

Legislative & Regulatory Update for Small Businesses



Presented by
Antonio "Tony" Franco
Peter B. Ford
afranco@pilieromazza.com
pford@pilieromazza.com



GSA SCHEDULE CONTRACTS: VETERANS FIRST?

- Kingdomware Technologies v. United States (2014)
 - Court of Federal Circuit held VA can procure goods and services through GSA Schedule contracts without first determining whether it could procure the same goods and services from SDVOSBs and VOSBs
- GSA Schedule contracts trump Veterans First



2013 NATIONAL DEFENSE AUTHORIZATION ACT ("NDAA"):

- Introduced significant changes to limitations on subcontracting ("LOS") and mentor-protégé ("MP") relationships
- LOS changes reflect Congress' concern that contract benefits intended for small businesses are claimed by large firms
- MP provisions will extend availability of "approved" MP agreements to all small businesses



NDAA REVISIONS TO LOS

- Services: small businesses (“SB”) cannot subcontract more than 50% of the amount paid under a contract
- Supplies: SBs cannot subcontract more than 50% of the amount (minus materials) paid under a contract
- Mixed Contracts: SB decides what accounts for the majority of the work under a contract (services or supplies), and then cannot subcontract more than 50% of the amount paid for that work



NDAA REVISIONS TO LOS

- Changes for construction contracts left to SBA rulemaking
- SBs may comply by subcontracting to “similarly situated entities”
- Changes unlikely to take effect until SBA issues rules, and FAR council revises contract clauses, that implement them



NEW MENTOR PROTÉGÉ PROGRAM

- Small Business Jobs Act
- Act allows for SBA to establish Mentor-Protégé programs for:
 - HUBZone Companies
 - SDVOSB's
 - WOSB's
- Programs will be comparable to the 8(a) program
- Proposed regulations early next year?



NDAA IMPACT ON MP AGREEMENTS

- SBA does not recognize MP Programs of other agencies, apart from MP Programs established through DoD. MP participation through programs of other agencies creates affiliation risks
- Now, NDAA has authorized SBA to create MP Program for all SBs
- New rules instituting such a program may be released within 1 to 3 months



SUBCONTRACTING

- SBA issued Final Rule - Purpose is to strengthen subcontracting
 - SBA to establish policies for subcontracting compliance, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices
 - Requires a prime contractor notify the CO in writing if the prime contractor fails to utilize a small business concern used in preparing and submitting the prime contractor's bid or proposal



SUBCONTRACTING

- Use of certain SBCs as subcontractors
 - If subcontracting plan is required, prime must represent it will use small business that assisted in preparing offer and notify CO in writing if it fails to utilize the small business
 - A prime used a small business in preparing the offer if; it referenced the SBC in the offer; prime has a subcontract or agreement with SBC to perform work on the contract; or SBC drafted any portion of the offer or prime used the SBC's pricing, cost information or technical expertise in preparing offer and there was an understanding the prime would use SBC as a subcontractor



SUBCONTRACTING

- Payments to subcontractors
 - Prime must notify CO if and why it reduces payments to a subcontractor or when payments are 90 days past due
 - Prime cannot prohibit a subcontractor from discussing any material matter with the CO



SUBCONTRACTING

- Subcontracting plans
 - CO is responsible for monitoring and evaluating small business subcontracting plan performance
 - Did prime make a good faith effort to meet its goals – missed one goal but overachieved in another?
 - CO must ensure prime submits subcontracting reports to eSRS



THE ROTECH DECISION

- September 19, 2014 decision of the U.S. Court of Federal Claims, COFC No. 14-502C, holding that the plain language of the nonmanufacturer rule in the Small Business Act applies to “any” supplies being procured via small business set-asides
- Therefore, these supplies must be provided by another small business unless SBA has granted a waiver of the nonmanufacturer rule
- The ruling would require even those supplies procured as an ancillary part of service or construction contracts to be procured from small businesses absent a waiver



THE ROTECH DECISION

- The Department of Justice can appeal this decision
- SBA can seek a Legislative Solution
- In the meantime, anticipate increased protests to the Court of Federal Claims



SMALL BUSINESS STATUS PRESUMED LOSS RULE

- What is the presumed loss rule?
 - Applies on every contract, subcontract, cooperative agreement, or grant that is set aside for award to small business concerns
 - If it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation there is a presumed loss to the United States
 - The presumed loss is equal to the amount expended by the United States on the contract, subcontract, or cooperative agreement



SMALL BUSINESS CERTIFICATIONS: PRESUMED LOSS RULE

- What constitutes a willful and intentional certification of small business size and status?
 - Submission of a bid, proposal, application or offer for a contract set aside or classified as intended for award to small business concerns
 - Submission of a bid, proposal, application or offer which encourages a federal agency to classify the bid or proposal, if awarded, as an award to a small business concern



SMALL BUSINESS CERTIFICATIONS: PRESUMED LOSS RULE

- Registration on any federal electronic database (i.e., SAM) for the purpose of being considered for award of Federal contracts. (Note that under the Rule, concerns must certify their size in SAM at least annually)
- The Rule may be determined not to apply in the case of unintentional errors, technical malfunctions and other situations demonstrating that the size misrepresentation was not affirmative, intentional, or willful



SMALL BUSINESS CERTIFICATIONS: PRESUMED LOSS RULE

- Penalties for Misrepresentations
 - Suspension or debarment
 - Civil penalties under the False Claim Act and Program Fraud Civil Remedies Act
 - Criminal penalties



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Any Questions?



888 17TH STREET, NW, 11TH FLOOR
WASHINGTON D.C. 20006

PHONE 202 857-1000

FAX 202 857-0200

WWW.PILIEROMAZZA.COM

Antonio R. Franco
Partner

afranco@pilieromazza.com

Peter B. Ford
Associate

pford@pilieromazza.com



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