



U.S. Small Business
Administration

Legislative & Regulatory Update

For Small Business Government Contracting
Programs

Eric Ness, Wisconsin District Director

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Legislative Action

National Defense Authorization Act for Fiscal Year

2020 [Public Law No. 116-92 \(conference report\)](#)

- Raises the threshold for justification and approval for 8(a) Program sole-source awards to \$100 million (Sec. 823)
- Clarifies that large prime contractors may receive subcontracting credit on individual subcontracting plans for small businesses at lower tiers (Sec. 870)
- Extends DOD Mentor-Protégé program to 2026 (Sec. 872)
- Accelerates, to the fullest extent permitted by law, the payment date for prime contractors that are small business concerns or that subcontract with small business concerns, with a goal of 15 days (Sec. 873)

NDAA FY20 – general provisions (cont.)

[Public Law No. 116-92 \(conference report\)](#)

- Requires that contracting officers provide a brief explanation to unsuccessful offerors, if requested, for task or delivery orders in an amount greater than the simplified acquisition threshold and less than or equal to \$5.5 million issued under an indefinite delivery indefinite quantity contract. (Sec. 874)
- Permits the surviving spouse of a veteran with a service-connected disability rated at less than 100 percent who does not die as a result of a service-connected disability to maintain ownership status of the SDVOSB for 3 years (Sec. 876)

Legislation to Watch – passed by House and sent to Senate

- **H.R. 1615 - House-passed VA-SBA Act**
 - Transfers SDVOSB and VOSB certification to SBA, requires certification governmentwide
 - Transfer date of 2 years after enactment, with 6-month extensions
 - SBA would take on VOSB certification on a reimbursable basis for VA
 - Current SBA self-certified firms would retain self-certification for 1 year
- [H.R.4727 - Department of Homeland Security Mentor-Protege Program Act of 2019](#) - Authorizes DHS MPP

Legislation to Watch – passed by House Committee

- H.R. 5130 - Capturing All Small Business Act of 2019 – would extend employee-based average to 24 months, instead of current 12 months
- H.R. 5146 - Unlocking Opportunities for Small Businesses Act of 2019 - requires federal government contracting officers to consider past performance into account when evaluating small businesses seeking to compete on federal prime contracts.

Recent SBA and FAR Regulatory Action

Final Rule: Calculation of Average Annual Receipts

[84 FR 66561](#)

- Implements Small Business Runway Extension Act of 2019
- Calculate annual receipts using average of prior five years, instead of prior three years
- Applies to all industries with receipts-based size standards
- Includes two-year transition period (through Jan. 6, 2022) that allows firms to choose between 3-year average and 5-year average
- Does not apply to SBA business loan or disaster loan programs

Final Rule: NDAA FY16/17 & RISE Act

[84 FR 65647](#)

Set-Aside Orders Off Small Business Set-Aside Multiple Award Contracts

Sections Revised: 125.2(e)(6) and 125.2(e)(6)(i)

-Revised to reflect that agencies can now set aside orders for 8(a), HUBZone, SDVO, or WOSB firms under MACs that were set aside for small business.

- Response to FAQs:

- This will not affect already-awarded MACs.
- Going forward, offerors will know what kind of set-asides are available at the time of award and on future orders.
- Standardized rules across programs will make it easier to determine the rules that apply to orders and will make all socioeconomic categories equally attractive to contracting officers.

-Additionally revised to clarify that contracting officers can “set aside orders against Multiple Award Contracts, including contracts that were set aside for small businesses.”

- Contracting officers can still set aside orders for contracts that were not set aside for small business.

Final Rule: NDAA FY16/17 & RISE Act (cont.)

[84 FR 65647](#)

Exclusions to Limitations on Subcontracting

Section Revised: 125.6(a)(1)

- Excludes direct costs from the LOS where costs are not the principal purpose of the acquisition
- Specifically excludes following costs:
 - airline travel
 - work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910)
 - cloud computing services
 - mass media purchases
- Excludes work performed overseas on awards made pursuant to the Foreign Assistance Act of 1961 or work required to be performed by a local contractor

Final Rule: NDAA FY16/17 & RISE Act (cont.)

[84 FR 65647](#)

Determining Compliance with Limitation on Subcontracting Rules

Section Revised: 125.6(e)

Added new paragraph to limitation on subcontracting compliance regulations to:

- Clarify that contracting officers can, at their discretion, require firms to provide evidence of compliance with the limitations on subcontracting if information demonstrating compliance is not already available.
 - Contracting officers are not required to request evidence of compliance.
- Include examples of documentation that contracting officers may request.
 - List is not intended to be exhaustive.
 - Contracting officers should only ask for documentation they don't already have.

Final Rule: NDAA FY16/17 & RISE Act (cont.)

[84 FR 65647](#)

Subcontracting to a Small Business Under a Socioeconomic Set-Aside

Sections Revised: 124.503(c)(1)(v), 124.507(b)(2), 125.18(f), 125.29(c), 126.601(i), 126.801(a), 127.504(c), and 127.602

- Addresses that there might be ostensible subcontracting on a socioeconomic set-aside with a small business not qualified for the set-aside
- As part of a status protest, SBA would make determination on program participant's overreliance on a non-similarly situated subcontractor
- SBA will not find that a prime is unduly reliant where prime can demonstrate that it will meet the LOS
- Also applies to CVE protests filed at OHA

Final Rule: HUBZone Comprehensive Review

[84 FR 65222](#)

- HUBZone maps, currently frozen through 2021, will be updated every five years
- Moves to annual recertification (from three-year), effective for all HUBZone contracts for the one-year period
- Requires HUBZone status in DSBS at time of *offer* (not time of award)

Final Rule: HUBZone Comprehensive Review

84 FR 65222 (cont.)

- Requires 35% employee HUBZone residency at time of certification and recertification; “attempt to maintain” during contract performance
- Defines “attempt to maintain” HUBZone status during HUBZone contract performance as having at least 20% HUBZone employees (must be 35% at application and recertification) and recruiting HUBZone employees
- An employee who resides in a HUBZone for at least 6 months before and after time of certification continues to count as HUBZone employee as long as an employee of the firm—even if employee moves or residence no longer qualifies
- Employees temporarily living overseas in connection with performance of a contract will be considered to reside at their U.S. residence

Final Rule: HUBZone Comprehensive Review

84 FR 65222 (cont.)

- Firms that invest in HUBZones by purchasing building or entering into long-term lease are deemed to meet principal office requirement for 10 years—even if office location no longer qualifies as a HUBZone
- Includes affiliate employees in 35% and principal office calculations if no clear line of fracture between firms
- Starting January 1, applications for HUBZone certification will be processed within 60 days of a complete submission

Direct Final Rule: HUBZone Program Provisions for Governor-Designated Covered Areas

84 FR 62447

- Starting 2020, Governors may petition SBA to designate covered areas as HUBZones.
- “Covered area” means—
 - located outside of an urbanized area;
 - population of 50,000 or less; and
 - average unemployment rate is at least 120% of the average unemployment rate for US/state.
- The Governor shall, at least annually, submit data to the Administrator certifying that each Governor-designated covered area continues to meet the definition of a covered area.

Direct Final Rule: HUBZone Program Provisions for Governor-Designated Covered Areas (cont.)

84 FR 62447

- In reviewing a request for designation included in such a petition, SBA may consider—
 - **the potential for job creation and investment** in the covered area;
 - the demonstrated **interest of small business concerns** in the covered area to be designated as a Governor-designated covered area;
 - how State and local government officials have incorporated the covered area into an **economic development strategy**; and
 - if the covered area was a HUBZone before becoming the subject of the petition, the **impact** on the covered area **if the Administrator did not approve** the petition.

Final Rule: Ownership and Control of Service-Disabled Veteran-Owned Small Business Concerns

83 FR 48908

- Common definition of ownership and control for SDVOSBCs across government-wide (including DOD) program and VA program
- VA determines eligibility for VA program
- Rule eases requirement that service-disabled vet make *all* decisions
 - Defines “extraordinary circumstances” in which non-SDV can have shared decision making authority
 - Control can shift when veteran is called to active duty
- If service-disabled veteran rated at 100 percent, surviving spouse can own and control for up to 10 years after veteran’s

Proposed Rule: Consolidation of Mentor Protege Programs and Other Government Contracting Amendments

84 FR 60846

- Comments due January 17, 2020
- Combine 8(a) and ASMPP – identical benefits
- Changes to M/P program:
 - MPA would not count if terminated within 18 months
 - Would not require mentor good character in every instance
 - Mentor cannot submit competing offers
 - Consider whether to limit mentors to revenues less than \$100 million
 - Protégés from Puerto Rico don't count for 3 limit, up to 2
 - Eliminate reconsideration
 - Changes to M/P annual reviews

Proposed Rule: Consolidation of Mentor Protege Programs

(cont.)

- Changes to joint venture rules:
 - Proposed to eliminate SBA approval for competitive 8(a) JV
 - Proposed to change 3-in-2 rule to 2 years
 - Consider measures to restrict changes in JV partners
 - Facility Security Officers may be administrative personnel
 - Clarification as to size of JV partners
- MAC codes and eligibility
 - Assign single NAICS code to order—must be included in underlying MAC
 - Except for FSS, eligibility for SBSA order on unrestricted MAC based on time of offer for order
 - Same for set-aside for status other than that for underlying contract

Proposed Rule: WOSB Certification Program

84 FR 21256

- SBA received comments from over 300 stakeholders, including individuals, small businesses, industry groups, and third-party certifiers, on its proposed rule, "Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification." SBA is currently reviewing these comments in advance of drafting a final rule.
- The rule would eliminate the self-certification option to comply with 2015 NDAA amendment that requires a WOSB/EDWOSB to be certified by SBA, an authorized Federal or state entity, or an authorized third-party certifier (TPC) in order to be awarded WOSB/EDWOSB set-aside or sole source contracts.
- Specifically, the rule would
 - Stand up a free certification program offered by SBA;
 - Expand the list of Federal and state entities that will be authorized to certify WOSBs/EDWOSBs in lieu of certification by SBA's Women-Owned Small Business Program office, including the 8(a) Business Development Program, the DOT Disadvantaged Business Enterprise Program, and the VA Center for Verification and Evaluation; and
 - Include detailed information about how SBA will oversee TPCs.

Proposed Rule: WOSB Certification Program

84 FR 21256 (cont.)

Other changes:

- Proposed to use a \$750,000 net worth standard when assessing economic disadvantage for EDWOSBs and both initial and continuing eligibility for the 8(a) Business Development Program in order to ensure consistency between SBA's programs.
- Proposed to lay out the process for firms seeking to re-apply after declinations.
- Proposed to detail procedures for how WOSBs/EDWOSBs will maintain certification and how SBA will conduct program examinations.

SBA - Wisconsin Offices

Wisconsin District Office

310 West Wisconsin Ave.

Suite 580W

Milwaukee, WI

Phone: 414-297-3941

Wisconsin District Office

740 Regent Street

Suite 100

Madison, WI

Phone: 608-441-5261

@SBA_Wisconsin