Presentation Overview
• 2017 NDAA Contracting Changes
  – SDVOSB Program(s) Overhaul
  – GAO Bid Protest Updates
  – DoD Procurement Changes
  – “All Small” Implementation
  – New FAR on Employee Confidentiality
SDVOSB Overhaul
SDVOSB Overhaul

• Background:
  – Government runs two SDVOSB programs: SBA and VA
  – SBA is self-certification program; VA is formal “verification” program
  – SBA and VA programs have separate eligibility requirements
    • For example, VA requires veteran to work “full time during ordinary working hours”; SBA does not
• 2017 NDAA:
  – Maintains two separate SDVOSB programs, but essentially consolidates the eligibility requirements
  – VA will be required to use eligibility rules developed by the SBA, which will apply to both programs
SDVOSB Overhaul

• **2017 NDAA:**
  – Ultimately will wipe out the eligibility rules with which many SDVOSBs/VOSBs (and PTACs!) are very familiar: 38 C.F.R. 74.3 & 38 C.F.R. 74.4
  – SBA Office of Hearings and Appeals will decide appeals from VA SDVOSB denials
    • My opinion: VA brought this one on itself by failing to provide a truly independent appeal option
SDVOSB Overhaul

• 2017 NDAA:
  – Calls for SBA & VA to jointly issue regulations implementing the requirement
    • Awkward!
    • Initial guidance supposed to be issued within 180 days of NDAA adoption (or by mid-2017)
    • Don’t hold your breath
    • Changes probably won’t kick in until 2018
SDVOSB Overhaul

• Verification Term:
  – Independent of the 2017 NDAA, VA announces that SDVOSB/VOSB verification terms will be three years, instead of two
  – No reason at this time to think that 2017 NDAA will affect administrative matters like verification terms (as opposed to eligibility matters)
GAO Bid Protests
GAO Bid Protests

• 2017 NDAA:
  – *Doesn’t* include proposed language that would have:
    • Required large defense contractors to reimburse GAO’s costs for denied protests
    • “Impounded” bridge contract profits if incumbent contractor protests; give profits to awardee if protest is denied
  – Instead, merely requires a “comprehensive study” on bid protest impact at DoD
    • Study to be performed by independent group, not GAO
GAO Bid Protests

• 2017 NDAA:
  – Restores GAO’s jurisdiction to hear protests of civilian task orders of $10 million or higher
  – Restores GAO’s jurisdiction to hear protests of DoD task orders, but ups threshold to $25 million
GAO Bid Protests

• 2017 NDAA:
  – Reiterates requirement that GAO provide annual list of common grounds for sustained protests

• Meanwhile:
  – GAO protest “sustains” jump in FY 2016, to 22.56% (versus 12% in FY 2015)
  – “Success rate” of protests was 46%, a slight increase over FY 2015
DoD Procurement Changes

• **2017 NDAA:**
  – Provides that DoD cannot use LPTA in certain types of procurements
    • Includes those predominantly seeking “knowledge-based professional services”
  – DoD required to issue annual reports describing any LPTA awards over $10 million
DoD Procurement Changes

• 2017 NDAA:
  – Limits use of lowest price, technically acceptable procurements
    • Provides list of six criteria that must be met before using LPTA (e.g., DoD would have minimal benefits from a proposal that exceeds minimum performance requirements)
DoD Procurement Changes

• 2017 NDAA:
  – Establishes preference for fixed-price contracts
    • FAR already contains such a preference
  – DoD will not be able to enter into cost reimbursement contracts over $50 million without high-level approval
    • Approval threshold falls to $25 million on Oct. 1, 2019
“All Small” Mentor-Protege
“All Small” Mentor-Protégé

- SBA’s “All Small” Mentor-Protégé program launches on October 1, 2016
- Effective Nov. 1, 2016 all applicants required to apply using electronic portal
  - SBA provides “template” on website
  - But heart of agreement is up to the parties: the specific assistance to be provided
“All Small” Mentor-Protégé

• To date, applications being processed very quickly:
  – SBA’s top procurement lawyer states that average processing time is eight days(!) as of January 2017
  – In contrast, 8(a) mentor-protégé applications may take two months or more
Common Question: For 8(a) protégé, “All Small” or 8(a) mentor-protégé?

– No substantive differences
– Same JV, affiliation & other benefits
– Processing time much faster for All Small
– Will SBA District Office feel circumvented?
Employee Confidentiality
Employee Confidentiality

• Government contractors operate in a highly competitive industry, and often require employees to sign non-disclosure/confidentiality agreements

• A recent FAR change requires many contractors to update those agreements to ensure compliance
Employee Confidentiality

• New FAR 52.203-18:
  – By submission of offer, “the Offeror represents that it will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract” to the Government.
Employee Confidentiality

• New FAR 52.203-19:
  – Contractor cannot require employees or subcontractors to sign agreements that don’t exempt permitted disclosures
  – Contractor must notify current employees and subcontractors that any existing prohibitions are no longer in effect
  – Exception for certain contractors dealing with classified or sensitive information
Questions?

Thank you!

Questions?
For More Information

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