

## A Call For Clarification Of SBA, FAR Recertification Rules

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Federal agencies are increasingly utilizing multiple award contracts (MACs), including General Services Administration Federal Supply Schedule (GSA schedule) contracts, to procure goods and services, presenting both opportunities and challenges for small businesses.

In a final rule<sup>[1]</sup> released on Oct. 2, 2013, the Small Business Administration issued new regulations that are likely to increase GSA schedule set-aside opportunities for small businesses by discouraging bundling, encouraging agencies to use on and off ramping procedures, and loosening requirements for set-asides. While these regulations, which become effective on Dec. 31, 2013, will likely prove to be quite beneficial to small businesses, they fail to address a key question that many large and small businesses are grappling with regarding recertification of size status under MACs.

The current SBA rule regarding size status states that a GSA schedule contract holder that was small at the time it submitted its offer for the GSA schedule contract is considered small for the life of the contract and all orders placed under the contract, unless it is required to recertify its size. Recertification triggers a new size determination. The SBA's final rule leaves this principle intact, but ignores a pertinent issue that many small (and large) business GSA schedule holders are facing: How does a business ascertain when a contracting officer has requested recertification for a task order under the contract?

Recertification is important because when it is required for a GSA schedule set-aside order only small business schedule holders that are small at the time of submitting their offer for that order are eligible for award. When recertification is not required, a GSA schedule holder that was small at the time of its offer (or renewal) for the GSA schedule contract qualifies as small for the life of the contract and all orders placed under the contract, even if it grows to be other than small. A request for recertification can immediately make a business that has grown to be other than small ineligible for the procurement at hand. Consequently, it is crucial that businesses know when a request for recertification has been made by the ordering agency.

This article discusses the confusion surrounding recertification requirements that originate from a lack of definition in the Federal Acquisition Regulation and SBA rules as to what constitutes a request for recertification from a contracting officer. It begins with a brief discussion of GSA schedule set-aside authority and the SBA recertification requirements. It follows with an analysis of recent cases that have grappled with determining whether a recertification request was made. Finally, the article concludes with a recommendation that the SBA and FAR Council implement standardized language to signify when recertification is required.

### Background Authority and Recertification Requirements

As a further effort to increase prime contract awards to small businesses, in 2010, the Small Business Jobs Acts permitted for the first time orders under the GSA schedule to be set aside for small businesses. GSA released an interim rule<sup>[2]</sup> in 2011 setting forth the basic set-aside procedures. Specifically, to set aside an order, the contracting officer must decide whether it is in the government's best interests to do so by determining that offers will be received from at

least two or more small businesses.[3] Agencies will only receive small business credit if the awardee meets the size standard that corresponds to the work that is performed.[4]

A contractor that qualified as a small business at the time of its initial offer in response to the solicitation to a GSA schedule contract may grow to be other than small and still qualify for small business set-aside orders as long as it has not been required to recertify its size.[5] A contractor is required to recertify at the end of a five-year (or longer) contract, or when its corporate structure has changed due to an acquisition or merger. Contractors may also be required to recertify at the discretion of the contracting officer at any point during the life of the contract and without out any structural change in the company.

Specifically, recertification is required within 120 days before the end of the fifth year of a MAC and within 120 days prior to exercising any option thereafter, within 30 days of an approved novation, within 30 days of a merger or acquisition, and when the contracting officer exercises his or her discretion to “explicitly require” recertification.[6]

This last ground for recertification has proved to be quite troublesome for many contractors, as it is often unclear when a contracting officer has “explicitly required” recertification. The SBA’s final rule declined to address the issue, and merely reiterated that the contracting officer has the discretion to request recertification for any set-aside order.[7] Thus, contractors are left in the dark to determine when the contracting officer has actually requested recertification.

#### Recent Decisions Highlight Confusion

Recent case law illustrates the confusion surrounding the question of what constitutes an “explicit request” for recertification. In *Size Appeal of Metters Industries Inc.*, the SBA’s Office of Hearings and Appeals found that the contracting officer requested recertification in a task order request for quote even though the TORFQ did not use the word “recertify.”[8] The TORFQ simply required that a concern “confirm” that its “status provided in the quotation is the same as that identified in the applicable GSA schedule.”[9]

The protester argued that this language did not explicitly require recertification, and that its small business status under its GSA schedule contract applied for purposes of its task order submission. OHA disagreed, citing the TORFQ’s references to “current” size standards and warnings that only proposals from small businesses would be accepted. It stated, “[R]ead in its entirety, the TORFQ appears to be asking each offeror to verify, in writing, that it was a small business on its GSA Schedule contract, and that the offeror was still a small business at time of task order proposal submission and task order award.”[10]

OHA rested its determination that the TORFQ language was sufficient to constitute an “explicit request” on its interpretation of the SBA’s goal of awarding procurements to small businesses. It stated:

The regulatory history of 13 C.F.R. § 121.404(g)(3)(v) is silent as to what the drafters of the regulation envisioned by an ‘explicit’ request for recertification. Nevertheless, SBA’s commentary accompanying the final rule makes plain that SBA’s primary concern was to ensure that ‘procurements meant for small businesses should be awarded to small businesses.’ 71 Fed. Reg. 66,434, 66,438 (Nov. 15, 2006). In light of this objective, the drafters likely would not have intended that a task order set aside for small businesses should be awarded to a firm that is

currently large, merely because the recertification request may have been drafted with less than perfect clarity.[11]

To add to the confusion, an area office recently took the position that by simply responding to a set-aside order, a company effectively recertifies itself as eligible for that particular size standard. In *Size Appeal Navarro Research and Engineering*, a company that was small under its GSA schedule, but had grown to be other than small when it submitted its bid for a set-aside task order, responded to the set-aside solicitation that did not contain language requiring recertification.[12]

The area office, citing the definition of a certification under 15 U.S.C. § 632(w)(2), held that by submitting an offer on a set-aside order, the company certified itself as a small business because “the mere submission of a proposal on a small business set-aside ‘shall be deemed an affirmative, willful, and intentional certification of small business size status.’”[13] The company appealed, arguing that recertification must be explicitly requested by the contracting officer under 121.404(g)(3). By the time the case reached OHA, the awarding agency had rescinded the task order and awarded it to another offeror, compelling OHA to dismiss the case as moot before it could address the tension between the Area Office’s interpretation of § 632 and 121.404(g)(3).

The reasoning in *Metters* and *Navarro* is inconsistent with both SBA regulations and past OHA decisions that have recognized that simply designating an order as a set-aside does not preclude small business GSA schedule holders that have become other than small from bidding on the procurement.[14] Moreover, in the final rule, the SBA reiterated that its policy is to recognize businesses that certify as small for their GSA schedule contract as small for the life of that contract as long as recertification is not required, thereby implicitly recognizing that many businesses grow to be other than small over the course of the contract.[15]

The SBA also explicitly rejected comments calling for mandatory recertification for every order under a GSA schedule contract.[16] This conflicting precedent and guidance indicates that without clear recertification language, OHA has free range to interpret a request for quotation and determine which of the SBA’s policies it wants to uphold for a specific procurement. If OHA decides to rest on the SBA’s goals of awarding small business contracts to concerns that truly are small, it may find that recertification was requested by the contracting officer. If OHA seeks to facilitate contract administration and relieve administrative burden, it may find that recertification was not requested.

These cases also illustrate how little guidance contractors have when determining whether recertification is required in a solicitation. Not only is it necessary for a contractor to know whether it is eligible for award prior to preparing a costly and time-intensive proposal, it is important at the protest stage. Size protests are only timely if brought immediately after size certification for the underlying contract, or immediately after a size certification for a task order if a size certification was requested. Accordingly, concerns may waste serious time and resources protesting an award to a small business GSA schedule holder that has become other than small if the area office determines that recertification was never requested.[17]

Recommendation for Path Forward

As it stands, too much is left to interpretation to accomplish the SBA's goal of ensuring that "procurements meant for small businesses should be awarded to small businesses." With the likely increase of small business set-aside orders under GSA schedules, the SBA and the FAR Council would be wise to consider adopting standard recertification language that could be incorporated in task order solicitations, so that no uncertainty exists as to when recertification is required. Standardized language would take the "guessing game" out of what "explicitly requires" means and provide small (and large) businesses greater transparency and predictability into which procurements they qualify for.

For instance, language could be added to FAR 8.405-5 and 52.219-13 that provides mandatory recertification language, if a contracting officer determines that a small business should recertify in response to a solicitation to an order. The language could refer to the offeror's current registration in the System for Award Management or require the offeror to make an affirmative representation as to its size status for the NAICS code assigned to the order as part of its task order response.

Standard language could also help ease the tension with 15 U.S.C. § 632 to make it clear when a contractor is required to re-represent its size status in connection with a small business set aside order. Without some sort of standard language, the area offices and OHA, not the contracting officers, will be left with too much discretion to determine whether the agency intended recertification, which is clearly not what the SBA intended.

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[1] Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, SBA Final Rule, 78 Fed. Reg. 61,114 (Oct. 2, 2013) (to be codified at 13 C.F.R. pts. 121, 124-27).

[2] Set-Asides for Small Business, Interim Rule, 76 Fed. Reg. 68,032, (Nov. 2, 2011).

[3] FAR 19.502-2. For GSA Schedule set-aside orders, the SBA final rule states that the "rule of two" must be met, and that a "rule of three" applies to some extent. 78 Fed. Reg. at 61,114, 61,125. Generally, the "rule of two" applies to all acquisitions over \$150,000, and states that a small business set-aside is only allowed when there is a reasonable expectation that two or more small businesses will submit offers and that the award will be made at fair market prices. 19.502-2. Generally, the "rule of three" applies to all proposed GSA MAC orders exceeding the simplified acquisition threshold, and requires that the RFQ be provided "to as many schedule contractors as practicable...to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirements." FAR 8.405-1, -2, -3. If fewer than three quotes are received from GSA Schedule contractors that can fulfill the requirements, the contracting officer must prepare a written determination explaining that despite reasonable efforts, it could not identify additional contractors capable of fulfilling the requirements. *Id.* The final rule states that

the two rules can be reconciled. It provides that the agency must first determine if a set-aside is appropriate based on whether the rule of two is met, and if so, then the agency must request quotes from over three GSA Schedule contract holders. Unlike the rule of three usually requires, however, “[a]gencies would not be required to document the circumstances for restricting consideration to less than three small business schedule contractors based on one of the reasons in FAR 8.405.” 78 Fed. Reg. 61,114, 61,125.

[4] FAR 8.405-5.

[5] 13 CFR 121.404(g) (“A concern that qualified as a small business at the time it receives a contract is considered a small business throughout the life of that contract.”); FAR 8.405-5(b) (“ordering activities should rely on the small business representations made by schedule contractors at the contract level”); 78 Fed. Reg. 61,114, 61,118 (“[SBA] believes that requiring a business to certify its size at the time of offer for a multiple award contract, and not for each order issued against the contract, strikes the right balance and is consistent with SBA’s current policy.”)

[6] 13 CFR 121.404(g)(3).

[7] 78 Fed. Reg. 61,114, 61,119. “Although some [commentators] did not agree that contracting officers should have the discretion to request recertification at the order level, SBA notes that this is currently permitted in the regulations and has been upheld by SBA’s Office of Hearings and Appeals (see Size Appeal of Quantum Professional Services, Inc., SBA No. SIZ-5207 (2011)...([A]pplicable regulations permit a size protest to be filed either upon award of an ID/IQ base contract, or upon award of an individual task order if the procuring agency requires recertification of size status for that order.”).

[8] Size Appeal of Metters Industries Inc., SBA No. SIZ-5456 (March 26, 2013).

[9] Id. at \*2.

[10] Id. at \*9. OHA referenced the definition of a “certification” under 15 U.S.C. § 632(w)(3) which indicates that a certification can consist of a representation that “that a business concern qualifies as a small business concern of the exact size and status claimed by the business concern for purposes of bidding on a Federal contract or subcontract.” Id.

[11] Id. at \*10.

[12] Navarro Research and Engineering, SBA No. SIZ-5473 at \*1 (May 29, 2013).

[13] Id. 15 U.S.C. § 632(w)(2) provides:

The following actions shall be deemed affirmative, willful, and intentional certifications of small business size and status:

(A) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(B) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(C) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research agreement, as a small business concern.

[14] See *Safety and Ecology Corporation*, SBA No. SIZ-5177 (2010) (holding that the inclusion of a set-aside clause does not constitute a request for recertification, and noting that SBA must balance its interest in ensuring that small businesses perform small business contracts with the interest of agencies in minimizing the administrative burden and the interest of small business GSA Schedule contractors in having “sufficient time to recoup proposal costs and conduct long-range strategic planning – in other words, ensuring that small businesses are permitted to grow.”).

[15] 78 Fed. Reg. 61,114, 61,119.

[16] *Id.* (“[R]equiring a business to certify its size at the time of offer for a multiple award contract, and not for each order issued against the contract, strikes the right balance and is consistent with SBA’s current policy.”)

[17] *Quantum Professional Services Inc.* SBA No. SIZ-5225 (2011) (holding that where the contracting officer did not request recertification for a task order under an IDIQ contract, an awardee’s size may only be protested upon award of the base contract, not the task order); *Tyler Construction Group*, SBA No. SIZ-5323 (2012) (“size protests may only be filed against task order issued under long term contracts if the contracting officers request size recertification for that task order.”).