**Subcontracting Reform – Enforcement of liquidated damages**

As part of the National Federal Contractors Association (NaFCA) and Set-Aside Alert Solutions Summit on Subcontracting Reform, focus working groups were formed. They are made up of small businesses that do business with the federal government and developed the following solution.

**Solution**

The SBA shall conduct a study to identify the reasons why the threat of liquidated damages being imposed by contracting officers on prime contractors that do not meet their subcontracting goals has not had any noticeable effect on subcontracting compliance.

The study shall examine the alleged lack of accountable oversight by the Small Business Administration regarding the enforcement of subcontracting plans and the negative impact that Summary Subcontracting Reporting, known in the industry as consolidated reporting, has had on subcontracting. Large businesses are hiding behind such reporting requirements (SF 294/SF 295), which do not identify the contracting dollars awarded to each individual business.

**Benefits**

* Identifies reasons for the ineffectiveness of the threat of liquidated damages.
* Marks the first step to implementing an effective enforcement system to punish prime contractors that violate their subcontracting plans.
* The prerequisite to effective subcontracting reform is reliable, accurate reporting.

**Background and Discussion**

The small business community is concerned that the proposed rule adds additional layers of oversight and review to regulations that already consist of nothing more than oversight and review. The regulations already empower contracting officers to approve and enforce subcontracting plans, which for the most part is not being done. Further, SBA has not been known to play an effective role as a small business advocate in having contracting officers do the job that taxpayers are paying for.

Regulations already contain the ability for contracting officers to impose liquidated damages to force large businesses to comply with their subcontracting plans. This has not been effective since liquidated damages were introduced. What is the purpose of adding more bureaucracy instead of enforcing already implemented ways to enforce current rules?

Accountability seems to be the key word. SBA has not been effectively held accountable for being tasked as the advocate for small businesses in the subcontracting programs. The community perception is that SBA is impotent in enforcing the subcontracting program. Further, the Office of Management and Budget (OMB) and agency heads have not held contracting officers accountable for doing their job.

Just like there is no record of effective use of liquidated damages, SBA has not provided any evidence to the community that any of the existing rules and oversight have made any difference in improving subcontracting plan compliance. SBA must establish credibility as an advocate of small businesses that do business with the federal government. If SBA believes that is has been effective as an advocate for small business subcontractors over the last few decades, it should publish case studies showing how it has done so. In particular, the fact that the SBA allows large businesses to report on their federal subcontracting achievements on a consolidated basis does little to convince the community of small business federal contractors that SBA has been an effective advocate.

After a few years of the subcontracting requirements being passed into law, it was clear that the regulations on subcontracting requirements were not being widely implemented by large businesses. The federal contracting community at the time strongly urged the small business community that if there was to be effective implementation and management of the subcontracting program by contracting officers, the regulations had to give the contracting officers a mechanism with which to enforce penalties against large businesses that were not effective in fulfilling their regulatory subcontracting requirements. Under the leadership of Congressman Parren Mitchell, liquidated damages were added to the subcontracting regulations. In over twenty years, the result has been that liquidated damages have been seldom used by contracting officers on companies that have not fulfilled their subcontracting plans. It seems clear that most large businesses are not concerned with not meeting their subcontracting plan requirements and being penalized by liquidated damages.

Since the inception of the federal subcontracting program, large businesses have not been consistently true to the letter or spirit of federal subcontracting regulations. Some twenty years ago, at the urging of agency contracting officers themselves to amend regulations with an enforcement tool, Congress acted to remedy this non-compliance by large businesses. Under the leadership of Congressman Mitchell and with the help of SBA, it passed regulation that allowed for significant liquidated damages to be imposed on large contractors that did not comply with federal subcontracting regulations. Contracting officers stated that if they were given the ability to impose such penalties, they would be able to ensure that large businesses would be compliant with subcontracting regulations. However, after more than twenty years of the threat or incentive of liquidated damages, the contracting officer community, having been given the tools they asked for, has failed to consistently improve large business subcontracting performance. If a penalty that was designed to diminish a company’s profit, if it does not meet its subcontracting goals, has no effect, it is evident that something is amiss.

The reason for this lack of improvement is that in reality, there has not been consistent imposition of liquidated damages on those large businesses that violated their subcontracting obligations. Through the formation of powerful lobbying industry associations, large businesses were able to mitigate the impact of the liquidated damages regulations. In response to the threat of liquidated damages, large federal contractors, with the help of their lobbying outfits, ensured that reporting requirements allowed them to hide behind obscure reporting practices.

Further, at a recent NaFCA conference, an SBA attorney, who was instrumental in developing the proposed regulations currently pending comments, was asked why the powerful tool of liquidated damages is not being used. In response, the SBA attorney responded that contracting officers, who are charged with reviewing subcontracting performance and assessing liquidated damages, were simply “too busy” to do so and considered it too cumbersome, difficult and costly to fight the massive litigation capacity of large businesses. If the federal government doesn’t see itself equipped to litigate against these large companies, how can a small business be expected to enforce its rights through legal action?

It is clear that the intent of liquidated damages was to force large prime contractors to honor their contracting officer approved subcontracting plans. The damages have not worked in the current regulatory framework, so the factors that keep liquidated damages from being used effectively must be changed.