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New Regulatory and Policy Changes Pose Big Opportunities and Even Bigger Challenges for Small Businesses

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Recent legal and regulatory changes are significantly altering the federal procurement playing field for government contractors, particularly small businesses. Many of these developments increase opportunities for small businesses, but heightened compliance requirements also create new risks.

Small Business Jobs and Credit Act (SBJCA)

On September 27, 2010 President Obama signed into law the SBJCA, providing numerous advantages to small businesses seeking federal contracts. SBJCA puts more federal work within the reach of small businesses by lowering the contract bundling threshold from \$10 million to \$2 million and agencies must now meet new justification requirements for any bundled awards exceeding the \$2 million threshold. It also authorizes SBA to expand the 8(a) mentor-protégé program to include small businesses owned by women or service-disabled veterans, as well as HUBZone businesses. The law also directs SBA to revise small business size standards every five years to keep pace with industry trends. In addition, the SBJCA eliminates the preference that HUBZone businesses had for set-aside contracts, thus putting key small business preference programs on equal footing.

Although the SBJCA provides new opportunities, many of the law's enforcement mechanisms create new risks for contractors of all sizes. Previously, small businesses only had to recertify their size status upon a change of control or before the fifth year and each subsequent year of long-term contracts. The new law makes recertification an annual requirement. This added burden is especially significant because the new law presumes that any small business set-aside contract

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awarded to a company that is not small was the result of an "affirmative, willful, and intentional" misrepresentation, resulting in liability in the amount of the award. Businesses may now face stiff penalties, even False Claims Act liability, as a result of a mistaken size certification. As for large businesses, the new law requires them to make greater efforts toward meeting their small business subcontracting goals and to explain any shortfalls. It also subjects large firms to adverse past performance reports for failing to pay subcontractors on time.

Women-Owned Small Business (WOSB) Set-Aside Contracts

Starting February 4, 2011, for the first time, federal agencies may set-aside contracts up to \$3 million (\$5 million for manufacturing) for (a) economically disadvantaged WOSBs in any one of 45 industries in which WOSBs are underrepresented or (b) to all WOSBs in any one of 38 industries in which WOSBs are substantially underrepresented. The new set-aside program aims to increase federal contracting opportunities for an estimated 12,000 eligible WOSBs.

However, the WOSB program also creates risks for companies that participate due to the significant eligibility, certification, and documentation

requirements. To be eligible, a WOSB must be certified by an approved third-party certifier or must self-certify and provide extensive eligibility documents that SBA will closely examine to confirm the business' eligibility and to prevent fraudulent representations. All WOSBs will be required to update their certifications at least annually to ensure that they remain current, accurate, and complete. The businesses could also be subject to civil liability, criminal penalties, and suspension or debarment for misrepresenting their status. In October, SBA posted a compliance guide for the program that is available at <http://www.sba.gov/wosb>.

Reporting First-Tier Subcontracts and Executive Compensation

As of July 8, 2010, new disclosure rules require prime contractors meeting certain thresholds to report information on (a) their first-tier subcontract awards of \$25,000 or more, and (b) the compensation received by the prime contractor and each of its first-tier subcontractors' five highest-paid executives. The reported information will be publicly available at USASpending.gov as part of the government's growing focus on transparency.

Importantly, small businesses are not exempted from the reporting requirements. The only exceptions are for classified contracts, contracts with individuals, and contracts less than \$25,000. However, the prime is not required to report subcontract information if the prime had less than \$300,000 in gross income in the prior tax year. Additionally, companies are exempt from reporting executive compensation information if the prime received less than 80 percent of its gross revenue and less than \$25 million from federal sources in the prior fiscal year.

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These same exceptions apply to the prime's requirement to report subcontract awards and executive compensation of its first-tier subcontractors. Given the limited exceptions, the reporting requirement is likely to significantly impact small businesses by creating an additional reporting requirement to the government and/or prime contractors.

Proposed Changes to SBA's Affiliation and 8(a) Program Regulations

Lastly, although SBA has yet to issue a final rule, it has proposed numerous changes to its affiliation and 8(a) Program regulations that may significantly affect small businesses.

For example, several changes are being proposed to SBA's mentor-protégé program. SBA is considering narrowing the exemption from affiliation for mentor-protégé joint ventures to only 8(a) contracts. SBA has also proposed heightened consequences for a mentor that fails to meet its commitments

to its protégé. Those consequences include stop work orders on contracts it performs with its protégé, termination of the mentor-protégé agreement, and debarment proceedings if SBA finds the mentor failed to comply with the terms of the agreement, particularly in providing developmental assistance.

Similarly, several proposed changes would affect joint ventures formed between a mentor and its protégé. Under SBA's proposed rules, a joint venture could receive three contract awards over a two-year period before the entities would be deemed affiliated rather than the prior limitation of three submitted offers in that two year period. In addition, the 8(a) participants to a joint venture for an 8(a) contract would have to perform 40 percent or more of the work done by the joint venture under the contract, rather than the current requirement of performing a "significant portion" of the work.

Greater opportunities are being provided for small business in the federal marketplace, but the administrative burden is also increased as are the oversight mechanisms and risks.



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