Welcome to The Impacts of New Mentor-Protégé Legislation

Moderator: Pamela Mazza, PilieroMazza PLLC

Speakers:
- Kenneth Dodds, SES, Director of Policy, Planning & Liaison, SBA
Small Business Regulation and Legislation Update

Kenneth Dodds
Director,
Office of Policy, Planning & Liaison
Small Business Administration
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Limitations on Subcontracting


- In the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount paid to the concern under the contract

- In the case of a contract for supplies (other than from a regular dealer in such supplies), may not expend on subcontractors more than 50 percent of the amount, less the cost of materials, paid to the concern under the contract

- Similarly Situated Entities – Contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted

- Sealift, Inc., B–409001, Jan. 6, 2014
NDAA 2013 Proposed Rule

- 79 FR 77955 (Dec. 29, 2014)
- Comment period closed May 6, 2015
- Combined Supplies/Services – NAICS code will dictate applicable performance requirements
- Written agreement required identifying subs and forecasting percentage of work
- Whether specific firms performed forecasted amount is not material, as long as overall percentage was met
- Only work performed by the subcontractor will count – work that the subcontractor subcontracts will count toward the subcontract amount that cannot be exceeded
NDAA 2013 Proposed Rule

- Joint Venture – Any JV will be considered small as long as each member qualifies as small under size standard
  - but excessive JV between two firms can result in affiliation
- Recertification required where acquisition occurs after offer but prior to award
- Rebuttable presumption of affiliation among family members, firms which derive 70% of revenue from another firm
NDAA 2013 Proposed Rule

- LOS and NMR do not apply to small business set asides below $150,000
- Non-manufacturer rule and software
  - When will SBA issue a waiver of the NMR for software?
- CO must request waiver of the NMR prior to posting solicitation, and must notify potential offerors of applicable waivers of the NMR
Mentor Protégé

- SBA has the authority to establish program for all small business concerns, “shall be identical” to 8(a) mentor protégé program, except to the extent necessary
  - 15 U.S.C. 657r

- SBA has the authority to review and approve small business mentor protégé programs of other agencies
  - Within one year of final regulations
  - Does not include DoD
Mentor Protégé Proposed Rule

- Proposed Rule 80 FR 6618 (February 5, 2015), comment period closed May 6

- JV must be in writing

- JV may not be populated (except with administrative personnel)
  - How do we know Protégé is performing required percentage of work?

- Should all JVs be separate legal entities for tracking purposes?

- HUBZone JV – consistent with other programs

- JV certifications and performance of work reports

- Application – Open Season?

- Mentors – for profit
  - How many proteges?
Protégé – small for primary industry?
- Current 8(a) program – half size standard, no 8(a) contract, developmental stage
- More than one mentor?

SBA verifies small business or socioeconomic status

Written agreement approved by SBA – identify assistance

Lasts up to 3 years, with one 3 year extension

Annual reports – SBA may not approve continuation
Mentor Protégé Proposed Rule

- Size of an approved JV may still be protested

- Change in primary industry classification – entity owned firm may not own another Participant that at the time of application or in the previous 2 years participated in the 8(a) program under same primary NAICS code

- Voluntary suspension – disaster, lapse in appropriation

- Benefits reporting by entity owned concerns

- Reverse Auctions – SBA rules apply (Rule of Two COC)
Credit for Lower Tier Subcontracting

- Proposed Rule 80 FR 60300 (10/06/15), Comment period closes 12/07/2015

- Where the subcontracting goals pertain only to an individual subcontracting plan, the contractor may receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns.

- Prime contractors must incorporate the subcontracting plan goals of their lower tier subcontractors in their individual subcontracting plans.

- Lower tier subcontractors must have their own individual subcontracting plans if the subcontract is at or above the subcontracting plan threshold, and are required to meet their subcontracting plan goals.

- The actual subcontracting dollars are only reported once for the same award to avoid double counting the dollars, notwithstanding the fact that a small business subcontract may be reported under more than one subcontracting plan.

- Implements Section 1614 of NDAA of 2014, 15 USC 637(d)(16)
Designated industries by NAICS code
CO does not have reasonable expectation of receiving offers from 2 or more WOSBs or EDWOSBs
Estimated price does not exceed $4 million ($6.5 million for manufacturing)
Award can be made at fair and reasonable price
80 FR 55019 (September 14, 2015), effective date October 14, 2015
Section 825 of NDAA of 2015

- Authority to award Sole Source Contracts to WOSBs or EDWOSBs
- SBA must conduct new study of industries where WOSBs are underrepresented by January 2016
- Certification – by Federal agency, a State government, SBA, or national certifying entity approved by SBA
Subcontracting
- Case 2014–003, 80 FR 32909, June 10, 2015
- Comment period closed August 10, 2015
- Implements SBA final rule on 2010 Jobs Act

Consolidation and Bundling
- Case 2014–015, 80 FR 31561, June 3, 2015
- Comment period closed August 3, 2015
- Implements SBA final rule on 2010 Jobs Act
Advisory Small Business Size Decisions

- Final Rule: 80 FR 7533, Feb. 11, 2015, effective date August 10, 2015
- Businesses cannot be penalized if they rely, in good faith, on an advisory opinion re: **size** issued by a PTAC or SBDC
- Discretionary authority for PTACs and SBDCs
- PTACs and SBDCs must
  - submit a copy of each determination to SBA’s Office of Procurement Law (OPL)
  - Provide a written analysis and include Form 355 and other evidence
- OPL may either refer for a formal size determination or issue a decision within 10 business days
- OPL must provide PTAC or SBDC a copy of the decision
- SBC may rely on PTAC or SBDC decision that it is small until SBA issues a decision stating otherwise or there has been a change that affects its size
- Size status may still be protested on a procurement
- Any firm that receives a negative determination from a PTAC or SBDC may request a formal size determination
Kenneth Dodds
- Director, Office of Policy, Planning & Liaison
- 202–619–1766
- kenneth.dodds@sba.gov

Questions?