

**SMALL BUSINESS GOVERNMENT
CONTRACTORS: LEGISLATIVE AND
REGULATORY UPDATE**

**2014 NATIONAL HUBZONE CONFERENCE
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OVERVIEW

- ❖ **New Final Rules**
 - Presumed Loss
 - Subcontracting
 - Multiple Award Contracts
- ❖ **Coming Attractions**
 - Performance of Work Requirements
 - Mentor-Protégé Programs
- ❖ **Labor and Employment Updates**
- ❖ **Others**



SBA'S PRESUMED LOSS RULE

- ❖ **Effective: August 15, 2013**
- ❖ **Key elements:**
 - **Presumption of loss**
 - **Deemed certifications**
 - **Signature requirement**
 - **Limitation of liability**
 - **Annual recertification**
 - **Applicability to subcontractors**
 - **Penalties**



PRESUMPTION OF LOSS

- ❖ The presumed loss rule reads as follows:
 - In every contract, subcontract, cooperative agreement, cooperative R&D agreement, or grant that is set aside, reserved, or otherwise classified as intended for award to small, 8(a), SDB, SDVOSB, HUBZone, WOSB, or EDWOSB firms, there is a presumption of loss to the government based on the total amount expended on the contract, subcontract, etc., whenever it is established that a firm willfully sought and received the award by misrepresentation.



DEEMED CERTIFICATIONS

- ❖ Under the presumed loss rule, the following actions will be deemed affirmative, willful, and intentional certifications of size or status:
 - Submission of a bid, proposal, application, or offer for a Federal grant, contract, subcontract, etc. that is reserved or otherwise classified for award based on size or status
 - Submission of a bid, proposal, application, or offer for a Federal grant, contract, subcontract, etc. that in any way encourages a Federal agency to classify the bid or proposal, if awarded, based on size or status
 - Registration in any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, etc. based on size or status



LIMITATION OF LIABILITY

- ❖ Presumption of loss, deemed certifications, and signature requirement “may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act . . .”
- ❖ A prime contractor acting in good faith should not be held liable for misrepresentations by its subcontractor
- ❖ No liability when government personnel erroneously identify the firm as small without any representation or certification by the firm or the firm’s knowledge



ANNUAL RECERTIFICATION

- ❖ **Presumed loss rule requires firms to certify size and status at least annually in SAM.gov**
 - **If a firm fails to certify at least annually, the firm will not be listed in SAM as small or with the relevant status unless and until the firm recertifies its size or status**
 - **Applies regardless of the length of the contract – this is not the same as the recertification rule that applies at the end of the 5th year on long-term contracts**
 - **Applies to small, SDB, SDVOSB, WOSB, and EDWOSB firms, but not 8(a) or HUBZone firms because the SBA is responsible for providing these designations**

- ❖ **No notice from SBA is required**



PRESUMED LOSS RULE FOR SUBCONTRACTORS

- ❖ The presumed loss rule applies to subcontractors who willfully misrepresent their size or status to receive a subcontract
- ❖ SBA believes that prime contractors who rely in good faith on the written representations of their subcontractors should be insulated from liability



PRESUMED LOSS RULE PENALTIES

- ❖ **Three types of penalties under the rule:**
 - **Suspension and debarment**
 - **Civil penalties under the False Claims Act and other laws**
 - **Criminal penalties**
 - **Up to \$500,000 fine and/or 10 years imprisonment for knowing misrepresentation**
 - **Up to \$5,000 fine and/or 2 years imprisonment for knowingly making a false statement to influence SBA actions, including not timely correcting continuing representations that are no longer true**
- ❖ **Presumption of loss penalty depends on receipt of contract, but other penalties (including suspension and debarment) do not**



SMALL BUSINESS SUBCONTRACTING

- ❖ **Effective: August 15, 2013**
- ❖ **For “covered contracts,” a prime contractor must notify the CO in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing its bid or proposal during contract performance**
 - **Subcontractors can inform COs of violations of this requirement**
 - **“Covered contracts” are those for which a small business subcontracting plan is required**



WHEN IS A SMALL BUSINESS “USED” IN PREPARATION OF A PROPOSAL?

- (1) The offeror specifically references a small business in the bid or proposal;**
- (2) The offeror has a subcontract or agreement in principle with the small business concern to perform a portion of the specific contract; or**
- (3) The small business concern drafted portions of the proposal or the offeror used the small business concern’s pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including email) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract**



SMALL BUSINESS SUBCONTRACTING (CONT'D)

- ❖ Prime contractor must also notify a CO in writing whenever the prime reduces payments to a small business subcontractor or when payments to a small business subcontractor are 90 days or more past due
- ❖ CO is responsible for monitoring and evaluating small business subcontracting plan performance
- ❖ Clarifies which subcontracts must be included in subcontracting data reporting and how data should be reported



MULTIPLE AWARD CONTRACTS (MAC) RULE

- ❖ **Effective: December 31, 2013**
- ❖ **New policies regarding Set-Asides:**
 - **Total Set-Asides**
 - **Partial Set-Asides**
 - **Reserves**
- ❖ **Size status**
- ❖ **Size recertification**
- ❖ **NAICS code designations**
- ❖ **On-ramp/Off-ramp**
- ❖ **Limitations on subcontracting**



SET-ASIDES

- ❖ **The SBA final rule provides:**
 - **Set-aside for part or parts of multiple award contracts for small business concerns;**
 - **Set-aside orders placed against multiple award contracts; and**
 - **Reserve one or more contract awards for small business concerns under full and open competition, when the agency intends to make multiple contract awards**
- ❖ **For partial set-asides, small businesses are allowed to bid on:**
 - **Non-set-aside portion**
 - **Set-aside portion**
 - **Both**
- ❖ **Prior to new rule, no set-asides for Schedule contracts, only “reserved” awards**



PARTIAL SET-ASIDES, RESERVES, AND SET-ASIDE ORDERS

- ❖ If the rule of two is not satisfied for the entire acquisition agencies have discretion to use one of several tools to increase small business participation
- ❖ Examples of the available tools are:
 - To award a multiple award contract with a partial set-aside when the acquisition can be broken into small discrete portions (such as CLINs, SIN, etc.)
 - To use a contract “reserve” when the acquisition cannot be broken into smaller, discrete portions until the individual task orders are drafted
 - The contracting officers may set aside orders when the rule of two is met for a particular order on a multiple award contract that was competed on a full and open basis
- ❖ Agencies have the discretion to forgo using the tools, even if the rule of two could be met
 - If an agency declines to use the tools, it must document why it did not do so when they could have been used



HOW TOTAL SET-ASIDES WORK

- ❖ The final rule expressly provides that contracting officers must set aside for small businesses an acquisition that will result in multiple award contracts when:
 - There is a reasonable expectation that two or more small businesses can provide the required services or
 - Supplies at a fair market price
- ❖ The contracting officer may (in lieu of small business set aside) choose to set aside the contract for:
 - 8(a) businesses
 - Qualified HUBZone small business concerns
 - Service-disabled veteran-owned small business concerns (“SDOV SBC”)
 - Disadvantaged woman-owned small businesses/women-owned small businesses (“EDWOSB/WOSB”)



HOW PARTIAL SET-ASIDES AND RESERVES WORK

- ❖ **Partial set-asides:** Partial set-aside appropriate when market research indicates that “rule of two” will not be met for the entire requirement (e.g., each CLIN or SIN), so procurement should be broken into parts, some of which are set aside
- ❖ **Reserves:** Agencies may use a reserve when an acquisition for a multiple award contract will be conducted using full and open competition and market research indicates that:
 - At least two small businesses could perform one part of the requirement, but requirement unable to be broken down smaller, or
 - At least one small business can perform the entire requirement, but no reasonable expectation of receiving at least two offers from small businesses



SIZE STATUS UNDER THE MAC RULE

- ❖ **Size status for multiple award contracts is determined at the time of initial offer**
- ❖ **If the contract contains multiple NAICS codes, size is determined for each code at the time of the initial offer**
- ❖ **The offeror is considered small for all orders subsequently issued under the different NAICS codes unless the contracting officer (in his/her discretion) requires size recertification at the order level**



SIZE RECERTIFICATION UNDER THE MAC RULE

- ❖ **Small business size certification good for the life of the contract (or for first five years of the contract for multiple award schedule contracts per 13 C.F.R. § 121.404(g)), except if the small business undergoes a “triggering” event**
 - **Small businesses do not have to recertify size for orders issued from multiple award contracts unless solicitation “explicitly requires” them to do so, 13 C.F.R. § 121.404(g)(3)(v)**
- ❖ **The final rule requires a recertification of size status when:**
 - **A small business is the acquired and when the small business is the acquirer**
 - **When a participant in a joint venture is involved in a merger or acquisition (regardless of whether the participant is the acquired concern or the acquiring concern)**



NAICS CODES

- ❖ Many solicitations have multiple NAICS codes assigned
- ❖ Under the final rule, in assigning NAICS codes and size standards to multiple award contracts, agencies will have two alternatives:
 - To assign one NAICS code and size standard to the contract if all of the orders are expected to be classified under the same code or
 - To divide the contract into discrete categories and assign different NAICS codes to each discrete CLIN, SIN, etc.
- ❖ Orders issued under the different categories would need to have the same NAICS code assigned to that category in the contract



ON-RAMPS/OFF-RAMPS

- ❖ The final rule gives agencies the discretion to use “on-ramps” and/or “off-ramps” in multiple award contracts with total set-asides, partial set-asides, or reserves
- ❖ “On-ramp” provisions allow agencies to award new contracts to a small business under a multiple award contract where some of the current awardees are no longer small as the result of a size recertification
- ❖ “Off-ramp” provisions allow agencies to remove or terminate a contract in which the contractor has recertified its status as other-than-small and is no longer eligible to receive new orders as a small business



LIMITATIONS ON SUBCONTRACTING UNDER THE MAC RULE

- ❖ For total or partial set-aside contracts, compliance with the limitations on subcontract is determined in each period of the contract (the base term and each option period)
 - Contracting officers have the discretion, on a contract-by-contract basis, to require compliance on an order-by-order basis
- ❖ When an order is set aside under a reserve or a full and open multiple award contract, the contractor must comply with the limitation on subcontracting requirement on an order-by-order basis



MORE CHANGES ON THE WAY TO THE LIMITATIONS ON SUBCONTRACTING

- ❖ Two substantive changes to the law governing limitations on subcontracting:
 - New limitations for service contracts will be based on the total amount paid to the small business, not the cost of the contract incurred for personnel
 - This means you will no longer be able to exclude the cost of materials, supplies, and other non-labor costs from subcontracting limit calculation
 - May meet performance requirements by subcontracting to other “similarly situated” small businesses
 - This is already available for HUBZone firms
- ❖ **BUT**, there has been no proposed rule change yet



NEW MENTOR-PROTÉGÉ PROGRAMS COMING FOR ALL SMALL BUSINESSES

- ❖ 2013 NDAA amended the Jobs Act to establish mentor-protégé program for all small business concerns
- ❖ No proposed rule yet – maybe by early-mid 2015?
- ❖ When issued, the proposed rules are expected to:
 - Be modeled after the 8(a) mentor-protégé program
 - Include exemptions from affiliation and joint venture capability
 - Provide mechanism for SBA to approve and issue regulations for mentor-protégé programs at agencies other than DOD
 - Allow current mentors and protégés with approved agreements to continue their relationship until the agreement expires



LABOR AND EMPLOYMENT RULES

- ❖ **Executive Order 13673, passed July 31, 2014**
 - Requires government contractors and subcontractors over \$500,000 to disclose violations of 14 different employment laws
 - 3-year look back requirement
 - Part of responsibility determination
 - Potential blacklisting of contractors based on labor law violations
- ❖ **Executive Order 13658, passed February 12, 2014**
 - \$10.10 minimum per hour minimum wage for employees of Federal contractors and subcontractors, adjusted annually thereafter by the Consumer Price Index for Urban Wage Earners and Clerical Workers
 - Effective January 2015
 - DOL to revise regulations for OT, including defining exemptions from OT and revising salary basis test



LABOR AND EMPLOYMENT RULES (CONT'D)

- ❖ **Service Contract Act Health and Welfare fringe benefit rate increase to \$4.02 per hour**
 - Effective July 22, 2014
 - Must be incorporated into contracts by the CO (meaning that it will not become effective on a contract until an option year or upon a new contract solicitation and award)
- ❖ **Amendments to EO 11478 and 11246 - OFFCP to add sexual orientation and gender identity discrimination to EEO requirements for government contractors**



OTHERS

- ❖ **SBA proposed rule for Advisory Opinions**
 - Proposed on June 25, 2014; comments were due in August
 - Would allow PTACs to provide small business status advisory opinions and allow contractors “safe harbor” from fraud penalties related to size certifications
- ❖ **Expansion of Personal Conflict of Interest rules**
- ❖ **Size standard increases**
 - Inflation adjustments in July 2014
 - Recent proposed increases for many employee-based size standards, including environmental remediation
- ❖ **Legislation pending to add sole source authority for WOSB/EDWOSB programs**



ANY QUESTIONS?

Thank you for attending today.

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