

# **Legislative and Regulatory Update for Small Businesses**

**Advisory Committee on Veterans Business Affairs**

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**Presented by:**

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## AGENDA

- Small Business Mentor-Protégé Program
- Joint Venture Changes
- *Kingdomware* Decision
- Changes to Limitations on Subcontracting
- *Rotech* Decision
- Presumed Loss Rule



# SMALL BUSINESS MENTOR-PROTÉGÉ PROGRAM

- Establishment of a Mentor-Protégé Program for all small businesses
- Identical to the 8(a) Mentor-Protégé Program
- SBA may modify for different types of small businesses



## SMALL BUSINESS

### MENTOR-PROTÉGÉ PROGRAM (CONT'D)

- Current 8(a) Mentor-Protégé Program:
  - Enhance capabilities and meet goals of business plan
  - Protégé requirements
  - Mentor requirements
  - Written agreement reviewed and approved by SBA
  - Annual Review by SBA



## SMALL BUSINESS

### MENTOR-PROTÉGÉ PROGRAM (CONT'D)

- Changes being proposed:
  - Potential for new programs:
    - SDVO/HUBZone/WOSB/Small Business
    - SBA seeks comments on number of programs
  - SBA proposing single small business Mentor-Protégé Program
  - Allows joint ventures with Mentors for any contracts the Protégé is eligible to receive



## SMALL BUSINESS

### MENTOR-PROTÉGÉ PROGRAM (CONT'D)

- Changes being proposed:
  - Program specifically designed as a business development tool to enhance the protégé's capabilities
  - Financial technical and/or management assistance
  - Equity/Loans/Financing
  - Performance of prime contracts/subcontracts through joint ventures



## SMALL BUSINESS

### MENTOR-PROTÉGÉ PROGRAM (CONT'D)

- Other Agency Mentor-Protégé Programs:
  - DOD statutorily approved
  - Other Departments have a one year extension
  - Other Department programs must be approved by SBA
- Annual reporting requirements for Departments with MP Program
  - Participants by category (SDV, WOSB, etc.)
  - On assistance rendered, and
  - Progress competing for prime contracts and subcontracts



# SBA PROPOSED CHANGES TO JOINT VENTURES

- SBA is proposing to eliminate populated joint ventures (JVs) when a JV is formed as a separate legal entity
- SBA is seeking comment on whether it should require all JVs to be formed as a separate legal entity
- SBA is proposing similar requirements for each small business program regarding the content of the JV agreement, such as the need for the SDVOSB, HUBZone, or WOSB/EDWOSB to act as managing JV partner and perform at least 40% of the JV's work
  - However, for small business JV's, the proposed rule states that they need not be in any specific form or contain any specific conditions to qualify as small.





# **SBA PROPOSED CHANGES TO JOINT VENTURES (CONT'D)**

- SBA is proposing that JV partners must receive profits commensurate with their ownership interests in a JV that is a separate legal entity while profits could be split commensurate with work performed for an “informal” JV
- SBA is proposing new certification and reporting requirements for all JVs
  - All JV partners would be required to submit a certification before contract performance begins and on an annual basis to SBA and the contracting officer:
    1. Will comply with the JV agreement, and
    2. Comply with regulations on performance of the contract



# SBA PROPOSED CHANGES TO JOINT VENTURES (CONT'D)

- SBA is considering options to better track awards to JVs, such as requiring all JVs to include “Small Business Joint Venture” or “Mentor-Protégé Small Business Joint Venture” in the name of the JV entity or requiring a disclosure within SAM.gov
- SBA is proposing to approve 8(a) JVs at any time, whether or not in connection with a specific 8(a) contract, rather than the current process of waiting until the contract award is imminent
- SBA has concluded that 8(a) JVs should not be immune from size protests which changes recent OHA case law holding that disappointed offerors could not protest the size of an SBA-approved 8(a) JV



# GSA SCHEDULE CONTRACTS: VETERANS FIRST?

- Kingdomware Technologies v. United States (2014)
  - Court of Federal Circuit held VA can procure goods and services through GSA Schedule contracts without first determining whether it could procure the same goods and services from SDVOSBs and VOSBs
- GSA Schedule contracts trump Veterans First



# CHANGES TO THE LIMITATIONS ON SUBCONTRACTING

- SBA is proposing to revise the Limitations on Subcontracting rule
- As revised, compliance will be determined by a percentage cap on the total amount of the prime contract that may be paid to subcontractors (50%, 85% and 75%)
- Exception to the limitation for “similarly situated entities”



## CHANGES TO THE LIMITATIONS ON SUBCONTRACTING (CONT'D)

- If a prime contractor intends to use any similarly situated entities as subcontractors, it must:
  - Identify each entity in its offer along with intended percentage subcontracted
  - Enter into a signed written agreement with every entity detailing percentage of work forecasted
  - Notify the contracting officer of any changes made to a subcontractor's award and how the change will affect compliance



# THE ROTECH DECISION

- September 19, 2014 decision of the U.S. Court of Federal Claims, COFC No. 14-502C, holding that the plain language of the nonmanufacturer rule in the Small Business Act applies to “any” supplies being procured via small business set-asides
- Therefore, these supplies must be provided by another small business unless SBA has granted a waiver of the nonmanufacturer rule
- The ruling would require even those supplies procured as an ancillary part of service or construction contracts to be procured from small businesses absent a waiver



# SMALL BUSINESS CERTIFICATIONS: PRESUMED LOSS RULE

- What is the presumed loss rule?
  - Applies on every contract, subcontract, cooperative agreement, or grant that is set aside for award to small business concerns
  - If it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation there is a presumed loss to the United States
  - The presumed loss is equal to the amount expended by the United States on the contract, subcontract, or cooperative agreement



## **SMALL BUSINESS CERTIFICATIONS: PRESUMED LOSS RULE (CONT'D)**

- What constitutes a willful and intentional certification of small business size and status?
  - Submission of a bid, proposal, application or offer for a contract set aside or classified as intended for award to small business concerns
  - Submission of a bid, proposal, application or offer which encourages a federal agency to classify the bid or proposal, if awarded, as an award to a small business concern





## **SMALL BUSINESS CERTIFICATIONS: PRESUMED LOSS RULE (CONT'D)**

- Registration on any federal electronic database (i.e., SAM) for the purpose of being considered for award of Federal contracts. (Note that under the Rule, concerns must certify their size in SAM at least annually)
- The Rule may be determined not to apply in the case of unintentional errors, technical malfunctions and other situations demonstrating that the size misrepresentation was not affirmative, intentional, or willful



# SMALL BUSINESS CERTIFICATIONS: PRESUMED LOSS RULE (CONT'D)

- Penalties for Misrepresentations
  - Suspension or debarment
  - Civil penalties under the False Claim Act and Program Fraud Civil Remedies Act
  - Criminal penalties



# Legislative & Regulatory Update for Small Businesses

## *Any Questions?*

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