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SBA Issues Proposed Rule to Establish Government-wide Veteran-Owned Small Business Certification Program

Client Alert

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Earlier this month, the U.S. Small Business Administration (“SBA”) issued its proposed rule to set up a Government-wide certification program for Veteran-Owned Small Business (VOSB) and Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns. The proposed rule comes on the heels of the 2021 National Defense Authorization Act, which calls for an end to SDVOSB self-certification and requires SBA to take over responsibility for SDVOSB certification from the Department of Veterans Affairs (“VA”) beginning on January 1, 2023.

Currently, firms seeking VOSB or SDVOSB sole source or set-aside contracts with Federal agencies (other than the VA, which has its own verification program for VA procurements) are required only to self-certify as to their status to be award eligible. Under the proposed rule, only SBA-certified firms will be eligible for VOSB and SDVOSB set-asides or sole-source contracts.

Under the proposed rule, the certification would be valid for 3 years from receipt of SBA’s written approval. There would be a one-year grace period, after January 1, 2023, for self-certifying SDVOSBs to apply to SBA for certification. Those that apply within the grace period would remain eligible for contract awards until SBA makes a final eligibility determination. Firms verified by the VA prior to January 1, 2023 will be deemed eligible by SBA for the remainder of the entity’s three-year eligibility term under current VA rules. Additionally, the proposed rule would grant reciprocity to small business entities participating in SBA’s 8 (a) Business Development and Women-Owned Small Business (WOSB) programs that are owned and controlled by one or more veterans or service-disabled veterans.

Regarding the substantive requirements for certification, because the rule is designed to transfer the VOSB and SDVOSB certification program from VA to SBA, SBA is essentially

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consolidating existing regulations with the VA's own verification guidelines and is largely adopting the latter's guidelines, continuing eligibility rules, and other procedures.

Nonetheless, a few portions of the proposed rule are worth highlighting. First, under the proposed rule, an entity can be certified by SBA if it is considered small for any North American Industry Classification System ("NAICS") code under which it currently conducts business activities. This is a more lenient standard than having to be being considered small under the entity's primary NAICS code. However, SBA is currently seeking guidance from commenters on how to define the term "currently conducts business activities."

Second, SBA is also seeking comments about a critical factor relating to the status of potential small business concerns: ownership and control. As currently written, the applicable SBA regulations (13 C.F.R. § 125.13(i), (k), and (l)) set out a number of "rebuttable presumptions" indicating control by a non-veteran—for example, a non-veteran holding an equity interest in the entity—which, if left un rebutted, would lead to an ineligibility determination. SBA is currently proposing to adopt these provisions, in full, but is seeking comment as to whether "those rebuttable presumptions should be viewed merely as factors of control by non-veterans rather than conditions of ineligibility that an applicant must rebut." SBA is also seeking comment on whether any of the presumptions should be amended.

Comments on the proposed rule must be received on or before August 5, 2022. We will continue to follow the implementation of this significant change impacting veteran-owned small business contractors. If you have any questions about the proposed rule or existing VOSB and/or SDVOSB eligibility requirements, please contact a member of the Butzel Aerospace and Defense Industry Group.

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