



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

September 1, 2006

United States Sentencing Commission  
ATTN: Public Affairs-Priorities Comment  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Sir or Madam:

This letter responds to the Federal Register notice, dated August 4, 2006, which sought comments on priority policy issues for the Federal sentencing guidelines (Guidelines). As discussed below, this letter requests a modification of the definition of the term "loss" in the Guidelines in order to promote prosecution of fraud that occurs in connection with obtaining certain governmental contracts.

*Statement of the Issue*

Congress established in section 15(g) of the Small Business Act the goal that 23% of all Federal government contracts be awarded to small businesses. 15 U.S.C. § 644(g). In setting this objective, Congress has advised as follows:

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government ... be placed with small-business enterprises ... to maintain and strengthen the overall economy of the Nation. [15 U.S.C. § 631(2)(a) (emphasis added)].

In addition, the Small Business Act states that "the power to let Federal contracts ... can be an effective procurement assistance tool for development of business ownership among groups that own and control little productive capital." 15 U.S.C. § 631(2)(d)(1)(v). Thus, Congress also established goals in section 15(g) of the Act that certain percentages of government contracts be awarded to women-owned businesses, minority-owned businesses and other disadvantaged businesses.

As a result, a large number of government contracts are reserved only for small businesses or disadvantaged businesses. However, there are numerous occasions when companies fraudulently obtain these set-aside contracts by misrepresenting that they meet the

criteria established by Small Business Administration (SBA) to be a small or disadvantaged business. These misrepresentations not only deprive contracting opportunities for legitimate small or disadvantaged businesses, they also undercut the national priorities reflected in the above-quoted statutory language. Although the SBA Inspector General has vigorously investigated this type of fraud and referred a number of cases for prosecution, many Federal prosecutors are reluctant to accept these cases because of the perception that the Government has not experienced any financial loss. If the company that misrepresented its status performs the contract satisfactorily, as is often the case, the Government has obtained the goods and services that it bargained for.

The SBA Office of Inspector General has discussed this problem with a Federal prosecutor who specializes in procurement fraud. This prosecutor advised that the problem could be alleviated by a change in the Guidelines under the Special Rules for determining loss in Application Note 3(F) of Section 2.B.1.1. Many of the Special Rules in that Note define loss in connection with fraudulent schemes for which it may be difficult to quantify the victim's actual financial loss, but which, nonetheless, cause societal harm. Although it may be similarly difficult to quantify the actual financial loss that results from small business contracting fraud, we believe that such fraud undermines the national priorities identified in the Small Business Act and that a special rule in the Guidelines is needed to enhance prosecution. Therefore, we request a revision of Section 2.B.1.1 of the Guidelines to include the following new Application Note 3(F)(viii):

(viii) Small and Disadvantaged Business Procurement.--In a case involving a contract with the Federal Government for the procurement of goods or services that is obtained through a fraudulent representation that the defendant was a "small business concern," a "qualified HUBZone small business concern", a "socially and economically disadvantaged small business concern", a "small business concern owned and controlled by women", or a "small business concern owned and controlled by service disabled veterans", as those terms are defined in sections 3 and 8 of the Small Business Act, loss shall include the amount paid for the goods or services, with no credit provided for the value of those goods or services.

#### *Citations*

15 U.S.C. § 631(2). This section of the Small Business Act explains the rationales for providing preferences in government contracting.

15 U.S.C. § 632. This section of the Small Business Act defines a small business concern and other disadvantaged businesses.

15 U.S.C. § 637. This section of the Small Business Act defines a socially and economically disadvantaged small business concern, and states the policy of the United States to provide maximum practicable opportunities for disadvantaged businesses to perform Federal contracts.

15 U.S.C. § 644(g). This section of the Small Business Act sets forth governmental goals for the award of contracts to small or disadvantaged businesses.

15 U.S.C. § 645(d). This section of the Small Business Act criminalizes misrepresentations of status when competing for contracts set aside for small or disadvantaged businesses.

*Why the Commission Should Make This Issue a Priority*

As discussed above, when government contracts intended to benefit small or disadvantaged businesses are diverted to ineligible contractors through fraud, the legitimate individual businesses that are deprived of these contracting opportunities are not the only victims. This fraud also does considerable harm to national economic policy goals. The proposed addition to the Sentencing Guidelines would give more appropriate weight to the true harm caused by this type of contract fraud and improve the opportunities for prosecution of this fraud. Effective prosecution will serve as a deterrent of future small business contract fraud. Therefore, we respectfully request that you include language like that recommended above in the next revision of the Sentencing Guidelines.

Please do not hesitate to contact Glenn Harris, Counsel to the Inspector General, at 202-205-6862 if there are any questions or if additional information is required.

Sincerely,



Eric M. Thorson  
Inspector General



Anthony Marfocchia  
Associate Deputy Administrator for  
Government Contracting and Business  
Development