

UPDATE FOR FEDERAL CONTRACTORS

Year-End Recap and Forecast for 2012

“The Good, the Bad and the Ugly”

OCTOBER 27, 2011
PILIEROMAZZA BREAKFAST SEMINAR

Presenters

- **Pam Mazza**, Managing Partner at PilieroMazza
- **Arya Parvizi**, Vice President, Capital Region, Business & Professional Banking Group, M&T Bank
- **Major Clark**, Assistant General Counsel for Procurement Policy, Office of Advocacy at SBA
- **Bridget Bean**, District Director, SBA Washington Metropolitan Area District Office

Overview of the Landscape

- Budget
- Fraud, Waste and Abuse
- Compliance, Oversight and Investigations

Budget

- National Debt – Reductions in Discretionary Spending for FY12
- Predictions of Possible Losers
 - Science
 - NASA
 - Agriculture
 - Financial Services
 - Interior
 - Environment
 - Justice
 - War Effort

Budget

- Possible Strategic Growth Opportunities:
 - Energy Research and Development
 - Building Infrastructure Investments in Support of Energy Conservation
 - Healthcare IT
 - VA Military Health Programs
 - Cyber IT and Security

Budget

- Less Money Equals:
 - More Competition?
 - Potential Contract Terminations?
 - Options Not Exercised?
 - Unpaid Requests for Equitable Adjustments?

Fraud, Waste and Abuse

- SBA has removed;
 - > 4000 Firms from HUBZone Program
 - > 1000 Firms from 8(a) Program
 - > 50 Firms from SDVOSB Program
- FY 2011, more than 30 firms and individuals have been suspended, proposed for debarment or debarred due to procurement misconduct.

Compliance, Oversight and Investigations

- Increased Scrutiny
 - More Policing by Competitors and Employees
 - More Compliance Requirements
 - More Reporting Requirements
 - More Public Data Bases
 - More OVERHEAD Costs

“The Good, the Bad and the Ugly”

Changes to SBA Loan Program

Arya Parvizi, M&T Bank

Small Business Regulations Going Forward
and the Impact on Contractors

Major Clark, SBA

Update of the WOSB Program

Bridget Bean, SBA

“The Good, the Bad and the Ugly”

- OFPP Final Policy Letter on Inherently Governmental
- Small Business Size and Integrity
- Small Business Subcontracting
- SDVOSB / CVE Update
- Interesting OHA Case
- Bid Protest Update

Performance of Inherently Governmental and Critical Functions

- September 12, 2011 – Federal Register Notice of Final Policy Letter
- Genesis of the policy letter - The President's March 4, 2009 memo requiring OMB to clarify when governmental outsourcing for services is and is not appropriate.
- Proposed policy letter was issued on March 31, 2010. With few exceptions, the final policy letter is similar to the draft

Performance of Inherently Governmental and Critical Functions

- Policy letter includes:
 - Lists of functions that are inherently governmental
 - List of functions closely associated with the performance of inherently governmental functions.
- Clarifies policy on contracting out of military security operations:
 - If a function is part of combat or could evolve into combat, then contractors can not be used.

Performance of Inherently Governmental and Critical Functions

- PSC President, Stan Soloway, told the Government Executive:

“We are pleased OFPP has retained flexibilities for agencies to determine what functions are considered closely associated with inherently governmental functions or are critical functions to agency missions and to provide for these functions in a way that best meets their needs and capabilities. However, we are concerned that the list of closely associated functions could be misconstrued as a ‘do not contract’ list, even though it is not the case, nor OFPP’s intent. The checklist that identifies closely associated functions must not become a barrier to contracting for work where it is appropriate to do so.”

Small Business Size & Integrity

- SBA Proposed Rule issued Friday, October 7, 2011
Comments are due by November 7, 2011
- Regulations were required by the Small Business Jobs Act of 2010 which established a statutory presumption of loss equal to the value of the contract when a concern willfully seeks and receives an award by misrepresentation.

Small Business Size & Integrity

- Certain actions are deemed affirmative, willful and intentional certifications
 - Submission of a bid or proposal or registration on any Federal data base for the purpose of being considered for:
 - Federal Grants
 - Contracts
 - Subcontracts
 - Cooperative Agreements
 - Research & Development Agreements
 - “reserved, set-aside, or otherwise classified as intended for small business” or
 - “which in any way encourages a federal agency to classify the bid or proposal, if awarded, as an award to a small business

Small Business Size & Integrity

- Penalty:
 - Value of contract performed
- Additional Penalties:
 - Suspension or debarment
 - False Claims Act civil penalties
- Applies to all programs—misrepresentation as to status as:
 - HUBZone
 - SDVOSB
 - 8(a)
 - WOSB
 - SDB

Small Business Size & Integrity

- Limitation of Liability for:
 - Unintentional errors or
 - Technical malfunction
- Defenses may include:
 - Firm's internal management procedures
 - Efforts made to timely correct the erroneous certification

Small Business Subcontracting

- Regulations required to implement provisions of the Small Business Jobs Act of 2010
- SBA issued proposed rule on October 5, 2011
- Comments due December 5, 2011
- Amends regulations to provide for a “covered contract”
 - A contract for which a small business subcontracting plan is required
 - Currently valued above \$1.5. million for construction and \$650,000 for all other contracts

Small Business Subcontracting

- Prime contractor must notify the CO when the Prime:
 - Fails to utilize a proposed subcontractor during contract performance
 - Reduces payments to a subcontractor or is > 90 days late
- Prime cannot prohibit subcontractor from discussing payment or utilization concerns with the government
- Prime must assign individual NAICS codes to their subcontracts and submit timely reports online at www.esrs.gov.
- CO may require a subcontracting plan if a firm's size status changes to other than small on contracts with durations of > 5 years.

Small Business Subcontracting

- Contracting Officer Responsibilities:
 - CO will be responsible for monitoring compliance of the subcontracting plan
 - Ensuring that contractors submit their subcontracting reports within 30 days after report ending date
 - Reviewing all reports within 60 days
 - Evaluating whether prime contractor has made a good faith effort to comply
 - Evaluating whether prime contractor has a history of untimely or reduced payments and, if so, record such in the Federal Awardee Performance and Integrity Information System (FAPIIS)

Small Business Subcontracting

- Subcontracting Consideration in Source Selection
 - Factors may include:
 - Subcontracting to be performed on the specific requirement;
 - The goals negotiated in previous subcontracting plans; and
 - The prime contractor's past performance in meeting those goals.

SDVOSB / CVE Update

2 Different Programs

1. VETS First – Set-asides for veterans and service-disabled veterans – By Department of Veterans Affairs
2. Agency Wide SDVOSB Program
 - Self certification
 - Eligibility protests – file with SBA

SDVOSB / CVE Update

- To participate the VOSB / SDVOSB must have a CVE Certification from VA

The regulation, 38 CFR 74, states that CVE has 60 days, when practicable, to make a final decision associated with the request for reconsideration. As of October 18, 2011, the number of requests for reconsideration is approaching 900; it is no longer practicable to process these within 60 days. Historically, 20% of companies receiving an initial denial requested reconsideration of that decision. Today, over 60% of companies receiving a denial are requesting reconsideration. We did not anticipate and lacked the resources currently to handle this extraordinary volume of activity. We are shifting and adding resources to speed up the process. In order to be fair to all applicants, we continue to process all requests for reconsideration on a first come, first served basis.

Sincerely,

The Request for Reconsideration Team

SDVOSB / CVE Update

- The priority created by the VETS First Act requires the VA to do marked research prior to utilizing any other set-aside program.
- Courts and GEO have held that this priority takes precedence over
 - FSS Scheduled Buys (Aldvera, B-405271, B-405524, Oct. 2011)
 - Brooks-Act Procurements (Powerhouse Design Architects & Engineers, Ltd., B-403175, Oct. 2010)
 - Ability One (Angelica, 95 Fed. Cl. 208, Oct. 2010)

Interesting OHA Cases & Bid Protest Update

Airborne Construction Services, SBA No. VET-203,
Nov. 2010

- SBA Office of Hearings and Appeals lacks jurisdiction to hear appeals from VA OSDDBU status determinations.
- SDVOSB status protests relate to VA Regulations and OHA will not hear appeals.

Interesting OHA Cases & Bid Protest Update

Spiral Solutions and Technologies, Inc.,
SIZ-2011-07-19-112, Sep. 2011

Ostensible Subcontractor Rule

- \$300 Million IDIQ Contract
- Prime contractor did not propose any of its personnel
- No discreet tasks assigned to either team member
- Proposal never referred to the prime contractor – just the team
- Would perform “as one entity” and “seamlessly integrated”
- Appeared to be a textbook ostensible subcontractor rule violation – Judge found no violation

Miscellaneous Topics for Discussion

- Teaming
- Mentor-Protégé
- Executive Compensation
- Any other topics of interest?

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QUESTIONS?

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