

LEGISLATIVE AND REGULATORY UPDATE

FOR GOVERNMENT CONTRACTORS

ABOUT PILIEROMAZZA

- ❖ Law firm in Washington, DC
 - Primary practice areas:
 - Government contracts
 - Small business procurement programs
 - Business & corporate
 - Labor & employment
 - Litigation

- ❖ Sign up for our newsletters, client alerts, weekly updates, blog, and view past presentations and other resources at www.pilieromazza.com

OVERVIEW

- ❖ Two big new proposed rules from SBA:
 - Mentor-protégé program for all small businesses
 - Limitations on subcontracting
- ❖ Joint venture past performance
- ❖ GSA Schedules
- ❖ WOSB/EDWOSB sole source
- ❖ Size standard changes
- ❖ Cybersecurity
- ❖ Other recent SBA rulemakings

TIMELINE FOR SBA'S NEW MENTOR-PROTÉGÉ PROGRAM

- ❖ Proposed rule issued February 5, 2015
- ❖ Comment period closed on May 6, 2015
- ❖ Target date for final rule is planned for early 2016

HOW WILL IT WORK?

- ❖ One new mentoring program available to all small businesses
- ❖ Patterned on existing 8(a) Mentor-Protégé Program
 - Designed as a business development tool to enhance protégé's capabilities
 - Would allow all small business protégés to joint venture with their large business mentors
 - Mentor could own up to 40% of the protégé
 - Also envisions assistance through loans, financing, prime contracts, and subcontracts

PROTÉGÉ ELIGIBILITY

- ❖ Must be small under its primary NAICS code and in need of mentoring
- ❖ Must undergo a formal SBA size determination (either in the past or as part of the mentor-protégé application)
- ❖ Must identify mentors for other agency mentor-protégé programs
- ❖ Generally, may not have more than one mentor at a time
 - SBA may permit a second mentor if the second mentor brings different expertise from the first mentor and can assist the protégé in an unrelated, secondary NAICS code

MENTOR ELIGIBILITY

- ❖ Must possess good financial condition, commitment to mentoring, and good character
- ❖ Only for-profit firms
- ❖ Generally, no more than one protégé at a time
 - However, SBA may approve up to three protégés for the same mentor if there is no adverse impact on any protégé
- ❖ A protégé cannot also be a mentor

PARTICIPATION

- ❖ SBA may utilize “open” and “closed” application periods
 - No details provided on thresholds for or timing of open and closed periods
 - This did not work well for VA’s mentor-protégé program, which was closed more than open
- ❖ Proposed participation period: up to three years in one agreement, maximum of six years overall
 - Protégé may have two three-year agreements with two different mentors, or two three-year agreements with the same mentor
 - SBA will review agreements annually

PROPOSALS FOR JOINT VENTURES

- ❖ Would eliminate populated joint ventures for “formal” joint ventures
 - Why not for “informal” joint ventures as well?
- ❖ Will all joint ventures need to be formed as a separate legal entity?
- ❖ Annual certifications of compliance from joint ventures, with possibility of suspension/debarment for noncompliance
- ❖ What is the best way for SBA to track JV awards?

MORE ON JOINT VENTURES

- ❖ Uniform requirements for all small business programs regarding size and content of JV agreement
 - Comparable to existing 8(a) JV requirements (e.g., small business must perform at least 40% of the work)
 - HUBZone firms may joint venture with non-HUBZone firms
 - Size protests permitted, including for 8(a) JVs
- ❖ However, some differences:
 - Proposal would require joint venture partners to share profit commensurate with their ownership interests in a separate legal entity joint venture
 - No prior approval of JVs except for 8(a) contracts

PROPOSALS FOR THE 8(A) PROGRAM

- ❖ New rule would change how SBA assesses an applicant's claim of social disadvantage
 - Would permit SBA to disregard an applicant's claim if the applicant does not provide sufficient evidence to make his/her claim any more likely than a legitimate alternate reason for adversity the applicant has faced
 - Designed to alter recent OHA case law favorable to applicants
 - Does this proposed rule raise the evidentiary burden on applicants above the current preponderance of the evidence standard?

TIMELINE FOR CHANGES TO LIMITATIONS ON SUBCONTRACTING

- ❖ Proposed rule released December 29, 2014
- ❖ Comments were originally due February 27, 2015; comment period extended to April 6, 2015
- ❖ Final rule may be issued by the end of 2015, but more likely in 2016

PROPOSED NEW SUBCONTRACTING LIMITS

- ❖ Proposed rule keeps the same subcontracting limits as are found in the existing rule:
 - 50% for services
 - 50% for supplies
 - Statute provides an exclusion for the cost of materials on supply contracts, but SBA left this out of the proposed rule
 - 15% for general construction
 - 25% for specialty trade construction
- ❖ However, focus would shift from contract labor costs to total contract value

MIXED SERVICE AND SUPPLY CONTRACTS

- ❖ NAICS code assigned to the contract will determine applicable subcontracting limit – services or supplies
 - In no case would the subcontracting limits for services and supplies apply to the same contract
- ❖ The applicable limitation on subcontracting (either for services or supplies) “shall apply only to that portion of the contract award amount”
 - This should mean that, on a contract primarily for services, you can exclude any supplies and apply the “50% of the total cost of the contract” subcontracting limitation to only the services portion of the contract

SIMILARLY SITUATED ENTITIES

- ❖ A similarly situated entity is a firm that meets the same size/status requirements as the prime contractor for the project in question
- ❖ Prime contractor + similarly situated subcontractors = performance requirement
- ❖ Must identify similarly situated entities in your proposal, and have a written agreement

OTHER NOTABLE PROPOSALS

- ❖ Changes to affiliation rules:
 - Affiliation based on close family connections between persons that are married, parents and children, or siblings
 - Economic dependence when one firm derives 70% or more of its revenue from another firm
- ❖ SB joint venture: each party in the JV must be small on its own, but not in the aggregate
- ❖ Size recertification for pending proposals
- ❖ NAICS code appeals: time to file and effect on RFP

SOFTWARE PURCHASES

- ❖ Nonmanufacturer rule (NMR): SB must provide the product of another small business, unless SBA grants waiver to permit LB product
- ❖ Proposal would apply NMR to software that is generally available to both the public and private sector unmodified
 - Change would allow SBA to grant waivers of the NMR for such software, permitting small businesses to supply software made by large businesses on set-aside contracts
 - Agencies would use NAICS code 511210 when purchasing software eligible for a waiver

SOFTWARE PURCHASES

- ❖ Change would not affect contracts for the creation or modification of custom-design software
 - SBA will continue to treat such software as a service, requiring small businesses (together with similarly situated entities) to perform the required percentage of the work

THE ROTECH DECISION

- ❖ Increasingly common for agencies to require past performance from the JV itself, not JV partners
- ❖ Efforts to combat this:
 - GAO has upheld crediting JV with past performance of the JV partners, see HydroGeoLogic Inc., B-406635 (July 25, 2012) and Network Security Techs., Inc., B-290741.2 (Nov. 13, 2002)
 - The Small Contractors Improve Competition Act of 2015, H.R. 1481
 - SBA's mentor-protégé proposed rule, 80 Fed. Reg. 6618 (Feb. 5, 2015)

GSA SCHEDULES

❖ Joint Ventures

- Congress is working on legislation that would permit joint ventures between schedule holders
- Currently, JV itself must have the schedule; only other option is Contractor Team Arrangement

GSA SCHEDULES

❖ Consolidation

- GSA is in the process of combining 8 separate professional services Schedules into one Professional Services Schedule (PSS)
- Consolidated (00CORP); MOBIS (874); PES (871); FABS (520); AIMS (541); LOGWORLD (874V); Environmental (899); Language (738II)
- Does not include IT (70) or HR (738X), but GSA could consolidate IT (70) – SIN C132-51, Professional Information Technology Services and HR (738X) – SIN C595-21, Human Resource Services only
- T&Cs remain unchanged – new size representations under applicable NAICS codes?
- End date for the new contract will be based on the award date of the new contract and will be for a period of 5 years with 3 potential option periods of 5 years each
- Target transition completion: November 2015

SOLE SOURCE FOR WOSBs/EDWOSBs

- ❖ 2015 NDAA added sole source authority for WOSB/EDWOSB programs
 - Available only if “rule of two” is not met
 - \$6.5M limit for manufacturing contracts; \$4M limit for all other contracts
 - SBA issued proposed rule to implement sole source authority on May 1, 2015
 - Comments due June 30, 2015
 - On track to pass this year?
 - Issues related to self-certification for WOSBs? Tension between regulations and 2015 NDAA language

SIZE STANDARD CHANGES

- ❖ Inflation adjustments effective in July 2014
- ❖ SBA recently proposed increases for many employee-based size standards
 - Many codes proposed for significant increases, including environmental remediation (from 500 to 1250 employees) and internet publishing (from 500 to 1000 employees)
 - SBA proposed to eliminate Value Added Reseller (“VAR”) exception with its 150-employee size standard – big fight over this
 - Comments were due November 10, 2014, and many were submitted along with letter from Congressman Sam Graves who opposed the elimination of the VAR exception
 - In December, SBA indicated the final rule would be issued in May 2015, but it could be delayed based on VAR controversy

CYBERSECURITY

- ❖ A lot of legislative and regulatory activity
- ❖ Defense Federal Acquisition Regulation Supplement
 - DFARS 252.204-7012 in all DoD contracts/subcontracts, requires adequate security controls to safeguard “UCTI”
 - DFARS 252.239-73 in all DoD IT procurements, allows DoD to exclude contractor that presents a supply chain risk
- ❖ National Defense Authorization Acts for 2013-2015 each addressed cybersecurity, with focus on rapid reporting of cyber incidents and sharing of information/cooperation between industry and government
- ❖ Coming soon to the Federal Acquisition Regulation (FAR)?

WHAT SHOULD YOU BE DOING FOR CYBERSECURITY?

- ❖ Identify your assets
- ❖ Implement company policy and procedures
- ❖ Penetration testing and vulnerability assessments
- ❖ Review your agreements
- ❖ Talk to your insurance broker

MAC SET-ASIDE RULE

- ❖ Effective: December 31, 2013
- ❖ Provides for set-asides of portions of MACs, orders placed against MACs, and reservation of some contracts for small businesses under full-and-open MACs
 - Allows agencies to use several tools to increase SB participation on MACs, even when “Rule of Two” is not satisfied for the entire acquisition
 - That said, agencies may forgo using the tools, even if the Rule of Two could be met – but must document why
- ❖ Size status for MACs determined at time of initial offer
 - Contractor will be considered small for each order under the MAC during first five years unless CO explicitly requires size recertification at the order level
- ❖ On/off ramps: Add or remove small businesses to MACs

SBA'S PRESUMED LOSS RULE

- ❖ Effective: August 15, 2013
- ❖ Key elements:
 - Presumption of loss to the government based on receipt of a contract through willful misrepresentation of size or status
 - Prime contractor liable for subcontractor misrepresentations, unless the prime contractor had a reasonable basis to rely on the subcontractor's representation
 - Limitation of liability for good faith attempts to comply and honest mistakes
 - Annual recertification requirement in SAM.gov
 - Significant penalties for misrepresentations, already seeing more audit and enforcement actions

SMALL BUSINESS SUBCONTRACTING

- ❖ For contracts that require a subcontracting plan, the prime contractor must notify the CO in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing the proposal
 - Subcontractors can inform COs of violations of this requirement
 - “Used in a proposal” means mentioned by name, the existence of a subcontract for the project, or the small business drafted a portion of the proposal and written expectation of receiving a subcontract
- ❖ Prime contractor must also notify the CO in writing whenever the prime contractor reduces payments to a small business subcontractor or when payments to a small business subcontractor are 90 days or more past due

QUESTIONS?

Thank you for joining us today.

If you would like to speak with Cy or Katie about today's session,
please contact them at:

Cy Alba

ialba@pilieromazza.com

(202) 857-1000

Katie Flood

kflood@pilieromazza.com

(202) 857-1000



888 17TH STREET, NW
11TH FLOOR
WASHINGTON, D.C. 20006
www.pilieromazza.com



TO LEARN MORE ABOUT PILIEROMAZZA

Sign up for our newsletters and blog at
www.pilieromazza.com

PM Legal Minute - Our blog, written by all of PilieroMazza's attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter - Our publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The *Legal Advisor* articles focus on recent legal trends, court decisions, legislative and regulatory rule-making as well as other newsworthy events.

Weekly Update - An e-mail sent every Friday that provides an up-to-the minute recap of legislative and regulatory issues affecting small businesses.

You can also follow us on:



@pilieromazza

