

SBA Revised Rules and the Jobs Act

A Look at the Landscape for Small Business,
One Year Later Seminar



Speakers

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Jobs Act Update

Small Business Set-Asides & Reserves
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Small Business Set-Asides and Reserves

- Defines Multiple Award Contract.9 (JA §1311):
 - multiple award IDIQ contract entered into under 41 USC 253h-253k
 - any other multiple award IDIQ contract
- Requires guidance that addresses the (JA § 1331):
 - set aside of part or parts of a multiple award contract for small business;
 - notwithstanding fair opportunity requirements, set aside of orders placed against multiple award contracts for small businesses; and
 - reserve of one or more contract award(s) for small businesses under full and open competition multiple award procurements.



Small Business Set-Asides and Reserves cont'd

- FAR **issued** interim final rule on November 2, 2011 (effective that date) at 76 FR 68032
 - Comments extended until February 3, 2012
- FAR **amended**:
 - FAR Subpart 8.4 to clarify that agencies may set-aside orders and blanket purchase agreements under the GSA Schedule;
 - FAR Subpart 16.5 to clarify that agencies may set-aside orders for SBCs in connection with multiple award contracts
 - The CO is not required to issue a justification for this exception to fair opportunity



Small Business Set-Asides and Reserves cont'd

- FAR also **amended** FAR Subpart 19.5 to authorize agencies to:
 - set aside part or parts of a multiple-award contract for SBCs, including set-asides for small business concerns under the 8(a), HUBZone, SDVOSB and the WOSB Programs;
 - set-aside orders placed against multiple-award contracts for SBCs, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs; and
 - reserve one or more contract awards for SBCs, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs, under full and open multiple-award procurements.

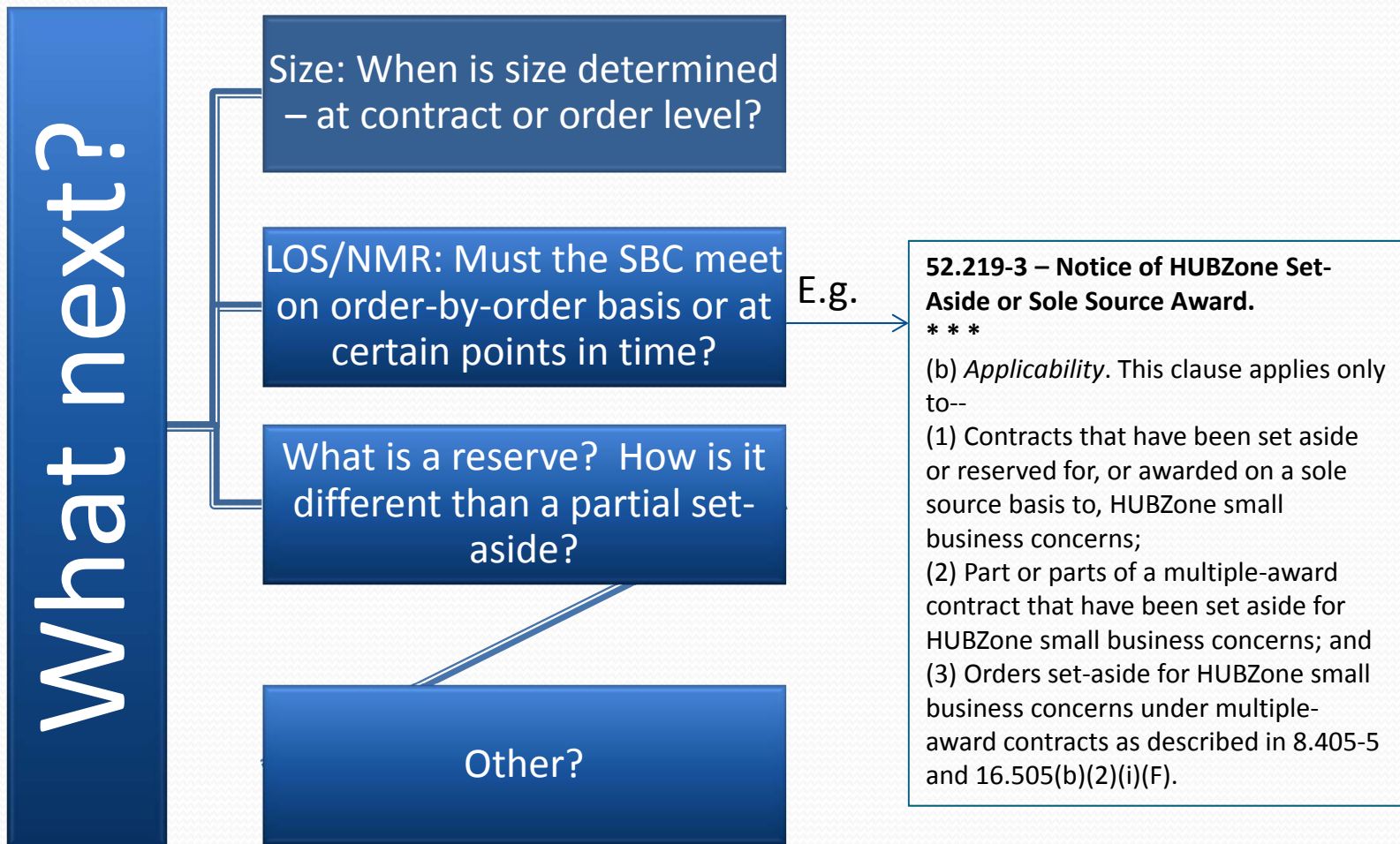
Small Business Set-Asides and Reserves cont'd

- FAR 8.405-5(a)(2) states that when setting aside orders and BPAs against the Schedule:
 - The specific small business program eligibility requirements identified in part 19 apply.
- FAR 16.505(b)(2)(i)(F) states that when setting aside orders for small business concerns:
 - The specific small business program eligibility requirements identified in part 19 apply.
- What does this mean? Examples:
 - Offer and acceptance requirements apply for 8(a) set-aside
 - Dollar thresholds apply (e.g., 8(a) set-aside threshold)
 - Joint venture requirements

Small Business Set-Asides and Reserves cont'd

- FAR also **amended**
 - Current contract clauses re: set-asides to address this new authority
 - This means that subcontracting limitations and NMR apply to these set-asides and reserves
- FAR **added** a new clause
 - 52.219-13 which states that the CO will give notice of which orders, if any, to be set aside under a multiple award contract

Small Business Set-Asides and Reserves cont'd



Small Business Status- Integrity

- SBA issued proposed rule on October 7 at 76 FR 62313
 - Comments were due on December 8, 2011
 - SBA received 22 comments
- Irrefutable presumption of loss to the US based on total amount of contract expended if business sought and received the award upon willful, affirmative, and intentional certification of its size or status and misrepresented its size or status
 - Applies to more than just contracts – applies to Federal grants, contracts, subcontracts, cooperative agreements, or cooperative research and development agreements

- Purpose

- JA 1343
- Prior to statute, it was difficult to prove loss



Small Business Status- Integrity cont'd

Proposed Regulations:

- What is a deemed willful certification of size and status?
 - Submitting offer for a solicitation that is reserved, set-aside or otherwise intended for award to small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
 - Submitting an offer that encourages the agency to classify the proposal if awarded to small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
 - Registration on any Federal database as small business, 8(a), SDB, SDVOSB, HUBZone or WOSB/EDWOSB
- Small Business must
 - Sign offer with certification as to size and status on same page as the certification
 - Update ORCA at least once a year or will not be listed as small in ORCA or retain status as SDB, SDVOSB, or WOSB/EDWOSB

Subcontracting

SBA issued proposed rule on October 5 at 76 FR 61626

- Comments were due on January 6, 2012
 - SBA received 105 comments
- Purpose is to strengthen subcontracting
 - JA sec. 1321,1322,1334

Section 1321 of the JA requires the SBA to establish policies for subcontracting compliance, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices.

Section 1322 of the JA requires a prime contractor notify the CO in writing if the prime contractor fails to utilize a small business concern used in preparing and submitting the prime contractor's bid or proposal.

Section 1334 of the JA requires a prime contractor that has a subcontracting plan to notify the CO in writing whenever a payment to a subcontractor is reduced or is 90 days or more past due for goods and services provided for the contract and for which the Federal agency has paid the contractor.

Subcontracting cont'd

SBA's proposed rule:

Use of certain SBCs as subcontractors

- If subcontracting plan is required, prime must represent it will use small business that assisted in preparing offer and notify CO in writing if it fails to utilize the small business.
- A prime used a small business in preparing the offer if: it referenced the SBC in the offer; prime has a subcontract or agreement with SBC to perform work on the contract; or SBC drafted any portion of the offer or prime used the SBC's pricing, cost information or technical expertise in preparing offer and there was an understanding the prime would use SBC as a subcontractor.

Payments to subcontractors

- Prime must notify CO if and why it reduces payments to a subcontractor or when payments are 90 days past due.
- Prime cannot prohibit a subcontractor from discussing any material matter with the CO.

Subcontracting plans

- CO is responsible for monitoring and evaluating small business subcontracting plan performance.
 - Did prime make a good faith effort to meet its goals – missed one goal but overachieved in another?
- CO must ensure prime submits subcontracting reports to eSRS.

Bundling, Comp Dem Repeal

- Agencies must post on the web a list and rationale for any bundled contract for which the Federal agency solicited bids or that was awarded by the Federal agency.
 - Posted not later than 30 days after the date on which the head of a Federal agency submits data certifications to OFPP
 - SBA issued direct final on October 13, 2011 at 76 FR 63542 and is effective November 28, 2011
- Repeals the Comp Dem Program
 - FAR Part 19.10 deleted
 - Effective 30 December 2010 (FAC 05-48)

Size Standard Review

SBA must review 1/3 of its size standards every 18 months and must conduct a complete review every 5 years. SBA has issued the following rules to date:

- Proposed to increase small business size standards for 20 industries and one sub-industry in NAICS Sector 53, Real Estate and Rental and Leasing (76 FR 70680).
 - The deadline for submission of comments ended on January 17, 2012.
- Proposed to increase small business size standards for nine industries in NAICS Sector 61, Educational Services (76 FR 70667).
 - The deadline for submission of comments ended on January 17, 2012.
- Proposed to increase small business size standards for 15 industries in NAICS Sector 51, Information (76 FR 63216).
 - The deadline for submission of comments ended on December 12, 2011.
- Proposed to increase small business size standards for 37 industries in NAICS Sector 56, Administrative and Support, Waste Management and Remediation Services (76 FR 63510).
 - The deadline for submission of comments ended on December 12, 2011.
- Proposed to increase small business size standards for 22 industries in NAICS Sector 48 49, Transportation and Warehousing (76 FR 27935).
 - The comment period ended on July 12, 2011.
- Proposed to increase small business size standards for 35 industries and one sub-industry in NAICS Sector 54, Professional, Scientific and Technical Services and one industry in NAICS Sector 81, Other Services (76 FR 14323).
 - The comment period ended on June 15, 2011.



8(a) Program Update

Issues that can trigger termination or
early graduation



Economic Disadvantage

- Personal Income
 - **\$250,000 initial eligibility;**
 - **\$350,000 continued eligibility**
 - Closely approximates IRS statistical data of top wage earners (\$261,000); and allows for growth during 9-year term
 - Income is averaged over previous 3 years
- For Pass through entities (Subchapter S Corporations, LLCs or Partnerships)
 - Funds used by the owner to pay taxes or reinvested into the company will not count towards personal income



Economic Disadvantage

- Total personal assets
 - **\$4M initial eligibility; \$6M continued eligibility**
- IRA accounts are the only excluded assets
 - All other assets are included, such as fair market value of primary residence and the value of the business
- SBA may consider spouse's financial condition where spouse has a role in the business or has lent money, provided credit or guaranteed a loan to the business



Economic Disadvantage

- Personal Net Worth
 - Initial Eligibility - \$250,000
 - Continued Eligibility - \$750,000
 - No change to current thresholds
 - New exclusions for IRA accounts
 - Also excludes fair market value of primary residence and the value of the applicant's business



Excessive Withdrawals

- Term withdrawal is very broadly defined
 - If SBA determines that withdrawals are excessive, SBA may request that the money be returned to the company
 - Early termination or graduation are also possibilities

Excessive Withdrawals

- Term withdrawal excludes officers' salaries
 - SBA may include if firm is circumventing the regs through the payment of salaries
- Because salaries are excluded, the amounts will be in the aggregate
 - Firms with sales up to \$1M, \$250,000;
 - Firms with sales between \$1M and \$2M, \$300,000;
 - **Firms with sales exceeding \$2M, \$400,000**



Primary NAICS Code

In determining whether to early graduate an 8(a) firm, SBA to consider, among other factors, whether the firm exceeds the size standard corresponding to its primary NAICS code for three successive program years.



Primary NAICS Code

A Participant may change its primary NAICS code where it can demonstrate that the majority of its revenues during a two year period have evolved from its former primary code to another code.



Joint Ventures



Joint Venture

- Common Law Rule – Joint venture is for a specific purpose, i.e., a single contract
 - Generally, ongoing entity going after multiple contracts is a partnership, not a JV
- All participants in the JV are prime contractors
- General Rule – participants are affiliated for that procurement – aggregate the receipts or number of employees of all the participants. 13 CFR 121.103(h)(2)



Joint Venture

- Exceptions to aggregation requirement - JV is small if each participant is small
 - “bundled”
 - Procurements above \$10 million if the size standard is employee based
 - Procurements with a value in excess of half of a revenue based size standard
 - 13 CFR 121.103(h)(3)(i)



SBA's 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.
- 13 CFR 121.103(h)



SBA's Definition

- The same JV entity may receive up to 3 contract **awards** in a 2 year period
- JV agreement must be in writing
- JV may be formal (separate entity) or informal (not a separate entity)
- If JV is separate legal entity (formal JV) it may be populated or unpopulated
- If JV is informal, it must be unpopulated
- The same participants can form another JV and pursue up to 3 more contract awards
 - Longstanding relationship between same partners will lead to finding of general affiliation



SBA's Definition

- Once JV receives an award, clock starts ticking
- May receive more than 3 awards if firm had not received 3 awards and made multiple offers prior to 2 years having passed since first award
- JV must meet Limitations on Subcontracting (performance requirements) FAR 52.219-14; 13 CFR 125.6
- For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees. 13 CFR 121.103(h)(5)

8(a) Joint Ventures

- JV with one or more other small businesses or Mentor
- For all 8(a) contracts (and all contracts with Mentor as JV partner), the JV agreement must comply with the 8(a) JV requirements.
 - Managed by 8(a) Participant
 - Profits commensurate with performance of work, or 51% of net profits to 8(a) if formal JV
 - Bank Accounts
 - Records held by 8(a) Participant
 - Total of 12 Requirements outlined at 13 CFR 124.513(c)
- 13 CFR 121.103(h)(3)(iii)
- Project Manager requirement:
 - Unpopulated or Populated only with admin personnel: employee of 8(a) managing venturer must be project manager
 - Populated: JV must demonstrate how performance is controlled by 8(a) managing venturer

8(a) Joint Ventures

- For all contracts, (not just 8(a)), the Participant must meet the limitations on subcontracting. 13 CFR 121.103(h)(3)(iii).
 - 8(a) Participant must perform at least **40%** of the work performed by the JV (includes all work done by non-8(a) joint venture participant and any of its affiliates at **any** subcontracting tier)
 - Must be more than administrative functions
 - If Populated JV (with individuals intended to perform on k), non-8(a) JV party and any of its affiliates, may **not** act as a subcontractor to the JV at any subcontracting tier unless approved by AA/BD
 - But JV must be 51% owned by 8(a) and 8(a) must receive 51% of profits
- 13 CFR 124.513(d)



8(a) Joint Ventures

- For 8(a) contracts ONLY, SBA District Office must approve JV agreement prior to contract award
- 13 CFR 124.513(e)
- Once a JV has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture if an addendum to the JVA is provided to and approved by SBA prior to contract award



8(a) BD Program Reporting

- Annual Review:
 - Participant must demonstrate how it is meeting the performance of work requirements for each contract that it is performing as a JV
- Contract:
 - At the completion of every contract awarded to a JV, the Participant must explain how the Performance of Work Requirements were met



SDVO Joint Ventures

- SDVO SBC must be managing venturer
- Employee of SDVO SBC must be project manager
- SDVO SBC must get 51% of net profits
- JV agreement must set forth responsibilities with respect to performance
- 13 CFR 125.15(b)



SDVO Joint Ventures

- SDVO Firms can form separate entities under 121.103(h). Construction Engineering Services, LLC, SBA No. VET-213 (2011)
- SDVO SBC subcontractors may be used to meet limitations on subcontracting (performance requirements) 13 CFR 125.6(b)



HUBZone JVs

- All JV participants must be HUBZone SBCs
- HUBZone subcontractors may be used to meet performance requirements. 13 CFR 125.6(c)
- Construction – performance requirement is 50% (prime must do 15% or 25%, as applicable)
- Non-manufacturer must supply the product of a HUBZone SBC (and no waivers)



Women-Owned SB JVs

- The EDWOSB or WOSB participant must be designated on the CCR and the ORCA as an EDWOSB or WOSB.
- The parties to the joint venture must enter into a written joint venture agreement.
- JV Agreement must designate an EDWOSB or WOSB as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract.
- The JV must perform the applicable percentage of work. Subcontractors do not count.
- The WOSB or EDWOSB must provide a copy of the joint venture agreement to the contracting officer and can do so through the WOSB Program Repository.



Ostensible Subcontractor Rule

- 13 CFR 121.103(h)(4)
- A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes
- An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or a subcontractor upon which the prime contractor is unusually reliant



Ostensible Subcontractor Rule

- All aspects of the relationship are considered, such as contract management, technical responsibilities, percentage of subcontracted work, bonding, **whether the subcontractor is the incumbent and is ineligible to submit its own offer**
- A prime can be found to be affiliated with its subcontractor even where the prime will meet the applicable performance requirements (limitations on subcontracting)



Mentor Protégé Agreements



8(a) Mentor Protégé Program

- Mentor can be small or large business or nonprofit
- Mentor can have up to 3 protégés at one time
- Protégé can have second Mentor, corresponding to an unrelated, secondary NAICS code.
- Mentor/Protégé Agreement must be approved by SBA before the firms can submit an offer on a procurement as a small business; otherwise there is no exception to affiliation at time of offer. The JV with the Mentor must be approved prior to award.
- SBA approved Mentor/Protégé joint ventures are small for federal subcontracts.
- SBA prohibited from approving a new Mentor/Protégé relationship within six months of the end of an 8(a) Participant's program term.
- SBA is looking to see if the assistance to be provided will promote developmental gains to the 8(a) firm, if the developmental gains are tied to the approved business development plan, whether there are issues of negative control, and if the agreement is merely a mechanism to enable non-8(a) firms to receive 8(a) contracts.



Possible

New Mentor Protégé Programs

Small Business Jobs Act

- Act allows for SBA to establish Mentor-Protégé programs for:
 - HUBZone Companies
 - SDVOSB's
 - WOSB's
- Programs will be comparable to the 8(a) program
- Proposed regulations later this year?

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QUESTIONS

