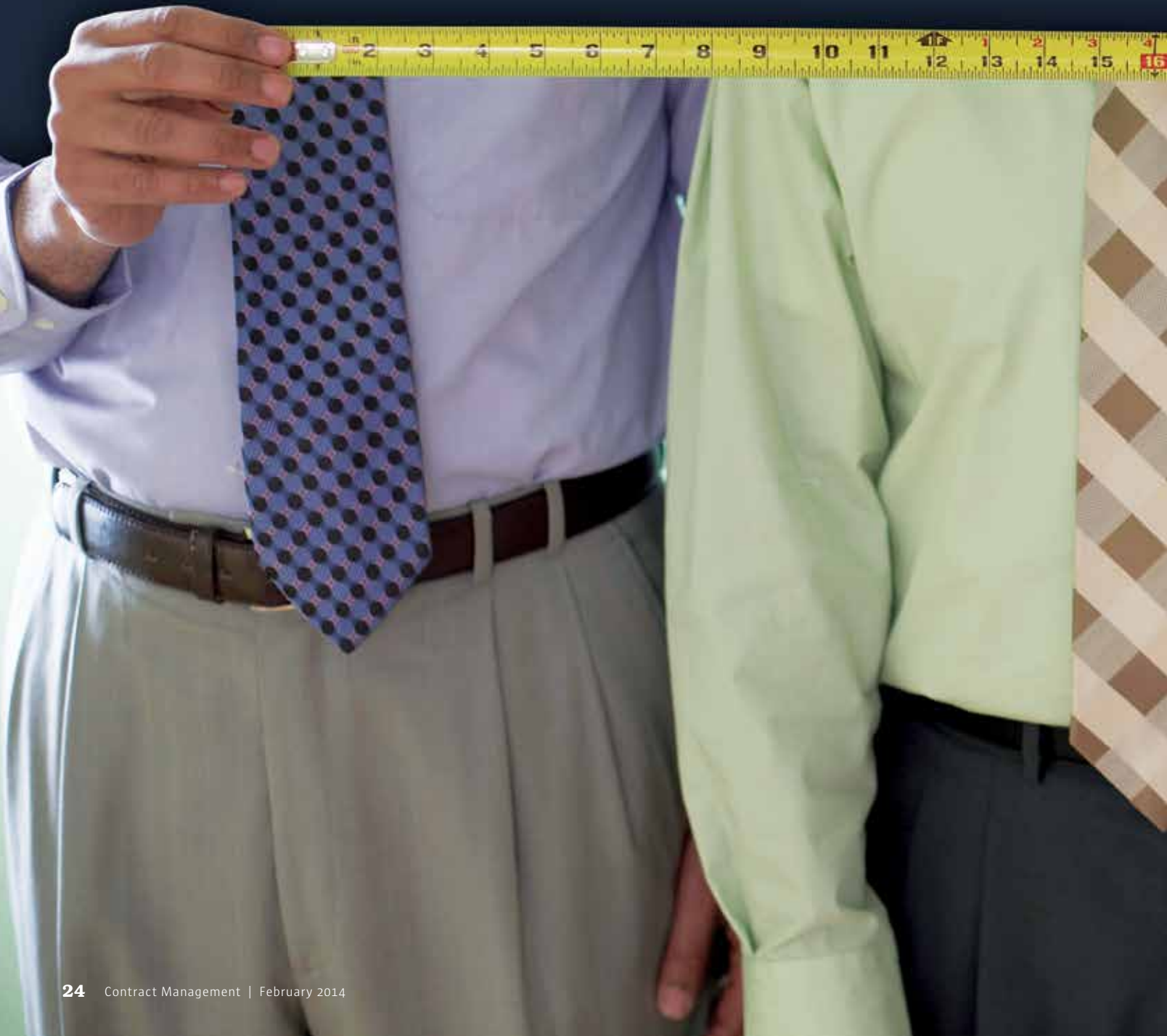


# RIGHT-SIZED:

HOW A CONTRACTOR AND ITS OUTSIDE COUNSEL ADJUSTED A GSA SCHEDULE BPA RFQ TO THE APPROPRIATE SIZE STANDARD



A SUMMARY OF A PARTICULARLY RELEVANT CASE AND LESSONS LEARNED TO HELP PREPARE YOU IF YOU FIND YOURSELF IN A SIMILAR SCENARIO.

BY JON WILLIAMS AND ALEX LEVINE



# LAST SUMMER, WE HELPED A CONTRACTOR WITH A CASE THAT HAD ALL OF THE PLOT TWISTS OF A HOLLYWOOD BLOCKBUSTER.

The case involved a request for quotation (RFQ) for a blanket purchase agreement (BPA) under a General Services Administration (GSA) Schedule contract. There were multiple Special Item Numbers (SINs) on the Schedule, with different North American Industry Classification System (NAICS) codes and size standards. The procuring agency

issued the RFQ as a total set-aside for small businesses, but the terms of the RFQ were unclear as to how size would be judged.

When the case came to us, time was running out before the proposal deadline, so we had to act quickly. We drew up options, weighing a protest with the Government

Accountability Office (GAO) versus an administrative appeal with the Small Business Administration (SBA). We settled on the SBA appeal and, after filing, we were able to achieve a resolution that was favorable for our client, but not without a few surprises along the way that led us to consider an injunctive action in federal court,



to question whether the BPA RFQ should have been issued as a small business set-aside, and to assess when a solicitation for a BPA or order under a multiple-award contract (MAC) requires offerors to recertify their size.

Given the tremendous amount of work running through MACs, other contractors have likely experienced similar situations, and the circumstances of our case may become more common this year as agencies begin to utilize new SBA rules that took effect December 31, 2013, to increase small business participation on MACs. Against this backdrop, the goal of this article is to walk you through what happened in our case and share our lessons learned so you will be prepared if you find yourself in a similar scenario.

## GAO OR SBA?

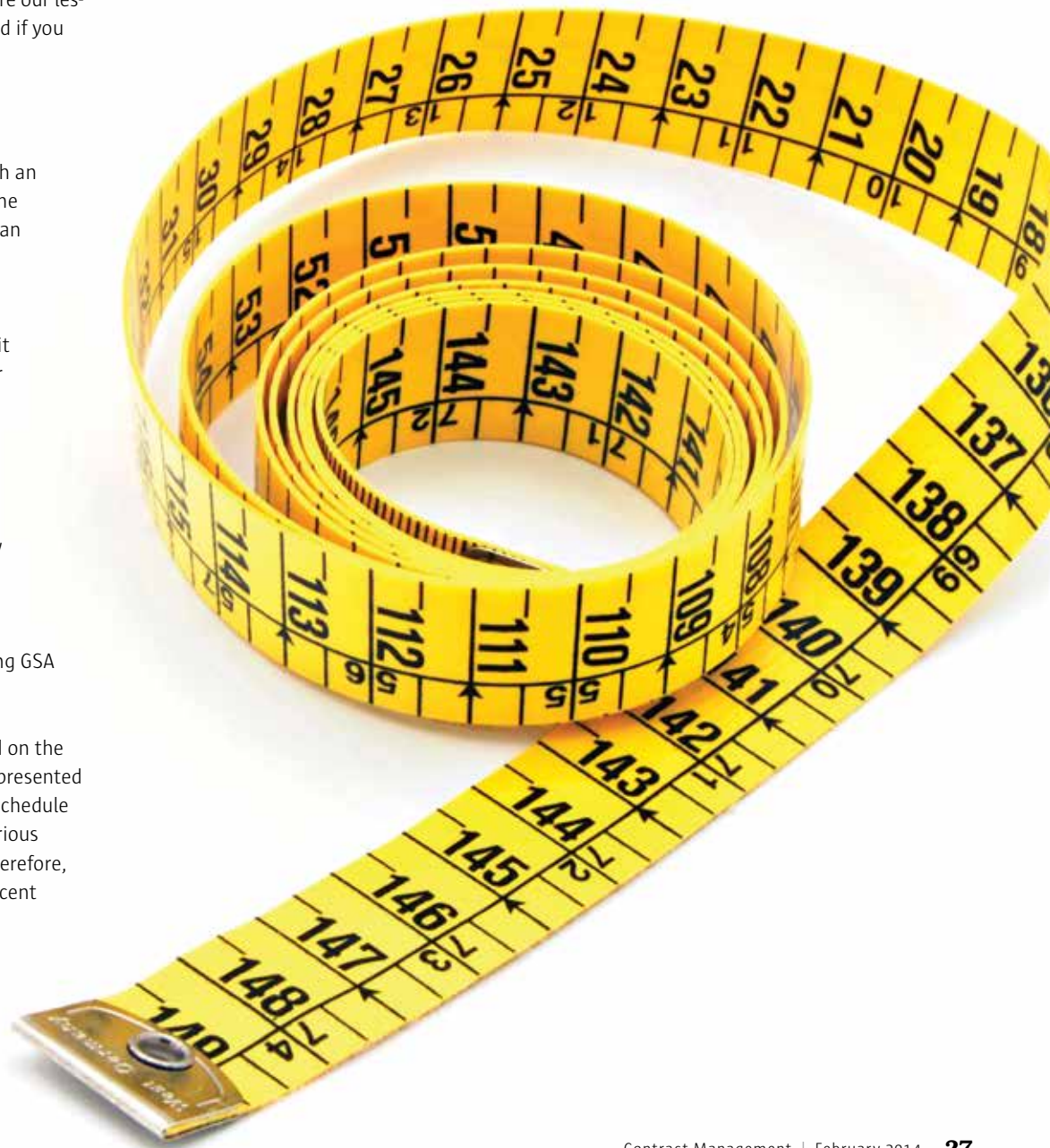
Our story began, like many do, with an urgent call from our client. For some time, the client had been tracking an important BPA opportunity under one of its GSA Schedule contracts. The RFQ and several amendments had been released, and each time it was clear the RFQ was set aside for small businesses under one NAICS code and size standard. However, with only a short time before the proposal deadline, the agency had issued an amendment that made size eligibility a two-part test. Now an offeror had to be “small” based on the size standard assigned to the BPA, *and* the offeror had to be considered “small” on its underlying GSA Schedule contract.

The new size requirement premised on the underlying GSA Schedule contract presented practical and legal problems. The Schedule at issue had multiple SINS, with various NAICS codes and size standards. Therefore, depending on their contract and recent sales, some offerors could be “small” for certain SINS and the BPA RFQ, but not “small” under other SINS or the underlying GSA

Schedule contract. This led to confusion about how a firm would qualify as “small” for the RFQ.

The time for Q&A with the agency had passed, and the proposal deadline was fast approaching, so we decided that clarifying the size requirement would have to be done via a challenge to the RFQ. Our initial thought was to file a pre-award protest with GAO. Offerors may challenge defective solicitation terms (including the terms of a BPA RFQ<sup>1</sup>) by submitting a protest to GAO before the proposal deadline.<sup>2</sup> One of the key advantages of a GAO protest is that the

agency may not award a contract while the protest is pending.<sup>3</sup> However, we were concerned GAO would view the protest not as a challenge to a defective solicitation term, but instead as a challenge to the NAICS codes incorporated into the RFQ. GAO does not have jurisdiction to hear challenges to the NAICS codes selected in a solicitation.<sup>4</sup> When an offeror wishes to contest the NAICS code in a solicitation, the appropriate forum is SBA.<sup>5</sup> So, we resolved to contest the RFQ amendment at SBA.



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To challenge the NAICS code assigned to a solicitation, you must file a NAICS code appeal with SBA's Office of Hearings and Appeals (OHA) within 10 days after issuance of the solicitation.<sup>6</sup> In our case, it had been much longer than 10 days since the solicitation came out. However, SBA's rules indicate that a NAICS code appeal may also be filed within 10 days of an amendment that affects the NAICS code or size standard.<sup>7</sup> Fortunately, we had a few days left within the 10-day window after the agency had issued the amendment that added the second size requirement.

## The NAICS Code Appeal

The NAICS code appeal was not without its own risks, however. The thrust of our argument against the two-part test for determining size eligibility was pretty straightforward and on firm legal ground. The dual size requirements were improper because they effectively assigned more than one NAICS code to the RFQ. It is well settled that an agency must only assign one NAICS code and size standard to a procurement: the one that best fits the principal purpose of the project.<sup>8</sup> In our research, however, we came across an SBA regulation that sparked a more fundamental question: Should the agency have set the BPA aside for small businesses?

The SBA regulation in question, 13 C.F.R. 121.404(g)(3)(vi), states:

A Blanket Purchase Agreement (BPA) is not a contract. Goods and services are acquired under a BPA when an order is issued. Thus, a concern's size may not be determined based on its size at the time of a response to a solicitation for a BPA.

At first blush, this rule can be read to suggest that the agency should not have set the BPA RFQ aside for small businesses, as setting aside the RFQ would require a size determination at the time of a response to the RFQ. But as we delved deeper, we concluded that the regulation did not prohibit the agency from setting aside the BPA RFQ. When SBA promulgated this rule, it seemed to envision that size would be irrelevant for most BPAs because BPAs are not contracts and would not typically be set aside.<sup>9</sup> Yet, an agency (like the one here) nevertheless could decide to set aside a BPA, in which case the SBA rules applicable to set-asides and size determinations, including those pertaining to the designation of the appropriate NAICS code, would apply.<sup>10</sup>

The other risk we confronted with the NAICS code appeal was the potential that, even if OHA ruled in our favor, the decision would not apply to the RFQ. SBA's rules describe procedures the contracting officer must follow when a NAICS code appeal is filed. The first step is for the

contracting officer to stay the solicitation.<sup>11</sup> The stay is critical because if a contracting officer receives OHA's ruling on a NAICS code appeal after the proposal deadline, "OHA's decision will not apply to the pending procurement, but will apply to future solicitations for the same supplies or services."<sup>12</sup> Conversely, if the contracting officer receives OHA's decision by the date offers are due, the contracting officer must amend the solicitation to change the NAICS code in accordance with OHA's ruling.<sup>13</sup> Because most procurements have quick turnarounds between the date the solicitation is issued and the date proposals are due, the utility of the NAICS code appeal process would be gutted if agencies did not follow the SBA rule that requires the contracting officer to stay the solicitation pending the outcome of the appeal.

When OHA receives a NAICS code appeal, it issues a "Notice and Order" directing the contracting officer to take the actions required under SBA's rules, including staying the solicitation. In the past, OHA's Notice and Order has included an explicit instruction to the contracting officer to stay the solicitation. We had a prior case where the contracting officer refused to stay the solicitation until she received OHA's instruction in the Notice and Order. So, in this particular case, we expected the Notice and Order would help us to ensure that the agency stayed the RFQ as required. However, to our surprise, the Notice and Order said nothing about the stay.<sup>14</sup>



## A RUN TO CLAIMS COURT?

Our concern about the lack of a stay instruction in OHA's Notice and Order was intensified when the agency issued its first amendment in response to our appeal. The amendment did not mention a stay or extend the deadline for proposals.<sup>15</sup> With only a few days before the proposal deadline, we would not get OHA's ruling in time unless the agency stayed the solicitation.

We contacted the agency counsel to determine why they had not extended the proposal deadline, and we continued to work with them toward a voluntary resolution. At the same time, we were readying our legal options if the negotiations failed. We concluded that the best approach, if necessary, would be to file a lawsuit for injunctive relief with the U.S. Court of Federal Claims arguing that the agency had arbitrarily and capriciously failed to follow the SBA rule requiring it to stay the solicitation.

It is rarely a sure thing (or inexpensive) to go into federal court, so our preference was to reach an amicable resolution with the agency. Fortunately, we were able to do so and the injunctive action was unnecessary because the agency issued another amendment that extended the proposal deadline by a few days. Then, the agency issued a further amendment removing the second size requirement and confirming that size would be judged based on the lone NAICS code and size standard remaining in the RFQ. These amendments were welcome news, for there was no need to run to Claims Court and we achieved amicably what we had set out to accomplish through the NAICS code appeal.

## Missing Representations and Certifications

However, there was one final twist. A closer review of the most recent amendment revealed that the "representations and certifications" clause, which had been in the RFQ all along, had vanished. SBA's regulations indicate that an agency must explicitly require recertification in a solicitation.<sup>16</sup> Therefore, even though the RFQ was clearly a set-aside and included several set-aside provisions (such as a size standard and the

"limitations on subcontracting" clause), the disappearance of the representations and certifications clause caused us to question whether offerors needed to be "small" at the time of their proposal for the RFQ.<sup>17</sup> We contacted the agency to determine if the lack of the representations and certifications clause was intentional, given it was clear to us that the agency intended the RFQ to be a set-aside and required offerors to be "small" at the time of their submission. This led to another amendment, and this time the representations and certifications clause was back in.

## New SBA Rules Effective December 31, 2013

Many of the issues stemming from this case arose because of uncertainties or confusion in the existing rules. Last October, SBA took a step toward clarifying how small business issues intersect with MACs and BPAs when it issued new regulations, effective December 31, 2013.<sup>18</sup>

One of the overarching purposes of the new SBA rules is to increase small business participation on MACs by providing various tools to contracting officers to use set-asides, partial set-asides, and reserves for small businesses. Regarding the determination of small business status for MACs, the new rules state that size will be assessed at the time of the initial offer for the MAC and if the MAC contains multiple SINs and NAICS codes, size will be separately judged under each applicable size standard at the time of the initial offer.<sup>19</sup> Thus, if an offeror for a MAC 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.<sup>20</sup>

One of the issues we struggled with in the case last summer—whether the BPA should have been set aside for small businesses—was addressed in the new rules. SBA eliminated 13 C.F.R. 121.404(g)(3)(vi), so there is no longer a rule stating that a concern's size may not be determined in response to a BPA. Though SBA explained in the rulemaking that

agencies do not need to require size recertification at the time of proposal submission for a BPA under a GSA Schedule contract because size has already been determined at the Schedule level, this does not mean an agency cannot choose to set aside a GSA Schedule BPA. As for BPAs not issued under a GSA Schedule contract, the new rule states that size will be determined both at the time of response to the solicitation for the BPA and at the time of any order under the BPA.<sup>21</sup>

## Conclusion

Our case last summer proved to be an interesting tutorial on small business status and determinations under GSA Schedule contracts and BPAs. With the continued emphasis on the government's use of strategic sourcing and MAC vehicles, this will probably not be the last time we encounter a situation like this. The new SBA rules clarify and resolve some of the issues we confronted, but uncertainties remain that will make this an interesting area to watch this year and beyond. **CM**

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### ABOUT THE AUTHORS

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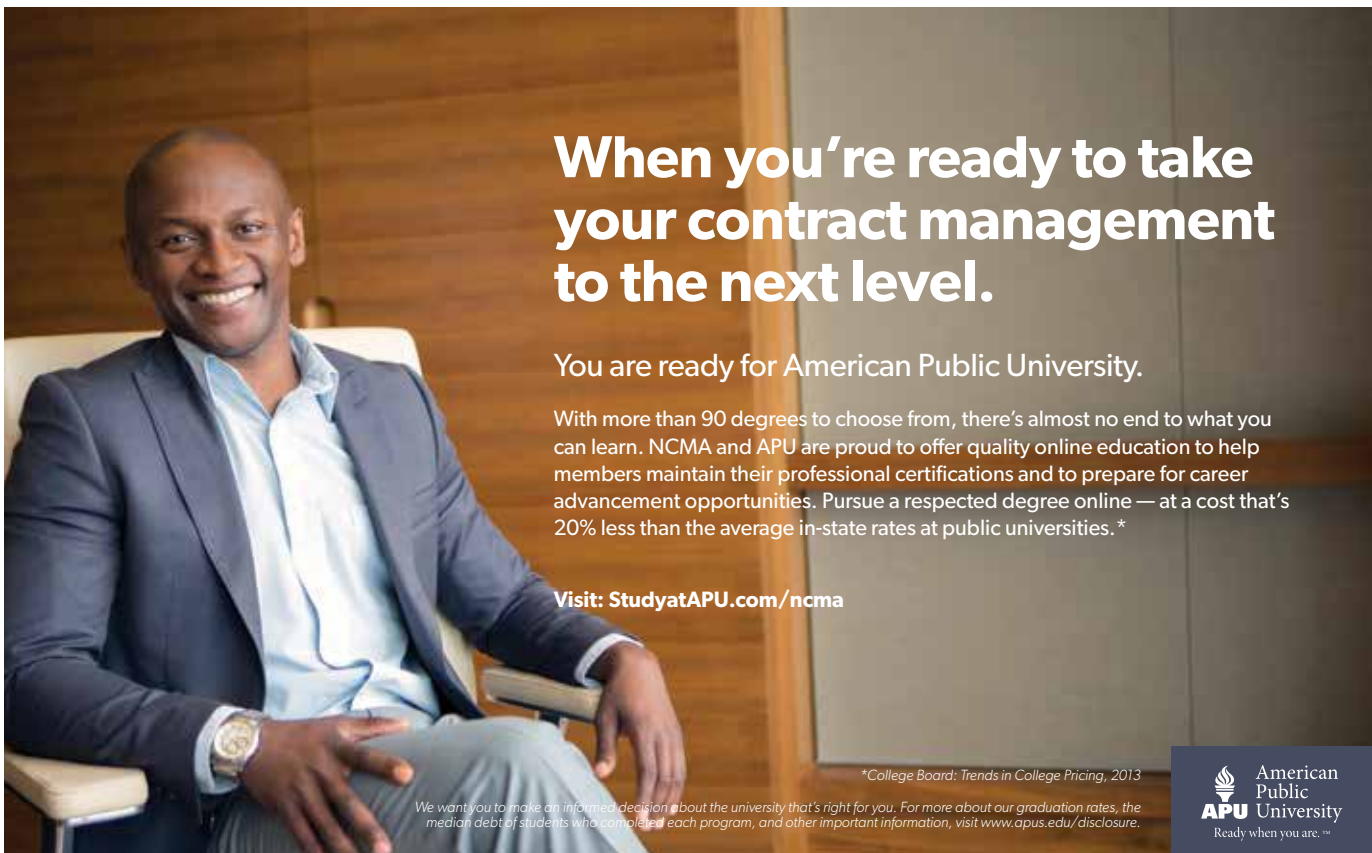
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### ENDNOTES

1. See, e.g., *Crewzers Fire Crew Transport, Inc.*, B-402530 (May 17, 2010).
2. 4 C.F.R. 21.2(a)(1); see also *CWTSatoTravel*, B-404479.2 (April 22, 2011).
3. See 31 U.S.C. 3553(c)(1).

4. 4 C.F.R. 21.5(b)(1); *BlueStar Energy Solutions*, B-405690 (Dec. 12, 2011); *Herman Miller, Inc.*, B-407028 (Oct. 19, 2012).
5. *Ibid.*; see also 13 C.F.R. 134.102(k).
6. 13 C.F.R. 121.1103(b)(1).
7. *Ibid.*; see also *NAICS Appeal of edCount, LLC*, SBA No. NAICS-5396 (2012) (appeal timely filed within 10 days from solicitation amendment when the amendment included answers from the agency indicating that multiple NAICS codes and size standards would apply to the procurement).
8. 13 C.F.R. 121.402(b); *Federal Acquisition Regulation (FAR) 19.102(c)* (“[f]or size standard purposes, a product or service shall be classified in only one industry, whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one.”); see also *NAICS Appeal of Technica Corp.*, SBA No. NAICS-5248 (2011) (holding that the agency must assign a single NAICS code to the procurement); and edCount, note 7 (finding that the contracting officer erred by stating that two NAICS codes, with different size standards, might apply to the procurement).
9. See Small Business Size Regulations; Size for Purposes of Government-Wide Acquisition Contracts, Multiple Award Schedule Contracts and Other Long-Term Contracts; 8(a) Business Development/Small Disadvantaged Business; Business Status Determinations, 71 *Fed. Reg.* 66434, 66438 (Nov. 15, 2006).
10. See *Size Appeal of SETA Corp.*, SBA No. SIZ-4477 (2002); *Size Appeal of Vistronix, Inc.*, SBA No. SIZ-4585 (2003); and *Size Appeal of Hardie’s Fruit & Vegetable Co. South, LP*, SBA No. SIZ-5347 (2012). See also 13 C.F.R. 121.1001(a) (permitting size protests for interested parties “in any instance in which a procurement or order has been restricted to or reserved for small business...”); and 15 U.S.C. 637(b)(6) (requiring offices of the government having procurement powers to accept as conclusive SBA’s determination as to which entities are to be designated “small-business concerns.”).
11. 13 C.F.R. 121.1103(c)(1)(i).
12. 13 C.F.R. 134.308(b).
13. *Ibid.*
14. We subsequently learned that OHA has stopped including this instruction in its Notice and Orders for NAICS code appeals.
15. As previously discussed, a stay is expressly provided for in SBA’s regulations, which state that “[u]pon receipt of the service copy of a NAICS code appeal, the contracting officer shall...[s]tay the solicitation.” (13 C.F.R. 121.1103(c)(1)(i).) However, there is no mention of a stay in the corresponding FAR provision, FAR 19.303(c)(4), which instead only states that, upon receipt of OHA’s Notice and Order, the contracting officer should send a copy of the solicitation relating to the NAICS code appeal to OHA.
16. 13 C.F.R. 121.404(g)(3)(v).
17. *Compare Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013) (holding that a task order solicitation required recertification where it instructed each offeror to specify its size status in its task order proposal, to verify its size as of the date of the task order quotation submission, and to again confirm its size as of the date of task order award) with *Size Appeal of Safety and Ecology Corporation*, SBA No. SIZ-5177 (2010) (merely setting aside a task order for small businesses without including any explicit language requiring recertification does not amount to a recertification requirement).
18. “Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation,” 78 *Fed. Reg.* 61114 (October 2, 2013).
19. *Ibid.*, at 61117–61118.
20. *Ibid.*, at 61118–61120.
21. *Ibid.*, at 61120.



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