

Legal Update for Small Business Government Contractors

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Agenda

- COVID-19 Updates
- New WOSB/EDWOSB Certification Rules
- Final HUBZone Revised Regulations
- New SBA and VA Verification Regulations
- Recent Regulations and Proposed Regulations
- Supply Chain Risk Management – Cybersecurity
- Enforcement News



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 (prime contracts) for sixth consecutive year
- **WOSB** goal was not met (5.0% goal; 4.75%)
- **HUBZone** goal not met (3.0% goal; 2.05%)
- **SDVOSB** goal was met (3.0% goal; 4.27%)

COVID-19 Updates

OMB M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*

“The Office of Management and Budget (OMB) serves the President of the United States in overseeing the implementation of his vision across the Executive Branch. Specifically, OMB’s mission is to assist the President in meeting his policy, budget, management and regulatory objectives and to fulfill the agency’s statutory responsibilities.”

“The health and safety of all Americans, including our Federal contractors, remains the top priority.”

OMB M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*

- FAR 7.108 says that “agencies generally shall not discourage a contractor from allowing its employees to telecommute in the performance of Government contracts.”
- Agencies must work with contractors to maximize telework to enable contract performance IAW CDC & state/local directives
- Ask contracting officer to change the place of performance:
 - FAR 52.243-1, Changes for supply and service contracts
 - FAR 52.212-4(c), Commercial item changes clause

OMB M-20-18, *Managing Federal Contract Performance Issues Associated with the Novel Coronavirus (COVID-19)*

- Encourages use of FAR clauses to extend or suspend performance – after discussing with contractor
- Use another contractor only for convenience of the government: termination for convenience or no-cost settlement
- “Excusable delays...should not negatively impact a contractor’s performance ratings.”
- Be “as flexible as possible in finding solutions”

Contract Flexibilities for Agencies

18.202 Defense or recovery from certain events.

(a) *Micro-purchase threshold.* The threshold increased from \$10,000 to \$20,000 “to support response to an emergency or major disaster.”

(b) *Simplified acquisition threshold.* The threshold increased from \$250,000 to \$750,000 “to support response to an emergency or major disaster.”

(c) [allows commercial item procedures for nuclear attacks, etc.]

(d) *Simplified procedures for certain commercial items.* The threshold limit is increased to \$13 million “to support response to an emergency or major disaster.”

Standard FAR Emergency Authorities

- Exception to competition, urgent requirements, FAR 6.302-2
- Exemption from SAM registration, FAR 4.1102(a)
- Waiver of some Ability One procedures, FAR 8.712(d)
- Waiver of Qualification List Requirements, FAR 9.206-1(b)
- Retroactive overtime approval, FAR 22.103-4(i)
- Waiver of EFT requirements, FAR 32-1103(e)
- Waiver of preference for US-flagged vessels, FAR 47.502(c)

GSA Non-availability Determination

- On April 3, 2020 the GSA made a “non-availability determination” for certain products under the TAA and Buy American statute

“At present, American lives and way of life face a grave challenge.”

- Until July 1, 2020 you can sell the following products to the government that are not US-made:
 1. N-95 Masks
 2. Disinfectant, beach and wipes
 3. Soap and hand sanitizer

Pernix Serka JV, CBCA 5683 (Apr. 22, 2020)

- Pernix had a contract in Sierra Leone to construct a water capture system for Dept. of State agency
- When Ebola outbreak began, Pernix asked KO for directions for protection of its personnel
- KO said there was no government agency directive to leave the area, so the decision was for Pernix to make,
- Pernix decided to demobilize

Pernix Serka JV, CBCA 5683 (Apr. 22, 2020)

- Contractor claimed \$1.8 million for additional safety expenses and the costs of demobilization/remobilization; DOS denied the claim and Pernix appealed to the CBCA
- CBCA reiterated that in a firm, fixed-price contract the contractor bears risk of unexpected costs not caused by government
- CBCA denied the claim: Under the contract, including FAR 52.249-10, *Default*, contractor is entitled to additional time for epidemic, but not additional costs

New WOSB/EDWOSB Certification Rules

WOSB Certification – Proposed Rule

- Old WOSB System:
 - “Self certification” with document repository
 - Third-party certification (WBENC, NWBOC, etc.)
- Highlights of New 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

- Recognition of 8(a), CVE, DBE certification by US DoT/ authorized state office PLUS evidence of women ownership
 - For EDWOSB must apply to SBA to show economic disadvantage
- Final regulations should be published on June 30, 2020 and will be effective 30 days later

Final Revised HUBZone Regulations

HUBZone Revisions - Background

- Program to promote contractors in Historically Underutilized Business Zones – areas with low income, high poverty or high unemployment
- Benefits include set-aside contracts, 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

The new HUBZone rules 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 use by procuring agencies.

Effective December 26, 2019

HUBZone Revisions – Eligibility

- ALL employees counted when calculating 35% - Including those away from principal office and at job sites
- Employees residing 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
- “Freezes” HUBZones for 8 years
 - 5-year maps + 3 years to move after map changes

New SBA and VA Verification Regulations

New SBA & VA Verification Rules, 1 Oct 2018

- VA now uses SBA definitions of “ownership” and “control”
- VA still “verifies” VOSB eligibility – SBA and VA working on transition to SBA certification for all VOSBs
- 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

Mandatory Requirements of JV Agreements

- *CVE Protest of Commonwealth Home Health Care, Inc.*, SBA No. CVE-116-P (2019)
- JV agreement between SDVOSB protégé and its mentor firm did not have to satisfy the ownership and control requirements for SDVOSBs
- It *was* required to comply with 13 C.F.R. § 125.18(b) (now 13 C.F.R. § 125.8(b)), requiring JV agreement to specify parties' contributions to contract performance
- Awardee lost the contract because its JV agreement did not specify contributions for specific procurement at time of bid

Mandatory Requirements of JV Agreements

- Small Business Joint Ventures
 - Any two small businesses may form a joint venture to bid on a set-aside contract
 - Joint venture agreement need not be in any specific form
- Small Business + Large Business MPP Joint Ventures
 - May bid on and perform set-aside contract using small business certifications/status/size
 - Joint venture agreement **MUST CONTAIN** specific provisions
 - Small business venture member must perform at least 40% of non-administrative contract work

Veteran Owner Required to Have License

- *CVE Appeal of Barry Capital Projects, Inc.*, SBA No. CVE-106-A (2019)
- Barry was St. Paul construction company with remodeler's license & primary NAICS code for residential construction
- CVE objected that Barry's son held Minnesota remodeler's license
- Barry failed to explain how he exercised management and supervisory control over his son
- SBA OHA upheld denial of re-verification based on failure to explain, and several other factors

Veteran Owner Not Required to Have License

- *VE Appeal of Veterans 1st Architecture, LLC, SBA No. CVE-122-A (2019)*
- CVE denied verification application because SDV did not have license required by State of Georgia for practice of architecture
- Appeal successful because firm did more than just practice architecture – SDV explained he could manage and control the daily operations of the firm as a whole

“Control” Details Matter

- *CVE Appeal of Valor Constr., Inc.*, SBA No. CVE-121-A (2019)
- SBA upheld denial of verification application because the Veteran:
 - Is employed full-time at another job
 - Does not have required managerial experience
 - **Is prohibited by Bylaws from unilaterally setting salaries**
- For SDVOSBs SBA regulations only allow the following limits on control:
 - (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.

JLS Medical Products, SBA No. CVE-147-A (Apr. 2, 2020)

- VA CVE proposed cancellation of JLS verification status:
 - Vet owner granted wife 40% interest and made her a “manager”
 - Vet didn’t meet ownership rule – he failed to inform CVE of transfer, and CVE records showed Vet owned 100%
 - An LLC manager has the authority to make all decisions of the LLC
- SBA OHA upheld the cancellation of verification:
 - CVE was wrong about ownership – Vet still owned 60%
 - CVE was right on the Vet’s lack of control – under law and OA, every manager had equal rights to manage company
 - Vet failed to notify CVE of change in ownership
- Make sure your operating agreement gives you control!

Recent Final Regulations

“Small Business Runway Extension Act”

- Traditionally, SBA averaged the last 3 years of receipts to determine if a business is “small” under a receipts-based standard
- Under the “Small Business Runway Extension Act of 2018,” Congress directed the SBA to use the **last five years** to determine average revenues for **service-based NAICS codes**
- On December 5, 2019 SBA issued **final rule, effective January 6, 2020 – applies to all revenue-based NAICS codes**
- Transition period applies – until January 6, 2022 a firm may use average receipts of EITHER last three years or last five years

Non-nondisplacement of qualified workers

- Since 2009, EO 13495 and the FAR have required a new service contractor to offer current employees a new position under the replacement contract
- Under the “non displacement of qualified workers” rule, the new contractor had to offer jobs to old workers unless there was documented evidence of poor performance
- EO 13897, Oct. 31, 2019, rescinded EO 13495
- As of Jun. 5, 2020, FAR Part 22.12 and FAR 52.222-17, *Nondisplacement of Qualified Workers*, are revoked

What Does “Made in America” Mean?

- *Acetris Health LLC v. US*, CAFC Feb. 10, 2020
- TAA and Buy American statute generally required that products sold to the federal government must be US-made – there are MANY subtleties and exceptions
- Statutes require “wholly US manufactured” products; the FAR uses “US manufactured” – not “wholly”
- In this case, prescription pills were “made” into pill form in the US using active ingredients formulated in India
- The CAFC disagreed with the long-held US government position that this was not enough for “US manufacture”

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 money spent on employees performing work – for example, a manufacturing firms and service contractors had to spend 50% of labor cost on 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 (Construction: 85% or 75%)
- 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
- Subcontracts to "Similarly Situated Entities" count as prime contractor dollars (WOSB may subcontract with WOSBs)

Contracting Officer LOS Enforcement

- Contracting officers may now require the contractor to demonstrate its compliance with the LOS rule:
 - At any time during performance or at completion of a contract
 - But only if information regarding LOS compliance is not already available to the contracting officer
- Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed

Ostensible Subcontractor/LOS Rules

- *In re Warrior Service Company, LLC*, SBA Size No. SIZ-6046 (Jan. 24, 2020)
- VA solicitation for home oxygen delivery services in VA and NC
- Based on proposal, VA found Warrior Service was non-responsible for lack of financing, no experience and violation of LOS and OSC rules
- SBA OHA agreed that Warrior violated OSC:
 - Large business subcontractor had all the experience necessary to qualify
 - Would rely on subcontractor for service and warehouse space
 - Would rely on subcontractor for equipment and supplies required
 - Warrior needed a loan from the subcontractor to perform
 - Subcontractor would perform primary and vital requirements: delivery of oxygen

Who is an “Employee” for LOS?

- Proposed rule would have clarified 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 would also be an employee for LOS purposes

Who is an “Employee” for LOS?

- SBA has revised the proposed rule to clarify that **all contractors** should apply SBA Size Policy Statement No 1 to determine whether independent contractors are employees or subcontractors
- As a result, for any contract, an individual that is considered an employee for size purposes would also be an employee for LOS purposes

New Exclusions from LOS Calculations

- New rule allows some direct costs to be excluded from contract value:
 1. To the extent they are not the principal purpose of the acquisition, and
 2. Small business concerns do not provide the service in the marketplace
- **Examples:**
 1. Airline travel
 2. Transportation or disposal entity costs under a contract with environmental remediation NAICS code (562910)
 3. Cloud computing services
 4. Mass media purchases
 5. Others.....?

Proposed New Regulations

Consolidation of Mentor-Protégé Programs

- Currently, the SBA “all small” MPP and the 8(a) MPP are in separate parts of SBA regulations
- The purpose and benefits of the two programs are identical
- As a result of executive order to review and streamline regulations, SBA propose to consolidate the two programs
- There will be just one “all small” mentor-protégé program

Elimination of “3 in 2” Rule for JVs

- Current regulations limit joint the duration of joint ventures to either:
 - Two years from the date of award of first contract, or
 - Award of three contracts to the joint venture (whichever comes first)
- Proposed rule would eliminate the 3-contract award rule – meaning the joint venture can bid on, and win, as many contracts as possible during the two years following its first proposal (not the date it was formed)
- The joint venture may perform contracts awarded during the two-year period after the end of the two-year period

Supply Chain Risk Management – Cybersecurity

Cybersecurity for Small Businesses

- Current FAR Cybersecurity Requirements:
 - FAR 52.204-21 requires 15 basic physical and access safeguards
 - DFARS 252.204-7012 applies more complex NIST standard and requires cyber incident reporting by most DoD contractors and subcontractors
 - Future FAR clause to apply NIST to non-DoD agencies
- September 2017, DoD DFARS implementation memo:

“Third party assessments or certifications of compliance are not required, authorized, or recognized by DoD, nor will DoD certify that a contractor is compliant with the NIST SP 800-171 security requirements.”

Additional Requirements for Defense Contractors

- DoD 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 (1 is low; 5 is high)
- 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

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 are 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

Enforcement Issues

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

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

Wisconsin Criminals

- *USA v. Mark Spindler, et. al.* (Brian Ganos and several construction companies)
- Alleged a twelve-year conspiracy to fraudulently obtain over \$260 million in government set-aside contracts
- Ganos used three straw owners to set up 8(a), DBE and SDVOSB companies
- Fraudulently obtained contracts intended for 8(a), DBE, and SDVOSB companies

Wisconsin Criminals

- Recently, Spindler, a CPA, was convicted of conspiracy in the scheme:
 - Wrote false letters to VA saying straw owner was “most highly compensated”
 - Assisted Ganos in “hiding” profits made by phony companies
 - Lied to FBI and VA about Ganos’s control of three companies
 - Sentencing set for May 6, 2020....he’s facing 20 years....
- Ganos previously plead guilty to wire fraud and mail fraud:
 - \$5,000 fine
 - 78-month prison sentence
 - Forfeiture of \$4 million in assets (including Colorado ski condo)

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