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Federal Contractor's Guide to the SBA's October 2020 Final Rule –

Part III: Changes to Affiliation Rules and General Small Business Programs

Presenters:

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Today's Agenda

- **Final Rule Changes to Affiliation Rules**
 - Economic Dependence Affiliation
 - Newly Organized Concern Rule
 - Size Status Determination Timing
- **Final Rule Changes to Small Business Programs**
 - Past Performance of First-Tier Subcontractors
 - Nonmanufacturer Rule and Multiple Item Procurements
- **Practical Implications of the Final Rule**
- **Preview: Fourth & Final Session (SBA 8(a) Program)**



Changes to Affiliation Rules: Economic Dependence

- **Affiliation:** When two businesses are so intertwined the SBA considers them a single entity for size determination
 - Focus on *CONTROL*
- **Economic Dependence Affiliation:** When one business derives **70%** or more of its income from another (3 year period)
- **Final Rule Change:** Small business can **rebut the presumption** of economic dependence by showing:
 - It has only **been in business for a short time** (and has only a limited number of contracts), or
 - The contractual **relationship does not limit its ability to sell** the same products or services to another buyer (*NEW*)



Changes to Affiliation Rules: Newly Organized Concern

- Affiliation may arise where directors, officers, key employees, etc. **from one business form a new business** in the same or related industry
 - Final Rule clarifies that a finding of affiliation will apply to current as well as former directors/officers/key employees
- The Final Rule also clarifies that the newly organized concern rule **will not apply to tribes**, Alaska Native Corporation (ANC) firms or Native Hawaiian Organization (NHO) entities



Changes to Affiliation Rules: Size Status Determination Timing

- Significant change for **ostensible subcontractor rule and joint venture agreement** requirements:
 - An agency will **determine size status** as of the **date of the *final proposal revision or final bid***
 - This timing previously only applied to the nonmanufacturer rule
 - **For example**, changes to JV or prime-subcontractor relationships that shift control away from the small business partner before final bid may result in affiliation
- Additionally, WOSB and SDVOSB applicants may now request formal size determinations for program eligibility



Changes to Small Business Programs: Small Business Past Performance

- Final Rule requires **agencies to consider** the “capabilities, **past performance**, and experience” of **first-tier subcontractors** if a **small business prime contractor** cannot demonstrate necessary past performance alone
 - To take advantage of the Final Rule, small business prime contractor must include a proposed “team of small business subcontractors” and specifically identify the first-tier subcontractor(s) in the proposal
- **Unclear:** Whether first-tier subcontractors must also be small, but it seems SBA’s intent is that the new rule apply only to small business subcontractors, not large business subcontractors.



Changes to Small Business Programs: Nonmanufacturer Rule and Multiple Item Procurements

- **Nonmanufacturer Rule:** Small business prime contractor can supply products that it did not manufacture as long as the products come from other small businesses
 - This is an **exception** to the rule that small business primes account for 50% of the cost of the products manufactured and are limited in how much they can subcontract
- Final Rule updates how the nonmanufacturer rule will apply to multiple item procurements with nonmanufacturer waivers



Practical Advice:

- Affiliation Remains the Single Most Dangerous Threat to Small Business Size Status
 - Thoughts on Transition to Other-than-Small Status
- Reminder: Significant Changes to Joint Venture Rules and the All-Small Mentor Protégé Program
- Bid Protest and Size Protest Implications
- Forecast for 2021 and Beyond



Upcoming Webinar

The last installment in this series will be on **December 15, 2020** and we will be covering updates and changes to the **SBA 8(a) Program**, and we will be covering the following topics:

- Sole Source Contracts
- Business Activity Targets
- Follow-on Contracts and Requirements
- Relaxation of Immediate Family Member Restrictions
- Changes to the 8(a) application process

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