

# LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

## *Government Contracting*

### **THREAT ASSESSMENT: ARE YOU READY FOR THE CYBERSECURITY BOOM?**

By Jon Williams

The government buys a significant amount of information technology (IT) services from the private sector, and this will probably always be true. However, in recent years the government's overall IT spending has stagnated. IT is still the place to be for many contractors, but understanding the direction of federal IT spending is critical to ensuring you are positioned where the government (and technology) is headed, rather than where it has already been.

In fiscal year 2014, IT spending is expected to grow for the first time in several years, driven in part by a surge in spending on cybersecurity. Cybersecurity is an increasingly hot area and it seems to have staying power: overall spending on cybersecurity is estimated to be as much as \$13 billion in 2014, and is expected to steadily increase to \$17 billion by 2017. Therefore, if you work in the IT field, you should be asking yourself whether your company is positioned to benefit from the boom in cybersecurity spending.

The current federal budget for cybersecurity is geared towards investments in innovative solutions to protect against emerging threats to federal networks and critical infrastructure. In addition, the government is focusing on research and development, continuous monitoring and better prevention of intrusions, improving incident response, and facilitating information sharing among agencies regarding threats. Certain agencies, like DHS and the VA,

are seeing a significant increase in IT spending. DHS in particular has and will continue to play an important role in the government's cybersecurity measures.

There have been several recent attempts at legislation to address cybersecurity. The lawmakers have had difficulty advancing these measures because of privacy and other concerns raised by the Edward Snowden situation and the increased scrutiny of the NSA's practices. One bill that may have decent prospects was introduced by House Homeland Security Committee Chairman Michael McCaul in December. The bill, referred to as the Cybersecurity and Critical Infrastructure Protection Act of 2013, is aimed at preventing cyber attacks on the banking system, energy pipelines, telecommunications networks, and other critical infrastructure. The bill does not include controversial liability protections found in an earlier House-passed measure that would have given companies broad liability protections in exchange for sharing cyber threat data with the government. The bill has

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*Continued on page 2*

#### IN THIS ISSUE

Are You Ready for the Cybersecurity Boom? .....	1
Size Appeal of Mali, Inc., SBA No. SIZ-5506 (2013).....	2
Be A Resolved Employer in 2014 .....	3
2014: Year of the WOSB? .....	4
PilieroMazza Seminars .....	5

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# CYBERSECURITY BOOM . . . . .

*Continued from page 1*

been lauded because it codifies DHS' National Cybersecurity and Communications Integration Center as the entity charged with facilitating real-time sharing among agencies of information about cyber threats to critical infrastructure.

As the government continues to focus on increasing cybersecurity, contractors should expect to see more

cybersecurity requirements flowed down to them in prime contracts and subcontracts. For example, last November, two new DFARS rules were implemented to place responsibilities on contractors for cybersecurity. Both of the new rules were effective November 18, 2013.

The first of the two new rules requires contractors to implement adequate measures to safeguard unclassified DOD information within the contractor's information systems. This rule also requires reporting of certain intrusions into the contractor's information systems. Cloud service providers and ISPs are considered to be a

subcontractor under the rule, and the prime contractor is responsible for ensuring compliance by its subcontractors.

The second rule is designed to allow the DOD to assess the risk of cyber threats in contractor supply chains on procurements related to national security. Defense contractors throughout the DOD's supply chain have been targeted by cyber attacks designed to steal unclassified technical data. To address supply chain vulnerabilities, the new rule establishes a pilot program to mitigate supply chain risk. The pilot program will run through September 2018. The new rule indicates procuring officials should consider whether to use an evaluation factor

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regarding supply chain risk when establishing solicitations. The rule also allows the government to limit disclosure of certain information in post-award debriefings and states that such limitations cannot be protested to the GAO. A supply chain risk contract clause will be added to contracts in appropriate cases.

The growing priority for cybersecurity in federal contracts will expand beyond DOD contracts that deal with national security issues. Indeed, there are a variety of ways and many agencies through which determined cyber criminals can attempt to access critical information or affect critical infrastructures. Consequently, contractors should expect to see more cybersecurity measures in their contracts even if your company does not perform IT and/or defense work.

And with this trend comes opportunity. The budget forecasts demonstrate the government is placing a premium on innovation and solutions in the cybersecurity field. Therefore, if you follow the money and the technology, cybersecurity is an area you want to have on your radar in 2014 and the next several years. □

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## Cases

### **SIZE APPEAL OF MALI, INC., SBA NO. SIZ-5506 (2013)**

PilieroMazza filed a size protest against a network of family-owned hotel companies in the Jersey Shore area. The SBA granted our protest and the protested firm filed an appeal with OHA. Rather than contest the affiliation findings, however, the protested firm's appeal alleged that the area office lacked authority to issue the size determination because the procurement in question was a blanket purchase agreement (BPA). OHA agreed with our position that the solicitation was clearly for a requirements contract, not a BPA, and the SBA had authority to issue the size determination. Therefore, OHA confirmed that the protested firm was ineligible for the contract and the agency made award to the next in line, which was our client. □

The *Legal Advisor* is a periodic newsletter designed to inform clients and other interested persons about recent developments and issues relevant to federal contractors and commercial businesses. Nothing in the *Legal Advisor* constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication but is subject to change and does not purport to be a complete statement of all relevant issues.

## BE A RESOLVED EMPLOYER IN 2014

By Nichole DeVries

In the spirit of the season, employers should make resolutions on ways to improve their human resource practices in 2014. And beyond simply making resolutions, you should have a plan to ensure you meet your objectives – easier said than done given everything else you must do to run your business. To help you succeed in achieving key employer resolutions this year, this article provides a roadmap to address what we believe are the top five “must-do’s” for employers in 2014.

### 1. DUST OFF THE EMPLOYEE HANDBOOK

Do you remember the last time you read your employee handbook cover to cover? And when was the last time you updated it? Laws are repealed, refined and implemented constantly and each state has a different set of rules. The first thing examined when a crisis arises is the employer’s policies. Therefore, it is critical for employers to review and update their handbooks at least annually. A detailed review is especially important in 2014 given the Supreme Court’s rulings on the Defense of Marriage Act and the Affordable Care Act, Maryland’s new handbook requirements relating to the rights of pregnant workers, the lessons learned from the government shut down, and so much more.

### 2. CLEAN-UP YOUR CONTRACTS

As your business size or environment changes, so should your evaluation of the company’s contractual relationships to its employees. When an employee you promoted last year goes to work for a competitor, you want to be confident the company is protected against unfair competition and the release of proprietary information.

The first step is to review contracts already in place with employees and determine whether they are legally enforceable. This is especially important if you have non-compete or confidentiality agreements with employees or if you operate in multiple states. A review will provide confidence that your agreements are enforceable in each state in which you operate.

The second step is to evaluate whether the nature or size of the company or its relationship with certain employees has changed such that you now need agreements not previously necessary. You should consider whether employees with access to proprietary information or with the potential to help a competitor gain an unfair advantage should be required to sign a non-compete or confidentiality agreement as a condition of employment in order to protect your business interests.

### 3. THE EMPLOYEE MORALE CHECK-UP

With so little time, we often band-aid the bad stuff and forget to devote attention to those employees who contribute to your success. Incentivizing employees and improving their morale can be an invaluable asset to the growth of a business. PilieroMazza has assisted employers in structuring incentive plans ranging from innovative compensation schemes to simple reward programs to encourage employees and reinforce their commitment to the company. Take time out this year to examine the various ways incentivizing your workforce will help propel your business into an even more profitable year.

### 4. EVALUATE YOUR TRAINING PROGRAMS

Well trained employees, especially management employees, drastically reduce the chance your business will be unable to effectively defend against a claim or lawsuit brought by a disgruntled employee. In fact, good management decisions will prevent such claims from arising in the first place and often greatly assist with improved employee morale and retention. Take some time this year to evaluate the effectiveness of your training programs. If you do not have training programs, think about the types of training that will be most beneficial to your team and that will also help protect the company from liability.

### 5. REVIEW YOUR HIRING AND FIRING POLICIES

Often employers fail to think in advance about how they will implement a sudden reduction in force, temporary layoff, or rehire. The government shut down was a good example of this for many employers. Given the new rules that mandate the hiring of predecessor employees on service contracts, and the EEOC’s focus on the disparate impact of layoffs on

*Continued on page 4*

## RESOLVED EMPLOYER IN 2014 . . . .

*Continued from page 3*

protected classes of employees, employers simply cannot afford to go without established reliable and fair hiring and termination policies.

Although sticking to these resolutions might seem like a tall order, they are necessary to protect your business in 2014 and into the future, so do not let them fall by the wayside. Invest the time to address these issues in 2014 and you will see the benefits. Let us know if you would like our assistance with your resolutions and in developing an HR improvement plan that fits with your goals in 2014. ☐

**About the Author:** Nichole DeVries, an associate with PilieroMazza, primarily practices in the areas of labor and employment law and general litigation. Ms. DeVries counsels clients in a broad range of employment matters including compliance with Title VII, ADA, ADEA, FLSA, FMLA, SCA, and EEOC. She may be reached at [ndevries@pilieromazza.com](mailto:ndevries@pilieromazza.com).

## *Women-Owned Businesses*

### 2014: YEAR OF THE WOSB?

By Megan C. Connor

If current developments are any indication, 2014 very well may be a banner year for the SBA's Woman-Owned Small Business (WOSB) Program. Recent surveys show the WOSB Program is trending up. WOSBs accounted for 4% of all small business federal contracts in fiscal year 2012, up from 3.5% in fiscal year 2009. WOSBs won \$16.2 billion in federal contracts in fiscal year 2012, up from \$15.7 billion in 2009, despite a 6% overall downturn in federal spending. In fact, WOSBs accounted for 4.8% of all eligible federal contracts through the first month of fiscal year 2014. This growth no doubt will be further stimulated by the May 2013 removal of the dollar limitations for competitive contracts set-aside under the WOSB Program.

All of these expansions guarantee two consequences for participants in the WOSB Program: more competition and more scrutiny. In some ways, the WOSB Program remains untested. In the first few years of the WOSB and Economically Disadvantaged Women-Owned Small Business (EDWOSB) set-aside programs, the dollar caps on set-aside contracts limited the use of these vehicles. However, now that the limits on the maximum value of WOSB and EDWOSB set-aside contracts have been lifted, these programs surely will grow. With very few decisions from SBA's Office of Hearings and Appeals concerning WOSBs and EDWOSBs, there is little guidance on how SBA interprets the regulations applicable to these

businesses. Therefore, all WOSBs and EDWOSBs intending to pursue WOSB/EDWOSB set-asides in 2014 should make sure they are in full compliance with the WOSB/EDWOSB regulations—particularly in light of the newly implemented “presumed loss” rule, which presumes a loss to the Government for a size or status misrepresentation equal to the total amount expended on a contract obtained by misrepresentation. Below are some of the regulatory requirements for WOSBs and EDWOSBs to consider when pursuing these set-asides.

The two most basic requirements for WOSBs and EDWOSBs are that a woman must be the majority owner of the firm and a woman must control the business. Regarding ownership, at least 51% of the firm must be owned by a woman or several women. The woman's ownership must be unconditional, meaning there are no restrictions on her ownership. And her ownership must be direct, and not through another entity like a holding company or employee stock ownership plan (although a revocable trust is acceptable).

As far as control of the firm, the management and daily business operations must be controlled by one or more women. The women who control the daily operations of the company do not necessarily have to be the same women who own at least 51% of the firm.

Control means long-term decision making and day-to-day management and administration of the business operations. In other words, a woman may not be a figurehead—she must be running the daily business and make important decisions guiding the firm's future. A woman must hold the highest officer position in the company, whatever the title of that position is. The company should be her focus (full-time, normal working hours), not a side project. And the woman (or women) must have managerial experience of the extent and complexity needed to run the business.

While “ownership” and “control” seem obvious, the nuances in how these terms are applied are where firms falter. While a woman does not need the technical expertise or the required license to control the company, she must have the ultimate managerial and supervisory control over those who have the

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technical expertise and licenses. However, if a man possesses the required license and has an equity interest in the business, he may be found to control the company—particularly if this man is the woman’s spouse. A woman managing a WOSB or EDWOSB should make sure her resume reflects the industry of her company.

Commonly, firms are tripped up by their own corporate documents, without realizing that these operating agreements and bylaws give negative control over the company to men. For instance, a standard operating agreement pulled off the internet may require each member of a limited liability company to sign a contract in order to bind the company. Or there could be a provision requiring

the signature of each member for withdrawals and transfers from the company bank account. While these types of provisions make perfect sense in the commercial world and, frankly, for businesses pursuing full and open federal contracts, they also allow a minority member to exert “negative control” over the company. If the SBA finds such negative control, it will determine that the company does not qualify as a WOSB or EDWOSB because a woman is not controlling the business.

Besides issues of ownership and control, firms certifying as to their WOSB or EDWOSB status must also ensure that all their corporate documents on file with the SBA are kept up-to-date. There are two ways a firm may certify its status as a

WOSB or EDWOSB. Either the firm may make a “modified” self-certification or the firm may obtain certification from an SBA-approved Third Party Certifier. In both cases, firms pursuing WOSB and EDWOSB set-aside contracts are required to upload their eligibility documentation to the WOSB Program Repository. Any updates or amendments to eligibility documentation must be uploaded to the Repository. For example, if a self-certifying firm amends its bylaws, the amended bylaws must be uploaded to the Repository. Before a firm submits an offer on any WOSB/EDWOSB set-aside contract, it should make sure its Repository documents are up-to-date because the contracting officer on the WOSB/EDWOSB procurement will verify

all required documents are uploaded. If the apparent successful offeror fails to submit any required documents, the contracting officer cannot award a WOSB/EDWOSB contract to that firm. Failure to upload the required documents to the Repository in a timely manner can also cause you to lose a post-award protest regarding your WOSB/EDWOSB eligibility.

A contracting officer may accept a firm’s certification as a WOSB/EDWOSB if the firm has provided all the required documents to the Repository and there has been no protest or “other credible information” that calls into question the firm’s eligibility. However, when a contracting officer has information that calls into question the firm’s eligibility or the firm fails to provide all the required documents, the contracting officer must refer the firm to the SBA for an eligibility examination. Alternatively, unsuccessful offerors may protest the status of the apparent successful offeror as a WOSB/EDWOSB. We are starting to see some WOSB/EDWOSB protests and expect this will increase in 2014.

With the lifting of the dollar caps on WOSB and EDWOSB set-asides, attention will turn to the WOSB Programs. Plus, lawmakers are considering the possibility for WOSB sole-source awards and the SBA may debut the WOSB mentor-protégé program in 2014. These are major and necessary developments for the WOSB Programs. However, these exciting changes also promise pressure for all participants, who should ensure they are prepared for status challenges—from both competitors and the SBA. □

**About the Author:** Megan Connor, an associate with PilieroMazza, focuses her practice in the areas of government contracts, small business administration programs, business and corporate law, and litigation. Ms. Connor represents clients in bid protests to the U.S. Government Accountability Office as well as general commercial matters in state and federal courts. She may be reached at [mconnor@pilieromazza.com](mailto:mconnor@pilieromazza.com).

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The Legal Advisor newsletter is published by PilieroMazza PLLC, a law firm that provides legal services to commercial businesses, federal contractors, trade associations, Indian tribes, Alaska Native Corporations, and other entities. If you have any comments or suggestions for future articles, please contact our editor, Jon Williams, at [jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com).

## *PilieroMazza Seminars*

### **MACS FINAL RULE ON SET-ASIDES AND UPDATES ON SBA REGULATIONS**

**JANUARY 31, 2014 | 7:45-11:00 A.M.**

In October, SBA issued its final rule on the use of set-asides on multiple award contracts and clarified the regulations on bundling and contract consolidation. The new rule will give procuring agencies more authority to utilize set-asides on MACs, provides clarity on the procedures, and may prove to be an additional tool for small businesses.

This seminar will discuss the new rules and provide an update on other recent regulations affecting government contractors. Topics covered will include

- Final rules for MACs, GWACs, FSS Schedules
- Presumed Loss Rule
- Limitations on subcontracting and performance of work requirements
- NDAA and Small Business Jobs Act update from SBA

#### **SPEAKERS:**

Dean Koppel, Assistant Director for Policy and Research,  
U.S. Small Business Administration  
Hope Lane, Partner, Government Contract Services  
Group, Aronson LLC  
Cy Alba, Partner, Government Contracts Group,  
PilieroMazza  
Katie Flood, Associate, Government Contracts Group,  
PilieroMazza

**MODERATOR:** Pam Mazza, Partner, PilieroMazza

**DATE:** January 31, 2014

**TIME:** 7:45 - 8:30 for networking and breakfast  
8:30 - 11:00 a.m. for the program

**LOCATION:** The Tower Club  
8000 Tower Crescent Drive, Suite 1700  
Vienna, VA 22182

**REGISTRATION FEE:** \$50.00

Visit the PM Events page at [www.pilieromazza.com](http://www.pilieromazza.com) to register.

This is a PilieroMazza and Aronson LLC Joint Seminar.