LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracting

SUBCONTRACTING PLANS: HOW IMPLEMENTING BEST PRACTICES NOW CAN SAVE YOU HEADACHES DOWN THE ROAD

By Katie Flood

As a federal contractor, there are already many areas where you must track your compliance with the rules and regulations carefully. One area increasingly receiving greater scrutiny from the government is prime contractors' compliance with their small business subcontracting plan obligations.

Under the Small Business Act as amended in 1978, prime contractors must provide small businesses subcontracting opportunities for all contracts in excess of $150,000. And, for large businesses, formal subcontracting plans are required elements for most full and open contracts that are in excess of $650,000 (or $1,500,000 in the case of construction contracts for public facilities). When a subcontracting plan has been incorporated into a prime contract, the large business prime contractor is required to provide the "maximum practicable opportunity" for small businesses to participate in the contract performance as subcontractors. The formal subcontracting plan must contain separate goals for small business participation, as well as small disadvantaged businesses under the various socioeconomic programs administered by the SBA.

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When developing the subcontracting plan, a contractor must first identify which plan type best fits its situation. If the contractor only wants to develop a plan specific to a single contract, it should develop an Individual Subcontracting Plan, to cover the entire contract period including options. The goals incorporated into the Individual Subcontracting Plan should be based on the offeror's planned subcontracting in support of that specific contract.

If a contractor does a lot of business with the Federal government, it might enter into a Master Subcontracting Plan, which contains all of the required elements of an individual plan, except the specific goals for individual contracting opportunities. If the company receives new contracts requiring subcontracting plans, it will then develop goals specific for each plan.

When a contractor sells commercial products and services to the government, it is encouraged to enter into a Commercial Subcontracting Plan. A Commercial Subcontracting Plan includes goals that are tied to the company's fiscal year and relates to the company's production in general for both commercial and noncommercial products or services, rather than in relation to a particular government contract. It can also apply either to the entire company or a portion of the company, such as a division or product line.

Regardless of the type, the Subcontract plan must contain certain required elements. Next to the specific subcontracting goals expressed in dollars and as a percentage of total planned subcontracting dollars, the most important piece of the subcontracting plan is the contractor's description of how it plans to meet these goals. When developing the plan,

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it is critical that the company engages in a team effort that involves all affected divisions of the company, as the established goals must be both reasonable and realistic.

Once its plan has been submitted to the agency either as part of the contractor's offer or as a Commercial Subcontracting Plan and has included specific subcontracting goals accepted by the agency, the contractor must make good faith efforts to satisfy the requirements incorporated into the plan. Contractors are also required to report their plan results on the government's Electronic Subcontracting Reporting System (eSRS), on a bi-annual basis for Individual Subcontracting Plans and an annual basis for Commercial Subcontracting Plans. At this stage, contractors need to adopt best practices to ensure that they are meeting their subcontracting plan goals. Such best practices include:

- Ensuring that the company maintains organized and complete files, in order to accurately track the total amount of subcontracting dollars being spent by the company
- Receiving up-to-date representations, signed by the subcontractor, of the subcontractor's size and socioeconomic status, obtained at least on an annual basis or when the subcontractor has a change of status
- Maintaining an internal subcontractor database, to cross-reference by NAICS code and socioeconomic status those subcontractors eligible for specific opportunities
- Searching diligently for qualified small businesses to keep the internal database a robust and a meaningful resource
- Conducting training to help company employees identify subcontracting opportunities available for small businesses
- Attending trade fairs, industry meetings, and other events where the contractor can engage in outreach to the small business community and identify potential teaming partners

Such best practices serve not only altruistic ends: A contractor's failure to comply with its subcontracting plan and make a "good faith effort" to maximize small business participation can bring significant penalties.

Such best practices serve not only altruistic ends: A contractor's failure to comply with its subcontracting plan and make a "good faith effort" to maximize small business participation can bring significant penalties. Penalties may include liquidated damages, which subjects vendors to prescribed financial liabilities if the contracting officer determines that the vendor failed to make a good faith effort to meet its subcontracting goals. Liquidated damages may be assessed in an amount equal to the actual dollar amount by which the vendor failed to achieve each subcontracting goal. Penalties can also include the government's claim of breach of contract; qui tam actions; loss of good will with the agency; and potentially suspension and/or debarment proceedings.

SBA will periodically audit contractors that hold subcontracting plans through its "Subcontracting Assistance Program." SBA's audit program includes a variety of periodic performance reviews, in addition to follow-up reviews after the contractor has submitted its reports. During the auditing process, SBA will not only review the contractor's plan and identify whether or not the contractor has successfully met its targets, but it will also examine the company's trends in its small business utilization, validate the methodologies the company used in preparing its reported figures, and evaluate the company's internal dedication and commitment to the program. If the contractor falls short on any metric, SBA will recommend that the contractor implement corrective action measures, or face penalties.

Plainly, there are many reasons why large business prime contractors must be very familiar with the rules governing subcontracting plans, especially during this current environment that requires heightened compliance. For these reasons, it is critical that contractors set in place best practices from the onset of their subcontracting plan creation, in order to ensure that they are meeting their goals and making the "good faith efforts" the government wants to see.

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RECENT ASBCA DECISION OPENS DOOR TO NEW APPROACH FOR CONTRACTORS NEGOTIATING COLLECTIVE BARGAINING AGREEMENTS

By Nichole D. Atallah

Many government contractors that perform service work on federal contracts subject to the Service Contract Act (SCA) find themselves bargaining with a unionized workforce at one point or another. In most cases, the collective bargaining agreement (CBA) negotiated between the union and the employer replaces the area-wide wage determination that would otherwise apply to the SCA contract and would then govern the terms and conditions of the unionized SCA employees.

Negotiating a CBA is not a simple task, especially because contractors are often restrained by their contractual obligations to the government. Although FAR 52.222-43, the SCA Price Adjustment Clause, provides a method for a contractor to pass on its increased wage and benefit costs, if any, to the government customer as reflected in a valid CBA, contractors have a legal obligation to negotiate a CBA at arms-length, within a range of rates common in the locality and without any clauses that are contingent upon the SCA or incorporation into the government contract. When negotiating the financial components of the CBA, contractors often take into consideration factors that include the morale of non-bargaining unit personnel and client satisfaction. As a result, contractors are often looking to negotiate CBA provisions that appeal to employee concerns but have the least immediate economic impact and that meet the needs of the government customer.

On March 12, 2015, in *Government Contracting Resources, Inc.,* ASBCA No. 59162, the Armed Services Board of Contract Appeals (ASBCA) provided contractors with CBA negotiations. In *Government Contracting Resources, Inc.* (GCR), the CBA negotiated between the union and GCR contained a provision providing for severance payments to former employees laid off for 30 days or longer due to lack of work. There was no dispute that the CBA was properly incorporated into GCR's contract with its government customer, NASA. At the time the CBA was incorporated into the NASA contract, GCR did not request a price adjustment under the Price Adjustment Clause because there were no severance costs to claim. However, when several employees were laid off as a result of a transition to a new contractor, the CBA required the severance payments to be made. GCR then requested a price adjustment from NASA pursuant to the Price Adjustment Clause.

NASA rejected the request and argued that because the contract was firm-fixed-price and because the potential severance costs were known from the outset of the award, the severance costs were not recoverable under the Price Adjustment Clause. On appeal, the ASBCA disagreed and found that the Price Adjustment Clause can be applied when a contractor experiences an increased cost in providing benefits contained in a wage determination, including a CBA, especially when a contractor cannot possibly know with any certainty what those costs might be in advance.

This case could have a significant impact on the types of proposals that unions and contractors bargain over in an effort to reach agreement. In the past, contractors have been reluctant to design creative solutions to employee concerns revealed at the bargaining table because of uncertainty about whether the costs would be recoverable from the government customer. Although the Price Adjustment Clause clearly calls for reimbursement for the difference in costs to the contractor as a result of an increase in wages and benefits reflected in the CBA, contracting officers often deny requests for equitable adjustment for costs that are speculative. For example, CBA provisions that provide for call-back pay or compensation during an unscheduled closing at the government installation might have been considered too speculative because there is no way for the contractor to know how many times it would need to call back an employee or how many days a government installation might unexpectedly close. In light of the ASBCA's ruling in *Government Contracting Resources*, such provisions may no longer present a hurdle because costs such as these may be recouped in a later request for equitable adjustment should those costs in fact be incurred. This gives both employers and unions an opportunity to think more broadly and be more creative during the CBA negotiation process to address employee concerns while at the same time giving contractors greater confidence in the financial ramifications.

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GUEST COLUMN

The Guest Column features articles written by professionals in the services community. If you would like to contribute an original article for the column, please contact our editor, Jon Williams at jwilliams@pilieromazza.com.

WOSBs: NOW IT'S YOUR TURN

By Ann Sullivan, President Madison Services Group, Inc.

In the coming days, the SBA is expected to issue proposed rules to implement sole source authority for the WOSB Federal Contracting Program. To be clear, as many are anxiously waiting, sole source authority is not yet available. But for those following the program, the hopefully-soon implementation will mark the final step in a fifteen-year crusade to start and strengthen a small business contracting program designed to support women-owned businesses.

PilieroMazza's Jon Williams and Megan Connor authored an excellent article detailing the embattled history of the WOSB program. Their work was an essential element of the campaign to bring sole source; it validated concerns and offered solutions. Simply put, the program was hamstrung from the start—limited to small contracts, lacking the critical contracting tool of sole source authority, and restricted to only a third of industries.

With the enactment of the FY15 National Defense Authorization Act, women entrepreneurs celebrated rolling back many of these disparities. This was not an easy fight. It required a united advocacy effort from the women's business community, champions in Congress and the Administration, and a ground game of women business owners second to none brought about legislative changes.

As the celebration comes to a close, however, real opportunities await. With parity between the programs achieved in statute, it is time to go out and use the program—that is, win contracts. Making that happen is now in the hands of women-owned companies across the country. But with so many changes in the last few years, many in the contracting community may be unaware of the new tools they can use. Through proposals, market inquiries, conversations, and negotiations, women contractors should appropriately steer agencies toward the program. To do that, business owners must understand the program—and be able to communicate how it works. This overview of the when, how, and why of the program, along with a few answers to frequently asked questions, is enough to arm every women-owned company with the knowledge to be the frontline advocates for the program.

With the new changes, companies in eligible NAICS codes (only one-third of industries are eligible) can effectively request any contract be procured through the WOSB program's authority. (Important note: to register as a WOSB/EDWOSB, your primary NAICS code must be included in the program; for a specific contract to be set-aside, that contract's NAICS code must be in the program).

The key to awarding a contract through the WOSB program is to ask early. Companies can request that a contract be set-side or sole-sourced (when implemented) in the pre-RFP stage. This is as easy as including an extra sentence to RFI/Sources Sought responses: "We respectfully request you consider setting this contract aside through the WOSB program." If a company does not think other women-owned firms will compete, they will soon be able to request the contract go through the program via sole source. Since the program is relatively new, contracting officers may not necessarily know when to use the program. Women-owned companies need to help them out by requesting it.

Since its establishment in 2011, the program has developed a reputation as complex. Rightfully so—it is limited to only certain NAICS codes, has two parts (EDWOSB and WOSB) with varying income requirements, has both self-certification and 3rd party certification, had caps on award sizes and no sole-source (which all the other programs did). As one contracting official put it, "it was different, so it didn't get used." With the changes that organizations, such as Women Impacting Public Policy (WIPP) advocated for, it is now much simpler to use.

To combat the program's reputation for difficulty, even as it begins to change, contractors should explain that the requirements of the agency are not insurmountable. To set-aside a contract, the contracting officer only needs to verify that WOSBs requesting the use of the program be registered in the System for Award Management (SAM). Only after selecting a company to award the contract to will the verification in the WOSB repository be required.

Verifying registration in SAM is simple: the company must be in SAM to begin with (which requires at minimum an annual update) and registered as a WOSB or EDWOSB (which covers both ED and WOSB provisions). Uploading documents to the repository is an additional, and sometimes

forgotten, step. Too many women-owned firms fail to add themselves to the repository or fail to upload all the documents (have you?). Important to agencies, no formal justification and approval (J&A) is necessary to set-aside contracts through the program.

From an advocate's perspective, an agency's rationale to use the WOSB program is simple. Twenty years have passed since Congress instituted the 5% goal for women-owned small businesses. It has never been met. In addition, Congress has often stated that it is in this country's interest to have a strong industrial base and that includes women-owned suppliers.

But in reality, an agency will care more about their efforts to meet the goal—not the government-wide goal. The WOSB procurement program should be seen as a tool for the agency to meet its women-owned goal. Indeed, there is no order of preference between small business contracting programs—only market research and an agency's individual goaling status. Conveying why the program has benefits for agencies is always a good idea.

In addition to the basics, women-owned companies should know a few details about the changes to the WOSB program that will impact procurement. A few frequently asked questions (and their answers) include:

Contracting Officers keep saying only small contracts can be awarded. Is that accurate?

No. A contract of any size can be set-aside through the program. Prior to 2013, there were caps on set-aside contracts, but those have since been lifted. Sole source contracts, when available, will be limited to awards of $4,000,000 or less (with an exception for manufacturing, which has a limit of $6,500,000). This is consistent with small business procurement programs. Again, sole source is not yet available, but may be available in 2015.

I have heard self-certification is going away. What will replace it? What if I am currently self-certified?

Part of the legislation that added sole source authority and expedited the NAICS review (see next) removed the option to self-certify as a WOSB. While self-certification remains an option until a different certification process is put in place, it is a change eventually coming. In the future, WOSBs must be certified by either a federal agency, a state government, a 3rd party certifier, or—possibly—the SBA itself (this would be a new certification process). It will be up to the SBA to determine if current self-certified WOSBs will be grandfathered in and when this portion of the program will be implemented.

My company does not fall into a WOSB/EDWOSB NAICS code. Can I appeal that decision?

No. The NAICS codes in the program were determined by a SBA study (Rand) in 2007 measuring underrepresentation of women-owned small businesses in federal contracting. Only a new study can update the codes. Fortunately, an accelerated study is required to be completed in January 2016. Although required by Congress, the SBA Administrator has been strongly supportive of this effort.

What is the difference between EDWOSB and WOSB?

ED stands for economically disadvantaged, and, accordingly has limits for women owners on income (less than $350,000 averaged over last three years), net worth (less than $750,000 not including equity in the company, equity in primary residence, and retirement account), and total assets (less than $6 million, not including retirement accounts).

Being an EDWOSB matters because in certain NAICS codes (see above), only EDWOSBs can compete for set-asides. Since EDWOSBs are, by definition, WOSBs, they can compete in both EDWOSB and WOSB NAICS code set-asides. In other words, EDWOSBs qualify for all NAICS codes included in the program.

The two categories stem from the original 2007 study. It actually measured two types of underrepresentation: substantially underrepresented and underrepresented. All WOSBs can receive set-asides in industries where substantial underrepresentation was found. Only EDWOSBs can receive set-asides in industries where the underrepresentation is not as severe. This makes sense, as economically disadvantaged women can access more contracting opportunities through the program.

Advocates for this program have achieved enormous victories in bringing parity to other small business contracting programs. With the addition of sole source, access to the federal market for women entrepreneurs is at an all-time high. The final piece is communication from women business owners to agencies. The information is out there (and in here!). The future of the WOSB program now rests in the hands of those at the front lines—women business owners. It is incredibly rewarding to hand off the baton to those this program was ultimately designed to serve. It is now time for women business owners to turn this program into a business opportunity.

About the Author: Ann Sullivan is the President of Madison Services Group, Inc., a woman-owned company that provides government relations and business development services to corporate and non-profit clients. The Sunlight Foundation recently named her one of Washington's four "perfectly bipartisan lobbyists." She can be reached at asullivan@madisonservicesgroup.com; learn more at www.madisonservicesgroup.com.

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PilieroMazza News

PilieroMazza is excited to welcome several new attorneys who have joined the firm this year, expanding the depth and breadth of our key practice groups. Ambika Biggs joined our litigation group from Baker Hostetler. Corey Argust and Jackie Unger joined our labor and employment group and handle litigation matters as well. Josh Humi is new to our corporate group. And Michelle Litteken, previously with Mayer Brown and a clerk at the U.S. Court of Federal Claims, joined the government contracts group. You can read more about each attorney's experience and background on the attorney profiles page on our website, available at: www.pilieromazza.com/attorneys.

We are also proud to announce Super Lawyers' recognition of three PilieroMazza partners for 2015. Managing Partner Pam Mazza was recognized as one of the top government contracts lawyers, and partners Jon Williams and Cy Alba were each recognized as Rising Stars in Government Contracts Law.

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"SBA PROTESTS: WHEN SIZE OR STATUS COME INTO QUESTION"

Join Jon Williams and Alex Levine from the Government Contracts Group for an informative webinar designed to help small and large contractors understand and navigate the SBA protest process. For more information visit: www.pilieromazza.com/events.

Date: Wednesday, May, 13, 2015
Location: Online webinar
Cost: Complimentary

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