

**Testimony of
Major L. Clark, III.
Assistant Chief Counsel for Advocacy
U.S. Small Business Administration**

*United States House of Representatives
Committee on Small Business
Subcommittee on Contracting and Workforce
and
United States House of Representatives
Committee on Veterans' Affairs
Subcommittee on Oversight and Investigations*

Date: December 10, 2013

Time: 10:00 AM

Location: 344 Cannon House Office Building

**Topic: Contracting Away Accountability - Reverse Auctions in Federal Agency
Acquisitions**

Chairman Hanna, Ranking Member Meng, Members of the Small Business Contracting and Workforce Subcommittee as well as Chairman Coffman and Ranking Member Kirkpatrick and Members of the Veterans' Affairs Subcommittee on Oversight and Investigations, I am honored to be here today to present testimony to you on behalf of the Office of Advocacy of the U. S. Small Business Administration and more specifically, on behalf of Chief Counsel Dr. Winslow Sargeant.

Dr. Sargeant would like me to thank you for the support that you have provided this office, and he looks forward to a continued partnership with you as we mutually strive to improve the economic climate for our small business stakeholders.

The Office of Advocacy is not in opposition to reverse auctions in the federal marketplace. Today, we are advocating for clear reverse auction guidance from the Office of Federal Procurement Policy.

My name is Major L. Clark, III, and I am the Assistant Chief Counsel for Procurement Policy for the Office of Advocacy. While my professional career includes both public and private sector experience, I previously served as the Staff Director for the House Small Business Committee under the chairmanship of the Honorable Parren J. Mitchell of Maryland so thank you for having me back.

I ask that this written testimony and two attachments be included as part of the official transcript of this hearing.

In 1976, the Office of Advocacy was established pursuant to Public Law 94-305 to represent the views of small entities. Advocacy advances the interests and concerns of small business before Congress, the White House, federal agencies, federal courts, and policymakers. The Office of Advocacy is an independent office within the Small Business Administration, so the views expressed by this office do not necessarily reflect the views of SBA or the Administration. We work with federal agencies in the rulemaking process to implement the requirements of the Regulatory Flexibility Act (RFA). The RFA requires federal agencies to consider the effects of their proposed rules on small businesses and other small entities, including small governments and small nonprofits.

Pursuant to the above statutory authority, the Office of Advocacy has been involved in the monitoring of reverse auction activities at the federal level since around 2006.

On February 27, 2008, the Office of Advocacy sent a letter to Administrator Paul Denett of the Office of Federal Procurement Policy with a recommendation from small business stakeholders to better define the reverse auction process. I have submitted this document as Attachment one.

Attachment two is a more recent letter to Acting Administrator Lesley Field of the Office of Federal Procurement Policy dated January 21, 2012 from Dr. Sargeant of the Office of Advocacy. This letter expresses additional concerns regarding the negative impact of reverse auctions on small businesses.

In the fall of 2012, we held a procurement roundtable in Seattle, Washington. During this roundtable, we heard from a woman-owned small business. The owner explained her recent experience with the reverse auction process where she lost an important contract. Moreover, when she tried to understand why she lost the contract, she could not receive a clear explanation for losing her bid. As a result, the inability of the contracting officer to explain clearly why she lost the auction was as frustrating to her as losing the bid. After our listening session, Advocacy conveyed this experience to the Office of Federal Procurement Policy.

In response to Advocacy's concerns, the Office of Federal Procurement Policy convened a small business stakeholder session in Washington, D.C. in which the attendees conveyed their concerns with the reverse auction process. Some of the concerns included a lack of clear guidance to agencies, conflicts with Federal Acquisition Regulation Part 19, the role and responsibilities of the third party providers, and finally, the fees required to participate in the reverse auction process.

More recently, small business associations that represent small architectural, engineering and surveying companies have reached out to the Office of Advocacy about reverse auctions with the same concerns as other small business stakeholders. It would appear that some agencies are attempting to use reverse auctions for these types of services.

In conclusion, Chief Counsel Sargeant would like to make it perfectly clear that the Office of Advocacy is not in opposition to reverse auctions in the federal marketplace. The intent of this office is to make sure that our small business stakeholders have a voice. We are advocating for clear reverse auction guidance from the Office of Federal Procurement Policy.

Thank you and I look forward to your questions.

Attachment One of Major L. Clark III's Testimony:

February 27, 2008

The Honorable Paul A. Denett
Administrator
Office of Federal Procurement Policy New Executive Office Building
Washington, DC 20501

Subject: "Two Existing FAR Rules/Policies" on Advocacy 's 2008 r3 Top 10 List

Dear Administrator Denett:

The Office of Advocacy is charged with monitoring compliance with the Regulatory Flexibility Act (RFA) and works with federal agencies to ensure that they analyze the impact of their proposed regulations on small business. Under the RFA, agencies are required not just to review proposed rules, but to review existing rules -as mandated by section 610 of the RFA. In an effort to increase compliance with section 610 and to ensure that agencies conduct transparent reviews in general, the Office of Advocacy developed the Regulatory Review and Reform (r3) initiative.

This r3 initiative was designed to identify and address existing federal rules that should be reviewed and may need reforming. r3 is a tool for small business stakeholders to suggest needed reforms to regulations that are outdated, ineffective, duplicative, or otherwise in need of review. After a call for nominations, over 80 existing rules were submitted by small businesses and their stakeholders identifying potential rules ready for review and reform. Following significant review and analysis of those nominations. I have selected the 2008 Top 10 rules for Review and Reform .

The purpose of this letter is to inform you that your office has two regulatory initiatives that appear on our 2008 r3 Top 10 list. This first is a rule on Retainage for Fix Priced A&E contracts and the other item is the OFPP initiative on reverse auctions. Advocacy will be announcing the 2008 r3 Top 10 Rules for Review and reform and releasing its annual report on agency compliance with the RFA on Thursday, February 28, 2008 at the National Press Club. A list of the r3 Top 10 rules can be found in the attached summary report. Additional information on the r3 initiative is available on our website: www.sba.gov/advo/r3. In addition, a six-month status report will be placed on our website to update the public regarding Advocacy and agency progress on the r3 Top 10 Rules for Review and Reform.

Advocacy has been working with staff in your office on these regulatory initiatives and we see this Top 10 list as an opportunity for both of our offices to accomplish burden reduction for small business and to be responsive to the regulated public.

We look forward to working with your office on these important reviews. If you have any questions or concerns, please do not hesitate to contact me or Major L. Clark, III on my staff at 202-205-7150 or major.clark@sba.gov.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Enclosure

Attachment Two of Major L. Clark III's Testimony:

January 21, 2012

Lesley Field
Acting Administrator
Office of Federal Procurement Policy
New Executive Office Building Washington, DC 20501

Re: Impact of Reverse Auctions on Small Businesses

Dear Administrator Field:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration submits this request for a review of current acquisition policies and practices regarding the acquisition tool of reverse auctions and the impact of such policies and practices on small businesses.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305¹ to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

Background

In 1997, the Federal Acquisition Regulations (FAR) were changed to allow for reverse auctions in the acquisition process. In Fiscal Year 2006, the National Defense Authorization Act required the Office of Management and Budget to study and develop a report on all types of commercially available online procurement services, including reverse auctions. In response to this request from Congress, the Office of Federal Procurement Policy established an inter-agency working group to review regulations, policies, and business considerations related to the use of online procurement services. The Office of Advocacy participated in many of the discussions of the working group.

On February 27, 2008, the Office of Advocacy submitted to Administrator Dennett of the Office of Federal Procurement Policy a recommendation from small business stakeholders regarding the need for better policies and/or regulations on the use of reverse auctions. This recommendation for action came as a result of this office seeking input from small business stakeholders across the country on regulations and policies that were negatively impacting their ability to obtain a

level playing field in Federal acquisitions. A copy of the letter to Administrator Dennett is [Attachment 1](#).

New Developments

On July 15, 2010 former OFPP Administrator Daniel Gordon testified before the Committee on the Budget of the United States Senate that reverse auctions have had some positive impacts on improving the Federal acquisition process and in this regard, some small businesses have been beneficiaries of multi-million dollar awards. We commend these results.

Notwithstanding these successful uses of reverse auctions, the Office of Advocacy continues to receive concerns from small business stakeholders regarding the lack of clarity in the application of reverse auctions from agency to agency. In this regard there is a current protest before GAO in which the small business alleges that the Army used the reverse auction acquisition tool but did not comply with the Small Business Act, (15 USC644). This case is: GAO PROTEST B-406329. SBA has filed a letter in support of the small business. A copy of the SBA letter is [Attachment 2](#).

We believe this case raises concerns that some Federal agencies using reverse auctions may not be complying with the simplified acquisition threshold requirements for contracts to be reserved for small businesses. The Small Business Act (15 USC 644) states, "simplified acquisitions shall be reserved exclusively for small business concerns."

Recommendations

Small businesses have stated that because of a lack of uniform clarity in policy or regulations they find an uneven hand in the application of reverse auctions to micro purchases. We recommend:

1. That the Office of Procurement Policy at a minimum provide a clear policy statement to the acquisition community that reverse auctions must comply with the requirements that contracts within the simplified acquisition threshold are to be reserved exclusively for small businesses.
2. That the Office of Federal Procurement Policy make a clear policy statement that reverse auctions are best when used for commodity acquisitions and not for service contracts.

Conclusion

We commend the efforts of the Federal acquisition community in its commitment of a level playing field for small businesses. We believe that the type of clarity being requested above will

be of tremendous assistance to the federal acquisition workforce as it continues to meet the acquisition mission of their agencies. Thank you for your prompt consideration of this request.

Please contact me or my Assistant Chief Counsel [Major Clark](#) at 202-205-7150 should you have any questions.

Best regards,


Winslow Sargeant
Chief Counsel for Advocacy

Major Clark III
Assistant Chief Counsel for Advocacy

Cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

Footnote:

1. 5 U.S.C. § 601 et seq.¹

¹ [Attachment 1:](#)  Letter of Chief Counsel for Advocacy Thomas M. Sullivan to The Hon. Paul A. Dennett, February 27, 2008

[Attachment 2:](#)  Letter of SBA Associate General Counsel John W. Klein to Pedro Briones, Esq., January 5, 2012