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PilieroMazza Client Alert
July 26, 2007

FAR Council Issues Interim Size Recertification Rule

On July 5, 2007, the Federal Acquisition Regulatory Council ("FAR Council") issued an interim regulation to implement the U.S. Small Business Administration's ("SBA") November 15, 2006 final rule on recertification of size status for government contracts. While the SBA rule would not have affected contracts held by a firm that entered into a merger or acquisition agreement before June 30, 2007, the FAR rule appears to require size recertification for small business contracts regardless of when such a transaction occurred. We encourage firms that could be detrimentally affected to file comments in order to mitigate the impact of the FAR Council's final size recertification rule.

Like the SBA regulation, the FAR rule requires contractors to recertify their size under several circumstances. For long-term contracts, defined as any contract that lasts more than five years including options, small businesses are required to recertify their size between 60 and 120 days prior to the end of the fifth year of the contract. Afterwards, small businesses must also recertify their size within 60 to 120 days prior to the exercise of further options.

A key difference between the SBA and FAR rules is their effect on small business set-aside contracts held by small business that were the subject of a merger or acquisition. Under the SBA's rule, size recertification is required within thirty days after a merger or acquisition has been finalized. However, there is no size recertification requirement for mergers and acquisitions that occurred before the effective date of the SBA's regulation, June 30, 2007.

In contrast, the FAR rule, as drafted, applies to any small businesses which are subject to a merger or acquisition, regardless of when such a transaction occurred. This is due to the way the FAR Council is implementing the rule. The FAR rule requires contracting officers to insert a new clause into all contracts that are subject to the interim regulation. The clause states that small business size recertification is required not just for long-term contracts and when a merger or acquisition occurs, but also within 30 days after a contract is modified to include the new clause if an acquisition or merger occurred before the contract was modified to include the clause. The FAR rule does not limit its application to acquisitions or mergers that occurred after the effective date of the SBA's final rule. Rather, the FAR rule, as currently drafted, will require all small business merged or acquired prior to June 30, 2007, to recertify their size once their contracts are modified to include the recertification clause.

If a firm can no longer certify as small businesses for a contract, its client may still exercise options and place new task and delivery orders. However, because the agency will no longer receive small business prime contracting credit for further contract actions, many firms fear that the recertification rules will cause a decline in revenue. Thus, firms that merged with or acquired small businesses prior to the June 30, 2007 effective date may be impacted by the new FAR rule.

Public comments on the FAR rule will be accepted until September 4, 2007. The FAR Council will presumably issue a final rule thereafter. We strongly encourage affected firms to submit written comments to the FAR Council to encourage them to issue a final rule that would not apply to small business contracts held by firms that merged or were acquired prior to June 30, 2007. If you would like assistance preparing such comments, or have any questions about the impact of the size recertification rules on your business, please feel free to contact us.

With kind regards,

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