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CLIENT ALERT

New SBA Rule Imposes Stricter Standards Affecting Size and Status Representations

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Last Friday, the U.S. Small Business Administration (“SBA”) issued the long-awaited final rule implementing provisions of the Small Business Jobs Act of 2010 (“Jobs Act”) pertaining to small business size and status integrity. The new rule, while softened from the proposed rule, implements a strict standard with wide-ranging consequences for contractors representing their size or status under the System for Award Management (“SAM”) database or submitting a proposal under a solicitation reserved or intended for small businesses or businesses participating in SBA programs.

The new rule, which becomes effective on August 27, 2013, imposes a presumption of loss equivalent to the total amount expended on the contract, subcontract, agreement or grant whenever a business concern has willfully sought and received an award by misrepresenting its size or status. Such presumption may be used in assessing civil, administrative, or criminal penalties or in imposing suspension or debarment on firms that have misrepresented their size or status.

This presumption, while strict, has been softened from the language used in the interim rule and in the Jobs Act, which would have made the presumption “irrefutable.” Instead, the new rule makes the presumption rebuttable. The new rule does not specify what criteria could be used to rebut the presumption and instead leaves such a determination to the relevant judicial or administrative body considering the presumption.

The presumption is also not designed to be applied for firms that make good faith or unintentional errors that would not warrant a finding of a False Claims Act violation, for instance a prime contractor that relies upon the written representation of a subcontractor. While the rule leaves it to a judge or jury to make such a factual determination, it lists relevant factors to be used in assessing whether the contractor was acting in good faith, including a firm’s internal management procedures, the clarity of the representation or certification requirement, and the efforts made by the firm to timely correct the error. As a practical matter, these requirements impose obligations on firms not only when representing their size or status, but also when instituting procedures to determine size or status and to quickly correct any misrepresentations.

In addition to imposing such a presumption of loss, the new rule also increases the number of certifications or representations made by small businesses or firms participating in SBA programs. The new rule states that any time a firm submits a bid, proposal, application or offer for a Federal contract, subcontract, grant or agreement set-aside, or otherwise intended for, a small business or a participant in an SBA program, such action shall be deemed an affirmative, willful and intentional certification as to that firm’s size or status. In addition, any time a firm registers itself in any Federal electronic database, e.g., SAM, for the purpose of being considered for such an award, such an action

is also deemed an affirmative, willful and intentional certification. The new rule also requires contractors to annually certify their size and status on SAM.

Thus, firms submitting offers on contracts or subcontracts that are intended for small businesses or participants in the SBA's programs should be cognizant of the fact that such submissions may be deemed certifications and that these certifications can impose presumptions with significant consequences for the firm's criminal, civil, administrative, and contractual liability and on its suspension or debarment status.

While the new rule was not intended to significantly impact contractors already performing under long term contracts, it could have significant, if unintended, consequences on contractors performing under indefinite-delivery, indefinite-quantity or federal supply schedule contracts that award task order or delivery order contracts intended for firms qualifying under the SBA's programs. Under the new rule, the deemed certification provision applies to firms submitting proposals under Federal "contracts" that have been set-aside for small businesses. In at least one case before the SBA's Office of Hearings and Appeals ("OHA"), OHA has indicated that this "contracts" language applied to representations made in a proposal under a task order contract set aside for small businesses.

Contractors can mitigate or avoid the presumption of loss if they have sound management procedures governing both size representations and the reporting of size misrepresentations. Therefore, it is critical that firms take steps to implement such best practices before making size or status representations after August 27th. If you would like assistance developing compliance procedures or if you have questions about the new rule, please contact Jon Williams or Alex Levine at (202) 857-1000. Mr. Williams may also be reached at jwilliams@pilieromazza.com, and Mr. Levine's email address is alevine@pilieromazza.com.