

## MSFC SBELT – Legislative Update 5 November 2015

### Reminder – Typical Regulatory Actions Process

- A proposed rule to implement the statute is generated
- Internal agency review is conducted
- **A proposed rule is included in the Federal Register for public comment**
- All comments are reviewed
- Changes made if needed
- A final rule is included in the Federal Register for comment
- FAR Council adopts the rule (DoD, NASA, GSA)

### Credit for Lower Tier Small Business Subcontracting

- Proposed Rule
- [80 FR 60300](#) dated 6 October 2015
- Comments due by December 7, 2015, RIN: 3245-AG71
- Does not apply to commercial or comprehensive subcontracting plans.

SBA is proposing to amend its regulations to implement Section 1614 of the National Defense Authorization Act for Fiscal Year 2014. The proposed amendments would allow an other than small prime contractor that has an individual subcontracting plan for a contract to receive credit towards its small business subcontracting goals for subcontract awards made to small business concerns at any tier. The prime contractor shall incorporate the lower tier subcontracting performance into its subcontracting plan goals. Currently, other than small business prime contractors establish small business subcontracting goals at the first tier level, and receive credit toward their subcontracting plan goal performance at the first tier level. The rule also proposes to implement the statutory requirements related to the subcontracting plans of all subcontractors that are required to maintain such plans, including the requirement to monitor subcontractors' performance and compliance towards reaching the goals set out in those plans as well as their compliance with subcontracting reporting requirements.

## DoD, GSA, and NASA: Small Business Subcontracting Improvements

- (FAR Case 2014-003)
- Proposed Rule posted 10 June 2015
- Comments due 10 August 2015, RIN Not Assigned
- 29 Comments Made

The proposed rule will implement a change in the method that Federal agencies will receive small business subcontracting credit. Historically, the agency that awards the contract also receives the small business subcontracting credit. The proposed rule changes this model by allowing the funding agency to receive the small business credit. SBA implemented this change of providing funding agency credit in its final rule in deference to the concerns expressed by the users of multi-agency contracts (MACs) and Government-wide acquisition contracts (GWACs), who have long been of the opinion that the agencies using these vehicles, *i.e.*, the funding agencies, should receive the small business subcontracting credit. **For consistency, this proposed FAR rule implements the requirement for funding agencies receiving small business subcontracting credit for all contract vehicles, not just MACs and GWACs.**

This proposed FAR rule also changes the requirement for a prime contractor to submit Summary Subcontract Reports (SSRs) for DoD and NASA contracts to be annually rather than semi-annually, and deletes the requirement for a prime contractor to submit a separate report to each DoD component for construction and related maintenance and repair contracts.

### **NASA FAR Supplement: Safety and Health Measures and Mishap Reporting**

- Proposed Rule
- [80 Federal Register 48282](#) dated 12 August 2015
- Comments due by October 13, 2015, RIN 2700–AE16
- 0 Comments Made

NASA proposes to amend the NASA FAR Supplement (NFS) to revise a current clause related to safety and health measures and mishaps reporting by narrowing the application of the clause, resulting in a decrease in the reporting burden on contractors while reinforcing the measures contractors at NASA facilities must take to protect the safety of their workers, NASA employees, the public, and high value assets. The revision to this proposed rule is part of NASA's retrospective plan under Executive Order (EO) 13563 completed in August 2011.

### **NASA FAR Supplement: NASA Capitalization Threshold**

- Interim Rule
- [80 Federal Register 51957](#) dated 27 August 2015
- Comments due by October 26, 2015, RIN 2700–AE23
- 0 Comments Made

NASA is issuing an interim rule amending the NASA FAR Supplement to increase the NASA capitalization threshold from \$100,000 to \$500,000.

## Small Business Mentor Protégé Program

- Proposed Rule
- [80 Federal Register 6617](#) dated 5 February 2015
- Comments due by April 6, 2015, RIN: 3245-AG24
- 117 Comments Made

SBA currently has a mentor-protégé program for the 8(a) Business Development Program that is intended to enhance the capabilities of the protégé and to improve its ability to successfully compete for Federal contracts. The Small Business Jobs Act authorized SBA to use this model to establish similar mentor-protégé programs for the Service Disabled Veteran-Owned, HUBZone, and Women-Owned Small Federal Contract Business Programs and the National Defense Authorization Act for Fiscal Year 2013 authorized this for all small businesses. The proposed rule would also make minor changes to the mentor-protégé provisions for the 8(a) Business Development program in order to make the mentor-protégé rules for each of the programs as consistent as possible. The proposed rule would amend the current joint venture provisions to clarify the conditions for creating and operating joint venture partnerships, including the effect of such partnerships on any mentor-protégé relationships. Finally, the proposed rule would make several additional changes to current size, 8(a) Office of Hearings and Appeals or HUBZone regulations, concerning among other things, ownership and control, changes in primary industry, standards of review and interested party status for some appeals.



## [Piliro Mazza Legal Advisor Newsletter and Blogs](#)

Section 825 also moves up the deadline for the SBA to conduct a study to determine the industries in which WOSBs are underrepresented, from January 2, 2018 (in the 2013 NDAA) to January 2, 2016 (in the 2015 NDAA). In order to comply with this requirement, SBA proposes revising the definitions of “underrepresentation” and “substantial underrepresentation” in 13 C.F.R. § 127.102 to provide SBA with flexibility to allow it to conduct a reliable and relevant study by the new, sooner deadline imposed by Congress.

In their Third Quarter 2015 issue of Legal Advisor, reminds GSA contracts that GSA Office of Inspector General (OIG) publishes an annual audit memorandum/report entitled ‘**Major Issues from Multiple Award Schedule Pre-award Audits.**’ The report is available at [www.gsaig.gov](http://www.gsaig.gov) and summarizes the recurring problem areas identified across the audits conducted in the prior year. Legal Advisor states that this year’s audit memorandum identified three primary issues:

- 1) use of unqualified labor on GSA task orders;
- 2) submission of Commercial Sales Practices (CSP) that are not current, accurate or complete; and

- 3) failure of sales tracking systems to capture and report all GSA sales. These problems are the focus of increasing scrutiny on all GSA contracts during the negotiation of contract awards and modifications as well as part of the Contractor Assessment compliance review program, which has recently increased in scope and frequency.

### **Piliero Mazza Blogs – May Be of Interest**

- [SBA Gradually Approves of Hiring Key Personnel from an Alleged Ostensible Subcontractor](#)
- [SBA Approval of 8\(a\) Joint Ventures – What Is Required Beyond the Regulations?](#)
- [UPDATED: Dissatisfied with an Unsatisfactory Rating? Contractor Options for Challenging CPARS](#)
- [DC Proposes New Law Requiring 16 Weeks of Paid Family and Medical Leave](#)

**WOSB Sole Source Now Available** – Check out [WIPP](#) for the four questions to ask when considering if a contract can be awarded to a WOSB via sole source authority.

- 1) Is the contract in a WOSB or EDWOSB eligible NAICS code?
- 2) Is the contract (including options) valued at \$6.5 million or less for manufacturing contracts or \$4 million or less for all other contracts?
- 3) Can the contract be awarded to the WOSB or EDWOSB at a fair and reasonable price?
- 4) In the determination of the contracting officer, is there a reasonable expectation that there is only one WOSB/EDWOSB that can perform?

### **[2013 National Defense Authorization Act](#) & Similarly Situated Entities**

- Section 1651 of the 2013 NDAA
- Proposed Rule
- [79 Federal Register 77595](#) dated 29 December 2014
- Comments original due by February 27, 2015; Extended to April 6, 2015
- RIN: 3245-AG58
- 215 Comments

Section 1651 of the NDAA requires that the limitations on subcontracting for full or partial small business set-aside contracts, HUBZone contracts, 8(a) BD contracts, SDVO SBC contracts, and WOSB and EDWOSB contracts, be evaluated based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. Significantly, the NDAA excludes from the limitations on subcontracting calculation the percentage of the award amount that the prime contractor spends on similarly situated entity subcontractors. When a contract is awarded pursuant to a small business set-aside or socioeconomic program set-aside, a similarly situated entity subcontractor is a small business concern subcontractor that is a participant of the same SBA program that qualified the prime contractor as an eligible offeror and awardee of the contract.

From:  Fernandez, Brenda J. <Brenda.Fernandez@sba.gov>  
To:  mary.griffith@avistastrategies.com  
Cc:  
Subject: RE: NDAA of 2013 Amendments Proposed Rule - Similarly Situated Entities

Sent: Mon 11/2/2015 1:34 PM

Good morning Ms. Griffith. I'm sorry that I do not have a time line or a status to give you on the release of a final rule for SBA's RIN 3245-AG58 at this time. I have contacted our OGC department to see if there is any update. If I'm provided with a status or any information that I may provide the public, I'll send you an updated email.

Thank you for your continued interest in SBA's small business programs.