

# **ACC NCR Government Contractors Small Business Contracting and Subcontracting Update**

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# Roadmap

- The Future of SBA's Contracting Programs Under the Trump Administration
- Recent Updates to the Small Business Subcontracting Program
- SBA's New Recertification Rules for Multiple Award Contracts
- Other Recent Changes to the SBA's Rules



# Future of SBA Programs

- Administration hostile to “affirmative action” or “DEI” type programs
  - EO 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 20, 2025)
  - EO 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025)
- Small businesses have borne the brunt of DOGE contract terminations to date
- Questions about what this may mean for the future of SBA’s small business contracting programs
  - Especially following recent court decisions striking down certain affirmative action policies



# Future of SBA Programs

- Most of the SBA small business contracting programs are grounded in statute—8(a), WOSB, SDVOSB, HUBZone
  - 15 U.S.C. 637, 657a, 657f
- The “Rule of Two” is not statutory
  - Based on SBA regulations, 13 C.F.R. 125.2, and the FAR, 19.502-2
  - The VA’s Rule of Two is statutory, 38 U.S.C. 8127
- The Administration could still de-emphasize small business contracting
  - Fewer “set-asides,” less focus on small business subcontracting achievements



# Future of SBA Programs

- On January 24, 2025, the SBA reset the small disadvantaged business goals to 5%, down from the 15% goal set by the Biden Administration
  - 5% is the statutory floor under 15 USC 644(g)(2)
  - SBA also removed individual agency small disadvantaged business goals
  - Potential cascading effects for prime and subcontractors
- New SBA Administrator “Day One” priorities are focused on SBA loan programs rather than contracting, but affirmed that SBA will enforce EOs such as Ending DEI



# Future of SBA Programs

- Another possible tactic is to cut the workforce responsible for overseeing and enforcing small business programs
  - DOGE activity has led to RIFs throughout SBA
  - Executive branch hiring freeze
  - Cuts to OSDBUs uncertain



# Small Business Subcontracting

- Historically, prime contractors could count small business subcontracting achievements only at the first tier (with an exception for ANCs and Indian Tribes)
- In October 2023, SBA issued a final rule revising its regulations to implement changes resulting from Section 870 of the FY20 NDAA
  - New threshold for small business subcontracting plans (\$750K)
  - Contractors with a subcontracting plan for a single contract can elect to receive credit for lower-tier subcontracts if:
    - The election is recorded in the prime contractor's subcontracting plan
    - The prime contractor's plan incorporates the goals of the lower-tier subcontractor
    - The lower-tier subcontractors have their own individual subcontracting plans
    - The prime contractor and subcontractors report their subcontracting performance



# Accelerated Payments to Small Businesses

- In December 2024, SBA issued a proposed rule to provide for faster payments to small business subcontractors
  - Based on FY24 NDAA
  - Would require prime contractors to notify the CO in writing if payment to small business subcontractor is overdue by 30 days
  - Allows CO to use any failure to make full and timely payments in CPARs
- Would also streamline the subcontracting reporting process for primes, allowing prime contractors the option to base size status on its primary NAICS code under commercial subcontracting plans and some other limited exceptions
- Adds clarification on how to calculate agency allocations on Commercial Summary Subcontract Reports
- Clarifies subcontracting reporting deadlines





# SBA's New Recertification Rule

- The rule clarifies SBA's recertification requirements for MACs that are set aside for small businesses, 89 Fed. Reg. 10248 (Dec. 17, 2024)
  - Reorganizes recertification requirements into a new provision
  - Makes changes in response to recent protest decisions adverse to SBA
- Establishes uniform rules governing the impact of “disqualifying recertifications”
- The rule was generally effective as of January 16, 2025, **but**:
  - The effective date of the rule's changes to certain SBA recertification requirements is delayed until January 17, **2026**



# SBA's New Recertification Rule (cont'd)

- Basic purpose of the rule is to make clear that if a firm recertifies as large following an M&A transaction, it is no longer eligible to receive new set-aside work under a MAC
  - This has purportedly always been SBA's intent, but the rules did not clearly reflect that
- The rule includes exceptions that treat M&A transactions involving small businesses more favorably
- The one-year delay in implementation may prompt increased M&A activity in the next year, but the impact of the delay may be overblown



# SBA's New Recertification Rule (cont'd)

- Changes to SBA rules do not change the terms of existing contracts
  - Be cognizant of “off-ramp” provisions in your MACs
- Agencies and contracting officers may not implement these new rules uniformly, as there are open questions that still need to be addressed



# SBA's Rules on When Size Is Determined

- **Set-aside contracts**: Size and status is generally determined as of the date of initial offer that includes price
- **Unrestricted MACs and BPAs**: Size and status is determined as of the date of initial offer that includes price ***for each set-aside order*** issued under the MAC or BPA
  - *Exception*: For GSA FSS orders and BPAs, size and status is determined as of the date of the initial offer that includes price ***for the FSS contract***
- **Set-aside or reserved MACs**: Size and status is determined as of the date of initial offer that includes price ***for the MAC***
  - *Exception*: Where a contracting officer requests size recertification for an order, size is determined as of the date of initial offer that includes price for that order



# SBA's Rules on When Recertification Is Required

- **M&A**: Within 30 days of a merger, acquisition, or sale of or by a contractor or an affiliate of the contractor
  - Applies only if the transaction results in a change in controlling interest
  - Applies to pending proposals for set-aside awards (if there is a change in size)
- **Long Term Contracts**: No more than 120 days prior to the end of the fifth year of the contract or the exercise of any option thereafter
  - CO *may* request recertification prior to the 120-day point in the fifth year
- **Contracting Officer Request**: When a contracting officer explicitly requires contractors to recertify size or status in response to a set-aside solicitation



# Disqualifying Recertifications

- A “disqualifying recertification” means that a firm no longer has the size or status required for eligibility to participate in a set-aside or reserved award
- Disqualifying recertifications have different impacts depending on the nature of the:
  - Event triggering the recertification: M&A, long-term contract, contracting officer request for a specific order
  - Contract type: MAC, FSS contracts, single-award contract



# Disqualifying Recertifications – Pre-award M&A

- If a firm makes a disqualifying recertification due to M&A after submitting its offer that includes price but before award:
  - The firm is **ineligible** for award if the transaction occurred within 180 days of offer
  - The firm is **eligible** for award if the transaction occurred more than 180 days after offer
- However, if the underlying award is a set-aside MAC, the firm is **ineligible** for award regardless of timing because it would not be eligible to receive any set-aside orders under the MAC



# Disqualifying Recertifications – Post-Award M&A (MACs)

- If a firm makes a disqualifying recertification due to M&A after award of a MAC:
  - The firm is **eligible** for new set-aside orders and options if the transaction occurs before January 17, 2026, but the agency cannot take small business credit
    - BUT: Many existing MACs have “off-ramp” provisions that apply if a firm becomes large through M&A
  - The firm is **ineligible** for new set-aside orders and options if the transaction occurs on or after January 17, 2026
    - Exception: If the transaction involves another small business, the firm is eligible for new set-aside orders and options, but the agency cannot take small business credit





# Disqualifying Recertification – Contracting Officer Request for a Specific Order

- If a firm makes a disqualifying recertification in response to a contracting officer request on a specific set-aside order (or BPA) under a MAC:
  - The firm is ineligible for that specific order (or BPA)
  - But the firm remains eligible for future orders or BPAs issued under the MAC



# Disqualifying Recertifications – Long-Term Contracts

- If a firm makes a disqualifying recertification in connection with a long-term contract:
  - The firm is **eligible** for options to be exercised before January 17, 2026, but the agency cannot take small business credit
  - The firm is **ineligible** for (i) new set-aside orders, and (ii) options to be exercised on or after January 17, 2026



# Disqualifying Recertifications – Single-Award Contracts

- If a firm makes a disqualifying recertification due to M&A or a long-term recertification in connection with a single-award contract:
  - The firm is **eligible** for new orders and options, but the agency cannot take small business credit



# GSA FSS Contracts

- Historically, SBA has exempted GSA FSS contracts from the recertification rules that apply to other MACs
- Under the new rule, GSA FSS contracts will retain one exemption:
  - For GSA FSS contracts, size and status is determined as of the date of the initial offer that includes price ***for the underlying GSA FSS contract***, or ***the latest recertification*** under the GSA FSS contract
  - For other unrestricted MACs, size and status is determined at the time of offer ***for an individual set-aside order***



# Disqualifying Recertifications – GSA FSS Contracts

- If a firm makes a disqualifying recertification in connection with a GSA FSS Contract, it is treated the same as other unrestricted MACs:
  - M&A recertification:
    - The firm is **ineligible** for pending set-aside order awards if the transaction occurs within 180 days of offer (but eligible if more than 180 days)
    - The firm is **ineligible** for future set-aside orders and options (but eligible for orders and options if the transaction is before January 17, 2026)
    - If the transaction involves another small business, the firm is **eligible** for future set-aside orders and options, but the agency cannot take small business credit
  - Long-term option recertification:
    - The firm is **ineligible** for future set-aside orders and options (but eligible for options exercised before January 17, 2026)



# New Size Protest Rights

- MAC holders may request a formal size determination of another contract holder's recertification of its size status
- The request must be sufficiently specific and provide some basis for questioning the firm's size
- The new rule does not include a time limit for filing the protest



# Impact on Subcontracting

- New recertification rule does not change the general rule for small business subcontracting that size and status are determined as of the date of the subcontract
- But many large businesses rely on small business MAC holders to get access to certain opportunities, and will need to be cognizant of these new rules to chose the best long-term teammate



# Open Questions

- ***Can contractors continue performing orders after a disqualifying recertification on a MAC?***
  - Rule addresses eligibility for new orders and options, but does not expressly address the status of existing orders that have options
  - In the preamble to the rule, SBA said its intent is that a concern that recertifies other than the size or status required for award it is currently performing may continue to perform for remainder of that period of performance
- ***Will agencies delay application of “off-ramp” terms under MACs to align with the delayed effective date of the new rule?***
  - Many MACs refer to SBA’s recertification rules in their off-ramp terms, which now allow contractors to remain eligible for new orders until January 2026 notwithstanding a disqualifying recertification





# Open Questions (cont'd)

- ***How will the new rule be applied to existing contracts?***
  - The rule states that it has no retroactive effect, which usually means it would apply only to new solicitations issued after the effective date
  - But, the preamble to the new rule states SBA's intention that the disqualifying recertification rule changes will apply to current contracts (after January 17, 2026)
- ***How do disqualifying certifications under GSA FSS contracts affect previously-awarded BPAs?***
  - Rule addresses impact only on the GSA FSS contract itself, but previously-awarded BPAs could have additional options and orders



# Mentor-Protégé Program Changes

- As part of the new recertification rules, SBA also announced some changes to the mentor-protégé program
  - Clarifies that if a mentor has a MPJV with a MAC and purchases another entity that is a mentor with a MPJV with the same MAC, it must give up one of the JVs
  - Clarifies protégé options if its mentor is acquired



# Mentor-Protégé Program Changes

- In July 2024 SBA announced that during its annual tribal consultation meetings that it was soliciting feedback on the mentor protégé program; specifically sought comments on two “perceptions”
  - Mentor-protégé joint ventures are securing a disproportionate number of orders under small business set-aside MACs
  - Small businesses often join mentor-protégé joint ventures because they cannot otherwise meet stringent experience and past performance requirements
- SBA suggested it was considering (1) eliminating the MP affiliation exception for MACs; or (2) limiting the affiliation exclusion for MPJVs to contracts and orders not exceeding five years.



# Increasing Small Business MAC Participation

- On October 25, SBA issued a proposed rule: Small Business Contracting: Increasing Small Business Participation on Multiple Award Contracts
  - Aims to expand the use of the small-business Rule of Two in MACs and make other regulatory revisions to encourage small business participation in new MACs
  - Agencies would be directed to set aside orders under MACs if there are at least two competitive small business offers.
  - COs must document reasons for not setting aside orders over the micro-purchase threshold, and submit it to the agency's small business specialist or relevant office
  - The rule would apply to new orders on existing MACs and all new MACs, while existing task and delivery orders remain unaffected
  - Rule would not apply to the FSS



# Increasing Small Business MAC Participation

- Similar FAR Proposed Rule issued January 15, 2025
  - Would require COs to set aside an order for small businesses if they reasonably expect to receive offers from at least two responsible small business contract awardees that are competitive in terms of fair market price, quality, capability, ability to comply with the delivery or performance schedule, and past performance
  - It would also increase and enhance small business documentation requirements to boost small business opportunities when developing acquisition strategies for MACs



# Other Potential Changes on the Horizon

- Updated size standards
- Clarifications to the new recertification rule



# Questions