

## Government Contracts Update

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### SBA Issues Proposed Rule Aimed at Increasing Small Business Contracting Opportunities

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On May 16, 2012, the Small Business Administration issued a proposed rule implementing portions of the Small Business Jobs Act of 2010. See 77 FR 29130-29165 (May 16, 2012). The lengthy rule covers many areas of the regulations governing small business contracting, with a particular focus on multiple award contracts. The proposed changes will impact virtually every small business government contractor. Comments are due on or before July 16, 2012.

While the rule covers many topics, several notable highlights include the following:

#### Set-Asides, Partial Set-Asides and Reserves for Multiple Award Contracts

The proposed rule would give agencies the discretion to award multiple award contracts with a reserve, partial set-aside, or other commitment to set aside individual orders for small businesses. Significantly, the SBA proposes to include GSA schedule contracts within the broad definition of "multiple award contract," which would expressly allow small business set-asides and the application of the "rule of two" within the GSA schedule program. (§125.1(k)).

Where the "rule of two" is met, agencies are already required to set aside a contract for small businesses. However, if the "rule of two" is not met, then the agencies will have the discretion under the proposed rule to use one of the following tools: partially set aside portions of the multiple award contract for small businesses, reserve one or more contract awards for small businesses under the multiple award contract, or set aside orders for small businesses where the "rule of two" is met for a specific order (despite the general requirement to give all IDIQ contract holders a "fair opportunity" to compete for each order).

While the rule would establish a process for agencies to consider using these tools to increase opportunities for small businesses, they would not be mandatory. However, if an agency decides not to use them, it must document its rationale.

#### Size Protests and NAICS Code Appeals

The proposed rule would expressly allow protests challenging the size of an apparently-successful offeror for orders awarded under partial set-asides and allow reserves of multiple award contracts and set-asides of orders under multiple award contracts. (§121.1004).

In addition, the SBA proposes to allow parties that want to be considered small for a procurement to appeal an agency's NAICS code designation on a solicitation issued on an unrestricted basis. (§121.1103).

Under current SBA Office of Hearings and Appeals jurisprudence, NAICS appeals are limited to solicitations issued on a set-aside basis. If the appeal is successful, and the new NAICS code increases the size standard, it is likely that at least two or more small business concerns could compete for the work, which would then require the agency to set the procurement aside for small businesses under the "rule of two."

SBA's proposed change would significantly increase the opportunity for small businesses to challenge the size standard associated with a procurement and improve their chances of competing for a contract on a set-aside basis. These chances would also increase since the SBA is proposing to require separate NAICS codes for individual orders under multiple award contracts (§125.2(e)), which would expand the potential for NAICS code appeals.

#### New Recertification Requirements

Under existing regulations, a contractor is required to recertify its size status whenever there is a novation, or a merger or acquisition where no novation is required. Recognizing that the current rules are

not entirely clear whether both the acquired and acquiring concern need to recertify, the SBA proposes to require recertification from both the acquired concern and the acquiring concern if each has been awarded a contract as a small business. The rule would also require recertification from a joint venture that has been awarded a contract as a small business when there is a novation, acquisition or merger, and the acquired, acquiring or merged concern is a participant in the joint venture. To the extent there was any uncertainty, this rule would ensure that a small business “acquiring” concern must consider the immediate implications of acquiring or merging with another concern, as it would have to recertify within 30 days. (§121.404).

In addition to recertifying size after a novation, merger or acquisition, the proposed rule would also require Service-Disabled Veteran-Owned, HUBZone and Woman-Owned Small Business concerns to recertify their respective status after a novation, merger, or acquisition. This rule would impact situations when the sale, merger or acquisition of a company may not change the size of the concerns, but may affect a concern's continuing eligibility in one of the programs due to a change, for example, in direct ownership or control. The implications of a recertification of status would thus also have to be considered prior to any sale, merger or acquisition.

#### **Certificate of Competency Program**

The proposed rule would extend SBA's Certificate of Competency Program not only to multiple award contracts, but also orders issued against multiple award contracts where the agency uses a small business offeror's capacity or credit for purposes of determining suitability for award. (§ 125.5). This rule would mean that the contracting officer would have to refer a small business concern to the SBA for a Certificate of Competency if it denies the award of a task or delivery order on the basis that the small business is non-responsible, even if the next apparently- successful offeror is also a small business.

#### **“On Ramp” Provision**

The proposed rule encourages agencies to consider adding an “on ramp” provision in multiple award contracts that would permit the agency to “refresh” the number of small business contract holders, as those numbers may diminish over time due to size changes. (§125.2(e)). Inclusion of such a provision would increase the opportunity for small business contractors to compete for task orders on large, multiple award contracts if they were unable to compete under the original multiple award contract solicitation (and possibly those that were unsuccessful during the first competition).

For more information, please contact the authors of this update or any member of our **Government Contracts Practice Group**.