



SBA Proposes Significant Changes to Its Small Business Regulations: Will You Be Impacted?

A PilieroMazza Webinar

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Presented By

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About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting
- Small Business Programs & Advisory Services
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Overview

- Important small business legislative developments
- Recent proposed rules by SBA and the FAR Council
- Submitting comments to the proposed rule
- Q&A

Latest from Capitol Hill

- **Small Business Runway Extension Act of 2018**
 - Period for measuring small business status increased from three years to five years
 - This means SBA would average your revenue over the past five completed fiscal years, not three, to determine if you are small
 - Signed into law on December 17, 2018

- **VA-SBA Act**
 - Would move VA's verification of SDVOSBs/VOSBs to SBA
 - This would require SDVOSBs to be certified government-wide; no more self-certification

- **Highlights from 2018 National Defense Authorization Act**
 - Froze HUBZone maps until January 1, 2020
 - Revised the DFARS statement of purpose to emphasize quality, timeliness, and price reasonableness
 - Simplified acquisition threshold increased to \$250,000 for DoD
 - Micro-purchase threshold increased to \$10,000

Significant Rule Changes Proposed By SBA

- A plethora of rule changes were proposed on December 4, 2018
- Proposed rule implements provisions of the 2016 and 2017 NDAAs and the Recovery Improvements for Small Entities After Disaster Act of 2015, as well as other clarifying amendments
- Proposed revisions address key small business issues such as:
 - Subcontracting plans
 - The non-manufacturer rule and Information Technology Value Added Reseller procurements
 - Set-asides within a set-aside
 - Recertification
 - Limitations on subcontracting
 - Size determinations
 - Ostensible subcontractor affiliation
 - And more!

Subcontracting Plans

- Failure to comply in “good faith” with periodic reporting requirement or duty to participate in studies/surveys as required by the government to determine compliance shall be a **material breach of contract**
 - Provides examples of when prime has not complied in good faith
 - Failure to make a good faith effort may be considered in past performance evals
- Commercial plans must include **indirect costs**
 - Increases the small business subcontracting goal and thus increases the amount of funds the prime will subcontract to small business concerns
 - Should allow agencies to negotiate more realistic commercial subcontracting plans
- Compliance reviews will use “Exceptional,” “Very Good,” and “Satisfactory,” instead of “Outstanding,” “Highly Successful,” and “Acceptable”
 - Conforms SBA regulations to the FAR

Small Business Contracting in Disaster Areas

- Agencies would be able to take double credit toward SB goals when awarding contracts to SBs in areas designated as disaster areas and preference for those firms if they will perform work in the disaster area
- A concern is “located in a disaster area,” if, during the last twelve months, it had its main operating office in the area and that office generated at least half of the firm’s gross revenues and employed at least half of the firm’s permanent employees
- Rule provides a number of factors SBA will consider if the firm does not meet the foregoing criteria in order to determine whether the firm resides or primarily does business in a disaster area

NMR and ITVAR Procurements

- Rule confirms that the size standard for the ITVAR procurements (under footnote 18 to NAICS code 541519) is 150 employees, not 500 employees
- However - ITVAR procurements are still subject to the NMR (which has a 500 employee size standard)
- To avoid confusion, the Rule amends the NMR to expressly state that a firm may qualify as an SBC to provide manufactured products or other supply items as a nonmanufacturer if, among other things, it does not exceed 500 employees “(or 150 employees for the Information Technology Value Added Reseller exception to NAICS Code 541519, which is found at § 121.201, footnote 18)”

Set-Aside Within A Set-Aside

- For task orders under IDIQ contracts, SBA is proposing to allow agencies to conduct a set aside for a certain type of small business (i.e., SDVOSB, WOSB, HUBZone, or 8(a)) when the IDIQ contract was a total small business set aside
- This is a complete shift in SBA policy
- SBA has chosen not to implement such a rule in the past because it was concerned that it would unfairly deprive SBCs of an opportunity to compete for orders issued under their MACs

Size Recertification

- Proposing language to clarify that recertification is required on full-and-open contracts when awarded to SBCs
- Adding recertification requirements for 8(a) participants and SDB concerns, which are already present in the SDVO, HUBZone, and WOSB regulations
- Provides that a prime relying on similarly situated sub may not count the sub towards its performance requirements if the sub recertifies as an entity other than that which it had previously certified
 - Rule does not require sub to recertify to the prime or the procuring agency, so it is unclear how compliance will be enforced

Limitations on Subcontracting

- SBA does not think this is being enforced enough, so it is proposing to require contractors to submit information to aid COs in **monitoring compliance**
- Requesting comments on whether all small primes performing set-aside or sole source contracts should be required to demonstrate compliance with the LOS, and if so, how?

Limitations on Subcontracting

- Clarifies when an **independent contractor** can be counted as an **employee** for size and LOS purposes
- Where a contract is assigned a NAICS code with an employee-based size standard, an IC may be deemed an employee under the terms of **SBA Size Policy Statement No 1**
- Where a contract is assigned a NAICS code with a receipts-based size standard, an IC cannot be considered an employee, and will always be deemed a subcontractor
- As a result, for a contract with an employee-based size standard, an individual that is considered an employee for size purposes will also be an employee for LOS purposes.

Limitations on Subcontracting

- **Proposed exclusions** from calculating LOS compliance:
 - Cloud computing:
 - Subcontract cost would be excluded from LOS where SB prime performs other services that are the primary purpose of the contract
 - SBA is asking for comment on an alternative that would treat cloud computing as a supply, which would make it subject to the NMR rule
 - Media buys
 - Transportation/disposal for environmental remediation firms where SBCs cannot provide the disposal or transportation services
 - Travel
- SBA is requesting comments on whether these types of costs should be excluded from the calculation for purposes of LOS compliance

Other Proposed Rule Impacting Limitations on Subcontracting

- December 4, 2018, the FAR Council finally issued a proposed rule to bring the FAR into compliance with the NDAA for FY 2013, which changed the limitations on subcontracting rule
- Proposed rule will conform the FAR's LOS clause, FAR 52.219-14, with how SBA performs the calculation, codified at 13 C.F.R. § 125.6
 - Both FAR and SBA regulations will now provide a calculation based on total contract revenues
- December 3, 2018, DoD issued a class deviation, effective immediately, to implement SBA's formulation of the LOS for all DoD contracts

Ostensible Subcontractor Affiliation

- One of the most common size protest grounds
- SBA is proposing to make an offeror ineligible for a set aside if the prime contractor has a small business “ostensible subcontractor” that does not qualify for the required socio-economic status
 - Ex.: If prime contract is set aside for SDVOSBs, and SDVOSB prime has an “ostensible subcontractor” that is a WOSB but not an SDVOSB, SBA would find the SDVOSB is not eligible for the contract
- Creates a **new protest ground** that will allow a protest of a prime contractor that is unduly reliant on a small, but not similarly situated subcontractor

Kit Assemblers

- Proposing to remove the kit assembler exception to the NMR
- Instead, SBA will apply the multiple item rule to kit assembler acquisitions
- Under this rule, if the majority of the items in a kit are made by a small business, no waiver of the NMR is required, but if the majority of the items are not made by a small business, a waiver of the NMR must be obtained
- Like all other acquisitions, the NMR will not apply to set-asides at or below the simplified acquisition threshold

Clarification on Size Determinations

- Proposing language to make it clear that size is generally determined at the time of initial offer or response including price
- Size is not determined when other formal responses are received after the initial offer, such as final proposal revisions.
- Proposed exception to this rule:
 - When an agency awards a MAC that does not require offers for the contract to include price, size will be determined on the date of initial offer for the contract, which may not include price

Clarification Where One Acceptable Offer Is Received On a Set Aside

- Confirms that if CO receives only one acceptable offer from a SBC in response to a set-aside, the CO should make an award to that firm
- The FAR provides such a rule but only for set-asides **below \$150,000**
 - SBA believes this policy should apply to all set-asides
- Decision to set aside is based on CO's expectation from market research that it will receive two or more fair market offers from capable SBCs
- As long as market research leads a CO to this conclusion, the "rule of two" is satisfied, no matter how many offers are actually received

Comments to Proposed Rule

- Comments are due on February 4, 2019
- Given the breadth and scope of the proposed rule, there are a number of nuanced issues that may affect your company or industry
- The attorneys at PilieroMazza would be happy to assist you in drafting comments or analyzing the proposed rule's impact

Questions?

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