



U.S. Small Business
Administration

SBA Legal and Regulatory Updates

**For Small Business Government Contracting
Programs**

April 5, 2022

Legislative Action

National Defense Authorization Act for Fiscal Year 2022

[Pub. Law 117-81](#), signed by the President on 12/27/21

Sect. 861 - Keeps the Miller Act threshold for bonding protection for small-business subcontractors on construction projects at its present level, instead of raising it for inflation.

Sect. 863 - Requires update to SAM.gov for small business status changes and notification to agencies where the firm has a pending offer, if the change would affect eligibility.

Sect. 864 - Gives OHA jurisdiction over HUBZone appeals.

Sect. 866 - Requires DoD report on CMMC effects on small business.

Introduced in the House

- [H.R. 4697](#), to strike section 8(a)(11), which is the basis of [bona fide place of business rule](#) in the 8(a) program
 - SBA has temporarily waived the requirement through FY22: [SBA Announces Moratorium on Bona Fide Place of Business Requirements for the 8\(a\) Business Development Program](#)
- [H.R. 6347](#), Military Spouse Entrepreneurs Act of 2021 – to establish a 5-year pilot procurement program for small businesses owned and controlled by military spouses, with a 5% goal
- [H.R. 6504](#), Native Pacific Islanders of America Equity Act - to define a Native CHamoru Organizations as a nonprofit corporation controlled by Guam natives or direct ancestors, similarly define Native Northern Marianas Organizations, and give such organizations the same treatment as Native Hawaiian Organizations for 8(a)/SDB and HUBZone eligibility.
- [H.R. 6923](#), the Accelerating Small Business Growth Act - create a grant program to help transportation agencies carry out innovative programs to compete for federally funded transportation projects.

Executive Action

OMB Memorandum: Advancing Equity in Procurement

M-22-03, Dec. 2, 2021 – implementing Executive Order 13985

1. Raises governmentwide SDB contracting goal to 11% for FY22, on the way to 15% by 2025.
2. Implements major changes to Category Management.
 - A. automatic Tier 2 credit for socioeconomic small businesses (SDB, WOSB, HUBZone, SDVOSB)
 - B. reinforced importance of small-business goal achievements
 - C. making SBA and Dept. of Commerce voting members on the Category Management Leadership Council.
3. Seeks to increase new entrants and reverse the decline in the small business supplier base.
4. Makes Federal senior managers accountable for small business contracting goals.
5. Ensures OSDBUGs have access to senior leadership

DoD Report on State of Competition in the DIB

[Press release](#), [Full report](#)

- Defense sector has consolidated from 51 to 5 defense prime contractors since the 1990s.
- Small businesses in the DIB have shrunk 40%,
 - Could lose an additional 15,000 SBs in the next 10 years without action
- Steps to increase competition within the industrial base:
 1. Strengthen merger oversight
 2. Address intellectual property limitations
 3. Increase new entrants through vehicles such as OTs and CSOs
 4. Increase opportunities for small business
 5. Implement sector-specific supply chain resiliency plans

2022 NAICS Manual Updates

[SBA Guidance Memo](#)

[OMB FR Notice](#)

[2022 NAICS Manual](#)

- On Dec 21, 2021, OMB adopted the U.S. Economic Classification Policy Committee's (ECPC) [recommended revisions](#) to the NAICS
- Approximately 170 codes in NAICS 2017 impacted
- OMB advised that effective date is January 1, 2022, for Federal statistical establishment data, **however, SBA is urging agencies to continue using the 2017 NAICS codes until SBA updates its size standards to NAICS 2022:**
 - The 2022 NAICS updates are not effective in SBA's loan programs and small business government procurement programs until SBA updates its Table of Small Business Size Standards through the rulemaking process
 - SBA's rule must be finalized before corresponding changes are made to the size standards in SAM.gov, FPDS-NG, and DSBS

Recent SBA and FAR Regulatory Action

New Revenue and Asset Based Size Standards

Sectors: [11,21,22,23](#) [48-49,51,52,53](#) [54,55,56](#) [61,62,72,72,81](#)

- Four rules issued on March 31, 2022, **effective May 2, 2022**
- 468 size standards reviewed (463 receipts-based, five asset-based (i.e., financial institutions)) based on:
 - Average firm size;
 - Degree of competition;
 - Trends in federal contracting;
 - Economic impacts of COVID-19; and
 - Public comment
- 229 size standards increased
- In the coming months, SBA plans to issue additional rulemakings on size standards in Sector 42 (Wholesale Trade), Sector 44-45 (Retail Trade), and Sector 31-33 (Manufacturing).

Direct Final Rule: Definition of Surviving Spouse/Change to Sole-Source Thresholds

86 FR 61670

- Allows surviving spouse of deceased service-disabled veteran to qualify as owner of SDVOSBC for up to:
 - 10 years after veteran's death, if veteran was 100% disabled
 - 3 years after veteran's death, for less than 100% disability
- Changes 8(a) sole-source J&A threshold to \$100 mil for DoD, \$25 mil for civilian
 - Applies to entity-owned (ANC/Tribe for DOD & civilian agencies; NHO for DOD only) firms and
 - Applies if only one eligible Participant would submit a fair-market offer
- Changes sole-source thresholds in 8(a), WOSB, and HUBZone to:
 - \$4.5 mil for nonmanufacturing (but still \$4 mil in SDVOSBC)
 - \$7 mil for manufacturing (same for SDVOSBC)

SBA Proposed Rule: Calculation of Employee-Based Size Standards

86 FR 60396

- Implements Sec. 863 of NDAA 2021
- Proposes to use a 24-month average to calculate a business's number of employees for eligibility purposes in all of SBA's programs (manufacturing industries and nonmanufacturing industries)
- Proposes to permit businesses in SBA's loan and SBIC programs to use a 5-year averaging period, in addition to the existing 3-year averaging period, for the purposes of calculating annual average receipts

SBA Proposed Rule: Past Performance Ratings for JV members and Subcontractors

86 FR 64410

- Implementing Sec. 868 of NDAA 2021
- Proposes to let small business use past performance from a joint venture, provided it worked on the joint venture's contracts
- Proposes to let a small business use past performance from a first-tier subcontract to go after a prime contract
 - Requires a change to subcontracting plans to direct primes to provide a rating to the small business within 15 days
 - Requests comment on whether to require a time frame within which the small business must make the request (e.g., during the prime's period of performance)

Nonmanufacturer Rule Class Waivers: Proposed terminations

[86 FR 69114](#) (furniture); [86 FR 63436](#) (radiology equipment)

- SBA issued notices of intent to terminate class waivers of the nonmanufacturer rule for two classes of products:
 - Radiology equipment (CT/CAT scanners, X-ray)
 - Certain furniture products (factory, hospital, and laboratory, plus specified frames and parts)
- If finalized, the nonmanufacturer rule will apply to these products
 - For set-aside contracts—except small-business set-asides below the SAT—awardees must provide their own product or the product of a small-business manufacturer
 - SBA also is able to grant individual waivers for specific contracts

SBA Final Rule: Correction to M/P Final Rule

[87 FR 380](#) (Jan. 5, 2022)

- Final rule of October 16, 2020, revised § 121.103(h) to clarify how a joint venture partner must calculate its proportionate share of joint venture receipts.
- JV partner must include in its receipts the same percentage as the percentage corresponding to the JV partner's share of work performed by the joint venture.
- Because the regulations no longer allow JVs to be populated, some reasoned that a JV populated with its own separate contracting-performing employees does not qualify as a JV, and thus that a JV need not include in its own receipts its proportionate share of receipts and employees from populated JVs.
- That was not SBA's intent.
- Correction clarifies that a concern must **include in its receipts and employee count its proportionate share** of joint venture receipts and joint venture employees, respectively, **regardless of whether the joint venture is populated or unpopulated.**

SBA Final Rule: Effective Date of 13 CFR 127.355, added by WOSB Final Rule Published May 11, 2020

[87 FR 3421](#) (Jan. 24, 2022)

- Establishes the effective date for § 127.355, “How will SBA ensure that approved third-party certifiers are meeting the requirements?”
 - Monthly reports
 - Full compliance review at least every 3 years
- Effective date of that reg relates back to the OMB approval - May 3, 2021.

Notice of new WOSB Program NAICS Codes

[87 FR 15468](#) (March 18, 2022)

- SBA identified new NAICS codes for the WOSB program
- Underrepresented industries are qualified for EDWOSB set-asides/sole-source procurements
 - 113 underrepresented NAICS codes
- Substantially underrepresented industries are qualified for WOSB set-asides/sole-source procurements
 - 646 substantially underrepresented NAICS codes

FAR Proposed Rule: Small Business Program Amendments

87 FR 10327

- Comments due April 25, 2022
- Size changes
 - Size determined at offer on a multiple-award contract, even if price not evaluated (e.g., two-step eval)
 - IT value-added reseller size standard of 150 employees
 - Allow status protests based on ostensible subcontractor
- Allow set-asides for socioeconomic programs where multiple-award contract was set aside for small business
- Cannot exercise an option past 5th year on an 8(a) contract if firm is no longer an 8(a) participant

FAR Final Rule: Limitations on Subcontracting

[86 FR 44233](#) (Aug. 11, 2021, effective Sept. 10, 2021)

- Applies across all small business programs
- Calculated as a percentage of the overall contract amount to be spent by the prime contractor on subcontractors.
- Adds concept of a “similarly situated entity”—a small business subcontractor that has the same small business program status as that which qualified the prime contractor for the prime contract
- Nonmanufacturer rule does not apply to small business set-asides at or below the simplified acquisition threshold
- Waivers of the nonmanufacturer rule allowed for procurements under the HUBZone Program
- CAAC [Letter No. 2021-02](#) authorizes civilian agencies to issue a class deviation to apply LOS exclusions for
 - Certain direct costs not provided by small business concerns (e.g., airline travel, cloud computing, mass media)
 - Work performed outside the United States on awards made pursuant to the Foreign Assistance Act of 1961, or work performed outside the United States required to be performed by a local contractor.

FAR Final Rule: Scope of PCR Review

86 FR 44247

- Implements NDAA 2017 Section 1811
- COs must provide the PCR a copy of any proposed acquisition package, including small business set-asides and reserves, at the PCR's discretion
- Clarified existing PCR duties to better reflect SBA regulations. PCRs may recommend:
 - the set-aside or sole-source award to a small business;
 - the breakout of discrete components, items, and requirements for competition; and
 - ways to improve competition

FAR Final Rule: Consolidation and Bundling

86 FR 61038

- Implements NDAA 2016 Section 863
- Requires the publication on SAM.gov of a notice, no later than 7 days before the solicitation, for
 - Substantial bundling, and for
 - Consolidation
- Requires the publication on SAM.gov of a determination, with the publication of the solicitation of
 - The rationale for substantial bundling, or that
 - Consolidation of contract requirements is necessary and justified

FAR Proposed Rule: Update of HUBZone Program

[86 FR 31468](#)

- Published June 14, 2021
- Implements SBA's comprehensive revision (84 FR 65222)
 - Removes requirement for firm to be HUBZone qualified at both offer and award for HUBZone set-asides—instead just offer
- Authorizes sole source awards under SAT

FAR Proposed Rule: WOSB Certification

[86 FR 55769](#)

- Would require agencies to check SBA's DSBS for WOSB/EDWOSB designation for WOSB/EDWOSB set-asides and sole-source awards
- Firms may submit offers on WOSB/EDWOSB set-asides if certification is pending
- Would remove mentions of the WOSB repository, which no longer exists

Notable Legal Decisions

GAO protest on joint ventures' security clearances

[InfoPoint LLC, B-419856](#), Aug. 27, 2021

- Protest from Michigan small business that an Air Force solicitation improperly required that a joint venture competing for the award, as opposed to the members of the joint venture, have a top-secret facility clearance.
- GAO reviewed section 1629 of NDAA FY20 and SBA's 13 CFR 121.103(h)(4).
- GAO concluded that the law unambiguously prohibits DOD from requiring that a joint venture hold a facility clearance if the members of the joint venture hold the required facility clearances.
- GAO sustained the protest and recommended that the Air Force remove the solicitation requirement.

GAO protest on protégé experience requirements

[Innovate Now, LLC, B-419546](#), Apr. 26, 2021

- Protest from Ohio joint venture that an Air Force solicitation improperly required a protégé member of a joint venture to meet the same work sample requirements of all other offerors
- GAO applied SBA's regs 13 CFR 125.8(e)
- GAO concluded that SBA regulations plainly prohibit an agency from holding protégé venturers to the same standards as other offerors. However, this does not prohibit the agency imposing minimum experience requirements on protégé firms.
- GAO sustained the protest and recommended that the Air Force revise the work sample requirements relating to protégé firms.

Program Updates & Refreshers

Mentor-Protégé

- [Mentor Protégé Consolidation](#)

- All Small Mentor Protégé Program and 8(a) Mentor Protégé Program merged to become the rebranded SBA Mentor Protégé Program
- 8(a) MP transfers: please check the [List of Active MPAs](#)
- 8(a) contracts: please e-mail joint.ventures@sba.gov after offer submission to ensure that DSBS accurately reflects JV eligibility

- Applications

- 105 days processing time (15 days for screening, 90 days for review)
- Please check Certify often for RFIs – applications are returned after 5 days

- Annual Evaluation

- SBA will terminate MPA for untimely or non-responsive annual evaluations
- Candor

Size standards: Small Business Runway Extension Act

- Effective **January 6, 2022**, size status for receipts-based size standards is measured under a 5-year average only
- 3-year average option no longer available
- A firm with fewer than 5 years of receipts will average its annual receipts over its existence (total receipts/weeks in business) x 52



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