

contract as awards to small businesses when, in reality, the order is actually made to an entity other than a small business. As a result, agencies, including GSA, are attempting to remedy the situation, as are administrative tribunals such as OHA and GAO. Consequently, SBA is proposing a regulation at 13 CFR 121.404(c) to specifically address size as it relates to awards issued pursuant to multiple award contracts, including specifically GSA's MAS Program.

Under the proposed rule, a firm that receives a MAS or other multiple award contract must certify annually on the anniversary date of the contract award that it continues to be a small business for a specified size standard. A concern that is small at the time of the initial offer for a MAS or other multiple award contract would be considered small for one year from the date of its certification. The concern would then have to re-certify its size each year, for the term of the contract. Under the proposed rule, procuring agencies would then publish a list of the re-certifications received, within 10 days of receipt, on their agency's Web site, in the **Federal Register**, or otherwise. The rule would permit any interested party to file a protest with the contracting officer challenging the size of the concern seeking re-certification. If the recertification is challenged, SBA would then perform a formal size determination with respect to the challenged firm. SBA specifically requests comments as to the best or most expedient way to post these re-certifications so as to ensure that interested parties may appropriately protest, but at the same time not imposing an undue burden on procuring agencies or on the small business concerns.

SBA also may review or request a formal size determination with respect to any re-certification. However, once a firm is recertified, the concern will be considered to be a small business with respect to any order it receives with a North American Industry Classification Code (NAICS) code having the same or higher size standard during that one year period. Each order issued pursuant to the contract could then be counted as an award to small business.

However, under the GAO decision in *CMS* cited above, a contracting officer would have the discretion to ask for size certifications for individual orders. This proposed rule does not seek to, and does not in fact, change such discretion.

The proposed rule is based on SBA's view that receiving a multiple award contract or getting on GSA's FSS is similar to being admitted to SBA's 8(a)

Business Development (BD) or HUBZone programs, and orders issued under multiple award contracts or off the schedule are similar to the actual award of an 8(a) BD or HUBZone contract. In the 8(a) BD and HUBZone programs, a concern must be small (for its primary NAICS code) at the time it is admitted to the program, and it must be small for each 8(a) BD or HUBZone contract it is awarded. Although the proposed rule would not require a firm to certify its status as (and in fact be) a small business for each order it receives under a multiple award contract (as an 8(a) or HUBZone concern must do for individual contracts once admitted to either of those programs), its requirement for annual certification makes size relevant for orders.

SBA also recognizes, however, that an order issued pursuant to a multiple award contract is intended to be a simple, fast way to procure needed goods and services. SBA does not seek to delay the procurement process or make it more complicated.

SBA considered three other alternatives to the proposed rule. The first alternative would require that for an agency to count an award issued under a multiple award or schedule contract as an award to a small business, the concern must be small as of the date of each order (in addition to being small at the time of its self-certification for the multiple award or schedule contract). The second alternative would require a firm to re-certify its status as a small business at the time of any option on the multiple award or schedule contract. SBA believes that the first alternative might require size certifications too often (and could delay the procurement process), and that the second alternative would require them too infrequently (letting a firm that has been purchased by a large business immediately after receiving its multiple award or schedule contract, for example, to be considered a small business for almost five years after becoming large). The third alternative SBA considered is similar to that proposed, but would require annual recertification or notification for a MAS or other multiple award contract only where a firm's size status for the MAS or other multiple award contract at issue has changed. While this alternative would significantly reduce paperwork and have a minimal effect on the procurement process, SBA was concerned about timely compliance with such a requirement. For example, if a firm that has grown to be other than small is seeking a substantial order as a small business under a MAS or other multiple award contract, it might not notify the contracting officer of its

changed status until after it received the order. SBA specifically requests comments on each of these three alternatives.

SBA also proposes to amend 13 CFR 121.1004(a)(3), regarding time limits for size protests in the case of multiple award and schedule procurements, including FSS contracts. The proposed regulation would authorize size protests challenging firms seeking re-certification of their status as small businesses for a MAS or other multiple award contract. In addition, it would specifically authorize size protests in connection with orders issued under those contracts. Since time of size for an order issued under a MAS or other multiple award contract is determined 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 (during the one-year period immediately following contract award) and as of the date the concern submits its re-certification (for the one-year period after any re-certification), a protest challenging the size of a concern for a specific order under a MAS or other multiple award contract relates to the date of the certification or re-certification, as applicable. Again, a contracting officer can request size certifications in connection with a specific order. In such a case, size would then be determined as of the date of the certification in connection with the order. Absent such a request by a contracting officer, the certification or re-certification date is the date at which SBA would determine a concern's size for a specific order.

SBA specifically requests comments on the appropriate time frame within which to require size protests relating to such orders. SBA recognizes that multiple award and schedule contracts are intended to be a fast, easy way for an agency to meet its procurement needs. However, SBA does not believe that a size protest would slow down the process or delay performance. A size protest in this context most probably would relate to whether an agency can count the award as an award to small business. Whether an award counts or does not count as a small business award has no bearing on whether the award can be made to a particular firm, or whether that firm can perform the award. Thus, the proposed rule would permit a protest to be made at any time prior to the expiration of the underlying multiple award or schedule contract.

Finally, the proposed rule would amend 13 CFR 124.503(h)(2) to ensure that size eligibility for 8(a) multiple award contracts is consistent with the