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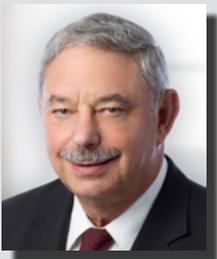
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Control is a Key Element in Determining Affiliation for SBA Small Business Size Determination

The most common reason for contractors failing to meet the Small Business size standards set by the Small Business Administration (SBA) is because they are found to be affiliated with other companies, such that one company can effectively assert control over the other entity. When that element of control does not exist, SBA will not find affiliation for purposes of a size determination, even though the companies may interact with each other on a regular basis over time. Stated another way, just because companies have relationships with each other does not always mean that they are affiliated for purposes of an SBA size determination.

In *Size Appeal of INV Technologies, Inc.*, SBA No. SIZ05816, March 22, 2017, INV Technologies Inc. (INV) appealed the Small Business Administration Area Office's determination that it was not a small business under the size standard for the subject procurement. The relevant procurement involving award of an Air Force solicitation for training services and support, was identified as a small business set-aside under NAICS code 611430. The Air Force awarded the contract for Professional and Management Development Training to INV Technologies. A size protest was filed by an unsuccessful offeror who alleged that INV was affiliated with other companies which when considered together, exceeded the size standard for the procurement. The SBA Area Office found that INV was not small because it was affiliated with a company named SNAP. The Area Office determined that there was affiliation because the two companies subcontracted with each other, and the owner and president of INV also worked for SNAP where he provided human resources, accounting and operational support. The SBA Area Office also relied on the fact that for a period of years, INV and SNAP had offices in the same building. It concluded that INV and SNAP were affiliated and that the combined receipts of the two companies would exceed the SBA size limitation. Accordingly, the Area Office determined that INV was not a small business for the procurement. INV appealed the Area Office's decision to the Office of Hearing Appeals (OHA).

OHA disagreed with the Area Office and concluded that a connection of the kind found in this instance between two entities does not necessarily cause affiliation. For instance, it found that the area office failed to demonstrate that either INV or SNAP possessed the power to control the other. OHA noted that INV and SNAP were each owned and controlled by different individuals, and there was no proof presented that the two owners shared an identity of interest. OHA also found no affiliation because subcontracting between the two companies did not reach the 70 percent threshold. Also, the fact that the two companies at one time had offices in the same

building was not significant to the present question of affiliation because evidence showed that ended two years prior to the present procurement. Lastly, the fact that the owner of INV was also a PMO manager of SNAP was not significant to establishing affiliation because no evidence was presented that INV's owner had influence or control over the SNAP business. In summary, even though there were a number of ties and connecting between the two companies and the owners of each, those facts, without also showing the ability of one company to control the other was not, according to OHA, sufficient evidence of the existence of affiliation. OHA granted the appeal and overturned the finding of the regional office that INV was not small.

Contractors: Be on the Lookout to Challenge Unreasonable Agency Procurements

Since government agencies are given substantial discretion in creating solicitations and evaluating proposals, contractors are frequently at a disadvantage in identifying and challenging improprieties. But that discretion is not unfettered, and contractors who commit the time and effort to presenting their proposals should be on the lookout for and prepared to challenge irregularities in the government's procurement award process.

A recent example of the benefits of this approach is seen in the Government Accountability Office's (GAO) decision in *Pitney Bowes, Inc.*, B-413876.2 (February 13, 2017). The solicitation, issued by the Department of the Treasury, Internal Revenue Service (IRS), was for the procurement of mail inserter/folder machines. These were essentially high-speed, high-capacity machines for document folding, processing and mailing of correspondence by the IRS.

One offeror, Pitney Bowes, protested before award, asserting that the government's specifications were unduly restrictive of competition and essentially amounted to a sole source procurement. Specifically, the Statement of Work called out a number of specific requirements for the folder/insertion machines which resulted in unreasonably limiting offerors' proposals. These restrictions included such things as a "high capacity sheet feeder

with a capacity of up to 1,000 per feeder with the capability of loading on the fly," a "feeder swap capability for up to 10 sheet feeders per machine," and an "envelope feeder to handle all types of envelopes from letters to flats." The protestor argued that these requirements are unduly restrictive of competition and amount to a de facto sole source requirement, because its (Pitney Bowes) equipment, although configured differently, could produce the same end result. For instance, Pitney Bowes provided evidence that a single feeder for all types of envelopes was not necessary and that with its equipment, feeders for the desired envelopes could be swapped out in less than 30 seconds.

In holding for the protestor, GAO noted that, even though the procuring agency is primarily responsible for determining its needs and the best method of accommodating them, when specifications are challenged as unduly restrictive, it is incumbent on the government agency to demonstrate that the restrictions and limitations it imposes on the specification are reasonably necessary to meet its needs. For each piece of equipment, the protestor was able to establish that its company's equipment, although configured differently, was capable of providing the end result required by the government. In contrast, the government was not able to demonstrate the reason why the limitations it placed on the equipment were essential, other than that they resulted effectively in the procurement of a sole source product.

As noted above, agencies are granted great discretion in determining their procurement needs, but they should be careful to document the reason for the selections they identify in a solicitation. GAO stated: "In sum, we recognize that the IRS is entitled to great discretion in establishing its needs. Here, however, we find that the agency has failed to provide reasonable justifications for the challenged specifications, such that we are unable to conclude that the challenged specifications are reasonably necessary for the agency to meet its needs." Offerors should be prepared to challenge any solicitation requirements which are unduly restrictive and for which no reasonable justification appears to exist.



For More Information

For questions regarding this alert or to learn more about how it may impact your business, please contact one of the authors, a member of our **Government Contracts** practice, or your Polsinelli attorney.

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