

ALERT

FAR to Include New Guidance Regarding Small Business Set-Asides Under Multiple-Award Contracts

December 8, 2016

WHAT: The FAR Council issued a proposed rule implementing changes adopted by the Small Business Administration (SBA) in 2013 regarding the use of small business set-asides under multiple-award contracts. The FAR Council previously issued an interim rule in 2011 to enable contracting officers to take advantage of new set-aside authority granted under the Small Business Jobs Act of 2010. The proposed rule expands on the interim rule to provide further guidance to contracting officers concerning how they can set aside work for small businesses under multiple-award contracts.

WHEN: December 6, 2016. Comments to the proposed rule are due February 6, 2017. [Get the proposed rule here.](#)

WHAT DOES IT MEAN FOR INDUSTRY: The proposed rule would clarify the requirements under FAR 19.502-4 when contracting officers are deciding whether to set aside multiple-award contracts and task/delivery orders. The proposed rule also addresses enforcement of the limitations on subcontracting rule. Both issues have been sources of confusion for agencies since the interim rule was issued in 2011. This confusion has led agencies to adopt their own internal practices, some of which have been contrary to the SBA's regulations and guidance, and which has in turn led to confusion for both small and large business offerors and multiple-award contract holders.

The proposed rule provides separate guidance for reserving multiple-award contracts for small businesses, partial-side asides, and setting aside individual task/delivery orders. Under the proposed rule, contracting officers will first be required to conduct market research

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to determine if a total contract set-aside is appropriate under the Rule of Two. If two or more responsible small business concerns are not expected to submit an offer on the entire requirement at a fair price, then the contracting officer must consider whether the requirement can be divided into distinct portions for a partial set-aside, and whether the Rule of Two would be satisfied for those portions. The contracting officer can also reserve awards for small businesses if a total set aside would not be appropriate and a partial set-aside is not feasible.

For task/delivery orders, contracting officers can continue to include provisions in multiple-award contracts setting forth the circumstances under which orders will be set aside. The rule contemplates those provisions stating that all task/delivery orders will be set-aside for any portion of the contract set-aside for small businesses, that the Rule of Two will be applied at the task/delivery order level (*i.e.*, orders will be set aside if the Rule of Two is met), or that orders will be set aside on a case-by-case basis.

The proposed rule would also clarify that the limitations on subcontracting and nonmanufacturer rules do not apply to awards reserved for small businesses under full-and-open multiple-award contracts. The rules would, however, apply to any set-aside orders placed under those reserves. Additionally, the general period for complying with the limitations on subcontracting rule would be clarified as the base period and each subsequent option, or alternatively, at the contracting officer's discretion, by the end of performance of each order.