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# Small Business Contracting Update

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# The Small Business Act

- Prime Contracting Goal
  - 23% for small businesses government-wide
  - 5% for Small Disadvantaged Businesses
  - 5% for Women-Owned Small Businesses
  - 3% for HUBZone businesses
  - 3% for Service-Disabled Veteran-Owned Businesses
- Subcontracting Goal = same percentages
- Annual Agency Scorecard
  - Government has fallen short for five years in a row

# Mechanisms for Meeting Goals

- Restricted Competition; i.e., set-asides
  - Set-asides accounted for nearly half of the \$97 billion in contracts awarded to small businesses in FY 2009
- Sole-Source contract awards
  - 8(a), SDVOSB, HUBZone
- Subcontracting Plan/Liquidated Damages
  - FAR 52.219-8, Utilization of Small Business Concerns (JAN 2011)
  - FAR 52.219-9, Small Business Subcontracting Plan (JAN 2011)
  - FAR 52.219-16, Liquidated Damages – Subcontracting Plan (JAN 1999)

# “Small” / “Other Than Small” Contract Relationships

## Types of Relationships

- Subcontracts
  - Small Business as Prime
  - Small Business as Sub
- Joint Ventures
  - 8(a)
  - Other
- Mentor-Protégé
  - 8(a)
  - Other
    - ✓ No affiliation exemption

## Common Issues

- Size or Status
- Affiliation
  - Ostensible subcontractor
  - Joint Ventures
- Performance of Work
  - FAR 52.219-14, Limitations on Subcontracting
- Nonmanufacturer Rule
  - 13 CFR 121.406
- Subcontracting Plan

# Affiliation

- Relates to the “size” of the concern
- In determining the size of a concern, SBA will include size of concern’s “affiliates”
- Affiliate = one party has the power to control another or third party has party to control both parties
- Control does not need to have been exercised
- Many “indicia” of affiliation
  - “Ostensible subcontractor” rule
  - Joint ventures

# Affiliation: Ostensible Subcontractor Rule

- “totality of circumstances test”
- Who is performing the “primary and vital” contract requirements?
- Is the small business prime “unduly reliant” on the large business subcontractor?
- “other factors” include whether subcontractor was formerly the incumbent; whether small business prime hired incumbent staff; whether the prime has necessary experience and/or resources
  - SBA will review teaming agreement and subcontract

# Joint Ventures

- General rule is that joint venturers are affiliated with one another
- **Exception to “general affiliation”** if joint venture limits itself to three contract awards within two year period
- **Exception to “procurement specific” affiliation** if members are also members of an SBA-approved 8(a) Mentor-Protégé agreement
- **Exception to “procurement specific” affiliation** if RFP reflects a “bundled requirement” or all members of the joint venture are small, and
  - if revenue-based size standard, contract’s value is greater than ½ size standard, or
  - if employee-based size standard, contract’s value exceeds \$10 million

# Performance of Work Requirements

- FAR 52.219-14, Limitations on Subcontracting
- Small business prime must perform a certain % of the contract work with its own employees
- % amount varies according to contract type
  - Services = 50% of the cost of contract performance incurred for personnel
  - Manufacturing = 50% of the cost of manufacturing, excluding the cost of materials
  - Construction = 15% of the cost of the contract, excluding the cost of materials



# Nonmanufacturer Rule

- 13 C.F.R. 121.406
- Only applies to procurements with a manufacturing or supply NAICS code
- Does not apply for simplified acquisitions less than \$25,000
- A small business non-manufacturer of an “end-item” may submit a bid/proposal for manufactured supplies under certain conditions:
  - Small business does not exceed 500 employees
  - Small business is primarily engaged in the retail or wholesale trade and normally supplies the type of item requested
  - Take ownership and possession of supply item consistent with industry practice
  - Will supply items manufactured by a small business in the United States unless waiver obtained

# Significant Small Business Contracting Events

- GAO report on the **Section 8(a) program** – 14 Ineligible Firms Received \$325 million In 8(a) Contracts (March 2010)
- GAO report on **SDVOSB program** – Fraud Prevention Controls Needed (May 2010)
- GAO report on **HUBZone Program** – HUBZone Program Remains Vulnerable to Fraud (June 2010)
  - SBA Administrator Karen Mills testifies before Congress re SBA's enforcement initiatives (July 2010)
- *Morris Griffin* case (August 2010)
- *Washington Post* articles on GTSI/ANCs (September 29, 2010)
- **GTSI Suspension** (October 1, 2010)
- Presidential Memorandum on Federal Small Business Contracting (April 2010) – Small Business Interagency Task Force (Summer 2010)



# New Developments: Legislation and Regulations

- **Small Business Jobs Act** (September 28, 2010)
  - **Anti-fraud provisions**
  - **Subcontracting provisions**
  - MAS set-aside provisions
  - Size standards review
  - Bundling/Consolidation provisions
- National Defense Authorization Act FY 2013
- SBA Regulations (February 2011)
  - Size Issues
  - Section 8(a) Program
  - Joint Ventures

# Jobs Act Implementing Regulations

- **Sections 1341 and 1342: Anti-Fraud**
  - SBA issued proposed rule on October 7, 2011  
*Small Business Size and Status Integrity*, 76 Fed. Reg. 62313
- **Sections 1321, 1322, 1334 Re: Subcontracting**
  - SBA issued proposed rule on October 5, 2011  
*Small Business Subcontracting*, 76 Fed. Reg. 61626
- **Sections 1311 and 1331: MAS Set-Asides**
- **Sections 1312 and 1313: Bundling/Consolidation**
  - SBA issued proposed rule on May 16, 2012  
*Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation*, 77 Fed. Reg. 29130

# Jobs Act Anti-Fraud Provisions

- *Section 1341* provides that certain actions constitute a **“deemed” willful and intentional certification** of size or status
  - Removes necessity to prove “knowledge” element of crime
- *Section 1341* establishes an **presumption of loss** resulting from a contractor’s willful certification
  - Previously, hard to demonstrate that Government was harmed financially from a false certification
  - Amount of \$ loss presumed = “total amount expended”
- *Section 1341* allows for **“protection from liability”** for “unintentional errors, technical malfunctions or other similar situations”

# Jobs Act Anti-Fraud Proposed Regulations

- SBA issued proposed rule on October 7, 2011  
*Small Business Size and Status Integrity*, 76 Fed. Reg. 62313
- Comments were due December 8, 2011
- SBA received 22 comments
- Inserted term “irrefutable”
  - “[T]here shall be an irrefutable presumption of loss to the United States based on the total amount expended . . . whenever it is established that a business concern other than a small business concern ‘willfully sought and received the award by misrepresentation.’”

## Jobs Act Anti-Fraud Proposed Regulations cont.

- Flushed out “limitation of liability provision”
  - Consideration given to firm’s “internal management procedures”
  - “clarity or ambiguity” of representation/certification
  - Efforts made by concern to correct an incorrect or invalid representation/certification in a timely manner
  - No liability for erroneous representations/certifications made by Government personnel

## Jobs Act Subcontracting Provisions

- *Section 1321* requires SBA to establish **policies for subcontracting compliance**
- *Section 1322* requires a prime contractor to 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
- *Section 1334* requires a prime contractor that has a subcontracting plan to notify the CO in writing **whenever a payment to a subcontractor is reduced or is 90 days or more past due** for goods/services provided under the contract and for which the Government has paid the prime contractor



# Jobs Act Subcontracting Proposed Regulations

- *Small Business Subcontracting*  
76 Fed. Reg. 61626 (October 5, 2011)
- **Use of small business team members**
  - If subcontracting plan required, prime must represent it will use small businesses that assisted it in preparing bid or proposal and notify the CO if it does not do so
  - Regulation defines broadly the circumstances in which the prime will be considered to have “used” a small business in connection with its bid or proposal
- **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

# Jobs Act Subcontracting Regulations cont.

- **Subcontracting Plan compliance**
  - CO responsible for monitoring and evaluating small subcontracting performance
  - CO must ensure prime submits subcontracting reports to eSRS
- **Evaluation factor for Subcontracting**
  - Proposed subcontracting
  - Proposed quick or timely payment
  - Past performance –timely subcontractor payment
  - Past performance – compliance w/ subk plan
- Comments were due January 6, 2011; SBA received **105** comments



# Other Jobs Act Implementing Regulations

- *Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 77 Fed. Reg. 29130 (May 2012)*
- **MAS Set-Asides**
  - Implements Section 1331 of the Jobs Act
  - Agencies have the authority to set aside for small businesses orders under multiple-award, indefinite-delivery, indefinite-quantity contracts
    - Includes GSA Schedule contracts
    - Various mechanisms for increasing small business participation (partial set-aside/reserves)
    - Discretionary on the part of the agency
- **Bundling/Consolidation**
  - Publication of bundling rationale; justification for consolidation

*Questions???*

U.S. Small Business Administration



