Client Alert

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Small Business Administration Makes Numerous Changes to Its Regulations

On May 31, 2016, the Small Business Administration published a final rule designed to clarify various small business set-aside rules. The rule can be found at 81 Fed. Reg. 34243. It is scheduled to take effect on June 30, 2016. The rule changes and related explanations fill over 20 pages in the Federal Register. A detailed review of all of them is beyond the scope of this article. However, three of the significant changes are discussed below.

The new rule changes how small businesses can form joint ventures to pursue and perform Section 8(a) set-aside work. Under the new rule a joint venture can submit a proposal if it is comprised of "at least one 8(a) Participant" and one or more other business entities "so long as each concern is small" under the appropriate NAICS code. 13 C.F.R. Sec. 124.513(b)(1). This changes the current joint venture affiliation rule. The current rule states that when two or more small businesses form a joint venture to pursue 8(a) work, the size of the 8(a) company must be less than half of the applicable NAICS standard requirement. It also imposes other restrictions depending on the type and size of the procurement. But under the new rule, so long as all businesses comprising the joint venture are small, the joint venture itself will also be deemed small and thus eligible to compete for all set-aside work. SBA hopes this change will result in more small business joint ventures. Small business owners are reminded, however, that a joint venture agreement must contain several required provisions and the agreement itself must be approved by SBA.

Another change involves the amount of work that can be subcontracted by a small prime contractor. Section 1651 of the 2013 National Defense Authorization Act ("NDAA") requires that a small prime contractor that is awarded a small business set-aside contract must perform at least 50 percent of the contract work with its own forces. The NDAA goes on, however, to exclude from the subcontractor calculation any work that is subcontracted to "similarly situated" subcontractors. In other words, a small business may subcontract work to another small business and that subcontracted work will not be counted against the 50 percent subcontracting cap. The current SBA rule does not include the "similarly situated" subcontractor exception, so this change was necessary to comply with the statute.

In another change to the affiliation rules, firms that are owned by "married couples, parties to civil union, parents, children and siblings" are presumed to be affiliated if they do business with each other. 13 C.F.R. Sec. 121.103(f)(1). This narrows the current rule, which provides that affiliation can be found if firms are owned by "family members." The new rule also creates a rebuttable presumption that firms are affiliated if one has derived more than 70 percent of its revenues from another firm over the past three years. The current rule permits SBA to find affiliation if one firm is "economically dependent" on the other, but does not define what it means to be "economically dependent." The new rule thus provides needed structure for this determination.

Other changes clarify how SBA calculates annual revenues, when SBA determines the size status of a business and numerous other matters. Hunton & Williams LLP is well positioned to help address your government contracting issues, whether those issues involve obtaining contracts or complying with the rigorous performance terms required of government contractors.

Contact

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