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8(a) REGULATORY UPDATE

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OVERVIEW

- Latest from Capitol Hill
- What's new from SBA
- Impacts of Category Management and the Section 809 Panel



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WHAT'S NEW FROM CAPITOL HILL

SMALL BUSINESS RUNWAY EXTENSION ACT OF 2018

- Small Business Runway Extension Act, which became law on December 17, 2018, amended the Small Business Act to change the three-year calculation to a five-year calculation
- SBA's position is that Congress amended the wrong section of the Small Business Act, so SBA has been slow to implement the change
- On June 24, 2019, SBA published its proposed rule changing the period of measurement for a receipts-based size calculation from three years to five years
- Comments to this proposed rule were due August 23, 2019
- SBA may finalize rule by end of 2019 or it could become effective sooner based on Congressional action in the 2020 National Defense Authorization Act

H.R. 190 - PROPOSED CHANGES TO SMALL BUSINESS SOLE SOURCE THRESHOLDS

- Bill would increase the sole source thresholds for all small business programs
 - Sole source thresholds of \$7M for manufacturing and \$4M for all other contracts would increase to \$10M and \$8M, respectively
 - Sole source thresholds would apply to each year of the sole source contract, rather than the total contract value
- Bill would also eliminate the need for “Rule of Two” justifications for sole source contracts through all the small business programs, making them similar to the current 8(a) sole source authority
- Future is unclear
 - These provisions are currently part of the Senate’s SBA Reauthorization Act
 - As of the August recess, the Senate bill was stalled

HOUSE SMALL BUSINESS COMMITTEE HEARING ON 8(a) PROGRAM

- September 2019 hearing on “The Role of the SBA 8(a) Program in Enhancing Economic Opportunities”
- Challenges facing the 8(a) program
 - Participation decline: 7,000 participants in 2010, decreased to 4,900 in 2016.
 - SBA initiative to increase participants by 5% year over year, but results are unclear
 - SBA OIG found SBA does not sufficiently document reasons why it approves a firm into the program, and need for increased safeguards around annual reviews and continuing eligibility reviews
- At urging of OIG, SBA is drafting a proposed rule to address what constitutes economic disadvantage and develop “objective and reasonable criteria for determining the threshold where socially disadvantaged individuals face economic disadvantage due to diminished credit and capital opportunities.”



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WHAT'S NEW FROM SBA

RECENT CHANGES IN SIZE CALCULATIONS

- In April 2019, SBA issued its revised Size Standards Methodology White Paper
- SBA is moving away from a fixed number of size standard levels or “bands”
 - Instead, each industry will have its own size standard based on that industry’s data
- Also in April, SBA said that it “plans to issue proposed rules on all receipts based size standards, including those in NAICS Sector 54 and Subsector 236, in the near future.”
- SBA is expected to soon issue proposed rules to change the size standards on an industry-by-industry basis
- In the meantime...

INFLATIONARY ADJUSTMENTS TO SIZE STANDARDS

- Effective August 19, 2019, SBA increased all of the receipts-based size standards:

Prior size standard (\$ million)	Size standard adjusted for inflation (\$ million)
\$0.75	\$1.05
5.5	6.0
7.5	8.0
11.0	12.0
15.0	16.5
18.0	19.5
19.0	20.5
20.5	22.0
25.0	27.0
27.5	30.0
29.5	32.0
32.0	34.5
32.5	35.0
36.5	39.5
37.5	40.5
38.5	41.5

LIMITATIONS ON SUBCONTRACTING (“LOS”)

- SBA issued a proposed rule on December 4, 2018 with revisions to key small business issues such as:
 - Limitations on subcontracting
 - Subcontracting plans
 - The nonmanufacturer rule and Information Technology Value Added Reseller procurements
 - Recertification
 - Size determinations
 - Ostensible subcontractor affiliation
- DoD issued a Class Deviation in December 2018; still waiting for final FAR rule change
- SBA does not think the LOS are being enforced enough, so it is proposing to require contractors to submit information to aid COs in monitoring compliance

IMPACT OF INDEPENDENT CONTRACTORS (“ICs”)

- SBA proposed rule would clarify when an IC can be counted as an employee for size and limitations on subcontracting
- Where a contract is assigned a NAICS code with an employee-based size standard, an IC may be deemed an employee under the terms of SBA Size Policy Statement No. 1
- Where a contract is assigned a NAICS code with a receipts-based size standard, an IC cannot be considered an employee, and will always be deemed a subcontractor
- As a result, for a contract with an employee-based size standard, an individual that is considered an employee for size purposes will also be an employee for LOS purposes

8(a) ECONOMIC DISADVANTAGE CRITERIA

- In a May 14, 2019 rulemaking, SBA proposed increasing economic disadvantage criteria for initial eligibility in 8(a) Program
 - Same levels for 8(a) and EDWOSB
 - AGI over 3 years may not exceed \$350,000
 - Net worth may not exceed \$750,000
 - Total assets may not exceed \$6 million

OTHER UPDATES ON THE 8(a) AND MENTOR-PROTÉGÉ PROGRAMS

- SBA is proposing to eliminate the separate 8(a) mentor-protégé program by consolidating it with the All Small Mentor-Protégé Program
- SBA may do away with the requirement for SBA approval of joint ventures for 8(a) contracts
- SBA is considering requiring 8(a) applicants to complete a tutorial to help determine if they are ready to be in the program
- SBA is seeking comment on whether to lift the restriction on mentors having more than three protégés at one time

RUMORS OF OTHER SBA RULE/POLICY CHANGES

- SBA wants to make it more difficult to take contracts out of the 8(a) program
- For ANC/Tribal 8(a)s, if you insert a holding company between the ANC/Tribe and the 8(a) firm, you do not need prior SBA approval for the change in ownership; you would just provide notice of the change to SBA
- If a protégé does not receive benefits from its mentor within the first 18 months of the

relationship, the protégé can terminate the relationship and it will not count towards the two mentors that a protégé may have in its lifetime

INCREASED SBA OIG ACTIVITY FOR 8(a) CONTRACTORS

- SBA OIG has told us that they are under pressure to root out fraud in the 8(a) program
- September 2019 SBA OIG report found shortcomings in SBA's suspension and debarment controls and investigations
- Expect to see continued, and perhaps increased, SBA OIG focus on 8(a) compliance and fraud cases

THE NONMANUFACTURER RULE FOR DOD 8(a) SUPPLY CONTRACTS

- On April 1, 2019, DoD proposed to apply SBA's nonmanufacturer rule ("NMR") to all DoD 8(a) contracts for supplies
- Currently, DFARS 252.219–7010 provides an exemption from the NMR for 8(a) contracts valued at or below \$25,000 and awarded under simplified acquisition procedures
- A few years ago, SBA revised its rules to apply the NMR to all 8(a) contracts, regardless of dollar value
- DoD's revision is designed to make its rule consistent with SBA



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IMPACTS OF CATEGORY MANAGEMENT AND THE SECTION 809 PANEL

WHAT IS CATEGORY MANAGEMENT?

- Government initiative to reduce contract duplication and save money on common goods and services (i.e., “categories”) purchased by the government
- Started in December 2014
 - Successor to Federal Strategic Sourcing Initiative (“FSSI”)
- Three goals of the initiative:
 - Save \$
 - Reduce the number of new contracts
 - Increase the amount of spending under government-wide management

HOW DOES IT WORK?

- Government will move to “best in class” or “BIC” contracting solutions that will be used government-wide
 - Today many agencies buy the same goods and services, under different contracts unique to each agency
- Category management will:
 - Consolidate government purchasing of common goods and services into fewer contracts that all agencies must use
 - Create consistent terms and conditions
 - Organize procurement resources to focus on specific spending areas
 - Emphasize leveraging government buying power

WHAT ARE THE CATEGORIES?

- IT
- Facilities and construction
- Professional services
- Medical
- Transportation and logistics
- Industrial Products and services
- Travel
- Security and protection
- Human capital
- Office management

WHAT ARE THE BICS?

- Full list is available at:
<https://hallways.cap.gsa.gov/app/#/gateway/best-class-bic/22574/list-of-best-in-class-solutions>
- Examples for IT:
 - VETS2
 - Alliant/Alliant 2 and Alliant/Alliant 2 SB
 - NASA SEWP
 - GSA Schedule IT 70

DOWNSIDES OF CATEGORY MANAGEMENT

- The data shows it is creating have's and have nots:
 - Reduction in contracts for certain goods and services makes it critical for companies in those industries to have the right contracts
 - Increase importance of teaming, joint ventures, mentor-protégé, and strategic acquisitions to ensure you have access to BICs
 - Companies that are unprepared could be shut out of their markets
- A relatively small number of companies are getting most of the \$:
 - According to SBA, # of SBs winning prime contracts has decreased by 25% since 2010
 - Category management should focus on the number of SBs receiving BIC spend, not just the percentage of BIC spend going to SBs

FY19 DECLINE IN CATEGORY MANAGEMENT SPENDING

- September 2019 GSA report indicates CM spending declined from 31.1% in FY 16 to 27.6% in FY 19
- Small business share of BIC spending declined from 56.5% to 37.7%
- Agencies doing the best in meeting their CM goals include: OPM, GSA, NSF, Army, Interior, State, Commerce, HUD
- Agencies close to meeting their CM goals include: HHS, NASA, Air Force, USAID, DHS, Doled
- Agencies further from meeting their CM goals include: DOE VA, DOL, DOT, and SSA

SECTION 809 PANEL

- Concluded its mission in July 2019
- Considered some radical ideas to transform DoD procurement
- Potential impact on all SB programs
 - Panel recommends DoD SB policies and programs should prioritize mission and advanced capabilities
 - Congress has yet to implement many of the panel's SB-related recommendations; unclear if they ever will

WHAT SBA IS DOING TO COMBAT NEGATIVE EFFECTS OF CATEGORY MANAGEMENT

- SBA is concerned about negative impact of Category Management on small businesses, including 8(a) firms
 - As noted earlier, SBA is considering strengthening the rules that restrict an agency's ability to remove an 8(a) contract from the 8(a) program
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- SBA has also provided recommendations to OFPP on implementing category management, including:
 - Include goals for each socioeconomic category
 - Ensure reduction in contract duplication and emphasis on BICs does not conflict with current acquisition regulations and laws
 - Develop a more transparent methodology to calculate cost savings, which is particularly important given the need for a cost-benefit analysis for consolidated requirements
 - Ensure all BICs have on-ramps, particularly for the socioeconomic categories
 - Ensure mandatory set-asides are met

WHAT CAN YOU DO TO COMBAT CATEGORY MANAGEMENT?

- Involve SBA under 13 C.F.R. 124.504(d)
 - Follow-on or renewable acquisition must remain in the 8(a) program unless SBA agrees to release it after receiving written request from the agency
 - If contract is critical to business development of the 8(a) firm currently performing it, SBA should decline to accept agency's request
 - If 8(a) contract moves to a BIC, it must be procured as some type of SB set-aside
- Question agency's cost/benefit analysis
 - Is the BIC a bad fit for the work and/or for meeting SB goals?
 - If so, advocate with agency, SBA, and on the Hill



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