Four Key Upcoming Developments for Small Businesses

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I. Credit for Lower Tier Small Business Subcontracting

II. Supreme Court to Rule On “Rule of Two”

III. Mandatory Disclosure Of Labor Law Violations

IV. Expansion Of Mentor-Protégé Program
I. Credit For Lower Tier Small Business Subcontracting

- SBA issued proposed regulation on October 6, 2015
- Comments due by December 7, 2015
- Implements Section 1614 of NDAA for FY 2014
Current Regulation at 13 C.F.R. 125.3

• For construction contracts or subcontracts >$1.5 Million or other contracts or subcontracts >$650,000 with subcontracting possibilities, must develop small business subcontracting plan

• FAR 52.219-9 contains rules for plan

• Small business concerns are exempt

• Goals are based on subcontracting at first tier
Proposed Regulation

• Allow contractor or subcontractor to receive credit for small business subcontracting at any tier
• Applies only to individual contract subcontracting plans
• Must avoid double counting
• Can accept subcontractor’s electronic size and socioeconomic representations
• Prime contractor recordkeeping and additional responsibilities concerning subcontractors’ compliance
Proposed Regulation (cont.)

- Prime contractor’s responsibilities for Subcontractors’ subcontracting plans
  - Incorporate subcontractor’s plans into its plan
  - Identify applicable NAICS code on subcontract solicitations
  - Review and approve subcontractors’ plans
  - Monitor subcontractors’ compliance with plans
  - Ensure subcontractors submit reports
  - Discuss subcontracting performance when necessary to ensure good faith effort to comply with plan
II. Supreme Court Will Rule On “Rule of Two”

• Kingdomware Technologies Inc. protested that Rule of 2 applied to VA procurement

• Challenge under Veterans Benefits, HealthCare and Information Technology Act of 2006

• GAO sustained protest, but VA ignored ruling

• Kingdomware protest at COFC, but COFC ruled that VA has discretion whether to set-aside for SDVOSBCs

• CAFC affirmed COFC ruling
II. Supreme Court Will Rule On “Rule of Two” (cont.)

• Supreme Court granted certiorari on June 22, 2015

• Protester + GAO – Rule of 2 uses mandatory language

• VA, COFC + CAFC – Preferential goal, set-aside not necessary when VA is meeting goal

• Questions
  — How will agency know it is meeting goal?
  — Is goal a maximum or minimum?

• Supreme Court hears oral argument in November
III. Mandatory Disclosure of Labor Law Violations


• Department of Labor issued proposed guidance on May 28, 2015, comment period closed on August 26, 2015

• Mandatory disclosure of labor law violations
  — For each proposal >$500,000
  — Violation based upon arbitral award, administrative merit determination or civil judgment
III. Mandatory Disclosure of Labor Law Violations (cont.)

—List for previous 3 years all violations of:

• Fair Labor Standards Act (FLSA)
• Occupational Safety and Health Act (OSHA)
• Migrant and Seasonal Agricultural Worker Protection Act
• National Labor Relations Act (NRLA)
• Davis-Bacon Act (DBA)
• Service Contract Act (SCA)
• Executive Order 11246 (EEO)
• Section 503 of Rehabilitation Act
• Vietnam Era Veterans’ Readjustment Assistance Act of 1974
III. Mandatory Disclosure of Labor Law Violations (cont.)

- Family and Medical Leave Act
- Title VII of the Civil Rights Act
- Americans with Disabilities Act of 1990
- Age Discrimination in Employment Act of 1967
- Executive Order 13658 (Minimum wage of $10.10)
- Equivalent state laws as defined by Department of Labor

Based upon disclosed labor law violations, contracting officer will consider whether offeror is responsible
III. Mandatory Disclosure of Labor Law Violations (cont.)

- For subcontracts >$500,000, subcontractor must disclose its labor law violations
- Every 6 months, contractor and subcontractors must update
- Contracting officer may consult with Labor Compliance Advisors created for each agency
- Contracting officer may refer information to debarring official
- Amend FAR so that serious, repeated, willful or persuasive labor law violations demonstrate lack of integrity or business ethics

• Paycheck transparency requirements
  - Overtime
  - Independent contractor
IV. Expansion of Mentor-Protégé Program

• SBA issued proposed rule on February 5, 2015
• Implements Section 1641 of NDAA for FY 2013
• Authorizes expansion of 8(a) mentor-protégé program to all small businesses
• Seeks consistency in rules for all types of small businesses
• Open to all 8(a) contractors
Benefits of Mentor-Protégé Program

• Protégé receive business development assistance like current 8(a) program without finding of affiliation
  — Technical and Management
  — Financial-equity (40%) and loans
  — Subcontracting
  — Joint ventures
• Protégé can have two mentors
• Mentor can have three protégés
• Three year M-P agreement, protégé can have two
Requirement for Mentor Protégé Program

• SBA must verify protégé is small business
• SBA must approve mentor-protégé written agreement
• Protégé has same rights as 8(a) program
  — Own 51% of each joint venture
  — Perform 40% of JV work
  — Serve as managing venturer
  — Employ program manager
  — Receive profits equal to ownership share
  — Control JV’s bank account and financial records
Requirement for Mentor Protégé Program (cont.)

• Mentor and protégé must certify that will perform contract per agreement
• Annual reporting of compliance to SBA and C.O.
• Failure to so perform contract can be grounds for debarment
• Expect to be very popular, SBA may have open periods for applications
• Except for DoD, other agency mentor-protégé programs will continue for one year without further SBA approval