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Did A Butterfly Just Flap Its Wings? The Potential Industry-Wide Consequences Of The SBA's Recent Suspension Of A Premier IT Contractor

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There is a theory in physics that a seemingly isolated event in one part of the world can have a significant, downstream impact in another. They (the Physics set) call it the Butterfly Effect. It's a central element of something called Chaos Theory (referenced by Jeff Goldblum in the original "Jurassic Park"), and you can see it in action in all walks of life. Even in Government contracting.

As you no doubt have heard by now, on Friday afternoon, without advance notice, the Small Business Administration suspended one of the country's premier IT solutions and services providers. The suspension notice, which already has made its way around the Internet and back, alleges that the company's conduct as a FirstSource subcontractor "would have made the prime contractor ineligible for award." In other words, the SBA believes that subcontractor and the prime contractor (in this case, an Alaska Native Corporation, or "ANC") were "affiliated," thereby rendering the prime other than a Small Business.

Regardless of whether the allegations hold up under scrutiny or not, the SBA's decision here, as a practical matter, could have a Butterfly Effect on industry generally.

The Government's recent focus on the Trade Agreements Act may provide a good parallel for assessing how the current Small Business/ANC issue might unfold.

Prior to 2005, the Government paid very little attention to the TAA. GSA Schedule Contracting Officers, for example, routinely told contractors "not to worry about it," and, frankly, most contractors didn't. The fact that GSA's own MAS Owners' Manual – the guidebook that purported to inform contractors about all things important to GSA – didn't make even one mention of the TAA clearly contributed to the atmosphere of non-compliance.

All that changed in 2005 thanks to a *qui tam* relator (whistleblower) named Safina Office Products. As you likely will recall, Safina brought suit under the False Claims Act (the Government's primary anti-fraud statute) against multiple Office Products contractors alleging a failure to comply with the TAA. Several large contractors settled their FCA cases with large payments to the Department of Justice, and all of a sudden TAA fever ran through the Government. The TAA became the "cause-celeb" within the procurement enforcement community. Contracting Officers started sending out

letters to contractors demanding that products be removed from the Schedule. The GSA Office of Inspector General initiated some 200 investigations into TAA compliance. DOJ took an active role in the pursuit of the “evil-doers,” as well as an active role in examining the Government’s own contracts (like SEWP) to determine whether those contracts contributed to the apparent lack of compliance within industry.

It is not at all a stretch to imagine the Government’s newly-found focus on its Small Business programs generating a similar downstream hurricane here. It would not be surprising, for example, to see any of the following:

- Prime contractors reassessing their current relationships with small businesses. (And small businesses doing the same.)
- Greater contracting officer focus on the SBA’s rules, and greater scrutiny of proposals in set-aside procurements.
- SBA OIG audits of large and small teammates on set-aside contracts, like SEWP or FirstSource.
- More frequent bid protests alleging affiliation.
- DOJ investigations into allegations of improper and undisclosed affiliation.
- Whistleblower lawsuits.

Accordingly, Small and Large contractors that team together on set-aside contracts would be well-advised to set aside some time (sooner rather than later) to “kick the tires and look under the hoods” of their teaming arrangements to ensure full compliance with the rules governing small business contracts. And, by the way, do not forgo this task because your contracting officer says “you’re fine.” The SBA size and affiliation rules can be extremely complicated, and are subject to multiple interpretations. When push comes to shove, you may not get the expected mileage from a defense based upon the oral advice of a contracting officer.

Additionally, since one of the best defenses against a suspension or debarment is an effective internal compliance program, you should take the time to kick those tires as well. FAR 52.203?13 provides a great starting point in this regard. While the elements of a compliance program outlined in that clause do not apply to all contractors, they do provide an extremely useful checklist.

Here’s a short action plan to help you get out ahead of the enforcement curve in this area:

- Review your current Large/Small business associations in connection with set-aside procurements to ensure that none push the envelope.
- Give increased scrutiny to future Large/Small business associations involving set-asides.
- Implement a clear, written policy that deals with Large/Small business contracting

issues.

- Provide enhanced training.
- Assess the *sufficiency* of your internal compliance program against the elements identified in FAR 52.203-13.
- Assess the *effectiveness* of your internal compliance program using in-house experts, or outside resources (lawyers, consultants, etc.).

And keep an eye open for further developments. Other butterflies soon may flap their wings as well.

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