

# Small Business Regulation and Legislation Update

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# Pending FAR Rules

- ▶ Similarly Situated Entities/Limitations on Subcontracting/Non-Manufacturer Rule Proposed Rule
- ▶ Joint Venture Proposed Rule
- ▶ Multiple Award Contracting Final Rule
- ▶ Part 19 and Contracts Awarded and Performed Outside the U.S. Proposed Rule
- ▶ Lower Tier Subcontracting Proposed Rule

# Pending SBA Rules

- ▶ LOS adjustments, order set asides, posting notice of bundling, PCR review of DOD overseas contracts, double credit for local area small business set asides, examples of bad faith in subcontracting proposed rule
- ▶ SDVO Ownership and Control Proposed Rule – Comments due March 30 (83 FR 4005)
- ▶ WOSB Certification Proposed Rule
- ▶ HUBZone Proposed Rule

# VA OHA Protests and Appeals Final Rule

- ▶ Protests of CVE eligibility and appeals of denials or cancellations of inclusion in the CVE database
- ▶ Effective October 1, 2018
- ▶ Implements portion of Section 1832 of the NDAA 2017
- ▶ Only applies to VA
- ▶ Non-VA SBA SDVO protest and appeal process remains
- ▶ 83 FR 13626 (March 30, 2018)

# SBA Direct Final Rule

- ▶ 83 FR 12849
- ▶ March 26, 2018
- ▶ Effective May 25, 2018 unless significant adverse comment is received by April 25, 2018

# SBA Direct Final Rule

- ▶ § 121.103 How does SBA determine affiliation?
- ▶ (h)(3)(ii) Two firms approved by SBA to be a mentor and protege under § 125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protege qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of §§ 124.513 (c) and (d), §§ 125.8(b) and (c), §§ 125.18(b)(2) and (3), §§ 126.616(c) and (d), or §§ 127.506(c) and (d) of this chapter, as appropriate.

# SBA Direct Final Rule

- ▶ **§ 121.404 When is the size status of a business concern determined?**
- ▶ **(g) However, the following exceptions apply to this paragraph (g):**

# SBA Direct Final Rule

- ▶ § 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?
- ▶ (d) The performance requirements (limitations on subcontracting) and the nonmanufacturer rule do not apply to small business set-aside acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101).

# SBA Direct Final Rule

- ▶ § 125.6 What are the prime contractor's limitations on subcontracting?
- ▶ (f) *Inapplicability of the limitations on subcontracting.* The limitations on subcontracting do not apply to:
  - ▶ (1) Small business set-aside contracts with a value that is greater than the micro-purchase threshold but less than or equal to the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101); or
  - ▶ \* \* \* \* \*

# SBA Direct Final Rule

- ▶ **§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?**
- ▶ **(e) (1) However, the following exceptions apply to this paragraph (e)(1):**
- ▶ **§ 125.22 When may a contracting officer set-aside a procurement for SDVO SBCs?**
- ▶ **(a) The contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to § 125.21.**

# SBA Direct Final Rule

- ▶ § 125.23 When may a contracting officer award sole source contracts to SDVO SBCs?
- ▶ (a) None of the provisions of §§ 125.21 or 125.22 apply;
- ▶ (b) (1) \$ 6,500,000 for a contract assigned a manufacturing NAICS code, or
- ▶ (2) \$ 4,000,000 for all other contracts;

# SBA Direct Final Rule

- ▶ Amend § 126.200 by removing the words "unconditionally and directly" in paragraph (b)(1)(i).
- ▶ 51% ownership by U.S. citizens

# SBA Direct Final Rule

- ▶ § 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?
  - ▶ (h) Recertification.
  - ▶ (1) However, the following exceptions apply to this paragraph (h)(1):
- ▶ § 126.612 When may a CO award sole source contracts to qualified HUBZone SBCs?
  - ▶ (b)(1) \$ 7,000,000 for a contract assigned a manufacturing NAICS code, or
  - ▶ (2) \$ 4,000,000 for all other contracts.

# SBA Direct Final Rule

- ▶ Amend § 126.616 by removing the words "HUBZone protege" and adding in their place the words "HUBZone SBC" in paragraph (d)(2).
- ▶ § 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?
- ▶ (h)(1) However, the following exceptions apply to this paragraph (h)(1):

# NDAA 2018 Section 846

- ▶ Procurements under e-commerce portal shall not exceed SAT
- ▶ Commercial product means commercially available off-the-shelf items, but does not include services
- ▶ 3 years after contract is awarded, GAO shall report on, among other things, the effect of the program on agencies ability to meet SBC goals

# NDAA 2018

- ▶ Section 846 – Procurement through Commercial e-Commerce portals
  - Phase I – 90 Days of enactment – Implementation Plan
  - Phase II – 1 year after submission of plan – report
  - Recommendations for changes or exemptions
  - Impact on MAS, SB set-asides, other preferences
- ▶ Phase III – 2 years after implementation plan – issue guidance on use
- ▶ Additional Implementation Phases – selection of participating agencies, award of contracts

# NDAA 2018 Section 846

- ▶ A procurement of a product made through a commercial e-commerce portal under the program is deemed to be an award of a prime contract for purposes of the goals established under the Small Business Act if the purchase is from a supplier that is a small business concern.
- ▶ Nothing in this section shall be construed as limiting the authority of a department or agency to restrict competition to small business concerns.

# NDAA 2018

- ▶ Section 805 – Simplified Acquisition Threshold increased to \$250,000
- ▶ Section 806 – Micro–Purchase Threshold increased to \$10,000
- ▶ Section 1702 – inserts SAT and MPT into Section 15(j) of the Small Business Act (the statutory SB reserve)
  - Replaces dollar amounts

# NDAA 2018

- ▶ LOS and NMR will not apply to small business set-asides below \$250,000
- ▶ Section 1702 also defines prime contract, for purposes of the Small Business Act, as a contract or contractual action entered into by the Federal Government to obtain supplies, materials, equipment, or services of any kind.
- ▶ (j) Small business reservation.(1) Each contract for the purchase of goods and services that has an anticipated value greater than MPT but not greater than SAT shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

# NDAA 2018

- ▶ Section 1701 (HUBZone)
- ▶ Uses state median income to calculate status for nonmetropolitan county
- ▶ Base Closure Area will remain HUBZone for at least 8 years
- ▶ Re-designated area eligible for 3 years
- ▶ State governors may petition for HUBZone designation
- ▶ HUBZone application review within 60 days of complete application

# NDAA 2018 – Section 1701

- ▶ HUBZone recertification no later than every 3 years
- ▶ Program Examination – if ineligible, firm has 30 days to show qualified, may not compete for HUBZone contracts during that time
- ▶ Map will not change until January 1, 2020, then will be updated every 5 years
- ▶ SBA must annually report on whether HUBZone is promoting economic development in distressed areas

Everything except map freeze, will be effective January 1, 2020

# Section 809 Report, Volume 1 of 3 (January 2018) Section 6

- ▶ While critical of DOD's focus on dollars and contract awards to small business for goaling purposes, the panel does not recommend changes to goaling for DOD. The panel recognizes the importance of products and services to DOD that do not directly enhance warfighting capabilities and will outline alternative means for companies offering such support to sell to DOD in a future report.
- ▶ Prioritize working with SBCs that enhance warfighting capability
- ▶ Consolidate organization of DOD small business programs
- ▶ Better outreach and communication and clear points of entry (PTACs)
- ▶ Enhancements to SBIR, RIF, consortia and technology accelerators
- ▶ Allowing firm that outgrows size standard to remain small for three additional years unless acquired

# American Relocation Connections

- ▶ Protest that BPA above the SAT under the FSS must be set aside for small business
- ▶ Regulatory implementation of Small Business Act, rule of two does not apply to FSS
- ▶ *Kingdomware* involved VA Act
- ▶ Nothing in *Kingdomware* addresses FAR Part 19, 8.4 or SBA's rules
- ▶ CO has the discretionary authority to set aside an order against the FSS, but is not required to do so
- ▶ B-416035, May 18, 2018

# Category Management

- ▶ Agencies have “Spend Under Management” goals and “Best in Class” goals
- ▶ Agencies still have to meet STATUTORY small business and socioeconomic prime contracting goals
- ▶ FY 2017, 43% BIC dollars to SBCs
  - 25.7% SUM dollars to SBCs
  - 75% of BIC contractors are SBCs
- ▶ \$22 Billion BIC spending out of \$442 Billion

# Joint Ventures

- ▶ Exception to affiliation for certain joint ventures. 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)(i)

# Joint Ventures

- ▶ 2 Mentor Protégé Programs: 8(a) BD and All Other Small Businesses
- ▶ Joint Venture Agreement must be approved by SBA prior to award of an 8(a) contract
- ▶ All Mentor Protégé Relationships will be Approved by the Office of Business Development
- ▶ 81 FR 48558 (July 25, 2016, effective August 24, 2016)

# Joint Ventures

- ▶ joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.
- ▶ This means that a specific joint venture entity generally may not be awarded more than three contracts over a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes.
- ▶ Once a joint venture receives one contract, SBA will determine compliance with the three awards in two years rule for future awards as of the date of initial offer including price. As such, an individual joint venture may be awarded more than three contracts without SBA finding general affiliation between the joint venture partners where the joint venture had received two or fewer contracts as of the date it submitted one or more additional offers which thereafter result in one or more additional contract awards.

# Joint Ventures

- ▶ For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture:
  - ▶ Must be in writing and must do business under its own name;
  - ▶ must be identified as a joint venture in the System for Award Management (SAM);
  - ▶ may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (i.e., the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture).

# Joint Ventures

- ▶ The same two (or more) entities may create additional joint ventures, and each new joint venture entity may be awarded up to three contracts in accordance with this section.
- ▶ At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them.
- ▶ For purposes of this paragraph (h), contract refers to prime contracts, and any subcontract in which the joint venture is treated as a similarly situated entity as the term is defined in part 125 of this chapter.
  - 13 CFR 121.103(h)

# Joint Ventures

- ▶ SF 295
- ▶ Purchases from a corporation, company or subdivision that is an affiliate of the prime/subcontractor are not included in this report
- ▶ If there is no exception from affiliation, then the JV counts as an affiliate. If there is an exception based on the mentor-protégé program and the appropriate JV program regulations, we do not consider the JV to be affiliated with its large partner.

# Contact Information

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- ▶ Questions?