
SBA Issues Proposed Rules to Implement the Small Business Jobs Act; Comments Due Soon


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Last week, the Small Business Administration (SBA) issued a pair of proposed rules that would amend SBA's regulations to implement provisions of the Small Business Jobs Act of 2010, Public Law 111-240 (the Jobs Act). The first of the proposed rules, issued on October 5, 2011, is aimed at increasing the protections afforded to small business subcontractors.¹ The second proposed rule, issued on October 7, 2011, is aimed at maintaining small business size and status integrity.² Together, the proposed rules will substantially enhance the protections afforded to small business prime and subcontractors.

Background – The Small Business Jobs Act

On September 27, 2010, President Obama signed into law the Jobs Act. In addition to enhancing small business loan provisions to increase lending support to small business concerns, increasing funding to SBA's Small Business Development Centers for training and counseling, and extending and expanding tax cuts to small businesses, the Jobs Act also establishes policies intended to improve subcontracting management, achievement, and performance, and small business size and status integrity. More specifically, in regards to small business subcontracting, the Jobs Act instructed SBA to adopt regulations establishing policies to address small business subcontracting compliance to combat fraud, waste, and abuse by large business prime contractors. And, in regards to small business size and status integrity, the Jobs Act included statutory provisions designed at preventing ineligible contractors from receiving small business contract awards.

SBA's proposed regulations, issued on October 5, 2011 and October 7, 2011, implement the small business subcontracting and small business size and status integrity provisions of the Jobs Act.

 ¹ 76 Fed. Reg. 61626 (Oct. 5, 2011)

² 76 Fed. Reg. 62313 (Oct. 7, 2011)

Small Business Subcontracting Overview

The October 5th proposed rule would require prime government contractors to notify the contracting officer in writing if the prime contractor decided to not use a small business subcontractor that the prime contractor used in preparing its bid or proposal, if the prime contractor reduced payments to the small business subcontractor, or if the prime contractor made payments to the small business subcontractor 90 days or more past due. The proposed rule would also make several changes to SBA's regulations aimed at improving the monitoring, reporting, and evaluation of small business contracting plans. The proposed changes to SBA's regulations would apply to "covered contracts," i.e. contracts for which a small business subcontracting plan is required, and the subcontracting opportunities are valued above \$1.5 million for construction contracts and \$650,000 for all other contracts. Key aspects of the proposed regulation are highlighted below.

Prime Contractor Notification Requirements

The proposed rule includes several new prime contractor notification requirements which are outlined below.

(1) Prime Contractor Must Notify the Contracting Officer if it Fails to Use a Small Business Subcontractor Used in Preparation of the Proposal

In accordance with Section 1322 of the Jobs Act, the proposed rule would require prime contractors to notify the contracting officer in writing whenever the prime contractor fails to use a subcontractor that the prime contractor used in preparing a bid or proposal. Because it may be difficult to define when a prime used a subcontractor in preparing a bid or proposal, the rule writers have specified that the notice requirement will be triggered when: (1) the small business is specifically referenced in the bid or proposal; (2) the prime contractor has entered into a written agreement with the small business for the purpose of performing a portion of the specific contract; or (3) the small business drafted portions of the proposal or submitted technical or pricing information that is included in the proposal or bid, with the intent or understanding that the small business will perform the related work if the prime is awarded the contract. As part of the notification, the prime contractor would also be required to provide the contracting officer with an explanation as to why the prime contractor failed to utilize the small business subcontractor in performing the contract.

(2) Prime Contractor Must Notify the Contracting Officer of Past Due or Reduced Payments to Small Business Subcontractor

The proposed rule would also require a prime contractor to notify the contracting officer in writing if the prime contractor reduced payments to the small business subcontractor or if the prime contractor's payment to the small business subcontractor is 90 days or more past due, provided that the government has already paid the prime contractor for the goods or services furnished by the subcontractor. In its notification to the contracting officer, the prime contractor would be required to include the reason for the reduction in payment or for its failure to promptly pay the small business subcontractor. According to the proposed rule, if the contracting officer determines that the prime contractor's reduction in payment to the small business subcontractor or its untimely payment to the small business subcontractor is not justified, then the contracting officer may require the prime contractor to enter into a funds control agreement with a neutral third party for the purpose of ensuring that the small business subcontractor is paid the contractual amount in a timely manner. Moreover, the proposed rule states that if the contracting officer determines that the prime contractor has a history of unjustified reduced or untimely payments to the small business subcontractor, then the contracting officer must note this in the Federal Awardee Performance and Integrity Information System (FAPPIIS) when evaluating the prime contractor's performance.

(3) Prime Contractor Must Notify Unsuccessful Small Business Offerors for Subcontracts

In addition to the above notification requirements, the proposed rule would also require the prime contractor to provide pre-award written notification to unsuccessful small business offerors on all subcontracts over \$150,000 for which small businesses received a preference and as a best practice provide written notice, when practical, to unsuccessful offerors for subcontracts at or below the \$150,000 level. The notification would include the name and location of the apparently successful offeror and whether the offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone, small disadvantaged business or women-owned small business.

The proposed rule also sets forth the prime contractor's responsibilities in regards to the preparation of and filing of Individual Subcontract Reports in the electronic subcontracting reporting system (eSRS).

Contracting Officer Responsibilities

The proposed rule would also clarify the role of the contracting officer in evaluating and monitoring the prime contractor's compliance with its subcontracting plan. The proposed rule would require the contracting officer to ensure that all prime contractors, when applicable, submit their subcontracting reports into the eSRS system within 30 days after the report ending date. And, the contracting officer would be required to review all reports in eSRS within 60 days of the report ending date.

Under the proposed rule, the contracting officer would further be charged with evaluating whether the prime contractor made a good-faith effort to comply with its small business subcontracting plan. As part of the evaluation the contracting officer would be required to consider whether the prime contractor fulfilled the requirements of its subcontracting plan, and whether the prime contractor paid small business subcontractors in a timely manner at the agreed-upon rate. The contracting officer would also be required to complete a compliance review of the prime contractor's small business subcontracting efforts.

The proposed rule would also mandate that contracting officers are to require prime contractors to update their small business subcontracting plans when an option under the prime contract is exercised and to submit an additional subcontracting plan if the value of a modification to the prime contract causes the value of the contract to exceed the subcontracting plan threshold. The proposed rule further states that a contracting officer may require a subcontracting plan from those small businesses whose size status changes from small to other than small as a result of a size recertification.

Subcontracting Consideration in Source Selection

In regards to source selection, the proposed rule states that a solicitation that requires a subcontracting plan may contain an evaluation factor for small business subcontracting participation. The proposed rule also states that where the procuring agency anticipates placing an order against a Federal Supply Schedule (FSS) or Government-wide Acquisition (GWAC) vehicle, then the procuring agency may evaluate small business subcontracting as a significant factor in the source selection evaluation.

The proposed rule states that the factors that may be evaluated, individually or in combination, in regards to subcontracting are: "(1) the subcontracting to be performed on the specific requirement; (2) the goals negotiated in previous subcontracting plans; and (3) the contractor's past performance in meeting the subcontracting goals contained in previous subcontracting plans." Further, the proposed rule states that a small business offer will receive the maximum possible score or credit for a small business participation

evaluation factor "without having to submit a subcontracting plan and without having to demonstrate subcontracting past performance."

Subcontracting Plan Requirements for FSS and GWAC Vehicles and Agency Credit

The proposed rule also addresses subcontracting plan requirements for multi-agency, FSS, and GWAC Indefinite Quantity/Indefinite Delivery (ID/IQ) vehicles and agency credit for such contracts. Specifically, the proposed rule states that, in regards to such contracts, (1) prime contractors would be required to submit small business subcontracting reports for individual orders to the procuring agency on an annual basis, (2) the agency funding the order would receive credit towards its small business subcontracting goals, and (3) the funding agency may establish its own small business subcontracting goals for orders.

Small Business Size and Status Integrity

The October 7th proposed rule is aimed at improving size and status integrity by setting forth the contractor actions that will be deemed a size representation, the penalties for willful misrepresentation, and establishing new size and status certification signature and recertification requirements. Specifically, the proposed rule would amend SBA's regulations to provide that the following actions will be deemed a willful and intentional size and status certification or representation: (1) submission of a bid or proposal for a federal grant, contract, subcontract, or other award intended for small business concerns; or (2) registration on any federal electronic database for the purpose of being considered for award of a federal grant, contract, subcontract, or other agreement as a small business concern. If a contractor is deemed to have willfully sought and received an award by misrepresenting its size or status then, under the proposed rule, there is an "irrefutable presumption" of loss to the federal government equal to the contract's value. The proposed rule also sets forth additional penalties for intentional and willful size and status misrepresentation, including suspension or debarment, civil liability under the False Claims Act, 31 U.S.C. §§ 3729-3733, and the Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812, and criminal penalties pursuant to section 16(d) of the Small Business Act, 15 U.S.C. § 645(d); 18 U.S.C. § 1001; and 31 U.S.C. §§ 3729-3733. Under the proposed rule, contractors will not be subject to the aforementioned penalties "in the case of unintentional errors or technical malfunctions that demonstrate that a misrepresentation of size was not affirmative, intentional or willful." According to the proposed rule, "consideration shall be given to the firm's internal management procedure governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner."

The proposed rule would also require that each solicitation, bid, or application for a federal award contain a certification concerning size and that "an authorized official" of the offeror sign the certification on the page which contains the size status claimed by the contractor. Under the proposed rule, contractors would also be required to annually recertify their size or status in the Online Representations and Certifications Application (ORCA) database. According to the proposed rule, a contractor that fails to recertify would no longer be listed as a small business in ORCA until the contractor completes the required recertification.

Further, the proposed rule would clarify that those contractors that wish to take part in SBA's 8(a) Business Development or Historically Underutilized Business Zone programs must meet the size and status requirements of the programs on the date the contractor applies for the program and on the date the program office requests a formal size determination of the contractor.

Conclusion and Recommendations

In summary, the proposed rules are designed to protect small businesses through improving the monitoring, reporting, and evaluation of small business contracting plans and through strengthening the size and status certification and representation regulations to prevent ineligible contractors from receiving small business awards. Contractors should take the time now to review the proposed rules and familiarize themselves with the lengthy new requirements.

Interested parties may submit comments on the October 5th proposed rule regarding small business subcontracting on or before December 5, 2011. Comments on the October 7th proposed rule regarding small business size and status integrity may be submitted on or before November 7, 2011.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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