



December 23, 2024

Ms. Donna Fudge
Lead Procurement Policy Analyst
U.S. Small Business Administration (SBA)
409 Third Street, SW
Washington, DC 20416

RE: Comments to Proposed Rule: RIN 3245-AH95:
**Small Business Contracting: Increasing Small Business Participation on
Multiple Award Contracts**

Dear Ms. Fudge:

The following comments are submitted on behalf of the American Council of Engineering Companies (ACEC) – the business voice of the U.S. engineering industry. Founded in 1906, ACEC is a national federation of fifty-one state and regional organizations representing nearly 5,500 engineering companies and nearly 600,000 engineers, surveyors, architects, and other specialists nationwide. 85% of our member companies have one hundred employees or fewer and 74% of our member companies have fifty employees or fewer. ACEC member companies drive the design of America’s infrastructure and built environment.

ACEC is pleased to provide input and seek clarifications on the proposed rule Increasing Small Business Participation on Multiple Award Contracts by the Small Business Administration (SBA) as published in the *Federal Register* on Friday, October 25, 2024. The proposed rule would revise sections of SBA’s regulations (13 CFR Part 125) to apply the “rule of two” to multiple-award contract task and delivery orders. As an association with many small businesses and other than small businesses working under multiple award contracts, we do not express support or opposition to the proposed rule. Rather, we seek to point out inconsistencies and clarifications necessary to avoid potential unintended consequences if the rule were to be finalized in the current form.

“Rule of Two” is Inconsistent with Architectural and Engineering (A/E) Services Procurement Laws and Regulations

ACEC recognizes the intent of the “rule of two” is to increase the use of small businesses. Federal Acquisition Regulation (FAR) subpart 36.6 and 40 U.S.C. chapter 11 (commonly known as the Brooks Architect Engineer Act or Brooks Act) require at least **three** most highly qualified offerors be identified in order to select one to proceed with the work. Additionally, the proposed rule applies to “...contracts that are competitive in terms of **price**, quality, and delivery.” A/E

services should be excluded by the fact that price cannot be considered during the selection of the most highly qualified offerors and is only addressed as fair and reasonable during negotiations with the most qualified, prior to the award of a contract or task. Under Brooks Act procurement procedures, price quotations are specifically not allowed to be considered in the selection process. **The proposed rule conflicts with this requirement of the Brooks Act,** which is summarized in the next paragraph below.

Public Law 92-582 (Brooks Act) and 40 USC CHAPTER 11 - SELECTION OF ARCHITECTS AND ENGINEERS states; “The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.” This policy was established to assure that physical infrastructure would be designed to protect the safety of the public while efficiently and effectively performing intended functions. Subsections 1103(c) and (d) of USC 40 Chapter 11 require agency heads to evaluate qualifications and performance data submitted annually or specifically and conduct discussions with **at least three companies** and select from those discussions **at least three companies** considered the most highly qualified to provide the services required, in order of preference. Negotiations of scope and cost of services are then sequentially conducted, starting with the most qualified offeror, until an acceptable scope and fair and reasonable price is reached.

The proposed rule does not specifically address A/E contracts, where A/E services are already technically under a “rule of three” –identified in accordance with the Brooks Act. Limiting the offer to potentially only those two offerors to determine an A/E selection creates a direct conflict.

Expanding the “rule of two” to A/E services multiple-award task order contracts dilutes the intent of the Brooks Act. This is especially true since the use of multiple award contracts has become the norm for engineering services contracts with the federal government, with those contracts becoming larger, broader in scope, and covering national geographic areas. Endangering the safety and performance of future physical infrastructure projects being designed by offerors that may not be the “most” highly qualified is possible. The intent of Congress under the Brooks Act to ensure the quality design of facilities needs to be considered.

If the proposed rule provisions remain, A/E multiple-award contracts should be clearly identified as an exception to the proposed rule.

Impact to Current Multiple-Award Contracts

If the proposed rule provisions remain, we request that only new contract solicitations be subject to the changes. Existing multiple-award contracts should be grandfathered in, and the selection process remain as previously understood or negotiated. Not doing so will negatively impact the companies holding long-term contracts, both financially and operationally.

Thank you for your consideration of our industry's concerns and recommendations. Many ACEC member companies hold federal multiple award contracts and will be directly impacted by this proposed change. We are committed to working with the SBA to find solutions without significant business disruption, prevent any confusion with other conflicting laws and regulations, and ensure a vibrant marketplace for all small businesses.

Respectfully,

A handwritten signature in blue ink that reads "Bradley J. Saull". The signature is written in a cursive style with a large initial 'B'.

Bradley J. Saull (*he/him*)
Vice President, Federal & International Programs
American Council of Engineering Companies (ACEC)
Direct: (202) 682-4342