

Reproduced with permission from Federal Contracts Report, 98 FCR 43, 07/09/2012. Copyright © 2012 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Small Business

SBA's Proposed Rule on IDIQ Set Asides is a Mixed Bag for Small Businesses



BY DEVON HEWITT

On May 16, 2012, the Small Business Administration issued what is arguably one of the most significant proposed rules for small businesses issued in the past decade. The proposed rule implements Section 1331 of the Small Business Jobs Act, signed by the president in September 2010. Section 1331 of the Jobs Act requires SBA and OFPP to establish regulations under which federal agencies may set aside orders under multiple-award, indefinite-delivery, indefinite-quantity contracts for small business. The rule is significant because it extends not only to multiple-award IDIQ contracts let by agencies, but also to multiple-award contracts on the Federal Supply Schedule. The proposed rule issued in May follows an interim rule issued by the FAR Council November 2, 2011 which gave contracting officers, per Section 1331, the authority to set aside task and delivery orders for small businesses under multiple-award contracts, including orders issued under FSS contracts. In the interim rule, the FAR Council advised that SBA would issue a similar rule addressing in more detail the requirements associated with setting aside a task or delivery competition under multiple award, IDIQ contracts. The proposed rule provides these detailed requirements.

Devon Hewitt is a partner at Protora Law.

'Rule of Two.' The Small Business Act and the Federal Acquisition Regulation require all agencies to reserve acquisitions above the simplified acquisition threshold for small businesses if two or more small businesses can perform the work at a fair market price, also known as the "rule of two." Set asides are one of the most successful ways for agencies to achieve their small business contracting goals and accounted for nearly half of the \$97 billion awarded to small businesses in FY 2009. The requirement to set aside acquisitions for small business under the "rule of two" applies to indefinite-quantity, indefinite-delivery contracts. However, because these contracts generally are broad in scope, most small businesses do not have the capability to perform all the types of tasks or provide all the types of goods that might be required during the life of such a contract. In addition, even if a small business was awarded a multiple-award, IDIQ contract, it often did not receive orders under the contract because of the FAR Part 16.5 requirement that agencies allow all contract awardees, including other than small businesses, a "fair opportunity" to participate in the task or delivery order competition.

The issue of set asides in the context of multiple-award, IDIQ contract procurements came to a head in 2008 with a protest at the GAO filed by a company called Delex. In *Delex*, SBA, and ultimately GAO, took the position that the rule of two applies to any task or delivery order competition valued at greater than the simplified acquisition threshold. Shortly after the GAO's decision in *Delex*, the U.S. Court of Federal Claims appeared to adopt the GAO's reasoning in a protest filed by Global Computer Enterprises. Notwithstanding these rulings, agencies have inconsistently used order set asides under multiple-award, IDIQ contracts.

Small businesses face similar challenges under the FSS program. FAR Parts 8 and 38, which address FSS buys, expressly exempt FSS contract ordering procedures from the FAR Part 19 small business contracting requirements. FAR Part 19, similarly, states that its requirements do not apply to required sources of supply

such as FSS contracts and the related ordering procedures in FAR Part 8. In 2010, the GAO confirmed in a protest decision that the FAR Part 19 small business contracting programs do not apply to the FSS program.

Section 1331. In response to these issues, Section 1331 was included in the Small Business Jobs Act. Section 1331 specifically provides the authority for agencies to set aside task and delivery order competitions for small businesses and extends that authority to all multiple award IDIQ contracts, including those on the federal supply schedules. Under the proposed rule, agencies must continue to follow the rule of two in setting aside acquisitions at the contract level. If the “rule of two” cannot be satisfied at the contract level, the proposed rule offers an agency three options, all of which are discretionary. The agency may: (1) issue a partial set-aside, (2) “reserve” the requirement or (3) set-aside or preserve the right to set-aside orders against a multiple award contract that was awarded pursuant to full and open competition. If the agency decides not to use one of these three options when it otherwise could, the agency must explain its decision in the contract file.

The proposed rule has created mixed feelings in the small business contracting community. The authority to set aside task or delivery order competitions under FSS contracts is a big win for small businesses. The FSS program is a mandatory source of supply for agencies. Beyond that, the simplified acquisition procedures associated with schedule buys makes FSS contracts extremely popular for agencies. Agencies acquire approximately \$40 billion in products and services under the FSS program, which amounts to approximately 10 percent of total federal procurement dollars spent on

acquisitions. The ability to apply for rather than compete for FSS contracts also is a tremendous advantage for small businesses interested in entering the federal market. More than 14,000 businesses have FSS contracts. About 37 percent of the dollars spent in connection with the FSS program, furthermore, are spent on small businesses, a percentage far higher than the governmentwide small business contracting goal of 23 percent established by the Small Business Act. By removing all legal barriers to task and delivery order set asides, therefore, Section 1331 should improve access to what is already a lucrative and important source of contracting for small businesses.

On the other hand, many small businesses believe Section 1331 did not go far enough. While the proposed rule provides agencies with the authority to set aside order competitions, the choice to do so is completely discretionary on the part of a contracting officer. Section 1331 did not change the regulatory landscape with respect to the issues raised in *Delex*. Section 1331, for example, did not eliminate the rule of two found in FAR Part 19. *Delex*, therefore, is still good law and could serve as a basis for other protests like it, even if SBA’s proposed rule is issued in final. The proposed rule also could lead to a backlash. The risk of another *Delex* protest, or a size/status protest, coupled with the additional level of administration required for set-aside competition, could cause agencies to avoid these contract vehicles altogether. Agencies generally conduct multiple-award IDIQ procurements or make FSS buys to simplify contracting for the agency. The proposed rule, however, will make “simplified acquisition” from small businesses more complicated in the future.