



REGULATORY CHANGES AFFECTING SMALL BUSINESS

NOVEMBER 30, 2011





REGULATORY CHANGES AFFECTING SMALL BUSINESS

- Mercedes Enrique
 - President & CEO,
Custom Mechanical Systems Corporation
- John Klein
 - Director of Government Contracting
Small Business Administration
- Dean Koppel
 - Assistant Director for Policy and Research
Small Business Administration
- Pamela Mazza
 - Partner
PilierioMazza PLLC



Overview

- SBA Proposed Rule – Small Business Size and Integrity
- SBA Proposed Rule - Small Business Subcontracting
- Multiple Award Contracts – Final Rule
- Update on Size Standards
- SDVOSB / CVE Update



Small Business Size & Integrity

- SBA Proposed Rule issued Friday, October 7, 2011, comments are due by December 8, 2011.
- Regulations were required by the Small Business Jobs Act of 2010, which established a statutory presumption of loss equal to the value of the contract when a concern willfully seeks and receives an award by misrepresentation.



Small Business Size & Integrity

- Penalty:
 - Value of contract performed
- Additional Penalties:
 - Suspension or debarment
 - False Claims Act civil penalties
- Applies to all programs—misrepresentation as to size and status as:
 - HUBZone
 - SDVOSB
 - 8(a)
 - WOSB
 - SDB
 - SBC



Small Business Size & Integrity

- Certain actions are deemed affirmative, willful and intentional certifications
 - Submission of a bid or proposal or registration on any federal data base for the purpose of being considered for:
 - Federal Grants
 - Contracts
 - Subcontracts
 - Cooperative Agreements
 - Research & Development Agreements
 - “reserved, set-aside, or otherwise classified as intended for small business” or
 - “which in any way encourages a federal agency to classify the bid or proposal, if awarded, as an award to a small business



Small Business Size & Integrity

- Limitation of Liability for:
 - Unintentional errors or
 - Technical malfunction
- Mitigating factors may include:
 - Firm's internal management procedures
 - Efforts made to timely correct the erroneous certification



Small Business Subcontracting

- Regulations required to implement provisions of the Small Business Jobs Act of 2010
- SBA issued proposed rule October 5, 2011
- Comments due December 5, 2011
- Amends regulations to provide for a “covered contract”
 - A contract for which a small business subcontracting plan is required
 - Currently valued above \$1.5 million for construction and \$650,000 for all other contracts



Small Business Subcontracting

- Prime contractor must notify the CO when the Prime:
 - Fails to utilize a proposed subcontractor during contract performance
 - Reduces payments to a subcontractor or is > 90 days late
- Prime cannot prohibit subcontractor from discussing payment or utilization concerns with the government.
- Prime must assign individual NAICS codes to their subcontracts and submit timely reports online at www.esrs.gov.
- CO may require a subcontracting plan if a firm's size status changes to other than small on contracts with durations of > 5 years.



Small Business Subcontracting

- **Contracting Officer Responsibilities:**
 - CO will be responsible for monitoring compliance of the subcontracting plan
 - Ensuring that contractors submit their subcontracting reports within 30 days after report ending date
 - Reviewing all reports within 60 days
 - Evaluating whether prime contractor has made a good faith effort to comply
 - Evaluating whether prime contractor has a history of untimely or reduced payments and, if so, record such in the Federal Awardee Performance and Integrity Information System (FAPIIS)



Small Business Subcontracting

- Subcontracting Consideration in Source Selection
 - Factors may include:
 - Subcontracting to be performed on the specific requirement;
 - The goals negotiated in previous subcontracting plans; and
 - The prime contractor's past performance in meeting those goals.



Multiple Award Contracts – Final Rule

- Amend Section 1331 which provides guidance under which Federal agencies may:
 - Set aside part of parts of a multiple-award contract for small business concerns;
 - Set aside orders placed against multiple-award contracts for small business concerns; and
 - Reserve one or more contract awards for small business concerns under full and open multiple-award procurements.



SDVOSB / CVE Update

- 2 Difference Programs
 1. VETS First – Set-asides for veterans and service-disabled veterans – By Department of Veterans Affairs
 2. Agency Wide SDVOSB Program
 - Self certification
 - Eligibility protests – file with SBA

SDVOSB / CVE Update

- To participate the VOSB / SDVOSB must have a CVE Certification from VA

The regulation, 38 CFR 74, states that CVE has 60 days, when practicable, to make a final decision associated with the request for reconsideration. As of October 18, 2011, the number of requests for reconsideration is approaching 900; it is no longer practicable to process these within 60 days. Historically, 20% of companies receiving an initial denial requested reconsideration of that decision. Today, over 60% of companies receiving a denial are requesting reconsideration. We did not anticipate and lacked the resources currently to handle this extraordinary volume of activity. We are shifting and adding resources to speed up the process. In order to be fair to all applicants, we continue to process all requests for reconsideration on a first come, first served basis.

Sincerely,

The Request for Reconsideration Team

SDVOSB / CVE Update

- The priority created by the VETS First Act requires the VA to do marked research prior to utilizing any other set-aside program.
- Courts and GAO have held that this priority takes precedence over
 - FSS Scheduled Buys (Aldvera, B-405271, B-405524, Oct. 2011)
 - Brooks-Act Procurements (Powerhouse Design Architects & Engineers, Ltd., B-403175, Oct. 2010)
 - Ability One (Angelica, 95 Fed. Cl. 208, Oct. 2010)

Small Business Jobs Act

- Act ordered GAO to conduct a government wide study of all mentor-protégé programs to determine effectiveness – completed & report issued June 15, 2011



Introduction

Federal Mentor-Protégé Programs, by Year of Program Implementation

- Department of Defense (DOD), 1991
- Environmental Protection Agency (EPA), 1994
- Department of Energy (DOE), 1995
- National Aeronautics and Space Administration (NASA), 1995* (Program revamped in 2008)
- Federal Aviation Administration (FAA), 1996
- Small Business Administration (SBA), 1998
- Department of Homeland Security (DHS), 2003
- Department of the Treasury (Treasury), 2003
- Department of State (DOS), 2005
- United States Agency for International Development (USAID), 2007
- General Services Administration (GSA), 2009
- Department of Health and Human Services (HHS), 2009
- Department of Veteran's Affairs (VA), 2010



SBA View of Agency Mentor-Protégé Programs for Affiliation Purposes

- SBA did not intend the Mentor-Protégé exemption to be triggered by MP programs from other federal agencies. Therefore, SBA clarified that the MP affiliation exception will only apply to firms in MP programs specifically authorized by statute (i.e., the SBA or DOD MP programs) or where SBA has authorized an exception for another federal agency's MP program.



Small Business Jobs Act

- Act allows for SBA to establish Government-wide Mentor-Protégé programs for:
 - HUBZone Companies
 - SDVOSBs
 - WOSBs
- Requires review of Size Standard
 - Sector 54 – finalizing
- SBA status on proposed rule making

REGULATORY CHANGES AFFECTING SMALL BUSINESS

QUESTIONS?

- Mercedes Enrique
 - President & CEO,
Custom Mechanical Systems Corporation
- John Klein
 - Director of Government Contracting
Small Business Administration
- Dean Koppel
 - Assistant Director for Policy and Research
Small Business Administration
- Pamela Mazza
 - Partner
PilieroSMAZZA PLLC

