

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Small Business

SBA PROPOSES NEW REGULATIONS WHICH PERMIT ADVISORY SMALL BUSINESS SIZE DECISIONS

By Patick Rothwell

As many small businesses are aware, the Jobs Act and its implementing regulations have imposed new penalties on small businesses for misrepresentation of size status. The seemingly broad scope of these penalties has been a source of ongoing concern to many because SBA's size regulations regarding affiliation are often not well understood by small businesses. This is, in part, because SBA's affiliation rules are both complicated and often difficult to apply on a fact-specific basis. Moreover, many small businesses have encountered difficulties in properly calculating their average annual receipts (or employees), along with their affiliates. In short, it is possible for a firm to honestly and mistakenly certify itself as a small business, and then, at least theoretically, face the prospect of additional penalties, some of which could be quite draconian for an honest mistake (suspension and debarment, loss of 8(a) eligibility, civil and criminal penalties, and so forth).

In order to mitigate the potential for such harshness, the National Defense Authorization Act of 2013 created an exemption to (or "safe harbor" from) such penalties for misrepresentation of size where the concern making the misrepresentation acted in good faith reliance on a written "small business status advisory opinion" (advisory opinion) from a Small Business Development Center (SBDC) or a Procurement Technical Assistance Center (PTAC). An SBDC is a center which offers one-stop assistance to individuals and small businesses by providing a wide variety of information and guidance in central and easily-accessible branch locations. There are SBDCs in each state and the District of Columbia. A PTAC provides assistance to businesses pursuing and performing under government contracts, including contracts with the Department of Defense, other federal agencies, state and local governments, and with government prime contractors. PTACs are

also located throughout the country and are a part of the Procurement Technical Assistance Program, which is administered by the Defense Logistics Agency.

On June 25, 2014, SBA issued proposed regulations implementing this new safe harbor provision. According to the proposed regulations, a concern that receives an advisory opinion may rely on that opinion for purposes of responding to federal procurements, such as submitting bids or proposals, from the date it is issued unless and until it is rejected by SBA.

The process by which an SBDC or PTAC will issue such an advisory opinion is not specified in the proposed regulation. Should an SBDC or PTAC issue an advisory opinion, it is required to submit the advisory opinion to SBA's Associate General Counsel for the Office of Procurement Law for review, along with documentation (including a written statement from the principal of the concern) in support of the opinion. SBA will then decide, within 10 business days of receipt, whether to accept or reject the advisory opinion. Or, SBA could request a formal size determination of the concern.

The advantages to these advisory opinions are self evident. If a concern receives an advisory opinion indicating it is small under the applicable size standard, it can avoid fraud or misrepresentation penalties for an inaccurate size certification in connection with submitting a bid or proposal. Thus, such an advisory opinion has the potential to be an invaluable form of protection from liability. Under the current size protest regulations, a small business contractor cannot test its strategy for remaining below applicable size standards without first being subject to a size protest and a size determination proceeding after it has already

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self-certified as small in response to a procurement. Thus, the advisory opinion would be a more proactive way for a concern to determine at an early stage that it is below a particular size standard.

On the other hand, it is possible that the utility of these new regulations will be limited. Importantly, no SDBC or PTAC is required to issue any advisory opinions, and there is no funding for issuing such opinions as of yet. Thus, it remains to be seen how many such entities will actually provide this service. Furthermore, it is not clear what level of evidence of size would satisfy an SDBC or PTAC initially, and, upon review, SBA. For instance, would SBA require a firm to submit information that would otherwise be required in a formal size determination proceeding, such information that would be requested in a Form 355? If that will be the case, then seeking an advisory opinion could be an expensive, cumbersome process. And, it appears the regulations do not contemplate the advisory opinion having any impact on a size protest. Thus, a contractor would not be able to use an advisory opinion as a complete defense to a size protest. Finally, there is no timeline for an SDBC or PTAC to issue advisory opinions. Thus, it is conceivable that, in many circumstances, an advisory opinion might not be received by the concern until after the deadline for responding to a particular procurement has passed.

In sum, while it remains to be seen how this new safe harbor from penalties arising from a misrepresentation of size will be utilized, it is, nevertheless, a tool that may well be useful for apparently small businesses to protect themselves from penalties should they later be unexpectedly determined to be other than small. Comments on this proposed regulation are due on or before August 25, 2014. Small businesses should consider submitting comments in response to these proposed regulations. Such comments could include suggesting to SBA that these advisory opinions should be used as a safe harbor from additional effects of an adverse size determination beyond penalties for misrepresentation. □

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