



SBA Update: Final Rule Significantly Changes Effect of Size/Status Recertifications, Alters M&A Landscape for Government Contractors

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As PilieroMazza outlined on December 17, 2024, the Small Business Administration (SBA) recently issued its highly-anticipated final rule (Rule) in response to its August 2024 proposed rule and the hundreds of public comments. The Rule significantly alters the size and socioeconomic status recertification obligations for government contractors and the effect of those recertifications. ***The Rule impacts eligibility for set-aside contracts, alters the landscape for mergers and acquisitions (M&A) in the government contracts industry, and could have other downstream consequences.***

Earlier this year, we outlined the key takeaways of SBA's proposed rule and raised concerns that it could diminish the acquisition value of small business contractors, make it more difficult for small businesses to successfully go to market prior to exceeding their size standard, and cause more small businesses to unwittingly cross into the "valley of death" that is the mid-sized market. In the final Rule, SBA addressed some, but not all, of these concerns. The Rule consolidates the recertification rules across all small business programs into newly created 13 C.F.R. § 125.12, which requires that a concern recertify its size and small business program status (*i.e.*, 8(a), HUBZone, WOSB/EDWOSB, or SDVOSB):

- Within 30 calendar days of a merger, acquisition, or sale of or by a concern or an affiliate of the concern, which results in a change in controlling interest. **NOTE:** the acquired and acquiring concerns must recertify their status under all set-aside contracts. For joint ventures, recertification is required from any joint venture partner that has merged or is party to the sale or acquisition.
- No more than 120 days prior to the end of the fifth year of a contract exceeding five years and no more than 120 days prior to any option being exercised thereafter.
- When requested to do so by the contracting officer (CO) in response to a solicitation for a set-aside or reserved order or agreement.

Qualifying Recertification: A concern that recertifies as small or the applicable status is generally considered to retain that status for up to five years from the date of recertification and remains eligible for set-aside or reserved awards unless there is a subsequent disqualifying recertification.

Disqualifying Recertification: This occurs when a contractor recertifies as either other than small or other than the applicable status required under the contract. A concern that makes a disqualifying recertification in response to a CO request for recertification on an order or agreement is ineligible for the order or agreement but remains eligible for other set-aside or reserved awards. As for disqualifying recertifications triggered by other events in the Rule, the effect is as follows:

- **Effect on Eligibility for Pending Set-Aside Proposals.** A concern that makes a disqualifying recertification following a merger, acquisition, or sale of or by a concern (or an affiliate of the concern) resulting in a change in controlling interest—which occurs within 180 days after the date of an offer but prior to award—is ineligible to receive the pending small business set-aside or reserved award. If such an event occurs 180 days after the date of an offer but prior to the award, the concern is eligible to receive a pending single award or reserve. However, where the underlying award is a set-aside or reserve multiple award contract (MAC), the concern is ineligible for the pending award. This is commonly referred to as the "180-Day Rule."
- **Effect on Eligibility for Future Set-Aside Task Orders.**
 - a. **Single Award Contracts.** A concern that makes a disqualifying recertification remains eligible for set-aside orders, but an agency cannot count the orders towards its size/status goals.

Privacy - Terms

b. Set-Aside MACs.

- i. **Long-Term Contract Recertification.** A concern that makes a disqualifying recertification in response to the recertification requirements on a long-term MAC (i.e., prior to the expiration of the 5th year and each option thereafter) is ineligible for set-aside or reserved orders under the MAC.
- ii. **Small Business to Large Business M&A Recertification.** A concern that makes a disqualifying recertification following a merger, acquisition, or sale that occurs *after January 16, 2026*, involving a business that does not qualify as small under the MAC, is ineligible to bid set-aside or reserved orders under the MAC. **Delayed Effective Date:** for such deals that occur *prior to January 17, 2026*, the concern remains eligible to bid set-aside and reserve orders after the deal, but the agency cannot count the orders towards its size/status goals.
- iii. **Small Business to Small Business M&A Recertification.** A concern that makes a disqualifying recertification following a merger, acquisition, or sale involving another small concern is eligible for set-aside and reserved orders issued under the MAC, but the agency cannot count the work towards its size/status goals.

c. **GSA/FSS Schedule Contracts.** A concern that makes a disqualifying recertification is ineligible to bid set-aside or reserved orders under the MAC. The delayed effective date of the rule discussed above does not apply to GSA Schedule contracts.

▪ Effect on Eligibility for Options.

a. **Single Award Contracts.** A concern that makes a disqualifying recertification remains eligible to receive options, but the agency cannot count the option towards its size/status goals.

b. Set Aside MACs.

- i. **Long-Term Contract Recertification.** A concern that makes a disqualifying recertification in response to the recertification requirements on a long-term set-aside MAC (i.e., prior to the expiration of the 5th year and each option thereafter) is ineligible to receive options.
- ii. **Small Business to Large Business M&A Recertification.** A concern that makes a disqualifying recertification following a merger, acquisition, or sale involving a business that does not qualify as small under the MAC is ineligible for any options exercised under the MAC *after January 16, 2026*. **Delayed Effective Date:** for such deals, the concern remains eligible for options exercised *prior to January 17, 2026*, but the agency cannot count the work towards its size/status goals.
- iii. **Small Business to Small Business M&A Recertification.** A concern that makes a disqualifying recertification following a merger, acquisition, or sale involving another small concern remains eligible to receive options, but the agency cannot count the work towards its size/status goals.

c. **GSA/FSS Schedule Contracts.** A concern that makes a disqualifying recertification is ineligible to receive options as a small business. The delayed effective date of the rule discussed above does not apply to GSA Schedule contracts.

- **Effect of Joint Ventures.** When a joint venture must recertify, it can recertify as small (1) where all parties to the joint venture qualify as small at the time of recertification or (2) the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification.

Takeaways

Below are some key takeaways to consider.

- **No More GSA/FSS Exceptions:** Historically, SBA regulations included an exception for GSA Schedule/FSS contracts, which provided that size and status for orders and agreements issued thereunder were generally determined as of the date of the offer for the master contract regardless of recertification. The Rule eliminates this exception, meaning a disqualifying recertification has the same effect on a GSA Schedule/FSS contract as it has on any other MAC.
- **Impact on GovCon M&A Market:** The Rule will significantly alter the M&A market for small business government contractors. As it stands, a contractor remains eligible for options under MACs despite making a disqualifying certification. Moreover, under the current rules, there are situations where a contractor remains eligible for future orders set aside under its pre-existing MACs despite making a disqualifying recertification. These rules make it possible for large companies to acquire small businesses and perform their small business contracts for a period of time into the future. In turn, this increases the market value of small businesses and creates opportunities for divestiture. However, after the Rule goes into full effect in January 2026, a large business that acquires a small business will no longer be eligible for future options or orders issued under the acquired concern's set-aside MACs. This could result in the acquisition value of small business contractors diminishing greatly, as the runway for set-aside contract performance will be greatly reduced by the changes made to the recertification rules. This could make it more difficult for small businesses to successfully go to market prior to exceeding their size standard and could cause more small businesses to unwittingly cross into the mid-sized market, where it is exceedingly difficult to compete and succeed. In the short term, however, the delayed effect of the Rule discussed above, could create significant M&A activity prior to 2026 as firms rush to complete acquisitions prior to January 17, 2026.
- **Encouraging Small-to-Small Business M&A:** Because the Rule includes an exception whereby a small business that acquires another small business can continue pursuing orders and options under the acquired concerns set-aside MACs, it also encourages small-to-small business acquisitions, which benefits small businesses and not the large business community.
- **Potential Increase in Off-Ramping Provisions:** Because the Rule makes a contractor ineligible for new orders under set-aside MACs after a disqualifying recertification, procuring agencies may be more inclined to insert off-ramping provisions in the next generation of large MACs. Off-ramping provisions require a contract to be terminated for convenience if, for example, the contractor is acquired or makes a disqualifying recertification.
- **Protests and Size Determinations to Enforce the Rule:** The Rule allows a MAC holder to (1) file a size protest challenging a fellow MAC holder's size recertification (made under the new § 125.12) in connection with a merger, acquisition, or sale prior to the expiration of the 5th year of the MAC (or the issuance of options thereafter) and (2) request a formal size determination concerning a recertifying MAC holder's size status. **NOTE:** the rule also permits such a protest by the CO or SBA. While it is

unclear what time limits apply to such a protest, if any, there appear to be no time limits associated with the newly created size determination request.

- **Policing Affiliates:** Under the Rule, recertification will be required if a triggering event occurs to the small business concern or one of its affiliates. Thus, not only will small businesses need to track their own mergers, sales, and acquisitions, but they must do the same for all of their affiliates.
- **No Novation Recertification Requirement:** Historically, SBA's regulations required recertification within 30 days of an approved contract novation. This requirement has been inexplicably removed from the regulations, though it still remains in the FAR.

At PilieroMazza, attorneys in our Government Contracts and Mergers & Acquisitions practice groups are ready to help small businesses understand and leverage this rule to maximize opportunities. Please contact Sam Finnerty at sfinnerty@pilieromazza.com if you have questions about this alert.

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