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## CLIENT ALERT

### **SBA Issues Final Rules on the Use of Set-Asides for Multiple Award Contracts**

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On October 2, 2013, SBA issued its long-anticipated final rule addressing the use of set-asides on multiple award contracts and clarifying the regulations on bundling and contract consolidation. The final rule implements sections of the Small Business Jobs Act of 2010. SBA had issued a proposed rule on these issues in May 2012, and solicited comments. Likewise, DOD, GSA, and NASA published an interim rule in November 2011 providing agencies with initial guidance regarding the use of set-asides on multiple award contracts. With certain exceptions, the final rule adopts most of the changes contained in the May 2012 proposed rule. Because the issues addressed in the final rule impact multiple SBA programs, SBA is promulgating many additions and amendments to several sections of its rules. This Client Alert highlights many of the key provisions in the final rule.

#### ***Total Set-asides***

The final rule expressly provides that contracting officers must set-aside for small businesses an acquisition that will result in multiple award contracts when there is a reasonable expectation that two or more small businesses can provide the required services or supplies at a fair market price. However, the contracting officer may, in lieu of a small business set aside, choose to set aside the contract for 8(a) businesses, qualified HUBZone small business concern, service-disabled veteran-owned small business concerns (“SDVO SBC”), or economically-disadvantaged woman-owned small businesses/woman-owned small businesses (“EDWOSB/WOSB”).

#### ***Section 1331 Authorities (Partial Set-Asides; Reserves; Set-Aside Orders)***

According to the final rule, if the rule of two is not satisfied for the entire acquisition, agencies will have discretion under the proposed rule to use one of several tools by which to increase small business participation. These tools are referred to in the final rule as “section 1331 authorities” after the corresponding section of the Jobs Act. One tool is to award a multiple award contract with a partial set-aside when the acquisition can be broken into smaller discrete portions, such as CLINs, SINs, etc. Another tool is to use a contract “reserve” when the acquisition cannot be broken into smaller, discrete portions until the individual task orders are drafted. Finally, the contracting officer may set-aside orders when the rule of two is met for a particular order on a multiple award contract that was competed on a full and open basis.

The final rule makes clear that agencies have the discretion to forego using these tools even if the rule of two could be met. However, if an agency declines to use these tools, it must document why it did not do so when these authorities could have been used.

In addition, small businesses will be permitted to submit an offer on the set-aside portion of a partial set-aside, the non-set-aside portion, or both. This is different from FAR § 19.502-3 which requires small businesses to first submit responsive offers on the non-set-aside portion to be considered for the set-aside portion.

### ***New Affiliation Exception for Bundled Contracts***

SBA's final rule provides for a new exception from affiliation for bundled contracts with a reserve. In such a case, a so-called "Small Business Teaming Arrangement" may submit an offer and receive award as a small business without regard to affiliation, so long as each team member is small under the applicable size standard, and there is a written signed teaming agreement or joint venture agreement among the members. In addition, the small business subcontracting limitations or nonmanufacturer rule (as applicable) will apply to each order, and the cooperative efforts of the members will be able to meet the subcontracting limitation requirement. A "Small Business Teaming Arrangement" can be either (i) a joint venture consisting of two or more small business concerns to act as a prime contractor; or (ii) a teaming arrangement between a small business prime contractor with one or more small business subcontractors which has a written "Small Business Teaming Agreement."

### ***On-Ramps/Off-Ramps***

The final rule gives agencies the discretion to use "on-ramps" and/or "off-ramps" in multiple award contracts with total set-asides, partial set-asides, or reserves. "On-ramp" provisions allow agencies to award new contracts to small business under a multiple award contract where some of the current awardees are no longer small as the result of a size recertification. "Off-ramp" provisions allow agencies to remove or terminate a contract in which the contractor has recertified its status as other-than-small and is no longer eligible to receive new orders as a small business.

### ***Size Status***

In the final rule, SBA provides that size status for multiple award contracts will be determined at the time of initial offer. If the contract contains multiple NAICS codes, size will be determined for each of those codes at the time of the initial offer. Thus, if an offeror for a multiple award contract is small at the time of its initial offer, the offeror will be considered small for all orders subsequently issued under the different NAICS codes that may be applicable at the order level unless the contracting officer, in his or her discretion, requires size recertification at the order level.

Similarly, the final rule provides that the “if small at the initial offer, small for the life of the contract” concept for size eligibility also applies to program eligibility for set-aside multiple award contracts. This means that, if an offeror was 8(a), HUBZone, SDVOSB, or EDWOSB/WOSB eligible when it won a set-aside multiple award contract, the contractor will remain 8(a), HUBZone, SDVOSB or EDWOSB/WOSB eligible for all orders subsequently issued under the contract, even if the contractor lost its program status during the course of the contract. Like the size recertification rule, however, this does not apply to long-term contracts or when there is a merger or novation.

The final rule also states that if “Agreements” such as Basic Agreements, Blanket Purchase Agreements, and Basic Ordering Agreements are set-aside, SBA will determine size at the time of response to the solicitation for the Agreement. Further, because such Agreements are not considered to be contracts under the FAR, the business concern must also qualify as small at the time it submits its offer or otherwise responds to a solicitation for each order under the Agreements.

In terms of challenges to size status, references to multiple award contracts have been added to SBA’s size protest regulations. Similarly, with respect to challenges of HUBZone, SDVO SBC, and EDWOSB/WOSB eligibility, references to multiple award contracts have been added to SBA’s eligibility protest regulations for such programs.

### ***Size Recertification***

The final rule clarifies that the requirement to recertify size status applies both when a small business is the acquired and when the small business is the acquirer. Similarly, the final rule clarifies that size recertification is required when a participant in a joint venture is involved in a merger or acquisition, regardless of whether the participant is the acquired concern or the acquiring concern.

In the proposed rule, SBA sought comments on whether businesses should be required to recertify size for long-term orders (i.e., orders longer than five years). Upon review of the comments, SBA decided not to include such a requirement in the final rule, stating that it believes that requiring a business to certify its size at the time of offer for a multiple award contract, and not for each order issued against the contract, strikes the right balance and is also consistent with SBA’s current policy.

### ***NAICS Codes***

Under the final rule, in assigning NAICS codes and size standards to multiple award contracts, agencies will have two alternatives: (1) to assign one NAICS code and size standard to the contract if all of the orders are expected to be classified under the same code; or (2) to divide the contract into discrete categories and assign different NAICS codes to each discrete CLIN, SIN, etc. Orders issued under the different categories would need to have the same NAICS code assigned to that category in the contract.

Importantly, in the preamble to the final rule, SBA noted that these changes in the manner in which NAICS codes are assigned will have significant impacts upon central government procurement data systems, such as the Federal Procurement Data System and similar systems at the agency level. SBA estimated that fully implementing this change to all acquisition systems across government would take as long as five years, and that the acquisition workforce across government would need extensive retraining.

The final rule also permits challenges to NAICS codes on unrestricted procurements so long as the challenger is seeking to be considered a small business for the challenged procurement. Under the current regulations, SBA's Office of Hearings and Appeals only permits NAICS code appeals for set-aside contracts.

### ***Limitations on Subcontracting***

In the proposed rule, SBA proposed that, for a multiple award contract, determination of compliance with limitations on subcontracting requirements would be made on an order-by-order basis. However, after considering the comments received by SBA in response, the final rule has a different approach for determining compliance with the limitation on subcontracting requirement. First, for total or partial set aside contracts, compliance with the limitation on subcontracting requirement will be determined in each period of the contract; that is, the base term and each option period. However, contracting officers have the discretion, on a contract-by-contract basis, to require compliance on an order-by-order basis. Second, when an order is set aside under a reserve or a full and open multiple award contract, the contractor must comply with the limitation on subcontracting requirement on an order-by-order basis.

### ***Effective Date***

The effective date of the final rule is on or before December 31, 2013. However, as explained above, SBA noted in the preamble to the final rule that implementation of some of these changes may take as long as five years. Moreover, the complex changes contained in the final rule will require significant retraining of the government's acquisition workforce. Thus, as a practical matter, it may take some time for contracting officers at the agency level to become aware of and use many of the newly available set aside options.

If you have any questions about the final rule, please do not hesitate to contact Patrick T. Rothwell or Kathryn V. Flood at 202-857-1000.