

## **RULES FOR SET-ASIDES FOR SMALL BUSINESS, INCLUDING WOMEN OWNED SMALL BUSINESS**

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The Government Accountability Office (“GAO”) recently considered a protest challenging a Department of Energy (“DOE”) decision not to set aside a solicitation for women-owned small business (“WOSB”) concerns. *EDWOSB Transformer Servs, LLC*, B-416683, Oct. 15, 2018. The GAO denied the protest because the decision to set aside for WOSB’s was discretionary. However, the decision is an excellent review of when agencies are required to set aside procurements for small business of varying types.

### **Determining Small Business Set Asides-Depends on the likely value of the procurement:**

1. Micropurchase (under \$10,000, see FAR 2.101 and recent amendments in the National Defense Authorization Act for 2018): **competitive procedures are not required if contracting officer considers the price to be reasonable.** FAR 13.203(a)(2).
2. Under Simplified Acquisition Threshold (“SAT”)(between \$10,001 and \$250,000, see FAR 2.101 and recent amendments in the National Defense Authorization Act for 2018): **automatically reserved exclusively and shall be set aside for small business unless there is no reasonable expectation of obtaining offers from two or more responsible small businesses that are competitive in terms of market prices, quality and delivery.** FAR 19.502-2.
3. Above the SAT (over \$250,001): **must be set aside if the “Rule of 2 Applies” (see below).** Use market research (See Federal Acquisition Regulation (“FAR”) Part 10) to determine which statement below applies:
  - a. The contracting officer shall first consider an acquisition from an 8(a), Historically Underutilized Business Zone (“HUBZone), Small Disadvantaged Veteran Owned Small Business (“SDVOSB”) or Women Owned Small Business (“WOSB”). FAR 19.203(c). There is no order of precedence among these small businesses. 13 CFR § 127.503(f)(2), FAR 19.203(a). If not procured from one of these types of businesses, consider b. below.
  - b. The contracting officer must set aside for small business any acquisition with an anticipated dollar value exceeding the SAT when “there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices.” (The “Rule of 2”). 13 CFR §127.503(f)(2), FAR 19.502-2(b)

The protest in *EDWOSB Transformer* revolved around the protester’s assertion that the DOE’s market research was unreasonable with respect to WOSB’s. The protester asserted that the “Rule of 2” must be conducted to satisfy the requirement to consider a set-aside for WOSB concerns.

GAO concluded that although agencies must consider set-asides for WOSBs prior to setting aside a procurement for small business concerns, neither the FAR nor the Small Business regulations ultimately require agencies to set aside the procurement for WOSBs alone. Agencies “may” set procurements aside for WOSBs, but they “must” set procurements aside for small businesses where the Rule of 2 applies. Therefore, the protest was denied.

The Takeaway: If you are a small business, and fall into a special category listed above (8(a) HUBZone, SDVOSB” or WOSB) the Rule of 2 *within* that special category does not necessarily mandate a special set-aside. However, whenever the Rule of 2 applies, the contracting officer must set aside the procurement, as explained above, for small business.

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