contract value exceeds \$94 million. In addition to the significant quantified cost savings, the contract will benefit from increased efficiency, reduced acquisition cycle times, enhanced performance, and better terms and conditions. The cost savings and other benefits that will be realized because of this consolidated to outweigh the negative impacts to small business.

01/11/2019 - FAS FEDSIM RCAS-FMS ITEMSS Task Order

Analyzed the benefits of consolidating three (3) separate Task Orders (TOs) into one (1) TO for the planned Information Technology Enterprise Management Systems Solution (ITEMSS) TO on behalf of the Product Lead (PL) Reserve Component Automation System-Force Management System (RCAS-FMS). The consolidated TO will sustain current software applications and hardware as well as the enhancements for current applications and RCAS, FMS, and Defense Readiness Reporting System-Army (DRRS-A) systems. Two of the TOs encompassed in the consolidated TO were issued by office of the Army Contracting Command - Aberdeen Proving Ground (ACC-APG), while the third and largest TO included in this new consolidated effort was issued by FEDSIM. GSA has found the consolidation necessary and justified. Consolidation of the requirements will result in substantial benefits estimated at 10 percent. The benefits exceed the requirement per Federal Acquisition Regulation (FAR) 7.107-2(d)(1)(ii) of five percent of the estimated contract value, when the contract value exceeds \$94 million. In addition to the significant quantified cost savings, the contract will benefit from increased efficiency and communication, reduced acquisition cycle times, enhanced performance realizing decreased redundancy, and increased contractor accountability. The cost savings and other benefits that will be realized because of this consolidated TO will outweigh the negative impacts to small business.

2018 Consolidations

11/29/2018 - PBS R7 Special Programs Division Repair and Alterations IDIQ Unrestricted (Nationwide)

Analyzed the benefits of consolidating separate contracts and orders into one (1) Multiple Award Indefinite-Delivery Indefinite-Quantity (IDIQ) contract for repair and alteration (R&A) services to be completed nationwide. This IDIQ will be utilized by GSA, PBS Special Programs Division contracting officers to support both PBS-funded and tenant agency contract needs. GSA found the consolidation necessary and justified. Consolidation of the requirements will result in quantifiable benefits estimated at 1.22%. In accordance with FAR 7.107-2(e)(1)(i) and (ii), although the benefits do not exceed the percentage listed in FAR 7.107-2(d)(3) of

10% of the estimated contract value for administrative savings, the use of IDIQ vehicles has proven to be mission critical for our region. In addition to the quantified cost savings, GSA will benefit from reduced procurement lead times, a simplified ordering process, and a more efficient process for obtaining security clearances for pre-qualified contractors for long-range resource planning. The cost savings and other benefits that will be realized because of this consolidated contract outweigh any possible negative impacts to small business.

11/16/2018 - PBS R7 Special Programs Division Repair and Alterations IDIQ Small Business (Arizona, New Mexico, Texas)

Analyzed the benefits of consolidating separate contracts and orders into one (1) Multiple Award Indefinite-Delivery Indefinite-Quantity (IDIQ) contract for repair and alteration (R&A) services to be completed in Arizona, New Mexico, and Texas. This IDIQ will be utilized by GSA, PBS Special Programs Division contracting officers to support both PBS-funded and tenant agency contract needs. GSA found the consolidation necessary and justified. Consolidation of the requirements will result in quantifiable benefits estimated at 1.67%. In accordance with FAR 7.107-2(e)(1)(i) and (ii), although the benefits do not exceed the percentage listed in FAR 7.107-2(d)(3) of 10% of the estimated contract value for administrative savings, the use of IDIQ vehicles has proven to be mission critical for our region and the procurement will be a total small business set-aside. In addition to the quantified cost savings, GSA will benefit from reduced procurement lead times, a simplified ordering process, and a more efficient process for obtaining security clearances for pre-qualified contractors for long-range resource planning. The cost savings and other benefits that will be realized because of this consolidated contract outweigh any possible negative impacts to small business.

08/30/2018 - Air Force's (AF) Air Combatant Command (ACC) Intelligence Surveillance Reconnaissance (ISR) Support Services

Analyzed the benefits of consolidating four separate Task Orders (TO) into one TO on behalf of the Air Force's (AF) Air Combatant Command (ACC). The consolidated TO will provide an enterprise-wide solution, bolstering the United States' (U.S.) security interests and positions, both at home and abroad, and protecting U.S. interests from emergent threats. GSA has found the consolidation necessary and justified, considering both quantitative and qualitative benefits. Consolidation of the requirements will result in substantial benefits estimated at 18 percent. The benefits exceed the requirement per Federal Acquisition Regulation (FAR) 7.107-2(d)(1)(ii) of five percent of the estimated contract value, when the contract value exceeds \$94 million. In addition to the significant quantified cost savings, the contract will benefit from increased efficiency and communication, reduced acquisition cycle times, enhanced performance realizing decreased redundancy, and increased contractor accountability. The cost savings, efficiency, and improved security posture benefits that will be realized because of this consolidated TO will outweigh the negative impacts to small business.

07/30/2018 - (EPA) Office of Chief Financial Officer (OCFO) Office of Technology Solutions (OTS) Information Technology (IT) Support Services

Analyzed the benefits of consolidating two (2) separate task orders into one (1) task order.... GSA has found the consolidation necessary and justified. Consolidation of the requirements will result in substantial benefits estimated at 17.35%. The benefits exceed the requirements per Federal Acquisition Regulation (FAR) 7.107-2(d) of 10% of the estimated contract value for contracts below \$94 million. In addition to the significant quantified cost savings, the task order will benefit from one set of program deliverables, cross utilization of contractor staffing, and reduced duplication of effort. The cost savings and other benefits that will be realized because of this consolidated task order outweigh the negative impacts to small business.

04/16/2018 - FEDSIM, TROJAN STRONG Family of Systems (FoS) Task Order, on behalf of Army's Communication-Electronic Research and Development Center (CERDEC); Intelligence Information Warfare Directorate (I2WD)

Analyzed the benefits of consolidating three (3) separate Task Orders (TO) into one (1) TO. GSA anticipates a savings of 17% will result from the consolidation. The cost savings and efficiency benefits that will be realized because of this consolidated TO will outweigh the negative impacts to small business.

04/12/2018 - Intelligence Planning and Analysis Support

Analyzed the benefits of consolidating four (4) Task Orders into one (1) consolidated Task Order (TO) ... GSA has found the consolidation necessary and justified. Consolidation of the requirements will result in substantial benefits estimated at 18 percent. The benefits exceed the requirement per Federal Acquisition Regulation (FAR) 7.107-2(d) of 5 percent of the estimated contract value, if the value exceeds \$94 million. In addition to the significant quantified cost savings, the TO will have qualitative benefits that includes increased efficiency, reduced redundancy, better communication, and increased accountability. The cost savings and efficiency benefits that will be realized because of this consolidated Task Order will outweigh the negative impacts to small business.

As shown above, numerous GSA determinations have converted existing 8(a) contracts into open, competition procurements.⁵⁵ According to said determinations, approved consolidation and bundled contracts have exceeded FAR 7.107-2(d)(1)(ii) required benefit of five percent (5%)

⁵⁵ FY17-20 Consolidating and Bundling Determinations, <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/consolidation-bundling-determinations>

of the estimated contract value as well as increased efficiency, reduced acquisition cycle times, enhanced performance, and better terms and conditions. The negative impacts on small businesses will also be outweighed by the cost and administrative savings realized because of consolidation.

Therefore, the authority granted to GSA provides full leverage to consolidate and bundle existing contracts as long as the statutory requirements are met. Additionally, their decisions to release contracts from 8(a) procurements to FSS or BPAs are authorized, as mentioned above.

In the instant matter, GSA acknowledged their lack of coordination with SBA in the removal of the 8(a) contract; however, their lack of coordination with SBA does not constitute unlawful acts on the agency. Pursuant to FAR 19.815, procurement awarded as 8(a) contract must remain in the 8(a) program unless there is a mandatory source or SBA agrees to release the requirement from the 8(a) program in accordance with 13 CFR §124.504(d). According to the mandatory source rule (FAR 8.002), a federal agency must procure a listed government source or publication to satisfy its supplies and services requirements. Particularly for services, the mandatory source must be selected from the Procurement List maintained by the Committee From People Who Are Blind or Severely Disabled⁵⁶. This list contains non-profit agencies that utilize people who are blind or significantly disabled to provide services to federal customers.

The solicitations for both protests fell under Operations and Maintenance (O&M) Services. The scopes of their original 8(a) included O&M of three (3) buildings in Complete Facilities Maintenance Services of Mississippi and O&M of approximately 2.5 million square feet of office space, parking lots, a childcare center, and guard booths at Suitland Census Headquarters in Maryland. Due to the magnitude of both scopes, it can be concluded that the sources listed on the Procurement List maintained by the Committee from People Who Are Blind or Severely Disabled

⁵⁶ Procurement List maintained by the Committee From People Who Are Blind or Severely Disabled, <https://www.abilityone.gov/index.html>

could not support the level of effort required at each site; thus, GSA's need to solicit these services. Therefore, the mandatory source rule does not apply.

As stated, SBA's approval to release the 8(a) contract to a non-8(a) competition requires the following certain factors to be considered: (a) whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; (b) whether the magnitude or value of the requirement has changed by at least twenty-five percent (25%) for equivalent periods of performance; and (c) whether the end user of the requirement has changed.⁵⁷

In the Complete Facilities Maintenance Services case, the original scope included facilities O&M of 9 buildings. The consolidated scope incorporated the original facilities O&M plus an engineering aspect, which would require the addition of an engineering professional to perform inspection and testing of building equipment and systems as well as provide preventive maintenance, repairs, and service calls. This scope change requires different capabilities than the original contracts, therefore, meeting the first factor in release from the program. The value of the original contracts totaled \$23.5 million and the consolidated contract value was estimated at \$26 million. Although the value of the consolidated contract did increase, it does not meet the minimum twenty-five percent (25%) change in value required for consideration. Lastly, the end user of the consolidated contract requirement did not change for this consolidation. Based on GSA's actions, only one (1) of the factors applied, which can constitute that the contract is not a follow-on contract, but rather a new requirement.

However, GAO's decision to dismiss the pre-award protest for Complete Facilities Maintenance Services solicitation did disclose that GSA would take corrective action to the initial solicitation by *further* coordinating with the SBA, reissuing the solicitation, and reopening the

⁵⁷ See 13 CFR §124.3 (West 2021).

period for submission of quotations. This decision does not confirm whether or not SBA approved such removal from the 8(a) program, although there was no known formal written approval or GSA Form 2689, it does imply some level of coordination took place beforehand. Consequently, their admitting the need for corrective action does not prove that GSA's action was improper and unlawful.

In the Suitland Census Headquarters, GSA's primary response to this challenge is SBA's approval was not warranted in accordance with FAR 8.404(a). This regulation exempted agencies from complying with FAR 19 if with the procurement was a BPA or orders placed against Federal Supply Schedule and Multi-Agency contracts. The previous awarded Suitland Census Headquarter contract was an Indefinite Delivery Contract (IDC) under the 8(a) program. An IDC is a type of Multiple Agency Contract that exempts the application of FAR 19 in acquisition planning. This contract vehicle is exempt from FAR 19 and concurrence from SBA was not required to convert from an 8(a) contract. This is also supported in the case of *In Re: Coast to Coast Computer Products, Inc., supra*.

C. Regulations, including 84 Fed. Reg. 60846-60881, regarding "Bona Fide" Offices

For competitive 8(a) construction contracts, while *previous* statutory and regulatory authorities required 8(a) Participants to have an *approved* bona fide place of business within the state where the work will be performed, SBA's final ruling on "Bona Fide Place of Business" has expanded opportunities to small businesses who can perform services interstate.

Under 13 CFR 124.501, participants in the 8(a) program are required to have an approved "bona fide place of business" for contract award. A bona fide place of business is defined as "a location where a Participant regularly maintains an office, which employs at least one full-time

individual within the appropriate geographical boundary.”⁵⁸ The term does not include construction trailers or other temporary construction sites.

SBA’s SOP 80 05 5 also required the 8(a) participants to “have a bona fide place of business within the state (or where a state is served by more than one SBA District Office, within the geographical boundaries served by the District Office) where the work will be performed.”

Not only must an entity have the office space, but it must have at least one full-time individual employed at the location. The person must conduct the activities of the 8(a) entity during normal business hours. The person cannot be an independent contractor and must not work for any other business during normal business hours.

In November 2019, SBA issued proposed rules for the Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments, 84 FR 60846-01.⁵⁹ Within the proposed language, SBA recommended the following changes to the bona fide place of business rules:

- a. the rule will be applicable to both competitive 8(a) and sole source procurements;⁶⁰
- b. to provide that in connection with a specific 8(a) competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical boundaries within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe;
- c. to allow a Participant to presume that SBA has approved its request for a bona fide place of business if SBA does not respond in the time identified. This allows a Participant to submit an offer where a bona fide place of business is required; and,

⁵⁸ 13 CFR §124.3

⁵⁹ Small Business Administration, Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments, Proposed Rules, Federal Register, Volume 84, No. 217, Friday, November 8, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-11-08/pdf/2019-23141.pdf>

⁶⁰ 13 CFR§ 124.501(k)(West 2021).

- d. to define a bona fide place of business to be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area, or a contiguous county to (whether in the same or different state) where the work will be performed.

On October 16, 2020, following a public comment period, the *proposed* rules were *finalized* into 85 FR 85 FR 66164-0.⁶¹ SBA incorporated the above-mentioned changes to the bona fide place of business rules.

However, on August 25, 2021, SBA announced a moratorium on the requirement that SBA’s 8(a) participants must establish a bona fide place of business in a specific geographic area in order to be awarded any construction contract through the 8(a) Program, citing ongoing COVID-19 challenges.⁶² The moratorium is effective August 25, 2021, and applies to all 8(a) construction contracts offered to the 8(a) Program between August 25, 2021, and September 30, 2022. During the moratorium, any 8(a) Program participant seeking an 8(a) construction contract (either on a sole source or competitive basis) will not be required to have or establish a bona fide place of business in any specific geographic location.

The SBA states that it “believes this modification will make it easier for small, disadvantaged businesses to be eligible to be awarded 8(a) construction contracts.”

⁶¹ But see subparagraph (d), which eliminated language “whether in the same or different state:”

d. to define a bona fide place of business to be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area, or a contiguous county to where the work will be performed.

⁶² <https://www.sba.gov/article/2021/aug/26/sba-announces-moratorium-bona-fide-place-businessrequirements-8a-business-development-program>

V. CONCLUSION

The statutes and regulations in place allow Federal agencies – such as GSA – to have full discretion to determine what is beneficial to their organization’s procurement needs.

Until there is a determination that substantiates TeamGOV’s allegations that GSA is engaging in deceptive and/or unfair procurement strategies, there will be no recourse for small businesses claiming impact. Indeed, without detailed proof or evidence from a specific case demonstrating that GSA improperly applied and/or disregarded any statute or regulation that the negatively impacted small businesses (specifically in relation to the consolidation and bundling of set-aside contracts), it may be assumed that no violation of any statute or regulation has taken place. This is based on the limited number of successful GAO bid protests or court appeals in relation to consolidation and/or set-aside competition. GAO also has a requirement to publicly release justifications and rationale for consolidating and bundling as per GSAM 507.107-5;⁶³ however, in the cases where the contracts are on the FSS or BPA, FAR 8.404 goes into effect, eliminating the need to justify such procurement method.

⁶³ GSAM 507.107-5 states “a summary notification of a determination that a consolidated, bundled, or substantially bundled requirement is necessary and justified will be published on the GSA public website for managing government awards. The notice will be posted within 7 days of the approved determination.” See FAR 7.107-5.