

# Current Legal and Financial Trends in Government Contracting



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# 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

# 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

# GSA Schedule Contracts: By the Numbers

- 19,000+ contracts in 2012
- 10% of federal procurement dollars go to GSA Schedule contracts -- \$50 billion
- 80% of GSA Schedule contract holders are small businesses. . . But only 36% of contract sales go to small businesses

# GSA Schedule Contracts: SBA Proposed Rule

- SBA trying to increase small business awards under GSA Schedule
- Every order must contain a NAICS code & size standard
- COs must document why not setting aside orders for small businesses
- Likely to become final this year

# 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**

# LPTA: Protests, Uphill Battles?

- **Pre-award protests**

- Difficult to win given discretion afforded to procurement officials to determine agency needs
- One potential protest basis is where the solicitation language is inconsistent in how the agency will perform the evaluation, e.g., where LPTA solicitation includes best value language

- **Post-award protests**

- Could challenge cost analyses and/or technical evaluations
- Best case would be protest by offeror with lowest price and technically unacceptable rating

# Reporting Executive Compensation (FAR 52.204-10)

- Contractors must report the names and total compensation of the five most highly compensated executives of the contractor and first-tier subcontractor for prior fiscal year
- Reported as part of annual registration requirement in SAM for contractor and after contract award for first-tier subcontractors
- “Executive” means officers, managing partners and any other employees with management responsibility over the company

# Reporting Executive Compensation— When Does It Apply?

- All contracts with a value of \$25,000 or more
- Does not apply to contractors and subcontractors who had gross income in the previous tax year under \$300,000
- Only report if all the following apply:
  - 80% or more of annual gross revenues in prior fiscal year from federal contracts and subcontracts
  - Received \$25 million or more in annual gross revenues from federal contracts and subcontracts
  - Public does not have access to information about the compensation of the executives through periodic reports public companies must file

# Non-Displacement of Qualified Workers

- Right of First Refusal to Predecessor Contractor's E/ee Required where Successor Contracts:
  - Same or similar services
  - Same location
  - Does it apply to me?
    - Does the SCA apply? If yes, then yes
    - Solicitation on or after January 18, 2013
    - FAR Clause – Christian Doctrine applies
  - Obligations
    - Predecessor = List of Employees
    - Right of first refusal
      - GOOD FAITH

# Non-Displacement of Qualified Workers

- **Exclusions**
  - Non-service employees
  - Not covered
  - Retained by predecessor
  - Successor employees that have worked for successor for less than 3 months
  - Reduced number of positions
  - Not the same job
  - Not the same terms of employment
    - **WATCH OUT** – for SCA requirements and Unions
  - Employee has refused offer

# Non-Displacement of Qualified Workers

- **Records**
  - Paper or electronic
  - Copies of written offers
  - Retain for 3 years
- **Avoidance Strategies that Won't Work**
  - Making an offer and then firing the employee after commencement ...
  - I ♥ DOL

# Consultants and Contingent Fees

- Consultants frequently perform a variety of legitimate services for government contractors
- However, in an increasingly competitive marketplace, temptation may exist to turn to consultants for help with obtaining contracts
- While not all assistance is prohibited, payment of a fee contingent on the receipt of a federal contract is expressly forbidden (with limited exceptions)

# Covenant Against Contingent Fees

- Covenant to be included in every contract awarded using procedures other than sealed bidding
- With exception of bona fide employees or bona fide commercial entities hired to secure business, contractors may not pay contingent fees
- A violation may result in:
  - Proposal rejection (pre-award)
  - Contract cancellation (post-award)
  - Suspension and/or debarment
  - Referral to the Department of Justice for further investigation

# Affordable Care Act

- Applies to employers with 50+ FTEs & Dependents
- TO DO: Qualitative Analysis of Benefits
  - Plan offered to F/T employees and children up to 26th birthday (who is excluded?)
  - Premium co-share of employee-only coverage not greater than 9.5% of household income (huh?) (w-2 (box1) income, rate of pay, FPL for single individual, safe harbors)
  - Non-Discrimination

# Affordable Care Act

- **Penalties:**
  - No Coverage-\$2,000 per year per number of F/T employee (less first 30 F/T employees)
  - Coverage, but does not meet standards
    - \$3,000 per year per F/T employee receiving subsidiary from Exchange; or
    - \$2,000 per year per number of F/T employee (less first 30 F/T employees)

# Affordable Care Act

- Long Term Strategic Planning
  - Recruiting Impact
  - Retention Impact
  - If not health benefits, then what?
  - Does it matter? Today v. Tomorrow
  - Costs
  - G & A
  - Competitive Bids



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