
Small Business - 2017

GovConectx Winter Showcase
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What's New in 2017

- New labor regulations
- Fair Pay and Safe Workplaces regulation
- *Kingdomware* and its ramifications
- SBA's All Small Mentor Protégé Program
- Limitations on Subcontracting Rule

New Labor Regulations/January 1

- Increase in Minimum Wage to \$10.20
 - EO 13658
 - Applies to DBA/SCA/Concessions/Real Property
 - If state law minimum wage higher, state law governs
- Paid Sick Leave
 - EO 1376
 - 7 days of paid sick leave annually
 - Applies to new contracts issued after January 1
 - Applies to DBA/SCA/Concessions/Real Property

New Labor Regulations/January 1 (cont.)

- Paycheck Transparency
 - EO 13673, Fair Pay and Safe Workplaces
 - Paychecks must contain information regarding hours worked, overtime, pay and any additions or deductions from pay
 - Must inform independent contractors of their status as independent contractors
 - Applies to new solicitations after January 1

Fair Pay and Safe Workplaces

- EO 13673
- “Blacklist” provision implemented in several FAR clauses
 - Required contractors to disclose “violations” of 14 labor statutes
 - Violations would be considered by COs in determining contractor responsibility/eligibility for award of contract

Fair Pay and Safe Workplaces (cont.)

- Term “violation” defined very broadly
 - Included administrative determinations
 - Included interim determinations
- Required prime contractor to report the “labor violations” of its subcontractors

Fair Pay and Safe Workplaces (cont.)

- Rule enjoined in October 2016 by a federal judge in Texas in response to a lawsuit filed by the Associated Builders and Contractors of Southeast Texas
 - Judge found EO was an overreach of Executive Branch's authority
 - Judge found EO contrary to Congressional intent
 - Congress never intended labor laws to be used as a weapon against contractors

Fair Pay and Safe Workplaces (cont.)

- Two weeks ago, the House of Representatives passed a measure disapproving the Fair Pay and Safe Workplaces EO
- Matter on hold pending outcome of litigation in Texas
- May affect other EOs that were implemented at the beginning of the year
 - Minimum Wage
 - Sick Leave

Kingdomware

- Supreme Court case addressing VA's implementation of the "Rule of Two"
 - Based on 2006 "Veterans First" statute
 - VA must award contract to VOSB if it determines that two or more VOSB's will submit offers at a fair and reasonable price
 - VA has taken the position that it may award task orders under GSA MAS contracts without regard to Rule of Two
 - VA rationale was that Rule of Two only applied to contracts, not task orders
- Supreme Court characterized a "task order" as a contract

Kingdomware (cont.)

- Implications for application of “Rule of Two” in other contexts
 - Small Business Act “Rule of Two”
 - Applicable to contracts between \$3,500 and \$150,000
 - GSA has taken the position that the SBA Rule of Two does not apply to task orders issued under GSA FSS contracts
 - GAO has agreed in a number of cases
 - SBA Memorandum issued to PCRs on October 20, 2016

SBA All Small Mentor-Protégé Program

- Effective August 24, 2016
- Modeled on SBA 8(a) Program but applies to all types of small businesses (except VOSBs)
- SBA has already received over 60 applications; processing them within 45 days
- Key aspect of Mentor-Protégé program is the ability of a small business to joint venture with an “other than small business” without regard to affiliation
 - Mentor may also own up to 40% of the Protégé

SBA All Small Mentor-Protégé Program (cont.)

- Joint venture partners presumed affiliated
 - Affiliation leads to aggregation of size
 - Two exceptions
 - Joint venture is made up of all small businesses each of which are small under NAICS code applicable to the procurement
 - Joint venture made up of a Mentor and Protégé
- Need executed and SBA-approved MPA before joint venture can submit a proposal
 - MPA must be in writing
 - MPA must detail assistance being provided by Mentor

SBA All Small Mentor-Protégé Program (cont.)

- Other agency MPA programs only allowed to continue for a year before getting approval by SBA to continue
 - Except for DoD Mentor-Protégé Program and SBIR/STTR Program
- Joint Venture advantages
 - Increased capability to bid large procurements
 - Agencies must credit the JV with the past performance of its members
 - Prime past performance
 - “Other than small businesses” can do up to 60% of the work and realize 60% of the profits in addition to owning up to 40% of the Protégé

Limitation on Subcontracting Rule

- FAR 52.219-14, Limitations on Subcontracting
- SBA 13 C.F.R. 125.6
- For services, standard used to be based on the cost incurred for personnel
 - Small business prime had to perform 50% of the cost of the contract incurred for personnel
- In SBA regulations, standard has changed to amount *paid* the prime contractor
 - Not implemented in the FAR yet

Limitation on Subcontracting Rule (cont.)

- Prime can meet its obligations under Limitations on Subcontracting rule by using a “similarly-situated entity”
 - Subcontractor has same small business program status as the prime contractor that made the prime contractor eligible for award
 - Entity must also be small under NAICS code prime assigns to subcontract
 - Entity must perform work with its own employees

Questions ?



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