

December 17, 2024

Federal Contract Set-Asides for Small Businesses

Introduction

Provisions of the Small Business Act authorize or, in some cases, require federal agencies to provide small businesses a preference when making a contract award. Preferences for small business contractors may take the form of contract set-asides, which may limit the competition for an award to small firms. Set-aside authorities are codified in different places in the U.S. Code, including where small business contracting programs are covered at 15 U.S.C. §644(j)(1). This In Focus provides an overview of small business contract set-asides. Other types of contracting preferences that may be granted to small businesses include sole-source awards (contracts made without competition) and price evaluation preferences. For detailed information on small business contracting policies, see CRS Report R45576, *An Overview of Small Business Contracting*.

History of Small Business Set-Asides

The Small Business Act (P.L. 83-163), which established the Small Business Administration (SBA), contains policies to promote contracts and subcontracts with small businesses. Small business contracting policies and programs respond to the 1953 congressional directive to ensure that a “fair proportion” of federal contract and subcontract dollars is awarded to small businesses (15 U.S.C. §631(a); and P.L. 83-163, the Small Business Act (as amended)). In order to facilitate contracting opportunities for small businesses, Congress has authorized federal agencies, under specified circumstances, to set aside contracts exclusively for small businesses.

The Competition in Contracting Act of 1984 (CICA) (enacted as part of the Deficit Reduction Act of 1984, P.L. 98-369, §§2701-2753) requires that contracts be entered into after “full and open competition through the use of competitive procedures” unless otherwise authorized by law. CICA addresses small business set-asides by allowing “procurement of property or services ... using competitive procedures, but excluding other than small business concerns” (10 U.S.C. §2304(b)(2) and 41 U.S.C. §253(b)(2)).

Small Business Contracting Requirements

Federal agencies are required to set-aside contracts for small businesses under certain conditions, and are generally encouraged to do so when possible, per 15 U.S.C. §644(j)(1). Set-asides may be “total” or “partial,” depending on the market research findings of purchasing agencies. If market research “indicates that a total set-aside is not appropriate,” and that a contract can be divided “into distinct portions,” contracting officers must “set aside a portion or portions of an acquisition, except for

construction, for exclusive small business participation” (48 C.F.R. §19.502-3(a)).

Agencies generally consider the value of a contract and the number of available small businesses able to complete required work.

- For contracts valued below the government’s “micro-purchase threshold” of \$10,000, there is no small business set-aside requirement (48 C.F.R. §13.201). Between the “micro-purchase threshold” of \$10,000 and the “simplified acquisition threshold” of \$250,000, an agency must award the contract to a small business “unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of fair market prices, quality, and delivery” (48 C.F.R. §19.502-2(a)).
- For contracts above the simplified acquisition threshold, agencies must also generally set aside contracts exclusively for small businesses as long as a contracting officer expects that offers will be obtained from at least two responsible small businesses and the award will be made at a fair market price (48 C.F.R. §19.502-2(b)). In addition, at this contract value, a contracting officer must also have “a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.” Moreover, before making a small business set-aside for acquisitions above this threshold, a contracting officer must “first consider an acquisition for the small business socioeconomic contracting programs” – i.e., contracting programs for certain types of small businesses such as women-owned small businesses (WOSBs), small businesses located within a HUBZone, and service-disabled veteran-owned small businesses (SDVOSBs) (48 C.F.R. §19.203(c)).

Certain regulations narrow the scope of these small business contracting requirements. For example, certain small business contracts awarded or performed overseas are not necessarily required to be set aside for small businesses.

Small Business Certifications

Small businesses generally self-certify their status as “small” when they register their business in the System for Award Management (SAM) database. The SBA currently uses two types of size standards to determine whether a firm qualifies as a small business, and which one applies depends on a firm’s industry: (1) number of employees and (2) average annual revenue. A business owner may find their applicable “size standard” and confirm that their firm

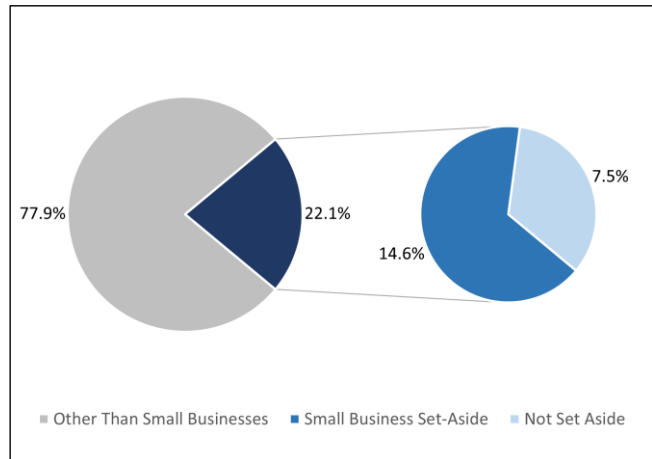
does not exceed it by looking at the SBA's small business size regulations at 13 C.F.R. Part 121. SBA also publishes a current table of size standards on its website. A contracting officer is required to accept an offeror's status representation in a specific bid or proposal that it is a small business unless "(1) another offeror or interested party challenges the concern's small business representation or (2) the contracting officer has a reason to question the representation" (48 C.F.R. §19.301-1(b)). Procedures for filing a challenge, or "protest" to a firm's size status representation are outlined in SBA regulations at 13 C.F.R. §121.1001-§121.1008.

Firms that seek to compete only with similar firms for government contracts through a socioeconomic small business contracting program (e.g., HUBZone small businesses, SBA 8(a) program participants, WOSBs, and SDVOSBs), are subject to certification requirements. Each socioeconomic program has its own certification requirements outlined in regulations. Firms may obtain certification through the SBA's online certification platform. Socioeconomic status protest procedures are outlined at 13 C.F.R. §124.1002 for SDBs, 13 C.F.R. §126.800-126.805 for HUBZone firms, 13 C.F.R. §128.500 for SDVOSBs (and veteran-owned small businesses), and 13 C.F.R. §127.600-§127.605 for WOSBs.

Contracts Awarded to Small Businesses

There are various sources of information on the contracts and amounts of federal contract awards made to small businesses. The Small Business Act (P.L. 85-536) requires the General Services Administration (GSA) to provide a report on all prime contract procurements made each fiscal year. The report, "Federal Procurement Data System Report," must be provided to the President and Congress and made available on a public website. The report tallies contracting preferences used by agencies. For example, the FY2023 report states that the dollar value of contracts to small businesses made through set-asides or "competitions restricted to small business concerns" was more than \$113 billion. This amount is provided relative to total contract expenditures of \$775 billion, of which awards to "other than small businesses" totaled \$604 billion and awards to small business totaled \$171 billion. **Figure 1** shows the contract dollars awarded through set-asides as a share of contract expenditures (over 14%). For more information about where to find data on federal contracts made to small businesses, see CRS Report R48185, *Sources of Data on Federal Small Business Contracts: In Brief*.

Figure 1. FY2023 Share of Small Business Contract Dollars Awarded Through Set-Asides



Source: GSA, "Final Data Report: FY2023 Federal Procurement Data System GSA Report," at <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/small-business-reports>.

Notes: The GSA report is statutorily required to include "all procurements made for the period covered by the report and may not exclude any contract awarded," while SBA reporting on contracts awarded to small businesses excludes certain contracts when the work cannot realistically be performed by small businesses.

Since 1978, federal agency heads have been required to establish small business procurement goals in consultation with the SBA. Through the Business Opportunity Development Reform Act of 1988 (P.L. 100-656), Congress set a minimum, government-wide, annual small business procurement goal, requiring that small businesses receive "not less than 20 percent of the total value of all prime contract awards for each fiscal year." Today that goal is 23% of the value of contract awards. Over the years, government-wide procurement goals for both prime and subcontract dollars have been established not only for small businesses generally, but for small businesses owned by socially and economically disadvantaged individuals, women-owned small businesses, small businesses located within a HUBZone, and small businesses owned by service-disabled veterans. For information on small business contracting goal-making and attainment, see CRS Insight IN12018, *Federal Small Business Contracting Goals*.

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IF12852

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