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Update on Small Business Issues Affecting Federal Contractors

Breakfast Seminar

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Update on Small Business Issues Affecting Federal Contractors

What we will cover:

- Joint Ventures Across Set-Aside Programs
- Affiliation Issues
- Rule of Two
- Service-Disabled-Veteran-Owned Small Business Concerns
- *Rothe* decision and DOD/SBA reaction
- Changes under the New Administration
  - The President's Executive Orders: Labor Issues
  - Taking DOD Work In-House

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OVERVIEW

- Several key decisions issued by the Government Accountability Office (GAO), the Small Business Administration Office of Hearings and Appeals (SBA) and the U.S. Court of Appeals for the Federal Circuit may influence the way small businesses do business.

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Joint Ventures Across Set-Aside Programs

- *White Hawk/Todd, a Joint Venture* (SBA)
  - **Neither Area Offices nor OHA may approve or review mentor protégé eligibility issues.**
  - **Only SBA's Director, Office of Business Development may review a firm's compliance with the SBA's mentor-protégé regulations.**

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Joint Ventures Across Set-Aside Programs (Cont.)

- *SES-TECH Global Solutions* (SBA)
  - **A joint venture for a small business contract is governed only by SBA's small business affiliation regulations.**
    - SBA may not review a joint venture agreement under the 8(a) regulations unless the procurement at issue is an 8(a) set-aside.
  - **SBA may not use the ostensible subcontractor rule to review a mentor/protégé joint venture because the existence of a joint venture is given.**

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Joint Ventures Across Set-Aside Programs (Cont.)

- *International Program Group, Inc.* (GAO)
  - Contracting agencies, before proceeding with a Service Disabled Veteran-Owned Small Business Set-Aside, must first reasonably consider whether the conditions for a HUBZone set-aside exist.
    - If they do, the agency must proceed with a HUBZone set-aside.

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Letters of Intent: Potential for Affiliation

- *WRS Infrastructure and Environment, Inc.* (SBA)
  - Affiliation may be found based on a non-legally-binding letter of intent to purchase all capital stock. In this case:
    - Letter of intent simply allowed negotiations between the parties.
    - Letter of intent did not provide either firm with the ability to control the other.
  - Letter constitutes an "agreement in principle" between the parties, and therefore must be given present effect.

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Rule of Two (FAR §19.502-2(b))

- *Delex* (GAO)
  - The Rule of Two applies to competitions for task and delivery orders issued under multiple-award contracts.
  - As such, the government must limit the competition for these delivery orders to small businesses if it concludes that:
    - It has a reasonable expectation of receiving offers from at least two responsible small business concerns, and
    - The award can be made at a fair market price.

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Ostensible Contractor Rule

- *TCE Incorporated* (SBA)
  - Responsibility determinations as to a firm's capacity to perform the contract are beyond the jurisdiction of the size determination process, and should be left to the contracting officer.
  - "To place too much emphasis on the challenged firm's prior experience in making an ostensible subcontractor determination runs the risk of closing the door on new small firms entirely."

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Service-Disabled-Veteran-Owned Small Business Concerns

- *IITS-Nabholz* (SBA)
  - **In order to qualify as an eligible SDVO SBC:**
    - **Veteran must "directly own" the concern.**
    - **Veteran must control the management and day-to-day operations of the concern.**
      - **SBA will consider:**
        - Nature of work ("The inherent nature of construction mandates onsite supervision and direction.")
        - Proximity of veteran to proposed work
        - Operating agreement of the applicant firm

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Rothe Development Corp. v. Department of Defense (Fed. Cir. 2008)

- Section 1207 (10 U.S.C. 2323 (2006))
  - DOD must award 5% of contracts for each fiscal year to SDBs.
  - DOD shall give assistance to SDBs.
  - DOD may make advance payments to SBDs.
  - DOD may award contracts to SBDs at prices up to 10% above fair market costs.
  - Presumes that certain minority groups are "socially disadvantaged" for purposes of obtaining SBD status.

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Rothe Development Corp. v. Department of Defense (Fed. Cir. 2008)

- November 4, 2008: Federal Circuit held that preferences given to small disadvantaged businesses by DOD under Section 1207 are unconstitutional as a race-based violation of the right to equal protection.
  - Rationale: insufficient statistical evidence of discrimination.
- Remanded to the District Court for the Western District of Texas to enjoin application of Section 1207.

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Rothe Development Corp.
(W.D.Tex. 2009)

- **February 26, 2009: District Court issued a broad injunction**
  - **Effectively eliminates Section 1207 and all of the preferences it establishes for SBDs (including 8(a) firms).**
  - **Full ramifications of ruling: uncertain.**

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DOD/SBA Reaction to *Rothe* Decision

- March 10, 2009 DOD memorandum: explained that contracts relying "exclusively" on the authority of the Section 1207 program must cease.
  - Memorandum was published after negotiation with SBA.
  - Memorandum clarified that set asides under the Small Business Act, including 8(a) and HUBZone set asides, remain valid.
  - In other words, procurement programs relying on separate legal authority (such as the 8(a) regulations) are not affected by *Rothe*.

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Overview of Changes Under the New Administration

- The President's Executive Orders: Labor Issues
  - Executive Order 13494—Economy in Government Contracting
  - Executive Order 13495—Nondisplacement of Qualified Workers Under Service Contracts
  - Executive Order 13496—Notification of Employee Rights Under Federal Labor Laws

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Overview of Changes Under the New Administration (Cont.)

- **Executive Order 13494—Economy in Government Contracting**
  - Forbids reimbursement of any union-organizing expenses by federal contractors
    - "Union-organizing expenses" include:
      - Preparing and distributing materials
      - Hiring or consulting legal counsel or consultants
      - Holding meetings
      - Planning or conducting activities by managers, supervisors, or union representatives during work hours.
  - Does not prohibit federal contractors from engaging in the activities in question
  - Contractors must ensure that they account for the funds used for any union organizing expenses separate from costs billed to the government

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Overview of Changes Under the New Administration (Cont.)

- **Executive Order 13495—Nondisplacement of Qualified Workers Under Service Contracts**
  - **Requires federal contractors (as well as their subcontractors) in certain circumstances, to offer jobs to the qualified employees of the predecessor contract when a service contract expires and a follow-on contract is awarded for the same service and at the same location.**
    - **Exception: A successor contractor may offer continued employment to its own workers if:**
      - **they have been in its employment for the previous three months and**
      - **would otherwise be laid off.**

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Overview of Changes Under the New Administration (Cont.)

Executive Order 13495 (cont)

- **Service contractors:**
  - Must carefully study the incumbent workforce to offer them employment.
  - Must make extra efforts to propose non-employee related discriminating factors to make proposals more competitive.
  - Must be prepared to defend employment decisions that could be challenged by incumbent employees who are not hired by a follow-on contractor.
- Penalties for noncompliance include:
  - Back pay
  - Willful violations: 3 year debarment from new federal contract awards.

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Overview of Changes Under the New Administration (Cont.)

- Executive Order 13496—Notification of Employee Rights Under Federal Labor Laws)
  - Requires federal contractors to post a notice informing employees of their rights under federal labor laws
  - Applicable to all federal contracts for goods and services exceeding the $100,000 simplified acquisition threshold
  - Repeals an order issued by the Bush Administration which required contractors to post a notice advising employees of their right to withhold certain dues payments from unions

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Overview of Changes Under the New Administration (Cont.)

- Taking DOD Work In-House
  - Contractors being phased out

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QUESTIONS?

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