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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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