

SBA'S NEW ITVAR SIZE RULE



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PRESENTED BY

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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as 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.

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PM Legal Minute – our blog, written by all of PilieroMazza's attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decision, legislative and regulatory rule-making as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the minute recap of legislative and regulatory issues affecting small businesses.

Webinars on YouTube – all of our past webinars can be found on the PilieroMazza YouTube channel.

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OVERVIEW

- ❖ History and proposed changes to SBA's ITVAR size rule
- ❖ What is SBA's new ITVAR size rule?
- ❖ Understanding the nonmanufacturer rule and waivers
- ❖ What should ITVARs do now?



THE OLD ITVAR SIZE RULE

- ❖ **In 2002, SBA created the ITVAR “exception” to NAICS code 541519 in Footnote 18**
 - **Exception added 150-employee size standard for ITVARs**
 - **Use of exception discretionary for COs**
 - **Available when between 15-50% of the contract is for value-added services**
 - **SBA explicitly rejected the 500-employee size standard under the “nonmanufacturer rule”**
 - **SBA found that companies with 150 employees are similar in size to the revenue limits of the regular 541519 size standard**



SBA'S PROPOSED CHANGE TO THE ITVAR SIZE RULE

- ❖ In 2014, SBA proposed to eliminate the ITVAR exception in Footnote 18 to NAICS code 541519
- ❖ SBA's reasoning:
 - Exception being misused; nonmanufacturer rule should apply
 - Many industries mix supplies and services but do not receive special exceptions
 - Confusion in the industry leading to size protests
 - Confusion at agencies about whether to count contracts under 541519 toward small business goals



SBA'S FINAL ITVAR SIZE RULE

- ❖ Effective February 26, 2016
- ❖ SBA did not eliminate the 150-employee size standard exception for ITVARs in Footnote 18
- ❖ However, SBA rule now says that ITVARs must comply with the nonmanufacturer rule when using Footnote 18 under NAICS code 541519
 - Does this effectively eliminate the 150-employee size standard in Footnote 18?



SBA'S FINAL ITVAR SIZE RULE

- ❖ SBA noted that ITVAR contracts are only minimally for services, so they should be classified as supply contracts
- ❖ SBA's final rule is new
 - 180-degree change from 2002 rule
 - New rule should apply prospectively only, not retroactively



THE NONMANUFACTURER RULE

- ❖ **Allows a small business to be the prime contractor on a supply project, when the small business is not the manufacturer of the product, as long as the small business:**
 - **Does not exceed 500 employees;**
 - **Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;**
 - **Takes ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; and**
 - **Supplies the product of a small business manufacturer made in the U.S., unless a waiver is granted**



EXCEPTIONS TO THE NONMANUFACTURER RULE

- ❖ The nonmanufacturer rule does not apply to:
 - Contracts predominantly for services
 - Full and open procurements
 - Subcontracts
 - Supply procurements using simplified acquisition procedures or set-aside orders under a full-and-open MAC, valued <\$25,000
 - Small business set-aside contracts between \$3,000 and \$150,000
 - Pending SBA rulemaking would confirm this exception
 - SBA wants to spur more small business spending for supply of name brand items like computers without need for waiver
 - Will this apply to orders under FSS and MAC contracts?



WAIVERS OF THE NONMANUFACTURER RULE

- ❖ Under the new ITVAR size rule, ITVARs must comply with the nonmanufacturer rule unless a waiver is granted
- ❖ Two types of waivers:
 - **Individual:** applies to a specific contract
 - **Class:** applies to an entire class of product



INDIVIDUAL WAIVERS

- ❖ **Approved by SBA**
- ❖ **Requested by CO**
- ❖ **Available when no small business manufacturer can reasonably be expected to offer a product meeting the specifications of a solicitation**
- ❖ **Applies to a specific contract only**



PROCESS FOR INDIVIDUAL WAIVERS

- ❖ **CO submits a written waiver request to Director of SBA's Office of Government Contracting**
- ❖ **No particular format for request, but must include:**
 - **Statement of specific item to be waived and justification for why the item is required**
 - **Solicitation number, NAICS code, dollar amount, and brief statement of procurement**
 - **For contracts over \$500k, must include a copy of the SOW**
 - **CO's determination (with supporting narrative) that there are no known small business manufacturers or processors for the item**



CLASS WAIVERS

- ❖ Applies to entire class of products
- ❖ Available when no small business manufacturers are available in the Federal market for a class of products
 - “Available” means small businesses have been awarded a contract or submitted an offer to supply the class of product within the last 24 months
 - “Class of products” is a subdivision of an NAICS industry number
 - GSA Product/Service Codes (“PSC”) – List developed by GSA delineating all major product categories (i.e., PSC 5961 – Semiconductor Devices and Associated Hardware)
 - Class waivers applied at the PSC level, thus, would never be applied to the service only PSCs



PROCESS FOR CLASS WAIVERS

- ❖ **SBA may initiate on its own initiative**
- ❖ **Any interested person, business, association, or Federal agency may submit a request to the Director of SBA's Office of Government Contracting**
- ❖ **No particular format for request, but must include:**
 - **Statement of class of product to be waived**
 - **Applicable NAICS code**
 - **Detailed information on the efforts to identify small business manufacturers or processors for the class**



CURRENT CLASS WAIVERS

- ❖ Class waivers currently exist for some IT products
 - Such as routers and switches, mainframe computers and peripherals, televisions, and CD players
 - Full list: <https://www.sba.gov/content/class-waivers/>

- ❖ There are currently no class waivers for 541519
 - Class waivers are tied to the supply NAICS code that best fits the product
 - 541519 is a service code, so class waivers are unlikely
 - Will supply code waivers apply to procurements using 541519?



CLASS WAIVERS FOR SOFTWARE PURCHASES

- ❖ Pending SBA proposal intended to make it easier to grant class waivers for name brand software
 - Applies to software that is generally available to both the public and private sector unmodified
 - Proposal may be finalized by mid to late 2016

- ❖ Software waivers would be under NAICS code 511210
 - How will this work for ITVARs selling under 541519?
 - How long will waiver process take?



OTHER PENDING CHANGES TO WAIVERS

- ❖ **COs would be required to notify potential offerors in the solicitation if a class or individual waiver applies**
- ❖ **SBA could grant waivers after the solicitation is issued, as long as CO provides offerors additional time to respond**
- ❖ **SBA could grant waivers after contract award when additional items that are waiver-eligible are sought through an in-scope modification**
- ❖ **These proposals may also be finalized by mid to late 2016**



POLICY ISSUES

❖ Inconsistent treatment of ITVARs over the years

2002: SBA creates ITVAR exception, says nonmanufacturer does not apply

2012: SBA reiterates that the nonmanufacturer rule does not apply to service codes

2014:

- Court rules that nonmanufacturer rule applies to all contracts, even those predominantly for services
- SBA proposes to eliminate the ITVAR exception

2015: NDAA overturns court case, says nonmanufacturer rule does not apply to contracts with services codes

2016:

- SBA final rule applies nonmanufacturer rule to ITVARs
- GAO ruling addresses market research for nonmanufacturers



POLICY ISSUES

- ❖ **Current SBA rule and GAO ruling could significantly diminish use of small business set-asides for IT products**
 - **SBA should return to its 2002 interpretation when nonmanufacturer rule did not apply to 541519**
 - **SBA and/or Congress need to clarify that market research for set-asides should include small business nonmanufacturers**
 - **Will agencies ignore the new rule, leading to protests?**
- ❖ **SBA should also clarify that class waivers issued under manufacturing codes will apply when the waived products are obtained using 541519**



WHAT SHOULD ITVARS DO?

- ❖ Understand and utilize existing exceptions to the nonmanufacturer rule and existing class waivers
- ❖ Facilitate individual waivers for your COs
 - Develop a template
 - Talk to COs as early in the acquisition cycle as possible
- ❖ Strength in numbers
 - Push SBA for class waivers
 - Push SBA and Congress for policy changes and clarifications



Questions?

Thank you for joining us today.

If you would like to speak with Jon or Cy about SBA's new ITVAR size rule, or for help in pursuing waivers and other workarounds, please contact them at:

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