

GOVERNMENT CONTRACTS ALERT: MAY 2011

Increased Potential Liability Regarding Small Business Contracting Requires Careful Attention

We've all seen the recent newspaper stories about shenanigans involving small business contracting. These scandals are more than just embarrassing for the companies involved, however; many businesses don't realize the full extent of the liability to which they could be exposed if they violate small business contracting rules.

Even if your company is no longer a small business, it is likely that you team with small businesses from time to time on federal contracts, grants, or cooperative agreements, or enter into subcontract arrangements with such businesses. Recent changes in the law will require much greater scrutiny of whether a company is a legitimate small business, because a misrepresentation of small business size can now expose companies to much greater financial losses and legal exposure.

Traditionally, a company that misrepresented its small business status was subject to a penalty of \$5,500 – \$11,000 per invoice as long as it fully performed its contract to the Government's satisfaction. The new "presumption of loss" standard changes all that: now, even if a small business fully performs a small business set-aside contract to the Government's full satisfaction, it may not only have to forfeit the entire contract amount, but will be subject to a total of treble damages if it subsequently is proven that the company "willfully sought and received the [small business] award by misrepresentation."¹ This much larger pool of potential damages is expected to result in a dramatic increase in the number of "whistleblower" lawsuits filed against companies that allegedly have misrepresented their status as a small business.

If you are a large business and are planning to act as a subcontractor or joint venture partner with a small business on a small business set-aside procurement, you could face liability if the small business misrepresents its size status in order to get the contract. A large business that is considering acquiring a small business may also be subject to serious liability in the event the small business size status of the acquired company is questioned and investigated.

This month's bottom line: A large business should consider including in subcontracts and/or joint venture/teaming agreements a provision in which the intended small business prime contractor certifies its small business status. Also, increased scrutiny at the outset of all proposed joint ventures, subcontracts, and teaming agreements, as well as mentor/protégé agreements, could help avoid a situation where the large business faces charges of false claims and the possibility of being liable for three times its total contract proceeds, plus other damages, because of its relationship with an alleged "small business."

Please contact me with any questions or concerns you may have.

¹ See section 1341 of the Small Business Jobs Act of 2010, Publ. L. 111-240.