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SMALL BUSINESS CONTRACTING PROGRAMS: AN UPDATE

By Devon E. Hewitt

More proposed rules and regulations affecting small business programs have been issued in 2011 and 2012 than have been issued in the prior decade. The main reason for this regulatory activity is the Small Business Jobs Act of 2010, which the President signed on September 27, 2010.[1] The Jobs Act included a number of provisions addressing small business contracting programs, nearly all of which required follow-on rulemaking. In addition, in February 2011, the SBA issued final regulations revamping the agency's 8(a) program for small disadvantaged businesses[2] and amending its size and status protest rules for all the agency's Government contracting programs.[3] The combination of the proposed and final rules issued pursuant to the Jobs Act, the final rules amending the 8(a) program, and other proposed and final rules issued in the normal course has resulted in an change to almost every federal contracting program benefiting small businesses. This update BRIEFING PAPER identifies these new proposed and final rules and their effect on the regulations described in two earlier BRIEFING PAPERS: *Small Business Contracting Programs—Part I* and *Small*

IN BRIEF

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Business Contracting Programs—Part II, published in October and December 2010, respectively.[4]

Small Business Contracting Goals

The Jobs Act amended the Small Business Act to make explicit the SBA's policy of negotiating a 3% HUBZone subcontracting goal with each agency.[5]

In 2012, the SBA issued scorecards for agencies regarding the success each agency had in meeting its prime and subcontracting goals in FY 2011.[6] The Government again failed to meet its Government-wide overall small business contracting goal of 23% but did exceed the SDB prime contracting goal.[7] The goal missed most often by agencies was that set for service-disabled veteran-owned small businesses.[8] Of the 23 agencies scored by the SBA, only five agencies met their prime contracting goal for SDVOSBs: the Department of Homeland Security, the Department of Veterans Affairs, the Environmental Protection Agency, the Department of the Treasury, and the SBA. The Department of Defense, which accounts for about 63% of the total prime contracting dollars awarded small businesses in FY 2011, only met its prime contracting goals for SDBs.[9] Of the $57 billion awarded small businesses by the DOD, only $5.8 billion went to SDVOSBs.[10] The Department of the Treasury received a grade of A+ and was the only agency to exceed the overall small business contracting goal and each specific small business goal.[11] In contrast, the Department of Energy received a grade of F for failing to achieve any of its prime small business contracting goals.[12]

Small Business Set-Asides

On March 2, 2012, the Federal Acquisition Regulation Councils published a final rule effective April 2, 2012, implementing § 1347 of the Small Business Jobs Act.[13] Section 1347 amends the Small Business Act to make clear there is no order of precedence among the small business socioeconomic contracting programs.[14] The final rule amends the FAR to clarify that parity exists among the socioeconomic programs and that Contracting Officers may exercise discretion in choosing which program to use for a set-aside acquisition.[15] The rule also clarifies that above the simplified acquisition threshold a CO must consider setting aside an acquisition under one of the specific programs before setting aside the acquisition for small businesses generally.[16] The one exception to this rule is if the requirement has been accepted by the SBA into the 8(a) program.[17] In determining which socioeconomic program to use, a CO must consider the results of market research and the agency's progress in fulfilling its small business goals.[18] A CO has discretion to set aside an acquisition above the micro-purchase threshold and below the simplified acquisition threshold under one of the specific socioeconomic contracting programs or for small businesses generally.[19]

The FAR Councils issued an interim rule on November 2, 2011, effective on the day of publication, implementing § 1331 of the Small Business Jobs Act.[20] Section 1331 addresses set-asides of task and delivery orders under multiple award contracts, including those on the Federal Supply Schedules managed by the General Services Administration.[21] The interim rule amends the FAR to provide that agencies *may* set aside orders or blanket purchase agreements

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under FSS contracts solely for competition among businesses within a particular socioeconomic group.[22] The interim rule affords the same discretion to COs placing orders under multiple award contracts, even those that require an agency to provide each contract holder with a fair opportunity to be considered for award.[23] Finally, the interim rule now allows agencies to reserve one or more contract awards under a multiple award contract procurement for small businesses, including those participating in any of the specific socioeconomic small business subcontracting programs.[24] Notably, the interim rule makes the decision to set aside a task/delivery order award or a part of a multiple award contract discretionary on the part of the CO, whereas the basis for this rule and its corollary in the Jobs Act, the *Delex* decision, states that set-asides of task/delivery order awards should be mandatory under the "rule of two."[25] However, the interim rule explains that the FAR Councils continue to work with the SBA to develop a more detailed rule implementing § 1331 of the Jobs Act.[26]

The SBA published this proposed rule on May 16, 2012.[27] With respect to set-asides, the proposed rule reaffirms that if the "rule of two" can be met at the contract level, an agency must set aside a multiple award contract for small businesses or a specific category of small businesses.[28] If the "rule of two" cannot be satisfied at the contract level, the proposed rule offers an agency three options, all of which are discretionary. The agency may (1) issue a partial set-aside, (2) "reserve" the requirement, or (3) set aside or preserve the right to set aside orders against a multiple award contract that was awarded pursuant to full and open competition.[29] If the agency decides not to use one of these three options when it otherwise could, the agency must explain its decision in the contract file.[30]

The proposed rule sets forth detailed definitions of the three options. A "partial set-aside" is defined as a contracting vehicle that may be used when market research indicates a total set-aside is not appropriate; the procurement can be broken up into smaller, discrete portions or discrete categories such as by contract line items, special item numbers, sectors or functional areas, or other equivalent; and two or more small businesses or a specific type of small business are expected to submit offers on the set-aside part of the requirement at a fair market price.[31] The proposed rule clarifies that a small business or specific type of small business is not required to submit an offer for both the set-aside portion of the requirement and the portion not set aside. A small business, however, is free to do so.[32]

A "reserve" in the context of a multiple award contract means an acquisition conducted using full and open competition where the agency determines that a partial set-aside is not appropriate; at least one small business or a specific type of business can perform the entire requirement or the rule of two is met with respect to part of the contract but cannot be satisfied for all the work contemplated throughout the term of the contract; and the CO makes contract awards to small businesses or certain types of small businesses with a promise to compete orders thereunder if the rule of two is met.[33]

The "order" set-aside option permits an agency, when making a multiple award contract pursuant to full and open competition, to make commitments to set aside orders, or preserve the right to consider set-asides, when the rule of two is met.[34]

Contract Bundling

On October 13, 2011, the FAR Councils issued a final rule amending the FAR to implement § 1312(a) of the Small Business Jobs Act.[35] Section 1312 requires an agency to publish on the agency's website a list and rationale for any bundled contract for which the agency solicited bids or that was awarded by the agency.[36] The final rule explains that requiring agencies to post a list of all bundled acquisitions and the reasons therefor "holds the agency accountable to the public for its actions."[37] The FAR Councils promulgated the amendments as a direct final rule effective November 28, 2011, but allowed the public 30 days to comment. The Councils advised that, if it received a significant number of negative comments, it would consider withdrawing the final rule.[38]

The SBA addressed the issue of contract bundling more extensively in a proposed rule released on May 16, 2012.[39] The proposed rule implements § 1313 of the Jobs Act, which requires that agencies address contract "consolidation," another form of "bundling."[40] A "consolidated" contract combines contracts performed by small or large businesses into one solicitation whereas

a "bundled" contract combines work previously performed by only small businesses or work that could have been performed only with small businesses.[41] "Consolidation" is defined in the proposed rule as use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of the agency with a total value over $2 million for goods and services that have been provided to or performed for the agency under two or more separate contracts, each lower in cost than the total cost of the contract for which the offers are solicited.[42] As is the case with bundling, an agency is allowed to "consolidate" contracts provided the agency justifies this decision in writing.[43] The process for obtaining and substantiating these justifications is discussed in the proposed rule.

SDB Evaluation Factor

A proposed rule issued on September 9, 2011, would remove provisions in the FAR that allow COs with the DOD, the National Aeronautics and Space Administration, and the U.S. Coast Guard to offer SDBs a pricing advantage in acquisitions.[44] In particular, the National Defense Authorization Act for FY 1987 allows these agencies to apply a price adjustment of up to 10% to afford SDBs a competitive price advantage when competing in full and open procurements.[45] However, the U.S. Court of Appeals for the Federal Circuit held in *Rothe Development Corp v. Department of Defense* that the price adjustment provision was unconstitutional.[46] The proposed rule, therefore, removes references to the price adjustment option from the FAR. The proposed rule does not address other mechanisms present in the FAR that benefit SDBs. For example, COs still may provide monetary incentives to prime contractors to encourage subcontracting opportunities to SDBs and still may use an evaluation factor or subfactor to evaluate the participation of small businesses as subcontractors.[47]

Small Business Program Eligibility Requirements

■ NAICS Codes

The SBA issued a final rule on February 2, 2011, in which it removed some language from the then-current regulations on selecting NAICS codes for small business procurements.[48] Previously, a CO was allowed to consider the NAICS code assigned to a similar, prior procurement in determining the NAICS code most applicable to an upcoming procurement. The SBA's prior regulations also allowed a CO to consider a NAICS code that "would best serve the purposes of the Small Business Act" in making this determination. The final rule removes these two items from the list of factors a CO may consider in selecting an appropriate NAICS code for a solicitation.[49] In the proposed rule, the SBA explained that consideration of these additional factors was "unnecessary."[50] In the SBA's words, "[a] repeated error is not persuasive evidence, especially since such classifications are almost never reviewed or challenged."[51] With respect to choosing a NAICS code that best serves the purposes of the Small Business Act, the SBA observed that "it was unclear" how a CO would make that determination.[52] The SBA proposed rule summarized that each solicitation should be classified based on the principal purpose of the solicitation and that choice only needs to be "reasonable."[53]

In a final rule issued on February 11, 2011, the SBA amended its regulations to reaffirm that a procurement for supplies also cannot be classified under a retail trade NAICS code.[54] The SBA clarified that the retail trade NAICS code applies to financial assistance such as loans, but should not apply to specified supply items.[55]

In its May 16, 2012 proposed rule on set-asides in the context of multiple award contracts, the SBA provided that an agency has two choices for assigning an NAICS code to multiple award contracts and orders issued thereunder: (1) assign one NAICS code and size standard to the contract if all orders under the contract are expected to be classified under the same code or (2) divide the contract into discrete categories such as contract line item numbers, special item numbers, sectors, functional areas, or the like and assign different NAICS codes and size standards, as applicable, to each one.[56] A small business must meet the size standard associated with the NAICS code assigned to each category for which the business submits an offer.[57]

■ Changes In Size Standards

The Jobs Act requires the SBA to conduct a "rolling review" of its size standards.[58] In addition, the SBA must review all size standards not less frequently than once every five years.[59] On October 12, 2011, the SBA issued a proposed rule that would increase the size standards of 37 industries in NAICS Sector 56, Administrative and Support, Waste Management and Remediation Services.[60] That same day the SBA also issued a proposed rule increasing the size standards in 15 industries in NAICS Section 51, Information.[61] On February 10, 2012, the SBA issued a final rule that increases 37 size standards in 34 industries and three sub-industries in NAICS Sector 54, Professional, Technical, and Scientific Services.[62] The final rule also increases one size standard in Sector 81, Other Services.[63] The final rule became effective on March 12, 2012.[64] On February 24, 2012, the SBA issued a proposed rule increasing small business size standards for 28 industries in NAICS Sector 62, Health Care and Social Assistance.[65] That same day the SBA issued a final rule increasing small business size standards for 22 industries in NAICS Sectors 48 and 49 for Transportation and Warehousing.[66] The final rule became effective March 26, 2012.[67]

On July 18, 2012, the SBA issued two proposed rules for NAICS Sector 23, Construction, and NAICS Sector 71, Arts, Entertainment and Recreation. The SBA proposed increasing the size standards for one industry and one sub-industry in Sector 23.[68] The SBA proposed increasing 17 size standards in NAICS Sector 71.[69] Comments for each proposed rule are due September 17, 2012. On July 19, 2012, the SBA issued a proposed rule increasing nine size standards under NAICS Sector 22, Utilities. Comments for this proposed rule also are due on September 17, 2012.[70]

■ Affiliation

The SBA's May 16, 2012 proposed rule addressing set-asides in the context of multiple award contracts included a provision exempting small businesses that enter into a "Small Business Teaming Arrangement" from affiliation when the team submits an offer as a small business in response to a solicitation for a "bundled" contract that has a "reserve."[71] The proposed rule defines a Small Business Teaming Arrangement as an arrangement where (1) two or more small businesses form a joint venture to act as a prime contractor or (2) two or more small businesses team as a prime and subcontractor.[72] The relationship of the small businesses must be set forth in writing and the writing must be provided to the CO as part of the proposal.[73]

Policing "Small" Business Representations

■ Self-Certification

The SBA published a proposed rule on October 7, 2011, implementing §§ 1341 and 1342 of the Jobs Act.[74] Section 1341 addresses the "presumed loss rule," which provides that where a small business misrepresents its size or status, there will be a presumption of loss to the Government equal to the "amount expended" on the contract or other instrument (i.e., subcontract, cooperative agreement, cooperative research and development agreement, or grant).[75] Because the Senate Report on the Jobs Act indicates that this presumption is "irrefutable," in the proposed rule the SBA proposes to add this term to the regulatory provision although the term was not included in the language of § 1341.[76] Section 1341 also addresses the "deemed certification rule," which provides that the submission of an offer or application for award intended for small business concerns will be deemed a size or status certification or representation in certain circumstances.[77] In this regard, an authorized official must sign in connection with a size or status certification or representation for a contract or other instrument.[78] In addition, the Jobs Act and the proposed rule state a "deemed certification" will be found anytime a contractor registers on an electronic database for the purposes of being considered for award of a small business contract.[79]

Section 1342 of the Jobs Act addresses the requirement that a small business certify annually in the Online Representations and Certifications Application database to its business size and/or status.[80] If a business fails to make the annual update or certification, the Jobs Act and the proposed rule provide that the small business no longer will be listed in ORCA as a small business or a particular type of small business until the business recertifies.[81]

The proposed rule does not include this ORCA certification provision with respect to the 8(a) or HUBZone programs as the SBA is responsible for providing these certification designations in federal procurement databases.[82]

The proposed rule also implements what the SBA calls in the proposed rule a "limitation of liability" provision.[83] Section 1341 of the Jobs Act requires the SBA to promulgate regulations protecting contractors from liability under § 1341 in cases of "unintentional errors, technical malfunctions, and other similar situations."[84] The proposed rule repeats this "limitation of liability" provision and adds that consideration will be given to a firm's internal management procedures, the ambiguity of the representation or certification requirement, and the efforts made to correct an inaccurate representation or certification in a timely manner.[85] The proposed rule explicitly states that an individual or firm will not be liable for "erroneous" representations or certifications made by Government personnel.[86]

Finally, the proposed rule includes provisions not addressed in the Jobs Act regarding the timing of the determination of the size status of a concern applying for the § 8(a) or HUBZone programs. The SBA's regulations currently provide that a concern applying for certification into these programs must be small at the time of application and at the date of certification by the SBA.[87] However, the SBA does not want to certify an applicant before determining its size eligibility.[88] Accordingly, the proposed rule amends the existing size regulations to state that, for purposes of entry into these programs, a concern must be small at the time it applies to the program and at the time the program office requests a formal size determination in connection with certification.[89]

■ Recertification

In its May 16, 2012 proposed rule on set-asides in the context of multiple award contracts, the SBA also proposed clarifying the circumstances in which small businesses must recertify as to their size status.[90] Specifically, the proposed rule requires recertification when a small business acquires or is acquired by another business.[91] Both the acquired and acquiring business must recertify if each has been awarded a contract as a small business.[92] For joint ventures that have certified as small, recertification is required when the acquired business, acquiring business, or merged business is a participant in a joint venture that has been awarded a contract or order as a small business.[93]

■ Penalties For Misrepresentation Of Size Status

The proposed rule issued by the SBA on October 7, 2011 includes a provision that sets forth in greater detail than before the penalties a contractor may face if it misrepresents its size or small business status.[94] The proposed rule makes explicit that an agency may suspend or debar a contractor for misrepresenting its size or status.[95] The proposed rule also reminds contractors that they may be liable under the False Claims Act or the Program Fraud Civil Remedies Act for such a misrepresentation.[96] In addition, the proposed rule continues to advise contractors that they could be subject to criminal penalties as well if they knowingly make a false statement or misrepresentation to the SBA for the purpose of influencing any actions of the SBA, including the failure to correct "continuing representations" that are no longer true.[97]

Size Protests & Size Appeals

The SBA issued a final rule on February 2, 2011, amending its status protest and appeal regulations.[98] The final rule increases the amount of time the SBA has to render a formal size determination from 10 business days to 15 business days from receipt of a protest.[99] The final rule requires a size appeal to be filed within 15 calendar days of receipt of a formal size determination and requires the SBA's Office of Hearings and Appeals to issue a size appeal decision within 60 calendar days of the close of the record.[100] The most substantive aspect of the final rule, however, concerns the regulation's clarification of the effect of a size determination or appeal on a pending procurement. The regulation clarifies that, if the SBA issues an initial size determination that a protested concern is eligible for the contract award, a CO can proceed with a contract award notwithstanding the fact that an appeal has been

filed. If the eligibility is overturned on appeal, the CO may choose to terminate the contract or refrain from exercising any option periods, but is not required to do so. However, the CO cannot continue to credit the contract proceeds for goaling purposes. Where a size determination concludes that a prospective awardee or awardee is ineligible for the contract, the CO cannot award the contract to the prospective awardee. If the contract has been awarded, the CO must either terminate the contract or refrain from exercising the next option period. If the ineligibility determination is overturned on appeal, the CO must credit the contract for goaling purposes.[101]

In a subsequent final rule issued on February 11, 2011, the SBA amended its regulations to allow the Office of Inspector General at the SBA to initiate size determination proceedings.[102]

In its May 16, 2012 proposed rule on set-asides in the context of multiple award contracts, the SBA proposed amending its size protest rules to clarify the procedures and timing of protests regarding set-aside multiple contract awards and set-aside orders under unrestricted multiple award contracts.[103]

Small Business Program Participation Requirements

■ Performance Of Work

When the SBA issued a proposed rule on May 16, 2012, addressing set-asides in the context of multiple award contracts, it included in the rule proposed amendments to the performance of work requirements.[104] Under the proposed rule, in the context of multiple award contracts, an agency will determine compliance with the performance of work requirement by using the period of performance for each order issued against the contract unless the order is competed amongst small and other-than-small businesses (in which case the performance of work requirements do not apply).[105] This rule applies equally to contracts or orders awarded pursuant to the SBA's 8(a) program. However, for the 8(a) awards, the applicable SBA District Director may waive this requirement under certain conditions.[106] The proposed rule requires the CO to document a small business's compliance with the performance of work requirements as part of the small business's performance evaluation.[107] If a small business fails to comply with the applicable performance of work requirement, in addition to documenting this noncompliance, the noncompliance will be made available to all COs under the Past Performance Information Retrieval System (PPIRS).[108] A CO may also terminate the contract for default.[109]

In addition, the proposed rule provides that, in the case of a contract awarded to a Small Business Teaming Arrangement based on an offer submitted in response to a bundled solicitation, the performance of work requirement applies to "the cooperative effort" of the team, not to the individual team members.[110]

■ Nonmanufacturer Rule

The SBA issued a final rule on February 11, 2011, in which it amended its regulations to state that a nonmanufacturer providing supplies to the Government must take ownership or possession of the items with its personnel, equipment, or facilities in a manner consistent with industry practice.[111] The same rule clarifies that the nonmanufacturer rule applies only to procurements that have been assigned a manufacturing NAICS code and only applies to the supply component of a requirement classified as a manufacturing or supply contract.[112]

In its May 16, 2012 proposed rule on set-asides in the context of multiple award contracts, the SBA proposed amending the nonmanufacturer rule to clarify that the rule also applies to a partial set-aside, reserve, or set-aside of orders against a multiple award contract to provide manufactured products or other supply items.[113]

8(a) Business Development Program

On February 11, 2011, the SBA issued a final rule amending its 8(a) program regulations.[114] The final rule made many substantive changes to the eligibility and participation requirements of the program.

■ The Role Of The SBA

The February 11, 2011 final rule amended the SBA's 8(a) regulations to require COs to submit

copies to the SBA servicing office of all modifications and options exercised by the agency within 15 business days of their occurrence or other date agreed by the SBA.[115]

■ 8(a) Program Contracting Benefits

On March 16, 2011, the FAR Councils issued an interim rule amending the FAR to implement § 811 of the National Defense Authorization Act for FY 2010.[116] Section 811 prohibits the award of a sole-source contract valued greater than $20 million under the 8(a) program without having a justification and approval executed by an "appropriate" official.[117] The J&A must be made public after contract award.[118] The interim rule became final without changes in a notice published in the *Federal Register* on April 18, 2012.[119]

■ 8(a) Program Eligibility Requirements

The final rule issued by the SBA on February 11, 2011, clarified and established monetary thresholds for demonstrating an individual's "economic disadvantage."[120] The final rule added a provision establishing a presumption of economic disadvantage if an individual's average adjusted gross income fell below $250,000. The rule also changed the period over which the average AGI would be computed from two years to three years.[121] In addition, the SBA amended the 8(a) regulations to establish a presumption of economic disadvantage if the "fair market value" of an individual's total assets is below $4 million.[122] Unlike the net worth analysis, the SBA does not exclude the fair market value of the primary residence or the value of the applicant concern in determining economic disadvantage in the total asset analysis.[123] The only assets excluded from the total asset determination are funds invested in a qualified individual retirement account.[124]

In addition, the final rule imposed a requirement that the disadvantaged manager of an 8(a) concern be physically located in the United States.[125]

■ 8(a) Program Participation Requirements

The SBA's February 11, 2011 final rule clarified and established monetary thresholds for demonstrating an individual's "economic disadvantage" for continued participation in the 8(a) program.[126] The final rule added a provision establishing a presumption of economic disadvantage if an individual's average AGI remained below $350,000 during the concern's program term. The rule also changed the period over which the average AGI would be computed from two years to three years.[127] In addition, the SBA amended the 8(a) regulations to establish a presumption of economic disadvantage if the "fair market value" of an individual's total assets remained below $6 million during the concern's program term.[128] Unlike the net worth analysis, the SBA does not exclude the fair market value of the primary residence or the value of the applicant concern in determining economic disadvantage in the total asset analysis.[129] The only assets excluded from the total asset determination are funds invested in a qualified IRA account.[130]

Under the Small Business Act, the SBA must limit withdrawals from an 8(a) concern made "for the personal benefit" of an 8(a) concern's owners or any person or entity affiliated with such owners.[131] If an owner makes "unduly excessive" withdrawals from the 8(a) concern for its personal benefit, the SBA may terminate the 8(a) concern's participation in the program.[132] The final rule amended the definition of what constitutes an "excessive withdrawal."[133] The final rule clarifies that officers' salaries are excluded from the calculation.[134] The final rule also increases the excessive withdrawal thresholds by $100,000.[135] Thus, for firms with sales of less than $1 million, the excessive withdrawal amount is now $250,000 instead of $150,000, for firms with sales between $1 million and $2 million the excessive withdrawal amount is $300,000 instead of $200,000, and for firms with sales exceeding $2 million the excessive withdrawal amount is $400,000 instead of $300,000.[136] Notwithstanding these clarifications, the final rule explicitly states that the SBA may look at the "totality of the circumstances" in determining whether a withdrawal or a series of withdrawals are excessive.[137] The final rule further states explicitly that, for the SBA to terminate or graduate early an 8(a) concern from the program, the withdrawals must be for an owner's "personal benefit" and "detrimental" to the 8(a) concern's achievement of "the targets, objectives, and goals" of the 8(a) concern's business plan.[138]

Under the final rule, an 8(a) concern is now allowed to change its primary industry classification, which may affect whether the 8(a) concern will be "graduated" early from the 8(a) program. An 8(a) concern may request the SBA allow it to change its primary NAICS code identified in its business plan and the SBA will grant the request where the 8(a) concern demonstrates the majority of its total revenues during a three-year period has evolved from one NAICS code to another.[139]

Finally, the final rule amended its 8(a) program regulations to differentiate between an 8(a) concern's graduation from the 8(a) program and an 8(a) concern's completion of its program term. The final rule provides that an 8(a) concern that has met the "targets, objectives and goals" set forth in its business plan may be considered to have "graduated" from the program.[140] In contrast, an 8(a) concern that has not met its "targets, objectives and goals" set forth in its business plan at the end of the program term will be considered to have "merely completed" its program term.[141]

■ 8(a) Mentor/Protégé Program

Under the SBA's February 11, 2011 final rule, a proposed mentor may demonstrate its "favorable financial health" by submitting copies of its federal tax returns submitted to the Internal Revenue Service, its audited financial statements or, in the case of publicly traded firms, its Securities and Exchange Commission filings for the prior three years.[142]

In addition, the final rule amended the SBA's 8(a) program regulations to limit the number of protégés any mentor can have at one time to three.[143] The final rule allows a protégé to have a second mentor, provided it demonstrates that the second mentor will provide specific expertise under a different, secondary NAICS code unrelated to the first mentor/protégé relationship and the two relationships otherwise will not compete or conflict with each other.[144] The final rule also allows the parties to request the SBA to reconsider the SBA's failure to approve a mentor/protégé relationship.[145] The parties may request reconsideration within 45 calendar days of receiving notice that its mentor/protégé agreement was declined.[146] If the SBA again declines to approve the mentor/protégé relationship, the proposed protégé cannot submit another mentor/protégé relationship with the same mentor for SBA approval for another 60 calendar days.[147]

The most significant changes in the final rule to the Mentor/Protégé program concern the assistance the proposed mentor offers to provide the proposed protégé.[148] The final rule requires the assistance the mentor will provide the proposed protégé to be tied to the protégé's SBA-approved business plan.[149] If the mentor fails to provide the assistance it agreed to provide in the SBA-approved mentor/protégé agreement, the SBA has the authority to recommend to the procuring agency that it issue a stop-work order.[150] The SBA also is authorized to terminate the mentor/protégé agreement and render the mentor firm ineligible to again act as mentor for two years from the date the SBA terminates the agreement.[151] In addition, the SBA may debar or suspend either the mentor or the protégé if it determines either entered into the agreement simply to take advantage of the benefits of the 8(a) program without providing some assistance or value in exchange.[152]

Contracting Programs For Veterans

■ SDVOSB Program Eligibility Requirements

On January 19, 2011, the Department of Veterans Affairs issued a final rule that changed some of the small business verification guidelines under the VA's Veterans First Contracting program.[153] In particular, the VA rescinded the requirement that veteran owners work full-time in the business for which they have applied for acceptance in VA's Vendor Information Pages database.[154] The final rule, however, requires the owner still to show a "sustained and significant time invested in the business" and to submit a statement affirming that the other employment activities will not have a "significant impact" on the owner's ability to manage and control the business seeking verification.[155] The final rule also rescinded the requirement limiting applicants to having only one business verified by the VA. An owner may have more than one verified business provided the owner can demonstrate, in both instances,

that the owner meets the requisite requirements of ownership and control.[156]

■ SDVOSB Status Protests & Appeals

The SBA published a final rule on February 2, 2011, in which it amended its protest and appeal procedures for all of its Government contracting programs, including the SDVOSB program.[157] The final rule is discussed above.

HUBZone Program

■ HUBZone Program Participation Requirements

On July 21, 2011, the SBA issued an interim rule in which it shortened from one year to 90 calendar days the time that an applicant to the HUBZone program whose application had been denied or a HUBZone concern that had been decertified must wait before reapplying for admission to the HUBZone program.[158]

■ HUBZone Status Protests & Appeals

The SBA published a final rule on February 2, 2011, in which it amended its protest and appeal procedures for all of its Government contracting programs, including the HUBZone program.[159] The final rule is discussed above.

Women-Owned Small Business Program

■ WOSB Program Contracting Benefits

The SBA issued an interim final rule on January 12, 2012, that adjusted the statutory thresholds of $5 million and $3 million for contracts awarded under the WOSB program.[160] The new thresholds are $6.5 million in the case of manufacturing contracts and $4 million in the case of all other contracts.[161] Consistent with the final rule raising the simplified acquisition threshold from $100,000 to $150,000,[162] the SBA also incorporated this new threshold amount in its regulations applicable to the WOSB program.[163]

■ WOSB Status Protests & Appeals

The SBA published a final rule on February 2, 2011, in which it amended its protest and appeal procedures for all of its Government contracting programs, including the WOSB program.[164] The final rule is discussed above.

Subcontracting Assistance Program

■ Subcontracting Plan Compliance

Section 1321 of the Jobs Act requires the SBA to publish regulations and policies for subcontracting compliance.[165] The SBA issued proposed regulations on subcontracting compliance on October 5, 2011.[166] Section 1322 of the Jobs Act requires a prime contractor that submitted a subcontracting plan to notify the CO in writing if the prime contractor fails to use a small business it used in preparing and submitting the prime contractor's bid or proposal.[167] The Jobs Act, however, did not further specify when a prime contractor would be considered to have used a small business in this manner. The SBA's proposed rule provides the needed clarification. Under the proposed rule, a prime contractor will have to notify the CO when (1) the prime contractor references a small business in a bid or proposal; (2) the prime contractor has entered into a teaming agreement with the small business; or (3) the small business drafted portions of the proposal or submitted information subsequently included in the prime's bid or proposal and did so with the intent or understanding that it would perform the related work in the event the prime was awarded the contract.[168]

This proposed rule also implements § 1334 of the Jobs Act, which requires a prime contractor notify the CO in writing whenever a payment to a subcontractor is "reduced" or is over 90 days past due, provided the payment was for goods and services delivered to the Government and for which the Government has paid.[169] Under the proposed rule, the prime contractor must include in the written notice to the CO the reason the prime contractor has reduced or refused payment to the subcontractor.[170]

■ Monitoring Subcontracting Compliance

The SBA's October 5, 2011 proposed regulations on subcontracting compliance provide that the CO is responsible for monitoring and evaluating small

business subcontracting plan performance.[171] The proposed rule also requires the CO to consider the prime contractor's unjustified reduced or delayed payments to any of its subcontractor(s) in evaluating the prime contractor's performance on a contract.[172] In addition, the CO must include in the Federal Awardee Performance and Integrity System the name of any prime contractor with a history of unjustified, untimely, or reduced payments to subcontractors.[173] The proposed rule defines a history of unjustified, untimely, or reduced payments as three incidents within a 12-month period.[174]

The proposed rule further requires compliance reviews to include an assessment as to whether the prime contractor assigned the proper NAICS code and corresponding size standard to a subcontract and whether the small business subcontractor that performed the work was small under that size standard.[175]

Other Small Business Programs

■ SBIR/STTR Programs

The National Defense Authorization Act for Fiscal Year 2012 contains the SBIR/STTR Reauthorization Act of 2011, which extends the Small Business Innovation Research and Small Business Technology Transfer programs through September 30, 2017.[176] The Reauthorization Act also allows businesses that are majority owned by venture capital operating companies, hedge funds, or private equity funds to participate in the SBIR/STTR programs.[177] On May 15, 2012, the SBA issued a proposed rule to amend its ownership, affiliation, and size rules to accommodate the participation of these types of companies in the SBIR/STTR programs.[178] For example, the proposed rule provides that applicants to the programs must be more than 50% owned and controlled by U.S. citizens, permanent resident aliens, or domestic business concerns or majority owned by multiple VCOCs, hedge funds, or private equity firms.[179] In addition, the proposed rule adds a new section to the SBA's size rules addressing affiliation in the context of the SBIR/STTR programs.[180]

■ Other Mentor/Protégé Programs

In the SBA's February 11, 2011 final rule regarding the 8(a) program, the SBA clarified that the exception to affiliation contained in the SBA's size rules applies only to participants in the SBA's 8(a) Mentor/Protégé program, other federal mentor/protégé programs that have a provision specifically authorizing an exception to affiliation in their authorizing statute, and programs the SBA has authorized to receive the exemption from affiliation.[181]

GUIDELINES

These *Guidelines* are intended to assist you in understanding the impact of changes in the regulations governing the small business contracting programs. They are not, however, a substitute for professional representation in any specific situation.

1. Realize that the many of the regulations applicable to small business Government contracting programs have changed significantly in the last two years and are still in the process of review and revision.

2. Understand that there have been many legislative initiatives in the last year to improve small business access to and success in the federal marketplace.

3. Keep apprised of the new regulations proposed and legislation introduced as the landscape for small business continues to change; consider submitting comments in response to proposed rules.

4. Be aware of the proposed regulations and initiatives designed to prevent fraud in small business contracting programs; the new rules impose far stricter penalties for misrepresentation of size and status by small business contractors and make it far easier for the Government to prosecute these cases.

5. Recognize that one of the most important proposed changes to small business contracting is a proposed rule allowing for small business

set-asides under multiple award contracts, including those on the Federal Supply Schedule.

6. Investigate the new 8(a) program rules issued by the SBA; these final rules represent the first overhaul of the 8(a) program in nearly a decade.

7. Learn about the new rules affecting prime contractors' obligations to small business team members; small businesses have more leverage now to ensure they receive a subcontract award.

8. Keep an eye out for regulations to be proposed by the SBA regarding new mentor-protégé programs; under the Small Business Jobs Act of 2010, the SBA now has the authority to extend the 8(a) mentor-protégé model to other programs such as the SDVOSB, WOSB, and HUBZone programs.

9. Monitor the SBA's proposed regulations on size standards; under the Small Business Jobs Act, the SBA must review size standards more frequently than it has done so in the past.

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181/ Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 76 Fed. Reg. 8222–23 (Feb. 11, 2011). See also J.R. Conkey & Assocs., Inc., SBA No. SIZ-5326 (Feb. 17, 2012) (finding that a prime and subcontractor were not exempt from affiliation because they had entered into a mentor/protégé agreement where the agreement was pursuant to the Department of Veterans Affairs' mentor/protégé program).