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CLIENT ALERT

SBA Issues Proposed Rules on the Use of Set-Asides for Multiple Award Contracts

May 25, 2012

On May 16, 2012, SBA issued a notice of proposed rulemaking to address the use of set-asides on multiple award contracts and to clarify the regulations on bundling and contract consolidation. The proposed rule implements sections of the Small Business Jobs Act of 2010, and it follows an interim rule published by DOD, GSA, and NASA last November. Because the issues addressed in the proposed rulemaking impact multiple SBA programs, SBA has proposed additions and amendments to several sections of its rules. This Client Alert highlights many of the key proposed rule changes.

Partial Set-Asides

According to the proposed rule, small businesses will be permitted to submit an offer on the set-aside portion of a partial set-aside, the non-set-aside portion, or both. Currently, FAR § 19.502-3 requires small businesses to first submit responsive offers on the non-set-aside portion to be considered for the set-aside portion, which SBA found to be too cumbersome.

Noting the frustration of small businesses that were forced to compete with large businesses for work when two or more small businesses were available, SBA determined that the “rule of two” will still apply at the contract level. This means that the proposed rule does not change the requirement to set aside a contract if the rule of two is satisfied. However, if the rule of two is not satisfied, agencies will have discretion under the proposed rule to use one of several tools to increase small business participation. These tools, referred to in the proposed rule as “section 1331 tools” after the corresponding section of the Jobs Act, are to award a multiple award contract with a partial set-aside, use a contract “reserve,” or insert a contract clause that commits to set-aside orders when the rule of two is met.

The proposed rule makes clear that agencies have the discretion to forego using the section 1331 tools even if the rule of two could be met. If an agency declines to use these tools, it must document how its planned action is consistent with the best interests of the agency. The proposed rule provides a number of examples for how agencies could make this determination, such as when the agency has a history of successfully awarding significant amounts of work to small businesses for the same requirements.

Size Status

SBA proposed several changes to the rules that impact the determination of small business status. For example, SBA proposed to amend the affiliation rules found at 13 C.F.R. § 121.103 to create an exception to affiliation for teams of small businesses that pursue bundled contracts. This affiliation exception would apply so long as each team member is small under the size standard corresponding to the NAICS code assigned to the contract and there is a written, signed teaming or joint venture agreement amongst the small business concerns.

Additionally, SBA stated that size status for multiple award contracts will be determined at the time of initial offer. If the contract contains multiple NAICS codes, size will be determined for each of those codes at the time of the initial offer. Thus, if an offeror for a multiple award contract is small at the time of its initial offer, the offeror will be considered small for all orders subsequently issued under the different NAICS codes that may be applicable at the order level. The preamble notes that contracting officers retain the discretion to require size recertification at the order level, but this is not required.

Similarly, SBA explained that the “if small at the initial offer, small for the life of the contract” concept for size eligibility also applies to program eligibility. This means that, if an offeror was HUBZone or SDVOSB eligible when it won the set-aside contract, the contractor will remain HUBZone or SDVOSB eligible for the life of the contract, even if the contractor lost its program status during the course of the contract. Like the size recertification rule, however, this does not apply to long-term contracts or when there is a merger or novation.

Further to when size is determined, SBA also stated that if “Agreements” such as Basic Agreements, Blanket Purchase Agreements, and Basic Ordering Agreements are set-aside, SBA will determine size at the time of response to the solicitation for the Agreement. Further, because such Agreements are not considered to be contracts under the FAR, the business concern must also qualify as small at the time it submits its offer or otherwise responds to a solicitation for each order under the Agreements.

In terms of challenges to size status, references to multiple award contracts will be added to SBA’s size protest regulations.

Size Recertification

SBA is proposing to clarify that the requirement to recertify size status applies both when a small business is the acquired and when the small business is the acquirer. Similarly, SBA is clarifying that size recertification is required when a participant in a joint venture is involved in a merger or acquisition, regardless of whether the participant is the acquired concern or the acquiring concern. SBA is also seeking comment on whether small businesses should be required to recertify their size on long-term orders.

NAICS Codes

In assigning NAICS codes and size standards to multiple award contracts, agencies would have two alternatives under the proposed rule: (1) assign one NAICS code and size standard to the contract if all of the orders are expected to be classified under the same code; or (2) divide the contract into discrete categories and assign different NAICS codes to each discrete CLIN, SIN, etc. Orders issued under the different categories would need to have the same NAICS code assigned to that category in the contract.

SBA also proposed to amend the NAICS code appeal rules to permit challenges to NAICS codes on unrestricted procurements. Currently, SBA's Office of Hearings and Appeals only permits NAICS code appeals for set-aside contracts. Under the proposed rule, contractors would be able to challenge the NAICS code assigned to an unrestricted procurement so long as the challenger is seeking to be considered a small business for the challenged procurement.

Limitations on Subcontracting

SBA is proposing an amendment to the limitations on subcontracting to explain that the period of performance for each order issued against a multiple award contract will be used to determine compliance with the performance requirements. For the period of measurement to determine compliance with the limitations on subcontracting, SBA considered using the aggregate at any point in time over the course of a multiple award contract. However, SBA determined that this would be unworkable, so SBA proposed to determine compliance on an order-by-order basis.

Comments on the proposed rule will be accepted until July 16, 2012. We strongly encourage affected and interested firms to submit comments to SBA. If you would like our assistance in preparing comments, or if you have any questions about the proposed changes and the comment process, please do not hesitate to contact Jon Williams at 202-857-1000.