

Column: Impact of Recent OHA decision on Size and Status Recertifications

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The new year brought a ruling from the Small Business Administration's Office of Hearings and Appeals (OHA) clarifying the effect of SBA's recertification rules.

These rules require recertification of size or socio-economic status within 30 days of an approved contract novation, merger, sale, or acquisition, and every five years for any long-term contract exceeding five years. See 13 C.F.R. §§ 121.404(g); 125.18(e); 126.601(h); 127.503(f).

It is clear that where, as a result of one of the foregoing trigger events, a concern no longer qualifies as small or no longer qualifies on the basis of its socio-economic status, the concern can no longer compete for new contracts set aside under its former size or status.

There had been significant debate, however, as to whether such a concern could still compete for set-aside orders issued under pre-existing contracts.

Indeed, some in the industry believed that when, as a result of a recertification event, a concern informed a procuring agency that it no longer qualified on the basis of its size or socio-economic status, that concern could not compete for any contracts or orders set aside under its former status.

The argument went quite simply that because a procuring agency can no longer count such orders towards its small business or socio-economic goals, the concern should not be eligible to compete for such orders.

OHA has now settled this debate.

Analytic Strategies Inc. case

In the Matter of Analytic Strategies, Inc., (SBA No. VET-268; Jan. 29, 2018), OHA held that if a concern qualifies for, and certifies as, belonging to a certain socio-economic status, in this case a service-disabled veteran-owned small business ("SDVOSB"), at the time of its initial offer for a multiple award contract, such as for the One Acquisition Solution for Integrated Services ("OASIS") Small Business Pool I, then it will retain that eligibility for each task order issued under the contract, unless the contracting officer requests a new cer-

tification in connection with a specific order.

In this case, Analytic Strategies qualified for the OASIS contract as an SDVOSB, but the company lost that status when it was acquired by a non-veteran-owned concern.

After it was acquired, Analytic Strategies updated its registration in the System for Award Management, indicating that it no longer qualified as an SDVOSB. The company also notified the General Services Administration of its new status.

GSA informed the company that it still qualified as an SDVOSB for orders issued under OASIS. Analytic Strategies followed up by bidding on, and being awarded, an OASIS task order set aside for SDVOSBs.

However, the SBA protested Analytic Strategies' status. SBA officials claimed that Analytic Strategies did not qualify as an SDVOSB because, in its opinion, "a concern that informs the procuring agency that it is no longer an SDVOSB concern is no longer eligible for orders set aside for SDVOSB concerns."

OHA's decision

OHA overruled SBA's interpretation of Analytic Strategies' status.

In vacating SBA's status determination, OHA highlighted a distinction within the recertification rules.

This distinction is between an offeror's eligibility to compete for set-aside orders and an agency's ability to take small business or socio-economic credit for such orders.

OHA explained that under current rules, when a contractor no longer qualifies as small or qualifies as being of a certain socio-economic status, the agency cannot count "options or orders pursuant to the contract, from that point forward, toward its procurement goals."

However, OHA held that an agency can still award those options and orders as a "set-aside" because the regulations do not explicitly preclude it from doing so.

This means that small business contractors can continue to bid on and be awarded task orders under pre-ex-

isting contracts even after no longer falling within the applicable status so long as the contracting officer does not require recertification for the new order.

Impact of the OHA ruling

In the months ahead, the impact of this ruling could be significant as there may be a surge in contracting officers requesting task-order-level recertifications, as agencies scramble to ensure that credit will actually be available for the "set-aside" they are awarding.

There also may be increasing competition for long-term contracts such as Alliant, Eagle II, SEWP, CIO SP3, OASIS, VETS 2 that exceed five years because, barring a certification request at the task order level, a small business contractor may be able to compete for set-aside orders five, 10 and 15 or more years after losing its status.

As with other complex issues, we caution that the language of each contract should be carefully reviewed. Some long-term contracts include, for example, provisions that "off-ramp" a contractor or move it to the non-set-aside portion of a contract if it informs the agency that it is no longer small or of a certain socio-economic status, making it impossible for the contractor to compete under its former status on that contract.

In sum, it is hard to predict how or if the Analytic Strategies ruling will affect the administration of or competition for long-term contracts, but one thing is clear: SBA's apparent intent behind the recertification rules and the actual effect of those regulations continue to be at odds.

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