REQUIRING SMALL BUSINESSES TO RECERTIFY THAT THEY ARE SMALL DURING CONTRACT PERFORMANCE WILL HAVE AN ADVERSE EFFECT ON THE SMALL BUSINESS COMMUNITYAND ON PROCURING AGENCIES

I. Introduction

There are many indications that the Administration may be considering a change to current federal regulations that provide, for purposes of small business awards, that a contractor's size status for the duration of the contract shall be determined as of the date of the firm's submission of its price proposal. We understand that the Administration is considering a requirement that small businesses recertify their size during contract performance, perhaps even on an annual basis. In this regard, the Office of Federal Procurement Policy recently issued a letter to several agencies holding Government-Wide Acquisition Contracts (GWACs) suggesting an annual certification. Recently, the General Services Administration (GSA) issued a deviation to the Federal Acquisition Regulations (FAR) to require schedule holders to recertify their size at the time of schedule renewal. More recently, the Small Business Administration requested comments as to whether small businesses should be required to recertify their size during contract performance and is apparently looking towards rulemaking on this subject.

The small business community is extremely concerned with the prospect of recertifications because of the potential adverse impact it will have on the small businesses and on the procurement community.

II. The Current Environment

Over the past several years, the federal government has been downsizing. Fewer contracting personnel are available to administer small contracts. Consequently, the number of contracts available has been diminished and awards to small businesses have decreased. The contracts that are being awarded are larger, often with longer periods of performance, more diverse requirements and dispersed geographic locations, precluding small businesses from effectively competing for contract awards. Agencies are increasingly buying from other agency vehicles, such as GSA Schedules and GWACs, and, within departments and agencies, tasks are often being competed and awarded on Multiple Award Contracts. In this environment, if a contractor does not have a contract vehicle, the contractor may have difficulty obtaining new work. Smaller businesses are often relegated to the less attractive position of subcontracting to major prime contractors with little ability to negotiate work under the contract and no privity with the government.

The Administration has astutely recognized these challenges. The president's small business initiative establishes goals of unbundling contracts, developing more accountability, and increasing competition, thereby increasing opportunities for small businesses. Efforts are being made to implement these goals in a very difficult environment.

Recertification of a small business' size during contract performance may appear consistent with these goals. However, in reality, there will be many adverse ramifications inconsistent with these goals if the current regulations are changed. This issue should be studied very carefully prior to any decision-making. Input from the procuring agencies and small and medium-sized government contractors should be considered to identify the exact problem, whether corrective action is necessary and, if so, what action will be least disruptive to agencies and contractors.

III. Impact of Procuring Agencies

Procuring agency awards to small businesses help to meet annual goals. Contracts are generally awarded for a base period and several options periods. Under current regulations, an agency receives credit during the total life of the small business contract so long as the business was small at the time of award. Changing these regulations to require recertification during contract performance will have the following effects:

1. Agencies will lack the resources to adequately supervise the recertification requirement;

2. Agencies will refuse to exercise an option for a firm that is unable to recertify because it has grown through the size standard;

3. Agencies will be unwilling to exercise options with firms that can not recertify because the agencies will not receive small business credit for their continued performance;

4. Agencies will be reluctant to set-aside larger, multiyear requirements, because they will be unwilling to risk that the small business awardee may grow through the size standard and be ineligible to service the contract;

5. Agencies will not meet their small business goals as the number and dollar value of awards to small businesses decreases;

6. Agencies will become more insistent that subcontracting awards to small businesses should count toward their goals, relegating small businesses to subcontractor status in the long-term future;

IV. Impact on Small Businesses

1. Small businesses, particularly in the services industry, which are trying to maintain a certain size standard to insure continued performance on existing contracts, will be unable to develop a long-term marketing strategy.

2. Small businesses will have a disincentive to bid on new work.

3. Small businesses will be unable to recoup their bid and proposal costs and other costs, which are currently amortized over the projected period of performance of the contract.

4. Small businesses will be unable to market their contracting vehicles, such as GWACs and GSA Schedules, for fear that they will be ineligible when the agency decides to award or issue the task order.

5. Small businesses will be confronted with significant employment issues as their ability to hire and retain qualified employees will be diminished given the limited growth opportunities for employees.

6. Small businesses will find it much harder to survive and will face more challenges than currently exist once they exceed their industry size standard. Many of the size standards are extremely small and, particularly in today's environment, once a firm becomes "other than small" it looses its attractiveness to prime contractors and procuring agencies. Yet, "mid-sized" businesses are generally no match for large businesses and will not be competitive on unrestricted procurements. The result is often that firms suffer a reduction in revenues and then re-qualify as small. Requiring recertification will exacerbate this problem as the firms may be cut off during contract performance and lose revenue that they have already been awarded.

V. Conclusion

Natural growth of small businesses is a process that should be protected in order to increase the industrial supply base, foster meaningful employment opportunities, and increase competition for federal work. Current regulations that allow for natural growth during contract performance are working. A recertification requirement will deter agencies from making awards to small businesses at the outset, and may prevent those businesses with awards from continued performance. In other words, a recertification requirement may cut firms off at the knees when they most need the work.