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Small Business Contracting: Increasing Small Business Participation on Multiple Award Contracts

A Proposed Rule by the [Small Business Administration](#) on [10/25/2024](#)

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Small Business Administration

13 CFR Part 125
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AGENCY:

U.S. Small Business Administration.

ACTION:

Proposed rule.

SUMMARY:

This proposed rule would apply the Rule of Two to multiple-award contract task and delivery orders, with some exceptions. Under the Rule of Two, unless an exception applies, an agency must set aside the award for small businesses where there is a reasonable expectation of receiving offers from two or more small-business contract holders under the multiple-award contract that are competitive in terms of price, quality, and delivery. Documentation requirements apply where the agency decides not to move forward with a set-aside order.

DATES:

Comments must be received on or before December 24, 2024.

ADDRESSES:

You may submit comments, identified by RIN 3245-AH95, and/or Docket Number SBA-2024-0002 by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov> (<https://www.regulations.gov>) and follow the instructions for submitting comments.
- *Mail (for paper, disk, or CD-ROM submissions):* Donna Fudge, Lead Procurement Policy Analyst, Office of Policy Planning and Liaison, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted on <https://www.regulations.gov> (<https://www.regulations.gov>). If you wish to submit confidential business information (CBI) as defined in the User Notice at

<https://www.regulations.gov> (<https://www.regulations.gov>), please submit the comments to Donna Fudge and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential.

FOR FURTHER INFORMATION CONTACT:

Donna Fudge, Lead Procurement Policy Analyst, Office of Policy Planning and Liaison, Small Business Administration, at donna.fudge@sba.gov (<mailto:donna.fudge@sba.gov>), (202) 205-6363.

SUPPLEMENTARY INFORMATION:

This proposed rule would expand the use of the small-business Rule of Two in multiple-award contracting and make other regulatory revisions to encourage the use of small businesses when creating new multiple-award contracts. In issuing this proposed rule, SBA implements recommendations of the Office of Federal Procurement Policy (OFPP) in its memorandum titled "*Increasing Small Business Participation on Multiple-Award Contracts*," dated January 25, 2024.

Section 15(a)(1)(C) of the Small Business Act, 15 U.S.C. 644(a)(1)(C) (<https://www.govinfo.gov/link/uscode/15/644>), provides that the Small Business Administration (SBA) shall "assur[e] that a fair proportion of the total purchases and contracts for goods and services of the Government in each industry category . . . are awarded to small business concerns." To further this statutory provision, SBA's regulations and the Federal Acquisition Regulation (FAR) provide that an acquisition shall be set aside for small business concerns whenever there is reasonable expectation that offers will be obtained from at least two responsible small business concerns that are competitive in terms of fair market prices, quality, and delivery (13 CFR 125.2(f) ([https://www.ecfr.gov/current/title-13/section-125.2#p-125.2\(f\)](https://www.ecfr.gov/current/title-13/section-125.2#p-125.2(f))); 48 CFR 19.502-2 (<https://www.ecfr.gov/current/title-48/section-19.502-2>)). This provision in SBA's regulations and the FAR is commonly referred to as the Rule of Two.

The Rule of Two dates back to 1964, when the Department of Navy first adopted it. Additional agencies implemented the rule afterward, and the FAR extended the Rule of Two for governmentwide application in 1984. The Rule of Two is the cornerstone of the Federal Government's support for small-business prime contracting. In Fiscal Year (FY) 2023, set-aside awards accounted for 65% of contracting dollars awarded to small

businesses, the highest percentage since data became available in 2010. Those set-aside dollars pushed the government's spending with small business prime contractors to \$178 billion in FY23, or 28.4%. Prior to the government-wide application of the Rule of Two in 1984, the Federal Government spent just 21% of its procurement dollars with small businesses.

This proposed rule would clarify the applicability of the Rule of Two to multiple-award contracts by directing that an agency set aside an order under a multiple-award contract for small business contract holders when the contracting officer determines there is a reasonable expectation of obtaining offers from two or more small business contract holders under the multiple-award contract that are competitive in terms of market prices, quality, and delivery. Like the OFPP memorandum, the proposed rule provides several exceptions, such as orders under the Federal Supply Schedule, or where an exception to fair opportunity or an agency-specific exception applies. When an agency is unable to set aside an order over the micro-purchase threshold and an exception does not apply, the contracting officer must document their rationale and provide the documentation to the agency's small business specialist or the Office of Small and Disadvantaged Business Utilization (OSDBU) or, for the Department of Defense, the Office of Small Business Programs (OSBP). An SBA procurement center representative (PCR) can review the documentation and may submit recommendations to increase small business opportunities.

These proposed changes result from an interagency negotiation among SBA, the FAR Council, and other agencies. SBA initiated this negotiation for three reasons.

First, the Small Business Act specifies that a fair proportion of the total "purchase and contracts" for goods and services shall be awarded to small business concerns. The statute does not limit the fair proportion language only to contracts. Rather, it applies it to both "purchase[s] and contracts." The Federal Government is directed to assure that a fair proportion of purchases and contracts are awarded to small businesses. SBA believes that the use of the words "purchase and" means that the Rule of Two should not apply only when an agency is considering the (□ print page 85073) award of a contract. It should also apply to all purchases of goods and services, as well. As such, SBA believes that it makes sense to apply the Rule of Two to orders issued under multiple-award contracts. Again, it should apply to all "purchases," not just to all new contracts.

Second, the proposed rule would provide certainty on how to apply the Rule of Two to task and delivery orders under multiple-award contracts and eliminate confusion created by an unresolved question in dispute between the Court of Federal Claims and the Government Accountability Office (GAO). The Court of Federal Claims agreed with the small-business plaintiffs in *Tolliver Group* that “an agency must apply the Rule of Two before an agency can even identify the possible universe of procurement vehicles which may be utilized for a particular scope of work.” 151 Fed. Cl. at 104. In a GAO protest decided after the court's ruling, GAO maintained its longstanding interpretation, which differs from the Court's position, that, in 15 U.S.C. 644(r) (<https://www.govinfo.gov/link/uscode/15/644>), Congress intended to clearly delineate a distinction between a procuring agency's mandatory set-aside obligations when establishing a contract, and an agency's discretion with respect to setting aside task or delivery orders under a multiple-award contracts, *i.e.*, indefinite delivery indefinite quantity (IDIQ) contracts. *Itility, LLC*, B-419167, Dec. 23, 2020, 2020 CPD P412 at 18. The proposed change to require application of the Rule of Two to task and delivery orders under multiple-award contracts, with certain exceptions, should eliminate lingering confusion.

Third, for similar reasons as those described in the OFPP memorandum, the proposed rule advances equity in Federal procurement practices. This rule is expected to create more contract opportunities for small businesses, particularly small disadvantaged businesses (SDBs). Executive Order 14091 (</executive-order/14091>) established a government-wide goal of awarding 15 percent of Federal contract spending to SDBs in FY 2025, and this proposed rule would put the government in a better position to achieve that goal.

This proposed rule rests on the authority in the Small Business Jobs Act of 2010, Public Law 111-240 (<https://www.govinfo.gov/link/plaw/111/public/240>), sec. 1331, codified at 15 U.S.C. 644(r) (<https://www.govinfo.gov/link/uscode/15/644>), for SBA and the FAR Council to establish guidance under which Federal agencies may, at their discretion and notwithstanding fair opportunity requirements, set aside orders placed against multiple-award contracts for small business concerns. Under this proposal, agencies are required to document their decisions not to set aside an order for small businesses. Such a decision might be based on one of the exceptions in the regulation, or because the Rule of Two is not satisfied— *i.e.*, where there are zero small businesses or only one small business that are responsible, available, and reasonably priced.

The OFPP memorandum, footnote 4, stated that Federal Supply Schedule orders are not covered by the term “multiple-award contract” as used in the memorandum. The memorandum stated that Schedules are continually open to new entrants and highly accessible to small businesses. Similarly, this proposed rule would not cover the Federal Supply Schedule. This also mirrors the treatment of the Federal Supply Schedule by the Court of Federal Claims, which exempted the Schedule from the Rule of Two in *VSolvit, LLC v. United States*, 151 Fed. Cl. 678 (2020), because of specific language providing so in FAR subpart 8.4.

Severability

SBA intends for the provisions of this proposed rule, if finalized, to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance.

Section-by-Section Analysis

13 CFR 125.2(C)(1)(I) ([HTTPS://WWW.ECFR.GOV/CURRENT/TITLE-13/SECTION-125.2#P-125.2\(C\)\(1\)\(I\)](https://www.ecfr.gov/current/title-13/section-125.2#P-125.2(C)(1)(I)))

The proposed rule adopts the updated terminology of “certified service-disabled veteran-owned small businesses concerns,” given that SBA now certifies service-disabled veteran-owned small businesses.

13 CFR 125.2(C)(2) ([HTTPS://WWW.ECFR.GOV/CURRENT/TITLE-13/SECTION-125.2#P-125.2\(C\)\(2\)](https://www.ecfr.gov/current/title-13/section-125.2#P-125.2(C)(2)))

The proposed rule would add a new § 125.2(c)(2) with new documentation and coordination requirements when an agency plans to establish a multiple award contract without an order set-aside provision. The current § 125.2(c)(3) only requires notification at least 30 days prior to the solicitation's issuance when an agency would issue a bundled requirement or one that would be unlikely for award to a small business. SBA believes that 30 days is not enough time to intervene in a large procurement when, oftentimes, the agency has been planning the procurement for over a year. The proposed rule would require small business specialists to notify the PCR as early in the acquisition planning process as possible where the multiple-award contract exceeds the substantial bundling threshold (even if the contract is not bundled), and the number of small business awardees is expected to be less than 30 percent of the total number of awardees. With the notification, the contracting officer must include market research and documentation