PILIERO MAZZA PLLC
ATTORNEYS AT LAW

MEMORANDUM

To: Clients and Friends

From: Pamela J. Mazza
Antonio R. Franco
Devon E. Hewitt
Jonathan T. Williams

Date: September 28, 2010

Re: Small Business Jobs and Credit Act of 2010 (H.R. 5297)

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I. Introduction

Yesterday afternoon, President Barack Obama signed the Small Business Jobs and Credit Act of 2010 (H.R. 5297) ("the Act") which Congress had sent to his desk late last week. The Act includes a number of financial benefits for small businesses including tax cuts and provisions to create greater access to credit and capital. Additionally, the Act makes several changes to the laws governing small business procurement programs, which will be the focus of this memorandum. The Act's most important measures include: returning parity to the various small business contracting programs; giving SBA authority to create mentor-protégé programs similar to the 8(a) mentor-protégé program for women-owned small businesses (WOSBs), HUBZone concerns and service-disabled veteran owned small businesses (SDVOSBs); establishing new procedures for updating size standards; requiring regulations to clarify that small business set-asides are permissible on multiple-award task order contracts ("MATOCs"); creating penalties for prime contractors who unjustly fail to pay their subcontractors and requiring contracting officers to publicly report the contractors; and repealing the Small Business Competitiveness Demonstration Program.

II. Restoring Parity

By changing "shall" to "may" in the HUBZone statute, the Act restores parity to all the small business programs. The change was necessary because in recent years, several federal courts and the Government Accountability Office ("GAO") have interpreted the HUBZone statute as giving that program priority over all other small business programs. See, e.g., Contract Management, Inc. v. Rumsfeld, 434 F.3d 1145 (9th Cir. 2006); Mission Critical Solutions v.

United States, 91 Fed. Cl. 386 (2010); Mission Critical Solutions B-401057 (May 4, 2009). According to this interpretation, the HUBZone statute requires a contracting officer to set-aside a procurement for HUBZone restricted competition any time the contracting officer reasonably expects to receive at least two offers from HUBZone qualified firms in response to the solicitation. However, the interpretation is at odds with long-standing Small Business Administration ("SBA") policy and the Administration's position that the programs are in parity. The conflict created chaos. Therefore, stakeholders in these programs lobbied for a change in the law to restore parity among the programs. The Act amends the statute to place the HUBZone program back on par with all other programs and returns discretion to the contracting officer as to whether to set-aside a procurement for a particular program.

III. New Mentor-Protégé Programs

The Act also allows SBA to create mentor-protégé programs for SDVOSBs, WOSBs and HUBZone concerns modeled after the 8(a) mentor-protégé program. The Act does not require SBA to establish the programs and SBA will have flexibility as to content and timing. The 8(a) mentor-protégé program is unique in that it allows an exemption from affiliation under many circumstances and allows 8(a) firms and their large business mentors to joint venture on 8(a) and small business set-asides. Although many agencies have mentor-protégé programs, they do not all share these characteristics. Under this new authority, SBA can create mentor-protégé programs for three new groups and provide those groups with benefits similar to those enjoyed by 8(a) mentor-protégé program participants. Should SBA move forward with these programs, it will develop proposed regulations defining the requirements for each new program. PilieroMazza will likely submit comments on any proposed rulemaking for the new programs and we will seek client input on our comments.

Additionally, with regard to mentor-protégé programs, the Act orders the GAO to conduct a government-wide study of all mentor-protégé programs in all agencies to determine whether the mentor-protégé relationships are effectively supporting the goal of increased small business participation in federal contracting. The GAO is required to evaluate: 1) how each federal agency is carrying out its mentor-protégé program; 2) whether there are systems in place to ensure that the protégés truly gain from the program and that it is not merely a mechanism for large businesses to participate in small business set-aside contracts; and 3) the degree to which protégé businesses are able to compete for federal contracts without the assistance of a mentor.

IV. Updating Size Standards

New procedures for evaluating and updating the North American Industry Classification System ("NAICS") code size standards are also included in the Act. The Act requires SBA to conduct a rolling review of at least one-third of all NAICS code size standards every 18 months. Furthermore, each size standard must be evaluated at least every five years. After completing its review, the SBA must make appropriate adjustments to the size standards to reflect market conditions. SBA also must produce a report to the House and Senate Small Business Committees outlining the factors evaluated and the criteria relied upon in deciding whether to make any revisions. This report must be made publicly available.

V. MATOC Set-Asides

In 2008, the GAO issued the Delex decision essentially confirming that the rule of two is applicable to multiple award contracts where large and small businesses are contract holders. Delex Systems, Inc., B-400403 (Oct. 8, 2008). The decision has been very controversial and some writers have suggested that it runs afoul of several small business statutes including those requiring fair opportunity to compete for federal contracts. This Act essentially endorses the Delex ruling and requires the Office of Federal Procurement Policy and the General Services Administration to provide regulatory guidance that the agencies have discretion to set aside part or parts of multiple award contracts or reserve contract awards under full and open competition for small businesses, including set-asides for 8(a), HUBZone, and SDVOSB concerns, notwithstanding the fair opportunity requirements. These regulations are to be promulgated within one year.

VI. Subcontractor Pay

The Act creates penalties for prime contractors who pay their small business subcontractors late or less than the agreed to price. The new law applies to any prime contracts for which subcontracting plans are required. Specifically, a prime contractor must notify the contracting officer if it pays a reduced price to the subcontractor upon completion of the subcontractor's work or if payment to the subcontractor is more than 90 days past due. Prime contractors must justify any late or reduced payments. Lack of justification will count against contractors' performance.

The Act also requires the Federal Acquisition Regulatory Council to promulgate regulations under which the contracting officer must record the identities of prime contractors with a history of unjustified, untimely payments and list them in the Federal Awardee Performance and Integrity Information System ("FAPIIS").

VII. Conclusion

The Act contains several provisions which could benefit the small business contracting community. However, the details have been left to the agencies and it remains to be seen what the proposed rules will hold. We will monitor the progress and keep you informed.

If you have any questions or would like to discuss any of these provisions, please give us a call.