



February 6, 2017

General Services Administration  
Regulatory Secretariat Division (MVCB)  
ATTN: Ms. Flowers  
1800 F Street NW., 2nd Floor  
Washington, DC 20405

Subject [FAR Case 2014–002; Docket No. 2014–0002, RIN 9000–AM93] Federal Acquisition Regulation:  
Set- Asides Under Multiple-Award Contracts

Dear Ms. Flowers,

The Coalition for Government Procurement appreciates the opportunity to submit the following comments on the above referenced proposed rule.

The Coalition for Government Procurement (“The Coalition”) is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Coalition members include small, medium, and large business concerns. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

## I. Assigning NAIC Codes

1. Proposed FAR 19.102(a)(2)(ii) directs that, for multiple award contracts, in assigning NAICS Contracting officers have the discretion to either —
  - (1) Assign one North American Industry Category System (NAICS) code (and corresponding size standard), to the entire solicitation that best describes the principle purpose of the solicitation; or
  - (2) When the procurement can be divided into portions or categories, (for example SINs) assign each category a single NAICS code and corresponding size standard which best describes the principal purpose attributed to the portion or category.

The proposed rule states that this instruction “ ... reflects a combination of guidance that is currently in the FAR and new guidance that has been added to accommodate the assignment of NAICS codes in solicitations that will result in multiple award contracts...” . The proposed FAR is in fact consistent with the Small Business regulation 13 CFR 121.402. Even though the proposed FAR complies with the Small

Business regulations, this provision could increase the administrative burden and workload for both GSA contractors and contracting officers and or possibly eliminate some small companies from participation in GSA schedule contracts.

Some GSA Schedule solicitations (for example Schedule 70) currently assign multiple NAICS to a single SIN. The descriptions of many SINs are broad enough to cover multiple NAICS. In order to comply with the proposed rule GSA could pursue several courses including:

- Apply one NAICS to existing SIN. In this case, some companies that currently qualify as small would no longer have the benefit of the small business designation
- Subdivide the SIN – this option could result in difficulty for an ordering activity that needs a more comprehensive solution. It could also cause additional workload for GSA in adjusting its systems to accommodate the collection and reporting of information. It would also increase cost to contractors for collecting, monitoring, reporting CSP and paying IFF.

The Coalition suggests that GSA and SBA work with Schedule contractors to develop a more cost efficient mechanism for assigning NAICS codes.

## II. Small Business Eligibility and NAICS

1. Proposed FAR 19.301-1 (ii) states that to be eligible as a small business an offer must represent that:

For a multiple-award contract where there is more than one NAICS code assigned, that it meets the small business size standard set forth for each distinct portion or category (e.g. Line Item Numbers LINs), Special Item Numbers (SINs), Sectors, Functional Areas (FAs), or the equivalent) for which it submits an offer. If the small business concern submits an offer for the entire multiple-award contract, it must meet the size standard for each distinct portion or category (e.g. LIN, SIN, Sector, FA, or equivalent);

As currently structured, GSA Schedule contracts often have multiple NAICS for an individual SIN. A company can be small for one NAICS within a SIN but not another. Applied literally a company business could not represent itself as small if it did not meet the size standard of each NAICS within a SIN. We recommend that the rule clarify that if an agency list more than one NAICS under a SIN that the offeror is an eligible if it meets the size standard of one or more NAICS under a particular category or SIN.

2. Proposed FAR 19.301-2(d)(1) states:

When a contractor rerepresents for a contract that it no longer qualifies as a small business concern identified in 19.000(a)(3) in accordance with FAR 52.219–28, the agency may no longer include the value of options exercised, modifications issued, orders issued, or purchases made under BPAs on that contract in its small business prime contracting goal achievements.

The Coalition recommends that this language be revised to clarify the agency may not include in its contracting goals, the value of orders etc. received after the date of the offeror's rerepresentation. The same clarification should be made in (d)(2) regarding rerepresentation of orders.

### III. Consistency in Set-Aside Requirements

1. The proposed rule is inconsistent in its guidance to contracting officers as to when a set-aside is appropriate for total set-asides, partial set-asides, and reserves. We recommend that the FAR Council clarify the variations in FAR §§ 19.502-2, 19.502-3, and 19.504-4.<sup>1</sup> In order to trigger the set-aside requirement under the Small Business Act, at least two small businesses must be competitive and technically capable of performing the stated requirements:

“Each contract for the purchase of goods and services that has an anticipated value greater than [\$3,000] but not greater than [\$150,000] shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns ***that are competitive with market prices and are competitive with regard to the quality and deliver of the goods or services being purchased.***”<sup>2</sup>

However, the proposed rule is inconsistent in how this requirement is applied across the set-aside options:

- *FAR § 19.502-2 Total small business set-asides:* (a) “...shall be set aside for small businesses unless the contracting officer determines that there is not a reasonable expectation of obtaining offers from ***two or more responsible small business concerns that are competitive in terms of fair market prices, quality and delivery.***”
- *FAR § 19.502-3(a)(4) Partial set-asides of contracts other than multiple award contracts; FAR § 19.502-4(a)(4) Partial set-asides of multiple award contracts:* “***Two or more responsible small business concerns are expected to submit an offer on the set-aside portion or portions of the acquisition at a fair market price.***”
- *FAR § 19.503 Reserves:* “***No reasonable expectation of receiving offers from at least two responsible small business concerns... at fair market price that can perform the entire requirement.***”

The Coalition recommends that the set-aside requirement be applied across all set-aside types consistent with the language of the Small Business Act. If the FAR Council has reason for different requirements, clarification should be provided to contracting officers in the rule.

### IV. Reserves

1. The proposed regulation is unclear. According to proposed FAR 19.503 a reserve is appropriate when:

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<sup>1</sup> 81 Fed. Reg. 88085

<sup>2</sup> 15 U.S.C. § 644(j); *see also* 80 Fed. Reg. 38294 (July 2, 2015) (increasing dollar amounts)

- there is no reasonable expectation that 2 or more small business concerns will submit offers for a total set-aside,
- the acquisition can't be subdivided for purposes of establishing a partial small business set aside or,
- there is no reasonable expectation that two or more firms can compete on a partial set aside.

Given this language it would appear that a reserve is appropriate when there is no expectation that there will be a realistic competition among small businesses. None-the-less, proposed 19.504(c), establishes a process for setting aside and competing orders under a reserve. The Coalition suggests that either 19.503 be clarified or that 19.504(c)(1) be deleted. Pursuant to 19.504(c)(1) (2) a contracting officer could issue orders directly to a small business concern that could perform the work.

2. Proposed 19.503 (d) states the limitation on subcontracting and the nonmanufacturer rule do not apply to reserves at the contract level, but shall apply to orders that are set aside (see 19.505).

If this language remains unchanged, it appears that the limitation on subcontracting and non-manufacturer rule will not apply to orders issued directly to a small business under a reserve (See 19.504(c)(2), but will not apply to orders that are set-aside under a reserve (See 19.504(c)(1)). If this is not the government's intent the language should be clarified.

## V. Performance of Work Requirements

1. With respect to the limitation on subcontracting, proposed section 19.505(a) provides that to be awarded a contract or order under a set-aside, the small business concern is required to perform:
  - (1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees.
  - (2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).

SBA published a proposed rule on December 29, 2014, that would have changed the rule to relate to percent of the contract price rather than cost. A final rule adopted this change and revised 13 CFR 125.6 accordingly. For commercial items price is an easier data element to track and monitor for both the government and contractor. The Coalition recommends that FAR 19.505 be revised consistent with the SBA regulation.

2. The proposed rule states that FAR 19.505 is revised to clarify the compliance period. The section provides as follows:
  - b) *Compliance period.* A small business contractor is required to comply with the limitation on subcontracting—

- (1) For a contract that has been set aside, by the end of the base term and then by the end of each subsequent option period. However, the contracting officer may instead require the contractor to comply with the limitation on subcontracting by the end of the performance period for each order issued under the contract; and
- (2) For an order set aside under a contract as described in 8.405–5 and 16.505(b)(2)(i)(F), by the end of the performance period for the order.

## VI. Consistency across Contract Types

1. It is not clear why contracting officers on GSA schedules and multiple award contracts are not given the option to comply with the limitation on subcontracting by the end of the base contract as are contracting officials for other (possibly multiple year) contracts. Affording Schedules and MAC's this option seems reasonable given the fact that federal customers may satisfy requirements for a single solution, using multiple orders, over a period of time. We recommend that paragraph 2 be deleted and that paragraph 1 be applicable to all contracts.

## VII. Exceptions to the Nonmanufacturer Rule

1. FAR 19.505(c)(5) Exceptions to the Nonmanufacturer rule

The proposed rule provides for an exception to the nonmanufacturer rule when—

(i) The procurement of supplies or a manufactured end product—

(A) Is processed under simplified acquisition procedures (see part 13); or

(B) Is for an order set aside for any of the small business concerns identified in 19.000(a)(3), placed under a full and openly competed multiple-award contract;

(ii) The cost is not anticipated to exceed \$25,000; and

(iii) The offeror supplies an end product that is manufactured or produced in the United States.

The Competition in Contracting Act (CICA) determined that the Federal Supply Schedule program is competitive when the FAR ordering procedures are followed. See FAR 6.102(d)(3). Consequently, we suggest that the language above be clarified to state that this exception to the non-manufacturer rule applies to the GSA Schedule Program. i.e.

(B) Is for an order set aside for any of the small business concerns identified in 19.000(a)(3), placed under a full and openly competed multiple-award contract *including the Federal Supply Schedule*;

Thank you for considering the Coalition's comments in response to the Set- Asides Under Multiple-Award Contracts proposed rule. If there are any questions, please contact me at (202) 331-0975 or [rwaldron@thecgp.org](mailto:rwaldron@thecgp.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'RWaldron', with a long horizontal flourish extending to the right.

Roger Waldron  
President