

ALERT

SBA Proposes to Apply the Rule of Two to Multiple-Award Contract Orders

October 31, 2024

WHAT: On October 25, 2024, the U.S. Small Business Administration (SBA) issued a proposed rule to revise sections of SBA's regulations (13 C.F.R. Part 125) to apply the Rule of Two to multiple-award contract task and delivery orders. The changes under the proposed rule reflect negotiation between SBA, the FAR council, and other agencies, as well as SBA's desire to increase small business participation on multiple award contracts.

WHEN: SBA issued the proposed rule on October 25, 2024, and invites interested persons to submit comments within 60 days (by December 24, 2024).

WHAT DOES IT MEAN FOR INDUSTRY: SBA's proposed rule would affect businesses holding multiple award contracts and agencies issuing orders under those contracts. Absent limited exceptions, the proposed rule would require that task and delivery orders under multiple-award contracts are set aside for small businesses where there is a reasonable expectation of receiving offers from two or more small-business contract holders under the multiple-award contract that are competitive in terms of price, quality, and delivery (i.e., the "Rule of Two"). Continue reading for a more in-depth discussion of the main changes included in this proposed rule.

On October 25, 2024, the U.S. Small Business Administration (SBA) published a proposed rule in the Federal Register. Interested persons and organizations have 60 days from the date of issuance to submit comments. SBA is proposing changes to 13 C.F.R. Part 125. SBA's proposed rule aims to increase small business participation on multiple-award contracts. The changes included in SBA's proposed rule are a product of negotiation among SBA, the FAR council, and

Authors

George E. Petel
Partner
202.719.3759
gpetel@wiley.law
Morgan W. Huston
Associate
202.719.4743
mhuston@wiley.law

Practice Areas

Government Contracts
Small Business Programs and Nontraditional Defense Contractors

other agencies.

According to the proposed rule, SBA initiated negotiation of this topic for three reasons:

1. **To comply with the Small Business Act.** The Small Business Act specifies that a fair proportion of the total “purchase[s] and contracts” for goods and services shall be awarded to small businesses. Because of this language, SBA believes the Rule of Two should also apply to all purchases rather than just contracts, and thus should apply to orders.
2. **To resolve a dispute between COFC and GAO.** The Court of Federal Claims (COFC) has held that an agency must apply the Rule of Two before identifying the procurement vehicles which may be used for a particular scope of work. (*Tolliver Grp., Inc. v. United States*, 151 Fed. Cl. 70, 104 (2020)). GAO has decided that Congress intended for agencies to have discretion in determining whether to set aside a task or delivery order under a multiple-award contract. (*ITility, LLC*, B-419167, Dec. 23, 2020, 2020 CPD ¶ 412). The proposed rule seems to strike a position between the two forums, not requiring application of the Rule of Two prior to choosing a particular multiple-award vehicle but requiring application of the Rule of Two on the selected multiple-award contract prior to issuing an order.
3. **To advance equity in federal procurement practices.** The rule is expected to create more contract opportunities for small businesses, particularly small, disadvantaged businesses.

Change

The proposed rule would revise the regulation on setting aside orders to require orders over the micro-purchase threshold, where the Rule of Two is satisfied with respect to small business contract holders, to be set aside. (See 13 C.F.R. 125.2(e)(6)).

Agencies would not be expected to amend the ordering procedures of existing multiple-award contracts which did not provide for order set-asides. But the proposed rule provides that an agency could choose to do so if adequate time remains on the contract (i.e. more than a year) in the interest of permitting small business concerns to fully perform or deliver under an order.

Exceptions

The proposed rule would apply the Rule of Two to orders under multiple-award contracts except for:

1. Orders under Federal Supply Schedule contracts;
2. When an exception to fair opportunity applies;
3. Where agency procedures reflect an appropriate exception.

Only one responsible source being available is an example of when an exception to fair opportunity applies. The proposed rule also provides examples of when agency-specific exceptions might be used, such as to address supply chain issues, national security risks, or a major disaster or emergency.

The proposed rule would require that agency exceptions be developed in consultation with both the agency OSDBU or OSBP and SBA, and made public before their use.

Documentation

Under the proposed rule, if one of the exceptions listed above does not apply, but an agency decides not to issue an order as a set-aside despite the underlying contract having two or more small business awardees, the agency would be required to document its determination. The agency would also be required to provide that documentation to the cognizant small business specialist.

As discussed above, the proposed rule does not require the application of the Rule of Two prior to choosing a particular multiple-award vehicle. But if an agency chooses to issue an order under a multiple-award contract that has one or no small business contract holders, the agency must document its rationale for that decision. The documentation must include the market research conducted by the agency. The agency must also provide that documentation to the small business specialist and ensure they have a reasonable opportunity to respond.

Notification

The proposed rule would require that an agency's small business specialist notify the SBA's Procurement Center Representative (PCR) as early in the acquisition planning process as possible where the multiple-award contract exceeds the substantial bundling threshold and small businesses are expected to be less than 30% of awardees.

Wiley's Government Contracts Practice will continue to monitor the proposed rule and report on any further developments.