

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 124

RIN 3245-AF06

Size for Purposes of the Multiple Award Schedule and Other Multiple Award Contracts; Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its regulations to address the time at which size is determined for purposes of the General Services Administration's (GSA) Multiple Award Schedule (MAS) Program, including the Federal Supply Schedule (FSS), and other multiple award contracts, including Governmentwide Acquisition Contracts and multi-agency contracts. SBA also proposes to amend its 8(a) Business Development regulations to address when a business concern may receive orders as an 8(a) program participant under GSA's MAS Program, including the FSS, and other multiple award contracts.

DATES: Comments must be received on or before June 24, 2003.

ADDRESSES: Written comments should be addressed to Linda G. Williams, Associate Administrator, Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or by FAX to (202) 205-6390 or by e-mail to Linda.Williams@sba.gov. You may also submit comments electronically to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Administrator, Office of Policy and Research, Office of Government Contracting, (202) 205-7322, dean.koppel@sba.gov.

SUPPLEMENTARY INFORMATION: The SBA's small business size regulations (13 CFR part 121) are used to determine

eligibility for all SBA and Federal programs that require a concern to be a small business. Currently, SBA's regulations provide that SBA determines the size of a concern as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer, including price. 13 CFR 121.404. Therefore, for a multiple award schedule (MAS), Federal Supply Schedule (FSS), multiple award, or Governmentwide Acquisition (GWAC) contract, size is determined as of the date of a concern's initial offer, including price. If a concern is small as of that date, agencies may place orders pursuant to the original contract and consider these orders as awards to a "small business" for the length of the MAS, FSS, multiple award contract or GWAC.

This has led to skewed and, in SBA's view, misleading results. Such contracts may have terms of five, ten, or twenty years, and can be amended to incorporate goods and services with varying size standards, and unlimited quantities. Therefore, orders to concerns receiving such contracts would be considered to be awards to small business even though a firm had grown to be large (either through natural growth or by merger or acquisition) during the term of the contract, and even though the firm is not (and may never have been) small with respect to the size standard corresponding to the work to be performed under a particular order.

For example, SBA has reviewed Federal Procurement Data System (FPDS) statistics as they relate to four business concerns that received contracts as small businesses under the GSA's MAS Program, but which have become other than small since that time. These four business concerns are continuing to receive orders issued pursuant to a MAS contract in which each certified that they were small at the time of the original MAS contract. In fiscal year 2000, these four business concerns received over \$190 million in such orders. Because these concerns were considered small at the time of the original MAS contract, each of these 1,313 contracting actions, valued at over \$190 million, could be counted as awards to small businesses. The figures for these same concerns in fiscal year 2001 are equally astounding—1,271

contracting actions amounting to over \$200 million in awards to other than small businesses.

In addition, SBA's Office of Hearings and Appeals (OHA) recently decided a size appeal relating to an order issued pursuant to the FSS. In *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002) (OHA decisions are available at www.sba.gov/oha/searchpage.html or by contacting OHA by e-mail at oha@sba.gov or by phone at 202-401-8200), OHA ruled that a request for quotations (RFQ) issued pursuant to a FSS contract was a new small business set-aside procurement. As such, OHA held that size should be determined as of the date of the firm's submission of its certification as an eligible small business with its price quotation in response to the RFQ, and not at the date of the firm's offer in response to the initial FSS solicitation.

Further, the U.S. General Accounting Office (GAO) weighed in on the issue in a recent bid protest. In *CMS Information Services, Inc.*, B-290541 (Aug. 7, 2002) (available at <http://www.gao.gov> or contact the Government Printing Office at 202-512-1530), the procuring agency limited competition to small businesses and required businesses to certify their size at the time they submitted their quotations. The protester argued that this certification requirement was improper because the offerors had each certified their size at the time they submitted their initial offer to GSA for award of its FSS contract. GAO ruled that when an agency limits competition to small business vendors under a competitive RFQ issued pursuant to the FSS, the agency may properly require firms to certify as to their small business size status as of the time they submit their quotations.

In addition, GSA implemented a Federal Acquisition Regulation (FAR) deviation requiring contractors operating under the MAS Program or any other multiple award contract (such as the FAST program in GSA's Federal Technology Service), to recertify that the concern qualifies as a small business each time their contract is up for renewal. See GSA News Release # 9991 (November 15, 2002) (available at <http://www.gsa.gov/Portal/newsreleases.jsp>).

This evidence indicates that agencies may be counting orders issued pursuant to a MAS or other multiple award