

Legislative and Regulatory Developments Affecting Small Businesses

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Formerly a partner at an international law firm, Devon Hewitt has over 20 years' experience in representing small, mid-tier and large government contractors. She has participated in over 100 bid protests and is one of the few attorneys to have appeared before GAO in formal hearings and argued bid protest appeals before the United States Court of Appeals for the Federal Circuit. Ms. Hewitt has particular expertise in small business contracting matters and currently serves on the Board of the Small Emerging Contractors Advisory Forum and on the Board of the Washington Chapter of the SDVOSB Council. Ms. Hewitt is a graduate of Smith College and the University of Virginia School of Law. Ms. Hewitt clerked for the Honorable Jose Fuste in the U.S. District Court for Puerto Rico.

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Recent Small Business Rules

- **Small Business Size Standards: Inflation Adjustment to Monetary Based Size Standards**, effective July 14, 2014
- **Small Business Subcontracting**, effective August 15, 2013
- **Small Business Size and Status Integrity**, effective August 27, 2013
- **Task and Delivery Order Contracts**, effective December 31, 2013

Small Business Size Standards Inflation Adjustment

- Adjustment made to *monetary-based* size standards
- Increase based on inflation, not industry review
- Last inflation-based adjustment was in 2008

- Subsector 541, Professional, Scientific and Technical Services
 - \$7 million to \$7.5 million
 - \$14 million to \$15 million
 - \$25.5 million to \$27.5 million

Small Business Subcontracting Rule

- For contracts where a subcontracting plan is required, a prime must notify the CO when it has failed to utilize a small business subcontractor “in the same scope, amount, and quality” as the subcontractor was used in preparing the prime’s bid/proposal
- Prime contractor must notify its CO, in writing, whenever the prime contractor reduces payments to a small business subcontractor from the “agreed upon” levels set forth in a subcontract or when payments owed a small business subcontractor are 90 days or more overdue
- *The rule provides that small businesses may discuss these issues directly with the CO and a prime contractor cannot prohibit a subcontractor from doing so*

Small Business Size and Status Integrity Rule

- Implements provisions from the Small Business Jobs Act of 2010
- Establishes a “*presumption of loss*” equal to the amount expended under a contract when a concern willfully seeks and receives a contract award by misrepresentation
 - Can be rebutted; see limitation of liability provisions
- Provides that a submission of an offer or proposal for award of a contract set-aside for small business concerns or registration on any Federal electronic data base will be “*deemed*” a size or status certification/representation
 - Small business authorized official must sign certification and submit signed certification with each bid/offer/proposal for a contract or subcontract
 - Must recertify in SAM no less than annually, otherwise concern will not be listed as small (not applicable to 8(a) or HUBZone firms)

Small Business Size and Status Integrity Rule cont.

- Includes safe harbor and limitation on liability provisions
 - Proposed Rule issued by SBA on June 25, 2014 establishes a “safe harbor” from fraud penalties for concerns that misrepresent size or status if they acted in good faith reliance upon small business status advisory opinions received from Small Business Development Centers (SBDCs) or Procurement Technical Assistance Centers (PTACs)
 - Presumption of loss and “deemed” certification may not occur in the case of “unintentional errors, technical malfunctions” etc.
 - ✓ SBA will look at firm’s internal compliance procedures; clarity or ambiguity of certification /representation; and efforts to correct incorrect misrepresentation in a timely manner

Task and Delivery Order Contracts Rule

- Authorized use of set-asides, partial set-asides and “reserves” in connection with Multiple Award Contracts
 - “Rule of Two” applies to MAC procurements
- Revised recertification rules
 - If an “agreement” is set-aside (BPA, BOA), concern must self-certify as small at the time it submits its offer for the agreement and must “qualify” as small at time it receives an order
 - While small businesses have to self-certify before receiving a BPA for a GSA MAS contract, the small business does not need to recertify for orders issued pursuant to the BPA
 - Small businesses must recertify when they get acquired or when they acquire a business
 - Small business joint venture must recertify when participant to joint venture gets acquired or is acquired

Task and Delivery Order Contracts Rule cont.

- Limitations on Subcontracting
 - Under a contract, concern must meet 51% performance of work requirement during each performance period
 - Under an order, concern must meet 51% performance of work requirement for period of performance set forth in the order
- Clarified that “if small for initial offer, then small for life of contract” principle applies to program status (i.e., HUBZone/SDVOSB/WOSB status)
 - But does not apply to long-term contracts; recertification required in 5th year
 - But does not apply where there is a trigger (merger, acquisition, novation)

Pending Small Business Rules

- National Defense Authorization Act for FY 2013 – **Limitations on Subcontracting**
 - 51% performance of work requirement applicable to *total amount paid* small business prime providing services to the Government
 - A small business prime may meet performance of work requirements by subcontracting to other “similarly situated” small businesses
 - ✓ OMB currently reviewing proposed rule; should be issued shortly

Pending Small Business Rules cont.

- National Defense Authorization Act for FY 2013 – **Mentor-Protégé Programs**
 - 8(a) Program Mentor-Protégé model will apply to all small business programs
 - SBA will oversee all agency Mentor-Protégé Programs
 - Rule not likely to be issued until next year
 - ✓ SBA chastised at a mid-July hearing of the House Small Business Committee on Contracting and the Workforce for delay in issuing rules related to the NDAA for FY 2013

Legislative Initiatives

- National Defense Authorization Act for FY 2015
 - Transfer control of VA's SDVOSB verification program to SBA
 - Increase Government small business contracting goal from 23% to 25%
 - Authorizes sole source awards to WOSBs of up to \$4 million (\$6 million for manufacturing contracts)
 - Passed House in May 2013, on Senate calendar

Questions?