Set-Asides for Small Businesses: Legal Requirements and Issues

(name redacted)
Legislative Attorney

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Summary

It has long been the "declared policy of the Congress" that a "fair proportion" of federal contracts be awarded to small businesses. In support of this policy, Congress has enacted various statutes authorizing procuring agencies to conduct competitions in which only small businesses may compete, or to make noncompetitive ("sole-source") awards to such firms in circumstances when similar awards could not be made to other firms.

Federal agencies can award contracts to small businesses by several different methods, depending upon the value of the contract and the number of small businesses likely to submit offers, among other factors.

- *"Small purchases" valued at between $3,500 and $150,000* are "reserved exclusively" for small businesses and are generally made using simplified acquisition procedures (e.g., purchase orders, blanket purchase agreements), sealed bidding, or contracting by negotiation.
- *Contracts whose value exceeds $150,000* can be awarded via sealed bidding or contracting by negotiation in competitions in which only small businesses may participate (i.e., "competitive set-asides"), *so long as the contracting officer reasonably expects offers from at least two small businesses*, and the award can be made at fair market price.
- *Contracts whose value exceeds $150,000* can, in some cases, be entered into by negotiating directly with a small business *if the contracting officer does not reasonably expect offers from at least two small businesses*.

All the foregoing are authorized under the Small Business Act, which permits federal agencies to conduct competitive set-asides for small businesses, as well as for specific types of small businesses (i.e., small disadvantaged businesses (SDBs) participating in the "8(a) Program" (8(a) firms), Historically Underutilized Business Zone (HUBZone) small businesses, women-owned small businesses (WOSBs), and service-disabled veteran-owned small businesses (SDVOSBs)). The Small Business Act also authorizes agencies to make sole-source awards to 8(a) firms, HUBZone small businesses, SDVOSBs, and WOSBs in certain circumstances. In addition, the Veterans Benefits, Health Care, and Information Technology Act of 2006, as amended, grants the Department of Veterans Affairs (VA) additional authority to conduct competitive set-asides for, and make sole-source awards to, SDVOSBs and other veteran-owned small businesses (VOSBs).

Small business set-asides are of perennial interest to Congress because of their role in effectuating the congressional policy of assisting small businesses. For example, the 112th Congress enacted legislation (P.L. 112-239) that expanded agencies' authority to conduct competitive set-asides for WOSBs, while the 113th Congress enacted legislation that permits sole-source awards to such businesses (P.L. 113-291). In addition, on February 22, 2016, the Supreme Court is scheduled to hear oral arguments in *Kingdomware Technologies, Inc. v. United States*, a case in which a SDVOSB challenges the Department of Veterans Affairs' procurement of certain supplies and services through the Federal Supply Schedules, rather than through a set-aside for SDVOSBs or VOSBs. For more information on this case, see CRS Legal Sidebar WSLG1322, *UPDATED: Supreme Court Postpones Oral Arguments in Challenge to the Department of Veterans Affairs' Practices as to Contracting "Set-Asides" for Veteran-Owned Small Businesses*, by (name re dacted).

Contents

Legal Authorities Governing Set-Asides 3
Small Purchases "Reserved" Under the Small Business Act 4
Competitive Set-Asides and Other Preferences Under the Small Business Act 6
Small Disadvantaged Businesses Participating in the 8(a) Program 9
HUBZone Small Businesses 11
Women-Owned Small Businesses 12
Service-Disabled Veteran-Owned Small Businesses 14
Veterans Benefits, Health Care, and Information Technology Act 15
Legal Issues 16
Implementation of the Rule of Two 17
Requirements to Use Small Business Set-Asides 20
Section 15(a) and Its Implementing Regulations 21
2006 Amendments to the Veterans Benefit Act 22
Partial Set-Asides 25
Set-Asides Under ID/IQ Contracts 26
Priority of and Among the Set-Aside Programs 28
Set-Asides Under the Small Business Act 28
Set-Asides Under the Veterans Benefits Act 30
Limitations on the Use of Small Business Set-Asides 31
Conclusions 34

Figures

Figure 1. Small Businesses Generally: Preferences Based on Contract Size 9
Figure 2. 8(a) Participants: Preferences Based on Contract Size 10
Figure 3. HUBZone Small Businesses: Preferences Based on Contract Size 12
Figure 4. Women-Owned Small Businesses: Preferences Based on Contract Size 14
Figure 5. Service-Disabled Veteran-Owned Small Businesses: Preferences Based on Contract Size 15

Tables

Table 1. Priority Sources for Purchasing Supplies and Services 29

Contacts

Author Contact Information 34
Acknowledgments 34

This report provides an overview of set-asides for small businesses, key legal requirements governing agencies' use of set-asides, and recent litigation regarding agencies' use (or non-use) of set-asides when conducting particular procurements. The term "set-aside" is commonly used to refer to a competition in which only small businesses may compete. However, this usage can obscure the fact that some set-asides involve small purchases that may be made by means of simplified acquisition procedures that entail less than "full and open competition," as well as by the sealed bidding or contracting by negotiation that is more commonly associated with set-asides of larger contracts. In order to better distinguish between these two categories of procurements, this report refers to the former as "purchases reserved for small businesses," and the latter as "competitive set-asides." In addition, some, but not all, of the statutory provisions pertaining to competitive set-asides also authorize agencies to award contracts without competition—by negotiating directly with a small business—when contracts cannot be set aside for small businesses (e.g., because offers cannot reasonably be expected from two or more small businesses), or when certain other conditions are met. Such awards are here referred to as "sole-source awards."

Small business set-asides are of perennial interest to Congress because of their role in effectuating the long-standing

> declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.[1]

In support of this policy, Congress has authorized agencies to conduct set-asides and make sole-source awards to small businesses, among other things. Specifically, with various provisions of the Small Business Act of 1958,[2] as amended, Congress has permitted federal agencies to conduct competitive set-asides for small businesses,[3] as well as for specific types of small businesses (i.e., small disadvantaged businesses (SDBs) participating in the "8(a) Program," Historically Underutilized Business Zone (HUBZone) small businesses, women-owned small businesses (WOSBs), and service-disabled veteran-owned small businesses (SDVOSBs)).[4] The Small Business Act also authorizes federal agencies to make sole-source awards to 8(a) participants, HUBZone small businesses, SDVOSBs, and WOSBs in certain circumstances,[5] as well as grant price evaluation adjustment preferences to HUBZone small businesses in unrestricted

[1] 15 U.S.C. §631(a)(1). Similar language was included in the Small Business Act of 1953, which first established the Small Business Administration (SBA) on a temporary basis. *See* An Act to Dissolve the Reconstruction Finance Corporation, to Establish the Small Business Administration, and for Other Purposes, P.L. 83-163, §202, 67 Stat. 232 (July 30, 1953).

[2] *See* An Act to Amend the Small Business Act of 1953, as Amended, P.L. 85-536, §4(a), 72 Stat. 384 (July 18, 1958).

[3] *See, e.g.*, 15 U.S.C. §644(a).

[4] *See, e.g.*, 15 U.S.C. §637(a) (set-asides for 8(a) participants); 15 U.S.C. §637(m) (set-asides for WOSBs); 15 U.S.C. §657a (set-asides for HUBZone small businesses); 15 U.S.C. §657f (set-asides for SDVOSBs). All 8(a) participants are SDBs, but not all SDBs are 8(a) participants. *See generally* CRS Report R40987, *"Disadvantaged" Small Businesses: Definitions and Designations for Purposes of Federal and Federally Funded Contracting Programs*, by (name redacted).

[5] *See, e.g.*, 15 U.S.C. §637(a) (8(a) participants); 15 U.S.C. §657a (HUBZone small businesses); 15 U.S.C. §657f (SDVOSBs); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, §825, 128 Stat. 3437-38 (December 19, 2014) (codified in 15 U.S.C. §637(m)(7)).

competitions.[6] In addition, the Veterans Benefits, Health Care, and Information Technology Act of 2006, as amended, grants the Department of Veterans Affairs (VA) additional authority to conduct competitive set-asides for, and make sole-source awards to, SDVOSBs and other veteran-owned small businesses (VOSBs).[7]

Congress has also sought to promote its "declared policy" of assistance to small businesses by requiring the establishment of governmentwide and agency-specific goals for the percentage of federal contract and/or subcontract dollars awarded to small businesses each year. The President is statutorily required to establish governmentwide goals, which must call for at least 23% of federal contract dollars to be awarded to small businesses (including 5% of federal contract and subcontract dollars to WOSBs; 5% to SDBs; 3% to HUBZone small businesses; and 3% to SDVOSBs).[8] Individual agencies, after "consultation" with the Small Business Administration (SBA), are also statutorily required to set agency-specific goals.[9] These goals must represent, "for that agency, the maximum practicable opportunity" for small businesses to participate in the contracts awarded by the agency, and the "cumulative annual prime contract goals for all agencies [must] meet or exceed the annual Governmentwide prime contract goal established by the President."[10] Set-asides for small businesses constitute one of the primary means by which agencies may meet their goals for contracting and subcontracting with small businesses.[11] However, these goals are not quotas,[12] and the set-aside programs do not serve or seek to ensure that 23% of all federal contract dollars, for example, is awarded to small businesses.

The 112th Congress enacted legislation that expands agencies' authority to conduct competitive set-asides for WOSBs,[13] while the 113th Congress enacted legislation that permits sole-source awards to such firms.[14]

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[6] *See, e.g.*, 15 U.S.C. §657a(b)(3)(A). An *unrestricted competition* is a competition in which all potential vendors that are not excluded from government contracting may compete. Small and other-than-small vendors compete together.

[7] *See, e.g.*, P.L. 109-461, 120 Stat. 3431 (December 22, 2006) (codified, in part, at 38 U.S.C. §§8127-8128).

[8] *See, e.g.*, 15 U.S.C. §644(g)(1)(A).

[9] 15 U.S.C. §644(g)(2)(A).

[10] 15 U.S.C. §644(g)(1)(B).

[11] *See, e.g., Examining the Rule of Two: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the Committee on Small Business, House of Representatives*, 100th Cong., 1st sess., May 7 and 13, 1987, at 69-70.

[12] *See, e.g.*, DynaLantic Corp. v. U.S. Dep't of Defense, 885 F. Supp. 2d 237, 244-245 (D.D.C. 2012) ("Congress has established an 'aspirational goal' for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurement dollars government wide. ... Additionally, each federal agency establishes its own goals by agreement between the agency head and the SBA. ... None of the goals established by Congress or [the Department of Defense] are rigid numerical quotas, and there is no penalty for failure to meet the goals."). Quotas for the percentage of contract or subcontract dollars awarded to certain types of small businesses could raise constitutional issues because firms' status is based, in part, on race and gender. Race and gender are "suspect classifications," and the government would have to show that any challenged programs which classify individuals on these bases are narrowly tailored to further a compelling government interest, in the case of race-conscious programs; or are substantially related to important government objectives, in the case of gender-conscious programs. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Craig v. Boren, 429 U.S. 190, 197 (1976). In *United States v. Virginia*, the Supreme Court required the State of Virginia to provide an "exceedingly persuasive justification" for its policy of maintaining an all-male military academy. 518 U.S. 515 (1996). It is unclear whether this standard is in fact more strict than the intermediate scrutiny standard of review that has long applied to gender classifications.

[13] National Defense Authorization Act for FY2013, P.L. 112-239, §1697, 126 Stat. 2091 (January 2, 2013),.

[14] P.L. 113-291, §825,128 Stat. 3437-38 (codified in 15 U.S.C. §637(m)(7)).

Interest in the set-aside programs seems likely to continue in the 114th Congress, in part, because a case currently pending before the Supreme Court involves small business set-asides. Specifically, on February 22, 2016, the Court is scheduled to hear oral arguments in *Kingdomware Technologies, Inc. v. United States*, a case in which a SDVOSB challenges the Department of Veterans Affairs' procurement of certain supplies and services through the Federal Supply Schedules, rather than through a set-aside for SDVOSBs or VOSBs.[15]

The report begins with an overview of the legal authorities governing set-asides and related contracting preferences for small businesses. Then, it turns to the legal issues, including (1) the implementation of the "Rule of Two," which permits or, in some cases, requires that agencies use set-asides when offers can reasonably be expected from at least two small businesses, and the award made at a fair price; (2) when agencies may be required to use set-asides for small businesses; (3) partial set-asides of contracts that cannot be totally set aside for small businesses; (4) set-asides under certain *indefinite-delivery/indefinite-quantity (ID/IQ) contracts* (i.e., contracts that call for the contractor to supply quantities of goods or services that are unknown at the time of contracting to the government upon the government's order); (5) priority of and among the set-aside programs; and (6) limitations on the use of small business set-asides.

Legal Authorities Governing Set-Asides

The Small Business Act of 1958, as amended, is the primary authority governing set-asides and related contracting preferences for small businesses. By its terms, or as implemented by SBA and the Federal Acquisition Regulatory Council (FAR Council), this act generally provides that "small purchases" are reserved for small businesses, and authorizes agencies to conduct competitive set-asides and, in some cases, grant other contracting preferences to small businesses.[16] However, it is important to note that one of the primary regulations implementing, in part, the Small Business Act—the Federal Acquisition Regulation (FAR)—applies only to the acquisition of goods and services by executive branch agencies with appropriated funds.[17] The FAR also excludes certain contracts (e.g., those performed overseas) from its requirements pertaining to small business contracting, as discussed below.[18] The Small Business Act does not expressly contemplate such exclusions. However, agency regulations are generally entitled to deference so long as Congress has not directly spoken to the precise question at issue, and the agency's reasonable interpretation of the statute is consistent with the purposes of the statute.[19]

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[15] For further discussion of this case, see CRS Legal Sidebar WSLG1322, *UPDATED: Supreme Court Postpones Oral Arguments in Challenge to the Department of Veterans Affairs' Practices as to Contracting "Set-Asides" for Veteran-Owned Small Businesses*, by (name redacted).

[16] The Small Business Act technically contemplates other agencies awarding their contracts to the SBA for subcontracting to SDBs participating in the 8(a) Program. However, in practice, SBA generally delegates its authority to subcontract with 8(a) firms to other agencies, which then award contracts directly to 8(a) firms. *See, e.g.*, 13 C.F.R. §124.501(a); Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Defense, January 4, 2013, *available at* https://www.sba.gov/sites/default/files/files/Department%20of%20Defense.pdf.

[17] *See, e.g.*, The Argos Group, B-406040 (January 24, 2012) (finding that HUBZone small businesses must be accorded a price evaluation preference when the General Services Administration acquires certain leasehold interests in real property even though such acquisitions are not subject to the FAR on the grounds that the Small Business Act "does not limit the type of contract to which it applies"). For more on the FAR, including a discussion of how "acquisition," "supplies," "services," and "appropriated funds" are defined or otherwise construed for purposes of the FAR, see generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by (name redacted), (name redacted), and (name redacted) .

[18] *See infra* note 26 and accompanying text.

[19] Chevron, USA v. Natural Resources Defense Council, 467 U.S. 837 (1984).

"[I]f the statute speaks clearly 'to the precise question at issue,'" the tribunal "must give effect to the unambiguously expressed intent of Congress," regardless of what the agency regulation provides.[20] However, where "the statute is silent or ambiguous with respect to the specific issue," the tribunal "must sustain the [a]gency's interpretation if it is 'based on a permissible construction' of the Act."[21]

In addition, Congress has supplemented the provisions of the Small Business Act by enacting additional legislation requiring the Department of Veterans Affairs (VA) to set aside contracts for SDVOBs and other VOSBs in certain circumstances.

Small Purchases "Reserved" Under the Small Business Act

Congress amended the Small Business Act in 1978 to address agencies' use of small businesses when making "small purchases."[22] Specifically, the act provides that

> Each contract for the purchase of goods and services that has an anticipated value greater than [$3,500] 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 delivery of the goods or services being purchased.[23]

This provision uses "shall," which has been construed as indicating mandatory agency action (see infra "Requirements to Use Small Business Set-Asides"),[24] and is generally taken to mean that agencies must award contracts valued at between $3,500 and $150,000 to small businesses, so long as the contracting officer is able to obtain offers from at least two small businesses that are competitive as to price and other terms.[25] However, certain regulations implementing this provision of the Small Business Act effectively narrow its scope. First, Part 19 of the FAR, which addresses "small business programs," generally "applies only in the United States or its outlying areas,"[26] which means that certain small contracts awarded and/or performed overseas are not

[20] Barnhart v. Walton, 535 U.S. 212, 217 (2002) (quoting *Chevron*, 467 U.S. at 842-43).

[21] *Id*. at 218 (quoting, in part, *Chevron*, 467 U.S. at 843).

[22] An Act to Amend the Small Business Act and the Small Business Investment Act of 1958, P.L. 95-507, 92 Stat. 1575 (October 24, 1978).

[23] 15 U.S.C. §644(j)(1). The act gives these figures as $2,500 and $100,000. However, they have been adjusted for inflation by regulation pursuant to the Ronald W. Reagan National Defense Authorization Act for FY2005. *See* P.L. 108-375, §807, 118 Stat. 2010-11 (October 28, 2004) (codified at 41 U.S.C. §1908). In certain circumstances, the thresholds could be greater than those given here. *See* 48 C.F.R. §13.003(b)(1).

[24] *See, e.g.*, Hughes & Sons Sanitation, B-270391 (February 29, 1996) ("Under the simplified acquisition procedures, an acquisition of services that has an anticipated dollar value exceeding [$3,500] and not exceeding [$150,000] is reserved exclusively for small business concerns and *must* be set aside.") (emphasis added).

[25] *See, e.g.*, Danielle Ivory, Big Firms Edge Out Small for Billions in Awards, *Bloomberg Gov't*, November 13, 2011 (reporting that "about $4.74 billion, or 45 percent, of more than $10.6 billion targeted for small businesses under government acquisition rules were won by bigger competitors in the year that ended September 30, 2011."). Regulations implementing, in part, this provision of the Small Business Act indicate that the requirement to "reserve" small purchases for small businesses does "not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, SDVOSB Program, or WOSB Program." 48 C.F.R. §19.203(b).

[26] 48 C.F.R. §19.000(b) ("This part, except for subpart 19.6, applies only in the United States or its outlying areas. Subpart 19.6 applies worldwide."). Subpart 19.6 addresses Certificates of Competency (COCs) and determinations of responsibility. Questions have recently been raised as to whether the regulations providing that Part 19 of the FAR generally applies only in "the United States or its outlying areas" are consistent with the Small Business Act, which does not contain such a geographical limitation. *But see* Latvian Connection Gen. Trading & Constr. LLC, B-408633 (September 18, 2013) ("Given the silence of the Small Business Act with respect to the application of § 644(j)(1) outside the United States and its outlying areas, we cannot say that the validly-promulgated, long-standing regulation (continued...)

necessarily set-aside for small businesses.[27] Similarly, Subpart 8.4 of the FAR, which governs the use of the Federal Supply Schedules, generally provides that Part 19 of the FAR "does not apply to BPAs [blanket purchase agreements] or orders placed against Federal Supply Schedule contracts."[28] (The Schedules are commonly used in purchasing commercial goods and services of the sort that small businesses could potentially supply.[29]) In addition, the FAR authorizes agencies to solicit small purchases on an unrestricted basis if they receive "no acceptable offers from responsible small business concerns."[30]

Agencies may use several different methods in making "small purchases," which are treated differently from larger purchases under federal procurement law. With larger purchases, agencies must generally obtain "full and open competition through the use of competitive procedures," which generally means that all responsible sources are permitted to submit bids or offers.[31] In contrast, with small purchases, agencies must generally "promote competition to the maximum extent practicable,"[32] and may rely upon "simplified acquisition procedures." These procedures include

- *governmentwide commercial purchase cards*, or purchase cards "similar in nature to ... commercial credit card[s]" issued to authorized personnel for use in acquiring and/or paying for goods or services;[33]
- *purchase orders*, or orders specifying the quantity of goods or services requested and a date of delivery, among other things;[34]

(...continued)

found at FAR § 19.000(b) is inconsistent with, or contrary to, the Small Business Act.").

[27] It is not immediately apparent whether Section 19.000(b) is to be construed as referring to procurements conducted within the United States, or contracts whose principal place of performance is within the United States. Also, questions have been raised about whether agencies are permitted to take certain actions required by Part 19 of the FAR in connection with contracts awarded and/or performed outside the United States. *But see* Maersk Line, Ltd., B-410280 (December 1, 2014) (finding that Part 19 applies to a contract whose place of performance is the Northern Mariana Islands). This decision could be taken to mean that the place of performance is the salient factor.

[28] 48 C.F.R. §8.404(a) ("Parts 13 (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202-1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts."). Section 19.202-1(e)(1)(iii) addresses "bundling" of contract requirements, or their consolidation into a contract that is likely to be "unsuitable" for award to a small business due to its size or other factors. *But see* 48 C.F.R. §8.405-5(a) (providing that "[a]lthough the preference programs of part 19 are not mandatory," ordering agencies may set aside orders and BPAs for small businesses). *See also* Kingdomware *Techs., Inc.*, B-405533.2 (November 10, 2011) (recognizing that orders under the Federal Supply Schedules are exempt from "the set-aside requirements in FAR Part 19").

[29] *See* U.S. Gen. Servs. Admin., GSA Schedules, *available at* http://www.gsa.gov/portal/category/100611.

[30] 48 C.F.R. §19.502-2(a).

[31] 10 U.S.C. §2304(a)(1)(A) (procurements of defense agencies); 41 U.S.C. §3301(a)(1) (procurements of civilian agencies). *Full and open competition* means that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. §107. For more on the competition requirements in federal contracting, see generally CRS Report R40516, *Competition in Federal Contracting: Legal Overview*, by (name re dacted).

[32] 48 C.F.R. §13.104. This generally entails "considering" the solicitation of at least three sources and, "[w]henever practicable," requesting quotations or offers from two sources not included in the previous solicitation. *Id.*

[33] 48 C.F.R. §13.001. While governmentwide commercial purchase cards are commonly associated with micro-purchases (generally valued at or below $3,500), the FAR expressly provides that "[a]gency procedures should not limit the use of Governmentwide commercial purchase cards to micro-purchases," but rather should encourage their use to place orders and/or make payments under other contractual instruments. 48 C.F.R. §13.301(b).

[34] *See generally* 48 C.F.R. §§13.302-1 to 13.302-5.

- *blanket purchase agreements*, or "charge accounts" with qualified sources of supply that are used to fill anticipated repetitive needs for supplies or services;[35]
- *imprest funds* (i.e., cash funds of fixed amounts established by an advance of funds for use periodically in making relatively small cash payments), and *third-party drafts* (i.e., agency bank drafts similar to checks);[36] and
- Standard Form 44, Purchase Order-Invoice-Voucher, which is "designed primarily for on-the-spot, over-the-counter purchases of supplies and nonpersonal services while away from the purchasing office or at isolated [locations]."[37]

Agencies could potentially use any of these simplified procedures when awarding a contract "exclusively reserved" for small businesses.[38] Alternatively, they could use sealed bidding or contracting by negotiation of the sort generally associated with full and open competition.[39] With *sealed bidding*, agencies open bids publicly at a specified time and place; evaluate them without discussions with bidders; and award the contract to the lowest-priced responsible bidder.[40] With *contracting by negotiation*, in contrast, agencies generally conduct discussions or negotiations with at least those vendors whose offers fall within the "competitive range" and award the contract to the offeror whose proposal represents the "best value" for the government considering price and other factors included in the solicitation.[41]

Competitive Set-Asides and Other Preferences Under the Small Business Act

When the value of a contract awarded under the authority of the Small Business Act exceeds the simplified acquisition threshold (generally $150,000),[42] somewhat different rules apply. Larger contracts are like "small purchases" in that the small business requirements of the FAR generally do not apply to contracts awarded and/or performed outside the United States, and agencies are not required to set-aside orders issued under Federal Supply Schedule contracts for small businesses.[43] However, larger purchases differ in that agencies may not use simplified acquisition procedures, but instead must use either sealed bidding or contracting by negotiation when conducting a competitive set-aside.[44] In addition, the type of small business involved (e.g., WOSB, SDVOSB) matters significantly more with larger purchases than with "small" ones, since

[35] 48 C.F.R. §13.303-1(a).

[36] 48 C.F.R. §13.001.

[37] 48 C.F.R. §13.306.

[38] 48 C.F.R. §19.502-5(a).

[39] *Id.*

[40] *See* 48 C.F.R. §14.101(a)-(e). Agencies are generally required to use sealed bids if (1) time permits the solicitation, submission, and evaluation of sealed bids; (2) the award will be made on the basis of price or price-related factors; (3) it is not necessary to conduct discussions with bidders about their bids; and (4) there is a reasonable expectation of receiving more than one sealed bid. 10 U.S.C. §2304(a)(2)(A)(i)-(iv) (procurements of defense agencies) & 41 U.S.C. §3301(b)(1)(A)(i)-(iv) (procurements of civilian agencies).

[41] 48 C.F.R. §§15.000-15.102. The *competitive range* consists of those proposals having the greatest likelihood of award based on the factors and significant sub-factors specified in the solicitation.

[42] The simplified acquisition threshold can be higher in certain circumstances (e.g., contingency operations, disaster responses). *See* 48 C.F.R. §2.101.

[43] *See supra* notes 26-30 and accompanying text.

[44] 48 C.F.R. §19.502-5(a).

the circumstances in which agencies may set aside contracts for small businesses (or grant other preferences) can vary depending upon the type of small business involved.

Section 15(a) of the Small Business Act of 1958 arguably paved the way for small business set-asides by providing that

> [t]o effectuate the purposes of this Act, small-business concerns within the meaning of this Act shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the [Small Business] Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns.[45]

By at least 1962, regulations implementing Section 15(a) treated the existence of a certain number of offerors and pricing as tantamount to a determination that setting aside a procurement for small businesses is "in the interest of assuring" that small businesses receive a "fair proportion" of government contracts, among other things.[46] Specifically, the 1962 regulations provided that an acquisition was to be set aside for small businesses when there was a "reasonable expectation" that offers would be obtained from a "sufficient number of small business concerns so that awards will be made at reasonable prices."[47] However, other agencies subsequently developed similar language, which expressly called for contracts to be set aside for small businesses whenever the contracting officer reasonably expected offers from at least two small businesses, and the award could be made at fair market price.[48] The latter provisions came to be known as the "Rule of Two" because of the focus on there being at least two small businesses.

What Is a Small Business?

The Small Business Act defines a *small business* as one that is "independently owned and operated"; is "not dominant in its field of operation"; and meets any size standards established by the Administrator of Small Business. The Administrator has established standards which specify firm size by North American Industrial Classification System (NAICS) code and provide, for example, that recreational vehicle dealers are small if their annual receipts (averaged over three years) are less than $32.5 million, while line-haul railroads are small if they have fewer than 1,500 employees.

15 U.S.C. §632(a)(1)-(2); 13 C.F.R. §§121.101-121.201.

[45] P.L. 85-536, §15, 72 Stat. 395 (codified, as amended, at 15 U.S.C. §644(a)). Similar language had been included in the Small Business Act of 1953. Prior to the establishment of the SBA, the Smaller War Plants Corporation (during World War II) and the Small Defense Plants Administration (during the Korean War) had been given similar authority to subcontract certain agency contracts to small vendors. *See* Act of July 31, 1951, P.L. 82-96, §110, 65 Stat. 131 (July 31, 1951); Small Business Mobilization Act, P.L. 77-603, §4(f), 56 Stat. 351 (June 11, 1942).

[46] As the Court of Federal Claims has noted, while most discussions of Section 15(a) emphasize the role of set-asides in ensuring that small businesses receive a "fair proportion" of government contracts, Section 15(a) also contemplates set-asides for other purposes, such as maintaining and mobilizing the nation's productive capacity. *See* Mgmt. & Training Corp. v. United States, No. 12-561C, 2012 U.S. Claims LEXIS 1580, at *27-*30 (November 29, 2012).

[47] 41 C.F.R. §1-1 706-5(a) (1962) (procurements of civilian agencies).

[48] *See, e.g., Examining the Rule of Two*, *supra* note 11, at 4, 37-38 (noting that the Department of the Navy began using the "Rule of Two" formulation, discussed below, in 1963; the Defense Acquisition Regulation, in 1979; and the National Aeronautics and Space Administration, in 1982). The at-least-two standard developed because of concerns that contracting officers interpreted "sufficient number" in differing ways, with some reportedly declining to set aside contracts for small businesses even when 10 or 12 potential small business offerors could be identified. *See, e.g.*, *OMB Efforts to Repeal the Rule of Two: Hearing Before the Subcommittee on SBA and SBIC Authority, Minority Enterprise,* (continued...)

The Rule of Two was incorporated in the FAR when the FAR was promulgated in 1983,[49] and currently appears in both the FAR and SBA regulations. Specifically, Section 19.502-2(b) of the FAR provides that

> [t]he contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that: (1) [o]ffers will be obtained from at least two responsible small business concerns offering the products of different small business concerns ...; and (2) [a]ward will be made at fair market prices,[50]

while SBA regulations similarly direct that agencies "shall" set aside any acquisition whose value exceeds the simplified acquisition threshold (generally $150,000) for small businesses when the Rule of Two is satisfied.[51] This language—and particularly the use of "shall"—has generally been taken to mean that agencies must set aside acquisitions whenever the Rule of Two is satisfied, as discussed below. However, even if "shall" is construed to indicate mandatory agency action here, any set-aside for small businesses under the authority of Section 15(a) and its implementing regulations would appear to have lower "priority" than set-asides for specific types of small businesses, as is also discussed below.[52]

Section 15(a) has historically not been construed as authorizing agencies to make sole-source awards to small businesses in circumstances when such an award could not otherwise be made (e.g., single source, urgent and compelling circumstances).[53]

(...continued)

and General Small Business Problems of the Committee on Small Business, House of Representatives, 99th Cong., 2d Sess., June 5 and 18, 1986, at 175-76 (1986). This distinction between the "sufficient number" standard and the Rule of Two has obvious significance in terms of the implementation of set-asides for small businesses. However, from a legal perspective, the more interesting choice was arguably the agencies' determination to craft a rule which effectively provides a "formula" for when and how agencies are to exercise their statutory discretion. In other words, while the Small Business Act apparently contemplates contracting officers and SBA determining on a contract-by-contract basis whether a set-aside serves certain purposes, the regulations implementing the act provide for set-asides to occur as a matter of course whenever a sufficient number of small businesses (or, later, two small businesses) are likely to submit offers.

[49] Dep't of Def., Gen. Servs. Admin., and Nat'l Aeronautics & Space Admin., Establishing the Federal Acquisition Regulation, 48 *Federal Register* 42102 (September 19, 1983). Although promulgated in 1983, the FAR took effect on October 1, 1984. The Rule-of-Two provisions in the FAR were not submitted for public comment prior to their promulgation, and some commentators have criticized them, in part, on this ground. *See, e.g.*, *OMB Efforts to Repeal the Rule of Two*, *supra* note 48, at 121.

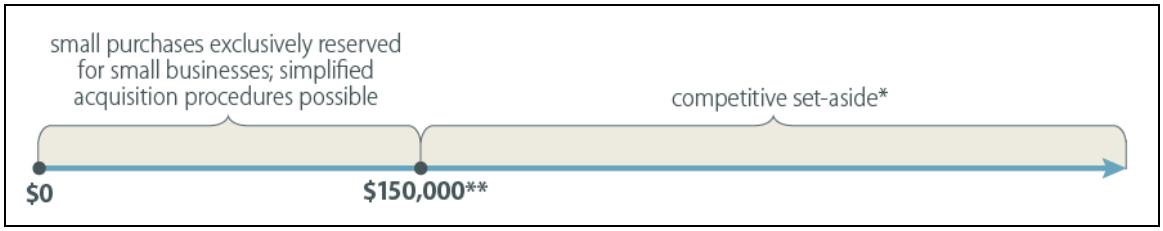
[50] 48 C.F.R. §19.502-2(b). Before any federal contract may be awarded, the contracting officer must determine that the contractor is "responsible" for purposes of that contract. *See generally* CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by (name redacted).

[51] 13 C.F.R. §125.2(f)(2)(i).

[52] *See infra* notes 173-174 and accompanying text.

[53] *See, e.g.*, 48 C.F.R. Subpart 19.5 (discussing only set-asides for small businesses generally). For more on the seven circumstances in which agencies may make sole-source awards under the authority of the Competition in Contracting Act (CICA) of 1984, as amended, see 10 U.S.C. §2304(c)(1)-(7) (procurements of defense agencies) & 41 U.S.C. §3304(a)(1)-(7) (procurements of civilian agencies); 48 C.F.R. §§6.302-1 to 6.302-7; CRS Report R40516, *Competition in Federal Contracting: Legal Overview*, by (name redacted).

Figure 1. Small Businesses Generally: Preferences Based on Contract Size



Source: Congressional Research Service, based on 15 U.S.C. §644(a); 48 C.F.R. Subpart 19.5.

* Section 15(a) has historically not been construed as authorizing agencies to make sole-source awards to small businesses in circumstances when such an award could not otherwise be made (e.g., single source).

* * $150,000 is currently the simplified acquisition threshold for most federal procurements, but the simplified acquisition threshold can be higher in certain circumstances (e.g., contingency operations, disaster responses).

Small Disadvantaged Businesses Participating in the 8(a) Program

Following the authorization of set-asides for small businesses generally, Congress granted agencies additional authority to set aside contracts for, or grant other contracting preference to, specific types of small businesses (i.e., small businesses that meet other eligibility requirements beyond size). The earliest of the programs for a specific type of small businesses was that for certain "small businesses owned and controlled by socially and economically disadvantaged individuals" ("small disadvantaged businesses" (SDBs)).[54] With amendments made to the Small Business Act in 1978, Congress required SBA to establish a "capital development ownership program" for SDBs, and authorized other agencies to award contracts to SBA for subcontracting to firms participating in this program (commonly known as the 8(a) Program).[55] However, in practice, particularly recently, SBA has delegated its authority to subcontract to other agencies, which effectively enter contracts with 8(a) participants in the same way that they enter contracts with other small businesses.[56]

What Is an 8(a) Firm?

8(a) participants must be "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals [or groups] who are of good character and citizens of the United States." They must also "demonstrate[] potential for success," which generally means that the business has been in operation for at least two full years immediately prior to its application to the 8(a) Program. Members of certain racial and ethnic groups are presumed to be socially disadvantaged, although other persons are also eligible for the 8(a) Program if they can prove that they are socially disadvantaged. Alaska Native Corporations and Community Development Corporations are deemed to be economically disadvantaged for purposes of the 8(a) Program, but other applicants must show actual economic disadvantage. This can be done, in part, by producing evidence of diminished capital and credit opportunities, including personal net worth of not more than $250,000 at the time of entry into the 8(a) Program ($750,000 for continuing eligibility). Individual owners and businesses may participate in the 8(a) Program for no more than nine years.

15 U.S.C. §§636(j)(10) and 637(a); 13 C.F.R. Part 124.

The procedures for subcontracting/contracting with 8(a) participants depend upon the anticipated value of the contract, as well as who owns the 8(a) firm. Section 8(a) establishes a "competitive threshold"—$4 million ($7 million for manufacturing contracts)—and imposes different requirements upon contracts whose anticipated value is at or below the competitive threshold than

[54] *See* 15 U.S.C. §637(a); 48 C.F.R. §§19.800-19.812.

[55] 15 U.S.C. §§636(j)(10), 637(a)(1).

[56] *See supra* note 16.

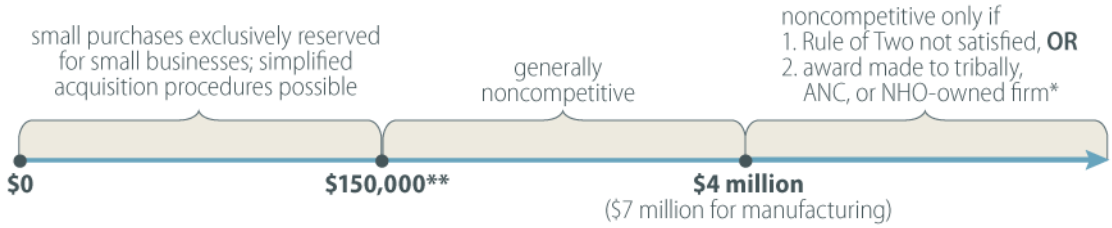
upon those whose anticipated value exceeds the competitive threshold.

- Contracts whose value is *at or below the competitive threshold* are typically awarded without competition, and may be competed among 8(a) firms only with the approval of the SBA's Office of Business Development.[57]
- Contracts whose value *exceeds the competitive threshold* must generally be competed whenever the Rule of Two is satisfied (i.e., the contracting officer reasonably expects offers from at least two responsible 8(a) firms, and the award can be made at fair market price).[58]

However, if the Rule of Two is not satisfied, or if SBA accepts the requirement on behalf of a firm owned by an Indian tribe, an Alaska Native Corporation, or, in the case of Department of Defense procurements, a Native Hawaiian Organization, the agency may make a sole-source award of a contract whose value exceeds the competitive threshold.[59]

Section 8(a) does not authorize agencies to grant price evaluation preferences to the bids or offers of SDBs in unrestricted competitions (i.e., competitions in which all firms may compete).[60] SDBs, including 8(a) firms, were once eligible for price evaluation preferences under other authorities.[61] However, such authorities have expired or been found unconstitutional, and are no longer in effect.[62]

Figure 2. 8(a) Participants: Preferences Based on Contract Size



Source: Congressional Research Service, based on 15 U.S.C. §637(a); 48 C.F.R. Subpart 19.8.

[57] 13 C.F.R. §124.506(c).

[58] 15 U.S.C. §637(a)(1)(D)(i); 13 C.F.R. §124.506(a)(2)(i)-(iii); 48 C.F.R. §19.805-1(a)(1)-(2). For more on responsibility, see *supra* note 50.

[59] 15 U.S.C. §637(a)(1)(D)(i); 13 C.F.R. §124.506(a)(2)(i)-(iii); 48 C.F.R. §19.805-1(a)(1)-(2). Such awards may be subject to certain conditions, e.g., that the award of the contract is consistent with the firm's business plan, and would not result in the firm exceeding the limits on firm value imposed on 8(a) participants. *See* 15 U.S.C. §637(a)(16)(A)(i)-(iii); 15 U.S.C. §636(j)(10)(I). It should also be noted that sole-source awards can be made to 8(a) firms under other authority, such as CICA, in certain circumstances. *See supra* note 53.

[60] A price evaluation preference could involve a reduction in the price of bids or offers by eligible persons. The amount of the reduction is generally equivalent to a certain percentage of the price of the bid or offer. For example, a 10% price evaluation preference made to an $110,000 bid would result in the bid being reduced by $11,000 to $99,000. $99,000 would then be used in determining which bid or offer is lowest priced or represents the "best value."

[61] Federal Acquisition Streamlining Act, P.L. 103-355, §7102, 108 Stat. 3368-69 (October 13, 1994) (procurements of civilian agencies); Department of Defense Authorization Act of 1987, P.L. 99-661, §1207, 100 Stat. 3973-75 (November 14, 1986) (procurements of defense agencies).

[62] *See* Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023, 1028 (Fed. Cir. 2008) (finding unconstitutional the authority under which defense agencies granted price evaluation preferences to the bids or offers of SDBs); P.L. 103-355, §7102 (authority permitting civilian agencies to grant price evaluation preferences to the bids or offers of SDBs expiring at the end of FY2000). This authority was later extended through the end of FY2003, but was not renewed thereafter. *See* Consolidated Appropriations Act, 2001, P.L. 106-554, §503(d), 114 Stat. 2763A-695 (December 21, 2000).

* Noncompetitive awards valued in excess of $4 million ($7 million for manufacturing contracts) may only be made to Native Hawaiian Organizations in Department of Defense procurements. Sole-source contracts could also be awarded to 8(a) firms under other authority than the Small Business Act.

* * $150,000 is currently the simplified acquisition threshold for most federal procurements, but the simplified acquisition threshold can be higher in certain circumstances (e.g., contingency operations, disaster responses).

HUBZone Small Businesses

The next set-aside program created was that for HUBZone small businesses. Commonly known as the "HUBZone Act," Title VI of the Small Business Reauthorization Act of 1997, as amended, provides that a contract opportunity may be set aside for HUBZone small businesses whenever the Rule of Two is satisfied (i.e., the contracting officer reas onably expects offers from at least two responsible HUBZone small businesses, and the award can be made at fair market price).[63]

The act also authorizes sole-source awards to HUBZone small businesses whenever (1) the business is determined to be responsible with respect to the performance of the contract, and the contracting officer does not reasonably expect that two or more HUBZone businesses will submit offers; (2) the anticipated award will not exceed $4 million ($7 million for manufacturing contracts); and (3) the award can be made at a fair and reasonable price.[64]

What Is a HUBZone Small Business?

HUBZone small businesses must generally be at least 51% unconditionally and directly owned and controlled by U.S. citizens and have their principal office in a HUBZone. At least 35% of their employees must also generally reside in a HUBZone.

A HUBZone is a Historically Underutilized Business (HUB) zone. HUBZone areas include census tracts or non-metropolitan counties with higher than average unemployment, or lower than average median household incomes; lands within Indian reservations; and certain base closure areas.

15 U.S.C. §632(p); 13 C.F.R. Part 126.

In addition, the HUBZone Act authorizes agencies to grant price evaluation preferences of up to 10% to the bids or offers of HUBZone small businesses in unrestricted competitions.[65] This means that, when determining which offer has the lowest price or represents the "best value" for the government, agencies may add up to 10% to the price of all offers except those offers received from HUBZone or certain other small businesses.[66]

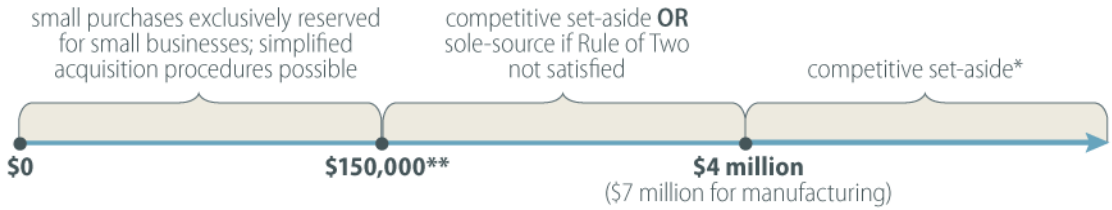
[63] For more on responsibility, see *supra* note 50.

[64] 15 U.S.C. §657a(b)(2)(A)(i)-(iii) (statutory requirements); 48 C.F.R. §19.1306(a)(1)-(6) (increasing the price thresholds, among other things). Sole-source awards may also be made to HUBZone small business under other authority, on grounds not related to their size and status. *See supra* note 53.

[65] 15 U.S.C. §657a(b)(3).

[66] 48 C.F.R. §52.219-4(b)(1)(i)-(ii). *See also* The Argos Group, B-406040 (January 24, 2012) (finding that HUBZone small businesses must be accorded a price evaluation preference when the General Services Administration acquires certain leasehold interests in real property even though such acquisitions are not subject to the FAR on the grounds that the Small Business Act "does not limit the type of contract to which it applies").

Figure 3. HUBZone Small Businesses: Preferences Based on Contract Size



Source: Congressional Research Service, based on 15 U.S.C. §657a; 48 C.F.R. Subpart 19.13.

* Sole-source contracts valued in excess of $4 million ($7 million for manufacturing contracts) may be awarded to HUBZone small businesses under other authority than the Small Business Act.

* * $150,000 is currently the simplified acquisition threshold for most federal procurements, but the simplified acquisition threshold can be higher in certain circumstances (e.g., contingency operations, disaster responses).

Women-Owned Small Businesses

Although set-asides for women-owned small businesses (WOSBs) were not implemented until 2011, the set-aside program for such firms was the next one created.[67] The Small Business Reauthorization Act of 2000[68] amended Section 8(m) of the Small Business Act in a way that SBA has construed as authorizing agencies to set aside contracts for economically disadvantaged and other WOSBs in certain circumstances. Specifically, as implemented by SBA, Section 8(m) permits agencies to set aside contracts for *economically disadvantaged WOSBs* when (1) the "rule of two" is satisfied (i.e., the contracting officer reasonably expects offers from at least two

[67] Implementation was delayed by the requirement that set-asides be used only in industries in which women are underrepresented or substantially underrepresented. SBA's first proposed rule regarding eligible industries identified only four: (1) intelligence; (2) engraving and metalworking; (3) furniture and kitchen cabinet manufacturing; and (4) motor vehicle dealerships. U.S. Small Bus. Admin., Proposed Rule: Women-Owned Small Business Federal Contract Assistance Procedures, 72 *Federal Register* 73285 (December 27, 2007) (hereinafter *SBA 2007 Proposed Rule*). This proposed rule was widely criticized, including by some Members of Congress, and SBA revised it to include an additional 27 industries. *See, e.g.*, Sens. Snowe, Dole Offer Bill to Overhaul Rule on Women-Owned Small Business Set Asides, 89 *Fed. Cont. Rep.* 180 (February 19, 2008); Robert Brodsky, SBA Issues New Proposal on Small Business Program, But Same Questions Remain, *Gov't Exec.*, September 30, 2008, *available at* http://www.govexec.com/dailyfed/0908/093008rb1.htm. However, before the revised rule could be finalized, the U.S. Court of Appeals for the Federal Circuit issued its decision in *Rothe Development Corporation v. Department of Defense*, striking down a race-conscious contracting program on the grounds that there was insufficient evidence of discrimination in the defense industry before Congress when it created the program. 545 F.3d 1023 (Fed. Cir. 2008). Although gender-conscious programs are subject to "intermediate" scrutiny, not strict scrutiny like the race-conscious program at issue in *Rothe*, SBA extended the comment period on the proposed rule in order to "review[]" how its determinations regarding the industries in which women were underrepresented might fare under *Rothe's* standard for a "strong basis in evidence." U.S. Small Bus. Admin., The Women-Owned Small Business Federal Contracting Assistance Procedures: Eligible Industries, 74 *Federal Register* 1153 (January 12, 2009). Then, in March 2009, Congress enacted the Omnibus Appropriations Act, 2009, which temporarily prohibited implementation of the proposed rule. P.L. 111-8, Administrative Provisions—Small Business Administration, §522, 123 Stat. 673 (March 11, 2009). In March 2010, the Obama Administration issued proposed regulations establishing the infrastructure for the women-owned small business set-aside program and identifying additional industries in which women are underrepresented or substantially underrepresented. U.S. Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Proposed Rule, 75 *Federal Register* 10030 (March 4, 2010) (hereinafter *SBA 2010 Proposed Rule*). These regulations identified 83 industries in which women are underrepresented or substantially underrepresented. They were finalized on October 7, 2010, and took effect on February 4, 2011. U.S. Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Final Rule, 75 *Federal Register* 62258 (October 7, 2010).

[68] *See* P.L. 106-554, tit. VIII, §811, 114 Stat. 2763A-708 (December 21, 2000) (codified at 15 U.S.C. §637(m)).

What Is a Woman-Owned Small Business?

WOSBs must be at least 51% owned by one or more women, with the management and daily operations of the business also controlled by one or more women.

To be considered economically disadvantaged, a woman's personal net worth must be less than $750,000 (excluding ownership interest in the small business and equity interest in the primary personal residence).

15 U.S.C. §632(n); 13 C.F.R. Part 127.

responsible WOSBs, and the award can be made at fair market price); and (2) the proposed procurement involves an industry in which WOSBs are *underrepresented*.[69] It also permits set-asides for *other WOSBs* (i.e., those that are not economically disadvantaged) when (1) the Rule of Two is satisfied, and (2) the proposed procurement involves an industry in which WOSBs are *substantially underrepresented*.[70] Initially, agencies could only set aside contracts whose value was below $4 million ($6.5 million in the case of manufacturing contracts). However, the 112th Congress enacted legislation that authorizes set-asides of contracts of any value for WOSBs.[71] Subsequently, the 113th Congress enacted legislation that also authorizes agencies to award sole-source contracts to WOSBs so long as the award can be made at a fair and reasonable price, and the anticipated value of the contract is below $4 million ($6.5 million for manufacturing contracts).[72]

WOSBs are not eligible for price evaluation preferences in unrestricted competitions.

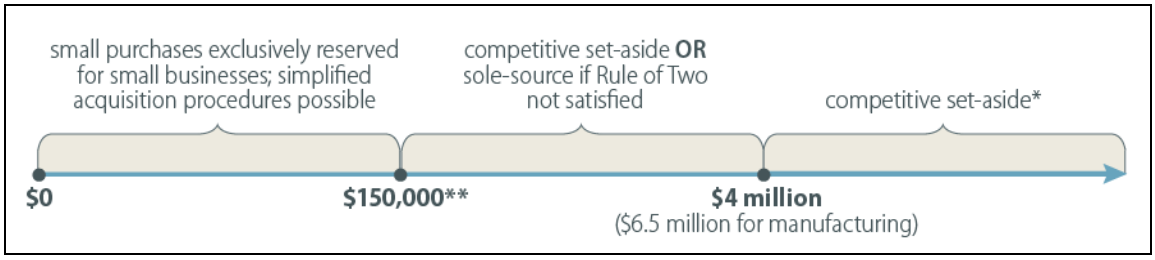
[69] For more on responsibility, see *supra* note 50.

[70] 15 U.S.C. §637(m)(2)(A)-(F) & (m)(4). There is an ambiguity in the statute as this last requirement (i.e., that the procurement involve an industry in which women are underrepresented) cross-references Section 8(m)(3), which waives the requirement that owners be economically disadvantaged when a contract involves an industry in which women are *substantially* underrepresented. A literal reading of the cross-reference suggests that only contracts involving industries in which women are substantially underrepresented qualify for set-asides. *See SBA 2007 Proposed Rule*, *supra* note 67 at 73286; *SBA 2010 Proposed Rule*, *supra* note 67 at 10031-32. However, this is arguably not the best way to interpret the statute, as SBA explained when it promulgated regulations under the authority of Section 8(m). In these regulations, SBA adopted the position that the statute's cross-reference to Section 8(m)(3) is a drafting error, and that the reference should have been to Section 8(m)(4). *See SBA 2007 Proposed Rule*, *supra* note 67 at 73286; *SBA 2010 Proposed Rule*, *supra* note 67 at 10031-32. Section 8(m)(4) requires SBA to identify industries in which women are underrepresented, without adding the *substantially* modifier. The regulations, therefore, distinguish between economically disadvantaged WOSBs and other WOSBs, authorizing set-asides for economically disadvantaged WOSBs in industries in which they are *underrepresented* and for other WOSBs only in industries in which they are *substantially underrepresented*. 48 C.F.R. §19.1505(b)-(c). SBA reasoned that if the cross-reference was read as written, the requirement that SBA identify industries in which women are underrepresented in Section 8(m)(4) and the waiver for industries with substantial underrepresentation in Section 8(m)(3) "would arguably be rendered inoperative or contradictory," as well as unsupported by the legislative history. *See SBA 2010 Proposed Rule*, *supra* note 67 at 10031; *SBA 2007 Proposed Rule*, *supra* note 67 at 73286. The SBA further noted that absent "corrective legislation clarifying the confusing cross-references" there will be "some degree of uncertainty" about "whether Section 8(m) effectively authorizes appropriate set-asides in industries where [WOSBs] are merely underrepresented rather than substantially underrepresented." *SBA 2007 Proposed Rule*, *supra* note 67 at 73286.

[71] P.L. 112-239, §1697, 126 Stat. 2091.

[72] P.L. 113-291, §825,128 Stat. 3437-38 (codified in 15 U.S.C. §637(m)(7)). Sole-source awards may also be made to WOSBs under other authority, on grounds not related to their size and status. *See supra* note 53.

Figure 4. Women-Owned Small Businesses: Preferences Based on Contract Size



Source: Congressional Research Service, based on 15 U.S.C. §637(m); 48 C.F.R. Subpart 19.15.

* Sole-source contracts may be awarded to women-owned small businesses under other authority than the Small Business Act.

** $150,000 is currently the simplified acquisition threshold for most federal procurements, but the simplified acquisition threshold can be higher in certain circumstances (e.g., contingency operations, disaster responses).

Service-Disabled Veteran-Owned Small Businesses

Finally, the Veterans Benefits Act of 2003 amended the Small Business Act to establish the set-aside program for service-disabled veteran-owned small businesses (SDVOSBs).[73] The 2003 amendments authorize agencies to set aside procurements for SDVOSBs whenever the Rule of Two is satisfied (i.e., the contracting officer reasonably expects offers from at least two responsible SDVOSBs, and the award can be made at fair market price).[74]

The 2003 amendments also authorize sole-source awards to SDVOSBs when (1) the contracting officer does not reasonably expect that two or more SDVOSBs will submit offers; (2) the anticipated award will not exceed $4 million ($6.5 million for manufacturing contracts); and (3) the award can be made at a fair and reasonable price.[75]

SDVOSBs are not eligible for price evaluation preferences in unrestricted competitions.

What Is a Service-Disabled Veteran-Owned Small Business?

An SDVOSB must be at least 51% unconditionally and directly owned and controlled by one or more service-disabled veterans. A veteran is a person who served "in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." A disability is service-related when it "was incurred or aggravated ... in [the] line of duty in the active military, naval, or air service."

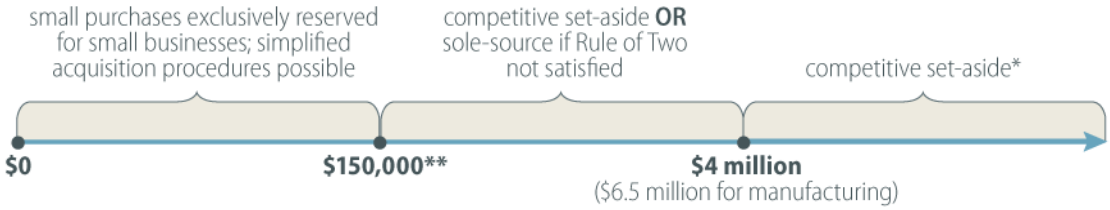
15 U.S.C. §632(q); 38 U.S.C. §101; 13 C.F.R. Part 125, Subparts A and B.

[73] *See* P.L. 108-183, tit. III, §308, 117 Stat. 2662 (December 16, 2003) (codified at 15 U.S.C. §657f); 48 C.F.R. §19.1405.

[74] 15 U.S.C. §657f(b). For more on responsibility, see *supra* note 50.

[75] 15 U.S.C. §657f(a)(1)-(3) (statutory requirements); 48 C.F.R. §19.1406(a)(2)(i) (increasing the price thresholds). Sole-source awards may also be made to SDVOSBs under other authority, on grounds not related to their size and status. *See supra* note 53.

Figure 5. Service-Disabled Veteran-Owned Small Businesses: Preferences Based on Contract Size



Source: Congressional Research Service, based on 15 U.S.C. §657f; 48 C.F.R. Subpart 19.14.

* Sole-source contracts valued in excess of $4 million ($6.5 million for manufacturing contracts) may be awarded under other authority than the Small Business Act.

** $150,000 is currently the simplified acquisition threshold for most federal procurements, but the simplified acquisition threshold can be higher in certain circumstances (e.g., contingency operations, disaster responses).

Veterans Benefits, Health Care, and Information Technology Act

Enacted three years after the Veterans Benefits Act, discussed above, the Veterans Benefits, Health Care, and Information Technology Act of 2006 created another set-aside program for veteran-owned small businesses (VOSBs).[76] However, unlike the program for SDVOSBs under the Small Business Act, which applies to procurements government wide, this program is limited to procurements of the Department of Veterans Affairs (VA), and veterans who are not disabled are eligible to participate. Additionally, under this program, VOSBs must have their eligibility verified by VA.[77] They may not self-certify as to their eligibility as they can for the SDVOSB set-aside program under the Small Business Act.[78]

Key Difference Between the Set-Aside Programs Under the Veterans Benefits Act and the Small Business Act

- The Veterans Benefits Act applies only to the procurements of VA, while the Small Business Act applies to the procurements of all federal agencies.
- The Veterans Benefits Act authorizes set-asides and sole-source awards for VOSBs, as well as for SDVOSBs. The Small Business Act authorizes only set-asides and sole-source awards for SDVOSBs.
- Set-asides for SDVOSBs are within agencies' discretion under the Small Business Act, while the VA is generally required by the Veterans Benefits Act to set-aside contracts for SDVOSBs (although it could retain discretion not to set-aside procurements for small businesses in particular circumstances).
- Firms must be listed in a database (the VetBiz Vendor Information Pages) maintained by the VA to be eligible for contracting preferences under the Veterans Benefits Act, while they may self-certify as to their eligibility for preferences under the Small Business Act.

[76] P.L. 109-461, 120 Stat. 3431 (December 22, 2006) (codified, in part, at 38 U.S.C. §§8127-8128). The same definitions of "veteran," "disability," and "small business" that are used under the Small Business Act apply here.

[77] *See* 38 U.S.C. §8127(e) ("A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f)."). *See also* A1 Procurement, JVG, B-404618.3 (July 27, 2011) (finding that GAO has jurisdiction to review a protest challenging a contracting officer's determination that a protester was not listed in VA's VetBiz database as being eligible for a set-aside award under the 2006 amendments).

[78] *See supra* "Service-Disabled Veteran-Owned Small Businesses."

The 2006 act authorizes the VA to set aside procurements for VOSBs, as well as make sole-source awards to them, in order to reach VA's goals for contracting and subcontracting with VOSBs.[79] Specifically, c*ontracts whose value is less than $150,000* may be awarded on a set-aside or sole-source basis at the contracting officer's discretion.[80] *Contracts valued in excess of $150,000* must generally be awarded via a set-aside if the contracting officer has a reasonable expectation that at least two VOSBs will submit offers, and the award can be made at a fair and reasonable price "that offers best value to the United States."[81] However, sole-source awards of contracts valued in excess of $150,000 can be made if (1) the contracting officer determines that the business is a responsible source with respect to the performance of the contract;[82] (2) the anticipated price of the contract (including options) does not exceed $5 million; and (3) the award can be made at a fair and reasonable price "that offers best value to the United States."[83]

Under the 2006 act, awards to SDVOSBs have "priority" over awards to VOSBs, which, in turn, have precedence over awards to other small businesses, as discussed below.[84]

The 2006 act does not authorize price evaluation preferences for the bids or offers of SDVOSBs or VOSBs.

Legal Issues

Legal questions about small business set-asides have arguably become more common in recent years, particularly since the Government Accountability Office (GAO) issued its 2008 decision in *International Program Group, Inc*., recommending that set-asides for HUBZone small businesses be given "precedence" over set-asides for SDVOSBs because the statute and regulations governing set-asides for HUBZone small businesses, at that time, used "shall," and "shall" indicates mandatory action.[85] Prior to *International Program Group*, GAO had issued decisions indicating that agencies should have considered set-asides in certain circumstances,[86] and GAO and the federal courts had even found that HUBZone set-asides were mandatory when the Rule of

[79] 38 U.S.C. §8127(a)(1)(A). The 2006 act requires the Secretary to "establish a goal for each fiscal year for participation in Department contracts (including subcontracts)" by VOSBs. The Secretary is also required to establish a separate goal for the participation of SDVOSBs in agency contracts and subcontracts. 38 U.S.C. §8127(a)(1)(A). However, the latter goal can be no less than the governmentwide goal for the percentage of contract and subcontract dollars awarded to SDVOSBs given in Section 15(g)(1) of the Small Business Act (currently 3%), while the former goal is within the Secretary's discretion. *See* 38 U.S.C. §8127(a)(2)-(3).

[80] 38 U.S.C. §8127(b).

[81] 38 U.S.C. §8127(d). The requirement that an award at fair and reasonable price also "offer[] best value to the United States" is unique to the program under the Veterans Benefits, Health Care, and Information Technology Act. However, it is unclear whether this additional requirement would make any difference in the circumstances in which set-asides and sole-source awards are used.

[82] For more on responsibility, see *supra* note 50.

[83] 38 U.S.C. §8127(c)(1)-(3). *See* Crosstown Courier Serv., Inc., B-406336 (April 23, 2012) (finding that there was no requirement that the VA conduct market research to determine if the procurement should be set aside for small businesses because the act grants the VA authority to use "noncompetitive procedures" for small purchases).

[84] 38 U.S.C. §8127(*i*)(1)-(4).

[85] B-400278; B-400308 (September 19, 2008).

[86] *See, e.g.*, DNO Inc., B-406256, B-406256.2 (March 22, 2012) ("Contracting officers generally are required to set aside for small business all procurements exceeding $150,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns."); Metasoft, LLC, B-402800 (July 23, 2010) ("Under FAR sect. 19.502-2(b), a procurement with an anticipated dollar value of more than [$150,000] must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price.").

Two was satisfied.[87] Nonetheless, notwithstanding such decisions, at least some agencies viewed themselves as retaining discretion to select which set-aside program to use (e.g., so as to maximize their performance vis-à-vis particular small business contracting goals). In particular, prior to GAO's 2008 decision, SBA had taken the position that agencies could determine whether to use HUBZone set-asides in specific procurements,[88] and the FAR Council had proposed amending the FAR expressly to provide that "[t]here is no order of precedence among the 8(a), HUBZone, and SDVOSB programs."[89]

By rejecting the view that agencies retained discretion to determine whether to use a HUBZone set-aside when the Rule of Two was satisfied, GAO's decision in *International Program Group* and related decisions in 2008-2010 appear to have prompted greater scrutiny of the statutory and regulatory language pertaining to small business set-asides and, specifically, provisions that could potentially be construed as requiring agencies to use—or not use—set-asides in particular procurements. There has also been increased interest in implementation of the Rule of Two since any requirement that agencies set aside contracts for small businesses is generally contingent upon the contracting officer reasonably expecting offers from at least two small businesses, and the award being made at fair market price.

Implementation of the Rule of Two

As discussed above, under the Rule of Two, contracting officers are generally only authorized (or, in some cases, required) to set aside an acquisition for small businesses if they reasonably expect that offers will be received from at least two responsible small businesses, and the contract can be awarded at fair market price.[90] In making these determinations (i.e., whether offers may be expected from at least two small businesses, fair market price), contracting officers engage in *market research*, or the process of "collecting and analyzing information about capabilities within

[87] *See, e.g.*, Contract Mgmt., Inc. v. Rumsfeld, 291 F. Supp. 2d 1166, 1174-75 (D. Haw. 2003) (finding that the HUBZone Act unambiguously required set-asides for HUBZone small businesses whenever the Rule of Two was satisfied, in part, because of its use of the word "shall"), *aff'd*, 2006 U.S. App. LEXIS 648 (9th Cir. Haw., January 11, 2006); SWR, Inc., B-294266 (October 6, 2004) (interpreting the FAR implementation of the HUBZone Act to require that acquisitions valued above the simplified acquisition threshold be set aside for HUBZone small businesses if the Rule of Two was satisfied because the FAR used "shall"). The district court in *Contract Management* had similarly noted that the FAR and SBA regulations implementing the HUBZone Act used the word "shall." *See* 291 F. Supp. 2d at 1174-75.

[88] *See, e.g.*, U.S. Small Bus. Admin., Small Business Size Regulations; Government Contracting Programs; HUBZone Program: Proposed Rule, 67 *Federal Register* 3826, 3832 (January 28, 2002) ("[I]f the contracting activity has met 0% of its HUBZone goals and has met its 8(a) goals, then the contracting officer should [set aside the procurement for HUBZone small businesses].").

[89] Dep't of Defense, Gen. Servs. Admin., Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation: FAR Case 2006-034, Socioeconomic Program Parity: Proposed Rule, 73 *Federal Register* 12699, 12699 (March 10, 2008) (proposing to amend the FAR to reflect SBA's view that there is parity among the programs for various types of small businesses, discussed above). This proposed rule was not finalized as a result of decisions by the U.S. Court of Federal Claims adopting GAO's interpretation of the HUBZone Act, which made the view that there was parity among the set-aside programs for various types of small businesses difficult to maintain. However, Congress subsequently amended the Small Business Act to remove some of the language that GAO and the court had relied upon in finding that HUBZone set-asides have precedence, and the FAR Council finalized a similar "parity" regulation in 2012. *See* Dep't of Defense, Gen. Servs. Admin., & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation: Socioeconomic Program Parity, 77 *Federal Register* 12930 (March 2, 2012) (codified, in part, at 48 C.F.R. §19.203(a) ("There is no order of precedence among the 8(a) Program ..., HUBZone Program ..., Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program ..., or the Women-Owned Small Business (WOSB) Program ....").

[90] *See supra* note 50 and accompanying text.

the market to satisfy agency needs."[91] However, the FAR's guidance on conducting market research is arguably limited,[92] and agencies are generally permitted to use any "reasonable method" to determine the availability of small businesses.[93] Permissible measures include considering prior procurement history, market surveys, and advice from the agencies' small business specialists and technical personnel.[94] On the other hand, agency market research efforts have been found to have been insufficient when the set-aside determination was based on outdated or incomplete information, or on an unreasonably limited search of the potential small business market.[95]

In determining the availability of potential small business offerors, the question is not just the existence of the requisite number of firms (i.e., at least two), but also their ability to perform,[96] which can depend, in part, upon firms' current obligations under other contracts.[97] In addition, the receipt of multiple responses from small businesses during the course of market research does not necessarily mean that a small business set-aside must be used.[98]

"Responsible" Small Businesses

Contracting officers would appear to have some discretion in determining, based upon their market research, whether at least two responsible businesses are capable of performing. The word *responsible* is generally a term of art when used in reference to federal contractors, indicating that the contractor: (1) has adequate financial resources to perform, or the ability to obtain them; (2) is able to comply with the required or proposed delivery or performance schedule; (3) has a satisfactory performance record; (4) has a satisfactory record of integrity and business ethics; (5) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; (6) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and (7) is otherwise qualified and eligible to receive an award under applicable laws and regulations.[99] However, agencies do not have to make an actual determination of responsibility with respect to prospective small business offerors when determining whether the Rule of Two is satisfied.[100] Rather, they must make an "informed

[91] 48 C.F.R. §2.101.

[92] *See generally* 48 C.F.R. Part 10.

[93] KNAPP Logistics Automation, Inc., B-406303 (March 23, 2012).

[94] *See, e.g.*, Raven Servs. Corp., B-243911 (August 27, 1991).

[95] *See, e.g.*, McSwain & Assocs., Inc.; Shel-Ken Properties, Inc.; Elaine Dunn Realty, B-271071; B-271071.2; B-271071.3; B-271071.4; B-271071.5; B-271071.6; B-271071.7; B-271071.8; B-271071.9 (May 20, 1996); Info. Ventures, Inc., B-294267 (October 8, 2004).

[96] *See, e.g.*, Am. Med. Equip. Co., B-407113, B-407113.2 (November 8, 2012); Info. Ventures, Inc., B-279924 (August 7, 1998).

[97] *See, e.g.*, Adams & Assocs., Inc. v. United States, 109 Fed. Cl. 340, 357 (2013), *aff'd on other grounds*, 741 F.3d 102 (Fed. Cir. 2013) (specifically noting a "relatively limited pool of small businesses" expressing interest in certain contracts); The Protective Group, Inc., B-310018 (November 18, 2007).

[98] *See, e.g.*, Belleville Shoe Mfg. Co., Altama Delta Corp., Wellco Enterprises, Inc., B-287237; B-287237.2; B-287237.3 (May 17, 2001).

[99] 48 C.F.R. §9.104-1. For more on responsibility, see generally CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by (name redacted).

[100] *See, e.g.*, Six3 Sys., Inc., B-404885.2 (October 20, 2011) ("[I]n making set-aside decisions, agencies need not make either actual determinations of responsibility or decisions tantamount to determinations of responsibility with regard to prospective offerors; they need only make an informed business judgment that there are small businesses expected to submit offers that are capable of performing.").

business judgment" that there are at least two small businesses expected to submit offers which are capable of performing.[101]

Fair Market Price

Contracting officers appear to have similar discretion in determining whether they can reasonably expect an award at fair market price. The FAR defines *fair market price*, for purposes of the small business programs, as "a price based on reasonable costs under normal competitive conditions and not on lowest possible cost,"[102] and prescribes two methods of assessing it. One method is used when considering a set-aside for 8(a) firms; the other, when considering set-asides for non-8(a) firms.

- With *set-asides under the 8(a) program*, fair market price is generally estimated using cost or price analysis and considering commercial prices for similar products and services, available in-house cost estimates, data submitted by SBA or the contractor, and data obtained from other agencies.[103]
- With *set-asides for WOSBs, SDVOSBs, HUBZone small businesses, and other small businesses,* fair market price is determined using the price analysis techniques articulated in FAR Section 15.404-1(b).[104] These generally provide for the contracting officer to obtain uncertified data on the prices at which the same or similar items were sold, and then determine whether that data is adequate for evaluating the price's reasonableness.[105] Permitted price analysis techniques for determining a reasonable price include comparing the offerors' proposed prices, or comparing the prices to historical prices paid for the same or similar items.[106]

However, regardless of whether the contemplated set-aside is for 8(a) firms or other small businesses, the focus is upon whether there is a reasonable expectation of an award at a fair market price, not upon whether the contracting officer is actually assured of such a price.[107] Moreover, in making this determination, a contracting officer may reasonably rely upon such things as information concerning prior procurements,[108] and the expectation that there will be

[101] *See, e.g.*, KNAPP Logistics Automation, Inc., B-406303 (March 23, 2012) (finding that a contracting officer's set-aside determination met this "informed business judgment" standard when it was based, in part, on the conclusion that a debriefing with the firm to discuss deficiencies with its proposal under a prior solicitation would be sufficient to permit the firm to offer an acceptable proposal this time around).

[102] 48 C.F.R. §19.001.

[103] 48 C.F.R. §§19.202-6(b), 19.807. For a new requirement, or one without a satisfactory procurement history, the procuring activity must use a price or cost analysis that takes into account prevailing market conditions; commercial prices for similar products or services; or data submitted by SBA or obtained from other agencies. 13 C.F.R. §124.511. For other requirements, the procuring activity must base the price estimate on recent award prices adjusted to ensure comparability. *Id*.

[104] 48 C.F.R. §19.202-6(a).

[105] 48 C.F.R. §15.404-1(b)(1).

[106] 48 C.F.R. §15.404-1(b)(2). If the contracting officer determines these methods would not produce a reasonable price (e.g., because there is insufficient information available), then other permissible methods include comparison with competitive published price lists, or independent government cost estimates; and comparison of proposed prices with prices obtained through market research for the same or similar items. *See id.*

[107] *See* Nat'l Linen Serv., B-285458 (August 22, 2000).

[108] *See* Six3 Sys., Inc., B-404885.2 (October 20, 2011) (contracting officer reasonably relied on prospective offerors' general history of providing fair and reasonable pricing on other contracts, as well as their specific history with a similar contract).

adequate price competition.[109] For example, GAO has found that it was reasonable for an agency to expect an award at fair market price when it had considered information on prior procurements which showed that small businesses had successfully performed at reasonable prices; conducted market research that indicated two incumbent small businesses and a third firm, at a minimum, intended to compete for the requirement; and received expressions of interest from other small businesses.[110]

Requirements to Use Small Business Set-Asides

When a statute or regulation authorizing set-asides for small businesses uses the word "shall," it could potentially be construed as requiring agencies to set aside particular procurements for small businesses if the Rule of Two is satisfied, or other conditions are met. "Shall" has long been viewed as indicating "mandatory intent," unless its context indicates otherwise,[111] and courts and commentators have historically applied this principle to the three statutory and regulatory provisions which use "shall" when referring to small business set-asides. These provisions include (1) Section 15(a) of the Small Business Act, which authorizes set-asides for small businesses generally; (2) Section 19.502-2 of the FAR, which implements, in part, Section 15(a) of the Small Business Act; and (3) the Veterans Benefits, Health Care, and Information Technology Act of 2006, in its provisions authorizing competitive set-asides for SDVOSBs and VOSBs. However, in practice, the extent of the preference for small businesses under these authorities may not be as broad as one might expect on the view that "shall" indicates mandatory agency action. As discussed below, the FAR exempts certain procurements conducted through the programs for various types of small businesses (e.g., WOSBs, SDVOSBs) from the requirements pertaining to set-asides for small businesses generally, and a federal court recently suggested that the Veterans Benefits Act uses "shall" within a context which leaves the VA with at least some discretion as to whether to use set-asides in particular procurements.

The provisions of the Small Business Act authorizing set-asides for 8(a) firms, WOSBs, and SDVOSBs and their implementing regulations, in contrast, all use "may,"[112] and have not been construed as indicating mandatory agency action.[113] Those authorizing set-asides for HUBZone small businesses previously used "shall" and were construed to mean that agencies were required to use a HUBZone set-aside whenever the Rule of Two was satisfied.[114] However, the 111th

[109] 48 C.F.R. §15.404-1(b)(2)(i); KNAPP Logistics Automation, Inc., B-406303 (March 23, 2012); Nat'l Linen Serv., B-285458 (August 22, 2000). *See also* 48 C.F.R. §15.403-1(c)(1) (defining adequate price competition).

[110] *See* Nat'l Linen Serv., B-285458 (August 22, 2000).

[111] *See* 1A *Sutherland Statutes and Statutory Construction*, §25:4 (Norman J. Singer ed., 2002) ("Unless the context otherwise indicates the use of the word 'shall' ... indicates a mandatory intent.").

[112] *See, e.g.*, 15 U.S.C. §637(m)(2) ("In accordance with this subsection, a contracting officer may restrict competition [to WOSBs]"); 15 U.S.C. §657f(b) ("In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to [SDVOSBs] ...").

[113] *See, e.g.*, DGR Assocs. v. United States, 94 Fed. Cl. 189, 195 (2010) ("A contracting officer's decision to set aside a contract opportunity under the 8(a) program is discretionary."); *Contract Mgmt.*, 291 F.2d at 1176 (noting that, while Section 8(a) of the Small Business Act mandates competition among 8(a) firms in certain circumstances, it leaves to agency discretion the initial offer and acceptance of contracts into the 8(a) Program). It should be noted, however, that once a requirement has been procured through the 8(a) Program, it generally cannot be procured from a non-8(a) source without SBA's consent. 13 C.F.R. §124.504(d). *But see* K-LAK Corp. v. United States, 98 Fed. Cl. 1 (2011) (rejecting a challenge to an agency's determination to procure through the Federal Supply Schedules services it had previously procured through the 8(a) Program, in part, on the grounds that the regulations governing withdrawal and modification of small business set-asides have not been identified as exceptions to the general rule that purchases off the Federal Supply Schedules are exempt from small business set-asides).

[114] These decisions relied heavily (but not exclusively) upon the use of "shall" in the statute governing set-asides for (continued...)

Congress amended the HUBZone Act by removing, in part, the language that GAO and the Court of Federal Claims relied upon in reaching this conclusion in a series of decisions issued in 2008-2010.[115]

Section 15(a) and Its Implementing Regulations

Section 15(a) of the Small Business Act and its implementing regulations, including Section 19.502-2 of the FAR, all use "shall," and the regulations, in particular, have been viewed by many tribunals and commentators as requiring set-asides for small businesses whenever the Rule of Two is satisfied. For example, GAO has repeatedly opined that contracting officers are "required" to set aside procurements whose value exceeds the simplified acquisition threshold when the Rule of Two is satisfied, or that such procurements "must" be set-aside.[116] The rationale for such assertions is not always articulated, but would appear to be the use of "shall" in Section 19.502-2 of the FAR. However, GAO, in particular, often follows any statement that set-asides are "required" or "must" be used with a further statement that the determination that there is a reasonable expectation that offers will be received from two or more responsible small business concerns, and that award will be made at a fair market price, is a "matter of business judgment within the contracting officer's discretion, and we will not sustain a protest challenging the determination absent a showing that it was unreasonable."[117] In short, this means that, while set-asides for small businesses under Section 15(a) may be seen as "mandatory" in certain circumstances, this requirement is contingent upon a determination (i.e., that the Rule of Two is satisfied) that contracting officers are seen as having discretion in making.[118]

(...continued)

HUBZone small businesses, and the use of "may," or other discretionary language, in the statutes governing set-asides for other types of small businesses. GAO and the court construed "shall" to indicate mandatory agency action, and "may" to indicate discretionary agency action, and concluded that mandatory agency actions took precedence over discretionary ones. *See, e.g.*, *DGR Assocs.*, 94 Fed. Cl. at 208 ("The word 'shall' is considered the 'language of command' and is presumptively mandatory."); Mission Critical Solutions v. United States, 91 Fed. Cl. 386, 404 (2010) ("The word 'shall' is ordinarily '[t]he language of command.'"); DGR Assocs., B-402494 (May 14, 2010) ("[T]he plain language of the statute authorizing the HUBZone program is mandatory" because it uses "shall."); Mission Critical Solutions, B-401057 (May 4, 2009) ("We have interpreted this language [i.e., the use of 'shall'] to mean that a HUBZone set-aside is mandatory where the enumerated conditions are met."); Int'l Program Group, B-400278, B-400308 (September 19, 2008) (describing the use of "shall" in the HUBZone Act and its implementing regulations as "mandatory"). For a more thorough discussion of these cases, see generally archived CRS Report R40591, *Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts*, by (name redacted).

[115] Small Business Jobs Act, P.L. 111-240, §1347(b)(1), 124 Stat. 2547 (September 27, 2010) (changing the "shall" in the HUBZone Act to "may").

[116] *See, e.g.*, DNO Inc., B-406256, B-406256.2 (March 22, 2012) ("Contracting officers generally are required to set aside for small business all procurements exceeding $150,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns."); Metasoft, LLC, B-402800 (July 23, 2010) ("Under FAR sect. 19.502-2(b), a procurement with an anticipated dollar value of more than [$150,000] must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price.").

[117] Am. Med. Equip. Co., B-407113, B-407113.2 (November 8, 2012). *See also* North Shore Med. Labs., Inc., B-310747 (February 6, 2008).

[118] Some commentators have further suggested that the "requirement" to set aside contracts for small businesses under Section 15(a) only applies when it has been determined that a set-aside meets one of the "interests" articulated in Section 15(a) (i.e., maintaining or mobilizing the nation's productive capacity, war or national defense programs, assuring that a "fair proportion" of government contracts and subcontracts be awarded to small businesses, assuring that a "fair proportion" of total sales of government property be made to small businesses). *See, e.g.*, *Examining the Rule of Two*, *supra* note 11, at 61 (expressing the view that the Rule of Two applies only after the decision to set aside (continued...)

In addition, the FAR provisions implementing Section 15(a) have effectively created certain exceptions to this requirement. Specifically, Subsection 19.203(c) of the FAR states that

> For acquisitions of supplies or services that have an anticipated dollar value exceeding the simplified acquisition threshold ..., the contracting officer shall first consider an acquisition for the small business socioeconomic contracting programs (i.e., 8(a), HUBZone, SDVOSB, or WOSB programs) before considering a small business set-aside.[119]

In other words, the "requirement" to set aside acquisitions for small businesses generally does not preclude setting aside acquisitions for 8(a) firms, WOSBs, SDVOSBS, or HUBZone small businesses. Similarly, the FAR expressly provides that agencies must generally "consider" sole-source awards to 8(a) firms, WOSBs, SDVOSBs, and HUBZone small businesses prior to setting aside an acquisition for small businesses generally.[120]

These "exceptions" are not expressly provided for in the Small Business Act, although an argument could be made that they are within the FAR Council's authority since the FAR Council established the requirement that contracts be set aside for small businesses when the Rule of Two is satisfied. They could also perhaps be said to be consistent with the act in that Congress intended there to be set-asides for specific types of small businesses, and this intent would be difficult to realize if agencies had to use set-asides in which any small businesses could participate whenever they reasonably expected offers from at least two small businesses. Nonetheless, the existence of such "exceptions" highlights the differences between Section 15(a) and its implementing regulations. Specifically, Section 15(a) requires that small businesses receive any contract, or part thereof, which SBA and the procuring agency determine is in the interest of assuring that a fair proportion of federal contracts are awarded to small businesses, among other things;[121] it does not require that agencies conduct competitions in which only small businesses may compete in every procurement where the Rule of Two is satisfied.

2006 Amendments to the Veterans Benefit Act

The Veterans Benefits, Health Care, and Information Technology Act of 2006 amended the Veterans Benefits Act to provide that the VA "shall" set aside contracts whose value exceeds the simplified acquisition threshold (generally $150,000) for SDVOSBs or VOSBs whenever the Rule of Two is satisfied.[122] The VA has generally interpreted the 2006 amendments to mean that it

(...continued)

an acquisition is made under 19.501-1 of the FAR, and determines the extent of the set-aside, not whether there will be a set-aside); *OMB Efforts to Repeal the Rule of Two*, *supra* note 48, at 34, 140 (noting that contracting officers have "broad discretion" under Section 15(a) to determine when a set-aside is appropriate, and that the Rule of Two comes into play only after it is determined that a set-aside meets the government's interest in maintaining or mobilizing the nation's productive capacity, among other things). However, this view does not appear to have been adopted by any court, and the regulations implementing, in part, Section 15(a) expressly state that having placed a "large percentage of previous contracts for the required item(s) ... with small business concerns" is not, in itself, sufficient cause for not setting aside an acquisition. 48 C.F.R. §19.502-6(a).

[119] 48 C.F.R. §19.203(c).

[120] 48 C.F.R. §19.800(e) (8(a) firms); 48 C.F.R. §19.1306(a) (HUBZone small businesses); 48 C.F.R. §19.1406(a) (SDVOSBs); 48 C.F.R. §19.1506(a) (WOSBs).

[121] *See supra* note 46 and accompanying text for a discussion of the other purposes of set-asides, according to Section 15(a) of the Small Business Act.

[122] *See* 38 U.S.C. §8127(d) ("Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to [VOSBs] if the contracting officer has a reasonable expectation that two or more (continued...)

is required to use set-asides for SDVOSBs or VOSBs in such circumstances, amending its regulations in 2009 to provide that

> the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns [or VOSBs, in certain circumstances] upon a reasonable expectation that
>
> (1) [o]ffers will be received from two or more eligible SDVOSB [or VOSB] concerns; and
>
> (2) [a]ward will be made at a fair and reasonable price.[123]

However, the VA also construed the 2006 amendments as permitting it to purchase goods and services through the Federal Supply Schedules, instead of through a set-aside for SDVOSBs and VOSBs, even though the Rule of Two is satisfied. The VA did so, in part, because of the long-standing exemption of orders placed through the Schedules from the FAR's small business requirements, previously discussed.[124]

Beginning in 2011, protesters challenged certain purchases that the VA proposed to make through the Schedules, arguing that the 2006 amendments and the VA regulations implementing them removed VA's discretion to purchase goods and services through the Schedules when the Rule of Two was satisfied. Key to the protesters' argument was the use of "shall" in the 2006 amendments and VA regulations.[125] The protesters also likened the 2006 amendments to the HUBZone Act, which, prior to its amendment in 2010, GAO and the Court of Federal Claims had construed as requiring set-asides for HUBZone small businesses whenever the Rule of Two was satisfied.[126]

GAO sided with the protesters in a series of 35 bid protest decisions issued in FY2012-FY2013.[127] GAO did so, in large part, because it construed the 2006 amendments to the Veterans

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(...continued)

[VOSBs] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States."). Subsection (b), in turn, authorizes contracting officers to use "other than competitive procedures" in awarding contracts whose value is below the simplified acquisition threshold, while Subsection (c) permits sole-source awards of contracts whose value is between the simplified acquisition threshold and $5 million when the Rule of Two is not satisfied. *See* 38 U.S.C. §8127(b) & (c).

[123] 48 C.F.R. §819.7005(a)(1)-(2).

[124] Dep't of Veterans Affairs, VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 *Federal Register* 64619, 64624 (December 8, 2009) (rejecting a commentator's suggestion that the VA Acquisition Regulation (VAAR) be clarified to indicate that VA's contracting programs for SDVOSBs and VOSBs do not encompass orders placed through the Schedules on the grounds that this change is unnecessary, and the "procedures in the FAR will continue to apply to VA [Schedules] task/delivery orders"). Because VA's interpretation here was articulated in the preamble to a regulation, instead of in the regulation itself, the court afforded it a lesser degree of deference when reviewing it than that contemplated under *Chevron*. *See Kingdomware Techs.*, 107 Fed. Cl. at 243.

[125] *Kingdomware Techs.*, 107 Fed. Cl. at 238-239.

[126] *Id*. at 239.

[127] For a listing of these cases, see Gov't Accountability Office, GAO Bid Protest Annual Report to Congress for Fiscal Year 2013, January 2, 2014, *available at* http://www.gao.gov/assets/660/659993.pdf; GAO Bid Protest Annual Report to Congress for Fiscal Year 2012, November 13, 2012, *available at* http://www.gao.gov/products/GAO-13-162SP. The earliest of the decisions was GAO's October 11, 2011, decision in *Aldevra*, which underlies much of the discussion below. It is important to note, however, that after the Court of Federal Claim's decision in *Kingdomware*, the GAO announced it would no longer hear protests which allege only that the VA improperly used the Federal Supply Schedules instead of a small business set-aside on the grounds that GAO cannot provide such protesters with "meaningful relief." Kingdomware Techs.—Reconsideration, B-407232.2 (December 13, 2012) (noting that because VA had declined to implement GAO's recommendations and the court had disagreed with GAO's interpretation, GAO could provide no relief to protesters). While GAO is not bound by the court's decision, it also cannot direct executive (continued...)

Benefits Act as unambiguously requiring the VA to set aside contracts for SDVOSBs and VOSBs whenever the Rule of Two was satisfied since they used the word "shall."[128] Thus, GAO found that VA's interpretation to the contrary was not entitled to deference,[129] and that the VA could not rely upon Section 8.404(a) of the FAR as a justification for purchasing items from the Federal Supply Schedules.[130] As previously noted, Section 8.404(a) of the FAR expressly provides that the provisions in Part 19 of the FAR regarding small business set-asides are generally inapplicable to purchases made through the Schedules.[131] However, in GAO's view, the FAR applies only to procurements conducted under the Small Business Act, not to procurements conducted under the 2006 amendments to the Veterans Benefits Act.[132]

Then, on November 27, 2012, the Court of Federal Claims issued its decision in *Kingdomware Technologies, Inc. v. United States*, wherein the court "respectfully disagree[d] with the GAO's interpretation" of the 2006 amendments.[133] The court found that, notwithstanding the use of "shall," the 2006 amendments did not unambiguously require the VA to employ set-asides for VOSBs instead of the Federal Supply Schedules whenever the Rule of Two is satisfied.[134] Rather, the court viewed the 2006 amendments as essentially "goal-setting" provisions, which left the VA with at least some discretion in determining when it will use set-asides to meet its goals for contracting with VOSBs.[135] The court also found that the VA had permissibly exercised this discretion by providing that the VA may purchase goods or services that could be obtained from VOSBs through the Federal Supply Schedules.[136] In particular, the court noted that the Schedules

(...continued)

branch action in the same way that a court can because of the separation of powers doctrine. *See, e.g.*, Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 986 (3d Cir. 1986) (noting that the separation of powers doctrine would be violated if GAO, as a legislative branch agency, were to interfere impermissibly with an executive branch agency's performance of its assigned functions, or assume a function more properly entrusted to an executive branch agency).

[128] Aldevra, B-405271; B-405524 (October 11, 2011) ("The provisions of both the VA Act and the VAAR are unequivocal; the VA 'shall' award contracts on the basis of competition restricted to SDVOSBs when there is a reasonable expectation that two or more SDVOSBs will submit offers and the award can be made at a fair and reasonable price."). *See also* Aldevra, B-406205 (March 14, 2012) ("We find that the plain language of 38 U.S.C. § 8127(d) mandates that VA 'shall' conduct its procurements using an SDVOSB (or VOSB) set-aside when there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the requirement at a reasonable price."); Kingdomware Techs., B-405727 (December 19, 2011) (similar).

[129] Aldevra, B-405271; B-405524 (October 11, 2011). *See also* Aldevra, B-406205 (March 14, 2012) ("In our view, the VA has not yet proffered an interpretation to which we can properly defer."). In the March 14 decision, GAO also noted that this was the first time the VA had raised the argument that the 2006 amendments were effectively goal-setting provisions, and that the VA was seeking *Chevron* deference for a rulemaking that it had not performed. The court that ultimately deferred to VA's interpretation, as discussed below, relied not on the precedent of *Chevron*, but on other cases addressing informal agency interpretations. *See infra* note 136 and accompanying text.

[130] Aldevra, B-405271; B-405524(October 11, 2011).

[131] *See supra* note 28 and accompanying text.

[132] Aldevra, B-405271; B-405524 (October 11, 2011) ("[T]he FAR language implementing the 2003 [Veterans Benefits] Act—and exempting the [Schedules] program (among other programs)—from its requirements—has no application to the statute at issue here.").

[133] *Kingdomware Techs.*, 107 Fed. Cl. at 244.

[134] *Id.*, at 238-243.

[135] *Id.*, at 239. The court also noted that the 2006 amendments were silent as to the Federal Supply Schedules, suggesting that the VA retained discretion as how use of the Schedules is to be reconciled with the amendments' preferences for VOSBs. *Id*. at 239-240. In addition, it noted language in the legislative history which it construed as suggesting that the 2006 amendments were intended to allow, but not require, set-asides for VOSBs. *Id*. at 240.

[136] *Id.*, at 242-244. While the court found that VA's interpretation lacked the "formality" of regulations and, thus, was not entitled to *Chevron* deference, it was still entitled to some deference because (1) the interpretation had remained consistent over time, and reflected a uniform approach within the agency; (2) the interpretation was not directly in (continued...)

have long been exempt from the small business set-aside requirements of Part 19 of the FAR, and "Congress can be presumed to be ... knowledgeable about existing law pertaining to legislation it enacts."[137]

Subsequently, in a decision issued on June 3, 2014, the majority of a three-judge panel of the U.S. Court of Appeals for the Federal Circuit affirmed the lower court's decision in *Kingdomware*, albeit on different grounds than those relied upon by the lower court.[138] According to the majority of the Federal Circuit, the VA is "required" to set aside contracts for VOSBs only "for purposes of meeting the [annual] goals" for contracting with VOSBs which the Veterans Benefits Act requires the VA to establish.[139] The majority reached this conclusion, in part, because it viewed the set-asides as a "tool" for meeting VA's goals,[140] and reasoned that a mandatory "tool" for achieving the goals would be inconsistent with the discretion that Congress expressly granted the agency in setting the goals.[141] One judge dissented, however, because he viewed the Veterans Benefits Act as unambiguously requiring VA to set aside contracts for small businesses when the Rule of Two is satisfied.[142] The Supreme Court granted Kingdomware's petition for review of this case, and is scheduled to hear oral arguments on February 22, 2016.[143]

Partial Set-Asides

Set-asides can generally be *total*, involving the reservation of the entire contract for small businesses, or *partial*, involving the reservation of certain *requirements* (i.e., the goods and/or services needed by the agency) under the contract.[144] Partial set-asides have historically been seen as "mandatory" when a total set-aside cannot be used because the statute and regulations authorizing them state that a partial set-aside "shall" be used under certain conditions.[145] These conditions are, however, arguably somewhat stringent, particularly when coupled with the general

(...continued)

conflict with the 2006 amendments or the VAAR; (3) the basis of the interpretation was clear; and (4) the interpretation reflected the traditional relationship between small business set-asides and the Federal Supply Schedules. *Id*. at 243-244.

[137] *Id*. at 241 (internal citations omitted).

[138] 754 F.3d at 924. In particular, the majority of the appellate court differed from the district court in viewing the provisions of the Veterans Benefits Act as unambiguous. *Id*. at 931. The district court, in contrast, had viewed the statute as ambiguous, and found that VA's interpretation was thus entitled to deference. *See supra* note 134 and accompanying text.

[139] 754 F.3d at 933-934.

[140] *Id*. at 934 (characterizing set-asides and other contracting preferences under the Veterans Benefits Act as "tools" that Congress provided to VA to ensure it meets the goals that it is required by statute to establish).

[141] *Id*. at 931. The majority was particularly concerned that the interpretation advanced by Kingdomware would, in its view, fail to give effect to the statutory language which states that set asides are to be used "for purposes of meeting the goals" required to be set under the act. *Id*. at 933. The majority also noted that Kingdomware's proposed interpretation would also result in VA continuing to set aside contracts for VOSBs "even *after* it has met its goals." *Id*.

[142] *Id*. at 934-938. The dissenting judge also viewed the statutory language as unambiguous. *Id*. at 934. However, he departed from the majority in viewing the statutory language regarding set asides "for purposes of meeting the goals" as "[p]refatory language [that] is introductory in nature and does nothing more than explain the general purpose for the Rule of Two mandate." *Id*. at 936.

[143] *See supra* note 15 and accompanying text.

[144] *But see* 48 C.F.R. §19.502-5(a) (simplified acquisition procedures cannot be used with partial set-asides).

[145] 15 U.S.C. §644(a) ("To effectuate the purposes of this chapter, small-business concerns ... *shall* receive any award or contract *or any part thereof*, ...") (emphasis added); 48 C.F.R. §19.502-3(a) ("The contracting officer *shall* set aside a portion of an acquisition, except for construction, for exclusive small business participation when ...") (emphasis added).

limitations on the applicability of Part 19 of the FAR, discussed previously (i.e., generally not applicable to contracts awarded and/or performed outside the United States, or orders under the Federal Supply Schedules).[146] First, contracts for construction are not subject to partial set-asides.[147] Second, such set-asides may generally only be used when (1) a total set-aside is inappropriate; (2) the requirement is "severable" into two or more economic production runs or reasonable lots; (3) at least one small business is expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirements at fair market price; (4) the acquisition is not subject to the simplified acquisition procedures, discussed above; and (5) it is not reasonably expected that only two concerns—one large and one small—with the capability to perform will tender offers.[148]

In particular, the requirement that the goods and/or services being procured be "severable" could potentially preclude the use of a partial set-aside when these goods and/or services are "so integrally related that only a single source can reasonably perform the work."[149] Decisions not to partially set aside acquisitions have also been upheld when an agency determined that having multiple vendors performing the work could increase the risks of performance, e.g., by making efforts to standardize computer systems more complicated, or less likely to succeed;[150] by increasing costs to the users;[151] or by leading to inconsistent results.[152] The fact that an agency makes multiple awards of a contract, or issues multiple orders under a contract, does not, in itself, prove that requirements are severable,[153] and there is no requirement that a partial set-aside include a certain portion of the agency's requirements.[154] On the other hand, a partial set-aside may be found to be improper where the set-aside portion is not of a sufficient quantity to be economically feasible.[155]

Set-Asides Under ID/IQ Contracts

Congress amended the Small Business Act in 2010 to expressly authorize set-asides of orders under multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts, among other things. Sometimes also known as task order/delivery order (TO/DO) contracts, *ID/IQ contracts* are contracts for services or goods that do not "procure or specify a firm quantity of supplies (other than a minimum or maximum quantity)," but rather "provide[] for the issuance of orders for the delivery of supplies during the period of the contract."[156] A *multiple-award ID/IQ contract*

[146] *See supra* notes 26-28 and accompanying text.

[147] 48 C.F.R. §19.502-3(a).

[148] 48 C.F.R. §19.502-3(a)(1)-(5). Agencies may, however, proceed with a partial set-aside when offers are expected from only two firms—one large and one small—if the head of the contracting activity authorizes this in a specific case. 48 C.F.R. §19.502-3(a)(5).

[149] Metasoft, LLC, B-402800 (July 23, 2010). *See also* Vox Optima, LLC, B-400451 (November 12, 2008) (noting that the "interrelationship of the tasks" determines, in part, whether the requirements are severable).

[150] *Id*.

[151] EAI Corp., B-283129 (October 7, 1999).

[152] *Id*.

[153] Metasoft, LLC, B-402800 (July 23, 2010) (multiple orders); Vox Optima, LLC, B-400451 (November 12, 2008) (multiple awards).

[154] Belleville Shoe Mfg. Co., Altama Delta Corp., Wellco Enterprises, Inc., B-287237; B-287237.2; B-287237.3 (May 17, 2001).

[155] Aalco Forwarding, Inc. et al., B-277241.16 (March 11, 1998).

[156] 48 C.F.R. §16.501-1.

is one awarded to multiple vendors, each of whom is generally eligible to compete for task or delivery orders issued under the contract.[157]

Specifically, pursuant to the 2010 amendments, agencies may:

> (1) set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns …;
>
> (2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b)), set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns …; and
>
> (3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns.[158]

The authority to set aside orders "[n]otwithstanding the fair opportunity requirements" is arguably particularly important, since federal law otherwise generally requires agencies to give all vendors holding a multiple-award contract a "fair opportunity to be considered" for orders valued in excess of $3,500,[159] and an agency could potentially be found to have breached its contract with the vendor by failing to provide such an opportunity.[160]

It is important to note, though, that the statutory and regulatory provisions governing set-asides of orders under ID/IQ contracts use "may," not "shall,"[161] and GAO recently construed them to mean that agencies are *not* required to set aside such orders for small businesses (or apply the

[157] There are certain exceptions to this rule, including for orders that must be placed with a particular contractor to meet a minimum guarantee under a contract. *See generally* 10 U.S.C. §2304c(b)(1)-(4) (procurements of defense agencies) & 41 U.S.C. §4106(c)(1)-(4) (procurements of civilian agencies).

[158] P.L. 111-240, §1331, 124 Stat. 2541 (September 27, 2010) (codified at 15 U.S.C. §644(r)).

[159] *See, e.g.*, 41 U.S.C. §4106(c) ("When multiple contracts are awarded under section 4103(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of [$3,500] that is to be issued under any of the contracts, unless (1) the executive agency's need for the services or property ordered is of such unusual urgency that providing the opportunity to all of those contractors would result in unacceptable delays in fulfilling that need; (2) only one of those contractors is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized; (3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or (4) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.").

[160] Appeal of MCC Constr. Co., A.S.B.C.A. No. 57400, 2012-2 B.C.A. ¶ 35,106 (2012) (finding that the procuring agency had breached a multiple-award contract that provided all vendors a fair opportunity to compete for orders under the contract by setting aside an order for small businesses). This contract was awarded under the authority of statutory provisions that have since been repealed, not the Small Business Act, and it appears to have been awarded prior to the enactment of the Small Business Jobs Act. However, the decision arguably confirmed what some commentators had suggested was a possibility (i.e., a finding of breach if any agency complied with a requirement to set aside orders for small business). *See, e.g.*, Steven W. Feldman & Raymond Fioravanti, Contract Dispute or Bid Protest? The *Delex Systems* Dilemma, 39 *Pub. Cont. L.J.* 483 (2010).

[161] *See, e.g.*, 48 C.F.R. §19.502-4 ("In accordance with section 1331 of P.L. 111-240 (15 U.S.C. 644(r)) contracting officers may, at their discretion (a) [w]hen conducting multiple-award procurements using full and open competition, reserve one or more contract awards for any of the small business concerns identified in 19.000(a)(3) ...; (b) [s]et aside part or parts of a multiple-award contract for any of the small business concerns identified in 19.000(a)(3) ...; or (c) [s]et aside orders placed under multiple-award contracts for any of the small business concerns identified in 19.000(a)(3)."). Both the SBA regulations and the FAR include orders placed under Federal Supply Schedule contracts among the orders that are subject to set-asides for small businesses. *See* 13 C.F.R. §125.1(k)(1); 48 C.F.R. §8.405-5(a).

Rule of Two in determining whether to use a set-aside).[162] Prior to the 2010 amendments, GAO had issued an earlier decision which had found that orders issued under at least some ID/IQ contracts were subject to "mandatory" set-asides pursuant to Section 19.502-2 of the FAR on the grounds that Section 19.502-2 purports to apply to "any acquisition over $150,000," and orders constitute acquisitions.[163] However, the FAR has been amended since the earlier GAO decision and, as amended, clearly states that "contracting officers may, at their discretion," set aside orders under multiple-award ID/IQ contracts.[164] Thus, GAO's earlier decision is generally seen to have been "overturned" by the 2010 legislation and its implementing regulations, although some commentators have questioned whether this was Congress's intent.[165]

Priority of and Among the Set-Aside Programs

The question of whether there is "precedence" or "priority" among the set-aside programs has been raised periodically. For example, it factored in GAO's and the court's consideration of whether HUBZone set-asides are mandatory when the Rule of Two is satisfied, as discussed previously.[166] It has also been raised in other contexts, including in discussions of what priority small business set-asides generally have as compared to other procurement preferences.

Set-Asides Under the Small Business Act

The FAR, in particular, currently has several provisions that address the priority of small business set-aside programs implemented under the authority of the Small Business Act vis-à-vis other procurement vehicles and as between themselves. Perhaps foremost among these is Subpart 8.002 of the FAR, which provides that agencies "shall satisfy requirements for supplies and services from or through the sources ... listed [in **Table 1**] in descending order of priority."[167]

[162] Edmond Scientific Co., B-410179; B-410179.2 (November 12, 2014).

[163] Delex Sys., Inc., B-400403 (October 8, 2008). GAO's decision here focused on orders placed under non-Federal Supply Schedules contracts, and the General Services Administration (GSA) reportedly responded to the *Delex* decision by stating that GSA did not view it as applying to orders placed under Schedules contracts. *See* GSA Memorandum from David A. Drabkin, Senior Procurement Executive, to All GSA Contracting Activities, October 28, 2008), quoted in Arnold & Porter LLP, GAO's Delex Decision and GSA's Response: The Clash of Titans, *available at* http://www.arnoldporter.com/resources/documents/CA_GAOsDelexDecision&GSAsResponse_012609.pdf. GAO ultimately reached a similar conclusion in a subsequent decision. *See* Kingdomware *Techs., Inc.*, B-405533.2 (November 10, 2011) (recognizing that orders under the Federal Supply Schedules are exempt from "the set-aside requirements in FAR Part 19"). The GAO's logic in *Delex* appears to have been largely adopted by the Court of Federal claims in a later decision, although the Armed Service Board of Contract Appeals has rejected the view that orders necessarily constitute acquisitions. *See* Global Computer Enters. v. United States, 88 Fed. Cl. 350, 499-50 n.121 (2009); Appeal of MCC Constr. Co., A.S.B.C.A. No. 57400, 2012-2 B.C.A. ¶ 35,106 (2012).

[164] 48 C.F.R. §19.502-4(c). The SBA regulations similarly provide that the "contracting officer may state in a solicitation or resulting multiple award contract" that orders are to be set aside. 13 C.F.R. §125.2(e)(6)(ii). The contracting officer had made such a statement in the contract at issue in *Edmond Scientific* because the contract was issued prior to the 2010 amendments.

[165] *See, e.g.*, Steven Koprince, Task Orders: Small Business Set-Asides Not Required, Says GAO, November 25, 2014, *available at* http://smallgovcon.com/gaobidprotests/task-orders-small-business-set-asides-not-required-says-gao/; Patrick Rothwell, The "Rule of Two" for Orders Placed Against Multiple Award Contracts: The Other Shoe Has Dropped, December 12, 2015 (copy on file with the authors).

[166] *See supra* notes 86-87 and accompanying text.

[167] 48 C.F.R. §8.002(a)(1)-(2).

Table 1. Priority Sources for Purchasing Supplies and Services

Supplies	Services
Agency inventories	Services on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled (i.e., AbilityOne)
Excess[a] from other agencies	Mandatory Federal Supply Schedules
Federal Prison Industries	Optional Use Federal Supply Schedules
Supplies on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled (i.e., AbilityOne)	Federal Prison Industries or commercial sources
Wholesale supply programs, such as the stock program of the General Services Administration	
Mandatory Federal Supply Schedules	
Optional-use Federal Supply Schedules	
Commercial sources	

Source: Congressional Research Service, based on 48 C.F.R. §8.002(a)(1)-(2).

a. *Excess property* means "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." 40 U.S.C. §102(3).

Many, if not all, of these priorities are expressly incorporated into Part 19 of the FAR (e.g., AbilityOne having priority over small business set-asides).[168] However, the priority afforded to Federal Prison Industries (FPI) in the purchase of goods is particularly noteworthy because, while FPI has priority over "commercial sources," including small businesses, agencies are also required to use "competitive procedures" whenever FPI has a "significant market share" (i.e., more than 5%).[169] "Competitive procedures" include small business set-asides,[170] and agencies must allow FPI to participate whenever competitive procedures are used.[171] Thus, agencies could conduct set-asides for small businesses in which FPI may compete, and bids or offers from FPI would not necessarily be subject to the same requirements (e.g., compliance with the limitations on subcontracting) as those from small businesses.[172]

The FAR further provides that, although there is no priority among the set-asides for various types of small businesses, set-asides for particular types of small businesses take precedence over

[168] *See, e.g.*, 48 C.F.R. §19.502-1(b) (noting that the requirement to set aside contracts for small businesses generally does not apply to "purchases from required sources of supply under Part 8" of the FAR); 48 C.F.R. §19.1304 ("This subpart does not apply to (a) [r]equirements that can be satisfied through award to (1) Federal Prison Industries, Inc. ...; or (2) AbilityOne participating non-profit agencies for the blind or severely disabled ...; (b) [o]rders under indefinite-delivery contracts ...; (c) [o]rders against Federal Supply Schedules ...; (d) [r]equirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) Program, unless SBA has consented to release the requirements from the 8(a) Program; (e) [r]equirements that do not exceed the micro-purchase threshold; or (f) [r]equirements for commissary or exchange resale items.").

[169] National Defense Authorization Act for FY2008, P.L. 110-181, §827, 122 Stat. 228-29 (January 28, 2008) (codified at 10 U.S.C. §2410n(b)(1)).

[170] *See* 41 U.S.C. §152 (defining "competitive procedures" to include "procurements conducted in furtherance of section 15 of the Small Business Act ... as long as all responsible business concerns that are entitled to submit offers for those procurements are permitted to compete").

[171] 10 U.S.C. §2410n(b)(1) (requiring consideration of "a timely offer" from FPI in such competitions); 48 C.F.R. §19.504 ("When using competitive procedures in accordance with 8.602(a)(4), agencies shall include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI.").

[172] *See, e.g.*, Tennier Indus., Inc., B-403946.2 (June 29, 2012) (upholding a challenged procurement in which an agency permitted FPI to compete for a contract set-aside for HUBZone small businesses).

those for small businesses generally.[173] In other words, agencies can elect whether to use a set-aside for 8(a) firms, WOSBs, SDVOSBs, or HUBZone small businesses in particular circumstances. (An agency could, for example, opt to set aside a particular acquisition for WOSBs because its performance on the goals for contracting and subcontracting with WOSBs was lower than its performance vis-à-vis its other goals.) In contrast, agencies must at least "consider" set-asides for 8(a) firms, WOSBs, SDVOSBs, or HUBZOne small businesses before using a set-aside for small businesses generally. Similarly, the FAR also provides that agencies must generally "consider" sole-source awards to 8(a) firms, SDVOSBs, and HUBZone small businesses prior to setting aside an acquisition for small businesses generally.[174]

Set-Asides Under the Veterans Benefits Act

The relationship between set-asides for SDVOSBs and VOSBs under the authority of the Veterans Benefits Act and certain "priority sources" listed in **Table 1** (e.g., AbilityOne) has arguably been seen as largely within VA's discretion. For example, GAO upheld a challenged VA procurement of items currently listed on the AbilityOne procurement list through AbilityOne, instead of a set-aside for SDVOSBs or VOSBs.[175] GAO did so, in part, because it found that the Veterans Benefits Act and the statute requiring agencies to purchase services from AbilityOne "can be read so as not to conflict" because the 2006 act does not expressly address the preference for AbilityOne:

> [t]hat is, the VA Act neither expressly overrides the [AbilityOne] preference nor provides that the preference for [veteran-owned] concerns is subordinate to that of the AbilityOne program.[176]

Thus, because it found that Congress had left a gap for the VA to fill in determining how set-asides for VOSBs were to be reconciled with the AbilityOne program, GAO found that VA's interpretation of the 2006 act—which provided for the VA to purchase items currently on the AbilityOne list from AbilityOne—was entitled to certain deference.[177] The Court of Federal Claims similarly found that VA guidelines requiring contracting officers to research whether VOSBs could supply requirements that are *not* currently on the AbilityOne list before adding them to the list warranted deference, in part, because the guidelines provide detailed instruction to "fill[] a space between the [2006 act], the Javits-Wagner-O'Day Act [which requires that certain purchases be made from AbilityOne], and their accompanying regulations."[178]

In contrast, the 2006 act is explicit as to the priority among set-asides for SDVOSBs, VOSBs, and other small businesses. Under the act, contracts awarded on a set-aside or sole-source basis to SDVOSBs have "priority" over those awarded to VOSBs.[179] Contracts awarded to VOSBs, in turn, have precedence over those awarded through the 8(a) or HUBZone programs, and contracts

[173] 48 C.F.R. §19.203(a) & (c).

[174] 48 C.F.R. §19.800(e) (8(a) firms); 48 C.F.R. §19.1306(a) (HUBZone small businesses); 48 C.F.R. §19.1406(a) (SDVOSBs); 48 C.F.R. §19.1506(a) (WOSBs).

[175] Alternative Contracting Enterprises, LLC; Pierce First Med., B-406265,B-406266,B-406291,B-406291.2,B-406318.1,B-406318.2,B-406343,B-406356,B-406357,B-406369,B-406371,B-406374,B-406400,B-406404,B-406428 (March 26, 2012).

[176] *Id*.

[177] *Id*.

[178] Angelica Textile Servs., Inc. v. United States, 95 Fed. Cl. 208, 222 (2010).

[179] 38 U.S.C. §8127(*i*)(1)-(4). *See also* Buy Rite Transport, B-403729; B-403768 (October 15, 2010) (affirming agency's determination to use a set-aside for SDVOSB, instead of a set-aside for VOSBs, in part, because the 2006 act provides that set-asides for SDVOSBs have "priority" over those for VOSBs).

awarded through the 8(a) or HUBZone programs have priority over those awarded "pursuant to any other small business contracting preference" (e.g., set-asides for WOSBs).[180]

Limitations on the Use of Small Business Set-Asides

While set-asides may sometimes be required and sometimes permitted, there could also be circumstances where set-asides are prohibited. Such a situation would arguably be most likely to arise because of statutory conditions imposed on the procurement of particular goods or services by particular agencies or, in the case of set-asides for 8(a) firms, because of court orders. For example, until it was repealed in 2010,[181] the Small Business Competitiveness Demonstration Program Act of 1988 required the Department of Defense (DOD) to "solicit[] on an unrestricted basis" contracts valued in excess of $25,000 for the procurement of services in industries where DOD had met an annual goal of awarding at least 40% of its contract dollars to small businesses.[182] Solicitation on an "unrestricted basis" precluded the use of small business set-asides, since small business set-asides entail the "restriction of [a] solicitation to small business concerns."[183] Similarly, in several cases, agencies have been barred from setting aside particular procurements for 8(a) small businesses as a result of challenges brought by nonminority contractors alleging that this program impermissibly discriminates against them. Because eligibility for the 8(a) Program is based, in part, on race,[184] in responding to such challenges, the government must show that the program is narrowly tailored to meet a compelling government interest.[185] An alleged government interest, in turn, qualifies as a compelling one, for due process or equal protection purposes, only when the government entity creating the racial classification (1) identified public or private discrimination with some specificity before resorting to race-conscious remedies and (2) had a "strong basis in evidence" to conclude that race-conscious remedies were necessary before enacting or implementing these remedies.[186] In a few cases, the government has been found to have lacked adequate evidence of discrimination and, thus, been barred from using 8(a) set-asides in particular industries or geographic areas.[187] For example, in

[180] 38 U.S.C. §8127(*i*)(1)-(4).

[181] P.L. 111-240, §1335, 124 Stat. 2543.

[182] P.L. 100-656, §713, 102 Stat. 3892 (November 15, 1988). This 40% goal was established by the 1988 act for certain industries, and was separate from the 23% goal provided for in Section 15 of the Small Business Act. *Id*. at §712, 192 Stat. 3890-91.

[183] 41 U.S.C. §3303.

[184] *See, e.g.*, Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023, 1035 (Fed. Cir. 2008) (finding that a Department of Defense program which incorporated the same presumption that members of certain racial and ethnic groups are socially disadvantaged that is incorporated in the 8(a) Program constituted an "explicit racial classification"). Some courts had previously denied firms or individuals standing to challenge programs with such presumptions on the grounds that the would-be plaintiffs were denied the contract because of inability to demonstrate social and economic disadvantage, not because of race. *See, e.g.*, Interstate Traffic Control v. Beverage, 101 F. Supp. 2d 445 (S.D. W.Va. 2000); Ellsworth Assocs. v. United States, 926 F. Supp. 207 (D.D.C. 1996). However, that approach no longer appears to be prevalent.

[185] S*ee, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). For further discussion of *Adarand* and related cases, see generally CRS Report RL33284, *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues*, by (name redacted)

[186] Shaw v. Hunt, 517 U.S. 899, 909-10 (1996); Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950, 958 (10th Cir. 2003).

[187] *See, e.g.*, Cortez III Service Corp. v. Nat'l Aeronautics & Space Admin., 950 F. Supp. 357, 361 (D.D.C. 1996) (finding that the 8(a) Program is facially constitutional, but that "agencies have a responsibility to decide whether there has been a history of discrimination in the particular industry at issue" prior to procuring requirements through the 8(a) Program); Fordice Constr. Co. v. Marsh, 773 F. Supp. 867 (S.D. Miss. 1990) ("The court … finds that the United States Army Corps of Engineers failed to give consideration to the impact of a 100% set-aside upon non-§8(a) eligible (continued...)

its 2012 decision in *DynaLantic Corporation v. U.S. Department of Defense*, the U.S. District Court for the District of Columbia found that the 8(a) Program was unconstitutional as applied in the military simulation and training industry because the Department of Defense (DOD) conceded it had "no evidence of discrimination, either in the public or private sector, in the simulation and training industry."[188] The court thus enjoined SBA and DOD from "awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so."[189]

Situations could also potentially arise where an agency—which is required to set aside certain acquisitions for small businesses—is also required to use other procurement vehicles and, thus, is seen as having discretion in giving the other procurement vehicle(s) priority over small business set-asides. This recently happened with the VA, as discussed previously. The VA is generally required, pursuant to the 2006 amendments to the Veterans Benefits Act, to use set-asides for SDVOSBs or other VOSBs whenever the Rule of Two is satisfied.[190] However, other provisions of law also require the VA (and other federal agencies) to procure certain services through AbilityOne, a program that promotes the employment of persons with handicaps and disabilities.[191] Faced with these dual mandates, VA issued guidance that directed VA contracting officers to procure all items currently listed on the AbilityOne procurement list from AbilityOne, rather through a set-aside for VOSBs.[192] This guidance was challenged on the grounds that the 2006 amendments to the Veterans Benefit Act require the VA to use set-asides for VOSBs whenever the Rule of Two is satisfied. However, GAO found that the issuance of this guidance was within VA's authority because the 2006 amendments did not indicate how VA's obligations under the Veterans Benefits Act were to be reconciled with its obligations as to AbilityOne.[193] Thus, GAO viewed the VA as having the discretion to preclude the use of set-asides for items currently on the AbilityOne list.[194]

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contractors in the Vicksburg area.").

[188] 885 F. Supp. 2d 237 (D.D.C. 2012).

[189] *Id*. at 293. The litigation in *DynaLantic* was reportedly settled by the parties while their appeals to the D.C. Circuit were pending. *See, e.g.,* Center for Individual Rights, DynaLantic Corp. v. Dep't of Defense: Feds End 19-Year Battle with DynaLantic, January 31, 2014, *available at* https://www.cir-usa.org/cases/dynalantic-corp-v-department-of-defense/ (reporting that the district court had approved an agreement between the parties that, among other things, bars the federal government from awarding any contracts in DynaLantic's industry for two years). After that time, the government reportedly must notify the court if it plans to begin making awards through the 8(a) Program in DynaLantic's industry and demonstrate that it has a strong basis in evidence for reinstating the program. *Id.*

[190] *See supra* notes 122 to 137 and accompanying text.

[191] 41 U.S.C. §8504(a) ("An entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the [Committee for Purchase From People Who Are Blind or Severely Disabled] and at the price the Committee establishes if the product or service is available within the period required by the entity.").

[192] *See* Dep't of Veterans Affairs, Deputy Assistant Secretary for Acquisition and Logistics, New Guidelines for Placing Items and Services on the AbilityOne Procurement List, April 28, 2010, *available at* http://www.va.gov/oal/docs/library/ils/il10-06.pdf.

[193] Alternative Contracting Enterprises, LLC; Pierce First Med., B-406265,B-406266,B-406291,B-406291.2,B-406318.1,B-406318.2,B-406343,B-406356,B-406357,B-406369,B-406371,B-406374,B-406400,B-406404,B-406428 (March 26, 2012).

[194] *Id*. *See also* Angelica Textile Servs., Inc. v. United States, 95 Fed. Cl. 208, 222 (2010) (finding that VA guidelines requiring contracting officers to research whether VOSBs could supply requirements that are *not* currently on the AbilityOne list before adding them to the list warranted deference, in part, because the guidelines provide detailed instruction to "fill[] a space between the [2006 act], the Javits-Wagner-O'Day Act, and their accompanying (continued...)

A requirement that an agency select vendors for particular goods or services on a "competitive basis," in contrast, would probably not be construed to preclude the use of small business set-asides, as evidenced by the courts' rejection of several challenges to the Department of Labor's (DOL's) determination to set aside certain contracts for the operation of Job Corps centers for small businesses.[195] The incumbent contractors—who did not qualify as "small" under the federal government's size standards—challenged DOL's determination, in part, on the grounds that set-asides do not constitute selections on a "competitive basis," as is generally required under the Workforce Investment Act. They also noted that set-asides are not among the exceptions to selection on a "competitive basis" expressly provided for in the act.[196] The court, however, rejected these arguments, finding that use of "competitive procedures" constitutes "select[ion] on a competitive basis" for purposes of the Workforce Investment Act (WIA).[197] In so doing, the court expressed its view that the Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act, contemplates various degrees of competition, from "full and open competition" through noncompetitive; and that procedures that do not constitute full and open competition are not necessarily noncompetitive.[198] In particular, the court found that "small business set-asides are, by definition, not 'noncompetitive,'" a holding which could have resonance beyond Workforce Investment Act.[199] It should be noted, however, that in reauthorizing WIA in 2014, Congress required DOL to permit firms that are operators of "high-performing centers" to participate in any "competitive selection process" for Center operators, regardless of the firm's size.[200]

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regulations").

[195] Res-Care, Inc. v. United States, 107 Fed. Cl. 136 (2012); Mgmt. & Training Corp. v. United States, No. 12-561C, 2012 U.S. Claims LEXIS 1580 (November 29, 2012).

[196] *Res-Care*, 107 Fed. Cl. at 140; *Mgmt. & Training Corp.*, 2012 U.S. Claims LEXIS 1580, at *15-*27. The Workforce Investment Act states that

> Except as provided in subsections (c) and (d) of Section 303 of the Federal Property and Administrative Services Act [FPASA] of 1949 …, the Secretary [of Labor] shall select on a competitive basis an entity to operate a Job Corps center and entities to provide activities described in this subtitle to the Job Corps center.

29 U.S.C. §2887(a)(2)(A). Because Subsections 303(c) and (d) expressly refer to the seven circumstances in which agencies may make noncompetitive awards (e.g., only one responsible source, unusual and compelling urgency), the protesters claimed that DOL was prohibited from using set-asides for small businesses on the grounds that set-asides are not authorized by Subsections 303(c) and (d) of FPASA, and do not entail "select[ions] on a competitive basis." *Res-Care*, 107 Fed. Cl. at 139. Rather, set-asides are authorized by Subsections 303(a) and (b), 41 U.S.C. §§3301, 3303, and according to the protesters, do not constitute selections on a competitive basis, even though they are designated as "competitive procedures" for purposes of federal procurement law. *See Res-Care*, 107 Fed. Cl. at 140.

[197] *Res-Care*, 107 Fed. Cl. at 141.

[198] *Id.*

[199] *Id.* In addition, the court in *Management & Training Corporation v. United States*, found that agencies were not required to determine that one of the four "interests" noted in Section 15(a) (e.g., war and national defense) was implicated before setting aside a contract for small businesses. *See* 2012 U.S. Claims LEXIS 1580, at *27-*30.

[200] Workforce Innovation and Opportunity Act, P.L. 113-128, §147(b)(1), 128 Stat. 1544 (July 22, 2014). The Joint Explanatory Statement accompanying an earlier appropriations measure had used similar language, providing that DOL "should" give "due consideration" to high-performing incumbent contractors, regardless of their size, as part of a "full, fair, and open competitive process" when awarding contracts to operate Job Corps Centers. However, a federal court recently construed this language as "precatory and directed at policy makers in the agency." Adams & Assocs., Inc. v. United States, 120 Fed. Cl. 250, 253 (2015).

Conclusions

As the foregoing discussion suggests, determining whether and when particular requirements pertaining to small business set-asides apply can be complicated. Multiple statutes—some of which apply only to specific agencies—govern set-asides for small businesses, and authorize different actions as to different types of small businesses. These statutes were enacted over time, between 1958 and 2006, and arguably have not always been consistent in their treatment of particular things (e.g., the circumstances in which sole-source awards may be made to 8(a) firms, as opposed to other types of small businesses). Further, these statutes have been implemented by SBA regulations and the FAR over a number of years, and the bases for certain regulatory interpretations are not always clear, even if they are arguably within the agency's discretion (e.g., the exclusion of contracts awarded and/or performed outside the United States from the small business requirements of the FAR). In addition, the statutes and regulations have been construed and applied by various judicial and administrative tribunals, which have, at times, had differing interpretations of the same provision (e.g., GAO viewing the VA as required to use set-asides for VOSBs instead of the Federal Supply Schedules, while the federal courts do not).

On top of all this, the stakes of these interpretations are arguably high, as small businesses and other vendors compete for a limited—and potentially dwindling—pool of federal contract dollars.[201] This can lead some to attempt to place significant weight on particular words (e.g., "shall," "competitive basis") in the hopes of narrowing—or broadening—the competition for particular procurements. Questions could, however, potentially be raised as to whether the existing statutory and regulatory provisions were drafted with such potential arguments in mind, or whether they are based, in part, on long-standing practices in the procurement field (e.g., the exclusion of orders placed through the Federal Supply Schedules from small business set-asides under the Veterans Benefits Act). Congress could potentially respond to any interpretations with which it disagrees by amending the relevant statutes; directing SBA or the FAR Council to promulgate or amend regulations; or requiring agencies to abide by particular interpretations of statutes or regulations.[202]

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

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[201] *See, e.g.*, Charles S. Clark, *Federal Contract Spending Fell 3.1 Percent in 2014, Study Finds*, GOV'T EXEC., June 5, 2015, available at http://www.govexec.com/contracting/2015/06/federal-contract-spending-fell-31-percent-2014-study-finds/114547/.

[202] *See, e.g.*, Local Community Recovery Act of 2006, P.L. 109-218, 120 Stat. 333 (April 20, 1996) ("It is the sense of Congress that the Corps of Engineers should promptly implement the decision of the Government Accountability Office in solicitation W912EE-06–R-0005, dated March 20, 2006.").