

# LEGAL ADVISOR

*A PilieroMazza Update for Federal Contractors and Commercial Businesses*

## *Small Business*

### **MORE SMALL BUSINESS SUBCONTRACTING PLAN CHANGES: SBA PROPOSES TO ALLOW SUBCONTRACTING PLAN CREDIT FOR SMALL BUSINESS SUBCONTRACTORS AT ANY TIER**

By Katie Flood

Following recent proposed changes to the FAR's small business subcontracting plan requirements, on October 6, 2015, SBA issued its own Proposed Rule, which will allow prime contractors to take subcontracting plan credit for small business subcontractors performing at any tier. The Proposed Rule implements directives passed by Congress in the National Defense Authorization Act for Fiscal Year 2014.

Under the current regulations, prime contractors are only allowed to take small or socioeconomic goaling credit for those subcontractors performing at the first tier level. The proposed changes will allow prime contractors with individual (i.e., contract specific plans) subcontracting plans to receive credit towards their small business subcontracting goals for subcontract awards made to small businesses at any tier. As a result, the lower tier subcontracting performance will need to be incorporated into the prime contractor's goals. The Proposed Rule will not change the status quo for contractors that hold commercial plans or a comprehensive (master) subcontracting plan – these contractors will still only be allowed to take goaling credit for awards made at the first tier.

Under the Proposed Rule, lower tier subcontractors (except small business concerns) will still be expected to implement their own subcontracting plans when the subcontracting threshold amounts are met (those subcontractors who receive subcontracts in excess of \$1.5 million in the case of a subcontract for the construction of any public facility, or in excess of \$650,000 in the case of all other subcontracts). Additionally, SBA has clarified that subcontracting dollars are only to be reported once for the same award to avoid double and triple counting the dollars, notwithstanding the

fact that a small business subcontract may be reported under more than one subcontracting plan. The Proposed Rule does not clarify how this will be accomplished or monitored.

In addition, where a prime contractor or subcontractor is required to have an individual subcontracting plan, the Proposed Rule will formalize their duties to actively monitor those plans. The prime contractor or the subcontractor will be required to review and approve subcontracting plans submitted by their subcontractors, monitor their subcontractors' compliance with the subcontracting plans, ensure that reports are submitted by their subcontractors, acknowledge receipt of subcontractors' reports, monitor subcontractor performance, and discuss subcontractor performance with subcontractors where necessary

In this vein, the Proposed Rule also requires that a subcontracting plan must contain a recitation of the types of records the prime contractor will maintain to demonstrate the procedures which have been adopted to ensure that subcontractors at all tiers comply with the requirements and goals in their respective subcontracting plans, including the establishment of source lists to identify small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, and efforts to identify and award subcontracts to such concerns.

The Proposed Rule will also amend the size regulations to allow prime contractors to accept a subcontractor's electronic self-certification as to size, if the solicitation

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for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size representations and certifications are accurate and complete. SAM certifications will count as a form of electronic submission.

Finally, and perhaps the most problematic aspect of the Proposed Rule, prime contractors will be required to issue a NAICS code and corresponding size standard for subcontract “solicitations,” a requirement that may prove to be a practical hindrance. In its current form, the Proposed Rule says that “[t]he contractor must assign to the solicitation and the resulting subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract.” (Emphasis added.) Of course, in practice, most subcontracts are not issued pursuant to a “solicitation,” but result from informal partnerships or teaming arrangements. It is unclear whether the Proposed Rule will require prime contractors to issue solicitations for all subcontract opportunities, simply so a NAICS code may be assigned to it.

Comments on the Proposed Rule are due on December 7, 2015. While many of the proposed changes make sense, clarification is needed regarding how prime contractors should monitor reporting of subcontracting dollars and how the NAICS code solicitation requirement will practically work. If you have any questions regarding the Proposed Rule or would like to submit comments, please do not hesitate to contact us. ☐

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