

GAO Decision Underscores Complexity Of '180-Day Rule'

By **Stephen Ramaley and Adam Bartolanzo** (January 23, 2024)

A Dec. 18 decision of the U.S. Government Accountability Office in Washington Business Dynamics LLC[1] illustrates the complexity of what legal practitioners conversant in the Small Business Administration regulatory regime have come to refer to as the "180-day rule."

This rule provides that, if a company undergoes a merger or acquisition — making it larger than a small business — within 180 days of submitting a proposal for a small business set-aside contract, it loses eligibility for that contract. If, however, the acquisition occurs more than 180 days after proposal submission, the company remains eligible to be awarded the contract.[2]

Understanding when the 180-day rule applies is critical for any company considering a merger or sale involving a small business.

Whether a target company still qualifies for a proposal pending as of the moment of transaction close can affect valuation, not to mention deal timing and post-closing growth. As a result, the GAO's recent ruling provides an important reminder for companies to stay vigilant of this evolving area of law.



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The Decision

In Washington Business Dynamics, or WBD, the protester challenged the award of a blanket purchase agreement by the GAO's Office of Personnel Management, which had issued the purchase agreement against the awardee's General Services Administration schedule.

WBD challenged the Office of Personnel Management's evaluation and trade-off decision, and the GAO eventually sustained these merits arguments. Importantly, however, the GAO first had to address the agency and awardee's argument that WBD lacked standing to challenge the procurement.

In particular, the agency and awardee argued that WBD no longer qualified for award of the purchase agreement, which was set aside for a service-disabled, veteran-owned small business because after offer but prior to award, WBD had been acquired by a non-service-disabled, veteran-owned small business concern.

WBD's acquisition occurred 147 days after the date for quotations, within the 180-day window.

Applying analysis of the law and applicable precedent, the GAO rejected this argument, finding instead that WBD remained eligible for the award, and thus had standing to maintain its protest.

The crux of the ruling is that the 180-day rule did not apply to set-aside orders or agreements placed against Federal Supply Schedule contracts, such as General Services Administration schedules.

The GAO first summarized the Small Business Administration's, or SBA's, recertification rules applicable to task orders and agreements issued against multiple-award vehicles. An October 2020 regulatory change now means that size and status recertification is required for such orders or agreements under unrestricted multiple-award vehicles — but that rulemaking explicitly excepted Federal Supply Schedule contracts from this mandate.[3]

Therefore, with no regulatory requirement for recertification, and because the contracting officer did not expressly require such recertification in the terms of the blanket purchase agreement solicitation either, the GAO concluded that blanket purchase agreement eligibility depended entirely on an offeror's size status under its General Services Administration schedule.

For the curious, the rule reads:

Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business ... a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement.[4]

The GAO then moved on to discuss the protester's size under its General Services Administration schedule, holding that the traditional recertification rule — which applies to existing awards and requires recertification within 30 days of a merger, sale or acquisition becoming final — did not make the protester ineligible for the pending blanket purchase agreement award, either.

First, the GAO found that a contrary interpretation would be irrational because of the regulation's exception for blanket purchase agreements issued under an unrestricted Federal Supply Schedule contract.

Second, and more importantly, the GAO ruled that it was not apparent that the traditional recertification rule, applicable to existing General Services Administration schedule contracts at the time of sale, necessitates recertification under the 180-day rule for pending quotations for a blanket purchase agreement or order to be issued against a General Services Administration schedule.

In this regard, the GAO relied on persuasive authority from the SBA's Office of Hearings and Appeals for guidance.

Specifically, in *Size Appeal of EBA Ernest Bland Associates PC*, in February 2022, the SBA's Office of Hearings and Appeals held that unless there is explicit language in a solicitation that requires offerors to recertify, the 180-day rule does not mandate recertification as a result of a merger, sale or acquisition at the Federal Supply Schedule task order level.[5]

Because, like the solicitation in that case, the solicitation to which WBD responded did not explicitly require offerors to recertify, the GAO declined to adopt the agency and awardee's invitation to read a recertification requirement into the regulation for a pending quotation in a Federal Supply Schedule purchase agreement competition.

Takeaways

The GAO's decision presents an extraordinary example of how the SBA's regulations can sometimes produce seemingly anomalous results.

On the one hand, WBD's acquisition required it to recertify that it was no longer small — and by extension, no longer a service-disabled, veteran-owned small business — for purposes of its Federal Supply Schedule contract and incumbent blanket purchase agreement.

However, this same corporate transaction did not mean WBD was ineligible for the follow-on blanket purchase agreement, because WBD was a service-disabled, veteran-owned small business at the time it submitted its initial quote including price.

This outcome was reached, again, because WBD was proposing on a Federal Supply Schedule blanket purchase agreement and the agency did not require size or status certification at the time of the blanket purchase agreement offer.

In the GAO's last substantive encounter with the 180-day rule, in Odyssey Systems Consulting Group Ltd. in July 2021, the GAO reached a similar holding in part because offerors were not required to recertify size or status at the task order level under a non-Federal Supply Schedule indefinite delivery/indefinite quantity.[6]

Before reading too much into these decisions, businesses should be aware of two important facts noted by the GAO in WBD.

First, the 180-day rule was amended in April 2023 to require recertification not only for contract offers, but now also for offers on orders or agreements. Because the solicitation at issue in WBD predated that amendment, the GAO's decision does not interpret the effect of that amendment going forward which, from its plain terms, more directly mandates ineligibility at the task order and blanket purchase agreement level as well.

Second, and perhaps in a nod to this new regulatory context, the GAO noted its decision was the product of the unique facts presented by the Office of Personnel Management procurement that WBD challenged, including the fact that WBD submitted a quotation for a blanket purchase agreement issued against a Federal Supply Schedule contract.

As a result, companies seeking to extend the rationale in WBD to quotations submitted after April 2023 for orders and blanket purchase agreements not issued against a Federal Supply Schedule contract are unlikely to succeed in shielding themselves from the 180-day rule like WBD did.

However, does this mean that the 180-day rule will certainly apply to all set-aside orders going forward? Not necessarily. The complexity of this regulation, as illustrated in WBD, all but guarantees a lively debate next time the GAO encounters the rule.

For one thing, the ruling still affects quotations submitted on solicitations issued on or before May 30, 2023, when the rule change was made effective.

Given procurements often drag on for months or sometimes even years, we will likely still see challenges under the old rule make their way to the GAO. And offerors thinking about mounting a post-award protest need to take careful stock of when the agency solicited its requirement, when the awardee submitted its quotation and if/when the awardee was acquired post-submission.

In addition to timing issues, the GAO's decision together with the new rule will likely intensify debate over which types of procurements are subject to the 180-day rule. Notably, the April 2023 rulemaking did not change the recertification regulation's broad exception for Federal Supply Schedule awards.

The GAO's reliance upon that exception in WBD begs the question of whether set-aside orders and blanket purchase agreements issued against a General Services Administration schedule — even those solicited after the April 2023 rulemaking that seemingly applied the 180-day rule to orders and agreements — remain immune to the 180-day rule.

Subsequent SBA rulemaking could clarify this issue, or perhaps it will be fleshed out in future litigation. Only time will tell.

For now, at least, Washington Business Dynamics represents an important reminder for both buyers and sellers to remain informed about the nature of each set-aside opportunity being pursued, and about the SBA regulations and their evolving interpretations to understand when recertification will be required post-closing and what the impact of that recertification might be.

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[1] B-421953, B-421953.2, Dec. 18, 2023, 2023 WL 8874140. Link here: <https://www.gao.gov/products/b-421953%2Cb-421953.2>.

[2] See 13 C.F.R. § 121.404(g)(2)(iii) for the rule.

[3] See 13 C.F.R. § 121.404(a)(1)(ii)(A).

[4] 13 C.F.R. § 121.404(a)(1)(ii)(A).

[5] SBA No. SIZ-6139, 2022 WL 529352. Link.

[6] B-419731 et al., Jul. 15, 2021, 2021 CPD ¶ 260. Link here: <https://www.gao.gov/products/b-419731%2Cb-419731.2%2Cb-419731.3>.