

ALERT

SBA Issues Final Rule Addressing Small Business Set-Asides in Connection With Multiple Award Contracts

October 4, 2013

On October 2, 2013, the U.S. Small Business Administration (SBA) issued a final rule establishing new policies and procedures for setting aside multiple award contracts (MACs) and task and delivery orders for small business. 78 Fed. Reg. 61114 (Oct. 2, 2013). The final rule implements several provisions of the Small Business Jobs Act of 2010, Pub. L. 111-240, which was designed to boost opportunities for small businesses in the federal marketplace. The rule recognizes that, notwithstanding agencies' increased use of MAC vehicles to acquire products and services, significant confusion still exists among contracting agencies regarding how and when MACs and task and delivery orders should be set aside for small business.

This rulemaking comes on the heels of a November 2011 interim rule revising the Federal Acquisition Regulation (FAR) to clarify that contracting officers have discretion to set aside all or part of MACs and individual task orders. See 76 Fed. Reg. 68032 (Nov. 2, 2011) (codified at 48 C.F.R. § 19.502-4). The SBA's final rule is intended to provide additional guidance to agencies concerning the tools available to contracting officers to set aside work for small businesses at the contract and task order level. The rule also changes existing SBA policy regarding the application of the limitations on subcontracting and nonmanufacturer rules in the MAC context.

All contractors (both large and small) that participate in MACs should familiarize themselves with the new rule, as its requirements will govern how and when agencies set aside work for small businesses under all MACs going forward. Below is a summary of several of the more significant aspects of the new rule.

Practice Areas

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Small Business Programs and Nontraditional Defense Contractors

Partial Set-Asides, Contract Reservation, and Order Set-Asides. The final rule applies to all “multiple award contracts,” which includes (1) a Multiple Award Schedule contract issued by the General Services Administration (GSA) or agencies granted Multiple Award Schedule contract authority by GSA, (2) a multiple award task-order or delivery-order contract issued in accordance with FAR Subpart 16.5, and (3) any other indefinite-delivery, indefinite-quantity (ID/IQ) contract entered into with two or more sources pursuant to the same solicitation. The rule provides guidance regarding the circumstances under which MACs can be partially set-aside or reserved for small business, and when individual task and delivery orders issued under MACs can be set aside.

Notably, the rule does not alter the existing “rule of two,” which requires agencies to set aside contracts for exclusive small business participation if there is a reasonable expectation that offers will be obtained from at least two responsible small businesses and award will be made at fair market prices. FAR 19.502-2(b). Rather, the new rule provides that where the “rule of two” is not met for a MAC, procuring agencies must give “meaningful consideration” to the following three options before determining that a small business set-aside is not appropriate:

- **Partial set-aside:** An agency may set aside portions of a MAC’s requirements exclusively for small businesses, where the procurement’s requirements can be broken up into smaller, discrete portions (e.g., CLINs, SLINs, or functional areas), and two or more small business concerns are expected to submit an offer for that portion. In contrast to the current rule, which requires submission of an offer on the non-set-aside portion, SBA’s final rule allows small businesses to submit an offer on the set-aside portion, non-set-aside portion, or both.
- **Reservation of contracts:** Agencies may also reserve awards for small businesses even where a MAC’s requirements cannot be broken into discretion portions. Unlike a partial set-aside, the contracting officer need not be able to divide the MAC into discrete, small business-only portions in order to reserve awards. To reserve awards for small business, the agency must find that either (1) at least two small businesses could perform a portion of the contract, or (2) at least one small business could perform the entire contract. Contracting officers may, but are not required to, establish dollar value targets for awards to small businesses under the contract.
- **Order set-aside:** When awarding MACs without partial set-asides or reserved awards, agencies may still commit in the solicitation to set aside individual task/delivery orders—or reserve the right to consider order set-asides—when the rule of two is met. This tool may also be applied to existing MACs where market research demonstrates that the goods or services to be procured fit within the established MAC and the “rule of two” is met for the individual order’s requirements.

The rule makes clear that agencies are not required to utilize these tools to set aside work for small business. However, contracting officers must document how a decision not to set aside is consistent with the best interests of the agency.

Limitations on Subcontracting/Nonmanufacturer Rule. One of the more significant changes in the final rule is the application of the limitations on subcontracting (commonly referred to as the “50 percent rule”) in the context of MACs. Previously, compliance with the limitations on subcontracting for indefinite quantity contracts was measured based on performance over the guaranteed minimum, unless the solicitation articulated a different period of performance for evaluation of bids or proposals. 13 C.F.R. 125.6(g). The final rule amends this requirement for total and partial set-aside contracts: Small business concerns now must perform the requisite percentage of work (or comply with the nonmanufacturer rule) for each performance period of the contract (*i.e.*, during the base term and then during each option period thereafter). The contracting officer has discretion to require the concern to perform the required percentage of work (or comply with the nonmanufacturer rule) for each order. For orders set aside under full-and-open MACs, or MACs with awards reserved for small business, compliance with these rules must be measured at the task/delivery order level.

Off-Ramp/On-Ramp of Small Businesses. The final rule also clarifies that contracting officers have the authority to allow new small businesses onto a MAC during performance, and can remove contractors that are no longer small. The rule encourages contracting officers, when drafting solicitations, to consider including an “on-ramp” provision that permits the agency to refresh the awards under the contract by adding more small business contractors throughout the life of the contract. The rule also sanctions the current practice of some agencies that use “off ramp” provisions to terminate contracts with companies that grow to become other than small during performance.

Application of Size Standards. The final rule clarifies the requirements for assigning North American Industry Classification System (NAICS) codes to MACs and task/delivery orders. NAICS codes establish the applicable size standard for determining which businesses qualify as small to perform that work. In the preamble to the final rule, SBA noted that it has observed instances in which an agency assigned multiple NAICS codes to a MAC, allowing businesses to potentially qualify as small for some, but not all, of the assigned codes. The agency could then receive credit for award of individual orders to a business that was small under one of the assigned codes but not small under the code assigned (or that should have been assigned) to the particular order. To address this perceived problem, the final rule requires every MAC and order to be assigned a single NAICS code that accurately reflects the nature of the work being performed. The rule also provides that where a MAC can be divided into discrete categories (e.g., CLINs, SLINs), each category should be assigned a separate NAICS code with a corresponding size standard. Orders issued under that category must utilize that code. Where orders can be issued under several categories, contracting officers are required to select the code that best represents the principal nature of the work being performed under that order.

Bundling/Consolidation of Contracts. The final rule builds on existing guidance with respect to bundling, which is designed to discourage the consolidation of procurements to the detriment of small business. The final rule defines the term “consolidation of contract requirements” to mean a solicitation for a single contract or a multiple award contract designed to “satisfy two or more requirements of the federal agency for goods or services that have been provided to or performed for the federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds \$2 million (including options).” Under the final rule, agencies may not conduct

consolidated acquisitions unless the senior procurement executive or chief acquisition officer (1) demonstrates that the benefits of the consolidated acquisition “substantially exceed” the benefits of each possible alternative approach with less consolidation, and (2) identifies the negative impact on small businesses. The rule also creates an affiliation exception for teams of small businesses submitting proposals for bundled contracts that are MACs.