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## Authors

**Lars Anderson**  
[leanderson@Venable.com](mailto:leanderson@Venable.com)  
703.760.1605

**Terry Elling**  
[telling@Venable.com](mailto:telling@Venable.com)  
202.344.8251

**Dismas Locaria**  
[dlocaria@Venable.com](mailto:dlocaria@Venable.com)  
202.344.8013

**Michael Robinson**  
[mwrobinson@Venable.com](mailto:mwrobinson@Venable.com)  
703.760.1988

## The Small Business Administration Flexes its Muscle: Contractors Should Ensure Accurate and Appropriate Representations and Teaming Arrangements

On October 1, 2010, the Small Business Administration ("SBA") suspended GTSI Corp. ("GTSI") for one year based upon adequate evidence demonstrating that it violated small business set-aside regulations to win and perform federal contracts. While the SBA has always had the authority to suspend and debar contractors for violating such rules, such action has occurred infrequently and typically has not been imposed against a contractor of GTSI's size. This action by the SBA may signal a new focus and desire to increase compliance with and enforcement of its rules and regulations. The SBA's action is also consistent with 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 which 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. GTSI was allegedly to serve as a subcontractor to MultimaxArray.

Following the award of the delivery order to MultimaxArray, Venable LLP, on behalf of a woman-owned small business, Wildflower International, 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 the functions of the prime contractor. Under the small business rules, MultimaxArray was required to perform the vital functions as the prime contractor and also perform at least 51% of the work under the delivery order. MultimaxArray did not contest the protest, so the SBA ruled that MultimaxArray was ineligible for that \$165 million delivery order.

Wildflower won that large delivery order on a recompete 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. During that litigation, information and documents became public concerning GTSI's use of two small businesses, one an ANC, EG Solutions, and MultimaxArray, to obtain contracts set aside for small businesses. According to an SBA 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 letter went on to state 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 emails 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 been compared to the Environmental Protection Agency's 2008 debarment of IBM.

**SBA's Enforcement Tools:** The GTSI case demonstrates the most recent and most significant example of the SBA taking action against a contractor that misrepresented its subcontractor arrangement with the federal government. The SBA letter stated that "SBA's Office of Inspector General is actively investigating the actions of GTSI with regard to its conduct as a subcontractor on numerous contracts set-aside for small businesses." The SBA, like to 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.

With respect to criminal and civil enforcement mechanisms, the False Statements Act and the Criminal and Civil False Claims Acts have varying degrees of punishment:

- For each violation of the False Statements Act, the government may impose:

- A fine, not to exceed \$10,000; and/or
- Imprisonment of not more than five years.
- For each violation of the Criminal False Claims Act, the government may impose:
  - A fine; and/or
  - Imprisonment of not more than five years.
- For each violation of the Civil False Claims Act, the government may impose:
  - A fine of \$5,500 to \$11,000;
  - An additional fine of three times the amount of damages sustained by the government; and/or
  - The cost to the government of the civil action brought.

While these penalties and actions are significant and can lead to jail time 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 indefinite delivery indefinite quantity ("IDIQ") contracts, General Services Administration Schedule contractors or the like, and, generally, bar an agency from exercising a contract's option. It also prevents the award of any subcontracts requiring government approval.

Suspensions are normally used where there is adequate evidence, such as an indictment, to believe that a cause for debarment exists, but the criminal proceeding is not final, and an immediate need for the government to protect the public interest. Suspension lasts during the pendency of such a proceeding, but generally do 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 is proposed for debarment. Under such agreements, the agency agrees to refrain from debarring the contractor in exchange for the contractor taking specified corrective actions (such as removing the officers and employees responsible for committing or failing to prevent improper conduct, implementing a new compliance program and accepting an independent auditor or compliance monitor).

Notably, suspensions and debarments by a single federal agency have government-wide 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 by the SBA bars a large systems integrator from competing for and winning contracts from agencies such as the Department of Defense or the Department of Homeland Security.

**Additional Legislative Scrutiny:** In addition to the various mechanisms currently available to federal agencies, Congress has and 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. For more information on this Act, click [here](#).

On October 6, 2010, Sen. Claire McCaskill, D-Mo., sent a letter to the SBA Inspector General requesting a complete investigation of the "multiple instances of potential waste, fraud and abuse" referenced in recent Washington Post articles. Furthermore, on October 7, 2010, Sen. McCaskill announced that when Congress returns from recess that she plans to introduce legislation that would place ANCs on an equal footing with other small disadvantaged businesses operating in the Small Business Administration'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 may signal a focus and determination for the SBA to expand its enforcement actions in a way not before seen. As a result, contractors, large and small should be mindful of the SBA

rules and regulations and their compliance mechanisms.

Additionally, contractors should ensure that:

- All statements, representations and certifications are accurate and verifiable.
- Teaming agreements, subcontracts, mentor/protégé relationships and other arrangements between small and large businesses are fully compliant, both in language and practice, with the SBA's rules and regulations.
- They maintain accurate records of the allocation of work between companies, use a recordkeeping 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 work.
- They keep apprised of new and pending legislation that will result in changes in the SBA's regulations, and make any changes in their compliance programs to ensure that they satisfy the new rules.

Finally, in the event a contractor is concerned over their compliance with the SBA regulations, such contractor 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.

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