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Four Key Upcoming Developments for Small Businesses

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- I. Credit for Lower Tier Small Business Subcontracting
- II. Supreme Court to Rule On “Rule of Two”
- III. Mandatory Disclosure Of Labor Law Violations
- IV. Expansion Of Mentor-Protégé Program

I. Credit For Lower Tier Small Business Subcontracting

- SBA issued proposed regulation on October 6, 2015
- Comments due by December 7, 2015
- Implements Section 1614 of NDAA for FY 2014

Current Regulation at 13 C.F.R. 125.3

- For construction contracts or subcontracts >\$1.5 Million or other contracts or subcontracts >\$650,000 with subcontracting possibilities, must develop small business subcontracting plan
- FAR 52.219-9 contains rules for plan
- Small business concerns are exempt
- Goals are based on subcontracting at first tier

Proposed Regulation

- Allow contractor or subcontractor to receive credit for small business subcontracting at any tier
- Applies only to individual contract subcontracting plans
- Must avoid double counting
- Can accept subcontractor's electronic size and socioeconomic representations
- Prime contractor recordkeeping and additional responsibilities concerning subcontractors' compliance

Proposed Regulation (*cont.*)

- Prime contractor's responsibilities for Subcontractors' subcontracting plans
 - Incorporate subcontractor's plans into its plan
 - Identify applicable NAICS code on subcontract solicitations
 - Review and approve subcontractors' plans
 - Monitor subcontractors' compliance with plans
 - Ensure subcontractors submit reports
 - Discuss subcontracting performance when necessary to ensure good faith effort to comply with plan

II. Supreme Court Will Rule On “Rule of Two”

- Kingdomware Technologies Inc. protested that Rule of 2 applied to VA procurement
- Challenge under Veterans Benefits, HealthCare and Information Technology Act of 2006
- GAO sustained protest, but VA ignored ruling
- Kingdomware protest at COFC, but COFC ruled that VA has discretion whether to set-aside for SDVOSBCs
- CAFC affirmed COFC ruling

II. Supreme Court Will Rule On “Rule of Two” (*cont.*)

- Supreme Court granted certiorari on June 22, 2015
- Protester + GAO – Rule of 2 uses mandatory language
- VA, COFC + CAFC – Preferential goal, set-aside not necessary when VA is meeting goal
- Questions
 - How will agency know it is meeting goal?
 - Is goal a maximum or minimum?
- Supreme Court hears oral argument in November

III. Mandatory Disclosure of Labor Law Violations

- “Fair Pay and Safe Workplaces” Executive Order 13673 issued July 31, 2014, *79 Fed. Reg.* 45,309-14
- Department of Labor issued proposed guidance on May 28, 2015, comment period closed on August 26, 2015
- Mandatory disclosure of labor law violations
 - For each proposal >\$500,000
 - Violation based upon arbitral award, administrative merit determination or civil judgment

III. Mandatory Disclosure of Labor Law Violations (*cont.*)

—List for previous 3 years all violations of:

- Fair Labor Standards Act (FLSA)
- Occupational Safety and Health Act (OSHA)
- Migrant and Seasonal Agricultural Worker Protection Act
- National Labor Relations Act (NRLA)
- Davis-Bacon Act (DBA)
- Service Contract Act (SCA)
- Executive Order 11246 (EEO)
- Section 503 of Rehabilitation Act
- Vietnam Era Veterans' Readjustment Assistance Act of 1974

III. Mandatory Disclosure of Labor Law Violations (*cont.*)

- Family and Medical Leave Act
 - Title VII of the Civil Rights Act
 - Americans with Disabilities Act of 1990
 - Age Discrimination in Employment Act of 1967
 - Executive Order 13658 (Minimum wage of \$10.10)
 - Equivalent state laws as defined by Department of Labor
- Based upon disclosed labor law violations, contracting officer will consider whether offeror is responsible

III. Mandatory Disclosure of Labor Law Violations (*cont.*)

- For subcontracts >\$500,000, subcontractor must disclose its labor law violations
- Every 6 months, contractor and subcontractors must update
- Contracting officer may consult with Labor Compliance Advisors created for each agency
- Contracting officer may refer information to debarring official
- Amend FAR so that serious, repeated, willful or persuasive labor law violations demonstrate lack of integrity or business ethics
- Paycheck transparency requirements
 - Overtime
 - Independent contractor

IV. Expansion of Mentor-Protégé Program

- SBA issued proposed rule on February 5, 2015
- Implements Section 1641 of NDAA for FY 2013
- Authorizes expansion of 8(a) mentor-protégé program to all small businesses
- Seeks consistency in rules for all types of small businesses
- Open to all 8(a) contractors

Benefits of Mentor-Protégé Program

- Protégé receive business development assistance like current 8(a) program without finding of affiliation
 - Technical and Management
 - Financial-equity (40%) and loans
 - Subcontracting
 - Joint ventures
- Protégé can have two mentors
- Mentor can have three protégés
- Three year M-P agreement, protégé can have two

Requirement for Mentor Protégé Program

- SBA must verify protégé is small business
- SBA must approve mentor-protégé written agreement
- Protégé has same rights as 8(a) program
 - Own 51% of each joint venture
 - Perform 40% of JV work
 - Serve as managing venturer
 - Employ program manager
 - Receive profits equal to ownership share
 - Control JV's bank account and financial records

Requirement for Mentor Protégé Program (*cont.*)

- Mentor and protégé must certify that will perform contract per agreement
- Annual reporting of compliance to SBA and C.O.
- Failure to so perform contract can be grounds for debarment
- Expect to be very popular, SBA may have open periods for applications
- Except for DoD, other agency mentor-protégé programs will continue for one year without further SBA approval