PILIERO MAZZA PLLC
ATTORNEYS AT LAW
888 17TH STREET, NW, 11TH FLOOR
WASHINGTON D.C. 20006
PHONE 202 857-1000
FAX 202 857-0200
WWW.PILIEROMAZZA.COM

GO, TEAM!
CREATING COMPLIANT TEAMING RELATIONSHIPS FOR SMALL BUSINESSES

City Club at Franklin Square
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Antonio R. Franco, Partner
afranco@pilieromazza.com

Isaias "Cy" Alba, IV, Partner
ialba@pilieromazza.com

The GTSI Suspensions

- October 2010: GTSI Corp. suspended by SBA from *all* government contracting
  - Allegations that GTSI, as subcontractor:
    - Performed all or nearly all of the contract work
    - Prepared proposals on behalf of small primes
    - Employees acted as if they were employed by prime
    - And other violations of small business regulations

The GTSI Suspensions

- SBA lifts suspension as part of settlement. GTSI agrees:
  - President, CEO, Senior Vice President, General Counsel resign
  - Other officers suspended
  - Cannot team on small business contracts
  - SBA monitor with unfettered access
  - Implement other ethics, compliance and training programs

The *Morris-Griffin* Case

- Facts:
  - 8(a) graduate & incumbent serves as sub to another 8(a)
  - Graduate performs most of work and supplies most of capital and resources
  - Dispute arises: 8(a) refuses to pay graduate for much of its work
  - Graduate sues in federal court

The *Morris-Griffin* Case

- Court Holding:
  - Subcontractor violated FAR’s subcontracting limits and other regulations
  - Subcontract “illegal” and “conceived in fraud” because of small business regulation violations
  - Subcontract *unenforceable* due to illegality
  - Subcontractor recovers *nothing* for work performed

How to Avoid Teaming Trouble

- Follow the subcontracting limits
  - Best practices to consider
- Avoid ostensible subcontractor affiliation
  - Risk factors and SBA OHA case law

Follow the Subcontracting Limits

- Ordinary subcontracting limits (FAR 52.219-14 and 13 C.F.R. 125.6)
  - Services: 50% of the cost of contract incurred for personnel
  - General construction: 15% of the cost of the contract
  - Specialty trade construction: 25% of the cost of the contract
- Special rules for 8(a), SDVOSB and HUBZone set-asides

Follow the Subcontracting Limits

- Best practices to consider:
  - State in proposal, teaming agreement and subcontract that subcontractor will perform no more than allowable percentage of work
  - Include a mechanism for prime contractor to reduce sub's work share if it appears limits will be violated
- Show the government you are taking the limits seriously

Avoid Ostensible Subcontractor Affiliation

- What is ostensible subcontractor affiliation?
  - SBA finds a prime contractor and its subcontractor affiliated for purposes of the procurement
  - Distinguished from “general” affiliation
    - Occurs when:
      - Subcontractor will perform primary and vital portions of contract, or
      - Prime is unusually reliant upon subcontractor

Avoid Ostensible Subcontractor Affiliation

- Many “indicia” or risk factors for ostensible subcontractor affiliation
- Evaluated by SBA and SBA OHA
- The more risk factors present, and the more severe the risk factors appear to be, the greater the risks of ostensible subcontractor affiliation

Avoid ostensible subcontractor affiliation

- Risk Factor No. 1: Division of Work
  - The larger the subcontractor's share of the work, and the more important that work is, the greater the risk
  - Complying with subcontracting limits does not necessarily mean no ostensible subcontractor affiliation
    - 23% sub work share sufficient in *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011).
- Failure to divide work can be a risk factor

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 2: Incumbency
  - Ostensible subcontractor affiliation more likely if subcontractor was previously the incumbent, but has since been rendered ineligible due to growth or loss of certifications
  - Example: *Size Appeals of CWU, Inc. & U.S. Department of Homeland Security*, SBA No. SIZ-5118 (2010)

Avoid ostensible subcontractor affiliation

- Risk Factor No. 3: Management
  - The greater the subcontractor’s management role, the greater the risks
  - *Size Appeal of TKC Tech Solutions, LLC*, SBA No. SIZ-4783 (2006): using subcontractor’s employee as Project Manager indicative of affiliation
  - *Size Appeal of Sectek, Inc.*, SBA No. SIZ-4558 (2003): reporting to joint committee indicative of affiliation

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 4: Proposal Terminology
  - Pervasive use of “we” “our” and “team” may be indicative of affiliation
  - *Size Appeal of J.W. Mills Management*, SBA No. SIZ-4995 (2008): repeated use of sub’s logo indicative of affiliation
  - OHA: “trying to get away” from this risk factor
  - Easy to control—why take the risk?

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 5: Proposal Preparation
  - If the subcontractor drafts or plays a large role in determining content of the proposal, it is indicative of affiliation
  - *Size Appeal of Eperience, Inc.*, SBA No. SIZ-4668 (2004): sub’s “substantial input” into proposal was “strong indicia” or affiliation

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 6: The Teaming Agreement
  - Teaming agreement should show that the small business will control the relationship and how work will be divided
  - *Size Appeal of Access Systems, Inc.*, SBA No. SIZ-4843 (2007): Teaming agreement was on sub's letterhead and did not indicate that prime would perform primary and vital portions of the work

Avoid ostensible subcontractor affiliation

- Risk Factor No. 7: Experience and Expertise
  - Affiliation risks increase if small prime has no relevant experience or expertise, but large sub does
  - *Size Appeal of Osirus, Inc.*, SBA No. SIZ-4546 (2003): prime had no experience in refuse collection and transportation services, but large subcontractor had substantial experience

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 8: Location, Location, Location
  - *Size Appeal of Leonardo Technologies, Inc.*, SBA No. SIZ-4597 (2003): managing contract from sub's offices indicative of affiliation
  - *Size Appeal of C.E. Garbutt Construction Co.*, SBA No. SIZ-5083 (2009): sub has offices in city where project is located, but prime is far away

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 9: Transferred Personnel
  - Affiliation risks increase when prime hires, or plans to hire, employees (particularly key employees) from subcontractor
  - *Size Appeal of Video Masters, Inc.*, SBA No. SIZ-4984 (2008): prime planned to hire 11 key employees from the subcontractor
  - OHA recognizes right of first refusal obligation under EO 13,495—but does not apply to managerial employees

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 10: Bonding, Financing & Equipment
  - Affiliation risks increase if the sub will provide essential bonding, financing or equipment
  - *Size Appeal of Emergency Beacon Corp.*, SBA No. SIZ-4813 (2006): sub provided necessary testing equipment and software

Avoid Ostensible Subcontractor Affiliation

- Risk Factor No. 11: Profit Sharing
  - In the SBA's eyes, joint ventures share profits and losses; prime/sub teams do not
    - *Size Appeal of American Guard Services,* SBA No. SIZ-4397 (2000): prime and subcontractor affiliated in large part due to 60/40 profit-splitting agreement

Small Business Job Act

- Act allows for SBA to establish Mentor-Protégé programs for:
  - HUBZone Companies
  - SDVOSB's
  - WOSB's
- SBA issued Semiannual Regulatory Agenda on July 7, 2011
  - Programs will be comparable to the 8(a) program
  - Roll out was expected in August 2011

Mentor-Protégé Programs

GAO
Accountability • Integrity • Reliability

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

Joint Ventures Between Small Businesses

- Once JV receives an award, clock starts ticking
  - May receive more than 3 awards if firm had not received 3 awards and made multiple offers prior to 2 years having passed since first award
  - JV must meet Limitations on Subcontracting (performance requirements) FAR 52.219-14; 13 CFR 125.6
  - For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees. 13 CFR 121.103(h)(5)

Joint Ventures

- Common Law Rule – Joint venture is for a specific purpose, i.e., a single contract
  - Generally, ongoing entity going after multiple contracts is a partnership, not a JV
- All participants in the JV are prime contractors
- General Rule – participants are affiliated for that procurement – aggregate the receipts or number of employees of all the participants.

  13 CFR 121.103(h)(2)

Joint Venture

- Exceptions to aggregation requirement - JV is small if each participant is small
  - “bundled”
  - Procurements above $10 million if the size standard is employee based
  - Procurements with a value in excess of half of a revenue based size standard
  - 13 CFR 121.103(h)(3)(i)

SDVO Joint Ventures

- SDVO SBC must be managing venturer
- Employee of SDVO SBC must be project manager
- SDVO SBC must get 51% of net profits
- JV agreement must set forth responsibilities with respect to performance
- 13 CFR 125.15(b)

SDVO Joint Ventures

- SDVO Firms can form separate entities under 121.103(h). Construction Engineering Services, LLC, SBA No. VET-213 (2011)
- SDVO SBC subcontractors may be used to meet limitations on subcontracting (performance requirements) 13 CFR 125.6(b)

HUBZone JVs

- All JV participants must be HUBZone SBCs
- HUBZone subcontractors may be used to meet performance requirements. 13 CFR 125.6(c)
- Construction – performance requirement is 50% (prime must do 15% or 25%, as applicable)
- Non-manufacturer must supply the product of a HUBZone SBC (and no waivers)

Women-Owned SB JVs

- The EDWOSB or WOSB participant must be designated on the CCR and the ORCA as an EDWOSB or WOSB.
- The parties to the joint venture must enter into a written joint venture agreement.
- JV Agreement must designate an EDWOSB or WOSB as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract.
- The JV must perform the applicable percentage of work. Subcontractors do not count.
- The WOSB or EDWOSB must provide a copy of the joint venture agreement to the contracting officer and can do so through the WOSB Program Repository.

8(a) Joint Ventures

- JV with one or more other small businesses or Mentor
- For all 8(a) contracts (and all contracts with Mentor as JV partner), the JV agreement must comply with the 8(a) JV requirements.
  - Managed by 8(a) Participant
  - Profits commensurate with performance of work, or 51% of net profits to 8(a) if formal JV
  - Bank Accounts
  - Records held by 8(a) Participant
  - Total of 12 Requirements outlined at 13 CFR 124.513(c)

8(a) Joint Ventures

- 13 CFR 121.103(h)(3)(iii)
- Project Manager requirement:
  - <u>Unpopulated or Populated only with admin personnel</u>: Employee of 8(a) managing venturer must be project manager
  - <u>Populated</u>: JV must demonstrate how performance is controlled by 8(a) managing venturer

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