

**The Florida Bar: Real Property, Probate and Trust Law Section  
Construction Law Committee**

**Small Business Sub-Committee**

September 14, 2015

Subcommittee Chair: Lisa Colon Heron  
Smith Currie & Hancock, LLP

**I. SBA ISSUED FINAL RULE AUTHORIZING SOLE SOURCE AWARDS FOR WOSBs.**

On September 11, 2015 the Small Business Administration (SBA) issued a final rule authorizing federal agencies to award sole source contracts to women-owned small businesses eligible for the Woman-Owned Small Business (WOSB) Federal Contract Program. The rule is effective October 14, 2015. The WOSB Program, set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), authorizes Federal contracting officers to restrict competition to eligible WOSB or Economically Disadvantaged Women Owned Small Businesses (EDWOSB) for federal contracts in certain industries.

The SBA found that women owned business are growing at a rate three times faster than other small business but the federal government has not achieved its goal of awarding five percent of federal contracts to WOSBs and EDWOSBs.

**II. LARGEST SUPPLIER OF WATER, SEWER AND STORM DRAIN PRODUCTS SETTLES DBE FRAUD CASE.**

HD Supply Waterworks agreed to pay \$4.9 million under the civil U.S. False Claims Act to settle a claim that it participated in a scheme to defraud the DBE program in order to obtain subcontracts on federally funded projects. The government alleged that HD enabled several prime contractors to falsely represent that a defunct DBE, American Indian Builders & Suppliers (AIB) performed a commercially useful function on federal-funded contracts by negotiating price and other terms of sale when, in fact, the prime contractors had negotiated directly with HD and used AIB as a pass through. HD acknowledged that AIB served as a pass through by collecting invoices from HD, transferring the information on the invoices to AIB'S invoices. AIB would markup the invoices and pass the marked up invoices to the prime contractors.

The government alleged that scheme allowed the prime contractors to falsely certify that AIB supplied the materials. That submission amounted to a fraudulent claim for payment from federal funds under the False Claims Act. The settlement is the largest of its kind involving a third party supplier in a DBE fraud case.

**III. SIZE APPEAL OF: JAMAICA BEARINGS COMPANY, APPELLANT RE: ELECTRICAL & ELECTRONIC SUPPLIES. SBA No. SIZ-5677, 2015, 2015 WL 5308075, (S.B.A.), September 03, 2015**

This appeal arises out a Defense Logistics Agency RFQ. The contracting officer set aside the procurement entirely for small business. The assigned NAICS code was for Ball and Roller manufacturing. The RFQ stated the procurement would be conducted under the simplified acquisition procedures set forth in the FAR part 13.

Electrical & Electronic Suppliers, Inc. (E&E) was the successful bidder. Jamaica Bearings Company (JBC) protested E&E's eligibility as a small business. JBC alleged that E&E is ineligible for the award because E&E would not manufacture the items being procured or comply with the non-manufacturer rule's requirement to take physical ownership or possession of the item.

The non-manufacturer rule found in 13 C.F.R. § 121.406(a) provides that a firm may qualify as a small business concern for a requirement to provide manufactured products or other supply items as a non-manufacturer if it:

- (i) Does not exceed 500 employees
- (ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;
- (iii) Takes ownership or possession of the item with its personnel, equipment or facilities in a manner consistent with industry practice; and
- (iv) Will supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(5) of this section.

Further, "[w]here the procurement of supplies or manufactured items is processed under Simplified Acquisition Procedures as defined in FAR 13.101 (48 CFR 13.101) ..., and the anticipated cost will not exceed \$25,000, the offeror does not have to supply the end product of a small business concern. However, the product acquired must be manufactured or produced in the United

States, and the small business offeror must meet the requirements of paragraph (b)(1)(i) through (b)(1)(iv) of this section. The offeror need not itself be the manufacturer of any of the items acquired.” *Id.* § 121.406(d).

JBC argued that E&E did not meet the second and third elements of the non-manufacturer rule. JBC claimed that E&E does not normally sell bearing, roller and tape because it has a different primary NAICS code. However, the record showed that E&E had been a distributor of Timken bearings since 2013. Therefore the record supported that E&E does normally sell the end items in question.

The third element requires that E&E “take ownership or possession of the items(s) with its personnel, equipment or facilities in a manner consistent with industry practice.” 13 C.F.R. § 121.406(b)(1)(iii). The Area Office determined that E&E will accept the end items from Timken at E&E’s facility, thereby taking ownership and possession of the end items. Thus, E&E met the third element of the test. JBC argued that E&E’s approach did not meet industry practice because E&E does not have specific authorization from Timken to sell bearings to the Government. The OHA found this argument unpersuasive because Timken authorized E&E to distribute Timken bearings and the record does not indicate that E&E is barred from selling to the Government.

Interestingly, the Administrative Judge pointed out that this appeal highlighted an ambiguity in the regulation as to whether a small business must produce the end item under 13 C.F.R. § 121.406(d) which provides that, for procurements processed under simplified acquisition procedures, “the offeror does not have to supply the end product of a small business concern.” When taken in conjunction with 13 C.F.R. 121.406(b)(1)(iv), which requires that the offeror supply the end item of a small business manufacturer. The Judge concluded that there was an administrative error in the regulations. The Judge pointed out that prior to 2014, 13 C.F.R. § 121.406(d) stated that “the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured in the United States, and the offeror does not exceed 500 employees.” 13 C.F.R. § 121.406(d) (2013). SBA then amended § 121.406(d) to address the new requirement that the non-manufacturer take ownership or possession of the end item. Rather than recite each of the non-manufacturer rule's requirements, SBA added language referring the reader to 13 C.F.R. § 121.406(b)(1). Notably, there is no indication in the commentary accompanying the proposed or final rules that SBA intended to substantively change the non-manufacturer rule for simplified acquisitions.

#### **IV. POSSIBLE CHANGES COMING TO MIAMI-DADE SMALL BUSINESS ENTERPRISE PROGRAM?**

In 2013 Miami Dade County launched a Disparity Study to determine whether minority and women owned businesses had equal access to contracting opportunities with the County. The final report was presented in May 2015. The Study concluded that, in the aggregate, there is a statistically significant disparity in the award of certain categories of County contracts based upon the available data. The Study recommended a series of both race-neutral and race conscious remedies to address those disparities. The Study, however identified a number of factors that will affect the ability of the Study to withstand the strict scrutiny imposed by the Equal Protection Clause of the United States Constitution.

The Study is flawed because the County has not kept sufficient necessary data to support a Disparity Study. For example the Study pointed out that the County performed a pre-disparity study and that pre-disparity study suggested nine recommendations for gathering relevant data to support any race conscious program. Most of those recommendations were not implemented by the County.

The Disparity Study recommended that the county first adopt race and gender neutral actions to enhance its Small Business Enterprise Program. Some of these recommendations include, increased funding and staffing; the unbundling of large procurements into smaller contracts; broadening the application of the direct purchase program; revision of insurance requirements; the advertisement of small contract bond provisions and enhancement of the outreach to minority businesses.

#### **NEXT MEETING**

**September 30, 2015 @ 12 PM EST.**

**Call-in number and password: 888-376-5050 / Pin 7542148521.**