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Column: Does SBA's New Recertification Rule Apply to My Contract?

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The Small Business Administration's regulations require a concern to recertify its small business and/or socio-economic size status (1) within 30 days of an approved contract novation; (2) within 30 days of a transaction becoming final in the case of a merger, sale, or acquisition, where contract novation is not required; and (3) no more than 120 days prior to the end of the fifth year of a contract exceeding five years in duration (including options) and no more than 120 days prior to exercising any option thereafter. See 13 CFR §§ 121.404(g), 125.18(e)(1), 126.601(h)(1), and 127.503(h)(1).

While these timelines are clear, the effect of recertification is subject to different interpretations.

There can be no doubt that, once a concern recertifies as other than small or no longer a certain socio-economic status, the agency can no longer count the options or orders issued pursuant to the concern's contracts, from that point forward, towards its small business/socio-economic goals.

However, until recently, there had been significant debate regarding whether such a concern would still be eligible to compete for these options and/or task orders. Some said yes, interpreting the recertification rules as only affecting an agency's ability to take socio-economic and/or small business credit, while others said no, arguing that recertification also affects a concern's eligibility to compete. SBA's Office of Hearings and Appeals attempted to put this debate to rest last year in the context of SBA's SDVO SBC status recertification rule, which mirrors its size recertification rule. See In the Matter of Analytic Strategies, Inc., SBA No. VET-268 (Jan. 29, 2018).

Notably, SBA submitted comments in Analytic Strategies endorsing the view that, in addition to credit, recertification affects a concern's eligibility to compete because it is an exception to the general rule that a concern maintains its socio-economic and/or small business status for the life of a contract. However, OHA was not persuaded and held that, under a plain reading of the then-current recertification rules ("Old Rule"), (1) an agency is not precluded from exercising options or issuing orders under a long-term contract where a concern recertifies that it is no longer small (or an SDVOSB, in that case) and (2) the concern is not otherwise deemed ineligible to compete for those awards.

In other words, OHA sided with those in the industry that interpreted the recertification rules as only affecting an agency's ability to take socio-economic/small business credit.

In response to Analytic Strategies, which could be perceived by SBA as an adverse ruling, SBA issued a "technical correction" to its recertification rules in the form of a direct final rule ("New Rule"). The strong implication is that, when the New Rule applies and a concern recertifies as other than small or no longer of a certain socio-economic status, the concern is no longer eligible to compete for any options or orders set aside under its former status. In effect, although SBA claims that the New Rule does not "make any substantive change" to the regulations, it is clearly intended to codify an interpretation of the recertification rules that stands in direct contrast to that announced in Analytic Strategies.

This confusion naturally raises the question posited above: when does the New Rule apply?

Unfortunately, the answer is not entirely clear. On paper, the New Rule became effective May 25, 2018, and expressly purports to not have a "retroactive or preemptive effect." This suggests the Old Rule may still apply to certain procurements. But, until recently, we could only speculate on what those procurements might be.

However, as detailed below, OHA has now clarified this issue, at least in some respects. Specifically, in the Size Appeal of Enhanced Vision Sys., Inc., SBA No. SIZ-5978, 2018 (Dec. 13, 2018), OHA confirmed that the New Rule should generally only apply to new procurements. This case concerned a small business set-aside procurement that was solicited before the New Rule went into effect, but it was ultimately awarded after the New Rule became effective. After submitting its proposal, the appellant had been acquired and was no longer small. As such, the issue was whether recertification was required and whether such recertification rendered the awardee ineligible for award.

In analyzing the issue, OHA explained that the New Rule did not apply to the procurement because the solicitation's issuance and the awardee's offer both preceded the New Rule's effective date of May 25, 2018. Accordingly, OHA concluded that the Old Rule applied to the procurement as well as OHA's interpretation thereof, as detailed in Analytic Strategies. As a result, OHA held that the appellant was not required to recertify its size and was not disqualified from award under SBA's recertification rules.

This ruling has significant implications. For one thing, it confirms that the Old Rule should apply to any solicitation that predates the New Rule. This is important because under the Old Rule, regardless of recertification, a concern maintains its status and, therefore, its eligibility for future options and orders for the life of a contract. In addition, this ruling could have wide-reaching implications for long-term, multiple award contracts ("MACs") (e.g., Alliant, Eagle II, SEWP, CIO SP3, OASIS, VET 2). Indeed, it could be argued that under Enhanced Vision, the Old Rule applies to options and orders issued after the New Rule's effective date under MACs that were solicited before the New Rule became effective. This would create a number of opportunities for contractors performing under such contracts that recently lost or anticipate losing their small business and/or socio-economic status.

Samuel S. Finnerty is an associate with PilieroMazza PLLC. If you would like to discuss these opportunities or the impact on your company or industry, please contact PilieroMazza and one of our attorneys will be happy to assist you.