

SECAF Legislative and Regulatory Committee Educational Program
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SMALL BUSINESS CONTRACTING UPDATE
FY 2013

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Mentor-Protégé Programs

- **Small Business Jobs Act (2010)**
 - Section 1347(b)(3)
 - Authorized SBA to establish Mentor-Protégé Programs for SDVOSBs, WOSBs and HUBZone concerns
 - Programs should be modeled on the 8(a) Mentor-Protégé Program
 - SBA has yet to issue proposed rule implementing this Jobs Act provision

Mentor-Protégé Programs

- **National Defense Authorization Act FY 2013**
 - Authorized SBA to establish Mentor-Protégé Program for *small businesses*
 - Agencies other than SBA interested in having a Mentor-Protégé Program must submit plan to SBA for approval (DoD excepted)
 - SBA must issue regulations ensuring consistency among programs
 - Existing SBA/DoD Mentor-Protégé Agreements not affected, other agency agreements valid for one year following the date on which SBA issues its regulations

Contract Bundling

- **Small Business Jobs Act**

- **Section 1312 – Bundling**

- SBA must establish a Government-wide policy on bundling
- Agencies must create a web site and publish a list and rationale for bundled contracts

- **Section 1311 – Consolidation**

- Defined as a solicitation that seeks offer for two or more requirements that had been performed previously under two or more contracts at a cost less than the cost of the contract for which offers are solicited
- “Bundling” is consolidation of two or more requirements previously performed by small businesses
- Agencies cannot consolidate contracts for a contract valued at greater than \$2 million without market research, justification and assurances that small businesses will included

Contract Bundling

- SBA issued **Final Rule** on October 13, 2011 implementing the Jobs Act Section 1312 provisions; rule effective November 28, 2011
- SBA issued proposed rule on May 16, 2012
Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 77 Fed. Reg. 29130
 - Requires justification of consolidated actions
 - Requires publication of rationale for consolidation
 - Exempts “Small Business Teaming Arrangements” from affiliation rule for “bundled” contracts that have a “reserve”
 - SBA received **75** comments; no scheduled date for Final Rule

Contract Bundling

- **National Defense Authorization Act FY 2013**
 - Section 1671
 - Construction contracts now considered part of bundling/consolidation review
 - Eliminates \$5 million contract, DoD-specific threshold for review; substitutes instead now government-wide \$2 million contract threshold
 - Requires GAO to review and report on consolidated contract awards

Anti-Fraud Provisions

- **Small Business Jobs Act**

- Sections 1341 and 1342

- provides that certain actions constitute a “*deemed*” *willful and intentional certification* of size or status
 - establishes an *presumption of loss* resulting from a contractor’s willful certification (total amount expended)
 - allows for “*protection from liability*” for “unintentional errors, technical malfunctions or other similar situations”
- SBA issued proposed rule implementing Jobs Act anti-fraud provisions on October 7, 2011

Anti-Fraud Provisions

- **Small Business Size and Status Integrity Proposed Rule**
 - 76 Fed. Reg.62313, 22 Comments received, Final Rule 3/13
 - Inserted term “irrefutable” before word “presumption”
 - 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

Anti-Fraud Provisions

- **National Defense Authorization Act FY 2013**
 - Sections 1681 and 1682
 - Limits the liability of a small business for misrepresentation of its size or status if it relies in good faith on an “advisory opinion” issued by a Small Business Development Center or a Procurement Technical Assistance Center
 - The SBDC or the PTAC does not have to issue the opinion
 - The SBDC or the PTAC must send copy of opinion to SBA and if SBA disagrees with opinion, the small business cannot rely on it
 - Businesses may be suspended or debarred for misrepresentation as to size or status without regard to whether they are “presently responsible” as provided in FAR Part 9

Subcontracting

- **Small Business Jobs Act**

- 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

Subcontracting

- SBA issued proposed rule on October 5, 2011
Small Business Subcontracting, 76 Fed. Reg. 61626
 - 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

Subcontracting

- **Small Business Subcontracting Proposed Rule 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;
Final Rule 3/13

Subcontracting

- **National Defense Authorization Act FY 2013**
 - If a prime contractor identifies a small business in its bid or proposal or subcontracting plan the prime must notify the small business that it has done so
 - Agencies must establish a “reporting mechanism” by which subcontractors can report “fraudulent” activity or “bad faith” by prime contractors with respect to implementing their subcontracting plans
 - A prime’s failure to meet the subcontracting goals set forth in its subcontracting plan may be considered in the prime’s past performance evaluation
 - Each agency subcontracting goal must be based on realistically achievable improvements, which will keep goal from decreasing
 - Federal subcontracting goals must break down achievements by NAICS, which will make it easier to track which industries are receiving subcontracting opportunities

MAS Contracts

- **Small Business Jobs Act**

- Section 1331
- Authorizes the set-aside of part or parts of MAS contracts for small business
- Authorizes the set-aside of orders under MAS contracts for small business
- At least one MAS contract must be “reserved” for small businesses

MAS Contracts

- **Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 77 Fed. Reg. 29130 (May 2012)**
 - 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

MAS Contracts

- **Federal Strategic Sourcing Initiatives**

- Non-mandatory contract vehicles (typically BPAs) competitively awarded to group of FSS contract holders for select products
- OMB Memo to Agency Heads dated December 5, 2012 encouraging use of FSSI's, including "issuing and enforcing mandatory use policies"
- GSA has committed to establish ten new FSSIs between FY 2013 and FY 2014
- At a recent industry conference, Joe Jordan, OFFP Administrator, stated that FSSI is intended to encompass \$150 billion of the \$500 billion the Government spends annually on goods and services

MAS Contracts

- **Demand Based Model**

- GSA published Proposed Rule in Federal Register, July 23, 2012, advising that it intended to institute a “Demand Based Model” to improve MAS contract administration and performance
- Effective September 21, 2012
 - Provides that MAS contracts and SINs identified therein will be assessed to see whether “continuous open season” should continue; MAS contracts and/or SINs may be temporarily suspended or eliminated altogether
- House Small Business Committee held a subcommittee hearing on 6/10/2012 and submitted comments in response to Proposed Rule on 10/25/2012



Questions?