

Small Professional Business – Shifting Paradigms to Do Business with the Federal Government

In September 2007, my law firm received certification under the 8(a) and Small Disadvantaged Business (SDB) programs from the United States Small Business Administration (SBA). Since that time, I've helped other businesses apply for 8(a)/SDB certification, Disadvantaged Business Enterprise (DBE) certifications, and state certifications recognizing minority, women, or other categories of small businesses (e.g., veteran-owned, service disabled veteran-owned, HUB Zone, etc.). What I've learned over the last two years is that "winning" or otherwise obtaining government work is a constant battle for small businesses. Since I don't want to reveal any client confidences, I'll share some of my law firm's experiences over the next several months.

For law firms (and possibly other small businesses), throw out everything you've "heard" about small business set asides at all of the network or government sponsored outreach sessions that you've attended. Small business set asides for legal services are a rarity. Here's the four scenarios that typically happen when the federal government contracts for legal services.

1. The federal entity uses FAR 6.001 limitation. These limitations are primarily set forth under FAR Subchapter F. FAR Subchapter F describes seven categories of "exemptions" so that the government can procure services and/or goods without having to use full and open procedures. What is interesting is that overall, about sixty percent of general services and goods are procured through these exemptions with only forty percent being procured under full and open competition, so it is important to understand these special categories. For legal services, the government tends to get around publicized procurements by using FAR 37-Service Contracting. This exception tends to be frequently used for litigation services, but is also used for other "advisory" services. Another "exemption" is through procurements under the Federal Supply Schedule (GSA), but that's another day's blog.
2. Use Simplified Acquisitions or Blanket Purchase Agreements.
3. Release a Sole Source Announcement with a finding that only one law firm can provide applicable legal services. For example, see the US Navy's sole source announcement to Stites & Harbison under N00173-07-R-SC04 for patent prosecution.
4. Put Solicitation out "unrestricted" (i.e., full and open competition) and include requirements that preclude small business participation. What is frustrating about these unrestricted solicitations is that many of the existing contracts to incumbent law firms (e.g., Edwards & Angell, Woodcock Washburn, Klarquist Sparkman, Merchant & Gould, etc.) do not even require small business contracting plans (e.g., waivers signed by agency and SBA so that large law firms do not have to use small law firms). Or, these contracts appear to be "intentionally" set at dollar values just under the threshold for requiring small business subcontracting (e.g., Department of Transportation's 2005 legal advisory service contracts to Katten Muchin, Nixon Peabody, Ballard Spahr, etc., were set at ceiling of \$490,000 to

avoid subcontracting required if contract was for \$500,000 or more). Still further, the SBA's Procurement Center Representatives (PCRs) and/or Commercial Marketing Representatives (CMRs) tend to support federal agency decisions to use "unrestricted" procurements for legal services despite registration of over one thousand small law firms registered with the Central Contractor Registration (www.ccr.gov) and listed on the Dynamic Small Business Search (DSBS) tool as well as proactive marketing from law firms to PCRs and small business specialists internal to federal agencies (e.g., OSDBU staff, Contracting Officer, etc.).

In all fairness, there are some federal agencies that do recognize that for acquisitions valued between the simplified acquisition thresholds up to \$100,000, then this is an automatic set aside for small businesses (e.g., IBB Office of Contracts Solicitation GC-08-01-GH). However, these set asides for small law firms are scarce as any search of the www.fbo.gov website will verify (search NAICS code for current and archived solicitations under NAICS 541110 (Office of Attorneys) and search with Small Business Set Aside checked).

So, where does this leave small law firms (and other small professional businesses (e.g., CPAs, etc.) that want to provide federal government services? Before that question can be answered, many small professional businesses must recognize that it will take a major paradigm shift in order for the federal government to start using small law firm set aside programs (unless a small law firm has an "in" at the agency). That paradigm shift happens when (a) small professional businesses come together and collectively approach the Small Business Administration (e.g., PCRs and supervisory PCRs), (b) small professional businesses file and follow up on GAO protests or with the Inspector General (to substantiate small business set asides by showing breadth and depth of small business qualifications and types of work that small businesses can do) and with supporting documentation from FOIA responses (e.g., findings used to justify full and open competitions along with task order pricing details over several years time that may demonstrate that each task order or a series of task orders are small enough to demonstrate warranting small business set asides, etc.), (c) small professional businesses file applications to get on the Federal Supply Schedule (FSS) (FAR 38 "exception") and market those FSS contracts, and (d) small professional businesses are able to have a dialogue with large professional businesses that explain the advantages of subcontracting and/or joint ventures (e.g., if a large business subcontracts with an 8a/SDB small business, then the government entity can Sole Source a contract for millions of dollars to the small business that has partnered with the large business. Remember that "teaming" agreements are not enforceable - only one teaming agreement has been held up by a court of law in DC, so use subcontracting agreements or joint ventures). And, if anyone else has other suggestions, experiences, or opinions, then I am eager to hear from you.