

The Financial Bailout Isn't Just for Big Business

Although the situation is fluid and fast-moving, small companies have a chance to pick up some of that \$700 billion.

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The Treasury Department may be spending up to \$700 billion in the financial bailout, and small business would like a part. Treasury has broad discretion to use that money to implement the law, and at this time, the department plans to include contracting opportunities for small businesses.

But everything about the bailout is fluid and fast-moving, and policies and procedures are yet to be finalized. Small businesses seeking contracts must know the existing rules and track developing policies and opportunities.

Contracts set aside for small businesses by Treasury under the bailout law need not follow the Federal Acquisition Regulation or the Small Business Administration definition of "small business." Nevertheless, the department apparently intends to apply the same definition. And its set-aside process is expected to look to the FAR.

The FAR, in turn, requires government agencies to set aside certain procurements for small businesses. Businesses interested in seeking these procurements thus must determine whether they meet the definition of a "small business."

A 'SMALL BUSINESS'?

The Small Business Act defines a "small business concern" as one that is "independently owned and operated and which is not dominant in its field of operation."

The Small Business Administration assigns "size standards" to industries to determine whether a business qualifies as a small business. Most standards are stated in number of employees or average annual receipts. Some financial industry standards are stated in "assets under custody."

This definition raises three preliminary questions for a business: (1) Does the business meet the North American Industrial Classification System code sought by the particular procurement? (2) Does the business meet the Small Business Administration size standard for that industry? (3) Is the business independently owned and operated?

The NAICS is a federal statistical standard for classifying businesses. Agencies conducting procurements use NAICS codes to identify the primary activity that is the subject of the procurement.

To help businesses find the right NAICS codes, the Small Business Administration provides guidance, with the activities for each code written in plain English. For procurement purposes, a business may qualify under multiple NAICS codes. It does not have to pigeonhole itself into any one industry.

Determining whether a business meets the size standard for the industry is relatively simple (though remember that "affiliates" can sometimes count toward size and thus can complicate matters). If the standard is stated as number of employees, that number is basically the average number of compensated employees of any kind over the last year. If the standard is average annual receipts, that number can generally be calculated from the business' tax forms covering the last three years, with simple deviations for businesses that have not been operating that long. If the standard is assets under custody, that number is calculated by averaging the assets reported on the business' quarterly financial statements for the last year. Businesses also can ask the SBA size-standard questions.

The SBA also helps businesses determine if they are "independently owned and operated" and otherwise meet the definition to be eligible for particular set-aside contracts.

This typically is straightforward, because businesses competing for a set-aside contract can self-certify that they meet this definition. The agency's contracting officer must accept that certification, unless he or she has reason to question it or another interested party challenges it. (There are criminal penalties, however, for knowingly misrepresenting a business' eligibility.)

CONTRACTING OPPORTUNITIES

The bailout presents a number of contracting opportunities for small business:

- *Contracts to serve as a financial agent of the Treasury Department*

The law gives Treasury authority for contracts under which private companies will provide financial services for Treasury. The department plans to enter into such financial-agent contracts, and it has created its own rules to govern competitions for those contracts.

Treasury recently stated that it has included small businesses in the selection process for these contracts.

Further, the department's rules require it to identify small financial institutions that do not meet minimum qualifications to manage the department's asset portfolio and seek to designate them as sub-managers for asset-management services. Treasury recently re-emphasized that small businesses that do not meet minimum requirements stated in solicitations for these services can participate as subcontractors.

- *Contracts to provide goods and services to the Treasury Department*

The bailout law gives Treasury the authority to restore liquidity and stability to the financial system. Treasury indicated that some of these contracts to perform these actions may be set aside for small businesses.

Even when contracts are not set aside, small businesses can compete for them. Also, if any contract's requirements are too large for a small business, it can participate as a subcontractor to a larger business.

What the government will buy to implement the bailout is unknown, but its current contracting needs suggest the breadth of opportunities that could develop. Treasury currently has contracts with private companies for everything from janitorial services to landscaping services to furniture to castor oil. It is seeking new contracts for items from security guards to IT support and from software to a boat.

COMING CHANGE

The coming change in the White House could also change Treasury's bailout program. President-elect Barack Obama likely will appoint a new Treasury secretary, who will inherit the bailout program and its hundreds of billions of dollars.

The bailout law does not require small-business participation in the procurements not otherwise governed by the FAR, and it could be interpreted to allow Treasury to waive FAR small-business requirements for FAR-covered contracts. Thus far, Treasury officials have included small-business contracting opportunities in their plans to implement the program, though their successors may not.

Overall, the situation remains very fluid. The bailout law effectively authorizes Treasury to start acting while the department is developing the governing rules. Not all of these rules have or will occur through the typical notice-and-comment rule-making procedures.

Small businesses and their lawyers must understand that bailout contracts are a fast-evolving area of law. They should closely follow the Treasury Department's actions and rule-making at its financial bailout Web site, www.treasury.gov/initiatives/eesa.

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