

## Government Contracts Advisory

### Three Proposed FAR Rules Implement the Small Business Jobs Act, Provide More Small Business Opportunities

June 16, 2015

In just over one week, federal contractors saw three proposed Federal Acquisition Regulation (FAR) rules issued to implement the Small Business Jobs Act (Jobs Act) of 2010, (Pub. L. 111-240), and will improve opportunities for small businesses working on federal contracts. These rules, if issued in final form, will impact both small businesses and large businesses that perform work on federal contracts.

#### The Small Business Jobs Act of 2010

To understand these three proposed rules, it is important to understand the objective of the law that the FAR seeks to implement.

On Sept. 27, 2010, President Obama signed into law the Small Business Jobs Act, described as the most significant piece of small business legislation in more than a decade. In a press release, the White House indicated that the new law will help small businesses continue to drive economic recovery and create jobs. The law implements recommendations from the President's Task Force on Federal Contracting Opportunities for Small Business, which understood that federal contracting plays an important role in the facilitation of socio-economic goals. Among the recommendations were to provide contracting officers with more discretion to reserve contract opportunities for small business, to make it harder to "bundle" contracts, and to hold prime contractors more accountable to their subcontracting plans.

#### The Three Proposed Rules

1. On June 10, a proposed FAR rule on "[Small Business Subcontracting Improvements](#)" (Subcontracting Improvements Rule) was published in the Federal Register to implement regulatory changes made by the Small Business Administration (SBA) to comply with the Jobs Act's requirement for a government-wide policy on small business contracting.
2. One week earlier, on June 3, a proposed rule on "[Consolidation and Bundling of Contract Requirements](#)" (Bundling Rule) was published in the Federal Register to also implement the Jobs Act and the regulatory changes made by the SBA in order to provide a government-wide policy on consolidation and bundling of contract requirements, an issue that has a direct impact on small business opportunities.
3. On June 2, a proposed rule was published in the Federal Register to provide a FAR definition of "[multiple-award contract](#)" (Definition Rule) consistent with an earlier SBA final rule that established new policies and procedures for multiple-award contracts and implemented the Jobs Act.

For the proposed rule issued on June 10, the public can submit comments no later than August 10, 2015. The two earlier proposed rules have the identical comment due date of August 3, 2015.

#### Highlights of the Proposed New Rules

The three proposed rules seek to achieve twin goals: the establishment of a government-wide policy on small business contracting and an increase in small business contracting opportunities.

#### Contact Us

Questions and comments about the Steptoe Government Contracts advisory are always welcome.

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### **The Subcontracting Improvements Rule makes numerous changes to the small business subcontracting process including:**

- Conforms the FAR rule to the SBA rule in that the failure of the contractor or subcontractor to comply in good faith with the clause of the contract entitled “Utilization Of Small Business Concerns” or an approved plan required by the clause shall be a material breach of the contract and may be considered in any past performance evaluation of the contractor
- Gives contracting officers the discretionary authority to require a subcontracting plan in the event a prime contractor’s size changes from small to other than small as a result of a size representation on a contract that contains FAR clause 52.219-9, Small Business Subcontracting Plan
- Provides new guidance regarding acceptable sources of information a prime contractor may use to determine a subcontractor’s size and socio-economic status
- Authorizes contracting officers to establish additional subcontract goals in terms of total contract dollars for individual subcontracting plans
- Includes a requirement for prime contractors to report order-level subcontracting information for multiple-award contracts intended for use by multiple agencies
- Requires that prime contractors make good faith efforts to utilize the small business subcontractors to the same or greater extent they were used in preparing the bid or proposal
- Requires that the prime contractor provides the contracting officer with a written explanation if it does not use a small business subcontractor to the same extent as described in the prime contractor’s bid or proposal
- Restricts prime contractors from prohibiting a subcontractor from discussing payment or utilization matters with the contracting officer
- Grants contracting officers discretion to establish subcontracting goals for individual orders
- Implements SBA’s regulatory requirement to establish a subcontracting plan when a modification of any value causes the contract to exceed the subcontracting plan’s threshold
- Revises the process for determining credits for small business subcontracting and provides the funding agency, not the awarding agency, credit for small business subcontracts

### **The Bundling Rule addresses contract consolidation and bundling concerns in several ways including:**

- Covers the acquisition of commercial items, including commercially available off-the-shelf (COTS) items
- Revises the definition of “bundling” and adds a new definition for “consolidation, consolidation of contract requirements, consolidated contract, or consolidated requirement”
- Addresses the consolidation of construction requirements
- Adds a definition for “small business teaming arrangement”
- Clarifies that agencies are to ensure that unnecessary and unjustified consolidation is avoided
- Clarifies that small business is to be a discipline that is represented in the acquisition planning team
- Clarifies that if a requirement is considered both consolidated and bundled, the agency must follow the guidance regarding bundling

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- Clarifies that an agency may not conduct an acquisition exceeding \$2 million that is a consolidation of contract requirements unless the agency's Senior Procurement Executive or Chief Acquisition Officer justifies the consolidation by showing that the benefits of the consolidated acquisition substantially exceed the benefits of each possible alternative approach and identifies any negative impact on small business concerns
- Requires federal agencies to notify current small business contractors of an agency's intent to bundle a contract requirement that was not previously bundled at least 30 days prior to the issuance of the solicitation, provide public notification of the intent to bundle, and notify SBA of a follow-on bundled or consolidated contract requirement

### **The Definition Rule proposes to add a definition of “multiple-award contract” to FAR subpart 2.1:**

- “Multiple-award contract” means a contract that is:
  1. A multiple-award schedule contract issued by GSA (e.g., GSA Schedule Contract), or agencies granted multiple-Award schedule contract authority by GSA (e.g., Department of Veterans Affairs), as described in FAR part 38
  2. A multiple-award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including government-wide acquisition contracts
  3. Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation”

*For more information and answers to questions regarding this proposed rule and guidance, or about Steptoe's government contracts practice, please contact Michael Mutek at +1 202 429 1376, Thomas Barletta at +1 202 429 8058, Paul Hurst at +1 202 429 8089, Kendall Enyard at +1 202 429 6489, and Andrew Irwin in Washington at +1 202 429 8177 or in Century City at +1 310 734 1926.*