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CLIENT ALERT

SBA Issues Several New Rulemakings, Including Proposed Increases to the Size Standards for NAICS Sectors 51 and 56

October 17, 2011

SBA has been busy recently issuing several important rulemakings, including the latest proposed increases to its size standards for NAICS Sectors 51 and 56. This Client Alert summarizes what you need to know about SBA's recent rulemakings.

Proposed Size Standard Increases for Sectors 51 And 56

On October 12, 2011, SBA issued proposed changes to the small business size standard for several industries under Sectors 51 and 56 of the North American Industry Classification System ("NAICS"). See 76 Fed. Reg. 63216 (Oct. 12, 2011); 76 Fed. Reg. 63510 (Oct. 12, 2011). The recent SBA proposals continue trends from prior proposed size standard changes. For instance, SBA implemented common size standards in Sector 56 (as it did previously for Sector 54, Professional, Scientific, and Technical Services), and assigned size standards from eight potential size standard levels. In addition, as with the prior sectors reviewed, many of the proposed size standards for Sectors 51 and 56 reflect significant increases over the existing standards. As noted in prior proposals and in light of current economic conditions, for the few industries in Sections 51 and 56 where SBA's analyses might support lowering size standards, SBA instead proposes to retain the current size standards.

Of the 15 industries SBA proposed to increase within Sector 51, SBA proposed the most dramatic increases in NAICS code 512131, Motion Picture Theaters (except Drive-Ins), and NAICS code 515112, Radio Stations; size standards in both industries would increase from the current \$7 million size standard to \$35.5 million. For Sector 56, Administrative and Support, Waste Management and Remediation Services, SBA evaluated 44 industries and proposed to increase size standards for 37 industries and retain the current standards for seven industries. SBA set common size standards for each of the following industry groups under Sector 56:

- Employment Services (Industry Group 5613)
- Business Support Services (Industry Group 5614)
- Travel Arrangement and Reservation Services (Industry Group 5615)
- Investigation and Security Services (Industry Group 5616)
- Other Support Services (Industry Group 5619)
- Waste Collection (Industry Group 5621)
- Waste Treatment and Disposal (Industry Group 5622)

There are a number of instances in Sector 56 in which SBA proposed increasing the applicable size standards by three or four times the existing threshold. For example, NAICS code 561311, Employment Placement Agencies, and NAICS code 561312, Executive Search Services, would increase from \$7 million to \$25.5 million, while the codes falling under Industry Group 5622, Waste Treatment and Disposal, would go from \$12.5 million to \$35.5 million. Increases were also proposed for codes such as 561990, All Other Support Services; 561621, Security Systems Services; and 562910, Remediation Services. Note, however, that SBA did not address employee-based size standards in this rulemaking, meaning that footnote 14 to code 562910 is unaffected and will remain in effect until SBA reviews industries with employee based size standards at a later time.

Public comments on the proposed size standard changes to Sectors 51 and 56 will be accepted until **December 12, 2011**. 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 Megan Connor at 202-857-1000.

Proposed Rule Enforcing Subcontracting Plan Requirements

SBA issued a proposed rule on October 5, 2011, implementing provisions of the Small Business Jobs Act. See 76 Fed. Reg. 61626 (Oct. 5, 2011). The proposed rule requires a prime contractor to notify the contracting officer (“CO”) in writing whenever the prime contractor does not utilize a subcontractor used in preparing its bid or proposal during contract performance. The proposed rule also requires a prime contractor to notify the CO in writing whenever the prime contractor reduces payments to a subcontractor or when payments to a subcontractor are 90 days or more past due. Further, the proposed rule clarifies that the CO is responsible for monitoring and evaluating small business subcontracting plan performance, specifies which subcontracts must be included or excluded in subcontracting data reporting, and updates subcontracting regulations regarding subcontracting plan thresholds and referencing the electronic subcontracting reporting system (“eSRS”). Finally, the proposed rule addresses how subcontracting plan requirements and credit towards subcontracting goals can be implemented in connection with Multi-agency, Federal Supply Schedule, Multiple Award Schedule and Government-wide Acquisition indefinite delivery, indefinite quantity contracts. The proposed rule only applies to “covered contracts,” i.e., those for which a small business subcontracting plan is required—currently procurements valued above \$1.5 million for construction and \$650,000 for non-construction. Comments on the proposed rule are due **December 6, 2011**.

Proposed “Presumed Loss” Rule

On October 7, 2011, SBA published a proposed rule that would presume a loss to the federal government equal to a contract’s value when a firm willfully misrepresents its size or socioeconomic status. See 76 Fed. Reg. 62313 (Oct. 7, 2011). In fiscal year 2010, SBA found approximately 200 firms to be ineligible for small business contracts. In proposing this rule, SBA aims to help reduce the number of ineligible firms that receive contracts under the agency’s

8(a) or HUBZone programs. Under the proposed rule, contractors must: meet the size and status requirements of small business procurement programs at the date they apply for the programs and the date the program office requests a formal size determination; annually certify their size or status in the Online Representations and Certifications Application (“ORCA”) database; and have an authorized company official sign a size or status certification or representation for a contract. To comply with the proposed rule, standard contracts and forms must be amended to enable company officials to sign the same page with the size or status the firm claims. In addition, the ORCA database also will need to be reprogrammed to automatically drop firms that do not recertify. Public comments on this proposed rule must be received by SBA on **November 7, 2011**.

Final Rule Conforming Regulations to Small Business Jobs Act of 2010

SBA issued a direct final rule, “Small Business Jobs Act: Implementation of Conforming and Technical Amendments,” on October 13, 2011. See 76 Fed. Reg. 63542 (Oct. 13, 2011). This direct final rule contains various amendments conforming SBA regulations to changes made by the Small Business Jobs Act of 2010 to several SBA programs, including business lending, disaster lending, and contract bundling. The rule also makes additional conforming changes to ensure that the regulations governing certain fees payable in the business loan programs are consistent with the related statutory authority in the Small Business Act. This rule is effective on **November 28, 2011**, without further action, unless significant adverse comment is received by **November 14, 2011**. If significant adverse comment is received, SBA will publish a timely withdrawal of the affected sections of the rule.

Final Rule on Loan Program Debt Refinancing

On October 12, 2011, SBA issued a final rule regarding the Small Business Jobs Act, 504 Loan Program Debt Refinancing. See 76 Fed Reg. 63151 (Oct. 12, 2011). This rule finalizes the interim final rule that implemented section 1122 of the Small Business Jobs Act of 2010, which authorizes projects approved for financing under Title V of the Small Business Investment Act to include the refinancing of qualified debt. As a result of comments received, this final rule amends the interim final rule to authorize the financing of business expenses as part of a Refinancing Project, to allow the Third Party Loan to be at least as much as the 504 loan instead of requiring that the Third Party Loan provide at least 50% of the financing, and to revise the definition of qualified debt. Other aspects of the interim final rule are adopted as final without change. This rule was effective **October 12, 2011**.

Proposed Size Standard Increases for NAICS Sector 51

<u>NAICS Code</u>	<u>NAICS Industry Title</u>	<u>Proposed Size Standard</u>	<u>Current Size Standard</u>
511210	Software Publishers	\$35.5 million	\$25.0 million
512110	Motion Picture and Video Production	\$30.0 million	\$29.5 million
512131	Motion Picture Theaters (except Drive-Ins)	\$35.5 million	\$7.0 million
512199	Other Motion Picture and Video Industries	\$19.0 million	\$7.0 million
512290	Other Sound Recording Industries	\$10.0 million	\$7.0 million
515111	Radio Networks	\$30.0 million	\$7.0 million
515112	Radio Stations	\$35.5 million	\$7.0 million
515120	Television Broadcasting	\$35.5 million	\$14.0 million
515210	Cable and Other Subscription Programming	\$35.5 million	\$15.0 million
517410	Satellite Telecommunications	\$30.0 million	\$15.0 million
517919	All Other Telecommunications	\$30.0 million	\$25.0 million
518210	Data Processing, Hosting, and Related Services	\$30.0 million	\$25.0 million
519110	News Syndicates	\$25.5 million	\$7.0 million
519120	Libraries and Archives	\$14.0 million	\$7.0 million
519190	All Other Information Services	\$25.5 million	\$7.0 million

Proposed Size Standard Increases for NAICS Sector 56

<u>NAICS Code</u>	<u>NAICS Industry Title</u>	<u>Proposed Size Standard</u>	<u>Current Size Standard</u>
561311	Employment Placement Agencies	\$25.5 million	\$7.0 million
561312	Executive Search Services	\$25.5 million	\$7.0 million
561320	Temporary Help Services	\$25.5 million	\$13.5 million
561330	Professional Employer Organizations	\$25.5 million	\$13.5 million
561410	Document Preparation Services	\$14.0 million	\$7.0 million
561421	Telephone Answering Services	\$14.0 million	\$7.0 million
561422	Telemarketing Bureaus and Other Contact Centers	\$14.0 million	\$7.0 million
561431	Private Mail Centers	\$14.0 million	\$7.0 million
561439	Other Business Service Centers (including Copy Shops)	\$14.0 million	\$7.0 million
561440	Collection Agencies	\$14.0 million	\$7.0 million
561450	Credit Bureaus	\$14.0 million	\$7.0 million
561491	Repossession Services	\$14.0 million	\$7.0 million
561492	Court Reporting and Stenotype Services	\$14.0 million	\$7.0 million
561499	All Other Business Support Services	\$14.0 million	\$7.0 million
561510	Travel Agencies*	\$19.0 million*	\$3.5 million*
561520	Tour Operators*	\$19.0 million*	\$7.0 million*
561591	Convention and Visitors Bureau	\$19.0 million	\$7.0 million
561599	All Other Travel Arrangement and Reservation Services	\$19.0 million	\$7.0 million
561611	Investigation Services	\$19.0 million	\$12.5 million
561612	Security Guards and Patrol Services	\$19.0 million	\$18.5 million
561613	Armored Car Services	\$19.0 million	\$12.5 million
561621	Security Systems Services (except Locksmiths)	\$19.0 million	\$12.5 million
561622	Locksmiths	\$19.0 million	\$7.0 million
561710	Exterminating and Pest Control Services	\$10.0 million	\$7.0 million
561740	Carpet and Upholstery Cleaning Services	\$5.0 million	\$4.5 million
561910	Packaging and Labeling Services	\$10.0 million	\$7.0 million

<u>NAICS Code</u>	<u>NAICS Industry Title</u>	<u>Proposed Size Standard</u>	<u>Current Size Standard</u>
561920	Convention and Trade Show Organizers*	\$10.0 million*	\$7.0 million*
561990	All Other Support Services	\$10.0 million	\$7.0 million
562111	Solid Waste Collection	\$35.5 million	\$12.5 million
562112	Hazardous Waste Collection	\$35.5 million	\$12.5 million
562119	Other Waste Collection	\$35.5 million	\$12.5 million
562211	Hazardous Waste Treatment and Disposal	\$35.5 million	\$12.5 million
562212	Solid Waste Landfill	\$35.5 million	\$12.5 million
562213	Solid Waste Combustors and Incinerators	\$35.5 million	\$12.5 million
562219	Other Nonhazardous Waste Treatment and Disposal	\$35.5 million	\$12.5 million
562910	Remediation Services	\$19.0 million	\$14.0 million
562920	Material Recovery Facilities	\$19.0 million	\$12.5 million

* This footnote to SBA’s table of size standards states the following: “As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.” SBA does not propose to modify the calculation of receipts for these industries.