



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 6, 2012

MEMORANDUM FOR DEPUTY SECRETARIES
CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES
AGENCY SMALL BUSINESS DIRECTORS

FROM: Joseph G. Jordan 
Administrator for Federal Procurement Policy
Office of Management and Budget

Karen G. Mills 
Administrator
Small Business Administration

SUBJECT: Follow-up: April 25, 2012 Meeting of the Small Business Procurement Group

Thank you for your participation at the White House Small Business Procurement Group meeting on April 25. During the meeting, each agency was asked to take the following three immediate steps, under your leadership, to ensure small businesses are utilized to the maximum extent practicable: (1) maximize opportunities for small businesses when making small dollar awards, (2) increase opportunities for small businesses under multiple award contracts, and (3) strengthen accountability for small business goal achievement. Additional information on each of these steps is provided below. As we move forward, each agency should ensure program, contracting, and small business policy staff understand their agency's small business contracting goals and the tools available for meeting their goals.

Maximizing Opportunities for Small Businesses Under the Simplified Acquisition Threshold

Pursuant to longstanding statutory requirements in the Small Business Act, agencies are required to automatically set aside work for small businesses that is equal to or less than the value of the simplified acquisition threshold (SAT) (generally \$150,000) unless the contracting officer determines the "rule of two" cannot be met – i.e., there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. However, a third-party analysis of data in the Federal Procurement Data System suggests that a significant amount of work under the SAT is not going to small businesses, including for products and services in industries where small businesses are typically well represented. This suggests that opportunities for small businesses are being lost, and that agencies must take additional steps to consistently apply set-asides in the manner prescribed in law and regulation.

Accordingly, we are asking that all agencies review their small business contracting practices for purchases under the SAT and make adjustments where appropriate. At a minimum, agencies should remind their contracting components of responsibilities to set aside contracts whose value is equal to or less than the SAT unless the rule of two is not met, to properly document the contract file when a set-aside is not used, and to maintain appropriate internal controls that ensure consistent application of these requirements. A sample memorandum to send to your agency's acquisition workforce is included as Attachment 2 for your consideration.

In the near future, the Small Business Administration (SBA) will provide each agency with an analysis of its contracts falling under the SAT that have not been awarded to small businesses. SBA expects agencies to monitor their SAT performance and take appropriate actions when missed opportunities to make contract awards to small businesses are identified.

We ask that all agencies report to OMB:

- (1) steps taken to ensure internal controls are in place for the consistent application of small business contracting requirements under the SAT,
- (2) steps taken (or planned) to increase utilization of small businesses where awards under the SAT are being made to other than small businesses, and
- (3) if no steps have been taken, why no action has taken place.

Increasing Small Business Utilization on Multiple Award Contracts

In working together to enact section 1331 of the Small Business Jobs Act of 2010, Public Law 111-240, both the Administration and Congress recognized that significant untapped opportunities exist to increase small business participation on multiple award contracts.¹ To capitalize on these opportunities, section 1331 directed the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, in consultation with the Administrator of General Services, to establish regulations under which Federal agencies may, at their discretion, use partial contract set-asides, contract reserves, and order set-asides under multiple award contracts.

As a first step, the Federal Acquisition Regulatory Council (FAR Council) issued an interim rule on November 2, 2011 to provide guidance on the section 1331 authorities. A number of agencies, including the Department of Homeland Security, have reported success stories and best practices using the interim rule. Information on these successful applications of section 1331 is available at <https://max.omb.gov/community/x/EwFoIQ>.

While use of the section 1331 tools is discretionary, the responsibility to give small businesses maximum practicable opportunity is mandatory, and agencies will be held accountable for taking all reasonable steps to meet their small business goals. This means that

¹ Multiple award contracts are large "umbrella" contracts that are awarded to a number of companies who then compete for specific orders after the umbrella contracts have been awarded. Over the life of a typical multiple award contract, which is often 5 years or more, hundreds of millions, if not billions, are spent through these types of vehicles.

each agency must determine how best to use the section 1331 tools with those tools previously available to increase awards to small businesses and help the Federal government meet its government-wide small business contracting goals each year. To help agencies measure their progress, SBA will provide agencies with an analysis of their task and delivery order spending (including spending under the SAT) that has not been awarded to small businesses.

To ensure the benefits of the FAR interim rule are being maximized, we ask that agencies take the six steps listed in Attachment 1 and report to OMB:

- (1) actions taken to accomplish the six steps,
- (2) if action was not taken, why no action was taken, and
- (3) when the agency reasonably expects to complete the six steps.

A sample memorandum to send to your agency's acquisition workforce is included as Attachment 3 for your consideration.

Strengthening Accountability for Small Business Goal Achievement

Achievement of Federal small business contracting goals depends greatly on effectively communicating those goals throughout agencies and with clear lines of accountability. To that end, we are asking each of you to hold senior leadership accountable for meeting your agency's small business goals, including any of the statutory socio-economic goals (Small Disadvantaged Business, HUBZone Small Business, Woman-Owned Small Business, and Service-Disabled Veteran-Owned Small Business). We encourage you to include agency small business contracting goals in the performance evaluations of all Senior Executive Service (SES) staff members who oversee your agency's acquisition workforce.

Agencies that have implemented performance evaluations containing small business contracting goal elements report that senior level leadership accountability plays a critical role in ensuring that those agencies meet or exceed their small business contracting and socio-economic goals. To that end, we ask agencies to report to OMB on the steps they have taken to hold senior leadership accountable for small business goals.

Agencies should submit their report covering the initiatives discussed above to Susan Truslow of OMB's Office of Federal Procurement Policy at struslow@omb.eop.gov by July 9, 2012.

Attachments

Short Term Steps for Increasing Small Business Opportunities Under Multiple Award Contracts

To help ensure the benefits of section 1331 of the Small Business Jobs Act of 2010 are being maximized, agencies should take the six steps listed below.¹

1. **Issue a memorandum to the acquisition workforce reminding them of the interim FAR rule on section 1331 and encouraging use of these tools.** Consistent with expectations announced by the FAR Council when the interim rule was published,² the memorandum should briefly review the various actions that can be taken under the interim rule and cite best practices and success stories (which could include those of Department of Homeland Security, if the agency does not yet have successes of its own to which it can point). We recommend that the memorandum be sent from the Deputy Secretary, or equivalent official, by June 15, 2012. A sample template is provided for your consideration in Attachment 3.
2. **Consider requiring order set-asides under multiple award contracts if the agency is not currently meeting its small business goals.** Historically, set-asides have proven to be the most powerful small business contracting tool. Accordingly, an increased commitment to order set-asides is likely to be a highly effective means to help an agency improve its small business contracting results and meet its small business goals. This can be achieved by committing to use order set asides unless there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery (i.e., unless the “rule of two” is not met).

Since the ultimate discretion of whether to apply a section 1331 tool rests with the contracting agency, the agency will need to determine the most appropriate application of a required set-aside. That is, the agency will have to decide whether to apply the tool to all of the agency’s contracting activities, an identified set of contracting activities, or a discrete set of acquisitions defined by industry or dollar threshold.³ The sample template includes alternative language to address mandatory application of set-asides to the extent the agency

¹ Any planned actions in response to this list should include a date for completion, which should be no later than August 31, 2012.

² When the interim rule was published, the FAR Council made clear that it expected agencies to take advantage of set-asides under multiple-award contracts by (1) identifying existing or prospective multiple-award contracts with small business contract holders where order set-asides may be appropriate, and (2) maximizing opportunities for small business by utilizing order set-asides under the Multiple Awards Schedule or Federal Supply Schedule Programs.

³ Agencies are encouraged to use the “MaxPrac” tool of the Department of Defense, which helps agencies to analyze their spend data and determine where small business capacity and opportunities are greatest. The Department of Defense has updated the MaxPrac tool with FY 2011 data, which is available as a zip file for download at <http://www.acq.osd.mil/osbp/docs/CivilianAgencyMaxPracFY11-0312.zip>. Questions regarding access and use of the tool may be directed to Ms. Carol Brown carol.a.brown@osd.mil in the Office of Small Business Programs in the Department of Defense.

deems appropriate. We recommend that any determination to require set-asides remain in effect at least until the agency is meeting its small business goals.

3. **Bilaterally modify existing multiple-award contracts to provide for order set-asides.** When the interim rule was published, the FAR Council encouraged agencies to modify, on a bilateral basis, existing multiple-award contracts if the remaining period of performance extends at least six months after the effective date, and the amount of work or number of orders expected under the remaining performance period is substantial. The sample template includes language regarding the bilateral modification of existing contracts.
4. **Strengthen internal controls.** Contract files should appropriately document how section 1331 tools were considered. If the agency is not currently meeting its various small business contracting goals, contracting components should also consider sampling contract files to review market research and other documents explaining how section 1331 tools were considered and, if not used, why the agency purchased the product or service on an unrestricted basis.
5. **Review SBA's proposed rule on section 1331.** On May 16, 2012, SBA published in the *Federal Register* a proposed rule providing more specific guidance to ensure that meaningful consideration of set-asides and reserves is given in connection with the award of multiple award contracts and task and delivery orders placed under them, and that those tools are used in a consistent manner. 77 FR 29130. Agencies are strongly encouraged to review the rule and provide directly to SBA's Dean Koppel at dean.koppel@sba.gov by July 16, 2012 any suggestions for improving the rule. SBA is especially interested in changes that will make the rule simpler, clearer, and more conducive to encouraging maximum use of the section 1331 tools by the agencies.
6. **Ensure the workforce is trained.** The General Services Administration has posted a set of "frequently asked questions," (FAQs), available at <http://www.gsa.gov/portal/content/113371>, to explain how set-asides can be applied when placing orders under Multiple Award Schedules contracts. Agencies are encouraged to review the FAQs and also to take advantage of free training that GSA offers on order set-asides. To access GSA's webinar training, please visit interact.gsa.gov and Continuous Learning Module (CLM), Basic Contracting for GSA Schedules (FAC023) at icatalog.dau.mil. To sign up for additional training, agencies should contact Steve Sizemore in GSA's Federal Acquisition Service at steve.sizemore@gsa.gov.

Sample Memorandum to send to the Acquisition Workforce in your agency

DATE: May XX, 2012

FROM: [Name], Deputy Secretary (or equivalent)

[Name], Chief Acquisition Officer, Senior Procurement Executive

[Name], Director, Office of Small and Disadvantage Business Utilization

SUBJECT: Increasing opportunities for small businesses through small business set-asides under the Simplified Acquisition Threshold

The purpose of this memorandum is to remind you of longstanding statutory requirements to set aside contracts for small businesses where the contract value is equal to or less than the simplified acquisition threshold (SAT) unless the “rule of two” is not met, and request that you redouble efforts to ensure these requirements are followed consistently. Set-aside requirements help to maximize small business contracting opportunities in the Federal marketplace. Greater management attention to the use of set-asides below the SAT can help our agency meet and exceed its small business contracting requirements each year.

Under section 15(j) of the Small Business Act and the Federal Acquisition Regulation, contracting officers are required to set aside contracts above the micro-purchase threshold¹ and below the SAT² for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns

¹ Under the FAR, “micro-purchase” means an acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold.

“Micro-purchase threshold” means \$3,000, except it means—

- (1) For acquisitions of construction subject to the Davis-Bacon Act, \$2,000;
- (2) For acquisitions of services subject to the Service Contract Act, \$2,500; and
- (3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as described in [FAR] [13.201\(g\)\(1\)](#), except for construction subject to the Davis-Bacon Act ([41 U.S.C. 1903](#))—

(i) \$15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

² Under the FAR, “simplified acquisition threshold” means \$150,000, except for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack ([41 U.S.C. 1903](#)), the term means—

(1) \$300,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(2) \$1 million for any contract to be awarded and performed, or purchase to be made, outside the United States.

that are competitive in terms of market prices, quality and delivery. FAR 19.502-2(a) requires the contracting officer to document the file if a set-aside is not used in connection with the award of a contract in this dollar range.

Further, [AGENCY] has awarded [##% - **SBA will soon provide agencies with a SAT performance analysis**] of contracts with dollar values equal to or less than the SAT to small businesses, falling short of our statutory requirement of awarding 100% of contracts below the SAT to small businesses when the rule of two is met.

To help the agency increase its contracting with small businesses, please take the following steps in conjunction with every new contract award that has an anticipated dollar value exceeding \$3,000 but not exceeding the SAT:

- Automatically reserve the work for small business concerns and set aside the contract for small business, unless there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.
- If the work is not set aside for small business, document in the contract file the reason for acquiring the service or product on an unrestricted basis.

Please ensure appropriate internal controls are used to monitor compliance with the steps described above. For example, contracting activities may decide to sample contract files to review market research and other documents explaining why the agency purchased the product or service on an unrestricted basis.

Thank you for your commitment to meeting and exceeding [AGENCY'S] small business contracting goals. We appreciate all of your efforts in utilizing small businesses to meet our requirements.

cc: Agency Chief Acquisition Officer
Agency Senior Procurement Executive
Agency Small Business Director

Sample Memorandum to send to the Acquisition Workforce in your agency

DATE: May XX, 2012

FROM: [Name], Deputy Secretary (or equivalent)

[Name], Chief Acquisition Officer, Senior Procurement Executive

[Name], Director, Office of Small and Disadvantage Business Utilization

SUBJECT: Maximizing Small Business Utilization on Multiple Award Contracts

The purpose of this Memorandum is to remind you of provisions in the Federal Acquisition Regulation (FAR) that became effective November 2, 2011, providing for the use of order set-asides in connection with multiple award contracts. In working together to enact section 1331 of the Small Business Jobs Act, both the Administration and Congress recognized that untapped opportunities exist to increase small business participation on multiple award contracts. They further recognized that set-asides historically have proven to be the most powerful small business contracting tool. For these reasons, you are asked to give increased attention to set-asides when placing orders under multiple award contracts.

Section 1331 of the Jobs Act directed the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration (SBA), in consultation with the Administrator of General Services, to establish regulations under which Federal agencies may, at their discretion: (1) set aside part or parts of a multiple award contract for small business, (2) reserve one or more awards on multiple award contracts that are established through full and open competition for small business, and (3) set aside orders under multiple award contracts for small businesses.

On November 2, 2011, an interim FAR rule was published to provide agencies with initial guidance for taking advantage of the section 1331 authorities. With respect to order set-asides, in particular, the interim rule:

- makes clear that set-asides may be used in connection with the placement of orders under multiple award contracts, notwithstanding the otherwise applicable requirement to provide each contract holder a fair opportunity to be considered;
- makes clear that set-asides may be utilized under any of the various small business programs (i.e. Small Business, Small Disadvantaged Business, HUBZone Small Business, Woman-Owned Small Business, and Service-Disabled Veteran-Owned Small Business);
- further makes clear that order set-asides may be used in connection with the placement of orders and blanket purchase agreements under Multiple Award Schedule (MAS) contracts; and

- amends existing solicitation provisions and contract clauses to provide notice of set-asides.

To ensure the benefits of order set-asides are being maximized, contracting activities should take the following immediate steps:

- (1) Identify prospective multiple-award contracts with small business contract holders where order set-asides may be appropriate and either preserve the option to set aside individual orders or commit to using order set-asides unless there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery (i.e., unless the “rule of two” is not met at the order level).
- (2) Identify existing multiple-award contracts with small business contract holders where order set-asides may be appropriate and either preserve the option to set-aside orders or commit to using order set-asides. This may require bilateral modifications, which should be considered if the remaining period of performance extends at least six months after the effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.
- (3) Consider order set-asides under MAS contracts. The General Services Administration has posted a set of “frequently asked questions” (FAQs), available at <http://www.gsa.gov/portal/content/113371>, to explain how set-asides may be applied when placing orders under MAS contracts. Agencies are encouraged to review the FAQs and also to take advantage of free training that GSA offers on order set-asides. To sign up for training, agencies should contact Steve Sizemore in GSA’s Federal Acquisition Service at steve.sizemore@gsa.gov.
- (4) Review success stories in connection with the use of the interim FAR rule, available at <https://max.omb.gov/community/x/EwFoIQ>, and document examples of successes as you identify them.
- (5) Ensure that contract files appropriately documents how section 1331 tools were considered.

[If the agency is not currently meeting all of its small business goals, consider the following alternative language for the steps listed above:

[AGENCY] is not currently meeting one or more of its small business goals. To ensure the benefits of order set-asides are being maximized, contracting activities should take the following immediate steps:

- (1) Identify prospective multiple-award contracts with small business contract holders where order set-asides may be appropriate and commit to using order set asides unless a determination is made prior to placing the order that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality and delivery (i.e., the “rule of two” is not

met at the order level). This commitment should be applied to the following new multiple award contracts: [*Agency should identify the appropriate scope of the commitment: all prospective multiple award contracts / multiple award contracts awarded by the following components (identify) / multiple award contracts that are predominantly for the following products or services (identify) / all orders within the following dollar range (identify)*]. For all other new multiple award contracts, either preserve the right to use set-asides or commit to using set asides.

- (2) Identify existing multiple-award contracts (with the scope identified in item (1), above) with small business contract holders where order set-asides may be appropriate and commit to using order set-asides. This may require bilateral modifications, which should be considered if the remaining period of performance extends at least six months after the effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.
- (3) Commit to order set-asides under MAS contracts for orders falling within the scope identified in item (1). GSA has posted a set of “frequently asked questions” (FAQs), available at <http://www.gsa.gov/portal/content/113371>, to explain how set-asides may be applied when placing orders under MAS contracts. Agencies are encouraged to review the FAQs and also to take advantage of free training that GSA offers on order set-asides. To sign up for training, agencies should contact Steve Sizemore in GSA’s Federal Acquisition Service at steve.sizemore@gsa.gov.]
- (4) Review success stories in connection with the use of the interim FAR rule, available at <https://max.omb.gov/community/x/EwFoIQ>, and document examples of successes as you identify them.
- (5) Ensure that contract files appropriately documents how section 1331 tools were considered.
- (6) Sample contract files to review market research and other documents explaining how order set-asides were considered and, if not used, why the agency purchased the product or service on an unrestricted basis.]

On May 16, 2012, SBA published in the *Federal Register* a proposed rule providing more specific guidance addressing all three components of section 1331, namely (1) partial contract set-asides, (2) contract reserves, and (3) order set-asides. The purpose of SBA’s rulemaking is to ensure both that meaningful consideration of set-asides and reserves is given in connection with the award and placement of task and delivery orders under multiple award contracts and that those tools are used in a consistent manner. You are urged to review the rule and provide feedback to **[insert agency POC]** by **[insert date that will allow the agency to submit consolidated feedback directly to SBA by July 9, 2012]**. You should focus on changes that will make the rule simpler, clearer, and more conducive to encouraging maximum use of the tools by the agency.

Contracting activities should report on actions taken or planned in response to this memorandum to **[insert POC]** by **[insert date that will allow agency to report back to OMB by July 9, 2012]**. Thank you for your attention to this important matter and for your ongoing commitment to help our agency meet and exceed its small business contracting goals.

cc: Agency Chief Acquisition Officer
Agency Senior Procurement Executive
Agency Small Business Director