

SMALL BUSINESS JOBS ACT AND NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013



Overview

- ❖ **Small Business Jobs Act of 2010 – Pending Regulations**
- ❖ **Accelerated Payments to Small Business Subcontractors**
 - ❖ OFPP Memo
- ❖ **FY 2013 NDAA Small Business Provisions**

SMALL BUSINESS JOBS ACT OF 2010 PENDING REGULATIONS

- ❖ Small Business Subcontracting Protections
- ❖ Small Business Certifications
- ❖ Multiple Award Contracts and Contract Bundling/Consolidation

SMALL BUSINESS SET-ASIDES AND RESERVES

Defines Multiple Award Contract (JA §1311)

- multiple award IDIQ contract entered into under 41 USC 253h-253k
- any other multiple award IDIQ contract

Requires guidance that addresses the (JA § 1331):

- set aside of part or parts of a multiple award contract for small business;
- notwithstanding fair opportunity requirements, set aside of orders placed against multiple award contracts for small businesses; and
- reserve of one or more contract award(s) for small businesses under full and open competition multiple award procurements.

SMALL BUSINESS SET-ASIDES AND RESERVES CONT'D

FAR Issued interim final rule on November 2, 2011
(effective that date) at 76 FR 68032

- Comments extended until February 3, 2012

FAR amended:

- FAR Subpart 8.4 to clarify that agencies may set-aside orders and blanket purchase agreements under the GSA Schedule;
- FAR Subpart 16.5 to clarify that agencies may set-aside orders for SBCs in connection with multiple award contracts
 - The CO is not required to issue a justification for this exception to fair opportunity

SMALL BUSINESS SET-ASIDES AND RESERVES CONT'D

FAR also amended FAR Subpart 19.5 to authorize agencies to:

- set aside part or parts of a multiple-award contract for SBCs, including set-asides for small business concerns under the 8(a), HUBZone, SDVOSB and the WOSB Programs;
- set-aside orders placed against multiple-award contracts for SBCs, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs; and
- reserve one or more contract awards for SBCs, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs, under full and open multiple-award procurements.

SMALL BUSINESS SET-ASIDES AND RESERVES CONT'D

FAR 8.405-5(a)(2) states that when setting aside orders and BPAs against the Schedule:

- The specific small business program eligibility requirements identified in part 19 apply.

FAR 16.505(b)(2)(i)(F) states that when setting aside orders for small business concerns:

- The specific small business program eligibility requirements identified in part 19 apply.

What does this mean? Examples:

- Offer and acceptance requirements apply for 8(a) set-aside
- Dollar thresholds apply (e.g., 8(a) set-aside threshold)
- Joint venture requirements

SMALL BUSINESS SET-ASIDES AND RESERVES CONT'D

FAR also amended

- Current contract clauses re: set-asides to address this new authority
 - This means that subcontracting limitations and NMR apply to these set-asides and reserves

FAR added a new clause

- 52.219-13 which states that the CO will give notice of which orders, if any, to be set aside under a multiple award contract

SBA PROPOSED RULE

SBA issued a Proposed Rule on May 16, 2012

- Rule proposes to implement several sections of the Jobs Act
 - Multiple Award Contracts
 - Bundling/Consolidation
- Rule proposes to reorganize part 125 and clarify other SBA regulations

Available at

- 77 Fed. Reg. 29130
- <http://www.gpo.gov/fdsys/search/home.action> (search 77 FR 29130)

Comments were due on July 16, 2012

Final Rule drafted

RESERVE VS. PARTIAL SET-ASIDE

Partial Set-Aside is done when it is determined that a multiple award CONTRACT is unsuitable in its ENTIRETY for a small business set-aside BUT it is determined that SOME requirements of that multiple award contract can be broken down into clearly defined requirements (segments, line items,...etc.) - suitable for a small business set-aside AT THE CONTRACT Level. Those items are identified as a “partial set-aside” in the solicitation and small businesses can submit proposals to be awarded a set-aside contract. The small businesses can submit proposals for the unrestricted portion of that contract; or for both the unrestricted portion and the partial set-aside. A partial small business set-aside has the set aside requirements (orders to be competed) in-place at time of contract award.

Reserves are done when contract requirements are NOT clearly defined, AND cannot be broken down individually at the contract level for order competition. HOWEVER, the CO has determined that the **possibility exists to set-aside some orders once defined requirements are determined**. In that case, the contract is competed on an unrestricted basis (Large and Small businesses submit offers for the multiple award contract), the contracting officer notifies all potential offerors in the solicitation of the intent to do a “reserve” of some of the contract awards for small businesses. Awards are made to both large and small businesses and once a requirement (order) is identified that is suitable for small businesses, that “order” competition will be “set-aside” for small business participation.

SMALL BUSINESS STATUS- INTEGRITY

SBA issued proposed rule on October 7 at 76 FR 62313

- Comments were due on December 8, 2011
- SBA received 22 comments

Irrefutable presumption of loss to the US based on total amount of contract expended if business sought and received the award upon willful, affirmative, and intentional certification of its size or status and misrepresented its size or status

- Applies to more than just contracts – applies to Federal grants, contracts, subcontracts, cooperative agreements, or cooperative research and development agreements

Purpose

- JA 1343
- Prior to statute, it was difficult to prove loss



SMALL BUSINESS STATUS- INTEGRITY CONT'D

Proposed Regulations:

What is a deemed willful certification of size and status?

- Submitting offer for a solicitation that is reserved, set-aside or otherwise intended for award to small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
- Submitting an offer that encourages the agency to classify the proposal if awarded to small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
- Registration on any Federal database as small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB

Small Business must

- Sign offer with certification as to size and status on same page as the certification
- Update SAM at least once a year or will not be listed as small in SAM or retain status as SDB, SDVOSB, or WOSB/EDWOSB

SUBCONTRACTING

SBA issued proposed rule on October 5 at 76 FR 61626

- Comments were due on January 6, 2012
 - SBA received 105 comments
- Purpose is to strengthen subcontracting
 - JA sec. 1321,1322,1334

Section 1321 of the JA requires the SBA to establish policies for subcontracting compliance, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices.

Section 1322 of the JA requires a prime contractor notify the CO in writing if the prime contractor fails to utilize a small business concern used in preparing and submitting the prime contractor's bid or proposal.

Section 1334 of the JA requires a prime contractor that has a subcontracting plan to notify the CO in writing whenever a payment to a subcontractor is reduced or is 90 days or more past due for goods and services provided for the contract and for which the Federal agency has paid the contractor.

SUBCONTRACTING CONT'D

SBA's proposed rule:

Use of certain SBCs as subcontractors

- If subcontracting plan is required, prime must represent it will use small business that assisted in preparing offer and notify CO in writing if it fails to utilize the small business.
- A prime used a small business in preparing the offer if: it referenced the SBC in the offer; prime has a subcontract or agreement with SBC to perform work on the contract; or SBC drafted any portion of the offer or prime used the SBC's pricing, cost information or technical expertise in preparing offer and there was an understanding the prime would use SBC as a subcontractor.

Payments to subcontractors

- Prime must notify CO if and why it reduces payments to a subcontractor or when payments are 90 days past due.
- Prime cannot prohibit a subcontractor from discussing any material matter with the CO.
- CO can require prime to enter into funds control agreement
- Prime with history of unjustified payment reported in FAPIIS

Subcontracting plans

- CO is responsible for monitoring and evaluating small business subcontracting plan performance.
 - Did prime make a good faith effort to meet its goals – missed one goal but overachieved in another?
- CO must ensure prime submits subcontracting reports to eSRS.

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SUBCONTRACTING

Evaluation Factor for Subcontracting

- Proposed Subcontracting
- Proposed Quick or Timely Payment
- Past Performance - Paying Subks on Time
- Past Performance – Subcontracting Plan

Multi-Agency, Multiple Award Schedule, Government-wide Acquisition Contracts

- Report for Orders – Submitted Annually
- Funding Agency gets Credit towards Goals
- Funding Agency may establish plan for orders

BUNDLING & CONSOLIDATION

Agencies must post on the web a list and rationale for any bundled contract for which the Federal agency solicited bids or that was awarded by the Federal agency.

- Posted not later than 30 days after the date on which the head of a Federal agency submits data certifications to OFPP
- SBA issued direct final on October 13, 2011 at 76 FR 63542 and is effective November 28, 2011

Consolidation – Justification required for consolidating 2 or more separate requirements each lower in cost than proposed acquisition.

BUNDLING VS. CONSOLIDATION

Bundling is the combining of 2 or more contracts that were performed or could have been performed by a small business into one contract that is not suitable for award to a small business.

Consolidation is the combining of 2 or more contracts that were performed by small or large businesses into 1 contract with a value of \$2 million or more.

OMB Policy to Accelerate Payment

- OMB Memo, 7/11/12
(<http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-16.pdf>)
- DoD FAR Deviation
- Proposed FAR Rule on 12/19/12 Will Require Accelerated Payment to Small Business Subcontractors (<http://www.gpo.gov/fdsys/pkg/FR-2012-12-19/html/2012-30550.htm>)

Small Business Provisions in FY 2013 National Defense Authorization Act

- **Section 1621: Procurement Center Representatives**
 - **Would allow PCRs to review and make recommendations related to the acquisition plans and procurement methods and would require PCRs to hold Level III Certification.**

- **Section 1622: Small Business Contracting Requirements Training**
 - **Would require DAU and FAI to establish a course on small business contracting requirements and require completion of the course by Level I Certifications.**

- **Section 1623: Acquisition Planning**
 - **Requires: PCRs to be invited to all acquisition planning processes, agencies to enumerate small business opportunities during the acquisition planning processes.**

- **Section 1641: Mentor Protégé Program**
 - **Establishes a Mentor Protégé Program modeled after the 8(a) Mentor Protégé Program for all small businesses.**

- **Section 1651: Limitations on Subcontracting**
 - **Places limits on small business primes for subcontracting 50% of the contract. It permits small businesses to team without entering into joint venture agreements. It will open larger, more complex acquisitions to small business participation. However, the calculation to determine 50% compliance is different than current regulations.**

Small Business Provisions in FY 2013 National Defense Authorization Act

- Section 1652: Penalties
 - Establishes penalties for violations of subcontracting limitations.

- Section 1653: Subcontracting Plans
 - Amends the Small Business Act and requires the head of each agency to collect and report data on the extent to which contractors of the agency meet the goals and objectives set forth in subcontracting plans and requires the agency to periodically reviews data collected and reported for the purpose of ensuring that large prime contractors comply in good faith with their subcontracting plans.
 - Requires the Administrator to establish a reporting mechanism that allows a subcontractor or potential subcontractor to report fraudulent activity or bad faith by a contractor with respect to a subcontracting plan

Section 1671: Contract Bundling

Now includes construction under the definition of covered contracting

Small Business Mentor/Protégé Program

- Applies to all small businesses
- Program to be identical to 8(a) mentor/protégé program
- Advantages to program
 - Multiple bids as joint venture
 - Mentor may own 40% of protégé
- SBA regulations with 270 days

NDAA Removes Dollar Limits for Women-Owned SBC

- WOSB set-asides allowed for 83 4-digit NAICS codes
- Previous law permitted set-asides only for contracts < \$6.5 million for manufacturing and < \$4.0 million for other contracts
- NDAA deletes these dollar limitations

NDAA Change Calculation of Subcontracting Limits

NDAA Changes Calculation for Limitations on Subcontracting (LOS)

- Purpose
- Current rule – 50 percent of incurred labor costs
- New rule – amount expended on “similarly situated” subcontractors is not considered “subcontracted”
- All small business programs will have same LOS requirement
- SBA to develop construction contract subcontracting limits after public comment and formal rulemaking



Questions?

