

HOT ISSUES IN FEDERAL CONTRACTING 2017

Presented by

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MAZZA

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DEVELOPMENTS IMPACTING SMALL BUSINESSES IN 2017

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OBJECTIVES

- Small Business Teaming Opportunities – the Similarly Situated Rule
- Working with Large Businesses – the New Mentor-Protégé Program
- Staying in Compliance – the New Joint Venture Requirements
- National Defense Authorization Act Fiscal Year 2017
- President Trump Administration – Impact on Government Contracting



SIMILARLY SITUATED ENTITIES



SIMILARLY SITUATED

- Work performed by Similarly Situated Entities may count towards the applicable limitations on subcontracting
- What is a “Similarly Situated Entity”?
 - Subcontractor that has same small business program status as the prime contractor
 - Small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform
- How much work can be subcontracted to a Similarly Situated Entity?
 - To count, work must be self-performed by subcontractor

EXAMPLE 1

An 8(a) set-aside contract is awarded in the total amount of \$10,000,000 for janitorial services. The prime contractor subcontracts \$8,000,000 of the janitorial services to another 8(a) firm. The prime contractor does not violate the limitation on subcontracting for services because the amount subcontracted to a similarly situated entity is excluded from the limitation on subcontracting.

EXAMPLE 2

An 8(a) set-aside contract is awarded in the total amount of \$1,000,000 for landscaping services. The prime contractor subcontracts \$500,001 to a small business subcontractor that is not also an 8(a) firm. The prime contractor is in violation of the limitation on subcontracting requirement because it has subcontracted more than 50% of the contract amount to a small business subcontractor, which is not considered similarly situated to an 8(a) prime contractor.

OTHER CONSIDERATIONS

- “Similarly situated subcontractors” are excluded from affiliation under the ostensible subcontractor rule
 - What does this mean in practice?
- The limitations on subcontracting do not apply to subcontractors entering into lower-tier subcontracts **except** where prime relying on subcontractor’s similarly situated status
- Independent Contractors: considered subcontractors and may count towards meeting limitation on subcontracting when Independent Contractor qualifies as a similarly situated entity



THE MENTOR-PROTÉGÉ PROGRAM



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THE NEW SBA MENTOR-PROTÉGÉ PROGRAM

- Available to all small businesses, including SDVOSBs, HUBZones, WOSBs, and 8(a)s
- Patterned on existing 8(a) Mentor-Protégé program
- Allows all small business protégés to joint venture with their large business mentors

BENEFITS

- M-P joint ventures may qualify as a small business for any federal government contract or subcontract where the protégé qualifies as small for the size standard assigned to the procurement
 - Why joint venture?
 - Does 3-in-2 rule still apply?
- Protégé firm can raise capital without fear of affiliation
 - Any limitations?
- Significant subcontracting work to protégé = potential incentives from procuring activities during contract evaluation

MENTOR ELIGIBILITY

- For-profit entity that demonstrates commitment and ability to assist small business concerns
 - Possesses “good character”
 - Not suspended or debarred
 - Can impart value to protégé
 - Demonstrates that it can meet the obligations outlined in the mentor-protégé agreement
- May generally have no more than one protégé at a time
 - May seek approval for up to three protégés as long as the additional relationships do not adversely affect the development of any of the protégé firms
- Firms can be both mentors and protégés

PROTÉGÉ ELIGIBILITY

- Must be small under its primary NAICS code or seeking assistance in secondary NAICS code under which it is small
 - Size determination required?
- Protégé not limited to a single mentor
- Importance of ensuring protégé qualifies as an SDVOSB/HUBZone/WOSB/8(a) firm

HOW TO APPLY

- Online application available at www.certify.sba.gov
- All applicants must execute and submit a Mentor-Protégé Agreement
 - Detailing needs, assistance, timeline, and success measurement is critical
- Other requirements besides a Mentor-Protégé Agreement?
- If interested in the new M-P Program, apply NOW



JOINT VENTURES



JOINT VENTURE - NEW REQUIREMENTS

- Uniform requirements for **all** small business programs regarding size and content of JV agreement
 - What requirements have changed for JVs on set aside contracts?
- Required written agreement for arrangement and responsibilities of the parties
 - Specificity is key **but** general descriptions okay for IDIQ and multiple award contracts

JOINT VENTURE - NEW REQUIREMENTS

- JV structures: both formal and informal allowed
 - How do they differ?
 - Can a JV be populated with direct labor?
- The JV Project Manager:
 - Employee of eligible JV partner; or
 - If JV is with mentor, signed letter of commitment from future PM who is not employee of mentor
- Agencies must consider past performance of JV partners when considering past performance of a JV entity

JOINT VENTURE - OTHER CONSIDERATIONS

- SAM registration requirements
- Certificates of compliance (contract-start, annual, and project-end)
 - What are you certifying to and why?
 - Failure to submit consequences
- Size protests of JVs permitted

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NATIONAL DEFENSE AUTHORIZATION ACT FISCAL YEAR 2017

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NDAA 2017

- VA Secretary's authority curtailed
 - VA prohibited from issuing regulations regarding ownership, control and size status of an SDVOSB or VOSB
 - VA required to use SBA regulations which will apply to both VA's verification and SBA's self-certification SDVOSB programs
 - VA will continue to verify status, but using SBA regulations

NDAA 2017

- New verification appeals process for SDVOSBs
 - SBA OHA will have authority to hear appeals from any small business denied verification by the VA
 - OHA will have jurisdiction if interested party challenges the inclusion in the VetBiz database of an SDVOSB or VOSB
 - Unclear if OHA will hear protest of verification as an SDVOSB or VOSB generally

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PRESIDENT TRUMP'S IMPACT ON GOVERNMENT CONTRACTING

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TRUMP ADMINISTRATION

- President Trump's Procurement Policies
 - Increased outsourcing of government services?
 - Increased infrastructure spending?
 - Emphasis on Commercial Items acquisitions
 - Emphasis on "Buy American"
 - Less LPTA procurements
 - NDAA for 2017 already limits for DOD



QUESTIONS?

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