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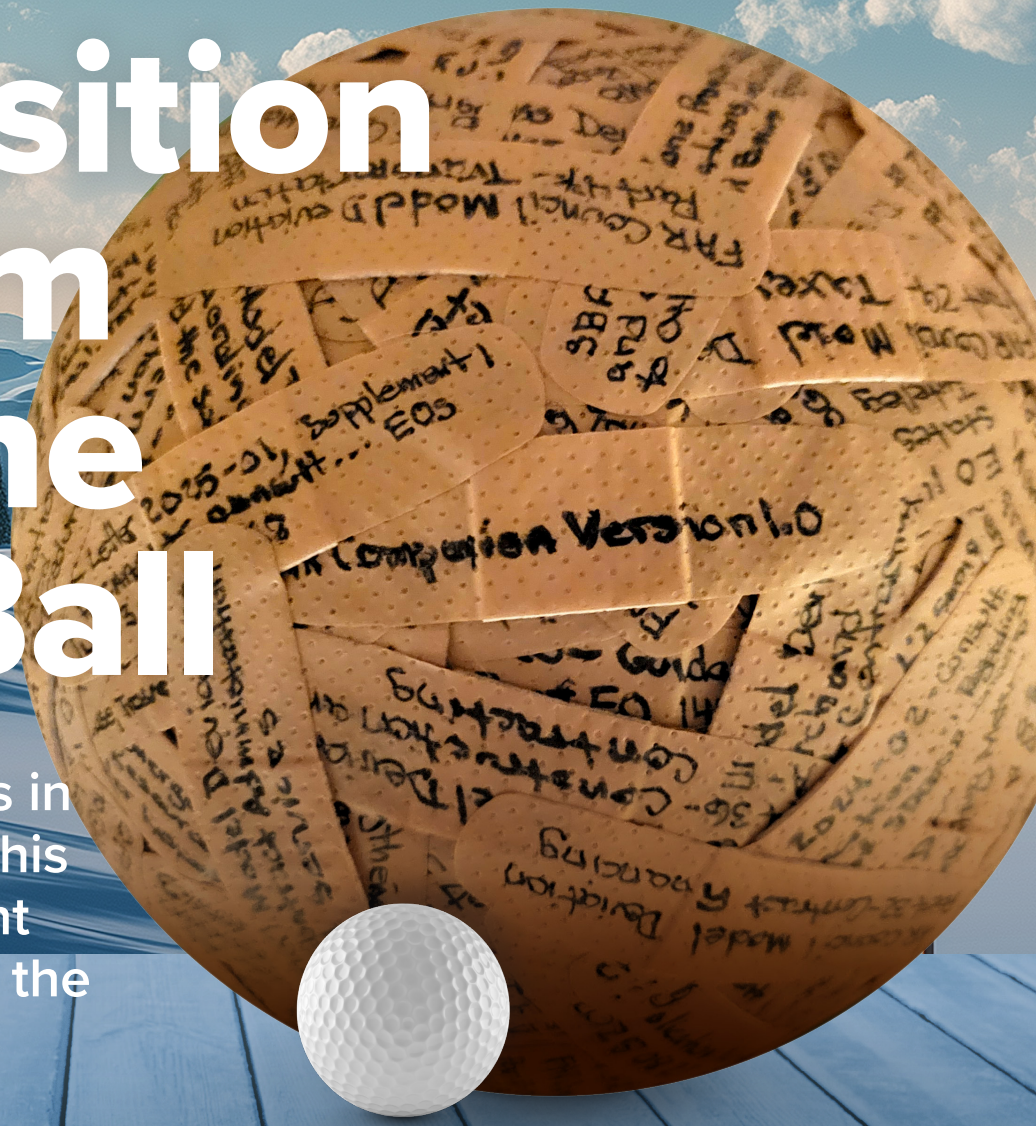
Acquisition Reform and the Golf Ball



The most Band-Aids in a single year since this empirical experiment began are added to the legendary golf ball.

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COUNSEL COMMENTARY

The FAR Part 19 Overhaul

The updated *FAR* includes new acquisition rules that will have profound impacts on small business set-aside contracting.

BY STEPHEN L. BACON

Earlier this year, the Federal Acquisition Regulation (FAR) Council issued the much-anticipated update to FAR Part 19 in conjunction with the Revolutionary FAR Overhaul (RFO). The updated FAR Part 19 establishes new regulations governing small business set-aside acquisitions, including several notable changes.

The most significant revisions relate to the "Rule of Two," the recertification rules related to task and delivery orders under multiple-award contracts, and competition requirements for contracts awarded under the Small Business Administration (SBA) 8(a) Business Development Program. The changes represent a mixed bag for small business government contractors.

Although some changes will increase opportunities for small businesses, other changes are likely to reduce the number of set-aside procurements. The updated *FAR* also introduces substantial uncertainty for small businesses in several key areas where the new *FAR* regulations are not aligned with current SBA regulations, which have not yet been revised.

Government contractors need to understand the new rules of the road for small-business set-aside procurements, where the risks of regulatory uncertainty remain, and how to leverage the revised rules to identify new opportunities.

The Rule of Two: Preserved for Contracts, Eliminated for Orders

The so-called Rule of Two is a cornerstone of small business set-aside contracting. It generally requires agencies to set aside procurements for small businesses where there is a reasonable expectation that two or more small businesses will submit offers at fair market prices.

The Rule of Two is mandated by statute for acquisitions above the Micro-Purchase Threshold (MPT) and up to the Simplified Acquisition Threshold (SAT), which was $350,000 as of October 1, 2025.[1] The Rule of Two is not a statutory requirement for acquisitions above the SAT, but it has been codified in FAR Part 19 for decades.

When the RFO effort was announced, there was substantial concern within the small business government contracting community that the Rule of Two would be eliminated for acquisitions above the SAT. That is because one of the stated objectives in the RFO is to eliminate acquisition regulations that are not grounded in statutory requirements.[2]

In accordance with Executive Order 14275, "Restoring Common Sense to Federal Procurement," non-statutory regulations should be removed unless they are "essential to sound procurement" because they are "necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect the economic or national security interests."[3]

Fortunately for small businesses, the FAR Council determined that the Rule of Two meets this standard, and so it was retained in the updated FAR Part 19. The Rule of Two is now codified at FAR 19.104-1(a) and applies to all contracts above the MPT.

Previously, contracting officers had to "first consider" setting aside contracts above the SAT for socioeconomic programs before considering a total small-business set-aside. The updated FAR Part 19 eliminates this preference for socioeconomic programs.

Moreover, the updated FAR Part 19 did not make the Rule of Two mandatory for orders issued under multiple-award

contracts. Instead, the new regulations provide that "contracting officers may, at their discretion, set aside orders placed under multiple-award contracts."[4] The new regulations go so far as to state that this exercise of discretion "is not a basis for protest."[5]

Whether the Rule of Two is mandatory or discretionary for orders has been the subject of litigation and conflicting legal interpretations of the Small Business Act and, specifically, 15 U.S.C. § 644(r). While the Government Accountability Office (GAO) has held that the Rule of Two is *not* mandatory for orders, at least one judge on the Court of Federal Claims has reached the opposite conclusion.[6] The updated FAR Part 19 effectively codifies GAO's view that the Rule of Two is not mandatory when an agency decides to conduct a task or deliver order procurement under a multiple-award contract.

The outgoing Biden administration had proposed regulations that would have adopted the Court's view that the Rule of Two *does* apply to orders.[7] But the proposed *FAR* rule was withdrawn in June 2025, which was an early indication that the RFO effort would not mandate the Rule of Two for orders.[8]

The elimination of the Rule of Two at the order level is likely to reduce opportunities for small businesses. Absent a clear requirement to set aside orders, agencies will have more latitude to use unrestricted MACs even when multiple small businesses could potentially compete.

Order-Level Size Recertification Rules

During the last decade, as the use of multiple-award contracts (MACs) has expanded dramatically, policymakers have struggled with how to determine a small business concern's eligibility for orders. One area of significant debate has been whether a firm's size eligibility for an order should be determined at the time of the proposal it submitted for the underlying MAC, or at the time of the proposal for the order.

In recent years, the recertification rules have distinguished between orders issued under "unrestricted" MACs and orders issued under MACs set aside for small businesses. For unrestricted MACs, offerors had to recertify at the order level. Recertification at the order level was generally not required for set-aside MACs unless the contracting officer requested recertification in connection with a specific order. These rules were codified in Small Business Administration (SBA) regulations and the former FAR 19.301-2(b)(2).

The updated FAR Part 19 eliminates small-business representation requirements at the order level. This includes removing the mandatory recertification requirements for orders under unrestricted MACs and the discretionary authority for COs to require recertification at the order level for set-aside MACs.

Under the new FAR 19.201-1(e)(1), a firm that is small at the time of its offer for the underlying MAC "is considered a small business concern for each order issued under the contract." The new FAR 19.301(a) retains the requirement for firms to recertify their size status after a novation, merger, or acquisition and, for long-term contracts, at the five-year mark and before any option thereafter is exercised.

The removal of order-level recertification requirements represents a dramatic

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change to existing policy that should expand opportunities for firms that are small when they compete for the MAC but subsequently grow and become "large" during the contract period. Notably, however, the updated *FAR* recertification rules conflict with other parts of FAR Part 19 update. For example, although order-level recertifications are no longer required, the updated *FAR* still contemplates the possibility of a size protest in connection with an order under an unrestricted MAC.[9]

The updated *FAR* is also not aligned with existing SBA regulations that still reflect the old paradigm where size is determined at the order level for unrestricted MACs and at the contract level for set-aside MACs unless the contracting officer requests recertification for a specific order.[10] The current SBA regulations also contain detailed rules regarding the effect of a disqualifying recertification on order eligibility that are not reflected in the updated FAR Part 19.[11]

The updated *FAR* provides that, after a contractor makes a disqualifying recertification, an agency may not count an order awarded to that contractor in the agency's small business prime contracting goal achievements.[12] Unlike the SBA regulations, the updated *FAR* does not specifically address the impact of a disqualifying recertification on order eligibility.

The FAR Council and SBA will need to resolve these inconsistencies through future rulemaking. Until then, small businesses face significant uncertainty regarding the applicable size recertification requirements and their effect on a company's eligibility for task and delivery orders under MACs. This is an area where contractors must carefully assess the interplay and conflicts between the updated *FAR* rules and SBA regulations until they are reconciled.

8(a) Program Changes

A key feature of the 8(a) program has been the so-called "Once-an-8(a)-Always-an-8(a)" rule. As the name suggests, this rule provides that once an agency's requirement is accepted into the SBA 8(a) program, that work must generally remain in the 8(a) program unless the SBA agrees to release it for non-8(a) competition.[13]

But the updated FAR Part 19 gives agencies more flexibility to release follow-on contracts from the 8(a) program. It provides that follow-on requirements do not need to remain in the 8(a) program if the follow-on contract "will be set aside under the HUBZOne, SDVOSB, or WOSB programs."[14] This is a significant change that gives agencies greater flexibility to compete 8(a) requirements among other small businesses with different socioeconomic statuses.

The updated *FAR* also includes enhanced competition requirements for 8(a) awards. Under existing rules, agencies are required to compete 8(a) contracts that exceed a competitive threshold of $4.5 million (or $7 million for manufacturing contracts) if there is a reasonable expectation that at least two eligible 8(a) participants will submit offers at fair market prices.[15]

This rule generally allows agencies to award sole source 8(a) contracts below the competitive threshold. But the updated *FAR* provides that, for acquisitions below the competitive threshold, "contracting officers must first try conducting the acquisition as a competitive 8(a) order using these government-wide contracts before proceeding with a sole source 8(a) award."[16] This requirement should create new opportunities for 8(a) contractors that hold government-wide contracts to compete for orders that may have previously been sole-sourced.

Conclusion

The FAR Part 19 overhaul represents a significant shift in small business contracting policy, but the real-world impact remains uncertain. Some changes are likely to increase small business opportunities while other changes may diminish the number of acquisitions set aside for small businesses.

The updated FAR Part 19 rules discussed above may be revised further following the notice and comment rulemaking process that will be completed for all new *FAR* sections developed as part of the RFO initiative. The FAR Council is unlikely to make major changes to key policy decisions in the rulemaking process, but it will hopefully add clarity where uncertainty remains. In addition, the SBA will need to revise its regulations to reconcile the differences between those regulations and the updated *FAR* provisions.

While the updated *FAR* is being formally codified through the rulemaking process, the new provisions are already taking effect through agency class deviations. To determine whether the updated FAR Part 19 applies to a given procurement, contractors and acquisition professionals will need to check if the relevant agency has issued a class deviation to adopt the new FAR Part 19. **CM**

Stephen L. Bacon is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, terminations, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counsel to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

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ENDNOTES

1 15 U.S.C. § 644(j)(1); see also 90 Fed. Reg. 41872, 41873 (Aug. 27, 2025).
2 See OMB Memorandum M-25-25, Overhauling the Federal Acquisition Regulation (May 2, 2025).
3 90 Fed. Reg. 16447, 16447–48 (Apr. 18, 2025).
4 FAR 19.111-2(a)(1).
5 FAR 19.111-2(a)(2).
6 ITility, LLC, B-419167, Dec. 23, 2020, 2020 CPD ¶ 412; The Tolliver Group, Inc., et al. v. United States, 151 Fed. Cl. 70 (2020).
7 89 Fed. Reg. 85072 (Oct. 25, 2024); 90 Fed. Reg. 3753 (Jan. 15, 2025).
8 90 Fed. Reg. 24773 (June 12, 2025).
9 See FAR 19.201-2(d)(1)(ii)(B).
10 See 13 C.F.R. § 121.404(c).
11 See 13 C.F.R. § 125.12.
12 Updated FAR 19.301(c).
13 See 13 C.F.R. § 124.504(d).
14 Updated FAR 19.108-11(a)(2).
15 See FAR 19.805-1(a).
16 Updated FAR 19.108-7(d)(1).