

DOJ Announces \$2.8 Million Settlement with Construction Company Over SDVOSB Set Asides, Further Fallout From DOJ's Settlement with TriMark USA

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by Chris DeLong

On Friday, May 13, 2022, the Department of Justice announced that it reached a settlement with Hensel Phelps Construction Company (“Hensel Phelps”) over allegations that the company had, in violation of the False Claims Act, circumvented subcontract set-asides for service-disabled veteran owned small businesses (“SDVOSB”).

The case concerned a multi-million dollar prime contract awarded in 2011 to Hensel Phelps by the General Services Administration to construct the Armed Forces Retirement Home’s New Commons/Health Care Building in Washington, D.C. As part of the contract, the government required Hensel Phelps to create and implement a small business subcontracting plan to provide contracting opportunities for SDVOSBs and other types of small businesses.

Although the entity relator, Fox Unlimited Enterprises, LLP (“Relator”), filed the action relatively recently in April 2022, the parties were presumably able to expeditiously settle the matter because this case relates to DOJ’s settlement with TriMark USA, LLC earlier this year, involving the same relator. In TriMark’s settlement agreement, TriMark agreed to pay \$48.5 million to resolve allegations that it manipulated SDVOSB set aside regulations by using other small businesses to obtain set-aside subcontracts but nevertheless performing most of the set-aside work itself. TriMark admitted that it, through one of its subsidiaries, identified small businesses with which it could partner, instructed them on preparing their bids and pricing, and even ghostwrote emails for the small businesses to make it appear that they, not TriMark, were doing the work.

Here, the Relator alleged that Hensel Phelps had credited its compliance with set-asides to an entity that the company should have known was merely a “pass-through” for a large, non-qualifying company—i.e., TriMark. Pursuant to Hensel Phelps’ settlement agreement, Hensel Phelps agreed to pay \$2.8 million to resolve the allegations. Notably, the large settlement amounts in both the TriMark and Hensel Phelps cases may reflect the government’s use of the presumption of loss rule in 15 U.S.C. § 632(w). Under the

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rule, when a government contractor willfully seeks and receives an award by misrepresenting its size or status, there is a presumption of loss to the United States equal to the entire value of the contract, subcontract, cooperative agreement, or grant that is set aside for small business concerns. This presumption, coupled with the FCA's treble damages provision, makes enforcement actions for small business contracting fraud more enticing to both the government and relators. The potential liability under the rule—and these settlements—highlights the risks to contractors in failing to comply with the subcontracting set-aside regulations.