



### Explanation of the SBA Recertification Regulations

The SBA Final Rule, effective June 30, 2007, requires contractors to recertify their small business status in 5 different circumstances:

1. Within 30 days after a contract novation;
2. Within 30 days after an acquisition or merger is complete;
3. Within 120 days prior to the end of the 5<sup>th</sup> year on a long term contract;
4. Before any option exercise after the 5<sup>th</sup> year on long-term contracts; and
5. On any competition for an order under, if requested by the contracting officer.

If the contractor fails to meet the size regulations upon recertification, the existence of a contract and its terms will be unaffected. However, the agency will no longer be able to get credit for options or awards to that contractor toward its small business goals and competitors will have expanded opportunities to contest awards.

The actual implementation and enforcement processes and future legal decisions and amendments cannot be predicted, but there are many serious ramifications apparent from the text and agency comments. The new regulations have increased the uncertainty surrounding small business valuations, future task orders and future contract option exercise depending on the circumstances of each contract.

1. The novation and post-M&A recertification will be made contract by contract on the NAICS code assigned each contract based on the size of the combined companies.
2. The regulations have placed long-term contracts over 5 years old with imminent options in jeopardy, because the contracting officer will gain the right to decline to exercise any future option if the contractor cannot meet the certification requirements.
3. Recertifications triggered by the new regulations may have a serious effect on revenues anticipated from future competed orders under GWACs, MASs and IDIQs. For example:
  - a. Contracting officers are given the discretion to require recertification on any competed task order under applicable contracts. If the contractor cannot meet the certification requirements, the

#### **Altus Associates**

2000 Corporate Ridge Suite 165

McLean, VA 22102

Telephone: 703-893-6403 Fax: 703-893-6406

[www.altus-associates.com](http://www.altus-associates.com)

contracting officer will not be able to award any set-aside orders to that contractor.

- b. Coupled with the Federal Acquisition Regulations, recertification triggered by the 5<sup>th</sup> year of a long-term contract may affect the award of any future competitive orders under all contract vehicles, except BPAs, for small business set-aside order awards, even though the contract remains in effect and the contracting officer has not requested recertification.
  - c. If the contractor is well along (say 4<sup>th</sup> year) in a long term contract and recertification will be required in the 5<sup>th</sup> year, anticipated revenues will be changed by the prospect of being at risk on option exercise and will lose all competitive set-aside orders after only one more year.
4. Subcontracts are not covered, but SBA and Congress are looking into eliminating the exclusion. Prime contractors typically have their own small business goals and great leeway in terminating subcontractors. Therefore, the risk of immediate business loss upon the inclusion of subcontracts under the recertification regulations will remain a substantial risk to future revenues and earnings for any small business with material subcontract revenues.
5. Disqualification risk on future orders and options will be affected by the context of the contract and the contractor. Examples of relevant facts are:
  - a. The agency's small business contracting status under its own small business goals;
  - b. Whether the contractor has a strong record of service;
  - c. Whether the contractor's services/ supplies are mission-critical; and
  - d. Whether the agency has viable alternative small business contractors with effective contract vehicles in place.
6. There is a risk that contract termination for the "convenience of the government" will be used by agencies to enforce the size requirements under existing contracts.