

Small business developments in government contracting regulations

By Richard Arnholt, Esq., Bass, Berry & Sims PLC

OCTOBER 6, 2022

On Sept. 23, 2022, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) published three final rules updating the procurement regulations to implement regulatory changes made by the Small Business Administration (SBA).

These final rules bring welcome updates to the Federal Acquisition Regulation (FAR) that eliminate confusion due to the conflict between SBA and FAR rules governing the mentor/protégé program, small business joint ventures, as well as Historically Underutilized Business Zone (HUBZone) and women-owned small businesses.

Joint venture updates

The final rule that is likely of interest to the broadest audience, including both large and small businesses, implements statutory and regulatory changes to the regulations governing small business joint ventures (JVs). (67 Fed. Reg. 58129). The changes reflect an increased willingness on the part of Congress and the SBA to allow large businesses to benefit from the small business program in exchange for providing support and guidance to small businesses.

The rule implements the expanded mentor/protégé program, which extended this important program to all categories of small businesses (it previously only applied to small businesses in the 8(a) program). In addition, it clarifies that JVs competing for 8(a) awards no longer need to be approved by the SBA.

It also clarifies that a JV may qualify as a small business if (1) each party to the JV is small under the applicable size standard or (2) the JV is formed between a mentor and a protégé under an SBA-approved mentor/protégé agreement. In addition, the update implements the SBA rule that a JV may qualify under set-asides for particular socio-economic small business categories as long as one party to the JV is in that category and the JV otherwise qualifies as small.

Most importantly, the rule explains that a contracting officer must consider the past performance of a JV offeror, but if a JV has no past performance the contracting officer “shall consider the past performance of each party to the joint venture.”

Given the importance of past performance in award decisions this is a potentially enormous benefit to small businesses that form JVs

with large businesses under the mentor/protégé program as they can now rely on the past performance of the large business mentor, something that was already clear in the SBA regulations. But, until now, not all contracting officers were clear that they were required to consider the past performance of JV members, large and small.

Clarification regarding women-owned small businesses certification

In October 2021, the Councils published a proposed rule implementing a final rule published by the SBA in 2020 that, in turn, implemented a statutory change to the women-owned small business certification rules in the FY 2015 National Defense Authorization Act.

The changes reflect an increased willingness on the part of Congress and the SBA to allow large businesses to benefit from the small business program in exchange for providing support and guidance to small businesses.

That change requires that, in accordance with the statute, women-owned small businesses (WOSB) and Economically Disadvantaged WOSBs (EDWOSB) be certified by the SBA or an SBA-approved third-party certifier, information that will be reflected in the SBA's Dynamic Small Business Search (DSBS) and on the System for Award Management (SAM). The Sept. 23, 2022, final rule at 87 Fed. Reg. 58237 adopts the proposed rule without significant change.

Importantly, this certification requirement applies only to WOSB or EDWOSB competing for set-asides or seeking sole-source awards under the WOSB Program. For those two types of awards, the small business must be certified or have a pending application for certification at the time of proposal submission. The contracting officer must confirm an offeror's eligibility in DSBS or SAM prior to evaluation of a proposal in a WOSB or EDWOSB set-aside or award under a sole-source contract.

If the apparent successful offeror's certification is pending, the contracting officer is required to notify the SBA and request a status determination, which must be provided within 15 calendar days. WOSB entities not competing for set-asides or seeking sole-source awards may continue to self-represent their size status.

The Councils determined that this rule will apply to acquisitions below the Simplified Acquisition Threshold (SAT), as well as to commercial item/service procurements, thereby permitting contracting officers to set-aside or sole-source contracts in those categories to WOSBs and EDWOSBs.

Expanding opportunities for HUBZone small businesses

Finally, the SBA updated its regulations governing the HUBZone small business program in November 2019, streamlining its rules and clarifying ambiguous terms. The final HUBZone rule published on Sept. 23, 87 Fed. Reg. 58232, follows a proposed FAR update published in the Federal Register in June 2021.

The revisions, particularly regarding mentor/protégé JVs, offer tremendous opportunities for both large and small businesses.

For HUBZone small businesses, perhaps the most important change is that they are now certified annually by the SBA, a certification recorded in the DSBS and reflected in SAM, meaning they no longer have to represent their size status with each offer. They will, however, continue to have to indicate at FAR 52.212-3 and 52.219-1 whether their HUBZone status has been determined by the SBA and certify that they will maintain the requirement that 35% of employees are HUBZone residents.

About the author



Richard Arnholt is a member of **Bass, Berry & Sims PLC** in Washington, D.C. He advises government contractors on risk mitigation, upgrades to ethics and compliance programs, and procurement fraud and misconduct allegations. He can be reached at rarnholt@bassberry.com.

Another welcome change is that the FAR regulations implementing the HUBZone Program now apply to contracts at or below the SAT. Previously, the HUBZone Act was included in the list of laws in the FAR that are inapplicable below the SAT, prohibiting agencies from issuing set-asides below that limit, which is typically \$250,000.

This revision will increase opportunities for HUBZone small businesses given that for the past few years there have been an average of over 100,000 awards below the SAT set-aside or sole-sourced for small businesses, none of which were available to participants in the HUBZone Program.

The revisions also clarify that on sole-source awards only, the SBA or the contracting officer may protest a HUBZone small business' status and that on all other procurements an apparently successful offeror's HUBZone status may also be challenged by an interested party. The procedures for filing a HUBZone status protest, which the contracting officers must refer to the Director of SBA's Office of HUBZone Program, were also updated, and it was made clear that the SBA will remove a business' certification from DSBS if the SBA determines as a result of the protest that the business does not meet the HUBZone Program requirements.

These, and other, changes to the HUBZone Program will ease the administrative burden to participate and create new opportunities for HUBZone small business, increasing the value of this certification.

Conclusion

The incorporation into the FAR of prior changes to the SBA's regulations will hopefully eliminate some of the confusion surrounding these beneficial, but somewhat complicated, programs. The revisions, particularly regarding mentor/protégé JVs, offer tremendous opportunities for both large and small businesses. But contractors must pay careful attention to the rules to ensure that they, or their JVs, meet the eligibility requirements for government contract opportunities.

Richard Arnholt is a regular contributing columnist on government contracting for Reuters Legal News and Westlaw Today.

This article was first published on Reuters Legal News and Westlaw Today on October 6, 2022.