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A Step Back: The Small Business Provisions in the National Defense Authorization Act for FY 2013

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Before ''fiscal cliff,'' ''sequestration,'' and ''debt ceiling'' became household terms, in March 2012 the House Small Business Committee reported over ten separate pieces of legislation championing the interests of small business contractors. Many of the bills had bi-partisan support and all passed the Senate, but with the November election and the aforementioned challenges facing Congress in the Fall of 2012, nothing happened. Ultimately, portions of these bills made it into the National Defense Authorization Act for FY 2013 (NDAA) which was signed by the President on January 3. Set forth below are, in my view, the most important small business provisions of the FY 2013 NDAA that survived the ''sausage making'' that is legislation.

Expanding Mentor-Protege Programs. Prior to 2010, the Small Business Administration (SBA) was authorized only to administer a ''Mentor-Protege Program'' in the context of the Section (8) Program that benefits small contractors owned by socially and economically disadvantaged individuals. The Department of Defense also has statutory authority to administer a similar program. While other agencies have ''mentor-protege programs,'' SBA takes the view that the major benefit associated with its 8(a) mentor-protege program, an exemption from ''affiliation'' when determining a contractor's size, did not apply to other agency programs except for the mentor-protege program administered by DOD. In the Small Business Jobs Act of 2010, however, Congress granted SBA the authority to implement mentor-protege programs ''modeled on the 8(a) program'' in connection with other programs run by SBA: the Service-Disabled Veteran-Owed Small Business (SDVOSB) program; the Women-Owned Small Business (WOSB) program; and the Historically Underutilized Business Zone (HUBZone) program.

The NDAA extended SBA's authority even further by allowing SBA to establish a mentor-protege program for small businesses generally. In addition, per the NDAA, no federal agency may establish a mentor-protege program unless it first submits a plan to SBA and SBA approves the plan. This provision was adopted in an effort to ensure consistency among all agency mentor-protege programs. The existing programs administered by DOD and related to the Small Business Innovation Research and Small Business Technology Transfer programs are exempt from the requirement of submitting a plan for approval. The new requirement that agencies submit and receive SBA approval of agency-specific mentor-protege programs will not affect existing mentor-protege agreements.

While consistency among agency mentor-protege programs and greater access to these program will increase small businesses access to the federal marketplace, small businesses shouldn't expect to reap the benefits of these additional programs very soon. Although the Small Jobs Act was enacted at the end of September 2010, SBA has yet to issue regulations regarding the SDVOSB, WOSB and HUBZone mentor-protege programs authorized by the Jobs Act. Under the NDAA, SBA has 270 days to issue regulations regarding the small business mentor-protege program which will undergo the typical, and lengthy, notice and comment process.

Limitations on Subcontracting. The FAR clause 52.219-14, Limitations on Subcontracting, must be included in every small business contract. The clause requires a small business prime to perform a certain percentage of the prime contract, thereby limiting the amount of work that can be subcontracted out. The clause addresses the issue of small businesses serving as ''fronts'' for larger businesses that actually perform the bulk of the prime contract work. The minimum percentage a small business prime must satisfy varies according to the nature of the contract: construction, supplies and services. For services, a small business prime must perform at least 50 percent of the cost of contract performance ''in-

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curred for personnel.'' SBA regulations contain specific definitions of the terms ''cost of the contract'' and ''cost of contract incurred for personnel.'' Small businesses have found compliance with this FAR clause challenging for a number of reasons. First, costs may be hard to track or determine for fixed-price contract work. Second, the ''costs'' associated with a contract often cannot be determined with certainty until contract performance is completed. Finally, contractors differ as to how each reports subcontract costs.

The NDAA amended the metric by which small businesses must measure their performance for supply and services contracts. For services contracts, instead of using the term, ''cost of contract performance incurred for labor,'' the NDAA substitutes the term ''amount paid to the contractor.'' This change should make monitoring compliance with the clause far easier for small businesses, but it also will make actual compliance more difficult for small businesses. Under the current rule, small businesses could exempt profit, G&A unrelated to labor and Other Direct Costs from the calculation. By including these elements in the calculation, small business primes actually will have to perform a greater percentage of the contract than under the existing rule.

In an effort to ameliorate the impact of this change, the NDAA made another change to the Limitations on Subcontracting requirement. The NDAA provides that the minimum performance requirements set forth in the clause do not apply to subcontracts awarded to ''similarly situated entities.'' Under the current rules, only SDVOSB and HUBZone primes were exempt from the limitations on subcontracting set forth in the FAR clause, provided the primes awarded subcontracts to SDVOSBs and HUBZones, respectively.

There is a dark side, however, to the NDAA changes to the Limitations on Subcontracting requirement; the bill provides that failure to comply with the minimum requirements of the Limitations on Subcontracting clause will result in significant penalties. At present, penalties apply only to instances of a contractor's misrepresentation as to its size or status.

Fraud. The Small Business Jobs Act of 2010 included a provision whereby small businesses will be ''deemed'' to have made an ''affirmative, willful and intentional'' certification as to its size or status each time the small business submits a bid or proposal to the government or any time it registers on an online federal database. Through the provision, the government no longer needs to establish in a criminal proceeding that a small business *knowingly* and *intentionally* made a material misrepresentation to the government. The Jobs Act provision did allow SBA to promulgate regulations that would provide ''adequate protections'' from liability in cases of ''unintentional errors, technical malfunctions, and other similar situations.'' SBA issued for comment proposed regulations implementing this provision of the Jobs Act, but did not specify the type of ''adequate protections'' it was considering providing small businesses.

The NDAA has attempted to address this problem by establishing a ''safe harbor'' provision. This concept was first introduced in the House through the Contracting Oversight for Small Business Jobs Act of 2012 (HR 4206) which included a ''safe harbor'' provision to protect small businesses that attempt in good faith to represent their status and size by getting a legal opinion. The NDAA has adopted the ''safe harbor'' concept but has provided small businesses a ''safe harbor'' only if the small business relies on a ''written advisory opinion'' from a small business development center or a procurement technical assistance center. While this appears to be good news for small businesses, the specific language of the provision indicates otherwise. The NDAA states that neither an SBDC nor a PTAC is required to give a small business an advisory opinion regarding their size or status. If either entity does decide to issue such an opinion, moreover, it must send a copy of the opinion to SBA, which may reject it. Once SBA rejects an opinion, the small business no longer can rely on the opinion.

Perhaps more troubling is a provision which, upon first glance, seems innocuous. The Small Business Act provides that a contractor that misrepresents its size or status shall be subject to the suspension and debarment regulations contained in subpart 9.4 of the FAR. As reflected in the language of the Small Business Act, the FAR calls for suspension and/or debarment of a contractor if its conduct affects the ''present responsibility'' of the contractor. This aspect of the FAR's suspension and debarment provisions is critical because it allows a contractor to show that it has taken actions to correct its prior misdeeds and to prevent them from recurring in the future. The ''present responsibility'' caveat also allowed the government to maintain a large pool of contractors that could provide robust competition in procurements. The NDAA has removed the ''present responsibility'' criterion from consideration in a suspension or debarment proceeding concerning the misrepresentation of a contractor. Thus, in cases where a contractor has misrepresented its size or status, the government only may consider a contractor's past acts and may not consider facts concerning efforts of the contractor to rehabilitate itself.

Women-Owned Small Business Program. When SBA finally adopted a women-owned small business program in 2010, it was heralded as major advance for women in federal contracting. The ''dirty little secret'' is that the scope of women-owned federal contractors that benefitted from the establishment of the program was fairly small. The program only applied to women-owned businesses in certain industries; the program did not allow the award of sole-source contracts; and WOSB set-asides were authorized only for contracts below $6.5 million for manufacturing contracts and $4 million for all other contracts. The NDAA attempts to increase the scope of the WOSB program by removing the dollar limits on the contracts that may be subject to a WOSB set-aside.

Many of the small business provisions in the NDAA provide real benefits to small business, but Congress adopted only a fraction of the proposals reflected in the small business bills reported out of the House last May. Small business contractors took two steps forward with the House bills; in many respects, despite some of the provisions above, the NDAA represents a step back.

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