

SBA Implements Rule Changes to Strengthen Federal Small Business Subcontracting

Legal Alert
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Garvey Schubert Barer Legal Update, July 25, 2013.

On July 16, 2013, the U.S. Small Business Agency (“SBA”) adopted important amendments to regulations governing small business subcontracting, to implement the Small Business Jobs Act of 2010, designed to increase federal subcontracting opportunities for small businesses. This alert highlights the most significant provisions of the new rules.

Primes To Provide “Maximum Practicable Opportunity” to Small Businesses

To address underutilization of small business enterprises, the amended rule provides that the prime contractor is responsible for ensuring that small business concerns are given the “maximum practicable opportunity” to participate in the performance of the work, and must conduct market research to identify small business subcontractors and suppliers through “all reasonable means.” Contractors on large awards have additional specific administrative and substantive responsibilities, which include giving pre-award written notice to unsuccessful small business subcontractors. Importantly, primes cannot prohibit subcontractors from discussing any material matter, including payment and utilization by the prime, directly with the contracting officer.

Primes Must Make Effort to Award to Subcontractors Used in Bidding Process Work in Same Scope, Amount and Quality Used in Submitting Quote or Bid

Small businesses complain that they frequently expend significant time and resources to assist large enterprises in preparing bids, quotes and proposals, and then do not receive the work expected upon award of the contract. The amended

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regulations address this in several ways. First, an offeror must represent to the contracting officer that it will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it “used” in preparing the bid or proposal, in the same scope, amount, and quality used in preparing and submitting the bid or proposal. Second, the regulations require that a prime contractor who fails to procure such items from such small business concerns must provide the contracting officer with a written explanation prior to the submission of the invoice for final payment and contract close-out. The contracting officer must evaluate the prime contractor’s compliance with these requirements, when rating the contractor for past performance.

Primes Must Notify Contracting Officer When Making Slow or Reduced Payments to Small Business Subcontractors

Another recurring issue is reduced or slow payments to small business subcontractors, which can face cash flow issues if not promptly paid by the prime. The amended SBA regulations require a prime contractor to notify the contracting officer in writing, if upon completion of a small business subcontractor’s work, the contractor pays a reduced price, or if the payment to the subcontractor is more than 90 days past due, and the agency has paid the prime contractor. A contractor will be deemed to have a history of slow or reduced payments if it self-reports 3 times within a one year period. Again, the contracting officer is required to evaluate the contractor’s compliance with this particular requirement when rating the contractor.

Small Business Subcontracting Plan and Goal Requirements in IDIQ/Multiple Award Contexts Clarified

SBA also adopted a new rule clarifying how small business subcontracting plan requirements and agency goals are to be implemented in the context of multiple-award contracts. Unless the prime contractor has a commercial subcontracting plan, awardees of IDIQ, Multiple Award and Federal Supply Schedule contracts exceeding certain thresholds must submit to the contracting officer a subcontracting plan for each such contract. Such contractors must also submit small business subcontracting reports for individual orders to the ordering or the funding agency on an annual basis. The agency funding an order awarded to a small business subcontractor will receive credit for the order toward that agency’s small business subcontracting goals. Also, the funding agency, in its discretion, may establish small business subcontracting goals for individual orders, and for Blanket Purchasing Agreements, or Basic Ordering Agreements.

Contracting Officers Responsible for Monitoring and Evaluating Small Business Subcontracting Performance

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Generally, the regulations makes it clear that contracting officers must monitor and evaluate compliance with small business subcontracting regulations, and may include in solicitations evaluation factors for small business subcontracting performance and compliance. Finally, for those contractors and subcontractors required to submit small business subcontracting reports, SBA clarified the definition of “subcontracts” which may be “credited,” and identified certain cost centers that cannot be considered in a subcontracting “base.”

The new SBA regulations must, in many cases, be harmonized with counterpart provisions of the Federal Acquisition Regulation, so their full impact may be delayed. Additional requirements associated with the changes are likely to increase the administrative burdens on prime contractors. Whether they are of any meaningful benefit to small business subcontractors remains to be seen. But the amended rules represent a further step in the direction of addressing some of the specific practices of prime contractors and the government often perceived to impede small businesses from receiving a greater share of federal contracting dollars.

If you have any questions about how the rules may affect your business specifically, please call Ben Lambiotte or John Knab.