

# Legislative Update

January 2013

# Topics

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# 2013 NDAA Small Business Topics

- Section 822 Renews and extends through December 31, 2014, a **test program** allowing agencies to use **simplified acquisition procedures for certain commercial items** above the simplified acquisition threshold. This authority, which expired at the end of 2011, allowed for use of simplified acquisition procedures for acquisitions of supplies and services valued from \$150,000 to \$6.5 million.
- Section 1697 **Eliminates the current restriction** that federal contract awards under the **WOSB** contracting program be capped at \$6.5 million for manufacturing and \$4 million for all other industry codes. **New SBA study** on additional NAICS to be included.

# 2013 NDAA Small Business Topics

- Section 1631 **Dropped a provision** contained in the House bill, opposed by the White House, that would have raised the current 23 percent government-wide annual small business contracting goal to 25 percent.

Instead, included language in the final version that would **mandate a minimum government-wide goal of 23 percent** and require each agency to have an annual goal that represents "the maximum practicable opportunity for small business concerns.

# 2013 NDAA Small Business Topics

- Section 1671 **Expands and modifies the definition of bundled contracts** and eliminates procedures related to contract consolidation under the Small Business Act.
- Section 1633 Requires the incorporation of small business considerations into the training and evaluation of senior executives responsible for acquisition functions, and requires federal agencies to ensure that **senior executives assume responsibility for the achievement of small business goals.**

# 2013 NDAA Small Business Topics

- Section 1651 **Clarifies statutory requirements** limiting the extent to which work awarded pursuant to a small business contract may be performed by subcontractors.
- Section 1652 **Strengthens penalties for violations of subcontracting limitations** applicable to small business contractors.

# 2013 NDAA Small Business Topics

- Section 1653 Strengthens requirements for **collecting, reviewing, and evaluating information on prime contractor compliance with small business subcontracting plans**, new mechanism for reporting fraud with respect to subcontracting plans, and requires SBA to report on compliance with plans.
- Section 1621 Clarifies the roles and responsibilities of **Procurement Center Representatives (PCRs)** in the acquisition process. Minor changes & added reference to receiving material electronically.

# Set-asides are Competitive

A DOL sources sought notice encouraged SB firms to provide a capabilities statement. Procurement was not set-aside. Five responses were received, four of which were from SB. DOL determined two SB's and one LB were potential sources. DOL converted the solicitation to issued 100% set-aside. **A large business protested saying that "small business set asides are not a form of competition.**

The **Court of Federal Claims** wrote: Competition in Contracting Act defines '**competitive procedures,**' to include procurements that **are set-aside to promote small businesses;** the common use of 'competition' and 'competitive' also support that small business set-asides are 'competitive,' **reiterated there must be a minimum of two** potential bidders before a procurement can be set aside for small businesses.

# Subcontracting Goals in RFP

Federal Claims Court decision (*See FirstLine Transp. Sec., Inc., v. United States, 12-601C, 2012 WL 5939228 (Fed. Cl. Nov. 19, 2012)*) **supported a TSA's decision to establish a 40% (of contract price) small business subcontracting goal in a RFP.**

A key element of the court supporting the TSA was how they handled questions. When asked whether proposals that don't meet the 40% will be disqualified, they answered, **"if the successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer ... the offeror will be ineligible for award."**

The court commented that TSA should have done **'more robust' MR** on which to base the goals and stated **preference for goals as a percentage of subcontracting dollars** but stopped short of challenging the KO's ability to base them on total contract price.

# GAO & FSS Set-asides

B-407367, Swank Healthcare, December 12, 2012

<http://www.gao.gov/products/B-407367>

Swank Healthcare, of St. Louis, Missouri, protests the terms of request for quotations (RFQ) No. VA777-12-Q-0257, issued by the Department of Veterans Affairs (VA) for commercial off-the-shelf online courses. Swank, a large business concern, **complains that the RFQ should not have been set aside for small businesses.** GAO denied the protest.

Swank complained that the VA **did not verify each SB's ability to meet all of the requirements** of the solicitation prior to making a set-aside decision. *(continued on next page)*

# GAO & FSS Set-asides

**“Agencies are not required to make actual determinations of responsibility** or decisions tantamount to determinations of responsibility in determining whether to set aside a procurement.”

An interesting footnote on the second page - GAO isn't weighing in on discretionary set-asides just yet.

"Although not argued by the VA, it is not clear that a complaint objecting to an **agency's decision to set aside a FSS** procurement for small business concerns states a valid basis for protest. As we otherwise find the protest has no merit, **we do not address this argument**".

# First Right of Refusal

The change dilutes the impact incumbency has on follow-on contract competitions, where a specific task was being performed by a specific employee whose expertise cannot be found elsewhere. This led to belief that an incumbent must remain in the competitive mix, trumping the rule of two or resulting in a limited source justification. Now, **service employees will have the first right of refusal to work for the new company.**

<http://www.gpo.gov/fdsys/pkg/FR-2012-12-21/pdf/2012-30590.pdf>

**Effective Date: January 18, 2013.** Applicability Date: This final rule is applicable to solicitations issued on or after the effective date.

**FAR 52.222-17**, which: (1) Informs the existing predecessor contractor's workforce of their right of first refusal; and (2) provides the list of service employees to the contracting officer no less than 30 days before contract completion.

# SBA-DOD Partnership Agreement

## Significant changes:

Special handling for sole source 8(a) offers in excess of \$20M.

Emphasis on correctly reporting 8(a) contract awards in FPDS-NG; matching contract awards with notices to SBA district offices.

Enforcement of limitation on subcontracting provisions of FAR 19.811-3, (PA IV B 9). Contracting officer responsibility.

# SBA-DOD Partnership Agreement

**Clear intent on SBA's part to suspend or rescind the PA if DoD fails to comply with the requirements.** (PA IV B 24 and VIII A) DoD cannot credit SDB goal accomplishments if 8(a) procedures not followed.

**Withhold award of a purchase order under the Simplified Acquisition Threshold for 2 days** while SBA makes its eligibility determination instead of making the award and including the DFARS clause (252.219-7011, Notification to delay performance). (PA - IV A 4(c) and IV B 10 and V(a))

# SBA No. NAICS-5422, Nov 27

Nov 5, 2012: Solicitation posted by Navy under NAICS code 711510, Independent Artists, Writers, and Performers.

Nov 19, 2012: SBA OHA received an email NAICS code appeal. The regulations require that an appeal must be filed within **10 calendar days** after issuance of the solicitation. **13 C.F.R. § 134.304(b)**.

However, **13 C.F.R. § 121.1103(b)(1)** states that the deadline for a NAICS code appeal is **10 business days**, rather than calendar days. SBA amended 13 C.F.R. § 121.1103(b)(1) in Feb 2011 to change calendar days to business days, but included no discussion of this change in the preamble. 76 Fed. Reg. 5680, 5681 (Feb. 2, 2011).

Accordingly, **OHA has ruled that the switch to business days in 13 C.F.R. § 121.1103(b)(1) was inadvertent**, not the result of any conscious intent by the agency to extend the deadline for NAICS code appeals. The appeal was dismissed.



Q&A