



SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245-AH95

Small Business Contracting: Increasing Small Business Participation on Multiple Award Contracts

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: This proposed rule would apply the Rule of Two to multiple-award contract task and delivery orders, with some exceptions. Under the Rule of Two, unless an exception applies, an agency must set aside the award for small businesses where there is a reasonable expectation of receiving offers from two or more small-business contract holders under the multiple-award contract that are competitive in terms of price, quality, and delivery. Documentation requirements apply where the agency decides not to move forward with a set-aside order.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AH95, and/or Docket Number SBA-2024-0002 by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov> and follow the instructions for submitting comments.
- Mail (for paper, disk, or CD-ROM submissions): Donna Fudge, Lead Procurement Policy Analyst, Office of Policy Planning and Liaison, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted on <https://www.regulations.gov>. If you wish to submit confidential business information

(CBI) as defined in the User Notice at <https://www.regulations.gov>, please submit the comments to Donna Fudge and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential.

FOR FURTHER INFORMATION CONTACT: Donna Fudge, Lead Procurement Policy Analyst, Office of Policy Planning and Liaison, Small Business Administration, at donna.fudge@sba.gov, (202) 205-6363.

SUPPLEMENTARY INFORMATION:

This proposed rule would expand the use of the small-business Rule of Two in multiple-award contracting and make other regulatory revisions to encourage the use of small businesses when creating new multiple-award contracts. In issuing this proposed rule, SBA implements recommendations of the Office of Federal Procurement Policy (OFPP) in its memorandum titled *“Increasing Small Business Participation on Multiple-Award Contracts,”* dated January 25, 2024.

Section 15(a)(1)(C) of the Small Business Act, 15 U.S.C. 644(a)(1)(C), provides that the Small Business Administration (SBA) shall “assur[e] that a fair proportion of the total purchases and contracts for goods and services of the Government in each industry category . . . are awarded to small business concerns.” To further this statutory provision, SBA’s regulations and the Federal Acquisition Regulation (FAR) provide that an acquisition shall be set aside for small business concerns whenever there is reasonable expectation that offers will be obtained from at least two responsible small business concerns that are competitive in terms of fair market prices, quality, and delivery (13 CFR 125.2(f); 48 CFR 19.502-2). This provision in SBA’s regulations and the FAR is commonly referred to as the Rule of Two.

The Rule of Two dates back to 1964, when the Department of Navy first adopted it. Additional agencies implemented the rule afterward, and the FAR extended the Rule of Two for governmentwide application in 1984. The Rule of Two is the cornerstone of the Federal Government’s support for small-business prime contracting. In Fiscal Year (FY) 2023, set-aside

awards accounted for 65% of contracting dollars awarded to small businesses, the highest percentage since data became available in 2010. Those set-aside dollars pushed the government's spending with small business prime contractors to \$178 billion in FY23, or 28.4%. Prior to the government-wide application of the Rule of Two in 1984, the Federal Government spent just 21% of its procurement dollars with small businesses.

This proposed rule would clarify the applicability of the Rule of Two to multiple-award contracts by directing that an agency set aside an order under a multiple-award contract for small business contract holders when the contracting officer determines there is a reasonable expectation of obtaining offers from two or more small business contract holders under the multiple-award contract that are competitive in terms of market prices, quality, and delivery. Like the OFPP memorandum, the proposed rule provides several exceptions, such as orders under the Federal Supply Schedule, or where an exception to fair opportunity or an agency-specific exception applies. When an agency is unable to set aside an order over the micro-purchase threshold and an exception does not apply, the contracting officer must document their rationale and provide the documentation to the agency's small business specialist or the Office of Small and Disadvantaged Business Utilization (OSDBU) or, for the Department of Defense, the Office of Small Business Programs (OSBP). An SBA procurement center representative (PCR) can review the documentation and may submit recommendations to increase small business opportunities.

These proposed changes result from an interagency negotiation among SBA, the FAR Council, and other agencies. SBA initiated this negotiation for three reasons.

First, the Small Business Act specifies that a fair proportion of the total "purchase and contracts" for goods and services shall be awarded to small business concerns. The statute does not limit the fair proportion language only to contracts. Rather, it applies it to both "purchase[s] **and** contracts." The Federal Government is directed to assure that a fair proportion of purchases and contracts are awarded to small businesses. SBA believes that the use of the words "purchase

and” means that the Rule of Two should not apply only when an agency is considering the award of a contract. It should also apply to all purchases of goods and services, as well. As such, SBA believes that it makes sense to apply the Rule of Two to orders issued under multiple-award contracts. Again, it should apply to all “purchases,” not just to all new contracts.

Second, the proposed rule would provide certainty on how to apply the Rule of Two to task and delivery orders under multiple-award contracts and eliminate confusion created by an unresolved question in dispute between the Court of Federal Claims and the Government Accountability Office (GAO). The Court of Federal Claims agreed with the small-business plaintiffs in *Tolliver Group* that “an agency must apply the Rule of Two before an agency can even identify the possible universe of procurement vehicles which may be utilized for a particular scope of work.” 151 Fed. Cl. at 104. In a GAO protest decided after the court’s ruling, GAO maintained its longstanding interpretation, which differs from the Court’s position, that, in 15 U.S.C. 644(r), Congress intended to clearly delineate a distinction between a procuring agency’s mandatory set-aside obligations when establishing a contract, and an agency’s discretion with respect to setting aside task or delivery orders under a multiple-award contracts, i.e., indefinite delivery indefinite quantity (IDIQ) contracts. *Itility, LLC*, B-419167, Dec. 23, 2020, 2020 CPD P412 at 18. The proposed change to require application of the Rule of Two to task and delivery orders under multiple-award contracts, with certain exceptions, should eliminate lingering confusion.

Third, for similar reasons as those described in the OFPP memorandum, the proposed rule advances equity in Federal procurement practices. This rule is expected to create more contract opportunities for small businesses, particularly small disadvantaged businesses (SDBs). Executive Order 14091 established a government-wide goal of awarding 15 percent of Federal contract spending to SDBs in FY 2025, and this proposed rule would put the government in a better position to achieve that goal.

This proposed rule rests on the authority in the Small Business Jobs Act of 2010, Pub Law 111-240, sec. 1331, codified at 15 U.S.C. 644(r), for SBA and the FAR Council to establish guidance under which Federal agencies may, at their discretion and notwithstanding fair opportunity requirements, set aside orders placed against multiple-award contracts for small business concerns. Under this proposal, agencies are required to document their decisions not to set aside an order for small businesses. Such a decision might be based on one of the exceptions in the regulation, or because the Rule of Two is not satisfied—i.e., where there are zero small businesses or only one small business that are responsible, available, and reasonably priced.

The OFPP memorandum, footnote 4, stated that Federal Supply Schedule orders are not covered by the term “multiple-award contract” as used in the memorandum. The memorandum stated that Schedules are continually open to new entrants and highly accessible to small businesses. Similarly, this proposed rule would not cover the Federal Supply Schedule. This also mirrors the treatment of the Federal Supply Schedule by the Court of Federal Claims, which exempted the Schedule from the Rule of Two in *VSolvit, LLC v. United States*, 151 Fed. Cl. 678 (2020), because of specific language providing so in FAR subpart 8.4.

Severability

SBA intends for the provisions of this proposed rule, if finalized, to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance.

Section-by-Section Analysis

13 CFR 125.2 (c)(1)(i)

The proposed rule adopts the updated terminology of “certified service-disabled veteran-owned small businesses concerns,” given that SBA now certifies service-disabled veteran-owned small businesses.

13 CFR 125.2 (c)(2)

The proposed rule would add a new §125.2(c)(2) with new documentation and coordination requirements when an agency plans to establish a multiple award contract without an order set-aside provision. The current §125.2(c)(3) only requires notification at least 30 days prior to the solicitation's issuance when an agency would issue a bundled requirement or one that would be unlikely for award to a small business. SBA believes that 30 days is not enough time to intervene in a large procurement when, oftentimes, the agency has been planning the procurement for over a year. The proposed rule would require small business specialists to notify the PCR as early in the acquisition planning process as possible where the multiple-award contract exceeds the substantial bundling threshold (even if the contract is not bundled), and the number of small business awardees is expected to be less than 30 percent of the total number of awardees. With the notification, the contracting officer must include market research and documentation explaining why the multiple-award contract is not set-aside or reserved with an expectation of at least 30 percent for small businesses. In the future, if this proposed rule is finalized, small business should make up at least 30 percent of new multiple-award contract holders and that should make the Rule of Two more effective on orders issued under those multiple award contracts.

The 30-percent threshold is based on the current proportion of multiple-award contract dollars going to small business, and agencies can reach that threshold by using contract reserves. Contract reserves are a procurement strategy available only for multiple-award contracts in which the agency sets aside some of the contract awards for small businesses (or a small business program such as 8(a) or HUBZone), and then competes orders only among those set-aside awardees.

13 CFR 125.2(c)(4)

The proposed rule incorporates the OFPP memorandum's recommendation that agencies share with small-business specialists documentation of the basis for not setting aside orders over the micro-purchase threshold, unless an exception applies. Small business specialists are agency

staff, typically working with the agency's OSDBU or OSBP. Small business specialists play a vital role in ensuring that the agency prioritizes small-business participation when planning acquisitions. Under the proposed rule, the agency would also document, and share with its small business specialist, the decision to place an order under a multiple-award contract with only one or no small business contract holders.

13 CFR 125.2 (e)(6)

The proposed rule would revise the regulation on setting aside orders, § 125.2(e)(6)(i), to require the set-aside of orders over the micro-purchase threshold where the Rule of Two is satisfied with respect to small-business contract holders. The only exceptions to applying the Rule of Two are for orders under Federal Supply Schedule contracts, when an exception to fair opportunity applies, or where agency procedures reflect an appropriate exception. When one of these three exceptions does not apply, the agency would be required to document its determination not to issue a set-aside and coordinate that documentation with the small business specialist. If the agency chooses to issue an order under a multiple award contract that has one or no small business contract holders, the agency must document the rationale for that decision, including the market research conducted by the agency, coordinate that documentation with the small business specialist, and ensure that the small business specialist has a reasonable opportunity to respond. This requirement would not apply to orders under the Federal Supply Schedule, where an exception to fair opportunity applies, or an agency-specific exception applies.

Through this proposed rule, SBA seeks to expand small-business participation on multiple-award contracts. Unlike the *Tolliver* decision, this proposed rule does not require the application of the Rule of Two prior to choosing a particular multiple-award contract vehicle. Thus, although the proposed rule would permit an agency to use existing multiple award vehicles, agencies would be required to conduct the Rule of Two analysis on the selected multiple-award contract before issuing an order (unless an exception applies). Agencies are not

expected to amend ordering procedures of existing multiple-award contracts that did not provide for order set-asides, but they could choose to do so if there is adequate time remaining on the contract (i.e., more than one year), to permit small business concerns to fully perform or deliver under an order.

Exceptions to the application of the mandatory Rule of Two would apply for orders under the Federal Supply Schedule, where an exception to fair opportunity applies (such as there being only one responsible source), and agency-specific exceptions. For example, agencies may use an agency-specific exception to address supply chain and national security risks, to address goods or services that no small businesses provide and would not provide in the future, or to respond to a major disaster or emergency. The proposed rule would require that agency exceptions be developed in consultation with both the agency OSDBU or OSBP and SBA, and made public before they are used. The exception procedures must have an appropriate mechanism to ensure responsible use.

Compliance with Executive Orders 12866, 12988, 13132, 13563, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612):

Executive Order 12866

The Office of Management and Budget (OMB) anticipates that this rulemaking will be a significant regulatory action and, therefore, is subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

Regulatory Impact Analysis:

1. **Is there a need for the regulatory action?**

This action implements recommendations made in OFPP's memorandum titled "Increasing Small Business Participation on Multiple-Award Contracts". It also addresses confusion from the contradictory decisions between the Court of Federal Claims and the Government Accountability Office (GAO). The Court of Federal Claims agreed with the small-

business plaintiffs in *Tolliver Group* that “an agency must apply the Rule of Two before an agency can even identify the possible universe of procurement vehicles which may be utilized for a particular scope of work.” 151 Fed. Cl. at 104. In a GAO protest decided after the court’s ruling, GAO ruled that agencies may set aside orders even if the underlying multiple-award contract does not notify contract holders to future set-asides. *Itility, LLC*, B-419167, Dec. 23, 2020, 2020 CPD P412 at 18. GAO has ruled agencies may set aside orders even if the underlying does not notify contract holders to future set-asides. *Marine Hydraulics Int’l LLC*, B-420562, May 25, 2022, 2022 CPD P122 at 10. This rulemaking is intended to eliminate any confusion and ensure that the policy is consistently implemented across all agencies. The proposed rule also supports Administration efforts to develop a competitive small-business contracting base and increase spending with small disadvantaged businesses (SDBs).

2. What is the baseline, and the incremental benefits and costs of this regulatory action?

Based on SBA’s analysis of FY 2019 to FY 2023 data, as shown in the table below, this change could add up to \$6 billion per year in small business contract spending. The table below shows the dollar gap between small-business spending on non-set-aside multiple-award task and delivery order contracts, and that same spending government wide, when the governmentwide numbers are adjusted to use the same NAICS-code distribution present in the non-set-aside multiple-award task-order contracts:

Dollars and Potential Dollars in Multiple-Award Contracts FY	Total Dollars on MACs (\$B)	Small Business Dollars on MACs (not set aside) (\$B)	MAC Small Business %	Overall Small Business % (NAICS adjusted)	Potential MAC Small Business Dollars (\$B)	Gap between actual and potential SB dollars (\$B)
2019	\$75.5	\$14.2	18.8%	24.8%	\$18.8	\$4.5
2020	\$92.5	\$16.9	18.3%	25.2%	\$23.3	\$6.4
2021	\$78.5	\$16.6	21.2%	25.7%	\$20.1	\$3.5
2022	\$84.4	\$17.0	20.2%	24.3%	\$20.6	\$3.5
2023	\$100.7	\$19.2	19.1%	25.1%	\$25.3	\$6.1

In the table above, the fifth column (Overall Small Business % (NAICS adjusted)) is multiplied by total dollars (second column) to determine the numbers in the sixth column (Potential MAC Small Business Dollars (\$B)). SBA presumes that applying the Rule of Two to task and delivery orders would close the dollar gap between small-business spending on non-set-aside multiple-award contracts and small-business spending, governmentwide, as adjusted. The action could add up to \$6 billion to small-business contract spending. With contract spending exceeding \$600 billion annually, this equates to less than 1 percent of all Federal contract spending.

This rulemaking will impose costs to the acquisition workforce to comply with the market-research, documentation, and coordination requirements when the Rule of Two is not applied, as specified in the rulemaking. Although some agencies currently apply the Rule of Two when ordering under a multiple-award contract vehicle and may have documentation and coordination procedures, SBA will assume for the purpose of calculating the potential cost that no agencies currently require the application of the Rule of Two.

In FY23, agencies awarded 130,246 orders to other-than-small businesses off multiple-award contracts, not including the Federal Supply Schedule. Many of those orders went repeatedly from the same agency to the same other-than-small contractors. The proposed rule allows agencies to use market research conducted within the past 18 months, so if an agency were ordering to the same other-than-small contractor repeatedly under the same multiple-award contract, the agency would, most likely, reuse market research from prior awards. After eliminating orders that went to the same other-than-small contractor on a single vehicle from the same agency, only 5,513 orders remain that would require new small-business market research annually. The actual number of affected orders is likely less because the 5,513 orders presume annual market research (i.e., every 12 months), but the proposed rule allows for market research to be used from up to 18 months prior.

Contracting officers must base a decision on sufficient facts, considering market research, to demonstrate a reasonable assessment of the availability of small businesses on the selected multiple-award contract. Market research may include but is not limited to a review of procurement history, search of databases such as SBA's Dynamic Small Business Search (DSBS), consultation with SBA Procurement Center, or internet searches. Because of the variety of market research methods, SBA estimates that the time required for justification of a decision ranges from a half-hour to search relevant databases to several hours for more extensive open-market research, with the distribution of methods skewed toward database searches rather than intensive market research. SBA therefore estimates that the mean time required for justification is 60 minutes for an estimated annual number of 5,500 affected contracts, resulting in an estimated annual burden to the government for market research of \$683,870.¹

Additionally, agency small-business specialists would review documentation for orders not set-aside above the micropurchase threshold. FAR section 7.104(d) currently requires such a review for orders not set-aside above the substantial bundling threshold. The number of additional orders to be reviewed annually (excluding those going from the same agency to the same contractor for the reasons explained in the last paragraph) is 3,700. SBA estimates that the time required for a small-business specialist to review this order documentation is 60 minutes. This considers that the orders are relatively low-dollar. SBA therefore estimates the annual burden to the government for small-business specialist review to be \$460,000.

3. What are the alternatives to this rulemaking?

SBA considered a rule that would require the agency to assess the Rule of Two prior to choosing an existing contracting vehicle. That approach could increase consideration of small businesses that may not presently be on a multiple-award contract, but fails to recognize that the capabilities and capacity of many qualified small businesses already on multiple-award contracts are not being fully leveraged by agencies. SBA's research suggests that the changes proposed by

¹ As performed by a GS-13 Step 5 (DC locality in 2024 of \$62.17 with 100% added for benefits and overhead).

this rulemaking to increase opportunities for small business contract holders on multiple-award contracts could advance diversity and resilience by adding up to \$6 billion per year in contract awards to small businesses. Requiring application of the Rule of Two prior to selecting an existing contracting vehicle would, in many cases, duplicate the small business market research that agencies have conducted when establishing the multiple-award contract and could undermine important benefits that these vehicles were designed to create, including the ability to meet mission needs in a timely manner at lower cost and the ability to implement Governmentwide priorities.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect. While this rulemaking will have no effect on task and delivery orders already awarded, it will apply to all new multiple-award contracts, the orders placed under those contracts, and a new order entered into on existing multiple-award contracts where ordering procedures allow for the set aside of the order.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this rulemaking will not have substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, Federalism, SBA has determined that this rulemaking has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13563

Executive Order 13563, Improving Regulation and Regulatory Review, directs agencies to, among other things: (a) afford the public a meaningful opportunity to comment through the Internet on proposed regulations, with a comment period that should generally consist of not less

than 60 days; (b) provide for an “open exchange” of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this proposed rule, as discussed below.

Did the agency use the best available techniques to quantify anticipated present and future costs when responding to Executive Order 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System – Next Generation, DSBS, and SAM.

Public participation: Did the agency: (a) afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The proposed rule will have a 60-day comment period and will be posted on www.regulations.gov to allow the public to comment meaningfully on its provisions. SBA has also discussed some of the proposals in this rulemaking with stakeholders at various small business on-line and in-person procurement conferences.

Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

The proposed rule is intended to eliminate confusion in the small business acquisition community arising due to contradictory decisions of the Court of Federal Claims and the GAO, and increase procurement opportunities for small businesses.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

This rulemaking does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. chapter 35.

Regulatory Flexibility Act, 5 U.S.C. 601 - 612

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule implements an OFPP memorandum and seeks to resolve confusion created by differing interpretations of the Rule of Two by the Court of Federal Claims (*Tolliver Group*, 151 Fed. Cl. 70) and the GAO (*iTility*, B-419167). It does not impose any costs on small business, but rather increases procurement opportunities for small business. Therefore, SBA does not believe the rulemaking would have a disparate impact on small entities or would impose any additional significant costs on them. For the reasons discussed, SBA certifies that this proposed rule does not have a significant economic impact on a substantial number of small entities.

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

For the reasons discussed in the preamble, the Small Business Administration proposes to amend 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

2. Amend § 125.2 by:

- a. In paragraph (c)(1)(i), removing the words “small business concerns owned and controlled by service-disabled veterans” and adding, in their place, the words “certified service-disabled veteran-owned small business concerns”;
- b. Redesignating paragraphs (c)(2) through (6) as (c)(3) through (7), respectively;
- c. Adding new paragraph (c)(2);
- d. Adding new paragraphs (c)(5)(iv) and (v);
- e. Removing paragraphs (e)(6)(ii) and (iii);
- f. Redesignating paragraphs (e)(6)(i), (iv), and (v) as (e)(6)(iii), (v), and (vi), respectively;
- g. Adding new paragraphs (e)(6)(i) and (ii);
- h. Removing the first sentence of newly redesignated paragraph (e)(6)(iii); and
- i. Adding new paragraph (e)(6)(iv).

The additions and revisions read as follows:

§ 125.2 What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses?

* * * * *

(c) * * *

(2) *PCR notification and early coordination on certain Multiple-award Contracts.* (i) The agency’s small business specialist must notify SBA’s Procurement Center Representative during the development of the acquisition plan as early in the planning process as possible if:

(A) The dollar value of the Multiple-award Contract exceeds the agency’s threshold for substantial bundling, though this requirement is not limited to bundled requirements; and

(B) the number of small business contract holders is expected to be under 30 percent of all expected holders.

(ii) When the number of small business contract holders on a multiple-award contract exceeding the substantial-bundling threshold is expected to be under 30 percent of all expected holders, the agency must document the acquisition plan with the rationale, including market research conducted, for not setting aside or reserving the contract for small business. The explanation should be reviewed by the agency's small business specialist.

* * * * *

(5) * * *

(iv) When placing an order valued over the micro purchase threshold under a multiple-award contract that has no or only one small business contract awardee, agencies must document and provide to its small business specialist:

(A) How the market research of small business contract holders, including small businesses that are not contract holders on the multiple award contract against which the order would be placed, and mission needs informed the agency's decision for selecting the multiple award contract to fulfill its needs

(B) The market research the agency conducted within the past 18 months regarding the multiple award contract.

(C) The requirement of this paragraph (c)(5)(iv) does not apply to orders under the Federal Supply Schedule, where an exception to fair opportunity applies, when an agency exception applies, or to repetitive orders, including orders placed using automated ordering procedures, issued by an agency when a prior order was documented and coordinated within the prior 18 months.

(v) When placing an order valued over the micro-purchase threshold under a multiple award contract that has two or more small business contract awardees but the agency does not set-aside the order for small business, agencies must document and provide to its small business specialist the basis for not setting aside the order, and ensure the specialist has an opportunity to respond. The agency small business specialist must notify the SBA PCR when the value of such

an order exceeds a dollar amount negotiated between the agency and the PCR. This documentation and coordination requirement does not apply to orders placed under the Federal Supply Schedule, citing an exception to fair opportunity, or using an agency-specific exception.

(e) * * *

(6) * * *

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 3406(c) and 41 U.S.C. 4106(c), and unless the order is under a Federal Supply Schedule or an agency exception in accordance with agency procedures applies, a contracting officer shall set aside orders valued over the micro-purchase threshold (MPT) for small business contract holders when the contracting officer determines there is a reasonable expectation of obtaining offers from two or more small business contract holders under the multiple-award contract that are competitive in terms of fair market price, quality, and delivery.

(ii) When placing an order valued over the MPT under a multiple award contract, and the contracting officer does not set-aside the order for small business, the contracting officer must document and provide to its small business specialist the basis for not setting aside the order, in accordance with paragraph (c)(4)(v) of this section.

* * * * *

(iv) Agencies may develop procedures for the use of agency-specific exceptions. Exception procedures must be developed in consultation with both the agency small business director and SBA, and made available to the public. Exception procedures must have an appropriate mechanism to ensure responsible use.

* * * * *

Isabella Casillas Guzman,
Administrator.