



# **Small Business Set-Aside Programs: An Overview and Recent Developments in the Law**

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## Summary

In government contracting law, a “set-aside” is a procurement in which only certain businesses may compete. Set-asides can be total or partial, depending upon whether the entire procurement, or just a severable segment of it, is so restricted. Eligibility for set-asides is typically based on business size, as well as demographic characteristics of the business owners. Currently, under the Small Business Act, there are set-aside programs for (1) small disadvantaged businesses participating in the 8(a) Minority Small Business and Capital Ownership Development Program (8(a) small businesses); (2) Historically Underutilized Business Zone (HUBZone) small businesses; (3) women-owned small businesses; (4) service-disabled veteran-owned small businesses; and (5) small businesses not belonging to any of the prior four categories.

These programs are all government-wide and could potentially be used by any agency. However, the programs differ in their eligibility requirements and the types of contracting preferences they provide for participating small businesses. For example, there are some significant differences among the programs as to when set-asides may be used (e.g., the value of qualifying contracts). Additionally, while the Small Business Act provides special authority for agencies to make sole-source awards to 8(a), HUBZone, and service-disabled veteran-owned small businesses, sole-source awards to women-owned or other small businesses are generally possible only under the authority of the Competition in Contracting Act (CICA). CICA authorizes noncompetitive awards, or awards made after soliciting and negotiating with only one source, to any size firm when certain conditions exist (e.g., single source; urgent and compelling circumstances). Moreover, only HUBZone small businesses qualify for “price evaluation preferences” in unrestricted competitions.

In addition, the Veterans Benefits, Health Care, and Information Technology Act of 2006 (P.L. 109-461) provides the Department of Veterans Affairs (VA) with additional authority to award set-aside or sole-source contracts to veteran-owned and service-disabled veteran-owned small businesses. Contracts with a value of less than \$150,000 may be awarded on a set-aside or sole-source basis at the contracting officer’s discretion. Contracts valued in excess of \$150,000 must generally be awarded via a set-aside, although sole-source awards of up to \$5 million may be made in certain circumstances.

The 111<sup>th</sup> Congress enacted legislation (P.L. 111-240) amending the statutory language that the Government Accountability Office (GAO) and U.S. Court of Federal Claims had construed, in a series of decisions issued in 2008-2010, as requiring agencies to give set-asides for HUBZone small businesses “precedence” over those for 8(a) and service-disabled veteran-owned small businesses. However, in 2010-2011, GAO and the Court of Federal Claims issued several other decisions interpreting the statutes and regulations governing the set-aside programs that could also affect the number of awards to such businesses. Among other things, these decisions found that VA is generally required to use set-asides for small businesses instead of procuring goods or services through the “optional” Federal Supply Schedules, although it was within VA’s discretion to promulgate guidelines providing that AbilityOne organizations are to be given priority when it purchases items on the AbilityOne list. (The Federal Supply Schedules are online “catalogs” that contain goods or services offered by multiple vendors. AbilityOne is a procurement program that promotes employment opportunities for persons who are blind or severely disabled.) Other decisions have addressed the market research underlying set-aside determinations; withdrawal of requirements from the 8(a) Program; and the applicability of the non-manufacturer rule and price evaluation preferences in HUBZone set-asides.

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## Introduction

This report discusses the set-aside programs for small businesses under the Small Business Act of 1958, as amended, and the Veterans Benefits, Health Care, and Information Technology Act of 2006, as well as recent decisions by the Government Accountability Office (GAO) and U.S. Court of Federal Claims interpreting these statutes and the regulations implementing them. These set-aside programs provide numerous contracting “preferences” to eligible small businesses, including restricted competitions (i.e., set-asides), sole-source awards, and price evaluation preferences in unrestricted competitions. Members and committees of Congress pay considerable attention to the set-aside programs because:

[i]t is the 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 [and] 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.<sup>1</sup>

Congress has also established goals for the percentage of federal contract and subcontract dollars awarded to small businesses government-wide.<sup>2</sup> It regularly oversees the small business contracting programs,<sup>3</sup> and Members frequently enact or introduce legislation to address perceived limitations of the set-aside programs, or expand eligibility for them.<sup>4</sup>

This report supersedes 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 Kate M. Manuel.

## Set-Asides Under the Small Business Act

A “set-aside” is a procurement in which only certain businesses may compete. Set-asides can be total or partial, depending upon whether the entire procurement, or just a severable segment of it,

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<sup>1</sup> 15 U.S.C. §631(a).

<sup>2</sup> See 15 U.S.C. §644(g)(1) (setting the goal that at least 23% of federal contract dollars be awarded to small businesses, as well as goals that 3% of federal contract and subcontract dollars be awarded to Historically Underutilized Business Zone (HUBZone) small businesses; 3% to service-disabled veteran owned small businesses; 5% to women-owned small businesses; and 5% to small disadvantaged businesses. In addition, Congress also requires agencies to set agency-specific goals for contracting with small businesses. See 15 U.S.C. §644(g)(2). In FY2010, SBA reported that small businesses were awarded 22.7% of federal contract dollars and that HUBZone small businesses were awarded 2.77% of federal contract and subcontract dollars; service-disabled veteran-owned small businesses, 2.5%; women-owned small businesses, 4.04%; and small disadvantaged businesses, 7.95%. See Hike in Small Business Awards in 2010 Called a “Significant” Improvement over 2009, 95 *Fed. Cont. Rep.* 681 (July 28, 2011). All small businesses participating in the Minority Small Business Ownership and Capital Development Program (commonly known as the 8(a) Program) are small disadvantaged businesses, but not all small disadvantaged businesses are 8(a) participants.

<sup>3</sup> For example, the Senate Ad Hoc Subcommittee on Contracting Oversight held hearings on July 26, 2011, on “How Oversight Failures and Regulatory Loopholes Allow Large Businesses to Get and Keep Small Business Contracts.”

<sup>4</sup> See, e.g., S. 1334, Expanding Opportunities for Main Street Act of 2011 (increasing the government-wide goals for contracting with small businesses, and for contracting and subcontracting with women-owned small businesses and small disadvantaged businesses); H.R. 598, An Act to Eliminate the Preferences and Special Rules for Alaska Native Corporations under the Program under Section 8(a) of the Small Business Act.

is so restricted.<sup>5</sup> Eligibility for set-asides is typically based on business size, as well as demographic characteristics of the business owners.<sup>6</sup> Set-asides, under current law, are not the same as quotas. Although agencies can set aside procurements for various types of small businesses (e.g., women-owned) and are required by statute to set minimum goals for contracting with such businesses,<sup>7</sup> the set-aside programs and the goals are not presently coupled. That is, the set-aside programs do not ensure that certain groups get a share of government contracts corresponding to agencies' contracting goals. Quotas, in contrast, would require that certain categories of businesses (e.g., minority-owned) get fixed percentages of government contracts.<sup>8</sup>

Although the Competition in Contracting Act (CICA) generally requires "full and open competition" for government procurement contracts, set-asides are permissible competitive procedures.<sup>9</sup> CICA specifically authorizes competitions excluding all sources other than small businesses (i.e., set-asides) when such competitions serve to assure that a "fair proportion" of all government contracts are awarded to small businesses.<sup>10</sup>

Although these programs are under the authority of the Small Business Act, they are government-wide, and any executive branch agency may generally use them when procuring goods or services. The Small Business Administration (SBA) promulgates regulations that govern eligibility and other aspects of the programs, and it works with agencies to promote contracting with the various types of small businesses eligible for the programs. However, only in the case of contracts with small disadvantaged businesses under the authority of Section 8(a) of the Small Business Act are agency contracts at least nominally "offered" to SBA and then "subcontracted" to small businesses.<sup>11</sup>

## Eligibility Requirements

Under the Small Business Act of 1958, as amended, there are currently five set-aside programs, benefiting (1) small disadvantaged businesses participating in the 8(a) Minority Small Business and Capital Ownership Development Program (8(a) small businesses); (2) Historically

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<sup>5</sup> See, e.g., 48 C.F.R. §19.502-2 (total set-asides); 48 C.F.R. §19.502-3 (partial set-asides).

<sup>6</sup> See 15 U.S.C. §637(a) (set-asides for 8(a) small businesses); 15 U.S.C. §637(m) (set-asides for women-owned small businesses); 15 U.S.C. §644 (set-asides for small businesses generally); 15 U.S.C. §647a (set-asides for HUBZone small businesses); 15 U.S.C. §657f (set-asides for service-disabled veteran-owned small businesses).

<sup>7</sup> See *supra* note 2.

<sup>8</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (finding unconstitutional a municipal ordinance that required the city's prime contractors to award at least 30% of the value of each contract to minority subcontractors).

<sup>9</sup> 10 U.S.C. §2304(a) (generally requiring full and open competition in the procurements of defense agencies); 41 U.S.C. §107 (defining "full and open competition"); 41 U.S.C. §3301(a) (generally requiring full and open competition in the procurements of civilian agencies). For more on competition in federal contracting, see CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by Kate M. Manuel.

<sup>10</sup> 10 U.S.C. §2304(b); 41 U.S.C. §3303 (CICA provisions authorizing set-asides for small businesses); 15 U.S.C. §644(a) (describing when set-asides for small businesses are permissible); 48 C.F.R. §§6.203-6.207 (authorizing set-asides for small business generally, 8(a) small businesses, HUBZone small businesses, service-disabled veteran-owned small businesses, and women-owned small businesses).

<sup>11</sup> In practice, SBA often delegates its authority to subcontract to the procuring agencies, which then effectively use it to award contracts 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, December 18, 2009, available at <http://www.acq.osd.mil/dpap/dars/pgi/docs/PA.pdf>.

Underutilized Business Zone (HUBZone) small businesses; (3) women-owned small businesses; (4) service-disabled veteran-owned small businesses; and (5) small businesses not belonging to any of the prior four categories. A small business is one that is “independently owned and operated,” is “not dominant in its field of operation,” and meets any definitions or standards established by the Administrator of Small Business.<sup>12</sup> These standards focus primarily upon the size of the business, as measured by the number of employees, its annual average gross income, and the size of other businesses within the same industry.<sup>13</sup>

The various subcategories of small businesses (i.e., 8(a), HUBZone, women-owned, and service-disabled veteran-owned) must meet these general criteria, as well as specific criteria tied to their subcategory, such as follows:

- *Small businesses participating in the Minority Small Business and Capital Ownership Development Program (8(a) Program):*<sup>14</sup> 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.”<sup>15</sup> They must also “demonstrate[] potential for success,”<sup>16</sup> 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.<sup>17</sup> Members of certain racial and ethnic groups are presumed to be socially disadvantaged,<sup>18</sup> although other persons are also eligible for the 8(a) Program if they can prove that they are socially disadvantaged.<sup>19</sup> Alaska Native Corporations and Community Development Corporations are deemed to be economically disadvantaged for purposes of the 8(a) Program,<sup>20</sup> 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.<sup>21</sup> Businesses may generally participate in the 8(a) Program for no more than nine years.<sup>22</sup>

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<sup>12</sup> 15 U.S.C. §632(a)(1)-(2)(A).

<sup>13</sup> 13 C.F.R. §§121.101-121.108. For example, businesses in the field of “scheduled passenger air transportation” are “small” if they have fewer than 1,500 employees, while those in the data processing field are “small” if they have a gross income of less than \$25 million. 13 C.F.R. §121.201.

<sup>14</sup> This program also provides training and technical assistance to 8(a) small businesses. For more on the 8(a) program, see CRS Report R40744, *The “8(a) Program” for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by Kate M. Manuel and John R. Luckey.

<sup>15</sup> 13 C.F.R. §124.101.

<sup>16</sup> *Id.*

<sup>17</sup> 13 C.F.R. §124.107.

<sup>18</sup> 15 U.S.C. §637(a)(5); 13 C.F.R. §124.103(b)(1). This presumption is rebuttable and “may be overcome with credible evidence to the contrary.” 13 C.F.R. §124.103(b)(3).

<sup>19</sup> 13 C.F.R. §124.103(c)(1). Evidence must include (1) at least one objective distinguishing feature that has contributed to social disadvantage (e.g., race, gender, physical handicap, geographic isolation); (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world because of the disadvantage. See 13 C.F.R. §124.103(c)(2)(i)-(iii).

<sup>20</sup> See Alaska Land Status Technical Corrections Act, P.L. 102-415, §10, 106 Stat. 2112 (October 14, 1992) (codified at 43 U.S.C. §1626(e)); Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 (“A Community Development Corporation (CDC) is considered to be a socially and economically disadvantaged entity if the parent CDC is a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, et seq.”).

<sup>21</sup> 13 C.F.R. §124.104(c). This amount increases to \$750,000 for purposes of continuing eligibility for the program. See (continued...)

- *HUBZone small businesses*: HUBZone small businesses must typically be at least 51% unconditionally and directly owned and controlled by U.S. citizens and have their principal office in a HUBZone.<sup>23</sup> At least 35% of their employees must also generally reside in a HUBZone.<sup>24</sup> 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 base closure areas.<sup>25</sup>
- *Small businesses owned and controlled by women*: Women-owned small businesses 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.<sup>26</sup>
- *Service-disabled veteran-owned small businesses*: A service-disabled veteran-owned small business must be at least 51% unconditionally and directly owned and controlled by one or more service-disabled veterans.<sup>27</sup> 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.”<sup>28</sup> A disability is service-related when it “was incurred or aggravated ... in [the] line of duty in the active military, naval, or air service.”<sup>29</sup>

8(a) and HUBZone small businesses must also be certified by SBA to be eligible for the set-aside programs.<sup>30</sup> Service-disabled veteran-owned small businesses can generally self-certify as to their eligibility,<sup>31</sup> while women-owned small businesses can either (1) be certified by a federal agency, state government, or national certifying entity approved by the SBA, or (2) self-certify and provide adequate documentation in accordance with standards set by the SBA.<sup>32</sup>

The categories of 8(a), HUBZone, women-owned, and service-disabled veteran-owned small businesses are not mutually exclusive.<sup>33</sup> For example, a business could potentially be both HUBZone and service-disabled veteran-owned if it meets the requirements of both programs.

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(...continued)

13 C.F.R. §124.104(c)(2)(ii).

<sup>22</sup> 13 C.F.R. §124.2. Participants may drop out of, or be terminated from, the 8(a) Program before their ninth year of participation, but neither individual owners nor their firms may participate in the program again after exiting it for any reason. Group-owners (e.g., Alaska Native Corporations) are treated somewhat differently. See CRS Report R40744, *The “8(a) Program” for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by Kate M. Manuel and John R. Luckey.

<sup>23</sup> 13 C.F.R. §126.200(b)(1) & (3).

<sup>24</sup> 13 C.F.R. §126.200(b)(4).

<sup>25</sup> 15 U.S.C. §632(p)(1) & (4).

<sup>26</sup> 15 U.S.C. §632(n).

<sup>27</sup> 15 U.S.C. §632(q)(1) & (4).

<sup>28</sup> 38 U.S.C. §101(2).

<sup>29</sup> 38 U.S.C. §101(16).

<sup>30</sup> 13 C.F.R. §124.112(b) (8(a) small businesses); 13 C.F.R. §126.200 (HUBZone small businesses).

<sup>31</sup> 13 C.F.R. §125.15. However, veteran-owned and service-disabled veteran-owned small businesses must have their eligibility verified by the Department of Veterans Affairs (VA) in order to be eligible for preferences in certain VA contracts. See *infra* note 75 and accompanying text.

<sup>32</sup> 15 U.S.C. §637(m)(2)(F)(i)-(ii).

<sup>33</sup> *But see* S. 1334, §105(b) (proposing to limit the number of categories in which a small business may qualify).

## Set-Aside Programs

In addition to their eligibility requirements, the various set-aside programs under the Small Business Act differ in the types of contracting preferences they provide. Each program is unique as to (1) the conditions in which set-asides may be used; (2) whether and when sole-source awards may be made; and (3) whether agencies may grant price evaluation preferences to the bids or offers of small businesses in unrestricted competitions.

### Small Businesses Generally

Regulations promulgated under the authority of Section 15 of the Small Business Act of 1958 authorize agencies to set aside contracts for small businesses that are not 8(a) participants or HUBZone, women-owned, or service-disabled veteran-owned small businesses. These regulations provide 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) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns ...; and (2) award will be made at fair market price.<sup>34</sup>

These requirements—that the contracting officer reasonably expects that offers will be received from at least two responsible small businesses, and the award will be made at fair market price—are commonly known as the “rule of two” because of their focus on there being at least two small businesses.

When a total set-aside is not appropriate, a procurement generally can be partially set aside for small businesses if (1) the requirement is severable into two or more economic production runs or reasonable lots; (2) the contracting officer reasonably expects one or more small businesses have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price; and (3) the acquisition is not subject to simplified acquisition procedures.<sup>35</sup> However, partial set-asides cannot be used when procuring construction work.<sup>36</sup>

Agencies can sometimes also make “sole-source awards” to small businesses (i.e., awards proposed or made after soliciting and negotiating with only one source). However, the Small Business Act does not authorize sole-source awards to small businesses that are not 8(a) participants or HUBZone or service-disabled veteran-owned small businesses. Rather, any such awards must generally be made under the authority of the Competition in Contracting Act, which permits sole-source awards when only one source can supply the goods or services or when other

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<sup>34</sup> 48 C.F.R. §19.502-2(b)(1)-(2). \$150,000 is generally the “simplified acquisition threshold,” or the maximum dollar value of an acquisition that may use simplified acquisition procedures. Simplified acquisition procedures include purchase orders, blanket purchase agreements, government-wide commercial purchase cards, and other authorized alternatives to sealed bids or negotiated offers. *See* 41 U.S.C. §3305. Section 15, as amended, further requires that procurements whose anticipated values are between \$3,000 and \$150,000 be “reserved exclusively” for small businesses unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive as to market price and the quality and delivery of goods and services. 15 U.S.C. §644(j)(1); 48 C.F.R. §19.502-2(a).

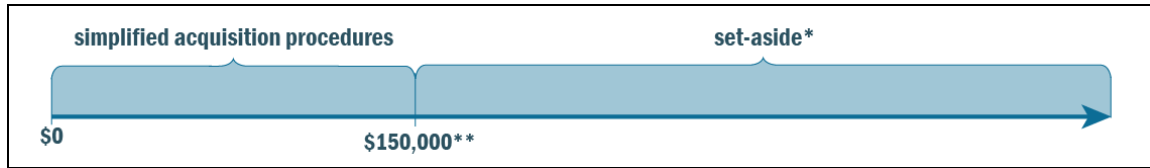
<sup>35</sup> 48 C.F.R. §19.502-3(a)(1)-(4).

<sup>36</sup> 48 C.F.R. §19.502-3(a).



circumstances justify a sole-source award (e.g., unusual and compelling circumstances; brand-name commercial items for resale).<sup>37</sup>

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



**Source:** Congressional Research Service.

\* The Small Business Act does not authorize sole-source awards to small businesses that are not 8(a) participants, or HUBZone or service-disabled veteran-owned small businesses.

\*\* \$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). Procurements whose value is between \$3,000 (\$15,000 in the case of contingency operations and disaster responses) and \$150,000 (\$300,000 in the case of contingency operations and disaster responses) are “exclusively reserved” for small businesses. However, in the case of such procurements, total small business set-asides generally may be conducted using simplified acquisition procedures. See 48 C.F.R. §19.502-5. Procurements whose value is over \$150,000 (\$300,000 in the case of contingency operations and disaster responses) generally cannot be conducted using simplified procedures.

## 8(a) Small Businesses

The earliest of the set-aside programs for specific types of small businesses was the set-aside program for “small businesses owned and controlled by socially and economically disadvantaged individuals.”<sup>38</sup> In 1978, Congress amended Section 8 of the Small Business Act to give agencies “discretion to [award] ... contract[s]” for goods or services, or to perform construction work, to the SBA for subcontracting to 8(a) small businesses.<sup>39</sup> Once an agency’s contract has been awarded to the SBA, it is then subcontracted to certified 8(a) small businesses.<sup>40</sup> The procedures for doing so 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 (\$6.5 million for manufacturing contracts)—and imposes different requirements upon contracts whose anticipated value is at or below the competitive threshold than 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 only be competed among 8(a) firms with the approval of the SBA’s Office of Business Development.<sup>41</sup> 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 eligible and responsible 8(a) firms,<sup>42</sup> and the award

<sup>37</sup> 10 U.S.C. §2304(c)(1)-(7) (procurements of defense agencies) & 41 U.S.C. §3304(a)(1)-(7) (procurements of civilian agencies). See also 48 C.F.R. §§6.302-1 to 6.302-7; CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, by Kate M. Manuel, supra note 9.

<sup>38</sup> See 15 U.S.C. §637(a); 48 C.F.R. §§19.800-19.812.

<sup>39</sup> 15 U.S.C. §637(a)(1)(A).

<sup>40</sup> 15 U.S.C. §637(a)(1)(D)(i). In practice, SBA generally delegates its authority to subcontract to the contracting agencies. See supra note 11.

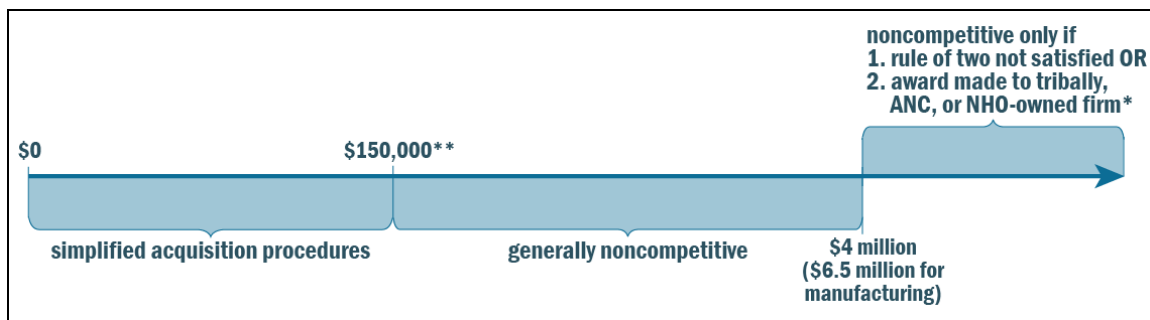
<sup>41</sup> 13 C.F.R. §124.506(c).

<sup>42</sup> Before any federal contract may be awarded, the contracting officer generally must determine that the contractor is “responsible” for purposes of that contract. See generally CRS Report R40633, *Responsibility Determinations Under* (continued...)

can be made at a fair market price).<sup>43</sup> 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.<sup>44</sup> Sole-source awards can also be made to 8(a) firms under other authority, such as CICA, in certain circumstances.<sup>45</sup>

Section 8(a) does not authorize agencies to grant price evaluation preferences to the bids or offers of small disadvantaged businesses in unrestricted competitions (i.e., competitions in which all firms may compete).<sup>46</sup> Small disadvantaged businesses, including 8(a) firms, were once eligible for price evaluation adjustments under other authorities. However, such authorities have expired and/or been found unconstitutional, and are no longer in effect.<sup>47</sup>

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



**Source:** Congressional Research Service.

\* Noncompetitive awards valued in excess of \$4 million (\$6.5 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). Procurements whose value is between \$3,000 (\$15,000 in the case of contingency operations and disaster responses) and \$150,000 (\$300,000 in the case of contingency operations and disaster responses) are “exclusively reserved” for small businesses. However, in the case of such procurements, total small business set-asides may generally be conducted using simplified acquisition procedures. See 48 C.F.R. §19.502-5.

(...continued)

*the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel.

<sup>43</sup> 15 U.S.C. §637(a)(1)(D)(i); 13 C.F.R. §124.506(a)(i)-(iii); 48 C.F.R. §19.805-1(a).

<sup>44</sup> *Id.* Such awards may be subject to certain conditions, e.g., that the award of the contract would be 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. 15 U.S.C. §637(a)(16)(A)(i)-(iii). See also 15 U.S.C. §636(j)(10)(I) (limits on firm value).

<sup>45</sup> See *supra* note 37 and accompanying text.

<sup>46</sup> A price evaluation adjustment could involve a reduction in the price of bids or offers by eligible parties. 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 adjustment 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” for the government. “Best value” is determined based upon price and various non-price evaluation factors selected by the agency. See 48 C.F.R. §15.304.

<sup>47</sup> 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 adjustments to the bids or offers of small disadvantaged businesses); Federal Acquisition Streamlining Act, P.L. 103-355, §7102, 108 Stat. 3368-69 (October 13, 1994) (price evaluation adjustment authority of civilian agencies expiring on September 30, 2003).

Procurements whose value is over \$150,000 (\$300,000 in the case of contingency operations and disaster responses) generally cannot be conducted using simplified procedures.

## HUBZone Small Businesses

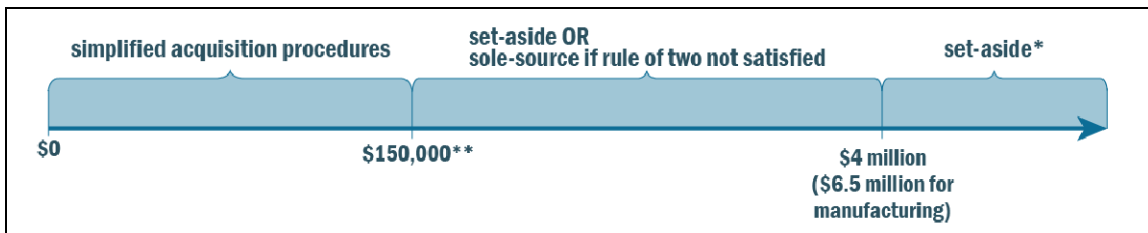
The next set-aside program created was that for HUBZone small businesses. Commonly known as the “HUBZone Act,” Title VI of the Small Business Reauthorization Act of 1997<sup>48</sup> provides that

a contract opportunity may be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.<sup>49</sup>

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;<sup>50</sup> (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.<sup>51</sup> Otherwise, sole-source awards may only be made to HUBZone firms under other authority, such as CICA.<sup>52</sup>

In addition, the HUBZone Act authorizes agencies to grant price evaluation adjustments of up to 10% to the bids or offers of HUBZone small businesses in unrestricted competitions.<sup>53</sup> 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.<sup>54</sup>

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



**Source:** Congressional Research Service.

<sup>48</sup> See P.L. 105-135, Title VI, §602(b)(1)(B), 111 Stat. 2629 (December 2, 1997) (codified at 15 U.S.C. §657a); 48 C.F.R. §19.1305.

<sup>49</sup> 15 U.S.C. §657a(b)(2)(B). The HUBZone Act originally provided that contracts “shall” be awarded via a HUBZone set-aside when these conditions are met. However, the 111<sup>th</sup> Congress amended the HUBZone Act, changing “shall” to “may.” See Small Business Jobs Act, P.L. 111-240, §1347(b)(1), 124 Stat. 2547 (September 27, 2010).

<sup>50</sup> For more on responsibility, see *supra* note 43.

<sup>51</sup> 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).

<sup>52</sup> See *supra* note 37.

<sup>53</sup> 15 U.S.C. §657a(b)(3).

<sup>54</sup> 48 C.F.R. §52.219-4(b)(i)-(ii).

\* Sole-source contracts valued in excess of \$4 million (\$6.5 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). Procurements whose value is between \$3,000 (\$15,000 in the case of contingency operations and disaster responses) and \$150,000 (\$300,000 in the case of contingency operations and disaster responses) are “exclusively reserved” for small businesses. However, in the case of such procurements, total small business set-asides generally may be conducted using simplified acquisition procedures. See 48 C.F.R. §19.502-5. Procurements whose value is over \$150,000 (\$300,000 in the case of contingency operations and disaster responses) generally cannot be conducted using simplified procedures.

## Women-Owned Small Businesses

Although set-asides for women-owned small businesses were not implemented until 2011, the set-aside program for them was the next one created.<sup>55</sup> The Small Business Reauthorization Act of 2000<sup>56</sup> amended Section 8(m) of the Small Business Act with the apparent intent to authorize set-asides for small businesses owned by one or more economically disadvantaged women when (1) the “rule of two” is satisfied; (2) the anticipated value of the contract will not exceed \$4 million (\$6.5 million in the case of manufacturing contracts); and (3) the proposed procurement involves an industry in which women-owned small businesses are underrepresented.<sup>57</sup>

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<sup>55</sup> Implementation was delayed by the requirement that set-asides be used only in industries in which women are underrepresented or substantially underrepresented. The 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 Fed. Reg. 73285 (December 27, 2007) (hereinafter *SBA 2007 Proposed Rule*). This proposed rule was widely criticized, including by some Members of Congress, and the 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, *Government Executive.com*, September 30, 2008, available at <http://www.govexec.com/dailyfed/0908/093008rb1.htm> (noting the SBA proposed to increase the number of industries from 4 to 31). 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*, 545 F.3d 1023 (Fed. Cir. 2008), 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. Although gender-conscious programs are subject to “intermediate” scrutiny, not strict scrutiny like the race-conscious program at issue in *Rothe*, the 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 Fed. Reg. 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 Fed. Reg. 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. Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Final Rule, 75 Fed. Reg. 62258 (October 7, 2010).

<sup>56</sup> See P.L. 106-554, Title VIII, §811, 114 Stat. 2763A–708 (December 21, 2000) (codified at 15 U.S.C. §637(m)).

<sup>57</sup> 15 U.S.C. §637(m)(2)(A)-(F) & (m)(4).

There is an ambiguity in the statute as this last requirement cross-references Section 8(m)(3),<sup>58</sup> which waives the requirement that owners be economically disadvantaged when a contract involves an industry in which women are *substantially* underrepresented.<sup>59</sup> A literal reading of the cross-reference suggests that only contracts involving industries in which women are substantially underrepresented qualify for the set-aside.<sup>60</sup> 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).<sup>61</sup> Section 8(m)(4) requires SBA to identify industries in which women are underrepresented, without adding the *substantially* modifier.<sup>62</sup> The regulations, therefore, distinguish between economically disadvantaged women-owned small businesses and other women-owned small businesses, authorizing set-asides for economically disadvantaged women-owned small businesses in industries in which they are *underrepresented* and for other women-owned small businesses only in industries in which they are *substantially underrepresented*.<sup>63</sup> 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,"<sup>64</sup> as well as unsupported by the legislative history.<sup>65</sup> 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 [women-owned small businesses] are merely underrepresented rather than substantially underrepresented."<sup>66</sup>

Section 8(m) does not authorize special sole-source awards to women-owned small businesses. Thus, any such awards to women-owned small businesses must be made under other authority, such as CICA.<sup>67</sup> Women-owned small businesses are also not eligible for price evaluation preferences in unrestricted competitions.

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<sup>58</sup> 15 U.S.C. §637(m)(2)(C) ("[T]he contract is for the procurement of goods or services with respect to an industry identified by the Administrator pursuant to paragraph (3))".

<sup>59</sup> 15 U.S.C. §637(m)(3) ("With respect to a small business concern owned and controlled by women, the Administrator may waive subparagraph (2)(A) [requiring the business be owned by economically disadvantaged women] if the Administrator determines that the concern is in an industry in which small business concerns owned and controlled by women are substantially underrepresented.").

<sup>60</sup> See *SBA 2007 Proposed Rule*, *supra* note 56 at 73286; *SBA 2010 Proposed Rule*, *supra* note 56 at 10031-32.

<sup>61</sup> See *SBA 2007 Proposed Rule*, *supra* note 56 at 73286; *SBA 2010 Proposed Rule*, *supra* note 56 at 10031-32.

<sup>62</sup> 15 U.S.C. §637(m)(4) ("The Administrator shall conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.").

<sup>63</sup> 48 C.F.R. §19.1505(b), (c).

<sup>64</sup> *SBA 2007 Proposed Rule*, *supra* note 56 at 73286.

<sup>65</sup> See *SBA 2010 Proposed Rule*, *supra* note 56 at 10031.

<sup>66</sup> *SBA 2007 Proposed Rule*, *supra* note 56 at 73286;

<sup>67</sup> See *supra* note 37.

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



**Source:** Congressional Research Service.

\* 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). Procurements whose value is between \$3,000 (\$15,000 in the case of contingency operations and disaster responses) and \$150,000 (\$300,000 in the case of contingency operations and disaster responses) are “exclusively reserved” for small businesses. However, in the case of such procurements, total small business set-asides generally may be conducted using simplified acquisition procedures. See 48 C.F.R. §19.502-5. Procurements whose value is over \$150,000 (\$300,000 in the case of contingency operations and disaster responses) generally cannot be conducted using simplified procedures.

### Service-Disabled Veteran-Owned Small Businesses

Finally, the Veterans Benefits Act (VBA) of 2003 amended the Small Business Act to establish the set-aside program for service-disabled veteran-owned small businesses.<sup>68</sup> The VBA authorizes agencies to set aside procurements for service-disabled veteran-owned small businesses whenever the “rule of two” is satisfied.<sup>69</sup>

The VBA also authorizes sole-source awards to service-disabled veteran-owned small businesses when (1) the contracting officer does not reasonably expect that two or more service-disabled veteran-owned small businesses will submit offers; (2) the anticipated award will not exceed \$3.5 million (\$6 million for manufacturing contracts); and (3) the award can be made at a fair and reasonable price.<sup>70</sup> Otherwise, sole-source awards may only be made to service-disabled veteran-owned small businesses under other authority, such as CICA.<sup>71</sup>

Service-disabled veteran-owned small businesses are not eligible for price evaluation preferences in unrestricted competitions.

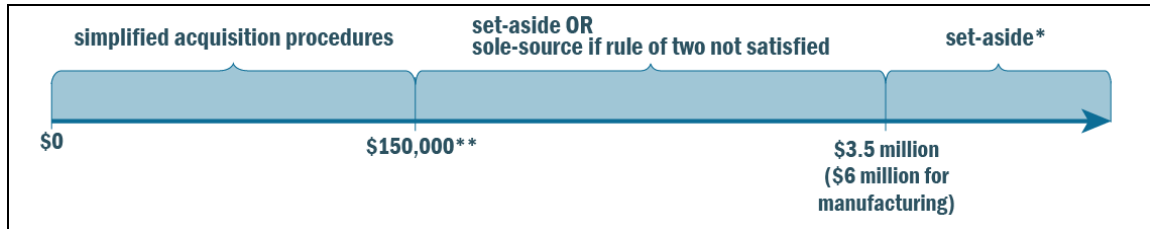
<sup>68</sup> See P.L. 108-183, Title III, §308, 117 Stat. 2662 (December 16, 2003) (codified at 15 U.S.C. §657f); 48 C.F.R. §19.1405.

<sup>69</sup> 15 U.S.C. §657f(b).

<sup>70</sup> 15 U.S.C. §657f(a)(1)-(3) (statutory requirements); 48 C.F.R. §19.1406(a) (increasing the price thresholds).

<sup>71</sup> See *supra* note 37.

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



**Source:** Congressional Research Service.

\* Sole-source contracts valued in excess of \$3.5 million (\$6 million for manufacturing contracts) 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). Procurements whose value is between \$3,000 (\$15,000 in the case of contingency operations and disaster responses) and \$150,000 (\$300,000 in the case of contingency operations and disaster responses) are “exclusively reserved” for small businesses. However, in the case of such procurements, total small business set-asides generally may be conducted using simplified acquisition procedures. See 48 C.F.R. §19.502-5.

Procurements whose value is over \$150,000 (\$300,000 in the case of contingency operations and disaster responses) generally cannot be conducted using simplified procedures.

## Set-Asides Under the 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.<sup>72</sup> However, unlike the program for veteran-owned small businesses under the Small Business Act, 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, veteran-owned small businesses must have their eligibility verified by VA.<sup>73</sup> They may not self-certify as to their eligibility as they can for the service-disabled veteran-owned small business set-aside program under the Small Business Act.<sup>74</sup>

The 2006 act authorizes VA to set aside procurements for veteran-owned small businesses, as well as make sole-source awards to them, in order to reach VA’s goals for contracting and subcontracting with veteran-owned small businesses.<sup>75</sup> Contracts whose value is less than

<sup>72</sup> 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.

<sup>73</sup> 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 decision that a protester was not listed in VA’s VetBiz database as eligible for a set-aside award under the 2006 act).

<sup>74</sup> See *supra* note 31 and accompanying text.

<sup>75</sup> 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 veteran-owned small businesses. He or she is also required to establish a separate goal for the participation of service-disabled veteran-owned small businesses in agency contracts and subcontracts. 38 U.S.C. §8127(a)(1)(A). However, the latter goal can be no less than the government-wide goal for the percentage of contract and subcontract dollars awarded to service-disabled veteran-owned small (continued...)

\$150,000 may be awarded on a set-aside or sole-source basis at the contracting officer's discretion.<sup>76</sup> 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 veteran-owned small businesses will submit offers, and the award can be made at a fair and reasonable price "that offers best value to the United States."<sup>77</sup> 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;<sup>78</sup> (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."<sup>79</sup>

Under the 2006 act, VA contracts awarded on a set-aside or sole-source basis to service-disabled veteran-owned small businesses have "priority" over those awarded to veteran-owned small businesses.<sup>80</sup> Contracts awarded to veteran-owned small businesses, in turn, have precedence over those awarded through the 8(a) or HUBZone programs, or "pursuant to any other small business contracting preference."<sup>81</sup>

## Developments in the Law Regarding Set-Asides

The 111<sup>th</sup> Congress enacted legislation (P.L. 111-240) that amended the statutory language which the Government Accountability Office (GAO) and U.S. Court of Federal Claims had construed, in a series of decisions issued in 2008-2010, as requiring agencies to give set-asides for HUBZone small businesses "precedence" over those for 8(a) and service-disabled veteran-owned small businesses.<sup>82</sup> However, in 2010-2011, GAO and the Court of Federal Claims issued several other decisions interpreting the statutes and regulations governing the set-aside programs that could also affect the number of awards to such businesses. For example, in *Aldevra*, GAO found that, in certain circumstances, the VA must use set-asides for veteran-owned small businesses, instead of procuring goods or services through the Federal Supply Schedules.<sup>83</sup> Some commentators have

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(...continued)

businesses 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).

<sup>76</sup> 38 U.S.C. §8127(b).

<sup>77</sup> 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 may be used.

<sup>78</sup> For more on responsibility, see *supra* note 43.

<sup>79</sup> 38 U.S.C. §8127(c)(1)-(3). *See* *Crosstown Courier Serv., Inc.*, B-406336 (Apr. 23, 2012) (finding that there was no requirement that VA conduct market research to determine if the procurement should be set aside for small businesses because the act grants VA authority to use "noncompetitive procedures" for small purchases).

<sup>80</sup> 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 service-disabled veteran-owned small businesses, instead of a set-aside for veteran-owned small businesses, in part, because the 2006 act provides that set-asides for service-disabled veteran-owned small businesses have "priority" over those for veteran-owned small businesses).

<sup>81</sup> 38 U.S.C. §8127(i)(1)-(4).

<sup>82</sup> *See generally* 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 Kate M. Manuel.

<sup>83</sup> B-405271; B-405524 (October 11, 2011).



suggested that this decision could result in over \$3 billion in additional spending by the VA with veteran-owned small businesses,<sup>84</sup> although such purchases could potentially be more expensive for the government than purchases under the Schedules.<sup>85</sup>

## **Market Research Underlying Set-Aside Determinations**

By upholding challenged market research practices, several recent decisions by GAO and the Court of Federal Claims highlight the broad discretion that contracting officers have in determining whether to use a small business set-aside when procuring particular goods or services. “Market research” is the term used to describe the process whereby agencies “collect[] and analyz[e] information about capabilities within the market to satisfy agency needs.”<sup>86</sup> The Federal Acquisition Regulation (FAR) requires contracting officers to conduct market research before developing new requirements or soliciting offers.<sup>87</sup> However, the FAR is generally silent as to how that market research should be conducted, particularly for purposes of a set-aside determination.<sup>88</sup> This silence is arguably significant because the determination as to whether to use a small business set-aside is based upon whether there is a “reasonable expectation” that at least two small businesses will submit offers and the award will be made at a fair market price.

### *Assessment and Training Solutions Consulting Corporation v. United States*

The Court of Federal Claims’ May 27, 2010, decision in *Assessment and Training Solutions Consulting Corporation v. United States* arose from the Army’s decision to use an 8(a) set-aside in procuring medical training and support services.<sup>89</sup> The incumbent contractor, which was not an 8(a) firm, alleged that this decision was based on inadequate market research.<sup>90</sup> The contracting officer had issued a “sources sought” notice, “seeking to identify 8(a) certified small business sources capable of providing instruction,” as well as searched the SBA Dynamic Small Business website, the Central Contractor Registration,<sup>91</sup> and the Internet.<sup>92</sup> The “sources sought” notice, in

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<sup>84</sup> See, e.g., Kathleen Miller, *Veteran-Owned Suppliers May Gain \$3 Billion from Griddle Fight*, *Bloomberg Gov’t*, November 14, 2011.

<sup>85</sup> *Id.* (noting that there is “less price sensitivity among buyers” in a set-aside, than in a “straight-up competition,” and that the contracting workforce “would be overwhelmed if it ha[s] to research whether veteran-owned companies could provide the ‘tens or hundreds of thousands’ of purchases it makes through the supply schedules”).

<sup>86</sup> 48 C.F.R. §2.101.

<sup>87</sup> 48 C.F.R. §10.001(a)(1)-(2).

<sup>88</sup> The FAR provides only that “[a]gencies must ... take advantage (to the maximum extent practicable) of commercially available market research methods in order to effectively identify the capabilities of small businesses and new entrants into Federal contracting that are available in the marketplace for meeting the requirements of the agency in furtherance of (A) [a] contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and (B) [d]isaster relief to include debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities” and that “[w]hen performing market research, [agencies] should consult with the local Small Business Administration procurement center representative.” See 48 C.F.R. §10.001(a)(2)(vi) & (c)(1). See also *Metasoft, LLC*, B-402800 (July 23, 2010), at ¶ 6 (“[T]he use of any particular method of assessing the availability of small businesses is not required.”).

<sup>89</sup> 92 Fed. Cl. 722 (2010).

<sup>90</sup> *Id.* at 727.

<sup>91</sup> Prospective federal contractors are generally required to register in the Central Contractor Registration. 48 C.F.R. §4.1201(a).

<sup>92</sup> 92 Fed. Cl. at 725-26.

particular, yielded nine responses.<sup>93</sup> However, only four were from 8(a) small businesses, and only one was from an 8(a) small business that “demonstrated a capability to perform the required services.”<sup>94</sup> The contracting officer proposed to SBA that the contract be offered as a sole-source award under Section 8(a).<sup>95</sup> However, the procurement was ultimately offered as an 8(a) set-aside after SBA identified another 8(a) firm capable of fulfilling the agency’s requirements.<sup>96</sup> In protesting this set-aside determination, the incumbent contractor alleged that (1) the materials furnished by the contracting officer to potential offerors in the “sources sought” notice were “not detailed enough to permit reasonable responses,” and (2) the responses received, along with the other market research, did not support the decision to set aside the procurement for 8(a) firms.<sup>97</sup>

The court disagreed, finding that Subpart 10.001 of the FAR gives contracting officers broad discretion in conducting market research.<sup>98</sup> The court noted that while Subpart 10.001 requires agencies to “[c]onduct market research *appropriate to the circumstances*” before taking certain actions, it also indicates that the extent of market research varies depending on the circumstances and directs agencies not to request “more than the minimum information necessary.”<sup>99</sup> “Given this regulatory guidance and the discretion afforded . . . contracting officers,” the court found that it “[could not] conclude that the market research conducted by the Contracting Officer was inadequate nor that the Contracting Officer’s 8(a) set-aside decision was unreasonable.”<sup>100</sup> The court also rejected the protester’s argument that FAR Subpart 19.805-1 contemplates “two separate ‘offers’” of procurements to the SBA, one for sole-source awards and one for set-aside awards.<sup>101</sup> Were this the case, the challenged procurement could have been found to be in violation of the regulation, since the Army initially offered the procurement to the SBA as a sole-source award, but the procurement was ultimately conducted as a set-aside. However, the court found that FAR Subpart 19.805-1 “does not provide for two separate offers but rather directs how an acquisition is to be awarded once it is ‘offered to the SBA under the 8(a) Program.’”<sup>102</sup>

### ***Metasoft, LLC***

Several months later, GAO, which had found that it lacked jurisdiction over the protest in *Assessment and Training Solutions*,<sup>103</sup> also addressed what constitutes adequate market research for a set-aside determination. In its July 30, 2010, decision in *Metasoft, LLC*, GAO upheld the Navy’s decision not to set aside a procurement of software support services for small

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<sup>93</sup> *Id.* at 725.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 726.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 729.

<sup>98</sup> *Id.* at 731.

<sup>99</sup> *Id.* (quoting 48 C.F.R. §10.001(a)-(b)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 732 (“Plaintiff insists that the language of FAR 19.805-1 ‘unquestionably implies that there are two separate ‘offers,’ one for sole source 8(a) awards, and one for competitive 8(a)’ and that ‘[a]n agency does not comply with SBA regulations merely by saying . . . that a single offering may be used for both competitive and sole source acquisitions.’”).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 727. The court, in contrast, found that the dispute was within its jurisdiction because the protester was an “interested party” for standing purposes since, if it succeed in challenging the decision to use an 8(a) set-aside, it could compete in any subsequent small business set-aside or unrestricted competition. *Id.* at 728.

businesses.<sup>104</sup> Prior to issuing the challenged solicitation, the Navy had issued a “sources sought” notice to identify small businesses interested in competing for the requirement.<sup>105</sup> However, although five small businesses responded, the Navy decided not to set aside the procurement for small businesses because it determined that none of these firms was capable of providing at least 50% of the services itself, as is generally required by statutory and regulatory “limitations on subcontracting.”<sup>106</sup> An 8(a) small business challenged this decision, asserting that the acquisition should have been totally or partially set-aside for small businesses.<sup>107</sup> The protester specifically alleged that, in determining not to set aside the procurement, the Navy misjudged the protester’s capacity to perform at least 50% of the requirements in question, as well as based its assessment of other firms’ capabilities upon incomplete information.<sup>108</sup>

GAO disagreed, noting that

because the record fails to demonstrate that small business concerns were denied access to information necessary for the preparation of responses to the sources sought notice, and the protester has not raised any other timely challenges to the agency’s findings pertaining to small businesses other than itself, Metasoft has not shown that the contracting officer abused his discretion in concluding that offers from at least two capable small business offerors could not be expected.<sup>109</sup>

GAO further found that the Navy’s determination not to use a partial set-aside was reasonable.<sup>110</sup> According to GAO, while FAR Subpart 19.502-3 requires agencies to set aside a portion of an acquisition for small businesses when the requirement is severable, an agency may consider whether it is in the government’s best interest to award the services separately, as well as whether the services may be defined in such a way as to permit them to be awarded separately, in making this determination.<sup>111</sup> The protester had asserted that the requirements here were severable because the agency was able to define certain services for inclusion in the first task order issued under the contract, leaving other tasks for later orders.<sup>112</sup> The agency, in contrast, had claimed that “the delivery orders under the contract are so integrally related that only a single source can reasonably perform the work.”<sup>113</sup>

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<sup>104</sup> B-402800 (July 23, 2010), at ¶¶ 1-2.

<sup>105</sup> *Id.* at ¶ 3.

<sup>106</sup> *Id.* at ¶ 4. Under these limitations, small businesses awarded a contract under the authority of the Small Business Act are generally required to perform certain percentages of the work under the contract. These percentages vary depending upon the type of the contract (e.g., service, manufacturing, construction). *See generally* CRS Report R40998, *The Inapplicability of Limitations on Subcontracting to “Preference Contracts” for Small Businesses: Washington-Harris Group*, by Kate M. Manuel.

<sup>107</sup> B-402800, at ¶ 5.

<sup>108</sup> *Id.* at ¶ 7.

<sup>109</sup> *Id.* at ¶ 9.

<sup>110</sup> *Id.* at ¶¶ 10-11.

<sup>111</sup> *Id.* at ¶ 10.

<sup>112</sup> *Id.* at ¶ 11.

<sup>113</sup> *Id.* at ¶ 10.

### ***Gear Wizzard, Inc. v. United States***

A later Court of Federal Claims decision in *Gear Wizzard, Inc. v. United States* similarly upheld a contracting officer's decision to cancel a solicitation designated as a small business set-aside because the contracting officer did not reasonably expect offers from at least two small businesses.<sup>114</sup> The Defense Logistics Agency (DLA) had originally issued a solicitation for shifter forks, valued at approximately \$73,551, as a small business set-aside.<sup>115</sup> It received 19 quotes in response to the solicitation, 17 of which were from small businesses.<sup>116</sup> However, after the closing date for offers, DLA sought to dissolve the set-aside on the grounds that there was not a reasonable expectation of offers from two or more small business offering the products of small business manufacturers, as is generally required under the "non-manufacturer rule" contained in FAR Subpart 19.502-2.<sup>117</sup> The "non-manufacturer rule" generally requires that, for small business set-asides other than for construction or services, "any concern proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufacturer."<sup>118</sup> The plaintiff objected to the agency's determination to dissolve the set-aside, as well as its subsequent attempts to procure shifter forks without using a set-aside. Specifically, the protester argued that the agency violated FAR Subpart 19.502-2(a), which states that "[i]f the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm," when the agency declined to make an award to it under the initial solicitation.<sup>119</sup> The protester further asserted that the agency violated FAR Subpart 19.502-2(a) by failing to set-aside the procurement for small businesses, given that at least two small businesses could be expected to make offers to supply its products.<sup>120</sup> Subpart 19.502-2(a) provides that

[e]ach acquisition of supplies ... exceeding \$3,000 ... but not over \$150,000 ... is automatically reserved exclusively for small business concerns and should be set aside for small business unless the contracting officer determines that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market price, quality, and delivery.

The court disagreed, finding that the agency had properly withdrawn the set-aside in accordance with FAR Subpart 19.506, which authorizes contracting officers to withdraw a small business set-aside prior to the award of a contract if they "consider[] that award would be detrimental to the public interest (e.g., payment of more than a fair market price)."<sup>121</sup> In reaching this conclusion, the court noted that the procurement history and market research in the administrative record supported the conclusion that the solicitation should not have been issued as a small business set-aside, while nothing in the record supported the plaintiff's contention that the cancellation was pretextual.<sup>122</sup> The court further noted that FAR 19.502-2(a) did not give the plaintiff "an absolute

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<sup>114</sup> 99 Fed. Cl. 266 (2011).

<sup>115</sup> *Id.* at 268.

<sup>116</sup> *Id.* at 269.

<sup>117</sup> *Id.*

<sup>118</sup> See 48 C.F.R. §19.502-2(c). The original solicitation at issue in *Gear Wizzard* specified that only two manufacturers offered approved shifter forks, the protester and another concern that was not small. See 99 Fed. Cl. at 269.

<sup>119</sup> 99 Fed. Cl. at 272.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 275-76.

<sup>122</sup> *Id.* at 278.

right to the award” because it encourages—but does not require—awards to small businesses that are the sole bidders or offers on a set-aside procurement.<sup>123</sup> Because it found that the agency had reasonably determined that the “rule of two” was not satisfied, the court also rejected the assertion that the agency was required to use a small business set-aside.<sup>124</sup>

Taken together, these three decisions illustrate the high burden that protesters must meet in order to disturb a set-aside determination because of alleged flaws in agency market research.<sup>125</sup> The deference that judicial and other tribunals accord to agency market research practices is, arguably, largely due to the FAR’s silence as to what constitutes adequate market research for purposes of a set-aside determination. However, this silence could result in agencies using set-asides less often than they potentially could. Factoring the best interests of the government into severability determinations, as well as granting agencies broad authority to decline to make awards to small businesses that are the sole bidders or offerors in set-aside procurements could have similar effects. For this reason, several commentators have recognized *Assessment and Training Solutions Consulting*, *Metasoft*, and *Gear Wizzard* as potentially significant decisions.<sup>126</sup>

## **Market Research for and Withdrawal of Requirements from 8(a) Set-Asides**

Other recent decisions construed the statutes and regulations governing set-asides for 8(a) firms.<sup>127</sup> First, in its April 2, 2010, decision in *Infiniti Solutions LLC v. United States*, the Court of Federal Claims addressed what constitutes permissible market research to support the award of a sole-source contract valued below the “competitive threshold” (generally \$4 million).<sup>128</sup> The dispute here centered upon a small business regulation, 13 C.F.R. §124.503(e), which provides that

[e]xcept for requirements for architectural and engineering services, SBA will not authorize formal technical evaluations for sole source 8(a) requirements. A procuring activity: (1) [m]ust request that a procurement be a competitive 8(a) award if it requires formal technical evaluations of more than one Participant for a requirement below the applicable competitive

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<sup>123</sup> *Id.* at 280. The court noted that the regulation in question uses “‘should,’ a permissive term that ‘reserves discretion to the agency,’” instead of “‘shall,’ ‘will’ or some other ‘mandatory’ term. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> More recent decisions arguably give the same deference to agency market research practices. *See, e.g.*, *Encompass Group, LLC*, B-406346 (Mar. 23, 2012) (upholding VA’s determination to set aside a procurement for service-disabled veteran-owned small businesses because it had conducted market research from which it determined that numerous eligible businesses were capable and interested in performing the requirements); *Kevcon, Inc.*, B-406101; B-406101.2; B-406101.3 (Feb. 6, 2012) (upholding VA’s decision not to set aside a procurement because its market research suggested it would not receive offers from two or more service-disabled veteran-owned small businesses).

<sup>126</sup> *See, e.g.*, Daniel Seiden, COFC: Small Business Set-Aside Cancellation Was Rational, Based on Procurement History, 95 *Fed. Cont. Rep.* 688 (June 28, 2011).

<sup>127</sup> One decision not addressed here, *Greystones Consulting Group, Inc.*, would have allowed agencies to permit contractors who are found to be other than small to continue performing contracts set aside for small businesses in certain circumstances. *See* B-402835 (June 28, 2010). However, regulations promulgated by SBA subsequent to this decision effectively overturned it by requiring contracting officers to terminate an ongoing contract if SBA concludes that the awardee is other than small, unless an appeal is timely filed with SBA’s Office of Hearings and Appeals. *See* Small Business, Small Disadvantaged Business, HUBZone, and Service-Disabled Veteran-Owned Business Status Protest and Appeal Regulations, 76 *Fed. Reg.* 5680 (February 2, 2011) (codified at 13 C.F.R. §121.1009(g)(2)(i)).

<sup>128</sup> 92 *Fed. Cl.* 347 (2010).

threshold amount; and (2) [m]ay conduct informal assessments of several Participants' capabilities to perform a specific requirement, so long as the statement of work for the requirement is not released to any of the Participants being assessed.

Where these conditions are not met and the procuring activity competes a requirement among 8(a) firms before offering the requirement to SBA and receiving SBA's formal acceptance of the requirement, the procurement generally may not be conducted through the 8(a) Program.<sup>129</sup>

In *Infiniti*, the Department of Housing and Urban Development (HUD) argued that a process wherein vendors made presentations in response to a draft statement of work constituted permissible market research.<sup>130</sup> HUD made a sole-source award to a competitor of Infiniti based, in part, upon these presentations.<sup>131</sup> Infiniti protested, asserting that HUD awarded an "illegal sole source contract" without following the procedures set forth in the FAR or, alternatively, awarded the contract competitively on the basis of unstated evaluation criteria.<sup>132</sup> GAO dismissed the protest, finding that HUD's actions constituted permissible "informal assessments" under 13 C.F.R. §124.503(e)(2) because "no solicitation was issued," and "there was neither a finalized statement of work nor a list of evaluation factors for award."<sup>133</sup> The court disagreed. According to the court, the "draft" statement of work transmitted to vendors by HUD constituted a "statement of work" within the meaning of 13 C.F.R. §124.503(e)(2), and not merely a synopsis of the requirements.<sup>134</sup> In reaching its conclusion, the court noted that the work statement incorporated into the awardee's contract did not "differ in any material respect" from the draft work statement sent to vendors.<sup>135</sup> However, while this conclusion rested upon the fact that the "draft" statement of work was essentially the same as the final one, the court's willingness to reverse GAO and look beyond the agency's characterization of its conduct is arguably significant. A contrary decision could have allowed agencies to avoid the prohibition upon competing requirements below the competitive threshold simply by characterizing statements of work as "drafts."

In a subsequent decision, *K-LAK Corporation v. United States*, the Court of Federal Claims rejected a challenge to an agency's determination to procure through the Federal Supply Schedules services that it had previously procured through the 8(a) Program.<sup>136</sup> The Air Force, which had previously obtained credit reports from an 8(a) small business, opted not to extend that business's contract after learning that credit reports were available at half the price through the Federal Supply Schedules.<sup>137</sup> The incumbent contractor protested, alleging that the agency's proposed course of conduct violated an SBA regulation limiting the "release" of requirements

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<sup>129</sup> See 13 C.F.R. §124.502(a) (prohibiting agencies from competing requirements among 8(a) firms before they are accepted by SBA). However, offers of requirements below the simplified acquisition threshold (generally \$150,000) are "assume[d]" to have been accepted at the time they are made, and the agency may proceed with the award if it does not receive a reply from SBA within two days of sending the offer. 13 C.F.R. §124.503(a)(4)(i). See also *Eagle Collaborative Computing Services, Inc.*, B-401043.3 (January 28, 2011) (finding that an agency properly awarded a sole-source contract valued below the simplified acquisition threshold even though SBA never accepted the requirements).

<sup>130</sup> 92 Fed. Cl. at 353.

<sup>131</sup> *Id.* at 354.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 358.

<sup>135</sup> *Id.*

<sup>136</sup> 98 Fed. Cl. 1 (2011).

<sup>137</sup> *Id.* at 2.

from the 8(a) Program.<sup>138</sup> At the time of the procurement, this regulation did not expressly contemplate—much less authorize—withdrawal of a requirement based on a decision to use the Federal Supply Schedules instead of an 8(a) contract,<sup>139</sup> and SBA agreed with the protester that it lacked authority to release the requirement from the 8(a) Program.<sup>140</sup> The Air Force, in contrast, asserted that its proposed use of the Federal Supply Schedules was “not the same” as withdrawal of the requirement from the 8(a) Program.<sup>141</sup>

The court agreed with the Air Force, finding that the agency was not required to comply with the Rule of Two or “any of the other regulations applicable to small businesses” because it decided to use the Federal Supply Schedules after the incumbent contractor’s contract expired.<sup>142</sup> In particular, the court noted that procuring agencies are free to decide whether to use the Federal Supply Schedules without regard to whether the requirement has been or could be met though a set-aside program, and 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.<sup>143</sup> While regulations promulgated by SBA on February 11, 2011, impose additional limitations upon withdrawal of requirements from the 8(a) Program, these regulations do not appear to definitively address whether the Federal Supply Schedules are “exempt” from small business set-asides.<sup>144</sup> In addition, the court’s view that the “regulations applicable to small businesses” do not apply to contracts that have “expired” could significantly affect implementation of small business programs generally if it were widely adopted.

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<sup>138</sup> *Id.* at 4.

<sup>139</sup> 13 C.F.R. §124.504(e) (2010) (“In limited instances, SBA may decline to accept the offer of a follow-on or renewal 8(a) acquisition to give a concern previously awarded the contract that is leaving or has left the 8(a) BD [Business Development] program the opportunity to compete for the requirement outside the 8(a) BD program. . . . SBA will consider release only where (i) [t]he procurement awarded through the 8(a) BD program is being or was performed by either a Participant whose program term will expire prior to contract completion, or, by a former Participant whose program term expired within one year of the date of the offering letter; (ii) [t]he concern requests in writing that SBA decline to accept the offer prior to SBA’s acceptance of the requirement for award an 8(a) contract; and (iii) [t]he concern qualifies as a small business for the requirement now offered to the 8(a) BD program.”).

<sup>140</sup> 98 Fed. Cl. at 4.

<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Id.* at 6.

<sup>143</sup> *Id.* at 6-7 (relying, in part, on Subparts 8.404(a), 38.101(e), and 19.502-1(b) of the FAR). *Cf.* Edmond Computer Co., B-402863; B-402864 (August 25, 2010) (re-affirming that the FAR’s provisions regarding small business set-asides do not apply to procurements conducted through the Federal Supply Schedules). It is unclear whether or how the relationship between small business set-asides and the Federal Supply Schedules might be affected by the Small Business Jobs Act, which called for the Office of Federal Procurement Policy to establish guidance under which agencies may set aside parts of multiple award contracts. P.L. 111-240, §1331. While the contracts underlying the Federal Supply Schedules can be characterized as multiple award contracts, such contracts are governed by different sections of the FAR than other multiple-award contracts. *See, e.g.,* 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](http://www.arnoldporter.com/resources/documents/CA_GAOsDelexDecision&GSAsResponse_012609.pdf).

<sup>144</sup> *See* Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 76 Fed. Reg. 8221 (February 11, 2011) (codified at 13 C.F.R. 124.504(d)(2011) (“Except as set forth in (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on or renewable acquisition must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition.”).

## Applicability of Non-manufacturer Rule and Price Evaluation Preferences in HUBZone Set-Asides

Yet other decisions have clarified the meaning of the statutes and regulations governing set-asides, sole-source awards, and price evaluation preferences for HUBZone small businesses. First, in its January 19, 2011, decision in *B&B Medical Services, Inc.*, GAO clarified that the “non-manufacturer rule” does not apply to procurements set aside for HUBZone small businesses.<sup>145</sup> The “non-manufacturer rule” provides that:

In order to qualify as a small business concern for a small business set-aside, service-disabled veteran-owned small business set-aside, [women-owned small business] or [economically disadvantaged women-owned small business] set-aside, or 8(a) contract to provide manufactured products or other supply items, an offeror must either: (1) [b]e the manufacturer or producer of the end item being procured (and the end item must be manufactured or produced in the United States); or (2) ... supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement.<sup>146</sup>

The protesters in *B&B Medical Services* challenged the terms of VA’s request for proposals for home oxygen equipment rental and services, alleging that VA failed to apply the non-manufacturer rule to the procurement, and that its failure to do so resulted in it improperly using a HUBZone set-aside.<sup>147</sup> GAO disagreed, finding that “by the plain language” of the Small Business Act, the non-manufacturer rule applies only to set-asides for 8(a) firms or for small businesses generally.<sup>148</sup> GAO further noted that the non-manufacturer rule does not apply to contracts for services, such as those proposed by VA.<sup>149</sup> GAO’s decision highlights a difference between the set-aside programs (i.e., whether they are subject to the non-manufacturer rule) that could be of interest to Congress given its recent efforts to promote “parity” among the set-aside programs.<sup>150</sup> Under this decision, HUBZone small businesses may compete for set-aside contracts by supplying the products of large businesses, while 8(a) firms and small businesses generally typically must supply the products of small businesses.

Later, in *Mission Critical Solutions v. United States*, the U.S. Court of Federal Claims found that the SBA regulations regarding HUBZone set-asides require that 35% of a HUBZone firm’s employees reside in a HUBZone both at the time of the firm’s offer *and* at the time of award.<sup>151</sup> The case arose from SBA’s determination to decertify a HUBZone firm, only 5.5% of whose

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<sup>145</sup> *B&B Medical Services, Inc.*; *Rotech Healthcare, Inc.*, B-404241; B-404241.2 (January 19, 2011).

<sup>146</sup> 13 C.F.R. §121.406(a).

<sup>147</sup> B-404241; B-404241.2, at ¶ 9.

<sup>148</sup> *Id.* at ¶ 13. GAO’s analysis here potentially raises some questions about the SBA regulation setting forth the non-manufacturer rule, because this regulation encompasses set-asides for all small businesses other than HUBZone small businesses, while GAO found that only the statutory provisions governing set-asides for 8(a) small businesses and small businesses generally include the non-manufacturer rule. *Id.*

<sup>149</sup> *Id.* at ¶ 17. Because the non-manufacturer rule did not apply, GAO did not have to address the protesters’ argument that no HUBZone or small business manufacturers were available, although it noted that the record contains “sufficient evidence” supporting the agency’s determination. *Id.* at ¶ 19.

<sup>150</sup> See P.L. 111-240, §1347(b)(1), 124 Stat. 2547 (amending the HUBZone act to remove the basis upon which GAO and the Court of Federal Claims found that HUBZone set-asides are mandatory).

<sup>151</sup> 96 Fed. Cl. 657 (2011).



employees currently lived in a HUBZone.<sup>152</sup> The HUBZone Act and its implementing regulations generally require that at least 35% of a firm's employees reside in a HUBZone for it to be eligible for certification as a HUBZone small business.<sup>153</sup> However, the firm in question challenged its decertification, alleging that the 35% residency requirement in 13 C.F.R. §126.200(b)(4) applies only to firms seeking HUBZone certification, and that it, as a current holder of a HUBZone contract, was instead required only to "attempt to maintain" 35% residency under 13 C.F.R. §126.103.<sup>154</sup> Thus, the firm alleged that it was a qualified HUBZone small business when it bid for and was awarded an Air Force contract. SBA disagreed with the firm's proposed interpretation of its regulations, asserting that the "attempt to maintain" standard in 13 C.F.R. §126.103 applied only to the performance of an existing contract, and that a firm was not excused from meeting the 35% residency requirement for a new contract because it was currently performing a prior contract.<sup>155</sup> The court agreed with SBA because "[a]s a general rule, the court defers 'even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly suited to speak to its original intent in adopting the regulation.'"<sup>156</sup>

While noting that the agency's interpretation would not necessarily control were it "plainly erroneous or inconsistent" with the regulations, the court found that the agency's interpretation here was neither plainly erroneous nor inconsistent with the regulations since the plaintiff's division of the regulations into those applicable to firms seeking certification and those applicable to firms seeking to remain qualified is "not so clear cut."<sup>157</sup> In particular, the court noted several provisions that appear to address both obtaining *and* maintaining certification.<sup>158</sup> The court also agreed with SBA's argument that plaintiff's proposed interpretation would thwart Congress's intent in enacting the HUBZone program, which was to revitalize economically depressed areas by promoting employment there.<sup>159</sup> A contrary decision could have allowed HUBZone firms to evade the residency requirements while their certification lasts,<sup>160</sup> so long as they had a contract at the time they submitted bids or offers for a new contract.

Finally, in *The Argos Group, LLC*, GAO found that price evaluation preferences for HUBZone small businesses apply to leases, as well as "procurement contracts."<sup>161</sup> This decision arose from

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<sup>152</sup> *Id.* at 660-61.

<sup>153</sup> *Id.* at 659 (citing 13 C.F.R. §126.200(b)(4)).

<sup>154</sup> *Id.* at 664-65.

<sup>155</sup> *Id.* at 663.

<sup>156</sup> *Id.* at 662 (quoting *Gose v. United States Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006)).

<sup>157</sup> *Id.* at 665.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Cf.* 13 C.F.R. §126.500 (requiring HUBZone firms to recertify every three years).

<sup>161</sup> B-406040 (Jan. 24, 2012). In an earlier case, GAO had found that the price evaluation preference for HUBZones in FAR Subpart 52.219-4 must be applied in procurements involving "best value" tradeoffs, even if the price of the HUBZone firm is lower than that of the "large" business. B-404952; B-404952.2 (July 8, 2011). In that case, a HUBZone small business protested the award of a contract for the demilitarization and disposal of ammunition to a large business that the Army had rated more highly on technical factors, but whose price was \$1.3 million higher than the protester's price before application of any price evaluation preference. The Army did not deduct 10% from the protester's price because the small business had "already submitted the lowest price offer." It asserted that the provisions of the HUBZone Act underlying the FAR clause only require that a price evaluation preference be applied where the offer of the HUBZone small business is higher than that of the large business. The SBA agreed with the Army's interpretation of the FAR clause. It also agreed with the Army that, to the degree the FAR clause diverges from (continued...)

the General Service Administration's (GSA's) attempt to lease space for another federal agency in Hudson Valley, New York.<sup>162</sup> GSA's solicitation for space did not include a price evaluation preference for HUBZone small businesses, which the protester alleged was required by the HUBZone Act.<sup>163</sup> GSA disagreed, arguing that the HUBZone price preference was not applicable to leases, but instead applied only to the procurement of goods and services.<sup>164</sup>

GAO sided with the protester for several reasons. First, it found that the HUBZone Act applies "broadly to all federal contracts that involve full and open competition," and is not limited to a particular "type" of contract, even though the FAR—which contains the standard clauses implementing the HUBZone price evaluation preference—applies only to certain contracts for goods and services.<sup>165</sup> Relatedly, GAO found that "there is little dispute" that a lease is a contract.<sup>166</sup> Finally, it observed that "no affirmative authority ... omits HUBZone Act requirements from procurements of leasehold interests in real property."<sup>167</sup>

## **Set-Asides Under the Veterans Benefits, Health Care, and Information Technology Act**

Several decisions specifically addressed set-asides and sole-source awards for veteran-owned and service-disabled veteran-owned small businesses under the Veterans Benefits, Health Care, and Information Technology Act of 2006. Arguably the most significant of these decisions was that by GAO in the *Aldevra* bid protest, which challenged the VA's determination to procure certain food preparation equipment through the Federal Supply Schedules (FSS).<sup>168</sup> The VA proposed placing the challenged orders through the FSS without considering whether a set-aside under the 2006 act was possible, but conceded that at least two service-disabled veteran-owned small businesses were capable of meeting some of its requirements.<sup>169</sup> The VA defended the proposed procurement by asserting that "neither the VA Act, nor the VA's implementing regulations, require the agency

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(...continued)

the HUBZone Act, the FAR clause should not be enforced. However, GAO disagreed, finding that the HUBZone Act can be construed to require price evaluation preferences for offers from HUBZone small businesses that are less than 10% higher than other offers. GAO also found that the FAR clause was enforceable because "we have been presented no evidence that the Army or SBA (or any commentator) asserted that the FAR provisions were unlawful either during the notice and comment period, or at any time since."

<sup>162</sup> B-406040, at ¶ 1.

<sup>163</sup> *Id.* at ¶¶ 3-4. The HUBZone Act provides that, in "any case in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror."

<sup>164</sup> B-406040, at ¶ 4.

<sup>165</sup> *Id.* at ¶ 10.

<sup>166</sup> *Id.* at ¶ 11.

<sup>167</sup> *Id.* at ¶ 12.

<sup>168</sup> B-405271; B-405524. As several commentators have noted, the use of the Federal Supply Schedules was "optional" for purposes of the VA's procurements. *See, e.g.*, Jeff Kinney, VA Should Have Followed GAO's Ruling in *Aldevra*, Attorney Says, 96 *Fed. Cont. Rep.* 510 (November 15, 2011). The use of the Federal Supply Schedules is "mandatory" in certain circumstances, and GAO's decision did not address whether the VA is required to use set-asides for veteran-owned businesses instead of the mandatory Federal Supply Schedules.

<sup>169</sup> B-405271; B-405524, at ¶¶ 6, 9.

to consider [service-disabled veteran-owned small business] and [veteran-owned small business] set-asides prior to determining whether to purchase goods or services through the FSS program,” and that “it has the discretion to determine whether to meet its requirements through the FSS before procuring from other sources.”<sup>170</sup> GAO disagreed. It found that the 2006 act required the VA to set aside procurements for service-disabled veteran-owned small businesses when the rule of two is satisfied because it states that the VA “shall” award contracts on the basis of competition restricted to such businesses when there is a reasonable expectation that two or more such businesses will submit offers and the award can be made at a fair market price.<sup>171</sup> GAO also found that the 2006 act requires the VA to conduct market research to determine whether a set-aside for service-disabled veteran-owned firms may be used, although it does not cite the exact statutory or regulatory language underlying this conclusion.<sup>172</sup> In addition, GAO rejected the VA’s attempt to rely on Subpart 8.404(a) of the FAR as a justification for its actions.<sup>173</sup> Subpart 8.404(a) of the FAR expressly provides that the provisions regarding small business set-asides in Part 19 of the FAR are generally inapplicable to procurements through the Schedules. However, as GAO noted, the FAR applies only to procurements under the Veterans Benefits Act of 2003, not to procurements under the 2006 act.<sup>174</sup>

In an earlier decision, *Powerhouse Design Architects & Engineers, Ltd.*, GAO had found that procurements of architect/engineer services by the VA are subject to set-asides for small businesses.<sup>175</sup> The VA had proposed conducting the procurements pursuant to the Brooks Act and its implementing regulations, which generally require that an agency conduct discussions with at least three firms when procuring architect/engineer services.<sup>176</sup> However, a service-disabled veteran-owned small business challenged this determination, asserting that the procurements should have been set-aside for veteran-owned small businesses under the 2006 act. GAO agreed, finding that neither the 2006 act nor regulations promulgated under its authority exempt

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<sup>170</sup> *Id.* at ¶ 7.

<sup>171</sup> *Id.* at ¶ 8 (“The provisions of both the VA Act and the VAAR [the Veterans Administration Acquisition Regulation] are unequivocal; the VA “shall” award contracts on the basis of competition restricted to [veteran-owned small businesses] when there is a reasonable expectation that two or more [such businesses] will submit offers and award can be made at a fair and reasonable price.”).

<sup>172</sup> *Id.* at ¶ 9. Based upon a subsequent decision, GAO’s decision here could be construed to mean that the VA cannot reasonably determine not to use a set-aside for veteran-owned small businesses without conducting market research. See *Kingdomware Techs.*, B-405727, at ¶ 9 (December 19, 2011).

<sup>173</sup> B-405271; B-405524, at ¶¶ 10-16.

<sup>174</sup> *Id.* at ¶ 14. In a subsequent decision, also involving Aldevra, GAO rejected VA’s argument that GAO “should abandon [its] previous conclusions about the plain meaning” of the Veterans Benefits, Health Care, and Information Technology Act, and defer to VA’s interpretation of the statute on the grounds that it is ambiguous. *Aldevra*, B-406205 (Mar. 14, 2012). VA had relied upon language in the 2006 act directing VA to establish goals for contracting and subcontracting with veteran-owned businesses in arguing that Congress “did not require that this authority [to set aside procurements for veteran-owned small businesses] be used in conducting all VA procurements.” *Id.* at ¶ 10. Rather, according to VA, Congress intended VA to use set-asides in meeting its goals, which meant that VA “may consider its current achievements vis-à-vis attaining the . . . contracting goals in deciding whether to do restricted competitions.” *Id.* at ¶ 11. GAO, however, rejected this argument because it found that the plain language of the 2006 act requires VA to use set-asides whenever the rule of two is satisfied. *Id.* at ¶ 14. In particular, GAO viewed the act’s language regarding the goals as explaining the purposes for mandating the use of set-asides, rather than creating an exception to such use. *Id.* GAO also noted that VA’s proposed interpretation of the 2006 act “is nowhere to be found in [its] 2009 notice and comment rulemaking,” and that VA was effectively seeking deference for a rulemaking it never performed. *Id.* at ¶ 18. See also *Kingdomware Techs.*, B-406507 (May 30, 2012) (adopting the reasoning of the *Aldevra* decision).

<sup>175</sup> B-403174; B-403175; B-403176; B-403177; B-403633; B-403647; B-403648; B-403649 (October 7, 2010).

<sup>176</sup> *Id.* at ¶ 3.

architect/engineer services.<sup>177</sup> GAO specifically rejected VA's assertion that statements made in the rule-making process exempting procurements of architect/engineer services from the requirements of the 2006 act were entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>178</sup> In so doing, GAO noted that it did not view the statements in question as necessarily exempting procurements of architect/engineer services from the requirements of the 2006 act.<sup>179</sup> Further, GAO also noted that "even if the Federal Register comment and response said what the agency claims, it would not . . . warrant deference as an agency interpretation of a statute arrived at through rule-making adjudication" because the statutory language is unambiguous that certain VA procurements be set aside for veteran-owned small businesses.<sup>180</sup>

A later decision by GAO, however, rejected the argument that the Veterans Benefits, Health Care, and Information Technology Act required VA to use a set-aside for small businesses instead of procuring items from the AbilityOne procurement list.<sup>181</sup> The AbilityOne Program under the Javits-Wagner-O'Day Act is designed to foster federal procurement from qualifying nonprofit entities employing handicapped and disabled persons,<sup>182</sup> and Subpart 8.002 of the FAR generally provides that procurements from the AbilityOne list take precedence over small business set-asides.<sup>183</sup> However, the Veterans Benefits, Health Care, and Information Technology Act has also been construed to require that VA use a set-aside for veteran-owned small businesses when the rule of two is satisfied, and the protesters in *Alternative Contracting Enterprises, LLC*, asserted that VA failed to comply with this requirement when it decided to purchase medical services and supplies from the AbilityOne list without considering whether the procurements could be set aside for small businesses.<sup>184</sup> VA disagreed, asserting that the VA act "is silent as to how the statute should operate with respect to the mandatory statutory preference [for AbilityOne],"<sup>185</sup> and that its regulations and guidance regarding the relationship between the 2006 act and AbilityOne are, thus, entitled to deference. The prologue to these regulations indicates that "AbilityOne's priority status has not been changed as a result of this rule."<sup>186</sup> VA procurement guidelines similarly instructed contracting officers that items currently on the AbilityOne list would continue to take priority over set-asides for veteran-owned businesses, and that, for new requirements, contracting officers should first determine whether the requirements should be set aside for veteran-owned small businesses before considering placing the requirement on the AbilityOne list.<sup>187</sup>

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at ¶ 10-11 (discussing applicability of *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

<sup>179</sup> *Id.* at ¶ 11.

<sup>180</sup> *Id.* at ¶ 12.

<sup>181</sup> *Alternative Contracting Enters., 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 (Mar. 26, 2012).

<sup>182</sup> See generally CRS Report RL34609, *The Randolph-Sheppard Act*, by Umar Moulta-Ali.

<sup>183</sup> See 41 U.S.C. § 8504(a).

<sup>184</sup> B-406265, at ¶¶ 1, 8.

<sup>185</sup> *Id.* at ¶ 9.

<sup>186</sup> *Id.* at ¶ 6.

<sup>187</sup> *Id.* at ¶ 6. In an earlier case, *Angelica Textile Services, Inc. v. United States*, the U.S. Court of Federal Claims had found that these guidelines explicitly applied to procurements begun prior to their issuance and were entitled to deference under *Skidmore v. Swift & Co.* 95 Fed. Cl. 208, 222 (2010). "Skidmore deference" is a more "limited form of (continued...)"

GAO agreed with VA, finding that the “two statutes 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.<sup>188</sup>

Because it found that Congress had left a gap for VA to fill in determining how set-asides for veteran-owned small businesses were to be reconciled with the AbilityOne program, GAO further found that VA’s interpretation of the act was entitled to certain deference.<sup>189</sup> Given that this interpretation was not the product of formal rulemaking, GAO declined to give it deference under *Chevron*.<sup>190</sup> However, GAO found that it was entitled to *Skidmore* deference, and that the protesters’ arguments, thus, failed because they had “not shown [VA’s interpretation] to be inconsistent with the statutes or unreasonable.”<sup>191</sup> In reaching this conclusion, GAO specifically rejected the protesters’ assertion that VA’s interpretation was unreasonable because it failed to “give weight” to the more recent and specific VA act.<sup>192</sup> It did so because it viewed the two statutes as not conflicting, and “a more specific statute trumps an earlier general one only when the two statutes are in conflict.”<sup>193</sup>

Overall, these decisions should help promote awards to veteran-owned and service-disabled veteran-owned small businesses by giving them “priority” not only over other small businesses, as provided for in the 2006 act, but also over procurements from the Federal Supply Schedules, or under the Brooks Act. Moreover, while veteran-owned businesses do not have such preference over the AbilityOne list, it would appear that an alternate interpretation of the 2006 act, granting them such preference, could potentially be found reasonable if VA were to adopt such an interpretation.

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(...continued)

deference” than *Chevron* deference, discussed above, based on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control.” *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Skidmore*, 323 U.S. 134, 140 (1944)). According to the *Angelica* court, the guidelines requiring contracting officers to research whether veteran-owned businesses could supply requirements before adding them to the AbilityOne List warranted *Skidmore* deference because VA is responsible for implementing the 2006 act; its guidelines provide detailed instruction to “fill[] a space between the [2006 act], the Javits-Wagner-O’Day Act, and their accompanying regulations; and VA’s instructions in the guidelines are consistent with the general maxim of statutory interpretation that “a specific statute of specific intention takes precedence over a general statute, particularly when the specific statute was later enacted.” 95 Fed. Cl. at 222.

<sup>188</sup> B-406265, at ¶¶ 12-13.

<sup>189</sup> *Id.* at ¶ 13.

<sup>190</sup> *Id.* at ¶ 15.

<sup>191</sup> *Id.* at ¶ 16.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

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