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Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, SBA Final Rule



05/31/2016
Federal Register

The Small Business Administration has published a wide-ranging final rule that implements several changes mandated by the National Defense Authorization Act of 2013, including **changes to limitations on subcontracting in small business contracts**, SBA's regulations concerning the nonmanufacturer rule and affiliation rules, and the treatment of joint ventures between small businesses.

The new regulation allows JVs to qualify for small business procurements as long as each member of the JV is small under the size standard assigned to the contract. The rule also aims to clarify the tests for a finding of affiliation by identity of interest, the ostensible subcontractor rule, and SBA's method of calculating annual receipts for revenue-based size standards, among other questions.

"SBA expects that costs now incurred by small business concerns as a result of ambiguous or indefinite regulations will be eliminated or reduced," SBA wrote in the rule. "Clarifying the confusion and uncertainty concerning the applicability of SBA's contracting regulations would also reduce the time burden on the small business contracting community and therefore make it easier for them to contract with the federal government."

Under the rule, small businesses will be allowed to use "similarly situated" subcontractors without counting those companies' work towards limitations on subcontracting, which SBA says will expand the capacity of the small business prime contractor and potentially enabling small businesses to compete for and obtain larger contracts.

In seeking to clarify its affiliation rules, which can disqualify small businesses that benefit from ties to other companies, SBA said that firms "owned or controlled by married couples, parties to a civil union, parents, children, and siblings are presumed to be affiliated with each other if they conduct business with each other," but allowed that presumption to be rebutted by "showing a clear line of fracture between the concerns." SBA clarified that other types of familial relationships are not grounds for affiliation on family relationships.

SBA also clarified the limitations on subcontracting and the nonmanufacturer rule (NMR) do not apply to small business set-aside contracts valued between \$3,000 and \$150,000. SBA said that the change will "spur small business competition by making it more likely that a contracting officer will set aside an acquisition for small business concerns because the agency will not have to request a waiver from SBA where there are no small business manufacturers available." Such waivers require market research and can take several weeks, which can discourage agencies from seeking them, according to SBA.

SBA amended its rule on **who may initiate a size status protest**, eliminating a double negative that confused contractors and government officials alike. The new language provides standing to any offeror that is in line or consideration for award, but does not provide standing for an offeror that has been found to be nonresponsive, technically unacceptable or outside of the competitive range, according to SBA.

The rule **codifies SBA's presumption of affiliation based on economic dependence, saying that a firm derives 70 percent or more of its revenue from another firm over the previous fiscal year will lead SBA to assume an affiliation based on economic dependence.** There is no statutory fixed percentage for economic dependence, but SBA's Office of Hearings and Appeals has used the 70 percent figure as a guide, and writing that benchmark into regulations will provide beneficial clarity to small businesses, according to the agencies.

SBA backed off of a proposed change to require written agreements and compliance reporting to ensure compliance with limitations on subcontracting and the new exemption for similarly situated subcontractors.

“Upon further review, SBA believes that this proposal would create a disincentive to utilize this new statutory authority,” SBA wrote. “Compliance reporting was not required by the statute, and in fact, reliance on similarly situated entities to help meet their performance requirements actually makes it easier these firms to comply with their obligations. Moreover, requiring a prime contractor to report on compliance with the limitations on subcontracting when it uses one or more similarly situated entities could hamper flexibility for firms during contract performance. For example, a firm may initially intend to comply on its own, but may find during contract performance that it must rely on one or more similarly situated subcontractors to meet its performance obligations.”

SBA has previously allowed similarly situated entities to be counted towards the limitations on subcontracting requirements under SDVO or HUBZone set-asides or sole source awards, without also requiring a separate written agreement, and that framework has worked well, according to the agency. Adding new written agreements and reporting would burden both small business contractors, which might be dissuaded from using the new exemption authority, and SBA and other federal agencies, which do not have the resources to review agreements or amendments to those agreements.

Source (<http://law.pubkgroup.com/wp-content/uploads/sites/6/2016/05/SBA-NDAA-update->

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