

A CONTRACT *PARTLY* PERFORMED IN THE UNITED STATES TRIGGERS THE SMALL BUSINESS SET-ASIDE REQUIREMENTS OF THE FAR

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A recent Government Accountability Office (“GAO”) protest indicts that if a contract is to be performed *in part* in the United States (and/or its outlying areas), then the small business set-aside provisions in the Federal Acquisition Regulation (“FAR”) apply. *Maersk Line, Ltd*, B-410280, Dec. 1, 2014. Under FAR 19.502-2(b) any procurement with an anticipated dollar value of more than \$150,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price. (This is known as the “Rule of 2”).

The Department of the Navy, Military Sealift Command (“MSC”) issued a solicitation for “multimodal cargo transportation services,” whereby the contractor will initially deliver a vessel in the U.S., load cargo in the U.S., and at the end of the contract, offload in the U.S. The vessel will visit ports world-wide during performance of the contract, with locations depending on national security needs.

The MSC set this procurement aside for small business pursuant to FAR Part 19. However, a large business, Maersk Line, protested that it was not reasonable to conclude that this procurement would be performed “within the U.S.” and a set-aside was improper, noting that FAR 19.000(b) states “This part [FAR Part 19] applies only in the U.S. or its outlying areas.” Maersk argued that this should be an unrestricted procurement, asserting that this contract was principally to be performed outside the U.S. by delivering munitions all over the world.

The GAO denied the protest, holding that “MSC’s determination regarding the place of performance was reasonable in light of the absence of specific guidance in the FAR defining the percentage of performance that must take place within the U.S. or its outlying territories in order for FAR Part 19 to apply...[GAO] finds no basis to conclude that the agency unreasonably concluded that this procurement would be performed *at least in part*, in the United States and its outlying areas for purposes of FAR part 19.” (Emphasis added).

In the past, many contracting offices have refused to apply FAR part 19, arguing that FAR 19.000(b) clearly made the set-asides inapplicable where performance was to be outside the U.S. Indeed, this case even cites *Latvian Connection Gen. Trading & Const. LLC*, B-408633, Sept. 18, 2013, 2013 CPD ¶ 225, noting that there, the procurement was for goods (armored cable) to be used outside the U.S., and the agency properly did not set aside the procurement for small business. Other contracting agencies have declined to set aside procurements where the entire contract was to be performed outside the U.S.

The author can find no other protest decisions where *partial performance* in the U.S. triggered FAR part 19, and required a set aside for small business.

TIP: As a small business, you should examine all unrestricted solicitations that are of interest to you in order to determine where performance will be made. If performance is *totally* inside the U.S., then the set aside requirements in the Rule of 2 must be used. However, if performance is *partially* in the U.S., based on *Maersk Line*, the agency cannot allege that FAR part 19 and the set aside, Rule of 2 does not apply. It would now be proper to protest that an agency had failed to set aside a procurement for small business where some portion of the performance took place in the U.S. Look closely at the places of performance for any contract.