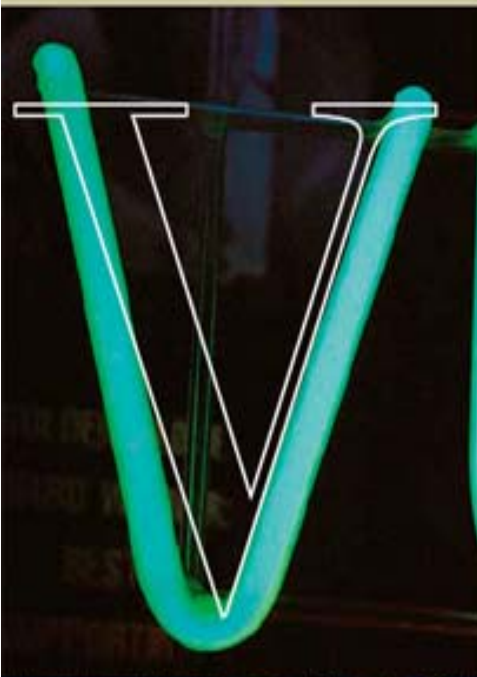


Ensuring  
Compliance in a  
Post-GTSL  
Environment:  
Lessons for  
Small and Large  
Businesses

December 7, 2010





## **Ensuring Compliance in a Post-GTSL Environment: Lessons for Small and Large Businesses**

December 7th, 2010  
12:00 – 1:30 p.m.

Venable LLP  
8010 Towers Crescent Drive, Suite 300  
Vienna, VA 22182

**Panelists:**

Lars Anderson  
Terry Elling

**Moderator:**

Dismas Locaria



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presentations

## Ensuring Compliance in a Post-GTSI Environment: Lessons for Small and Large Businesses

December 7, 2010

Speakers:  
Lars Anderson  
Terry Elling

Moderator:  
Dismas Locaria



### Overview

- Background
- GTSI Suspension
- GTSI Compliance Agreement
- EGS & MultimaxArray Suspended
- Recent Small Business Legislation
- Practice Points
- Questions/Discussion



## Background

- Small Business Size Protest
  - Feb 2007 – DHS awarded Master IDIQ FirstSource Contract to 11 small businesses
  - June 2008 – Citizenship & Immigration Service issued multiple delivery order (MDO) task order (TO)
  - GTSI employee, on behalf of MultimaxArray, emailed DHS & all FirstSource contractors declining to bid on a different, small TO
  - Sept 15, 2008 – CIS awarded \$165M MDO to MultimaxArray
  - Wildflower receives anonymous fax of standard Dell Teaming Agreement that identifies GTSI as acting as the prime contractor of the CIS MDO
  - Wildflower files size protest alleging that MultimaxArray is affiliated with GTSI
  - MultimaxArray declines to contest the size protest and SBA determines MultimaxArray ineligible for CIS MDO due to affiliation with GTSI
  - January 2009 – Wildflower wins reprourement of CIS MDO



## Background *cont'd*

- *GTSI vs Wildflower*
  - After Wildflower won the CIS MDO, GTSI filed an action against Wildflower in U.S. District Court (E.D. VA) claiming that Wildflower's use of the GTSI/Dell Teaming Agreement in the size protest was a violation of a Trade Secret
  - Wildflower counterclaimed that GTSI had systematically violated small business regulations and used MultimaxArray and EG Solutions (EGS) as mere "fronts" to illegally obtain FirstSource TO
  - The Parties engaged in extensive discovery, whereupon GTSI's teaming agreement with MultimaxArray and contracts with EGS were publicly disclosed, as were multiple email communications
  - From these documents, it was uncovered that
    - GTSI prepared their proposals using the prime's letterhead, email addresses and id for *FedBid* & *FedConnect*
    - GTSI employees were instructed to answer the phone as the prime's employees
    - GTSI performed virtually 100% of the Task Orders
    - GTSI prepared invoices using the prime's letterhead
    - GTSI kept up to 99.5% of the contract price paid by DHS
  - GTSI and Wildflower settled their litigation in Feb 2010 on the eve of trial



## GTSI Suspension

- October 1, 2010, SBA suspended GTSI based on evidence that it violated small business set-aside regulations
- Suspension based upon information and documentation demonstrating that GTSI's arrangements with small business prime contractors, including an ANC:
  - Placed GTSI in control of the prime contract
  - Provided little to no involvement for the small business in the performance of the contract



## GTSI Compliance Agreement

- Entered into on October 19, 2010 between SBA and GTSI
- Terms
  - In effect for up to 3 years
  - GTSI does not admit to wrongdoing or breaking the law
  - SBA reserves the right to extend the scope of the case if it comes across any additional revealing facts
  - GTSI barred from participating in small business contracts as a subcontrol or mentor
  - GTSI's President & CEO and its VP/GC resigned
  - SBA suspended 3 other executives: 1) vice president of civilian sales and general manager; 2) senior sales manager; and 3) program manager
  - GTSI must name an ethics officer and adopt a code of ethics
  - SBA and GTSI will agree on an independent company monitor who will ensure GTSI's compliance with acquisition rules and the agreement
    - Monitor will have full access to inspect GTSI on an ongoing basis and report to SBA without interference from GTSI
    - GTSI does not have the right to see the monitor's monthly reports before they go to SBA
    - GTSI required to give the monitor management-style office space and it must pay, among other things, all monitor fees, retainers and other reimbursements, including any legal fees
- The investigation regarding potential criminal action and/or debarment continues





## EGS & MultimaxArray Suspended

- On Nov 18, 2010, SBA suspended EGS and MultimaxArray
- These two companies are two of the 11 DHS small business FirstSource prime contractors
- SBA determined that as prime contractors, they allowed a subcontractor (GTSI) to perform “most if not all the work on the contract”
- The suspension of EGS and MultimaxArray continues and the Government's investigation continues



## Recent Small Business Legislation

The Small Business Jobs and Credit Act of 2010 (H.R. 5297)

- Effective September 27, 2010
- Key Provisions
  - Small Business Certification Integrity
    - Imposes a strict liability standard on contractors that misrepresent their size status
    - Contractors that violate these size standards are presumed to be liable for the amount which the government expends on a contract intended for small businesses



## Recent Small Business Legislation *cont'd*

- Annual Size Certification
  - The law now requires all small business to recertify their size status annually on ORCA
  - Previously contractors only had to recertify their size status prior to the fifth contract year on long-term contracts
- Payment of Subcontractors
  - The new law imposes new past performance and potential non-responsibility consequences on prime contractors that fail to pay their subcontractors in a timely manner



## Recent Small Business Legislation *cont'd*

- Subcontracting Plan Integrity
  - The new law requires large businesses to make, as part of their small business subcontracting plans, an affirmative representation that they will make a “good faith effort” to meet the subcontracting intentions stated in their bid or proposal
  - Large contractors will also be required to explain in writing why they failed to comply with their proposed subcontracting plan
- Small business requirements under multiple IDIQ contracts will be enforced for each task/delivery order





## Recent Small Business Legislation *cont'd*

- Small Business Contracting Parity
  - The new law restores parity between the HUBZone contracting program and the 8(a) and service-disabled veteran-owned programs
  - This also includes the expanded use of mentor/protégé program to HUBZone and service-disabled veteran small businesses



## Recent Small Business Legislation *cont'd*

- Other possible changes to the Small Business Programs
- Changes to the Alaskan Native Corporation (“ANC”) program
  - Place ANCs on an equal footing with other small disadvantaged businesses
  - Eliminate ANCs ability to receive sole-source contracts for unlimited value



## Practice Points

- SBA may be expanding its enforcement actions in a way not before seen, as a result, contractors should ensure that:
  - All statements, representations and certifications are accurate and verifiable
  - Teaming agreements, subcontracts, subcontracting plans, mentor/protégé relationships and other arrangements are fully compliant in language and in practice
  - Maintain accurate records of the allocation of work between parties
  - Utilize accurate records to ensure that the small business retains at least the required share of the work
  - Keep apprised of new and pending legislation that will result in changes to the SBA's regulations and make any changes necessary to ensure continued compliance



## Questions/Discussion?

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### AREAS OF PRACTICE

Government Contracts

### INDUSTRIES

Transportation and  
Transportation Infrastructure

Maritime

Government Contractors

### BAR ADMISSIONS

District of Columbia

Virginia

### EDUCATION

J.D., University of Virginia School  
of Law, 1970

B.S., University of Virginia, 1967

Lars Anderson's practice focuses on government contracting.

In 39 years in the field, he has handled virtually every issue that arises in contracting and doing business with the federal government. Clients rely on him for:

- assistance during the competitive bid process
- defense or prosecution of bid protests
- help in complying with regulations and laws during contract performance
- resolution of disputes and claims during contract performance
- resolution of claims as a result of contract termination

His experience includes resolving disagreements over highly technical specifications - including changed conditions, delays or disruption in construction, manufacture or maintenance of weapons systems and equipment, and allegations regarding violations of procurement integrity laws.

His experience encompasses, among other areas:

- aerospace - maritime
- electronics - OMB A-76 competitions
- Travel - information technology
- Small Business 8(a) programs

He also assists contractors in performing risk analysis and developing proposals.

Mr. Anderson's familiarity with the government's internal procedures and regulatory requirements provides invaluable insight for contractor clients, and often facilitates amicable resolutions to contract disputes.

### SIGNIFICANT MATTERS

Mr. Anderson has prosecuted and defended bid protests before government agencies, the U.S. Court of Federal Claims, the General Accountability Office and in federal district courts.

- Through bid protests at GAO in a case involving a lost DOD contract in excess of \$100 million, Mr. Anderson won back a five-year contract for the incumbent.
- He has successfully prosecuted and defended Small Business size protests, including one that netted his client a \$170-million IT contract.
- Mr. Anderson prosecuted an administrative patent infringement claim against the Navy that led to a favorable settlement for the patent owner as well as substantial royalties.

Mr. Anderson has defended allegations of fraudulent conduct and misrepresentation

of facts and defective pricing in investigations by inspector generals and Defense Contract Audit Agency auditors.

He has also prosecuted claims for improper termination of contracts for default and claims for equitable adjustments before contract appeals boards and in government-sponsored alternative dispute resolution proceedings.

Representative clients:

- IT service companies - electronics instrumentation companies
- construction - travel service companies
- ship operators - aircraft and ship maintenance/repair
- military training simulator
- manufacturers - federal supply schedule contractors
- base maintenance/operations
- 8(a) companies - electronics instrumentation companies

## HONORS

U.S. Navy Distinguished Civilian Service Award, 1985

Member of the Office of General Counsel, Department of the Navy, 1970-1985

## ACTIVITIES

Mr. Anderson coordinates Venable's Virginia pro bono neighborhood-outreach program.

He is judge advocate general for the North-South Skirmish Association, a non-profit group engaged in historical preservation and educational activities focused on the American Civil War.

## PUBLICATIONS

- October 26, 2010, "GTSI's Suspension Shows That Contractors Should Ensure Accurate Representations Concerning Small Business Matters", *Federal Contracts Report*
- October 2010, The Small Business Administration Flexes its Muscle: Contractors Should Ensure Accurate and Appropriate Representations and Teaming Arrangements, *Government Contracts Update*
- August 12, 2008, Federal courts hold that failure to disclose an OCI may result in False Claims Act liability, *Government Contracts Update*



## Terry L. Elling

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### AREAS OF PRACTICE

Government Contracts

### INDUSTRIES

Government Contractors

### GOVERNMENT EXPERIENCE

Trial Attorney, Army Contract Appeals Division

Chief, Commercial Litigation, Department of the Army Litigation Division

Assistant General Counsel (Ethics and Fiscal Policy), Department of the Army

### BAR ADMISSIONS

District of Columbia  
Illinois

### COURT ADMISSIONS

U.S. Supreme Court  
U.S. Court of Appeals for the Federal Circuit  
U.S. Court of Federal Claims

### EDUCATION

Terry Elling has significant experience in government contracting rules and procedures.

He provides counsel and representation across the spectrum of government contract matters – including bid protests, claims, prime contractor-subcontractor disputes and civil false claims. Mr. Elling also has significant experience with due diligence in connection with the merger and acquisition of government contractors, as well as post-transaction matters such as novations.

Mr. Elling has deep experience in related areas such as:

- Government ethics
- Industrial and personnel security
- Federal appropriations and fiscal law
- Export controls - Foreign ownership, control and influence (FOCI)
- Freedom of Information Act and Privacy Act

Mr. Elling brings a broad-based, strategic perspective to government contracts matters. He advises clients on the impact legal issues will have upon planned and ongoing programs, and helps them identify and implement efficient and cost-effective solutions.

Clients call on his experience in litigation of protests and claims, as well as in internal investigations of potential false claims and similar issues.

As an Army judge advocate prior to joining Venable, he was responsible for litigating many "high visibility" procurement and personnel cases.

While an Army trial attorney in the 1990s, Mr. Elling was an early advocate of Alternative Dispute Resolution (ADR) to resolve disputes while maintaining a positive working relationship between the government and its contractors.

Mr. Elling retired from active duty in 2002. Prior to retirement, he held a number of government contract and litigation assignments, including Chief of the Commercial Litigation Branch, U.S. Army Litigation Division, and as Assistant General Counsel (Ethics and Fiscal Policy), Department of the Army.

### HONORS

President, Northern Virginia Chapter of the National Contract Management Association.

Vice chair, Contract Claims and Dispute Resolution Committee, Public Contract Law Section, American Bar Association.



LL.M., U.S. Army Judge Advocate  
General's Corps School, 1991

J.D., University of Illinois College of  
Law, 1982

B.A., *magna cum laude*, University  
of Illinois, 1979

Phi Beta Kappa

Omicron Delta Epsilon  
(Economics Honorary)

## MEMBERSHIPS

American Bar Association, Public  
Contract Law Section

DC Bar Association

Illinois State Bar Association

Federal Bar Association

National Contract Management  
Association, Northern Virginia  
Chapter

## ACTIVITIES

Mr. Elling serves child support and veteran's benefits clients, as part of Venable's pro bono program.

Mr. Elling is a member, and the immediate past chairman of, the board of directors of the Tuberous Sclerosis Alliance, a nonprofit dedicated to finding a cure and to improving the lives of those affected by tuberous sclerosis.

## PUBLICATIONS

- November 2010, Contractors in Afghanistan Should Prepare for the Termination of Private Security Contracts and Taxation of Subcontractors, Government Contracts Update
- November 2010, Goldmines and Landmines – Fundamentals of Federal Grants Compliance
- October 26, 2010, "GTSI's Suspension Shows That Contractors Should Ensure Accurate Representations Concerning Small Business Matters", *Federal Contracts Report*
- October 2010, The Small Business Administration Flexes its Muscle: Contractors Should Ensure Accurate and Appropriate Representations and Teaming Arrangements, Government Contracts Update
- August 2010, FAPIIS Goes Public: Contractor Performance and Integrity Information Database Will Be Made Publicly Available, Government Contracts Update
- June 2010, DoD Contractors and Subcontractors: Are You Complying with the New Flowdown Notice Requirement on U.S. Export Control Laws?, Government Contracts Update
- May 5, 2010, Goldmines and Landmines: Fundamentals of Federal Grants Compliance
- February 2010, Proposed DFARS Rule: Withholding Payments to DoD Contractors, Government Contracts Update
- November 18, 2009, Proposed Rules Issued For Prevention of Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, Government Contracts Update
- November 2009, Government Ethics and Grants Compliance
- July 13, 2009, The Federal False Claims Act - What Does It Mean for Nonprofit Organizations?
- May/June 2009, What Must a US Government Contractor Know About Doing Business in Afghanistan?, *Fairfax County Chamber of Commerce GovCon Report, Issue 7, Vol. 3*
- June 24, 2009, Zero-Defect DCAA Audits: A Fundamental Shift From Cooperation To Strict Compliance, Government Contracts Update
- May 2009, The Role of the Federal Circuit in Federal Procurement Law, *Federal Circuit Bar Association Newsletter - Volume XIII, No. 3*
- March 31, 2009, US-Iraq SOFA and Recent Decisions Highlight Risks for US Contractors Supporting US Efforts Overseas, Government Contracts Update
- March 12, 2009, President Obama Issues Memorandum to the Heads of Executive Departments and Agencies Concerning Government Contracting, Government Contracts Update
- March 11, 2009, Feature Comment: President Obama Issues Memo on Government Contracting to the Heads of Executive Departments and Agencies
- March 2009, Suspension and Debarment: New Developments and Future Challenges, *Contract Management*
- March 1, 2009, Managing Subcontracts: Optimizing the U.S. Government's Supply Chain (Expected November 2009)
- February 3, 2009, GSA Proposes Several Significant Changes to its Federal Supply Schedule Contracting Program, Government Contracts Update
- October 2008, The National Defense Authorization Act for FY09's Clean Contracting Act Mandates Significant Changes in Federal Acquisitions, Government Contracts

## Update

- August 8, 2008, 2007 Year in Review: Analysis of Significant Federal Circuit Government Contracts Decisions
- July 31, 2008, Department of Justice Updated Guidance on Seeking Waivers of Attorney-Client Privilege May Not Go Far Enough, Government Contracts Update
- June 5, 2008, DoD Amends Interim DFARS Provisions that Prohibit Payment of "Excessive Pass-Through Charges" on Subcontracts, Government Contracts Update
- May 2008, This issue includes Government Contractor Code of Ethics and Business Conduct update, and article on EPA's suspension of IBM., Government Contracts Update
- December 2007, GAO Sustains Bid Protest Alleging that Cancellation of Solicitation was Pretextual and Unreasonable, Government Contracts Update
- November 2007, DOJ Seeks to Expand Proposed FAR Amendment Requiring Contractor Code of Ethics to Include Mandatory Reporting of Violations, Government Contracts Update
- August 31, 2007, 2006 Year In Review: Analysis of Significant Federal Circuit Government Contracts Decisions, *Public Contract Law Journal*
- August 2007, Federal Circuit Bid Protest Decision Reinforces the Importance of Timely Raising Patent Defects in a Solicitation, Government Contracts Update
- May 2007, Interim DFARS Provisions Prohibit Payment of "Excessive Pass-Through Charges" on Subcontracts, Government Contracts Update
- February 2007, SPECIAL: Proposed FAR Amendment Would Require Contractor Code of Ethics and Business Conduct and Impose Related Requirements, Government Contracts Update
- January 2007, New Department of Justice Guidance on Circumstances in Which Prosecutors Should Seek Access to Privileged Information Does Not Eliminate Many Concerns, Government Contracts Update
- September 2006, ASBCA Denies Reimbursement for Costs for Contractor's Failure to Comply with Contract's Limitation of Costs Clause, Government Contracts Update
- August 21, 2006, Department of Defense Revises Proposed Rules for Export-Controlled Information and Technology, Government Contracts Update
- June 12, 2006, Ninth Circuit Allows *Qui Tam* Suit Based on Information Obtained Under FOIA Request, *Northern Virginia Technology Council B2G Committee Legal Update*
- May 25, 2006, Ninth Circuit Allows *Qui Tam* Suit Based on Information Obtained Under FOIA Request, Government Contracts Update
- December 2005, Know Your Contracting Officer: Contracting with the Federal Government in Times of Natural Disaster and Other Emergencies, *84 Federal Contracts Report 21*, Government Contracts Update
- November 2005, Special Edition Covering the Fall Legislative Agenda and Global Trade Issues, Government Contracts Update
- November 11, 2005, Federal Circuit Affirms Court of Federal Claims Ruling on Damages Available for Partial Breach of Contract, *Northern Virginia Technology Council B2G Committee Legal Updates*
- October 2005, Federal Circuit Affirms Court of Federal Claims Ruling on Damages Available for Partial Breach of Contract, Government Contracts Update
- September 2005, Subcontractor Suit Barred Where Officials Lacked Authority to Bind Government, Government Contracts Update
- August 4, 2005, Department of Defense Proposes New Rules for Export-Controlled Information Technology, Government Contracts Update
- July 2005, Federal Circuit Reverses Court of Federal Claims Ruling on Timeliness of Contract Disputes Act Appeal, Government Contracts Update
- March 2005, Limitation on the Payment of Funds to Influence Federal Transactions, Government Contracts Update
- October 26, 2004, Gifts to Government Employees, Government Contracts Update

- October 21, 2004, Post-Employment Restrictions on Former Government Officials, Government Contracts Update
- October 19, 2004, Employment Negotiations with Government Personnel, Government Contracts Update
- September 2004, Reliance on Government Estimates, Government Contracts Update
- August 2004, Government Release of Information, Government Contracts Update
- May 2004, Subcontractor Remedies, Government Contracts Update
- Spring 2003, Litigating With (Not Against) the Government: Freedom of Information Act May Compel Disclosure of Attorney Work Product, *The Procurement Lawyer*
- November 1996, Casenote: Impact of Scheduled Airline Traffic Offices v. United States on Evaluation of Travel Services Contracts, *1996 Army Lawyer 44*
- July 1994, Contesting Applications for Attorneys Fees in Government Contract Litigation, *1994 Army Lawyer 21*
- Summer 1991, Guilty Plea Inquiries: Do We Care Too Much?, *134 Mil.L.Rev. 195*

## SPEAKING ENGAGEMENTS

Mr. Elling has been a frequent speaker on procurement, fiscal, and litigation topics at The U.S. Army Judge Advocate General's Legal Center and School, the United States Military Academy and the U.S. Air Force Material Command.

- June 1, 2010, "Winning Bid Protests - Best Practices" audio seminar for Federal Contracts Training Center
- May 12, 2010, "Federal Grant and Contract Compliance for Nonprofits: Goldmines and Landmines" webcast for ACC's Nonprofit Organizations Committee
- July 14, 2009, Legal Quick Hit: "The Federal False Claims Act - What Does It Mean for Nonprofit Organizations?"
- April 28, 2009, NOVA Chapter of the National Contract Management Association's day-long "Hot Topics" seminar
- March 5, 2009, NOVA Chapter, National Contract Management Association
- April 30, 2008, National Contract Management Association (NCMA), Northern Virginia Chapter
- September 24, 2007 - September 27, 2007, Four-Day Government Contracts Course
- October 13, 2006, National Contract Management Association Seminar
- October 13, 2006, Government Ethics: The Challenge and Consequences of Service Contractors in the Government Workplace
- April 13, 2006, Drafting a Winning Proposal: Tips for Preparing Proposals that Can (1) Win and (2) Withstand a Protest
- April 1, 2005, Panel Member, "Government Ethics Overview and Recent Developments" at the ABA Public Contract Law Section Spring Educational Program
- November 2004, Panel Member, "International Traffic in Arms Regulations-A Compliance Primer" at the Dayton, Ohio, Chapter National Contract Management Association
- November 2004, Panel Member, "Claims and Disputes-Pitfalls and Pratfalls" at the Northern Virginia Chapter, National Contract Management Association
- June 3, 2004, National Contract Management Association



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### AREAS OF PRACTICE

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Recovery Act Task Force

### BAR ADMISSIONS

District of Columbia  
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### EDUCATION

J.D., *with honors*, University of  
Maryland School of Law, 2003

Articles Editor, *Maryland Law  
Review*

B.A., *magna cum laude*, San  
Francisco State University, 1999

Dismas Locaria is a member of the firm's Government Contracts group. Mr. Locaria's practice focuses on assisting government contractors in all aspects of working with the Federal government, as well as representing and counseling clients in the burgeoning homeland security field.

Mr. Locaria has represented clients before various Federal agencies, including the EPA, Department of Navy, GSA, SBA, Army Corps. of Engineers, Maritime Administration, as well as others. The subject of these representations has ranged from suspension and debarment and regulatory matters, to contract procurement, administration and compliance issues. Mr. Locaria has also represented clients in the form of bid protests, claims and disputes before the United States Court of Federal Claims, the Government Accountability Office, and the Armed Services Board of Contract Appeals. Mr. Locaria also has extensive experience in client counseling, including assisting clients with the nuances of becoming government contractors and implementing appropriate systems and methods to achieve and maintain regulatory and contractual compliance.

Mr. Locaria represents a number of clients in homeland security related matters including drafting guidelines for various companies' information handling, such as Sensitive Security Information, or in harnessing all the benefits of the SAFETY Act. In fact, Mr. Locaria has assisted several clients in receiving SAFETY Act Certification, the highest level of protection afforded under the Act. Mr. Locaria has published on the topic of the SAFETY Act and is a co-author and contributor to Venable's Homeland Security Desk Book.

### PUBLICATIONS

"Frankel v. Board of Regents of the University of Maryland System - In the Name of Equality: The Proper Expansion of Maryland's Heightened Rational Basis Standard," 61 MD L. REV. 847 (2002).

- October 26, 2010, "GTSI's Suspension Shows That Contractors Should Ensure Accurate Representations Concerning Small Business Matters", *Federal Contracts Report*
- October 2010, The Small Business Administration Flexes its Muscle: Contractors Should Ensure Accurate and Appropriate Representations and Teaming Arrangements, Government Contracts Update
- June 2010, Government Contractors Toolkit - Selling to the Federal Government
- March 2010, Contractors Can Challenge the Government's In-Sourcing Efforts
- December 2009, The GSA Schedules: How to "Get on Schedule" and Broaden Your Business, *Originally published in the December 2009 issue of Contract Management magazine, © 2009, the National Contract Management Association*
- November 18, 2009, Proposed Rules Issued For Prevention of Personal Conflicts of

Interest for Contractor Employees Performing Acquisition Functions, Government Contracts Update

- August 27, 2009, New OMB Guidance Further Signals the Sea Change in Government Contracting, Government Contracts Update
- July 13, 2009, The Federal False Claims Act - What Does It Mean for Nonprofit Organizations?
- May 29, 2009, The Federal Government Provides Significant Opportunities for Asset Managers Looking to Expand Their Business, Financial Services Alert
- March 2009, Suspension and Debarment: New Developments and Future Challenges, *Contract Management*
- February 24, 2009, Increased Oversight of Government Contracts, Government Contracts Update
- February 3, 2009, GSA Proposes Several Significant Changes to its Federal Supply Schedule Contracting Program, Government Contracts Update
- October 2008, The National Defense Authorization Act for FY09's Clean Contracting Act Mandates Significant Changes in Federal Acquisitions, Government Contracts Update
- August 8, 2008, 2007 Year in Review: Analysis of Significant Federal Circuit Government Contracts Decisions
- July 31, 2008, Department of Justice Updated Guidance on Seeking Waivers of Attorney-Client Privilege May Not Go Far Enough, Government Contracts Update
- July 23, 2008, GAO'S New Bid Protest Jurisdiction May Aim to Foster Competition but Leaves Many Questions Unanswered, Government Contracts Update
- March 2008, 2008 DoD Authorization Bill Adds Relief and Complexity to DoD's Procurement of Specialty Metals, Government Contracts Update
- October 2007, Court of Federal Claims Makes Unusual Request for FTC Opinion on OCI Issue, Government Contracts Update
- August 31, 2007, 2006 Year In Review: Analysis of Significant Federal Circuit Government Contracts Decisions, *Public Contract Law Journal*
- June 2007, The U.S. Supreme Court Narrows Relators' Ability to Pursue Qui Tam Claims, Government Contracts Update
- January 2007, New Department of Justice Guidance on Circumstances in Which Prosecutors Should Seek Access to Privileged Information Does Not Eliminate Many Concerns, Government Contracts Update
- September 7, 2006, Homeland Security Deskbook: Private Sector Impacts of the War Against Terrorism
- Fall 2006, Final SAFETY Act Rule Resolves Some Questions, Generates Others, and Creates Important Procurement Linkage to the SAFETY Act, *Procurement Lawyer*
- August 2006, Administrative Remedies: Contractors Should be Concerned With Losing More Than Just Dollars in a Civil Suit, Government Contracts Update
- May 12, 2006, Possible Changes on the Horizon for Berry Amendment, *Northern Virginia Technology Council B2G Committee Legal Updates*
- April 2006, Possible Changes on the Horizon for the Berry Amendment, Government Contracts Update
- April 2005, Former 8(A) Business Not Liable for Warranty and Upgrade Services, Government Contracts Update
- December 2004, SBA Issues Final Rules For Subcontracting Assistance Program, Government Contracts Update
- September 2004, Reliance on Government Estimates, Government Contracts Update
- May 2004, Critical Infrastructure Information Act, Government Contracts Update



## SPEAKING ENGAGEMENTS

- July 14, 2009, Legal Quick Hit: "The Federal False Claims Act - What Does It Mean for Nonprofit Organizations?"
- September 4, 2008, National Contract Management Association, NOVA Chapter - Monthly Meeting
- January 17, 2008, National Contract Management Association: Greater Johnstown Chapter's Dinner Meeting
- November 1, 2007, Northern Virginia Chapter of the National Contract Management Association (NCMA)





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# FEDERAL CONTRACTS



## REPORT

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### Suspension and Debarment

## **GTSI's Suspension Shows That Contractors Should Ensure Accurate Representations Concerning Small Business Matters**

BY LARS E. ANDERSON, TERRY L. ELLING, MICHAEL W. ROBINSON, AND DISMAS LOCARIA

**O**n October 1, 2010, the Small Business Administration suspended GTSI Corp. (GTSI) based upon adequate evidence demonstrating that it violated small business set-aside regulations to win and perform

*Lars E. Anderson has practiced in the field of government contracting for 40 years, including 15 years as a Navy procurement attorney, and has handled virtually every issue that arises in contracting and doing business with the federal government. Terry L. Elling has extensive experience in government contracting, first as an Army trial attorney, and then as an integral member of Venable's government contracts team since 2002. Michael W. Robinson has more than 20 years of board litigation experience, including bid protests at the U.S. Court of Federal Claims and litigation between government contractors in U.S. district courts. Dismas Locaria has been a member of Venable's government contracts team since 2003, with experience in all facets of doing business with the federal government with emphasis on appropriate measures to achieve and maintain regulatory and contractual compliance.*

federal contracts. While the SBA has always had the authority to suspend and debar contractors for violating its rules, enforcement action of this type has occurred infrequently and, typically, has not been imposed against a contractor of GTSI's size. The SBA's action against GTSI likely signals a new and broader focus to increase enforcement of its rules and regulations, and comes on the heels of heightened public and Congressional scrutiny of large business participation in small business contracting, particularly where large businesses are "teamed" with Alaska Native Corporations (ANCs).

**Background.** According to the *Government Executive*, the evidence that led to the SBA's suspension of GTSI stems from a 2008 successful protest of a \$165-million delivery order under the Department of Homeland Security's (DHS) FirstSource information technology contract awarded to a joint venture company, MultimaxArray. The FirstSource procurement was a 100 percent small business set-aside reserved for eligible small businesses that had been awarded indefinite delivery indefinite quantity (IDIQ) contracts. Under the small business rules, MultimaxArray (or any successful small business awardee) was required to perform the vital functions as the prime contractor, and also perform at least 51 percent of the services required under the delivery order. GTSI was allegedly to serve as a subcontractor to MultimaxArray for the delivery order.

Following the award of the delivery order to MultimaxArray, Wildflower International, Ltd. (Wildflower),

a woman-owned small business represented by Venable LLP, protested the award, alleging, among other things, that MultimaxArray was simply a front company for GTSI, which would actually perform the majority of the work and function as the *de facto* prime contractor. The protest included documentation illustrating GTSI's role. In response to an SBA request for information, MultimaxArray chose not to contest the protest, so the SBA ruled that MultimaxArray was ineligible for that \$165-million delivery order.

Wildflower then won that large delivery order on a re-compete and GTSI initiated litigation against it in federal court, contending that the information used to expose GTSI in the SBA protest was improperly obtained by Wildflower. Wildflower filed a counterclaim, asserting that GTSI was improperly participating in the First-Source Program through the use of small business fronts that had been awarded IDIQ contracts in the program.

That litigation was settled on the eve of trial, but not before GTSI executives had testified about GTSI's activities in the program and information and documents had become public concerning GTSI's use of two small businesses, one an ANC, EG Solutions, and Multimax Array, to obtain contracts set aside for small businesses. According to the SBA suspension letter: "There is evidence that GTSI's prime contractors had little to no involvement in the performance of the contracts in direct contravention of applicable laws and regulations regarding the award of small business contracts." The suspension letter further noted that: "The evidence shows that GTSI was an active participant in a scheme that resulted in contracts set-aside for small businesses being awarded to ineligible contractors. . .GTSI was responsible for receiving and reviewing, on behalf of [two] prime contractors, quotes and contracting opportunities. . .by having email forwarded from the prime contractor directly to GTSI employees" and "GTSI was also responsible for preparing and in some instances sending responses to contracting officers regarding contract opportunities on behalf of the prime contractors."

The SBA decision to suspend GTSI is remarkable because the government rarely moves directly to suspend or debar an entire company as large as GTSI, which earned more than \$540 million in prime contract awards in Fiscal 2009, according to *Government Executive's* annual top 200 contractor rankings. This case has drawn wide publicity and has been compared to the Environmental Protection Agency's 2008 debarment of IBM.

On October 19, 2010, GTSI and the SBA executed an "Administrative Agreement" which provides that, in exchange for the SBA lifting the suspension, GTSI agreed to major changes in its senior management and business practices. GTSI's president and CEO, and its senior vice president and general counsel, resigned, and the vice president of civilian sales and general manager, the senior sales manager, and the program manager have been suspended for up to three years. Under the agreement, GTSI may not do any business with a small business prime contractor under any contract or task order directly or indirectly intended to benefit any type of small business concern. GTSI is likewise prohibited from participating in a mentor/protégé relationship or joint venture with a small business.

Under the agreement, GTSI is required to retain an independent monitor approved by the SBA who will oversee GTSI's conduct for up to three years and report directly to the SBA. GTSI is required to hire an ethics officer and to adopt, implement, and to maintain a self-governance ethics program that covers all employees and is acceptable to the SBA. GTSI is required to fully cooperate with an ongoing investigation by the SBA's Office of Inspector General and is required to make its current and/or former executives, employees and consultants available to testify on behalf of the government in any criminal or civil proceeding arising out of the continuing investigation.

### **The SBA's Enforcement Tools.**

The GTSI case demonstrates the most recent and most significant example of the SBA taking action against a large contractor that misrepresented its sub-contractor arrangement with a small business. In particular, the agreement by which GTSI had its suspension lifted illustrates the potential scope of SBA oversight for contractors that run afoul of the small business regulations, and the corrective action that may be necessary to address SBA concerns.

The SBA, as with all federal agencies, has criminal, civil, and administrative enforcement mechanisms at its disposal to address incorrect statements and misrepresentations made during the award process and during contract performance.

While these penalties and actions are significant and can lead to criminal penalties for offending individuals, administrative action (*e.g.*, suspension or debarment actions) can be the most significant and damaging from a company's perspective. Suspension and debarment actions, albeit not meant for punishment, but rather, for ensuring the government contracts with "presently responsible" entities, excludes companies from entering into new contracts or new participation in federal loans, grants, or other federal financial assistance programs when an entity's responsibility (*i.e.*, its integrity and ethical standards) is at issue. These actions normally do not affect existing contracts or current loan or grant participation. However, they will bar the issuance of new task or delivery orders against IDIQ contracts, General Services Administration Schedule contractors, or the like, and generally bar an agency from exercising a contract's option. They also prevent the award of any subcontracts requiring government approval.

Suspensions are normally used where there is adequate evidence to believe that a cause for debarment exists, but the criminal or investigative proceeding is not final, and there is an immediate need for the government to protect the public interest. Suspension lasts during the pendency of such proceeding, but generally, does not exceed 12 months. Debarments are based upon a final adjudication, such as a conviction or settlement, and are for a fixed period of time, typically no more than three years. In some cases, agencies will enter into an "Administrative Agreement" with a contractor that has been suspended and/or is proposed for debarment. Under such agreements, the agency agrees to refrain from suspending or debarment the contractor in exchange for the contractor taking specified corrective actions (such as removing officers and employees responsible for committing or failing to prevent improper conduct, implementing a new compliance program, and accepting an independent auditor or compliance moni-



tor). In the case of GTSI, the “Administrative Agreement” resulted in lifting the suspension. However, the SBA investigation continues and could result in further enforcement actions, including criminal prosecutions and/or debarment of the company.

Notably, suspensions and debarments by a single federal agency have governmentwide effect, both in the procurement (i.e., contract) realm, as well as in the non-procurement (i.e., grants, loan assistance, and other federal and federally-funded programs and benefits) realm. Thus, a suspension or debarment by the SBA bars a large systems integrator from competing for and winning contracts from agencies such as the Department of Defense or the DHS.

**Additional Legislative Scrutiny.** In addition to the various mechanisms currently available to federal agencies, Congress continues to examine and pass new legislation to improve the operation of these small business programs and prevent their misuse. Recently, on September 27, 2010, President Obama signed into law the Small Business Jobs and Credit Act of 2010 (H.R. 5297), a “small business stimulus” bill intended to create jobs by providing a variety of financial assistance to small businesses, but also including a number of significant and wide-reaching provisions that will impact all government contractors. That legislation contained provisions directed at preserving “small business size and status integrity” and setting forth potentially significant penalties for companies that improperly submit bids set aside for small businesses, or improperly certify their size status to obtain a contract. Some of the more significant provisions of the act include:

- a presumption that any business that incorrectly represents its size status has done so intentionally, and that the presumptive damages incurred by the government equal all amounts paid under the contract;
- a requirement that small businesses re-certify their size and status annually; and
- a requirement that a new governmentwide policy on prosecution of small business size and status fraud be promulgated and publicized for all federal agencies.

In addition, on October 6, 2010, Sen. Claire McCaskill (D-Mo.) sent a letter to the SBA’s Inspector General requesting a complete investigation of the “multiple instances of potential waste, fraud and abuse” referenced in recent *Washington Post* articles. The next day, Sen. McCaskill announced that, when Congress returns from recess, she plans to introduce legislation that would place ANCs on an equal footing with other small disadvantaged businesses operating in the SBA’s 8(a) Business Development Program. In particular, this legislation would eliminate the ability of ANCs to receive sole-source contracts of unlimited value, whereas 8(a) firms’ noncompetitive contracts are capped at \$3.5 million, or \$5.5 million for manufacturing.

**Practitioner’s Tips.** Although the SBA’s authority to suspend or debar contractors is nothing new, the SBA’s most recent action and increased Congressional interest signal a renewed focus and determination for the SBA to expand its enforcement actions in a way not seen before. As a result, contractors, large and small, should be mindful of the SBA rules and regulations and their compliance mechanisms.

Contractors should have their company’s code of business ethics reviewed to ensure that it is current, complete, and being enforced. At least annually, con-

tractors should conduct an internal audit of its business practices, procedures, policies, and internal controls for compliance with its code of business ethics and the special requirements of government contracting, including monitoring and auditing to detect criminal conduct and other conduct violating federal law or regulations, and a periodic assessment of the risk of criminal conduct.

Contractors, both large and small, should take steps to educate appropriate officers and employees regarding the special requirements and restrictions associated with the various government programs intended, directly or indirectly, to benefit small businesses. Both small businesses acting as prime contractors, and large businesses acting as subcontractors or mentors to those small businesses, need to be fully knowledgeable regarding the current restrictions and obligations on both parties under such small business preference programs. Care needs to be taken by both parties to ensure that the actual relationship between the large and small businesses does not violate the applicable law and regulations for such contracts. Since such requirements are often dependent upon the specific nature of a particular contract, the division of work and responsibility between the large and small business should be reviewed for each individual contract and type of relationship.

Contractors should ensure that:

- All statements, representations and certifications are accurate, complete, and verifiable. These include, for example: applications and annual certifications made by small businesses; small businesses’ subcontracting plans submitted by large business prime contractors; and, online as well as solicitation-specific representations and certifications made by all government contractors (particularly representations concerning average annual revenue and numbers of employees).

- Teaming agreements, subcontracts, mentor/protegé relationships, and other arrangements between small and large businesses are fully compliant, both in language and practice, with the SBA’s rules and regulations. Agreements should specify the particular roles of each party and address specific responsibilities of each with respect to contract bidding, performance, billing, revenue split and managerial responsibilities.

- The large business does not have *de facto* control of contract performance where it is a subcontractor to, or teamed with, a small business in order to be eligible for a particular government contract or subcontract. The involvement and participation of a large business under such arrangements should be fully disclosed to the government in order to avoid any misunderstanding or appearance of impropriety as to the identity and relationship of the parties in dealing with the government.

- They maintain accurate records of the allocation of work between companies, use a record keeping system that has the capability to maintain such records, and utilize this information to ensure that the small business retains at least the required share of the contract work and revenue. For example, under most service contracts, the small business must incur more than half of the direct labor charges under a contract that is awarded based on a set-aside or preference for small businesses. It is critical that the parties be able to demonstrate that the small business has, in fact, performed the required share of the work.

- They keep apprised of new and pending legislation that will result in changes in the SBA’s regulations. All existing contracts, subcontracts, and compliance

programs are reviewed and revised, as appropriate, to ensure they are consistent with the new statutes and regulations.

- Allegations or evidence of potential violations are promptly addressed.

In the event a contractor is concerned over its compliance with the SBA regulations, it may wish to consult

with experienced government contracts legal counsel to determine whether there is, in fact, a violation and how best to notify the government of such non-compliance with the aim of avoiding or mitigating the myriad of criminal, civil, and administrative actions that could ensue.



Please contact any of the attorneys in our [Government Contracts Group](#) if you have any questions regarding this alert.

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## President Signs Small Business Legislation Impacting All Government Contractors

On September 27, 2010, President Obama signed into law the Small Business Jobs and Credit Act of 2010 (H.R. 5297), a "small business stimulus" bill intended to create jobs by providing a variety of financial assistance to small businesses. The law also contains a number of significant and wide-reaching provisions that will impact all government contractors.

On balance, these new provisions seek to preserve contracting opportunities for small businesses. However, contractors need to be aware of several new enforcement mechanisms that could result in significant monetary penalties, negative past performance information, and even suspension and debarment.

Key contracting provisions include:

**Small Business Certification Integrity.** Perhaps the most significant enforcement provision of the new law is the imposition of what is effectively a strict liability standard for size misrepresentations. The law creates a "presumption of loss" to the United States in an amount expended on a small business set-aside contract whenever a contractor that is other than small "willfully sought and received the award by misrepresentation." Section 1341. In other words, contractors that misrepresent their size status are presumed to be liable for the amount which the government expends on a contract intended for small businesses.

Notably, the law also creates a far-reaching, *automatic presumption* of misrepresentation when a small business set-aside contract is awarded to a company that is not small. For example, submitting a proposal intended for small businesses or registering in a federal database for purposes of obtaining a contract intended for small businesses shall be "deemed affirmative, willful, and intentional certifications of small business size and status." Section 1341. Thus, a contractor that believes in good faith that his company is small (based on his understanding of the affiliation rules and the calculation of annual receipts during the relevant period) will be "deemed" to have affirmatively, willfully, and intentionally misrepresented the company's size status if the company is not actually small.

Although the law indicates that such conduct may not be deemed willful for "unintentional errors, technical malfunctions, and other similar situations," these terms are not defined and appear to be narrow exceptions. The clear purpose of the law is to impose automatic and strict penalties on contractors that mistakenly certify their size status as small. The consequences of such a mistake can be enormous, in terms of both monetary damages and the reputation of the concern. There may also be serious False Claims Act implications based on the statutory presumption of willful and intentional misrepresentation.

**Annual Size Certification.** The law now requires all small businesses to recertify their size status on an annual basis through the Online Representations and Certifications Application. See Section 1342. Under existing law, small business contractors only had to recertify their size status prior to the fifth contract year on long-term contracts, and every year thereafter. The annual recertification requirement is notable not only because it adds additional burden to small businesses, but each recertification now exposes contractors to a potential "deemed" willful misrepresentation, and the resulting significant penalties, if the contractor is not actually small.

Although size certifications and the importance of making accurate representations to the government are not new, the statutory presumption of intentional misrepresentation effectively eliminates (or significantly curtails) the potential defenses for mistaken certifications. When considered in light of the often complex affiliation and size determination rules that contractors have to navigate, the new certification requirement further exposes contractors to additional risk and potential liability on an annual basis.

**Payment of Subcontractors.** The new law imposes new past performance and potential non-responsibility consequences on prime contractors that fail to pay their subcontractors in a timely manner. For those contracts in which the prime contractor is required to have a small business subcontracting plan, the new law would require the prime to notify the agency when either (a) they pay a "reduced price to a subcontractor" for work completed, or (b) a payment to a subcontractor is more than 90 days past due. See Section 1334.

Significantly, the law provides that the contracting officer "shall consider the unjustified failure by a prime contractor to make a full or timely payment to a subcontractor in evaluating the performance of the prime



contractor.” *Id.* Moreover, a prime contractor with a “history of unjustified, untimely payments” to subcontractors will be included in the Federal Awardee Performance and Integrity Information System. *Id.*

Although the new rule should make delinquent prime contractors more accountable, it may also provide subcontractors considerable leverage in prime-sub disputes. Past performance records are taking on an increasingly important role in the award of government contracts. Because the word “unjustified” is not defined and is inherently subjective, prime contractors may think twice before withholding payment to subcontractors, even during good-faith performance disputes.

**Subcontracting Plan Integrity.** Small businesses have increasingly voiced frustration that prime contractors have no obligation or incentive to follow their proposed small business subcontracting plans. Under the new law, offerors will be required to make, as part of their small business subcontracting plans, an affirmative representation that they will make a “good faith effort” to acquire the goods and services “from the small business concerns used in preparing and submitting to the contracting agency the bid or proposal, in the same amount and quality used in preparing and submitting the bid or proposal.” Section 1322. Contractors will also have to explain in writing to the contracting officer why they failed to comply with their proposed subcontracting plan.

**Small Business Contracting Parity.** The new law restores “parity” between the HUBZone contracting program and the 8(a) and service-disabled veteran-owned programs. The existing HUBZone statute provided that agencies “shall” set contracting opportunities aside for HUBZone businesses when there is a reasonable expectation that two or more offerors will compete, and the agency will receive fair market prices. In contrast, the corresponding statutes for 8(a), service-disabled veteran-owned concerns, and women-owned concerns provided only that agencies “may” set aside such opportunities.

The new law eliminates the statutory preference for HUBZone concerns by changing the “shall” to “may.” Several recent decisions from the Court of Federal Claims and GAO had sustained protests when the agency did not set such contracting opportunities aside for HUBZone concerns. *See, e.g., Rice Servs., Inc.*, B-403746, Sept. 16, 2010 and *DGR Associates, Inc. v. United States*, No. 10-396C, 2010 WL 3211156 (Fed. Cl. Aug. 13, 2010). Because agencies are no longer required to set aside contracts for HUBZone concerns before considering set-asides for 8(a), service-disabled veteran-owned, or women-owned concerns, there is legitimate concern among HUBZone contractors that they will lose a significant number of contracting opportunities going forward.

**Expanding the Mentor-Protégé Program.** As part of the attempt to restore “parity” among the various small business contracting programs, the new law also provides for the establishment of a mentor-protégé program for small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by women, and HUBZone small business concerns, and will be modeled after the existing mentor-protégé program for 8(a) concerns. *See* Section 1345.

**Contract Bundling Accountability.** In an effort to preserve small business contracting opportunities, the new law seeks to reduce contract bundling by lowering the bundling threshold from \$10 million to only \$2 million. If an agency wants to bundle contract requirements that exceed \$2 million, the agency must:

- conduct market research;
- identify any “alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;”
- issue a written determination that bundling is “necessary and justified;”
- identify any “negative impact” on small business concerns; and
- certify that “steps will be taken to include small business concerns” in the agency’s acquisition strategy.

Section 1313. The law expressly states that contract “savings” is not a valid justification for bundling contract requirements, unless the expected savings are “substantial.” Instead, the law permits agencies to consider such factors as contract quality, acquisition life cycle, and terms and conditions as potential benefits of bundling.

Importantly, agencies are now required, when deciding whether to consolidate existing contract requirements, to make such decisions “with a view to providing small business concerns with appropriate opportunities to participate as prime contractors and subcontractors in the procurements of the Federal agency.” Section 1313. Agencies must also publish on their website a “list and rationale for any bundled contract for which the Federal agency solicited bids or that was awarded by the Federal agency.” Section 1312(a). These new provisions should significantly improve the transparency of agency bundling decisions and provide affected small businesses with an opportunity to hold agencies accountable.

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