VETERANS IN BUSINESS CONFERENCE™

HOT TOPICS IN CORPORATE COMPLIANCE

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Presented by
Jon Williams, Partner
jwilliams@pilieromazza.com

PILIERO MAZZA PLLC
ATTORNEYS AT LAW

888 17th Street, NW, 11th Floor
Washington, DC 20006
Tel: 202-857-1000
Fax: 202-857-0200

Top Compliance Issues for SDVOSBs

- **Protect Your Small Business Status**
- **Joint Ventures, Subcontracts, and Teaming Agreements**
- **Stay Compliant with the SBA and VA SDVOSB Program Requirements**

Spotlight on Small Business Contractors

- **More compliance requirements**
- **More policing by competitors and employees**
- **More reporting requirements**
- **More public databases**

Presumed Loss Rule

If you falsely certify your size, the presumed loss to the government is the value of the contract you received. Penalties assessed under the presumed loss rule can include monetary value of the contract, suspension and debarment, and False Claims Act liability.

- **Take steps to limit potential liability**
  1. Unintentional errors or technical malfunction
  2. Internal management procedures and plans to avoid false certifications
  3. Timely response to correct erroneous certification

Why Size Matters

- **Being "small" is the essential ingredient of all federal small business contracting programs**
  1. A concern must be "small" for admission into certain SBA small business contracting programs, such as the SDVOSB program
  2. A concern also must be "small" to compete for and win a procurement set-aside for small businesses
  3. Therefore, as an SDVOSB, your small business status is one of your most important assets

- **Being "small" exempts you from certain requirements**
  1. Reporting executive compensation
  2. Ethics awareness and compliance program under FAR § 52.203-13
  3. Cost Accounting Standards

How Size Is Determined

- **Calculating Size by Average Annual Receipts:** Size determined by a concern's "average annual receipts" plus its affiliates' average annual receipts
  1. "Total income" plus "cost of goods sold" (as these terms are defined by the IRS)
  2. Certain exclusions, such as sales taxes and franchise taxes collected for and remitted to a taxing authority
  3. Typically, average annual receipts determined by federal income tax returns and any amendments

- **Period of measurement:** Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three

Avoid Affiliation

- **What is affiliation?**

  Two firms are deemed to be affiliated when one firm has the power to control the other, or when both firms are controlled by a third. To the SBA, "[i]t does not matter whether control is exercised, so long as the power to control exists." Control may be affirmative or negative and may be found when control is exercised indirectly through a 3rd party. Any business entity can be an affiliate, including concerns located outside of the U.S. and non-profits.

- **Examples of what causes affiliation**

  1. Common ownership and management
  2. Shared facilities and employees
  3. Newly organized concern
  4. Joint ventures
  5. Significant percentage of revenue from contracts with one company
  6. The "totality of the circumstances"

Avoid Affiliation

(continued)

- **What does it mean to be affiliated?**

  When determining if a firm is a small business, the SBA aggregates the average annual revenues or total number of employees for the firm and all of its affiliates

- **How to avoid affiliation**

  1. Understand the various ways that affiliation can occur
  2. Proactively assess the potential for affiliation prior to corporate transactions
  3. Be wary of corporate documents that give another party "negative control" over your business
  4. Diversify your teaming partners and sources of revenue
  5. Do not assume your family member's business is unaffiliated with your firm
  6. Make sure your website and marketing materials do not create an impression of affiliation with other firms

Can I Create a New Company to Stay Small?

- **Frequently Asked Question:** To stay small, can a company or the owners of a company create a new company and run new business through it?

- **Short Answer:** No. The simple act of creating a new company does not negate the common ownership, newly organized concern, and totality of the circumstances issues that lead to affiliation for size purposes. However, in theory, if the new business has different ownership, management, and operations, this could work. But creating such a different company defeats the purpose for why most business owners would want to do this.

Joint Ventures

- **What is a joint venture?**

  Commonly defined as "an association of concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out a specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally."

- **Characteristics of a joint venture**

  1. Partnership or limited liability company
  2. Shared profits and losses
  3. Co-management
  4. Limited duration
  5. Affiliation

Joint Ventures

(continued)

- **Advantages & Drawbacks**

  1. **Pros:** Resources of multiple firms combined at prime contract level to create a stronger offeror; JV partners can receive favorable partnership tax treatment; JV revenue attributed in proportion to ownership; relatively quick and easy to implement
  2. **Cons:** Shared control and ownership of intellectual property; customers may have concerns about accountability and authority; joint and several liability for partnerships; some administrative costs/time

- **Regulatory Requirements**

  1. SBA small business regulations govern size status, "3 in 2" rule, affiliation, and apportionment of revenues to JV partners
  2. For VA, JV must be listed as verified in VetBiz.gov
  3. SDVOSB must control the JV and bring more than its SDVOSB status
  4. JV <u>may</u> be a separate legal entity (e.g., an LLC) for SBA, but <u>must</u> be a separate legal entity for VA

Subcontracts & Teaming Agreements

- **Avoid open-ended arrangements – should be specific to one procurement**
- **Follow the performance of work requirements**
  1. Services: 50% of the cost of the contract incurred for personnel
  2. General construction: 15% of the cost of the contract incurred for personnel
  3. Specialty trade construction: 25% of the cost of the contract incurred for personnel
  4. For SDVOSBs: the performance of work requirements must be met by the SDVOSB prime contractor and/or other SDVOSBs
- **Avoid "ostensible subcontractor" affiliation**
- **Ensure SDVOSB prime contractor is in control of the project**
- **"Flow down" prime contract obligations to subcontractors**

SDVOSB Program Compliance

- **Two different programs, one through SBA and the other through VA**
  1. Both programs have similar, but not identical, eligibility requirements
  2. SBA program permits self-certification, while VA program requires verification by VA's Center for Veterans Enterprise
  3. Veteran must control the business, both on paper and in reality, and must devote substantial attention to the business
- **Common issues with SDVOSB eligibility**
  1. Corporate documents give non-veteran "negative control" over the board of directors and decision-making for the company
  2. Veteran does not actively oversee the company's operations and lives several states away from where the company performs most of its work
  3. Veteran is married and lives in a community property state
  4. Veteran is heavily reliant on another company, or non-veterans, to operate the business
  5. Veteran is restricted in transferring his/her ownership in the SDVOSB