SBTDC MARKETPLACE

FEDERAL CERTIFICATION & AFFILIATION

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EXPECT EXCELLENCE®
About Smith Anderson

• Founded in 1912, Smith Anderson is the largest business and litigation law firm headquartered in the world-renowned Research Triangle region and one of the largest in North Carolina
• 135+ lawyers located in a single office in downtown Raleigh
• We serve a diverse group of regional, national and international companies ranging in size from large public companies to emerging growth businesses
• Our experience crosses national and international markets, positioning us to handle matters for our clients wherever their business has operations or transactions
National Expertise at Local Market Value

Core areas of practice:

- Corporate
- Finance
- Government
- Health Care
- Litigation

- Private Equity
- Real Estate Development
- Tax
- Technology
- Workplace Law
Today’s Goals

• Make the SBA look good!
• Defining the terms “Small Business Concern” and “Affiliation.”
• “Affiliation” factors.
• Risks and Penalties for Non-Compliance.
What is a “Small Business Concern”? 

Generally, No “Master List” for “SBCs”

The cutoff for “small” versus “not small” varies by industry.

Size status is certified when the business responds to the government solicitation.

Two ways to determine size: “gross receipts” and employees;

• Which depends upon particular industry or NAICS code.
• “Gross receipts” averaged over three years for business and its affiliates.
• “Employees” based upon full-time, part-time or other bases (includes “leased” employees) and its affiliates.
<table>
<thead>
<tr>
<th>NAICS Code</th>
<th>Description</th>
<th>Size Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>113310</td>
<td>LOGGING</td>
<td>500 EMPLOYEES</td>
</tr>
<tr>
<td>236220</td>
<td>COMMERCIAL AND INSTITUTIONAL BUILDING CONSTRUCTION</td>
<td>$36.5 million</td>
</tr>
<tr>
<td>237990</td>
<td>OTHER HEAVY AND CIVIL ENGINEERING CONSTRUCTION</td>
<td>$36.5 million</td>
</tr>
<tr>
<td>238160</td>
<td>ROOFING CONTRACTORS</td>
<td>$15.0 million</td>
</tr>
<tr>
<td>238910</td>
<td>SITE PREPARATION CONTRACTORS</td>
<td>$15.0 million</td>
</tr>
<tr>
<td>321991</td>
<td>MANUFACTURED HOME (MOBILE HOME) MANUFACTURING</td>
<td>1250 EMPLOYEES</td>
</tr>
<tr>
<td>483211</td>
<td>INLAND WATER FREIGHT TRANSPORTATION</td>
<td>750 EMPLOYEES</td>
</tr>
<tr>
<td>531120</td>
<td>LESSORS OF NONRESIDENTIAL BUILDINGS (EXCEPT MINIWAREHOUSES)</td>
<td>$27.5 million</td>
</tr>
<tr>
<td>561612</td>
<td>SECURITY GUARDS AND PATROL SERVICES</td>
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<tr>
<td>562119</td>
<td>OTHER WASTE COLLECTION</td>
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<tr>
<td>562910</td>
<td>REMEDIATION SERVICES</td>
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<tr>
<td>624230</td>
<td>EMERGENCY AND OTHER RELIEF SERVICES</td>
<td>$32.5 million</td>
</tr>
</tbody>
</table>
Quiz

• Business self-certifies as small on emergency relief contract (NAICS 624230; $32.5 MM).
• Three-year average revenues are $30.0 MM.
• Is the business small?
What is “Affiliation”?

An SBA determination that two or more companies/entities are sufficiently intertwined through “ownership”, “control”, or other factors that the revenues and employees of the companies/entities should be combined for purposes of determining SBC’s eligibility for a small business set-aside. 13 CFR 121.103
Affiliation: Not Just Naked Ownership

- SBA uses “totality of circumstances” test. 13 CFR 121.103 to determine affiliation.
  - Few bright lines.
  - Common ownership or “control.”
  - Common management.
  - Undue influence by one company or person over SBC.
  - Economic co-dependency/high revenue percentages.
  - Other factors.
  - Newly organized entities will be scrutinized.

- “Power to Control” is test, not “actual exercise of control.”

- Negative Control can cause affiliation
Identity of Business or Economic Interest
Size appeal of Tesecon, Inc. SBA No. SIZ-5985 (Feb 2019)

• 3 Brothers have various joint business interests
• Business failed to rebut the presumptions
• Office of Hearing and Appeals upheld adverse SBA determination
Common Management
CopaSat, LLC  SBA No. SIZ-5918 (May 31, 2018)

- 1 or more officers, directors managing members, or partners who control the Board of Directors and/or management of one concern also control the board of director or management of another concern
- Only requires “critical influence or ability to exercise substantive control”
- CEO and COO presumed to have substantive control
- Rebuttable
Contractual Relationships/Economic Dependency

• When “one or both of the concerns depends upon the other for a high percentage of its revenues.”
• Affiliation may also arise from repeat teaming or continuing contractual relationships.
• Company A provides significant loans to Company B and guarantees other loans to Company B. Company B’s over reliance of dependence on Company A’s financial support (both direct and indirect) results in their affiliation.
Negative Control
Team Waste Gulf Coast, LLC SBA No. SIZ-5864 (Nov 6, 2017)

• Operating Agreement terms:
  ○ Power to block extraordinary actions in order to protect minority investor interest (Not Negative Control)
  ○ Power to block ordinary actions essential to operating a company (Negative Control)
What is an Ostensible Subcontractor?

• Affiliation between SBC prime and large subcontractor.
• Subcontractor is really the prime contractor because it performs “primary and vital requirements of the contract,” or “the prime is unusually reliant on the subcontractor.”
  ○ DMS Management Services, LLC, SIZ-5546 (2014)
• Not a percentage workshare determination, but a consideration of all aspects of the relationship.
  ○ Foregoing factors of affiliation plus,
  ○ Agreements between prime and sub,
  ○ Terms of teaming agreement (technical responsibilities)
The Size Protest Process
Size Protest Process

Deadline for Protest; 5 days from award.
Protest is sent to contracting officer.
KO sends protest to SBA Area Office; 15 days to respond.
Appeals to OHA; OHA decisions published.

Successful protest means:
• Bidder not eligible for protested award.
• Bidder cannot re-size itself to win award.
• Bidder loses ability to bid on procurements set-aside for the size procurement protested (or smaller) until bidder recertifies.
Size Protest Process

Bidder responding to protest must move quickly. Must complete and certify SBA Form 335, usually within one week. Burden is on the small business to persuade SBA that its certification is accurate.
RISK OF NONCOMPLIANCE

- Reputation and Brand Damage
- Suspension or Debarment.
- Whistleblowers - Qui Tam
- False Claims Act claims.
- Criminal penalties: $500,000 fine, 10 years imprisonment or both, for knowingly misrepresenting small biz size.
Questions

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