

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Small Business

SBA PROVIDES NEW SET-ASIDE AUTHORITIES FOR MULTIPLE AWARD CONTRACTS

By Patrick Rothwell

On October 2, 2013, SBA issued a final rule which made numerous changes to its rules governing small business contracting procedures for multiple award contracts (MACs). We recently summarized the regulatory changes in a Client Alert. This article focuses on a portion of the final rule that is perhaps of greatest interest to small businesses – the so-called “Section 1331 Authorities.”

The Section 1331 Authorities get their name from the Jobs Act of 2010. Because agencies are increasingly using MACs, the goal was to expand contracting authority for set asides and other methods of ensuring small businesses participation on the MACs. The final rule confirms that agencies must set aside a MAC when there is a reasonable expectation that two or more small businesses (including 8(a), SDVOSB, HUBZone, etc.) can provide the required services or supplies at a fair market price. However, if the “rule of two” is not satisfied at the MAC level, agencies will now have the discretion to use the new “Section 1331 Authorities” as means to increase small business participation in a MAC.

The first Section 1331 Authority is to segregate a MAC into a partial set aside. Partial set asides can be used when: (i) the acquisition can be broken into smaller discrete portions, such as CLINs, SINs, etc.; and (ii) the “rule of two” can be met for some of these smaller, discrete portions. An agency may partially set aside MACs for any category of small business. Competition for orders will be restricted according to whether the order falls under a CLIN that was set aside.

Furthermore, the new rule permits small businesses to submit an offer on the set-aside portion of a partial set aside, the non-set-aside portion, or both. Currently, however, the FAR requires small businesses to submit offers on the non set-aside portion as well as the set-aside portion. Thus, SBA anticipates that the FAR will need to be amended.

The next Section 1331 Authority allows agencies to “reserve” awards for the various categories of small businesses under the following three circumstances:

First, agencies may create reserves when the acquisition cannot be broken into smaller, discrete portions until the individual task orders are drafted, and two or more awards can be made to small businesses that can perform part of the requirement, but not all of it. If the “rule of two” is met on an order, the order is competed solely among the small businesses.

Second, a reserve may be created when at least one small business can perform the entire requirement, but the “rule of two” cannot be met. In this case, orders can be issued directly to the one small business awardee.

Third, if the “rule of two” cannot be met for a bundled acquisition, and no small business can perform because it is bundled, an agency can issue the solicitation as a reserve for one or more small businesses with a “Small Business Teaming Arrangement.” A “Small Business Teaming Arrangement” can be either a joint venture or prime/sub teaming arrangement as long as both firms are small businesses and use a written “Small Business Teaming Agreement” that sets the responsibilities, roles, and percentages of work between the parties.

The final Section 1331 authority concerns already-established MACs that were competed on a full and open basis. Under this authority, an agency has discretion to set aside orders for the various types of small businesses when the “rule of two” is met. In addition, this authority can be used to set aside orders on GSA Schedule contracts, but FAR 8.4 must also be followed.

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The effective date of the final rule is December 31, 2013. However, the SBA noted in the preamble to the final rule that implementation of some of these changes may take as long as five years, in part because the complex changes 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 to become aware of and use many of the newly-available set-aside options. It is also important to remember that agencies have the discretion to forego using the Section 1331 Authorities even if the "rule of two" could be met. However, if an agency declines to use these tools, it must document why. For this reason, and given the increased use of MACs and pressure to meet small business goals, the Section 1331 Authorities are posed to become important methods for agencies to increase small business participation and meet their goals through MACs. □

About the Author: Patrick Rothwell, an associate with PilieroMazza, practices primarily in government contracts and litigation. He can be reached at prothwell@pilieromazza.com.

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