

Firm Settles Case of Fraudulently Misreporting Socioeconomic Awards

Written by Administrator

Tuesday, 10 November 2009 00:00



Socioeconomic reporting is a pain. It's not just reporting one's subcontract awards made to small businesses versus those made to large businesses; it's much more complicated than that.

Federal and state governments have created many different "flavors" of small business, from the classic small "disadvantaged" business to small woman-owned businesses, and from "historically underutilized businesses" ("HUBzone") to service-disabled veteran-owned businesses. Each recipient of a subcontract award needs to be properly categorized and properly reported. Moreover, many agencies (and prime contracts) contain socioeconomic "goals" that must be attained. Failure to attain those goals may affect award or incentive fees. Failure to make "good faith efforts" to achieve those goals can lead to liquidated damages being imposed.

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Agencies are closely monitored by Congress to assure that the proper proportion of Federal dollars is going to the various socioeconomic business categories. At the state and local levels the same close scrutiny exists. The ability to consistently achieve socioeconomic goals is a competitive advantage. Conversely, a history of failure can keep a company from winning new work. Rarely, though, does one hear about a company facing criminal or civil charges related to its socioeconomic reporting.

This is one of those rare times.

On November 5, 2009 the United States Attorney for the Eastern District of New York [reported](#) that the Tutor Perini Corporation had agreed to settle a civil fraud suit for the sum of \$9.75 million.

[According](#) to Wikipedia, Tutor Perini (formerly Tutor Corporation) is one of the largest general contractors in the United States, with 2008 revenues of \$5.6 billion. It is headquartered in Framingham, MA. The article reveals a dynamic history, with numerous changes of ownership and control. The entity is currently listed on the New York Stock Exchange.

According to the Department of Justice press release, Tutor Perini was performing on several “public works projects” for the City and State of New York. Those contracts were funded, at least partially, through grants made by the U.S. Department of Transportation (USDOT)—making them federally funded contracts. The USDOT issued regulations “to increase the participation” of “disadvantaged business enterprises (DBEs)” in federally funded public construction contracts related to transportation. Accordingly, the NY government entities established “goals for the percentage of work to be awarded to DBEs” and were also required to “ensure that good faith efforts [were] made by general contractors to engage qualified DBEs as subcontractors.” The regulations require that not less than 10 percent of authorized funds must be awarded to DBEs.

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The press release reports that Tutor Perini “falsely and fraudulently reported that certain minority and disadvantaged business enterprises ... were performing subcontracted work” Tutor Perini settled the case for \$9.75 million, but “the settlement does not constitute an admission of liability by Perini.”

Oh, really. The company settled for nearly \$10 million but expects its shareholders and the SEC to believe that it wasn't really liable? One wonders what DOJ's initial litigation position was, to make a \$10 million settlement the appropriate business decision? And of course, the \$9.75 million settlement is just the entire amount at issue. All the internal and external costs associated with litigating the case are unallowable pursuant to the Cost Principle at 48 C.F.R. § 31.205-47 (“Costs related to legal and other proceedings”).

It may be that Tutor Perini made the right decision. The DOJ press release made no mention of any alleged violations of the [False Statements Act](#) (18 U.S.C. § 1001), which is the statute one normally thinks of when false reporting is being alleged. Similarly, no mention was made of any violations of the [False Claims Act](#) (31 U.S.C. § 3729). Often, when a false statement is alleged, each invoice that is “tainted” by that false statement is alleged to be a claim submitted under false pretenses. As one source notes—

The False Claims Act also imposes liability on an individual who may knowingly submit a false record in order to obtain payment from the government. An example of this may include a

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government contractor who submits a record that he knows (or should know) is false and that indicates compliance with certain contractual or regulatory requirements.

Consequently, Tutor Perini may have dodged a bullet. If each individual invoice submitted in connection with its NYDOT construction projects was deemed to be a false claim, the total penalties it might have been facing could easily be double or triple the amount of its settlement. Only management (and its counsel) know for sure.

Socioeconomic reporting is a pain. It seems to add little (if any) value to the work being done, and is usually treated like a bureaucratic waste of time. But as this press release shows, a contractor must take pains to get it right. The cost of noncompliance is just too high.

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