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Suspension and Debarment

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

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On 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

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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 debarmenting 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.