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SBA Changes Certification Procedures for Small Disadvantaged Businesses

If you are small business that works with the federal government, either as a prime contractor or subcontractor, we want you to know about some important changes made by the Small Business Administration to its small disadvantaged business program.

After initially suspending its review of applications for its small disadvantaged business (SDB) program, the Small Business Administration (SBA) recently released an interim final rule that eliminates SBA's authority to certify eligible businesses as SDBs. Firms are now able to "self-certify" with respect to subcontracting opportunities and to use alternative certification procedures for prime contracts using the specific procedures outlined by the rule. These changes, which may have significant ramifications to eligible business entities, are summarized below.

Background and Rationale for the Interim Final Rule

Since 1999, the SDB program allowed procuring agencies, such as the Department of Defense (DOD), to use price evaluation adjustments of up to ten percent when assigning federal prime or subcontracts to SDBs. These adjustments allowed federal procuring agencies to incentivize the use of SDBs for contracts and to meet government-wide procurement goals regarding the use of disadvantaged businesses. However, recent developments have caused interest in the SDB program to wane with small business owners.

- On December 9, 2004, Congress mandated that the authority to use price evaluation adjustments expire for all procuring agencies except for NASA, the Coast Guard, and the DOD. Yet, because the three remaining agencies with such price evaluation adjustment authority have successfully met government-wide targets with respect to contracts given to disadvantaged businesses, they have only sparingly offered the price evaluation adjustment benefit to SDBs. As a result, small businesses have had little incentive to incur the costs associated with the SDB certification process with the SBA.
- Furthermore, under the Economy Act of 1932, as amended, procuring agencies have often entered into "Economy Act Agreements," whereby the agencies agree to reimburse the SBA for the costs associated with the SDB certification process. Because most federal procuring agencies are no longer exercising price evaluation adjustments, either due to the expiration of authority or the satisfaction of government-wide SDB procurement goals without the need for such adjustments, they have less frequently entered into Economy Act Agreements with the SBA. Without the prospect of reimbursement from procuring agencies coupled with the lack of interest of small business owners to apply to the SDB program without the benefit of price evaluation adjustments, the SBA has opted to restructure the SDB certification process to account for these recent trends.

New Certification Process

The SBA's response has come in the form of an interim final rule that became effective on **October 3, 2008** and remained subject to comments through November 3, 2008. Under this current rule, the SBA no longer will certify small business entities as SDBs.

For Federal Prime Contracts. For the purposes of securing a federal prime contract, a small business can certify as an SDB by meeting at least one of the following criteria:

- The small business is a current participant in the SBA's 8(a) business development program;
- The small business has been certified as an SDB by the SBA within three years of the date the small business seeks to self-certify as an SDB;
- The procuring agency has provided the small business with certification that the small business qualifies as an SDB; or
- The small business has applied for SDB certification with the procuring agency and has not received a negative determination regarding its application.

For Federal Subcontracts. With respect to federal subcontracts, a small business may self-certify as an SDB if it believes in good faith that it is owned and controlled by one or more socially and economically

disadvantaged individuals. Such disadvantaged individuals must demonstrate ownership and control by holding at least 51% of all ownership interests and controlling the management and daily operations of the business.

Disputes and Penalties for Misrepresentation

Though small businesses now have the ability to self-certify under the new rules with respect to subcontracts and to use the alternatives specified above to certify for prime contracts, the SBA will retain the authority to administer any protests and appeals of SDB status as it had prior to the effective date of the interim final rule.

In addition, penalties (including fines, debarment and ineligibility for participation in SBA programs) will continue to apply to any small business that misrepresents its SDB status. The new rule also provides that the SBA may initiate a proceeding to determine whether a business properly qualifies as an SDB whenever the SBA receives "credible information" that calls the small business's status into question.

Accordingly, it is critical that small businesses continue to adhere to the SBA's new certification standards in order to maintain a healthy and beneficial relationship with federal procurement agencies and prime contractors and to avoid costly penalties and administrative intervention.

What You Should Do

If you are a small business that has worked with the federal government, you should determine whether you can continue to be certified as an SDB on prime contracts by using the criteria outlined above, and whether you can self-certify as an SDB on subcontracts.

If you are not a "large" business that performs federal prime contracts and subcontracts, you should determine the effect that the new rules and criteria may have on your ability to satisfy any small disadvantaged business subcontracting requirements that are included in your contracts or subcontracts.

If you have any questions about how these new interim rules apply to your business, please contact any of the following members of Venable's Business Transactions and Government Contracts practice groups:

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