

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2561 Rayburn House Office Building  
Washington, DC 20515-6315

The Honorable Isabel Guzman  
Administrator  
Small Business Administration  
409 3<sup>rd</sup> Street, SW  
Washington, DC 20024

Mr. Khem R. Sharma, Ph.D.  
Chief  
Office of Size Standards  
Small Business Administration  
409 3<sup>rd</sup> Street, SW  
Washington, DC 20024

July 19, 2021

Dear Administrator Guzman and Mr. Sharma:

As Republican Members of the Subcommittee on Contracting and Infrastructure, we write in response to the Small Business Administration's (SBA) Proposed Rule on Small Business Size Standards: Wholesale Trade; Retail Trade at 86 Fed. Reg. 28012. Under this proposed rule, the SBA is considering retaining the current 500-employee size standard for Federal procurement of supplies under the nonmanufacturer rule.<sup>1</sup> We take this opportunity to share our concerns regarding the nonmanufacturer rule and suggest a new analyses that may contribute to a more equitable environment for all small businesses operating as nonmanufacturers under this rule.

A business may qualify as a nonmanufacturer if it meets a set of qualifications enumerated at 14 CFR 121.406(b). Importantly, for the purposes of this letter, is the requirement that the business does not exceed 500 employees.<sup>2</sup> We sent a letter to the SBA on March 31, 2021, expressing serious concerns regarding a recent Project on Government Oversight (POGO) report. The crux of that correspondence was that there may be exploitable vulnerabilities in law or regulation that permit companies to evade competition in the open market and unfairly enrich themselves with small business contract awards. As stated by a former employee of the

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<sup>1</sup> 14 CFR 121.406

<sup>2</sup> 14 CFR 121.406(b)(1)(i)

company investigated in the POGO report: “Maybe the small business size standards need to be changed...but that’s not [the company’s] fault.”<sup>3</sup> To state simply, our concern is that the alternative size standard of 500 employees established by the nonmanufacturer rule may be abused by large companies seeking to enrich themselves through contracts set aside for small businesses. This 500-employee threshold is the sole measurement of size for companies operating as nonmanufacturers under the SBA’s rule, meaning that any other measurement, such as revenue, is immaterial to whether the company is considered small or other than small. This creates a situation where companies can obtain exorbitant amounts of revenue (i.e. over \$3 billion annually) by winning awards intended for small businesses and continue to retain their small size status, even though they may be considered large or dominant by any other measure. Retaining this sole determinant of size by the number of employees for nonmanufacturers also leaves little room for new, truly small entrants into this market. *For these reasons, we suggest that the SBA Office of Size Standards consider conducting an assessment of the nonmanufacturing industry, based on revenue and/or other factors, to determine what may be considered small for the size of a business qualifying as a nonmanufacturer.*

A second concern we raise are waivers to the nonmanufacturer rule. The SBA may waive the requirement that the nonmanufacturer supply the product of a small business manufacturer if certain elements are met; *see* 13 C.F.R. 121.1201-1206. Issuance of a waiver permits procuring agencies to purchase items made by other-than-small manufacturers, through the small business nonmanufacturer. While there are instances in which such waivers may be appropriate, there are other instances in which waivers are granted resulting in large sums of federal funds, intended for small businesses, to be passed through the small manufacturer into the pocketbooks of other-than-small businesses and be counted towards the government’s small business goals.

For example, the SBA issued an individual nonmanufacturer rule waiver for solicitation number: SPE8EJ-18-R-0001 which consists of a total small business set-aside award with a 2 year base period and four 2-year option periods, totaling 10 years. The total value of that contract award is approximately \$33 billion. Setting aside the highly concerning issue of an individual waiver being granted in this circumstance, the waiver granted to this solicitation meant that any item purchased off of this particular contract, again totaling \$33 billion over the next 10 years, could be manufactured by a large business and therefore the funds on the contract passed to those large businesses, regardless of if a small business manufacturer could have made that product (e.g. backpacks). Since the solicitation was awarded as a total small business set-aside award, all \$33 billion allocated to the contract will count towards the government agency’s small business goals, even if a significant percentage was eventually passed on to large manufacturers.

These instances create distortions in the SBA’s reporting of the government’s small business goal achievements, inflating the dollar amounts reported as going to small businesses. The government has reported meeting its 23% small business goal since 2013, yet accurate reporting of dollars actually received by small businesses, like in the circumstances described above, would reduce the actual dollars reported as distributed to small businesses, which may impact whether or not the government had actually met its small business goals. Should greater

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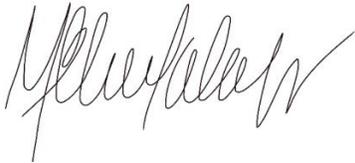
<sup>3</sup> <https://www.pogo.org/investigation/2021/02/how-a-small-business-kingpin-wins-billions-in-defense-contracts/>

clarity be provided concerning the actual dollars received by small businesses and passed through to large businesses, Congress may have a more accurate picture of the true circumstances of the federal government's achievement towards its small business procurement goals. *To this end, we request information regarding:*

- 1. The SBA's processes in awarding individual waivers to the nonmanufacturer rule, and*
- 2. The process and justification the SBA and relevant agencies followed for awarding an individual waiver for solicitation number SPE8EJ-18-R-0001.*

We respectfully request a response from the SBA by August 31, 2021. If you have questions regarding this request, please contact Vivian Ling, Counsel to the Committee for the minority, at (202) 225-5821.

Sincerely,



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Maria Salazar  
Ranking Member  
Subcommittee on Contracting  
and Infrastructure  
Committee on Small Business



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Jim Hagedorn  
Member  
Subcommittee on Contracting  
and Infrastructure  
Committee on Small Business



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Pete Stauber  
Member  
Subcommittee on Contracting and  
Infrastructure  
Committee on Small Business



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Dan Meuser  
Member  
Subcommittee on Contracting  
and Infrastructure  
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