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SBA Proposed Rules On Business Integrity and Subcontracting Plans Will Significantly Affect Government Contractors

The Small Business Administration recently issued two proposed rules implementing key elements of the Small Business Jobs Act of 2010. See [Venable's GVC Update of September 2010](#) (summarizing the requirements of the Act). These rules will have a significant impact on both small and large Government contractors. It is important that your business understand these new rules and how they will impact your business decisions.

Small Business Size and Integrity (76 FR 62313): On October 7, 2011, the SBA issued its proposed rule implementing the Small Business Jobs Act's business integrity requirements, including the new statutory presumption of loss equal to the value of a small business contract if the contract was awarded based on false information or material misrepresentations. This rule will have a significant impact on contractors and substantially increases the severity of inaccurate small business size representations. Specific elements of the proposed rule include:

- There will be an "irrefutable presumption of loss to the United States based on the total amount expended" whenever it is determined that a concern "willfully sought and received" the contract, subcontract, cooperative agreement, or grant reserved for small businesses (or other classifications, such as 8(a), service-disabled veteran-owned, HUBZone, and woman-owned small businesses) by misrepresentation. A contractor's liability for this loss is in addition to the severe monetary penalties under the False Claims Act and Program Fraud Civil Remedies Act, and related criminal penalties.
- The rule specifically states that a misrepresentation is a cause for suspension and debarment.
- The rule proposes a "deemed certification" for any submission of a bid or proposal for a contract set aside for small businesses (or other classifications) or in a way that encourages the Government to classify the award as a small business award. There will also be a deemed certification whenever a concern registers on an electronic database for purposes of being considered for an award of a small business contract.
- Liability is limited when a misrepresentation is the result of "unintentional errors or technical malfunctions." However, the rule notes that persons and concerns are subject to existing criminal penalties for failure to correct "continuing representations" that are no longer true.

Comments are due by November 7, 2011.

Small Business Subcontracting Plans (76 FR 61626): On October 5, 2011, the SBA issued a proposed rule addressing small business subcontracting plans, currently required for contracts (other than construction), in excess of \$650,000. These changes, required by the Small Business Jobs Act, are intended to address long-standing concerns within the small business contracting community that large businesses rely on small businesses to win contracts, but have no obligation to follow the subcontracting plans once the contract is awarded. The proposed rule includes the following key requirements:

- Offeror must represent to the contracting officer that it will make a good faith effort to award subcontracts to the small businesses that it used or referenced in its bid or proposal.
- If an offeror fails to use the small businesses that it referenced or relied upon in its proposal, the offeror must provide the contracting officer with a written explanation. A prime contractor also must notify the contracting officer if it pays a reduced price to a subcontractor or payment to a subcontractor is more than 90 days past due.
- Contracting officers are tasked with monitoring the prime contractor's compliance with its subcontracting plan. Responsibilities include making determinations whether the prime has a history of unjustified, untimely, or reduced payments to subcontractors. If so, the contracting officer must report the prime contractor in the Federal Awardee Performance and Integrity Information

System (FAPIS), which will negatively affect the contractor's past performance rating for future contract efforts.

- For contracts with durations of more than five years, the contracting officer may now require a subcontracting plan if the firm's size status changes to other than small following its recertification. Additionally, primes must update their subcontracting plans upon the award of an option or if a modification causes the value of the contract to exceed the subcontracting plan threshold.
- Prime contractors cannot prohibit a subcontractor from discussing matters pertaining to payment or utilization of small business concerns directly with the Government.
- Prime contractors must assign individual NAICS codes to their subcontracts, and submit timely and accurate Individual Subcontract Reports online at www.esrs.gov.
- Prime contractors must provide pre-award written notification to unsuccessful small business offerors for all subcontracts in excess of \$150,000 in which a small business received a preference.
- If a contract exceeds the simplified acquisition threshold, prime contractors are responsible for ensuring that small businesses have the "maximum practicable opportunity" to participate in the performance of the contract.

Comments are due by December 5, 2011.

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