

# Small Business Size Enforcement: Significant Actions in Congress & the GAO

Presentation  
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# Critical Small Business Size Protest Considerations

- Consideration 1: Ability to Protest Once the Impropriety Is Discovered
- Consideration 2: Ability to Temporarily Stay the Challenged Contract Award
- Consideration 3: Effective Termination and Re-Award of Mis-Awarded Contract

# 1988: The Business Opportunity Development Reform Act

- The Wedtech scandal brought down Democratic Congressmen and Republican appointees at the SBA, Justice Department, and the White House
- Congress cracked down on “fronts” and other ineligible businesses
- Time Magazine dubbed the 8(a) and DBE set-asides as “The \$4 billion Temptation”
- Result: Section 16(d) of the Small Business Act, 15 U.S.C. §645(d)

# Section 16(d) Penalties for Misrepresentation:

- Imprisonment up to 10 years and fines up to \$500,000
- Program Fraud Civil Remedies Act
- Suspension and debarment based on statutory presumption of non-responsibility
- Ineligibility to participate in any program or activity authorized under the Small Business Act for 3 years
  - This would include set-aside contracts

# Small Business Protests: A Fight on Two Fronts

- Small Business Administration has jurisdiction over determining size and status under the Small Business Act, 15 U.S.C. §632.
- Government Accountability Office has jurisdiction over the propriety and validity of the contract award under the Competition in Contracting Act, 31 U.S.C. §§3551-3556
- Protests are filed at the SBA to challenge size and status, and, separately, at the GAO to challenge the validity of the contract award

# Key GAO Precedents:

- Tiger Enterprises (2004)
- Planned Systems (2004)
- Alatec (2006)
- Hydroid (2007)

# Tiger Enterprises, B-292815.3, B-293439 (Jan. 20, 2004)

- Protest sustained
- SBA size protest timely obtained and not appealed
- Discussion of countervailing reasons to let large business keep the contract: urgency and substantial performance

# Planned Systems, B-292319.7 (Feb. 24, 2004)

- Protest denied – contract award “legally unobjectionable”
- SBA size protest timely filed, but decision rendered outside the 10-day stay under SBA regs
- Allegations of delay by the agency
- SBA decision made after GAO issued its decision and CICA automatic stay expired

# Alatec, B-298730 (Dec. 4, 2006)

- Protest sustained
- SBA size protest timely filed, but decision rendered outside the 10-day stay under SBA regulations
- GAO CICA stay was still in place; SBA OHA affirmed finding the awardee other than small
- Agency should have terminated on the grounds that the award is inconsistent with the integrity of the Small Business Act
- Footnote 3 distinguished and/or reversed *Planned Systems*

# Hydroid, B-299072 (Jan. 31, 2007)

- Protest sustained
- GAO found duty to refer bid to the SBA if it indicates that the bidder is a large business
- Timely SBA size protest filed, decision rendered, OHA appeal untimely
- Countervailing reasons arguments denied

# Recent U.S. Senate Actions

- S. 3778 (previous Congress)
- S. 2300
- Creates a new SBA small business protest system on the same terms as the GAO bid protest system
- Divests GAO jurisdiction of small business size protests
- Gives SBA jurisdiction over mis-awarded small business contracts
- Authorizes recovery of fees

# Recent U.S. House Actions

- H.R. 3867, Small Business Contracting Program Improvement Act
  - Section 205 renders any small business concern an interested party
  - Sent to the Senate in Nov. 2007
- H.R. 1873, Small Business Fairness in Contracting Act
  - Section 301 requires CCR identification of any small business size or status protest lost
  - Sent to the Senate in May 2007