



# SBA Regulations Implementing NDAA FY 2013



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# New SBA Regulations

- Proposed Rule issued December 29, 2014
- Final Rule issued May 31, 2016, 81 Fed. Reg. 34243
- Effective June 30, 2016
- Topics
  - **Limitations on Subcontracting**
  - Subcontracting Plans
  - Affiliation
  - Joint Ventures
  - Calculation of Annual Receipts
  - Recertification
  - **Nonmanufacturer Rule**
  - Certificate of Competency

# Limitations on Subcontracting

- Standard now is % of amount government *paid* prime contractor rather than cost of contract
- Limitations on subcontracting vs. performance of work
- Cannot pay subcontractor more than certain percentage of amount paid prime
  - Services (50%), Supplies (50%), Construction (85%), Special Trades (75%)

## Limitations on Subcontracting (cont.)

- Does not apply to small business set-asides valued between \$3,500 and \$150,000
- Excludes “similarly situated entities”
  - = subcontractor that has the same small business program status as the prime contractor that made prime contractor eligible for award
    - Already the case for the HUBZone and SDV SBC programs
- The subcontractor/entity must also be small under the NAICS code applicable to the *subcontract*

## LOS: “Similarly Situated Entity”

- First tier subcontractor (similarly situated entity) must perform work with its own employees; any work subcontracted by the first tier subcontractor is considered subcontracted work
- Independent Contractors are considered subcontractors and can be “similarly situated entities”
- Similarly situated entities exempt from “ostensible contractor” rule

# LOS: Mixed Service/Supply Contracts

- CO to determine primary purpose of contract and assign corresponding NAICS code
- LOS percentages apply only to that portion considered the primary purpose of the contract
- Includes any overhead or indirect costs associated with primary purpose, but does not include “cost of materials”

# LOS: Compliance

- Period of time to determine compliance in set-aside contract is usually the base term and each subsequent option period
- For an order set aside under a full and open contract, period of compliance is period of performance for each order
- CO has discretion under set-aside contract to make compliance correlate to task order period of performance

# LOS: Penalties for Noncompliance

- Fine of the greater of \$500,000 or the amount spent on subcontracts above the permitted percentage
- Basis for debarment
  - Unless firm made good faith representation that it would use similarly situated entities and meet the LOS requirements but through “unforeseen circumstances” was unable to do so



# Nonmanufacturer Rule

- If a concern not a manufacturer of an end item in a supply/manufacturing contract, typically must provide item manufactured by a domestic small business
- Waivers permitted where there are no small business manufacturers of end item
  - Waiver not required if at least 50% of the estimated contract value of the items are manufactured by small businesses
- New rule states that nonmanufacturer rule does not apply to acquisitions between \$3,500 and \$150,000

# Nonmanufacturer Rule: Waiver

- Waivers usually obtained by the CO prior to award
- CO must notify offerors of waiver in solicitation
- Waiver permitted after solicitation issued provided CO provides offerors with additional time to respond
- In some cases, waiver may be appropriate after contract award
- Where a waiver has been granted for some items, LOS requirements will apply only to non-waived items

# Nonmanufacturer Rule: Software

- Most commercial available software will be considered a supply item subject to the nonmanufacturer rule
- Cloud based solutions are considered services
- Custom design or modification of software is a service
- Will be available for a waiver, NAICS code that should apply is 511210, Software Publishers

# Subcontracting Plans

- Contractor that fails to provide a written corrective action plan after receiving a marginal or unsatisfactory rating for its subcontracting plan or fails to make a good faith attempt to comply, will not only be in breach of contract, failure also be taken account in any past performance evaluation
- Prime contractor that identifies small business by name as a subcontractor in a proposal/subcontracting plan must notify that subcontractor in advance and in writing

# Affiliation

- Identity of Interest/Family Relationships
  - Presumption (rebuttable) of affiliation exists for firms that conduct business with each other and are owned and controlled by persons who are married couples, parties to a civil union, parents and children and siblings.
- Economic Dependence
  - Entities are presumed affiliated if a firm derives 70% or more of its revenue from another firm over the three prior fiscal years
  - Presumption rebuttable, ie., new business
  - No affiliation between concerns owned by an Indian tribe, ANC, NHO, or CDC based on contractual relationships

# Joint Ventures

- Joint venture members presumed to be affiliated
- Two exceptions: (1) Section 8(a)M/P joint venture and (2) all small businesses and acquisition is of a certain size
- New rule eliminates size of acquisition requirement; now only each member has to be small under applicable NAICS code

# Calculation of Annual Receipts

- Receipts include all income
- Only exceptions are those listed in regulation
- Receipts specifically includes passive income

# Recertification

- Following a merger or acquisition, a concern must recertify its size status within 30 days
- New rule states that if merger or acquisition occurs after an offer is submitted but before award of a contract, the offeror must recertify its size to the CO *prior to award*



# Standing to file a Size Protest

- As long as disappointed offeror is in line or consideration for award, it has standing to bring a size protest
- If offeror has found to be non-responsive, technically unacceptable or outside the competitive range, it does not have standing to bring a size protest

# Certificate of Competency

- Finding of non-responsibility due to financial capacity and award is for IDIQ contract
- Consideration of the firm's maximum financial capacity will be made by SBA
- COC will be issued for certain amount which will be the limit of financial capacity for that contract
  - CO cannot deny the firm an award of an order or contract based on financial capacity if the firm has not reached the financial maximum identified in the COC

# Supreme Court Decision

- *Kingdomware Technologies, Inc. v. United States*
- Concerns the “Rule of Two” which is imposed by statute
- VA had not been applying Rule of Two to acquisitions that contemplated the ordering of supplies/services off the Federal Supply Schedules
- Supreme Court confirmed that Rule of Two applies to all VA acquisitions
- VA has issued acquisition policy directive implementing Rule of Two immediately

# Contact Information



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