

SBA Adds Sharp Teeth to Small Business Size Certification and Status Rules

Legal Alert
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Garvey Schubert Barer Legal Update, July 30, 2013.

On June 28, 2013, SBA issued final, tougher regulations under the 2010 Jobs Act to crack down on companies that are not small, but receive federal contract awards or advantages intended for small businesses. The tough new rules better protect eligible small businesses, but also create significant bad consequences if a business intentionally misrepresents its size or disadvantaged status. This Alert highlights the most significant provisions of the amended SBA small business size and status rules.

The Government's Loss Will Be Equal to the Full Value of the Contract, When the Contract is Obtained through Willful Misrepresentation of Small Business Status

Under the 2010 Small Business Act and the new SBA rules, there will be a presumption that the Government's loss is the entire value of the contract, regardless of the Government's actual loss, if the Government proves willful misrepresentation of small business size or status. Thus, if a large company wins a \$20 million small business set aside by intentionally misrepresenting its size, then the Government's claim for losses will be \$20 million. If treble damages under the False Claims Act are awarded, then the damages owed by the guilty company will be \$60 million, plus per-incident fines. The presumption applies across the board: the SBA rules say that the "presumption of loss shall be applied in all manner of criminal, civil, administrative, contractual, common law, or other actions . . ." SBA indicated that the presumption will apply not only to contracts set aside for small businesses, but also to "price evaluation preferences, source selection factors, and other mechanisms which somehow classify a solicitation as intended for award to specific entities."

Contact

John A. Knab

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Submission of Offer or Application Intended for Small Business Concerns Deemed a “Affirmative and Willful” Certification

Under the new rules, there are several new ways to “willfully” certify small business size and status. Submitting a bid, proposal, offer, or application for any federal contract, grant or subcontract intended for award to a small business will be deemed an “affirmative, willful and intentional” certification of size and status. Also, if a bid or proposal in any way “encourages” an agency to classify an award as one to a small business concern, the “deemed certification” rule will apply. Registration in any Federal database (such as ORCA or SAM) as a small business will also be treated as a “deemed certification.”

Signature of Authorized Officer Required

The new regulations specifically require an authorized official to sign the small business size and status certification page of any solicitation, bid or proposal for a Federal contract, subcontract, or grant. SBA indicates that the FAR Council will adopt a counterpart rule.

No Liability for “Unintentional Errors”

The SBA rule provides that the “presumption” and “deemed certification” rules set forth above may be determined not to apply in the case of “unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size or status was not affirmative, intentional, willful or actionable under the False Claims Act.” SBA clarified that a prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors, nor will a business concern be liable for the government’s mistakes in classifying that concern. SBA set out several factors that will be considered in assessing whether a representation was “willful,” including: the concern’s internal management procedures governing status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and any efforts made to correct an incorrect or invalid representation or certification in a timely manner.

The new rules go into effect on August 27, 2013. They have serious consequences for all federal contractors and grantees, and subcontractors. Growth, affiliations with other companies, and changes in ownership can undermine the validity of a firm’s assumptions about its small or disadvantaged business status. Such assumptions can lead to incorrect certifications or misstatements about size or status. The Jobs Act legislation and new SBA regulations increase the risk of potentially disastrous consequences of such errors. Penalties for false size or status certifications are severe, and include suspension or debarment, civil penalties and treble damages under the False Claims Act (which will now be measured by the full value of the contract, per the “presumption”), and criminal penalties under the Small Business Act. Before taking any action that would constitute a “deemed certification,” or otherwise making any representation concerning small or disadvantaged business status, be sure your company meets the necessary qualifications, giving full consideration to current

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revenues and/or number of employees, all affiliations, and any changes in management or control.

Please call [Ben Lambiotte](#), [Julia Holden-Davis](#), [Buzz Bailey](#), or [John Knab](#) if you have any questions or need any guidance or assistance on small or disadvantaged business status questions.