

Government Contracts Update

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New SBA Regulations Focus on Small Business Size and Status Integrity

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The Small Business Administration's (SBA) much anticipated new regulations on small business size and status integrity implement key provisions of the Small Business Jobs Act of 2010 (Jobs Act). Most notably (and as anticipated), the regulations implement the strict liability provisions of the Jobs Act by imposing penalties on businesses that willfully misrepresent their small business size or status in order to obtain contracts, subcontracts, grants, cooperative agreements, or research and development cooperative agreements. The regulations also require signed size and status certifications from company officials as well as annual size and status certifications in the System for Award Management (SAM). As a result of these new regulations, small businesses must be vigilant in accurately calculating and representing their size and status. Otherwise such companies risk ruinous contractual, civil, and criminal penalties that can far exceed even the value of the contract, regardless of whether the government receives the actual product or service sought under the contract.

Penalties for "Willful" Misrepresentation of Small Business Size and Status

The SBA's new regulations impose penalties on any business that "willfully" seeks and receives a contract award by misrepresentation of its small business size and status. Three actions are generally deemed to be willful certifications under the regulations:

- . Submitting a response to a solicitation (for a contract, subcontract, grant, or cooperative agreement) specifically intended for award to a small business;
- . Submitting a response to a solicitation (for a contract, subcontract, grant, or cooperative agreement) that, if successful in obtaining an award, would encourage the government to classify the award as being made to a small business; and
- . Registering on a government contracting database, such as SAM, as a small business concern.

Thus, if a concern holds itself out to be a small business in any of these three ways and is later found not to satisfy the applicable small business requirements, it is deemed to have willfully misrepresented its small business size and status, and is subject to penalties unless certain exceptions apply.

The new regulations create a presumption that the government's loss caused by a small business status misrepresentation is equal to the amount expended by the government — be it on a contract, subcontract, grant, or cooperative agreement — thereby potentially requiring a contractor to return all money paid under the contract. The new regulations also explicitly discuss civil penalties under the False Claims Act and the Program Fraud Civil Remedies Act, as well as criminal penalties under the Small Business Act. This suggests that agencies may not limit their damages to contract expenditures. Furthermore, a contractor misrepresenting its small business status is subject to suspension and debarment under these regulations.

Annual Small Business Certification on SAM

From a practical standpoint, the new regulations' most noteworthy requirement is that small businesses must certify their status in SAM at least annually. If a business fails to make an annual certification, it will not be listed as a small business in SAM until it recertifies its status. Such a loss of status obviously impacts a contractor's ability to obtain contract awards. In the comments accompanying the regulations, SBA clarified that annual recertification on SAM is meant only for purposes of future awards, not continuing eligibility for previously awarded long-term contracts.

Given the myriad problems SAM has faced since it went online last year, only time will tell whether this process will be a simple administrative function for small businesses.

Requirement for Signed Certification of Size Status

The new regulations contain a similar requirement that a small business responding to a solicitation must include in its response a certification of its small business size and status, signed by an authorized official of the business on the same page as the claimed size status.

The regulations also make slight changes to the timing of a small business size determination for participants in the 8(a) Business Development program. Where such a determination previously was made as of the date of the business's application and the date of certification by the SBA, under the new regulations, a determination is made as of the application date and, where applicable, the date the SBA program office requests a formal size determination.

Exceptions and Safe Harbors

The new regulations are intended to impose penalties only on those contractors that willfully misrepresent their small business size and status. The regulations therefore include limitations of liability in the event of:

- "Unintentional errors;"
- Technical malfunctions; and
- "Other similar situations" showing that any misrepresentation was not affirmative, intentional, willful, or actionable under the False Claims Act.

The regulations further state that a prime contractor relying in good faith on a subcontractor's representation regarding small business status will not be held liable for any misrepresentation by the subcontractor about its size. The new regulations also exempt contractors from liability in cases where government personnel have erroneously identified a contractor as a small business if the contractor has made no such representation and had no knowledge of the erroneous identification.

How Small Businesses Can Avoid Liability

When these new regulations go into effect on August 27, 2013, the burden will be on small businesses to certify their small business size and status in SAM annually, as well as in every response to a government procurement solicitation. To avoid the heavy penalties called for in the regulations, it is paramount that small business contractors be careful and thorough in assessing their size and status.

Some steps small businesses can take to limit potential liability include the following:

- Assign one primary, and a secondary, individual for ensuring the representations in SAM are always accurate and are updated once annually;
- Clarify who will be the authorized official responsible for signing the small business size and status certification;
- Establish and maintain internal management procedures governing size representation or certifications;
- Ensure all representations and certifications are clear and unambiguous; and
- Make efforts to correct an incorrect or invalid representation or certification in a timely manner.

For more information on how these regulations might impact your business, or to better understand the requirements regarding small businesses, please contact [Dismas Locaria](#) at , [Keir Bancroft](#) at , [Nathaniel Canfield](#) at , or any of the other attorneys in Venable's [Government Contracts Practice Group](#).