



U.S. Small Business  
Administration

# GAO Protest Case Studies

**DoD Small Business Training Week 2018**  
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# Rand Corp. Analysis: Assessing Bid Protests of DOD Procurements

[Free e-book](#) (2018)

- More than half of the protests at GAO and COFC are from self-identified small businesses
- Small business contracts represent only 15–20 percent of total contract dollars
- “Loser-pays” pilot program for DoD *excludes* businesses with annual revenues under \$250 million (Section 827 of the FY 2018 NDAA)
- Rand’s ideas:
  - require all protests at GAO to be filed through legal counsel
  - provide legal assistance to small businesses—perhaps through the Small Business Administration

# GAO Final Rule on Bid Protest Regulations

[83 FR 13817](#) (April 2, 2018)

- New electronic filing system called EPDS.
- Must use EPDS for all filings to GAO.
- \$350 filing fee for new protests.
- No small business waiver.
- No additional fee for supplemental protests.
- The threshold for protests of task orders (\$25 mil for DOD, \$10 mil for civilian) does not apply to FSS, so FSS orders can be protested at any dollar amount.
- For stay overrides, have to send override justification to GAO now.

# Javits-Wagner-O'Day Act

[Goodwill Industries of the Valleys; SourceAmerica](#), B-415137, Nov. 29, 2017

- Facts: Custodial services at the Charlottesville, Va. Courthouse are on the AbilityOne procurement list. Goodwill has performed the services since 2004 through a direct contract. GSA decided to shift cleaning services over to the lessor in 2017. GSA would not tell Goodwill that the lessor would use Goodwill for cleaning services.
- Issue: Does the JWOD Act require GSA to either contract directly with Goodwill or direct the lessor to subcontract to Goodwill?
- Application Regulation:  
Contracting activities procuring services which have included within them services on the Procurement List shall require their contractors for the larger service requirement to procure the included Procurement List services from nonprofit agencies designated by the [AbilityOne Commission].  
41 C.F.R. § 51-5.2(e),

# Javits-Wagner-O'Day Act

[Goodwill Industries of the Valleys; SourceAmerica](#), B-415137, Nov. 29, 2017

- Held: There is no exception to JWOD for leases. GSA must enter into a direct contract for custodial services with an AbilityOne contract, or modify its lease to direct subcontract performance of the custodial services consistent with the JWOD Act.
- “[T]he plain language of the JWOD Act and its implementing regulations provides no exception for leases. Rather, the language of the Act broadly applies to all procurements that are conducted by ‘[a]n entity of the Federal Government’--with the only exception to the Act’s mandatory source requirements being applicable to acquisitions from Federal Prison Industries, Inc.”

# Small business set-aside Rule of Two

[Synchrogenix Information Strategies, LLC](#), B-414068.4, Sept. 8, 2017

- Facts: FDA set aside an IT services contract for small businesses. Two small business submitted offers, and the agency made award. Afterward, the other offeror filed a GAO protest. During corrective action, the protestor was acquired by a large business. For corrective action, the agency required that offerors submit new size certifications.
- Issue: Must the agency reconsider its set-aside decision when, after issuance of the solicitation, only one small business offeror remains?
- Application Regulation: FAR 19.502-2, small business Rule of Two

# Small business set-aside Rule of Two

[Synchrogenix Information Strategies, LLC](#), B-414068.4, Sept. 8, 2017

- Held: The agency is not required to revisit its set-aside decision if circumstances change after issuance of the solicitation. Even if only one small business offeror remains, the agency may make award if there is a fair market price.
- “[The agency’s market research was conducted prior to the issuance of the solicitation, and the agency concluded it had a reasonable expectation that offerors would be received from two or more small businesses. The fact that, during the course of the procurement, one of the two small business offerors is no longer capable of submitting a revised proposal, does not mean the procurement should be viewed as a de facto sole-source procurement. “

# Set-asides under the non-manufacturer rule

[AeroSage, LLC](#), B-414640, B-414640.3, Jul 27, 2017

- Facts: DLA set aside 11 of 39 VA CLINs for SDVOSBs, but solicited the remainder for full-and-open competition. DLA found that, for sites that were more than 100 miles from a small-business refinery, an SDVOSB would not be able to provide a product of a small business.
- Issue: Does the nonmanufacturer rule—which requires the awardee of a small business set-aside to provide the product of a small business—apply to a fuel contract?
- Application Regulation: 13 C.F.R. § 121.406(b)(3), application of the nonmanufacturer rule



# Set-asides under the non-manufacturer rule

[AeroSage, LLC](#), B-414640, B-414640.3, Jul 27, 2017

- Held: The nonmanufacturer rule applies because the solicitation uses a supply NAICS code, 324110, Petroleum Refineries. The agency is not required to seek a waiver of the nonmanufacturer rule. Because the protestor could not meet the nonmanufacturer rule, the protestor was not an interested party to challenge DLA's set-aside decision.
- “[T]he nonmanufacturer rule applies to this procurement, meaning that a prospective SDVOSB offeror that is not a refinery, such as AeroSage, must offer the product of a small business refinery.”

# NAICS codes of the offeror

[Veterans Electric, LLC](#), B-413198, Aug 26, 2016

- Facts: The VA set aside a contract for constructions services to upgrade electric service at Wood National Cemetery in Milwaukee. The requirement was assigned NAICS code 238210, Electrical contractors, with a size standard of \$15 million. The awardee, Architectural Consulting Group (ACG) does not have NAICS code 238210 in its SAM profile.
- Issue: Is the offeror of a small business set-aside required to certify to the NAICS code in the solicitation in order to receive award?
- Application Regulation: FAR 19.102(b), small business size representation

# NAICS codes of the offeror

[Veterans Electric, LLC](#), B-413198, Aug 26, 2016

- Held: There is no requirement to certify to the specific NAICS code in the solicitation. The offeror can be eligible for award by certifying as small for the particular size standard.
- “We are provided no basis to conclude that the lack of a particular NAICS code means that ACG lacks the technical experience required by the solicitation. ”

# Certificate of Competency referrals

[Sea Box, Inc.](#), B-414742, Sep 6, 2017

[MicroTechnologies, LLC](#), B-414670,B-414670.2, Aug 1, 2017

[Competitive Range Solutions, LLC](#) B-413104.10, Apr 18, 2017

- Facts: In Solicitation #1, GSA required that the documentation for relocatable simulator shelters be accredited as SECRET, open storage. The small business offeror did not submit a statement of a SECRET rating.
- In Solicitation #2, the offeror's proposal did not demonstrate the ability to expand domestic wireless service for the Navy.
- In Solicitation #3, NIH used a two-stage proposal evaluation. The small business offeror was eliminated because its proposal did not show capabilities in health-related missions.
- Issue: Does exclusion of the small business offeror from further consideration require referral to the SBA for a certificate of competency (COC) review?
- Application Regulation: 13 C.F.R. § 125.5(a)(2)(ii), referral to SBA upon refusing to consider a small business based on a non-comparative basis for a responsibility-type evaluation factor.

# Certificate of Competency referrals

[Sea Box, Inc.](#), B-414742, Sep 6, 2017

[MicroTechnologies, LLC](#), B-414670, B-414670.2, Aug 1, 2017

[Competitive Range Solutions, LLC](#) B-413104.10, Apr 18, 2017

- Held: In solicitation #1, the requirement for security accreditation is not responsibility-related, and no referral to SBA is required.
- In solicitation #2, a determination based on failure to submit required information is not a responsibility determination. No SBA referral is required.
- In solicitation #3, the requirement for capability in health-related missions is responsibility related. Before rejecting the proposal in a two-phase evaluation, the agency must refer the matter to SBA for a COC determination.

# 8(a) acceptance, adverse impact rule

[SKC, LLC](#) B-415151: Nov 20, 2017

[SKC, LLC v. U. S.](#), No. 17-1982C, March 14, 2018

- Facts: SKC received a five-year \$50 million facility support services contract as a small business set-aside from the Defense Intelligence Agency (DIA). While DIA changed its acquisition strategy, it awarded SKC a two-year bridge contract. While SKC was performing the bridge contract, DLA decided to offer the requirement to SBA's 8(a) program for a sole-source to an Alaska Native Corporation for a three-year, \$20 million contract.
- Issue: Was SBA required to perform an adverse impact analysis before accepting the contract into the 8(a) program?
- Application Regulation: 13 C.F.R. § 124.504(c), adverse impact on incumbent small businesses.

# 8(a) acceptance, adverse impact rule

[SKC, LLC](#) B-415151: Nov 20, 2017

[SKC, LLC v. U. S.](#), No. 17-1982C, March 14, 2018

- Held: SBA reasonably determined that the 8(a) offer was for a new contract. SBA does not consider the value of a bridge contract when determining whether an offeror procurement is a bridge contract. Instead, SBA compares the long-term contract to the offer.
- “[W]e will accept the SBA’s interpretation of its own regulations unless that interpretation is not reasonable.”
- “An agency’s interpretations of its own regulations are entitled to controlling weight unless the court can conclude that it is plainly erroneous or inconsistent with the regulation.”

# 8(a) acceptance, sole-source award

[GOV Services, Inc.](#), B-414374, May 11, 2017

- Facts: During preparation to compete the requirement for janitorial services in the 8(a) program, NIH awarded a one-year sole-source bridge contract to an Alaska Native Corporation under the 8(a) program.
- Issue: Was SBA precluded from accepting a sole-source bridge contract because the agency had announced the intent to compete the long-term contract?
- Application Regulation: 13 C.F.R. § 124.506(b), no removal from competition to award on a sole-source basis to an ANC.



# 8(a) acceptance, sole-source award

[GOV Services, Inc.](#) B-414374: May 11, 2017

- Held: The long-term contract and bridge contract are different requirements. The agency did not remove the long-term contract from competition in order to award the bridge contract as a sole-source award. The sole-source award is a “new requirement” under SBA’s regulations because its value is more than 25 percent less than the requirement offered to SBA for competition.

# HUBZone contracts, parity

[JRS Staffing Services](#) B-414630, B-414630.2: Jul 28, 2017

- Facts: The BOP awarded a HUBZone sole-source contract for life connection program facilitation. A WOSB had submitted a capability statement during market research and protested the award.
- Issue: Where the agency finds one WOSB and one HUBZone to meet its requirements, can the agency award the contract as a HUBZone sole-source award?
- Application Regulations: FAR 19.1306, HUBZone sole-source awards. FAR 19.203(a), small business program parity.

# HUBZone contracts, parity

[JRS Staffing Services](#) B-414630, B-414630.2: Jul 28, 2017

- Held: The agency reasonably used the HUBZone sole-source authority after considering the results of market research and the agency's goaling progress.
- "The record establishes that, while BOP considered the results of its market research, the agency's decision to use the HUBZone program was based primarily on the agency's lack of progress in meeting its HUBZone goals. BOP had spent only 0.75 percent of its acquisition dollars on HUBZone small business concerns, well short of its 3 percent goal. At the same time, the agency had spent 7.15 percent of its acquisition dollars on WOSBs, which was in excess of its 5 percent goal."

# SDVOSB Rule of Two

[Walker Development & Trading Group, Inc.](#) B-414365, May 18, 2017

- Facts: The VA issued an SDVOSB set-aside RFQ for mobile cardiac outpatient telemetry devices. SBA had issued a nonmanufacturing rule class waiver for the applicable NAICS code, 334510, electromedical and electrotherapeutic apparatus manufacturing.
- Issue: Where SBA has waived the nonmanufacturer rule, does the agency need to consider compliance with the limitations on subcontracting when deciding whether to issue a set-aside?
- Application Regulation: 13 C.F.R. § 121.406(a), compliance with the limitations on subcontracting *or* the nonmanufacturer rule.

# SDVOSB Rule of Two

[Walker Development & Trading Group, Inc.](#) B-414365: May 18, 2017

- Held: Where SBA has waived the nonmanufacturer rule, a firm can supply the product of any size business. The offeror is not required to meet any limitations on subcontracting.

# SDVOSB Rule of Two (cont.)

[AeroSage LLC](#), B-414314, B-414314.2: May 5, 2017

- Facts: During market research for fuel delivery at the Milwaukee VA Medical search, DLA found two SDVOSBs owned by the same individual. DLA issued a small-business set-aside solicitation, rather than an SDVOSB set-aside.
- Issue: Is the Rule of Two satisfied where both firms are owned by the same individual?
- Application Regulation: 38 U.S.C. § 8127, the VA Rule of Two.

# SDVOSB Rule of Two (cont.)

[AeroSage LLC](#) B-414314, B-414314.2: May 5, 2017)

- Held: If the only two potential SDVOSB offerors are co-owned, the agency can reasonably determine that there is a lack of price competition. Because the Rule of Two requires that award be made at a fair and reasonable price, the agency can determine that there is not a reasonable expectation of receiving a reasonable price.
- “The record shows that through reasonable market research, the contracting officer identified only two SDVOSBs that she reasonably expected to submit a quotation in response to the solicitation. The record further shows that she documented concern that due to their common ownership (and the fact that the principal and negotiator for both firms is the same individual), these two firms essentially would be competing against each other. Thus, she decided that adequate price competition would not occur and, therefore, there was not a reasonable expectation that award could be made at a fair and reasonable price.”

# Recent past performance decisions

- Past performance evaluation is not required to be an element of an LPTA solicitation. Past performance will be evaluated as a matter of responsibility. [\*Data Monitor Systems, Inc.\*](#), B-415761, Mar. 6, 2018.
- Unless the solicitation specifically requires consideration of affiliates' past performance, the agency is not required to consider the past performance of an ANC's parent or sister companies. [\*Eagle Eye Electric, LLC\*](#), B-415562, B-415562.3, Jan. 18, 2018.
- An agency can limit its consideration to past performance of a joint venture member that was similar to the size, content, and complexity of the agency's requirements. [\*AbacusSecure LLC\*](#), B-415175, B-415175.2, B-415175.3, B-415175.4: Dec 6, 2017
- An agency can seek past performance references other than those listed in a proposal. [\*Fattani Offset Printers\*](#), B-415308, Nov. 20, 2017.



# Recent past performance decisions (cont.)

- The affiliate sister company must commit to provide resources to the offeror's performance, if the agency is going to consider the past performance of the affiliated firm. [Language Select LLP](#), B-415097.2, Nov 14, 2017.
- References provided by a company with shared ownership and control can be disregarded based if the information "lacked credibility." [PacArctic, LLC](#), B-413914.3, B-413914.4, May 30, 2017.



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