



PROGRAM MATERIALS

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Does It Take Two to Tango? - What Lawyers and Clients Need to Know About Changes to the Rule of Two in Government Contracting

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Does It Take Two to Tango? – What Lawyers and Clients Need to Know About Changes to the Rule of Two in Government



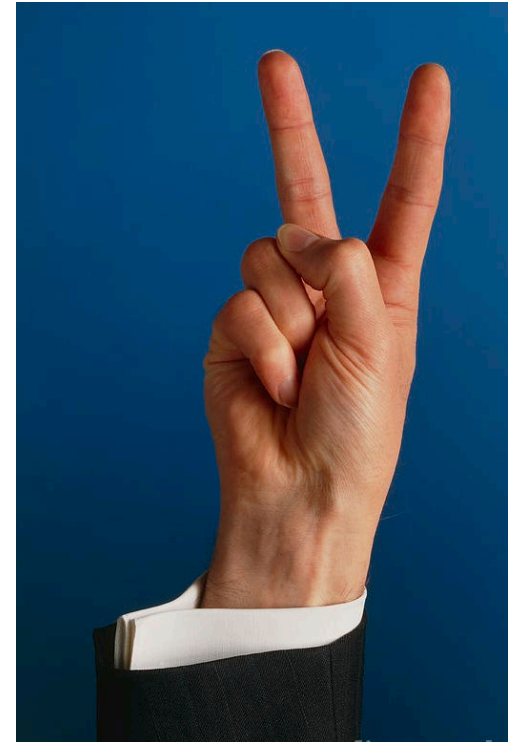
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Questions to be Answered

- What is the Rule of Two and where does it exist in the law?
- What are the Effects of the Rule of Two?
- What impact did the FAR overhaul have on the Rule of Two?
- What are some common criticisms of the Rule of Two?
- Should the Rule of Two apply to Multiple Award Contracts?
- How have Congress and/or Agencies responded to the split regarding the Rule of Two?

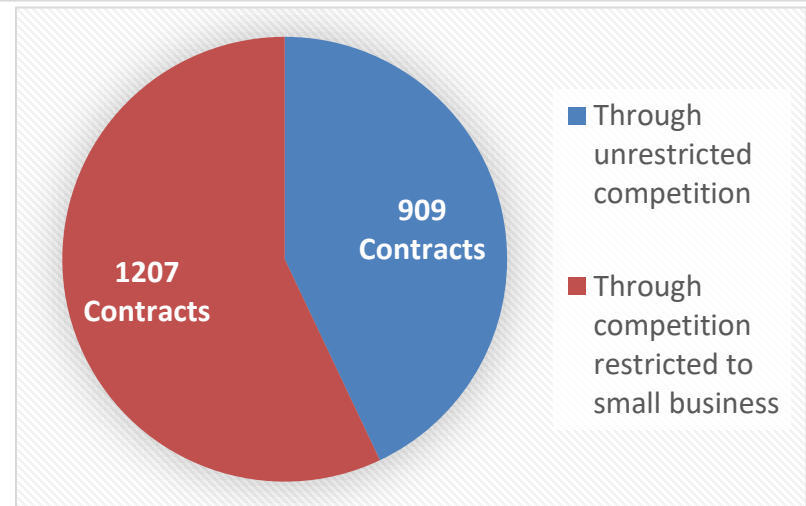
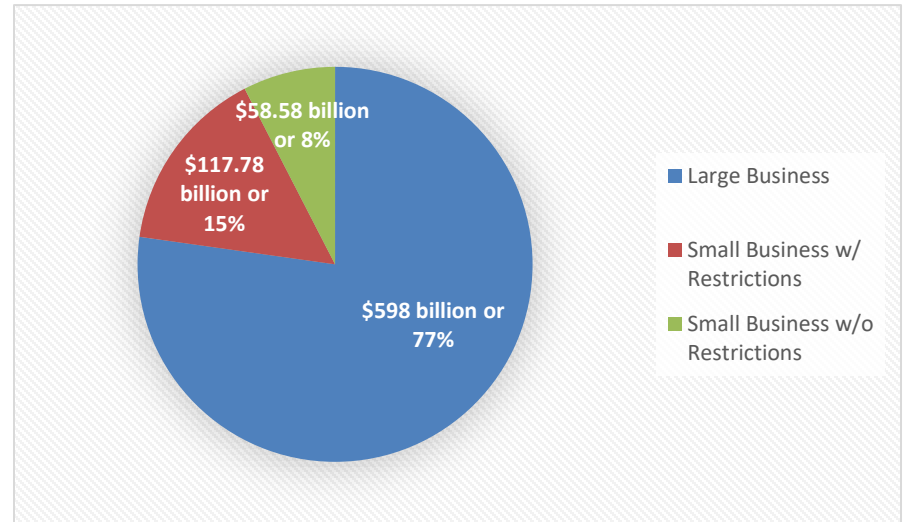
What is the Rule of Two?

- The Rule of Two is a component of federal procurement law that directs contracting officers to award contracts to small businesses under certain conditions.
- Designed to implement the congressional goal of assuring a fair proportion of purchases of goods and services by the government is allocated to small businesses.
- The VA has a rule that operates similarly but is sourced in a separate statute.



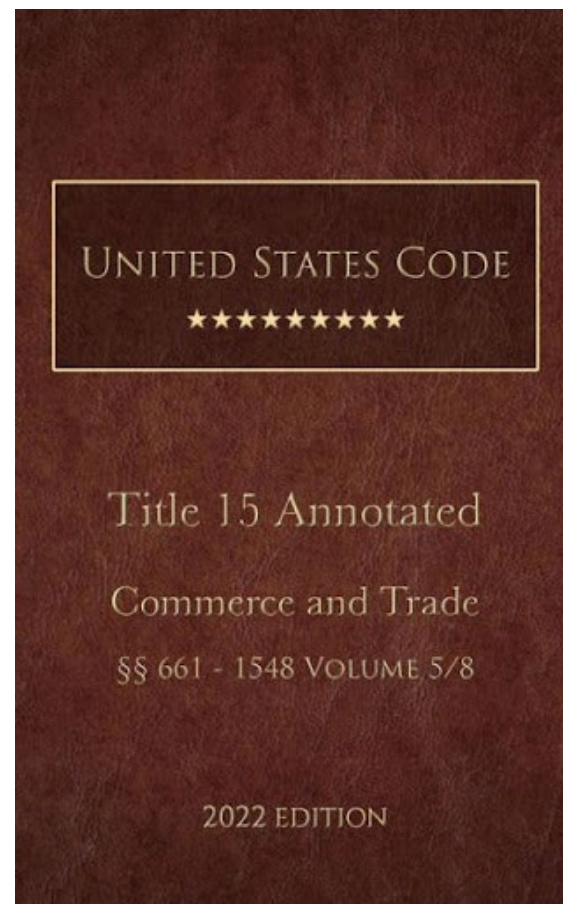
Effects of the Rule of Two

- Rule of Two and other set-aside programs are responsible for most of the money small businesses obtain from the federal government.
- The vast majority of contracts made by the Federal government remain with large businesses.
- More contracts are made with small businesses through restricted competition than unrestricted.



The Statutory Foundation of the Rule of Two

- The statutory basis for the Rule of Two is found in 15 U.S.C. § 644(j).
- “Each contract for the purchase of goods and services that has an anticipated value greater than the micro-purchase threshold, but not greater than the simplified acquisition threshold shall be reserved exclusively for small business concerns . . .”
- The rule doesn’t apply where the contracting officer cannot obtain two competitive offers from small businesses.



The VA Rule of Two

- Exists separately from 15 U.S.C. § 644(j).
- Housed in 38 U.S.C. 8127(d) and instructs the VA to set aside contracts for veteran-owned small businesses.
- In *Kingdomware Techs., Inc. v. United States*, the Supreme Court found that the VA applying the rule was mandatory, not discretionary.
- Since that decision, the number of contracts set aside for Veteran small businesses has increased.
- The VA currently utilizes a cascading evaluation process where veteran-owned small businesses are given priority then veteran-owned large businesses.



Existing Regulatory Modifications to the ROT

- The FAR has subsequently modified the Rule of Two beyond its normal statutory limits.
- FAR § 19.502-2(a): Rule of Two not required where no reasonable expectation of two or more competitive offers.
- FAR § 19.502-2(b): Contracts that exceed the simplified acquisition threshold (\$350,000) should still be set aside.
- FAR § 19.203: First priority should be given to small business socioeconomic contracting programs— most often women or veteran-owned small businesses



Small Business Socioeconomic Programs

- Small Business Socioeconomic Programs include:
- 8(a)– designed to help the development of small businesses through training and technical assistance
- HUBZone–designed to fuel growth in “historically underutilized business zones.”
- SDVOSB-- service-disabled veteran-owned small businesses.
- VOB– Veteran Owned Business
- WOSB-- Women-owned small businesses.



The FAR Overhaul

- The FAR overhaul was designed to implement Executive Order 14275 *Restoring Common Sense to Federal Procurement* and OMG Memo M-25-26.
- The stated purpose of the overhaul was to remove unnecessary, non-statutory language and reduce the complexity of the FAR overall.
- “If the policy or practice is outdated, redundant, or otherwise unnecessary, it will be eliminated.”
- The overhaul was posted on September 30 of this year, and the deadline for comment recently passed on November 3.
- Full implementation does not yet have a firm date, but has been implemented slightly by some agencies.



FAR Overhaul- Increase of Simplified Acquisition Threshold and Others

- Revision to FAR increased the Micro-purchase threshold from \$10,000 to \$15,000.
- Increased Simplified Acquisition Threshold from \$250,000 to \$350,000.
- But the simplified acquisition threshold is defined statutorily as \$250,000. Is this a Potential issue post-*Loper Bright*?
- Is increase so high as to be arbitrary and capricious?



FAR Overhaul- Removal of Priority for Small Business Socioeconomic Programs

- Priority for small business socioeconomic contracting programs under FAR § 19.203 was removed.
- Small business socioeconomic contracting programs may still be considered--- just no longer prioritized over other small businesses.
- This removal of priority and the adjustments to thresholds were the only major changes to the Rule of Two.



Criticisms of the Rule of Two

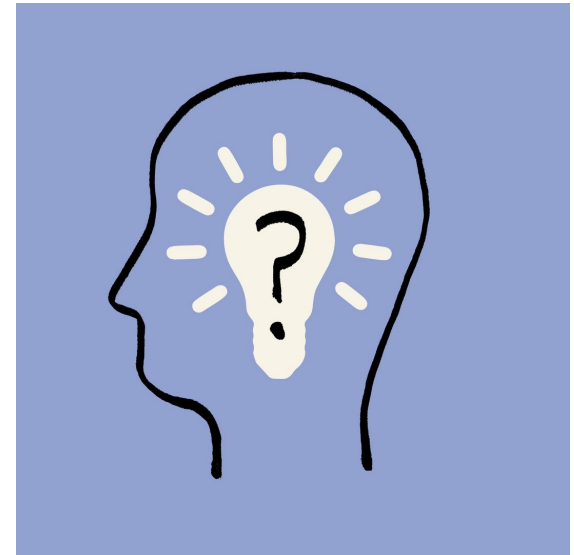
- Economic inefficiency
 - Generally more expensive to the taxpayer.
- Prone to Fraud
 - False certification or misrepresentation to obtain preferential treatment is common
- Challenges to Growth
 - Set aside programs can lead to uneven small business growth and may overlook non-financial barriers



Application of the ROT to Multiple Award Contracts– An Open Question

- Source of disagreement:
15 U.S.C. § 644(r) in the Small Business Jobs Act of 2010:

“[The Administrator of Federal Procurement Policy] shall, by regulation, establish guidance under which Federal agencies may, at their discretion--
 - (1) set aside part or parts of a multiple award contract for small business concerns
 - (2) [S]et aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2); and
 - (3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements



Lingering question:

Does § 644(r) imply that the Rule of Two is discretionary altogether for multiple award contracts?

Tolliver Group v. United States– The Mandatory View

- Does 644 (r) imply that the Rule of Two is discretionary altogether for multiple award contracts? **No.**
- Court of Federal Claims relies first on FAR 19.502-2, which states that the rule applies to “any acquisition.”
- Court looks to the language of § 644(r)– finds that it merely instructs agencies on “*how* a multiple award contract may be structured or *how* a task order competition under a multiple award contract may be competed. ” *Tolliver Grp., Inc. v. United States*, 151 Fed. Cl. 70, 114 (2020) (emphasis in original).
- “[T]he fact that an agency has the discretion to partially set-aside “a portion” of a multiple award contract for small business does not lead to the ineluctable conclusion that having decided *not* to engage in a partial set-aside, an agency may thereafter dispense with the Rule of Two. The latter does not follow from the former.” *Id.* at 115.



Matter of Itility, LLC– The Discretionary View

- Does 644 (r) imply that the Rule of Two is discretionary altogether for multiple award contracts? **Yes.**
- “[S]et-aside determinations under multiple-award contracts are discretionary, not mandatory.” *Matter of: Itility, LLC*, B-419167 at *12 (Dec. 23, 2020).
- GAO points to a history of decisions that have come to the same conclusion.
- GAO also points to subsequent regulations in the FAR and elsewhere in the CFR that confirm the use of discretionary language when discussing multiple award contracts and the rule of two.





Agency/Congressional Responses to Split

- SBA under the Biden Administration proposed a rule that would apply the Rule of Two to multiple award contracts. Comment period ended Dec. 2024, and there have been no new updates since.
- The existing SBA rule has the Rule of Two as discretionary 13 C.F.R. § 125.2.
- Protecting Small Business Competitions Act of 2025— proposed bill in Congress to expand the Rule of Two to multiple award contracts.
- The recent FAR Overhaul reaffirmed the discretionary interpretation of the Rule of Two.



Which View is Correct?

- Would we expect Congress to have been clearer if it intended to create an exception to the Rule of Two?
- Is it appropriate for *Tolliver* to rely first and foremost on the FAR and not the statutory foundation of the Rule of Two?
- Does the *Tolliver* decision render the language of § 644(r) superfluous?
- What role (if any) should subsequent longstanding contemporaneous interpretations of § 644(r) serve in analysis? (See *Loper Bright* and *Skidmore*).



Loper Bright

Facts of the Case

- *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)
 - Combined with a case called *Relentless Inc.*
- Facts of the case:
 - National Marine Fisheries Service created a new rule that required Atlantic herring fishing vessels to host NMFS “observers” and pay a daily fee for them
 - Statute allows NMFS to require “observers” on domestic vessels and charge for some vessels, but silent as to Atlantic herring vessels



***Loper Bright* Decision**

Key Holdings

- Case focused on the Administrative Procedures Act (5. U.S.C. § 706): courts must decide “all relevant questions of law”
- Key Point: “In the business of statutory interpretation, if it is not the best, it is not permissible”
 - Agencies aren’t experts in interpreting the law, Courts are
 - No deference to agencies but can “respect” their insight where they are subject matter experts (citing *Skidmore*)
 - No reason to assume Congress meant ambiguity to favor agencies
 - *Chevron* has caused confusion in the courts who use it less and less and we have had to address it over and over
 - No *stare decisis* because *Chevron* never appropriately considered the APA



Loper Bright **Another Key Decision**

- *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024).
 - Justice Barrett Decision (6-3)
 - Key Point: APA cases don't accrue until plaintiff is injured by final agency action
 - Opens up the door to many agency challenges



What to Expect from Here?

General Legal Thoughts

- Return to *Skidmore*?
- Forum Shopping?
- Reining in Agencies or Handcuffing them?



What to Expect from Here?

Government Contracts and Rule of Two

- Large increase in cases before the Court of Federal Claims instead of the Government Accountability Office
 - *Percipient.ai, Inc v. United States*, 104 F.4th 839 (Fed. Cir. 2024)
- Additional fodder in bid and solicitation protests
- Unlikely to see wholesale attacks on the FAR/DFARS— but portions of FAR that clash with their statutory background could be on the chopping block. Do agencies have authority to make such rules?
- For Rule of Two, that could be the application of the Rule of Two beyond SAT, the adjustment of SAT, etc.

Questions?



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