



WEBINAR

**5 THINGS ALL
VETERAN OWNED BUSINESSES
NEED TO KNOW
FOR 2017**



**A PilieroMazza, PLLC Presentation
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WEBINAR

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PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for over 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services, including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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PM Legal Minute – Our blog provides updates and analysis of issues that our practice groups have encountered, as well as tips and practical advice for government contractors

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rulemaking as well as other newsworthy events.

Weekly Update – An email sent each Friday that recaps any relevant actions taken by Congress, the administration, or the courts.

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OVERVIEW

- Small Business Teaming Opportunities – the Similarly Situated Rule
- Working with Large Businesses – the Mentor-Protégé Program
- Staying in Compliance – the New Joint Venture Requirements
- VA Contracting Opportunities – Kingdomware Decision
- President Trump Administration – Impact on Veteran-Owned Businesses

Similarly Situated Entities



Similarly Situated

- Work performed by Similarly Situated Entities may count towards the applicable limitations on subcontracting
- What is a “Similarly Situated Entity”?
 - Subcontractor that has same small business program status as the prime contractor
 - Small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform
- How much work can be subcontracted to a Similarly Situated Entity?
 - To count, work must be self-performed by subcontractor



Example 1

A SDVOSB set-aside contract is awarded in the total amount of \$10,000,000 for janitorial services. The prime contractor subcontracts \$8,000,000 of the janitorial services to another SDVOSB. The prime contractor does not violate the limitation on subcontracting for services because the amount subcontracted to a similarly situated entity is excluded from the limitation on subcontracting.



Example 2

A SDVOSB set-aside contract is awarded in the total amount of \$1,000,000 for landscaping services. The prime contractor subcontracts \$500,001 to a small business subcontractor that is not also a SDVOSB. The prime contractor is in violation of the limitation on subcontracting requirement because it has subcontracted more than 50% of the contract amount to a small business subcontractor, which is not considered similarly situated to a SDVOSB prime contractor.

Other Considerations

- “Similarly situated subcontractors” are excluded from affiliation under the ostensible subcontractor rule
 - What does this mean in practice?
- The limitations on subcontracting do not apply to subcontractors entering into lower-tier subcontracts **except** where prime relying on subcontractor’s similarly situated status
- Independent Contractors: considered subcontractors and may count towards meeting limitation on subcontracting when Independent Contractor qualifies as a similarly situated entity

The Mentor-Protégé Program



The New SBA Mentor-Protégé Program

- Available to all small businesses, including SDVOSBs, HUBZones, WOSBs, and 8(a)s
- Patterned on existing 8(a) Mentor-Protégé program
- Allows all small business protégés to joint venture with their large business mentors

Benefits

- M-P joint ventures may qualify as a small business for any federal government contract or subcontract where the protégé qualifies as small for the size standard assigned to the procurement
 - Why joint venture?
 - Does 3-in-2 rule still apply?
- Protégé firm can raise capital without fear of affiliation
 - Any limitations?
- Significant subcontracting work to protégé = potential incentives from procuring activities during contract evaluation



Protégé Eligibility

- Must be small under its primary NAICS code or seeking assistance in secondary NAICS code under which it is small
 - Size determination required?
- Protégé not limited to a single mentor
- Importance of ensuring protégé qualifies as an SDVOSB/HUBZone/WOSB/8(a) firm

How to Apply

- Online application available at www.certify.sba.gov
- All applicants must execute and submit a Mentor-Protégé Agreement
 - Detailing needs, assistance, timeline, and success measurement is critical
- Other requirements besides a Mentor-Protégé Agreement?
- If interested in the new M-P Program, apply NOW

Joint Ventures

New Requirements

- Uniform requirements for **all** small business programs regarding size and content of JV agreement
 - What requirements have changed for JVs on set aside programs?
- Required written agreement for arrangement and responsibilities of the parties
 - Specificity is key **but** general descriptions okay for IDIQ and multiple award contracts

New Requirements

- JV structures: both formal and informal allowed
 - How do they differ?
 - Can a JV be populated with direct labor?
- The JV Project Manager:
 - Employee of eligible JV partner; **or**
 - If JV is with mentor, signed letter of commitment from future PM who is not employee of mentor
- Agencies must consider past performance of JV partners when considering past performance of a JV entity

Other Considerations

- SAM registration requirements
- Certificates of compliance (contract-start, annual, and project-end)
 - What are you certifying to and why?
 - Failure to submit consequences
- Size protests of JVs permitted

VA Contracting Opportunities: Kingdomware

Kingdomware

- 2006 Veterans Benefits, Health Care, and Information Technology Act
 - Section 8127(d) ‘Rule of Two’
 - Department of Veteran Affairs (“VA”) “shall award” contracts to veteran owned small businesses if two conditions are met: (1) two or more veteran-owned small businesses are likely to submit offers, and (2) if the award could be made “at a fair and reasonable price that offers best value to the United States.”

Kingdomware

- Government Accountability Office (“GAO”) sustained a SDVOSB’s bid protest that the VA had violated the law by not applying the ‘Rule of Two’ to the GSA Schedule
- VA ignored GAO decisions
- Kingdomware took VA to Court of Federal Claims (“COFC”) and COFC upheld GAO decision

Kingdomware

- In Supreme Court case, VA argued Congress never intended for Federal Supply Schedule (“FSS”) contracts to be covered by 2006 law
- Supreme Court unanimously rejected VA’s arguments saying (1) Congress did not include an explicit exception for FSS contracts in the 2006 law; (2) VA FSS orders are contracts; and (3) veterans’ preferences apply to all VA acquisitions, regardless of whether or not the VA has met its annual veteran contracting goals



Kingdomware Impact

- VOSB and SDVOSB given priority in all VA acquisitions when the legal requirements for that priority are met
- More VA set-aside contracting opportunities for VOSBs and SDVOSBs
- Veterans' preference continues to apply even after VA meets its VOSB contracting goals

National Defense Authorization Act Fiscal Year 2017

NDAAs 2017

- Signed into Law on December 23, 2016
- New VA and SBA Regulations for VOSBs and SDVOSBs will take effect “on date on which the Administrator of the Small Business Administration and the Secretary of Veteran Affairs jointly issues regulations implementing such sections.”
- SBA and VA “shall issue guidance” within 180 days of the enactment of NDAA 2017 (June 21, 2017)
- Consolidates definition of SDVOSB as defined in the Small Business Act

NDAAs 2017

- VA Secretary's authority curtailed
 - VA prohibited from issuing regulations regarding ownership, control and size status of an SDVOSB or VOSB
 - VA required to use SBA regulations which will apply to both VA and SBA's self-certification SDVOSB programs
 - VA will continue to verify status, but using SBA regulations

NDAAs 2017

- New verification appeals process for SDVOSBs
 - SBA OHA will have authority to hear appeals from any small business denied verification by the VA
 - OHA will have jurisdiction if interested party challenges the inclusion in the VetBiz database of an SDVOSB or VOSB
 - Unclear if OHA will hear protest of verification as an SDVOSB or VOSB generally

President Trump's Impact on Government Contracting



Trump Administration

- Roll back of President Obama’s Executive Orders (“EO”)
 - Final DOL Overtime Rules Were to Take Effect on December 1, 2016
 - Set threshold for exempt employees overtime pay ineligibility to \$47,476 annually for a full-year worker
 - Regulation enforcement enjoined by court
 - Trump Administration may seek to overturn if court does not



Trump Administration

- EO 13673: Fair Pay and Safe Workplaces
 - New paycheck transparency requirements took effect January 1, 2017 (Other provisions not in effect)
- EO 13706: Establishing Paid Sick Leave for Federal Contractors
 - Ensures contractor employees can earn up to seven days of paid sick leave annually, including paid leave for family care

Trump Administration

- President Trump's Procurement Policies
 - Increased outsourcing of government services?
 - Increased infrastructure spending?
 - Emphasis on Commercial Items acquisitions
 - Emphasis on “Buy American”
 - Less LPTA procurements
 - NDAA for 2017 already limits for DOD



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ANY QUESTIONS?

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