

# Small Business Jobs Act Update



February 2012

# Small Business Set-Asides and Reserves

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

# Small Business Set-Asides and Reserves cont'd

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

# Small Business Set-Asides and Reserves cont'd

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

# Small Business Set-Asides and Reserves cont'd

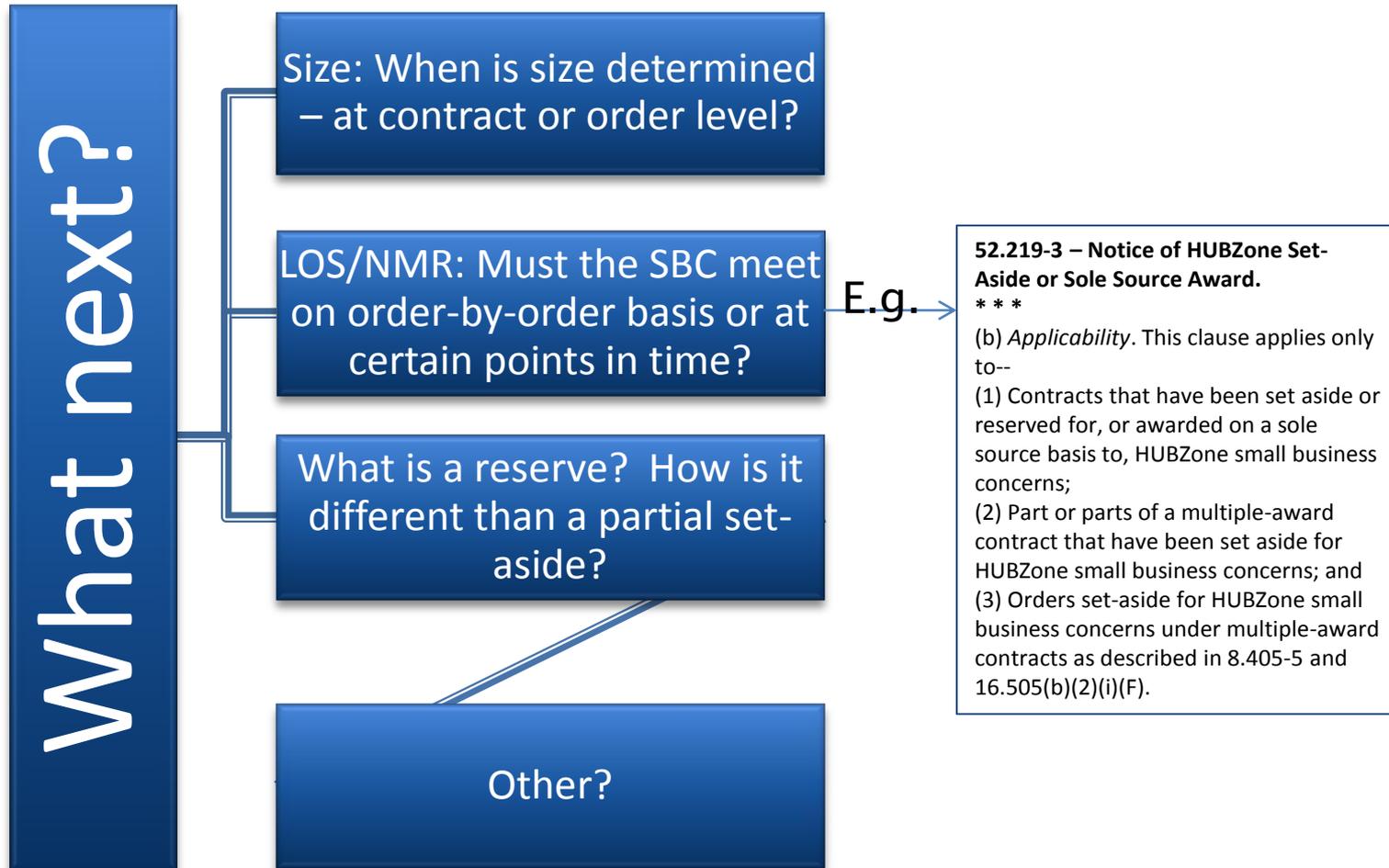
- ▶ FAR 8.405-5(a)(2) states that when setting aside orders and BPAs against the Schedule:
  - The specific small business program eligibility requirements identified in part 19 apply.
  
- ▶ FAR 16.505(b)(2)(i)(F) states that when setting aside orders for small business concerns:
  - The specific small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

# Small Business Set-Asides and Reserves cont'd

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

# Small Business Set-Asides and Reserves

## cont'd



# Small Business Status- Integrity

- ▶ SBA issued proposed rule on October 7 at 76 FR 62313
  - Comments were due on December 8, 2011
  - SBA received 22 comments
- ▶ Irrefutable presumption of loss to the US based on total amount of contract expended if business sought and received the award upon willful, affirmative, and intentional certification of its size or status and misrepresented its size or status
  - Applies to more than just contracts – applies to Federal grants, contracts, subcontracts, cooperative agreements, or cooperative research and development agreements
- ▶ Purpose
  - JA 1343
  - Prior to statute, it was difficult to prove loss



# Small Business Status- Integrity cont'd

## Proposed Regulations:

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

# Subcontracting

SBA issued proposed rule on October 5 at 76 FR 61626

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

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

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

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

# Subcontracting cont'd

SBA's proposed rule:

Use of certain SBCs as subcontractors

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

Payments to subcontractors

- Prime must notify CO if and why it reduces payments to a subcontractor or when payments are 90 days past due.
- Prime cannot prohibit a subcontractor from discussing any material matter with the CO.
- CO can require prime to enter into funds control agreement
- Prime with history of unjustified payment reported in FAPIIS

Subcontracting plans

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

# Bundling & Consolidation

- ▶ Agencies must post on the web a list and rationale for any bundled contract for which the Federal agency solicited bids or that was awarded by the Federal agency.
  - Posted not later than 30 days after the date on which the head of a Federal agency submits data certifications to OFPP
  - SBA issued direct final on October 13, 2011 at 76 FR 63542 and is effective November 28, 2011
- ▶ Consolidation – Justification required for consolidating 2 or more separate requirements lower in cost than proposed acquisition

# Comp Demo Repeal

- FAR Part 19.10 deleted
- Effective 30 December 2010 (FAC 05-48)
- ▶ **Small Business Set-Asides**
  - Construction of Buildings (Subsector 236)
  - Heavy and Civil Engineering Construction (237)
  - Specialty Trade Contractors (238)
  - Non-Nuclear Ship Repair
  - Architectural and Engineering Services
  - Refuse Systems and Related Services
  - Landscaping and Pest Control Services

# Size Standard Review

**SBA must review 1/3 of its size standards every 18 months and must conduct a complete review every 5 years.**

- ▶ Final Rule: NAICS Sector 72, Accommodation and Food Services (75 FR 61604, October 6, 2010)
- ▶ Final Rule: NAICS Sector 81, Other Services (75 FR 61591, October 6, 2010)
- ▶ Final Rule: NAICS Sector 54, Professional, Technical, and Scientific Services (77 FR 7490 (February 10, 2012))
- ▶ Proposed Rule: NAICS Sector 48–49, Transportation and Warehousing (76 FR 27935 (May 13, 2011))
- ▶ Proposed Rule: NAICS Sector 51, Information (76 FR 63216 (October 12, 2011))
- ▶ Proposed Rule: NAICS Sector 56, Administrative and Support, Waste Management and Remediation Services (76 FR 63510 (October 12, 2011))
- ▶ Proposed Rule: NAICS Sector 61, Educational Services (76 FR 70667 (November 15, 2011))
- ▶ Proposed Rule: NAICS Sector 53, Real Estate and Rental and Leasing (76 FR 70680 (November 15, 2011))

Questions?