

Practice Update

How SBA’s New Rule Will Affect a Small Government Contractor’s Projected Set-Aside Work Following “Disqualifying” M&A Activity

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By [Amanda P. Spector](#), [Daniel Miktus](#), and [John M. Neary](#)

The Small Business Administration’s (SBA) final rule, which amends numerous requirements concerning small business contracting policies (the Final Rule), went into effect on January 16, 2025.^[i] The Final Rule will significantly impact small government contractors’ ability to obtain future set-aside work (particularly with respect to multiple award schedule contracts) following a “disqualifying” recertification in connection with a merger, acquisition, or sale (a Disqualifying Event).^[ii] This article explains the nuances of SBA’s Final Rule in the context of small government contractors qualifying for set-aside work on multiple award contracts, and how these changes are expected to impact M&A activity in 2025 as small businesses navigate the consequences of SBA’s Final Rule.

As a preliminary matter, it is important to recognize that the Final Rule does not change all aspects of the recertification process with respect to M&A activity. For example, pursuant to FAR 52.219-28 (Post Award Small Business Program Representation), a small business contractor is required to recertify its size and status at particular intervals, as further outlined in the clause. Under the Final Rule, small businesses must still recertify their size and status within 30

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calendar days following certain occurrences, such as a merger, acquisition, or sale. As has previously been understood, recertification following a merger, acquisition, or sale is only required if it results in a “change in controlling interest.”^[iii] Although the proposed August 2024 version of the rule sought to include an “agreement in principle” as a trigger for recertification, that change was notably absent from the final version of the rule.^[iv] Furthermore, SBA’s new regulation does not impact the recertification process for single-award set-aside contracts. Therefore, even if a small business submits a disqualifying recertification following a Disqualifying Event, it still remains eligible for additional orders and options under its current set-aside contract, despite no longer being small. However, and just as the rule stated previously, the awarding agency is no longer able to count the value of the future orders and options towards its small business goals.

The most significant changes in the Final Rule concerning the effects of disqualifying M&A activity on multiple award schedule contracts can be found in the new version of 13 CFR § 125.12.

One notable change is SBA’s clarification of the “180-Day Rule” for pending set-aside offers. For single set-aside awards only, the new rule is that a small government contractor may still be eligible for a set-aside contract, despite no longer being small at the time of award, so long as the Disqualifying Event occurred more than 180 days after submission of its offer. However, if the Disqualifying Event occurred within 180 days of the offer, then the previously small company is not eligible to receive the award.

However, the 180-Day Rule only applies if the contract at issue is a single set-aside award. If the underlying contract vehicle is a set-aside multiple award contract, and a previously small government contractor submitted an offer prior to the Disqualifying Event, then it is ineligible for award regardless of when it submitted its offer. The SBA

has explained its reasoning here in that “where the underlying award is a multiple award small business set aside or reserve[,] the concern is ineligible for the pending award because the concern would not be eligible for orders set aside for small business or set aside for a specific type of small business.”[v]

For these reasons, the Final Rule provides that, following a Disqualifying Event, a previously small business will be ineligible for future orders and option periods under set-aside or restricted multiple award contracts. This is a significant change in that the SBA has previously allowed, at least for a certain period of time, for small businesses to obtain future orders and option periods on restricted multiple award contracts despite no longer being small following a Disqualifying Event. However, this extended period of eligibility has been removed and 13 CFR §§ 125.12(e)(2)(ii)(B)(1) and 125.12(e)(2)(iii)(B) respectively provide:

“If a concern has a disqualifying recertification in response to a recertification requirement on a long-term multiple award contract or a recertification requirement following a merger, acquisition, or sale involving a business entity that does not itself qualify as small under the NAICS code assigned to the multiple award contract, the concern is ineligible to submit an offer for a set aside or reserved award after the triggering event occurs.”

“For a multiple award contract that is set-aside or reserved for small business, a concern that submits a disqualifying recertification in response to a recertification requirement on a long-term contract or a recertification requirement following a merger, acquisition, or sale involving a business entity that does not itself qualify as small under the NAICS code assigned to the multiple award contract is ineligible to receive options.”

These new regulations prohibit contracting officers from awarding future orders and option periods on set-aside multiple award contracts to previously

small businesses after a Disqualifying Event. Previously, it was within the awarding agency's discretion to do so, albeit with the understanding that it could not count the value of the orders or options toward its internal small business goals. The Final Rule will essentially eliminate that discretion, and previously small contractors will become immediately ineligible for future work after a Disqualifying Event.[vi]

Additionally, SBA's new rule dramatically changes the eligibility of previously small contractors' eligibility for future set-aside orders on unrestricted multiple award schedule contracts. The Final Rule now establishes size for unrestricted multiple award contracts on each order placed under the contract vehicle, not at the time of award for the underlying contract. This marks a new operative date for determining small business size status. Previously, size status and corresponding small business eligibility dated back to the time of initial award for the underlying contract, unless the contracting officer requested an order-specific size representation. This allowed contractors to receive set-aside orders under unrestricted multiple award contracts despite not being small at the time of the specific order at issue. In effect, the only relevant certification dated back to when contractors received their initial awards. With the Final Rule, SBA has specifically stated its intent to disallow this. It explains, "SBA never intended to allow a firm's self-certification for the underlying unrestricted multiple award contract to control whether a firm is small at the time an order or agreement is set-aside for small business years after the multiple award contract was awarded." [vii]

Perhaps one of the most significant changes in SBA's new regulation is the removal of the Federal Supply Schedule (FSS) exception to a Disqualifying Event. Under the prior rule, a previously small contractor could continue to receive set-aside orders under FSS contracts so long as the contractor was small at the time it secured its current five-year ordering period

and the contracting officer did not request an order-specific size representation. Now, size is no longer determined at the FSS contract level, and the contractor must certify as small with respect to each individual set-aside order. Similar to the new rule for multiple award contracts, this will prevent a previously small contractor from obtaining future set-aside work after a Disqualifying Event, even on unrestricted contract vehicles.

Is 2025 the Year to Sell?

The SBA has stated that the new prohibitions on awarding future set-aside orders under restricted multiple award contracts to no longer small contractors is delayed for deals that occur prior to January 17, 2026. This affords small businesses a one-year grace period and means that if a Disqualifying Event occurs prior to this date, a previously small contractor will still remain eligible for set-aside orders under the contract, so long as the contract vehicle in question is a restricted multiple award contract.

The SBA has not included any exceptions to this delayed effective date. In other words, it appears that a small business that is part of a Disqualifying Event up until January 17, 2026, could continue to obtain future set-aside or reserved orders until the end of the contract vehicle or until another disqualifying certification is made or required (such as in long-term contracts where recertification is required no more than 120 days prior to the end of the fifth year and no more than 120 days prior to exercising any option).

With respect to future option periods, the SBA has also provided a delayed effective date of January 17, 2026, such that if a Disqualifying Event occurs before that deadline, the previously small contractor will remain eligible for options exercised prior to this date. This is different from future set-aside orders under a restricted multiple award contract, whereby with this delayed effective date a contractor

would still be eligible to receive orders after January 17, 2026, so long as the deal occurs prior to this date. Here, with respect to option periods, the delayed effective date allows contractors an opportunity to receive options up until January 17, 2026, but not after. It is also crucial to note that the delayed effective date of January 17, 2026, does not apply to FSS contracts. This is significant as FSS contracts are now not only subject to the same recertification process, but also are not afforded the same one-year grace period as restricted multiple award contracts. Therefore, as of January 16, 2025, a previously small government contractor is immediately ineligible for any future set-aside work and option periods under its FSS contracts, regardless of whether the Disqualifying Event causing the disqualification occurs prior to January 17, 2026.

For small businesses with set-aside multiple award contracts or companies looking to acquire such entities, now may be the time to consider a merger, acquisition, or sale. With the delayed effective date of January 17, 2026, small government contractors and prospective purchasers have a relatively small window to ensure that they are able to retain previously anticipated future set-aside work. After that time, small businesses can no longer expect to receive additional set-aside work under their multiple award contracts once undergoing a change in small business size status due to a Disqualifying Event. Similarly, companies considering an acquisition will likely want to close the transaction before January 17, 2026, in order to secure previously anticipated future set-aside work.

Exception for Small Businesses That Join With Other Small Businesses

The SBA included an interesting nuance in its new rule that appears to benefit small businesses who either decide to get acquired by or to acquire another *small* business. The SBA has expressly stated:

“Where two business concerns individually qualify as small before a merger, acquisition or sale but do not in the aggregate after such occurrence, the final rule allows the contract holder to remain eligible for orders issued under an underlying small business multiple award contract.”[viii]

This exception seeks to maintain the status-quo rule for small-to-small acquisitions. Therefore, even if a business is no longer small following a Disqualifying Event, if both businesses were individually small prior to the transaction, the resulting business will continue to remain eligible for orders under a set-aside multiple award contract. The SBA, in creating this exception, appears to be affording small government contractors more incentive, and a more advantageous position, when participating in small M&A transactions. It also serves to create a brand-new “classification” within SBA’s other-than-small category, a category of federal contractors who are comprised solely of small businesses and are uniquely able to compete for set-aside work no longer available to other large businesses.

The SBA’s Final Rule significantly restricts the prospects for small government contractors to obtain future set-aside work following a Disqualifying Event. While limiting competition from larger entities will assist some small businesses, the Final Rule may also serve as a deterrent to long-term growth, as small government contractors may either opt to stay small, or sell this year before the full regulation goes into effect.

This article is a summary of the SBA’s new Final Rule and does not constitute legal advice or opinion. For legal advice concerning the new Final Rule, please contact Akerman LLP.

This article was originally published on Law360 on February 14, 2025.

[i] 89 Federal Register 102448.

[ii] The SBA has expressly stated that this new rule will not be applied retroactively. 89 FR 102465.

[iii] 13 CFR § 125.12(a).

[iv] 89 Federal Register 68305.

[v] 89 Federal Register 102494.

[vi] However, the SBA has provided a delayed effective date of January 17, 2026, for set-aside orders under reserved multiple award contracts.

[vii] 89 Federal Register 102450.

[viii] 89 Federal Register 102465.

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