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THE BEST DEFENSE IS A GOOD OFFENSE

– PROACTIVE PREPARATION FOR SIZE PROTESTS

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PRESENTED BY

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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decision, legislative and regulatory rule-making as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the minute recap of legislative and regulatory issues affecting small businesses.

Webinars on YouTube – all of our past webinars can be found on the PilieroMazza YouTube channel.

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OVERVIEW

- The procurements that may be protested
- A brief explanation of the protest process
- The information that a protested firm is required to produce
- Arguments that are often raised in a size protest and risk mitigation strategies
- Size protest defense tips



THE PROCUREMENTS THAT MAY BE PROTESTED



WHAT MAY BE PROTESTED?

- Any procurement where an offeror is required to represent its size and/or status
- May be filed on set-aside contracts and task orders
 - For TOs under MACs, check whether the RFP contains an explicit recertification requirement
- SBA protests may be filed by an eligible offeror, the contracting officer (“CO”), or SBA, plus:
 - Large businesses when only one concern submitted an offer
 - Prime contractor or other eligible subcontractors for subcontracts awarded under the Subcontracting Program



WHEN & WHAT TO FILE

- **Filing deadlines**
 - Five business days after you first learn the identity of the awardee or presumptive awardee
 - However, the CO and SBA may file an SBA protest at any time
- **A size or eligibility protest is typically filed as a letter**
 - Letter should be addressed to the CO
 - Separate letters for protests involving size and eligibility issues?
 - Include supporting evidence
- **For size protests only, you can also file your protest via telephone, as long as you follow up in writing within 24 hours**



THE PROTEST PROCESS



HOW SBA PROCESSES PROTESTS

- After the protest is filed with the CO, the CO will forward it to the appropriate SBA office for processing
 - Size protests are handled by SBA area office serving the area in which the headquarters of the protested concern is located
 - WOSB, EDWOSB, and SDVOSB eligibility protests are handled by SBA's Office of Government Contracting
 - HUBZone eligibility protests are handled by the HUBZone Office



HOW SBA PROCESSES PROTESTS

- Within a few days after receiving the protest from the CO, SBA will send a letter to the protested firm requesting a response
- SBA's letter typically requests:
 - A response to the protest allegations
 - Corporate records (i.e., operating agreement, proposal, etc.)
 - Financial statements and tax returns
 - Completed SBA Form 355 (for size cases)
- SBA usually gives protested firm three to five days to respond
- After communication with protested firm is completed, SBA will issue decision, typically within 15-30 days



THE INFORMATION A PROTESTED FIRM MUST PRODUCE



THE FORM 355

- Corporate documents
 - Articles of Incorporation, Bylaws, and Shareholder Agreement
 - Partnership agreement
 - Articles of organization and operating agreement
- Sales by NAICS code
- Names and addresses of owners, partners, members, or principal stockholders
- Names and address of all officers and members of the board of directors
- Whether an owner, partner, member, principal stockholder, officer, or board member is an owner, partner, director, officer, member, employee or principal stockholder in another business



THE FORM 355

- **Number of employees**
- **Gross sales or receipt of business for each of its most recently completed three fiscal years as of the date of the application or offer**
- **All documentary materials about affiliates, including recorded documents, operating documents, financial and tax information**
- **Name, address, ownership information, and primary NAICS code of affiliates**
- **Relationship between protested firm and alleged affiliate**
 - **Financial assistance**
 - **Common employees**
 - **Subcontracting**



CORPORATE DOCUMENTS & FINANCIAL RECORDS

- Financial statements
- Tax returns
 - The SBA will cross-reference against the 355
- Corporate documents
 - The SBA is looking at ownership and control
 - Key provisions



ARGUMENTS THAT ARE OFTEN RAISED IN A SIZE PROTEST & RISK MITIGATION STRATEGIES



PROTESTS AGAINST JOINT VENTURES

- Size
 - Each firm must be small
 - 3 in 2 rule – JV cannot be awarded more than three contracts within a two year period
- SDVOSB, WOSB, and EDWOSB: Does the JV agreement comply with the applicable SBA JV rules?
 - KRR Partners Joint Venture Petitioner, SBA No. VET-241 (2013) (SDVOSB JV lost contract because their JV agreement did not specify parties' responsibilities w/r/t contract performance)
- HUBZone: Is one JV partner a HUBZone firm and the other either small or a mentor?



COMMON CONTROL

- Affiliation may arise where one or more officers, directors, managing members, or partners who control the Board of Directors and/or management of one concern also control the Board of Directors or management of one or more other concerns
- **Risk Mitigation**
 - Be mindful of public information
 - Press Releases
 - Social Media
 - Websites
 - Revise corporate documents
 - Changes in personnel



FAMILIAL AFFILIATION

- A type of identity of interest
- There is a rebuttable presumption that close family members (e.g., father/daughter, husband/wife, siblings) have an identity of interest
- Rebutted with: (i) evidence showing that the interests thought to be identical or substantially identical are, in fact, separate and (ii) a clear fracture in the businesses



FAMILIAL AFFILIATION - RISK MITIGATION

- **Show Clear Fracture**
 - Do not engage in business together
 - Participate in different industries
 - Do not share employees, resources, or a location
 - Do not provide assistance to one another
- **Limit control in corporate documents**



COMMON OWNERSHIP

- A type of identity of interest
- Occurs when an owner, partner, member, principal stockholder, officer, or board member holds an ownership interest in another firm
- **Risk Mitigation**
 - Focus on control
 - Do not engage in business together
 - Do not share offices, resources, or employees



COMMON INVESTMENTS

- Identity of interest
- Occurs when two or more individuals hold ownership interests in two or more companies
- The ownership interests can be small
- **Risk Mitigation**
 - Sell the assets
 - Minimize the number of commonly held assets
 - Do not engage in business together
 - Do not share offices, resources, or employees



NEWLY ORGANIZED CONCERN

Arises when the following four factors are met:

1. Former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new firm
 - A key employee is someone in a position of critical influence or substantive control over a firm's operations or management
2. The new concern is in the same or related industry
3. The persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees
4. The one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, whether for a fee or otherwise



NEWLY ORGANIZED CONCERN - RISK MITIGATION

- Do not provide assistance when an employee leaves to start a company
- If a key employee leaves to start a company, encourage them to go into a different industry (or at least a different NAICS code)
- Because all four elements are required, removing any one is extremely helpful in reducing risk



OSTENSIBLE SUBCONTRACTOR

- An ostensible subcontractor is a subcontractor –
 - That performs primary and vital requirements of a contract or
 - Upon which the prime contractor is unusually reliant
- Ostensible subcontractor is a contract-specific form of affiliation
- Whether ostensible subcontractor affiliation exists is based on the unique facts and circumstances of the solicitation in question and the parties' approach to the project as reflected in their teaming agreement, subcontract, and proposal



OSTENSIBLE SUBCONTRACTOR - RISK MITIGATION

- Make sure the prime contractor is performing the primary and vital contract requirements
- The prime contractor should be responsible for the proposal and negotiating the prime contract
- Who is providing the personnel?
- Who has the relevant experience?



ECONOMIC DEPENDENCE

- An identity of interest through economic dependence may arise when one firm provides critical financial assistance to another firm, such as through loans or financial guarantees
- Economic dependence also occurs when one firm generates a significant percentage of its revenue on contracts awarded to it by a second firm
 - One firm is economically dependent upon another if it derives 70% or more of its revenues from that firm
 - There may also be economic dependence where one concern is so dependent on another for contracts or business that its economic viability would be in jeopardy without that business



ECONOMIC DEPENDENCE - RISK MITIGATION

- Diversification
- Think beyond subcontracting
 - Joint Ventures
 - Mentor-Protégé?
- Do not derive 70% of your revenues from a single company



SIZE PROTEST DEFENSE TIPS



#1 PROTEST DEFENSE TIP: BE PROACTIVE!

- The best (and sometimes only) defense is a good offense
 - Many potential protest issues have to be addressed before the protest is filed
 - There is only so much we can do to defend circumstances that existed as of when you submitted your initial proposal w/ price



TIPS FOR BEING PROACTIVE

- **Undergo annual and pre-bid checkups**
 - **Review corporate documents for negative control issues, particularly after a change in ownership**
 - **Complete all fracture steps if you recently broke ties with an affiliate**
 - **Take steps to diversify customers and revenue sources**
 - **Write your teaming agreement, proposal, and subcontract with an eye toward mitigating ostensible subcontractor affiliation**
 - **Be mindful of issues created by letters of intent**
 - **Implement and utilize written procedures for making size and eligibility representations**



COMPLETE THE 355

- **Completing the 355 helps to identify potential protest risks**
 - **Firms owned or controlled by an owner, partner, member, principal stockholder, officer, or board member**
 - **Common investments**
 - **Revenues getting close to the line**
 - **Familial affiliation**



KEEP CURRENT RECORDS

- Maintain financial statements to use if tax returns are incomplete
 - Track loans and inter-affiliate transactions
- Do you know where your corporate records are?
- Can you get the necessary information from alleged affiliates?



Any Questions?

Thank you for joining us today.

If you would like to speak with Tony or Michelle about SBA protests, please contact them at:

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