

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Small Business

SBA PROPOSES IMPORTANT NEW SMALL BUSINESS CONTRACTING RULES

By Patrick Rothwell

On December 29, 2014, the SBA published proposed amendments to its small business and socioeconomic set aside regulations. Although all of the proposed amendments are of interest to those involved in small business contracting, there are three specific proposed changes which are of heightened interest to many of our readers. They are: (i) clarifications regarding findings of affiliation based upon an identity of interest; (ii) expansion of small business joint venturing without affiliation; and (iii) when a concern must recertify size following a merger or acquisition. Each of these changes is briefly outlined below.

AFFILIATION BASED UPON FAMILIAL RELATIONSHIPS

SBA regulations provide that concerns owned or controlled by family members have identical or substantially identical business or economic interests and may be found to be affiliated. 13 C.F.R. § 121.103(f). SBA's practice has been to find that such concerns are subject to a rebuttable presumption of affiliation simply by virtue of the familial relationship itself. Nevertheless, there has been ongoing confusion about the extent to which persons are treated as members of a family for purposes of an affiliation finding. In order to clarify this issue, SBA has proposed to amend its regulations such that firms owned or controlled by married couples, parties to a civil union, parents and children, and/or siblings are presumed to be affiliated with each other if they conduct business with each other. This presumption may be overcome by a "clear line of fracture" between the concerns. Importantly, the proposed rule also states other types of familial relationships, such as, presumably, cousin relationships, are not grounds for a finding of an affiliation based upon an identity of interest. By conducting business, the proposed regulations identify as examples, subcontracts, joint ventures, sharing or providing loans, resources, equipment, locations or employees with each other.

These changes, if made final, should provide small businesses some clearer lines as to the types of family relationships that could give rise to a finding of affiliation.

AFFILIATION BASED UPON ECONOMIC DEPENDENCE

In addition to where there are familial relationships present, an identity of interest, and, therefore, an affiliation, between firms may be found where one firm is economically dependent upon the other firm. However, the extent to which the economic ties between two companies are so close that one firm is dependent upon the other has historically been difficult to determine and is the subject of constant litigation. Even though there is no fixed percentage of revenues in SBA's current regulations which would serve as the threshold for a finding of economic dependence, the SBA's Office of Hearings and Appeals (OHA) has held that economic dependence is present when one firm derives 70% or more of its receipts from another concern. However, even in such a case, OHA has found the 70% threshold not to be applicable in a case of a start-up firm.

SBA has proposed to adopt OHA's precedent at least in part. The proposed rule provides that economic dependence of one firm upon another may be found if one concern derives 70% or more of its receipts from the other concern in the previous fiscal year. However, this new rule still leaves open many important problems in determining whether economic dependence is present. For instance, although the preamble to the new rule indicates that the presumption of affiliation can be rebutted for new firms that have only received a few contracts, it is uncertain whether the affiliation can be rebutted in other ways. It is also unclear to what extent a finding of affiliation may occur when a firm has earned a majority of its revenues from another firm but not 70%. Likewise, it is unclear from the rule whether receipts from other past fiscal years are relevant to an economic dependence analysis.

Continued on page 2

Published by

PM | **PILIERO
MAZZA** PLLC
ATTORNEYS AT LAW

Continued from page 1

JOINT VENTURES

SBA has proposed a change in the joint venture rules which will significantly benefit small businesses. Currently, joint venture partners, combined, must meet the applicable size standard except for bundled or “large” procurements, where the partners will be eligible as long as each is small on its own. SBA is now proposing to allow small businesses to joint venture without affiliation on any contract as long as the businesses are each, on their own, considered to be small under the applicable size standard for the contract. This will open up more joint venture opportunities for small businesses and is welcome news to the small business contracting community.

RECERTIFICATION OF SIZE FOLLOWING A MERGER OR ACQUISITION

Currently, there is a gap in SBA regulations regarding when a concern must recertify its size in connection with a merger or acquisition. The proposed rule closes this gap by requiring firms to recertify their size to the contracting officers on pending proposals where the merger or acquisition occurs prior to award.

While this proposed rule requires recertification prior to award, it is less clear what effect the recertification has on the pending proposal. If, after recertification, an offeror is no longer small under the applicable size standard, can (or must) the contracting officer still make award to that offeror if it was small at the time it submitted its initial proposal, including price? Thus, even if the proposed rule were to come into effect, there would still be some unanswered questions regarding the practical effect of a recertification prior to award. □

About the Author: Patrick Rothwell, an associate with PilieroMazza, practices primarily in government contracts and litigation. Mr. Rothwell advises clients in a variety of government contract matters, including size protests before the SBA and bid protests before the Government Accountability Office and the United States Court of Federal Claims. He can be reached at prothwell@pilieromazza.com.

The *Legal Advisor* is a periodic newsletter designed to inform clients and other interested persons about recent developments and issues relevant to federal contractors and commercial businesses. Nothing in the *Legal Advisor* constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication but is subject to change and does not purport to be a complete statement of all relevant issues.