

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 reprocur 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
