Government Contracts Update

October 2024

Key Changes in SBA's Proposed Rule: 8(a) Business Development Program

Key Notes:

- SBA's Proposed Rule relaxes 8(a) program application requirements.
- SBA proposes increase in allowable ownership interest in 8(a) program participants.

The U.S. Small Business Administration (SBA) recently published a proposed rule, "HUBZone Program Updates and Clarifications, and Clarifications to Other Small Business Programs" (Proposed Rule), which proposes several changes to the regulations governing SBA's set-aside federal contracting programs. In this third installment in our series of client alerts examining the Proposed Rule, we discuss a few important changes SBA is proposing for its 8(a) Business Development program. Below we highlight revisions to the current regulations that will affect 8(a) program applicants and participants.

Application Requirements – Operating Revenue

Before admittance to the 8(a) program, SBA requires applicants to demonstrate that their business has reasonable prospects for success in competing in the private sector. 13 C.F.R. 124.107. To conduct this analysis, SBA requires applicants to provide income tax returns from the prior two years showing operating revenues in the primary industry in which the applicant is seeking a certification. 13 C.F.R. 124.107(a). This requirement has affected program eligibility where the applicant's tax return does not accurately reflect industry revenue because the tax return business activity codes do not align with the North American Industry Classification System, which SBA uses. To eliminate this issue, SBA proposes to relax this requirement by only requesting that the applicant's tax return demonstrates that the business has operating revenues generally.

Ownership and Control

Set forth below are changes that SBA proposes for the regulations governing the 8(a) program's ownership and control requirements.

Ownership Restrictions

Currently, a non-participant business concern in the same or a similar line of business as an 8(a) program participant may not own more than a 10% interest in the participant concern while it is in its developmental stage (years 1–4 in the program) or no more than a 20% interest while the participant concern is in its transitional stage (years 5–8 in the program). 13 C.F.R. 124.105(h). SBA proposes to increase the allowable ownership interest to 20% and 30%, respectively, consistent with the 8(a) program eligibility requirements at 13 C.F.R. 124.108(a)(4).

Change in Ownership

SBA permits 8(a) program participants to change ownership so long as one or more disadvantaged individuals still own and control the business after the transaction and SBA approves of the change in writing before it occurs. 13 C.F.R. 124.105(i). There are three exceptions to the prior approval requirement outlined at 13 C.F.R. 124.105(i)(2) that only require notice of the change of ownership:

- All non-disadvantaged owners involved in the transaction own no more than a 20% interest in the participant concern both before and after the transaction.

- The transfer results from a disadvantaged principal's death or incapacity due to a serious long-term illness or injury.
- The disadvantaged individual or entity in control of the participant concern will increase its percentage of ownership interest.

SBA proposes to amend these exceptions by increasing the ownership interest limitation for a non-disadvantaged owner from 20% to 30%. It also proposes adding a fourth exception that would not require prior approval for a change in ownership if the program participant has never received an 8(a) contract. There will still be a requirement to provide SBA with notice of any changes within 60 days of the transaction.

Program Compliance – Non-8(a) Business Activity Target

To ensure that 8(a) program participants do not heavily rely on program contracts, SBA requires them to meet a non-8(a) business activity target. 13 C.F.R. 124.509. To achieve this target, participant concerns must generate a certain percentage of non-8(a) program revenue in a given program year. 13 C.F.R. 124.509(b)(1). A participant concern may face restrictions for not meeting the non-8(a) business activity target (13 C.F.R. 124.509(d)(4)); however, if the concern can show good faith efforts to meet the target, it may not be subject to the restrictions.

In assessing good faith efforts, SBA looks to unsuccessful offers the concern submitted that would have helped it achieve its business activity target had it received the contract award. 13 C.F.R. 124.509(d)(1)(i)(A). SBA seeks to clarify in the Proposed Rule that it will only consider unsuccessful contract offers for which the participant concern had a reasonable prospect of success. Therefore, SBA will not consider an unsuccessful offer a good faith effort to meet the business activity target if the concern submits an offer for a contract it was unlikely to receive based on the types of contracts it previously performed.

FOR MORE INFORMATION

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