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MEDWEEK

MINORITY ENTERPRISE DEVELOPMENT WEEK

NEW YEAR'S RESOLUTIONS FOR SMALL BUSINESS CONTRACTORS: PREPARING FOR KEY LEGISLATIVE AND REGULATORY CHANGES IN 2016

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OVERVIEW

- ❖ Coming soon from SBA
 - Mentor-protégé program for all small businesses
 - Limitations on subcontracting
 - Size standard changes
 - Joint ventures (JVs)
 - Changes for 8(a), WOSBs/EDWOSBs, HUBZone, and SDVOSBs
 - And more!
- ❖ Cybersecurity
- ❖ Recent developments in labor & employment
- ❖ Latest activity on Capitol Hill

COMING SOON FROM SBA

NEW MENTOR-PROTÉGÉ PROGRAM FOR ALL SMALL BUSINESSES

- ❖ Proposed in February 2015
- ❖ Comments filed in May 2015
- ❖ Final rule not expected before mid-2016

HOW WILL THE NEW MENTOR-PROTÉGÉ PROGRAM WORK?

- ❖ Available to all small businesses
- ❖ Patterned on existing 8(a) Mentor-Protégé Program
 - Designed as a business development tool to enhance protégé's capabilities
 - Would allow all small business protégés to joint venture with their large business mentors
 - Mentor could own up to 40% of the protégé
 - Also envisions assistance through loans, financing, prime contracts, and subcontracts

HOW TO QUALIFY AS A PROTÉGÉ

- ❖ Must be a small business under your primary NAICS code and in need of mentoring
- ❖ Generally, you cannot have more than one mentor at a time
 - SBA may permit a second mentor if the second mentor brings different expertise from the first mentor and can assist the protégé in an unrelated, secondary NAICS code

HOW TO QUALIFY AS A MENTOR

- ❖ Mentor must possess good financial condition, commitment to mentoring, and good character
- ❖ Only for-profit firms
- ❖ Generally, no more than one protégé at a time
 - However, SBA may approve up to three protégés for the same mentor if there is no adverse impact on any protégé
- ❖ A protégé cannot also be a mentor

HOW TO PARTICIPATE

- ❖ Must submit a written application to SBA
 - SBA may utilize “open” and “closed” application periods
 - Will SBA be able to handle application volume?

- ❖ Proposed participation period: up to three years in one agreement, maximum of six years overall
 - Protégé may have two three-year agreements with two different mentors or two three-year agreements with the same mentor
 - SBA will review agreements annually

SBA'S PROPOSED CHANGES TO THE LIMITATIONS ON SUBCONTRACTING

- ❖ Proposed in December 2014
- ❖ Comments submitted in April 2015
- ❖ Final rule not expected before mid-2016
- ❖ What is it?
 - The limitations on subcontracting require the prime contractor on a small business set-aside contract to self-perform a certain percentage of the contract labor costs

PROPOSED NEW SUBCONTRACTING LIMITS

- ❖ Proposed rule keeps the same subcontracting percentages as are found in the existing rule:
 - 50% for services
 - 50% for supplies
 - 15% for general construction
 - 25% for specialty trade construction
- ❖ Focus would shift from contract labor costs to total contract value

MIXED SERVICE AND SUPPLY CONTRACTS

- ❖ The NAICS code assigned to the contract determines the permissible subcontracting percentage
 - In no case would the subcontracting limits for services and supplies apply to the same contract
 - This means that, on a contract primarily for services, you can exclude any supplies and apply the “50 percent of the total cost of the contract” subcontracting limitation to only the services portion of the contract

SIMILARLY SITUATED ENTITIES

- ❖ A similarly situated entity is a firm that meets the same size/status requirements as the prime contractor for the project in question
 - Example: For an 8(a) prime contract, only 8(a) subcontractors would qualify as “similarly situated”
- ❖ Prime contractor + similarly situated subcontractors = performance requirement
- ❖ Must identify similarly situated entities in your proposal, and have a written agreement

SBA'S PROPOSED CHANGES FOR JVs

- ❖ Eliminate populated JVs
- ❖ Form the JV as a separate legal entity (i.e., LLC)
- ❖ Annual certifications of compliance
- ❖ Uniform requirements regarding JV size and content of JV agreement
 - Requirements are similar to current 8(a) JV rules – e.g., the small business must perform at least 40% of the JV's work
 - Each party in the JV must be small on its own, but does not need to be small in the aggregate
- ❖ No SBA approval of JVs except when pursuing 8(a) contracts

OTHER NOTABLE SBA PROPOSALS

- ❖ Changes to affiliation rules:
 - Affiliation based on close family connections between persons that are married, parents and children, or siblings
 - Economic dependence when one firm derives 70 percent or more of its revenue from another firm
- ❖ Size recertification for pending proposals

SIZE STANDARD CHANGES

- ❖ Inflation adjustments effective in July 2014
 - This happens roughly every five years
- ❖ SBA expected to finalize proposed increases for many employee-based size standards soon
 - Many codes proposed for significant increases, including environmental remediation (from 500 to 1250 employees) and internet publishing (from 500 to 1000 employees)
 - SBA proposed to eliminate Value Added Reseller exception with its 150-employee size standard – big fight over this
- ❖ 2016 National Defense Authorization Act (“NDAA”) created process for contractors to challenge size standards

PROPOSED CHANGES FOR THE 8(A) PROGRAM

- ❖ SBA is proposing to change how it assesses an applicant's claim of social disadvantage
 - Proposal would permit SBA to disregard an applicant's claim if the applicant does not provide sufficient evidence to make his/her claim any more likely than a legitimate alternate reason for adversity the applicant has faced
 - Designed to alter recent OHA case law favorable to applicants
 - Proposed rule seems to raise the evidentiary burden on applicants and make it harder to get into the 8(a) program
- ❖ SBA will permit size protests against 8(a) JVs

PROPOSED CHANGES FOR THE HUBZONE PROGRAM

- ❖ HUBZone firms would be permitted to joint venture with non-HUBZone firms
- ❖ Overhaul of SBA's HUBZone rules may be coming this year
- ❖ 2017 NDAA may include provisions to improve HUBZone program

CHANGES FOR THE WOSB/EDWOSB PROGRAM

- ❖ Agencies now have the ability to issue sole source contracts to WOSBs and EDWOSBs
 - Sole source authority is now in the SBA rules and the FAR
 - Available only if “rule of two” is not met
 - \$6.5M limit for manufacturing contracts; \$4M limit for all other contracts

- ❖ Congress directed SBA to implement a certification program for WOSBs and EDWOSBs
 - SBA is currently seeking comments from the public about how it should implement this certification program
 - Comments are due February 16, 2016

PROPOSED CHANGES FOR THE VA'S SDVOSB PROGRAM

- ❖ VA recently proposed significant changes to its SDVOSB eligibility rules
 - Comments were due in early January
 - Final rule could be issued late this year
 - Many proposed changes are positive and “business friendly”

SMALL BUSINESS SUBCONTRACTING

- ❖ A lot of legislative and regulatory developments in this area over the last year
 - More focus on ensuring primes follow their subcontracting plans and are held accountable
- ❖ When a prime contractor uses you in a proposal, you have rights to make sure you get what you bargained for
 - Primes must notify the CO in writing if they do not use you on the contract
 - Primes must also notify the CO in writing whenever they reduce payments to a small business subcontractor or when payments to a small business are 90 days or more past due
 - You have the right to communicate with the CO directly about these issues

SET-ASIDES FOR MULTIPLE-AWARD CONTRACTS

- ❖ More and more work is being issued through large multiple-award contracts, referred to as MACs or GWACs
- ❖ SBA rules now permit agencies to reserve portions of these contracts, or individual task orders, for small businesses
- ❖ Size status for MACs determined at time of initial offer
 - Contractor will be considered small for each order under the MAC during first five years unless CO explicitly requires size recertification at the order level

SBA INSPECTOR GENERAL (“IG”) ACTIVITY

- ❖ IG investigations are up at SBA; this trend is expected to continue in 2016
- ❖ More focus on misrepresentations of size and status
- ❖ SBA’s “Presumed Loss Rule”
- ❖ Important for small businesses to have an internal policy and procedures for making size and status representations
 - Get it right every time you make a representation
 - Make sure your employees understand

CYBERSECURITY

CYBERSECURITY

- ❖ A lot of legislative and regulatory activity in recent years, and this is expected to continue in 2016
- ❖ If you work on DoD projects, your contracts may already include cybersecurity provisions on your security measures and supply chain risk
- ❖ Despite all the activity, we are still lacking a clear and concise regulatory framework
- ❖ Coming soon to the FAR?

WHAT SHOULD YOU BE DOING FOR CYBERSECURITY?

- ❖ Identify your assets
- ❖ Understand contractual requirements you are under
- ❖ Implement company policy and procedures
- ❖ Periodic testing and vulnerability assessments
- ❖ Review your agreements
- ❖ Assess your partners and their practices and risks
- ❖ Talk to your insurance broker

RECENT DEVELOPMENTS IN LABOR & EMPLOYMENT

MINIMUM WAGE FOR FEDERAL CONTRACTORS

- ❖ \$10.15 effective January 1, 2016
- ❖ Adjusted annually
- ❖ Applies to new and replacement contracts when employee wages are governed by the Fair Labor Standards Act, Davis-Bacon Act (“DBA”), Service Contract Act (“SCA”), and Concessions Contracts
- ❖ Contractors must pay at least the minimum wage, or the wage rates required under the DBA or SCA, whichever is higher
- ❖ Prime contractors responsible for subcontractor compliance

PRICE ADJUSTMENTS

- ❖ You can seek a price adjustment to your contract when subject to new contractor minimum wages
- ❖ The permitted adjustment is the difference between current hourly rate of pay for employees and newly-issued rate that results in an increase in hourly pay
 - Adjustments may include associated labor costs as a result of changes in social security and unemployment taxes, and workers' compensation insurance
 - Adjustments may not include general administrative costs, overhead, or profit

INCREASE TO OVERTIME THRESHOLD

- ❖ Proposed Rule issued on July 6, 2015
- ❖ Increases threshold for when employees are entitled to overtime pay
 - Salary basis would go from \$455 per week (\$23,660/year) to \$970 per week (\$50,440/year) in 2016
 - Highly-compensated threshold increased from \$100,000/year to \$122,148/year
 - To increase further by undetermined method
- ❖ Final rule expected by mid-2016

PAID SICK LEAVE FOR FEDERAL CONTRACTORS

- ❖ Executive Order issued on September 7, 2015
- ❖ Beginning January 1, 2017:
 - One hour of sick leave for every 30 hours worked
 - Cannot be capped at less than 56 hours per year
 - Must be carried forward from year to year
 - Must be provided in addition to leave under SCA/DBA
 - Can be used for illness, preventative care, caring for a family member, domestic abuse or sexual assault, or associated counseling and legal services
 - No required pay out of accrued sick leave at termination
- ❖ Must flow down to subcontractors at any tier

FAIR PLAY SAFE WORKPLACES

- ❖ Executive Order 13673 issued on July 31, 2014
- ❖ Applies to government contractors and subcontractors with contracts over \$500,000
- ❖ For new contracts in 2016, requires disclosure of violations of 14 different federal employment laws and state equivalents
- ❖ Three-year look back requirement
- ❖ Contractors must disclose corrective actions related to violations
- ❖ Prime contractors responsible for subcontractors

14 FEDERAL LABOR LAWS AND STATE LAW EQUIVALENTS

1. Fair Labor Standards Act
 2. Occupational Safety and Health Act
 3. Migrant and Seasonal Agricultural Worker Protection Act
 4. National Labor Relations Act
 5. Davis-Bacon Act
 6. Service Contract Act
 7. Executive Order 11246 of Sept. 24, 1965 (EEO)
 8. Family and Medical Leave Act
 9. Title VII of the Civil Rights Act
 10. Section 503 of the Rehabilitation Act of 1973 (prohibits disability discrimination)
 11. Vietnam Era Veteran's Readjustment Assistance Act
 12. Americans with Disabilities Act
 13. Age Discrimination in Employment Act
 14. Executive Order 13658 of Feb. 12, 2014 (contractor minimum wage)
- State law equivalents (only OSHA for now)

LATEST ACTIVITY ON CAPITOL HILL

2016 NDAA

- ❖ Adjusts agency scorecards to better determine if agencies are meeting prime and subcontracting goals
- ❖ Requires agencies to evaluate past performance of major subcontractors and joint venture partners
- ❖ Makes clear the non-manufacturer rule only applies to contracts for products, but not services
- ❖ Creates appeal process to challenge size standards

RECENT PROPOSALS FROM THE HOUSE SMALL BUSINESS COMMITTEE

- ❖ H.R. 4341, “Defending America’s Small Contractors Act of 2016”
 - Fairly comprehensive bill: “plain language rewrite” of definition of “small business procurements”; expanded duties and responsibilities of PCRs and CMRs; strengthens small business subcontracting opportunities; pilot program to provide qualified first-tier subcontractors the opportunity to obtain past performance ratings directly from contracting agency and prime contractor

RECENT PROPOSALS FROM THE HOUSE SMALL BUSINESS COMMITTEE

- ❖ H.R. 4322, “Mentor-Protégé Cooperation Reform Act of 2016”
 - Would clarify the prohibition on affiliation under the Mentor-Protégé Program of DoD, and amend the Small Business Act to improve cooperation between the Mentor-Protégé programs of SBA and DoD

- ❖ H.R. 4331, “Small Business Easy Contract Compliance Enhancement and List Act of 2016”
 - Would strengthen the role of PTACs and the assistance they provide to small business contractors, particularly after contract award

QUESTIONS?

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