

CONTRACT VALUE = VALUE OF LOSS

WILLFULL MISREPRESENTATION EQUATES TO DISASTER

SMALL BUSINESS ADMINISTRATION FINAL AMENDED RULE “BOLSTERS” SMALL BUSINESS CONTRACTING PROGRAMS

INTRODUCTION

With the release of its Final Rule concerning the size and status of small businesses, which became effective on August 27, 2013, the Small Business Administration (SBA) will tighten its grip on contractors (also referred to as concerns) that intentionally misrepresent their size in order to obtain contracts exclusively limited to small businesses.

The Final Rule lays out **three distinct areas** where the SBA will more closely monitor who it is dealing with when awarding small business contracts. As such, it becomes paramount for small business contractors who compete for the procurement of contracts specifically set aside by the Federal Government to gain a thorough and complete understanding of these regulations. Contractors who do not qualify for these specific limited contract awards will need to recognize that stiffer penalties will exist. This article briefly outlines this change.

RULE HIGHLIGHTS

The first relevant provision of the Final Rule is the “presumption of loss”. This presumption is equal to the total dollar value of the contract and is based on intentional misrepresentation by the contractor. Under this provision, if a concern/contractor intentionally misrepresents its small-business size and status in order to obtain a Government contract, the Government will be presumed to have suffered a loss.

In other words, had the contractor committed no misrepresentation, the Government would not have been wronged. As a result of the “intentional wrong” committed against the Government via this misrepresentation, **the small-business contractor will be liable to the Government for the total value of the contract awarded.**

In the second relevant provision, the SBA lists specific instances where a concern/contractor is “**believed**” to have represented itself as a small business. These instances consist of activities where a concern/contractor holds itself out to be a small business, or at least gives the Government the impression it is holding itself out to be the same, during the contract procurement process. Specifically included are encouraging a Federal agency to classify a bid or proposal submitted, if awarded, as one to a small business **and registering itself on any Federal database in order to be considered for a small business award.** Hence, it becomes important for a concern/contractor to not portray itself in the eyes of the Government as a small business solely to obtain a contract award.

In the third relevant provision of the Final Rule, the SBA will require all bids and proposals for small-business contracts to now include documentation certifying that the submitting concern/contractor is indeed a true small business. This certification must be completed and signed by a contractor’s authorized employee and must show, at a minimum, that annual size certification has been completed through either the System for Award Management (SAM) or other like database. If the contractor fails to show its annual certification, it will be excluded from the list of small business concerns until it can show its compliance. **In addition, because a contractor’s authorized official is required to certify the small-business-size status, this certification may present an avenue to the**

Government to seek potential individual liability on the part of that authorized official for misrepresentation of the contractor's size status.

Conversely, the Final Rule states that the aforementioned three requirements will not apply in cases of: “unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729 et seq...” 13 C.F.R. § 121.411(g). Section 121.411(g) additionally explains that a prime contractor, acting in good faith, will also not be held liable for its subcontractor's size misrepresentation. Finally, “an individual or firm will not be held liable where Government personnel erroneously identified a concern as small, without any representation or certification having been made by the concern, and where such identification was made without the knowledge of the individual or firm.” (Id.) Thus, where the individual or firm is not responsible for the error, no liability will exist.

CONCLUSION

The penalties outlined apply not only to new certifications and representations, but also to companies and individuals that fail to correct certifications and representations that, for whatever reason, are no longer correct. In order to maintain that contractor certification and representation is both true and accurate, it becomes increasingly important to enlist the guidance of experts in order to alleviate or eliminate the likelihood for error.

Thus, the changes under the Final Rule will significantly affect all small business contractors that deal with the Federal Government, as well as those that try to portray themselves as a “small business” status through their intentional misrepresentations.

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