

Small Business Regulation and Legislation Update

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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 – 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

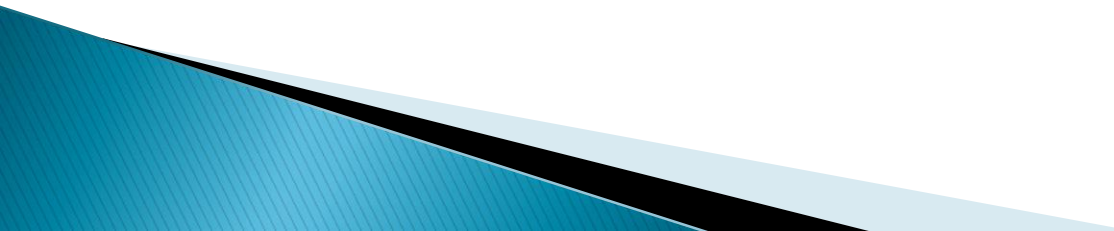
NDAA 2013 Final Rule – Software

- ▶ 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)
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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)

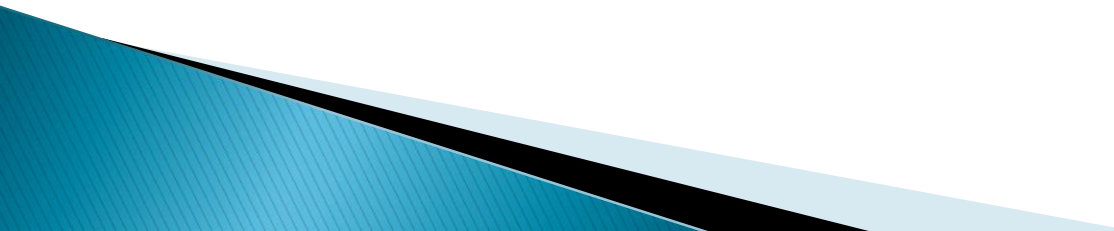
NDAA 2013 Final Rule – 8(a)

- ▶ 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)
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Mentor Protégé Final Rule

- ▶ Mentor Protégé programs of other agencies
 - ▶ Within one year of August 24, 2016, the head of an agency must submit a plan for any program the agency seeks to continue
 - ▶ Does not apply to DoD
 - ▶ 81 FR 48558 (July 25, 2016, effective August 24, 2016)
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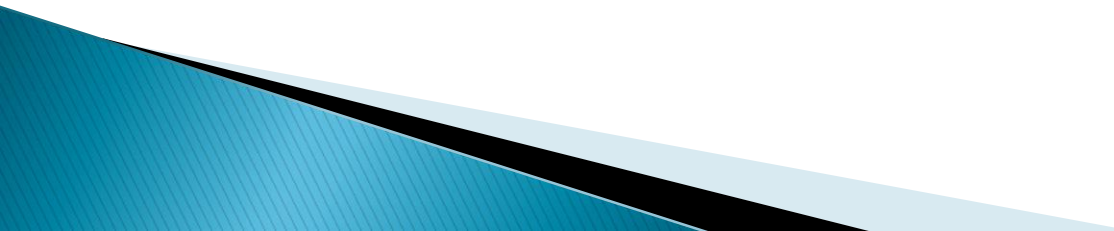
Lower Tier Subk Final Rule

- ▶ 81 FR 94246 (12/23/16), Implements Section 1614 of NDAA of 2014, 15 USC 637(d)(16)

Where the prime contractor has an individual subcontracting plan, the prime contractor shall establish two sets of small business subcontracting goals, one goal for the first tier and one goal for lower tier subcontracts awarded by other than small subcontractors with individual subcontracting plans.

Under individual subcontracting plans the prime contractor shall receive credit for small business concerns performing as first tier subcontractors (first tier goal) and 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 (lower tier goal).

Other-than-small, 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 make a good faith effort to meet their subcontracting plan goals. The prime contractor and any subcontractor with a subcontracting plan are responsible for reporting on subcontracting performance under their contracts or subcontracts at their first tier.




Lower Tier Subk Final Rule

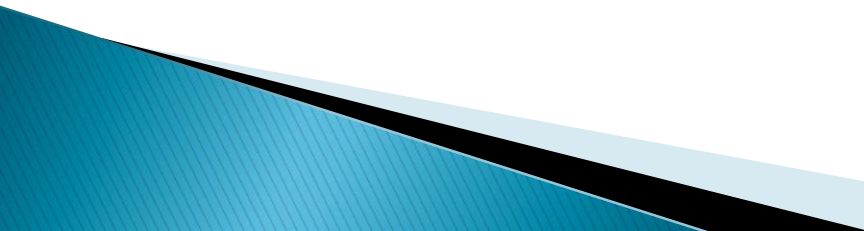
The prime contractor's performance under its individual subcontracting plan will be calculated using its own reporting at the first tier for its first tier goal and its subcontractors' first tier reports under their plans for the lower tier subcontracting goals.

The prime contractor's performance under the individual subcontracting plan must be evaluated based on its combined performance under the first tier and lower tier goal.

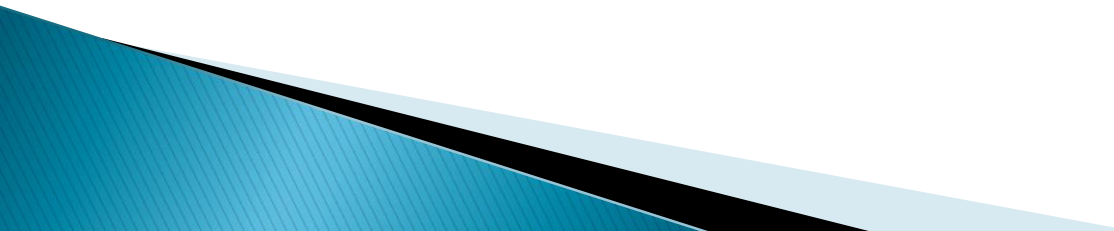
Other-than-small prime contractors and subcontractors with subcontracting plans shall report on their subcontracting performance on the Summary Subcontracting report (SSR) at their first tier only.



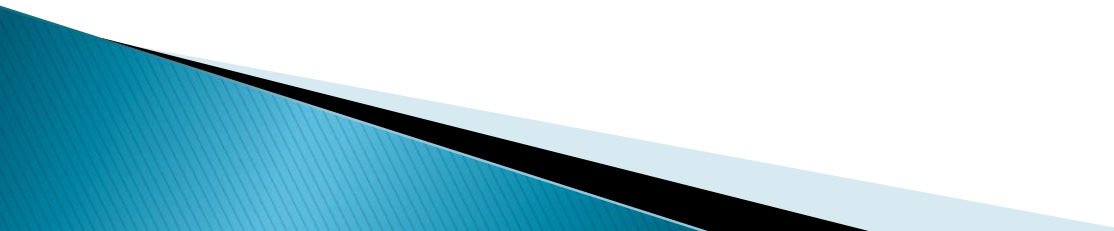
Lower Tier Subk Final Rule

- ▶ The contractor must assign to each subcontract, and to each solicitation, if a solicitation is utilized, the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see § 121.410 of this chapter).
 - ▶ A formal solicitation is not required for each subcontract, but the contractor must provide some form of written notice of the NAICS code and size standard assigned to potential offerors prior to acceptance and award of the subcontract.
 - ▶ The prime contractor (or subcontractor) may rely on a subcontractor's electronic representations and certifications, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are current, accurate and complete as of the date of the offer for the subcontract.
 - ▶ Electronic submission may include any method acceptable to the prime contractor (or subcontractor) including, but not limited to, size or socioeconomic representations and certifications made in SAM (or any successor system).
 - ▶ A prime contractor (or subcontractor) may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract
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Lower Tier Subk Final Rule

- ▶ Except when subcontracting for commercial items, the prime contractor must require all subcontractors (except small business concerns) who receive subcontracts in excess of \$1,500,000 in the case of a subcontract for the construction of any public facility, or in excess of \$700,000 in the case of all other subcontracts, and which offer further subcontracting possibilities, to adopt a subcontracting plan of their own consistent with this section, and must ensure at a minimum that all subcontractors required to maintain subcontracting plans pursuant to this paragraph will review and approve subcontracting plans submitted by their subcontractors; monitor their subcontractors' compliance with their approved subcontracting plans; ensure that subcontracting reports are submitted by their subcontractors when required; acknowledge receipt of their subcontractors' reports; compare the performance of their subcontractors to their subcontracting plans and goals; and discuss performance with their subcontractors when necessary to ensure their subcontractors make a good-faith effort to comply with their subcontracting plans
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Lower Tier Subk Final Rule

- ▶ The prime contractor must provide a written statement of the types of records it will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan established in accordance with paragraph (c)(1)(x) of this section, including the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women; the efforts to identify and award subcontracts to such small business concerns; and size or socioeconomic certifications or representations received in connection with each subcontract.
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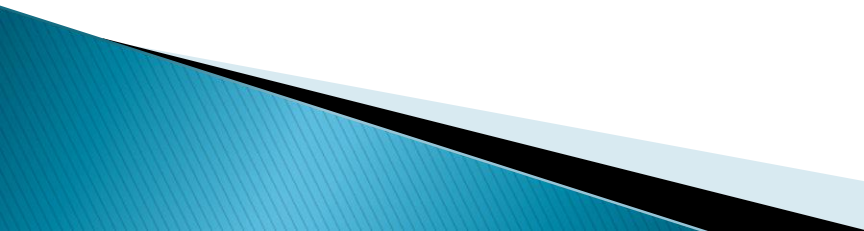
Section 898 of NDAA 2016

- ▶ DFAR proposed rule
 - ▶ DOD may not preclude non-profit from competition for religious-related service contracts, including set aside contracts
 - ▶ DOD may not award religious-related service contract 8(a), HUBZone, WOSB or SDVO sole source
 - ▶ 81 FR 93875 (December 22, 2016)
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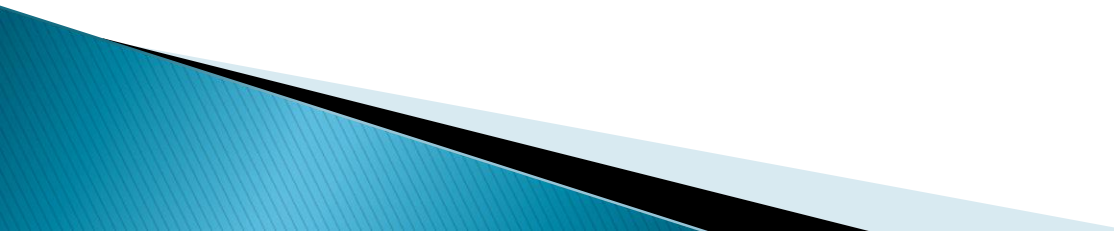
FAR Final Rule on Payment of Subcontractors

- ▶ (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 (as defined in 19.701), made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer shall—
 - ▶ (i) 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; and
 - ▶ (ii) Determine 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 ratings in Table 42-2).
- ▶ The following payment or nonpayment situations are not considered to be unjustified:
 - ▶ (A) There is a contract dispute on performance.
 - ▶ (B) A partial payment is made for amounts not in dispute.
 - ▶ (C) A payment is reduced due to past overpayments.
 - ▶ (D) There is an administrative mistake.
 - ▶ (E) Late performance by the subcontractor leads to later payment by the prime contractor.
- ▶ 81 FR 93481 (December 20, 2016)

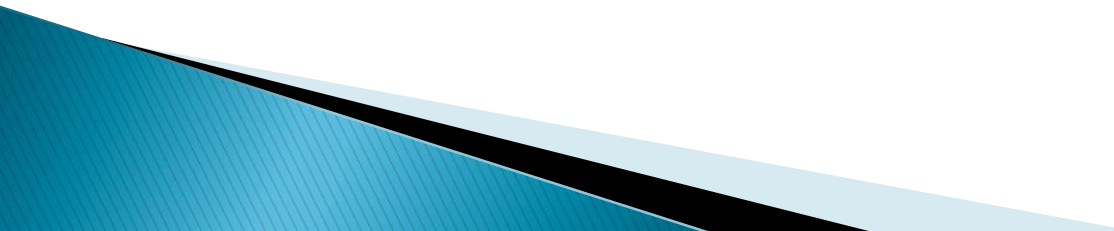
FAR Subcontracting Final Rule

- ▶ (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
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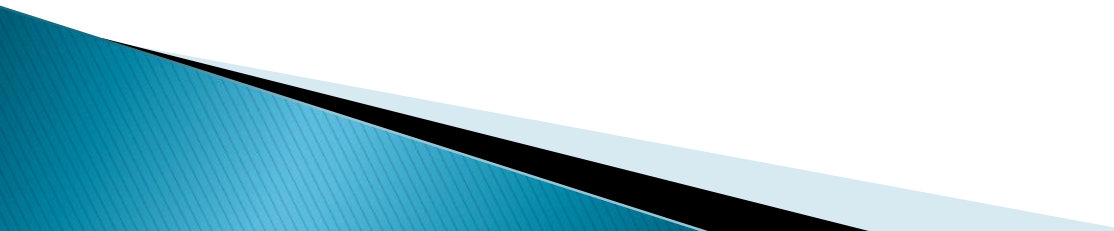
FAR Subcontracting Final Rule

- ▶ (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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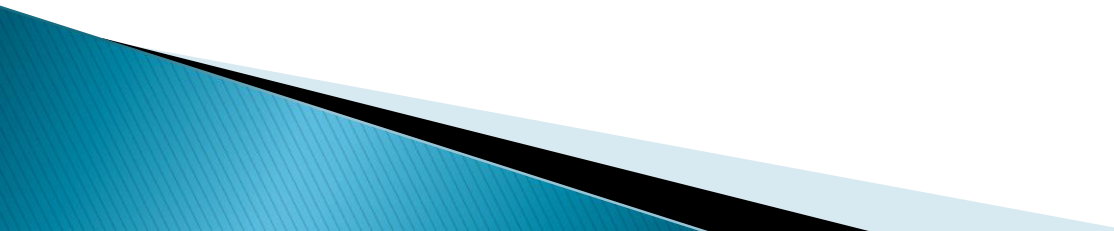
FAR Subcontracting Final Rule

- ▶ (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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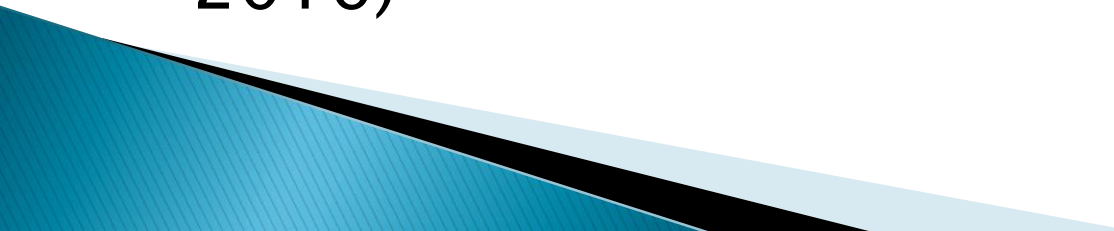
FAR Subcontracting Final Rule

- ▶ (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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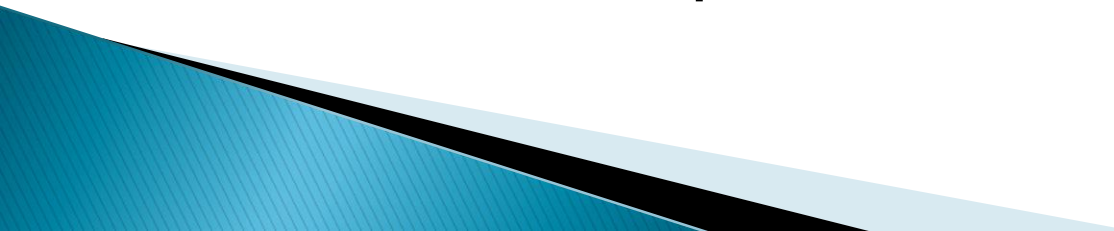
HUBZone Direct Final Rule

- ▶ 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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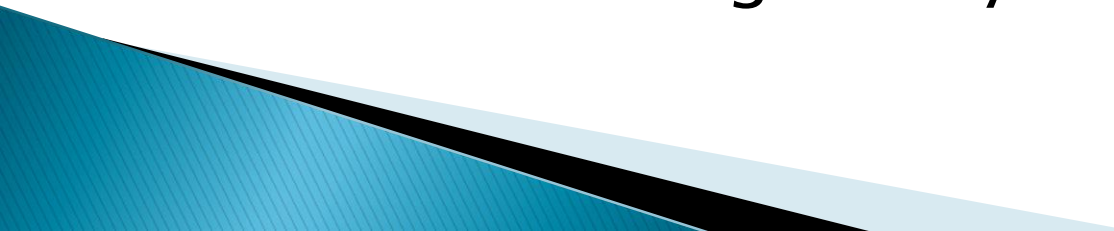
FAR Multiple Award Contracting

- ▶ Implements SBA Final Rule (78 FR 61114, October 2, 2013) implementing Section 1331 of the Jobs Act of 2010
 - ▶ Interim FAR rule (76 FR 68032, Nov. 2, 2011)
 - ▶ Reserves, partial set-asides and order set-asides under multiple award contracts
 - ▶ Proposed Rule 81 FR 88072 (December 6, 2016)
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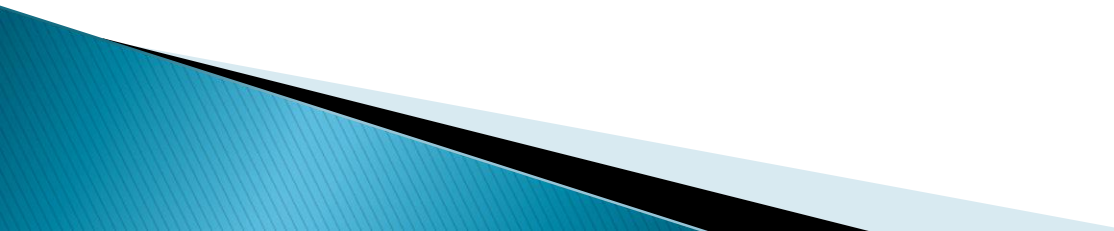
NDAA 2017

- ▶ 826 – Extends Comprehensive Subcontracting Plan until December 31, 2027
 - ▶ 1802 – GSA must issue small business goaling report without exclusions
 - ▶ 1811 – PCRs shall not review DoD acquisitions, and not considered for goaling, if Foreign Military Sale, Humanitarian, Contingency, Status of Forces Agreement or awarded AND performed outside U.S.
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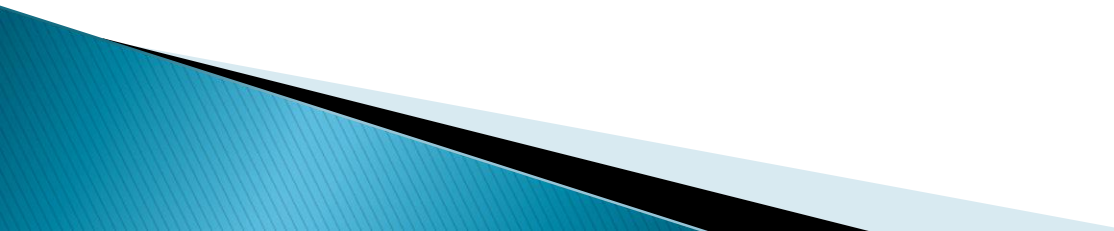
NDAA 2017

- ▶ 1812 – OSDBU responsible for reviewing credit card acquisitions in FPDS between \$3,500 and \$150,000
 - ▶ 1813 – OSDBU, Mentors, SBA, PCRs shall provide resources on compliance with regulations
 - ▶ 1814 – SBA shall provide DAU, FAI, SBDCs, PTACs list of regulatory changes
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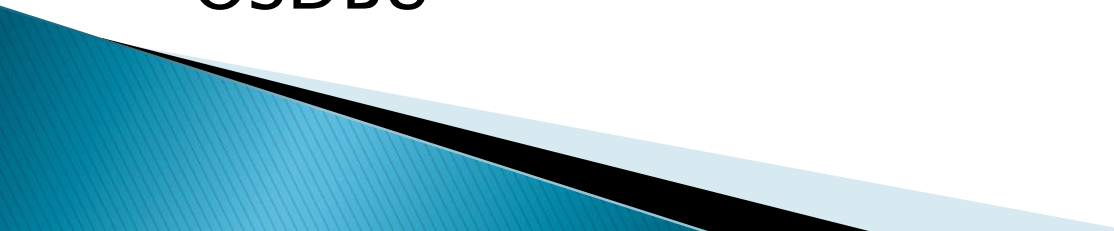
NDAA 2017

- ▶ 1821 – Failure to file subcontracting reports may be material breach and considered in past performance evaluation
 - ▶ OSDDBU responsible for reviewing Subcontracting Plans
 - ▶ SBA will issue examples of good faith compliance with Subcontracting Plan
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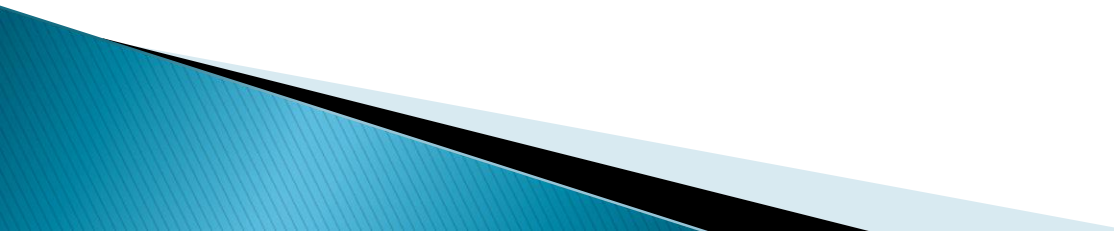
NDAA 2017

- ▶ 1822 – Pilot Program for Subcontractor to Obtain Past Performance ratings
 - Subcontractor does not have rating in CPARs, and is first tier subcontractor under subcontracting plan
 - Subcontractor applies with proposed rating
 - Submitted to OSDBU and Prime Contractor
 - If OSDBU and Prime agree, or one agrees, enter into CPARs
 - If OSDBU or Prime do not agree, or both do not respond, Subcontractor can submit rebuttal and neither favorable nor unfavorable rating is entered into CPARs
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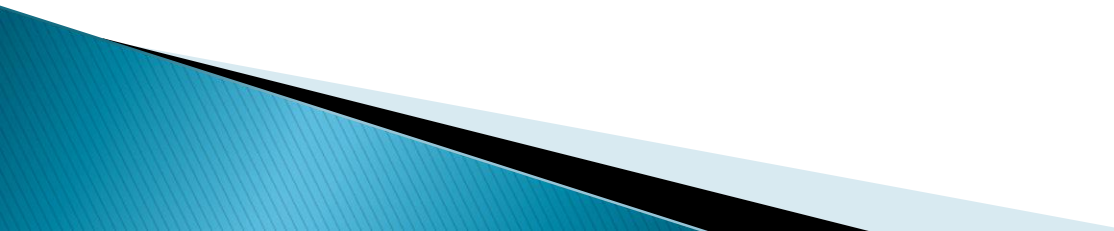
NDAA 2017

- ▶ 1822 – Subcontractor may use subcontract past performance as prime contract past performance
 - ▶ Pilot lasts 3 years from time first small business receives rating
 - ▶ GAO will issue report
 - ▶ Application to CMR, Other SBA Employee, or OSDBU
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NDAA 2017

- ▶ 1823 – DoD may request size determination for DoD Mentor Protégé, may not approve if SBA found Mentor Protégé affiliated
 - ▶ 1831 – Size Standard for Agriculture Enterprises; Subject to Rolling Review
 - ▶ 1832 – VA will use SBA definition for SDVO
 - ESOP and Surviving Spouse allowed
 - Appeals to SBA OHA
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NDAA 2017

- ▶ 1833 – Petitions for Reconsideration for previously established size standards may be filed within 30 days of final rule
 - ▶ 1834 – SBIR and STTR extended until 2022
 - ▶ 1835 – SBA and VA shall issue guidance
 - ▶ 851 – DOD report on major defense acquisition
 - ▶ 890 – GAO Study on DoD contracts awarded to minority-owned and women-owned businesses
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