

Client Alert

False Claims Act Consent Judgment Can Prompt Termination of SDVOSB Status Even Without an Admission of Liability

June 14, 2021

In its recent decision, *CVE Appeal of First State Manufacturing, Inc.*, SBA No. CVE-184-A (2021), the Small Business Administration Office of Hearing and Appeals (OHA) denied an appeal of a decision by the Department of Veterans Affairs Center for Verification and Evaluation (CVE) to cancel First State Manufacturing, Inc.'s verification of service-disabled veteran-owned small business (SDVOSB) status. CVE issued its Notice of Verified Status Cancellation based on concerns of present responsibility related to a consent judgment entered into merely a month before to resolve a False Claims Act (FCA) lawsuit against First State that required First State to pay over \$393,000. Prior to the FCA lawsuit, First State's Vice President for Marketing/Contract Administration and Chief Executive Vice President/Chief Financial Officer were criminally charged, pled guilty, and were sentenced to prison terms for bribing an Amtrak official to win federal Government contracts. In the appeal before OHA, First State argued that CVE erred in cancelling its verified SDVOSB status for two reasons: (1) the FCA consent judgment was based upon an underlying FCA settlement agreement that did not admit liability or wrongdoing by First State; and (2) the Federal Railway Administration, which oversees Amtrak funding, determined that First State was "presently responsible," and that the likelihood of future harm to the Government did not warrant suspension or debarment. First State further argued that as the Federal Railway Administration is the agency with the potential injury, its determination of present responsibility should have been given greater deference by CVE.

OHA was unpersuaded by First State's arguments. In concluding that there was no clear error by CVE in canceling verification of First State's SDVOSB status, OHA noted that CVE had "ample reason" to be concerned about First State's present responsibility based on following "circumstances": (1) CVE learned via a U.S. Attorney's Office (USAO) that two of First State's executives bribed a procurement official to win contracts; (2) that the executives faced criminal bribery charges, pled guilty, and were sentenced to prison terms; (3) that the USAO later brought a FCA lawsuit against First State as a company; and (4) that First State agreed to settle the FCA suit via a consent judgment that required First State to pay over \$393,000. OHA also expressed concern with First State's partial disclosures of the circumstances leading to the appeal, including, failing to (1) explain how the executive's wrongful conduct went undetected by the company; (2) show how it would address CVE's concerns about the wrongdoing; (3) show how its new ethics and compliance code would address past wrongdoing; and (4) disclose the FCA action to OHA.

The decision appears to be an outlier to the extent that CVE relied on an FCA settlement with a non-admission of liability clause as support for its decision, as such settlements in and of themselves do not typically support a lack of present responsibility finding. It also highlights that in dealing with the government, multiple stakeholders may be involved, and those stakeholders may have different interests and different views of the same facts and circumstances, potentially leading to different outcomes.



For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Olivia Lynch

Partner – Washington, D.C.
Phone: +1.202.624.2654
Email: olynch@crowell.com

Brian Tully McLaughlin

Partner – Washington, D.C.
Phone: +1.202.624.2628
Email: bmclaughlin@crowell.com

Lyndsay A. Gorton

Counsel – Washington, D.C.
Phone: +1.202.654.6713
Email: lgorton@crowell.com

Zachary Schroeder

Counsel – Washington, D.C.
Phone: +1.202.624.2676
Email: zschroeder@crowell.com