

A Legislative & Regulatory Update

Issues Affecting Small Government Contractors

May 31, 2012

MCCC GovConNet Committee

Pam Mazza
Partner



888 17th St. NW, 11th Floor
Washington, DC 20006
Tel: 202.857.1000
Fax 202.857.0200

Overview

White House Defense Bill

Jobs Act Update

Subcontracting

Mentor-Protégé Programs

Size Standards Review

Small Business Status – Integrity

House Defense Authorization Bill

Threatened veto

- Raise the goal for agency contract awards to small businesses from 23% to 25%
- Toughen “bundling” of contracts
- Elevate Agency OSDBU Offices
- Crack down on large firms hiding behind small businesses to win contracts



Jobs Act Update

Subcontracting
Mentor-Protégé Programs
Size Standards Review
Small Business Status – Integrity

Subcontracting

SBA issued proposed rule on October 5 at 76 FR 61626

- Comments were due on January 6, 2012
- SBA received 105 comments
- Purpose is to strengthen subcontracting
- JA sec. 1321,1322,1334

Section 1321 of the JA requires the SBA to establish policies for subcontracting compliance, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices.

Section 1322 of the JA requires a prime contractor notify the CO in writing if the prime contractor fails to utilize a small business concern used in preparing and submitting the prime contractor's bid or proposal.

Section 1334 of the JA requires a prime contractor that has a subcontracting plan to notify the CO in writing whenever a payment to a subcontractor is reduced or is 90 days or more past due for goods and services provided for the contract and for which the Federal agency has paid the contractor.

Subcontracting

SBA's proposed rule:

Use of certain SBCs as subcontractors

- If subcontracting plan is required, prime must represent it will use small business that assisted in preparing offer and notify CO in writing if it fails to utilize the small business.
- A prime used a small business in preparing the offer if: it referenced the SBC in the offer; prime has a subcontract or agreement with SBC to perform work on the contract; or SBC drafted any portion of the offer or prime used the SBC's pricing, cost information or technical expertise in preparing offer and there was an understanding the prime would use SBC as a subcontractor.

Payments to subcontractors

- Prime must notify CO if and why it reduces payments to a subcontractor or when payments are 90 days past due.
- Prime cannot prohibit a subcontractor from discussing any material matter with the CO.

Subcontracting plans

- CO is responsible for monitoring and evaluating small business subcontracting plan performance.
 - Did prime make a good faith effort to meet its goals – missed one goal but overachieved in another?
- CO must ensure prime submits subcontracting reports to eSRS.

Possible

New Mentor Protégé Programs

Small Business Jobs Act

- Act allows for SBA to establish Mentor-Protégé programs for:
 - HUBZone Companies
 - SDVOSB's
 - WOSB's
- Programs will be comparable to the 8(a) program
- Proposed regulations later this year?

8(a) Mentor Protégé Program

- Mentor can be small or large business or **nonprofit**
- Mentor can have up to **3 protégés at one time**
- Protégé **can have second Mentor**, corresponding to an unrelated, secondary NAICS code.
- Mentor/Protégé Agreement must be approved by SBA before the firms can submit an offer on a procurement as a small business; otherwise there is no exception to affiliation at time of offer. The JV with the Mentor must be approved prior to award.
- SBA approved Mentor/Protégé joint ventures **are small for federal subcontracts.**
- **SBA prohibited from approving a new Mentor/Protégé relationship within six months of the end of an 8(a) Participant's program term.**
- SBA is looking to see if the assistance to be provided will promote developmental gains to the 8(a) firm, if the developmental gains are tied to the approved business development plan, whether there are issues of negative control, and if the agreement is merely a mechanism to enable non-8(a) firms to receive 8(a) contracts.

Size Standard Review

SBA must review 1/3 of its size standards every 18 months and must conduct a complete review every 5 years. SBA has issued the following rules to date:

- Proposed to increase small business size standards for 20 industries and one sub-industry in NAICS Sector 53, Real Estate and Rental and Leasing (76 FR 70680).
 - The deadline for submission of comments ended on January 17, 2012.
- Proposed to increase small business size standards for nine industries in NAICS Sector 61, Educational Services (76 FR 70667).
 - The deadline for submission of comments ended on January 17, 2012.
- Proposed to increase small business size standards for 15 industries in NAICS Sector 51, Information (76 FR 63216).
 - The deadline for submission of comments ended on December 12, 2011.

Size Standard Review

- Proposed to increase small business size standards for 37 industries in NAICS Sector 56, Administrative and Support, Waste Management and Remediation Services (76 FR 63510).
 - The deadline for submission of comments ended on December 12, 2011.
- Increased the small business size standards for 22 industries in NAICS Sector 48 49, Transportation and Warehousing (76 FR 27935).
 - Revised size standards were effective March 26, 2012.
- Increased the small business size standards for 34 industries and one sub-industry in NAICS Sector 54, Professional, Scientific and Technical Services and one industry in NAICS Sector 81, Other Services (76 FR 14323).
 - Revised size standards were effective March 12, 2012

Primary NAICS Code

In determining whether to early graduate an 8(a) firm, SBA to consider, among other factors, whether the firm exceeds the size standard corresponding to its primary NAICS code for three successive program years.

Primary NAICS Code

A Participant may change its primary NAICS code where it can demonstrate that the majority of its revenues during a ~~two~~ **three** year period have evolved from its former primary code to another code.

- **Technical Correction**

Small Business Status- Integrity

- SBA issued proposed rule on October 7 at 76 FR 62313
 - Comments were due on December 8, 2011
 - SBA received 22 comments
- Irrefutable presumption of loss to the US based on total amount of contract expended if business sought and received the award upon willful, affirmative, and intentional certification of its size or status and misrepresented its size or status
 - Applies to more than just contracts – applies to Federal grants, contracts, subcontracts, cooperative agreements, or cooperative research and development agreements
- Purpose
 - JA 1343
 - Prior to statute, it was difficult to prove loss



Small Business Status- Integrity cont'd

Proposed Regulations:

- What is a deemed willful certification of size and status?
 - Submitting offer for a solicitation that is reserved, set-aside or otherwise intended for award to small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
 - Submitting an offer that encourages the agency to classify the proposal if awarded to small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
 - Registration on any Federal database as small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
- Small Business must
 - Sign offer with certification as to size and status on same page as the certification
 - Update ORCA at least once a year or will not be listed as small in ORCA or retain status as SDB, SDVOSB, or WOSB/EDWOSB

A Legislative & Regulatory Update

Issues Affecting Small
Government Contractors

QUESTIONS?



888 17th St. NW, 11th Floor
Washington, DC 20006
Tel: 202.857.1000
Fax 202.857.0200

Pam Mazza
pmazza@pilieromazza.com