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A brief discussion of some current Government Contracting Compliance Issues

Contractors in the federal Government are quite often baffled and confused about various levels and requirements for compliance in the execution of contracts. These issues can fall into different categories and resources. This article is intended to address some of the more recent issues that have raised compliance questions and, hopefully, provide the guidance to assist in your understanding of the issues.

So why should we discuss compliance at all?

- 1. You are working for the Federal Government
- 2. There are a lot of pitfalls that can hurt you
- 3. The enforcement mechanisms can be rough
 - False Claims Act
 - Fair Labor Standards Act
- 4. In many instances the Government has the right to audit you

Below are listed some of the more recent laws applicable to small businesses working with the Federal Government:

1. New All Small Mentor Protégé Agreements
2. Joint Ventures
3. When a JV can bid on a project
4. Limitations on Subcontracting
5. 40/60 work split inside JV
6. Three in Two Rule (3/2 Rule)
7. Representations and Certifications (Reps and Certs)
8. Pass Through (Ostensible Subcontractor Rule)
9. VA Issue – Unemployability certification by Veteran
10. HUBZone Issue – when do you have to be in compliance with HUBZone during bid and award process
11. Progress Payments (and certifying them)

The New All Small Mentor Protégé Program – 13 CFR § 125.9

Here is the description of the program (well one description)

- Formerly, only 8(a) (Disadvantaged) businesses could be in the program
- Now any small business can have a mentor
- What are the advantages/limitations to having a mentor?
- In the M/P agreement, they SBA focuses on 5 specific areas of development provided by the Mentor:
 - Management & Technical Assistance, Financial Assistance, Business Development Assistance, Contracting Assistance, G&A Assistance
- The mentor and protégé can also form joint ventures (standalone companies) to bid on contracts using the protégé's status
- The Mentor can own up to a 40% equity interest in the protégé – up to protege

... and here are some of the compliance issues associated with the program:

- When do you sign the JV Agreement?
- How do the Limitations on Subcontracting affect the joint venture
- How does the 60/40 split work
- What is the Three in Two 3/2 Rule about
- Applicable to any company but specifically affects JVs – When is the JV ready to bid a project (SAM)
- Representations and Certifications (Reps and Certs)

Let's address these one at a time:

When do we sign the joint venture agreement in an MP arrangement?

Only sign after the Mentor Protégé Agreement has been approved

Rationale

Think about it: Before the Mentor Protégé Agreement is signed, you do not have the benefit of the waiver of affiliation

So, if the M/P is not approved you are just a large and small business. Therefore, do not sign the JV before or on the same date as you receive your approval. The competitors, contracting officer or SBA can file a size protest and do.

How do the **Limitations on Subcontracting** (LOS) affect the joint venture?

The LOS rules determine what the minimum amount of work a small business must perform on a contract.

In a joint venture these rules apply to the Joint Venture, not the small business

Example – Construction – 15% LOS

Services 50% of work must be performed by the small business or a similarly situated subcontractor

A violation of this rule can lead to a charge of affiliation with your subcontractors
13 CFR 125.6

How does **the 60/40 split** relate to the JV? 13 CFR 125.8(c)(1)

This is where the confusion begins in a JV.

The Parties to the joint venture (the large business) have minimum amounts of work the small business must perform.

The small business must perform at least 40% of the work the JV performs.

That is both inside the JV and if the businesses subcontractor work to each other (e.g. Large business performs 60% inside the JV and then the JV issues a subcontract to the large business – both count)

What is the **Three in Two 3/2 Rule** about? 13 C.F.R.§121.103(h)

So now we have this M/P Agreement and are ready to start forming Joint Ventures under the JV

Why did I say Joint Ventures (plural)

This is where more confusion begins and many firms assisting in the formation fail to advise the client of:

A joint venture is limited to being awarded more than 3 contracts in a 2 year period

What does this mean?

The name is silly, it simply means that once you have 3 contracts under a JV, you need to make another one.

What about the 2 years?

I think it was added to sound cool and flow. Just form another JV.

Applicable to any company but specifically affects JVs – When is the JV ready to bid a project (SAM) FAR Subpart 4.1102

This question comes up a lot – **When do I have to be registered in SAM** to bid a project. The time it takes to accomplish this is not consistent.

Effective Oct. 26, 2018, you must be registered in SAM before you submit a federal bid, proposal or quote.

This is a killer and really easy to check by your competitors. The contracting officer should check this as part of the responsibility determination upon award.

Representations and Certifications (Reps and Certs). *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)

As with a lot of legal issues, decided cases affect what the rules mean. *Escobar* is no exception.

In order to bid on a Government contract, the bidder must provide representations and certifications (reps and certs). Under *Escobar*, even if you try to avoid submitting your reps and certs, if they are not also under ORCA in SAM (System for Award Management). The Supreme Court upheld the Implied Certification Theory. If you have been found to submit a false ORCA (online representations and certifications) certification, you are subject to prosecution under the False Claims Act (FCA), whether you possessed the intent or not.

BEWARE – 13 CFR 121.108 – Presumption of Loss Rule

Adds up to an amount based on the total amount expended on the contract.

Ostensible Subcontractor Rule 13 CFR 121.103(h)(4). An oldie but a goodie.

A subcontractor is defined as ostensible when it is actually performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue
DoverStaffing four-factor test:

- (1) the distribution of work between the prime and subcontractors;
- (2) who will manage the contract;
- (3) who has the higher skilled, more expensive staff; and
- (4) who wrote the proposal

DoverStaffing LLC, SBA No. SIZ-5300, 2011 WL 7101064] (Dec. 14, 2011)

Note – failure to meet these standards can lead to a False claim and the presumption of loss rule

Another, easier to apply test, the old test, is still a reliable indicator of the presence of ostensible subcontractor issues:

- (1) who will manage the contract;
- (2) which party possesses the requisite background and expertise to carry out the contract;
- (3) “which party ‘chased the contract;’
- (4) what degree of collaboration was there on the bid or proposal;
- (5) are there discrete tasks to be performed by each or is there commingling of personnel and material?

- (6) what is the amount of work to be performed by each;
 - (7) which party performs the more complex and costly contract functions.
- D P Associates, Inc.*, SBA No. 2719, 1987 WL 93680 (Aug. 7, 1987)

Recent very **real examples** of compliance enforcement:

VA Issue – Certificate of Non-employability

To Qualify for unemployability (which raises your VA Disability to 100%, there are two factors: You have at least 1 service-connected disability rated at 60% or more disabling, or 2 or more service-connected disabilities—with at least 1 rated at 40% or more disabling and a combined rating of 70% or more—and

You can't hold down a steady job that supports you financially (known as substantially gainful employment) because of your service-connected disability. Odd jobs (marginal employment), don't count.

So if a Veteran is claiming this benefit and receives a W-2, the IRS and VA will perform “matching” and you will be considered under both False Claims and Wire Fraud Statutes.

HUBZONE Case

The rules governing a bid as a HUBZONE contractor are different than any other “status” program.

A firm must be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract. 13 CFR 126.601(c).

Penalties for noncompliance are assessed pursuant to 126.900

Presumption of Loss Based on the Total Amount Expended

Suspension or debarment

FCA (False Claims Act)

These examples and illustrations are not the complete list nor are intended to be relied upon. A general familiarity with the rules and a consultant or other expert advisor can assist you in navigating these confusing and complex regulations. A good preventive law program can save you time and money over the long run and in contrast to even one enforcement action, far cheaper to implement.

Call me if you have any questions – Dave Rose – 678-854-0222