LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

GOVERNMENT CONTRACTING

The All Small Mentor/Protégé Program, One Year Later: Lessons Learned and a Key Milestone

By Katie Flood

In October, it will be one year since SBA began accepting applications to its All Small Mentor-Protégé Program, which was modeled after its existing 8(a) Mentor/Protégé Program. During this time, we have been able to draw some lessons regarding how SBA has approached the All Small Mentor/Protégé Program application process, including the types of questions that applicants have received as SBA has vetted their submissions. In addition, now that we are also approaching the one-year mark of the approval of the first All Small Mentor/Protégé relationships, one of the first major program compliance milestones will soon be upon us, in that protégés will soon need to file their first annual reports regarding the benefits they have received from their mentors.

Unlike the 8(a) Mentor/Protégé Program, SBA has processed applications for admission to the All Small Program at a rapid clip: SBA reports that its average approval time for an All Small Mentor/Protégé application is 8-12 business days, as opposed to the typical months-long application process for the 8(a) Mentor/Protégé Program.

There is also a stark difference in the amount of documentation applicants need to produce for the All Small application. Indeed, if the protégé is seeking assistance from the mentor under its primary NAICS code, the applicants need only submit a copy of the mentor/protégé agreement; the protégé's business plan; the mentor's and protégé's completed certificates of training for the certify.sba.gov portal; and the mentor's DUNS number. If the protégé is applying under a secondary code, the protégé will also need to submit evidence that it has performed prior work in that particular industry – for example, a copy of a contract, subcontract, invoices, or other type of indication that the protégé has done work under that code. Unlike in the 8(a) Mentor/Protégé Program, unless a specific question arises, a potential mentor is not required to prove its qualifications or "fitness" to serve in the mentoring role, such as through the production of financial information or tax returns.

Once the application has been submitted, SBA will question applicants that submit under secondary codes if they have failed to provide sufficient evidence of the work performed under that code. SBA will also ask applicants to produce copies of existing mentor/protégé agreements that either the mentor or protégé have entered into, to verify that the assistance provided by the mentor to the protégé is not duplicative of assistance the protégé already receives under another mentoring agreement.

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Application considerations aside, now that we are approaching the program's one year mark, those early applicants that were approved in the program's early days must look towards compliance reporting obligations. One of the major compliance metrics of the mentor/protégé agreement is that the protégé must report, within 30 days of the anniversary of SBA's approval of the mentor/protégé agreement, the following information for the preceding year:

- All technical and/or management assistance provided by the mentor to the protégé;
- All loans to and/or equity investments made by the mentor in the protégé;
- All subcontracts awarded to the protégé by the mentor and all subcontracts awarded to the mentor by the protégé, and the value of each subcontract;
- All federal contracts awarded to the mentor-protégé relationship as a joint venture (designating each as a small business set-aside, small business reserve, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and
- A narrative describing the success such assistance has had in addressing the developmental needs of the protégé and addressing any problems encountered.

The protégé is also required to report the mentoring services it receives by category and hours, and certify to SBA whether there has been any change in the terms of the mentor/protégé agreement.

In turn, SBA will review the protégé's report on the mentor/protégé relationship and may decide not to approve continuation of the agreement if it finds that the mentor has not provided the assistance set forth in the mentor/protégé agreement or that the assistance has not resulted in any material benefits or developmental gains to the protégé. SBA has indicated that it will provide protégés with a 60-day notice regarding the benefits reporting requirement.

Mentors and protégés that form joint ventures must also ensure that they are complying with their obligation to report to SBA on their compliance with the performance of work requirements. In addition to the certification made upon contract award, the protégé is required to submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each contract set aside or reserved for small business that is performed by the joint venture during the year. A similar report must be filed at the conclusion of contract performance, detailing how the joint venture met the performance of work requirements for the contract.

"Now that we are approaching the program's one year mark, those early applicants that were approved in the program's early days must look towards compliance reporting obligations."

To date, there have been no reported decisions at SBA's Office of Hearings and Appeals ("OHA") which discuss how SBA will treat specific affiliation considerations between mentors and protégés under the new All Small Mentor/Protégé Program. For example, will OHA treat affiliation considerations differently under the All Small Mentor/Protégé Program than it does under the 8(a) Mentor/Protégé Program? But, based on the rapid approval rate of these applications, and the number of mentor/protégé joint ventures that are currently or soon to be performing contracts, we are sure to see some unique situations arise for these All Small Mentor/Protégé relationships. This will be especially true with regard to the compliance milestones that will be cropping up with the one year anniversary of SBA's acceptance of applications.

If you have any questions regarding the All Small Mentor/Protégé Program, joint venture formation, or compliance considerations, please do not hesitate to contact us.

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Protecting Your Employees and Confidential Information when Working with Teaming Partners

By Ambika Biggs

Teaming with another company to win federal contracts can be a fruitful practice for small and large business alike. Small companies may get the opportunity to bid on work that they otherwise would be unable to perform, and large companies can subcontract with small companies to bid as part of a team on work that they may be ineligible to perform because competition is restricted to businesses in certain socio-economic groups.

However, teaming with another company to win work is not without risk. Two common issues that arise are disputes between teaming partners regarding employee poaching and the misappropriation of a teaming member's confidential and proprietary information. It is important for contractors to be familiar with the types of disputes that could occur with respect to these issues so they can take proactive steps to try to prevent them from happening in the first place.

With respect to employee poaching, a couple of scenarios commonly occur. Take, for example, a situation in which a contractor has performed on a government contract for years, but is no longer eligible to bid on it when the contract is re-competed due to its increased size, so the contractor teams with a small business to bid on the contract. After the small business prime is awarded a government contract, the prime terminates the subcontractor so the prime can receive all of the profit on the contract instead of splitting it with the subcontractor. Oftentimes, not only will the prime contractor wrongfully terminate the subcontractor, but it also will solicit and hire the subcontractor's employees who have experience performing on the contract. Another common scenario is that a prime and subcontractor work together on a contract, but then end up as competitors on the follow-on contract, and one company attempts to hire away its former partner's employees.

Contractors can avoid these types of issues by including appropriate non-solicitation provisions in their teaming agreements and subcontracts that prevent their teaming partners from attempting to hire away their employees. When using non-solicitation provisions, companies should consider the following tips:

1. If you are not the drafting party, make sure the provision is mutual. Oftentimes, the provision will be drafted to prevent one party from soliciting the other party's employees (i.e., the subcontractor is prohibited from soliciting the prime's employees), but not vice versa.

2. Ensure that the provision is enforceable. Sometimes non-solicitation clauses are too vague because they do not define key terms, such as which employees are covered by the provisions. Other times, they are too broad and attempt to cover more activity than is necessary for a company to protect its business interests, for example by prohibiting the parties from hiring any employees of the other teaming partner, even if they have no connection to the contract on which the parties teamed.

3. Make sure the clauses are for a reasonable length of time. If a non-solicitation provision only covers the period when the teaming agreement or subcontract is in force, a teaming partner could simply terminate the contract and then would be free to hire its former teaming partner's employees. On the flip-side, if the provision's term is too long, a court may not enforce it at all.

4. Ensure that the provision is in compliance with the applicable law. Teaming agreements and subcontracts should establish which state's laws will govern the agreements, and companies should make sure that the non-solicitation clause is enforceable under that state's laws, as some jurisdictions have stricter requirements than others.

Even when companies follow these tips, there will be some occasions when they have no choice but to let a successor contractor hire their employees. For instance, for contracts relating to services that are deemed "vital" to the Government, under FAR 52.237-3, the incumbent contract must allow "as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services" provided in the contract. And, for contracts that are subject to Executive Order 13495, the successor contractor must

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offer employment to the predecessor contractor's employees for positions for which they are qualified.

With regard to the misappropriation of proprietary information, a common scenario that arises involves one of the teaming partners providing confidential material to the other partner to include in the proposal or during the performance of the contract, and the other teaming partner then uses this material for a later contract or with a different teaming partner. To try to avoid these scenarios, confidentiality provisions in teaming agreements and subcontracts should:

1. Clearly define what type of information is covered by the confidentiality provision. This material could include technical methods, inventions, and know-how, or even the specific language contained in a proposal, as it can take substantial effort to draft the perfect proposal language.

2. Detail how confidential information will be identified. Will all information exchanged be considered confidential information, or does the information have to be marked with a legend indicating it is confidential?

3. Establish the remedies for a breach of the clause. The party whose information is disclosed or misappropriated may be entitled to damages or injunctive relief, and this should be clearly set forth in the contract.

4. Include a timeline for either returning or destroying the other party's confidential information and verifying that all such information has been returned or destroyed.

"Teaming with another company to win work is not with out risk."

Even if non-solicitation and confidentiality provisions are included in teaming agreements and subcontracts, a company may still attempt to hire its teaming partner's employees or misappropriate its confidential and proprietary information. However, if the provisions are well drafted, any dispute should be short lived and more easily resolved than it otherwise would be, saving the company time, money, and the frustration that comes with protracted litigation. An ounce of prevention when drafting these provisions is usually worth a pound of cure if a dispute arises.

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LABOR AND EMPLOYMENT

Employee Refusal of Medical Treatment – Tips to Avoid Costly Claims

By Meghan Leemon

Imagine a situation where you notice your employee badly cuts his thumb at work, and you, as the employer, offer to call an ambulance or take him for a medical examination, but the employee refuses and insists he is fine. Days, weeks, or even months go by and then suddenly you are notified that the same employee is suing your company because his injury was not treated properly and now his thumb must be amputated. Or, you notice that an employee is having chest pains or is visibly ill, you offer to get the employee medical attention and the employee insists that she is ok, but is later found deceased in her car while on the way home.

As the employer, are you liable in these scenarios? Whether the employer will be found liable for an injury or harm even if the employee failed to seek medical care often depends on whether the employer acted reasonably or properly documented the employee's refusal of medical treatment.

First, it is important to understand how employers may be held accountable for failure to properly record incidents. Although each state has a different set of rules, there are generally timelines that must be followed as to when the employee should notify the employer and the employer should notify the insurer and/or the state when an injury has occurred, typically within a few days of the injury. If an employer is aware of an injury and the employee refuses to file a notice, employers should first explain to the employee that reporting job-related injuries may entitle them to benefits and failure to report injuries may result in a rejection of a later claim. If the employee still refuses,

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have the employee sign a statement of claim refusal. If the employee refuses to sign a statement, which they have a right to do, ensure that records are kept detailing the conversation, including who was involved and when the conversation took place. Although often an employee may still file a claim for workers' compensation benefits, it is critical that employers maintain all injury and illness records to protect the employer's eligibility for insurance coverage and to assist the insurer in any subsequent investigation

In addition to workers' compensation, some injuries or illnesses need to be reported to the Occupational Safety and Health Administration ("OSHA"). Generally, any work-related injury or illness requiring medical treatment beyond simple first aid (such as a Band-Aid) must be recorded on the employer's OSHA log. There are minimal exceptions to this, including if you have 10 or fewer employees during the last calendar year, unless OSHA or the Bureau of Labor Statistics informs you that you must keep records. However, severe injuries, such as death, amputation or hospitalization have stricter reporting requirements.

Even if an employer complies with all reporting requirements, the scope of employer liability could depend on the thoroughness of the employer's records and policies. Some illnesses are not work related but arise during the workday. Employers are often hesitant to get involved when an employee makes a decision regarding their own health. However, employers should still take reasonable steps to ask the employee whether they would like to seek medical care and record the incident just like they would a work-related injury.

As noted above, it is important to have an employee sign a refusal of care form and to sufficiently record the details of the interaction, including any witness statements. However, an employer's duty may go beyond completing this form. If, in using reasonable judgment, the employee appears to be okay, it may be sufficient to document the incident and have the employee acknowledge she refused treatment. If the employer has any doubt about whether the employee needs emergency medical treatment, it is important to call emergency services by dialing 911. First responders are trained to follow standard operating procedures when a person refuses medical treatment and often are able to better assess a situation than supervisors or managers who do not have medical expertise. Having emergency medical service personnel involved helps add another level of protection against your liability. Of course, this should be documented in your records as well.

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It is nearly inevitable that an employee will be injured or become ill at work, and employees often refuse medical treatment. It is important for employers to have a policy in place to deal with this type of situation and to properly train front line supervisors and managers to follow these procedures consistently. Additionally, make sure the company is meeting reporting requirements through established standard operating procedures including a refusal of medical treatment form. PilieroMazza attorneys are here to assist should employers need assistance developing or revising these policies.

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UPCOMING WEBINAR

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More information can be found at www.pilieromazza.com/events

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GUEST COLUMN

Sustainability Through Cost Control

By Stephanie Scarola

Let's face it, working for the Government is tough business! The operating environment is challenging to say the least – a 'best value' buying climate (at best), an evolving competitive landscape, the war for talent, emerging compliance requirements, and unyielding financial performance expectations to name a few.

The need for government contractors to be cost competitive has never been greater. More than ever before, the ability to creatively manage costs will be a deciding factor of future success. Effective cost management can create a competitive edge, but you need to go beyond traditional cost cutting and improving the optics of cost pools or indirect rates to address fixed costs and create cost structure flexibility. Improving cost structure flexibility not only lowers indirect rates – it can fund investments in diversification, and just might help you exploit new opportunities or weather setbacks.

Assessing your needs and sourcing practices will help you target cost areas for potential reductions or conversion from fixed to variable. Knowing where to start can be daunting, but some areas that can yield the greatest benefit include:

- Occupancy Costs – Paying for an option for future expansion versus committing to additional space now can result in future cost avoidance should that expansion not be necessary. Does your lease allow for sub-leasing unused space? Alternatively, if you've got temporary needs, utilizing swing space could be a good alternative.
- Supplier based costs – What products and services are you using? What are you buying and how is it priced? Places to look for significant savings include Insurance, Group Health, Telecom and Financial Services. There is often opportunity to save without changing providers or services. The bottom line is that being an informed buyer drives value.
- Technology - While IT costs can be significant, it's often least understood. Beyond addressing network costs, and though never easy, perhaps it is time to look at whether reducing IT infrastructure through data center consolidation, virtualization, outsourcing or offshoring will reduce expenses and/or increase cost structure flexibility.

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- Support Services – Would outsourcing certain support services shed fixed costs in favor of a more flexible cost structure – one that that scales with need? Areas to look at include payroll processing, accounting, technical support, and any processes that are standard and repeatable. Be mindful of sacrificing future cost flexibility in exchange for a lower expense today – make sure it makes sense in the long run.
- Infrastructure Integration – Like many contractors, if you've grown somewhat through acquisitions, chances are there could be an opportunity to better leverage skills and costs relative to how support services are delivered across your business units. How are Finance, HR, Legal, and IT support services delivered? If it's distributed, is this a strategic decision or is it time to re-consider integration and consolidation?

Improving cost flexibility and trimming costs is often not easy, but preserving your optionality is critical and against the headwinds of an increasingly complex and challenging environment, it may be due time to consider.

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