



Column: Size Recertification Now Required for Pending Proposals After Merger or Acquisition

by Kathryn Flood and Josh Humi, attorneys, PilieroMazza PLLC

Effective June 30, 2016, the SBA has implemented a final rule regarding the subcontracting limitation requirements mandated by the National Defense Authorization Act of 2013. This new rule addresses numerous topics, amongst which includes a new requirement for offerors to recertify size on pending proposals for small business set-asides if the offeror has undergone a merger or acquisition.

Under the prior version of the SBA rules, a business only recertified its size status with respect to its existing set-aside contracts upon a triggering event, such as a merger, acquisition, or novation.

The new rule adds a requirement that, subsequent to a merger or acquisition, a business must recertify its size status for any pending proposals for set-aside contracts as well.

In other words, if a business submitted a proposal to a federal agency under a small business set-aside, and while that proposal is pending with the agency the business undergoes a merger or acquisition, the recertification rules now require the business to recertify its size status to the agency with respect to that pending proposal.

The pre-existing recertification requirements make clear that the business' size status recertification will not affect the terms of existing contracts. So, regardless of the new size status of the business upon a recertification, it would not change the terms of those affected existing contracts.

If the business recertifies as other than small, the awarding agency will not be able to count the contract for small business purposes going forward. Without the incentive of the agency being able to claim small business credit for the awarded contract, the agency could end the contract or could pre-

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vent the contractor from competing for future task orders under the contract. However, the agency does not have to terminate the contract, and in most cases will let the contractor remain on the contract after a recertification from small to large.

The new rule has a much greater potential to negatively impact contracts for small businesses.

Under the new rule, if a small business has a pending proposal with an agency for a small business contract and the business undergoes a merger or acquisition, it must inform the agency. At the sensitive stage when proposals are under evaluation, it seems highly unlikely that agencies would award a small business contract to a contractor that has recertified its size status from small to large. Thus, and perhaps not surprisingly, we expect the new rule to significantly diminish a contractor's chances of winning a set-aside contract when it has to recertify as large while its proposal is pending.

If an agency did proceed to award a small business contract to a firm that recertified as large on its pending proposal, it remains to be seen whether other offerors could successfully challenge that award.

On the one hand, it seems a size protest would not be successful because of the long-standing principle that size is determined as of the date of proposal submission, not the date of award. However, SBA could look at the circumstances differently in light of this new recertification rule and depend-

ing on when the merger or acquisition became an agreement in principle.

Additionally, there may be grounds to protest such an award to GAO or the Court of Federal Claims. We will have to watch how these issues are fleshed out as agencies and contractors live with the new rule.

Another practical implication of the new recertification rule is that it has the potential to further depress the merger and acquisition market for small businesses. The pre-existing recertification rules already made it unfairly onerous for small businesses by devaluing their existing set-aside contracts in the eyes of potential large business purchasers. The added recertification rule for pending proposals will only make this worse by devaluing proposals (already a very speculative factor in acquisitions) even further.

In light of the new recertification rule, small businesses that are considering a merger or acquisition need to be mindful of the potential impact of recertification on their pending proposals for set-aside contracts. In many cases, it might be prudent to delay the transaction until after the pending proposals have been awarded, so the small business will have the contract in hand and, therefore, potentially greater value in the acquisition.

Kathryn Flood and Josh Humi are attorneys with PilieroMazza PLLC in the Government Contracting and Business and Corporate Groups respectively. For over 25 years, PilieroMazza has helped businesses to successfully navigate a diverse array of legal matters, including government contracting, SBA's procurement programs, litigation, labor and employment and corporate law. Visit www.pilieromazza.com.