

TOPIC 8

SMALL BUSINESS CONSIDERATIONS

Objective

To determine an agency's compliance with small business procurement rules when awarding and administering small business contracts or programs.

Subobjectives

1. Evaluate whether contracts reported as being awarded to small businesses were actually awarded to small businesses.
2. Evaluate whether the procuring agency is monitoring (has monitored) the contractor's compliance with small business regulations.

SMALL BUSINESS CONSIDERATIONS

INTRODUCTION

This guide provides detailed audit steps for determining an agency's compliance with small business procurement rules when awarding and administering small business contracts or programs. The guide expands upon the researchable questions associated with Small Business Considerations (Topic 8) identified in the *Contract Audit Guide Framework* that was released in 2009 by the Contracting Committee of the Federal Audit Executive Council. The framework provides a construct of issues and researchable questions to consider when planning audits or reviews of contracts. It is the Contracting Committee's intention to issue detailed audit guides for each issue identified in the framework. Audit teams are encouraged to modify the *Small Business Considerations Audit Guide* as appropriate, and to use the guide, in conjunction with other appropriate tools, to assess compliance with the small business contracting rules. For your convenience, the guide includes relevant definitions of small business contracting terms, references to the appropriate small business regulations, and links to online resources for information referenced in the guide.

BACKGROUND

The Small Business Act requires the President to establish annual government-wide goals where 23 percent of all Federal procurements are awarded to small businesses. Small business awards may be made under "set-aside" procedures, where only small businesses are allowed to bid, through sole-source contracting procedures involving 8(a) companies, or through other procurement methods, such as "full and open" competition and a small business wins the contract.

The Small Business Administration (SBA) has various regulations which define small businesses and other rules that both procuring agencies and small businesses must follow to assure that small businesses benefit from the procurement and that small business awards are accurate. Small business size regulations are contained in 13 CFR 121; 8(a) program regulations are contained in 13 CFR 124; and regulations concerning performance requirements in "set-aside" awards, including sole-source 8(a) contracts, are contained in 13 CFR 125.6. Federal Acquisition Regulation (FAR) Part 19 provides implementing guidance for small business acquisitions.

The key control used to determine whether a company is small is the company's certification that it is small for the contract. Each contract is assigned an industry designation using the North American Industry Classification System (NAICS) to assess the size standard for the corresponding business. NAICS codes and the corresponding method to determine size are found in 13 CFR § 121.101.

DEFINITIONS

8(a) Contracts – Small, disadvantaged companies apply for entry into SBA’s 8(a) development program. Contracts awarded to 8(a) companies using special SBA 8(a) procedures are considered 8(a) contracts. In essence, SBA enters into contracts with other Federal agencies and SBA “subcontracts” out to qualified participants in SBA’s 8(a) program.

Central Contractor Registry (CCR) – CCR is the primary vendor database for the U.S. government. Government vendors are required to register in CCR in order to do business with the federal government. This database includes basic company contact information, as well as the NAICS codes they registered for and whether or not they are small for each code. This is generally a self-certifying database. The SBA does not make any representation as to the accuracy of any of the data included, other than certifications relating to 8(a) Business Development, HUBZone, or Small Disadvantaged Business status. The SBA strongly recommends that contracting officers diligently review a bidder's small business self-certification before awarding a contract. See <http://www.ccr.gov>.

Certifying Size - Firms receiving contracts certify whether they are small when they respond to a solicitation. For contracts through the General Services Administration’s (GSA) Multiple Awards Schedule (MAS) Program and other GSA multiple award contracts (MAC), these small business certifications are valid until contract renewal (i.e., up to 5 years), even if the firm outgrows its small business status. For all other contracts containing option years, including Government-Wide Acquisition Contracts (GWAC), the procuring office is not required to have the contractor re-certify it is small when exercising each option. Thus, the contractor retains its small business status for the life of the contract (e.g., 20 years) even if it outgrows its small business status.

Contracting Officers – According to FAR Subpart 1.602-2, contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. This includes all clauses set forth in the contract, including FAR 52.219-6 “Notice of Total Small Business Set-Asides” and FAR 52.219-14 “Limitations on Subcontracting.”

Contractor Performance Requirements –In order to be awarded a full or partial small business set aside contract, a small business must agree that for a:

- Contract for services (except construction), the firm will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.
- Contract for supplies or products (other than procurement from a non-manufacturer), the concern will perform at least 50 percent of the cost of manufacturing supplies or products (not including the cost of materials).
- Contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees.
- Special Trade contracts, the concern will perform at least 25 percent of the cost of the contract with its own employees.

See 13 CFR § 125.6 at <http://www.gpoaccess.gov/cfr/retrieve.html> and FAR 52.219-14 at <http://www.acqnet.gov/far> for more detailed information

Federal Procurement Data System - Next Generation (FPDS-NG) – FPDS-NG is a central repository that holds information relating to every contract awarded by the federal government. The information contained in this database shows the type of award, award amount, date it was signed, contract number, purchase order number, awarding agency (sometimes also, the contracting office), as well as type of set aside, large or small business, and many other facts relating to each specific contract. In order to find a contract in this system, you can perform a search on the contract number. See <https://fpds.gov> and click on FPDS-NG link.

Non-Manufacturer Rule – In order for a firm to qualify for a requirement to provide manufactured products as a non-manufacturer it:

- Must not exceed 500 employees;
- Be primarily engaged in the retail/wholesale trade and normally sell the type of item being supplied; and
- Supply the end item of a small business manufacturer or processor made in the U.S., or obtain a waiver of such requirement.

The SBA Administrator or designee may waive the requirement for the non-manufacturer to provide the end item of a small business manufacturer or processor made in the U.S. under the following two circumstances:

- The contracting officer has determined that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications required by a particular solicitation and SBA accepts that determination.
- SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market.

See 13 CFR § 121.406 at <http://www.gpoaccess.gov/cfr/retrieve.html> and FAR § 52.219-14 at <http://www.acqnet.gov/far>.

North American Industry Classification System (NAICS) – NAICS is a system developed by the Census Bureau for categorizing the various industries in the U.S. The SBA has implemented size standards that correspond with each NAICS code that contracting officers should use to determine whether a company is considered small for the contract in question. There are two types of size standards: employee-based and revenue-based. The link shows a table of size standards sorted by NAICS code <http://www.sba.gov/size/sizetable2002.html>.

Employee-Based NAICS Code – A NAICS code that has a size standard that is based on the number of employees a company had over each of the 12 months prior to the date the company submits a written self certification to the procuring agency; or, if in the On-line Representations and Certifications (ORCA), the date they submitted an offer. Additional details for calculation of the number of employees can be found at 13 CFR § 121.106 (<http://www.gpoaccess.gov/cfr/retrieve.html>).

Revenue-Based NAICS Code – A NAICS code that has a size standard that is based on the average annual revenues of a company from each of the 3 complete fiscal years prior to the date the company submits a written self certification to the procuring agency (or, if in ORCA, the date they submitted an offer). More details on how to calculate annual receipts can be found at 13 CFR § 121.104 (<http://www.gpoaccess.gov/cfr/retrieve.html>).

On-line Representations and Certifications (ORCA) – An e-Government initiative developed by the Integrated Acquisition Environment (IAE) to replace the paper-based representations and certifications (reps and certs). As of January 1, 2005, every company which submits an offer for a contract with the Federal Government is required to have its reps and certs on-line at <http://orca.bpn.gov>. Each firm is required to update its reps and certs at least annually, but they must also update them every time there is a change in company information that would affect their reps and certs. Submission of an offer indicates that, as of the date of the submission, the firm's reps and certs are complete, up-to-date, and accurate. Contracting Officers are now required to use ORCA in determining whether a company is small for a given contract.

Representations and Certifications (Reps and Certs) – Each firm that submits an offer for a contract for the federal government is required to fill out a reps and certs. The submitting company certifies whether or not it is a small business for the procurement. Until January 1, 2005, for every offer, a paper form was filled out. As of January 1, 2005, firms are required to do one set of reps and certs on the ORCA website which are updated at least annually. (See On-line Representations and Certifications.)

Small Business Set-Asides – Acquisitions that are reserved exclusively for competition among small business firms. These set asides may be total or partial. In order to obtain a small business set aside, the firm must certify that it is small for the NAICS code the contracting officer assigns the contract in question.

AUDIT STEPS

SUBJECTIVE 1: EVALUATE WHETHER CONTRACTS REPORTED AS BEING AWARDED TO SMALL BUSINESSES WERE ACTUALLY AWARDED TO SMALL BUSINESSES

A. Identify whether the contract is reported as being awarded to a small business.

1. Check the Federal Procurement Data System - Next Generation (FPDS-NG) or agency database to determine whether the contract has been reported as going to a small business. (Note: Although the reliability of data in FPDS-NG is questionable, it is the government repository of contract data and should be the starting place for identifying small business awards. However, FPDS-NG data will need to be corroborated against information in the contract files.) The process to gain access to FPDS-NG is as follows:
 - Log onto <https://fpds.gov> and click on FPDS-NG link. Register for a username and pin.
 - Once access has been granted, login and go to the main screen.
 - Enter the contract number in the search field in the upper right hand corner.
 - Click on the appropriate contract number from the list to view details related to the contract in question.
 - Refer to section entitled “Contracting Officers Business Size Selection” which lists the size of the company that was awarded the contract (either

“small” or “other than small”). FPDS-NG also shows the name of the contracting agency that handled this contract, as well as information on the company.

2. If FPDS-NG and/or the agency database reports the contract was awarded to a small business and the contract is either a “small business set-aside” (this is listed in FPDS-NG under “Competition Information,” “Type of Set Aside”) or over \$100,000, complete the following steps. (If it is not recorded as “small,” then it is reported as “other than small business” procurement and does not require small business analysis.)
- B. Establish how the determination that the business was small was made.
1. Obtain the following from the contract file:
 - Contract award document (SF1449).
 - Representations and Certifications (Reps and Certs). If the offer was made prior to January 1, 2005, the reps and certs will be paper-based; as of January 1, 2005 each company that holds a contract with the federal government should have its reps and certs on-line at <http://orca.bpn.gov>.
 - Solicitation.
 2. Determine the North Atlantic Industry Classification System (NAICS) code for the contract in question.
 - The NAICS code should be included in the synopsis of the contract or in the solicitation.
 - If the contract is a small business set aside, the NAICS code should be on the award document as well.
 3. Determine NAICS code’s size standard. See <http://www.sba.gov/size/sizetable2002.html>.
 4. Determine whether the company certified it was “small” or “other than small” for the contract NAICS code by reviewing the company’s reps and certs for the contract in question, either in the paper form or on-line. If the contract in question is an order from a multiple award contract (MAC), the firm is evaluated based on their size at the time of the original MAC offer.
 - If the offer was made prior to January 1, 2005, the reps and certs will be paper based and included under Section 52.219-1.
 - If on-line, i.e., in the Online Representations and Certifications Application (ORCA), determine whether the NAICS code for the contract in question is listed in the company’s reps and certs, and if so, whether it certified it was small for the specific NAICS code. As of January 1, 2005, each company that holds a contract with the federal government should have their reps and certs on-line at <http://orca.bpn.gov>, with the exception of those companies who are awarded contracts “in support of unusual or compelling needs” (FAC 01-26). To search ORCA:

1. Enter the firm's DUNS number in "Search Current ORCA record."
 2. Section 52.219-1 will include the NAICS codes to which the company has certified its size.
- C. If the company certified itself as "other than small," interview the Contracting Officer (CO) to determine whether he/she relied on any other documentation besides the firm's reps and certs to determine size. If so, request documentation and evaluate. Determine and document why the contract was reported as going to a small business.
- D. Determine whether the company was small. If the classification of this contract in FPDS-NG or the agency contract database as a "small business" appears correct using the above steps, complete the following:
1. Check the company's website to determine whether it is likely to be a "small business." Many companies have background sections on their websites where they list their corporate history, company facilities, recent major contracts, etc. Attempt to determine whether the company is likely to be a large business.
 2. If the NAICS code is revenue-based, request that the firm provide documentation, e.g., financial statements and business tax returns, showing its annual revenues for its last three completed fiscal years prior to the date the firm submitted a written self-certification that it was small to the procuring agency (for paper reps and certs), or if the certification is on ORCA, the date they submitted the offer. The revenues must be for the company and *all* of its affiliates. Determine whether the company was small. (See 13 CFR 121.104 at <http://www.gpoaccess.gov/cfr/retrieve.html> for details on how to determine whether the company was small.)
 3. If the NAICS code is employee-based, request documentation, e.g., payroll from the company showing the number of employees for the company and all of its affiliates for each of the completed 12 months prior to the date that the company submitted a written self certification that it was small to the procuring agency (paper reps and certs), or if the certification is in ORCA, the date they submitted an offer. Determine whether the company was small. (See 13 CFR 121.106 at <http://www.gpoaccess.gov/cfr/retrieve.html> for details on how to determine whether the company was small.)
- E. If the contract was to provide a manufactured product, ask the contracting officer if the company was a "non-manufacturer." If the contractor was a non-manufacturer, determine if the procuring office ensured that the contractor qualified as a non-manufacturer (see 13 CFR 121.406). Documentation should be obtained from the procuring agency files on the contract.
1. How did the procuring agency determine that the contractor did not exceed 500 employees? Based only on the information provided to the procuring agency, would you have concluded that the company had less than 500 employees?
 2. How did the procuring agency determine that the contractor is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied? Based only on the information provided to the procuring agency, would you have concluded that the company met this criterion?

3. How did the procuring agency determine that the end product was manufactured/processed in the United States by a small business? Based only on the information provided to the procuring agency, would you have concluded that the company met this criterion?
4. If the manufacturer of the end product is not a small business, request a copy of the non-manufacturer waiver issued by SBA. There are two types of waivers:
 - Individual: the contracting officer has determined that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications required by a particular solicitation. 13 CFR 121.406(b)(3)(i)
 - Class: SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market. 13 CFR 121.406(b)(3)(ii)

If no waiver was issued, contact the contracting officer to determine why the contract was awarded as a small business set-aside contract in violation of the non-manufacturer rule.

- F. Evaluate all documentation and determine whether or not the contract size was appropriately coded in FPDS-NG or the agency contract database as “small.” If 1) the contract was inappropriately coded in FPDS-NG, 2) the company misrepresented itself, 3) there are discrepancies because of agency personnel, or 4) there are any other concerns that need addressed, contact the SBA-OIG Auditing Division (202.205.6587) to take appropriate action.

SUBOBJECTIVE 2: EVALUATE WHETHER THE PROCURING AGENCY IS MONITORING (HAS MONITORED) THE CONTRACTOR’S COMPLIANCE WITH SMALL BUSINESS REGULATIONS

If the contract being reviewed is a small business set-aside, which includes all contracts awarded under the Section 8(a) program and the company is determined to be small, complete the following:

- A. Determine whether the procuring office effectively monitored the contract to determine whether the contractor did the required amount of labor with its own employees.
 1. See background information, “Contractor Performance Requirements” and 13 CFR 125.6 at <http://www.gpoaccess.gov/cfr/retrieve.html> for guidance on determining the percentage of labor costs the small business contractor was required to complete with its own employees.
 2. Obtain all documentation, e.g., certified payroll records, the contracting officer used to ensure that the contractor was doing the required percentage of work.
 3. Determine how the contracting officer or the technical representative reviewed the documents to ensure contractor compliance and whether they made sure the documentation was accurate, e.g., if payroll records were reviewed, that they analyzed them to ensure that the small business’s employees were actually their own, and not employees of their subcontractors.

4. Determine whether the contracting officer or the technical representative ascertained whether the contractor did the required amount of labor with its own employees. If not, why not.
 5. Based only on the information provided to the procuring agency, would you have concluded that the company was doing the required percentage of work?
- B. Evaluate all documentation and determine whether or not procuring officials effectively monitored compliance with small business regulations. Contact the appropriate contracting officer and the SBA OIG Auditing Division (202.205.6587) if a non-manufacturer received a small business set aside but did not receive a waiver in order to supply products from a large business.

Complete the following table for each contract.

SUMMARY

Agency:

Auditor/Contact Name:

Auditor/Contact Phone Number and Email Address:

| | |
|--|--|
| Contractor Name | |
| Contractor DUNS Number | |
| Contract Number | |
| Contract Modification/Order Number | |
| Date Signed | |
| Dollar Value of Contract Action | |
| NAICS Code/Size Standard | |
| If small business set-aside, type of set-aside. | |
| Where noted as small (FPDS-NG and/or agency database). | |
| Was the company small for the procurement? | |
| If not small for procurement, reason(s) so recorded, e.g., company size miscoded in database, company misrepresented its size. | |
| If set-aside contract, did procuring official(s) determine that the contract was complying with the percentage of work requirements? If no, why not. | |
| Did reviewer agree the company did at least the minimum required percentage of work if a set-aside contract? | |
| If the contractor was a non-manufacturer on this contract, did the procuring office ensure that the contractor qualified as a non-manufacturer? | |
| Did reviewer agree that the non-manufacturer rule was properly followed? | |
| If no to above question, describe why. | |
| Describe any corrective actions recommended. | |
| Contracting Agency | |
| Contracting Office | |
| Contracting Officer (CO) | |
| Contact Information for CO | |
| Additional Comments | |