

# Small Business Regulation and Legislation Update

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# Federal Government FY 2015

- ▶ SB 23 % Goal 25.7462%
  - 3<sup>rd</sup> Consecutive year
- ▶ SDB 5% Goal 10.0570%
  - Highest Ever
- ▶ WOSB 5% Goal 5.0546%
  - First Time Ever Met
- ▶ SDVO 3% Goal 3.9263%
  - Highest Ever
- ▶ HUBZone 3% Goal 1.8230%

# Limitations on Subcontracting

- ▶ Section 1651 National Defense Authorization Act of 2013
- ▶ In the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount **paid** to the concern under the contract
- ▶ In the case of a contract for supplies (other than from a regular dealer in such supplies), may not expend on subcontractors more than 50 percent of the amount, less the cost of materials, **paid** to the concern under the contract
- ▶ **Similarly Situated Entities** – Contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted
- ▶ SBA Final Rule – 81 FR 34243 (May 31, effective June 30, 2016)

# NDAA 2013 Final Rule – LOS

- ▶ Similarly situated entity is a subcontractor that has the same small business program status as the prime contractor.
- ▶ This means that: for a HUBZone requirement, a subcontractor that is a qualified HUBZone small business concern; for a small business set-aside, partial set-aside, or reserve a subcontractor that is a small business concern; for a SDVO small business requirement, a subcontractor that is a self-certified SDVO SBC; for an 8(a) requirement, a subcontractor that is an 8(a) certified Program Participant; for a WOSB or EDWOSB contract, a subcontractor that has complied with the requirements of part 127.
- ▶ 13 CFR 125.1

# NDAA 2013 Final Rule – LOS

- ▶ In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.
  - ▶ 13 CFR 125.1
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# NDAA 2013 Final Rule – LOS

- ▶ In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded.
  - 13 CFR 125.6(a)(1)

# NDAA 2013 Final Rule – LOS

- ▶ In the case of a contract for supplies or products (other than from a nonmanufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded.
- ▶ Cost of materials are excluded and not considered to be subcontracted.
  - 13 CFR 125.6(a)(2)(i)

# NDAA 2013 Final Rule – LOS

- ▶ In the case of a contract for general construction, it will not pay more than 85% of the amount paid by the government to it to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.
  - 13 CFR 125.6(a)(3)

# NDAA 2013 Final Rule – LOS

- ▶ In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime may be paid to firms that are not similarly situated.
- ▶ Any work that a similarly situated subcontractor further subcontracts will count towards the 75% subcontract amount that cannot be exceeded.
- ▶ Cost of materials are excluded and not considered to be subcontracted.
  - 13 CFR 125.6(a)(4)

# NDAA 2013 Final Rule – LOS

- ▶ Mixed contracts. Where a contract combines services and supplies, the contracting officer shall select the appropriate NAICS code as prescribed in § 121.402(b) of this chapter.
- ▶ The contracting officer's selection of the applicable NAICS code is determinative as to which limitation on subcontracting and performance requirement applies.
- ▶ In no case shall the requirements of paragraph (a)(1) and (a)(2) of this section both apply to the same contract.
- ▶ The relevant limitation on subcontracting in paragraph (a)(1) or (a)(2) of this section shall apply only to that portion of the contract award amount.
  - 13 CFR 125.6(b)

# NDAA 2013 Final Rule – LOS

- ▶ Subcontracts to similarly situated entities. A small business concern prime contractor that receives a contract listed in §125.6(a) and spends contract amounts on a subcontractor that is a similarly situated entity shall not consider those subcontracted amounts as subcontracted for purposes of determining whether the small business concern prime contractor has violated §125.6(a), to the extent the subcontractor performs the work with its own employees.
- ▶ Any work that the similarly situated subcontractor does not perform with its own employees shall be considered subcontracted SBA will also exclude a subcontract to a similarly situated entity from consideration under the ostensible subcontractor rule (§ 121.103(h)(4)).
  - 13 CFR 125.6(c)

# NDAA 2013 Final Rule – LOS

- ▶ Determining compliance with applicable limitation on subcontracting.  
The period of time used to determine compliance for a total or partial set-aside contract will be the base term and then each subsequent option period. For an order set aside under a full and open contract or a full and open contract with reserve, the agency will use the period of performance for each order to determine compliance unless the order is competed among small and other-than-small businesses (in which case the subcontracting limitations will not apply).
- ▶ (1) The contracting officer, in his or her discretion, may require the concern to comply with the applicable limitations on subcontracting and the nonmanufacturer rule for each order awarded under a total or partial set-aside contract.
- ▶ (3) Work performed by an independent contractor shall be considered a subcontract, and may count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.
  - 13 CFR 125.6(e)

# NDAA 2013 Final Rule – JVs

- ▶ Exception to affiliation for certain joint ventures. (i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract.
  - 13 CFR 121.103(h)(3)

# NDAA 2013 Final Rule – Affiliation

- ▶ Firms owned or controlled by married couples, parties to a civil union, parents, children, and siblings are presumed to be affiliated with each other if they conduct business with each other, such as subcontracts or joint ventures or share or provide loans, resources, equipment, locations or employees with one another. This presumption may be overcome by showing a clear line of fracture between the concerns. Other types of familial relationships are not grounds for affiliation on family relationships.
  - 13 CFR 121.103(f)(1)

# NDAA 2013 Final Rule – Affiliation

- ▶ SBA may presume an identity of interest based upon economic dependence if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years.
  - (i) This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts.
  - (ii) A business concern owned and controlled by an Indian Tribe, ANC, NHO, CDC, or by a wholly-owned entity of an Indian Tribe, ANC, NHO, or CDC, is not considered to be affiliated with another concern owned by that entity based solely on the contractual relations between the two concerns.
    - 13 CFR 121.103(f)(2)

# NDAA 2013 Final Rule – Size

- ▶ For purposes of architect–engineering, design/build or two–step sealed bidding procurements, a concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may or may not include price).
  - 13 CFR 121.404(f)

# NDAA 2013 Final Rule – Recert.

- ▶ (i) In the case of a merger, sale, or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. \* \* \*
- ▶ (ii) \* \* \*
- ▶ (D) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award.
  - 13 CFR 121.404(g)(2)

# NDAA 2013 Final Rule – NMR

- ▶ The rental of an item(s) is a service and should be treated as such in the application of the nonmanufacturer rule and the limitation on subcontracting.
- ▶ SBA's waiver of the nonmanufacturer rule means that the firm can supply the product of any size business without regard to the place of manufacture. However, SBA's waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the Buy American Act or the Trade Agreements Act.
  - 13 121.406(b)(4) & (7)

# NDAA 2013 Final Rule – NMR

- ▶ (e) Multiple Item Acquisitions. (1) If at least 50% of the estimated contract value is composed of items that are manufactured by small business concerns, then a waiver of the nonmanufacturer rule is not required. There is no requirement that each and every item acquired in a multiple-item procurement be manufactured by a small business.
  - 13 CFR 121.406(e)(1)

# NDAA 2013 Final Rule – NMR

- ▶ (2) If more than 50% of the estimated contract value is composed of items manufactured by other than small concerns, then a waiver is required. SBA may grant a contract specific waiver for one or more items in order to ensure that at least 50% of the value of the products to be supplied by the nonmanufacturer comes from domestic small business manufacturers or are subject to a waiver.
- ▶ (3) If a small business is both a manufacturer of item(s) and a nonmanufacturer of other item(s), the manufacturer size standard should be applied.
  - 13 CFR 121.406(e)

# NDAA 2013 Final Rule – NMR

- ▶ Where appropriate, SBA will generally grant waivers for an individual contract or order prior to the issuance of a solicitation, or, where a solicitation has been issued, when the contracting officer provides all potential offerors additional time to respond.
  - 13 CFR 121.1203(a)

# NDAA 2013 Final Rule – NMR

- ▶ SBA may grant a waiver after contract award, where the contracting officer has determined that the modification is within the scope of the contract and the agency followed the regulations prior to issuance of the solicitation and properly and timely requested a waiver for any other items under the contract, where required.
  - 13 CFR 121.1203(b)

# NDAA 2013 Final Rule – NMR

- ▶ (a) Contracting officers must provide written notification to potential offerors of any waivers being applied to a specific acquisition, whether it is a class waiver or a contract specific waiver. This notification must be provided at the time a solicitation is issued. If the notification is provided after a solicitation is issued, the contracting officer must provide potential offerors a reasonable amount of additional time to respond to the solicitation.
- ▶ (b) If a contracting officer does not provide notice, and additional reasonable time for responses when required, then the waiver cannot be applied to the solicitation. This applies to both class waivers and individual waivers.
  - 13 CFR 121.1206

# NDAA Final Rule – Software

- ▶ NAICS code 511210 – For purposes of Government procurement, the purchase of software subject to potential waiver of the nonmanufacturer rule pursuant to § 121.1203(d) should be classified under this NAICS code.
  - 13 CFR 121.201, Footnote 20

# NDAA 2013 Final Rule – Software

- ▶ Waivers for the purchase of software. (1) SBA may grant an individual waiver for the procurement of software provided that the software being sought is an item that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and the item:
  - ▶ (i) Has been sold, leased, or licensed to the general public, or has been offered for sale, lease, or license to the general public;
  - ▶ (ii) Is sold in substantial quantities in the commercial marketplace; and
  - ▶ (iii) Is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.
    - 13 CFR 121.1203(d)(1)

# NDAA 2013 Final Rule – Software

- ▶ If the value of services provided related to the purchase of a supply item that meets the requirements of paragraph (1) of this section exceeds the value of the item itself, the procurement should be identified as a service procurement, even if the services are provided as part of the same license, lease, or sale terms. If a contracting officer cannot make a determination of the value of services being provided, SBA will assume that the value of the services is greater than the value of items or supplies, and will not grant a waiver.
  - 13 CFR 121.1203(d)(2)

# NDAA 2013 Final Rule – Software

- ▶ Subscription services, remote hosting of software, data, or other applications on servers or networks of a party other than the U.S. Government are considered by SBA to be services and not the procurement of a supply item. Therefore SBA will not grant waivers of the nonmanufacturer rule for these types of services.
  - 13 CFR 121.1203(d)(3)

# NDAA 2013 Final Rule – 15(j)

- ▶ The performance requirements (limitations on subcontracting) and the nonmanufacturer rule do not apply to small business set-aside acquisitions with an estimated value less than \$150,000.
  - 13 CFR 121.406(d)
- ▶ Inapplicability of limitations on subcontracting. The limitations on subcontracting do not apply to: (1) small business set-aside contracts with a value less than 150,000, or (2) subcontracts (except where a prime is relying on a similarly situated entity to meet the applicable limitations on subcontracting).
  - 13 CFR 125.6(f)

# NDAA 2013 Final Rule – 8(a)

- ▶ Procurements for construction services (e.g., the building of a specific structure) are generally deemed to be new requirements. However, recurring indefinite delivery or indefinite quantity task or delivery order construction services are not considered new (e.g., a recurring procurement requiring all construction work at base X).
  - 13 CFR 124.504(c)(1)(ii)(B)

# NDAA 2013 Final Rule – Subk

- ▶ (8) A prime contractor that identifies a small business by name as a subcontractor in a proposal, offer, bid or subcontracting plan must notify those subcontractors in writing prior to identifying the concern in the proposal, bid, offer or subcontracting plan
- ▶ (9) Anyone who has a reasonable basis to believe that a prime contractor or a subcontractor may have made a false statement to an employee or representative of the Federal Government, or to an employee or representative of the prime contractor, with respect to subcontracting plans must report the matter to the SBA Office of Inspector General. All other concerns as to whether a prime contractor or subcontractor has complied with SBA regulations or otherwise acted in bad faith may be reported to the Government Contracting Area Office where the firm is headquartered.
  - 13 CFR 125.3(c)

# NDAA 2013 Final Rule – HUBZone

- ▶ A qualified HUBZone SBC may submit an offer on a HUBZone contract for supplies as a nonmanufacturer if it meets the requirements of the nonmanufacturer rule set forth at § 121.406 of this chapter.
  - 13 CFR 126.601(f)

# Information Value Added Technology Reseller

- ▶ 81 FR 4436 (January 26, 2016)
  - ▶ NAICS 541519, Footnote 18
  - ▶ 150 employees
  - ▶ At least 15% and not more than 50% value added services, as measured by the total contract price.
  - ▶ Manufacture the products or supply the product of a small business, unless SBA has issued a waiver
  - ▶ Less than 15%, classify under manufacturing
  - ▶ More than 50%, classify under service
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# Lower Tier Subk Proposed Rule

- ▶ Proposed Rule 80 FR 60300 (10/06/15), Comment period closed 12/07/2015
- ▶ Where the subcontracting goals pertain only to an individual subcontracting plan, the contractor may receive credit for small business concerns performing as first tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns.
- ▶ Implements Section 1614 of NDAA of 2014, 15 USC 637(d)(16)

# Lower Tier Subk Proposed Rule

- ▶ Prime contractors must incorporate the subcontracting plan goals of their lower tier subcontractors in their individual subcontracting plans.
  - ▶ Lower tier subcontractors must have their own individual subcontracting plans if the subcontract is at or above the subcontracting plan threshold, and are required to meet their subcontracting plan goals.
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# Lower Tier Subk Proposed Rule

- ▶ The actual subcontracting dollars are only reported once for the same award to avoid double counting the dollars, notwithstanding the fact that a small business subcontract may be reported under more than one subcontracting plan.

# Lower Tier Subk Proposed Rule

- ▶ Prime contractors may accept a subcontractor's electronic self-certification as to size, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size representations and certifications are accurate and complete. Electronic submission may include any method acceptable to the prime contractor including, but not limited to, size representations and certifications made in SAM (or any successor system).
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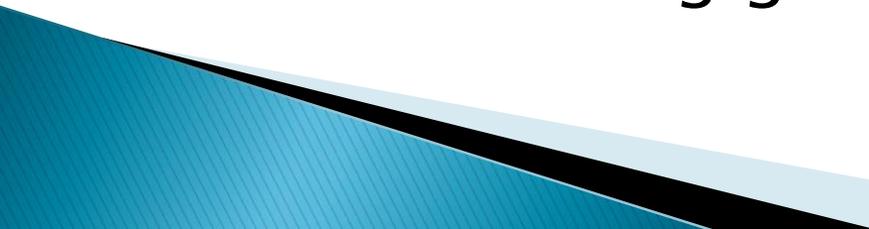
# NDAA 2016, P.L. 114-92, 11/25/15

- ▶ 863 – Substantial bundling – notice must be published at least 7 days before solicitation
  - ▶ 864 – Non-manufacturer rule does not apply to contracts where principal purpose is acquisition of services or construction. Only applies where principal purpose is the acquisition of supplies.
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# NDAA 2016, P.L. 114-92, 11/25/15

- ▶ 867 – Allows past performance of all team members (JV or subs) to be considered for bundled or consolidated contracts, or multiple award contracts above the substantial bundling threshold for the agency (DOD \$8 million, \$6 million NASA/GSA/DOE, \$2.5 million or more for all other agencies).
- ▶ Section 868 – SBA Scorecard
  - 50% prime goals
  - 50% subk goals, number of SBCs awarded contracts, number of SBCs awarded subks, other factors

# NDAA 2016, P.L. 114-92, 11/25/15

- ▶ 869 – Authorizes petitions for reconsideration of industry size standards to SBA’s Office of Hearings and Appeals – Proposed Rule 81 FR 69723 (Oct. 7, 2016)
  - ▶ 870 – OSDDBU – notice from SBC that solicitation unduly restricts the ability of SBCs
  - ▶ 871 – SES – Responsible for meeting subcontracting goals
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# FAR Proposed Rule on Payment of Subcontractors

- ▶ (g) Past performance evaluations shall include an assessment of the contractor's—
  - ▶ (1) Performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219–9, Small Business Subcontracting Plan; and
  - ▶ (2) Reduced or untimely payments (see 19.701) determined by the Contracting Officer to be unjustified to small business subcontractors.
- ▶ (i) The contracting officer shall consider and evaluate a contractor's written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified.
- ▶ (ii) The contracting officer determines that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12 month period (see 42.1503(h)(1)(vi) and the evaluation factors in Table 42–2).
  
- ▶ 81 FR 3087 (January 20, 2016)

# FAR Subcontracting Final Rule

- ▶ (1) Requiring prime contractors to make good faith efforts to utilize their proposed small business subcontractors during performance of a contract to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal. To the extent a prime contractor is unable to make a good faith effort to utilize its small business subcontractors as described above, the prime contractor is required to explain, in writing, within 30 days of contract completion, to the contracting officer the reasons why it is unable to do so.
- ▶ (2) Authorizing contracting officers to calculate subcontracting goals in terms of total contract dollars in addition to the required goals in terms of total subcontracted dollars.
- ▶ 81 FR 45833 (July 14, 2016) effective November 1, 2016

# FAR Subcontracting Final Rule

- ▶ (3) Providing contracting officers with the discretion to require a subcontracting plan in instances where a small business rerepresents its size as an other than small business.
  - ▶ (4) Requiring subcontracting plans even for modifications under the subcontracting plan threshold if said modifications would cause the contract to exceed the plan threshold.
  - ▶ (5) Requiring prime contractors to assign North American Industry Classification System (NAICS) codes to subcontracts.
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# FAR Subcontracting Final Rule

- ▶ (6) Restricting prime contractors from prohibiting a subcontractor from discussing payment or utilization matters with the contracting officer.
  - ▶ (7) Requiring prime contractors to resubmit a corrected subcontracting report within 30 days of receiving the contracting officer's notice of report rejection.
  - ▶ (8) Requiring prime contractors to provide the socioeconomic status of the subcontractor in the notification to unsuccessful offerors for subcontracts.
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# FAR Subcontracting Final Rule

- ▶ (9) Requiring prime contracts with subcontracting plans on task and delivery order contracts to report order level subcontracting information after November 2017.
  - ▶ (10) Funding agencies receiving small business subcontracting credit.
  - ▶ (11) On indefinite-delivery, indefinite-quantity contracts, the contracting officer may establish subcontracting goals at the order level (but not a new subcontracting plan).
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# HUBZone Direct Final Rule

- ▶ Qualified Base Closure Area
  - ▶ Qualified Disaster Area
  - ▶ Native Hawaiian Organization
  - ▶ 81 FR 51312 (August 4, 2016), effective October 3, 2016
  - ▶ Implements Section 866 of the NDAA 2016, P.L. 114-92, 11/25
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  - ▶ Questions?
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