



# **PilieroMazza Webinar**

## **Recertifications of Size or Status: What Contractors Need to Know**

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# Presented by

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# About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for over 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting Law
- Small Business Programs
- Labor & Employment Law
- Business & Corporate Law
- Litigation

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# Agenda

- Deemed certifications
- General rule for size and status certifications
- Exceptions to the general rule
- Recertification
- Penalties for false certifications

# Certification Basics

- Certifications usually made at time of initial offer, which includes price
- SAM registration representations are considered certifications – rerepresent on an annual basis and after any triggering event
  - Cannot force your subcontractor to register in SAM

# Size vs. Socioeconomic Certifications

- Generally, the rules track across the small business and socioeconomic regulations with regard to timing of certifications and rerepresentations

# SBA Regulations vs. the FAR

- Differences between SBA regulations and the FAR:
  - SBA regulations say that recertification is required if small business acquires or is acquired by “another concern”
  - FAR does not specify
- Generally, contracts requiring rerepresentations of size will contain FAR 52.219-28
  - SBA regulations also require recertification for all socioeconomic program representations, but the FAR does not contain equivalent clauses for these programs
- Proposed FAR amendment will allow contractors to recertify new size or socioeconomic statuses upon every recertification
  - As opposed to SBA’s rules, which allows for such recertification only upon subsequent option periods

# General Rule

- Representations of size and socioeconomic status are generally good for the life of the contract—even if natural growth occurs
- Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business



# Exceptions to the General Rule

- 8(a) awards
- HUBZone awards
- Subcontracts
- Architect-engineering, design/build, or two-step sealed bidding procurements
- “Agreements”
- Multiple Award Contracts
- Other Long Term Contracts
- Triggering Events

## 8(a) Awards

- Eligibility is determined at both time of proposal with price and time of award
- Size may be protested but 8(a) eligibility may not

# HUBZone Contracts

- Must be an eligible HUBZone contractor on two key dates:
  1. date of proposal submission and
  2. date of contract award
- Both dates constitute a representation of HUBZone status

# Subcontracts

- A subcontractor's size status at the time it submits its offer for the subcontract governs
  - Accept written representations or SAM certifications
- Absent a term or condition in the subcontract that requires rerepresentation, subcontractors are not required to rerepresent their size status to the prime contractor after undergoing a merger or acquisition
  - Prime contractor may rely on the subcontractor's small business size representation until another representation of size is required
- Prime contractor may rely in good faith on the small business size representations made by its subcontractor

# **A/E, Design/Build, or Two-Step Sealed Bidding Procurements**

- Concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may or may not include price)

# “Agreements” (including BPAs, BOAs, and Basic Agreements)

- Concern must qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement
- Because an Agreement is not a contract, the concern must also qualify as small for each order issued pursuant to the Agreement in order to be considered small for the order and for an agency to receive small business goaling credit

# **BPAs Issued Against GSA Schedules**

- For BPAs issued against GSA Schedules, contractor may rely upon the representations made at the Schedule level
- **HOWEVER**, if the contractor undergoes a triggering event requiring rerepresentation at the Schedule level, the ordering agency may no longer rely upon the representations made at the time the BPA was awarded (because the original Schedule representations have changed)
  - Orders are always placed against the underlying Schedule, not the BPA – the Schedule representations control at the time the order is issued

# Multiple Award Contracts Are Special!

- If a concern is small at the time of initial offer for a Multiple Award Contract (MAC), then it will be considered small for each order issued against the contract with the same NAICS code and size standard, unless a contracting officer requests size recertification in connection with a specific order
  - Must be a specific request for recertification
- Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business



# NAICS Code Issues Under MACs

- Representation is based upon the size standard set forth for each discrete category (e.g., CLIN, SIN, Sector, FA or equivalent) for which a business concern submits an offer and represents it is small for the MAC
- If concern submits an offer for the entire MAC, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent)
- If concern is small at the time of offer for a discrete category on the MAC, it is small for each order issued against that category with the same NAICS code and corresponding size standard
  - Unless a contracting officer requests size recertification in connection with a specific order
- All orders under a MAC must be assigned same NAICS code as underlying contract

# MAC Orders to 8(a) Firms

- For multiple award contracts, differences between whether or not contract was competed exclusively amongst 8(a) participants
  - Competed exclusively (i.e., vehicle like GSA 8(a) STARS II) = eligible for set-aside orders even if contractor has otherwise exited the 8(a) program, because vehicle itself was offered and accepted by SBA into the 8(a) program
  - Not competed exclusively (i.e., most GSA Schedules) = must be current participant, as agency must offer and SBA must accept each order into the program
- Directed sole source awards, SBA must always accept order into the program – means company must be current 8(a) participant
- Options may be exercised so long as they are priced – otherwise contractor must be current 8(a) participant
- Contracts may be modified so long as modifications are within the contract's scope – otherwise, contractor must be current 8(a) participant

# Long Term Contracts Require Recertification

- For contracts with durations of more than 5 years (including options), CO must request that business recertify its small business size or socioeconomic status:
  - Within 60 to 120 days prior to the end of the fifth year of the contract; and
  - Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter
- A business concern that certified itself as other than small, either initially or prior to an option being exercised, may recertify itself as small for a subsequent option period if it meets the applicable size standard

# Triggering Events

- Certain events trigger recertification for all set-aside contracts, including MACs:
  - Novation
  - Merger/Acquisition
- Generally, contracts requiring rerepresentations of size will contain FAR 52.219-28
  - No equivalent clause for socioeconomic programs

# Novation

- Recertification of size or status required within 30 days of approved contract novation
- What requires novation? See FAR Part 42
- Name changes do not require recertification

# Merger, Sale, or Acquisition

- In the case of a merger, sale, or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its size or status to the contracting agency

# Mergers/Acquisitions: Recertification Required from Multiple Sources!

- Required from concern and its affiliates:
  - If concern, or affiliate of concern, acquires or is acquired by another concern
- From both the acquired concern and the acquiring concern if each has been awarded a contract as a small business
- From a joint venture when an acquired concern, acquiring concern, or merged concern is a participant in a joint venture that has been awarded a contract or order as a small business

# Pending Proposals

- If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award
  - Relatively new rule, effective last year (2016)
  - Unclear whether agency is allowed (or would be willing to) issue award after recertification is made on a pending proposal



# Ownership Changes

- Question of whether an ownership change requires recertification
- SBA regulation states that recertification required when small business acquires or is acquired by “another concern”
  - Different standard for individuals acquiring ownership?
- How much ownership change requires recertification?
  - Majority?
  - Enough to change control?

## **8(a) Contracts Are Special Too!**

- Cannot transfer 8(a) contracts without waiver from SBA
- If an 8(a) contract is transferred without SBA's waiver, it will be terminated
- Recertification and triggering events do not apply in the 8(a) world

# What Does Recertification Mean?

- Submitted to the contracting agency (usually the CO)
- Recertify under size standard effective at time of recertification, assigned to contract's original NAICS code
- Does not change terms and conditions of contract
  - Unless contract has an off-ramping provision, contractor keeps contract even if it cannot recertify size or status

# Effect of Recertification

- After a contractor rerepresents it is other than small, the agency may no longer include in small business prime contracting goal achievements:
  - Value of options exercised
  - Modifications issued
  - Orders issued
  - Purchases made under BPAs on that contract
- Agencies should issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation
- Contractors that are no longer small may be required to adopt a small business subcontracting plan

# Penalties for False Representations

- Presumed loss rule applies to small business and socioeconomic programs
- *“In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a **small business concern [or other socioeconomic designation]** willfully sought and received the award by misrepresentation.”*

# Questions?

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