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SBA Final Rule Addresses Impact of Protest Decisions and Revises Small Business Recertification Requirement

Under a Final Rule that became effective March 4, 2011, the Small Business Administration (SBA) has established uniform standards across all small business programs that address how initial and appeal decisions in set-aside eligibility protests will impact the procurement at issue. This Final Rule also removes a requirement for small businesses to recertify their size status where a federal procurement solicitation is substantially modified such that initial offers are no longer responsive and revised proposals must be submitted.

For government contractors, these changes increase the likelihood that filing and prosecuting a meritorious size protest will result in meaningful relief and decrease the risk that a contractor will lose an opportunity to compete in a protracted procurement where the solicitation has been substantially re-written.

Background

The SBA regulations provide protest procedures for challenging the eligibility of a contractor for an award that has been restricted to small businesses or a particular group of small businesses. In the past, some agencies would essentially ignore a size protest and proceed with an award of a contract and contend that after the awardee exhausted the SBA appeal process that the contract should not be terminated even though the awardee was determined to be other than small. SBA's Final Rule addresses the impact of an initial or appeal decision during these size or status protests on the procurement at issue. The Final Rule applies to both size protests challenging an entity's eligibility based on its revenues, number of employees, or affiliation, and status protests challenging an entity's eligibility to certify as a particular class of small business, such as Small Disadvantaged or Service-Disabled, Veteran-Owned, or HUBZone.

Under the Final Rule, contracting officers have incentive to delay making the contract award until SBA issues its initial decision denying the protest because not doing so places the procurement at risk of being interrupted after performance has started, if SBA ultimately sustains the protest. At the same time, the Final Rule also balances the procuring agency's need to move forward if SBA's initial decision denies the protest by not requiring termination of award if SBA's initial decision is overturned on appeal. The following chart summarizes the key implications of the Final Rule:

Time of Award	Initial Decision Result	Appeal Result	Impact on Award
After Initial Decision	Protest denied	Appeal sustained	Agency "may" but not required to apply the appeal decision
Before Initial Decision	Protest sustained	No appeal filed	Agency required to terminate award
Before Initial Decision	Protest sustained	Appeal sustained	Agency required to terminate award or not exercise next option

In addition to revising SBA's rules addressing the impact of initial and appeal decisions, the Final Rule eliminates a requirement in 13 C.F.R. § 121.404(a) that small businesses recertify their size status after initial offer in procurements where a solicitation is substantially modified such that the initial offers are no longer responsive and a revised proposal must be submitted. SBA explained its reasoning for this change in the Proposed Rule, stating that "[d]isqualifying an offeror based on whether a procuring agency's requirement changes during the course of a protracted procurement unfairly punishes both the procuring agency and offerors that have expended time and resources pursuing the procurement." 75 Fed. Reg. 9130. SBA further explained that if a federal procurement's requirements have changed so drastically that all offers have become non-responsive, then the agency should cancel and re-issue the solicitation to all potential offerors.

Practitioner Tips

The Final Rule provides greater clarity for government contractors to assess the potential risks and rewards involved in filing or defending SBA protests challenging an entity's size or status eligibility, including protests that are appealed after SBA's initial decision. If a procuring agency makes an award before SBA issues its initial decision, the Final Rule creates a substantial risk of the award later being terminated if the SBA sustains a size protest. Of course, if the agency does withhold the contract award pending the SBA's initial decision and the SBA sustains the protest and determines the potential awardee is other than small, the agency cannot then award the contract to that entity. Thus, the SBA's Final Rule makes it much more likely that filing and prosecuting a meritorious size protest will result in meaningful relief – i.e. contract award.

By eliminating the recertification requirement, the Final Rule reduces the risk that a contractor might lose its opportunity to continue competing in a procurement by being required to recertify due to substantial changes in the solicitation's requirements. This provides greater certainty to contractors that their bid and proposal budgets will not go to waste if their size status changes during procurements that have become protracted due to protests, discussions, funding issues, or other delays.

*Venable's team of government contract attorneys have substantial experience advising government contractors on SBA small business program issues and strategies, including prosecution or defense of size and status protests, regulatory and compliance issues that impact 8(a) companies, Women-Owned and Service-Disabled, Veteran-Owned Small Businesses, and HUBZone companies. For more information, please contact the authors of this article or any of the attorneys in the **Government Contracts Practice Group**.*

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