



# National Veterans SMALL BUSINESS CONFERENCE

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Building Partnerships - Veterans, Business, and Government

## Legislative & Regulatory Update for Small Businesses



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# OVERVIEW

- Update on current SDVOSB and VOSB Issues
- NDAA for 2013
- Subcontracting
- Mentor-Protégé Programs
- Small Business Certifications – Presumed Loss Rule

# UPDATE CURRENT SDVOSB/VOSB

- VOSB Verifications
  - VA reviewing its VOSB Verification regulations
    - ❑ On May 13, 2013, the VA requested comments concerning its verification regulations
    - ❑ The VA wanted to know how the verification rules/process could be streamlined, and how it could encourage more applications from veteran-owned concerns
  - The VA has also instituted a Pre-Determination Process for applicant firms
    - ❑ Agency's interest in collaborating with the contracting community on these issues may signal that VOSB Verification will be easier to obtain in the near future

# UPDATE CURRENT SDVOSB/VOSB

- COFC's Recent Reversals of Adverse Status Determinations
  - KWV, Inc. v. U.S.
    - ❑ The VA revoked the VOSB status of KWV based largely on the owner's out-of-state residency
    - ❑ The VA argued the owner could not control his company at a distance
    - ❑ COFC set aside the VA's decision to revoke KWV's status because residency does not appear in the VA's regulations as an element of ownership/control

# UPDATE CURRENT SDVOSB/VOSB

- COFC's Recent Reversals (cont'd)
  - Miles Construction, Inc. v. U.S.
    - ❑ Following a protest, the VA revoked Miles' VOSB status due to transfer restrictions in the firm's governing documents
    - ❑ On review, COFC found that restrictions did not compromise veteran control because they were standard commercial terms that would not take effect unless the veteran owner sold his interest in Miles
    - ❑ COFC also found that the VA's revocation deprived Miles of due process, as the VA's notice did not alert Miles that transfer restrictions might be at issue

# GSA SCHEDULE CONTRACTS: VETERANS FIRST?

- Kingdomware Technologies v. United States (2012)
  - Court of Federal Claims 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

## 2013 NATIONAL DEFENSE AUTHORIZATION ACT ("NDAA"):

- Introduced significant changes to limitations on subcontracting ("LOS") and mentor-protégé ("MP") relationships
- LOS changes reflect Congress' concern that contract benefits intended for small businesses are claimed by large firms
- MP provisions will extend availability of "approved" MP agreements to all small businesses

# NDAA Revisions to LOS

- Services: small businesses (“SB”) cannot subcontract more than 50% of the amount paid under a contract
- Supplies: SBs cannot subcontract more than 50% of the amount (minus materials) paid under a contract
- Mixed Contracts: SB decides what accounts for the majority of the work under a contract (services or supplies), and then cannot subcontract more than 50% of the amount paid for that work

# NDAA Revisions to LOS

- Changes for construction contracts left to SBA rulemaking
- SBs may comply by subcontracting to “similarly situated entities”
- Changes unlikely to take effect until SBA issues rules, and FAR council revises contract clauses, that implement them

# NEW MENTOR PROTÉGÉ PROGRAM

- 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?

# NDAA IMPACT ON MP AGREEMENTS

- SBA does not recognize MP Programs of other agencies, apart from MP Programs established through DoD. MP participation through programs of other agencies creates affiliation risks
- Now, NDAA has authorized SBA to create MP Program for all SBs
- New rules instituting such a program may be released within 6 to 9 months

# SUBCONTRACTING

- SBA issued Final Rule - Purpose is to strengthen subcontracting
  - SBA to establish policies for subcontracting compliance, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices
  - 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

# SUBCONTRACTING

- 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

# SUBCONTRACTING

- 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

- 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

# SMALL BUSINESS STATUS 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**

- 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

- 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

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

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## *Any Questions?*

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