

New Legislative and Regulatory Developments Affecting Small Businesses



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Recent Regulations and Legislation

- **SBA Final Rule** (issued October 16, 2020; effective November 16, 2020)
 - Consolidation of the Section 8(a) and All Small Mentor/Protégé Program
 - Revision of the “3 in 2” Rule
 - Joint Venture Security Clearances
 - Subcontractor Past Performance
 - Recertification of Orders Under Multiple Award Contracts
 - Recertification after Merger, Acquisition or Sale
 - Clarification of Workshare Requirements

Recent Regulations and Legislation (cont.)

- **2021 National Defense Authorization Act**
 - Past Performance
 - Transfer of SDVOSB and VOSB Certification to SBA
 - Extension of the Section 8(a) Program Term
 - Employee-Based Size Standards

SBA's Mentor/Protégé Programs

- “All Small” Mentor/Protégé Program consolidated with Section 8(a) Mentor/Protégé Program
- Mentor/Protégé relationship terminated within 18 months of SBA approval will not count towards Protégé's two mentor lifetime limit
- Reconsideration of declined Mentor/Protégé Agreements no longer available

Joint Ventures

- Revision of the “3 in 2” Rule (for purposes of an affiliation analysis)
 - A JV cannot submit a bid/proposal in response to a solicitation after two years from the date of its first contract award (the “2”)
 - No longer a limit on the number of contracts a JV can receive within those two years
 - Novation of contract would trigger two-year period if novated contract was the JV’s first contract; novation could be approved after two-year period
- Security Clearance
 - Agencies now prohibited from requiring a JV to, itself, have a security clearance
 - Security clearance may be held by a member of the JV; but the member holding the clearance must be the same member that will perform the classified work
 - If the classified work is the “primary and vital” part of the agency’s requirements, the small business member of the JV must have the requisite facility clearance

Joint Ventures (cont.)

- Recertification of JV Member
- Workshare Requirements
 - Limitations on Subcontracting
 - Prime contractor JV must receive 50% of the amount received by the JV from the agency
 - This “workshare” requirement can be satisfied by the prime JV or a “similarly situated” subcontractor to the JV
 - Workshare requirements for Managing Member of a JV
 - Managing Member/Majority Owner must perform a minimum of 40%
 - Managing Member/Majority Owner cannot rely on a “similarly situated subcontractor” to fulfill the 40% workshare requirement

Joint Ventures (cont.)

- **Approval of Section 8(a) Joint Ventures**
 - A Section 8(a) JV no longer must be approved prior to receiving award of contract pursuant to a Section 8(a) set-aside competitive procurement
 - Section 8(a) JV must still receive SBA approval prior to receipt of a sole-source contract
- **Past Performance**
 - Small business without any past performance may rely on its past performance as part of a joint venture
 - Agency must evaluate this past performance if cited in a proposal

Transfer of SDVOSB and VOSB Verification

- Responsibility for certifying a small business's SDVOSB or VOSB status transferred from VA Center for Verification and Evaluation (CVE) to SBA
 - Transition to occur within two years; extensions permitted
 - After transition, SDVOSBs no longer can “self-certify” their status
 - One year “grace period”
 - Post-transfer, unverified SDVOSBs or VOSBs must file an application for verification within one-year of the transfer date
 - but these applicants may self-verify while application pending at SBA

Recertification Requirements

- Post Merger, Acquisition or Sale
 - Currently, a small business that has submitted a bid/proposal and subsequently is involved in a merger, acquisition or sale must recertify its size prior to contract award and if, “other than small” at time of recertification, it cannot receive the contract award
 - Now, if recertification after submission of offer results in offeror being “other than small”, offeror may still receive contract award, provided the transaction triggering the recertification occurred 180 days after submission of the offer
 - An agency, however, may not credit the contract costs against its small business contracting goals

Recertification Requirements (cont.)

- Orders Under Multiple Award Contracts
 - Not applicable to FSS contracts or BPAs issued under those contracts
 - A small business or certain type of small business may rely on its status at time of the MAC award for any order issued under the MAC
 - The MAC must have been awarded pursuant to a set-aside procurement
 - Unless the Contracting Officer explicitly requests recertification
 - Opposite rule for MACs awarded pursuant to a *particular type of small business set-aside procurement*
 - If MAC awarded pursuant to a small business set-aside and order set-aside for WOSB, SDVOSB etc., MAC awardee must certify to that specific status when it submits its offer
 - Opposite rule for MACs awarded on an *unrestricted* basis
 - If order under an unrestricted MAC is set-aside for small businesses or a type of small business, MAC awardee must certify to its status on the date it submits its offer

Recertification Requirements (cont.)

- **Eligibility Post Recertification As Other than Small**
 - Prior to SBA's new rule, a concern that qualified at small at time of award but later recertified as "other than small" could still receive orders/options under that contract
 - New rule provides that, after recertifying as other than small where recertification required, concern may no longer receive orders/options under pre-existing contracts

Past Performance

- Reliance on past performance gained as a member of a joint venture
- Agencies must consider past performance of a small business (or certain type of small business) offeror's "first tier" subcontractor
 - If small business prime does not have the requisite past performance
 - First-tier subcontractor must be a small business
 - First-tier subcontractor must be cited in small business prime's offer
- Prime contractor's required to submit a subcontracting plan, must provide a "first-tier" small business subcontractor (or a certain type of small business) a past performance "assessment" if requested by the first-tier small business subcontractor
 - Agency must consider this past performance if cited in the offer

Section 8(a) Program

- Nine-year Section 8(a) Program term extended to 10 years
 - Applies to any concerns in the Section 8(a) Program as of September 9, 2020
 - Applies even if program term suspended as part of COVID-19 relief measures
 - SBA required to issue implementing regulation within 15 days after statutory provision enacted (2021 NDAA/December 28, 2020)
- Current rule prohibits an applicant from using its disadvantaged status for entry into the Section 8(a) Program if family member has done so previously
 - Waiver permitted but waiver not likely to occur if the two concerns in same line of business, unless applicant demonstrates “no connection” exists between two companies
 - New rule replaces “no connection” standard with more forgiving standard
 - But SBA’s affiliation rules applicable to size of business still apply

Section 8(a) Program (cont.)

- Eliminates reconsideration process for denial of Section 8(a) application
 - Applicant can reapply within in 90 days (as opposed to prior rule of 12 months)
- Approval of Ownership Changes
 - SBA no longer needs to approve change of ownership if ownership stake is less than 20%
 - SBA no longer needs to approve an increase in disadvantaged owner's ownership stake in 8(a) concern

Miscellaneous

- Period of measurement for “employee-based” size standards extended from 12 months to 24 months
 - If average number of employees for each pay-period over the prior 24 months is below the applicable size standard, business is small