

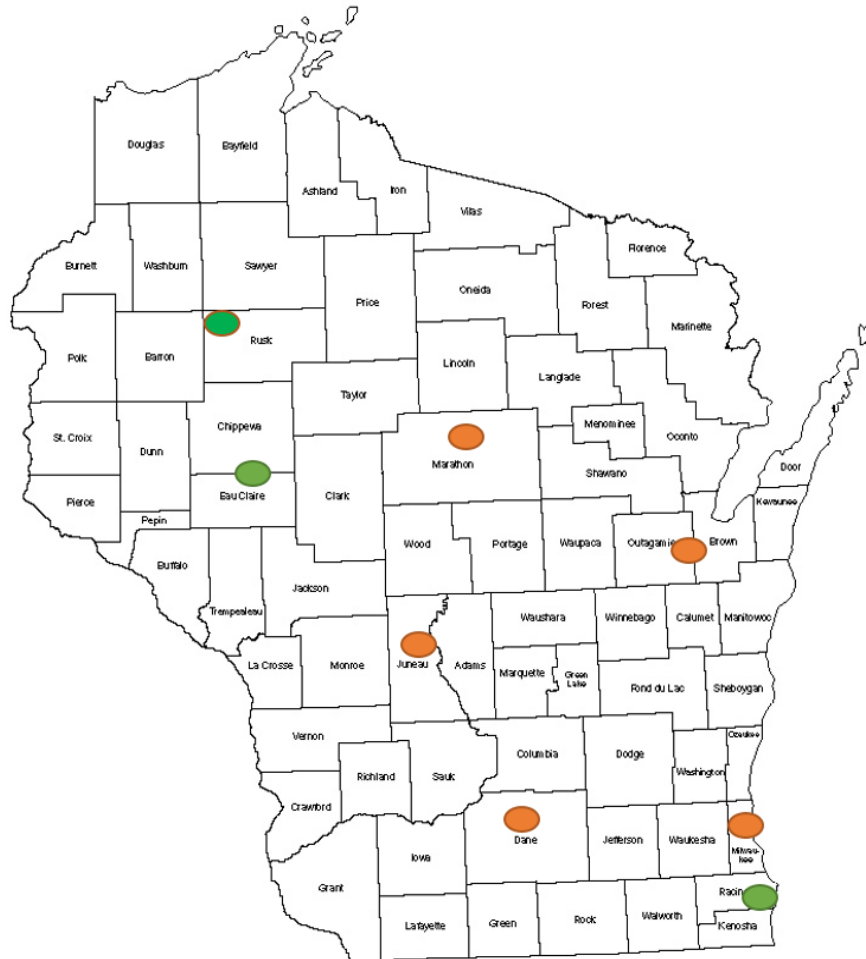


A Procurement Technical Assistance Center (PTAC)



# RECENT REGULATORY CHANGES FOR SMALL BUSINESS — A WEBINAR October 27, 2016





## LOCATIONS:

- **Primary office – Milwaukee** - Technology Innovation Center
- **Staffed Satellite offices**
  - Madison** (FEED – Food Enterprise & Economic Development / MEC – Madison Enterprise Center)
  - Camp Douglas** (Juneau County Economic Development Corporation)
  - Wausau** (Wausau Region Chamber of Commerce)
  - Appleton** (Fox Valley Technical College)
- **Active Partnerships**
  - Racine** – LaunchBox
  - Eau Claire** - Western Dairyland
  - Ladysmith** – Indianhead Community Action

## MY ACCOUNT

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### Current Opportunities [View All](#)

- 1. Olbrich Botanical Gardens Education Center and Production Greenhouse Construction - September 21, 2016** Architectural Consulting Services for Olbrich Botanical Gardens Education Center and Production Greenhouse
- 2. Milwaukee County Zoo planning \$44.6 million in exhibit upgrades - September 1, 2016** The Milwaukee County Zoo plans to spend about \$44.6 million on exhibit upgrades and construction projects over the next five years, according to an economic impact study completed this summer by a University of Wisconsin-Milwaukee economics professor. The study does not say how the projects will be paid for.  
  
 The study, which was commissioned by the zoo to measure its annual economic impact on the four-county Milwaukee metropolitan area, includes a rough outline of planned construction projects through 2021.
- 3. Milwaukee County - Acquisition and Development of a Commercial/Building - August 15, 2016**  
 Milwaukee County  
 Request for Proposals  
 Acquisition and Development of a Commercial/Industrial Building at 9150 Watertown Plank Road, Wauwatosa, WI 53226  
 (Taxkey # 3729999017)  
 RFP # 7131  
 Issue Date: August 4, 2016

### Latest Newsletters [View All](#)

**WPI Acquisition Alert**  
September 6th 2016

October 31, 2016

### Latest Presentations [View All](#)

**A Winning Approach to Contract Award: Preparation, Lead Generation, Follow-Up and Closing The Deal**

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# RECENT REGULATORY CHANGES FOR SMALL BUSINESSES – A WEBINAR

October 27, 2016

William E. Hughes

Emily A. Constantine

# Introduction

- Many procurements are set aside in whole or in part for “small business concerns”
- Eligibility as a “small business concern” is determined under SBA’s size regulations, 13 CFR part 121.
- SBA recently issued rules implementing the 2013 National Defense Authorization Act, which will impact these rules.
- Final rule regarding FAR changes implementing SBA regulatory changes issued on July 14, 2016

# Understanding Affiliation

- Identifying “affiliates” is critical in identifying whether an entity or concern meets the requirements for a small business concern eligible for SBA assistance
- The focus is on the power to control and involves a fact-intensive analysis of ownership, management, and contractual relations
- Size is determined by evaluating measures such as receipts and employees of both foreign and domestic, as well as for-profit and not-for-profit, affiliates

# Presumption of Affiliation

- Affiliation can also be found based on “identity of interest”
- When firms or individuals have “identical or substantially identify business or economic interests,” they can be “treated as one party with such interests aggregated”
- This presumption can be overcome, however, by showing that these interests are separate

# New Rule Regarding Affiliation and Identity of Interest

- The new rule created bright-line tests for determining identity of interest based on either relationships or economic dependence
- It did not fundamentally alter standing practice; rather, it codified precedent set and followed by the Office of Hearings and Appeals

# Personal/Familial Relationships

- If the firms are owned or controlled by a married couple, individuals joined by civil union, parents, children, or siblings, they are presumed to have an identity of interest if they conduct business with each other
- Examples includes “subcontracts or joint ventures or share or provide loans, resources, equipment, locations or employees”
- This presumption can be rebutted by establishing “a clear line or fracture between the concerns”
- Other types of relationships (e.g., cousins, grandparents) do not create such a presumption

# The 70% Rule

- An identity of interest may also be presumed on the basis of economic dependence if the concern derived at least 70% of its receipts from another concern over the prior three fiscal years
- This presumption can be overcome by showing that the concern in question is not, in fact, wholly dependent on the other
- A business concern owned and controlled by (or a wholly-owned entity of) an Indian Tribe, ANC, NHO, or CDC is not considered to be an affiliate of another concern owned by that entity based only on the existence of a contractual relationship

# The 70% Rule: Overcoming the Presumption Example

- If the firm in question is fairly new, for example, and only has two or three contracts—one of which is greater than 70% of its receipts—this presumption will likely be rebutted (absent other evidence of affiliation or identities of interest) because the firm has been in business for only a brief amount of time and presumably has not had the opportunity to secure a large number of contracts

# Affiliation and Joint Ventures: Definition

- “A 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.”

# Affiliation and Joint Ventures

- Generally, entities in a joint venture will be considered affiliates if any one of them seeks financial assistance from the SBA
- There is an exception, however, if the joint venture submits an offer as a small business for federal procurement and each individual business concern is considered small under the applicable standard related to the NAICS code assigned to that contract
- The new rule eliminated the requirement that the proposed procurement be bundled or large

# Affiliation and Joint Ventures: Old Rule vs. New Rule

- The new rule eliminated the requirement that the proposed procurement be bundled or large
- Previously, the procurement must have been considered bundled or consolidated or, if not bundled/consolidated, must have been valued at least \$10 million for employee-based size standards or at least half the size standard corresponding to the NAICS code assigned to the contract for receipts-based size standards

# Limitations on Subcontracting

- Key Change: Similarly Situated Entities
  - Shift from concept of a required percentage of work to be performed by a prime contractor to the concept of limiting a percentage of the award amount to be spent on subcontractors
  - Only first-tier contractors may be “similarly situated”
  - Similarly-situated independent contractors may count towards applicable limitations on subcontracting
- Changes to formula for calculating the limitations on subcontracting
  - Now based on contract value
  - No major modifications to percentage limitations
- “Mixed contract”
  - Contracting officer must select the “single NAICS code which best describes the principal purpose of the product or service being acquired.”
  - Examples in rule
- Exemptions

# Limitations on Subcontracting

- New concept: Similarly Situated Entities
  - Similarly situated = participant of the same set-aside program that qualified as the prime
  - Must also qualify as small for the subcontract under size-standard for prime contract
- Amounts paid to similarly situated entities are not considered subcontracts
- For purposes of determining whether the prime/sub performed the required amount of work, any work that a similarly situated first-tier subcontractor subcontracts will be regarded as subcontracted to a non-similarly situated entity
- Independent contractors

# Non-Manufacturer Rule

- NMR = exception to limitation on subcontracting rules for certain contracts
- 2016 NDAA clarified that NMR applies only to contracts that are principally for supplies
  - Simplifies bidding on contracts for services and construction
- Waivers typically granted before issuance of solicitation
- Post award waivers may be awarded in some circumstances; notice required
- Contracts between \$3.5-\$150k exempt
- Applicability to commercially available software

# Subcontracting Plans

- Prime contractors must provide written notice to a subcontractor of intent to identify the small business by name as a potential subcontractor in a bid, proposal, offer, bid, or subcontracting plan
- Contracting agency must collect, report, and review data regarding compliance with goals and objectives of subcontracting plan
- Implements reporting requirements
- Failure to provide a written corrective action plan after receiving a marginal or unsatisfactory rating for its subcontracting plan performance or failure to make a good faith effort to comply with its subcontract plan constitutes a material breach that will be considered in past performance evaluations

# Upcoming WPI Events – Acquisition Hour Webinars

- November 8, 2016 – [Contract Closeouts: Preparing for a Smooth Ending](#) - Presented by Mark Dennis, Consultant, La Crosse River Consulting
- November 9, 2016 – [Export Controls – ITAR and Associated Requirements](#)
- November 15, 2016 – [The New Small Mentor Protégé program –the SBA Perspective](#) – Presented by Shane Mahaffy, Lead Business Opportunity Specialist, U.S. Small Business Administration
- November 29, 2016 – [The New Small Mentor Protégé Program – A Lawyer’s Perspective](#) - Presented by Emily A. Constantine, Attorney, Husch Blackwell LLP
- November 30, 2016 – **Updates on the HUBZone program** – Presented by Shane Mahaffy, Lead Business Opportunity Specialist, U.S. Small Business Administration
- December 6, 2016 – [Preparing for CPSR Audit](#) – Presented by Phil Bail, Principal, Phil Bail & Associates
- December 7, 2016 – [10 Issues in Federal Government Construction Projects](#)

# Upcoming WPI Events – [premarketplacewi.org](http://premarketplacewi.org)

- **Pre-MARKETPLACE 2016 Series - Winning Approach to Contract Award: Preparation, Lead Generation, Follow-Up and Closing The Deal**
  - *November 3<sup>rd</sup>, 2016 - [Wauwatosa- Technology Innovation Center \(Previously Milwaukee County Research Park\)](#) 10437 Innovation Dr. Wauwatosa, WI 53226*

# Other Upcoming WPI Events

- [Federal Industry Briefing with GSA, EPA, NAVFAC, USACE and US SBA – hosted by the SAME Lake Michigan and Chicago Posts](#) – November 3, 2016 – Highland Park, IL
- [Post-Election Federal Market Insights - Where's the Money?](#) – November 15<sup>th</sup>, 2016 – Milwaukee – Presented by Capstone National Partners
- [What it Takes to WIN – Opportunities with the Department of Defense for Small Business Manufacturers](#) – November 17<sup>th</sup>, 2016 – Milwaukee – Presented by Jean Polka and Ken Kotloski, WPI
- [End of Year Federal Contractor Update](#) – January 17, 2017 - Milwaukee

# Other Upcoming Events



[www.SBEacademy.com](http://www.SBEacademy.com)



[www.MarketplaceWisconsin.com](http://www.MarketplaceWisconsin.com)



# QUESTIONS?

# Continuing Professional Education



CPE Certificate available, please contact:

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# SURVEY



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