

Small Business Regulatory Shake-Up

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Agenda

- FINALLY! Two Recent Sets of Proposed SBA Regulations to Implement FY13 NDAA and Other Changes
 - Revamp of Calculations for Limitations on Subcontracting
 - Expansion of and Changes to SBA and Other Agency Mentor-Protégé Programs
 - Challenges and Opportunities for Large and Small Businesses
- Additional Proposed Revisions to WOSB Regulations and Pending Bills in Congress
- What's on the Horizon – Impact of Proposed Changes

Limitations on Subcontracting

79 Fed. Reg. 77955 (12/29/14) Proposed SBA Regulation (comment period extended through 4/6/15) – 215 comments received

- Complete overhaul of formula for calculating compliance with limitations on subcontracting – intended to be easier
- Shift from cost-based formula to comparison of amount paid to prime versus other than “similarly situated” subcontractors at any tier (defined as small business that is qualified the same as prime for the type of set aside)
- New compliance certification and harsh fine (greater than \$500K or amount exceeding limitation on subcontracting)

Limitations on Subcontracting – Questions and Challenges

- “Subcontractor” is undefined – i.e., does it include 1099’s?
- Will the cost of materials exclusion in current regulations be carried forward?
- Exclusion for similarly situated subs “at any tier” requires more oversight by prime
- For ID/IQ contracts, does calculation apply at contract or order level?

Non-Manufacturer Rule

- CO requirement to notify potential offerors of applicable waiver(s)
- N-M Rule does not apply to acquisitions < \$150K
- Certain software treated as supplies (N-M Rule applies) but some eligible for waivers; custom designed software or modified for Gov't contract not subject to N-M Rule
- Tough new change for IT re-sellers
- Does not resolve lingering confusion on N-M application associated with COFC decision *Rotech v. United States*, 118 Fed. Cl. 408 (2014)
 - COFC held that the N-M Rule applies to any supplies even if the NAICS code assigned is for services
 - Decision is contrary to unambiguous SBA regulations, and will require Federal Circuit reversal or a statutory amendment to rectify

Affiliation

- Exclusion for “similarly situated” contractors in application of ostensible subcontractor rule
- Changes to test for “identity of interest” affiliation:
 - Rebuttable presumption of affiliation if firms do business together and are owned/controlled by married couple, parties to civil union, parents and children, or siblings
 - Presumption of affiliation based on economic dependence if a company derives $\geq 70\%$ of revenues from single company in prior fiscal year

Recertification/Notification

- New requirement to recertify size before award if merger/acquisition occurs after proposal submission but before award
 - What is impact?
 - When is size determined?
- Prime contractors have to notify small businesses prior to their inclusion in bid, proposal, or subcontracting plan
 - Mechanisms for reporting bad faith or fraud if in connection with subcontracting plan
 - Sanctions include liquidated damages, material breach finding, consideration in past performance evaluation

Expansion to Mentor-Protégé Program

80 Fed. Reg. 6618 (2/5/15) – Proposed SBA Regulation (comment period extended through 5/6/15) – over 70 comments received already

- Significant expansion of 8(a) M-P program to all categories of small businesses (SDVO/HUBZone/WOSB/EDWOSB)
 - Concern for how SBA can process influx of applications, even with set open/closed periods
 - Annual review to determine if M-P agreement should be allowed to continue another year
 - Limit on duration proposed at 3 years and a total of 2 M-P agreements for protégé (either with same or different mentor)
 - Same affiliation exemption for JVs extended

Expansion to Mentor-Protégé Program

- Relationship Limitations
 - Generally no more than 1 protégé per mentor; max of 3 but no adverse impact on protégé development
 - Protégé cannot also be mentor
 - Generally no more than 1 mentor per protégé; may have 2 if not competing/conflicting
 - Delete current size restrictions for 8(a) protégé for consistency
 - Prohibit non-profits from qualifying as mentor
 - Need to chose counterpart wisely in light of limitations – are there more opportunities (set asides) with a specific category of SB?

Revamp of Agency M-P Programs

- Except for DoD, other agencies have 1-year grace period then must obtain SBA approval
- Raise question of whether subcontracting incentives should be included as part of SBA M-P Program
- Annual reporting for agencies on participants, assistance to protégés, and protégé progress competing for prime and subcontracts

M-P Joint Ventures

- JV must be reduced to written agreement
- Does not require JV to be separate legal entity – but SBA questions whether all JVs formed under M-P agreements should be separate legal entities
- JVs cannot be populated with individuals to perform awarded contracts (for tracking and ensuring protégé is benefitting)
- New certification on compliance with JV regs and JV agreement at multiple points in time with sanctions
- New requirement to allow SBA to track award to JVs but SBA requesting guidance on how (separate DUNS, SAM)
- Non-HUBZone firms permitted to JV with HUBZones
- Authorize size protests of SBA approved JVs (previously off limits based on OHA precedent)

Revisions to 8(a) Regulations

- New exception to tribally owned (e.g., ANC) internal affiliation exemption if more than one subsidiary has “substantial unfair competitive advantage within an industry category”
- One individual cannot be responsible for management and daily operations of more than two 8(a) tribally-owned concerns
- SBA has ability to change the primary NAICS code of 8(a) participant in appropriate circumstances

Next Changes in the Pipeline

- 80 Fed. Reg. 24846 (5/1/15) - Proposed SBA Regulation with new sole source authority for WOSBs, EDWOSBs
 - Permitted if contract value \leq \$6.5M for manufacturing contracts and \leq \$4M for all others
- H.R. 1481, the Small Contractors Improve Competition Act of 2015 and S. 958, the Small Business Fairness Act propose to modify the way agencies evaluate the past performance and capabilities of small businesses proposing as a team or a JV

Impact of Changes

- Unknown timeline for issuance of final SBA regulations – M-P Program changes will take the longest because of volume of SBA questions
- Continued confusion, particularly on limitations on subcontracting until FAR also amended
- Greater incentives and authorization for SB alliances (teaming and JVs) – fewer competitors and stronger teams on set-asides and full and open
- More JVs and teams increase confidence in agency set-aside determinations – contributing to increase in percentage of annual spending/awards to small business
- Explosion of JVs fueled by M-P expansion, but likely reduction in 8(a) M-P relationships
- Need to invest in development of M-P JV templates – we can help!
- Further backlog and delays within SBA – more M-P agreements and JVs to approve and more size protests
- Disappearance of non-DoD agency-level M-P Programs?

Questions?

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WHITE HOUSE v. CONGRESS:

Government Contractors Bracing for Showdown in Washington

WELCOME ATTENDEES

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