Contracting with Small Businesses in the Wake of GTSI’s Suspension

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Agenda

• The Enforcement Landscape
• Risk Areas for Small Businesses
• Risk Areas for Large Businesses
• Regulatory Developments
  – 8(a) Program
  – Parity in Set-Asides
  – WOSB Program
  – Size Protests and Appeals
  – Targeting ANCs (Again...)
The Enforcement Landscape

• Big business for small businesses (SBA Report on the Small Business Economy for FY10):
  – SBs awarded $96.8 billion in federal prime contracts in FY09 (21.89% of all federal dollars)
  – As of July 2010, SBs had received 30% of economic stimulus money
  – SBs awarded 31.82% of federal subcontract dollars in FY09

• “The Small Business Administration has no tolerance for fraud, waste and abuse in any of our programs. Reflective of that commitment, over the last 18 months we’ve taken steps aimed at ensuring only eligible companies receive the benefits of our business development and contracting programs by strengthening our ongoing oversight and enforcement.”
  --SBA Administrator Karen Mills, 10/1/2010
The Enforcement Landscape

• “GTSI suspension: a shot across the bow?”
  -Washington Technology
• “NY Man Wrongly Won $16M in Military [Small Business] Contracts: Jury”
  -Law360
• “Schiavone Construction to Pay $20 Million and Costs of Investigation to Resolve Public Works Hiring Fraud: Schiavone Admits Fraudulently Reporting that Minority and Disadvantaged Business Enterprises Performed Subcontracted Work on Contracts with New York City and New York State”
  -DOJ Press Release
The Enforcement Landscape

• The headlines make it clear that enforcement is a concern for both small and large business contractors
• 10/1 suspension of GTSI is a key example:
  – GTSI served as a subcontractor on contracts where the prime contractors had little to no involvement (0-.5%) in performing set-aside contracts
  – GTSI concealed its involvement on these contracts (business cards, email addresses)
  – The suspension was lifted only after key personnel, including the CEO and GC, were removed from the company
  – Even though the small business prime contractors had the primary responsibility for enforcing the limitations on subcontracting clause, GTSI was suspended first—and without warning
  – Even after suspension lifted, GTSI revenues have plummeted 31% from the prior year
  – Key small business primes also suspended
Enforcement Risks: Small Businesses

• **False Certifications**
  – The Small Business Jobs and Credit Act of 2010 provides that an offeror’s mere submission of a proposal for a small-business set-aside contract, or even its registration in a database to be considered for a set-aside, is to be considered an “affirmative, willful and intentional” certification that the offeror meets the small business size and status requirements.

• **Work Allocation**
  – Post-GTSI, small businesses can expect to have their subcontracting relationships with large businesses scrutinized to ensure that the small businesses are not being used as “pass-throughs”.
  – Added care in negotiating terms of teaming agreements, subcontracts.
  – Failure to comply with limitations on subcontracting also grounds for proposal elimination.
Enforcement Risks: Small Businesses

• **Size Protests**
  – Low threshold to file; short time frame to respond and response includes significant documentation and certified SBA Form 355
  – May now also be filed by SBA OIG (in addition to CO, SBA Government Contracting Area Director, other eligible offerors)
  – Teaming arrangements and subcontracting agreements will be scrutinized
  – OIG may begin an investigation based on the results of the size protest

• **Unenforceable Subcontracts**
  – In *Morris-Griffin Corp. v. C & L Servs. Corp.*, a federal district court found a subcontract between a small business prime and large business sub to be unenforceable because it violated SBA regulations and the limitation on subcontracting
  – The court found that small business’s size certification was “conceived in fraud” and that set-asides are “susceptible to finagling”
Enforcement Risks: Large Businesses

• **Work Allocation**
  – Large business must be aware of limitation on subcontracting requirements when working with small business subcontractors on set-aside contractors
  – Large businesses cannot rely on their small business prime contractors to be responsible for this issue
  – DOT DBE program crack-down – small business subcontractor must perform “commercially useful function”

• **Unenforceable Subcontracts**
  – Large businesses should also be concerned about *Morris-Griffin Corp. v. C & L Servs. Corp.*
Enforcement Risks: Large Businesses

• **Subcontracting Goals and Reporting**
  – Requirement for President/CEO approval of Summary Subcontract Report (SSR) submissions
  – Little guidance on what constitutes “good faith” to meet goals
  – Impact on past performance evaluations
  – The Small Business Jobs and Credit Act of 2010 requires contractors to make a “good faith effort” to use small businesses identified in their proposals and to explain any failure to do so to the CO

• **Performance/Award Risks**
  – Prime is ultimately responsible for subcontractor performance
  – Subcontracting plan = condition of award
  – FAR 9.104-4: “Determinations of prospective subcontractor responsibility may affect the Government’s determination of prospective prime contractor’s responsibility”
8(a) Program Regulatory Changes

- Effective 3/14/2011
- **8(a) Program Eligibility Requirements**
  - Individuals claiming social and economic disadvantage must reside in the United States
  - Finances of a spouse will not be considered when evaluating an application (unless spouse will be involved with the business)
  - Revised net worth amounts for initial ($250K) and continued eligibility ($350K for 3-year average)
  - General prohibition against family members owning 8(a)’s in same or similar line of business
  - Changes in primary NAICS code permitted if consistent with majority of revenues during 3-year period
  - Distinction between Program graduation (meet targets, objectives, goals) versus Program completion
8(a) Program Regulatory Changes

- **New Joint Venture Requirements**
  - JV can be awarded up to 3 contracts in 2 years; may form multiple JVs
  - Both “formal” and “informal” and populated and unpopulated JVs are now expressly allowed
  - **Unpopulated or Thinly Populated JV Requirements**: SB employee is project manager; SB must perform 40% of work performed by JV; SB must perform 40% of the total work performed by JV partners (and affiliates)
  - **Populated JV Requirements**: demonstrate performance of the contract controlled by SB and what SB will gain from performance; Mentor or affiliate(s) may not also be subcontractor
  - SBs must receive profits equating to % of performance, or if separate legal entity, equating to its ownership interest, and are no longer automatically entitled to 51% of profits
  - 8(a) firms have to report how JV requirements were satisfied
8(a) Program Regulatory Changes

- **Mentor/Protégé Program**
  - Assistance has to be tied to the Protégé’s SBA-business plan
  - Mentor may have more than one Protégé (limit of 3)
  - Protégé may have more than one Mentor
  - An 8(a) firm cannot be both a mentor and protégé simultaneously
  - Mentor/Protégé JVs may be deemed small for subcontracts
  - Require Mentor/Protégé agreements to be approved by the SBA in advance before the firms can submit an offer as a JV
  - To qualify for exclusion from affiliation, Mentor/Protégé JV must comply with requirements of 13 CFR 124.513
  - SBA has discretionary authority to recommend the issuance of a stop work order for contracts with a Mentor/Protégé JV if the mentor fails to give the agreed-upon assistance; other sanctions include termination of Mentor/Protégé agreement, contract termination, or suspension and debarment
Parity in 8(a), HUBZone, and SDVOSB Program Set-Asides

- 3/16/2011 interim rule clarifies a CO’s ability to use discretion when determining whether an acquisition will be set aside for 8(a), HUBZone, or SDVOSB contractors
  - Previously, GAO and the COFC interpreted the Small Business Act to require priority be given to HUBZone small businesses when setting aside acquisitions
  - Interim rule clarifies and reflects the statutory relationship among the small business programs
  - Although this interim rule does NOT address WOSBs, a separate rule, establishes parity between WOSBs and other SBA small business contracting programs
- As a result of this rule, an increase in SDVOSB set-asides may occur
  - FY09 – Agencies had least success in meeting SDVOSB goals
  - 18,213 registered SDVOSBs (compared to 9,303 HUBZones and 9,234 8(a)’s)
Parity in 8(a), HUBZone, and SDVOSB Program Set-Asides

- 3/16/2011 interim rule additional clarifications:
  - If a requirement has been accepted by SBA under the 8(a) Program, it must remain in the 8(a) program unless SBA agrees to its release.
  - If an acquisition exceeds the simplified acquisition threshold, the CO must consider a set-aside or sole-source acquisition to a small business under the 8(a), HUBZone, or SDVOSB programs before proceeding with a small business set-aside.
  - The small business set-aside requirement of FAR 19.502-2(a) does not preclude award of a contract to a qualified 8(a) program participant, HUBZone small business concern, or SDVOSB concern, because SBA's regulations grant a CO discretion to use the 8(a), HUBZone, or SDVOSB at dollar levels above the micro-purchase threshold and at or below the simplified acquisition threshold.
WOSB Program Establishment

• 10/7/2010 final rule implementing the statutory goal that 5% of federal contracting dollars go to WOSBs
  – Provides for set-aside procurements for contracts under certain dollar thresholds ($5 million for manufacturing contracts and $3 million for other contracts) for WOSBs in the 83 identified industries in which they are underrepresented
    • Prior proposed rule had only identified 4 industries
    • 45 NAICS codes in which WOSBs are underrepresented and 38 NAICS codes in which WOSBs are substantially underrepresented
    • In the substantially underrepresented industries, the CO may award to WOSBs regardless of economic disadvantage
  – Removes requirement that each Federal agency certify it had engaged in discrimination against WOSBs prior to setting aside a contract
  – Specifies that there is no order of precedence between 8(a), HUBZone, SDVOSB, and WOSB concerns for setting aside contracts
WOSB Program Establishment

• 10/7/2010 final rule additional specifics:
  – Effective 2/4/2011
  – Sets forth the eligibility criteria for the program
    • A small business concern must be 51 percent owned and controlled by one or more women
    • The woman who holds the highest officer position of the concern must manage it on a full-time basis and devote full-time to the business concern during normal working hours
    • The woman manager need not have the technical expertise or license required, but must demonstrate that she has the ultimate managerial and supervisory control over those possessing the required licenses or technical expertise
  – Establishes the protest and appeal process for WOSB and EDWOSB status protests
WOSB Program Establishment

• 10/7/2010 final rule additional specifics:
  – WOSBs and EDWOSBs may self-certify their status as long as adequate documents are provided to support the certification, or WOSBs or EDWOSBs may be certified by approved third-party certifiers, including Federal agencies
  – SBA has yet to approve ANY third-party certifiers, so non-8(a) WOSB’s access to government contracts are limited to self-certifying entities
  – Additional documentation required to be submitted (and reviewed by CO) for self-certifying entities

• 4/1/2011 interim rule amends the FAR to implement the SBA’s regulations government-wide in order to further assist Federal agencies in achieving the 5% statutory goal for contracting with WOSBs
  – Comments due by 5/31/2011
Changes to Small Business Size Protest and Appeal Regulations

• Under 2/2/2011 final rule, SBA’s Office of Hearings and Appeals (OHA) now has the authority to review all timely appeals of size determinations
  – Previously, size appeals were prohibited if the contract had already been awarded and the issues raised on appeal were contract-specific – this was a regular basis for appeal dismissals

• Specifies a uniform, bright-line rule for how initial and appellate decisions apply to the procurement in question
  – For example, if after contract award the SBA makes an initial decision that a contractor is other than small, then the procuring agency must terminate the award or not exercise the next option if the initial decision is not overturned on appeal
  – Additionally, the CO must apply the final decision to the procurement in question for goaling purposes
Changes to Small Business Size Protest and Appeal Regulations

• 15 business days, rather than 10, for SBA to decide a size protest - still not a hard deadline (“if possible”)
  
  – SBA-conducted survey found that nearly 1/3 of all size protests were determined after the 10 day time limit (extensions for response to protest regularly requested)
  
  – In line with time-frame allowed for other status protests, e.g., SDVOSB and HUBZone, which are often less complicated than size

• OHA to issue size appeal decisions within 60 days, “if possible”
Continued Spotlight on ANCs

- *Washington Post* spotlight and focus on ANCs
  - O’Harrow series and connection to GTSI
  - Investigative reporting – calls to contractors for the next story
- Effective 9/9/11 – added ANC reporting on benefits that have been provided to the tribal members
- Pending legislation to remove ANC benefits
  - Prohibit ANCs from receiving sole-source contracts greater than existing caps on other 8(a) participants
  - ANCs would no longer automatically be considered socially and economically disadvantaged businesses
  - Limits on subsidiaries
  - Require ANCs to be managed by socially and economically disadvantaged individuals
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