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Legal Innovators

Our attorneys guide clients through the maze of regulations to maximize a company's ability to secure government contracts. If you would like more information on this issue or any other government contracts issue, please contact us.

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CHANGED SMALL BUSINESS STATUS FOR FSS CONTRACT HOLDERS

Changing circumstances, usually taking the form of a potential acquisition or merger, often lead to questions from small businesses about continuation of their small business status for purposes of federal programs, particularly their status as small businesses under General Services Administration ("GSA") Federal Supply Schedule ("FSS") contracts. Affiliation rules dictate how newly acquired employees and financial assets are to be counted for purposes of small business status. (Depending upon NAICS code for the relevant industry, small business status is a function of either the average number of employees over a twelve-month period or a three-year average of annual revenue.) Which employees and what revenue must be counted often depends upon what date is to be used for purposes of certification.

Small Business Administration ("SBA") regulations establish that small business status is to be determined as of the date of contractor certification. 13 C.F.R. §§ 121.404, 121.504. Generally, when orders are placed against an FSS contract, the relevant date for determining size status is that of the original FSS contract certification or the most recent FSS certification renewal. *See, e.g., Whitecraft Indus., Inc.*, SBA No. 2016, 1984 WL 41960 (S.B.A. Aug. 30, 1984). Thus, were a small business to become large midway through its FSS contract, it could still receive orders as a small business.

However, in some cases, an agency does not simply place an

order under an existing FSS contract but instead issues its own request for quotation ("RFQ"), with its own certification requirements. In these cases, a recent SBA decision makes clear, *even if a purchase is ultimately made under an FSS contract*, the date for determining size status is the date of the new certification. *SETA Corp. Fed. Emergency Mgmt. Agency*, SBA No. SIZ-4477, 2002 WL 563870 (S.B.A. Mar. 1, 2002). *SETA Corp.* involved a Federal Emergency Management Agency ("FEMA") procurement limited to small businesses that were also FSS contract holders. As part of its procurement, FEMA required offerors responding to the RFQ to self-certify their small business status. Award was made to SETA, a company that was not small at the time of award but that had an earlier FSS contract as a small business. In deciding that SETA was not a small business eligible for award in the FEMA procurement, the SBA stated:

Had FEMA merely issued SETA an order against the FSS contract, the question of SETA's size would not have arisen. Instead, FEMA conducted its own small business set aside procurement, limited to firms on the GSA Schedule, and nothing in the FAR prohibits this.

When a procuring agency uses an RFQ, a responding contractor, or quoter, does not make an offer, it provides a quote, and the Government provides the offer in the form of an order. ... In determining what 13 C.F.R.

§ 121.404 means in the context of a response to an RFQ issued under an FSS, this Office holds that the date to determine size, when by definition the contractor does not make an "offer," is the date the concern submits its written self-certification of size in its response to the procuring agency's solicitation. This holding is consistent with the broad interpretation of "procurement," finding that issuing an RFQ in this context is a procurement.

This decision makes clear that, as far as the SBA is concerned, formerly small businesses that no longer qualify as small because of growth or affiliation may no longer bid against RFQs set aside for small businesses, even if limited to FSS contract holders or even if referencing their FSS contract numbers. A recent General Accounting Office decision has agreed with this position. See *CMS Info. Servs., Inc.*, B-290541 (G.A.O. Aug. 7, 2002) (denying protest asserting that agency improperly required re-certification of small business status, and holding "there is nothing objectionable in an agency's requiring that FSS vendors responding to a task order RFQ be small as of the date quotations are due, instead of relying on the original FSS self-certification, which may not reflect a vendor's current small business status").

If, however, an agency simply places an order against an FSS contract without soliciting quotes, a former small business can make the sale and the agency may still be able to claim small business credit. It is also important to note that the SBA in *SETA Corp.* stated that the above limitation does not apply to Section 8(a) contractors.

Is An FSS Contract In Your Future?

Recently a Department of Veterans Affairs ("DVA") Procurement Reform Task Force recommended changing the contracting hierarchy for DVA procurements. DVA will now be required to procure goods and services from companies that hold FSS or DVA national contracts. Open market and local purchases are permissible only in rare circumstances. This requirement appears to apply to all DVA purchases, including medical/surgical supplies, information technology, construction, and services acquisitions.

By centralizing and nationalizing its contracts, DVA intends to leverage its purchasing power to obtain lower prices. A significant volume of purchases under FSS contracts negotiated by DVA are made by other government agencies, which include the Department of Defense, the Coast Guard, the Bureau of Prisons, the Public Health Service, and the Indian Health Service.

It appears that DVA initiated these reforms to avoid Congress stepping in and statutorily requiring such changes. In January, Representative Lane Evans (D-IL) introduced legislation (H.R. 3645) that would require DVA to use FSS and national contracts as mandatory sources of supply for the purchase of medical supplies. DVA opposed the bill, stating that it could implement such reforms absent a statutory mandate. Further, DVA desired to maintain some procurement flexibility where a product or service required was not available on an FSS or national contract and in times of true emergency. On July 22, the House

of Representatives passed the bill. The bill now goes to the Senate.

It is too early to predict the entire impact of this reform. However, it is clear that a contractor seeking to sell products or services to DVA now must have its products or services on an FSS or DVA national contract. Open market and local purchases appear to be on the way out. Whether other agencies will follow DVA's lead remains to be seen.

As a result, if not already doing so, DVA contractors should begin to consider whether they need to hold an FSS contract. Unlike other government contracts, FSS contracts include unique terms and conditions such as the Price Reduction clause, Economic Price Adjustment clause, and Industrial Funding Fee clause. Also, contractors seeking FSS contracts must disclose an array of commercial prices and policies when completing a Commercial Sales Practices form. In addition, FSS contracts include pre-award and post-award audit clauses.



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