

Small Business Compliance

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Outline

- I. Is the “small business concern” truly small, and is it owned, and controlled, by the preference individual?
- II. Bid Protest Process & New SBA Regulations
- III. Cyberlock – Enforceability of Teaming Agreements
- IV. Questions?

I.

Does the Small, Disadvantaged Business Truly Qualify?

Size Standards and Small Businesses

- Goal Set by Congress:
 - Award 23% of procurement dollars to small business concerns every year.
 - 5% to women-owned small businesses.
 - 5% for small disadvantaged businesses.
 - 3% to HUBZone small businesses.
 - 3% to Service-Disabled Veteran-Owned Small Businesses.

Source: <http://www.sba.gov/content/small-business-goaling>

Size Standards and Small Businesses

- “Small business concern” defined by \$\$ or # employees.
- Depends on NAICS code - Examples:
 - Electronic Computer Manufacturing – 1,000 Employees
 - Passenger Car Rental – \$25.5 million
 - Tobacco Farming – \$.75 million
 - Highway, Street, and Bridge Construction – \$33.5 million
 - Offices of Lawyers – \$7.0 million
 - Petroleum Refineries – 1,500 employees

Ensuring “Small” Business is “Small”:

- Government Wants Small Business Contracts to be Awarded to Businesses that are Truly Small.
- Size of Bidding Company Measured by Totaling Average Revenue or Overage Number of Employees of Company and All of the Company’s “Affiliates”.
- SBA will not look only at the business itself to determine size.

“Ownership” and “Control”

- For 8(a) firms, for example, 51% of firm must be “owned” by one or more disadvantaged individuals.
 - Individual owner must reside in United States.
- Separately, and independently, the disadvantaged individual must “control” the 8(a):
 - Strategic policy decisions.
 - Day-to-day management of business operations.
 - Exercise of independent business judgment.
 - Disadvantaged full-time manager must be physically located in the United States.

Affiliations and Small Business Status

- Affiliations can eliminate small business status.
- “Affiliation”: A second company controls the “small” business, or one third party controls the “small” business and other “businesses”
- Examples
 - Investment by outsiders.
 - Ownership or control by an individual with affiliated businesses.
 - Ownership or control by a large company.
 - Economic or technical dependence upon other businesses.

“Positive” Control and “Negative” Control

- “Control” includes the power to control decision making.
- “Positive control”
 - Majority ownership of business by affiliate.
 - Or, major block of voting stock, if there is no majority owner.
 - Express power to make major decisions by company.
- “Negative control” examples:
 - Power of affiliate to “veto” important business operations by management, even if affiliate carries no management title.
 - Power of affiliate to block decisions by shareholders, even if affiliate owns less than 50% of business.

Ostensible Subcontractors

- “Ostensible Subcontractor” Rule 13 CFR 121.103(h)(4)
 - Specific to prime/subcontractor relationship.
 - SBA determines if prime and sub are affiliated.
 - If prime and sub are affiliated, revenues and personnel are combined to decide whether they are “small.”
 - An “ostensible subcontractor” unduly controls (or has the power to control) the prime.
 - “Negative control” and “Third Party control.”

Other Affiliation Red Flags

- Brand new entity formed or spun out of old company.
- “Identity of Interest” among family members.
- (If one immediately family member is using his or her disadvantaged status to qualify a business, another immediate family member cannot qualify a different concern using his or her disadvantaged status – though this can be waived).
- Economic dependence: most revenue coming from relationship with other business.
- “Totality of the Circumstances” Test: Few Bright Lines.

II.

Bid Protests and SBA Inquiries

Protests by Losing Bidders

- Small Business Protests are Decided by SBA (not GAO).
- Losing Bidder Need Not Be Next In Line for Award.
- Losing Bidder's Arguments.
 - Sub has too much control over the contract (ostensible subcontractor)
 - Prime is not “small” for set-asides.
 - Prime has affiliations with companies that are not small.
- Protester goal: have winning prime declared “other than small” and ineligible to bid on a set-aside contract.

Protests Decision Making Process

- SBA decides whether business is small.
- Protested business must provide a written response to challenge (adverse inference if not).
- Burden is on the small business to establish its small business size. Greater weight on documents prepared before protest.
- If small business not small, the set-aside award is lost, and federal databases are updated to show the adverse size determination, and recertification may be required.

New SBA Rules (June 28, 2013)

- Annual SAM certification of small business status.
- “Willful misrepresentations” if company is not small and
 - Responds to small business solicitation;
 - Responds to solicitation that encourages government to classify award as being made to small business;
 - Registers in SAM as small business concern;
- Presumption that all money paid by Government to contractor or grantee must be returned.
- Exceptions for unintentional or technical errors.

III.
The Cyberlock Decision
(April 3, 2013)

Cyberlock

- A Detailed Teaming Agreement, and Not a Generic One, Is Needed Before the Parties Can Chase a Government Contract.
- Team members agreed, in writing, that if the prime bidder was awarded a contract, 51% percent would be performed by the prime and 49% by the teammate as a subcontractor.
- Team members did not:
 - Agree how the scope of work would be divided.
 - Attach terms of subcontract that would be executed.
- Contract noted that it was possible parties would not be able to agree on the terms of a subcontract.

Cyberlock

- Teammates prepared proposal together. Prime won the contract but teammates could not agree on terms of the subcontract.
- Decision:
 - No contract, an “agreement to agree” only.
 - Teaming agreement too indefinite to enforce.
- Virginia law applied, might be appealed to Fourth Circuit.

Questions?

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