

## PITFALLS TO GROWTH OF SMALL BUSINESS GOVERNMENT CONTRACTORS

### THE VALUE OF MEETING THE “SMALL BUSINESS” SIZE STANDARD

In the federal government contracting arena, incentives for small businesses make “small business” size status highly favorable. For example, federal agencies must aim to place 23% of their contracting dollars with small businesses. Any business that is certified as “small” as of the date it makes its proposal to the government is eligible to enter those contracts.

Agencies frequently use set-aside contracts so that only small businesses are eligible for particular contracts. Small business contracts that come through the set-aside program do come with some restrictions, including restrictions on the use of subcontractors to carry out the work under the contract.

The policy goal is the success of small businesses; of course, success, presumably, means the business will eventually exceed the relevant small business size standard. The business may grow organically or it may grow by acquiring or being acquired by another business. In government contracting parlance, the business becomes a size “other than small.” Because small business contracts often represent the lion’s share of the value of a small business government contractor, the fate of those contracts is of significant concern to the owners of government contractors that expect to grow to be other than small.

### SIZE RECERTIFICATION DURING THE LIFE OF A CONTRACT

Under the Federal Acquisition Regulations and rules promulgated by the Small Business Administration, a contractor with a small business contract only has to recertify its size status under a limited number of circumstances. A business’ growth is inconsequential unless and until the recertification requirement is triggered. The following table details those circumstances:

Length of Base Term of “Small Business” Contract	When Size Recertification is Required	Example
Any Length	Within 30 days of an approved contract novation	Contractor has its assets acquired by or is the non-survivor in a merger with another business entity
	Within 30 days of the finalization of a merger or acquisition where novation is not required	Contractor acquires the assets of or is the survivor in a merger with another business entity
More than five years, including options	120 days prior to the end of the fifth year of the contract	MAS, MAC, or GWAC contract reaching the end of its fifth year
	120 days prior to the exercise of any option under a MAS, MAC or GWAC	MAS, MAC, or GWAC reaching an option period at the end of its tenth year

### CONSEQUENCES OF A CERTIFICATION AS “OTHER THAN SMALL”

Unfortunately for government contractors, the government holds all the cards if the recertification causes a determination that the business is other than small. If the government so desires, the contract will continue in force regardless of the contractor’s change in size. The substantive terms of a small business contract—including limits on subcontracting—will not change.

However, government contracting rules discourage federal agencies from continuing to elect options or place orders on small business contracts with businesses that become certified as other than small. First, if the contractor certifies as other than small, then the agency may not count toward its small business contracting goals any options or orders on that contract. Agencies have an incentive to stop ordering from the other than small contractor and place their orders with contractors that are still certified as small. Second, even on ongoing contracts the agency may choose to terminate the contract for the convenience of the government if the contractor certifies as other than small. In either event, the loss of revenue from those contracts may have a detrimental effect on the value of the business. Contractors should plan their growth accordingly.

**General Counsel, P.C. – Experienced Representation of Government Contractors:** Led by William T. Welch with J. Patrick McMahon and Douglas Callabresi, General Counsel’s Government Contracts Group has over fifty years of government contract law experience. For more information, visit [www.generalcounsellaw.com](http://www.generalcounsellaw.com) or call: (703) 556-0411.