

Government Contracts Blog

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Size Does Matter - Impacts Of The Small Business Jobs Act Of 2010

By [David S. Gallacher](#)

On September 27, 2010, President Obama signed into law the Small Business Jobs and Credit Act of 2010 (Pub. L. No. 111-240). The Act is intended to free up capital by providing tax cuts for small businesses (some of which are temporary) and to promote exports of U.S. products, all with a view to stimulating the small business sector as an engine of job creation. But, as usual, the Administration's efforts to improve the economy through stimulus measures also give rise to new risks for companies doing business with the federal Government – whether as a prime or a subcontractor, as a large or a small business.

Following are some highlights of the contracting portions of the Act, focusing on subcontract management issues, small business contracting opportunities, and anti-fraud risks.

1. **Increased Obligations Relating ToThe Management Of Small Business Subcontractors By Large Business Companies.**

- Prime Contractors Must “Make Good” on Representations Regarding Anticipated Use of Small Business Subcontractors. While the Act includes several provisions designed to strengthen the ability of small businesses to operate as both prime or subcontractors on federal contracts, it also forces large businesses to help facilitate and manage these opportunities. For example, Section 1322 requires large companies to agree as part of their subcontracting plans to: (1) make a good faith effort to acquire goods and services from the small business concerns as described in the original proposal; and (2) provide the Contracting Officer (“CO”) with a written explanation if the contractor fails to acquire the goods or services from the small business subcontractors as described in the proposal. In this respect, if a large business prime contractor enters into an agreement with a small business and discloses this arrangement in its proposal (as is commonly the case with [teaming agreements](#)), the prime contractor is now obligated: (1) to put forth a good faith attempt to “make good” on all the statements made in the proposal regarding the small business partner’s performance; and (2) to issue a written explanation to the CO if there is any change in how the ultimate subcontract will be performed. This places an additional burden on the prime contractor, *i.e.*, to conduct a careful review of the promises it made in order to get the contract in the first place.
- Timely Subcontract Payments to Small Businesses. Section 1334 of the Act also requires prime contractors with subcontracting plans to notify their CO if the prime contractor reduces or delays payment for more than ninety days to its small business subcontractors. If the prime contractor’s actions are not justified, then the CO must enter this information into the Federal Awardee Performance and Integrity Information System (“FAPIIS”), with a potentially consequent negative effect on the prime contractor’s past performance rating. New regulations

will provide direction as to how COs are to assess and record a contractor's failure to satisfy this requirement. But whatever those regulations say, this new requirement puts prime contractors on notice that "slow-paying" subcontractors (while never a risk-free exercise) may now become a high-risk practice that places a potent weapon in the hands of small business subcontractors.

2. **New Provisions Relating To Contract Awards And Small Business Opportunities.** The Act contains a number of new requirements aimed at expanding small business access to award of federal work as both prime and subcontractors and to assure the companies are fairly treated once they have been awarded the work.
 - Expanded Small Business Set-Asides Under Multiple Award Contracts. Section 1331 allows small business set-asides under multiple award IDIQ contracts for all types of small business concerns, but requires the OFPP and SBA to issue precise guidance within one year as to how to implement this expanded opportunity (while, presumably, simultaneously protecting against the abuse of these new small business set-asides by businesses who are not truly "small").
 - Creating Parity Between HUBZone Companies and Other Small Business Concerns. Section 1347 of the Act eliminates the mandatory preference for small business set-asides that HUBZone businesses have enjoyed in recent years, resolving a point of contention that has been [well discussed in the media](#).
 - Limitations on Contract Bundling and Consolidation of Contract Requirements. Sections 1312 and 1313 require a host of new regulations relating to bundling of contract work requirements. As a general rule, the Act prohibits consolidation of contract requirements for all contracts valued at more than \$2 million (reduced from the prior limit of \$10 million), absent the completion of a complex justification by the agency for such action, including consideration of alternative methods more friendly to small business and issuance of a written justification for the proposed bundling. New rules will be issued outlining these procedures.
 - Five-Year Updates to Size Standards. Section 1344 of the Act requires the SBA to issue regulations requiring the update and revision of at least one-third of its size standards every eighteen months to ensure that the size standards accurately reflect current industry status and current industry trends. This information must be made publicly available and public comment will be solicited on all proposed updates.
3. **New Small Business Anti-Fraud Provisions.** As noted above, the Act aims to expand the opportunities for small businesses to obtain federal awards under contracts and subcontracts. However, the Act also puts forth a number of measures designed to ensure that only businesses that are truly "small" can take advantage of this expanded access. As might be expected, Congress has developed a host of anti-fraud measures that will require more rigorous small business certification requirements and will enhance the Government's ability to impose a meaningful remedy when a contractor misrepresents its size. For instance:
 - Deemed Certifications. Section 1341 identifies a number of circumstances where the law will consider an offeror to have made a "deemed certification," *i.e.*, an "affirmative, willful and intentional" representation regarding its small business status. This includes, for example, merely submitting an offer to perform work under a solicitation for a small business set-aside *regardless of whether the offeror has otherwise represented itself as a small business*. Congress recognized that the new "deemed certification" rule could have a devastating impact on small businesses whose owners or employees make innocent misrepresentations, and so the Act directs the SBA to issue safe harbor regulations to address unintentional errors or technical

misapplications of the law. How much “safe harbor” those provision may actually offer remains to be seen. But, however they turn out, the new “deemed certification” rule is definitely a “game changer” that places a significant onus on any contractor that holds itself out as a small business or pursues work under small business set-asides.

- Presumption of Government Loss. Section 1341 also creates a presumption that the Government’s “loss” from a company’s misrepresentation of its business size is equal to the total value of the contract. This provision could have a significant impact on contractors, particularly if the DOJ chooses to pursue a False Claims Act case against a company that has misrepresented its size, with the DOJ potentially able to recover *treble* damages on that “loss.” Such an outcome would constitute a windfall to the government and a significant penalty for the contractor. The Act is silent as to whether this presumption can be rebutted, but any attempt at rebuttal would, no doubt, be a very fact-intensive (and expensive) exercise. This statutory requirement may be a disproportionate reaction to current abuses of the small business program and could well serve to diminish the positive effect of other provisions of the Act intended to stimulate small business participation in federal contracting. The extent of any such negative effect, if any, remains to be seen. But it is seems likely that, in enacting this presumption of loss, Congress allowed its passion to combat size misrepresentations to obscure the presumption’s potential to crush an actual small business.
- Improved Training and Enforcement. Section 1343 requires improved training for Government contracting personnel relating to small business issues, including small business size classifications thereby (presumably) better equipping the government personnel to spot noncompliance issues relating to small businesses. Contracting personnel will also be encouraged to refer such matters to the proper enforcement authorities (an inevitable fact, considering that we now live in a world where certifications come in three flavors – “express,” “deemed” and “implied”). Especially in light of the [recent suspension of GTSI](#), Government personnel are no doubt ready to “pull the trigger” on issues relating to small business noncompliance. Also, be aware that DOJ has been instructed to coordinate with other governmental authorities to issue government-wide policies on prosecuting small business size status misrepresentations. The enforcement sword is definitely hanging over the heads of all companies (both large and small) who wish to participate in the opportunities offered by the Act. Just remember – size matters in government contracting more than ever.

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