

Legal Update for Small Business Government Contractors

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Agenda

- Introduction
- New Test for Determining “Smallness”
- HUBZone Proposed Revised Rules
- New WOSB/EDWOSB Certification Rules
- New SBA and VA Verification Rules
- Supply Chain Risk Management – Cybersecurity
- What’s New in Bondage?
- Limitations on Subcontracting Explained
- Late is still late!

Introduction - Why Is This Important?

- In 2018 Federal government spent \$120.8 billion on prime contracts with small business
- Federal government met the the 23% statutory goal for sixth consecutive year
- **WOSB** goal was not met (5.0% goal; 4.75%)
- **SDVOSB** goal was met (3.0% goal; 4.27%)
- **HUBZone** goal not met (3.0% goal; 2.05%)

New Test for Determining “Smallness”

“Small Business Runway Extension Act”

- Under the “Small Business Runway Extension Act of 2018,” the SBA will soon use the *last five years* to determine average revenues for *service-based NAICS codes*
- Congress thought it was self-executing; SBA disagreed
- On June 24, 2019 SBA issued proposed regulations...

“Small Business Runway Extension Act”

- Clarifies that SBRA only applied to *service-sector* industries
- SBA proposes to extend calculation period for ALL receipts-based industries to five years – not just service industries
- Five year period effective with FINAL RULE expected in January 2020
- Will not apply rule retroactively – apply three year rule for all offers made before final rule effective date, including in size appeals

“Small Business Runway Extension Act”

- This will result in many more businesses staying “small” longer...
- ...but for companies with declining revenues, they may be “stuck” in the large business category longer....

HUBZone SBA Proposed Revised Rules

HUBZone Revisions - Background

- Program to promote contractors in Historically Underutilized Business Zones – areas with low income, high poverty or high unemployment
- Benefits include contract set-aside, sole source and price evaluation preferences
- In FY 2017 federal agencies awarded 81,000 HUBZone contract valued at \$7.53 billion
- Historically, federal goal of 3% not met – only 2.05% in FY 2018
- Firm must have 35% of employees and “principal place of business” in HUBZone, determined by census tract

HUBZone Revisions - Background

- President Trump Executive Order 13771 directed agencies to reduce regulatory burdens and control regulatory costs
- SBA reviewed all of its regulations for revision or elimination – starting with HUBZone regulations
- HUBZone program established in 1997 – regulations have been “tweaked” but never fully revised
- In October 2018 SBA issued proposed revisions to the HUBZone regulations at 13 C.F.R. Part 126
- Expected to be final in January 2020

HUBZone Revisions - Background

The proposed amendments are intended to:

1. Make it easier for small business concerns to understand and comply with the program's requirements, and
2. Make the HUBZone program a more attractive avenue for procuring agencies.

HUBZone Revisions – Eligibility

- Clarify that ALL employees are counted when calculating 35%
 - Including those away from principal office and at job sites
- Employees that reside in HUBZone at certification are HUBZone employees as long as employed *by the firm*:
 - Even if they move out of HUBZone
 - Even if their residence is re-zoned non-HUBZone

HUBZone Revisions - Miscellaneous

- HUBZone certification good for one year – if small for NAICS code
- After one year, firm recertifies qualifications or withdraws – no more three-year re-certification statement
- “Freezes” HUBZones for 8 years
 - 5 year maps + 3 years to move after map changes
- Eliminate requirement to show qualification at offer and award of contract – need only qualify at offer

New WOSB/EDWOSB Certification Rules

WOSB Certification – Proposed Rule

- In 2014 Congress told SBA to require SBA certification for WOSB & EDWOSB
- In 2015 SBA asked for public input in on what a certification rule should look like
- On 14 May 2019 SBA published a proposed rule for SBA certification of WOSB and EDWOSB
- SBA expects final rule in January 2020

WOSB Certification – Proposed Rule

- Old WOSB System:
 - “Self certification” with document repository
 - Third-party certification (WEBENC, NWBOC, etc.)
- Highlights of Proposed Rule:
 - Retains third-party certification
 - SBA certification is NOT mandatory
 - No substantive change to qualification rules for WOSB/EDWOSB - require 51% ownership and control by one or more women

WOSB Certification – Proposed Rule

- New System – WOSB:
 - Direct, no-cost certification application to SBA
 - Recognition of 8(a), CVE, DBE certification by US DoT authorized state office PLUS evidence of women ownership
 - Evidence of third-party certification by WEBENC, NWBOC, etc.
- New System – EDWOSB:
 - Direct, no-cost certification application to SBA
 - Women-owned 8(a) participants qualify as EDWOSB concerns
 - CVE-verified and DBE certified concerns are deemed to be controlled by women; must apply to SBA to show economic disadvantage
 - Evidence of third-party certification by WEBENC, NWBOC, etc.

WOSB Certification – Proposed Rule

- Submit applications to <https://certify.sba.gov>
- Required documents: corporate records, personal and business financials, tax returns, personal financial information, and others as requested by SBA
- Must be complete, accurate and signed by authorized officer
- Notify SBA of changes occurring after application
- Denials must be in writing and include reasons
- Includes request for reconsideration process

New SBA and VA Verification Rules

New SBA & VA Verification Rules, 1 Oct 2018

Ownership:

- VA will now use SBA ownership rules at 13 CFR Part 125
- “Veteran” includes surviving spouse
- Exclude ESOP stock from 51% calculation in public company

New SBA & VA Verification Rules, 1 Oct 2018

Ownership:

- *Adopts VA reg that allows “commercially reasonable” restraints on ownership*
- Clarifies requirement for Veteran to receive profits commensurate with ownership interest
- Community property laws are disregarded (current approach in WOSB program; changes VA rule)

New SBA & VA Verification Rules, 1 Oct 2018

Control:

- Veterans owner(s) must meet all super-majority voting requirements
- Veterans must tell CVE about all supermajority voting requirements, including those in state law – before and after verification

New SBA & VA Verification Rules, 1 Oct 2018

Control:

- Includes short list of actions that may be subject to super-majority voting:
 - (1) Adding a new equity stakeholder;
 - (2) Dissolution of the company;
 - (3) Sale of the company;
 - (4) The merger of the company; and
 - (5) Company declaring bankruptcy.

New SBA & VA Verification Rules, 1 Oct 2018

Control:

- Person who provides “critical financing” may be found to control company
- Rebuttable presumption that Veteran who does not work “normal hours” does not control business
- Rebuttable presumption on lack of control for owners who don’t live in commuting distance

New SBA & VA Verification Rules, 1 Oct 2018

- Vet Business may appeal denial of verification by VA to the SBA Office of Hearings and Appeal
- “Interested parties” may challenge VA verification of small business size and ownership/control of business at OHA
- Next step will likely be SBA certification for all VOSBs

Supply Chain Risk Management – Cybersecurity Challenges

Cybersecurity for Small Businesses

- Current FAR Cybersecurity Requirements:
 - FAR 52.204-21 requires 15 basic physical and access safeguards
 - DFARS 252.204-7012 applies complex NIST standard and self-reporting to most DoD contractors and subcontractors
- Future FAR Cybersecurity Requirements:
 - FAR clause to apply NIST standards to non-DoD agencies

Additional Requirements for Defense Contractors

- Cybersecurity Maturity Model Certification (“CMMC”)
- Intended to certify a company's compliance with federal cybersecurity regulations around controlled unclassified information (CUI)
- Will be used to evaluate and rate contractors' ability to protect sensitive data on a 1-5 scale
- Timeline:
 - June 2019 – Announced by DoD
 - January 2020 – Initial version of CMMC scheduled to go public
 - June 2020 – CMMC requirements appear in requests for information
 - September 2020 – CMMC a regular feature of defense procurement

US ex rel. BRIAN MARKUS, v. AEROJET ROCKETDYNE HOLDINGS, INC

- Whistle-blower false claims act case in California, claimed that Aerojet falsely certified that it met FAR cyber-security requirements
- Whistleblower terminated for refusing to sign FAR certifications of compliance
- No allegation of actual data breach or loss, by Aerojet, a DoD/NASA contractor
- Aerojet SJM to dismiss false certification and promissory fraud claims DENIED – case can continue

Cybersecurity Help

- NIST Small Business Cybersecurity Act in August 2018:
 - NIST disseminates clear & concise resources to help small businesses identify and reduce cybersecurity risks
 - Resources will be informational & generally applicable to a wide range of small businesses, depending on nature and size of small business
 - Promote cybersecurity awareness & cybersecurity culture - with practical application strategies
 - The resources must be technology-neutral and compatible with COTS solutions

Small Business Cybersecurity Corner

<https://www.nist.gov/itl/smallbusinesscyber>

- Cybersecurity Basics
- Planning Guides
- Guidance by Topic
- Responding to a Cyber Incident
- Training

What's New in Bondage?

Bondage: “What’s in *your* contract?”

- K-Con Inc. won two fixed price contracts to sell pre-engineered metal buildings to the Army
- After award, the Army directed K-Con to provide payment and performance bonds before the Army would issue “notice to proceed”
- K-Con objected, because the contracts did not include performance or payment bond clauses

Bondage: “What’s in *your* contract?”

- K-Con relented, provided the bonds, and filed claims (one for each contract):
 - Claimed the cost of the bonds and
 - The cost of delay in the work schedule
- The Army rejected both claims, and K-Con appealed to the ASBCA and then the Federal Circuit

Bondage: “What’s in *your* contract?”

- Army claimed that contracts were *construction* contracts and that all FAR construction contracts require bonds
- K-Con argued these were NOT construction contracts:
 - They were issued using commercial item form SF 1449, and
 - “FOB: Destination” – commercial item shipping term
- But the contract referred to “construction” of a laundry facility and required Davis-Bacon compliance...like a construction contract
- Army successfully argued contracts were “patently ambiguous” – so poorly written that K-Con should have asked for clarification!

Bondage: “What’s in *your* contract?”

- The Court agreed and then decided that the FAR bonding clause is in the contract, even if it isn’t physically present...
- Under the *Christian Doctrine*, a court may read a clause into your contract if:
 1. The clause is mandatory under the law – including the FAR; **and**
 2. The clause expresses “a significant or deeply ingrained strand of public procurement policy.”

“What’s in *your* contract?”

- Every FAR *contract* includes:
 - Protest after award clause
 - Disputes clause
 - Termination for convenience clause
 - Termination for default clause
 - Buy American Statute clause (or another “domestic content” clause)

Know and Use FAR Part 53 Forms

- Federal agencies “bid bonds” are a promise to pay the government if awardee fails to sign a contract when tendered:
 - Difference of winning bid price and replacement contract, AND
 - Excess [administrative re-procurement costs](#)
- Some civilian bid bond forms do not clearly promise to pay administrative costs and are NOT RESPONSIVE to solicitation
- Use only SF 24, Contractor Bid Bond in FAR Part 53

Limitations on Subcontracting Explained

Limitations on Subcontracting - Background

- Small businesses performing sole source and set-aside contracts must perform a specified amount of work on the contract
- Originally, this work share was measured by counting money spent on employees performing the work – for example, a manufacturing firm had to spend 50% of the labor cost on its own employees
- In 2013 Congress changed the measurement to a share of prime contract dollars – the same manufacturer could freely subcontract up to 50% of the prime contract amount
- Counting contract dollars is MUCH EASIER for contractors and KOs

LOS Calculation Method (Finally) Changed

- December 4, 2018, the FAR Council finally issued a **proposed rule** to bring the FAR into compliance with the NDAA for FY 2013, which changed the limitations on subcontracting rule
- Proposed rule will conform the FAR's LOS clause, FAR 52.219-14, with how SBA performs the calculation, codified at 13 C.F.R. § 125.6
- Both FAR and SBA regulations will now provide a calculation based on total contract revenues
- **Subcontracts to “Similarly Situated Entities” count as prime contractor dollars (WOSB may subcontract freely with other WOSBs)**

Who is an “Employee” for LOS?

- Clarifies when an **independent contractor (IC)** can be counted as an **employee** for size and LOS purposes:
 - Where a contract is assigned a NAICS code with an [employee-based size standard](#), an IC may be deemed an employee under the terms of **SBA Size Policy Statement No 1**
 - Where a contract is assigned a NAICS code with a [receipts-based size standard](#), an IC cannot be considered an employee, and will always be deemed a subcontractor
- As a result, for a contract with an employee-based size standard, an individual that is considered an employee for size purposes may also be an employee for LOS purposes

Late is Still Late

Late Is Still Late!

- *Airrus Mgmt. Sys.*, LLC, B-416358, Aug. 9, 2018
- Army rejected proposal for roof repair contract
- Agency servers bounced first attempts to submit proposal for exceeding the system's allowable attachment size
- Final attempt did not reach the designated email address until six minutes after proposal submission deadline passed
- GAO said that agency reasonably rejected proposal as late
- Agencies sometimes have **discretion to extend submission deadline** even after late proposal is received – not often used

Late Is Still Late! (Best Practices)

- Read all solicitations and award notices and understand when your submission is due
- Build in an extra day for submission of proposals, quotes and protest documents
- Confirm receipt with the designated government POC (may or may not be the contracting officer)
- If you are late, determine if the agency can waive the late rule

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