

COMMENTS
on the Interim FAR Rule
regarding Integrity in Small Business Certifications

Submitted by Max V. Kidalov
Vice President & General Counsel
THE CENTECH GROUP, INC.
9/4/07

Statement of Interest

THE CENTECH GROUP, INC. is a government contractor which holds long-term and short-term small business contracts with a variety of Federal agencies.

Statement of Policy

1. The Interim Rule Is Ineffective at Preventing Ongoing Misrepresentation and Miscoding on Individual Contracts

The stated purpose of the Interim Rule is to improve accuracy in representation of small business size and status on Federal prime contracts. The Interim Rule is ineffective in doing so, because it contains a glaring loophole that is easily abused by Federal agencies eager to get easy credit towards small business achievements by channeling small business dollars to subsidiaries of large businesses. The loophole occurs because the Interim Rule does not impose a time limit on when existing contracts have to be modified in order to incorporate the small business recertification requirements. The results are nothing short of astounding. A 3-year or 5-year contract awarded prior to June 30 would not be subject to recertification requirements for years, until the Federal agency chooses to incorporate these requirements into the contract. This time period could easily be several years, until the time that the base period runs out and the agency must face the choice to exercise options. A press release of the Small Business Administration No. 07-44, *Myth/Fact: Is There a 5-Year Loophole in New SBA Contracting Rules?*, argues that the loophole does not exist because recertification requirements apply to existing contracts. However, the Interim Rule permits agencies to defer the application of these requirements for years.

Further, the Interim Rule does not make it clear that companies that have been acquired by large businesses must recertify their small business status (or lack thereof) within 30 days as well as in connection with individual task orders.

Recommendation: It is recommended that the FAR Council impose a reasonable period of 30-90 days requiring all contracts to be modified for inclusion of the recertification requirements, and further provide that these requirements will be included by operation of law regardless of whether the contracts were modified.

Further, it is recommended that the Interim Rule be modified to clearly require certification by merged or acquired firms for purposes of bidding on task orders.

2. The Interim Rule is Ineffective at Preventing Ongoing Misrepresentation on the Central Contractor Registration (CCR) and Online Representations and Certifications Application (ORCA) Databases

Another purpose of the Interim Rule is to improve the accuracy of small business size and status representations in the government-wide databases such as CCR and ORCA. The Interim Rule is ineffective at doing so, because it does not require contractors to update their ORCA and CCR small business representations unless and until directed to recertify themselves by an individual contracting officers. As a result, the Interim Rule places the integrity of the government-wide databases and of future contract competitions or awards at the mercy of individual contracting officers at Federal agencies which are administering current contracts with the companies which have been acquired. Since these agencies and contracting officers may have a vested interest in continuing to do business with large business subsidiaries under small business contract vehicles, they are unsuitable for being wholly responsible for updating the integrity of ORCA and CCR.

Moreover, the Interim Rule does not utilize the authorities in SBA regulations, 13 C.F.R. §121.1001, which give SBA Government Contracting Area Directors and the head of the SBA Office of Government

Contracting in Washington, DC the authority to initiate size determinations for the purpose of cleaning up government-wide databases.

Recommendation: It is recommended that the Interim Rule be modified to provide for notice and dual reporting to the SBA Area Directors and/or the Office of Government Contracting on any recertification requests. This should specifically apply to matters in connection with companies which have not recertified themselves within 30 days of mergers or acquisitions.

3. The Interim Rule is Ineffective at Applying the Anti-Misrepresentation Provisions of the Small Business Act

The Small Business Act contains numerous anti-misrepresentation provisions, including 15 U.S.C. 645(d). These provisions clearly state that companies misrepresenting their status will be subject to mandatory debarment because of Congressionally-presumed lack of business ethics and responsibility. However, the Interim Rule does not provide any guidance on when misrepresentation would trigger the application of these provisions.

Recommendation: It is recommended that the Interim Rule be modified to require contracting officers to refer companies which continue to hold themselves out as small businesses to the SBA for the specific purpose of obtaining a ruling not only on proper small business size and status, but also on misrepresentation. In addition, the Interim Rule should permit similar reference to agency suspension and debarment officials.

4. The Interim Rule is Inconsistent With the Recent SBA Recertification Regulation

Another stated purpose of the Interim Rule is to promote consistency with the SBA Recertification Regulations. However, as shown above, these regulations are in conflict. In this case, Federal agencies will follow the FAR only without any additional guidance.

Recommendation: It is recommended that the Interim Rule be modified to specifically direct Contracting Officers to follow the SBA Recertification Regulations.

5. The Interim Rule Fails to Utilize Existing Authorities Concerning Non-responsibility, Fraud and Misrepresentation in Government Contracting

Statutes such as the False Claims Act and the Procurement Integrity Act as well as the Federal Acquisition Regulation provides Federal agencies with authorities to take protective or penal actions against companies which are non-responsible for reasons of integrity and ethics. These authorities are complimentary to the Small Business Act's anti-misrepresentation provisions. However, the Interim Rule does not provide for use of these authorities to combat small business size and status misrepresentation. As a result, the Interim Rule sends a message that misconduct in small business programs is OK.

Recommendation: It is recommended that the Interim Rule be modified to specifically encourage contracting officers and Federal agencies to utilize all generally available suspension, debarment, and non-responsibility penalties that are available for other types of misrepresentation.