

Ensuring Compliance With Small Business Set-aside Requirements: Lessons For Small and Large Businesses

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Overview

- ❑ Background
- ❑ New Small Business Administration (“SBA”) Regulations
 - ❑ Small Business Jobs Act of 2010
 - ❑ Revamping of the 8(a) Program Rules
 - ❑ Women-Owned Small Business Program
- ❑ GTSI Overview
- ❑ Compliance Issues
- ❑ Practical Implications

Background

How did we get here...

- Existing financial climate
- Largest government deficit
- Contract awards intended for small businesses benefiting large or non-disadvantaged businesses
- Pressure on the government to be fiscally responsible
- Transparency and accountability
- Prevention of fraud, waste and abuse

New SBA Regulations

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

New SBA Regulations

The Small Business Jobs and Credit Act of 2010 (H.R. 5297) – Cont'd

- ❑ Annual Size Certification
 - ❑ The law now requires all small businesses 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

New SBA Regulations

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

New SBA Regulations

The Small Business Jobs and Credit Act of 2010 (H.R. 5297) – 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 small business programs
 - ❑ This also includes the expanded use of mentor/protégé program to HUBZone and service-disabled veteran-owned small businesses

New SBA Regulations

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

New SBA Regulations

New 8(a) Program Rules

- For New 8(a) applicant changes
 - Net worth still capped at \$250,000; however, retirement income no longer used
 - Owner must be highest paid employee with salary limit of \$350,000
 - Total asset threshold of \$4 million
 - Family members are able to own other 8(a) companies in a different industry

New SBA Regulations

New 8(a) Program Rules – Cont'd

- For existing 8(a) certified firms
 - \$750,000 net worth limit
 - \$6 million total assets
 - There are now exceptions to Mentor/Protégé programs from other federal agencies
 - SIC code no longer used, only NAICS
 - Spouse's financial condition only in certain circumstances
 - Contract thresholds for manufacturing NAICS codes increased to \$6,500,000

New SBA Regulations

New 8(a) Program Rules – Cont'd

- ❑ For Joint Ventures (“JV”) awarded an 8(a) contract
 - ❑ 8(a) firm must perform at least 40% of the work
 - ❑ Cannot subcontract work to any non-8(a) JV partner (including a mentor)
 - ❑ Each 8(a) must report the JV performed 50% of work and 8(a) JV participant performed 40% of work
 - ❑ JV duration limited to three years
- ❑ 8(a) can now have up to three mentors
- ❑ Determination of size standards now uses three years of sales rather than two years
- ❑ Annual reporting to the SBA on 8(a) eligibility

New SBA Regulations

Women-Owned Small Business

- Effective February 4, 2011*
 - Set aside for WOSB or EDWOSB
 - For 38 4-digit NAICS substantially underrepresented or 45 4-digit NAICS underrepresented industries
 - Rule of 2 exists
 - Anticipated award price including options does not exceed \$5M for manufacturing or \$3M for other contractors

New SBA Regulations

Women-Owned Small Business – Cont'd

- Eligibility requirements - WOSB
 - Meet small business size standards
 - 51% owned by women who are US citizens
 - Woman must be FT and control and hold highest officer position

- Eligibility requirements – EDWOSB
 - Personal net worth is less than \$750,000 (exclusions)
 - Adjusted gross income average over three years is \$350,000 or less
 - Fair market value of assets is \$6M or less (excludes retirement)

New SBA Regulations

Women-Owned Small Business – Cont'd

Self-Certification	Third-Party Certification
<ul style="list-style-type: none">• Register in CCR• Compile and upload data• Represent status in ORCA	<ul style="list-style-type: none">• Register in CCR• SBA-approved Third-Party Certification• Compile and upload data• Represent status in ORCA

GTSI Overview

October 1, 2010 Findings

- Violated Small Business set-aside regulations
- Exceeded the small business size threshold based on number of employees
- GTSI in control of prime contract
- Performed work as a subcontractor although:
 - Answered phone as prime
 - Prepared documents using prime's letterhead, etc.
 - Communicated using prime's email addresses
 - Prepared invoices using prime's letterhead
- Performed 99% of work on all task orders

GTSI Overview

Effect on the Business Community

- ❑ Increased small business certification scrutiny
 - ❑ Size standards based on NAICS code
 - ❑ Number of employees
 - ❑ Three years worth of sales
- ❑ Annual size certification in ORCA
- ❑ Increased subcontracting plan scrutiny for large businesses
- ❑ Parity for Alaska Native Corporations (“ANC”) and HUBZone contractors with the rest of the 8(a) participants

GTSI Overview

Compliance Agreement

- GTSI does not admit to wrongdoing or breaking law
- SBA can extend scope of case
- GTSI barred from participating in small business contracts as a sub or mentor
- GTSI's President & CEO and VP/GC resigned
- SBA suspended three other executives
- GTSI must name ethics officer and adopt code of ethics
- SBA and GTSI agree on independent company monitor to ensure compliance with acquisition rules and agreement
- Investigation regarding potential criminal action and/or debarment continues

GTSI Overview

EGS & MultimaxArray Suspended

- ❑ SBA suspended EGS and MultimaxArray
- ❑ Represented 2 of 11 DHS small business FirstSource prime contractors
- ❑ SBA determined that as a Prime – they allowed a subcontractor (GTSI) to perform “most if not all the work on the contract”
- ❑ Investigation continues

Compliance Issues

- ❑ 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

Practical Implications

- Can small businesses be successful?
 - Annual recertifications
 - Shorter term contract actions
 - Option years not taken into account when determining if a small business performed 50% of the work
 - Less time to transition to compete with large businesses
- If a large business JV member cannot be a subcontractor, what is the incentive?
 - Profit only vs. profit and work
- What is an employee vs. 1099 contractor vs. subcontractor vs. consultant?
- What additional reporting requirements will the SBA put on small businesses, JV's, Mentor/Protégé's, etc.?

Questions / Comments

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