

The Federal Small Business Program

Year-In-Review 2017

Wisconsin Procurement Institute (WPI) and the National
Contract Management Association (NCMA)





Looking Back...2017 In Review

1. NAICS Code Size Standards Change
2. Challenge to Small Business 8 (a) Program Fails...for now
3. VA presents “tiered evaluations” as way to insure fair and reasonable prices from SDVOSB’s and VOSB’s
4. Counting of first tier subcontractor small business awards by the prime contractor is still not part of the FAR.

1. NAICS Code Size Standards Change

- September 27, 2017 Federal Register
- SBA adopts its proposed revisions to its small business size standards – 21 new industries were created by reclassifying, combining, or splitting 29 existing industries. (refer to the Federal Register for details)
- 2017 version of the North American Industry Classification System (NAICS) – go to: <https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/table-small-business-size-standards>
- Effective Date: October 1, 2017

NAICS Study Reference Document

- SBA Report in April 2017 to The Committee on Small Business and Entrepreneurship of the Senate titled *“The First Five-Year Comprehensive Review of Small Business Size Standards Under the Small Business Jobs Act of 2010”*
- This report lays out the guidelines SBA used to set size standards to the 2017 version of NAICS
 - Faulty Premise? – In 1953, the SBA established 500 employees as the anchor size standard for manufacturing industries
 - Food for Thought - The average manufacturing establishment was home to 35.3 jobs in 2012, according to EMSI’s 2013.2 dataset.
 - Minority Entities - When firms register in SAM, they can identify themselves as minority. FPDS uses this designation when awards are made.

2. Challenge to Small Business 8(a) Program Fails...for now

The 8(a) Business Development Program is a business assistance program for small disadvantaged businesses.

- [Rothe Development, Inc. v. U.S. Department of Defense, No. 1:12-cv-00744 \(D.C. Cir. Sept. 9, 2016\)](#), Rothe challenged the Department of Defense's policy of setting aside certain procurements exclusively for 8(a) Program participants.
 - Note: Rothe Development, Inc., which is not an 8(a) participant, brought suit against the DoD, arguing that it had been improperly precluded from competing for these contracts.
- Rothe challenged the constitutionality of the 8(a) Program itself. Rothe attacked the statutory provisions establishing the 8(a) Program, claiming that the underlying 8(a) Program statute "contains a racial classification that presumes that certain racial minorities are eligible for the program," while denying such a presumption to those who are not members of those groups. Rothe argued that this classification system violated its right to equal protection under the [Due Process Clause of the Fifth Amendment](#).

Note: "[due process of law](#)" must be part of any proceeding that denies a citizen "life, liberty or property"

2. continued...Supreme Court Refuses to Hear Rothe Development Certiorari Petition

- The Rothe case was heard by the Court of Appeals for the D.C. Circuit which denied its request.
- Rothe filed a Petition for Writ of Certiorari to the U.S. Supreme Court. (a losing party files with the Supreme Court asking the Supreme Court to review the decision of a lower court)
- On October 16, 2017, The US Supreme Court decided not to Hear Rothe Development Petition Related to SBA's 8(a) Program
- As a result, the [decision of the Court of Appeals for the D.C. Circuit](#) decision stands. The statutes establishing 8(a) program are constitutional.

3. VA presents “tiered evaluations” as way to insure fair and reasonable prices from SDVOSB’s and VOSB’s

- At a December 5, 2017 National Veterans Small Business Engagement in St. Louis, the VA presented its idea of “tiered evaluations”.
- If tiered evaluations become policy, the VA will allow non small businesses to compete on some SDVOSB or VOSB setasides. If the VA doesn’t feel it can reach a fair and reasonable price with the veteran entities, it could award a contract to a non-veteran small business or to a large business that submitted a proposal if the price from one of the non-veteran businesses was determined fair and reasonable.

4. SBA Proposal To Allow 2nd Or Lower Tier Reporting of Small Business Awards

- On December 23, 2016, the SBA issued a final rule amending its regulations to implement section 1614 of the National Defense Authorization Act for Fiscal Year 2014. The rule is effective January 23, 2017
-but what exactly is this final rule: and,
- ...why isn't it part of the Federal Acquisition Regulation yet?

Section 1614 of National Defense Authorization Act of 2014

- Amended the Small Business Act so if the prime contractor has an **individual subcontracting plan** for a specific prime contract with an executive agency, the prime contractor shall receive credit towards its subcontracting plan goals for awards made to small Business entities **at any tier under the contract, to the extent reported on the subcontracting plans of its lower tier subcontractors.**

The final rule also

- Requires the prime contractor to monitor subcontractors' performance and compliance toward reaching the goals set out in these plans as well as their compliance with subcontracting reporting requirements.
- SBA is also clarifying that the size standard for a particular subcontract must appear in the solicitation for the subcontract.

Why Hasn't Implementation of Public Law 113-66, Section 1614 (c) Taken Effect?

The Federal Acquisition Regulation (FAR) Council must first open a FAR case to begin discussing how to best implement this statutory requirement into the FAR. This hasn't happened yet.

Going Forward - As this process continues, the proposed language will be posted in the Federal Register, where anyone can read, review and provide comments. The FAR Council must review and address all comments and post them in the Federal Register as a final notice with the FAR language.

Note: You can follow the FAR cases posted in the Federal Register at the following link: <https://www.regulations.gov/>.

Phil Bail & Associates Small Business Program Articles

- Diversity Gone Wild, *Contract Management*, September 2005
- Socioeconomic Programs – On the Road to Failure?, *Contract Management*, April 2006
- Missed Opportunities for Small Business, *Contract Management*, December 2006
- Federal Small Business Programs and the Small Business Act of 1953, *Contract Management*, October 2009
- The Demise of the Federal Small Business Program, January 2010, *Defense Journal*
- The Good, the Bad, the Ugly – How Congress Affects the Small Business Program, *Contract Management*, May 2014

Questions?

Ask Questions of Phil Bail & Associates through its website at philbail.com; or, by email at phil@philbail.com; or by calling (262) 573-3396

Phil Bail & Associates is a Veteran-Owned Small Business that helps contractors prepare for Contractor Purchasing System Reviews (CPSR's) and Small Business Program Audits, terminations; and equitable adjustments/claims