Insights: Alerts

Changes to the SBA Regulations Change the Face of Small Business Government Contracting and Create New Opportunities for Both Small and Big Businesses

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On July 26, 2016, the U.S. Small Business Administration (SBA) issued extensive amendments to its regulations to implement provisions of the Small Business Jobs Act of 2010 and the National Defense Authorization Act for Fiscal Year 2013. The amendments are extensive, and the more critical amendments relate to (a) the mentor-protégé program, (b) rules associated with affiliation, (c) disadvantaged business status, and (d) the Historically Underutilized Business Zones (HUBZone) program. In this alert, we provide a brief overview of the major changes made to each part of the SBA regulations. Over the coming weeks, we will release additional alerts that take a deeper dive into the amendments impacting the individual SBA programs.

A. New Mentor-Protégé Programs

The Mentor-Protégé Program (M-P Program) allows a business that is other than small to provide business development assistance to an SBA-recognized Small Business Concern (SBC). Prior to these amendments, the SBA limited eligibility for the M-P Program to participants in the 8(a) Small Business Development Program (8(a) Program). The 8(a) Program is limited to SBCs owned and controlled by socially and economically disadvantaged individuals. The amendments expand the M-P Program to now encompass *all* small business programs. This enables SBCs participating in the HUBZone, Women-Owned Small Businesses (WOSB), and Service-Disabled Veteran-Owned Businesses (SDVO) programs, as well as traditional SBCs, to receive business development assistance from and joint venture with a qualified mentor entity.

These changes provide opportunities for both small and large businesses. Now, small businesses of all types can find a mentor to provide business development assistance. Additionally, large businesses have a larger pool of potential protégés. Serving as a mentor will allow large businesses to participate with their protégés on set-aside programs. Both small and large businesses should be careful to ensure that such arrangements align with the regulations and that the small business is not used as a "front."

B. Additional Guidance on Affiliation

The amendments also provide small businesses with additional guidance on how the SBA determines affiliation between a small business concern and a large business. Affiliation is generally defined under SBA's regulations as a situation where one or more companies either controls or has the power to control another company or when a third party controls or has the power to control both companies. If affiliation exists between companies, the revenues or number of employees, depending upon the size standard, are combined to determine if an entity exceeds the size

standard. Affiliation is a key element when determining whether a business is small. The amendments provide that the SBA will no longer find affiliation as a result of "common administrative services," like bookkeeping, payroll, recruiting, human resources support, record retention, maintenance of databases for regulatory compliance or invoice preparation, and other duties unrelated to contract performance. In contrast, services that require actual and direct control over the day-to-day oversight of contract performance can still result in a finding of affiliation.

C. Small Disadvantaged Business Status Determinations

The amendments further provide additional requirements and guidance on who is socially disadvantaged for purposes of qualifying under the 8(a) Program. More specifically, while the prior regulations generally created a presumption that certain races and ethnicities were socially disadvantaged, now, where readily available, individuals must present corroborating evidence of social disadvantage. The revised regulations place the burden on the individual applicant to prove that their social disadvantage is "chronic and substantial" through facts and evidence that establish that the individual suffered social disadvantage that negatively impacted their ability to enter into or advance in the business world.

D. Changes to the HUBZone Program

The amendments also impact the HUBZone program. The HUBZone program, creates preferences for businesses that both have a headquarters in an HUBZone and have at least 35 percent of their employees reside in HUBZones. HUBZones are determined by the U.S. Census as containing lower income and business usage and are revised along with the census performed every decade. Notable changes included in the amendment consist of (a) increasing the SBA's review period for applications from 30 days to 90 days, (b) expressly placing the burden to demonstrate eligibility on the applicant SBC, (c) a presumption against eligibility due to incomplete data or failure to respond to SBA document requests, and (d) requiring the applicant to notify SBA of any changes in status after submitting its application that may impact eligibility for the program.

Conclusion

Over the coming weeks, we will provide a more in-depth review of the amendment's changes to SBA's regulations and programs. In the meantime, should you have specific requests for information or questions about any SBA program, please contact any of the authors identified on this alert or your regular Kilpatrick Townsend contact.

Related People



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