



**JOBS ACT – FINAL RULE  
GWACs & CONSOLIDATION BRIEF**  
*FEDERAL REGISTER NOTICE – VOL. 78; NO. 191. Eff. 12-31-13*

**Mid-Atlantic Regional Council  
March 5, 2014**

BY: Barbara Weaver, PCR-CMR  
AREA 2 – Office of Government Contracting

# Jobs Act Review – 9-27-2010

- ▶ Considered the most significant small business legislation in over decade
- ▶ Provided capital, tax relief and new opportunities for small business

# Jobs Act Changes Included:

- ▶ Woman-Owned Small Business Set-Asides
- ▶ Changes to Small Business Subcontracting Programs
- ▶ Parity resolved and Comp Demo gone
- ▶ Misrepresentations became a big deal
- ▶ **Multiple Award Schedules [MAS] Set-Asides became a focus for increased small business opportunities**

# The Background . . .

- ▶ Multiple Award Schedules [MAS] have been growing exponentially for past 15 years.
  - Important for the government to reduce cost and eliminate duplication.
  - Challenging for small businesses who initially were not well-represented on MAS'.
  - Challenging also because there was no encouragement for agencies to consider small business under MAS Contracts.

# Section 1331 of The Jobs Act

Tasked heads of OFPP, SBA, and GSA to establish regulations under which federal agencies may:

- ▶ Set aside part(s) of MAS' for small business
- ▶ Reserve one or more awards for small business on MAS' awarded thru full and open competition
- ▶ Set-aside orders under MAS' awarded thru full and open competition with no set-asides or reserves for small business

# Jobs Act Progression . . .

- ▶ DoD, GSA and NASA Interim Rule of 11-2011 provided agencies with initial guidance regarding Section 1331.
- ▶ SBA followed up May 2012 with a proposed rule to provide specific guidance.
- ▶ The final rule discussed here and effective 12-31-13 is the result.

# Summary of Jobs Act Final Rule

## Rule Changes in Multiple Award Contracts (MACs)

- Small Business Set-Aside Authorities:
  - Partial Set-Asides
  - Reserves, or
  - Set-Asides of Orders
- NAICS Code assignment
- Size determination and recertification requirements
- Limitations on Subcontracting and Non-Manufacturer Rule
- Bundling and Consolidation
- Reorganizing PCR Contracting Assistance Regulations

# Partial Set-Asides

- Used when Market Research indicates:
  1. Acquisition can be broken into smaller, discrete portions (e.g. Contract Line Item Number (CLIN), Special Item Number, (SIN), etc.); and
  2. Rule of two will not be met for whole acquisition but can be met for smaller, discrete portions
- Contracting Officer will issue Solicitation as Partial Set-Aside.
- *SB submits offer on either the set-aside OR the non set-aside portion OR both.*
- SB must submit one offer that addresses each part of solicitation on which it wants to compete.
- Orders placed against Set-Aside Portions are competed *only* among SB awardees.
- SBs that submitted offer on non Set-Aside Portions are allowed to compete against Other Than Small Business for non Set-Aside Portions.

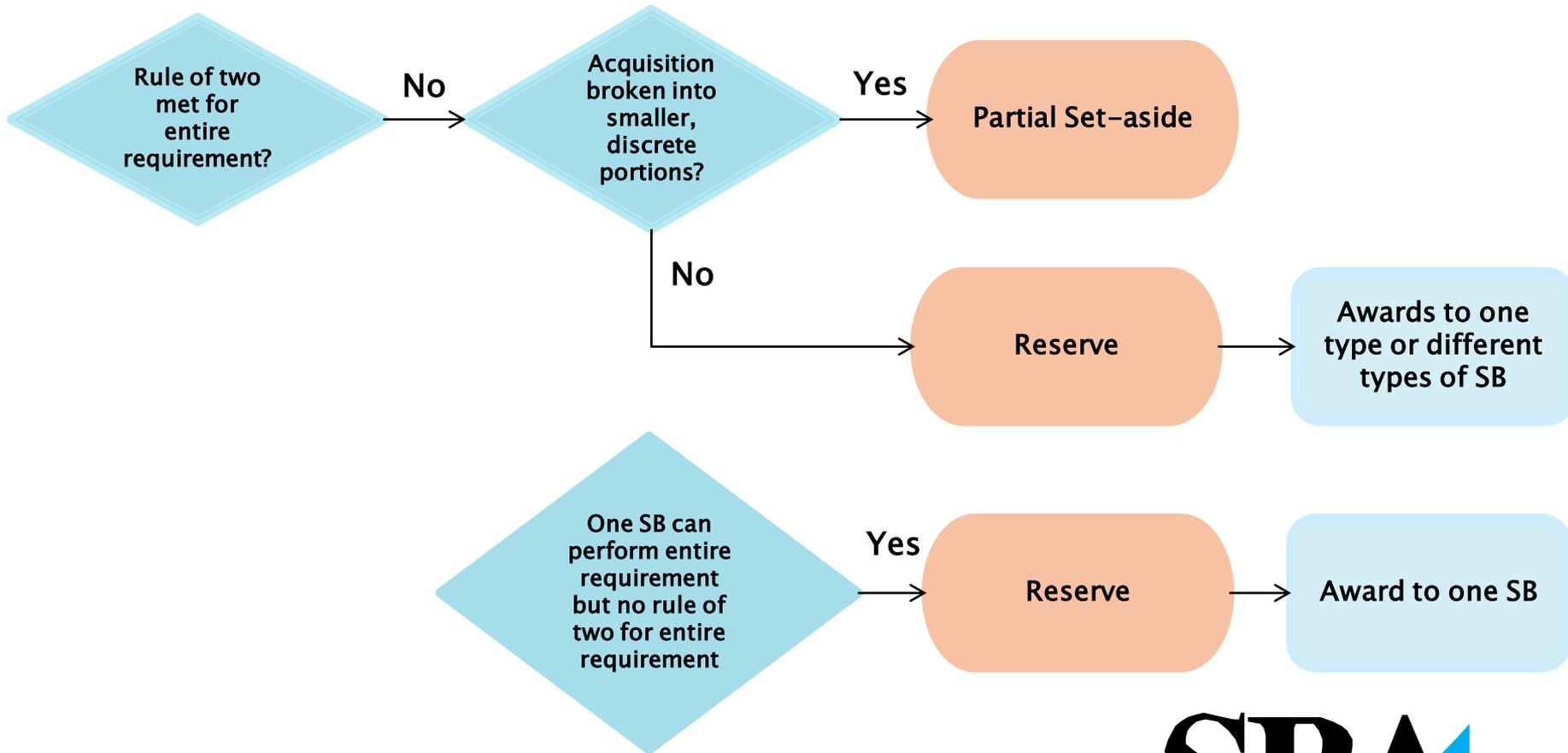
# Small Business Reserves

- Used when Market Research indicates:
  - Acquisition cannot be broken into discrete portions until individual Orders are drafted; and
  - Rule of two will be met for part of Contract OR at least one Small Business could perform all of the Contract.
- Conducted under full & open process, Contracting Office *may* “reserve” awards for SB to ensure SB will receive contracts under Multiple Award Contracts.
- Orders must be Set-Aside for Small Business under “reserved” Contract if “rule of two” is met.
- If SB is awarded contract and capable of performing at the order level, Contracting Officer competes order among Small Businesses.
- *Contracting Officer has discretion to establish SB award targets.*

# Reserves

- Contracting Officer *may* issue a solicitation as Small Business “reserve” if Market Research shows:
  - 1) 2 or more awards can be made to SB that can perform part of requirement ➡ If rule of two is satisfied for the Order, it is competed among SB “reserve” participants.
  - 2) At least one SB can perform the entire requirement but there is no reasonable expectation of receiving at least 2 offers from SB at fair market prices ➡ Orders placed may be issued directly to SB awardee.
  - 3) Bundled acquisitions: Rule of two will not be met for entire requirement due to bundling ➡ CO may issue solicitation as a “SB reserve” and issue award to Small Business Teaming Arrangement (SBTA). Orders placed are competed among all awardees.

# Partial Set-asides / Reserves



# Set-Asides for Orders

- Goods or services can be acquired through existing MAC that has been competed full and open.
- Market research shows that two or more awards can be made to SB that can perform part but not all of the requirement.
- Contracting Offer will issue solicitation as a small business reserve and *may* state set-aside intention in solicitation.
- Solicitation must state that orders will be automatically set-aside when the rule of two is satisfied or that the agency reserves the right to set aside such orders.

# Set-Asides of Orders

- Use of Set-Asides for Orders under GSA MAS Contracts:

Below SAT	Above SAT
Determine whether set-aside of orders is appropriate.	Apply “rule of two” first
Survey or request quotes from 3 GSA Schedule contractors through GSA Advantage!	Provide RFQ to as many GSA Schedule contractors as possible

# Agency Requirements

- Agencies are required to consider Section 1331 authorities in awarding MACs but there is no order of preference.
- If an Agency decides not to use any Section 1331 authority with respect to MACs, it must explain its decision and document the Contract File.
- Agencies have the discretion to forego using these authorities even if the requirements could be met. However, they need to explain how their planned action is consistent with Agency's responsibility to provide "maximum practicable opportunities" for Small Businesses.

# Agency Requirements

- Once an Agency uses a Section 1331 authority, it **must honor the commitment** when placing Orders.
  - If an Agency inserts a clause in a MAC pursuant to full and open competition stating that it will set-aside Orders when the “rule of two” is met, it must do so.
  - Alternatively, if the Agency preserves the right to set-aside Orders, it is not required to set-aside an Order every time the “rule of two” can be met, but should document the File with an explanation when it does not do so.

# On and Off Ramps for MACs

- “On and Off Ramps” are mechanisms for adding and removing Awardees for MACs set-aside for Small Businesses.
- If a Small Business becomes other than small due to a merger or acquisition, it is up to Contracting Agency to “off-ramp” or terminate that contractor. If not off-ramped, any Awards issued to contractor will not count toward Agency’s small business goals.

# PCR Reviews on MACs

- PCRs only review MACs not set-aside or reserved for small businesses.
- The ultimate decision of whether to apply a Section 1331 authority to any given procurement action rests with the Contracting Officer.

# Small Business Teaming Arrangements

- Two or more Small Businesses form a Joint Venture (JV) or enter into written Agreement where one SB acts as Prime and other SB(s) act as Sub(s).
- Agreement must be in writing and submitted to the Contracting Officer as part of Proposal.
- Each member must be small under size standard assigned to the Contract.
- Exception to “Affiliation” was established for bundled MACs issued with Small Business “reserve” under 13 CFR 121.103, but all businesses must be small.

# NAICS Code Assignment

- NAICS Codes must be assigned to all MACs and Orders issued thereunder.
- If no single NAICS Code applies, Contracting Officers can apply multiple codes only if requirements can be divided into discrete categories (i.e. CLINs, SINs).
- Orders placed against each category are assigned the same NAICS Code.
- The Agency will receive Small Business credit only if the Small Business receiving the Order is small under NAICS Code assigned to the Order.

# Size Determination and Recertification Requirements

- Small Businesses must certify their Size status in accordance with NAICS codes assigned to the MACs.
- For MACs, self-certification occurs at time of initial offer including price.
- For Agreements such as BPAs, BAs, BOAs, Size is determined *at time of response to the solicitation for agreement*. Because Agreements are not Contracts under FAR, SB credit is applied only if SB qualifies as small *at time of the Order*.
- For BPAs issued against GSA MACs, Size is determined at time of offer on the Contract.
- Re-certification requirements apply if a Small Business acquires another business or is acquired, or is part of a Joint Venture involved in a merger or acquisition.

# Bundling and Consolidation

- Consolidation:
  - Single or Multiple Award Contract with a total cost in excess of \$2 million, a statutory threshold (*see* 15 U.S.C. 657) not subject to amendment by SBA;
  - Reflects two or more requirements previously provided under multiple contracts; and
  - Requires approval by a Senior Agency Official.
- Bundling is a type of consolidation unsuitable for SB, but suitable for SB participating in Small Business Teaming Arrangements. The Rule requires 30 days' notice of the Agency's rationale for bundling on Agency's website.

# Limitations on Subcontracting/NMR

- Under set-aside MACs, Limitations on Subcontracting and Non-Manufacturer Rule (NMR) apply to Base period and each option period.
- Under MAC subject to SB “reserve” or set-aside orders (under full and open contract), limitations on subcontracting and NMR apply at order level.
- Compliance with limitations on subcontracting will be evaluated as part of Offeror’s past performance.
- Failure to comply can trigger “Termination for Default.”

# MAC Set-Asides or Reserves for 8(a)

- An agency may issue sole source awards against MACs set-aside or reserved for 8(a) Participants if dollar thresholds for sole source awards are met.
- Where an Agency seeks to award an order on a sole source basis to one particular 8(a) without competition among all 8(a) contract holders, the Agency must offer and SBA must accept the Order into the 8(a) Program on behalf of the identified 8(a) Contract Holder.
- A Procuring Activity must offer and SBA must accept a requirement that is reserved for 8(a) Participants

# MAC Set-Asides or Reserves for 8(a)

- Limitations on Subcontracting/NMR:
  - **Total and Partial Set-Asides.** Required to comply with Limitations on Subcontracting and the Non-Manufacturing Rule during each performance (i.e. Base and Option) Period. The Contracting Officer has discretion to require compliance at the Order level.
  - **Orders set-aside under Full and Open Contracts or Reserves.** Required to comply with Limitations on Subcontracting and the Non-Manufacturing Rule for each order.
  - SBA District Director *may* permit 8(a) Participant to subcontract in excess of limitations for Total or Partial Set-Asides with a written determination that larger amounts are essential during certain performance stages.

# Tiered Evaluation of Offers

- An Agency cannot create a Tiered Evaluation of offers or “Cascade” unless it has specific Statutory Authority to do so.
- Cascading is a procedure used in negotiated acquisitions when the Contracting Officer establishes a tiered or cascading order of precedence for evaluating offers that is specified in the Solicitation. It states that if no award can be made at the first tier, it will evaluate offers at the next lower tier, until award can be made.

# To Summarize . . .

- ▶ These Small Business Act changes promise to make things more complicated for COs, SBS', and PCR's.
- ▶ Ultimately, they also support the prospects of improved “maximum practicable opportunity” for small businesses in the world of Multiple Award Schedule actions.

# Questions?

barbara.weaver@sba.gov  
amy.kim@sba.gov

