

**RIN 3245-AH95**

**Docket Number SBA-2024-0002**

To Whom It May Concern:

On behalf of the National Small Business Association (NSBA), the oldest advocacy organization for America's small businesses, we thank you for the opportunity to submit these comments on the Small Business Administration's (SBA) proposed rule titled "Small Business Contracting: Increasing Small Business Participation on Multiple Award Contracts" ("Proposed Rule"). As a champion for the growth and success of small businesses, we commend the SBA's efforts to expand opportunities for small-business participation in federal contracting.

In accordance with the SBA Office of Advocacy's [request](#), this letter will address the following: (1) whether Federal Schedule (FSS) contracts should be exempted from this proposed statutory and regulatory requirement; (2) whether Procurement Center Representatives (PCRs) should be given more authority to ensure the Proposed Rule is used to the maximum extent possible; and (3) how the Proposed Rule can be strengthened to increase the contract awards described in FAR 19.502-2 to small businesses.

First, NSBA encourages SBA to include FSS contracts in the scope of the Proposed Rule. Rather than exempting these contracts, NSBA believes that SBA has the opportunity through the Proposed Rule to implement 15 U.S.C. §644(j)(1) in a way that more closely aligns with the statutory intent of setting aside contracts for small businesses under certain conditions and encouraging them to do so when possible, as described in a recent Congressional Research Service (CRS) [report](#) (p. 7).

Second, NSBA believes that PCRs should be given more authority to ensure the Proposed Rule is used to the maximum extent possible. We are open to the types of authority that can be exercised by PCRs; for example, could be authorized to report cases where set-asides are not used as effectively as they should be and enable them to share this information with relevant agencies including SBA as well as industry groups in the interest of full transparency.

Third, NSBA believes that the Proposed Rule's application of the "Rule of Two" to task and delivery orders under multiple-award contracts (MACs) represents a critical step in ensuring that small businesses receive a fair share of federal contracting opportunities. Expanding the Rule of Two to MACs ensures its applicability across the federal government and is well aligned with the statutory directive under the Small Business Act, assuring a fair proportion of contracts and purchases are awarded to small businesses.

While the Proposed Rule has the prospect of increasing federal contract awards for small businesses, we are cognizant that it could be circumvented by agencies. In *Tolliver Group*, the Court of Federal Claims (COFC) ruled that “an agency must apply the Rule of Two before an agency can even identify the possible universe of procurement vehicles which may be utilized for a particular scope of work.” (*Tolliver Group*, 151 Fed. Cl. at 104). The Government Accountability Office (GAO) protested COFC’s ruling, and in *iTility, LLC* reiterated its longstanding interpretation that Congress intended to clearly delineate a distinction between a procuring agency’s mandatory set-aside obligations when establishing a contract and an agency’s discretion with respect to setting aside task or delivery orders under a MAC, i.e., indefinite delivery indefinite quantity (IDIQ) contracts. (*iTility, LLC*, B-419167, Dec. 23, 2020, 2020 CPDP412 at 18).

By declining to follow COFC’s ruling, agencies may be able to develop RFPs to avoid this proposed rule by creating distinct small and large contracting vehicles that render the Rule of Two useless at the ordering level, potentially eliminating revenue for small businesses. Thus, NSBA strongly recommends that SBA implement provisions that deter agencies from leveraging this loophole in the final rule.

In closing, NSBA urges SBA to finalize and swiftly implement this Proposed Rule incorporating the considerations outlined in this letter. We believe the Proposed Rule is a significant step towards leveling the playing field for small businesses, and we commend SBA’s leadership in promoting an inclusive and equitable federal procurement process that strengthens our economy.

Thank you for your continued dedication to supporting America’s small businesses. To discuss this comment further, please contact Rachel Grey at [rgrey@nsbaadvocate.org](mailto:rgrey@nsbaadvocate.org). NSBA stands ready to assist in the implementation of this rule and to support SBA’s mission to build an equitable economy.