**Presumed Loss Rule Refresher**

**By Christine V. Williams, 12/29/2017**

The SBA’s Presumed Loss Rule has now been in play for about four and half years, and in a 2016 enforcement action someone went to jail over it.  (Link below to the Memorandum Opinion giving details).

As we head into the New Year, it bears remembering some of the regulations that are still in play within the SBA that carry serious consequences.  With that in mind, here is an overview of the Presumed Loss Rule as well as the “Safe Harbors” contained within that regulation.

On Friday, June 28, 2013, a rule implementing provisions of the Small Business Jobs Act of 2010 (“Jobs Act”) pertaining to small business size and status integrity took effect.  The rule amended the SBA’s regulations to implement statutory provisions establishing that there is a ***presumption***of loss equal to the value of the contract, or other instrument, when a concern ***willfully***seeks and receives an award by misrepresentation of its size/status.  Below is an overview of the regulation and a link to the criminal case where it was criminally enforced.

Some of the key provisions of the regulation are as follows:

* The submission of an offer or application for an award intended for small business concerns will be deemed a size or status certification or representation in certain circumstances;
* An authorized official must sign in connection with a size or status certification or representation for a contract or other instrument; and
* Concerns that fail to update their size or status in the Online Representations and Certifications Application (“ORCA”) database or successor database, such as the System for Award Management (“SAM”), at least annually shall no longer be identified in the database as small or some other socioeconomic status, until the representation is updated.

**Presumption of Loss:**

**The Basics**

* There is now a presumed loss that is the amount of the contract, or other award vehicle, when a concern willfully seeks and receives an award by misrepresentation of size and/or status. Notably, the regulation only mentions willful misrepresentation, but the commentary in the Federal Register cites reckless misrepresentation as well.
* Although the original language contained the words “irrefutable” presumption of loss, the SBA made the presumption rebuttable and limits liability in the case of unintentional error, technical malfunction, or other similar situations. (“Safe Harbor” applies to another who is recognized *i.e., PTAC*, who certifies your size)
* The question of whether a firm has willfully or recklessly misrepresented its size (*i.e.,*whether later found affiliates are included) is a factual determination best made by a judge, jury or other decider of fact.
* The firm may be able to rebut the presumption by demonstrating that it was not reckless or willful in its misrepresentations, but acted in good faith.

**The Presumption of Loss is Determined by the Forum**

* It is SBA’s intent that the presumption of loss shall be applied in all manner of criminal, civil, administrative, contractual, common law, or other actions, which the United States government may take to redress willful misrepresentation.
* Thus, the finder of fact, notice requirements, and means of defense must depend on the specific action taken against a business concern.

**The Types of Contracts and Awards to which This Applies**

* This presumption of loss rule applies to all solicitations issued under the Federal Acquisition Regulations (“FAR”) that contain clauses providing notice regarding set- asides, reserves, partial set-asides, price evaluation preferences, source selection factors, and other mechanisms which somehow classify a solicitation as intended for award to specific entities.
* It is SBA’s intent that the rule be broadly inclusive of those that are addressed by the FAR provisions listed above and those that are not specifically addressed by those FAR provisions.
* In short, this applies to every contract, subcontract, cooperative agreement, or cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to a small business concern or concerns.

**Deemed Certification**

* Registration on any Federal electronic database (*i.e.,*ORCA/SAM) for the purpose of being considered for award shall be deemed an affirmative, willful, and intentional certification as to the relevant concern’s small business size and status.
* This deemed certification is not something the SBA can waive; it is part of the Jobs Act.  15 USC sec. 632(w)(2)(C).
* Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement set aside for award or otherwise classified for small business shall be deemed a willful certification.
* Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern shall be deemed a willful certification.
* Allowing continued representations to proceed where they are no longer true shall be deemed willful certification.

**Limitation of Liability**

* Willful certification may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar actions that demonstrate that a misrepresentation of size was not affirmative, intentional, willful, or actionable under the False Claims Act.
* Relevant factors to consider in making a good faith determination may include: (1) the firm’s internal management procedures governing size representation or certification; (2) the clarity or ambiguity of the representation or certification; and (3) the efforts made to correct an incorrect or invalid representation or certification in a timely manner.
* A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors.

**Annual Recertification/Contracts Longer than Five Years**

* The rule does not impose new reporting requirements. A firm must still certify its size and status annually in order to be identified as small or other socioeconomic concern under SAM.
* For purposes of establishing continuing eligibility for previously-awarded long term contracts, recertification is required within 60 to 120 days prior to the end of the fifth year of the contract. This is distinct from the annual recertification under SAM.

**Penalties**

* Suspension or debarment;
* False Claims Act;
* Program Fraud Civil Remedies Act; and
* Criminal penalties.

As we head into the New Year, it is worth revisiting some of the regulations that have been in play for a few years because of the stiff penalties non-compliance can carry with them.  Here is the link for the Singh case, where Tarsem Singh went to jail over the violations of said Rule: [Singh case](https://outlooklaw.com/wp-content/uploads/2017/12/Singh-case.pdf)