

**LOOK BEFORE YOU LEAP:**  
**PREPARING FOR SBA'S NEW RULE**  
**ON SIZE AND STATUS REPRESENTATIONS**



**A PilieroMazza Webinar**  
August 13, 2013



## **PRESENTED BY**

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## **OVERVIEW**

- ❖ Understanding the new rule
- ❖ What you should do to prepare
- ❖ Q&A



## UNDERSTANDING THE NEW RULE

- ❖ Effective August 27, 2013
- ❖ Implements “presumption of loss” provisions of the Small Business Jobs Act of 2010
  - Jobs Act established a presumption of loss to the government from a size or status misrepresentation equal to the total amount expended on a contract obtained by misrepresentation
  - Designed to prevent and deter fraud and misrepresentation in small business procurements
  - Expected to boost prosecutions by increasing the dollar value of size/status misrepresentation cases



## **KEY ELEMENTS OF THE RULE**

- ❖ **Presumption of loss**
- ❖ **Deemed certifications**
- ❖ **Signature requirement**
- ❖ **Limitation of liability**
- ❖ **Annual recertification**
- ❖ **Applicability to subcontractors**
- ❖ **Penalties**



## PRESUMPTION OF LOSS

- ❖ The new rule reads as follows:

In every contract, subcontract, cooperative agreement, cooperative R&D agreement, or grant that is set aside, reserved, or otherwise classified as intended for award to small, 8(a), SDB, SDVOSB, HUBZone, WOSB, or EDWOSB firms, there is a presumption of loss to the government based on the total amount expended on the contract, subcontract, etc., whenever it is established that a firm willfully sought and received the award by misrepresentation



## **PRESUMPTION OF LOSS** (CONTINUED)

- ❖ “Broadly inclusive” of set-asides, reserves, partial set-asides, price evaluation preferences, source selection factors, and any other mechanism not specifically addressed in the FAR
- ❖ Proposed to be an irrefutable presumption, but the final rule makes it rebuttable
  - Rebuttable presumption allows firms to demonstrate mitigating circumstances to avoid liability
  - Trier of fact (i.e., judge or jury), not SBA, will decide if the presumption is rebutted on a case-by-case basis in civil and criminal proceedings



## **DEEMED CERTIFICATIONS**

- ❖ Under the new rule, the following actions will be deemed affirmative, willful, and intentional certifications of size or status:
  - Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, etc. that is reserved or otherwise classified for award based on size or status
  - Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, etc. that in any way encourages a Federal agency to classify the bid or proposal, if awarded, based on size or status
  - Registration in any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, etc. based on size or status





## DEEMED CERTIFICATIONS (CONTINUED)

- ❖ Jobs Act specifically deems registration on a Federal electronic database as a willful certification as to size and status
- ❖ SBA believes it needs broad rules to cover registrations in electronic databases because agencies typically rely on these representations for their goals
- ❖ Preamble to the new rule states that “a firm is expected to verify its representation in SAM every time it submits an offer on a government contract”
  - What is the impact on task orders under set-aside contracts when recertification is not explicitly required?



## SIGNATURE REQUIREMENT

- ❖ Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant must contain a certification concerning the firm's small business size and status, and an authorized official must sign the certification on the same page
- ❖ Requires a “wet” signature – electronic signatures in online representations will not suffice
- ❖ SBA acknowledged that this requirement will necessitate changes to FAR clauses
  - What should contractors do in the meantime?



## LIMITATION OF LIABILITY

- ❖ Presumption of loss, deemed certifications, and signature requirement “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 was not affirmative, intentional, willful or actionable under the False Claims Act . . . .”
- ❖ A prime contractor acting in good faith should not be held liable for misrepresentations by its subcontractor
- ❖ No liability when government personnel erroneously identify the firm as small without any representation or certification by the firm or the firm’s knowledge



## LIMITATION OF LIABILITY (CONTINUED)

- ❖ Relevant factors in determining whether the presumption of loss provisions apply may include:
  - The firm's internal management procedures governing size and status representations and certifications
  - The clarity or ambiguity of the representation or certification requirement
  - The efforts made to correct an incorrect or invalid representation or certification in a timely manner
    - SBA declined to say that a correction within 30 days would be timely; this will be left to the trier of fact
- ❖ This list is not exhaustive
  - Other factors may be relevant depending on the case



## **LIMITATION OF LIABILITY (CONTINUED)**

- ❖ In the final rule, SBA changed the limitation of liability provisions from “shall” to “may” to give the trier of fact discretion
  - This change may lessen the effectiveness of the protection for firms that make mistakes
- ❖ SBA believes good faith misinterpretation of its rules should not be considered a willful misrepresentation, and leniency should be shown to new or unsophisticated firms
  - However, whether an SBA regulation is ambiguous, and whether a firm's misinterpretation was made in good faith, will be decided by the trier of fact, not SBA



## ANNUAL RECERTIFICATION

- ❖ Firms must certify size and status at least annually in the System for Award Management (SAM) database
  - If a firm fails to certify at least annually, the firm will not be listed in SAM as small or with the relevant status unless and until the firm recertifies its size or status
  - Applies regardless of the length of the contract – this is not the same as the recertification rule that applies at the end of the 5<sup>th</sup> year on long-term contracts
  - Applies to small, SDB, SDVOSB, WOSB, and EDWOSB firms, but not 8(a) or HUBZone firms because the SBA is responsible for providing these designations
- ❖ No notice from the SBA is required – the onus is on you



## **SUBCONTRACTORS**

- ❖ The new rule applies to subcontractors who willfully misrepresent their size or status to receive a subcontract
- ❖ SBA believes that prime contractors who rely in good faith on the written representations of their subcontractors should be insulated from liability
  - Will the trier of fact agree?
  - What constitutes good faith reliance on a subcontractor's representation?



## PENALTIES

- ❖ Three types of penalties under the rule
  - Suspension and debarment
  - Civil penalties under the False Claims Act and other laws
  - Criminal penalties
    - Up to \$500,000 fine and/or 10 years imprisonment for knowing misrepresentation
    - Up to \$5,000 fine and/or 2 years imprisonment for knowingly making a false statement to influence SBA actions, including not timely correcting continuing representations that are no longer true
- ❖ Presumption of loss penalty depends on receipt of contract, but other penalties (including suspension and debarment) do not





## **WHAT YOU SHOULD DO TO PREPARE**

- ❖ Undergo an internal review
- ❖ Develop & implement corporate policy and procedures for size and status representations
- ❖ Perform risk analysis for your projects and partners
- ❖ Modify your teaming agreements and subcontracts
- ❖ Other tips



## **INTERNAL REVIEW**

- ❖ **Thoroughly assess your current size and status representations in SAM to see if you get a clean bill of health or identify issues you need to address**
  - **Do this now and update at least once a year**
  - **Goals: catch past misrepresentations, ensure future representations are accurate, and demonstrate good faith**
  
- ❖ **Document the review**
  - **Memorialize scope of internal review, when it was conducted, by whom, conclusions, and any corrective measures implemented**
  - **Important to build a compliance file containing support for your representations and certifications**



## INTERNAL REVIEW (CONTINUED)

- ❖ **Raised stakes for noncompliance = don't go it alone**
  - Your advisors should assist you with the internal review
  - Get letters from your advisors for your compliance file
- ❖ **The internal review needs to go beyond checking tax returns and employee head count**
  - Treat it like a mock size determination and complete the SBA Form 355, Application for Small Business Size Determination
  - Thorough affiliation analysis requires a review of financial statements, corporate documents, current contracts, revenue breakdown by customer, outside interests by owners and officers, recent M&A activity, etc.



## **POLICY AND PROCEDURES**

- ❖ **Develop and implement company policy and procedures for size and status representations**
  - **Continue to build your compliance file!**
  - **These are your best tools for ensuring accurate representations and to defend against a claim of willful misrepresentation; without them, you are taking a big risk**
  
- ❖ **Policy**
  - **Adhere to the laws and regulations for the small business programs, ensure all of your representations are 100% accurate, and take quick action to rectify mistakes**
  - **Make this part of your company's mission statement and drill it home to your employees**



## **POLICY AND PROCEDURES (CONTINUED)**

### **❖ Procedures**

- Pick a date for annual updates of SAM and other online databases
- Spell out size/status verification procedures for each bid (e.g., check SAM, confirm revenue or head count, determine if any “triggering events” have occurred, document review)
- Specify a person in charge of the initial verification and provide escalation procedures for internal and external review when the initial verification is unclear
- Review by outside advisors: periodic and for triggering events
- Designate the authorized company official who will sign representations and certifications in your proposals
- Steps for documenting your interpretations of rules and circumstances
- Discuss how you will correct inaccurate representations
- Provide for employee awareness and training
- Explain when and how you will conduct risk analysis



## TRIGGERING EVENTS

- ❖ You should revisit your size and status representations for certain “triggering events”
  - Some situations may be clear cut, such as assessing income reflected on tax returns or affiliation based on common majority ownership of multiple firms
  - But many situations will have at least some gray area, including:
    - Identity of interest through economic dependence
    - Familial relationships
    - Newly organized concerns
    - Ostensible subcontractor
  - Critical to understand SBA's affiliation rules



## TRIGGERING EVENTS (CONTINUED)

- ❖ Examples of triggering events:
  - Changes in ownership or management
  - Mergers, acquisitions, and spin-offs
  - Teaming arrangements with large business incumbents
  - Joint ventures
  - Involvement with businesses owned by family members
  - Performance of a significant # of contracts over time with one firm that account for a high % of your revenue
- ❖ When you have a triggering event, follow your procedures, seek external review, document the file



## PERFORM A RISK ANALYSIS

- ❖ For new projects:
  - Make sure you can do the primary and vital requirements as a prime contractor and will control the project
  - Do you have a good faith basis to pursue with the required size or status?
  
- ❖ For new business partners:
  - Assess risk at teaming agreement stage
  - As a small business, will you be able to perform enough of the work, in the key areas, and are you comfortable with the indemnification your partner is likely to require?
  - If you depend on your partner's size or status, what have you done to verify and how comfortable are you?





## **TEAMING AGREEMENTS & SUBCONTRACTS**

- ❖ Prime contractors and subcontractors need to take precautions when depending on another firm's size or status representation
  - Always get a written size and status representation from your subcontractor in the teaming agreement and subcontract based on current revenue or employees
  - Confirm your subcontractor's SAM profile includes the appropriate size or status representation and print for your compliance file
  - Use indemnification clauses to protect yourself from liability and recoup proposal costs if team is undermined by partner's size or status misrepresentation



## **OTHER TIPS**

- ❖ **Start using a new signature or cover page for your proposals that has a “wet” signature from your authorized official on the same page as your relevant size and/or status representation(s)**
- ❖ **Firms interested in merging with, investing in, or acquiring a small business should take steps to avoid liability for possible presumed loss rule violations**
  - **M&A due diligence efforts should emphasize an analysis and investigation of deemed certifications and the impact of recent triggering events on size and status**
  - **M&A documents should include protections against willful size and status misrepresentations**



## **ANY QUESTIONS?**

**Thank you for joining us today.**

**If you would like to speak with Jon or Peter about SBA's new rule on size and status representations and how to best prepare, please contact them at:**

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