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NEWSLETTER

Small Business Recertification: Key Issues Under SBA's Recent Proposed Changes

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The U.S. Small Business Administration (SBA) recently issued a proposed rule that covers a variety of topics that will be of interest to small- and large-business government contractors, touching on requirements for the Historically Underutilized Business Zone (HUBZone) program, joint ventures, the mentor-protégé program, and recertification requirements under multiple-award contracts. We covered the sweeping scope of the proposed rule in a recent client alert, and HUBZone program participants in particular should closely review the proposed program updates.

Of broader interest to the government contracting community, however, are proposed changes to the small business recertification requirements for multiple award contracts, which may affect both small businesses that grow organically and those that are acquired by other large businesses. SBA proposed these changes in response to several recent protest decisions that SBA believes "adopted incorrect interpretations" of its regulations.

A small business concern's size and program status are generally determined as of the date the concern submits a written self-certification to the procuring activity as part of its initial offer or response which includes price. 13 CFR § 121.404(a). Generally speaking, a small business concern that grows to become other than small or is acquired during performance of a single-award contract will be permitted to continue performing the contract to completion.

For multiple award IDIQ contracts, however, recertification requirements during contract performance can impact eligibility for future orders and options. SBA's existing regulations include several scenarios to address situations in which a concern might need to

Authors

John R. Prairie
Partner
202.719.7167
jprairie@wiley.law

George E. Petel
Partner
202.719.3759
gpetel@wiley.law

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recertify, but these scenarios have created significant confusion in recent years, in part due to several recent protest decisions that declined to accept SBA's interpretation of its own rules.

SBA's proposed rule attempts to clarify these ambiguities in a way that should give small business concerns, potential investors and buyers, and other interested parties more confidence about how the rules will be enforced and the impacts of both growth and M&A activity. Although some issues remain unaddressed—such as application of the rule to option periods or whether the rule will apply retroactively—the updated rules should result in greater overall clarity in this area going forward.

Below are key questions regarding the new proposed multiple-award contract recertification rules that will apply if adopted:

1. **What happens if my firm has a set-aside contract and my firm grows to be other than small during performance?**

Size would still be determined as of the date a concern submits its initial offer which includes price. On a standard five-year contract, a firm would generally remain small for the life of the contract even if it grows organically to become other than small during performance.

On a long-term multiple-award contract that lasts for more than five years, however, a concern generally must recertify its size during the fifth year of performance. For a concern that grows organically to become other than small (rather than growth through a merger or acquisition) the proposed rule provides that the concern may continue to perform the remaining term of the current period of performance. So, for example, if a concern grows to become other than small during the second year of a five-year base period of a long-term contract, it can finish performing the final three years of the base period. But after recertification in the fifth year, the concern would be ineligible to receive new options or set-aside orders if the concern recertified as other than small. The prohibition on new orders would apply to all multiple-award contracts, including Federal Supply Schedule (FSS) contracts. The proposed rule is unclear if the prohibition on options applies only at the multiple award contract level, or at the individual order level as well. In other words, if a firm recertifies as other than small in the fourth year of a five-year base period on a long-term IDIQ contract, but has a task order that extends for an additional three years beyond the base period, the proposed rule is unclear whether the agency can continue to exercise options on the task order after the base period of the IDIQ contract ends.

Under the proposed rule, size recertifications for orders would not impact a concern's status for the overall IDIQ contract. If a concern is required by the contracting officer to recertify its size for a particular set-aside order under a multiple-award contract, but cannot recertify as having the applicable size or status, the concern is ineligible for that specific order but remains eligible for future set-aside orders under that contract.

2. **What happens if my firm is acquired while I have a proposal pending?**

If a firm is involved in a merger, sale, or acquisition after submitting an offer for a set-aside opportunity but before award, it must recertify its size and status to the contracting officer. This recertification requirement applies to both contracts and orders issued under multiple-award contracts. If the firm recertifies that it no

longer has the size and/or status required for the award:

- The firm is *ineligible* for award if the merger, sale, or acquisition transaction occurred *within 180 days* of offer submission and before award; but
- The firm is *eligible* for award if the merger, sale, or acquisition occurred *more than 180 days* after the date of offer but prior to award.

The reason for the difference is that SBA does not want to encourage small businesses to delay a transaction until right after a proposal is submitted, but doesn't want to penalize them when agencies take a long time to evaluate proposals and make an award.

One other notable aspect of the proposed rule is that where the underlying award is a multiple-award small business set aside or reserve, the firm is *ineligible* for the pending award if it recertifies as other than small regardless of how long the proposal has been pending. This is because the firm would not be eligible for any set-aside orders under the award.

3. **Do I need to be concerned with these changes if I sell through the FSS?**

Yes, because the proposed rule provides that the same triggering events that can disqualify a concern from receiving orders under multiple award contracts will also apply to FSS orders. Historically, SBA has been careful to limit imposing its recertification rules on GSA FSS contracts. But the new rule makes clear that this will no longer be the case. Accordingly, under the proposed rule, FSS schedule holders that must recertify their status to GSA as a result of a triggering event, such as a merger or acquisition, will be *ineligible* for set-aside orders thereafter.

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Over 80 comments have been received to date on the proposed rule, with many challenging the short comment period for these recertification clarifications, and questioning whether SBA intends to make these clarifications retroactive. The SBA seems intent on getting this rule finalized before the end of the year. Wiley's Government Contracts Practice will continue to monitor these issues and keep contractors apprised of new developments.