

PRELIMINARY WORKING GROUP DRAFT
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SECTION 1423 ACQUISITION ADVISORY PANEL
SMALL BUSINESS CROSS-CUTTING WORKING GROUP

DRAFT BACKGROUND AND ISSUES STATEMENT
SECTIONS OF REPORT

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I. INTRODUCTION

Small businesses have been long recognized as one of the nation’s most valuable economic resource. As reflected in Table 1, small businesses participate in all major U.S. industries. Indeed, studies commissioned by the U.S. Small Business Administration (“SBA”) Office of Advocacy reveal that small businesses represent 99.7 percent of all employers and employ about half of all private sector employees.¹ The Office of Advocacy studies further show that small businesses pay 44.3 percent of the total U.S. private payroll and have generated 60 to 80 percent of net new jobs annually.² In addition, small businesses employ 39 percent of high tech workers (such as scientists, engineers, and computer workers) and produce 13 to 14 times more patents per employee than large firms.

Table 1: Small Business Employment by Major Sector

Industry	Percent of Small Business Employees	Number of Employees (in millions) By Major Sector				
		2000	2001	2002	2003	2004
Goods-producing industries	48.41	24.65	23.87	22.55	21.81	21.88
Natural resources and mining	38.24	0.60	0.61	0.58	0.57	0.59
Construction	96.15	6.79	6.83	6.71	6.73	6.96
Manufacturing	42.34	17.27	16.44	15.26	14.51	14.33
Service-producing industries	55.03	107.14	107.96	107.79	108.19	109.59
Trade, transportation and utilities	52.32	26.22	25.99	25.50	25.29	25.51
Wholesale trade	62.79	5.93	5.77	5.65	5.61	5.65
Retail trade	42.92	15.28	15.24	15.02	14.92	15.04
Information	25.56	3.63	3.63	3.39	3.19	3.14
Financial activities	39.73	7.69	7.81	7.85	7.98	8.05
Professional and business services	44.83	16.67	16.48	15.98	15.99	16.41
Education and health services	47.84	15.11	15.65	16.20	16.59	16.95
Leisure and hospitality	61.43	11.86	12.03	11.99	12.18	12.48
Other services	86.16	5.17	5.26	5.37	5.40	5.43
Government	0	20.79	21.12	21.51	21.58	21.62

Notes: Seasonally adjusted. See <http://www.bls.gov/ces/cessuper.htm> for NAICS code equivalents for each sector. The small business percentage by sector is based on 2002 firm size data.

Sources: U.S. Small Business Administration, Office of Advocacy, using data from the U.S. Department of Commerce, Bureau of the Census; U.S. Department of Labor, Bureau of Labor Statistics.

¹ See U.S. Small Bus. Admin., *Frequently Asked Questions: Academic Research on Small Businesses (How important are small businesses to the U.S. economy?)*, available at <http://app1.sba.gov/faqs/faqindex.cfm?areaid=24> (last visited Aug. 31, 2005).

² *Id.*

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Recognizing the vital role of small businesses in the U.S. economy, both the Legislative and Executive Branches of government have emphasized small business contracting as a fundamental socioeconomic goal underlying Federal procurement policy. In Section 8(d) of the Small Business Act, for example, Congress explicitly declares that “[i]t is the policy of the United States that small business concerns have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems.”³ To effectuate that policy, Congress established a governmentwide small business contracting goal of not less than 23 percent of the total value of all Federal prime contract awards each fiscal year.⁴ Congress further established separate contracting goals for the various categories of small business concerns (“SBCs”), including a five percent goal for small disadvantaged businesses (“SDBs”); a five percent goal for women-owned small businesses (“WOSBs”); a three percent goal for HUBZone SBCs; and a three percent goal for small businesses owned and controlled by service-disabled veterans (“SDVOSBs”).⁵

The Executive Branch also has consistently acknowledged the government’s fundamental interest in supporting small businesses through Federal contracting. The current Small Business Agenda, which President George W. Bush unveiled in March 2002, outlines specific proposals to improve the access of small businesses to Federal contracts.⁶ As part of that Agenda, the President reiterates that small businesses are the heart of the American economy and that the contracting process should be fair, open, and straightforward to these businesses. More recently, President Bush issued an Executive Order designed to strengthen and increase contracting opportunities for SDVOSBs.⁷ In that October 20, 2004 Order, President Bush charged agencies with responsibility for developing strategies to reserve contracts exclusively for SDVOSBs and to encourage SDVOSB participation in competitive contract awards.

Consistent with the National policy to maximize small business participation in procurements, the total small business share of Federal contracting dollars has continued to grow in recent years. The Federal Procurement Data Center (“FPDC”) reports that in Fiscal Year (“FY”) 2004, small businesses received a record \$69.23 billion of Federal prime contracts.⁸ Those dollars represent 23.09 percent of the total \$299.9 billion of Federal prime contracting

³ 15 U.S.C. § 637(d). As the basis for the government’s small business contracting policy, Section 3(a) of the Small Business Act explains that encouraging and developing the capacity of small business is critical to promoting the country’s economic well being and national security. 15 U.S.C. § 631(a).

⁴ 15 U.S.C. § 644(g)(1).

⁵ *Id.*

⁶ President Bush’s Small Business Agenda is available on the official Whitehouse web site at <http://www.whitehouse.gov/infocus/smallbusiness/agenda.html> (last visited Aug. 31, 2005).

⁷ See “Executive Order: Service-Disabled Veterans Executive Order,” <http://www.whitehouse.gov/news/releases/2004/10/20041021-5.html> (last visited Aug. 31, 2005).

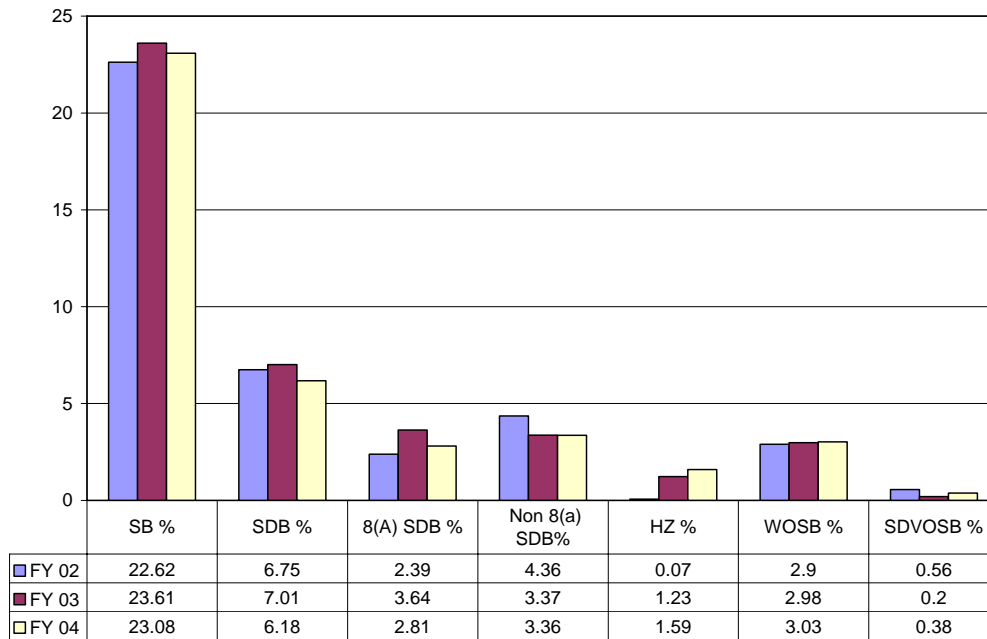
⁸ The complete Small Business Goaling Report is available at <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>.

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dollars awarded in FY 2004, as adjusted for goaling purposes.⁹ A complete list of small business contracting dollars for FY 2004, by major Federal department and small business category is provided at the Small Business Appendix (“SB Appendix”) 1.

As reflected in Figure 1 below, many of the small business categories experienced a steady climb in the amount of prime contracting dollars in recent years. For example, the prime contracting dollars awarded to WOSBs increased by \$814.6 million to a record \$9.1 billion. That represents about three percent of the total Federal prime contracting dollars, up from 2.98 and 2.9 in FY 2003 and 2002, respectively. Likewise, HUBZone SBCs and SDVOSBs have received a record amount of contracting dollars in FY 2004. As detailed in the small business contracting data provided in SB Appendix 1, HUBZone SBCs dollars increased by 40 percent, to \$4.78 billion. Also in FY 2004, SDVOSBs dollars more than doubled, reaching \$1.15 billion, up from \$550 million in FY 2003. Despite the increase in contracting dollars to WOSBs, HUBZone SBCs and SDVOSBs, however, agencies have never achieved the statutory goals for any of those three categories of small businesses. In addition, even in the SDB category where the government has exceeded the governmentwide statutory goal of five percent, the total dollars to SDBs decreased from 7.01 percent in FY 2003, to 6.18 percent in FY 2004.

**Figure 1: Small Business Percent of Total Federal Prime Contracting Dollars
 FY 2002 – 2004**



Source: FPDS Annual Reports.

⁹ As explained in SBA’s Goaling Guidelines, the baseline for the total value of prime contract awards used to determine small business goal achievements excludes several categories of procurements that are not covered under the goaling program. Among the exclusions are procurements using non-appropriated funds; procurements using mandatory sources such as the Javits-Wagner-O’Day (“JWOD”) Act (41 U.S.C. 46-48c) participating nonprofit agencies; contracts for foreign governments or international organizations; and contracts not subject to the Federal Acquisition Regulation (“FAR”). See *Goaling Guidelines for the Small Business Preference Programs*, available at <http://www.sba.gov/GC/goals/ggtotal71503.pdf> (last visited on Nov. 10, 2005).

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As discussed in greater detail in Section III of this Small Business Working Group Report, the small business goal achievements on multiple award multi-agency contracting vehicles has been mixed. The small business share of awards against the General Services Administration (“GSA”) Federal Supply Schedule (“FSS” or “Schedule”) has been among the most significant, representing about 80 percent of the Schedule contract awards and 36.8 percent, or \$11.4 billion, of FSS sales in FY 2004.

Taken together, Federal agencies have made significant progress in expanding small business contracting. However, although the government has achieved the overall small business goal of not less than 23 percent of the total value of prime contract awards, agencies have fallen short of the statutory goals for the small business subcategories of WOSBs, HUBZone SBC and SDVOSBs. Accordingly, in carrying out its charge to recommend improvements to the services acquisition process, the Acquisition Advisory Panel established a Small Business Working Group to consider small business issues that cut across the Panel’s statutory charter. In attempting to identify and analyze those issues, the Group focused on the governing statutory mandate to enhance small business contracting opportunities, as balanced against the government’s fundamental interest in encouraging efficiency, transparency, and competition in the Federal procurement process.

A. Areas of Consideration

As directed by the Panel Chair, the Small Business Working Group focused on the Panel’s five general areas of consideration: commercial practices, performance-based service acquisitions, interagency contracts, workforce, and inherently governmental functions. Based on the Group’s review and the Panel’s development of various issues in those five areas, the Small Business Working Group identified two primary issues relating to interagency contracting, commercial practices, and workforce.

The first of the two major issues considered was the extent to which Federal services acquisition strategies are structured to afford small business participation on the prime contracting level. Specifically, in light of the varied small business goal achievements, the Group reviewed existing laws, regulations and policies to ensure that there is adequate guidance in selecting specific small business contracting mechanisms and appropriate interagency contracting vehicles to facilitate small business goal achievements. The Group further analyzed the laws and policies governing the process for defining requirements. The Group’s primary objective in this regard was to identify effective incentives and acquisition planning tools to encourage small business contracting in the face of a shrinking acquisition workforce and the recent initiative to leverage spending through strategic sourcing.

The second of the two major issues examined was the adequacy of guidance for utilizing small business contracting methods against multiple award task order contracts, including governmentwide agency contracts (“GWACs”) and the FSS. The Group’s underlying objective in this second major area of consideration was to identify salient policies and practices that may be used to build on successful small business goal achievements, particularly in the context of commercial buys off GSA’s Schedule. Further, in this major issue area, like the first, the Group sought strategies to promote small business contracting opportunities, without compromising the overarching goals of contracting efficiency, integrity and competition.

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It is noteworthy that the Working Group initially explored possible issues regarding compliance in small business subcontracting, as a result of early public statements recommending reforms in this area. A summary of the public statements are attached at SB Appendix 2. However, the Group concluded that more accurate and reliable data is necessary to fully analyze small business subcontracting issues. The Federal government recently launched a new electronic Subcontracting Reporting System (“eSRS”), which is designed to create higher visibility and transparency in the collection of Federal subcontracting data and accomplishments. Once this web-based reporting tool is fully operational, it will provide more accurate and timely data, as well as analytical tools to permit a comprehensive examination of small business subcontracting activity. A summary of the relevant subcontracting requirements and eSRS reporting capabilities is provided at SB Appendix 3.

It is also noteworthy that the Working Group recognized as a threshold matter that there are many small business contracting issues, though of critical importance to the Federal procurement community, are beyond the scope of the Panel’s statutory charter. Notable examples involve issues relating to small business size standards. The issue of small business recertification on multiple award contracts, for example, has garnered significant attention in recent years.¹⁰ That issue, however, is the subject of a pending SBA proposed rule.¹¹ At this writing, SBA has not yet promulgated final regulatory amendments. Without a final rule for the Working Group to review and assess its possible impact, an analysis of that issue in this Report would be premature, at best.

Likewise, the Small Business Working Group recognizes the fundamental need for reforms to the system for defining and applying the size status of a business concern. Since SBA has already published an Advance Notice of Proposed Rulemaking (“ANPRM”) to simplify and restructure small business size standards,¹² that issue may not be ripe for consideration in this process, particularly given its wider application to Federal procurement as a whole. Nonetheless, the Working Group expresses its full support of SBA’s declared purpose to simplify small business size standards. More specifically, the Working Group urges an approach that would allow small business status designation based on the firm’s primary North American Industry Classification System (“NAICS”) to remain effective for a fixed period, such as three years, and to apply across industries and procurements during that fixed period. The Working Group believes that such a simplified means of determining small business status would make contracting with small businesses easier and more convenient. In so doing, it will increase the effectiveness of programs to enhance small business participation in the Federal marketplace.

¹⁰ See, e.g., General Accountability Office, *Reporting of Small Business Contract Awards Does Not Reflect Current Business Size*, GAO-03-704T (May 7, 2003).

¹¹ See 68 Fed. Reg. 20350 (April 25, 2003).

¹² SBA published the ANPRM on December 3, 2004. It requested public input on how best to simplify and restructure small business size standards. 69 Fed. Reg. 70197 (Dec. 3, 2004). The ANPRM comment period closed on April 3, 2005. SBA received more than 6,100 comments. In June 2005, SBA also conducted public hearings in 11 locations across the country to provide interested parties an opportunity to meet with SBA officials and discuss their views on the issues. See 70 Fed. Reg. 25133 (May 12, 2005) (discussing the purpose, location and format of the scheduled hearings).

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B. Methodology

To analyze the two major issue areas, the Small Business Working Group reviewed the relevant statutes, regulations and policies. The Group also analyzed available data from the Federal Procurement Data System-NG (“FPDS-NG”), Inspector General and General Accountability Office (“GAO”) reports, and Comptroller General bid protest decisions. In addition, the Group reviewed various Congressional hearing testimony and interviewed procurement experts from both industry and the public sector to obtain information on best practices. Furthermore, the Working Group took into account written public comments submitted to the Panel and relevant oral comments presented during the Panel’s public meetings held in Washington, DC, Texas and California.

This Report describes the Group’s findings and accompanying recommendations based on its analysis of the extensive information reviewed. The Report has two main sections corresponding to each of the two general areas of consideration. Each section begins with a discussion of the relevant legal background and is followed by an analysis of the Group’s findings and the supporting documentation. Each section then concludes with specific recommendations, including any necessary proposed line-in/line-out statutory and regulatory amendments.

**II. THE PROCESS OF STRUCTURING ACQUISITION STRATEGIES
TO AFFORD SMALL BUSINESS PARTICIPATION**

A. Background

The performance of acquisition functions generally cuts across different agency lines of responsibility. Thus, for example, the contracting community finds it must balance the need for quick and efficient contracting (especially in light of current workforce issues and the need to strategically source services) with the achievement of socioeconomic, or small business, goals. Consequently, the Small Business Working Group has studied this balance with respect to two aspects of acquisition planning -- guidance in using the various small business contracting programs and guidance in promoting small business participation in consolidated contracts.

1. Guidance in Using Small Business Contracting Programs

The Small Business Act sets forth several specific contracting or business assistance programs, which include the 8(a) Business Development (8(a) BD),¹³ HUBZone,¹⁴ SDVOSB¹⁵

¹³15 U.S.C. § 637(a) (if the SBA certifies to any officer of the Government having procurement powers that there is a competent and responsible 8(a) Participant which can perform a specific Government contract, the officer shall be authorized in his discretion to let such procurement contract). Section 8(a) awards can be made pursuant to competition restricted to 8(a) concerns, or on a sole source basis. *Id.* § 637(a)(1)(D) & (a)(1)(B).

¹⁴15 U.S.C. § 657a(b)(2) (the statute provides that “[n]otwithstanding any other provision of law” . . . “a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns. . . .” and allows the contracting officer (CO) to make sole source awards to responsible HUBZone SBCs in limited situations).

¹⁵15 U.S.C. § 657f(a) & (b) (permits agencies to award sole source and set aside contracts to SDVO SBCs when certain conditions are met).

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and WOSB¹⁶ programs. These programs provide contracting preferences, either through a sole source or reserve (set aside) award, or through use of a price evaluation preference, to eligible SBCs in Federal contracting. The Act also sets forth requirements for reserving acquisitions for SBCs, depending on the dollar value of the procurement.¹⁷ The Government collects data on the number of contracts and the amount of contract dollars each of these SBCs receive from the different agencies.¹⁸ The Government uses this data to determine whether or not the agency is meeting its small business goals.¹⁹

The SBA has attempted to reconcile the Act's various programs, including the various set aside and sole source provisions, in its regulations.²⁰ For example, the regulations provide discretion to the CO by stating that the CO should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.²¹

The FAR has also attempted to reconcile the various programs in its regulations.²² For example, the FAR provides that before deciding to set aside an acquisition for SBCs, HUBZone SBCs, or SDVO SBCs, the CO should review the acquisition for offering under the 8(a) Program.²³ According to the FAR, if the acquisition is offered to the SBA, SBA regulations give

¹⁶15 U.S.C. § 637(m) (permits agencies to restrict competition to WOSBs in industries in which WOSBs are underrepresented).

¹⁷15 U.S.C. §§ 644(a) & 644(j). The Act provides that contracts for the purchase of goods and services valued greater than \$2,500 but not greater than \$100,000 shall be reserved exclusively for SBCs unless there are less than two SBCs that will submit a competitive offer. *Id.* § 644(j)(1). In general, the Small Business Act also requires a fair proportion of contracts be let to SBCs. *Id.* § 644(a).

¹⁸ See FPDS Next Generation, www.fpds.gov.

¹⁹These goals are summarized as follows: SBCs-23%; SDBs-5%; WOSBs-5%; HUBZone-3%; and SDVO SBCs-3%. 15 U.S.C. § 644(g)(1). Because these statutory goals are Government-wide, the percentages are based on the aggregate of all Federal procurement. The Act also requires that each Federal department and agency have an annual goal that presents, for that agency, the maximum practicable opportunity for SBCs. *Id.* This agency goal is separate from the Government-wide goal.

²⁰The SBA implements its statutory programs in its regulations as follows: 8(a) BD, 13 C.F.R. part 124; SDB, 13 C.F.R. part 124; HUBZone, 13 C.F.R. part 126; and SDVO, 13 C.F.R. part 125. The SBA has not yet issued regulations implementing the WOSB program.

²¹13 C.F.R. §§ 124.503(j), 125.19(b), & 126.607(b).

²²The FAR states that CO's must set-aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone SBCs and must consider HUBZone set-asides before considering HUBZone sole source awards or small business set-asides. 48 C.F.R. § 19.1305(a). Further, the FAR provides that a CO shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible SBCs offering the products or services of different SBCs. *Id.* § 19.502-2(b). Further, the FAR provides that the contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVO SBCs and shall consider service-disabled veteran-owned small business set-asides before considering SDVO SBC sole source awards. *Id.* § 19.1405(a).

²³48 C.F.R. § 19.800(e).

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first priority to HUBZone 8(a) concerns.²⁴ As noted above, this regulation now conflicts with the SBA's regulations and leaves less discretion to the CO.

The courts and GAO have also attempted to address the preferences within the Small Business Act and interpret the implementing regulations. In Contract Management, Inc. v. Rumsfeld, the court ruled that "the SBA and FAR regulations pertaining to the HUBZone Program sufficiently promote the congressional objective of parity between the HUBZone and 8(a) programs."²⁵ In USA Fabrics, Inc., the protester challenged an agency's decision to set-aside the acquisition for SBCs and not to set aside the procurement for HUBZone SBCs.²⁶ The GAO ruled that the agency failed to conduct adequate market research to determine whether at least two HUBZone SBCs could submit an offer at fair market price and sustained the protest.²⁷

In an attempt to address the agency's socioeconomic goals and need to quickly and efficiently administer a contract, some agencies are using "cascading" procurement.²⁸ In other words, the agency will issue a solicitation that is open to 8(a), HUBZone, SDVO SBCs and other than SBCs and set a cascading order of priority in the solicitation.²⁹ The GAO has stated that it has no basis to object to the scheme since it has the effect of increasing the opportunity for SBCs under an otherwise unrestricted solicitation.³⁰ Currently, there is no statute or regulation that

²⁴48 C.F.R. § 19.800(e). This is no longer true. The SBA amended its regulations to provide that ". . . the contracting officer shall set aside the requirement for HUBZone, 8(a) or SDVO SBC contracting before setting aside the requirement as a small business set-aside." 13 C.F.R. § 126.607(b).

²⁵Contract Management, Inc. v. Rumsfeld, 291 F.Supp.2d 1166, 1177 (D. Hawaii 2003).

²⁶USA Fabrics, Inc., B-295737; B-295737.2, 2005 CPD ¶ 82 (Apr. 19, 2005).

²⁷Id.

²⁸See Carriage Abstract, Inc. B-290676 et al, 2002 CPD ¶ 148 (Aug. 15, 2002). In that protest, the GAO stated that although an agency may review a large business proposal submitted under a cascading set-aside preference, the agency is not required to do so. GAO also stated it found no reason to question the use of cascading set aside preference provisions previously used by HUD. HUD argued that the approach promotes the interests of small business concerns and provides the agency with an efficient means to continue the procurement in the event that sufficient small business participation is not realized.

²⁹For example, the solicitation might state that the agency will first issue an award to an 8(a) BD concern, but if an award cannot be made to such a concern, it will issue an award to a HUBZone SBC, etc.

³⁰Carriage Abstract, Inc., supra. We note, however, that the GAO has not technically addressed whether such procurements are in accordance with the law since the GAO has only addressed this issue post award. Also, agencies are using similar types of cascading procurements to address the Act's preference programs as well as other programs, such as the Randolph-Sheppard Act (RSA). In Automated Communication Systems, Inc. v. United States, 49 Fed. Cl. 570, 578 (2001), the court ruled that the HUBZone price evaluation preference and the preference to certain blind persons licensed by a State agency pursuant to the RSA can be given its due and that the agency could issue the solicitation as a full and open competition and if the blind vendor submits a bid and the CO decides to conduct negotiations with that vendor, the RSA preference takes priority; if the blind vendor does not receive the contract award, the HUBZone SBCs receive the benefit of the price evaluation preference. See also Intermark, Inc., B-290925, 2002 CPD ¶ 180 (Oct. 23, 2002) (the GAO stated that the solicitation could contain a set of cascading preferences or priorities whereby competition is limited to SBCs and blind vendors).

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precludes a cascading procurement, although there is also no statute or regulation providing guidance on its use either.³¹ This has caused some problems with implementing the procurement.³²

In sum, the Group analyzed the myriad of different laws providing for preferences to SBCs to determine whether the contracting community has adequate guidance in deciding which preference is applicable to an acquisition.³³ Assuming they do not, this can create a burden (in time and administration, as well as monetary if there is a subsequent protest) on the procuring agency. As a subpart to this issue, the Group reviewed a current, creative contracting practice – cascading procurements – to see if it addresses the agency’s socioeconomic requirements while at the same time providing a quick and efficient contracting mechanism.

2. Guidance with Contract Consolidation

Contract bundling and consolidation are not new. For several years now, agencies have been consolidating contracts to streamline the procurement process, reduce administrative efforts and costs, and leverage their buying power.³⁴ Further, contract consolidation may be necessary if an agency is interested in strategic sourcing -- leveraging an agency’s spending power to the maximum extent possible by acquiring commodities and services more effectively and efficiently.³⁵

³¹Urban Group, Inc.; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 7.

³²Greenleaf Constr. Co. v. U.S., 67 Fed. Cl. 350 (2005). HUD had issued a cascading procurement. The initial competitive range offerors were SBCs. Later, however, one offeror was found to be other than small and another was found to be technically noncompetitive. Because this left only one offeror, the CO cascaded the procurement to the unrestricted category. The court ruled that HUD had adequate competition at the small business tier and the fact that only one SBC offeror remained in the competitive range did not compel a cascade to the unrestricted tier.

³³We note that in addition to the small business preferences set forth in the Small Business Act, there are several statutes that provide contracting preferences to other types of entities. This includes preferences for products and services of the Federal Prison Industries, 18 U.S.C. § 4124, preferences for supplies and services of certain nonprofit agencies employing people who are blind or who have other severe disabilities, 41 U.S.C. § 47(d)(2)(A), and a preference for the operation of vending facilities on Federal property to blind persons licensed by a State agency, 20 U.S.C. § 107 (the RSA). We believe that it would be best to first address any problems associated with guidance in using the statutory preferences set forth in the Act before tackling the larger issue of the guidance for the Act’s preference programs in conjunction with the ones set forth above.

³⁴U.S. Government Accountability Office, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 4 (May 2004), available at <http://www.gao.gov/new.items/d04454.pdf>.

³⁵Office of Management and Budget, Memorandum on Implementing Strategic Sourcing, (May 20, 2005), available at http://www.whitehouse.gov/omb/procurement/comp_src/implementing_strategic_sourcing.pdf (last visited on Oct. 26, 2005). The OMB explains that strategic sourcing will ultimately help agencies optimize performance, minimize price and increase achievement of socio-economic goals, among other things. Id.

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However, the President, in his Small Business Agenda,³⁶ and Congress have expressed concern about contract consolidation or bundling.³⁷ Thus, there are specific statutory provisions defining and addressing bundling.³⁸ Both the SBA and the FAR have further defined these bundling provisions in its regulations.³⁹ Recently, the SBA and FAR council amended their regulations to address interagency contract vehicles and bundling.⁴⁰ Specifically, these regulations state that orders placed against a FSS contract or task or delivery order contract awarded by another agency must comply with all requirements for a bundled contract when the order meets the definition of “bundled contract.”⁴¹

Bundling, as defined by the Small Business Act, is not per se prohibited. The statute allows the agency to bundle its requirements if the agency has performed sufficient market research and has justified the bundled action.⁴² In sum, a bundled procurement is necessary and justified if the agency will derive measurably substantial benefits as a result of consolidating the requirements into one large contract.⁴³ This is true even if the acquisition involves “substantial bundling.”⁴⁴

The Act requires all agencies to provide SBA’s PCR with a copy of the solicitation when the procurement renders small business prime contractor participation unlikely and the statement of work includes goods or services currently being performed by SBCs.⁴⁵ If the bundling is

³⁶President Bush’s Small Business Agenda is available on the official White House web site at <http://www.whitehouse.gov/infocus/smallbusiness/agenda.html> (last visited on Aug. 31, 2005).

³⁷See 15 U.S.C. § 631(j); see also S. Rep. No. 105-62, at 21 (1997) (“Often bundling results in contracts of a size or geographic dispersion that small businesses cannot compete for or obtain. As a result, the government can experience a dramatic reduction in the number of offerors. This practice, intended to reduce short term administrative costs, can result in a monopolistic environment with a few large businesses controlling the market supply”).

³⁸15 U.S.C. §§ 632(o), 644(a) & 644(e).

³⁹See 13 C.F.R. § 125.2, 48 C.F.R. §§ 2.101, 7.104(d)(2)(i), 7.107 and subparts 19.2, 19.4.

⁴⁰48 C.F.R. §§ 2.101, 8.404(c)(2), 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii).

⁴¹48 C.F.R. § 8.404(c)(2); see also 48 C.F.R. § 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii); Sigmatech, Inc., B-296,401 (Aug. 10, 2005) (GAO sustained a protest challenging the bundling of system engineering and support services with other requirements under a single-award BPA issued under awardee’s FSS contract).

⁴²The Small Business Act requires the agency to perform certain “market research to determine whether consolidation of the requirements is necessary and justified” before proceeding with a bundled acquisition strategy. 15 U.S.C. § 644(e)(2)(A); see also 13 C.F.R. § 125.2(d)(3); 48 C.F.R. § 10.001(a)(3)(vi).

⁴³15 U.S.C. § 644(e)(2)(B); see also 13 C.F.R. § 125.2(d)(5)(i); 48 C.F.R. § 7.107(a).

⁴⁴13 C.F.R. § 125.2(d)(7); 48 C.F.R. § 7.107(e). Substantial bundling is \$7 million or more for the Department of Defense; \$5 million or more for the National Aeronautics and Space Administration, the General Services Administration and the Department of Energy; and \$2 million or more for all other agencies. 13 C.F.R. § 125.2(b)(2)(i); 48 C.F.R. § 7.104(d)(2)(i).

⁴⁵15 U.S.C. § 644(a); see also 13 C.F.R. § 125.2(b)(3); 48 C.F.R. § 19.202-1(e).

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necessary and justified, the PCR will work with the procuring activity to preserve small business prime and subcontract participation to the maximum extent practicable.⁴⁶ If the requirement involves “substantial bundling,” the agency is required to specify actions designed to maximize small business participation as subcontractors at various tiers under the contract.⁴⁷

Sometimes, the agency is amenable to the SBA’s suggestions to promote small business participation in a bundled procurement.⁴⁸ Other times, the agency itself attempts to mitigate the impact.⁴⁹ For example, in Phoenix Scientific Corporation, the U.S. Department of the Air Force (Air Force) issued a multiple award IDIQ task order supply and support contract for maintenance of the agency’s weapons systems.⁵⁰ All offerors, including SBCs, could compete for four unrestricted awards.⁵¹ After that selection process, the Air Force would consider any previously unselected SBCs for the award of two contracts reserved for SBCs.⁵² At least 15% of the total value of all task orders would be awarded to SBCs as prime contractors and the large business primes would be required to subcontract a minimum of 23% of the total value of their task orders to SBCs.⁵³ The GAO ruled that this was not a bundled requirement pursuant to the Small Business Act because it was suitable for award to a SBC since SBCs would receive at least two awards as prime contractors and would receive a percentage of the task order awards.⁵⁴

Similarly, in Teximara, the GAO approved an Air Force acquisition in which the agency separated its requirement into two contracts – the Big BOS and the Little BOS.⁵⁵ The Air Force

⁴⁶See 15 U.S.C. §§ 644(a) (create procurement that encourages small business prime participation; 15 U.S.C. § 644(e)(“To the maximum extent practicable, procurement strategies used by the various agencies having contracting authority shall facilitate the maximum participation of small business concerns as prime contracts, subcontractors, and suppliers); 15 U.S.C. § 644(e)(3) (maximize small business participation at the subcontract levels).

⁴⁷15 U.S.C. § 644(e)(3); see also 13 C.F.R. § 125.2(d)(7), 48 C.F.R. § 7.107(e).

⁴⁸See e.g. B.H. Aircraft Company, Inc., B-295399.2 (July 25, 2005) (SBA agreed to the bundling with certain conditions, intended to promote and preserve small business participation for these parts, and which were memorialized in writing between the SBA and DLA).

⁴⁹The U.S. Department of Defense’s Office of Small and Disadvantaged Business Utilization has prepared a Contract Consolidation Guide, available at <http://www.acq.osd.mil/sadbu/news/contractconsolidation.pdf>, which addresses mitigation of consolidated requirements. For example, the Guidebook recommends giving evaluation points and greater credit to offerors that have identified small business teaming partners, joint ventures, or other small business subcontractors in their proposals, or establishing an award fee or other incentive that monetarily rewards contractors for meeting or exceeding goals in subcontracting plans. Guidebook at 2-2 through 2-5.

⁵⁰Phoenix Scientific Corp., B-286817, 2001 CPD ¶ 24 (Feb. 22, 2001).

⁵¹Id.

⁵²Id.

⁵³Id.

⁵⁴Id.

⁵⁵Teximara, B-293221.2, 2004 CPD ¶ 151 (July 9, 2004).

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did not reserve any of the Big BOS for small business participation as prime contractors but reserved the Little BOS for SBCs.⁵⁶ The Air Force required a minimum of 25% small business participation under the Big BOS, encouraged a greater percentage of small business participation through the award fee incentive provisions of the RFP, and stated it would continue to reserve the performance of approximately \$15 million in construction and other miscellaneous work for SBCs.⁵⁷ The GAO believed this satisfied the requirement to maximize small business participation on the requirement as a whole.⁵⁸

Despite all of this, there are still SBCs that believe contract consolidation has resulted in a decline in contract awards to SBCs (despite the fact that Federal purchasing has increased).⁵⁹ Further, reports issued by the Office of Federal Procurement Policy (OFPP) and the SBA's Office of Advocacy state that the use of consolidated contracts has resulted in a decline of awards to SBCs.⁶⁰ These reports also state that contract consolidation has grown with the increased use of interagency contracting vehicles.⁶¹

However, we note that according to a report by the GAO, only 4 agencies reported a total of 24 bundled contracts in FY 2002 and 16 agencies reported no bundled contracts despite FPDS data indicating that there were 928 bundled contracts (of which 33% were awarded to

⁵⁶Id.

⁵⁷Id.

⁵⁸Id.

⁵⁹See SARA Advisory Acquisition Panel Summary of Statements Submitted by Small Businesses (Jorge G. Lozano, Condortech Services, Inc.; Betty Manetta, Argent Assoc.; Monika Moo-Young, MYI Consulting).

⁶⁰Office of Federal Procurement Policy, Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses, at 3-4 (Oct. 2002), available at www.acqnet.gov (OFPP Reports), citing to Office of Advocacy, U.S. Small Bus. Admin., The Impact of Contract Bundling on Small Business FY 1992 – FY 2001, at 5 (Oct. 2002), available at www.sba.gov/advo/research/rs221tot.pdf (“for every increase of 100 bundled contracts there was a decrease of 60 contracts to small business; and for every additional \$100 awarded on bundled contracts there was a decrease of \$12 to small business. At a level of \$109 billion in FY 2001, bundled contracts cost small businesses \$13 billion annually. This is making it increasingly difficult for small businesses to compete and survive in the federal marketplace.”). We note that the report issued by the Office of Advocacy utilized a definition for the term “bundling” different than set forth in statute but nevertheless provides data on a “type” of contract consolidation.

⁶¹OFPP has stated that bundling has been “exacerbated by the use of contract vehicles that are not uniformly reviewed for contract bundling. Orders under agency multiple award contracts (MACs), multi-agency contracts, Government-Wide Acquisition Contracts (GWACs) and GSA’s Multiple Award Schedule Program are not subject to uniform reviews for contract bundling issues.” OFPP, Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses, at 5. According to the report issued by the SBA’s Office of Advocacy, there were over 10,000 consolidated orders/modifications issued in FY 1992 - FY 2001 off the FSS for a total of over \$50 million. Office of Advocacy, U.S. Small Bus. Admin., The Impact of Contract Bundling on Small Business FY 1992 – FY 2001, at 5, 15, 27 (the most frequently used contract vehicles for bundling are GSA Schedules, MACs, BOAs and IDIQ contracts).

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SBCs).⁶² Meanwhile, a report by the SBA's Inspector General's (IG's) office reveals that procuring agencies may be incorrectly applying the statutory definition of bundling to their requirements or simply failing to notify the SBA of such actions.⁶³ All of the reports commented on the need for timely and accurate data on bundling.⁶⁴

As evidenced from the above, the Group studied current practices, law and available data to ascertain apparent issues the contracting community faces with respect to defining requirements and particularly with respect to the practice of consolidating requirements. Specifically, the Group considered whether the contracting community has adequate guidance in promoting the use of small businesses when consolidating requirements.

**III. THE ABILITY OF SMALL BUSINESS TO COMPETE
IN THE MULTIPLE AWARD CONTRACTING ENVIRONMENT**

A. Background

The Federal Acquisition Streamlining Act of 1994 (FASA)⁶⁵ formalized the task or delivery order contracting technique, whereby the government acquires supplies or services during the contract period by issuing an order to the contractor. Generally, the government is only obligated to acquire a stated minimum of supplies or services, and the contractor is only obligated to provide a stated maximum. Congress established a preference for the award of multiple contracts when utilizing the technique, and a requirement that each contractor be provided a "fair opportunity" to compete for an order, with limited exception.⁶⁶ Contracting officers were given wide latitude in conducting competitions for orders.⁶⁷ Thus, there are two levels of competition - offerors must compete for award of one of the contracts, and then must compete with other contract awardees for each order.

⁶²U.S. Government Accountability Office, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 2. The report takes issue with the data showing that 33% of the bundled contracts were awarded to SBCs since, by definition, a small business is precluded from award of a bundled contract. Id. at 6.

⁶³Office of the Inspector General, U.S. Small Bus. Admin., Audit of the Contract Bundling Process, No. 5-20 at 4-5 (May 20, 2005); GAO, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 6 (agencies are confused by statutory definition of bundling). According to the report, officials at two of four agencies contacted did not know they were mandated to report all potential bundlings. Id. at 5. Further, the IG noted three instances where an agency did not classify a procurement as bundled, but the SBA Procurement Center Representative (PCR) did. Id.

⁶⁴GAO, GAO-04-454, Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain, at 6; IG, Audit of the Contract Bundling Process, No. 5-20 at 8-9; OFPP, Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses, at 8.

⁶⁵ Pub. L. No. 103-355, 108 Stat. 3423 (1994).

⁶⁶ Federal Acquisition Regulation (FAR) § 16.505(b).

⁶⁷ FAR § 16.505(b)(1)(ii).

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The passage of FASA, the enactment of the Clinger-Cohen Act⁶⁸ two years later, and the expansion of the General Services Administration's (GSA's) Multiple Award Schedules (MAS) program has led to a marked increase in the use of multiple award indefinite delivery, indefinite quantity (IDIQ) contracting vehicles.⁶⁹ The data suggests that small business concerns (SBCs) have been able to compete for and obtain multiple award IDIQ contracts and subsequent orders.⁷⁰ The reason may be due in large part to the creation of innovative procurement procedures by procuring agencies in an effort to meet their annual SBC prime contracting goals.⁷¹ Some procuring agencies have "reserved" one or more prime contract awards for SBCs under solicitations that were competed full and open, although there is no express authority for such an action. Some procuring agencies have awarded IDIQ contracts that contain ordering procedures that provide that competition for an order may be limited to SBCs. It is unclear whether agencies in fact have authority to limit competition for orders to SBCs, in light of the fair opportunity provisions mentioned above. Moreover, the Section 803 procedures applicable to the Department of Defense (DoD) may in fact prevent DoD from limiting order competitions to SBCs.⁷² Under GSA's MAS program, which has its own unique ordering procedures, procuring agencies have used a variety of methods to target small business MAS contractors. GSA has implemented policies and procedures that enhance procuring agencies ability to target small business MAS contractors, and SBCs received 36.8% of the dollars awarded under the MAS program in fiscal year 2004, up from 35.6% in fiscal year 2003.⁷³

⁶⁸ The Clinger-Cohen Act authorizes agencies to award multiple information technology task or delivery order contracts which are open to other federal agencies and are referred to as Government-Wide Acquisition Contracts (GWACs). Divisions D and E of the National Defense Authorization Act for Fiscal Year 1996 (Pub. L. No. 104-106, 110 Stat. 186 (1996)).

⁶⁹ According to the Government Accountability Office (GAO), total federal government expenditures valued over \$25,000 on Indefinite Delivery, Indefinite Quantity (IDIQ) contracts, Blanket Purchase Agreements (BPAs), and the General Service Administration's (GSA's) Multiple Award Schedules (MAS) program increased from 16 percent of federal procurement expenditures in fiscal year 1994 to 25 percent of federal procurement expenditures in fiscal year 1999. Gen. Acct. Off., Rep. No. GAO-04-738T, *Small Business: Trends in Federal Procurement in the 1990s*, p. 20 (2001). Sales under the GSA's MAS program have grown at least 21 percent sequentially for the past seven years, and totaled \$31.1 billion in fiscal year 2004.

⁷⁰ Gen. Acct. Off., Rep. No. GAO-04-738T, *Small Business: Trends in Federal Procurement in the 1990s*, pp. 12-20 (2001) (Small business concerns (SBCs) "received the legislatively mandated goal for federal contract expenditures each fiscal year from 1993 to 1999" and the small business share of dollars awarded under task and delivery order vehicles increased from 24 percent in fiscal year 1994 to 32 percent in fiscal year 1999); Gen. Acct. Off., Rep. No. GAO/NSIAD-98-215, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, pp. 8-11 (1998). SBCs received approximately 22-23% of total federal procurement expenditures for fiscal years 2000-2003.

⁷¹ Congress has established an annual government-wide goal for prime contracting with small businesses of not less than 23 percent of the total value of awarded contracts. 15 U.S.C. § 644(g)(1). Each agency also establishes its own annual goals for small business prime contracting. 15 U.S.C. § 644(g)(2).

⁷² Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); Defense Federal Acquisition Regulation (DFAR) §§ 208.404-70, 216.505-70.

⁷³ As of the end of fiscal year 2004, approximately 80% of the 16,500 MAS contracts were held by SBCs. In fiscal year 2004, SBCs received \$11.4 billion of the \$31.1 billion in dollars awarded under the MAS program.

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Given the fact that procuring agencies have created varying procurement procedures applicable to SBCs in the multiple award contracting environment, it may be time for Federal policy-makers to address whether procuring agencies have the authority to reserve prime contract awards for SBCs under multiple award solicitations that are competed full and open, and whether competition for orders under full and openly competed contracts can be limited to SBCs.

1. Competition for Multiple Award Contracts

The Federal Acquisition Regulation (FAR) provides that a contracting officer shall set aside any acquisition over \$100,000 for exclusive small business participation if there is a reasonable expectation that offers will be obtained from at least two responsible SBCs and award will be made at a fair market price.⁷⁴ Obviously, this regulation was written to address a single-award procurement. If a contracting officer expects to award five contracts, the fact that he or she reasonably expects two SBCs to submit offers does not compel a total small business set-aside of all five contracts. What some agencies have done is "reserve" one or more contracts for SBCs in the context of a full and open multiple award procurement.⁷⁵ However, such an action may be illegal under current law. Arguably, the Competition in Contracting Act and its implementing regulations strictly provide for competition that is either full and open, i.e., contracts awarded without regard to size status, or competition that is only open to SBCs.⁷⁶

If an agency does reserve one or more prime contract awards for SBCs, it is unclear whether the limitations on subcontracting should apply to the small business prime contractor.⁷⁷ Under existing regulations, for a total or partial small business set-aside service contract "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern."⁷⁸ However, small business "reserves" are not "set-asides" under

⁷⁴ FAR § 19.502-2(b).

⁷⁵ See Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Con. L.J. 429, 465-6 (2002); *Phoenix Scientific Corporation*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24; Gen. Acct. Off., Rep. No. GAO/NSIAD-98-215, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, pp. 10-11 (1998). Some agencies have labeled these "reserves" as partial small business set-asides, but the partial small business set-aside FAR provisions only apply to definite quantity supply contracts - the acquisition must be divided into severable economic production runs or reasonable lots which have comparable terms and delivery schedules, and any small business which wants to compete for the set aside portion must submit a responsive offer on the non-set-aside portion. FAR § 19.502-3.

⁷⁶ See 10 U.S.C. § 2304(b)(2) ("The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644)"); 41 U.S.C. § 253(b)(2) ("An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of Title 15"); FAR § 6.203(a) ("contracting officers may set aside solicitations to allow only such [small business] business concerns to compete").

⁷⁷ 15 U.S.C. § 644(o); FAR § 52.219-14; 13 C.F.R. § 125.6.

⁷⁸ FAR § 52.219-14; 13 C.F.R. § 125.6. The performance requirements of the HUBZone program actually exceed those of the other small business programs. See FAR §§ 52.219-3, 52.219-4, 52.219-14; 13 C.F.R. §§ 125.6(c), 126.700.

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current regulations, and the limitations on subcontracting provisions do not address "reserves."⁷⁹ On the one hand, the award of a "reserved" prime contract in the context of a full and open multiple award procurement only entitles the awardee to the opportunity to compete for orders with other awardees, including concerns that are other than small and that are not required to perform any particular portion of the work themselves. Consequently, it might be unfair to make a small business awardee adhere to performance requirements that are not applicable to its competitors. Moreover, the size protest process is available to prevent a "front" SBC from being awarded a prime contract reserved for SBCs, through application of the ostensible subcontractor rule.⁸⁰ On the other hand, the limitations on subcontracting regulations are based on statute, which provides that the limitations apply to contracts that are awarded to SBCs "in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small business concerns."⁸¹ Arguably, agencies reserve prime contracts for SBCs for the same reason they set aside contracts for SBCs - to ensure that a "fair proportion" of contracts are placed with SBCs.

Under current law, a procuring agency receives full credit towards its small business goals for a prime contract awarded to an SBC, regardless of the method of competition, i.e., regardless of whether the SBC must perform any specific portion of the work.⁸² However, if an SBC teams with a large business as a prime, or teams with other SBCs as a prime and they collectively exceed the size standard, the agency will get no credit for the award towards its small business prime contracting goals.⁸³ GSA has implemented a policy applicable to MAS orders which allows an SBC to team with other MAS contractors, both large and small, and allows the procuring agency to receive credit towards its small business prime contracting goals for the portion of the order performed by SBCs.⁸⁴

⁷⁹ "The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A 'set-aside for small business' is the reserving of an acquisition exclusively for participation by small business concerns." FAR § 19.501(a); *see* FAR § 52.219-14, 13 C.F.R. § 125.6 (limitations on subcontracting provisions); SBA's regulations mention reserves as a way to mitigate bundling. 13 C.F.R. § 125.2(b)(6)(i)(6).

⁸⁰ 13 C.F.R. § 121.103(h)(4) (a concern is affiliated with its subcontractor if the subcontractor will perform primary and vital functions of the contract or if the prime is unusually reliant on the subcontractor).

⁸¹ 15 U.S.C. § 644(a).

⁸² 15 U.S.C. § 644(o); FAR § 52.219-14; 13 C.F.R. § 125.6.

⁸³ Concerns submitting an offer to perform a prime contract are generally considered to be joint venturers, and affiliated for purposes of determining size for that particular procurement. 13 C.F.R. § 121.103(h)(2). There are some exceptions to this general rule for bundled or very large contracts and joint ventures created pursuant to the Small Business Administration's (SBA's) 8(a) Business Development program Mentor-Protégé regulations. 13 C.F.R. § 121.103(h)(3).

⁸⁴ These so-called Contractor Team Arrangements (CTA) allow the "team" to meet the government agency's needs by providing a total solution that combines the supplies and/or services from the team members' separate GSA MAS contracts. It permits contractors, especially SBCs with limited specialties, to complement each other's capabilities to compete for orders for which they may not independently qualify. A customer benefits from a CTA by buying a solution rather than making separate buys from various contractors. In light of increasing demand for total solutions, often at odds with the effort to curtail contract bundling, a CTA may be an effective way for an SBC to enhance its competitiveness. GSA's CTA policy also promotes large-small business partnership, as opposed to subcontracting arrangements, which allows the small business team partner be paid in a timely manner. A procuring

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2. Competition for Task Orders

The set aside requirements of FAR Part 19 generally apply before task or delivery order contracts are solicited and awarded, not when an order competition is conducted or the order is placed. Nevertheless, agencies have awarded IDIQ contracts with ordering procedures that provide that certain orders will be competed exclusively among SBCs.⁸⁵ Limiting competition for orders to SBCs on a full and openly competed contract appears to be contrary to the fair opportunity requirements.⁸⁶ This issue was raised in a bid protest before the Government Accountability Office (GAO), but the protest was dismissed on jurisdictional grounds.⁸⁷ Moreover, DoD may not be able to limit competition for orders to SBCs because of the Section 803 requirement to provide notice of a purchase to all contractors and fairly consider all responses.⁸⁸ If an order competition is limited to SBCs under a full and openly competed contract, it is unclear whether the winner of the order competition would have to comply with the limitations on subcontracting provisions, since the statute and regulations specifically reference "contracts" that are "set aside" for SBCs.⁸⁹

GSA's MAS program "provides Federal agencies...with a simplified process for obtaining commercial supplies and services at prices associated with volume buying."⁹⁰ Orders placed in accordance with FAR subpart 8.4 "are considered to be issued using full and open competition."⁹¹ Ordering agencies are not generally required to notify all contractors on a

agency receives credit towards its small business prime contracting goals for the portion of the requirement that small business team members perform.

⁸⁵ See *Size Appeal of the Department of the Air Force*, SBA No. SIZ-7432 (2005), where the SBA's Office of Hearings and Appeals (OHA) held that an agency can set aside a solicitation for an order under an IDIQ contract, and can request size new certifications in connection with the order competition. The OHA decision has been challenged in the United State Court of Federal Claims. *LB&B Associates, Inc. v. U.S.*, Case No. 05-1066c.

⁸⁶ FAR § 16.505(b) provides that each contract awardee must be provided a "fair opportunity" to be considered for award of an order valued over \$2,500, unless: (1) the need for the goods or services is so urgent that providing a fair opportunity would lead to unacceptable delays, (2) only one awardee is capable of providing the unique or highly specialized goods or services, (3) the order is a logical follow-on to a previous order and every awardee was provided with a fair opportunity to compete for the original order, or (4) the order is necessary to fulfill a minimum guarantee.

⁸⁷ *Professional Performance Development Group, Inc.*, B-294054.3, Sep. 30, 2004, 2004 CPD ¶ 191.

⁸⁸ Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); DFAR § 216.505-70.

⁸⁹ 15 U.S.C. § 644(o) ("A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees that" it will perform a specific portion of the work); 13 C.F.R. § 125.6 ("In order to be awarded a full or partial small business set-aside contract" an SBC must agree to perform a specific portion of the work).

⁹⁰ FAR § 8.402(a).

⁹¹ FAR § 8.404(a).

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particular Schedule of their intent to purchase.⁹² For orders above the micro-purchase threshold (\$2500), contracting officers generally must review the capabilities of, or solicit quotes from, at least three MAS contractors.⁹³ However, when DoD orders services valued over \$100,000 under an MAS it must provide notice of its intent to purchase to: (1) all contractors under the applicable Schedule, or (2) as many MAS contractors as practicable to ensure that at least three quotes are received.⁹⁴ Posting a requirement on GSA's electronic request for quotation system (e-Buy) is one way DoD can meet this requirement.⁹⁵ Procuring agencies on average receive three quotes in response to a solicitation posted on e-Buy.

The set aside requirements of FAR Part 19 also apply to the MAS program "at the acquisition planning stage prior to issuing" a solicitation for a contract, not at the order level.⁹⁶ Although there is no requirement to conduct small business set-aside analysis prior to placing an order under GSA's MAS program, FAR subpart 8.4 provides that "Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s)."⁹⁷ In addition, agencies have in fact limited consideration for orders exclusively to SBCs, and one GSA MAS contract (Schedule 70, SIN 132-51) specifically authorized ordering agencies to limit competition for award of an order to SBCs.⁹⁸ However, under current MAS ordering procedures procuring agencies are required to provide solicitations to any MAS contractor that requests it, and to evaluate all quotes received in response.⁹⁹ Nevertheless, agencies continue to limit competition for orders to SBCs, because there is no explicit prohibition in the FAR.¹⁰⁰ On June 30, 2005, GSA issued an Acquisition Letter which

⁹² The fair opportunity provisions of FAR subpart 16.5 do not apply to MAS orders. FAR § 16.500(c). As discussed *supra*, there are additional notice requirements applicable to DoD when ordering services valued over \$100,000 under the MAS program.

⁹³ FAR §§ 8.405-1, 8.405-2.

⁹⁴ DFAR § 208.404-70.

⁹⁵ FAR § 8.405-2(d); DFAR § 208.404-70(c)(2).

⁹⁶ FAR §§ 8.404(a)(1), 38.101(e).

⁹⁷ FAR § 8.405-5(b).

⁹⁸ GAO upheld a procuring agency's decision to require MAS contractors to submit size certifications along with their quotations in an order competition limited to SBCs that was conducted among Schedule 70, SIN 132-51 MAS contractors. *CMS Information Services, Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132. The SBA's OHA has held that if a procuring agency limits competition for an MAS order (or BPA) to SBCs, a concern must be small at the time of their quote in order to be eligible for award. *Size Appeal of Advanced Management Technology, Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of SETA Corporation, Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002). GSA requires contractors to re-certify their size status when an option is exercised, typically every five years. GSA Acquisition Letter MV-03-01, February 21, 2003.

⁹⁹ FAR §§ 8.405-2(c)(4), (d).

¹⁰⁰ *See Systems Plus, Inc.*, B-297215.

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allows ordering activities to "make socio-economic status a primary evaluation factor when making a best value determination. [Citation omitted]."¹⁰¹

¹⁰¹ GSA Acquisition Letter V-05-12, June 6, 2005.