Cascading Set-Asides

Achieving small business goals via multi-tiered competition

What is cascading?

- Multi-tiered, competitive, small business set-aside source selection process
- All types of businesses may submit offers
- Offers considered in hierarchical tiers (e.g., HUBZone)
- Offers may cascade to lower tier if inadequate competition at their tier
- Award made at highest tier at which adequate competition exists

Origin of Cascading

- HUD's Real Estate Owned Single Family Management & Marketing contracts:
  - New effort for HUD & industry
  - Qualified sources unknown
  - Small business property management firms protested to SBA:
    - No small business set-aside
    - Alleged bundling
  - Need for small business participation

HUD's Real Estate Owned Mission

- Management and disposition (normally via sale) of a national inventory of single family properties owned or held by HUD after owners default on FHA-insured loans.

A Brief History of REO

- Presence in 81 HUD Field Offices
- Supported by:
  - 200+ field-based property management contractors:
    - Most - small business
    - Wide range of service area sizes
  - Other contract services (advertising, marketing, sales closings, etc.)

The Conundrum

- Provide contract support for a wide range of services in large service areas
- Ensure uniformity in service delivery
- Provide opportunity to small business-
  - New, complex requirement
  - Unknown universe of qualified small businesses
- Minimize possibility of having to reprocure due to inadequate set-aside sources

HUD-SBA Solution

- Establish reasonable number of geographic service areas
- Designate the service areas most appropriate for set-aside
- Create new cascading set-aside process:
  - Attract all types of businesses
  - Give preference to small & small disadvantaged businesses
- Encourage small business subcontracting by all awardees

M&M I Cascade Method

- Competitive award made:

  1st - to eligible 8(a) business concerns

  2nd - to eligible small business concerns ***if*** insufficient 8(a) competition

  3rd - on an unrestricted basis considering all competitive offers ***if*** insufficient small business competition

The Measure of Success – M&M I

- 55 firms submit 430 proposals
- 16 major contracts awarded:
  - 5 to small businesses
  - 1 to small disadvantaged business
- $927 million total award value
- $220 million awarded to small & small disadvantaged firms

M&M II Solicitation

SET-ASIDES:

- 1 area: 8(a) set-aside
- 3 areas: Small business set-aside

CASCADES:

- 3 areas: 3 tier cascade: 1st 8(a) > 2nd Small Business > 3rd Unrestricted
- 14 areas: 2 tier Cascade: 1st Small business > 2nd Unrestricted

FULL & OPEN - 3 areas

The Measure of Success – M&M II

- 87 firms submit 243 proposals
- 23 major contracts awarded to date:
  - 14 to small disadvantaged businesses
  - 6 to small businesses
  - 3 to large businesses
- $1.6 billion total award value
- $1.3 billion awarded to small & small disadvantaged firms

A Defensible Approach

- GAO upholds M&M I use of cascading
- "A solicitation provision stating that a section 8(a) set-aside will become a small business set-aside if fewer than two acceptable offers from 8(a) firms are received is *not contrary to statute or regulation, or unfair to small businesses.*" (B-281352, B-281353)

GAO support for cascading…

- "We are aware of **no statute or regulation that would prohibit this approach** […]. Since the scheme […] will have the effect of ***increasing the opportunity for small business concerns*** under an otherwise unrestricted solicitation, we have **no basis to object to this set-aside scheme** as unduly burdensome for small business concerns."
- Cascading also upheld under B-289277, B-289277.2, B-290676 & B-290676.2

GAO offers cascading solution…

- GAO states that "…there is no conflict in applying the two preferences…. The solicitation can include a 'cascading' set of priorities or preferences whereby competition is limited to small business concerns and [other entities]"
- B-290925, Intermark Inc. (Oct. 2002)

Cascade Today - New Challenges

- More competing set-aside programs -
  - HUBZone
  - Service Disabled Veteran Owned Small Business
- Greater complexity in creating cascades
  - HUBZone - 8(a) parity
- Harder to justify bundling

When should it be used?

- New requirements
- No precedent of performance by small business
- Inconclusive market research (i.e., adequate competition for traditional set-asides not evident)
- Above $3M (if 8(a) included)

When should it not be used?

- Market research reveals adequate sources for traditional set-aside(s)
- Requirement previously met by small business

Other Considerations

- Agency's annual small business goals and current accomplishments
  - Which need more $$ awarded this FY?
- Restructuring requirements so that traditional set-asides are possible
  - Can work appropriate for small business logically be segregated out?

What are the key steps?

- Conduct market research
  - ***CCR Dynamic Search***
- Assess status of agency small business goals achievement
- Design cascade
- Evaluate offers
- Select competitive offer at highest tier possible

Designing a Cascade

- Hierarchy must be followed -
  - 8(a), HUBZone,
  - SDVOSB,
  - Other small businesses, and
  - Other-than-small businesses
- Numerous configurations are possible
- Not all business types need be included
- Other-than-small-business always the lowest tier

Sample Cascade Tiers

1st - 8(a) Concerns*
2nd - HUBZone Small Business Concerns*
3rd - SDVOSBs
4th - Other Small Businesses
5th - Other-Than-Small Businesses

*CAUTION! These may ***not*** cascade to next tier *unless* also classified at that tier (e.g., both 8(a) & HUBZone concern). They *may* cascade to small business tier.

A variation

1st tier: 8(a) Concerns
2nd tier: HUBZone Small Business Concerns
3rd tier: Other Small Businesses
4th tier: Other-Than-Small Businesses

Another variation

1st tier: 8(a) Concerns
2nd tier: SDVOSBs
3rd tier: Other Small Businesses
4th tier: Other-Than-Small Businesses

Evaluating Offers

- Start with highest tier-
  - Consider only these offers
  - Determine acceptable offers
  - Determine if adequate competition exists
- If inadequate competition –
  - Proceed to next lower tier
  - Cascade down acceptable offer *if* possible
- Proceed through tiers, as needed

Adequate Competition

- 8(a) –
  - Competitive offers received from at least 2 qualified, responsible concerns; and
  - Award can be made at fair market price
- HUBZone, SDVOSB & Small Business–
  - Both conditions above; *or*
  - One acceptable offer received from responsible concern, *and* Contracting Officer decides to award to it

Wrinkles…

- 8(a) firm may not cascade to HUBZone tier unless firm is also HUBZone
- 8(a) or HUBZone may not cascade to SDVOSB tier unless also an SDVOSB
- 8(a), HUBZone & SDVOSB may cascade to "Other Small Business" if that tier is reached

Caution!

- Don't use prices from lower tier offers (e.g., large businesses) to establish price reasonableness of higher tier offers *unless* the lower tier has been reached
- Don't forget to make proper 8(a) offers & obtain SBA acceptance of 8(a) awards
- Don't include tiers for business types that have no formal set-aside authority (e.g., WOSBs)
- Do use best value/tradeoff approach

Do we need more authority?

- Cascading—
  - Can be done under existing regulatory authorities (FAR Parts 19.5, 19.8, 19.13, 19.14)
  - Is a flexible, creative use of existing guidance
  - Has been upheld by GAO
  - Is a process not a new regulatory requirement
- Adherence to all set-aside rules must be the standard
- Establish Governmentwide standard guidance (e.g., best practices vs. new regulation)

Final Thoughts

- Can be complex
- Requiring activities must understand it
- Clear direction to offerors is a must
- Adherence to solicitation is mandatory
- Use judiciously - abundance of set-aside programs
- No substitute for poor market research