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# Column: Multiple-Award Contracts--Path to Growth or Punishment for Success?

**By A. John Shoraka and Pamela Mazza**

Size and status representations for task orders issued under Multiple-Award Contracts (MAC) and schedules have become a controversial and complex issue.

Generally, the Small Business Administration's (SBA) size rules state that representations made at the time of initial offer are valid throughout the life of a contract. This means that all representations made with respect to a MAC will be valid for each order issued against the contract, unless a contracting officer requests recertification in connection with a specific order.

Why is this important? MACs, including General Services Administration (GSA) Schedules, can bring certainty and efficiency to the federal contracting process. The heavy lifting is done at contract award when both the contracting agency and interested bidders can file protests against a firm they believe to be misrepresenting its size or status. At the task order level, the issuance of an order is no longer subject to separate size and status certifications, and therefore, the award of the order is not subject to protests.

This is only one efficiency of the MAC process, but it is an important one, as protests can drag on for months and negatively impact the mission of the ultimate customer.

Furthermore, since MACs are usually long-term contracts, not requiring recertification at the task order level provides certainty for small business government contractors, allowing them to project and plan their growth strategy, assured that they will be eligible to compete on and win task orders for at least the entire base period of the underlying contract, regardless of growth or ownership changes. In fact, small businesses use this strategy as a way of expanding their "run way" to become mid-sized.

## MAC complexities

Complexities arise not only because of recent cases and agency interpretations of the rules, but also because of varying perceptions regarding these. For example, regulators put into place rules that require firms to recertify their size and status upon merger or acquisition. This seems like a reasonable requirement, since SBA was criticized when federal agencies received small business credit on task orders issued to apparently small businesses, which were actually large firms (i.e. small businesses purchased by large firms that were continuing to perform small business contracts).

In order to address this perceived abuse, SBA amended the rules to require firms performing small business set-asides to recertify upon merger or acquisition. If a firm cannot recertify its size or status post-acquisition, an agency cannot continue to receive small business credit.

This requirement certainly makes sense from the perspective of a regulator. However, it has a significant negative impact on small businesses' ability to grow through acquisitions or to create an exit strategy through a sale. The rule has a chilling effect that stifles the marketplace and depresses the purchase price for small business owners.

## Analytic Strategies case

Interestingly, in a recent case with wide-ranging implications, SBA's Office of Hearings and Appeals confirmed the broad nature of SBA's rule that a contractor maintains its size and socio-economic status for the life of a contract, regardless of recertification, after a merger or acquisition. *See Analytic Strategies, Inc., SBA No. VET-268 (2018).*

The Analytic Strategies case confirms that, unless recertification is requested by the procuring agency at the task order level, an offeror will maintain its status for the life of a contract regardless of a general recertification post merger or acquisition.

This means that a firm can bid on and be awarded set-aside task orders even if it loses its small business size or socio-economic status post acquisition. The only restriction is that the procuring agency can no longer take credit for small business or socio-economic spend.

It is too early to predict what SBA's response is going to be to this ruling; however, if they intended that recertification (other than that requested in connection with a task order) impact an offeror's eligibility to compete for set-aside task orders, they will have to amend their respective rules.

The Analytic Strategies ruling seemingly relaxes the restrictions surrounding the continuation of task order awards to firms under set-aside procurements, even after merger or acquisition.

## Supreme Court decision

In the opposite direction, in 2016, the Supreme Court ruled in *Kingdomware Technologies, Inc. v. United States* that a task order issued under a MAC or against a schedule is indeed a contract. Many experts have interpreted this ruling to apply only to the Veterans Affairs' (VA) statutory authority under VA-administered Federal Supply Schedule contracts; however, others are using the ruling to argue that a firm must meet the size and socio-economic designations of the order at the time of offer for that task order.

Essentially, this argument holds that a task order is a contract, and the current rules require that a firm affirmatively represent its size and status at time of offer for a contract.

There have been significant discussions between SBA, the Office of Federal Procurement Policy, GSA, and congressional oversight committees regarding the interpretation of the Kingdomware ruling. Needless to say, it adds a new level of complexity to the unsettled questions of when a firm needs to recertify its size and status and if a firm can continue to compete for and receive set-aside task orders under MACs and schedules, even after an acquisition or merger where the firm no longer meets the small business size standard or qualifies for socio-economic status.

We believe SBA can and should clarify its regulations to note that, whether or not a task order is a contract, certification as to size and status is only required upon submission of the initial proposal for an underlying contract vehicle and that agencies can

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continue to take credit for small business task order awards through the life of the contract absent a recertification request from the contracting officer.

**Unintended downside**

The federal government continues to rely heavily on the use of MACs, government-wide acquisition contracts, and Federal Supply Schedules, and it is setting aside a significant number of these underlying vehicles for small businesses.

Obviously the government's confidence in small businesses' ability to perform these contracts is a good thing. The unintended downside is that a small business that is successful in receiving multiple, large task orders may become mid-sized quickly, leaving it few options for continued growth.

How small businesses compete for, win, and ultimately benefit from these vehicles is key to the health of the small business government contracting sector.

We understand that the benefits of the small business set-aside programs must flow to the intended recipients. However, we should also understand that the ability to sell a firm is a benefit for small business owners that should not be jeopardized.

We urge policymakers and regulators to place more emphasis on the growth of these small businesses—the backbone of our country—and to work towards minimizing complexities in the procurement process. Such change may be accomplished by reconsidering the regulations to emphasize the ability for small business concerns to flourish and continue to positively impact jobs and our economy.

*A. John Shoraka is the managing director of PilieroMazza Advisory Services, LLC, a consulting firm, and Pamela Mazza is the managing partner of PilieroMazza PLLC law firm.*