

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Small Business

NOW IS THE TIME FOR GOVERNMENT CONTRACTING REGULATORY COMPLIANCE REVIEWS

By Patrick Rothwell

Twice a year, at the time our clocks are set forward for daylight savings time and set backwards to standard time, we all get reminders from the fire department or the television news that we should test and change the batteries of the smoke and carbon monoxide detectors in our homes. Similarly, the New Year is a good time for small government contractors to check their compliance programs to make sure they are still working. This article offers suggestions for a compliance review that would be manageable and beneficial to ensure your compliance program works well this year.

To begin, firms that pursue federal small business set aside procurements should review, at the start of each new year, their federal tax returns, books of account, and internal financial statements and estimates for the last three completed fiscal years (as well as payroll records for the past 12 months) to determine whether they are near or over the SBA size standard(s) applicable to any small business set aside procurements which they may seek this year. Once the prior year ends, that year must now be included in your calculation of small business status. Therefore, it is important to assess as early as possible in the New Year how the most recently-completed year will impact your small business status.

It is a common misconception that until a concern files a federal income tax return for its most recently completed fiscal year, its size is measured by the prior three fiscal years for which there are completed federal income tax returns. In fact, size is always measured based on the three most recently completed fiscal years (or the last 12 months for employee-based size standards). Until you file your tax returns for the most recently-completed year, SBA will use any other available information to calculate your firm's receipts for that year, including regular books of account, audited financial statements, and affidavits. SBA may also use your tax returns

once they are filed later in the year. Thus, you cannot wait until you file your tax returns. You need to consider early in the New Year whether, based on your financial statements and estimates for the past year, that year will bump you over the size standard for your industry. While a mistaken self-certification of size may be inadvertent, there is, besides the potential loss of a contract, always the risk that SBA might consider the concern's self-certification to be a false certification, which would compound the consequences.

The New Year is also a good time for contractors to review their System for Award Management (SAM) profile. The FAR generally requires that contractors, in order to keep their SAM registrations active, review and update on an annual basis the information contained in their SAM profiles to ensure they are current, accurate and complete. Although the annual update requirement may take place at a different time during the year, it is a good idea for a contractor to get into the habit of performing this review early in the New Year to ensure your SAM profile is current, accurate, and complete.

Small contractors should also set aside time in the New Year to review their profiles on other databases which have information about the company, including its business relationship and even its relationship with individuals. Among the profiles that should be reviewed include the contractor's SBA Dynamic Small Business Search database profile (if it has one), its Dun & Bradstreet report, its LinkedIn profile, its website, and any other similar source of information available to the public. A disappointed bidder may well use any information contained within such databases, including SAM profiles, as a basis to allege that a particular concern is other than small. Such information could include the contractor's purported number of

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employees, its supposed revenues, its business or other relationships that could allegedly give rise to an affiliation allegation, and much else that could be misconstrued. Therefore, it is important that the information contained in these databases be current and accurate, so that a competitor does not use inaccurate or outdated information as a basis to challenge a contractor's size.

Finally, the New Year is a good time for a contractor to review and update, if needed, its Code of Business Ethics and Conduct. With certain exceptions, a concern which has a federal contract, the value of which is expected to exceed \$5.5 million and the performance period of which is 120 days or more, is required to develop a Code of Business Ethics and Conduct. If you do not have an Ethics Code, make a resolution to put one in place this year. If you already have one in place, spend some time in the New Year to review your Ethics Code to make sure it is realistic and up-to-date with your current business practices and the ever-changing regulatory and compliance landscape for small contractors. You should also be aware that if your firm has a federal contract that is not for a commercial item and for which your firm has not represented itself as a small business, you are also required to develop an ongoing business ethics awareness and compliance program and internal control requirements that comply with the standards in the FAR. If you have an ongoing ethics compliance program and internal controls, it is particularly timely for you to review them now to make sure that they both meet the standards set forth in the FAR and the particular needs of your firm.

While most of this work can and should be performed internally by the federal contractor, PilieroMazza has regularly been asked by clients to provide assistance with government contracting regulatory compliance issues, such as reviewing the contractor's size or its code of business and ethical conduct. We would be happy to be of assistance should your business find that outside assistance from legal counsel in performing government contracting compliance reviews is warranted.

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