

# **SBA UPDATES ON SBJA & 2013 NDAA**

**DOD Pacific Northwest Regional Council  
for Small Business Education & Advocacy  
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**Nicholas Manalisay  
Deputy Area Director  
SBA, Govt. Contracting, Area VI**

# TOPICS

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- ❖ Small Business Subcontracting
- ❖ Presumed Loss
- ❖ Multiple Award Contracts
- ❖ Coming Attractions:
  - ❖ Performance of Work Requirements
    - ❖ AKA Limitation on subcontracting (LOS)
  - ❖ Mentor – Protégé Programs

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# **SMALL BUSINESS SUBCONTRACTING**

**SBA Final Rule  
Effective August 15, 2013**

# SMALL BUSINESS SUBCONTRACTING

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- ❖ **For “covered contracts,” a prime contractor must notify the Contracting Officer (CO) in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing its bid or proposal during contract performance**
  - Subcontractors can inform COs of violations of this requirement
  - “Covered contracts” are those which a small business subcontracting plan is required

# SMALL BUSINESS SUBCONTRACTING

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## ❖ **Prime contractor deemed to have “used” a small business subcontractor in preparing its bid or proposal when:**

- (1) the offeror specifically references a small business in the bid or proposal
- (2) the offeror has a subcontract or agreement in principle with the small business concern to perform a portion of the specific contract, or
- (3) the small business concern drafted portions of the proposal or the offeror used the small business concern’s pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including email) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract

# SMALL BUSINESS SUBCONTRACTING

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- ❖ **Prime contractor must notify a CO in writing whenever the prime reduces payments to a small business subcontractor or when payments to a small business subcontractor are 90 days or more past due**
  - ❖ **Include reason for reduction or failure**
  - ❖ **Applies when prime contractor has been paid by the agency**
- ❖ **CO responsible for monitoring and evaluating small business subcontracting plan performance**
- ❖ **Clarifies which subcontracts must be included in subcontracting data reporting and how data should be reported**

# SMALL BUSINESS SUBCONTRACTING

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- ❖ **Large prime contractors are responsible for assigning NAICS codes and corresponding size standards to subcontracts**
  - Should use guidance in SBA's regulations governing CO's assignment of NAICS codes to prime contractors;
  - Prime contractors may rely on the representations made in subcontractors' SAM profiles;
  - Prime contractors may **NOT** make SAM registration a requirement for size or socioeconomic representation at the subcontract level.

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# **PRESUMED LOSS**

**SBA Final Rule  
Effective August 27, 2013**

# UNDERSTANDING THE NEW RULE

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- ❖ **Implements “presumption of loss” provisions of the Small Business Jobs Act of 2010.**
  - Jobs Act established a presumption of loss to the government from a size or status misrepresentation equal to the total amount expended on a contract obtained by misrepresentation.
  - Designed to prevent and deter fraud and misrepresentation in small business procurements.
  - Expected to boost prosecutions by increasing the dollar value of size/status misrepresentation cases.

# KEY ELEMENTS OF THE RULE

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- ❖ **Presumption of loss**
- ❖ **Deemed certifications**
- ❖ **Signature requirement**
- ❖ **Limitation of liability**
- ❖ **Annual recertification**
- ❖ **Applicability to subcontractors**
- ❖ **Penalties**

# PRESUMPTION OF LOSS

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## ❖ The new rule reads as follows:

- In every contract, subcontract, cooperative agreement, cooperative R&D agreement, or grant that is set aside, reserved, or otherwise classified as intended for award to small, 8(a), SDB, SDVOSB, HUBZone, WOSB, or EDWOSB firms, there is a presumption of loss to the government based on the total amount expended on the contract, subcontract, etc., whenever it is established that a firm willfully sought and received the award by misrepresentation.

# PRESUMPTION OF LOSS

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- ❖ **“Broadly inclusive” of set-asides, reserves, partial set-asides, price evaluation preferences, source selection factors, and any other mechanism not specifically addressed in the FAR**
- ❖ **Proposed to be an irrefutable presumption, but the final rule makes it rebuttable.**
  - Rebuttable presumption allows firms to demonstrate mitigating circumstances to avoid liability.
  - Trier of fact (i.e., judge or jury), not SBA, will decide if the presumption is rebutted on a case-by-case basis in civil and criminal proceedings.

# DEEMED CERTIFICATIONS

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- ❖ **“Under the new rule, the following actions will be deemed affirmative, willful, and intentional certifications of size or status”:**
  - Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, etc. that is reserved or otherwise classified for award based on size or status.
  - Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, etc. that in any way encourages a Federal agency to classify the bid or proposal, if awarded, based on size or status.
  - Registration in any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, etc. based on size or status.

# DEEMED CERTIFICATIONS

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- ❖ **Jobs Act specifically deems registration on a Federal electronic database as a willful certification as to size and status.**
- ❖ **SBA believes it needs broad rules to cover registrations in electronic databases because agencies typically rely on these representations for their goals.**
- ❖ **Preamble to the new rule states that “a firm is expected to verify its representation in SAM every time it submits an offer on a government contract”.**
  - **What is the impact on task orders under set-aside contracts when recertification is not explicitly required?**

# SIGNATURE REQUIREMENT

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- ❖ **Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant must contain a certification concerning the firm's small business size and status, and an authorized official must sign the certification on the same page.**
- ❖ **SBA acknowledged that this requirement will necessitate changes to FAR clauses.**

# LIMITATION OF LIABILITY

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- ❖ **Presumption of loss, deemed certifications, and signature requirement “may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act . . . .”**
- ❖ **A prime contractor acting in good faith should not be held liable for misrepresentations by its subcontractor.**
- ❖ **No liability when government personnel erroneously identify the firm as small without any representation or certification by the firm or the firm’s knowledge.**

# LIMITATION OF LIABILITY

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- ❖ **Relevant factors in determining whether the presumption of loss provisions apply may include:**
  - The firm's internal management procedures governing size and status representations and certifications;
  - The clarity or ambiguity of the representation or certification requirement; and
  - The efforts made to correct an incorrect or invalid representation or certification in a timely manner.
  
- ❖ **This list is not exhaustive**
  - Other factors may be relevant depending on the case.

# LIMITATION OF LIABILITY

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- ❖ **In the final rule, SBA changed the limitation of liability provisions from “shall” to “may” to give the trier of fact discretion.**
  - This change may lessen the effectiveness of the protection for firms that make mistakes.
- ❖ **SBA believes good faith misinterpretation of its rules should not be considered a willful misrepresentation, and leniency should be shown to new or unsophisticated firms.**
  - However, whether an SBA regulation is ambiguous, and whether a firm’s misinterpretation was made in good faith, will be decided by the trier of fact, not SBA.

# ANNUAL RECERTIFICATION

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- ❖ **Firms must certify size and status at least annually in the System for Award Management (SAM) database.**
  - If a firm fails to certify at least annually, the firm will not be listed in SAM as small or with the relevant status unless and until the firm recertifies its size or status.
  - Applies regardless of the length of the contract – this is not the same as the recertification rule that applies at the end of the 5<sup>th</sup> year on long-term contracts.
  - Applies to small, SDB, SDVOSB, WOSB, and EDWOSB firms, but not 8(a) or HUBZone firms because the SBA is responsible for providing these designations.
- ❖ **No notice from the SBA is required**

# SUBCONTRACTORS

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- ❖ The new rule applies to subcontractors who willfully misrepresent their size or status to receive a subcontract.
- ❖ SBA believes that prime contractors who rely in good faith on the written representations of their subcontractors should be insulated from liability.

# PENALTIES

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- ❖ **Three types of penalties under the rule**
  - Suspension and debarment
  - Civil penalties under the False Claims Act and other laws
  - Criminal penalties
    - Up to \$500,000 fine and/or 10 years imprisonment for knowing misrepresentation.
    - Up to \$5,000 fine and/or 2 years imprisonment for knowingly making a false statement to influence SBA actions, including not timely correcting continuing representations that are no longer true.
  
- ❖ **Presumption of loss penalty depends on receipt of contract, but other penalties (including suspension and debarment) do not.**

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# **Multiple Award Contracts**

**SBA Final Rule**

**Effective December 31, 2013**

# SET-ASIDES

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- ❖ **The SBA final rule provides:**
  - Set-aside for part or parts of multiple award contracts for small business concerns;
  - Set-aside orders placed against multiple award contracts; and
  - Reserve one or more contract awards for small business concerns under full and open competition, when the agency intends to make multiple contract awards.
  
- ❖ **For partial set-asides, small businesses are allowed to bid on:**
  - Non-set-aside portion
  - Set-aside portion
  - Both
  
- ❖ **Prior to Act, no set-asides for Schedule contracts, only “reserved” awards.**

# TOTAL SET-ASIDES

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- ❖ **The final rule expressly provides that contracting officers must set-aside for small businesses an acquisition that will result in multiple award contracts when:**
  - There is a reasonable expectation that two or more small businesses can provide the required services; or
  - Supplies at a fair market price.
  
- ❖ **The contracting officer may (in lieu of small business set aside) choose to set aside the contract for:**
  - 8(a) businesses;
  - Qualified HUBZone small business concern;
  - Service-disabled veteran owned small business concerns (“SDOV SBC”);
  - Disadvantaged woman-owned small businesses/women-owned small businesses (“EDWOSB/WOSB”).

# FINAL RULE – ADDITIONAL POINTS

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- ❖ **Notes that FSS contracts now included under the umbrella definition of “multiple award contracts”.**
- ❖ **Guidance on the assignment of NAICS codes to individual contracts and SINS.**
  - In assigning NAICS codes and size standards to multiple award contracts, agencies would have two alternatives under the final rule:
    - (1) assign one NAICS code and size standard to the contract if all of the orders are expected to be classified under the same code: or
    - (2) divide the contract into discrete categories and assign different NAICS codes to each discrete CLIN, SIN, etc. Orders issued under the different categories would need to have the same NAICS code assigned to that category in the contract.

# **SECTION 1331 AUTHORITIES**

## **(PARTIAL SET-ASIDES; RESERVES; SET-ASIDE ORDERS)**

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- ❖ **If the rule of two is not satisfied for the entire acquisition agencies will have discretion to use one of several tools to increase small business participation.**
- ❖ **Examples of the available tools are:**
  - To award a multiple award contract with a partial set-aside when the acquisition can be broken into small discrete portions (such as CLINs, SIN, etc.)
  - To use a contract “reserve” when the acquisition cannot be broken into smaller, discrete portions until the individual task orders are drafted.
  - The contracting officers may set-aside orders when the rule of two is met for a particular order on a multiple award contract that was competed on a full and open basis.
- ❖ **Agencies have the discretion to forgo using the tools, even if the rule of two could be met.**
  - If an agency declines to use the tools, it must document why it did not do so when they could have been used.

# FINAL RULES – ADDITIONAL POINTS

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- ❖ **The “if small at the initial offer, small for the life of the contract” concept for size eligibility will also apply to program eligibility. This means that, if an offeror was HUBZone or SDVOSB eligible when it won the set-aside contract, the contractor will remain HUBZone or SDVOSB eligible for the life of the contract, even if the contractor lost its program status during the course of the contract. Like the size recertification rule, however, this does not apply to long-term contracts or when there is a merger or novation.**
- ❖ **Prohibits “cascading” evaluation unless agency has specific statutory authority - 13 CFR 125.2(e)(7)**
- ❖ **If “Agreements,” such as Basic Agreements, Blanket Purchase Agreements, and Basic Ordering Agreements, are set aside, SBA will determine size at the time of the response to the solicitation for the Agreement.**
  - **Additionally, since “Agreements” are not considered contracts, the concern must also qualify as small at the time it submits its offer or otherwise responds to a solicitation for each order**

# HOW PARTIAL SET-ASIDES AND RESERVES WORK

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- ❖ **Partial set-asides: final rule would update the current procedures as outlined in the FAR.**
  - Recommends severing acquisition into discrete components or categories rather than production runs or lots.
  - Partial set-aside appropriate when market research indicates that “rule of two” will not be met for the entire requirement (e.g., each CLIN or SIN).
  
- ❖ **Reserves: final rule utilizes reserves when an acquisition for multiple award contract will be conducted using full and open competition and market research indicates that:**
  - At least two small businesses could perform one part of the requirement, but requirement unable to be broken down smaller, or
  - At least one small business can perform the entire requirement, but no reasonable expectation of receiving at least two offers from small businesses.

# SIZE STATUS

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- ❖ **Size status for multiple award contracts will be determined at the time of initial offer.**
- ❖ **If the contract contains multiple NAICS codes, size will be determined for each code at the time of the initial offer.**
  - The offeror will be considered small for all orders subsequently issued under the different NAICS codes unless the contracting officer (in his/her discretion) requires size recertification at the order level.

# SIZE STATUS

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- ❖ **Challenges references to multiple award contracts have been added to SBA's size protest regulations for:**
  - Size status;
  - HUBZone;
  - SDVOSB; and
  - EDWOSB/WOSB

# SIZE RECERTIFICATION

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- ❖ **Small business size certification supposedly good for the life of the contract (or for first five years of the contract for multiple award schedule contracts per 13 C.F.R. § 121.404(g)), except if the small business undergoes a “triggering” event.**
  - Small businesses do not have to recertify size for orders issued from multiple award contracts unless solicitation “explicitly requires” them to do so, 13 C.F.R. § 121.404(g)(3)(v).
- ❖ **However, unclear what constitutes an “explicit request”:**
  - Language of solicitation?
  - Incorporation of FAR clauses representing updated certifications?

# SIZE RECERTIFICATION

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- ❖ **Ability to protest size of awardee?**
- ❖ **The final rule requires a recertification of size status when:**
  - A small business is the acquired and when the small business is the acquirer;
  - When a participant in a joint venture is involved in a merger or acquisition (regardless of whether the participant is the acquired concern or the acquiring concern).

# NAICS CODES

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- ❖ **Many solicitations have multiple NAICS codes assigned.**
- ❖ **Under the final rule, in assigning NAICS codes and size standards to multiple award contracts, agencies will have two alternatives:**
  - To assign one NAICS code and size standard to the contract if all of the orders are expected to be classified under the same code; or
  - To divide the contract into discrete categories and assign different NAICS codes to each discrete CLIN, SIN, etc.
- ❖ **Orders issued under the different categories would need to have the same NAICS code assigned to that category in the contract.**

# BUNDLING

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- ❖ **The final rule provides for a new exception from affiliation for bundled contracts with a reserve.**
- ❖ **A “Small Business Teaming Agreement” may submit an offer and receive award as a small business without regard to affiliation, so long as each team member is small under the applicable size standard, and there is a written signed teaming agreement or joint venture agreement among the members.**
- ❖ **The small business subcontracting limitation or non-manufacturer rule will apply to each order and the cooperative efforts of the members will be able to meet the subcontracting limitation requirement.**
- ❖ **A “Small Business Teaming Agreement” can be either:**
  - A joint venture consisting of two or more small business concerns to act as a prime contractor; or
  - A teaming arrangement between a small business prime contractor with one or more small business subcontractors which has a written “Small Business Teaming Agreement”.

# ON-RAMPS/OFF-RAMPS

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- ❖ **The final rule gives agencies the discretion to use “on-ramps” and/or “off-ramps” in multiple award contracts with total set-asides, partial set-asides, or reserves.**
- ❖ **“On-ramp” provisions allow agencies to award new contracts to a small business under a multiple award contract where some of the current awardees are no longer small as the result of a size recertification.**
- ❖ **“Off-ramp” provisions allow agencies to remove or terminate a contract in which the contractor has recertified its status as other-than-small and is no longer eligible to receive new orders as a small business.**

# LIMITATIONS ON SUBCONTRACTING

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- ❖ **The final rule has allowed for the determination of compliance with the limitations on subcontracting by:**
  - For total or partial set-aside contracts, compliance will be determined in each period of the contract (the base term and each option period).
    - Contracting officers have the discretion, on a contract-by-contract basis, to require compliance on an order-by-order basis.
  - When an order is set aside under a reserve or a full and open multiple award contract, the contractor must comply with the limitation on subcontracting requirement on an order-by-order basis.
- ❖ **These compliance requirements differ from the final rule, in that determination of compliance was going to be made on an order-by-order basis.**

# EFFECTIVE DATE

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## ❖ **The final rule effective on December 31, 2013.**

- As noted earlier, SBA has stated the implementation of these changes may take up to five years.
- The complex changes in the final rule require significant retraining of the government's acquisition workforce.
- Practically, it may take some time for contracting officers at the agency level to become aware of and use many of the newly available set aside options.

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# COMING ATTRACTIONS...

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# **PERFORMANCE OF WORK REQUIREMENTS**

Addressed in 2013 NDAA  
No Proposed Rule (Yet)

# 2013 NDAA CHANGES

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- ❖ **Two substantive changes to the law governing limitations on subcontracting – Section 1651 of Public Law (no proposed rule yet):**
  - New limitations for service contracts are now based on the total amount paid to the small business, not the cost of the contract incurred for personnel.
  - May meet performance requirements by subcontracting to other “similarly situated” small businesses.

# TOTAL AMOUNT OF THE COST OF THE CONTRACT

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- ❖ **Prime contractors may not spend more than 50% of total amount paid to the concern under the contract on subcontractors.**
- ❖ **No longer able to exclude the cost of materials, supplies, and other non-labor costs from subcontracting limit calculation.**

# “SIMILARLY SITUATED” SMALL BUSINESSES

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- ❖ **Small business prime contractors may now meet their performance requirements by subcontracting to other “similarly situated” small businesses. (Those small under the same standard or participating in the same small business program.)**
  - Prime contractors must be careful to make sure they count only those subcontractors who are participating in the same program, or who are also small for straight forward small business set-asides
  - The new law does not allow for all small business subcontractors to fall within the exception.

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# **MENTOR-PROTÉGÉ PROGRAMS**

Addressed in 2013 NDAA  
No Proposed Rule (Yet)

# MENTOR-PROTÉGÉ PROGRAMS FOR ALL SMALL BUSINESS CONCERNS

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- ❖ Amended the Jobs Act to establish mentor-protégé program for all small business concerns – Section 1641 of Public Law (no proposed rule yet)
- ❖ The new mentor-protégé program modeled after SBA’s 8(a) BD mentor-protégé program
- ❖ The new program will include the exemptions from affiliations
- ❖ The SBA will approve and issue regulations for mentor-protégé programs at agencies other than DOD
- ❖ The SBA has confirmed regulations “have not left the building”
- ❖ Current mentors and protégés with approved agreements will be allowed to continue their relationship until the agreement expires

# UPCOMING SBA MENTOR-PROTÉGÉ REGULATIONS

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## ❖ **The SBA regulations must address at a minimum:**

- Eligibility requirements;
- Types of developmental assistance to be provided;
- Whether such assistance would affect the eligibility of the program participant as a small business due to affiliation concerns;
- Length of the relationship;
- Benefits that may accrue to the mentor;
- Reporting requirements during both participation and post participation;
- Whether if a mentor-protégé pair is accepted to participate in one program is therefore eligible to participate in all federal mentor-protégé programs; and
- Actions to be taken to ensure benefits for program participants.

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# **Other Relevant 2013 NDAA Amendments to the 2010 Jobs Act**

# 2013 NDAA AMENDMENTS TO 2010 JOBS ACT

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## ❖ **Section 1631 – Goals for Procurement Contracts Awarded to Small Business Concerns**

- Maintains the government-wide prime contracting goals for participation by small business concerns are not less than 23% of the total value of all prime contract awards for each fiscal year.

## ❖ **Section 1632 – Acquisition Planning:**

- Requires that each federal department or agency provide opportunities for the participation of small business concerns
- Requires the invitation of the appropriate Directors of Small and Disadvantaged Business Utilization to participate in the acquisition planning process, including access to acquisition plans.