



## Potential pitfalls for small businesses in hiring incumbent staff

by Alexander O. Levine, associate, Piliello Mazza PLLC

Many small businesses operate under the assumption that it is permissible to hire incumbent personnel *en masse* on a successor contract in order to comply with the legal requirement to provide a right of first refusal of employment to such incumbent personnel.

Indeed, shortly after the executive order first issuing this requirement, the Small Business Administration's Office of Hearings and Appeals (OHA) stated that in light of this new requirement it is "no longer sensible" to consider the hiring of such incumbent personnel as an indicator of size affiliation.

Despite the SBA OHA's statement, however, small businesses must be very careful when hiring such personnel, because recent cases at the office have made it clear that the hiring of incumbent personnel can create size affiliation problems where these personnel are being hired from the small business' proposed subcontractor.

Navigating these potential pitfalls will require small businesses to be mindful of how it proposes to go about hiring such personnel.

### Ostensible subcontractor rule

Under the SBA's ostensible subcontractor rule, size affiliation can be found between a prime contractor and its subcontractor, where the former is unusually reliant on the latter to perform the contract.

In determining unusual reliance, recent cases at the SBA hearing and appeals office have clarified that a small business may be found to be unusually reliant upon its subcontractor where it proposes to hire *en masse* its subcontractor's employees. That is the case notwithstanding the above requirement providing that a successor contractor must offer a right of first

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refusal to the incumbent's non-managerial employees.

### DoverStaffing Inc. legal case

In one typical case, *In the Matter of DoverStaffing, Inc.*, the SBA hearings and appeals office found unusual reliance where the prime contractor proposed to hire both managerial and non-managerial incumbent staff from its subcontractor.

OHA noted that the small business' proposed hiring *en masse* of its incumbent subcontractor's personnel, and its proposed hiring of managerial personnel who were excluded from the right of first refusal requirement, resulted in a finding of affiliation.

Noting that none of the prime contractor's key employees were current employees, OHA found affiliation under the ostensible subcontractor rule based on the prime contractor's unusual reliance on its subcontractor.

As this case and other recent cases demonstrate, the SBA's review of a small business' hiring of a subcontractor's incumbent staff focuses on a number of key factors.

Such factors can include whether the small business concern is a new or inexperienced concern that is relying upon the experience of its subcontractor to perform the contract, whether the incumbent staff being hired are managerial personnel and whether

the hiring of incumbent staff is proposed *en masse* or whether such hiring is done on a more individualized basis.

### Incumbent hiring circumscribed

In short, OHA's broad initial statement on the acceptability of hiring incumbent staff has been narrowly circumscribed in practice. Accordingly, small business concerns must continue proceeding carefully when proposing to perform a requirement by hiring a subcontractor's incumbent.

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## Small vendors included on major Army systems contract

Two small businesses were included in the Army's just-awarded \$4.1 billion contract for communications and transmissions systems.

Globecom Systems Inc. of Hauppauge, NY and Intelligent Decisions Inc. of Ashburn, VA will share in the firm-fixed-price, non-option-eligible, indefinite-delivery/indefinite-quantity multiple vendor award.

There also were 10 large awardees, including Lockheed Martin Corp. and General Dynamics.

The Army said 24 bids were received.