

SESSION 10

SMALL BUSINESS CONTRACTING

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3:00 PM to 4:00 PM



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Small Business Contracting

- What is a *small business*?

Small Business

- Small business: size falls under the size standard for the associated NAICS code
 - ▶ Socioeconomic eligibility: primary NAICS
 - ▶ Contract eligibility: solicitation's NAICS
 - ▶ Size is ordinarily determined as of the date the company submits its bid/application
- Business size + size of any affiliates

Determining Business Size

- Services contracts = receipts
 - ▶ Total income + costs of goods sold
 - ▶ Preceding 3 or 5 completed fiscal years
 - ▶ 13 C.F.R. § 121.104

Determining Business Size

- Supply/manufacturing contracts = employees
 - ▶ Average number of employees over preceding 12 calendar months
 - ▶ 2021 NDAA: 24-month calculation period
 - ▶ 13 C.F.R. § 121.106

Improper Small Business Certification

- Most size and socioeconomic certifications are self-certifications
- Improper certifications
 - ▶ Lost contracts and eligibility
 - ▶ Suspension and debarment (e.g., 13 C.F.R. § 121.108)
 - ▶ False Claims Act liability (31 U.S.C. § 3729 *et seq.*)
 - ▶ *United States v. Strock*, 982 F.3d 51 (2nd Cir. 2020)
 - ▶ *BTR Enters. v. United States*, 140 Fed. Cl. 500 (2018)

Small Business Contracting

■ Updated Regulations

8(a) Program Changes

- No more 8(a) JV agreement approval
 - ▶ Only Sole-Source
- 8(a) Program Term Extension if admitted on 9/9/2020
- Economic Disadvantage Increase
 - ▶ Net worth: from \$250,000 to \$750,000
 - ▶ Income: from \$250,000 to \$350,000

Mentor/Protégé Consolidation

- No more 8(a) Mentor-Protégé program, Automatic Transition to All-Small
- Super-size mentors allowed? (Over \$100m revenue)
- Must recertify size/socioeconomic status for set-aside orders under unrestricted (or differing set-aside) multiple award contracts; N/A to GSA FSS

Mentor/Protégé Consolidation

- Removes “3” from “3-In-2” JV rule
- Joint Venture Facility Clearance
- Sale After Proposal Submission Affects Size
 - ▶ If the sale within 180 days of offer: company is ineligible for award
 - ▶ If after 180 days: award allowed, but doesn't count for goaling

Certification Updates: WOSB

- Self-certification eliminated
 - ▷ SBA: No fees! 90-day timeline
 - ▷ Third Party: Allowed, must upload certificate
- Recertification
 - ▷ Annual “attest” that company meets requirements
 - ▷ Full examination every three years

Certification Updates: SDVOSB

- DoD OIG: 16/29 SDVOSBs not eligible (Feb. 2020 report)
- 2021 NDAA: No SDVOSB self-certification
 - ▶ CVE transferred to SBA
 - ▶ *Timing*: 2 years after 2021 NDAA adopted
 - ▶ One-year “grace period” for self-certified SDVOSBs

Small Business Subcontracting Proposed Rule

- Would require contracting officers to look at the totality of the prime contractor's actions to see if prime contractor made good faith effort to subcontract to small businesses
- Failure to meet goals ≠ lack of good faith efforts

DoD Accelerated Payment to Small Businesses

- Establishes a goal of payment to small business prime contractors and subcontractors within 15 days or less
- Prohibits prime contractors from requiring consideration or charging subcontractors a fee to make accelerated payments

Small Business Contracting

■ Ongoing Concerns

Limits on Subcontracting

- Services – 50% of the cost of contract performance
- General construction –15% of the cost of the contract not including materials
- Specialty construction–25% of the cost of the contract not including materials

Limits on Subcontracting

- Supplies – limit depends on whether prime contractor is the manufacturer/processor or a nonmanufacturer
 - ▶ Manufacturer/processor – 50% of the cost of manufacturing the supplies not including materials
 - ▶ Nonmanufacturer – must supply the product of a domestic small business manufacturer/processor (unless there is a waiver)

Domestic Sourcing Requirements

- Requirement for nonmanufacturer to supply products of a domestic small business manufacturer
- Buy American – small businesses are *not* exempt from compliance

Small Business Contracting

■ DOT Regulatory Issues

Federal Aviation Administration

- Acquisition Management exempt from
 - ▷ Small Business Act (P.L. Public Law 104-50)
 - ▷ Federal Acquisition Regulations
- SBA's Office of Hearings and Appeals Decisions – persuasive, but not binding on the FAA
- FAA's AMS Policy defines:
 - ▷ Small Business
 - ▷ Small Disadvantaged Business
 - ▷ Socially and Economically Disadvantaged Business (SEDB)
 - ▷ Socially Disadvantaged Individuals

FAA Small Business Contracting Policy

- Procurements for:
 - ▷ Products
 - ▷ Construction
 - ▷ Services
- Procurements valued between \$10K and \$150K automatically set aside
 - ▷ SEDB ((8(a) certified) and/or
 - ▷ Service-Disabled Veteran-Owned Small Business (SDVOSB)
- Procurements above the specified range may be set aside when appropriate
- FAA Policy encourages subcontracting when appropriate

DOT Assisted (Funded) Projects

Requires recipients (which may be public or private entities to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA or FTA) to comply with DOT prescribed Disadvantaged Business Enterprise (DBE) contracting requirements to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts
- Create level playing field on which DBEs can compete fairly
- Ensure only firms that fully meet DBE eligibility standards allowed to participate as DBEs

DOT Assisted (Funded) Projects

- Remove barriers to participation of DBEs in DOT-assisted contracts
- Promote the use of DBEs in in all types of federally-assisted contracts and procurement activities
- Assist development of firms that can compete successfully in marketplace outside of DBE program; and
- Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs

When Department of Transportation DBE Requirements Do and Don't Apply

Do apply:

- Federal-aid highway funds authorized under Titles I (other than Part B) and V of ISTEA, TEA-21, SAFETEA-LU and Divisions A and B of MAP-21;
- Federal transit funds authorized by Titles I, III, V and VI of ISTEA, or Titles I, III, and V of the TEA-21, SAFETEA-LU, Divisions A and B of MAP-21.
- Airport funds authorized by 49 U.S.C. 47101, et seq.

Do not apply:

- Contracts to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands.
- Contracts in which DOT financial assistance does not participate.

DOT Assistance Program Goals and Limitations

10% Requirement

- Not less than 10% of DOT funds, nationally, are to be expended with DBEs.
- The national 10 percent goal does not authorize or require recipients to:
 - ▶ set overall or contract goals at the 10 percent level, or
 - ▶ set any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

DOT Assistance Program Goals and Limitations

Set-Asides Not Permitted

- Recipients are not permitted to use quotas for DBEs on DOT-assisted contracts subject to 49 CFR Part 26.
- Recipients may not set-aside contracts for DBEs on DOT-assisted contracts, except that, in limited and extreme circumstances, recipients may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

Contractor/Subcontractor Requirements Where Goals Established by Recipient

Contract may only be awarded to a bidder/offeror who makes good faith efforts to meet recipient's goals. Recipient must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

- Documents that contractor has obtained enough DBE participation to meet the goal; or
- Documents that contractor made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal.

DOT DBE and SEDB Enterprises

DBE: SBA Size Standards PLUS

- DBE did not have average gross receipts in excess of \$23.98 million over the preceding 3 fiscal years.

SEDBE:

- Social Disadvantage: A U.S. citizen (or lawfully admitted permanent resident of the U.S.) who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.
- Economic Disadvantage: For individual owner, personal net worth may not exceed \$1.32 million.

Who Determines Socially and Economically Disadvantaged Status?

- The recipient of DOT assistance (based on DOT guidelines)
- DOT rebuttable presumption of categories presumed to be socially and economically disadvantaged:
 - ▷ Black Americans
 - ▷ Hispanic Americans
 - ▷ Native Americans
 - ▷ Asian-Pacific Americans
 - ▷ Subcontinent Asian Americans
 - ▷ Women

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■ Thank you!

Challenge Question



Submit your answer to craig@pubklaw.com
Subject line: Panel 6 Challenge Question