

Maximizing Small Business Participation

Recently announced rules have opened up, and encouraged the use of, multiple award contracts as a powerful means for federal agencies to meet small business contracting goals.

BY JONATHAN T. WILLIAMS, M.SAME
AND ALEXANDER O. LEVINE, M.SAME

Often touted as the engine driving our economic recovery, small businesses are responsible for approximately 46 percent of gross domestic product, employ 49 percent of the private work force and make up more than 99 percent of all American businesses. In today's uncertain economic environment, the creativity, innovation and technical expertise that small businesses provide to government agencies are critical to ensure a competitive marketplace and encourage job growth.

Yet despite the importance of small businesses to procurement initiatives, the government as a whole has had difficulty achieving its goal of awarding 23 percent of federal prime contracting dollars to small businesses. Although government-wide use of small businesses has come close to the 23 percent goal in recent years, last year's figures, recently announced at 21.7 percent of prime contracting dollars, again missed the goal and by a wider margin than in previous years.

Recognizing the need to utilize small businesses, the government has stepped up efforts to encourage agencies to award a larger percentage of contracting dollars to small businesses. Indeed, pending legislative language in the *National Defense Authorization Act for Fiscal Year 2013* would increase the small-business contracting goal to 25 percent, and would make the bonuses of senior agency executives at least partly conditional on meeting such goals.

One tool that has become a focal point for such efforts is the use of multiple award contracts (MACs).

MAC is a contract award to several businesses that can complete the work anticipated, which allows those awardees to compete for task orders as government needs arise. The use of MACs—which are



Bank stabilization work for the Oahe Dam in South Dakota was solicited by the U.S. Army Corp of Engineers pursuant to a small business multiple award task order. PHOTO COURTESY PILIEROMAZZA

intended to reduce costs by simplifying the buying process—has greatly expanded within the last few years. They have become a preferred method of making purchasing quicker and less staff intensive given the realities of understaffed federal contracting offices.

WATCHING THE NUMBERS

A recent Bloomberg study found that U.S. government spending on MACs rose 49 percent, to \$121 billion, in four years—more than double the growth rate of all contracting. There are roughly 3,000 MACs currently active for the acquisition of everything from military material to professional services.

The use of MACs can be particularly beneficial to small businesses, as they offer an opportunity to capture repeat

business without the need to engage in multiple, expensive solicitation competitions. While small businesses' share of MAC awards has increased during the last five years, with recent numbers showing small businesses winning 21.6 percent of contract dollars awarded under MACs in FY2010, it falls short of the government's overall small business contracting goals.

The new administrator for the Office of Federal Procurement Policy, Joe Jordan, has sought to remedy this problem, recently recommending that agencies increase their use of MACs as a means to meet the 23 percent small business contracting goal. Jordan—the former head of the U.S. Small Business Administration's (SBA) small business contracting program—wrote in a June 6, 2012, memorandum that agencies should consider the use

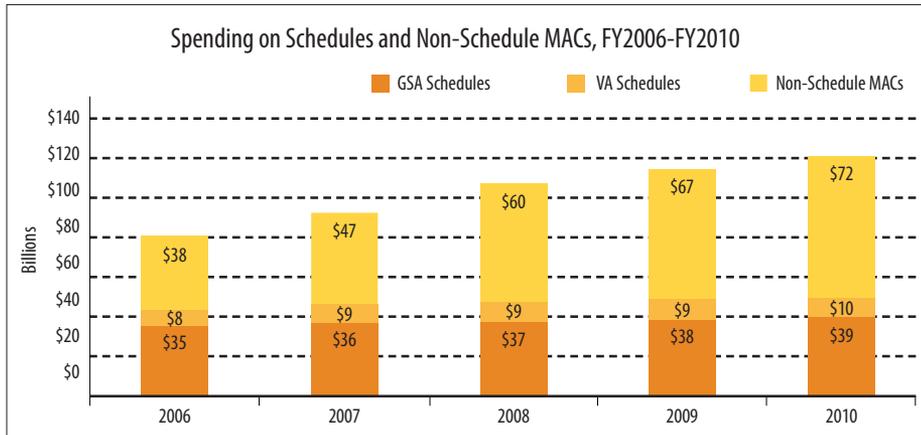


IMAGE COURTESY BLOOMBERG GOVERNMENT STUDY

of MACs with an eye toward “maximizing opportunities for small businesses when agencies make small dollar awards, and strengthening accountability for small business goal achievement.” Together with SBA Administrator Karen Mills, Jordan recommended that such increases could occur either by way of new MAC orders or through modifying existing MACs to provide for order set-asides.

A recent example of this focus on small business set-asides is the Department of Homeland Security’s (DHS) FirstSource II solicitation, issued in late 2011. FirstSource II is a multi-billion dollar procurement for IT equipment, software and related services. DHS has historically been one of the top agencies at awarding contracting dollars to small business, having awarded about 32 percent of its contract dollars to small businesses in 2009 and 2010. As a MAC with a 100 percent small business set-aside—worth a potential \$3 billion—the FirstSource II solicitation is a prime example of how DHS is capitalizing on MACs to maintain its success in small business contracting.

APPLYING SOLUTIONS

To assist other agencies in sharing the same success as DHS, the government has begun to implement rules designed to increase the amount of MAC dollars awarded to small business concerns. One such example is the interim rule issued by the Federal Acquisition Regulation (FAR) Council in November 2011, establishing a set-aside option for orders placed under U.S. General Service Administration (GSA) Schedules and other indefinite

delivery, indefinite quantity (IDIQs) contracts. The rule adds a new section to FAR, clarifying previously murky procurement law to make it clear that contracting officers can set aside task or delivery orders or Blanket Purchase Agreements for small businesses under GSA Multiple Award Schedules or on blanket purchase agreements, and on any other MACs.

This rule was followed by one proposed by SBA on May 16, 2012, to address the use of set-asides on MACs and to clarify the regulations on bundling and contract consolidation. The proposed rule, which implements sections of the *Small Business Jobs Act of 2010*, 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, FAR § 19.502-3 requires small businesses to first submit responsive offers on the non-set-aside portion to be considered for the set-aside portion, which SBA found cumbersome.

Under the proposed SBA rule, agencies would have several tools at their disposal to increase small business set-aside dollars. These include: (1) awarding a MAC with a partial set-aside; (2) using a contract “reserve,” or; (3) inserting a contract clause that commits to set-aside orders when an agency concludes that it has a reasonable expectation of receiving offers from at least two responsible small businesses and an award can be made at a fair and reasonable price (otherwise known as the “the rule of two”).

In assigning North American Industry Classification System (NAICS) codes and size standards to MACs, government agencies would have two alternatives un-

der the proposed rule: (1) 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) divide the contract into discrete categories and assign different NAICS codes to each discrete category. However, if an agency declines to use these tools, it must document how its planned action is consistent with its best interests.

SBA also proposes several changes to the rules that impact the determination of small business status. One such change is that offerors’ size or program status for MACs would be determined at the time of the initial offer. 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.

Finally, Congress has begun to propose measures designed to promote the use of MACs to meet government small business goals. One such effort is a pending bill, *HR 4118*, which would require the president to set annual government-wide small-business goals for task orders and delivery orders placed against MACs, blanket purchase agreements and basic ordering agreements.

A COMMON GOAL

Viewed together, these new rules represent an attempt to capitalize on the government’s rapidly expanding use of MACs to make it easier for agencies to meet their small business contracting goals. MACs also afford a unique opportunity for small business concerns to get their foot in the door, allowing them to become eligible for large IDIQ task orders for which they might not otherwise effectively compete.

For these reasons, as the economic recovery continues and greater focus is placed on meeting (and exceeding) small business goals, MACs are positioned to play a critical role for agencies and small businesses—just as small businesses play a critical role in the economic recovery.

TME

Jonathan T. Williams, M.SAME, is Partner, and Alexander O. Levine, M.SAME, is Associate, PiliroMazza PLLC. They can be reached at 202-857-1000, or jwilliams@piliromazza.com; and alevine@piliromazza.com, respectively.