

**Authors:**

Paul A. Debolt
padebolt@Venable.com
202.344.8384

Keir X. Bancroft
kxbancroft@Venable.com
202.344.4826

Nathaniel S. Canfield
nscanfield@Venable.com
202.344.4714

New SBA Regulations Address Multiple Award Contracts

Any contractor performing under a multiple award contract (MAC), including an IDIQ, a GSA Schedule Contract, a GWAC, or a multiple award task or delivery order contract, should be aware that small business regulation of such contracts will change drastically because of a recent rule by the Small Business Administration (SBA). These changes will go into effect on December 31, 2013. Highlights from the new rule appear below.

1. Agencies may set aside portions of their MACs for small businesses by:
 - Establishing partial set-asides based on CLINs;
 - Reserving awards for small businesses when specific task order requirements are not clearly defined; and
 - Setting aside orders.
2. NAICS codes must be assigned to all MACs and orders issued thereunder.
 - A single NAICS code must be designated for each order issued under the MAC.
 - The agency will receive small business credit only if the small business receiving an order is small under the NAICS code assigned to that order.
3. The rule clarifies size determination requirements.
 - Small businesses must certify size status in accordance with the NAICS codes assigned to the MAC.
 - For a MAC, self-certification is at the time of initial offer, including price.
 - For BPAs, basic agreements, or basic ordering agreements, size determinations apply at the time of the response to the solicitation; but small business credit is applied only if the small business qualifies as small at time of an order.
 - Recertification requirements apply if a small business itself acquires another business, or is acquired, or is part of a joint venture involved in a merger or acquisition.
4. The rule clarifies Limitations on Subcontracting (the 50 Percent Rule) and the Nonmanufacturer Rule.
 - Under a set-aside MAC, the 50 Percent Rule and Nonmanufacturer Rule apply to the base period and each option; the contracting officer reserves discretion to require compliance at the order level.
 - Under a MAC subject to small business reserve or set-aside of orders, the 50 Percent Rule and Nonmanufacturer Rule apply at the order level.

- The SBA may allow 8(a) small businesses' compliance to be measured every six months.
- Compliance with the 50 Percent Rule will be evaluated as part of an offeror's past performance. A contractor's failure to comply with the Rule can trigger a termination for default.
- These changes do not reflect changes to the 50 Percent Rule issued in the 2013 National Defense Authorization Act for FY 2013.

5. Consolidation and Bundling

- Consolidation applies to contracts in excess of \$2 million, reflecting two or more requirements previously provided under multiple contracts, and requires approval by senior agency official.
- Bundling is a type of consolidation unsuitable for small businesses, but suitable for small businesses participating in a Small Business Teaming Arrangement (SBTA). The rule requires 30 days' notice of the agency's rationale for bundling on the agency's website.

6. SBA Procurement Center Representatives (PCRs) will work with agencies to ensure compliance.

The SBA's rule changes give agencies tools to ensure that small businesses are included in multiple award contract procurements, and set forth the manner in which small businesses can compete for those contracts. As with the business size and status integrity regulations [previously addressed by Venable's Government Contracts Practice Group](#), these regulations implement provisions of the Small Business Jobs Act of 2010 (Jobs Act). A more detailed analysis of the rule is provided below.

Agency Tools for Making Awards to Small Businesses under Multiple Award Contracts

The new rules apply broadly to multiple award contracts, which the SBA has defined as:

- A Multiple Award Schedule (MAS) contract issued by the General Services Administration (GSA) or any agencies granted MAS contract authority by GSA;
- A multiple award task order or delivery order contract, including government-wide acquisition contracts; or
- Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

The rules provide three means by which agencies can ensure that small businesses are included in multiple award contract procurements: partial set-asides of contracts, reserves of awards, and set-asides of orders.

Partial Set-Asides of Contracts

An agency may make a partial set-aside of a contract when two conditions are met. First, the acquisition can be broken into smaller, discrete portions, such as by contract line item number (CLIN), special item number (SIN), or functional area (FA). Second, the "rule of two" will not be met for the whole acquisition, *i.e.*, there is not a reasonable expectation that the contracting officer will obtain offers from at least two small businesses, and the award will be made at a fair market price. Third, the "rule of two" can be met for some of the smaller, discrete portions of the contract.

If those conditions are met, the contracting officer will issue the solicitation as a partial set-aside, and orders placed against those portions of the contract that were set aside will be competed only among the small businesses that were awarded the set-aside portions of the contract. Notably, there is no requirement that small businesses make an offer on the non-set-aside portion of the contract in order to compete on the set-aside portion, which is a departure from previous rules under the FAR. Small businesses may still compete for the non-set-aside portion of a multiple award contract with a partial set-aside, though, as the contracting officer may state in the solicitation that small businesses can compete against all offerors on the non-set-aside portion of the contract.

Reserves of Awards

When an acquisition cannot be broken into smaller, discrete portions because requirements cannot be clearly identified until individual task orders are drafted, an agency may reserve awards for small businesses. Reserves of awards apply in three different scenarios.

First, if market research shows that two or more awards can be made to small businesses that can perform part, but not all, of the requirement, the contracting officer may issue the solicitation as a small business reserve. If the

“rule of two” is satisfied for an order placed against the contract, the order is competed solely among the small businesses that participated in the reserve.

Second, if market research shows that at least one small business can perform the entire requirement but there is no reasonable expectation of receiving at least two offers from small businesses at fair market prices, the contracting officer may also issue the solicitation as a small business reserve. Orders placed against the contract may be issued directly to the one small business awardee.

Finally, on a bundled acquisition, if market research shows that the “rule of two” will not be met for the entire requirement and that no small business can perform the entire requirement due to the bundling, the contracting officer may issue the solicitation as a reserve for a small business teaming arrangement (SBTA), and issue an award to an SBTA. Orders placed against the contract are competed among all contract awardees.

Under the new rules, a contracting officer making use of a reserve for a multiple award contract is permitted, but not required, to set forth targets for the dollar value of reserves under the contract.

Set-Asides of Orders

When an agency awards a multiple award contract pursuant to full and open competition, without making use of a partial set-aside or a reserve, the new rules also permit the agency either to commit to setting aside orders or to preserve its right to consider setting aside orders placed under the contract. When making use of this tool, the contracting officer must state in the solicitation whether orders under the contract will be automatically set aside whenever the “rule of two” is satisfied for that order, or if the agency simply preserves the right to set aside such orders.

SBA also harmonized the use of set-asides for orders placed under GSA MAS contracts. For acquisitions below the simplified acquisition threshold, the agency first applies the “rule of two” to determine whether a set-aside of orders is appropriate. The agency then surveys or requests quotes from three schedule contractors through [GSA Advantage!](#), in accordance with FAR requirements. SBA notes that the agency can request quotes from more than two small businesses in that instance. The agency would follow much the same process for acquisitions above the simplified acquisition threshold, first applying the “rule of two” and then providing the request for quotes to as many schedule contractors as practicable.

Agency Requirements

While agencies are required to consider use of these tools in awarding multiple award contracts, there is no order of preference specified in the new rules. If an agency decides not to use a partial contract set-aside, reserve, or set-aside of orders with respect to a multiple award contract, however, it must explain its decision and document it in the contract file.

NAICS Code Assignments

To achieve greater accuracy in how NAICS codes are assigned to multiple award contracts and orders, as well as in corresponding agency credit for small business contracting goals, the new rules provide guidance to contracting officers with respect to NAICS code assignments.

The new rules require assignment of NAICS codes to all multiple award contracts and orders thereto, which is in line with SBA’s current regulations requiring every contract and order for a long-term contract to be assigned a NAICS code. If all of the orders issued against a multiple award contract can be classified under a single NAICS code and corresponding size standard, the contracting officer simply assigns that NAICS code to the contract. If no single NAICS code applies, the contracting officer can apply multiple NAICS codes only if it can divide the contract into discrete categories, such as by CLIN, SIN, or FA. In that case, the contracting officer assigns a single NAICS code to each discrete category, and orders placed against each category are assigned the same NAICS code as that given to the category. The SBA explained that this rule is designed to eliminate situations it has observed where an agency assigns multiple NAICS codes to a multiple award contract, and the agency claims small business contracting credit for an award to a business that qualifies as small under some of the NAICS codes assigned to the contract, but not to the NAICS code that was assigned (or should have been assigned) to the order.

Where an agency can issue an order against multiple categories on a multiple award contract, such as with a GSA MAS contract, the new rules require the contracting officer to select the single NAICS code from the contract that best represents the principal nature of the acquisition for that order, which usually is the component accounting for the greatest percentage of contract value.

Size Determinations

The new rules align the timing of size determinations for multiple award contracts with current SBA regulations, providing that size determinations for multiple award contracts are made at the time a business self-certifies as part of its initial offer including price. Where a multiple award contract has been assigned multiple NAICS codes, if a small business seeks to compete for task orders under the entire contract, the business must certify its size status with respect to each NAICS code assigned to the contract. The business will be considered small for the corresponding NAICS codes for the life of the multiple award contract, unless the contract has a term greater than five years. In that case, the contractor must recertify its status no more than 120 days prior to the end of the fifth year or prior to exercising any option thereafter. Where a contractor has certified its size upon making an offer on a multiple award contract, the contracting officer may require recertification for each order placed against the contract, but that authority is discretionary.

The new rules also clarify the size determination regulations that apply when a small business is part of a merger or acquisition. The new rules make clear that recertification of size status is required not only if a small business is acquired, but also if a small business acquires another concern. Recertification is also required when a participant in a joint venture is involved in a merger or acquisition, which can affect the joint venture's status. For example, if a small business in a mentor-protégé joint venture is acquired and becomes other than small, the joint venture will not be considered small from that point forward.

With respect to agreements, such as blanket purchase agreements (BPAs), basic agreements (BAs), or basic ordering agreements (BOAs), the new SBA regulations state that size determination is made at the time of the response to the solicitation for the agreement. Because agreements are not contracts under the FAR, however, an agency may only count an order awarded under an agreement toward its small business contracting goals if the awardee also qualifies as small at the time the order is placed. There is an exception to the general rule in the case of BPAs issued against GSA MAS contracts. In that case, size will have been determined at the time of the offer on the contract, and the SBA therefore does not believe that size needs to be determined upon issuance of the BPA.

Finally, the new rules address agency tools for on- and off-ramping contractors. While the proposed rules contemplated mandatory off-ramping of a small contractor on a set-aside multiple award contract that becomes other than small, the final rule left the use of this tool to the discretion of the contracting officer. With respect to all multiple award contracts, therefore, the new rules provide that the use of on- and off-ramping is at the agency's discretion. Where an agency has set aside orders for small businesses, however, a business that has recertified as other than small will not be eligible to compete for those orders.

Subcontracting Limitations and the Nonmanufacturer Rule

The final regulations set forth the criteria by which small businesses will be judged to be in compliance with the 50 Percent Rule and the Nonmanufacturer Rule. Under a set-aside multiple award contract, a contractor must meet the limitations on subcontracting and satisfy the Nonmanufacturer Rule in each period of the contract, *i.e.*, during the base period and each option period. By contrast, compliance at the order level is required for multiple award contracts subject to a reserve or set-aside of orders. The final rule also gives contracting officers the discretion to require compliance at the order level for set-aside multiple award contracts.

With respect to 8(a) business development participants, the SBA has retained the rule that permits the SBA to waive the order-by-order compliance requirement, instead allowing compliance to be measured against all orders issued during a six-month period under certain conditions. The SBA retained this exception because the 8(a) program is a business development program, and the SBA conducts annual reviews of participants to assess compliance.

A contracting officer must document a business's compliance with the 50 Percent Rule and the Nonmanufacturer Rule as part of the business's performance evaluation, and that information accordingly is made available on the Past Performance Information Retrieval System. Thus, a contractor's compliance with these rules will affect the evaluation of its past performance when competing on future procurements. Furthermore, failure to comply with subcontracting limitations can result in actions by the contracting officer such as a cure notice, a show cause notice, a termination for convenience, or even a termination for default.

Consolidation and Bundling

As defined under the new rules, a consolidation occurs when there is a solicitation for a single contract or multiple award contract with a total cost in excess of \$2 million, which is to satisfy two or more requirements that were previously provided under two or more contracts, each of which was lower in cost than the consolidated contract. A

procurement is also considered to be consolidated if it is for a single contract for construction at two or more discrete sites. The new rules place limits on when agencies are permitted to proceed with consolidated procurements, providing that they are permitted only if the agency's Senior Procurement Executive or Chief Acquisition Officer justifies the consolidation – by finding that the benefits substantially exceed the benefits of separate procurements – and identifies the impacts of consolidation on small businesses.

Bundling, under the new regulations, is a specific type of consolidation, wherein consolidation results in a contract or multiple award contract that is likely unsuitable for award to a small business because of the bundling of requirements, but may be suitable for award to an SBTA. Similar to the agency requirements for consolidation, an agency pursuing a bundled procurement must document the acquisition strategy, including a determination that bundling is necessary and justified when compared to the benefits of using separate, smaller contracts. The new rules also require that the bundling rationale be published on the agency's website at least 30 days prior to issuing a solicitation, which is in line with Department of Defense policy for bundled procurements.

Small businesses may form SBTAs to compete on bundled contracts without affecting their size status for any other purpose. The rules require an SBTA to have a written agreement that the SBTA must submit to the contracting officer when submitting a proposal on a bundled contract. There is no limit to the size of an SBTA, but it must be composed solely of small businesses, each of which qualifies as small under the NAICS code assigned to the contract. The SBTA agreement also must set forth percentages or other allocations of work among the participants.

PCR Assistance

In order to ensure agency compliance, the new rules set forth the SBA's responsibilities with respect to these provisions. The rules provide that the SBA's procurement center representatives (PCRs) must work at the earliest stage possible with the agency, reviewing acquisitions to ensure that the agency complies with all applicable statutory and small business requirements. For example, the PCRs will assist in identifying consolidated or bundled procurements, and encourage the use of set-asides and reserves.

Implementation

Recognizing that these new rules represent significant changes to the way in which agencies engage in multiple award procurements, the SBA estimates that full, government-wide implementation may take up to five years and will require extensive retraining of acquisition personnel. Nevertheless, the new regulations provide powerful tools for agencies to ensure that small businesses do not get overlooked in multiple award contracts. For assistance in determining how your small business can take advantage of the new rules or on how these regulations might impact your business, or to better understand the requirements regarding small businesses, please contact **Paul Debolt** at padebolt@Venable.com, **Keir Bancroft** at kxbancroft@Venable.com, **Nathaniel Canfield** at nscanfield@Venable.com, or any of the other attorneys in Venable's **Government Contracts Practice Group**.